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1 California Points & Authorities Foreword

Foreword

Foreword

Lawyers and judges presently face the giant task of accommodating the law to a mass society characterized by an industrialization ever becoming more complex. Inevitably, in this development, the law, reflecting these changes, grows more complicated and more specialized.

The combination of disconcerting change and exploding specialization imposes new demands upon the attorney; it necessarily makes the presentation of the wide variety of legal motions and proceedings far more difficult; the task of collection of supporting authorities has become more onerous. Yet the task must be accomplished in the context of the increasing speed demanded in a busy law office. Hence the legal profession faces a new and acute need for aid in the presentation of point and authorities.

Thus the design of "Points and Authorities" is to provide for the attorney the applicable decisions and citations required for motions and procedures at the trial level, and, in so doing, to supply the basic material for the preparation of appellate briefs. To make for easier use, the editors have presented the points and authorities in the form of such motions and procedures. These authorities are discussed following the memorandum under the heading "Discussion of Authorities." Additional cases supporting the point, if there are such, and related cases which may prove of assistance in pertinent factual situations are also included under the identifying title "Additional Authorities."

The editors have utilized an exhaustive method of preparation in order to develop the most functional and complete compilation of points and authorities. They have examined literally thousands of memoranda filed in the last few years in courts throughout the state. To this investigation the editors have added the dissecting factor of research and analysis conducted on a mass scale beyond the resources of the private practitioner. From this large utilization of talent they have sought to construct models which exemplify the best form of statement of the point and the most persuasive supportive authority. They set out a terse statement of the legal principles; they follow the statement with the most cogent and recent decisional and statutory substantiation.

The case law has been arranged into a hierarchy of diminishing authority. The writers first cite the recent California Supreme Court case or the recognized "leading" case. Thereafter come the earlier Supreme Court cases, followed by court of appeal cases in the same order. If the editors cite cases which are persuasive only, in each instance the warn the reader of that fact in the "Discussion of Authorities."

Although the requirement for the citation of proper authority to support the advocate's position lies deep in the process of the common law, it has become today, with the mounting complexity of the law, even more important and very frequently the object of statutory command. California Rules of Court require, in appellate court briefs, for example, that each point in a brief appear separately under an appropriate heading, which should be precise and generally descriptive of the subject matter covered (Cal. Rules of Ct., Rule 15 (a)). The same rules require that memoranda of points and authorities be submitted in the trial court on pain that the court may construe the absence of such memorandum as an admission by the attorney that the motion or proceeding lacks merit (Cal. Rules of Ct., Rules 202(a), 203(a), 203(b), and 239(b) (superior courts), and Rules 502(a), 503(a), 503(b), and 527(b) (municipal courts). Points and authorities are also required on all original proceedings in reviewing courts (Cal. Rules of Ct., Rule 56).

The increasing volume and range of motions and procedures that compose the daily grist of the trial judge, which is superimposed upon the growing volume of case authority, imposes new burdens upon counsel. Today's trial and appellate judge bears too heavy a load to indulge counsel in long rambling memoranda; the judge has no time for cumbersome quotation, for inapplicable general principle, for miscited cases.

In most matters the memorandum should be readable and comprehensible in a few moments; in substance, it should be sufficiently descriptive so that its applicability to the issue involved becomes at once apparent; mere abstract statements of the law are of little benefit. Above all, it should be reliable. In summary, a memorandum of points and authorities should separate the issues, state them concisely and accurately, contain short and simply constructed statements of law, and support such statements with accurate citations of statutes and of the best cases in point.

A guide to aid the attorney preparing memoranda of points and authorities has become almost a necessity in these days of an expanding and ever more complex law. The goal of the present set is to provide that guide and fulfill the need. It is the first work of its kind; it should be a valuable addition to California legal literature. Proper use of the set can be a great time-saver to both court and counsel. We welcome it.

MATTHEW O. TOBRINER
1965
Associate Justice,
Supreme Court of California.

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What's New

1 California Points & Authorities Scope

Scope

HIGHLIGHTS

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Loss of Consortium Damages After Anticipated Death of Spouse
The California Supreme Court has held that a plaintiff spouse may recover damages for lost companionship and affection resulting from the anticipated premature death of the spouse.
Deadline for Arbitration Tolled by Commencement of Action
The California Supreme Court has held that the commencement of an action by a party to a controversy within the period of time specified in an arbitration agreement to demand arbitration tolls the time limitations in the agreement.
2010 Legislation, Rules of Court, Regulations, and Latest Cases
This release updates chapters throughout with the changes to California legislation, regulations, and rules of court effective July 1, 2010, and also the latest state and federal case law opinions of 2009 and 2010.

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

ADMINISTRATIVE LAW

Right to Practice Profession is Fundamental Vested Right. In *Sandarg v. Dental Board of California (2010) 184 Cal. App. 4th 1434* , the court of appeal held that if an administrative agency revokes a person's license to practice a profession and the person brings a petition for a writ of mandate to restore the license, the trial court must apply its independent judgment to review the facts underlying the administrative decision. See *Ch. 195, Public Administrative Law, § 195.12[4][a]*.

Party Exhausted Remedies by Obtaining Administrative Decision. In *Runyon v. Board of Trustees of the California State Univ. (2010) 48 Cal. 4th 760* , the California Supreme Court held that, under *Gov. Code § 8547.12*, a party is not required to overturn an administrative decision through a petition for writ of mandate before filing a civil

action. See *Ch. 195, Public Administrative Law, § 195.88*.

Exhaustion of Administrative Remedies Not Always Required. In *In re Electric Refund Cases (2010) 184 Cal. App. 4th 1490* , the court of appeal held that exhaustion of administrative remedies is not required when to do so would be futile. See *Ch. 195, Public Administrative Law, § 195.94*.

ALTERNATIVE DISPUTE RESOLUTION

Deadline for Demanding Arbitration Tolled by Commencement of Judicial Action. The Supreme Court in *Pearson Dental Supplies, Inc. v. Superior Court (2010) 48 Cal. 4th 665* , held the commencement of a civil action by a party in a controversy, within the period of time specified in an arbitration agreement for a party to the agreement to demand or initiate arbitration, tolls the applicable time limitations contained in the agreement. See Ch. 20, *Arbitration: Compelling*, § 20.236.

Powers of Arbitrator. In *Greenspan v. LADT, LLC (2010) 185 Cal. App. 4th 1413* , the court held when parties incorporate rules that empower an arbitrator to decide issues of arbitrability, that incorporation serves as clear evidence of the parties' intent to delegate such issues to the arbitrator. See *Ch. 20, Arbitration: Compelling, § 20.10*.

Preservation of Claim Under Insurance Code. In *Blankenship v. Allstate Ins, Co. (2010) 186 Cal. App. 4th 87* , an insured was denied a motion to compel arbitration for failure to request arbitration within two years of the accrual of the claim, as required under *Ins. Code § 11580.2(i)*. The insured sought tolling on the basis of his disability of being a minor, but the court ruled that *Ins. Code § 11580.2(i)* imposes an absolute obligation on the insured to comply with its mandates or else the insured forfeits his claim. See *Ch. 20, Arbitration: Compelling, § 20.43*.

Attempts to Settle Do Not Necessarily Waive Right to Arbitration, Nor Does Demurrer to Complaint. In *Zamora v. Lehman (2010) 186 Cal. App. 4th 1* , the court held attempts to settle the judicial action that do not result in undue delay are not inconsistent with the right to arbitrate; and filing and obtaining a ruling on a demurrer on grounds of the matter lacked specificity or failed to allege the timeliness of the claim is not inconsistent with the right to arbitrate. See Ch. 20, *Arbitration: Compelling*, § 20.236.

ATTORNEYS

Attorney Signature Recital Not Basis for Tort Liability to Opposing Attorney. The court of appeal held that an attorney who, on behalf of a client, signs a contract that contains a signature recital reading "approved as to form and content" does not by doing so make a representation to the attorney for the other contracting party that may form the basis for tort liability to that other attorney. See *Freedman v. Brutzkus (2010) 182 Cal. App. 4th 1065* , discussed in *Ch. 24A, Attorneys at Law: Malpractice, § 24A.21*.

Defendant's Presence Out of State Tolls Limitations Period in Legal Malpractice Action. The court of appeal held that under *Code Civ. Proc. § 351*, if a defendant is out of state when a cause of action against him or her accrues, or after accrual the defendant leaves the state, the running of any statute of limitations is tolled while the defendant is out of state, and this tolling period is applicable to a legal malpractice claim. See *Jocer Enterprises, Inc. v. Price (2010) 183 Cal. App. 4th 559* , discussed in *Ch. 24A, Attorneys at Law: Malpractice, § 24A.55*.

Contingency Fee Agreement Need Not Comply With Rule 3-300 to Create Valid Lien. In *Plummer v. Day/Eisenberg, LLP (2010) 184 Cal. App. 4th 38, 45-48, 108 Cal. Rptr. 3d 455* , the court of appeal held that unlike an hourly fee agreement, a contingency fee agreement need not comply with *Cal. Rules of Prof. Conduct, Rule 3-300*, to create a valid lien on the recovery. See *Ch. 25, Attorney's Fees, § 25.40[1]*.

CIVIL PROCEDURE

Anti-SLAPP -- Plaintiff Has Burden to Prove Commercial Exemption to Anti-SLAPP Statute. In *Simpson*

Strong-Tie Co., Inc. v. Gore (2010) 49 Cal. 4th 12 , a corporation in the business of designing, manufacturing, and marketing building products, sued an attorney who had arranged for an advertisement to be placed in a newspaper to locate individuals who had purchased galvanized fasteners and connectors manufactured by plaintiff and two other companies, for defamation, trade libel, false advertising, and unfair business practices, seeking compensatory and punitive damages as well as injunctive relief. See Ch. 161, *Motions to Strike: Anti -SLAPP*, § 161.36.

Anti-SLAPP -- Anti-SLAPP Motion of Employment Screening Company Properly Granted in Action Under Megan's Law Website. In *Mendoza v. ADP Screening & Selection Services, Inc. (2010) 182 Cal. App. 4th 1644* , as part of defendant's preemployment background check on plaintiff, defendant accessed the Megan's Law Website (MLW), and plaintiff's prospective employer decided not to hire him based on information disclosed on MLW, which defendant disclosed to the prospective employer. The Court of Appeal affirmed the trial court's granting of defendant's anti-SLAPP motion, finding that the plain language of *Code Civ. Proc. § 425.17(c)* did not apply, because the statements by defendant on which plaintiff based his complaint were not made by defendant about its own business or about one of its business competitors, but about plaintiff's presence on MLW. See Ch. 161, *Motions to Strike: Anti -SLAPP*, § 161.30.

Certification of Products as "Organic" Was Not Protected Activity for Anti-SLAPP Motion. In *All One God Faith, Inc. v. Organic & Sustainable Industry Standards, Inc. (2010) 183 Cal. App. 4th 1186, 107 Cal. Rptr. 3d 861* , a soap company sued a trade association, which was in the process of developing a standard to define "organic" differently than federal law and certifying members meeting the standard to advertise their products as organic, alleging that the certification would constitute unfair competition and misleading advertising. With regard to the applicability of *Code Civ. Proc. § 425.17(c)*, it was undisputed that the association's members were in the business of selling goods and the association, as a nonprofit trade association, acted on its members' behalf. See Ch. 161, *Motions to Strike: Anti -SLAPP*, § 161.36.

Defaults -- Relief From Default Available to In-House Counsel. In *Gutierrez v. G & M Oil Co. (2010) 184 Cal. App. 4th 551, 557-565, 108 Cal. Rptr. 3d 864* , the court of appeal held that relief under *Code Civ. Proc. § 473(b)* is available even if the party's attorney is a corporate officer or in-house counsel. See *Ch. 70, Defaults, Default Judgments, and Relief From Judgments and Orders, § 70.54[1]*.

Judgment -- Judgment Debtor Need Not Continuously Own Property for Homestead Exemption. In *Broadway Foreclosure Investments, LLC v. Tarlesson (2010) 184 Cal. App. 4th 931, 936-938, 109 Cal. Rptr. 3d 319* , the court of appeal held that a judgment debtor need only reside at, not own, a property to obtain the benefits of a homestead exemption. See *Ch. 112, Homesteads, § 112.20[1]*.

Summary Judgment -- Plaintiffs Could Not Create Triable Issue of Fact by Contradicting Prior Discovery Responses. In *Whitmire v. Ingersoll-Rand Co. (2010) 184 Cal. App. 4th 1078* , the court found that reasonable jurors could not find that plaintiffs had produced sufficient evidence to create a triable issue of fact that the husband was exposed to asbestos-containing materials with enough frequency and regularity as to show a reasonable medical probability that the exposure was a factor in causing his illness. See *Ch. 221, Summary Judgments, § 221.20*.

Summary Judgments -- Superseding Complaint Renders Motion for Summary Judgment Moot. A form has been added to reflect the holding in *State Compensation Insurance Fund v. Superior Court (2010) 184 Cal. App. 4th 1124* , that summary adjudication was not proper when a superseding complaint rendered the defendant's motion moot. See Ch. 221, *Summary Judgments*, § 221.48.

CLASS ACTIONS

Class Action Under UCL May Not Define Class to Include Persons Who Could Not Have Suffered Injury. In a class action alleging fraudulent business practices in violation of the UCL, not all class members are required to show injury in fact or actual loss of money and property [*see In re Tobacco II Cases (2009) 46 Cal. 4th 298* ; *see also Bus. &*

Prof. Code §§ 17203, 17204, 17535]. However, a court of appeal has held that in such a case, the class definition must not include persons who were not exposed to the alleged fraudulent business practice and could not have lost money or property as a result of the alleged unfair competition. See *Pfizer Inc. v. Superior Court (2010) 182 Cal. App. 4th 622 , covered in Ch. 41, Class and Representative Actions, § 41.02[3]*.

Class Action Settlement Notice Must Include Unambiguous Class Definition. A court of appeal has held that a trial court reviewing a class action settlement for fairness must ensure that the class definition is unambiguous, so that persons receiving notice of the settlement will be able to determine whether they are members of the class. See *Cho v. Seagate Tech. Holdings, Inc. (2009) 177 Cal. App. 4th 734 , covered in Ch. 41, Class and Representative Actions, § 41.02[5]*.

CONTEMPT

Order of Indirect Contempt Entered in Absence of Sufficient Initiating Affidavit Is Void. *Koehler v. Superior Court (2010) 181 Cal. App. 4th 1153* has reversed a trial court's order of indirect contempt based on the contemner's failure to pay previously ordered sanctions based on several defects in the contempt procedures used by the superior court. For example, the superior court had commenced the contempt proceedings on its own and with no initiating affidavit; in the absence of a sufficient initiating affidavit, the contempt order was void. See *Ch. 47, Contempt, §§ 47.07, 47.08, 47.30*.

DEBT COLLECTION

Negotiable Instruments -- Promissory Note Between Joint Venturers Is Not Subject to Usury Law. In *Junkin v. Golden West Foreclosure Serv., Inc. (2010) 180 Cal. App. 4th 1150* , the court applied the little-used "joint venture exception" to the usury law. In the case of joint venturers, one of whom holds a note made by the other to effectuate their venture, the usury law does not prevent enforcement of the note even though its terms would violate the usury law if the note had been made to memorialize a loan. Since the note is part of a transaction that is not a "loan or forbearance of any money, goods or things in action" [*see Cal. Const., art. XV, § 1*], the usury law does not apply. For a memorandum supporting the contention that the usury law does not apply because a promissory note between the maker and the holder, see Ch. 166, *Negotiable Instruments*, § 166.140.

DISCOVERY

Discovery -- U.S. Supreme Court Comments on Privacy Expectations of Employees Using Employer-Provided Communication Devices. Ch. 85A, *Discovery: E-Discovery*, has been updated to discuss *City of Ontario v. Quon (2010) 130 S. Ct. 2619, 177 L. Ed. 2d. 216* , in which the U.S. Supreme Court reversed a Ninth Circuit decision that upheld plaintiff police officers' claims that a search of their text messages violated their *Fourth Amendment* and California constitutional privacy rights, based on a reasonable expectation of privacy in content of those messages. Although the Court sidestepped the parties' disagreement over the officers' privacy expectation, it offered insight on how the law is responding to personal use of cell phones by employees. See Ch. 85A, *Discovery : E-Discovery*, § 85A.11.

Discovery -- Subpoena Duces Tecum. Ch. 218, *Subpoena*, has been updated with discussion of *Terry v. SLICO (2009) 175 Cal. App. 4th 352* , in which the court of appeal held that service of the deposition subpoena on nonparty witness was effective despite absence of a supporting affidavit or declaration. *Code Civ. Proc. § 2020.510(b)*, providing that a deposition subpoena need not be accompanied by an affidavit or declaration showing good cause for the production of the documents and things designated, controlled, preempting *Code Civ. Proc. § 1987.5*, which provides that service of subpoena duces tecum issued before trial without copy of affidavit is invalid. For discussion, see *Ch. 218, Subpoena, § 218.25[2][a]*. A new form has been added; see Ch. 218, *Subpoena*, § 218.40.

EMPLOYMENT

Discharge of Public Employee Who Criticized Superiors Did Not Violate Free Speech. A court of appeal has held that the discharge of a government law librarian for making statements critical of his supervisors did not violate the free-speech clause of the California Constitution [*Cal. Const. art. I, § 2(a)*]. See *Kaye v. Board of Trs. of San Diego County Pub. Law Library (2009) 179 Cal. App. 4th 48* , discussed in *Ch. 36, Civil Service, § 36.28*.

University Employees May Sue on Whistleblower-Retaliation Claim After Adverse Decision on Administrative Complaint. The California Supreme Court has held that *Gov. Code § 8547.12(c)*, which authorizes a State University employee to file suit on a whistleblower retaliation claim if the university has not "satisfactorily addressed" the employee's administrative complaint within 18 months, refers to satisfaction of the complaining employee, rather than a good-faith standard for investigation of the complaint. The employee may sue after receiving an adverse administrative decision. See *Runyon v. Board of Trs. of Cal. State Univ. (2010) 48 Cal. 4th 760* , *covered in Ch. 36, Civil Service, § 36.40[2][d][i]*.

Public Policy Protects Employee Against Retaliation for Asserting Good Faith, Mistaken Claim for Overtime Pay. A court of appeal has held that the public policy underlying an employer's duty to pay overtime wages protects an employee from termination for making a good-faith but mistaken claim to overtime pay. See *Barbosa v. IMPCO Techs. (2009) 179 Cal. App. 4th 1116* , discussed in Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.51A.

School District That Dismisses Probationary Teacher for Unsatisfactory Performance Must Provide 90-Day Written Notice. A court of appeal has held that a school district dismissing a probationary teacher for unsatisfactory performance must comply with the notice requirements that apply to the dismissal of a permanent employee for unsatisfactory performance. Accordingly, the district must give the teacher, at least 90 calendar days before the notice of dismissal, a written notice specifying the nature of the unsatisfactory performance, with specific instances of behavior to furnish the employee an opportunity to correct the faults and overcome the charge [*Educ. Code §§ 44932(a)(4), 44938(b), 44948.3(a)*]. See *Achene v. Pierce Joint Unified Sch. Dist. (2009) 176 Cal. App. 4th 757* , discussed in *Ch. 211, Schools: Certification, Dismissal, and Related Employment Issues, § 211.39[2][b]*.

INSURANCE

Insurance Policy Rescission Based on Concealment. In *Carolina Cas. Ins. Co. v. RDD, Inc. (N.D. Cal. 2010) 685 F. Supp. 2d 1052* , the court granted summary judgment to the insurer for rescission of an employment practices liability policy, because the insured failed to disclose in the application that one employee resigned because of sexual harassment. See *Ch. 120, Insurance, § 120.250[4][d]*.

Alleged Patent Infringement Constitutes Advertising Injury. In *Hyundai Motor America v. National Union Fire Ins. Co. (9th Cir. 2010) 600 F.3d 1092* , the Ninth Circuit held, after applying a contextual analysis to the facts, that infringement of a patented advertising method on the insured automobile manufacturer's website constituted a "misappropriation of advertising ideas" and hence, an advertising injury covered in the CGL policy. See *Ch. 120, Insurance, § 120.50[4][a]*.

Insurer's Failure to Investigate and Advise Claimant Supports Bad Faith Verdict. In *Amerigraphics, Inc. v. Mercury Cas. Co. (2010) 182 Cal. App. 4th 1538* , the insurer of a printing and design company acted in bad faith with respect to claims for flood damage, by failing to promptly investigate the claim and failing to advise the insured of potential available coverage, among other things. See *Ch. 120, Insurance, § 120.184[4][a]*.

SCHOOLS

Field Trip Immunity May be Extended to Host School. The court of appeal held that immunity for field trips provided by *Educ. Code § 35330* is not limited to the school district in which the injured student is enrolled, but extends to any school district that is a significant participant in conducting the field trip, such as a district that hosts the field trip

at its facilities. See *Sanchez v. San Diego County Office of Education (2010) 182 Cal. App. 4th 1580* , discussed in *Ch. 210, Schools: Actions by Students, § 210.22*.

Factual Issues Remained on School District's Liability for Sexual Assault of Second-Grade Student. The court of appeal held that triable issues of fact existed as to whether a school district breached its duty of care when supervising elementary school children during a voluntary, on-campus, after-school playground program, and whether any such breach proximately caused the sexual assault of a second-grade student by other students in an unlocked storage shed. See *J.H. v. Los Angeles Unified School Dist. (2010) 183 Cal. App. 4th 123* , discussed in *Ch. 210, Schools: Actions by Students, § 210.27*.

Police Presence Does Not Change Standard for Reasonableness of Search of Student. In *In re K.S. (2010) 183 Cal. App. 4th 72* , a high school vice-principal searched the pants of a student after being informed by a police officer that the student possessed Ecstasy pills hidden in a slit in his pants. The vice-principal made an independent decision to conduct the search in the presence of two police officers, but did not ask either officer to conduct the search. The court found that the reasonableness standard of *New Jersey v. TLO* and *In re William G.* applied because the police role in the search of the student was at all times clearly subordinate to the role of the vice-principal, who made the decision to search and conducted the search. See *Ch. 210, Schools: Actions by Students, § 210.24*.

STATUTORY INTERPRETATION

Principles of Statutory Construction Apply to Constitutional Provisions. In *Greene v. Marin County Flood Control & Water Conservation Dist. (2010) 49 Cal. 4th 277* , the California Supreme Court has held that *Cal. Const., art. XIII D, § 6*, which requires voter approval for new or increased property-related fees, does not incorporate the secret-ballot requirements applicable to elections under *Cal. Const., art. II, § 7*. In construing the constitutional provisions, the Court applied principles of constitutional interpretation that are similar to those governing statutory construction. See *Ch. 217, Statutory Interpretation, § 217.22*.

TORTS

Amendment Permitted When Justification for Failure to Comply With Civ. Code § 1714.10 Is Alleged. The court of appeal held that a trial court may permit amendment of a complaint after sustaining a demurrer based on failure to comply with *Civ. Code § 1714.10*, which requires a prefiling order to file a complaint alleging a conspiracy between attorney and client, when the plaintiff appears able to allege that the attorney was not providing legal representation at the time of the alleged conspiratorial conduct, or when plaintiff appears able to allege that the attorney's acts went beyond the performance of a professional duty to serve the client and involved a conspiracy to violate a legal duty in furtherance of the attorney's financial gain. See *Central Concrete Supply Co., Inc. v. Bursak (2010) 182 Cal. App. 4th 1092* , discussed in *Ch. 46, Conspiracy, §§ 46.28, 46.51*.

Attorney With Valid Charging Lien May Pursue Conversion Action When Proceeds Are Wrongfully Withheld. The court of appeal held that an attorney may maintain an action for conversion against any party who wrongfully withholds or disburses funds subject to a valid attorney's lien. See *Plummer v. Day/Eisenberg, LLP (2010) 184 Cal. App. 4th 38* , discussed in *Ch. 51, Conversion, § 51.22*.

Withdrawn Code Civ. Proc. § 998 Offer Revives Last Rejected Offer. In *One Star, Inc. v. STAAR Surgical Co. (2009) 179 Cal. App. 4th 1082, 1093-1095, 102 Cal. Rptr. 3d 195* , the court of appeal held that if a *Code Civ. Proc. § 998* offer is withdrawn by a party before its statutory expiration, the withdrawing party's right to cost shifting under *Code Civ. Proc. § 998* is determined by the last rejected *Code Civ. Proc. § 998* offer. See *Ch. 60, Costs, § 60.17*.

Stare Decisis Not Important Right Affecting Public Interest. In *Serrano v. Stefan Merli Plastering Co. (2010) 184 Cal. App. 4th 178, 186-190, 108 Cal. Rptr. 3d 777* , the court of appeal held that pursuant to *Code Civ. Proc. § 1021.5*, the fact that an appellate decision was published did not make it of public interest for purposes of recovering

attorney's fees from an opposing party. See *Ch. 60, Costs, § 60.361*.

To Recover Fees, Parties Is Not "Opposing" When Defending Common Settlement. In *McGuigan v. City of San Diego (2010) 183 Cal. App. 4th 610, 624-629, 107 Cal. Rptr. 3d 554* , the court of appeal held that "opposing party" as used in *Code Civ. Proc. § 1021.5* means a party whose position in the litigation was adverse to that of the prevailing party, and that parties defending a settlement between them are no longer opposing. See *Ch. 60, Costs, § 60.408*.

Prejudgment Interest Not Included When Comparing Compensatory Damages to Punitive Damages. The court of appeal held that prejudgment interest should not be included when comparing compensatory damages to punitive damages. See *Amerigraphics, Inc. v. Mercury Casualty Co. (2010) 182 Cal. App. 4th 1538* , discussed in *Ch. 64, Damages: Tort, § 64.141*.

Loss of Consortium Damages After Anticipated Death of Spouse Recoverable; Res Judicata May Prevent Recovery of Damages in Subsequent Wrongful Death Suit. The California Supreme Court held that a plaintiff spouse may recover damages for lost companionship and affection resulting from the anticipated premature death of the other spouse, if that premature death is sufficiently certain to occur and is caused by the injuries sustained due to the defendant's wrongful conduct. The Court also held that because the plaintiff spouse brought a loss of consortium action seeking damages for permanent deprivation of companionship and affection, but dismissed the action with prejudice, plaintiff was barred by the res judicata doctrine from seeking the same damages in a subsequent action. See *Boeken v. Philip Morris USA, Inc. (2010) 48 Cal. 4th 788* , discussed in *Ch. 64, Damages: Tort, § 64.44*, and *Ch. 66, Death and Survival Actions, § 66.27*.

Legal Complexity Does Not Establish Probable Cause to Bring Suit. The court of appeal held that a lawyer is not immune from liability for malicious prosecution because the area of law involved in the underlying case was complex and no case law with similar facts established that the claim was untenable. See *Franklin Mint Co. v. Manatt, Phelps & Phillips, LLP (2010) 184 Cal. App. 4th 313* , discussed in *Ch. 147, Malicious Prosecution and Abuse of Process, § 147.51*.

Party Host Had No Duty to Protect Guests From Unknown Assailants. The court of appeal held that the host of a residential party who posted an open invitation to the party on his MySpace page did not owe a duty of care to protect against a third-party criminal assault on party guests, perpetrated by unknown assailants. See *Melton v. Boustred (2010) 183 Cal. App. 4th 521* , discussed in *Ch. 178, Premises Liability, §§ 178.63, 178.64*.

Factual Issues on Dangerousness of Raised Road Median. The court of appeal, in reversing summary judgment that had been granted to a city, held that the city had failed to demonstrate as a matter of law that a raised center divider in a city intersection did not constitute a dangerous condition of public property. The court concluded that the city failed to prove the absence of prior accidents involving the raised center divider at that particular traffic intersection when the city provided evidence only that the city's claims administrator searched its database and found no other claims involving that intersection during the previous five years. See *Lane v. City of Sacramento (2010) 183 Cal. App. 4th 1337* , discussed in *Ch. 196, Public Entities, § 196.210*.

UNFAIR COMPETITION

Reliance Required in Action for Unlawful Business Practices Based on Misrepresentations. The court of appeal held that the actual reliance requirements applicable to fraud-based actions under the UCL apply not just to actions under the fraudulent business practices category of the statute, but also to actions brought under the unlawful business practices category if based on alleged misrepresentations. See *Hale v. Sharp Healthcare (2010) 183 Cal. App. 4th 1373* , and *Durell v. Sharp Healthcare (2010) 183 Cal. App. 4th 1350* , discussed in *Ch. 235, Unfair Competition, § 235.63*.

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CHAPTER 1 WRITING LEGAL MEMORANDA AND BRIEFS

1-1 California Points & Authorities 1.syn

AUTHOR: Evelio M. Grillo, Esq., Editorial Consultant

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Editorial Consultant n*

FOOTNOTES:
(n2)Footnote *. Mr. Grillo, a graduate of Harvard Law school and a civil litigation expert in San Francisco, helped to draft the statewide law and motion rules adopted in 1997 as a member of the State Bar Committee on Rules and Procedures of Court, 1993-1996. He is currently a judge in the Alameda Superior Court. Judge Grillo has reviewed the chapter, adding both his substantive and practical insight. The chapter, written by this publication's coordinating editor, is, in § 1.03, adapted in part from a former version of the chapter written by Raymond L. Ocampo, former Director of Legal Writing and Research at Hastings College of the Law, San Francisco, and former counsel for Oracle Corporation.

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CHAPTER 1 WRITING LEGAL MEMORANDA AND BRIEFS
I. INTRODUCTION

1-1 California Points & Authorities § 1.01

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§ 1.01 Scope

[1] Introduction to Drafting Memoranda and Using This Publication

This is the introductory chapter to the publication, designed for the all litigation practitioners, from those having substantial experience to those having little or none. Section 1.03, discussing drafting considerations and strategies, is intended to provide a broad overview of law and motion strategy and drafting considerations and will be useful either as a refresher for experienced counsel, or as a starting point for those who have only occasionally appeared in law and motion proceedings or have drafted a memorandum or brief.

Sections 1.04 and 1.05 provide detailed discussion of all relevant technical requirements. Section 1.04 addresses when memoranda are required or recommended. Section 1.05 discusses the format requirements governing content, page limits, citation style, reference to exhibits, and all other aspects of format.

Section 1.06 provides an important guideline for understanding how best to use the other chapters in this publication as a tool in both researching and drafting memoranda and briefs.

Section 1.10 sets out a basic, "skeletal" form for use in beginning or completing a draft memorandum. It provides the overall structure of caption, tables, summary of argument, statement of facts, argument, conclusion, and signature block.

Section 1.11 provides a form of ex parte application, for use in obtaining leave to file a memorandum in excess of the page limits imposed by *Cal. Rules of Ct., Rule 3.1113(d)*.

[2] Related Pleading and Practice Chapters

For discussion and forms relating to preparing and filing motions generally, see California Forms of Pleading and Practice, Ch. 372, *Motions and Orders* (Matthew Bender). For discussion and coverage relating to memoranda, similar in scope to this chapter but also including coverage of service and filing requirements and a Research Guide, see

California Forms of Pleading and Practice, Ch. 417, *Points and Authorities* (Matthew Bender).

Other general procedural chapters in that publication include:

- Discussion and forms relating to the general use of affidavits or declarations in support of noticed motions: Ch. 15, *Affidavits, Certificates, and Declarations* .

- Alternative forms of captions and introductions: Ch. 108, *Captions and Introductions* .

- Detailed general discussion of the format requirements governing not only memoranda, but all pleadings and papers filed in trial courts: Ch. 123, *Complaints and Cross Complaints* .

- Discussion and forms relating to fax service and filing of papers: Ch. 264, *Fax Filing and Service of Papers* .

- Discussion and forms for use in applications for orders shortening or extending time: Ch. 524, *Shortening and Extension of Time* .

Chapters in that publication with discussion and forms relating to particular motions, demurrers, and petitions in which memoranda are used include the following:

- Ch. 38, *Reference* .

- Ch. 125, *Consolidation, Severance, and Coordination of Actions* .

- Ch. 136, *Continuances* .

- Ch. 174, *Costs and Attorney's Fees* .

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- Ch. 195, *Discovery: Inspection of Tangible Evidence* .

- Ch. 196, *Discovery: Requests for Admissions* .

- Ch. 197, *Discovery: Physical and Mental Examinations* .

- Ch. 198, *Discovery: Exchange of Expert Witness Information* .

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- Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .
- Ch. 303, *Injunctions* .
- Ch. 314, *Interpleader* .
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- Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances* .
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- Ch. 358, *Mandate and Prohibition* .
- Ch. 371, *Motions After Trial* .
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- Ch. 486, *Receivers* .
- Ch. 518, *Service of Summons and Papers* .
- Ch. 537, *Summary Judgment* .
- Ch. 571, *Venue* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeGeneral OverviewCivil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPleading & PracticeMotion PracticeSupporting MemorandaCivil ProceduresPleading & PracticePleadingsComplaintsRequirementsCivil ProceduresAppealsBriefs

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1-1 California Points & Authorities § 1.02

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§ 1.02 Governing Law

The form and content of supporting and opposing memoranda are governed primarily by *Cal. Rules of Ct., Rule 3.1113* [*see also Cal. Rules of Ct., Rules 3.1110* (general format), 3.1300 (time for filing and serving papers), and 3.1302 (place and manner of filing)].

Additional requirements governing papers generally are set out in *Cal. Rules of Ct., Rule 2.100-2.119*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadings

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1-1 California Points & Authorities § 1.03

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§ 1.03 Drafting Considerations

[1] Initial Strategic Considerations

[a] Consider Immediate Goals and Overall Case Strategy

Law and motion practice is expensive and should be used judiciously. The expenditure of attorney time and court resources, and the sum of client costs may easily become disproportionate to the importance of the litigation when motions are filed without careful consideration of their objectives and necessity.

Thus, counsel should decide on the objectives of a motion before it is filed, and how those objectives fit into the overall strategy of a given case. Every motion should be filed or responded to as part of the overall litigation strategy in the particular case, rather than as a matter of habit or routine. Similarly, opposition to a motion should not be automatic but should be considered in light of the benefit to the client of either opposing the motion or stipulating to the relief requested.

Strategic considerations will always vary depending on the case, but in all casescounsel should carefully weigh the costs and benefits of making or opposing a motion. Consideration of possible *negative* outcomes may, for example, include one or more of the following:

- Will an argument asserted in a memorandum filed now only serve to undermine the client's position later in the litigation?

- Will a demurrer force the opposing party's attorney to educate himself or herself in the case, and result in a pleading more difficult to contest in the long run?

- Will a summary judgment motion force opposing counsel to organize more thoroughly and earlier for trial?

PRACTICE TIP:

Avoiding Sanctions. An all too common practice by some counsel is to file or oppose a motion to "wear down" an opponent with limited resources. For example, when moving counsel files a motion of questionable strategic significance or legal basis with the expectation that by doing so, opposing counsel will have to expend time and resources to oppose the motion and will eventually capitulate. The practice of filing or opposing of a motion solely for the purpose of harassment, delay, or for the purpose of increasing the opposition's costs or attorney's fees may subject both attorney and client to sanctions [*see, e.g., Code Civ. Proc. § 128.7* (sanctions for papers presented to court for improper purpose or that are not warranted under law or facts)]. For detailed discussion and forms on this topic, see Ch. 207, *Sanctions* , and California Forms of Pleading and Practice, Ch. 510, *Sanctions* (Matthew Bender)]. *Evelio M. Grillo, Esq.*

For more particular strategic considerations, relating to selected specific procedures, see *§ 1.03[4]*.

[b] Consider the Audience: The Law and Motion Judge

The hearing of law and motion matters in many counties is reserved for one judge, and lawyers in such counties have an excellent opportunity to become acquainted with the predilections of the judge who will hear all of their motions. Although an attorney will obtain some advantage by learning of a certain judges' idiosyncrasies, such information generally is not available except through word of mouth or experience. Any disadvantage due to unfamiliarity with a particular judge's style can be overcome adopting a style of advocacy focuses on the following consideration:

- Forceful argument that the client's case as an advocate, and not as an apologist. [*see also § 1.03[1][c]*].

- Clear and concise argument. Judges are required to read and assess innumerable memoranda in the course of a day and react positively to clarity and brevity.

- Creative argument when the circumstances call for it. Boilerplate arguments never impress an experienced judge and are ineffective.

PRACTICE TIP:

Study Your Judge. Understanding the law and motion judge enables counsel to prepare a more effective written presentation.

Several methods exist for learning the law and motion judge's judicial philosophy, consistent with the rules of professional responsibility:

- Attend law and motion hearings. There is no substitute for the direct experience of appearing before the judge. Observing the techniques and mis-steps of other lawyers may yield a wealth of information, and if counsel observes enough motions before the same judge, a discernible pattern may emerge.

- Speak to colleagues about the judge. Although a judge's reputation may be colored by the experiences of your colleagues, most of the time the judge's reputation contains a germ of truth and may be well deserved and extremely accurate.

- Attend professional functions such as bar lunches or seminars at which the judge will be speaking. Specific questions can be asked at that time.

- Review and observe the local law and motion rules. The local rules are often drafted with substantial input by the judge who hears law and motion matters. When arguing in the law and motion department you are a guest in the judge's house. Honor the house rules.

[c] Stipulate to Routine, Undisputed, or Unimportant Issues

Judges abhor being bothered with and having to decide routine matters that should be the subject of stipulation between counsel, and clients should not have to pay for making, or opposing, a motion that could have been avoided through stipulation. The most common example of routine matters that should be agreed on by stipulation is an extension of time to respond to a pleading.

As judges are generally liberal in granting extensions and other routine forms of relief when the circumstances warrant an extension, counsel should avoid forcing an opponent to seek relief on a routine matter unless a particularly good reason exists for declining a stipulation. Even then, a lawyer should consider granting a very limited extension or other limited relief rather than insisting on strict compliance with a deadline.

PRACTICE TIP:

Protect Your Record of Stipulations. One common mistake made by counsel is failing to protect their record when requesting or agreeing to routine relief from opposing counsel. A written request, *e.g.,* for and extension, and the confirming letter will become the record in the event of a dispute regarding that request. Do not make the mistake of authoring a confirming letter which does not accurately represent the agreement between counsel, and never misrepresent the course of conversations between counsel. Doing so may precipitate a war of confirming letters which may become part of the record before the law and motion judge. Such an exchange between counsel is a sign of inexperience and only serves to irritate the court. Always be polite in your written exchanges with opposing counsel, and never resort to name-calling or invective, no matter how cathartic it may seem at the time. In the event you encounter counsel who seeks to draw you into a discourteous and unprofessional war of words, politely decline counsel's invitation by letter, advise counsel that you will seek relief from the court, and then do so. *Evelio M. Grillo, Esq.*

Counsel who routinely contest even the most simple requests, such as moving a hearing date when an unavoidable conflict arises in opposing counsel's schedule, may well find that the negative impression of such conduct, on both the law and motion judge and opposing counsel, is ultimately more detrimental than beneficial, both to the client in the case at hand and counsel's reputation. Routine administrative matters, calendaring and scheduling matters should not be utilized to gain a tactical advantage over opposing counsel.

Furthermore, opposing a motion for an improper purpose, or when not warranted under the law or on the facts (such as contesting a fact that is clearly not subject to reasonable dispute), may result in sanctions under *Code Civ. Proc. § 128.7* if the complaint or petition in the matter was filed after January 1, 1995 [*see Code Civ. Proc. § 128.7(i)* (operative effect of *Code Civ. Proc. 128.7*); *see also Code Civ. Proc. § 128.5* (sanctions for actions or tactics arising from a complaint filed or proceeding initiated on or before December 31, 1994)].

PRACTICE TIP:

Be Professional and Courteous. In addition to saving time and money, granting routine courtesies to opposing counsel facilitates the smooth resolution of litigation in the following ways:

- Shows good faith by the party granting the courtesy.
- Reserves the party reciprocal good will and courtesy.

- If an extension has been granted, makes it easier for the party granting the extension to obtain relief when the extended time limit is not met by the opposition.

- Opens the dialogue between opposing counsel, thereby facilitating communication that may lead to agreement on other routine and facilitate settlement discussions.

[d] Remember the Limits of Oral Argument

Most judges base their decisions on the papers, not on oral argument. Many law and motion departments even make and post tentative rulings before the scheduled hearing. Time is therefore better spent on drafting the memorandum than on preparation for oral argument in law and motion. Brilliant oral argument cannot revive a poorly drafted, logically inconsistent written argument.

PRACTICE TIP:

Preparing for Oral Argument. This chapter focuses on drafting memoranda as distinguished from related issues such as serving and filing memoranda (*see § 1.01*) and oral argument, if any. Nevertheless, counsel who do not have extensive oral argument experience should keep the following considerations in mind when preparing for oral argument:

- Do not repeat or read from the written argument. If you are sure that the Court has had time to review your pleadings, it may be more advisable to state that you have covered the issues in the papers and are prepared to submit on them unless the judge has particular questions. In any event be brief and simple.

- Listen carefully to the judge's questions; judges do not like to have to repeat themselves and careful listening to the judge's questions will provide clues as to the issues the judge considers important.

- Avoid distracting the judge, and never stretch the truth, evade a question, or otherwise antagonize the judge; you may be before the judge again.

- Be fully prepared. Anticipate and even rehearse the tough questions.

- Stay focused on your objective in the proceeding (and your overall case strategy) [*see § 1.03[1][a]*].

- Acting calm and confident can help you gain or retain these qualities.

[2] General Writing Considerations

[a] Begin With an Outline

The object of a memorandum is to persuade the judge of the merits of your client's position, through concise, forceful and logical argument. Sound logic requires good organization. A logical progression of argument leads the judge to the conclusion presented by your memorandum.

Organization can sometimes be difficult when an attorney conducts exhaustiveresearch first and then attempts to organize the results. Usually the more effective method is to begin by preparing a rough outline, before conducting any extensive research. This will force the attorney to concentrate on identifying and organizing the major issues from the outset, and will focus, and may reduce the need for additional research.

The outline should, of course, be revised as dictated by the results of research. In any event, it will provide the framework for easy drafting once research is completed.

PRACTICE TIP:

Use Your Facts to Focus Your Research. One common mistake made when drafting a supporting or opposing memorandum is to begin and complete research without giving due deference to the factual basis for the motion.

Preparing a memorandum without first considering the evidentiary basis for the motion often results in a memorandum with scant factual support, or one that may even harm the client's case later in the litigation. Supporting declarations and affidavits should be developed in tandem with ongoing legal research. By working on the factual statement and developing supporting declarations and other evidentiary bases *before* research is conducted, your resulting memorandum will be more tightly written and more effective. Declarations that are created as an afterthought, especially in an effort to force the facts to fit a preconceived legal argument, stick out like a sore thumb and may be contradicted by more concrete facts developed through later discovery.

Once the facts are properly developed and considered, the forms in this publication are designed to be used to "jump-start" the process of research and drafting a complete memorandum, as discussed in more detail in *§ 1.06. Evelio M. Grillo, Esq.*

[b] Focus on Strengths

A memorandum for a particular party should highlight or focus on that party's strongest arguments. The party's strongest points should be emphasized with regard to each issue of the argument. Counsel's goal should be a focused attack on or defense of the issues where it will do the most good, as distinguished from a scattered, comprehensive discussion of all possible issues. Although obviously no major argument should be ignored, a memorandum of points and authorities is not a bar exam. Do not focus on arguments based more on equity or policy grounds to the exclusion of the strongest legal and factual arguments.

Note that argument should always proceed in a logical order leading to the conclusion [*see § 1.03[3][b]*]. Thus, the strongest arguments need not be placed first, but should be given emphasis in their proper, logical order.

[c] Argue in an Adversarial Style

Both advisory and adversary legal writing involve argument and persuasion, but they differ in the attorney's relation to the audience. In an advisory opinion letter or office memorandum, the attorney writes as an advisor, weighing all factors. In adversary writing, his or her role changes from adviser to advocate. Instead of neutrally analyzing both sides, the attorney writing a memorandum should use a forceful, adversarial style in arguing the one side of his or her client. The attorney should write as if he or she is convinced of the legal correctness and essential justice of the views espoused in the argument. He or she will thus add belief to his or her opinion, and in turn lend greater force to the argument [*see also* discussion in *§ 1.03[1][b]*].

[d] Use Clear and Concise Writing

In memoranda, the attorney's audience is the judge, and, to a lesser extent, opposing counsel, that is, legal professionals who understand both law, the adversarial process, and the strategy of persuasion. They are best reached by argument that is not only adversarial but also clear and concise [*see also* discussion in *§ 1.03[1][b]*]. Clarity, brevity, and precision are critical; such writing is not only more persuasive, but also required by memorandum page limits [*see § 1.05[1]*] and the judge's limited time. Brevity follows clarity and precision. Clarity and precision are best accomplished by carefully editing of the initial and subsequent drafts, to clarify any ambiguous or uncertain steps in the argument and

to eliminate redundant passages, "throat clearing" phrases, and other unnecessary verbiage.

Concise writing in this sense does not, however, mean that the attorney should make any assumptions on the part of his or her audience. A persuasive memorandum will explain the basis for each step of the argument that leads logically to the conclusion.

The tone of the memorandum is again governed by consideration of the audience; it should be politely formal as distinguished from the more familiar tone of advisory writing.

In other respects, the style and tone of the memorandum should conform to common sense and basic rules of good writing. For example:

- The tone should appear knowledgeable and reasonable, not strident or dogmatic; the argument should rely on logical rather than emotional persuasion.

- Positive, direct assertions are always more effective than neutral statements. Active verbs have more persuasive force than passive verbs.

[3] Drafting the Argument

[a] Introductory Elements: Summary of Argument and Statement of Facts

The first thing the judge will want is a proper context within which to place the argument, that is:

- A brief summary of argument that both identifies the issues and briefly argues their proper resolution under the law. This Summary of Argument, or Questions Presented, is most simply a compilation of the Main Issue headings in the main argument, followed by the heading for the conclusion. For framing these headings, see *§ 1.03[3][e]*.

- A statement of all material and relevant facts, whether based on pleadings or evidence, to provide an evidentiary basis for the judge's ruling and the human side of the litigation, that is, to provide a sense of where justice and policy lies. The statement of facts also provides the preliminary point of reference for understanding the thrust of the argument later to come.

PRACTICE TIP:

Drafting the Statement of Facts. All facts material and relevant to the motion should be included in the memorandum, even those facts more favorable to the opposing party. Of critical importance is phrasing the description of facts in the most favorable manner. For example, an attorney may employ strong verbs, concrete nouns, and reemphasis of favorable details to highlight favorable facts, but use weaker verbs, abstract nouns, and a deemphasis of details to downplay unfavorable facts. Minimizing the impact of unfavorable facts and emphasizing the impact of favorable facts, must be subtle, so as to retain an overall tone of impartiality. In the statement of facts a judge wants all relevant factual information, and his or her confidence in your presentation may be undermined by an overly strident and partisan statement of facts. Reserve overt adversarial language for the main argument.

In most instances, counsel should preface the summary of argument and statement of facts with a very brief introduction, usually no more than one or two sentences, to provide a very basic initial orientation to the pleading before the judge, *e.g.*, "This is a general demurrer by Defendant Doe to Plaintiff's causes of action for invasion of privacy and intentional infliction of emotional distress." The introduction, however brief, helps the judge to focus on the matter before the court.

The Introduction, Summary of Argument, and Statement of Facts is followed by the main argument, consisting of Main Issue headings and detailed argument following each heading [*see* respectively *§ 1.03[3][e]* and *[f]*]. For further discussion of the basic structure and elements of a memorandum, see *§§ 1.05[5]* and *1.06[2][a]*.

[b] Main Issue Headings in the Argument

The main argument in a memorandum consists of a series of main issue headings, each followed by paragraphs of detailed argument that support its conclusory statement. The main issue headings, like those in the forms of this publication, should be presented as follows:

- Headings should be graphically highlighted from the rest of argument for easy reference, by use of boldface type, all-capital letters, or underlining, etc.

- Headings should be phrased assertively and argumentatively, so that the issue is identified and a favorable resolution of the issue argued in the same statement, *e.g.*, **The Court Should Sustain Defendant's Demurrer Because the Complaint Fails to State Facts Constituting a Misrepresentation Within the Meaning of *Civil Code Section 1710*.** An effective argumentative heading summarizes the argument following and provides a convenient reference for the judge, who may not have time to read the entire argument. Argumentative phrasing is more forceful and has more persuasive impact than merely declarative headings.

- Headings should be placed in a series that logically leads the judge to the final conclusion. Just the argument under each heading should logically compel the conclusion stated in that heading, so too the headings should compel the argument's conclusion.

Note that, in a more complex memorandum, it may be necessary to utilize argumentative subheadings in order to organize most logically and forcefully the argument under a main heading.

[c] The Argument

Following each heading are paragraphs providing the detailed text of the argument. For convenience, each paragraph is referred to here as a "point" or "point paragraph." In writing the point paragraphs, which are the heart of the memorandum, the following considerations are paramount:

- **Support Each Point With Authority.** Each statement of law must be supported by citation to the best possible authority, whether statute, rule, or case law. The forms in this publication all conform to this requirements, setting out "point paragraphs" or statements of law supporting by primary source authority [*see also § 1.04[7]*, for discussion regarding citation requirements and the citability of case law]. Secondary source authority, such as restatements or treatises, should be relied on only as additionalsupport for primary authority, or as a last resort when there is no primary authority on point.

- **Present Points in Logical Progression Leading to the Conclusion of the Main Issue Heading.** Each point paragraph should be positioned so that the entire series of paragraph are steps leading logically and progressively to the conclusion stated in the Main Issue heading [*see § 1.03[3][b]*]. The argument should demonstrate that the conclusion is sound, and indeed, necessary, irrespective of the opposition's best argument [*see also* discussion in *§ 1.03[3][d]*].

- **Discuss Each Point And Link the Law Favorably to Your Facts.** Each point paragraph must include discussion that applies the statement of law to the facts. This should be done by reference to the

statement of facts [*see § 1.03[3][a]*] and to any attached declarations or exhibits. Just as obviously, the law and facts must be discussed in argument that demonstrates how the law applies favorably to the facts and supports the ultimate conclusion of the Main Issue heading [*see § 1.03[3][b]*].

- **Show That a Ruling in Your Favor Will Satisfy Legal Precedent, Justice, Policy, and Practical Concerns.** The attorney's argument should assist the judge in reaching a favorable decision, by articulating clearly all possible reasons why a favorable decision is the right decision. Thus, the attorney should include all the reasons the judge could be expected to provide in a written statement of decision in favor of the attorney's client. While the foremost reason is the logical application of legal precedent, the attorney should also articulate reasons why a favorable decision will produce a just result consistent with policy or practical concerns. When presenting arguments based on justice and policy, the attorney should consider carefully what is appropriate and what is overreaching or irrelevant. If the equities of the case are unfavorable, the attorney may have to argue against natural sympathy or apparent justice, as for example, by downplaying immediate equity in favor of more distant but ultimately more important policy goals.

[d] Refuting Opposing Argument

In a memorandum, the attorney must discuss opposing argument, unfavorable facts, and contrary authority so that they may be distinguished, explained, or refuted. Unfavorable facts or authority should not, however, receive equal treatment; through proper emphasis and organization the attorney should consistently highlight the attorney's own argument and conclusion.

One effective way to deal with opposition while emphasizing one's own position is to "surround" the opposition. In other words, with regard to each issue, the attorney begins a section with his or her own argument, then acknowledges and refutes the opposition in the middle, and concludes with his or her own argument.

Refuting the opposition may take a number of forms, including the following:

- A comparison of the weight of authority on each side.
- Interpretation of a rule or analysis of the policies behind it.
- Distinguishing the facts of the case so as to avoid unfavorable application of a rule of law.
- Conceding issues that are relatively unimportant, or which cannot be effectively refuted, in order to focus on strengths.
- Distinguishing the opposition's legal authorities.

The attorney should attempt to provide more than one basis for refuting the opposition, and when possible, provide the judge with as many avenues to support a favorable decision.

In a supporting memorandum, refuting the opposition requires anticipating and possibly acknowledging the opposing party's arguments, without providing the opposition with ammunition to undermine the supporting memorandum. A reply memorandum may be utilized to deal with opposing argument not addressed in the supporting memorandum.

In the case of an opposing memorandum, the attorney has the disadvantage of being "on the defensive," and having to respond to issues and argument not completely of his or her own choosing. In this situation it is sometimes effective to rephrase more favorably the issues stated by the moving party. It is also important to avoid the stance of mere

negativity. Argument, including argument responsive to the moving party's brief, should be phrased in positive terms. The attorney should also advance any new argument that may undermine the moving party's position.

An attorney in the position of responding to a supporting memorandum should also consider whether the motion involves an issue of sufficient importance that it requires concerted opposition in light of his or her overall case strategy. Motions are often made without informing the opposition in advance of filing. Orders are sought regarding matters that an opposing lawyer might have agreed to if asked. In this situation, it may be strategically preferable to stipulate to the motion [*see Linsk v. Linsk (1969) 70 Cal. 2d 272, 276-278, 74 Cal. Rptr. 544, 449 P.2d 760* (giving examples of matters to which attorneys may and may not stipulate)].

Alternatively, rather than filing direct opposition, the attorney may find it more advantageous to file a counter motion and seize the initiative. For example, in amotion for change of venue, the opposing party may agree on the basic argument that the venue should be changed, but countermove for a forum different from that proposed by the moving party [*see Code Civ. Proc. §§ 396b, 397*].

[e] The Conclusion

At the end of the memorandum, the attorney should include a conclusion section. The conclusion should be a succinct summary of the relief requested or opposed, and the reason why the relief should be granted or denied.

[4] Considerations in Specific Proceedings

[a] Demurrers

The most common ground for demurrer is the general demurrer, that is, the failure of the complaint or cross complaint to state facts sufficient to constitute a cause of action. The main advantage of the demurrer is that it permits the demurring party to object at an early stage in the proceedings to the sufficiency of the opposing party's legal theories. Thus, a defendant may be able to eliminate certain causes of action or narrow the grounds for the plaintiff's action before the defendant files an answer. The defendant can also force the plaintiff to amend the complaint to further determine the plaintiff's theories before an answer is filed and before discovery is conducted.

The disadvantages to demurring may outweigh the advantages, however, even when a complaint is technically demurrable. The demurrer will educate opposing counsel and will require opposing counsel to concentrate and focus on the action. Since leave to amend is usually granted, plaintiff's counsel is given the opportunity to cure any defects in the action early in the proceedings.

When one is considering whether to demur or not to demur, one should consider the alternatives such as an answer, a motion to strike, or a motion for summary judgment later in the proceedings. Discovery is an alternative procedure that should also be considered.

When writing the memorandum in support of a demurrer, one should be as specific and organized as possible. For example, one should demur to specific causes of action in a complaint that alleges several breach of contract theories; if one were to attack the entire complaint, the demurrer might be overruled if only one of several causes of action is valid.

The party opposing the demurrer should state the facts of the complaint as facts, rather than stating that facts are "alleged." One need only state once that the allegations of the complaint are presumed true for purposes of the demurrer; after that has been stated, the facts can thus be stated as facts rather than qualified with the term "alleged." It may also be useful at times to quote particular allegations to ensure that the judge reads those portions of the pleading that demonstrate a cause of action is sufficiently stated. Finally, the party opposing demurrer should always conclude by a statement to the effect leave to amend is not needed, since the demurrer should be overruled, but in the event it *is*

sustained, the court should grant leave to amend.

See also the references in *§ 1.04[1][d]*.

[b] Summary Judgment Motions

Although the valid purpose of the summary judgment motion is to obtain a judgment prior to trial, or to eliminate issues from trial, a summary judgment motion may also be used for discovery. The moving party sometimes makes this motion in order to discover the theories of the opposing party before trial. By moving for summary judgment, the opposition is required to set forth the nature of the dispute and the facts and theories precluding summary judgment, and the moving party obtains this information regardless of the outcome of the motion. Note, however, that a motion made solely for this purpose is arguably subject to sanctions [*see Code Civ. Proc. § 128.7*].

The party moving for summary judgment should be careful in the memorandum and supporting pleadings to meet all of the special procedural requirements for summary judgment. This is important particularly because summary judgment requires the entry of judgment without a trial and therefore prevents a party from having his or her day in court. For detailed discussion of the procedure to be followed on motions for summary judgment, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

Summary judgment motions are based on extrinsic evidence such as declarations. Thus, citations to the factual record are critical in the memorandum. Critical passages should be quoted rather than paraphrased even though the actual material (*e.g.*, deposition transcript) will accompany the memorandum of points and authorities.

The opposing party has a decision to make with respect to emphasis and detailed discussion in his or her memorandum in opposition to the motion. He or she can be surgically precise and attack the adequacy of the showing, or can set forth more than is required to defeat the motion to ensure the motion's defeat. Most attorneys are concerned about not firing all of their shots, but if the moving party's showing is inadequate, as sometime occurs in summary judgment motions, then the lawyer should be confident that a few well-placed facts and arguments may be sufficient to defeat the motion. Proffering all of your evidence in opposition to a summary judgment motion enables the moving party to determine the position of the opposing party and will enable the moving party to have used summary judgment for discovery purposes to meet the moving party's burden of proof.

Thus, the opposing party should write confidently, but write technically, eitherto show the inadequacy of the showing or provide the evidentiary bases for raising genuine issues of material fact so as to defeat the summary judgment motion.

[c] TRO's and Injunctions

A party seeking injunctive relief bears a heavy burden, and consequently it is necessary for that party to prepare well-written moving papers, particularly a well-written supporting memorandum. The heavy burden exists because the moving party must show a likelihood of success in order to obtain injunctive relief. The moving party is also usually under severe time pressure. Finally, the moving party must convince the judge that the requested injunctive relief is more "prohibitory" (thou shall not) than "mandatory" (thou shall). California courts have limited the issuance of mandatory preliminary injunctions to extreme cases while permitting injunctive relief in prohibitory cases [*see, e.g., Alvarez v. Eden Township Hosp. Dist. (1961) 191 Cal. App. 2d 309, 312, 12 Cal. Rptr. 661*]. The moving party must therefore anticipate opposition by taking care to request relief in prohibitory rather than mandatory terms.

Perhaps the most important part of the memorandum in support of injunctive relief is the statement of facts. The statement of facts must demonstrate to the judge the necessity for the injunctive relief being requested. Thus, the statement of facts must be extremely persuasive in and of itself, and be based on competent extrinsic evidence in the form of declarations, affidavits, and other evidence.

The equitable considerations should be stressed by the moving party, and the statement of facts should be arranged to stress the equities in favor of the moving party. The inadequacy of the legal remedy should be stressed and the fact that the injury is irreparable should be demonstrated. In demonstrating that the injury is irreparable, it is helpful to anticipate the alternatives to injunctive relief and to negate the adequacy of such alternatives.

The party opposing the injunctive relief should take special care to write an affirmative statement of facts, not just "no, that did not happen." The opposition should attack the specific equitable grounds set forth by the moving party by showing the adequacy of the legal remedies or by showing the different alternatives to injunctive relief. In appropriate circumstances, the opposing party should attempt the boomerang effect; if the moving party has anticipated alternatives to injunctive relief and attempted to negate those alternatives, the opposing party can suggest that the anticipation of those alternatives by the moving party suggests their viability.

Finally, the opposing party should attack the evidentiary basis of the moving papers. The opposing party may do so in the body of the opposing memorandum; if the attack on the evidentiary basis is extensive, a summary can be set forth in the body of the memorandum and an appendix may be added in which the objections are further detailed.

See also references to related memoranda in *§ 1.04[1][d]*.

[d] Motions in Limine

A motion in limine a motion made just prior to trial and is used to ensure either that particular evidence is admitted or particular evidence is excluded or not referred to during the trial. The motion is often used to ensure that extremely prejudicial evidence is excluded or not referred to by opposing counsel. The other major reason for making a motion in limine is to ensure that particularly important evidence is admitted at the trial. A motion in limine would enable a party seeking the admission of particular evidence to better weigh the settlement value of a particular case. If the judge indicates that the evidence, which is important to the moving party, will not be admitted at trial, the party may lower his or her expectations and thus may be induced to settle.

Most motions in limine can be anticipated since the key evidence in the case should be apparent to counsel on both sides. Whenever the admissibility or excludability of particular evidence is in question, and whenever such evidence is critical to the outcome of the case, a motion in limine is likely. Both parties should be aware of the possibility of making a motion in limine, and both parties should be anticipating the opposition to such a motion, particularly since the motions are normally made just before trial, and little time exists then for preparing written memoranda.

The memorandum in support of the motion in limine should be drafted to enable the trial judge to orient himself or herself to the nature of the case as well as to the specific evidence problem. The moving party thus has an opportunity to educate the trial judge at the outset of the trial or just before the trial; the opportunity, however, can be disastrous if the moving party overstates his or her case. For example, if the moving party states that the admission of particular evidence is necessary for plaintiff's case, then the plaintiff is inviting the judge's belief that the case is not viable if the evidence is excluded. Such a mistake can have the consequence of opening the door for the judge's thinking that a judgment notwithstanding the verdict may be appropriate in the event the jury rules in favor of the plaintiff.

PRACTICE TIP:

Motions in Limine Distinguished With Regard to Memoranda and Oral Argument. As discussed in *§ 1.03[1][d]*, in most motion proceedings, the memoranda play a key role while oral argument is comparatively rare. By contrast, memoranda submitted in support of a motion in limine are generally brief and to the point, usually consisting of no more than two or three pages, and judges deciding such motions usually rely heavily on oral argument. Thus, when presenting a motion in limine it is important both to have a concise written presentation of the motion, and also to be prepared to persuasive

oralargument. *Evelio M. Grillo, Esq.*

See also discussion in *§ 1.04[1][c]*.

[e] Motions for New Trial or JNOV

A memorandum supporting a motion for new trial or judgment notwithstanding the verdict is often based on a memoranda for summary judgment filed earlier during the proceedings or the trial brief. Such motions may also be based on a motion in limine aimed at excluding particular evidence. Evidence actually admitted or excluded at trial will usually be included in the posttrial memorandum.

A major difficulty in writing a memorandum in support of a posttrial memorandum is injecting a fresh approach to the writing. The person writing the memorandum should review it with this in mind.

The opposing party should state the case affirmatively and positively. The usual memorandum in opposition to a substantive posttrial motion states that the verdict is supported by the evidence, that the defendant is ignoring all such evidence, and that the defendant is ignoring the standard of law that requires that all reasonable inferences should be viewed in favor of the winning party.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureSummary JudgmentMotions for Summary JudgmentWritten MotionsCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureAppealsBriefsCriminal Law & ProcedurePretrial Motions & ProceduresGeneral Overview

California Points & Authorities

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Volume 1 Chapters 1-19 WRITING LEGAL MEMORANDA AND BRIEFS; ABATEMENT AND SURVIVAL OF ACTIONS---to---AMENDED AND SUPPLEMENTAL PLEADINGS
CHAPTER 1 WRITING LEGAL MEMORANDA AND BRIEFS
I. INTRODUCTION

1-1 California Points & Authorities § 1.04

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§ 1.04 When Memoranda Are Required or Needed

[1] Supporting Memoranda Usually Required

[a] Use of Supporting Memoranda Generally

A supporting memorandum is required now in almost all proceedings in which a motion, application, or petition may be made or opposed by any party in an action. See *§ 1.04[1][b] -[e]* for discussion of the proceedings in which they are required, and see *§ 1.04[1][f]* for an illustrative list of common proceedings requiring or needing supporting memoranda, with cross-references relating to those proceedings.

A supporting memorandum is strongly recommended in those instances in which it is not required. For example, an oral motion at trial does not require a supporting memorandum. Usually time and circumstance preclude the preparation of one. In some instances, however, an oral motion is easily anticipated and will greatly benefit from the advanced preparation and submission of a memorandum. The most common example is a motion in limine, made immediately before trial regarding evidentiary issues. While a motion in limine is often made without a supporting memorandum, the motion can usually be anticipated by the moving party and can involve issues critical to his or her case. In such a case it may be useful to prepare a supporting memoranda to support oral argument. For further discussion of motions in limine, see *§ 1.03[4][d]* and California Forms of Pleading and Practice, Ch. 373, *Motions in Limine* (Matthew Bender).

PRACTICE TIP:

Prepare Memorandum Whenever Time Permits. Even when not required, a supporting memorandum, when brief and to-the-point, may nevertheless be effectual in proceedings such as an oral motion. One or two pages citing the authority under which the motion is being made may be a big help to the Court. Consider drafting memoranda for important proceedings in which they are not required, when the proceedings are anticipated or time otherwise allows preparation.

[b] Memorandum Required to Support Demurrer or Notice of Motion

One of the main rules regarding supporting memorandum is set out in *Cal. Rules of Ct., Rule 3.1113*, requiring a supporting memorandum to accompany any notice of motion [*Cal. Rules of Ct., Rules 3.1113(a)*; *see also Cal. Rules of Ct., Rule 3.1112(a)* (papers filed in support of motion must, at least, consist of the motion itself, notice of hearing on the motion, and a memorandum in support of motion or demurrer)].

The requirements of *Cal. Rules of Ct., Rule 3.1113*, as well as the other requirements set out in *Cal. Rules of Ct., Rule 3.1100 et seq.*, apply generally to all civil law and motion proceedings, as defined in *Cal. Rules of Ct., Rules 3.1103*, and also to discovery conducted in family law and probate proceedings [*Cal. Rules of Ct., Rule 3.1100*].

Cal. Rules of Ct., Rule 3.1103 defines "law and motion" to include the following:

- Proceedings on application before trial for an order, except for causes arising under the Welfare and Institutions Code, the Probate Code, the Family Code, or *Code Civ. Proc., §§ 527.6, 527.7*, and *527.8* (injunctive relief from harassment, domestic violence, gang violence, and violence to employees) [*Cal. Rules of Ct., Rule 3.1103(a)(1)*].

- Proceedings on application for an order regarding enforcement of judgments, attachment, appointment of receivers, obtaining or setting aside default judgments, writs of review, mandate, and prohibition, petitions to compel arbitration, and enforcement of arbitration awards [*Cal. Rules of Ct., Rule 3.1103(a)(2)*].

As noted above, the requirement of submitting a supporting memorandum under *Cal. Rules of Ct., Rule 3.1113(a)*, applies when filing a demurrer or a"notice of motion." A notice of motion is required in the following instances under *Code Civ. Proc. § 1005(a)*:

(1) Notice of application and hearing for a writ of attachment under *Code Civ. Proc. § 484.040*.

(2) Notice of application and hearing for claim and delivery under *Code Civ. Proc. § 512.030*.

(3) Notice of hearing for claim of exemption under *Code Civ. Proc. § 706.105*.

(4) Motion to quash summons under *Code Civ. Proc. § 418.10(b)*.

(5) Motion for determination of a good-faith settlement under *Code Civ. Proc. § 877.6*.

(6) Hearing for discovery of a peace officer's personnel records under *Evid. Code § 1043*.

(7) Notice of hearing of a third-party claim under *Code Civ. Proc. § 720.320*.

(8) Motion for an order to attend a deposition more than 150 miles from deponent's residence under *Code Civ. Proc. § 2025.260*.

(9) Notice of hearing of application for relief under *Gov. Code § 946.6*.

(10) Motion to set aside default or default judgment and for leave to defend action pursuant to *Code Civ. Proc. § 473.5*.

(11) Motion to expunge notice of pendency of action pursuant to *Code Civ. Proc. § 405.30*.

(12) Motion to set aside default or default judgment and for leave to amend pursuant to *Code Civ. Proc. § 585.5*.

(13) Any other proceeding under the Code of Civil Procedure in which notice is required and no other time or method is prescribed by law or by court or judge.

For further discussion of when a notice of motion is required, the requirements applicable to such motions, and a general forms of noticed motion, see California Forms of Pleading and Practice, Ch. 372, *Motions and Orders* (Matthew Bender). For discussion and forms relating to demurrers, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender) [*see also* Ch. 71, *Demurrers and Motions for Judgments on the Pleadings* , for memoranda relating specifically to demurrers].

The absence of a memorandum except when exempted under *Cal. Rules of Ct., Rule 3.1114(a)*, may be construed by the court as an admission that the motion or demurrer is not meritorious and cause for its denial and, in the case of a demurrer, as a waiver of all grounds not supported [*Cal. Rules of Ct., Rule 3.1113(a)*]. Local trial court rules should be consulted for possible additional effects for failure to file. For example, a local court may have discretion, if it chooses not to deny the matter on its merits, either to place the matter off calendar or to allow a continuance [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rule 9.5].

[c] Memorandum Required to Support Motion for New Trial

Although motions for a new trial are excluded from the requirements of *Cal. Rules of Ct., Rule 3.1113(a)* (discussed in *§ 1.04[1][b]*), a party seeking a new trial is nevertheless required to file a supporting memorandum within 10 days of filing the notice of intention to move for a new trial [*Cal. Rules of Ct., Rule 3.1600(a)*]. For discussion and forms relating to motions for a new trial, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender) [*see also* Ch. 155, *Motions After Trial* , for memoranda relating specifically to demurrers].

Absent a memorandum in support of a motion for new trial, the court may deny the motion without a hearing on the merits [*Cal. Rules of Ct., Rule 3.1600(b)*].

[d] Memorandum Required to Support Petition for Writ

The requirement that a memorandum be filed in support of a petition for a writ of mandate, prohibition, or review may reasonably be inferred from the fact that such petitions are subject to the requirements of *Cal. Rules of Ct., Rule 3.1100 et seq.*, including *Cal. Rules of Ct., Rule 3.1113(a)* (discussed in *§ 1.04[1][b]*) [*see Cal. Rules of Ct., Rule 3.1103(a)(2)* and discussion in *§ 1.04[1][b]*], and from statutory references and requirements that render such petitions essentially equivalent to a "notice of motion" [*see Code Civ. Proc. §§ 1003* ("motion" as application for an order), *1088, 1089, 1090, 1107* (all referring to petition as "motion" or "application" and including minimum notice requirements)].

[e] Memorandum Required to Support Ex Parte Application

A supporting memorandum must be included with an ex parte application [*Cal. Rules of Ct., Rule 3.1201*].

A memorandum was not previously required with respect to an ex parte application, as distinguished from a noticed motion. It is arguable that this new requirement is different than the requirement of a memorandum in support of a noticed motion or demurrer. The difference, arguably, is based on the difference between a noticed motion and an ex parte application. The latter are generally allowed only in exceptional circumstances, either because of some emergency or because the matter is so routine a more expensive hearing on noticed motion is unnecessary [*see, e.g., Cal. Rules of Ct., Rule 3.1202(c)* (requiring ex parte application to be supported by declaration with competent facts based on personal knowledge showing irreparable harm, immediate danger, or some other statutorybasis for ex parte relief rather than relief after a hearing on noticed motion)]. In other words, it is arguable that an extensive memorandum is not required, because either the exigent circumstances preclude its timely preparation, or the routine nature of the matter at

hand renders it unnecessary.

For further discussion and forms relating to ex parte applications in general, see California Forms of Pleading and Practice, Ch. 372, *Motions and Orders* (Matthew Bender).

[f] References to Commonly Used Procedural Points and Authorities

As noted in *§ 1.04[1][a]-[e]*, supporting memoranda are required in a majority of motion proceedings. The proceedings in which they are more commonly used, together with references to memoranda relating to those proceedings, are as follows:

- **Pretrial Motions on the Pleadings.** These include:
  - Motions to dismiss for lack of jurisdiction (*see* Ch. 132, *Jurisdiction: Personal Jurisdiction and Inconvenient Forum* and Ch. 133, *Jurisdiction: Subject Matter Jurisdiction*).
  - Demurrers or motions for judgment on the pleadings (*see* Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* , and *§ 1.06[4][a]*).
  - Motions to strike (*see* Ch. 160, *Motions to Strike*).
  - Motions for leave to amend or supplement pleadings (*see* Ch. 16, *Amended and Supplemental Pleadings*).
  - Motions relating to cross complaints (*see* Ch. 61, *Cross Complaints*).
- **Pretrial Motions for Disposition Without Trial.** These include:
  - Motions for summary judgment and summary adjudication (*see* Ch. 221, *Summary Judgments* , and *§ 1.06[4][b]*).
  - Motions for involuntary dismissal based on delay in prosecution of the action (*see* Ch. 90, *Dismissal*).
  - Motions to dismiss, exclude evidence, or adjudicate certain issues as a sanction (*see* Ch. 82, *Discovery: Sanctions for Discovery Misuse* , and Ch. 207, *Sanctions*).
- **Pretrial Motions to Preserve Assets or Status Quo.** These include:
  - Motions relating to attachment, receivers, and similar provisional relief (*see, e.g.,* Ch. 23, *Attachment* ; Ch. 40, *Claim and Delivery* ; and Ch. 200, *Receivers*).
  - Motions for injunctive relief (*see* Ch. 116, *Injunctions* ; *see also* discussion in *§ 1.04[1][c]* and *§ 1.06[4][c]*).
  - Motions for security for costs (*see* Ch. 60, *Costs*).
- **Discovery Motions.** These include a wide variety of motions under the Discovery Act (*Code Civ. Proc. § 2016.010 et seq.*), including motions to compel or limit discovery, motions relating to the taking,

recording, and distribution of depositions, motions relating to expert witness lists and expert witness, motions for discovery to preserve evidence, and motions for sanctions for noncompliance with discovery orders. *See*

- Ch. 80, *Discovery: Scope, Regulation, and Timing*
- Ch. 81, *Discovery: Privileges and Other Discovery Limitations*
- Ch. 82, *Discovery: Sanctions for Discovery Misuse*
- Ch. 83, *Discovery: Depositions*
- Ch. 84, *Discovery: Interrogatories*
- Ch. 85, *Discovery: Production or Inspection of Tangible Evidence*
- Ch. 86, *Discovery: Requests for Admissions*
- Ch. 87, *Discovery: Physical and Mental Examinations*
- Ch. 88, *Discovery: Exchange of Expert Witness Information*
- Ch. 89, *Discovery: Preservation of Evidence*
- Ch. 89A, *Discovery: Review of Discovery Orders*

- **Other Motions Relating to the Parties or Action.** These, usually pretrial, motions include:

  - Motions to interplead or intervene (*see* Ch. 123, *Interpleader* , and Ch. 124, *Intervention*).
  - Motions to change venue (*see* Ch. 238, *Venue*).
  - Motions to add parties (*see* Ch. 168, *Parties*).
  - Motions to sever, consolidate, or coordinate causes of action (*see* Ch. 45, *Consolidation, Severance, and Coordination of Actions*).
  - Motion to certify, or decertify, a class (*see* Ch. 41, *Class and Representative Actions*).
  - Motions to advance, continue, or stay the action (*see* Ch. 180, *Pretrial Proceedings* , Ch. 48, *Continuance of Proceedings* , and Ch. 10, *Abatement and Survival of Actions*).

- **Post-Order or Post-Judgment Motions.** These include:

  - Motions to reconsider an order (*see* Ch. 158, *Motions to Reconsider and Renewed Motions*).
  - Motions for a new trial or for judgment notwithstanding the verdict (*see* Ch. 155,

Motions After Trial).

- Motions to tax or strike a memorandum of costs, or motions relating to the entitlement or determination of the amount of an award of attorney's fees (*see* Ch. 60, *Costs*).

- Motions for interest (*see* Ch. 121, *Interest*).

- Motions to amend or correct a judgment (*see* Ch. 131, *Judgments*).

- Motions for relief from a default, default judgment or judgment (*see* Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders*).

- **Writ Petitions.** These include:

  - Petitions to review interlocutory orders by writ of mandate or prohibition (*see* Ch. 150, *Mandate and Prohibition*).

  - Other petitions for review of contempt orders, administrative decisions, etc. (*see* Ch. 205, *Review (Certiorari), Writ of* , and Ch. 195, *Public Administrative Law; see also* Ch. 47, *Contempt* , and Ch. 110, *Habeas Corpus*).

[2] Opposing Memoranda

Opposing memoranda are generally permitted, but not required.

Even though not expressly required, an opposing memorandum is itself the opposition to a motion, demurrer, or petition. No other opposing paper, aside from any appropriate attachments, is necessary. Opposing memoranda are therefore *strongly* recommended [*see* Los Angeles Co. Super. Ct. Rules, Rule 9.15 (failure to file opposition creates inference that motion or demurrer is meritorious)]. If the moving party has filed a supporting memorandum, an opposing memorandum is essential absent a deliberate decision not to oppose the proceeding. Even when no supporting memorandum has been filed, a brief opposing memorandum is appropriate to argue that court should exercise its discretion to deny the motion or demurrer [*see § 105.04[1][a]* and *[b]*, for discussion of effect of failure to file a required supporting memorandum].

If a party has decided not to oppose a matter, that party should, as a courtesy to the court, file and serve a statement of nonopposition on or before the date on which any written opposition is due.

[3] Reply Memoranda

Reply memoranda are generally permitted, but not required. Reply memoranda have a much more limited function than supporting or opposing memoranda and should not be abused. Generally they are appropriate only in situations such as the following:

- When the opposing papers raised facts or legal issues not mentioned in the supporting memorandum. These should include some explanation for the omission.

- When new law or facts relevant to the proceeding have come to the attention of the moving party only after the supporting memorandum was filed. Again, explanation for omission of the material from the supporting memorandum should be supplied when necessary. In this situation it will usually be

necessary to allow the opposing party time to prepare a response to such new law or facts.

[4] Time for Serving and Filing Memoranda

The general deadlines for serving and filing memoranda in most noticed motion proceedings are governed by *Code Civ. Proc. § 1005(b)* [*see Cal. Rules of Ct., Rule 3.1300*]:

- Supporting memoranda, together with other moving and supporting papers, must be served and filed at least 16 court days before the hearing; the moving and supporting papers served must be a copy of the papers filed or to be filed.

- Opposing memoranda must be filed and a copy served on each party at least 9 court days before the hearing.

- Reply memoranda, when submitted, must be filed and a copy served on each party at least five court days before the hearing.

Code Civ. Proc. § 1005(b) also specifies the allowable extensions of time when service of moving papers is by mail, FAX, or express mail, and requires as well that service of opposing and reply papers must be by means reasonably calculated to ensure delivery by the close of the next business day after filing.

Code Civ. Proc. § 1005(b) does not apply to all proceedings in which memoranda are used, and counsel should check for the possible application of different service and filing requirements in specific proceedings [*see, e.g., Code Civ. Proc. § 437c(a), (b)* (service and filing requirements in proceedings forsummary judgment or summary adjudication)]. For further discussion of service and filing requirements generally, see California Forms of Pleading and Practice, Ch. 372, *Motions and Orders* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePartiesInterventionMotions to InterveneCivil ProcedureDismissalsInvoluntary DismissalsMotionsCivil ProcedureAppealsBriefs

California Points & Authorities

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Volume 1 Chapters 1-19 WRITING LEGAL MEMORANDA AND BRIEFS; ABATEMENT AND SURVIVAL OF ACTIONS---to---AMENDED AND SUPPLEMENTAL PLEADINGS
CHAPTER 1 WRITING LEGAL MEMORANDA AND BRIEFS
I. INTRODUCTION

1-1 California Points & Authorities § 1.05

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§ 1.05 Format Requirements

[1] Page Length Limits

[a] In General

The general page limits, which apply to the vast majority of memoranda, that is, those filed in trial court "law and motion" proceedings (discussed in *§ 1.04[1][b]*), are as follows [*Cal. Rules of Ct., Rule 3.1113(d)*]:

- An opening or responding memorandum may not exceed 15 pages, except in a summary judgment or summary adjudication motion (discussed in *§ 1.05[1][b]*).

- A reply or closing memorandum may not exceed 10 pages.

- These page limits do not take into account exhibits, declarations, attachments, a table of contents, a table of authorities, or the proof of service. [*Cal. Rules of Ct., Rule 3.1113(d)*]. If the memorandum includes a table of contents and table of authorities, the caption page also appears to be excluded in calculating the page length of the memorandum. The pagination requirements applicable to memoranda that include such tables provide that the caption page is not to be numbered, the tables are to be numbered separately using lowercase Roman numerals, and the consecutive numbering of the memorandum itself in Arabic numerals is to begin on the first page of the text [*see Cal. Rules of Ct., Rule 3.1113(h)* and discussion in *§ 1.05[2]*].

A memorandum that exceeds the page limitations of *Cal. Rules of Ct., Rule 3.1113(d),* will not be rejected for filing on the ground that it is too long. However, the court has discretion to refuse to consider such a memorandum; if the court so decides, its minutes or order must so indicate [*Cal. Rules of Ct., Rules 3.1113(d), 3.1300(d)*].

[b] Summary Judgment or Adjudication

In a summary judgment or summary adjudication motion, no opening or responding memorandum may exceed 20 pages [*Cal. Rules of Ct., Rule 3.1113(d)*]. Otherwise the general limits and exceptions apply [*see § 1.05[1][a]* and *§ 1.05[1][c]*].

[c] Procedure for Filing Longer Memorandum

A party may apply to the court at least 24 hours before the memorandum is due for leave to file a longer memorandum. The application must state reasons why the argument cannot be made within the page limitations [*Cal. Rules of Ct., Rule 3.1113(e)*].

Although the application is ex parte, the applicant must provide written notice of the application to other parties [*Cal. Rules of Ct., Rule 3.1113(e)*]. Although the application is expressly excepted from the requirement of a personal appearance by the applicant [*Cal. Rules of Ct., Rule 3.1207*], other requirements applicable to ex parte application generally must be observed [*see Cal. Rules of Ct., Rule 3.1200 et seq.*].

An applicant should, if possible, make the application sufficiently in advance so that the memorandum may be brought within applicable page limits if the application is denied. Counsel should also avoid any temptation to circumvent the page-limit requirements by way of utilizing any format "sleight of hand," in lieu of an application or in the event an application is denied. Such practices are obvious to the courts and create a highly negative impression [*see Marriage of Green (1989) 213 Cal. App. 3d 14, 28, 261 Cal. Rptr. 294* (appellate brief deemed an "insult" to the court when it included an unpaginated "Introduction," and unpaginated "exhibits" that contained discussion which was properly a part of the brief, and also contained an excessive use of single-spaced footnotes that also included discussion and text that was properly part of the brief)]. See also the discussion in *§ 1.03[2][d]*, relating to concise writing a brevity as a drafting consideration.

For further discussion and a form of application for leave to file a memorandum in excess of applicable page limits, see *§ 1.11*.

[2] General Paper and Format Requirements

The format of a memorandum is subject to the general format requirements applicable generally to papers filed in trial courts [*Cal. Rules of Ct., Rule 2.100 et seq.*], as well the general format requirement applicable generally to law and motion proceedings under *Cal. Rules of Ct., Rule 3.1110* [*see Cal. Rules of Ct., Rules 3.1100, 3.1113(a)*].

The general requirements of *Cal. Rules of Ct., Rules 2.100-2.119*, include the following:

- Recycled paper must be used for all original papers and all copies of papers, documents, and exhibits, whether filed or served on other parties. The attorney, party, or other person filing or serving a document certifies, by the act of filing or service, that the document was produced on paper purchased as recycled [*Cal. Rules of Ct., Rule 2.101*; *see Pub. Res. Code § 42202*; *Cal. Rules of Ct., Rule 1.6* (defining recycled paper)].

- The paper must be typewritten or printed, or prepared by a photocopyingor other duplicating process that will produce clear and permanent copies equally legible to printing. It must also use a type size not smaller than 12 points. The paper used must be opaque and unglazed, white or unbleached, of standard quality not less than 20-pound weight and 81/2 by 11 inches in size [*Cal. Rules of Ct., Rules 2.103, 2.104*].

- Papers presented for filing must have two prepunched normal-size holes, centered 21/2 inches apart

and 5/8 of an inch from the top of the paper [Cal. Rules of Ct., Rule 2.1115].

- Only one side of the paper is to be used. The lines on each page must be double or one and one-half spaced, and the lines must be consecutively numbered. Descriptions of real property may be single-spaced, and quotations, footnotes, and footers may be single-spaced on unnumbered lines if they otherwise comply generally with the spacing requirements of *Cal. Rules of Ct., Rule 2.111* [*Cal. Rules of Ct., Rules 2.102, 2.107, 2.108*; *see § 1.05[3]* for discussion of requirements of *Cal. Rules of Ct., Rule 2.111*].

- Pages are to be numbered consecutively at the bottom, and each paper is to consist entirely of original pages without riders, firmly bound together at the top [*Cal. Rules of Ct., Rules 2.109, 2.113*; *see also Cal. Rules of Ct., Rule 3.1110(c)* (bound papers to be numbered consecutively)]. Note, however, that if a *memorandum* includes a table of contents and table of authorities, it must be paginated as follows notwithstanding any other rule: the caption page or pages is not to be numbered, the pages of the tables are to be numbered consecutively using lowercase Roman numerals starting on the first page of the tables, and the pages of the text of the memorandum are to be numbered consecutively using Arabic numerals starting on the first page of the text [*see Cal. Rules of Ct., Rule 3.1113(h)*].

- Each page must have a footer in the bottom margin, below the page number and separated by a printed horizontal line, which sets out the title of the paper or some clear and concise abbreviation [*Cal. Rules of Ct., Rule 2.110(a), (b)* (also providing two examples of abbreviations: "Complaint" and "XYZ Corp.'s Motion for Summary Judgment")]. The title or abbreviated title given in the footer must be in at least 10-point type [*Cal. Rules of Ct., Rule 2.110(c)*].

- Exhibits may be fastened to pages of the specified size, and when prepared by a machine copying process, must be equal to typewritten material in legibility and permanency of image [*Cal. Rules of Ct., Rule 2.114*].

The general requirements of *Cal. Rules of Ct., Rule 3.1110*, include the following:

- **Reference to Previously Filed Papers.** Any paper previously filed must be referred to by date of execution and title [*Cal. Rules of Ct., Rules 3.1110(d)*].

- **Binding of Papers.** All pages of the memorandum and each exhibit must be attached together at the top by a method that permits pages to be easily turned and the entire content of each page to be read [*Cal. Rules of Ct., Rule 3.1110(e)*].

- **Exhibits.** If the memorandum has exhibits, each must be separated by a hard 81/2 by 11 inch sheet with hard paper or plastic tabs extending below the bottom of the page, bearing the designation of the exhibit. An index to exhibits must be provided. Pages from a single deposition and associated exhibits must be designated as a single exhibit. Exhibits in a foreign language must be accompanied by an English translation, certified under oath by a qualified interpreter [*Cal. Rules of Ct., Rule 3.1110(f), (g)*].

For additional general requirements that apply to first page of a pleading or paper to be filed in a trial court, including the first page of a memorandum, see *§ 1.05[3]*.

Note that local rules relating to pleadings, demurrers, ex parte applications, motions, discovery, provisional remedies, and *form and format of papers* are expressly superseded by the statewide rules of court [*Cal. Rules of Ct., Rule 3.20(a)*].

[3] Requirements for First Page; Caption

The first page of the memorandum of points and authorities, if prepared as a separate document, must be in the following form [*Cal. Rules of Ct., Rule 2.111*]:

- In the space commencing 1 inch from the top of the page with line 1, to the left of the center of the page, the name, office address or, if none, residence address or mailing address (if different), telephone number, fax number and e-mail address (if available), and State Bar membership number of the attorney for the party in whose behalf the paper is presented, or of the party if he or she is appearing in person. The inclusion of a fax number or e-mail address on any document does not constitute consent to service by fax or e-mail unless otherwise provided by law.

- In the first 2 inches of space between lines 1 and 7 to the right of the center of the page, a blank space for the use of the clerk.

- On line 8, at or below 3 1/3 inches from the top of the paper, the title of the court.

- Below the title of the court, in the space to the left of the center of thepage, the title of the case. In the title of the case on each initial complaint or cross-complaint, the name of each party must commence on a separate line beginning at the left margin of the page. On any subsequent pleading or paper, it is sufficient to provide a short title of the case (1) stating the name of the first party on each side, with appropriate indication of other parties, and (2) stating that a cross-action or cross-actions are involved (e.g., "and Related Cross-action"), if applicable.

- To the right of and opposite the title, the number of the case.

- Below the number of the case, the nature of the paper and, on all complaints and petitions, the character of the action or proceeding. In a case having multiple parties, any answer, response, or opposition must specifically identify the complaining, propounding, or moving party and the complaint, motion, or other matter being answered or opposed.

- Below the nature of the paper or the character of the action or proceeding, the name of the judge and department, if any, to which the case is assigned.

- Below the nature of the paper or the character of the action or proceeding, the word "Referee:" followed by the name of the referee, on any paper filed in a case pending before a referee appointed under *Code of Civil Procedure section 638* or *639*.

- On the complaint, petition, or application filed in a limited civil case, below the character of the action or proceeding, the amount demanded in the complaint, petition, or application, stated as follows: "Amount demanded exceeds $10,000" or "Amount demanded does not exceed $10,000," as required by *Government Code section 72055*.

- In the caption of every pleading and every other paper filed in a limited civil case, the words "Limited Civil Case," as required by *Code of Civil Procedure section 422.30(b)*.

- If a case is reclassified by an amended complaint, cross-complaint, amended cross-complaint, or other pleading under *Code of Civil Procedure section 403.020* or *403.030*, the caption must indicate that the action or proceeding is reclassified by this pleading. If a case is reclassified by stipulation under *Code of Civil Procedure section 403.050*, the title of the stipulation must state that the action or proceeding is reclassified by this stipulation. The caption or title must state that the case is a limited civil case

reclassified as an unlimited civil case, or an unlimited civil case reclassified as a limited civil case, or other words to that effect.

In addition, the first page must specify immediately below the case number [*Cal. Rules of Ct., Rule 3.1110(b)*]:

- The date, time, and location, if ascertainable, of any scheduled hearing and the name of the hearing judge, if ascertainable.
- The nature or title of any attached document other than an exhibit.
- The date of filing of the action.
- The trial date, if set.

If a party wishes to appear by telephone, the phrase "Telephone Appearance" must be placed below the title of the moving or opposing papers [*Cal. Rules of Ct., Rule 3.670(d)*; for detailed discussion of this type of appearance, *see* California Forms of Pleading and Practice, Ch. 372, *Motions and Orders* (Matthew Bender)].

For sample form of caption conforming to these requirements, for use at the beginning of the first page of memorandum of points and authorities that is to be filed as a separate document, see the skeletal form of a memorandum set out in *§ 1.10*.

[4] Tables of Both Contents and Authorities Usually Required

A memorandum longer than 10 pages must include a table of contents and table of authorities [*Cal. Rules of Ct., Rule 3.1113(f)*].

Any table of authorities should list, in alphabetical order, federal cases first, and then state cases. The page or pages on which each case is cited should appear directly opposite each case name in the table. Cases should be followed by statutes, also in alphabetical order by code title, with federal statutes preceding state statutes. Secondary sources, such as law review articles, treatises, or textbooks, should be included after statutes. This order is not, however, established in stone or by rule: it is accepted practice, for example, to cite the more relevant state authority before federal authority in memoranda filed in state trial courts. The tabling of statutory authority prior to case authority is also sometimes used, as it is the more logical arrangement of primary authority. For citation style of the table of authorities, see *§ 1.05[7]*.

For a sample skeletal form including tables of contents and authorities, which may be modified for use in drafting such tables, see *§ 1.10*.

[5] Requirements Relating to Argument and Discussion

[a] Introduction and Summary of Argument

Although not required by statute, it is usually a good idea to include an introduction of one to two sentences in the memorandum. The introduction helps the court focus on which parties' brief the court is reading, the nature of the motion, and whether the brief is supporting or opposing the pending motion. Anexample of a simple introduction would be as follows: "This memorandum is submitted on behalf of plaintiff Jones and against defendant Smith in support of plaintiff Jones' Motion for Summary Judgment."

A memorandum filed in a trial court civil law and motion proceeding, which exceeds 15 pages, must include an opening summary of argument [*Cal. Rules of Ct., Rule 3.1113(f)*]. Unless the memorandum is unusually short, a summary to

preview the issues is good practice in any event; a summary of argument will necessarily include the memorandum's conclusions and requests for relief, which are not elsewhere required to the stated in the memorandum.

PRACTICE TIP:

Open With Introduction and Summary of Argument. The placement of the "opening" argument is not precisely specified by the rules. The best course is the obvious one: place the "opening" summary at the very beginning, before the initial statement of facts. This opening "issue context" will assist the reader in sifting quickly through the following statement of facts [*see § 1.05[5][b]*] and point the way leading to the reader's agreement with the memorandum's conclusions.

[b] Statement of Facts

A memorandum filed in a trial court civil law and motion proceeding must contain a statement of facts [*Cal. Rules of Court, Rule 3.1113(b)*]. The facts must come from any source that the court may accept as evidence in the particular proceeding. For example, memoranda supporting or opposing a demurrer may cite pleaded facts or facts subject to judicial notice, while those supporting or opposing a motion for summary judgment may cite facts set out in declarations or exhibits submitted in the proceeding, verified pleaded facts, or facts subject to judicial notice [*see* discussion in *§§ 1.05[5][c]* and 1.05[6]].

PRACTICE TIP:

Be Concise But Accurate. The statement should be concise, since it is to be followed by argument with citation to authority that will further explicate the most relevant facts and link them to the memorandum's legal conclusions. It should nevertheless accurately and completely set out *all* important facts and sufficient additional facts.

The statement of facts should be dispassionate, yet blend the favorable facts with unfavorable, in a manner that will subtly elicit agreement with the interpretation of facts most favorable to the memorandum's conclusions. Thus, favorable facts should be given emphasis and "woven" with any important unfavorable facts. A well-fashioned statement of facts will not mislead the reader, but will encourage the reader to follow the interpretation given to salient facts in the following argument (*see § 1.05[5][c]*).

See also comments in *§§ 1.03[1][a]* and *1.03[3][a]*.

[c] Statement of Law, Evidence, and Argument

A memorandum filed in a trial court civil law and motion proceeding must contain a concise statement of the law, evidence, and arguments relied on, and a discussion of the statutes, cases, and textbooks cited in support of the position advanced [*Cal. Rules of Court, Rule 3.1113(b)*]. In other words, a memorandum must include a statement and discussion of the legal authorities that support the memorandum's conclusions, linked by argument to evidence (*see* statement of facts discussed in *§ 1.05[5][b]*), which, again, supports the memorandum's conclusions.

PRACTICE TIP:

Use Numbered Primary Headings With Lettered Secondary Discussion. Depending on the complexity of the issues presented and the length of the memorandum, the statement of law, evidence, and argument may be organized in any number of ways. One clear, recommended method of organization is as follows:

- Provide primary headings or paragraphs that are strong, affirmative statements supporting the party's position. These should be consecutively numbered using Arabic numbers.

- After each primary heading or paragraph, provide more detailed sections stating points of law, evidence, and argument that, taken together, support the primary paragraph. These should be consecutively designated with capital letters.

Forms in this publication facilitate drafting a memorandum as recommended above; each form has a single primary heading or paragraph (which is therefore not numbered in the form) followed by consecutively lettered secondary paragraphs (*i.e.*, points of law and cited authority to which facts and argument need to be added).

When drafting a memorandum, primary paragraphs selected from the forms should be numbered consecutively as appropriate, and secondary sections should be re-lettered as necessary when adding, deleting, or reorganizing secondary paragraphs selected from the forms.

For further comments and discussion relating to preparing the argument, see *§ 1.03[3][b] -[d]*. For discussion of preparing the argument portion of a memorandum by selecting and tailoring the forms in this publication, *see § 1.06*.

[6] Declarations, Exhibits, and Other Evidentiary or Legal Attachments

[a] Evidentiary Attachments

[i] Evidence Generally Necessary to Support Memorandum

A memorandum supporting a motion, demurrer, petition, etc., is normally accompanied by some form of evidence on which the motion or other application is based, usually in the form of affidavits or declarations under penalty of perjury setting forth evidentiary facts. If a memorandum refers to evidence that is not yet before the court, a copy of such evidence, usually in the form of an affidavit or declaration, must accompany the memorandum [*see Code Civ. Proc. § 1010*; *see also Code Civ. Proc. § 1005(b)*].

While evidentiary facts are usually set out in an affidavit or declaration, they may also be set out in documentary evidence, presented as an exhibits that are authenticated by an affidavit or declaration attached to the exhibit, or in discovery products similarly authenticated (*e.g.*, deposition testimony and interrogatories). Evidentiary facts may also be matters subject to judicial notice. When submitting evidence discussed in a memorandum of points and authorities, counsel must be cognizant of the foundational requirements for the court to consider the evidence, as well as the limitations on the Court's consideration of particular forms of evidence.

PRACTICE TIP:

Develop Evidence for Motion First. One of the common problems encountered by counsel when preparing a memorandum is to prepare legal arguments first before the evidentiary basis of the motion is fully understood. Except in cases of very simple motions which require very little evidentiary support, counsel should attempt to develop the evidence for the motion before expending substantial time and effort on drafting the legal argument section of the points and authorities. A brilliant legal argument, without supporting facts, will not prevail over a less complex, straight forward legal argument supported by one or two critical facts. Prepare the legal argument section of the memorandum with due consideration to the evidence available to support the motion. *Evelio M. Grillo, Esq.*

Note that some motions may not be supported by extrinsic evidence (for example, a demurrer, a motion for judgment on the pleadings under *Code Civ. Proc. § 438*, or a statutory motion to strike under *Code Civ. Proc. §§ 435-437*): in these instances the supporting or opposing memorandum must rely on pleadings or judicially noticed matters.

[ii] References to Declarations and Exhibits

References in a memorandum to a declaration, affidavit, or exhibit must include the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*Cal. Rules of Ct., Rule 3.1113(l)*].

[iii] Declarations and Affidavits

An affidavit is (1) a written declaration under oath made without notice to the adverse party [*Code Civ. Proc. § 2003*]; (2) one of the three modes of taking the testimony of a witness [*see Code Civ. Proc. § 2002(1)*]; and (3) expressly authorized for use "on a motion" [*Code of Civ. Proc. § 2009*]. A declaration under penalty of perjury may be used in lieu of an affidavit [*Code Civ. Proc. § 2015.5*]. For all practical purposes, declarations under penalty of perjury have replaced affidavits as the mode of presenting the evidence of a witness on a motion. For discussion and forms relating to affidavits and declarations generally, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* (Matthew Bender).

For requirements concerning the attachment of declarations and affidavits, see *§ 1.05[8]*.

[iv] Exhibits

Evidentiary exhibits may accompany a memorandum. Exhibits usually set out documentary evidence such as a contract central to the action. In most instances the exhibit will require authentication by declaration attached to the exhibit.

PRACTICE TIP:

Using Documentary Evidence. One common mistake made when submitting documentary evidence to the court in support of a factual statement in a memorandum is to attach the exhibit, or to submit it with an attorney declaration which inadequately authenticates the document. When submitting the document in support of the factual proposition asserted in a memorandum, provide sufficient foundation and authentication to overcome any evidentiary objections so that the court may properly consider the evidence in conjunction with your motion. *Evelio M. Grillo, Esq.*

Discovery products may also be used, in addition to documentary evidence, to support factual propositions asserted in a memorandum. Discovery products include responses to interrogatories, requests for admissions, deposition testimony, and documents obtained through discovery. Discovery products are, like documentary evidence, presented as exhibits that must be authenticated by an attorney or other declaration when being presented to the court. It is not enough for counsel simply to attach interrogatory responses or deposition testimony to abrief without the appropriate authentication.

For format requirements applicable to exhibits, see *§ 1.05[2]*.

[v] Facts Subject to Judicial Notice

If a memorandum relies on evidence or matters that subject to judicial notice, such judicial notice must be requested in a separate document that lists the specific items for which notice is requested, and the document must comply with the requirements of *Cal. Rules of Ct., Rule 3.1306(c)* [*Cal. Rules of Ct., Rule 3.1113(m)*]. For further discussion of the requirements of *Cal. Rules of Ct., Rule 3.1306(c)* and a form of request for judicial notice, see California Forms of Pleading and Practice, Ch. 321, *Judicial Notice* (Matthew Bender).

PRACTICE TIP:

Judicial Notice. Evidentiary material, such as statutes or pleadings, of which the party wishes the court to take judicial notice should be attached to the motion in some admissible form (for example, certified copies from the court or authenticated by declaration). Alternatively, the party requesting judicial notice

should provide copies of the evidentiary material to the court and each party and arrange for the original documents to be in the courtroom at the time of hearing [*Cal. Rules of Ct., Rule 3.1306(c)*].

Judicial notice can be a formidable device to present evidence to the court when the evidence presented meets the statutory requirement for judicial notice. Facts which are subject to dispute are not subject to judicial notice and are poor candidates for inclusion in an request for judicial notice. Conversely, prior judgments, prior verified complaints, and certified copies of deeds and other official government actions, when incorporated into a request for judicial notice, provide a sound evidentiary basis for a motion. Do not attempt to use judicial notice to present facts which are not properly judicially noticeable.

One good practice in complex law and motion matters is for counsel to include copies with any request for judicial notice of any relevant pleadings, papers, or orders in the proceedings. By incorporating such copies with the request, the court will be able to rely on the request for judicial notice rather than rummaging through five or ten volumes of files attempting to locate the documents cited in a memorandum of points and authorities. *Evelio M. Grillo, Esq.*

[b] Legal Attachments

If a memorandum cites to a court opinion in either of the following situations, a copy of the opinion must be attached to the memorandum and furnished to the court and other parties [*Cal. Rules of Ct., Rule 8.1115(c)*]:

- When the opinion is an unpublished opinion by the Court of Appeal or by an appellate department of the superior court, but is nevertheless citable under *Cal. Rules of Ct., Rule 8.1115(b)* [*see § 1.05[7]* [c] for discussion of these limited exceptions].

- When the opinion is by any court but is available only in a computer-based source of decisional law.

The copy should be attached and tabbed as an exhibit as required by Cal. Rules of Ct., Rule 3.1111(f) (discussed in *§ 1.05[2]*).

In addition [*Cal. Rules of Ct., Rule 3.1113(j)*]:

- If a California case is cited before the time that it is published in the Advance Sheets of the Official Reports, a copy of that case must be attached and tabbed as an exhibit pursuant to *Cal. Rules of Ct., Rule 3.1110(f)* (discussed in *§ 1.05[2]*).

- If any authority is cited other than California cases, statutes, constitutional provisions, or state or local rules, a copy of this authority must be attached to the memorandum and tabbed as an exhibit under *Cal. Rules of Ct., Rule 3.1110(f)* (discussed in *§ 1.05[2]*).

Note that the requirements of *Cal. Rules of Ct., Rule 3.1113(j)* require attached copies of not only of non-California authority, but also any California authority not expressly mentioned, such as ordinances, regulations, or other unusual matter.

[7] Citation Requirements

[a] Case Citation Format

A citation to case law must include the volume and page number of the official court reporter and the year of decision; no other citations are required [*Cal. Rules of Ct., Rule 3.1113(c)*]. Practitioners should not take this requirement too

literally, however, even if it is construed merely to provide that citation to other reporters are not required. For one thing, the required case citation styles, discussed in *§ 1.05[7][b]*, must be considered. In particular, "point-pages," the specific pages of a case opinion that contain the language for which the case is cited, should always be included in a case citation. Judges, Justices, and court attorneys may be greatly inconvenienced if these are not provided.

PRACTICE TIP:

Priority in Citing Case Authority. In citing cases, it is most effective and economical to follow these guidelines:

- Cite to the highest legal authority that is binding and supports the party's position.

- Cite to the most recent case for a particular legal proposition. If the highest authority for the proposition is not a recent one, cite that authority and alower but more recent authority to show the proposition remains valid.

- Cite cases from the appellate district in which the action is pending when possible because authority from the district in which any appeal will be heard will likely be more persuasive to the trial judge.

- Avoid string citations when one case is dispositive. A string of citations dealing with a single legal proposition may be useful only when contrary authority exists among various appellate courts. Listing the pertinent cases with explanation acknowledges contrary cases and indicates the weight of authority for a proposition.

- Cite all relevant legal authority, even that which may not necessarily be favorable to one's position [*see Cal. Rules Prof. Conduct, Rule 5-200*]. Acknowledge contrary legal authority by distinguishing those cases on the facts or on the law. These cases will likely be identified either in the opposing papers or by the court's research attorneys. Thus, to ignore contrary cases will lead to losing credibility with the court.

- Verify that the cited case law is current and valid. The easiest way to do this is to check the status of all cases cited in Shepard's California Citations, or the Shepard's volume for the relevant jurisdiction, just before filing the memorandum of points and authorities.

- Avoid excessive use of headnotes. Do not rely exclusively on case headnotes or treatise interpretations of a case, because headnotes and treatises can be wrong and do not give the reader the full context of the decision.

[b] Citation Style: *The Bluebook* or *The California Style Manual*

The style of citation used in a memorandum, whether citing to cases, statutes, or other authority, must conform to one or the other of the following, at the option of the party filing the document [*see Cal. Rules of Ct., Rule 3.1113(i)*]:

- *The California Style Manual* (4th ed. 2000). This manual, developed and published by the Reporter of Decisions for the state courts, is the citation style used in all opinions filed by the California appellate courts.

- The most recent edition of *The Bluebook*; A Uniform System of Citation (Harvard Law Review Ass'n 18th ed. 2005). This is the most commonly used citation manual nationwide.

Either of the two styles, once chosen, must be used consistently throughout the memorandum [*see Cal. Rules of Ct., Rule 3.1113(i)*].

CAUTION:

Modify Citations in This Publication as Necessary. Note the citation styles in this publication do not conform *strictly* to either *The Bluebook* or *The California Style Manual*, although the publication's newer citation style conforms to the style of *The Bluebook* with few exceptions (such as the placement of the date in case citations). Thus, counsel are advised always to check and modify, as appropriate, the citations found in the forms of this publication, so that they conform to the chosen style of either *The Bluebook* or *The California Style Manual*.

[c] Rules Affecting Citability of Cases

With certain exceptions discussed *below*, an unpublished opinion may not be cited or relied on by a court or a party in any other action or proceeding [*Cal. Rules of Ct., Rule 8.1115(a)*]. Unpublished opinions include those that have been superseded by a grant of review, rehearing, or other action (unless the Supreme Court orders publication) [*see Cal. Rules of Ct., Rule 8.1100(d)*; *see also Cal. Rules of Ct., Rules 8.264, 8.268, 8.500* (relating to finality, rehearing, and review)].

Unpublished opinions also include decisions of the court of appeal or the appellate departments of the superior court that have been certified by those courts for publication [*see Cal. Rules of Ct., Rule 8.1105(b), (c)* (when opinions of these courts may be certified for publication)], but which the Supreme Court has subsequently "decertified" or ordered not to be published notwithstanding the certification by the lower reviewing court [*see Cal. Rules of Ct., Rule 8.1105(d)(2)*].

By "depublishing" or "decertifying" a court of appeal opinion, the Supreme Court lets the decision stand with regard to the parties but eliminates its precedential value. The Supreme Court has exercised this power with increasing frequency. Although the decertification of an opinion is not supposed to be a reflection of the court's opinion regarding the correctness of the decision or statements in the opinion [*see Cal. Rules of Ct., Rule 8.1125(d)*], its increasing use of decertification orders does appear to be an expedient method of shaping the development of case law without adding to the Court's burdened docket.

The Court's power to decertify court of appeal opinions is virtually unlimited. *Cal. Const., Art. VI, § 14*, provides simply that court of appeal opinions shall be published "as the Supreme Court deems appropriate," whereas *Cal. Rules of Ct., Rule 8.1105(e)(2)*, provides, "The Supreme Court may order that an opinion certified for publication is not to be published or that an opinion not certified is to be published. The Supreme Court may also order publication of an opinion, in whole or in part, at any time after granting review" [*see also Gov. Code § 68902* (publication of court of appeal opinions as Supreme Court "may deem expedient")].

Factors such as the workload of the court, or the potential embarrassment of alitigant, lawyer, judge, or other person should not affect the determination of whether to publish an opinion [*Cal. Rules of Court, Rule 8.1105(d)*].

Most importantly, while a request that the Court consider the decertification of any court of appeal decision must be made within 30 days after that decision becomes final with regard to the court of appeal [*Cal. Rules of Ct., Rule 8.1125(a)(4)*], there is no comparable time limit on the Court's power to decertify an opinion on its own motion [*see Cal. Rules of Ct., Rule 8.1105(e)(2)*]. Consequently, the Supreme Court has sometimes ordered the decertification of court of appeal opinions long after they have become final and have been published initially in the advance sheets of the official reports. Therefore, when relying on recently published court of appeal decisions, it is crucial to check their subsequent history to determine that the case has not been decertified. One convenient method of checking subsequent history is through the Subsequent History Table that appears in the most recently published Official Advance Sheet of

the California Reports.

The few instances in which an unpublished opinion may be cited are when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel, or when the opinion is relevant to a criminal or disciplinary action or proceeding because it states reasons for a decision affecting the same defendant or respondent in another such action or proceeding [*Cal. Rules of Ct., Rule 8.1115(b)*]. A copy of any citable unpublished opinion must be furnished to the court and all parties by attaching it to the document in which it is cited or, if the citation is to be made orally, by letter within a reasonable time in advance of citation [*Cal. Rules of Ct., Rule 8.1115(c)*].

[8] Attaching or Combining the Memorandum With Other Papers

To the extent practicable, a supporting memorandum and declarations must be attached to the notice of motion [*Cal. Rules of Ct., Rule 3.1113(k)*].

A supporting memorandum may be combined in a single document with the motion or demurrer itself, with the notice of hearing on the motion or demurrer, or with both [*Cal. Rules of Ct., Rule 3.1112(c)*]. If a supporting memorandum is combined with a motion or demurrer and the notice of hearing, the caption of the combined document must specify the supporting memorandum as one of the separate items included in the combined document [*Cal. Rules of Ct., Rule 3.1112(c)*]. In this instance, declarations and affidavits would then be attached to the combined document, to the extent practicable, under *Cal. Rules of Ct., Rule 3.1113(k)*.

PRACTICE TIP:

Combining the Memorandum With the Motion and Notice of Motion. Before the adoption of former Cal. Rules of Ct., Rule 312 in 1997 [*now see Cal. Rules of Ct., Rule 3.1112*], the common practice was to file a notice of motion with a supporting memorandum and supporting declarations (if applicable); in most instances the notice of motion was also considered to be the written motion as well. The notice of motion and supporting memorandum were commonly combined or attached, together with any supporting declarations. Now, rather than prepare the motion and notice of motion (or hearing) as separate documents, it is likely that most practitioners will combine the two as permitted under *Cal. Rules of Ct., Rule 3.1112(c)*. Under *Cal. Rules of Ct., Rule 3.1112(c)* and *Cal. Rules of Ct., Rule 3.1113(k)*, practitioners may then either combine or attach the supporting memorandum with the motion and notice of motion, although it appears that supporting declarations must be prepared as separate documents to be attached if practicable. Combining the memorandum with the motion and notice of motion should prove to be a common practice so long as practitioners take care to use an appropriate caption that specifies all combined elements. *Evelio M. Grillo, Esq.*

If a supporting memorandum is prepared as a separate document, it much conform to the caption requirements discussed in *§ 1.05[3]*.

For a skeletal form of memorandum prepared as a separate document, see *§ 1.10*.

[9] Proposed Orders

If a party prepares a proposed order or judgment, it must be lodged and served with, but not attached to, a supporting memorandum and other moving papers [*Cal. Rules of Ct., Rule 3.1113(n)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureSummary JudgmentSupporting MaterialsMemoranda of LawCivil

ProcedureAppealsBriefsGovernmentsCourtsRule Application & Interpretation

California Points & Authorities

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Volume 1 Chapters 1-19 WRITING LEGAL MEMORANDA AND BRIEFS; ABATEMENT AND SURVIVAL OF ACTIONS---to---AMENDED AND SUPPLEMENTAL PLEADINGS
CHAPTER 1 WRITING LEGAL MEMORANDA AND BRIEFS
I. INTRODUCTION

1-1 California Points & Authorities § 1.06

AUTHOR: Evelio M. Grillo, Esq., Editorial Consultant

§ 1.06 Using This Publication

[1] Purpose and Scope of Publication

This is primarily a publication of forms that are intended to be used to assemble quickly all the basic elements and points of law needed for a particular memorandum. In other words, it is designed to provide a timesaving "jump start" toward fashioning a completed memorandum that is tailored to the specific situation at hand.

The forms of this publication focus on legal issues, both procedural and substantive, that are most likely to arise in adversarial proceedings in which memoranda are required or desirable. Thus, this publication is not intended to provide an exhaustive discussion of the law on each topic covered. A thorough legal background for each topic, as well as the practice forms for motions, demurrers, etc., that memoranda are used to support or oppose, are found in the companion publication to this one: California Forms of Pleading and Practice (Matthew Bender).

PRACTICE TIP:

Useful Secondary Purpose of This Publication. The comments and discussion following each form include a discussion of authorities.This discussion summarizes *concisely but thoroughly* the case law authority cited in the form. Researchers may use these discussions very effectively, in lieu of the shorter and frequently misleading summaries of California case law found in case digests, annotated codes, and similar other publications. The topical organization of this publication permits easy access to these case discussions. If using the CD-ROM version of this publication, a researcher has the capability to immediately "jump" from the discussion of authorities to complete opinion of a cited case, or even to the cited point page of a case.

[2] Using Forms to Draft Memoranda

[a] Basic Structure of Memorandum

The necessary elements of a memorandum of points and authorities are listed below in their recommended order [*see § 1.03[2][a]* for further discussion of the recommended order and *§ 1.05* for discussion of the format requirements relating to each of the elements]:

- The Caption or Title on the first page of the memorandum.

- The Tables of Contents and Authorities (required when memorandum exceeds 10 pages under *Cal. Rules of Ct., Rule 3.1113(f)*).

- The Introduction

- The Opening Summary of Argument (always recommended but required when memorandum exceeds 15 pages under *Cal. Rules of Ct., Rule 3.1113(f)*).

- The Summary or Statement of Facts [*see Cal. Rules of Ct., Rule 3.1113(b)*].

- The Argument; under *Cal. Rules of Ct., Rule 3.1113(b)*, this is described as "a concise statement of the law, evidence, and arguments relied on, and a discussion of the statutes, cases, and textbooks in support of the position advanced."

- The Conclusion; that is, a concise statement of the ruling sought from the court based on the argument presented.

- The Signature Block.

[b] Select Relevant Forms

As mentioned in *§ 1.06[1]*, this publication is mainly one of forms that may be used to draft memoranda. The forms are essentially "building blocks," for use in assembling quickly all the basic elements and points of law needed for a particular memorandum. These "building block" forms include:

- **Outline or "Skeletal" Form.** This form sets out the basic elements in the required format, for use in constructing the framework or outline for the body of the memorandum. It includes a the caption or heading; instruction for placement and drafting of the table of contents and table of authorities, if any; instruction for placement and drafting the summary of argument, statement of facts, argument, and conclusion; and a signature block. This form is set out in *§ 1.10*. The other "argument" forms in this publication (discussed *below*), particularly those relating to a specific procedural context, may also include a more specific caption and signature block.

- **The "Argument" Forms: Main and Secondary Points of Law With Supporting Authorities.** The forms in the remaining chapters of this publication include two major components: (1) a single main point or heading and (2) one or more secondary paragraph that each include a point of law supported by citation to case law or other authority. The secondary point paragraph or paragraphs, taken together, support the argumentative conclusion of the main heading. In many instances the secondary point paragraphs of a form will include "optional" points that may be suited to a particular case but will not always be necessary or relevant. For further discussion of how to complete a draft argument that was started by using these forms, see *§§ 1.03[3][b] -[d]* and *1.05[5][c]*.

Whenever possible, the publication provides argument forms setting out both the "supporting" and "opposing" points of view for a given issue. That is, they present whatever argument may be given that will either support or oppose a

specific ruling, based on analysis of the existing relevant authorities and the particular facts of the case. Whenever a form has one or more other forms that may be used to express a contrary point of view, a reference to these forms is included in the form's comments, so that users may examine argument that may be expected from the opposing party.

Thus, the form selection process when preparing a particular memorandum is essentially twofold:

- The "skeletal" form in *§ 1.10* of this chapter may be used to piece together quickly an outline for the memorandum: the caption or title, and the beginnings of the tables, if needed, summaries of argument and fact, the conclusion, and closing signature block.

- The remaining chapters of the publication may then be searched for "argument" forms that are relevant to the particular procedural or substantive points of law that need to be addressed in the memorandum.For discussion of various aids for finding relevant "argument" forms, see *§ 1.06[2][c]*.

For discussion of how to assemble the forms, once they are selected, see *§ 1.06[2][d]*.

[c] Methods for Finding Relevant Forms for Selection

This publication has the following aids for finding the relevant forms for drafting argument that includes all the procedural and substantive issues that need to be addressed in a particular memorandum:

- **CD-ROM Searches.** In the CD-ROM version of this publication, appearing on ***Authority(R),*** relevant forms may be located simply by using the "search" mode and typing in key search terms.

- **Publication Tables of Contents and Chapter Synopses.** This publication has topical chapters arranged in alphabetical order. Volume 1 include lists of all the chapters, both (1) in the alphabetical order in which they appear, and (2) grouped under general topical headings such as "Business," "Civil Procedure," etc. Each chapter, in turn, has its forms grouped according to subtopics, unless the topic of the chapter is itself very short and specialized. There is a synopsis at the beginning of each chapter that lists all the forms to be found in that chapter, under their subtopical headings, if any. The CD-ROM version of this publication, appearing on ***Authority(R),*** also has a "contents" mode, which may be used to quickly view greater or lesser detail in the publication's table of contents.

- **Index.** The final volume of the publication includes an index with complete topical entries for each form.

- **Tables of Cases and Statutes.** The final volume of the publication also include tables of cases and statutes, with references to forms in which these listed authorities are cited. Thus, if the user is looking for a form relating to a particular case or statute, it may be found quickly through these tables.

- **Form Comments.** The comments to each form include cross-references to related or opposing forms.

[d] Recommended Method for Assembling Selected Forms

When all relevant forms have been selected, the "argument" forms should be copied or placed in their proper positions within the "skeletal" form set out in *§ 1.10*, that is, within the main body or argument portion of the memorandum [*see* discussion of "skeletal" and "argument" forms in *§ 1.06[2][b]*].

Alternatively, the argument portion of the memorandum may be assembled first, and the other components added later

in their proper positions. To determine the proper location or order of the memorandum's components, see discussion of the basic structure of a memorandum in and refer to the skeletal outline form in *§ 1.10*.

In either case, the argument forms are then assembled to form the initial draft of the legal argument to be presented. They should be organized to comprise a series of argumentatively styled main points that are arranged logically to lead to and support the conclusion of the memorandum, that is, the particular ruling of the court being sought by the party filing the memorandum.

Each main point is, in turn, supported by secondary point paragraphs and their authorities, together with additional discussion that shows how the particular facts relate to these points.

PRACTICE TIP:

Easy Assembly Using Authority(R) Version. The CD-ROM version of this publication on ***Authority(R)*** provides an easy medium for assembling the forms of this publication into a draft of the main body of a memorandum. A user may simply create a word processing file, open and search this publication, then "copy" and "paste" the selected forms into the word processing document.

[3] Completing the Draft Memorandum

[a] Completing the Argument

Once the argument forms have been arranged in logical order to lead to the conclusion of the memorandum, the argument portion of the memorandum must be completed by adding discussion that shows the relationship between the points of law stated and the facts of the particular case.

- In completing the argument portion of the memorandum, the user should consult the Comments of the selected forms. These often provide tips on how to add factual discussion to the points of law.

- Users should also consult the Discussion of Authorities of selected forms. These summarize the cited authorities and may be useful, for example, in relating the facts of the case to similar facts in case law authorities that were decided favorably, or in distinguishing the facts of the case from facts in case law authorities that were not decided favorably.

PRACTICE TIP:

Complete Summary or Statement of Facts Before Drafting Argument. It is important to develop fully, if not complete, the Summary of Facts before completing the argument portion of the memorandum. This not onlyprovides a proper focus for researching and drafting the argument, but precludes a situation in which the facts ultimately to not support adequately the argument presented. It also makes it to add factual discussion to the argument, as the statement of facts will provides a convenient reference point for all the necessary facts and the proper references to these facts in the supporting declarations, exhibits, pleadings, etc. After the argument is completed, the statement of facts may be reviewed and modified if necessary. For further discussion regarding the statement of facts, see *§§ 1.03[3][a]* and *1.05[5][c]*.

For further discussion relating to drafting the argument portion of the memorandum, see *§§ 1.03[3][b] -[d]* and *1.05[5][c]*.

[b] Completing the Remaining Components of the Memorandum

When the Argument portion of the memorandum is completed (*see § 1.06[3][a]*), the remaining components of the memorandum, as discussed in *§ 1.06[2][a]* and as set out in the skeletal outline form in *§ 1.10*, should then be

completed:

- The first-page Caption or Title and last-page signature block should be completed if they have not been completed already.

- A Table of Contents should be added if required; if it has already been prepared, it should be checked and modified if necessary to add correct pagination and any omitted elements, once the memorandum is completed.

- Cited authorities may be copied to build the Table of Authorities if such a table is required.

- The Summary or Statement of Facts should be added if it has not already been prepared.

- The Conclusion should be added.

- The Summary of Argument may be easily constructed after completion of the Argument and Conclusion, simply by compiling the main point headings in the Argument and the Conclusion and then modifying this compilation as desired.

For detailed discussion of drafting requirements and strategies to be considered in completing a memorandum, see generally *§§ 1.03* and *1.05*.

[4] Using This Publication to Draft Trial or Appellate Briefs

With appropriate modification, the forms in this publication may be used in drafting trial or appellate briefs, in addition to their use in drafting memoranda of points and authorities.

The basic elements of an appellate brief are essentially the same as those of a memorandum [*see also § 1.06[2][a]*]:

- A statement of the facts.

- An "assignment of errors" or "questions presented" section, which is essentially and functionally a summary of argument that identifies the issues, argues their resolution, and leads to a conclusion. As in a memorandum, this section usually consists of the headings used in the main argument together with the conclusion.

- The main argument, which includes concise, argumentative headings, argument in regular paragraphs (arguing relevant law in relation to the evidence admitted at trial or found in the appellate record), and a statement of conclusion calling for a favorable ruling from the court.

A trial brief functions differently that either a memorandum or appellate brief. The latter are designed to seek or oppose a specific ruling or request for relief based on a fixed record of evidence provided to the court, whether in the form of affidavits, exhibits, evidence subject to judicial notice, or the record of a prior court proceeding. Trial briefs, by contrast, are generally not supported by evidence per se, but are submitted to the trial judge shortly before or at the commencement of trial to provide that judge with a "road map" of the trial, summarizing the evidence that is the judge should anticipate being presented, alerting the judge to the legal and evidentiary issues that he or she should expect to arise during the trial, and, optimally, guiding and persuading the judge with respect to all the rulings or findings that he or she will be expected to decide during the trial. Still, a trial brief has elements similar to a memorandum:

- An introduction describing the nature of the action.

- A detailed discussion of anticipated evidence and evidentiary issues.

- A discussion of the law applicable to the resolution of the legal issues, which, in a jury trial, are sometimes tied to the jury instructions requested in the case.

PRACTICE TIP:

Preparation of Trial Brief. Although the trial brief is usually not required, it is recommended. It enhances the credibility of the attorney; he or she appears organized to the judge. In addition, it assists counsel in persuading the judge of the correctness of his or her client's position, and may serve as a basis for posttrial memoranda.

Although the basic components are very similar, a memorandum is often shorter and more routine, or less innovative, than a brief. The function of anygiven memorandum is usually less critical than a brief, particularly an appellate brief. A civil appeal is a major undertaking in itself, usually involving more work and requiring more imaginative argument than a memorandum. A good but novel argument may also receive more attention from a reviewing court as distinguished from a trial court, since the former has more latitude in considering broader questions of law and policy. An appellate brief's argument will therefore usually have more breadth and innovation than a memorandum, in proportion with the greater significance of the questions and the higher level of the court.

An appellate brief, in particular, will also require a different argument than that presented at the trial court level involving the same issues. The applicable standard of review on appeal determines the focus of argument in an appellate brief, just as the burden of proof at the trial court level will determine the focus of argument in a trial brief.

Format requirements also differ, particularly for appellate briefs [*cf.* discussion in *§ 1.06* and Cal. Rules of Ct., Rule 8.200 et seq. (rules governing appellate briefs)].

Thus, the forms in this publication should be modified accordingly when used in a trial or appellate brief rather than in a memorandum. Similarly, portions of an appellate brief adapted from an earlier memorandum should be modified to present argument consistent with the standards applicable on review.

For detailed discussion of drafting requirements of appellate briefs, together with skeletal forms and sample appellate briefs, see California Forms of Pleading and Practice, Ch. 40, *Appeal: An Overview* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureAppealsBriefs

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California Points & Authorities

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Volume 1 Chapters 1-19 WRITING LEGAL MEMORANDA AND BRIEFS; ABATEMENT AND SURVIVAL OF ACTIONS---to---AMENDED AND SUPPLEMENTAL PLEADINGS
CHAPTER 1 WRITING LEGAL MEMORANDA AND BRIEFS
I. INTRODUCTION

1-1 California Points & Authorities §§ 1.07-1.09

AUTHOR: Evelio M. Grillo, Esq., Editorial Consultant

[Reserved]

§§ 1.07[Reserved]

California Points & Authorities

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Volume 1 Chapters 1-19 WRITING LEGAL MEMORANDA AND BRIEFS; ABATEMENT AND SURVIVAL OF ACTIONS---to---AMENDED AND SUPPLEMENTAL PLEADINGS
CHAPTER 1 WRITING LEGAL MEMORANDA AND BRIEFS
II. FORMS

1-1 California Points & Authorities § 1.10

AUTHOR: Evelio M. Grillo, Esq., Editorial Consultant

§ 1.10 Skeletal Form of Memoranda

[1] FORM Skeletal Form of Memoranda

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM _____ [*specify, e.g.,* IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS]
Plaintiff,	)	
vs.	)	
_____ [*name*],	)	[TELEPHONE APPEARANCE]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Hearing Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

[*ADD table of contents and table of authorities after first page, either if desired or if memorandum exceeds 10 pages; see §§ 1.06[2][a], 1.06[4]*]

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... _____

I. SUMMARY OF ARGUMENT ..... _____

II. STATEMENT OF FACTS ..... _____

III. ARGUMENT

[*Set out Issue Main Headings (see §§ 1.06[2][a] and 1.06[2][b]), e.g., as follows:*]

A. A MOTION FOR JUDGMENT ON THE PLEADINGS IS PROPER TO RAISE THE BAR OF THE STATUTE OF LIMITATIONS AND MAY BE MADE AT ANY TIME BEFORE FINAL JUDGMENT IS ENTERED ..... _____

B. THE COMPLAINT SHOWS ON ITS FACE THAT THIS ACTION IS BARRED BY THE STATUTE OF LIMITATIONS ..... _____

IV. CONCLUSION

TABLE OF AUTHORITIES

Page

Cases

[*LIST cases in alphabetical order and page(s) on which they appear*]

Statutes

[*LIST statutes in alphabetical order by code and page(s) on which they appear*]

Texts

[*LIST texts cited and page(s) on which they appear*]

Law Reviews

[*LIST law reviews or journals cited and page(s) on which they appear*]

[*ADD opening summary of argument if desired or if memorandum exceeds 15 pages; see §§ 1.06[2][a], 1.06[5][a],[b], 1.06[3][a]*]

I. SUMMARY OF ARGUMENT

[*SUMMARIZE the arguments set forth in the memorandum: one method is to compile or adapt the Main Issue Headings and the Conclusion; see §§ 1.06[2][a], 1.06[a], 1.06[3][a]*]

II. STATEMENT OF FACTS

_____ [*State all relevant and material facts; see §§ 1.06[2][a], 1.06[b], 1.06[3][a]*]

III. ARGUMENT

[*SET FORTH each Main Issue Heading, with paragraphs under each arguing the law and facts relevant to that issue, anticipating and refuting the major opposing arguments. Forms from other chapters in this publication should be assembled here as appropriate. See §§ 1.06, 1.06[c], 1.06[3][b] -[d]*]

IV. CONCLUSION

[*SET FORTH concluding heading and brief summary of argumentative conclusions with request for favorable ruling from the court. See §§ 1.06[3][b], 1.06[3][e]*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Use of Form

This skeletal form in *§ 1.10[1]* outlines the form and content of a supporting memorandum. With appropriate modifications, it may be used by the moving party to support a petition or application or as a reply memorandum, or by the opposing party to challenge a motion, petition, or application.

As discussed in *§ 1.06[2]* and *[3]*, the form is designed to be used in conjunction with forms selected from the remaining chapters in this publication, as needed, which relate to the specific procedural and substantive issues to be addressed in the argument portion of the memorandums. For detailed discussion on how to use this form in combination with other forms in this publication, see generally *§ 1.06*.

For detailed discussion of the format requirements with which the skeletal form complies, see generally *§ 1.05*. For strategic considerations in drafting the body of the memorandum, see *§ 1.03*. For discussion of when a supporting, opposing, or reply memorandum is required or recommended, see *§ 1.04*.

[3] Elements of Memorandum

[a] Caption or Title

The caption in this form should be modified as necessary to indicate the specific motion or proceeding to which it

relates and to indicate, if necessary, that the memorandum is an opposing or reply memorandum rather than a supporting memorandum, etc. Note that many of the forms in this publication, relating to specific procedural contexts, include more specifically tailored captions that may be substituted for the caption in this form.

A caption is included only if the memorandum is served and filed separately. In actual practice this will occur most frequently in the case of opposing or reply memoranda. Supporting memoranda may, and often are, combined with or attached to a notice of motion and motion (or demurrer, petition, or other application). In this situation, the caption of that notice of motion or other primary document will include a reference to the attached memorandum, and the caption in this form may be omitted. In its place, the first page of the memorandum need only be identified with a title describing its nature as an attachment, *e.g.*, MEMORANDUM SUPPORTING DEMURRER TO SECOND AMENDED COMPLAINT, or even, simply, SUPPORTING MEMORANDUM.

For discussion of format requirements relating to the caption, see *§ 1.06[3]*; see also general discussion in *§ 1.06[2]* and *[3][b]*.

[b] Tables of Contents and Authorities

Tables of Contents and Authorities are required if the memorandum exceeds 10 pages [*Cal. Rules of Ct., Rule 3.1113(f)*], and may be desirable in any event. For further discussion relating to these elements, see *§§ 1.05[4]* and *1.06[2][a], [3][b]*. For discussion of rules relating to citation, which should be followed in the Table of Authorities as well as in the Argument, see *§ 1.05[7]*.

[c] Introduction and Summary of Argument

A brief introduction is always recommended [*see* discussion in *§ 1.05[5][a]*]. If it is, "Introduction" should be added to table of contents of the skeletal form.

An opening summary of argument is required if the memorandum exceeds 15 pages [*Cal. Rules of Ct., Rule 3.1113(f)*], and is recommended in any case. For further discussion relating to this element, see *§§ 1.03[3][a], 1.05[5][a]*, and *§ 1.06[2][a], [3][b]*.

[d] Statement of Facts

An statement of facts is required in all memoranda [*Cal. Rules of Ct., Rule 3.1113(b)*]. For further discussion relating to this element, see *§§ 1.03[3][a], 1.05[5][b]*, and *1.06[2][a], [3][b]*.

A statement of facts must refer to, and be based upon, evidence competent or legally cognizable in the proceeding to which the memorandum applies. In the case of a demurrer or similar challenge to the pleadings, the facts must be based on the allegations in the pleading or facts subject to judicial notice. In the case of other motions, evidence is usually supplied by declarations, affidavits, documents, deposition transcripts, and matter subject to judicial notice. For discussion relating to the attachment to the memorandum of such declarations, exhibits, and requests for judicial notice, see *§ 1.05[6]*.

[e] Argument

A memorandum must include argument, that is, the required concise statement of the law, evidence, and argument relied on, as well as the required discussion of the statutes, cases, and textbooks cited in support of the position advanced [*Cal. Rules of Ct., Rule 3.1113(b)*].

The Argument portion is, of course, the heart of the memorandum. The remaining forms in this publication are designed to used in compiling and drafting all the necessary legal issues, authorities relied upon, and their discussion. The

argument is then completed by adding discussion that refers to the facts of the case and links them favorably to the points of law and authorities that have been selected. For detailed discussion on selecting and using other forms in this publication to draft and complete the argument, see *§ 1.06[2]* and *[3][a]*. For detailed discussion of the requirements and other considerations relating to the drafting of the argument, see *§§ 1.03[3][b] -[d]* and *1.05[5][c]*.

[f] Conclusion

The conclusion is essentially the end of the Argument portion, discussed in *§ 1.10[3][e]*. For further discussion of this element, see *§§ 1.03[3][e]*, *1.05[5][c]*, and *1.06[2][a]*, *[3]*.

[g] Signature Block

The signature block should be modified as necessary. Note that many of the forms in this publication relating to specific procedural contexts will also include signature blocks that may used in lieu of the one set out in this form.

[4] Related Memoranda

As discussed in *§ 1.10[2]* and *[3][e]*, this form is designed to be used with any of the other forms in this publication, which should be selected to draft the argument portion of the memorandum based on the specific procedural and substantive issues that need to be addressed in the memorandum. For discussion of how to select and combine other relevant forms with this form, see *§ 1.06[2]*.

California Points & Authorities

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Volume 1 Chapters 1-19 WRITING LEGAL MEMORANDA AND BRIEFS; ABATEMENT AND SURVIVAL OF ACTIONS---to---AMENDED AND SUPPLEMENTAL PLEADINGS
CHAPTER 1 WRITING LEGAL MEMORANDA AND BRIEFS
II. FORMS

1-1 California Points & Authorities § 1.11

AUTHOR: Evelio M. Grillo, Esq., Editorial Consultant

§ 1.11 Ex Parte Application for Leave to File Memorandum in Excess of Page Limits

[1] FORM Ex Parte Application for Leave to File Memorandum in Excess of Page Limits

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	EX PARTE APPLICATION FOR LEAVE TO FILE MEMORANDUM IN EXCESS OF PAGE LIMITATION, SUPPORTING DECLARATION(S) of _____ [*name(s)*], AND PROPOSED ORDER
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Hearing Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

APPLICATION

_____ [*Identify party, e.g.*, Defendant] _____ [*name*] hereby applies for an order, pursuant to *California Rules of Court, Rule 3.1113(e)*, granting leave to file a memorandum in _____ [

purpose of memorandum, e.g., support of motion to dismiss for lack of jurisdiction] that is in excess of _____ [*specify page limitation, e.g.,* 15] pages in length.

[*EITHER, if proposed memorandum is attached*]

The memorandum that _____ [*identify party, e.g.,* defendant] seeks leave to file consists of _____ [*specify number, e.g.,* 22] pages, and is attached as an exhibit to the declaration of _____ [*name of declarant attorney*] in support of and attached with this application.

[*OR, if proposed memorandum is unavailable to present for evaluation*]

_____ [*Identify party, e.g.,* Defendant] seeks leave to file a memorandum not exceeding _____ [*specify number of pages anticipated, e.g.,* 22] pages in length.

[*CONTINUE*]

This application is made on the grounds that good cause exists to permit a longer memorandum and is based on the attached declaration of _____ [*name of declarant attorney*].
Dated: _____

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ *typed name*]

Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. _____ [*State facts showing reasons why the argument cannot be made within the page limit, e.g.,* The argument in support of defendant's motion to dismiss for lack of jurisdiction is an issue of first impression in this jurisdiction. An adequate analysis of this issue requires discussion of numerous authorities both inside and outside California. Unless the court grants leave to file a memorandum of points and authorities in support of this motion that exceeds 15 pages, defendant will be denied the opportunity to present to the court a complete analysis of an issue central to the entire action.

[3. A copy of the drafted memorandum is attached hereto and made a part hereof].

4. On _____ [*date*], I provided written notice to _____ [*name*], attorney for _____ [*specify party, e.g.,* plaintiff] of _____ [*specify moving party, e.g.,* defendant's] intention to make this application at the time noted above, _____ [*specify facts demonstrating means of written notice, e.g.,* as set forth in the attached proof of personal service].

5. *California Rules of Court, Rule 3.1113(e)* provides the basis for granting ex parte relief as requested in this application, rather than setting this matter for hearing on notice motion.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____

_____ [*signature*]

_____ [*name of declarant*]

POINTS AND AUTHORITIES

Pursuant to the provisions of *California Rules of Court, Rule 3.1113(e)*, the court, for good cause shown, may grant leave to file a memorandum of points and authorities in excess of the page limits otherwise applicable under that rule.

PROPOSED ORDER

[*EITHER, if proposed memorandum is attached*]

Good cause appearing, IT IS HEREBY ORDERED that:

The application of _____ [*identify party, e.g.,* defendant] for leave to file the memorandum attached to the declaration of _____ [*name of declarant attorney*] in support of this application is GRANTED.

[*OR, if the proposed memorandum is unavailable for the court's evaluation*]

Good cause appearing, IT IS HEREBY ORDERED that:

The application of _____ [*identify party, e.g.,* defendant] for leave to file a memorandum in _____ [*specify purpose of memorandum, e.g.,* support of motion to dismiss for lack of jurisdiction] that is in excess of _____ [*specify number, e.g.,* 15] pages is GRANTED; and

The memorandum may not exceed _____ [*leave blank for court to fill in or specify number of pages anticipated, e.g.,* 22] pages in length.
Dated: _____

_____ [signature]

Judge of the _____ Court

[2] Use of Form

This form of application is for use to seek an order granting leave to file a memorandum in excess of the page limitations prescribed by *Cal. Rules of Ct., Rule 3.1113(d)* [*see also Cal. Rules of Ct., Rule 3.1200 et seq.* (requirement for ex parte applications)]. For discussion of the ex parte procedure for obtaining leave to file a longer memorandum, see *§ 1.05[1][c]*.

The form includes a declaration is for use in setting forth facts supporting ex parte application for leave to file a memorandum in excess of page limitations [*Cal. Rules of Ct., Rule 3.1113(e)*].

The form, in both the application and declaration, sets forth alternative paragraphs depending on whether the proposed memorandum is available for the court's evaluation. A court is more likely to grant an application for leave to file an existing memorandum, which presumably represents the party's best efforts to present its position in as few pages as possible, than an application for leave to file a memorandum of undetermined length not yet in existence. Therefore, when possible, counsel should attach as an exhibit the proposed memorandum.

The form contains within the same document a form of order granting the application. If the application is denied, the court may elect either to cross out the existing language on the proposed order and insert the word "DENIED" or the like, or to rely on its own record of minute order denying the application.

If the application is granted, the applying party must give notice to all other parties [*see Code Civ. Proc. § 1019.5(a)*].

[3] Requirements for Ex Parte Applications in General

Ex parte applications are governed generally by *Cal. Rules of Ct., Rule 3.1200 et seq.*

An ex parte application must be in writing and must include the following [*Cal. Rules of Ct., Rule 3.1201*]:

- An application containing the case caption and stating the relief requested.

- A declaration in support of the application.

- A declaration, competent and based on personal knowledge, regarding the notice provided to other parties pursuant to *Cal. Rules of Ct., Rule 3.1204*. Under *Cal. Rules of Ct., Rules 3.1203(a), 3.1204(b),* a party seeking an ex parte order must notify all parties no later than 10:00 a.m. the court day before the ex parte appearance, absent a showing of exceptional circumstances. The declaration must show the date, time, and manner that notice was given, the party informed, the relief sought, any response, and whether opposition is expected. Alternatively, it must state reasons why notice should not be required.

- Memorandum.

- A proposed order.

Moreover, the declarations must include competent testimony based on personal knowledge of irreparable harm, immediate danger, or any other statutory basis for granting ex parte relief rather than setting the matter for hearing on noticed motion [Cal. Rules of Ct., Rules 3.1201, 3.1202(c)].

The declaration in the form set out in *§ 1.11[1]* includes statements showing that written notice was provided as required under Cal. Rules of Ct., Rules 3.1203, 3.1204, and also that *Cal. Rules of Ct., Rule 3.1113(e)* provides the basis for granting ex parte relief rather than setting the matter for hearing on noticed motion. This would appear to satisfy

both the requirement for a declaration re notice under *Cal. Rules of Ct., Rule 3.1201* and the requirement of showing a"statutory basis" for ex parte relief under *Cal. Rules of Ct., Rule 3.1202(c)*.

The brief statement of the court's authority to grant leave under *Cal. Rules of Ct., Rule 3.1113(e)*, set out in the form under the heading "Memorandum" would, in addition, appear to satisfy the requirement for "Memorandum" under *Cal. Rules of Ct., Rule 3.1201*. As discussed in *§ 1.04[1][e]*, this requirement arguably requires only a brief recitation of applicable authorities as opposed to a full-blown "memorandum." In this case, *Cal. Rules of Ct., Rule 3.1113* expressly provides for ex parte relief, and the matter is relatively routine, such that it is one of the few such situations in which an ex parte application may be considered without any personal appearance [*see Cal. Rules of Ct., Rule 3.1207*]. Thus, it appears to be a suitable situation for which a brief statement of the applicable authority will satisfy the requirement of "memorandum" under *Cal. Rules of Ct., Rule 3.1201*.

For detailed discussion of all requirements under *Cal. Rules of Ct., Rule 3.1200 et seq.* governing ex parte applications in general, together with a general form of ex parte application, see California Forms of Pleading and Practice, Ch. 372, *Motions and Orders* (Matthew Bender).

California Points & Authorities

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Chapters 2 through 9 RESERVED

1-2 California Points & Authorities Chapters 2 through 9

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Chapters 2RESERVED

California Points & Authorities

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Volume 1 Chapters 1-19 WRITING LEGAL MEMORANDA AND BRIEFS; ABATEMENT AND SURVIVAL OF ACTIONS---to---AMENDED AND SUPPLEMENTAL PLEADINGS
CHAPTER 10 ABATEMENT AND SURVIVAL OF ACTIONS

1-10 California Points & Authorities 10.syn

§ 10.syn Synopsis to Chapter 10: ABATEMENT AND SURVIVAL OF ACTIONS

§ 10.01 Scope of Chapter

§ 10.02 Governing Statutes

§ 10.03 Points and Authorities in Separate Trial Proceeding

§ 10.04 Definitions and Terminology

§ 10.05 Grounds for Abatement

§ 10.06 Raising Abatement Issue

[1] By Demurrer or Answer

[2] By Amended Answer

[3] By Supplemental Answer

[4] Against Defendant

§ 10.07 Trial of Plea in Abatement

§ 10.08 Motion for Separate Trial of Plea in Abatement

[1] Time and Manner of Motion

[2] Ruling on Motion

§ 10.09 Page Limits on Points and Authorities

§ 10.10 Related Pleadings and Practice Forms

§ 10.11 Related Points and Authorities

§§ 10.12-10.29 [Reserved]

§ 10.30 Supporting Motion for Separate Trial of Special Defense Constituting Ground of Abatement to Prosecution of Action [Code Civ. Proc. § 597]--Another Action Pending [Code Civ. Proc. § 430.10(c)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Interlocutory Judgment

[c] Alternative to Abatement

[d] Raising Objection

[e] Waiver of Objection

[f] Prior Pending Foreign Action

[g] Related Pleading and Practice Forms

[h] Related Points and Authorities

[3] Discussion of Authorities

[a] Another Action Pending as Ground of Objection

[b] Ground for Abatement

[c] Prior Action Seeks Different Remedy

[d] Basis of Rule

[e] Separate Trial Authorized

[f] Purpose of Separate Trial

[4] Additional Authorities

[a] Ground for Abatement

§ 10.31 Supporting Motion for Separate Trial of Special Defense Constituting Ground of Abatement to Prosecution of Action [Code Civ. Proc. § 597]--Lack of Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Plaintiff Required to Sue Through Guardian or Conservator of Estate or Guardian Ad Litem [Code Civ. Proc. § 372]

[1] FORM

[2] Comments

[a] Use of Form

[b] Hearing

[c] Emancipated Minor

[d] Exceptions Pertaining to Minors

[e] Effect of Failure to Appoint Guardian Ad Litem

[f] Raising Objection Against Plaintiff; Waiver

[g] Raising Objection Against Defendant

[h] Related Pleading and Practice Forms

[i] Related Points and Authorities

[3] Discussion of Authorities

[a] Requirement That Plaintiff or Cross Complainant Appear Through Legal Representative

[b] Person for Whom Conservator May Be Appointed

[c] Person Required to Sue by Legal Representative as Lacking Capacity to Sue Individually

[d] Lack of Legal Capacity to Sue as Ground for Objection

[e] Lack of Capacity to Sue as Ground of Abatement

[f] Separate Trial Authorized

[4] Additional Authorities

[a] Person Required to Sue by Legal Representative as Lacking Capacity to Sue Individually

§ 10.32 Supporting Motion for Separate Trial of Special Defense Constituting Ground of Abatement to Prosecution of Action [Code Civ. Proc. § 597]--Lack of Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Failure to File and Publish Fictitious Business Name Statement [Bus. & Prof. Code §§ 17910, 17917, 17918]

[1] FORM

[2] Comments

[a] Use of Form

[b] Hearing

[c] Nature of Objection; Subsequent Compliance

[d] Raising Objection

[i] By Demurrer

[ii] By Answer

[e] Waiver of Objection

[f] Motion to Dismiss

[g] Related Pleading and Practice Forms

[h] Related Points and Authorities

[3] Discussion of Authorities

[a] Filing and Publication of Statement Required

[b] Effect of Failure to Comply With Statutes

[c] Ground for Abatement

[4] Additional Authorities

[a] Ground for Abatement

§ 10.33 Supporting Motion for Separate Trial of Special Defense Constituting Ground of Abatement to Prosecution of Action [Code Civ. Proc. § 597]--Lack of Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Party's Corporate Powers, Rights, and Privileges Have Been Suspended for Failure to File Required Information Statement [Corp. Code §§ 1502 and 2205(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Hearing

[c] Defending the Motion

[d] Raising Objection

[e] Waiver of Objection

[f] Related Pleading and Practice Forms

[g] Related Points and Authorities

[3] Discussion of Authorities

[a] Suspension of Domestic Corporation's Corporate Powers, Rights, and Privileges

[b] Lack of Capacity to Sue

§ 10.34 Supporting Motion for Separate Trial of Special Defense Constituting Ground of Abatement to Prosecution of Action [Code Civ. Proc. § 597]--Lack of Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Party's Corporate Powers, Rights, and Privileges Have Been Suspended, or Exercise of Party's Corporate Powers, Rights, and Privileges in This State Have Been Forfeited, for Nonpayment of Taxes [Rev. & Tax. Code § 23301] or Failure to File Required Tax Return [Rev. & Tax. Code § 23301.5]

[1] FORM

[2] Comments

[a] Use of Form

[b] Hearing

[c] Defending the Motion

[d] Raising Objection

[e] Waiver of Objection

[f] Related Pleading and Practice Forms

[g] Related Points and Authorities

[3] Discussion of Authorities

[a] Suspension of Domestic Corporation's Corporate Powers, Rights, and Privileges

[b] Forfeiture of Foreign Corporation's Corporate Powers, Rights, and Privileges

[c] Lack of Capacity to Sue

[d] Plea in Abatement

[4] Additional Authorities

[a] Lack of Capacity to Sue

[b] Plea in Abatement

§ 10.35 Supporting Motion for Separate Trial of Special Defense Constituting Ground of Abatement to Prosecution

of Action [Code Civ. Proc. § 597]--Lack of Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Foreign Corporation Suing on Intrastate Business Without Having Obtained Certificate of Qualification [Corp. Code §§ 2105, 2203(c)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Hearing

[c] Certificate of Qualification

[d] Raising Objection

[e] Waiver of Objection

[f] Related Pleading and Practice Forms

[g] Related Points and Authorities

[3] Discussion of Authorities

[a] Certificate of Qualification Required

[b] Nonqualified Corporation Lacks Capacity to Sue

[c] Ground of Abatement

[4] Additional Authorities

[a] Ground of Abatement

§ 10.36 Supporting Motion for Separate Trial of Special Defense Constituting Ground of Abatement to Prosecution of Action [Code Civ. Proc. § 597]--Defect of Parties [Code Civ. Proc. § 430.10(d)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Alternative to Separate Trial

[c] Hearing

[d] Defect or Misjoinder of Parties

[e] Raising Objection

[f] Waiver of Objection

[g] Abatement of Action

[i] On Ground of Defect of Parties

[ii] Misjoinder of Parties

[h] Related Pleading and Practice Forms

[i] Related Points and Authorities

[3] Discussion of Authorities

[a] Defect of Parties as Ground for Objection

[b] Plea in Abatement

§ 10.37 Supporting Motion for Separate Trial of Special Defense Constituting Ground of Abatement to Prosecution of Action [Code Civ. Proc. § 597]--Action Is Premature [Code Civ. Proc. § 430.10(e)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Hearing

[c] Raising Objection; Waiver

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Nonexistence of Cause of Action as Ground for Objection

[b] Premature Action

[c] Plea in Abatement

§ 10.38 Supporting Motion [Code Civ. Proc. §§ 1003, 1010] for Stay of Action on Ground of Another Action Pending [Code Civ. Proc. § 430.10(c)] in Another Jurisdiction

[1] FORM

[2] Comments

[a] Use of Form

[b] Nature of Stay

[c] Factors Considered on Motion

[d] Court Order

[e] Alternative Procedure to Motion for Stay

[f] Action Pending in Foreign Country

[g] Related Pleading and Practice Forms

[h] Related Points an Authorities

[3] Discussion of Authorities

[a] Motion to Stay--Action Pending in Federal Court

[b] Motion to Stay--Action Pending in Court of Sister State

[c] Power of Court to Stay Action

[d] Purpose of Rule

[e] Denial of Motion as Abuse of Discretion

[4] Additional Authorities

[a] Motion to Stay

[i] Action Pending in Court of Sister State

§ 10.39 Opposing Motion for Separate Trial of Special Defense Constituting Ground of Abatement to Prosecution of Action [Code Civ. Proc. § 597]--Ground of Abatement No Longer Exists

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Discretion of Court to Deny Motion

[b] Failure of Defense--Another Action Pending--Other Action No Longer Pending

[c] Failure of Defense--Lack of Legal Capacity to Sue--Fictitious Business Name Statutes Complied With

[d] Failure of Defense--Lack of Legal Capacity to Sue--Corporate Powers Revived

[e] Failure of Defense--Premature Action--Ground No Longer Exists

[f] Waiver of Plea in Abatement by Delay

[4] Additional Authorities

[a] Failure of Defense--Action No Longer Pending

[b] Failure of Defense--Lack of Legal Capacity to Sue--Fictitious Business Name Statutes Complied With

[c] Failure of Defense--Lack of Legal Capacity to Sue--Corporate Powers Revived

[d] Failure of Defense--Premature Action--Ground No Longer Exists

§ 10.40 Opposing Motion for Stay of Action on Ground of Another Action Pending in Court in Another Jurisdiction--Exercise of Discretion Requires Denial of Motion

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] When Abatement Exists as Matter of Right

[b] Motion to Stay Invokes Judicial Discretion

[c] Factors to Be Considered by Court Militating Against Stay

[4] Additional Authorities

[a] Motion to Stay Invokes Judicial Discretion

[b] Factors to Be Considered by Court Militate Against Stay

§§ 10.41-10.59 [Reserved]

§ 10.60 Supporting Motion for Order Substituting Personal Representative for Deceased Party [Code Civ. Proc. § 377.31 or 377.41]

[1] FORM

[2] Comments

[a] Use of Form

[b] Effect of Prior Proceedings on Substituted Party

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Absent Substitution, Judgment Will be in Excess of Jurisdiction

[b] Survival Action Not Defeated by Joinder With Nonsurvival Action

[4] Additional Authorities

[a] Absent Substitution, Judgment Will be in Excess of Jurisdiction

§ 10.61 Supporting Motion for Order Substituting Transferee of Interest in Pending Action or Proceeding in Place of Transferor [Code Civ. Proc. § 368.5]

[1] FORM

[2] Comments

[a] Use of Form

[b] Transferee's Option

[i] Action Permitted to Proceed in Transferee's Name

[ii] Action Proceeding in Transferee's Name

[c] Nature of Motion

[d] Supplemental Pleading

[e] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Transferee as Entitled to Substitution

[4] Additional Authorities

[a] Transferee as Entitled to Substitution

§ 10.62 Opposing Motion for Order Substituting Representative for Deceased Party [Code Civ. Proc. § 377.31 or 377.41]--Proceeding to Change Marital Status Does Not Survive Death of Spouse

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Requirement That Cause of Action Survive

[b] Nonsurvivable Causes

[c] Dissolution of Marriage Proceeding Does Not Survive

[d] Proceeding for Annulment Does Not Survive

[e] Nonsurvivable Cause Abates on Party's Death

[4] Additional Authorities

[a] Dissolution of Marriage Proceeding Does Not Survive

§ 10.63 Opposing Motion for Order Substituting Transferee of Interest in Pending Action or Proceeding in Place of Transferor [Code Civ. Proc. § 368.5]--Basic Purpose of Transfer Was Unlawful

[1] FORM

[2] Comments

[a] Use of Form

[b] Denial of Motion

[3] Discussion of Authorities

[a] Substitution of Transferee Not Required

[b] Substitution of Parties Is in Court's Discretion

[c] Substitution Should be Denied if Purpose of Transfer Was Unlawful

[4] Additional Authorities

[a] Substitution of Transferee Is in Court's Discretion

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PART I. INTRODUCTION

1-10 California Points & Authorities § 10.01

§ 10.01 Scope of Chapter

This chapter contains memoranda of points and authorities that may be submitted in support of a motion for a separate trial of the plea in abatement that there is another action pending between the same parties on the same cause [*see § 10.30*], that plaintiff lacks legal capacity to sue [*see §§ 10.31 -10.35*], that there is a defect of parties [*see § 10.36*], and that the action is premature [*see § 10.37*]. A memorandum of points and authorities in opposition to the motion for use where the ground of abatement no longer exists is included [*see § 10.39*]. Also included is a memoranda of points and authorities supporting [*see § 10.38*] and opposing [*see § 10.40*] a motion to stay the action on the ground that another action is pending between the same parties on the same cause in another jurisdiction.

This chapter also contains memoranda of points and authorities supporting and opposing a motion for an order substituting a deceased party's personal representative for the deceased party [*see §§ 10.60, 10.62*] and for an order substituting the transferee of an interest in a pending action or proceeding for the transferor [*see §§ 10.61, 10.63*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeGeneral OverviewCivil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPleading & PracticeMotion PracticeSupporting MemorandaCivil ProceduresPartiesSubstitutionsGeneral OverviewCivil ProceduresPretrial MattersSeparate TrialsCivil ProceduresAppealsBriefs

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1-10 California Points & Authorities § 10.02

§ 10.02 Governing Statutes

The nonabatement of actions and proceedings by reason of the death or disability of a party or by the transfer of an interest in them is provided for in *Code Civ. Proc. §§ 368.5* (transfer of interest), *375* (disability), and *377.21* (death). The survival of causes of action in favor of or against deceased persons is provided for in *Code Civ. Proc. §§ 377.10-377.50*. Authority for the substitution of parties on death, disability, or transfer of an interest in a pending action or proceeding is contained in *Code Civ. Proc. §§ 368.5*, *375*, *377.30-377.33*, and *377.40-377.41*. Procedures for substituting parties pending an appeal are found in *Cal. Rules of Ct., Rule 8.36(a)* [*see also Hollaway v. Scripps Memorial Hospital (1980) 111 Cal. App. 3d 719, 724 n.1, 168 Cal. Rptr. 782* ; *Erickson v. Boothe (1949) 90 Cal. App. 2d 457, 459, 203 P.2d 122*].

Separate trial of pleas in abatement or pleas in bar is governed by *Code Civ. Proc. § 597*. A motion to stay a California action on the ground that another action is pending between the same parties on the same cause in another jurisdiction is nonstatutory and is governed by case law [*see § 10.38[2]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePartiesSubstitutionsDeath of PartyCivil ProcedurePartiesSubstitutionsIncompetencyCivil ProcedurePartiesSubstitutionsMotions for SubstitutionCivil ProceduresPretrial MattersSeparate Trials

California Points & Authorities

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1-10 California Points & Authorities § 10.03

§ 10.03 Points and Authorities in Separate Trial Proceeding

As is discussed in *§ 10.07[1]*, a ground of abatement may be raised by demurrer or answer. If it is raised by answer, the proper procedure to try the issue is by a separate trial of the issue under *Code Civ. Proc. § 597*. The points and authorities for pleas in abatement are for use in separate trial proceedings. Points and authorities supporting and opposing demurrers raising a particular ground of abatement are found in Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

The points and authorities in support of the motion for separate trial should be distinguished from the points and authorities in support of the special defense itself. The scope of the hearing on the motion pursuant to *Code Civ. Proc. § 597* is whether or not the special defense pleaded is one for which a separate trial is available and, if it is, whether in the discretion of the court, a separate trial should be permitted. The points and authorities supporting the substantive defense should be reserved until there is a separate trial.

Thus, the opposing points and authorities in this chapter may be used to show that there is nothing to try, as for example, the ground of abatement which existed the action was commenced or the motion was filed no longer exists [*see § 10.39*]. On the other hand, other chapters in this publication should be consulted if, for example, the ground of abatement pleaded never existed and its nonexistence is subject to proof. For example, if the special defense pleaded is another action pending, plaintiff may oppose the motion for separate trial by enumerating the essential elements of that defense and then, by invoking judicial notice of the court's records and file in the other action, show that one or more of the essential elements is absent. Points and authorities that may be adapted for such use are included in Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

Nevertheless, it is recommended that counsel should have with him or her at the hearing on the motion for separate trial any evidence necessary to establish the defense of the particular ground of abatement and be prepared to present it should the judge so require. If there is no dispute as to the facts and, hence, nothing to be tried, the court may dispose of the defense at that hearing and deny the motion. That is, if it appears as a matter of law, for example, that there is another action pending between the same parties on the same cause, the court would enter the interlocutory judgment required by *Code Civ. Proc. § 597*. On the other hand, if it appears that there are disputed fact questions to be tried, for

example, a dispute as to the identity of the parties or the identity of the issues, requiring admission of extrinsic evidence, a separate trial would normally be ordered.

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-10 California Points & Authorities § 10.04

§ 10.04 Definitions and Terminology

The words "abate," "abatement," and their variants are not defined by California statutes [*Burnand v. Irigoyen (1943) 56 Cal. App. 2d 624, 628, 133 P.2d 1*], although they appear in several of them [*see, e.g., Civ. Code §§ 3484* (abatement of a nuisance), *Code Civ. Proc. § 385* (an action or proceeding does not abate by the death)].

The term "abatement" in California has been used historically with reference to certain dilatory pleas by which an objection is made to the place, mode, or time of asserting a claim or cause of action. But the courts have not been consistent in their use of the term. Some courts have said that abatement means to put an end to the lawsuit [*see, e.g., Kelley v. Upshaw (1952) 39 Cal. 2d 179, 186-187, 246 P.2d 23* ; *Simmons v. Superior Court (1950) 96 Cal. App. 2d 119, 123, 214 P.2d 844*], whereas other courts have used the term to mean a suspension of the action [*see, e.g., Tyrone v. Kelley (1973) 9 Cal. 3d 1, 14, 106 Cal. Rptr. 761, 507 P.2d 65* , quoting from *Kadota Fig Ass'n v. Case-Swayne Co. (1946) 73 Cal. App. 2d 796, 804, 167 P.2d 518*]. The term appears today, with respect to pleas in abatement, to be used more in this latter sense than in the former, thereby entitling the plaintiff to apply for a continuance to take the necessary steps to correct the ground of abatement. It would appear that the action will be terminated only if the matter of abatement cannot readily be corrected (for example, the action is premature) or it can be easily corrected but plaintiff declines to take the steps necessary to correct it.

The term "plea in abatement" referred to the first pleading permitted at common law. It did not challenge the merits of plaintiff's claim, but only the place, mode, or time it was asserted. A "plea in bar" also did not dispute the merits of plaintiff's claim but, unlike pleas in abatement, did raise defenses which would finally dispose of the action, such as the defenses of the statute of limitations or the statute of frauds [*see generally* Clark on Code Pleading (2d ed), §§ 78, 95; Witkin, California Procedure (2d ed), Vol 3, *Pleading,* § 951].

Neither pleas in abatement nor pleas in bar, as they were known at common law, are known in California practice. The only pleadings allowed in civil actions today are complaints, demurrers, answers, and cross complaints [*Code Civ. Proc. § 422.10*]. Nevertheless, the same kinds of objections that were raised by common-law pleas in abatement and pleas in bar may be raised today by demurrer or answer and a ruling on them obtained prior to trial of the action on the merits [*see* discussion in *§§ 10.07 -10.08*]. The procedure is substantially the same whether the special defense raised is in the

nature of a plea in abatement or a plea in bar, but since this chapter is limited in scope to those defenses in the nature of common-law pleas in abatement, no further mention, other than incidentally, will be made of pleas in bar.

The term "plea in abatement" (as well as "plea in bar") continues to be used in California to describe the substance, purpose, and effect of a pleading, motion, order, or judgment, that is, to describe an objection to the place, mode, or time of asserting a claim without disputing its justness [*see* *Kelley v. Upshaw (1952) 39 Cal. 2d 179, 186, 246 P.2d 23* ; *Nevills v. Shortridge (1905) 146 Cal. 277, 278, 79 P. 972* ; *Ostrowski v. Miller (1964) 226 Cal. App. 2d 79, 87, 37 Cal. Rptr. 790*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-10 California Points & Authorities § 10.05

§ 10.05 Grounds for Abatement

The grounds for abatement of actions are many and varied. The common grounds today, as at common law, are the objections set forth in *Code Civ. Proc. § 430.10(b)-(d)*, as follows: (1) the person who filed the pleading does not have the legal capacity to sue [*Code Civ. Proc. § 430.10(b)*; *see §§ 10.31 -10.35*]; (2) there is another action pending between the same parties on the same cause [*Code Civ. Proc. § 430.10(c)*; *see § 10.30*]; (3) there is a defect (nonjoinder) of parties [*Code Civ. Proc. § 430.10(d)*; *see § 10.36*]; and (4) there is a misjoinder of parties [*Code Civ. Proc. § 430.10(d)*; *see § 10.36[2]*]. They are not, however, exclusive. Other defenses have been and may be recognized by the courts as dilatory. Another common ground of abatement not expressly mentioned in *Code Civ. Proc. § 430.10* is that the action is premature [*see § 10.37*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-10 California Points & Authorities § 10.06

§ 10.06 Raising Abatement Issue

[1] By Demurrer or Answer

The Code of Civil Procedure provides only two methods of raising issues that were raised by the common-law pleas in abatement, namely, by demurrer or by answer. If the ground for abatement appears on the face of the complaint or cross complaint, or from matter of which the court must or may take judicial notice [*see Code Civ. Proc. § 430.70*; *Evid. Code §§ 451, 452*], the plea in abatement should be taken by demurrer on one of the grounds listed in *Code Civ. Proc. § 430.10* [*Code Civ. Proc. § 430.30(a)*; *see also, e.g., Follansbee v. Benzenberg (1954) 122 Cal. App. 2d 466, 475, 265 P.2d 183*]. If the ground for abatement does not appear on the face of the pleading, whether or not it would appear from judicially noticed matter, the objection may be taken by answer [*Code Civ. Proc. § 430.30(b)*], either by denying the material allegations of the complaint, if any, which negate the ground for abatement [*see Code Civ. Proc. § 431.30(b)(1)*] or, where the abatement issue cannot be raised by simple denial, by alleging the ground as an affirmative defense [*see Code Civ. Proc. §§ 431.30(b)(2), 590(2)*]. If not taken by demurrer or answer, the objection is normally deemed waived [*see Code Civ. Proc. § 430.80(a)*].

It should be noted that special demurrers, including those on the ground of abatement, are not allowed in limited civil cases [*see Code Civ. Proc. §§ 91(a), (d), 92(c)*].

[2] By Amended Answer

Should the defendant or cross defendant fail to take the objection by demurrer or answer and the ground for objection existed the answer to the complaint or cross complaint was filed, it would appear that the proper procedure would be for the defendant or cross defendant to amend the answer "of course" to set up the defense if the time to do so has not expired [*see Code Civ. Proc. § 472*] or, ifthe time to amend "of course" has expired, to serve and file a noticed motion [*see Code Civ. Proc. §§ 1005, 1005.5, 1010*] for leave to file an amended answer or an amendment to the answer [*see Code Civ. Proc. § 473(a)*] to set up the special defense.

[3] By Supplemental Answer

If the ground of abatement does not come into existence until after the pleadings are filed, as for example, the corporate powers, rights, and privileges of a domestic corporation plaintiff are suspended, or the exercise of the corporate powers, rights, and privileges of a foreign corporation plaintiff in this state are forfeited, for nonpayment of any tax, penalty, or interest, or failure to file a required tax return [*see Rev. & Tax. Code §§ 23301* (tax, penalty, or interest), *23301.5* (tax return); and *§ 10.34*] after the answer has been filed and plaintiff consequently lacks legal capacity to prosecute the action, the proper way to raise the abatement issue would appear to be by noticed motion for leave to file a supplemental answer under *Code Civ. Proc. § 464* to plead plaintiff's lack of legal capacity to sue. The defense has, however, been raised in other manners [*see* discussion in *§ 10.34[2]*].

[4] Against Defendant

The objection that a party lacks capacity to sue may be raised against a defendant as well. Replications (replies to answers) are not permitted in civil actions in California and lack of capacity to defend is not one of the objections listed in *Code Civ. Proc. § 430.20* which may be taken by a demurrer to the answer. Since the issue is not one which can be raised by "answer," it does not come within the operation of *Code Civ. Proc. § 597*, authorizing a separate trial of that "defense." Hence, the abatement issue would, in this situation, have to be raised in some other manner, as for example, by a motion by plaintiff for summary judgment [*see Code Civ. Proc. § 437c*] or by a motion to strike the answer to the complaint [*see Code Civ. Proc. §§ 435-437*] on the ground its filing is not authorized or, where the suspension occurs after the pleadings are filed, by an objection at trial to the introduction of any evidence by defendant on the ground its corporate powers have been suspended and that, consequently, it may not defend against the action.

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-10 California Points & Authorities § 10.07

§ 10.07 Trial of Plea in Abatement

Where an objection constituting a ground of abatement is taken by demurrer [*see Code Civ. Proc. §§ 430.10, 430.30(a)*; and discussion in *§ 10.07[1]*], the hearing on the demurrer constitutes a trial of the issues of law so raised [*see Code Civ. Proc. §§ 589, 591*]. If the objection is taken by answer [*Code Civ. Proc. § 431.30(b)(1), (2)*], the court on its own motion or on motion of any party may order a separate trial of that defense [*Code Civ. Proc. § 597*]. There is, however, no requirement that a special defense be heard in advance of the other issues in the case and, hence, a plea in abatement may be heard either before the trial of other issues or along with the trial of other issues [*Kubon v. Kubon (1958) 51 Cal. 2d 229, 232, 331 P.2d 636* ; *Healy v. Stationers Corp. (1964) 228 Cal. App. 2d 601, 603, 39 Cal. Rptr. 679*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-10 California Points & Authorities § 10.08

§ 10.08 Motion for Separate Trial of Plea in Abatement

[1] Time and Manner of Motion

Code Civ. Proc. § 597 fails to state or in what manner the motion by a party for separate trial of special defenses is to be made. It has been suggested that the motion should be on notice in advance of trial or at the trial judge's informal pretrial conference in chambers before trial, and that the last feasible time for making the motion is just before the drawing of the jury in a jury trial ["1959 Institute for California Judges--Panel Discussion, Part I: Preliminary Matters and Trial Proceedings," *47 Cal. L Rev 703, 708-709 (1959)*]. It has been suggested that it is likely, however, that an oral motion made immediately before impanelment of the jury would not be well received, and the better time to arrange for a separate trial is at the pretrial conference [*see* California Civil Procedure During Trial (Cal. CEB 1960), ch 9, Order of Proof, § 9.14], assuming, of course, that one is held.

[2] Ruling on Motion

Code Civ. Proc. § 597 is permissive only and the trial court may deny the motion for separate trial, in which case the special defense may be tried at the trial of the case on the merits [*Kubon v. Kubon (1958) 51 Cal. 2d 229, 232-233, 331 P.2d 636*].

If the motion is granted, a separate trial of the special defense will be ordered [*Code Civ. Proc. § 597*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-10 California Points & Authorities § 10.09

§ 10.09 Page Limits on Points and Authorities

Generally, a memorandum must not exceed 15 pages, or, in the case of a motion for summary judgment or summary adjudication, 20 pages. A reply or closing memorandum may not exceed 10 pages [*see Cal. Rules of Ct., Rule 3.1113(d)*]. Any party desiring to file a longer memorandum must obtain leave of court [*see Cal. Rules of Ct., Rule 3.1113(d)*]. For further discussion of the page limitations under *Cal. Rules of Ct., Rule 3.1113*, and of other basic format requirements of memoranda, see *Ch. 1, Writing Legal Memoranda and Briefs, § 1.01[5]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-10 California Points & Authorities § 10.10

§ 10.10 Related Pleadings and Practice Forms

For a procedural guide for use on a motion for separate trial of a special defense and forms of notice of motion for separate trial, an order granting the motion, an interlocutory judgment abating proceedings, and judgments of dismissal, as well as forms of demurrers, affirmative defenses, and related papers on the grounds of (1) lack of legal capacity to sue, (2) another action pending, (3) nonjoinder or misjoinder of parties, and (4) failure to state a cause of action in that the action is premature, see California Forms of Pleading and Practice, Ch. 3, *Abatement of Actions* (Matthew Bender). For forms of demurrers to complaints on all the grounds enumerated in *Code Civ. Proc. § 430.10*, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For forms of demurrers raising the bar of the statute of limitations, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* (Matthew Bender).

For forms of notices of motion for leave to file an amended pleading, an amendment to the pleading, or a supplemental pleading, forms of amended pleadings, and related forms, see California Forms of Pleading and Practice, Ch. 21, *Amended and Supplemental Pleadings* (Matthew Bender)

For a form of petition for a writ of prohibition to restrain proceedings in a second action in California there is a prior action pending between the same parties on the same cause in another California court which has assumed jurisdiction over the action, and a form of petition for writ of mandate on the same ground where the prior action is pending in a non-California court, see California Forms of Pleading and Practice, Ch. 3, *Abatement of Actions* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-10 California Points & Authorities § 10.11

§ 10.11 Related Points and Authorities

For memoranda of points and authorities supporting and opposing demurrers on all the grounds listed in *Code Civ. Proc. § 430.10* (demurrer to complaint or cross complaint), see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For points and authorities supporting a motion for separate trial of the special defense that the action is barred by the statute of limitations and supporting and opposing a demurrer to a complaint on that ground, see Ch. 143, *Limitation of Actions* .

For memoranda of points and authorities supporting and opposing a motion for leave to file an amended or supplemental pleading, see Ch. 16, *Amended and Supplemental Pleadings* .

For memoranda of points and authorities supporting and opposing motions to strike complaints and motions for summary judgment on the various grounds related to the legal capacity of a corporation to sue, see *Ch. 52, Corporations, § 52.20* et seq.

Legal Topics:

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1-10 California Points & Authorities §§ 10.12-10.29

[Reserved]

§§ 10.12[Reserved]

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A. Pleas in Abatement

1-10 California Points & Authorities § 10.30

§ 10.30 Supporting Motion for Separate Trial of Special Defense Constituting Ground of Abatement to Prosecution of Action [Code Civ. Proc. § 597]--Another Action Pending [Code Civ. Proc. § 430.10(c)]

[1] FORM Supporting Motion for Separate Trial of Special Defense Constituting Ground of Abatement to Prosecution of Action [Code Civ. Proc. § 597]--Another Action Pending [Code Civ. Proc. § 430.10(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SEPARATE TRIAL OF SPECIAL DEFENSE IN ABATEMENT
vs.	)	
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

A MOTION FOR SEPARATE TRIAL OF THE SPECIAL DEFENSE PLEADED IN THE ANSWER THAT THERE IS ANOTHER ACTION PENDING BETWEEN THE SAME PARTIES ON THE SAME CAUSE SHOULD BE GRANTED SINCE TO GRANT THE MOTION WOULD SAVE USELESS LABOR AND EXPENSE OTHERWISE SPENT IN LITIGATING THE OTHER ISSUES IN THE CASE IF THE PLEA IN ABATEMENT PROVES MERITORIOUS.

A. Another Action Pending as Ground of Objection. A party against whom a _____ [complaint *or* cross complaint] has been filed may object to it by answer on the ground there is another action pending between the same parties on the same cause of action (*Code Civ. Proc. §§ 430.10(c), 430.30(b)*).

B. Ground for Abatement. The pendency of a prior action based on the same cause and contested by the same parties and considered in the same jurisdiction is ground for abatement of the second action (*Lawyers Title Ins. Corp. v. Superior Court (1984) 151 Cal. App. 3d 455, 458, 199 Cal. Rptr. 1* ; *Hanrahan v. Superior Court (1947) 81 Cal. App. 2d 432, 435, 184 P.2d 157*).

[*Optional*] **C. Prior Action Seeks Different Remedy.** The fact that the prior action seeks a different remedy does not prevent abatement of the second action the remedy sought in the second action could also be obtained by filing a cross-complaint in the prior action (*Lawyers Title Ins. Corp. v. Superior Court (1984) 151 Cal. App. 3d 455, 459-460, 199 Cal. Rptr. 1*).

D. Basis of Rule. The basis of the rule as to prior pending actions is to prevent two actions between the same parties involving the same subject matter from proceeding independently of each other (*Simmons v. Superior Court (1950) 96 Cal. App. 2d 119, 124-125, 214 P.2d 844*).

E. Separate Trial Authorized. When the answer pleads that another action is pending on the same cause of action, the court may, on its own motion or on motion of a party, proceed to the trial of this special defense before the trial of any other issue in the case (*Code Civ. Proc. § 597*; *Hanrahan v. Superior Court (1947) 81 Cal. App. 2d 432, 436, 184 P.2d 157*).

F. Purpose of Separate Trial. The purpose of a separate trial of a special defense is to avoid the labor and expense involved in litigating the other issues the special defense proves meritorious (*see Neff v. New York Life Ins. Co. (1947) 30 Cal. 2d 165, 175, 180 P.2d 900* ; *Leonard v. Flynn (1891) 89 Cal. 535, 540, 26 P. 1097* (overruled by implication on another point in *Pollard v. Harlow (1903) 138 Cal. 390, 391-393, 71 P. 454*)).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for separate trial of the special defense [*Code Civ. Proc. § 597*] that there is another action pending between the same parties on the same cause [*Code Civ. Proc. § 430.10(c)*]. This is by far the most common ground of abatement, based on the unnecessary multiplicity of actions and on the assumption that the first suit affords an adequate remedy and that the second thus annoys and harasses the defendant [*Lindsay v. Stewart (1887) 72 Cal. 540, 542, 14 P. 516* ; *Simmons v. Superior Court (1950) 96 Cal. App. 2d 119, 124, 214 P.2d 844* ; *see also* Conservatorshipof *Pacheco (1990) 224 Cal. App. 3d 171, 175-176, 273 Cal. Rptr. 522* ; *California Union Ins. Co. v. Trinity River Land Co. (1980) 105 Cal. App. 3d 104, 109, 163 Cal. Rptr. 802*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

This form is for use only to abate the second action. Pendency of the second action is never a ground for abatement of the first action [*California Union Ins. Co. v. Trinity River Land Co. (1980) 105 Cal. App. 3d 104, 108, 109, 163 Cal. Rptr. 802* ; *Hagan v. Fairfield (1961) 194 Cal. App. 2d 240, 246, 247, 16 Cal. Rptr. 14*].

[b] Interlocutory Judgment

If the defense of another action pending or a demurrer based on another action pending is sustained (and no other special defense is sustained), an interlocutory, appealable judgment is entered in favor of the defendant pleading the defense to the effect that no trial of other issues shall be had until the final determination of the other action [*Code Civ. Proc. § 597*; *Lawyers Title Ins. Corp. v. Superior Court (1984) 151 Cal. App. 3d 455, 459, 199 Cal. Rptr. 1*].

The purpose of the interlocutory judgment is to permit the trial court to retain jurisdiction over the subsequent action so that a final determination is had in the prior pending action the court will be empowered to determine the issues in the subsequent suit. If a judgment on the merits is rendered in the first action, the party asserting the plea in abatement should be granted leave to amend the answer to plead the res judicata effect of the judgment in bar of the subsequent action [*Lord v. Garland (1946) 27 Cal. 2d 840, 851, 168 P.2d 5*].

[c] Alternative to Abatement

When both actions are pending in the same court, the court may in an appropriate case order them consolidated [*see Shuffer v. Board of Trustees (1977) 67 Cal. App. 3d 208, 217-218, 221, 136 Cal. Rptr. 527* ; *see also Mobil Oil Corp. v. Superior Court (1978) 79 Cal. App. 3d 486, 493, 145 Cal. Rptr. 17* ; *Karp v. Dunn (1964) 229 Cal. App. 2d 192, 196, 40 Cal. Rptr. 96*] or, if they are not pending in the same court, coordinated under the rather complicated procedure set out in *Code Civ. Proc. §§ 404-404.8*. For discussion and forms for use in consolidation and coordination proceedings, see California Forms of Pleading and Practice, Ch. 125, *Consolidation, Severance, and Coordination of Actions* (Matthew Bender).

[d] Raising Objection

The objection that there is another action pending between the same parties on the same cause [*Code Civ. Proc. § 430.10(c)*] may be raised by demurrer if the ground appears from the face of the complaint or cross complaint or from matters of which the court must or may take judicial notice [*Code Civ. Proc. § 430.30(a)*; *California Union Ins. Co. v. Trinity River Land Co. (1980) 105 Cal. App. 3d 104, 108, 163 Cal. Rptr. 802* ; *see also Code Civ. Proc. § 430.70* and *Evid. Code §§ 451-453* (judicial notice)] or by answer if the ground of objection does not appear from the face of the complaint or cross complaint, whether or not it would appear from judicially noticed matter [*see Code Civ. Proc. § 430.30(b)*]. If the objection is taken by affirmative defense in the answer [*see Code Civ. Proc. § 431.30(b)(2)*], the defense, to be sufficient, must allege all the essential facts necessary to be proved to sustain it [*California Trust Co. v. Gustason (1940) 15 Cal. 2d 268, 273, 101 P.2d 74* ; *Scheeline v. Moshier (1916) 172 Cal. 565, 570, 158 P. 222*]. Of course, the defense of another action pending is not available unless the parties, issues, and causes of action are the same [*Hayworth v. City of Oakland (1982) 129 Cal. App. 3d 723, 728 fn. 2, 181 Cal. Rptr. 214*].

If the objection that there is another action pending between the same parties on the same cause can be established by the allegations of the complaint or cross complaint together with matter of which the court must or may take judicial notice, the better, if not required, practice would be to raise the objection by demurrer. On the other hand, if the objection cannot be so established or if there are disputed fact questions as to the identity of the parties or issues, the objection should be raised by answer followed by a motion for separate trial of that defense [*see Lord v. Garland (1946) 27 Cal. 2d 840, 849-850, 168 P.2d 5*].

[e] Waiver of Objection

Failure to raise, by demurrer or answer, the objection of another action pending is deemed a waiver of it [*see Code Civ. Proc. § 430.80(a)*; *Martin v. Pacific S.W. Royalties (1940) 41 Cal. App. 2d 161, 171, 106 P.2d 443* ; *see also Hayworth v. City of Oakland (1982) 129 Cal. App. 3d 723, 728 fn. 2, 181 Cal. Rptr. 214*].

The defense of another action pending may also be waived by failure to present it within a reasonable time, by pursuing a course inconsistent with it, or by obtaining a continuance without calling the court's attention to the plea [*see, e.g., San Martin v. Superior Court (1959) 169 Cal. App. 2d 14, 18, 336 P.2d 618* ; *Bank of America v. Cohen (1937) 21 Cal. App. 2d 510, 512, 69 P.2d 875*].

[f] Prior Pending Foreign Action

Code Civ. Proc. § 430.10(c), authorizing an objection to the complaint or cross complaint on the ground that another action is pending, does not require that the prior action be pending in a California court. Since a California court may take judicial notice of the records of any court of record of the United States or any state of the United States [*see Evid. Code § 452(d)*], and must do so if a proper request is made [*Code Civ. Proc. § 430.70*; *Evid. Code §§ 11, 453*], the objection that another action is pending in a foreign jurisdiction may be raised by demurreras well as by answer. Regardless of whether the objection is raised by demurrer or answer, the defendant has the right to have the subsequent action suspended only if the prior action is pending in a California state court [*see Code Civ. Proc. § 431.10(c)*; *Thomson v. Continental Ins. Co. (1967) 66 Cal. 2d 738, 746-747, 59 Cal. Rptr. 101, 427 P.2d 765*]. If the prior action is pending in a foreign jurisdiction, the issue is one of comity rather than one of right and the trial court has discretion whether to suspend or stay the California action and may consider several factors which require the consideration of evidence other than judicially noticed matters. Thus, the better, if not required, practice is to take the objection by answer and seek a separate determination of that defense. Such a determination may be made under *Code Civ. Proc. § 597*, since the provision authorizes a separate trial of the special defense pleaded in the answer that another action is pending on the same cause of action, and does not limit the action to one pending in a California court. The practice, however, has been to make a non-statutory motion for a stay. Points and authorities that may be used to support and oppose such a motion are set out in *§§ 10.38* and *10.40*.

[g] Related Pleading and Practice Forms

For forms of an affirmative defense that another action is pending, a notice of motion for separate trial of a special defense, an order granting the motion, an interlocutory judgment abating the action, a petition for writ of prohibition to restrain proceedings in the second action where both actions are pending in California, and a petition for writ of mandate to dismiss an action or stay proceedings where the prior action is pending in another state, see California Forms of Pleading and Practice, Ch. 3, *Abatement of Actions* (Matthew Bender).

For forms of demurrers on the ground of another action pending, see California Forms of Pleading and Practice, Ch. 3, *Abatement of Actions* and Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender).

[h] Related Points and Authorities

For memoranda of points and authorities supporting and opposing a demurrer on the ground of another action pending, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Another Action Pending as Ground of Objection

Code Civ. Proc. § 430.10(c) provides that the party against whom a complaint or cross complaint has been filed may

object, by demurrer or answer as provided in *Code Civ. Proc. § 430.30,* to the pleading on the ground that there is another action pending between the same parties on the same cause of action.

Code Civ. Proc. § 430.30(b) provides that any ground for objection (listed in *Code Civ. Proc. § 430.10*) to a complaint or cross complaint does not appear on the face of the pleading, the objection may be taken by answer.

[b] Ground for Abatement

In ***Lawyers Title Ins. Corp. v. Superior Court*** *(1984) 151 Cal. App. 3d 455, 199 Cal. Rptr. 1* , an action for damages, defendant moved for abatement under *Code Civ. Proc. §§ 430.10(c)* and *597* based on a pending action for declaratory relief that defendant had brought prior to plaintiffs' commencement of the action for damages. The trial court denied defendant's motion, and defendant sought review by petition for a writ of prohibition. In granting the writ, the reviewing court stated that the pendency of another action arising out of the same transaction is a ground for abatement of the second action. The court held that such ground was established in defendant's favor, because it was undisputed that there was an action filed by defendant for declaratory relief still pending plaintiffs, the real parties in interest, filed their action for damages, and that both actions involved the same parties and arose out of the same transaction (*151 Cal. App. 3d 455, 458, 459-460*).

Hanrahan v. Superior Court *(1947) 81 Cal. App. 2d 432, 184 P.2d 157* , was a proceeding in prohibition to restrain a trial court from proceeding with an action on the ground that another prior action was pending between the same parties on the same cause. Although a peremptory writ of prohibition was denied on the ground that petitioner had failed to first seek relief in the trial court, the court of appeal said that it is well settled in California that the pendency of a prior action based on the same cause, contested by the same parties, and considered in the same jurisdiction is ground for abatement of the second action (*81 Cal. App. 2d 432, 435*). The court stated that petitioner could obtain that relief from the trial court by alleging that ground in his answer to the complaint in the second action under former Code Civ. Proc. § 433 (*now see Code Civ. Proc. § 430.30(b)*), and then by having the issue tried first under *Code Civ. Proc. § 597* (*81 Cal. App. 2d 432, 436*).

[c] Prior Action Seeks Different Remedy

The facts and procedural background of ***Lawyers Title Ins. Corp. v. Superior Court*** *(1984) 151 Cal. App. 3d 455, 199 Cal. Rptr. 1* , are discussed in *§ 10.30[3][b]*. In granting the writ of prohibition to stay the second action, the court of appeal rejected the plaintiffs' argument that the second action should not be abated because they would not be entitled to receive any monetary relief in the prior action for declaratory relief. The court noted that, while abatement is not appropriate the first action cannot afford the relief sought in the second action, there was no obstacle in this case to preclude their filing a cross-complaint for damages in the prior action and thus secure a determination of all issues (*151 Cal. App. 3d 455, 459-460*).

[d] Basis of Rule

Simmons v. Superior Court *(1950) 96 Cal. App. 2d 119, 214 P.2d 844* , was a proceeding in prohibition (treated as a proceeding in mandate) to restrain a superior court from proceeding further with an action pending final determination of an action between the same parties on the same cause pending in the court of a sister state. Defendant's motion to stay the California action was denied. In issuing a writ of mandate commanding the trial court to stay the action pending final determination of the sister state action, the court of appeal said that the rule which forbids a later action in the same state between the same parties involving the same subject matter rests on principles of wisdom and justice, to prevent vexation, oppression, and harassment, to prevent unnecessary litigation, to prevent a multiplicity of suits, and in short to prevent two actions between the same parties involving the same subject matter from proceeding independently of each other (*96 Cal. App. 2d 119, 124-125*).

[e] Separate Trial Authorized

Code Civ. Proc. § 597 in pertinent part provides that the answer pleads that another action is pending on the same cause of action the court may, either on its own motion or on motion of any party, proceed to the trial of such special defense before the trial of any other issue in the case.

Hanrahan v. Superior Court *(1947) 81 Cal. App. 2d 432, 184 P.2d 157* , is discussed in *§ 10.30[3][b]*. In denying a writ of prohibition to restrain the trial court from proceeding with an action which was sought on the ground that another prior action was pending between the same parties on the same cause, the court of appeal pointed out to the petitioner that in the cases cited to support the issuance of the writ, the lower court had been asserting jurisdiction and actually performing acts in regard to the subject matter of the action or proceeding. The court noted that here petitioner had sought no relief in the lower court and that the court had done nothing, nor threatened to do anything, in the action. It further noted that under *Code Civ. Proc. § 597*, petitioner could have had the issue of another action pending first tried and that, therefore, petitioner had a plain, speedy, and adequate remedy which required denial of the application for the writ.

[f] Purpose of Separate Trial

Neff v. New York Life Ins. Co. *(1947) 30 Cal. 2d 165, 180 P.2d 900* , involved the application of *Code Civ. Proc. § 597* to a plea in bar. This was an action to recover disability benefits under an insurance policy and premiums paid on the policy after the disability arose. The complaint showed on its face that the action was barred by the statute of limitations and failed to allege facts which would estop defendant from pleading it. Defendant's objection at trial to the introduction of any evidence by plaintiff on the ground of the bar of the statute was sustained after plaintiff had made an offer of proof, and judgment was entered for defendant. On appeal, plaintiff contended he was entitled under *Code Civ. Proc. § 597* to a separate trial of the statute of limitations issue. The Supreme Court rejected this contention on the ground that the statute did not apply to a situation where it could be clearly seen, both from plaintiff's pleading and from his comprehensive offer of proof, that he could not present a cause of action not barred by the statute of limitations, that is, there was nothing to try. Therefore, the Court affirmed the judgment. The Court said that *Code Civ. Proc. § 597* states a procedural rule which authorizes the trial court in proper cases to avoid an unjustifiable expenditure of time in the trial of issues relating to the merits of an action it appears after the trial of the special defense that plaintiff in any event could not recover (*30 Cal. 2d 165, 175*).

Leonard v. Flynn *(1891) 89 Cal. 535, 26 P. 1097* (overruled by implication on another point in *Pollard v. Harlow (1903) 138 Cal. 390, 391-393* [*see Lawrence v. Maloof (1967) 256 Cal. App. 2d 600, 603, 64 Cal. Rptr. 233*]), was an action to recover possession of land. In his answer defendant denied the allegations of the complaint, alleged title to the land in himself, and, as affirmative defenses, set up the bar of the statute of limitations, that another action was pending between the same parties on the same cause, title by adverse possession, and an equitable estoppel against plaintiff. The trial court found in accordance with the affirmative defenses and plaintiff appealed from the subsequent judgment for defendant. In reversing the judgment on the ground that none of the defenses was supported by the evidence, the Supreme Court nevertheless said that in a case where, in addition to the defense of abatement by reason of the pendency of another action, the defendant relies on other defenses, which go directly to the merits of the cause, it would seem to be the better practice for the trial court to require the defendant to present his evidence on his plea in abatement at the opening of his defense; if it were proven to be meritorious, it would in many cases save much useless labor and great expense in litigating other defenses (*89 Cal. 535, 540*). It should be noted that while *Leonard* was decided prior to the enactment of *Code Civ. Proc. § 597*, authorizing a separate trial of the defense, its rationale about saving labor and expense appears still to be valid.

[4] Additional Authorities

[a] Ground for Abatement

Mobil Oil Corp. v. Superior Court (1978) 79 Cal. App. 3d 486, 145 Cal. Rptr. 17 , was a mandate proceeding by which petitioner sought to compel the trial court to vacate its order staying an unlawful detainer proceeding commenced by petitioner as the lessor against its lessee and to enter an order denying the motion to stay. Real party in interest (the lessee) had commenced a prior action against petitioner to establish his alleged right to continue to operate a service station on the premises leased from petitioner. The lessee's demurrer to the unlawful detainercomplaint on the ground, among others, that there was another action, pending was overruled, but his subsequent motion to stay on that ground was granted. Although the court of appeal held that the trial court abused its discretion in granting the motion to stay since the parties to the unlawful detainer proceeding and the prior pending action were not in the same relationship (*79 Cal. App. 3d 486, 490, 493*) and issued a peremptory writ of mandate (*79 Cal. App. 3d 486, 495-496*), it characterized the plea of another action pending as a matter of abatement (*79 Cal. App. 3d 486, 493*).

Other cases pointing out that the plea of another action pending is a plea in abatement or ground for abatement include: *Perry v. Jordan (1949) 34 Cal. 2d 87, 90, 207 P.2d 47* ; *Lord v. Garland (1946) 27 Cal. 2d 840, 844, 846-848, 850, 851, 854, 168 P.2d 5* ; *Wulfjen v. Dolton (1944) 24 Cal. 2d 891, 897, 151 P.2d 846* ; *Chapman v. Moore (1907) 151 Cal. 509, 511, 91 P. 324* ; *Shuffer v. Board of Trustees (1977) 67 Cal. App. 3d 208, 217, 136 Cal. Rptr. 527* ; *Williams v. California (1976) 62 Cal. App. 3d 960, 964, 133 Cal. Rptr. 539* ; *Colvig v. RKO Gen., Inc. (1965), 232 Cal. App. 2d 56, 73, 42 Cal. Rptr. 473* .

Bescos v. Bank of America (2003) 105 Cal. App. 4th 378, 129 Cal. Rptr. 2d 423 was a proceeding in which the appellant sought rescission of a lease agreement, restitution of all consideration paid, and penalties from a bank. Appellant also filed a second suit against the bank, which was dismissed after the trial court sustained without leave to amend the bank's demurrer on the ground that the first case was pending and involved the same matter between the parties. The trial court sustained the bank's demurrer to the second case without leave to amend and dismissed the action on the ground that a case was pending which involved the same matter "between the same parties." The court of appeal held that the trial court properly sustained the demurrer. A review of the pleading in the second case disclosed the same parties and the same transaction, included the additional theories of liability of conspiracy and fraud and a request to enjoin the bank from perpetrating certain alleged acts. The additional theories were not considered "different wrongs" that gave rise to different primary rights, but rather different ways of committing the same wrongs (*105 Cal. App. 4th 378, 392*).

California Points & Authorities

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Volume 1 Chapters 1-19 WRITING LEGAL MEMORANDA AND BRIEFS; ABATEMENT AND SURVIVAL OF ACTIONS---to---AMENDED AND SUPPLEMENTAL PLEADINGS
CHAPTER 10 ABATEMENT AND SURVIVAL OF ACTIONS
PART II. FORMS
A. Pleas in Abatement

1-10 California Points & Authorities § 10.31

§ 10.31 Supporting Motion for Separate Trial of Special Defense Constituting Ground of Abatement to Prosecution of Action [Code Civ. Proc. § 597]--Lack of Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Plaintiff Required to Sue Through Guardian or Conservator of Estate or Guardian Ad Litem [Code Civ. Proc. § 372]

[1] FORM Supporting Motion for Separate Trial of Special Defense Constituting Ground of Abatement to Prosecution of Action [Code Civ. Proc. § 597]--Lack of Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Plaintiff Required to Sue Through Guardian or Conservator of Estate or Guardian Ad Litem [Code Civ. Proc. § 372]

[*Caption. See § 10.30[1].*]

THE COURT SHOULD GRANT THE MOTION FOR SEPARATE TRIAL OF THE SPECIAL DEFENSE PLEADED IN THE ANSWER THAT _____ [PLAINTIFF *or* CROSS COMPLAINANT] LACKS LEGAL CAPACITY TO SUE IN HIS/HER INDIVIDUAL CAPACITY BECAUSE THE PLEA IS A GROUND OF ABATEMENT AND TO GRANT THE MOTION WOULD SAVE USELESS LABOR AND EXPENSE OTHERWISE SPENT IN LITIGATING THE OTHER ISSUES IN THE CASE IF THE DEFENSE PROVES MERITORIOUS.

A. Requirement That _____ [Plaintiff *or* Cross Complainant] Appear Through Legal Representative. A[n] _____ [minor *or* incompetent person *or* person for whom a conservator has been appointed] must appear in an action either by a guardian or conservator of his or her estate or by a guardian ad litem appointed by the court in which the action is pending (*Code Civ. Proc. § 372(a)* [*if a minor, add: Fam. Code § 6601*]).

[*Optional*] **B. Person for Whom Conservator May Be Appointed.** The term "incompetent" person, as used in *Section 372 of the Code of Civil Procedure*, includes a person for whom a conservator may be appointed (*Code Civ. Proc. § 372(a)*).

C. Person Required to Sue by Legal Representative as Lacking Capacity to Sue Individually. A[n]

_____ [minor *or* incompetent person *or* person for whom a conservator has been appointed] lacks legal capacity to maintain an action in his or her individual capacity (*see In re Marriage of Higgason (1973) 10 Cal. 3d 476, 484, 110 Cal. Rptr. 897, 516 P.2d 289* (disapproved on another point in *In re Marriage of Dawley (1976) 17 Cal. 3d 342, 352, 131 Cal. Rptr. 3, 551 P.2d 323*); *Parker v. Bowron (1953) 40 Cal. 2d 344, 351, 254 P.2d 6*).

D. Lack of Legal Capacity to Sue as Ground for Objection. A party against whom a _____ [complaint *or* cross complaint] has been filed may object to the pleading by answer on the ground that the party filing the pleading lacks legal capacity to sue (*Code Civ. Proc. §§ 430.10(b), 430.30(b)*).

E. Lack of Capacity to Sue as Ground of Abatement. The objection that plaintiff lacks legal capacity to sue is a ground of abatement (*Tingley v. TimesMirror Co. (1907) 151 Cal. 1, 13* ; *Wilson v. Mattei (1927) 84 Cal. App. 567, 576, 258 P. 453* ; *see Hydrotech Systems, Ltd. v. Oasis Waterpark (1991) 52 Cal. 3d 988, 994 n.4, 277 Cal. Rptr. 517, 803 P.2d 370* (dicta)).

F. Separate Trial Authorized. When the answer sets up any defense not involving the merits of the cause of action alleged but constituting a ground of abatement to its prosecution, the court may, on its own motion or on the motion of any party, proceed to the trial of the special defense before the trial of any other issue in the case (*Code Civ. Proc. § 597*).

G. Purpose of Separate Trial. [*See § 10.30[1], Paragraph E.*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for separate trial of the special defense [*Code Civ. Proc. § 597*], pleaded in the answer either by denying the relevant allegations of the complaint or cross complaint [*Code Civ. Proc. § 431.30(b)(1)*] or by alleging, as an affirmative defense [*Code Civ. Proc. § 431.30(b)(2)*], that plaintiff or cross complainant is a minor, an incompetent person, or a person for whom a conservator has been appointed who is not appearing by a guardian or conservator of the estate or by a guardian ad litem [*Code Civ. Proc. § 372*], and, hence, lacks legal capacity to sue [*Code Civ. Proc. § 430.10(b)*]. A minor is any person under the age of 18 [*Fam. Code § 6500*].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Hearing

Counsel should have with him or her at the hearing any evidence necessary to sustain the defense of lack of legal capacity to sue and be ready to present it should the judge so request. If there is no dispute as to the facts and, hence, nothing to be tried, it would appear that the court would dispose of the defense at the hearing of the motion for separate

trial and deny the motion. That is, if it appears that plaintiff or cross complainant is a person required to appear by a guardian or conservator of the estate or guardian ad litem and has not done so, the court would: (1) appoint a guardian ad litem and direct the filing of an amended complaint or cross complaint to allege the appointment and show that plaintiff or cross complainant is appearing by a guardian ad litem; (2) if the party has a guardian or conservator of his or her estate, direct that the party appear by the guardian or conservator and that the pleading be amended to show this fact; or (3) continue the hearing to allow the party sufficient time within which to make formal application for appointment of a guardian ad litem and direct the filing of an amended pleading after appointment to show the fact of appointment and that the party is appearing by a guardian ad litem. Of course, if there are disputed fact questions to be tried, for example, whether or not plaintiff or cross complainant is a person for whom a conservator may be appointed, that is, whether or not the party is incompetent within the meaning of *Code Civ. Proc. § 372*, a separate trial would normally be ordered.

[c] Emancipated Minor

An emancipated minor [*see Fam. Code § 7002*] is considered as being over the age of majority for the purpose of his or her capacity to sue and be sued in his or her own name [*Fam. Code § 7050(e)(4)*]. Such a minor need not, therefore, appear in an action or proceeding by a guardian of his or her estate or a guardian ad litem [*see Jolicoeur v. Mihaly (1971) 5 Cal. 3d 565, 582 fn. 12, 96 Cal. Rptr. 697, 488 P.2d 1* (persons who were minors under former Civ. Code § 25 (*now see Fam. Code § 6500*), but of voting age, held entitled to sue in their own right without appointment of guardian ad litem to enforce their voting rights under *26th Amendment* to United States Constitution, which had emancipated them with respect to voting)].

[d] Exceptions Pertaining to Minors

A minor 12 years of age or older may appear in court without a guardian, counsel, or guardian ad litem to request or to oppose a request for any of the following [*see Code Civ. Proc. § 372(b)*]:

- An injunction or temporary restraining order or both to prohibit harassment pursuant to *Code Civ. Proc. § 527.6*.

- An injunction or temporary restraining order or both against violence or a credible threat of violence in the workplace pursuant to *Code Civ. Proc. § 527.8*.

- A protective order pursuant to the Domestic Violence Prevention Act (*Fam. Code § 6200 et seq.*).

- A protective order pursuant to *Fam. Code §§ 7710* and *7720* (protective orders under the Uniform Parentage Act).

Notwithstanding *Code Civ. Proc. § 372(a)*, a minor may appear in court without a guardian ad litem in the following proceedings if the minor is a parent of the child who is the subject of the proceedings:

- Family Court proceedings pursuant to *Fam. Code § 7600 et seq.* [*Code Civ. Proc. § 372(c)(1)(a)*];

- Dependency proceedings pursuant to *Welf. & Inst. Code § 200 et seq.* [*Code Civ. Proc. § 372(c)(1)(b)*];

- Guardianship proceedings for a minor child pursuant to *Prob. Code § 1500 et seq.* [*Code Civ. Proc. § 372(c)(1)(c)*];

- Any other proceedings concerning child custody, visitation, or support [*Code Civ. Proc. §*

372(c)(1)(d)].

If the court finds that the minor parent is unable to understand the nature of the proceedings or to assist counsel in preparing the case, the court must, upon its own motion or upon a motion by the minor parent or the minor parent's counsel, appoint a guardian ad litem [*Code Civ. Proc. § 372(c)(2)*].

[e] Effect of Failure to Appoint Guardian Ad Litem

The absence of a guardian ad litem, where required by statute, is not ajurisdictional defect in the fundamental sense. While the failure of the court to appoint a guardian ad litem may constitute an act in excess of jurisdiction, the failure may be waived since a judgment rendered in the absence of a guardian ad litem is not void but merely voidable [*White v. Renck (1980) 108 Cal. App. 3d 835, 838-840, 166 Cal. Rptr. 701* , criticized on another ground in *Pham v. Wagner Litho Machinery Co. (1985) 172 Cal. App. 3d 966, 971-972, 218 Cal. Rptr. 476*].

[f] Raising Objection Against Plaintiff; Waiver

Where the ground of objection that plaintiff or cross complainant lacks legal capacity to sue [*Code Civ. Proc. § 430.10(b)*] appears from the face of the complaint or cross complaint or from any matter of which the court must or may take judicial notice [*see Evid. Code §§ 451, 452*], the objection on that ground may be taken by demurrer [*Code Civ. Proc. § 430.30(a)*]. Where the ground of objection does not appear from the face of the complaint or cross complaint, whether or not it would appear from judicially noticed matter, the objection may be taken by answer [*Code Civ. Proc. § 430.30(b)*].

On raising the objection by amended or supplemental answer, see the discussion in *§ 10.07*.

The failure to take the objection by demurrer or answer that plaintiff or cross complainant lacks legal capacity to sue normally constitutes a waiver of it [*see Code Civ. Proc. § 430.80(a)*].

[g] Raising Objection Against Defendant

If the defendant is a minor, an incompetent person, or a person for whom a guardian has been appointed who is not appearing by a guardian or conservator of the estate or guardian ad litem, plaintiff may object to the defendant's lack of capacity to defend by moving for the appointment of a guardian ad litem for him or her [*see Code Civ. Proc. § 373(c)*]. It is to plaintiff's advantage to do so because a minor not so represented has an absolute right to disaffirm any judgment against him or her. This right continues throughout the defendant's minority until barred by laches after reaching the age of majority [*see Garbutt v. Campbell (1955) 130 Cal. App. 2d 167, 168-169, 278 P.2d 508* (order setting aside default against minor defendant and permitting defendant to answer affirmed); *Keane v. Penha (1946) 76 Cal. App. 2d 693, 697, 173 P.2d 835* (order setting aside default and default judgment against minor affirmed); *see also Fam. Code § 6710* (disaffirmance by minor of contract)]. A judgment made and entered without the appointment of a guardian ad litem against an incompetent who is not appearing by a guardian or conservator of his or her estate may be vacated in a proceeding for that purpose if no innocent purchaser has acquired rights under the judgment [*Briggs v. Briggs (1958) 160 Cal. App. 2d 312, 319, 325 P.2d 219*].

[h] Related Pleading and Practice Forms

For a form of affirmative defense that a plaintiff minor is not appearing by a guardian or conservator of his or her estate or a guardian ad litem and a form of notice of motion for separate trial of a special defense in abatement, see California Forms of Pleading and Practice, Ch. 3, *Abatement of Actions* (Matthew Bender).

[i] Related Points and Authorities

For memoranda of points and authorities supporting a demurrer to the complaint on the ground that plaintiff does not have legal capacity to sue in that the action is by the guardian, rather than the ward by his or her guardian, or that the action on behalf of the ward is prosecuted by a foreign personal representative not qualified as such in this state, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Requirement That Plaintiff or Cross Complainant Appear Through Legal Representative

Code Civ. Proc. § 372 in pertinent part provides that a minor, an incompetent person, or a person for whom a conservator has been appointed is a party, such person "shall" appear either by a guardian or conservator of the estate or by a guardian ad litem appointed by the court in which the action or proceeding is pending, or by a judge thereof, in each case.

Fam. Code § 6601 provides that a minor may enforce his or her rights by civil action or other legal proceedings in the same manner as a person of full age, except that a guardian must conduct the same.

[b] Person for Whom Conservator May Be Appointed

Code Civ. Proc. § 372(a), provides that where reference is made "in this section" to "incompetent person," the reference is deemed to include "a person for whom a conservator may be appointed."

[c] Person Required to Sue by Legal Representative as Lacking Capacity to Sue Individually

In re Marriage of Higgason *(1973) 10 Cal. 3d 476, 110 Cal. Rptr. 897, 516 P.2d 289* (disapproved on another ground in *In re Marriage of Dawley (1976) 17 Cal. 3d 342, 352, 131 Cal. Rptr. 3, 551 P.2d 323*), was a proceeding for dissolution of marriage. The proceeding was brought on behalf of the wife, who was under conservatorship, by and through her guardian ad litem. The trial court denied the husband's motions for spousal support, division of community property, and payment of attorney's fees and costs, and granted the wife's petition forinterlocutory dissolution of marriage. In affirming the judgment of dissolution but reversing it in all other respects, the Supreme Court held that the proceeding could be brought on behalf of a spouse under conservatorship by and through his or her guardian ad litem, provided it is established that the spouse is capable of exercising a judgment, and expressing a wish, that the marriage be dissolved on account of irreconcilable differences and has done so (*10 Cal. 3d 476, 483*). The Court said that, under the terms of *Code Civ. Proc. § 372*, an incompetent person is a party to an action he or she must appear either by a guardian [now guardian or conservator] of the estate or by a guardian ad litem appointed by the court in which the action is pending. The Court added that had the wife, being under conservatorship, attempted to prosecute the action in her individual capacity, *Code Civ. Proc. § 372* could have been raised against her right to bring it (*10 Cal. 3d 476, 484*).

Parker v. Bowron *(1953) 40 Cal. 2d 344, 254 P.2d 6* , involved a plaintiff who lacked standing, rather than legal capacity, to sue, but in distinguishing the two kinds of plaintiffs, the Supreme Court said that incapacity is merely a legal disability, such as infancy or insanity, which deprives a party of the right to come into court (*40 Cal. 2d 344, 351*).

[d] Lack of Legal Capacity to Sue as Ground for Objection

Code Civ. Proc. § 430.10(b) provides that the party against whom a complaint or cross complaint has been filed may object, by demurrer or answer as provided in *Code Civ. Proc. § 430.30*, to the pleading on the ground that the person who filed the pleading does not have the legal capacity to sue.

Code Civ. Proc. § 430.30(b) provides that any ground for objection (set forth in *Code Civ. Proc. § 430.10*) to a

complaint or cross complaint does not appear on the face of the pleading, the objection may be taken by answer.

[e] Lack of Capacity to Sue as Ground of Abatement

Tingley v. Times Mirror *(1907) 151 Cal. 1, 89 P. 1097* , was an action for libel in which defendant's motion, made during trial, to file an amended answer to set up pleas in abatement, including the plea that plaintiff lacked legal capacity to sue because she had not joined her husband as a party plaintiff, as then required by statute, was denied. Defendant, after trial, appealed from the judgment for plaintiff. In affirming the judgment and holding that the trial court did not err in denying the motion since it was untimely made, the Supreme Court said that the pleas of which defendant sought to avail itself by amendment were pleas in abatement (*151 Cal. 1, 13*).

Wilson v. Mattei *(1927) 84 Cal. App. 567, 258 P. 453* , was an action on an open book account and common counts for the reasonable value of materials furnished and labor performed pursuant to contracts, which were not, however, pleaded. From a judgment for plaintiff, defendant appealed contending among other things that plaintiff lacked capacity to sue because he had failed to submit the dispute to arbitration as provided in the contract. Although the court of appeal held that defendant had waived this defense by failure to plead it, modified the judgment, and affirmed it as modified, it said that a defense based on the incapacity of a plaintiff to sue is regarded as a plea in abatement (*84 Cal. App. 567, 576)* .

In ***Hydrotech Systems, Ltd. v. Oasis Waterpark*** *(1991) 52 Cal. 3d 988, 277 Cal. Rptr. 517, 803 P.2d 370* , plaintiff, a New York corporation, brought suit for fraud and breach of contract. The defendants demurred on multiple grounds, including the failure of the complainant to allege that the plaintiff held a California contractor's license. The trial court sustained the demurrer and dismissed the complaint against all but one defendant. On plaintiff's appeal, the court of appeal reversed as to the cause of action for fraud, and affirmed dismissal in all other respects. Plaintiff sought review in the Supreme Court.

In the Supreme Court, the plaintiff argued that *Bus. & Prof. Code § 7031* should not apply to bar an unlicensed nonresident to sue on an isolated transaction in California under exceptional circumstances or to bar actions for fraud. Before addressing those issues, the Supreme Court noted, on an issue not before it on the appeal, that the complaint did not need to allege the plaintiff's capacity to sue and that lack of capacity does not appear on the face of the complaint, it cannot be raised by demurrer, but is a special plea in abatement (*52 Cal. 3d 988, 994 n.4*). The Court then went on to reverse in part and affirm in part, holding that *§ 7031* barred all the alleged causes of action (*52 Cal. 3d 988, 997, 1002*).

[f] Separate Trial Authorized

Code Civ. Proc. § 597 in pertinent part provides that the answer sets up any defense not involving the merits of plaintiff's cause of action but constituting a ground of abatement to its prosecution, the court may, "either upon its own motion or upon the motion of any" party, proceed to the trial of such special defense or defenses before the trial of any other issue in the case.

[4] Additional Authorities

[a] Person Required to Sue by Legal Representative as Lacking Capacity to Sue Individually

Cases quoting the rule from *Parker v. Bowron (1953) 40 Cal. 2d 344, 351, 254 P.2d 6* , discussed in *§ 10.31[3][c],* include: *Tinsley v. Palo Alto Unified School Dist. (1979) 91 Cal. App. 3d 871, 883, 154 Cal. Rptr. 591* ; and *Oakland Mun. Improvement League v. Oakland (1972) 23 Cal. App. 3d 165, 170, 100 Cal. Rptr. 29* .

California Points & Authorities

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Volume 1 Chapters 1-19 WRITING LEGAL MEMORANDA AND BRIEFS; ABATEMENT AND SURVIVAL OF ACTIONS---to---AMENDED AND SUPPLEMENTAL PLEADINGS
CHAPTER 10 ABATEMENT AND SURVIVAL OF ACTIONS
PART II. FORMS
A. Pleas in Abatement

1-10 California Points & Authorities § 10.32

§ 10.32 Supporting Motion for Separate Trial of Special Defense Constituting Ground of Abatement to Prosecution of Action [Code Civ. Proc. § 597]--Lack of Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Failure to File and Publish Fictitious Business Name Statement [Bus. & Prof. Code §§ 17910, 17917, 17918]

[1] FORM Supporting Motion for Separate Trial of Special Defense Constituting Ground of Abatement to Prosecution of Action [Code Civ. Proc. § 597]--Lack of Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Failure to File and Publish Fictitious Business Name Statement [Bus. & Prof. Code §§ 17910, 17917, 17918]

[*Caption. See § 10.30[1].*]

THE COURT SHOULD GRANT THE MOTION FOR SEPARATE TRIAL OF THE SPECIAL DEFENSE PLEADED IN THE ANSWER THAT _____ [PLAINTIFF *or* CROSS COMPLAINANT] LACKS LEGAL CAPACITY TO SUE BECAUSE OF HIS/HER/ITS FAILURE TO HAVE FILED AND PUBLISHED A FICTITIOUS BUSINESS NAME STATEMENT, AS REQUIRED BY STATUTE, BECAUSE THE PLEA IS A GROUND OF ABATEMENT AND TO GRANT THE MOTION WOULD SAVE USELESS LABOR AND EXPENSE OTHERWISE SPENT IN LITIGATING THE OTHER ISSUES IN THE CASE IF THE SPECIAL DEFENSE PROVES MERITORIOUS.

A. Filing and Publication of Statement Required. Every person who regularly transacts business in this state for profit under a fictitious business name is required to file and publish a fictitious business name statement (*Bus. & Prof. Code §§ 17910, 17917(a)*).

[*Optional*] **B. "Person" Defined.** As used in the fictitious business name statutes (*Bus. & Prof. Code §§ 17900-17930*), the word "person" includes individuals, limited liability companies, partnerships and other associations, and corporations (*Bus. & Prof. Code § 17902*).

C. Prohibition Against Maintenance of Action. No person transacting business under a fictitious business name contrary to the provisions of *Sections 17900-17930 of the Business and Professions Code*[, or his or her or its assignee],

may maintain any action on or on account of any _____ [contract made *or* transaction had] in the fictitious business name in any court of this state until the fictitious business name statement has been executed, filed, and published as required by these sections (*Bus. & Prof. Code § 17918*).

D. Lack of Legal Capacity to Sue as Ground for Objection. [*See § 10.31[1], Paragraph D.*]

E. Effect of Failure to Comply With Statutes. A person who is required to comply with the provisions of *Sections 17900-17930 of the Business and Professions Code* and has failed to do so lacks legal capacity to maintain an action on account of any _____ [contract made *or* transaction had] in the fictitious business name (*Kadota Fig Ass'n v. Case-Swayne Co. (1946) 73 Cal. App. 2d 796, 798, 801-805, 167 P.2d 518*).

F. Ground for Abatement. The failure of plaintiff to file and publish a fictitious business name statement required to do so by statute is a ground for abatement (*Tyrone v. Kelley (1973) 9 Cal. 3d 1, 13-14, 106 Cal. Rptr. 761, 507 P.2d 65* ; *Rudneck v. Southern Cal. Metal & Rubber Co. (1920) 184 Cal. 274, 281, 193 P. 775*).

G. Separate Trial Authorized. [*See § 10.31[1], Paragraph F.*]

H. Purpose of Separate Trial. [*See § 10.30[1], Paragraph E.*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for separate trial of the special defense [*Code Civ. Proc. § 597*], pleaded in the answer either by denying the relevant allegations of the complaint or cross complaint [*Code Civ. Proc. § 431.30(b)(1)*] or by alleging it as an affirmative defense [*Code Civ. Proc. § 431.30(b)(2)*], that plaintiff is a person transacting business under a fictitious business name, that the contract or transaction sued on was made or had in the fictitious business name, and that plaintiff has failed to file and publish the fictitious business name statement required by *Bus. & Prof. Code §§ 17910* and *17917*, respectively, and, hence, lacks legal capacity to sue [*Code Civ. Proc. § 430.10(b)*; *Bus. & Prof. Code § 17918*].

When appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Hearing

Counsel should have with him or her at the hearing any evidence necessary to sustain the defense of lack of legal capacity to sue and be ready to present it should the judge so request. If there is no dispute as to the facts and, hence, nothing to be tried, it would appear that the court would dispose of the defense at the hearing of the motion for separate trial and deny the motion. That is, if it appears that plaintiff or cross complainant is not a person or entity required to file

and publish a fictitious business name statement and has not done so or that, if it is so required and has not done so, the action is not on a contract made or transaction had in the fictitious business name, the court would so rule and deny the motion. Conversely, if it appears that plaintiff or cross complainant is requiredto file and publish a fictitious business name statement and has not done so and that the action is on a contract made or transaction had in the fictitious business name, the court would, on application of the plaintiff or cross complainant, grant a continuance to enable plaintiff to comply with *Bus. & Prof. Code §§ 17910* and *17917* [*see* discussion in *§ 10.32[2][c]*].

On the other hand, if there are fact issues to be tried, it would appear that the court would order a separate trial of the special defense.

[c] Nature of Objection; Subsequent Compliance

An objection to the maintenance of an action on the ground plaintiff has not complied with *Bus. & Prof. Code §§ 17910* and *17917* by filing and publishing the fictitious business name statement is a mere matter of abatement pending trial, which has the result of suspending the trial until the statutes are complied with. It is not jurisdictional. Moreover, *Bus. & Prof. Code § 17918* does not prohibit the commencement of the action, but only its maintenance "until the fictitious business name statement has been executed, filed, and published." Hence, before an action is finally dismissed on that ground, plaintiff should, prior to the trial, be given an opportunity to comply with the statutes if he, she, or it so desires [*Kadota Fig Ass'n v. Case-Swayne Co. (1946) 73 Cal. App. 2d 796, 804, 805, 167 P.2d 518* (involving predecessor statutes); *see also Tyrone v. Kelley (1973) 9 Cal. 3d 1, 14, 106 Cal. Rptr. 761, 507 P.2d 65* ; *Rudneck v. Southern Cal. Metal & Rubber Co. (1920) 184 Cal. 274, 282, 193 P. 775*].

[d] Raising Objection

[i] By Demurrer

When the objection that plaintiff or cross complainant lacks capacity to sue appears from the face of the complaint or cross complaint, or from any matter of which the court is required to or may take judicial notice [*see Evid. Code §§ 451, 452*], the objection on that ground may be taken by a demurrer to the pleading [*Code Civ. Proc. §§ 430.10(b), 430.30(a)*; *see § 10.07*].

Despite the fact that the failure of plaintiff to have complied with *Bus. & Prof. Code §§ 17910-17917* would not likely have appeared on the face of the complaint, courts nevertheless have permitted a demurrer on the ground of lack of legal capacity to sue the complaint shows that plaintiff or cross complainant is a person required to file and publish a fictitious name statement but is silent as to whether the statement has in fact been filed and published. Trial courts have frequently entertained such demurrers, and the appellate courts have assumed or stated by way of dictum that a demurrer is proper in such a case [*see, e.g., Sweeney v. Stanford (1885) 67 Cal. 635, 636, 8 P. 444* ; *Rivers v. Beadle (1960) 183 Cal. App. 2d 691, 700-701, 7 Cal. Rptr. 170* ; *Kadota Fig Ass'n v. Case-Swayne Co. (1946) 73 Cal. App. 2d 796, 800, 167 P.2d 518* ; *Pleaters' & Stitchers' Ass'n v. Davis (1934) 140 Cal. App. 403, 406, 35 P.2d 401* ; *Spreckels v. Grace Darling Hosp. Ass'n (1915) 28 Cal. App. 646, 648, 153 P. 718*]. For a memorandum of points and authorities in support of a demurrer on this ground, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[ii] By Answer

Where the complaint fails to allege compliance with *Bus. & Prof. Code §§ 17910-17917*, but shows that plaintiff is required to comply, the better procedure for raising the objection that plaintiff lacks legal capacity to maintain the action is by setting it up as an affirmative defense in the answer [*Code Civ. Proc. § 431.30(b)(2)*] and then moving the court, on notice, for a trial of this special defense before trial on the merits [*Code Civ. Proc. § 597*].

If the plaintiff alleges both that plaintiff is transacting business under a fictitious business name and compliance that plaintiff has complied with *Bus. & Prof. Code §§ 17910-17917*, the issue may be raised by answer admitting that

plaintiff is doing business under a fictitious business name but denying compliance with the statutes, where such is the fact. It is not necessary in such case to plead noncompliance affirmatively [*see Rudneck v. Southern Cal. Metal & Rubber Co. (1920) 184 Cal. 274, 280-281, 193 P. 775* ; *Sweeney v. Stanford (1885) 67 Cal. 635, 636, 8 P. 444*]. Again, a motion for separate trial of this issue under *Code Civ. Proc. § 597* is proper.

On raising the issue by amended or supplemental answer, see *§ 10.07*.

[e] Waiver of Objection

The failure to raise the objection that plaintiff lacks legal capacity to sue [*Code Civ. Proc. § 430.10(b)*] by demurrer [*Code Civ. Proc. § 430.30(a)*] or answer [*Code Civ. Proc. § 430.30(b)*] normally constitutes a waiver of it [*Code Civ. Proc. § 430.80(a)*; *see also Kadota Fig Ass'n v. Case-Swayne Co. (1946) 73 Cal. App. 2d 796, 805, 167 P.2d 518* (grounds for mere abatement of an action as waivable)].

[f] Motion to Dismiss

It has been held that the issue of noncompliance with the fictitious business name statutes is properly presented by averment in the answer by way of affirmative defense that plaintiff failed to file and publish the required statement coupled with a motion to dismiss on the same ground [*Andrews v. Glick (1928) 205 Cal. 699, 700-701, 272 P. 587]* . It should be noted, however, that this ground is not among those specified by the Code of Civil Procedure as proper for dismissal [*see Code Civ. Proc. §§ 581-581d*] unless the issue has been presented in some proper manner (as by demurrer), there has been a ruling on it in favor of the defendant (as by sustaining the demurrer), and plaintiff has failed to amend the complaint within the time allowed to allege compliance or, where necessary to doso, has failed to secure a continuance to allow time for compliance with the statutes.

[g] Related Pleading and Practice Forms

For a form of affirmative defense that plaintiff has failed to comply with the fictitious business name statutes and hence lacks legal capacity to sue and for forms of notice of motion for separate trial, order granting the motion, and judgment, see California Forms of Pleading and Practice, Ch. 3, *Abatement of Actions* (Matthew Bender).

For forms of demurrers on the same ground, see California Forms of Pleading and Practice, Ch. 3, *Abatement of Actions* and Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender).

[h] Related Points and Authorities

For a memorandum of points and authorities in support of a demurrer to a complaint on the ground that plaintiff has failed to file and publish the fictitious business name statement as required by statute and hence lacks legal capacity to sue, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Filing and Publication of Statement Required

Bus. & Prof. Code § 17910 in pertinent part provides that every person who regularly transacts business in this state for profit under a fictitious business name "shall" file a fictitious business name statement in accordance with *Bus. & Prof. Code §§ 17910-17918* not later than 40 days from the time he or she commences to transact the business.

Bus. & Prof. Code § 17917(a) provides that within 30 days after a fictitious business name statement has been filed, the registrant must cause a statement in the form prescribed by *Bus. & Prof. Code § 17913(a)* to be published pursuant to *Gov. Code § 6064* in a newspaper of general circulation in the county in which the registrant's principal place of

business is located or, if there is no such newspaper in that county, then in a newspaper of general circulation in an adjoining county, and if the registrant does not have a place of business in this state, the notice is to be published in a newspaper of general circulation in Sacramento County.

[b] Effect of Failure to Comply With Statutes

Kadota Fig Ass'n v. Case-Swayne Co. *(1946) 73 Cal. App. 2d 796, 167 P.2d 518* , was an action on a written agreement for an accounting and for money received. Defendants' demurrer on the ground plaintiff had failed to file and publish the fictitious business name certificate (now statement) as required by former Civ. Code §§ 2466 and *2468* [now *Bus. & Prof. Code §§ 17910, 17917*] and, hence, lacked legal capacity to sue, was sustained without leave to amend, and the action was dismissed. Although the court of appeal held that it was error to have sustained the demurrer without leave to amend (*73 Cal. App. 2d 796, 803)* and that plaintiff should, before the action is finally dismissed on the foregoing ground, be given an opportunity to comply with the statutes if it so desired (*73 Cal. App. 2d 796, 805*), the court held that the demurrer for lack of legal capacity to sue was properly sustained (*73 Cal. App. 2d 796, 801-803*).

[c] Ground for Abatement

Tyrone v. Kelley *(1973) 9 Cal. 3d 1, 106 Cal. Rptr. 761, 507 P.2d 65* , was an action to recover a fee for finding a lender which committed itself to loan defendants up to a specified sum for a construction project. On the fourth day of trial, defendants, over plaintiff's objection, moved to amend their answer to raise as a third affirmative defense plaintiff's failure to have filed a certificate that he was doing business under a fictitious business name as required by former Civ. Code § 2466 [now *Bus. & Prof. Code § 17910*]. The trial court reserved ruling on the motion but on the last day of trial denied defendants' motion for nonsuit made on the same ground, ruling that the failure to file the certificate was a mere matter of abatement and not a jurisdictional defect. From a judgment for plaintiff, defendants appealed. In affirming the judgment on the ground, among others, that a judgment on the merits should not be reversed where a plea in abatement is raised for the first time during trial (*9 Cal. 3d 1, 14*), the Supreme Court, quoting from *Kadota Fig Ass'n v. Case-Swayne Co. (1946) 73 Cal. App. 2d 796, 804, 167 P.2d 518* , discussed in *§ 10.32[3][b]* stated the rule that an objection to the maintenance of an action on the ground plaintiff has not complied with the provisions of former Civ. Code §§ 2466 and 2468 [now *Bus. & Prof. Code §§ 17910, 17917*] by filing and publishing the certificate (now statement) required is a mere matter of abatement pending the trial, which has the result of suspending the trial until the statute is complied with (*9 Cal. 3d 1, 13-14*).

Rudneck v. Southern Cal. Metal & Rubber Co. *(1920) 184 Cal. 274, 193 P. 775* , was an action by a partnership to recover the purchase price for certain material sold and delivered to the defendant. Plaintiffs alleged compliance with former Civ. Code §§ 2466 and 2468 [now *Bus. & Prof. Code §§ 17910, 17917*], but this allegation was denied in the answer. At trial, plaintiffs proved that it had filed the fictitious business name certificate (now statement) but introduced no evidence with respect to its publication. Judgment was for plaintiffs, and defendant appealed. The Supreme Court, in reversing the judgment on the single issue of the publication by plaintiffs of their certificate, pointed out that failure to comply with the fictitious business name statutes was but a matter of abatement (*184 Cal. 274, 281*).

[4] Additional Authorities

[a] Ground for Abatement

The factual background of *Kadota Fig Ass'n v. Case-Swayne Co. (1946) 73 Cal. App. 2d 796, 167 P.2d 518* , is discussed in *§ 10.32[3][b]*. In reversing the judgment of dismissal with directions to the trial court to grant plaintiff a reasonable time within which to amend its complaint if it so desired, the court of appeal said that an objection to the maintenance of an action on the ground that plaintiff has not complied with the provisions of Civ. Code §§ 2466 and *2468* [repealed; now *Bus. & Prof. Code §§ 17910, 17917*] by filing and publishing the certificate (now statement) required thereby, is a mere matter of abatement pending the trial, which has the result of suspending the trial until the statute is complied with, the objection is not jurisdictional (*73 Cal. App. 2d 796, 804*).

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1-10 California Points & Authorities § 10.33

§ 10.33 Supporting Motion for Separate Trial of Special Defense Constituting Ground of Abatement to Prosecution of Action [Code Civ. Proc. § 597]--Lack of Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Party's Corporate Powers, Rights, and Privileges Have Been Suspended for Failure to File Required Information Statement [Corp. Code §§ 1502 and 2205(b)]

[1] FORM Supporting Motion for Separate Trial of Special Defense Constituting Ground of Abatement to Prosecution of Action [Code Civ. Proc. § 597]--Lack of Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Party's Corporate Powers, Rights, and Privileges Have Been Suspended for Failure to File Required Information Statement [Corp. Code §§ 1502 and 2205(b)]

[*Caption. See § 10.30[1].*]

THE COURT SHOULD GRANT THE MOTION FOR SEPARATE TRAIL OF THE SPECIAL DEFENSE PLEADED IN THE ANSWER THAT THE _____ [PLAINTIFF'S *or* CROSS-COMPLAINANT'S] CORPORATE POWERS HAVE BEEN SUSPENDED FOR FAILURE TO FILE THE REQUIRED INFORMATION STATEMENT WITH THE SECRETARY OF STATE AND DEPRIVES IT OF LEGAL CAPACITY TO SUE, AND TO GRANT THE MOTION WOULD SAVE USELESS LABOR AND EXPENSE OTHERWISE SPENT IN LITIGATING THE OTHER ISSUES IN THE CASE IF THE SPECIAL DEFENSE PROVES MERITORIOUS.

A. Suspension of Domestic Corporation's Corporate Powers, Rights, and Privileges. The corporate powers, rights, and privileges of a domestic corporation may be suspended for failure to file the Information Statement with the Secretary of State required by *Corporations Code Sections 1502* and *2205(b)*.

B. Lack of Capacity to Sue. A corporation that has its powers suspended or forfeited under *Corporations Code Sections 1502* and *2205(b)* for failure to file the required Information Statement lacks the legal capacity to prosecute or defend a civil action during the period of suspension (*see Palm Valley Homeowners Assn., Inc. v. Design MTC (2000) 85 Cal. App. 4th 553, 560, 102 Cal. Rptr. 2d 350*).

C. Lack of Legal Capacity to Sue as Ground for Objection. [*See § 10.31[1], Paragraph D.*]

D. Plea in Abatement. [*See § 10.34[1], Paragraph D.*]

E. Separate Trial Authorized. [*See § 10.31[1], Paragraph F.*]

F. Purpose of Separate Trial. [*See § 10.30[1], Paragraph F.*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for separate trial of the special defense [*Code Civ. Proc. § 431.30(b)(2)*] that plaintiff's or cross-complainant's corporate powers have been suspended for failure to file the required information statement with the Secretary of State within 90 days after the filing of its original articles and annually thereafter [*Corp Code §§ 1502* and *2205(b)*], and that it therefore lacks legal capacity to sue [*Code Civ. Proc. § 430.10(b)*].

This form is intended primarily to provide points and authorities relating to the assertion of this defense in the procedural context of a plea in abatement, and thus, the authorities relating to the substantive law of suspension and revivor are not set forth or discussed in their entirety in this form. For further discussion and additional points and authorities that may, in an appropriate case, be combined with these points and authorities, see Ch. 52, *Corporations* .

This form contains authority relating only to suspension of a domestic corporation for failure to file the required information statement [*Corp Code §§ 1502* and *2205(b)* (application to domestic corporations)].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law state. Include the date the corporation was initially filed with the Secretary of State, the dates by which the corporation failed to file the information statement, and information from the Secretary of State certificate indicating the suspension of the corporation's powers.

[b] Hearing

Counsel should bring to the hearing any evidence that will establish the suspension of plaintiff's corporate powers. For example, a copy of the Secretary of State's certificate of the fact of suspension. *Corp. Code § 2205* may be attached to the declaration [*see Code Civ. Proc. §§ 2009, 2015.5*] supporting the motion if not already attached to the answer, and the certificate itself offered in evidence at the hearing if so requested by the judge. If the fact of suspension is admitted or not contested by the corporation, it would appear that the court would, at the hearing of the motion for separate trial, normally rule on the effect of the defense on the action, because the issue is a matter of law and there would be no facts to try at a separate trial of the special defense that plaintiff or cross complainant lacks legal capacity to sue.

[c] Defending the Motion

If the corporation's corporate powers were suspended but have been revived [*Corp. Code § 2205* (discussed in Ch. 52, *Corporations*)], the corporation should be prepared to offer in evidence at the hearing the certificate of revivor from the Secretary of State [*see Rev. & Tax. Code § 23305a*].

If plaintiff's or cross complainant's corporate powers have not yet been revived but the corporation has applied for revivor or intends to do so [*see Corp. Code § 2205(d)*], the corporation should seek a continuance to allow it time to secure the certificate of revivor.

Even if the objection that a party's corporate powers have been suspended is sustained, the party should, before the action is dismissed or other adverse ruling is made, be given an opportunity of filing the information statement and reinstating the corporation if it manifests a willingness to do so [*see Welco Constr., Inc. v. Modulux, Inc. (1975) 47 Cal. App. 3d 69, 70, 120 Cal. Rptr. 572* (suspension for failure to pay taxes)]. The granting of a continuance for such purpose is proper [*Welco Constr., Inc. v. Modulux, Inc. (1975) 47 Cal. App. 3d 69, 70, 120 Cal. Rptr. 572* (suspension for failure to pay taxes)].

[d] Raising Objection

The objection that plaintiff's or cross complainant's corporate powers have been suspended, that is, that the corporation lacks legal capacity to sue [*Code Civ. Proc. § 430.10(b)*] may be raised by demurrer if the ground of objection appears from the face of the corporation's pleading or from matter of which the court must or may take judicial notice [*Code Civ. Proc. § 430.30(a)*; *see also Code Civ. Proc. § 430.70* and *Evid. Code §§ 451-453* on judicial notice] or by answer if the ground of objection does not appear from the face of the pleading, whether or not it would appear from judicially noticed matter [*Code Civ. Proc. § 430.30(b)*], by alleging it as an affirmative defense [*see Code Civ. Proc. § 430.30(b)(2)*]. While the fact of suspension would not normally appear from the face of the pleading, it would seem the court could take judicial notice of the fact of suspension pursuant to either *Evid. Code § 452(c)*, authorizing the court to take judicial notice of the official acts of the executive department of any state, or *Evid. Code § 452(h)*, authorizing the court to take judicial notice of facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy [*see People v. Terry (1974) 38 Cal. App. 3d 432, 439, 113 Cal. Rptr. 233* (judicial notice of death certificate)]. On raising the issue by amended or supplemental answer and suggested procedures for raising the objection, see *§ 10.07*.

Notwithstanding the foregoing, the issue of suspension of corporate powers for failure to file the required information statement can be raised other than by demurrer [*Palm Valley Homeowners Assn., Inc. v. Design MTC (2000) 85 Cal. App. 4th 553, 560, 102 Cal. Rptr. 2d 350* (motion to strike pleadings and for sanctions against attorneys for the corporation)]. For cases where the issue of suspension or forfeiture for failure to pay taxes, see discussion in *§ 10.34[2][d]*.

[e] Waiver of Objection

The failure to object by demurrer or answer to a party's lack of legal capacity to sue normally constitutes a waiver of the objection [*see Code Civ. Proc. § 430.80(a)*]. But an objection based on the suspension of corporate powers is not waived so long as those powers remain suspended [*see Gar-Lo, Inc. v. Prudential Sav. & L. Ass'n (1974) 41 Cal. App. 3d 242, 244, 116 Cal. Rptr. 389*] and may be asserted so long as the corporation is under the disability [*Diverco Constructors v. Wilstein (1970) 4 Cal. App. 3d 6*], provided a judgment on the merits has not been entered and become final [*Traub Co. v. Coffee Break Service, Inc. (1967) 66 Cal. 2d 368, 369, 57 Cal. Rptr. 846, 425 P.2d 790* ; *see also Peacock Hill Ass'n v. Peacock Lagoon Constr. Co. (1972) 8 Cal. 3d 369, 371-372, 105 Cal. Rptr. 29, 503 P.2d 285* (explaining the holding in *Traub*)].

[f] Related Pleading and Practice Forms

For a form of affirmative defense that plaintiff's corporate powers have been suspended for forfeited for failure to pay taxes and for a form of notice of motion for separate trial, a form of order granting the motion, and a form of judgment, see California Forms of Pleading and Practice, Ch. 3, *Abatement of Actions* (Matthew Bender).

[g] Related Points and Authorities

For memoranda of points and authorities relating to additional aspects of the substantive law of suspension and revivor of corporate powers, rights, and privileges for nonpayment of taxes or failure to file returns, set forth in the context of motions supporting and opposing summary judgment, see Ch. 52, *Corporations* . That chapter also contains points and authorities relating to voidability of a contract entered into by a corporation during the period of suspension or forfeiture.

[3] Discussion of Authorities

[a] Suspension of Domestic Corporation's Corporate Powers, Rights, and Privileges

Corp. Code § 1502 requires that every corporation file, within 90 days after filing its original articles and annually thereafter, a statement containing all of the following: the names and complete business or residence addresses of its incumbent directors; the number of vacancies on the board, if any; the names and complete business or residence addresses of its chief executive officer, secretary, and chief financial officer; the street address of its principal executive office, or principal place of business if its principal business office is located in another state; the mailing address of the corporation, if different from the street address of its principal executive office; a statement of the general type of business that constitutes the principal business activity of the corporation, and a statement identifying its agent for service of process.

Corp. Code § 2204 describes the process for imposition of the financial penalty for failure to file the information statement. If the corporation fails to file the information statement, the Secretary of State shall mail a notice of delinquency, advising the corporation of the monetary penalty imposed by *Rev. & Tax. Code § 19141* for failure to timely file the required statement. If the corporation does not file the informationstatement within 60 days after the mailing of this notice, the Secretary of State certifies the name of the corporation to the Franchise Tax Board, who assesses a financial penalty under *Rev. & Tax. Code § 19141*.

Corp. Code § 2205 describes the suspension process. If a corporation fails to file a required information statement and also did not file an information statement in the previous 24 months, and was certified for penalty pursuant to *Corp. Code § 2204*, it is subject to suspension. In such a case, the Secretary of State mails a notice to the corporation informing the corporation that its corporate powers, rights, and duties will be suspended after 60 days if it fails to file the information statement. If the corporation does not file the information statement within that 60 day period, the Secretary of State notifies the Franchise Tax Board of the suspension and mails a notice of suspension to the corporation. Thereupon, the corporate rights, powers, and privileges of the corporation are suspended, except for the purpose of amending the articles of incorporation to set forth a new name, and for the purpose of filing the information statement. If the corporation files a new information statement, the Secretary of State certifies that fact to the Franchise Tax Board, and the corporation will then be relieved from suspension, so long as there is no other suspension also pending under *Rev. & Tax. Code § 23301* or *23301.5*.

[b] Lack of Capacity to Sue

In ***Palm Valley Homeowners Assn., Inc. v. Design MTC*** *(2000) 85 Cal. App. 4th 553, 102 Cal. Rptr. 2d 350* , Design MTC, a corporation, was a subcontractor named as a defendant in a construction defects lawsuit. In March 1997, the corporation's attorneys learned that the corporation had been suspended for failure to file the information statement required by *Corp. Code § 1502* but failed to notify the court or opposing counsel but instead continued to participate in

the litigation, including participating in discovery and filing a summary judgment motion in July 1998. In August, 1998, plaintiff's investigator learned of the corporation's suspended status and plaintiff's attorney brought the problem to the attention of the corporation's attorney and the court. The court granted an order shortening time for plaintiff's motion to strike Design MTC's answer and took Design MTC's summary judgment motions off calendar. The court also imposed sanctions, after a noticed hearing, against Design MTC's attorneys, in excess of $14,000 for discovery abuse under Code Civ. Proc. § 2023 and *Code Civ. Proc. § 128.5* (frivolous actions taken in bad faith). The sanctions were based on the corporation's attorneys engaging in litigation on behalf of their client while knowing their client was a suspended corporation. The firm appealed from the sanctions order, which was affirmed on appeal (*85 Cal. App. 4th 553, 556-558*).

Attorneys for the corporation argued that a suspension for failure to file the required information statement should not carry the same consequences as a suspension for failure to pay taxes. Cases analyzing corporate suspensions for failure to pay taxes have noted that one of the purposes of such a suspension is to pressure the suspended corporation to pay its taxes; the attorneys argued that since this public policy purpose did not apply in this case, and it was reasonable for them to believe that a suspension for failing to file an information statement would not preclude corporate access to the courts. The court disagreed, holding, in effect, that "suspended" means "suspended," and held that, "[g]iving the benefit of any doubt to the firm ... we think it inescapable that any reasonable attorney reviewing the relevant statutes would entertain a strong suspicion that Design MTC was disqualified from exercising any powers, including the right to resort to the courts in litigation" (*85 Cal. App. 4th 553, 562*).

The court analyzed the governing statutes as follows: *Corp. Code § 1502* provides that every corporation must file a statement every two years containing such information as the corporation's current directors, the number of board vacancies, if any, the current officers, and the name and address of a person in the state, designated to receive service of legal process upon the corporation. *Corp. Code § 2204* provides that, if a corporation fails to file its required information statement under *Corp. Code § 1502*, the Secretary of State shall give notice of the delinquency; 60 days after notice of the delinquency, the Secretary of State must certify the name of the corporation to the Franchise Tax Board, and the Franchise Tax Board imposes a penalty upon the corporation.

If a corporation fails to file a statement under *Corp. Code § 1502*, fails to file a statement for 24 months, and has been assessed a penalty under *Corp. Code § 2204* during that 24-month period, then the corporation is subject to suspension under *Corp. Code § 2205*. The Secretary of State must notify the corporation that "its corporate powers, rights, and privileges" will be suspended after an additional 60 days, if it fails to file a statement under *Corp. Code § 1502*. If the corporation fails to comply within 60 days, the Secretary of State certifies to the Franchise Tax Board that the corporation is suspended, and mails a notice to the suspended corporation. "[T]hereupon, except for the purpose of amending the articles of incorporation to set forth a new name, the corporate powers, rights, and privileges of the corporation are suspended" [*Corp. Code, § 2205(c)*].

Corp. Code § 2205(d) provides that, notwithstanding the suspension, the corporation is empowered to file a statement under *Corp. Code § 1502*; if it does so, the Secretary of State "shall certify that fact to the Franchise Tax Board and the corporation may thereupon be relieved from suspension" unless it is also suspended by the Franchise Tax Board for nonpayment of taxes. Before *Corp. Code § 2205* was amended in 1999, it provided that the Secretary of State must certify the suspended corporation's compliance with *Corp. Code § 1502* to the Franchise Tax Board, and that the corporation may "thereupon, *in accordance with Section 23305a of the Revenue and Taxation Code* , be relieved from suspension ... ." (italics added; *see* Stats. 1999, ch. 1000, § 23). The italicized language was in effect at the time of all the events herein.

California Points & Authorities

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Volume 1 Chapters 1-19 WRITING LEGAL MEMORANDA AND BRIEFS; ABATEMENT AND SURVIVAL OF ACTIONS---to---AMENDED AND SUPPLEMENTAL PLEADINGS
CHAPTER 10 ABATEMENT AND SURVIVAL OF ACTIONS
PART II. FORMS
A. Pleas in Abatement

1-10 California Points & Authorities § 10.34

§ 10.34 Supporting Motion for Separate Trial of Special Defense Constituting Ground of Abatement to Prosecution of Action [Code Civ. Proc. § 597]--Lack of Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Party's Corporate Powers, Rights, and Privileges Have Been Suspended, or Exercise of Party's Corporate Powers, Rights, and Privileges in This State Have Been Forfeited, for Nonpayment of Taxes [Rev. & Tax. Code § 23301] or Failure to File Required Tax Return [Rev. & Tax. Code § 23301.5]

[1] FORM Supporting Motion for Separate Trial of Special Defense Constituting Ground of Abatement to Prosecution of Action [Code Civ. Proc. § 597]--Lack of Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Party's Corporate Powers, Rights, and Privileges Have Been Suspended, or Exercise of Party's Corporate Powers, Rights, and Privileges in This State Have Been Forfeited, for Nonpayment of Taxes [Rev. & Tax. Code § 23301] or Failure to File Required Tax Return [Rev. & Tax. Code § 23301.5]

[*Caption. See § 10.30[1].*]

[*EITHER*]

THE COURT SHOULD GRANT THE MOTION FOR SEPARATE TRIAL OF THE SPECIAL DEFENSE PLEADED IN THE ANSWER THAT THE _____ [PLAINTIFF'S *or* CROSS COMPLAINANT'S] CORPORATE POWERS HAVE BEEN SUSPENDED FOR _____ [NONPAYMENT OF TAXES *and/or* FAILURE TO FILE A REQUIRED TAX RETURN] BECAUSE THE SUSPENSION OF A DOMESTIC CORPORATION'S CORPORATE POWERS DEPRIVES IT OF LEGAL CAPACITY TO SUE AND TO GRANT THE MOTION WOULD SAVE USELESS LABOR AND EXPENSE OTHERWISE SPENT IN LITIGATING THE OTHER ISSUES IN THE CASE IF THE SPECIAL DEFENSE PROVES MERITORIOUS.

A. Suspension of Domestic Corporation's Corporate Powers, Rights, and Privileges. The corporate powers, rights, and privileges of a domestic taxpayer may be suspended for failure to timely pay any tax, penalty, or interest, or any portion of it due and payable under *Revenue and Taxation Code Section 19001 et seq.* (payments and assessments under franchise and income tax laws) or under *Revenue and Taxation Code Section 23001 et seq.* (Bank and Corporation Tax

Law) or any liability, or portion of it, due and payable under *Revenue and Taxation Code Section 19131* (penalties and additions to tax under franchise and income tax laws), or to file a tax return required by the Bank and Corporation Tax Law (*Rev. & Tax. Code §§ 23301* (tax and liability), *23301.5* (tax return)).

[*OR*]

THE COURT SHOULD GRANT THE MOTION FOR SEPARATE TRIAL OF THE SPECIAL DEFENSE PLEADED IN THE ANSWER THAT THE EXERCISE OF THE _____ [PLAINTIFF'S *or* CROSS COMPLAINANT'S] CORPORATE POWERS, RIGHTS, AND PRIVILEGES IN THIS STATE HAVE BEEN FORFEITED FOR _____ [NONPAYMENT OF TAXES *and/or* FAILURE TO FILE A REQUIRED TAX RETURN] BECAUSE THE FORFEITURE OF A FOREIGN CORPORATION'S CORPORATE POWERS, RIGHTS, AND PRIVILEGES IN THIS STATE DEPRIVES IT OF LEGAL CAPACITY TO SUE, AND TO GRANT THE MOTION WOULD SAVE USELESS LABOR AND EXPENSE OTHERWISE SPENT IN LITIGATING THE OTHER ISSUES IN THE CASE IF THE SPECIAL DEFENSE PROVES MERITORIOUS.

A. Forfeiture of Foreign Corporation's Corporate Powers, Rights, and Privileges. The corporate powers, rights, and privileges of a foreign taxpayer in this state may be forfeited for failure to timely pay any tax, penalty, or interest, or any portion of it due and payable under *Revenue and Taxation Code Section 19001 et seq.* (payments and assessments under franchise and income tax laws) or under *Revenue and Taxation Code Section 23001 et seq.* (Bank and Corporation Tax Law) or any liability, or potion of it, due and payable under *Revenue and Taxation Code Section 19131* (penalties and additions to tax under franchise and income tax laws), or to file a tax return required by the Bank and Corporation Tax Law (*Rev. & Tax. Code §§ 23301* (tax and liability), *23301.5* (tax return)).

[*CONTINUE*]

B. Lack of Capacity to Sue. A corporation that has its powers suspended or forfeited under *Revenue and Taxation Code Section 23301* or *23301.5* for failure to pay taxes or other liabilities or to file returns lacks the legal capacity to prosecute or defend a civil action during the suspension or forfeiture (*see Reed v. Norman (1957) 48 Cal. 2d 338, 343, 309 P.2d 809* ; *Sade Shoe Co. v. Oschin &Snyder (1990) 217 Cal. App. 3d 1509, 1512* ; *Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp. (1957) 155 Cal. App. 2d 46, 49-50, 317 P.2d 649*).

C. Lack of Legal Capacity to Sue as Ground for Objection. [*See § 10.31[1], Paragraph D.*]

D. Plea in Abatement. The defense that plaintiff's corporate powers have been suspended for nonpayment of taxes and that it, therefore, lacks legal capacity to sue, is a plea in abatement (*see Traub Co. v. Coffee Break Serv., Inc. (1967) 66 Cal. 2d 368, 370, 57 Cal. Rptr. 846, 425 P.2d 790* ; *Sade Shoe Co. v. Oschin & Snyder (1990) 217 Cal. App. 3d 1509, 266 Cal. Rptr. 619* ; *Welco Constr., Inc. v. Modulux, Inc. (1975) 47 Cal. App. 3d 69, 72, 120 Cal. Rptr. 572*).

E. Separate Trial Authorized. [*See § 10.3[1], Paragraph F.*]

F. Purpose of Separate Trial. [*See § 10.30[1], Paragraph F.*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for separate trial of the special defense [*Code Civ. Proc. § 597*], pleaded in the answer [*Code Civ. Proc. § 431.30(b)(2)*], that plaintiff's or cross complainant's corporate powers have been suspended for nonpayment of taxes [*Rev. & Tax. Code § 23301*] and/or failure to file a tax return [*Rev. & Tax. Code § 23301.5*] and that it therefore lacks legal capacity to sue [*Code Civ. Proc. § 430.10(b)*].

This form is intended primarily to provide points and authorities relating to the assertion of this defense in the procedural context of a plea in abatement, and thus, the authorities relating to the substantive law of suspension and revivor are not set forth or discussed in their entirety in this form. For further discussion and additional points and authorities that may, in an appropriate case, be combined with these points and authorities, see Ch. 52, *Corporations* , in this publication.

This form contains authority relating only to suspension of a domestic corporation's powers or forfeiture of the powers of a foreign corporation qualified to do business in *California. Rev. & Tax. Code §§ 23301* and *23301.5* do not apply to foreign corporations that are required by *Corp. Code § 2105* to qualify to do intrastate business in California unless they have in fact qualified with the Secretary of State [*Rev. & Tax. Code § 23301.6*]. If the corporation is required to qualify but has not done so, the points and authorities in *§ 10.35* will provide the basis for the defense and plea in abatement.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Hearing

Counsel should have with him or her at the hearing any evidence that will establish the suspension or forfeiture of plaintiff's corporate powers. For example, a copy of the Secretary of State's certificate of the fact of suspension [*Rev. & Tax. Code § 23302(c)*; *see* discussion in *§ 10.34[3][a]*] may be attached to the declaration [*see Code Civ. Proc. §§ 2009, 2015.5*] supporting the motion if not already attached to the answer, and the certificate itself offered in evidence at the hearing if so requested by the judge. If the fact of suspension or forfeiture is admitted or not contested by the corporation, it would appear that the court would, at the hearing of the motion for separate trial, normally rule on the effect of the defense on the action, because that is a matter of law and there would be no facts to try at a separate trial of the special defense that plaintiff or cross complainant lacks legal capacity to sue.

[c] Defending the Motion

If the corporation's corporate powers were suspended or forfeited but have been revived [*see Rev. & Tax. Code §§ 23305-23305.2* (discussed in Ch. 52, *Corporations*)], the corporation should be prepared to offer in evidence at the hearing the certificate of revivor from the Franchise Tax Board [*see Rev. & Tax. Code § 23305a* (discussed in Ch. 52, *Corporations*)].

If plaintiff's or cross complainant's corporate powers have not yet been revived but the corporation has applied for revivor [*see Rev. & Tax. Code § 23305*] or intends to do so, the corporation should seek a continuance to allow it time to secure the certificate of revivor.

Even if the objection that a party's corporate powers have been suspended or forfeited is sustained, the party should,

before the action is dismissed or other adverse ruling is made, be given an opportunity of paying the taxes and reinstating the corporation if it manifests a willingness to do so [*see Reed v. Norman (1957) 48 Cal. 2d 338, 344, 309 P.2d 809* ; *Welco Constr. Inc. v. Modulux, Inc. (1975) 47 Cal. App. 3d 69, 70, 120 Cal. Rptr. 572*]. The granting of a continuance for such purpose is proper [*see Schwartz v. Magyar House, Inc. (1959) 168 Cal. App. 2d 182, 184, 335 P.2d 487* (leading case); *see also Welco Constr., Inc. v. Modulux, Inc. (1975) 47 Cal. App. 3d 69, 70, 120 Cal. Rptr. 572* ; *Old Fashion Farms v. Hamrick (1967) 253 Cal. App. 2d 233, 235, 61 Cal. Rptr. 254]* .

[d] Raising Objection

The objection that plaintiff's or cross complainant's corporate powers have been suspended or forfeited, that is, that the corporation lacks legal capacity to sue [*Code Civ. Proc. § 430.10(b)*], may be raised by demurrer if the ground of objection appears from the face of the corporation's pleading or from matter of which the court must or may take judicial notice [*Code Civ. Proc. § 430.30(a)*; *see also Code Civ. Proc. § 430.70* and *Evid. Code §§ 451-453* on judicial notice] or by answer if the ground of objection does not appear from the face of the pleading, whether or not it would appear from judicially noticed matter [*Code Civ. Proc. § 430.30(b)*], by alleging it as an affirmative defense [*see Code Civ. Proc. § 431.30(b)(2)*]. While the fact of suspension or forfeiture would not normally appear from the face of the pleading, it would seem the court could take judicial notice of the fact of suspension pursuant to either *Evid. Code § 452(c)*, authorizing the court to take judicial notice of the official acts of the executive department of any state, or *Evid. Code § 452(h)*, authorizing the court to take judicial notice of facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy [*see People v. Terry (1974) 38 Cal. App. 3d 432, 439, 113 Cal. Rptr. 233* (judicial notice of death certificate)]. On raising the issue by amended or supplemental answer and suggested procedures for raising the objection, see *§ 10.07*.

Notwithstanding the foregoing, the objection that a plaintiff's or cross complainant's corporate powers have been suspended or forfeited for nonpayment of taxes has been raised in a variety of ways other than by demurrer or by answer and motion for separate trial of that defense. For example, it has been raised by motion for summary judgment [*see Gar-Lo, Inc. v. Prudential Sav. & L. Ass'n (1974) 41 Cal. App. 3d 242, 243, 116 Cal. Rptr. 389*], on a motion to dissolve a writ of attachment [*A.E. Cook Co. v. K S Racing Enterprises, Inc. (1969) 274 Cal. App. 2d 499, 500, 79 Cal. Rptr. 123*], by a challenge at trial of plaintiff's standing to prosecute the action [*Welco Constr., Inc. v. Modulux, Inc. (1975) 47 Cal. App. 3d 69, 70, 120 Cal. Rptr. 572*], by an objection at trial to the introduction of any evidence by plaintiff [*Old Fashion Farms v. Hamrick (1967) 253 Cal. App. 2d 233, 234, 61 Cal. Rptr. 254*], by a motion to dismiss the corporation's appeal [*Peacock Hill Ass'n v. Peacock Lagoon Constr. Co. (1972) 8 Cal. 3d 369, 370-371, 105 Cal. Rptr. 29, 503 P.2d 285*], and on appeal from a judgment [*Rooney v. Vermont Inv. Corp. (1973) 10 Cal. 3d 351, 359, 110 Cal. Rptr. 353, 515 P.2d 297*].

[e] Waiver of Objection

The failure to object by demurrer or answer to a party's lack of legal capacity to sue normally constitutes a waiver of the objection [*see Code Civ. Proc. § 430.80(a)*]. But an objection based on the suspension of corporate powers is not waived so long as those powers remain suspended [*see Gar-Lo, Inc. v. Prudential Sav. & L. Ass'n (1974) 41 Cal. App. 3d 242, 244, 116 Cal. Rptr. 389*] and may be asserted so long as the corporation is under the disability [*Diverco Constructors, Inc. v. Wilstein (1970) 4 Cal. App. 3d 6, 12, 85 Cal. Rptr. 851*], provided a judgment on the merits has not been entered and become final [*Traub Co. v. Coffee Break Serv., Inc. (1967) 66 Cal. 2d 368, 369, 57 Cal. Rptr. 846, 425 P.2d 790* ; *see also Peacock Hill Ass'n v. Peacock Lagoon Constr. Co. (1972) 8 Cal. 3d 369, 371-372, 105 Cal. Rptr. 29, 503 P.2d 285* (explaining the holding in *Traub*); Witkin, California Procedure (2d ed.), vol. 3, §§ 72, 73, 956].

[f] Related Pleading and Practice Forms

For a form of affirmative defense that plaintiff's corporate powers have been suspended or forfeited for failure to pay taxes and for a form of notice of motion for separate trial, a form of order granting the motion, and a form of judgment, see California Forms of Pleading and Practice, Ch. 3, *Abatement of Actions* (Matthew Bender).

[g] Related Points and Authorities

For memoranda of points and authorities relating to additional aspects of the substantive law of suspension and revivor of corporate powers, rights, and privileges for nonpayment of taxes or failure to file returns, set forth in the context of motions supporting and opposing summary judgment, see Ch. 52, *Corporations* . That chapter also contains points and authorities relating to voidability of a contract entered into by a corporation during the period of suspension or forfeiture.

[3] Discussion of Authorities

[a] Suspension of Domestic Corporation's Corporate Powers, Rights, and Privileges

Rev. & Tax. Code § 23301 provides that, except for the purposes of filing an application for exempt status or amending the articles of incorporation as necessary either to perfect that application or to set forth a new name, the corporate powers, rights, and privileges of a domestic taxpayer may be suspended, and the exercise of the corporate powers, rights, and privileges of a foreign taxpayer in this state may be forfeited, if any of the following conditions occur:

(a) If any tax, penalty, or interest, or any portion thereof, that is due and payable under Chapter 4 (commencing with Section 19001) of Part 10.2 (payments and assessments under franchise and income tax laws), or under "this part" (the Bank and Corporation Law, *Rev. & Tax. Code § 23001 et seq.*), either at the time the return is required to be filed or on or before the 15th day of the ninth month following the close of the income year, is not paid on or before 6 p.m. on the last day of the 12th month after the close of the taxable year.

(b) If any tax, penalty, or interest, or any portion thereof, due and payable under Chapter 4 (commencing with Section 19001) of Part 10.2 (payments and assessments under franchise and income tax laws), or under "this part" (the Bank and Corporation Law, *Rev. & Tax. Code § 23001 et seq.*), upon notice and demand from the Franchise Tax Board, is not paid on or before 6 p.m. on the last day of the 11th month following the due date of the tax.

(c) If any liability, or any portion thereof, which is due and payable under Article 7 (commencing with Section 19131) of Chapter 4 of Part 10.2 (penalties and additions to tax under franchise and income tax laws), is not paid on or before 6 p.m. on the last day of the 11th month following the date that the tax liability is due and payable.

Rev. & Tax. Code § 23301.5 provides that, except for the purposes of filing an application for exempt status or amending the articles of incorporation as necessary either to perfect that application or to set forth a new name, the corporate powers, rights, and privileges of a domestic taxpayer may be suspended, and the exercise of the corporate powers, rights, and privileges of a foreign taxpayer in this state may be forfeited, if a taxpayer fails to file a tax return required by "this part" (i.e., the Bank and Corporation Tax Law, *Rev. & Tax. Code § 23001 et seq.*).

Rev. & Tax. Code §§ 23301 and *23301.5* apply only to a foreign corporation that has qualified to do business in California, but a taxpayer required under *Corp. Code § 2105* to qualify is not deemed to have done so unless the taxpayer has in fact qualified with the Secretary of State [*see Rev. & Tax. Code § 23301.6* (discussed in Ch. 52, *Corporations*)].

[b] Forfeiture of Foreign Corporation's Corporate Powers, Rights, and Privileges

See discussion in *§ 10.30[3][a]*.

[c] Lack of Capacity to Sue

Reed v. Norman *(1957) 48 Cal. 2d 338, 309 P.2d 809* , was a derivative action by a corporate stockholder for the dissipation by defendant directors and officers of corporate assets. From a judgment for defendants, plaintiff appealed. Defendants moved to dismiss the appeal on the ground, among others, that the corporation's right to engage in litigation had been suspended for failure to pay the state franchise tax under *Rev. & Tax. Code § 23301*. Although the Supreme Court held that under the circumstances of the case it would be inequitable to permit *Rev. & Tax. Code § 23301* to be used as a shield for protecting allegedly dishonest corporate officials and denied the motion to dismiss, it stated the general rule that a corporation may not prosecute or defend an action or appeal from an adverse judgment while its corporate rights are suspended for failure to pay taxes (*48 Cal. 2d 338, 343*).

In ***Sade Shoe Co. v. Oschin & Snyder*** *(1990) 217 Cal. App. 3d 1509, 266 Cal. Rptr. 619* , the plaintiff was suspended shortly after the cause of action accrued. The plaintiff then filed its return, paid its taxes, and filed a domestic stock statement. The Secretary of State informed plaintiff the penalty for failing to timely file the statement would be waived and that the Franchise Tax Board would be instructed to waive the penalty. This was expected to take about 90 days. Shortly thereafter, while owing the state $90.85 in penalties and interest, the plaintiff filed the complaint against the defendant. Nearly two years later the statute of limitations ran on the cause of action, and two and a half years after that, the defendant moved for summary judgment on the ground the statute of limitations had expired during plaintiff's suspension. Ten days later, plaintiff obtained a certificate of revivor, and 12 days later plaintiff opposed the summary judgment motion. The motion was granted, and plaintiff appealed.

The court of appeal affirmed. The plaintiff argued that it had substantially complied with the requirements to obtain a revivor of its corporate powers before the statute of limitations expired, and that it would be inequitable to dismiss the action. The court first stated that a corporation which has its powers suspended pursuant to Code Civ. Proc. §§ 23301 and 23301.5 lacks the legal capacity to prosecute or defend a civil action during its suspension (*217 Cal. App. 3d 1509, 1512*). From that it followed that the statute of limitations continues to run on an action filed by a corporation while its powers are suspended (*217 Cal. App. 3d 1509, 1513*). Thus, plaintiff's complaint had been ineffective to commence the action or toll the statute of limitations, which expired before the plaintiff had obtained the certificate of revivor (*217 Cal. App. 3d 1509, 1513*). The court further held that the plaintiff had not substantially complied with the requirements for revivor (*217 Cal. App. 3d 1509, 1516*), and therefore, affirmed.

Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp. *(1957) 155 Cal. App. 2d 46, 317 P.2d 649* , involved an action commenced in 1951 by a California corporation against a Nevada corporation to cancel a lease. During trial, plaintiff discovered that the defendant had forfeited its powers for failure to pay taxes. The parties stipulated that a certificate of suspension or forfeiture as of August 1, 1950 might be received in evidence, and the plaintiff moved to strike pleadings and enter defendant's default. The court denied the motion and entered judgment for the defendant. Plaintiff filed intention to move for new trial and filed a corrected certificate showing defendant's rights to transact business were forfeited on August 1, 1950 and had not been revived. At the hearing on the motion, the defendant produced a certificate of revivor. The motion was denied, and plaintiff appealed.

On appeal, the court noted that a corporation may not prosecute or defend an action, nor appeal from an adverse judgment while its corporate rights are suspended for failure to pay taxes (*155 Cal. App. 2d 46, 49-50*). Recognizing thatthe cases on which it relied dealt with suspension of domestic corporations, the court then held that the same principles applied a foreign corporation had forfeited its powers (*155 Cal. App. 2d 46, 50*). Finding that the defendant corporation's powers were not revived before the judgment was entered, the court reversed (*155 Cal. App. 2d 46, 51*).

[d] Plea in Abatement

Traub Co. v. Coffee Break Serv., Inc. *(1967) 66 Cal. 2d 368, 57 Cal. Rptr. 846, 425 P.2d 790* , was an appeal from the denial of cross defendants' motion to vacate and set aside a final judgment in favor of cross complainant, a

California corporation, on the ground that before entry of judgment and continuously to the time of the motion, cross complainant's corporate powers had been suspended for failure to pay corporate taxes [*Rev. & Tax. Code § 23301*] levied pursuant to the Bank and Corporation Tax Law. The cross complaint was filed in February 1960. Cross complainant's corporate powers were suspended on December 1, 1961. Judgment on the cross complaint was entered in August 1963. Cross defendants' motion was made in September 1964 and denied on October 29, 1964. Cross complainant's corporate powers were reinstated [*see Rev. & Tax. Code §§ 23305, 23305a*] on November 12, 1964. Cross defendants urged that the judgment was void for lack of jurisdiction. In affirming the order on the ground the judgment was not void and hence not subject to "the collateral attack attempted" (*66 Cal. 2d 368, 369*), the court said that a plea of lack of capacity of a corporation to maintain an action by reason of a suspension of its corporate powers for nonpayment of its taxes is a plea in abatement (*66 Cal. 2d 368, 370*). The court disapproved any contrary views expressed in *Belle Vista Inv. Co. v. Hassen (1964) 227 Cal. App. 2d 837, 39 Cal. Rptr. 184* (*66 Cal. 2d 368, 372*).

The facts and procedural background of ***Sade Shoe Co. v. Oschin & Snyder*** *(1990) 217 Cal. App. 3d 1509, 266 Cal. Rptr. 619* , are discussed in *§ 10.34[3][c]*. The primary issue was whether revivor could be affected by substantial compliance even though the corporation had not paid penalties and interest. In discussing the matter, the court of appeal noted that the defense of suspension is a plea in abatement and thus must be strictly construed against the party asserting it (*217 Cal. App. 3d 1509, 1515*).

Welco Constr., Inc. v. Modulux, Inc. *(1975) 47 Cal. App. 3d 69, 120 Cal. Rptr. 572* , was an action by a domestic corporation whose corporate powers had been suspended, about two months before the action was filed, for nonpayment of corporate franchise taxes. On the date set for trial, defendant challenged plaintiff's standing to prosecute the action because of the suspension. Plaintiff's motion for a continuance for the purpose of reviving the corporation was granted, and a certificate of revivor was obtained. Defendant's motion to amend the answer to plead the statute of limitations, which had not run the action was filed but had run before the certificate of revivor was issued, was granted and its subsequent motion for nonsuit was granted on the ground the action was barred by the statute of limitations. Plaintiff appealed from the subsequent judgment for defendant. The court of appeal affirmed the judgment. Although it recognized the rule that procedural steps taken in an action or proceeding by a suspended corporation may be validated retroactively by a certificate of revivor, it held that this rule did not, under *Rev. & Tax. Code § 23305a*, apply to prejudice any substantive defense, such as the bar of the statute of limitations, which accrued during the period of suspension (*47 Cal. App. 3d 69, 71*). In the course of its opinion, the court, quoting from *Traub Co. v. Coffee Break Serv. Inc. (1967) 66 Cal. 2d 368, 370, 57 Cal. Rptr. 846, 425 P.2d 790* , restated the rule that a plea of lack of capacity of a corporation to maintain an action by reason of a suspension of corporate powers for nonpayment of taxes is a plea in abatement (*47 Cal. App. 3d 69, 72*).

[4] Additional Authorities

[a] Lack of Capacity to Sue

Timberline Inc. v. Jaisinghani (1997) 54 Cal. App. 4th 1361, 64 Cal. Rptr. 2d 4 involved a suspended corporation that filed an application to renew a judgment under *Code Civ. Proc. § 683.110*. The clerk renewed the judgment. Defendant, on receiving notice that the judgment had been renewed, filed a motion in the trial court to vacate the renewal of judgment based on the corporation having been suspended and not being entitled to enjoy the state court's powers. The trial court denied the motion to vacate, and defendant appealed.

The court of appeal reversed, directing the trial court to vacate its order denying the motion and to enter a new order granting the motion. The court held that the renewal of an unsatisfied judgment is an invalid act if attempted by a suspended corporation that has not taken the necessary action to revive itself (*54 Cal. App. 4th 1361, 1368*). The court noted that a suspended corporation cannot prosecute or defend an action, appeal from an adverse judgment, or seek a writ of mandate. The court, however, also noted that a corporation's status only comes to light during litigation, the normal practice is for the trial court to grant a short continuance to enable a suspended corporation to effect

reinstatement (by paying back taxes, interest and penalties) to defend itself in court (*54 Cal. App. 4th 1361, 1366*). Moreover, the court pointed out cases which hold the effect of a corporation reviving itself by payment of delinquent taxes is to retroactively legitimize the corporation's prior acts (*54 Cal. App. 4th 1361, 1366-1367*).

[b] Plea in Abatement

Duncan v. Sunset Agricultural Minerals (1969) 273 Cal. App. 2d 489, 78 Cal. Rptr. 339 , which involved a corporate defendant whose corporate powers had been suspended, restates the rule that a plea of lack of capacity of a corporation to maintain an action by reason of a suspension of corporate powers for nonpayment of taxes is a plea in abatement.

California Points & Authorities

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CHAPTER 10 ABATEMENT AND SURVIVAL OF ACTIONS
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A. Pleas in Abatement

1-10 California Points & Authorities § 10.35

§ 10.35 Supporting Motion for Separate Trial of Special Defense Constituting Ground of Abatement to Prosecution of Action [Code Civ. Proc. § 597]--Lack of Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Foreign Corporation Suing on Intrastate Business Without Having Obtained Certificate of Qualification [Corp. Code §§ 2105, 2203(c)]

[1] FORM Supporting Motion for Separate Trial of Special Defense Constituting Ground of Abatement to Prosecution of Action [Code Civ. Proc. § 597]--Lack of Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Foreign Corporation Suing on Intrastate Business Without Having Obtained Certificate of Qualification [Corp. Code §§ 2105, 2203(c)]

[*Caption. See § 10.30[1].*]

A MOTION FOR SEPARATE TRIAL OF THE SPECIAL DEFENSE PLEADED IN THE ANSWER THAT _____ [PLAINTIFF *or* CROSS COMPLAINANT] LACKS LEGAL CAPACITY TO SUE ON INTRASTATE BUSINESS BECAUSE IT HAS FAILED TO SECURE A CERTIFICATE OF QUALIFICATION FROM THE CALIFORNIA SECRETARY OF STATE SHOULD BE GRANTED BECAUSE THE PLEA IS A GROUND OF ABATEMENT AND TO GRANT THE MOTION WOULD SAVE USELESS LABOR AND EXPENSE OTHERWISE SPENT IN LITIGATING THE OTHER ISSUES IN THE CASE IF THE SPECIAL DEFENSE PROVES MERITORIOUS.

A. Certificate of Qualification Required. A foreign corporation is prohibited from transacting intrastate business in California without having first obtained a certificate of qualification from the California Secretary of State (*Corp. Code § 2105(a)*).

B. Nonqualified Corporation Lacks Capacity to Sue. A foreign corporation that transacts intrastate business in this state without having complied with *Section 2105 of the Corporations Code* may not maintain any action or proceeding on any intrastate business, commenced before compliance (*Corp. Code § 2203(c)*).

C. Lack of Capacity to Sue as Ground for Objection. [*See § 10.31[1], Paragraph D.*]

D. Ground of Abatement. The failure of a foreign corporation to have obtained a certificate of qualification to transact intrastate business in California is a ground of abatement in any action by it on that intrastate business (*see Corp. Code § 2203(c)*; *Home Owners' Loan Corp. v. Gordon (1939) 36 Cal. App. 2d 189, 192, 97 P.2d 845*).

E. Separate Trial Authorized. [*See § 10.31[1], Paragraph F.*]

F. Purpose of Separate Trial. [*See § 10.30[1], Paragraph F.*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for separate trial of the special defense [*Code Civ. Proc. § 597*], pleaded in the answer [*Code Civ. Proc. § 431.30(b)(2)*], that plaintiff or cross complainant, a foreign corporation, lacks legal capacity to maintain the action [*Code Civ. Proc. § 430.10(b)*] on intrastate business because of its failure to have obtained a certificate of qualification from the California Secretary of State [*Corp. Code §§ 2105, 2203(c)*].

This form is intended primarily to provide points and authorities relating to the assertion of this defense in the procedural context of a plea in abatement, and thus the authorities detailing the substantive law relating to the qualification requirements to do intrastate business are neither set forth nor discussed in their entirety in this form. For further discussion and additional points and authorities regarding the qualification requirements to do intrastate business, see Ch. 52, *Corporations* . This form may be expanded to address a particular situation by addition of points and authorities from Ch. 52, *Corporations* .

Note also that in many situations an evidentiary hearing will be necessary to determine whether the extent of intrastate business is sufficient to require the foreign corporation to obtain a certificate of qualification [*see, e.g., Mediterranean Exports, Inc. v. Superior Court (1981) 119 Cal. App. 3d 605, 615, 174 Cal. Rptr. 169* (motion to strike treated as motion for summary judgment); *see also Corp. Code § 191(a)*; *Automotriz Del Golfo de Cal. v. Resnick (1957) 47 Cal. 2d 792, 794, 306 P.2d 1* ; *Home Owners' Loan Corp. v. Gordon (1939) 36 Cal. App. 2d 189, 192, 97 P.2d 845* (certificate not required of foreign corporation engaging in interstate commerce or of corporations organized under laws of United States)]. Points and authorities describing the extent of intrastate business that requires a certificate may be found in Ch. 52, *Corporations* .

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Hearing

Counsel should have with him or her at the hearing any evidence necessary to sustain the defense of lack of legal capacity to sue because of plaintiff's failure to have secured a certificate of qualification to do intrastate business in California and be ready to present it should the judge so request. If there is no dispute as tothe facts and, hence, nothing to be tried, it would appear the court would dispose of the defense at the hearing of the motion for separate trial and deny the motion. That is, if it appears that plaintiff or cross complainant is not a foreign corporation required to qualify in California and has not done so or that, if it is required to qualify and has not done so, the action is not on intrastate business, or that it has qualified to do business in California, the court would so rule at that time and deny the motion. Conversely, if it appears that plaintiff or cross complainant is required to qualify and has not done so and that the action is on intrastate business, the court would, on application by the corporation, grant a continuance to enable it to secure a certificate of qualification.

[c] Certificate of Qualification

A foreign corporation [*see Corp. Code § 171* (defining foreign corporation)] is prohibited from transacting intrastate business in California without having first obtained a certificate of qualification from the California Secretary of State. To obtain a certificate, the corporation must [*Corp. Code § 15*] file, on a form prescribed by the Secretary of State, a statement and designation, signed by a corporate officer, stating the following [*Corp. Code § 2105(a)*]:

(1) Its name and the state or place of its incorporation or organization;

(2) The address of its principal executive office;

(3) The address of its principal office in this state, if any;

(4) The name of an agent on whom process directed to the corporation may be served in California (this designation must comply with the provisions of *Corp. Code § 1502(b)*);

(5) Its irrevocable consent to service of process directed to it on the agent designated and to service of process on the Secretary of the State if the agent so designated or the agent's successor is no longer authorized to act or cannot be found at the address given; and

(6) If the corporation is an insurer which will be subject to the Insurance Code, a statement of that fact.

The statement and designation must have annexed to it a certificate by an authorized public official of the state or place of incorporation to the effect that the corporation is an existing one in good standing in that state or place or, in the case of an association, an officers' certificate stating that it is a validly organized and existing business association under the laws of a specified foreign jurisdiction [*Corp. Code § 2105(b)*].

Any corporate agent, before it may be designated by a foreign corporation as its agent for service of process, must comply with *Corp. Code § 1505* [*Corp. Code § 2105(c)*].

On payment of the required fees, the Secretary of State will, subject to the provisions of *Corp. Code § 2106(b)*, relating to the corporate name, file the statement and designation prescribed in *Corp. Code § 2105* and issue a certificate of qualification stating the date the statement and designation were filed and that the corporation is qualified to transact intrastate business, subject to any licensing requirements otherwise imposed by California laws [*Corp. Code § 2106(a)*].

[d] Raising Objection

The objection that plaintiff or cross complainant is a foreign corporation suing on intrastate business without having obtained a certificate of qualification from the California Secretary of State [*see Corp. Code § 2105*] and that it,

therefore, lacks legal capacity to sue [*Code Civ. Proc. § 430.10(b)*; *Corp. Code § 2203(c)*], may be raised by demurrer if the ground of objection appears from the face of the complaint or cross complaint or from matter of which the court must or may take judicial notice [*Code Civ. Proc. § 430.30(a)*; *see also Code Civ. Proc. § 430.70* and *Evid. Code §§ 451-453* on judicial notice; *but see Los Angeles Ry. Co. v. Davis (1905) 146 Cal. 179, 180-181, 79 P. 865* (failure to allege affirmatively capacity of corporation to maintain is not ground for general demurrer)]. If the ground of objection does not appear from the face of the complaint or cross complaint, whether or not it would appear from judicially noticed matter, the objection may be taken by answer [*Code Civ. Proc. § 430.30(b)*] by alleging it as an affirmative defense [*Code Civ. Proc. § 431.30(b)(2)*] or, if plaintiff or cross complainant has falsely alleged that it is qualified to transact business in California, by denying that allegation [*see Code Civ. Proc. § 431.30(b)(1)*].

[e] Waiver of Objection

Failure to object by demurrer [*Code Civ. Proc. § 430.30(a)*] or answer [*Code Civ. Proc. § 430.30(b)*] to plaintiff's or cross complainant's lack of legal capacity to sue [*Code Civ. Proc. § 430.10(b)*] is declared by *Code Civ. Proc. § 430.80(a)* to be a waiver of that objection. Thus, it has been held that unless plaintiff foreign corporation's failure to take the required steps to authorize it to do business in this state is put in issue by demurrer or answer, the objection is waived [*see H.D. Haley & Co. v. McVay (1924) 70 Cal. App. 438, 441, 233 P. 409* ; *see also Bernheim Distilling Co. v. Elmore (1909) 12 Cal. App. 85, 86, 106 P. 720* (failure of plaintiff foreign corporation to file in California Secretary of State's office a certified copy of its articles of incorporation and designation of agent for service of process as required by former statute, held waived by failure to raise it by answer)].

[f] Related Pleading and Practice Forms

For a form of affirmative defense that plaintiff foreign corporation is suing on intrastate business without having obtained a certificate of qualification, and for forms of notice of motion for separate trial, order granting the motion, andjudgment, see California Forms of Pleading and Practice, Ch. 3, *Abatement of Actions* (Matthew Bender).

[g] Related Points and Authorities

Ch. 52, *Corporations* contains memoranda of points and authorities, in the context of motions supporting and opposing summary judgment, relating to additional aspects of the substantive law regarding the capacity of a foreign corporation to maintain an action in California on intrastate business.

[3] Discussion of Authorities

[a] Certificate of Qualification Required

Corp. Code § 2105(a) provides that a foreign corporation shall not transact intrastate business without having first obtained from the Secretary of State a certificate of qualification, and that to obtain such certificate it "shall" file, on a form prescribed by the Secretary of State, a statement and designation signed by a corporate officer stating the matters listed in the section.

Corp. Code § 15 defines "shall," as used in the code, as mandatory.

[b] Nonqualified Corporation Lacks Capacity to Sue

Corp. Code § 2203(c) in pertinent part provides that a foreign corporation subject to the provisions of *Corp. Code § 2100 et seq.* that transacts intrastate business without complying with *Corp. Code § 2105* shall not maintain any action or proceeding on any intrastate business so transacted in any court of this state, commenced prior to compliance with *Corp. Code § 2105*, until it has complied with the provisions thereof.

[c] Ground of Abatement

Corp. Code § 2203(c) prohibits maintenance of an action in any court in this state on intrastate business by a foreign corporation which has failed to comply with *Corp. Code § 2105* (to obtain certificate of qualification), the action has been commenced prior to compliance, until plaintiff has (1) complied with the provisions of *Corp. Code § 2105*, (2) paid the Secretary of State a penalty of $250 in addition to the fees due for filing the statement and designation required by *Corp. Code § 2105*, and (3) filed, with the clerk of the court in which the action is pending, receipts showing the payment of the fees and penalty and all franchise taxes and any other taxes on business or property in this state that should have been paid for the period during which it transacted intrastate business.

Home Owners' Loan Corp. v. Gordon *(1939) 36 Cal. App. 2d 189, 97 P.2d 845* , although holding that plaintiff, as a corporation organized under laws of the United States, was not subject to the then-applicable requirements for qualification of foreign corporations to do intrastate business in California, did comment that a matter of record, such as the failure to obtain qualification, must be alleged positively and not on information and belief and that "This rule is particularly applicable to a pleading in abatement which, being dilatory in nature, is to be strictly construed" (*36 Cal. App. 2d 189, 192)* .

[4] Additional Authorities

[a] Ground of Abatement

In *Bernheim Distilling Co. v. Elmore (1909) 12 Cal. App. 85, 106 P. 720* , the court of appeal affirmed the refusal of the trial court to allow an amendment to the answer to set forth plaintiff foreign corporation's failure to comply with the then-applicable requirements for qualification of foreign corporations to do intrastate business in California. The court noted that the defense was disfavored as a plea in abatement (*12 Cal. App. 85, 86)* .

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§ 10.36 Supporting Motion for Separate Trial of Special Defense Constituting Ground of Abatement to Prosecution of Action [Code Civ. Proc. § 597]--Defect of Parties [Code Civ. Proc. § 430.10(d)]

[1] FORM Supporting Motion for Separate Trial of Special Defense Constituting Ground of Abatement to Prosecution of Action [Code Civ. Proc. § 597]--Defect of Parties [Code Civ. Proc. § 430.10(d)]

[*Caption. See § 10.30[1].*]

A MOTION FOR SEPARATE TRIAL OF THE SPECIAL DEFENSE PLEADED IN THE ANSWER THAT THERE IS A DEFECT OF PARTIES _____ [PLAINTIFF *or* DEFENDANT *or* CROSS COMPLAINANT *or* CROSS DEFENDANT] SHOULD BE GRANTED BECAUSE THE PLEA IS A GROUND OF ABATEMENT AND TO GRANT THE MOTION WOULD SAVE USELESS LABOR AND EXPENSE OTHERWISE SPENT IN LITIGATING THE OTHER ISSUES IN THE CASE IF THE SPECIAL DEFENSE PROVES MERITORIOUS.

A. Defect of Parties as Ground for Objection. A party against whom a _____ [complaint *or* cross complaint] has been filed may object by answer on the ground there is a defect of parties (*Code Civ. Proc. §§ 430.10(d), 430.30(b)*).

B. Plea in Abatement. The plea that there is a defect, or nonjoinder, of parties is a plea in abatement (*Tingley v. Times Mirror (1907) 151 Cal. 1, 12-13, 89 P. 1097*).

C. Separate Trial Authorized. [*See § 10.31[1], Paragraph F.*]

D. Purpose of Separate Trial. [*See § 10.30[1], Paragraph F.*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for separate trial of the special defense [*Code Civ. Proc. § 597*], pleaded in the answer [*Code Civ. Proc. § 431.30(b)(2)*], that there is a defect of parties [*Code Civ. Proc. § 430.10(d)*]. For an alternative proceeding, see discussion in *§ 10.36[2][b]*.

When appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

This form does not cover the alleged misjoinder of a party, although misjoinder is discussed in these Comments to the extent necessary to distinguish the two grounds. Any misjoinder of parties would normally appear from the face of the complaint or cross complaint and, hence, the objection on this ground would be taken by demurrer [*see Code Civ. Proc. § 430.30(a)*; *Follansbee v. Benzenberg (1954) 122 Cal. App. 2d 466, 474-475, 265 P.2d 183* (alleged misjoinder of plaintiffs); and discussion in *§ 10.36[2][e]*], rather than by answer [*see Code Civ. Proc. § 430.30(b)*] and motion for separate trial of that defense under *Code Civ. Proc. § 597*. For forms of demurrer on this ground, see California Forms of Pleading and Practice, Ch. 3, *Abatement of Actions* , and Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For memoranda of points and authorities supporting and opposing a demurrer on this ground, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender).

[b] Alternative to Separate Trial

Although the defense that there is a defect of parties is a plea in abatement and, hence, a defense for which a separate trial under *Code Civ. Proc. § 597* is authorized, it appears that the more common method for obtaining an adjudication of this issue, where the ground of the objection does not appear from the face of the complaint or cross complaint, is to plead the defense in the answer [*see Code Civ. Proc. § 431.30(b)(2)*] and, then, by noticed motion [*see Code Civ. Proc. §§ 1005, 1005.5, 1010*], move for an order [*Code Civ. Proc. § 1003*] compelling joinder of the omitted party under *Code Civ. Proc. § 389(a)*. For forms for use on a noticed motion proceeding to obtain an order compelling joinder, see California Forms of Pleading and Practice, Ch. 395, *Parties* (Matthew Bender). For memoranda of points and authorities supporting and opposing such a motion, see Ch. 168, *Parties* .

[c] Hearing

Counsel should have with him or her at the hearing any evidence necessary to sustain the defense of nonjoinder and be ready to present it should the judge so request. If there is no dispute as to the facts and, hence, nothing to be tried, it would appear that the court would dispose of the defense at that time. That is, if it appears that the omitted party is not one whose joinder is required under *Code Civ. Proc. § 389*, the court would so rule and deny the motion for separate trial. Conversely, if it appears that the omitted party is a person described in *Code Civ. Proc. § 389(a)* and that such person can be joined without depriving the court of jurisdiction over the subject matter of the action, the court would so rule, order both that the person be joined as a party [*see Code Civ. Proc. § 389(a)*] and that an amended complaint, or amendment to the complaint, be filed to show such joinder, and deny the motion for separate trial. If, however, it appears that the person is one described in *Code Civ. Proc. § 389(a)* as one who cannot be made a party, the court might either proceed to consider the factors listed in *Code Civ. Proc. § 389(b)* and then rule on whether the action is to proceed without the omitted party or be dismissed for nonjoinder, or it might order that these issues be determined on a

separate trial of the special defense of nonjoinder.

[d] Defect or Misjoinder of Parties

A party against whom a complaint or cross complaint has been filed may object to it on the ground there is a defect (nonjoinder) or misjoinder of parties [*Code Civ. Proc. § 430.10(d)*]. The defect or misjoinder may be of a party plaintiff or cross complainant or of a party defendant or cross defendant. Whether there is a defect of parties can be determined only by reference to the compulsory joinder statute [*Code Civ. Proc. § 389*], defining what persons must be made parties to an action. An objection that there is a misjoinder of parties can be determined only by a reference to both that statute and to the permissive joinder of parties statutes [*Code Civ. Proc. §§ 378, 379*], defining who may be joined as parties plaintiff or defendant to an action.

As is true with lack of legal capacity to sue, a defect or misjoinder of a party is a ground of abatement [*see Tingley v. Times Mirror (1907) 151 Cal. 1, 12-13, 89 P. 1097* ; Witkin, California Procedure (2d ed), Vol. 3, *Pleading,* § 951; Clark on Code Pleading (2d ed), § 73].

[e] Raising Objection

The objection that there is a defect (nonjoinder) or misjoinder of parties [*Code Civ. Proc. § 430.10(d)*] may be taken by demurrer where the ground appears from the face of the complaint or cross complaint or from matters of which the courtmust or may take judicial notice [*Code Civ. Proc. § 430.30(a)*; *see also Code Civ. Proc. § 430.70* and *Evid. Code §§ 451-453* on judicial notice] or by answer where the ground of objection does not appear from the face of the pleading, whether or not it would appear from judicially noticed matter [*Code Civ. Proc. § 430.30(b)*; *see also Stratford Irrigation Dist. v. Empire Water Co. (1941) 44 Cal. App. 2d 61, 70, 111 P.2d 957*].

[f] Waiver of Objection

Statute provides that the objection that there is a defect or misjoinder of parties [*Code Civ. Proc. § 430.10(d)*] is waived if not raised by demurrer or answer [*Code Civ. Proc. § 430.80(a)*], and this rule normally applies [*see Tyrone v. Kelley (1973) 9 Cal. 3d 1, 14, 106 Cal. Rptr. 761, 507 P.2d 65* (nonjoinder of plaintiff) *Engineering etc. Corp. v. Longbridge Inv. Co. (1957) 153 Cal. App. 2d 404, 421, 314 P.2d 563* (nonjoinder of defendant); *Shahabian v. Najarian (1936) 14 Cal. App. 2d 435, 441-442, 58 P.2d 396* (misjoinder of defendant)].

However, the objection that a person who is determined to be an indispensable party [*see Code Civ. Proc. § 389(b)*] has not been joined is not waived by failure to take it by demurrer or answer, but, rather, may be taken at any time [*see Bank of Cal. v. Superior Court (1940) 16 Cal. 2d 516, 521-523, 106 P.2d 879* ; *Fraser-Yamor Agency, Inc. v. Del Norte County (1977) 68 Cal. App. 3d 201, 214, 137 Cal. Rptr. 118*].

[g] Abatement of Action

[i] On Ground of Defect of Parties

If a nonjoined person is an indispensable party who cannot be joined, the action will be dismissed [*see Code Civ. Proc. § 389(b)*]. If the person can be, but has not been, joined, the court is required to order joinder [*see Code Civ. Proc. § 389(a)*].

[ii] Misjoinder of Parties

A misjoinder of parties will seldom, if ever, result in the abatement of an action or proceeding. First, unless it appears that the interest of a properly named defendant will be adversely affected by the misjoinder of another party, only the improperly joined party may raise the objection of misjoinder [*see California Farm & Fruit Co. v. Schiappa-Pietra*

(1907) 151 Cal. 732, 744-745, 91 P. 593 (no prejudice to defendant in alleged improper joinder of plaintiffs); *Kennedy v. Bank of America (1965) 237 Cal. App. 2d 637, 653, 47 Cal. Rptr. 154* (properly named defendant not adversely affected by alleged misjoinder of other defendants)]. Secondly, if the misjoinder can be corrected by severance of the actions and parties, that may be done [*see Code Civ. Proc. § 1048(b)*]. Thirdly, if a person who has no interest in the action is joined as a party, the court may, under *Code Civ. Proc. § 578*, give judgment in favor of a defendant entitled to recover against a defendant who is liable and dismiss the action as to the other parties [*Gillespie v. Gouly (1908) 152 Cal. 643, 645, 93 P. 856* (improper joinder of plaintiffs)].

[h] Related Pleading and Practice Forms

For forms of affirmative defenses and demurrers on the ground of nonjoinder and misjoinder of a party plaintiff or defendant, a notice of motion for separate trial, an order granting the motion, and judgment, see California Forms of Pleading and Practice, Ch. 3, *Abatement of Actions* (Matthew Bender). For alternative forms of demurrers on this ground, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender).

For forms for use on a noticed motion proceeding to obtain joinder of an omitted party, see California Forms of Pleading and Practice, Ch. 395, *Parties* (Matthew Bender).

[i] Related Points and Authorities

For memoranda of points and authorities supporting and opposing a demurrer to a complaint or cross complaint on the ground of defect or misjoinder of parties, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For memoranda of points and authorities supporting and opposing a noticed motion to compel joinder of an omitted party, see Ch. 168, *Parties* .

[3] Discussion of Authorities

[a] Defect of Parties as Ground for Objection

Code Civ. Proc. § 430.10(d) provides that the party against whom a complaint or cross complaint has been filed may object, by demurrer or answer as provided in *Code Civ. Proc. § 430.30*, to the pleading on the ground that there is a defect of parties.

Code Civ. Proc. § 430.30(b) provides that any ground for objection (listed in *Code Civ. Proc. § 430.10*) to a complaint or cross complaint does not appear on the face of the pleading, the objection may be taken by answer.

[b] Plea in Abatement

Tingley v. Times Mirror *(1907) 151 Cal. 1, 89 P. 1097* , was an action for libel, in which defendant's motion during trial to file an amended answer to plead a defect of parties in that plaintiff wife had failed to join her husband as a party plaintiff, as then required by statute, and that plaintiff wife lacked capacity to sue, was denied, and judgment was for plaintiff. In affirming the judgment on the ground the motion was untimely and the trial court, therefore, did not err in denying it, the Supreme Court characterized the above pleas as pleas in abatement (*151 Cal. 1, 13-14*).

California Points & Authorities

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1-10 California Points & Authorities § 10.37

§ 10.37 Supporting Motion for Separate Trial of Special Defense Constituting Ground of Abatement to Prosecution of Action [Code Civ. Proc. § 597]--Action Is Premature [Code Civ. Proc. § 430.10(e)]

[1] FORM Supporting Motion for Separate Trial of Special Defense Constituting Ground of Abatement to Prosecution of Action [Code Civ. Proc. § 597]--Action Is Premature [Code Civ. Proc. § 430.10(e)]

[*Caption. See § 10.30[1].*]

A MOTION FOR SEPARATE TRIAL OF THE SPECIAL DEFENSE PLEADED IN THE ANSWER THAT THE ACTION IS PREMATURE SHOULD BE GRANTED SINCE THE PLEA IS A GROUND OF ABATEMENT AND TO GRANT THE MOTION WOULD SAVE USELESS LABOR AND EXPENSE OTHERWISE SPENT IN LITIGATING THE OTHER ISSUES IN THE CASE IF THE SPECIAL DEFENSE PROVES MERITORIOUS.

A. Nonexistence of Cause of Action as Ground for Objection. A party against whom a _____ [complaint *or* cross complaint] has been filed may object to it by answer on the ground it fails to state a cause of action (*see Code Civ. Proc. §§ 430.10(e), 430.30(b)*).

B. Premature Action. No cause of action exists where the action is prematurely filed (*Bank of Italy etc. Ass'n v. Bentley (1933) 217 Cal. 644, 647-648, 20 P.2d 940*).

C. Plea in Abatement. The plea that the action is premature is a plea in abatement (*Kelley v. Upshaw (1952) 39 Cal. 2d 179, 186, 246 P.2d 23*).

D. Separate Trial Authorized. [*See § 10.31[1], Paragraph F.*]

E. Purpose of Separate Trial. [*See § 10.30[1], Paragraph E.*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for separate trial of the special defense [*Code Civ. Proc. § 597*], pleaded in the answer [*Code Civ. Proc. § 431.30(b)(2)*], that the action is premature.

Counsel should add argument linking the points and authorities in this form with the facts of his or her case.

[b] Hearing

Counsel should have with him or her at the hearing any evidence necessary to sustain the defense of prematurity of action. If there is no dispute as to the facts and, hence, nothing to be tried, it would appear that the court would dispose of the defense at that time. That is, if it appears that the action is not premature, the court would so rule and deny the motion for separate trial. Conversely, if it appears that the action is premature, and has not yet matured [*see § 10.39*], the court would so find, deny the motion for separate trial, and dismiss the action without prejudice.

[c] Raising Objection; Waiver

The objection that the action is premature may be raised by general demurrer [*Code Civ. Proc. § 430.10(e)*], that is, on the ground the complaint or cross complaint fails to state facts sufficient to constitute a cause of action in that it appears on the face of the pleading or from judicially noticed matter that the action is premature [*see Code Civ. Proc. §§ 430.10, 430.30*; *see also Code Civ. Proc. § 430.70* and *Evid. Code §§ 451-453* on judicial notice]. Where the defect does not appear from the face of the complaint or cross complaint, whether or not it would appear from judicially noticed matter, the objection may be taken by answer [*Code Civ. Proc. §§ 430.10, 430.30(b)*].

While the objection that the pleading fails to state facts sufficient to constitute a cause of action [*Code Civ. Proc. § 430.10(e)*] is normally not waived by failure to take it by demurrer or answer [*see Code Civ. Proc. § 430.80(a)*], the objection that the action is premature is waived if not timely raised [*see, e.g., Kelley v. Upshaw (1952) 39 Cal. 2d 179, 186-189, 246 P.2d 23* ; *State Medical Educ. Bd. v. Roberson (1970) 6 Cal. App. 3d 493, 501, 86 Cal. Rptr. 258*].

[d] Related Pleading and Practice Forms

For a form of affirmative defense and a form of demurrer on the ground the action is premature, a form of notice of motion for separate trial, a form of order granting the motion, and a form of judgment, see California Forms of Pleading and Practice, Ch. 3, *Abatement of Actions* (Matthew Bender).

[3] Discussion of Authorities

[a] Nonexistence of Cause of Action as Ground for Objection

Code Civ. Proc. § 430.10(e) provides in pertinent part that the party against whom a complaint or cross complaint has been filed may object, by demurrer or answer as provided in *Code Civ. Proc. § 430.30*, to the pleading on the ground that the pleading does not state facts sufficient to constitute a cause of action.

Code Civ. Proc. § 430.30(b) provides that any ground for objection (listed in *Code Civ. Proc. § 430.10*) to a complaint or cross complaint does not appear on the face of the pleading, the objection may be taken by answer.

[b] Premature Action

Bank of Italy etc. Ass'n v. Bentley *(1933) 217 Cal. 644, 20 P.2d 940* , was an action on a promissory note. The note was secured by a trust deed on real property which was of substantial value and which had not, at the time the action was commenced, been sold under the power of sale provision in the trust deed. Defendants, by way of defense, alleged, among other things, that the note was secured and that the action was premature because at the time the complaint was filed, no cause of action existed. The trial court upheld this contention on the theory that no action may be brought on a note secured by a trust deed unless and until the security is exhausted, and rendered judgment for defendants. The Supreme Court also agreed with the contention (*217 Cal. 644, 648*). Affirming the judgment (*217 Cal. 644, 659*), it pointed out that where the security has not been exhausted an action on the note is premature (*217 Cal. 644, 650*) and that every complaint is predicated on the theory that plaintiff is entitled to judgment at the time of its filing (*217 Cal. 644, 658*).

[c] Plea in Abatement

Kelley v. Upshaw *(1952) 39 Cal. 2d 179, 246 P.2d 23* , was an action on an extension agreement for payment of a promissory note. The note was for $17,900 loaned to defendants Upshaw and was payable at the rate of $200 per week plus interest. Defendants defaulted. Plaintiff entered into an extension agreement executed by defendants Upshaw and defendant Howarth which required immediate payment of $1,200 and payment of the balance of $50 per week plus interest. The agreement provided that plaintiff would accept a specified reduced sum as full payment if paid on or before a specified date. It further provided that in the event of default, the entire balance of the note plus interest was to be due and was to be payable at the rate of $50 per week plus interest. On defendants' subsequent default, plaintiff sued. Following trial and after entry of a minute order in which judgment was ordered against defendants and plaintiff's counsel was directed to prepare findings, defendant Howarth retained an attorney who, in his objections to the findings, took the position that Howarth could not be liable for more than the accrued installments of principal and interest and that plaintiff could not recover future installments which had not yet accrued. Judgment was for plaintiff for accrued principal and interest payable forthwith and for the balance of the note payable at the rate of $50 per week plus interest. The Supreme Court, although it affirmed the judgment on the ground the trial court had correctly distinguished between accrued installments and the total amount provided for in the agreement (*39 Cal. 2d 179, 186*), characterized defendant Howarth's objection that the action with respect to the unaccrued installments was premature as a dilatory plea, a plea in abatement (*39 Cal. 2d 179, 186*).

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1-10 California Points & Authorities § 10.38

§ 10.38 Supporting Motion [Code Civ. Proc. §§ 1003, 1010] for Stay of Action on Ground of Another Action Pending [Code Civ. Proc. § 430.10(c)] in Another Jurisdiction

[1] FORM Supporting Motion [Code Civ. Proc. §§ 1003, 1010] for Stay of Action on Ground of Another Action Pending [Code Civ. Proc. § 430.10(c)] in Another Jurisdiction

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES. IN SUPPORT OF MOTION FOR STAY OF
vs.	)	ACTION (ANOTHER ACTION PENDING IN AN-
_____ [*name*],	)	OTHER JURISDICTION)
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

A MOTION FOR AN ORDER STAYING AN ACTION SHOULD BE GRANTED WHERE THERE IS ANOTHER ACTION PENDING BETWEEN THE SAME PARTIES ON THE SAME CAUSE IN A COURT OF ANOTHER JURISDICTION AND THE STAY IS NECESSARY TO AVOID A MULTIPLICITY OF SUITS AND TO PREVENT VEXATIOUS LITIGATION.

A. Motion to Stay. A defendant in a California action may move to stay that action if there is another action pending between the same parties on the same cause in a _____ [federal court *or* court of a sister state] (_____ [*if other action is in federal court*] *Thomson v. Continental Ins. Co. (1967) 66 Cal. 2d 738, 746, 59 Cal. Rptr. 101, 427 P.2d 765* [*if in sister state court: Simmons v. Superior Court (1950) 96 Cal. App. 2d 119, 122-123, 214 P.2d 844*]).

B. Power of Court to Stay Action. A California court may, where there is another action pending between the same parties on the same cause in the court of another jurisdiction, stay or suspend the action before it while awaiting decision in the first action (*Simmons v. Superior Court (1950) 96 Cal. App. 2d 119, 123, 214 P.2d 844*).

C. Purpose of Rule. The purpose of the rule permitting a stay of the secondaction if a prior action between the same parties on the same cause is pending in another jurisdiction is to avoid a multiplicity of suits and prevent vexatious litigation, conflicting judgments, confusion, and unseemly controversy between litigants and the courts (*Simmons v. Superior Court (1950) 96 Cal. App. 2d 119, 125, 214 P.2d 844*).

D. Denial of Motion as Abuse of Discretion. A trial court abuses its discretion in denying a motion to stay a California action on the ground of another action pending between the same parties on the same cause in a court of another jurisdiction where it is shown: (1) the issues raised in the California action can be litigated in the prior pending foreign action; (2) a stay of the California action would impose no hardship on the plaintiff; and (3) the stay is necessary to avoid a multiplicity of actions and to prevent vexation or hardship, or both, to the defendant (*Simmons v. Superior Court (1950) 96 Cal. App. 2d 119, 125, 214 P.2d 844*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a nonstatutory motion for an order staying the action on the ground there is another action pending between the same parties on the same cause in a federal court or a court of a sister state.

Counsel should add argument linking the points and authorities in this form with the facts of his or her case. Counsel will have to show that the other pending action is between the same parties on the same cause. That is, he or she will have to make the same showing as is required to support the plea of another action pending between the same parties on the same cause in a California state court. If there is any doubt about the identity of the parties or issues, or as to whether the prior action is "pending," counsel should add to these memorandum points and authorities on the law regarding those issues. Points and authorities that may be adapted for incorporation in this form are included in Ch. 71, *Demurrers and Motions for Judgment on the Pleadings , § 71.65*.

[b] Nature of Stay

A stay of an action is similar to a continuance [*Thomson v. Continental Ins. Co. (1967) 66 Cal. 2d 738, 746 fn. 4, 59 Cal. Rptr. 101, 427 P.2d 765*], except that a continuance is normally directed to a single court proceeding, such as a hearing or trial, whereas a stay is directed to all court proceedings in a case. A court that stays an action or proceeding retains jurisdiction over the parties and over the cause [*Ferreira v. Ferreira (1973) 9 Cal. 3d 824, 841, 109 Cal. Rptr. 80, 512 P.2d 304* (involving application of forum non conveniens doctrine)].

[c] Factors Considered on Motion

A motion for a stay on the ground of another action pending between the same parties on the same cause in a United States federal court or in a court of a sister state is addressed to the sound discretion of the trial court. In exercising its discretion, whether or not to grant the motion, the court will consider the importance of discouraging multiple litigation designed solely to harass an adverse party, the importance of avoiding unseemly conflicts with the courts of other jurisdictions, whether the rights of the parties can best be determined by the court of the other jurisdiction because of the nature of the subject matter, the availability of witnesses, and the stage to which the proceedings in the other court have already advanced [*Thomson v. Continental Ins. Co. (1967) 66 Cal. 2d 738, 746-747, 59 Cal. Rptr. 101, 427 P.2d 765* ; *see § 10.40*]. However, if the other action is pending in a federal court in California and, hence, hardship on the plaintiff in being forced to litigate in a distant state is not a consideration, the strong policy of comity may prevail so as to require a stay of the California action [*see Thomson v. Continental Ins. Co. (1967) 66 Cal. 2d 738, 747-748, 59 Cal. Rptr. 101, 427 P.2d 765* ; *see also Clark's Fork Reclamation Dist. v. Johns (1968) 259 Cal. App. 2d 366, 369, 66 Cal. Rptr. 370*].

[d] Court Order

If the motion for a stay is granted, the court will normally make an order staying the action until further order of the court or until final determination, or termination, of the prior pending action, whichever occurs first. The completion or other termination of the prior pending action removes the bar to the California action which can then proceed, subject to any res judicata plea the defendant may assert by way of amended answer on the basis of any foreign judgment [*see Thomson v. Continental Ins. Co. (1967) 66 Cal. 2d 738, 746 fn. 4, 59 Cal. Rptr. 101, 427 P.2d 765*].

[e] Alternative Procedure to Motion for Stay

The nonstatutory motion for a stay of a California action the same action is pending in a court of another jurisdiction between the same parties is the only procedure that has been endorsed by California courts to suspend the California action pending a final determination of the prior action [*see, e.g., Simmons v. Superior Court (1950) 96 Cal. App. 2d 119, 123, 214 P.2d 844*]. Moreover, courts have stated that a prior action is ground for abatement only it is between the sameparties on the same cause and is pending in the same jurisdiction [*see, e.g., Colvig v. RKO Gen., Inc. (1965) 232 Cal. App. 2d 56, 70, 42 Cal. Rptr. 473*]. Nevertheless, courts have made these statements without citing *Code Civ. Proc. § 597* and, apparently, without taking cognizance of the fact that the procedure authorized by *Code Civ. Proc. § 597* for a motion for separate trial of the issue that another action is pending would appear to apply, regardless of whether the prior action is pending in a California court or in a court of another jurisdiction. By the terms of *Code Civ. Proc. § 597*, if the defense that another action is pending or a demurrer based on another action pending is sustained in a separate trial of that issue, the court will enter an interlocutory judgment instead of a judgment of dismissal [*see Code Civ. Proc. § 597*]. That is, under *Code Civ. Proc. § 597*, regardless of whether the prior action is pending in a California court or in a court of another jurisdiction, the action is not terminated but is, in effect, stayed until a final determination of the prior action. In view of the rules evolved by the courts and extended by *Code Civ. Proc. § 597*, there appears to be no need to continue the procedural distinction based on where the prior action is pending, although the distinction remains valid with respect to the showing that is required to support the plea. That is, a stronger showing is required to support the plea where the prior action is pending in another jurisdiction than is required where the prior action is pending in a California state court.

[f] Action Pending in Foreign Country

The pendency of an action in a foreign country is not a bar to the institution of another action between the same parties on the same cause in the California courts, since every country is entirely sovereign and unrestricted in its powers and does not acknowledge the right of any other nation to hinder its own acts and proceedings. Hence, a California court is under no duty to stay an action until determination of an action pending in a foreign country even though the entire controversy might be disposed of by the foreign court. However, as a matter of comity and not of right, a California court is empowered to continue a case if the circumstances warrant it [*Pesquera Del Pacifico v. Superior Court (1949) 89 Cal. App. 2d 738, 740-741, 201 P.2d 553*].

Pesquera was a proceeding in prohibition by which petitioners sought to restrain a California trial court from proceeding with an action in which they were defendants after the trial court had denied their motion for a continuance made on the ground that there was another action pending in a court of Mexico between the same parties on the same cause. The court of appeal, in denying the writ, did not state the kind of circumstances that would warrant a continuance, or stay, of a California action. But it did point out that the trial court, in denying the motion for a continuance, had found that there was no satisfactory proof or evidence to show that any or all of the issues in the Mexico action were identical with or similar to the issues involved in the California action, that it did not appear that the issue of title to the property in dispute (claims) had been raised or adjudicated in the Mexico action, that it did not appear that the decision of the Supreme Court of Justice of Mexico was res judicata as to any issue or issues presented by the complaint in that action, and that the action could be as conveniently tried in the San Diego court as in the courts of Mexico. The court of appeal said it was apparent the ruling based on these findings was a matter entirely within the discretion of the trial court and it could not say that the denial of the motion was an abuse of discretion [*Pesquera Del Pacifico v. Superior Court (1949) 89 Cal. App. 2d 738, 741, 201 P.2d 553*]. It would, therefore, appear that the factors a court will consider in ruling on a motion to continue or stay a California action on the ground of another action pending in a foreign country are substantially the same as those it will consider in ruling on a motion to stay where the prior action is pending in a United States court or a court of a sister state. A stronger showing would no doubt be required, however, since the judgments of courts of foreign countries are not protected by the full faith and credit clause (Art IV, § 1) of the U.S. Constitution.

[g] Related Pleading and Practice Forms

For a form of petition for writ of mandate to compel the trial court to enter its order staying the action on the ground of another action pending in another jurisdiction after the trial court has refused to do so, see *California Forms of Pleading and Practice, Ch. 3, Abatement of Actions, § 3.50 et seq.* (Matthew Bender).

[h] Related Points an Authorities

For points and authorities in support of petition for writ of mandate to compel the trial court to enter its order staying the action on the ground of another action pending in another jurisdiction after the trial court has refused to do so, see Ch. 150, *Mandate and Prohibition* .

[3] Discussion of Authorities

[a] Motion to Stay--Action Pending in Federal Court

Thomson v. Continental Ins. Co. *(1967) 66 Cal. 2d 738, 59 Cal. Rptr. 101, 427 P.2d 765* , was an action by a California resident against two insurance companies and their adjuster for damages for breach of an insurance contract covering property in Texas which had been damaged by winds and vandals, and for an alleged civil conspiracy among the defendants to coerce plaintiff to accept a sum representing only a small fraction of the actual damages. Plaintiff had initially filed suit against these three defendants in the U.S. District Court for the Southern District of California, but that court, on defendants' motion, had ordered the case transferred, for the convenience of witnesses, to the U.S. District Court for the Southern District of Texas. No trial date had as yet been set in the Texasaction. Plaintiff then filed the

present action in a California state court. Defendants' motion for dismissal on the ground of forum non conveniens was granted and plaintiff appealed from the judgment of dismissal. In reversing the judgment on the ground that, in the absence of unusual circumstances which did not appear in the case before it, a California court may not dismiss an action on the ground of forum non conveniens if the plaintiff is a California resident, the Supreme Court pointed out that the pendency of the nearly identical action in the federal court in Texas had no bearing on the forum non conveniens question but that it might be a ground for a stay of the California action (*66 Cal. 2d 738, 746*). The Court, however, declined to intimate any views as to how the trial court should rule on such a request, if made, because the propriety of a stay is a question which must first be addressed to the discretion of the trial judge (*66 Cal. 2d 738, 747*).

[b] Motion to Stay--Action Pending in Court of Sister State

Simmons v. Superior Court *(1950) 96 Cal. App. 2d 119, 214 P.2d 844* , was a proceeding in prohibition, treated as mandate, by which a wife sought to restrain the trial court from proceeding in an action brought against her by her husband. Both parties were residents of Texas. Five days before the husband filed his California action, the wife had filed in a Texas court an action for divorce and for determination of the parties' rights in property, substantially all of which was owned by the wife at the time of marriage. Among the properties acquired after marriage were 1,200 shares of stock in two Texas corporations. This stock had been owned by the wife's son and acquired by her shortly after her marriage. The day the Texas action was filed, the Texas court made an order enjoining the husband from using the stock certificates and appointed a receiver of them and of the seals of the corporations. In the husband's California action, the husband alleged he was the owner of an undivided half interest in the 1,200 shares (which the wife in her Texas action had alleged were her separate property), in United States savings bonds issued to the wife, in bank accounts in the name of the wife, in safe deposit box contents (the safe deposit boxes being in the name of the wife), and in two parcels of California real estate standing of record in the wife's name. He sought a determination of the parties' respective rights in this property. The wife in the California action moved for an order staying further proceedings until final determination of the Texas action, and the motion was denied (*96 Cal. App. 2d 119, 122*). The petition for writ of prohibition followed. Holding that the trial court had abused its discretion [*see § 10.38[3][e]*] and in issuing a peremptory writ of mandate directing the trial court to stay all further proceedings until final determination of the Texas action, the court of appeal observed with approval that the wife had properly sought a stay of the California action rather than its abatement, that is, rather than its dismissal (*96 Cal. App. 2d 119, 123*).

[c] Power of Court to Stay Action

The factual background of ***Simmons v. Superior Court*** *(1950) 96 Cal. App. 2d 119, 214 P.2d 844* , is discussed in *§ 10.38[3][b]*. The court of appeal, quoting with approval from 1 Am Jur § 39, pp 42, 44, said that although the general rule is that the pendency of a prior suit in one state cannot be pleaded in abatement (meaning termination of action without prejudice) or in bar (meaning termination of action with prejudice) to a subsequent suit in another state even though both suits are between the same parties and on the same cause of action, the court in which the second action is brought may, nevertheless, in its discretion stay or suspend that suit, awaiting decision in the first one, or, influenced by a spirit of comity, may refuse to entertain it, if the same relief can be awarded in the prior suit (*96 Cal. App. 2d 119, 123*). Quoting with approval from an Oregon case, the court added that it is within the discretion of the court in which the second action is pending to stay the same until after the decision of the first action pending in another state and that the principle of comity between the states calls for the refusal on the part of the courts of this state to proceed to a decision before the termination of the prior action (*96 Cal. App. 2d 119, 123-124*).

[d] Purpose of Rule

The factual background of ***Simmons v. Superior Court*** *(1950) 96 Cal. App. 2d 119, 214 P.2d 844* , is discussed in *§ 10.38[3][b]*. The court of appeal explained that the rule which forbids a later action in the same state between the same parties involving the same subject matter rests on principles of wisdom and justice, to prevent vexation, oppression, and harassment, to prevent unnecessary litigation, to prevent a multiplicity of suits, and, in short, to prevent two actions

between the same parties involving the same subject matter from proceeding independently of each other (*96 Cal. App. 2d 119, 124-125*). The court said that it thought there is no distinction in reason or difference in principle between a case where a later action between the same parties involving the same subject matter is commenced in the same state and a case where a later action between the same parties involving the same subject matter is commenced in another state, and that if proceedings should be stayed in the first case mentioned, it is in order to avoid a multiplicity of suits and prevent vexatious litigation, conflicting judgments, confusion, and unseemly controversy between litigants and courts, and that all of this may occur if the later action is commenced in another state, as well as if it is commenced in the same state (*96 Cal. App. 2d 119, 125*).

[e] Denial of Motion as Abuse of Discretion

The factual background of ***Simmons v. Superior Court*** *(1950) 96 Cal. App. 2d 119, 214 P.2d 844* , is discussed in *§ 10.38[3][b]*. The court of appeal held that the trial court, under the facts of the case, abused its discretion in not staying, as a matter of comity, further proceedings in the California action until the finaldetermination of the Texas action (*96 Cal. App. 2d 119, 125)* . The main factors that appeared to influence its decision were: (1) the Texas action and the California action were between the same parties and involved the same subject matter (*96 Cal. App. 2d 119, 128*); (2) the Texas action would adjudicate all the issues involved in the California action (*96 Cal. App. 2d 119, 128, 131*), and, in this connection, the Texas court had jurisdiction to adjudicate the issues involved (*96 Cal. App. 2d 119, 128*), under Texas law it had acquired jurisdiction of the subject matter of the action (*96 Cal. App. 2d 119, 128-129*), and the Texas court had first assumed and exercised jurisdiction (*96 Cal. App. 2d 119, 126-127, 129*); (3) a stay of the California action would impose no hardship on the husband (*96 Cal. App. 2d 119, 131*); (4) the stay was necessary to avoid a multiplicity of actions relating to the same subject matter (*96 Cal. App. 2d 119, 130*); and (5) it would be both vexatious and a hardship to compel the wife to defend in the California action (*96 Cal. App. 2d 119, 126, 128*).

Other factors the court considered were: (1) both parties were residents of Texas (*96 Cal. App. 2d 119, 131*); (2) the corporations whose stock formed part of the property involved had their principal place of business in Texas and had never done business in California (*96 Cal. App. 2d 119, 126*); (3) the persons who kept the corporate records were in Texas (*96 Cal. App. 2d 119, 126*); (4) all the witnesses, with the possible exception of the husband, and all the books and records pertaining to the ownership of the property involved and necessary to establish the facts common to both actions, were in Texas (*96 Cal. App. 2d 119, 127*); (5) the remedy which might be afforded by the Texas court was equally as effective and advantageous as any that might be afforded by the California court (*96 Cal. App. 2d 119, 131*); (6) the rights of the parties in the property involved in both actions could not properly be determined in the California action until the issues made in the Texas action had been adjudicated (*96 Cal. App. 2d 119, 130*); (7) the husband's removal of stock certificates from Texas with the apparent purpose of preventing the Texas court from acquiring jurisdiction over them (*96 Cal. App. 2d 119, 129-130*); (8) the husband's opposition to the wife's repeated efforts to bring the Texas action to an early trial (*96 Cal. App. 2d 119, 127*); and (9) the husband's assurance to the Texas court in obtaining a continuance of the trial date to a future specified time that no attempt would be made by him to bring the California action on for trial (*96 Cal. App. 2d 119, 127*).

[4] Additional Authorities

[a] Motion to Stay

[i] Action Pending in Court of Sister State

In *Leadford v. Leadford (1992) 6 Cal. App. 4th 571, 8 Cal. Rptr. 2d 9* , defendant demurred to plaintiff's complaint on several grounds, including the existence of another action pending between the parties in Pennsylvania. The trial court sustained the demurrer and stayed the action as to the causes of action relating to the pending action (*6 Cal. App. 4th 571, 573*). The appellate court reversed the ruling staying the action on the ground that the trial court improperly heard the issue on demurrer. When the actions are pending in courts of different states, the determination whether to stay the later-filed action is discretionary, not mandatory, and should be raised by motion, not demurrer (*6 Cal. App. 4th 571,*

574). A discretionary ruling on whether to stay must take into consideration matters outside the pleadings, such as the seriousness of the threat of multiple and vexatious litigation, the convenience of the parties, the status of the foreign action, and the competing interests of the two forums. Though some evidence of such matters was before the court, they were beyond proper consideration on demurrer (*6 Cal. App. 4th 571, 575*).

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1-10 California Points & Authorities § 10.39

§ 10.39 Opposing Motion for Separate Trial of Special Defense Constituting Ground of Abatement to Prosecution of Action [Code Civ. Proc. § 597]--Ground of Abatement No Longer Exists

[1] FORM Opposing Motion for Separate Trial of Special Defense Constituting Ground of Abatement to Prosecution of Action [Code Civ. Proc. § 597]--Ground of Abatement No Longer Exists

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*],	)	IES IN OPPOSITION TO MOTION FOR SEPAR-
Defendant.	)	ATE TRIAL OF SPECIAL DEFENSE
	)	[*Code Civ. Proc. § 597*]
	)	

_____

A MOTION FOR SEPARATE TRIAL OF THE PLEA IN ABATEMENT THAT _____ [THERE IS ANOTHER ACTION PENDING *or* PLAINTIFF LACKS LEGAL CAPACITY TO SUE *or* THE ACTION IS PREMATURE *or other*] SHOULD BE DENIED IF THE GROUND OF ABATEMENT NO LONGER EXISTS.

A. Discretion of Court to Deny Motion. The court has discretion to grant or deny a motion for separate trial of a plea in abatement (*Code Civ. Proc. § 597*; *Healy v. Stationers Corp. (1964) 228 Cal. App. 2d 601, 603, 39 Cal. Rptr. 679*).

B. Failure of Defense. The plea in abatement that _____ [there is another action pending *or*

plaintiff lacks legal capacity to sue _____ (for failure to have complied with the fictitious business name statutes *or* because its corporate powers have been suspended) *or* the action is premature *or other*] fails if the facts on which it is based no longer exist (_____ [*select appropriate authority: Collins v. Ramish (1920) 182 Cal. 360, 368, 188 P. 550* (*another action pending*) *or Rudneck v. Southern Cal. Metal & Rubber Co. (1920) 184 Cal. 274, 282, 193 P. 775* (*failure to have complied with fictitious business name statutes*) *or Diverco Constructors, Inc. v. Wilstein (1970) 4 Cal. App. 3d 6, 12, 85 Cal. Rptr. 851* (*suspension of corporate powers*) *or American Alternative Energy Partners II v. Windridge, Inc. (1996) 42 Cal. App. 4th 551, 561, 49 Cal. Rptr. 2d 686* (failure to have filed certificate of limited partnership) *or Edwards v. Container Kraft Carton & Paper Supply Co. (1958) 161 Cal. App. 2d 752, 756, 327 P.2d 622* (*prematurity of action*)]).

[*Optional*] **C. Waiver of Plea in Abatement by Delay.** A plea in abatement must be raised by the defendant at the earliest opportunity or it is waived. The proper time to raise a plea in abatement is in the original answer or by demurrer at the time of the answer. It is a technical objection and must be pleaded specifically (*Color-Vue, Inc. v. Abrams (1996) 44 Cal. App. 4th 1599, 1604, 52 Cal. Rptr. 2d 443* (such as a lack of capacity to sue)).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion for separate trial of a special defense constituting a ground of abatement [*Code Civ. Proc. § 597*] if the ground of abatement no longer exists.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. The opposing declaration should set forth the probative facts within the declarant's knowledge showing that the ground of abatement no longer exists and should have attached to it appropriate copies of any court orders, certificates, etc., establishing that fact. Appropriately authenticated copies of these papers or documents should be secured for introduction at the hearing on the motion.

[b] Related Points and Authorities

This form may be enhanced with additional points and authorities from Ch. 52, *Corporations* , relating to the effect of revivor.

[3] Discussion of Authorities

[a] Discretion of Court to Deny Motion

Code Civ. Proc. § 597 provides that if the answer raises a plea in abatement, the trial court "may," either on its own motion or on motion of any party, proceed to the trial of such defense before the trial of any other issue in the case.

Healy v. Stationers Corp. *(1964) 228 Cal. App. 2d 601, 39 Cal. Rptr. 679* , was a mandate proceeding to enforce

plaintiff's right, as a director of a corporation, to inspect the corporation's books and records. The petition was served on March 13, 1963, and filed on March 28, 1963. On March 22, 1963, respondents filed a separate action to have petitioner removed from the board of directors. An alternative writ of mandate was issued by the court on April 4, 1963, ordering respondents to produce the books and records of the corporation for petitioner's inspection or to show cause on April 12, 1963, why they had not done so. On April11, 1963, respondents filed a demurrer to the petition and a motion to abate the action on the petition until there was a final determination of their removal action. The hearing was noticed for April 17, 1963. On April 12, 1963, a hearing was held on the petition for mandate. The trial court, over respondents' plea for abatement asserted in their answer and argued at the hearing, issued the writ ordering inspection to commence on April 16, 1963. On April 26, 1963, the court overruled the demurrer and denied the motion to abate. Respondents appealed, contending that the trial court erred in proceeding with the hearing on the petition the removal action was pending and undisposed of, and that the trial court should have first determined the issue of law raised by the removal action before considering the petition on its merit, evidently relying in part on *Code Civ. Proc. § 597*. The court of appeal affirmed. With respect to the abatement issue, the court said that since *Code Civ. Proc. § 597* provides only that if the answer raises a plea in abatement the court "may," on the motion of either party, proceed to the trial of the special defense before trial of any other issue in the case. It noted that the trial judge presiding in the Writs and Receivers department had made it abundantly clear to respondents' counsel that if he had any evidence to present diverse to petitioner's right to inspect the books, the case would be sent to a trial department for full hearing, but that respondents refused the offer. It concluded that respondents could not complain on appeal that the court abused its discretion in refusing to hear first the plea in abatement (*228 Cal. App. 2d 601, 603*).

[b] Failure of Defense--Another Action Pending--Other Action No Longer Pending

Collins v. Ramish *(1920) 182 Cal. 360, 188 P. 550* , was an action to recover the balance due on a contract for certain tile and marble work in defendant's theater. Before commencing this action, plaintiff had commenced another action against the same defendant on the same cause, had been nonsuited at trial, and had taken an appeal which was pending the present action was commenced and tried. Defendant, in his answer, had pleaded the defense of another action pending, but the trial judge found that plaintiff had abandoned the other action and that it was, therefore, no longer pending. From a judgment for plaintiff, defendant appealed. The Supreme Court held that under *Code Civ. Proc. § 1049* an action is deemed to be pending from the time of its commencement until its final determination on appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied, that under this rule the prior action was pending, and that it was immaterial that plaintiff had practically abandoned it (*182 Cal. 360, 366*). The Court reversed the judgment on the ground the findings were not supported by the evidence. It ordered a new trial limited to the issue of former pending action and on the amount to be allowed defendant for defects in the tile work. The Court nevertheless noted that the prior appeal had been dismissed by it on plaintiff's application and that this fact would be available to plaintiff on the new trial. The Court said that it is thoroughly settled in California that a dismissal of the former action pending at the time of the commencement of the subsequent action made at any time before the trial of the subsequent action, or even before the conclusion of such trial, completely disposes of the plea of former action pending (*182 Cal. 360, 368*).

[c] Failure of Defense--Lack of Legal Capacity to Sue--Fictitious Business Name Statutes Complied With

The factual background of ***Rudneck v. Southern Cal. Metal & Rubber Co.*** *(1920) 184 Cal. 274, 193 P. 775* , is discussed in *§ 10.30[3][c]*. In reversing the judgment for plaintiffs for a new trial on the single issue of whether plaintiffs had published the fictitious business name certificate [now statement], as required by former statute [*now see Bus. & Prof. Code § 17917*], the Supreme Court said that it is settled that it is not necessary that plaintiffs have complied with the statute at the time of the commencement of the action; it is sufficient if they have done so at the time, at least, issue as to the matter of abatement is made. The Court did not hesitate to extend this rule so that it is sufficient if the statute is complied with before trial on the issue, and that the defense fails if it appears at the time of the trial that the matter of abatement no longer exists (*184 Cal. 274, 282*).

[d] Failure of Defense--Lack of Legal Capacity to Sue--Corporate Powers Revived

Diverco Constructors, Inc. v. Wilstein *(1970) 4 Cal. App. 3d 6, 85 Cal. Rptr. 851* , was an action to foreclose mechanics' liens for money allegedly due. On the date set for trial, defendants moved to dismiss the complaint on the ground plaintiff's corporate powers had, on a date after the action had been commenced, been suspended for nonpayment of corporate taxes. In opposition to the motion, plaintiff offered a certificate of revivor from the Franchise Tax Board which showed plaintiff's corporate powers had been reinstated two days before the trial. The trial judge on his own motion ordered the case off calendar for the reason that all action taken by plaintiff following the suspension of its corporate powers was null and void and that until plaintiff again took the necessary steps to bring the case on for trial, plaintiff had no standing in court. The same day, plaintiff filed a motion for an order setting the case for an early trial setting conference and defendants filed opposition. Three days later, defendants for the first time, filed a motion to dismiss the action for want of prosecution under the two-year provision specified in former Code Civ. Proc. § 583 (the five-year period specified in that section had at the time almost expired). The trial court granted plaintiff's motion to set, and the case was set for pretrial conference on a specified date and for trial on a subsequent specified date, which was before expiration of the five-year period. The order stated that it was made without prejudice to a ruling on the pending motion to dismiss for failure to bring the case to trial within two years.The pretrial conference was held on the date specified, while on the same date in a different department the motion to dismiss under former Code Civ. Proc. § 583 was granted and the case was dismissed. Plaintiff's motion for reconsideration was denied, and plaintiff appealed. In reversing the judgment with directions to set the case for trial within 48 days of the filing of the remittitur, the court of appeal said: (1) that suspension of corporate powers is a defense which may be asserted so long as the party-corporation is under disability, but that on revival of its corporate powers the party may proceed with the prosecution or defense of the action, and that, since plaintiff's corporate powers had been revived two days before the motion to dismiss on the ground of suspension was made, the motion was groundless; (2) that plaintiff's actions in the case during the period of suspension were not a nullity; and (3) that the trial judge erred in ordering the case off calendar but should have proceeded with the trial as counsel for both parties were ready. The court further held that the trial court abused its discretion in granting the motion to dismiss for not bringing the case to trial within two years (*4 Cal. App. 3d 6, 12-13*).

[e] Failure of Defense--Premature Action--Ground No Longer Exists

In ***American Alternative Energy Partners II v. Windridge, Inc.*** *(1996) 42 Cal. App. 4th 551, 49 Cal. Rptr. 2d 686* , a plaintiff, alleging its status to be a limited partnership, filed a complaint for contract damages. Defendant moved to dismiss the complaint on the ground that plaintiff had not filed a required certificate of limited partnership until after the complaint was filed, and thus lacked capacity to sue at the time of the filing of the complaint. The trial court agreed with defendant's position, and granted the motion for dismissal.

The court of appeal stated that the defendant confused lack of capacity to sue with lack of right to sue, pointing out that incapacity is merely a legal disability, while standing to sue goes to the existence of a cause of action (*42 Cal. App. 4th 551, 559*). The Corporation Code provides that if a limited partnership is not formed because of noncompliance with the recordation requirement, then the partnership is a general partnership. Furthermore, there is no statute penalizing noncompliance with the recordation requirement by depriving the partnership of its capacity to sue. The court thus concluded that until it complied with the certification requirement, the plaintiff was a general partnership and did not lack capacity to sue (*42 Cal. App. 4th 551, 561*). The court thus reversed the judgment of dismissal.

Edwards v. Container Kraft Carton & Paper Supply Co. *(1958) 161 Cal. App. 2d 752, 327 P.2d 622* , was an action by a former employee to recover damages for malicious prosecution of an injunction action against him by his former employer. Dissatisfied about his earnings with the company and the company's failure to give him certain stock in it, plaintiff had quit and opened his own competing business. The company then sued to enjoin him from soliciting its customers; it made a number of false allegations in its complaint and secured issuance of both a temporary restraining order and a preliminary injunction, which were subsequently discharged. Judgment in that case was for the former

employee, who then commenced the present action for malicious prosecution and recovered judgment. On appeal from this latter judgment, the company argued, among other things, that the action had been brought prematurely since it was filed before the time for appeal from the prior judgment had expired. In affirming the judgment, the court of appeal said that prematurity of action is merely ground for abatement and if the ground has ceased to exist before time of trial it cannot then or thereafter prevail (*161 Cal. App. 2d 752, 756*)

[f] Waiver of Plea in Abatement by Delay

In ***Color-Vue, Inc. v. Abrams*** *(1996) 44 Cal. App. 4th 1599, 52 Cal. Rptr. 2d 443* , two attorneys sued a corporation for unpaid legal fees, and in a consolidated action, the corporation sued the attorneys for legal malpractice. After the corporation announced that it was ready for trial, the attorneys moved to dismiss the corporation's action on the ground that the corporation had been suspended by the Secretary of State for failure to pay its franchise taxes. The trial court granted the motion to dismiss. One of the attorneys also recovered a default judgment against the corporation on the same ground. Approximately two weeks later, the corporation paid its taxes and obtained a certificate of revivor. The corporation then moved to set aside the dismissal, but the motion was denied.

On appeal, the corporation argued that the trial court abused its discretion in granting the motion to dismiss. The attorneys argued that the corporation was required to prove that it was in good standing as part of its case, and that the corporation was therefore not ready for trial. The court of appeal stated initially that the attorneys were wrong in claiming that the corporation's suspension deprived it of standing to sue, explaining that suspension of corporate powers results in a lack of capacity to sue, not a lack of standing to sue. The court then stated that a plea of lack of capacity of a corporation to maintain an action by reason of a suspension for nonpayment of taxes is a plea in abatement which is not favored in law and is to be strictly construed. The distinction between lack of standing and lack of capacity is significant because a plea in abatement such as lack of capacity must be raised at the earliest opportunity or it is waived (*44 Cal. App. 4th 1599, 1604*). The court then noted that the attorneys knew several months prior to raising the issue that the corporation had been suspended by the Secretary of State, but did not raise the issue at any of several pretrial hearings. The attorneys' only explanation for this delay was that they had no duty to raise the issue before trial. The court concluded that the plea was waived by unnecessary delay. Although the court recognized that if a corporation announces that it does not intend to pay its taxes, an opposing party might be relieved fromtheir waiver of the defense, but that was not the situation in this case, in which the corporation stated its intention to pay the taxes, paid them, and promptly obtained a certificate of revivor, and was in good standing the judgments were entered (*44 Cal. App. 4th 1599, 1605*). The court thus reversed the trial court judgment and remanded the matter for further proceedings.

[4] Additional Authorities

[a] Failure of Defense--Action No Longer Pending

Wood v. Herson (1974) 39 Cal. App. 3d 737, 114 Cal. Rptr. 365 , was an action for specific performance to impose a trust and damages for interference of contract arising out of defendant's purchase of real property at a foreclosure sale. Defendant's motion for summary judgment was granted on the ground all the issues raised in the present case had been adjudicated in a prior unlawful detainer proceeding in which title to the property had been litigated, and, hence, the present action was barred by the doctrine of res judicata. Plaintiff, as defendant in the unlawful detainer proceeding, had appealed from that judgment and the appeal was still pending, although plaintiff had taken no action to pursue it after filing the notice of appeal. In affirming the judgment, the court of appeal said that the former action was only technically "pending" inasmuch as it had apparently been abandoned (*39 Cal. App. 3d 737, 747-748*), that plaintiff had not on the present appeal raised the issue whether pendency of the former proceeding prevented the judgment from becoming res judicata of the issues of the present case, that the court of appeal had the power to dismiss the prior appeal on its own motion, and that the effect of such an order would be to finally end the former action (*39 Cal. App. 3d 737, 748*). The court said that a dismissal or discontinuance of the former action at any time before the trial of a subsequent action, or even before the conclusion of such trial, completely removes the objection that a former action is still pending

and the judgment would thereby become a conclusive determination of the rights of the parties (citing *Collins v. Ramish (1920) 182 Cal. 360, 366-368, 188 P. 550*). Therefore, it reasoned that if it reversed the summary judgment in the instant action and dismissed the pending appeal in the former action, a later motion for summary judgment, if made, would necessarily have to be granted thereby promoting a "gross injustice" and unnecessarily lengthening the litigation between the parties (*39 Cal. App. 3d 737, 748*).

The court in *Wood* was concerned with the problem of giving res judicata effect to a prior judgment that was not final [*see Code Civ. Proc. § 1049*], rather than with the defense of another action pending, which neither party had raised. Instead, defendant had moved for summary judgment on the ground that the prior judgment was a bar to prosecution of the present action, and the motion was granted. To this extent, the case differs from *Ramish*, which the court of appeal cites and which is discussed in *§ 10.39[3][b]*. Had proper procedure been followed, defendant would have pleaded another action pending [*Code Civ. Proc. § 430.10(c)*] by demurrer or answer [*Code Civ. Proc. §§ 430.10, 430.30(a), (b), 431.30(b)(2)*], secured entry of an interlocutory judgment staying the present action on this ground [*Code Civ. Proc. § 597*; *Lord v. Garland (1946) 27 Cal. 2d 840, 850, 168 P.2d 5*], secured dismissal of the appeal from the prior judgment [now see Cal. Rules of Court, Rule 8.147], and then moved for leave to amend the complaint to set up the affirmative defense of res judicata [*Lord v. Garland (1946) 27 Cal. 2d 840, 851, 168 P.2d 5]* and for summary judgment on the ground the action had no merit [*Code Civ. Proc. § 437c*] since it was barred by the doctrine of res judicata [*Wood v. Herson (1974) 39 Cal. App. 3d 737, 746, 114 Cal. Rptr. 365*]. The same evidence with respect to the issues would, of course, have been required to support the defense of another action pending as was required to support the defense of res judicata, the only difference being that to support the former defense it would have to be shown that the other action was still pending, whereas to support the latter defense it would have to be shown that the judgment in the prior action or proceeding was final.

Since the court noted that plaintiff had apparently abandoned the appeal in the prior case and had not questioned the res judicata effect of the prior judgment on the ground of nonfinality (the unsuccessful attack on the prior judgment was that it went beyond the issues presented by the unlawful detainer proceeding and to that extent was not res judicata), it could have held that defendant had, by failing to urge it, waived the objection that the prior action was still pending and, hence, could not be res judicata of the present action, and dismissed the prior appeal on its own motion [*Cal. Rules of Ct., Rule 8.147*]. Then, by taking judicial notice of the unlawful detainer proceeding [*see Evid. Code §§ 452(d), 459*], the court affirmed the judgment on the ground it appeared as a matter of law that the present action was barred by the prior final judgment.

Other cases supporting the rule that the plea in abatement of a prior action pending fails if the action is no longer pending include: *Rudneck v. Southern Cal. Metal & Rubber Co. (1920) 184 Cal. 274, 282, 193 P. 775* ("It is well settled that a plea by way of abatement of another action pending will be avoided by proof that the other action is no longer pending at the time of trial, although it may have been pending the plea was made"); *Colvig v. RKO Gen., Inc. (1965) 232 Cal. App. 2d 56, 71, 42 Cal. Rptr. 473* (where the first action is concluded by judgment or dismissal before the second action is commenced, the plea of another action pending is untenable); *Karp v. Dunn (1964) 229 Cal. App. 2d 192, 195, 40 Cal. Rptr. 96* (dismissal of the prior action before any trial of the second action completely disposes of the plea of another action pending); *Hall v. Citizens Nat'l Trust & Sav. Bank (1942) 53 Cal. App. 2d 625, 631, 128 P.2d 545* (plea by way of abatement of another action pending will be avoided by proof that other actionis no longer pending at time of trial, though it may have been pending plea was made).

[b] Failure of Defense--Lack of Legal Capacity to Sue--Fictitious Business Name Statutes Complied With

In *Tyrone v. Kelley (1973) 9 Cal. 3d 1, 14, 106 Cal. Rptr. 761, 507 P.2d 65* , the Supreme Court noted that the plea in abatement on the basis of the fictitious name statute is properly raised prior to trial, plaintiff may thereafter comply with the statute and then proceed to trial.

[c] Failure of Defense--Lack of Legal Capacity to Sue--Corporate Powers Revived

Peacock Hill Ass'n v. Peacock Lagoon Constr. Co. (1972) 8 Cal. 3d 369, 105 Cal. Rptr. 29, 503 P.2d 285 , involved a motion by plaintiff to dismiss defendant's appeal from an adverse judgment on the ground defendant's corporate powers had been suspended pursuant to *Rev. & Tax. Code § 23301* (nonpayment of franchise taxes). In opposition to the motion, defendant filed a declaration accompanied by a receipt from the Franchise Tax Board indicating that defendant had filed its delinquent return, paid the penalty assessment, and applied for a certificate of revivor pursuant to *Rev. & Tax. Code § 23305*. Subsequently, it filed a certificate of revivor issued by the Franchise Tax Board, indicating that defendant had filed its delinquent return, showing that is had been reinstated and revived to good standing. In denying the motion to dismiss, the Supreme Court, citing cases, pointed out that in a number of situations the revival of corporate powers by the payment of delinquent taxes has been held to validate otherwise invalid prior action (*8 Cal. 3d 369, 371*), that in *Traub Co. v. Coffee Break Serv., Inc. (1967) 66 Cal. 2d 368, 57 Cal. Rptr. 846, 425 P.2d 790* , it cited with approval several court of appeal decisions in which the corporate plaintiff had been allowed to maintain a lawsuit even though it was suspended at the time it filed its complaint, that the appellate courts reasoned that the plea of lack of capacity of a corporation because of its suspension for failure to pay taxes is a plea in abatement which is not favored in law and must be supported by the facts at the time of the plea, and that in each case it was held that revival of the corporate powers before trial was sufficient to permit the corporation to maintain its action (*8 Cal. 3d 369, 372*). The Court said that the authorities make clear that, as to matters occurring prior to judgment, the revival of corporate powers has the effect of validating the earlier acts and permitting the corporation to proceed with the action, and that the same rule should ordinarily apply to matters occurring subsequent to judgment (*8 Cal. 3d 369, 373*). The Court concluded that defendant's corporate powers had been revived and that it could proceed with its appeal (*8 Cal. 3d 369, 374*).

The factual background of *Traub Co. v. Coffee Break Serv., Inc. (1967) 66 Cal. 2d 368, 57 Cal. Rptr. 846, 425 P.2d 790* , is discussed in *§ 10.34[3][d]*. In affirming the order denying the motion to vacate and set aside the judgment, the Supreme Court, in the course of its opinion, said that the plea of lack of capacity of a corporation to maintain an action by reason of a suspension of its corporate powers for nonpayment of its taxes [*Rev. & Tax. Code § 23301*] is a plea in abatement which is not favored in the law, is to be strictly construed, and must be supported by facts warranting the abatement at the time of the plea (*66 Cal. 2d 368, 370*).

Hall v. Citizens Nat'l Trust & Sav. Bank (1942) 53 Cal. App. 2d 625, 128 P.2d 545 , was an action to enjoin a proposed trustee's sale pursuant to a notice of sale. The action was commenced November 4, 1940. Plaintiff corporation's corporate powers had been suspended June 26, 1930, and were revived November 22, 1940. Certain transactions between the corporate plaintiff and the individual plaintiffs, as well as commencement of the present action, occurred during the period of suspension. Revival occurred subsequent to the filing of the answer in the case but before trial of the cause. From a judgment for plaintiffs, defendants appealed. Although the court of appeal reversed the judgment on the ground of insufficiency of the findings and of the evidence to support the injunction (*53 Cal. App. 2d 625, 638-639*), the court held, with respect to the abatement issue, that a revival of corporate powers subsequent to the interposition of a plea in abatement raising the question, but before the hearing of the plea, is a sufficient avoidance of the plea (*53 Cal. App. 2d 625, 630*), that the defense fails if it appears at the time of the trial, and that the matter of abatement no longer exists (*53 Cal. App. 2d 625, 631*).

[d] Failure of Defense--Premature Action--Ground No Longer Exists

Walter J. Warren Ins. Agency v. Surpur Timber Co. (1967) 250 Cal. App. 2d 99, 58 Cal. Rptr. 143 , was an action on an open book account and an account stated to recover insurance premiums advanced and to be advanced by plaintiff on defendant's behalf. The total amount sought was based in part on an assigned claim of premiums to be advanced for which plaintiff had become liable to pay but which claim was not assigned by the insurance company to plaintiff until after the action had been commenced. The fact of the assignment was incorporated in an amended and a second amended complaint. Judgment was for plaintiff, and defendant appealed contending, among other things, that the action was premature as to the assigned claim. In affirming the judgment, the court of appeal stated that the case called for

application of the principle that prematurity of action is merely ground for abatement and if the ground has ceased to exist before time of trial it cannot then or thereafter prevail (*250 Cal. App. 2d 99, 105*).

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Volume 1 Chapters 1-19 WRITING LEGAL MEMORANDA AND BRIEFS; ABATEMENT AND SURVIVAL OF ACTIONS---to---AMENDED AND SUPPLEMENTAL PLEADINGS
CHAPTER 10 ABATEMENT AND SURVIVAL OF ACTIONS
PART II. FORMS
A. Pleas in Abatement

1-10 California Points & Authorities § 10.40

§ 10.40 Opposing Motion for Stay of Action on Ground of Another Action Pending in Court in Another Jurisdiction--Exercise of Discretion Requires Denial of Motion

[1] FORM Opposing Motion for Stay of Action on Ground of Another Action Pending in Court in Another Jurisdiction--Exercise of Discretion Requires Denial of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Defendant.	)	IES IN OPPOSITION TO MOTION FOR STAY OF
	)	ACTION ON GROUND OF ANOTHER ACTION
	)	PENDING IN COURT OF ANOTHER JURISDIC-
		TION

_____

A MOTION FOR AN ORDER STAYING AN ACTION ON THE GROUND THAT THERE IS ANOTHER ACTION PENDING BETWEEN THE SAME PARTIES ON THE SAME CAUSE IN A COURT OF ANOTHER JURISDICTION SHOULD BE DENIED WHERE THE FACTORS TO BE CONSIDERED BY THE COURT MILITATE AGAINST A STAY.

A. When Abatement Exists as Matter of Right. Abatement of the second action on the ground of another action pending is available as a matter of right only if both suits are predicated on the same cause of action and both suits are

pending in the same jurisdiction (*Tinney v. Tinney (1963) 211 Cal. App. 2d 548, 552, 27 Cal. Rptr. 239*).

B. Motion to Stay Invokes Judicial Discretion. A motion for an order staying an action on the ground that there is another action pending between the same parties on the same cause in a _____ [federal court *or* court of a sister state] is addressed to the sound discretion of the trial court (*Thomson v. Continental Ins. Co. (1967) 66 Cal. 2d 738, 746-747, 59 Cal. Rptr. 101, 427 P.2d 765* ; *Farmland Irrigation Co. v. Dopplmaier (1957) 48 Cal. 2d 208, 215, 308 P.2d 732*).

C. Factors to Be Considered by Court Militating Against Stay. In exercising its discretion on a motion to stay, the court should consider: (1) the importance of discouraging multiple litigation designed solely to harass an adverse party; (2) the importance of avoiding unseemly conflicts with the courts of other jurisdictions; (3) whether the rights of the parties can best be determined by the court of the other jurisdiction because of the nature of the subject matter, the availability of witnesses, or the stage to which the proceedings in the other court have advanced; and (4) the hardship to the parties. If these issues are resolved in favor of continuing the California action, the motion for a stay should be denied (*see Farmland Irrigation Co. v. Dopplmaier (1957) 48 Cal. 2d 208, 215, 308 P.2d 732* ; *Tinney v. Tinney (1963) 211 Cal. App. 2d 548, 553, 27 Cal. Rptr. 239* ; *see also Thomson v. Continental Ins. Co. (1967) 66 Cal. 2d 738, 746-747, 59 Cal. Rptr. 101, 427 P.2d 765*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion for an order staying an action or proceeding on the ground there is another action pending between the same parties on the same cause of action in a court of another jurisdiction [*see § 10.38*]. The ground of opposition is that on a consideration of the factors involved the proper exercise of judicial discretion requires denial of the motion.

The motion may also be defeated by establishing that one or more of the essential elements of the defense of another action pending is lacking. For points and authorities that may be adapted in such event for inclusion in these points and authorities, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

When appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] When Abatement Exists as Matter of Right

Tinney v. Tinney *(1963) 211 Cal. App. 2d 548, 27 Cal. Rptr. 239* , was an action by a husband against his former wife for declaratory relief seeking an adjudication of the rights of the parties in certain Oklahoma properties. The day before their marriage in Arkansas, the parties had executed an antenuptial agreement by which defendant accepted certain

benefits in full settlement of her rights of dower, alimony, and every other interest or claim in plaintiff's property and estate. After the marriage the parties accumulated certain property in California and Oklahoma. Subsequently, plaintiff husband secured from a California court an interlocutory decree of divorce on the grounds of adultery and extreme mental cruelty. The community property was awarded to him and defendant was denied alimony orany other relief. The parties, through their respective counsel, had prior to the divorce decree, executed a joint pretrial statement which provided that the community property consisted solely of a residence in Los Angeles, household furniture and furnishings, and two cars. In the subsequent California action, defendant filed an answer setting up a number of affirmative defenses, including the defense that there was another action pending in Oklahoma, and filed a cross complaint (*211 Cal. App. 2d 548, 551 fn. 1*). The court entered a judgment declaring that plaintiff was the sole owner of the property, that defendant had no interest in it, ordering defendant to execute and file a dismissal with prejudice of the Oklahoma action and to deliver to plaintiff a quitclaim deed to the property, that defendant take nothing by reason of her cross complaint, and that plaintiff recover his costs. Defendant appealed from this judgment, contending, among other things, that the trial court should have abated the action until a determination could be made in the Oklahoma case. In rejecting this contention and affirming the judgment, the court said that abatement on the ground of another action pending between the same parties is available as a matter of right only where both suits are predicated on the same cause of action and both suits are pending in the same jurisdiction (*211 Cal. App. 2d 548, 552*).

[b] Motion to Stay Invokes Judicial Discretion

Thomson v. Continental Ins. Co. *(1967) 66 Cal. 2d 738, 59 Cal. Rptr. 101, 427 P.2d 765* , was an action by a California resident against two insurance companies and an adjustment bureau for damages for breach of insurance contracts covering Texas real property owned by plaintiff and for damages for civil conspiracy. The property had been damaged by wind and vandals. Plaintiff alleged that defendants refused to settle and had entered into a civil conspiracy to coerce plaintiff to accept for his losses a sum representing only a small fraction of the actual damages and that in the course of this conspiracy the insurers canceled their policies with plaintiff and so damaged his reputation in the business community that no company would offer him insurance (*66 Cal. 2d 738, 740-741*). Plaintiff had originally filed an action on the same cause against the same parties in a federal district court in California which, on defendants' motion, transferred the case to a federal district court in Texas. Plaintiff filed an amended complaint in the Texas court which defendants answered. No trial date had yet been set in that action. In the present California action, defendants' motion to dismiss the action on the ground of forum non conveniens was granted and plaintiff appealed from the judgment of dismissal. The Supreme Court reversed the judgment on the ground that an action by a California resident could not be dismissed on the ground of forum non conveniens in the absence of unusual circumstances, and that such circumstances did not appear in the case (*66 Cal. 2d 738, 742-745)* . The Court further said that the pendency of the nearly identical action in federal court in Texas had no bearing on the forum non conveniens question presented. It added that such a pending action may be grounds for a stay of the California proceedings but not for a dismissal and that granting a stay in such a case where the issues in the two actions are substantially identical is a matter addressed to the sound discretion of the trial court (*66 Cal. 2d 738, 746*).

Farmland Irrigation Co. v. Dopplmaier *(1957) 48 Cal. 2d 208, 308 P.2d 732* , was an action for declaratory relief with respect to plaintiff's right to manufacture and sell irrigation equipment under a patent license agreement and a declaration of its duties under the royalty provisions of that agreement. The action was by the original licensee's assignee against the licensor-inventor's assignee. Prior to the commencement of this action, defendant had brought another action against plaintiff's assignor in a federal district court in Oregon for an accounting of royalties allegedly due under the license. Plaintiff's motion to intervene in that action was denied and it commenced the present action. Defendant's motion for a stay of the present proceedings pending final judgment in the Oregon action was denied. The case was tried on the merits and a declaratory judgment in favor of plaintiff was entered. Defendant appealed, contending, among other things, that the trial court abused its discretion in denying his motion for a stay. The Supreme Court stated that an action is brought in a court of this state involving the same parties and the same subject matter as an action already pending in a court of another jurisdiction, a stay of the California proceedings is not a matter of right, but within the sound discretion of the trial court (*48 Cal. 2d 208, 215*). It held that the trial court did not abuse its

discretion in denying the motion to stay (*48 Cal. 2d 208, 216*) and affirmed the judgment (*48 Cal. 2d 208, 228*).

[c] Factors to Be Considered by Court Militating Against Stay

The factual background of ***Farmland Irrigation Co. v. Dopplmaier*** *(1957) 48 Cal. 2d 208, 308 P.2d 732* , is discussed in *§ 10.40[3][b]*. In holding that the trial court did not abuse its discretion in denying defendant's motion to stay the action on the ground of another action pending in another state, the Supreme Court said that in exercising its discretion the court should consider the importance of discouraging multiple litigation designed solely to harass an adverse party, and of avoiding unseemly conflicts with the courts of other jurisdictions, and that it should also consider whether the rights of the parties can best be determined by the court of the other jurisdiction because of the nature of the subject matter, the availability of witnesses, or the stage to which the proceedings in the other court have already advanced (*48 Cal. 2d 208, 215*). The Court then pointed out that (1) the parties to the present action were not identical with those in the Oregon action, (2) plaintiff was not a party to the Oregon action, (3) its attempt to intervene as a party defendant was successfully prevented by defendant, and (4) plaintiff brought the present action not to harass defendant with multiple litigation but to assert interests it claimed would not be adequately represented in the Oregon action. It further held that in deciding whether the representation of plaintiff in theOregon action was an adequate substitute for a present determination of its rights in a California court, the trial court was not bound by the federal court's determination that the representation of plaintiff's assignee was adequate to prevent intervention (*48 Cal. 2d 208, 215*). The Court added that all the issues in the present action were not involved in the Oregon action, although they would have been had plaintiff's motion to intervene and file a counterclaim raising the additional issues been granted (*48 Cal. 2d 208, 216*).

The factual background of ***Tinney v. Tinney*** *(1963) 211 Cal. App. 2d 548, 27 Cal. Rptr. 239* , is discussed in *§ 10.40[3][a]*. The court pointed out that the Oklahoma action was concerned only with a part of the properties involved in the California action and, hence, by implication that the California court was better able to provide more complete relief; it further said that defendant had made no showing whatever of any abuse of discretion on the part of the trial court, failing to suggest that she was unable conveniently to attend the trial in California, that she was unable to produce in California any witnesses or any other evidence that would be available in Oklahoma, or that she was in any way prejudiced. The court concluded that the trial court acted properly within its discretion it chose not to abate or stay the California action (*211 Cal. App. 2d 548, 553*).

The factual background of ***Thomson v. Continental Ins. Co.*** *(1967) 66 Cal. 2d 738, 59 Cal. Rptr. 101, 427 P.2d 765* , is discussed in *§ 10.40[3][b]*. In discussing a stay on the ground of another action pending in a court of another jurisdiction but without intimating any views as to how the trial court's discretion should be exercised if a request for a stay were to be made on retrial on the ground that the propriety of a stay is a question which must first be addressed to the discretion of the trial judge (*66 Cal. 2d 738, 747*), the Court nevertheless quoted the statement regarding factors to be considered from *Farmland Irrigation Co. v. Dopplmaier (1957) 48 Cal. 2d 208, 215, 308 P.2d 732* , *above* (*66 Cal. 2d 738, 746-747*). The Court also indicated that hardship to the plaintiff in staying the California state court action was a factor to be considered (*66 Cal. 2d 738, 747)* .

[4] Additional Authorities

[a] Motion to Stay Invokes Judicial Discretion

Leeds v. Superior Court (1965) 231 Cal. App. 2d 723, 42 Cal. Rptr. 151 , was a proceeding seeking a writ of prohibition or mandate to compel the trial court (respondent) to either dismiss or stay proceedings in an action pending in that court on the ground that a prior action was pending in Nevada between petitioner as plaintiff and real parties in interest as defendants concerning substantially the same subject matter as the California action, in which real parties in interest were the plaintiffs and petitioner was defendant. The trial court had denied petitioner's motion to dismiss action or stay proceedings on ground another action pending in Clark County, Nevada. In denying the petition, the court of appeal said that an action is brought in a court of this state involving the same parties and the same subject matter as an

action already pending in a court of another jurisdiction, a stay of the California proceedings is not a matter of right, but within the sound discretion of the trial court (*231 Cal. App. 2d 723, 724*).

The factual background of *Tinney v. Tinney (1963) 211 Cal. App. 2d 548, 27 Cal. Rptr. 239* , is discussed in *§ 10.40[3][a]*. In affirming the judgment, the court said that the question of whether a court should stay or abate a proceeding in one state until an action in another state is completed is within the discretion of the trial court (*211 Cal. App. 2d 548, 553*).

[b] Factors to Be Considered by Court Militate Against Stay

In *Gregg v. Superior Court (1987) 194 Cal. App. 3d 134, 239 Cal. Rptr. 380* , plaintiff janitorial service brought an action for fraud, unfair business practices, and operation of an illegal collection agency against defendant. At the hearing on an order to show cause for a preliminary injunction, defendant moved to stay the matter until related federal proceedings were terminated. Plaintiff was not a party to the related federal proceedings in which his attorney represented 50 plaintiffs in 11 lawsuits against defendant. The trial court granted the motion and did not rule on the preliminary injunction, finding it moot. The court of appeal concluded that the trial court abused its discretion and issued a peremptory writ of mandate directing it to dissolve the stay (*194 Cal. App. 3d 134, 139*). The court explained that a stay of action pending resolution of related lawsuits is sought, and one action is in state court and the other in federal court, the principle of comity may call for a discretionary refusal of the court to entertain the second suit pending determination of the first-filed action (*194 Cal. App. 3d 134, 136*). However, the court observed that the principle of priority based on comity applies most strongly the federal and state court actions are in rem or quasi in rem. The main reason for priority disappears the action is purely in personam. The court reiterated that an application for a stay is addressed to the sound discretion of the trial court. However, the court noted that most cases in which a stay was issued involved two related lawsuits between the same or substantially identical parties. Although a stay may be granted the parties are substantially different, the court said those actions have been special proceedings in rem, and are not persuasive authority for an in personam action (*194 Cal. App. 3d 134, 137-138*). The court found it significant that plaintiff sought personal relief from contracts and damages for fraud and unlawful business practices directed toward him. He had not sought relief in another forum and was not a party to a related action in another forum. Moreover, if he wanted to file an action in federal court he would be required to retain new counsel because his attorney had promised the federal court that he would not file new actions in federal court before the trial in the lead federal case. Thus, the court said the trial court's stay order forced plaintiff to suspend all efforts to seek monetary and injunctive relief (*194 Cal. App. 3d 134, 138*).

The factual background of *Leeds v. Superior Court (1965) 231 Cal. App. 2d 723, 42 Cal. Rptr. 151* , is set forth in *§ 10.40[4][a]*. The court said that in order to justify a stay of proceedings on the ground of another action pending in a court of another jurisdiction, the trial court should consider among other things which court can best determine the matter because of the nature of the subject matter, the availability of witnesses, or the stage to which the proceedings have already advanced. It added the petitioner had failed to show any real prejudice in the trial court's denial of the motion. Quoting from *Tinney v. Tinney (1963) 211 Cal. App. 2d 548, 553, 27 Cal. Rptr. 239* , discussed in *§ 10.40[3][c]* the court said that defendant has made no showing whatever of any abuse of discretion on the part of the trial court. She did not suggest that she was unable conveniently to attend the trial in California, that she was unable to produce any witnesses in California or any other evidence that would be available in Oklahoma, or that she was in any way prejudiced. Therefore, the court concluded that the trial court properly acted within its discretion it chose not to abate or stay the action (*231 Cal. App. 2d 723, 724*).

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A. Pleas in Abatement

1-10 California Points & Authorities §§ 10.41-10.59

[Reserved]

§§ 10.41[Reserved]

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B. Survival and Continuation of Actions

1-10 California Points & Authorities § 10.60

§ 10.60 Supporting Motion for Order Substituting Personal Representative for Deceased Party [Code Civ. Proc. § 377.31 or 377.41]

[1] FORM Supporting Motion for Order Substituting Personal Representative for Deceased Party [Code Civ. Proc. § 377.31 or 377.41]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ORDER SUBSTITUTING _____ [PERSONAL REPRESENTATIVE *or* DECEDENT'S SUCCESSOR IN INTEREST] FOR DECEASED _____ [PLAINTIFF *or* DEFENDANT *or specify other party*]
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	
	)	
	)	Date: _____
	)	Time: _____
	)	Dept.: _____
	)	Discovery Cut-Off: _____
	)	Motion Cut-Off: _____
	)	Trial Date: _____

_____

THE COURT SHOULD GRANT THE MOTION TO SUBSTITUTE _____ [*name*], AS _____ [PERSONAL REPRESENTATIVE *or* DECEDENT'S SUCCESSOR IN INTEREST], FOR _____ [PLAINTIFF *or* DEFENDANT *or specify other party*], WHO DIED WHILE THIS _____ [ACTION *or* PROCEEDING] WAS PENDING.

A. Nonabatement of Action or Proceeding by Death. A pending _____ [action *or* proceeding] does not abate by the death of a party if the cause of action survives (*Code Civ. Proc. § 377.21*).

B. Survival of Cause of Action. A person's cause of action is not lost by reason of that person's death, but survives subject to the applicable limitations period (*Code Civ. Proc. § 377.20*).

[*EITHER, if continuing pending action after plaintiff's death*]

C. Continuation of Action or Proceeding. On motion, the court shall allow a pending _____ [action *or* proceeding] that does not abate to be continued by the _____ [decedent's personal representative *or* decedent's successor in interest if no personal representative is appointed for the decedent] (*Code Civ. Proc. § 377.31*).

[*OR, if commencing or continuing an action after defendant's death*]

C. Survival of Cause of Action. A cause of action against a person is not lost by reason of that person's death, but survives subject to the applicable limitations period (*Code Civ. Proc. § 377.20*). A cause of action against a decedent that survives may be asserted against the decedent's personal representative or, to the extent provided by statute, against the decedent's successor in interest (*Code Civ. Proc. § 377.40*).

D. Continuation of Action or Proceeding. On motion, the court shall allow a pending _____ [action *or* proceeding] against the decedent that does not abate to be continued _____ [against the decedent's personal representative *or* to the extent provided by statute, against the decedent's successor in interest] (*Code Civ. Proc. § 377.41*).

[*CONTINUE*]

[*Optional*] **E. Decedent's Successor in Interest.** The "decedent's successor in interest" is the beneficiary of the decedent's estate or other successor in interest who succeeds to a cause of action or a particular item of property that is the subject of a cause of action (*Code Civ. Proc. § 377.11*).

F. Absent Substitution, Judgment Will be in Excess of Jurisdiction. Rendering judgment for or against a deceased party without first substituting his or her executor or administrator is action in excess of jurisdiction and subject to prevention or annulment by some form of direct attack, such as appeal (*Bliss v. Speier (1961) 193 Cal. App. 2d 125, 126-127, 13 Cal. Rptr. 847*).

[*Optional*] **G. Survival Action Not Defeated by Joinder With Nonsurvival Action.** The fact that a survivable cause of action is joined with an action that does not survive does not defeat its survivability (*Poon v. Poon (1966) 244 Cal. App. 2d 746, 754-755, 53 Cal. Rptr. 365* (prior law)).

[*Optional*] **H. Action for Wrongful Death May be Joined with Survival Action.** An action under *Code of Civil Procedure Section 377.30* may be joined with a wrongful death action under *Code of Civil Procedure Section 377.60*

arising out of the same wrongful act or neglect (*Code Civ. Proc. § 377.62(a)*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

CAUTION:
Despite *Code Civ. Proc. § 377.20*, certain actions or proceedings do not survive death [*see § 10.62*].

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for an order substituting the personal representative or, if none, the successor in interest of a deceased party in the decedent's place as plaintiff or defendant [*Code Civ. Proc. § 377.31* or *377.41*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Counsel should show that the party has died and that the person sought to be substituted has been appointed and qualified as the executor or administrator of the deceased party's estate [*Campbell v. West (1892) 93 Cal. 653, 656, 29 P. 219, 29 P. 645*]. Optional Paragraph E should be used if the action or proceeding is to be commenced or continued by or against the decedent's successor in interest. A successor in interest is broadly defined [*see Code Civ. Proc. § 377.11*], and may include, among others, persons who collect a decedent's small estate without administration [*see Prob. Code § 13107.5*]. If the successor in interest is commencing or continuing the decedent's cause of action, the successor in interest must file an affidavit or declaration under penalty of perjury setting forth the basis to his or her status as successor in interest [*see Code Civ. Proc. § 377.32(a)*].

If Optional Paragraph G is used, counsel should point out that the motion to substitute is directed only to that part of the cause of action that survives. Optional Paragraph H may be used the motion to substitute is brought concurrently with a motion for joinder of a death action based on the same underlying facts. For discussion and forms relating to consolidation of a death action with a survival action for trial, see *Ch. 45, Consolidation, Severance, and Coordination of Actions § 45.20* et seq., and *Ch. 66, Death and Survival Actions, § 66.90* et seq.

NOTE:
Neither *Code Civ. Proc. § 377.31* nor *377.41* indicates whether the motion for substitution should be made on ex parte application or by noticed motion. A number of older cases state that the substitution for a deceased party may be by ex parte application [*see, e.g., Campbell v. West (1892) 93 Cal. 653,656, 29 P. 219, 29 P. 645* ; *Kittle v. Bellegarde (1890) 86 Cal. 556, 563, 25 P. 55*]. However, the better practice, if the motion is made before or after trial, is to proceed by noticed motion. If the party dies during the progress of the trial, the motion will normally be made orally in open court without notice but in the presence of counsel for the adverse party.

[b] Effect of Prior Proceedings on Substituted Party

The personal representative substituted in an action or proceeding for a deceased party takes up the case where his or her predecessor left it. One who is substituted as plaintiff takes the place of the original plaintiff with respect to both the benefits and the burdens of his or her predecessor. A substituted defendant may avail himself or herself of all rulings made and of all exceptions reserved by the original defendant prior to the substitution [*Bliss v. Speier (1961) 193 Cal. App. 2d 125, 127, 13 Cal. Rptr. 847* (quoting from 67 C.J.S., *Parties*, § 89)].

[c] Related Pleading and Practice Forms

For forms of notices of motion for substitution, supporting declarations, and orders, see California Forms of Pleading and Practice, Ch. 21, *Amended and Supplemental Pleadings* (Matthew Bender).

[3] Discussion of Authorities

[a] Absent Substitution, Judgment Will be in Excess of Jurisdiction

Bliss v. Speier *(1961) 193 Cal. App. 2d 125, 13 Cal. Rptr. 847* , involved three consolidated actions against an individual and a corporation. In two of the actions, defendants counterclaimed (now cross complained [*Code Civ. Proc. § 428.80*]) for sums exceeding plaintiffs' demands. After trial but before judgment, the individual defendant died. An executrix of his estate was appointed and qualified but was not substituted into the actions as a party defendant. Judgment was entered awarding defendants $6,850.26 which was the excess of the amount awarded them over the amount awarded plaintiffs. Plaintiffs appealed, claiming the judgments were invalid because they were rendered against a decedent without substitution of his personal representative. In reversing the judgments and remanding the causes for further proceedings, the court of appeal, quoting Witkin California Procedure, p. 399, said that a judgment entered against a defendant who died after jurisdiction over him had been obtained but before judgment is in excess of jurisdiction and subject to prevention or annulment by some form of direct attack (*193 Cal. App. 2d 125, 126*). The court distinguished those cases, holding under varying circumstances that the claim that a judgment so rendered is void and subject to collateral attack is unsound on the ground that those cases did not apply where the attack on the judgment was direct by appeal (*193 Cal. App. 2d 125, 127*).

[b] Survival Action Not Defeated by Joinder With Nonsurvival Action

Poon v. Poon *(1966) 244 Cal. App. 2d 746, 53 Cal. Rptr. 365* (prior law), was a divorce action by a wife. She also sought in the action to have certain deeds, executed by her to her husband pursuant to a property settlement agreement which she was allegedly induced to sign by the husband's fraud and misrepresentation, set aside and title to the property quieted in her, as well as an accounting. The husband cross complained for divorce. Following the sixth day of trial, the husband killed the wife. The administrator of the wife's estate moved for an order substituting himself as plaintiff in the action, and the motion was denied. The administrator appealed. In reversing the order with directions to the trial court to grant the motion for substitution (*244 Cal. App. 2d 746, 755*), the court of appeal held that the joinder of causes of action which survive (actions arising out of alleged violation of property rights) with an action which does not survive (divorce action [*see § 10.62*]) does not defeat the survivability of the former (*244 Cal. App. 2d 746, 754-755*).

[4] Additional Authorities

[a] Absent Substitution, Judgment Will be in Excess of Jurisdiction

Downey v. Johnson (1968) 263 Cal. App. 2d 775, 69 Cal. Rptr. 830 , was an eminent domain proceeding to condemn certain parcels of land for a municipal building site. Both the landowner and her son, as conservator of her person and estate, were named defendants. The conservator, a layperson, purported throughout the proceeding to act in propria persona for the conservatee. The conservatee died and her son was appointed her executor, but no substitution of parties was made in the eminent domain proceeding. An interlocutory judgment was entered awarding various sums for specified parcels to the son as executor of the mother's estate. The son appealed in propria persona. The court of appeal

reversed the judgment on the ground that it was invalid. It held that the son, neither as conservator nor as executor, was entitled to appear in propria persona and conduct the trial proceedings and that he was not competent to waive any defects in procedure on behalf of the conservatee (*263 Cal. App. 2d 775, 778-783*). With respect to the failure to have the executor substituted for the decedent as a party defendant, the court, after noting that determination of the legal issues and the trial of the valuation issue all took place after the owner's death, held that, under the circumstances, the judgment was in excess of jurisdiction (*263 Cal. App. 2d 775, 783*).

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1-10 California Points & Authorities § 10.61

§ 10.61 Supporting Motion for Order Substituting Transferee of Interest in Pending Action or Proceeding in Place of Transferor [Code Civ. Proc. § 368.5]

[1] FORM Supporting Motion for Order Substituting Transferee of Interest in Pending Action or Proceeding in Place of Transferor [Code Civ. Proc. § 368.5]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ORDER SUBSTITUTING TRANSFEREE OF INTEREST IN PENDING _____ [ACTION *or* PROCEEDING] FOR TRANSFEROR
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	Date: _____
	)	Time: _____
	)	Dept: _____
		Discovery Cut-Off: _____
		Motion Cut-Off: _____
		Trial Date: _____

_____

THE MOTION FOR AN ORDER SUBSTITUTING THE TRANSFEREE OF AN INTEREST IN THIS _____ [ACTION *or* PROCEEDING] IN THE PLACE OF THE TRANSFEROR SHOULD BE

GRANTED.

A. Nonabatement of Action or Proceeding by Assignment. _____ [An action *or* A proceeding] does not abate by the transfer of an interest in the _____ [action *or* proceeding] or by any other transfer of an interest (*Code Civ. Proc. § 368.5*).

B. Substitution of Transferee Authorized. _____ [An action *or* A proceeding] may, on the transfer of any interest in it, be continued in the name of the original party, or the court may allow the person to whom the transfer was made to be substituted in the place of the transferor (*Code Civ. Proc. § 368.5*).

C. Transferee as Entitled to Substitution. The transferee of an interest in a pending _____ [action *or* proceeding] is entitled to be substituted as a party in the place of the transferor (*see Ford v. Bushard (1897) 116 Cal. 273, 277, 48 P. 119* ; *Macmillan Petroleum Corp. v. Griffin (1950) 99 Cal. App. 2d 523, 526, 222 P.2d 69*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion by the transferee or transferor of an interest in a pending action or proceeding for an order substituting the transferee as a party in the place of the transferor [*Code Civ. Proc. § 368.5*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Transferee's Option

[i] Action Permitted to Proceed in Transferee's Name

If, after an action is commenced, the plaintiff transfers his, her, or its interest in the property in controversy, the transferee has the option of allowing the action to continue in the name of the original plaintiff or to be substituted as plaintiff and proceed in his, her, or its own name [*Knobloch v. Associated Oil Co. (1915) 170 Cal. 144, 147, 148 P. 938*]. If the transferee elects the former alternative, the case may proceed in the original party's name without any further action by the court [*Malone v. Big Flat Gravel Mining Co. (1892) 93 Cal. 384, 390, 28 P. 1063* ; *Davis v. Rudolph (1947) 80 Cal. App. 2d 397, 401, 181 P.2d 765*]. In this case, the court may give judgment according to the conditions existing the case was commenced. The transferee is deemed to have elected to trust the original plaintiff to make over the title in some appropriate manner after the judgment has become final [*Knobloch v. Associated Oil Co. (1915) 170 Cal. 144, 147, 148 P. 938* ; *see also Haines v. Pigott (1959) 174 Cal. App. 2d 805, 808, 345 P.2d 339*]. The same rule applies a defendant transfers his, her, or its interest in the property in controversy during the pendency of the action or proceeding [*Malone v. Big Flat Gravel Mining Co. (1892) 93 Cal. 384, 390, 28 P. 1063* ; *Bates v. Berry (1923) 63 Cal. App. 505, 509, 219 P. 83*]. The same rule also applies the transferring party is an intervenor [*see Knapp*

Development & Design v. Pal-Mal Properties (1987) 195 Cal. App. 3d 786, 793, 240 Cal. Rptr. 920].

[ii] Action Proceeding in Transferee's Name

Code Civ. Proc. § 368.5 provides that the court "may allow" the transferee of an interest to be substituted in a pending action or proceeding for the transferor. Although the section does not expressly so state, it appears that a court order is required. "Substantial compliance," however, may be sufficient [*Nezik v. Cole (1919) 43 Cal. App. 130, 140, 184 P. 523*], and the failure to secure a court order may be waived [*see Dougherty v. California Kettleman Oil Royalties, Inc. (1937) 9 Cal. 2d 58, 84-85, 69 P.2d 155]* . Thus, in *Nezik* the court of appeal held that, while there was no order of substitution, the filing of a notice of motion for leave to file an amended and supplemental complaint to allege termination of defendant's corporate existence and to name the corporation's directors at the time of termination as defendants, and the court order granting the motion and giving defendants 20 days from service of the order to plead to the amended and supplemental complaint, constituted substantial compliance with former Code Civ. Proc. § 385 [*now see Code Civ. Proc. § 368.5*]. In *Dougherty,* the California Supreme Court held that the assignee waived the objection that there was no order substituting it as the party defendant, which was done by filing an amended and supplemental complaint (to allege the assignment), where the defendant assignor was thereafter dismissed from the case and the assignee both answered the amended and supplemental complaint and filed a cross complaint. The Court, however, at page 85 stated that the more orderly method of procedure was to move for a substitution.

[c] Nature of Motion

Since *Code Civ. Proc. § 368.5* fails to expressly require a court order for substitution of parties [*see § 10.38[2][d]*], it is silent as to whether the application for the order may be made ex parte or should be made by noticed motion. In *Ford v. Bushard (1897) 116 Cal. 273, 276, 48 P. 119* , the Supreme Court held that defendants had waived any error that no notice was given for a motion for substitution they filed an answer to the supplemental complaint (to allege the assignment) without objection. In any case, the Court in dictum said that since defendants had made no showing as to how the motion for substitution was made, the Court would presume in favor of the regularity of the proceedings that notice was given. However, in *Macmillan Petroleum Corp. v. Griffin (1950) 99 Cal. App. 2d 523, 526, 222 P.2d 69* , the court of appeal, in upholding the validity of an order made on ex parte application substituting the plaintiff's assignee as the plaintiff in the action, said that while it is better practice that a notice be given, there is no requirement that notice of application for substitution of a party plaintiff be given to the defendant. Citing *Macmillan,* the court of appeal, in *Chatten v. Martell (1958) 166 Cal. App. 2d 545, 553, 333 P.2d 364* , applied the rule to the substitution of plaintiffs by the filing of an amended complaint the assignment occurred before the action was commenced. The original complaint had named the assignor as plaintiff. An amended complaint was filed naming the assignee as plaintiff. Defendant's demurrer to the amended complaint was sustained with leave to amend, but his demurrer to the second amended complaint was sustained without leave to amend and the action was dismissed. In reversing the judgment, the court, with respect to notice of substitution, said that in substituting plaintiffs, although it is better practice to give notice, there is no requirement that notice of application for substitution under *Code Civ. Proc. § 47* (relating to amended pleadings) be given.

In view of the dictum in *Ford* and the contrary holdings in *Macmillan* and *Chatten,* both of which, however, acknowledged that the better practice would be to proceed by noticed motion, it would appear the noticed motion procedure should be used. The motion for an order of substitution may be combined with a motion to file a supplemental pleading [*see Code Civ. Proc. § 464*] to allege the transfer [*see § 10.61[2][d]*].

On the other hand, a motion by one party to have the adverse party's transferee substituted for the adverse party, must, to comport with due process of law, be made on notice [*Higgins v. Kay (1914) 168 Cal. 468, 470-473, 143 P. 710*].

[d] Supplemental Pleading

Normally, if the court orders the substitution of a transferee for a transferor of an interest in a pending action or proceeding, the filing of a supplemental pleading [*see Code Civ. Proc. § 464*] is required [*see Northern Ry. Co. v. Jordan (1890) 87 Cal. 23, 27-28, 25 P. 273*]. Hence, the motion for substitution may be combined with a motion for leave to file a supplemental pleading.

[e] Related Pleading and Practice Forms

For forms of notices of motion for substitution of the transferee of an interest in a pending action or proceeding in place of the transferor, see California Forms of Pleading and Practice, Ch. 21, *Amended and Supplemental Pleadings* (Matthew Bender).

[3] Discussion of Authorities

[a] Transferee as Entitled to Substitution

Ford v. Bushard *(1897) 116 Cal. 273, 48 P. 119* , was an action for damages for breach of a contract regarding the sale of orange trees. One of the plaintiffs died before trial but had, before his death, assigned his interest in the contract to another person. The assignee secured an order substituting her as a party plaintiff in the place of the deceased assignor and granting her leave to file a supplemental pleading to allege the assignment and death. Defendants filed an answer to the supplemental complaint denying the assignment. No evidence with respect to the assignment was presented at trial, and the jury returned a verdict for plaintiffs.Although the Supreme Court reversed the judgment because of plaintiffs' failure at trial to present any evidence showing the assignment, it said that in the case of an alleged assignment of the cause of action, the assignee is entitled to be substituted on a showing of probable cause (*116 Cal. 273, 277*).

Macmillan Petroleum Corp. v. Griffin *(1950) 99 Cal. App. 2d 523, 222 P.2d 69* , involved an appeal from the last in a series of orders made by the trial court in a proceeding to enforce a 13-year-old judgment. Plaintiff, a foreign corporation, had dissolved after the judgment was rendered but several years prior to the enforcement proceeding. It had, however, before dissolving, assigned the judgment to another corporation. The enforcement proceeding was commenced in the name of the dissolved corporation but on ex parte application the assignee corporation was substituted as the party plaintiff. The order appealed from, among other things, vacated the order of substitution. On appeal, defendant sought to uphold this portion of the trial court's order, contending that the order of substitution was invalid because it was made on ex parte application rather than by noticed motion. In rejecting this contention [*see* discussion in *§ 10.61[2][c]*] and reversing that portion of the order vacating the substitution order, the court of appeal said that an assignee is entitled to be substituted as party plaintiff in the place of the assignor (*99 Cal. App. 2d 523, 526*).

[4] Additional Authorities

[a] Transferee as Entitled to Substitution

Northern Ry. Co. v. Jordan (1890) 87 Cal. 23, 25 P. 273 , was an ejectment action by a railway company and an individual. Both plaintiffs and defendants claimed title to the land in question. After action was commenced, the individual plaintiff transferred his interest in the land to another person who was, by court order, substituted for the individual plaintiff. Judgment was for plaintiffs. In reversing the judgment for uncertainty in the description of the land and for plaintiffs' failure to have filed a supplemental complaint to allege the fact of the assignment, the Supreme Court, with respect to the substitution of parties, said that the transferee, having succeeded by transfer to the interest of the individual plaintiff, had a right to be substituted as plaintiff if he desired to do so (*87 Cal. 23, 27*).

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CHAPTER 10 ABATEMENT AND SURVIVAL OF ACTIONS
PART II. FORMS
B. Survival and Continuation of Actions

1-10 California Points & Authorities § 10.62

§ 10.62 Opposing Motion for Order Substituting Representative for Deceased Party [Code Civ. Proc. § 377.31 or 377.41]--Proceeding to Change Marital Status Does Not Survive Death of Spouse

[1] FORM Opposing Motion for Order Substituting Representative for Deceased Party [Code Civ. Proc. § 377.31 or 377.41]--Proceeding to Change Marital Status Does Not Survive Death of Spouse

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM OF POINTS AND AUTHORIT-
Marriage of	)	IES IN OPPOSITION TO MOTION FOR ORDER
Petitioner	)	SUBSTITUTING PERSONAL REPRESENTATIVE
_____ [*name*],	)	OF DECEASED _____
Respondent	)	[PETITIONER *or* RESPONDENT]
_____ [*name*],	)	Date: _____
	)	Time: _____
	)	Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

THE MOTION TO SUBSTITUTE THE _____ [EXECUTOR *or* ADMINISTRATOR] OF THE DECEASED _____ [PETITIONER *or* RESPONDENT] SHOULD BE DENIED BECAUSE A CAUSE OF ACTION TO ALTER THE PARTIES' MARITAL STATUS DOES NOT SURVIVE THE DEATH OF A SPOUSE.

A. Requirement That Cause of Action Survive. Abatement of a pending action or proceeding by the death of a party will not occur only if the cause of action survives (*see Code Civ. Proc. § 377.21*).

B. Nonsurvivable Causes. Not all causes of action survive death, notwithstanding the broad language of *Code of Civil Procedure Section 377.20* (*Poon v. Poon (1966) 244 Cal. App. 2d 746, 751 n.3, 53 Cal. Rptr. 365* (prior law; construing former Prob. Code § 573(a), from which *Code Civ. Proc. § 377.20* is derived)).

[*EITHER*]

C. Dissolution of Marriage Proceeding Does Not Survive. A family lawproceeding for dissolution of marriage does not survive the death of either party (*In re Marriage of Williams (1980) 101 Cal. App. 3d 507, 510, 161 Cal. Rptr. 808*).

[*OR*]

C. Proceeding for Annulment Does Not Survive. A family law proceeding for a judgment of nullity does not survive the death of either party (*Greene v. Williams (1970) 9 Cal. App. 3d 559, 562-564, 88 Cal. Rptr. 261*).

[*CONTINUE*]

D. Nonsurvivable Cause Abates on Party's Death. A cause of action that does not survive death abates on the death of a party (*see* *Poon v. Poon (1966) 244 Cal. App. 2d 746, 753, 53 Cal. Rptr. 365*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion for an order substituting the personal representative of a deceased party in the place of the decedent in a pending proceeding for dissolution of marriage or judgment of nullity.

Counsel should add argument linking the points and authorities in this form with the facts of his or her case.

[3] Discussion of Authorities

[a] Requirement That Cause of Action Survive

Code Civ. Proc. § 377.21 provides that a pending action or proceeding does not abate by the death or any disability of a party, "if the cause of action survives."

[b] Nonsurvivable Causes

The factual background of ***Poon v. Poon*** *(1966) 244 Cal. App. 2d 746, 53 Cal. Rptr. 365* , is discussed in *§ 10.60[3][a]*. The court of appeal stated that although former Prob. Code § 573 (*now see Code Civ. Proc. § 377.20*), following its 1961 amendment, would appear to make all causes of action survive, it was apparent, in view of the fact that divorce actions do not survive the death of either party, that the section did not merit such a broad interpretation (*244 Cal. App. 2d 746, 751 n.3*).

[c] Dissolution of Marriage Proceeding Does Not Survive

In re Marriage of Williams *(1980) 101 Cal. App. 3d 507, 161 Cal. Rptr. 808* , arose out of a wife's marriage dissolution proceeding. The trial court awarded custody of the parties' minor children to the wife pendente lite. Thereafter, because she became critically ill and entered a hospital, her husband moved for an order transferring custody to him. The same day, the wife's mother and brother, claiming custody and visitation rights with respect to the children, moved for an order joining them as parties. Two days later the wife died. The husband's motion was later granted without prejudice to the joinder motion. The husband then moved for dismissal of the proceeding on the ground his wife had died. The joinder motion and motion to dismiss were heard together. The trial court granted the motion to dismiss and denied the joinder motion. The mother and brother appealed. In affirming the order denying the joinder motion on the ground the proceeding had been dismissed, the court of appeal said that divorce is a personal action that does not survive the death of a party, that one of the parties dies, dissolution occurs as a matter of law, that there is nothing left for a court to dissolve or annul, that dissolution by death is final, irrevocable, nonmodifiable, and nonappealable, and that the rule of nonsurvivability, established early in the cases, remains applicable in dissolution proceedings under the Family Law Act (*101 Cal. App. 3d 507, 510*).

[d] Proceeding for Annulment Does Not Survive

Greene v. Williams *(1970) 9 Cal. App. 3d 559, 88 Cal. Rptr. 261* , was an action by the mother of a deceased minor to annul his marriage on the ground of minority. The widow's demurrer to the complaint was sustained without leave to amend, and the action was dismissed. The mother appealed, centering her argument on the existence of a property right to annul the marriage, a right which she claimed survived the child's death. In affirming the judgment, the court of appeal, citing former Civ. Code § 4500 (*now see Fam. Code § 310*), pointed out that the marriage had already been dissolved by death (*9 Cal. App. 3d 559, 562*). With respect to the mother's argument, the court acknowledged that there were two possible sources for such a property right: (1) a right in the child itself, which survives the death of the child and passes to the parent; and (2) an independent right in the parent, which continues in existence and remains unaffected by the child's death. With respect to the first, the court said that an adult's cause of action for divorce does not survive the death of the other party and that in the absence of specific legislation the same is true of an adult's cause of action for annulment. It is likewise true, said the court, that an adult's cause of action for divorce or for annulment does not survive his or her own death and that the general rule ofsurvivability of causes of action does not apply to matrimonial cases. The court believed that a minor's right to seek annulment is subject to the same rule, but added that even if the cause of action is considered a right of property, it is one which terminates with death, and since the right expires on the minor's death, nothing survives to pass to the parent, for a successor right of action cannot be longer-lived than the right from which it derives (*9 Cal. App. 3d 559, 563*). The court further held that the parent has no independent right to secure an annulment after the child's death, because the parent's right to have a minor's marriage annulled is derivative and designed to permit one person to act on behalf of another at a time the latter is presumed incapable of acting prudently in his or her own behalf (*9 Cal. App. 3d 559, 563-564*).

[e] Nonsurvivable Cause Abates on Party's Death

The factual background of ***Poon v. Poon*** *(1966) 244 Cal. App. 2d 746, 53 Cal. Rptr. 365* , is discussed in *§ 10.60[3][a]*. The court of appeal held that because a divorce action involving the status of the parties does not survive death, there could be no question but that such an action abates on the death of one of the spouses (*244 Cal. App. 2d 746, 753*).

[4] Additional Authorities

[a] Dissolution of Marriage Proceeding Does Not Survive

In re Marriage of Shayman (1973) 35 Cal. App. 3d 648, 111 Cal. Rptr. 11 , was a divorce action by a wife against her husband who answered and cross complained. The cause was tried, and written findings of fact and conclusions of law were filed. The findings set forth the rights of the parties with regard to items of community property, child custody, support, attorneys' fees, and costs. The conclusions of law contained provisions for disposition of these matters in the same form as in a judgment. The document concluded with the statement, "Let judgment be entered accordingly." No judgment was entered. About three weeks later the husband died. The husband's attorney then, by noticed motion, secured entry of an interlocutory judgment nunc pro tunc to the date the findings and conclusions were filed [*see Code Civ. Proc. § 669*]. The wife appealed, contending the trial court had no jurisdiction to proceed as it did. The court of appeal acknowledged as "true" the rule that the death of a party to a dissolution proceeding abates the cause of action, as the status of the parties is no longer before the court, and that the court loses jurisdiction to make any further determination of property rights, alimony, costs, or attorneys' fees, but held the rule does not apply to prevent entry of a judgment in conformity with a decision which had been issued before death (*35 Cal. App. 3d 648, 651*). The court reversed the judgment with directions to enter judgment consistent with the decision set forth in the findings of fact and conclusions of law and in the form prescribed by Cal. Rules of Ct., Rule 1287 (*35 Cal. App. 3d 648, 653*).

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Volume 1 Chapters 1-19 WRITING LEGAL MEMORANDA AND BRIEFS; ABATEMENT AND SURVIVAL OF ACTIONS---to---AMENDED AND SUPPLEMENTAL PLEADINGS
CHAPTER 10 ABATEMENT AND SURVIVAL OF ACTIONS
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B. Survival and Continuation of Actions

1-10 California Points & Authorities § 10.63

§ 10.63 Opposing Motion for Order Substituting Transferee of Interest in Pending Action or Proceeding in Place of Transferor [Code Civ. Proc. § 368.5]--Basic Purpose of Transfer Was Unlawful

[1] FORM Opposing Motion for Order Substituting Transferee of Interest in Pending Action or Proceeding in Place of Transferor [Code Civ. Proc. § 368.5]--Basic Purpose of Transfer Was Unlawful

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR ORDER SUBSTITUTING TRANSFEREE OF INTEREST IN PENDING _____ [ACTION *or* PROCEEDING] FOR TRANSFEROR
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

THE MOTION FOR AN ORDER SUBSTITUTING THE TRANSFEREE OF AN INTEREST IN THIS _____ [ACTION *or* PROCEEDING] FOR THE TRANSFEROR SHOULD BE DENIED BECAUSE THE BASIC PURPOSE OF THE TRANSFER WAS UNLAWFUL AND SUBSTITUTION WOULD ALLOW THE UNLAWFUL PURPOSE TO BE ACCOMPLISHED.

A. Substitution of Transferee Not Required. In the event an interest in _____ [an action *or* a proceeding] is transferred the _____ [action *or* proceeding] may be continued in the name of the original party (*Code Civ. Proc. § 368.5*).

B. Substitution of Parties Is in Court's Discretion. The court has the discretion to allow or disallow the transferee of an interest in a pending _____ [action *or* proceeding] to be substituted in the place of the transferor (*Code Civ. Proc. § 385(a)*; *see Ruby v. Superior Court (1951) 104 Cal. App. 2d 175, 176, 231 P.2d 868* ; *Ruby v. Superior Court (1951) 104 Cal. App. 2d 175, 176, 230 P.2d 860* (prior law; construing former Code Civ. Proc. § 385(a), from which *Code Civ. Proc. § 368.5* is derived).

C. Substitution Should Be Denied if Purpose of Transfer Was Unlawful. A substitution of parties should be denied if the transfer was made for an unlawful purpose and to order the substitution would permit the consummation of that purpose (*see Ruby v. Superior Court (1951) 104 Cal. App. 2d 175, 176, 231 P.2d 868* ; *Ruby v. Superior Court (1951) 104 Cal. App. 2d 175, 176, 230 P.2d 860*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion for an order substituting the transferee of an interest in a pending action or proceeding in the place of the transferor.

Counsel should add argument linking the points and authorities in this form with the facts of his or her case.

[b] Denial of Motion

Normally, a motion by the transferee or transferor of an interest in a pending action or proceeding to have the transferee substituted as a party will be granted. But, as shown by this form, the court may deny such a motion if the transfer was made for an unlawful purpose and the substitution would allow consummation of that purpose.

A motion by the adverse party for substitution of the transferee for the transferor may, in the court's discretion, be denied [*see, e.g., Alameda County Home Inv. Co. v. Whitaker (1933) 217 Cal. 231, 234* (no abuse of discretion is denying defendant's motion to bring in party succeeding to plaintiff's interest), *cert den., 290 U.S. 640, 54 S. Ct. 59, 78 L. Ed. 556]* .

[3] Discussion of Authorities

[a] Substitution of Transferee Not Required

Code Civ. Proc. § 368.5 provides that an action or proceeding does not abate by the transfer of an interest in the action

or proceeding or by any other transfer of an interest. The action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding.

[b] Substitution of Parties Is in Court's Discretion

Code Civ. Proc. § 368.5 in pertinent part provides that the action or proceeding may be continued in the name of the original party or the court "may allow" the person to whom the transfer is made to be substituted in the action or proceeding.

Ruby v. Superior Court of San Francisco *(1951) 104 Cal. App. 2d 175* , was an application for a writ of mandate to compel a trial court to substitute a party plaintiff. The alternative writ was denied without opinion and a petition for rehearing filed. In denying the petition for rehearing, the court of appeal said that whether a motion to substitute shall be granted under *Code Civ. Proc. § 385* (*now see Code Civ. Proc. § 368.5*) is discretionary with the trial court (*104 Cal. App. 2d 175, 176*).

[c] Substitution Should be Denied if Purpose of Transfer Was Unlawful

The procedural background of ***Ruby v. Superior Court of San Francisco*** *(1951) 104 Cal. App. 2d 175* , is discussed in *§ 10.63[3][b]*. The trial court had, on the motion for substitution, interrogated the alleged assignee, a layperson, and concluded that he was being brought into the case merely to represent the petitioners in the action. In denying the motion for rehearing, the court of appeal held that the trial court was justified in finding that the basic purpose of the assignment was to permit a layperson to practice law, that the finding was supported by the evidence, and that a substitution intended to permit a layperson to practice law should not be permitted (*104 Cal. App. 2d 175, 176*).

[4] Additional Authorities

[a] Substitution of Transferee Is in Court's Discretion

Fay v. Steubenrauch (1903) 138 Cal. 656, 72 P. 156 , was an action to foreclose a mortgage executed by one defendant on land subsequently conveyed to the other defendant. After decree of foreclosure and appeal to the Supreme Court, the defendant to whom the land had been conveyed, in turn, conveyed it to one Lund and subsequent to this conveyance died. Lund sought an order substituting him in the case in place of the deceased defendant. Although the Court ordered the substitution on the ground that under the facts shown its discretion would be properly exercised by an order of substitution as prayed for, it said that former Code Civ. Proc. § 385 (*now see Code Civ. Proc. § 368.5*), providing that the court may allow the person to whom the transfer is made to be substituted in the action or proceeding, is a permissive statute and appeals to the discretion of the court (*138 Cal. 656, 657*).

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CHAPTER 11 ACCORD AND SATISFACTION

1-11 California Points & Authorities 11.syn

§ 11.syn Synopsis to Chapter 11: ACCORD AND SATISFACTION

§ 11.01 Scope of Chapter

§ 11.02 Governing Statutes

§ 11.03 Setting Aside Accord

§ 11.04 Use of This Chapter

§ 11.05 Related Pleading and Practice Chapters

§ 11.06 Related Points and Authorities Chapters

§§ 11.07-11.19 [Reserved]

§ 11.20 Supporting Contention That the Obligation Sued on Was Extinguished by Accord and Satisfaction [Civ. Code § 1521 et seq.]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Accord and Satisfaction Extinguishes Original Obligation

[b] Accord Defined

[c] Accord for Performance or Promise

[d] Accord May Be Implied

§ 11.21 Supporting Contention That the Obligation Sued on Was Extinguished by Accord and Satisfaction [Civ. Code § 1521 et seq.]--Partial Payment of Disputed Amount [Civ. Code § 1526(a); Com. Code § 3311]

[1] FORM

[2] Comments

[a] Use of Form

[b] Tender by Check

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Partial Payment of Disputed Amount Extinguishes Original Obligation

[b] Test for Dispute

[c] Accord and Satisfaction Evidenced by Check

[d] Discharge by Tender of Negotiable Instrument

[e] Accord and Satisfaction by Check Not Abrogated by Commercial Code Section 1308

[f] Creditor's Denial of Intention Ineffective

[g] Creditor or Its Appropriate Agent Knew of Tender

[4] Additional Authorities

[a] Test for Dispute

[b] Accord and Satisfaction Evidenced by Check

[c] Creditor's Denial of Intention Ineffective

§ 11.22 Supporting Contention That the Obligation Sued on Was Extinguished by Accord and Satisfaction [Civ. Code § 1521 et seq.]--Something Different Accepted for Original Obligation

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Accord and Satisfaction by Agreement to Accept Something Different

[4] Additional Authorities

[a] Accord and Satisfaction by Agreement to Accept Something Different

§ 11.23 Supporting Contention That the Obligation Sued on Was Extinguished by Accord and Satisfaction [Civ. Code § 1521 et seq.]--Part Performance of Liquidated Undisputed Claim

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Part Performance or Payment Accepted in Writing Extinguishes Debt

[b] Obligation Must Be Liquidated and Undisputed

[c] Writing Required for Acceptance

[d] Creditor's Written Acceptance Evidenced by Check

[4] Additional Authorities

[a] Part Performance or Payment Accepted in Writing Extinguishes Debt

§ 11.24 Supporting Contention That the Obligation Sued on Was Extinguished by Accord and Satisfaction [Civ. Code § 1521 et seq.]--Promise as Satisfaction

[1] FORM

[2] Comments

[a] Use Of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Promise as Accord

[b] Promise as Satisfaction Extinguishes Debt

[4] Additional Authorities

[a] Promise as Satisfaction Extinguishes Debt

§ 11.25 Supporting Contention That the Obligation Sued on Was Extinguished by Accord and Satisfaction [Civ. Code § 1521 et seq.]--Special Pleading Excused

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Obligee Proves Payment and Circumstances

[b] Accord and Satisfaction Raised by Motion for Summary Judgment

§ 11.26 Supporting Contention That the Obligation Sued on Was Extinguished by Accord and Satisfaction [Civ. Code §§ 1521-1526]--Composition, Extension Agreement, or Release [Civ. Code § 1526(b)-(d)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[c] Related Pleading and Practice Forms

§ 11.27 Opposing Contention That the Obligation Sued on Was Extinguished by Accord and Satisfaction [Civ. Code §§ 1521-1526]--Accord Not Valid--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Rules of Contract Apply

[b] Necessary Elements of Valid Accord

[4] Additional Authorities

[a] Rules of Contract Apply

[b] Necessary Elements of Valid Accord

§ 11.28 Opposing Contention That the Obligation Sued on Was Extinguished by Accord and Satisfaction [Civ. Code § 1521 et seq.]--Accord Not Valid--No Meeting of the Minds [Civ. Code § 1526(a); Com. Code § 3311(c)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Meeting of Minds Required

[b] Intention to Agree

[c] Intention From Circumstances

[d] Accord and Satisfaction as Question of Fact

[e] Conditional Tender Must Be Clear

[f] Subsequent Conduct Disproves Accord and Satisfaction

[g] Debtor Did Not Send Check to Appropriate Person or Office

[h] Creditor Tendered Repayment Within 90 Days

[4] Additional Authorities

[a] Meeting of Minds Required

[b] Intention to Agree

[c] Accord and Satisfaction as Question of Fact

§ 11.29 Opposing Contention That the Obligation Sued on Was Extinguished by Accord and Satisfaction [Civ. Code § 1521 et seq.]--Accord Not Valid--No Bona Fide Dispute

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Bona Fide Dispute as Consideration

[b] Bona Fide Dispute Required

[c] Honest Dispute Required

[d] Arbitrary Refusal to Pay

[e] No Dispute When Claim Concededly Due

[f] Wages Concededly Due Do Not Extinguish Disputed Claim

[4] Additional Authorities

[a] Bona Fide Dispute Required

[b] Honest Dispute Required

[c] No Dispute When Claim Concededly Due

[d] Wages Concededly Due Do Not Extinguish Disputed Claim

§ 11.30 Opposing Contention That the Obligation Sued on Was Extinguished by Accord and Satisfaction [Civ. Code § 1521 et seq.]--Accord Not Executed

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Accord Must Be Executed

[e] Part Performance Not Satisfaction

[3] Additional Authorities

[a] Accord Must Be Executed

[b] Part Performance Not Satisfaction

§ 11.31 Opposing Contention That the Obligation Sued on Was Extinguished by Accord and Satisfaction [Civ. Code § 1521 et seq.]--Accord and Satisfaction Not Specially Pleaded

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Accord and Satisfaction Must Be Pleaded

[4] Additional Authorities

[a] Accord and Satisfaction Must Be Pleaded

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1-11 California Points & Authorities § 11.01

§ 11.01 Scope of Chapter

This chapter contains forms for use in supporting [*see §§ 11.20 -11.26*] and opposing [*see §§ 11.27 -11.31*] the contention that an obligation sued on was extinguished by accord and satisfaction.

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1-11 California Points & Authorities § 11.02

§ 11.02 Governing Statutes

Accord and satisfaction are governed by *Civ. Code §§ 1521-1526*. Accord and satisfaction when accomplished by tender of a check or draft in full satisfaction of a disputed debt is governed by both *Civ. Code § 1526* and *Com. Code § 3311*. *Com. Code § 1308*, which governs reservation of rights in other contracts under the Commercial Code, specifies that it does not apply to an accord and satisfaction.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Negotiable Instruments (Article 3)Discharge & PaymentPaymentCommercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsDefinitionsChecksContracts LawPerformanceAccord & Satisfaction

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1-11 California Points & Authorities § 11.03

§ 11.03 Setting Aside Accord

An accord and satisfaction may be set aside on the grounds of mistake [*see, e.g., Bldg. Serv. Emp. Pension Tr. v. Amer. Bldg. Maint. (9th Cir. 1987) 828 F.2d 576, 578* (applying California law)]. For points and authorities relating to mistake as a basis for rescission, see Ch. 92, *Duress, Menace, Fraud, Undue Influence, and Mistake* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawPerformanceAccord & Satisfaction

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1-11 California Points & Authorities § 11.04

§ 11.04 Use of This Chapter

The forms in this chapter set forth substantive authorities supporting and opposing the contention that an obligation has been extinguished by an accord and satisfaction. They may be included as part of a memorandum or in a trial or appellate brief. For discussion of how to use the forms in this chapter to draft a memorandum or a trial or appellate brief, see Ch. 1, *Writing Legal Memoranda and Briefs* .

The forms in this chapter may be used when an accord and satisfaction has been asserted as an affirmative defense to claims arising from tort or breach of contract. Generally, defendant must specially plead the defense in the answer [*Berger v. Lane (1923) 190 Cal. 443, 213 P. 45* ; *see § 11.31*]. There are, however, certain exceptions [*Russell v. Riley & Peterson (1927) 82 Cal. App. 728, 256 P. 557* ; *Ramos v. City of Santa Clara (1973) 35 Cal. App. 3d 93, 110 Cal. Rptr. 485* ; *see § 11.25*] to this general rule. Furthermore, the court may allow an answer to be amended if defendant does not fall within the exceptions and fails to specially plead the defense [*Ramos v. City of Santa Clara (1973) 35 Cal. App. 3d 93, 110 Cal. Rptr. 485* ; *Code Civ. Proc. §§ 472, 473*]. The forms may also be used by defendant in support of a general demurrer to a complaint [*Code Civ. Proc. §§ 430.10(e), 430.20(a)*] when the complaint shows on its face that the obligation sued on has been extinguished by an accord and satisfaction. They may be used in support of or in opposition to a motion for summary judgment [*Code Civ. Proc. § 437c*] on the ground that the action has no merit because the undisputed facts show that the obligation sued on has been extinguished by an accord and satisfaction. Other procedures in which the forms can be used are on motion for new trial [*Code Civ. Proc. § 657*] and on a motion for judgment notwithstanding the verdict [*Code Civ. Proc. § 629*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedureAppealsBriefsCommercial Law (UCC)Negotiable Instruments (Article 3)Discharge & PaymentPaymentContracts LawPerformanceAccord & Satisfaction

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1-11 California Points & Authorities § 11.05

§ 11.05 Related Pleading and Practice Chapters

For a discussion and forms for use in actions involving accord and satisfaction generally, and for a discussion of the distinction between accord and satisfaction and other affirmative defenses, see California Forms of Pleading and Practice, Ch. 6, *Accord and Satisfaction* (Matthew Bender). For a discussion and forms for affirmative defenses based on modification, novation, rescission, or lack of one of the essential elements of a contract, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender). For a discussion and forms for affirmative defenses based on release, see California Forms of Pleading and Practice, Ch. 520, *Settlement and Release* (Matthew Bender). For a discussion and forms relating to amendment of pleadings, see California Forms of Pleading and Practice, Ch. 21, *Amended and Supplemental Pleadings* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedureAppealsBriefsContracts LawPerformanceAccord & SatisfactionContracts LawPerformanceNovation

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1-11 California Points & Authorities § 11.06

§ 11.06 Related Points and Authorities Chapters

For points and authorities relating to actions for breach of contract and to defenses to the formation and enforcement of a contract generally, see Ch. 50, *Contracts* . For points and authorities relating to the enforcement of an accord agreement generally, see Ch. 214, *Specific Performance* . For a discussion and forms relating to amendment of pleadings, see Ch. 16, *Amended and Supplemental Pleadings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormContracts LawBreachGeneral OverviewContracts LawPerformanceAccord & SatisfactionContracts LawRemediesSpecific Performance

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1-11 California Points & Authorities §§ 11.07-11.19

[Reserved]

§§ 11.07[Reserved]

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1-11 California Points & Authorities § 11.20

§ 11.20 Supporting Contention That the Obligation Sued on Was Extinguished by Accord and Satisfaction [Civ. Code § 1521 et seq.]--General Form

[1] FORM Supporting Contention That the Obligation Sued on Was Extinguished by Accord and Satisfaction [Civ. Code § 1521 et seq.]--General Form

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE OBLIGATION SUED ON WAS EXTINGUISHED BY ACCORD AND SATISFACTION.

A. Accord and Satisfaction Extinguishes Original Obligation. Acceptance of the consideration of an accord by the creditor extinguishes the obligation and is called satisfaction (*Civ. Code § 1523*; *see also B. & W. Engineering Co. v. Beam (1913) 23 Cal. App. 164, 170, 137 P. 624*).

B. Accord Defined. An accord is an agreement to accept, in extinction of an obligation, something different from or less than that to which the person agreeing to accept is entitled (*Civ. Code § 1521*; *Thompson v. Williams (1989) 211 Cal. App. 3d 566, 571, 259 Cal. Rptr. 518*).

C. Accord for Performance or Promise. The terms of the accord may provide either for the performance of an act or the giving of a promise as the consideration for the extinction of the existing obligation (*Silvers v. Grossman (1920) 183 Cal. 696, 699, 192 P. 534* ; *Everhardy v. Union Finance Co. (1931) 115 Cal. App. 460, 463, 1 P.2d 1024*).

[*Optional*] **D. Accord May Be Implied.** The agreement of an accord and satisfaction need not be express, but may be implied from the circumstances (*Lapp-Gifford Co. v. Muscoy Water Co. (1913) 166 Cal. 25, 32, 134 P. 989* ; *Thompson v. Williams (1989) 211 Cal. App. 3d 566, 571, 259 Cal. Rptr. 518* ; *Rankin v. Miller (1960) 179 Cal. App. 2d 133, 139, 3 Cal. Rptr. 496*).

[*When appropriate, counsel should add points and authorities relating to a particular type of accord and satisfaction (see §§ 11.21 -11.24) and/or points and authorities supporting the contention that the party asserting an accord and*

satisfaction is excused from specially pleading it (see § 11.25).]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the obligation sued on was extinguished by accord and satisfaction. This form may be used alone or combined with points and authorities relating to a specific type of accord and satisfaction [*see §§ 11.21 -11.24*].

The argument supported by these points and authorities may be raised by plaintiff in an action to cancel a lien on his or her property if the obligation that was secured by the lien on the property was extinguished by an accord and satisfaction. It may also be raised by defendant as an affirmative defense in an action for damages in tort or for breach of contract.

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the extinction of an obligation by accord and satisfaction. If used as an affirmative defense, the accord and satisfaction should generally be specially pleaded in the answer [*see § 11.31*], but there are exceptions [*see § 11.25*] to this general rule. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel should show an agreement supported by consideration to accept something different from, or less than, the original obligation and execution of such an agreement.

[b] Related Pleading and Practice Forms

For a discussion and forms for use in accord and satisfaction generally, see California Forms of Pleading and Practice, Ch. 6, *Accord and Satisfaction* (Matthew Bender). For a discussion and forms for affirmative defenses based on modification, novation, rescission or lack of one of the essential elements of a contract, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender). For a discussion and forms for affirmative defenses based on payment and settlement and release, see California Forms of Pleading and Practice, Ch. 385, *Negotiable Instruments* , and Ch. 520, *Settlement and Release* ; respectively.

[c] Related Points and Authorities

For points and authorities relating to actions for breach of contract and for defenses to the formation and enforcement of a contract generally, see Ch. 50, *Contracts* . For points and authorities relating to the enforcement of an accord agreement generally, see Ch. 214, *Specific Performance* .

[d] Opposing Points and Authorities

For points and authorities attacking the validity of the accord agreement generally, see *§§ 11.27* and *11.28*.

For points and authorities opposing the contention that the original obligation was extinguished because the accord was not executed, see *§ 11.30*.

For points and authorities opposing the contention that the obligation was extinguished by an accord and satisfaction because the defense was not specially pleaded, see *§ 11.31*.

[3] Discussion of Authorities

[a] Accord and Satisfaction Extinguishes Original Obligation

In ***B. & W. Engineering Co. v. Beam*** *(1913) 23 Cal. App. 164, 137 P. 624* , plaintiff sought to recover the balance of a sum of money alleged to be due on a contract to clear land from defendants. This contract was entered into between plaintiff's assignor and Beam. The contract called for payment of actual cost of work done plus 15 percent commission. Plaintiff alleged the actual cost to be $1,411. Defendants disputed and refused to pay the claim upon the grounds that the contract covenanted that the actual cost of the work would not exceed $1,000 and that the charge for actual work, as made by plaintiff's assignor, included the cost of work and labor not called for by the contract. Defendants sent plaintiff a check for $1,070 with the endorsement "in full settlement of this bill" (*23 Cal. App. 164*). Plaintiff accepted and cashed the check, used the proceeds, and then sued for the remainder owed under the contract. The action was defended, inter alia, on the ground that the obligation was extinguished by accord and satisfaction. The trial court gave judgment to defendants. Plaintiff appealed on the ground that the evidence did not support the findings on the issue of accord and satisfaction.

The court of appeal affirmed the judgment. The court held that the endorsement on the check given to plaintiff clearly showed that plaintiff had full knowledge that the check was given and receipted in full settlement and satisfaction of all claims arising out of the contract in suit (*23 Cal. App. 164, 169*). The court said that accord and satisfaction means the substitution of a new agreement for, and in satisfaction of, a preexisting agreement between the same parties. It is an agreement whereby one of two parties having a right of action against the other upon a claim arising out of an existing agreement, agrees to accept from the other party something in satisfaction of that right of action different from, and usually less than, that which might be recovered upon the original obligation. The court held that the effect of such an agreement, when executed, was to extinguish the antecedent liability (*23 Cal. App. 164, 170*).

[b] Accord Defined

The court of appeal in ***Thompson v. Williams*** *(1989) 211 Cal. App. 3d 566, 259 Cal. Rptr. 518* , affirmed the trial court's judgment based on a summary judgment in favor of defendant. The award and affirmance were based on a finding that the parties had performed an accord and satisfaction. The court stated that in order to establish the defense of accord and satisfaction defendant must prove that (1) a bona fide dispute existed between the parties, (2) the debtor made clear that the tender was subject to the condition that it be in full satisfaction of the creditor's unliquidated claim, and (3) the creditor clearly understood when accepting the tender that it constituted payment in full of the particular claim in issue. A writing is not essential to an accord and satisfaction, but may be implied (*211 Cal. App. 3d 566, 571*).

[c] Accord for Performance or Promise

In ***Silvers v. Grossman*** *(1920) 183 Cal. 696, 192 P. 534* , plaintiff sued to recover damages for injuries received in an automobile accident caused by defendant's negligence. As an affirmative defense, defendant pleaded that plaintiff had agreed in writing to accept $50 in full satisfaction of all claims, and that the money was tendered but plaintiff refused to accept it. The trial court gave judgment for the defendant, finding an accord and satisfaction in plaintiff's promise to accept the $50.

The Supreme Court reversed the judgment. The Court held that the defense of accord and satisfaction was subject to a general demurrer because it was not specially pleaded, and that the trial court's error in overruling the demurrer was prejudicial to plaintiff (*183 Cal. 696, 702*). The Court further held that the terms of an accord may provide for either the performance of an act or the giving of a promise as the consideration for the extinction of the existing obligation, but that if the promise per se is relied upon, the giving and acceptance of the promise in satisfaction of the preexisting obligation must be averred in the pleadings (*183 Cal. 696, 699*). The Court found that nowhere in the answer was there an averment of any agreement to accept, in satisfaction of the claim, defendant's mere promise to pay (*183 Cal. 696, 700*), and that it did not appear from the face of the instrument of agreement whether the claim was actually

released in consideration of the promise per se, or whether the agreement was preliminary in nature (*183 Cal. 696, 700-701*). Therefore, a finding that there was an accord and satisfaction was not supported by the pleadings, and the Court instructed the trial court to sustain the demurrer to defendant's defense with leave to amend (*183 Cal. 696, 703*).

Everhardy v. Union Finance Co. *(1931) 115 Cal. App. 460, 1 P.2d 1024* , was an action for money had and received and for conversion. Defendant alleged that an obligation to deliver 400 shares of stock was extinguished by plaintiff's acceptance of 100 shares of stock and a promise to issue 300 shares when they became available. The trial court held that this was an accord and satisfaction. Plaintiff appealed the trial court's judgment, and the court of appeal affirmed. The appellate court held that the fact that plaintiff received and retained the stock and written promise for a number of months without objection, that she called and thanked defendant's president for their issuance and delivery to her, together with the fact that she told the defendant's secretary that the issuance of the stock to her was all that she wanted, was amply sufficient to support the findings of the trialcourt that plaintiff intended to accept the 100 shares and the promise as a complete accord and satisfaction of the former demand for the 400 shares of capital stock (*115 Cal. App. 460, 466*).

[d] Accord May Be Implied

Lapp-Gifford Co. v. Muscoy Water Co. *(1913) 166 Cal. 25, 134 P. 989* , was an action to recover a balance due upon a contract. Defendant asserted the affirmative defense of accord and satisfaction. Defendant sent plaintiff a check accompanied by a letter that explained that the check represented final payment for work done under the contract. Defendant claimed an accord and satisfaction was effectuated when plaintiff cashed the check. The trial court found that there was no accord and satisfaction and gave judgment for plaintiff.

On appeal, the Supreme Court affirmed the judgment. The Court held that an essential element of an accord and satisfaction by tender of a check was that the tender be subject to the condition that an acceptance of the check would be a satisfaction of the obligation in full (*166 Cal. 25, 27*). The Court found that defendant's letter, accompanying the check, did not state, in clear and unequivocal terms, that the sum tendered was offered as a full settlement (*166 Cal. 25, 27-28*). The Court said that the term "final payment" could reasonably be construed here to refer to another payment due under the contract, and it found that the check itself contained nothing to indicate that it was intended to operate as a payment in full (*166 Cal. 25, 28*). The Court cited with approval the opinion of the court of appeal that stated that an accord and satisfaction is the result of an agreement between the parties consummated by a meeting of the minds of the parties, accompanied by sufficient consideration. It stated that the agreement need not be express, but may be implied from circumstances, and that the intention of the parties must be determined from all the circumstances attending the transaction (*166 Cal. 25, 32*). In this case, the Court found that the evidence justified the trial court's finding that the tender of the check was not subject to the condition that an acceptance of the check would be a satisfaction in full (*166 Cal. 25, 28, 33*).

See *Thompson v. Williams (1989) 211 Cal. App. 3d 566, 571, 259 Cal. Rptr. 518* , discussed in *§ 11.20[3][b]*.

Rankin v. Miller *(1960) 179 Cal. App. 2d 133, 3 Cal. Rptr. 496* , was an action to recover money owed under an agreement. The agreement provided that plaintiff would receive a commission on the sale of defendant's property. Defendant conveyed the property without giving plaintiff his commission. Plaintiff filed suit. Defendant then reacquired the property and offered plaintiff a second exclusive contract to sell it in exchange for dropping the suit. Plaintiff refused to drop the suit but accepted the exclusive contract and subsequently, the property was sold and plaintiff was given a commission. Defendant asserted that this was an accord and satisfaction extinguishing the original obligation. The trial court found that there was an accord and satisfaction and gave judgment for defendant. Plaintiff appealed, and the court of appeal affirmed the judgment.

The court of appeal held that an agreement embodying an accord and satisfaction need not be an express agreement, but may be implied from circumstances. The court said than an inference that an agreement was made may be based upon

proof of conduct as well as on proof of words, and that the inference to be drawn from the conduct of a person may prevail over the person's statements that are inconsistent with that conduct. The court found that the plaintiff, by his conduct, acquiesced in the desire expressed by the defendant that an accord be reached and that the controversy be settled by the plaintiff's receipt of compensation upon a sale under the new listing, despite his words to the contrary (*179 Cal. App. 2d 133, 139*).

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1-11 California Points & Authorities § 11.21

§ 11.21 Supporting Contention That the Obligation Sued on Was Extinguished by Accord and Satisfaction [Civ. Code § 1521 et seq.]--Partial Payment of Disputed Amount [Civ. Code § 1526(a); Com. Code § 3311]

[1] FORM Supporting Contention That the Obligation Sued on Was Extinguished by Accord and Satisfaction [Civ. Code § 1521 et seq.]--Partial Payment of Disputed Amount [Civ. Code § 1526(a); Com. Code § 3311]

[*The following may be included in a memorandum, or in a trial or appellate brief. It should be combined with a general form, supporting the contention that the obligation sued on was extinguished by accord and satisfaction (see § 11.20)*].

THE OBLIGATION SUED ON WAS EXTINGUISHED BY ACCORD AND SATISFACTION BECAUSE THE OBLIGATION WAS DISPUTED AND THE CREDITOR ACCEPTED PAYMENT OF A SUM LESS THAN THE DISPUTED AMOUNT AS FULL SATISFACTION OF THE ORIGINAL OBLIGATION.

A. Partial Payment of Disputed Amount Extinguishes Original Obligation. When the amount due is in dispute and an agreement has been reached to accept a lesser sum as full payment, and that agreement is fully executed by the payment and acceptance of the lesser sum, the original obligation is extinguished (*B. & W. Engineering Co. v. Beam (1913) 23 Cal. App. 164, 175, 137 P. 624*).

B. Test for Dispute. It does not matter whether there is a solid foundation for the dispute; the test is whether the dispute is honest or fraudulent (*Potter v. Pacific Coast Lumber Co. (1951) 37 Cal. 2d 592, 597, 234 P.2d 16* ; *Thompson v. Williams (1989) 211 Cal. App. 3d 566, 573, 259 Cal. Rptr. 518*).

[*EITHER*]

[*Optional*] **C. Accord and Satisfaction Evidenced by Check.** When there is a disputed or unliquidated claim, and the debtor tenders the creditor a check or draft notated with the words "payment in full" or words of similar meaning, in settlement in full discharge of the claim, the creditor's acceptance of the check ordraft constitutes an accord and satisfaction unless the creditor protests by striking out or otherwise deleting the notation or unless acceptance was

inadvertent or without knowledge of the notation (*Civ. Code § 1526(a)*; *see Potter v. Pacific Coast Lumber Co. (1951) 37 Cal. 2d 592, 597-599, 234 P.2d 16* (notation on accompanying voucher)).

[*OR*]

[*Optional*] **C. Discharge by Tender of Negotiable Instrument.** If a person against whom a claim is asserted proves that (1) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (2) the amount of the claim was unliquidated or subject to a bona fide dispute, and (3) the claimant obtained payment of the instrument [and did not tender repayment within 90 days after the instrument was paid], unless *Commercial Code Section 3311(c)(1)* applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim (*Com. Code § 3311(a), (b), (c)(2)*).

[*CONTINUE*]

[*Optional*] **D. Accord and Satisfaction by Check Not Abrogated by *Commercial Code Section 1308*.** The rule that acceptance of a check tendered in full satisfaction of a debt will act as an accord and satisfaction has not been abrogated by *Commercial Code Section 1308*, which provides that a party who, with explicit reservation of rights, assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved (*Com. Code § 1308(b)*; *see Connecticut Printers, Inc. v. Gus Kroesen, Inc. (1982) 134 Cal. App. 3d 54, 57-61, 184 Cal. Rptr. 436*).

[*Optional*] **E. Creditor's Denial of Intention Ineffective.** When a claim is disputed or unliquidated and the tender of a check or draft in settlement of the claim notifies the creditor that the check must be accepted in full discharge of the claim or not at all, the retention and use of that check or draft, other than inadvertently, and without striking out or otherwise deleting the notice on the check that it is intended as full settlement, constitutes an accord and satisfaction; it is immaterial that the creditor protests in any other manner against accepting the tender in full payment (*Civ. Code § 1526(a)*; *Potter v. Pacific Coast Lumber Co. (1951) 37 Cal. 2d 592, 597, 234 P.2d 16* ; *Thompson v. Williams (1989) 211 Cal. App. 3d 566, 575, 259 Cal. Rptr. 518*).

[*Optional*] **F. Creditor or Its Appropriate Agent Knew of Tender.** A claim is discharged if the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant, or an agent of the claimant having direct responsibility with respect to the disputed obligation, knew that the instrument was tendered in full satisfaction of the claim (*Com. Code § 3311(d)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the obligation sued on was extinguished by an accord and satisfaction because partial payment was made of a disputed obligation and accepted by the creditor as satisfaction in full. This form should be combined with the general form, supporting the contention that the obligation was extinguished by an accord and satisfaction [*see Civ. Code § 1526(a), Com. Code § 3311*; *see also § 11.20*]. The form may be included in a memorandum, or in a trial or appellate brief.

The argument supported by these points and authorities may be raised by plaintiff in an action to cancel a lien on his or her property because the obligation that was secured by lien on the property was extinguished by an accord and satisfaction. It may also be raised by defendant as an affirmative defense in an action for damages in tort or for breach

of contract.

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the extinction of an obligation by accord and satisfaction.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel should show that there was a bona fide dispute as to the amount due under the original obligation. Counsel may show this by demonstrating that there was an honest disagreement over the amount due. Counsel should show that there was an agreement between the parties to accept a lesser payment in satisfaction of the original obligation, and that the lesser sum was paid. This can be done by showing that the obligee gave the obligor a check for a sum less than the disputed original claim on which the words "payment in full" or other words of similar meaning were notated, and that the creditor, knowing of the notation, accepted the check as full satisfaction by cashing the check without striking out the notation that it was tendered in full settlement [*see Civ. Code § 1526(a)*].

[b] Tender by Check

Two separate provisions govern the tender of checks in full satisfaction of disputed or unliquidated claims: *Civ. Code § 1526(a)* and *Com. Code § 3311* (alternative Optional Paragraphs C). Although arguably the debtor has a greater burden of proof under *Com. Code § 3311*, especially if the creditor is an organization, the creditor's act of striking out the notation before it negotiates the check will defeat a claim of accord and satisfaction under *Civ. Code § 1526(a)*.The parallel provision under *Com. Code § 3311(c)(2)* states that, subject to *Com. Code § 3311(d)* (Paragraph F), the creditor can "undo" the accord and satisfaction by tendering repayment within 90 days after it collected the check [*Com. Code § 3311(c)(2)*]. This repayment option is not available to a creditor that is an organization which, within a reasonable time before the tender, notified the debtor to send communications concerning disputed debts to a designated person, office, or place [*Com. Code § 3311(c)(2)*]. Nor is it available, if, before collecting the check, the creditor or its appropriate agent knew the tender was intended as full satisfaction (Paragraph F) [*Com. Code § 3311(d)*]. *Com. Code § 3311* is slightly broader in that it applies to tender of any instrument, while *Civ. Code § 1526(a)* applies only to checks and drafts. Thus, counsel must chose whichever statute provides the best result in each particular case.

In addition, counsel must evaluate the particular facts of the case bearing on the issue of whether the creditor knew at the time it negotiated the check or instrument that it was intended by the debtor to constitute full payment. *Com. Code § 3311(c), (d)* and *Civ. Code § 1526(a)* each address this issue in their own ways [*see* first alternative Paragraph C, Paragraphs E and F, and *§ 11.28*]. When the creditor is an organization and proves that within a reasonable time before the tender, it sent a conspicuous statement to the debtor that communications concerning disputed debts, including tenders of instruments as full satisfaction of a debt, are to be sent to a designated person, office, or place, the disputed debt will not be discharged unless the instrument or accompanying communication was received by that designated person, office, or place [*Com. Code § 3311(c)(1)*; *see § 11.28*]. If the particular situation involves such a notice, and the debtor did not send the check to the person, place, or office specified in the notice, but can prove that the creditor, or an agent of the creditor having direct responsibility with respect to the disputed obligation, knew that the instrument was tendered in full satisfaction of the claim before it started collection of the instrument, an accord and satisfaction can still be established under *Com. Code § 3311(d)* (Paragraph F).

[c] Related Pleading and Practice Forms

For a discussion and forms for use in actions involving accord and satisfaction generally, see California Forms of Pleading and Practice, Ch. 6, *Accord and Satisfaction* (Matthew Bender).

For a discussion and forms for affirmative defenses based on modification, novation, rescission, or lack of one of the essential elements of a contract, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

For a discussion and forms for an affirmative defense based on release, see California Forms of Pleading and Practice, Ch. 520, *Settlement and Release* (Matthew Bender).

[d] Related Points and Authorities

For points and authorities relating to actions for breach of contract and for defenses to the formation and enforcement of a contract generally, see Ch. 50, *Contracts* . For points and authorities relating to the enforcement of an accord agreement generally, see Ch. 214, *Specific Performance* .

[e] Opposing Points and Authorities

For points and authorities opposing the validity of the accord agreement generally, see *§§ 11.27 -11.29*.

For points and authorities opposing the contention that the original obligation has been extinguished because the accord was not executed, see *§ 11.30*.

For points and authorities opposing the contention that the obligation was extinguished by an accord and satisfaction on the ground that the defense was not specially pleaded, see *§ 11.31*.

[3] Discussion of Authorities

[a] Partial Payment of Disputed Amount Extinguishes Original Obligation

The facts and procedural background of ***B. & W. Engineering Co. v. Beam*** *(1913) 23 Cal. App. 164, 137 P. 624* , are discussed in *§ 11.20[3][a]*. The court of appeal in affirming the trial court's judgment for defendants stated the rule governing accord and satisfaction to be that when an agreement to accept in full payment a sum less than the amount in dispute has been shown to have been fully executed by the payment and acceptance of the lesser sum, the original obligation is thereby extinguished (*23 Cal. App. 164, 175*). The court held that the defendants had demonstrated an accord and satisfaction by their tender of a conditional check, for a sum less than the amount in dispute, and plaintiff's use of the check. Therefore, the original obligation was extinguished (*23 Cal. App. 164, 169*).

[b] Test for Dispute

In ***Potter v. Pacific Coast Lumber Co.*** *(1951) 37 Cal. 2d 592, 234 P.2d 16* , a plaintiff sought to recover the alleged balance due under contracts for the sale of three carloads of lumber. Plaintiff contended that defendants were to pay for all shipping charges since the contract read "F.O.B. mill." Defendants contended that they were only to pay shipping from Portland to the destination. In remitting for the shipments, defendants mailed a check or draft, attached to which was a voucher identifying the shipment for which payment was intended and setting forth the amount of the corresponding invoice, with deductions noted. Printed at the top of each such voucher was the notation, "Payment of sight draft attachedhereto is accepted in full settlement of account stated below, and endorsement thereof will constitute payee's receipt." Plaintiff cashed the checks or drafts after calling defendants and protesting. Plaintiff later wrote defendants seeking additional payments. Defendants pleaded an accord and satisfaction as an affirmative defense to plaintiff's suit to recover any money allegedly due under the contract. The trial court rejected the defense and gave judgment for plaintiff. Defendants appealed, and the Supreme Court reversed the trial court's judgment.

The Court found that there was a dispute between the parties as to defendants' obligation for the shipping charges of the lumber (*37 Cal. 2d 592, 598*). In so holding, the Court said that it did not matter that there was no solid foundation for the dispute, since the test was whether the dispute was honest or fraudulent (*37 Cal. 2d 592, 597*).

The facts and procedural background of ***Thompson v. Williams*** *(1989) 211 Cal. App. 3d 566, 259 Cal. Rptr. 518* , are discussed in *§ 11.21[3][f]*. In affirming a judgment for defendant based on an accord and satisfaction of a disputed

referral fee, the court of appeal cited the passage from *Potter v. Pacific Coast Lumber Co. (1951) 37 Cal. 2d 592, 234 P.2d 16* , that it matters not that there is no solid foundation for the dispute because the test is whether the dispute is honest or fraudulent (*211 Cal. App. 3d 566, 573*). Here, there was no evidence that the dispute between the parties was fraudulent (*211 Cal. App. 3d 566, 573*).

[c] Accord and Satisfaction Evidenced by Check

The facts and procedural background of ***Potter v. Pacific Coast Lumber Co.*** *(1951) 37 Cal. 2d 592, 234 P.2d 16* , are discussed in *§ 11.21[3][b]*. In *Potter*, the Supreme Court reversed the trial court's judgment for plaintiff. The Supreme Court said that the trial court, by rejecting defendants' plea of accord and satisfaction, had found that the voucher attached to each check by defendant company did not inform plaintiff that the check was intended as full payment of the disputed claim and that the plaintiff did not accept the checks as full settlement of the amount due by endorsing them or depositing them for collection. The Court held that these findings were improper when a claim is disputed or unliquidated and the tender of a check or draft in settlement of the claim notified the creditor that the check must be accepted in full discharge of his or her claim or not at all, the retention and use of the check or draft constitute an accord and satisfaction. The law permits a creditor in that situation two alternatives: either reject the tender or accept it in accordance with the condition (*37 Cal. 2d 592, 597*). In this case, the Court found that the claim was disputed; that the condition imposed upon plaintiff's acceptance of the checks or drafts was clear and unequivocal that payment was intended as full satisfaction of the disputed account; and that plaintiff so understood the explicit terms of the proffered settlement. Therefore, the Court held that plaintiff's acceptance, endorsement, and cashing of the checks or drafts was an acceptance of the condition and amounted to an agreement that the claims be thereby compromised and settled (*37 Cal. 2d 592, 598-599, 603*).

[d] Discharge by Tender of Negotiable Instrument

Com. Code § 3311 was added by Stats. 1992, ch. 914, § 6. "Instrument" within the meaning of Division 3 of the Commercial Code means negotiable instrument, which includes checks, drafts, notes, money orders, cashier's check, teller's check, traveler's checks, demand draft, and all other unconditional promises or orders to pay a fixed amount of money [*Com. Code § 3104*]. Thus, this alternative may be available when the instrument is not a check or draft, which are the only ones addressed by *Civ. Code § 1526*.

Com. Code § 3311(a) and *(b)* provide the basic criteria for discharge. However, if an institutional creditor ("claimant" in Commercial Code parlance) had previously notified the debtor to address correspondence regarding the obligation to a particular person, office, or place, no accord will result unless the tender was made to that person, office, or place [*Com. Code § 3311(c)(1)*; *see § 11.28*], or that person or some other appropriate agent of the creditor knew of the tender [*Com. Code § 3311(d)*; *see* Optional Paragraph F].

Com. Code § 3311(c)(2) provides that the obligation is not discharged if the claimant, whether or not an organization, proves that within 90 days after payment of the instrument, the claimant tendered repayment of the amount of the instrument to the person against whom the claim is asserted. However, this paragraph does not apply if the claimant is an organization that sent a statement complying with subparagraph (A) of paragraph (1), set forth in *§ 11.28*. In addition, subdivision (c) is subject to subdivision (d) [Paragraph F]. Thus, this repayment exception will not apply if the debtor can establish that the creditor or its appropriate agent knew of the tender. If the creditor did tender repayment, counsel should omit the bracketed phrase in the second Optional Paragraph C and use Paragraph F as well.

[e] Accord and Satisfaction by Check Not Abrogated by Commercial Code Section 1308

The Commercial Code provides that a party that with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved [*Com. Code § 1308(a)*]; however, this does not apply to an accord and satisfaction [*Com. Code § 1308(b)*].

Subdivision (a) of *Com. Code § 1308* was originally enacted as *Com. Code § 1207*. Until the exception in subdivision (b) was added in 1992, *Connecticut Printers, Inc. v. Gus. Kroesen, Inc. (1982) 134 Cal. App. 3d 54, 184 Cal. Rptr. 436* , was the only California case to consider whether former Com. Code § 1207 abrogated the common law rule stated in *Potter v. Pacific Coast Lumber Co. (1951) 37 Cal. 2d 592, 234 P.2d 16* [*see* Paragraph C].

In ***Connecticut Printers, Inc. v. Gus Kroesen, Inc.*** *(1982) 134 Cal. App. 3d 54, 184 Cal. Rptr. 436* , plaintiff sought to recover interest due and owing on a debt. Defendant tendered a check to plaintiff notated as representing payment in full for all obligations owed by defendant. Defendant claimed that plaintiff's deposit of the check was an acceptance that constituted an accord and satisfaction. Plaintiff claimed its intent not to accept the check as full payment was designated by a notation on the check that payment was accepted without prejudice and subject to final determination of amount due, in accordance with former Com. Code § 1207, and therefore deposit of the check did not constitute an accord and satisfaction. The trial court granted summary judgment for defendant, and plaintiff appealed. The court of appeal reversed.

The court of appeal reversed the summary judgment and remanded the case for further proceedings. The court found that former Com. Code § 1207, which provided that a party who with explicit reservation of rights assents to performance in a manner offered by the other party does not thereby prejudice the rights reserved, did not abrogate the common law rule stated in *Potter v. Pacific Coast Lumber Co. (1951) 37 Cal. 2d 592, 597, 234 P.2d 16* (discussed in *§ 11.21[3][c]*), that when a claim is disputed or unliquidated and the tender of a check or draft in settlement of the claim is of such character as to give the creditor notice that it must be accepted in full discharge of the claim or not at all, retention and use of that check or draft constitute an accord and satisfaction, and it is immaterial that the creditor protests against accepting the tender in full payment (*134 Cal. App. 3d 54, 57, 61*). The court reasoned that principles of law and equity apply unless explicitly displaced by particular provisions of the Commercial Code. The common law rule regarding accord and satisfaction was not explicitly displaced by former Com. Code § 1207 because that section related to contracts generally and the common law rule relates only to checks or draft tendered in full settlement of creditor's claim (*134 Cal. App. 3d 54, 58*). The court observed, however, that the rule of the *Potter* case applies only when there is a bona fide dispute between the parties and that the record in this case was insufficient to determine whether there was a bona fide dispute. The court therefore remanded the case to the trial court for resolution of that issue and for any other appropriate further proceedings (*134 Cal. App. 3d 54, 61*).

[f] Creditor's Denial of Intention Ineffective

The facts and procedural background of ***Potter v. Pacific Coast Lumber Co.*** *(1951) 37 Cal. 2d 592, 234 P.2d 16* , are discussed in *§ 11.21[3][b]*. The Supreme Court, in reversing the trial court's decision, held that plaintiff's cashing of the conditional check extinguished the original obligation despite plaintiff's argument that the conduct of both parties after the receipt and cashing of the drafts indicated that neither of them intended that the prior acceptance by plaintiff of the drafts was in full settlement of the claim. Plaintiff pointed to his oral protests and letters seeking additional payment. The Court said that these simply show that plaintiff did not willingly assent to the condition of full settlement accompanying the three remittances, but the defendants remained firm in their intention that the checks be in full satisfaction of the claim (*37 Cal. 2d 592, 599-600*). The Court held that it is immaterial that the creditor protests against accepting the tendered check as full payment, for in that case the law permits but two alternatives: either reject or accept in accordance with the condition (*37 Cal. 2d 592, 597*).

Thompson v. Williams *(1989) 211 Cal. App. 3d 566, 259 Cal. Rptr. 518* , was a dispute between attorneys over a referral fee. A contingency matter was settled and a $450,000 attorney's fee was paid to defendant. Plaintiff claimed $150,000, but defendant stated he would only pay $114,000. After having cashed two checks from defendant totaling $114,000, plaintiff sued defendant for the remainder. Judgment for defendant was affirmed. Plaintiff based the claim to the additional money on the fact that plaintiff and defendant discussed the payment of the remainder of the referral fee after plaintiff had cashed the two check, arguing that the subsequent conversations demonstrated that neither of the

parties intended the payments to be in full satisfaction of plaintiff's claim. The court noted that plaintiff continued to refer cases to defendant and periodically raised the subject of the remainder due of the referral fee that was the subject of this action. Defendant's replies were always noncommittal, such as "we will see" or "I'll think about it." The court characterized plaintiff's repeatedly raising the subject as evidence that he continued to brood over the balance he felt was due him, and that defendant's replies evidenced an attempt not to antagonize a continuing referral source. The court cited *Potter v. Pacific Coast Lumber (1951) 37 Cal. 2d 592, 599, 234 P.2d 16* , in concluding that nothing defendant said in response to plaintiff's doleful inquiries amounted to an acknowledgment of a continuing obligation or an admission that additional sums were due (*211 Cal. App. 3d 566, 575*).

[g] Creditor or Its Appropriate Agent Knew of Tender

Com. Code § 3311(c) is subject to *Com. Code § 3311(d). Com. Code § 3311(d)* is for use to establish discharge (1) against an organizational claimant that contends it had given the debtor notice to direct correspondence and payments regarding the obligation to a particular person, place, or office [*see Com. Code § 3311(c)(1)* (set forth in *§ 11.28*)] and the debtor did not comply with that notice, or (2) when the creditor tendered repayment within 90 days after receiving payment of the check. Discharge can still be proved under *Com. Code § 3311(d)* if the debtor shows that the appropriate person within claimant's organization knew that the instrument was tendered in full satisfaction. The debtormust establish that the creditor or its agent knew of the tender before it initiated collection of the instrument.

[4] Additional Authorities

[a] Test for Dispute

The facts and procedural background of *B. & W. Engineering Co. v. Beam (1913) 23 Cal. App. 164, 137 P. 624* , are discussed in *§ 11.20[3][a]*. The court of appeal, in affirming the trial court's decision that the money paid to, and accepted by, defendant constituted an accord and satisfaction, held that there must be a bona fide dispute (*23 Cal. App. 164, 170*). The court said it was not required, however, that in order to validate an executed agreement of accord and satisfaction, such as in the present case, that the circumstances of the transaction upon which it is founded should affirmatively show that there was room for an honest dispute, and that it did not matter that there was no solid foundation for the dispute. The court held that the test was whether the dispute was honest or fraudulent. If honest, the court held that the dispute affords a basis for an accord between the parties, the execution of which is the satisfaction (*23 Cal. App. 164, 170-171*).

[b] Accord and Satisfaction Evidenced by Check

In *California Bean Growers' Assn. v. Rindge L. & N. Co. (1926) 199 Cal. 168, 248 P. 658* , plaintiff brought an action to recover liquidated damages for breach of a marketing agreement. Defendant counter-claimed for the difference between the alleged value of his crop and the amount he received from plaintiff on account thereof. The trial court entered judgment for plaintiff, and defendant appealed. The Supreme Court held that the question of recoupment or damages to defendant could not be considered in this action because the account was settled by an accord and satisfaction (*199 Cal. 168, 180*). The Court found that after defendant complained that plaintiff's charges were excessive and demanded a settlement, plaintiff sent him two checks. The first, in November, was accompanied by a letter stating that the check represented, with a noted exception, a final settlement of defendant's account. The second, in February, covering the noted exception, was endorsed with the statement "this amount represents the final settlement of your account." Defendant cashed both checks. The Court held that this was sufficient to support the finding of the trial court to the effect that there was an account stated between the parties and an accord and satisfaction (*199 Cal. 168, 181*).

Creighton v. Gregory (1904) 142 Cal. 34, 75 P. 569 , was an action to recover the balance owed under a contract to purchase oranges. There was a dispute between the parties as to whether defendant was obligated to purchase unmerchantable oranges. The parties entered into an oral agreement, modifying the original contract, under which

defendant would take the damaged oranges at a reduced rate. At time of payment, plaintiff refused to accept the lesser sum. Defendant subsequently sent a check to plaintiff for the lesser sum, which inadvertently was not signed. Plaintiff went to defendant, had him sign the check, then proceeded to cash the check and use the funds. The trial court held that this constituted an accord and satisfaction, extinguishing the original contract obligation.

The Supreme Court affirmed. It held that the admitted findings of facts showed that there was a dispute between the parties as to what was due under the contract, that there was an acceptance by plaintiff of less than that to which he was entitled, and that this acceptance extinguished the obligation and constituted satisfaction. The Court held that the intention of the parties must be determined from all the circumstances attending the transaction, and that the legal effect of the conduct of the parties was for the court to pronounce. The Court said that from the evidence it was reasonable to infer that defendant would not have parted with the check had plaintiff not led him to suppose that it ended their dealings under the contract (*142 Cal. 34, 42*).

Connecticut Printers, Inc. v. Gus Kroesen, Inc. (1982) 134 Cal. App. 3d 54, 184 Cal. Rptr. 436 , is discussed in *§ 11.21[3][e]*.

Besco Enterprises, Inc. v. Carole, Inc. (1969) 274 Cal. App. 2d 42, 78 Cal. Rptr. 645 , was an action to recover for merchandise that was returned to defendant. Defendant pleaded that an accord and satisfaction had extinguished any claims. The trial court held that there was an accord and satisfaction because defendant had tendered a check in an amount less than the amount in dispute on the condition that plaintiff accept it as payment in full, and plaintiff had retained the check. The court of appeal reversed, noting that cashing the check or its certification is an act of dominion sufficient to constitute an acceptance of the conditions and an accord and satisfaction. It said that when the check is retained for an unreasonable length of time without protest as to its being in full payment, even though uncashed, this also may constitute an accord and satisfaction (*274 Cal. App. 2d 42, 44*). In the present case, the plaintiff protested against the check being full payment and held it, but did not cash it. Based on these facts, the court refused to imply an accord and satisfaction on the rationale that there was no duty to return the check once notice of its refusal was given, unless such a return was demanded (*274 Cal. App. 2d 42, 45*).

[c] Creditor's Denial of Intention Ineffective

Acadia, California, Ltd. v. Herbert (1960) 54 Cal. 2d 328, 5 Cal. Rptr. 686, 353 P.2d 294 , was an action for damages and declaratory relief, arising out of defendant's failure to deliver water as called for under agreements modified by the acceptance of a conditional check. Defendant originally delivered pressurized water, but plaintiffs became dissatisfied with the amount of pressure and entered into negotiations with defendant to increase it. They offered to prepay waterrentals up to $1,000 to cover the installation of an additional tank. After defendant installed the second tank to increase the pressure, he requested a check from plaintiffs for payment. Plaintiffs sent one check which was refused, then sent another stating that its acceptance would confirm the understanding that the delivery of water with the then-existing facilities would be continued. Defendant cashed this check but contended that the original agreement was not modified thereby. The trial court gave judgment for plaintiff, and the Supreme Court affirmed.

The Court held that defendant's denial of an intention to modify the agreement was ineffective. The Court stated that when something to which the offeree is not unconditionally entitled is tendered to him upon stated conditions and he exercises dominion over it, he is bound by the conditions even though he informs the offeror that he rejects them. When he can rightfully exercise dominion over the thing tendered only if he accepts the conditions, he will not be permitted to avoid the conditions by asserting that his conduct was tortious. The Court held that since the check was tendered on condition that the delivery of household water pressurized by the improved facilities would be continued so as to insure an adequate water supply for plaintiffs, defendant's acceptance of the check bound him to give the service for which the check was intended (*54 Cal. 2d 328, 336*)

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1-11 California Points & Authorities § 11.22

§ 11.22 Supporting Contention That the Obligation Sued on Was Extinguished by Accord and Satisfaction [Civ. Code § 1521 et seq.]--Something Different Accepted for Original Obligation

[1] FORM Supporting Contention That the Obligation Sued on Was Extinguished by Accord and Satisfaction [Civ. Code § 1521 et seq.]--Something Different Accepted for Original Obligation

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with a general form, supporting the contention that the obligation sued on was extinguished by accord and satisfaction (see § 11.20).*]

THE OBLIGATION SUED ON WAS EXTINGUISHED BY ACCORD AND SATISFACTION BECAUSE THE CREDITOR ACCEPTED SOMETHING DIFFERENT FROM THE ORIGINAL OBLIGATION AS FULL SATISFACTION FOR THE ORIGINAL OBLIGATION.

Accord and Satisfaction by Agreement to Accept Something Different. An agreement to accept something different from the original obligation, when performed, extinguishes the original obligation (*Civ. Code §§ 1521, 1523*; *see also McAllister v. Drapeau (1939) 14 Cal. 2d 102, 111, 92 P.2d 911*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the obligation sued on was extinguished by an accord and satisfaction because the creditor accepted something different from the original obligation in full satisfaction of that obligation. This form should be combined with a general form, supporting the contention that the original obligation was extinguished by an accord and satisfaction [*see § 11.20*]. The points and authorities set forth in this form may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.

The argument supported by these points and authorities may be raised by plaintiff in an action to cancel a lien on his or her property because the obligation that was secured by the lien was extinguished by an accord and satisfaction. It may

also be raised by defendant as an affirmative defense in an action for damages in tort or for breach of contract.

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the extinction of an obligation by accord and satisfaction.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel should show that the obligee offered, and the creditor accepted, something different from the original obligation in full satisfaction of the original obligation. The original obligation may be either disputed and unliquidated, or undisputed and liquidated [*see B. & W. Engineering Co. v. Beam (1913) 23 Cal. App. 164, 170, 137 P. 624* ; *McAllister v. Drapeau (1939) 14 Cal. 2d 102, 111, 92 P.2d 911*]. The substitution of something different constitutes consideration for the accord [*see San Juan v. St. John's Gas Co. (1904) 195 U.S. 510, 521, 25 S. Ct. 108, 49 L. Ed. 299*].

Counsel should not confuse accord and satisfaction by agreement to accept something different in full satisfaction of the original obligation with a novation. The agreement between the parties resembles a novation [*Civ. Code § 1531(1)*] in that it consists of the substitution of a new obligation for the old one. The distinction is that the parties to an accord and satisfaction are bargaining for performance of the agreement and do not intend that the new agreement itself extinguish the obligation [*see Gardiner v. Gaither (1958) 162 Cal. App. 2d 607, 620, 329 P.2d 22*].

[b] Related Pleading and Practice Forms

For a discussion and forms for use in accord and satisfaction generally, see California Forms of Pleading and Practice, Ch. 6, *Accord and Satisfaction* (Matthew Bender). For a discussion and forms for affirmative defenses based on modification, novation, rescission, or lack of one of the essential elements of a contract, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender). For a discussion and forms for an affirmative defense based on release, see Ch. 520, *Settlement and Release* . For a discussion and forms foraffirmative defenses based on settlement, see Ch. 385, *Negotiable Instruments* and Ch. 520, *Settlement and Release* , respectively.

[c] Related Points and Authorities

For points and authorities relating to actions for breach of contract and for defenses to the formation and enforcement of a contract generally, see Ch. 50, *Contracts* . For points and authorities relating to the enforcement of an accord agreement generally, see Ch. 214, *Specific Performance* .

[d] Opposing Points and Authorities

For points and authorities opposing the validity of the accord agreement generally, see *§ 11.27*. For points and authorities opposing the validity of the accord agreement because there was no meeting of the minds of the parties, see *§ 11.28*.

For points and authorities opposing the contention that the original obligation was extinguished because the accord was not executed, see *§ 11.30*.

For points and authorities opposing the contention that the obligation was extinguished by an accord and satisfaction on the ground that the defense was not specially pleaded, see *§ 11.31*.

[3] Discussion of Authorities

[a] Accord and Satisfaction by Agreement to Accept Something Different

McAllister v. Drapeau *(1939) 14 Cal. 2d 102, 92 P.2d 911* , was an action to cancel a note and deed of trust and to recover the amounts paid thereunder. Plaintiffs borrowed $11,050 from defendants, signed a promissory note, and secured repayment on the note by giving a first deed of trust on their home. Owing $8,271, plaintiffs defaulted on the note. Since they were in imminent danger of losing their home property by foreclosure, they sought refinancing via the Home Owners Loan Corporation. The corporation offered defendants cash and bonds amounting to $5,850 for the deed of trust. Defendants told plaintiffs that they would accept this offer if plaintiffs executed a note for $1,300, secured by a second trust deed on their home property. Plaintiffs executed the note, then defendants signed an agreement with the corporation to accept the bonds and cash as full settlement of defendants' claim. After defendants received the bonds and cash, plaintiffs contended that their obligation on all notes and deeds of trust were extinguished by accord and satisfaction.

The trial court gave judgment for plaintiffs. Defendants appealed, and the court of appeal affirmed. The appellate court held that by signing the consent, defendants agreed to release their entire claim and that the unqualified agreement constituted a valid release and an accord and satisfaction (*14 Cal. 2d 102, 111*).

[4] Additional Authorities

[a] Accord and Satisfaction by Agreement to Accept Something Different

Treadwell v. Himmelmann (1875) 50 Cal. 9 , was an action to recover money owed on a promissory note. Defendant executed a written instrument for his promise to repay $1,000 that he had borrowed from plaintiff. At the time defendant signed the instrument, the parties orally agreed that defendant should procure to himself an assignment of liens against plaintiff's land in order to stop an action pending for payment of assessments secured by the liens. Defendant was to hold the liens and at plaintiff's election enforce the lien for plaintiff's benefit or allow the liens to expire. The procurement and holding of the liens was to fully satisfy the original obligation on the promissory note. Defendant obtained the liens and contended that since plaintiff did not elect to have them enforced before they expired, the accord was satisfied and the obligation to pay the $1,000 extinguished. The trial court refused to admit evidence as to the accord and satisfaction and gave judgment to plaintiff. The Supreme Court reversed and remanded the case for a new trial on the ground that the evidence was improperly excluded. The Court held that the legal effect of the oral agreement was, once the defendant had performed his part, to be regarded as payment in full (*50 Cal. 9, 11*).

Ransom v. Farish et al. (1854) 4 Cal. 386 , was an action to obtain an entry of satisfaction of a judgment and an injunction. Plaintiff contended that his obligation to satisfy a judgment requiring him to restore possession of property to defendant and pay $1,800 in damages for forcible entry and detainer was extinguished by an accord and satisfaction entered into between defendant and his cotortfeasor. After the original judgment was entered against plaintiff and cotortfeasor, defendant purchased the property from the cotortfeasor at under the market value and found a third party to indemnify his liability on the original judgment. The cotortfeasor promised not to appeal, and defendant promised not to prosecute him on the original judgment. The trial court found that these facts amounted to an accord and satisfaction, extinguishing plaintiff's liability on the original judgment and granted plaintiff an injunction. Defendants appealed. The Supreme Court affirmed, holding that the facts showed an accord and satisfaction of the entire judgment (*4 Cal. 386, 387*).

Morrison v. Landers (1943) 56 Cal. App. 2d 607, 133 P.2d 34 , was an action to cancel two promissory notes. Plaintiffs had purchased property from defendants and executed two notes securing repayment of the purchase price. One note was held by a bank and the other was held by defendants. Plaintiffs, having troublemaking the monthly payments on both notes, applied for a loan under the Home Owners' Loan Act. Under the Act, the Home Owners' Loan Corporation exchanged bonds for mortgages. Defendants consented to accept bonds and a lien for $740 in exchange for their note. In addition to receiving the bonds and lien from the corporation, defendants had plaintiffs sign two unsecured notes. The trial court gave judgment in favor of plaintiffs, canceling these notes executed by plaintiffs and directed that payments made thereon be credited against the lien. Defendants appealed, and the Supreme Court affirmed the

judgment. The Court held the unsecured notes to be invalid. It found that there was an agreement by defendants with the Home Owners' Loan Corporation to accept a second lien and bonds in exchange for the note on plaintiffs' property. Since defendants received the bonds and lien, the Court held that this constituted an accord and satisfaction of all obligations of plaintiffs to defendants, and the debt could not be reinstated by the unsecured notes (*56 Cal. App. 2d 607, 613-614*).

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1-11 California Points & Authorities § 11.23

§ 11.23 Supporting Contention That the Obligation Sued on Was Extinguished by Accord and Satisfaction [Civ. Code § 1521 et seq.]--Part Performance of Liquidated Undisputed Claim

[1] FORM Supporting Contention That the Obligation Sued on Was Extinguished by Accord and Satisfaction [Civ. Code § 1521 et seq.]--Part Performance of Liquidated Undisputed Claim

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with a general form, supporting the contention that the obligation sued on was extinguished by accord and satisfaction (see § 11.20).*]

THE OBLIGATION SUED ON WAS EXTINGUISHED BY ACCORD AND SATISFACTION BECAUSE THE OBLIGOR GAVE PART PERFORMANCE OF THE LIQUIDATED AND UNDISPUTED OBLIGATION AS FULL SATISFACTION OF THE ORIGINAL OBLIGATION AND THE CREDITOR ACCEPTED IN WRITING.

A. Part Performance or Payment Accepted in Writing Extinguishes Debt. Part performance of an obligation, either before or after a breach thereof, when expressly accepted by the creditor in writing, in satisfaction, or rendered in pursuance of an agreement in writing for that purpose, though without new consideration, extinguishes the obligation (*Civ. Code § 1524*; *Schwartz v. California Claim Service (1942) 52 Cal. App. 2d 47, 53-55, 125 P.2d 883*).

B. Obligation Must Be Liquidated and Undisputed. *Section 1524 of the Civil Code* has reference only to an agreement of accord and satisfaction made in cases in which the obligation is neither doubtful nor disputed (*B. & W. Engineering Co. v. Beam (1913) 23 Cal. App. 164, 175, 137 P 624*).

C. Writing Required for Acceptance. The obligor's acceptance of an accord is required to be in writing in order to extinguish a liquidated claim (*Schwartz v. California Claim Service (1942) 52 Cal. App. 2d 47, 53, 125 P.2d 883*).

[*Optional*] **D. Creditor's Written Acceptance Evidenced by Check.** Endorsement of a check for a lesser amount, tendered as payment in full of a liquidated and undisputed claim, which bears an unequivocal endorsement that the creditor releases the debtor from any and all claims and which clearly states that the check is accepted as a complete

discharge of the debt, has the effect of releasing the debtor from such claims and discharging the debt (*Petroleum Collections Inc. v. Sulser (1968) 265 Cal. App. 2d Supp. 976, 976-979*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the obligation sued on was extinguished by an accord and satisfaction because partial performance of an undisputed, liquidated obligation was accepted by the creditor in writing as full satisfaction of the original obligation. This form should be combined with the general form, supporting the contention that the obligation was extinguished by an accord and satisfaction [*see § 11.20*]. The form may be included in a memorandum of points and authorities, or in a trial or appellate brief.

The argument supported by these points and authorities may be raised by plaintiff in an action to cancel a lien on his or her property because the obligation that was secured by lien on the property was extinguished by an accord and satisfaction. It may also be raised by defendant as an affirmative defense in an action for damages in tort or for breach of contract.

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the extinction of an obligation by accord and satisfaction.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel should show that the obligee partly performed the original obligation and that the creditor accepted this partial performance in writing as full satisfaction of the original obligation. The original obligation must be shown to be liquidated and undisputed.

[b] Related Pleading and Practice Forms

For a discussion and forms for use in accord and satisfaction generally, see California Forms of Pleading and Practice, Ch. 6, *Accord and Satisfaction* (Matthew Bender). For a discussion and forms for affirmative defenses based on modification, novation, rescission, or lack of one of the essential elements of a contract, see Ch. 140, *Contracts* , in that publication. For a discussion and formsfor an affirmative defense based on release, see Ch. 520, *Settlement and Release* . For a discussion and forms for affirmative defenses based on payment and settlement, see Ch. 385, *Negotiable Instruments* and Ch. 520, *Settlement and Release* , respectively.

[c] Related Points and Authorities

For points and authorities relating to actions for breach of contract and for defenses to the formation and enforcement of a contract generally, see Ch. 50, *Contracts* . For points and authorities relating to the enforcement of an accord agreement generally, see Ch. 214, *Specific Performance* .

[d] Opposing Points and Authorities

For points and authorities opposing the validity of the accord agreement generally, see *§ 11.27*. For points and authorities opposing the validity of the accord agreement because there was no meeting of the minds of the parties, particularly if the creditor's acceptance was obtained by fraud or mistake, see *§ 11.28*.

For points and authorities opposing the contention that the original obligation was extinguished because the accord was not executed, see *§ 11.30*.

For points and authorities opposing the contention that the obligation was extinguished by an accord and satisfaction on the ground that the defense was not specially pleaded, see *§ 11.31*.

[3] Discussion of Authorities

[a] Part Performance or Payment Accepted in Writing Extinguishes Debt

Schwartz v. California Claim Service *(1942) 52 Cal. App. 2d 47, 125 P.2d 883* , involved an action, inter alia, to recover damages for allegedly wrongful execution of, and failure to enter, satisfaction of judgment and permitting execution to remain as a lien on plaintiff's property. Plaintiff offered in writing to pay California Claim Service, Ltd., the judgment creditor and one of the defendants in this action, $15 in full settlement of the judgment. Defendant accepted, and plaintiff paid defendant the $15 by a check endorsed with words indicating it was to be satisfaction in full. Defendant cashed this check, and its attorney delivered a written satisfaction of the judgment to plaintiff. In this suit, plaintiff contended that this offer and acceptance by the judgment debtor constituted an accord and satisfaction, extinguishing any obligations under the judgment. Therefore, an execution issued on the judgment and levy on plaintiff's bank account by defendants was wrongful and malicious. The trial court gave judgment on the pleading in favor of defendants. Plaintiff appealed.

The court of appeal reversed, holding that the facts were sufficient to constitute a valid accord and satisfaction of the judgment debt. The court noted that the former common-law rule was that a liquidated indebtedness presently due could not be discharged by payment of less than the whole sum because an agreement of such nature would lack consideration (*52 Cal. App. 2d 47, 52-53*). The court observed, however, that *Civ. Code § 1524* changed the common-law rule by dispensing with the necessity for a new consideration (*52 Cal. App. 2d 47, 53*). The statute provides that part performance of an obligation, either before or after a breach thereof, when expressly accepted by the creditor in writing, in satisfaction, or rendered in pursuance of an agreement in writing for that purpose, though without any new consideration, extinguishes the obligation (*52 Cal. App. 2d 47, 53*). The court said that the satisfaction of judgments for less than their face value was an everyday occurrence, and since every such settlement represents an agreement mutually satisfactory to the parties and fraught with some benefit to each, it should not be the policy of the law to discourage such sensible arrangements under which a creditor can satisfy a judgment for what he or she thinks it is worth, and a debtor can settle it for what he or she can afford to pay (*52 Cal. App. 2d 47, 55*).

[b] Obligation Must Be Liquidated and Undisputed

The facts and procedural background of ***B. & W. Engineering Co. v. Beam*** *(1913) 23 Cal. App. 164, 137 P 624* , are discussed in *§ 11.20[3][a]*. In the *Beam* case, the court of appeal affirmed the trial court's judgment for defendant, finding that the original obligation was extinguished by an accord and satisfaction. In holding that the acceptance of the payment for a sum less than the amount in dispute need not be in writing, the court held that *Civ. Code § 1524* had reference only to agreements of release and satisfaction made in cases in which the obligation is neither doubtful nor disputed (*23 Cal. App. 164, 174-175*).

[c] Writing Required for Acceptance

The facts and procedural background of ***Schwartz v. California Claim Service*** *(1942) 52 Cal. App. 2d 47, 125 P.2d 883* , are discussed in *§ 11.23[3][a]*. In this action for damages against defendants for failure to enter a satisfaction of judgment, the court of appeal reversed the trial court's judgment for defendants. The court held that the undisputed original obligation, the judgment debt, was extinguished by an accord and satisfaction because *Civ. Code § 1524* had eliminated the necessity for consideration in such cases and required only that the creditor's acceptance be in writing. The court found that defendant's acceptance, evidenced by the cashing of the conditional check and the written satisfaction of judgment, was in writing and the original obligation was thereby extinguished (*52 Cal. App. 2d 47, 53-56*).

[d] Creditor's Written Acceptance Evidenced by Check

Petroleum Collections Inc. v. Sulser (1968) 265 Cal. App. 2d Supp. 976, 265 Cal. App. 2d Supp. 976, 70 Cal. Rptr. 537 , was an action to recover the full amount of an obligation. Defendant sent a check for an amount less than a liquidated and undisputed claim as payment in full of all obligations. The check bore an endorsement stating that by endorsing the check, the creditor released the defendant from any and all claims or liability of any kind as of the date of the check. Plaintiff cashed the check. Defendant contended that plaintiff's cashing of the conditional check constituted an accord and satisfaction. The trial court agreed and dismissed plaintiff's action.

The court of appeal affirmed. The court held that upon reading *Civ. Code §§ 1524* and *1541*, it was indisputable that the original obligation herein involved was settled and discharged (*265 Cal. App. 2d Supp. 976, 976-977*). The court held that when the endorsement of a check for a lesser amount, tendered as payment in full of a liquidated and undisputed claim, bears an unequivocal endorsement that the creditor releases the debtor from any and all claims, and clearly states that the check is accepted as a complete discharge of any and all claims, it has the effect of releasing the debtor from such claims and discharging the original debt (*265 Cal. App. 2d Supp. 976, 979*).

[4] Additional Authorities

[a] Part Performance or Payment Accepted in Writing Extinguishes Debt

In *Russell v. Riley & Peterson (1927) 82 Cal. App. 728, 256 P. 557* , plaintiff filed a complaint for reformation of an agreement, for damages from the alleged breach of that agreement, and for damages by reason of alleged negligence of defendant. In the answer defendant denied the material allegations in both causes of action and pleaded, as a further defense, payment as settlement in full for all claims. Defendant sent a check to plaintiff for $213 that stated it was in full payment of the account. Plaintiff cashed the check. Defendant contended that the cashing of the check by plaintiff constituted payment in full of his obligation under the original contract and any subsequent agreement. The trial court gave judgment for defendant, and plaintiff appealed. The court of appeal affirmed. The court found that plaintiff must and could read the endorsement on the check and that her cashing of the check constituted payment in full of defendant's obligations (*82 Cal. App. 728, 735*).

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1-11 California Points & Authorities § 11.24

§ 11.24 Supporting Contention That the Obligation Sued on Was Extinguished by Accord and Satisfaction [Civ. Code § 1521 et seq.]--Promise as Satisfaction

[1] FORM Supporting Contention That the Obligation Sued on Was Extinguished by Accord and Satisfaction [Civ. Code § 1521 et seq.]--Promise as Satisfaction

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with a general form, supporting the contention that the obligation sued on was extinguished by accord and satisfaction (see § 11.20).*]

THE OBLIGATION SUED ON WAS EXTINGUISHED BY ACCORD AND SATISFACTION BECAUSE THE OBLIGEE PROMISED SOMETHING DIFFERENT FROM, OR LESS THAN, THAT REQUIRED BY THE ORIGINAL OBLIGATION AND THE CREDITOR ACCEPTED THE PROMISE AS FULL SATISFACTION OF THE ORIGINAL OBLIGATION.

A. Promise as Accord. The terms of an accord may provide for the giving of a promise as consideration for the extinction of an existing obligation (*Silvers v. Grossman (1920) 183 Cal. 696, 699, 192 P. 534* ; *Everhardy v. Union Finance Co. (1931) 115 Cal. App. 460, 463, 1 P.2d 1024*).

B. Promise as Satisfaction Extinguishes Debt. An agreement to accept the obligee's promise to pay as satisfaction of a claim extinguishes the original obligation (*see* *Silvers v. Grossman (1920) 183 Cal. 696, 699, 192 P. 534* ; *Everhardy v. Union Finance Co. (1931) 115 Cal. App. 460, 466, 1 P.2d 1024*).

[2] Comments

[a] Use Of Form

These points and authorities may be submitted in support of the contention that the obligation sued on was extinguished by an accord and satisfaction because the obligee promised something different from, or less than, that required by the original obligation and the creditor accepted the promise as full satisfaction of the original obligation. This form should

be combined with the general form, supporting the contention that the obligation was extinguished by an accord and satisfaction [*see § 11.20*]. The form may be included in a memorandum of points and authorities, or in a trial or appellate brief.

The argument supported by these points and authorities may be raised by plaintiff in an action to cancel a lien on his or her property because the obligation that was secured by lien on the property was extinguished by an accord and satisfaction. It may also be raised by defendant as an affirmative defense in an action for damages in tort or for breach of contract.

These points and authorities may be combined, when appropriate, with pointsand authorities relating to the specific procedural context in which counsel wishes to raise the issue of the extinction of an obligation by accord and satisfaction.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. The factual situation should clearly show that the creditor's acceptance of the promise was in full satisfaction of the original obligation. A creditor's acceptance of the debtor's promise to give something different from, or less than, that originally agreed on, in extinction of the original obligation, should be distinguished from an executory accord, which is a promise by the creditor to accept the debtor's performance at a future date, not the debtor's mere promise to perform in satisfaction of the original obligation.

[b] Related Pleading and Practice Forms

For a discussion and forms for use in accord and satisfaction generally, see California Forms of Pleading and Practice, Ch. 6, *Accord and Satisfaction* (Matthew Bender).

For a discussion and forms for affirmative defenses based on modification, novation, rescission, or lack of one of the essential elements of a contract, see Ch. 140, *Contracts* , in that publication. For a discussion and forms for an affirmative defense based on release, see Ch. 520, *Settlement and Release* . For a discussion and forms for affirmative defenses based on payment and settlement, see Ch. 385, *Negotiable Instruments* , and Ch. 520, *Settlement and Release* , respectively.

[c] Related Points and Authorities

For points and authorities relating to actions for breach of contract and for defenses to the formation and enforcement of a contract generally, see Ch. 50, *Contracts* . For points and authorities relating to the enforcement of an accord agreement generally, see Ch. 214, *Specific Performance* .

[d] Opposing Points and Authorities

For points and authorities opposing the validity of the accord agreement generally, see *§ 11.27*. For points and authorities opposing the validity of the accord agreement because there was no meeting of the minds of the parties, see *§ 11.28*. For points and authorities opposing the validity of the accord agreement because there was no bona fide dispute, see *§ 11.29*.

For points and authorities opposing the extinction of the original obligation because the accord was not executed, see *§ 11.30*. For points and authorities opposing the contention that the obligation was extinguished by an accord and satisfaction on the ground that the defense was not specially pleaded, see *§ 11.31*.

[3] Discussion of Authorities

[a] Promise as Accord

The facts and procedural background of ***Silvers v. Grossman*** *(1920) 183 Cal. 696, 192 P 534* , are discussed in *§ 11.20[3][c]*. Although the Supreme Court reversed the trial court's judgment for failure to plead promise as accord and satisfaction, it held that the terms of an accord may provide for the giving of a promise as the consideration for the extinction of the existing obligation (*183 Cal. 696, 699*).

The facts and procedural background of ***Everhardy v. Union Finance Co.*** *(1931) 115 Cal. App. 460, 1 P.2d 1024* , are discussed in *§ 11.20[3][c]*. In *Everhardy*, the court of appeal affirmed the trial court's decision that an accord and satisfaction, extinguishing defendant's original obligation to issue 400 shares of stock to plaintiff, was effected by plaintiff's acceptance of 100 shares of stock and defendant's promise to issue the rest. The court quoted *Silvers v. Grossman (1920) 183 Cal. 696, 192 P 534* , for the rule that the terms of an accord may provide for the giving of a promise as the consideration for the extinction of the existing obligation, and the giving and acceptance of the promise is the execution of the accord (*115 Cal. App. 460, 463*).

[b] Promise as Satisfaction Extinguishes Debt

The facts and procedural background of ***Silvers v. Grossman*** *(1920) 183 Cal. 696, 192 P 534* , are discussed in *§ 11.20[3][c]*. The Supreme Court in *Silvers* reversed the trial court's judgment on the ground that the accord and satisfaction was not supported by the pleading. The Court said that the finding of an accord and satisfaction was not repugnant to it, but held that the giving and acceptance of the promise in satisfaction of the preexisting obligation must be averred in the pleadings. Defendant failed to plead that the promise was given and accepted in full satisfaction of the original obligation (*183 Cal. 696, 699*).

The facts and procedural background of ***Everhardy v. Union Finance Co.*** *(1931) 115 Cal. App. 460, 1 P.2d 1024* , are discussed in *§ 11.20[3][c]*. The court of appeal, in affirming the trial court's judgment for defendant, held that plaintiff's acceptance of the 100 shares of stock and defendant's promise to deliver 300 shares when they became available constituted an accord and satisfaction extinguishing defendant's obligation under the original agreement (*115 Cal. App. 460, 466*).

[4] Additional Authorities

[a] Promise as Satisfaction Extinguishes Debt

Gardner v. Shreve (1949) 89 Cal. App. 2d 804, 202 P.2d 322 , was an action forbreach of an express contract, and for enforcement of an implied contract. The trial court granted a summary judgment for plaintiff. The court of appeal reversed. Plaintiff had entered a written agreement to take part in defendant's business. When plaintiff did not live up to the terms of the agreement, defendant rescinded the agreement and agreed to refund plaintiff's money. The parties subsequently entered into a written agreement terminating their relationship. Defendant failed to refund the money by the agreed date, and plaintiff instituted a suit to recover the money. After the suit was instituted but before defendant was served with the complaint, defendant sent plaintiff a promissory note agreeing to pay the money owed at a future date. Plaintiff did not return the note but continued with the suit. Defendant then asserted, as defense to the action, that plaintiff had accepted the note as satisfaction for the original obligation. The court of appeal found that defendant in her affidavit had stated an express, executed agreement to give and receive the promissory note as full satisfaction of the original obligation and that such an executed agreement is effective to discharge the original debt, but held that there was a triable issue as to plaintiff's acceptance of the note. Therefore, the case should have gone to trial (*89 Cal. App. 2d 804, 808*).

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1-11 California Points & Authorities § 11.25

§ 11.25 Supporting Contention That the Obligation Sued on Was Extinguished by Accord and Satisfaction [Civ. Code § 1521 et seq.]--Special Pleading Excused

[1] FORM Supporting Contention That the Obligation Sued on Was Extinguished by Accord and Satisfaction [Civ. Code § 1521 et seq.]--Special Pleading Excused

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with a general form, supporting the contention that the obligation sued on was extinguished by accord and satisfaction (see § 11.20). It may also be combined with any of the specific forms, supporting the contention that the obligation sued on was extinguished by accord and satisfaction (see §§ 11.21 -11.24).*]

THE OBLIGATION SUED ON WAS EXTINGUISHED BY AN ACCORD AND SATISFACTION THAT DOES NOT HAVE TO BE SPECIALLY PLEADED BECAUSE _____ [OBLIGEE PROVED PAYMENT AND THE CIRCUMSTANCES UNDER WHICH IT WAS MADE *or* OBLIGOR RAISED THE DEFENSE BY MOTION FOR SUMMARY JUDGMENT].

[*EITHER*]

Obligee Proves Payment and Circumstances. If the plaintiff, as a part of his or her case, proves the payment and the circumstances under which it was made, tending to show an accord and satisfaction, the defendant may rely upon the facts thus shown as an accord and satisfaction, although not pleaded as such by defendant in the answer (*Russell v. Riley & Peterson (1927) 82 Cal. App. 728, 736, 256 P. 557*).

[*OR*]

Accord and Satisfaction Raised by Motion for Summary Judgment. Failure to raise the defense of accord and satisfaction in the answer does not of necessity preclude defendant from asserting this defense on a motion for summary

judgment (*Ramos v. City of Santa Clara (1973) 35 Cal. App. 3d 93, 95, 110 Cal. Rptr. 485*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the obligor may prove that the obligation sued on was extinguished by an accord and satisfaction and that the requirement that an accord and satisfaction be specially pleaded is excused. This form should be combined with the general form, supporting the contention that the obligation was extinguished by an accord and satisfaction [*see § 11.20*]. It may also be combined with one of the specific forms, supporting the contention that the obligation sued on was extinguished by an accord and satisfaction [*see §§ 11.21 -11.24*].

The argument supported by these points and authorities may be used by the obligor to oppose a motion by the obligee to exclude evidence of an accord and satisfaction or to support a motion by the obligor for summary judgment. Should the accord and satisfaction fail on the ground that it was not specially pleaded, the obligee can also move to amend the pleadings, for the trial court has the discretion to allow amendment of the pleading at any stage [*Ramos v. City of Santa Clara (1973) 35 Cal. App. 3d 93, 95, 110 Cal. Rptr. 485*].

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue that an accord and satisfaction need not be specially pleaded. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel may demonstrate that the accord and satisfaction does not have to be specially pleaded by showing that either the issue of an accord and satisfaction is being raised for the first time in a motion for summary judgment or that the obligee, in presenting his or her case, has proved a payment and its circumstances that tended to show an accord and satisfaction.

[b] Related Pleading and Practice Forms

For a discussion and forms for use in accord and satisfaction generally, see California Forms of Pleading and Practice, Ch. 6, *Accord and Satisfaction* (Matthew Bender). For a discussion and forms relating to amendment of pleadings, see Ch. 21, *Amended and Supplemental Pleadings* .

[c] Related Points and Authorities

For discussion and forms relating to amendment of pleadings, see Ch. 16, *Amended and Supplemental Pleadings* .

[d] Opposing Points and Authorities

For points and authorities opposing the contention that the obligation was extinguished by an accord and satisfaction on the ground that the defense was not specially pleaded, see *§ 11.31*.

[3] Discussion of Authorities

[a] Obligee Proves Payment and Circumstances

Russell v. Riley & Peterson *(1927) 82 Cal. App. 728, 256 P. 557* , was an action for reformation of an agreement, for damages from the alleged breach thereof, and for damages by reason of alleged negligence of defendants. In their answer, defendants denied the material allegations in all causes of action and pleaded payment in full for all claims as a

further defense. Plaintiff contended that defendants had not paid in full because defendants had agreed to pay $213 and to put plaintiff's land back in the same condition it was in when defendants went onto it; yet defendants had only paid the $213. She also contended that defendants could not prove an accord and satisfaction on the ground that the check was tendered on the condition that it be accepted in full satisfaction of all claims, since defendants had not pleaded an accord and satisfaction in their answer. The trial court gave judgment for defendants, and the court of appeal affirmed. The court, conceding without deciding that the pleading in the present case did not meet the requirements for pleading the defense of accord and satisfaction, held that the rule requiring an accord and satisfaction to be specially pleaded before it can be availed of as a defense is subject to the exception that if the obligee, as a part of his or her case, proves the payment and circumstances under which it was made, tending to show an accord and satisfaction, the defendant may rely upon the facts thus shown as an accord and satisfaction although it is not pleaded as such in the answer (*82 Cal. App. 728, 736* . The court held that in this case, plaintiff had chosen to prove the fact of payment in aid of her own case and the circumstances surrounding the payment; therefore, she had no right to object that all of the facts connected with the payment were shown (*82 Cal. App. 728, 736-737*).

[b] Accord and Satisfaction Raised by Motion for Summary Judgment

Ramos v. City of Santa Clara *(1973) 35 Cal. App. 3d 93, 110 Cal. Rptr. 485* , was an action against a city on a construction contract. Defendant was granted a summary judgment in its favor on the ground that plaintiff's claims against defendant were barred by a provision in the contract to the effect that the acceptance of final payment under the contract constituted a release of all claims.

Plaintiff appealed from the judgment. The court of appeal affirmed. Plaintiff claimed that the city was precluded from asserting the defense of release or accord and satisfaction because they failed to plead the defenses in their answer. The court noted that plaintiff had pointed out that the affirmative defenses of accord and satisfaction must be specially pleaded in order to raise them as issues, but said that it did not follow that failure to raise the defense of accord and satisfaction in the answer of necessity precluded asserting this defense on a motion for summary judgment. The court pointed out that plaintiff did not object to the motion at the time it was made, on the ground that the defense of accord and satisfaction had not been raised in the answer, and that plaintiff did not argue on appeal that the defense took him by surprise or prejudiced him in any way.

It explained that the trial court has discretion to allow amendment of any pleading at any stage of the proceedings, and that liberality is displayed in allowing amendment of answers so that a defendant may assert all defenses available (*35 Cal. App. 3d 93, 95-96*). The court incorporated this rationale in deciding that since the defense of accord and satisfaction may be decided by summary judgment, provided that there are no triable issues of fact, it was proper for the trial court to permit defendant to raise the issue by motion (*35 Cal. App. 3d 93, 96*).

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1-11 California Points & Authorities § 11.26

§ 11.26 Supporting Contention That the Obligation Sued on Was Extinguished by Accord and Satisfaction [Civ. Code §§ 1521-1526]--Composition, Extension Agreement, or Release [Civ. Code § 1526(b)-(d)]

[1] FORM Supporting Contention That the Obligation Sued on Was Extinguished by Accord and Satisfaction [Civ. Code §§ 1521-1526]--Composition, Extension Agreement, or Release [Civ. Code § 1526(b)-(d)]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with a general form, supporting the contention that the obligation sued on was extinguished by accord and satisfaction (see § 11.20).*]

THE OBLIGATION SUED ON WAS EXTINGUISHED BY ACCORD AND SATISFACTION BECAUSE THE CREDITOR ACCEPTED A CHECK TENDERED IN CONJUNCTION WITH A(N) _____[_____(COMPOSITION *or* EXTENSION) AGREEMENT PURSUANT TO SECTION 1526(b) *or* RELEASE OF CLAIM PURSUANT TO SECTION 1526(c)] OF THE CIVIL CODE.

[*EITHER*]

A. Composition or Extension Agreement. Notwithstanding *Section 1526(a)of the Civil Code*, acceptance of a check or draft constitutes an accord and satisfaction if the check or draft is tendered pursuant to a composition or extension agreement between a debtor and its creditors pursuant to which all creditors of the same class are accorded similar treatment, and the creditor receives the check or draft with knowledge of the restriction (*Civ. Code § 1526(b)*).

[*OR*]

A. Release of Claim. Notwithstanding *Section 1526(a) of the Civil Code*, acceptance of a check or draft by a creditor constitutes an accord and satisfaction when the check or draft is issued pursuant to or in conjunction with a release of a claim (*Civ. Code § 1526(c)*).

[*CONTINUE*]

[*Optional*] **B. Presumption of Creditor's Knowledge of Composition or Extension Agreement.** A creditor shall be conclusively presumed to have knowledge of a restriction to a check tendered pursuant to a composition or extension agreement under *Section 1526(b) of the Civil Code* if a creditor either (1) has, previous to the receipt of the check or draft, executed a written consent to the composition or extension agreement, or (2) has been given written notice, not less than 15 days nor more than 90 days prior to receipt of the check or draft, that a check or draft will be tendered with a restrictive endorsement and that acceptance and cashing of the check or draft will constitute an accord and satisfaction (*Civ. Code § 1526(b)*).

[*Optional*] **C. What Constitutes Notice of Composition or Extension Agreement.** For purposes of paragraph (2) of *Section 1526(b) of the Civil Code*, mailing the notice by first-class mail, postage prepaid, addressed to the address shown for the creditor on the debtor's books or such other address as the creditor may designate in writing constitutes notice (*Civ. Code § 1526(d)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the obligation sued on was extinguished by an accord and satisfaction because partial payment was made in conjunction with either a composition or extension agreement that met the requirements of *Civ. Code § 1526(b)* or a release of claim [*Civ. Code § 1526(b), (c)*]. This form should be combined with the general form, supporting the contention that the obligation was extinguished by an accord and satisfaction [*see § 11.20*]. Optional Paragraph B is for use if the creditor's knowledge that the check was tendered in accordance with a composition or extension agreement is in issue. Optional Paragraph C is for use if the knowledge issue depends on mailing of notice under *Civ. Code § 1526(b)(2).*

These points and authorities may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of extinction of an obligation by accord and satisfaction.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should attach a copy of the release, composition agreement, or extension agreement to which the check related.

[b] Opposing Points and Authorities

§§ 11.27 -11.31 oppose the validity of the accord and satisfaction. *§ 11.30* opposes the contention on the ground that the accord and satisfaction was not executed. *§ 11.31* opposes the contention on the ground that the defense of accord and satisfaction was not specially pleaded.

[c] Related Pleading and Practice Forms

For discussion and forms relating to accord and satisfaction in general, see California Forms of Pleading and Practice, Ch. 6, *Accord and Satisfaction* (Matthew Bender). For discussion and forms relating to releases and settlements in general, see Ch. 520, *Settlement and Release* in that publication. For discussion and forms relating to composition agreements, including a form of affirmative defense that a creditor's action against a debtor is barred by a composition agreement, see Ch. 94, *Bankruptcy* in that publication.

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1-11 California Points & Authorities § 11.27

§ 11.27 Opposing Contention That the Obligation Sued on Was Extinguished by Accord and Satisfaction [Civ. Code §§ 1521-1526]--Accord Not Valid--General Form

[1] FORM Opposing Contention That the Obligation Sued on Was Extinguished by Accord and Satisfaction [Civ. Code §§ 1521-1526]--Accord Not Valid--General Form

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

THE OBLIGATION SUED ON WAS NOT EXTINGUISHED BY ACCORD AND SATISFACTION, BECAUSE ALL THE ELEMENTS OF A CONTRACT WERE NOT PRESENT. THEREFORE, THE ALLEGED ACCORD WAS NOT VALID.

A. Rules of Contract Apply. Since an accord is an agreement, it is subject to the same rules applicable to other agreements (*Sierra & San Francisco P. Co. v. Universal Elec. & Gas Co. (1925) 197 Cal. 376, 387, 241 P 76*).

B. Necessary Elements of Valid Accord. Since the discharge of claims by way of accord and satisfaction is dependent on contract, it follows that the elements necessary for valid contracts generally must be present in an accord and satisfaction. Therefore, there must be (1) a proper subject matter, (2) competentparties, (3) a consent or meeting of the minds of the parties, and (4) consideration (*Sierra & San Francisco P. Co. v. Universal Elec. & Gas Co. (1925) 197 Cal. 376, 387, 241 P 76*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose the contention that the obligation sued on was extinguished by accord and satisfaction when all the elements necessary for a valid accord are not present. This form opposes *§§ 11.20 -11.26*. It can be used alone or combined with specific forms opposing the contention that the obligation sued on was extinguished because the accord was not valid [*see §§ 11.28, 11.29*].

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to raise an objection to extinction of an obligation by accord and satisfaction. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel should show that one or more of the elements necessary for a valid accord are missing. If counsel is opposing the contention that the obligation sued on was extinguished by an accord and satisfaction because the minds of the parties did not meet, making the accord invalid, this form should be combined with the specific form on that point [*see § 11.28*]. If counsel is opposing the contention that the obligation sued on was extinguished by an accord and satisfaction because there was no consideration and the facts show that a partial payment was made on a liquidated or undisputed claim, then this form may be combined with the specific form opposing the contention that the obligation sued on was extinguished by an accord and satisfaction on the ground that there was no bona fide dispute [*see § 11.29*].

[b] Related Pleading and Practice Forms

For a discussion and forms for use in accord and satisfaction generally, see California Forms of Pleading and Practice, Ch. 6, *Accord and Satisfaction* (Matthew Bender). For a discussion and forms relating to the lack of one or more of the essential elements of a contract, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[c] Related Points and Authorities

For points and authorities relating to actions for breach of contract and for defenses to the formation and enforcement of a contract generally, see Ch. 50, *Contracts* .

[3] Discussion of Authorities

[a] Rules of Contract Apply

Sierra & San Francisco P. Co. v. Universal Elec. & Gas Co. *(1925) 197 Cal. 376, 241 P 76* , was an action for the balance due for electrical energy furnished by the plaintiff to the defendant. Defendant had agreed to buy from plaintiff all of the electrical energy that might be required by it in the regular course of business for a period of eight years in excess of that which might be generated in its own plant. Subsequently, plaintiff tried to get defendant to take all of its power from plaintiff. An agreement was reached in which defendant agreed to shut down its steam plant and plaintiff agreed to operate its steam plant seven days a week and to base its service charge on a lesser rate. Six months later, plaintiff rescinded this agreement because changing conditions necessitated an increased rate. Defendant continued to pay the lesser amount under the terms of the modified agreement, and plaintiff filed suit for the difference between the service charge based on the lower rate and the service charge based on the regular rate. Defendant alleged in his answer that the original agreement was extinguished, inter alia, by plaintiff's cashing of checks sent by defendant and accompanied by vouchers which stated that the checks constituted payment in full. The trial court held that there had been no accord and satisfaction and gave judgment for plaintiff.

The Supreme Court affirmed the trial court's judgment. The Court found that the Railroad Commission had jurisdiction over public utilities by virtue of the Public Utilities Act. By the terms of this act, the utility company was required to file the contract with the Railroad Commission. Once filed, the rates and charges specified therein become the established and only lawful rates that the plaintiff could charge or receive (*197 Cal. 376, 381-382*). The Court noted that because an accord is an agreement, it is subject to the same rules applicable to other agreements and that the essentials necessary for valid contracts must be present. The Court held that an accord and satisfaction could not be implied in this case because plaintiff could not lawfully accept the checks tendered by defendant (*197 Cal. 376, 387*). Therefore, the Court held that the court below was correct in finding and concluding that there was no accord and satisfaction because the checks could not be regarded as subject to the conditions recited by defendant, and the element of consideration for the agreement of accord was lacking (*197 Cal. 376, 388*).

[b] Necessary Elements of Valid Accord

The facts and procedural background of ***Sierra & San Francisco P. Co. v. Universal Elec. & Gas Co.*** *(1925) 197 Cal. 376, 241 P. 76* , are discussed in *§ 11.27[3][a]*. The Supreme Court, in affirming the trial court's decision, held that the discharge of claims by way of accord and satisfaction is dependent uponcontract and that it followed that the essentials necessary for valid contracts generally must be present in a contract of accord and satisfaction. The Court, therefore, held that a valid accord requires: (1) a proper subject matter, (2) competent parties, (3) a consent or meeting of the minds of the parties, and (4) consideration (*197 Cal. 376, 387*).

[4] Additional Authorities

[a] Rules of Contract Apply

Dobinson v. McDonald (1891) 92 Cal. 33, 27 P. 1098 , was an action to recover the balance owed on commission for the sale of property. The parties had agreed that plaintiffs were to act as sole agents for the sale of defendant's property and receive a commission of $5,000 even if defendant sold the property himself. Before the agreement expired, defendant told plaintiffs that he wished to withdraw the property from the market. Plaintiffs agreed to surrender the original agreement to defendant for $1,000. When plaintiffs learned that the property had already been sold at the time the offer was made by defendant, they sued for the remainder owed on the commission. The trial court gave judgment to plaintiffs, and defendant appealed. The Supreme Court affirmed the judgment. The Court stated that accord agreements were subject to all the rules applicable to other agreements. Thus, the Court said that if the consent of the plaintiffs thereto was obtained through fraud exercised by defendant, plaintiffs had the right to rescind the agreement. The Court held that the false statement by defendant to plaintiffs, that he had not sold the property at the time he offered to give them $1,000 for a surrender of their agreement, constituted fraud and that plaintiffs were entitled to a rescission of the agreement. Therefore, the Court held that the facts found by the trial court fully sustained the judgment (*92 Cal. 33, 37*).

[b] Necessary Elements of Valid Accord

See *Thompson v. Williams (1989) 211 Cal. App. 3d 566, 571, 259 Cal. Rptr. 518* , discussed in *§ 11.20*.

In *Moving Picture Machine Operators Union v. Glasgow Theaters, Inc. (1970) 6 Cal. App. 3d 395, 86 Cal. Rptr. 33* , plaintiffs sought to recover payments owed to a pension fund, claiming that a dispute regarding when payment should begin was settled by a compromise. The trial court, finding that no payments were ever made under this agreement, gave judgment to plaintiffs for the amount that defendants conceded they owed to plaintiffs. The court of appeal affirmed, holding that there was no accord and satisfaction because the accord had not been executed (*6 Cal. App. 3d 395, 404*). In so holding, the court said that since an accord signifies an agreement between the parties, the primary principles of the law of contracts are necessarily applicable, that is, proper subject matter, competent parties, mutual consent, and consideration (*6 Cal. App. 3d 395, 403*).

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§ 11.28 Opposing Contention That the Obligation Sued on Was Extinguished by Accord and Satisfaction [Civ. Code § 1521 et seq.]--Accord Not Valid--No Meeting of the Minds [Civ. Code § 1526(a); Com. Code § 3311(c)]

[1] FORM Opposing Contention That the Obligation Sued on Was Extinguished by Accord and Satisfaction [Civ. Code § 1521 et seq.]--Accord Not Valid--No Meeting of the Minds [Civ. Code § 1526(a); Com. Code § 3311(c)]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with a general form, opposing the contention that the obligation sued on was extinguished by accord and satisfaction because the accord was not valid (see § 11.27).*]

THE OBLIGATION SUED ON WAS NOT EXTINGUISHED BY ACCORD AND SATISFACTION, BECAUSE THERE WAS NO MEETING OF THE MINDS OF THE PARTIES. THEREFORE, THE ACCORD WAS NOT VALID.

A. Meeting of Minds Required. An accord and satisfaction is the result of an agreement between the parties and must be consummated by a meeting of the minds of the parties (*Lapp-Gifford Co. v. Muscoy Water Co. (1913) 166 Cal. 25, 32, 134 P. 989*).

B. Intention to Agree. There is no accord unless the parties agree that the obligation is extinguished (*Cline v. Zappettini (1955) 131 Cal. App. 2d 723, 729, 281 P.2d 35*).

C. Intention From Circumstances. The intention of the parties regarding the accord agreement must be determined from all the circumstances attending the transaction (*Lapp-Gifford Co. v. Muscoy Water Co. (1913) 166 Cal. 25, 32, 134 P. 989*).

D. Accord and Satisfaction as Question of Fact. Whether an agreement amounts to an accord and satisfaction is a question of intention of the parties and a question for the trier of fact to decide (*Conderback Inc. v. Standard Oil Co. (1966) 239 Cal. App. 2d 664, 680, 48 Cal. Rptr. 901*).

[*Optional*] **E. Conditional Tender Must Be Clear.** The debtor must make it clear that acceptance of what he or she tenders is subject to the condition that it shall be in full satisfaction (*see Civ. Code § 1526(a)*; *Potter v. Pacific Coast Lumber Co. (1951) 37 Cal. 2d 592, 597, 234 P.2d 16*).

[*Optional*] **F. Subsequent Conduct Disproves Accord and Satisfaction.** The acceptance and cashing of a check, tendered subject to the condition that it is in full satisfaction of all claims, does not constitute an accord and satisfaction when the giving and acceptance of the check is followed by such conduct of both parties so as to clearly show that they did not consider the check a final settlement of the debt (*Owens v. Noble (1946) 77 Cal. App. 2d 209, 215, 175 P.2d 241*).

[*Optional*] **G. Creditor Struck Out Notation on Check.** When a claim isdisputed or unliquidated and a check or draft is tendered by the debtor in settlement thereof in full discharge of the claim, and the words "payment in full" or other words of similar meaning are notated on the check or draft, the acceptance of the check or draft does not constitute an accord and satisfaction if the creditor protests against accepting the tender in full payment by striking out or otherwise deleting that notation (*Civ. Code § 1526(a)*).

[*Optional*] **H. Check Cashed Inadvertently.** When a claim is disputed or unliquidated and a check or draft is tendered by the debtor in settlement thereof in full discharge of the claim, and the words "payment in full" or other words of similar meaning are notated on the check or draft, the acceptance of the check or draft does not constitute an accord and satisfaction if the acceptance of the check or draft was inadvertent or without knowledge of the notation (*Civ. Code § 1526(a)*).

[*Optional*] **I. Debtor Did Not Send Check to Appropriate Person or Office.** Subject to *Commercial Code Section 3311(d)*, a claim is not discharged if the claimant is an organization and proves that (A) within a reasonable time before the tender, the claimant sent a conspicuous statement to the person against whom the claim is asserted that communications concerning disputed debts, including an instrument tendered as full satisfaction of a debt, are to be sent to a designated person, office, or place, and (B) the instrument or accompanying communication was not received by that designated person, office, or place (*Com. Code § 3311(c)(1)*).

[*Optional*] **J. Creditor Tendered Repayment Within 90 Days.** Subject to *Commercial Code Section 3311(d)*, a claim is not discharged if the claimant, whether or not an organization, proves that within 90 days after the instrument tendered as full satisfaction was paid, the claimant tendered repayment of the amount of the instrument to the person against whom the claim is asserted (*Com. Code § 3311(c)(2)*).

CAUTION:

The case authority on which this form is based, particularly those cases involving checks, may have been qualified by *Civ. Code § 1526(a)* [Stats. 1987, ch. 1268], set forth in Optional Paragraphs G and H. Now that *Civ. Code § 1526(a)* specifies that protest by the creditor means striking out or otherwise deleting the notation that the check is full settlement, it is not clear whether other protests are sufficient to avoid an accord and satisfaction.

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose the contention that the obligation sued on was extinguished by accord and satisfaction because the minds of the parties had not met. This form should be combined with the general form, opposing the contention that the obligation sued on was extinguished by an accord and satisfaction because the accord was not valid [*see § 11.27*]. This form opposes *§§ 11.20 -11.26*.

There are now two provisions that govern tender of checks in full satisfaction of disputed or unliquidated claims: *Civ. Code § 1526(a)* and *Com. Code § 3311*. For comparison of their various provisions, see *§ 11.21[2][b]*. Optional Paragraphs G and H in this form are for use when proceeding under *Civ. Code § 1526(a)*. Optional Paragraphs I and J are applicable when proceeding under *Com. Code § 3311*. Also, both Paragraphs I and J may be defeated if creditor knew at the time it collected the check that the check had been tendered in full satisfaction [*see Com. Code § 3311(d)* (set forth in *§ 11.21*)].

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue that an obligation was not extinguished by an accord and satisfaction.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel should show that the minds of the parties had not met and that there was no intention to accept something different from, or less than, the original obligation as satisfaction for the original obligation. This may be done by showing, for example, that the obligor did not make it clear to the creditor that what he or she was tendering was subject to the condition it be accepted in full satisfaction of the original obligation, and that the creditor's acceptance of the item was agreement to the condition and extinguished the original obligation. It can also be done by showing that the subsequent conduct of the parties showed an intention that the tender was not satisfaction in full.

[b] Related Pleading and Practice Forms

For a discussion and forms for use in accord and satisfaction generally, see California Forms of Pleading and Practice, Ch. 6, *Accord and Satisfaction* (Matthew Bender).

For a discussion and forms relating to the lack of one of the essential elements of a contract, particularly meeting of the minds of the parties, see Ch. 140, *Contracts* in that publication.

[c] Related Points and Authorities

For points and authorities relating to actions for breach of contract and to defenses to the formation and enforcement of contracts generally, see Ch. 50, *Contracts* .

[3] Discussion of Authorities

[a] Meeting of Minds Required

The facts and procedural background of ***Lapp-Gifford Co. v. Muscoy Water Co.*** *(1913) 166 Cal. 25, 134 P. 989* , are discussed in *§ 11.20[3][d]*. In affirming the trial court's decision that there was no accord and satisfaction, the Supreme Court held that an accord and satisfaction is the result of an agreement between the parties and must be consummated by a meeting of the minds of the parties (*166 Cal. 25, 32)* . The Court held that the parties in this case had not reached a meeting of the minds; therefore, there was no accord and satisfaction (*166 Cal. 25, 28)* .

[b] Intention to Agree

Cline v. Zappettini *(1955) 131 Cal. App. 2d 723, 281 P.2d 35* , was an action brought by an attorney for declaratory relief, seeking a determination of his rights under a contingent fee employment contract. The attorney defended two actions for defendant. Defendant paid the contingent fee for only one action by sending a check accompanied by a letter stating that the check was as per agreement dated April 1, 1952. The attorney informed defendant that he objected to any reduction in his fees and that he was filing a suit for his fee. Defendant acknowledged that he owed the amount sent by check and said that whatever happened the attorney should keep the check. The check was then certified. Defendant asserted the affirmative defense of accord and satisfaction to the attorney's suit for fees. The trial court gave judgment

for the attorney, and defendant appealed. The court of appeal affirmed. The court held that the parties must agree that the obligation is extinguished or there is no accord, but it also noted the exception that when an offer by the debtor is on condition that the remittance be taken in full payment and the creditor accepts with knowledge of the condition, there is an accord and satisfaction even if the creditor states that he is not accepting the check in full satisfaction. The court held that this rule was not applicable to the facts in this case because defendant's statements to plaintiff obviated any condition attached to the checks, and that since the parties had not agreed that the obligation was extinguished, there was no accord and satisfaction (*131 Cal. App. 2d 723, 729*).

[c] Intention From Circumstances

The facts and procedural background of ***Lapp-Gifford Co. v. Muscoy Water Co.*** *(1913) 166 Cal. 25, 134 P. 989* , are discussed in *§ 11.20[3][d]*. The Supreme Court affirmed the trial court's judgment and held that there was no accord and satisfaction because the parties did not intend the check to operate as a payment in full (*166 Cal. 25, 28*). The Court said that the intention of the parties must be determined from all the circumstances attending the transaction (*166 Cal. 25, 32*).

[d] Accord and Satisfaction as Question of Fact

Conderback Inc. v. Standard Oil Co. *(1966) 239 Cal. App. 2d 664, 48 Cal. Rptr. 901* , was an action to recover the balance of money allegedly due on a contract to construct and maintain a fair exhibit. Plaintiff sent defendant several invoices. Defendant paid all, but contended that it agreed to pay on the last invoice only on the condition it receive assurance that this payment was final, and it claimed plaintiff gave such assurance by the letter plaintiff sent. Plaintiff, however, contended that no condition was affixed to the payment, that the letter was signed on the assumption that it referred to the finality of the particular billing, and that defendant made subsequent payments thus indicating it did not intend this to be in full satisfaction of the contract debt. The trial court entered judgment for the plaintiff. Defendant appealed.

The court of appeal modified and affirmed the judgment. The court held that the question whether an agreement amounts to an accord and satisfaction is one of the intentions of the parties and is therefore a question of fact (*239 Cal. App. 2d 664, 680*). The court held that the jury could reasonably conclude from the evidence that the parties herein did not agree that the payment was final. Therefore, the original obligation was not extinguished by an accord and satisfaction (*239 Cal. App. 2d 664, 682*).

[e] Conditional Tender Must Be Clear

Civ. Code § 1526(a) describes the words "payment in full," or other words of similar meaning, as a clear notation on a check tendered by a debtor in settlement and full discharge of a disputed claim [*see Civ. Code § 1526(a)*].

The facts and procedural background of ***Potter v. Pacific Coast Lumber Co.*** *(1951) 37 Cal. 2d 592, 234 P.2d 16* , are discussed in *§ 11.21[3][c]*. The Supreme Court reversed the trial court's holding that there was no accord and satisfaction effected by tender of the conditional check. In finding an accord and satisfaction, the Court held that the debtor had fulfilled the requirement of making it clear that acceptance of what he tenders is subject to the condition that it be in full satisfaction, by the notation on the voucher stating that "payment of sight draft attached hereto is accepted in full settlement of account stated below, and endorsement thereof will constitute payee's receipt" (*37 Cal. 2d 592, 597, 598-599*).

[f] Subsequent Conduct Disproves Accord and Satisfaction

Owens v. Noble *(1946) 77 Cal. App. 2d 209, 175 P.2d 241* , was an action for a partnership accounting. Defendants alleged that the partnership was dissolved and denied that any money was due to plaintiff. They alleged, however, that there had never been an accounting. The trial court gave judgment for plaintiff. Defendants appealed, and the court of

appeal affirmed. On appeal, the courtinterpreted defendants' contentions as possibly being an assertion of accord and satisfaction. The court found that an accord and satisfaction was not specifically pleaded as generally required. The court went on to hold that it was an essential element of accord and satisfaction by tender of check that the tender is subject to the condition that the acceptance of the check is satisfaction in full. The court said that this condition was not shown by the mere fact that the debtor accompanied the check with an account showing a balance equal to the amount of the check and held that it was disproved when the giving and acceptance of the check was followed by such conduct of both parties as to clearly show that they did not consider the check a final settlement of the debt (*77 Cal. App. 2d 209, 215*). The court found that the subsequent actions of plaintiff, in objecting to the check as payment in full, and of the defendants, in discussing with plaintiff what additional property he was to take and in admitting to plaintiff's attorney that there was still property within their possession in which plaintiff had an interest, made it apparent that at the time the check was tendered it did not represent the full amount owed to plaintiff (*77 Cal. App. 2d 209, 214-215*).

[g] Debtor Did Not Send Check to Appropriate Person or Office

Com. Code § 3311 was added by Stats. 1992, ch. 914, § 6. For discussion of what constitutes an "instrument" under Division 3, see *§ 11.21[3][d]*.

Com. Code § 3311(c) is limited by *Com. Code § 3311(d)*, which is set forth in *§ 11.21*, Paragraph F.

[h] Creditor Tendered Repayment Within 90 Days

The repayment option provided by *Com. Code § 3311(c)(2)* is not available to an organizational claimant that sent a statement complying with subparagraph (A) of paragraph (1) [*see* Optional Paragraph I]. Nor will tender of repayment defeat an accord and satisfaction if the creditor, or its appropriate agent, knew at the time it collected the check that the check was tendered in full satisfaction [*see Com. Code § 3311(d)*, set forth in *§ 11.21*, Paragraph F].

[4] Additional Authorities

[a] Meeting of Minds Required

Dunlap v. Bellah (1960) 184 Cal. App. 2d 579, 7 Cal. Rptr. 766 , was an action to quiet title to real property. In acquiring the real property at issue in this case, plaintiff assumed an obligation to make payments on a promissory note for the purchase price of the property, which was secured by a second deed of trust on the real property and by a chattel mortgage on the fixtures therein. Plaintiff contended that defendants had divested themselves of any interest in the subject real property by virtue of an accord and satisfaction resulting from negotiations between the parties when defendants accepted $4,600 as settlement of the debt. Defendants contended that the agreement reached related only to the fixtures and that a release had been given only for the chattel mortgage on the fixtures. The trial court entered judgment for plaintiff, and defendant appealed. The court of appeal affirmed.

The court inferred from statements made by defendants and from the lack of any objection by defendants for over eight years that the payment tendered by plaintiff was to satisfy the debt on the promissory note releasing both the chattel mortgage on the fixtures and the second deed of trust, and that defendants intended to settle the account. The court therefore held that there was a meeting of the minds and that an accord and satisfaction had been effected releasing plaintiff of all obligations to defendants (*184 Cal. App. 2d 579, 587*).

[b] Intention to Agree

Kinkle v. Fruit Grower's Supply Co. (1944) 63 Cal. App. 2d 102, 146 P.2d 8 , was an action to recover the balance due under a contract for cutting and hauling logs. Plaintiff discovered that defendant was erroneously measuring the logs cut under the contract and called defendant's attention to that fact. The superintendent of defendant's corporation then assured plaintiff that any differences in measurements that might exist would be adjusted. Defendant subsequently sent

payment by check for the logs, based on the incorrect measurements, saying that the payment represented payment in full. Plaintiff cashed the check. At trial, defendant contended that plaintiff's cashing of the check constituted an accord and satisfaction of his obligation to pay the actual amount owed for the logs. The trial court rendered judgment in favor of plaintiff. Defendant appealed, and the court of appeal affirmed the judgment. The court said that whether or not the acceptance and cashing of the conditional check amounted to an accord and satisfaction depended on the mutual intention of the respective parties inferred from the circumstances of the transaction and the conduct of the parties (*63 Cal. App. 2d 102, 112*). The court found that the plaintiff did not intend the check to be the full and final settlement of defendant's account because plaintiff relied on defendant's assurance that the errors would be adjusted, and defendant's failure to measure the logs according to contract requirement constituted constructive fraud or at least mistake, making any accord agreement invalid (*63 Cal. App. 2d 102, 112-115*).

Whepley Oil Company v. Associated Oil Company (1935) 6 Cal. App. 2d 94, 44 P.2d 670 , was an action to recover the balance due as a royalty from an oil lease. The lease provided that plaintiff was to receive one eighth of the proceeds from the sale of gasoline produced on the lease holding, less the cost of manufacturing and operating costs estimated at 65 percent. Shortly after the lease agreement was entered into, defendant entered into a contract with a third company whereby the company agreed to process the oil and give defendant 50 percent of the gross. Plaintiff claimed that its royalty payment should be based onthe 50 percent received by defendant, not the 35 percent that was estimated as profit. Defendants asserted the affirmative defense of accord and satisfaction because plaintiff had accepted payment based on the lower percentage. The trial court entered judgment for plaintiff, and defendant appealed. The court of appeal affirmed. The court held that there must be a meeting of the minds of the contracting parties for an accord and satisfaction to come into existence. In this case, the court found that plaintiff, at first, had no knowledge that defendant was receiving more than 35 percent as a profit and that once plaintiff discovered this, he promptly advised defendant that he was taking the position that he was entitled to receive a royalty based on the 50 percent and made a request that the controversy be submitted to arbitrators as provided in the lease agreement (*6 Cal. App. 2d 94, 113*). Therefore, the court held that the minds of the parties had not met, that the accord was not valid, and that the original obligation was not extinguished (*6 Cal. App. 2d 94, 112-113*).

[c] Accord and Satisfaction as Question of Fact

The facts and procedural background of *Owens v. Noble (1946) 77 Cal. App. 2d 209, 175 P.2d 241* , are discussed in *§ 11.28[2][f]*. In affirming the trial court's finding that there was no accord and satisfaction, the court held that whether or not an agreement amounts to an accord and satisfaction is a question of fact. Here the court found that the trial court decided that by their subsequent conduct, the parties to the agreement did not intend the check to be satisfaction of the original obligation (*77 Cal. App. 2d 209, 214-215*).

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§ 11.29 Opposing Contention That the Obligation Sued on Was Extinguished by Accord and Satisfaction [Civ. Code § 1521 et seq.]--Accord Not Valid--No Bona Fide Dispute

[1] FORM Opposing Contention That the Obligation Sued on Was Extinguished by Accord and Satisfaction [Civ. Code § 1521 et seq.]--Accord Not Valid--No Bona Fide Dispute

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with a general form, opposing the contention that the obligation sued on was extinguished by accord and satisfaction because the accord was not valid (see § 11.27).*]

THE OBLIGATION SUED ON WAS NOT EXTINGUISHED BY ACCORD AND SATISFACTION, BECAUSE THE OBLIGATION WAS UNLIQUIDATED AND THERE WAS NO BONA FIDE DISPUTE BETWEEN THE PARTIES. THEREFORE, THERE WAS NO CONSIDERATION TO SUPPORT THE ACCORD, AND THE ACCORD WAS NOT VALID.

A. Bona Fide Dispute as Consideration. To constitute a good consideration for a settlement by way of compromise, there must have been an actual bona fide difference or dispute between the parties regarding their legal rights (*Berger v. Lane (1923) 190 Cal. 443, 451, 213 P. 45*).

B. Bona Fide Dispute Required. For the principle of accord and satisfaction to apply in disposition of an unliquidated claim, there must be a bona fide dispute between the parties (*Potter v. Pacific Coast Lumber Co. (1951) 37 Cal. 2d 592, 597, 234 P.2d 16* ; *Berger v. Lane (1923) 190 Cal. 443, 447-448, 213 P. 45*).

C. Honest Dispute Required. The dispute or controversy should be founded in good faith. Without an honest dispute, an agreement to take a lesser amount in payment for the unliquidated claim is without consideration and void (*Berger v. Lane (1923) 190 Cal. 443, 448, 213 P. 45*).

[*Optional*] **D. Arbitrary Refusal to Pay.** An arbitrary refusal to pay is not a bona fide dispute (*Kelly v. David D. Bohannon Organization (1953) 119 Cal. App. 2d 787, 792, 260 P.2d 646*).

[*Optional*] **E. No Dispute When Claim Concededly Due.** When payment is admittedly due and owing, the alleged accord and satisfaction must fail because it is not supported by any consideration (*Western Concrete Structures Co. v. James I. Barnes Constr. Co. (1962) 206 Cal. App. 2d 1, 8, 23 Cal. Rptr. 506*).

[*Optional*] **F. Wages Concededly Due Do Not Extinguish Disputed Claim.** The principle that an accord and satisfaction may be consummated by the payee's cashing of a check bearing a restrictive endorsement that notifies the payee that it must be accepted in full settlement of a disputed claim or not at all does not apply to a claim for wages conceded by the employer to be due (*Sullivan v. Del Conte Masonry Co. (1965) 238 Cal. App. 2d 630, 633, 48 Cal. Rptr. 160*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the obligation sued on was extinguished by an accord and satisfaction when there was no bona fide dispute between the parties. This form should be combined with the general form, opposing the contention that the obligation sued on was extinguished by an accord and satisfaction because the accord was not valid [*see § 11.27*]. This form opposes the contention that the obligation was extinguished by an accord and satisfaction based on partial payment of a disputed claim [*see § 11.21*].

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue that an obligation was not extinguished by an accord and satisfaction.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel should show that there was no dispute over the amount owed. This may be demonstrated by showing, forexample, that the dispute was arbitrarily created by one of the parties [*see, e.g.,* *Berger v. Lane (1923) 190 Cal. 443, 213 P. 45*].

Optional Paragraph D should be used when the amount of the obligation is known to both parties, but one arbitrarily refuses to pay.

Optional Paragraph E can be used when an accord and satisfaction is alleged by the payment of part of a concededly due amount, subject to the condition that it be accepted as satisfaction in full of the entire amount. It can also be used when an accord and satisfaction is alleged to extinguish separate claims by payment of a concededly due claim. Optional Paragraph F should be used when a concededly due payment for wages is tendered, subject to the condition that it be accepted in full satisfaction of a disputed amount, and this is alleged to constitute an accord and satisfaction.

[b] Related Pleading and Practice Forms

For a discussion and forms for use in accord and satisfaction generally, see California Forms of Pleading and Practice, Ch. 6, *Accord and Satisfaction* (Matthew Bender).

For a discussion and forms relating to the essential elements of a contract such as consideration, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[c] Related Points and Authorities

For points and authorities relating to actions for breach of contract and to defenses to the formation and enforcement of a contract generally, see Ch. 50, *Contracts* .

[3] Discussion of Authorities

[a] Bona Fide Dispute as Consideration

Berger v. Lane *(1923) 190 Cal. 443, 213 P. 45* , was an action to recover the balance of commission owed pursuant to a written contract to sell land. Plaintiff contended that defendant had agreed in writing to pay a commission of 5 percent of the sale price and that this was a fixed and definite sum. Defendant contended that there was a dispute over the amount of commission due and over who was to pay it. He further contended that his tender of a check to plaintiff with a letter stating, "I enclose my check as your commission for sale of lot as agreed upon at time of sale and as part of terms of sale," amounted to an accord and satisfaction extinguishing the original obligation, and he pleaded this as an affirmative defense. The trial court, deciding that the case made by defendant established an accord and satisfaction of a preexisting claim, gave judgment of nonsuit.

In reversing the decision of the trial court, the Supreme Court found that there was no bona fide dispute between the parties. Therefore, the check tendered on the condition that it be accepted in full satisfaction of the original debt and cashed by the creditor did not extinguish the original debt. The Court said that the compromise of a disputed or doubtful claim was in itself a good consideration. It held that without a bona fide dispute, as here, the accord was not supported by consideration and thus was void (*190 Cal. 443, 450-451*).

[b] Bona Fide Dispute Required

The facts and procedural background of ***Potter v. Pacific Coast Lumber Co.*** *(1951) 37 Cal. 2d 592, 234 P.2d 16* , are discussed in *§ 11.21[3][c]*. The Supreme Court, reversing the trial court's judgment for plaintiff, held that there was a valid accord and satisfaction extinguishing the original obligation. The Court held that for the principle of accord and satisfaction to apply in disposition of an unliquidated claim, there must be a bona fide dispute between the parties (*37 Cal. 2d 592, 597*). The Court found that there was a bona fide dispute between the parties involved in this suit (*37 Cal. 2d 592, 602*).

The facts and procedural background of ***Berger v. Lane*** *(1923) 190 Cal. 443, 213 P. 45* , are discussed in *§ 11.29[3][a]*. The Supreme Court, in reversing the trial court's judgment of nonsuit, held that there was no accord and satisfaction extinguishing the original debt because there was no bona fide dispute. The Court held that the conditional check would satisfy the obligation only if the amount due was in dispute (*190 Cal. 443, 447*). The Court found that defendant had arbitrarily refused to pay and that therefore, there was no dispute. Thus, the original obligation was not extinguished (*190 Cal. 443, 448*).

[c] Honest Dispute Required

The facts and procedural background of ***Berger v. Lane*** *(1923) 190 Cal. 443, 213 P. 45* , are discussed in *§ 11.29[3][a]*. In deciding that there was no accord and satisfaction extinguishing the original debt, the Supreme Court reversed the trial court's judgment of nonsuit. The Court held that there was no bona fide dispute between the parties. The Court said that although it is not necessary that the dispute or controversy be well founded, it is necessary that it be founded in good faith. It held that without an honest dispute, an agreement to take a lesser amount in payment for the unliquidated claim is without consideration and void, and held that an arbitrary refusal to pay, based on the mere pretense of the debtor and made for the obvious purpose of exacting terms that were inequitable and oppressive, was not such an honest dispute as would satisfy the requirement of the rule (*190 Cal. 443, 448*). The Court held that since testimony offered by plaintiff related to the honesty of the dispute, it should have been heard, and therefore, the Court ruled that the nonsuit was erroneously granted (*190 Cal. 443, 453*).

[d] Arbitrary Refusal to Pay

Kelly v. David D. Bohannon Organization *(1953) 119 Cal. App. 2d 787, 260 P.2d 646* , was an action to recover the

balance due for services rendered under a contract. The contract provided that plaintiff's services be compensated at specific rates. Defendant contended that when it let plaintiff go, it tendered a check endorsed with the statement that it was payment in full of all claims. Defendant further contended that when plaintiff cashed the check, the original obligation was extinguished by an accord and satisfaction. The trial court entered judgment for plaintiff, and defendant appealed. The court of appeal affirmed the trial court's holding. The court of appeal held that an accord and satisfaction must be predicated upon a bona fide dispute. An arbitrary refusal to pay, based on the mere pretense of the debtor made for the obvious purpose of exacting terms that are inequitable and oppressive, is not such a dispute as will satisfy the requirements of the rule. It said that a person cannot create a dispute sufficient as a consideration for a compromise by a mere refusal to pay an undisputed claim, since that would be extortion and not compromise (*119 Cal. App. 2d 787, 792*). The court held that substantial evidence supported the finding that there was no bona fide dispute. Therefore, there could be no accord and satisfaction (*119 Cal. App. 2d 787, 793, 795*).

[e] No Dispute When Claim Concededly Due

Western Concrete Structures Co. v. James I. Barnes Constr. Co. *(1962) 206 Cal. App. 2d 1, 23 Cal. Rptr. 506* , was an action for breach of contract and for payment for services or materials furnished. Plaintiff submitted two invoices to defendant. Defendant paid one and returned the other accompanied by a letter of transmittal that stated that the remittance was to be payment in full for services to date, and that the second invoice was an unwarranted and unauthorized charge. The check itself was endorsed with a notation stating that its acceptance acknowledged payment in full of all moneys due to date and canceled the second invoice. Defendant claimed that this constituted an accord and satisfaction barring plaintiff's claim to payment of the second invoice. The trial court gave judgment for plaintiff. Defendant appealed. The court of appeal affirmed, holding that there was no dispute regarding either the fact of the obligation as stated in the first invoice, which was paid by defendant's check, or the amount that defendant was obliged to pay thereunder. Since formation of an accord and satisfaction requires consideration, and since the payment here was admittedly due and payable, the court held that payment by defendant was payment of the exact amount on an undisputed obligation and not consideration for an accord and satisfaction of a separate disputed claim (*206 Cal. App. 2d 1, 8*).

[f] Wages Concededly Due Do Not Extinguish Disputed Claim

In ***Sullivan v. Del Conte Masonry Co.*** *(1965) 238 Cal. App. 2d 630, 48 Cal. Rptr. 160* , an action was brought seeking an accounting and payment of money due under an employment agreement. Defendant contended that an accord and satisfaction had been effected by his tender of a check to plaintiff endorsed as payment in full of all money owing, which plaintiff cashed. The trial court gave judgment for plaintiff. Defendant appealed, and the court of appeal affirmed. The court held that the principle that an accord and satisfaction may be consummated by the giving of a check bearing a restrictive endorsement, notifying the payee that it must be accepted in full settlement of a disputed claim or not at all, and the cashing of the check by the payee did not apply to a claim for wages concededly due. It held that *Lab. Code § 206* applied to employee wages and required that upon termination of an employee's services the employer was bound to pay the employee all wages conceded to be due and could require no condition in connection with payment. Therefore, plaintiff's agreement to accept less was void (*238 Cal. App. 2d 630, 633*).

[4] Additional Authorities

[a] Bona Fide Dispute Required

In *Edgar v. Hitch (1956) 46 Cal. 2d 309, 294 P.2d 3* , an agreement was made for defendant to buy and for plaintiff to sell hay. Despite a prior discussion of defendant's asking price, no purchase price was mentioned when the agreement was made. Plaintiff contended that the purchase price discussed was $42.50 per ton, while defendant contended that the price discussed was $32.50 per ton. Defendant paid plaintiff by check, bearing a notation that this constituted payment in full for all hay bought. Plaintiff retained the check, demanded additional payment, and instituted this suit. The trial court gave judgment for plaintiff. Defendant appealed. The Supreme Court noted that there was testimony supporting

the view that there was no bona fide dispute between the parties because defendant had been informed of plaintiff's asking price before entering into the agreement, and there was evidence that defendant's insistence on a lower price was not the result of a genuine misunderstanding but merely an attempt to get away with paying less than the amount originally agreed upon (*46 Cal. 2d 309, 311-312*). The Court said that the trial court could have properly found that the defendant had not proved his defense of accord and satisfaction, but the Court reversed the judgment because the trial court did not make an express finding rejecting defendant's plea of accord and satisfaction (*46 Cal. 2d 309, 312-313*).

Security First National Bank v. Rospaw (1951) 107 Cal. App. 2d 220, 237 P.2d 76 , was an action to recover the principal sum owed on a written promissory note. Defendant denied that the sum was due and payable because there was a contemporaneous oral agreement that the note was to be effective only during the lifetime of the payee. The trial court granted plaintiff's motion for judgment on the pleadings on the grounds that the answer failed to raise any issue of fact or to statea defense. Defendant appealed. The court of appeal held that the facts pleaded did not show an accord and satisfaction and affirmed the judgment of the trial court. The court held that an agreement of accord and satisfaction presupposes a prior controversy concerning the relative rights of the parties under the preexisting agreement, and a right of action must have already accrued on the old obligation for a new agreement to constitute an accord and satisfaction (*107 Cal. App. 2d 220, 223-224*).

The facts and procedural background of *B. & W. Engineering Co. v. Beam (1913) 23 Cal. App. 164, 137 P 624* , are discussed in *§ 11.20[3][a]*. In affirming the judgment for defendant, the court of appeal held that an agreement of accord and satisfaction presupposes a prior controversy concerning the relative rights of the parties under the preexisting agreement, and that before a dispute concerning a claim for money alleged to be due under an existing contract can be made the basis of an agreement of accord and satisfaction, it must be shown that the dispute was bona fide (*23 Cal. App. 164, 170*).

[b] Honest Dispute Required

The facts and procedural background of *B. & W. Engineering Co. v. Beam (1913) 23 Cal. App. 164, 137 P 624* , are discussed in *§ 11.20[3][a]*. On appeal, plaintiff contended that the facts of the transaction showed that defendant's claim could not have been honestly disputed and the finding of accord and satisfaction was not established by the evidence as a matter of law. The court of appeal disagreed and affirmed the trial court's judgment. The court said that it was not required that the circumstances of the transaction on which the dispute was founded affirmatively show that there was room for an honest dispute. It said that the rule was that if a debt or claim was disputed at the time of payment, the payment of a part of the whole debt is good satisfaction when accepted, and it did not matter that there was no solid foundation for the dispute. The court held that the test in such a case was whether the dispute was honest or fraudulent. It said the dispute, if honest, affords a basis for an accord between the parties, which the law favors, and the execution of which is the satisfaction (*23 Cal. App. 164, 170-171*).

[c] No Dispute When Claim Concededly Due

MacIsaac & Menke Co. v. Cardox Corp. (1961) 193 Cal. App. 2d 661, 14 Cal. Rptr. 523 , was an action to recover reasonable costs for additional work performed under a written subcontract, modified by an executed oral agreement. Defendants contended that if liable under the modified contract, their liability was limited to $8,991 by reason of a writing signed by plaintiff that acknowledged receipt of $6,139 as payment in full of all sums due plaintiff other than the sum of $8,991, over which there was a dispute. The trial court entered judgment for plaintiff for $15,623, which the court found to be the reasonable value of plaintiff's work. The court of appeal affirmed the judgment and rejected defendants' contention. The court found that the receipt was not supported by any consideration because the payment of $6,139 was admittedly due and owing. The court therefore held that the alleged accord and satisfaction failed for lack of consideration (*193 Cal. App. 2d 661, 671*).

Rued v. Cooper (1897) 119 Cal. 463, 51 P 704 , was an action to recover a large amount of money advanced for the purpose of buying, carrying, and selling shares of stock in mining corporations for plaintiff, upon margin, under a contract for that purpose. Defendants pleaded that plaintiff accepted a lesser sum than that advanced, together with shares of stock, as full payment, settlement, and satisfaction of the claim. The trial court found that there was an accord and satisfaction and gave judgment for defendants. Plaintiff appealed, and the Supreme Court reversed the judgment. The Court found that the payment of the money was of a sum conceded to be due under the terms of the contract. It held that payment of a part of the whole debt is not a good satisfaction even if accepted, unless the amount of the claim is disputed. In this case, the Court found that there was no dispute or controversy, and hence no agreement to accept something different from, or less than, that to which plaintiff was legally entitled; therefore, there was no accord (*119 Cal. 463, 467*).

[d] Wages Concededly Due Do Not Extinguish Disputed Claim

Reid v. Overland Machined Products (1961) 55 Cal. 2d 203, 10 Cal. Rptr. 819 , 359 P.2d 251 , was an action for an accounting for wages and commissions allegedly earned pursuant to a written employment contract. Defendant contended that its obligation was extinguished by accord and satisfaction because plaintiff cashed checks that were made conditional as payment in full. The trial court found that there was no accord and satisfaction and gave judgment for plaintiff. Defendant appealed.

The Supreme Court held that the trial court correctly ruled that there was no accord and satisfaction but reversed the judgment because of errors in the admission and exclusion of evidence. In its holding, the Court said that ordinarily the conditional payment of either an amount concededly owed, or an amount in excess of that concededly owed, is sufficient consideration for a settlement of a bona fide disputed claim, and an offer and acceptance of such an amount given in full payment for the disputed claim therefore discharges the debt (*55 Cal. 2d 203, 207*). The Court held that this rule does not apply in the case of wages because *Lab. Code § 206* requires an employer to pay without consideration all wages concededly due and expressly precludes an employer from coercing a settlement of disputed claims by offering a conditional payment. Since the checks tendered by defendant were for wages concededly due and conditioned on the release of all additional liability, no accord and satisfaction could result, because such an agreement would violate state law. Plaintiff therefore was entitled to recover on the contract (*55 Cal. 2d 203, 208*).

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Volume 1 Chapters 1-19 WRITING LEGAL MEMORANDA AND BRIEFS; ABATEMENT AND SURVIVAL OF ACTIONS---to---AMENDED AND SUPPLEMENTAL PLEADINGS
CHAPTER 11 ACCORD AND SATISFACTION
PART II. FORMS

1-11 California Points & Authorities § 11.30

§ 11.30 Opposing Contention That the Obligation Sued on Was Extinguished by Accord and Satisfaction [Civ. Code § 1521 et seq.]--Accord Not Executed

[1] FORM Opposing Contention That the Obligation Sued on Was Extinguished by Accord and Satisfaction [Civ. Code § 1521 et seq.]--Accord Not Executed

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE OBLIGATION SUED ON WAS NOT EXTINGUISHED BY ACCORD AND SATISFACTION, BECAUSE THE ACCORD WAS NEVER EXECUTED OR SATISFIED.

A. Accord Must Be Executed. The accord may be binding on the parties, but it does not discharge the obligation it is intended to satisfy until it is executed. Execution alone is satisfaction (*Holton v. Noble (1890) 83 Cal. 7, 9, 23 P. 58*).

[*Optional*] **B. Part Performance Not Satisfaction.** Payment of an amount less than the amount due under an accord agreement does not execute the accord or satisfy the original obligation (*see Simmons v. Oullahan (1888) 75 Cal. 508, 508-509, 17 P. 543*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the obligation sued on was extinguished by accord and satisfaction when the accord was never executed or satisfied. This form opposes *§§ 11.20 -11.24*.

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to raise an objection to the extinction of an obligation by accord and satisfaction. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel may show that the accord agreement was not satisfied by showing that the amount or item agreed on to extinguish the original debt was never tendered, or that what was tendered was only part of what was agreed on.

[b] Related Pleading and Practice Forms

For a discussion and forms for use in accord and satisfaction generally, see California Forms of Pleading and Practice, Ch. 6, *Accord and Satisfaction* (Matthew Bender). For a discussion and forms relating to contracts generally, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[c] Related Points and Authorities

For points and authorities relating to actions for breach of contract and for defenses to the formation and enforcement of a contract generally, see Ch. 50, *Contracts* .

[d] Accord Must Be Executed

Holton v. Noble *(1890) 23 P. 58* , was an action to recover rent due on a written lease. Defendants asserted the defense of accord and satisfaction by claiming that the landlord had agreed to extend the time for payment and to accept less than what was due under the lease. The trial court granted a motion of plaintiff for judgment on the pleadings. The Supreme Court affirmed the judgment. The Court held that unless the accord agreement to accept the smaller sum in discharge of the larger was carried out, the obligation to pay the larger sum was never extinguished or discharged; execution alone is satisfaction. Since defendant's answer showed that the agreement was never executed, the original obligation remained unaffected ( ).

[e] Part Performance Not Satisfaction

Simmons v. Oullahan *(1888) 75 Cal. 508, 17 P. 543* , was an action for goodssold and delivered. Plaintiff entered into an agreement with defendant to accept one half of the amount due under the contract for the goods delivered. Defendant gave plaintiff an even smaller sum than that agreed on, together with a receipt containing an expression to the effect that the sum paid was his pro rata of the distribution. Defendant contended that this satisfied the accord agreement, thus extinguishing his obligation under the original contract. The trial court gave judgment for plaintiff. Defendant appealed, and the Supreme Court affirmed. The Court held that an accord without full satisfaction was not a bar to an action. It said that a receipt is never conclusive and found that defendant did not pay the amount due under the accord agreement. Therefore, the Court held that the accord was not satisfied and that defendant's debt was not extinguished (*75 Cal. 508, 509*).

[3] Additional Authorities

[a] Accord Must Be Executed

Moving Picture Machine Operators Union v. Glasgow Theaters, Inc. (1970) 6 Cal. App. 3d 395, 86 Cal. Rptr. 33 , involved an action to recover payments owed by defendant to a pension fund for the benefit of union members. There was a dispute between the parties regarding the date on which payments were to begin. This dispute was settled by an oral agreement with a compromise date reached by counsel for both parties. The agreement was ratified by the parties but subsequently repudiated by defendant. No payments were made. Plaintiff claimed that this constituted an accord and satisfaction. Following the filing of the suit, defendant admitted it owed plaintiff $1,209. The trial court held the original written agreement void due to an alteration of a material part and gave judgment for the plaintiff for $1,209. Both defendant and plaintiff appealed. In affirming the judgment, the court of appeal held that it is necessary to show satisfaction as well as an accord, since an accord without satisfaction does not extinguish the original obligation (*6 Cal. App. 3d 395, 403*). The court found that, although an accord was reached, no money was paid. It therefore held

that the accord was not satisfied (*6 Cal. App. 3d 395, 404*). Since the court held the original obligation void, defendants were held liable only for the amount they conceded to owe plaintiff (*6 Cal. App. 3d 395, 406*).

Rabinowitz v. Kandel (1969) 1 Cal. App. 3d 961, 81 Cal. Rptr. 897 , involved, inter alia, an action to recover the amount due under a $10,000 promissory note. Defendants asserted the affirmative defense of accord and satisfaction. Defendants claimed that plaintiffs orally agreed to accept an assignment of proceeds from an escrow in full satisfaction of the obligation on the promissory note. They further claimed that the agreement had been satisfied and that defendants' obligation under the promissory note had been extinguished by plaintiffs' acceptance of two notes secured by deeds of trust for $8,000, which were payable to defendants and never assigned by defendants to plaintiffs. Plaintiffs claimed that the two notes had been forwarded as collateral for the promissory note and not as satisfaction of the accord agreement. The trial court entered judgment for defendants. Plaintiffs appealed. The court of appeal reversed the trial court's judgment and held that defendants failed to sustain their burden of proof that there was an accord and satisfaction. The court held that the accord was never executed since the plaintiffs did not receive the proceeds from the escrow (*1 Cal. App. 3d 961, 965*). It held that the two notes were not satisfaction of the alleged agreement, and no finding was made by the trial court of a second accord that could be satisfied by receipt of the two notes (*1 Cal. App. 3d 961, 966*).

In *Silvers v. Grossman (1920) 183 Cal. 696, 192 P. 534* , the facts and procedural background of which are discussed in *§ 11.20[3][c],* the Supreme Court reversed the trial court's judgment, finding that the satisfaction of the accord was not pleaded. The Court held that an accord alone is insufficient as a defense to an action on the original obligation and that such original obligation is not actually extinguished until there has been an acceptance of the consideration agreed upon, or in other words, satisfaction (*183 Cal. 696, 699*).

[b] Part Performance Not Satisfaction

Simmons v. Hamilton (1880) 56 Cal. 493 , was an action to recover money from defendants who were jointly indebted to plaintiff on a promissory note. Plaintiff entered a verbal agreement with defendants to accept one fourth of the amount owed on the promissory note from defendant Bicknell and three fourths of the amount owed from defendant Hamilton in the form of a promissory note, secured by a mortgage on real estate in Los Angeles. Defendant Bicknell's portion was accepted by plaintiff, but defendant Hamilton's note was rejected because the mortgage offered to secure payment was on Hamilton's homestead and was not satisfactory to plaintiff. Defendants contended that their obligation under the promissory note was extinguished by an accord agreement. The trial court held that defendants were jointly indebted on the note, and that plaintiff was entitled to judgment upon the note against defendant Hamilton but not against defendant Bicknell. The trial court then issued an order granting a new trial. Defendant Bicknell appealed the order granting a new trial. The Supreme Court held that the trial court had erred in its conclusion of law, for the findings did not support the defense of accord and satisfaction. The Court held that a plea of accord and satisfaction must show an accord that has been executed. The Court found that the verbal agreement was never executed by defendants. It held that although the agreement was performed in part by defendant Bicknell, part performance of a verbal agreement by one or two joint debtors was not an execution by both, and since an unexecuted agreement does not extinguish the obligation of joint debtors, the obligation of defendants was not extinguished (*56 Cal. 493, 495*).

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PART II. FORMS

1-11 California Points & Authorities § 11.31

§ 11.31 Opposing Contention That the Obligation Sued on Was Extinguished by Accord and Satisfaction [Civ. Code § 1521 et seq.]--Accord and Satisfaction Not Specially Pleaded

[1] FORM Opposing Contention That the Obligation Sued on Was Extinguished by Accord and Satisfaction [Civ. Code § 1521 et seq.]--Accord and Satisfaction Not Specially Pleaded

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT SHOULD NOT BE ALLOWED TO SHOW AN ACCORD AND SATISFACTION, BECAUSE IT WAS NOT SPECIALLY PLEADED AS AN AFFIRMATIVE DEFENSE.

Accord and Satisfaction Must Be Pleaded. The person who relies on an accord and satisfaction must plead both (*Berger v. Lane (1923) 190 Cal. 443, 447, 213 P. 45* ; *Silvers v. Grossman (1920) 183 Cal. 696, 192 P. 534*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose the contention that the obligation sued on was extinguished by an accord and satisfaction because the defense of accord and satisfaction was not specially pleaded. Counsel should note that there are certain exceptions to the requirement that an accord and satisfaction be specially pleaded [*see § 11.25*].

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to raise an objection to extinction of an obligation by accord and satisfaction. This would most likely be raised in a motion to exclude evidence, or in either a motion for judgment notwithstanding the verdict or a motion for new trial when support of plaintiff argues that he or she is entitled to judgment because, although an accord and satisfaction was purportedly proven, it was never pleaded by defendant. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of

law stated. Counsel should show that the answer does not aver both the accord and satisfaction.

[b] Related Pleading and Practice Forms

For a discussion and forms for use in accord and satisfaction generally, see California Forms of Pleading and Practice, Ch. 6, *Accord and Satisfaction* (Matthew Bender). For a discussion and forms relating to contracts generally, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender). For a discussion and forms relating to amendment of pleadings, see California Forms of Pleading and Practice, Ch. 21, *Amended and Supplemental Pleadings* (Matthew Bender).

[c] Related Points and Authorities

For points and authorities relating to contracts generally, see Ch. 50, *Contracts* . For a discussion and forms relating to amendment of pleadings, see Ch. 16, *Amended and Supplemental Pleadings* .

[3] Discussion of Authorities

[a] Accord and Satisfaction Must Be Pleaded

The facts and procedural background of ***Berger v. Lane*** *(1923) 190 Cal. 443, 213 P. 45* , are discussed in *§ 11.29[3][a]*. In reversing the trial court's decision, the Supreme Court found that there was no bona fide dispute and therefore no accord and satisfaction extinguishing the original obligation. In so holding, the Court noted that the defendant relying on an accord and satisfaction must plead and prove both (*190 Cal. 443, 447*).

The facts and procedural background of ***Silvers v. Grossman*** *(1920) 183 Cal. 696, 192 P. 534* , are discussed in *§ 11.20[3][c]*. The Supreme Court in *Silvers* reversed the trial court's judgment for plaintiff and the court's finding of an accord and satisfaction because satisfaction was not pleaded. The Court held that a plea that averts an unexecuted accord fails to state facts sufficient to constitute a defense. It held that if the giving and acceptance of a promise is the execution of the accord, and if the promise per se is relied on, then the giving and acceptance of the promise in satisfaction of the preexisting obligation must be averred in the pleadings (*183 Cal. 696, 699*).

[4] Additional Authorities

[a] Accord and Satisfaction Must Be Pleaded

The facts and procedural background of *Simmons v. Oullahan (1888) 75 Cal. 508, 17 P. 543* , are discussed in *§ 11.30[3][b]*. In affirming the trial court's judgment for plaintiff, the Supreme Court noted that the defendant who relies on accord and satisfaction must plead and prove the satisfaction as well as the accord (*75 Cal. 508, 509*).

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CHAPTER 12 ACCOUNTING

1-12 California Points & Authorities 12.syn

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§ 12.01 Scope of Chapter

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§ 12.09 When Issue Regarding Right to Accounting Arises

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§§ 12.12-12.19 [Reserved]

§ 12.20 Supporting Contention That Action for Accounting Is Equitable or Transitory or Both

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Action for Accounting as Equitable or Transitory or Both

[4] Additional Authorities

[a] Action for Accounting as Equitable or Transitory or Both

§ 12.21 Supporting Contention That Proper County for Trial of Accounting Action Is County of Defendant's Residence [Code Civ. Proc. § 395(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Defendant as Entitled to Trial of Accounting Action in County of His or Her Residence

[b] Joinder of Local Action With Accounting Action as Not Depriving Defendant of Right to Trial in County of His or Her Residence

[c] Request for Incidental Local Relief as Not Changing Nature of Action for Equitable Relief From Transitory to Local

[4] Additional Authorities

[a] Defendant as Entitled to Trial of Accounting Action in County of His or Her Residence

[b] Joinder of Local Action With Accounting Action as Not Depriving Defendant of Right to Trial in County of His or Her Residence

[c] Request for Incidental Local Relief as Not Changing Nature of Action for Equitable Relief From Transitory to

Local

§ 12.22 Opposing Contention That Proper County for Trial of Action Is County of Defendant's Residence [Code Civ. Proc. § 395(a)]--Incidental Accounting Does Not Affect Venue of Local Action

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Incidental Accounting as Not Changing Nature or Venue of Local Action

[4] Additional Authorities

[a] Incidental Accounting as Not Changing Nature or Venue of Local Action

§ 12.23 Opposing Contention That Proper County for Trial of Action Is County of Defendant's Residence [Code Civ. Proc. § 395(a)]--Action Is Founded on Contract

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Contract Provisions of Code Civ. Proc. § 395(a) as Applicable to Actions Involving Accounting Founded on Contract

[4] Additional Authorities

[a] Contract Provisions of Code Civ. Proc. § 395(a) as Applicable to Actions Involving Accounting Founded on Contract

§§ 12.24-12.39 [Reserved]

§ 12.40 Supporting Contention That Accounting Does Not Lie--No Accounting Is Necessary or Remedy at Law Is Adequate

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] No Accounting Necessary or Remedy at Law Is Adequate

[b] Right to Accounting as Required to Be Shown

[c] Accounting as Not Required When Need or Right Is Not Shown

[4] Additional Authorities

[a] No Accounting Necessary or Remedy at Law Is Adequate

§ 12.41 Supporting Contention That No Cause for Accounting Exists--Account Settled by Agreement of Parties

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] No Accounting After Account Settled

[4] Additional Authorities

[a] No Accounting After Account Settled

§ 12.42 Supporting Contention That No Cause for Accounting Exists--No Accounting Necessary When Sum Sued for Is Certain

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Complaint Seeks Recovery of Sum Certain

[b] All Facts Necessary to Calculate Sum Sought Are or Can Be Alleged

[4] Additional Authorities

[a] Complaint Seeks Recovery of Sum Certain

§ 12.43 Supporting Contention That No Cause for Accounting Exists--No Accounting Necessary When Items Are Not in Dispute

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Items Not in Dispute

§ 12.44 Supporting Contention That No Cause for Accounting Exists--No Right to Accounting in Absence of Misconduct or Breach of Fiduciary Duty by Defendant

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] No Right to Accounting in Absence of Misconduct or Breach of Fiduciary Duty by Defendant

§ 12.45 Opposing Contention That No Cause for An Accounting Exists--Cause for Accounting Sufficiently

Alleged; Specification of Sum as Minimum Amount Due as Surplusage

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Necessary Allegations

[b] Specification of Sum as Minimum Amount Due as Surplusage

[4] Additional Authorities

[a] Necessary Allegations

[b] Specification of Sum as Minimum Amount Due as Surplusage

§ 12.46 Opposing Contention That No Cause for An Accounting Exists--Fiduciary Relationship and Duty to Account Exist

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Memoranda

[3] Discussion of Authorities

[a] Fiduciary Relationship and Duty to Account Exist

§ 12.47 Opposing Contention That No Cause for an Accounting Exists--Complicated Accounts Rendering Action at Law Impractical

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Complicated Accounts Rendering Action at Law Impractical

[4] Additional Authorities

[a] Complicated Accounts Rendering Action at Law Impractical

§§ 12.48-12.59 [Reserved]

§ 12.60 Supporting Contention That Action Is Barred by Statute of Limitations--Accounting Is Ancillary to Main Action, Which Is Barred

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Nature of Right Sued on as Determining Which Statute of Limitations Applies

[b] Accounting Ancillary to Main Action

[4] Additional Authorities

[a] Nature of Right Sued on as Determining Which Statute of Limitations Applies

§ 12.61 Opposing Contention That Action Is Barred by Statute of Limitations--Action for Accounting May Be Commenced at Any Time Within Four Years After It Accrues [Code Civ. Proc. § 343]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Action for Accounting as Governed by Code Civ. Proc. § 343

[b] Code Civ. Proc. § 343 as Applying to Actions Seeking an Accounting When Duty to Account Arises From Fiduciary Relationship of Parties

[4] Additional Authorities

[a] Code Civ. Proc. § 343 as Applying to Actions Seeking an Accounting When Duty to Account Arises From Fiduciary Relationship of Parties

§§ 12.62-12.79 [Reserved]

§ 12.80 Supporting Contention That Trial Court's Disposition of Accounting Action Is Improper--Mere Statement of Balance Due Without Ordering Reference

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Mere Statement by Trial Court of Balance Due Without Reference as Insufficient

[4] Additional Authorities

[a] Mere Statement by Trial Court of Balance Due Without Reference as Insufficient

§ 12.81 Opposing Contention That Trial Court's Disposition of Accounting Action Is Improper--Account Need Not Be Stated in Accepted Bookkeeping Fashion

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Sufficiency of Account

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1-12 California Points & Authorities § 12.01

§ 12.01 Scope of Chapter

This chapter discusses the nature, jurisdiction, and venue of accounting actions and contains memoranda for use in supporting [*see §§ 12.20, 12.21*] and opposing [*see §§ 12.22, 12.23*] the contentions that an action for an accounting is equitable and transitory in nature and that the general venue statute applies.

The chapter also relates to the pleading of a cause of action, and the showing required, for an accounting and contains memoranda supporting [*see §§ 12.40 -12.43*] and opposing [*see §§ 12.45 -12.47*] the contention that no cause of action for an accounting is alleged or no right to an accounting is shown.

The chapter contains memoranda for use in supporting [*see § 12.60*] and opposing [*see § 12.61*] the contention that an accounting action is barred by the statute of limitations.

This chapter contains memoranda supporting [*see § 12.80*] and opposing [*see § 12.81*] the contention that the court's statement of an account is insufficient.

This chapter does not cover references to take an account pursuant to *Code Civ. Proc. § 638* or *639*. For memoranda relating to references, see Ch. 201, *Reference and Referees* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureRemediesEquitable AccountingsElementsCivil ProcedureRemediesEquitable AccountingsPartnershipsGovernmentsLegislationStatutes of LimitationsGeneral Overview

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1-12 California Points & Authorities § 12.02

§ 12.02 When Action for an Accounting Lies

An action for an accounting lies whenever a fiduciary relation exists between the parties and a duty rests on the defendant to render an account [*see, e.g., San Pedro Lumber Co. v. Reynolds (1896) 111 Cal. 588, 596-597, 44 P. 309* ; *see also § 12.46*]. The action also lies in cases in which the accounts involved are so complicated that an ordinary action at law demanding a fixed sum is not practicable [*see, e.g., Brea v. McGlashan (1934) 3 Cal. App. 2d 454, 460, 39 P.2d 877* ; *see also § 12.47*]. However, the mere existence of a complicated accounting relationship is insufficient by itself to permit the maintenance of an action for an accounting. To support an accounting, the plaintiff must prove that the defendant committed some form of misconduct, violated a fiduciary duty, or otherwise owes money to the plaintiff [*see Union Bank v. Superior Court (1995) 31 Cal. App. 4th 573, 593-594, 37 Cal. Rptr. 2d 653* ; *see also § 12.44*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesEquitable AccountingsElementsCivil ProcedureRemediesEquitable AccountingsPartnershipsCivil ProcedureRemediesEquitable AccountingsTrusts

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1-12 California Points & Authorities § 12.03

§ 12.03 Common-Law Action of Account Distinguished

An equitable action for an accounting should not be confused with a legal action based on the old common law action of account. The latter action lies against a fiduciary entrusted with property for which he or she is under a present duty to account, and it may be prosecuted as either a legal or an equitable action, jurisdiction of the action being concurrent. When the action is at law, however, the defendant has a right to a jury trial even though the action could have been brought in equity [*see Ripling v. Superior Court of Los Angeles County (1952) 112 Cal. App. 2d 399, 403-404, 407-408* (holding that plaintiff's election to obtain a writ of attachment on claim based on express contract and for money had and received constituted election to proceed at law rather than in equity)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsActions in EquityCivil ProcedureRemediesEquitable AccountingsElementsCivil ProcedureRemediesEquitable AccountingsPartnershipsCivil ProcedureRemediesEquitable AccountingsTrustsGovernmentsCourtsCommon Law

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1-12 California Points & Authorities § 12.04

§ 12.04 Parties Between Whom Accounting May Be Had

[1] Statutory Authority

There is no statute generally authorizing an action for an accounting, although several statutes provide for an accounting by specified persons. The following are examples: *Civ. Code § 1158(d)* (accounting by custodian of gift to minor); *Corp. Code §§ 15021, 15022* (accounting by partners); *Lab. Code § 2861* (accounting by employee); *Penal Code § 536a* (accounting by commission merchant, broker, factor, or consignee to whom property is consigned or entrusted for sale); *Prob. Code §§ 8525(b), 10950, 10952* (accounting by administrator or executor of estate); *Prob. Code § 2620 et seq.* (accounting by guardian or conservator); *Prob. Code § 2632* (accounting when guardian or conservator is deceased or incapacitated or has absconded).

[2] Examples as Illustrated by Cases

As illustrated by the cases cited, the following are examples of parties between whom an accounting may be had. The list is not intended to be exhaustive.

- Administrator and person with whom decedent was living [*McAllen v. Souza (1937) 24 Cal. App. 2d 247, 74 P.2d 853*].

- Agent and principal [*San Pedro Lumber Co. v. Reynolds (1896) 111 Cal. 588, 44 P. 309* ; *Arbuckle v. Clifford F. Reid, Inc. (1931) 118 Cal. App. 272, 4 P.2d 978* ; *Allsopp v. Joshua Hendy Machine Works (1907) 5 Cal. App. 228, 90 P. 39* (disapproved on another point in *Jefferson v. J.E. French Co. (1960) 54 Cal. 2d 717, 720, 7 Cal. Rptr. 899, 355 P.2d 643*)].

- Charitable corporations [*Brown v. Memorial Nat. Home Foundation (1958) 158 Cal. App. 2d 448, 322 P.2d 600* (action by attorney general against two charitable corporations involved in dispute)].

- Client and attorney [*Clark v. Millsap (1926) 197 Cal. 765, 242 P. 918*].

- Distributee of deceased's estate and alleged converters of estate's assets [*Mackay v. Clark Rig Bldg. Co. (1935) 5 Cal. App. 2d 44, 42 P.2d 341*].

- Employee and employer [*Remme v. Herzog (1963) 222 Cal. App. 2d 863, 35 Cal. Rptr. 586* ; *Brea v. McGlashan (1934) 3 Cal. App. 2d 454, 39 P.2d 877*].

- Factor and principal [*National Bank of New Zealand v. Finn (1927) 81 Cal. App. 317, 253 P. 757*].

- Guardian and ward [*Trumpler v. Cotton (1895) 109 Cal. 250, 41 P. 1033*].

- Husband and wife [*Chiarodit v. Chiarodit (1933) 218 Cal. 147, 21 P.2d 562* ; *Gunder v. Gunder (1929) 208 Cal. 559, 282 P. 794* ; *Ennes v. Ennes (1957) 147 Cal. App. 2d 574, 305 P.2d 622* ; *Roy v. Roy (1938) 29 Cal. App. 2d 596, 85 P.2d 223*].

- Joint venturers [*Stilwell v. Trutanich (1960) 178 Cal. App. 2d 614, 3 Cal. Rptr. 285* ; *Nesbitt v. Bruce Eells & Assoc. (1951) 105 Cal. App. 2d 370, 233 P.2d 183* ; *Erwing v. Jones (1945) 69 Cal. App. 2d 97, 158 P.2d 265* ; *Peardon v. White (1924) 65 Cal. App. 463, 224 P. 263*].

- Lessor and lessee [*Hollar v. Saline Products, Inc. (1935) 3 Cal. 2d 80, 43 P.2d 273*].

- Lodges [*Most Worshipful Sons of Light Grand Lodge v. Sons, etc., Lodge (1949) 91 Cal. App. 2d 582, 205 P.2d 722*].

- Owner and contractor's surety [*National Brass Wks. v. Weeks (1928) 92 Cal. App. 318, 268 P. 412*].

- Parties agreeing under *Code Civ. Proc. § 638* (reference to take account) [*Jackson v. Puget Sound Lumber Co. (1898) 123 Cal. 97, 55 P. 788*].

- Partners [*Bakewell v. Bakewell (1942) 21 Cal. 2d 224, 130 P.2d 975* ; *Middleton v. Finney (1931) 214 Cal. 523, 6 P.2d 938* ; *Di Blasi v. Di Blasi (1930) 209 Cal. 753, 290 P. 7* ; *Doudell v. Shoo (1911) 159 Cal. 448, 114 P. 579* ; *Shirley v. Cook (1953) 119 Cal. App. 2d 220, 259 P.2d 25* ; *David v. Goodman (1948) 89 Cal. App. 2d 162, 200 P.2d 568* ; *Jackson v. Allen (1921) 55 Cal. App. 257, 203 P. 411*].

- Stockholder and president of corporation [*Stoll v. Selander (1947) 81 Cal. App. 2d 286, 183 P.2d 935*].

- Trustee and beneficiary [*Purdy v. Johnson (1917) 174 Cal. 521, 163 P. 893* ; *Title Insurance & Trust Co. v. Ingersoll (1910) 158 Cal. 474, 111 P. 360* ; *Esslinger v. Cummins (2006) 144 Cal. App. 4th 517, 523-528, 50 Cal. Rptr. 3d 538* ; *Miller v. Miller (1963) 217 Cal. App. 2d 538, 31 Cal. Rptr. 618* ; *Estate of McCabe (1950) 98 Cal. App. 2d 503, 220 P.2d 614* ; *Estate of McCabe (1948) 87 Cal. App. 2d 430, 197 P.2d 35*].

- Trustee and trust settlor, if trust instrument reserves to settlor power to petition court for supervised accounting [*Patton v. Sherwood (2007) 152 Cal. App. 4th 339, 343-344, 61 Cal. Rptr. 3d 289]* .

Legal Topics:

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

Civil ProcedureRemediesEquitable AccountingsElementsCivil ProcedureRemediesEquitable AccountingsPartnershipsCivil ProcedureRemediesEquitable AccountingsTrustsEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAccountingEstate, Gift & Trust LawTrustsTrusteesDuties & PowersAccounting

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1-12 California Points & Authorities § 12.05

§ 12.05 Jurisdiction

As shown by the authorities cited in *§ 12.20*, an action for an accounting is equitable in nature. The superior court generally has jurisdiction of these actions [*see Cal. Const., Art. VI, § 10*]. In a limited civil case, the superior court has jurisdiction to take accounts when necessary to preserve the property or rights of any party to the action [*see Code Civ. Proc. §§ 85, 86(a)(1), (8)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureRemediesEquitable AccountingsElementsCivil ProcedureRemediesEquitable AccountingsPartnershipsCivil ProcedureRemediesEquitable AccountingsTrusts

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1-12 California Points & Authorities § 12.06

§ 12.06 Venue

An action for an accounting is transitory and, under *Code Civ. Proc. § 395(a)*, the defendant is normally entitled to have the action tried in the county of his or her residence [*Smith v. Smith (1891) 88 Cal. 572, 577, 26 P. 356* ; *see § 12.21*]. However, if the right to an accounting is based on contract, then under *Code Civ. Proc. § 395(a)* and subject to the provisions of *Code Civ. Proc. § 395(b)* (discussed *below*), the action may be tried in the county in which the contract was to be performed when the defendant has contracted to perform the contract in a particular county, in the county in which the contract was entered into, or in the county of the defendant's residence [*Gilman v. Nordin (1952) 112 Cal. App. 2d 788, 790, 247 P.2d 394* ; *see § 12.23*]. The county in which the obligation is incurred is deemed to be the county in which it is to be performed, unless there is a special contract in writing to the contrary [*Code Civ. Proc. § 395(a)*]. *Code Civ. Proc. § 395(b)*, referred to above, contains special venue provisions for actions founded on a defendant's obligation for goods, services, loans or extensions of credit intended primarily for personal, family, or household use, other than an obligation described in *Civ. Code § 1812.10* (Unruh Retail Installment Sales Act) or *2984.4* (Rees-Levering Motor Vehicle Sales and Finance Act).

If plaintiff seeks other relief in addition to an accounting, it is the main relief sought that determines the character of the action for venue purposes [*Neet v. Holmes (1942) 19 Cal. 2d 605, 611-612, 122 P.2d 557* ; *see § 12.22*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureRemediesEquitable AccountingsElementsCivil ProcedureRemediesEquitable AccountingsPartnershipsCivil ProcedureRemediesEquitable AccountingsTrusts

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1-12 California Points & Authorities § 12.07

§ 12.07 Stating Action for Accounting

As noted in et seq, an action for an accounting lies whenever a fiduciary relation exists between the parties and a duty rests on the defendant to render an account [*see, e.g., San Pedro Lumber Co. v. Reynolds (1896) 111 Cal. 588, 596-597, 44 P. 309* ; *see also § 12.46*]. The action also lies in cases in which the accounts involved are so complicated that an ordinary action at law demanding a fixed sum would not be practicable [*see, e.g., Brea v. McGlashan (1934) 3 Cal. App. 2d 454, 460, 39 P.2d 877* ; *see also § 12.47*].

A cause of action for an accounting is stated if the facts showing the existence of the relationship that requires an accounting are alleged with the statement that some balance, which cannot be ascertained without an accounting, is due plaintiff [*Whann v. Doell (1923) 192 Cal. 680, 684, 221 P. 899* ; *see § 12.45*].

Legal Topics:

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

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1-12 California Points & Authorities § 12.08

§ 12.08 Procedure

Except as otherwise provided by law, the court in its discretion regulates the order of proof [*Evid. Code § 320*]. However, in the case of an action involving an accounting, the right to an accounting must be established before an accounting is in order [*Baxter v. Krieger (1958) 157 Cal. App. 2d 730, 732, 321 P.2d 879* ; *see § 12.40*]. That is, the right to an accounting is a preliminary fact that must normally be established before evidence of the accounting is admissible [*see Evid. Code §§ 400, 403*]. Once the right to an accounting is shown, the court either proceeds to take the account itself or orders a reference for that purpose [*Stoll v. Selander (1947) 81 Cal. App. 2d 286, 294, 183 P.2d 935*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureRemediesEquitable AccountingsElementsCivil ProcedureRemediesEquitable AccountingsPartnershipsCivil ProcedureRemediesEquitable AccountingsTrustsEvidenceProcedural ConsiderationsPreliminary QuestionsGeneral Overview

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1-12 California Points & Authorities § 12.09

§ 12.09 When Issue Regarding Right to Accounting Arises

As indicated by the above discussion, the issue regarding a right to an accounting arises first with respect to the pleading seeking an accounting (either a complaint or cross complaint). If the pleading fails to state a cause of action, it is subject to a demurrer, a nonstatutory motion for judgment on the pleadings, or an objection to the introduction of evidence at trial. A memorandum must be filed in support of a demurrer or noticed motion [*Cal. Rules of Ct., Rule 3.1113(a)*]. They may also be required by the court in support of an objection to the introduction of evidence at trial and may, even if not requested by the court, be cited in support of the objection.

The second point at which the issue arises is after the party seeking the accounting has produced his or her evidence at trial. If that evidence is insufficient to establish the party's right to an accounting, the accounting is normally denied. If the court proceeds with an accounting even though the right to it has not been established, counsel may wish to cite points and authorities in support of his or her objection to the accounting or secure permission to file a trial brief on the issue before the accounting is had.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPretrial JudgmentsJudgment on the PleadingsCivil ProceduresRemediesEquitable AccountingsElementsCivil ProceduresRemediesEquitable AccountingsPartnershipsCivil ProceduresRemediesEquitable AccountingsTrusts

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1-12 California Points & Authorities § 12.10

§ 12.10 Related Pleadings and Practice Chapters

For a discussion of jurisdiction in the California judicial system and forms for use in proceedings challenging jurisdiction, see California Forms of Pleading and Practice, Ch. 324, *Jurisdiction: Subject Matter Jurisdiction* (Matthew Bender). For a discussion of venue and forms for use in moving to change venue, see California Forms of Pleading and Practice, Ch. 571, *Venue* (Matthew Bender). For a discussion, procedural guide, and forms of general notices of motion and related papers, see California Forms of Pleading and Practice, Ch. 372, *Motions and Orders* (Matthew Bender).

For a discussion, procedural guide, and forms of complaints for use in accounting actions, see California Forms of Pleading and Practice, Ch. 7, *Accounting, Action For* (Matthew Bender). For a discussion, procedural guide, and forms for use in demurring to a complaint or moving for judgment on the pleadings, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For a discussion of motions for nonsuit and judgment, see California Forms of Pleading and Practice, Ch. 389, *Nonsuit and Motions for Judgment* (Matthew Bender).

For a discussion of the statutes of limitations and forms relating to the manner of pleading them, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* (Matthew Bender).

For a discussion, procedural guide, and forms of demurrers and motions for judgment on the pleadings, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For a discussion, procedural guide, and forms of nonsuit and motions for judgment, see California Forms of Pleading and Practice, Ch. 389, *Nonsuit and Motions for Judgment* (Matthew Bender). For a discussion, procedural guide, and forms for use on motions for summary judgment or for separate trial of the defense that the action is barred by the statute of limitations, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* and California Forms of Pleading and Practice, Ch. 3, *Abatement of Actions*, § 3.110 et seq. (Matthew Bender), respectively.

For a discussion, procedural guide, and forms for use on motions for a new trial or to set aside and vacate the judgment, see *California Forms of Pleading and Practice, Ch. 371, Motions After Trial, § 371.60 et seq.* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-12 California Points & Authorities § 12.11

§ 12.11 Related Points and Authorities Chapters

For memoranda supporting and opposing motions to change the place of trial from a court lacking to a court having subject matter jurisdiction, or to change venue, see Ch. 133, *Jurisdiction: Subject Matter Jurisdiction* , and *Ch. 238, Venue, § 238.30* et seq.

For memoranda supporting and opposing a general demurrer to a complaint or a motion for judgment on the pleadings, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For memoranda for use in proceedings relating generally to the bar of the statute of limitations, see Ch. 143, *Limitation of Actions* . For forms of memoranda supporting and opposing motions for summary judgment and motions for separate trial of an affirmative defense, see Ch. 221, *Summary Judgments* , and et seq., respectively.

For memoranda supporting and opposing a motion for new trial or a motion to set aside and vacate the judgment, see Ch. 155, *Motions After Trial* , in this set.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedureRemediesEquitable AccountingsElementsCivil ProcedureRemediesEquitable AccountingsPartnershipsCivil ProcedureRemediesEquitable AccountingsTrusts

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1-12 California Points & Authorities §§ 12.12-12.19

[Reserved]

§§ 12.12[Reserved]

California Points & Authorities

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Volume 1 Chapters 1-19 WRITING LEGAL MEMORANDA AND BRIEFS; ABATEMENT AND SURVIVAL OF ACTIONS---to---AMENDED AND SUPPLEMENTAL PLEADINGS
CHAPTER 12 ACCOUNTING
PART II. FORMS
A. Nature, Jurisdiction, And Venue Of Accounting Actions

1-12 California Points & Authorities § 12.20

§ 12.20 Supporting Contention That Action for Accounting Is Equitable or Transitory or Both

[1] FORM Supporting Contention That Action for Accounting Is Equitable or Transitory or Both

[*The following may be included in a memorandum supporting or opposing a motion, or in a trial or appellate brief.*]

AN ACTION FOR AN ACCOUNTING IS _____ [AN ACTION IN EQUITY *or* A TRANSITORY ACTION *or* AN ACTION IN EQUITY AND TRANSITORY].

Action for Accounting as Equitable or Transitory or Both. An action for an accounting is a proceeding in equity and essentially a personal (transitory) action (*Neet v. Holmes (1942) 19 Cal. 2d 605, 611, 122 P.2d 557* ; *Smith v. Smith (1891) 88 Cal. 572, 577, 26 P. 356*).

[2] Comments

[a] Use of Form

This form may be used in support of a defendant's contention that the action for accounting is equitable or transitory or both.

This form may be combined with a form of memorandum relating to the specific procedural context in which counsel wishes to raise the issue regarding the nature of an action for accounting. For example, the point and authorities set out in this form may be combined with points and authorities establishing that an action for an accounting is governed by the venue provisions of *Code Civ. Proc. § 395(a)* [*see § 12.21*], or supporting a motion to change venue when the action has been filed in a court in a county other than that in which defendant resides, that is, in an improper court for trial [*see Code Civ. Proc. § 397(a)*]. This form might also be combined with points and authorities opposing a jury trial or supporting a motion for trial by an advisory jury [*see* discussion in California Forms of Pleading and Practice, Ch. 326A, *Jury Verdicts* (Matthew Bender)].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, if it is not entirely clear from the complaint that the action is one for an accounting, counsel should include a discussion of the allegations showing that the action is in fact one for an accounting [*see § 12.40* et seq.].

[b] Related Pleading and Practice Chapters

For forms of notices of motion to change venue or to transfer a case from a court lacking to a court having subject matter jurisdiction, see California Forms of Pleading and Practice, Ch. 571, *Venue* , Ch. 323, *Jurisdiction: Subject Matter Jurisdiction* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities supporting and opposing a motion to change venue or to transfer a case from a court lacking to a court having subject matter jurisdiction, see *Ch. 238, Venue § 238.30* et seq., and Ch. 133, *Jurisdiction: Subject Matter Jurisdiction* .

[3] Discussion of Authorities

[a] Action for Accounting as Equitable or Transitory or Both

In ***Neet v. Holmes*** *(1942) 19 Cal. 2d 605, 122 P.2d 557* , plaintiffs sued the defendants in Los Angeles County, the county of defendants' residence, for an accounting, a declaration of trust of certain mining property situated in Imperial County, and other relief. Some of the defendants, contending that the causes of action alleged were local in nature and triable in the county in which the mining properties were situated [*see Code Civ. Proc. § 392*], moved for a change of venue to Imperial County. The motion was denied, and defendants appealed. The Supreme Court affirmed. The Court concluded that the principal relief sought by the complaint was an accounting and held that such an action is a proceeding in equity and is essentially a personal action (*Neet v. Holmes (1942) 19 Cal. 2d 605, 611, 122 P.2d 557*).

Smith v. Smith *(1891) 88 Cal. 572, 26 P. 356* , was an action brought in Tuolumne County against a resident of Merced County to have certain absolute conveyances of real property in Tuolumne County and of real property in Merced County as well as of certain personal property (livestock and equipment), all allegedly given to secure repayment of a debt, declared to be mortgages. Plaintiff also sought a judgment requiring defendant to account for the real property and its rents, issues, and profits, and for the personal property and its proceeds and increase. Defendant's motion for change of venue to the county of his residence was denied, and defendant appealed. The Supreme Court reversed. The Court pointed out that the primary object of the action was for an accounting and held that an action for an accounting is a proceeding in equity and is essentially a personal (i.e., transitory) action (*Smith v. Smith (1891) 88 Cal. 572, 577, 26 P. 356*).

Note that superior court orders granting or denying a motion to change the place of trial are reviewable by mandate [*Code Civ. Proc. § 400*]. Thus, the orders involved in the above cases are no longer appealable and would instead be reviewed by mandate. An order in a limited civil case granting or denying a motion to change the place of trial is, however, appealable to the appellate division of the superior court [*Code Civ. Proc. § 904.2(c)*].

[4] Additional Authorities

[a] Action for Accounting as Equitable or Transitory or Both

Bardwell v. Turner (1933) 219 Cal. 228, 25 P.2d 978 , was a proceeding by defendants for a writ of supersedeas to stay proceedings in the trial court pending appeal from an order denying their motion for change of venue to the county of their residence in an action for an accounting and to establish the rights of the parties with respect to their interests in

and profits from certain oil wells and oil leases. Concluding that the appeal presented a substantial question regarding the nature of the action and ordering the writ issued, the Supreme Court pointed out that an action for an accounting is a proceeding in equity and is essentially a personal action (*219 Cal. 228, 230*).

In *Hays v. Cowles (1943) 60 Cal. App. 2d 514, 141 P.2d 26* , an action for dissolution of a hotel partnership in which plaintiff sought an accounting, the appointment of a receiver, the sale of the partnership property, the liquidation of the partnership affairs, and, after payment of the debts, a division of the proceeds between plaintiff and defendant as their interests might appear, the court of appeal, in reversing an order denying defendant's motion for a change of venue to the county of his residence, stated that it is well settled that an action for an accounting is a proceeding in equity and is essentially a personal action (*60 Cal. App. 2d 514, 518*).

Note that superior court orders granting or denying a motion to change the place of trial are reviewable by mandate [*Code Civ. Proc. § 400*]. Thus, the orders involved in the above cases are no longer appealable and would instead be reviewed by mandate. An order in a limited civil case granting or denying a motion to change the place of trial is, however, appealable to the appellate division of the superior court [*Code Civ. Proc. § 904.2(c)*].

Additional cases stating that an action for an accounting is an action in equity include: *San Pedro Lumber Co. v. Reynolds (1896) 111 Cal. 588, 596, 44 P. 309* ; *Civic Western Corp. v. Zila Industries, Inc. (1977) 66 Cal. App. 3d 1, 14, 135 Cal. Rptr. 915* ; *Estate of Peebles (1972) 27 Cal. App. 3d 163, 166, 103 Cal. Rptr. 560* ; *St. James Church v. Superior Court (1955) 135 Cal. App. 2d 352, 359, 287 P.2d 387* ; and *Kritzer v. Lancaster (1950) 96 Cal. App. 2d 1, 6, 214 P.2d 407* .

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1-12 California Points & Authorities § 12.21

§ 12.21 Supporting Contention That Proper County for Trial of Accounting Action Is County of Defendant's Residence [Code Civ. Proc. § 395(a)]

[1] FORM Supporting Contention That Proper County for Trial of Accounting Action Is County of Defendant's Residence [Code Civ. Proc. § 395(a)]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

AN ACTION FOR AN ACCOUNTING IS SUBJECT TO THE VENUE PROVISIONS OF SECTION 395(a) OF THE CODE OF CIVIL PROCEDURE AND, UNDER THAT SECTION, DEFENDANT IS ENTITLED TO HAVE THE ACTION TRIED IN THE COUNTY OF HIS/HER RESIDENCE.

A. Defendant as Entitled to Trial of Accounting Action in County of His or Her Residence. Since an action for an accounting is a proceeding in equity and is essentially a personal action, *Section 395(a) of the Code of Civil Procedure* applies and defendant has the right, under this section, to have the action tried in the county of his or her residence (*Smith v. Smith (1891) 88 Cal. 572, 577, 26 P. 356*).

[*Optional*] **B. Joinder of Local Action With Accounting Action as Not Depriving Defendant of Right to Trial in County of His or Her Residence.** A plaintiff cannot deprive a defendant of his or her right to have an action for an accounting tried in the county of his or her residence by uniting in the complaint a local action requiring trial in a different county (*Smith v. Smith (1891) 88 Cal. 572, 576-577, 26 P. 356*).

[*Optional*] **C. Request for Incidental Local Relief as Not Changing Nature of Action for Equitable Relief From Transitory to Local.** When a determination of an estate or interest in land is merely incidental to the determination of a cause for equitable relief, the action is transitory rather than local (*Neet v. Holmes (1942) 19 Cal. 2d 605, 611, 122 P.2d 557*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a defendant's contention that the action is for an accounting and that the defendant is entitled to have it tried in the county of his or her residence. Note, however, that if the action is based on contract, then under *Code Civ. Proc. § 395(a)* an alternative venue applies [*see § 12.23*].

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue regarding the proper county for trial. For example, they may be combined with points and authorities establishing the nature of an action for accounting [*see § 12.20*] or supporting a motion to change venue when the action has been filed in a court in a county other than that in which defendant resides, that is, in an improper court for trial [*see Code Civ. Proc. § 397(a)*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, if it is not entirely clear from the complaint that the action is one for an accounting, counsel should include a discussion of the allegations showing that the action is in fact one for an accounting [*see § 12.40* et seq.].

[b] Related Pleading and Practice Chapters

For forms of notices of motion to change venue, see California Forms of Pleading and Practice, Ch. 571, *Venue* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities generally supporting and opposing a motion to change venue, see *Ch. 238, Venue § 238.30* et seq.

[d] Opposing Points and Authorities

In an appropriate case, the points and authorities in *§§ 12.22* and *12.23* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Defendant as Entitled to Trial of Accounting Action in County of His or Her Residence

The factual background of ***Smith v. Smith*** *(1891) 88 Cal. 572, 26 P. 356* , is discussed in *§ 12.20[3][A]*. In reversing the order denying defendant's motion for change of venue to the county of his residence, the Supreme Court concluded that the primary object of the action was for an accounting, with a personal judgment against defendant for any excess found on the accounting to have been received by him over (1) his expenses in operating the conveyed property and livestock business and (2) the amount of the indebtedness, in addition to a reconveyance of the property (*88 Cal. 572, 577*). The Court said that the defendant in an action for an accounting, which is a proceeding in equity and is essentially a personal action, has the right, under former Code Civ. Proc. § 395 [*now see Code Civ. Proc. § 395(a)*], to have the action tried in the county of his or her residence (*88 Cal. 572, 577*).

[b] Joinder of Local Action With Accounting Action as Not Depriving Defendant of Right to Trial in County of His or Her Residence

The factual background of ***Smith v. Smith*** *(1891) 88 Cal. 572, 26 P. 356* , is discussed in *§ 12.20[3][A]*. In reversing the order denying defendant's motion for change of venue to the county of his residence, the Supreme Court said that the plaintiff cannot, by uniting in his complaint matters that formed the subject of a personal action with matters that

formed the subject of a local action, compel the defendant to have both those matters tried in a county other than that in which he resides. The Court said that it is only when real estate alone is the subject matter of the action that the provisions of *Code Civ. Proc. § 392* (venue of actions relating to real property) can be invoked against a defendant who resides in a county different from that in which the land is situated (*88 Cal. 572, 576*). The Court pointed out that the "proceeds and increase" of the personal property were treated in the complaint as distinct from the "rents, issues, and profits" of the real estate and that it was under the allegation regarding the proceeds and increase of the personal property that plaintiffs demanded an accounting and asked that they have judgment against defendant for such sum as shall be found to be due on the accounting (*88 Cal. 572, 577*). The Court held that plaintiff could not deprive defendant of his right under *Code Civ. Proc. § 395* [*now Code Civ. Proc. § 395(a)*] to have the action tried in the county of his residence by uniting in the complaint a demand for an accounting of certain rents, issues, and profits alleged to have been received by the defendant from real estate situated in another county and for a judgment requiring defendant to reconvey the real estate, and that unless the cause of action set forth in the complaint falls wholly within te provisions of *Code Civ. Proc. § 392,* or one of the two next succeeding sections, the provisions of *Code Civ. Proc. § 395* prevail (*88 Cal. 572, 577-578*).

[c] Request for Incidental Local Relief as Not Changing Nature of Action for Equitable Relief From Transitory to Local

The factual background of ***Neet v. Holmes*** *(1942) 19 Cal. 2d 605, 122 P.2d 557* , is discussed in *§ 12.20[3][a]*. In affirming the order denying the motion for change of venue from the county of defendants' residence to the county in which the real property was situated, the Supreme Court concluded that the principal relief sought by the plaintiffs was (1) an accounting of operations in the leased mining property and in the additional mines located by the defendants, and (2) a judgment, based on the fruits thereof, including title to the additional mines of which the plaintiffs had been deprived by the alleged fraud of the defendants (*19 Cal. 2d 605, 611*). The Court said that the defendants would be entitled to have the case tried in the county of their residence if the determination of an estate or interest in land was merely incidental to the determination of a cause for equitable relief (*19 Cal. 2d 605, 611*) and concluded that it was obvious that the action turned principally on the personal obligation, as distinct from the title, and that judgment for any mining properties then not owned by the plaintiffs would follow, if at all, merely as an incident of the judgment establishing the personal obligation (*19 Cal. 2d 605, 612*).

[4] Additional Authorities

[a] Defendant as Entitled to Trial of Accounting Action in County of His or Her Residence

The factual background of *Neet v. Holmes (1942) 19 Cal. 2d 605, 122 P.2d 557* , is discussed in *§ 12.20[3][a]*. In affirming the order denying defendants' motion for a change of venue to the county in which the real property was situated, the Supreme Court, citing *Code Civ. Proc. § 395,* said that had the action been brought in Imperial County (the county in which part of the real property was situated), defendants would have been entitled to have it removed to Los Angeles County, the county of their residence (*19 Cal. 2d 605, 611*).

The factual background of *Hays v. Cowles (1943) 60 Cal. App. 2d 514, 141 P.2d 26* , is discussed in *§ 12.20[4][a]*. The court of appeal, in reversing the order denying defendant's motion for a change of venue to the county of his residence, stated that the defendant in an action for an accounting, which is a proceeding in equity and essentially a personal action, has the right under *Code Civ. Proc. § 395* [*see now Code Civ. Proc. § 395(a)*] to have the action tried in the county of his or her residence (*60 Cal. App. 2d 514, 518*).

[b] Joinder of Local Action With Accounting Action as Not Depriving Defendant of Right to Trial in County of His or Her Residence

The factual background of *Bardwell v. Turner (1933) 219 Cal. 228, 25 P.2d 978* , is discussed in *§ 12.20[4][a]*. In ordering issuance of a writ of supersedeas, the Supreme Court, after pointing out that an action for an accounting is

essentially a personal action, said that if in one complaint allegations and a prayer for relief in causes of action both transitory and local have been united, the defendants are entitled to have the cause tried in the county of their residence (*219 Cal. 228, 230*).

The factual background of *Hays v. Cowles (1943) 60 Cal. App. 2d 514, 141 P.2d 26* , is discussed in *§ 12.20[4][a]*. The court of appeal, in reversing the order denying defendant's motion for a change of venue to the county of his residence, stated that by an unbroken chain of decisions beginning with *Smith v. Smith (1891) 88 Cal. 572, 26 P. 356* , it had been definitely established that *Code Civ. Proc. § 392* (venue of actions relating to real property) was effective only when real property or the title to real property was the exclusive subject matter of the action, and that when a cause of action for relief in personam was also joined, the defendant was entitled to have the cause transferred to the county of his or her residence (*60 Cal. App. 2d 514, 516*). The court added that a plaintiff cannot deprive a defendant of his or her right to have the action tried in the county of his or her residence by uniting in the complaint a demand that as a sequence of the litigation the defendant be required also to convey certain real property situated in a county other than the county of defendant's residence (*60 Cal. App. 2d 514, 518*).

See also *All-Cool Alum. etc. Co. v. Superior Court (1964) 224 Cal. App. 2d 660, 36 Cal. Rptr. 769* , a proceeding in mandate arising out of a trial court action in which a local action and a transitory action had been united. The corporate defendant in the action sought writ of mandate compelling the trial court to set aside its order changing venue from the county of the corporation's principal place of business to the county in which the real property was situated. The order was made on the motion of the individual defendants in the case. The court of appeal said that when a local action and a transitory action are combined as separate causes of action in a single complaint, the case must remain in the county of a defendant's residence on the insistence of that defendant, and that the principal place of business of a corporation is its residence for the purpose of determining venue (*224 Cal. App. 2d 660, 666*). The court quoted the language from *Smith v. Smith (1891) 88 Cal. 572, 577, 26 P. 356* , discussed in *§ 12.21[3][b]*, and restated the settled general rule that an action must be wholly local in its nature to require it to be brought under former Cal. Const., Art. VI, § 5(repealed in 1966), and *Code Civ. Proc. § 392* in the county in which the property that is the subject matter of the action is situated (*224 Cal. App. 2d 660, 667, 668*).

[c] Request for Incidental Local Relief as Not Changing Nature of Action for Equitable Relief From Transitory to Local

Hammon v. American etc. Mining Co. (1962) 203 Cal. App. 2d 306, 21 Cal. Rptr. 409 , was an action in which plaintiff sought a decree establishing the rights and duties of the parties under a mineral lease; an injunction restraining defendant from conveying, leasing, or encumbering any mineral claims covered by the agreement; an accounting; and judgment for the amount found on trial to be due plaintiff. The action was filed in the county of the principal place of business of defendant, whose motion to have the action transferred to the county in which the realty was situated on the ground the action was local was granted. Plaintiff appealed. The court of appeal reversed. It held that the action was but a single action for the redress of one wrong, that the cause of action rested on breach of contract, that the main relief sought was personal (a money judgment for unpaid royalties), and that the action was transitory and had been filed in the proper county (*203 Cal. App. 2d 306, 306-310*). The court explained that when the sole or main relief sought consists of a money judgment, and other relief as an incident to that end, the action must be classified as transitory for venue purposes and that even if an action involves realty, it constitutes for venue purposes a transitory action if the main relief sought is a money judgment (*203 Cal. App. 2d 306, 309*). The court concluded that plaintiff's action for a determination of his rights under the lease and for unpaid royalties due pursuant to it could not be construed to seek relief that was mainly local in nature and that any determination of title to realty could only be incident to recovery under the contract (*203 Cal. App. 2d 306, 313*).

Note that superior court orders granting or denying a motion to change the place of trial are reviewable by mandate [*Code Civ. Proc. § 400*]. Thus, the orders involved in the above cases are no longer appealable and would instead be reviewed by mandate. An order in a limited civil case granting or denying a motion to change the place of trial is,

however, appealable to the appellate division of the superior court [*Code Civ. Proc. § 904.2(c)*].

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1-12 California Points & Authorities § 12.22

§ 12.22 Opposing Contention That Proper County for Trial of Action Is County of Defendant's Residence [Code Civ. Proc. § 395(a)]--Incidental Accounting Does Not Affect Venue of Local Action

[1] FORM Opposing Contention That Proper County for Trial of Action Is County of Defendant's Residence [Code Civ. Proc. § 395(a)]--Incidental Accounting Does Not Affect Venue of Local Action

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE PROPER VENUE OF THIS ACTION, WHICH IS PRIMARILY LOCAL IN CHARACTER, IS NOT AFFECTED BY THE FACT THAT AN ACCOUNTING MAY BE NECESSARY, AS AN INCIDENT TO THIS ACTION, TO ALLOW PLAINTIFF TO OBTAIN THE FULL RELIEF THAT HE/SHE SEEKS.

Incidental Accounting as Not Changing Nature or Venue of Local Action. When the main relief sought by an action is local in character, neither the character nor venue of the action is changed by the fact that an incidental accounting may be required to provide the plaintiff with complete relief (*see Grocers' etc. Union v. Kern etc. Co. (1907) 150 Cal. 466, 471-473, 89 P. 120* ; *Dial v. Homestead Land etc., Co. (1919) 39 Cal. App. 479, 481, 179 P. 444*).

[2] Comments

[a] Use of Form

These point and authorities may be submitted in opposition to a party's contention that an action involving an accounting may be tried only in the county of defendant's residence when the main relief sought in the action is local in nature and the accounting is merely incidental to it.

These point and authorities may be used alone or combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue regarding the proper county for trial. For example, they may be used alone to oppose a motion for change of venue of an action brought in the proper

county for trial under *Code Civ. Proc. § 392* or in combination with other points and authorities to support a motion for change of venue to the county in which all or a part of the real property involved is situated [*see Code Civ. Proc. § 397(a)*].

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities set out in *§ 12.21*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Chapters

For forms of notices of motion to change venue, see California Forms of Pleading and Practice, Ch. 571, *Venue* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities generally supporting and opposing a motion to change venue, see *Ch. 238, Venue § 238.30* et seq.

[3] Discussion of Authorities

[a] Incidental Accounting as Not Changing Nature or Venue of Local Action

Grocers' etc. Union v. Kern etc. Co. *(1907) 150 Cal. 466, 89 P. 120* , was an appeal from an order denying defendant's motion for change of venue from the City and County of San Francisco to Kern County. Defendant contended that the action was for specific performance of a contract to convey lands in Kern County; that under former Cal. Const., Art. VI, § 5(repealed in 1966), requiring certain actions relating to real property to be commenced in the county in which the real property or some part of it was situated, the superior court of San Francisco had no jurisdiction; that the action should have been commenced in Kern County; and that the action fell within the letter of *Code Civ. Proc. § 392(a)(1)*, relating to venue of actions involving the title or interests in real property. Defendant further argued that former Cal. Const., Art. XII, § 16(repealed in 1972; now see *Code Civ. Proc. § 395.5*), relating to venue of actions against corporations, was unconstitutional as a denial of equal protection under *U.S. Const., Amend. XIV*, if construed to deprive defendant of its right to have the action tried in Kern County, a right accorded to natural persons. Plaintiff contended that the action was brought under *Code Civ. Proc. § 395* [*now Code Civ. Proc. § 395(a)*], that it was of the class in which real and personal actions are joined in the same complaint, and that under the authority of *Smith v. Smith (1891) 88 Cal. 572, 26 P. 356* , discussed in *§ 12.21[3][a]* and *[b]*, San Francisco was the proper place of trial because it was the principal place of business of the corporate defendant and its residence within the purview of *Code Civ. Proc. § 395*.

In order to determine the true character of the action, the Supreme Court analyzed the allegations of the complaint and concluded that, stripped to its essentials, the action was simply (1) for specific performance of a contract for the sale of land under an allegation that the purchase price had been paid and (2) for an incidental accounting of monies advanced by defendant to plaintiff, and of monies received by defendant from the sale of crops from the land and portions of the land itself, all of which merely went to the issue regarding whether or not the purchase price had been paid (*Grocers' etc. Union v. Kern etc. Co. (1907) 150 Cal. 466, 468-472, 89 P. 120*). The Court explained that in any action for specific performance when the matter in dispute is the payment or nonpayment of the purchase price, an accounting may be necessary and, if necessary, will be ordered, such being clearly within the power of a court exercising equitable and legal functions. The Court concluded, however, that such an accounting in no way changes the cause of action (*Grocers' etc. Union v. Kern etc. Co. (1907) 150 Cal. 466, 472, 89 P. 120*). The Court said that, although the proceeding might necessitate an accounting, the relief sought was the conveyance of the land and that, if it should be determined

that a payment in excess of the consideration had actually been made, the personal judgment for plaintiff that would follow would be but incidental to the real cause of action and relief sought (*Grocers' etc. Union v. Kern etc. Co. (1907) 150 Cal. 466, 472-473, 89 P. 120*). Having determined that the character of the action was local, the Supreme Court concluded that it was an action for the determination of a right or interest in real property and that under *Code Civ. Proc. § 392(1)* (*now see Code Civ. Proc. § 392(a)*), had to be tried in the county in which the land was situated (*Grocers' etc. Union v. Kern etc. Co. (1907) 150 Cal. 466, 473-474, 89 P. 120*). The Court held that the defendant was therefore entitled under *Code Civ. Proc. § 392(1)* (*now see Code Civ. Proc. § 392(a)*) to have the place of trial changed to Kern County and reversed the order denying a change of venue (*Grocers' etc. Union v. Kern etc. Co. (1907) 150 Cal. 466, 476, 89 P. 120*).

Dial v. Homestead Land, etc., Co. *(1919) 39 Cal. App. 479, 179 P. 444* , was an action brought in the City and County of San Francisco by a stockholder to compel a reconveyance to defendant corporation of certain real property, alleged to have been transferred by the corporation to defendant bank by fraud. Defendants' motion for change of venue to Lassen County, the county in which the real property was situated, was granted, and plaintiff appealed. In affirming the order, the court of appeal held that the action was in the nature of an action involving real property, which, under *Code Civ. Proc. § 392*, has to be tried in the county in which the real estate is situated. The court also held that the nature of the action was not changed by the fact that an accounting was prayed for, since the accounting was one to which plaintiff or the corporation could be entitled only on a determination that the corporation was the owner of, and was to be reinvested with the title to, the real estate, and it was therefore a mere incident to the main relief sought (*Dial v. Homestead Land, etc., Co. (1919) 39 Cal. App. 479, 480-481, 179 P. 444*).

Note that superior court orders granting or denying a motion to change the place of trial are reviewable by mandate [*Code Civ. Proc. § 400*]. Thus, the orders involved in the above cases are no longer appealable and would instead be reviewed by mandate. An order in a limited civil case granting or denying a motion to change the place of trial is, however, appealable to the appellate division of the superior court [*Code Civ. Proc. § 904.2(c)*].

[4] Additional Authorities

[a] Incidental Accounting as Not Changing Nature or Venue of Local Action

State v. Royal Consolidated Min. Co. (1921) 187 Cal. 343, 202 P. 133 , was an action brought in Sacramento County by the State Controller, acting under former Pol. Code § 3773, to secure possession of mining properties situated in Calaveras County and of the rents, issues, and profits derived from them by virtue of a tax deed issued to the state in 1905 by the tax collector of Calaveras County. Judgment was for defendant, and plaintiff appealed. The Supreme Court reversed because of numerous errors by the trial court. The Court had been in doubt as to whether or not the action had been brought in the proper county and had called for argument on the issue. The Court, after consideration of the arguments, held that former Pol. Code § 3773, insofar as it authorized the state to bring an action in the Superior Court of Sacramento County for the possession of real property located in other counties, violated former Cal. Const., Art. VI, § 5 (repealed in 1966), which required certain actions relating to real property to be commenced in the county in which the real property or some part of it was situated, and was consequently unconstitutional. In answering the state's contention that the action was transitory because an accounting was sought, the Court said that on this point it was sufficient to say that the action insofar as it related to rents, issues, and profits was essentially one to quiet title within the meaning of the constitution because the right thereto depended on the issue of title and an adjudication of the right to rents was necessarily determinative of the right to the land itself (*187 Cal. 343, 350*). The Court added that an action for rents and profits of land in which the right to the title is involved is not a transitory action (*187 Cal. 343, 351*).

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1-12 California Points & Authorities § 12.23

§ 12.23 Opposing Contention That Proper County for Trial of Action Is County of Defendant's Residence [Code Civ. Proc. § 395(a)]--Action Is Founded on Contract

[1] FORM Opposing Contention That Proper County for Trial of Action Is County of Defendant's Residence [Code Civ. Proc. § 395(a)]--Action Is Founded on Contract

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THIS ACTION FOR AN ACCOUNTING IS FOUNDED ON A CONTRACT AND THEREFORE NEED NOT BE TRIED IN THE COUNTY IN WHICH DEFENDANT RESIDES, BUT MAY ALSO BE TRIED IN THE COUNTY _____ [IN WHICH THE CONTRACT WAS TO BE PERFORMED, IF DEFENDANT CONTRACTED TO PERFORM IT IN A PARTICULAR COUNTY, *and/or* IN WHICH THE CONTRACT WAS ENTERED INTO].

A. Venue of Action Founded on Contract. Subject to the provisions of *Section 395(b) of the Code of Civil Procedure*, relating to actions founded on an obligation of the defendant for goods, services, loans or extensions of credit intended primarily for personal, family, or household use, other than an obligation described in Section 1812.10 (Unruh Retail Installment Sales Act) or 2984.4 (Rees-Levering Motor Vehicle Sales and Finance Act) of the Civil Code, when a defendant has contracted to perform an obligation in a particular county, either the county where the obligation is to be performed or in which the contract in fact was entered into or the county in which the defendant or any such defendant resides at the commencement of the action is a proper county for the trial of an action founded on the obligation, and the county in which the obligation is incurred is deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary (*Code Civ. Proc. § 395(a)*).

B. Contract Provisions of *Code Civ. Proc. § 395(a)* as Applicable to Actions Involving Accounting Founded on Contract. An action for an accounting founded on a contract is governed by the contract provisions of *Section 395(a) of the Code of Civil Procedure* (*Gilman v. Nordin (1952) 112 Cal. App. 2d 788, 790, 247 P.2d 394*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that an action for accounting may be tried only in the county of defendant's residence when the following facts exist: (1) the action is founded on a contract; (2) the action was not brought in the county of defendant's residence; and (3) the action was brought either in the county where the contract was entered into or, if the defendant contracted to perform the obligation in a county other than where he or she resides or the contract was entered into, where the contract was to be performed.

These points and authorities may be used alone or combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue regarding the proper county for trial. For example, they may be used alone to oppose a motion for change of venue to the county of defendant's residence or in combination with other points and authorities supporting or opposing the contention that the action was tried in an improper court.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities set out in *§ 12.21*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Chapters

For forms of notices of motion to change venue, see California Forms of Pleading and Practice, Ch. 571, *Venue* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities generally supporting and opposing a motion to change venue, see *Ch. 238, Venue, § 238.30* et seq.

[3] Discussion of Authorities

[a] Contract Provisions of Code Civ. Proc. § 395(a) as Applicable to Actions Involving Accounting Founded on Contract

Gilman v. Nordin *(1952) 112 Cal. App. 2d 788, 247 P.2d 394* , was an appeal from an order denying defendant's motion for a change of venue from the City and County of San Francisco to the county of his residence. The complaint contained four counts. The first alleged an agreement between the parties to be performed in San Francisco forming a partnership with its sole place of business located in San Francisco and breach of the agreement by defendant; it asked for dissolution of the partnership and an accounting. The other counts were on contract and the parties conceded that under these counts defendant was not entitled to a change of venue. In affirming the order denying the motion for change of venue, the court of appeal acknowledged the rule that if a defendant is entitled to a trial in the county of his or her residence on any one of several causes of action in a complaint, he or she is entitled to a change of venue to that county notwithstanding that on all the other causes he or she would not be entitled to such change. The court added, however, that if the first count was founded on an obligation contracted to be performed in San Francisco as alleged, defendant was not entitled under *Code Civ. Proc. § 395* to a transfer of the case to the county of his residence (*112 Cal. App. 2d 788, 790*). The court concluded that the action was founded on contract. It pointed out that plaintiff alleged the partnership contract, its breach by defendant, and asked that the partnership formed by that contract be dissolved. The court explained that in determining the truth of that allegation, the trial court had to determine whether or not there was such a contract; what its terms were; in what respect, if any, did defendant breach it; and whether or not the partnership formed by it should be dissolved. The court also explained that in the accounting the trial court had to

determine what the assets of the partnership were, if any, and divide those assets in accordance with the contract (*112 Cal. App. 2d 788, 790*). Although the complaint alleged neither the place where the contract was entered into nor a "special contract in writing to the contrary" [*see Code Civ. Proc. § 395(a)*], the court held that defendant, since he had failed to deny (and therefore admitted) the allegation that the contract was to be performed in San Francisco, was estopped to deny that the contract had been entered into in San Francisco (*112 Cal. App. 2d 788, 792*). Since the action had been brought where the contract was to have been performed and presumptively where it was entered into, the court held that defendant was not entitled to a change of venue to the county of his residence. The court said that (under *Code Civ. Proc. § 395*) the county of a defendant's residence is not a preferred place of trial over the county in which the contract is entered into or is to be performed (*112 Cal. App. 2d 788, 793*).

Note that superior court orders granting or denying a motion to change the place of trial are reviewable by mandate [*Code Civ. Proc. § 400*]. Thus, the orders involved in the above cases are no longer appealable and would instead be reviewed by mandate. An order in a limited civil case granting or denying a motion to change the place of trial is, however, appealable to the appellate division of the superior court [*Code Civ. Proc. § 904.2(c)*].

[4] Additional Authorities

[a] Contract Provisions of Code Civ. Proc. § 395(a) as Applicable to Actions Involving Accounting Founded on Contract

Rudnick v. Delfino (1956) 140 Cal. App. 2d 260, 294 P.2d 983 , was an appeal from an order denying a defendant's motion for change of venue from Kern County to San Bernardino County, the county of his residence. The order was made in an action for dissolution of a limited partnership, for an accounting, and for division and distribution of the partnership assets in which the complaint alleged that the partnership contract was made and entered into in Kern County, although it also asserted the filing of a certificate of limited partnership in San Bernardino County, and that one of the defendants was a resident of Kern County. The court noted that the purpose of the partnership, as shown by its articles, was to acquire and use lands in San Bernardino County for agricultural purposes and stock raising and that its principal place of business was fixed at a city in that county (*140 Cal. App. 2d 260, 264*). The court, citing *Gilman v. Nordin (1952) 112 Cal. App. 2d 788, 790, 247 P.2d 394* (discussed in *§ 12.23[3][a]*) and other cases, pointed out that an action for dissolution of a partnership and an accounting is a transitory action based on the partnership agreement and is controlled as to venue by the contract provisions of *Code Civ. Proc. § 395* and that, if Kern County was a proper place of trial under any of the three alternatives set forth in that section (county of residence of defendants or some of them, county where contract was entered into, or county where contract was to be performed), the order denying a change of venue had to be affirmed (*140 Cal. App. 2d 260, 264*). The court concluded that the order denying the motion for a change of venue was justified because one of the named defendants was a resident of Kern County (*140 Cal. App. 2d 260, 267*).

Note that superior court orders granting or denying a motion to change the place of trial are reviewable by mandate [*Code Civ. Proc. § 400*]. Thus, the orders involved in the above cases are no longer appealable and would instead be reviewed by mandate. An order in a limited civil case granting or denying a motion to change the place of trial is, however, appealable to the appellate division of the superior court [*Code Civ. Proc. § 904.2(c)*].

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CHAPTER 12 ACCOUNTING
PART II. FORMS
A. Nature, Jurisdiction, And Venue Of Accounting Actions

1-12 California Points & Authorities §§ 12.24-12.39

[Reserved]

§§ 12.24[Reserved]

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B. Pleading And Showing Cause For An Accounting

1-12 California Points & Authorities § 12.40

§ 12.40 Supporting Contention That Accounting Does Not Lie--No Accounting Is Necessary or Remedy at Law Is Adequate

[1] FORM Supporting Contention That Accounting Does Not Lie--No Accounting Is Necessary or Remedy at Law Is Adequate

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

AN ACCOUNTING IS NOT PROPER IN THIS CASE BECAUSE _____ [AN ACCOUNTING IS NOT NECESSARY *and/or* PLAINTIFF'S REMEDY AT LAW IS ADEQUATE].

A. No Accounting Necessary or Remedy at Law Is Adequate. An action for an accounting will not lie if it appears from the complaint that none is necessary or that there is an adequate remedy at law (*St. James Church v. Superior Court (1955) 135 Cal. App. 2d 352, 359, 287 P.2d 387*).

B. Right to Accounting as Required to Be Shown. Before an accounting is in order, the right to it must first be established (*Baxter v. Krieger (1958) 157 Cal. App. 2d 730, 732, 321 P.2d 879*).

C. Account as Not Required When Need or Right Not Shown. An accounting may be dispensed with if no need or right to one is shown (*Baxter v. Krieger (1958) 157 Cal. App. 2d 730, 732, 321 P.2d 879*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a defendant's contention that no cause for an accounting is stated or shown because an accounting is unnecessary or because plaintiff has an adequate remedy at law.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the

specific procedural context in which counsel wishes to raise the issue regarding the propriety of an accounting. For example, when the ground of objection appears from the face of the complaint or from judicially noticed matter, the points and authorities set out in this form may be combined with points and authorities supporting a general demurrer to a complaint for an accounting [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*], a nonstatutory motion for judgment on the pleadings, or, if the court requires points and authorities, an objection at trial to the introduction of evidence. For a discussion of objections to the introduction of evidence in an accounting action, see *Stilwell v. Trutanich (1960) 178 Cal. App. 2d 614, 617-618, 3 Cal. Rptr. 285* .

These points and authorities may also be cited in support of an objection to the taking of an account at trial after the party seeking the accounting has presented his or her evidence and the evidence is insufficient to establish the party's need or right to an accounting. If the evidence fails to establish any cause of action and points and authorities are required or permitted by the court, these points and authorities may be combined with a memorandum of points and authorities in support of a motion for nonsuit [*see Code Civ. Proc. § 581c*] or a motion for judgment [*see Code Civ. Proc. § 631.8*].

The point might, however, arise in other contexts, for example, with respect to a determination of the applicable statute of limitations [*see §§ 12.60, 12.61*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Chapters

For a form of general demurrer and a notice motion for judgment on the pleadings, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities supporting and opposing a general demurrer to a complaint or a motion for judgment on the pleadings, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[d] Opposing Points and Authorities

In an appropriate case, the points and authorities in *§§ 12.45 -12.47* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] No Accounting Necessary or Remedy at Law Is Adequate

St. James Church v. Superior Court *(1955) 135 Cal. App. 2d 352, 287 P.2d 387* , was a proceeding in mandate by which petitioner, a religious corporation, sought to compel the superior court to assume and exercise jurisdiction over an action in which it was the plaintiff. The action arose out of the retention of monies ($240) received by one of petitioner's trustees as rent for church property pursuant to a one-year lease entered into by the trustee acting as an individual trustee and without the prior knowledge or consent of the other trustees. The action had originally been filed in the superior court, which transferred the case to the municipal court. The municipal court transferred it back to the superior court. The superior court then refused to exercise jurisdiction on the ground that jurisdiction was in the municipal court. The complaint prayed for an injunction permanently enjoining the trustee from collecting the rentals, that the trustee be required to make a true accounting of all monies collected by him, and for a money judgment based on the accounting. Holding that the municipal court did not have jurisdiction of the action for a permanent injunction, the court of appeal ordered the writ issued. It held, however, that the complaint did not state a case for an accounting.

The full amount of the rentals collected by defendant had been alleged in the complaint. The court said that a suit for an accounting does not lie when it appears from the complaint that none is necessary or that there is an adequate remedy at law (*135 Cal. App. 2d 352, 359*).

[b] Right to Accounting as Required to Be Shown

Baxter v. Krieger *(1958) 157 Cal. App. 2d 730, 321 P.2d 879* , was an action by defendants' former salesman for claimed commissions due under an oral employment contract on sales made during the period of employment and for an accounting covering that entire period. The evidence showed that the employment covered a period of some six and one half years, that after an order was shipped plaintiff received a notice of the amount of the commission earned on the particular order by receiving a copy of the order with the commission shown on it, that commission statements accompanied by check were furnished monthly to plaintiff throughout the employment period, and that plaintiff protested cuts in his commission from time to time but received an explanation for them. The trial court found there were no commissions or any monies due by defendants to plaintiff and denied an accounting. Judgment was entered for defendants, and plaintiff appealed contending, among other things, that he was entitled to a full and formal accounting. The court of appeal affirmed. It held that before an accounting is in order, the right to it must be established (*157 Cal. App. 2d 730, 732*).

[c] Accounting as Not Required When Need or Right Is Not Shown

The factual background of ***Baxter v. Krieger*** *(1958) 157 Cal. App. 2d 730, 321 P.2d 879* , is discussed in *§ 12.40[3][b]*. In affirming the judgment for defendants, the court of appeal said that an accounting may be dispensed with when, under the evidence, the need or right to one is not shown (*157 Cal. App. 2d 730, 732*).

[4] Additional Authorities

[a] No Accounting Necessary or Remedy at Law Is Adequate

Civic Western Corp. v. Zila Industries, Inc. (1977) 66 Cal. App. 3d 1, 135 Cal. Rptr. 915 , was an action to recover on promissory notes secured by defendant's business property, inventory, and accounts receivable. Summary judgment pursuant to stipulation of the parties was entered granting plaintiff a permanent injunction restraining defendant from preventing or interfering with plaintiff's entrance on defendant's premises to take possession of the collateral. Defendant subsequently filed an answer denying default and cross complained for an accounting, damages for trespass, declaratory relief, to have the permanent injunction declared void, and, by amendment, for forcible entry and forcible detainer. Defendant sought an accounting of the proceeds of accounts receivable assigned by it to plaintiff and alleged that the assignment transactions were so involved and complicated as to require an accounting to determine the financial status of the parties with respect to each other and that the total volume of these transactions was in the area of $2 million. Plaintiff's motion for summary judgment on the cross complaint was granted, and defendant appealed. Although it reversed the judgment with respect to the first three causes of action alleged in the cross complaint, including the action for an accounting, on the ground that there were triable issues of fact with respect to these causes of action, the court of appeal, quoting from *St. James Church v. Superior Court (1955) 135 Cal. App. 2d 352, 359, 287 P.2d 387* (discussed in *§ 12.40[3][a]*), said that a suit for an accounting does not lie when it appears from the complaint that none is necessary or that there is an adequate remedy at law (*66 Cal. App. 3d 1, 14*).

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1-12 California Points & Authorities § 12.41

§ 12.41 Supporting Contention That No Cause for Accounting Exists--Account Settled by Agreement of Parties

[1] FORM Supporting Contention That No Cause for Accounting Exists--Account Settled by Agreement of Parties

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

AN ACCOUNTING IS NOT PROPER IN THIS CASE BECAUSE THE PARTIES HAVE ALREADY SETTLED THEIR ACCOUNT, AND THERE HAS BEEN NO CHARGE OF FRAUD OR MISTAKE IN CONNECTION WITH THE SETTLEMENT.

No Accounting After Account Settled. In the absence of a charge of fraud or mistake, no cause for an accounting exists after a settlement of the account acquiesced in by plaintiff (*see Kinley v. Thelen (1910) 158 Cal. 175, 183, 110 P. 513*).

[2] Comments

[a] Use of Form

This point and authority may be submitted in support of a defendant's contention that no cause for an accounting is stated because the parties have previously settled their account.

This point and authority may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue regarding the propriety of an accounting. For example, when the ground of objection appears from the face of the complaint or from judicially noticed matter, the point and authority may be combined with points and authorities supporting a general demurrer to a complaint for an accounting [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*], a nonstatutory motion for judgment on the pleadings, or an objection at trial to the introduction of evidence if the court requires points and authorities.

This form may also be submitted in opposition to a motion for a reference to take an account [*see § 12.40*]. The point might also arise in other contexts, for example, with respect to a determination of the applicable statute of limitations [*see §§ 12.60* and *12.61*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the point of law stated.

[b] Related Pleading and Practice Chapters

For a form of general demurrer and a notice motion for judgment on the pleadings, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities supporting and opposing a general demurrer to a complaint or a motion for judgment on the pleadings, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[d] Opposing Points and Authorities

In an appropriate case, the points and authorities in *§§ 12.45 -12.47* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] No Accounting After Account Settled

Kinley v. Thelen *(1910) 158 Cal. 175, 110 P. 513* , was an action for an accounting arising out of an oral "trusteeship" agreement entered into in 1892 between plaintiff and defendants, a bank and an individual. The individual defendant was a director and the cashier and general managing officer of the bank and acted as trustee for both the bank and plaintiff under the trusteeship agreement. Pursuant to the agreement and in consideration of the defendant bank's agreement to make loans to plaintiff from time to time, plaintiff transferred certain securities and conveyed certain real properties located in Texas and California to the trustee, who was to manage the properties, pay taxes, and so forth, and sell the properties as occasion might offer and apply the proceeds to repayment of plaintiff's indebtedness to the bank. The second amended complaint, which detailed the transactions between the parties over a period of several years, alleged, among other things, in or around March 1903 the trustee informed plaintiff that he had not been able to sell the Texas or California lands and reconveyed the properties by quitclaim deed to plaintiff. The plaintiff at the same time executed his renewal note for $6,000, the amount of his remaining indebtedness as represented by the trustee, and delivered to the trustee certain bonds in a coal company as security for plaintiff's unpaid indebtedness. In effect, the complaint alleged that, as a result of the defendant's breach of the trusteeship agreement, plaintiff's Texas and California lands had been lost by foreclosure prior to 1903, that a purported sale by the trustee in April 1906 for $6,000 of stock in defendant bank owned by plaintiff was not bona fide, that defendants retained possession of plaintiff's coal company bonds and notes executed by plaintiff, although plaintiff was not indebted to defendant bank, that plaintiff had demanded an accounting of the trusteeship and all property received under it, and that defendants had refused to provide this. It was alleged that the value of the Texas property was $6,400, the value of the California property was $800, the value of the stock sold for $6,000 was $10,000, and the value of the bonds was $5,000. Defendants' demurrer was sustained, and plaintiff appealed from the subsequent judgment for defendants.

The Supreme Court affirmed. It held that the complaint failed to state any cause of action. The Court specifically held that the complaint did not show grounds for an accounting (*158 Cal. 175, 182*). With respect to the requested accounting of the transactions prior to March 1903, the Court said that plaintiff's debt had been fixed by the agreement of the parties in 1903 and security for it given; that whatever uncertainty may have existed regarding the earlier dealings

of the parties, all doubts were resolved by the giving of the 1903 note; that this transaction constituted a settlement of account between the parties; that plaintiff, after acquiescing in that settlement, could not, in the absence of a charge of fraud or mistake, be permitted to reopen questions that were then closed; that no such charge was made; and that there was no allegation that the trustee's statement concerning the amount of plaintiff's indebtedness was not in fact entirely correct (*158 Cal. 175, 182-183*).

[4] Additional Authorities

[a] No Accounting After Account Settled

In *Loupias v. Rosen (1951) 102 Cal. App. 2d 781, 228 P.2d 611* , the court of appeal held that the trial court properly sustained without leave to amend a demurrer to a count seeking dissolution of a partnership, an accounting, and the appointment of a receiver in which plaintiff alleged that a dissolution by agreement had occurred more than two years prior to the filing of the complaint, which merely pleaded an executed contract under which plaintiff had received all the benefits accruing to him, and the complaint did not attack the dissolution agreement on the ground of fraud, deceit, misrepresentation, or other equitable ground, or seek to rescind it, or offer to put the parties in status quo (*102 Cal. App. 2d 781, 783, 785*).

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1-12 California Points & Authorities § 12.42

§ 12.42 Supporting Contention That No Cause for Accounting Exists--No Accounting Necessary When Sum Sued for Is Certain

[1] FORM Supporting Contention That No Cause for Accounting Exists--No Accounting Necessary When Sum Sued for Is Certain

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

AN ACCOUNTING IS NOT PROPER IN THIS ACTION BECAUSE THE AMOUNT SOUGHT TO BE RECOVERED BY PLAINTIFF IS A SUM CERTAIN.

A. Complaint Seeks Recovery of Sum Certain. An accounting will not be accorded when the complaint seeks recovery of a sum certain (*Tostevin v. Douglas (1958) 160 Cal. App. 2d 321, 329-330, 325 P.2d 130*).

[*Optional*] **B. All Facts Necessary to Calculate Sum Sought Are or Can Be Alleged.** An accounting will not be accorded when all the facts necessary for the calculation of the amount sought are alleged in the complaint or can be alleged in a supplemental complaint, since the amount is certain and recovery may be had in an action at law (*St. James Church v. Superior Court (1955) 135 Cal. App. 2d 352, 359, 287 P.2d 387* ; *see Civ. Code § 3538*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a defendant's contention that no cause for an accounting is stated because the amount sought by plaintiff is a sum certain or because all the facts necessary to calculate the account between the parties are or can be alleged in the complaint.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue regarding the propriety of an accounting. For

example, when the ground of objection appears from the face of the complaint, the points and authorities may be combined with points and authorities supporting a general demurrer to a complaint for an accounting [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*], a nonstatutory motion for judgment on the pleadings, or an objection at trial to the introduction of evidence if the court requires points and authorities.

These points and authorities may also be submitted in opposition to a motion for a reference to take an account [*see § 12.40* et seq.]. The point might also arise in other contexts, for example, with respect to a determination of the applicable statute of limitations [*see § 12.60* and *12.61*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Chapters

For a form of general demurrer and a notice motion for judgment on the pleadings, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities supporting and opposing a general demurrer to a complaint or a motion for judgment on the pleadings, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Complaint Seeks Recovery of Sum Certain

Tostevin v. Douglas *(1958) 160 Cal. App. 2d 321, 325 P.2d 130* , was an action for declaratory relief and an accounting. Although there were numerous changes in essential averments among the original and subsequently amended verified complaints, the gist of the action was that under an oral agreement entered into in May 1954, defendants employed plaintiff to solicit and procure personnel and material for a series of travelogue television shows at a fixed salary of $50 per week and that defendants repudiated the agreement and refused to be bound by it. Plaintiff prayed for an accounting for all monies to which he was entitled under the agreement and for a judgment in the sum of $7,900 for compensation due under the contract from June 1, 1954, to the date the complaint was filed and for a further judgment in the sum of $50 per week thereafter for as long as defendants received compensation for the showing of the series. Defendants' motion to strike the third amended complaint was granted, and plaintiff appealed from the subsequent judgment of dismissal.

The court of appeal affirmed. With respect to the prayer for an accounting, the court pointed out that plaintiff was to receive a fixed salary of $50 per week to a total sum of $7,900 and that it failed to see why plaintiff needed an accounting, that the amount due was a simple matter of mathematics, and that plaintiff himself alleged it in a sum certain (*160 Cal. App. 2d 321, 329*). The court said that there is no occasion for an accounting when plaintiff seeks to recover what he alleges in his complaint to be a sum certain to his knowledge (*160 Cal. App. 2d 321, 330*).

[b] All Facts Necessary to Calculate Sum Sought Are or Can Be Alleged

The factual background of ***St. James Church v. Superior Court*** *(1955) 135 Cal. App. 2d 352, 287 P.2d 387* , is discussed in *§ 12.40[3][a]*. Although the court of appeal ordered issuance of a writ of mandate compelling the trial court to assume jurisdiction over the action for a permanent injunction, it said, in holding that the complaint failed to state a case for an accounting, that if a complaint sets forth all the facts necessary for the calculation of an account between the parties, recovery may be had in an action at law (*135 Cal. App. 2d 352, 359*). The court explained that in the case before it clearly appeared that no accounting was necessary, that so far as recovery of monies alleged to have

been collected by the defendant was sought, plaintiff had an adequate remedy at law, and that all the facts necessary for the calculation of the amount sought were alleged or could be alleged in a supplemental complaint and the amount was thus certain (*135 Cal. App. 2d 352, 359*).

[4] Additional Authorities

[a] Complaint Seeks Recovery of Sum Certain

The factual background of *Kinley v. Thelen (1910) 158 Cal. 175, 110 P. 513* , is discussed in *§ 12.41[3][a]*. In affirming the judgment for defendants, the Court said that it first had to ascertain what causes of action were not stated and that the complaint did not show grounds for an accounting (*158 Cal. 175, 182*). With respect to the sale of the stock, the Court pointed out that the amount of damage sustained was, in effect, a sum certain in that the amount of damage was not unknown to plaintiff, since he alleged that the shares were worth $10,000 and that they were sold for $6,000; hence, if the sale was unauthorized, the damage was $4,000 (*158 Cal. 175, 183*).

The factual background of *Civic Western Corp. v. Zila Industries, Inc. (1977) 66 Cal. App. 3d 1, 135 Cal. Rptr. 915* , is discussed in *§ 12.40[4][a]*. Although the court of appeal reversed the summary judgment for plaintiff on defendant's cross complaint with respect to the first three causes of action, including the action for an accounting, on the ground that triable issues of fact existed, the court of appeal, quoting from *St. James Church v. Superior Court (1955) 135 Cal. App. 2d 352, 359, 287 P.2d 387* (discussed *below*), said that an accounting will not be accorded with respect to a sum that a plaintiff seeks to recover and alleges in his complaint to be a sum certain (*66 Cal. App. 3d 1, 14*).

The factual background of *St. James Church v. Superior Court (1955) 135 Cal. App. 2d 352, 287 P.2d 387* , is discussed in *§ 12.40[3][a]*. Although the court of appeal ordered issuance of a writ of mandate compelling the trial court to assume jurisdiction over the action for a permanent injunction, it said, in holding that the complaint did not state a case for an accounting, that an accounting will not be accorded with respect to a sum that a plaintiff seeks to recover and alleges in his complaint to be a sum certain (*135 Cal. App. 2d 352, 359*).

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Volume 1 Chapters 1-19 WRITING LEGAL MEMORANDA AND BRIEFS; ABATEMENT AND SURVIVAL OF ACTIONS---to---AMENDED AND SUPPLEMENTAL PLEADINGS
CHAPTER 12 ACCOUNTING
PART II. FORMS
B. Pleading And Showing Cause For An Accounting

1-12 California Points & Authorities § 12.43

§ 12.43 Supporting Contention That No Cause for Accounting Exists--No Accounting Necessary When Items Are Not in Dispute

[1] FORM Supporting Contention That No Cause for Accounting Exists--No Accounting Necessary When Items Are Not in Dispute

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

AN ACCOUNTING IS NOT NECESSARY IN THIS ACTION BECAUSE THE ITEMS OF THE ACCOUNT ARE KNOWN TO PLAINTIFF AND ARE NOT IN DISPUTE.

Items Not in Dispute. No accounting is necessary when the items of an account are not in dispute and are known to plaintiff (*Bayer v. Barrett (1932) 127 Cal. App. 305, 310, 15 P.2d 801*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a defendant's contention that no cause for an accounting is stated because the items of the account are known to plaintiff and are not in dispute.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue regarding the propriety of an accounting. For example, when the ground of objection appears from the face of the complaint or from judicially noticed matter, the points and authorities may be combined with points and authorities supporting a general demurrer to a complaint for an accounting [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*], a nonstatutory motion for judgment on the pleadings, or an objection at trial to the introduction of evidence if the court requires points and authorities.

These points and authorities may also be submitted in opposition to a motion for a reference to take an account [*see §§*

12.45 -12.47]. The point might also arise in other contexts, for example, with respect to a determination of the applicable statute of limitations [*see §§ 12.60* and *12.61*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Chapters

For a form of general demurrer and a notice motion for judgment on the pleadings, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities supporting and opposing a general demurrer to a complaint or a motion for judgment on the pleadings, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Items Not in Dispute

Bayer v. Barrett *(1932) 127 Cal. App. 305, 15 P.2d 801* was an action by the beneficiaries under a trust deed for an accounting, an adjudication that the trustors under the trust deed were in default, and a judicial sale of the property covered by the trust deed. The trustors had not only defaulted in their monthly payments under the promissory note, but they had also refused to reimburse the plaintiffs for fire insurance premiums and taxes advanced by the latter. The trustors defaulted in the case, and the cause was tried on the issues raised by the complaint and the answer of the trustee. From a judgment for defendants, including those whose defaults had been entered, plaintiffs appealed.

The court of appeal affirmed. Relying on the rule of law laid down in a prior appeal in the case, the court held that a beneficiary cannot foreclose an ordinary trust deed and have a judicial sale in lieu of a trustee's sale in the absence of unusual circumstances justifying special equitable relief (*127 Cal. App. 305, 309-310*). The trustee did not deny that the complaint sufficiently pleaded a case for such relief, but argued that the evidence failed to meet the test and that there was no need for an accounting. The court of appeal agreed, not because the items were all matters capable of easy proof, as argued by the trustee, but because there was no showing that any of the items were in dispute. The court said that the default of the trustors was merely an admission that the items set forth in the complaint were due and correct but that these items were known to plaintiffs and there was, therefore, no need for an accounting (*127 Cal. App. 305, 310*).

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1-12 California Points & Authorities § 12.44

§ 12.44 Supporting Contention That No Cause for Accounting Exists--No Right to Accounting in Absence of Misconduct or Breach of Fiduciary Duty by Defendant

[1] FORM Supporting Contention That No Cause for Accounting Exists--No Right to Accounting in Absence of Misconduct or Breach of Fiduciary Duty by Defendant

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

AN ACCOUNTING IS NOT PROPER IN THIS CASE BECAUSE PLAINTIFF HAS FAILED TO _____ [ALLEGE *and/or* PROVE] THAT DEFENDANT COMMITTED ANY TORT OR OTHER MISCONDUCT OR VIOLATED ANY FIDUCIARY DUTY OWED TO PLAINTIFF, OR THAT DEFENDANT OTHERWISE OWES ANY MONEY TO PLAINTIFF.

A. Right to Accounting as Required to Be Shown. [*See § 12.40[1], Paragraph B.*]

B. Account as Not Required When Need or Right Not Shown. [*See § 12.40[1], Paragraph C.*]

C. No Right to Accounting in Absence of Misconduct or Breach of Fiduciary Duty by Defendant. The mere existence of a complicated accounting relationship is insufficient by itself to permit the maintenance of an action for an accounting. To support an accounting, the plaintiff must prove that the defendant committed some form of misconduct, violated a fiduciary duty, or otherwise owes money to the plaintiff (*see Union Bank v. Superior Court (1995) 31 Cal. App. 4th 573, 593-594, 37 Cal. Rptr. 2d 653*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a defendant's contention that plaintiff has not sufficiently alleged or proved the right to an accounting because plaintiff has not alleged or proved that defendant committed any

tort or other misconduct or violated any fiduciary duty owed to plaintiff, or that defendant otherwise owes any money to plaintiff.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue regarding the propriety of an accounting. For example, if the ground of objection appears from the face of the complaint, the points and authorities in this form may be combined with points and authorities supporting a general demurrer to the complaint [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, if the issue arises at the pleading stage, counsel should insert argument showing that plaintiff's complaint fails to allege any facts sufficient to show that defendant committed any tort or other wrongdoing or violated any fiduciary duty owed towards plaintiff, or that defendant otherwise owes a sum of money to plaintiff. If the issue arises on summary judgment, counsel should add argument demonstrating that the affidavits and other evidence submitted in support of and opposition to the motion show as a matter of law that defendant committed no misconduct and violated no duty toward plaintiff that would support an action for an accounting.

Counsel should also add points and authorities supporting his or her contentions regarding plaintiff's failure to allege or prove a tort or other violation of duty towards the plaintiff. For example, if plaintiff based the action for an accounting on defendant's alleged commission of fraud, defendant's counsel should add points and authorities supporting his or her contention that no cause of action for fraud was alleged or proven [*see, e.g.,* Ch. 105, *Fraud and Deceit*].

[3] Discussion of Authorities

[a] No Right to Accounting in Absence of Misconduct or Breach of Fiduciary Duty by Defendant

In ***Union Bank v. Superior Court*** *(1995) 31 Cal. App. 4th 573, 37 Cal. Rptr. 2d 653* , plaintiffs were investors in a limited partnership that leased a medical scanner from a medical leasing company under a complex lease arrangement. Defendant bank had lent money to the leasing company. As security for the loan, the leasing company had assigned to defendant bank the right to repossess the scanner in the event that the limited partnership defaulted on its rental payments. The limited partnership did subsequently default on its rental payments, and the defendant bank repossessed the scanner after it was abandoned by the limited partnership. The plaintiff investors then sued 40 codefendants, including the bank, for various types of alleged negligent and intentional misrepresentation and for an accounting. The defendant bank moved for summary judgment, but the trial court denied the motion. The bank then petitioned for a writ of mandate from the court of appeal, seeking to require the trial court to grant the summary judgment motion.

The court of appeal granted the writ and directed the trial court to grant the defendant's summary judgment motion. The court first held that the evidence submitted by the defendant bank in support of the summary judgment motion was sufficient to shift the burden of proof to plaintiffs under former Code Civ. Proc. § 437c(o)(2) (*now see Code Civ. Proc. § 437c(p)(2)*), and that the facts referred to in the plaintiff's supporting papers were insufficient to create a triable issue as to whether defendant was civilly liable for any misrepresentations on its part. Therefore, plaintiffs had failed to sustain their burden of proving that the various fraud claims had merit (*31 Cal. App. 4th 573, 592-593*). The court then noted that the sole remaining cause of action was for an accounting. The court observed that the grounds for an accounting alleged in the complaint (breach of fiduciary duty; complicated accounts; and fraud) were proper (*31 Cal. App. 4th 573, 593*). However, the court noted that it had concluded that there was no basis for a finding of fraud or breach of fiduciary relationship, and plaintiffs had admitted that defendant did nothing wrong in administering the loan or seizing the medical scanner. Hence, the court concluded, defendant had proven that it engaged in no misconduct and, as a result, plaintiffs had no right to an accounting (*31 Cal. App. 4th 573, 593-594*). The court held that since the defendant owed no money to the plaintiffs and did not deprive them of any money or the lawful use of the scanner, as a matter of law, the accounting action must be dismissed. The court further observed that no California decision holds that the existence of a complicated accounting relationship between parties by itself permits the maintenance of a lawsuit

between them when no money is owed and no property must be returned (*31 Cal. App. 4th 573, 594*).

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1-12 California Points & Authorities § 12.45

§ 12.45 Opposing Contention That No Cause for An Accounting Exists--Cause for Accounting Sufficiently Alleged; Specification of Sum as Minimum Amount Due as Surplusage

[1] FORM Opposing Contention That No Cause for An Accounting Exists--Cause for Accounting Sufficiently Alleged; Specification of Sum as Minimum Amount Due as Surplusage

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE COMPLAINT SUFFICIENTLY STATES A CAUSE OF ACTION FOR AN ACCOUNTING BECAUSE IT ALLEGES FACTS SHOWING THE EXISTENCE OF A RELATIONSHIP THAT REQUIRES AN ACCOUNTING AND FURTHER ALLEGES THAT SOME BALANCE, WHICH CANNOT BE ASCERTAINED WITHOUT AN ACCOUNTING, IS DUE PLAINTIFF, [AND THE SPECIFICATION OF A SUM AS THE MINIMUM AMOUNT DUE MAY BE REGARDED AS MERE SURPLUSAGE].

A. Necessary Allegations. A cause of action for an accounting need only state facts showing the existence of the relationship that requires an accounting and the statement that some balance that cannot be ascertained without an accounting is due the plaintiff (*Whann v. Doell (1923) 192 Cal. 680, 684, 221 P. 899* ; *Brea v. McGlashan (1934) 3 Cal. App. 2d 454, 460, 39 P.2d 877*).

[*Optional*] **B. Specification of Sum as Minimum Amount Due as Surplusage.** The allegation of a fixed sum as the minimum amount of damages sustained in a complaint that otherwise states a cause of action for accounting does not change the character of the action and may be disregarded as surplusage (*San Pedro Lumber Co. v. Reynolds (1896) 111 Cal. 588, 44 P. 309* ; *Brea v. McGlashan (1934) 3 Cal. App. 2d 454, 460, 39 P.2d 877*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that an action for accounting does

not lie. The form sets forth the general point that a cause of action for an accounting need only state facts showing the existence of a relationship that requires an accounting and the statement that some balance that cannot be ascertained without an accounting is due the plaintiff.

These points and authorities may be used alone or combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue regarding the propriety of an accounting. For example, they may be used in combination with other points and authorities to oppose a general demurrer to a complaint for an accounting, a motion for judgment on the pleadings, or an objection to the introduction of evidence, or in any other proceeding in which it is contended that no accounting lies. For a discussion of objections to the introduction of evidence in an accounting action, see *Stilwell v. Trutanich (1960) 178 Cal. App. 2d 614, 617-618, 3 Cal. Rptr. 285* .

In an appropriate case, these points and authorities may be submitted in opposition to the contentions supported by the points and authorities set out in *§§ 12.40 -12.43*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Chapters

For a form of general demurrer and a notice motion for judgment on the pleadings, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities supporting and opposing a general demurrer to a complaint or a motion for judgment on the pleadings, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Necessary Allegations

Whann v. Doell *(1923) 192 Cal. 680, 221 P. 899* , was an action for dissolution of a partnership and an accounting. Plaintiff in her complaint alleged that the partnership was engaged in manufacturing and selling a medicine, that part of the proceeds of the business were invested in certain apartment houses and other described real estate, and that title was taken in defendant's name. Plaintiff prayed that her one-half interest in the real estate be declared, for an accounting of the rents, issues, and profits of the real estate and partnership business, and that the assets of the partnership be distributed and the partnership dissolved. By an amendment to the complaint, plaintiff alleged that the rents and profits of the real estate amounted to $18,844.22. In her answer, defendant alleged that the net receipts from the sale of the medicine was $37,580.08, one half of which she was entitled to receive as wages and not as partnership profits; that plaintiff had paid her $21,629.36 for such wages and living expenses, which were also to be shared equally; and that the living expenses of the plaintiff (her one half) amounted to $6,065, of which she had paid $2,839.32 (being the difference between $21,629.36 and one half of the profits, $37,580.08, to wit, $18,790.04). Defendant admitted that the profits of the real estate were $17,938.25 but claimed the real estate as her own. Trial was before the court without a jury and without a reference or interlocutory decree ordering an accounting. The trial court made specific findings with respect to the claims of the parties, the result of which was a finding to the effect that defendant had been overpaid $2,839.32, and rendered judgment equalizing the division by increasing plaintiff's interest in the partnership property, after directing the payment to her of the money on hand and by directing a sale of the property. Defendant appealed.

The Supreme Court affirmed the judgment. In determining the sufficiency of the complaint, the Court explained that the situation presented by an accounting action is unique in that the issues raised by the pleadings may be only those with

relation to the existence of the copartnership or other relationship that requires an accounting and the statement that some balance is due the plaintiff, and that other issues are raised by the account and the exceptions to it, not by the pleadings (*192 Cal. 680, 684*).

Brea v. McGlashan *(1934) 3 Cal. App. 2d 454, 39 P.2d 877* , was an action by a former employee against the owner of a radio station. The complaint was in two counts, the first of which was for an accounting. In this count, plaintiff alleged as follows: (1) she had been orally employed by defendant for a one-year period to solicit radio advertising for defendant and was to be paid 25 percent of the sums paid by the advertisers on contracts for radio advertising that she obtained; (2) she did obtain advertising contracts for defendant; (3) she did not know the amounts paid by the advertisers pursuant to the contracts because defendant refused to tell her; (4) some four months after the employment contract was entered into, defendant refused to recognize plaintiff as his agent or employee; (5) prior to this time she had secured the oral consent of numerous other business concerns to hold themselves in readiness to use time on defendant's radio station under the then current advertising rates; and (6) contrary to the terms of her employment, defendant had ascertained the existence of these oral contracts and solicited and obtained advertising contracts from these business concerns through other agents. Judgment on this count was for plaintiff, and defendant appealed.

The court of appeal affirmed. Citing *Whann v. Doell (1923) 192 Cal. 680, 684, 221 P. 899* (discussed *above*), the court said that under our system of pleading, a cause of action for accounting need only state facts showing the existence of the relationship that requires an accounting and the statement that some balance is due the plaintiff (*3 Cal. App. 2d 454, 460*). The court held that the complaint sufficiently alleged the employment, the manner of compensation, the performance of services showing some compensation to be due, and the fact that the correct amount could not be ascertained without an accounting (*3 Cal. App. 2d 454, 460*).

[b] Specification of Sum as Minimum Amount Due as Surplusage

San Pedro Lumber Co. v. Reynolds *(1896) 111 Cal. 588, 44 P. 309* , was an action by plaintiff against its former agent and employee for the enforcement and foreclosure of a lien on pledged stock and for an accounting to determine the amount for which the lien could be enforced. In its complaint, plaintiff alleged the relationship of the parties and the acts of defendant that constituted mismanagement of plaintiff's business and misappropriation of plaintiff's monies and property. Plaintiff further alleged that it was unable to state the precise amount of the losses sustained by it but, according to information and belief, the aggregate was about $65,000. Plaintiff also alleged that, although the amount of defendant's indebtedness was unsettled, unascertained, and in dispute, the defendant executed to plaintiff's president a written transfer and assignment of specified shares of stock in order to secure repayment. From a judgment for plaintiff, defendant appealed. The Supreme Court affirmed. After holding that the complaint sufficiently stated a cause of action for an accounting, the Court added that the character of the complaint was not changed by the averment that before the commencement of the action an investigation had shown that plaintiff had suffered a loss of "upward of sixty-five thousand dollars" (*111 Cal. 588, 597*).

The factual background of ***Brea v. McGlashan*** *(1934) 3 Cal. App. 2d 454, 39 P.2d 877* , is discussed in *§ 12.45[3][a]*. In her complaint for an accounting, plaintiff alleged that because of defendant's breach of the employment contract, plaintiff had sustained damage in the sum of $8,000 or more, and that an accounting was necessary for the exact amount of damages to be ascertained (*3 Cal. App. 2d 454, 459*). The court of appeal, after holding that the complaint sufficiently alleged a cause of action for an accounting, added that the additional allegation that the amount due was $8,000 was surplusage and that its inclusion did not render the complaint uncertain (*3 Cal. App. 2d 454, 460*).

[4] Additional Authorities

[a] Necessary Allegations

Remme v. Herzog (1963) 222 Cal. App. 2d 863, 35 Cal. Rptr. 586 , was an action by an employee against his former

employer for an accounting and to recover the percentage of profits due him. Plaintiff was employed as the manager of the business in 1955. It was agreed orally that his compensation was to be one third of the net profits of the business. In 1956, the business was incorporated, and in April 1957, plaintiff and the corporation entered into a written employment contract providing in part that, in lieu of fixed remuneration for services, plaintiff was to receive one third of the net profits and the privilege of drawing $600 per month, which was to be deducted from his share of the net profits. Plaintiff subsequently terminated his employment and filed the action. The trial court granted an accounting and subsequently judgment was entered for plaintiff. Defendants appealed, contending that the trial court improperly granted the accounting because plaintiff did not produce sufficient evidence to show that he was entitled to it.

The court of appeal affirmed. It pointed out that if a plaintiff has a cause of action of which the court has jurisdiction, and it is necessary to have an accounting to determine his rights, it will be done, and that whether or not the facts would have given jurisdiction to a court of equity is of no consequence (*222 Cal. App. 2d 863, 865*). The court said that a reading of the transcript made it clear, from the great difficulties involved and the disputes between professional accountants as to what in the nature of profits the books of the corporation showed, that this was a proper case to order an account, that it was alleged, and apparently from the whole record the allegation was true, that plaintiff's employer had possession of the books of account from which the amount of profits earned could be ascertained, and that such a situation emphasizes the plaintiff's right to have an accounting (*222 Cal. App. 2d 863, 865-866*).

Stilwell v. Trutanich (1960) 178 Cal. App. 2d 614, 3 Cal. Rptr. 285 , was an action for an accounting to apportion losses incurred in connection with an alleged joint venture. Plaintiffs appealed a judgment of dismissal entered after defendant's objection at trial to the introduction of evidence was sustained. In reversing the judgment, the court of appeal said that a complaint for an accounting need only state facts showing the nature of the relationship that requires an accounting and that some balance is due the plaintiff, and that any other issues are raised by the account and the exceptions to it, not by the pleadings (*178 Cal. App. 2d 614, 620*).

Kritzer v. Lancaster (1950) 96 Cal. App. 2d 1, 214 P.2d 407 , was an action against a stockbroker and its salesman for an accounting. The complaint in effect alleged (1) a confidential relationship between the parties; (2) an oral agreement between plaintiff, a 60-year-old man in ill health, and defendants pursuant to which defendants became the trusted agents of plaintiff to handle his money and invest it in sound securities for his benefit; (3) misconduct of defendants who, contrary to the terms of the agreement, bought and sold speculative and unsound securities with plaintiff's money for their own gain and secret profit; and (4) resulting loss to plaintiff, which could not be ascertained without an accounting, the means of which were within the knowledge of defendants (*96 Cal. App. 2d 1, 2, 7*). Defendants' general demurrer and special demurrer for uncertainty were sustained with leave to amend. Plaintiff elected to stand on his complaint, the action was dismissed, and plaintiff appealed. Holding that the complaint sufficiently stated a cause of action for an accounting, the court of appeal reversed the judgment (*96 Cal. App. 2d 1, 7, 9*). Quoting from *Brea v. McGlashan (1934) 3 Cal. App. 2d 454, 459-460, 39 P.2d 877* (discussed in *§ 12.45[e][a]*), the court said that under our system of pleading, a cause of action for accounting need only state facts showing the existence of the relationship that requires an accounting and the statement that some balance is due plaintiff (*96 Cal. App. 2d 1, 7-8*).

[b] Specification of Sum as Minimum Amount Due as Surplusage

In *Kritzer v. Lancaster (1950) 96 Cal. App. 2d 1, 214 P.2d 407* (discussed in *§ 12.45[4][a]*), plaintiff alleged on information and belief that his total loss exceeded $10,000 and that the amount of secret profits made by defendants exceeded $2,000. The court of appeal, quoting from *Brea v. McGlashan (1934) 3 Cal. App. 2d 454, 459-460, 39 P.2d 877* (discussed in *§ 12.45[3][a]*), in effect held that the allegation was surplusage and that the character of the complaint for an accounting was not affected by it (*96 Cal. App. 2d 1, 8-9*).

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1-12 California Points & Authorities § 12.46

§ 12.46 Opposing Contention That No Cause for An Accounting Exists--Fiduciary Relationship and Duty to Account Exist

[1] FORM Opposing Contention That No Cause for An Accounting Exists--Fiduciary Relationship and Duty to Account Exist

[*The following may be included in a memorandum supporting or opposing a motion, or in a trial or appellate brief.*]

AN ACCOUNTING IS PROPER IN THIS ACTION BECAUSE A FIDUCIARY RELATIONSHIP EXISTS BETWEEN THE PARTIES AND A DUTY RESTS ON THE DEFENDANT TO RENDER AN ACCOUNT.

Fiduciary Relationship and Duty to Account Exist. An accounting lies whenever a fiduciary relationship exists between the parties and a duty rests on the defendant to render an account (*San Pedro Lumber Co. v. Reynolds (1896) 111 Cal. 588, 596-597, 44 P. 309* ; *Esslinger v. Cummins (2006) 144 Cal. App. 4th 517, 523-528, 50 Cal. Rptr. 3d 538* ; *Kritzer v. Lancaster (1950) 96 Cal. App. 2d 1, 6-7, 214 P.2d 407*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a party's contention that no accounting lies. The form sets forth the point that an action for an accounting is proper when a fiduciary relationship exists between the parties and the defendant is under a duty to render an account.

This form may be used alone or combined with a memorandum relating to the specific procedural context in which counsel wishes to raise the issue regarding the propriety of an accounting. For example, this form may be used in combination with another form to oppose a general demurrer to a complaint for an accounting, a motion for judgment on the pleadings, or an objection to the introduction of evidence, or in any other proceeding in which it is contended that no accounting lies. For a discussion of objections to the introduction of evidence, see *Stilwell v. Trutanich (1960) 178*

Cal. App. 2d 614, 617-618, 3 Cal. Rptr. 285 .

In an appropriate case, this form may be submitted in opposition to the contention supported by the forms *set out in §§ 12.40 -12.43*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Chapters

For a form of general demurrer and a notice motion for judgment on the pleadings, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender).

[c] Related Memoranda

For memoranda supporting and opposing a general demurrer to a complaint or a motion for judgment on the pleadings, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings*

[3] Discussion of Authorities

[a] Fiduciary Relationship and Duty to Account Exist

The factual background of ***San Pedro Lumber Co. v. Reynolds*** *(1896) 111 Cal. 588, 44 P. 309* , is discussed in *§ 12.45[3][b]*. The complaint alleged that defendant had been plaintiff's trusted agent and employee for several years, that he had been defendant's branch manager, and that, as branch manager, his duties included keeping and accounting for all monies and property of the company coming into his hands, overseeing and directing all other company employees at the branch office, furnishing plaintiff from time to time with statements of the accounts, affairs, and property of the company, and paying over to plaintiff all monies received by him for plaintiff. The complaint further alleged that prior to a specified date, defendant had failed to account for or pay over to plaintiff considerable sums of money that had come into his hands for plaintiff's use and benefit, that defendant had appropriated these sums to his own use, that other considerable sums of money had been lost to the company through the dishonesty and embezzlement of other employees as a result of defendant's failure to properly discharge his duty as agent and manager of the business, and that an accounting was necessary to determine the precise amount of the losses. From a judgment for plaintiff, defendant appealed, contending among other things that the complaint did not state a cause of action.

The Supreme Court affirmed. It said the complaint showed that defendant was plaintiff's trusted agent, acting in a fiduciary capacity, and having for a long period of time the entire charge and control of its business at the branch office, and that by various kinds of misconduct, which were specially described, he caused losses and became liable in large sums of money, the true amounts of which could not be ascertained and determined without an accounting by defendant of the administration of his trust. The Court held that this was a sufficient ground for an accounting in equity and that the complaint stated a cause of action (*111 Cal. 588, 595*). The Court explained that the case presented a fiduciary relation between the parties in the nature of a trust, which brought it especially within equitable remedies (*111 Cal. 588, 596*). Quoting from Pomeroy's Equity Jurisprudence, § 1421, the Court said that a suit in equity for an accounting is proper when a fiduciary relationship exists between the parties and a duty rests on the defendant to render an account, and that when the relationship is such that a confidence is reposed by the principal in his agent and the matters for which an accounting is sought are peculiarly within the knowledge of the latter, equity will assume jurisdiction (*111 Cal. 588, 596-597*).

In ***Esslinger v. Cummins*** *(2006) 144 Cal. App. 4th 517, 50 Cal. Rptr. 3d 538* , the remainder beneficiary of a trust sent the trustee a written request for trust documents and an accounting covering several years. The trustee provided some information but declined to provide an accounting on the ground that a remainder beneficiary is not entitled to an

accounting. The beneficiary then petitioned the probate court for an order compelling the trustee to provide an accounting. The probate court ordered the trustee to prepare and file formal accountings for each of the relevant years. The trustee appealed, and the court of appeal affirmed (*144 Cal. App. 4th 517, 528-529)* .

The court of appeal acknowledged that a remainder beneficiary, with no right to current trust distributions, generally does not have a right to receive the trustee's annual accounting (*see Prob. Code § 16062(a)*). However, a remainder beneficiary may make a written request to the trustee for information about the assets, liabilities, receipts, and disbursements of the trust, the acts of the trustee, and the particulars relating to the administration of the trust relevant to the beneficiary's interest, including the terms of the trust (*Prob. Code § 16061*). If the trustee does not comply with a reasonable request within 60 days, and no report or account had been made within the six months preceding the remainder beneficiary's request, then the remainder beneficiary may petition the court to compel the trustee to report information about the trust or to account (*Prob. Code § 17200(b)(7)*). The court of appeal concluded that, because the trustee had not complied with the remainder beneficiary's request for information, the beneficiary had standing to seek an accounting, and the probate court had the power to order the trustee to account (*144 Cal. App. 4th 517, 523-528)* .

The factual background of ***Kritzer v. Lancaster*** *(1950) 96 Cal. App. 2d 1, 214 P.2d 407* , is discussed in *§ 12.45[4][a]*. The complaint alleged as follows: (1) there was a confidential relationship between plaintiff and defendant salesman; (2) plaintiff reposed great confidence in the salesman's friendship, integrity, and business judgment, particularly with regard to safe investments in corporate securities; (3) this was at all times known to defendants; (4) by an oral agreement defendants became plaintiff's trusted agents to handle and invest his money in sound securities; (5) defendants acted contrary to the terms of the agreement in buying and selling speculative and unsound stocks with plaintiff's money for their own gain and secret profit; and (6) this resulted in loss to plaintiff, the amount of which could not be ascertained without an accounting. The complaint prayed for an accounting of all acts and conduct by defendants with plaintiff's money and stock account and of all transactions conducted by defendants for plaintiff, either as his agent, defendant broker's own principal, or otherwise, that the profits and gains made by defendants therefrom be determined, as well as plaintiff's losses, and that judgment be rendered for such amount as the court may determine is due and payable to plaintiff.

The court of appeal, in reversing the judgment of dismissal, pointed out that an action for an accounting frequently presents a fiduciary relationship between the parties in the nature of a trust, which brings it especially within equitable remedies. The court said that when the allegations of a complaint show that defendant was a trusted agent of the plaintiff, acting in a fiduciary capacity and having for a long period of time the entire charge and control of plaintiff's business, and that by various kinds of misconduct, which are specially described, defendant caused losses and became liable in various sums of money, the true amounts of which cannot be ascertained and determined without an accounting, there is a sufficient ground for an accounting in equity (*96 Cal. App. 2d 1, 6-7*). The court held that the complaint, liberally construed, sufficiently stated a cause of action in equity for an accounting and was good as against a general demurrer (*96 Cal. App. 2d 1, 7*). The court also held that the complaint was good as against a special demurrer for uncertainty because, although many of the allegations could have been made more definite and certain, the complaint clearly stated a cause of action for an accounting because it appeared that a relationship existed that required an accounting and that there was something due plaintiff from the defendants (*96 Cal. App. 2d 1, 7*).

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1-12 California Points & Authorities § 12.47

§ 12.47 Opposing Contention That No Cause for an Accounting Exists--Complicated Accounts Rendering Action at Law Impractical

[1] FORM Opposing Contention That No Cause for an Accounting Exists--Complicated Accounts Rendering Action at Law Impractical

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

AN ACCOUNTING IS PROPER IN THIS CASE BECAUSE THE ACCOUNTS BETWEEN THE PARTIES ARE COMPLICATED, THEREBY RENDERING AN ACTION AT LAW IMPRACTICAL.

Complicated Accounts Rendering Action at Law Impractical. An action for an accounting may be brought, even though no fiduciary relationship exists between the parties, when the accounts are so complicated that an action at law for a sum certain would be impractical (*Civic Western Corp. v. Zila Industries, Inc. (1977) 66 Cal. App. 3d 1, 14, 135 Cal. Rptr. 915* ; *see Brea v. McGlashan (1934) 3 Cal. App. 2d 454, 460, 39 P.2d 877*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that no accounting lies. The form sets forth the point that an action for an accounting may be brought, even though no fiduciary relationship exists between the parties, when the accounts are so complicated that an action at law for a sum certain would be impractical.

These points and authorities may be used alone or combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue regarding the propriety of an accounting. For example, they may be used in combination with other points and authorities to oppose a general demurrer to a complaint for an accounting, a motion for judgment on the pleadings, or an objection to the introduction of evidence, or may be used in any other proceeding in which it is contended that no accounting lies. For a discussion of

objections to the introduction of evidence in accounting actions, see *Stilwell v. Trutanich (1960) 178 Cal. App. 2d 614, 617-618, 3 Cal. Rptr. 285* .

In an appropriate case, these points and authorities may be submitted in opposition to the contentions supported by the points and authorities set out in *§§ 12.40 -12.43*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Chapters

For a form of general demurrer and a notice motion for judgment on the pleadings, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities supporting and opposing a general demurrer to a complaint or a motion for judgment on the pleadings, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Complicated Accounts Rendering Action at Law Impractical

The factual background of ***Civic Western Corp. v. Zila Industries, Inc.*** *(1977) 66 Cal. App. 3d 1, 135 Cal. Rptr. 915* , is discussed in *§ 12.40[4][a]*. In reversing the summary judgment for plaintiff on defendant's cross-complaint with respect to the accounting action on the ground that triable issues of fact existed, the court of appeal said that an accounting cause of action is equitable in nature and may be sought when the accounts are so complicated that an ordinary legal action demanding a fixed sum is impracticable (*66 Cal. App. 3d 1, 14*).

The factual background of ***Brea v. McGlashan*** *(1934) 3 Cal. App. 2d 454, 39 P.2d 877* , is discussed in *§ 12.45[3][a]*. In affirming the judgment for plaintiff, the court of appeal said that ordinarily no accounting is necessary between an employer and an employee, but that when payment is alleged to be in the form of a percentage of the monies received by the employer, and the complaint alleges that plaintiff does not know what monies have been received through contracts procured by her, an accounting would be the only method of arriving at the amount due (*3 Cal. App. 2d 454, 460*). The court held that the complaint alleged sufficiently the employment, the manner of compensation, the performance of services showing some compensation to be due, and the fact that the correct amount could not be ascertained without an accounting (*3 Cal. App. 2d 454, 460*).

[4] Additional Authorities

[a] Complicated Accounts Rendering Action at Law Impractical

The factual background of *Kritzer v. Lancaster (1950) 96 Cal. App. 2d 1, 214 P.2d 407* , is discussed in *§ 12.45[4][a]* and *§ 12.46[3][a]*. Although the court of appeal, in holding that the complaint stated a cause of action for an accounting, rested its decision reversing the judgment on the ground that a confidential relationship was alleged to have existed between the parties, it added that, viewed in the light of the holding in *Brea v. McGlashan (1934) 3 Cal. App. 2d 454, 39 P.2d 877* , discussed in *§ 12.47[3]*; the complaint also stated a cause of action. The court then quoted at length from *Brea*, including the statement that ordinarily no accounting is necessary between an employer and an employee, but that when the payment is alleged to be in the form of a percentage of the monies received by the employer, and the complaint alleges that the plaintiff does not know what monies have been received through contracts procured by her, an accounting would be the only method of arriving at the amount due (*96 Cal. App. 2d 1, 7-8*).

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1-12 California Points & Authorities §§ 12.48-12.59

[Reserved]

§§ 12.48[Reserved]

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1-12 California Points & Authorities § 12.60

§ 12.60 Supporting Contention That Action Is Barred by Statute of Limitations--Accounting Is Ancillary to Main Action, Which Is Barred

[1] FORM Supporting Contention That Action Is Barred by Statute of Limitations--Accounting Is Ancillary to Main Action, Which Is Barred

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THIS ACTION FOR AN ACCOUNTING IS BARRED BY THE STATUTE OF LIMITATIONS BECAUSE THE ACCOUNTING SOUGHT IS MERELY ANCILLARY OR INCIDENTAL TO PLAINTIFF'S CAUSE OF ACTION FOR _____ [*specify*], WHICH IS BARRED BY THE PROVISIONS OF SECTION _____ [*specify statute of limitations applicable to main cause of action*] OF THE _____ [*specify code*].

A. Nature of Right Sued on as Determining Which Statute of Limitations Applies. The nature of the right sued on, not the form of action or the relief demanded, determines the applicability of the statute of limitations (*Jefferson v. J.E. French Co. (1960) 54 Cal. 2d 717, 718, 7 Cal. Rptr. 899, 355 P.2d 643*).

B. Accounting Ancillary to Main Action. When an accounting is merely ancillary to the perfection of the right sued on, the statute of limitations governing the right basically in issue applies (*Jefferson v. J.E. French Co. (1960) 54 Cal. 2d 717, 719, 7 Cal. Rptr. 899, 355 P.2d 643*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a defendant's contention that the accounting prayed for is merely ancillary or incidental to the basic right sued on, that the action on the right basically in issue is barred by the statute of limitations governing it, and that the longer statute [*Code Civ. Proc. § 343* (four years)] applicable to an

action for an accounting does not apply.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to establish the specific statute of limitations that applies to the action in which an ancillary or incidental accounting is sought. For example, when it appears from the face of the complaint or from judicially noticed matter, that the accounting sought is merely incidental to some other cause of action and that the other cause of action is barred by the applicable statute of limitations, the points and authorities may be combined with points and authorities supporting a general demurrer to the complaint [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*] or a nonstatutory motion for judgment on the pleadings. If the bar of the statute does not appear from the face of the complaint, these points and authorities may be combined with points and authorities supporting a motion for summary judgment [*see Code Civ. Proc. § 437c*], or if the bar of the statute has been pleaded in the answer, a motion for a separate trial of the defense [*see Code Civ. Proc. § 597*], or if points and authorities are required by the court, a motion for nonsuit [*see Code Civ. Proc. § 581c*], a motion for judgment [*see Code Civ. Proc. § 631.8*], or an objection at trial to the introduction of evidence.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Chapters

For forms of demurrers and a notice of motion for judgment on the pleadings, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For forms for use on motions for summary judgment or for separate trial of the defense that the action is barred by the statute of limitations, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* and *Ch. 3, Abatement of Actions, § 3.110* (Matthew Bender), respectively. For general forms for use in proceedings involving statutes of limitations, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities supporting and opposing demurrers and motions for judgment on the pleadings, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For memoranda of points and authorities supporting and opposing motions for summary judgment and motions for separate trial of an affirmative defense, see Ch. 221, *Summary Judgments* and *Ch. 10, Abatement and Survival of Actions, § 10.30* et seq. For memoranda of points and authorities supporting and opposing proceedings involving the statutes of limitation, see Ch. 143, *Limitation of Actions* .

[d] Opposing Points and Authorities

In an appropriate case when the accounting sought is not merely incidental to some other action, the points and authorities in *§ 12.61* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Nature of Right Sued on as Determining Which Statute of Limitations Applies

Jefferson v. J.E. French Co. *(1960) 54 Cal. 2d 717, 7 Cal. Rptr. 899, 355 P.2d 643* , was an action filed on February 2, 1959, to recover a balance due under an oral employment contract by which plaintiff had been employed as a sales manager of defendants' automobile agency at a specified salary, payable monthly, plus 10 percent of the profits, payable annually, and for an accounting. Plaintiff had received all his monthly salary payments and certain sums as his percentage of profits for 1955, 1956, and 1957, but no payments had been made to him on account of profits for 1953, 1954, and 1958. However, before entry of the judgment, plaintiff waived any claim to profits for the two-year period

prior to the commencement of the action. Defendants demurred to the complaint on the ground the action was barred by the two-year provision set forth in *Code Civ. Proc. § 339(1)*, requiring, with specified exceptions, that an action on a contract, obligation, or liability not founded on an instrument of writing be commenced within two years from the date it accrues. Plaintiff contended that the action was essentially equitable in nature and that such actions are governed by the four-year limitation of *Code Civ. Proc. § 343* (four years on action as to which no other limitation is specified). The demurrer was sustained without leave to amend and plaintiff appealed from the subsequent judgment for defendants. The Supreme Court affirmed. The Court concluded that the primary purpose of the action was to recover money under an oral contract and held that the nature of the right sued on, not the form of action or the relief demanded, determines the applicability of the statute of limitations (*54 Cal. 2d 717, 718*).

[b] Accounting Ancillary to Main Action

The factual background of ***Jefferson v. J.E. French Co.*** *(1960) 54 Cal. 2d 717, 7 Cal. Rptr. 899, 355 P.2d 643* , is discussed in *§ 12.60[3][a]*. In affirming the judgment for defendants on the ground the action was barred by the two-year statute of limitations applicable to oral contracts (*Code Civ. Proc. § 339(1)*), the Court held that the accounting sought was merely ancillary to the perfection of plaintiff's right under the oral contract, and that aspect of the action should not operate to avoid the effect of a statute prescribing a period of limitation with respect to the right basically in issue (*54 Cal. 2d 717, 719*).

Citing the following cases, the Court acknowledged that a number of decisions held or contained language that might be construed to mean that *Code Civ. Proc. § 343* is the applicable statute of limitations if an accounting is involved: *McArthur v. Blaisdell (1911) 159 Cal. 604, 608, 115 P. 52* ; *West v. Russell (1888) 74 Cal. 544, 546-547, 16 P. 392* ; *Schaefer v. Berinstein (1960) 180 Cal. App. 2d 107, 132-133, 4 Cal. Rptr. 236* ; *People v. Taliaferro (1957) 149 Cal. App. 2d 822, 825, 309 P.2d 48* ; *Austin v. Harry E. Jones, Inc. (1939) 30 Cal. App. 2d 362, 368, 86 P.2d 379* ; *Swan v. Smith (1929) 102 Cal. App. 541, 544, 283 P. 829* ; *Freeman v. Donohoe (1923) 65 Cal. App. 65, 81-85, 223 P. 431* ; and *Allsopp v. Joshua Hendy Machine Works (1907) 5 Cal. App. 228, 234, 90 P. 39* . The Court disapproved these cases insofar as they were contrary to the views expressed by it in *Jefferson.* The Court said that none of the cited decisions considered the problem in the light of the principle that the nature of the right sued on should be determinative rather than matters of form and procedure, that in *West*, as well as some of the other cases cited, the question of whether *Code Civ. Proc. § 343* applied was unimportant because written agreements were involved as to which the applicable period of limitation would in any event have been four years under *Code Civ. Proc. § 337*, and that this fact may explain the lack of careful consideration of the problem (*54 Cal. 2d 717, 719-720*).

[4] Additional Authorities

[a] Nature of Right Sued on as Determining Which Statute of Limitations Applies

The factual background of *Tostevin v. Douglas (1958) 160 Cal. App. 2d 321, 325 P.2d 130* , is discussed in *§ 12.42[3][a]*. The complaint was entitled "Complaint for Declaratory Judgment and for an Accounting." The court of appeal, in affirming the judgment of dismissal on the ground the action was barred by the two-year period of limitations in *Code Civ. Proc. § 339(1)*, said that the action was really one to recover an amount due for breach of the terms of an oral agreement and that the nature of the right sued on and not the form of the action, nor the relief demanded, determines the applicability of the statute of limitations (*160 Cal. App. 2d 321, 328*). Quoting from *Bendien v. Solov (1949) 89 Cal. App. 2d 904, 907, 202 P.2d 372* , the court said that there was no merit in plaintiffs' contention that the two-year statute of limitations was inapplicable because the suit was for an accounting. The court held that entitling an action a complaint for an accounting does not change the character of the action and that the character of the action is to be determined not from the relief demanded but from the allegations of the complaint (*160 Cal. App. 2d 321, 328*).

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1-12 California Points & Authorities § 12.61

§ 12.61 Opposing Contention That Action Is Barred by Statute of Limitations--Action for Accounting May Be Commenced at Any Time Within Four Years After It Accrues [Code Civ. Proc. § 343]

[1] FORM Opposing Contention That Action Is Barred by Statute of Limitations--Action for Accounting May Be Commenced at Any Time Within Four Years After It Accrues [Code Civ. Proc. § 343]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THIS ACTION FOR AN ACCOUNTING IS NOT BARRED BY THE STATUTE OF LIMITATIONS BECAUSE IT [INVOLVES A DUTY TO ACCOUNT ARISING FROM THE FIDUCIARY RELATIONSHIP OF THE PARTIES AND] IS [THEREFORE] GOVERNED BY SECTION 343 OF THE CODE OF CIVIL PROCEDURE AND HAS BEEN COMMENCED WITHIN FOUR YEARS AFTER THE CAUSE OF ACTION ACCRUED, AS PERMITTED BY THAT SECTION.

A. Four-Year Statute of Limitations. An action for relief not provided for in *Sections 312-342 of the Code of Civil Procedure* must be commenced within four years after the cause of action accrues (*Code Civ. Proc. § 343*).

B. Action for Accounting as Governed by *Code Civ. Proc. § 343*. *Section 343 of the Code of Civil Procedure*, prescribing a four-year period of limitation on the commencement of actions, applies to actions for an accounting (*Moss v. Moss (1942) 20 Cal. 2d 640, 644, 128 P.2d 526*).

[*Optional*] **C. *Code Civ. Proc. § 343* as Applying to Actions Seeking an Accounting When Duty to Account Arises From Fiduciary Relationship of Parties.** *Section 343 of the Code of Civil Procedure*, prescribing a four-year period of limitation on the commencement of actions, applies when the duty to account arises from the fiduciary relationship of the parties (*Manok v. Fishman (1973) 31 Cal. App. 3d 208, 210-213, 107 Cal. Rptr. 266*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the action seeking an accounting is barred by some period of limitations less than four years and to establish that the applicable statute of limitations is *Code Civ. Proc. § 343*, requiring that an action for relief not otherwise specified in *Code Civ. Proc. §§ 312-342* be commenced within four years after it accrues.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to establish that the action seeking an accounting is governed by *Code Civ. Proc. § 343*. For example, if the primary right sued on is the right to an accounting and the accounting is not merely incidental to some other cause of action which is barred by a shorter period of limitation, these points and authorities may be used to oppose any of the proceedings, enumerated in *§ 12.60[2][a]*. Paragraph C should be included when the duty to account arises from the fiduciary relationship of the parties or the accounting is merely ancillary to other relief sought resulting from a breach of the fiduciary relationship.

If the primary right sued on is for an accounting and was commenced more than four years after the action accrued, these points and authorities may be used to support a defendant's contention that the action is barred by the statute of limitations and may be used in combination with points and authorities supporting any of the proceedings enumerated in *§ 12.60[2][a]*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Action for Accounting as Governed by Code Civ. Proc. § 343

Moss v. Moss *(1942) 20 Cal. 2d 640, 128 P.2d 526* , was an action for declaratory relief seeking a determination of plaintiff's obligations to his former wife under a property settlement agreement. Defendant's demurrer to the complaint on the ground, among others, that the action was barred by the statute of limitations, was sustained without leave to amend, and plaintiff appealed. The Supreme Court affirmed. Plaintiff contended that the complaint stated a cause of action for cancellation of the agreement. The Court pointed out that, since there was no statute of limitation expressly governing an action for cancellation of an instrument because of its illegality, the action was governed by *Code Civ. Proc. § 343* (four years), and that under that section the action was barred because it had been filed more than 10 years after the cause of action accrued (*20 Cal. 2d 640, 644*). In support of its holding as to the applicability of *Code Civ. Proc. § 343*, the Court reiterated the "well settled" rule in California that the four years' limitation of *Code Civ. Proc. § 343* applies to all suits in equity not strictly of concurrent cognizance in law and equity and pointed out that the section has been considered applicable to actions for an accounting, among others (*20 Cal. 2d 640, 644*).

Counsel should note that the Supreme Court, in support of its statement that *Code Civ. Proc. § 343* applies to actions for an accounting, cited *McArthur v. Blaisdell (1911) 159 Cal. 604, 115 P. 52* , and *West v. Russell (1888) 74 Cal. 544, 16 P. 392* . Both these cases are among those disapproved by the *Supreme Court in Jefferson v. J.E. French Co. (1960) 54 Cal. 2d 717, 7 Cal. Rptr. 899, 355 P.2d 643* (discussed in *§ 12.60[3][a], [b]*), to the extent that they are contrary to the views expressed in *Jefferson.* See discussion of *Manok v. Fishman (1973) 31 Cal. App. 3d 208, 107 Cal. Rptr. 266* , in.

[b] Code Civ. Proc. § 343 as Applying to Actions Seeking an Accounting When Duty to Account Arises From Fiduciary Relationship of Parties

Manok v. Fishman *(1973) 31 Cal. App. 3d 208, 107 Cal. Rptr. 266* , was an action based on an oral partnership agreement for an accounting and declaratory relief. Defendant's demurrer to the complaint, on the ground that the action

was barred by the two-year limitation period provided by *Code Civ. Proc. § 339(1)* for bringing an action on a contract, obligation, or liability not founded on an instrument in writing, was sustained without leave to amend, and plaintiff appealed from the subsequent judgment (order) of dismissal.

The court of appeal reversed. The court, in holding that the action was governed by *Code Civ. Proc. § 343*, pointed out the following: (1) the general rule is that partners have no right to bring an action at law against one another until partnership affairs are wound up and the balance due between the members is agreed on; (2) prior to that time, the only remedy available to a partner is in equity, seeking an accounting; and (3) under *Corp. Code § 15022*, a partner has a statutory right to an accounting (a) when wrongfully excluded from the partnership business, (b) when the right to an accounting is based on a contractual provision contained in the partnership agreement, or (c) when it is "just and reasonable" under the circumstances (*31 Cal. App. 3d 208, 211*).

The court, citing *Freeman v. Donohoe (1923) 65 Cal. App. 65, 223 P. 431* , explained that it had long been the rule that the four-year period of limitation set forth in *Code Civ. Proc. § 343* applied to an action between partners for an accounting (*31 Cal. App. 3d 208, 211*). The court acknowledged that *Freeman* as one of the cases disapproved by the *Supreme Court in Jefferson v. J.E. French Co. (1960) 54 Cal. 2d 717, 7 Cal. Rptr. 899, 355 P.2d 643* (discussed in *§ 12.60[3][a]* and *[b]*), to the extent that it was contrary to the views expressed in *Jefferson*, and the *Manok* court quoted extensively from the *Jefferson* case (*31 Cal. App. 3d 208, 211-212*). In determining what the Supreme Court in *Jefferson* disapproved of in *Freeman*, the *Manok* court noted the following: (1) the Supreme Court's disapproval was localized to pages 81-85 of the *Freeman* opinion; (2) the discussion in *Freeman* of the statute of limitations commences on page 79, where the *Freeman* court pointed out that an action for the settlement of partnership affairs was in substance an action for the enforcement of a trust and for an accounting, which historically had been brought in courts of equity whose function included the enforcement of trusts; (3) pages 81-85 of the *Freeman* opinion on the other hand include a discussion of some earlier cases which held *Code Civ. Proc. § 343* applicable to actions on contracts in which relief in the form of an accounting was sought, contrary to the overruling decision in *Jefferson;* and (4) it was thus necessary for the Supreme Court in *Jefferson* to disapprove this part of the *Freeman* opinion insofar as it was contrary to the views expressed in *Jefferson.* The *Manok* court added that the most significant part of the *Freeman* case was the order made by he Supreme Court when it denied a hearing in that case; this order, published in *65 Cal. App. at page 94* , states that the Supreme Court (1) did not approve that portion of the *Freeman* opinion which seems to hold that the action may be regarded as on a contract, obligation, or liability founded on an instrument in writing, and (2) was satisfied with the conclusion in *Freeman* that the statute of limitations applicable to the case was the one prescribed by *Code Civ. Proc. § 343*. The *Manok* court held that, inasmuch as *Jefferson* disapproved only certain language appearing on pages 81-85 of *Freeman*, it had to regard the language of the Supreme Court itself, appearing at page 94 of *Freeman* as an authoritative statement of the present law (*31 Cal. App. 3d 208, 212*).

The *Manok* court concluded that the original contract by which the partnership allegedly began was not the primary right sued on, but that the action was based on the alleged relationship of the parties carrying on a jointly owned business, and the fiduciary duties that the law imposes on such parties. The court said that the law imposes on such parties obligations arising out of the nature of their fiduciary relationship and that one of these is the duty to account as provided in *Corp. Code §§ 15021* and *15022*. The court held that this is the primary right that is the basis of the action, and that the action is not governed by the statute relating to actions on a contract, but by the four-year catch-all statute provided in *Code Civ. Proc. § 343* (*31 Cal. App. 3d 208, 213*).

[4] Additional Authorities

[a] Code Civ. Proc. § 343 as Applying to Actions Seeking an Accounting When Duty to Account Arises From Fiduciary Relationship of Parties

In *Schneider v. Union Oil Co. (1970) 6 Cal. App. 3d 987, 86 Cal. Rptr. 315* , plaintiff's complaint set forth five causes of action as follows: (1) to establish plaintiff's status in defendant company as a stockholder, (2) for an ancillary

accounting, (3) to quiet title to shares, (4) for declaratory relief, and (5) in the alternative, for damages suffered by reason of defendant's breach of its fiduciary duty. Plaintiff and her father had owned, as joint tenants, shares of stock of defendant corporation. The father, without plaintiff's knowledge, forged her signature on the stock certificate and caused it to be transferred to a third party. After the father's death some 12 years later, plaintiff learned of the transfer and demanded that defendant recognize and confirm her stock ownership and her rights and status as a stockholder, but defendant refused. Defendant's demurrer to the complaint was sustained without leave to amend on the ground that the action was for conversion of shares of stock and barred by the three-year period of limitation prescribed by former Code Civ. Proc. § 338(3) [*now see Code Civ. Proc. § 338(c)*]. Plaintiff appealed from the subsequent judgment of dismissal.

The court of appeal reversed. The court held that the relationship between a corporation and its stockholders is fiduciary in the nature of a trusteeship, that the corporation transferred title to the stock at its peril, and that when a corporation transfers title to stock on a forged or unauthorized endorsement or refuses to transfer title at the demand of the owner, it commits an action that is both one of conversion and a breach of trust and that plaintiff has an election of remedies (*6 Cal. App. 3d 987, 992*). The court pointed out that the nature and extent of a plaintiff's recovery is substantially different, depending on the remedy chosen. If plaintiff sues for conversion, the damages are measured by the value of the stock as of the date of the wrongful transfer or refusal to transfer, with interest from that time, whereas if plaintiff sues to establish his or her interest in the corporation, plaintiff is entitled to receive a new certificate as evidence of stock ownership, together with all dividends declared thereon from and after the date of the wrongful transfer or refusal to transfer (*6 Cal. App. 3d 987, 993*). The court held that the action was based on defendant's breach of its fiduciary duty and that the four-year period of limitation under *Code Civ. Proc. § 343* applied (*6 Cal. App. 3d 987, 993*). The court, however, added that even if it regarded the action as one for conversion and applied the three-year period prescribed by former Code Civ. Proc. § 338(3) [*now see Code Civ. Proc. § 338(c)*], plaintiff's action was not barred because the cause of action did not accrue until she acquired knowledge of the defendant's breach of its fiduciary obligation to her (*6 Cal. App. 3d 987, 993*).

See also *Estate of Peebles (1972) 27 Cal. App. 3d 163, 103 Cal. Rptr. 560* , in which the trial court had dismissed an action following an order sustaining a general demurrer to plaintiff's complaint without leave to amend on the ground that the action by an administratrix-with-the-will-annexed seeking recovery of capital allegedly contributed to a partnership by the decedent and for an accounting was barred by the statute of limitations. The administratrix had been appointed more than four years before the complaint was filed. The court of appeal (1) pointed out that an action for an accounting may be subject to the four-year period of limitation provided in *Code Civ. Proc. § 343*, (2) concluded under the applicable code provisions that the cause of action accrued when the decedent died, (3) held that the estate representative had a maximum of four years, or two years if *Code Civ. Proc. § 339*, relating to actions on oral contracts, obligations, or liabilities, applied, in which to seek an accounting and had not done so, and (4) affirmed the judgment (*27 Cal. App. 3d 163, 166, 169*).

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C. Statute Of Limitations

1-12 California Points & Authorities §§ 12.62-12.79

[Reserved]

§§ 12.62[Reserved]

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1-12 California Points & Authorities § 12.80

§ 12.80 Supporting Contention That Trial Court's Disposition of Accounting Action Is Improper--Mere Statement of Balance Due Without Ordering Reference

[1] FORM Supporting Contention That Trial Court's Disposition of Accounting Action Is Improper--Mere Statement of Balance Due Without Ordering Reference

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE TRIAL COURT'S MERE STATEMENT OF THE BALANCE DUE PLAINTIFF, WITHOUT ORDERING A REFERENCE, IS NOT A PROPER DISPOSITION OF THIS ACTION.

Mere Statement by Trial Court of Balance Due Without Reference as Insufficient. In an action seeking an accounting, a statement of the balance due in the trial court's statement of decision, without a reference, is not a proper disposition of the action (see *Whann v. Doell (1923) 192 Cal. 680, 684, 221 P. 899* ; *ABC Egg Ranch v. Abdelnour (1963) 223 Cal. App. 2d 12, 17, 35 Cal. Rptr. 487*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention in an action seeking an accounting that the trial court erred in failing to order a reference to take an account or to properly take the account itself.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue as to the propriety of the procedure adopted by the trial court in an action for an accounting in which the trial court failed to order a reference to take an account and merely found or gave judgment for the balance due. For example, the points and authorities may be used in combination with points and authorities supporting a notice of intention to move for a new trial [*see Code Civ. Proc. § 657*] or a motion to set aside and vacate the judgment [*see Code Civ. Proc. § 663*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the point of law stated.

[b] Related Pleading and Practice Chapters

For a form of notice of intention to move for a new trial or to set aside and vacate the judgment, see *California Forms of Pleading and Practice, Ch. 371, Motions After Trial, § 371.60 et seq.* (Matthew Bender)

[c] Related Points and Authorities

For memoranda of points and authorities supporting and opposing a motion for new trial or a motion to set aside and vacate the judgment, see *Ch. 155, Motions After Trial, §§ 155.50 et seq. and 155.320* et seq., in this set.

[d] Opposing Points and Authorities

In an appropriate case, the points and authorities in *§ 12.81* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Mere Statement by Trial Court of Balance Due Without Reference as Insufficient

The factual background of ***Whann v. Doell*** *(1923) 192 Cal. 680, 221 P. 899* , is discussed in *§ 12.45[3][a]*. After pointing out that the issues raised by the pleadings in an accounting action may be only those with relation to the existence of the relationship that requires an accounting and the statement that some balance is due the plaintiff and that the other issues are raised by the account and the exceptions to it, the Supreme Court said that a statement of the balance due in the findings of the court, without a reference, and without an account or without exceptions being taken to specific items, is not a proper disposition of the action. The reasons given were as follows: (1) the issues between the parties are not framed or disposed of in such manner as to show the method by which the general result is reached; (2) the aggrieved party cannot successfully present his or her grievances to an appellate court because the appellate court must assume in support of the judgment that every controverted fact was determined in favor of the respondent; and (3) even if the appellate court had the disposition and power to reexamine the entire account, the presumption in favor of the action of the trial court as to the contested items would ordinarily render such action wholly nugatory (*192 Cal. 680, 684*).

Nevertheless, after considering the trial court's findings and the defendant's contentions with respect to them, the Court concluded that each item protested by the defendant had been properly allowed. Consequently, she was not prejudiced on her appeal by the general presumption in favor of a judgment and was not injuriously affected by the method of the trial court, "which might otherwise call for a reversal." The Court therefore affirmed the judgment (*192 Cal. 680, 688*).

ABC Egg Ranch v. Abdelnour *(1963) 223 Cal. App. 2d 12, 35 Cal. Rptr. 487* , was an action for an accounting, dissolution of a partnership, capital contribution by defendant, and distribution of assets under an alleged oral partnership between the parties. The trial court, in its findings of fact, found that the parties had formed a partnership to carry on the business of operating a wholesale egg route, that the profits and losses were to be divided equally, that each party was to make an equal capital contribution, that defendant did not contribute equal capital, that defendant was to receive $100 per week for his services, that the parties had agreed on a named firm to prepare an accounting and audit of the partnership business, and that defendant had drawn more than $100 per week salary as agreed on. The trial court rendered judgment dissolving the partnership as of a specified date, adjudging that plaintiff have title and possession of a truck and that defendant have title to an air conditioning unit purchased by the partnership, awarding plaintiff the sum

of $6,635.70, and adjudging that the cost of the audit of $600 be paid one half by each party. Defendant appealed.

The court of appeal reversed with directions to the trial court to vacate the findings and judgment and to reopen the case for the taking of such additional evidence as may be necessary to prepare proper findings. Quoting 38 Cal. Jur. 2d, *Partnership* § 157, the court said that in an action for an accounting between partners, the findings must set forth the partnership assets, their value, and the capital balances of the partners, although there is no requirement that the assets be particularly described (*223 Cal. App. 2d 12, 16*). Quoting *Davis v. California Motors (1946) 73 Cal. App. 2d 241, 246-247, 166 P.2d 52* , which, in turn, quoted *Whann v. Doell (1923) 192 Cal. 680, 684, 221 P. 899* (discussed *above*), the court said that in the absence of a reference, a mere statement of the balance due in the findings of the court is not a proper disposition of the action (*223 Cal. App. 2d 12, 17*). The court further set forth the nature of the findings required on the reopening of the case in order for the trial court to comply with the rule set out in *§ 12.81* (*223 Cal. App. 2d 12, 17-19*).

The findings of fact referred to in the above discussed cases are no longer required, having been replaced by a statement of decision [*see Code Civ. Proc. § 632*]. Nevertheless, the rule applied in these cases appears to be equally applicable to statements of decision.

[4] Additional Authorities

[a] Mere Statement by Trial Court of Balance Due Without Reference as Insufficient

Regalado v. Regalado (1961) 198 Cal. App. 2d 549, 18 Cal. Rptr. 468 , was an action for partition of realty and for an accounting of all income received by defendant as rent for the property and for judgment against defendant for the amount found due plaintiff as her share of the rents. The trial court found that the Regalados owned the property as tenants in common, each owning an undivided one-half interest, that the realty was subject to a deed of trust, that partition could not be made without prejudice to the owners, and that a sale was necessary. It rendered an interlocutory judgment decreeing that the realty be sold and the proceeds applied in a specified manner, including the payment to defendant Regalado of $1,976.42 as reimbursement for principal paid on the trust deed in installments of $79 per month. Defendant appealed, contending among other things, that, with respect to the court's finding that defendant had paid $1,976.42 on the principal of the note secured by the trust deed, it could not be determined how or for what period of time the court found the amount was paid. The court of appeal held that this point was well taken (*198 Cal. App. 2d 549, 553*). It pointed out that the trial court failed to cast any detailed account, only finding that defendant did pay this sum and was entitled to credit. The appellate court held, under the authority of *Whann v. Doell (1923) 192 Cal. 680, 221 P. 899* (discussed in *§ 12.80[3][a]*), that the finding was insufficient since the reviewing court could not ascertain from the record the manner in which the sum was calculated, and it reversed that portion of the interlocutory judgment requiring its payment from the sale proceeds (*198 Cal. App. 2d 549, 553, 555*).

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1-12 California Points & Authorities § 12.81

§ 12.81 Opposing Contention That Trial Court's Disposition of Accounting Action Is Improper--Account Need Not Be Stated in Accepted Bookkeeping Fashion

[1] FORM Opposing Contention That Trial Court's Disposition of Accounting Action Is Improper--Account Need Not Be Stated in Accepted Bookkeeping Fashion

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE TRIAL COURT'S STATEMENT OF THE ACCOUNT IN THIS ACTION IS ADEQUATE BECAUSE THE CONTROVERTED ITEMS OF THE ACCOUNT AND THEIR DISPOSITION CAN BE INTELLIGENTLY ASCERTAINED FROM _____ [PROCEDURE FOLLOWED *and/or* THE RECORD]; THE COURT WAS NOT REQUIRED TO STATE THE ACCOUNT IN ACCEPTED BOOKKEEPING FASHION.

Sufficiency of Account. In taking an account, there is no requirement that the trial court state the account in an accepted bookkeeping fashion; rather, any procedure or record from which it can be intelligently ascertained what the issues were as to the controverted items and how these issues were disposed of by the trial court will suffice for the purpose (*Whann v. Doell (1923) 192 Cal. 680, 684, 221 P. 899* ; *Blase v. Pedlow (1960) 183 Cal. App. 2d 367, 373, 6 Cal. Rptr. 635*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that the mere statement by a trial court of the balance due without ordering a reference is an improper disposition of an accounting action. The form sets forth the general points that the trial court in taking an account is not required to state the account in an accepted bookkeeping fashion and that any procedure or record from which it can be intelligently ascertained what the issues were as to the controverted items and how these issues were disposed of by the trial court will suffice for the purpose.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue as to the propriety of an accounting. For example, they may be combined with points and authorities opposing a notice of intention to move for a new trial [*see Code Civ. Proc. § 657*] or a motion to set aside and vacate the judgment [*see Code Civ. Proc. § 663*].

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities set out in *§ 12.80*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the point of law stated.

[b] Related Pleading and Practice Chapters

For forms for use on motions for a new trial or to set aside and vacate the judgment, see *California Forms of Pleading and Practice, Ch. 371, Motions After Trial § 371.60* et seq. (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities supporting and opposing a motion for new trial or a motion to set aside and vacate the judgment, see *Ch. 155, Motions After Trial §§ 155.50 et seq. and 155.320* et seq.

[3] Discussion of Authorities

[a] Sufficiency of Account

The factual background of ***Whann v. Doell*** *(1923) 192 Cal. 680, 221 P. 899* , is discussed in *§ 12.45[3][a]*. In affirming the judgment, the Supreme Court said that it is obvious that a statement of the balance due in the findings of the court, without a reference, and without an account, or without exceptions being taken to specific items, is not a proper disposition of the action, but that, on the other hand, the contention that an account must be stated in accepted bookkeeping fashion cannot be maintained. The Court said that any procedure or record from which it can be intelligently ascertained what the issues were as to the controverted items and how these issues were disposed of by the trial court will suffice for the purpose, whether the matter appears from the findings, the decree, or a bill of exceptions, showing the controversy and its disposition (*192 Cal. 680, 684-685*). The Court considered the trial court's findings and appellant's contentions with respect to them and held that under the facts of the case defendant was not prejudiced by the method of trial and decision adopted by the trial court. The Court accordingly affirmed the judgment (*192 Cal. 680, 686-688*).

Blase v. Pedlow *(1960) 183 Cal. App. 2d 367, 6 Cal. Rptr. 635* , was an action for an accounting based on an alleged oral partnership to operate an auto wrecking business and for other relief. The trial court found (1) that plaintiff had been originally employed under an oral agreement to perform certain labor for defendant in her auto towing service and then by oral agreement further employed to manage an auto wrecking business established by defendant and, as compensation for his services, was to be paid a sum equal to one half of the net profits of the business and (2) that full and fair accountings had been made by defendant and accepted by plaintiff during the course of the employment. The trial court concluded that no partnership ever existed between the parties, that plaintiff was not entitled to an accounting, and that plaintiff was entitled to recover nothing in the action. Plaintiff appealed.

The court of appeal affirmed. Quoting from *Davis v. California Motors (1946) 73 Cal. App. 2d 241, 166 P.2d 52* , which in turn quoted from *Whann v. Doell (1923) 192 Cal. 680, 684, 221 P. 899* (discussed *above*), the court said that it was true that in the absence of a reference, a mere statement of the balance due in the findings of the court is not a proper disposition of the action, but that, on the other hand, the contention that an account must be stated in accepted bookkeeping fashion cannot be maintained. Any procedure or record from which it can be intelligently ascertained what

the issues were as to the controverted items and how these issues were disposed of by the trial court will suffice for the purpose, whether the matter appears from the findings, the decree, or a bill of exceptions, showing the controversy and the disposition thereof (*183 Cal. App. 2d 367, 373*). The court of appeal concluded from the record in the case that these requirements had been complied with (*183 Cal. App. 2d 367, 373*).

The findings of fact referred to in the above discussed cases are no longer required, having been replaced by a statement of decision [*see Code Civ. Proc. § 632*]. Nevertheless, the rule applied in these cases appears to be equally applicable to statements of decision.

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CHAPTER 13 ADVERSE POSSESSION

1-13 California Points & Authorities 13.syn

AUTHOR: Virginia A. Johnson

§ 13.syn Synopsis to Chapter 13: ADVERSE POSSESSION

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§§ 13.05-13.09 [Reserved]

§ 13.10 Supporting Motion for New Trial in Quiet Title Action--Evidence Insufficient to Establish Adverse Possession

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[3] Discussion of Authorities

[a] Grounds for New Trial

[b] Elements Required for Adverse Possession

[c] Burden of Proof

[d] Acts of Occupation Indicating Ownership

[e] Notice to Owner

[f] Offer to Buy

[g] Renunciation

[h] Occupation By Mistake

[i] Nonpayment of Taxes

[j] Good Faith Possession

[k] Incorrect Land Description

[4] Additional Authorities

[a] Elements Required for Adverse Possession

[b] Burden of Proof

[c] Acts of Occupation Indicating Ownership

[d] Notice to Owner

[e] Renunciation

[f] Occupation By Mistake

[g] Offer to Buy

[h] Good Faith Possession

[i] Incorrect Land Description

§ 13.11 Opposing Motion for New Trial in Quiet Title Action--Possession by Plaintiff's Tenant Attributed to Plaintiff

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[3] Additional Authorities

[a] Possession of Tenant Attributed to Landlord

§ 13.12 Opposing Motion for New Trial in Quiet Title Action--Evidence Sufficient to Show Notice of Adverse Claim

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Presumption of Notice

[b] Proof Necessary

[4] Additional Authorities

[a] Presumption of Notice

[b] Proof Necessary

§ 13.13 Opposing Motion for New Trial in Quiet Title Action--Evidence Sufficient to Show Payment of Taxes

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Redemption

[b] Payment By Two Claimants

[c] Misdescription on Assessment Rolls

[d] Nonpayment After Title Acquired

[e] Taxes Not Assessed

[4] Additional Authorities

[a] Redemption

[b] Payment By Two Claimants

[c] Misdescription on Assessment Rolls

[d] Nonpayment After Title Acquired

[e] Taxes Not Assessed

§ 13.14 Opposing Motion for New Trial in Quiet Title Action--Evidence Sufficient to Show Possession

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Fence as Substantial Enclosure

[b] Enclosure By Fence and Natural Barriers

[c] Temporary Destruction of Portions of Enclosure

[d] Farming Land Cultivated in Usual Manner

[e] Improvement of Town Lot

[4] Additional Authorities

[a] Enclosure By Fence and Natural Barriers

§ 13.15 Opposing Motion for New Trial in Quiet Title Action--Evidence Sufficient to Establish Claim Under Written Instrument

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Ordinary Use

[b] Use As City Residence

[4] Additional Authorities

[a] Ordinary Use

§§ 13.16-13.19 [Reserved]

§ 13.20 Supporting Motion for Summary Judgment in Quiet Title Action--Plaintiff Not in Adverse Possession

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[3] Discussion of Authorities

[a] Elements of Adverse Possession

[b] Occupation With Permission

[c] Occupation By Lessee

[d] Occupation By Mortgagor

[e] Occupation By Tenant in Common

[f] Recordation of Conveyance to Cotenant

[g] Interruption of Possession

[h] Privity Necessary for Tacking

[i] Limitations Period Does Not Run While Parties Are in Fiduciary Relationship

[4] Additional Authorities

[a] Occupation With Permission

[b] Occupation By Tenant in Common

[c] Recordation of Conveyance to Cotenant

[d] Interruption of Possession

§ 13.21 Opposing Defendant's Motion for Summary Judgment in Quiet Title Action--Possession Actually Adverse

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Hostile Possession

[b] Possession Commenced By Mistake

[c] Offer to Purchase Claim Before Title Acquired

[d] Offer to Purchase Interest After Title Acquired

[4] Additional Authorities

[a] Hostile Possession

[b] Possession Commenced By Mistake

§ 13.22 Opposing Motion for Summary Judgment in Quiet Title Action--Possession Adverse As to Cotenant

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Acts of Ownership Adverse to Cotenants

[b] Recordation of Deed Conveying Entire Interest

[4] Additional Authorities

[a] Acts of Ownership Adverse to Cotenants

§ 13.23 Opposing Motion for Summary Judgment in Quiet Title Action--Possession Continuous for Five Years

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Continuous Personal Presence Not Required

[b] Periods of Vacancy

[c] Seasonal Use

[d] Slight Use

[4] Additional Authorities

[a] Continuous Personal Presence Not Required

[b] Periods of Vacancy

[c] Seasonal Use

[d] Slight Use

§ 13.24 Opposing Motion for Summary Judgment in Quiet Title Action--Tacking of Possession for Five Years

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Privity Between Successive Adverse Claimants

[4] Additional Authorities

[a] Privity Between Successive Adverse Claimants

§§ 13.25-13.29 [Reserved]

§ 13.30 Supporting General Demurrer to Complaint--Action to Recover Real Property--Bar of Statute of Limitations

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[3] Discussion of Authorities

[a] Failure to State Cause of Action

[b] Statute of Limitations

[4] Additional Authorities

[a] Failure to State Cause of Action

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FOOTNOTES:
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I. INTRODUCTION

1-13 California Points & Authorities § 13.01

AUTHOR: Virginia A. Johnson

§ 13.01 Scope of Chapter

This chapter contains forms of points and authorities for actions in which a party is attempting to establish or oppose the establishment of, title to real property by adverse possession. It also contains a form to support a demurrer to an action by the legal title holder to recover real property based on the bar of the statute of limitations.

Part II, Subpart A, includes forms supporting (*see § 13.10*) and opposing (*see § 13.11* et seq.) a motion for a new trial by a defendant in a quiet title action commenced by a claimant by adverse possession, on the grounds that the evidence is sufficient to establish the elements of adverse possession.

Part II, Subpart B, includes forms supporting (*see § 13.20*) and opposing (*see § 13.21* et seq.) a motion for summary judgment made by the legal title holder against a claimant by adverse possession.

Part II, Subpart C, contains a form for supporting a demurrer against an action brought by the legal title holder based on the bar of the statute of limitations (*see § 13.30*).

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsGeneral OverviewReal Property LawAdverse PossessionGeneral OverviewReal Property LawAdverse PossessionElements of Adverse ClaimsReal Property LawAdverse PossessionDefensesReal Property LawAdverse PossessionProcedure

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1-13 California Points & Authorities § 13.02

AUTHOR: Virginia A. Johnson

§ 13.02 Governing Law

Adverse possession is governed by case and statutory law. *Dimmick v. Dimmick (1962) 58 Cal. 2d 417, 421, 24 Cal. Rptr. 856, 374 P.2d 824* and its progeny enumerate the five elements necessary to establish title by adverse possession. In addition to judicial enumeration, particular requisites are provided by statute. Specifically, occupancy by adverse possession is governed by *Civ. Code §§ 1006, 1007*. Title by adverse possession is governed by *Code Civ. Proc. §§ 322-325*. Actions to quiet title based on adverse possession are governed by *Code Civ. Proc. § 760.010 et seq.* Statutes of limitations on the commencement of actions to recover real property are set forth in *Code Civ. Proc. §§ 318-328*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdverse PossessionGeneral OverviewReal Property LawAdverse PossessionElements of Adverse ClaimsReal Property LawAdverse PossessionClaims By & Against Governmental EntitiesReal Property LawAdverse PossessionDefensesReal Property LawAdverse PossessionProcedure

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1-13 California Points & Authorities § 13.03

AUTHOR: Virginia A. Johnson

§ 13.03 How to Use the Forms in This Chapter

[1] Page Limits on Points and Authorities

Generally, a supporting or opposing memorandum must not exceed 15 pages, or, in the case of a motion for summary judgment or summary adjudication, 20 pages. A reply or closing memorandum may not exceed 10 pages [*see Cal. Rules of Ct., Rule 3.1113(d)*]. Exhibits, declarations, attachments, a table of contents, a table of authorities, and the proof of service are excluded from these page limits. Any party desiring to file a longer memorandum must obtain leave of court [*see Cal. Rules of Ct., Rule 3.1113(e)*]. For further discussion of the page limitations under *Cal. Rules of Ct., Rule 3.1113*, and of other basic format requirements of memoranda, see *Ch. 1, Writing Legal Memoranda and Briefs, § 1.05*.

[2] Using the Forms to Build a Draft Memorandum

Some forms in this chapter contain both a procedural argument (*e.g.*, a motion for new trial) and alternative substantive arguments from which to choose to form a complete memorandum. Other forms contain only substantive arguments, which should be combined with the desired procedural argument. For a detailed discussion on how to select and use the forms to build a draft memorandum and complete the draft, with detailed discussion of all drafting requirements and strategic or stylistic considerations, see Ch. 1, *Writing Legal Memoranda and Briefs* . For a skeletal form of memorandum for use in creating a property formatted outline in which to compile relevant forms from this publication, see also Ch.1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentSupporting MaterialsMemoranda of LawReal Property LawAdverse PossessionGeneral OverviewReal Property LawAdverse PossessionElements of Adverse ClaimsReal Property LawAdverse PossessionDefensesReal Property LawAdverse PossessionProcedure

California Points & Authorities

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Volume 1 Chapters 1-19 WRITING LEGAL MEMORANDA AND BRIEFS; ABATEMENT AND SURVIVAL OF ACTIONS---to---AMENDED AND SUPPLEMENTAL PLEADINGS
CHAPTER 13 ADVERSE POSSESSION
I. INTRODUCTION

1-13 California Points & Authorities § 13.04

AUTHOR: Virginia A. Johnson

§ 13.04 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

For detailed legal background discussion, research guides, procedural checklists, and practice forms of complaints, answers, and other papers related to adverse possession, see California Forms of Pleading and Practice, Ch. 13, *Adverse Possession* , and Ch. 482, *Quieting Title* (Matthew Bender).

[2] Related Points and Authorities

For other potentially relevant points and authorities, see the following chapters:

- Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .
- Ch. 155, *Motions After Trial* .
- Ch. 170, *Partnerships and Joint Ventures* .
- Ch. 180, *Pretrial Proceedings* .
- Ch. 198, *Quieting Title* .
- Ch. 221, *Summary Judgments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdverse PossessionGeneral OverviewReal Property LawAdverse PossessionElements of Adverse

ClaimsReal Property LawAdverse PossessionClaims By & Against Governmental EntitiesReal Property LawAdverse PossessionDefensesReal Property LawAdverse PossessionProcedure

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I. INTRODUCTION

1-13 California Points & Authorities §§ 13.05-13.09

AUTHOR: Virginia A. Johnson

[Reserved]

§§ 13.05[Reserved]

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Volume 1 Chapters 1-19 WRITING LEGAL MEMORANDA AND BRIEFS; ABATEMENT AND SURVIVAL OF ACTIONS---to---AMENDED AND SUPPLEMENTAL PLEADINGS
CHAPTER 13 ADVERSE POSSESSION
II. FORMS
A. Motions for New Trial

1-13 California Points & Authorities § 13.10

AUTHOR: Virginia A. Johnson

§ 13.10 Supporting Motion for New Trial in Quiet Title Action--Evidence Insufficient to Establish Adverse Possession

[1] FORM Supporting Motion for New Trial in Quiet Title Action--Evidence Insufficient to Establish Adverse Possession

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF MOTION FOR NEW TRIAL
Plaintiff,	)	
vs.	)	[Telephone Appearance]
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

THE COURT SHOULD GRANT DEFENDANT'S MOTION FOR A NEW TRIAL BECAUSE PLAINTIFF'S EVIDENCE IS INSUFFICIENT TO PROVE ADVERSE POSSESSION.

A. Grounds for New Trial. On the application of the party aggrieved, the _____ [verdict *or* decision]

may be vacated, in whole or in part, and a new trial may be granted, on all or some of the issues, on the ground that the evidence is insufficient to justify the _____ [verdict *or* decision], if substantial rights of the aggrieved party are materially affected thereby (*Code Civ. Proc. § 657*).

B. Elements Required for Adverse Possession. In an action to quiet title based on adverse possession, the burden is on the claimant to prove that (1) possession has been by actual occupation under such circumstances as to constitute reasonable notice to the owner; (2) such possession was hostile to the owner's title; (3) the claimant claims the property as his or her own, under either color of title or claim of right; (4) possession has been continuous and uninterrupted for at least five years; and (5) the claimant has paid all of the taxes levied and assessed against the property during that period (*Dimmick v. Dimmick (1962) 58 Cal. 2d 417, 421, 24 Cal. Rptr. 856, 374 P.2d 824*).

C. Burden of Proof. The burden on the claimant is to prove every essential element of adverse possession by clear and satisfactory evidence, and if one element is not proved, the claim fails (*Landini v. Day (1968) 264 Cal. App. 2d 278, 282, 70 Cal. Rptr. 260*).

[*Optional*] **D. Acts of Occupation Indicating Ownership.** Occupation of the property is not sufficient to prove a claim of adverse possession unless it constitutes a subjection of the property to the will and dominion of the claimant; and it is not established by a mere assertion of title, but, rather, it must be coupled with acts of ownership that proclaim to the world, and bring notice to the owner, that a right is claimed in the land over which the claimant is seeking to exercise dominion (*West v. Evans (1946) 29 Cal. 2d 414, 417, 175 P.2d 219*). For the purpose of constituting an adverse possession by a person claiming title not founded on a written instrument, judgment, or decree, land is deemed to have been possessed and occupied only when (1) it has been protected by a substantial enclosure; or (2) it has been usually cultivated or improved (*Code Civ. Proc. § 325*).

[*Optional*] **E. Notice to Owner.** Occupation of property is not sufficient to prove a claim of adverse possession unless it is sufficiently open and notorious to notify an ordinarily prudent owner of its existence and its hostile character, or unless the owner is actually notified of it (*Saecker v. Cohn (1919) 180 Cal. 151, 156, 179 P. 890*).

[*Optional*] **F. Offer to Buy.** If a claimant by adverse possession offered, during the five year period, to buy the property from the person whose title he or she disputes, such an offer amounts to a clear recognition of the other person's title (*Central P. R. Co. v. Mead (1883) 63 Cal. 112, 113*).

[*Optional*] **G. Renunciation.** One who uses land with the consent of the owner can effect an ouster for purposes of adverse possession by renouncing, definitely and without qualification, his or her subordination to the owner, and this renunciation must be sufficiently clear to put the owner on notice that subsequent possession is adverse to his or her title (*Southern Pac. Co. v. City & County of San Francisco (1964) 62 Cal. 2d 50, 56, 41 Cal. Rptr. 79, 396 P.2d 383*).

[*Optional*] **H. Occupation By Mistake.** When the occupation of land is by mere mistake, with no intention by the occupant to claim as his or her own land that does not belong to him or her, but with the intention only to claim to the true line, wherever it may be, this occupation is not adverse possession (*Holzer v. Read (1932) 216 Cal. 119, 123, 13 P.2d 697*).

[*Optional*] **I. Five-Year Occupation with Payment of Taxes.** In no case shall adverse possession be considered established under the provisions of any sectionor sections of the Code of Civil Procedure unless it shall be shown that the land has been continuously occupied and claimed for the period of five years and that the claimant or claimants and the predecessors and grantors thereof paid all of the taxes, whether state, county, or municipal, that have been levied and assessed upon the land (*Code Civ. Proc. § 325*).

[*Optional*] **J. Nonpayment of Taxes.** A claimant cannot obtain title by adverse possession unless he or she establishes that no taxes were assessed against the land or that, if assessed, he or she paid them (*Mesnick v. Caton (1986) 183*

Cal. App. 3d 1248, 1260, 228 Cal. Rptr. 779).

[*Optional*] **K. Good Faith Possession.** Possession under color of title must be in good faith; and if a claimant knows when the deed is taken that it is not valid, good faith is lacking (*Nutting v. Herman Timber Co. (1963) 214 Cal. App. 2d 650, 658, 29 Cal. Rptr. 754*).

[*Optional*] **L. Incorrect Land Description.** A claim of adverse possession cannot be founded on a written instrument, judgment, or decree that does not describe, or that incorrectly describes, the land in question (*Sorensen v. Costa (1948) 32 Cal. 2d 453, 458, 196 P.2d 900*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for a new trial in a quiet title action that resulted in a judgment in favor of a claimant plaintiff by adverse possession. The ground of the motion would be that evidence of one or more of the required elements of plaintiff's adverse possession was insufficient to support the verdict or decision [*see Code Civ. Proc. § 657(6)*]. With appropriate modifications this form may be used to support a motion for summary judgment by a defendant (property owner) in a quiet title action commenced by a claimant by adverse possession.

[b] Argument

Counsel should add argument linking the points of law in this form applicable to his or her case with the facts of the case. For example, if the evidence was insufficient to show tax payments by plaintiff for five years, counsel will point out that plaintiff was required to either prove that he or she made the payments or that no taxes were assessed during that period and will point out how the evidence was insufficient to prove either fact.

[c] Related Pleading and Practice Chapters

For a form of notice of intention to move for a new trial, and a form of order granting such a motion, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender). For discussion of adverse possession and for related complaints, see Ch. 13, *Adverse Possession* in that publication.

[3] Discussion of Authorities

[a] Grounds for New Trial

Insufficiency of evidence to justify a verdict or other decision is a ground for granting a new trial (*Code Civ. Proc. § 657(6)*). Accordingly, if a court or jury in an action to quiet title finds that a claimant has acquired title by adverse possession, and the evidence is insufficient to establish all the principal elements for acquisition of such a title, a motion for new trial on the ground of insufficiency of the evidence would be appropriate.

A party seeking a new trial must file a notice of intention to move for a new trial [*Code Civ. Proc. § 659*] supported by a memorandum [*Cal. Rules of Ct., Rule 3.1600*], and a motion on the ground of insufficiency of the evidence to justify

the verdict or other decision must be made on the minutes of the court (*Code Civ. Proc. § 658*). When the motion is made on the minutes, reference may be made to any depositions or documentary evidence offered at trial, and to the court reporter's report of the proceedings or any certified transcript of the report (*Code Civ. Proc. § 660*). For more complete analysis of motions for new trial, see Ch. 155, *Motions After Trial* .

[b] Elements Required for Adverse Possession

Dimmick v. Dimmick *(1962) 58 Cal. 2d 417, 24 Cal. Rptr. 856, 374 P.2d 824* , was an action to quiet title by a joint tenant who had exclusive possession of the property for 22 years, except for a beehive stored on the property by the defendant joint tenant. The Supreme Court affirmed a judgment in favor of both parties, as joint tenants, and rejected the plaintiff's contention that he had acquired full title by adverse possession, holding that the possession of one cotenant is presumed to be with the permission of the other cotenant until the cotenant out of possession has notice that the other cotenant's possession is hostile (*58 Cal. 2d 417, 422*). The court stated in substance the elements of adverse possession set out as Paragraph B (*58 Cal. 2d 417, 421*).

[c] Burden of Proof

In ***Landini v. Day*** *(1968) 264 Cal. App. 2d 278, 70 Cal. Rptr. 260* , the courtmade the statement set out as Paragraph C in its opinion supporting a decision affirming a judgment against a claimant by adverse possession (*264 Cal. App. 2d 278, 281*). The issue was whether an advertising sign on the disputed property constituted claimant's occupation of the property for the five-year period. The court held against the claimant because the evidence was insufficient to establish that the claimant, as opposed to a third party, had placed the sign on the property, and insufficient to establish that the sign had been there for five years (*264 Cal. App. 2d 278, 283*).

[d] Acts of Occupation Indicating Ownership

West v. Evans *(1946) 29 Cal. 2d 414, 175 P.2d 219* , was an action by a cotenant seeking to quiet title against his cotenant. The Supreme Court reversed a judgment for the plaintiff, who was held not to have proved that he had occupied the property sufficiently to acquire title by adverse possession. Plaintiff's mother had received a part interest in the property in a divorce settlement. Plaintiff and his mother continued to live on the property and subsequently plaintiff's mother gave him a deed that did not refer to her fractional share. Plaintiff recorded the deed and paid the property taxes on the property for the required period. The Court held that neither his continuing to live there while his mother was there, nor hisrecording of the deed, was sufficient to indicate an ownership claim to 100 percent of the interest on the grounds that the possession of one cotenant is deemed to be with the permission of the other cotenant. In so holding, the Court stated in substance the rule set out as Paragraph D (*29 Cal. 2d 414, 417-418*).

[e] Notice to Owner

In ***Saecker v. Cohn*** *(1919) 180 Cal. 151, 179 P. 890* , the Supreme Court stated, in substance, the rule set out as Paragraph E in its opinion supporting reversal of a judgment for a claimant by adverse possession. The Court found that the claimant's pasturing of sheep on the property for only a few days in the fall and spring, and not even every fall and spring, was not enough to give notice of occupation to the owner (*180 Cal. 151, 156*).

[f] Offer to Buy

In ***Central P. R. Co. v. Mead*** *(1883) 63 Cal. 112* , the Supreme Court affirmed a judgment for the owner (plaintiff) and made the statement set out as Paragraph H, after observing that there was evidence tending to show an offer by the claimant (defendant) to purchase the property within the period of five years immediately preceding commencement of the action. The Court stated that such an offer would be a perfect answer to the defendant's claim of adverse possession (*63 Cal. 112, 113*).

[g] Renunciation

In ***Southern Pac. Co. v. City & County of San Francisco*** *(1964) 62 Cal. 2d 50, 41 Cal. Rptr. 79, 396 P.2d 383* , the Supreme Court reversed a judgment quieting title in favor of a railroad corporation that held an easement by implication in certain vacated street areas, the title to which was in dispute. The court determined that the fact that the railroad corporation was identified as the owner on the tax assessment rolls was not sufficient to give notice to the owner that the railroad corporation was asserting ownership (*62 Cal. 2d 50, 56*).

[h] Occupation By Mistake

Holzer v. Read *(1932) 216 Cal. 119, 13 P.2d 697* , was a quiet title action involving a boundary dispute resulting from a mistake on a survey. Plaintiff's neighbor was claiming title by adverse possession of that part of the property mistakenly not shown. The Supreme Court affirmed a judgment for the plaintiff and made the statement set out as Paragraph H (*216 Cal. 119, 123*).

[i] Nonpayment of Taxes

Mesnick v. Caton *(1986) 183 Cal. App. 3d 1248, 228 Cal. Rptr. 779* , was an action by a property owner against a neighboring property owner to regain land beyond a fence built between plaintiff's and defendant's property. Defendant cross complained for declaratory relief and to quiet title on the ground, among others, of adverse possession. In affirming judgment for plaintiff, the court of appeal pointed out that the trial court found the evidence totally insufficient to establish that defendant had paid the taxes on the disputed property. The court said that the adverse claimant had the burden of establishing that no taxes were assessed against the land, or that, if assessed, he paid them, and held that his failure to pay taxes on the land he claimed was fatal to his claim (*183 Cal. App. 3d 1248, 1260*).

[j] Good Faith Possession

In ***Nutting v. Herman Timber Co.*** *(1963) 214 Cal. App. 2d 650, 29 Cal. Rptr. 754* , affirming a judgment against a claimant by adverse possession, the court stated that actual knowledge of a deed's invalidity at the time it was taken eliminates the essential element of good faith and thus negates hostility of possession (*214 Cal. App. 2d 650, 658*).

[k] Incorrect Land Description

In ***Sorensen v. Costa*** *(1948) 32 Cal. 2d 453, 458, 196 P.2d 900* , although affirming a judgment in favor of a claimant by adverse possession, the Supreme Court noted that the claimant's adverse possession was not founded on a written instrument, judgment, or decree when the claimant and his predecessors took possession under deeds that incorrectly described the property occupied (*32 Cal. 2d 453, 458*).

[4] Additional Authorities

[a] Elements Required for Adverse Possession

The facts and procedural background of *Mesnick v. Caton (1986) 183 Cal. App. 3d 1248, 228 Cal. Rptr. 779* , are discussed in *§ 13.10[3][i]*. The court of appeal, in affirming the judgment for plaintiff, said the elements necessary to perfect a claim for adverse possession are (1) payment of taxes, (2) occupation that is open and notorious, (3) occupation that is continuous, (4) occupation that is hostile to the true owner, and (5) occupation that is under a claim of title (*183 Cal. App. 3d 1248, 1258*).

[b] Burden of Proof

In *Weller v. Chavarria (1965) 233 Cal. App. 2d 234, 43 Cal. Rptr. 364* , affirming a judgment against a claimant by

adverse possession, the court stated that the burden is on the claimant to prove every essential element by clear and satisfactory evidence (*233 Cal. App. 2d 234, 242*).

In *Nutting v. Herman Timber Co. (1963) 214 Cal. App. 2d 650, 29 Cal. Rptr. 754* , affirming a judgment against a claimant by adverse possession, the court stated that (1) adverse possession cannot be proved by inference but can be proved only by clear and positive proof; (2) the burden of proving all essential elements is on the claimant; and (3) if one element is wanting, the claim must fall (*214 Cal. App. 2d 650, 657-658*).

[c] Acts of Occupation Indicating Ownership

In *Sevenman v. Long Bell Lbr. Co. (1954) 129 Cal. App. 2d 528, 277 P.2d 510* , reversing a judgment for a claimant by adverse possession and holding that the claimant's and a predecessor's occasional visits to the land were not sufficient, the court stated that merely because land is hardly usable at all does not excuse a claimant by adverse possession from exercising acts of possession and control that would constitute some notice to the world and to the legal owner of the claimant's hostile conduct (*129 Cal. App. 2d 528, 533*).

In *Enos v. Murtaugh (1941) 47 Cal. App. 2d 269, 117 P.2d 905* , affirming a judgment against a claimant by adverse possession, the court stated that actual residence on the property is not always essential, but there must be a subjection to the will and dominion of the claimant, manifested in some appropriate way. The property was the home of claimant's mother. The court found that the claimant's acts of paying for the lot, building the house, staying there for brief periods, and giving her money for property taxes and other expenses for the house did not indicate that he was asserting ownership (*47 Cal. App. 2d 269, 273-274*).

[d] Notice to Owner

In *Wareham v. Randolph (1960) 184 Cal. App. 2d 218, 7 Cal. Rptr. 483* , reversing a judgment for a claimant by adverse possession, the court stated that an open and notorious occupation with hostile intent is a necessary constituent of an adverse possession; neither a hostile intent without this occupation nor this occupation without hostile intent is sufficient. The court found that the claimant's three visits to the property in five or six years did not satisfy the requirements (*184 Cal. App. 2d 218, 224*).

[e] Renunciation

In *Johnson v. Ocean Shore R.R. Co. (1971) 16 Cal. App. 3d 429, 94 Cal. Rptr. 68* , when the claimant by adverse possession acquired possession originally under an agreement, the court stated that a person cannot acquire title by adverse possession in such a case unless he or she gives clear and actual notice to the owner of the later adverse possession. The court found that letters sent by the claimant railroad company, which had an easement by agreement, did not give unequivocal notice that the railroad company was asserting fee ownership because the letters referred to the claimant's interest as a right-of-way (*16 Cal. App. 3d 429, 436*).

In *Mattes v. Hall (1915) 28 Cal. App. 361, 152 P. 436* , affirming a judgment against a claimant by adverse possession, the court stated that when a person takes possession of property as a tenant at sufferance, he or she cannot acquire title by this possession, no matter how long it continues; rather, the claimant must begin a new period of possession by clearly, positively, and unequivocally disavowing the owner's title and asserting his or her own title in hostility, with actual notice being given to the owner. In this case the claimant's grantor had obtained control of the property from the owner, who had gone away for a while. The court found that the building of an additional fence to enclose the unimproved property was not enough to notify the owner that the holding under permission had become hostile (*28 Cal. App. 361, 365*).

[f] Occupation By Mistake

The facts and procedural background of *Mesnick v. Caton (1986) 183 Cal. App. 3d 1248, 228 Cal. Rptr. 779* , are discussed in *§ 13.10[3][i]*. The court of appeal, in affirming the judgment for plaintiff, said that though hostile possession and claim of right may be established when the occupancy occurs through mistake, the claimant's possession must be adverse to that of the record owner, unaccompanied by any recognition, express or inferable from the circumstances, of the right of the latter (*183 Cal. App. 3d 1248, 1259*). The court explained that there appeared to be a mistaken belief as to the true legal boundary, but that the trial court found that defendant claimed only what was his and his intent was not to claim unowned land. The court concluded, therefore, that the element of hostility was absent (*183 Cal. App. 3d 1248, 1259-1260*).

In *Ikola v. Goff (1973) 31 Cal. App. 3d 872, 107 Cal. Rptr. 663* , affirming a judgment against a claimant by adverse possession, the court noted that the claimant intended to possess only what was his. The court held that when a person occupies the land of another by mistake without intending to claim it as his or her own and intends only to claim so much as is his or hers, according to wherever the boundary is, this occupation is not adverse (*31 Cal. App. 3d 872, 878*).

[g] Offer to Buy

In *Lovell v. Frost (1872) 44 Cal. 471, 474-475* , affirming a judgment against a claimant by adverse possession, the Supreme Court stated that an offer to purchase the property, rather than an offer to purchase an outstanding or adverse claim or title for the purpose of quieting the claimant's possession or protecting the claimant from litigation, amounts to a clear and unequivocal recognition by the claimant of the owner's title. This recognition proves that the claimant does not, at that time, claim the title as against the owner; and if this recognition occurs within five years immediately preceding the commencement of an action by the claimant to quiet title in himself or herself, it will defeat the action (*44 Cal. 471, 474-475*).

[h] Good Faith Possession

In *Madden v. Alpha Hardware & Supply Co. (1954) 128 Cal. App. 2d 72, 274 P.2d 705* , determining that a party's knowledge of lack of title at the time a purported purchase of property was made supported the inference of bad faith, the court stated that possession under color of title must be in good faith. If it appears that the claimant knew that the deed conveyed no title, legal or equitable, this does not entitle the claimant to the benefit of the rule as to constructive possession (*128 Cal. App. 2d 72, 76-77*).

[i] Incorrect Land Description

In *Winchell v. Lambert (1956) 146 Cal. App. 2d 575, 304 P.2d 149* , although reversing a judgment against claimants by adverse possession whose improvements encroached on neighboring lots, the court concluded that, because the deed to the property on which the improvements were built did not cover any portion of the lots encroached on, the adverse possession, if any, was not founded on a written instrument, judgment, or decree (*146 Cal. App. 2d 575, 581*).

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CHAPTER 13 ADVERSE POSSESSION
II. FORMS
A. Motions for New Trial

1-13 California Points & Authorities § 13.11

AUTHOR: Virginia A. Johnson

§ 13.11 Opposing Motion for New Trial in Quiet Title Action--Possession by Plaintiff's Tenant Attributed to Plaintiff

[1] FORM Opposing Motion for New Trial in Quiet Title Action--Possession by Plaintiff's Tenant Attributed to Plaintiff

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN OPPOSITION TO MOTION FOR NEW TRI-
vs.	)	AL
_____ [*name*],	)	[Telephone Appearance]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

DEFENDANT'S MOTION FOR A NEW TRIAL SHOULD BE DENIED BECAUSE THE EVIDENCE IS SUFFICIENT TO PROVE PLAINTIFF ACTUALLY POSSESSED AND OCCUPIED THE PROPERTY FOR FIVE YEARS.

A. Possession of Tenant Attributed to Landlord. When the relation of landlord and tenant has existed between any persons, the possession of the tenant is deemed the possession of the landlord until the expiration of five years from _____ [(*when there was a written lease*) the termination of the tenancy (*or, when there was no written lease*) the time of the last payment of rent]_____ [*add, if appropriate:* notwithstanding that the tenant may have _____ (acquired another title *or* claimed to hold adversely to the landlord)] (*Code Civ. Proc. § 326*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to a defendant's motion for a new trial on the ground that the evidence in a quiet title action was insufficient to establish adverse possession, when the plaintiff has been, for the required time period, a landlord of a tenant who actually possessed and occupied the property in question. The form should be combined with any of the forms set forth in *§§ 13.12 -13.15* that are applicable to the particular case. With appropriate modifications, this form may be used to oppose a motion for summary judgment made by the defendant in an action to quiet title to real property brought by a claimant by adverse possession.

[b] Argument

Counsel should add argument linking the point in this form with the facts of his or her his case. Thus, counsel should show that the plaintiff's tenant actually occupied the property for five years.

[c] Related Pleading and Practice Chapters

For a form of order denying a motion for a new trial, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender). For a form of judgment quieting title based on adverse possession, see Ch. 13, *Adverse Possession* in that publication.

[3] Additional Authorities

[a] Possession of Tenant Attributed to Landlord

In *Palin v. Sweitzer (1937) 8 Cal. 2d 329, 65 P.2d 351* , the Supreme Court affirmed a judgment in a partition action finding that one cotenant had accomplished ouster and disseisin of his cotenants, and that adverse possession had ripened into title. The claimant had for a number of years leased the property and retained the rentals, and the Supreme Court stated that possession by the claimant's tenants was deemed to be the claimant's possession (*8 Cal. 2d 329, 331*).

In *Beckett v. Petaluma (1915) 171 Cal. 309, 153 P. 20* , the Supreme Court affirmed a judgment for the city in a quiet title action. The city claimed title to land by adverse possession, and the Supreme Court held that a finding of bar of the statute of limitations, sufficient to support a judgment in favor of the city, was supported by evidence that the city, through its tenants, had been in exclusive, continuous, and adverse possession of the property for at least 10 years (*171 Cal. 309, 312*).

In *St. James Church v. Superior Court (1955) 135 Cal. App. 2d 352, 287 P.2d 387* , the court of appeal issued a writ of mandate to compel the respondent court to assume jurisdiction of an action by the owner of real property to enjoin a third party from collecting rents from tenants on the property. The court stated that as a general rule, the possession of a tenant is that of his or her landlord. The tenant's possession inures to the benefit of the landlord and constitutes possession by the landlord for the purpose of securing to him or her the benefits of adverse possession and the bar of the statute of limitations (*135 Cal. App. 2d 352, 362*).

In *Fugl v. Edwards (1950) 96 Cal. App. 2d 460, 464, 215 P.2d 802* , the court of appeal determined that evidence was sufficient to establish the necessary elements of adverse possession in favor of a party who was in actual occupation of property through tenants continuously under circumstances that constituted reasonable notice to a party claiming superior title. The court stated that personal occupation is not required because possession by a tenant inures to the benefit of one (*i.e.*, the landlord) claiming by adverse possession (*96 Cal. App. 2d 460, 464*).

In *McLeod v. Reyes (1935) 4 Cal. App. 3d 143, 40 P.2d 839* , the court of appeal affirmed a judgment in favor of the claimants to a title by adverse possession who (1) rented cabins or summer homes on the disputed premises to different persons, (2) rented the premises to campers, and (3) at times rented the premises to motion picture concerns. The court stated that it is not necessary that one claiming by adverse possession be in personal occupation, and that possession by one's tenant inures to one's benefit (*4 Cal. App. 3d 143, 148*).

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1-13 California Points & Authorities § 13.12

AUTHOR: Virginia A. Johnson

§ 13.12 Opposing Motion for New Trial in Quiet Title Action--Evidence Sufficient to Show Notice of Adverse Claim

[1] FORM Opposing Motion for New Trial in Quiet Title Action--Evidence Sufficient to Show Notice of Adverse Claim

[*For caption, see § 13.11.*]

DEFENDANT'S MOTION FOR A NEW TRIAL SHOULD BE DENIED BECAUSE THE EVIDENCE IS SUFFICIENT TO SHOW PLAINTIFF'S POSSESSION OF THE PROPERTY CONSTITUTED REASONABLE NOTICE OF PLAINTIFF'S ADVERSE CLAIM.

A. Presumption of Notice. Open, visible, and notorious possession will raise a presumption of notice (*Hails v. Martz (1946) 28 Cal. 2d 775, 778, 172 P.2d 52*).

[*Optional*] **B. Proof Necessary.** All that the claimant must show is that his or her occupation was such as to constitute reasonable notice to the true owner that the claimant claimed the land as his or her own, and the fact that the record owner was unaware of his or her own rights in the land is immaterial (*Sorensen v. Costa (1948) 32 Cal. 2d 453, 461, 196 P.2d 900*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a defendant's motion for a new trial when the defendant contends the evidence is insufficient to establish that plaintiff's possession of the property constituted reasonably notice of the plaintiff's claim to the land. The form should be combined with any of the forms set forth in *§§ 13.11, 13.13 -13.15* that are applicable to the particular case. With appropriate modifications, this form may be used to oppose a motion for summary judgment made by the defendant in an action to quiet title to real property brought by a claimant by adverse possession.

[b] Argument

Counsel should add argument linking the point of law with the facts of his or her case. Thus, counsel should include a description of the plaintiff's possession that demonstrates that it was open, visible, and notorious.

[3] Discussion of Authorities

[a] Presumption of Notice

Hails v. Martz *(1946) 28 Cal. 2d 775, 172 P.2d 52* , involved reversal of a judgment against a claimant to an easement by prescription to divert the flow of water from his property to his neighbor's property. In rejecting the contention that the claimant was not entitled to a finding on the issue of a prescriptive right because there was no evidence of actual knowledge by the adverse party, the Supreme Court stated the rule set out as Paragraph A. In substance, the Court concluded that the fact that the claimant's predecessor had constructed a ditch and an embankment that diverted the water flow constituted open, visible, and notorious possession (*28 Cal. 2d 775, 778*).

[b] Proof Necessary

Sorensen v. Costa *(1948) 32 Cal. 2d 453, 196 P.2d 900* , involved affirmance of a judgment for a claimant by adverse possession. In rejecting the contention that a mutual mistake of the parties prevented perfection of the title by adverse possession, the Supreme Court stated the rule set out as Paragraph B (*32 Cal. 2d 453, 461*).

[4] Additional Authorities

[a] Presumption of Notice

In *Lindsay v. King (1956) 138 Cal. App. 2d 333, 292 P.2d 23* , affirming in part and reversing in part a judgment in an action to establish rights to a flow of water, the court stated the rule set out as Paragraph A, with regard to the knowledge required in cases of prescriptive rights (*138 Cal. App. 2d 333, 342*).

In *Chapman v. Sky L'Onda Mut. Water Co. (1945) 69 Cal. App. 2d 667, 159 P.2d 988* , the court of appeal affirmed a judgment for a defendant in an ejectment action in which the defendant claimed title by adverse possession. The defendant used the property for dams and reservoir sites. The court stated that it is not an indispensable requirement that the adverse claimant show that the record owner had actual knowledge that the claimant was asserting an adverse claim, and that possession so open, visible, and notorious that it will raise the presumption of an adverse claim is the equivalent of actual knowledge (*69 Cal. App. 2d 667, 678-679*).

In *Wood v. Davidson (1944) 62 Cal. App. 2d 885, 145 P.2d 659* , the court of appeal affirmed a judgment for the defendants and held that they had acquired limited title to water by adverse possession. The defendants had diverted water from a spring on the owner's land to their land for irrigation by ditches dug by the defendants. The court stated

that the rule is that either the record owner must have actual knowledge or the possession must be so open, visible, and notorious that it will raise a presumption of notice to the record owner of the adverse claim (*62 Cal. App. 2d 885, 889-890*).

[b] Proof Necessary

In *Nielsen v. Gibson (2009) 178 Cal. App. 4th 318, 327, 100 Cal. Rptr. 3d 335* , the court of appeal affirmed a judgment quieting title in favor of the adverse claimants who fenced in the subject property, irrigated it, built a go-kart course on it and paid property taxes on the property. The claimants satisfied the "open and notorious" requirement for adverse possession, so that the owner, who was in Ireland, was presumed to have had notice of the adverse claim [*178 Cal. App. 4th 318, 327*]. The presumption applied even though the owner was in Ireland. When an adverse claimant is in open possession and the true owner fails to look after his or her interests and remains in ignorance of the claim, it is the owner's own fault [*178 Cal. App. 4th 318, 328*].

In *Kraemer v. Kraemer (1959) 167 Cal. App. 2d 291, 309, 334 P.2d 675* , the court of appeal affirmed a judgment for the plaintiff in a quiet title action in which the plaintiff claimed title by adverse possession, and stated the rule set out as Paragraph B. The plaintiff claimed under color of title and had not been aware that his grantor did not own a 100 percent interest. The court found that the plaintiff's execution of oil and gas leases and receipt of royalties from the leases, and the acts of the tenants in drilling for oil, constituted the notorious acts that gave constructive notice to the legal owner (*167 Cal. App. 2d 291, 308*).

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CHAPTER 13 ADVERSE POSSESSION
II. FORMS
A. Motions for New Trial

1-13 California Points & Authorities § 13.13

AUTHOR: Virginia A. Johnson

§ 13.13 Opposing Motion for New Trial in Quiet Title Action--Evidence Sufficient to Show Payment of Taxes

[1] FORM Opposing Motion for New Trial in Quiet Title Action--Evidence Sufficient to Show Payment of Taxes

[*For caption, see § 13.11.*]

DEFENDANT'S MOTION FOR A NEW TRIAL SHOULD BE DENIED BECAUSE THE EVIDENCE IS SUFFICIENT TO SHOW PLAINTIFF'S PAYMENT OF TAXES FOR THE REQUISITE PERIOD.

[*Optional*] **A. Redemption.** If, after taxes on the property were allowed to become delinquent, a claimant to title by adverse possession made a redemption in good faith while the claimant or his or her successor in interest was in undisturbed possession of the property, then this redemption operates as a sufficient payment of taxes to satisfy the statutory requirement for acquiring title by adverse possession (*Gray v. Walker (1910) 157 Cal. 381, 386, 108 P. 278*).

[*Optional*] **B. Payment By Two Claimants.** A claim to title by adverse possession is not defeated by the fact that taxes on the property were paid by both the claimant by adverse possession and another claimant to the title (*Cummings v. Laughlin (1916) 173 Cal. 561, 565, 160 P. 833*).

[*Optional*] **C. Misdescription on Assessment Rolls.** When a claimant to title by adverse possession has paid taxes actually assessed on the property occupied, the fact that the property was not correctly described on the assessment rolls and tax bills is not controlling, and the claimant has complied with the statutory requirement of payment of taxes to establish title by adverse possession (*Sorensen v. Costa (1948) 32 Cal. 2d 453, 466 467, 196 P.2d 900*).

[*Optional*] **D. Nonpayment After Title Acquired.** The failure of a claimant by adverse possession to pay taxes coming due after the claimant acquired his or her title by adverse possession is not material to the validity of the claimant's acquisition of title by adverse possession (*Southern Pac. R.R. Co. v. Whitaker (1895) 109 Cal. 268, 273, 41 P. 1083*).

[*Optional*] **E. Taxes Not Assessed.** A failure to pay taxes for a period during which no valid levy or assessment was made on the property in question does not preclude a claimant from acquiring title to the property by adverse possession (*Harvey v. Meyer (1897) 117 Cal. 60, 61 63, 48 P. 1014*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to a defendant's motion for a new trial based on insufficient evidence of payment of taxes when the plaintiff contends that the evidence of payment was sufficient.

With appropriate modifications, this form of points and authorities may be used to oppose a motion for summary judgment made by the defendant in an action to quiet title to real property brought by a claimant by adverse possession.

[b] Argument

Counsel should add argument linking the points in this form with the facts of her or her case. Thus counsel should show that the plaintiff paid the taxes for the requisite period or that there was no valid assessment.

[3] Discussion of Authorities

[a] Redemption

In ***Gray v. Walker*** *(1910) 157 Cal. 381, 108 P. 278* , the Supreme Court determined that a claimant had acquired title by adverse possession, and affirmed a judgment in favor of the claimant. The Court stated that the fact that in one year the land was sold for delinquent taxes and subsequently redeemed by the plaintiff did not prevent the acquisition of title by adverse possession (*157 Cal. 381, 386*).

[b] Payment By Two Claimants

In ***Cummings v. Laughlin*** *(1916) 173 Cal. 561, 160 P. 833* , in affirming a judgment in favor of the claimants to title by adverse possession, the Supreme Court concluded that the claimants fully complied with the law by payment of taxes on the land, even though the taxes were also paid by the record holder of title (*173 Cal. 561, 565*).

[c] Misdescription on Assessment Rolls

Sorensen v. Costa *(1948) 32 Cal. 2d 453, 196 P.2d 900* , was a quiet title action in which the Supreme Court affirmed a judgment in favor of the claimant by adverse possession. The Court found that the claimant proved by substantial evidence that the description on the tax assessment rolls was mistaken and that he and his predecessors not only thought that they were paying taxes on the occupied land (which is, in itself, insufficient) but in fact paid taxes actually assessed against the land (*32 Cal. 2d 453, 466-467*).

[d] Nonpayment After Title Acquired

In ***Southern P. R. Co. v. Whitaker*** *(1895) 109 Cal. 268, 41 P. 1083* , affirming a judgment for a claimant by adverse

possession, the Supreme Court stated that when a fee is once acquired by a five years' adverse possession, it continues until conveyed or lost to another adverse possessor. Therefore, the failure of one who had acquired title by adverse possession to pay taxes for a year after title was acquired could not divest or in any way affect the title (*109 Cal. 268, 273*).

[e] Taxes Not Assessed

In ***Harvey v. Meyer*** *(1897) 117 Cal. 60, 48 P. 1014* , a claimant to title by adverse possession was held to have established title by adverse possession despite his failure to pay taxes during his period of occupancy, when the assessment during the period in question was absolutely void (*117 Cal. 60, 61-63*).

[4] Additional Authorities

[a] Redemption

In *Owsley v. Matson (1909) 156 Cal. 401, 104 P. 983* , reversing a judgment against a claimant by adverse possession, the Supreme Court stated that a redemption of taxes after the adverse possession had ceased could not relate back so as to make it a payment during the period of adverse possession. However, if the tax has been allowed to become delinquent, a sale has taken place, and a redemption has been made, and all of this has been done in good faith and while the adverse claimant or his or her successor in interest has been in undisturbed possession, it is sufficient to bring the occupant within the terms of the statute, which requires the claimant to pay the taxes on the property claimed (*156 Cal. 401, 405*).

In *Kohler v. Bristow (1955) 131 Cal. App. 2d 692, 281 P.2d 352* , affirming a judgment in favor of a claimant by adverse possession, the court stated the same rule as was set out in the *Owsley* case, *above* (*131 Cal. App. 2d 692, 698-699*).

In *Weyse v. Biedebach (1927) 86 Cal. App. 712, 261 P. 1086* , affirming a judgment in favor of a claimant by adverse possession, the court stated that the claimant and his predecessors, following tax sales, exercised every right and performed every duty incidental to ownership, having purchased at sales for delinquent taxes and paid subsequent assessments, besides claiming under a color of title (*86 Cal. App. 712, 720*).

[b] Payment By Two Claimants

In *Cavanaugh v. Jackson (1893) 99 Cal. 672, 34 P. 509* , affirming a judgment in favor of a claimant by adverse possession, the Supreme Court concluded that the requirement of payment of taxes was satisfied when the land was assessed to the claimant and the taxes on the land were paid by him, even though the land was also assessed to the opposing party, who also paid the taxes (*99 Cal. 672, 673-675*).

In *Kendrick v. Klein (1944) 65 Cal. App. 2d 491, 150 P.2d 955* , affirming a judgment in favor of a claimant by adverse possession when the claimant had paid the assessments against the property each year, the court concluded that the fact that the property may have been doubly assessed by the authorities could not serve to destroy the claimant's adverse possession (*65 Cal. App. 2d 491, 497*).

In *Pereira Farms Corp. v. Simas (1924) 69 Cal. App. 159, 230 P. 976* , the court of appeal affirmed a judgment in favor of a claimant by adverse possession and rejected the contention that adverse possession is not established when there is double assessment and double payment of taxes on disputed land. The court quoted a text for the proposition that when there is double taxation and double payment of taxes on land, a claimant to title by adverse possession has fully complied with the law when he or she has paid the taxes on the land, even though they have also been paid by the holder of the record title (*69 Cal. App. 159, 163*).

[c] Misdescription on Assessment Rolls

In *Gilardi v. Hallam (1981) 30 Cal. 3d 317, 178 Cal. Rptr. 624, 636 P.2d 588* , the Supreme Court held that the claimant had not met his burden of proof that taxes were paid. The Court stated, however, in dicta, that when it is shown that there is an error in the description on the assessment roll, the claimant may establish the error and the payment of taxes. It also stated that when the claimant by construction of buildings or other valuable improvements or by building fences has visibly shown occupation of a disputed strip of land adjoining the boundary, the natural inference is that the assessment was not based on the record boundary but on the improvements visibly possessed by the parties. (*30 Cal. 3d 317, 326-327*).

In *Winchell v. Lambert (1956) 146 Cal. App. 2d 575, 304 P.2d 149* , the court of appeal reversed a judgment against claimants by adverse possession whose house encroached on a neighboring lot. The claimants had paid taxes on the whole of their residence, including the encroaching portion. The court concluded that the requirement of payment of taxes was satisfied even though the lot on which the house encroached was described as unimproved for assessment purposes (*146 Cal. App. 2d 575, 582-583*).

In *Frericks v. Sorensen (1952) 113 Cal. App. 2d 759, 248 P.2d 949* , affirming a judgment in favor of claimants by adverse possession, the court concluded that the requirement of payment of taxes was satisfied when the claimants and their predecessors had paid taxes assessed for certain improvements on land occupied by them, despite the fact that the land was mistakenly described on the assessment rolls (*113 Cal. App. 2d 759, 762*).

[d] Nonpayment After Title Acquired

In *LeFevre v. Borwick (1953) 116 Cal. App. 2d 786, 254 P.2d 626* , the court of appeal affirmed a judgment in favor of claimants by adverse possession. The court found that plaintiffs paid all taxes levied on the property for the fiscal years 1946-47, 1947-48, 1948-49, 1949-50, and 1950-51 prior to the commencement of the action. As plaintiffs' possession ripened into title not later than March 1, 1951, their inability to pay the taxes for the fiscal year 1951-52 prior to the commencement of the action did not defeat the title so acquired (*116 Cal. App. 2d 786, 789*).

In *Meier v. Meier (1945) 71 Cal. App. 2d 502, 507, 162 P.2d 950* , affirming a judgment in favor of a claimant by adverse possession, the court stated that the law does not require the impossible, and the fact that taxes became delinquent after the claimant had acquired title to the property could not defeat that title except through a sale held under the tax laws (*71 Cal. App. 2d 502, 507*).

[e] Taxes Not Assessed

In *Oneto v. Restano (1889) 78 Cal. 374, 379, 20 P. 743* , the Supreme Court stated that, with respect to the payment of taxes to establish title by adverse possession, the requirement does not apply when no taxes have been assessed (*78 Cal. 374, 379*).

In *Santa Clara v. Ivancovich (1940) 47 Cal. App. 2d 502, 511, 118 P.2d 303* , the court of appeal affirmed a judgment against a city that sought to recover a strip of land claimed to have been dedicated to public street purposes (the strip having never been assessed for either city or county taxes for the 25 years next preceding trial of the city's action). The court found that no taxes were paid on the strip, and that when no taxes are assessed the failure to make tax payments will not prevent title by adverse possession.

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A. Motions for New Trial

1-13 California Points & Authorities § 13.14

AUTHOR: Virginia A. Johnson

§ 13.14 Opposing Motion for New Trial in Quiet Title Action--Evidence Sufficient to Show Possession

[1] FORM Opposing Motion for New Trial in Quiet Title Action--Evidence Sufficient to Show Possession

[*For caption, see § 13.11.*]

DEFENDANT'S MOTION FOR A NEW TRIAL SHOULD BE DENIED BECAUSE THE EVIDENCE IS SUFFICIENT TO SHOW PLAINTIFF'S POSSESSION.

[*Optional*] **A. Fence as Substantial Enclosure.** Whether a fence is sufficient to turn cattle is the usual test in determining whether it constitutes a substantial enclosure for purposes of adverse possession (*Jones v. Hodges (1905) 146 Cal. 160, 163, 79 P. 869*).

[*Optional*] **B. Enclosure By Fence and Natural Barriers.** It is not necessary, in order to constitute an adverse possession, that an entire tract be enclosed by a fence, if the fences constructed, together with natural barriers, are sufficient enclosures to turn cattle (*Palin v. Sweitzer (1937) 8 Cal. 2d 329, 331, 65 P.2d 351*).

[*Optional*] **C. Temporary Destruction of Portions of Enclosure.** The mere temporary destruction of portions of an enclosure by fire or flood does not defeat the acquisition of title by adverse possession (*Baldwin v. Durfee (1897) 116 Cal. 625, 627, 48 P. 724*).

[*Optional*] **D. Farming Land Cultivated in Usual Manner.** Adverse possession not founded on a written instrument, judgment, or decree, is established with regard to farming land when the property is farmed and cultivated in the usual manner of farming and cultivating lands in the neighborhood where the property is situated (*Trull v. Dunn (1926) 79 Cal. App. 545, 552, 250 P. 185*).

[*Optional*] **E. Improvement of Town Lot.** Adverse possession not founded on a written instrument, judgment, or

decree, is established with regard to a town lot when it was improved in the manner or to the extent usual in the case of similar property; and if so improved, such a lot need not be cultivated (*Gray v. Walker (1910) 157 Cal. 381, 385, 108 P. 278*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to a defendant's motion for a new trial on the ground that the evidence in a quiet title action was insufficient to establish adverse possession, when the plaintiff asserts that the evidence of adequate actual possession was sufficient. It should be combined with any of the forms set forth in *§§ 13.11 -13.13* or *13.15* that are applicable to the particular case.

With appropriate modifications, these points and authorities may be used to oppose a motion for summary judgment made by the defendant in an action to quiet title to real property brought by a claimant by adverse possession.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, if the claimant did not enclose the property, or used it only occasionally, counsel would argue that this use was sufficient for adverse possession by analogy to one of the cases discussed below.

[3] Discussion of Authorities

[a] Fence as Substantial Enclosure

In ***Jones v. Hodges*** *(1905) 146 Cal. 160, 79 P. 869* , the Supreme Court determined that evidence was sufficient to show erection and maintenance of a substantial enclosure for purposes of adverse possession, although the evidence was conflicting on the question. The Court noted that whether a fence is sufficient to turn cattle is the usual test in determining whether an enclosure is substantial or not (*146 Cal. 160, 163*).

[b] Enclosure By Fence and Natural Barriers

In ***Palin v. Sweitzer*** *(1937) 8 Cal. 2d 329, 65 P.2d 351* , affirming a judgment in favor of a claimant by adverse possession, the Supreme Court stated that it was not necessary that the entire tract be enclosed by a fence in order to comply with *Code Civ. Proc. § 325* (requiring that land be usually cultivated or improved) if the fences, together with the natural barriers, were sufficient enclosures to turn cattle for pasturage (*8 Cal. 2d 329, 331*).

[c] Temporary Destruction of Portions of Enclosure

In ***Baldwin v. Durfee*** *(1897) 116 Cal. 625, 48 P. 724* , affirming a judgment in favor of a claimant by adverse possession, the Supreme Court stated the rule set out as Paragraph C (*116 Cal. 625, 627*).

[d] Farming Land Cultivated in Usual Manner

In ***Trull v. Dunn*** *(1926) 79 Cal. App. 545, 250 P. 185* , the court affirmed a judgment in favor of a claimant by adverse possession when the record showed the facts on which the rule set out as Paragraph D is based (*79 Cal. App. 545, 552*).

[e] Improvement of Town Lot

In ***Gray v. Walker*** *(1910) 157 Cal. 381, 108 P. 278* , the Supreme Court determined that adverse possession was established and stated that the requirement of the statute (*Code Civ. Proc. § 325*) that land be usually cultivated or improved meant that it should be cultivated in the manner and to the extent usual in the case of similar property (*157 Cal. 381, 385*).

[4] Additional Authorities

[a] Enclosure By Fence and Natural Barriers

In *Goodwin v. McCabe (1888) 75 Cal. 584, 586, 17 P. 705* , the Supreme Court reversed a judgment against a claimant to title based on prior possession, when land was bounded on one side by a lake, on another side by a slough that emptied into the lake, and on the remaining sides by a fence. The Court concluded that the claimant was entitled to a jury instruction to the effect that he was entitled to a verdict if, among other factors, he had built a fence of any kind in such a manner that, together with natural barriers, it formed a complete enclosure sufficient to turn cattle (*75 Cal. 584, 586*).

In *Conroy v. Duane (1873) 45 Cal. 597, 603* , when disputed property was bounded on one side by a natural barrier, the Supreme Court determined that no fence was needed on that side, and stated that the rule in this regard is well settled (*45 Cal. 597, 603*).

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1-13 California Points & Authorities § 13.15

AUTHOR: Virginia A. Johnson

§ 13.15 Opposing Motion for New Trial in Quiet Title Action--Evidence Sufficient to Establish Claim Under Written Instrument

[1] FORM Opposing Motion for New Trial in Quiet Title Action--Evidence Sufficient to Establish Claim Under Written Instrument

[*For caption, see § 13.11*.]

DEFENDANT'S MOTION FOR A NEW TRIAL SHOULD BE DENIED BECAUSE THE EVIDENCE IS SUFFICIENT TO ESTABLISH PLAINTIFF'S CLAIM UNDER A WRITTEN INSTRUMENT.

A. Entry Under Claim of Title. When it appears that the occupant or those under whom the occupant claims entered into the possession of the property under claim of title, exclusive of other right, founding this claim upon a written instrument, as being a conveyance of the property in question, and that there has been a continued occupation and possession of the property included in the instrument, decree, or judgment, or of some part of the property, under the claim, for five years, the property so included is deemed to have been held adversely, except that when it consists of a tract divided into lots, the possession of one lot is not deemed a possession of any other lot of the same tract (*Code Civ. Proc. § 322*).

B. Sufficiency of Possession and Occupation. For the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument, or a judgment or decree, land is deemed to have been possessed and occupied when _____ [when it has been usually cultivated or improved or when it has been protected by a substantial enclosure *or* when, although not enclosed, it has been used for the supply of fuel, or of fencing-timber for the purposes of husbandry, or for pasturage, or for the ordinary use of the occupant *or* when a known farm or single lot has been partly improved, and in that case the portion of the farm or lot that may have been left not cleared, or not enclosed according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated] (*Code Civ. Proc. § 323*).

C. Ordinary Use. Land has been used for the ordinary use of the occupant when it has been used for a use that is appropriate to the location and character of the property (*Posey v. Bay Point Realty Co. (1932) 214 Cal. 708, 712, 7 P.2d 1020*).

D. Use As City Residence. Adverse possession founded on a written instrument, judgment, or decree, is established by use of a lot as a city residence, although not completely enclosed, when this use constituted the ordinary use of the occupant (*Kockemann v. Bickel (1892) 92 Cal. 665, 668, 28 P. 686*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to a defendant's motion for a new trial on the ground that the evidence in a quiet title action was insufficient to establish a claim under a written instrument, judgment, or decree, when the plaintiff asserts that the evidence was in fact sufficient. It should be combined with any of the forms set forth in *§§ 13.11 -13.14* that are applicable to the particular case.

With appropriate modification this form of points and authorities may be used to oppose a motion for summary judgment made by the defendant in an action to quiet title to real property brought by a claimant by adverse possession.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, if the claimant used the property as a city residence, counsel should argue that this use was sufficient even without a complete enclosure.

[3] Discussion of Authorities

[a] Ordinary Use

In ***Posey v. Bay Point Realty Co.*** *(1932) 214 Cal. 708, 7 P.2d 1020* , affirming a judgment in favor of a claimant by adverse possession, the Supreme Court stated that the plain meaning of "for the ordinary use of the occupant" in *Code Civ. Proc. § 323* is a use appropriate to the location and character of the property, that each case must rest on its own peculiar facts, and that even slight use would be sufficient if only a slight use could be made of the property (*214 Cal. 708, 712*).

[b] Use As City Residence

In ***Kockemann v. Bickel*** *(1892) 92 Cal. 665, 28 P. 686* , affirming a judgment in favor of claimants by adverse possession, the Supreme Court concluded that entering, residing on, and improving property satisfies the requirements of *Code Civ. Proc. § 323*, even though an enclosure is not complete, if the property was thus used for the ordinary use of the occupant as a city residence (*92 Cal. 665, 668*).

[4] Additional Authorities

[a] Ordinary Use

In *Treager v. Friedman (1947) 79 Cal. App. 2d 151, 169, 179 P.2d 387* , affirming a judgment for a claimant by adverse possession, the court stated the rule set out as Paragraph C and found that the requirement was met when the claimant assumed full and exclusive authority in renting and operating four apartment houses and dealing with them without regard to the real owners (*79 Cal. App. 2d 151, 169*).

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AUTHOR: Virginia A. Johnson

[Reserved]

§§ 13.16[Reserved]

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B. Summary Judgment Motions

1-13 California Points & Authorities § 13.20

AUTHOR: Virginia A. Johnson

§ 13.20 Supporting Motion for Summary Judgment in Quiet Title Action--Plaintiff Not in Adverse Possession

[1] FORM Supporting Motion for Summary Judgment in Quiet Title Action--Plaintiff Not in Adverse Possession

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN SUPPORT OF MOTION FOR SUMMARY
vs.	)	JUDGMENT
_____ [*name*],	)	[Telephone Appearance]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

SUMMARY JUDGMENT FOR DEFENDANT IS PROPER BECAUSE ALL THE PAPERS SUBMITTED SHOW THAT PLAINTIFF CANNOT CLAIM ADVERSE POSSESSION.

A. Motion for Summary Judgment. A defendant in any action or proceeding may move for summary judgment if it is contended that the action has no merit, and this motion shall be granted if all of the papers submitted show that there is

no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law (*Code Civ. Proc. § 437c*).

B. Elements of Adverse Possession. In an action to quiet title based on adverse possession, the burden is on the claimant to prove that (1) possession has been by actual occupation under such circumstances as to constitute reasonable notice to the owner; (2) this possession was hostile to the owner's title; (3) the claimant claims the property as his or her own, under either color of title or claim of right; (4) possession has been continuous and uninterrupted for at least five years; and (5) the claimant has paid all of the taxes levied and assessed against the property during that period (*Dimmick v. Dimmick (1962) 58 Cal. 2d 417, 421, 24 Cal. Rptr. 856, 374 P.2d 824*).

[*Optional*] **C. Occupation With Permission.** A person who has occupied land with the permission or consent of the owner and who has never claimed the land adversely to the owner cannot establish title by adverse possession through this occupation (*Huntley v. San Francisco Sav. Union (1900) 130 Cal. 46, 48, 62 P. 255*).

[*Optional*] **D. Occupation By Lessee.** A tenant cannot have possession of the demised property adversely to the landlord's title (*Harvey v. Nurick (1968) 268 Cal. App. 2d 213, 215, 74 Cal. Rptr. 94*).

[*Optional*] **E. Occupation By Mortgagor.** When the owner and occupier of land has mortgaged the land, his or her continued occupation of the land thereafter is not adverse to the mortgagee's rights and estate unless and until the mortgagor denies those rights and claims an unencumbered title for himself or herself so openly and notoriously that the mortgagee should have known of the adverse claim (*Comstock v. Finn (1936) 13 Cal. App. 2d 151, 156, 56 P.2d 957*).

[*Optional*] **F. Occupation By Tenant in Common.** A tenant in common does not acquire the title of his or her cotenant merely by taking exclusive possession of the property (*Dimmick v. Dimmick (1962) 58 Cal. 2d 417, 422, 24 Cal. Rptr. 856, 374 P.2d 824*).

[*Optional*] **G. Recordation of Conveyance to Cotenant.** The recordation of a deed purporting to convey the entire property in land to a tenant in possession is not, as a matter of law and independent of any other fact, notice to his or her cotenant of the adverse character of the grantee's possession (*West v. Evans (1946) 29 Cal. 2d 414, 418, 175 P.2d 219*).

[*Optional*] **H. Interruption of Possession.** Any interruption of an adverse possession within the required five years prevents acquisition of title by prescription (*Big Three Mining & Milling Co. v. Hamilton (1909) 157 Cal. 130, 140, 107 P. 301*).

[*Optional*] **I. Privity Necessary for Tacking.** A claimant of land by adverse possession who must rely on the possession of a previous holder must show a privity of estate between the claimant and the previous holder and cannot tack to the time of the claimant's possession that of a previous holder when the land claimed adversely was not included within the boundaries of the conveyance the claimant received from the previous holder (*Von Neindorff v. Schallock (1937) 21 Cal. App. 2d 44, 48, 68 P.2d 278*).

[*Optional*] **J. Limitations Period Does Not Run While Parties Are in Fiduciary Relationship.** The statute of limitations does not run when the parties occupy a fiduciary relationship toward each other (*Estate of Seifert (2005) 128 Cal. App. 4th 64, 68, 26 Cal. Rptr. 3d 560*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a defendant's motion for summary judgment in a quiet title action commenced by a claimant by adverse possession whose possession has not actually been adverse. With appropriate modifications this form may be used to support a motion for a new trial, on the ground of insufficient evidence, in a quiet title action commenced by an adverse claimant who obtained a judgment in his or her favor.

[b] Argument

Counsel should add argument linking the relevant points of law to the facts of his or her case. For example, if the defendant occupied the property at any time during the five years prior to the commencement of the action, counsel should argue that this occupation prevented the claimant from acquiring title by adverse possession.

[c] Related Pleading and Practice Chapters

For a form of notice of motion for summary judgment, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender). For a discussion of adverse possession and related complaints, see California Forms of Pleading and Practice, Ch. 13, *Adverse Possession* (Matthew Bender).

[3] Discussion of Authorities

[a] Elements of Adverse Possession

Dimmick v. Dimmick *(1962) 58 Cal. 2d 417, 421, 24 Cal. Rptr. 856, 374 P.2d 824* , is discussed in *§ 13.10[3][b]*.

[b] Occupation With Permission

Huntley v. San Francisco Sav. Union *(1900) 130 Cal. 46, 62 P. 255* , was a quiet title action commenced by a claimant whose possession was not taken under any claim of title but was taken with his father's permission, for the purpose of ascertaining whether he could make a living out of it. There was nothing in the record tending to show that the claimant had ever asserted or claimed to hold possession of the land adversely to his father. The Supreme Court affirmed a judgment in favor of the defendant (*130 Cal. 46, 48*).

[c] Occupation By Lessee

Harvey v. Nurick *(1968) 268 Cal. App. 2d 213, 74 Cal. Rptr. 94* , was a quiet title action. During the last portion of the period in which the claimant asserted adverse possession, the claimant was actually a tenant of the owner and paid rent. The court affirmed a judgment in favor of the defendant and stated that as a general rule, "a lessee in possession of real property under a lease cannot dispute his landlord's title nor can he hold adversely to him while holding under the lease" (*268 Cal. App. 2d 213, 215*).

[d] Occupation By Mortgagor

Comstock v. Finn *(1936) 13 Cal. App. 2d 151, 56 P.2d 957* , was a quiet title action in which the trial court found that the necessary element of hostility (adverse claim) was not proved. In affirming a judgment against the adverse claimant, the appellate court stated that the possession of a mortgagor or his or her assignee not only is entirely consistent with the rights and estate of the mortgagee but also, as a general rule, cannot be adverse to the mortgagee's rights and estate until

the person in possession denies the mortgagee's rights under the mortgage and sets up an exclusive title in himself or herself so openly and notoriously that the mortgagee must know of the adverse claim (*13 Cal. App. 2d 151, 156*).

[e] Occupation By Tenant in Common

Dimmick v. Dimmick *(1962) 58 Cal. 2d 417, 24 Cal. Rptr. 856, 374 P.2d 824* , is discussed in *§ 13.10[3][b]*. In rejecting the plaintiff's contention that he had acquired full title to the land in question, to the exclusion of the defendant who was a joint tenant, the Supreme Court stated the following: each tenant in common (analogous in this case to a joint tenant) has a right to occupy the whole of the property; the possession of one is deemed the possession of all; each may assume that another in exclusive possession is possessing for all and not adversely to the others; and, therefore, one tenant in common does not, merely by exclusive possession, gain title by adverse possession against the others. This possession will be presumed to be by permission and rightful, unless notice is brought home to the others that it has become hostile (*58 Cal. 2d 417, 422*).

[f] Recordation of Conveyance to Cotenant

West v. Evans *(1946) 29 Cal. 2d 414, 175 P.2d 219* , involved the claim of a tenant in common that he had gained full title as against his cotenant by reason of adverse possession, notice of which was, he contended, given by recordation of a deed purporting to convey full title to him. The Supreme Court made the statement set out as Paragraph G in rejecting this contention (*29 Cal. 2d 414, 417*).

[g] Interruption of Possession

Big Three Mining & Milling Co. v. Hamilton *(1909) 157 Cal. 130, 107 P. 301* , was a quiet title action. In holding against the claimant by adverse possession, the Supreme Court stated that to acquire title by prescription the possession of the property must be not only hostile but also exclusive, continuous, and uninterrupted for a period of five years prior to the commencement of the action, and stated the rule set out as Paragraph H (*157 Cal. 130, 140*).

[h] Privity Necessary for Tacking

Von Neindorff v. Schallock *(1937) 21 Cal. App. 2d 44, 68 P.2d 278* , involved a claim to title by adverse possession. The court stated the rule set out as Paragraph I and cited as authority *San Francisco v. Fulde (1869) 37 Cal. 349, 353-354* . The Supreme Court in that case affirmed a judgment against a claimant by adverse possession and stated that a person who preceded the claimant in possession but held for less than five years will be deemed to have held in subordination to the true title, unless there was a privity between that person and the claimant, in which case the possession of the former becomes the possession of the latter, both possessions being referred to the same entry (*21 Cal. App. 2d 44, 48*).

[i] Limitations Period Does Not Run While Parties Are in Fiduciary Relationship

In ***Estate of Seifert*** *(2005) 128 Cal. App. 4th 64, 26 Cal. Rptr. 3d 560* , the decedent left a parcel of real property to two sons in his will. A third son, who was also the executor of the estate, claimed that the decedent had previously made him an oral gift of the property. The property was omitted from the distribution of the estate. One of the beneficiaries named in the will filed a petition to have the court require the executor to either produce a deed or reopen probate to distribute the property in accordance with the will. The trial court ruled that the executor had acquired title to the property by adverse possession. In particular, the trial court concluded that the period in which the third son served as executor could be counted in determining that possession was hostile and continuous for a period of five years. The court of appeal reversed. An executor is an officer of the court and occupies a fiduciary relation toward all parties having an interest in the estate. The statute of limitations does not run when the parties occupy a fiduciary relationship toward each other, so long as that relationship is not repudiated. Thus, a guardian may not acquire title by adverse possession against his or her ward, nor an agent against his or her principal, nor an executor against the heirs (*128 Cal.*

App. 4th 64, 68).

[4] Additional Authorities

[a] Occupation With Permission

In *Janes v. Le Deit (1964) 228 Cal. App. 2d 474, 39 Cal. Rptr. 559* , affirming a judgment for the defendant in a boundary dispute case, the court stated, by way of analogy, that title cannot be acquired by adverse possession when the occupant has entered into possession by permission or consent of the owner (*228 Cal. App. 2d 474, 488-489*).

[b] Occupation By Tenant in Common

In *Oglesby v. Hollister (1888) 76 Cal. 136, 18 P. 146* , reversing a judgment for the plaintiff in a quiet title action, the Supreme Court stated that when possession commences with the consent of the owner, which is the presumption when one tenant in common is in sole possession, there can be no adverse possession until there has been a disclaimer by the assertion of an adverse title, and notice of the disclaimer to the owner, either directly or inferentially from notorious acts (*76 Cal. 136, 141*).

In *Preciado v. Wilde (2006) 139 Cal. App. 4th 321, 42 Cal. Rptr. 3d 792* , a plaintiff who held title to property as tenants in common with his niece and sought to quiet title based on adverse possession failed to carry his burden of proving ouster. The niece testified that she had no notice that the plaintiff wanted to interfere with her right to possession and title. The plaintiff admitted he had never excluded his niece from the property, never restricted her access, or informed her he was challenging her ownership. The plaintiff constructed fences, but admitted they were not designed to exclude family members. The plaintiff conceded that part of the property was fenced in by the niece's father. In addition, some of the changes to the property made by the plaintiff were remote in time or involved only a small area. Finally, other changes were not initiated by the plaintiff until after he had consulted the niece or her father, which refuted the plaintiff's claim of hostility (*139 Cal. App. 4th 321, 325-326*).

[c] Recordation of Conveyance to Cotenant

In *Wilkerson v. Thomas (1953) 121 Cal. App. 2d 479, 263 P.2d 678* , affirming a judgment against a claimant by adverse possession, the court stated that the claimant's recordation of a quitclaim deed was not, as a matter of law and independent of any other fact, notice to a cotenant of the adverse character of the claimant's possession (*121 Cal. App. 2d 479, 487-489*).

[d] Interruption of Possession

In *Strauss v. Canty (1915) 169 Cal. 101, 105, 145 P. 1012* , affirming a judgment against a claimant by adverse possession, the Supreme Court stated that while possession could be maintained by using the land for pasture during the grazing season even though there was no enclosure, the possession must be of an exclusive character; and when the evidence is silent on the question of occupancy by others, which is entirely consistent with a view that the claimant's possession was casual and intermittent, a trial court is justified in finding that exclusive and continuous possession had not been proved (*169 Cal. 101, 105*).

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CHAPTER 13 ADVERSE POSSESSION
II. FORMS
B. Summary Judgment Motions

1-13 California Points & Authorities § 13.21

AUTHOR: Virginia A. Johnson

§ 13.21 Opposing Defendant's Motion for Summary Judgment in Quiet Title Action--Possession Actually Adverse

[1] FORM Opposing Defendant's Motion for Summary Judgment in Quiet Title Action--Possession Actually Adverse

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN OPPOSITION TO MOTION FOR SUM-
vs.	)	MARY JUDGMENT
_____ [*name*],	)	[Telephone Appearance]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE PLAINTIFF'S POSSESSION WAS ACTUALLY ADVERSE.

A. Hostile Possession. Possession is adverse and hostile when, although the parties have had no dispute as to title during the period of possession, the possession by the claimant is adverse to the owner and unaccompanied by any recognition, express or implied, of the owner's rights in the property (*Sorensen v. Costa (1948) 32 Cal. 2d 453, 459, 196 P.2d 900* ; *Kunza v. Gaskell (1979) 91 Cal. App. 3d 201, 210, 154 Cal. Rptr. 101*).

[*Optional*] **B. Possession Commenced By Mistake.** Title by adverse possession may be acquired through possession or use commenced by mistake (*Gilardi v. Hallam (1981) 30 Cal. 3d 317, 322-326, 178 Cal. Rptr. 317, 536 P.2d 588* ; *Sorensen v. Costa (1948) 32 Cal. 2d 453, 460, 196 P.2d 900* ; *Kunza v. Gaskell (1979) 91 Cal. App. 3d 201, 210-211, 154 Cal. Rptr. 101*).

[*Optional*] **C. Offer to Purchase Claim Before Title Acquired.** The offer of a party in possession of property that he or she claimsas his or her own to purchase an outstanding title or claim does not admit that the outstanding title or claim is valid and does not destroy that party's effort to acquire title by adverse possession (*Furlong v. Cooney (1887) 72 Cal. 322, 328, 14 P. 12*).

[*Optional*] **D. Offer to Purchase Interest After Title Acquired.** An offer to purchase outstanding interests in property made after acquisition of title by adverse possession does not affect the title already acquired (*Montgomery & Mullen Lbr. Co. v. Quimby (1912) 164 Cal. 250, 254, 128 P. 402*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to a defendant's motion for summary judgment in a quiet title action commenced by a claimant by adverse possession, when the motion is based on the ground that the plaintiff's possession was not actually adverse or hostile to the defendant. With appropriate modifications this form may be used to oppose a motion for a new trial on the ground of insufficiency of evidence to support a judgment in favor of a claimant by adverse possession.

[b] Argument

Counsel should add argument linking the relevant points of law to the facts of his or her case. For example, if plaintiff made an offer to buy the property after satisfying all of the elements of adverse possession, counsel would argue that the offer was not an acknowledgment of title defeating the plaintiff's claim.

[3] Discussion of Authorities

[a] Hostile Possession

In ***Sorensen v. Costa*** *(1948) 32 Cal. 2d 453, 196 P.2d 900* , affirming a judgment in favor of a claimant by adverse possession, the Supreme Court stated that the requirement of hostility means not that the parties must have a dispute as to the title during the period of possession, but that the claimant's possession must be adverse to the record owner unaccompanied by any recognition, express or implied, of the rights of the owner (*32 Cal. 2d 453, 459*).

In ***Kunza v. Gaskell*** *(1979) 91 Cal. App. 3d 201, 154 Cal. Rptr. 101* , an action to quiet title and for ejectment, a fence had been built in 1936 separating the northern and southern parcels of land in question. From 1943 to 1973, each of the owners of the parcels treated the fence as the boundary, and was assessed for and paid taxes on the land up to his or her side of the fence. In 1973, defendant owner of the north parcel destroyed the fence and claimed land south of the fence line. The trial court entered judgment for plaintiff, and defendant appealed. In finding that the record supported the trial court's conclusion that plaintiff and his predecessor in interest had acquired title to the southern parcel through adverse possession, the appellate court cited the statements of the Supreme Court in *Sorenson v. Costa (1948) 32 Cal. 2d 453, 459-460, 196 P.2d 900* , which are set out as Paragraphs A and B of this form (*91 Cal. App. 3d 201, 210*).

[b] Possession Commenced By Mistake

In ***Gilardi v. Hallam*** *(1981) 30 Cal. 3d 317, 178 Cal. Rptr. 624, 636 P.2d 588* , plaintiff occupied a certain portion of neighboring property based on a mistaken survey. Defendant appealed a verdict quieting title to the property in plaintiff's name. The Supreme Court held that adverse possession can be based on the occupier entering the land mistakenly believing he or she is the owner, unless it is established by substantial evidence that he or she recognized the potential claim of the record owner and expressly or impliedly reflected intent to claim the disputed land only if the record title was determined to be in his or her favor. The Supreme Court reversed, however, holding that plaintiff had not established that he paid the taxes on the property at issue. The Court did note that the failure to establish payment of taxes would not bar plaintiff from establishing the right to a prescriptive easement on the property (*30 Cal. 3d 317, 322-326*).

The claimant in ***Sorenson v. Costa*** *(1948) 32 Cal. 2d 453, 196 P.2d 900* (discussed in *§ 13.22[3][a]*) took possession under a deed containing mistaken descriptions of the boundaries. The Supreme Court stated the rule as set out in Paragraph B (*32 Cal. 2d 453, 460*).

Kunza v. Gaskell *(1979) 91 Cal. App. 3d 201, 154 Cal. Rptr. 101* , is discussed in *§ 13.22[3][a]*.

[c] Offer to Purchase Claim Before Title Acquired

In ***Furlong v. Cooney*** *(1887) 72 Cal. 322, 14 P. 12* , reversing a judgment against a claimant by adverse possession, the Supreme Court quoted an earlier opinion to the effect that a jury instruction substantially stating the rule set out as Paragraph C is correct (*72 Cal. 322, 328*).

[d] Offer to Purchase Interest After Title Acquired

In ***Montgomery & Mullen Lbr. Co. v. Quimby*** *(1912) 164 Cal. 250, 128 P. 402* , affirming a judgment in favor of a claimant by adverse possession, the Supreme Court concluded that a mere offer by the claimant to buy the claim of an opposing party in order to clear the claimant's title, made after the claimant's possession had continued for more than five years, was not an acknowledgment of title breaking continuity of possession (*164 Cal. 250, 254*).

In ***Frick v. Sinon*** *(1888) 75 Cal. 337, 17 P. 439* , the Supreme Court, in affirming a judgment in favor of a claimant by adverse possession, concluded that an offer to buy out a hostile claim could not invalidate the title of the claimant or her predecessor in interest because, having acquired title by adverse possession, the claimant could be divested of the title only by conveyance in writing while she remained in possession (*75 Cal. 337, 341*).

[4] Additional Authorities

[a] Hostile Possession

In *Newman v. Cornelius (1970) 3 Cal. App. 3d 279, 83 Cal. Rptr. 435* , the court of appeal reversed a judgment against claimants by adverse possession and held that they had done all that was necessary to gain title by adverse possession.

The court stated that the requirement of hostility means, not that the parties must have a dispute as to the title during the period of possession or that there is open aggression or combat, but that the claimant's possession must be adverse to the record owner, unaccompanied by any recognition, express or inferable from the circumstances, of the right in the latter. The possession must not only operate as an ouster of the holder of the legal title, but the title must be claimed as against the true owner during the entire statutory period (*3 Cal. App. 3d 279, 289*).

[b] Possession Commenced By Mistake

In *Park v. Powers (1935) 2 Cal. 2d 590, 42 P.2d 75* , affirming a judgment for the claimant by adverse possession who had entered land under the mistaken belief that it was land conveyed to him in a deed that was actually for adjoining lands, the Supreme Court stated the rule set out as Paragraph B (*2 Cal. 2d 590, 596*).

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1-13 California Points & Authorities § 13.22

AUTHOR: Virginia A. Johnson

§ 13.22 Opposing Motion for Summary Judgment in Quiet Title Action--Possession Adverse As to Cotenant

[1] FORM Opposing Motion for Summary Judgment in Quiet Title Action--Possession Adverse As to Cotenant

[*For caption, see § 13.21, with which this form may be combined.*]

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE PLAINTIFF'S POSSESSION WAS ADVERSE AS TO HIS/HER COTENANT.

A. Acts of Ownership Adverse to Cotenants. When a tenant in common having possession of the entire property performs acts of ownership of an unequivocal character, overt and notorious, and of such a nature as by their own import to inform his or her cotenants that an adverse possession and disseisin are intended to be asserted against them, the tenant in common's possession is adverse (*Johns v. Scobie (1939) 12 Cal. 2d 618, 624, 86 P.2d 820*).

B. Recordation of Deed Conveying Entire Interest. When a tenant in common takes possession and claims title under an invalid deed purporting to convey the entire interest in the property to the tenant in common, the recordation of the deed is notice to his or her cotenants of its existence and of the adverse character of the tenant in common's claim so as to start the period of limitations running, provided the tenant in common is not aware of the existence of his or her cotenants (*Johns v. Scobie (1939) 12 Cal. 2d 618, 624, 86 P.2d 820*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to a defendant's motion for summary judgment in a quiet title action commenced by a claimant by adverse possession, when the motion is based on the ground that plaintiff's possession was not adverse to the defendant for the reason that the parties are tenants in common. With appropriate modifications this form may be used to oppose a motion for a new trial on the ground of insufficiency of evidence to support a judgment in favor of a claimant by adverse possession.

[b] Argument

Counsel should add argument linking the relevant points of law with the facts of his or her case. Thus, counsel should show that the plaintiff's possession was adverse as to the co-tenant.

[3] Discussion of Authorities

[a] Acts of Ownership Adverse to Cotenants

In ***Johns v. Scobie*** *(1939) 12 Cal. 2d 618, 86 P.2d 820* , concluding that a tenant in common's recordation of a deed purporting to convey property solely to a cotenant claiming by adverse possession was sufficient notice to his cotenants under the circumstances (when the claimant was not aware of the existence of the cotenants), the Court stated the rules set out as Paragraphs A and B (*12 Cal. 2d 618, 624*).

[b] Recordation of Deed Conveying Entire Interest

Johns v. Scobie *(1939) 12 Cal. 2d 618, 86 P.2d 820* , is discussed in *§ 13.23[3][a]*.

[4] Additional Authorities

[a] Acts of Ownership Adverse to Cotenants

In *Akley v. Bassett (1922) 189 Cal. 625, 642, 209 P. 576* , the Supreme Court determined that adverse possession was established when the claimant's predecessor in title entered into open and notorious possession of an entire tract under a deed that purported to convey the whole tract, with the claimant in turn entering into possession (*189 Cal. 625, 642*).

In *Zolezzi v. Michelis (1948) 86 Cal. App. 2d 827, 832, 195 P.2d 835* , the court of appeal affirmed a judgment in favor of a claimant by adverse possession. The found that a tenant in common acquired a title by prescription under the statute of limitations because he (1) entered into actual possession of land under claim and color of title, (2) with his predecessors in interest, had maintained possession, and (3) exercised acts of ownership, openly and notoriously, claiming the land adversely to other cotenants who were of age, and to all the world, and (4) paid taxes assessed on the land for the required period.

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1-13 California Points & Authorities § 13.23

AUTHOR: Virginia A. Johnson

§ 13.23 Opposing Motion for Summary Judgment in Quiet Title Action--Possession Continuous for Five Years

[1] FORM Opposing Motion for Summary Judgment in Quiet Title Action--Possession Continuous for Five Years

[*For caption, see § 13.21, with which this form may be combined.*]

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE PLAINTIFF'S POSSESSION WAS CONTINUOUS FOR FIVE YEARS.

A. Continuous Personal Presence Not Required. It is not essential to the continuity of possession that there should be a continuous personal presence of some person on the property holding for the adverse claimant (*Montgomery & Mullen Lbr. Co. v. Quimby (1912) 164 Cal. 250, 253-254, 128 P. 402*).

[*Optional*] **B. Periods of Vacancy.** Periods of vacancy incident to or occasioned by a change of possession, or by the substitution of one tenant for another, and that are not longer than reasonable in view of the character of the land and the uses to which it is adapted and devoted, do not constitute an interruption of possession, if there is no intention to abandon possession (*Botsford v. Eyraud (1906) 148 Cal. 431, 436, 83 P. 1008*).

[*Optional*] **C. Seasonal Use.** When enclosed land suitable for grazing and pasturage is occupied each year during the full period of the season therefor, possession is continuous within the meaning of the requirement for continuous possession (*Park v. Powers (1935) 2 Cal. 2d 590, 595, 42 P.2d 75*).

[*Optional*] **D. Slight Use.** If but slight use can be made of land claimed adversely, and this slight use is actually made of the land, then the requirement of continuous and uninterrupted occupancy is satisfied (*Posey v. Bay Point Realty Co. (1932) 214 Cal. 708, 712, 7 P.2d 1020*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to a defendant's motion for summary judgment in a quiet title action commenced by a claimant by adverse possession, when the motion is based on the ground that the plaintiff's possession has not been continuous for five years. With appropriate modifications this form may be used to oppose a motion for a new trial on the ground of insufficiency of evidence to support a judgment in favor of a claimant by adverse possession.

[b] Argument

Counsel should add argument linking the points of law with the facts of his or her case. For example, if plaintiffs tenants occupied the property, with brief periods of vacancy between tenancies, and the purported owner did not occupy during these periods, counsel would argue that these periods did not interrupt plaintiff's possession.

[3] Discussion of Authorities

[a] Continuous Personal Presence Not Required

In ***Montgomery & Mullen Lbr. Co. v. Quimby*** *(1912) 164 Cal. 250, 128 P. 402* , the Supreme Court determined that adverse possession was established although property was vacant during a period after the claimant ceased to use it as a lumber yard until a tenant of the claimant took possession. There was no intrusion by the purported owner or any other person during the period of vacancy. The Court observed that constant occupancy and use is not always required, depending on the character of the property and the use to which it is adapted, and that one who owns a house for rental does not abandon or lose his or her possession every time it remains vacant between tenancies. In rejecting the defendant's claim that the plaintiff's adverse possession was not continuous, the Supreme Court stated the rule set out as Paragraph A (*164 Cal. 250, 253-254*).

[b] Periods of Vacancy

In ***Botsford v. Eyraud*** *(1906) 148 Cal. 431, 83 P. 1008* , involved a determination that there was no break in continuity of possession when a predecessor in interest of an adverse claimant deeded enclosed property to another who did not occupy the property for about a year, although the property continued to be enclosed. As authority for this determination, the Supreme Court quoted from a text the rule set out as Paragraph B (*148 Cal. 431, 436*).

[c] Seasonal Use

In ***Park v. Powers*** *(1935) 2 Cal. 2d 590, 42 P.2d 75* , affirming a judgment for a claimant by adverse possession, the period of actual use each year lasted from May until October or November (*2 Cal. 2d 590, 595*).

In ***Webber v. Clarke*** *(1887) 74 Cal. 11, 17, 15 P. 431* , affirming a judgment in favor of an adverse claimant, the Court concluded that pasturage only during the grazing season was sufficient when the land was not suitable for pasturage the rest of the year and was not occupied by anyone else during that time (*74 Cal. 11, 17*).

[d] Slight Use

In ***Posey v. Bay Point Realty Co.*** *(1932) 214 Cal. 708, 7 P.2d 1020* , the Supreme Court stated the rule set out as Paragraph D in affirming a judgment for a claimant by adverse possession. The court found that the claimant's use of the land as a refuge for some stock and only a supplement to the real pasture was sufficient, given that the land was unsuitable for even pasteurage most of the year (*214 Cal. 708, 712*).

[4] Additional Authorities

[a] Continuous Personal Presence Not Required

In *Newman v. Cornelius (1970) 3 Cal. App. 3d 279, 83 Cal. Rptr. 435* , the court of appeal reversed a judgment against claimants by adverse possession. The court stated, in listing the requirements for acquiring title by adverse possession and concluding that they had been fulfilled, that it is not essential to continuity, in every case, that there shall be a continuous personal presence on the lot of some person holding for the adverse claimant. It is enough, under the code, that it is devoted to the ordinary use of the occupant, when the possession is under color of title. Constant occupancy and use is not always required. It depends on the character of the property and the use to which it is adapted (*3 Cal. App. 3d 279, 290*).

In *Los Angeles County v. Pacific Elec. Ry. Co. (1928) 93 Cal. App. 512, 269 P. 767* , the court of appeal affirmed a judgment in a condemnation proceeding, after amendment to include a finding that a claimant to title by adverse possession was the owner of disputed property, and to provide for payment of proceeds in the proceeding to the adverse claimant rather than to the holder of the legal title. The court stated that the continuity of adverse possession necessary to the maintenance of such a claim, does not require that the claimant be constantly present on the land, and that it is enough if the claimant is present at all times and seasons appropriate to the regular and usual cultivation of the land (*93 Cal. App. 512, 514*).

[b] Periods of Vacancy

In *Bernstein v. Dodik (1933) 129 Cal. App. 454, 18 P.2d 983* , the court affirmed a judgment quieting title to easements for use of a driveway when, although there were periods of vacancy of a duplex bungalow during substitution of one tenant for another, there was no evidence of intention to abandon the right-of-way in dispute (*129 Cal. App. 454, 458*).

In *Merrill v. Hooper (1932) 125 Cal. App. 80, 13 P.2d 786* , affirming a judgment in favor of claimants to title by adverse possession who had rented the disputed premises with some periods of vacancy occurring, the court stated that the temporary periods of vacancy, not evincing any intention of abandonment of possession, did not interrupt the continuity of their possession (*125 Cal. App. 80, 84*).

[c] Seasonal Use

In *Kellogg v. Huffman (1934) 137 Cal. App. 278, 30 P.2d 593* , the court affirmed a judgment in favor of an adverse claimant who for several years had leased land each year for grazing purposes, when no one other than his tenants was permitted to use the land during the period in question (*137 Cal. App. 278, 284*).

[d] Slight Use

In *Newman v. Cornelius (1970) 3 Cal. App. 3d 279, 290, 83 Cal. Rptr. 435* , the court stated that slight use was sufficient when it determined that the requirement of continuous and uninterrupted possession was met when land in a mountainous area was used for summer and weekend recreational purposes, coupled with a modest attempt to extract gold, although not in commercial quantities (*3 Cal. App. 3d 279, 290*).

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Volume 1 Chapters 1-19 WRITING LEGAL MEMORANDA AND BRIEFS; ABATEMENT AND SURVIVAL OF ACTIONS---to---AMENDED AND SUPPLEMENTAL PLEADINGS
CHAPTER 13 ADVERSE POSSESSION
II. FORMS
B. Summary Judgment Motions

1-13 California Points & Authorities § 13.24

AUTHOR: Virginia A. Johnson

§ 13.24 Opposing Motion for Summary Judgment in Quiet Title Action--Tacking of Possession for Five Years

[1] FORM Opposing Motion for Summary Judgment in Quiet Title Action--Tacking of Possession for Five Years

[*For caption, see § 13.21, with which this form may be combined.*]

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE THE PLAINTIFF IS IN PRIVITY WITH HIS/HER PREDECESSOR[S] IN INTEREST, AND TOGETHER THEY HAVE HELD THE PROPERTY FOR FIVE YEARS.

Privity Between Successive Adverse Claimants. It is not necessary that one person be in possession for the full five years to establish a prescriptive title if there is privity between adverse possessors who together have held the property adversely for the full five years (*Sorensen v. Costa (1948) 32 Cal. 2d 453, 461-464, 196 P.2d 900*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to a defendant's motion for summary judgment in a quiet title action commenced by a claimant by adverse possession, when the motion is based on the ground that the

plaintiff has not been in possession for five years, but the plaintiff asserts the continuous possession of himself or herself and predecessors in interest. With appropriate modifications this form may be used to oppose a motion for a new trial on the ground of insufficiency of evidence to support a judgment in favor of a claimant by adverse possession.

[b] Argument

Counsel should add argument linking the points of law with the facts of his or her case. Thus, counsel should show that plaintiff and his or her predecessor(s) in interest were in privity and together were in possession of the property for five years.

[3] Discussion of Authorities

[a] Privity Between Successive Adverse Claimants

In ***Sorensen v. Costa*** *(1948) 32 Cal. 2d 453, 196 P.2d 900* , after noting the rule that privity between successive claimants to title by adverse possession is necessary in order to tack one person's possession onto that of another, the Supreme Court found that there was sufficient privity between a claimant and his predecessors to support a finding of continuous possession for the five-year statutory period. The land had been conveyed by deeds mistakenly describing the property, which supported the conclusion that the claimant's predecessors intended to transfer the land in question, and possession of the land had been transferred to each successive occupant during the five-year period (*32 Cal. 2d 453, 461-464*).

[4] Additional Authorities

[a] Privity Between Successive Adverse Claimants

In *Saner v. Knight (1927) 86 Cal. App. 347, 260 P. 942* , affirming a judgment in favor of a claimant by adverse possession, the court concluded that the claimant's possession could be tacked to that of the former adverse occupants when the property was conveyed to successive occupants by deeds containing correct descriptions (*86 Cal. App. 347, 351-352*).

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1-13 California Points & Authorities §§ 13.25-13.29

AUTHOR: Virginia A. Johnson

[Reserved]

§§ 13.25[Reserved]

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CHAPTER 13 ADVERSE POSSESSION
II. FORMS
C. Demurrers

1-13 California Points & Authorities § 13.30

AUTHOR: Virginia A. Johnson

§ 13.30 Supporting General Demurrer to Complaint--Action to Recover Real Property--Bar of Statute of Limitations

[1] FORM Supporting General Demurrer to Complaint--Action to Recover Real Property--Bar of Statute of Limitations

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN SUPPORT OF GENERAL DEMURRER TO
vs.	)	COMPLAINT
_____ [*name*],	)	[Telephone Appearance]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT SHOWS ON ITS FACE THAT IT IS BARRED BY THE STATUTE OF LIMITATIONS.

A. Objection By Demurrer. The party against whom a complaint has been filed may object, by demurrer as provided in *Section 430.30 of the Code of Civil Procedure*, to the complaint on the ground that it does not state facts sufficient to constitute a cause of action (*Code Civ. Proc. § 430.10(e)*). When any ground for objection to a complaint appears on the face thereof (*or* from any matter of which the court is required to or may take judicial notice), the objection on that ground may be taken by a demurrer to the complaint (*Code Civ. Proc. § 430.30(a)*).

B. Failure to State Cause of Action. The objection that an action is barred by a statute of limitations must be deemed to be included in the ground of demurrer that the complaint does not state facts sufficient to constitute a cause of action (*Bell v. Bank of Cal. (1908) 153 Cal. 234, 245, 94 P. 889*).

C. Statute of Limitations. No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained unless it appears that the plaintiff or the plaintiff's ancestor, predecessor, or grantor, was seised or possessed of the property in question within five years before the commencement of the action (*Code Civ. Proc. § 318*).

D. Commencement of Action. An action is commenced, within the meaning of *Code of Civil Procedure Sections 312 through 363*, when the complaint is filed (*Code Civ. Proc. § 350*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a demurrer to a complaint in a quiet title action, based on the bar of the statute of limitations [*see Code Civ. Proc. § 318*].

[b] Argument

Counsel should add argument linking the points of law with the facts of his or her case. Thus, counsel should show the facts by which the applicable limitation period is to be determined.

[c] Related Pleading and Practice Chapters

For a form of demurrer by which to assert the bar of the statute of limitations, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* , and Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For a form of affirmative defense raising the bar of the statute of limitations in a quiet title action, see California Forms of Pleading and Practice, Ch. 13, *Adverse Possession* (Matthew Bender).

[3] Discussion of Authorities

[a] Failure to State Cause of Action

Bell v. Bank of Cal. *(1908) 153 Cal. 234, 94 P. 889* , was an action for the recovery of shares of stock. The defendant asserted in a general demurrer that the action was barred by a statute of limitations, and the trial court sustained the demurrer and dismissed the action. The method of asserting the defense of bar of a statute of limitations was not, apparently, an issue either in the trial court or on appeal. However, the Supreme Court said, "The bar of the statute of

limitations is not specified in the code as a ground of demurrer ...#x2026; and that objection to a complaint, while required to be stated in the demurrer, must be deemed to be included within the ground of want of facts sufficient to constitute a cause of action" (*153 Cal. 234, 245*).

[b] Statute of Limitations

In ***Earl v. Lofquist*** *(1933) 135 Cal. App. 373, 27 P.2d 416* , a quiet title action in which it affirmatively appeared from the complaint that the defendant had been in possession of the property for 11 years before the action was commenced, the court held that the action was barred by *Code Civ. Proc. § 318* and affirmed a judgment of dismissal after the sustaining of a general demurrer (*135 Cal. App. 373, 378-379*).

[4] Additional Authorities

[a] Failure to State Cause of Action

California Safe Deposit & Trust Co. v. Sierra Valleys Ry. Co. (1910) 158 Cal. 690, 112 P. 274 , was an action to foreclose a deed of trust securing corporate bonds. The defendant did not demur but asserted in the answer that the action was barred by a statute of limitations. On appeal from a judgment on the merits, it was contended that the defense of limitations was waived by failure to raise it in a demurrer. The Supreme Court noted that "the only ground of demurrer applicable [in this case] is the failure to state facts sufficient [to constitute a cause of action], and this ground is, by the express provision of section 434 [superseded by *Code Civ. Proc. § 430.80*], not waived by failure to demur. The true rule, under our practice, is, we think, that the defendant may, if the defect appears on the face of the complaint, set up the bar of the statute either by demurrer or by answer. If the complaint does not show that the statute has run, the defendant must plead his right by answer" (*158 Cal. 690, 698*).

In *Tobin v. Stevens (1988) 204 Cal. App. 3d 945, 251 Cal. Rptr. 587* , the court held that seisin does not require actual possession of the property and that the seisin requirement was met when the plaintiff had legal title to the property within five years of the commencement of the action (*204 Cal. App. 3d 945, 949-951*).

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[1] In General

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[1] Related Pleading and Practice Forms

[2] Related Points and Authorities

§§ 14.09-14.19 [Reserved]

§ 14.20 Supporting Contention That Complaint States Statutory Cause of Action for False or Misleading Advertising [Bus. & Prof. Code §§ 17500, 17535]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Use of Unfair Competition Cases

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Duty of Reasonable Care Defined

[b] Specific Language of Each Advertisement Is Not Required

[c] Deceptive Advertising Practice, Though Not Continuing, Will Probably Recur

[4] Additional Authorities

[a] Person Who Has Been Injured May Sue for Relief From Violation of False Advertising Law

[b] Restitution or Other Equitable Relief

§ 14.21 Supporting Contention That Complaint States Statutory Cause of Action for False or Misleading Advertising [Bus. & Prof. Code §§ 17500, 17535]--False or Misleading Advertising Constitutes Unfair Competition [Bus. & Prof. Code § 17200]

[1] FORM

[2] Comments

[a] Use of Form

[b] Advertising and Unfair Competition Statutes Compared

[3] Discussion of Authorities

[a] False or Misleading Advertising Is Unfair Competition

§ 14.22 Supporting Contention That Complaint States Statutory Cause of Action for Fraud Based on False or Misleading Advertising [Civ. Code §§ 1709, 1710]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] False Advertising May Constitute Actionable Fraud

[b] Intentional Misrepresentation

[c] Negligent Misrepresentation

[d] Fraudulent Concealment

[e] Pleading Rules Are Relaxed When Defendant Possesses More Facts Than Plaintiff

[f] Pleading Rules Are Relaxed When Advertising Campaign Is Based on Long-Term, Cumulative Impact

[g] Liability to Purchasers Who Do Not See Advertising

[h] Promise Concerning Safety of Product Is Statement of Fact, Not "Puffing"

§ 14.23 Opposing Contention That Complaint States Statutory Cause of Action for False or Misleading Advertising [Bus. & Prof. Code §§ 17500, 17535]--Statutory Prohibitions Do Not Apply to Good-Faith Publisher or Broadcaster of Advertising [Bus. & Prof. Code § 17502]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Good-Faith Publishers or Broadcasters Are Exempted

[b] Deceptive Prize or Gift Offer

[c] Deceptive Real Estate Advertisement

§ 14.24 Opposing Contention That Complaint States Statutory Cause of Action for False or Misleading Advertising [Bus. & Prof. Code §§ 17500, 17535]--Statutory Prohibitions Do Not Apply to Election Campaign Practices

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Statutes Do Not Apply to Campaign Practices

§ 14.25 Opposing Contention That Complaint States Statutory Cause of Action for False or Misleading Advertising [Bus. & Prof. Code §§ 17500, 17535]--Statute Does Not Authorize Claim for Damages

[1] FORM

[2] Comments

[a] Use of Form

[b] History of Remedies for Deceptive Advertising

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Damages Are Not Authorized

§ 14.26 Opposing Contention That Complaint States Cause of Action for Fraud Based on False or Misleading Advertising [Civ. Code § 1709]--Misrepresentation Was Mere Puffing

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Alleged Misrepresentation Is Mere "Puffing"

§ 14.27 Supporting Contention That Outdoor Advertising Ordinance Is Constitutional--Ordinance Does Not Impermissibly Infringe Free Speech [U.S. Const., Amend. I; Cal. Const. Art. 1, § 2]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Outdoor Advertising Is Protected Commercial Speech

[b] Standard for Regulation of Commercial Advertising

[c] Ban on All Off-Site Commercial Signs Is Permitted

[d] Ban on All Off-Site Signs, Regardless of Content, Is Permitted

[e] California Constitution Does Not Provide Greater Protection

[4] Additional Authorities

[a] Standard for Regulation of Commercial Advertising

[b] Ban on All Off-Site Commercial Signs Is Permitted

§ 14.28 Supporting Contention That Outdoor Advertising Ordinance Is Constitutional--Ordinance Is Proper Exercise of Police Power [U.S. Const., Amends. X, XIV; Cal. Const. Art. I, §§ 13, 14; Art. XI, § 7]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Standard for Exercise of Police Power

[b] Traffic Safety

[c] Aesthetic Considerations

§ 14.29 Opposing Contention That Outdoor Advertising Ordinance Is Constitutional--Ordinance Impermissibly Infringes Free Speech [U.S. Const., Amend. I; Cal. Const. Art. I, § 2]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Ordinance Cannot Afford Commercial Speech Greater Protection Than Noncommercial Speech

[b] Ordinance Cannot Make Content-Based Restriction on Noncommercial Speech

[c] Legislative Intent Precludes Saving Construction

§ 14.30 Opposing Contention That Outdoor Advertising Ordinance Is Constitutional--Ordinance Violates Right to Due Process [U.S. Const., amend. XIV; Cal. Const. art. I, § 7(a)] or Takes Property Without Compensation [U.S. Const., amend. V; Cal. Const., art. I, § 19]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Reasonable Amortization Period Is Required

[b] One-Year Amortization Period Is Facially Unreasonable

[c] Ordinance Constitutes Taking Without Compensation if, Among Factors, Amortization Period Is Unreasonable

§ 14.31 Opposing Contention That Outdoor Advertising Ordinance Is Constitutional--Ordinance Violates Equal Protection Guarantees [U.S. Const., Amend. XIV; Cal. Const. art. I, § 7(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Ordinance May Not Make Arbitrary Classification

[4] Additional Authorities

[a] Ordinance May Not Make Arbitrary Classification

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1-14 California Points & Authorities § 14.01

§ 14.01 Scope of Chapter

This chapter contains memoranda relating to actions based on false or misleading advertising practices and actions involving local ordinances regulating billboards and other outdoor advertising displays. It includes memoranda supporting [*see §§ 14.20, 14.21*] and opposing [*see §§ 14.23 -14.25*] the contention that a complaint states a cause of action for statutory false advertising or unfair competition, and memoranda supporting [*see § 14.22*] and opposing [*see § 14.26*] the contention that a complaint states a cause of action for fraud based on false or misleading advertising. This chapter also includes memoranda supporting [*see §§ 14.27, 14.28*] and opposing [*see §§ 14.29 -14.31*] the contention an outdoor advertising ordinance is constitutional.

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1-14 California Points & Authorities § 14.02

§ 14.02 Governing Law

The False Advertising Law [*Bus. & Prof. Code § 17500 et seq.*] generally prohibits false or misleading advertising and authorizes actions for injunctive relief and restitution [*Bus. & Prof. Code § 17535*]. Note that in some cases, this law can be preempted by federal law [*see, e.g., Silvas v. E*Trade Mortg. Corp. (9th Cir. 2008) 514 F.3d 1001, 1008* (class action against lender dismissed based on federal preemption of lending regulation)]. For discussion, see *California Forms of Pleading and Practice, Ch. 14, Advertising, § 14.12[1]* (Matthew Bender).

False or misleading advertising also may be a cause of action for equitable relief under *Bus. & Prof. Code § 17200 et seq.* (sometimes referred to collectively as the unfair competition law). Billboards and other forms and methods of outdoor advertising are regulated by the Outdoor Advertising Act [*Bus. & Prof. Code § 5200 et seq.*] and by federal law [*see 23 U.S.C. § 131*]. For discussion of these actions, see Ch. 565, *Unfair Competition* ; see also Matthew Bender(R) Practice Guide: Californa Unfair Competition and Business Torts, Ch. 2, *Unfair Competition*, and Ch. 3, *False/Misleading Advertising*.

Consumers' remedies for certain deceptive advertising practices are set forth in *Civ. Code §§ 1770, 1780, 1781*.

Tort actions for fraudulent misrepresentation are governed generally by *Civ. Code §§ 1709* and *1710* and case law.

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionFalse AdvertisingState RegulationAntitrust & Trade LawTrade Practices & Unfair CompetitionState RegulationGeneral Overview

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1-14 California Points & Authorities § 14.03

§ 14.03 How to Use Forms in This Chapter

[1] Page Limits on Points and Authorities

One of the more significant drafting requirements to keep in mind are page limits: supporting and opposing memoranda may not exceed 15 pages. A reply or closing memorandum may not exceed 10 pages. Exhibits, declarations, attachments, the table of contents, the table of authorities, and the proof of service are excluded from these page limits [*Cal. Rules of Ct., Rule 3.1113(d)*]. Any party must obtain leave of court to file a longer memorandum [*see Cal. Rules of Ct., Rule 3.1113(e)*]. These and other drafting requirements are discussed in further detail in Ch. 1, *Writing Legal Memoranda and Briefs* .

[2] Using the Forms to Build a Draft Memorandum

Forms in this chapter are in the form of contentions based on particular procedural and substantive points of law, and may be combined with each other depending on the facts and issues involved. They may also be combined with any appropriate procedural forms, depending on the context in which they are raised. For example, the form supporting a contention that a complaint states a statutory cause of action for false or misleading advertising may be combined with appropriate procedural forms in Ch. 116, *Injunctions* . The contentions in the chapter may also be adapted for use in a trial or appellate brief or be used to research office memoranda and jury instructions. Whatever procedural context or paper is involved, counsel should add argument to the points and authorities being used and show the relationship between the facts of the case and the points of law stated.

For a discussion of how to use the forms in this chapter to draft a memorandum or a trial or appellate brief, and for a sample of a complete memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

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1-14 California Points & Authorities § 14.04

§ 14.04 Statutory Action for False or Misleading Advertising

Bus. & Prof. Code § 17500 generally prohibits the dissemination of false or misleading advertising that is known, or by the exercise of reasonable care should be known, to be false or misleading. In addition, the False Advertising Law makes many particular methods of false or misleading advertising unlawful. For example, it is unlawful for any newspaper owner or publisher willfully and knowingly to misrepresent the circulation of the newspaper in order to gain subscribers [*see Bus. & Prof. Code § 17533*]. For a detailed discussion of the specific prohibitions, see California Forms of Pleading and Practice, Ch. 14, *Advertising* (Matthew Bender).

Any person who has suffered injury in fact and has lost money or property as a result of a violation of the False Advertising Law may sue for injunctive and other equitable relief; but the plaintiff may pursue representative claims or relief on behalf of others only if the plaintiff meets that standing requirement and complies with *Code Civ. Proc. § 382*, concerning class action certification [*Bus. & Prof. Code § 17535*; *see Bus. & Prof. Code § 17506* (defining person); *see also Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 215, 197 Cal. Rptr. 783, 673 P.2d 660* ; § 14.20]. The action may also be prosecuted by the Attorney General, district attorney, or other specified public prosecutor, who can also obtain civil penalties [*Bus. & Prof. Code § 17535*]. When they bring such actions, both private persons and prosecuting authorities bear the burden of proving the advertising claims to be false or misleading. Prosecuting authorities, but not private plaintiffs, have the administrative power to request advertisers to substantiate advertising claims before bringing actions for false advertisement [*see Bus. & Prof. Code § 17508*], but the prosecuting authorities retain the burden of proof in the false advertising actions [*National Council Against Health Fraud, Inc. v. King Bio Pharmaceuticals, Inc. (2003) 107 Cal. App. 4th 1336, 1344-1345, 1348, 133 Cal. Rptr. 2d 207* (holding that it would be inappropriate to shift burden of proof to defendant in private plaintiff false advertising action when private plaintiff is not authorized by statute to seek substantiation of advertising claim from defendant)].

As a further remedy in either a private or public action, *Bus. & Prof. Code § 17535* authorizes the court to make such orders or judgments, including the appointment of a receiver, as may be necessary to (1) prevent the use or employment of any practices that violate the False Advertising Law or (2) restore to any person in interest any money or property acquired by unlawful practices [*Bus. & Prof. Code § 17535*].

Claims for injunctive relief under the False Advertising Law are not subject to arbitration [*Cruz v. Pacificare Health Systems, Inc. (2003) 30 Cal. 4th 303, 307, 316, 133 Cal. Rptr. 2d 58, 66 P.3d 1157]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionFalse AdvertisingState RegulationCivil ProcedureJusticiabilityStandingBurdens of Proof

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1-14 California Points & Authorities § 14.05

§ 14.05 Statutory Action for Unfair Competition

A violation of the False Advertising Law is also a cause of action for injunctive and other equitable relief under *Bus. & Prof. Code § 17200 et seq.* (commonly referred to collectively as the unfair competition law) [*see Bus. & Prof. Code §§ 17200, 17203*; *e.g., Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 209-210, 197 Cal. Rptr. 783, 673 P.2d 660* ; § 14.21]. Restitution is specifically authorized [*Bus. & Prof. Code § 17203*], and the concept of restitution, in this context, is not limited to the return of money or property that was once in the plaintiff's possession; it is broad enough to allow the plaintiff to recover money or property in which he or she has only a vested interest [*Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal. 4th 1134, 1149, 131 Cal. Rptr. 2d 29, 63 P.3d 937]* . Although the California Supreme Court once held that restitution was available solely as a form of ancillary relief and could not be awarded except along with the issuance of an injunction [*Fletcher v. Security Pac. Nat'l Bank (1979) 23 Cal. 3d 442, 452-453, 153 Cal. Rptr. 28, 591 P.2d 51]* , it is now settled that restitution may be awarded without injunctive relief [*ABC Int'l Traders, Inc. v. Matsushita Elec. Corp. of Am. (1997) 14 Cal. 4th 1247,1271, 61 Cal. Rptr. 2d 112, 931 P.2d 290]* .

The plaintiff may not obtain an award of damages [*Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co. (1999) 20 Cal. 4th 163, 179, 83 Cal. Rptr. 2d 548, 973 P.2d 527]* unless the plaintiff pleads, in a separate count, a claim for damages in the complaint stating the unfair competition claim [*see, e.g., Allied Grape Growers v. Bronco Wine Co. (1988) 203 Cal. App. 3d 432, 452-453 249 Cal. Rptr. 872* (grape seller was entitled to damages under *Com. Code § 2706* along with injunction under *Bus. & Prof. Code § 17203*)].

For additional forms for points and authorities relating to actions based on statutory unfair competition, see *Ch. 235, Unfair Competition, § 235.50* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionFalse AdvertisingState RegulationAntitrust & Trade LawTrade Practices & Unfair CompetitionState RegulationGeneral OverviewCivil ProcedureRemediesGeneral Overview

California Points & Authorities

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1-14 California Points & Authorities § 14.06

§ 14.06 Tort Action for Fraudulent Misrepresentation

False and misleading advertising may constitute the tort of fraudulent misrepresentation, negligent misrepresentation, or fraudulent concealment [*Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 215-221, 197 Cal. Rptr. 783, 673 P.2d 660* ; *see § 14.22*]. The elements of intentional fraud generally are [*Molko v. Holy Spirit Assn. (1988) 46 Cal. 3d 1092, 1108, 252 Cal. Rptr. 122, 762 P.2d 46* ; *see Civ. Code § 1710(1)*]:

- A misrepresentation.
- Knowledge of its falsity.
- Intent to induce reliance on the misrepresentation.
- Justifiable reliance.
- Resulting damage.

Negligent fraud arises from making the misrepresentation with no reasonable ground for believing it to be true [*Civ. Code § 1710(2)*]. Fraudulent concealment includes concealment of a fact by one who gives information of other facts that are likely to mislead in the absence of communication of the concealed fact [*Civ. Code § 1710(3)*].

If the misrepresentation in an advertisement is mere "puffing," or a statement of opinion, there may be no liability for fraud [*see* *Hauter v. Zogarts (1975) 14 Cal. 3d 104, 111, 120 Cal. Rptr. 681, 534 P.2d 377* ; § 14.26]. However, courts interpret "puffing" liberally in favor of injured consumers, especially when the misrepresentation concerns safety [*see* *Hauter v. Zogarts (1975) 14 Cal. 3d 104, 112, 120 Cal. Rptr. 681, 534 P.2d 377]* . If the defendant had superior knowledge regarding the subject matter of the representations, and the other party is so situated that he or she may reasonably rely on such supposed superior knowledge or special information, the representations may be construed as fact, not opinion [*Toole v. Richardson-Merrell, Inc. (1967) 251 Cal. App. 2d 689, 706-707, 60 Cal. Rptr. 398* (manufacturer's oral and written statements to physicians and advertisements in medical journals concerning safety of

drug)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionFalse AdvertisingState RegulationTortsBusiness TortsFraud & MisrepresentationActual FraudElementsTortsBusiness TortsFraud & MisrepresentationNegligent MisrepresentationGeneral OverviewTortsBusiness TortsFraud & MisrepresentationNondisclosureGeneral Overview

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1-14 California Points & Authorities § 14.07

§ 14.07 Regulation of Outdoor Advertising

[1] In General

Before the United Supreme Court ruled that commercial speech is entitled to some *First Amendment* protection [*see Bigelow v. Virginia (1975) 421 U.S. 809, 818, 95 S. Ct. 2222, 44 L. Ed. 2d 600]* , state and local regulation of billboards and other outdoor advertising was typically challenged on the ground that the governmental entity was exceeding the police power reserved to the states by *U.S. Const., Amend. X*. In reviewing legislation for the purpose of testing its propriety as an exercise of the police power, the court determines whether the subject of the legislation is within the state's power and, if so, whether the means adopted to accomplish the result are reasonably designed for that purpose, and have a real and substantial relation to the objects sought to be attained [*Serve Yourself Gas etc. Assn. v. Brock (1952) 39 Cal. 2d 813, 817-818, 249 P.2d 545]* . The California Supreme Court has made clear that under this standard, the goals of eliminating traffic hazards and improving the appearance of a city are proper objectives for the exercise of the city's police power and an ordinance that virtually eliminates billboards designed to be viewed from streets and highways bears a reasonable relationship to those objectives [*Metromedia, Inc. v. City of San Diego (1980) 26 Cal. 3d 848, 855, 859, 164 Cal. Rptr. 510, 610 P.2d 407 , rev'd on First Amendment grounds, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981)* ; *see § 14.28*].

In addition, federal and state equal protection guarantees require that classification of advertising for purposes of regulation must not be arbitrarily made, but must be based on natural, intrinsic, or constitutional distinctions that suggest reasons for and justify the particular legislation [*see Carlin v. City of Palm Springs (1971) 14 Cal. App. 3d 706, 712, 92 Cal. Rptr. 535]* . Due process requires that a local government may not require the removal of outdoor advertising without either (1) payment of just compensation, or (2) the allowance of a reasonable amortization period, commensurate with the owner's investment [*Metromedia, Inc. v. City of San Diego (1980) 26 Cal. 3d 848, 881-882, 164 Cal. Rptr. 510, 610 P.2d 407 , rev'd on First Amendment grounds, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981)]* .

[2] First Amendment Limitations

Since 1975, it has been clear that commercial speech is entitled to *First Amendment* protection, although commercial

speech may be made subject to more stringent governmental regulation than noncommercial speech [*Virginia Pharmacy Bd. v. Virginia Consumer Council (1976) 425 U.S. 748, 770, 771, 96 S. Ct. 1817, 48 L. Ed. 2d 346* ; *Bigelow v. Virginia (1975) 421 U.S. 809, 818, 95 S. Ct. 2222, 44 L. Ed. 2d 600]* . The *First Amendment* protects commercial speech that concerns lawful activity and is not misleading [*Posadas de Puerto Rico Assocs. v. Tourism Co. (1986) 478 U.S. 328, 340, 106 S. Ct. 2968, 92 L. Ed. 2d 266]* . A governmental restriction on otherwise protected commercial speech is valid under the *First Amendment* only if it (1) seeks to implement a substantial governmental interest, (2) directly advances that interest, and (3) reaches no farther than necessary to accomplish the given objective [*Posadas de Puerto Rico Assocs. v. Tourism Co. (1986) 478 U.S. 328, 340, 106 S. Ct. 2968, 92 L. Ed. 2d 266]* .

The application of these constitutional principles in the area of outdoor advertising is, however, uncertain in the wake of the United States Supreme Court's decision in *Metromedia, Inc. v. San Diego (1981) 453 U.S. 490, 512, 101 S. Ct. 2882, 69 L. Ed. 2d 800* , because this decision lacked a cohesive majority in setting forth the rationale for its holding invalid a San Diego municipal ordinance that banned all off-site billboard advertisements with certain limited exceptions. For further discussion of *Metromedia* and subsequent California cases that have applied it, see *§§ 14.27* and *14.29*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of SpeechCommercial SpeechAdvertisingTransportation LawBridges & RoadsBillboards

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1-14 California Points & Authorities § 14.08

§ 14.08 Related Discussion and Forms

[1] Related Pleading and Practice Forms

For a discussion and forms relating to actions based on false or misleading advertising and governmental regulation of advertising, see California Forms of Pleading and Practice, Ch. 14, *Advertising* (Matthew Bender). For discussion and forms relating to actions under the Consumers Legal Remedies Act (Civ. Code § 1750 et seq.), see Ch. 504, *Sales: Consumers Legal Remedies Act* .

For discussions and forms for use in particular cases involving advertising, see the following chapters in that publication:

- Ch. 72, *Attorney Practice and Ethics*
- Ch. 112, *Civil Rights*
- Ch. 340, *Libel and Slander*
- Ch. 349, *Literary Property and Copyright*
- Ch. 429, *Privacy*
- Ch. 484, *Radio and Television*
- Ch. 502, *Sales: Warranties*
- Ch. 565, *Unfair Competition*

[2] Related Points and Authorities

For additional points and authorities relating to actions based on statutory unfair competition, see Ch. 235, *Unfair Competition* . For points and authorities relating to actions based on invasion of privacy for the unauthorized advertising or other use of an individual photograph or likeness, see Ch. 184, *Privacy: Invasion of Privacy* . For points and authorities relating to products liability of a publisher for failure to inspect a product advertised in its publication, see *Ch. 190, Products Liability, § 190.190* et seq. For points and authorities relating to actions based on fraud or deceit and actions for injunctive relief generally, see respectively Ch. 105, *Fraud and Deceit* , and Ch. 116, *Injunctions* .

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[Reserved]

§§ 14.09[Reserved]

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1-14 California Points & Authorities § 14.20

§ 14.20 Supporting Contention That Complaint States Statutory Cause of Action for False or Misleading Advertising [Bus. & Prof. Code §§ 17500, 17535]--General Form

[1] FORM Supporting Contention That Complaint States Statutory Cause of Action for False or Misleading Advertising [Bus. & Prof. Code §§ 17500, 17535]--General Form

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE COMPLAINT STATES A CAUSE OF ACTION FOR EQUITABLE RELIEF BASED ON FALSE OR MISLEADING ADVERTISING BECAUSE IT ALLEGES (1) THAT DEFENDANT HAS DISSEMINATED, AND WILL CONTINUE TO DISSEMINATE, ADVERTISING THAT DEFENDANT KNOWS, OR BY THE EXERCISE OF REASONABLE CARE SHOULD KNOW, IS LIKELY TO DECEIVE MEMBERS OF THE PUBLIC AND (2) THAT PLAINTIFF WAS IN FACT INJURED AND LOST _____ [MONEY *and/or* PROPERTY] AS A RESULT OF DEFENDANT'S VIOLATION OF THE FALSE ADVERTISING LAW.

A. Person Who Has Been Injured May Sue for Relief From Violation of False Advertising Law. An action for relief from a violation of the False Advertising Law, *Business and Professions Code Section 17500 et seq.*, may be maintained by any person who has suffered injury in fact and has lost money or property as a result of the violation (*Bus. & Prof. Code § 17535*).

B. General Prohibition Against False or Misleading Advertising. It is unlawful for any person to make or disseminate, or cause to be made or disseminated, either to the public in California or from California to the public in any state, any statement concerning real or personal property or services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition of the property or services, if the statement (1) is untrue or misleading, (2) is known, or by the exercise of reasonable care should be known, to be untrue or misleading, and (3) is made or disseminated or caused to be made or disseminated with intent directly or indirectly to dispose of the property, to perform the services, or to induce the public to enter into any obligation relating thereto (*Bus. & Prof. Code § 17500*).

[*Optional*] **C. Duty of Reasonable Care Defined.** The duty of reasonable care imposed by *Business and Professions Code Section 17500* includes a duty of investigation when facts are present that would put a reasonable person on notice of possible misrepresentations (*People v. Forest E. Olson, Inc. (1982) 137 Cal. App. 3d 137, 139, 186 Cal. Rptr. 804*).

[*Optional*] **D. Plaintiff Need Not Allege Actual Deception, Reliance, or Damages.** A statement is untrue or misleading for purposes of an action under *Business and Professions Code Section 17500* if members of the public are likely to be deceived; the complaint need not allege actual deception, reliance, or damages (*Chern v. Bank of America (1976) 15 Cal. 3d 866, 876, 127 Cal. Rptr. 110, 544 P.2d 1310* ; *Fletcher v. Security Pacific National Bank (1979) 23 Cal. 3d 442, 454, 153 Cal. Rptr. 28, 591 P.2d 51*).

[*Optional*] **E. Specific Language of Each Advertisement Is Not Required.** The complaint need not plead the exact language of every deceptive statement; it is sufficient for plaintiff to describe a scheme to mislead customers, and allege that each misrepresentation to each customer conforms to that scheme (*Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 212-213, 197 Cal. Rptr. 783, 673 P.2d 660*).

[*Optional*] **F. Deceptive Advertising Practice, Though Not Continuing, Will Probably Recur.** An injunction should issue if the defendant's unlawful advertising practice has ceased but will probably recur (*People v. Toomey (1985) 157 Cal. App. 3d 1, 20, 203 Cal. Rptr. 642*).

[*Optional*] **G. Restitution and Other Equitable Relief.** The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by the defendant of any practices that violate *Business and Professions Code Section 17500 et seq.*, or that may be necessary to restore to any person in interest any money or property that may have been acquired by means of any such violations (*Bus. & Prof. Code § 17535*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a complaint states a cause of action for false or misleading advertising under *Bus. & Prof. Code § 17535*. These points and authorities should be combined with other points and authorities pertaining to the specific procedural context in which they are raised. For example, they would most commonly be combined with general points and authorities supporting a motion for a preliminary injunction. They may also be adapted for use in a trial or appellate brief.

Bus. & Prof. Code § 17535 authorizes an action for any violation or proposed violation of the False Advertising Law [*Bus. & Prof. Code § 17500 et seq.*]. Although this form is based only on the most general statutory prohibition on false or misleading advertising, *Bus. & Prof. Code § 17500*, it may be adapted to incorporate additional authorities based on the statutes that prohibit specific advertising practices [*see § 14.04*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Use of Unfair Competition Cases

A violation of the False Advertising Law is also a cause of action for injunctive and other equitable relief under *Bus. & Prof. Code § 17200 et seq.*, commonly referred to collectively as the unfair competition law. Therefore, cases that analyze pleadings and remedies under the unfair competition law are applicable to an analysis of actions based on false or misleading advertising. For points and authorities supporting the contention that false or misleading advertising

constitutes actionable unfair competition, see *§ 14.21*. For discussion and other points and authorities based on that unfair competition law, see *Ch. 235, Unfair Competition, § 235.50* et seq.

[c] Related Pleading and Practice Forms

For discussion and a form for a complaint for injunctive relief based on statutory false advertising and unfair competition, see California Forms of Pleading and Practice, Ch. 14, *Advertising* (Matthew Bender). For a form for a notice of motion for a preliminary injunction and other related forms for use in proceedings for injunctive relief generally, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities supporting a motion for a preliminary injunction and relating generally to injunctive relief, see the Ch. 116, *Injunctions*.

[e] Opposing Points and Authorities

The points and authorities *set out in §§ 14.23 -14.25* may be used in an appropriate case to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Duty of Reasonable Care Defined

In ***People v. Forest E. Olson, Inc.*** *(1982) 137 Cal. App. 3d 137, 186 Cal. Rptr. 804* , a real estate brokerage corporation published newspaper advertisements that documented its "fast sales" by listing hundreds of addresses of homes the corporation claimed it had sold within only a few days. The addresses were compiled by the defendant's computer department and given to the corporate officer responsible for the ad campaign. The printout included a substantial number of addresses of newly built tract homes. The corporation had a practice of writing up listing agreements for new tract homes on the day of sale. Therefore, the printout showed that these homes sold on the same day they were listed, even though some of them had remained unsold for over a year. The officer responsible for the ad campaign recognized that many new tract home addresses appeared on the printout, but was not familiar with the corporation's listing practices for new tract homes. Another corporate officer who examined the advertisements was aware of the listing practice but did not investigate whether the large number of new tract home addresses appearing in the advertisements was due to that practice. The People brought an action against the brokerage corporation for violation of *Bus. & Prof. Code §§ 17200* (unfair competition) and 17500, and the trial court found that the advertisements were false and misleading. However, the court entered a directed verdict for the defendant, finding that the defendant's employees had reasonably relied on the computer printout and so exercised their duty of reasonable care.

The court of appeal reversed, holding that the defendant failed to meet the standard of reasonable care imposed by *Bus. & Prof. Code § 17500*. The duty is not satisfied by unquestioning reliance on representations made by others. Instead, the statute imposes a duty of investigation. The failure to verify and investigate breaches the duty of care when facts are present that would put a reasonable person on notice of possible misrepresentations. Therefore, the defendant had a duty to attempt to verify the computer printout, especially given the light burden such an attempt would create and the probable success of an investigation (*137 Cal. App. 3d 137, 139-140)* . The court stressed that the duty to investigate is particularly applicable when the information relied on and the sources of verification are both within the corporation that disseminates the misleading ads. In the corporate context, *Bus. & Prof. Code § 17500* imposes a duty of communication among corporate departments. Because the defendant's employees together had all the information necessary to realize the advertisements were misleading, this knowledge was imputed to the defendant (*137 Cal. App. 3d 137, 140)* .

[b] Specific Language of Each Advertisement Is Not Required

In ***Committee on Children's Television, Inc. v. General Foods Corp.*** *(1983) 35 Cal. 3d 197, 197 Cal. Rptr. 783, 673 P.2d 660* , a group of plaintiffs, including organizations, adult consumers, and children, filed a class action against a cereal manufacturer, a retailer, and advertising agencies on behalf of California residents who had been or would be misled by defendant's television advertisements of highly sugared cereals. Plaintiff's complaint alleged that defendant's commercials, which were broadcast daily over a period of four years, were directed at a susceptible audience of young children and made numerous implied misrepresentations that the cereals were healthful and nutritious. The complaint included causes of action based on (1) violation of *Bus. & Prof. Code § 17200 et seq.* (unfair competition); (2) violation of *Bus. & Prof. Code § 17500 et seq.* (false or misleading advertising); and (3) intentional, negligent, and "common-law" fraud. Plaintiffs sought damages, restitution, an injunction, and other equitable relief. The trial court sustained various demurrers, ruling that the complaint failed to state causes of action for fraud, which requires that misrepresentations be alleged with specificity, because plaintiffs did not identify the exact times, dates, places, and language of each commercial that was broadcast; that the organizational plaintiffs had no standing in the action for fraud even if it were pleaded with sufficient specificity; and that damages were not available under the unfair competition or false advertising laws. The plaintiffs' failure to describe the alleged deceptive practices with sufficient particularity was also apparently the ground on which the trial court sustained a demurrer to the causes of action under the unfair competition and false advertising laws. A judgment of dismissal was entered, and plaintiffs appealed.

The Supreme Court reversed and remanded for further proceedings, holding that the complaint stated causes of action for injunctive relief and restitution under the unfair competition law and the False Advertising Law (*35 Cal. 3d 197, 214)* and that the parent and child plaintiffs should be permitted to amend the complaint to set forth a representative selection of defendant's advertisements in support of their causes of action for fraud (*35 Cal. 3d 197, 218, 220-221)* . The more rigorous pleading requirement applicable to an action for fraud does not apply to pleadings based on violation of the False Advertising Law and the unfair competition law (*35 Cal. 3d 197, 212 n.11*). In these statutory actions, a plaintiff need not plead the exact language of every deceptive statement; it is sufficient to describe a scheme to mislead customers, and allege that each misrepresentation to each customer conforms to that scheme (*35 Cal. 3d 197, 212-213)* . Plaintiffs' complaint set out 19 misrepresentations, some general, some specific, as well as 42 material, undisclosed facts concerning the cereals' actual nutritional value. The complaint alleged that each misrepresentation and failure to disclose occurred in every advertisement for the specified product during the period in question. These allegations were sufficient to notify the defendants which advertisements were at issue and what deceptive practices were challenged (*35 Cal. 3d 197, 213)* . Also, policy considerations mitigated against requiring plaintiffs to set out the specific language of each advertisement because the cost and difficulty of doing so would deter suits seeking to enjoin large-scale campaigns of deceptive advertising (*35 Cal. 3d 197, 214)* .

The Supreme Court reversed and remanded for further proceedings, holding that the complaint stated causes of action for injunctive relief and restitution under the unfair competition law and the False Advertising Law (*35 Cal. 3d 197, 214)* and that the parent and child plaintiffs should be permitted to amend the complaint to set forth a representative selection of defendant's advertisements in support of their causes of action for fraud (*35 Cal. 3d 197, 218, 220-221)* . The more rigorous pleading requirement applicable to an action for fraud does not apply to pleadings based on violation of the False Advertising Law and the unfair competition law (*35 Cal. 3d 197, 212 n.11*). In these statutory actions, a plaintiff need not plead the exact language of every deceptive statement; it is sufficient to describe a scheme to mislead customers, and allege that each misrepresentation to each customer conforms to that scheme (*35 Cal. 3d 197, 212-213)* . Plaintiffs' complaint set out 19 misrepresentations, some general, some specific, as well as 42 material, undisclosed facts concerning the cereals' actual nutritional value. The complaint alleged that each misrepresentation and failure to disclose occurred in every advertisement for the specified product during the period in question. These allegations were sufficient to notify the defendants which advertisements were at issue and what deceptive practices were challenged (*35 Cal. 3d 197, 213)* . Also, policy considerations mitigated against requiring plaintiffs to set out the specific language of each advertisement because the cost and difficulty of doing so would deter suits seeking to enjoin large-scale campaigns of deceptive advertising (*35 Cal. 3d 197, 214)* .

[c] Deceptive Advertising Practice, Though Not Continuing, Will Probably Recur

In ***People v. Toomey*** *(1985) 157 Cal. App. 3d 1, 203 Cal. Rptr. 642* , the People brought an action against a seller of discount casino coupons to enjoin advertisements and sales solicitations that allegedly violated *Bus. & Prof. Code §§ 17200* (unfair competition) and 17500. The trial court issued a preliminary injunction, but defendant continued the illegal advertising practices. After a trial, the court imposed civil penalties against defendant, both for violations of the statutes and for violation of the preliminary injunction, and issued a permanent injunction. In addition, the court ordered defendant to make restitution to all customers who purchased casino coupons during a specified time period, and to maintain an account for this purpose. On appeal, defendant contended that the permanent injunction was improper because he had ceased sales of the coupons before the time of trial.

The court of appeal affirmed the judgment, holding in part that a court can issue an injunction under *Bus. & Prof. Code §§ 17500, 17535*, to enjoin an event that has already occurred if there is a showing of threatened future harm or continuing violations. The fact that defendant continued to use many of the same deceptive marketing techniques found objectionable by the trial court when it issued the preliminary injunction, and failed to comply with the preliminary injunction, supported the trial court's conclusion that defendant's illegal practices would continue (*157 Cal. App. 3d 1, 20)* .

[4] Additional Authorities

[a] Person Who Has Been Injured May Sue for Relief From Violation of False Advertising Law

In *Day v. AT&T Corp. (1998) 63 Cal. App. 4th 325, 74 Cal. Rptr. 2d 55* , plaintiffs brought suit as private attorneys general on behalf of the people of California for injunctive relief to prevent telephone carriers and phone card retailers who sell prepaid phone cards from engaging in misleading and deceptive advertising under *Bus. & Prof. Code §§ 17200* and *17500*. Defendants demurred on the ground that the action was barred by the "filed rate doctrine." That doctrine derives from the requirement in the Federal Communications Act that common carriers file with the FCC and keep open for public inspection all charges and the classifications, practices, and regulations affecting the charges [*47 U.S.C. § 203(a)*] The doctrine prohibits an entity subject to these requirements from charging rates other than those properly filed with the appropriate federal regulatory authority, presumes the consumer's knowledge of all lawful rates, and bars consumer suits for damages arising out of claims involving those rates (*63 Cal. App. 4th 325, 335)* . The superior court sustained the demurrers without leave to amend and dismissed the action. Plaintiffs appealed.

The court of appeal held that under California's unfair business practices and deceptive advertising provisions, defendants were prohibited from disseminating misleading or deceptive packaging materials with their prepaid phone cards. Plaintiffs were entitled to seek to enjoin the alleged practice, and defendants' demurrers to the claim were erroneously sustained. The court stated that an action which only seeks to enjoin misleading or deceptive practices in the advertising of phone card rates, and seeks no monetary recovery, does not implicate the federal filed rate doctrine and can proceed under *Bus. & Prof. Code §§ 17200* and *17500*. Plaintiffs, however, could not seek to recover money from defendants, as the net effect of imposing a monetary sanction would be to effectuate a rebate, a matter strictly of federal concern under the Federal Communications Act and therefore barred by the filed rate doctrine (*63 Cal. App. 4th 325, 335-337)* .

[b] Restitution or Other Equitable Relief

The court of appeal in *Consumers Union of U.S., Inc. v. Alta-Dena Certified Dairy (1992) 4 Cal. App. 4th 963, 6 Cal. Rptr. 2d 193* , affirmed a judgment requiring a producer of raw certified milk products (RCMP) to place a warning on its RCMP for 10 years stating that it might contain dangerous bacteria and specifying the categories of persons who might be most at risk. The court said the trial court's authority under *Bus. & Prof. Code §§ 17203* and *17535* was sufficient, given the circumstances, to require the warning. There were findings that as a result of its long-standing and

broad-based advertising campaign, defendant had created a public perception that RCMP were safe and nutritionally superior to pasteurized milk (*4 Cal. App. 4th 963, 972*). The warning was necessary to correct that misperception (*4 Cal. App. 4th 963, 972-973*). To allow consumers to continue to buy the product on the strength of the impression built up by prior advertising would be unfair and deceptive. The court's authority to "prevent the use or employment" of unfair business practices and false advertising necessarily includes the authority to make orders to prevent the consequences of past conduct and to correct false impressions built up by prior advertising--something that might not be accomplished by an injunction against future violations (*4 Cal. App. 4th 963, 973, 975*). The court noted that requiring affirmative disclosure as a remedy for consumer deception is not without precedent in California or in matters before the Federal Trade Commission, and discussed many cases that had imposed warnings (*4 Cal. App. 4th 963, 973-974*).

For a detailed discussion of the coverage of the FLSA, consult Wilcox, California Employment Law, Ch. 1 (Matthew Bender).

For a detailed discussion of the coverage of the FLSA, see Wilcox, California Employment Law, Ch. 1 (Matthew Bender).

For a detailed discussion of the coverage of the FLSA, see California Employment Law, Ch. 1 (Matthew Bender).

Sample text goes here [*Gov. Code § 53298.5*; *see also Gov. Code § 53296* (definitions), *Gov. Code § 53297* (right to file administrative complaint alleging improper local government activities), *Gov. Code § 53298* (prohibiting reprisal actions for disclosure of improper local governmental activities)]

For discussion and forms for use in particular cases involving civil service actions, see the following chapters in that publication:

- California Forms of Pleading and Practice, Ch. 182, *Declaratory Relief* .
- California Forms of Pleading and Practice, Ch. 292, *Habeas Corpus* .
- See California Forms of Pleading and Practice, Ch. 303, *Injunctions* .
- See California Forms of Pleading and Practice, Ch. 358, *Mandate and Prohibition* .

The court of appeal in *Consumers Union of U.S., Inc. v. Alta-Dena Certified Dairy (1992) 4 Cal. App. 4th 963, 6 Cal. Rptr. 2d 193* , affirmed a judgment requiring a producer of raw certified milk products (RCMP) to place a warning on its RCMP for 10 years stating that it might contain dangerous bacteria and specifying the categories of persons who might be most at risk. The court said the trial court's authority under *Bus. & Prof. Code §§ 17203* and *17535* was sufficient, given the circumstances, to require the warning. There were findings that as a result of its long-standing and broad-based advertising campaign, defendant had created a public perception that RCMP were safe and nutritionally superior to pasteurized milk (*4 Cal. App. 4th 963, 972*). The warning was necessary to correct that misperception (*4 Cal. App. 4th 963, 972-973*). To allow consumers to continue to buy the product on the strength of the impression built up by prior advertising would be unfair and deceptive. The court's authority to "prevent the use or employment" of unfair business practices and false advertising necessarily includes the authority to make orders to prevent the consequences of past conduct and to correct false impressions built up by prior advertising--something that might not be accomplished by an injunction against future violations (*4 Cal. App. 4th 963, 975*). The court noted that requiring affirmative disclosure as a remedy for consumer deception is not without precedent in California or in matters before the Federal Trade Commission, and discussed many cases that had imposed warnings (*4 Cal. App. 4th 963, 973-974*).

Defendant also claimed that safeguarding the public health is a legislative function, and that therefore, a court was constitutionally prohibited posing the warning. The court held a court may incidentally duplicate a legislative function

without violating the separation of powers doctrine, and that the warning was incidental to carrying out the judicial function of protecting the public from unscrupulous business practices and not a violation (*4 Cal. App. 4th 963, 974-975*).

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1-14 California Points & Authorities § 14.21

§ 14.21 Supporting Contention That Complaint States Statutory Cause of Action for False or Misleading Advertising [Bus. & Prof. Code §§ 17500, 17535]--False or Misleading Advertising Constitutes Unfair Competition [Bus. & Prof. Code § 17200]

[1] FORM Supporting Contention That Complaint States Statutory Cause of Action for False or Misleading Advertising [Bus. & Prof. Code §§ 17500, 17535]--False or Misleading Advertising Constitutes Unfair Competition [Bus. & Prof. Code § 17200]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE COMPLAINT ALSO STATES A CAUSE OF ACTION FOR UNFAIR COMPETITION BECAUSE ANY VIOLATION OF BUSINESS AND PROFESSIONS CODE SECTIONS 17500 AND 17535 NECESSARILY CREATES A CAUSE OF ACTION UNDER BUSINESS AND PROFESSIONS CODE SECTION 17203.

False or Misleading Advertising Is Unfair Competition. As used in *Business and Professions Code Section 17200 et seq.*, unfair competition means and includes unfair, deceptive, untrue, or misleading advertising and any act prohibited by *Business and Professions Code Section 17500 et seq.*; therefore, any violation of the false advertising law necessarily violates the unfair competition law (*Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 209-210, 197 Cal. Rptr. 783, 673 P.2d 660* ; *see Bus. & Prof. Code §§ 17200, 17203*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a complaint that states a cause of action for false or misleading advertising under *Bus. & Prof. Code §§ 17500, 17535* also states a cause of action for unfair competition under *Bus. & Prof. Code § 17203*. These points and authorities should be combined with other points and authorities pertaining to the specific procedural context in which they are raised. For example, they would most commonly be combined with general points and authorities supporting a motion for a preliminary injunction. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

See also *§ 14.20[2]*.

[b] Advertising and Unfair Competition Statutes Compared

Bus. & Prof. Code § 17203, which creates a cause of action for unfair competition, and *Bus. & Prof. Code § 17535*, which creates a cause of action for false or misleading advertising, contain identical provisions for relief. Both statutes authorize an injunction and such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of the unlawful practice, or as may be necessary to restore to any person in interest any money or property that may have been acquired by means of the unlawful practice.

For discussion and additional forms of memoranda based on the unfair competition statutes, see the Ch. 235, *Unfair Competition*, § 235.50 et seq.

[3] Discussion of Authorities

[a] False or Misleading Advertising Is Unfair Competition

The facts and procedural background of ***Committee on Children's Television, Inc. v. General Foods Corp.*** *(1983) 35 Cal. 3d 197, 197 Cal. Rptr. 783, 673 P.2d 660* are discussed in *§ 14.20[3][b]*. In that case, the Supreme Court held that plaintiffs stated causes of action for injunctive relief and restitution under both *Bus. & Prof. Code §§ 17203* and *17535* (*35 Cal. 3d 197, 214)* . The Court framed its analysis of plaintiff's allegations by observing that any violation of the proscription against false advertising, *Bus. & Prof. Code § 17500*, necessarily violates the unfair competition law, *Bus. & Prof. Code § 17200 et seq.* (*35 Cal. 3d 197, 209-210)* . Therefore, any advertising scheme involving false, unfair, misleading, or deceptive advertising equally violates both statutes (*35 Cal. 3d 197, 211)* .

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1-14 California Points & Authorities § 14.22

§ 14.22 Supporting Contention That Complaint States Statutory Cause of Action for Fraud Based on False or Misleading Advertising [Civ. Code §§ 1709, 1710]

[1] FORM Supporting Contention That Complaint States Statutory Cause of Action for Fraud Based on False or Misleading Advertising [Civ. Code §§ 1709, 1710]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S COMPLAINT STATES A CAUSE OF ACTION FOR _____ [INTENTIONAL MISREPRESENTATION *and/or* NEGLIGENT MISREPRESENTATION *and/or* FRAUDULENT CONCEALMENT] BECAUSE IT ALLEGES THAT DEFENDANT _____ [MADE A MISREPRESENTATION OF MATERIAL FACT TO PLAINTIFF, WHICH DEFENDANT KNEW WAS FALSE AND ON WHICH DEFENDANT INTENDED PLAINTIFF TO RELY, THAT PLAINTIFF JUSTIFIABLY RELIED ON THE MISREPRESENTATION *and/or* MADE A MISREPRESENTATION OF MATERIAL FACT TO PLAINTIFF, WHICH DEFENDANT HAD NO REASONABLE GROUND TO BELIEVE WAS TRUE AND ON WHICH DEFENDANT INTENDED PLAINTIFF TO RELY, THAT PLAINTIFF JUSTIFIABLY RELIED ON THE MISREPRESENTATION *and/or* MADE REPRESENTATIONS OF FACT THAT WERE LIKELY TO MISLEAD PLAINTIFF BECAUSE DEFENDANT FAILED TO DISCLOSE OTHER FACTS THAT MATERIALLY QUALIFIED THE FACTS DISCLOSED], AND THAT PLAINTIFF SUFFERED DAMAGES AS A RESULT.

A. False Advertising May Constitute Actionable Fraud. False and misleading advertising may constitute the tort of intentional or negligent misrepresentation, or fraudulent concealment (*see Civ. Code § 1710(1)-(3)*; *Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 215-216, 220-221, 197 Cal. Rptr. 783, 673 P.2d 660*).

[*EITHER*]

B. Intentional Misrepresentation. The elements of intentional fraud are (1) a misrepresentation, (2) knowledge of its

falsity, (3) intent to induce reliance on the misrepresentation, (4) justifiable reliance, and (5) resulting damage (*Molko v. Holy Spirit Assn. (1988) 46 Cal. 3d 1092, 1108, 252 Cal. Rptr. 122, 762 P.2d 46* ; *see Civ. Code § 1710(1)*).

[*AND/OR*]

C. Negligent Misrepresentation. The elements of negligent fraud are (1) a misrepresentation of material fact, (2) no reasonable ground for believing the representation to be true, (3) intent to induce reliance on the misrepresentation, (4) justifiable reliance, and (5) resulting damages (*Christiansen v. Roddy (1986) 186 Cal. App. 3d 780, 785-786, 231 Cal. Rptr. 72* ; *see Civ. Code § 1710(2)*).

[*AND/OR*]

D. Fraudulent Concealment. Fraudulent concealment consists of the nondisclosure of facts when the facts materially qualify disclosed facts or when the nondisclosure renders the disclosed facts likely to mislead (*Welch v. State of California (1983) 139 Cal. App. 3d 546, 555-556, 188 Cal. Rptr. 726* ; *see Civ. Code § 1710(3)*).

[*CONTINUE*]

[*Optional*] **E. Pleading Rules Are Relaxed When Defendant Possesses More Facts Than Plaintiff.** The requirement that fraud must be specifically pleaded is relaxed when it appears from the allegations that the facts of the controversy lie more in the knowledge of defendant and when the setting out of each advertisement verbatim, specifying the time, place, and medium, would, as a practical matter, provide less effective notice and be less useful in framing issues than would the setting out of a shorter, more generalized version (*Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 217, 197 Cal. Rptr. 783, 673 P.2d 660*).

[*Optional*] **F. Pleading Rules Are Relaxed When Advertising Campaign Is Based on Long-Term, Cumulative Impact.** Plaintiff need not specify each advertisement seen and relied on when plaintiff acted in response to a long-term advertising campaign, which sought to persuade by cumulative impact rather than by a particular representation on a particular date (*Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 218-219, 197 Cal. Rptr. 783, 673 P.2d 660*).

[*Optional*] **G. Liability to Purchasers Who Do Not See Advertising.** A cause of action for fraudulent advertising exists if defendant made a misrepresentation to one group with the intent to influence the behavior of third parties who ultimately purchase defendant's product, whether or not the terms of the advertisement were repeated to the third parties (*Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 219, 197 Cal. Rptr. 783, 673 P.2d 660*).

[*Optional*] **H. Promise Concerning Safety of Product Is Statement of Fact, Not "Puffing".** An advertisement that does not indicate the seller's subjective opinion about the merits of the product, but rather factually describes an important characteristic of the product, its purported safety, is a statement of fact rather than mere "puffing." Promises of safety have consistently been held to be representations of fact (*see* *Hauter v. Zogarts (1975) 14 Cal. 3d 104, 111-112, 120 Cal. Rptr. 681, 534 P.2d 377*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a complaint states a cause of action for the tort of fraud under *Civ. Code §§ 1709* and *1710*. These points and authorities should be combined with other points and authorities pertaining to the specific procedural context in which they are raised. For example, they might be combined with general points and authorities opposing a demurrer or a motion to strike. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion, procedural guide, and forms of complaint for fraud generally, see California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender).

[c] Related Points and Authorities

For additional forms of memoranda relating generally to tort actions for fraud, see Ch. 105, *Fraud and Deceit* .

[d] Opposing Points and Authorities

These points and authorities *set out in § 14.26* may be used in an appropriate case to oppose the contention supported by this memorandum.

[3] Discussion of Authorities

[a] False Advertising May Constitute Actionable Fraud

The facts and procedure of ***Committee on Children's Television, Inc. v. General Foods Corp.*** *(1983) 35 Cal. 3d 197, 197 Cal. Rptr. 783, 673 P.2d 660* are discussed in *§ 14.20[3][b]*. The Supreme Court held that parents and children should be permitted to amend the complaint to set forth a representative selection of defendants' advertisements in support of their causes of action for intentional misrepresentation under *Civ. Code § 1710(1)*, negligent misrepresentation under *Civ. Code § 1710(2)*, and fraudulent concealment under *Civ. Code § 1710(3)* (*35 Cal. 3d 197, 215-216, 220-221)* .

[b] Intentional Misrepresentation

In ***Molko v. Holy Spirit Assn.*** *(1988) 46 Cal. 3d 1092, 252 Cal. Rptr. 122, 762 P.2d 46* , former members of Sun Myung Moon's Unification Church brought an action against the church for fraud, intentional infliction of emotional distress, and false imprisonment. Plaintiffs' cause of action for fraud was based on alleged misrepresentations, made by church members who recruited them, about the organization's religious affiliation. The trial court granted summary judgment in the church's favor and the judgment was affirmed on appeal.

The Supreme Court reversed the summary judgment on the cause of action for fraud, holding that there was no constitutional bar to holding the church liable for inducing plaintiffs, by misrepresentation and concealment of its identity, into unknowingly entering an atmosphere in which plaintiffs were then subjected to "coercive persuasion" (*46 Cal. 3d 1092, 1119-1120*). The necessary elements of a fraud claim, the Court stated, are (1) misrepresentation (false representation, concealment, or nondisclosure), (2) knowledge of falsity, (3) intent to induce reliance, (4) justifiable reliance, and (5) resulting damage (*46 Cal. 3d 1092, 1108*).

[c] Negligent Misrepresentation

In ***Christiansen v. Roddy*** *(1986) 186 Cal. App. 3d 780, 231 Cal. Rptr. 72* , several lenders obtained a judgment against an appraiser and loan broker for making a negligent misrepresentation concerning the value of property securing a loan.

The court of appeal affirmed the judgment against the loan broker, holding that there was sufficient evidence to support the trial court's finding that the broker had no reasonable ground for believing the appraiser's valuation to be accurate and that the lenders reasonably and justifiably relied on the loan broker's skill and knowledge (*186 Cal. App. 3d 780, 788-789*). The court stated that the elements of a cause of action for negligent misrepresentation are (1) the defendant made a representation about a past or existing material fact; (2) the representation was untrue; (3) regardless of his or her actual belief, the defendant made the representation without any reasonable ground for believing it to be true; (4) the representation was made with intent to induce plaintiff to rely on it; (5) plaintiff was unaware of the falsity of the representation, acted in reliance on the truth of the representation, and was justified in his or her reliance; and (6) as a result of his or her reliance on the truth of the representation, the plaintiff sustained damages (*186 Cal. App. 3d 780, 785-786*).

[d] Fraudulent Concealment

In ***Welch v. State of California*** *(1983) 139 Cal. App. 3d 546, 188 Cal. Rptr. 726* , a public works contractor brought an action against the state for unanticipated costs of repairing a bridge, alleging that he was misled by the state's failure to disclose information concerning a prior, similar repair project done on the same bridge. The trial court entered a judgment for the state, holding that the state was not liable for the nondisclosure, because plaintiff failed to prove that the state actively and intentionally concealed the information.

The court of appeal reversed and remanded, holding that there is no requirement of proving an affirmative fraudulent intent to conceal in order to recover for nondisclosure (*139 Cal. App. 3d 546, 556)* . The court recognized that a cause of action for nondisclosure of material facts may arise when the defendant makes representations but does not disclose facts that materially qualify the facts disclosed (*139 Cal. App. 3d 546, 555)* . Because there is no requirement of intent to conceal, the Court held, the state had a duty to disclose, if disclosure would have eliminated or materially qualified the misleading effect of the representations in the construction plans the state supplied to bidders (*139 Cal. App. 3d 546, 556)* .

[e] Pleading Rules Are Relaxed When Defendant Possesses More Facts Than Plaintiff

The facts and procedural background of ***Committee on Children's Television, Inc. v. General Foods Corp.*** *(1983) 35 Cal. 3d 197, 197 Cal. Rptr. 783, 673 P.2d 660* , are discussed in *§ 14.20[3][b]*. In its analysis of the specificity of the complaint, the Court recognized that fraud actions are subject to strict requirements of particularity in pleading. Every element of the cause of action must be alleged factually and specifically to furnish the defendant with notice of definite charges and to enable the court to weed out unmeritorious claims (*35 Cal. 3d 197, 216-217)* . Less specificity is required, however, when it appears from the nature of the allegations that the defendant must necessarily possess full information concerning the facts of the controversy, or when the facts lie more in the knowledge of the opposite party (*35 Cal. 3d 197, 217)* . The place, time, and content of the advertisements, the Court found, was fully known to the defendant manufacturer (*35 Cal. 3d 197, 217-218)* . In addition, the Court observed, plaintiffs' 64-page complaint alleged thousands of misrepresentations in various media over a span of four years. A complaint that set out each advertisement verbatim and specified the time, place, and medium, would, as a practical matter, provide less effective notice and be less useful in framing the issues than would a shorter, more generalized version (*35 Cal. 3d 197, 217)* . The Court concluded that defendant was entitled to know what it was in the images and words of the advertisements that gave rise to the alleged misrepresentations. For plaintiffs to provide an explanation for every advertisement, however, would be impractical. Therefore, the Court held that the trial court could reasonably require plaintiffs to set out or attach a representative selection of advertisements, to state the misrepresentations made, and to indicate the language or images on which any implied misrepresentations were based (*35 Cal. 3d 197, 218)* .

[f] Pleading Rules Are Relaxed When Advertising Campaign Is Based on Long-Term, Cumulative Impact

The facts and procedural background of *Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 197 Cal. Rptr. 783, 673 P.2d 660* , are discussed in *§ 14.20[3][b]*. The Court rejected the argument that the complaint was deficient because it failed to indicate that any particular child relied on or even saw any particular television advertisement. The Court recognized that a specific statement of the advertisements seen and relied on by the individual plaintiffs would have demonstrated that they had a valid cause of action (*35 Cal. 3d 197, 218-219)* . The realistic setting of the case, however, made such specific pleading impossible. A long-term advertising campaign, the Court observed, may seek to persuade by cumulative impact, not by a particular representation on a particular date. The Court held that plaintiffs should be able to base their cause of action on an allegation that they acted in response to an advertising campaign, even if they could not recall the specific advertisements (*35 Cal. 3d 197, 219)* .

[g] Liability to Purchasers Who Do Not See Advertising

The facts and procedural background of ***Committee on Children's Television, Inc. v. General Foods Corp.*** *(1983) 35 Cal. 3d 197, 197 Cal. Rptr. 783, 673 P.2d 660* , are discussed in *§ 14.20[3][b]*. The Court rejected the argument that the complaint was deficient because it described one group, children, who received the misrepresentations and a different group, parents, who purchased the product. The Court observed that defendants spent millions to advertise cereals on children's programs because they were aware that parents are influenced in their purchases by the desires of their children. Although plaintiffs did not allege that the children repeated the representations to their parents, repetition was not a prerequisite to liability. It was sufficient, the Court held, to allege that defendant made a misrepresentation to one group intending to influence the behavior of the ultimate purchaser, and that defendant succeeded in this plan (*35 Cal. 3d 197, 219)* .

[h] Promise Concerning Safety of Product Is Statement of Fact, Not "Puffing"

In ***Hauter v. Zogarts*** *(1975) 14 Cal. 3d 104, 120 Cal. Rptr. 681, 534 P.2d 377* , plaintiff brought a products liability action, including a claim for misrepresentation, for injuries he suffered while using a golf training device that was designed to return hit balls to the golfer by the use of an elastic cord. The box the device was sold in and the accompanying instruction booklet both bore the words "Completely Safe Ball Will Not Hit Player." Following a verdict for defendants, the trial judge granted plaintiff's motion for judgment notwithstanding the verdict, and defendants appealed.

The Supreme Court affirmed the trial judge's order, holding in part that, as a matter of law, plaintiff should recover on his cause of action for false representation (*14 Cal. 3d 104, 114, 121)* . The Court reasoned that defendants were liable under common-law tort principles if "Completely Safe Ball Will Not Hit Player" was a misrepresentation of material fact on which plaintiff justifiably relied. On the other hand, if defendants' assertion of safety was merely a statement of opinion, or mere "puffing," they could not be held liable for its falsity (*14 Cal. 3d 104, 111)* . The court concluded that defendants' statement was so broad that it properly fell within common-law tort principles (*14 Cal. 3d 104, 111-112*). The statement did not indicate the seller's subjective opinion about the merits of the product but rather factually described an important characteristic of the product. The court of appeal observed that courts have consistently held similar promises of safety to be representations of fact and that, in addition, there is a trend toward narrowing the scope of "puffing" and expanding the liability that flows from broad statements of manufacturers about the quality of their products (*14 Cal. 3d 104, 112*).

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1-14 California Points & Authorities § 14.23

§ 14.23 Opposing Contention That Complaint States Statutory Cause of Action for False or Misleading Advertising [Bus. & Prof. Code §§ 17500, 17535]--Statutory Prohibitions Do Not Apply to Good-Faith Publisher or Broadcaster of Advertising [Bus. & Prof. Code § 17502]

[1] FORM Opposing Contention That Complaint States Statutory Cause of Action for False or Misleading Advertising [Bus. & Prof. Code §§ 17500, 17535]--Statutory Prohibitions Do Not Apply to Good-Faith Publisher or Broadcaster of Advertising [Bus. & Prof. Code § 17502]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

SECTION 17500 [AND SECTION(S) _____ [*specify additional section(s) pleaded in complaint, if appropriate, e.g.,* 17504] OF THE BUSINESS AND PROFESSIONS CODE DOES/DO NOT APPLY TO GOOD-FAITH PUBLISHERS OR BROADCASTERS.

A. Good-Faith Publishers or Broadcasters Are Exempted. The provisions of *Sections 17500-17509 of the Business and Professions Code* do not apply to any visual or sound radio broadcasting station, to any internet service provider or commercial online service, or to any publisher of a newspaper, magazine, or other publication who broadcasts or publishes, including over the internet, an advertisement in good faith, without knowledge of its false, deceptive, or misleading character (*Bus. & Prof. Code § 17502*).

[*Optional*] **B. Deceptive Prize or Gift Offer.** *Bus. & Prof. Code § 17533.8*, prohibiting false or misleading advertising regarding a prize or gift offer, does not apply to the publisher of any newspaper, periodical, or other publication, or any radio or television broadcaster, or the owner or operator of any cable, satellite, or other medium of communications who broadcasts or publishes, including over the internet, an advertisement or offer in good faith, without knowledge that it violates the statute (*Bus. & Prof. Code § 17533.8(b)*).

[*Optional*] **C. Deceptive Real Estate Advertisement.** *Bus. & Prof. Code § 17530*, prohibiting false or misleading advertising regarding real estate, does not apply to the publisher of any newspaper, or any job printer unless the publisher or printer has an interest as owner or agent in the advertised real estate (*Bus. & Prof. Code § 17530*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that a complaint states a cause of action for false or misleading advertising under *Bus. & Prof. Code § 17535*, on the ground that certain statutory proscriptions do not apply to a defendant who is a publisher or broadcaster who disseminated false or misleading advertising in good faith. These points and authorities should be combined with other points and authorities pertaining to the specific procedural context in which they are raised. For example, they might be combined with general points and authorities supporting a demurrer to the complaint or a motion for summary judgment. They may also be adapted for use in a trial or appellate brief.

In an appropriate case, the points and authorities set out in this form may be used to oppose the contention supported by the points and authorities *set out in § 14.20*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Points and Authorities

For a form of memorandum opposing the contention that a publisher has a duty to investigate an alleged defective product advertised in its publication, see *Ch. 190, Products Liability, § 190.190* et seq.

[3] Discussion of Authorities

[a] Good-Faith Publishers or Broadcasters Are Exempted

Bus. & Prof. Code §§ 17500-17509, which *Bus. & Prof. Code § 17502* makes inapplicable to good-faith publishers and broadcasters, include prohibitions against false and misleading advertising generally [*see Bus. & Prof. Code § 17500*], unadvertised limitations on quantity of sales [*Bus. & Prof. Code § 17500.5*], certain statements about "former price" [*Bus. & Prof. Code § 17501*], deceptive pricing of goods or services sold only in multiple units [*Bus. & Prof. Code § 17504*], misrepresentation of control, character, or volume of business [*Bus. & Prof. Code § 17505*], deceptive pricing of different articles of merchandise or types of service within the same class of merchandise or service [*Bus. & Prof. Code § 17507*], certain factual claims and brand comparisons [*Bus. & Prof. Code § 17508*], false claims that consumer goods are safe for the environment [*Bus. & Prof. Code § 17508.5*], and certain transactions conditioned on the sale or lease of a different product or service [*Bus. & Prof. Code § 17509*] For discussion of these statutory prohibitions, see California Forms of Pleading and Practice, Ch. 14, *Advertising* (Matthew Bender).

[b] Deceptive Prize or Gift Offer

Bus. & Prof. Code § 17533.8, which exempts from its terms publishers and broadcasters who act in good faith, makes it unlawful to offer a prize or gift without disclosing at the time of the offer the offeror's intent to make a sales presentation.

[c] Deceptive Real Estate Advertisement

Bus. & Prof. Code § 17530, which exempts publishers and printers who have no interest in advertised real estate, makes it unlawful for a person to publish statements concerning the extent, location, ownership, title, or other characteristic of real estate if the person knows the statements are untrue and publishes the statements with the intention to mislead.

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1-14 California Points & Authorities § 14.24

§ 14.24 Opposing Contention That Complaint States Statutory Cause of Action for False or Misleading Advertising [Bus. & Prof. Code §§ 17500, 17535]--Statutory Prohibitions Do Not Apply to Election Campaign Practices

[1] FORM Opposing Contention That Complaint States Statutory Cause of Action for False or Misleading Advertising [Bus. & Prof. Code §§ 17500, 17535]--Statutory Prohibitions Do Not Apply to Election Campaign Practices

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

SECTIONS 17500-17577.6 OF THE BUSINESS AND PROFESSIONS CODE DO NOT APPLY TO ELECTION CAMPAIGN PRACTICES.

Statutes Do Not Apply to Campaign Practices. *Section 17500 et seq. of the Business and Professions Code* do not apply to election campaign practices (*O'Connor v. Superior Court (1986) 177 Cal. App. 3d 1013, 1014, 1019-1020, 223 Cal. Rptr. 357*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that a complaint states a cause of action for false or misleading advertising under *Bus. & Prof. Code § 17535*, on the ground that the false advertising statutes do not apply to election campaign practices. These points and authorities should be combined with other points and authorities pertaining to the specific procedural context in which they are raised. For example, they might be combined with general points and authorities supporting a demurrer to the complaint or a motion for summary judgment. They may also be adapted for use in a trial or appellate brief.

In an appropriate case, the points and authorities set out in this form may be used to oppose the contention supported by the points and authorities *set out in § 14.20*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Statutes Do Not Apply to Campaign Practices

In ***O'Connor v. Superior Court*** *(1986) 177 Cal. App. 3d 1013, 223 Cal. Rptr. 357* , an incumbent politician brought an action for injunctive relief and damages against an election opponent and the opponent's consulting firm, alleging that they had violated *Bus. & Prof. Code §§ 17200, 17500,* by publishing falsified, negative endorsements of plaintiff in their campaign literature. The trial court overruled defendants' demurrers, and they petitioned for a writ of mandate.

The court of appeal issued the writ, holding that *Bus. & Prof. Code § 17200 et seq.* (unfair competition) and *Bus. & Prof. Code § 17500 et seq.* do not apply to election campaign practices (*177 Cal. App. 3d 1013, 1014)* . Under the *First Amendment*, the court explained, it is the context in which the speech is made, rather than the status of the speaker, which determines whether or not speech is protected. The statutes may not regulate conduct in a political campaign, even when the conduct arises in the arguably commercial context of statements made about a candidate for political office by a paid political consulting firm (*177 Cal. App. 3d 1013, 1018-1019)* . The complete and carefully limited scheme of election regulation and enforcement provided by the Legislature in express penal provisions of the Elections Code do not include a private cause of action for damages and injunctive relief based on false or misleading statements made in an election campaign. Thus, it is apparent that the Legislature recognized that any attempt at wholesale regulation of, or government intrusion into, the content of political literature is constitutionally impermissible (*177 Cal. App. 3d 1013, 1019-1020)* .

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1-14 California Points & Authorities § 14.25

§ 14.25 Opposing Contention That Complaint States Statutory Cause of Action for False or Misleading Advertising [Bus. & Prof. Code §§ 17500, 17535]--Statute Does Not Authorize Claim for Damages

[1] FORM Opposing Contention That Complaint States Statutory Cause of Action for False or Misleading Advertising [Bus. & Prof. Code §§ 17500, 17535]--Statute Does Not Authorize Claim for Damages

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

SECTION 17535 OF THE BUSINESS AND PROFESSIONS CODE DOES NOT AUTHORIZE AN AWARD OF MONEY DAMAGES TO A PRIVATE PLAINTIFF.

Damages Are Not Authorized. *Section 17535 of the Business and Professions Code* does not authorize recovery of damages by private individuals (*Chern v. Bank of America (1976) 15 Cal. 3d 866, 875, 127 Cal. Rptr. 110, 544 P.2d 1310*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that a complaint states a cause of action for false or misleading advertising under *Bus. & Prof. Code § 17535*, on the ground that plaintiff has no claim for damages. These points and authorities should be combined with other points and authorities pertaining to the specific procedural context in which they are raised. For example, they might be combined with general points and authorities supporting a summary adjudication of a cause of action for damages. They may also be adapted for use in a trial or appellate brief.

In an appropriate case, the points and authorities set out in this form may be used to oppose the contention supported by the points and authorities *set out in § 14.20*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] History of Remedies for Deceptive Advertising

Before 1972, former Bus. & Prof. Code § 17535 provided that false or misleading advertising could be enjoined in either a private or public action but was silent regarding the power of the trial court to order restitution. Nevertheless, the Supreme Court held that a trial court had the inherent power to order restitution as a form of ancillary relief in an action brought under this earlier version of Bus. & Prof. Code § 17535. The Court reasoned that the statute did not restrict the court's general equity jurisdiction, either expressly or by a necessary and inescapable inference. In the absence of such a restriction, the court may exercise the full range of its inherent powers in order to accomplish complete justice between the parties [*People v. Superior Court (1973) 9 Cal. 3d 283, 286, 107 Cal. Rptr. 192, 507 P.2d 1400]* .

Before 1976, former Civ. Code § 3369 provided that any person performing or proposing to perform an act of unfair competition within California could be enjoined in either a private or public action. The statute defined unfair competition to include untrue or misleading advertising and any act prohibited by former Bus. & Prof. Code § 17500 et seq. In 1976, former Civ. Code § 3369 was amended to authorize a court to make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice that constitutes unfair competition, or as may be necessary to restore to any person in interest any money or property that may have been acquired by means of that unfair competition. In 1977, the unfair competition provisions of former Civ. Code § 3369 were repealed and replaced by *Bus. & Prof. Code §§ 17203, 17204*, with no significant substantive change in their provisions for injunctive relief, restitution, and other equitable relief. *Bus. & Prof. Code § 17200* was also enacted to define untrue or misleading advertising as a type of unfair competition. In 1992, *Bus. & Prof. Code § 17204* was amended to allow the Attorney General or any district attorney or authorized county counsel or city attorney to seek any relief, not just injunctive relief.

Bus. & Prof. Code § 17203, which creates a cause of action for unfair competition, and *Bus. & Prof. Code § 17535*, which creates a cause of action for false or misleading advertising, contain essentially identical provisions for relief. Both statutes authorize an injunction and such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of the unlawful practice, or as may be necessary to restore to any person in interest any money or property that may have been acquired by means of the unlawful practice.

[c] Related Pleading and Practice Forms

For discussion and a form of complaint for injunctive relief based on statutory false advertising, see California Forms of Pleading and Practice, Ch. 14, *Advertising* (Matthew Bender).

[3] Discussion of Authorities

[a] Damages Are Not Authorized

In ***Chern v. Bank of America*** *(1976) 15 Cal. 3d 866, 127 Cal. Rptr. 110, 544 P.2d 1310* , bank customers brought a class action for damages and injunctive relief under *Bus. & Prof. Code § 17535* against a bank for a violation of *Bus. & Prof. Code § 17500* based on the bank's practice of quoting "per annum" interest rates calculated on the basis of a 360-day year. Plaintiffs also sought damages for breach of contract. The named plaintiff admitted that just before she signed a loan contract with defendant, she was presented with a federal truth-in-lending statement that made her aware of the discrepancy in the bank's interest calculation. The trial court granted summary judgment in favor of defendant on all counts, and plaintiff appealed. In affirming summary judgment for defendant on the claim for damages under *Bus. & Prof. Code § 17500* for false or misleading statements, the Supreme Court held that the applicable statutes do not authorize recovery of damages by private individuals. Private relief, the Court said, is limited to the filing of actions for an injunction under *Bus. & Prof. Code § 17535* or the recovery of civil penalties by specified public officers under *Bus. & Prof. Code §§ 17535.5, 17536* (*15 Cal. 3d 866, 875)* .

The holding in *Chern* was based on the ground that *Bus. & Prof. Code § 17535* does not expressly authorize an award of damages. The Supreme Court subsequently has held that *Bus. & Prof. Code § 17203*, which is identical with respect to available relief, does not allow the plaintiff to recover damages, but authorizes only equitable relief (including restitution) [*see, e.g., Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co. (1999) 20 Cal. 4th 163, 179, 83 Cal. Rptr. 2d 548, 973 P.2d 527* ; *Bank of the West v. Superior Court (Industrial Indem. Co.) (1992) 2 Cal. 4th 1254, 1266, 10 Cal. Rptr. 2d 538, 833 P.2d 545* (incidentally citing *Chern* and noting that it "interpret[s] the nearly identical language of section 17535")]. It is clear that if the Court were to address the issue now, the Court would likewise hold that damages cannot be recovered under *Bus. & Prof. Code § 17535*.

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1-14 California Points & Authorities § 14.26

§ 14.26 Opposing Contention That Complaint States Cause of Action for Fraud Based on False or Misleading Advertising [Civ. Code § 1709]--Misrepresentation Was Mere Puffing

[1] FORM Opposing Contention That Complaint States Cause of Action for Fraud Based on False or Misleading Advertising [Civ. Code § 1709]--Misrepresentation Was Mere Puffing

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION FOR FRAUDULENT MISREPRESENTATION BECAUSE THE REPRESENTATION MADE BY DEFENDANT WAS A MERE STATEMENT OF OPINION, NOT FACT.

Alleged Misrepresentation Is Mere "Puffing". When an alleged misrepresentation in an advertisement is mere "puffing," or a statement of opinion, the advertiser is not liable for fraud, unless the person expressing the opinion does not in fact entertain it, the opinion amplifies false representations of fact, the opinion is expressed in a manner implying a factual basis that does not exist, or the expression of opinion is made by a party possessing superior knowledge (*Pacesetter Homes, Inc. v. Brodkin (1970) 5 Cal. App. 3d 206, 211, 85 Cal. Rptr. 39*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that a complaint states a cause of action for intentional or negligent fraud under Civ. Code §§ 1709, 1710. The ground for opposition is that the alleged misrepresentation was a representation of opinion, not fact. These points and authorities should be combined with other points and authorities pertaining to the specific procedural context in which they are raised. For example, they might be combined with general points and authorities supporting a demurrer to the complaint or a motion for summary judgment. They may also be adapted for use in a trial or appellate brief.

In an appropriate case, these points and authorities may be used to oppose the contention supported by the points and

authorities *set out in § 14.22*.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Alleged Misrepresentation Is Mere "Puffing"

In ***Pacesetter Homes, Inc. v. Brodkin*** *(1970) 5 Cal. App. 3d 206, 85 Cal. Rptr. 39* , a buyer cross complained against a seller in an action for rents due after foreclosure, alleging that the seller fraudulently represented that the rental income of the property would be more than the rents the buyer actually obtained. The seller's agents had told the buyer that the units to be constructed on the property would rent for specified amounts. They also stated, however, that the buildings would be an excellent investment "if you receive the rents as we contemplate." The trial court entered judgment against the buyer, and the buyer appealed.

The court of appeal affirmed, holding that the record supported the trial court's determination that the buyer did not establish all the elements necessary to sustain a cause of action for fraud (*5 Cal. App. 3d 206, 210)* . In its discussion of the requirement that there be a representation of fact, the court rejected the buyer's assertion that the statements of the seller's agents were "the assertion, as a fact, of that which is not true" within the definition of *Civ. Code § 1710(2)*. The trial court was justified, the court held, in construing the statements as those of opinion concerning future estimated rentals and not as an unqualified representation of what those rentals would be (*5 Cal. App. 3d 206, 211*). The court also noted that certain exceptional circumstances, in which courts will treat expressions of opinion as misrepresentations of fact, were not present in the buyer's case. These circumstances include the following: (1) the person expressing the opinion does not in fact entertain it; (2) the opinion amplifies false representations of fact; (3) the opinion is expressed in a manner implying a factual basis that does not exist; or (4) the expression of opinion is made by a party possessing superior knowledge (*5 Cal. App. 3d 206, 211-212*).

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1-14 California Points & Authorities § 14.27

§ 14.27 Supporting Contention That Outdoor Advertising Ordinance Is Constitutional--Ordinance Does Not Impermissibly Infringe Free Speech [U.S. Const., Amend. I; Cal. Const. Art. 1, § 2]

[1] FORM Supporting Contention That Outdoor Advertising Ordinance Is Constitutional--Ordinance Does Not Impermissibly Infringe Free Speech [U.S. Const., Amend. I; Cal. Const. Art. 1, § 2]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____[*Cite ordinance or legislation regulating outdoor advertising*] DOES NOT VIOLATE THE FEDERAL OR STATE FREE SPEECH CLAUSES BECAUSE IT REGULATES PURELY COMMERCIAL SPEECH, DIRECTLY ADVANCES A SUBSTANTIAL GOVERNMENTAL INTEREST, AND REACHES NO FURTHER THAN NECESSARY TO ACCOMPLISH ITS OBJECTIVE.

A. Outdoor Advertising Is Protected Commercial Speech. Commercial signs and billboards are a form of free speech protected by the *First Amendment of the United States Constitution* (*City and County of San Francisco v. Eller Outdoor Advertising (1987) 192 Cal. App. 3d 643, 656, 237 Cal. Rptr. 815*).

B. Standard for Regulation of Commercial Advertising. A governmental restriction on commercial advertising is valid under the *First Amendment* if it (1) seeks to implement a substantial governmental interest, (2) directly advances that interest, and (3) reaches no further than necessary to accomplish the given objective (*Posadas de Puerto Rico Assocs. v. Tourism Co. (1986) 478 U.S. 328, 340, 106 S. Ct. 2968, 92 L. Ed. 2d 266*).

C. Ban on All Off-Site Commercial Signs Is Permitted. A local government may ban all off-site, commercial outdoor signs to achieve the goals of traffic safety and improved aesthetics (*Metromedia, Inc. v. San Diego (1981) 453 U.S. 490, 507, 512, 570, 101 S. Ct. 2882, 69 L. Ed. 2d 800* (plurality opinion of White, J.; dissenting opinion of *Rehnquist, J.); City and County of San Francisco v. Eller Outdoor Advertising (1987) 192 Cal. App. 3d 643, 662-664, 237 Cal. Rptr. 815*).

D. Ban on All Off-Site Signs, Regardless of Content, Is Permitted. A local government may ban all off-site signs,

whether commercial or noncommercial, and permit all on-site signs, whether commercial or noncommercial, because such regulation is content-neutral (*City and County of San Francisco v. Eller Outdoor Advertising (1987) 192 Cal. App. 3d 643, 660-661, 237 Cal. Rptr. 815*).

E. California Constitution Does Not Provide Greater Protection. The California free speech clause, *Section 2 of Article I of the California Constitution*, does not afford pure commercial speech any greater protection than that accorded by the *First Amendment* (*People v. Superior Court (Olson) (1979) 96 Cal. App. 3d 181, 195, 157 Cal. Rptr. 628*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a city may enforce an outdoor advertising ordinance because the ordinance regulates commercial speech in conformity with both the *First Amendment of the U.S. Constitution* and *Cal. Const., Art. I, § 2*. These points and authorities should be combined with other points and authorities pertaining to the specific procedural context in which they are raised. For example, they might be combined with general points and authorities opposing a motion for a preliminary injunction to enjoin enforcement of the ordinance. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion of federal, state, and local regulation of outdoor advertising, see California Forms of Pleading and Practice, Ch. 14, *Advertising* (Matthew Bender).

[c] Opposing Points and Authorities

These points and authorities *set out in § 14.29* may be used in an appropriate case to oppose the contention supported by this memorandum.

[3] Discussion of Authorities

[a] Outdoor Advertising Is Protected Commercial Speech

The facts and procedural background of ***City and County of San Francisco v. Eller Outdoor Advertising*** *(1987) 192 Cal. App. 3d 643, 237 Cal. Rptr. 815* , are discussed in *§ 14.27[3][d]*. In upholding an ordinance that regulated outdoor advertising, the court of appeal recognized that it is well established that signs and billboards provide a forum for the expression of ideas. Therefore, any governmental regulation or prohibition of such signs bears scrutiny under the *First Amendment*. Even commercial speech, which proposes no more than a commercial transaction, enjoys a substantial degree of *First Amendment* protection (*192 Cal. App. 3d 643, 656)* .

[b] Standard for Regulation of Commercial Advertising

In ***Posadas de Puerto Rico Assocs. v. Tourism Co.*** *(1986) 478 U.S. 328, 106 S. Ct. 2968, 92 L. Ed. 2d 266* , the owner of two Puerto Rican casinos challenged a statute and regulations that prohibited advertising of casino gambling to the Puerto Rican public, asserting that they violated the plaintiff's commercial free speech rights under the United States Constitution, as well as the equal protection and due process guarantees. The trial court found the laws constitutional, adopting a narrowing construction that generally allowed such advertising as long as it was aimed at tourists, even if the

advertising might incidentally reach the residents of Puerto Rico. The Supreme Court of Puerto Rico dismissed plaintiff's appeal on the ground that it presented no substantial federal question.

The United States Supreme Court affirmed, holding that the statute and regulations as construed did not violate the *First Amendment* (*478 U.S. 328, 344, 106 S. Ct. 2968, 92 L. Ed. 2d 266*). The Court applied the test first articulated in *Central Hudson Gas & Electric Corp. v. Public Services Comm'n of New York (1980) 447 U.S. 557, 566, 100 S. Ct. 2343, 65 L. Ed. 2d 341* . Under *Central Hudson*, commercial speech receives a limited form of *First Amendment* protection so long as it concerns a lawful activity and is not misleading or fraudulent. Once it is determined that the *First Amendment* applies to the particular kind of commercial speech at issue, then the speech may be restricted only if the government's interest in doing so is substantial, the restrictions directly advance the government's asserted interest, and the restrictions are no more extensive than necessary to serve that interest (*478 U.S. 328, 340)* .

[c] Ban on All Off-Site Commercial Signs Is Permitted

In ***Metromedia, Inc. v. San Diego*** *(1981) 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800* , billboard owners brought an action to enjoin the enforcement of a San Diego ordinance that banned all outdoor advertising signs, with the exception of (1) "on-site" signs, or signs that were located on the premises where the advertised goods or services were made or sold, and (2) a group of other very limited types of signs, such as commemorative historical plaques and temporary political campaign signs. In *Metromedia, Inc. v. City of San Diego (1980) 26 Cal. 3d 848, 866-871, 164 Cal. Rptr. 510, 610 P.2d 407 , rev'd, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981)* , the California Supreme Court had upheld the ordinance on the grounds that it neither exceeded the city's police power nor violated the *First Amendment*.

On appeal, the United States Supreme Court reversed, but the majority of the Court was unable to agree on the rationale for its decision. A plurality of four justices concluded that the ordinance could constitutionally ban all off-site commercial signs to achieve the goals of traffic safety and improved aesthetics because such a ban would meet all the criteria in the *Central Hudson* test (discussed in *§ 14.27[3][b]*) (*453 U.S. 490, 507* , opinion of White, J.).

However, this same plurality went on to observe that billboards can carry noncommercial, as well as commercial, messages. Because the San Diego ordinance exempted *on-site commercial* signs from the general ban, without making any comparable exemption for on-site signs carrying noncommercial messages, the plurality held that it violated the *First Amendment* in that it impermissibly afforded "a greater degree of protection to commercial than to noncommercial speech" (*453 U.S. 490* , opinion of White, J.). The plurality also found the ordinance violated the *First Amendment* because it permitted some off-site signs carrying certain types of *noncommercial* messages, such as historic plaques, thereby impermissibly choosing "the appropriate subjects of public discourse" (*453 U.S. 490, 514-515* , opinion of White, J.).

Two other justices also found the ordinance unconstitutional, and concurred in the judgment, but disagreed with the plurality's analysis. They found that the practical effect of the ordinance was a total ban on billboards as an effective medium of expression. Therefore, the proper *First Amendment* test was the test for content-neutral prohibitions of particular media of communication (*453 U.S. 490* , concurring opinion of Brennan, J.). Under that test, a city could totally ban billboards if it could show that a sufficiently substantial governmental interest was directly furthered by the total ban, and that no more narrowly drawn restriction would promote the achievement of that goal as well (*453 U.S. 490, 528* , concurring opinion of Brennan, J.). Applying the test, the justices concluded that the city failed to demonstrate that the ordinance directly furthered the asserted interest in traffic safety or that the city's interest in aesthetics was substantial enough in the commercial and industrial areas of the city to justify the prohibition of billboards there (*453 U.S. 490, 528-534* , concurring opinion of Brennan, J.). They also disagreed with the plurality's view that an ordinance totally banning commercial billboards, but allowing noncommercial billboards, would be constitutional. They reasoned that such an ordinance would pose *First Amendment* problems at least as serious as those raised by a total ban because it would give city officials the right, before approving a billboard, to determine whether

the proposed message was commercial or noncommercial (*453 U.S. 490, 536-540* , concurring opinion of Brennan, J.).

Three justices dissented in separate opinions, each expressing the view that the city's ban on billboards was justified by its interest in traffic safety and aesthetic improvement and that the limited exceptions contained in the ordinance did not offend the *First Amendment* (*453 U.S. 490, 540-555, 555-569, 569-570* , dissenting opinions of Stevens, J., Burger, C.J., Rehnquist, J.). One justice asserted that an aesthetic justification alone is sufficient to sustain a total prohibition of billboards within a community (*453 U.S. 490, 570* , dissenting opinion of Rehnquist, J.). Another justice asserted that a total ban on billboards to improve the quality of the environment is permissible as long as the ordinance is wholly impartial, without bias in favor of one point of view or another, and the overall market for communication remains open for the communication of ideas (*453 U.S. 490, 552-553, 101 S. Ct. 2882, 69 L. Ed. 2d 800* , dissenting opinion of Stevens, J.). Both of these justices also concluded that the limited exceptions in the ordinance, for signs such as historic plaques and temporary political campaign signs, did not present any additional threat to the interest protected by the *First Amendment* (*453 U.S. 490, 553-554* , dissenting opinion of Stevens, J.; *453 U.S. 490, 570* , dissenting opinion of Rehnquist, J.).

Note that in *Metromedia* there was no clear majority ruling on the point of law cited, that is, that a local government may ban all off-site, commercial outdoor signs to achieve the goals of traffic safety and improved aesthetics. It is arguable, however, that a such majority was apparent in the plurality opinion of Justice White combined with the dissenting opinions. In *City and County of San Francisco v. Eller Outdoor Advertising (1987) 192 Cal. App. 3d 643, 658, 237 Cal. Rptr. 815* (discussed in *§ 14.27[3][d]*), the court of appeal observed that despite the emergence of three distinct schools of thought in *Metromedia,* a clear majority of seven expressly concluded that the city's substantial interest in safety and aesthetics justified an absolute ban on all commercial, off-site outdoor signs.

On remand from the *United States Supreme Court, the California Supreme Court in Metromedia, Inc. v. City of San Diego (1982) 32 Cal. 3d 180, 185 Cal. Rptr. 260, 649 P.2d 902* , found that it could not construe the San Diego ordinance to avoid the prohibition on noncommercial signs and so declared the ordinance invalid (*32 Cal. 3d 180, 187, 191)* . The Court reasoned that the legislative history showed the city intended to include some noncommercial billboards in its general prohibition and that such a prohibition was unconstitutional (*32 Cal. 3d 180, 189*). The Court went on to observe that an alternative ordinance that regulates the location, size, and appearance of billboards but that stops short of a total ban would avoid the problem of distinguishing commercial from noncommercial speech. Given the invalidity of a ban on all off-site billboards, the Court said, the city's purpose would be better served by an ordinance that bans most off-site billboards, rather than by one that draws a distinction based on content (*32 Cal. 3d 180, 191)*).

The facts and procedural background of ***City and County of San Francisco v. Eller Outdoor Advertising*** *(1987) 192 Cal. App. 3d 643, 237 Cal. Rptr. 815* , are discussed in *§ 14.27[3][d]*. In that case, the court of appeal upheld the constitutionality of an ordinance that banned all off-site signs in certain areas, with exemptions that were construed to apply to all types of noncommercial messages (*192 Cal. App. 3d 643, 662-664)* .

[d] Ban on All Off-Site Signs, Regardless of Content, Is Permitted

In ***City and County of San Francisco v. Eller Outdoor Advertising*** *(1987) 192 Cal. App. 3d 643, 237 Cal. Rptr. 815* , a city brought a public nuisance action against two billboard companies, as well as the owners of property where the billboards were located, to compel defendants to remove billboards that violated the city's sign ordinance. The ordinance applied to certain areas of the city designated to be of cultural, historic, or scenic importance and was enacted to promote the aesthetics, traffic safety, and economic stability of the area. It prohibited all off-site signs, or those directing attention to a business or other activity conducted off the premises. On-site signs, or signs directing attention to a business or other activity conducted on the premises, were permitted. The ordinance also exempted from the ban certain signs such as historic plaques, temporary political posters, and temporary signs of a patriotic, religious, charitable, or civic character. The trial court denied the city's motion for summary judgment, on the ground that the constitutionality of the ordinance was a triable issue of fact. However, the action was eventually dismissed for failure to

bring the case to trial within the mandatory statutory period. The city appealed on the ground that summary judgment should have been granted.

The court of appeal reversed and remanded, holding that the sign ordinance was constitutional as a matter of law (*192 Cal. App. 3d 643, 665)* . The court observed that the ordinance was essentially content-neutral: it distinguished between off-site and on-site signs but did not distinguish between commercial and noncommercial signs (*192 Cal. App. 3d 643, 655-656)* . The court held that such a content-neutral ban on all off-site signs is justified by the city's interests in reducing traffic hazards and improving aesthetics (*192 Cal. App. 3d 643, 659)*). Further, the ordinance left abundant alternative forums for the same communication, and in fact defendant maintained numerous billboards throughout other sections of the city that were not affected by the ban (*192 Cal. App. 3d 643, 659)*). By permitting *all* forms of on-site signs, the court observed, the ordinance avoided the flaw in the ordinance struck down by the United States Supreme Court in *Metromedia,* which permitted only on-site signs referring to commercial goods and services offered on the property (*192 Cal. App. 3d 643, 660)* . The court noted that the ordinance was facially invalid because it permitted exemptions for many, but not all, categories of signs displaying ideological communication throughout the city. Such discrimination based on content is not allowed in the area of noncommercial speech (*192 Cal. App. 3d 643, 662)* . Nevertheless, the court was able to give the ordinance a saving construction. Because of the extent of the exemptions, which included signs such as temporary displays of patriotic, religious, charitable, or civic character, the court concluded that the legislative intent was to allow most noncommercial signs. Therefore, the court construed the ordinance to permit all categories of noncommercial messages (*192 Cal. App. 3d 643, 664)* .

[e] California Constitution Does Not Provide Greater Protection

In ***People v. Superior Court (Olson)*** *(1979) 96 Cal. App. 3d 181, 157 Cal. Rptr. 628* , the People brought an action against a real estate firm for violation of *Bus. & Prof. Code §§ 17200, 17500,* based on deceptive newspaper advertising. The trial court granted defendant's motion for summary judgment, ruling in part that the imposition of civil penalties for the negligent dissemination of false advertising violated the *First Amendment* and *Cal. Const., art. I, § 2,* the California free speech clause. The People petitioned for a writ of mandate.

The court of appeal issued the writ, holding that the statutes did not abridge either the *First Amendment* or the California free speech clause (*96 Cal. App. 3d 181, 189, 195)* . The court stated that although in some contexts *Cal. Const., art. I, § 2,* is more inclusive that the *First Amendment,* there is no indication that the California Constitution affords pure commercial speech greater protection than that accorded by the *First Amendment* (*96 Cal. App. 3d 181, 195)* .

[4] Additional Authorities

[a] Standard for Regulation of Commercial Advertising

The court of appeal in *Rodriguez v. Solis (1991) 1 Cal. App. 4th 495, 2 Cal. Rptr. 2d 50 , review denied, 1 Cal. App. 4th 495*). The court said it could uphold the restriction only if it discerned a substantial governmental interest advanced by the ordinance, which goes no further than is necessary to effect the governmental interest. The court perceived that prohibiting, for aesthetic reasons, freestanding advertising signs oriented toward a landscaped freeway was a substantial governmental interest (*1 Cal. App. 4th 495, 513)* , and that its ordinance went no further than necessary to accomplish the city's objective (*1 Cal. App. 4th 495, 514-516)* .

The court of appeal in *Tahoe Regional Planning Agency v. King (1991) 233 Cal. App. 3d 1365, 285 Cal. Rptr. 335* , reversed and remanded for factual determinations to resolve a *Fifth Amendment* challenge to an ordinance of the Tahoe Regional Planning Agency. A taking challenge turns on whether the ordinance, or whether the amortization period, is a reasonable alternative to compensation. The court cited *Nollan v. California Coastal Com. (1987) 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677* , for the proposition that to survive a *Fifth Amendment* takings challenge, the interest

sought to be advanced by a land-use ordinance or regulation, including those with legitimate aesthetic purposes, must be substantially advanced by the regulation. The ordinance at issue substantially and directly advanced TRPA's legitimate interest in maintaining the natural scenic quality of the region (*233 Cal. App. 3d 1365, 1401*).

[b] Ban on All Off-Site Commercial Signs Is Permitted

In *Showing Animals Respect & Kindness v. City of West Hollywood (2008) 166 Cal. App. 4th 815, 83 Cal. Rptr. 3d 134* , the court held that an ordinance banning all mobile billboard advertising (except on buses and taxicabs), which had no definition of advertising, was applicable equally to both commercial and noncommercial speech and was not unconstitutional as applied to a nonprofit organization's vehicle that, while on city streets, presented messages, in both videos and sound recordings, against cruelty to animals (*166 Cal. App. 4th 815, 819-825)* . The declared purpose of the ordinance was to eliminate mobile billboard advertising within the city "in order to promote the safe movement of vehicular traffic, to reduce air pollution, and to improve the aesthetic appearance of the city," which, as the U.S. Supreme Court noted in the *Metromedia* opinion (*see § 14.27[3][c]*), are substantial governmental goals (*166 Cal. App. 4th 815, 823)* .

Tahoe Regional Planning Agency v. King (1991) 233 Cal. App. 3d 1365, 285 Cal. Rptr. 335 , is discussed in *§ 14.27[4][a]*. The court of appeal held that an ordinance that is facially invalid under the *First Amendment* and *Fourteenth Amendment* because of an exception for a specific type of sign may be construed and thus implemented constitutionally by severing the exception. The ordinance in question prohibited all off-premises commercial signs except for temporary political signs (*233 Cal. App. 3d 1365, 1403-1409*).

In *City of Salinas v. Ryan Outdoor Advertising, Inc. (1987) 189 Cal. App. 3d 416, 234 Cal. Rptr. 619* , a city brought an action under various zoning ordinances to compel an outdoor advertising company to remove certain signs. One of the ordinances banned off-site signs throughout the city, except in commercial zones and, with a permit, unclassified zones. The trial court found for the city, and the judgment was affirmed on appeal.

In the course of the litigation, the United States Supreme Court decided *Metromedia* (discussed in *§ 14.27[3][c]*). To comply with the decision, the city adopted a new ordinance defining "on-site" signs to include signs used exclusively to present a noncommercial message. The case was remanded to the court of appeal from the United States Supreme Court for further consideration in light of *Metromedia*.

On remand, the court of appeal affirmed the part of the judgment ordering removal of some of the signs, holding that the ordinances were partially preempted by state law governing outdoor advertising (*189 Cal. App. 3d 416, 433-434)* . In its discussion of the on-site sign ordinance, the court rejected defendant's argument that the ordinance was invalid because it allowed a city official to determine what was commercial and what was noncommercial speech. The court held that city officials have sufficient guidance from the various court decisions relating to billboards and commercial speech, including the United States Supreme Court's definition of "commercial speech" in *Central Hudson Gas & Electric Corp. v. Public Services Comm'n of New York (1980) 447 U.S. 557, 561, 100 S. Ct. 2343, 65 L. Ed. 2d 341* , as "expression related solely to the economic interests of the speaker and its audience" (*189 Cal. App. 3d 416, 429-430)*).

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1-14 California Points & Authorities § 14.28

§ 14.28 Supporting Contention That Outdoor Advertising Ordinance Is Constitutional--Ordinance Is Proper Exercise of Police Power [U.S. Const., Amends. X, XIV; Cal. Const. Art. I, §§ 13, 14; Art. XI, § 7]

[1] FORM Supporting Contention That Outdoor Advertising Ordinance Is Constitutional--Ordinance Is Proper Exercise of Police Power [U.S. Const., Amends. X, XIV; Cal. Const. Art. I, §§ 13, 14; Art. XI, § 7]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Cite ordinance or legislation regulating outdoor advertising*] IS A PROPER EXERCISE OF THE POLICE POWER BECAUSE IT BEARS A REASONABLE RELATIONSHIP TO PROPER GOVERNMENTAL OBJECTIVES.

A. Standard for Exercise of Police Power. An ordinance regulating outdoor advertising is a proper exercise of a city's police power if (1) the achievement of the purposes recited in the ordinance are proper objectives for the exercise of the city's police power and (2) the ordinance bears a reasonable relationship to those objectives (*Metromedia, Inc. v. City of San Diego (1980) 26 Cal. 3d 848, 855, 164 Cal. Rptr. 510, 610 P.2d 407 , rev'd on other grounds, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981))* .

[*Optional*] **B. Traffic Safety.** An ordinance that eliminates billboards designed to be viewed from streets and highways reasonably relates to traffic safety as a matter of law (*Metromedia, Inc. v. City of San Diego (1980) 26 Cal. 3d 848, 858-859, 164 Cal. Rptr. 510, 610 P.2d 407 , rev'd on other grounds, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981))* .

[*Optional*] **C. Aesthetic Considerations.** Aesthetic considerations alone justify the exercise of the police power to ban all off-site billboards in a community (*Metromedia, Inc. v. City of San Diego (1980) 26 Cal. 3d 848, 860-863, 164 Cal. Rptr. 510, 610 P.2d 407 , rev'd on other grounds, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981))* .

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a city may enforce an outdoor advertising ordinance because it falls within the proper exercise of the city's police power. These points and authorities should be combined with other points and authorities pertaining to the specific procedural context in which they are raised. For example, they might be combined with general points and authorities opposing a motion for a preliminary injunction to enjoin enforcement of the ordinance. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

See also *§ 14.27[2]*.

[b] Opposing Points and Authorities

The memoranda of points and authorities *set out in §§ 14.30* or *14.31* may be used in an appropriate case to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Standard for Exercise of Police Power

The facts and procedural history of ***Metromedia, Inc. v. City of San Diego*** *(1980) 26 Cal. 3d 848, 866-871, 164 Cal. Rptr. 510, 610 P.2d 407 , rev'd on other grounds, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981)* , are discussed in *§ 14.27[3][c]*. The Court held a San Diego ordinance, which banned all outdoor signs except for on-site commercial signs and some other special types of signs, did not violate the *First Amendment*, but was reversed on this issue by the United States Supreme Court.

However, the high court did not disturb the California Supreme Court's ruling on the issue of whether the ordinance exceeded the proper exercise of the city's police power. The California Court held that the achievement of the purposes recited in the ordinance--eliminating traffic hazards and improving the appearance of the city--represented proper objectives for the exercise of the police power and the ordinance bore a reasonable relationship to those objectives (*26 Cal. 3d 848, 855)* . The Court rejected the argument that the police power can never be employed to prohibit completely, rather than simply regulate, a business not found to be a public nuisance, overruling *Varney & Green v. Williams (1909) 155 Cal. 318, 100 P. 867* (*26 Cal. 3d 848, 863-865)* .

[b] Traffic Safety

The facts and procedural history of ***Metromedia, Inc. v. City of San Diego*** *(1980) 26 Cal. 3d 848, 866-871, 164 Cal. Rptr. 510, 610 P.2d 407 , rev'd on other grounds, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981)* , are discussed in *§ 14.27[3][c]*. In upholding an ordinance that generally banned all outdoor signs except on-site commercial signs, the Court observed that the party challenging an ordinance has the burden to prove that it does not reasonably relate to its objectives. However, the Court went on to hold that as a matter of law, an ordinance that eliminates billboards designed to be viewed from streets and highways reasonably relates to traffic safety (*26 Cal. 3d 848, 858-859)* .

[c] Aesthetic Considerations

The facts and procedural history of ***Metromedia, Inc. v. City of San Diego*** *(1980) 26 Cal. 3d 848, 866-871, 164 Cal. Rptr. 510, 610 P.2d 407 , rev'd on other grounds, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981)* , are discussed in *§ 14.27[3][c]*. In upholding an ordinance that generally banned all outdoor signs except on-site commercial signs, the Court overruled Varney & Green v. Williams (1909) 155 Cal. 318 , which had held that aesthetic

considerations alone cannot justify the exercise of the police power to prohibit advertising billboards. The Court held that the goal of improving the appearance of the community was sufficient to uphold the ordinance under the city's police power (*26 Cal. 3d 848, 860-861*).

California Points & Authorities

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1-14 California Points & Authorities § 14.29

§ 14.29 Opposing Contention That Outdoor Advertising Ordinance Is Constitutional--Ordinance Impermissibly Infringes Free Speech [U.S. Const., Amend. I; Cal. Const. Art. I, § 2]

[1] FORM Opposing Contention That Outdoor Advertising Ordinance Is Constitutional--Ordinance Impermissibly Infringes Free Speech [U.S. Const., Amend. I; Cal. Const. Art. I, § 2]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Cite ordinance or other governmental legislation regulating outdoor advertising*] VIOLATES THE *FIRST AMENDMENT* BECAUSE IT _____ [PROHIBITS ON-SITE NONCOMMERCIAL SIGNS BUT NOT ON-SITE COMMERCIAL SIGNS, THEREBY PROVIDING GREATER PROTECTION TO COMMERCIAL SPEECH THAN TO NONCOMMERCIAL SPEECH *and/or* PROHIBITS SOME, BUT NOT ALL, SIGNS CARRYING NONCOMMERCIAL MESSAGES, THEREBY MAKING A CONTENT-BASED RESTRICTION ON NONCOMMERCIAL SPEECH].

A. Outdoor Advertising Is Protected Commercial Speech. [*See § 14.27[1], P A.*]

B. Standard for Regulation of Commercial Advertising. [*See § 14.27[1], P B.*]

C. Ordinance Cannot Afford Commercial Speech Greater Protection Than Noncommercial Speech. A local government cannot exempt on-site commercial signs from a general ban on outdoor advertising, without also exempting on-site noncommercial signs (*Metromedia, Inc. v. San Diego (1981) 453 U.S. 490, 513, 536-540, 101 S. Ct. 2882, 69 L. Ed. 2d 800* (plurality opinion of White, J.; concurring opinion of Brennan, J.).

D. Ordinance Cannot Make Content-Based Restriction on Noncommercial Speech. An outdoor advertising ordinance cannot permit some, but not all, signs carrying noncommercial messages, thereby making a content-based restriction on noncommercial speech (*Metromedia, Inc. v. San Diego (1981) 453 U.S. 490, 514-515, 101 S. Ct. 2882, 69 L. Ed. 2d 800*).

[*Optional*] **E. Legislative Intent Precludes Saving Construction.** An ordinance that unconstitutionally discriminates between permissible and impermissible noncommercial speech cannot be given a saving construction when the legislative history shows that the local legislature intended to prohibit some noncommercial speech, rather than to allow all noncommercial speech (*Metromedia, Inc. v. City of San Diego (1982) 32 Cal. 3d 180, 187-189, 185 Cal. Rptr. 260, 649 P.2d 902*).

[2] Comments

CAUTION:

Note, especially in the context of Paragraph D of this form, that an ordinance that is facially invalid under the *First Amendment* and *Fourteenth Amendment* because of an exception for a specific type of sign may be construed and thus implemented constitutionally by severing the exception [*Tahoe Regional Planning Agency v. King (1991) 233 Cal. App. 3d 1365, 1403-1409, 285 Cal. Rptr. 335* (ordinance prohibited all off-premises commercial signs except for temporary political signs)].

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that a city may enforce an outdoor advertising ordinance, and is based on the ground that the ordinance violates the *First Amendment*. These points and authorities should be combined with other points and authorities pertaining to the specific procedural context in which they are raised. For example, they might be combined with general points and authorities supporting a motion for a preliminary injunction to enjoin enforcement of the ordinance. They may also be adapted for use in a trial or appellate brief.

In an appropriate case, the points and authorities set out in this form may be used to oppose the contention supported by the points and authorities *set out in § 14.27*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion of federal, state, and local regulation of outdoor advertising, see California Forms of Pleading and Practice, Ch. 14, *Advertising* (Matthew Bender).

[3] Discussion of Authorities

[a] Ordinance Cannot Afford Commercial Speech Greater Protection Than Noncommercial Speech

The facts and procedural history of ***Metromedia, Inc. v. San Diego*** *(1981) 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800* , are discussed in *§ 14.27[3][c]*. In holding that an ordinance banning all outdoor signs, except for on-site commercial signs and certain types of signs such as historical plaques, violated the *First Amendment*, a plurality of the United States Supreme Court struck down the ordinance because it exempted *on-site commercial* signs from the city-wide ban but made no comparable exception for on-site signs carrying noncommercial messages. This, the plurality explained, impermissibly afforded a greater degree of protection to commercial than to noncommercial speech (*453 U.S. 490, 513* , opinion of White, J.).

Two other justices found the ordinance unconstitutional, and therefore concurred in the judgment (*453 U.S. 490, 528-534* , concurring opinion of Brennan, J.). However, they would also have struck the ordinance if it had permitted all noncommercial billboards. They reasoned that such an ordinance would pose serious *First Amendment* problems because it would give city officials the right, before approving a billboard, to determine whether the proposed message

is commercial or noncommercial (*453 U.S. 490, 536-540* , concurring opinion of Brennan, J.).

[b] Ordinance Cannot Make Content-Based Restriction on Noncommercial Speech

The facts and procedural history of ***Metromedia, Inc. v. San Diego*** *(1981) 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800* , are discussed in *§ 14.27[3][c]*. In holding that an ordinance banning all outdoor signs, except for on-site commercial signs and certain types of signs such as historical plaques, violated the *First Amendment*, a plurality of the United States Supreme Court concluded that the exceptions for certain special types of signs created an impermissible infringement on noncommercial speech. It is not constitutional, the Court asserted, to permit *some* off-site signs carrying certain types of noncommercial messages, such as historical plaques or temporary political campaign signs, because this impermissibly chooses "the appropriate subjects of public discourse" (*453 U.S. 490, 514-515* , opinion of White, J.).

Two other justices found the ordinance unconstitutional, and therefore concurred in the judgment (*453 U.S. 490, 528-534* , concurring opinion of Brennan, J.). However, they concluded that the ordinance was, in practical effect, a total ban against billboards as a medium for communication because neither the on-site exception nor the other limited exceptions provided a real alternative for the general commercial or noncommercial billboard advertiser (*453 U.S. 490, 525-526* , concurring opinion of Brennan, J.).

[c] Legislative Intent Precludes Saving Construction

The facts and procedural history of ***Metromedia, Inc. v. City of San Diego*** *(1982) 32 Cal. 3d 180, 185 Cal. Rptr. 260, 649 P.2d 902* , the final disposition of the *Metromedia* case on remand, are discussed in *§ 14.27[3][c]*. In striking down an ordinance that exempted some, but not all, off-site, noncommercial signs from a general ban, the California Supreme Court found that it could not construe it to avoid the prohibition on noncommercial signs (*32 Cal. 3d 180, 187, 191)* . The Court reasoned that the legislative history showed the city intended to include some noncommercial billboards in its general prohibition (*32 Cal. 3d 180, 189)* .

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1-14 California Points & Authorities § 14.30

§ 14.30 Opposing Contention That Outdoor Advertising Ordinance Is Constitutional--Ordinance Violates Right to Due Process [U.S. Const., amend. XIV; Cal. Const. art. I, § 7(a)] or Takes Property Without Compensation [U.S. Const., amend. V; Cal. Const., art. I, § 19]

[1] FORM Opposing Contention That Outdoor Advertising Ordinance Is Constitutional--Ordinance Violates Right to Due Process [U.S. Const., amend. XIV; Cal. Const. art. I, § 7(a)] or Takes Property Without Compensation [U.S. Const., amend. V; Cal. Const., art. I, § 19]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Cite ordinance or other governmental legislation regulating outdoor advertising*] VIOLATES FEDERAL AND STATE DUE PROCESS PROTECTION AGAINST THE TAKING OF PROPERTY WITHOUT COMPENSATION BECAUSE IT DOES NOT PROVIDE FOR A REASONABLE AMORTIZATION PERIOD BEFORE REMOVAL OF NONCONFORMING SIGNS.

A. Due Process of Law. A person may not be deprived of property without due process of law (*U.S. Const., amend. XIV*; *Cal. Const. art. I, § 7(a)*).

B. Reasonable Amortization Period Is Required. If a local government seeks the removal of outdoor advertising without payment of just compensation, it must not require removal until a reasonable amortization period, commensurate with the owner's investment, has passed (*Metromedia, Inc. v. City of San Diego (1980) 26 Cal. 3d 848, 881-882, 164 Cal. Rptr. 510, 610 P.2d 407 , rev'd on other grounds, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981))* .

[*Optional*] **C. One-Year Amortization Period Is Facially Unreasonable.** Although the reasonableness of an amortization period as applied to a particular billboard depends on facts peculiar to that billboard, a one-year period is generally unreasonable on its face (*Metromedia, Inc. v. City of San Diego (1980) 26 Cal. 3d 848, 882-883, 164 Cal. Rptr. 510, 610 P.2d 407 , rev'd on other grounds, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981))* .

[*Optional*] **D. Ordinance Constitutes Taking Without Compensation if, Among Factors, Amortization Period Is Unreasonable.** An outdoor advertising ordinance becomes a "taking" rather than a valid noncompensable regulatory action if, among other factors, there is no reasonable amortization period, thereby depriving the owner of all economically viable use of the property (*see Tahoe Regional Planning Agency v. King (1991) 233 Cal. App. 3d 1365, 1394-1402, 285 Cal. Rptr. 335*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that a city may enforce an outdoor advertising ordinance, and is based on the ground that the ordinance violates the right to due process, or the right not to have property taken without compensation, by failing to provide a reasonable amortization period before requiring removal of a sign that violates the ordinance. These points and authorities should be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they might be combined with general points and authorities supporting a motion for a preliminary injunction to enjoin enforcement of the ordinance. They may also be adapted for use in a trial or appellate brief.

In an appropriate case, the points and authorities set out in this form may be used to oppose the contention supported by the points and authorities *set out in § 14.28*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion of federal, state, and local regulation of outdoor advertising, see California Forms of Pleading and Practice, Ch. 14, *Advertising* (Matthew Bender).

[3] Discussion of Authorities

[a] Reasonable Amortization Period Is Required

The facts and procedural history of ***Metromedia, Inc. v. City of San Diego*** *(1980) 26 Cal. 3d 848, 866-871, 164 Cal. Rptr. 510, 610 P.2d 407 , rev'd on other grounds, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981)* , are discussed in *§ 14.27[3][c]*. The Court held that a San Diego ordinance, which banned all outdoor signs except for on-site commercial signs and other special signs such as historic plaques, did not violate the *First Amendment*, but was reversed on this issue by the United States Supreme Court.

However, the high court did not disturb the California Supreme Court's ruling on the issue of whether the ordinance provided a unreasonably short amortization period after which nonconforming signs must be removed. The California Court held that the ordinance's amortization period, which ranged from one to four years, depending on the depreciated value of the sign, was not facially unreasonable (*26 Cal. 3d 848, 883*). The Court stated that when local government seeks to eliminate nonconforming uses, it may pursue two constitutionally equivalent alternatives: either (1) eliminate the use immediately by payment of just compensation, or (2) require removal of the use without compensation following a reasonable amortization period commensurate with the plaintiff's investment (*26 Cal. 3d 848, 881-882*). The determination of the length of a reasonable amortization period involves a process of weighing the public gain to be derived from a speedy removal of the nonconforming use against the private loss that removal of the use would entail (*26 Cal. 3d 848, 882-883)* . The sign owner has the burden of proving the unreasonableness of the amortization period applied to each sign, taking into account the cost of the billboard, its depreciated value, remaining useful life, length and remaining term of the lease under which it is maintained, and the harm to the public if the structure remains standing

beyond the prescribed amortization period (*26 Cal. 3d 848, 884)* .

[b] One-Year Amortization Period Is Facially Unreasonable

The facts and procedural history of ***Metromedia, Inc. v. City of San Diego*** *(1980) 26 Cal. 3d 848, 866-871, 164 Cal. Rptr. 510, 610 P.2d 407 , rev'd on other grounds, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981)* , are discussed in *§ 14.27[3][c]*. The Court held a San Diego ordinance, which banned all outdoor signs except for on-site commercial signs and some other special types of signs such as historic plaques, did not violate the *First Amendment*, but was reversed on this issue by the United States Supreme Court.

However, the high court did not disturb the California Court's ruling on the issue of whether the ordinance provided a unreasonably short amortization period after which nonconforming signs must be removed. The California Court held that the ordinance's amortization period was not facially unreasonable. The Court noted cases that held a one-year period was generally unreasonable, with the possible exception of signs that had been fully depreciated for federal income tax purposes. In contrast, amortization periods ranging from two years and eight months to three years have been upheld. Therefore, the amortization period in the San Diego ordinance, which ranges from one to four years, depending on the depreciated value of the sign, was not facially unreasonable (*26 Cal. 3d 848, 883)* .

[c] Ordinance Constitutes Taking Without Compensation if, Among Factors, Amortization Period Is Unreasonable

The court of appeal in ***Tahoe Regional Planning Agency v. King*** *(1991) 233 Cal. App. 3d 1365, 285 Cal. Rptr. 335* , reversed and remanded for factual determinations to resolve a *Fifth Amendment* "taking" challenge to an ordinance of the Tahoe Regional Planning Agency (TRPA). At issue were the interests of billboard owners and lessees and owners of real property on which nonconforming signs were located. The court said that since *First Lutheran Church v. Los Angeles County (1987) 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250* , and *Nollan v. California Coastal Com. (1987) 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677* , the reasonableness test of an amortization period for discontinuance of nonconforming signs has taken on aspects of the traditional *Fifth Amendment* "takings" challenge (*233 Cal. App. 3d 1365, 1399, 1401*). When the interest of the owner of the real property on which the nonconforming sign is located is at issue, the challenge seems to apply not only to the sign but also to the land on which it is situated [*see* (3) on list of criteria to be considered on remand, *below*].

Without a reasonable amortization period, the ordinance goes too far and becomes a "taking" rather than a valid noncompensable regulatory action. A taking occurs if the owner has been deprived of "all economically viable use of the property" (*233 Cal. App. 3d 1365, 1399, 1401*). However, in order for an amortization period to be upheld as a reasonable alternative to compensation, it is not necessary that the nonconforming property have no value at the end of the termination period (*233 Cal. App. 3d 1365, 1396-1397*). The amortization period cannot be viewed in isolation but is only one of the facts that the court should consider in defining the character of the government action as a valid regulation or a compensable taking (*233 Cal. App. 3d 1365, 1400* , citing *Georgia Outdoor Advertising v. City of Waynesville (4th Cir. 1990) 900 F.2d 783, 786-787* , as the only previous case applying *First Lutheran* criteria in context of amortization-or-compensation issue). To survive a takings challenge under *Nollan*, the interest sought to be advanced by a land-use ordinance or regulation, including one with legitimate aesthetic purposes, also must be substantially advanced by the nonconforming-sign regulation. The court found TRPA's ordinance substantially and directly advanced its legitimate interest in maintaining the natural scenic quality of the region (*233 Cal. App. 3d 1365, 1401*). In addition, the issue of taking or an amortization period as an alternative to compensation requires a fully developed factual record with regard to the specific property and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances. The issue cannot often be determined from a joint stipulation of facts or on a motion for summary judgment (*233 Cal. App. 3d 1365, 1401-1402, 1401 n.25*). All relevant facts are to be considered, including the following (*233 Cal. App. 3d 1365, 1402*):

(1) The number of billboards that can economically be used for permitted advertising and the number that are economically useless;

(2) The terms of leases for billboard locations;

(3) The land owned for billboard locations and whether it has any other economic use;

(4) The cost of the billboards that can and cannot be used;

(5) The depreciation taken on the billboards and their actual life expectancy;

(6) The income expected during the amortization period, and when a challenge is brought after expiration of the amortization period, the income earned through the time of judicial resolution;

(7) The salvage value of the billboards that cannot be used;

(8) The percentage of affected signs compared to remaining signs in the owner's business unit;

(9) The relative value of affected and remaining signs; and

(10) Whether the amortization period is reasonable.

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§ 14.31 Opposing Contention That Outdoor Advertising Ordinance Is Constitutional--Ordinance Violates Equal Protection Guarantees [U.S. Const., Amend. XIV; Cal. Const. art. I, § 7(a)]

[1] FORM Opposing Contention That Outdoor Advertising Ordinance Is Constitutional--Ordinance Violates Equal Protection Guarantees [U.S. Const., Amend. XIV; Cal. Const. art. I, § 7(a)]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Cite ordinance or other governmental legislation regulating outdoor advertising*] VIOLATES FEDERAL AND STATE EQUAL PROTECTION GUARANTEES BECAUSE IT MAKES ARBITRARY DISTINCTIONS BETWEEN TYPES OF ADVERTISING.

A. Equal Protection. A person may not be denied equal protection of the laws (*U.S. Const., amend. XIV*; *Cal. Const. art. I, § 7(a)*).

B. Ordinance May Not Make Arbitrary Classification. A local government may not restrict or prohibit one type of outdoor advertising but allow another if the classification does not bear a rational relationship to a legitimate state purpose (*Carlin v. City of Palm Springs (1971) 14 Cal. App. 3d 706, 712, 92 Cal. Rptr. 535* ; *see Metromedia, Inc. v. City of San Diego (1980) 26 Cal. 3d 848, 880, 164 Cal. Rptr. 510, 610 P.2d 407 , rev'd on other grounds, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981))* .

[2] Comments

CAUTION:

Note that an ordinance that is facially invalid under the *First Amendment* and *Fourteenth Amendment* because of an exception for a specific type of sign may be construed and thus implemented constitutionally by severing the exception [*Tahoe Regional Planning Agency v. King (1991) 233 Cal. App. 3d 1365, 1403-1409, 285 Cal. Rptr. 335* (ordinance prohibited all off-premises commercial signs except for temporary political signs)].

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that a city may enforce an outdoor advertising ordinance, on the ground that it violates equal protection guarantees because it makes an arbitrary classification between the types of signs that are prohibited and the types of signs allowed. These points and authorities should be combined with other points and authorities pertaining to the specific procedural context in which they are raised. For example, they might be combined with general points and authorities supporting a motion for a preliminary injunction to enjoin enforcement of the ordinance. They may also be adapted for use in a trial or appellate brief.

In an appropriate case, the points and authorities set out in this form may be used to oppose the contention supported by the points and authorities *set out in § 14.28*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion of federal, state, and local regulation of outdoor advertising, see California Forms of Pleading and Practice, Ch. 14, *Advertising* (Matthew Bender).

[3] Discussion of Authorities

[a] Ordinance May Not Make Arbitrary Classification

In ***Carlin v. City of Palm Springs*** *(1971) 14 Cal. App. 3d 706, 92 Cal. Rptr. 535* , the owner of a resort hotel brought an action against a city to enjoin enforcement of an ordinance that prohibited the outdoor display of all "rate signs," or signs that referred to prices. After a trial, the court upheld the ordinance and plaintiff appealed.

The court of appeal reversed, holding that the ordinance violated equal protection because there was no natural, intrinsic, or constitutional distinction between rate signs and nonrate signs (*14 Cal. App. 3d 706, 714)* . Although the government has the power to regulate signs, the court explained, the classification of advertising signs must not be arbitrarily made for the mere purpose of classification but must be based on some distinction, natural, intrinsic, or constitutional, that suggests a reason for and justifies the legislation. The burden of proof rests on the person attacking the legislation to establish that there is no public nexus between the legislation and what it attempts to correct (*14 Cal. App. 3d 706, 712)* . The court found that the ordinance could not be justified on aesthetic grounds because there is no difference, from an aesthetic viewpoint, between a rate sign and a nonrate sign. The court also rejected the arguments that rate signs create an atmosphere of "bargain basement commercialism" inimical to the general welfare of a resort community (*14 Cal. App. 3d 706, 714)* . The fact that some rate signs might be deceptive or fraudulent could not justify the ordinance, because other statutes provided penalties for false advertising. Finally, the court rejected the argument that the ordinance was justified on economic grounds because tourists who make reservations in luxury hotels become disgruntled on discovering the existence of low-rate accommodations (*14 Cal. App. 3d 706, 715)* .

The facts and procedural history of ***Metromedia, Inc. v. City of San Diego*** *(1980) 26 Cal. 3d 848, 866-871, 164 Cal. Rptr. 510, 610 P.2d 407 , rev'd on other grounds, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981)* , are discussed in *§ 14.27[3][c]*. The Court held a San Diego ordinance, which banned all outdoor signs except for on-site commercial signs and some other special types of signs such as historical plaques, did not violate the *First Amendment*, but was reversed on this issue by the United States Supreme Court.

However, the high court did not disturb the California Court's ruling that the ordinance did not deny the sign owners the equal protection of the laws. The California Court ruled that the ordinance, which did not compensate owners for

removal of their billboards, was partially preempted by state law. The state Court, therefore, interpreted the ordinance to require that compensation be paid to owners whose signs were located within 660 feet of federal highways and were therefore covered by the California Outdoor Advertising Act (*Bus. & Prof. Code § 5200 et seq.*) (*26 Cal. 3d 848, 878, 880)* . The United States Supreme Court rejected the argument that the ordinance, by failing to pay compensation for signs that fell out of the preemptive scope of the state law, denied equal protection to the owners who received no compensation. When a distinction involves purely economic regulation, the Court stated, it may be sustained if the classification bears a reasonable relationship to a legitimate state purpose (*26 Cal. 3d 848, 880)* . The Court held that the city could choose the more economical alternative of requiring removal of signs after expiration of an amortization period, rather than paying compensation (*26 Cal. 3d 848, 881)* .

[4] Additional Authorities

[a] Ordinance May Not Make Arbitrary Classification

In *Valley Outdoor, Inc. v. City of Riverside (9th Cir. 2006) 446 F.3d 948* , a sign company began construction without having obtained a permit for erection of a billboard. The governing ordinances included a procedure for granting a permit application after the commencement of construction. The billboard in question was to be placed nearer to a freeway than the city's applicable ordinance allowed. That ordinance, however, was invalidated (in unrelated litigation) on constitutional grounds during the period of construction. An amended ordinance, imposing identical placement criteria, took effect after construction was completed, and consequently, the billboard was not subject to the amended ordinance. Therefore, as a tactic in the city's effort to force removal of the offending billboard, officials refused to accept or process the sign company's application for the post-construction issuance of a permit. The Ninth Circuit, deciding that the company could maintain an action for a declaratory judgment against the city, held that the company's right to equal protection mandated even-handed enforcement of the city's procedure for issuance of a permit on an application after the commencement of construction (*446 F.3d 948, 956)* .

California Points & Authorities

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Volume 1 Chapters 1-19 WRITING LEGAL MEMORANDA AND BRIEFS; ABATEMENT AND SURVIVAL OF ACTIONS---to---AMENDED AND SUPPLEMENTAL PLEADINGS
CHAPTER 15 ALCOHOLIC BEVERAGE LICENSING

1-15 California Points & Authorities 15.syn

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[1] FORM

[2] Comments

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[b] Limited Scope of Review

[c] Reasonable Person Standard

[d] Consideration of Nature of Proposed Premises

[e] Mere Proximity to Church or School

[f] Law Enforcement Problem

[4] Additional Authorities

[a] Mere Proximity to Church or School

§ 15.21 Supporting Petition for Writ of Review [Bus. & Prof. Code § 23090; Code Civ. Proc. §§ 1067-1077] of Order of Alcoholic Beverage Control Appeals Board Granting Alcoholic Beverage License--By Protestant or Department of Alcoholic Beverage Control--General Form

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Limited Scope of Review

[b] Opinion Testimony

[c] Vicinity of Church, Hospital, School, Playground, or Youth Facility

[d] Law Enforcement Problem

[4] Additional Authorities

[a] Limited Scope of Review

[b] Opinion Testimony

[c] Vicinity of Church, Hospital, School, Playground, or Youth Facility

[d] Law Enforcement Problem

§ 15.22 Supporting Petition for Writ of Review [Bus. & Prof. Code § 23090; Code Civ. Proc. §§ 1067-1077] of Order of Alcoholic Beverage Control Appeals Board Suspending or Revoking Alcoholic Beverage License for Sale of

Alcoholic Beverage to Minor [Bus. & Prof. Code § 25658(a)]--Minor Gave Proof of Majority [Bus. & Prof. Code § 25660]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Reliance on Document Issued by Government

[3] Discussion of Authorities

[a] Good Cause as Limitation on Power to Suspend or Revoke License

[b] Reliance on Evidence of Majority as Defense to Suspension or Revocation of License

[c] Right to Assume Validity and Rightful Possession of Document

[d] Mere Suspicion of Invalidity as Not Precluding Reliance on Document

[e] Single Identification Check at Door

[f] Licensee Permitting Minor to Remain on Premises

[4] Additional Authorities

[a] Right to Assume Validity and Rightful Possession of Document

§ 15.23 Supporting Petition for Writ of Review [Bus. & Prof. Code § 23090; Code Civ. Proc. §§ 1067-1077] of Order of Alcoholic Beverage Control Appeals Board Suspending or Revoking Alcoholic Beverage License for Sale of Alcoholic Beverage to Minor [Bus. & Prof. Code § 25658(a)]--No Face-to-Face Identification of Seller by Minor Decoy [4 Cal. Code Reg. § 141(b)(5)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Failure to Make Face-to-Face Identification Is Defense

§ 15.24 Supporting Petition for Writ of Review [Bus. & Prof. Code § 23090; Code Civ. Proc. §§ 1067-1077] of Order of Alcoholic Beverage Control Appeals Board Suspending or Revoking Alcoholic Beverage License for Violation of Law Not Involving Moral Turpitude [Cal. Const., art. XX, § 22; Bus. & Prof. Code § 24200(a)]--Violation as Lacking Rational Relationship to or Actual Effect on Operation of Licensed Business in Manner Consistent With

Public Welfare and Morals

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Relationship of Violations to Conduct of Business

§ 15.25 Supporting Petition for Writ of Mandate [Bus. & Prof. Code § 23090.5; Code Civ. Proc. §§ 1085, 1086]--Review of Rule or Regulation of Department of Alcoholic Beverage Control--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Review of Rules and Regulations

[b] Performance of Administrative Duties

[c] Regulation Beyond Scope of Department's Statutory Power

[4] Additional Authorities

[a] Review of Rules and Regulations

[b] Performance of Administrative Duties

§ 15.26 Supporting Petition for Writ of Mandate [Bus. & Prof. Code § 23090.5; Code Civ. Proc. §§ 1085, 1086]--To Restrain Enforcement of Unconstitutional Statute--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Review of Quasi-Judicial Action

[b] Exhaustion of Administrative Remedies Not Required

[c] Original Jurisdiction of Supreme Court

[4] Additional Authorities

[a] Review of Quasi-Judicial Action

§ 15.27 Opposing Petition for Writ of Mandate [Bus. & Prof. Code § 23090.5; Code Civ. Proc. §§ 1085, 1086]--To Review or Restrain Adjudicatory Action of Department of Alcoholic Beverage Control--Exclusivity of Procedure by Writ of Review [Bus. & Prof. Code § 23090] and Failure to Exhaust Administrative Remedy

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Exclusivity of Procedure by Writ of Review

[b] Exhaustion of Administrative Remedies

[4] Additional Authorities

[a] Exclusivity of Procedure by Writ of Review

§ 15.28 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action for Restitution of Purchase Money--By Plaintiff--Transfer of Alcoholic Beverage License Denied by State

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Restitution for Failure of Consideration

[b] Unqualified Agreement to Buy Not Implied

[4] Additional Authorities

[a] Restitution for Failure of Consideration

§ 15.29 Supporting Motion for Summary Adjudication [Code Civ. Proc. § 437c(f)] of Validity of Option Agreement to Retransfer License to Seller of Licensed Premises on Buyer's Default in Purchase--By Plaintiff

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Motion for Summary Adjudication of Issues

[b] Option for Retransfer of Alcoholic Beverage License as Enforceable

California Points & Authorities

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PART I. INTRODUCTION

1-15 California Points & Authorities § 15.01

§ 15.01 Scope of Chapter

This chapter contains memoranda of points and authorities for use in supporting petitions for a writ of review to review an administrative order denying [*see § 15.20*], granting [*see § 15.21*], and suspending or revoking [*see §§ 15.22, 15.24*] an alcoholic beverage license. It also contains memoranda supporting and opposing a petition for a writ of mandate to review acts of the Department of Alcoholic Beverage Control [*see §§ 15.25, 15.26, 15.27*], supporting a motion for summary judgment in an action for restitution of purchase money after the department fails to approve transfer of a license [*see § 15.28*], and supporting a motion for summary adjudication of the issue of the validity of an option agreement given by a buyer of licensed premises to retransfer the license to the seller in the event of the buyer's default in the purchase [*see § 15.29*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsGeneral OverviewCivil ProcedureSummary JudgmentMotions for Summary JudgmentWritten MotionsCivil ProcedureRemediesWritsCommon Law WritsMandamusGovernmentsLocal GovernmentsLicensesGovernmentsState & Territorial GovernmentsLicenses

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1-15 California Points & Authorities § 15.02

§ 15.02 Governing Statutes

Alcoholic beverage licenses, including the granting or denial and suspension or revocation of licenses, are governed by *Cal. Const., art. XX, § 22* and *Bus. & Prof. Code § 23000 et seq.* Issuance and transfer of licenses are governed in particular by *Bus. & Prof. Code §§ 23950-24082*, subject to the restrictions contained in *Bus. & Prof. Code §§ 23770-23827*. Suspension and revocation of licenses are governed in particular by *Bus. & Prof. Code §§ 24200-24211*. Miscellaneous restrictions regulating licensees in the conduct of the licensed business are contained in *Bus. & Prof. Code §§ 25600-25667*. Administrative review of decisions regarding licensing is governed particularly by *Bus. & Prof. Code §§ 23080-23089*, and judicial review is governed by *Bus. & Prof. Code §§ 23090-23090.7*.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsLicenses

California Points & Authorities

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1-15 California Points & Authorities § 15.03

§ 15.03 Summary of Licensing Procedure

[1] In General

The Department of Alcoholic Beverage Control, as successor to the State Board of Equalization, has the exclusive power to license the manufacture, importation, and sale of alcoholic beverages in California [*Cal. Const., art. XX, § 22*; *Bus. & Prof. Code § 23051*]. The department has the power, in its discretion, to deny, suspend, or revoke any specific alcoholic beverages license if it determines for good cause that the granting or continuance of the license would be contrary to public welfare or morals, or that a person seeking or holding a license has violated any law prohibiting conduct involving moral turpitude [*Cal. Const., art. XX, § 22*]. The transfer of a license is subject to official investigation and approval in the same manner as the initial issuance of a license [*Greve v. Leger, Ltd. (1966) 64 Cal. 2d 853, 859, 52 Cal. Rptr. 9, 415 P.2d 824*]. It is the department and not the Alcoholic Beverage Control Appeals Board or the courts that must determine whether or not good cause exists for denying a license on the ground that its issuance would be contrary to public welfare or morals [*Kirby v. Alcoholic Beverage Control Appeals Bd. (1972) 7 Cal. 3d 433, 437, 102 Cal. Rptr. 857, 498 P.2d 1105* ; *Sepatis v. Alcoholic Beverage Control Appeals Bd. (1980) 110 Cal. App. 3d 93, 102, 167 Cal. Rptr. 729*].

[2] Administrative Review

Any person aggrieved by the decision of the Department of Alcoholic Beverage Control may appeal to the Alcoholic Beverage Control Appeals Board. Review of the department's decision by the board is limited to a determination of whether or not the department proceeded without or in excess of its jurisdiction, whether or not it proceeded in the manner required by law, whether or not its decision is supported by the findings, whether or not its findings are supported by substantial evidence in light of the whole record, and whether or not there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department [*Cal. Const., art. XX, § 22*; *Bus. & Prof. Code §§ 23081, 23084*].

[3] Petitioning for Judicial Review

To obtain judicial review, any person affected by a final order of the Alcoholic Beverage Control Appeals Board,

including the Department of Alcoholic Beverage Control, may apply to the Supreme Court or to the court of appeal for the appellate district in which the proceeding arose, for a writ of review of the order [*Bus. & Prof. Code § 23090*; *see, e.g.,* *Chevron Stations, Inc. v. Alcoholic Beverage Control Appeals Board (2007) 149 Cal. App. 4th 116, 123-124, 57 Cal. Rptr. 3d 6* ; *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (1999) 71 Cal. App. 4th 1518, 1520, 84 Cal. Rptr. 2d 621* (Department of Alcoholic Beverage Control challenged determination by Alcoholic Beverage Control Appeals Board regarding lawfulness of "trade sampling")]. Notwithstanding the statutory authority of "any person affected" to petition for a writ of review, the only persons who have the right to appear in the review proceedings are the board, the department, and parties to the action or proceeding before the board [*Bus. & Prof. Code § 23090.3*]. Under the above provisions, standing to seek judicial review of the board's orders is limited to parties who appeared before the board [*Rice v. Alcoholic Beverage Control Appeals Bd. (1978) 21 Cal. 3d 431, 436 fn. 4, 146 Cal. Rptr. 585, 579 P.2d 476*]. If a writ petition is filed in superior court, the court must transfer the writ to the Court of Appeal under the statute mandating that a court lacking subject matter jurisdiction over an action transfer it to a court with jurisdiction [*Padilla v. Department of Alcoholic Beverage Control (1996) 43 Cal. App. 4th 1151, 1157-1158, 51 Cal. Rptr. 2d 133* ; *see Code Civ. Proc. § 396* (petition for writ of mandate filed pursuant to *Code Civ. Proc. § 1094.5* in superior court, challenging ABC's decision to revoke alcoholic beverage license, treated as writ of review and denied by appellate court)].

Although review by the court is the second successive level of review under *Bus. & Prof. Code § 23090*, the scope of review at each level is the same. The court, like the board, must uphold the department's decision if the decision is supported by substantial evidence in the original record before the department [*Kirby v. Alcoholic Beverage Control Appeals Bd. (1968) 261 Cal. App. 2d 119, 121, 67 Cal. Rptr. 628* ; *compare Bus. & Prof. Code § 23090.2* with *Bus. & Prof. Code § 23084*; for a discussion of limitations on the scope of review, see *§ 15.03[2]*]. Following the hearing, the court must either affirm or reverse the department's decision or remand the case for further proceedings before, or reconsideration by, the department [*Bus. & Prof. Code § 23090.3*].

A petition to a reviewing court for a writ within its original jurisdiction, if the Petition might lawfully have been made to a lower court in the first instance, must set forth the circumstances which, in the opinion of the petitioner, render it proper that the writ should issue originally from the reviewing court [Cal. *Rules of Ct., Rule 8.490(b)*]. Thus, if a petition for a writ of review or writ of mandate is addressed to the Supreme Court in the first instance, counsel, in the memorandum of points and authorities supporting the petition, should set forth circumstances showing why the writ should be issued originally by the Supreme Court rather than by the court of appeal. In the case of proceedings for a writ of mandate, the Supreme Court will exercise its original jurisdiction in appropriate cases when the issues presented are of great public importance and must be resolved quickly [*Clean Air Constituency v. California State Air Resources Bd. (1974) 11 Cal. 3d 801, 808, 114 Cal. Rptr. 577, 523 P.2d 617*]. Similar factors should probably be emphasized when a writ of review is sought from the Supreme Court in the first instance.

[4] Effect of 1967 Legislation Adding Bus. & Prof. Code §§ 23090-23090.7

By the enactment of *Bus. & Prof. Code §§ 23090-23090.7* in 1967, the Legislature removed the superior court as the first level of judicial review [*Walsh v. Kirby (1974) 13 Cal. 3d 95, 102 fn. 11, 118 Cal. Rptr. 1, 529 P.2d 33* ; *Department of Alcoholic Bev. Control v. Superior Court (1968) 268 Cal. App. 2d 67, 69-71, 73 Cal. Rptr. 780*]. The 1967 legislation also specified limitations on the scope of judicial review, but the scope of review as to evidentiary matters was not altered by that legislation [*Walsh v. Kirby (1974) 13 Cal. 3d 95, 102-103, 103 n.12, 118 Cal. Rptr. 1, 529 P.2d 33* ; *see also Bus. & Prof. Code § 23090.2*; *Department of Alcoholic Bev. Control v. Superior Court (1968) 268 Cal. App. 2d 67, 75, 73 Cal. Rptr. 780*]. Thus, pre-1967 decisions involving evidentiary review of the department's decisions are still good law.

Legal Topics:

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

Administrative LawAgency AdjudicationDecisionsGeneral OverviewAdministrative LawJudicial ReviewGeneral OverviewAdministrative LawJudicial ReviewReviewabilityStandingGovernmentsLocal GovernmentsLicensesGovernmentsState & Territorial GovernmentsLicenses

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1-15 California Points & Authorities § 15.04

§ 15.04 Related Pleading and Practice Chapters

For discussion and forms for use in administrative and judicial proceedings relating to applications for and suspension or revocation of alcoholic beverage licenses, see California Forms of Pleading and Practice, Ch. 18, *Alcoholic Beverage Licenses* (Matthew Bender). That chapter also includes discussion and forms relating to proceedings for a writ of mandate to compel the department of Alcoholic Beverage Control to perform administrative duties and relating to proceedings for restitution of the purchase price of a liquor license when transfer of the license has been denied by the department.

For discussions and forms relating to proceedings involving licensing by public administrative agencies in general, see California Forms of Pleading and Practice, Ch. 470, *Overview of Public Administrative Law* , through Ch. 474C, *Procedures in Reviewing Agency Decisions* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusGovernmentsLocal GovernmentsLicensesGovernmentsState & Territorial GovernmentsLicenses

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1-15 California Points & Authorities § 15.05

§ 15.05 Related Points and Authorities Chapters

For a form of points and authorities relating to public administrative law generally, including points and authorities supporting a demurrer to a petition for a writ of mandate to review a decision of the Alcoholic Beverage Control Appeals Board, see Ch. 195, *Public Administrative Law* .

For a form of points and authorities relating to civil liability for furnishing alcoholic beverages, see Ch. 15A, *Alcoholic Beverages: Civil Liability for Furnishing* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusGovernmentsLocal GovernmentsLicensesGovernmentsState & Territorial GovernmentsLicenses

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1-15 California Points & Authorities §§ 15.06-15.19

[Reserved]

§§ 15.06[Reserved]

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PART II. FORMS

1-15 California Points & Authorities § 15.20

§ 15.20 Supporting Petition for Writ of Review [Bus. & Prof. Code § 23090; Code Civ. Proc. §§ 1067-1077] of Order of Alcoholic Beverage Control Appeals Board Denying Alcoholic Beverage License--By Applicant or Department of Alcoholic Beverage Control--General Form

[1] FORM Supporting Petition for Writ of Review [Bus. & Prof. Code § 23090; Code Civ. Proc. §§ 1067-1077] of Order of Alcoholic Beverage Control Appeals Board Denying Alcoholic Beverage License--By Applicant or Department of Alcoholic Beverage Control--General Form

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

[*OR*]

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA,
_____ APPELLATE DISTRICT

_____ [DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL *or name of applicant*], Petitioner, vs. ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD, Respondent[,] [DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Real Party in Interest].	)	NO. _____ MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF REVIEW

_____

THE COURT SHOULD REVERSE THE ALCOHOLIC BEVERAGE CONTROL APPEAL BOARD'S DECISION _____ [AFFIRMING THE ORDER OF THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL DENYING PETITIONER *or* REVERSING THE ORDER OF THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL GRANTING _____ (PETITIONER *or, if Department of Alcoholic Beverage Control is petitioner, name of applicant*)] AN ALCOHOLIC BEVERAGE LICENSE BECAUSE THERE IS INSUFFICIENT EVIDENCE OF GOOD CAUSE FOR DENIAL OF A LICENSE.

A. Review of Alcoholic Beverage Control Appeals Board Decision. Within 30 days after a final order of the Alcoholic Beverage Control Appeals Board is filed, any person affected by the order, including the Department of Alcoholic Beverage Control, may apply to the Supreme Court or to the court of appeal for the appellate district in which the proceeding arose for a writ of review of the final order (*Bus. & Prof. Code § 23090*). Following the hearing, the court may enter judgment reversing the decision of the department, or may remand the case for further proceedings before, or reconsideration by, the Department of Alcoholic Beverage Control (*Bus. & Prof. Code § 23090.3*).

[*EITHER, if board affirmed department's decision denying license*]

B. Arbitrary Exercise of Discretion. The discretion of the Department of Alcoholic Beverage Control to deny a license if it determines for good cause that granting the license would be contrary to public welfare or morals is not an absolute discretion, but must be exercised in accordance with the law, and the department must not act arbitrarily in determining what is contrary to public welfare or morals. To exercise its discretion, the department must know and consider all the material facts in evidence together with the legal principles essential to an informed, intelligent, and just decision, and its decisions must be based on sufficient evidence (*Martin v. Alcoholic Beverage Control Appeals Bd. (1961) 55 Cal. 2d 867, 875-876, 13 Cal. Rptr. 513, 362 P.2d 337* ; *see also Department of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (1981) 122 Cal. App. 3d 549, 554, 175 Cal. Rptr. 342*).

[*OR, if board reversed department's decision granting license*]

B. Limited Scope of Review. Review of the decision of the Department of Alcoholic Beverage Control by the Alcoholic Beverage Control Appeals Board and by the courts is limited to a determination of whether or not the department proceeded without or in excess of its jurisdiction, whether or not it proceeded in the manner required by law, whether or not its decision is supported by the findings, whether or not its findings are supported by substantial evidence in light of the whole record, and whether or not there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department (*Cal. Const., art. XX, § 22*; *Bus. & Prof. Code §§ 23084, 23090.2*).

[*AND, for use with second Paragraph B*]

C. Reasonable Person Standard. In determining whether or not the facts established by substantial evidence constitute good cause for concluding that issuance of the license will not be contrary to public welfare or morals, the Department of Alcoholic Beverage Control exercises discretion based on the reasonable person standard, and neither the

Alcoholic Beverage Control Appeals Board nor the courts may substitute a contrary decision that is equally or more reasonable (*Sepatis v. Alcoholic Beverage Control Appeals Bd. (1980) 110 Cal. App. 3d 93, 102, 167 Cal. Rptr. 729*).

D. Consideration of Nature of Proposed Premises. The department may consider the integrity of the applicant shown by his or her previous business experience, the kind of business to be conducted on the premises and the probable manner in which it will be conducted, and the type of guests who will patronize it and the probability that their consumption of alcoholic beverages will be moderate (*Koss v. Department of Alcoholic Beverage Control (1963) 215 Cal. App. 2d 489, 495, 30 Cal. Rptr. 219* ; see also *Sepatis v. Alcoholic Beverage Control Appeals Bd. (1980) 110 Cal. App. 3d 93, 100-103, 167 Cal. Rptr. 729*).

[*Optional*] **E. Mere Proximity to Church or School.** The mere proximity of the proposed premises to a church or school is insufficient to establish good cause for denial of an alcoholic beverage license (*Martin v. Alcoholic Beverage Control Appeals Bd. (1961) 55 Cal. 2d 867, 880, 13 Cal. Rptr. 513, 362 P.2d 337* (church); *Reimel v. Alcoholic Beverage Control Appeals Bd. (1967) 255 Cal. App. 2d 40, 45, 62 Cal. Rptr. 778* (school)).

[*Optional*] **F. Law Enforcement Problem.** The denial of a license application pursuant to *Section 23958 of the Business and Professions Code* on the basis that the license would tend to create a law enforcement problem must be supported by substantial evidence of repeated and on-going criminal activity in connection with the applicant's premises or locale, not mere expectation of disturbances of undetermined severity occurring at an indefinite time in the future (*Department of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (1981) 122 Cal. App. 3d 549, 556-557, 556-557 fn. 6, 175 Cal. Rptr. 342*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a petition for a writ of review of a final order of the Alcoholic Beverage Control Appeals Board denying an alcoholic beverage license. The memorandum may be submitted either by an unsuccessful applicant seeking judicial review of an order affirming a decision of the Department of Alcoholic Beverage Control to deny a license [*see* first Paragraph B] or by the department or the applicant seeking judicial review of an order reversing a decision of the department to grant a license [*see* second Paragraph B and Paragraph C].

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In particular, in cases involving proximity to a church or school, counsel should compare and contrast the detailed facts of the case with the facts presented by the diverse cases involving proposed premises in proximity to churches and schools because the case will turn on the sufficiency of the evidence supporting the department's decision [*see* *Martin v. Alcoholic Beverage Control Appeals Bd. (1961) 55 Cal. 2d 867, 880, 13 Cal. Rptr. 513, 362 P.2d 337* ; *see* cases collected in *§ 15.20[3][e], [4][a]*, and cases collected in *§ 15.21[3][c], [4][c]*].

[3] Discussion of Authorities

[a] Arbitrary Exercise of Discretion

The applicants in ***Martin v. Alcoholic Beverage Control Appeals Bd.*** *(1961) 55 Cal. 2d 867, 13 Cal. Rptr. 513, 362 P.2d 337* , sought transfer of an on-sale beer and wine license to their restaurant, which was directly across the street from a church. The Department of Alcoholic Beverage Control denied the application on the ground that issuance of the license would be contrary to public welfare and morals because the premises were in the immediate vicinity of a church, although the church did not protest issuance of the license. On applicants' appeal, the Alcoholic Beverage Control Appeals Board reversed on the basis that the record should contain some evidence of good cause for denying the license in addition to the proximity of the premises to a church. The department then sought review of the board's decision by mandamus proceedings in superior court. The court affirmed the board's decision, and the department appealed.

The Supreme Court affirmed. The Court noted that judicial review is necessarily directed at the board's decision, but that any determination of whether the board has exceeded its limited powers incidentally requires a review of the department's decision and of the record that the department's decision is based on (*55 Cal. 2d 867, 871-872*). The Court recognized the scope of the department's discretion, stating that if reasonable minds might differ as to whether issuance of a license would be contrary to public welfare, the determination of the question falls within the broad area of the department's discretion. However, the Court also stated that the discretion to be exercised by the department is not absolute, but must be exercised in accordance with the law, and that *Cal. Const., art. XX, § 22*, providing that the department may deny or revoke a license for good cause, implies that the department's decisions should be based on sufficient evidence and that it should not act arbitrarily in determining what is contrary to public welfare or morals (*55 Cal. 2d 867, 876*). The Court held, however, that the board had properly concluded that there was no substantial evidence supporting the department's determination that good cause existed to deny the license (*55 Cal. 2d 867, 880-881*).

Although *Martin* was decided prior to the 1967 legislation that added *Bus. & Prof. Code §§ 23090-23090.7*, governing judicial review of the board's decisions, that legislation did not change the scope of judicial review on evidentiary matters, and *Martin* may still be relied on in this regard [*Walsh v. Kirby (1974) 13 Cal. 3d 95, 103 fn. 12, 118 Cal. Rptr. 1, 529 P.2d 33*].

In ***Department of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.*** *(1981) 122 Cal. App. 3d 549, 175 Cal. Rptr. 342* , the Department of Alcoholic Beverage Control denied an on-sale beer and wine license to a disco music establishment. The department based its decision on findings that the establishment's remote location would result in slow police response times to requests for help, and that the predominance of youthful patrons might result in occasional disturbances occurring in the indefinite future, constituting a law enforcement problem. The Alcoholic Beverage Control Appeals Board affirmed the license denial on an alternative ground of zoning restrictions but rejected the department's determination that issuance of the license would create a law enforcement problem as unsupported by substantial evidence. When the establishment subsequently obtained zoning approval and was granted the license, the department sought review of the board's reversal of the license denial.

The court of appeal affirmed the reversal, holding that (1) the findings of limited police response power were based on conflicting evidence and were not substantially supported by the evidence, and (2) the reasoning of the department that unspecified disturbances might occur at times in the indefinite future was too speculative to meet the probable impairment of public welfare test for good-faith denial of a license under *Cal. Const Art XX, § 22* (*122 Cal. App. 3d 549, 556-558, 556-557 fn. 6*).

[b] Limited Scope of Review

Cal. Const., art. XX, § 22 and *Bus. & Prof. Code § 23084* limit the scope of review of the department's decisions by the Alcoholic Beverage Control Appeals Board, as set out in Paragraph B of this form. *Bus. & Prof. Code § 23090.2* imposes the same limitations on the scope of review by the court of appeal or Supreme Court.

[c] Reasonable Person Standard

In ***Sepatis v. Alcoholic Beverage Control Appeals Bd.*** *(1980) 110 Cal. App. 3d 93, 167 Cal. Rptr. 729* , the Department of Alcoholic Beverage Control granted an application for transfer of an on-sale retail license even though there were already four "too many" bars in the area of the proposed premises under the department's statistical formula for determining when there is an undue concentration of licenses in a neighborhood. Issuance of licenses where there is undue concentration of licenses is permitted by *Bus. & Prof. Code § 23958* if the applicant shows that public convenience or necessity will be served by the issuance. The department reasoned that public convenience or necessity would be served by transfer of the license because the proposed premises would be of a different character than existing bars and would appeal to all segments of the community, including persons in the area who were reluctant to enter other bars in the neighborhood. Protestors appealed to the Alcoholic Beverage Control Appeals Board, which reversed on the ground that "public convenience or necessity" related only to availability of alcoholic beverages and did not permit consideration of the physical appearance or aesthetic features of the licensed premises or of whether the applicant would cater to a particular segment of the public. The applicant petitioned for review of the board's order.

In reversing the board's order and reinstating the department's decision, the court of appeal recognized the limited scope of its review (*110 Cal. App. 3d 93, 102*). The court stated that on factual issues, the standard of review is whether or not the department's findings are supported by substantial evidence, and that if the evidence supporting the findings is not conflicting, the conclusions reached present questions of law reviewable for correctness, jurisdictional excess, or abuse of discretion [citing *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal. 3d 85, 94, 84 Cal. Rptr. 113, 465 P.2d 1* (discussed in *§ 15.22[3][a]*), and *Rice v. Alcoholic Beverage Control Appeals Bd. (1979) 89 Cal. App. 3d 30, 35, 152 Cal. Rptr. 285*]. The court also stated that in determining whether or not the facts established by substantial evidence constitute good cause for determining that issuance of a license will not be contrary to public welfare or morals, the department exercises discretion on a reasonable person standard, which may allow a difference of opinion on the same subject, and that when the decision is the subject of choice within reason, the department is vested with the discretion of making the selection it deems proper, and neither the board nor the courts may substitute a contrary decision, even though equally or more reasonable [relying on *Koss v. Department of Alcoholic Beverage Control (1963) 215 Cal. App. 2d 489, 496, 30 Cal. Rptr. 219*].

[d] Consideration of Nature of Proposed Premises

In ***Koss v. Department of Alcoholic Beverage Control*** *(1963) 215 Cal. App. 2d 489, 30 Cal. Rptr. 219* , the Department of Alcoholic Beverage Control granted an on-sale license to a resort owner who wanted to serve alcoholic beverages in the resort's dining room. Members of a nearby church and of the community who had protested the license application appealed to the Alcoholic Beverage Control Appeals Board. The board reversed, holding that the department's findings were not supported by substantial evidence and that the department had abused its discretion in issuing the license. Both the applicant and the department petitioned the superior court for writs of mandate to compel the board to set aside its order. The superior court ordered issuance of the writs, holding that the department's findings were supported by substantial evidence and that issuance of the license had not been an abuse of discretion. Protestants and the board, who had intervened in the mandamus proceedings, appealed.

The court of appeal affirmed, stating that the only issues before it were the same as those before the trial court, that is, whether or not the department's findings were supported by substantial evidence and whether or not the decision based on those findings constituted an abuse of discretion (*215 Cal. App. 2d 489, 492-493*). The department had found that issuance of the license would not be contrary to public morals or welfare and, given the type of operation involved, would not create a moral hazard to the church in the immediate vicinity of the premises, or interfere with the quiet enjoyment of their property by the residents of the predominantly residential area in which the premises were located. The protestants and the board urged that the findings were not supported by substantial evidence because uncontested evidence showed that the members of a church located 200 feet from the premises had vigorously protested issuance of the license, and that 147 residents of the area had also protested issuance, complaining of noise, traffic problems, and the potential for operation of vehicles in the neighborhood by persons under the influence of alcohol (*215 Cal. App. 2d*

489, 493). After reviewing the nature of the resort, the court stated, relying on prior California law, that mere proximity to a church did not require a finding that issuance of the license would be contrary to public welfare or morals (*215 Cal. App. 2d 489, 495*). Rather, the court held that the department was entitled to consider the integrity of the applicant as shown by his previous business experience, the kind of business to be conducted on the licensed premises and the probable manner in which it would be conducted, and the type of guests who would patronize it and the probability that their consumption of alcoholic beverages would be moderate (*215 Cal. App. 2d 489, 495*). The department was also entitled to consider that the protests were primarily directed to previously existing conditions which were attributable to an unlicensed premises and which had ceased to exist since the applicant had purchased the premises, that any aggravation of those conditions and the occurrence of other objectionable conditions, such as intoxicated drivers, assumed overindulgence by the patrons, which was not probable given the type of management, operation, and patrons involved, and that the times when the church was used made interference with its use by guests of the premises unlikely (*215 Cal. App. 2d 489, 495-496*). These considerations provided substantial evidence in support of the department's decision, and the court held that the board's decision reversing the department was contrary to law (*215 Cal. App. 2d 489, 496-497*).

The facts and procedural background of ***Sepatis v. Alcoholic Beverage Control Appeals Bd.*** *(1980) 110 Cal. App. 3d 93, 167 Cal. Rptr. 729* , are discussed in *§ 15.20[3][c]*.

In *Sepatis*, the court of appeal reversed the board and reinstated the decision of the department. The court reasoned that since *Bus. & Prof. Code § 23958* authorizes issuance of licenses on a showing of public convenience or necessity even though issuance would result in or add to an undue concentration of licenses, "public convenience or necessity" must be based on criteria different from those involved in a determination of "undue concentration" (*110 Cal. App. 3d 93, 98*). The court was critical of developing a standard that would turn on the appeal of premises to particular segments of the public, but noted, on pages 100-101, that the department may take into account the attractiveness of the premises, the probable manner in which it will be conducted, and the type of guests who will patronize it in determining whether or not licensing premises located near a church would be contrary to public welfare and morals [citing *Martin v. Alcoholic Beverage Control Appeals Bd. (1961) 55 Cal. 2d 867, 874, 880, 13 Cal. Rptr. 513, 362 P.2d 337* (discussed in *§ 15.20[3][e]*), and *Koss v. Department of Alcoholic Beverage Control (1963) 215 Cal. App. 2d 489, 495, 30 Cal. Rptr. 219* , discussed *above*]. The court declined to propound a definitive interpretation of "public convenience or necessity," holding that substantial evidence in the record supported the department's finding that the proposed premises would appeal to all segments of the community, including residents and business people in the area who were reluctant to enter existing bars in the vicinity, and that the department had not abused its constitutional or statutory discretion in considering that fact as an aspect of public convenience or in concluding that, on balance, issuance of the license would not be contrary to public welfare or morals, as that term is used in the agency's constitutional mandate (*110 Cal. App. 3d 93, 102-103*).

[e] Mere Proximity to Church or School

CAUTION:

The following cases were decided before the 1992 amendment of *Bus. & Prof. Code § 23789* authorizing the department to refuse to issue *any* retail license for premises located within the immediate vicinity of churches, hospitals, schools, public playgrounds, and nonprofit youth facilities.

The facts and procedural background of ***Martin v. Alcoholic Beverage Control Appeals Bd.*** *(1961) 55 Cal. 2d 867, 13 Cal. Rptr. 513, 362 P.2d 337* , are discussed in *§ 15.20[3][a]*.

In affirming, the Supreme Court noted that *Cal. Const., art. XX, § 22*, empowers the department to deny, suspend, or revoke licenses if it determines for good cause that the granting or continuance of the license would be contrary to public welfare and morals (*55 Cal. 2d 867, 871, 872*). The Court also noted that the department was specifically authorized to refuse to issue on-sale retail licenses for premises located within the immediate vicinity of a church by

Bus. & Prof. Code § 23789, but held that this statutory provision did not require denial of a license based solely on mere proximity to a church and that the statute could not impair the constitutional requirement that good cause be shown for denial of a license. The Court held that the statutory language and the Constitution required the department to exercise a legal discretion in passing on the application (*55 Cal. 2d 867, 875*). The Court then canvassed a number of prior California cases dealing with granting or denying licenses to premises near churches, schools, and religious communities, and concluded that the cases were not entirely consistent, each depending on its own facts (*55 Cal. 2d 867, 877-880*). The Court found that in those cases, the determining factor in upholding the department's decision was whether or not there was substantial evidence on which reasonable minds might differ as to whether issuance of the license would be contrary to public welfare and morals (*55 Cal. 2d 867, 880*). The Court concluded that the board and superior court had properly found that the department's decision was not supported by substantial evidence, since mere proximity to a church was insufficient to establish good cause for denial. Moreover, the department could not arbitrarily refuse to consider the other pertinent undisputed evidence, and the proximity of the church was not significant enough to support the denial, given the fact that the church did not protest the license and that there were already eight licensed premises within 600 feet of applicant's premises, only one of which had an on-sale beer and wine license. The Court also noted that the proprietors of the proposed premises were law-abiding persons operating a superior restaurant and trying to make its services better and attractive to a larger number of patrons (*55 Cal. 2d 867, 880*).

In ***Reimel v. Alcoholic Beverage Control Appeals Bd.*** *(1967) 255 Cal. App. 2d 40, 62 Cal. Rptr. 778* , the Department of Alcoholic Beverage Control denied a supermarket's application for an off-sale beer and wine license on the grounds that the proposed premises was in the immediate vicinity of a school and that issuance of the license would be contrary to the public welfare and morals. The Alcoholic Beverage Control Appeals Board reversed, finding that the department's decision was without reason under the evidence, arbitrary, and an abuse of discretion. The department petitioned the superior court for a writ of mandate to overturn the board's decision. The department appealed from the court's denial of the petition.

The court of appeal affirmed, holding that mere proximity to a school or church does not as a matter of law constitute the good cause that must be established in order to deny a license under the Constitution. The court then examined the department's finding that issuance of the license would be contrary to public welfare and morals, the only determination that could constitutionally support denial of the license under *Cal. Const., art. XX, § 22* (*255 Cal. App. 2d 40, 45*). The department's findings of fact in support of its determination were that the proximity of the premises to the school was incompatible with the school's legally imposed duty to instruct children as to the evil effects of alcohol, that some of the children went by and entered the supermarket, that the school ground was already being littered with discarded liquor bottles, and that the new license would attract more public imbibers to the area. The court held that none of the findings, when substantively analyzed, was sufficient to sustain the constitutional requirement of good cause for denial of a license (*255 Cal. App. 2d 40, 46-50*). The court found that the sale of beer and wine anywhere is incompatible with the educational policy of the state regarding alcohol, so that the policy was not substantial evidence that sale of beer and wine across the street from the school would contravene public welfare and morals (*255 Cal. App. 2d 40, 46-47*). As to children passing by and frequenting the premises, the court noted that the evidence showed that only a few of the students passed by and that even fewer entered the store. Noting the character of the supermarket, including facts indicating that sales to or thefts by children of beer and wine were unlikely, and that none of the students were old enough to purchase beer and wine, the court concluded that the extent to which the students frequented the store did not constitute substantial evidence that issuance of the license would be contrary to public welfare and morals (*255 Cal. App. 2d 40, 47-48*). The court disregarded the public imbibing and litter problem because: (1) of the school's location in a busy commercial neighborhood with two other off-sale premises nearby; (2) no litter could be attributed to the supermarket, which as yet had made no sales; and (3) reference to liquor bottles was irrelevant since a beer and wine license was involved. Testimony that people might drink in the supermarket's parking lot and drive on the nearby streets under the influence of alcohol was deemed to be mere speculation and conjecture, not constituting substantial evidence (*255 Cal. App. 2d 40, 48*).

The court distinguished two cases in which an off-sale beer and wine license was denied to premises near a school. The

court noted that in *Weiss v. State Bd. of Equalization (1953) 40 Cal. 2d 772, 256 P.2d 1* , a license was denied where the proposed premises were 80 pedestrian feet from a high school in a partly residential neighborhood, while in the case before it, the proposed premises was 400 pedestrian feet from an elementary school in a commercial area. In *Reimel v. Alcoholic Beverage Control Appeals Bd. (1967) 250 Cal. App. 2d 673* , a license was denied where the neighborhood was entirely residential except for the proposed premises, which proposed to sell the alcoholic beverages in connection with the sale of take-out food, making it likely that alcoholic beverages would be consumed near the premises and within 200 feet of the school (*255 Cal. App. 2d 40, 49*). On pages 49-50, the court concluded that the cases granting and denying licenses to premises near churches and schools are not altogether consistent, each case seeming to turn on its own facts with the determining factor being whether or not there was substantial evidence on which reasonable minds might differ as to whether denying or granting the license would or would not be contrary to public welfare and morals [citing *Martin v. Alcoholic Beverage Control Appeals Bd. (1961) 55 Cal. 2d 867, 880, 13 Cal. Rptr. 513, 362 P.2d 337* (discussed *above*)].

Counsel should note that *Reimel v. Alcoholic Beverage Control Appeals Bd. (1967) 255 Cal. App. 2d 40, 62 Cal. Rptr. 778* , was distinguished in *Kirby v. Alcoholic Beverage Control Appeals Bd. (1968) 261 Cal. App. 2d 119, 126-129, 67 Cal. Rptr. 628* (discussed in *§ 15.21[4][c]*), in which the court found that substantial evidence supported contentions relating to litter and likely consumption of alcoholic beverages in the vicinity of a school. The court in *Kirby* made a fairly detailed comparison between the facts of the case before it and the facts of *Reimel.*

For authorities in which the courts upheld decisions of the department to deny a license because the proposed premises were in close proximity to a church or school, see *§ 15.21[3][c], [4][c]*.

[f] Law Enforcement Problem

The facts and procedural background of ***Department of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.*** *(1981) 122 Cal. App. 3d 549, 175 Cal. Rptr. 342* , are discussed in *§ 15.20[3][a]*. In an extensive footnote, the court of appeal discussed cases in which license denials were supported by substantial evidence of repeated and on-going criminal activity in connection with an applicant's premises or locale. Such activity, held the court, constituted a legitimate concern to law enforcement agencies and established a good-faith basis for a denial of a license by the department. The present case, on the other hand, involved only a determination by the department that disturbances of undetermined severity might occur in the indefinite future. The court upheld the board's decision that such a determination was too speculative and broad to meet the good-faith requirement for license denial based on avoidance of a law enforcement problem (*122 Cal. App. 3d 549, 556-557 fn. 6*).

[4] Additional Authorities

[a] Mere Proximity to Church or School

As noted in *Martin v. Alcoholic Beverage Control Appeals Bd. (1961) 55 Cal. 2d 867, 880, 13 Cal. Rptr. 513, 362 P.2d 337* (discussed in *§ 15.20[3][e]*), cases dealing with the proposed licensing of premises near schools and churches appear to turn on their own facts. In these cases, the question before the court is whether or not the findings of the Department of Alcoholic Beverage Control or its predecessor, the State Board of Equalization, are supported by sufficient evidence, or whether or not its actions were arbitrary or an abuse of discretion. In the following cases, the department's decision granting a license was upheld on appeal.

In *Koss v. Department of Alcoholic Beverage Control (1963) 215 Cal. App. 2d 489, 30 Cal. Rptr. 219* (discussed in *§ 15.20[3][d]*), the superior court granted a writ of mandate to set aside an order of the Alcoholic Beverage Control Appeals Board that had reversed a decision of the department granting an on-sale license to a resort owner who wanted to serve alcoholic beverages primarily in the resort's dining room. The court of appeal affirmed the superior court holding that substantial evidence supported the department's decision to grant the license, given the applicant's integrity,

the type of business and probable manner in which it would be conducted, the probable type of patrons, the nature of the protests, which related to conditions of the premises when unlicensed and under a prior owner, and the unlikelihood of conflict with services at a church 200 feet away from the licensed premises because of the times at which the church was used (*215 Cal. App. 2d 489, 495-496*).

In *Board of Trustees v. Munro (1958) 163 Cal. App. 2d 440, 329 P.2d 765* , the superior court ordered issuance of a writ of mandate compelling the department and the board to reverse their decisions granting an off-sale license to a supermarket near a high school, a church, a proposed playground, and a proposed Y.M.C.A. The court of appeal reversed, holding that the department's decision was supported by substantial evidence. The evidence had shown that the alcoholic beverages were to be sold in a department separate from the rest of the store to minimize the possibility of theft and inadvertent sale to minors, although protestants had claimed that the students would manage to obtain alcoholic beverages through adults, pilferage, or misrepresentation of age. Church representatives had testified against the license, but had admitted that no bad effects on their congregation could be expected, and Y.M.C.A. representatives had testified that their members would be more apt to drink than if alcoholic beverages were not so handy to their headquarters. The court, however, held that, as a matter of law, this testimony had not proven that granting the license would be contrary to public welfare or morals (*163 Cal. App. 2d 440, 442-447*).

In *Altadena Community Church v. State Board of Equalization (1952) 109 Cal. App. 2d 99, 240 P.2d 322* , the superior court granted a petition for a writ of mandate to reverse a decision of the Board of Equalization that had granted an on-sale general liquor license to a restaurant. The court of appeal reversed, holding that the Board of Equalization had not abused its discretion in granting the license to the restaurant which already had a beer and wine license and which had been licensed before the opening of at least one of the three churches in the immediate vicinity. There had not been any showing that operation of the licensed premises had interfered with the churches' operations (*109 Cal. App. 2d 99, 104-105*).

California Points & Authorities

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Volume 1 Chapters 1-19 WRITING LEGAL MEMORANDA AND BRIEFS; ABATEMENT AND SURVIVAL OF ACTIONS---to---AMENDED AND SUPPLEMENTAL PLEADINGS
CHAPTER 15 ALCOHOLIC BEVERAGE LICENSING
PART II. FORMS

1-15 California Points & Authorities § 15.21

§ 15.21 Supporting Petition for Writ of Review [Bus. & Prof. Code § 23090; Code Civ. Proc. §§ 1067-1077] of Order of Alcoholic Beverage Control Appeals Board Granting Alcoholic Beverage License--By Protestant or Department of Alcoholic Beverage Control--General Form

[1] FORM Supporting Petition for Writ of Review [Bus. & Prof. Code § 23090; Code Civ. Proc. §§ 1067-1077] of Order of Alcoholic Beverage Control Appeals Board Granting Alcoholic Beverage License--By Protestant or Department of Alcoholic Beverage Control--General Form

[*Caption. See § 15.20[1].*]

THE COURT SHOULD SET ASIDE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD'S DECISION REVERSING THE ORDER OF THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL DENYING AN ALCOHOLIC BEVERAGE LICENSE TO _____ [*name of applicant*] BECAUSE THERE IS SUBSTANTIAL EVIDENCE IN SUPPORT OF THE DEPARTMENT'S FINDING THAT GRANTING THE LICENSE WOULD BE CONTRARY TO PUBLIC WELFARE AND MORALS.

A. Review of Alcoholic Beverage Control Appeals Board Decision. [*See § 15.20]1], Paragraph A.*]

B. Limited Scope of Review. Review of the decision of the Department of Alcoholic Beverage Control by the Alcoholic Beverage Control Appeals Board and by the courts is limited to a determination of whether or not (1) the department proceeded without or in excess of its jurisdiction, (2) the department proceeded in the manner required by law, (3) the department's decision is supported by the findings, (4) the department's findings are supported by substantial evidence in light of the whole record, and (5) there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department (*Cal. Const., art. XX, § 22*; *Bus. & Prof. Code §§ 23084, 23090.2*). Neither the board nor the court may overturn a finding of fact of the department on the ground that a contrary finding would have been equally or more reasonable, and if reasonable minds can differ as to whether granting a license would or would not be contrary to public welfare, the determination of the question is within the department's discretion (*Kirby v. Alcoholic Beverage Control Appeals Bd. (1972) 7 Cal. 3d 433, 436, 102 Cal. Rptr. 857, 498 P.2d 1105*).

C. Constitutional Limit on Authority of Department to Deny License. The Department of Alcoholic Beverage Control has the power, in its discretion, to deny any specific alcoholic beverages license if it determines, for good cause, that the granting of the license would be contrary to public welfare or morals, or that a person seeking a license has violated any law prohibiting conduct involving moral turpitude (*Cal. Const., art. XX, § 22*).

[*Optional*] **D. Opinion Testimony.** Past experience and expert opinion can constitute substantial evidence in support of the department's assessment of the future impact of the proposed premises on the public welfare and morals (*Kirby v. Alcoholic Beverage Control Appeals Bd. (1972) 7 Cal. 3d 433, 441, 102 Cal. Rptr. 857, 498 P.2d 1105*).

[*Optional*] **E. Vicinity of Church, Hospital, School, Playground, or Youth Facility.** The Department of Alcoholic Beverage Control is specifically authorized by statute to refuse the issuance, other than renewal or ownership transfer, of any retail license for premises located within the immediate vicinity of churches and hospitals and within at least 600 feet of schools and public playgrounds or nonprofit youth facilities, including, but not limited to, facilities serving Girl Scouts, Boy Scouts, or Campfire Girls (*Bus. & Prof. Code § 23789*; *see Weiss v. State Bd. of Equalization (1953) 40 Cal. 2d 772, 775, 256 P.2d 1*). Even though mere proximity to a church or school does not constitute good cause for denial of a license, such proximity coupled with some additional evidence disclosing a potential threat to public welfare and morals is sufficient to justify denial of a license (*Kirby v. Alcoholic Beverage Control Appeals Bd. (1972) 7 Cal. 3d 433, 440, 102 Cal. Rptr. 857, 498 P.2d 1105*).

[*Optional*] **F. Law Enforcement Problem.** The Department of Alcoholic Beverage Control may deny an application for a license if issuance of the license would tend to create a law enforcement problem (*Bus. & Prof. Code §§ 23958, 23958.3*; *see Kirby v. Alcoholic Beverage Control Appeals Bd. (1972) 7 Cal. 3d 433, 440-441, 102 Cal. Rptr. 857, 498 P.2d 1105*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a petition for a writ of review of a final order of the Alcoholic Beverage Control Appeals Board that resulted in granting an alcoholic beverage license by reversing an order of the Department of Alcoholic Beverage Control that had denied issuance of the license.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In particular, in cases involving proximity to a church, hospital, school, public playground, or nonprofit youth facility, including, but not limited to, facilities serving Girl Scouts, Boy Scouts, or Campfire Girls, counsel should compare and contrast the diverse cases involving proposed licenses for premises in these locales, because the case will turn on the sufficiency of the evidence supporting the department's decision [*see Martin v. Alcoholic Beverage Control Appeals Bd. (1961) 55 Cal. 2d 867, 880, 13 Cal. Rptr. 513, 362 P.2d 337* ; *see* cases collected in *§ 15.21[3][c], [4][c]*, and in *§ 15.20[3][e], [4][a]*].

[3] Discussion of Authorities

[a] Limited Scope of Review

In ***Kirby v. Alcoholic Beverage Control Appeals Bd.*** *(1972) 7 Cal. 3d 433, 102 Cal. Rptr. 857, 498 P.2d 1105* , the Department of Alcoholic Beverage Control denied an application for an off-sale beer and wine license on the ground that it would be contrary to public welfare and morals because the premises were located in a residential area, operation of the premises would disturb the residents' quiet enjoyment of their property, and issuance would create or aggravate an existing police problem in the area. The premises sought to be licensed were located in a shopping center in a community surrounded by a university campus. Shortly before the application was made, there had been civil disturbances on campus and in the community. There were no other licensed premises in the community. A protest was

filed by the county sheriff, who testified as to the riots that had taken place in the vicinity. The sheriff also stated that, in his experience, 50 to 60 percent of all persons arrested in the county were under the influence of alcohol, and that the college community had the highest crime rate in the county. On appeal by the applicant, the Alcoholic Beverage Control Appeals Board reversed the department's denial of the application on the ground that it lacked evidentiary support, was arbitrary, and constituted an abuse of discretion. The department petitioned for review of the board's decision.

In reversing the board's decision and affirming the department's denial of the license, the Supreme Court recognized the limitations on the scope of review of the department's decisions by both the board and the courts. The Court stated that neither the courts nor the board could disregard or overturn a finding of fact of the department for the reason that a contrary finding would have been equally or more reasonable. If reasonable minds could differ as to whether granting a license would or would not be contrary to public welfare, the determination of the question falls within the broad area of discretion that the department is empowered to exercise. The Court also stated that the standard of review by the board pursuant to *Cal. Const., art. XX, § 22*, and by the courts pursuant to *Bus. & Prof. Code § 23090.2* is the same, that is, the department's findings must be upheld if supported by substantial evidence in light of the whole record (*7 Cal. 3d 433, 436*).

[b] Opinion Testimony

The facts and procedural background of ***Kirby v. Alcoholic Beverage Control Appeals Bd.*** *(1972) 7 Cal. 3d 433, 102 Cal. Rptr. 857, 498 P.2d 1105* , are discussed in *§ 15.21[3][a]*. In *Kirby*, the board and the applicant contended that the evidence failed to establish that the civil disturbances were attributable to the consumption of alcoholic beverages because the sheriff's testimony relating crime to intoxication and regarding the likelihood that the premises might aggravate police problems was mere opinion testimony and wholly speculative. The Court rejected the contention, noting that the department's role in evaluating an application for a license is to assure that the public welfare and morals are preserved from probable impairment in the future. The Court then held that in appraising the likelihood of future harm to the public welfare, the department, of necessity, must be guided to a large extent by past experience and the opinions of experts [relying on *Kirby v. Alcoholic Beverage Control Appeals Bd. (1968) 261 Cal. App. 2d 119, 129, 67 Cal. Rptr. 628* (discussed in *§ 15.21[4][b]*)] (*7 Cal. 3d 433, 441*). The Court concluded that the sheriff's testimony constituted evidence, based on his 25 years of experience as a law enforcement officer in the area, that granting the license could aggravate an existing law enforcement problem and thus be contrary to the public welfare (*7 Cal. 3d 433, 442*).

[c] Vicinity of Church, Hospital, School, Playground, or Youth Facility

CAUTION:

The following cases were decided before the 1992 amendment of *Bus. & Prof. Code § 23789* authorizing the department to refuse to issue *any* retail license for premises located within the immediate vicinity of churches, hospitals, schools, public playgrounds, and nonprofit youth facilities.

In ***Weiss v. State Board of Equalization*** *(1953) 40 Cal. 2d 772, 256 P.2d 1* , plaintiffs filed an application with the State Board of Equalization for an off-sale beer and wine license at their grocery and delicatessen. After hearing, the Board denied the application on the grounds that issuance of the license would be contrary to the "public welfare and morals" because of the proximity of the premises to a high school. Plaintiffs sought a writ of mandate in the superior court to compel the Board to issue the license. The trial court rendered judgment denying plaintiffs' writ petition, and the plaintiffs appealed from the judgment.

The Supreme Court affirmed the judgment. The Court noted, preliminarily, that the Board was authorized by the predecessor statute to *Bus. & Prof. Code § 23789* to refuse issuance of an on-sale license to premises in the immediate vicinity of a school. However, the Court held the Department also had the power, under *Cal. Const., art. XX, § 22*, to refuse issuance of an off-sale license to premises near schools when issuance of the license would be inimical to public

morals and welfare (*40 Cal. 2d 772, 775*). The Court further found the Board did not act arbitrarily in denying the license application, because a reasonable person could conclude that the sale of liquor on premises within 80 feet of some buildings on a high school ground would adversely affect the public welfare and morals (*40 Cal. 2d 772, 775-776*).

Counsel should note that *Weiss* was decided not only before the enactment of *Bus. & Prof. Code § 23789*, but also before the 1992 amendment of the statute, which authorizes the department to refuse the issuance of *any* retail license for premises located within the immediate vicinity of churches, hospitals, schools, public playgrounds, and nonprofit youth facilities.

The facts and procedural background of ***Kirby v. Alcoholic Beverage Control Appeals Bd.*** *(1972) 7 Cal. 3d 433, 102 Cal. Rptr. 857, 498 P.2d 1105* , are discussed in *§ 15.21[3][a]*. In that case, in a four to three decision over a strong dissent, the Supreme Court reversed the board's order and affirmed the department's decision denying the license. The Court recognized that mere proximity to schools or churches may not constitute good cause for denial, but noted that other cases have held that proximity to a church or school coupled with some additional evidence disclosing a potential threat to the public welfare or morals is sufficient to justify denial of a license. The Court held that the case before it fell into the second category because the proximity of the premises to the university was coupled with the additional factors of the age and past "exuberance" of the community and university population, the absence of any other licensed premises in the area, and the presence of a nearby restaurant with take-out food service that would enhance the likelihood that beer would be consumed near campus (*7 Cal. 3d 433, 440*). An additional ground supporting denial of the license was that substantial evidence supported the department's finding that the premises might present a law enforcement problem (*7 Cal. 3d 433, 440-442*).

For authorities in which an alcoholic beverages license was granted notwithstanding the proximity of the proposed premises to a church or school, see *§ 15.20[3][e], [4][a]*. Reference to these authorities is particularly important because, as the Supreme Court stated in *Martin v. Alcoholic Beverage Control Appeals Bd. (1961) 55 Cal. 2d 867, 880, 13 Cal. Rptr. 513, 362 P.2d 337* , the cases are not entirely consistent, each turning on its own facts, with the determining factor being whether or not there was substantial evidence on which reasonable minds might differ as to whether the denying or granting of the license would or would not be contrary to public welfare and morals. In this regard, it should be noted that in *Kirby* and in all four cases discussed in *§ 15.21[4][c]*, the court upheld the department's original decision.

[d] Law Enforcement Problem

The facts and procedural background of ***Kirby v. Alcoholic Beverage Control Appeals Bd.*** *(1972) 7 Cal. 3d 433, 102 Cal. Rptr. 857, 498 P.2d 1105* , are discussed in *§ 15.21[3][a]*. There, in a four to three decision over a strong dissent, the Supreme Court reversed the board's order and affirmed the department's decision denying the license. The Court held, relying on prior California law and on *Bus. & Prof. Code § 23958*, that the department may deny a license if it determines, from substantial evidence, that the premises might present a law enforcement problem (*7 Cal. 3d 433, 440-441*). The Court then rejected a challenge to the sufficiency of the evidence on the issue of a law enforcement problem (see discussion in *§ 15.21[4][b]*) (*7 Cal. 3d 433, 441-442*).

[4] Additional Authorities

[a] Limited Scope of Review

In *Donia v. Alcoholic Bev. etc. Appeals Bd. (1985) 167 Cal. App. 3d 588, 213 Cal. Rptr. 447* , the Department of Alcoholic Beverage Control denied a market's application for an off-sale beer and wine license on the ground that its issuance would tend to create or aggravate an existing law enforcement problem and would be contrary to the public welfare and morals. The Alcoholic Beverage Control Appeals Board reversed that decision on the ground that it was

unsupported by the findings and that the findings were unsupported by substantial evidence. The principal of a nearby elementary school and other concerned citizens petitioned for a writ of review. The court of appeal reversed the board's order, and thoroughly discussed the evidence and expert testimony. It concluded that in reviewing a decision by the department, the board is limited to determining whether the decision was supported by the findings, and whether the findings were supported by substantial evidence in the light of the whole record. Neither the board nor a reviewing court may disregard or overturn a finding of fact of the department for the reason that a contrary finding would have been equally or more reasonable. If it is conceded that reasonable minds might differ as to whether granting a license would or would not be contrary to the public welfare, that concession merely shows that the determination of the question falls within the broad area of discretion which the department was empowered to exercise. Under the general principles of the substantial evidence rule, both the board and the reviewing court must view the evidence in the light most favorable to the department's decision (*167 Cal. App. 3d 588, 595*).

[b] Opinion Testimony

In *Kirby v. Alcoholic Beverage Control Appeals Bd. (1968) 261 Cal. App. 2d 119, 67 Cal. Rptr. 628* , the court of appeal, in reinstating a decision of the Department of Alcoholic Beverage Control that had been reversed by the Alcoholic Beverage Control Appeals Board, rejected the contention that some of the evidence was opinion testimony and purely speculative and conjectural. The testimony concerned potential problems with litter and consumption of alcoholic beverages around a fast food stand near the proposed premises. The Court held that the testimony was not objectionable, noting that the proposed business was not yet in operation and that the attempt to assess its future impact on the public welfare and morals had to be based on experience, sound reason, and evidence in the record (*261 Cal. App. 2d 119, 129*).

[c] Vicinity of Church, Hospital, School, Playground, or Youth Facility

CAUTION:

The following cases were decided before the 1992 amendment of *Bus. & Prof. Code § 23789* authorizing the department to refuse to issue ***any*** retail license for premises located within the immediate vicinity of churches, hospitals, schools, public playgrounds, and nonprofit youth facilities.

In *Kirby v. Alcoholic Beverage Control Appeals Bd. (1968) 261 Cal. App. 2d 119, 67 Cal. Rptr. 628* , the court of appeal reversed an order of the Alcoholic Beverage Control Appeals Board that had reversed a decision of the Department of Alcoholic Beverage Control denying an off-sale beer and wine license to a convenience market. The court held that the department's decision had not been arbitrary when the evidence had shown that the market was 392 pedestrian feet from an elementary school in a partly residential area, that there was heavy student foot traffic past the store's location, and that alcoholic beverages were likely to be consumed in the vicinity of the store due to the presence of a nearby hamburger stand where students and other minors already congregated (*261 Cal. App. 2d 119, 123-131*).

Reimel v. Alcoholic Beverage Control Appeals Bd. (1967) 250 Cal. App. 2d 673, 58 Cal. Rptr. 788 , involved an application for an off-sale beer and wine license that was denied by the Department of Alcoholic Beverage Control. The Alcoholic Beverage Control Appeals Board reversed, and the superior court denied the department's petition for a writ of mandate. The court of appeal reversed the superior court, and upheld the department's decision. The court held that the department had not denied the license arbitrarily when the evidence had shown that the proposed premises was a grocery store located 200 feet from an elementary school, that the school district protested the license, and that the store, which was patronized by 20 children per day, was to be converted into a delicatessen with a take-out food service, giving rise to the possibility that alcoholic beverages might be consumed in the vicinity of the school.

In *Bowman v. Alcoholic Beverage Control Appeals Bd. (1959) 171 Cal. App. 2d 467, 340 P.2d 652* , the department denied an on-sale license for an inn. The board reversed, and, on a petition for a writ of mandate, the superior court refused to overturn the board's order. The court of appeal reversed, however, holding that the department had not abused

its discretion in denying the license when the evidence had established that the inn was located in a small mountain community that was established as a religious community with many youth camps and other campgrounds operated by religious, cultural, and educational institutions in the vicinity, that there was no comparable religious community in Southern California, and that the absence of alcohol was a factor leading to the community's development (*171 Cal. App. 2d 467, 469-472*).

In *Schaub's Inc. v. Department of Alcoholic Beverage Control (1957) 153 Cal. App. 2d 858, 315 P.2d 459* , the department and board both denied an application for transfer of an off-sale license to a supermarket that was located across the street from one church and near another. The superior court denied a petition for a writ of mandate, and the court of appeal affirmed, holding that the department had not acted arbitrarily. The court, noting that the churches were in the vicinity first, relied heavily on the department's discretion (*153 Cal. App. 2d 858, 861-866*).

[d] Law Enforcement Problem

In *Department of Alcoholic Bev. Control v. Alcoholic Bev. etc. Bd. (1982) 133 Cal. App. 3d 814, 184 Cal. Rptr. 367* , the court of appeal reversed the finding of the Alcoholic Beverage Control Appeals Board, which was that the Department of Alcohol Beverage Control had not established good cause in denying a permit for an off-sale beer and wine license. The court, in holding that it was the department that had the authority to determine whether the issuance of an off-sale license would be contrary to public welfare and morals, ruled that the department's finding that issuance of the license would create an undue concentration of licenses in a high crime area provided a proper basis for denying application and was supported by the evidence. The role of the appeals board and the courts in reviewing the decision of the department, the court stated, was limited to determining whether the department acted arbitrarily in making its decision (*133 Cal. App. 3d 814, 817-819*).

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Volume 1 Chapters 1-19 WRITING LEGAL MEMORANDA AND BRIEFS; ABATEMENT AND SURVIVAL OF ACTIONS---to---AMENDED AND SUPPLEMENTAL PLEADINGS
CHAPTER 15 ALCOHOLIC BEVERAGE LICENSING
PART II. FORMS

1-15 California Points & Authorities § 15.22

§ 15.22 Supporting Petition for Writ of Review [Bus. & Prof. Code § 23090; Code Civ. Proc. §§ 1067-1077] of Order of Alcoholic Beverage Control Appeals Board Suspending or Revoking Alcoholic Beverage License for Sale of Alcoholic Beverage to Minor [Bus. & Prof. Code § 25658(a)]--Minor Gave Proof of Majority [Bus. & Prof. Code § 25660]

[1] FORM Supporting Petition for Writ of Review [Bus. & Prof. Code§ 23090; Code Civ. Proc. §§ 1067-1077] of Order of Alcoholic Beverage Control Appeals Board Suspending or Revoking Alcoholic Beverage License for Sale of Alcoholic Beverage to Minor [Bus. & Prof. Code § 25658(a)]--Minor Gave Proof of Majority [Bus. & Prof. Code § 25660]

[*Caption. See § 15.20[1].*]

THE COURT SHOULD REVERSE THE ORDER OF THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD AFFIRMING THE DECISION OF THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL THAT [SUSPENDED *or* REVOKED] PETITIONER'S ALCOHOLIC BEVERAGE LICENSE BECAUSE THE DEPARTMENT'S DETERMINATION THAT PETITIONER DID NOT RELY, IN GOOD FAITH, ON BONA FIDE EVIDENCE OF MAJORITY AND IDENTITY IN SERVING THE MINOR IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. Review of Alcoholic Beverage Appeals Board Decision. [*See § 15.20[1], Paragraph A.*]

B. Constitutional Authority of Department to Suspend or Revoke License. The Department of Alcoholic Beverage Control has the power, in its discretion, to suspend or revoke any specific alcoholic beverages license if it determines, for good cause, that the continuance of the license would be contrary to public welfare or morals, or that a person holding a license has violated any law prohibiting conduct involving moral turpitude (*Cal. Const., art. XX, § 22*).

C. Good Cause as Limitation on Power to Suspend or Revoke License. The constitutional provision permitting the Department of Alcoholic Beverage Control to suspend or revoke a license for "good cause" necessarily implies that the department's decisions must be based on sufficient evidence and that the department must not act arbitrarily in determining what is contrary to public welfare or morals (*Boreta Enterprises, Inc. v. Department of Alcoholic*

Beverage Control (1970) 2 Cal. 3d 85, 95, 84 Cal. Rptr. 113, 465 P.2d 1 ; *H.D. Wallace & Associates, Inc. v. Department of Alcoholic Beverage Control (1969) 271 Cal. App. 2d 589, 591-592, 76 Cal. Rptr. 749*).

D. Reliance on Evidence of Majority as Defense to Suspension or Revocation of License. Proof that the licensee, or the licensee's employee or agent, demanded, was shown, and acted in reliance on bona fide evidence of majority and identity in any sale of alcoholic beverages to a minor is a defense to any proceeding to suspend or revoke any license based on that sale. Bona fide evidence of majority and identity of the person is a document issued by a federal, state, county, or municipal government, or subdivision or agency thereof, including, but not limited to, a motor vehicle operator's license, an identification card issued to a member of the Armed Forces that contains the name, date of birth, description, and picture of the person, or a valid passport issued by the United States or by a foreign government (*Bus. & Prof. Code § 25660(a)*). *Bus. & Prof. Code § 25660* applies to fake identification cards that purport to be government issued, but are not (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (2004) 118 Cal. App. 4th 1429, 1439-1445, 13 Cal. Rptr. 3d 826*).

E. Right to Assume Validity and Rightful Possession of Document. If a bartender or clerk acted in good faith and without actual knowledge, gained from the appearance of the purchaser or otherwise, that the document evidencing majority did not or could not belong to the minor, [and if the alteration of the document was not discernible with reasonable diligence], the bartender or clerk has a right to assume that the person presenting the document would not unlawfully possess or use it (*Conti v. State Bd. of Equalization (1952) 113 Cal. App. 2d 465, 466-467, 248 P.2d 31* ; *Young v. State Bd. of Equalization (1949) 90 Cal. App. 2d 256, 258, 202 P.2d 587*).

F. Mere Suspicion of Invalidity as Not Precluding Reliance on Document. The bartender or clerk is justified in assuming the validity of the document and in accepting the holder as the legal owner unless the personal appearance of the holder of the document demonstrates above mere suspicion that he or she is not the legal owner of the document (*Conti v. State Bd. of Equalization (1952) 113 Cal. App. 2d 465, 466-467, 248 P.2d 31*).

[*Optional*] **G. Single Identification Check at Door.** When a minor patron has exhibited to one of the licensee's employees on entry, and at all times thereafter has on his person, what is found to be bona fide evidence of majority and identity, the licensee may assert reliance on the original demand and exhibition in selling, furnishing, or permitting the consumption of an alcoholic beverage by that minor following that entry. The defense is not lost because a second employee made an inadequate inquiry before serving the minor (*Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal. App. 2d 181, 193, 67 Cal. Rptr. 734*).

[*Optional*] **H. Licensee Permitting Minor to Remain on Premises.** *Bus. & Prof. Code §§ 25665* does not provide that a licensee automatically commits a violation when a minor is on the premises. The violation occurs only when the licensee "permits" a minor not only to "enter" the licensed premises, but also to "remain" on the licensed premises without lawful business therein [*Bus. & Prof. Code § 25665*].
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a petition for a writ of review of a final

order of the Alcoholic Beverage Control Appeals Board which affirmed suspension of an alcoholic beverage license, based on sales to minors in violation of *Bus. & Prof. Code § 25658*, when the licensee asserts, as a defense, that he or she relied on bona fide documentary evidence of majority and identity exhibited by the minor prior to making the sale [*see Bus. & Prof. Code § 25660(c)*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

Because the defense of reliance on bona fide evidence of majority and identity [*Bus. & Prof. Code § 25660(c)*] applies to offenses under *Bus. & Prof. Code §§ 25658, 25663*, and *25665*, this form may also be used with appropriate modifications in support of a petition for a writ of review of an order suspending a license for employing a minor in on-sale premises [*Bus. & Prof. Code § 25663*] or for permitting a minor to enter and remain in licensed premises without lawful business [*Bus. & Prof. Code § 25665*], as well as for selling alcoholic beverages to a minor, or allowing a minor to consume alcoholic beverages in on-sale premises [*Bus. & Prof. Code § 25658*].

[c] Reliance on Document Issued by Government

To establish the defense provided for in *Bus. & Prof. Code § 25660*, the licensee must show that he or she acted in good faith in reliance on documentary proof of age. There is no independent good-faith defense absent reliance on a document issued by a federal, state, county, or municipal government, or a subdivision thereof. The defense may be established even though the document is altered, forged, or otherwise spurious, but no defense is established if the licensee acted in reliance on a notarized identification card prepared by the minor, even though the licensee acts in good faith [*Kirby v. Alcoholic Beverage Control Appeals Bd. (1968) 267 Cal. App. 2d 895, 897-899, 73 Cal. Rptr. 352* ; *but see Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (2004) 118 Cal. App. 4th 1429, 1439-1445, 13 Cal. Rptr. 3d 826* (*Bus. & Prof. Code § 25660* applies to fake identification cards that purport to be government issued, but are not); *Keane v. Reilly (1955) 130 Cal. App. 2d 407, 412, 279 P.2d 152* (reliance on official-appearing document prepared by minor held sufficient)].

[3] Discussion of Authorities

[a] Good Cause as Limitation on Power to Suspend or Revoke License

Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control *(1970) 2 Cal. 3d 85, 84 Cal. Rptr. 113, 465 P.2d 1* , involved revocation of an on-sale license on the ground that the licensee's employment of topless waitresses was contrary to public welfare and morals, which is grounds for revocation under *Cal. Const., art. XX, § 22* and under *Bus. & Prof. Code § 24200(a)*. An additional ground relied on by the Department of Alcoholic Beverage Control was that the employment of topless waitresses constituted keeping a disorderly house in violation of *Bus. & Prof. Code § 25601*, making revocation proper under *Bus. & Prof. Code § 24200(b)* (providing for revocation if licensee violates *Bus. & Prof. Code § 23000 et seq.*). The department acted on two separate accusations against the licensee relating to separate occasions. In both cases, the department revoked the license, subject to a one-year probation, and the Alcoholic Beverage Control Appeals Board affirmed. In each case, the licensee filed a petition for a writ of mandate in the superior court. Although the cases were not consolidated, they were treated together. The superior court held that there was insufficient evidence to support revocation of the license under *Bus. & Prof. Code § 24200* and issued a writ of mandate compelling the department to set aside its decision. The department appealed the judgment granting the writ to the Supreme Court.

In affirming, the Supreme Court, held that the department's discretion is not absolute, but must be exercised in accordance with law, and that the provision of *Cal. Const., art. XX, § 22*, which allows the department to revoke a license "for good cause," necessarily implies that the department's decisions should be based on sufficient evidence and

that the department should not act arbitrarily in determining what is contrary to public welfare or morals [quoting *Stoumen v. Reilly (1951) 37 Cal. 2d 713, 717, 234 P.2d 969*] (*2 Cal. 3d 85, 95*). On the merits of the cases, the Court held that use of topless waitresses could not be deemed per se contrary to the public welfare and morals and concluded that there was insufficient evidence that their employment had led to improper activity on the licensed premises that would be contrary to public welfare and morals (*2 Cal. 3d 85, 99-106*).

Counsel should note that in *Boreta Enterprises, Inc.,* the Court invited the department to adopt regulations relating to topless waitresses (*2 Cal. 3d 85, 106*). The department since adopted regulations relating to topless waitresses and nude entertainment. The courts have upheld such regulations, so that licensees are subject to suspension or revocation of their licenses for employing a topless waitress in violation of the department's regulations [*see Bus. & Prof. Code § 24200(b)* (violation of regulation as ground for suspension or revocation of license); *Kirby v. Alcoholic Beverage Control Appeals Bd. (1975) 47 Cal. App. 3d 360, 361-366, 120 Cal. Rptr. 847* ; *Locker v. Kirby (1973) 31 Cal. App. 3d 520, 521-527, 107 Cal. Rptr. 446*].

In ***H.D. Wallace & Associates, Inc. v. Department of Alcoholic Beverage Control*** *(1969) 271 Cal. App. 2d 589, 76 Cal. Rptr. 749* , the Department of Alcoholic Beverage Control revoked petitioner's corporate liquor license, but stayed the revocation for six months on condition that the sole shareholder of the corporation divest himself of ownership of the business and not be employed in any managerial capacity. The revocation was based on the ground that the shareholder's overall arrest record, involving public drunkenness, drunk driving, and driving with suspended licenses, showed that he was not a fit person to hold an alcoholic beverage license. After the Alcoholic Beverage Control Appeals Board affirmed the department's decision, the licensee petitioned the court of appeal for a writ of review.

The court of appeal reversed. On pages 591-592, after noting that the department has authority to suspend or revoke a license in its discretion if it determines for good cause that continuation of the license would be contrary to public welfare or morals, the court held that the good-cause requirement necessarily implies that the department must base its decision on sufficient evidence and avoid arbitrariness [relying on *Stoumen v. Reilly (1951) 37 Cal. 2d 713, 717, 234 P.2d 969*] (*271 Cal. App. 2d 589, 591-592*). The court found that there was no evidence that the convictions had any actual effect on the conduct of the licensed business and that there was no rational relationship between the offenses and operation of the licensed business in a manner consistent with public welfare and morals. Thus, the court held that since there was no substantial evidence that continuation of the license would be contrary to the public welfare or morals, good cause for revocation was lacking (*271 Cal. App. 2d 589, 593-594*).

[b] Reliance on Evidence of Majority as Defense to Suspension or Revocation of License

In ***Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.*** *(2004) 118 Cal. App. 4th 1429, 13 Cal. Rptr. 3d 826* , the department suspended a liquor license after the licensee's clerk sold two six-packs of beer to a minor. The minor used a fake identification card, purporting to be issued by the State of California, identifying the minor as 22 years old, rather than 19. The department rejected the licensee's defense under *Bus. & Prof. Code § 25660*, which requires the licensee to reasonably rely on identification issued by a government agency. The department implicitly found the statute applied to fake identification cards that purport to be government issued, but found the licensee did not reasonably rely on the fake ID.

The Alcoholic Beverage Control Appeals Board reversed the department's determination, holding that the defense under *Bus. & Prof. Code § 25660* did not apply to identification cards that were not in fact issued by a government agency. It also held that the licensee did reasonably rely on the minor's ID card.

The court of appeals reversed the Appeals Board's decision. The court held that *Bus. & Prof. Code § 25660* applies to fake identification cards that purport to be issued by a government agency, but that the licensee failed to exercise reasonable diligence and did not reasonably rely on the fake ID (*118 Cal. App. 4th 1429, 1439-1445*). The court also held that the Appeals Board may not reweigh the evidence or exercise independent judgment to overturn the

department's factual findings to reach a contrary, although equally reasonable, result (*118 Cal. App. 4th 1429, 1437*). Specifically, the court held the Appeals Board was wrong to reject the department's finding that the licensee had not reasonably relied on the minor's fake ID.

[c] Right to Assume Validity and Rightful Possession of Document

In ***Conti v. State Bd. of Equalization*** *(1952) 113 Cal. App. 2d 465, 248 P.2d 31* , the Board of Equalization suspended a liquor license based on evidence showing that the licensees sold a bottle of beer to a 19-year-old Coast Guard member who presented an out-of-state driver's license for identification. The driver's license identified the person as being over the age of 21 years. The liquor licensees defended under former Section 61.2(b) of the Alcoholic Beverage Control Act (*see now Bus. & Prof. Code § 25660*), which provided a defense to the charge of sale of alcoholic beverages to minors if the licensor his agent or employee demanded and was shown bona fide documentary evidence of majority and identity prior to making the sale. The Board of Equalization found that the licensee failed to establish the defense. The licensees brought a proceeding in mandamus to review the board's order. The superior court annulled the board's order on the ground that it was not supported by any substantial evidence, and the board appealed.

The court of appeal affirmed, holding that licensees are not required to determine at their peril whether a driver's license is a bona fide license of the party presenting it (*113 Cal. App. 2d 465, 466*). The court quoted *Young v. State Bd. of Equalization (1949) 90 Cal. App. 2d 256, 258, 202 P.2d 587* , in support of the proposition that a defense is established on the demand for and presentation of one of the types of documentary evidence described in former § 61.2(b) and that the seller, if acting in good faith and without actual knowledge gained from the appearance of the purchaser, or otherwise, that the identification could not belong to the minor, has a right to assume that anyone presenting such identification would not unlawfully possess or use it (*113 Cal. App. 2d 465, 467*). The court found no conflict in the evidence, but only a shade of difference in the suspicions that the witnesses might have had because of the minor's personal appearance (*113 Cal. App. 2d 465, 466*). The court then held that unless the personal appearance of the holder of the driver's license demonstrates above mere suspicion that he or she is not the legal owner of the license, a bartender is justified in assuming that the driver's license is valid and that the holder is its legal owner (*113 Cal. App. 2d 465, 466-467*). The court noted that the board's hearing officer had made no findings of fact relating to presentation and inspection of the driver's license, but had only concluded that no defense was established under § 61.2(b), and that the trial court had found that there was no substantial evidence to support the hearing officer's determination (*113 Cal. App. 2d 465, 467*).

In ***Young v. State Bd. of Equalization*** *(1949) 90 Cal. App. 2d 256, 202 P.2d 587* , the Board of Equalization suspended liquor licenses based on a sale of whiskey to a 17-year-old boy. At the sales clerk's request for identification, the boy presented a draft registration card issued in another person's name. The boy had altered the card so that it would show its holder to be over the age of 21. The clerk looked at both sides of the card and asked the boy to sign a piece of paper, and, finding a fair resemblance between the signature on the card and the boy's signature, he made the sale. The board found that the liquor licensees had not established the defense of demanding and being shown documentary evidence of majority and identity. The liquor licensees petitioned for a writ of mandate to set aside the board's order suspending their license. A writ was issued by the superior court, and the board appealed.

On appeal, the board contended that the draft card did not constitute bona fide documentary evidence of majority and identity because it had been issued to a person other than the minor and because the age shown on the card had been altered. The court, however, held that the defense was established when the clerk demanded identification and was shown the draft card, which at that time constituted bona fide documentary evidence of majority and identity under former § 61.2(b) of the Alcoholic Beverage Control Act [*but see now Bus. & Prof. Code § 25660* (no longer listing registration certificate as bona fide evidence and requiring document shown to licensee to have person's name, date of birth, description, and picture on it)]. The court held that if the clerk acted in good faith and without actual knowledge, gained from the appearance of the purchaser or otherwise, that the card did not or could not belong to the minor, and if the alteration was not discernible or ascertainable with reasonable diligence, he had a right to assume that anyone

presenting such a card would not unlawfully possess or use it (*90 Cal. App. 2d 256, 258*). Noting that the clerk had made a comparison of signatures, that he did not know the boy personally, and that there was no contention that the boy's appearance was such as to arouse suspicion that he was under age, the court affirmed, holding that it would not disturb the trial court's finding that the board's decision was not supported by substantial evidence (*90 Cal. App. 2d 256, 258*).

[d] Mere Suspicion of Invalidity as Not Precluding Reliance on Document

Conti v. State Bd. of Equalization *(1952) 113 Cal. App. 2d 465, 248 P.2d 31* , is discussed in *§ 15.22[3][c]*.

[e] Single Identification Check at Door

In ***Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control*** *(1968) 261 Cal. App. 2d 181, 67 Cal. Rptr. 734* , the Department of Alcoholic Beverage Control suspended an alcoholic beverage license based on sales of alcoholic beverages to two minors and on permitting the minors to consume the beverages on the licensed premises. Charges that the licensee allowed the minors to enter the licensed premises were dismissed because the defense of reliance on bona fide evidence of majority and identity under *Bus. & Prof. Code § 25660* was established as to those offenses. The licensee's door checker had demanded documentary evidence of the majority and identity of the minors when they entered the premises. The minors exhibited bona fide documentary evidence of their majority and identity in the form of California driver's licenses naming persons over 21 years of age, and the door checker relied on the licenses in admitting them to the premises. The bartender then served the minors alcoholic beverages and permitted the minors to consume the beverages on the premises, without inspecting their identification. Before serving one of the minors, the bartender did receive oral confirmation from the door checker that his identification had been checked, but the bartender neither inspected the other minor's identification nor sought oral confirmation from the door checker that his identification had been checked. The licensee appealed to the Alcoholic Beverage Control Appeals Board, and the board reversed the charges relating to the first minor, but affirmed as to the second minor. The superior court denied the licensee's petition for a writ of mandate to set aside the department's order and the board's decision to the extent that it affirmed the department's order. The licensee appealed from the superior court's judgment.

The court of appeal reversed, rejecting the argument of the department and board that because a licensee's acts in (1) allowing entry to the licensed premises, (2) selling alcoholic beverages, and (3) permitting their consumption on the licensed premises are separate transactions, the employee or agent engaging in each particular transaction must satisfy himself or herself that bona fide evidence of age and identity has been shown and act in reliance thereon. The court noted that the interest of the licensee, not of the bartender, was at stake, and that since a licensee is barred by the acts and omissions of his or her employees, he or she should have the benefit of their collective conduct, knowledge, and reliance (*261 Cal. App. 2d 181, 190*). The court held that the defense of the door check, which had been held effective against the otherwise admitted offense of allowing the minors to enter, should not be lost to a transaction of which the entry is but a part. Even though permitting entry and permitting consumption might be separate offenses, they are not necessarily separate transactions when the sale and consumption immediately follow the entry. Absent a duty to make a second demand before serving the minor, the second employee's inadequate inquiry should not defeat the licensee's right to rely on the original determination that the patron had shown the evidence required by law. The court found this to be particularly true in the case before it since the patron possessed, had shown, and could have shown again a driver's license which, although altered, was found to show that he was over the age of 21. The court found that nothing in prior case law required the exhibition of evidence for each purchase made on the same occasion, and the court rejected the contentions of the department and board that a double check was necessary to protect against serving minors who may properly be admitted to the premises on lawful business, to discourage exchange of evidence of identity inside the premises, and to increase the chances of catching altered documents and cases of false identity (*261 Cal. App. 2d 181, 191-193*). The court concluded that if the minor patron has exhibited to one employee on entry, and at all times thereafter has on his or her person, a document which is found to be bona fide evidence of majority and identity, the licensee may assert reliance on the original demand and exhibition in selling, furnishing, or permitting the consumption

of an alcoholic beverage by that minor following that entry. Moreover, that defense is not lost because a second employee pursued an inadequate inquiry before serving the minor (*261 Cal. App. 2d 181, 193*).

[f] Licensee Permitting Minor to Remain on Premises

In ***CMPB Friends, Inc. v. Alcoholic Beverage Control Appeals Board*** *(2002) 100 Cal. App. 4th 1250, 122 Cal. Rptr. 2d 914* , the Alcoholic Beverage Control Appeals Board affirmed a decision of the Department of Alcoholic Beverage Control to suspend petitioner's on-sale liquor license for ten days. The suspension was based on the ground that a minor entered the licensee's premises and her identification was not checked for about ten minutes. The court of appeal reversed and held that the passage of ten minutes before a licensee attempts to check a minor's identification is not, by itself, enough to warrant the conclusion that a *Bus. & Prof. Code § 25665* violation occurred (*100 Cal. App. 4th 1250, 1255-1257*). There is no set period of time in which a violation occurs. When one waitress was serving 40 to 60 patrons and took ten minutes to observe and approach the minor who entered the bar, those ten minutes do not necessarily constitute an unreasonable amount of time within which to demand proof of age. On the other hand, a licensee may be found to have behaved so passively with regard to its affirmative duty to exclude minors from its premises that a violation is established (*100 Cal. App. 4th 1250, 1256*).

[4] Additional Authorities

[a] Right to Assume Validity and Rightful Possession of Document

In *Dethlefsen v. State Bd. of Equalization (1956) 145 Cal. App. 2d 561, 303 P.2d 7* , the State Board of Equalization suspended a liquor license after the licensees' employee sold an alcoholic beverage to a minor. The employee did not demand evidence of age and identify because she remembered the minor from a recent occasion when she had demanded identification, and he had exhibited a draft registration card. The card had been issued to him, but he had altered the date of birth to show that he was over 21 years old. Both the employee and minor testified that the employee had looked at the description on the card and thoroughly compared the minor's physical appearance with the description. The licensees obtained a writ of mandate from the superior court setting aside the findings and order of the board as not supported by substantial evidence. The board appealed from the judgment.

The court of appeal affirmed, citing *Young v. State Bd. of Equalization (1949) 90 Cal. App. 2d 256, 258, 202 P.2d 587* (discussed in *§ 15.22[3][c]*), for the proposition that if a clerk acts in good faith and without actual knowledge, gained from the appearance of the purchaser, or otherwise, that the identification card did not or could not belong to the minor, and if the alteration of the card was not discernible or ascertainable with reasonable diligence, he or she has a right to assume that anyone presenting such a card would not unlawfully possess or use it (*145 Cal. App. 2d 561, 565*). The court also quoted *Conti v. State Bd. of Equalization (1952) 113 Cal. App. 2d 465, 466, 248 P.2d 31* (discussed in *§ 15.22[3][c]*), for the proposition that unless the personal appearance of the holder of the driver's license demonstrates above mere suspicion that he or she is not the legal owner of the license, the bartender is justified in assuming the validity of the driver's license and in accepting the holder as the legal owner (*145 Cal. App. 2d 561, 566*). The court found that in the case before it, there was no finding of bad faith or that the employee in fact discovered the alteration of the card, nor had the board made any express finding that the employee lacked diligence. The board had merely found that the alteration should have been apparent from a reasonably careful inspection of the card, so that the employee was not justified in assuming that the minor was of age on the basis of the card (*145 Cal. App. 2d 561, 566*). The card was before the court, and the court noted that it was difficult to detect the alteration without a close and critical examination (*145 Cal. App. 2d 561, 564-565*). Also, noting that the minor was almost 20 years old and fit the description on the card, the court held that the board's finding was not supported by substantial evidence (*145 Cal. App. 2d 561, 566-567*). The court rejected the board's criticism that the court was improperly weighing the evidence, holding that the purpose of *Bus. & Prof. Code § 25660* was to protect licensees when they are confronted with a patron whose appearance made it doubtful whether or not he or she was an adult. When that doubt arises, the licensee can rely on documentary evidence, the bona fides of which must be ascertained if the lack of bona fides would be disclosed by reasonable

inspection under the circumstances. The court held, however, that in making the inspection, the clerk has the right to presume that the holder has not committed the crime of altering the document (*145 Cal. App. 2d 561, 567-568*).

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1-15 California Points & Authorities § 15.23

§ 15.23 Supporting Petition for Writ of Review [Bus. & Prof. Code § 23090; Code Civ. Proc. §§ 1067-1077] of Order of Alcoholic Beverage Control Appeals Board Suspending or Revoking Alcoholic Beverage License for Sale of Alcoholic Beverage to Minor [Bus. & Prof. Code § 25658(a)]--No Face-to-Face Identification of Seller by Minor Decoy [4 Cal. Code Reg. § 141(b)(5)]

[1] FORM Supporting Petition for Writ of Review [Bus. & Prof. Code § 23090; Code Civ. Proc. §§ 1067-1077] of Order of Alcoholic Beverage Control Appeals Board Suspending or Revoking Alcoholic Beverage License for Sale of Alcoholic Beverage to Minor [Bus. & Prof. Code § 25658(a)]--No Face-to-Face Identification of Seller by Minor Decoy [4 Cal. Code Reg. § 141(b)(5)]

[*Caption. See § 15.20[1].*]

THE COURT SHOULD REVERSE THE ORDER OF THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD AFFIRMING THE DECISION OF THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL THAT [SUSPENDED *or* REVOKED] PETITIONER'S ALCOHOLIC BEVERAGE LICENSE, BECAUSE THE MINOR DECOY FAILED TO MAKE A FACE-TO-FACE IDENTIFICATION OF THE ALLEGED SELLER, AND THE FAILURE IS A COMPLETE DEFENSE TO THE DEPARTMENT'S CHARGE.

A. Review of Alcoholic Beverage Appeals Board Decision. [*See § 15.20[1], Paragraph A.*]

B. Constitutional Authority of Department to Suspend or Revoke License. [*See § 15.22[1], Paragraph B.*]

C. Good Cause as Limitation on Power to Suspend or Revoke License. [*See § 15.22[1], Paragraph C.*]

D. Minor Decoy Must Make Face-to-Face Identification of Alleged Seller. Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy must make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face-to-face identification of the alleged seller of the alcoholic beverages (*4 Cal. Code Reg. § 141(b)(5)*).

E. Failure to Make Face-to-Face Identification Is Defense. Failure to comply with *4 Cal. Code Reg. § 141(b)(5)* is a

defense to any action brought pursuant to *Business and Professions Code Section 25658* (*4 Cal. Code Reg. § 141(c)*; *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Bd. (1998) 67 Cal. App. 4th 575, 581, 79 Cal. Rptr. 2d 126*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a petition for a writ of review of a final order of the Alcoholic Beverage Control Appeals Board that affirmed suspension of an alcoholic beverage license, based on sales to minors in violation of *Bus. & Prof. Code § 25658*. This form may be used when the licensee asserts, as a defense, that the minor decoy failed to make a face-to-face identification of the alleged seller [*4 Cal. Code Reg. § 141(b)(5)*].

When appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

For example, in a case in which no face-to-face identification was made, and there is no dispute regarding that fact, the petitioner may argue:

- The peace officer directing the decoy is required to make a reasonable attempt to enter the licensed premises and have the minor decoy make a face-to-face identification, as required by *4 Cal. Code Reg. § 141(b)(5)*.

- It is undisputed that no such attempt was made.

- The failure to comply with the requirements of rule 141 is a defense to any action brought under *Bus. & Prof. Code § 25658*.

- Therefore, the suspension of the petitioner's license should not stand.

[3] Discussion of Authorities

[a] Failure to Make Face-to-Face Identification Is Defense

In ***Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Bd.*** *(1998) 67 Cal. App. 4th 575, 79 Cal. Rptr. 2d 126* , a 19-year-old decoy working with a city police department entered a restaurant, sat down at the bar, and ordered a beer. Without first requesting identification, the bartender served the decoy. The decoy paid for the beer and a police officer seated at a nearby table observed the transaction. The Department of Alcoholic Beverage Control cited the restaurant's owner for selling an alcoholic beverage to a minor in violation of *Bus. & Prof. Code § 25658(a)*. The restaurant's owner denied the accusation and a hearing was held. The police officer testified that on completion of the transaction, he informed the bartender that she sold beer to a minor and identified the decoy as the minor. It was undisputed that the police officer did not have the decoy make the required face-to-face identification of the bartender. An administrative law judge sustained the charge and ordered a 15-day suspension of Acapulco's liquor license. The

restaurant owner appealed to the Alcoholic Beverage Control Appeals Board, contending the decoy's failure to make a face-to-face identification of the bartender was a complete defense to the Department's charge. The Board refused to give rule 141 a "rigid and literal interpretation" because the police officer had been sitting only a few feet away at the time of the sale. The Board affirmed the 15-day suspension, and the restaurant owner petitioned for writ of review in the court of appeal.

The court of appeal issued a writ of review, reversed the Board's decision affirming the Department's order, and directed the Department to enter a new order withdrawing the accusation. The Board argued that its refusal to apply rule 141 was no more than an exercise of its right to interpret a rule governing its enforcement obligations. The court held, however, that *4 Cal. Code Reg. § 141(b)(5)* "means what it says." According to the court, the Department's increasing reliance on decoys demands strict adherence to the rules adopted for the protection of the licensees, the public, and the decoys themselves. The court stated that if the rules are inadequate, the Department has the right and the ability to seek changes. It does not have the right to ignore a duly adopted rule (*67 Cal. App. 4th 575, 581*). It was undisputed that no attempt was made to reenter or remain on the restaurant's premises so that the decoy, who purchased the beer, could make a face-to-face identification of the bartender. It was also undisputed that *4 Cal. Code Reg. § 141(c)* provides a defense when there is a failure to comply with the requirements of rule 141. It follows, therefore, that the restaurant owner's suspension could not stand (*67 Cal. App. 4th 575, 581, 582*).

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1-15 California Points & Authorities § 15.24

§ 15.24 Supporting Petition for Writ of Review [Bus. & Prof. Code § 23090; Code Civ. Proc. §§ 1067-1077] of Order of Alcoholic Beverage Control Appeals Board Suspending or Revoking Alcoholic Beverage License for Violation of Law Not Involving Moral Turpitude [Cal. Const., art. XX, § 22; Bus. & Prof. Code § 24200(a)]--Violation as Lacking Rational Relationship to or Actual Effect on Operation of Licensed Business in Manner Consistent With Public Welfare and Morals

[1] FORM Supporting Petition for Writ of Review [Bus. & Prof. Code § 23090; Code Civ. Proc. §§ 1067-1077] of Order of Alcoholic Beverage Control Appeals Board Suspending or Revoking Alcoholic Beverage License for Violation of Law Not Involving Moral Turpitude [Cal. Const., art. XX, § 22; Bus. & Prof. Code § 24200(a)]--Violation as Lacking Rational Relationship to or Actual Effect on Operation of Licensed Business in Manner Consistent With Public Welfare and Morals

[*Caption. See § 15.20[1].*]

THE COURT SHOULD REVERSE THE ORDER OF THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD AFFIRMING THE DECISION OF THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL THAT _____ [SUSPENDED *or* REVOKED] PETITIONER'S ALCOHOLIC BEVERAGE LICENSE BECAUSE THE _____ [SUSPENSION *or* REVOCATION] WAS BASED ON PETITIONER'S VIOLATIONS OF LAW NOT INVOLVING MORAL TURPITUDE AND NOT HAVING ANY RATIONAL RELATIONSHIP TO OR ACTUAL EFFECT ON THE OPERATION OF THE LICENSED BUSINESS IN A MANNER CONSISTENT WITH THE PUBLIC WELFARE AND MORALS.

A. Review of Alcoholic Beverage Control Appeals Board Decision. [*See § 15.20[1], Paragraph A.*]

B. Constitutional Authority of Department to Suspend or Revoke License. [*See § 15.22[1], Paragraph B.*]

C. Good Cause as Limitation on Power to Suspend or Revoke License. [*See § 15.22[1], Paragraph C.*]

D. Relationship of Violations to Conduct of Business. In order to establish good cause for suspension or revocation of an alcoholic beverage license due to violations of law that do not involve moral turpitude, there must be a rational

relationship between the offense and the operation of the licensed business in a manner consistent with public welfare and morals or there must be evidence that the offense had an actual effect on the conduct of the licensed business (*H.D. Wallace & Associates, Inc. v. Department of Alcoholic Beverage Control (1969) 271 Cal. App. 2d 589, 593-594, 76 Cal. Rptr. 749*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a petition for a writ of review of a final order of the Alcoholic Beverage Control Appeals Board which affirmed suspension or revocation of an alcoholic beverage license based on the licensee's violations of law, when those violations did not involve moral turpitude and did not have any actual effect on or rational relationship to the operation of the licensed premises.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Relationship of Violations to Conduct of Business

The facts and procedural background of ***H. D. Wallace & Associates, Inc. v. Department of Alcoholic Beverage Control*** *(1969) 271 Cal. App. 2d 589, 76 Cal. Rptr. 749* , are discussed in *§ 15.22[3][a]*. In that case, the court of appeal noted that the department had found that the licensee's sole shareholder was not a fit and proper person to hold an alcoholic beverage license because of his arrest record involving his intemperate use of alcoholic beverages, even though the record contained impressive evidence as to the reputation regarding conduct of the business. The department had found that none of the offenses involved moral turpitude, and had based revocation of the license on the ground that its continuation would be contrary to the public welfare and morals within the meaning of *Cal. Const, Art XX, § 22* and *Bus. & Prof. Code § 24200(a)* (*271 Cal. App. 2d 589, 591*). The court recognized that, in regard to personal fitness, *Cal. Const., art. XX, § 22* and *Bus. & Prof. Code § 24200(d)* provide for suspension or revocation based on offenses involving moral turpitude in absolute terms without regard for the effects of the conduct on the licensed business (*271 Cal. App. 2d 589, 592-593*).To give both the moral turpitude and the public welfare and morals provisions their maximum scope without clashing with one another, the court held that, properly construed, the public welfare and morals clause permits revocation for violations of law not involving moral turpitude, but having a rational relationship to the operation of the licensed business in a manner consistent with public welfare and morals. Noting that the department had apparently believed that the past conduct of the licensee's sole shareholder might cause a future problem, the court found that the department had, in effect, revoked the license on conjecture and speculation (*271 Cal. App. 2d 589, 593*) The court held that there was no evidence that the convictions had an actual effect on the licensed business and that there was no rational relationship between the offenses and operation of the business in a manner consistent with public welfare and morals (*271 Cal. App. 2d 589, 593-594*). The court held that since there was no substantial evidence that continuation of the license would be contrary to the public welfare or morals, good cause for revocation did not exist (*271 Cal. App. 2d 589, 594*).

H. D. Wallace & Associates, Inc., was distinguished in ***Kirby v. Alcoholic Beverage Control Appeals Bd.*** *(1970) 7*

Cal. App. 3d 126, 86 Cal. Rptr. 433 . In *Kirby,* the licensee's sole shareholder, while intoxicated at a bar other than his own licensed premises, flagrantly flouted the regulatory authority by physically assaulting persons he recognized to be department representatives acting within the scope of their duty. The court of appeal held that it is an oversimplification to say that the rational relationship rule precludes exercise of the disciplinary authority unless the act occurs on, or in direct connection with the operation of, the licensed premises. The court found that a rational relationship existed between the licensee's violation of law and the operation of the licensee's business in a manner consistent with public welfare and morals because the shareholder's acts showed a reasonably close potential for disregard of regulatory authority in the operation of his own premises (*7 Cal. App. 3d 126, 128-129*).

Counsel should note that if suspension or revocation of a license is based on the licensee's violation of a law involving moral turpitude, there is no requirement that its effect on the conduct of the licensed business be shown [*Rice v. Alcoholic Beverage Control Appeals Bd. (1979) 89 Cal. App. 3d 30, 38, 152 Cal. Rptr. 285*].

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1-15 California Points & Authorities § 15.25

§ 15.25 Supporting Petition for Writ of Mandate [Bus. & Prof. Code § 23090.5; Code Civ. Proc. §§ 1085, 1086]--Review of Rule or Regulation of Department of Alcoholic Beverage Control--General Form

[1] FORM Supporting Petition for Writ of Mandate [Bus. & Prof. Code § 23090.5; Code Civ. Proc. §§ 1085, 1086]--Review of Rule or Regulation of Department of Alcoholic Beverage Control--General Form

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

[*OR*]

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA,
_____ APPELLATE DISTRICT

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	MEMORANDUM OF POINTS AND AUTHORIT-
DEPARTMENT OF ALCOHOLIC BEVERAGE	)	IES IN SUPPORT OF PETITION FOR WRIT OF
CONTROL,	)	MANDATE
Respondent.	)	[*Bus. & Prof. Code § 23090.5*; *Code Civ. Proc. §§*
	)	*1085, 1086*]

_____

THE COURT HAS JURISDICTION TO ISSUE A WRIT OF MANDATE AGAINST THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL TO REVIEW THE DEPARTMENT'S _____ [RULES AND REGULATIONS *or* ADMINISTRATIVE ACTIONS].

A. Review of Actions of Department of Alcoholic Beverage Control by Writ of Mandate. The _____ [Supreme Court *or* court of appeal] has jurisdiction to issue a writ of mandate against the Department of Alcoholic Beverage Control in any proper case (*Bus. & Prof. Code § 23090.5*; see *Code Civ. Proc. §§ 1085, 1086*).

B. Writ of Mandate to Compel Act When No Adequate Remedy at Law. A writ of mandate may be issued to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he or she is unlawfully precluded (*Code Civ. Proc. § 1085*). The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law (*Code Civ. Proc. § 1086*).

[*EITHER*]

C. Review of Rules and Regulations. The appellate courts have jurisdiction of proceedings challenging rules and regulations of the Department of Alcoholic Beverage Control by writ of mandate pursuant to *Section 23090.5 of the Business and Professions Code*, which partially limits and supersedes *Section 11350 of the Government Code* which generally permits review of regulations adopted under the Administrative Procedure Act by actions for declaratory relief in superior court (see *Schenley Affiliated Brands Corp. v. Kirby (1971) 21 Cal. App. 3d 177, 196, 98 Cal. Rptr. 609*).

[*OR*]

C. Performance of Administrative Duties. *Section 23090.5 of the Business and Professions Code* provides for judicial review by writ of mandate of orders, rules, decisions, or other acts of the department in the performance of its duties when it is acting in its administrative capacity, rather than in its limited judicial capacity (*Samson Market Co. v. Kirby (1968) 261 Cal. App. 2d 577, 581, 68 Cal. Rptr. 130* , appeal dismissed, *393 U.S. 11, 89 S. Ct. 49, 21 L. Ed. 2d 18*).

[*Optional*] **D. Regulation Beyond Scope of Department's Statutory Power.** Substantive review of administrative regulations focuses on whether or not the regulation would alter or amend the statute or enlarge or restrict the agency's statutory powers (*Schenley Affiliated Brands Corp. v. Kirby (1971) 21 Cal. App. 3d 177, 182, 98 Cal. Rptr. 609*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a petition for a writ of mandate either to challenge the validity of regulations promulgated by the Department of Alcoholic Beverage Control or to review actions

of the department undertaken in an administrative, rather than quasi-judicial, capacity. A regulation may be reviewed to determine whether or not it is within the authority delegated to the department, whether or not it is reasonable, and whether or not the department followed proper procedure in issuing it [*Ralphs Grocery Co. v. Reimel (1968) 69 Cal. 2d 172, 175 fn. 2, 70 Cal. Rptr. 407, 444 P.2d 79*]. The petition must be filed in the Supreme Court or a court of appeal because *Bus. & Prof. Code § 23090.5* deprived the superior courts of jurisdiction to review any orders, rules, or decisions of the department [*Schenley Affiliated Brands Corp. v. Kirby (1971) 21 Cal. App. 3d 177, 195-196, 98 Cal. Rptr. 609*].

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms relating to petitions for writs of mandate generally, see California Forms of Pleading and Practice, Ch. 358, *Mandate and Prohibition* .

[c] Related Points and Authorities

For additional forms of memoranda of points and authorities supporting a petition for writ of mandate and for forms of memoranda of points and authorities opposing a petition for a writ of mandate, see Ch. 150, *Mandate and Prohibition* in this set.

For a form of points and authorities supporting a demurrer to a petition for a writ of mandate that seeks review of a decision of the Alcoholic Beverage Control Appeals Board, see Ch. 195, *Public Administrative Law* .

[3] Discussion of Authorities

[a] Review of Rules and Regulations

In ***Schenley Affiliated Brands Corp. v. Kirby*** *(1971) 21 Cal. App. 3d 177, 98 Cal. Rptr. 609* , petitioners, a group of liquor distillers and wholesalers, brought suit in superior court to enjoin the Department of Alcoholic Beverage Control from enforcing one of its administrative regulations. The superior court refused to intervene on the ground that *Bus. & Prof. Code § 23090.5* deprived it of jurisdiction, and petitioners then applied to the court of appeal for a writ of mandate either to restrain the director of the department from enforcing the regulation or to compel the superior court to hear a lawsuit directed to the same end. Petitioners contended that the department lacked statutory power to promulgate amendments to former 4 Cal. Code Reg. § 100(f) (repealed), which restricted the variety and rates of discounts in wholesale prices of distilled spirits, and that improper procedures were followed in adoption of the amendments. The court held that the amendments were improper to the extent that they prohibited multiple discount rates in the sale of a single brand or item of distilled spirits because the department lacked statutory authority to veto the prices set by producers (*21 Cal. App. 3d 177, 185-187*). The court upheld the amendments in other respects and also held that the department had not used improper procedures in enacting the regulations (*21 Cal. App. 3d 177, 187-195*). The court then rejected petitioners' contention that *Bus. & Prof. Code § 23090.5* only deprived superior courts of jurisdiction to review the department's quasi-judicial actions in adversary proceedings, as opposed to its quasi-legislative actions, such as rulemaking (*21 Cal. App. 3d 177, 195-198*). The court recognized that *Bus. & Prof. Code § 23090* governs review of the department's quasi-judicial actions, and held that *Bus. & Prof. Code § 23090.5* is distinctly designed to channel into the appellate courts proceedings challenging the department's rules and regulations. Thus, the court held that *Gov. Code § 11440* (*now see Gov. Code § 11350*), which provides for review of administrative regulations by declaratory relief actions in superior court, is limited and superseded by *Bus. & Prof. Code § 23090.5* (*21 Cal. App. 3d 177, 196*). Petitioners also argued that if *Bus. & Prof. Code § 23090.5* did apply to review of regulations, it unconstitutionally infringed on the original jurisdiction of the superior courts and deprived petitioners of a de novo hearing, but the court rejected this argument because there would be no more right to a de novo hearing in the superior court than in the

appellate court (*21 Cal. App. 3d 177, 195-198*).

[b] Performance of Administrative Duties

In ***Samson Market Co. v. Kirby*** *(1968) 261 Cal. App. 2d 577, 68 Cal. Rptr. 130* , appeal dismissed, *393 U.S. 11, 89 S. Ct. 49, 21 L. Ed. 2d 18* , petitioner, having failed to obtain renewal of the lease on the premises for which it held an off-sale alcoholic beverage license, surrendered its license to the Department of Alcoholic Beverage Control as required by *4 Cal. Code Reg. § 65(a)*. Rule 65(d) at that time provided that such a voluntarily surrendered license would be cancelled if not transferred to another person, transferred for use at another premises, or redelivered and the licensed activity resumed, within six months from the date of surrender, unless the period was extended by the department. Shortly before the six-month period elapsed, petitioner requested, pursuant to Rule 65(d), that the time for cancellation be extended to allow consummation of a proposed sale. The department denied the request. Three accusations were then pending against petitioner's license. Petitioner sought writs of mandate from the superior court and from the court of appeal to compel the director of the department to extend the time for cancellation. The superior court placed the proceeding off its calendar on the ground that it lacked jurisdiction, and the court of appeal issued its alternative writ to determine which court had jurisdiction to grant petitioner relief.

The court of appeal noted that the parties had agreed that the case did not involve a judicial decision of the department, so that a writ of review pursuant to *Bus. & Prof. Code § 23090* was not authorized and that any possible relief could only be by way of writ of mandate (*261 Cal. App. 2d 577, 580*). The court recognized that in enacting *Bus. & Prof. Code §§ 23090-23090.4*, the Legislature had established a new procedure for review of final orders of the Alcoholic Beverage Control Appeals Board in cases involving the department's exercise of its limited judicial powers, and the court determined that the Legislature had not intended to provide an alternative procedure for judicial review of such orders or decisions when it enacted *Bus. & Prof. Code § 23090.5*. The court held that *Bus. & Prof. Code § 23090.5* was intended to provide for judicial review of the orders, rules, decisions, or other acts of the department in the performance of its duties when acting in its administrative capacity rather than in its limited judicial capacity (*261 Cal. App. 2d 577, 581*). The court then held, relying on cases construing comparable language in *Lab. Code §§ 5950-5956* and Section 67 of the former Public Utilities Act (*now see PUC § 1759*), that under *Bus. & Prof. Code § 23090.5*, the superior courts do not have jurisdiction to issue a writ of mandate to review such administrative actions by the department, while courts of appeal do have such jurisdiction (*261 Cal. App. 2d 577, 581-584*). The court held, however, that petitioner was not entitled to relief on the merits of its claim (*261 Cal. App. 2d 577, 584-585*).

[c] Regulation Beyond Scope of Department's Statutory Power

The facts and procedural background of *Schenley Affiliated Brands Corp. v. Kirby (1971) 21 Cal. App. 3d 177, 98 Cal. Rptr. 609* , are discussed in *§ 15.25[3][a]*. In that case, the court of appeal stated, on page 182, that substantive review of administrative regulations is guided by the well-established principles that the regulation is shielded by a presumption of regularity and that the focus of judicial inquiry is whether or not the regulation would alter or amend the statute or enlarge or restrict the agency's statutory powers [citing *Ralphs Grocery Co. v. Reimel (1968) 69 Cal. 2d 172, 175, 70 Cal. Rptr. 407, 444 P.2d 79* , and *Morris v. Williams (1967) 67 Cal. 2d 733, 748-749, 63 Cal. Rptr. 689, 433 P.2d 697*] (*21 Cal. App. 3d 177, 182*). The court held that an administrative regulation prohibiting producers and wholesalers of distilled spirits from establishing multiple discount rates for the sale of a single brand of distilled spirits was invalid. The court reasoned that the department exceeded its power by vetoing prices when it only had statutory authority under *Bus. & Prof. Code § 24756* to require price posting, and that the regulation would increase the scope of the legislation beyond that fixed by the Legislature (*21 Cal. App. 3d 177, 184-186*). The court upheld a second regulation, however, holding that the regulation, prohibiting discounts conditioned on the purchase of seller-designated assortments of brands, was a reasonable implementation of *Bus. & Prof. Code § 25503*, prohibiting indirect discrimination in the price of any brand of distilled spirits sold to different retail licensees under like terms and conditions (*21 Cal. App. 3d 177, 187-190*). The court also rejected an attack on the procedures followed in adopting the amendments to the regulations which were the subject of the challenge (*21 Cal. App. 3d 177, 190-195*).

NOTE:

Bus. & Prof. Code § 24756 was declared invalid in that it violated the Sherman Antitrust Act (*15 U.S.C. §§ 1-31*) in *Lewis-Westco & Co. v. Alcoholic Bev. etc. Appeals Bd. (1982) 136 Cal. App. 3d 829, 840, 186 Cal. Rptr. 552* .

[4] Additional Authorities

[a] Review of Rules and Regulations

In *Locker v. Kirby (1973) 31 Cal. App. 3d 520, 107 Cal. Rptr. 446* , the court entertained a proceeding on a writ of mandate in which the petitioners unsuccessfully challenged the constitutionality of a regulation of the Department of Alcoholic Beverage Control relating to topless waitresses. The court did not, however, discuss the propriety of the procedure used.

[b] Performance of Administrative Duties

In *American Drug Stores, Inc. v. Stroh (1992) 10 Cal. App. 4th 1446, 13 Cal. Rptr. 2d 432* , a liquor licensee, threatened with disciplinary action by the Department of Alcoholic Beverage Control (the ABC), sought declaratory and injunctive relief in superior court to prevent the ABC from imposing penalties against the licensee. The trial court sustained the ABC's demurrer on the ground that the superior court lacked jurisdiction. The court relied on *Bus. & Prof. Code § 23090.5*, which gives the supreme court or appellate courts exclusive jurisdiction to "review, affirm, reverse, correct, or annul any order ... [of the ABC] or to suspend, stay, or delay, the operation or execution thereof, or to restrain, enjoin, or interfere with [the ABC] in the performance of its duties." The trial court found that although there had not yet been any "order" (i.e. disciplinary action), section 23090.5 applied because the instant action merely sought preemptively to attack the validity of a future order, triggering the application of section 23090.5 (*10 Cal. App. 4th 1446, 1449*).

The court of appeal affirmed, finding that the language of *Bus. & Prof. Code § 23090.5* divests the superior courts of any jurisdiction to review actions by the ABC. The court held that the statutory scheme comprehensively vests exclusive jurisdiction in the supreme court or appellate courts to review disciplinary actions by the ABC, and that this jurisdiction may not be circumvented by filing a superior court action to a prospective disciplinary action styled as a claim for declaratory or injunctive relief (*10 Cal. App. 4th 1446, 1449-1452*).

For a discussion of the court's decision regarding the appellant's claim to treat the appeal as a writ of mandate, see *§ 15.27[4][a]*.

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Volume 1 Chapters 1-19 WRITING LEGAL MEMORANDA AND BRIEFS; ABATEMENT AND SURVIVAL OF ACTIONS---to---AMENDED AND SUPPLEMENTAL PLEADINGS
CHAPTER 15 ALCOHOLIC BEVERAGE LICENSING
PART II. FORMS

1-15 California Points & Authorities § 15.26

§ 15.26 Supporting Petition for Writ of Mandate [Bus. & Prof. Code § 23090.5; Code Civ. Proc. §§ 1085, 1086]--To Restrain Enforcement of Unconstitutional Statute--General Form

[1] FORM Supporting Petition for Writ of Mandate [Bus. & Prof. Code § 23090.5; Code Civ. Proc. §§ 1085, 1086]--To Restrain Enforcement of Unconstitutional Statute--General Form

[*Caption. See § 15.25[1].*]

THE COURT SHOULD EXERCISE ITS JURISDICTION OVER THIS PROCEEDING FOR A WRIT OF MANDATE BECAUSE PETITIONERS CHALLENGE THE CONSTITUTIONALITY OF A STATUTE ON ITS FACE, NO MATERIAL FACTS ARE DISPUTED, ISSUES OF STATEWIDE IMPORTANCE ARE RAISED, AND PETITIONER WILL BE SUBJECT TO PENALTY BECAUSE HE/SHE MUST CHOOSE WHICH ONE OF CONTRADICTORY LAWS TO OBEY.

A. Review of Actions of Department of Alcoholic Beverage Control by Writ of Mandate. [*See § 15.25[1], Paragraph A.*]

B. Writ of Mandate to Compel Act When No Adequate Remedy at Law. [*See § 15.25[1], Paragraph B.*]

C. Review of Quasi-Judicial Action. Mandamus is an appropriate writ for the review of the exercise of quasi-judicial power by the *Department of Alcoholic Beverage Control (Sail'er Inn, Inc. v. Kirby (1971) 5 Cal. 3d 1, 7, 95 Cal. Rptr. 329, 485 P.2d 529* ; *Midcal Aluminum, Inc. v. Rice (1979) 90 Cal. App. 3d 979, 981, 153 Cal. Rptr. 757* , aff'd sub nom. *California Liquor Dealers v. Midcal Aluminum (1980) 445 U.S. 97, 100 S. Ct. 937, 63 L. Ed. 2d 233*).

D. Exhaustion of Administrative Remedies Not Required. Petitioners are not required to exhaust their administrative remedies before the court may issue a writ of mandate when petitioners challenge the constitutionality of a statute on its face, no material facts are in dispute, important issues of statewide significance are raised, and petitioners are placed in the untenable position of having to choose to obey possibly conflicting federal and state laws and face a penalty under the one they choose to disobey (*Sail'er Inn, Inc. v. Kirby (1971) 5 Cal. 3d 1, 6-7, 95 Cal. Rptr. 329, 485 P.2d 529* ; *Midcal Aluminum, Inc. v. Rice (1979) 90 Cal. App. 3d 979, 981-982, 153 Cal. Rptr. 757* , aff'd sub nom.

California Liquor Dealers v. Midcal Aluminum (1980) 445 U.S. 97, 100 S. Ct. 937, 63 L. Ed. 2d 233).

[*Add points and authorities supporting contention that challenged statute is unconstitutional.*]

[*Optional*] **E. Original Jurisdiction of Supreme Court.** The Supreme Court will exercise its original jurisdiction in a mandate proceeding when the issues presented are of great public importance and must be resolved promptly (*San Francisco Unified School Dist. v. Johnson (1971) 3 Cal. 3d 937, 944-945, 92 Cal. Rptr. 309, 479 P.2d 669* , cert. denied sub nom. *Fehlhaber v. San Francisco Unified School Dist., 401 U.S. 1012, 91 S. Ct. 1266, 28 L. Ed. 2d 549* ; see *Sail'er Inn, Inc. v. Kirby (1971) 5 Cal. 3d 1, 7, 95 Cal. Rptr. 329, 485 P.2d 529*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a petition for a writ of mandate challenging the constitutionality of a statute on its face before the Department of Alcoholic Beverage Control has taken action based on the statute.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Opposing Points and Authorities

The points and authorities set out in *§ 15.27* may be used in an appropriate case to oppose a petition for a writ of mandate supported by this memorandum.

[c] Related Pleading and Practice Forms

For forms relating to a petition for a writ of mandate generally, see California Forms of Pleading and Practice, Ch. 358, *Mandate and Prohibition* .

[d] Related Points and Authorities

For additional forms of memoranda of points and authorities supporting a petition for a writ of mandate and for forms of memoranda of points and authorities opposing a petition for a writ of mandate, see Ch. 150, *Mandate and Prohibition* .

For a form of points and authorities supporting a demurrer to a petition for a writ of mandate that seeks review of a decision of the Alcoholic Beverage Control Appeals Board, see Ch. 195, *Public Administrative Law* in this set.

[3] Discussion of Authorities

[a] Review of Quasi-Judicial Action

In ***Sail'er Inn, Inc. v. Kirby*** *(1971) 5 Cal. 3d 1, 95 Cal. Rptr. 329, 485 P.2d 529* , petitioners were on-sale liquor

licensees. Some of the petitioners had hired women bartenders and had been charged by the Department of Alcoholic Beverage Control with violation of *Bus. & Prof. Code § 25656*, which prohibited women from tending bar. Other petitioners had not been charged, but desired to hire female bartenders. Petitioners sought a writ of mandate from the California Supreme Court to prevent the department from revoking their licenses for violation of *Bus. & Prof. Code § 25656*, arguing that the statute was unconstitutional. The Court held that mandamus is an appropriate writ for the review of the exercise of quasi-judicial power by the department. Noting that under *Code Civ. Proc. § 1085*, a writ of mandate may be issued to compel the admission of a party to the use and enjoyment of a right to which he or she is entitled, and from which he or she is unlawfully precluded by an inferior tribunal or board, the Court held that mandate was an appropriate remedy for both groups of petitioners, even though certiorari might have been an appropriate remedy for the petitioners who had already been charged with violations of *Bus. & Prof. Code § 25656* by the department (*5 Cal. 3d 1, 7*). The Court found the statute unconstitutional on a variety of grounds (*5 Cal. 3d 1, 8-22*).

Petitioner in ***Midcal Aluminum, Inc. v. Rice*** *(1979) 90 Cal. App. 3d 979, 153 Cal. Rptr. 757* , aff'd sub nom. *California Liquor Dealers v. Midcal Aluminum (1980) 445 U.S. 97, 100 S. Ct. 937, 63 L. Ed. 2d 233* , was the subject of an accusation filed before the Department of Alcoholic Beverage Control, complaining that petitioner had violated California fair trade and price posting laws regulating the wholesale and retail sale of wine. Petitioner stipulated to the truthfulness of the facts set forth in the accusation and further stipulated that the department might subject petitioner to penalties pursuant to the Business and Professions Code, subject to a judicial determination of the constitutionality of the wine fair trade and price posting laws [*Bus. & Prof. Code §§ 24850-24881*]. Petitioner then applied to the court of appeal for a writ of mandate. The court, relying on *Sail'er Inn, Inc. v. Kirby (1971) 5 Cal. 3d 1, 7* , *above,* held that mandate is an appropriate writ for review of the exercise of quasi-judicial power by the department (*90 Cal. App. 3d 979, 981*). The court then held that the fair trade and price posting laws were invalid because they conflicted with federal law (*90 Cal. App. 3d 979, 982-986*).

[b] Exhaustion of Administrative Remedies Not Required

The facts and procedural background of ***Sail'er Inn, Inc. v. Kirby*** *(1971) 5 Cal. 3d 1, 95 Cal. Rptr. 329, 485 P.2d 529* , are discussed in *§ 15.26[3][a]*. In *Sail'er Inn,* the Supreme Court recognized that mandamus will not ordinarily issue until after the administrative agency has made its final order or decision (*5 Cal. 3d 1, 7*). The Court held, however, that it would be improper to require exhaustion of administrative remedies under the extraordinary circumstances of the case. The circumstances pointed to by the Court were that petitioners challenged the constitutionality of the statute on its face, no material facts were disputed, important legal issues of statewide significance were raised, and two of the petitioners were placed in the untenable position of having to choose whether to obey possibly conflicting federal and state laws and face a penalty under the one they chose to disobey (*5 Cal. 3d 1, 6-7*).

Counsel should note, however, that except in the circumstances set forth in *Sail'er Inn, Inc., above,* exhaustion of administrative remedies is required even though a statute is challenged on constitutional grounds. The constitutional issue must be raised before the Department of Alcoholic Beverage Control first, unless extraordinary circumstances exist, such as petitioner being exposed to penalties under the one of two conflicting laws he chooses to disobey [*Subriar v. Bakersfield (1976) 59 Cal. App. 3d 175, 192-193, 130 Cal. Rptr. 853* (distinguishing *Sail'er Inn, Inc., above,* on the ground that in the case before it there were no such extraordinary circumstances)].

The facts and procedural background of ***Midcal Aluminum, Inc. v. Rice*** *(1979) 90 Cal. App. 3d 979, 153 Cal. Rptr. 757* , aff'd sub nom. *California Liquor Dealers v. Midcal Aluminum (1980) 445 U.S. 97, 100 S. Ct. 937, 63 L. Ed. 2d 233* , are discussed in *§ 15.26[3][a]*. There, the court of appeal held that it would be improper to require petitioner to exhaust its administrative remedies, pointing to the same set of circumstances as were relied on by the Supreme Court in *Sail'er Inn, Inc. v. Kirby (1971) 5 Cal. 3d 1, 6-7* , discussed *above,* in excusing petitioners from the exhaustion requirement (*90 Cal. App. 3d 979, 981-982*). The court of appeal in *Midcal Aluminum* rejected the department's contention that the court's assumption of jurisdiction would encourage similar petitions, attempting to bypass administrative procedures through feigned constitutional issues. The court considered that possibility unlikely since the

court was not reviewing the accusation, but only the validity of the statutes on which it was based, and rejection of petitioner's claims would leave petitioner before the department to face accusations it had admitted (*90 Cal. App. 3d 979, 982*).

[c] Original Jurisdiction of Supreme Court

In ***San Francisco Unified School Dist. v. Johnson*** *(1971) 3 Cal. 3d 937, 92 Cal. Rptr. 309, 479 P.2d 669* , cert. denied sub nom. *Fehlhaber v. San Francisco Unified School Dist., 401 U.S. 1012, 91 S. Ct. 1266, 28 L. Ed. 2d 549* , the California Supreme Court stated, at page 944, that the Court entertains original jurisdiction in mandamus only in cases in which the issues presented are of great public importance and must be resolved promptly [citing *Sacramento County v. Hickman (1967) 66 Cal. 2d 841, 845, 59 Cal. Rptr. 609, 428 P.2d 593*]. The issues before the court were the interpretation and constitutionality of Educ. Code § 1009.5 (now *Educ. Code §§ 35350, 72209*), which prohibits transportation of students without written permission of their parents. The Court determined that these issues were of great public concern and importance, their prompt resolution being essential to orderly planning and pupil assignment throughout the state (*3 Cal. 3d 937, 945*).

The facts and procedural background of ***Sail'er Inn, Inc. v. Kirby*** *(1971) 5 Cal. 3d 1, 95 Cal. Rptr. 329, 485 P.2d 529* , are discussed in *§ 15.26[3][a]*. In that case, the Supreme Court issued the alternative writ to review the exercise of quasi-judicial power by the Department of Alcoholic Beverage Control. The case presented the issue of the constitutionality of *Bus. & Prof. Code § 25656*, prohibiting women, with some exceptions, from tending bar. The Court noted that important legal issues of statewide significance were raised by the petitioners (*5 Cal. 3d 1, 6-7*). At page 7, the Court stated that by issuing the alternative writ, they had determined that the exercise of their jurisdiction in the case was proper [relying on prior California law, including *San Francisco Unified School Dist. v. Johnson (1971) 3 Cal. 3d 937, 945, 92 Cal. Rptr. 309, 479 P.2d 669*].

[4] Additional Authorities

[a] Review of Quasi-Judicial Action

In *Norman Williams Co. v. Rice (1980) 108 Cal. App. 3d 348, 166 Cal. Rptr. 563* , the court of appeal entertained a petition for a writ of mandate to determine the validity of *Bus. & Prof. Code § 23672*, prohibiting licensed importers from importing any brand of distilled spirits unless designated as an authorized importer by the brand owner and to restrain the Department of Alcoholic Beverage Control from enforcing the statute. The court held that it had jurisdiction to consider the validity of the statute, which was alleged to be in fatal conflict with federal law, in a proceeding for a writ of mandate (*108 Cal. App. 3d 348, 354 fn. 2*). The court held that the statute was partially invalid (*108 Cal. App. 3d 348, 355-363*).

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1-15 California Points & Authorities § 15.27

§ 15.27 Opposing Petition for Writ of Mandate [Bus. & Prof. Code § 23090.5; Code Civ. Proc. §§ 1085, 1086]--To Review or Restrain Adjudicatory Action of Department of Alcoholic Beverage Control--Exclusivity of Procedure by Writ of Review [Bus. & Prof. Code § 23090] and Failure to Exhaust Administrative Remedy

[1] FORM Opposing Petition for Writ of Mandate [Bus. & Prof. Code § 23090.5; Code Civ. Proc. §§ 1085, 1086]--To Review or Restrain Adjudicatory Action of Department of Alcoholic Beverage Control--Exclusivity of Procedure by Writ of Review [Bus. & Prof. Code § 23090] and Failure to Exhaust Administrative Remedy

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

[*OR*]

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA,
_____ APPELLATE DISTRICT

_____[*name*],	)	
Petitioner,	)	NO. _____
vs.	)	MEMORANDUM OF POINTS AND AUTHORIT-
DEPARTMENT OF ALCOHOLIC BEVERAGE	)	IES IN OPPOSITION TO PETITION FOR WRIT OF
CONTROL,	)	MANDATE
Respondent.	)	[*Bus. & Prof. Code § 23090.5*; *Code Civ. Proc. §§*
	)	*1085, 1086*]

_____

THE COURT DOES NOT HAVE JURISDICTION OVER A PETITION FOR A WRIT OF MANDATE TO REVIEW AN ADJUDICATORY ACT OF THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL BECAUSE THE EXCLUSIVE PROCEDURE FOR JUDICIAL REVIEW IS BY WRIT OF REVIEW PURSUANT TO *Bus. & Prof. Code § 23090* [AND BECAUSE PETITIONER HAS NOT EXHAUSTED HIS/HER ADMINISTRATIVE REMEDIES].

A. Exclusivity of Procedure by Writ of Review. *Section 23090.5 of the Business and Professions Code* authorizes a writ of mandate only to review the orders, rules, decisions, or other acts of the Department of Alcoholic Beverage Control in the performance of its duties when acting in its administrative capacity, and does not authorize an alternative avenue of judicial review of the department's adjudicatory decisions apart from the writ of review provided for in *Sections 23090-23090.7 of the Business and Professions Code* (*Top Hat Liquors v. Department of Alcoholic Beverage Control (1974) 13 Cal. 3d 107, 111-112, 118 Cal. Rptr. 10, 529 P.2d 42*).

[*Optional*] **B. Exhaustion of Administrative Remedies.** Courts are generally without jurisdiction to review a decision of the Department of Alcoholic Beverage Control adversely affecting a licensee until the administrative remedies provided in *Sections 23080-23089 of the Business and Professions Code* have been exhausted (*Top Hat Liquors v. Department of Alcoholic Beverage Control (1974) 13 Cal. 3d 107, 110-111, 118 Cal. Rptr. 10, 529 P.2d 42*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Respondent _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a petition for a writ of mandate which seeks to review or restrain an adjudicatory action of the Department of Alcoholic Beverage Control. If the petition for a writ of mandate is brought before the department has acted or before the Alcoholic Beverage Control Appeals Board has made a final order reviewing the department's decision, Paragraph B of this form may be included as an additional objection to the petition.

This memorandum may be submitted in opposition to a petition for a writ of mandate [*Bus. & Prof. Code § 23090.5*; *Code Civ. Proc. §§ 1085, 1086*] supported by the points and authorities set out in *§ 15.26*.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Points and Authorities

For a memorandum of points and authorities supporting a demurrer to a petition for a writ of mandate brought in superior court to review a decision of the Alcoholic Beverage Control Appeals Board, see Ch. 195, *Public Administrative Law* .

[3] Discussion of Authorities

[a] Exclusivity of Procedure by Writ of Review

In ***Top Hat Liquors v. Department of Alcoholic Beverage Control*** *(1974) 13 Cal. 3d 107, 118 Cal. Rptr. 10, 529 P.2d 42* , the Department of Alcoholic Beverage Control collected evidence of 11 sales of alcoholic beverages by employees of a licensee below the minimum retail prices established in accordance with *Bus. & Prof. Code § 24755* [held unconstitutional in *Rice v. Alcoholic Beverage Control Appeals Bd. (1978) 21 Cal. 3d 431, 459, 146 Cal. Rptr. 585, 579 P.2d 476*]. Then, in a single proceeding, the department imposed a $250 fine for the first sale and fines of $1,000 for each successive sale pursuant to *Bus. & Prof. Code § 24755.1*. The licensee petitioned the Supreme Court for a writ of mandate to compel reduction of the penalty to $250, claiming that the imposition of such cumulative penalties is not permissible under *Bus. & Prof. Code § 24755.1* and that, if permissible, it is unconstitutional. After petitioning the Court, the licensee also filed an appeal with the Alcoholic Beverage Control Appeals Board, but since the board had not acted on the appeal when the court ruled on the petition, the Court treated the administrative remedies as unexhausted.

The Court, having held that *Bus. & Prof. Code §§ 23090-23090.7* provide the exclusive avenue for judicial review of the board's final orders, noted that it had not overlooked *Bus. & Prof. Code § 23090.5*, which authorizes the Supreme Court and courts of appeal to issue writs of mandate in any proper case. The Court held, however, that *Bus. & Prof. Code § 23090.5* does not authorize review of the department's adjudicatory decisions by writ of mandate as an alternative to the writ of review provided for in *Bus. & Prof. Code §§ 23090-23090.7*. The Court reasoned that when the Legislature enacted *Bus. & Prof. Code §§ 23090-23090.7* in 1967, it intended to limit the scope of review of the department's adjudicatory decisions, which were previously reviewed pursuant to general mandamus provisions. The writ of mandate remains available in accordance with *Code Civ. Proc. § 1085* to challenge departmental acts or failures to act which the law specially enjoins or which deny a party of the use or enjoyment of a right or office to which he or she is entitled (*13 Cal. 3d 107, 111*). On pages 111-112, the Court held that in *Bus. & Prof. Code § 23090.5*, the Legislature intended to provide for judicial review of the orders, rules, decisions, or other acts of the department in the performance of its duties when acting in its administrative rather than its limited judicial capacity [citing *Samson Market Co. v. Kirby (1968) 261 Cal. App. 2d 577, 581, 68 Cal. Rptr. 130* (discussed in *§ 15.25[3][b]*)]. Thus, the Court held that the effect of the 1967 legislation is to deny the availability of the writ of mandate to review the department's adjudicatory acts (*13 Cal. 3d 107, 112*).

[b] Exhaustion of Administrative Remedies

The facts and procedural background of ***Top Hat Liquors v. Department of Alcoholic Beverage Control*** *(1974) 13 Cal. 3d 107, 118 Cal. Rptr. 10, 529 P.2d 42* , are discussed in *§ 15.27[3][a]*. In that case, the Court did not reach the merits of petitioner's claims because petitioner had not exhausted its administrative remedies, but the Court did note that in pursuing those remedies, petitioner would be entitled to the benefit of the Court's decision in *Walsh v. Kirby (1974) 13 Cal. 3d 95, 118 Cal. Rptr. 1, 529 P.2d 33* , which held that the imposition of cumulative penalties on similar investigative practices was, in that case, arbitrary and capricious and constituted a denial of due process (*13 Cal. 3d 107, 109*). The Court noted the rule that courts are generally without jurisdiction to review administrative action until after the administrative remedy provided by statute has been exhausted and held that that rule applies to cases of liquor licensees adversely affected by a decision of the department (*13 Cal. 3d 107, 110*). The Court held that *Bus. & Prof. Code §§ 23090-23090.7* provided the exclusive route for judicial review of the department's decisions (*13 Cal. 3d 95*). Since *Bus. & Prof. Code § 23090*, specifying the conditions under which applications for a writ of review may be made, limits applications to persons affected by a final order of the Alcoholic Beverage Control Appeals Board, the Court held that it is manifest that review is only possible after the board has made a final order, that is, after the administrative remedies have been exhausted (*13 Cal. 3d 107, 111*). The Court found no merit to petitioner's claim that it would be irreparably injured if required to assert the administrative remedy because it failed to show that its situation was unique (*13 Cal. 3d 107, 112*).

[4] Additional Authorities

[a] Exclusivity of Procedure by Writ of Review

The facts and procedural background of *American Drug Stores, Inc. v. Stroh (1992) 10 Cal. App. 4th 1446, 13 Cal. Rptr. 2d 432* , are discussed in *§ 15.25[3][a]*. In an attempt to preserve the action, the liquor licensee sought to treat the appeal from the sustaining of the ABC's demurrer as a writ petition under *Bus. & Prof. Code § 23090.5*. The appellate court refused to do so because the licensee's request for treating the appeal as a petition for extraordinary relief was not made in its opening brief but was raised for the first time in its reply brief. The court held that points raised for the first time in a reply brief will ordinarily not be considered because such consideration would deprive the respondent of an opportunity to counter the argument (*10 Cal. App. 4th 1446, 1453*).

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1-15 California Points & Authorities § 15.28

§ 15.28 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action for Restitution of Purchase Money--By Plaintiff--Transfer of Alcoholic Beverage License Denied by State

[1] FORM Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action for Restitution of Purchase Money--By Plaintiff--Transfer of Alcoholic Beverage License Denied by State

	)	
	)	NO. _____
SUPERIOR COURT OF CALIFORNIA,	)	MEMORANDUM OF POINTS AND AUTHORIT-
COUNTY OF _____	)	IES IN SUPPORT OF MOTION FOR SUMMARY
_____ [*name*],	)	JUDGMENT
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD GRANT PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT BECAUSE, WHEN THE SALE OF A BUSINESS THAT INCLUDES AN ALCOHOLIC BEVERAGE LICENSE IS MADE CONTINGENT ON STATE APPROVAL OF THE TRANSFER OF THE LICENSE TO THE VENDEE, AND TRANSFER OF THE LICENSE IS NOT APPROVED, THE VENDEE IS ENTITLED TO RESTITUTION OF AMOUNTS PAID INTO ESCROW DUE TO THE FAILURE OF CONSIDERATION.

A. Summary Judgment. A plaintiff may move for summary judgment in any action or proceeding if it is contended that there is no defense to the action. Such motion must be granted if all of the papers submitted show that there is no

triable issue as to any material fact and that plaintiff is entitled to a judgment as a matter of law (*Code Civ. Proc. § 437c*).

B. Restitution for Failure of Consideration. When a contract for the sale of a business that includes an alcoholic beverage license is contingent on the state's approval of transfer of the license, denial of the application for transfer of the license results in a total failure of consideration to the buyer, and the buyer is entitled to restitution of the sums that he or she has paid into escrow, so that the seller

will not be unjustly enriched (*Lenchner v. Chase (1950) 98 Cal. App. 2d 794, 801-802, 804, 220 P.2d 921*).

[*Optional*] **C. Unqualified Agreement to Buy Not Implied.** In view of the provisions of the Alcoholic Beverage Control Act and the administrative rules and regulations respecting transfer of licenses, an unqualified agreement to purchase a business with an alcoholic beverage license, or an undertaking on the buyer's part amounting to a warranty to have the license transferred to the buyer, will not be implied in a contract to purchase a business having such a license (*Richards v. Dep't of Alcoholic Beverage Control (2006) 139 Cal. App. 4th 304, 314, 42 Cal. Rptr. 3d 782* ; *Lenchner v. Chase (1950) 98 Cal. App. 2d 794, 803, 220 P.2d 921*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of plaintiff's motion for summary judgment in an action for restitution. The form is for use when the plaintiff, as buyer, has brought an action for restitution of the purchase price after rescinding a contract for the purchase of a business which includes an alcoholic beverage license because the Department of Alcoholic Beverage Control denied the application to transfer the license.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations that support the motion [*see Code Civ. Proc. § 437c*].

[b] Related Pleading and Practice Forms

For a form of complaint for restitution based on rescission and for money had and received by a transferee against a transferor of an alcoholic beverage license and against the escrow holder after transfer of the license has been disapproved, see California Forms of Pleading and Practice, Ch. 18, *Alcoholic Beverage Licenses* and Ch. 19, *Alcoholic Beverages: Civil Liability* .

For discussion and additional forms relating to actions for restitution based on rescission, see California Forms of Pleading and Practice, Ch. 490, *Rescission and Restitution* . For discussion and additional forms relating to actions for money had and received, see Ch. 121, *Common Counts* in that set.

[c] Related Points and Authorities

For memoranda of points and authorities relating to summary judgments, generally, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Restitution for Failure of Consideration

In ***Lenchner v. Chase*** *(1950) 98 Cal. App. 2d 794, 220 P.2d 921* , plaintiffs deposited $15,000 in escrow in connection with their proposed purchase of a tavern. Plaintiffs and defendant seller joined in applying for transfer of defendant's liquor license to plaintiffs. Transfer of the license was denied by the State Board of Equalization, and two weeks later,

defendant seller repossessed the premises, which plaintiffs had been operating for about three months. Defendant seller had contemporaneously bought another tavern, and defendant escrow holder had paid itself and its salesman commissions on both sales. Defendant seller had also made a demand on the escrow holder, at the escrow holder's request, to pay $10,000 from the escrow fund to the seller of the tavern that defendant seller was buying. When plaintiffs demanded return of the $15,000, defendants refused, and plaintiffs brought suit for money had and received. The trial court held that the contract was contingent on transfer of the license, relying on the language of the application for transfer of the license, the only paper signed by both parties. The application had stated that transfer of title to the licensed business would coincide with transfer of the license, as was provided by the board's rules at that time. The court found no undertaking on plaintiffs' part to have the license transferred to them, no provision for forfeiture in the event of failure to obtain a license, nor any express warranty that plaintiffs had no police record (which was apparently the basis for the board's denial of the transfer). Defendants appealed from a judgment awarding plaintiffs $15,000, less profits taken by them while they operated the premises, and less some adjustments relating to inventory.

The court of appeal affirmed. The court held that the language of the application that transfer of title to the licensed business was to coincide with transfer of the license not only fixed the time when title to the business would pass, but also meant that without a transfer of the license there could be no transfer of title to the licensed business (*98 Cal. App. 2d 794, 801*). Since transfer of title to the business was the consideration for payment of the $15,000, the inability to transfer it resulted in a total failure of consideration (*98 Cal. App. 2d 794, 802*). The court rejected defendants' contention that plaintiffs' own acts made performance impossible, with the same legal effect as if plaintiffs had voluntarily refused to proceed with performance. The contention was based on plaintiffs' acts over a four-year period ending five years before the contract was entered into (the acts apparently relied on by the board in denying transfer of the license). The court held that these acts, occurring prior to the time of contracting, could not be considered, and that plaintiffs had taken affirmative actions in furtherance of the performance of the contract (*98 Cal. App. 2d 794, 802-803*). Moreover, the court noted, there was no language in the writings involved to support defendants' claim that plaintiffs had unqualifiedly promised to purchase the tavern or had undertaken to have the license transferred to themselves, and that no such promise could be implied due to the provisions of the Alcoholic Beverage Control Act [*Bus. & Prof. Code § 23000 et seq.*] and the rules of the board regarding transfers (*98 Cal. App. 2d 794, 803*). The court also rejected defendants' argument that there was not a scintilla of evidence that the parties agreed that the money would be returned in the event transfer of the license was denied. The court held that no such agreement was necessary, the case being a simple one of unjust enrichment [citing *Riff v. Mayhew (1949) 90 Cal. App. 2d 712, 717, 203 P.2d 812*] (*98 Cal. App. 2d 794, 804*).

[b] Unqualified Agreement to Buy Not Implied

In ***Richards v. Dep't of Alcoholic Beverage Control*** *(2006) 139 Cal. App. 4th 304, 42 Cal. Rptr. 3d 782* , plaintiff entered into a sales agreement to buy a restaurant and the alcoholic beverage license. However, the buyer did not apply to the agency for a transfer of the license. While investigating reports of license violations, the agency became aware of the sale of the tavern and obtained a surrender of the license from the previous owner. The buyer filed a complaint against the agency alleging that he acquired the license by purchasing the tavern and that the license was "summarily revoked" without prior warning. The Department moved for summary judgment or summary adjudication arguing that the buyer had no standing to sue the Department because he never applied for a transfer of the license. The trial court granted the motion.

The Court of Appeal affirmed, holding that *Bus. & Prof. Code § 24071.1* does not provide for an automatic transfer of the license upon the sale of the tavern, and that transfer of a license from the licensee to another person is valid only upon approval by the Department (*139 Cal. App. 4th 304, 313, 314*). The requirement for such approval is an implied condition of all agreements for the transfer of alcoholic beverage licenses, whatever the context and whatever the nature of the consideration (*139 Cal. App. 4th 304, 314*).

Lenchner v. Chase *(1950) 98 Cal. App. 2d 794, 220 P.2d 921* , is discussed in *§ 15.28[3][a]*.

[4] Additional Authorities

[a] Restitution for Failure of Consideration

Plaintiff in Riff v. Mayhew (1949) 90 Cal. App. 2d 712, 203 P.2d 812 , paid $25,000 to defendant escrow holder in connection with plaintiff's proposed purchase of a cocktail lounge and restaurant from defendant sellers. The premises were located in an area zoned for apartment house use. The premises had apparently been operated as a social club, a use permitted by the zoning ordinance, which did not permit public places of entertainment or restaurants. At the time the escrow opened, defendant sellers were unsuccessfully attempting to get an entertainment cafe license from the city. The escrow agreement stated that the premises were being purchased for the purpose of operating an on-sale alcoholic beverage establishment. The State Board of Equalization, however, denied defendants' application to transfer to plaintiff a liquor license covering the location on the grounds that plaintiff was not the real party in interest and that the application had contained misrepresentations. When the application for transfer of the liquor license was denied, plaintiff gave notice to defendants of his election to terminate escrow on the ground that the board had refused to allow transfer of the license. Plaintiff demanded return of the money he had paid into escrow, and on the same day, abandoned the premises, which he had been operating under an oral agreement with defendants. Plaintiff subsequently brought suit for rescission based on denial of the application to transfer the license, and defendant sellers' failure to deliver a valid assignment of lease or sublease into escrow. Defendants denied that there had been a final denial of the transfer of the license, and filed a cross complaint alleging that plaintiff caused the license transfer to be denied by refusing to name his partners in the purchase. The trial court found in plaintiff's favor that there had been a material failure of consideration due to denial of the application for transfer of the license, which was found to have been denied due to defendants' inability to provide a valid sublease and not solely because of plaintiff's withholding and misstating information. Defendants appealed from the judgment awarding plaintiff the $25,000 he had placed in escrow.

On appeal, plaintiff urged that under the zoning ordinance, no transfer of the liquor license could be made, and that nothing plaintiff did could have changed the situation (*90 Cal. App. 2d 712, 716*). The court of appeal held that although there was conflicting evidence, the material findings and judgment were supported by substantial evidence, which precluded the court of appeal from interfering with the trial court's decision. The court found this rule to be particularly applicable to the findings that there was a complete failure of consideration and that the objects of the escrow agreement were impossible of fulfillment, and held that it would be contrary to both law and equity to allow defendants to retain the $25,000 in those circumstances. The court stated that the impossibility of conducting the premises for the purpose stated in the escrow agreement was of sufficient materiality to excuse plaintiff from further performance of the contract, and that there was, moreover, substantial evidence to support the finding that the impossibility did not result solely from plaintiff's actions or representations due to the zoning regulations prohibiting the use (*90 Cal. App. 2d 712, 717*). Since plaintiff's alleged default was not the sole cause of the collapse of the proposed transaction, the court held that defendants could not retain the money (*90 Cal. App. 2d 712, 717-718*).

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Volume 1 Chapters 1-19 WRITING LEGAL MEMORANDA AND BRIEFS; ABATEMENT AND SURVIVAL OF ACTIONS---to---AMENDED AND SUPPLEMENTAL PLEADINGS
CHAPTER 15 ALCOHOLIC BEVERAGE LICENSING
PART II. FORMS

1-15 California Points & Authorities § 15.29

§ 15.29 Supporting Motion for Summary Adjudication [Code Civ. Proc. § 437c(f)] of Validity of Option Agreement to Retransfer License to Seller of Licensed Premises on Buyer's Default in Purchase--By Plaintiff

[1] FORM Supporting Motion for Summary Adjudication [Code Civ. Proc. § 437c(f)] of Validity of Option Agreement to Retransfer License to Seller of Licensed Premises on Buyer's Default in Purchase--By Plaintiff

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORIT-
vs.	)	IES IN SUPPORT OF MOTION FOR SUMMARY
_____ [*name*],	)	ADJUDICATION
Defendant.	)	[*Code Civ. Proc. § 437c(f)*]
	)	Date: _____
	)	Time: _____
	)	Location: _____
		[Trial Date: _____]

_____

THE COURT SHOULD GRANT PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION OF PLAINTIFF'S CAUSE OF ACTION BASED ON DEFENDANT'S BREACH OF THE OPTION AGREEMENT, BECAUSE SECTION 24076 OF THE BUSINESS AND PROFESSIONS CODE PROVIDES NO DEFENSE TO AN ACTION FOR DAMAGES FOR BREACH OF AN OPTION AGREEMENT TO RETRANSFER AN ALCOHOLIC BEVERAGE LICENSE FOR A VALUABLE CONSIDERATION ON THE DEFAULT OF THE BUYER IN THE PURCHASE OF THE PREMISES.

A. Motion for Summary Adjudication of Issues. If it is contended that there is no defense to a cause of action, any party may move for summary adjudication as to that cause of action (*Code Civ. Proc. § 437c(f)*).

B. Option for Retransfer of Alcoholic Beverage License as Enforceable. An agreement giving the seller of licensed premises an option to repurchase the alcoholic beverage license covering the premises for more than nominal consideration is not forbidden by *Section 24076 of the Business and Professions Code* which forbids licensees to pledge their licenses as security for the fulfillment of an agreement (*Greve v. Leger, Ltd. (1966) 64 Cal. 2d 853, 860, 52 Cal. Rptr. 9, 415 P.2d 824*). *Section 24076 of the Business and Professions Code* prohibits specific enforcement of such an option more than 90 days after it was entered into, but does not provide any defense to an action for damages (*Greve v. Leger, Ltd. (1966) 64 Cal. 2d 853, 862, 52 Cal. Rptr. 9, 415 P.2d 824*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of plaintiff's motion for summary adjudication on the ground that there is no defense to his or her cause of action for breach of an option agreement to repurchase an alcoholic beverage license from a buyer who has defaulted in the purchase of the licensed premises. For forms relating generally to a motion for summary judgment or summary adjudication, see Ch. 221, *Summary Judgments* .

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Motion for Summary Adjudication of Issues

Code Civ. Proc. § 437c(f) provides that if it is contended that there is no defense to a cause of action, any party may move for summary adjudication concerning that cause of action. The statute further provides that a motion for summary adjudication can be made by itself or as an alternative to a motion for summary judgment and must proceed in all procedural respects as a motion for summary judgment [*Code Civ. Proc. § 437c(f)*]. For further discussion and forms, see Ch. 221, *Summary Judgments* .

[b] Option for Retransfer of Alcoholic Beverage License as Enforceable

In ***Greve v. Leger, Ltd.*** *(1966) 64 Cal. 2d 853, 52 Cal. Rptr. 9, 415 P.2d 824* , plaintiffs had sold a hotel, together with liquor licenses, to defendant. Defendant had given plaintiffs an option, exercisable on defendant's default in purchasing the hotel, to repurchase the licenses for the amount defendant had paid for them. Defendant did default, and plaintiffs repossessed the hotel and tendered the option price for the licenses. When defendant refused the tender, plaintiffs sued to enjoin transfer of the licenses to a third party and to compel defendant to retransfer the licenses to plaintiffs. The court sustained a demurrer to the complaint without leave to amend, and plaintiffs appealed from the judgment of dismissal that followed. At oral argument in the court of appeal, defendant revealed that the licenses had been sold to third parties, and in their appeal to the Supreme Court, plaintiffs sought leave to amend the complaint to seek damages.

The Supreme Court reversed, rejecting defendant's argument that plaintiffs' suit was prohibited by *Bus. & Prof. Code § 24076*, which forbids agreements pledging transfer of a license as security for the fulfillment of any agreement and forbids transfer of a license to fulfill an agreement entered into more than 90 days before the transfer application is filed. The Court first determined that the traditional meaning of "security" would not include an option exercisable only on payment of substantial additional consideration, or which, on performance, does not give the option-holder any asset out of which to satisfy the underlying claim against the option-giver (*64 Cal. 2d 853, 858*). The Court then refused to follow previous California court of appeal cases that had read "security" so broadly as to include an option given to the lessor of licensed premises by the lessee to repurchase the license at the termination of the lease, concluding that those cases had incorrectly divined the purpose of *Bus. & Prof. Code § 24076* and that the section was not intended to outlaw all agreements for the transfer of licenses which serve to assure the value of some other asset (*64 Cal. 2d 853, 857-860*). Thus, the Court held that the agreement before it was not a security device within the meaning of *Bus. & Prof. Code § 24076*, even though it tended to preserve the value of plaintiffs' interest in the hotel in the event of repossession, because the option did not perform either of the ordinary functions of a "security": (1) it did not give plaintiffs an automatic right to retake the licenses on defendant's default, but only to repurchase at the same price defendant had paid, which could not be deemed nominal, and (2) exercise of the option would not have given plaintiffs an asset out of which they could satisfy their claim against defendant for its default on the contract to purchase the hotel (*64 Cal. 2d 853, 860*).

The Court further held that the portion of *Bus. & Prof. Code § 24076*, forbidding *transfer* of a license to fulfill an agreement over 90 days old, unlike the provision forbidding parties from *concluding an agreement* pledging a license as security, does not make agreements for the transfer of licenses illegal, but only prevents transfer of licenses in satisfaction of such agreements. Consequently, the Court held that *Bus. & Prof. Code § 24076* precluded specific performance of the option agreement, but did not render the agreement illegal, and did not provide any defense to an action for damages for breach of the option agreement (*64 Cal. 2d 853, 861-862*).

Although the Supreme Court in *Greve* did criticize and refuse to adopt the reasoning of *Elmquist v. Lock (1961) 194 Cal. App. 2d 372, 377* , it did not expressly disapprove *Elmquist* (*64 Cal. 2d 853, 859-860*). In *Elmquist*, the purchaser had agreed to do all things necessary to have his name removed from the license in the event he defaulted before half the combined purchase price of the licensed premises and the license was paid. The *Elmquist* court reasoned that the agreement could not be permitted because its performance would vest ownership of the license in the person to whom performance was due regardless of his qualifications to be licensed, and that this would violate the purpose of *Bus. & Prof. Code § 24076* to prevent a transfer of ownership by any means other than the statutory procedure which limits transfers to those who are qualified to hold licenses. In *Greve*, the Supreme Court found this reasoning to be erroneous because it assumed that the purchaser's performance of the agreement to remove his name from the license would automatically effect a transfer of the license without official approval. That assumption was incorrect because California case law has held that all agreements for the transfer of alcoholic beverage licenses are subject to an implied condition that official approval of the transfer is required (*64 Cal. 2d 853, 859*). Nonetheless, the result in *Elmquist* may have survived *Greve* because, unlike the agreement in *Greve*, the agreement in *Elmquist* provided for retransfer of the license on the buyer's default in paying of a purchase price which included payment for the license itself, as well as for the licensed premises, and did not call for the seller to give any consideration for retransfer of the license. These distinguishing factors make the agreement in *Elmquist* more like a pledge of security than the agreement in *Greve*, where retransfer was not tied to default in the purchase price of the license itself, but only of the licensed premises, and the seller was required to pay for the retransfer. For these reasons, an agreement such as the one in *Elmquist* might still be held invalid under *Bus. & Prof. Code § 24076* as a pledge of a license as security for an agreement.

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CHAPTER 15A ALCOHOLIC BEVERAGES: CIVIL LIABILITY FOR FURNISHING

1-15a California Points & Authorities 15a.syn

§ 15a.syn Synopsis to Chapter 15a: ALCOHOLIC BEVERAGES: CIVIL LIABILITY FOR FURNISHING

§ 15A.01 Scope of Chapter

§ 15A.02 Governing Statutes

§ 15A.03 Related Pleading and Practice Chapters

§ 15A.04 Related Points and Authorities

§§ 15A.05-15A.19 [Reserved]

§ 15A.20 Supporting Defendant's Motion for New Trial on Ground of Insufficiency of Evidence [Code Civ. Proc. § 657(6)] in Action Against Tavern Keeper to Recover for Personal Injuries Received in Assault by Other Patron--Defendant Unaware of Assailant's Violent Propensity

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Reweighing Evidence

[b] Known Violent or Vicious Propensity as Prerequisite to Liability

[c] Circumstances Establishing Duty of Proprietor

[4] Additional Authorities

[a] Reweighing Evidence

§ 15A.21 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action Against Furnisher of Alcoholic Beverage to Recover for Injuries Caused by Intoxicated Person--By Defendant--Statutory Immunity [Bus. & Prof. Code § 25602(b); Civ. Code § 1714(c)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Statutory Immunity From Liability for Furnishing Alcoholic Beverages

[b] Immunity From Liability for Permitting Consumption on Premises

[c] Action for Nuisance Also Barred

[d] Suit by Consumer Barred

[e] Social Host's Immunity

[f] Exception to Immunity Limited to Cases Involving Obviously Intoxicated Minor

[4] Additional Authorities

[a] Statutory Immunity From Liability for Furnishing Alcoholic Beverages

[b] Social Host's Immunity

§ 15A.22 Supporting General Demurrer [Code Civ. Proc. §§ 430.10(e), 430.30(a)] in Action Against Furnisher of Alcoholic Beverages to Minor to Recover for Injuries Caused by Intoxicated Person--By Defendant--Statutory Immunity [Bus. & Prof. Code § 25602(c); Civ. Code § 1714(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Statutory Immunity From Liability for Furnishing Alcoholic Beverages to Sober Minor

[4] Additional Authorities

[a] Statutory Immunity From Liability for Furnishing Alcoholic Beverages to Sober Minor

§ 15A.23 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action Against Furnisher of Alcoholic Beverages to Recover for Injuries Caused by Intoxicated Person--Exceptions to Statutory Immunity [Bus. & Prof. Code § 25602(b); Civ. Code § 1714(c)]--Furnishing Alcoholic Beverage to Intoxicated Minor or Incompetent Persons [Bus. & Prof. Code § 25602.1]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Statutory Exception to Immunity for Selling, Furnishing, or Giving Away Alcoholic Beverages to Obviously Intoxicated Minors

[b] No Statutory Immunity When Furnishing Alcoholic Beverage to Person Suffering From Exceptional Physical or Mental Condition

[c] "Obviously Intoxicated" Defined

§ 15A.24 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action Against Furnisher of Alcoholic Beverages to Recover for Injuries Caused by Intoxicated Person--Exceptions to Statutory Immunity [Bus. & Prof. Code § 25602(b); Civ. Code § 1714(c)]--Negligent Performance of Undertaking Resulting in Harm to Third Person

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Negligent Performance of Undertaking

[b] Conduct Outside Scope of Statutory Immunity

§ 15A.25 Opposing Contention That Furnisher of Alcoholic Beverages Not Liable for Injuries Caused by Intoxicated Person--Exceptions to Statutory Immunity [Bus. & Prof. Code § 25602(b); Civ. Code § 1714(c)]--Duty of Premises Owner or Possessor to Protect Patrons From Tortious Conduct of Third Parties

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Duty to Protect Against Wrongful Conduct of Third Persons

[b] Statutory Immunity Inapplicable

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PART I. INTRODUCTION

1-15a California Points & Authorities § 15A.01

§ 15A.01 Scope of Chapter

This chapter contains memoranda of points and authorities relating to civil liabilities of persons furnishing alcoholic beverages. It includes a memorandum in support of defendant's motion for a new trial in an action to recover damages from a tavern keeper for injuries suffered on the defendant's premises in an assault by a third party [*see § 15A.20*]. This part also contains memoranda supporting [*see § 15A.21*] and opposing [*see § 15A.23*] a defendant's motion for summary judgment, and supporting a defendant's general demurrer [*see § 15A.22*], in an action to recover damages for injuries when the sole basis of liability is that defendant furnished alcoholic beverages to the plaintiff or a third party. This part also contains memoranda opposing a defendant's motion for summary judgment on the ground that the action seeks recovery not for furnishing alcoholic beverages to the plaintiff or a third party, but for the breach of an independent duty of care [*see § 15A.24*] and opposing the contention that the furnisher of alcoholic beverages is not liable on the grounds that an exception to statutory immunity imposes a duty on a premises owner to protect patrons from the tortious conduct of third parties [*see § 15A.25*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsTortsNegligenceDutyAlcohol ProvidersDram Shop StatutesTortsNegligenceDutyAlcohol ProvidersKnowledge RequirementsTortsNegligenceDutyAlcohol ProvidersSocial HostsTortsPremises Liability & PropertyGeneral Premises LiabilityDefensesGeneral Overview

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1-15a California Points & Authorities § 15A.02

§ 15A.02 Governing Statutes

Civil liability based on the furnishing of alcoholic beverages to another is restricted by *Civ. Code § 1714(b), (c)* and *Bus. & Prof. Code § 25602(b), (c)*. Civil liability based on the furnishing of alcoholic beverages to a minor is governed by *Bus. & Prof. Code § 25602.1*.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDutyAlcohol ProvidersDram Shop StatutesTortsNegligenceDutyAlcohol ProvidersKnowledge RequirementsTortsNegligenceDutyAlcohol ProvidersSocial Hosts

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1-15a California Points & Authorities § 15A.03

§ 15A.03 Related Pleading and Practice Chapters

For discussion and forms relating to actions against a party who furnished alcoholic beverages to another, see California Forms of Pleading and Practice, Ch. 19, *Alcoholic Beverages: Civil Liability* , and Ch. 421, *Premises Liability* (Matthew Bender).

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1-15a California Points & Authorities § 15A.04

§ 15A.04 Related Points and Authorities

For a form of points and authorities relating to alcoholic beverage licensing, see Ch. 15, *Alcoholic Beverage Licensing* .

For memoranda of points and authorities supporting and opposing summary judgment in premises liability cases based on acts of third parties, see Ch. 178, *Premises Liability* .

Related memoranda of points and authorities that may be useful in particular cases involving a furnisher of alcoholic beverages may be found in the following chapters:

- Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .
- Ch. 80, *Discovery: Scope, Regulation, and Timing* .
- Ch. 81, *Discovery: Privileges and Other Discovery Limitations* .
- Ch. 82, *Discovery: Sanctions for Discovery Misuse* .
- Ch. 83, *Discovery: Depositions* .
- Ch. 84, *Discovery: Interrogatories* .
- Ch. 85, *Discovery: Production or Inspection of Tangible Evidence* .
- Ch. 86, *Discovery: Requests for Admissions* .
- Ch. 87, *Discovery: Physical and Mental Examinations* .
- Ch. 88, *Discovery: Exchange of Expert Witness Information* .

- Ch. 89, *Discovery: Preservation of Evidence* .
- Ch. 89A, *Discovery: Review of Discovery Orders* .
- Ch. 104, *Fictitiously Named Defendants (DOES)* .
- Ch. 160, *Motions to Strike* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedurePretrial JudgmentsJudgment on the PleadingsGovernmentsLocal GovernmentsLicensesGovernmentsState & Territorial GovernmentsLicensesTortsNegligenceDutyAlcohol ProvidersDram Shop Statutes

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1-15a California Points & Authorities §§ 15A.05-15A.19

[Reserved]

§§ 15A.05[Reserved]

California Points & Authorities

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Volume 1 Chapters 1-19 WRITING LEGAL MEMORANDA AND BRIEFS; ABATEMENT AND SURVIVAL OF ACTIONS---to---AMENDED AND SUPPLEMENTAL PLEADINGS
CHAPTER 15A ALCOHOLIC BEVERAGES: CIVIL LIABILITY FOR FURNISHING
PART II. FORMS

1-15a California Points & Authorities § 15A.20

§ 15A.20 Supporting Defendant's Motion for New Trial on Ground of Insufficiency of Evidence [Code Civ. Proc. § 657(6)] in Action Against Tavern Keeper to Recover for Personal Injuries Received in Assault by Other Patron--Defendant Unaware of Assailant's Violent Propensity

[1] FORM Supporting Defendant's Motion for New Trial on Ground of Insufficiency of Evidence [Code Civ. Proc. § 657(6)] in Action Against Tavern Keeper to Recover for Personal Injuries Received in Assault by Other Patron--Defendant Unaware of Assailant's Violent Propensity

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____ _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN SUPPORT OF NEW TRIAL
vs.	)	[*Code Civ. Proc. § 657*]
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THE COURT SHOULD GRANT DEFENDANT'S MOTION FOR NEW TRIAL BECAUSE THE EVIDENCE IS INSUFFICIENT TO SHOW THAT DEFENDANT KNEW OF PLAINTIFF'S ASSAILANT'S VICIOUS PROPENSITIES.

A. Motion for New Trial. On the application of the party aggrieved, the _____ [verdict *or* decision] may be vacated, in whole or in part, and a new trial granted on all or some of the issues on the ground that the evidence is insufficient to justify the _____ [verdict *or* decision], if the substantial rights of the aggrieved party are materially affected thereby (*Code Civ. Proc. § 657(6)*).

[*Optional, in case of motion after jury trial*] **B. Reweighing Evidence.** On a motion for new trial, the court must reweigh the evidence, the inferences therefrom, and the credibility of the witnesses in determining whether the jury clearly should have reached a different verdict (*Code Civ. Proc. § 657*; *Lippold v. Hart (1969) 274 Cal. App. 2d 24, 25, 78 Cal. Rptr. 833*). The court may grant a new trial even though the evidence might justify the verdict, and it is the court's duty to set aside the jury's verdict whenever the court's conscience is impressed with the injustice of the verdict, or the court believes that the evidence is unreliable (*Moore v. City & County of San Francisco (1970) 5 Cal. App. 3d 728, 738, 85 Cal. Rptr. 281*).

C. Known Violent or Vicious Propensity as Prerequisite to Liability. The proprietor of a place where alcoholic beverages are served is not an insurer of his or her patron's safety. His or her duty is limited to the exercise of reasonable care, and he or she is liable only if he or she has negligently received or harbored guests of known violent or vicious propensities (*Kingen v. Weyant (1957) 148 Cal. App. 2d 656, 661, 307 P.2d 369* ; *see also* *Saatzer v. Smith (1981) 122 Cal. App. 3d 512, 518, 176 Cal. Rptr. 68*).

D. Circumstances Establishing Duty of Proprietor. The duty to protect a patron from injury by another arises only when one or more of the following circumstances exists: The proprietor (1) allows a person on the premises who has a known propensity for fighting, (2) allows a person to remain on the premises whose conduct has become obstreperous and aggressive to such a degree that the proprietor knows or ought to know that it endangers others, (3) has been warned of danger from an obstreperous patron and fails to take suitable measures for the protection of others, (4) fails to stop a fight as soon as possible after it started, (5) fails to provide adequate staff to police the premises, and (6) tolerates disorderly conditions (*Slawinski v. Mocettini (1963) 217 Cal. App. 2d 192, 196, 31 Cal. Rptr. 613* ; *see also* *Saatzer v. Smith (1981) 122 Cal. App. 3d 512, 516, 518-519, 176 Cal. Rptr. 68*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted by defendant in support of a motion for a new trial after plaintiff has been awarded a favorable jury verdict or court decision in an action against the defendant proprietor of a place where alcoholic beverages are served to recover for injuries sustained by plaintiff on the defendant's premises from an assault by another patron. The form is for use when there is insufficient or no evidence that defendant knew that the assailant had a violent propensity.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Although not essential, counsel might also show the lack of any evidence showing that the assailant had a violent propensity in the first place, which would give further strength to the argument that defendant did not know of any such propensity.

[b] Related Pleading and Practice Forms

For discussion and forms relating to motions for new trials, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities supporting and opposing motions for new trial in general, see Ch. 155, *Motions After Trial* .

For memoranda of points and authorities supporting and opposing motions for summary judgment in cases involving premises liability in general, see Ch. 178, *Premises Liability* .

[3] Discussion of Authorities

[a] Reweighing Evidence

Lippold v. Hart *(1969) 274 Cal. App. 2d 24, 78 Cal. Rptr. 833* , involved an action for personal injuries arising out of an automobile accident in which the jury gave a verdict for the defense. At the hearing on plaintiffs' motion for a new trial, the trial judge stated that plaintiff driver was definitely entitled to recover something, that he disbelieved some of defendant's testimony, and that defense counsel's ingenuity and persuasiveness had led the jury to disbelieve plaintiff driver's testimony. Even though the judge stated that an unjust result had occurred, he denied the motion, stating that he had to abide by the unanimous verdict. Plaintiffs appealed from the adverse judgment.

In reversing the judgment, the court of appeal held that the trial judge's statements showed that he had misconceived his function on the motion for new trial. The court found that the statements suggested that the judge thought himself bound to uphold the jury verdict because the evidence was conflicting (*274 Cal. App. 2d 24, 25*). The court, however, relying on *Code Civ. Proc. § 657* and prior California law, held that a judge is not bound by a conflict in evidence when ruling on a motion for a new trial. Rather, he must reweigh the evidence, the inferences therefrom, and the credibility of the witnesses in determining whether the jury clearly should have reached a different verdict (*274 Cal. App. 2d 24, 25-26*). Because the period during which the trial court had jurisdiction to order a new trial had expired when the court of appeal ruled on the appeal, the court reversed the judgment rather than attempting to revive the trial court's jurisdiction by vacating the judgment and order denying a new trial (*274 Cal. App. 2d 24, 27*).

Moore v. City & County of San Francisco *(1970) 5 Cal. App. 3d 728, 85 Cal. Rptr. 281* , involved an action for false imprisonment and false arrest. After the jury returned a verdict for defendant, the judge granted plaintiff's motion for judgment notwithstanding the verdict as to part of the case, and for a new trial as to another part of the case, based on insufficiency of the evidence and other grounds. Both parties appealed. The court of appeal reversed the partial judgment notwithstanding the verdict, but affirmed the order granting a new trial. In affirming the order granting a new trial, the court held that trial courts have the power to grant a new trial even though the evidence might justify a verdict, and that the trial judge has the duty to set aside a jury's verdict whenever his or her conscience is impressed with the injustice thereof or if he or she believes the evidence is unreliable (*5 Cal. App. 3d 728, 738*). The court held that the trial judge, who had found the evidence concerning the arrest weak and subject to a great deal of doubt in his mind, had acted well within his discretion (*5 Cal. App. 3d 728, 738-739*).

[b] Known Violent or Vicious Propensity as Prerequisite to Liability

In ***Kingen v. Weyant*** *(1957) 148 Cal. App. 2d 656, 307 P.2d 369* , plaintiff's injury occurred as his assailant was leaving a tavern after a brief altercation with a third party. During that altercation, the bartender had said, "Boys, break it up," and a gentlemanly settlement was reached. The assailant then grabbed his wife off a bar stool and headed out of the tavern. On the way to the door, the assailant either hit or pushed plaintiff, who was playing shuffleboard, and

plaintiff fell, resulting in personal injuries. There was evidence that plaintiff had put a hand on the assailant, with whom he was acquainted, and objected to assailant's treatment of assailant's wife. Plaintiff sued the tavern owners, alleging that they negligently served intoxicating beverages to the assailant with knowledge that he had vicious, violent, quarrelsome, and disorderly propensities, and that they negligently failed to control his conduct and allowed him to assault plaintiff. The jury returned a verdict in defendants' favor, but the trial court granted plaintiff's motion for a new trial. Defendant tavern owners appealed from the order granting a new trial.

The court of appeal reversed, holding that the evidence would not support a judgment against defendant tavern owners (*148 Cal. App. 2d 656, 660*). The court applied the rule that the proprietor of an inn is under a duty to protect his patrons from injury, annoyance, and mistreatment, but is not an insurer of their safety. The court held that a proprietor's obligation is limited to the exercise of reasonable care, and that he or she is liable only when he or she negligently receives or harbors guests with known violent or vicious propensities. The plain ground of this liability is the proprietor's negligence in harboring persons dangerous to the peace and comfort of the patrons, for whose comfort the proprietor is bound to provide (*148 Cal. App. 2d 656, 661*). The court recognized the common law rule that then prevailed, that the sale of liquor to an ordinary man does not imposeliability on the seller for damages resulting from the intoxication (*148 Cal. App. 2d 656, 660*). The evidence showed that the assailant had been a frequent patron of defendants' tavern for several years, and had had only one argument on the premises which was with his wife. Plaintiff had known the assailant for two years and had never seen him in a fight (*148 Cal. App. 2d 656, 660-661*). The court held that under this evidence, the assailant was not shown to be known to defendant tavern owners as a violent person (*148 Cal. App. 2d 656, 661*). The court also found that the bartender had taken prompt and effective action in terminating the argument between the assailant and the third party, his admonition to break it up having been heeded by the assailant. At that point there was no reasonable probability that the assailant would attack anyone because he immediately started to leave. The court held that the bartender could not be required to anticipate plaintiff's action of attempting to restrain the assailant as he was leaving and that the actions of defendant tavern owners could not be considered the proximate cause of plaintiff's injuries (*148 Cal. App. 2d 656, 661-662*).

In ***Saatzer v. Smith*** *(1981) 122 Cal. App. 3d 512, 176 Cal. Rptr. 68* , a tavern patron brought a negligence action against the owner for injuries suffered as a result of a fight between two other customers. The owner's motion for summary judgment was granted, and the court of appeal affirmed. At the time plaintiff's cause of action accrued, a commercial vendor of alcoholic beverages could be held liable for injuries proximately caused by the sale of liquor to an obviously intoxicated person (*122 Cal. App. 3d 512, 517-518*). The only other ground for liability of an owner for negligence, the court noted, is an owner's failure to exercise reasonable care in protecting patrons from injury caused by other customers, such as in receiving or harboring guests of known violent propensities. No evidence of a breach of either duty was demonstrated by plaintiff in her opposing declarations. Rather, the facts were that the fighting patrons had not been previously noticed to be intoxicated or boisterous, their altercation occurred suddenly and unexpectedly, and the employees reached and stopped the fight as soon as possible after it began. The evidence all refuted plaintiff's claim that defendant was negligent in not providing for the protection of his patrons, or in serving liquor to intoxicated patrons. As the court noted, a tavern owner is not an insurer of customer safety, but is only responsible for exercising reasonable care, and such care was demonstrated by defendant's evidence (*122 Cal. App. 3d 512, 516, 518-519*).

The court also rejected plaintiff's claim that the owner breached a duty of care owed to customers injured as a result of a fight on the premises by failing to ascertain the names of the combatants. The case cited by plaintiff in support of her contention, *Clemente v. State of California (1980) 101 Cal. App. 3d 374, 161 Cal. Rptr. 799* (disapproved in *Williams v. State of California (1983) 34 Cal. 3d 18, 28 n.9, 192 Cal. Rptr. 233, 664 P.2d 137*), involved a special relationship arising between an investigating police officer and an injured pedestrian who was completely dependent on the officer for the identity of the motorcyclist who hit him. The court held that no special relationship exists between a tavern owner and a customer so as to give rise to a duty to ascertain the identities of other customers causing injuries (*122 Cal. App. 3d 512, 519-520*).

[c] Circumstances Establishing Duty of Proprietor

Plaintiffs' decedent in ***Slawinski v. Mocettini*** *(1963) 217 Cal. App. 2d 192, 31 Cal. Rptr. 613* , was drinking in defendants' tavern and restaurant from about 11 o'clock on a Saturday morning until about 8:30 that evening. His assailant came in around 11:00 a.m. for a beer and again at 6:00 p.m. Decedent and his assailant did not know one another, but engaged in a normal and friendly conversation until 8:00 p.m. when decedent backhanded the assailant off his stool, and they scuffled on the floor. They were separated by other patrons, and the assailant left without saying a word to anyone. The evidence was conflicting as to whether he looked angry and rushed out or walked out in a normal manner. About 30 minutes later, the assailant returned with a gun and shot decedent five or six times, killing him. Plaintiffs brought suit against defendant tavern owners based on their failure to properly supervise and control their premises so as to prevent the attack and for harboring the assailant. After the jury returned a verdict in plaintiffs' favor, the court granted defendants' motion for a new trial on the ground, in part, that the evidence was insufficient because there was no probative evidence that defendants should have known that the assailant had dangerous propensities and that he would cause bodily harm to decedent. Plaintiffs appealed from the order granting a new trial.

In affirming, the court of appeal noted that plaintiffs had conceded that no cause of action for the negligent furnishing of intoxicating beverages could (at that time) be maintained in California, and that the complaint was based wholly on defendants' failure to properly control and police the premises and prevent the assailant from injuring decedent. The court noted the well-settled proposition that the proprietor of a place where intoxicating beverages are sold owes a duty to exercise reasonable care to protect his or her patrons from injury by fellow guests. Any guest of such a place has the right to assume that he or she is in an orderly house and that the proprietor or his or her employees will exercise reasonable care in maintaining appropriate decorum. The court further stated that although the proprietor is under a duty to protect his or her patrons from injury, annoyance, and mistreatment, he or she is not an insurer of their safety and is only liable for negligently receiving or harboring guests of known violent or vicious propensities. The court relied on *Kingen v. Weyant (1957) 148 Cal. App. 2d 656, 661, 307 P.2d 369* (discussed in *§ 15A.20[3][b]*)]. The court concluded that a tavern keeper's duty to protect a patron from injury by another arises only when one or more of the following circumstances exists: The tavern keeper (1) allows a person on the premises who has a known propensity for fighting; (2) allows a person toremain on the premises whose conduct has become obstreperous and aggressive to such a degree that the tavern keeper knows or ought to know that it endangers others; (3) has been warned of danger from an obstreperous patron and fails to take suitable measures for the protection of others; (4) fails to stop a fight as soon as possible; (5) fails to provide adequate staff to police the premises; and (6) tolerates disorderly conditions (*217 Cal. App. 2d 192, 196*). The test of whether or not the duty of reasonable care has been discharged is the probability or foreseeability of injury to a plaintiff. Reviewing the evidence, the court found conflicting evidence as to the assailant's reputation for a hot temper, but found it to be uncontroverted that defendants were unaware of this and had never had trouble with him. Any breach of duty, the court concluded, would have had to arise from a negligent evaluation of the situation after the first incident between decedent and his assailant. In that regard, the court concluded that there was no evidence that defendants had any way of knowing that the assailant would return (*217 Cal. App. 2d 192, 197*). The court held that considering the state of the evidence, there was no doubt that the trial court properly granted the motion for a new trial. The court discussed the standard of review of orders granting a new trial, noting that all presumptions favor the order over the verdict and that an appellate court will reverse an order granting a new trial only when it can be said as a matter of law that there is no substantial evidence to support a contrary judgment (*217 Cal. App. 2d 192, 198*).

Saatzer v. Smith *(1981) 122 Cal. App. 3d 512, 176 Cal. Rptr. 68* , is discussed in *§ 15A.20[3][b]*.

[4] Additional Authorities

[a] Reweighing Evidence

The facts and procedural background of *Slawinski v. Mocettini (1963) 217 Cal. App. 2d 192, 31 Cal. Rptr. 613* , are discussed in *§ 15A.20[3][c]*. In affirming an order granting defendants' motion for a new trial, the court noted that the

order had to be affirmed even if the reviewing court might have ruled differently in the first instance. The court stated that in considering the sufficiency of the evidence on the hearing of a motion for a new trial, it is the trial court's exclusive province to judge the credibility of witnesses, to determine the probative force of testimony, and to weigh the evidence, and that the trial court may draw reasonable inferences therefrom opposed to those drawn by the trier of fact at the trial (*217 Cal. App. 2d 192, 198*).

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Volume 1 Chapters 1-19 WRITING LEGAL MEMORANDA AND BRIEFS; ABATEMENT AND SURVIVAL OF ACTIONS---to---AMENDED AND SUPPLEMENTAL PLEADINGS
CHAPTER 15A ALCOHOLIC BEVERAGES: CIVIL LIABILITY FOR FURNISHING
PART II. FORMS

1-15a California Points & Authorities § 15A.21

§ 15A.21 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action Against Furnisher of Alcoholic Beverage to Recover for Injuries Caused by Intoxicated Person--By Defendant--Statutory Immunity [Bus. & Prof. Code § 25602(b); Civ. Code § 1714(c)]

[1] FORM Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action Against Furnisher of Alcoholic Beverage to Recover for Injuries Caused by Intoxicated Person--By Defendant--Statutory Immunity [Bus. & Prof. Code § 25602(b); Civ. Code § 1714(c)]

[*Caption. See § 15A.20[1]*.]

THE COURT SHOULD GRANT DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE CIVIL LIABILITY BASED ON FURNISHING ALCOHOLIC BEVERAGES TO AN INTOXICATED PERSON IS BARRED BY SECTION 25602(b) OF THE BUSINESS AND PROFESSIONS CODE [AND SECTION 1714(c) OF THE CIVIL CODE].

A. Summary Judgment. [*See § 15A.20[1], Paragraph A.*]

B. Statutory Immunity From Liability for Furnishing Alcoholic Beverages. No person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any habitual or common drunkard or to any obviously intoxicated person pursuant to *Section 25602(a) of the Business and Professions Code* may be held civilly liable to any injured person or the estate of such person for injuries inflicted on that person as a result of intoxication by the consumer of such alcoholic beverage (*Bus. & Prof. Code § 25602(b)*).

[*Optional*] **C. Immunity From Liability for Permitting Consumption on Premises.** *Section 25602 of the Business and Professions Code*, reasonably construed, bars suit against those who simply permit the consumption of alcoholic beverages on their premises as well as against those who supply alcohol (*Leong v. San Francisco (1991) 235 Cal. App. 3d 827, 833-834, 1 Cal. Rptr. 2d 41*).

[*Optional*] **D. Action for Nuisance Also Barred.** *Section 25602(b) of the Business and Professions Code* bars a cause of action for nuisance based on the sale or furnishing of alcoholic beverages in violation of alcoholic beverage licensing

statutes (*Cory v. Shierloh (1981) 29 Cal. 3d 430, 436, 174 Cal. Rptr. 500, 629 P.2d 8*).

[*Optional*] **E. Suit by Consumer Barred.** *Section 25602(b) of the Business and Professions Code* bars suit by the intoxicated consumer as well as by third persons injured by the consumer (*Cory v. Shierloh (1981) 29 Cal. 3d 430, 437, 174 Cal. Rptr. 500, 629 P.2d 8*).

[*Optional*] **F. Social Host's Immunity.** No social host who furnishes alcoholic beverages to any person may be held legally accountable for damages suffered by such person, or for injury to the person or property of, or death of, any thirdperson, resulting from the consumption of such beverages (*Civ. Code § 1714(c)*).

[*Optional*] **G. Exception to Immunity Limited to Cases Involving Obviously Intoxicated Minor.** By declaring that the consumption of alcohol, and not the sale or furnishing of such, is the proximate cause of injury inflicted by intoxicated persons, the legislature spoke loudly and clearly that it rejected the concept of preserving even limited liability for those selling or furnishing alcoholic beverages to anyone other than obviously intoxicated minors (*Cardinal v. Santee Pita, Inc. (1991) 234 Cal. App. 3d 1676, 1683, 286 Cal. Rptr. 275*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for summary judgment by a defendant who furnished alcoholic beverages to an intoxicated person in an action to recover for damages that were caused by the intoxicated person.

Optional Paragraph G supports the argument that the intoxicated person is not within the class of persons for which an exception to the statutory immunity applies; that is, he or she was not an obviously intoxicated minor [*see Bus. & Prof. Code § 25602.1*]. It may be used to oppose a contention that the plaintiff's claim is exempt from the immunity bar because the defendant was a social host who knew that his or her guest was one who because of some exceptional physical or mental condition should not have been served alcoholic beverages and was or should have been aware of the risks included in providing that person with alcohol [*see Cantor v. Anderson (1981) 126 Cal. App. 3d 124, 130-131, 178 Cal. Rptr. 540 (Third Appellate District)* ; *see also § 15A.23[3][b]*]. The authority cited in this form, *Cardinal v. Santee Pita, Inc. (1991) 234 Cal. App. 3d 1676, 1683, 286 Cal. Rptr. 275 (Fourth Appellate District)* [*see § 15A.21[3][f]*], criticizes, and is in conflict with the position taken in *Cantor*. From a tactical standpoint, counsel may wish to raise the argument in a reply brief to counter an argument in an opposition memorandum that the plaintiff's claim is exempt from the statutory bar of immunity.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show, by specific reference to affidavits or declarations that support the motion, that defendant is within the class of persons exempted from civil liability under *Bus. & Prof. Code § 25602(b)* [*see Code Civ. Proc. § 437c(b)* (support required for motion for summary judgment)].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations which support the motion [*see Code Civ. Proc. §*

437c].

[b] Related Pleading and Practice Forms

For forms and discussion relating to civil liability based on acts of intoxicated persons, see California Forms of Pleading and Practice, Ch. 19, *Alcoholic Beverages: Civil Liability* (Matthew Bender).

[c] Related Points and Authorities

For forms and discussion relating to the liability of a premises owner for the tortious acts of third parties, see Ch. 178, *Premises Liability* .

[d] Opposing Points and Authorities

If appropriate, the points and authorities in *§§ 15A.23 -15A.25* may be used to oppose the contention supported by the points and authorities in this form.

[3] Discussion of Authorities

[a] Statutory Immunity From Liability for Furnishing Alcoholic Beverages

The legislature's purpose in adding subsection (b) to *Bus. & Prof. Code § 25602* was to abrogate the holdings in cases such as *Vesely v. Sager (1971) 5 Cal. 3d 153, 158-167, 95 Cal. Rptr. 623, 486 P.2d 151* , *Bernhard v. Harrah's Club (1976) 16 Cal. 3d 313, 317, 324-325, 128 Cal. Rptr. 215, 546 P.2d 719* ; and *Coulter v. Superior Court (1978) 21 Cal. 3d 144, 149-155, 145 Cal. Rptr. 534, 577 P.2d 669* , in favor of prior judicial interpretation finding that the consumption of alcoholic beverages rather than the serving of them is the proximate cause of injuries inflicted on another by an intoxicated person [*see Bus. & Prof. Code § 25602(c)*]. The Supreme Court has held that *Bus. & Prof. Code § 25602(b)* is constitutional [*Cory v. Shierloh (1981) 29 Cal. 3d 430, 437-441, 174 Cal. Rptr. 500, 629 P.2d 8]* .

[b] Immunity From Liability for Permitting Consumption on Premises

In ***Leong v. San Francisco Parking, Inc.*** *(1991) 235 Cal. App. 3d 827, 1 Cal. Rptr. 2d 41* , plaintiffs brought an action against a city parking authority and a major league baseball team for the wrongful death of their son. The decedent was killed when a vehicle collided with him after the driver left the stadium parkinglot. The first amended complaint alleged that the driver had been drinking alcoholic beverages in the parking lot both before and after the game, and was intoxicated at the time of the accident. The defendants demurred on the grounds that the plaintiffs' claim failed to state facts sufficient to constitute a cause of action and was uncertain because there was no allegation that the driver was an obviously intoxicated minor. The trial court sustained the demurrer without leave to amend. The plaintiffs' filed a motion for reconsideration or, in the alternative, to vacate the judgment. The trial court denied the motion and the plaintiffs appealed.

The court of appeal affirmed the judgments. The principle issue was whether *Bus. & Prof. Code § 25602* applied to immunize the defendants. The plaintiffs argued that *§ 25602* does not bar suit against the defendants because the plaintiffs could plead specific facts alleging that the defendants did not "furnish, sell or give alcoholic beverages to patrons to consume in or about their vehicles in the parking lot." Further, they contended that the absence of any allegation that the city furnished the driver with alcohol rendered the city subject to suit for negligence, notwithstanding *§ 25602* (*235 Cal. App. 3d 827, 832*). The court disagreed, citing *Coulter v. Superior Court (1978) 21 Cal. 3d 144, 148, 145 Cal. Rptr. 534, 577 P.2d 669* (partially abrogated by *Bus. & Prof. Code § 25602* and *Civ. Code § 1714(b)*). In *Coulter*, the plaintiffs claimed that one defendant permitted the driver to be served alcoholic beverages on its premises. In the portion of the opinion unaffected by subsequent legislation, the Supreme Court held that because the complaint did not allege that the defendants actually furnished liquor to the driver, no liability was imposed (*235 Cal. App. 3d*

827, 832). Thus, the court of appeal held that *Bus. & Prof. Code § 25602*, reasonably construed, bars suit against those who simply permit the consumption of alcoholic beverages on their premises as well as against those who supply alcohol (*235 Cal. App. 3d 827, 833-834*).

In addition, the court cited *DeBolt v. Kragen Auto Supply, Inc. (1986) 182 Cal. App. 3d 269, 272* , which held that *§ 25602* specifically abrogated the Supreme Court's application of common-law negligence principles to alcohol consumption-related injuries (*235 Cal. App. 3d 827, 834*).

[c] Action for Nuisance Also Barred

The plaintiff in ***Cory v. Shierloh*** *(1981) 29 Cal. 3d 430, 174 Cal. Rptr. 500, 629 P.2d 8* , was a minor who was injured when he lost control of his vehicle while attempting to drive home from a party at which he had become intoxicated. Plaintiff brought suit against the lessor of the building where the party was held, the liquor stores that had sold the liquor, the host, and others. One theory of the suit was that the host's use and occupancy of the premises constituted a nuisance because the host permitted the unlicensed and unlawful sale and furnishing of alcoholic beverages to minors and others on the premises. Defendant host demurred to the complaint on the basis of the 1978 amendments to *Bus. & Prof. Code § 25602* and *Civ. Code § 1714*. The trial court sustained the demurrer, and plaintiff appealed from the ensuing judgment of dismissal.

The Supreme Court affirmed. The Court noted that the trial court had held that the legislature, by mandating that the proximate cause of injuries resulting from intoxication is the consumption of alcoholic beverages rather than the furnishing of the beverages or the management of one's property, extended immunity to the sale or furnishing of alcoholic beverages in violation of licensing statutes, whether or not such acts also constituted a nuisance (*29 Cal. 3d 430, 436*). The Supreme Court found itself forced to agree, because the essence of each cause of action against defendant host was that he had unlawfully caused or permitted plaintiff's intoxication to occur, and that plaintiff was injured as a proximate result (*29 Cal. 3d 430, 436-437*). The Court held that *Bus. & Prof. Code § 25602(b)* granted defendant immunity from liability to plaintiff, emphasizing the language of the statute that "*No person* who sells, furnishes ...#x2026; any alcoholic beverage ...#x2026; *shall be civilly liable to any injured person ...#x2026;* for injuries inflicted on that person as a result of intoxication by the consumer of such alcoholic beverages." The Court did not reach the question of whether defendants could be deemed social hosts who would be additionally shielded from liability by *Civ. Code § 1714(c)* (*29 Cal. 3d 430, 437*).

The exception from immunity that leaves an alcoholic beverage licensee open to liability for causes of action based on injuries caused by selling or furnishing alcoholic beverages to an obviously intoxicated minor did not apply because defendant host was not an alcoholic beverage licensee (*29 Cal. 3d 430, 436*).

[d] Suit by Consumer Barred

The facts and procedural background of ***Cory v. Shierloh*** *(1981) 29 Cal. 3d 430, 174 Cal. Rptr. 500, 629 P.2d 8* , are discussed in *§ 15A.21[3][c]*. The Supreme Court held that *Bus. & Prof. Code § 25602(b)*, which immunizes persons who furnish alcoholic beverages from liability to anyone injured as a result of the consumer's intoxication, applies to actions brought by the injured consumer as well as to actions by third persons injured by the consumer (*29 Cal. 3d 430, 437*).

[e] Social Host's Immunity

The legislature's purpose in adding subsection (c) to *Civ. Code § 1714* was the same as the purpose in adding subsection (b) to *Bus. & Prof. Code § 25602* [*see Civ. Code § 1714(b)*; *see also § 15A.21[3][a]*]. The statute has been held constitutional [*see Cory v. Shierloh (1981) 29 Cal. 3d 430, 437-441*].

[f] Exception to Immunity Limited to Cases Involving Obviously Intoxicated Minor

Cardinal v. Santee Pita, Inc. *(1991) 234 Cal. App. 3d 1676, 286 Cal. Rptr. 275* , involved an action for damages based on personal injuries that the plaintiff sustained when he was struck by a motor vehicle after he left defendant's bar. The complaint alleged that the defendant and its employees continued to serve the plaintiff alcoholic beverages even though defendant knew, or should have known, that the plaintiff was disabled and mentally incompetent, and unable to control his consumption of alcohol due to his disability. Defendant demurred to the complaint on the ground that an action against it was barred by *Bus. & Prof. Code § 25602* and *Civ. Code § 1714*. The trial court sustained the demurrer without leave to amend and dismissed the complaint. The plaintiff appealed after the judgment of dismissal was entered.

The court of appeal affirmed the judgment. The plaintiff contended that his cause of action was not barred by the absolute immunity provided servers of alcoholic beverages because he was within a class of persons unable to resist the consumption of alcohol due to an exceptional mental or physical condition, an exception judicially recognized in *Cantor v. Anderson (1981) 126 Cal. App. 3d 124, 130-131, 178 Cal. Rptr. 540 (Third Appellate District)* . The court of appeal disagreed, finding *Cantor*'s interpretation of case law "strained" and its analysis of the 1978 dramshop legislation "shaky at best" (*234 Cal. App. 3d 1676, 1683*). Although the Supreme Court referred to *Cantor* in *Strang v. Cabrol (1984) 37 Cal. 3d 720, 724, 726, 209 Cal. Rptr. 347, 691 P.2d 1013* [*see § 15A.22[3][a]*], the court considered that reference to be dictum (*234 Cal. App. 3d 1676, 1682*). The court, instead, cited *Strang*'s recitation of the maxim that an express exclusion from the operation of a statute indicates that the legislature intended no other exceptions to be implied (*234 Cal. App. 3d 1676, 1681*). The court relied on the holding in *Strang* that the legislature abolished tort liability against the furnisher of alcoholic beverages except in one situation, namely, the providing of alcohol to an obviously intoxicated minor. Thus, the court held that the plaintiff, as a matter of law, could not state a cause of action (*234 Cal. App. 3d 1676, 1683*).

[4] Additional Authorities

[a] Statutory Immunity From Liability for Furnishing Alcoholic Beverages

Hepe v. Paknad (1988) 199 Cal. App. 3d 412, 244 Cal. Rptr. 823 , was an action for damages for injuries sustained by plaintiff in a traffic accident allegedly caused by a bar's sale and service of alcohol to the alcoholic driver of a car that hit plaintiff's motorcycle. The court of appeal affirmed the trial court's ruling, which sustained defendants' demurrers without granting plaintiff leave to amend the complaint and entered judgment of dismissal against plaintiff. The court of appeal refused to find that the defendant driver's alcoholism constituted an exceptional physical or mental condition sufficient under *Cantor v. Anderson (1981) 126 Cal. App. 3d 124, 178 Cal. Rptr. 540* [*see § 15A.23[3][b]*], to except defendant bar owner from immunity under *Bus. & Prof. Code § 25602*. The court rejected the *Cantor* analysis as not resting on a sound statutory basis. Instead, the court relied on the holding of *Strang v. Cabrol (1984) 37 Cal. 3d 720, 728, 209 Cal. Rptr. 347, 691 P.2d 1013* [*see § 15A.22[3][a]*], that no exceptions to the immunity of *Bus. & Prof. Code § 25602* exist, or are to be implied, other than that applicable to the provision of alcohol to an obviously intoxicated minor (*199 Cal. App. 3d 412, 418-419*).

[b] Social Host's Immunity

In *Bass v. Pratt (1986) 177 Cal. App. 3d 129, 222 Cal. Rptr. 723* , plaintiff brought an action against defendants who had served alcohol in their home to an already intoxicated minor, who subsequently caused injury to plaintiff when their automobiles collided. On appeal from the trial court's grant of defendant's motion for summary judgment, the court of appeal affirmed. The court considered plaintiff's argument that the case came within the parameters of *Cantor v. Anderson (1981) 126 Cal. App. 3d 124, 132, 178 Cal. Rptr. 540* , which held that a social host could be held liable for furnishing liquor to a guest known to have an "exceptional physical or mental condition" that made the consumption of liquor unsafe. The court rejected the contention that youth itself constitutes a physical condition that precludes the safe and lawful provision and consumption of alcohol. The court held that the statutory provisions of *Civ. Code § 1714* and

Bus. & Prof. Code § 25602 immunize a social host against civil liability for furnishing alcoholic beverages to an intoxicated minor, absent a showing that the minor was incompetent, incapable of voluntary action, or otherwise suffering from some peculiar mental disability (*177 Cal. App. 3d 129, 135-137*).

In *Andre v. Ingram (1985) 164 Cal. App. 3d 206, 210 Cal. Rptr. 150* , plaintiff lived with defendant's adult son in defendant's home. Plaintiff brought and later drank a bottle of liquor with defendant's son in defendant's home. The couple were later in an accident in plaintiff's car, which was driven by defendant's intoxicated son. Plaintiff brought an action for personal injuries against defendant. The trial court dismissed after sustaining defendant's demurrer. The court of appeal affirmed. Plaintiff based her argument on a special relationship of host and guest that she alleged required defendant to prevent her drunk son from driving or to warn plaintiff that her son was an alcoholic and therefore appeared not intoxicated when he really was. The court stated that *Bus. & Prof. Code §§ 25602, 25602.1*, and *Civ. Code § 1714* provide that consumption, not furnishing, of alcoholic beverages is the proximate cause of injuries resulting from intoxication and that no social host who furnishes alcoholic beverages to anyperson shall be held legally accountable for damages or injury resulting from the consumption of those beverages (*164 Cal. App. 3d 206, 209-210*).

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Volume 1 Chapters 1-19 WRITING LEGAL MEMORANDA AND BRIEFS; ABATEMENT AND SURVIVAL OF ACTIONS---to---AMENDED AND SUPPLEMENTAL PLEADINGS
CHAPTER 15A ALCOHOLIC BEVERAGES: CIVIL LIABILITY FOR FURNISHING
PART II. FORMS

1-15a California Points & Authorities § 15A.22

§ 15A.22 Supporting General Demurrer [Code Civ. Proc. §§ 430.10(e), 430.30(a)] in Action Against Furnisher of Alcoholic Beverages to Minor to Recover for Injuries Caused by Intoxicated Person--By Defendant--Statutory Immunity [Bus. & Prof. Code § 25602(c); Civ. Code § 1714(b)]

[1] FORM Supporting General Demurrer [Code Civ. Proc. §§ 430.10(e), 430.30(a)] in Action Against Furnisher of Alcoholic Beverages to Minor to Recover for Injuries Caused by Intoxicated Person--By Defendant--Statutory Immunity [Bus. & Prof. Code § 25602(c); Civ. Code § 1714(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____ _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER BY _____ [*name*] TO COMPLAINT OF _____ [*name*] ON GROUND OF STATUTORY IMMUNITY [*Bus. & Prof. Code § 25602(c)*; *Civ. Code § 1714(b)*; *Code Civ. Proc. §§ 430.10(e), 430.30(a)*]
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THE COURT SHOULD SUSTAIN DEFENDANT'S GENERAL DEMURRER BECAUSE THE COMPLAINT SHOWS ONLY THAT DEFENDANT FURNISHED ALCOHOLIC BEVERAGES IN VIOLATION OF SECTION 25658(a) OF THE BUSINESS AND PROFESSIONS CODE, IN WHICH CASE CIVIL LIABILITY IS BARRED BY SECTION 1714(b) OF THE CIVIL CODE AND SECTION 25602(c) OF THE BUSINESS AND PROFESSIONS CODE.

A. General Demurrer. The party against whom a complaint has been filed may object to it by demurrer on the ground that it fails to state facts sufficient to constitute a cause of action when the ground of objection appears on the face of the complaint [or from any matter of which the court must or may take judicial notice] (*Code Civ. Proc. §§ 430.10(e), 430.30(a)*).

B. Statutory Immunity From Liability for Furnishing Alcoholic Beverages to Sober Minor. A person who sells, furnishes, gives, or causes to be sold, furnished, or given away any alcoholic beverage to any person under the age of 21 who is not obviously intoxicated, in violation of *Section 25658(a) of the Business and Professions Code*, may not be held civilly liable to any injured person or the estate of such person for injuries inflicted on that person as a result of intoxication by the consumer of such alcoholic beverage due to the sweeping civil immunity provided by *Section 1714 of the Civil Code* and *Section 25602 of the Business and Professions Code* (*Strang v. Cabrol (1984) 37 Cal. 3d 720, 724-725, 209 Cal. Rptr. 347, 691 P.2d 1013*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a general demurrer by a defendant who furnished alcoholic beverages to a minor, in an action to recover for damages caused by the minor. It may also be modified for use in support of a motion for summary judgment [*see § 15A.21*]. Counsel should note, however, that legislation has extended liability to all persons who sell or cause to be sold an alcoholic beverage to an obviously intoxicated minor for those injuries proximately caused to a third party as a result of the sale [*see Bus. & Prof. Code § 25602.1*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms and discussion regarding demurrers, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For forms and discussion regarding civil liability based on acts of intoxicated persons, see California Forms of Pleading and Practice, Ch. 19, *Alcoholic Beverages: Civil Liability* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities relating to demurrers generally, see Ch. 71, *Demurrers and Motions for*

Judgment on the Pleadings .

[3] Discussion of Authorities

[a] Statutory Immunity From Liability for Furnishing Alcoholic Beverages to Sober Minor

Plaintiff in ***Strang v. Cabrol*** *(1984) 37 Cal. 3d 720, 209 Cal. Rptr. 347, 691 P.2d 1013* , was injured in an accident caused while riding in a vehicle driven by an intoxicated minor. She brought an action against defendants, retail liquor dealers, alleging that, in violation of *Bus. & Prof. Code § 25658*, they sold alcholic beverages to a minor who in turn provided the alcohol to the minor driver who consumed the alcohol and whose intoxication caused plaintiff's injuries. The trial court sustained a general demurrer by defendants without leave to amend. Plaintiff appealed.

The Supreme Court affirmed. The Court rejected the argument that defendants remained exposed to common law tort liability because *Bus. & Prof. Code § 25658* did not include any express language of civil immunity like that in *Bus. & Prof. Code § 25602*. The Court concluded that, on the contrary, the sweeping civil immunity provided under *Civ. Code § 1714* and *Bus. & Prof. Code § 25602* were intended to encompass the situation in which alcoholic beverages are sold to a minor in violation of *Bus. & Prof. Code § 25658*. The only exception to this sweeping immunity is expressly provided by *Bus. & Prof. Code § 25602.1*, which only applies in a situation in which a licensed defendant sells alcoholic beverages to an obviously intoxicated minor (*37 Cal. 3d 720, 724-725*). In holding that a defendant who furnished alcoholic beverages to a sober minor was immune from civil liability, the Court expressly disapproved the inconsistent holding in *Burke v. Superior Court (1982) 129 Cal. App. 3d 570, 181 Cal. Rptr. 149* (*37 Cal. 3d 720, 728*).

[4] Additional Authorities

[a] Statutory Immunity From Liability for Furnishing Alcoholic Beverages to Sober Minor

In *DeBolt v. Kragen Auto Supply, Inc. (1986) 182 Cal. App. 3d 269, 227 Cal. Rptr. 258* , consolidated wrongful death actions arising out of an automobile accident caused by an intoxicated minor, the court of appeal affirmed the trial court's judgment, dismissing plaintiffs' complaints after sustaining defendant's demurrers without leave to amend. The court held that the social host immunity of *Civ. Code § 1714(b)* shielded defendant from liability incurred by serving alcohol to the minor at a party hosted by defendant, and then ordering the minor to leave the party when she became intoxicated and disorderly (*182 Cal. App. 3d 269, 276*). In so holding, the court ruled that plaintiffs could not avoid the effect of *Civ. Code § 1714(b)* by alleging defendant's wrong to be forcing the minor toleave the party or failing to provide her with safe transportation, not furnishing the alcohol (*182 Cal. App. 3d 269, 274*).

In *Rogers v. Alvas (1984) 160 Cal. App. 3d 997, 207 Cal. Rptr. 60* , the court of appeal affirmed the grant of summary judgment for defendants, retail liquor dealers, who sold whiskey to a sober minor. The minor drank the whiskey, became intoxicated, obtained an automobile, and drove it through plaintiff's house, causing personal injury to her. The court concluded that licensed alcoholic beverage dealers who provide alcoholic beverages to sober minors are statutorily immune from claims by third parties injured as a result of the intoxication of those minors by virtue of *Bus. & Prof. Code § 25602.1*. Defendants contended that *Bus. & Prof. Code §§ 25602, 25602.1*, and *Civ. Code § 1714* established their statutory immunity from plaintiff's claim. The court discussed the legislative history of the enactment and amendment of those code sections and *Cory v. Shierloh (1981) 29 Cal. 3d 430, 174 Cal. Rptr. 500, 629 P.2d 8* (discussed in *§ 15A.21[3][c]*), concluding that defendants' immunity was clearly required (*160 Cal. App. 3d 997, 1000-1004*).

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CHAPTER 15A ALCOHOLIC BEVERAGES: CIVIL LIABILITY FOR FURNISHING
PART II. FORMS

1-15a California Points & Authorities § 15A.23

§ 15A.23 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action Against Furnisher of Alcoholic Beverages to Recover for Injuries Caused by Intoxicated Person--Exceptions to Statutory Immunity [Bus. & Prof. Code § 25602(b); Civ. Code § 1714(c)]--Furnishing Alcoholic Beverage to Intoxicated Minor or Incompetent Persons [Bus. & Prof. Code § 25602.1]

[1] FORM Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action Against Furnisher of Alcoholic Beverages to Recover for Injuries Caused by Intoxicated Person--Exceptions to Statutory Immunity [Bus. & Prof. Code § 25602(b); Civ. Code § 1714(c)]--Furnishing Alcoholic Beverage to Intoxicated Minor or Incompetent Persons [Bus. & Prof. Code § 25602.1]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____ _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORIT-
vs.	)	IES IN OPPOSITION TO MOTION FOR SUM-
_____ [*name*],	)	MARY JUDGMENT
Defendant.	)	[*Code Civ. Proc. § 437c*]
	)	Date: _____
	)	Time: _____
	)	Location: _____
		[Trial Date: _____]

_____

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE THE STATUTORY IMMUNITY FROM CIVIL LIABILITY BASED ON _____[SELLING OR CAUSING TO BE SOLD

or FURNISHING OR CAUSING TO BE FURNISHED *or* GIVING OR CAUSING TO BE GIVEN AWAY] ALCOHOL TO ANOTHER PERSON PROVIDED BY SECTION 25602(b) OF THE BUSINESS AND PROFESSIONS CODE AND SECTION 1714(c) OF THE CIVIL CODE DOES NOT APPLY WHEN DEFENDANT _____ [SOLD OR CAUSED TO BE SOLD *or* FURNISHED OR CAUSED TO BE FURNISHED *or* GAVE OR CAUSED TO BE GIVEN AWAY] ALCOHOL TO _____ [AN OBVIOUSLY INTOXICATED MINOR *or* A PERSON HAVING AN EXCEPTIONAL PHYSICAL OR MENTAL CONDITION OF WHICH DEFENDANT WAS OR SHOULD HAVE BEEN AWARE].

[*EITHER*]

A. Statutory Exception to Immunity for Selling, Furnishing, or Giving Away Alcoholic Beverages to Obviously Intoxicated Minors. Notwithstanding*Section 25602(b) of the Business and Professions Code* (barring civil liability generally for damages caused by furnishing alcoholic beverages to obviously intoxicated persons), a cause of action may be brought by or on behalf of any person who has suffered injury or death against any person holding an alcoholic beverage license pursuant to *Section 23300 of the Business and Professions Code*, or any person required to be licensed under that section, or any person authorized by the federal government to sell alcoholic beverages on a military base or other federal enclave, who sells, furnishes, gives, or causes to be sold, furnished, or given away any alcoholic beverage, or any other person who sells, or causes to be sold, any alcoholic beverage, to any obviously intoxicated minor when the sale, furnishing, or giving of that beverage to the minor is the proximate cause of the personal injury or death sustained by that person (*Bus. & Prof. Code § 25602.1*; *see Chalup v. Aspen Mine Co. (1985) 175 Cal. App. 3d 973, 975-979, 221 Cal. Rptr. 97*).

[*OR*]

A. No Statutory Immunity When Furnishing Alcoholic Beverage to Person Suffering From Exceptional Physical or Mental Condition. An action may be brought for any resulting damages against a person who furnished an alcoholic beverage to another person knowing that because of an exceptional physical or mental condition the other person should not be served alcohol, when the person furnishing the beverage was or should have been aware of the risks involved in furnishing the beverage (*Cantor v. Anderson (1981) 126 Cal. App. 3d 124, 132, 178 Cal. Rptr. 540*).

[*Optional*] **B. "Obviously Intoxicated" Defined.** "Obvious intoxication" is defined by a person's appearance. Outward manifestations of obvious intoxication include incontinence, unkempt appearance, alcoholic breath, loud or boisterous conduct, bloodshot or glassy eyes, incoherent or slurred speech, flushed face, poor muscular coordination or unsteady walking, loss of balance, impaired judgment, and argumentative behavior (*Jones v. Toyota Motor Co. (1988) 198 Cal. App. 3d 364, 368, 370, 243 Cal. Rptr. 611*). These outward manifestations must be sufficient to cause a reasonable person with normal powers of observation to believe that the minor [or exceptionally disabled person] was intoxicated (*Schaffield v. Abboud (1993) 15 Cal. App. 4th 1133, 1140-1141, 19 Cal. Rptr. 2d 205*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for summary judgment by a defendant who has sold, furnished, or given alcoholic beverages to an underage person or an exceptionally disabled person in an action to recover for damages that were caused by the person who was sold, furnished, or given the beverage.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations setting out factual allegations required for the exceptions to statutory immunity to apply [*see Code Civ. Proc. § 437c*].

In an appropriate case, the points and authorities in this form may be submitted in opposition to a motion for summary judgment supported by the points and authorities in *§ 15A.21*.

[3] Discussion of Authorities

[a] Statutory Exception to Immunity for Selling, Furnishing, or Giving Away Alcoholic Beverages to Obviously Intoxicated Minors

Bus. & Prof. Code § 25602.1 provides that, notwithstanding *Bus. & Prof. Code § 25602(b)* (barring civil liability for damages caused by furnishing alcoholic beverages to obviously intoxicated persons), a cause of action may be brought by or on behalf of any person who has suffered injury or death against any person licensed, or required to be licensed, pursuant to *Bus. & Prof. Code § 23300* (licensing of alcoholic beverage vendors), or any person authorized by the federal government to sell alcoholic beverages on a military base or other federal enclave, who sells, furnishes, gives, or causes to be sold, furnished, or given away any alcoholic beverage, or any other person who sells, or causes to be sold, any alcoholic beverage to any obviously intoxicated minor, when the furnishing, sale, or giving of that beverage to the minor is the proximate cause of the personal injury or death sustained by that person.

Former Civ. Code § 25 [*now see Fam. Code § 6500*] provides that minors are all persons under 18 years of age. In enacting former Civ. Code § 25 (*now see Fam. Code § 6500*), however, the legislature also adopted a statement of intent declaring that whenever the term "21 years of age" or any similar phrase regarding such age appears in any provision of law, it shall be deemed to mean 18 years of age, except for those provisions relating to the minimum age for the sale, purchase, or consumption of alcoholic beverages [Stats. 1971, ch. 1748, § 1].Bus. & Prof. Code § 25062.1 appears in that part of the Business and Professions Code which forbids liquor transactions to person less than 21 years of age. For these reasons, it appears that the term "minor" as used in *Bus. & Prof. Code § 25602.1* may refer to persons under 21 years of age rather than merely to persons under 18 years of age.

In ***Chalup v. Aspen Mine Co.*** *(1985) 175 Cal. App. 3d 973, 221 Cal. Rptr. 97* , plaintiff, an 18-year-old woman, became intoxicated while sitting at the bar in defendant restaurant. After leaving the restaurant she ran across the street against the traffic signal and was hit by a car, sustaining injuries. Plaintiff brought an action against defendant for negligence in serving her alcoholic beverages. The trial court granted summary judgment in favor of defendant. Plaintiff appealed.

The court of appeal reversed. The sole issue on appeal was whether a cause of action existed under *Bus. & Prof. Code § 25602.1* for a minor patron against a licensed purveyor of alcohol for injuries suffered by the minor as a proximate result of the sale of the alcoholic beverages to her while she was obviously intoxicated. The court carefully examined the legislative history and meaning of *Bus. & Prof. Code § 25602.1*, saying that the ordinary and usual meaning of its words would include minors in the absence of a statement excluding them, since "any person" means any person. Minors are among the persons allowed to sue under the *Bus. & Prof. Code § 25602.1* exception to the statutory immunity provided by *Bus. & Prof. Code § 25602(b)* (*175 Cal. App. 3d 973, 975-979*).

[b] No Statutory Immunity When Furnishing Alcoholic Beverage to Person Suffering From Exceptional Physical or Mental Condition

In ***Cantor v. Anderson*** *(1981) 126 Cal. App. 3d 124, 178 Cal. Rptr. 540* , plaintiff alleged that defendants, knowing of the resident's disability, served alcoholic beverages to one of the residents of the home for developmentally disabled persons maintained by plaintiff. As a result of consuming the beverages, the disabled resident fell into a seizure, lost consciousness, was rendered unable to control his actions and subsequently became violent, injuring plaintiff. Defendants interposed a general demurrer, which the trial court sustained without leave to amend.

The court of appeal reversed and directed the trial court to enter a new order sustaining the demurrer with leave to amend. Reviewing the history of liability of a person furnishing alcohol to another for damages caused by the person to whom alcohol had been furnished as a result of intoxication, the court cited a series of cases in which the Supreme Court had held that both a vendor and a social host who had furnished alcohol to an obviously intoxicated person could be held liable for any proximately caused damage. The court noted that the rule set forth in these cases was subsequently abrogated by the legislature. As the court noted, the legislature amended *Civ. Code § 1714* (providing that everyone is responsible for an injury occasioned to another by want of ordinary care or skill in managing his or her own property or person), on which the Supreme Court had relied when it imposed liability on the furnisher of alcoholic beverages, by adding to that section subsections (c) (social host who furnishes alcoholic beverages to guest not liable for damages suffered by either guest or any third person resulting from consumption of such beverages) and (b) (reinstating prior judicial interpretation of the section that it is the drinking of alcoholic beverages and not the serving of them which is the proximate cause of any injury resulting from intoxication). The court also noted that *Bus. & Prof. Code § 25602* (furnishing alcoholic beverage to an obviously intoxicated person by licensed vendor of such beverages as misdemeanor), on which the Supreme Court had relied when it imposed liability on persons who furnished alcohol in commercial settings, was similarly modified by the legislature [*see Bus. & Prof. Code § 25602(b), (c)*] (*126 Cal. App. 3d 124, 128*).

The court held that since the meaning of *Civ. Code § 1714(c)* is determined by the legislative intent declared in *Civ. Code § 1714(b)* to return to the original common law rule, that rule, as set forth by the Supreme Court in the case of *Cole v. Rush (1955) 45 Cal. 2d 345, 289 P.2d 450* , was the applicable rule in the present case (*126 Cal. App. 3d 124, 129*). However, the court also noted that returning to the *Cole* rule required returning to the limitations of that rule as well. Reviewing the *Cole* case, the court noted that the Supreme Court had addressed itself to the sale of alcoholic beverages to the ordinary person and had held only that the voluntary consumption of alcoholic beverages by a competent person contributed directly to any resulting injury, thus superseding any sale or gift of the beverage as proximate cause. The court cited several cases to show that the traditional common law rule did not affect liability for furnishing alcohol to a person unable to resist its consumption (*126 Cal. App. 3d 124, 130*).

The court further held that *Civ. Code § 1714* did not prevent the drinker's exceptional physical or mental condition from being deemed a concurrent proximate cause when the injuries complained of were a joint effect of the alcohol and the drinker's condition. Thus, the statutory abrogation of liability for the alcohol did not bar a claim based on liability for the injuries as a foreseeable and concurrent result of the exceptional condition (*126 Cal. App. 3d 124, 130-131*).

The court concluded that the complaint as written did not state a cause of action under the principles that it had set forth. However, the court stated that the addition of an allegation that the defendants not only knew of the drinker's condition when they served him an alcoholic beverage but also knew or should have known the effect which the beverage would have on the drinker by reason of his condition would cure the insufficiency of the complaint. Thus, the court heldthat the trial court's dismissal of the complaint without leave to amend was error (*126 Cal. App. 3d 124, 132*).

NOTE:

The decision by the Third Appellate District Court of Appeal in *Cantor v. Anderson (1981) 126 Cal. App. 3d 124, 130-131* , is in conflict with the position taken by the Fourth Appellate District Court of

Appeal in *Cardinal v. Santee Pita, Inc. (1991) 234 Cal. App. 3d 1676* [*see § 15A.21[3][f]*]. *Cardinal* held that, by providing a specific statutory exception to the immunity allowed a seller or furnisher of alcoholic beverages in cases in which alcoholic beverages are sold to an obviously intoxicated minor [*see Bus. & Prof. Code § 25602.1*], the legislature rejected even limited liability for those selling or furnishing such beverages to anyone other than obviously intoxicated minors [*see Cardinal v. Santee Pita, Inc. (1991) 234 Cal. App. 3d 1676, 1683, 286 Cal. Rptr. 275*]. *Cantor* has also been criticized by the Sixth Appellate District Court of Appeal [*Hepe v. Paknad (1988) 199 Cal. App. 3d 412, 418-419, 244 Cal. Rptr. 823* ; *see § 15A.21[4][a]*].

[c] "Obviously Intoxicated" Defined

Jones v. Toyota Motor Co. *(1988) 198 Cal. App. 3d 364, 243 Cal. Rptr. 611* , was an action for damages for injuries sustained by plaintiff when, as a passenger, he was seriously injured in a single vehicle collision, against a liquor licensee for having served alcohol to the allegedly obviously intoxicated minor driver [*see Bus. & Prof. Code § 25602.1*]. The jury returned a unanimous verdict for the defendant, and plaintiff appealed, contending that the jury instructions were prejudicially erroneous.

The court of appeal found one of the jury instructions to be erroneous, but held that error to be harmless under the facts of the case, and affirmed the judgment. In so holding, the court stated that "obvious intoxication" is defined by a person's appearance (*198 Cal. App. 3d 364, 368*]. The court held that the jury was properly instructed that it should consider several outward manifestations of obvious intoxication, which included the factors set forth in Paragraph B of § 15A.29[1] (*198 Cal. App. 3d 364, 370*].

In ***Schaffield v. Abboud*** *(1993) 15 Cal. App. 4th 1133, 19 Cal. Rptr. 2d 205* , an minor struck plaintiff's motor scooter with a car, injuring plaintiff. Plaintiff brought an action for damages against defendant on the ground that the latter has sold alcoholic beverages to the minor when his was obviously intoxicated. The jury returned a verdict for the defendant, and plaintiff appealed, contending that the trial court improperly instructed the jury that the minor was not obviously intoxicated unless he exhibited one or more signs of intoxication that were sufficient to cause a reasonable person to believe he was intoxicated.

The court of appeal held that these instructions were correct because the standard for determining obvious intoxication is measured by the observations of a reasonable person. Sellers are liable only if they do not perceive warning signs that a reasonable person would have perceived, or if they ignore warning signs that the did in fact perceive. Holding otherwise would impose strict liability on the seller (*15 Cal. App. 4th 1133, 1140-1141*).

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1-15a California Points & Authorities § 15A.24

§ 15A.24 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action Against Furnisher of Alcoholic Beverages to Recover for Injuries Caused by Intoxicated Person--Exceptions to Statutory Immunity [Bus. & Prof. Code § 25602(b); Civ. Code § 1714(c)]--Negligent Performance of Undertaking Resulting in Harm to Third Person

[1] FORM Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action Against Furnisher of Alcoholic Beverages to Recover for Injuries Caused by Intoxicated Person--Exceptions to Statutory Immunity [Bus. & Prof. Code § 25602(b); Civ. Code § 1714(c)]--Negligent Performance of an Undertaking Resulting in Harm to Third Person

[*Caption. See § 15A.23[1]*.]

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE THERE IS A TRIABLE ISSUE OF MATERIAL FACT REGARDING WHETHER DEFENDANT OWED PLAINTIFF A DUTY BASED ON DEFENDANT'S UNDERTAKING TO RENDER SERVICES TO ANOTHER THAT HE/SHE SHOULD HAVE RECOGNIZED AS NECESSARY FOR THE PROTECTION OF A THIRD PERSON. SUCH CONDUCT IS OUTSIDE THE SCOPE OF IMMUNITIES ALLOWED FURNISHERS OF ALCOHOLIC BEVERAGES.

A. Negligent Performance of Undertaking. One who undertakes, gratuitously or for consideration, to render services to another that he or she should recognize as necessary for the protection of a third person or his or her property, is subject to liability to the third person for physical harm resulting from his or her failure to exercise reasonable care to protect his or her undertaking if _____ [his or her failure to exercise reasonable care increases the risk of harm *or* he or she has undertaken to perform a duty owed by the other to the third person *or* the harm is suffered because of reliance of the other or the third person on the undertaking] (*Williams v. Saga Enters., Inc. (1990) 225 Cal. App. 3d 142, 151, 274 Cal. Rptr. 901*).

B. Conduct Outside Scope of Statutory Immunity. Although, under *Section 25602 of the Business and Professions Code* and *Section 1714 of the Civil Code*, a furnisher of alcoholic beverages has no duty to the public insofar as his or her patrons' consumption of alcohol affects those persons, a furnisher of alcoholic beverages may nonetheless be held liable under the principles expressed in *Section 324A of the Restatement (Second) of Torts* (*Williams v. Saga*

Enterprises., Inc. (1990) 225 Cal. App. 3d 142, 153-154).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion for summary judgment by a defendant who has undertaken to render a service to another, such as to a patron, to whom the defendant has sold, furnished, or given alcoholic beverages, and the circumstances were such that the defendant should have recognized that the services were necessary for the protection of a third person. Under these circumstances, the defendant assumes a "good Samaritan" role that takes the case out of the scope of the liability limitations in *Bus. & Prof. Code § 25602* and *Civ. Code § 1714* and places it within the parameters of *Restatement (Second) of Torts § 324A* [*see Williams v. Saga Enters., Inc. (1990) 225 Cal. App. 3d 142, 151, 274 Cal. Rptr. 901*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel would refer to facts in declarations tending to show that the defendant had undertaken to render a service to another which he or she should have recognized as necessary for the protection of a third person or his things.

For example, in *Williams v. Saga Enterprises, Inc.*, counsel presented a partial reporter's transcript from the criminal trial of the drunk driver who caused the plaintiff's injuries. The transcripts reflected the testimony of the defendant restaurant's manager to a custom that the accused had of giving his car keys to the bartender at the restaurant whenever he came to the establishment. From this evidence, the court concluded that the plaintiff submitted a triable issue of material fact regarding whether the defendant and its patron, the drunk driver, had an arrangement or agreement on the night of the accident to the effect that the keys would not be returned if the patron were under the influence of alcohol. Such an arrangement would permit liability under *Restatement (Second) of Torts § 324A* [*Williams v. Saga Enters., Inc. (1990) 225 Cal. App. 3d 142, 153, 274 Cal. Rptr. 901* ; *see § 15A.24[3][a]*].

In an appropriate case, these points and authorities may be submitted in opposition to the motion supported by the points and authorities in *§ 15A.21*.

[3] Discussion of Authorities

[a] Negligent Performance of Undertaking

Williams v. Saga Enters., Inc. *(1990) 225 Cal. App. 3d 142, 274 Cal. Rptr. 901* , involved an action for personal injuries stemming from an automobile accident in which the plaintiff alleged that his injuries resulted from the defendant's intoxication at the time of the accident. The complaint also named asa defendant the owner of a restaurant where the defendant driver had been drinking before the accident occurred. In discovery, plaintiff learned that employees of the defendant restaurant had received the defendant driver's car keys before serving him drinks and had returned the keys to him after the defendant driver became intoxicated. The plaintiff contended that the returning of the keys constituted negligent entrustment of the vehicle and rendered the defendant restaurant liable to the plaintiff. The defendant restaurant filed a motion for summary judgment, contending that it could not be charged with negligent entrustment, and that under *Bus. & Prof. Code § 25602* and *Civ. Code § 1714*, it could not be held liable for the

defendant driver's negligence while intoxicated. The trial court granted the summary judgment motion, and the plaintiff appealed.

The court of appeal reversed the judgment, and remanded the cause to the trial court with directions to vacate its order and conduct further proceedings. The court acknowledged that a tavern owner has no duty to the public insofar as his or her patrons' consumption of alcohol affects those persons. The court concluded, however, that testimony at the defendant driver's criminal trial by the defendant restaurant's manager, regarding a custom that the accused had of giving his car keys to the bartender at the restaurant whenever he came to the establishment, supported the inference that the defendant driver placed his keys with the defendant restaurant's bartenders to keep himself from driving while under the influence. Together, the court held that this evidence was sufficient to create a triable issue of material fact over whether the restaurant employees had assumed (and breached) a duty under *Restatement (Second) of Torts § 324A* (*225 Cal. App. 3d 142, 151*).

The defendant restaurant argued that since no special relationship exists between a tavern owner and its patrons, summary judgment was warranted. The court, however, cited *Williams v. State of California (1983) 34 Cal. 3d 18, 192 Cal. Rptr. 233, 664 P.2d 137* (which involved *Restatement (Second) of Torts § 323*, a companion section to *§ 324A*), for the proposition that even without any special relationship, *§ 324A* prevents such a judgment in light of the evidence of the undertaking by the restaurant employee (*225 Cal. App. 3d 142, 152*). The court did agree that the case did not involve negligent entrustment because the defendant restaurant did not own the vehicle driven by the defendant driver. This was of no value to the defendant restaurant, however, given the existence of an issue regarding *Restatement (Second) of Torts § 324A* (*225 Cal. App. 3d 142, 153*).

[b] Conduct Outside Scope of Statutory Immunity

The facts and procedural background of ***Williams v. Saga Enters., Inc.*** *(1990) 225 Cal. App. 3d 142, 274 Cal. Rptr. 901* , are discussed in *§ 15A.24[3][a]*. The court concurred with the plaintiff's assertion that a "good Samaritan" role adopted by a tavern owner's employees with respect to the tavern owner takes the case out of the scope of the liability limitations in *Bus. & Prof. Code § 25602* and *Civ. Code § 1714*. The court stated that by statute a tavern owner has no duty to the public insofar as his or her patrons' consumption of alcohol affects those persons. The tavern owner may, however, be held liable under the principles expressed in *§ 324A of the Restatement (Second) of Torts* (*225 Cal. App. 3d 142, 153-154*).

California Points & Authorities

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Volume 1 Chapters 1-19 WRITING LEGAL MEMORANDA AND BRIEFS; ABATEMENT AND SURVIVAL OF ACTIONS---to---AMENDED AND SUPPLEMENTAL PLEADINGS
CHAPTER 15A ALCOHOLIC BEVERAGES: CIVIL LIABILITY FOR FURNISHING
PART II. FORMS

1-15a California Points & Authorities § 15A.25

§ 15A.25 Opposing Contention That Furnisher of Alcoholic Beverages Not Liable for Injuries Caused by Intoxicated Person--Exceptions to Statutory Immunity [Bus. & Prof. Code § 25602(b); Civ. Code § 1714(c)]--Duty of Premises Owner or Possessor to Protect Patrons From Tortious Conduct of Third Parties

[1] FORM Opposing Contention That Furnisher of Alcoholic Beverages Not Liable for Injuries Caused by Intoxicated Person--Exceptions to Statutory Immunity [Bus. & Prof. Code § 25602(b); Civ. Code § 1714(c)]--Duty of Premises Owner or Possessor to Protect Patrons From Tortious Conduct of Third Parties

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS LIABLE FOR INJURIES CAUSED PLAINTIFF BY AN INTOXICATED THIRD PARTY BECAUSE DEFENDANT OWED PLAINTIFF A DUTY AS AN [OWNER *or* POSSESSOR] OF PREMISES TO PROTECT PLAINTIFF FROM THE TORTIOUS CONDUCT OF THIRD PARTIES ON THOSE PREMISES AND THEREFORE DEFENDANT'S LIABILITY IS NOT PRECLUDED BY THE STATUTORY IMMUNITY PROVIDED TO FURNISHERS OF ALCOHOLIC BEVERAGES.

A. Duty to Protect Against Wrongful Conduct of Third Persons. An owner or possessor of premises, including a business proprietor, owes a duty to invitees, including patrons, to take affirmative action to protect them against the wrongful conduct of third persons that threatens their safety if that conduct and its accompanying harm are reasonably foreseeable (*Frances T. v. Village Green Owners Ass'n (1986) 42 Cal. 3d 490, 499-503, 229 Cal. Rptr. 456, 723 P.2d 573* ; *Southland Corp. v. Superior Court (1988) 203 Cal. App. 3d 656, 664, 250 Cal. Rptr. 57*).

B. Statutory Immunity Inapplicable. Although, under *Business & Professions Code Section 25602(b)* and *Civil Code Section 1714(c)*, the consumption rather than the serving of alcoholic beverages is the proximate cause of injuries inflicted on another by an intoxicated person and a furnisher of alcoholic beverages has no duty to the public, insofar as the consumption of alcohol by his/her/its patrons affects others, a furnisher may nonetheless be liable to a patron for failure to maintain a safe premises because he/she/it has permitted his/her/its premises to be used as an arena for aggressive tortfeasors (*Cantwell v. Peppermill, Inc. (1994) 25 Cal. App. 4th 1797, 1802-1803, 31 Cal. Rptr. 2d 246*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a defendant who has furnished alcoholic beverages to a third person is not liable under *Bus. & Prof. Code § 25602(b)* and *Civ. Code § 1714(c)* for the injuries suffered by plaintiff because of that third person's tortious conduct. The basis for opposition is that the furnisher, as a premises owner or possessor, has a duty to maintain a safe premises and to protect patrons from the reasonably foreseeable wrongful acts of third persons, and that this duty is outside the scope of the immunity from liability afforded by those statutes.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel raises the issue of the liability of a furnisher of alcoholic beverages to patrons injured by the tortious acts of a third person. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing the wrongful conduct of the third party, the harm it caused, and why that conduct was reasonably foreseeable to an extent that justifies imposing on defendant a duty to prevent that harm.

If appropriate, these points and authorities may be submitted in opposition to the points and authorities in *§§ 15A.21* and *15A.22*.

[b] Related Pleading and Practice Forms

For forms and discussion regarding civil liability based on acts of intoxicated persons, see California Forms of Pleading and Practice, Ch. 19, *Alcoholic Beverages: Civil Liability* (Matthew Bender).

[c] Related Points and Authorities

For forms and discussion relating to the liability of a premises owner for the tortious acts of third parties, see Ch. 178, *Premises Liability* .

[3] Discussion of Authorities

[a] Duty to Protect Against Wrongful Conduct of Third Persons

In ***Frances T. v. Village Green Owners Ass'n*** *(1986) 42 Cal. 3d 490, 229 Cal. Rptr. 456, 723 P.2d 573* , plaintiff was robbed and raped in her condominium by an assailant who entered her dwelling under the cover of darkness. Plaintiff brought a negligence action against the condominium association for negligently failing to provide adequate lighting in the common areas that it controlled and for wrongfully ordering her to remove the additional lighting she had provided on her own initiative. The trial court sustained defendant's demurrer to plaintiff's cause of action.

The Supreme Court reversed. The Court held that defendant was under the same duty to maintain the common areas as that of a landlord (*42 Cal. 3d 490, 499-501*). Under this standard, defendant was potentially liable for failure to take steps to protect plaintiff from the criminal acts of third parties. Plaintiff hadalleged in her cause of action that defendant knew that the lighting around her unit was inadequate and also knew that a number of crimes had been committed in the area as a result of poor lighting. The Court held that these allegations, if proven, would support a finding of negligence, and that the negligence was a legal cause of plaintiff's injuries (*42 Cal. 3d 490, 503*).

Southland Corp. v. Superior Court *(1988) 203 Cal. App. 3d 656, 250 Cal. Rptr. 57* , was a mandate proceeding arising out of an action for damages against the owners of a convenience store by a customer who, after leaving the defendants' premises, was criminally assaulted while walking to his car. The car was parked on a vacant, unpaved lot

adjacent to the store; defendants neither owned nor leased the lot but knew that its patrons used the lot for parking. The trial court denied defendants' motion for summary judgment, and defendants petitioned the court of appeal for a writ of mandate to compel the trial court to grant their motion.

In denying a peremptory writ and discharging the alternative writ on the ground that there were triable issues of fact regarding whether defendants controlled the adjacent lot and whether harm to plaintiff was foreseeable, the court of appeal held that a premises owner or possessor who opens those premises to the public for business purposes is subject to liability to members of the public for physical harm caused them on the premises by the accidental, negligent, or intentionally harmful acts of third persons and by the failure of the premises owner or possessor to exercise reasonable care either to discover that these acts are occurring or are likely to occur, to give a warning adequate to enable the visitors to avoid the harm, or to protect them against it in some other way. Liability is normally imposed if a premises owner or possessor has reasonable cause to anticipate the misconduct of third persons (*203 Cal. App. 3d 656, 663*). The court explained that premise owners or possessors are not the insurers of the safety of persons on their premises, but that they do have a duty to take reasonable steps to protect those persons from foreseeable injury, even to the extent of controlling the conduct of third parties (*203 Cal. App. 3d 656, 668*).

[b] Statutory Immunity Inapplicable

In ***Cantwell v. Peppermill, Inc.*** *(1994) 25 Cal. App. 4th 1797, 31 Cal. Rptr. 2d 246* , plaintiffs were a married couple who were dining at a restaurant, bar, and lounge (at which alcoholic beverages were served) operated by defendants. Another patron who had been furnished alcoholic beverages by defendants assaulted and stabbed the husband. Plaintiffs' original complaint for personal injury and loss of consortium alleged two causes of action: liability for furnishing alcohol to the assailant that caused his aggressive behavior; and premises liability for failing to protect patrons against assaults. Defendants demurred to the complaint in reliance on *Bus. & Prof. Code § 25602(b)*, which provides that a furnisher of alcoholic beverages to intoxicated persons is not civilly liable to any injured person for injuries resulting from the intoxication of the consumer of the alcoholic beverages, and the trial court gave plaintiffs leave to file an amended complaint. Plaintiffs' amended complaint omitted the first cause of action, alleging that defendants had known for three years about assaults committed on the premises, but had failed to warn or otherwise protect its patrons. The trial court sustained defendants' demurrer to the amended complaint and granted judgment of dismissal, and plaintiffs appealed.

The court of appeal reversed and remanded, holding that *Bus. & Prof. Code § 25602* does not preclude all actions against innkeepers merely because they furnish alcohol. A proprietor has a duty of care to protect patrons from the reasonably foreseeable criminal or tortious conduct of third persons, whether or not these third persons purchased or consumed alcohol on the proprietor's premises (*25 Cal. App. 4th 1797, 1801*). The court noted that a license to sell alcoholic beverages does not confer a grant of immunity to an innkeeper who permits the premises to be used as an arena for aggressive tortfeasors. The court held that the purpose of *Bus. & Prof. Code § 25602* was to immunize defendants from liability to plaintiffs injured by the intoxicated drivers to whom defendants had furnished alcoholic beverages, not to immunize innkeepers who encourage or permit their patrons to become so drunk and belligerent that they assault other patrons (*25 Cal. App. 4th 1797, 1802-1803*).

California Points & Authorities

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Volume 1 Chapters 1-19 WRITING LEGAL MEMORANDA AND BRIEFS; ABATEMENT AND SURVIVAL OF ACTIONS---to---AMENDED AND SUPPLEMENTAL PLEADINGS
CHAPTER 16 AMENDED AND SUPPLEMENTAL PLEADINGS

1-16 California Points & Authorities 16.syn

§ 16.syn Synopsis to Chapter 16: AMENDED AND SUPPLEMENTAL PLEADINGS

§ 16.01 Scope of Chapter

§ 16.02 Governing Statutes

§ 16.03 Distinction Between Amended Pleadings and Amendments to Pleadings

§ 16.04 Procedure for Amending Pleadings

§ 16.05 Counter Motion to Reopen Case After Amendment

§ 16.06 Forcible Entry and Detainer

§ 16.07 Use of Noticed Motion and memorandum

§ 16.08 Actions Involving Child Support

§ 16.09 Page Limits on Memorandum

§ 16.10 Related Pleadings and Practice Forms

§ 16.11 Related Points and Authorities

§§ 16.12-16.29 [Reserved]

§ 16.30 Supporting Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[c] Limitations on General Rule of Liberality

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Statutory Authority

[b] Liberal Allowance of Amendment

[c] Denial of Leave to Amend Rarely Justified

[d] Timely Motion to Amend to Assert Meritorious Claim or Defense

[e] Amendment at Any Time Before Judgment

[f] Postponement of Trial Appropriate

[g] Amendment in Fast Track Proceedings

[4] Additional Authorities

[a] Liberal Allowance of Amendment

[b] Denial of Leave to Amend Rarely Justified

[c] Timely Motion to Amend to Assert Meritorious Claim or Defense

§ 16.31 Supporting Motion for Leave to File Amended Pleading or Amendment to Pleading to Conform to Proof [Code Civ. Proc. §§ 469, 470, 473(a), 576]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Failure to Amend to Conform to Proof

[c] Opposing Points and Authorities

[d] Limitation on Amendment to Conform to Proof

[e] Notice of Motion

[f] Filing Formal Amendment

[3] Discussion of Authorities

[a] Statutory Authority

[b] Discretion of Court

[c] Liberal Allowance of Amendment

[d] Amendment at Any Stage of Trial

[e] Notice Not Required

[4] Additional Authorities

[a] Discretion of Court

[b] Liberal Allowance of Amendment

[c] Amendment at Any Stage of Trial

§ 16.32 Supporting Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Before Court Grants Judgment on Pleadings

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Amendment of Defective Pleading Before Judgment on the Pleadings

[4] Additional Authorities

[a] Amendment of Defective Pleading Before Judgment on the Pleadings

§ 16.33 Supporting Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Correction of Mistaken or Inadvertent Statement

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Amendment to Correct Error Caused by Mistake or Inadvertence

[b] Amendment to Omit Allegation

[4] Additional Authorities

[a] Amendment to Correct Error Caused by Mistake or Inadvertence

§ 16.34 Supporting Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--To More Fully or Accurately State Cause of Action or Defense

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Amendment to State Cause of Action or Defense More Fully or Accurately

[b] Amendment to State Cause of Action or Defense More Fully or Accurately

[4] Additional Authorities

[a] Amendment to State Cause of Action or Defense More Fully or Accurately

§ 16.35 Supporting Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Complaint--To Correct Failure to State Cause of Action

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[3] Discussion of Authorities

[a] Alleging Essential Element of Cause of Action

[4] Additional Authorities

[a] Alleging Essential Element of Cause of Action

§ 16.36 Supporting Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Complaint--Correction of Technical Defect

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[3] Discussion of Authorities

[a] Amendment to Cure Technical Defect

[4] Additional Authorities

[a] Amendment to Cure Technical Defect

§ 16.37 Supporting Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Complaint--New Theory of Recovery After Limitations Period Has Run

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[i] Related Uses

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Relation Back of Amendment Based on Same General Set of Facts

[4] Additional Authorities

[a] Relation Back of Amendment Based on Same General Set of Facts

§ 16.38 Supporting Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Complaint--Change in Relief Sought

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Changing Relief Sought

[b] Change From Law to Equity

[4] Additional Authorities

[a] Changing Relief Sought

§ 16.39 Supporting Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Complaint--Increased Demand for Damages

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Amendment to Conform to Proof Increasing Damages

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Increase in Amount of Damages

[4] Additional Authorities

[a] Increase in Amount of Damages

§ 16.40 Supporting Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Complaint--Addition of Party Defendant or Correction of Misnomer of Defendant

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memorandum

[c] Notice of Motion

[d] Prior Dismissal Does Not Bar Reinstating Defendant as Doe Defendant

[e] Related Pleading and Practice Forms

[f] Related Points and Authorities

[3] Discussion of Authorities

[a] Amendment to Add Party or Correct Misnomer

[b] Correction of Misnomer After Statute of Limitations Has Run

[c] Suit Brought Against Wrong Defendant Because of Similarly Named Dual Entities

[d] Prior Dismissal Without Prejudice Does Not Bar Amendment Reinstating Defendant

[4] Additional Authorities

[a] Correction of Misnomer After Statute of Limitations Has Run

[b] Suit Brought Against Wrong Defendant Due to Similarly Named Dual Entities

§ 16.41 Supporting Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Complaint--Addition of Party Plaintiff

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Addition of Party Plaintiff

[b] Addition of Party Plaintiff

[c] Addition of Plaintiff's Solely-Owned Professional Corporation

[4] Additional Authorities

[a] Addition of Party Plaintiff

§ 16.42 Supporting Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Complaint--Substitution of Plaintiffs or Change in Plaintiff's Capacity to Establish Standing to Sue

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Amendment to Change Plaintiff's Capacity

[b] Amendment to Bring In Real Party In Interest as Plaintiff

[c] Amendment to Correct Mistake In Plaintiff's Name

[4] Additional Authorities

[a] Amendment to Bring In Real Party in Interest as Plaintiff

[b] Amendment to Correct Mistake in Plaintiff's Name

§ 16.43 Supporting Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Answer--Particular Liberality in Allowing Amendment of Answers

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Liberal Amendment of Answers

[4] Additional Authorities

[a] Liberal Amendment of Answers

§ 16.44 Supporting Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Answer--To Assert New Defense

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Amendment to State New Defense

[b] Proposed Defense Is Novel Question

[4] Additional Authorities

[a] Amendment to State New Defense

[b] Proposed Defense Is Novel Question

§ 16.45 Opposing Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Amendment Only in Furtherance of Justice

[b] Showing to Justify Exercise of Discretion

[4] Additional Authorities

[a] Showing to Justify Exercise of Discretion

§ 16.46 Opposing Motion for Leave to File Amended Pleading or Amendment to Pleading to Conform to Proof [Code Civ. Proc. §§ 469, 470, 473(a), 576]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Failure of Proof

[3] Discussion of Authorities

[a] Introduction of New Issue

[b] Prejudice to Adverse Party

[c] Lack of Evidence

[d] Evidence Objected to

[e] Based on Evidence Relating to Pleaded Issue

[f] Amendment on Appeal is Not Permitted if the Trial Court Sustains a Demurrer With Leave to Amend and the Plaintiff Elects Not to Amend the Pleading

[4] Additional Authorities

[a] Introduction of New Issue

[b] Prejudice to Adverse Party

[c] Lack of Evidence

§ 16.47 Opposing Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Failure to Present Copy of Amendment

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Copy of Amendment

[4] Additional Authorities

[a] Copy of Amendment

§ 16.48 Opposing Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473, 576]--Unwarranted Delay in Presenting Amendment

[1] FORM

[2] Comments

[a] Use of Form

[b] Lack of Diligence Unavailable as Grounds Early in Proceedings

[3] Discussion of Authorities

[a] Unwarranted Delay as Grounds for Denial

[b] Lack of Due Diligence

[c] New Issue Requiring Further Investigation or Discovery

[d] Motion on Eve of Trial

[4] Additional Authorities

[a] Unwarranted Delay as Grounds for Denial

[b] New Issues Requiring Further Investigation or Discovery

§ 16.49 Opposing Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Failure to Correct Defect

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Failure to Correct Defect

§ 16.50 Opposing Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Unexplained Omission of Allegation Fatal to Pleading

[1] FORM

[2] Comments

[a] Use of Form

[b] Purpose of Rule

[3] Discussion of Authorities

[a] Unexplained Omissions

[b] Answers

[c] Unverified Pleadings

[4] Additional Authorities

[a] Unexplained Omissions

[b] Unverified Pleadings

§ 16.51 Opposing Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§

473(a), 576]--Contradiction of Admission in Original Pleading

[1] FORM

[2] Comments

[a] Use of Form

[b] Mistake or Inadvertence

[3] Discussion of Authorities

[a] Contradictory Amendment

[4] Additional Authorities

[a] Contradictory Amendment

§ 16.52 Opposing Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Complaint--Proposed Amendment States No Ground for Relief

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[3] Discussion of Authorities

[a] No Amendment if No Relief Possible

[4] Additional Authorities

[a] No Amendment if No Relief Possible

§ 16.53 Opposing Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Complaint--Entirely New Cause of Action or New Party Plaintiff After Statute of Limitations Has Run

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[3] Discussion of Authorities

[a] No Amendment to State Entirely New Cause of Action Barred by Statute of Limitations

[b] New Party Enforcing Independent Right

[c] Different Instrumentality

[4] Additional Authorities

[a] No Amendment to State Entirely New Cause of Action Barred by Statute of Limitations

[b] New Party Enforcing Independent Right

§ 16.54 Opposing Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Complaint--Addition of Party Defendant After Statute of Limitations Has Run

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] No Amendment to Add New Party After Limitations Period Has Run

[b] Amendment to Correct Characterization of Party's Capacity

[c] Amendment to Deficient Initial Complaint For Purposes of Relation Back Doctrine

[4] Additional Authorities

[a] No Amendment to Add New Party After Limitations Period Has Run

§ 16.55 Opposing Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Answer--Inequitable Defense

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Inequitable Defense

§§ 16.56-16.69 [Reserved]

§ 16.70 Supporting Motion for Leave to File Supplemental Complaint [Code Civ. Proc. § 464(a)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Discretion of Court

[b] Liberal Allowance of Supplemental Pleadings

§ 16.71 Supporting Motion for Leave to File Supplemental Complaint [Code Civ. Proc. § 464(a)]--To Recover Additional Relief Based on Same Issues

[1] FORM

[2] Comments

[a] Use of Form

[b] Award of Additional Relief Without Supplemental Complaint

[3] Discussion of Authorities

[a] Additional Relief Based on Same Issues

[b] Installments Accruing After Original Complaint

[c] After Appeal

§ 16.72 Supporting Motion for Leave to File Supplemental Complaint [Code Civ. Proc. § 464(a)]--Seeking Different Relief

[1] FORM

[2] Comments

[a] Use of Form

[b] Supplemental Pleading Not Necessary in Equity

[3] Discussion of Authorities

[a] Change in Relief Sought

§ 16.73 Supporting Motion for Leave to File Supplemental Complaint [Code Civ. Proc. § 464(a)]--Substitute Personal Representative for Defendant in Pending Action [Code Civ. Proc. § 377.41]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Substitution of Personal Representative

§ 16.74 Supporting Motion for Leave to File Supplemental Answer [Code Civ. Proc. § 464(a)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Occurrences Material to Defense

§ 16.75 Supporting Motion for Leave to File Supplemental Answer [Code Civ. Proc. § 464(a)]--Defense Arising After Filing of Original Answer

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Assertion of New Defense

[b] Discharge in Bankruptcy

[c] Res Judicata

[4] Additional Authorities

[a] Res Judicata

§ 16.76 Opposing Motion for Leave to File Supplemental Pleading [Code Civ. Proc. § 464(a)]--Matters Not Occurring Between Original Pleading and Judgment

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Matters Occurring Before Original Pleading or After Judgment

[4] Additional Authorities

[a] Matters Occurring Before Original Pleading or After Judgment

§ 16.77 Opposing Motion for Leave to File Supplemental Complaint [Code Civ. Proc. § 464(a)]--Not in Furtherance of or Consistent With Original Action

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Furtherance of and Consistency With Original Action

[4] Additional Authorities

[a] Furtherance of and Consistency With Original Action

§ 16.78 Opposing Motion for Leave to File Supplemental Complaint [Code Civ. Proc. § 464(a)]--No Cause of Action When Original Complaint Filed

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] No Cause of Action When Original Complaint Filed

§ 16.79 Opposing Motion for Leave to File Supplemental Complaint [Code Civ. Proc. § 464(a)]--Introducing New Cause of Action

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] New Cause of Action

[4] Additional Authorities

[a] New Cause of Action

§ 16.80 Opposing Motion for Leave to File Supplemental Answer [Code Civ. Proc. § 464(a)]--Insufficient to Assert Defense

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] No Defense Stated

[4] Additional Authorities

[a] No Defense Stated

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1-16 California Points & Authorities § 16.01

§ 16.01 Scope of Chapter

This part contains memoranda of points and authorities relating to amended pleadings. It includes general forms for use in supporting [*see § 16.30*] and opposing [*see § 16.45*] a motion for leave to file an amended pleading. Also included are general forms for use in supporting [*see § 16.31*] and opposing [*see § 16.46*] a motion for leave to amend to conform to proof.

In addition to the general forms, forms relating to specific grounds for granting or denying a motion for leave to amend are included in this part. These forms should be incorporated in the general forms as appropriate. Included are forms relating to specific grounds in support of a motion for leave to amend that may apply to any type of pleading [*see §§ 16.32 -16.34*], forms that apply to complaints [*see §§ 16.35 -16.42*], and forms that apply to answers [*see §§ 16.43, 16.44*].

This part also contains forms relating to specific grounds in opposition to a motion for leave to amend that may be applicable to any type of pleading [*see §§ 16.47 -16.51*], that apply to complaints [*see §§ 16.52 -16.54*], and that apply to answers [*see § 16.55*].

This part contains memoranda of points and authorities relating to motions for leave to file supplemental pleadings. It includes:

- General forms for use in supporting a motion for leave to file a supplemental complaint [*see § 16.70*] or answer [*see § 16.74*].

- Forms designed to be combined with the general forms and presenting specific grounds for granting a motion for leave to file a supplemental complaint [*see §§ 16.71, 16.72*] or answer [*see § 16.75*].

- A form supporting a motion to file a supplemental complaint to substitute a personal representative for a defendant who dies pending the action [*see § 16.73*].

- Forms for use in opposing a motion for leave to file a supplemental complaint [*see §§ 16.77 -16.79*], answer [*see § 16.80*], or either type of supplemental pleading [*see § 16.76*].

Provisions relating to amendment of pleadings and supplemental pleadings in particular proceedings, such as *Code Civ. Proc. §§ 1173* (forcible entry and detainer) and *1250.340* (eminent domain) are not included. Also excluded are amendments under *Code Civ. Proc. § 474* to designate the true name of fictitiously named defendants. For forms of points and authorities related to proceedings involving fictitious defendants, see Ch. 104, *Fictitiously Named (DOES)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsConforming Pleadings to EvidenceCivil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of CourtCivil ProcedurePleading & PracticePleadingsAmended PleadingsRelation BackCivil ProcedurePleading & PracticePleadingsSupplemental Pleadings

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1-16 California Points & Authorities § 16.02

§ 16.02 Governing Statutes

Generally, amendment of pleadings is governed by *Code Civ. Proc. §§ 469-475, 576*, and *Cal. Rules of Ct., Rule 3.1324*.

Supplemental pleadings in general are governed by *Code Civ. Proc. § 464*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsConforming Pleadings to EvidenceCivil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of CourtCivil ProcedurePleading & PracticePleadingsAmended PleadingsRelation BackCivil ProcedurePleading & PracticePleadingsSupplemental Pleadings

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1-16 California Points & Authorities § 16.03

§ 16.03 Distinction Between Amended Pleadings and Amendments to Pleadings

Amended pleadings and amendments to pleadings set forth facts occurring before the action was begun, while the purpose of supplemental pleadings is to allege material facts occurring after the former complaint or answer was filed [*compare Code Civ. Proc. § 464* (supplemental pleadings) *with Cohen v. Superior Court (1966) 244 Cal. App. 2d 650, 657, 53 Cal. Rptr. 378* (amended pleadings and amendments to pleadings)].

An amended pleading is a complete new pleading that totally replaces the prior pleading of the party who files it, as distinguished from an amendment to a pleading which alters only part of the prior pleading. In either case, the subject of the amendment relates to facts that occurred before the action was instituted [*Cohen v. Superior Court (1966) 244 Cal. App. 2d 650, 657, 53 Cal. Rptr. 378*]. The forms of memoranda in this part may be used in support of or in opposition to motions for leave to file either amended pleadings or amendments to pleadings.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsConforming Pleadings to EvidenceCivil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of CourtCivil ProcedurePleading & PracticePleadingsAmended PleadingsRelation BackCivil ProcedurePleading & PracticePleadingsSupplemental Pleadings

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1-16 California Points & Authorities § 16.04

§ 16.04 Procedure for Amending Pleadings

Without moving for leave of court, a party may amend any pleading once as a matter of course before the answer or demurrer is filed, or after demurrer and before the trial of the issue of law on the demurrer. Thus, a plaintiff has a right to amend his or her pleading at any time before a responsive pleading is filed and even after a responsive pleading is filed up to the time of the hearing on the demurrer, if applicable [*Barton v. Khan (2007) 157 Cal. App. 4th 1216, 1222, 69 Cal. Rptr. 3d 238*]. The amended pleading is merely filed and a copy served on the adverse party [*Code Civ. Proc. § 472*].

Otherwise, leave of court is required in order to file an amended pleading. The court may, in furtherance of justice and on any terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect [*Code Civ. Proc. § 473(a)*]. No notice requirement is imposed by *Code Civ. Proc. § 473* for such a motion. Such amendments may add new parties to the action [*National Secretarial Service, Inc. v. Froehlich (1989) 210 Cal. App. 3d 510, 519, 258 Cal. Rptr. 506*].

Once a judgment has been rendered, a pleading may not be amended unless the judgment is first vacated [*see Issa v. Alzammar (1995) 44 Cal. Rptr. 2d 617*].

The court may likewise, in its discretion, after notice to the adverse party, allow, on such terms as may be just, an amendment to any pleading or proceeding in other particulars [*Code Civ. Proc. §§ 473(a), 576*]. Although *Code Civ. Proc. § 576* does not impose any notice requirement, the procedures for amendment under *Code Civ. Proc. § 473(a)* should be followed because *Code Civ. Proc. § 576* was apparently enacted merely to clarify the law so as to ensure that amendment of pretrial orders would be subject to the same principles as amendment of pleadings [*see Gonzales v. Brennan (1965) 238 Cal. App. 2d 69, 74-75, 47 Cal. Rptr. 501*].

A memorandum must accompany the notice of motion for leave to file an amended pleading. The court may construe absence of the memorandum as an admission that the motion is not meritorious and as cause for its denial [*Cal. Rules of Ct., Rule 3.1113(a)*].

A motion to amend a pleading before trial must include a copy of the proposed amendment or amended pleading, which must be serially numbered to differentiate it from previous pleadings or amendments; it must state what allegations in the previous pleading are proposed to be deleted, if any, and where, by page, paragraph, and line number, the deleted allegations are located, and it must state what allegations are proposed to be added to the previous pleading, if any, and where, by page, paragraph, and line number, the additional allegations are located [Cal. Rules of Ct., Rule 3.1324(a)(1)-(3)]. The motion must be accompanied by a supporting declaration that specifies: the effect of the amendment; why the amendment is necessary and proper; when the facts giving rise to the amended allegations were discovered; and the reasons why the request for amendment was not made earlier [*Cal. Rules of Ct., Rule 3.1324(b)(1)-(4)*]. Local Court Rules governing motions to file amended pleadings are null and void as they are preempted by the California Rules of Court [*Cal. Rules of Ct., Rule 3.20(a)*]. For forms of declarations in support of a motion for leave to file an amended pleading, see California Forms of Pleading and Practice, Ch. 21, *Amended and Supplemental Pleading* (Matthew Bender).

A motion for leave to amend and, therefore, a memorandum in support of the motion are not necessary in order to obtain leave to amend a pleading after a demurrer to it is sustained because leave to amend within 10 days is deemed granted when the demurrer is ruled on, unless the court orders otherwise [*Cal. Rules of Ct., Rules 3.1100, 3.1320(g)*; *see also Code Civ. Proc. § 472a*].

If a complaint or cross complaint is amended, a copy of the amendment or amended complaint or cross complaint must be filed and served on the defendants or cross defendants affected by it [*Code Civ. Proc. § 471.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProceduresPleading & PracticePleadingsAmended PleadingsLeave of CourtCivil ProceduresPleading & PracticePleadingsAnswersCivil ProceduresPleading & PracticePleadingsSupplemental Pleadings

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1-16 California Points & Authorities § 16.05

§ 16.05 Counter Motion to Reopen Case After Amendment

If the adverse party is denied the opportunity to present material evidence on any issue due to an amendment to conform to proof introducing a new issue, the adverse party should apply to the court to reopen the case so that the evidence may be introduced [*Reidy v. Collins (1933) 134 Cal. App. 713, 722-723, 26 P.2d 712* ; *Hedstrom v. Union Trust Co. (1908) 7 Cal. App. 278, 283, 94 P. 386* ; *see also Simone v. McKee (1956) 142 Cal. App. 2d 307, 314, 298 P.2d 667*]. On applying to reopen the case, it must be shown that the adverse party was misled or prevented from introducing evidence to rebut the evidence on which the amendment was based and that, on reopening, he or she will be able to introduce evidence tending to overcome that evidence [*see Hedstrom v. Union Trust Co. (1908) 7 Cal. App. 278, 283, 94 P 386*]. However, it has been held that a party was prejudiced in presenting her case by an amendment introducing a new issue, contributory negligence, when plaintiff reasonably declined the opportunity to reopen to avoid unduly highlighting the issue [*Brautigam v. Brooks (1964) 227 Cal. App. 2d 547, 560, 38 Cal. Rptr. 784*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProceduresPleading & PracticePleadingsAmended PleadingsLeave of CourtCivil ProceduresPleading & PracticePleadingsSupplemental Pleadings

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1-16 California Points & Authorities § 16.06

§ 16.06 Forcible Entry and Detainer

When on the trial of any proceeding under *Code Civ. Proc. §§ 1159-1179a* (forcible entry and detainer), it appears from the evidence that the defendant has been guilty of either a forcible entry or forcible or unlawful detainer other than the offense charged in the complaint, the judge must order that the complaint be forthwith amended to conform to the proof. The amendment must be made without any imposition of terms, and no continuance is to be permitted on account of the amendment unless the defendant shows by affidavit, good cause therefor to the satisfaction of the court [*Code Civ. Proc. § 1173*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProceduresPleading & PracticePleadingsAmended PleadingsLeave of CourtCivil ProceduresPleading & PracticePleadingsSupplemental PleadingsReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & DetainerReal Property LawTitle QualityAdverse Claim ActionsUnlawful Detainer

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1-16 California Points & Authorities § 16.07

§ 16.07 Use of Noticed Motion and memorandum

A plaintiff or defendant may be allowed to make a supplemental complaint or answer on motion [*Code Civ. Proc. § 464*]. The Code of Civil Procedure does not require the motion to be noticed, but it has been suggested that a noticed motion should be used in all but "exceptional cases" [*see* California Civil Procedure Before Trial, Vol. 1, § 23.17 (Cal. CEB 3rd ed.)]. If counsel proceeds by noticed motion, a memorandum must be filed with the notice of motion [*Cal. Rules of Ct., Rules 3.1113(a)*].

Counsel proceeding ex parte might wish to submit a supporting memorandum as well. Although it is not required, it provides a procedure for bringing authorities and argument before the judge in case he or she has doubts as to granting the motion.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of CourtCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsSupplemental Pleadings

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1-16 California Points & Authorities § 16.08

§ 16.08 Actions Involving Child Support

In actions involving child support, a party may file a supplemental complaint to establish paternity or support for another child of the parents of the child whose paternity and support are already in issue. The supplemental complaint may be filed without leave of court [*Code Civ. Proc. § 464(b)*; *see Code Civ. Proc. § 464(c)* (amended or supplemental summons)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsSupplemental PleadingsFamily LawChild SupportGeneral Overview

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1-16 California Points & Authorities § 16.09

§ 16.09 Page Limits on Memorandum

Generally, a memorandum must not exceed 15 pages in length, or, in the case of a motion for summary judgment or summary adjudication, 20 pages in length. A reply or closing memorandum may not exceed 10 pages in length [*see Cal. Rules of Ct., Rule 3.1113(d)*]. Any party desiring to file a longer memorandum must obtain leave of court [*see Cal. Rules of Ct., Rule 3.1113(e)*]. For further discussion of the page limitations under *Cal. Rules of Ct., Rule 3.1113*, and of other basic format requirements of memoranda see *Ch. 1, Writing Legal Memoranda and Briefs, § 1.05*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsSupplemental PleadingsCivil ProcedureSummary JudgmentSupporting MaterialsMemoranda of Law

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1-16 California Points & Authorities § 16.10

§ 16.10 Related Pleadings and Practice Forms

For a discussion and forms relating to amendment of pleadings, see California Forms of Pleading and Practice, Ch. 21, *Amended and Supplemental Pleadings* (Matthew Bender).

For a discussion and forms relating to amendment of complaints to increase the damages sought, see California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender).

For a discussion and forms relating to amendment of prayers, see California Forms of Pleading and Practice, Ch. 420, *Prayers* (Matthew Bender).

For additional discussion and forms relating to bringing a new party into an action, see California Forms of Pleading and Practice, Ch. 395, *Parties* (Matthew Bender).

For discussion relating to amendment of pleadings after the statute of limitations has run, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* (Matthew Bender).

For a discussion of continuances when a pleading is amended, and forms relating to continuances generally, see California Forms of Pleading and Practice, Ch. 136, *Continuances* (Matthew Bender).

For a discussion and forms relating to amendment of pretrial orders, see California Forms of Pleading and Practice, Ch. 425, *Pretrial Proceedings* (Matthew Bender).

For discussion and forms relating to supplemental pleadings generally, see California Forms of Pleading and Practice, Ch. 21, *Amended and Supplemental Pleadings* (Matthew Bender).

For a discussion of amending and supplementing pleadings in eminent domain proceedings, see California Forms of Pleading and Practice, Ch. 247, *Eminent Domain* (Matthew Bender).

For discussion and forms relating to supplemental pleadings for use in particular cases, see the following chapters in California Forms of Pleading and Practice (Matthew Bender):

- Ch. 226, *Dissolution of Marriage: Attorney's Fees* .
- Ch. 122, *Community Property* .
- Ch. 440, *Probate: Is Probate Necessary?* , et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsSupplemental PleadingsCivil ProcedureRemediesDamagesGeneral Overview

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1-16 California Points & Authorities § 16.11

§ 16.11 Related Points and Authorities

Memoranda that may be useful in particular proceedings when amended pleadings are sought to be filed may be found in Ch. 66, *Death and Survival Actions* , and Ch. 186, *Probate of Wills* .

For forms of memoranda supporting a motion for an order to bring a new party into an action, see Ch. 168, *Parties* , in this set. For memoranda relating to substitution of named parties for fictitiously named defendants, see Ch. 104, *Fictitiously Named Defendants (DOES)*.

For a memorandum relating to amendment of pleadings and pretrial orders under *Code Civ. Proc. § 576*, see Ch. 180, *Pretrial Proceedings* .

For memoranda relating to motions to strike amended pleadings, see Ch. 160, *Motions to Strike* .

For related memoranda for use in substituting a personal representative for a deceased party, see Ch. 10, *Abatement and Survival of Actions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProceduresPleading & PracticePleadingsSupplemental PleadingsCivil ProceduresPartiesSubstitutionsDeath of PartyTortsWrongful Death & Survival ActionsSurvival Actions

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1-16 California Points & Authorities §§ 16.12-16.29

[Reserved]

§§ 16.12[Reserved]

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A. Amended Pleadings

1-16 California Points & Authorities § 16.30

§ 16.30 Supporting Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--General Form

[1] FORM Supporting Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	memorandum IN SUPPORT OF MOTION FOR
Defendant.	)	LEAVE TO FILE _____
	)	[AMENDED *or* AMENDMENT TO A(N)]
	)	_____ [COMPLAINT *or* DEMUR-
		RER *or* ANSWER *or* CROSS COMPLAINT]

_____

THE DISCRETION OF THE COURT TO ALLOW A PARTY TO AMEND ANY PLEADING SHOULD BE LIBERALLY EXERCISED SO THAT CASES MAY BE DETERMINED ON THEIR MERITS.

A. Statutory Authority. The court, in its discretion, may allow an amendment to any pleading in the furtherance of justice and on such terms as may be proper (*Code Civ. Proc. §§ 473(a), 576*). A[n] _____ [complaint *or* demurrer *or* answer *or* cross complaint] is a pleading (*Code Civ. Proc. § 422.10*). Amendment may be allowed by the court at any time before or after commencement of trial (*Code Civ. Proc. § 576*).

B. Liberal Allowance of Amendment. The power of the courts to allow amendment of pleadings is to be liberally exercised so that cases may be decided on their merits (*Desny v. Wilder (1956) 46 Cal. 2d 715, 751, 299 P.2d 257* ; *Klopstock v. Superior Court (1941) 17 Cal. 2d 13, 19-20, 22, 108 P.2d 906*).

C. Denial of Leave to Amend Rarely Justified. A court will very rarely be justified in refusing a party leave to amend so that he or she may properly present the case (*Guidery v. Green (1892) 95 Cal. 630, 633, 30 P. 786* ; *Redevelopment Agency v. Herrold (1978) 86 Cal. App. 3d 1024, 1031, 150 Cal. Rptr. 621*).

D. Timely Motion to Amend to Assert Meritorious Claim or Defense. It is an abuse of the court's discretion to deny a timely motion to amend when the refusal deprives a party of the right to assert a meritorious cause of action or defense, if granting leave to amend will not prejudice the opposing party (*Redevelopment Agency v. Herrold (1978) 86 Cal. App. 3d 1024, 1031, 150 Cal. Rptr. 621* ; *Morgan v. Superior Court (1959) 172 Cal. App. 2d 527, 530, 343 P.2d 62*).

E. Amendment at Any Time Before Judgment. A trial court has complete power to allow amendment of pleadings at any time before entry of judgment (*Bank of America v. Superior Court (1942) 20 Cal. 2d 697, 702, 128 P.2d 357*).

[*Optional*] **F. Postponement of Trial Appropriate.** Trial courts may allow amendments to pleadings and if necessary, postpone trial. Motions to amend are properly granted as late as the first day of trial or even during trial if the defendant is alerted to the charges by the factual allegations, no matter how framed and the defendant will not be prejudiced. If the original pleading has not framed the issues in an articulate and precise manner, a plaintiff should not be precluded from having a trial on the merits (*Honig v. Financial Corp. of America (1992) 6 Cal. App. 4th 960, 965, 7 Cal. Rptr. 2d 922*).

[*Optional*] **G. Amendment in Fast Track Proceedings.** Matters should be promptly resolved. However, if an amendment is appropriate, the trial court should continue the trial if necessary, even if the matter is on fast track (*Honig v. Financial Corp. of America (1992) 6 Cal. App. 4th 960, 967, 7 Cal. Rptr. 2d 922*).

[*Add supporting points and authorities relating to any specific reasons why the amendment should be allowed (see §§ 16.32 -16.44).*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for leave to file an amended pleading or an amendment to a pleading. It contains only general points supporting amendment, and is designed to be used as a framework for a supporting memorandum. More specific points and authorities supporting amendment of a complaint [*see §§ 16.35*

-*16.42*] and an answer [*see §§ 16.43, 16.44*] are included in this part and should be combined with this form as relevant to the case. Points and authorities relating to specific grounds for allowing amendment that may apply to any type of pleading are also included [*see §§ 16.32 -16.34*] and should likewise be combined with this form as relevant.

For a general form of points and authorities that should be used to support a motion for leave to amend to conform to proof see *§ 16.31*, rather than *§ 16.30*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In particular, counsel should indicate why the motion is timely and why amendment would not prejudice the opposing party.

[b] Opposing Points and Authorities

The points and authorities set out in *§ 16.45* may be used in an appropriate case to generally oppose a motion for leave to amend supported by this memorandum, as may the points and authorities set out in *§§ 16.47 -16.55*, relating to specific grounds of opposition.

[c] Limitations on General Rule of Liberality

Even though courts ordinarily exercise liberality in allowing amendment of pleadings, particularly of answers [*see § 16.43*], allowance of amendments rests in the sound discretion of the trial court. Courts are much more critical of proposed amendments to pleadings offered after long unexplained delay or on the eve of trial, or when there is a lack of diligence, or there is prejudice to the opposing party [*Hulsey v. Koehler (1990) 218 Cal. App. 3d 1150, 1159, 267 Cal. Rptr. 523* ; *Permalab-Metalab Equipment Corp. v. Maryland Cas. Co. (1972) 25 Cal. App. 3d 465, 472, 102 Cal. Rptr. 26* ; *see Rainer v. Community Memorial Hosp. (1971) 18 Cal. App. 3d 240, 257-258, 95 Cal. Rptr. 901* ; *see also Kolani v. Gluska (1998) 64 Cal. App. 4th 402, 405, 412, 75 Cal. Rptr. 2d 257* (leave to amend may be denied if there is prejudice to opposing party, such as delay in trial, loss of critical evidence, or added costs of preparation; absent this or any statute of limitations concern, trial court should have granted leave to amend, rather than sustaining demurrer without leave to amend, when it knew of potentially viable claim at time of sustaining of demurrer, even though plaintiff did not request leave to amend)]. Moreover, the right to amend should be denied if a change is made in the liability sought to be enforced or it appears to a certainty that no basic right exists or no relief can possibly be granted [*Hunt v. Smyth (1972) 25 Cal. App. 3d 807, 101 Cal. Rptr. 4* ; *Landis v. Superior Court (1965) 232 Cal. App. 2d 548, 554, 42 Cal. Rptr. 893*].

Denial of amendment has been upheld on two grounds--the subject matter of the proposed pleading or the conduct of the parties. If the subject matter raises a disfavored plea, is insufficient to state a cause of action or defense, contradicts an admission in the original pleading without a showing of mistake or excuse, or changes the cause of action, denial is upheld. If the conduct of the party shows long and unexplained delay, particularly if indicative of bad faith or if requiring a continuance, denial is upheld. Reversals are common, however, where the appellant shows prejudice from the denial of the motion to amend [*Hunt v. Smyth (1972) 25 Cal. App. 3d 807, 101 Cal. Rptr. 4* ; *Landis v. Superior Court (1965) 232 Cal. App. 2d 548, 554-555, 42 Cal. Rptr. 893*].

[d] Related Pleading and Practice Forms

For forms of notices of motion for orders to grant leave to amend pleadings, see California Forms of Pleading and Practice., Ch. 21, *Amended and Supplemental Pleadings* (Matthew Bender).

[3] Discussion of Authorities

[a] Statutory Authority

The section most often cited as providing authority to the court to allow amendment of any pleading in furtherance of justice is *Code Civ. Proc. § 473* which specifically allows amendment, without notice to the adverse party, to add or strike out the name of any party, or to correct a mistake in the name of a party, or a mistake in any other respect. *Code Civ. Proc. § 473* also provides that the court may, in its discretion, after notice to the adverse party, allow amendment to any pleading in other particulars, on such terms as may be just.

Additional authority for amendment of pleadings is provided by *Code Civ. Proc. § 576*, which provides that any judge, at any time before or after commencement of trial, in the furtherance of justice, and on such terms as may be proper, may allow the amendment of any pleading or pretrial conference order. The purpose of *Code Civ. Proc. § 576* is to clarify the effect of amendments to pleadings when the pretrial conference order is not amended, and to give statutory support to the rule of *Feykert v. Hardy (1963) 213 Cal. App. 2d 67, 28 Cal. Rptr. 510* , that the same principles which govern judicial discretion in allowing amendments of pleadings apply with respect to amendments of pretrial orders [*Gonzales v. Brennan (1965) 238 Cal. App. 2d 69, 74-75, 47 Cal. Rptr. 501*]. Given this function of *Code Civ. Proc. § 576* and its failure to address procedural matters relating to amendments, it is suggested that the notice provisions of *Code Civ. Proc. § 473* be complied with even though *Code Civ. Proc. § 576* contains no express notice requirement.

[b] Liberal Allowance of Amendment

In ***Desny v. Wilder*** *(1956) 46 Cal. 2d 715, 299 P.2d 257* , plaintiff's first amended complaint alleged that defendants had contracted to pay plaintiff if they used his entire 65-page story to make a motion picture, but that they appropriated the story without paying plaintiff. Plaintiff's testimony, however, revealed that only a synopsis of the story was ever submitted to defendants. After summary judgment was entered against him, plaintiff moved for an order setting aside the judgment and for leave to file an amendment to his amended complaint to allege that he submitted the synopsis rather than the 65-page story to defendants. The court denied the motion and plaintiff appealed from the summary judgment entered against him.

Defendants' argument, inter alia, that the proposed amendment would have substituted a different cause of action which was barred by the statute of limitations, was rejected by the Supreme Court which held that great liberality is indulged in allowing amendment so that lawsuits may be determined on their merits (*46 Cal. 2d 715, 751*). The Court ruled that the proposed amendment should have been allowed because it did not state facts giving rise to a wholly distinct and different legal obligation against defendants, but merely conformed the pleading to the plaintiff's testimony as to the manner in which the story was submitted to defendants (*46 Cal. 2d 715, 752*).

Klopstock v. Superior Court *(1941) 17 Cal. 2d 13, 108 P.2d 906* , involved a stockholder's representative suit originally brought by an improper party. The suit was initiated by the executor of a person who had been the legatee of shares in the corporation. The executor won a judgment in favor of the estate of the legator which was reversed by the court of appeal because the legator's estate was not a party to the action. The court of appeal also declared that plaintiff was not a proper party to bring the action. Subsequent to the reversal, the trial court granted plaintiff's motion for leave to file an amended and supplemental complaint to name the administratrix of the legator's estate as plaintiff. The trial court also denied defendants' motion to dismiss which asserted that, under the court of appeal's decision, the complaint did not state a cause of action in the plaintiff, and that this fundamental defect could not be cured by amendment. Defendants then applied for a writ of mandate to compel dismissal of the action.

The Supreme Court, in rejecting the defendants' contention, stated that *Code Civ. Proc. § 473*, empowering courts to permit amendments in furtherance of justice, has been very liberally construed and that the discretionary power of courts to allow amendment of pleadings is to be liberally exerted in favor of hearing cases on their merits (*17 Cal. 2d 13, 19, 22*). Applying that liberal standard, the Court held that, given the circumstances that a plaintiff in a derivative action is merely a nominal party asserting a claim on behalf of a corporation, and that the defendants had been fully aware of the facts underlying the claim since the original complaint was filed, the trial court acted well within its discretion in allowing amendment of the complaint to bring in a new person as the nominal plaintiff (*17 Cal. 2d 13, 21*

).

[c] Denial of Leave to Amend Rarely Justified

Guidery v. Green *(1892) 95 Cal. 630, 30 P 786* , involved an action for an accounting and dissolution of a partnership. The defendant answered, denying the existence of the partnership and denying that plaintiff's decedent performed the conditions required of him by the contract of partnership. Defendant also raised an affirmative defense that a subsequent contract superseded, vacated, and annulled the contract that was the basis of plaintiff's suit. At trial, after defendant proved execution of the subsequent contract, he sought to show that it had been executed on the consideration and agreement that the prior agreement be canceled and all of plaintiff's claims under it against defendant waived. Plaintiff objected that the evidence was not responsive to any pleaded issue, and the court sustained the objection. Defendant then sought to amend the answer to raise the issue, but the court sustained plaintiff's objection that the amendment was too late and took plaintiff by surprise. The court ordered recovery in plaintiff's favor and denied defendant's motion for new trial. Defendant appealed from the order refusing a new trial.

The Supreme Court reversed, finding that the amendment stated a good defense to plaintiff's claim and that the court should have allowed amendment for that reason, if no other. As to any surprise on plaintiff's part, the court could have continued the case until plaintiff had prepared to meet the defense and could also have imposed on defendant such terms as would compensate plaintiff for the expense and delay (*95 Cal. 630, 633*). The Court went on to state that it can very rarely happen that a court will be justified in refusing a party leave to amend his or her pleading so that he or she may properly present the case, and obviate any objection that the facts that constitute the cause of action or defense are not embraced within the issues, or properly presented by the pleadings (*95 Cal. 630, 633-634*). The Court stated that the rule was particularly compelling when the objection to testimony was not that it was brought to the adversary's notice for the first time, but that it was not within the terms of the issue due to the language of the pleadings. In the case before the Court, the defendant had attempted to raise the defense in his original answer, and the testimony was excluded only because the trial court had held that the phraseology used did not raise the issue. Thus, the Court concluded, the trial court should have allowed the amendment (*95 Cal. 630, 634*).

Redevelopment Agency v. Herrold *(1978) 86 Cal. App. 3d 1024, 150 Cal. Rptr. 621* , involved an eminent domain proceeding. Almost 10 months after filing an answer that asserted four affirmative defenses, defendant landowner filed a notice of a motion to amend the answer to add a fifth affirmative defense, which would allege that plaintiff was guilty of fraud, bad faith, and abuse of discretion. The motion to amend was twice denied, and summary judgment was ultimately rendered against defendant, who appealed.

The court of appeal stated the rule that it is a rare case in which a court will be justified in refusing a party leave to amend the pleadings so that his or her case may be properly presented, citing *Morgan v. Superior Court (1959) 172 Cal. App. 2d 527, 530, 343 P.2d 62* , discussed *above* (*86 Cal. App. 3d 1024, 1031*). The court found that defendant's amendment asserted a meritorious defense, and that any delay which might have resulted from further discovery was far outweighed by defendant's right to have the case determined on the merits (*86 Cal. App. 3d 1024, 1032*).

[d] Timely Motion to Amend to Assert Meritorious Claim or Defense

The facts and procedural background of *Redevelopment Agency v. Herrold (1978) 86 Cal. App. 3d 1024, 150 Cal. Rptr. 621* , are discussed in *§ 16.30[3][c]*. There, the court of appeal quoted *Morgan v. Superior Court (1959) 172 Cal. App. 2d 527, 530, 343 P.2d 62* , for the proposition that if a motion to amend is timely made and granting it will not prejudice the opposing party, it is error to refuse permission to amend, and when the refusal also results in a party being deprived of the right to assert a meritorious cause of action or a meritorious defense, it is not only error, but an abuse of discretion (*86 Cal. App. 3d 1024, 1031*). The court found that defendant's proposed amendment asserted a meritorious defense, that denial of the motion deprived defendant of the right to assert that defense, and that any delay due to further discovery was far outweighed by defendant's right to have the case determined on the merits. The court

also found that plaintiff must have been aware of defendant's theory from interrogatories propounded five months before the amendment was first requested, and that the only possible prejudice to plaintiff would be a determination that defendant's position was correct. In this situation, the court concluded that the denial of defendant's motion to amend was an abuse of discretion (*86 Cal. App. 3d 1024, 1032*).

In ***Morgan v. Superior Court*** *(1959) 172 Cal. App. 2d 527, 343 P.2d 62* , plaintiff filed a complaint for divorce alleging extreme cruelty as grounds (case arose when law required pleading of grounds for divorce). At the time she filed the complaint, plaintiff believed that defendant had committed adultery, but lacked positive proof. During extended negotiations relating to property rights and support, plaintiff obtained proof, but to protect the parties' children and name, did not amend her complaint. When negotiations subsequently proved fruitless, however, and a contested action became unavoidable, plaintiff filed notice of a motion for leave to file an amendment to the complaint to allege adultery as a further ground for divorce. The motion was made before either party had moved to set the matter for trial. The trial court denied the motion, and plaintiff sought a writ of mandate to compel the trial court to permit the amendment.

The court of appeal issued the writ, stating that the discretion to permit amendments to pleadings cannot be exercised arbitrarily, that a court is rarely justified in refusing leave to amend in order to properly present a case, and that it is error to deny a timely made motion that is not prejudicial to the opposing party. Moreover, if the denial deprives a party of the right to assert a meritorious cause of action or defense, the denial is an abuse of discretion (*172 Cal. App. 2d 527, 530*). Applying these principles, the court found that defendant did not and could not contend that he was taken by surprise, and that he was not otherwise prejudiced, while denial would deprive plaintiff of the right to prove many facts that would influence the court in dividing the community property (*172 Cal. App. 2d 527, 530-531*). Accordingly, the court held that the trial court acted arbitrarily and abused its discretion in denying plaintiff's motion, an abuse emphasized by its ignoring plaintiff's uncontradicted reasons for not including the allegation in her original complaint (*172 Cal. App. 2d 527, 531*).

[e] Amendment at Any Time Before Judgment

Bank of America v. Superior Court *(1942) 20 Cal. 2d 697, 128 P.2d 357* , involved a motion to amend made when the case was on remand from a prior appeal. In the original proceedings, the trial court had sustained a demurrer to a four-count complaint without leave to amend and entered a judgment of dismissal. On plaintiffs' appeal from that judgment, the court of appeal held that the trial court had properly sustained the demurrer to counts one and two, but that the third and fourth counts did state causes of action. The court of appeal therefore reversed, directing the trial court to grant plaintiffs leave to file an amended complaint. On remand, the court granted plaintiffs' motion for leave to amend their complaint as to counts one and two over defendant's objection that the court lacked jurisdiction over those two counts due to the appellate decision as to them. Defendant then petitioned for certiorari to annul the order allowing amendment.

In denying the petition, the Supreme Court held that the trial court had power to allow amendment at any time before entry of judgment (*20 Cal. 2d 697, 702*). The Court also held that parties have the same right to apply for permission to amend after reversal as they would have had if there had never been a judgment entered, and that there is only one judgment regardless of the number of counts in the complaint, so that the trial court was well within its jurisdiction in permitting the amendment (*20 Cal. 2d 697, 701-703*).

[f] Postponement of Trial Appropriate

In ***Honig v. Financial Corp. of America*** *(1992) 6 Cal. App. 4th 960, 7 Cal. Rptr. 2d 922* , plaintiff filed a complaint alleging, among other things, attempted constructive termination, and the action was assigned to a "fast track" court pursuant to the Trial Court Delay Reduction Act [*Gov. Code § 68600 et seq.*]. Three months after the complaint was filed, plaintiff was fired for insubordination. Approximately two months before the scheduled trial date, plaintiff filed

an opposition to defendants' motion for summary judgment and moved for leave to amend his complaint to assert a cause of action for termination in violation of public policy, a contention that the insubordination charge was merely a pretext for his termination, and a cause of action for defamation. The trial court granted the summary judgment motions and denied plaintiff's motion to amend (*6 Cal. App. 4th 960, 964*).

The court of appeal, reversing, held the trial court abused its discretion in refusing the amendment. The court noted that the proposed amendments finished telling the story begun in the original complaint, events of which the parties were fully aware, and that permitting amendment would not have prejudiced the defendants (*6 Cal. App. 4th 960, 966*). In so ruling, the court noted that trial courts may allow amendments to pleadings and, if necessary, postpone trial. Motions to amend are properly granted as late as the first day of trial or even during trial if the defendant is alerted to the charges by the factual allegations, no matter how framed and the defendant will not be prejudiced. If the original pleading has not framed the issues in an articulate and precise manner, a plaintiff should not be precluded from having a trial on the merits (*6 Cal. App. 4th 960, 965*).

[g] Amendment in Fast Track Proceedings

The facts and procedural background of *Honig v. Financial Corp. of America (1992) 6 Cal. App. 4th 960, 7 Cal. Rptr. 2d 922* , are discussed in *§ 16.30[3][f]*.

In finding that the amendment should have been allowed, even two months before the scheduled trial date, the court expressed its awareness of the purposes of the fast track, which it supports. The court noted, however, that, if an amendment is appropriate, the trial court should continue the trial if necessary, even if the matter is on a fast track (*6 Cal. App. 4th 960, 967*).

[4] Additional Authorities

[a] Liberal Allowance of Amendment

In *Haley v. Dow Lewis Motors, Inc. (1999) 72 Cal. App. 4th 497, 85 Cal. Rptr. 2d 352* , plaintiffs, after having filed a Chapter 7 bankruptcy petition, filed a complaint alleging several causes of action, some of which had accrued before and others after the bankruptcy petition was filed. In holding that the trial court erred in granting the defendants' motion for judgment on the pleadings and in denying plaintiffs' motion to amend the complaint to substitute the bankruptcy trustee as plaintiff, the court of appeal noted that leave to amend a complaint is entrusted to the trial court's sound discretion, and under the liberal amendment policy set forth in *Klopstock v. Superior Court (1941) 17 Cal. 2d 13, 108 P.2d 906* and subsequent cases, with regard to the causes of action that accrued before the bankruptcy petition was filed, plaintiffs should have been permitted to amend their defective pleading (*72 Cal. App. 4th 497, 506-509*). The court further noted that the causes of action that accrued after the filing of the bankruptcy petition were not property of the bankruptcy estate, and thus granting defendants' motion for judgment on the pleadings as to them had been improper (*72 Cal. App. 4th 497, 503-506*).

In *Solit v. Tokai Bank (1999) 68 Cal. App. 4th 1435, 81 Cal. Rptr. 2d 243* , the court of appeal reversed judgment in favor of the cross defendant. The court concluded that the trial court erred in denying the cross complainant's motion for leave to file a second amended cross complaint when the trial court erroneously concluded that the cross complainant's earlier release of a mechanic's lien prevented the cross complainant from filing any valid mechanic's lien thereafter. The court noted that the trial court should have considered the cross complainant's motion for leave to file an amended pleadings on the merits, to wit, on whether the cross complainant, the party seeking to amend, was not diligent in offering the amendment after knowledge of the facts, or whether delay prejudiced the adverse party. Generally, leave to amend must be granted liberally, provided there is no statute of limitations concern, nor any prejudice to the opposing party, such as delay in trial, loss of critical evidence, or added preparation costs (*68 Cal. App. 4th 1435, 1448*).

In *Higgins v. Del Faro (1981) 123 Cal. App. 3d 558, 176 Cal. Rptr. 704* , the court of appeal reversed a trial court's denial of leave for plaintiff to amend her complaint, noting that the amendment would have corrected a minor technical error of the pleading (attachment of the wrong document), would not have resulted in undue delay, and would not have prejudiced the adverse party. Failure to grant leave in such a case, the court stated, is a denial of justice and is directly opposed to the policy that cases should be tried and decided on the merits (*123 Cal. App. 3d 558, 564-565*).

The rule of liberality of pleading was applied to support amendment of an answer to conform to proof in *Davis v. Cordova Recreation & Park Dist. (1972) 24 Cal. App. 3d 789, 101 Cal. Rptr. 358* . Plaintiffs, claiming negligence on defendant's part, brought an action to recover for the death of their child, who had drowned in a pond maintained by defendant. The only affirmative defense raised in the answer was contributory negligence, but at trial both parties introduced evidence on the issue of the design immunity defense. At the close of trial, the court ruled that the design immunity defense was established, directed judgment for defendant, and granted defendant permission to amend the answer to conform to the proof. On appeal, plaintiffs claimed prejudice and surprise, but the court of appeal found that plaintiffs had anticipated the defense and had directed their cause so as to defeat it. The court proceeded to uphold the trial court's action allowing amendment in accordance with the policy of liberally allowing amendment of pleadings in order that litigation may be tried on its merits (*24 Cal. App. 3d 789, 794*).

The complaint in *Barba v. Superior Court (1966) 239 Cal. App. 2d 572, 49 Cal. Rptr. 60* , a suit arising out of an automobile collision, failed to allege that defendant owner had given defendant driver permission to drive the car involved in the accident, an allegation necessary to fasten full civil liability on the owner. When the case came to trial, plaintiffs moved to amend the complaint to allege that the car was being driven with the consent and permission of defendant owner. The motion was denied, and defendant owner moved for dismissal of the action which was granted on the grounds that no cause of action was stated against the owner for imputed liability as owner of a car driven by another. Plaintiffs then sought a writ of mandate to compel the trial court to allow the amendment.

In ordering the writ to issue, the court of appeal stated that courts should show great liberality at all stages in permitting such amendments as will facilitate the production of all the facts bearing on the questions involved in the action, where this can be done without working great delay and without jeopardizing the rights of an adverse party, and where the cause of action and the issues involved will not be radically changed (*239 Cal. App. 2d 572, 577*).

[b] Denial of Leave to Amend Rarely Justified

In *Branick v. Downey Savings & Loan (2006) 39 Cal. 4th 235, 46 Cal. Rptr. 3d 66* , plaintiffs alleged that defendant savings and loan association had misrepresented and overcharged customers for recording fees. They claimed standing to sue on behalf of the general public and did not allege that they had transacted business with the savings and loan association, paid the fees, suffered injury in fact, or lost money or property as a result of the alleged practices. The trial court ruled that federal law preempted the claims. While the appeal was pending, Proposition 64 (approved November 2004) took effect and repealed that statutory authorization to sue on behalf of the general public. The court of appeal held the federal law did not preempt the claims, that Proposition 64 revoked the plaintiffs' standing, and that the trial court should determine whether to grant leave to amend the complaint to allege injury in fact. The Supreme Court concluded that Proposition 64 did not affect the ordinary rules governing amendment and relation back. Thus, it was proper to remand the matter to the trial court to exercise its discretion under *Code Civ. Proc. § 473(a)(1)*, in ruling whether to grant leave to amend. In so ruling, the court held that leave to amend a compliant is entrusted to the sound discretion of the trial court. The exercise of that discretion will not be disturbed on appeal absent a clear showing of abuse. More importantly, the discretion to be exercised is that of the trial court, not the reviewing court. Thus, even if the reviewing court might have ruled otherwise in the first instance, the trial court's order will not be reversed unless, as a matter of law, the order is not supported by the record.

The plaintiff in *Sanai v. Saltz (2009) 170 Cal. App. 4th 746, 88 Cal. Rptr. 3d 673* made various claims under the Fair Credit Reporting Act [*15 U.S.C. § 1681 et seq.*], the Consumer Credit Reporting Agencies Act [*Civ. Code, § 1785.1 et*

seq.], and state common law. Specifically, he alleged that furnishers of credit information failed to investigate the accuracy of reported information upon receiving notice of a dispute. In alleging a violation of *15 U.S.C. § 1681s* 2(b), he first asserted that he had informed the furnishers of the dispute. He then sought to amend his complaint to allege that he also informed the consumer credit reporting agency of the dispute and that the agency notified the furnishers. The trial court held that plaintiff would be allowed to amend his complaint only if plaintiff could produce admissible evidence that shows that he contacted the credit reporting agency and that the agency contacted the furnishers of the information. Plaintiff submitted a declaration under penalty of perjury regarding his written complaints to the agency and its response; plaintiff further argued that the court's stay of all discovery precluded him from producing additional admissible evidence. The trial court subsequently ruled that plaintiff's showing was insufficient to permit an amendment to his complaint, and granted the motion for judgment on the pleadings without leave to amend.

The appellate court noted that the trial court has every right to guard against sham pleadings and to prevent abuse of the litigation process. For example, the trial court has discretion to deny leave to amend when the proposed amendment omits or contradicts harmful facts pleaded in a prior pleading unless a showing is made of mistake or other sufficient excuse for changing the facts. Absent such a showing, the proposed pleading may be treated as a sham. Although noting that the trial court had good reason to be hesitant to accept new factual allegations from the plaintiff, at least to the extent they were inconsistent with prior allegations, the appellate court held that the trial court went too far when it demanded the production of admissible evidence, specifically excluding plaintiff's own testimony, to support the proposed amendment to the complaint while at the same time preventing plaintiff from conducting any discovery. While noting that the trial court has powerful tools to shield parties and nonparties from abusive litigation tactics, the appellate court concluded that "the trial court is simply without power to demand, as the condition for leave to amend, that a party present admissible evidence sufficient to withstand summary judgment" (*170 Cal. App. 4th 746, 770)* .

In *Johnson v. County of Los Angeles (1983) 143 Cal. App. 3d 298, 191 Cal. Rptr. 704* , an action for wrongful death against a county and county employees, the court of appeal reversed the trial court's order sustaining defendants' demurrer to the complaint without leave to amend and dismissing the action on the ground of sovereign immunity. The court of appeal discussed the rules governing amendment after demurrer before reaching the substantive issues in the action. The court stated that denial of leave to amend after a demurrer is sustained is an abuse of discretion when the complaint is not fundamentally deficient in alleging facts showing a right to some relief that can properly be given but is deficient only with respect to the manner or form in which the facts warranting relief have been pleaded. The court further noted that liberality in permitting amendments is the rule, not only when a complaint is defective regarding form but also when it is deficient in substance, if a fair opportunity to correct the substantive defect has not previously been given (*143 Cal. App. 3d 298, 306*).

Saari v. Superior Court (1960) 178 Cal. App. 2d 175, 2 Cal. Rptr. 856 , was an action for personal injuries arising out of an automobile accident. The case went to trial on the original complaint which alleged negligence, and nonsuit was granted on the basis of plaintiff's contributory negligence. The judgment in favor of defendant was reversed on appeal, but both before and after that appeal, plaintiff moved to amend his complaint to allege willful and wanton misconduct. The court denied plaintiff's motions on both occasions, and plaintiff petitioned for a writ of mandate to compel the court to allow the amendment.

The court of appeal held that the amendment was not objectionable as setting up a distinct and different legal obligation that was barred by the statute of limitations, as contended by defendant, but that it merely constituted a change in the theory of recovery of damages for personal injury inflicted by a particular car, which was also the gist of the original complaint (*178 Cal. App. 2d 175, 178-179*). The court then quoted *Morgan, above,* on the principles governing amendment of pleadings, and directed the writ of mandate to issue (*178 Cal. App. 2d 175, 180*).

Daum v. Superior Court (1964) 228 Cal. App. 2d 283, 39 Cal. Rptr. 443 , involved a suit for breach of contract. The trial court sustained defendants' demurrer without leave to amend until such time as the conditions precedent in the contract between the parties might occur. Plaintiffs moved to vacate that order and for leave to file a second amended

complaint alleging anticipatory breach and a second cause of action for services rendered. After the court denied plaintiffs' motion, they sought a writ of mandate.

The court of appeal granted the writ, noting that plaintiffs were not attempting to introduce an entirely new cause by the proposed second amended complaint, but were merely proposing a change of theory in their action against defendants from breach of contract to anticipatory breach of contract (*228 Cal. App. 2d 283, 286-287*). The court held that denial of plaintiffs' motion to amend was an abuse of discretion, relying on *Morgan, above,* as cited by *Saari, above* (*228 Cal. App. 2d 283, 289*).

[c] Timely Motion to Amend to Assert Meritorious Claim or Defense

Dunzweiler v. Superior Court (1968) 267 Cal. App. 2d 569, 73 Cal. Rptr. 331 ; *Daum v. Superior Court (1964) 228 Cal. App. 2d 283, 39 Cal. Rptr. 443* ; and *Saari v. Superior Court (1960) 178 Cal. App. 2d 175, 2 Cal. Rptr. 856* , are discussed in *§ 16.30[4][b]*.

California Points & Authorities

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Volume 1 Chapters 1-19 WRITING LEGAL MEMORANDA AND BRIEFS; ABATEMENT AND SURVIVAL OF ACTIONS---to---AMENDED AND SUPPLEMENTAL PLEADINGS
CHAPTER 16 AMENDED AND SUPPLEMENTAL PLEADINGS
PART II. FORMS
A. Amended Pleadings

1-16 California Points & Authorities § 16.31

§ 16.31 Supporting Motion for Leave to File Amended Pleading or Amendment to Pleading to Conform to Proof [Code Civ. Proc. §§ 469, 470, 473(a), 576]--General Form

[1] FORM Supporting Motion for Leave to File Amended Pleading or Amendment to Pleading to Conform to Proof [Code Civ. Proc. §§ 469, 470, 473(a), 576]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	memorandum IN SUPPORT OF MOTION FOR
Defendant.	)	LEAVE TO AMEND _____
	)	[COMPLAINT *or* ANSWER *or* CROSS COM-
	)	PLAINT] TO CONFORM TO PROOF

_____

THE COURT SHOULD LIBERALLY EXERCISE ITS DISCRETION TO ALLOW AN AMENDMENT TO CONFORM TO PROOF AT ANY STAGE OF TRIAL.

A. Statutory Authority. No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually mislead the adverse party to his or her prejudice in maintaining his or her action or defense on the merits. Whenever it appears that a party has been so mislead, the court may order the pleadings to be amended, on such terms as may be just (*Code Civ. Proc. § 469*). If the variance is not material, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs (*Code Civ. Proc. § 470*). The court, in its discretion, after notice to the adverse party, may allow an amendment to any pleading in the furtherance of justice and on any terms as may be just, at any time before or after commencement of trial (*Code Civ. Proc. §§ 473(a), 576*).

B. Discretion of Court. An amendment to allege a new cause of action to conform to proof is favored, and a trial court abuses its discretion by prohibiting such an amendment when it would not prejudice another party (*South Bay Building Enterprises, Inc. v. Riviera Lend-Lease, Inc. (1999) 72 Cal. App. 4th 1111, 1124, 85 Cal. Rptr. 2d 647* ; *Brady v. Elixir Industries (1987) 196 Cal. App. 3d 1299, 1303, 242 Cal. Rptr. 324*). Although the Code of Civil Procedure statutes use the word "may," thus committing the matter to the trial court's discretion, the court must permit an amendment to conform to proof offered by plaintiff where no prejudice results to defendant. The same rule applies to a plaintiff's request to direct the fact to be found according to the evidence as provided by *Code of Civil Procedure Section 470* (*Walker v. Belvedere (1993) 16 Cal. App. 4th 1663, 1670, 20 Cal. Rptr. 2d 773*).

C. Liberal Allowance of Amendment. The power of the courts to allow amendment of pleadings is to be liberally exercised so that cases may be decided on their merits, and the greatest liberality is encouraged in allowing amendments to conform to proof (*Desny v. Wilder (1956) 46 Cal. 2d 715, 751, 299 P.2d 257* ; *Bidart Bros. v. Elmo Farming Co. (1973) 35 Cal. App. 3d 248, 259, 110 Cal. Rptr. 819*).

D. Amendment at Any Stage of Trial. The trial court may permit amendment to conform to proof at any stage of the trial, even after submission of the cause (*Lee v. Murphy (1897) 119 Cal. 364, 367, 51 P. 549* ; *Jud Whitehead Heater Co. v. Obler (1952) 111 Cal. App. 2d 861, 869, 245 P.2d 608*).

E. Notice Not Required. Notice of a motion to amend to conform to proof is not required (*State Medical Educ. Bd. v. Roberson (1970) 6 Cal. App. 3d 493, 502, 86 Cal. Rptr. 258* ; *McKee v. Mires (1952) 110 Cal. App. 2d 517, 522-523, 242 P.2d 954*).

[*Add, where appropriate, supporting points and authorities relating to any specific reasons why the amendment should be allowed (see §§ 16.32 -16.44).*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be used in support of a motion for leave to amend pleadings to conform to proof. It contains only general points supporting amendment, and is designed to be used as a framework for a supporting memorandum. More specific points and authorities supporting amendment of a complaint [*see §§ 16.35 -16.42*] and an answer [*see §§ 16.43, 16.44*] should be combined with this form as relevant to the case. Points and authorities relating to specific grounds for allowing amendment that may apply to any type of pleading are also included [*see §§ 16.32 -16.34*] and should likewise be combined with this form as relevant.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Counsel should attempt to show that the opposing party was not mislead in order to allow the court to amend

under *Code Civ. Proc. § 470* rather than *Code Civ. Proc. §§ 469, 473*, or *576* thereby avoiding costs and the imposition of other terms that might be imposed under *Code Civ. Proc. § 469*. The other terms that might be imposed could include reopening the case for the opposing party to meet any new issues that may be pleaded, unless the opposing party has already presented his or her full case [*see Simone v. McKee (1956) 142 Cal. App. 2d 307, 314, 298 P.2d 667*].

[b] Failure to Amend to Conform to Proof

The general rule in a contested cause is that, absent an amendment to the complaint to conform to proof, a court may not award the plaintiff a sum in excess of the amount of damages plaintiff claims to have sustained [*Castaic Clay Manufacturing Co. v. Dedes (1987) 195 Cal. App. 3d 444, 449, 240 Cal. Rptr. 652*]. However, it is the averments of the complaint, not the prayer, that determines the maximum sum that may be awarded. A court may grant a plaintiff any relief consistent with the case made by the complaint and embraced within the issue [*Castaic Clay Manufacturing Co. v. Dedes (1987) 195 Cal. App. 3d 444, 449, 240 Cal. Rptr. 652* (citing *Code Civ. Proc. § 580*, which provides that the relief granted to the plaintiff, absent an answer, cannot exceed the relief demanded in the complaint, but that otherwise the court may grant plaintiff any relief consistent with the case made by the complaint and embraced within the issue)]. Thus, an award of compensatory damages in an amount greater than that set forth in the complaint does not prejudice the defendant when evidence was admitted on the issue of damages of at least the amount that was awarded and the parties actually tried the issues of damages in amounts above the limits set forth in the body of the complaint [*Castaic Clay Manufacturing Co. v. Dedes (1987) 195 Cal. App. 3d 444, 449-450, 240 Cal. Rptr. 652*]. Hence, although a failure to seek leave to amend the complaint to conform to proof on the amount of damages claimed may be lamentable, a judgment in excess of the amounts prayed for may nevertheless be affirmed on appeal for the sake of judicial economy, which would be ill served by requiring retrial of a case because of the technical omission [*Castaic Clay Manufacturing Co. v. Dedes (1987) 195 Cal. App. 3d 444, 449-450, 240 Cal. Rptr. 652*].

[c] Opposing Points and Authorities

The points and authorities set out in *§ 16.46* may be used to generally oppose a motion for leave to amend supported by this memorandum, as may the points and authorities set out in *§§ 16.48, 16.53*, and *16.54*, relating to specific grounds of opposition.

[d] Limitation on Amendment to Conform to Proof

While a mere variance may be remedied by amendment, a failure of proof is fatal [*Johnson v. De Waard (1931) 113 Cal. App. 417, 423, 298 P. 92* (holding, however, that proof of a written contract with somewhat different terms from the oral contract alleged in the complaint did not constitute a failure of proof)]. There is a failure of proof, rather than a variance under *Code Civ. Proc. § 469* or *470* (discussed in *§ 16.31[3][a]*), when the allegation of the claim or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its general scope and meaning [*Code Civ. Proc. § 471*]. Under *Code Civ. Proc. § 471*, the plaintiff may not use an amendment to conform to proof to abandon the entire case made by his or her pleading in favor of a new and different case, but the amendment is proper and the court has discretion to allow it if it is not entirely foreign to the original action and the relief sought arises on the same general state of facts as the prior pleading [*Sieck v. Hall (1934) 139 Cal. App. 279, 301, 34 P.2d 844* (amendment proper where both original and amended complaint were for indebtedness in money based on contract to pay bonus, amendment changing only method of computing bonus)].

Cases dealing with the propriety of allowing amendment to conform to proof do not appear to cite *Code Civ. Proc. § 471* often. For a discussion of cases that deal with the closely related proposition that an amendment to conform to proof should not be allowed to introduce new issues into the case, see the cases collected in *§ 16.31[3][b]* and *16.46[3][a], [4][a]*.

[e] Notice of Motion

Notice of a motion to amend to conform to proof is not required [*State Medical Educ. Bd. v. Roberson (1970) 6 Cal. App. 3d 493, 502, 86 Cal. Rptr. 258*]. A memorandum is only mandatory in the case of a motion made on notice [*see Cal. Rules of Ct., Rule 3.1113(a)*]. Therefore, submission of this memorandum is optional.

[f] Filing Formal Amendment

When leave to amend to conform to proof is granted and the proof has been made, a formal amendment to the pleading in question need not be filed [*Donovan v. Wechsler (1970) 11 Cal. App. 3d 210, 213, 89 Cal. Rptr. 669* ; *Fitzsimmons v. Fitzsimmons (1946) 72 Cal. App. 2d 545, 548-549, 164 P.2d 934*]. It is not essential to a good motion to amend to conform to proof that the exact amendment sought to be made be shown [*Youngblood v. Los Angeles (1958) 160 Cal. App. 2d 481, 490, 325 P.2d 587*]. It is better practice to file the amendment, however [*Fitzsimmons v. Fitzsimmons (1946) 72 Cal. App. 2d 545, 548-549, 164 P.2d 934*].

[3] Discussion of Authorities

[a] Statutory Authority

The basic authority of the court to allow amendment of pleadings to conform to proof is provided by *Code Civ. Proc. § 473* [*Simone v. McKee (1956) 142 Cal. App. 2d 307, 314, 298 P.2d 667* ; *see also Code Civ. Proc. § 576* (overlapping *Code Civ. Proc. § 473*)]. Additionally, *Code Civ. Proc. § 469* provides express authority to amend to conform to proof, on such terms as may be just, when there has been a material variance between the allegation in a pleading and the proof, that is, a variance that actually mislead the adverse party to his or her prejudice in maintaining his or her action or defense on the merits. If the variance is found not to be material, as provided in *Code Civ. Proc. § 469*, the court may, pursuant to *Code Civ. Proc. § 470*, direct the fact to be found according to the evidence, or may order immediate amendment, without costs.

[b] Discretion of Court

South Bay Building Enterprises, Inc. v. Riviera Lend-Lease, Inc. *(1999) 72 Cal. App. 4th 1111, 85 Cal. Rptr. 2d 647* , involved an action by a junior lienholder against a senior lienholder and the debtor for fraud and conspiracy in relation to the nonjudicial foreclosure sale in which plaintiff's junior lien was extinguished without plaintiff receiving any proceeds of the sale. Plaintiff moved to amend its complaint to conform to the evidence offered at trial, seeking to add two new causes of action, one for money due under *Civ. Code § 2924k* and one for conversion. The trial court denied the motion and ultimately granted defendants' motion for a directed verdict. Plaintiff appealed.

In reversing the judgment, the court of appeal concluded that the trial court had erred in denying plaintiff's request to amend its complaint. In so doing, the court, quoting *Brady v. Elixir Industries (1987) 196 Cal. App. 3d 1299, 1303, 242 Cal. Rptr. 324* , stated that a pleading may be amended at the time of trial unless the adverse party can establish prejudice. When a party is allowed to prove facts to establish one cause of action, an amendment which would allow the same facts to establish another cause of action is favored, and a trial court abuses its discretion by prohibiting such an amendment when it would not prejudice another party. A variance between pleading and proof does not justify the denial of an amendment unless the unamended pleading mislead the adverse party to his or her prejudice in maintaining his or her action or defense on the merits (*72 Cal. App. 4th 1111, 1124*).

In ***Brady v. Elixer Industries*** *(1987) 196 Cal. App. 3d 1299, 242 Cal. Rptr. 324* , the plaintiff employee alleged sex discrimination and constructive discharge against her employer. At trial, certain evidence that was not pleaded in support of the discrimination cause of action was admitted as proof of the allegations of constructive discharge. She then moved to amend her discrimination cause of action to conform to the proof presented on the discharge cause. The court denied the motion as not timely presented and subsequently granted nonsuit on the discrimination cause of action (*196 Cal. App. 3d 1299, 1302*).

The appellate court reversed and held that the amendment should have been allowed. If a party is allowed to prove facts to establish one cause of action, an amendment that would allow the same facts to establish another cause of action is favored. It was an abuse of discretion to prohibit the amendment to conform to proof. Such an amendment should only be denied if a party was misled to its prejudice in maintaining the action or defense on the merits (*196 Cal. App. 3d 1299, 1303*).

In ***Walker v. Belvedere*** *(1993) 16 Cal. App. 4th 1663, 20 Cal. Rptr. 2d 773* , plaintiff brought a personal injury action against the driver and the owner of a vehicle that struck her car. The action against the owner was based on negligent entrustment. Judgment was entered in the defendant owner's favor. Two weeks later, the plaintiff moved to set aside the judgment and enter a new one adding recovery against the owner under *Veh. Code §§ 17150* and *17151*, which hold an owner liable up to $15,000 for a permissive user's negligence. The trial court denied the motion, and plaintiff appealed.

The court of appeal reversed, addressing the issue, among others, that the plaintiff did not plead a cause of action for owner's statutory liability, nor did she ask to amend to conform to proof (*16 Cal. App. 4th 1663, 1669*). The court first acknowledged the fundamental principle that a plaintiff must recover, if at all, on the cause of action set out in the complaint, and not on some other which may be developed by the proofs. However, the court went on to quote *Code Civ. Proc. §§ 469* and *470*, as set out in Paragraph A of the form and discussed in *§ 16.31[3][a]*. Making the statement set out in the form, the court went on to find no prejudice in this case, in which the defendant was on notice throughout of the circumstances surrounding the plaintiff's claim, and the statutory liability theory added nothing previously unknown or unexpected (*16 Cal. App. 4th 1663, 1670*).

[c] Liberal Allowance of Amendment

Desny v. Wilder *(1956) 46 Cal. 2d 715, 299 P.2d 257* , is discussed in *§ 16.30[3][b]*.

In ***Bidart Bros. v. Elmo Farming Co.*** *(1973) 35 Cal. App. 3d 248, 110 Cal. Rptr. 819* , plaintiff, who bought real property from defendant subject to outstanding leases, sued to recover rents collected by defendant on plaintiff's behalf. In paying the rents collected to plaintiff, defendant had offset property taxes it paid and interest due on the purchase price notes given to defendant by plaintiff. Plaintiff appealed from a judgment which allowed the offset, urging that the trial court had erred in allowing defendant to file an amended answer alleging the offset as an affirmative defense after the close of trial.

In affirming, the court of appeal stated that allowance of amendments to conform to proof rests in the sound discretion of the trial court, that abuse of discretion is not shown unless prejudice appears and unless new and entirely different issues are thus brought into the case, and that the greatest liberality is encouraged in this respect, citing *Crown Prod. Co. v. California Food Prod. Corp. (1947) 77 Cal. App. 2d 543, 550, 175 P.2d 861* , discussed *below* (*35 Cal. App. 3d 248, 259*). Plaintiff argued that it could have established a waiver of the defense of setoff or an estoppel to assert it, but the court found it difficult to understand how plaintiff could have been surprised and unprepared on that element of the case, which went to the very heart of the litigation (*35 Cal. App. 3d 248, 259-260*).

[d] Amendment at Any Stage of Trial

On appeal from a judgment foreclosing a mortgage in ***Lee v. Murphy*** *(1897) 119 Cal. 364, 51 P 549* , defendant argued that the trial court erred in allowing plaintiff to amend the complaint after having gone to trial and submitting the case for decision. Although reversing on other grounds, the Supreme Court rejected this argument. The Court held that while it is unusual to find it necessary to amend the complaint after a case has been submitted, there is no time before judgment when the power of the court to allow amendment in the interest of justice under *Code Civ. Proc. § 473* ceases (*119 Cal. 364, 366-367*).

Jud Whitehead Heater Co. v. Obler *(1952) 111 Cal. App. 2d 861, 245 P.2d 608* , involved consolidated cases in

which a sole proprietor and his successor corporation sued a former employee and his wife to impose constructive trusts on property purchased by defendants with money embezzled from plaintiffs before and after incorporation of the business. The individual plaintiff's complaint included a claim against certain jewelry. The proof, however, revealed that the funds to pay for the jewelry were taken after the business was incorporated, and the court allowed the corporation to amend its complaint to include that claim. On defendants' appeal from a judgment for plaintiffs, defendants urged that the court had erred in allowing the amendment.

Defendants claimed that they had been prejudiced because, if the cases had not been consolidated, judgment on the claim for the jewelry could not have been given to plaintiff corporation because the evidence relating to the jewelry would not have been admissible under the then issues. The court of appeal rejected defendants' argument since the evidence would have been admissible in the corporation's case, even though the claim was not pleaded, to show transactions between the parties as bearing on whether the moneys that were pleaded were stolen. Thus, the corporation could have amended to conform to proof even if the actions had not been consolidated (*111 Cal. App. 2d 861, 868*). The court held that the law is settled that the trial court may permit an amendment to a complaint to conform to the proof at any stage of the trial, even after submission of the cause, unless the amendment introduces a new and independent cause of action, quoting *Sandvold v. Perrot (1946) 74 Cal. App. 2d 344, 348-349, 168 P.2d 995* .

[e] Notice Not Required

In ***State Medical Educ. Bd. v. Roberson*** *(1970) 6 Cal. App. 3d 493, 86 Cal. Rptr. 258* , plaintiff sued to recover on a student loan that became payable in the year defendant finished her internship. The complaint alleged that defendant completed her internship in Washington, D.C. in 1962, but in the course of discovery, it was learned that she actually finished it in California in 1966. After the court granted a motion made by plaintiff for summary judgment, defendant moved for reconsideration. When defendant's motion came on for hearing, the court denied it and at the same time granted a motion to amend the complaint to conform to proof that was apparently made by plaintiff at the hearing. Judgment was entered, and defendant appealed.

In affirming, the court of appeal rejected defendant's contention that formal notice of the motion to amend was necessary. The court, relying on prior California law, held that notice of a motion to amend to conform to proof need not be given because in the case of such an amendment the evidence has already been offered as to the subject matter of the amendment so that it would not be worthwhile to require notice to the adverse party (*6 Cal. App. 3d 493, 502*).

By the original complaint in ***McKee v. Mires*** *(1952) 110 Cal. App. 2d 517, 242 P.2d 954* , defendants were sued individually and as partners. After trial, the court granted plaintiff's motion, made in open court, to amend to conform to proof by alleging defendants' liability as ostensible partners. The facts were found in plaintiff's favor, and judgment was entered against the defendants, who appealed.

The court of appeal rejected defendants' contention that the trial court had committed prejudicial error in permitting amendment of the complaint without service and filing of a motion or notice of hearing on the motion to amend. The court held that it was unnecessary to serve and file the motion because the motion was made in open court (*110 Cal. App. 2d 517, 522-523*). The court also noted that defendants were not misled or prejudiced by the amendment because the transactions between the parties had been gone into fully and defendants had abundant opportunity to refute the issues raised by the amended pleading (*110 Cal. App. 2d 517, 523*).

[4] Additional Authorities

[a] Discretion of Court

In *A.N. v. County of Los Angeles (2009) 171 Cal. App. 4th 1058, 90 Cal. Rptr. 3d 293* , A.N. filed his original complaint in May 2005 and his amended complaint in November 2005. A.N. filed the bulk of his Doe amendments in

August 2007 and served most of his Doe amendments at that time. A.N.'s counsel did not state the dates upon which counsel learned the names of the Doe defendants and did not explain why their identities could not have been discovered sooner, as the record indicated that counsel had access to the information sooner. In affirming the trial court's finding that the delay was unreasonable and prejudicial, the appellate court saw no reasonable explanation in the record for A.N.'s roughly two year delay in filing and serving the Doe amendments, observing that *Code Civ. Proc. § 474* includes an implicit requirement that a plaintiff cannot unreasonably delay the filing of a Doe amendment after learning a defendant's identity (*171 Cal. App. 4th 1058, 1066-1067)* .

Bidart Bros. v. Elmo Farming Co. (1973) 35 Cal. App. 3d 248, 110 Cal. Rptr. 819 , is discussed in *§ 16.31[3][b]*.

[b] Liberal Allowance of Amendment

Davis v. Cordova Recreation & Park Dist. (1972) 24 Cal. App. 3d 789, 101 Cal. Rptr. 358 , is discussed in *§ 16.30[4][a]*.

Crown Prod. Co. v. California Food Prod. Corp. (1947) 77 Cal. App. 2d 543, 175 P.2d 861 , is discussed in *§ 16.31[3][c]*.

[c] Amendment at Any Stage of Trial

The facts of *Union Bank v. Wendland (1976) 54 Cal. App. 3d 393, 126 Cal. Rptr. 549* , are discussed in *§ 16.44[3][a]*. In reversing a judgment in plaintiff's favor, the court of appeal held that the trial court had abused its discretion in denying defendant's motion to amend the answer to conform to proof (*54 Cal. App. 3d 393, 400-401*). Defendant had made the motion after the case was submitted for decision, and the court held that amendment to conform to proof may be allowed after submission, relying on prior California law (*54 Cal. App. 3d 393, 400 n.3*).

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Volume 1 Chapters 1-19 WRITING LEGAL MEMORANDA AND BRIEFS; ABATEMENT AND SURVIVAL OF ACTIONS---to---AMENDED AND SUPPLEMENTAL PLEADINGS
CHAPTER 16 AMENDED AND SUPPLEMENTAL PLEADINGS
PART II. FORMS
A. Amended Pleadings

1-16 California Points & Authorities § 16.32

§ 16.32 Supporting Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Before Court Grants Judgment on Pleadings

[1] FORM Supporting Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Before Court Grants Judgment on Pleadings

[*The following should be combined with a general form of memorandum in support of a motion for leave to file an amended pleading or an amendment to a pleading (see § 16.30).*]

THE COURT SHOULD GRANT LEAVE TO AMEND THE _____ [COMPLAINT *or* ANSWER *or* CROSS COMPLAINT] BEFORE GRANTING JUDGMENT ON THE PLEADINGS SO THAT _____ [*specify moving party*] IS GIVEN AN OPPORTUNITY TO CORRECT THE DEFECTIVELY PLEADED _____ [CAUSE OF ACTION *or* DEFENSE] BECAUSE _____ [THE FACTS INDICATE THE EXISTENCE OF A GOOD _____ (CAUSE OF ACTION *or* DEFENSE) AND THE DEFECTS WERE NOT CALLED TO _____'S (*specify moving party*) ATTENTION *or* THE _____ (COMPLAINT *or* ANSWER *or* CROSS COMPLAINT) HAS BEEN UPHELD AGAINST A GENERAL DEMURRER].

Amendment of Defective Pleading Before Judgment on the Pleadings. A trial court should grant leave to amend before granting judgment on the pleadings when the facts indicate that the party probably has a good cause of action or defense, but that it has been pleaded imperfectly or defectively, and the defects have not been called to his attention by demurrer or by notice of motion for judgment on the pleadings or if the defective pleading was earlier upheld against general demurrer (*MacIsaac v. Pozzo (1945) 26 Cal. 2d 809, 815-816, 161 P.2d 449* ; *Dobbins v. Hardister (1966) 242 Cal. App. 2d 787, 796, 51 Cal. Rptr. 866*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a motion for leave to file an amended pleading or an amendment to a pleading when the motion to amend is made in response to a motion for judgment on the pleadings. It does not provide a complete memorandum but is designed to be combined with the general form of memorandum supporting amendment of pleadings set out in *§ 16.30*. It may also be used with forms relating to any other grounds which may exist for amending the pleading [*see §§ 16.33 -16.44*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Amendment of Defective Pleading Before Judgment on the Pleadings

MacIsaac v. Pozzo (1945) 26 Cal. 2d 809, 161 P.2d 449 , was an action for a declaratory judgment that a joint venture agreement was valid. Defendants' answer alleged that the agreement was invalid because it was induced by fraud. By cross complaint based on the fraud, defendants sought to be paid a greater percentage of moneys payable to the joint venturers than called for in the agreement. The cross complaint, however, did not expressly seek rescission or specifically ask for damages. When the case came to trial, the court granted judgment for plaintiffs on the pleadings on the ground that the cross complaint did not state any cause of action against the plaintiffs. There had been no notice of the motion for judgment on the pleadings, nor had there been any demurrer to defendant's pleadings. The court denied defendants' request for leave to amend their answer to conform with the court's expressed opinion regarding the pleadings, and defendants appealed.

The Supreme Court reversed, stating that defendants' failure to ask for the proper relief in their cross complaint was not fatal to their cause because the defect was curable by amendment (*26 Cal. 2d 809, 815*). Quoting *Kelley v. Kriess (1885) 68 Cal. 210, 9 P 129* , the Court stated that if a plaintiff has a good cause of action which has not been set out in the complaint by accident or mistake, the court, on motion for judgment on the pleadings, should permit amendment on application to do so. The Court proceeded to hold that this proposition applies to defendants' pleadings as well. Thus, the Court held that when the facts stated indicate that the party probably has a good cause of action or defense, but that it has been pleaded imperfectly or defectively, and the defects have not been called to the party's attention by demurrer or by notice of motion for judgment on the pleadings, the party should be given an opportunity to elect to stand on the pleadings or to amend them before the motion for judgment on the pleadings is granted (*26 Cal. 2d 809, 815-816*).

Plaintiffs in Dobbins v. Hardister (1966) 242 Cal. App. 2d 787, 51 Cal. Rptr. 866 , sued for the value of goods sold and delivered to defendant. Defendant answered denying the allegations of the complaint on information and belief, and the court denied a demurrer to the answer which asserted that the answer was insufficient for failure to positively admit or deny matters which were presumptively in defendant's knowledge. Plaintiffs later noticed a motion for judgment on the pleadings on the same grounds, and the motion was granted. Defendant appealed.

After agreeing with the trial court that defendant's answer was insufficient, the court of appeal reversed and directed that defendant be granted leave to amend (*242 Cal. App. 2d 787, 794, 798*). The court found that there are two situations in which a trial court must grant leave to amend before granting judgment on the pleadings. For the first situation, the court cited the rule in *MacIsaac v. Pozzo (1945) 26 Cal. 2d 809, 161 P.2d 449* , discussed *above*, allowing amendment when the facts show that a party probably has a good cause of action or defense which has been defectively pleaded. For the second situation, the court relied on *Shabrick v. Moore (1961) 195 Cal. App. 2d 56, 15 Cal. Rptr. 310* (discussed in *§ 16.32[4][a]*), stressing the need to allow amendment before granting a motion for judgment on the pleadings when the complaint or answer has already been upheld against a general demurrer (*242 Cal. App. 2d 787, 796*). The court held the rule in *Shabrick, above*, applicable because defendant's answer had been upheld against an attack on the same grounds on demurrer and it appeared probable that the defect could be corrected by amendment (*242 Cal. App. 2d 787, 796-797*).

The court reached this decision even though defendant did not appear at the hearing on the motion for judgment on the pleadings and did not request leave to amend, noting that under *Code Civ. Proc. § 472c*, when a demurrer is sustained without leave to amend, a request for leave to amend is not necessary to obtain appellate review of whether the trial court abused its discretion in making the order, and citing *MacIsaac, above,* for the proposition that the reason for the *Code Civ. Proc. § 472c* rule applies equally to a motion for judgment on the pleadings so that the same result should obtain (*242 Cal. App. 2d 787, 797-798*).

Note, however, that in *Tiffany v. Sierra Sands Unified School Dist. (1980) 103 Cal. App. 3d 218, 162 Cal. Rptr. 669* , the court stressed the language in *MacIsaac, above,* that on a motion for judgment on the pleadings, the court should permit amendment on the pleader's application to do so. In *Tiffany,* the plaintiff made no effort to amend his complaint before, at, or after trial, and the court of appeal held that the trial court did not abuse its discretion in granting judgment on the pleadings without leave to amend (*103 Cal. App. 3d 218, 225-226*). Thus, unless the party desires to stand on the pleadings as they are, a motion for leave to file an amended pleading appears to be the safest way to preserve the opportunity to amend to correct defects in the pleading that are asserted in a motion for judgment on the pleadings.

[4] Additional Authorities

[a] Amendment of Defective Pleading Before Judgment on the Pleadings

See Ludgate Ins. Co. v. Lockheed Martin Corp. (2000) 82 Cal. App. 4th 592, 98 Cal. Rptr. 2d 277 , discussed in *§ 16.36[4][a]*.

In *San Diego County Council, Boy Scouts of America v. Escondido (1971) 14 Cal. App. 3d 189, 92 Cal. Rptr. 186* , a consolidated appeal, plaintiffs sought a declaration that defendant held title to certain real property in trust for the benefit of boys and girls who might from time to time be members of the Boy Scouts and Girl Scouts of the Escondido area. In one of the actions, the plaintiff was an organization in the Boy Scouts hierarchy that encompassed that area. The dispute arose after the property was deeded to defendant by the trustee, and defendant proposed using the proceeds of any sale of the property for a broader public use. After the first witness was sworn, defendant objected to the introduction of evidence on the ground that the complaint did not state a cause of action by eligible parties. The court sustained the objection and denied plaintiff's motion to amend the complaint. Plaintiff appealed from the ensuing judgment on the pleadings.

The court of appeal reversed. The court noted that the plaintiff held itself ready to amend the complaint to allege the factual background in more detail, to make a detailed allegation of plaintiff's nature and standing, and to join as parties the attorney general and the Girl Scouts organization with status equivalent to that of plaintiff in the Boy Scouts. In holding that the plaintiff's request to amend should have been granted, the court cited *MacIsaac v. Pozzo (1945) 26 Cal. 2d 809, 161 P.2d 449* (discussed in *§ 16.32[3][a],* on the propriety of allowing amendment on a motion for judgment on the pleadings when a party with a good cause of action has failed to set it out by accident or mistake, especially when the defects were not earlier called to the pleader's attention (*14 Cal. App. 3d 189, 194*).

Plaintiffs in Olson v. Sacramento County (1969) 274 Cal. App. 2d 316, 79 Cal. Rptr. 140 , brought suit against defendant for breach of contract, and defendant cross complained alleging fraud. The court granted plaintiffs' motion, as cross defendants, for judgment on the pleadings on the ground that the action for fraud was barred by the statute of limitations because the cross complaint did not allege facts excusing failure to discover the fraud within the statutory period. Before judgment was entered on the order, cross complainant moved for a new trial on the order granting the judgment or alternatively for leave to amend the cross complaint, but judgment was entered the next day, and cross complainant appealed.

The court of appeal reversed, holding that the proposed amended cross complaint contained sufficient allegations to

avoid the statute of limitations and that since it stated a cause of action which was not barred by the statute of limitations, the trial court should have allowed it to be filed (*274 Cal. App. 2d 316, 327-329*). The court relied on *Dobbins v. Hardister (1966) 242 Cal. App. 2d 787, 51 Cal. Rptr. 866* (discussed in *§ 16.32[3][a]*), and *Shabrick v. Moore (1961) 195 Cal. App. 2d 56, 15 Cal. Rptr. 310* , discussed *below*, finding them applicable both because the proposed amended cross complaint showed that defendant had a good cause of action which had been defectively pleaded in the original cross complaint and because, although there had been no prior demurrer to the cross complaint, it had been earlier upheld against motions to dismiss and to strike, and for judgment on the pleadings which had been denied by a different judge from the one who granted the second motion for judgment on the pleadings (*274 Cal. App. 2d 316, 329-330*).

In *Shabrick v. Moore (1961) 195 Cal. App. 2d 56, 15 Cal. Rptr. 310* , the trial court granted defendant's motion for judgment on the pleadings. On plaintiff's appeal, the court of appeal held that the trial court had not abused its discretion in granting the judgment as to plaintiff's claim on an oral contract that was barred by the statute of frauds because the defect clearly could not be corrected by amendment (*195 Cal. App. 2d 56, 60*). At the same time, however, the *Shabrick* court held that the trial court did err in granting judgment on the pleadings on a claim for quantum meruit that was poorly pleaded and sought the wrong measure of damages, holding that an opportunity to amend should have been allowed, particularly because the complaint had already been upheld against demurrer earlier in the proceedings (*195 Cal. App. 2d 56, 63*).

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1-16 California Points & Authorities § 16.33

§ 16.33 Supporting Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Correction of Mistaken or Inadvertent Statement

[1] FORM Supporting Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Correction of Mistaken or Inadvertent Statement

[*The following should be combined with a general form of memorandum in support of a motion for leave to file an amended pleading or an amendment to a pleading (see § 16.30) or to amend to conform to proof (see § 16.31).*]

THE COURT SHOULD ALLOW AMENDMENT OF THE PLEADING BECAUSE THE PROPOSED AMENDMENT MERELY CORRECTS AN ERROR RESULTING FROM MISTAKE OR INADVERTENCE.

A. Statutory Authority. The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading by correcting a mistake in the name of a party, or a mistake in any other respect (*Code Civ. Proc. § 473(a)*).

[*EITHER*]

B. Amendment to Correct Error Caused by Mistake or Inadvertence. A party should be allowed to amend to correct an error in a pleading caused by mistake or inadvertence (*Meyer v. State Bd. of Equalization (1954) 42 Cal. 2d 376, 386, 267 P.2d 257* ; *Board of Trustees v. Superior Court (2007) 149 Cal. App. 4th 1154, 1167-1170, 57 Cal. Rptr. 3d 755* ; *Freidberg v. Freidberg (1970) 9 Cal. App. 3d 754, 761, 88 Cal. Rptr. 451*).

[*OR*]

B. Amendment to Omit Allegation. A party should be allowed to amend a pleading to omit allegations that where

made as the result of a mistake or inadvertence (*Lamoreux v. San Diego & Ariz. E. Ry. Co. (1957) 48 Cal. 2d 617, 623, 311 P.2d 1*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for leave to amend a pleading to correct a misstatement of fact in the original pleading by correcting or omitting an allegation. They do not provide a complete memorandum, but are designed to be combined with one of the general forms of memoranda of points and authorities supporting amendment of pleadings set out in *§§ 16.30* and *16.31*, as well as with forms relating to any other grounds that may exist for amending the pleadings [*see §§ 16.32, 16.34 -16.44*]. The first variation of Paragraph B is for use if an error is to be corrected by changing an allegation or replacing it with a new allegation; the second variation of Paragraph B is for use only if the error is to be corrected by omitting an allegation.

The case law underlying this memorandum relates to the objections to a motion to amend that the proposed amendment omits, without explanation, an allegation fatal to the pleading [*see § 16.50*] or contradicts an admission made in the original pleading [*see § 16.51*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Opposing Points and Authorities

The points and authorities set out in *§ 16.50* or *16.51* may be used in an appropriate case to oppose a motion for leave to amend supported by this memorandum.

[3] Discussion of Authorities

[a] Amendment to Correct Error Caused by Mistake or Inadvertence

In ***Meyer v. State Bd. of Equalization*** *(1954) 42 Cal. 2d 376, 267 P.2d 257* , plaintiffs brought suit to recover sales taxes that they had paid under protest. In their complaint, plaintiffs alleged that their role in relation to the sales in question was that of broker. Defendant's answer did not admit or deny this allegation, but an amended answer did deny it. Ultimately, however, plaintiffs prevailed in trial court, and defendant appealed.

The Supreme Court reversed, rejecting plaintiffs' position in defense of the judgment that the trial court had erred in allowing amendment of defendant's answer. The Court acknowledged the rule that a party cannot be allowed to file an amendment contradicting an admission made in his or her original pleadings, but held that the rule is subject to an exception when it is clearly shown that the earlier pleading is the result of mistake or inadvertence (*42 Cal. 2d 376, 386*).

In ***Board of Trustees v. Superior Court*** *(2007) 149 Cal. App. 4th 1154, 57 Cal. Rptr. 3d 755* , the court considered the validity of a complaint signed by the party's father, with the party's knowledge and consent, instead of by the party or his/her attorney of record, as required by *Code of Civ. Proc. §§ 446* and *128.7*. In reviewing the language of section 446, its legislative history, and the wider historical circumstances of its enactment, the court found no suggestion that the Legislature intended a plaintiff's failure to comply with the subscription requirement to constitute an incurable defect. Similarly, the court found that section 128.7 also does not support the contention that a signature defect of the type at issue renders the complaint void and not subject to amendment. Thus, the court concluded that section 128.7 may be interpreted to allow correction of a signature defect in a complaint after the defect is called to the attention of the plaintiff, where the correction is promptly made and the court finds that the plaintiff actually assented to the filing of

the action (*149 Cal. App. 4th 1154, 1167-1170)* .

Freidberg v. Freidberg *(1970) 9 Cal. App. 3d 754, 88 Cal. Rptr. 451* , involved plaintiff's attempt to set aside a property settlement agreement with defendant, her former husband, on the ground that it had been procured by his fraud. The complaint alleged that defendant had represented to plaintiff that the community interest in his law practice was not more than $22,000, when it was actually in excess of $200,000. However, in a later deposition, plaintiff stated that defendant had insisted that there was no community interest in the law practice at all. In the deposition the plaintiff explained the allegation in the complaint by suggesting that in drafting it her attorneys must have drawn on the property settlement agreement which stated that plaintiff would receive a certain amount per month in consideration for giving up her interest in the law practice. Plaintiff moved for leave to amend her complaint to correct a mistake of fact unknown to the pleader at the time the complaint was filed, but the court apparently denied the motion. The trial court granted summary judgment for defendant and plaintiff appealed.

In reversing, the court of appeal held that the plaintiff should be allowed to amend her complaint, stating that the right of a party to correct a misstatement of fact when it appears the error was the result of a mistake or inadvertence cannot be denied (*9 Cal. App. 3d 754, 761-763*). The court recognized that when a verified pleading is amended to correct an error resulting from mistake or inadvertence, the resulting contradiction with the original allegation does not carry with it the onus of untruthfulness (*9 Cal. App. 3d 754, 761*).

[b] Amendment to Omit Allegation

In ***Lamoreux v. San Diego & Ariz. E. Ry. Co.*** *(1957) 48 Cal. 2d 617, 311 P.2d 1* , plaintiff brought suit for the wrongful death of her husband, who was killed in a railroad crossing accident. Plaintiff's suit named both her husband's employer and the railroad as defendants, alleging that they were jointly engaged in raising the grade at the crossing and so negligently performed the work as to create a trap for motorists. Plaintiff also filed a claim for workmen's compensation which resulted in a settlement and release of the employer. An amended complaint subsequently omitted the employer as a party and omitted the allegations connecting the employer with the accident. Plaintiff won a verdict against the railway, but an order granting a new trial was entered, and plaintiff appealed from that order.

In affirming the order, the Supreme Court addressed the railway's contention that the release of the employer acted to release the railway as a joint tortfeasor as well. The railway relied on the allegations in the original complaint as establishing that it was a joint tortfeasor with the employer, and the Court recognized that when a verified complaint contains allegations destructive of a cause of action, the defect cannot be cured in later pleadings by simply omitting the allegations without explanation. However, the Court stated that a party should be allowed to correct a pleading by omitting an allegation which, it appears, was made as the result of a mistake or inadvertence. The Court proceeded to hold that plaintiff was not bound by the allegations of her original complaint which were omitted from the amended complaint in light of her explanation that after further investigation, she had become satisfied that the evidence would not support the allegations relating to the employer's negligence (*48 Cal. 2d 617, 623*).

[4] Additional Authorities

[a] Amendment to Correct Error Caused by Mistake or Inadvertence

In *Higgins v. Del Faro (1981) 123 Cal. App. 3d 558, 176 Cal. Rptr. 704* , the court of appeal reversed the trial court's denial of plaintiff's motion to amend her complaint, noting that the amendment would have corrected a minor technical error in the pleading (attachment of wrong document) and would not have caused undue delay in the trial. The court stated that the policy of liberally allowing amendment any time before or during trial prevails so long as no prejudice is shown to the adverse party, and no such prejudice was demonstrated in the instant case (*123 Cal. App. 3d 558, 564*).

In *Hooper v. Romero (1968) 262 Cal. App. 2d 574, 68 Cal. Rptr. 749* , plaintiff sued the driver and owner of a truck

for damages, including damages to "plaintiff's automobile" suffered in an accident which occurred while plaintiff was riding in the automobile and her husband was driving it. After both sides had presented their cases, defendants sought an instruction on imputed contributory negligence on the ground that plaintiff's allegation in the complaint constituted an admission that the automobile was her separate property so that the negligence of her husband in driving it was imputable to her. Plaintiff moved to amend the complaint to delete any language which could be construed as alleging that she was the sole owner of the automobile, or alternatively, to clarify the language to reflect its intended meaning that plaintiff had a community property interest in the automobile (which would prevent her husband's negligence from being imputed to her) and to reopen the case to offer evidence of the nature of the ownership. The court denied the motion, and gave an instruction on imputed contributory negligence to the jury which returned a verdict for defendants. Plaintiff appealed.

Reversing, the court of appeal stated that when a party inadvertently makes an allegation which is destructive of his or her cause of action or of a valid defense, the courts generally favor amendment of pleadings to permit the party to assert the true facts and to correct the innocent error, and that this liberality applies during, as well as before trial. The court held that the trial court abused its discretion by denying the proposed amendment because it would not have deprived defendants of any valid defense, but would only, on reopening of the case, have allowed the true facts as to ownership to be proved. Then if community ownership were not established, defendants would still have been able to assert their defense (*262 Cal. App. 2d 574, 580*).

Gould v. Stafford (1894) 101 Cal. 32, 35 P. 429 , involved a dispute between riparian landowners over defendant's allegedly wrongful diversion of water from a stream. After the first trial of the case, the Supreme Court reversed a judgment in defendant's favor, and on remand, defendant moved to amend the answer to change the defense from a claim that he was entitled to more water than his flume could carry, to a claim that tenants on his property over whom he had no control were solely liable for any excessive diversion of water. The trial court allowed the amendment over plaintiff's objection. A second trial ensued, resulting in a judgment for plaintiff which was also reversed by the Supreme Court. Prior to the third trial, plaintiff moved to strike the amended answer, and the motion was denied. Defendant prevailed on the third trial, and plaintiff appealed.

The Supreme Court finally affirmed, rejecting plaintiff's contention that the amendment should not have been allowed because it was based mainly on a mistake of law made by defendant's attorney. The Court held that the power of a court to allow an amendment is not limited by the character of the mistake which requires it to be exercised, citing the power conferred on the courts by *Code Civ. Proc. § 473* to allow amendment to correct, in addition to certain enumerated mistakes, mistakes in any other respect or in any other particulars (*101 Cal. 32, 34*).

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1-16 California Points & Authorities § 16.34

§ 16.34 Supporting Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--To More Fully or Accurately State Cause of Action or Defense

[1] FORM Supporting Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--To More Fully or Accurately State Cause of Action or Defense

[*The following should be combined with a general form of memorandum in support of a motion for leave to file an amended pleading or an amendment to a pleading (see § 16.30).*]

THE COURT SHOULD ALLOW THE AMENDMENT TO STATE THE _____ [CAUSE OF ACTION *or* DEFENSE] MORE FULLY OR ACCURATELY.

Amendment to State Cause of Action or Defense More Fully or Accurately. Ordinarily, a motion to amend a pleading to state a cause of action or defense more fully or accurately should be granted (*Wells Fargo & Co. v. McCarthy (1907) 5 Cal. App. 301, 316, 90 P. 203* ; *see also Oakes v. McCarthy Co. (1968) 267 Cal. App. 2d 231, 261-262, 73 Cal. Rptr. 127* and *Angie M. v. Superior Court (1995) 37 Cal. App. 4th 1217, 1227, 44 Cal. Rptr. 2d 197*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for leave to amend a pleading to state a cause of action or defense more fully and accurately when it has already been generally or ambiguously pleaded. It does not provide a complete memorandum, but is designed to be combined with one of the general forms of memoranda of points and authorities set out in *§§ 16.30* and *16.31*, as well as with forms relating to any other grounds that may exist for amending the pleading [*see §§ 16.32, 16.33, 16.35 -16.44*].

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case

and the points of law stated.

[3] Discussion of Authorities

[a] Amendment to State Cause of Action or Defense More Fully or Accurately

In ***Wells, Fargo & Co. v. McCarthy*** *(1907) 5 Cal. App. 301, 90 P. 203* , an action to foreclose a mortgage, defendants sought to introduce evidence of a novation of the promissory note that plaintiff had sued on. When the court excluded the evidence on the ground that it was not admissible under the pleadings, defendants asked leave to file an amended answer to assert the agreement that they claimed to constitute a novation. After the court denied the motion, one defendant moved to file an amended answer setting up the agreement as a novation giving him a lien on the premises prior to plaintiff's lien. The court sustained plaintiff's objection to the motion, and defendants ultimately appealed from a judgment in favor of plaintiff.

Although the court of appeal did not reverse the trial court, it stated, that, ordinarily, an application to amend a pleading to present more fully or accurately a cause of action or defense should be granted on such terms as appear just (*5 Cal. App. 301, 316*). The court held that the trial court had not abused its discretion in the case before it, however, due to defendants' delay in asserting the defense, noting that the action had been pending for over five years when the amendment was sought and that it would not be in the furtherance of justice to allow the amendment, which would have defeated plaintiff's right to enforce a just obligation (*5 Cal. App. 301, 316-318*).

Oakes v. McCarthy Co. *(1968) 267 Cal. App. 2d 231, 73 Cal. Rptr. 127* , was a suit for damages arising out of movement of the filled lot on which plaintiffs' house was built. One of plaintiffs' claims against the developer was a claim for fraud based in part on affirmative misrepresentations that the work on the premises was done in good workmanlike manner. After plaintiffs rested their case in chief, they moved to amend the pleadings to conform to proof to add an allegation to the fraud count stating that the affirmative misrepresentations had been made that the house had been constructed in compliance with FHA requirements and that inspection by FHA inspectors was plaintiffs' assurance of proper grading of the lot. Plaintiffs recovered a judgment against the developer for fraud, and the developer appealed, claiming, inter alia, that the trial court erred in granting the motion to amend.

The court of appeal affirmed, holding that the amendment did not attempt to add a new cause of action, but only elaborated on the representation of good workmanship which had been previously pleaded. Noting that the trial court had allowed defendants a one-week continuance to take depositions on the issue in response to their claim of surprise, the court held that absent an abuse of discretion prejudicing the opposing party, amendments are to be allowed with liberality and that the trial court had acted within its discretion (*267 Cal. App. 2d 231, 262*).

[b] Amendment to State Cause of Action or Defense More Fully or Accurately

In ***Angie M. v. Superior Court*** *(1995) 37 Cal. App. 4th 1217, 44 Cal. Rptr. 2d 197* , plaintiff brought an action for childhood sexual abuse and intentional infliction of emotional distress. Defendant demurred to the cause of action for intentional infliction of emotional distress, and the trial court sustained the demurrer without leave to amend on various grounds, including that plaintiff failed to allege any facts showing that she suffered "severe" emotional distress.

The court of appeal agreed with the trial court on the issue that the complaint failed to plead sufficient facts demonstrating the nature, extent or duration of the alleged emotional distress. However, the court stated that denial of leave to amend constitutes an abuse of discretion unless the complaint shows on its face that it is incapable of amendment. Furthermore, liberality in permitting amendment is the rule if a fair opportunity to correct any defect has not been given. Since the deficiencies in plaintiff's pleading appeared to be easily corrected, the court concluded that it was an abuse of discretion for the trial court to deny leave to amend to allege specific facts sufficient to show the severity of plaintiff's alleged emotional distress (*37 Cal. App. 4th 1217, 1227*). The court thus issued a writ of mandate

directing the trial court to vacate its order sustaining the demurrer without leave to amend.

[4] Additional Authorities

[a] Amendment to State Cause of Action or Defense More Fully or Accurately

Plaintiffs in Eatwell v. Beck (1953) 41 Cal. 2d 128, 257 P.2d 643 , brought suit for damages resulting from misrepresentations as to the income of a motel they purchased. Plaintiffs failed to plead or prove the proper measure of damages allowable in a case of fraud in the sale of property, and at the close of plaintiff's case, defendants moved for nonsuit. Before the court ruled on the motion, plaintiffs moved to reopen the case and for leave to amend the complaint so that the property values relevant to the appropriate measure of damages could be proven. The court denied plaintiffs' motion and granted defendants' motion for nonsuit. On appeal, the Supreme Court reversed. The Court stated that the original complaint clearly attempted to state a cause of action for damages for fraud, and that although it did not specifically allege damages under the proper theory, the facts alleged tended at least inferentially to show that there was such damage. Finding no apparent prejudice to defendants by the plaintiffs' failure to have earlier pleaded the more specific facts as to damage, the Court held that plaintiffs' request for leave to amend should have been granted (*41 Cal. 2d 128, 135-136*).

In *Brooks v. E.J. Willig Truck Transp. Co. (1953) 40 Cal. 2d 669, 255 P.2d 802* , the trial court allowed plaintiffs to amend the complaint, which alleged that defendants were negligent in the operation and control of a truck, to allege that defendant driver violated two sections of the Vehicle Code relating to hit and run accidents. The court subsequently sustained defendants' demurrer to the amended complaint on the ground that the new allegations were barred by the statute of limitations. At trial proof was made of the statutory violations, and on appeal from a judgment in plaintiffs' favor, defendants argued that they were prejudiced because the court's rulings had led them to believe that these issues were excluded from the case. In rejecting defendants' contention, the Supreme Court stated that the demurrer to the new allegations in the amended complaint should not have been sustained in the first place because the new allegations set forth specific acts and omissions which were a part of the operation and control of the truck, and since they were not unrelated to the facts alleged in the original complaint, they were not barred by the statute of limitations (*40 Cal. 2d 669, 681*).

The original complaint in *Jaffe v. Heffner (1959) 173 Cal. App. 2d 512, 343 P.2d 374* , sought a judgment quieting title to real property in plaintiff. At trial, the court allowed plaintiff to amend the complaint to allege a constructive trust, and plaintiff prevailed on that theory. On appeal, defendants claimed that they were prejudiced by the amendment, but the court of appeal rejected their contention, holding that an amended complaint elaborating allegations in a preceding one, though adding additional misrepresentations, does not state a new cause of action (*173 Cal. App. 2d 512, 516-517*).

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1-16 California Points & Authorities § 16.35

§ 16.35 Supporting Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Complaint--To Correct Failure to State Cause of Action

[1] FORM Supporting Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Complaint--To Correct Failure to State Cause of Action

[*The following should be combined with a general form of memorandum in support of a motion for leave to file an amended pleading or an amendment to a pleading (see § 16.30) or to amend to conform to proof (see § 16.31).*]

THE COURT SHOULD ALLOW AMENDMENT OF THE COMPLAINT BECAUSE THE AMENDMENT SUPPLIES AN ESSENTIAL ELEMENT OF THE CAUSE OF ACTION ORIGINALLY SOUGHT TO BE ALLEGED.

Alleging Essential Element of Cause of Action. The court should allow amendment of a complaint to supply an essential element of the cause of action sought to be alleged in the original complaint (*Smith v. Los Angeles Bookbinders Union (1955) 133 Cal. App. 2d 486, 495, 284 P.2d 194* ; *see Title Insurance & Trust Co. v. Affiliated Gas Equip., Inc. (1961) 191 Cal. App. 2d 318, 330-332, 12 Cal. Rptr. 729*).

[2] Comments

[a] Use of Form

These points and authorities may be used in support of a motion for leave to amend a complaint that failed to state a cause of action. It does not provide a complete memorandum, but is designed to be combined with one of the general forms of memoranda of points and authorities set out in *§§ 16.30* and *16.31*, as well as with forms relating to any other specific grounds that may exist for amending the complaint [*see §§ 16.32 -16.34, 16.36 -16.42*]. If the failure to state a cause of action is the result of a particularly technical defect, counsel may want to consider use of § 16.36 along with this form.

If a precautionary amendment is to be made to ensure that the complaint is sufficient, and counsel does not wish to admit the deficiency of the complaint by arguing that the amendment should be allowed because it will provide an essential element of the cause of action, it may be preferable to support the motion on the ground that the amendment will more fully or accurately state the cause of action [*see § 16.34*].

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

With appropriate modifications, these points and authorities may be used to support a motion for leave to file an amended cross complaint or an amendment to a cross complaint.

[3] Discussion of Authorities

[a] Alleging Essential Element of Cause of Action

Smith v. Los Angeles Bookbinders Union (1955) 133 Cal. App. 2d 486, 284 P.2d 194 , involved an action for libel. When the case came to trial, defendants objected to the introduction of evidence on the ground that the complaint did not state a cause of action. The objection was based on the complaint's failure to allege matter that was libelous on its face, as is necessary to constitute libel per se, or if the matter could be considered libel per quod due to innuendo, the complaint failed to allege any special damages that would make it actionable. The court sustained the demurrer with leave to amend. An amended complaint was subsequently filed which did allege special damages, but defendants' demurrer to the amended complaint on the ground that it stated a new cause of action barred by the statute of limitations was sustained. Plaintiffs appealed.

The court of appeal reversed, first determining that the complaint had not alleged libel per se because the matter was not libelous on its face (*133 Cal. App. 2d 486, 492-494)* . The court then held that a complaint that fails to state a cause of action because it does not allege an essential element of the cause of action may be amended to incorporate that indispensable element. The defendant is not surprised or prejudiced by such an amendment because it only corrects a defective statement of the cause of action attempted to be stated in the original complaint (*133 Cal. App. 2d 486, 495*). Such an amendment does not constitute the allegation of a new cause of action after the statute of limitations has run where there is no attempt to state facts giving rise to a wholly distinct and different legal obligation against defendant (*133 Cal. App. 2d 486, 495-496*). In the case before the court, the basic cause of action was the plaintiffs' right to be free from defamation, and so long as the same publication was the gist of the original and amended complaints, there could be no difference in the identity of the cause of action, whether libel per se or per quod (*133 Cal. App. 2d 486, 497*).

Plaintiffs in Title Ins. & Trust Co. v. Affiliated Gas Equip., Inc. (1961) 191 Cal. App. 2d 318, 12 Cal. Rptr. 729 , sued to recover for property damages resulting from a fire caused by a furnace. The original complaint included claims based on negligent manufacture and installation of the furnace and breach of express and implied warranties. At the beginning of trial, defendants moved to dismiss the causes of action based on breach of warranty due to plaintiffs' failure to allege that notice of the breach was given to defendants within a reasonable time after breach, an essential element of a cause of action for breach of warranty. Plaintiffs countered with a motion to amend the complaint to include the missing allegation. The court denied plaintiffs' motion and granted defendants' motions to dismiss. Plaintiffs appealed from judgments entered in favor of two defendants and as to a third defendant, from a judgment notwithstanding the verdict and order granting a new trial.

In reversing the adverse judgments and affirming the order granting a new trial, the court of appeal held that the motions to dismiss were erroneously granted and that leave to amend should have been allowed (*191 Cal. App. 2d 318, 329-332*). The court found that the motion to amend did not surprise or prejudice defendants since the original

complaint alleged breach of warranty except for the element of notice, and defendants' pretrial statement and the pretrial order recognized the existence and breach of warranty as issues to be tried (*191 Cal. App. 2d 318, 330-332*).

[4] Additional Authorities

[a] Alleging Essential Element of Cause of Action

The facts and procedural background of *Klopstock v. Superior Court (1941) 17 Cal. 2d 13, 108 P.2d 906* , are discussed in *§ 16.30[3][b]*. In criticizing the unqualified statement that a new or different cause of action cannot be introduced by amendment, the Supreme Court noted that the most common kinds of amendments are those amending complaints that do not state facts sufficient to constitute a cause of action. The Court recognized that such amendments do in fact introduce a new cause of action for the first time, and concluded that the better formulation of the rule is that a wholly different cause of action is not to be introduced by amendment (*17 Cal. 2d 13, 20*).

The facts of *Barba v. Superior Court (1966) 239 Cal. App. 2d 572, 49 Cal. Rptr. 60* , are discussed in *§ 16.30[4][a]*. The court of appeal in *Barba* noted that, although plaintiffs' complaint was inartfully drawn, it was apparent from defendant owner's answer and conduct at pretrial that defendant was at all times aware that it had been sued on the theory that it was the owner of a vehicle which was being driven by a person who had permission to drive it at the time of the accident. The answer had not raised the issue, and at pretrial, defendant owner had stated that permissive use was not in issue (*239 Cal. App. 2d 572, 576*). Recognizing that an amendment should not be allowed to introduce a wholly different cause of action, the court relied on *Klopstock v. Superior Court (1941) 17 Cal. 2d 13, 108 P.2d 906* , discussed *above*, for the proposition that the test for a wholly different cause of action is not based on technical rules of pleading, but is whether an attempt is made to state facts which give rise to a wholly distinct and different legal obligation against the defendant (*239 Cal. App. 2d 572, 577-578*). Applying that test, the court held that plaintiffs were attempting to enforce only one legal obligation against defendant owner, and that the amendment, relating only to the driver's status, was not prejudicial to defendant owner where nothing in the pleadings or pretrial statements and order indicated any other theory of liability. The court finally held that the trial court had abused its discretion in refusing to allow amendment, and ordered the writ of mandate to issue to compel the trial court to allow the amendment (*239 Cal. App. 2d 572, 578*).

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1-16 California Points & Authorities § 16.36

§ 16.36 Supporting Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Complaint--Correction of Technical Defect

[1] FORM Supporting Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Complaint--Correction of Technical Defect

[*The following should be combined with a general form of memorandum in support of a motion for leave to file an amended pleading or an amendment to a pleading (see § 16.30) or to amend to conform to proof (see § 16.31).*]

THE COURT SHOULD ALLOW AMENDMENT OF THE COMPLAINT BECAUSE THE AMENDMENT WILL CORRECT A TECHNICAL DEFECT IN AN OTHERWISE ADEQUATE PLEADING.

Amendment to Cure Technical Defect. An amendment designed to cure a technical defect in a pleading otherwise adequate to put the other party on notice of the true basis of the pleader's case should be allowed in furtherance of the policy favoring trial on the merits (*Bice v. Stevens (1955) 136 Cal. App. 2d 368, 379, 289 P.2d 95*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for leave to amend a complaint that is subject to a technical defect in pleading. It does not provide a complete memorandum, but is designed to be combined with one of the general forms of memoranda of points and authorities set out in *§§ 16.30* and *16.31*, as well as with forms relating to any other specific grounds that may exist for amending the complaint [*see §§ 16.32 -16.35, 16.37 -16.42*]. This form should be used when the complaint puts the defendant on notice of plaintiff's claim, but fails to state a cause of action for some technical reason. It is, therefore, closely related to *§ 16.35*, and counsel should particularly consider use of *§ 16.35* with this form.

If correction of the technical defect requires the omission or contradiction of a fact pleaded in a prior complaint, counsel

should consider use *§ 16.36* and should note that an explanation of the mistake or inadvertence leading to the erroneous pleading of the fact to be omitted or contradicted is required [*see §§ 16.50, 16.51*]. However, since this form relates to technically imperfect pleadings, it is more likely to require an elaboration on the facts pleaded (as where the wrong measure of damages has been pleaded) than to require an omission or change of pleaded facts.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

With appropriate modifications, these points and authorities may be used to support a motion for leave to file an amended cross complaint or an amendment to a cross complaint.

[3] Discussion of Authorities

[a] Amendment to Cure Technical Defect

Bice v. Stevens (1955) 136 Cal. App. 2d 368, 289 P.2d 95 , involved claims of fraud arising out of an exchange of commercial properties. The complaint alleged the impossibility of rescission and sought damages in lieu of rescission, but alleged an incorrect measure of damages. Defendants objected to the introduction of any evidence on the ground that the complaint failed to state a cause of action. The court sustained the objection on the basis that no damages were alleged because the complaint did not allege the property values necessary to determine damages. Plaintiffs moved to amend the complaint to allege the relevant values, but the court denied the motion on the ground that, four years after the original complaint was filed, it raised new and different issues on which the defendants could not be expected to be prepared to go to trial. Plaintiffs appealed from the judgment entered against them.

The court of appeal reversed, taking note of the rule that when facts alleged in a complaint show that the plaintiff is entitled to some sort of damages, failure to plead the correct rule of damages is not fatal (*136 Cal. App. 2d 368, 373-374)* . Consistent with this rule, the court held that the defect in the complaint was a technical one in a pleading which was otherwise adequate to put the defendant on notice, and that in such a case, amendment had to be allowed in furtherance of allowing trial on the merits. The court did not consider the defendants to be prejudiced by the delay because the question of damages was not a new issue, but was already in the case. Accordingly, the court held that the trial court had abused its discretion by rejecting the proposed amendment (*136 Cal. App. 2d 368, 379*).

[4] Additional Authorities

[a] Amendment to Cure Technical Defect

In *Central Concrete Supply Co., Inc. v. Michael Bursak (2010) 182 Cal. App. 4th 1092, 105 Cal. Rptr. 3d 909* , the underlying complaint alleged that the defendant/appellant attorney had conspired with a former client to defraud the plaintiff/respondent company. At the trial court level, defendant/appellant moved to strike the complaint due to plaintiff/respondent's failure to comply with *Civ. Code § 1714.10(a)*, which prohibits the unauthorized filing of an action for nonexempt civil conspiracy against an attorney based on conduct arising from the representation of a client that is in connection with any attempt to contest or compromise a claim or dispute; the section requires a plaintiff who desires to pursue such an action to first commence a special proceeding by filing a verified petition naming the attorney as respondent. The trial court granted defendant/appellant's motion to strike the complaint, but gave plaintiff 30 days leave to amend the complaint. *Civ. Code § 1714.10(b)* provides that the failure to obtain the court approval required in § 1714.10(a) is a defense to the action.

On appeal, defendant/appellant contended that because the company neither complied with the prefiling requirement of *Civ. Code § 1714.10(a)* nor alleged any exceptions to that requirement under *Civ. Code § 1714.10(c)*, leave to amend

was improperly granted. The court of appeal held that subsection (b) does not divest the trial court of its authority, under *Code Civ. Proc. § 473*, to grant leave to amend; in appropriate circumstances, amendment after a sustained demurrer is permissible. Such circumstances existed here because the company might be able to plead that the attorney was not representing his former client at the time of the conspiracy or that he went beyond his professional obligations and conspired to violate a legal duty for financial gain.

In *Board of Trustees v. Superior Court (2007) 149 Cal. App. 4th 1154, 57 Cal. Rptr. 3d 755* , the court considered the validity of a complaint signed by the party's father, with the party's knowledge and consent, instead of by the party or his/her attorney of record, as required by *Code of Civ. Proc. §§ 446* and *128.7*. In reviewing the language of section 446, its legislative history, and the wider historical circumstances of its enactment, the court found no suggestion that the Legislature intended a plaintiff's failure to comply with the subscription requirement to constitute an incurable defect. Similarly, the court found that section 128.7 also does not support the contention that a signature defect of the type at issue renders the complaint void and not subject to amendment. Thus, the court concluded that section 128.7 may be interpreted to allow correction of a signature defect in a complaint after the defect is called to the attention of the plaintiff, where the correction is promptly made and the court finds that the plaintiff actually assented to the filing of the action (*149 Cal. App. 4th 1154, 1167-1170)* .

In *Ludgate Ins. Co. v. Lockheed Martin Corp. (2000) 82 Cal. App. 4th 592, 98 Cal. Rptr. 2d 277* , defendant and cross complainant appealed from a judgment on the pleadings entered in favor of plaintiff and cross defendant. The court of appeal reversed. The court noted that the trial court implicitly concluded that because the cross complainant had failed to state that exhibits attached to the cross complaint and extensively discussed in the body of the cross complaint were "incorporated by reference" as part of the cross complaint, they were not part of the pleading, and should not be considered in determining whether the cross complaint stated a cause of action. The court of appeal found this to be a technical exercise and stated that the mantra "incorporated by reference" is not sacrosanct and under a rule of liberal construction cannot defeat an otherwise adequate pleading. Moreover, if all that was needed was to state the magic words "incorporated by reference," the trial court should have allowed the cross complainant to further amend the cross complaint to add those words. Denying cross-complainant the opportunity of such a harmless amendment was an abuse of discretion (*82 Cal. App. 4th 592, 608-610*).

In *Dieckmann v. Superior Court (1985) 175 Cal. App. 3d 345, 220 Cal. Rptr. 602* , after plaintiff had substituted a defendant's true name, the trial court granted defendant's motion for judgment on the pleadings due to the absence, in the original complaint, of an allegation that the true names of the fictitiously named defendants were unknown to plaintiff, as required by *Code Civ. Proc. § 474*. Plaintiff filed a petition for writ of mandate to direct the trial court to vacate its order. The court of appeal directed the writ to issue, holding that the absence of the allegation constitutes a technical pleading omission, subject to liberal amendability under *Code Civ. Proc. § 473* (*175 Cal. App. 3d 345, 358*).

Babcock v. Antis (1979) 94 Cal. App. 3d 823, 156 Cal. Rptr. 673 , involved several actions for unlawful detainer and damages brought in municipal court. Each complaint contained a request for contingent, uncalculated, future damages in a certain amount per day which could potentially exceed the $5,000 jurisdictional limit of the municipal court. Although the judgments recovered by plaintiffs in municipal court were within the $5,000 limit, the appellate department of the superior court reversed the judgments as being void for lack of jurisdiction because the complaints had failed to specify a $5,000 limit on recovery. The cases were transferred to the court of appeal, which reversed the appellate department. The court of appeal held that pleadings technically vulnerable to a construction that might defeat the court's jurisdiction after entry of judgment may be corrected after judgment by amendment to conform to proof (*94 Cal. App. 3d 823, 830*). Although it would have been preferable to amend before judgment, the court of appeal held that it had power to correct technical mistakes in pleadings not affecting the substantial rights of the parties, and accordingly, the court ordered its clerk to insert a limitation on damages in the prayer of each complaint (*94 Cal. App. 3d 823, 830-831*).

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Volume 1 Chapters 1-19 WRITING LEGAL MEMORANDA AND BRIEFS; ABATEMENT AND SURVIVAL OF ACTIONS---to---AMENDED AND SUPPLEMENTAL PLEADINGS
CHAPTER 16 AMENDED AND SUPPLEMENTAL PLEADINGS
PART II. FORMS
A. Amended Pleadings

1-16 California Points & Authorities § 16.37

§ 16.37 Supporting Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Complaint--New Theory of Recovery After Limitations Period Has Run

[1] FORM Supporting Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Complaint--New Theory of Recovery After Limitations Period Has Run

[*The following should be combined with a general form of memorandum in support of a motion for leave to file an amended pleading or an amendment to a pleading (see § 16.30) or to amend to conform to proof (see § 16.31).*]

THE COURT SHOULD ALLOW AMENDMENT OF THE COMPLAINT TO STATE THE NEW THEORY OF RECOVERY EVEN THOUGH THE STATUTE OF LIMITATIONS HAS RUN BECAUSE RECOVERY IS SOUGHT ON THE SAME GENERAL SET OF FACTS AS IN THE ORIGINAL COMPLAINT AND THE AMENDED COMPLAINT WILL THEREFORE BE DEEMED TO RELATE BACK TO THE FILING OF THE ORIGINAL COMPLAINT TO AVOID THE BAR OF THE STATUTE OF LIMITATIONS.

Relation Back of Amendment Based on Same General Set of Facts. An amended complaint should be allowed even though it adds a new theory of recovery on which the statute of limitations has run or alleges new specific facts, or both, if recovery is sought in both pleadings on the same general set of facts. The amended complaint is deemed filed as of the time the original complaint is filed to avoid the bar of the statute of limitations (*Smeltzley v. Nicholson Mfg. Co. (1977) 18 Cal. 3d 932, 939-940, 136 Cal. Rptr. 269, 559 P.2d 624* ; *Grudt v. Los Angeles (1970) 2 Cal. 3d 575, 583-585, 86 Cal. Rptr. 465, 468 P.2d 825*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for leave to amend a complaint to state a new theory of recovery and to allege any specific facts that are required to establish that theory. The form is for use when the new theory would be barred by the statute of limitations if it were not deemed to relate back to the filing of the original

complaint. It would also support such a motion made when the new theory would not be barred by the statute of limitations, although there is less likelihood of objection to the amendment in that situation. The form does not provide a complete memorandum, but is designed to be combined with one of the general forms of memoranda of points and authorities supporting amendment of pleadings set out in *§§ 16.30* and *16.31*, as well as with forms relating to any other grounds that may exist for amending the complaint [*see §§ 16.32 -16.36, 16.38 -16.42*].

The primary purpose of the memorandum is to overcome the objection to a motion to amend that the proposed amended complaint states a new cause of action on which the statute of limitations has run [*see § 16.53*]. Therefore, rather than raising the issue in the points and authorities supporting the motion to amend, counsel for the moving party may wish to wait until opposing counsel objects to amendment on those grounds, and then raise the point and authorities contained in this form in a reply memorandum, if time allows (or after requesting a continuance) and if permitted by local court rules and practice, or in oral argument on the motion for leave to amend. However, if the court decides that this is an issue which should have been anticipated and addressed in the papers supporting the motion to amend, rather than disposed of later on a demurrer to the amended complaint, moving party might lose the opportunity to address the issues at all, or, fully and in writing, if the court will not permit oral argument on the point or accept reply memoranda and moving party has not raised the issue in the supporting memorandum.

If the proposed amendment involves a change in the relief sought as well as in the theory of recovery by which relief is sought, counsel may want to consider use of *§ 16.38* in addition to this form.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Opposing Points and Authorities

The points and authorities set out in *§ 16.53* may be used in an appropriate case to oppose a motion for leave to amend a pleading supported by this memorandum.

[i] Related Uses

With appropriate modifications, these points and authorities may be used to support a motion for leave to file an amended cross complaint or an amendment to a cross complaint.

This form may also be used, with appropriate modifications, to oppose a motion to strike or a demurrer to an amended complaint when the motion is brought on the ground that it is barred by the statute of limitations.

[c] Related Pleading and Practice Forms

For additional discussion relating to amendment of pleadings after the statute of limitations has run, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* (Matthew Bender).

[3] Discussion of Authorities

[a] Relation Back of Amendment Based on Same General Set of Facts

In ***Smeltzley v. Nicholson Mfg. Co.*** *(1977) 18 Cal. 3d 932, 136 Cal. Rptr. 269, 559 P.2d 624* , plaintiff was injured while operating a machine. The original complaint alleged that plaintiff was injured because defendants failed to provide him with a safe place to work and acted in reckless disregard of his safety. Plaintiff's employers were named as defendants, along with standard fictitious defendants alleged in each cause of action. After the statute of limitations had run, plaintiff filed an amended complaint substituting the manufacturer of the machine that had injured him for Doe I, and alleging that his injury was caused by the defective condition of the machine. The trial court sustained the

manufacturer's demurrer to the amended complaint without leave to amend on the ground that the action against the manufacturer was barred by the statute of limitations, and plaintiff appealed from the resulting judgment dismissing his action as to the manufacturer.

The Supreme Court reversed, applying the general rule stated in *Austin v. Massachusetts Bonding & Insurance Co. (1961) 56 Cal. 2d 596, 15 Cal. Rptr. 817, 364 P.2d 681* (discussed in *§ 16.37[4][a]*), that an amended complaint relates back to the filing of the original complaint, thus avoiding the bar of the statute of limitations, so long as recovery is sought in both pleadings on the same general set of facts (*18 Cal. 3d 932, 934, 940*). The Court also relied on *Garrett v. Crown Coach Corp. (1968) 259 Cal. App. 2d 647, 66 Cal. Rptr. 590* , where the complaint had alleged that named and fictitious defendants negligently maintained and operated a school bus. There, the trial court sustained a demurrer to an amended complaint which substituted the bus manufacturer for Doe I and alleged negligent design and manufacture of the bus, and the court of appeal reversed. The Supreme Court in *Smeltzley* noted the striking parallel with *Garrett*, in that in each case the amendment only changed the basis of the alleged liability from responsibility for the operation of the injury-causing instrumentality to responsibility for the manufacture of it, while the accident and injuries alleged remained the same as in the original complaint (*18 Cal. 3d 932, 936-937*).

The *Smeltzley* Court also relied on *Barnes v. Wilson (1974) 40 Cal. App. 3d 199, 114 Cal. Rptr. 839* , in which the original complaint had charged named defendants, tavern owners, and fictitious defendants with failing to warn decedent of the danger created by the presence of his assailant, and failing to protect decedent. The court of appeal in *Barnes* held that an amendment bringing in the owners of a neighboring tavern as Does and alleging that they served the assailant liquor when he was already intoxicated, satisfied the test requiring recovery to be sought on the same general set of facts. Additionally, the *Smeltzley* Court relied on *Grudt v. Los Angeles (1970) 2 Cal. 3d 575, 86 Cal. Rptr. 465, 468 P.2d 825* , discussed *below*, which applied the same test in a case involving a new cause of action asserted after the statute of limitations had run, but not involving the addition of a new party (*18 Cal. 3d 932, 938*).

In *Smeltzley* the Court stressed that under *Austin, above,* and its progeny, the original and amended complaints rested on different theories, invoked different legal duties, and required proof of significantly different facts. The Court reiterated the warning of *Austin* that any attempt to determine whether an amendment relates back to the filing of the original complaint by inquiring whether it states a wholly different cause of action results in confusion and undue restrictions on the right to amend. Thus, the fact that the amended complaint rests on a different legal theory and states a different cause of action is irrelevant under *Austin;* the test is whether the amended complaint relates to the same general set of facts as the original complaint. The *Smeltzley* Court deemed the test satisfied because both complaints sought recovery for the same accident and injuries (*18 Cal. 3d 932, 940*).

Plaintiff in

Grudt v. Los Angeles *(1970) 2 Cal. 3d 575, 86 Cal. Rptr. 465, 468 P.2d 825* , brought a wrongful death action against two police officers and the city based on the shooting of her husband. The original complaint alleged that the officers were employees of the city and that they had intentionally and wrongfully shot her husband. Plaintiff's motion to amend the complaint to add a second cause of action against the city for negligently employing dangerous and violence-prone officers was granted by the law and motion department, but stricken by the trial judge on the first day of trial on the ground that it was barred by the statute of limitations. Plaintiff appealed after a jury verdict for defendants.

The Supreme Court held that the trial court erred in striking plaintiff's second cause of action. The Court applied the prevailing rule in actions involving parties designated by their true names in the original complaint, that if an amendment is sought after the statute of limitations has run, the amended complaint is deemed filed as of the date of the original complaint provided recovery is sought in both pleadings on the same general set of facts (*2 Cal. 3d 575, 583*). The Court determined that although the second cause of action added a significant new dimension to the lawsuit, both counts in the amended complaint recited the same acts of the officers as the gravaman of the action and both sought compensation for plaintiff's loss of her husband. The allegation of additional incidental facts regarding the officers' prior

dangerous conduct and the city's knowledge of it did not set up a significantly different cause of action, and the general rule applied to allow amendment without encountering the bar of the statute of limitations (*2 Cal. 3d 575, 583-585*).

[4] Additional Authorities

[a] Relation Back of Amendment Based on Same General Set of Facts

In *Wilson v. Bittick (1965) 63 Cal. 2d 30, 45 Cal. Rptr. 31, 403 P.2d 159* , plaintiff brought suit for trespass to a quarter section of land. After the statute of limitations had run, plaintiff amended the complaint to claim trespass to an entire half section of land, and to double the compensatory damages sought. The court granted defendants' motion for summary judgment, and on appeal, defendants argued in support of that judgment that the second amended complaint was barred by the statute of limitations. The Supreme Court held that the amended complaint did not state a new cause of action by adding an additional quarter section of land to the claim, because recovery was sought on the same general set of facts as was the original complaint, relying on *Austin v. Massachusetts Bonding & Insurance Co. (1961) 56 Cal. 2d 596, 15 Cal. Rptr. 817, 364 P.2d 681* , discussed *below*, for the test of when an amended complaint related back to the filing of the original complaint thereby avoiding the bar of the statute of limitations (*63 Cal. 2d 30, 37-38*).

In *Austin v. Massachusetts Bonding & Insurance Co. (1961) 56 Cal. 2d 596, 15 Cal. Rptr. 817, 364 P.2d 681* , plaintiff sued several defendants by name and others by fictitious name to recover securities and moneys delivered to defendants. The complaint stated that the named defendants were covered by a bond, but did not seek to recover on the bond. Over two years later, plaintiffs filed an amended complaint with leave of court substituting the company that issued the bond for one of the fictitiously named defendants and seeking to recover on the bond. Plaintiffs appealed from a judgment entered in favor of the bonding company after its demurrer was sustained without leave to amend.

The Supreme Court reversed, rejecting defendant's argument that plaintiffs' claim on the bond was barred by the statute of limitations. The Court followed the modern rule that, when parties are designated by their true names, the limitations bar against an amended complaint filed after the statute of limitations has run is avoided by deeming the amended complaint filed as of the date of the original complaint, provide recovery is sought in both pleadings on the same general set of facts (*56 Cal. 2d 596, 600-602*). The Court found that such an amendment did not affect a fictitiously named defendant any differently than it affected a truly named defendant, and that a plaintiff who was unaware of the defendant's true identity at the time the original complaint was filed was as much in need of the liberality of amendment permitted by the rule as a plaintiff who had been aware of the defendant's identity (*56 Cal. 2d 596, 602-603*). Therefore, and in furtherance of the policy of litigating cases on their merits, the Court applied the modern rule to the case and held that the suit was not barred by the statute of limitations.

In *Wennerholm v. Stanford Univ. School of Medicine (1942) 20 Cal. 2d 713, 128 P.2d 522* , plaintiff's first four complaints alleged that defendants' negligent failure to disclose the dangerous side effects of a drug caused her to use the drug, and resulted in her blindness. The fifth amended complaint alleged that the representations were made with knowledge of their falsity, and the trial court sustained a demurrer to it. On plaintiff's appeal, defendants urged that the demurrer was properly sustained because the fifth amended complaint for fraud stated a new and different cause of action than the prior complaints for negligence and was barred by the statute of limitations. Applying the rule that an amended complaint relates back to the date of filing the original complaint so long as both seek recovery on the same general set of facts, the court held that the mere change in legal theory from negligent to fraudulent misrepresentation did not constitute statement of an entirely different cause of action (*20 Cal. 2d 713, 717-718*).

In *Walton v. Guinn (1986) 187 Cal. App. 3d 1354, 232 Cal. Rptr. 451* , plaintiff, who was injured in an automobile accident, brought suit against the other driver and his insurer. Plaintiff's original complaint alleged that the driver negligently operated a motor vehicle, causing injury to plaintiff, and the insurer acted in bad faith in refusing to pay benefits to the plaintiff. These allegations were listed under the heading "CAUSE OF ACTION--Breach of Contract," and made no reference to special damages. Plaintiff then filed an amended complaint against the insurer alleging bad

faith. The action was dismissed as premature. After the period of limitations had run, plaintiff filed another amended complaint alleging a cause of action against the driver for negligence including special damages. The trial court entered judgment for defendant on the ground that the action was barred by the statute of limitations. The court of appeal reversed. It held that the first amended complaint did not supersede the original complaint for the purposes of avoiding the statute of limitation under the relation back doctrine (*187 Cal. App. 3d 1354, 1359-1361*). The court also held that an amended complaint alleging special damages not mentioned in the original complaint may relate back to the original complaint as long as the special damages are the result of the injury alleged in the original complaint (*187 Cal. App. 3d 1354, 1362*).

In *Nelson v. Nevel (1984) 154 Cal. App. 3d 132, 201 Cal. Rptr. 93* , plaintiff brought suit against the man with whom she had cohabited for a share of property jointly acquired by them. Defendant moved for judgment on the pleadings, based on the bar of the two-year statute of limitations of *Code Civ. Proc. § 339* for actions based on implied contracts. The court granted the motion without allowing plaintiff to amend the pleading to set forth an equitable action. Under equitable actions, the four-year statute of limitations, *Code Civ. Proc. § 343*, would have applied, and plaintiff's case would have been timely filed. The court of appeal reversed, holding that the trial court abused its discretion by not allowing plaintiff an opportunity to amend her complaint to assert an equitable action because plaintiff would thus be denied justice, and defendant would not be prejudiced, because he had long known of plaintiff's defect but had made no move to raise the problem until the date of trial (*154 Cal. App. 3d 132, 141*). The court stated that the modern rule allows an amended complaint to relate back to the date of filing of the original complaint and thus avoids the bar of the statute of limitations so long as recovery in both pleadings is based on the same general set of facts (*154 Cal. App. 3d 132, 142*).

In *Lamont v. Wolfe (1983) 142 Cal. App. 3d 375, 190 Cal. Rptr. 874* , plaintiff and plaintiff's wife brought suit for personal injury and loss of consortium for injuries allegedly caused by the negligence of the hospital and doctors who treated plaintiff's wife. After plaintiff's wife died, plaintiff sought to amend the complaint to change the theory of recovery to wrongful death. The trial court sustained defendants' demurrer to the action based on the ground that it was barred by *Code Civ. Proc. § 340.5* because it was not filed within one year of plaintiff's wife's death. The court of appeal held that the wrongful death action related back to the timely filed complaint for loss of consortium because both pleadings related to the same general set of facts; the same negligent acts of defendants and the same injuries to plaintiff (*142 Cal. App. 3d 375, 378-381*).

In *Hirsa v. Superior Court (1981) 118 Cal. App. 3d 486, 173 Cal. Rptr. 418* , plaintiff brought suit for personal injuries sustained when his vehicle was struck by a van driven by one defendant and owned by the other defendant. Defendant owner was also sued in its capacity as defendant driver's employer. After the statute of limitations had run, plaintiff moved to amend the complaint to add a cause of action against defendant owner and employer for negligent entrustment of the van to defendant driver. The motion was denied by the trial court, and plaintiff petitioned the court of appeal for a writ of mandate to compel the trial court to grant the motion. The court of appeal ordered the writ to issue, holding that the pleadings related to the same general set of facts so that the amendment related back to the filing of the original complaint and was not barred by the statute of limitations (*118 Cal. App. 3d 486, 489*).

The complaint in *Rainer v. Community Memorial Hosp. (1971) 18 Cal. App. 3d 240, 95 Cal. Rptr. 901* , a medical malpractice suit arising out of numerous operations, was based on negligence, and did not raise any issue of informed consent or battery. The issue of informed consent arose on the first day of trial, but the court excluded evidence on that matter despite plaintiffs' assertion that the complaint would be amended to raise the issue. The court also denied a motion made by plaintiffs at the close of their case to amend the complaint to conform to proof to raise the issue of informed consent and to add a cause of action for battery. Plaintiffs appealed from a judgment which was only partially in their favor.

The court of appeal held that the trial court had abused its discretion in denying the amendment (*18 Cal. App. 3d 240, 254-256*). The court stated, relying on *Austin v. Massachusetts Bonding & Insurance Co. (1961) 56 Cal. 2d 596, 15*

Cal. Rptr. 817, 364 P.2d 681 , discussed *above*, and other prior California law, that where additional investigation and discovery is not required to meet the new issue, it would constitute an abuse of discretion not to permit amendment of a complaint, even at the outset of trial, if the amendment merely adds a new theory of recovery on the same set of facts constituting the cause of action (*18 Cal. App. 3d 240, 254*). The court then noted that defendants had only objected to introduction of the issue because it had not been pleaded, and not because of surprise or the necessity for additional investigation (*18 Cal. App. 3d 240, 255*). Resolving the issue, the court held that the claim of battery was not a new cause of action, but only a new theory of recovery, and that the amendment should have been allowed the first time it was requested, so that the issue could have been fully litigated (*18 Cal. App. 3d 240, 255-256*).

On the other hand, the court of appeal held that the trial court had not abused its discretion in denying plaintiff's motion to amend to plead a theory of independent negligence against the hospital in addition to the theory of respondent superior (*18 Cal. App. 3d 240, 257-259*). The court held that the motion, made on the third day of trial, had been properly denied due to plaintiffs' long unexcused delay which was prejudicial to defendants because interjection of the new issue would have further complicated the trial, and defendants had not made discovery and preparation for trial on the issue (*18 Cal. App. 3d 240, 258*). This aspect of *Rainer* is discussed in *§ 16.48[4][b]*.

Plaintiff in Overholser v. Glynn (1968) 267 Cal. App. 2d 800, 73 Cal. Rptr. 628 , was a shareholder and, with other shareholders, a guarantor of a corporation's notes. After the corporation's default, plaintiff's assets were used to satisfy the notes, and the bank assigned the obligations secured by the shareholder guarantees to plaintiff. Plaintiff brought suit as the bank's assignee, but during pretrial it appeared that there was a valid defense to that action. Accordingly, plaintiff moved to amend the complaint to set forth as a second cause of action a common count for money had and received. The court granted the motion and plaintiff went on to recover against defendants, one of whom appealed.

The court of appeal affirmed. Defendant argued that the amendment had been improperly granted because the statute of limitations had run. The court, however, found that the amendment related back to the filing of the original complaint, thereby avoiding the bar of the statute of limitations, because the common count was based on the facts alleged in the original complaint supplemented by defendants' answers and varied only the theory of recovery (*267 Cal. App. 2d 800, 805*). The court held that it is the basic set of facts and not legal theory pleaded that determines plaintiff's right to amend after the statute of limitations has run, citing *Austin v. Massachusetts Bonding & Insurance Co. (1961) 56 Cal. 2d 596, 15 Cal. Rptr. 817, 364 P.2d 681* , discussed *above*, and other prior California authority (*267 Cal. App. 2d 800, 805-806*). The court also held that a change in the form or type of contractual obligation alleged may be only a change in legal theory, not affecting the cause of action for breach of the obligation. As an example, the court pointed to amendment of a complaint on an express contract to change to a claim for, or to add a count for, quantum meruit (*267 Cal. App. 2d 800, 806*).

The original complaint in *Landis v. Superior Court (1965) 232 Cal. App. 2d 548, 42 Cal. Rptr. 893* , sought damages and declaratory relief based on breach of an oral contract. Before the case was set for pretrial or trial, plaintiff twice moved for leave to file an amended complaint for reformation of a written contract and for damages and declaratory relief based on breach of the written contract as reformed. The trial court twice denied plaintiff's motion, and plaintiff sought a writ of mandate.

The court of appeal rejected defendants' contention that the amendment should not be allowed because reformation was barred by the statute of limitations, and issued a writ of mandate compelling the trial court to permit amendment. Relying on *Austin v. Massachusetts Bonding & Insurance Co. (1961) 56 Cal. 2d 596, 15 Cal. Rptr. 817, 364 P.2d 681* , discussed *above*, the court held that an amendment is to be allowed, and will relate back to overcome the bar of the statute of limitations, if recovery is sought on the same general set of facts as the original complaint and that for the purpose of amendment, the term "cause of action" includes any claim based on the same general set of facts. Noting that although reformation is sometimes referred to as a "cause of action," it is really only one of several remedies for a single wrong, the court held that the pleadings revealed one inseverable transaction falling within the rule of *Austin* (*232 Cal. App. 2d 548, 555-556*).

In *Youngblood v. Los Angeles (1958) 160 Cal. App. 2d 481, 325 P.2d 587* , plaintiff brought suit against the city and the county flood control district for erosion damage his property had sustained during a storm. Plaintiff claimed that the city had negligently dumped an increased volume of water in a channel near plaintiff's property which cause erosion and brought down a large tree. Massive erosion followed when the city and flood control district then removed the tree, which had supported plaintiff's property, rendering the city and district liable for inverse condemnation. At trial, it appeared that the real cause of the erosion had been the negligent construction of a revetment by the district. At the close of plaintiff's case, his motion to amend the complaint to conform to proof was denied, the court granted a nonsuit, and plaintiff appealed.

The court of appeal reversed as to the flood district. The court found that the record made out a prima facie case for inverse condemnation against the district based on its construction of the revetment which had diverted water from its natural channel onto plaintiff's land (*160 Cal. App. 2d 481, 487-488*). Noting the rules that an amendment is not objectionable for stating a new cause of action if it simply shifts from one theory of liability to another or supplies an essential element of the cause of action which was missing in the original complaint, the court held that the trial court had abused its discretion in denying plaintiff's motion to amend to conform to proof (*160 Cal. App. 2d 481, 489-490*). It should be noted, however, that the court also held that the trial court had not abused its discretion in denying the motion to amend as to the city. That amendment would have stated an entirely different and new cause of action against the city based on a new and different obligation by changing from a common law claim relating to removal of the tree to a statutory claim relating to construction and maintenance of a nearby bridge (*160 Cal. App. 2d 481, 490-492*).

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1-16 California Points & Authorities § 16.38

§ 16.38 Supporting Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Complaint--Change in Relief Sought

[1] FORM Supporting Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Complaint--Change in Relief Sought

[*The following should be combined with a general form of memorandum in support of a motion for leave to file an amended pleading or an amendment to a pleading (see § 16.30) or to amend to conform to proof (see § 16.31).*]

THE COURT SHOULD ALLOW THE AMENDMENT TO THE COMPLAINT BECAUSE IT MERELY CHANGES THE RELIEF SOUGHT.

A. Changing Relief Sought. A change by amendment from one kind of relief to another is not a change in the cause of action if the transaction is the same, and the court may properly allow such an amendment (*Peters v. Binnard (1933) 219 Cal. 141, 149, 25 P.2d 834*).

[*Optional*] **B. Change From Law to Equity.** The fact that the change made by an amendment is from legal to equitable relief is immaterial (*Rosemead Co. v. Shipley Co. (1929) 207 Cal. 414, 420, 278 P 1038* ; *Walsh v. McKeen (1888) 75 Cal. 519, 17 P 673*).

[2] Comments

[a] Use of Form

These points and authorities may be used in support of a motion for leave to amend a complaint to change the relief sought. It does not provide a complete memorandum, but is designed to be combined with one of the general forms of memoranda of points and authorities set out in *§§ 16.30* and *16.31*, as well as with forms relating to any other grounds that may exist for amending the complaint [*see §§ 16.32 -16.37, 16.39 -16.42*].

The primary purpose of this memorandum is to overcome the objection to a motion to amend that the proposed amended complaint states a new cause of action on which the statute of limitations has run [*see § 16.53*]. Therefore, rather than raising the issue in the points and authorities supporting the motion to amend, counsel for the moving party may wish to wait until opposing counsel objects to amendment on that ground, and then raise the points and authorities contained in this form in a reply memorandum, if time allows (or after requesting a continuance) and if permitted by local court rules and practice, or in oral argument on the motion for leave to amend. However, if the court decides that this is an issue which should have been anticipated and addressed in the papers supporting the motion to amend, rather than disposed of later on a demurrer to the amended complaint, moving party might lose the opportunity to address the issues at all, or fully and in writing, if the court will permit argument on the point or accept reply memoranda, and moving party has not raised the issue in the supporting memorandum.

The cases underlying this memorandum arose in response to objections that the proposed amendment would improperly introduce a new cause of action. For that reason, the language of the form states the negative proposition that the change in relief sought does not constitute a new cause of action. In this connection, it should be noted that the test of a proper amendment is no longer whether the amendment states a new cause of action, but whether the amendment seeks recovery on the same general set of facts as the original complaint [see *Smeltzley v. Nicholson Mfg. Co. (1977) 18 Cal. 3d 932, 940, 136 Cal. Rptr. 269, 559 P.2d 624* , discussed in *§ 16.37[3][a]*]. Counsel using this form may also want to see *§ 16.37*, which sets forth the modern rule allowing amendments based on the same general set of facts, because an amendment that changes only the relief sought would fall within the terms of that rule.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

With appropriate modifications, these points and authorities may be used to support a motion for leave to file an amended cross complaint or an amendment to a cross complaint.

[b] Related Pleading and Practice Forms

For a discussion and forms relating to amendment of prayers, see California Forms of Pleading and Practice, Ch. 420, *Prayers* (Matthew Bender).

[3] Discussion of Authorities

[a] Changing Relief Sought

In *Peters v. Binnard (1933) 219 Cal. 141, 25 P.2d 834* , plaintiff originally sought, in part, $5,000 damages for defendants' failure to cancel a note, thereby breaching a contract between the parties. After the parties had submitted their cases, the court ordered that plaintiff have leave to file an amended complaint to conform to proof. The amended complaint prayed for cancellation of the note or, in the alternative, for damages, and a judgment was entered ordering cancellation of the note. On appeal, defendants complained that the order allowing amendment was in error. The Supreme Court affirmed, holding that a change by amendment from one kind of relief to another is not a change in the cause of action if the transaction is the same, relying on *Rosemead Co. v. Shipley Co. (1929) 207 Cal. 414, 420, 278 P 1038* , discussed in *§ 16.38[3][b]*.

[b] Change From Law to Equity

At the opening of trial in *Rosemead Co. v. Shipley Co. (1929) 207 Cal. 414, 278 P 1038* , the court allowed plaintiffs to file an amended complaint changing the prayer for relief from a request for a money judgment to a request for a variety of equitable remedies, including (1) a declaration that plaintiffs owned the property in dispute, and (2)

cancellation of a contract, deed, and court decree on the ground that they were fraudulently obtained. The court entered a judgment granting the requested relief, and on appeal, the Supreme Court held that the amendment, contrary to defendants' contention, did not introduce a new cause of action. The Court held, relying on prior California law, that a change by amendment from one kind of relief to another is not a change in the cause of action if the transaction is the same, and that the fact that the change is from legal to equitable relief is immaterial (*207 Cal. 414, 420*).

In *Walsh v. McKeen (1888) 75 Cal. 519, 17 P 673* , plaintiff, as executrix, prayed for a judgment in a particular amount of money, claiming that the estate was entitled to the money as decedent's contribution to a partnership and his share of the profits. During trial, the court allowed plaintiff to amend the prayer of her complaint to ask for an accounting and such other or further relief as might be deemed equitable and proper. On defendant's appeal, the Supreme Court held that the amendment was properly allowed, holding that an action does not fail because plaintiff has made a mistake as to the form of remedy. The Court held that a party cannot be sent out of court merely because the facts do not allow relief to be granted at law, or in equity, as the case might be, but that a party can be sent out of court only when no relief can be allowed on the facts in law or equity (*75 Cal. 519, 521-522*).

[4] Additional Authorities

[a] Changing Relief Sought

The original complaint in *Jaffe v. Heffner (1959) 173 Cal. App. 2d 512, 343 P.2d 374* , sought a judgment quieting title to real property in plaintiff. At trial, the court allowed plaintiff to amend the complaint to allege a constructive trust, and plaintiff prevailed on that theory. On appeal, defendants claimed that they were prejudiced by the amendment, but the court of appeal rejected their contention, holding that the amendment of a complaint to change from one kind of relief to another is not a change in the cause of action if the transaction is the same (*173 Cal. App. 2d 512, 516-517*).

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1-16 California Points & Authorities § 16.39

§ 16.39 Supporting Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Complaint--Increased Demand for Damages

[1] FORM Supporting Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Complaint--Increased Demand for Damages

[*The following should be combined with a general form of memorandum in support of a motion for leave to file an amended pleading or an amendment to a pleading (see § 16.30) or to amend to conform to proof (see § 16.31).*]

THE COURT MAY ALLOW THE AMENDMENT TO INCREASE THE DAMAGES SOUGHT.

Increase in Amount of Damages. An amendment to a complaint praying for damages greater than originally sued for is properly allowed if it relates solely to the identical cause of action set forth in the original complaint (*Nuttman v. Chais (1950) 101 Cal. App. 2d 476, 479, 225 P.2d 660* ; *Babcock v. Jewell (1930) 110 Cal. App. 323, 325-326, 294 P 30*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for leave to file an amended complaint or an amendment to a complaint in order to increase the damages requested in the prayer. It does not provide a complete memorandum but is designed to be combined with one of the general forms of memoranda of points and authorities supporting amendment of pleading *set out in §§ 16.30* and *16.31*, as well as with forms relating to any other grounds that may exist for amending the pleading [*see §§ 16.32 -16.38, 16.40 -16.42*].

This form would not be used in an action for personal injuries or wrongful death, because in such cases, the complaint may not state the amount of damages claimed [*Code Civ. Proc. § 425.10(b)*].

The rule in this form provides that an amendment to increase the damages claimed may be allowed if based on the identical cause of action as the original complaint. In this connection, it should be noted that the test of whether an amendment is proper is no longer whether the amendment states a new cause of action, but whether the amendment seeks recovery on the same general set of facts as the original complaint [*Smeltzley v. Nicholson Mfg. Co. (1977) 18 Cal. 3d 932, 940, 136 Cal. Rptr. 269, 559 P.2d 624* , discussed in *§ 16.37[3][a]*]. Counsel using this form may also want to use § 16.37, which sets forth the modern rule allowing amendments based on the same general set of facts because an amendment that only increases the demand for damages would most likely fall within the terms of that rule.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, these points and authorities may be used to support a motion for leave to file an amended cross complaint or an amendment to a cross complaint.

[c] Amendment to Conform to Proof Increasing Damages

An amendment to increase the amount of damages requested should not be made in the presence of the jury after the production of evidence, because a motion granted under such circumstances has been held to be prejudicial error [*see Sanguinetti v. Moore Dry Dock Co. (1951) 36 Cal. 2d 812, 819, 228 P.2d 557*]. However, a motion to amend to increase the damages requested may be made during trial outside the presence of the jury [*see Russell v. Geis (1967) 251 Cal. App. 2d 560, 570-571, 59 Cal. Rptr. 569* (motion made during conference between court and counsel during voir dire)].

[d] Related Pleading and Practice Forms

For a discussion and forms relating to amendment of complaints to increase the damages sought and to amendment of prayers, see California Forms of Pleading and Practice, Ch. 177, *Damages* and Ch. 420, *Prayers* (Matthew Bender).

[3] Discussion of Authorities

[a] Increase in Amount of Damages

Defendants in Nuttman v. Chais (1950) 101 Cal. App. 2d 476, 225 P.2d 660 , appealed from a judgment foreclosing mechanics' liens on their property, arguing that plaintiff should not have been allowed to amend the complaint to conform to the proof by alleging a greater amount due than was alleged in the original complaint. The court of appeal affirmed, holding that the trial court did not abuse its discretion in allowing the amendment, and stating that an amendment to a complaint praying for damages greater than originally sued for is properly allowed if the evidence justifies such increase and relates solely to the identical cause of action in the original pleading, relying on prior California law (*101 Cal. App. 2d 476, 479*).

In *Babcock v. Jewell (1930) 110 Cal. App. 323, 294 P. 30* , plaintiff sued to recover usurious interest and a penalty for exacting it. Plaintiff alleged that she paid $372.09 to defendants for a six-month loan of $1,288, but later amended her complaint to allege that she paid defendants $6,172 for a six-month loan of $4,500. On defendants' appeal from a judgment in plaintiff's favor, defendants argued that the amended complaint asserted a new cause of action, based on three separate transactions, and was barred by the statute of limitations. The court of appeal disagreed, and held that the identical cause of action, a claim for a usurious charge arising out of a loan of a definite amount of money, was presented because on the facts there had been but one transaction (*110 Cal. App. 323, 325-326)* . Additionally, the court stated that if the complaint, as amended, related solely to the identical cause of action set forth in the original complaint, the fact that the amendment increased the amount of damages claimed would not present any tenable legal

objection (*110 Cal. App. 323, 325*).

[4] Additional Authorities

[a] Increase in Amount of Damages

The facts and procedural background of *Wilson v. Bittick (1965) 63 Cal. 2d 30, 45 Cal. Rptr. 31, 403 P.2d 159* , are discussed in *§ 16.37[4][a]*. The Supreme Court noted that it is settled that a complaint may be amended to increase the amount of damages prayed for without incurring the bar of the statute of limitations (*63 Cal. 2d 30, 39 fn. 7*).

In *Russell v. Geis (1967) 251 Cal. App. 2d 560, 59 Cal. Rptr. 569* , defendant appealed from a judgment on an adverse jury verdict in an action for defamation, contending, in part, that the trial court erred in allowing plaintiffs to amend their complaints (the cases were consolidated for trial and appeal) to double the claim for general damages. Plaintiffs had informed defendant of their intention to amend to increase the damages claimed, but did not formally move to amend prior to commencement of trial. Defense counsel mentioned the amount of damages requested in the original complaints while questioning the second juror, at which time questioning was interrupted, and in a conference between court and counsel, plaintiffs' attorneys moved to amend the complaints. The court of appeal held that there was no error in allowing the amendment, because it had not been made in the presence of the jury, and because defendant had mentioned the amount of the prayer before any evidence had been adduced, with the intention of precluding amendment under *Sanguinetti v. Moore Dry Dock Co. (1951) 36 Cal. 2d 812, 228 P.2d 557* . *Sanguinetti* precludes amendment to increase the damages prayed for, if the motion to amend is made in front of the jury after the evidence in a case has been submitted, in order to prevent the jury from being influenced by the court allowing the motion. The *Russell* court distinguished *Sanguinetti* on the facts and held that if there were any error in the trial court permitting amendment, it was harmless (*251 Cal. App. 2d 560, 570-571*).

Plaintiffs in Duffey v. General Petroleum Corp. (1949) 93 Cal. App. 2d 757, 209 P.2d 986 , sued defendant for $2,100 in damages alleging that defendant spilled gasoline that contaminated plaintiffs' water supply. At the beginning of trial and without notice, the court allowed plaintiffs' motion to amend their complaint to increase the alleged amount of damage to $4,000 over defendant's objection. After the jury returned a verdict for $4,000, defendant appealed, urging that the amendment should not have been allowed because it was inevitably prejudicial to defendant, and took defendant by surprise. The court of appeal rejected defendant's contention, holding that defendant could not have been prejudiced because the answer had denied any damages at all, and defendant had not moved for a continuance in the trial court. The court also noted that the plaintiffs had not acted in bad faith or without just reason because, after the complaint was filed, they drilled a new well to secure a noncontaminated water supply, but the water at the new location was found to be contaminated also (*93 Cal. App. 2d 757, 759*).

Relying on *Duffey, above*, the court of appeal in *Hougham v. Eyherabide (1951) 103 Cal. App. 2d 673, 230 P.2d 139* , held that the trial court had not erred in allowing amendment without notice at the beginning of trial to increase the amount of damages claimed for injury to growing crops in an action for trespass (*103 Cal. App. 2d 673, 674-675*).

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1-16 California Points & Authorities § 16.40

§ 16.40 Supporting Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Complaint--Addition of Party Defendant or Correction of Misnomer of Defendant

[1] FORM Supporting Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Complaint--Addition of Party Defendant or Correction of Misnomer of Defendant

[*The following should be combined with a general form of memorandum in support of a motion for leave to file an amended pleading or an amendment to a pleading (see § 16.30), or to amend to conform to proof (see § 16.31).*]

THE COURT SHOULD ALLOW AMENDMENT OF THE COMPLAINT TO _____ [ADD *or* CORRECT A MISTAKE IN THE NAME OF] A PARTY DEFENDANT.

A. Amendment to Add Party or Correct Misnomer. The court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading by adding or striking out the name of any party, or by correcting a mistake in the name of a party (*Code Civ. Proc. § 473*; *Fifth & Broadway Partnership v. Kimny, Inc. (1980) 102 Cal. App. 3d 195, 199, 162 Cal. Rptr. 271*).

[*Optional*] **B. Correction of Misnomer After Statute of Limitations Has Run.** The court should allow a party to amend a pleading to correct an error in naming a _____ [defendant *or* cross defendant] who was served with summons and who ought to realize that he or she is the party intended to be named defendant even though the statute of limitations may have run at the time of amendment (*Thompson v. Southern Pac. Co. (1919) 180 Cal. 730, 733-734, 183 P. 153* ; *Canifax v. Hercules Powder Co. (1965) 237 Cal. App. 2d 44, 57-58, 46 Cal. Rptr. 552*).

[*Optional*] **C. Suit Brought Against Wrong Defendant Because of Similarly Named Dual Entities.** Even though amendment to correct a misnomer cannot be used to substitute parties after the statute of limitations has run, amendment should be allowed when _____ [plaintiff *or* cross complainant] has made an excusable mistake attributable to the existence of dual entities with strikingly similar business names or to the use of fictitious names, and the real tortfeasor is aware of the suit (*Mayberry v. Coca Cola Bottling Co. of Sacramento (1966) 244 Cal.*

App. 2d 350, 352-354, 53 Cal. Rptr. 317). Amendment is allowed under the theory of equitable estoppel when, in this situation, the defense takes willful action to mask the error from the petitioner (*Cuadros v. Superior Court (1992) 6 Cal. App. 4th 671, 676-678, 8 Cal. Rptr. 2d 18*).

[*Optional*] **D. Prior Dismissal Without Prejudice Does Not Bar Amendment Reinstating Defendant.** A plaintiff may amend a complaint to reinstate a defendant when a dismissal without prejudice regarding that defendant was previously entered (*Kuperman v. Great Republic Life Insurance Co. (1987) 195 Cal. App. 3d 943, 947, 241 Cal. Rptr. 187*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for leave to amend a complaint to add a party defendant or to correct a misnomer of a defendant who was named, although improperly, in the complaint. It is not for use in support of an amendment substituting a truly named defendant for a fictitiously named defendant, such amendment being mandatory when the defendant's true name is learned [*see Code Civ. Proc. § 474*].

By including the appropriate optional paragraph, the memorandum may be used when the amendment is sought to correct a misnomer of the defendant (when the proper defendant has been sued by the wrong name) after the statute of limitations has run [Optional Paragraph B]; to substitute defendants after the statute of limitations has run if the plaintiff was misled and sued the wrong defendant because of the existence of related businesses with similar names [Optional Paragraph C]; or to reinstate a defendant when a dismissal without prejudice regarding that defendant had been entered [Optional Paragraph D].

The form does not provide a complete memorandum, but is designed to be combined with one of the general forms of memoranda set out in *§§ 16.30* and *16.31*, as well as with forms relating to any other grounds that may exist for amending the complaint [*see §§ 16.32 -16.39, 16.41, 16.42*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

With appropriate modifications, this memorandum may be used to support a motion for leave to file an amended cross complaint or an amendment to a cross complaint.

[b] Opposing Memorandum

The memorandum set out in *§ 16.54* may be used in an appropriate case to oppose a motion for leave to amend supported by this memorandum.

[c] Notice of Motion

Notice of a motion to amend a pleading by adding or striking out the name of any party, or by correcting a mistake in the name of a party is not required [*Code Civ. Proc. § 473*]. Therefore, because a memorandum is mandatory only in the case of a motion made on notice [*see Cal. Rules of Ct., Rule 3.1113(a)*], submission of this memorandum is optional.

[d] Prior Dismissal Does Not Bar Reinstating Defendant as Doe Defendant

Paragraph D provides a basis for reinstating a named defendant after that defendant has been effectively dismissed without prejudice because the defendant was omitted from a prior amended complaint. An alternative method for reinstating a defendant who was mistakenly dismissed is through an amendment to substitute the defendant's true name

for a Doe defendant [*see* *Parker v. Robert E. McKee, Inc. (1992) 3 Cal. App. 4th 512, 516-517, 4 Cal. Rptr. 2d 347*]. For a discussion of the substitution of true names of fictitious defendants, see Ch. 104, *Fictitiously Named Defendants (DOES)*.

[e] Related Pleading and Practice Forms

For a discussion and forms relating to bringing a new party into an action, see California Forms of Pleading and Practice, Ch. 395, *Parties* (Matthew Bender). For a discussion of amendment of a complaint to bring in a new party defendant after the statute of limitations has run, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* (Matthew Bender).

[f] Related Points and Authorities

For forms of memoranda of points and authorities supporting a motion for an order to bring a new party into an action, see Ch. 168, *Parties* .

[3] Discussion of Authorities

[a] Amendment to Add Party or Correct Misnomer

In ***Fifth & Broadway Partnership v. Kimny, Inc.*** *(1980) 102 Cal. App. 3d 195, 162 Cal. Rptr. 271* , an unlawful detainer action, the complaint named an individual doing business as Orange Delite as a sublessee defendant. The individual answered, but during trial, it was revealed that the subtenant in possession and using the premises for a fast food stand called Orange Delite was Kimny, Inc. The individual defendant was the sole shareholder and president of the corporation, was responsible for its day-to-day operations, and was the only person authorized to sign checks on its behalf or withdraw funds from its bank account. When defendant closed his case, plaintiff moved to amend the complaint to add the corporation as a defendant. The court granted the motion, declaring Doe I to be "Kimny, Inc., dba Orange Delite," and the corporation appealed from judgment entered against it alone.

The court of appeal affirmed, holding that under *Code Civ. Proc. § 473* a court has discretion to allow amendment to add a party not named in the original complaint. The court further held that the trial court had not abused its discretion in allowing amendment because the record did not show, nor did the corporation claim, that it was prejudiced by the amendment adding it as a party (*102 Cal. App. 3d 195, 199)* .

[b] Correction of Misnomer After Statute of Limitations Has Run

Thompson v. Southern Pac. Co. (1919) 180 Cal. 730, 183 P. 153 , involved a suit for personal injuries against a railroad. The complaint named Southern Pacific Railroad Company, stated to be a California corporation, as defendant. There was, in fact, a company of that name, incorporated in California, but it was not the company involved in the accident. The proper defendant was a Kentucky corporation, Southern Pacific Company. Summons was served on the Kentucky corporation, however, and the court denied that corporation's motion, made in a special appearance, to quash summons. After the statute of limitations had run, plaintiff moved to amend his complaint to correct defendant's name. Southern Pacific Company again appeared specially to oppose the motion to amend, and after the motion was granted, answered, still reserving its special appearance. The verdict on the first trial was set aside and when the case came to trial the second time, defendant objected to introduction of evidence on the ground that it had been brought into the case as a defendant by amendment after the statute of limitations had run without ever having been served with process. Defendant appealed from a subsequent judgment for plaintiff.

The court of appeal held that the amendment was proper, noting that the real defendant's agent received the summons and knew the contents of the complaint, as evidenced by the corporation's special appearance in the action. The court held that since the trial court acquired jurisdiction of the person of the defendant, it had power to correct the misnomer

of the party defendant in the complaint (*180 Cal. 730, 734*).

The plaintiffs in *Canifax v. Hercules Powder Co. (1965) 237 Cal. App. 2d 44, 46 Cal. Rptr. 552* , attempted to bring suit against the manufacturer of a dynamite fuse for negligently failing to warn of the timing of the fuse. Plaintiffs named Coast Equipment Company as the defendant manufacturer mistakenly believing that to be the name of the manufacturer, which in fact was Coast Manufacturing and Supply Company. Coast Manufacturing nonetheless answered the complaint denying that "Coast Equipment" had manufactured the fuse. After the statute of limitations had run, Coast Manufacturing moved for summary judgment, and plaintiffs moved to amend the complaint to correctly name defendant. The court denied the motion to amend and granted summary judgment to defendant.

On plaintiff's appeal the court reversed, finding that defendant was not prejudiced or misled, but had full notice that it was the party intended to be sued. The court held that a mere misnomer may be corrected after the statute of limitations has run without incurring its bar when full notice is given and a reasonably prudent person would realize that he or she is the party intended to be named as defendant (*237 Cal. App. 2d 44, 57-58*).

[c] Suit Brought Against Wrong Defendant Because of Similarly Named Dual Entities

In *Cuadros v. Superior Court (1992) 6 Cal. App. 4th 671, 8 Cal. Rptr. 2d 18* plaintiff was rear-ended by a vehicle rented from a Budget Rent-A-Car franchise located in Santa Monica. Correspondence regarding the incident generated a response from Budget Rent-A-Car of Brentwood (Budget Brentwood). After plaintiff filed an action naming Budget, Inc. as a defendant, plaintiff was advised by an attorney for Budget Rent-A-Car in Chicago that the vehicle was owned by Budget Rent-A-Car of Santa Monica (Budget Santa Monica). Plaintiff then designated Budget Santa Monica as a Doe defendant, and Budget Santa Monica answered the complaint. Sometime after defendants obtained substitute counsel, plaintiff and defendants stipulated to binding arbitration and to dismiss the Doe defendants. At the arbitration defendants revealed for the first time that the vehicle involved was owned by Budget Rent-A-Car of Westwood (Budget Westwood). The arbitrator entered judgment in favor of the named defendants. Plaintiff moved to vacate the arbitration award and to amend the complaint on the ground that she had mistakenly named Budget, Inc., and Budget Santa Monica instead of Budget Westwood. The trial court denied the motion to amend on the ground that the statute of limitations had run (*6 Cal. App. 4th 671, 676*).

The court of appeal, applying the doctrine of equitable estoppel, held that the trial court had abused its discretion in denying plaintiff's motion to amend. Under equitable estoppel, a defendant may not, by statement or conduct, lull the plaintiff into a false sense of security resulting in inaction (*6 Cal. App. 4th 671, 675*). In *Cuadros,* as in *Mayberry,* discussed *below,* the named defendants and the correct defendant had strikingly similar names, and each, regardless of their official titles, referred to itself as either "Budget" or "Budget Rent-A-Car" or both. Further, all entities used the same Santa Monica address, and one individual was the owner or officer or both of each entity (*6 Cal. App. 4th 671, 676*). The defendants conducted themselves for over three years as though they were properly named defendants (*6 Cal. App. 4th 671, 677*). The participation of the various Budget entities in settlement negotiations, discovery, and arbitration, the similarity of names, and the substantial identity of the persons involved were sources both of the plaintiff's excusable mistake and the real tortfeasor's awareness. The court found it difficult to see how the proper defendant would be harmed if the motion to amend were granted (*6 Cal. App. 4th 671, 678*).

Mayberry v. Coca Cola Bottling Co. of Sacramento *(1966) 244 Cal. App. 2d 350, 53 Cal. Rptr. 317* , involved an action for damages caused by drinking a bottle of contaminated Coca-Cola. The beverage was bottled by Coca Cola Bottling Co. of Sacramento, a partnership, but plaintiff brought suit against a corporation of the same name. In fact the corporation supplied syrup to the partnership, and the partners were also the officers and directors of the corporation. The corporation answered and asserted contributory negligence as an affirmative defense. No indication was given by defendant corporation that identity would be at issue in the trial until testimony was being taken at trial. When the error was revealed, plaintiff's motion to amend to substitute the partnership for the corporation was granted. The court then, however, granted the partnership's demurrer based on the statute of limitations, and plaintiff appealed from the ensuing

judgment of dismissal.

The court of appeal reversed, noting that after the statute of limitations has run, a complaint may be amended to correct a misnomer, but not to permit replacement of parties (*244 Cal. App. 2d 350, 352*). The court found that the general rule would not allow amendment because plaintiff specified the corporation as defendant, rather than just giving the fictitious name which could have meant either the partnership or corporation (*244 Cal. App. 2d 350, 353*). However, the court recognized and applied an exception to the rule taking into consideration the fact that modern business practice often divides integrated business operations into a group of artificial legal entities. In such cases, when the similar business names or fictitious names of dual entities cause a plaintiff to make an excusable mistake, the mistake may be cured by amendment. The real tortfeasor's knowledge of the suit is another factor to be considered (*244 Cal. App. 2d 350, 353*). The court directed the trial court to allow amendment, finding that the manner in which the partnership and corporation were entwined showed both excusable mistake on plaintiff's part and awareness on the tortfeasor's part (*244 Cal. App. 2d 350, 353-354*).

[d] Prior Dismissal Without Prejudice Does Not Bar Amendment Reinstating Defendant

In ***Kuperman v. Great Republic Life Insurance Co.*** *(1987) 195 Cal. App. 3d 943, 241 Cal. Rptr. 187* , plaintiffs filed a complaint against several defendants, including Great Republic Life Insurance Co., alleging several causes of action based on denial of benefits under an insurance policy. Plaintiffs filed a first amended complaint naming all the same defendants, a second amended complaint omitting Great Republic as a defendant, and a third amended complaint including Great Republic again. The trial court granted Great Republic's motion to strike the third amended complaint, on the ground that the prior omission of its name effected a dismissal barring the action against it. Plaintiffs unsuccessfully moved for leave to file the third amended complaint or, in the alternative, to vacate the court's order granting the motion to strike. Plaintiffs appealed.

The court of appeal reversed, holding that although the filing of plaintiffs' second amended complaint effected a dismissal regarding Great Republic, the dismissal was without prejudice, and did not bar the filing of a subsequent action against that defendant. Great Republic was therefore properly reinstated as a defendant in the third amended complaint, and the trial court erred in striking that pleading (*195 Cal. App. 3d 943, 946-947*).

[4] Additional Authorities

[a] Correction of Misnomer After Statute of Limitations Has Run

Lazar v. Estate of Lazar (1962) 208 Cal. App. 2d 554, 25 Cal. Rptr. 354 , involved a suit to recover property from a decedent's estate after the coexecutors denied plaintiff's claim. The suit named as defendant the estate of the decedent, and a copy of the summons and complaint was served on the executors' attorney. The court sustained a demurrer to the complaint without leave to amend and entered judgment that plaintiff take nothing on the ground that an estate is not legal entity subject to suit. On plaintiff's appeal, the court of appeal held that it was apparent that plaintiff used the name of the estate as the proper legal name against which he might prosecute his action. The court then held that since the attorney for the executors appeared in the action on behalf of the "estate" and urged in his brief that the logical defendants obviously should have been the executors, it was reasonable to assume that the executors were aware that the word "estate" was an erroneous designation and that they would not be taken by surprise if the complaint were amended to name them as defendants. Accordingly, the court reversed and held that plaintiff was entitled to amend the complaint (*208 Cal. App. 2d 554, 561*).

[b] Suit Brought Against Wrong Defendant Due to Similarly Named Dual Entities

Smith v. Pickwick Stages Sys. (1931) 113 Cal. App. 118, 297 P 940 , involved a suit for personal injuries suffered by plaintiff at a stage station where she was meeting a passenger. Plaintiff brought a suit against "The Pickwick Corporation, a Corporation," when in fact the stage system and station were operated by Pickwick Stages System, a

Corporation. After summons was served on the person who was president of both corporations, The Pickwick Corporation filed a verified answer asserting the defense that plaintiff's injury was caused by her own negligence. After the statute of limitations had run on the accident, the court permitted plaintiff's motion to amend the complaint to correct the mistake in defendant's name. Defendant ultimately appealed from judgment entered on a jury verdict for plaintiff.

The court of appeal affirmed, noting two essential facts: (1) the president of Pickwick Stages System was actually served in the action so that the court had jurisdiction over that corporation, and (2) the two corporations used their names interchangeably throughout California and Pickwick Stages System advertised the stage business under the name Pickwick Corporation, which was Pickwick Stages System's holding company (*113 Cal. App. 118, 122-123*). The court went on to note that the allegations of the original complaint regarding the defendant's operation of a stage line were applicable only to Pickwick Stages System and not to the other corporation, so that any officer of Pickwick Stages System who read the complaint had to have known that it was the intended defendant. Moreover, the court stated that Pickwick Stages System must actually have appeared in the action because the verified answer asserted facts which could only be truthfully sworn to by the corporation whose employees actually participated in the events surrounding the accident (*113 Cal. App. 118, 124*).

Plaintiffs in Most Worshipful Sons v. Sons of Light Lodge (1958) 160 Cal. App. 2d 560, 325 P.2d 606 , sought to recover assets of a fraternal organization which were taken by a seceding group. One of the assets was a building which the seceding group deeded to a building corporation. Plaintiffs did not file their second amended complaint, which first joined the building corporation as a defendant, until seven years after filing the original and first amended complaints and over five years after the building corporation acquired the property. The court overruled a demurrer to the amended complaint and denied the motion to strike it. Defendants appealed from a subsequent judgment for plaintiffs.

In affirming, the court of appeal reasoned that the action against the building corporation was to establish the fictitious identity of the corporation as an alter ego of the other defendants, and that it was therefore properly brought into the action (*160 Cal. App. 2d 560, 566-567*). Further, the court held that because the corporation was the alter ego of the originally named defendants, there could be no laches in plaintiff's delay to amend the complaint and the statute of limitations could not run (*160 Cal. App. 2d 560, 569*).

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1-16 California Points & Authorities § 16.41

§ 16.41 Supporting Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Complaint--Addition of Party Plaintiff

[1] FORM Supporting Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Complaint--Addition of Party Plaintiff

[*The following should be combined with a general form of memorandum in support of a motion for leave to file an amended pleading or an amendment to a pleading (see § 16.30) or to amend to conform to proof (see § 16.31).*]

THE COURT SHOULD ALLOW AMENDMENT OF THE COMPLAINT TO ADD A NEW PARTY PLAINTIFF BECAUSE THE SUBSTANTIAL RIGHTS OF THE PARTIES ARE NOT AFFECTED.

A. Statutory Authority. The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect (*Code Civ. Proc. § 473(a)*).

B. Addition of Party Plaintiff. The court may allow amendment of a complaint to add a party as plaintiff if the amendment does not affect the substantial rights of the parties (*Polk & Hensley v. Coffin & Swain (1858) 9 Cal. 56, 58* ; *California Air Resources Bd. v. Hart (1993) 21 Cal. App. 4th 289, 301, 26 Cal. Rptr. 2d 153*).

[*Optional*] **C. Addition of Plaintiff's Solely-Owned Professional Corporation.** An individual plaintiff may be allowed to amend the complaint to add his or her solely-owned professional corporation as a new party plaintiff, after the statute of limitations has run, if the plaintiff and the professional corporation are, for purposes of the action, essentially the same, the same general set of facts are alleged in the amended complaint, and the defendant will not suffer prejudice (*Pasadena Hospital Assn., Ltd. v. Superior Court (1988) 204 Cal. App. 3d 1031, 1033, 251 Cal. Rptr. 686*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a motion for leave to amend a complaint to add a new party plaintiff. It does not provide a complete memorandum, but is designed to be combined with one of the general forms of memoranda of points and authorities supporting amendment of pleadings set out in *§§ 16.30* and *16.31*, as well as with forms relating to any other grounds that may exist for amending the pleading [*see §§ 16.32 -16.40, 16.42*].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Opposing Points and Authorities

The points and authorities set out in *§ 16.53* may be used in an appropriate case to oppose a motion for a leave to amend supported by this memorandum.

[c] Related Pleading and Practice Forms

For forms of amended complaint, of notice of motion for leave to file an amended complaint, and of supporting declarations, see California Forms of Pleading and Practice, Ch. 21, *Amended and Supplemental Pleadings* (Matthew Bender).

[d] Related Points and Authorities

For forms of memoranda of points and authorities relating to joinder of parties, see Ch. 168, *Parties* .

[3] Discussion of Authorities

[a] Addition of Party Plaintiff

In ***Polk & Hensley v. Coffin & Swain*** *(1858) 9 Cal. 56* , plaintiff brought suit for damages to his cattle. During trial, it appeared that plaintiff shared title to the cattle with another, and at the close of trial, the court allowed amendment of the complaint to add the joint owner as coplaintiff. On defendants' appeal from judgment for plaintiffs, defendants urged that there had been a fatal variance of proof in regard to ownership of the cattle, because the original complaint had alleged only that the original plaintiff was the owner. In rejecting this contention, the Supreme Court held that it is always in the power of the court to allow an amendment to a complaint, so long as it does not affect the substantial rights of the parties, and that the amendment in question did not change the merits of the case or the liability of the defendants (*9 Cal. 56, 58-59*).

[b] Addition of Party Plaintiff

In ***California Air Resources Bd. v. Hart*** *(1993) 21 Cal. App. 4th 289, 26 Cal. Rptr. 2d 153* , the plaintiff filed a complaint for civil penalties for the sale of new motorcycles in violation of California air pollution control standards against an individual who owned a motorcycle sales business. The defendant moved to dismiss on the grounds that *Health & Safety Code § 43154(b)* provided for prosecution of such an action exclusively by the Attorney General and that the action had to be prosecuted in the name of the People of the State of California instead of the Board. In response to the motion, the Board moved to amend the complaint to substitute the People as plaintiff, and argued that the Attorney General had delegated by letter to the Board the power to prosecute the action. The trial court granted the motion and dismissed the action without prejudice (*21 Cal. App. 4th 289, 293-294*).

The court of appeal reversed, holding that the Attorney General's delegation of authority to prosecute the action was

permitted by *Health & Safety Code § 7*, which allows a public officer to delegate to another any power granted to him or her under that code and by *Gov. Code § 11040*, which specifically allows a state agency to employ counsel with the written consent of the Attorney General and did not violate any public policy. The court further stated that *Code Civ. Proc. § 473* has been construed to permit amendment to substitute a plaintiff with standing for one who is not a real party in interest. It noted that allowing an amendment and relation back to avoid the statute of limitations does not depend on whether the parties are technically or substantially changed but whether the nature of the action is substantially changed. It found that where leave is sought to substitute a new plaintiff based upon a technical defect in the plaintiff's status due to an honest mistake in the naming of a party, amendment is generally proper. However, it is not proper when used to interject a new party into the litigation for the first time under the guise of a misnomer. Based on the record, the court concluded that the plaintiff's proposed amendment was a technical one which did not affect the nature of the action and authorized the board to maintain the action in the name of the People of the State of California on remand (*21 Cal. App. 4th 289, 298-301*).

[c] Addition of Plaintiff's Solely-Owned Professional Corporation

Pasadena Hospital Assn. v. Superior Court *(1988) 204 Cal. App. 3d 1031, 251 Cal. Rptr. 686* , was a libel action brought by a doctor against a hospital. At the time the alleged libel occurred, the doctor was practicing as a professional corporation. After the expiration of the applicable limitations period, the doctor moved to amend the complaint to name the professional corporation, of which he was the sole shareholder, as a new party plaintiff. The trial court granted the motion and subsequently overruled defendant's demurrer based on the statute of limitations. Defendant petitioned for a writ of mandate.

The court of appeal denied the writ, holding that the amendment related back to the original filing of the complaint because (1) the doctor and his professional corporation were, for purposes of the action, essentially the same; (2) the same general set of facts was alleged in the amended complaint; (3) and the hospital would suffer no prejudice (*204 Cal. App. 3d 1031, 1033*). The court observed that, although professional corporations are considered to be separate entities, their primary purpose is to gain tax advantages. The court found that none of the doctor's duties or services changed when he stopped practicing as a sole practitioner for the hospital and began practicing as a professional corporation. The claims of both the doctor and the corporation were identical in that they arose from the same conduct on the defendant's part. Any harm caused by the libel to the doctor affected the corporation as well. The damages, if any, to the corporation were of like character and were incurred in like manner as the damages to the doctor. Therefore, the court concluded, the addition of the doctor's corporate status did not constitute an addition of an entirely new and different party but merely remedied a technical defect to reflect plaintiff's status at the time the alleged injury occurred (*204 Cal. App. 3d 1031, 1036*). The interests of justice weighed in favor of treating the amendment as one of form rather than of substance. Because, in addition, no possible prejudice to the hospital would result, the amendment properly related back to the original complaint (*204 Cal. App. 3d 1031, 1037*).

[4] Additional Authorities

[a] Addition of Party Plaintiff

In *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo (1985) 172 Cal. App. 3d 151, 217 Cal. Rptr. 893* , plaintiffs sought writs of mandate to review two county board of supervisors' decisions relating to approval of a shopping center project. After the statute of limitations had run, an amended petition was filed in one of the proceedings adding a new plaintiff. The trial court denied any relief, and on plaintiffs' appeal, one of defendants' arguments was that the amended petition had been properly denied because one plaintiff improperly injected itself into the litigation without leave of court after the period of limitations had run. The court of appeal rejected this contention. The court, citing *Code Civ. Proc. § 473*, recognized the court's power to allow parties to amend pleadings to add parties, and stated that when recovery is sought on the same basic set of facts, the main policy of the statute of limitations is satisfied. The mere addition of a plaintiff did not alter the general set of facts originally alleged; thus defendants were

not prejudiced and no reasonable purpose would have been served by dismissing that plaintiff. The court granted that the plaintiffs did not have a right to add a party as a matter of course, but noted that plaintiffs at least implicitly sought permission by naming the party in the amended petition, and that the trial court's statements and actions (telling plaintiffs they had a right to be there, not striking the amended complaint, and ultimately denying the petition on other grounds) supported the conclusion that the court permitted the new party to be included (*172 Cal. App. 3d 151, 160*).

In *Guenter v. Lomas & Nettleton Co. (1983) 140 Cal. App. 3d 460, 189 Cal. Rptr. 470* , plaintiff filed a class action against defendant, naming as the class members the 28 named beneficiaries in a second deed of trust. The trial court denied certification of the class, holding that the class was not so numerous as to make joinder impracticable. After the statute of limitations on the action had expired, plaintiff moved to amend the complaint to name as plaintiffs all 28 beneficiaries. The motion was denied, and plaintiff appealed. The court of appeal reversed, holding that the amendment should have been allowed to relate back to the date of the original complaint because the plaintiffs who were sought to be brought in by amendment were, in the original action, members of the class that the named plaintiff sought to represent (*140 Cal. App. 3d 460, 468-469*). *Guenter* was criticized in *Bangert v. Narmco Materials, Inc. (1984) 163 Cal. App. 3d 207, 210-211, 209 Cal. Rptr. 438* , for opening a door that would allow members of a decertified class to avoid statute of limitations as long as original litigation continued [*see also* *Jolly v. Eli Lilly & Co. (1988) 44 Cal. 3d 1103, 1119, 1123-1126, 245 Cal. Rptr. 658, 751 P.2d 923* questioning *Bangert* and further discussing the effect of class actions on the statute of limitations].

Pruitt v. Fontana (1956) 143 Cal. App. 2d 675, 300 P.2d 371 , disapproved on other grounds in *Mattei v. Hopper (1958) 51 Cal. 2d 119, 126, 330 P.2d 625* , involved an action for breach of contract and other causes of action arising out of an agreement to sell real estate. After a demurrer to plaintiff's third amended complaint was sustained with leave to amend, plaintiff filed a fourth amended complaint that added three new causes of action and a new plaintiff. The new plaintiff was the transferee by written assignment of a portion of the original plaintiff's interest in the transaction underlying the suit. Defendant moved to strike the complaint on the grounds that it added new causes of action and parties. The motion was granted, and plaintiff's subsequent motion for leave to file the complaint was denied. Plaintiff appealed from the judgment dismissing the action and from the orders striking the complaint and denying leave to file it.

In reversing, the court of appeal noted that the addition of a party plaintiff who is a partial assignee of the obligation sued on is not prejudicial to defendant, but is to defendant's advantage because it allows his liability on a single claim to be adjudicated in one suit (*143 Cal. App. 2d 675, 683-684*). The court held that amendment is proper when there is no attempt to state a new and different cause of action, but merely to add a partial assignee as a party plaintiff to secure a complete determination of the original cause of action, and that the trial court abused its discretion in striking the amended complaint and denying leave to file it (*143 Cal. App. 2d 675, 684*).

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1-16 California Points & Authorities § 16.42

§ 16.42 Supporting Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Complaint--Substitution of Plaintiffs or Change in Plaintiff's Capacity to Establish Standing to Sue

[1] FORM Supporting Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Complaint--Substitution of Plaintiffs or Change in Plaintiff's Capacity to Establish Standing to Sue

[*The following should be combined with a general form of memorandum in support of a motion for leave to file an amended pleading or an amendment to a pleading (see § 16.30) or to amend to conform to proof (see § 16.31).*]

THE COURT SHOULD ALLOW THE AMENDMENT OF THE COMPLAINT [TO CHANGE THE CAPACITY IN WHICH PLAINTIFF BRINGS SUIT SO AS] TO SUBSTITUTE THE REAL PARTY IN INTEREST FOR A PLAINTIFF WHO LACKS STANDING.

A. Statutory Authority. [*See § 16.41[1], Paragraph A.*]

[*EITHER*]

B. Amendment to Change Plaintiff's Capacity. When plaintiff has brought suit in the wrong capacity, a complaint may be amended to change the capacity in which plaintiff brings the suit (*Thorpe v. Story (1937) 10 Cal. 2d 104, 114, 73 P.2d 1194* ; *Olsen v. Lockheed Aircraft Corp. (1965) 237 Cal. App. 2d 737, 741, 47 Cal. Rptr. 242*).

[*OR*]

B. Amendment to Bring In Real Party In Interest as Plaintiff. The court may allow amendment of a complaint to bring in a party plaintiff with standing to sue when the original plaintiff lacked standing (*Cal. Gas. Retailers v. Regal Petroleum Corp. (1958) 50 Cal. 2d 844, 850-851, 330 P.2d 778* ; *Klopstock v. Superior Court (1941) 17 Cal. 2d 13,*

19-21, 108 P.2d 906).

[*AND, for optional use with second paragraph B*]

C. Amendment to Correct Mistake In Plaintiff's Name. A party bringing suit in the wrong name may amend the complaint to substitute the name of the real party in interest (*Bank of America v. Superior Court (1973) 35 Cal. App. 3d 555, 557, 110 Cal. Rptr. 709*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a motion for leave to amend a complaint to substitute a party with standing to assert the cause of action for a party without standing. The form may be used where the original plaintiff's lack of standing resulted from naming the correct plaintiff, but in the wrong capacity (first alternative Paragraph B), or from naming an incorrect plaintiff (second alternative Paragraph B). By including optional Paragraph C with the second alternative Paragraph B, the form may be used where the original plaintiff was named incorrectly due to a mistake.

The form does not provide a complete memorandum, but is designed to be combined with one of the general forms of memoranda of points and authorities supporting amendment of pleadings *set out in §§ 16.30* and *16.31*, as well with forms relating to any other grounds that may exist for amending the complaint [*see §§ 16.32 -16.41*].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Opposing Points and Authorities

The points and authorities *set out in § 16.53* may be used in an appropriate case to oppose a motion for leave to amend supported by this memorandum.

[c] Related Pleading and Practice Forms

For forms of amended complaint, notice of motion for leave to file an amended complaint, and supporting declarations, see California Forms of Pleading and Practice, Ch. 21, *Amended and Supplemental Pleadings* (Matthew Bender).

[3] Discussion of Authorities

[a] Amendment to Change Plaintiff's Capacity

In ***Thorpe v. Story*** *(1937) 10 Cal. 2d 104, 73 P.2d 1194* , the members of a bondholders' protective committee sought recovery in their own names on a written guaranty of a bond issue. At trial the court ruled that plaintiffs were not suing in their individual capacities, but were trustees of an express trust, and allowed amendment of the complaint to reflect that plaintiffs sued in their capacity as trustees. Subsequently, plaintiffs were given judgment against defendants, and all parties appealed.

On appeal defendants asserted, inter alia, that plaintiffs lacked standing because the bondholders' protective agreement did not make plaintiffs "holders and purchasers" of the bonds to whom the guaranty ran. The Supreme Court held that the complaint as amended at trial was sufficient, stating that the amendment was properly allowed and did not constitute a change in the cause of action or theory on which the suit was predicated (*10 Cal. 2d 104, 114)* .

Olsen v. Lockheed Aircraft Corp. *(1965) 237 Cal. App. 2d 737, 47 Cal. Rptr. 242* , involved a suit for wrongful death arising out of a Texas airplane crash. After some rather convoluted proceedings, defendants moved for judgment on the pleadings on the ground that cross complainant decedent's widow, could not sue in her individual capacity under the Texas wrongful death law. Before the court could rule on the motion, however, cross complainant filed a notice of motion to amend her complaint and a proposed "Second Amended Complaint" in which she sued as administratrix of decedent's estate. The court granted both motions and entered judgment for cross defendants on the first amended cross complaint. Defendants then demurred to the second amended cross complaint contending that it was not an amendment, but a new complaint that was barred by the statute of limitations. The demurrer was sustained, and cross complainant appealed from the resulting judgment.

The court of appeal reversed, applying California law to the procedural issues before it (*237 Cal. App. 2d 737, 740*). The court cited *Cal. Gas. Retailers v. Regal Petroleum Corp. (1958) 50 Cal. 2d 844, 851, 330 P.2d 778* , discussed in *§ 16.42[4][a]* for the proposition that great liberality is allowed in amending pleadings, particularly when the only change is a substitution of parties without alteration of the substantive grounds of the suit. The court then held the amendment was properly allowed, quoting *Reardon v. Balaklala Consol. Copper Co. (C.C.N.D. Cal. 1912) 193 F. 189* , in stating that there was no change in the facts or cause of action alleged and that a change in the name of the plaintiff and capacity in which he or she sues is a change of form rather than substance which in no sense constitutes the bringing of a new cause of action (*237 Cal. App. 2d 737, 741)* . Because the amendment was proper, the court held that it related back to avoid the statute of limitations, and that cross defendants' demurrer should not have been sustained (*237 Cal. App. 2d 737, 742*).

[b] Amendment to Bring In Real Party In Interest as Plaintiff

Cal. Gas. Retailers v. Regal Petroleum Corp. *(1958) 50 Cal. 2d 844, 330 P.2d 778* , was a suit brought by a nonprofit corporation consisting of members who were distributors of major oil company products. Plaintiff alleged that defendants, independent service station operators, had committed unfair trade practices and other conduct causing plaintiff's members to suffer loss of customers and sales. After both sides had rested, plaintiff moved for leave to file an amendment to the complaint to add one of its members as a plaintiff. The motion was granted on the day decision was rendered, and judgment was entered in favor of plaintiffs on one of the causes of action that had been alleged. Defendants appealed.

The Supreme Court first held that the corporation was not a proper party (*50 Cal. 2d 844, 849-850*). However, relying on the power of courts to allow amendments under *Code Civ. Proc. § 473* to add or strike the name of any party, the Court went on to hold that the amendment of the complaint to include as a plaintiff the individual member, who was a proper party to assert the claims, had cured the original defective pleading (*50 Cal. 2d 844, 850-851*). Noting that the amendment had not stated any new cause of action or any new facts, and that defendants had not been prejudiced by the amendment, the Court decided that the trial court had not abused its discretion in permitting amendment (*50 Cal. 2d 844, 851*).

The facts and procedural background of ***Klopstock v. Superior Court*** *(1941) 17 Cal. 2d 13, 108 P.2d 906* , are discussed in *§ 16.30[3][b]*. In *Klopstock*, the Supreme Court held that the trial court had acted properly in allowing amendment of a complaint to substitute a proper party for the original plaintiff after judgment in favor of plaintiff had been reversed by a court of appeal and the case had been remanded (*17 Cal. 2d 13, 19-22*). The Court recognized that a complaint cannot be amended to state a wholly different cause of action (*17 Cal. 2d 13, 20*). Then, however, the Court went on to find that there was no change in the liability asserted against defendants, who were fully apprised of the facts that were relied on to state a right to relief against them from the time the original complaint was filed. Also noting that the party who presses a derivative suit on behalf of a corporation is a nominal party, the Court held that the amendment was well within the discretion of the court under *Code Civ. Proc. § 473* (*17 Cal. 2d 13, 21*). The Court found support for its decision in *Curtis v. Nye & Nissen (1927) 86 Cal. App. 507, 512-513, 261 P. 747* , in which the

court of appeal held that an amendment substituting a corporation for an individual plaintiff on a showing that the corporation was the party with the right to bring the action did not constitute an attempt to set up a new cause of action (*17 Cal. 2d 13, 21-22*).

[c] Amendment to Correct Mistake In Plaintiff's Name

Bank of America v. Superior Court *(1973) 35 Cal. App. 3d 555, 110 Cal. Rptr. 709* , involved an action by Continental Assurance Company against a bank to recover money. Plaintiff's counsel, however, mistakenly brought suit in the name of Continental Casualty Company. Over one year after the complaint was filed, the court granted a motion made in the name of the original plaintiff to amend the caption by substituting the name of the real party in interest for that of the original plaintiff. The bank petitioned for a writ of mandate to compel the trial court to vacate its order.

The court of appeal denied the writ, noting that the cause of action was not changed by the amendment, and that the pleadings set forth copies of the check which was involved in the action and revealed the name of the real party in interest as maker. The bank therefore always knew exactly the case it would have to meet. The only prejudice the bank suggested was that it had inquired of the secretary of state whether the original party was authorized to do business in California and had been informed that it was. However, it was stipulated that if the request had been made in reference to the real party in interest, the response would have been the same. The court thus followed *Klopstock v. Superior Court (1941) 17 Cal. 2d 13, 108 P.2d 906* , discussed in *§ 16.42[3][b]*.

[4] Additional Authorities

[a] Amendment to Bring In Real Party in Interest as Plaintiff

Plaintiff in *Tenants Assn. of Park Santa Anita v. Southers (1990) 222 Cal. App. 3d 1293, 272 Cal. Rptr. 361* , was an unincorporated association of residents in a mobilehome park. The trial court sustained defendants' demurrers without leave to amend based on plaintiff's lack of standing to sue. The court of appeal held that the association did have standing as to some parts of the action, but not as to others. The court cited *Cal. Gas. Retailers v. Regal Petroleum Corp. (1958) 50 Cal. 2d 844, 330 P.2d 778* , discussed in *§ 16.42[3][b]* for its reasoning that a pleading may be amended even after the cause was submitted, if the amendment states no new cause of action, does not state any new facts, and defendants are not prejudiced. The court found that because allowing plaintiff to add its members as plaintiffs would not involve stating any new cause of action or new facts, the defendants would not be prejudiced. Then, in reversing the dismissal, the court directed the trial court to give plaintiff leave to amend the complaint to add individual members of the association as plaintiffs to the already stated causes of action as to which the association lacked standing (*222 Cal. App. 3d 1293, 1304-1305*).

In *Jensen v. Royal Pools (1975) 48 Cal. App. 3d 717, 121 Cal. Rptr. 805* , the original plaintiff was an unincorporated association, consisting of condominium owners, which sought damages for the negligent construction of a defective swimming pool in the common area of the condominium project. The pool builder moved for summary judgment on the ground that a condominium owner's association does not have standing to sue to recover damages to common areas of a condominium. The association was allowed to amend the complaint to add individuals who owned a condominium unit as plaintiffs, to represent themselves and the class of owners. The court then sustained defendant's demurrer to the amended complaint on the ground that the action was barred by the statute of limitations, and the individual plaintiffs appealed.

On appeal, the only issue was whether the amended complaint related back to the time of filing of the original complaint so as to be timely. The court of appeal noted the modern rule in cases involving parties designated by their true names in the original complaint, that an amendment made after the statute of limitations has run will be deemed to relate back to the date of filing the original complaint when recovery is sought in both pleadings on the same general set of facts, citing *Austin v. Massachusetts Bonding Insurance Co. (1961) 56 Cal. 2d 596, 600, 15 Cal. Rptr. 817, 364*

P.2d 681 (discussed in *§ 16.37[4][a]*). The court then noted that the same rule applies even when new plaintiffs are substituted or added after the statute of limitations has run, citing *Cox v. San Joaquin Light & Power Co. (1917) 33 Cal. App. 522, 166 P. 578* , in which amendment to substitute decedent's personal representative for an heir was allowed (*48 Cal. App. 3d 717, 721*). The court concluded that the only justification for permitting defendants to raise the statute of limitations would be prejudice, and relied on *Klopstock v. Superior Court (1941) 17 Cal. 2d 13, 108 P.2d 906* , and *Cal. Gas. Retailers v. Regal Petroleum Corp. (1958) 50 Cal. 2d 844, 330 P.2d 778* (both discussed in *§ 16.42[3][b]*), in finding that defendants were not prejudiced by the substitution of plaintiffs (*48 Cal. App. 3d 717, 721-722*). Thus, the court held that the trial court had erred by sustaining defendants' demurrer.

Powers v. Ashton (1975) 45 Cal. App. 3d 783, 119 Cal. Rptr. 729 , involved seven causes of action against employers relating to contributions allegedly owed by the employers to four employee trust funds pursuant to collective bargaining agreements. The suit was initiated by the administrator of the funds, and defendants demurred on the ground that the administrator was not the real party in interest and, therefore, lacked standing to sue. The court sustained the demurrer without leave to amend and plaintiff appealed. The court of appeal agreed that the trustees of the funds were the real parties in interest, so that the demurrer had been properly sustained. The court went on, however, to hold that the trial court had abused its discretion by denying leave to amend, citing *Klopstock v. Superior Court (1941) 17 Cal. 2d 13, 108 P.2d 906* (discussed in *§ 16.42[3][b]*), for the proposition that *Code Civ. Proc. § 473* permits amendment to substitute a plaintiff with standing for one who is not a real party in interest (*45 Cal. App. 3d 783, 790*).

[b] Amendment to Correct Mistake in Plaintiff's Name

Plaintiff in California Cent. Airlines v. Fritz (1959) 169 Cal. App. 2d 436, 337 P.2d 531 , brought suit for breach of contract in the name "California Central Airlines, a California corporation." At pretrial conference, plaintiff's counsel revealed that the suit had inadvertently been brought in the wrong name and that the contract was actually by California Coastal Airlines, a California corporation, doing business as California Central Airlines. Plaintiff then moved to amend the complaint, and defendant moved for summary judgment. The court denied plaintiff's motion and granted summary judgment to defendants. Plaintiff appealed.

In reversing, the court of appeal noted that the obligation asserted by plaintiff was fully described in the complaint and that the answer showed that defendants were fully aware of the details of the transaction. Moreover, although there had been two prior incarnations of California Central Airlines, Inc., the only entity shown to have ever existed called California Central Airlines without the "Inc." was California Coastal Airlines doing business under that name. Defendants made no showing that the original complaint misled them as to the transaction sued on or the true party asserting the claim. Relying on *Klopstock v. Superior Court (1941) 17 Cal. 2d 13, 108 P.2d 906* (discussed in *§ 16.42[3][b]*), the court reversed and directed the trial court to grant plaintiff's motion to amend (*169 Cal. App. 2d 436, 438-439*).

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1-16 California Points & Authorities § 16.43

§ 16.43 Supporting Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Answer--Particular Liberality in Allowing Amendment of Answers

[1] FORM Supporting Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Answer--Particular Liberality in Allowing Amendment of Answers

[*The following should be combined with a general form of memorandum in support of a motion for leave to file an amended pleading or an amendment to a pleading (see § 16.30) or to amend to conform to proof (see § 16.31).*]

THE POLICY OF LIBERALLY ALLOWING AMENDMENT OF PLEADINGS IS PARTICULARLY APPLICABLE TO AMENDMENT OF ANSWERS.

Liberal Amendment of Answers. The rule that courts should liberally allow amendment of pleadings if the amendment does not prejudice the substantial rights of others is particularly applicable to answers (*Gould v. Stafford (1894) 101 Cal. 32, 34, 35 P. 429* ; *Dunzweiler v. Superior Court (1968) 267 Cal. App. 2d 569, 576, 73 Cal. Rptr. 331*).

[2] Comments

[a] Use of Form

This points and authorities may be submitted in support of a motion for leave to amend an answer. It does not provide a complete memorandum, but is designed to be combined with one of the general forms of memoranda of points and authorities set out in *§§ 16.30* and *16.31*, as well as with forms relating to any other specific grounds that may exist for amending the answer (*see § 16.32*)].

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Liberal Amendment of Answers

The facts and procedural background of ***Gould v. Stafford*** *(1894) 101 Cal. 32, 35 P. 429* , are discussed in *§ 16.33[4][a]*. The Supreme Court rejected plaintiff's contention that the amendment changing the ground of defense should not have been allowed. The Court affirmed, holding that the trial court had not abused its discretion in permitting the amendment, stating the rule that courts will be liberal in allowing an amendment to a pleading when it does not seriously impair the rights of the opposite party, particularly when the pleading is an answer (*101 Cal. 32, 34*).

The facts and procedural background of ***Dunzweiler v. Superior Court*** *(1968) 267 Cal. App. 2d 569, 73 Cal. Rptr. 331* , are discussed in *§ 16.30[4][b]*. In holding that a writ of mandate should issue to compel the trial court to allow the defendant to amend his answer, the court of appeal held that the policy of great liberality in allowing amendment to pleadings at any stage of the proceedings so as to dispose of cases on their merits when the permission to amend will not prejudice the substantial rights of others is particularly important when amendment is sought as to an answer, relying on *Gould v. Stafford (1894) 101 Cal. 32, 35 P. 429 , above,* and *Hyman v. Tarplee (1944) 64 Cal. App. 2d 805, 149 P.2d 453* , discussed in *§ 16.43[4][a]*.

[4] Additional Authorities

[a] Liberal Amendment of Answers

In *Ramos v. Santa Clara (1973) 35 Cal. App. 3d 93, 110 Cal. Rptr. 485* , the court of appeal, affirming summary judgment in favor of defendant, held that defendant's failure to assert the affirmative defenses of accord and satisfaction and release in its answer did not preclude assertion of them on a motion for summary judgment. The court reasoned that although the defenses had to be specially pleaded in order to be raised as issues, the failure to raise them in the answer did not preclude assertion of them on a motion for summary judgment because a trial court has discretion to allow amendment of pleadings at any stage of the proceedings. The court noted that liberality should be particularly displayed in allowing amendment of answers so that a defendant may assert all available defenses, citing *Gould v. Stafford (1894) 101 Cal. 32, 35 P. 429* (discussed in *§ 16.43[4][a]*), and *Hyman v. Tarplee (1944) 64 Cal. App. 2d 805, 149 P.2d 453* .

Hyman v. Tarplee (1944) 64 Cal. App. 2d 805, 149 P.2d 453 , involved a dispute over funds in a bank account and whether they had been the subject of a valid gift as claimed by defendants. The original answer had alleged that a gift of the funds had been made and was to be effective on the donor's death. After the attorney who drafted the answer died, defendants' new attorneys ascertained that the answer did not set forth the facts correctly, and several weeks before the trial, moved to amend the answer to allege that there had been an absolute gift prior to the donor's death. The court granted the motion and, ultimately, defendants prevailed on the merits. Plaintiff appealed.

In affirming, the court of appeal held that the trial court had not abused its discretion in allowing the amendment. Plaintiff argued that allowing an amendment that set up an entirely different transaction from the one relied on as a defense in the original answer was an abuse of discretion, but the court held that allowing the amendment was obviously within the discretion of the trial court. The court noted that the rule of liberality in allowing amendments when they do not seriously impair the rights of the opposite party is particularly applicable to answers (*64 Cal. App. 2d 805, 813-814*).

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1-16 California Points & Authorities § 16.44

§ 16.44 Supporting Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Answer--To Assert New Defense

[1] FORM Supporting Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Answer--To Assert New Defense

[*The following should be combined with a general form of memorandum in support of a motion for leave to file an amended pleading or an amendment to a pleading (see § 16.30) or to amend to conform to proof (see § 16.31).*]

THE COURT SHOULD ALLOW THE AMENDMENT OF THE ANSWER TO STATE A NEW DEFENSE.

A. Amendment to State New Defense. Granting or denying a motion for leave to file an amendment to an answer to set up a new defense is a matter committed to the sound discretion of the trial court (*Wrightson v. Dougherty (1936) 5 Cal. 2d 257, 265-266, 54 P.2d 13* ; *see* *Union Bank v. Wendland (1976) 54 Cal. App. 3d 393, 400-401, 126 Cal. Rptr. 549*).

[*Optional*] **B. Proposed Defense Is Novel Question.** When the legal sufficiency of the proposed defense is a novel question almost certain to be tested in an appellate court, the preferable practice is to permit the amendment and allow the parties to test its legal sufficiency by demurrer, motion for judgment on the pleadings, or other appropriate proceedings (*California Casualty Gen. Ins. Co. v. Superior Court (1985) 173 Cal. App. 3d 274, 281, 218 Cal. Rptr. 817*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for leave to amend an answer to assert a new defense. Optional Paragraph B is included for use if the proposed defense is a novel question almost certain to be tested in an appellate court [*see* *California Casualty Gen. Ins. Co. v. Superior Court (1985) 173 Cal. App. 3d 274, 281, 218*

Cal. Rptr. 817]. It does not provide a complete memorandum, but is designed to be combined with one of the general forms of memoranda of points and authorities set out in *§§ 16.30* and *16.31*, as well as with forms relating to any other specific grounds that may exist for amending the answer [*see § 16.32*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Opposing Points and Authorities

The points and authorities set out in *§ 16.55* may be used in an appropriate case to oppose a motion for leave to amend supported by this memorandum.

[3] Discussion of Authorities

[a] Amendment to State New Defense

Wrightson v. Dougherty (1936) 5 Cal. 2d 257, 54 P.2d 13 , involved a dispute over the ownership of certain securities. The court granted defendants' motions for nonsuit and judgment on the pleadings, made after plaintiff's opening statement, on the grounds that plaintiff's cause of action was barred by the statute of limitations. Judgments of dismissal were then entered, and plaintiff appealed.

In affirming, the Supreme Court rejected plaintiff's claim that the trial court had abused its discretion in allowing amendment of the answers to plead the statute of limitations. The Court, relying on prior California law, held that it is settled that motions for leave to amend answers are committed to the sound discretion of the trial court, including motions for leave to amend so that the statute of limitations may be pleaded (*5 Cal. 2d 257, 265-266*).

In *Union Bank v. Wendland (1976) 54 Cal. App. 3d 393, 126 Cal. Rptr. 549* , plaintiff sued defendant on a promissory note. Defendant's answer asserted that plaintiff's action sought a deficiency judgment barred by *Code Civ. Proc. § 580b*. After the case was submitted, defendant moved to amend the answer to conform to proof to allege that the action was barred by a different antideficiency statute. The court denied defendant's motion, and judgment was entered for plaintiff. Defendant appealed.

The court of appeal reversed. The court noted that granting permission to amend answers is largely within the discretion of the court, and stated the basic rule applicable to amendments to conform to proof, that the amended pleading must be based on the same general set of facts as those on which the cause of action or defense as originally pleaded was grounded (*54 Cal. App. 3d 393, 400-401*). The court then noted that the proposed amended answer was based on the same general set of facts as the affirmative defense in the original answer, and that whichever statute was relied on, the whole theory of defense was that plaintiff could not have a deficiency judgment. The court held that it was an abuse of discretion to deny defendant's motion for leave to amend to conform to proof (*54 Cal. App. 3d 393, 401*).

[b] Proposed Defense Is Novel Question

California Casualty Gen. Ins. Co. v. Superior Court (1985) 173 Cal. App. 3d 274 , 218 Cal. Rptr. 817 , was an action to recover compensatory and punitive damages for, inter alia, defendant insurers' alleged breach of the duty of good faith and fair dealing regarding a claim submitted under plaintiff's automobile insurance policy. The trial court denied defendants' motion seeking leave to amend their answer to add a fourth affirmative defense, which stated that plaintiff and her former attorney's bad faith conduct in the prosecuting, handling, and management of the uninsured motorist claim precluded defendants from obtaining full and complete information. Defendants consequently requested that any damages awarded against them for bad faith be reduced by the amount of the bad faith conduct of plaintiff and her former attorney. Defendants sought an alternative writ of mandate to review the superior court order denying their motion.

The court of appeal issued the writ, noting that the failure of a proposed amendment to state facts sufficient to constitute a cause of action or defense may support an order denying a motion to amend (*173 Cal. App. 3d 274, 280*). However, when the legal sufficiency of the proposed defense is a novel question almost certain to be tested in an appellate court, the preferable practice would be to permit the amendment and allow the parties to test its legal sufficiency by demurrer, motion for judgment on the pleadings, or other appropriate proceedings. The proceedings might serve to develop the factual content of the proposed defense and to refine the language in which it is pleaded. Should a general demurrer ultimately be sustained, the appellate court would at least be apprised of the ground on which the proposed defense was rejected, and therefore be in a position to focus its attention on the appropriate considerations on review (*173 Cal. App. 3d 274, 281*).

[4] Additional Authorities

[a] Amendment to State New Defense

Gonzales v. Brennan (1965) 238 Cal. App. 2d 69, 47 Cal. Rptr. 501 , involved a medical malpractice suit, brought against a doctor employed by a county. On the day of trial, defendant moved in chambers to amend the pretrial order and the answer to allege that plaintiff failed to file a claim in accordance with the then prevailing requirements of the Government Code. Defendant also moved for dismissal, if the other motions were allowed. The court took the matters under submission, and later granted the motions to amend the answer and pretrial order. In subsequent proceedings in chambers, defendant orally moved for summary judgment or judgment on the pleadings, and the court granted summary judgment. Plaintiff appealed.

The court of appeal affirmed, although criticizing the use of summary judgment as an inappropriate tool (*238 Cal. App. 2d 69, 76*). Plaintiff urged that amendment of the pretrial order was error, but the court applied cases decided under *Code Civ. Proc. § 473*, allowing amendment to plead the statute of limitations on the day of trial or even later, for the rule that granting or refusing leave to amend an answer is a matter committed to the sound discretion of the trial court (*238 Cal. App. 2d 69, 75*). The court held that the same principles that govern the exercise of discretion in allowing amendment of pleadings apply with respect to amendment of pretrial orders (*238 Cal. App. 2d 69, 74-75*). In response to plaintiff's contention that he was prejudiced by the amendment, the court noted the distinction between prejudice and detriment, and held that the fact that plaintiff might have won the lawsuit if the amendment had not been allowed, did not constitute prejudice (*238 Cal. App. 2d 69, 75-76*).

In *White v. Citizens Nat'l Trust & Sav. Bank (1941) 46 Cal. App. 2d 418, 116 P.2d 117* , plaintiffs, on appeal from an adverse judgment entered after trial, argued that the trial court had erred in allowing defendant to amend the answer to plead estoppel during the trial. Plaintiffs argued that they were surprised and were not given time to meet the issue. Affirming the court of appeal held otherwise, noting that the trial judge had offered to give more time to plaintiffs at the end of trial if they needed it, and they had never requested it.

Plaintiff in

Marr v. Superior Court (1939) 30 Cal. App. 2d 275, 86 P.2d 141 , sued defendants in justice court on a promissory note and for obtaining a loan by false representations. Plaintiff's amended complaint included a statement that one of the defendants had been adjudged bankrupt, and defendants' answer admitted the allegation of bankruptcy. At trial, the attempts of defendant bankrupt to introduce evidence of his discharge in bankruptcy were opposed because he had not pleaded a discharge. His motion to amend the answer to plead the discharge was denied and judgment was entered against him. After appealing to the superior court, defendant twice moved to amend the answer, and his motion was twice denied. He then sought a writ of mandate to compel the superior court to allow amendment.

The court of appeal directed the writ to issue. The court held that the discharge in bankruptcy was a meritorious defense,

and stated the rule that amendments are allowed in the furtherance of justice when they can be permitted without prejudice to substantial rights of others, and not simply to give one a technical advantage. The court noted that under such circumstances, denial of a motion to file an amended pleading has been held to be reversible error, citing *Hurley v. Lake County (1933) 133 Cal. App. 219, 23 P.2d 838* (*30 Cal. App. 2d 275, 278*).

Plaintiff in *Rose v. Doe (1907) 4 Cal. App. 680, 89 P. 135* , appealed from an order denying his motion for a new trial, asserting, inter alia, that the trial court had erred in granting defendant leave to file an amended answer after a motion for nonsuit had been denied. In affirming the order, the court of appeal held that amendments setting up special defenses other than those presented in the original answer may be permitted. The court stated that allowance of an amended answer is a matter for the court's discretion, which is best exercised when it tends to bring about judgment on the merits of controversies. The court went on to note that allowing amendment to set up a defense on the merits that has not been previously pleaded would very rarely be held erroneous (*4 Cal. App. 680, 685*).

[b] Proposed Defense Is Novel Question

Kittredge Sports Co. v. Superior Court (1989) 213 Cal. App. 3d 1045, 261 Cal. Rptr. 857 , was an action by a retailer against a sporting goods manufacturer for breach of an express indemnification for products liability in refusing tender of defense in a personal injury lawsuit. Subsequently, the retailer settled with the injured party and sought to amend its complaint against the manufacturer to add causes of action for breach of the covenant of good faith and fair dealing and tortious denial of the existence of the contract. The trial court denied the motion, and plaintiff petitioned the appellate court for a writ of mandate.

In granting a peremptory writ directing the trial court to vacate its order denying the motion and to enter a new order granting leave to amend the complaint, the court of appeal first pointed out that under *Code Civ. Proc. § 473* the trial court has discretion to allow amendments to the pleading in furtherance of justice and that this discretion should be exercised liberally in favor of amendments, for judicial policy favors resolution of all disputed matters in the same lawsuit (*213 Cal. App. 3d 1045, 1047*). In reply to defendant's assertion that the law does not recognize a cause of action in tort for the mere denial of liability under the contract and that a tort arises only when a party denies the existence of a contract, not merely liability, the court of appeal, citing *California Casualty Gen. Ins. Co. v. Superior Court (1985) 173 Cal. App. 3d 274, 281, 218 Cal. Rptr. 817* (discussed in *§ 16.44[3][b]*), said that even if the proposed legal theory is a novel one, the preferable practice would be to permit the amendment and allow the parties to test its legal sufficiency by demurrer, motion for judgment on the pleadings, or other appropriate proceedings (*213 Cal. App. 3d 1045, 1048*).

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§ 16.45 Opposing Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--General Form

[1] FORM Opposing Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	memorandum IN OPPOSITION TO MOTION FOR
Defendant.	)	LEAVE TO FILE [AMENDED *or* AMENDMENT
	)	TO A(N)] _____ [COMPLAINT
	)	*or* DEMURRER *or* ANSWER *or* CROSS COM-
		PLAINT] [*Code Civ. Proc. §§ 473, 576*]

_____

THE COURT SHOULD DENY THE PROPOSED AMENDMENT BECAUSE ALLOWING THE AMENDMENT WOULD NOT BE IN THE FURTHERANCE OF JUSTICE.

A. Amendment Only in Furtherance of Justice. Amendment is only to be granted if the court, in the exercise of its discretion, finds that it will be in furtherance of justice (*Bank of Woodland v. Heron (1898) 122 Cal. 107, 109, 54 P 537* ; *Nelson v. Specialty Records, Inc. (1970) 11 Cal. App. 3d 126, 139, 89 Cal. Rptr. 540*).

B. Showing to Justify Exercise of Discretion. An application for leave to amend is addressed to the sound discretion of the court and may be denied when no showing is made to justify exercise of the court's discretionary power (

Tognazzi v. Wilhelm (1936) 6 Cal. 2d 123, 127, 56 P.2d 1227).

[*Add opposing points and authorities relating to any specific reasons why amendment should not be allowed (see §§ 16.47 -16.55).*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted to oppose a motion for leave to file an amended pleading or an amendment to a pleading. It contains only general points opposing amendment, and is designed to be used as a framework for an opposing memorandum. More specific points and authorities opposing amendment on various grounds are set out in *§§ 16.47 -16.55* and should be combined with this form as relevant to the case. For a general form of points and authorities opposing a motion for leave to amend to conform to proof, see *§ 16.46*.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

This form may be used in opposition to a memorandum in support of a motion for leave to amend a pleading pursuant to *Code Civ. Proc. §§ 473, 576*, or both sections, such as the one *set out in § 16.30*.

[3] Discussion of Authorities

[a] Amendment Only in Furtherance of Justice

Plaintiff in Bank of Woodland v. Heron (1898) 122 Cal. 107, 54 P. 537 , brought an action to foreclose a mortgage that secured a promissory note made by defendant husband. The complaint alleged and the answer admitted the proper acknowledgment and recordation of the mortgage, but at trial evidence was introduced showing that the acknowledgment had been irregularly made so that the mortgage was not entitled to be recorded. Defendant wife, to whom defendant husband had transferred the mortgaged land after executing the promissory note, then filed a declaration of homestead on the property and moved to amend to state that fact and to deny the allegations in the complaint regarding due acknowledgment of the mortgage. The court refused to allow amendment to deny due acknowledgment and judgment was entered for plaintiff. Defendants appealed from the judgment.

On appeal, defendant wife argued that the amendment should have been allowed. Affirming, the Supreme Court held that the great liberality with which amendments are to be allowed should only be displayed in furtherance of justice. The Court found that while plaintiff bank had parted with money on the security of the mortgage, defendant wife had received the property by gift and sought to set up a homestead and to amend in order to impair plaintiff bank's security and perhaps defeat collection of a just debt by taking advantage of the disclosure at trial, in testimony which was irrelevant to any point in controversy, that the acknowledgment was faulty. The Court stated that the case was so far

from showing an abuse of discretion in denying the amendment that the Court would be more inclined to hold that it would have been an abuse to have allowed the amendment. Holding that a proposed new defense must not only be a legal defense, but must also be an equitable defense, the Court held that under the circumstances, the proposed defense was highly inequitable (*122 Cal. 107, 109*).

In *Nelson v. Specialty Records, Inc. (1970) 11 Cal. App. 3d 126, 89 Cal. Rptr. 540* , plaintiff, as assignee, brought suit for breach of contract alleging that his assignor had fully performed its part of the contract. Plaintiff's opening statement, however, revealed that plaintiff intended to prove that performance by his assignor had been waived or excused in part, and defendants moved for dismissal on the ground that proof of waiver or excuse of performance would constitute an impermissible material variance from the pleadings. Plaintiff then moved for permission to amend his pleadings to allege waiver or estoppel in regard to the contract obligation that his assignor had not performed. Noting that the complaint had been filed five years earlier and that plaintiff's counsel had been on the case for 18 months, the court denied the motion to amend and granted the motion to dismiss. Plaintiff appealed from the ensuing judgment of dismissal.

Affirming, the court of appeal stated that it is the contemporary policy of the law to permit amendment of pleadings even at the commencement of trial so that litigation may be fully tried, but that an amendment is to be granted only if the trial court in the exercise of its discretion finds that it will subserve the interests of justice (*11 Cal. App. 3d 126, 139*). The court found that there was no abuse of discretion under the circumstances, stressing the long unexcused delay in amending to assert an issue known to plaintiff long before the original complaint was filed (*11 Cal. App. 3d 126, 139-140*). Moreover, to show reversible error, plaintiff would have had to show that a continuance would not have been granted to defendants, because if the case had been continued, it would have become subject to mandatory dismissal the next day for failure to come to trial within five years from the filing of the complaint. The court also questioned the substance of plaintiff's position on waiver of performance, and concluded that plaintiff did not make a prima facie showing that the amendment would have promoted the interests of justice or placed plaintiff in any better position than he was on the close of his opening statement (*11 Cal. App. 3d 126, 140-141*).

[b] Showing to Justify Exercise of Discretion

The original complaint in *Tognazzi v. Wilhelm (1936) 6 Cal. 2d 123, 56 P.2d 1227* , sought a declaration of plaintiff's rights to certain real property, which plaintiff allegedly conveyed to her daughters as a sham to protect the property against a possible deficiency judgment. After the court sustained a demurrer to the complaint without leave to amend, plaintiff moved to vacate the order and for leave to file an amended complaint. The proposed amended complaint alleged that defendant daughter induced the conveyance by false representations and that plaintiff had no intention of defrauding any creditors in making the conveyance. The court denied the motion and plaintiff appealed the judgment entered on the order sustaining the demurrer.

In affirming on the ground that the amended complaint contained allegations contradicting an admission in the original pleading, the Supreme Court stated, citing *Brown v. Aguilar (1927) 202 Cal. 143, 149, 259 P 735* , that an application for leave to amend is addressed to the sound discretion of the court and may be denied when no showing is made to justify exercise of the court's discretionary power (*6 Cal. 2d 123, 127*).

[4] Additional Authorities

[a] Showing to Justify Exercise of Discretion

The original answer in *Baxter v. Riverside Portland Cement Co. (1913) 22 Cal. App. 199, 133 P. 1150* , denied the complaint's allegations of negligence and asserted the defense of contributory negligence. On the day of trial, defendant moved to amend the answer to assert the additional defense of assumption of risk. The motion was denied, and after trial, defendant moved to amend the pleadings to conform to proof by adding the defense of assumption of risk, this

time explaining that the facts underlying the defense were not ascertained until two days before trial. The court also denied this motion, and defendant appealed from the judgment recovered by plaintiff.

The court of appeal affirmed, noting that courts universally require, and should require, that some showing be made to justify the exercise of the court's discretionary power to allow amendments. The court then held that the trial court properly exercised its discretion in denying the first request to amend because no reason was given for the failure to make all of the defenses available in the original answer (*22 Cal. App. 199, 201*). Nor was there error in denying the motion to conform to proof because the case was fully tried on the theory of assumption of risk and there was no prejudice to defendant in the failure to allow amendment (*22 Cal. App. 199, 201-202*).

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§ 16.46 Opposing Motion for Leave to File Amended Pleading or Amendment to Pleading to Conform to Proof [Code Civ. Proc. §§ 469, 470, 473(a), 576]--General Form

[1] FORM Opposing Motion for Leave to File Amended Pleading or Amendment to Pleading to Conform to Proof [Code Civ. Proc. §§ 469, 470, 473(a), 576]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN OPPOSITION TO MOTION
Defendant.	)	FOR LEAVE TO AMEND _____
	)	[COMPLAINT *or* ANSWER *or* CROSS COM-
	)	PLAINT] TO CONFORM TO PROOF [*Code Civ. Proc. §§ 469, 470, 473, 576*]

_____

THE COURT SHOULD DENY THE MOTION TO AMEND TO CONFORM TO PROOF BECAUSE THE AMENDMENT WOULD _____ [INTRODUCE A NEW ISSUE TO THE CASE *or* BE PREJUDICIAL TO _____ (*specify opposing party*) *or both*].

[*EITHER*]

A. Introduction of New Issue. A trial court abuses its discretion if it permits an amendment to conform to proof that will introduce into the case new and substantially different issues not included in the pleadings, on which the adverse party had no opportunity to defend (*Trafton v. Youngblood (1968) 69 Cal. 2d 17, 31, 69 Cal. Rptr. 568, 442 P.2d 648*).

[*AND/OR*]

B. Prejudice to Adverse Party. A trial court abuses its discretion by permitting amendment to conform to proof if the rights of the adverse party will be prejudiced by the amendment (*Trafton v. Youngblood (1968) 69 Cal. 2d 17, 31, 69 Cal. Rptr. 568, 442 P.2d 648* ; *Garcia v. Roberts (2009) 173 Cal. App. 4th 900, 912, 93 Cal. Rptr. 3d 286*).

[*Optional*] **C. Lack of Evidence.** It is manifestly erroneous for the court to grant leave to amend to conform to proof when the record shows that no conformity results due to the absence of the claimed evidence (*Hunt v. Smyth (1972) 25 Cal. App. 3d 807, 829-830, 101 Cal. Rptr. 4* ; *Brautigam v. Brooks (1964) 227 Cal. App. 2d 547, 560, 38 Cal. Rptr. 784*).

[*Optional*] **D. Evidence Objected to.** A motion to amend to conform to proof cannot be predicated on evidence to which an objection has properly been made (*Hunt v. Smyth (1972) 25 Cal. App. 3d 807, 101 Cal. Rptr. 4* ; *Brautigam v. Brooks (1964) 227 Cal. App. 2d 547, 561, 38 Cal. Rptr. 784*).

[*Optional*] **E. Based on Evidence Relating to Pleaded Issue.** When proof has been introduced in conformity with the pleadings, there is no room for a court to exercise its discretion to allow an amendment of the pleadings to introduce another issue that the proof also supports. When evidence was properly admitted under the original pleading, failure to object to its admission does not estop a party from objecting to a motion to amend to conform to the proof based on that evidence (*Winberry v. Lopez (1960) 178 Cal. App. 2d 672, 679, 3 Cal. Rptr. 245* ; *Makovsky v. Makovsky (1958) 158 Cal. App. 2d 738, 744-745, 323 P.2d 562*).

[*Optional*] **F. Amendment on Appeal is Not Permitted if Trial Court Sustains Demurrer with Leave to Amend and Plaintiff Elects Not to Amend Pleading.** While the failure to request leave to amend in the trial court ordinarily does not prevent a plaintiff from making such a request for the first time on appeal (*Code Civ. Proc. § 472c(a)*), this general rule does not apply if the trial court sustains a demurrer with leave to amend and the plaintiff elects not to amend the pleading (*Las Lomas Land Co., LLC v. City of Los Angeles (2009) 177 Cal. App. 4th 837, 861, 99 Cal. Rptr. 3d 503* , citing *Reynolds v. Bement (2005) 36 Cal. 4th 1075, 1091, 32 Cal. Rptr. 3d 483, 116 P. 3d 1162*).

[*Add, where appropriate, opposing memoranda relating to any other reasons why amendment should not be allowed* (*see §§ 16.48, 16.53,* 52)].

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted to oppose a motion for leave to amend pleadings to conform to proof. It contains only general points opposing amendment and is designed to be used as a framework for an opposing memorandum. More specific points opposing amendment on various grounds are set out in *§§ 16.48, 16.53,* and *16.54* and should be combined with this form as relevant to the case.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

This form may be used in opposition to a memorandum in support of a motion for leave to amend to conform to proof pursuant to *Code Civ. Proc. §§ 469, 470, 473,* and *576* such as the one set out in *§ 16.31*.

[b] Failure of Proof

While a mere variance may be remedied by amendment, a failure of proof is fatal [*Johnson v. De Waard (1931) 113 Cal. App. 417, 423, 298 P. 92*]. For a discussion of failure of proof, see *§ 16.31[2][b]*.

[3] Discussion of Authorities

[a] Introduction of New Issue

In ***Trafton v. Youngblood*** *(1968) 69 Cal. 2d 17, 69 Cal. Rptr. 568, 442 P.2d 648* , defendant, an attorney, answered plaintiff's claim for money had and received and for violation of an escrow agreement by asserting affirmative defenses of laches and what was in effect an account stated. Defendant also cross complained for an amount due on the account stated. After trial, the court prepared a memorandum decision rejecting those defenses and during oral argument on defendant's objections to the proposed findings of fact, defendant moved to reopen the case to permit him to file an amended answer asserting the reasonable value of his services as a counterclaim (counterclaim practice now eliminated in favor of cross complaints [*see Code Civ. Proc. §§ 426.10-426.70*]). The court denied the motion and rendered judgment in plaintiff's favor. Defendant appealed.

The Supreme Court affirmed, finding that defendant had deliberately asserted his claim for fees as an account stated in order to avoid a determination of their reasonableness by the court and that he had sought to assert the new defense only when the failure of his tactic became apparent (*69 Cal. 2d 17, 29-30*). The Court cited *Lavely v. Nonemaker (1931) 212 Cal. 380, 385, 298 P. 976* , for the proposition that amendments to conform to proof should not be allowed when they raise new issues not included in the original pleadings and on which the adverse party had no opportunity to defend. At trial in *Trafton,* defendant never raised, and in fact renounced, any issue of the reasonable value of his services (*69 Cal. 2d 17, 31*). There had been some evidence introduced on the issue of account stated from which the reasonable value of defendant's services could have been determined. The Court held, however, that this mere fortuity would not allow injection of a new issue into the case under the guise of an amendment to conform to proof, because evidence introduced on one issue cannot be considered as establishing another issue that was not before the court for trial. Since the issue of the reasonableness of the services was not before the court by the explicit agreement of the parties, defendant's proposed amendment clearly would have substantially prejudiced plaintiff, who had had no opportunity to offer evidence on the issue during trial (*69 Cal. 2d 17, 32*).

[b] Prejudice to Adverse Party

The facts and procedural background of ***Trafton v. Youngblood*** *(1968) 69 Cal. 2d 17, 69 Cal. Rptr. 568, 442 P.2d 648* , are set forth in *§ 16.46[3][a]*. There, the Supreme Court, in affirming a judgment for plaintiff, held that the trial court had not abused its discretion in denying defendant's motion to amend to conform to proof.

In affirming, the Court stated the general principle that allowance of amendments to conform to proof rests largely in the trial court's discretion, which will not be disturbed on appeal absent an abuse of discretion. The Court went on to state that no abuse of discretion is shown unless by permitting the amendment new and substantially different issues are introduced in the case or the rights of the adverse party are prejudiced (*69 Cal. 2d 17, 31*). The Court found that the amendment would have injected a new issue into the case that defendant had never raised and indeed had renounced as an issue (*69 Cal. 2d 17, 31-32*). Thus, the Court concluded that allowance of the amendment would have substantially prejudiced plaintiff, who had had no opportunity to offer evidence on the issue (*69 Cal. 2d 17, 32*).

In ***Garcia v. Roberts*** *(2009) 173 Cal. App. 4th 900, 93 Cal. Rptr. 3d 286* , plaintiff alleged that defendants reneged on an agreement to allow plaintiff to purchase real property. The trial court permitted plaintiff, through a successor in interest, to amend the complaint at trial to conform to the proof, adding a claim for breach of written contract to the initial claims, which included breach of oral contract. The Court of Appeal reversed the order permitting plaintiff to allege a breach of written contract cause of action and vacated the part of the judgment awarding damages on that cause of action, holding that the amendment at trial unfairly prejudiced defendants and that the trial court therefore abused its discretion under *Code Civ. Proc. §§ 473, 576,* and *469.* Plaintiff testified at his deposition that there was only an oral loan agreement between the parties concerning the property and that he had no knowledge of any agreement in the nature of a written lease-option. That testimony reasonably limited the focus of defendants' discovery efforts and the manner in which they prepared for trial. A number of significant factual issues that specifically related to the lease-option agreement were not pursued, since it became unnecessary to do so in light of plaintiff's deposition. Indeed, since plaintiff denied knowledge of the lease-option agreement, the pursuit of discovery from plaintiff on that subject could reasonably go no further. Further, at the time of trial plaintiff was deceased and so could not be questioned on any issues relevant to the lease-option agreement. Plaintiff, whom it turned out knew about the lease-option agreement but refused to allow his attorney to raise it, could not be permitted through his successor-in-interest to blow hot and cold to defendants' prejudice (*173 Cal. App. 4th 900, 912-913)* .

[c] Lack of Evidence

Plaintiffs in ***Hunt v. Smyth*** *(1972) 25 Cal. App. 3d 807, 829, 101 Cal. Rptr. 4* , were obligors on a promissory note that called for payments of $250 per month, increasing to $350 after a certain time. Plaintiffs missed numerous payments and after the payments should have increased, never paid more than $250 per month. When defendant took steps to foreclose on a deed of trust securing the note, plaintiffs brought suit to enjoin the foreclosure based on the theory that defendant had waived payment of the $100 increase in payments. After suit was initiated, plaintiffs learned by a letter from defendant's attorney that defendant was relying on all missed payments as the grounds for foreclosure. When the letter was introduced in evidence, defendant attempted to limit its use to the issue of whether there had been an agreement to reduce payments on the note from $350 to $250, but the court overruled defendant's objection. It also appeared at trial that a second notice of default had been filed to cure a defect in the original notice. When testimony in the case had been concluded, and the court called for briefs on the issues of the amount of payments and the adequacy of the second notice of default, plaintiffs brought up the issue of waiver of all the missed payments, and the court stated that the issue came under the general question of whether there had been a waiver. Subsequently, plaintiffs filed an amendment to their complaint addressing the issues of the notice of default and waiver of all missed payments. The court granted defendant's motion to strike the amendment insofar as it related to the missed payments, and denied plaintiffs' following motion for leave to amend to allege the matters that had been stricken. Plaintiffs appealed from a judgment which denied them the injunctive relief they sought, ordered them to pay defendant on the original terms of the note, and awarded attorney's fees to defendant.

In affirming, although modifying on other grounds, the court of appeal held that the trial court had not abused its discretion in denying leave to amend. The court primarily relied on plaintiffs' delay and the failure of the facts relied on to entitle plaintiffs to any relief. In regard to the latter ground, the court cited *Brautigam v. Brooks (1964) 227 Cal. App. 2d 547, 38 Cal. Rptr. 784 , below,* for the proposition that granting leave to amend to conform to proof is manifestly erroneous when no conformity will result due to the absence of the claimed evidence (*25 Cal. App. 3d 807,*

829-830).

The original answer in ***Brautigam v. Brooks*** *(1964) 227 Cal. App. 2d 547, 38 Cal. Rptr. 784* , a personal injury case arising out of an automobile collision, alleged that plaintiff was contributorily negligent. At the opening of trial, defendants expressly withdrew that defense. During cross examination of plaintiff, defendants' counsel asked plaintiff about her actions immediately prior to the accident. The court allowed the questions over plaintiff's objection that contributory negligence was not at issue, ruling that the evidence simply showed the incidents leading up to the accident, and that it had nothing to do with contributory negligence. After the parties had rested, defendant moved to amend to conform to the proof by reasserting plaintiff's contributory negligence. The court granted the motion, and gave plaintiff the opportunity to reopen the case to introduce evidence on the issue of contributory negligence. Plaintiff declined the opportunity, however, in the belief that offering evidence relating to the defense at that stage of the jury trial would unduly highlight the defense. Plaintiff appealed from a judgment entered on an adverse verdict.

The court of appeal reversed after it reviewed the evidence and found that there was no substantial evidence of contributory negligence (*227 Cal. App. 2d 547, 555-560*). The court found that the case went to trial with no plea of contributory negligence and that the case was not tried on that issue (*227 Cal. App. 2d 547, 555*). The court concluded that it is manifestly erroneous to grant leave to amend to conform to proof when no conformity results because the claimed evidence is absent (*227 Cal. App. 2d 547, 560*).

[d] Evidence Objected to

The facts and procedural background of ***Hunt v. Smyth*** *(1972) 25 Cal. App. 3d 807, 101 Cal. Rptr. 4* , are discussed in *§ 16.46[3][c]*. In *Hunt*, the court of appeal affirmed, although modifying on other grounds (*25 Cal. App. 3d 807, 837*). The court held that the trial court did not abuse its discretion in denying leave to amend primarily because of plaintiffs' delay and because the facts relied on in the proposed amendment would not entitle them to any relief (*25 Cal. App. 3d 807, 829-830*). In the course of its opinion, the court noted that, moreover, a motion to amend to conform to proof cannot be predicated on evidence to which an objection has properly been made, relying on *Brautigam v. Brooks (1964) 227 Cal. App. 2d 547, 38 Cal. Rptr. 784* , discussed in *§ 16.46[3][c]* (*25 Cal. App. 3d 807, 829*).

The facts and procedural background of ***Brautigam v. Brooks*** *(1964) 227 Cal. App. 2d 547, 38 Cal. Rptr. 784* , are *set forth in § 16.46[3][c]*. The court of appeal, relying on prior California law, held that when evidence is promptly objected to as not supporting the allegations of the pleadings, a motion to amend to conform to proof after the evidence has been admitted should not be granted, and that if it is granted, it cannot cure the error in admission of the evidence and constitutes an abuse of discretion (*227 Cal. App. 2d 547, 561*).

[e] Based on Evidence Relating to Pleaded Issue

Plaintiff in ***Winberry v. Lopez*** *(1960) 178 Cal. App. 2d 672, 3 Cal. Rptr. 245* , sued defendant to recover on a promissory note and obtained a writ of attachment on a parcel of real property once owned by defendant. Defendant's former wife intervened to quiet title to the property in her name. Plaintiff answered the complaint in intervention alleging actual fraud in the conveyance from defendant to intervenor. Evidence that defendant had been insolvent at the time of the transfer was admitted at trial for the sole purpose of showing circumstances that might lead to an inference of fraudulent intent. Plaintiff moved to amend his answer to conform to the proof of defendant's insolvency by specifically alleging that insolvency, so as to establish a case of constructive fraud. The court denied the motion, and plaintiff appealed from a judgment quieting title in the intervenor.

The court of appeal affirmed because the evidence of insolvency was properly admissible under the original answer and the evidence was admitted for that purpose alone (*178 Cal. App. 2d 672, 679*). The court followed *Makovsky v. Makovsky (1958) 158 Cal. App. 2d 738, 323 P.2d 562 , below*, in which the court stated that when proof adduced is in conformity with the pleadings, there is no room for a court to exercise its discretion and allow amendment of the

pleading. No element of estoppel works against a party for failure to object to evidence that is made the basis of an amendment to conform to proof, when that evidence was proper under the original pleading. The court concluded that evidence of insolvency admitted to show actual fraud could not be converted into proof of constructive fraud by amendment of the answer when constructive fraud had not been pleaded and the case was tried only on the issue of actual fraud (*178 Cal. App. 2d 672, 679*).

Plaintiff in ***Makovsky v. Makovsky*** *(1958) 158 Cal. App. 2d 738, 323 P.2d 562* , alleged in her complaint for divorce that the community property included a jewelry business. Defendant's answer admitted the allegation, disputing only the value of the business. At trial, evidence was admitted relating to the acquisition of the business, which showed that it was defendant's separate property. Plaintiff's attorney stated that he had no objection to admission of the evidence "for historical reasons only" (*158 Cal. App. 2d 738, 744*). In a memorandum decision after a nonjury trial, the court authorized defendant to amend his answer to conform to the proof that the business was his separate property, and defendant did so. Plaintiff appealed from a judgment awarding the business to defendant as his separate property.

Reversing, the court of appeal held that the trial court had abused its discretion in allowing the amendment (*158 Cal. App. 2d 738, 744-745*). The court found that the evidence as to acquisition of the business might well have been admissible under the original pleadings, and held that when proof adduced is in conformity with the pleadings, there is no room for a court to exercise its discretion and allow amendment of the pleadings to change an admission therein to a denial. The court further noted that facts not controverted by the answer are not in issue, that no evidence of them is required, and that when proof at trial is consonant with such admitted facts, a judge abuses his discretion by allowing amendment, to the prejudice of a party, after submission of the case (*158 Cal. App. 2d 738, 744*). The court also noted that parties ordinarily are estopped from objecting to such an amendment because they have allowed the issue to be tried without objection. However, estoppel is based on failure to assert a right that should have been asserted, and an estoppel does not arise out of failure to object to the admission of evidence that is in conformity to with the original pleadings (*158 Cal. App. 2d 738, 744-745*). The court found that plaintiff was prejudiced because she might have introduced different evidence if she had known that the court was considering the evidence relating to the business as determinative of its status as separate or community property. Because she was not informed, she was deprived a full and fair trial on the issue (*158 Cal. App. 2d 738, 745*).

[f] Amendment on Appeal is Not Permitted if the Trial Court Sustains a Demurrer With Leave to Amend and the Plaintiff Elects Not to Amend the Pleading

In ***Las Lomas Land Co., LLC v. City of Los Angeles*** *(2009) 177 Cal. App. 4th 837, 99 Cal. Rptr. 3d 503* , a city terminated its environmental review of a proposed development project and rejected the project before the completion of a draft environmental impact report (EIR), after the developer allegedly spent millions of dollars in an effort to comply with the city's requirements. The developer sought to compel the city to complete the EIR for the proposed project before making any decision on the project. The city generally demurred to the complaint. At the conclusion of the hearing on defendant's demurrer, the court stated that it would sustain the demurrer on all counts, and asked whether plaintiff was requesting leave to amend the petition and complaint; plaintiffs counsel said no. The appellate court noted that the general rule allowing a plaintiff to request leave to amend for the first time on appeal does not apply if the trial court sustains a demurrer with leave to amend and the plaintiff elects not to amend the pleading; in those cases, it must be presumed that the plaintiff has stated as strong a case as he can (citing *Reynolds v. Bement (2005) 36 Cal. 4th 1075, 1091, 32 Cal. Rptr. 3d 483*). The trial court here did not enter an order sustaining the demurrer with leave to amend, but instead asked whether plaintiff was requesting leave to amend. In responding "no," plaintiff's counsel expressly declined an opportunity to amend the pleading just as surely as if the court had granted leave to amend and plaintiff had elected not to do so. The court of appeal found that the result should be the same, and concluded that plaintiff forfeited its claim of error based on the denial of leave to amend and deny the motion for leave to amend its petition and complaint (*177 Cal. App. 4th 837, 861)* .

[4] Additional Authorities

[a] Introduction of New Issue

In *Avedissian v. Manukian (1983) 141 Cal. App. 3d 379, 190 Cal. Rptr. 291* , an action for breach of a promissory note, the parties executed a stipulation to extend the period for prosecution of the action. After the original five-year period had passed and on the first day of trial, plaintiff moved to amend the original complaint to add a new cause of action involving the issues of ratification and estoppel. The trial court denied the motion, and the court of appeal affirmed the order. The court held that the trial court had not abused its discretion in denying an amendment that would add a new set of facts and theories not included in the complaint filed more than five years ago. To seek such an amendment nearly six years after the original complaint was filed and on the first day of trial was not an act of due diligence and would have undoubtedly prejudiced the defendant, who had been waiting six years to defend against the original claim (*141 Cal. App. 3d 379, 384*). The fact that the parties had stipulated to extend the time for prosecution had no relationship or effect on the limitations for amending complaints (*141 Cal. App. 3d 379, 383*).

In *Earp v. Nobmann (1981) 122 Cal. App. 3d 270, 175 Cal. Rptr. 767* , the court of appeal, in holding that the trial court had erroneously permitted defendant to amend its cross complaint to conform to proof, noted that although courts are liberal in permitting amendments to conform to proof, such an amendment must not introduce a new cause of action or a new issue, or substantially change the claim or defense. The court held that in the case before it, the amendment alleged facts entirely outside the cause of action stated in the original cross complaint, since facts under which defendant sought to uphold the award of damages against plaintiff had not even occurred at the time the original cross complaint was filed (*122 Cal. App. 3d 270, 286*). The court concluded that such subsequent facts may only be brought into the action by means of a supplemental cross complaint, and, in this case, defendant had failed to move for leave to file a supplemental pleading, as required by *Code Civ. Proc. § 464* (*122 Cal. App. 3d 270, 286-287*).

Barcelon v. Cortese (1968) 263 Cal. App. 2d 517, 69 Cal. Rptr. 657 , involved consolidated actions for real estate commissions brought by plaintiffs, who were brokers, against defendant buyer. At the close of plaintiff Barcelon's case, defendant moved for a nonsuit on the ground that there was insufficient written evidence of the employment relationship. The day after an extensive discussion of the nonsuit in chambers, plaintiff moved to amend the complaint to conform to proof so as to allege that there was a third-party beneficiary contract to pay him a fee. The court granted the motion for nonsuit and denied plaintiff's motion as the amendment was beyond the issues set forth in the pretrial order, which was directed solely to defendant's breach of his contract with plaintiff. On plaintiff's appeal from the judgment of nonsuit, the court of appeal found no abuse of discretion and affirmed, noting that the proposed amendment would have introduced a new issue and could have substantially changed the defense (*263 Cal. App. 2d 517, 528*).

The facts and procedural background of *Brautigam v. Brooks (1964) 227 Cal. App. 2d 547, 38 Cal. Rptr. 784* , are set forth under § 16.46[3][c]. In holding that the trial court abused its discretion in allowing an amendment to conform to proof that introduced the defense of contributory negligence, the court stated that amendments to conform to proof must not introduce a new cause of action or new issue, or substantially change the claim or defense (*227 Cal. App. 2d 547, 561*).

Plaintiff in Bank of United States v. Foreman (1929) 102 Cal. App. 756, 283 P 874 , sued defendant as an accommodation indorser on nine notes. Defendant answered, denying the allegations of the complaint seriatim. After trial, the court filed a memorandum for judgment in plaintiff's favor. Thereafter, defendant moved to amend the answer to conform to the proof to allege for the first time that the notes were indorsed and transferred to plaintiff on the express condition that part of the proceeds be held on deposit for defendant's security. The court granted the motion and found in defendant's favor that plaintiff had fraudulently converted that part of the proceeds to its own use, and offset that amount against plaintiff's recovery. On plaintiff's appeal from the unsatisfactory judgment in its favor, the court of appeal modified the judgment to eliminate the offset allowed by the trial court. The court stated the rule that an amendment to pleadings at or following trial should not be allowed over the adverse party's objection when the amendment raises new issues that were not included in the original pleadings, relying on prior California law. The court found that the rule applied since the bank's fraud was not an issue at the trial of the case, and the bank had had no

opportunity to defend the accusation of fraud (*102 Cal. App. 756, 764*).

[b] Prejudice to Adverse Party

Hulsey v. Koehler (1990) 218 Cal. App. 3d 1150, 267 Cal. Rptr. 523 , was an action for declaratory relief and reformation of a promissory note executed in connection with plaintiffs' sale of a mobilehome park to defendant. The trial court had denied defendant's motion, made some three years after defendant had answered plaintiffs' amended complaint, to amend her answer to conform to proof to allege specially as an affirmative defense that the action was barred by the mandatory cross complaint statute (*Code Civ. Proc. § 426.30*) because of plaintiffs' failure to plead their cause of action as a cross complaint in a prior action by the defendant against the plaintiffs. Judgment was for the plaintiffs, and defendant appealed.

The court of appeal said that courts ordinarily should exercise liberality in permitting amendments at any stage of the proceeding and, in particular, liberality should be displayed in allowing amendments to answers, for a defendant denied leave to amend is permanently deprived of a defense. The court explained, however, that whether such amendment is allowed rests in the sound discretion of the trial court, and that courts are much more critical of proposed amendments to answers when offered after long unexplained delay or on the eve of trial, or where there is a lack of diligence, or there is prejudice to the other party (*218 Cal. App. 3d 1150, 1159*). The court noted that defense counsel's excuse for the delay was simply that he had discovered *Code Civ. Proc. § 426.30* as a potential defense only two days before trial while reading a transcript of the deposition of one of the plaintiffs. The court further noted that the trial court, in denying the motion as untimely, impliedly found an unreasonable lack of diligence in the belated assertion of the defense, that the delay had prejudiced the plaintiffs because of the attorney's fee provision, and that plaintiffs had a right to know the risk and weigh their exposure prior to trial, and certainly prior to the time they put on their evidence (*218 Cal. App. 3d 1150, 1159*). The court concluded that the trial court had not abused its discretion and affirmed the judgment (*218 Cal. App. 3d 1150, 1150-1160*).

[c] Lack of Evidence

Plaintiff in Johnston v. Yolo County (1969) 274 Cal. App. 2d 46, 79 Cal. Rptr. 33 , sued the county for personal injuries sustained in an automobile accident, alleging that the road as constructed constituted a dangerous condition. Defendant did not assert a design immunity defense in the original answer, but after some testimony at trial relating to the construction of the road, defendant moved to amend the answer to allege the immunity to conform to proof. The motion was never acted on, and defendant's motion for nonsuit on the basis of design immunity was later denied. Defendant appealed a judgment entered on an adverse jury verdict.

In affirming, the court of appeal held that the design immunity defense was properly excluded from the case, because a fact crucial to one element of the defense had not been proven (*274 Cal. App. 2d 46, 54-55*). The court stated that notwithstanding prevailing liberality in the amendment of pleadings to conform to proof, an amendment will not be permitted where there is a complete failure of proof, citing *Code Civ. Proc. § 471* for the proposition that there is a complete failure of proof when the allegation of the claim or defense to which the proof is directed, is unproved, not in some particular or particulars only, but in its general scope and meaning. The court went on to hold that the refusal to allow amendment had to be sustained because a fact vital to the proposed defense was unproved in its general scope and meaning (*274 Cal. App. 2d 46, 51*).

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Volume 1 Chapters 1-19 WRITING LEGAL MEMORANDA AND BRIEFS; ABATEMENT AND SURVIVAL OF ACTIONS---to---AMENDED AND SUPPLEMENTAL PLEADINGS
CHAPTER 16 AMENDED AND SUPPLEMENTAL PLEADINGS
PART II. FORMS
A. Amended Pleadings

1-16 California Points & Authorities § 16.47

§ 16.47 Opposing Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Failure to Present Copy of Amendment

[1] FORM Opposing Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Failure to Present Copy of Amendment

[*The following should be combined with a general form of memorandum in opposition to a motion for leave to file an amended pleading or an amendment to a pleading (see § 16.45).*]

THE COURT SHOULD DENY THE MOTION TO AMEND THE PLEADING BECAUSE _____ [*specify moving party*] HAS NOT PRESENTED A COPY OF THE PROPOSED AMENDMENT TO THE COURT.

Copy of Amendment. The court may properly deny a motion for leave to file an _____ [amended *or* amendment to a] pleading when the _____ [*moving party*] does not propose a specific amendment in writing (*Neher v. Kauffman (1925) 197 Cal. 674, 686, 242 P. 713* ; *Atchison, Topeka & Santa Fe Ry. Co. v. Superior Oil Co. (1966) 243 Cal. App. 2d 289, 295, 52 Cal. Rptr. 53*).

[2] Comments

[a] Use of Form

This points and authorities may be used in opposition to a motion for leave to file an amended pleading or an amendment to a pleading when the moving party fails to present a copy of the proposed amendment to the court. It does not provide a complete memorandum but is designed to be combined with the general form of memorandum opposing amendment of pleadings set out in *§ 16.45*, as well as with forms relating to any other grounds that may exist for denying permission to amend the pleading [*see §§ 16.49 -16.55*].

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Copy of Amendment

One issue urged by defendants on their appeal from a judgment entered in plaintiff's favor after trial in *Neher v. Kauffman (1925) 197 Cal. 674, 242 P. 713* , was that the trial court erred in denying them leave to file asecond amendmentto the answer. Defendants had asked for leave to file the amendment during the course of trial, but the court did not immediately rule on the request and defendants did not insist on a ruling. After trial, the court made a minute entry of an order denying the motion. The Supreme Court held that there was no error because allowing amendment during trial is largely in the discretion of the trial court and because no error could be predicated on the ruling since defendants never prepared or tendered for filing any proposed amendment (*197 Cal. 674, 686*).

Notwithstanding the rule in *Neher,* however, a request for leave to amend "to conform with" the trial court's ruling that the pleading was defective was held to be sufficient specification of the nature of the proposed amendment even though proposed pleadings were not tendered in *MacIsaac v. Pozzo (1945) 26 Cal. 2d 809, 816, 161 P.2d 449* . There, the Supreme Court stated that defendants were not bound to appear at trial armed with proposed amendments when there had been no indication that the pleadings would be attacked at the opening of trial by a motion for judgment on the pleadings (*26 Cal. 2d 809, 816*).

In *Atchison, Topeka & Santa Fe. Ry. Co. v. Superior Oil Co. (1966) 243 Cal. App. 2d 289, 52 Cal. Rptr. 53* , plaintiff sued defendants as employers of a driver who ran into plaintiff's train, causing property damage. After all the evidence was in, plaintiff expressed a desire in chambers to amend the complaint to include a cause of action against defendants based on their directly causing the accident by overworking the driver. The court denied the suggestion of amendment, and plaintiff appealed from the judgment entered in defendants' favor.

The court of appeal noted defendants' argument that plaintiff's failure to propose a specific amendment in writing was reason alone to justify denial of the attempted amendment (*243 Cal. App. 2d 289, 295*). Then, after finding that even under the proposed amendment defendants' liability would hinge on the negligence of the driver, the court recognized that allowance of amendments is a matter within the discretion of the trial court and held that the trial court correctly denied the informal suggestion of amendment (*243 Cal. App. 2d 289, 296-297*).

[4] Additional Authorities

[a] Copy of Amendment

The trial court in *Jones v. Daly (1981) 122 Cal. App. 3d 500, 176 Cal. Rptr. 130* , sustained a general demurrer to a complaint without leave to amend, and the court of appeal affirmed. The court stated that although it is normally an abuse of the trial court's discretion to sustain a general demurrer without leave to amend, the burden is on the plaintiff to prove such abuse, and that burden was not met when plaintiff failed to indicate the manner in which the complaint would be amended and how the amendment would cure the pleading defects (*122 Cal. App. 3d 500, 510-511*).

In *Hook v. Wren (1941) 44 Cal. App. 2d 441, 112 P.2d 669* , the court of appeal affirmed a judgment of dismissal entered after a demurrer to an amendment to an amended complaint was granted without leave to further amend. In affirming, the court held that plaintiffs' motion for leave to further amend was properly denied because they neither disclosed the nature of the alteration they desired to make, nor presented a copy of the proposed amendment to the trial court (*44 Cal. App. 2d 441, 442*).

De L'Eau v. Williams (1934) 139 Cal. App. 116, 33 P.2d 427 , involved an action on a contract. During trial, defendant's counsel stated that just that morning, he and defendant had learned of fraud in the underlying transaction in that undisclosed dual commissions had been taken, and he further stated that he was going to ask leave to file an

amended answer and amended cross complaint to set up those facts. The court denied the motion when it was made. Defendant never actually presented a proposed pleading to the court nor stated the exact wording of the proposed pleading to the court. Plaintiff recovered judgment after trial, and defendant appealed, urging, inter alia, that the trial court had abused its discretion in refusing leave to amend.

The court of appeal, however, held that there was no abuse of discretion given the attempt to assert a new defense based on an agency relationship when none of the pleadings had alleged an agency relationship between the parties, the very long delay in moving to amend (over five years after the action had commenced), and the insufficient explanation of defendant's failure to discover the new facts earlier. The court went onto hold that no error could be predicated on the ruling denying permission to amend because defendant never prepared or tendered for filing any proposed amendment, citing *Neher v. Kauffman (1925) 197 Cal. 674, 242 P. 713* , discussed *above* (*139 Cal. App. 116, 118*).

California Points & Authorities

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Volume 1 Chapters 1-19 WRITING LEGAL MEMORANDA AND BRIEFS; ABATEMENT AND SURVIVAL OF ACTIONS---to---AMENDED AND SUPPLEMENTAL PLEADINGS
CHAPTER 16 AMENDED AND SUPPLEMENTAL PLEADINGS
PART II. FORMS
A. Amended Pleadings

1-16 California Points & Authorities § 16.48

§ 16.48 Opposing Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473, 576]--Unwarranted Delay in Presenting Amendment

[1] FORM Opposing Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473, 576]--Unwarranted Delay in Presenting Amendment

[*The following should be combined with a general form of memorandum in opposition to a motion for leave to file an amended pleading or an amendment to a pleading (see § 16.45) or to amend to conform to proof (see § 16.46).*]

THE COURT SHOULD DENY THE PROPOSED AMENDMENT BECAUSE OF _____'S [*specify moving party*] UNWARRANTED DELAY IN PRESENTING IT.

A. Unwarranted Delay as Grounds for Denial. Unwarranted delay in presenting a proposed amendment may be grounds in itself for denial of a motion for leave to amend (*Record v. Reason (1999) 73 Cal. App. 4th 472, 86 Cal. Rptr. 2d 547* ; *Roemer v. Retail Credit Co. (1975) 44 Cal. App. 3d 926, 939-940, 119 Cal. Rptr. 82*). Denial may rest on the lack of diligence in offering the amendment after knowledge of the facts or the effect of the delay on the adverse party (*Roemer v. Retail Credit Co. (1975) 44 Cal. App. 3d 926, 939-940, 119 Cal. Rptr. 82*).

[*Optional*] **B. Lack of Due Diligence.** A lack of due diligence may be inferred from a long delay in presenting an amendment after knowledge of the facts (*Roemer v. Retail Credit Co. (1975) 44 Cal. App. 3d 926, 940, 119 Cal. Rptr. 82*).

[*Optional*] **C. New Issue Requiring Further Investigation or Discovery.** Denial of permission to amend pleadings may be based on long unexcused delay especially when the proposed amendment interjects a new issue that may require further investigation or discovery procedures (*Green v. Rancho Santa Margarita Mortgage Co. (1994) 28 Cal. App. 4th 686, 692, 33 Cal. Rptr. 2d 706* ; *Cain v. State Farm Mut. Auto. Ins. Co. (1976) 62 Cal. App. 3d 310, 315, 132 Cal. Rptr. 860*).

[*Optional*] **D. Motion on Eve of Trial.** The court may deny a motion to amend a pleading when the motion is made on the eve of trial, the amendment alleges a new issue based on different facts that were known to _____ [plaintiff *or* defendant] when the original _____ [complaint *or* answer] was filed, but no excuse is given for the delay, the original _____ [complaint *or* answer] gave no inkling of the new facts, and a continuance would be required if leave to file the amended _____ [complaint *or* answer] were granted (*Moss Estate Co. v. Adler (1953) 41 Cal. 2d 581, 586, 261 P.2d 732* ; *see* *Magpali v. Farmers Group, Inc. (1996) 48 Cal. App. 4th 471, 487-488, 55 Cal. Rptr. 2d 225*).

[2] Comments

[a] Use of Form

This form of memorandum may be submitted in opposition to a motion for leave to file an amended pleading or an amendment to a pleading when the motion is made after an unexplained or unexcusable delay. It does not provide a complete memorandum but is designed to be combined with one of the general forms of memoranda of points and authorities opposing amendment of pleadings set out in *§§ 16.45* and *16.46*, as well as with forms relating to any other grounds that may exist for denying permission to amend the pleading [*see §§ 16.47, 16.49 -16.55*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Lack of Diligence Unavailable as Grounds Early in Proceedings

In *Landis v. Superior Court (1965) 232 Cal. App. 2d 548, 557, 42 Cal. Rptr. 893* (discussed in *§ 16.37[4][a]*), the court of appeal stated that it was unable to find any case upholding denial of a motion to amend based solely on lack of diligence at a stage of the proceeding when pretrial or trial had not been set. The court also stated that it is unreasonable to deny permission to amend when the only apparent hardship to a defendant is that he or she will have to defend. Therefore, counsel, in relating the facts of the case to this form, should emphasize the closeness of the motion to amend to the trial date, and point to any prejudice other than the necessity of meeting a potentially valid issue.

[3] Discussion of Authorities

[a] Unwarranted Delay as Grounds for Denial

In ***Record v. Reason*** *(1999) 73 Cal. App. 4th 472, 86 Cal. Rptr. 2d 547* , an action for personal injuries, the defendant moved for summary judgment based on primary assumption of risk. The plaintiff moved for leave to amend the complaint to assert a cause of action for reckless or intentional behavior, the motion to be heard at the same time as the summary judgment motion. The court granted summary judgment in defendant's favor and denied plaintiff's motion as being untimely and having no good cause. Plaintiff appealed.

The court of appeal affirmed. In concluding that the trial court did not abuse its discretion in denying plaintiff leave to amend the complaint, the court pointed out that plaintiff had knowledge of the circumstances on which plaintiff based the amended complaint on the day plaintiff was injured, almost three years before plaintiff sought leave to amend. Quoting *Roemer v. Retail Credit Co. (1975) 44 Cal. App. 3d 926, 939-940, 119 Cal. Rptr. 82* , the court noted that even if a good amendment is proposed in proper form, unwarranted delay in presenting it may itself be a valid reason for denial (*73 Cal. App. 4th 472, 486-487*). The court also noted that the appellant was not prejudiced by the denial of the amendment because the court had to consider the issue of recklessness in determining whether primary assumption of risk applied, and plaintiff's evidence opposing the summary judgment motion was nearly identical to the evidence supporting the motion to amend.

In ***Roemer v. Retail Credit Co.*** *(1975) 44 Cal. App. 3d 926, 119 Cal. Rptr. 82* , a libel action, defendant requested

leave to amend its answer to plead partial truth of the defamatory statements in mitigation of damages. The request was made at the close of defendant's case, on the second trial of the matter, and was denied by the court. Defendant appealed from a judgment entered on an adverse verdict.

In affirming, the court of appeal held that the trial court had not abused its discretion in denying leave to amend both because the proposed amendment contradicted a prior stipulation and because of defendant's delay in presenting it. Defendant claimed that the evidence introduced at the second trial had shown that some of the statements were true, but the court found that the truth of the matters had been shown at the first trial as well, and held that such long delay in offering the amendment after knowledge of the facts could be construed by the court to constitute a lack of due diligence (*44 Cal. App. 3d 926, 940*). The court stated, relying on prior California law, that the law is clear that even if a good amendment is proposed in proper form, unwarranted delay in presenting it may be of itself a valid reason for denial based on the lack of diligence after knowledge of the facts or the effect of the delay on the adverse party (*44 Cal. App. 3d 926, 939-940*).

[b] Lack of Due Diligence

Roemer v. Retail Credit Co. *(1975) 44 Cal. App. 3d 926, 119 Cal. Rptr. 82* , is discussed in *§ 16.48[3][a]*.

[c] New Issue Requiring Further Investigation or Discovery

Green v. Rancho Santa Margarita Mortgage Co. *(1994) 28 Cal. App. 4th 686, 33 Cal. Rptr. 2d 706* , involved a race discrimination action against, among others, a mortgage broker, for failure to obtain a loan for plaintiffs to purchase a new home in a development. At the close of plaintiffs' case in the first trial of the action, plaintiffs moved to amend their complaint to add a claim for professional negligence against the broker, but the trial court denied the motion. The jury then found the broker liable for damages, but in responses to special questions found the race was not a factor in broker's failure to obtain a loan. The trial court set aside the judgment based on the verdict, entered a judgment in the broker's favor and immediately vacated that judgment and granted plaintiffs a new trial.

Plaintiffs were then granted permission to file a new complaint adding a cause of action for professional negligence, but in to avoid an additional deposition, plaintiffs agreed to retrial without the professional negligence cause of action. Plaintiffs never did file an amended complaint, and the court ultimately entered an order precluding the plaintiffs from prosecuting a negligence claim against the broker and reinstated the earlier judgment in the broker's favor. Plaintiffs appealed, and appellate court reversed on the ground the trial court could not reinstate the judgment it had vacated. The court also held that the trial court had properly refused to allow plaintiffs to amend their complaint to add a negligence cause of action and remanded for new trial solely on the cause of action for race discrimination.

On remand, the broker moved to amend its answer to include an affirmative defense based on its own negligence. The trial court denied the motion, plaintiffs prevailed on the retrial, and defendant broker appealed.

The court of appeal affirmed, noting that the proposed amendment contradicted defendant's verified original answer which unequivocally asserted that defendant had worked diligently to obtain a loan for plaintiffs (*28 Cal. App. 4th 686, 691-692*). The court further found that the amendment would have interjected a new issue in the case requiring plaintiffs to conduct further discovery as well as to redo their trial strategy (*28 Cal. App. 4th 686, 693*). The court also noted that defendant offered no excuse for its delay in seeking the amendment and characterized defendant's action as "legal gamesmanship in its purest sense" (*28 Cal. App. 4th 686, 692-693*).

Cain v. State Farm Mut. Auto. Ins. Co. *(1976) 62 Cal. App. 3d 310, 132 Cal. Rptr. 860* , involved an action for invasion of privacy. On the morning the action was set for trial, plaintiffs moved to amend the complaint to allege that defendant's wrongful conduct occurred over a period of time ending well within one year of the time the suit was instituted. No reason was given for the motion's untimeliness and no supporting affidavits or other proof were

submitted. Defendant objected on the basis that a continuance would be necessary for further research and investigation, and the trial court denied the motion. The issue of the statute of limitations was then tried before the other issues in the case, resulting in a judgment for defendant from which plaintiffs appealed.

Although reversing on other grounds, the court of appeal held that there was neither error nor abuse of discretion in denial of the motion. Relying on prior California law, the court stated that a long unexcused delay may be the basis for denying permission to amend pleadings, especially when the amendment would interject a new issue that might require further investigation or discovery procedures (*62 Cal. App. 3d 310, 315*).

[d] Motion on Eve of Trial

The theory of defense in the original answer in ***Moss Estate Co. v. Adler*** *(1953) 41 Cal. 2d 581, 261 P.2d 732* , an action to quiet title, was that defendant had an interest in a well on plaintiff's adjoining land because it had tapped a pool underlying both properties. Only 12 days before the date set for trial, defendant moved to amend her answer to assert a new defense based on violation of confidential and agency relationships giving rise to an equitable interest in the well. The court denied the motion, and after plaintiff was given judgment quieting title, defendant appealed.

The Supreme Court held that the trial court had not abused its discretion in denying leave to amend. In reaching its decision, the Court noted that the defendants' motion to file the amended answer, which would have alleged a new defense based on different facts, came on the eve of trial, over two months after defendant had notice of the trial date, and over one year after the original answer had been filed. The Court also noted that defendant had known the facts when the original answer was filed, no excuse was given for the delay, and a continuance would have been necessary to give plaintiff time to investigate the new issues of fact if leave to amend had been granted (*41 Cal. 2d 581, 586*).

In ***Magpali v. Farmers Group, Inc.*** *(1996) 48 Cal. App. 4th 471, 55 Cal. Rptr. 2d 225* , plaintiff's original complaint was based on breach of contract, fraud, and intentional infliction of emotional distress arising out of plaintiff's tenure as an insurance agent for defendant. The complaint alleged that defendant breached the parties' agreement by telling plaintiff how to run his business, putting him in a status that restricted his ability to bind Farmers policies, and terminating the agreement without good cause. The complaint included an allegation that plaintiff was specifically told to avoid writing policies for Hispanics and Filipinos. Plaintiff sought to amend his complaint on the eve of trial to add an Unruh Civil Rights Act violation alleging racial discrimination by a business establishment based on the allegation that he was specifically told to avoid writing policies for Hispanics and Filipinos. The trial court denied leave to amend the complaint. Plaintiff dropped the breach of contract claim, and after plaintiff presented his case on the other causes of action, the court granted defendant's motion for nonsuit. Plaintiff appealed.

The court of appeal found no abuse of discretion in the denial of the request for leave to amend, noting that the amendment was proposed on the eve of trial, nearly two years after the complaint was originally filed, with no explanation for the delay (*48 Cal. App. 4th 471, 486*). The court stated that although courts are bound to apply a policy of great liberality in permitting amendments to complaints at any stage of the proceedings, up to and including the trial, this policy should be applied only where no prejudice is shown to the adverse party. The policy of liberality does not apply when inexcusable delay and probable prejudice to the adverse party are shown (*48 Cal. App. 4th 471, 487*). The court found that in this case adding the new cause of action would have significantly changed the tenor and complexity of the complaint because the original complaint focused on dealings between the plaintiff and the defendant and the amended complaint would have required exploration of the defendant's activities and practices in the entire Southern California area. Plaintiff conceded that addition of the new claim would have necessitated, at the very least, a continuance to allow defendant to depose new witnesses. The court concluded that where the trial date is set, and counsel, the parties, the trial court, and the witnesses have blocked the time, and the only way to avoid prejudice to the opposing party is to continue the trial date, then refusal of leave to amend cannot be an abuse of discretion (*48 Cal. App. 4th 471, 487-488*).

[4] Additional Authorities

[a] Unwarranted Delay as Grounds for Denial

In *A.N. v. County of Los Angeles (2009) 171 Cal. App. 4th 1058, 90 Cal. Rptr. 3d 293* , A.N. filed his original complaint in May 2005 and his amended complaint in November 2005. A.N. filed the bulk of his Doe amendments in August 2007 and served most of his Doe amendments at that time. A.N.'s counsel did not state the dates upon which counsel learned the names of the Doe defendants and did not explain why their identities could not have been discovered sooner, as the record indicated that counsel had access to the information sooner. In affirming the trial court's finding that the delay was unreasonable and prejudicial, the appellate court saw no reasonable explanation in the record for A.N.'s roughly two year delay in filing and serving the Doe amendments, observing that *Code Civ. Proc. § 474* includes an implicit requirement that a plaintiff cannot unreasonably delay the filing of a Doe amendment after learning a defendant's identity (*171 Cal. App. 4th 1058, 1066-1067)* .

In *Englert v. Ivac Corp. (1979) 92 Cal. App. 3d 178, 154 Cal. Rptr. 804* , the court of appeal held that denial of a motion to amend a complaint in an action for replevin to allege malice and add a prayer for punitive damages was not an abuse of discretion when the motion was made on the day of trial. The court noted that plaintiff claimed that the amendment would not require discovery of new evidence, and that he had unsuccessfully moved to amend five weeks earlier without alleging malice, so that he had both the evidence and opportunity to suggest the amendment earlier. In finding no abuse of discretion, the court relied on *Roemer v. Retail Credit Co. (1975) 44 Cal. App. 3d 926, 119 Cal. Rptr. 82* , discussed in *§ 16.48[3][a]* for the rule that unwarranted delay without more can be a valid reason for denying a motion to amend (*92 Cal. App. 3d 178, 190*).

Permalab-Metalab Equipment Corp. v. Maryland Cas. Co. (1972) 25 Cal. App. 3d 465, 102 Cal. Rptr. 26 , involved an action on a construction contract bond issued by defendant bonding company. Defendant's answer raised the defense of plaintiff's breach of contract and in answer to an interrogatory served a month before trial, defendant stated that it was relying on breach of contract to support its defense and counterclaim. Five days before the day set for trial, however, defendant served and filed notice of a motion to amend the answer to assert an affirmative defense based on the lack of a mechanic's lien claim or giving statutorily required notice to defendant. The motion was heard and denied on the day of trial. After plaintiff prevailed in the trial court, defendant appealed.

The court of appeal affirmed. Defendant urged that the motion was based on facts discovered after the original complaint was filed. The court however, found that defendant's delay of nearly three years in moving to amend was prejudicial to plaintiff which lost rights it would have had against the contractor which had gone out of business in the interim (*25 Cal. App. 3d 465, 471*). Relying on prior California law, the court recognized that courts are critical of proposed amendments to answers when they are offered after long unexplained delay, or on the eve of trial, or when there is a lack of diligence, or there is prejudice to the other party. Accordingly, the court held that the trial court had not abused its discretion in denying the motion to amend (*25 Cal. App. 3d 465, 472*).

[b] New Issues Requiring Further Investigation or Discovery

Plaintiff in Marvin v. Marvin (1976) 18 Cal. 3d 660, 134 Cal. Rptr. 815, 557 P.2d 106 , brought an action for declaratory relief to determine her contract and property rights against defendant, with whom plaintiff had lived, without being married to him, for several years. Plaintiff also sought to impose a constructive trust on half of the property acquired during the relationship. On the day of trial, plaintiff asked for leave to file an amended complaint to add two causes of action for breach of contract against a corporation that was not a party to the suit. Plaintiff alleged that the corporation was the alter ego of defendant. The court denied leave to amend, and on appeal from a subsequent judgment on the pleadings in defendant's favor, plaintiff argued that the trial court had abused its discretion in denying leave to amend. Although reversing on other grounds, the Supreme Court rejected plaintiff's argument that she should have been allowed to amend her complaint. The Court cited *Hayutin v. Weintraub (1962) 207 Cal. App. 2d 497, 24*

Cal. Rptr. 761 , in holding that denial of the motion was not an abuse of discretion because, if the motion had been granted, a long continuance would have been required to investigate wholly new factual issues, and discovery would have to be done again, all at substantial inconvenience and needless and substantial additional expense to defendant (*18 Cal. 3d 660, 667 n.2*).

In *Young v. Berry Equipment Rentals, Inc. (1976) 55 Cal. App. 3d 35, 127 Cal. Rptr. 200* , plaintiff brought suit for personal injuries arising out of an accident involving a fork lift. Among the defendants was the owner of the fork lift who was alleged to be vicariously liable as owner pursuant to statute. After a jury verdict was returned in favor of all defendants, judgment notwithstanding the verdict was entered against the owner of the fork lift, and a new trial was granted, solely on the issue of damages. Thereafter, plaintiff moved to amend the complaint to allege a new theory of liability against the owner based on negligent entrustment. The court denied the motion to amend because the new trial was limited to the issue of damages. Dissatisfied with the judgment that was entered in his favor in the second trial, plaintiff appealed.

The court of appeal reversed on other grounds, but held that the trial court had not abused its discretion in denying the motion. The court relied on prior California law for the proposition that a long unexcused delay may be the basis for denying permission to amend pleadings, especially when the amendment would interject a new issue that might require further investigation or discovery procedures (*55 Cal. App. 3d 35, 39*). Plaintiff argued that the amendment was based on information first learned at trial, but the court noted that defendant owner had been a party subject to the rules of discovery from the beginning of the action, and that the motion to amend came nearly a year and a half after the original complaint was filed (*55 Cal. App. 3d 35, 39*). In addition to the motion's untimeliness, the amendment would have prejudiced defendant owner by allowing the issue of liability to be reopened and exposing the owner to greater liability than in the original action because the statutory vicarious liability on which the judgment was based was subject to a $15,000 maximum damage limit (*55 Cal. App. 3d 35, 39-40*). The court stated that allowing the amendment, which would permit plaintiff to avoid a statute plaintiff should have been aware of before or during trial, would not only have been prejudicial to defendant, but would have condoned plaintiff's lack of preparation for trial (*55 Cal. App. 3d 35, 40*).

One of the claims in *Rainer v. Community Memorial Hosp. (1971) 18 Cal. App. 3d 240, 95 Cal. Rptr. 901* , a medical malpractice suit, was against defendant hospital based on respondeat superior. On the third day of trial, plaintiffs moved to amend the complaint to add a theory of independent negligence against the hospital. The court denied the motion, and plaintiffs ultimately appealed from a judgment that was only partially in their favor.

The court of appeal rejected plaintiffs' contention that the denial was erroneous, relying on prior California law to hold that a long unexcused delay may be the basis for denying permission to amend pleadings, especially when the proposed amendment interjects a new issue that may require further investigation or discovery procedures. The court noted that plaintiff, without good cause, had waited until the third day of trial, five years after commencement of the suit and over 10 months after having notice of the theory, before seeking amendment, and even then did not have the evidence ready to prove the issues. Additionally, defendants showed that interjection of the amendment would have further complicated an already complicated trial before a jury, that no discovery and preparation on the trial of these issues had been made by them, and that matters which might have been the subject of pretrial investigation would not be admissible under the Evidence Code (*18 Cal. App. 3d 240, 258*). The court concluded that denial of the amendment was not an abuse of discretion (*18 Cal. App. 3d 240, 258-259*). The court held, however, that an *amendment first* sought at trial on the second day of testimony to add issues of informed consent and a battery to issues of negligence should have been allowed, since that amendment merely added a new theory of recovery on the same set of facts constituting the cause of action and would not have required additional investigation or discovery (*18 Cal. App. 3d 240, 251-256*). This aspect of *Rainer* is discussed in *§ 16.37[4][a]*.

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1-16 California Points & Authorities § 16.49

§ 16.49 Opposing Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Failure to Correct Defect

[1] FORM Opposing Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Failure to Correct Defect

[*The following should be combined with a general form of memorandum in opposition to a motion for leave to file an amended pleading or an amendment to a pleading; (see § 16.45).*]

THE COURT SHOULD NOT ALLOW AMENDMENT OF THE PLEADING BECAUSE THE AMENDMENT DOES NOT CORRECT THE DEFECT IN THE ORIGINAL PLEADING.

Failure to Correct Defect. The court may properly deny permission to amend when the proposed amended pleading is vulnerable to objection on the same grounds as the original pleading (*Rose v. Ames (1942) 53 Cal. App. 2d 583, 589, 128 P.2d 65* ; *Stiebel v. Roberts (1941) 42 Cal. App. 2d 434, 440, 109 P.2d 22*)

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion for leave to file an amended pleading or an amendment to a pleading when the amendment is defective on the same grounds as the original pleading. It does not provide a complete memorandum but is designed to be combined with the general form of memorandum opposing amendment of pleadings set out in *§ 16.45*, as well as with forms relating to any other grounds that may exist for denying permission to amend the pleading [*see §§ 16.47, 16.48, 16.50 -16.55*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Failure to Correct Defect

In ***Rose v. Ames*** *(1942) 53 Cal. App. 2d 583, 128 P.2d 65* , plaintiff appealed from a judgment entered after the court sustained a demurrer to the complaint and denied plaintiff's motion for leave to file an amended complaint. The court of appeal held that the trial court had not abused its discretion in denying plaintiff's motion because the proposed amended complaint did not supply the material allegations that were missing from the original complaint and was therefore vulnerable to demurrer on the same grounds as the original complaint (*53 Cal. App. 2d 583, 589*).

In ***Stiebel v. Roberts*** *(1941) 42 Cal. App. 2d 434, 109 P.2d 22* , defendants' objection to the introduction of evidence on the ground that the complaint did not state a cause of action was sustained. Plaintiffs' motion to amend the complaint was then made and denied, and judgment was entered in defendants' favor. On plaintiffs' appeal, the court of appeal held that the trial court had not abused its discretion in denying plaintiffs' motion because the complaint still would not have been sufficient to state a cause of action even if the amendments had been allowed (*42 Cal. App. 2d 434, 440*).

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1-16 California Points & Authorities § 16.50

§ 16.50 Opposing Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Unexplained Omission of Allegation Fatal to Pleading

[1] FORM Opposing Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Unexplained Omission of Allegation Fatal to Pleading

[*The following should be combined, where appropriate, with a general form of memorandum in opposition to a motion for leave to file an amended pleading or an amendment to a pleading (see § 16.45).*]

THE COURT SHOULD DENY THE MOTION TO AMEND THE PLEADING BECAUSE THE AMENDMENT OMITS AN ALLEGATION FATAL TO THE PLEADING WITHOUT EXPLANATION.

A. Unexplained Omissions. If a verified pleading contains an allegation rendering the complaint vulnerable, the defect cannot be cured by simply omitting the allegation in a later pleading without explanation, and the court may properly deny leave to make such an amendment (*Payne v. Bennion (1960) 178 Cal. App. 2d 595, 603-604, 3 Cal. Rptr. 14*)

[*Optional*] **B. Answers.** The rule that facts once alleged under oath, rendering an original pleading vulnerable to attack, cannot be withdrawn from consideration by simply filing an amended pleading omitting those facts without explanation, applies to answers (*Hardy v. Admiral Oil Co. (1961) 56 Cal. 2d 836, 840, 16 Cal. Rptr. 894, 366 P.2d 310*)

[*Optional*] **C. Unverified Pleadings.** The rule that the unexplained omission of allegations destructive of a cause of action will not cure the defect applies to unverified pleadings as well as verified pleadings (*Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 836, 69 Cal. Rptr. 321, 442 P.2d 377*)

[2] Comments

[a] Use of Form

These points and authorities may be used in opposition to a motion for leave to file an amended pleading or an

amendment to a pleading when the amendment deletes, without explanation, an allegation which was fatal to the pleading. It does not provide a complete memorandum but is designed to be combined with the general form of memorandum opposing amendment of pleadings set out in *§ 16.45*, as well as with forms relating to any other grounds that exist for denying permission to amend the pleading [*see §§ 16.47 -16.49, 16.51 -16.55*].

By including the appropriate optional paragraph, the form may be directed specifically toward a proposed amended answer [Paragraph B], an unverified pleading [Paragraph C], or both.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

This form may be used in opposition to a memorandum in support of a motion for leave to amend a pleading pursuant to *Code Civ. Proc. §§ 473, 576*, or both, such as the one set out in *§ 16.33*.

[b] Purpose of Rule

The rule that allegations of fact in a verified complaint that are subsequently omitted or contradicted are still binding on the plaintiff is valid and useful to defeat abuses of the privilege to amend, and to discourage sham and untruthful pleadings. However, the rule is not intended to prevent honest plaintiffs from correcting erroneous allegations of generic terms that may have legal implications but that are also loosely used by laypersons, or to prevent the correction of ambiguous statements of fact [*Contreras v. Blue Cross of California (1988) 199 Cal. App. 3d 945, 950, 245 Cal. Rptr. 258*].

[3] Discussion of Authorities

[a] Unexplained Omissions

Plaintiff in ***Payne v. Bennion*** *(1960) 178 Cal. App. 2d 595, 3 Cal. Rptr. 14* , brought suit for wrongful death alleging that the decedent's death was caused by defendant driver's negligence while acting within the scope of her employment by defendant superintendent of schools. Defendants' demurrer to the complaint was sustained with leave to amend as to defendant driver only. Plaintiff moved for permission to file an amended complaint as to both defendants, and the court denied the motion. The second cause of action in the amended complaint would have omitted the allegation regarding scope of employment, and instead would have alleged on information and belief that defendant driver was not acting within the scope of her employment at the time of the accident. Judgment was subsequently entered for defendants based on the order sustaining the demurrer, and plaintiff appealed.

The primary question before the court of appeal was whether the trial court abused its discretion in denying leave to amend. The determination of that question required the court to determine whether the proposed amended complaint stated a cause of action against either defendant (*178 Cal. App. 2d 595, 598*). The court held that the original complaint and the first cause of action in the amended complaint failed to state a cause of action due to immunities and notice requirements applicable to public employees (*178 Cal. App. 2d 595, 598-602*). The court then applied the rule that if any verified pleading contains an allegation which renders a complaint vulnerable, the defect cannot be cured simply by omitting the allegation, without explanation, in a later pleading. Because plaintiff had originally alleged that defendant driver had been acting within the scope of her employment and did not offer any explanation for omitting that allegation from the amended complaint, the amended complaint was deemed to contain the same defect as the original and the court held that the trial court did not abuse its discretion in denying leave to amend (*178 Cal. App. 2d 595, 603-604*).

[b] Answers

In ***Hardy v. Admiral Oil Co.*** *(1961) 56 Cal. 2d 836, 16 Cal. Rptr. 894, 366 P.2d 310* , plaintiff brought suit to recover

a down payment on a contract. The court granted plaintiff's motion for judgment on the pleadings on the ground that the third amended answer did not state facts constituting a defense and that it appeared from all the verified pleadings on file that plaintiff was entitled to judgment. Judgment was entered accordingly and defendant appealed.

The Supreme Court affirmed, stating that the issue on appeal was whether or not it could be determined from all the verified pleadings on file that defendant had admitted the delivery of preliminary title reports showing any defect of title (*56 Cal. 2d 836, 839*). Defendant argued that its third amended answer placed this issue in controversy, but the Court stated the rule that facts once alleged under oath, rendering an original pleading vulnerable to attack, cannot be withdrawn from consideration by simply filing an amended pleading omitting such facts without explanation, relying on prior California law, including *Payne v. Bennion (1960) 178 Cal. App. 2d 595, 603, 3 Cal. Rptr. 14* (discussed in *§ 16.50[3][a]*). Defendant had made the crucial admission in its original and first amended answers, and the rule applied to prevent defendant from avoiding the admissions made in the earlier answers (*56 Cal. 2d 836, 840-841*).

[c] Unverified Pleadings

Plaintiff in ***Reichert v. General Ins. Co.*** *(1968) 68 Cal. 2d 822, 69 Cal. Rptr. 321, 442 P.2d 377* , sued five insurance companies for failure to pay a claimed loss pursuant to a conspiracy to defraud plaintiff. The complaint revealed that plaintiff had been adjudged bankrupt after the events of which he complained. Demurrers to the complaint were sustained on the ground, inter alia, that plaintiff lacked standing to sue due to the bankruptcy. The first and second amended complaints later filed asserted four common counts without reference to the bankruptcy. Judgment for defendants was entered after the court sustained their demurrer to the second amended complaint, again partly on the ground that any cause of action had passed to the trustee in bankruptcy, and plaintiff appealed.

The Supreme Court affirmed, relying on prior California law for the rule that when a verified complaint contains allegations destructive of a cause of action, the defect cannot be cured in subsequently filed pleadings by simply omitting such allegations without explanation, because the original defect will infect the subsequent pleading to render it vulnerable to demurrer. The Court recognized that a party should be allowed to correct a pleading by omitting allegations which were made mistakenly or inadvertently, but noted that plaintiff offered no explanation that the prior allegation of bankruptcy was the result of mistake or inadvertence and that its omission was to correct an error (*68 Cal. 2d 822, 836-837*). The Court held that these principles applied even though the original complaint did not appear to have been verified (*68 Cal. 2d 822, 836*).

[4] Additional Authorities

[a] Unexplained Omissions

Continental Ins. Co. v. Lexington Ins. Co. (1997) 55 Cal. App. 4th 637, 64 Cal. Rptr. 2d 116 , involved an insurance coverage dispute arising out of a catastrophic, multi-vehicle traffic accident. The accident was allegedly caused by the driver of a tractor/trailer rig who was acting as agent for the lessee of the tractor/trailer rig. Plaintiff had issued a liability insurance policy to the lessor of the trailer portion of the rig. One defendant (Planet) had issued a liability insurance policy to the lessor of the tractor portion (or power unit) of the rig, and the other defendant (Lexington) had issued an umbrella liability insurance policy also to the lessor of the tractor portion of the rig, in which the Planet insurance policy was specified as underlying insurance. Following settlement of the personal injury and wrongful death lawsuits arising out of the accident, plaintiff filed an action for equitable indemnity, contribution, and declaratory relief against Planet and Lexington. Lexington filed a general demurrer to the complaint which was sustained without leave to amend. Plaintiff appealed from a judgment of dismissal entered thereafter.

The court of appeal affirmed. On appeal, plaintiff contended that since Lexington's demurrer was sustained without leave to amend, for the purposes of the appeal the court must assume that the liability policy issued on the tractor by Planet (who was not a party to the appeal) did not provide for permissive user coverage, with the effect that Lexington's

policy dropped down and provided primary coverage for the lessee and the driver as permissive users of the tractor. In rejecting this contention, the court noted that plaintiff specifically alleged in its complaint that the Planet policy provided coverage for permissive users of the tractor, including the driver. Even if plaintiff were given leave to amend its complaint, it would not be allowed to amend the complaint to state a fact directly contradictory to one stated previously. A plaintiff may not discard factual allegations of an earlier complaint, or avoid them by contradictory averments in a superseding, amended pleading. Thus, the court must assume for purposes of the appeal that the Planet policy did provide permissive user coverage (*55 Cal. App. 4th 637, 646*).

Software Design & Application, Ltd. v. Hoefer & Arnett, Inc. (1996) 49 Cal. App. 4th 472, 56 Cal. Rptr. 2d 756 involved an action by a foreign corporation and its sole owner and founder against banks and brokerage firms. Plaintiffs, who were not customers of defendants, attempted to state causes of action for negligence, conversion, and violation of *California Uniform Commercial Code § 11204*. The real culprit, however, was the plaintiffs' faithless financial consultant entrusted with a valuable portfolio, who liquidated the assets with the help of his sister through a scheme involving a series of fictitious accounts. One transaction involved the transfer of the individual plaintiff's Paine-Webber portfolio to an account opened by the consultant in the name of a limited partnership that did not exist with defendant Hoeffer & Arnett, Inc. The trial court sustained demurrers to the first amended complaint, concluding there was no liability under the pleadings, and then dismissed the complaint after plaintiffs failed to further amend.

The court of appeal affirmed the judgment. The court pointed out that in connection with the transfer of the individual plaintiff's Paine-Webber portfolio to defendant Hoeffer & Arnett, the plaintiffs averred that certain documentation from Paine-Webber accompanied the transfer which indicated that the securities and funds being transferred were owned and controlled exclusively by the individual plaintiff. The initial pleading stated that the documentation included true copies of a letter signed by the plaintiff, as well as a transfer request form also signed by the plaintiff, both of which were attached as exhibits. The amended complaint, however, did not include a description of this documentation, nor were copies of those documents attached. The court noted that the documents were not at all questionable or irregular on their face, and authorized a transfer of the plaintiff's account. The court further noted that the plaintiffs cannot retreat from the allegations and supporting exhibits concerning actual documentation, and supplant them in amended pleadings with conclusory allegations characterizing the documentation in general terms, and with an entirely different twist. When a, complaint contains allegations destructive to a cause of action the defect cannot be cured by their omission without explanation in a subsequent pleading. Moreover, allegations in a complaint must yield to contrary facts found in exhibits to the complaint (*49 Cal. App. 4th 472, 484*).

In *Leong v. San Francisco Parking, Inc. (1991) 235 Cal. App. 3d 827, 832 n.5, 1 Cal. Rptr. 2d 41* , plaintiffs's son was killed by an intoxicated driver leaving a baseball stadium parking lot. The first amended complaint alleged that defendants, the baseball team, and the parking company provided alcoholic beverages during the game and that the driver became intoxicated at the stadium and parking lot. Defendants demurred on the ground that statutory law affirms prior judicial interpretation finding that the consumption of alcoholic beverages rather than the serving of them is the proximate cause of injuries inflicted upon another by an intoxicated person [*see Bus. & Prof. Code § 25602(b)*]. Despite plaintiffs' contention that they could plead specific facts alleging that defendants did not furnish alcoholic beverages for patrons to consume in the parking lot, the court sustained the demurrer without leave to amend (*235 Cal. App. 3d 827, 830*).

The court of appeal affirmed, stating that plaintiffs cannot avoid dismissal by simply omitting, with no explanation other than a desire to avoid the pertinent statute, allegations destructive of their cause of action (*235 Cal. App. 3d 827, 833*).

Colapinto v. County of Riverside (1991) 230 Cal. App. 3d 147, 281 Cal. Rptr. 191 , was an action for damages for the destruction of a building and its contents allegedly caused by the negligence of the defendant county's fire department when, in fighting a fire, but without making an investigation and without having fire fighting equipment in proper working order or in place, they smashed open a large door of the building allowing air to rush in on what was a

smouldering fire, causing it to burst into flames that they couldn't control. Defendant's demurrer to the complaint, on the ground the county had absolute immunity under *Gov. Code §§ 850* and *850.2*, was sustained with leave to amend. Plaintiff's amended complaint omitted the foregoing facts and alleged that the department's negligent operation of a motor vehicle caused the destruction of the building. The defendant's motion for summary judgment was granted, and plaintiff appealed.

In affirming the summary judgment, the appellate court said that if a party files an amended complaint and attempts to avoid the defects of the original complaint by either omitting facts which made the previous complaint defective or by adding facts inconsistent with those of previous pleadings, the court may take judicial notice of prior pleadings and may disregard inconsistent allegations in the amended pleading (*230 Cal. App. 3d 147, 151*). The court said that plaintiffs' original complaint had alleged negligence in the manner in which the firefighters fought the blaze; in the first amended complaint, they changed the facts to allege that the negligent operation of a motor vehicle resulted in the destruction of the building. The court said the amended complaint does not mention that the motor vehicle was used as a method to fight the fire or explain the manner in which the firefighters fought the fire. This amendment changed the facts and was made solely to avoid the summary judgment. The court said that, therefore, it could ignore the amendment (*230 Cal. App. 3d 147, 152*). The court further noted that a complaint against a public entity is subject to a demurrer or judgment on the pleadings if the facts or theory of the complaint are different from those alleged in the original claim filed with the public entity, and that, under this rule, the first amended complaint was subject to dismissal by either procedure, had they been used (*230 Cal. App. 3d 147, 152 n.1*).

[b] Unverified Pleadings

Amid v. Hawthorne Community Medical Group, Inc. (1989) 212 Cal. App. 3d 1383, 261 Cal. Rptr. 240 , was an action by a surgeon, alleging various theories of recovery, against a hospital for damages arising out of the hospital's having sent to an affiliated health insurer a copy of a peer review committee's evaluation of plaintiff's medical performance. The evaluation had been adopted by the hospital's board of directors. In affirming the judgment of dismissal after defendant's demurrer to plaintiff's fourth amended complaint was sustained without leave to amend, the court said that although generally courts will disregard the original pleading after an amended pleading has been filed, they will not do so where an amended complaint attempts to avoid defects set forth in a prior complaint by ignoring them. The court may examine the prior complaint to ascertain whether the amended complaint is merely a sham (*212 Cal. App. 3d 1383, 1387*).

NOTE:
The court never expressly stated that the complaints involved were unverified; however, it consistently referred to them as "complaint," "first amended complaint," and so forth. This would appear to indicate that they were not verified. Moreover, the court's foregoing statement of the rule is not on its face limited to verified complaints or pleadings. Consequently, the case would appear to support the point that the rule applies to unverified complaints, as well as to verified complaints.

In *Hills Transp. Co. v. Southwest Forest Indus., Inc. (1968) 266 Cal. App. 2d 702, 72 Cal. Rptr. 441* , the unverified original complaint sought recovery for breach of a written contract based on letters attached to the complaint. The unverified first amended complaint maintained the claim for breach of contract, but deleted the exhibits attached to the original complaint, and added a claim for fraud. Both complaints succumbed to demurrers, as did a second amended complaint which also alleged breach of contract and fraud and was verified. The demurrers to the second amended complaint were sustained without leave to amend, and plaintiff appealed the judgment of dismissal, complaining of the trial court's refusal to allow further amendment.

The court of appeal affirmed. The court reviewed the exhibits to the original complaint to find that those letters showed that there was no written contract (*266 Cal. App. 2d 702, 711-712*). Then, noting that the original complaint had alleged those letters as the contract, and that the second amended complaint merely omitted the letters while continuing

to allege a written contract, the court stated the rule that a pleader may not attempt to breathe life into a complaint by omitting relevant facts which made the previous complaint defective. That principle, together with the trial court's right to take into account plaintiff's failure to produce other writings to support the claim of contract after the writings originally relied on were ruled insufficient, justified the trial court in denying further leave to amend (*266 Cal. App. 2d 702, 712-713*). In taking a superseded pleading into account in determining whether further pleading should be allowed, the court held that no distinction should be drawn between verified and unverified pleadings, so that trial courts may function without blinkers and take note of the entire history of the pleadings when pertinent (*266 Cal. App. 2d 702, 710-711*).

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1-16 California Points & Authorities § 16.51

§ 16.51 Opposing Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Contradiction of Admission in Original Pleading

[1] FORM Opposing Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Contradiction of Admission in Original Pleading

[*The following should be combined with a general form of memorandum in opposition to a motion for leave to file an amended pleading or an amendment to a pleading (see § 16.45).*]

THE COURT SHOULD NOT ALLOW AMENDMENT OF THE PLEADING BECAUSE THE PROPOSED AMENDMENT CONTRADICTS AN ADMISSION IN THE ORIGINAL PLEADING.

Contradictory Amendments. As a general rule, a party will not be allowed to file an amendment contradicting an admission made in his or her original pleadings (*Tognazzi v. Wilhelm (1936) 6 Cal. 2d 123, 127, 56 P.2d 1227* ; *Brown v. Aguilar (1927) 202 Cal. 143, 149, 259 P. 735*)

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion for leave to file an amended pleading or an amendment to a pleading when the amendment contradicts an admission in a prior pleading of the moving party. It does not provide a complete memorandum but is designed to be combined with the general form of memorandum opposing amendment of pleadings set out in *§ 16.45*, as well as with forms relating to any other grounds that may exist for denying permission to amend the pleading [*see §§ 16.47 -16.50, 16.52 -16.55*].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Mistake or Inadvertence

The rule that a party may not make an amendment contradicting an admission made in his or her original pleading is subject to an exception when it is clearly shown that the earlier pleading is the result of inadvertence or mistake [*Meyer v. State Bd. of Equalization (1954) 42 Cal. 2d 376, 267 P.2d 257* , discussed in *§ 16.33[3][a]*].

[3] Discussion of Authorities

[a] Contradictory Amendment

The facts and procedural background of ***Tognazzi v. Wilhelm*** *(1936) 6 Cal. 2d 123, 56 P.2d 1227* , are discussed in *§ 16.45[3][b]*. The Supreme Court in *Tognazzi* affirmed, first holding that the trial court properly sustained the demurrer without leave to amend because equity will not assist the grantor in a conveyance in fraud of his or her creditors to obtain a reconveyance from the grantee (*6 Cal. 2d 123, 125*). The Court then found that the allegation of the proposed amended complaint that the plaintiff had no intent to defraud any creditors flew squarely in the face of the allegation in the original complaint that the conveyance was a sham (*6 Cal. 2d 123, 126-127*). Accordingly, the Court held that the trial court had not abused its discretion in denying the motion for leave to file the amended complaint. The Court relied on prior California law for the general rule that a party will not be allowed to file an amendment contradicting an admission made in his original pleadings (*6 Cal. 2d 123, 127*).

It should be noted that the Court went on to state that if an amendment contradicting a prior admission is proper in any case, it must be on very satisfactory evidence that the party was deceived or misled, or that the pleading was made under a clear mistake as to the facts (*6 Cal. 2d 123, 127*). See, generally, the cases discussed in *§ 16.36*.

In ***Brown v. Aguilar*** *(1927) 202 Cal. 143, 259 P 735* , plaintiff, as assignee of a contractor, sued defendant for the balance due on a construction contract. The case went to trial on defendant's third amended answer which included an admission that a named person was the architect and agent employed by defendant to draw plans for and supervise erection of the building. The trial court refused to allow defendant to file a fourth amended answer changing that admission, and on appeal from an adverse judgment entered after trial, defendant asserted the refusal as error.

The Supreme Court affirmed, stating the same general rule, and qualification to it, that the Court cited in *Tognazzi, above*. The Court held that the trial court had not abused its discretion in denying the motion to amend, but, on the contrary, had acted wisely in denying the application (*202 Cal. 143, 149*). An additional factor supporting the Court's decision was that defendant had been given an earlier opportunity to amend after the faulty allegation had been called to her attention and had not done so (*202 Cal. 143, 148*).

[4] Additional Authorities

[a] Contradictory Amendment

In *American Advertising & Sales Co. v. Mid-Western Transport (1984) 152 Cal. App. 3d 875, 199 Cal. Rptr. 735* , the president of plaintiff corporation sued to enforce a contract with defendant. Defendant sought summary judgment on the ground that plaintiff was not licensed by the Interstate Commerce Commission and therefore could not enforce the contract as a matter of law (*152 Cal. App. 3d 875, 877, 878 n.2*). Plaintiff's president then requested leave to amend his complaint to allege that defendant's contract was not with plaintiff corporation but with a properly licensed wholly owned subsidiary. The trial court denied the motion to amend, and plaintiff appealed (*152 Cal. App. 3d 875, 877-878*). The court of appeal affirmed, stating as well established the rule that a proposed amendment that contradicts an earlier pleading will not be allowed absent very satisfactory evidence that clearly shows that the earlier pleading was the result of mistake or inadvertence (*152 Cal. App. 3d 875, 879*). Here, the only evidence was a declaration by the president that he had been mistaken. The court held that there had been no abuse of discretion in denying leave to amend, since the trial court could reasonably have suspected the credibility and good faith of this declaration, considering the

president's unlimited access to, and presumptive knowledge of, the correct facts, which he had nonetheless repeatedly denied before the motion for summary judgment (*152 Cal. App. 3d 875, 878-880*).

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1-16 California Points & Authorities § 16.52

§ 16.52 Opposing Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Complaint--Proposed Amendment States No Ground for Relief

[1] FORM Opposing Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Complaint--Proposed Amendment States No Ground for Relief

[*The following should be combined with a general form of memorandum in opposition to a motion for leave to file an amended pleading or an amendment to a pleading (see § 16.45).*]

THE COURT SHOULD DENY PERMISSION TO AMEND THE COMPLAINT BECAUSE IT APPEARS TO A CERTAINTY THAT NO RELIEF COULD POSSIBLY BE GRANTED UNDER THE PROPOSED AMENDMENT.

No Amendment if No Relief Possible. The right to amend a pleading should be denied if it appears to a certainty that no relief could possibly be granted under the amended pleading (*Robinson & Wilson, Inc. v. Stone (1973) 35 Cal. App. 3d 396, 413, 110 Cal. Rptr. 675* ; *Bernstein v. Financial Indem. Co. (1968) 263 Cal. App. 2d 324, 328, 69 Cal. Rptr. 543*)

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion for leave to file an amended pleading or an amendment to a pleading when the amendment does not state grounds for relief. It does not provide a complete memorandum but is designed to be combined with the general form of memorandum opposing amendment of pleadings set out in *§ 16.45*, as well as with forms relating to any other grounds that may exist for denying permission to amend the pleading [*see §§ 16.47 -16.54*].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

With appropriate modifications, these points and authorities may be used to oppose motion for leave to file an amended cross complaint or an amendment to a cross complaint.

[3] Discussion of Authorities

[a] No Amendment if No Relief Possible

In ***Robinson & Wilson, Inc. v. Stone*** *(1973) 35 Cal. App. 3d 396, 110 Cal. Rptr. 675* , plaintiffs, general contractors, sued defendant owners for breach of a construction contract, and defendants cross complained against plaintiffs for alleged breaches of the contract. Six months before trial, defendants moved to amend the cross complaint to assert a claim for attorneys' fees pursuant to the contract. The court denied the motion, and after defendants prevailed at trial, they appealed from the order denying their motion to amend the cross complaint.

The court of appeal affirmed the order, finding that the contract terms did not provide for an award of attorneys' fees, and that an express contractual provision was essential to such recovery (*35 Cal. App. 3d 396, 411-414*). The court held, relying on prior California law, that the right to amend a pleading should be denied if it appears to a certainty that no relief could possibly be granted under the amended pleading (*35 Cal. App. 3d 396, 413*).

Plaintiff in ***Bernstein v. Financial Indem. Co.*** *(1968) 263 Cal. App. 2d 324, 69 Cal. Rptr. 543* , brought suit for breach of contract premised on the theory that defendant had no right to terminate the contract. When plaintiff sought to introduce testimony on that theory, defendant objected, based on the parol evidence rule. To counter the objection, plaintiff asked leave to amend the complaint to add a new cause of action alleging a contemporaneous oral agreement not to terminate the contract. The motion was denied, plaintiff rested his case, and defendant moved for judgment. Plaintiff appealed from the adverse judgment entered after the court granted defendant's motion.

In affirming, the court of appeal rejected plaintiff's contention that the trial court erred by denying leave to amend the complaint (*263 Cal. App. 2d 324, 327-328*). The court held that it seemed settled that the right to amend should be denied if it appears to a certainty that no relief could possibly be granted under the amended pleading. The court then found that the proposed cause of action based on wrongful termination of the contract was wholly unsustainable given the conceded right of either party to terminate the contract at any time on written notice. Thus, the court concluded that if the proposed pleading had been allowed to be filed, it could not state facts sufficient to state a cause of action for wrongful breach of contract, and that since no relief was obtainable under it, refusal to allow its filing was manifestly proper (*263 Cal. App. 2d 324, 328*).

[4] Additional Authorities

[a] No Amendment if No Relief Possible

In *Central National Ins. Co. v. California Ins. Guarantee Assn. (1985) 165 Cal. App. 3d 453, 211 Cal. Rptr. 435* , appellant insurance company, defendant in an action for declaratory relief brought by another insurance company, filed a cross complaint for declaratory relief against an insurance association. The trial court sustained a demurrer to the cross complaint without leave to amend on the ground that the association's "covered claims" did not include any obligations to insurers or any claim asserted by an assignee or one claiming by right of subrogation, and that appellant fell clearly within the excluded class. The court of appeal affirmed, holding that leave to amend should be denied when the facts are not in dispute, and the nature of the plaintiff's claim is clear, but, under the substantive law, no liability exists (*165 Cal. App. 3d 453, 460-461*).

In *Lemoge Electric v. County of San Mateo (1956) 46 Cal. 2d 659, 297 P.2d 638* , the Supreme Court affirmed a judgment entered on an order sustaining a demurrer to a complaint for reformation of a contract without leave to amend.

The Court recognized the rule that it is ordinarily an abuse of discretion to sustain a demurrer without leave to amend if there is a reasonable possibility that the defect can be cured by amendment, but in affirming, the Court noted that plaintiff clearly could not amend to state a cause of action for reformation or rescission, and that plaintiff had not shown how the complaint could be amended to state a cause of action in quasi contract (*46 Cal. 2d 659, 664*).

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1-16 California Points & Authorities § 16.53

§ 16.53 Opposing Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Complaint--Entirely New Cause of Action or New Party Plaintiff After Statute of Limitations Has Run

[1] FORM Opposing Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Complaint--Entirely New Cause of Action or New Party Plaintiff After Statute of Limitations Has Run

[*The following should be combined with a general form of memorandum in opposition to a motion for leave to file an amended pleading or an amendment to a pleading (see § 16.45).*]

THE COURT SHOULD DENY LEAVE TO AMEND THE COMPLAINT BECAUSE THE PROPOSED AMENDMENT ALLEGES AN ENTIRELY NEW CAUSE OF ACTION VIOLATING A DIFFERENT PRIMARY RIGHT AND BASED ON ENTIRELY DIFFERENT FACTS FROM THE ORIGINAL COMPLAINT AND IS BARRED BY THE STATUTE OF LIMITATIONS.

A. No Amendment to State Entirely New Cause of Action Barred by Statute of Limitations. After the statute of limitations has run, a party may not file an amended complaint alleging an entirely new cause of action violating an entirely different primary right and based on an entirely different set of facts than the original complaint (*Shelton v. Superior Court (1976) 56 Cal. App. 3d 66, 76-77, 128 Cal. Rptr. 454*)

[*Optional*] **B. New Party Enforcing Independent Right.** The court should not allow amendment of a complaint to add a new party plaintiff who seeks to enforce an independent right after the statute of limitations has run (*Dubbers v. Goux (1875) 51 Cal. 153, 154-155* ; *Diliberti v. Stage Call Corp. (1992) 4 Cal. App. 4th 1468, 1471, 6 Cal. Rptr. 2d 563*)

[*Optional*] **C. Different Instrumentality.** If the instrumentality alleged to have caused an injury in the amended complaint is different from the instrumentality alleged in the original complaint to have caused the injury, the complaints relate to different accidents, and the amended complaint is not based on the same general set of facts as the

original complaint and does not relate back to avoid the statute of limitations (*see Coronet Manufacturing Co. v. Superior Court (1979) 90 Cal. App. 3d 342, 345-347, 153 Cal. Rptr. 366*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to a motion for leave to file an amended complaint or an amendment to a complaint that would introduce an entirely new cause of action or, after the statute of limitations has run, add a new party plaintiff. It does not provide a complete memorandum but is designed to be combined with the general form of memorandum in *§ 16.45*, as well as with forms relating to any other grounds that may exist for denying permission to amend the pleading [*see §§ 16.47 -16.52, 16.54*].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

This form may be used in opposition to a memorandum in support of a motion for leave to amend a pleading pursuant to *Code Civ. Proc. § 473* or *576*, or both sections, such as the ones set out in*§§ 16.37*, *16.41*, and *16.42*.

[i] Related Uses

With appropriate modifications, these points and authorities may be used to oppose a motion for leave to file an amended cross complaint or an amendment to a cross complaint.

[3] Discussion of Authorities

[a] No Amendment to State Entirely New Cause of Action Barred by Statute of Limitations

Shelton v. Superior Court *(1976) 56 Cal. App. 3d 66, 128 Cal. Rptr. 454* , involved a joint complaint by a husband and wife for personal injuries each received in an automobile accident. After the statute of limitations had run, plaintiffs moved to amend the complaint to include claims for damages for loss of consortium. The court denied the motion and plaintiffs petitioned for a writ of mandate to compel the trial court to allow the amendment.

The court of appeal denied plaintiffs' petition following *Bartalo v. Superior Court (1975) 51 Cal. App. 3d 526, 124 Cal. Rptr. 370* , discussed in *§ 16.53[3][b]* to the extent that each plaintiff sought to assert a claim for loss of consortium by amending the other's cause of action for personal injuries (*56 Cal. App. 3d 66, 73-74*).

The court then determined that the amendment could not be allowed even if it were assumed that the amendment sought to add each plaintiff's claim for loss of consortium to his or her own claim for personal injuries. The court held that the rule of *Austin v. Massachusetts Bonding & Insurance Co. (1961) 56 Cal. 2d 596, 15 Cal. Rptr. 817, 364 P.2d 681* (discussed in *§ 16.37[4][a]*), that an amendment based on the same general set of facts as the original complaint will relate back to the date of filing the original complaint to avoid the statute of limitations, did not apply (*56 Cal. App. 3d 66, 76-81*). The court distinguished *Austin* and similar cases on several grounds. While *Austin* had allowed only one recovery on the general set of facts, plaintiffs sought to add a second recovery, for injuries to each other, in addition to recovery for injuries to themselves. Also, although the facts giving rise to defendants' liability for loss of consortium were related to the facts alleged in the original complaint, the facts measuring that liability were novel and were not asserted until the amendment (*56 Cal. App. 3d 66, 77*). Moreover, the amendment was not a mere change in legal theory, but the assertion of an entirely different cause of action based on violation of a different primary right, the right to be free of loss of consortium due to a tortious injury of a spouse, as opposed to the right to be free of tortious personal injury to oneself (*56 Cal. App. 3d 66, 78, 80*). The severable and independent nature of those rights was not changed by the fortuitous fact that they were both violated by the same tortious act, and assertion of one within the statutory

period did not excuse failure to assert the other (*56 Cal. App. 3d 66, 80*).

[b] New Party Enforcing Independent Right

In ***Dubbers v. Goux*** *(1875) 51 Cal. 153* , plaintiff moved to substitute his wife as plaintiff based on an affidavit that she had been the real party in interest when the action was commenced. The court granted the motion, and the defendant ultimately appealed from a judgment recovered by the substituted plaintiff, arguing that *Code Civ. Proc. § 473* did not allow amendment to substitute a party who has a cause of action for a party who never had a cause of action.

The Supreme Court reversed, noting that there was no contention that plaintiff wife had succeeded to any interest of her husband pending the action or that she had any joint interest with him in the subject matter. The Court found that she was substituted because she was the sole party in interest at the time the action had commenced, so that, in effect, she was permitted to prosecute a new suit, for another cause of action, by merely being substituted as sole plaintiff in the former action. The Court held that *Code Civ. Proc. § 473* did not authorize such an amendment, and that the trial court had erred in allowing the substitution (*51 Cal. 153, 154-155*).

In ***Diliberti v. Stage Call Corp.*** *(1992) 4 Cal. App. 4th 1468, 6 Cal. Rptr. 2d 563* , sisters were involved in an automobile accident as driver and passenger. The driver was not injured, but the passenger was. The action, however, was mistakenly filed in the name of the driver against the driver of the other car alleging personal injury and not even mentioning that there was a passenger. After the statute of limitations had run, the error was discovered, and plaintiff's counsel moved to amend the complaint to substitute the injured passenger for the uninjured plaintiff driver. The motion was denied, and plaintiff appealed.

The issue on appeal was whether the substitution could be made after the statute of limitations had run. The court noted that it would have no trouble permitting the substitution if the original complaint sounded as a claim for a passenger. Changing the caption would be nothing more than correcting an obvious mistake in form. However, the issue turned on whether the mistake was a merely a misnomer in the description of a party or a substitution or entire change of parties. In determining whether the amendment will relate back to avoid the statute of limitations, the focus is not on whether the parties substantively changed but on whether the nature of the action is substantially changed (*4 Cal. App. 4th 1468, 1470*). The court cited *Bartalo v. Superior Court (1975) 51 Cal. App. 3d 526, 124 Cal. Rptr. 370* (discussed in *§ 16.53[4][b]*) for the proposition that where an additional party plaintiff joining in a suit seeks to enforce an independent right, the amended pleading does not relate back to allow the substitution. The court found the situation in this case to be identical to *Bartalo* except that sisters were involved rather than husband and wife and affirmed denial of the motion (*4 Cal. App. 4th 1468, 1471-1472*).

[c] Different Instrumentality

The original complaint in ***Coronet Manufacturing Co. v. Superior Court*** *(1979) 90 Cal. App. 3d 342, 153 Cal. Rptr. 366* , an action for wrongful death, alleged that plaintiffs' daughter was electrocuted while using a defective electric hair dryer manufactured by the named defendant. Several "Does" were included as defendants, and the complaint alleged that all defendants supplied parts for the hair dryer. After the statute of limitations had run, plaintiffs filed their second amended complaint substituting another manufacturer for one of the "Does," dropping the original named defendant from the suit, and adding an allegation that the defendants manufactured and supplied component parts for a table lamp. The court overruled defendant's demurrer to the second amended complaint, and defendant petitioned for a writ of mandate to compel the trial court to enter an order sustaining the demurrer.

The issue on appeal was whether the amended complaint related back to the filing of the original complaint to avoid the bar of the statute of limitations. The court of appeal stated the rule to be that an amended complaint will relate back if it rests on the same general set of facts as the original complaint and refers to the same action and the same injuries referred to in the original complaint, even though it may rest on a different legal theory or state a different cause of

action (*90 Cal. App. 3d 342, 345*). Reviewing prior California law, the court reasoned that amendments relate back when they are based on the same accident without change in the offending instrumentality, and that the amendment to change the instrumentality in question from a hair dryer to a lamp was distinguishable (*90 Cal. App. 3d 342, 345-347*). While both complaints related to death by electrocution at the same location, the original complaint involved one accident with one instrumentality, a hair dryer, and the second amended complaint related another accident involving a different instrumentality, a lamp (*90 Cal. App. 3d 342, 347*). Concluding that the second amended complaint did not relate back, the court ordered the writ of mandate to issue, but also ordered that plaintiffs be given the opportunity to further amend because, if they could plead that the hair dryer was connected to the lamp switch and socket, the complaints would relate to the same accident, use of the hair dryer, and the second amended complaint would relate back (*90 Cal. App. 3d 342, 347-348*).

[4] Additional Authorities

[a] No Amendment to State Entirely New Cause of Action Barred by Statute of Limitations

In *County of Santa Clara v. Atlantic Richfield Co. (2006) 137 Cal. App. 4th 292, 40 Cal. Rptr. 3d 313* , a group of governmental entities in a class action suit against lead manufacturers sought leave to file an amended complaint adding a cause of action for continuing trespass. The trial court denied leave on the ground that the proposed allegations did not state a cause of action. The court of appeal affirmed, holding that there was no cause of action for trespass in this instance because the pleadings clearly established that the lead was placed on plaintiffs' property either by the plaintiffs or with their consent. Where the owner has consented to the entry of the product onto the land there can be no cause of action for trespass. The court of appeal held that the trial court did not abuse its discretion in denying leave to file an amended pleading adding the proposed trespass cause of action because the proposed allegations did not, in fact, state a trespass cause of action (*137 Cal. App. 4th 292, 314-316)* .

In *Boyle v. City of Redondo Beach (1999) 70 Cal. App. 4th 1109, 83 Cal. Rptr. 2d 164* , the appellate court affirmed a judgment in respect to the trial court having sustained demurrers without leave to amend as to plaintiff's first amended complaint with regard to alleged violations of the open meeting requirements of the Brown Act (*Gov. Code § 54950 et seq.*) concerning a particular meeting because the appropriate limitations period had expired. In reaching this conclusion, the court noted that an amended complaint relates back to the original complaint and avoids the statute of limitations as a bar only if it (1) rests on the same set of general facts as the original complaint, and (2) refers to the same accident and same injuries as the original complaint (*70 Cal. App. 4th 1109, 1119*). At the same time, the court reversed the judgment as to the award of attorney fees and remanded to the trial court to make appropriate findings.

In *Andalon v. Superior Court (1984) 162 Cal. App. 3d 600, 208 Cal. Rptr. 899* , plaintiff sought to amend her complaint for negligent infliction of emotional distress because of the failure to detect or properly apprise her of the possibility of a genetic defect in her unborn child to include a cause of action for negligent infliction of bodily injury by medical treatment. The court of appeal held the proposed amendment to be barred by statute of limitations, since it found the general set of facts underlying the cause of action in the original complaint to be distinct from those underlying the proposed amendment, and the instrumentality of causation of bodily injury to be different in each cause of action (*162 Cal. App. 3d 600, 616*).

The first amended complaint in *Warden v. Kahn (1979) 99 Cal. App. 3d 805, 160 Cal. Rptr. 471* , alleged violation of the Invasion of Privacy Act of 1967 [*Penal Code § 630 et seq.*] based on the secret recording of plaintiff's telephone conversations by one defendant who shared the recordings with the other defendants so that one of the defendants could present fraudulent claims against plaintiff and extort settlements and monetary concessions from plaintiff. After a demurrer to that complaint was sustained with leave to amend and one of the defendants filed a motion for summary judgment and judgment on the pleadings, plaintiff filed a second amended complaint alleging extensive factual matters unrelated to the first amended complaint, and asserting many additional theories and causes of action based on conspiracy, including fraud, deceit, defamation, malicious prosecution, intentional interference with contracts and

business relations, and intentional infliction of severe emotional distress. The allegations regarding the recorded telephone conversations were alleged in the second amended complaint as one of the many overt acts which ripened into the conspiracy. The trial court granted a motion to strike the second amended complaint made on the ground that, except for the allegations concerning the recordings, the complaint set up wholly different causes of action. Plaintiff appealed from the ensuing judgment of dismissal.

The court of appeal affirmed the dismissal of the second amended complaint. The court noted that while the first amended complaint was founded solely on violation of the Invasion of Privacy Act, the second amended complaint alleged entirely new causes of action, alleging violation of an entirely different primary right, and was based on an entirely different set of facts (*99 Cal. App. 3d 805, 809-810*). The court, acknowledging the general rule allowing great liberality in the amendment of pleadings, held that the law is settled that a party may not file an amended complaint which states such an entirely new and different cause of action (*99 Cal. App. 3d 805, 810*).

Coronet Manufacturing Co. v. Superior Court (1979) 90 Cal. App. 3d 342, 153 Cal. Rptr. 366 , is discussed in *§ 16.53[3][c]*.

In *Youngblood v. Los Angeles (1958) 160 Cal. App. 2d 481, 325 P.2d 587* , plaintiff brought suit against the city and the county flood control district complaining of removal of a tree during a storm which allowed flood waters to erode his land. The trial court granted a nonsuit after denying plaintiff's motion to amend the complaint to conform to proof. The court of appeal, after reversing and holding that the amendment should have been allowed as to the flood control district [*see* discussion in *§ 16.37[4][a]*], affirmed as to the city. The court held that the proposed amendment, basing the city's liability for the erosion damage on a statutory obligation relating to the construction and maintenance of a defective and dangerous bridge, when the original complaint had charged the city with, if anything, violation of a common law obligation related to the tree removal, was not merely a change in theory, but constituted the introduction of an entirely different and new cause of action because it was based on a new and different obligation. Thus, the trial court had not erred in denying amendment of the complaint as to the city (*160 Cal. App. 2d 481, 491-492*).

In *Taliaferro v. Industrial Ind. Co. (1955) 131 Cal. App. 2d 120, 280 P.2d 114* , plaintiff's original complaint sought to enjoin defendant from commencing a threatened action at law to collect a premium charge which defendant claimed to be due and owing. After a demurrer to this complaint was sustained, plaintiff filed an amended complaint containing the same allegations and additionally alleging that defendant had overcharged plaintiff for seven years. A demurrer to the amended complaint was sustained without leave to amend and plaintiff appealed, contending that it was error to sustain the demurrer without leave to amend because the complaint could be amended to state a cause of action. The court rejected this contention in regard to plaintiff's attempt to enjoin defendant's threatened suit (*131 Cal. App. 2d 120, 122*). The court then went on to reject the argument that the allegations of past overcharges made the action necessary to prevent a multiplicity of actions, holding that the allegations of money due for past overcharges were completely foreign to the cause of action attempted to be stated in the original complaint and that a trial court does not abuse its discretion in denying leave to amend a complaint to state an entirely different cause of action from that originally pleaded (*131 Cal. App. 2d 120, 122-123*).

Plaintiffs in Lewis & Queen v. S. Edmondson & Sons (1952) 113 Cal. App. 2d 705, 248 P.2d 973 , recovered judgment against defendants on a labor and material bond, and one of defendants' contentions on appeal was that the trial court had abused its discretion in denying defendants' motion to file an amendment to their answer to assert a counterclaim on the day the case was called for trial. The counterclaim was an alleged claim on an open book account for work, labor, services, and rental rendered and delivered by defendants to plaintiffs. The court of appeal held that the trial court had not abused its discretion because, in part, a party should not be permitted an amendment that raises a new cause of action or a new defense, and defendants had attempted to inject new issues into the action at the time of trial (*113 Cal. App. 2d 705, 710-711*).

[b] New Party Enforcing Independent Right

Bartalo v. Superior Court (1975) 51 Cal. App. 3d 526, 124 Cal. Rptr. 370 , was an action for personal injury resulting from an accident. After suit was filed and over a year after the accident, the California Supreme Court first recognized a cause of action for loss of consortium. Plaintiff and her husband thereafter successfully moved to file an amended complaint adding the husband as plaintiff with a cause of action for loss of consortium. Defendant's demurrer to the new cause of action in the amended complaint was denied, and defendant petitioned for a writ of mandate to compel the trial court to sustain the demurrer.

The court of appeal reversed. The court applied *Austin v. Massachusetts Bonding & Ins. Co. (1961) 56 Cal. 2d 596, 600-601, 15 Cal. Rptr. 817, 364 P.2d 681* (discussed in *§ 16.37[4][a]*), as to when an amended complaint will relate back to the filing of the original complaint to avoid the statute of limitations. The court reasoned that the husband's loss of consortium was a wholly different legal liability or obligation from his wife's claim for personal injuries because the elements of the loss were personal to him (*51 Cal. App. 3d 526, 533*). The court stated the general rule that if an additional plaintiff joins in a suit to enforce an independent right after the statute of limitations has run, the complaint does not relate back (*51 Cal. App. 3d 526, 533*). The court also distinguished cases such as *Cal. Gas. Retailers v. Regal Petroleum Corp. (1958) 50 Cal. 2d 844, 330 P.2d 778* , and *Klopstock v. Superior Court (1941) 17 Cal. 2d 13, 108 P.2d 906* (discussed in *§ 16.42[3][b]*), which allow substitution of a different plaintiff to correct a technical defect in plaintiff's status, to join a necessary party, or to substitute the real party in interest for a nominal plaintiff. The court held that an amendment to add a new and additional party seeking damages not previously pleaded on a different obligation after the statue of limitations had run did not fall into any of these categories (*51 Cal. App. 3d 526, 534*).

In *Dominguez v. Alhambra (1981) 118 Cal. App. 3d 237, 173 Cal. Rptr. 345* , plaintiff, individually and as guardian ad litem of her children, sued for the wrongful death of her husband, who died as a result of injuries sustained in a vehicle accident. After the statute of limitations had run, plaintiff moved to amend the complaint to assert a claim, as administratrix of decedent's estate, for a survival cause of action for damages incurred by decedent prior to his death. The defendants included governmental entities and private parties. The trial court denied plaintiff's motion to amend as to the governmental entities, and after allowing the amended pleading to be filed as to the private parties, sustained their demurrer to it on the ground that it was barred by the statute of limitations. Plaintiff appealed from the adverse orders.

The court of appeal ruled that the order denying the motion to amend operated as a final judgment against plaintiff, as administratrix, in regard to the governmental entities. As to the private parties, the court ordered the trial court to enter, nunc pro tunc as of the date of the order sustaining the demurrer, a judgment on the order sustaining the demurrer, and proceeded to consider the matter as an appeal from that judgment (*118 Cal. App. 3d 237, 241-242*). The court found that the amended complaint was not timely filed with regard to either category of defendants and held that the amendment did not relate back to the date of filing the original complaint so as to avoid the statute of limitations. The court distinguished prior California cases that allow amended complaints to relate back when the amendment merely identifies a defendant previously designated as a Doe defendant, or makes a technical change in the capacity in which the plaintiff sues on the same cause of action, or adds a new cause of action asserted by the same plaintiff on the same general set of facts. The court found that the survival cause of action, which could have been brought by decedent in his lifetime, was wholly different from the decedent's heir's cause of action for wrongful death. The court thus held that the amended complaint sought to enforce an independent right of an independent entity, the decedent's estate, and that it could not relate back to the filing of the heir's action for wrongful death. The court therefore affirmed the order denying plaintiff's motion to amend and the judgment entered on the demurrer (*118 Cal. App. 3d 237, 242-245*).

Plaintiff in Phoenix of Hartford Ins. Companies v. Colony Kitchens (1976) 57 Cal. App. 3d 140, 128 Cal. Rptr. 893 , sued for damages arising out of an automobile accident. Defendant asserted the bar of the statute of limitations as to the claim for personal injuries, and defendant's motion for judgment on the pleadings was granted with leave to amend. An amended complaint was filed adding plaintiff's insurer as a party plaintiff "by and through its assured, [the original plaintiff]." The insurer sought recovery of the amount it had paid plaintiff for his injuries, based on a statutory right of subrogation applicable to insurers that pay on uninsured motorist claims and that provided a longer period of

limitations. Defendant appealed from an adverse judgment on the amended complaint.

The court of appeal reversed as to the insurer holding that the amended complaint did not relate back to the date of filing the original complaint under the same general set of facts rule stated in *Grudt v. City of Los Angeles (1970) 2 Cal. 3d 575, 86 Cal. Rptr. 465, 468 P.2d 825* , and *Austin v. Massachusetts Bonding & Insurance Co. (1961) 56 Cal. 2d 596, 15 Cal. Rptr. 817, 364 P.2d 681* . The court held that the recovery sought by the original plaintiff was based on a set of facts supporting an action in tort under common law, which accrued as a cause of action when plaintiff was injured by defendant's negligence, while the recovery sought by the amended complaint was based on a set of facts supporting an action on subrogated rights provided by a statute and accruing only when the insurer paid its insured under the uninsured motorist provision in its policy (*57 Cal. App. 3d 140, 145-146*). The court further held that the doctrine of relation-back does not apply when the cause of action in the complaint is in favor of one plaintiff and the cause of action in the amended complaint is in favor of another plaintiff, referring to *Dubbers v. Goux (1875) 51 Cal. 153, 154* , discussed in *§ 16.53[3][b]*.

California Points & Authorities

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Volume 1 Chapters 1-19 WRITING LEGAL MEMORANDA AND BRIEFS; ABATEMENT AND SURVIVAL OF ACTIONS---to---AMENDED AND SUPPLEMENTAL PLEADINGS
CHAPTER 16 AMENDED AND SUPPLEMENTAL PLEADINGS
PART II. FORMS
A. Amended Pleadings

1-16 California Points & Authorities § 16.54

§ 16.54 Opposing Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Complaint--Addition of Party Defendant After Statute of Limitations Has Run

[1] FORM Opposing Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Complaint--Addition of Party Defendant After Statute of Limitations Has Run

[*The following should be combined with a general form of memorandum in opposition to a motion for leave to file an amended pleading or an amendment to a pleading (see § 16.45) or to amend to conform to proof (see § 16.46).*]

THE COURT SHOULD NOT ALLOW AMENDMENT OF THE COMPLAINT BECAUSE THE PROPOSED AMENDMENT WOULD ADD A NEW DEFENDANT TO THE SUIT AFTER THE STATUTE OF LIMITATIONS BARRED THE CAUSE OF ACTION.

A. No Amendment to Add New Party After Limitations Period Has Run. After the statute of limitations has run, amendment should not be permitted to add a party who, up to the time of the proposed amendment, was neither a named nor a fictitiously designated party to the proceeding (*Ingram v. Superior Court (1979) 98 Cal. App. 3d 483, 492, 159 Cal. Rptr. 557*).

[*Optional*] **B. Amendment to Correct Characterization of Party's Capacity.** Even though an amendment may be allowed to change the characterization of the defendant from an individual, partnership, or other association after the statute of limitations has run if there is merely a defect in the characterization, amendment should not be allowed if it constitutes a substitution or entire change of parties (*Thompson v. Palmer Corp. (1956) 138 Cal. App. 2d 387, 390, 291 P.2d 995*).

[*Optional*] **C. Amendment to Deficient Initial Complaint For Purposes of Relation Back Doctrine.** Amendment of a complaint for purposes of invoking the relation back doctrine when the statute of limitations has passed is impermissible if the initial complaint's pleadings are so deficient that the adversary is not informed of the factual basis of the claim (*Davaloo v. State Farm Ins. Co. (2005) 135 Cal. App. 4th 409, 419, 37 Cal. Rptr. 3d 528*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion for leave to file an amended complaint or an amendment to a complaint that would add a new party defendant after the statute of limitations had run on the cause of action. It does not provide a complete memorandum but is designed to be combined with one of the general forms of memoranda of points and authorities opposing amendment of pleadings set out in *§§ 16.45* and *16.46*, as well as with forms relating to any other grounds that may exist for denying permission to amend the pleading [*see §§ 16.47 -16.53*].

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

This form may be used in opposition to a memorandum in support of a motion for leave to amend a pleading pursuant to *Code Civ. Proc. § 473*, or *576*, or both sections, such as the one set out in *§ 16.40*.

[i] Related Uses

With appropriate modifications, this points and authorities may be used to oppose a motion for leave to file an amended cross complaint or an amendment to a cross complaint.

[b] Related Points and Authorities

For a memorandum opposing a motion to bring in a new party on the ground that the person sought to be joined is not required to be joined as a party, see Ch. 168, *Parties* .

[3] Discussion of Authorities

[a] No Amendment to Add New Party After Limitations Period Has Run

Plaintiff in Ingram v. Superior Court (1979) 98 Cal. App. 3d 483, 159 Cal. Rptr. 557 , brought suit for personal injuries he sustained in an automobile accident. The named defendants were the owner of the truck in which plaintiff was riding and the owner and driver of the car with which it collided. The complaint did not name the driver of the truck or his estate as a defendant, but did allege his negligence in regard to the accident. On learning that the insurance coverage of the truck owner was limited in cases of derivative liability, plaintiff acted to amend the complaint to bring in the truck driver's estate as a party. The court, which had allowed the amendment after the statute of limitations had run, subsequently granted a motion to strike the amendment, and plaintiff petitioned for a writ of mandate.

The court of appeal denied the writ. Citing *Stephens v. Berry (1967) 249 Cal. App. 2d 474, 57 Cal. Rptr. 505* , discussed in *§ 16.54[4][a]* the court applied the straightforward rule that amendment after the statute of limitations has run will not be permitted to add a party who, up to the time of the proposed amendment, was neither a named nor fictitiously designated party to the proceeding. The court noted that the complaint and plaintiff's pretrial statement clearly raised the issue of the truck driver's negligence in order to establish the truck owner's liability and not the driver's liability. Thus, the amendment, sought after plaintiff learned of the limitation on the owner's insurance coverage, was not one calculated to correct a clearly defined or obvious error of omission, as would be the case of a misnomer of a defendant (*249 Cal. App. 2d 474, 492*).

[b] Amendment to Correct Characterization of Party's Capacity

Thompson v. Palmer Corp. (1956) 138 Cal. App. 2d 387, 291 P.2d 995 , was an action for personal injuries brought against, inter alia, five individuals, doing business as Bob'N Del. After the statute of limitations had run, the court

granted plaintiffs' motion for leave to file an amended complaint to allege the corporate existence and capacity of Bob'N Del and to allege the relationship of the individual defendants to the corporation. The corporation, however, objected to the introduction of any evidence against it on the ground that the statute of limitations barred any action against it, and the court sustained the objection and dismissed the action against the corporation. Plaintiffs appealed.

Affirming, the court of appeal rejected plaintiffs' contention that the amendment merely corrected a misnomer in the name of a party to the original complaint. The court stated the general rule providing that amendment is to be allowed to change the description or characterization of a party from an individual, partnership, or other association after the statute of limitations has run, if the misdescription or mischaracterization is merely a misnomer or defect in the description or characterization. Amendment is not to be allowed, however, if it constitutes a substitution or entire change of parties (*138 Cal. App. 2d 387, 390*). The court found that it was controlled by the reasoning in *Craig v. San Fernando Furniture Co. (1928) 89 Cal. App. 167, 264 P 784* , which addressed the question of whether an amendment to change a defendant from a corporation to partnership of the same name and to designate the individual partners as defendants constituted a change in parties defendant (*138 Cal. App. 2d 387, 391-392*). The *Thompson* court noted that *Craig* held that changing the designation of the business from a corporation to a partnership did not constitute a change in the defendant entity, but that since an association of persons transacting business under a common name is a distinct entity from the individual persons who are its members, the amendment to add the individual partners as defendants constituted an attempt to add new parties that was barred by the statute of limitations (*138 Cal. App. 2d 387, 392-394*). Because the original complaint in *Thompson* had not named "Bob'N Del" as a defendant, but instead had correctly named individual defendants with the merely descriptive words "doing business as Bob'N Del," the court held that it was a case of attempting to add a new party after the statute of limitations had run. The court noted, however, that a different question would have been presented if Bob'N Del had been named as a defendant in the original complaint, but incorrectly describe as a partnership (*138 Cal. App. 2d 387, 396*).

A more liberal view toward allowing amendment to correct a misnomer which results in bringing in a new party may be taken if the case involves related entities with similar names [*see* *Mayberry v. Coca Cola Bottling Co. of Sacramento (1966) 244 Cal. App. 2d 350, 53 Cal. Rptr. 317* (discussed in *§ 16.40[3][c*]).

[c] Amendment to Deficient Initial Complaint For Purposes of Relation Back Doctrine

In ***Davaloo v. State Farm Ins. Co.*** *(2005) 135 Cal. App. 4th 409, 37 Cal. Rptr. 3d 528* , the defendant insurance company demurred to the plaintiff's initial complaint seeking recovery of damages caused by the Northridge earthquake. The initial complaint was filed during the special time period under *Code Civ. Proc. § 340.9* which revived certain time-barred claims for policy benefits against insurers for losses caused by the January 17, 1994 Northridge earthquake and provides a cause of action on such a claim may be commenced within one year of the statute's January 1, 2001 effective date. The trial court sustained the demurrer with leave to amend. The plaintiff subsequently filed an amended complaint after the expiration of the *Code Civ. Proc. § 340.9* time period. The defendant subsequently demurred on the grounds the amended complaint was essentially the same complaint with the caption changed, and that both complaints did not meet the factual pleading requirements of *Code Civ. Proc. § 425.10(a)(1)*. The trial court sustained the demurrer with leave to amend, concluding the original complaint was so devoid of facts that it amounted to a sham complaint. Plaintiff appealed.

The court of appeal upheld the order sustaining the demurrer with leave to amend. The court held the requirement that the complaint allege ultimate facts forming the basis for the plaintiff's cause of action is central to the relation-back doctrine and the determination whether an amended complaint should be deemed filed as of the date of the original pleading. An amended complaint relates back to a timely filed original complaint, and thus avoids the bar of the statute of limitations, only if it rests on the same general set of facts and refers to the same "offending instrumentalities," accident and injuries as the original complaint (*135 Cal. App. 4th 409, 415*). The relation-back doctrine, therefore, requires courts to compare the factual allegations in the original and amended complaints (*135 Cal. App. 4th 409, 416*). "Just as a plaintiff who changes the essential facts upon which recovery is sought is not entitled to the benefits of the

relation-back doctrine, so too a plaintiff who files a complaint containing no operative facts at all cannot subsequently amend the pleading to allege facts and a theory of recovery for the first time and claim the amended complaint should be deemed filed as of the date of the original, wholly defective complaint: Going from nothing to something is as much at odds with the rationale for allowing an amended pleading to relate back to the filing of the original documents as changing from one set of facts to a different set" (*135 Cal. App. 4th 409, 416*). Other than in the caption, the original complaints do not name either of the plaintiffs or the defendant; do not identify the property at issue by address or otherwise, merely averring it is within California (not even Southern California); and do not provide the number of the applicable insurance policy, let alone describe its terms. The complaints contain a number of generic allegations describing the full range of improper actions any insurer theoretically could have taken in response to a claim for policy benefits for damages caused by the Northridge earthquake but give no specifics of any kind as to a dispute between the plaintiff's) specified in the caption and State Farm. Under the most liberal construction of the pleadings, the body of each of the original complaints alleged nothing more than the Northridge earthquake caused harm to a resident or residents of Los Angeles County. Such an allegation falls far short of apprising the defendant insurer of the factual basis of the claim (*135 Cal. App. 4th 409, 417*).

[4] Additional Authorities

[a] No Amendment to Add New Party After Limitations Period Has Run

Stephens v. Berry (1967) 249 Cal. App. 2d 474, 57 Cal. Rptr. 505 , involved an action for damages arising out of a three-car accident. Plaintiffs' vehicle was struck in the rear by a Ford Falcon driven by one Berry. The impact propelled plaintiff's car into a DeSoto in front of them which was driven by one Reynolds. Subsequently, plaintiffs negotiated unsuccessfully with Berry's insurer for a settlement. When the negotiations proved fruitless, plaintiffs brought suit, but named Reynolds as defendant alleging that he struck them from the rear while driving his DeSoto. Over four months later, plaintiffs amended the complaint to allege that Reynolds rearended them with a Ford Falcon. Plaintiffs first served Berry as Doe I, after the statute of limitations had run. Berry moved to strike the complaint as to himself. Plaintiffs then served Berry as Doe II and as the person sued as Reynolds, and moved to amend the complaint to substitute Berry for Reynolds as defendant. The court granted Berry's motion to strike and denied plaintiff's motion to amend. Plaintiffs appealed.

The court of appeal affirmed, rejecting plaintiffs' contention that they merely misnamed the proper defendant and that the court could correct this clerical error. The court recognized the power of courts to allow amendment to correct clerical error when misnomer is evident, but stressed the need to distinguish corrections of honest mistake in naming a party from the question of whether or not a claimed misnomer is a guise for adding a party to the suit for the first time (*249 Cal. App. 2d 474, 478*). The court followed the general rule that a party cannot be added to a suit by amendment after the statute of limitations has run because even if plaintiffs always had intended to sue Berry, the case was not one of misnomer, but of failure to name the right party as defendant, which falls within the general rule (*249 Cal. App. 2d 474, 478-479*).

Plaintiff in *Chitwood v. Los Angeles County (1971) 14 Cal. App. 3d 522, 92 Cal. Rptr. 441* , brought suit for damages to plaintiff's property caused by construction of a pipe, on property maintained by defendant, which changed the natural flow of rainfall. After the statute of limitations had run, plaintiff learned that the property was owned by the Los Angeles County Flood Control District rather than by defendant, and sought to amend her complaint to substitute the Flood Control District for the defendant named in the complaint. Plaintiff's motion was denied, and summary judgment was granted to defendant. On plaintiff's appeal, the court of appeal held that amendment is not permitted after the statute of limitations has run to drop one party and add a new party who up to the time of amendment was not a party to the proceedings, citing *Stephens v. Berry (1967) 249 Cal. App. 2d 474, 57 Cal. Rptr. 505* . The court added that the fact that the wrong party was named by honest mistake does not avoid that rule.

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A. Amended Pleadings

1-16 California Points & Authorities § 16.55

§ 16.55 Opposing Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Answer--Inequitable Defense

[1] FORM Opposing Motion for Leave to File Amended Pleading or Amendment to Pleading [Code Civ. Proc. §§ 473(a), 576]--Answer--Inequitable Defense

[*The following should be combined with a general form of memorandum of points and authorities in opposition to a motion for leave to file an amended pleading or an amendment to a pleading (see § 16.45).*]

THE COURT SHOULD NOT ALLOW THE PROPOSED AMENDMENT OF THE ANSWER BECAUSE IT WOULD ASSERT A DEFENSE WHICH IS INEQUITABLE UNDER THE CIRCUMSTANCES OF THE CASE.

Inequitable Defense. Amendment should not be allowed to assert a defense which is inequitable under the circumstances of the case. It is not enough that the proposed defense be a legal defense, it must be an equitable defense as well (*Bank of Woodland v. Heron (1898) 122 Cal. 107, 109, 54 P 537*)

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose a motion for leave to file an amended answer or an amendment to an answer when it would be inequitable to allow assertion of the new defense contained in the amendment. It does not provide a complete memorandum but is designed to be combined with the general form of memorandum opposing amendment of pleadings set out in *§ 16.45*, as well as with forms relating to any other grounds that may exist for denying permission to amend the answer [*see §§ 16.47 -16.51*].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

This form may be used in opposition to a memorandum in support of a motion for leave to amend an answer to state a new defense pursuant to *Code Civ. Proc. § 473*, or *576*, or both sections, such as the one set out in *§ 16.44*.

[3] Discussion of Authorities

[a] Inequitable Defense

Bank of Woodland v. Heron *(1898) 122 Cal. 107, 54 P 537* , is discussed in *§ 16.45[3][a]*. In *Bank of Woodland*, the Supreme Court stated that a proposed new defense to be introduced by amendment of the answer must be equitable as well as legal. The Court noted that in the case before it, defendant wife had sought to assert a homestead on property she had received by gift from her husband and thereby to impair plaintiff bank's security interest in the property. The security interest was based on a mortgage executed by defendant husband prior to transfer of the land to defendant wife, and she had not filed her homestead claim until learning, during the course of the trial, that the mortgage had been improperly recorded. The Court held that the proposed defense was highly inequitable under the circumstances of the case, and stated that it would have been more inclined to hold that there had been an abuse of discretion if the trial court had allowed the amendment (*122 Cal. 107, 109*).

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1-16 California Points & Authorities §§ 16.56-16.69

[Reserved]

§§ 16.56[Reserved]

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1-16 California Points & Authorities § 16.70

§ 16.70 Supporting Motion for Leave to File Supplemental Complaint [Code Civ. Proc. § 464(a)]--General Form

[1] FORM Supporting Motion for Leave to File Supplemental Complaint [Code Civ. Proc. § 464(a)]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	memorandum IN SUPPORT OF MOTION FOR
vs.	)	LEAVE TO FILE SUPPLEMENTAL COMPLAINT
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

THE COURT SHOULD LIBERALLY EXERCISE ITS DISCRETION TO ALLOW A SUPPLEMENTAL COMPLAINT ALLEGING MATERIAL FACTS OCCURRING AFTER THE ORIGINAL COMPLAINT WAS FILED.

A. Statutory Authority. The plaintiff may be allowed, on motion, to make a supplemental complaint alleging facts material to the case occurring after the former complaint (*Code Civ. Proc. § 464(a)*).

B. Discretion of Court. Permission to file a supplemental complaint is in the discretion of the trial court, provided it is

in furtherance of and consistent with the original complaint and does not state a new or independent cause of action (*Stephani v. Abbott (1934) 137 Cal. App. 510, 516, 30 P.2d 1033*).

C. Liberal Allowance of Supplemental Pleadings. Trial courts should exercise liberality in permitting the filing of supplemental pleadings when the alleged after-occurring facts are pertinent (*People ex rel. Dep't of Public Works v. Douglas (1971) 15 Cal. App. 3d 814, 820, 93 Cal. Rptr. 644*). The policy of law is to generally permit the filing of supplemental pleadings (*Louie Queriolo Trucking, Inc. v. Superior Court (1967) 252 Cal. App. 2d 194, 197, 60 Cal. Rptr. 389*).

[*Add, where appropriate, supporting points and authorities relating to any specific grounds for allowing the supplemental complaint to be filed* (*see §§ 16.71, 16.72*)].

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be used in support of a motion for leave to file a supplemental complaint. It contains only general points and is designed to be used as a framework for a supporting memorandum. More specific points and authorities in support of filing a supplemental complaint on various grounds are set out in *§§ 16.71* and *16.72* and should be combined with this form as relevant to the case.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Opposing Points and Authorities

The points and authorities set out in *§§ 16.76 -16.79* may be used in an appropriate case to oppose a motion for leave to file a supplemental pleading supported by this memorandum.

[3] Discussion of Authorities

[a] Discretion of Court

Plaintiff in ***Stephani v. Abbott*** *(1934) 137 Cal. App. 510, 30 P.2d 1033* , brought suit to enjoin defendants from diverting waste or irrigation water over plaintiff's land and for damages. The trial court allowed a supplemental complaint to be filed over defendants' objection. The supplemental complaint alleged nine items of damage caused by flooding on later dates, sought an injunction, and set up a plea in bar based on a prior judgment. Defendants appealed from a judgment in plaintiff's favor.

The court of appeal affirmed, holding that the trial court had not abused its discretion in allowing the supplemental

complaint to be filed. The court stated that permission to file a supplemental complaint is in the discretion of the trial court, provided it is in furtherance of and consistent with the original complaint and is not a new or independent cause of action. The supplemental complaint was properly allowed because it recited further instances of trespasses similar to those originally alleged, so that both complaints showed invasion of plaintiff's right to the use of her property without interference from defendants and damages incidental to that invasion (*137 Cal. App. 510, 516*).

[b] Liberal Allowance of Supplemental Pleadings

In ***People ex rel. Dep't of Public Works v. Douglas*** *(1971) 15 Cal. App. 3d 814, 93 Cal. Rptr. 644* , the state brought suit to condemn defendants' land for freeway purposes, and defendants answered claiming damages. About eight months after the answer was filed and four months before commencement of trial, the court denied defendants' motion for leave to file a supplemental answer. The supplemental answer alleged a settlement of the action and repudiation of the settlement by the state, all occurring after the original answer was filed. After judgment was entered on a jury verdict awarding defendants less compensation than had been provided for in the settlement, defendants appealed.

In reversing and holding that the trial court had committed prejudicial error in denying leave to file the supplemental answer, the court of appeal stated that a trial court should exercise liberality in permitting the filing of supplemental pleadings when the alleged after-occurring facts are pertinent. The court found the prejudicial nature of the error to be apparent since the ruling prevented defendants from first litigating an issue that might have been decisive, thereby obviating a long and costly trial relating to the value of the land (*15 Cal. App. 3d 814, 820*).

Louie Queriolo Trucking, Inc. v. Superior Court *(1967) 252 Cal. App. 2d 194, 60 Cal. Rptr. 389* , arose out of an accident in which a truck driven by an employee of plaintiff fell into an excavation made by defendant in a highway. In its complaint for damages, plaintiff alleged that defendant was negligent in regard to the excavation and that plaintiff's employee was not contributorily negligent, while defendant denied negligence on its part and alleged that plaintiff's employee was contributorily negligent. Plaintiff moved to file a supplemental complaint alleging that the employee had recovered a judgment against defendant for injuries sustained in the accident in a suit in which the same issues were presented. After the court denied the motion, plaintiff sought a writ of mandate.

The court of appeal ordered the writ of mandate to issue (*252 Cal. App. 2d 194, 200*). Because a court may deny the right to file a supplemental pleading if the new matter in it fails, as a matter of law, to constitute a defense, the court assumed that the trial court had denied the motion, which would have presented a defense to the claim of contributory negligence, on the ground that plaintiff was not entitled to assert the prior judgment as a collateral estoppel (*252 Cal. App. 2d 194, 198*).

The court held, however, that plaintiff would be entitled to urge the alleged judgment as a collateral estoppel (*252 Cal. App. 2d 194, 198-200*). Thus, the court held that the trial court had abused its discretion in denying leave to file the supplemental complaint, stating that the attitude of California trial courts is that there should be great liberality in permitting adjustments to pleadings, if timely requested, and that the law's policy is generally to permit the filing of supplemental pleadings. The court cited *Code Civ. Proc. § 464* and *Blanchard v. Superior Court (1935) 5 Cal. App. 2d 115, 42 P.2d 689* (*252 Cal. App. 2d 194, 197, 200*).

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1-16 California Points & Authorities § 16.71

§ 16.71 Supporting Motion for Leave to File Supplemental Complaint [Code Civ. Proc. § 464(a)]--To Recover Additional Relief Based on Same Issues

[1] FORM Supporting Motion for Leave to File Supplemental Complaint [Code Civ. Proc. § 464(a)]--To Recover Additional Relief Based on Same Issues

[*The following should be combined with a general form of points and authorities in support of a motion for leave to file a supplemental complaint (see § 16.70).*]

THE COURT SHOULD ALLOW FILING OF THE SUPPLEMENTAL COMPLAINT TO CLAIM ADDITIONAL RELIEF BASED ON THE SAME ISSUES AS THE ORIGINAL COMPLAINT.

A. Additional Relief Based on Same Issues. When a party's right to additional relief depends on exactly the same issues as the right to recover under the original complaint, the court may allow a supplemental complaint to be filed to seek the additional relief even though, technically, new causes of action are added (*Perkins v. Benguet Consol. Mining Co. (1942) 55 Cal. App. 2d 720, 772-774, 132 P.2d 70* ; *Stephani v. Abbott (1934) 137 Cal. App. 510, 516, 30 P.2d 1033*).

[*Optional*] **B. Installments Accruing After Original Complaint.** When a plaintiff's claim is for payments due in installments under a contract, the court should allow a supplemental complaint to be filed to recover installments accruing after the original complaint was filed and up to the date of trial to avoid a multiplicity of actions (*Brix v. Peoples Mut. Life Ins. Co. (1935) 2 Cal. 2d 446, 455-457, 41 P.2d 537* ; *Strickler Co. v. Eisner (1935) 5 Cal. App. 2d 441, 443-444, 42 P.2d 1065*).

[*Optional*] **C. After Appeal.** A supplemental complaint may be allowed to claim payments accruing subsequent to the original complaint after remittitur from the appellate court (*Davis v. Stewart (1944) 67 Cal. App. 2d 415, 419, 154 P.2d 447*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for leave to file a supplemental complaint that seeks to recover additional relief based on the same issues as the original complaint. It includes specific optional paragraphs for use if the case involves an installment contract (Paragraph B) or a supplemental complaint sought to be filed after remittitur from an appellate court (Paragraph C). This form does not provide a complete memorandum but is designed to be combined with the general form of memorandum supporting a motion to file a supplemental complaint set out in *§ 16.70*, as well as with points and authorities relating to any other grounds that may exist for allowing the supplemental complaint to be filed [*see, e.g., § 16.72*].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Award of Additional Relief Without Supplemental Complaint

Damages may be awarded, in a judicial proceeding, for detriment resulting after commencement of the proceeding [*Civ. Code § 3283*]. Under *Civ. Code § 3283*, no supplemental pleading is required to recover such damages [*Hicks v. Drew (1897) 117 Cal. 305, 312, 49 P 189* ; *see also Minor v. Minor (1960) 184 Cal. App. 2d 118, 127, 7 Cal. Rptr. 455] Civ. Code § 3283*, however, simply refers to damages that may accrue in the future as the proximate result of the tort of breach of contract on which the action is based [*Brix v. Peoples Mut. Life Ins. Co. (1935) 2 Cal. 2d 446, 452, 41 P.2d 537* (discussed in *§ 16.71[3*][b])]. If new causes of action accrue after the complaint has been filed, but relief on the new causes of action depends on the same issues as are raised by the original complaint, a supplemental pleading may be filed [*Brix v. Peoples Mut. Life Ins. Co. (1935) 2 Cal. 2d 446, 456-457, 41 P.2d 537* (additional breaches of installment contract); *Stephani v. Abbott (1934) 137 Cal. App. 510, 516, 30 P.2d 1033* (additional trespasses, discussed in *§ 16.71[3*][a])]. Note, however, that although installments accruing after commencement of the suit may be the subject of a supplemental complaint under *Brix, above*, it may not be necessary to file a supplemental complaint to recover later accruing installments in an action at law where the original complaint sought to recover an installment debt in its entirety, so as to include installments that had not matured when suit was commenced, if no plea in abatement was filed based on the prematurity of the action as to the unaccrued installments. In such a case, judgment may be rendered for all installments that have matured at the time of judgment [*see Kelley v. Upshaw (1952) 39 Cal. 2d 179, 186-189, 246 P.2d 23* ; *Minor v. Minor (1960) 184 Cal. App. 2d 118, 127, 7 Cal. Rptr. 455* ; *Kazanteno v. Cal.-Western Etc. Ins. Co. (1955) 137 Cal. App. 2d 361, 377, 290 P.2d 332]* .

A supplemental complaint is not necessary in equity because of the principle that a court of equity will make a final disposition of litigation governed by the circumstances as shown to exist at the time judgment is rendered rather than at the inception of the litigation [*Kazanteno v. California-Western States Life Ins. Co. (1955) 137 Cal. App. 2d 361, 376, 290 P.2d 332]* .

[3] Discussion of Authorities

[a] Additional Relief Based on Same Issues

Perkins v. Benguet Consol. Mining Co. *(1942) 55 Cal. App. 2d 720, 132 P.2d 70* , involved a dispute over entitlement to dividends declared by defendant, a foreign business organization analogous to a corporation. The original complaint sought recovery of dividends declared in the seven years prior to the suit. Three supplemental complaints were filed seeking to recover dividends for additional years during the pendency of the suit. Defendant appealed from a judgment awarding plaintiff the dividends for the entire period covered by all the complaints.

Although reversing in part on other grounds, the court of appeal rejected defendant's contention that the supplemental complaints were erroneously allowed because they set up new causes of action as to each dividend sought. The court

acknowledged the general rule that a supplemental complaint may not set up a new cause of action, but stated that the rule is not of inevitable application. The court noted that *Code Civ. Proc. § 464* provides for setting up after-occurring facts that are material to the case. The court held that the "case" concerned plaintiff's ownership of the stock and her attendant right to dividends. The court concluded that the declaration of dividends after the filing of the original complaint was material to the case since plaintiff's right to dividends, whether declared before or after the original complaint, depended on the same issues. Thus, the court held that the trial court had not erred in allowing the supplemental complaints to be filed (*55 Cal. App. 2d 720, 773-774*).

Stephani v. Abbott *(1934) 137 Cal. App. 510, 30 P.2d 1033* , is discussed in *§ 16.70[3][a]*.

[b] Installments Accruing After Original Complaint

Plaintiff insured in ***Brix v. Peoples Mut. Life Ins. Co.*** *(1935) 2 Cal. 2d 446, 41 P.2d 537* , sued defendant insurer for unpaid disability benefits payable monthly under a contract of insurance. When suit was instituted only four payments were due to plaintiff, but at the conclusion of trial plaintiff moved for leave to file a supplemental complaint to conform to the evidence, which showed that by then 13 installments had accrued and were unpaid. The court never ruled on plaintiff's motion, but did enter judgment in plaintiff's favor awarding him the total sum of the 13 payments. Defendant appealed.

The Supreme Court affirmed, although modifying the judgment on other grounds. The Court held that the supplemental complaint could be filed nunc pro tunc as of the date of trial, and proceeded to consider the case as though it had been filed (*2 Cal. 2d 446, 455-456*). The Court then held that in an action to recover the amount due on an insurance policy, payable in installments, the plaintiff is entitled to recover all benefits that have accrued at the time the suit was filed and can file a supplemental complaint to include installments up to the date of filing the supplemental complaint (*2 Cal. 2d 446, 456*). The Court found that this rule was in harmony with the spirit of modern procedure which endeavors to provide for the settlement in a single action of all controversies between the parties growing out of the same subject matter (*2 Cal. 2d 446, 457*).

In ***Strickler Co. v. Eisner*** *(1935) 5 Cal. App. 2d 441, 42 P.2d 1065* , a suit to recover unpaid installments of rent, the court allowed plaintiff to file a supplemental complaint to claim unpaid installments that accrued after the original complaint was filed. On defendant's appeal from a judgment in plaintiff's favor, defendant urged that the trial court had erred in allowing the supplemental complaint because it presented new causes of action accruing after filing of the original complaint. The court of appeal held, relying on out-of-state law, that when an installment contract is involved, installments that accrue after suit is filed may be covered by a supplemental pleading. The court indicated that adoption of the rule would tend to save a multiplicity of actions (*5 Cal. App. 2d 441, 443-444*).

[c] After Appeal

Davis v. Stewart *(1944) 67 Cal. App. 2d 415, 154 P.2d 447* , involved, in part, an accounting for defendant's stewardship of real property. The case was appealed three times. After the remittitur went down from the second appeal, defendant surrendered possession of the premises. Plaintiff then filed a supplemental complaint for a final accounting of defendant's stewardship. The trial court made findings and entered an order favorable to plaintiff, and defendant prosecuted his third appeal. One of defendant's contentions was based on an argument that the prior judgment was interlocutory rather than final (*67 Cal. App. 2d 415, 418*). In rejecting this argument, the court of appeal reasoned that the account involved contracts that presented many severable issues, that the prior judgment was a final one, completely adjudicating all demands that were fully matured when the action was commenced, and that there was no way of knowing that there would be further issues to try until the supplemental complaint was filed. In the course of its reasoning, the court stated that after the remittitur went down, the plaintiff had the right to file the supplemental complaint presenting demands that accrued subsequent to the issues pleaded in the original complaint (*67 Cal. App. 2d 415, 419*).

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1-16 California Points & Authorities § 16.72

§ 16.72 Supporting Motion for Leave to File Supplemental Complaint [Code Civ. Proc. § 464(a)]--Seeking Different Relief

[1] FORM Supporting Motion for Leave to File Supplemental Complaint [Code Civ. Proc. § 464(a)]--Seeking Different Relief

[*The following should be combined with a general form of points and authorities in support of a motion for leave to file a supplemental complaint (see§ 16.70).*]

THE COURT SHOULD ALLOW THE SUPPLEMENTAL COMPLAINT TO BE FILED BECAUSE IT ONLY SEEKS DIFFERENT RELIEF.

Change in Relief Sought. The filing of a supplemental complaint may not be objected to on the ground that it requests different relief (*Jacob v. Lorenz (1893) 98 Cal. 332, 338, 33 P 119* ; *Jaffa v. Guttman (1959) 175 Cal. App. 2d 790, 798, 346 P.2d 876*)

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for leave to file a supplemental complaint that seeks relief different from that sought in the original complaint. It does not provide a complete memorandum but is designed to be combined with the general form of memorandum supporting a motion to file a supplemental complaint set out in *§ 16.70*, as well as with forms relating to any other grounds that may exist for allowing the supplemental complaint to be filed (see, e.g., *§ 16.71*).

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Supplemental Pleading Not Necessary in Equity

A court of equity will make a final disposition of litigation governed by the circumstances as shown to exist at the time judgment is rendered rather than at the inception of the litigation, and a supplemental pleading is not necessary to that end [*Schaefer v. Berinstein (1960) 180 Cal. App. 2d 107, 134, 4 Cal. Rptr. 236]* . Thus, a trial court may make an award of damages that are purely incidental to the equitable relief originally sought even though no supplemental complaint was filed alleging the existence of facts occurring subsequent to the filing of the original complaint [*Kazanteno v. Cal.-Western Etc. Ins. Co. (1955) 137 Cal. App. 2d 361, 377, 290 P.2d 332]* . Therefore, it is not necessary to use this form when the original complaint seeks equitable relief.

[3] Discussion of Authorities

[a] Change in Relief Sought

Plaintiff in ***Jacob v. Lorenz*** *(1893) 98 Cal. 332, 33 P 119* , initiated suit to enjoin defendants from washing away a ditch owned by plaintiff. After defendants answered, alleging that they had destroyed part of the ditch since the complaint had been filed, the court allowed plaintiff to file a supplemental complaint alleging the partial destruction of the ditch and praying for damages and an injunction restraining further injury to the ditch. The court denied defendants' motion to strike the supplemental complaint, and defendants appealed from a judgment in plaintiff's favor.

The Supreme Court affirmed. The Court recognized that a supplemental complaint must have reference to matters which may be consistent with and in aid of the case made by the original complaint, and that it cannot substitute a new and independent cause of action for that alleged in the original complaint. The Court found, however, that the trial court had not violated any of these limitations on its discretionary power to allow the filing of supplemental complaints (*98 Cal. 332, 337*). The Court reasoned that the subject of the action was plaintiff's property and right to convey water in his ditch, a right that was not destroyed and was still the subject of litigation. The claim for damages was incident to that right and consistent with it, rather than being an independent cause of action. The Court also noted that it was defendants' own act that made the different or additional relief necessary. Holding that it is no objection to a supplemental complaint that different or additional relief is asked for, and that the object of the supplemental complaint is to obtain additional or different relief without resort to a new trial, the Court held that the trial court had properly denied defendants' motion to strike the supplemental complaint (*98 Cal. 332, 338*).

In ***Jaffa v. Guttman*** *(1959) 175 Cal. App. 2d 790, 346 P.2d 876* , plaintiff's amended complaint sought specific performance of a contract for joint purchase of certain real estate and for imposition of constructive and resulting trusts on the property. In a supplement to the amended complaint, plaintiff alleged that the property had been lost to the parties by foreclosure of a trust deed executed by defendant, and prayed for rescission of the contract, an equitable lien on excess funds realized on the foreclosure sale, and recovery of funds spent on taxes and improvements. The court denied defendant's motion to strike the supplemental complaint, and after trial, rendered judgment for plaintiff. Defendant appealed.

Affirming, the court of appeal held that the trial court did not err in denying defendant's motion to strike the supplement to the complaint. The court held that it is no objection to a supplemental complaint that different relief is asked for, citing *Jacob v. Lorenz (1893) 98 Cal. 332, 338, 33 P 119* , discussed *above.* The court noted that the foreclosure sale affected the rights plaintiff asserted in her amended complaint, and that she properly sought a monetary judgment against defendant secured by the surplus realized in the foreclosure proceedings (*175 Cal. App. 2d 790, 798*).

Counsel should note that in ***Vavuris v. Pinelli*** *(1957) 147 Cal. App. 2d 390, 394, 305 P.2d 149* , the court of appeal stated, in dicta, that a supplemental complaint cannot be used by a plaintiff to change an election of remedies. In *Vavuris,* the original pleading had sought damages for breach of an oral agreement to execute a lease, while the proposed pleading sought damages on the theory that a new lease was in effect between the parties, and the court held

that the denial of plaintiff's motion for leave to file the supplemental complaint was not prejudicial error because both theories turned on the existence of an agreement to execute a lease, which was found not to exist.

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1-16 California Points & Authorities § 16.73

§ 16.73 Supporting Motion for Leave to File Supplemental Complaint [Code Civ. Proc. § 464(a)]--Substitute Personal Representative for Defendant in Pending Action [Code Civ. Proc. § 377.41]

[1] FORM Supporting Motion for Leave to File Supplemental Complaint [Code Civ. Proc. § 464(a)]--Substitute Personal Representative for Defendant in Pending Action [Code Civ. Proc. § 377.41]

[*Caption. See § 16.70.*]

THE COURT SHOULD ALLOW PLAINTIFF TO FILE THE SUPPLEMENTAL COMPLAINT TO ALLEGE SUBSTITUTION OF DEFENDANT'S PERSONAL REPRESENTATIVE FOR DEFENDANT AND FILING OF A CREDITOR'S CLAIM.

A. Statutory Authority. [*See § 16.70[1], Paragraph A.*]

B. Substitution of Personal Representative. It is proper to file a supplemental complaint substituting a deceased defendant's personal representative for the defendant and alleging the filing of a creditor's claim (*Clary v. Miller (1951) 101 Cal. App. 2d 790, 793, 226 P.2d 32*)

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for leave to file a supplemental complaint substituting a personal representative for a defendant who has died and alleging that a claim has been filed in the probate proceeding.

The motion supported by this form would be made concurrently with a motion pursuant to *Code Civ. Proc. § 377.41* to allow an action to be continued, after the death of a party, against the party's representative. For forms of memoranda relating to motions pursuant to *Code Civ. Proc. § 377.41*, see Ch. 10, *Abatement and Survival of Actions* in this set.

When a personal representative is substituted for a deceased plaintiff in a pending action, it is not necessary to file an amended or supplemental complaint. The order substituting the personal representative as a party is sufficient to continue the suit as the substitution involves no change in the defense [*see Kittle v. Bellegarde (1890) 86 Cal. 556, 561-563, 25 P. 55*]. It is logical that a supplemental complaint must be filed when a personal representative is substituted for a defendant, however, since the plaintiff must prove the filing of his or her claim with the court in order to recover against the decedent's estate [*see Prob. Code § 9370*; *see also Prob. Code § 9150(b)*].

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For a form of notice of motion for an order substituting a personal representative for a defendant, a form of declaration in support of the motion, and a form of a supplemental complaint for such use, see California Forms of Pleading and Practice, Ch. 454, *Probate: Claims Against the Estate* (Matthew Bender). Additional forms of notice of motion for an order substituting a personal representative for a defendant and supporting declaration appear in California Forms of Pleading and Practice, Ch. 21, *Amended and Supplemental Pleadings* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities relating to motions for the substitution of a personal representative for a defendant, see Ch. 10, *Abatement and Survival of Actions* .

[3] Discussion of Authorities

[a] Substitution of Personal Representative

In *Clary v. Miller (1951) 101 Cal. App. 2d 790, 226 P.2d 32* , an action to recover money and interest due on a loan, defendant died after filing an answer but before trial. A personal representative was appointed and plaintiff duly presented a creditor's claim to her. When the claim was not allowed, plaintiff moved to revive and continue the action against the personal representative and for leave to file a supplemental complaint naming the representative as a party defendant. The motion was granted, and after trial, judgment was entered in plaintiff's favor. On appeal, defendant contended that the supplemental complaint did not state a cause of action against the personal representative. The court of appeal rejected that contention, stating that it is proper to file a supplemental complaint substituting a personal representative as a party defendant and alleging presentation of a creditor's claim to the personal representative (*101 Cal. App. 2d 790, 793*).

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1-16 California Points & Authorities § 16.74

§ 16.74 Supporting Motion for Leave to File Supplemental Answer [Code Civ. Proc. § 464(a)]--General Form

[1] FORM Supporting Motion for Leave to File Supplemental Answer [Code Civ. Proc. § 464(a)]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
	)	NO. _____
vs.	)	memorandum IN SUPPORT OF MOTION FOR
_____ [*name*],	)	LEAVE TO FILE SUPPLEMENTAL ANSWER
Defendant.	)	[*Code Civ. Proc. § 464*]
	)	
	)	

_____

THE COURT SHOULD LIBERALLY EXERCISE ITS DISCRETION TO ALLOW A SUPPLEMENTAL ANSWER ALLEGING MATERIAL FACTS OCCURRING AFTER THE ORIGINAL ANSWER WAS FILED.

A. Statutory Authority. The defendant may be allowed, on motion, to make a supplemental answer, alleging facts material to the case occurring after the former answer (*Code Civ. Proc. § 464*)

B. Liberal Allowance of Supplemental Pleadings. [*See § 16.70[1], Paragraph C.*]

C. Occurrences Material to Defense. A court may allow a defendant to file a supplemental answer alleging

occurrences which are material to the defense and which happened after the commencement of the action and prior to judgment (*Security-First Nat'l Bank v. Hauer (1941) 47 Cal. App. 2d 302, 307, 117 P.2d 952*).

[*Add, where appropriate, supporting points and authorities relating to any specific grounds for allowing the supplemental answer to be filed* (*see e.g., § 16.75*)].

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be used in support of a motion for leave to file a supplemental complaint. It contains only general points and is designed to be used as a framework for a supporting memorandum. More specific points and authorities in support of filing a supplemental answer on various grounds are set out in *§ 16.75* and should be combined with this form as relevant to the case.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Opposing Points and Authorities

The points and authorities set out in *§§ 16.76, 16.80* may be used in an appropriate case to oppose a motion for leave to file a supplemental answer supported by this memorandum.

[3] Discussion of Authorities

[a] Occurrences Material to Defense

Plaintiff in Security-First Nat'l Bank v. Hauer (1941) 47 Cal. App. 2d 302, 117 P.2d 952 , brought an action to recover the proceeds of the sale of crops that secured the purchase price of agricultural land plaintiff had sold to defendant. Summary judgment was ordered in plaintiff's favor, but before judgment became final, plaintiff mailed defendant notice of forfeiture of all of defendant's interest under the sales agreement. Defendant received the notice on the day the judgment was entered and promptly moved to set aside the judgment on the ground of fraud. Plaintiff appealed from the order granting defendant's motion.

The court of appeal affirmed the order because the remedies of forfeiture and an action for the purchase price are inconsistent remedies, the choice of one precluding the right to exercise the other (*47 Cal. App. 2d 302, 305-307*). The court also held, citing *Code Civ. Proc. § 464*, that the trial court did not err in permitting defendant to file a supplemental answer alleging occurrences which were material to the defense and happened after the action was commenced and prior to judgment (*47 Cal. App. 2d 302, 307*).

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1-16 California Points & Authorities § 16.75

§ 16.75 Supporting Motion for Leave to File Supplemental Answer [Code Civ. Proc. § 464(a)]--Defense Arising After Filing of Original Answer

[1] FORM Supporting Motion for Leave to File Supplemental Answer [Code Civ. Proc. § 464(a)]--Defense Arising After Filing of Original Answer

[*The following should be combined, where appropriate, with a general form of points and authorities in support of a motion for leave to file a supplemental answer (see § 16.74).*]

THE COURT SHOULD ALLOW FILING OF THE SUPPLEMENTAL ANSWER BECAUSE IT ALLEGES A DEFENSE THAT AROSE AFTER THE ORIGINAL ANSWER WAS FILED.

A. Assertion of New Defense. A defense arising after the original answer was filed may be presented by supplemental answer (*People ex rel. Dep't of Public Works v. Douglas (1971) 15 Cal. App. 3d 814, 819, 93 Cal. Rptr. 644*)

[*Optional*] **B. Discharge in Bankruptcy.** A defendant should be granted leave to file a supplemental answer to set up a discharge in bankruptcy obtained subsequent to the commencement of the action, when the motion to file the supplemental answer is made within a reasonable time after obtaining the discharge (*Jensen v. Dorr (1911) 159 Cal. 742, 748, 116 P 553*).

[*Optional*] **C. Res Judicata.** A court may allow a defendant to file a supplemental answer to set up the defense of res judicata by pleading a judgment rendered after the suit was commenced (*Keech v. Beatty (1899) 127 Cal. 177, 181-182, 59 P. 837*)

[2] Comments

[a] Use of Form

This memorandum may be used in support of a motion for leave to file a supplemental answer alleging a defense that

arose after the original answer was filed. It does not provide a complete memorandum but is designed to be combined with the general form of memorandum supporting a motion to file a supplemental answer set out in *§ 16.74*.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Assertion of New Defense

The facts and procedural background of ***People ex rel. Dep't of Public Works v. Douglas*** *(1971) 15 Cal. App. 3d 814, 93 Cal. Rptr. 644* , are discussed in *§ 16.70[3][b]*. There, the court of appeal reversed, holding that denial of leave to file a supplemental answer that alleged the making and repudiation by plaintiff of a settlement after filing of the original answer constituted prejudicial error. The court stated, citing *Code Civ. Proc. § 464* and *Faye v. Feldman (1954) 128 Cal. App. 2d 319, 325-326, 275 P.2d 121* (also involving a settlement), that a defense arising after the original answer was filed is properly presented by supplemental answer (*15 Cal. App. 3d 814, 819)* .

[b] Discharge in Bankruptcy

In ***Jensen v. Dorr*** *(1911) 159 Cal. 742, 116 P 553* , plaintiff sued for services and material furnished at defendant's request. After the suit had been commenced, defendant obtained a discharge in bankruptcy. Defendant asked leave to file a supplemental answer setting up the discharge in bankruptcy as a defense against his personal liability for the debts which plaintiff had sued on, but the court denied leave and ultimately gave a personal judgment against defendant for the full amount of plaintiff's claims. Defendant appealed, and the court of appeal held that the denial of leave to file the supplemental answer constituted prejudicial error. The court stated that it cannot be doubted that it is an abuse of discretion for a trial court to refuse leave to a defendant to set up by supplemental answer a discharge in bankruptcy obtained after the action was commenced, when proper application to supplement is made within a reasonable time after obtaining the discharge (*159 Cal. 742, 748*).

[c] Res Judicata

Plaintiff in ***Keech v. Beatty*** *(1899) 127 Cal. 177, 59 P. 837* , sued defendants to recover specific personal property or its value. After the suit was commenced, a judgment was entered in another action in favor of defendants against the same plaintiff, who had sued in the same capacity for the same property on the same grounds, but in another county. Defendants were allowed by leave of court to file supplemental answers setting up the judgment in the other county by way of plea in bar. Judgment was subsequently entered in defendants' favor, and plaintiff appealed. The Supreme Court affirmed, holding that the trial court had properly allowed filing of the supplemental answers (*127 Cal. 177, 182*).

[4] Additional Authorities

[a] Res Judicata

In *Johnston, Baker & Palmer v. Record Mach. & Tool Co. (1960) 183 Cal. App. 2d 200, 6 Cal. Rptr. 847* , defendant appealed from an order entering judgment nunc pro tunc as of the date a settlement agreement was stipulated to in open court. The judgment dismissed both plaintiffs' action and defendant's cross complaints with prejudice. On his appeal, defendant urged, inter alia, that there was not a sufficient showing to justify entry of the order nunc pro tunc, and that such entry was prejudicial because it would bar him from proceeding with a new action that he had instituted. The court, however, held that defendant could not establish prejudicial error because plaintiffs were, in any event, entitled to entry of the judgment as of the time it was actually entered, and that judgment, if not final when plaintiffs had to file their answer as defendants in the new action, could have been pleaded as a defense to the new action in the nature of res judicata by a supplemental answer after it had become final (*183 Cal. App. 2d 200, 211*).

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1-16 California Points & Authorities § 16.76

§ 16.76 Opposing Motion for Leave to File Supplemental Pleading [Code Civ. Proc. § 464(a)]--Matters Not Occurring Between Original Pleading and Judgment

[1] FORM Opposing Motion for Leave to File Supplemental Pleading [Code Civ. Proc. § 464(a)]--Matters Not Occurring Between Original Pleading and Judgment

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
	)	memorandum IN OPPOSITION TO MOTION FOR
_____ [*name*],	)	LEAVE TO FILE SUPPLEMENTAL
Defendant.	)	_____ [COMPLAINT *or* AN-
	)	SWER]
	)	[*Code Civ. Proc. § 464*]

_____

THE COURT SHOULD NOT ALLOW THE SUPPLEMENTAL _____ [COMPLAINT *or* ANSWER] TO BE FILED BECAUSE IT DOES NOT RELATE TO MATTERS OCCURRING AFTER THE ORIGINAL _____ [COMPLAINT *or* ANSWER] WAS FILED.

A. Statutory Authority. A supplemental complaint or answer may only allege facts which are material to the case and occurring after the former complaint or answer (*see Code Civ. Proc. § 464*).

B. Matters Occurring Before Original Pleading or After Judgment. The function of a supplemental complaint is to present facts material to the case occurring after the former complaint, and the right to file a supplemental complaint can only be exercised with reference to matters that occurred between the time of filing the original complaint and the trial or judgment in the action (*Gleason v. Gleason (1880) 54 Cal. 135, 136* ; *Erickson v. Boothe (1954) 127 Cal. App. 2d 644, 647, 274 P.2d 460*). [*If form used in opposition to motion to file supplemental answer, add:* Since *Section 464 of the Code of Civil Procedure* contains the same requirements for supplemental answers as for supplemental complaints, this rule would apply to the right to file a supplemental answer as well].

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be used in opposition to a motion for leave to file a supplemental pleading on the ground that the proposed supplement does not relate to matters occurring between the time the prior pleading was filed and the time judgment was entered. If the memorandum is being submitted in opposition to a motion for leave to file a supplemental answer, the bracketed material in Paragraph B of the form should be included.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

This form may be used in opposition to a memorandum in support of a motion for leave to file a supplemental pleading pursuant to *Code Civ. Proc. § 464* such as the ones set out in *§§ 16.70* and *16.74*.

[3] Discussion of Authorities

[a] Matters Occurring Before Original Pleading or After Judgment

In ***Gleason v. Gleason*** *(1880) 54 Cal. 135* , plaintiff moved to file a supplemental complaint several months after a decree had been rendered dissolving plaintiff's marriage to defendant. The supplemental complaint involved a dispute over the title to property acquired by defendant, allegedly in trust for plaintiff, pursuant to a contract made when the parties were married. Defendant did not, however, acquire title to the property until after the prior judgment. Plaintiff appealed from the court's order denying the motion. The Supreme Court affirmed, holding that a supplemental complaint can only be filed with reference to matters that occurred between the time of filing the original complaint and the trial or judgment in the action. The Court also found the proposed supplemental complaint objectionable as setting forth a new and distinct cause of action (*54 Cal. 135-136*).

Erickson v. Boothe *(1954) 127 Cal. App. 2d 644, 274 P.2d 460* , involved an action for declaratory relief relating to possession of a ranch. After prolonged proceedings, the court determined that plaintiff had wrongfully dispossessed defendant and ordered plaintiff to show cause why she should not be ordered to account to defendant for the value of her use of the premises. Plaintiff then moved for leave to file a supplemental complaint for damages caused by waste

committed by defendant during his possession of the property. The court denied plaintiff's motion, and plaintiff appealed from a judgment in defendant's favor.

The court of appeal affirmed, holding that the trial court properly denied the motion to file a supplemental complaint. The court noted, citing *Code Civ. Proc. § 464*, that the function of a supplemental complaint is to bring to the notice of the court and opposing party facts material to the case occurring after the former complaint (*127 Cal. App. 2d 644, 647*). The court quoted *Gleason v. Gleason (1880) 54 Cal. 135* , *above*, for the proposition that a supplemental complaint can only have reference to matters that occurred between the time of filing the original complaint and the trial or judgment in the action (*127 Cal. App. 2d 644, 647*). Because waste could only have been committed by defendant while he was in possession, and the original complaint had not been filed until after he was out of possession, it was impossible for the supplemental complaint to relate to facts occurring after the original complaint or between the time of filing the original complaint and the trial or judgment.

Although *Gleason* and *Erickson* speak in terms of matters occurring after filing of the original complaint, this point has equal application to an answer, and the language of *Code Civ. Proc. § 464* makes it apparent that supplemental answers must be limited to matters occurring after the original answer was filed [*Code Civ. Proc. § 464*].

[4] Additional Authorities

[a] Matters Occurring Before Original Pleading or After Judgment

Thomas v. Department of Motor Vehicles (1976) 59 Cal. App. 3d 731, 131 Cal. Rptr. 164 , involved a petition for a writ of mandate to compel the defendant to collect taxes, and license and registration fees on all vehicles owned and operated by state and national banks in California. The original petition was filed in December, 1972, on the theory that the California Constitution compelled collection of the taxes after the Congress of the United States removed a bar against taxing national banks in 1969. One year after the court announced its intended decision, which was adverse to petitioner on the ground that a saving provision in the federal statute postponed its effect as to the taxes at issue until January, 1973, petitioner moved for leave to file a supplemental petition for a writ of mandate. The supplemental petition sought to compel defendant to collect taxes for the period after January 1, 1973. The court denied the motion and entered a judgment denying relief. Petitioner appealed from the judgment.

The court of appeal modified the judgment, but held that the trial court had not erred in denying petitioner's belated motion to file a supplemental petition because the proposed petition did not allege any facts material to the case occurring after the former petition, citing *Code Civ. Proc. § 464* (*59 Cal. App. 3d 731, 741*).

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1-16 California Points & Authorities § 16.77

§ 16.77 Opposing Motion for Leave to File Supplemental Complaint [Code Civ. Proc. § 464(a)]--Not in Furtherance of or Consistent With Original Action

[1] FORM Opposing Motion for Leave to File Supplemental Complaint [Code Civ. Proc. § 464(a)]--Not in Furtherance of or Consistent With Original Action

[*Caption. See § 16.76.*]

THE COURT SHOULD NOT ALLOW FILING OF THE SUPPLEMENTAL _____ [COMPLAINT *or* ANSWER] BECAUSE IT IS NOT IN FURTHERANCE OF AND CONSISTENT WITH THE ORIGINAL ACTION.

A. Statutory Authority. [*See § 16.76[1], Paragraph A.*]

B. Furtherance of and Consistency With Original Action. A supplemental complaint must be in furtherance of and consistent with the original action (*Gonzales v. Arbelbide (1957) 155 Cal. App. 2d 721, 726-727, 318 P.2d 746*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*
Attorney for Defendant _____ [*name*

[2] Comments

[a] Use of Form

This memorandum may be used in opposition to a motion for leave to file a supplemental complaint on the ground that

the proposed supplement is not in furtherance of or consistent with the original action.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

This form may be used in opposition to a memorandum in support of a motion for leave to file a supplemental complaint pursuant to *Code Civ. Proc. § 464* such as the one set out in *§ 16.70*.

[3] Discussion of Authorities

[a] Furtherance of and Consistency With Original Action

The original pleadings in ***Gonzales v. Arbelbide*** *(1957) 155 Cal. App. 2d 721, 318 P.2d 746* , were all addressed to the parties' rights to use the water of a creek. Over a year after the original complaint was filed, plaintiffs were allowed to file a supplemental complaint seeking damages and extra relief for an alleged trespass on their property by defendant and plaintiffs in intervention. The supplemental complaint did not allege that the trespass was related in any way to the use of the water. Rather, the supplemental complaint involved a boundary dispute between plaintiffs and plaintiffs in intervention and the location of a fence. On appeal from the judgment in the suit, plaintiffs in intervention argued that the trial court erred in allowing the supplemental complaint to be filed. The court of appeal agreed, relying on prior California law for the propositions that the office of a supplemental complaint is to present facts material to the case occurring after the former complaint which would affect the rights asserted and the judgment to be rendered, and that a supplemental complaint must be in furtherance of and consistent with the original action (*155 Cal. App. 2d 721, 726-727*).

[4] Additional Authorities

[a] Furtherance of and Consistency With Original Action

In *Majors v. Merced County (1962) 207 Cal. App. 2d 427, 24 Cal. Rptr. 610* , the court of appeal upheld the trial court's action in denying leave to file a supplemental complaint that would have added an action for wrongful death to a suit that had originally been brought by the decedent for hospital expenses and lost wages. In so doing, the court of appeal noted that the function of a supplemental complaint is to present facts material to the case occurring after the former complaint that would affect the rights asserted and the judgment to be rendered. The court also stated that a supplemental complaint must be in furtherance of and consistent with the original action (*207 Cal. App. 2d 427, 436*).

Stephani v. Abbott (1934) 137 Cal. App. 510, 30 P.2d 1033 , is discussed in *§ 16.70[3][a]*. In upholding the trial court's action in allowing a supplemental complaint, the court of appeal noted the requirement that supplemental complaints be in furtherance of and consistent with the original action (*137 Cal. App. 510, 516*).

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1-16 California Points & Authorities § 16.78

§ 16.78 Opposing Motion for Leave to File Supplemental Complaint [Code Civ. Proc. § 464(a)]--No Cause of Action When Original Complaint Filed

[1] FORM Opposing Motion for Leave to File Supplemental Complaint [Code Civ. Proc. § 464(a)]--No Cause of Action When Original Complaint Filed

[*Caption. See § 16.76.*]

THE COURT SHOULD NOT ALLOW FILING OF THE SUPPLEMENTAL COMPLAINT BECAUSE PLAINTIFF HAD NO CAUSE OF ACTION WHEN THE ORIGINAL COMPLAINT WAS FILED.

A. Statutory Authority. [*See § 16.76[1], Paragraph A.*]

B. No Cause of Action When Original Complaint Filed. Because a supplemental complaint is proper only in aid of the case made by the original complaint, relief cannot be granted on a supplemental complaint when the proof shows that the plaintiff had no cause of action when the original complaint was filed. If a party has no cause of action at the time of the institution of his action, he or she cannot maintain it by filing a supplemental complaint founded on matters which have subsequently occurred (*Imperial Land Co. v. Imperial Irrigation Dist. (1916) 173 Cal. 668, 673, 161 P 116* ; *Walton v. Kern County (1940) 39 Cal. App. 2d 32, 34, 102 P.2d 531*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion for leave to file a supplemental complaint on the ground that a supplemental complaint cannot be allowed when there was no cause of action at the time the original complaint was filed, where the nonexistence of the cause of action was due to prematurity of the original complaint or due to plaintiff's failure to prove the allegations of the original complaint [see *Imperial Land Co. v. Imperial Irrigation Dist. (1916) 173 Cal. 668, 673, 161 P 116* (failure to prove original allegations); *Walton v. Kern County (1940) 39 Cal. App. 2d 32, 34, 102 P.2d 531* (premature action)].

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

This form may be used in opposition to a memorandum in support of a motion for leave to file a supplemental complaint pursuant to *Code Civ. Proc. § 464* such as the one set out in *§ 16.70*.

[3] Discussion of Authorities

[a] No Cause of Action When Original Complaint Filed

The original complaint in *Imperial Land Co. v. Imperial Irrigation Dist. (1916) 173 Cal. 668, 161 P 116* , attacked an assessment levied by defendant district. In a supplemental complaint, plaintiffs sought to enjoin enforcement of the assessment on the ground that a petition for an election had been filed with the district, and that therefore, the assessment could not be enforced until an election was held on it. The court ruled against plaintiffs on both complaints, and plaintiffs appealed from the judgment that they take nothing.

The Supreme Court affirmed, first holding that the trial court had ruled correctly in finding no merit in the attacks made on the assessment by the original complaint (*173 Cal. 668, 670-672*). The Court then held that since a supplemental pleading is proper only in aid of the case made by the original complaint, relief cannot be granted on a supplemental complaint when the proof shows that the plaintiff had no cause of action when the original complaint was filed. The Court relied on prior California law for the proposition that if a party has no cause of action at the time the action is instituted, the action cannot be maintained by filing a supplemental complaint founded on matters that have subsequently occurred. Because the plaintiffs had no cause of action when the complaint was filed as shown by the findings of the trial court against their allegations, plaintiffs could not make a new case by supplemental complaint. The supplemental complaint was also faulty for asserting a new and independent cause of action (*173 Cal. 668, 673*).

The rule of *Imperial Land Co., above*, was recognized in *Cohn v. Cohn (1941) 47 Cal. App. 2d 683, 118 P.2d 903* , but the court distinguished *Imperial Land Co.* because in *Cohn* the parties had stipulated to the filing of the supplemental complaint to set up a new cause of action, and therefore, it had to be regarded as a substituted pleading (*173 Cal. 668, 689-690*).

Plaintiff in Walton v. Kern County (1940) 39 Cal. App. 2d 32, 102 P.2d 531 , sued defendant public entity for a death allegedly caused by improper maintenance of a road. Plaintiff had filed a claim with the defendant which was never acted on. Over one year after suit was initiated, defendant filed notice of a motion for judgment on the pleadings on the ground that the action had been prematurely filed before the expiration of the 90-day period which defendant had to act on plaintiff's claim. Plaintiff responded with a motion for leave to file a supplemental complaint alleging that the claim

had been rejected by defendant's failure to act on it within 90 days. The court denied plaintiff's motion and granted defendant's motion for judgment on the pleadings. Plaintiff appealed from the judgment.

Affirming, the court of appeal applied the general rule that when an action is prematurely brought and the original complaint must fall, a supplemental complaint has no place as a pleading (*39 Cal. App. 2d 32, 34*).

Counsel should note that *Walton* has been questioned to the extent that it stands for the proposition that a plaintiff has no cause of action against a local governmental entity until the entity has rejected the claim. It is now recognized that the waiting period requirement is not part of the cause of action but a procedural prerequisite to suit [*Cory v. Huntington Beach (1974) 43 Cal. App. 3d 131, 134-135, 117 Cal. Rptr. 475*].

The rule in *Walton* is not absolute and universal in application [*Radar v. Rogers (1957) 49 Cal. 2d 243, 247, 317 P.2d 17*]. In *Radar* plaintiffs sued fictitiously named defendants as administrators of the estate of the tortfeasor, who was killed in the accident that caused plaintiffs' damages. Plaintiffs had made no claim against the estate because no personal representative had been appointed when suit was brought, but when an administratrix was appointed, they filed a claim which was rejected. Subsequently, plaintiffs filed amended complaints, the first to name the personal representative and the second to allege presentation and rejection of their claims. On plaintiffs' appeal from a judgment entered on an order sustaining a demurrer to the second amended complaint, the Supreme Court treated the amended complaints as supplemental complaints because they alleged facts occurring after the original complaint was filed. The Court held that the rule of *Walton, above,* was not absolute and universal in application. *Walton* was distinguished because in *Radar* the cause of action did exist when the original complaint was filed, while in *Walton,* the court had held that a supplemental complaint cannot aid an original complaint filed before the cause of action has arisen (*49 Cal. 2d 243, 247*). The Court reversed, finding that the purpose of the Probate Code sections requiring claims to be made prior to institution of suit against estates had been fulfilled, and that the defense was a disfavored plea in abatement (*49 Cal. 2d 243, 247-250*).

In *Grant v. Sun Indem. Co. (1938) 11 Cal. 2d 438, 80 P.2d 996* , the Supreme Court also refused to apply the rule that a supplemental complaint cannot be filed when the cause of action was not complete when the suit was commenced, although the Court did not cite *Imperial Land Co., above,* or *Walton, above.* In *Grant* the suit was premature when the original complaint was filed due to a provision of the insurance policy that was being sued on. The Court, however, applied the rule that an insurance company cannot repudiate a policy and stand on a provision of the policy to its own benefit at the same time, and gave effect to the supplemental complaint alleging satisfaction of the provision the insurance company was relying on (*11 Cal. 2d 438, 440*).

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1-16 California Points & Authorities § 16.79

§ 16.79 Opposing Motion for Leave to File Supplemental Complaint [Code Civ. Proc. § 464(a)]--Introducing New Cause of Action

[1] FORM Opposing Motion for Leave to File Supplemental Complaint [Code Civ. Proc. § 464(a)]--Introducing New Cause of Action

[*Caption. See § 16.76.*]

THE COURT SHOULD DENY THE MOTION FOR LEAVE TO FILE THE SUPPLEMENTAL COMPLAINT BECAUSE IT INTRODUCES A NEW CAUSE OF ACTION.

A. Statutory Authority. [*See § 16.76[1], Paragraph A.*]

B. New Cause of Action. A supplemental complaint alleging a new cause of action cannot be allowed because it is not material to the original case (Brown v. *Valley View Mining Co. (1900) 127 Cal. 630, 633, 60 P 424* ; *Flood v. Simpson (1975) 45 Cal. App. 3d 644, 647, 119 Cal. Rptr. 675*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion for leave to file a supplemental complaint on the ground that the proposed supplement would introduce a new cause of action.

For limitations on the scope of the proposition that a supplemental complaint cannot state a new cause of action, see *§§ 16.71* and *16.72*.

For a related discussion of amending complaints to state a new theory of recovery, see *§ 16.37*.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

This form may be used in opposition to a memorandum in support of a motion for leave to file a supplemental complaint, pursuant to *Code Civ. Proc. § 464*, such as the one set out in *§ 16.70*.

[3] Discussion of Authorities

[a] New Cause of Action

Plaintiff in ***Brown v. Valley View Mining Co.*** *(1900) 127 Cal. 630, 60 P 424* , originally sued defendant on an employment contract calling for defendant to pay plaintiff a certain sum for a certain period of services. At the close of testimony, plaintiff moved for leave to file a supplemental complaint alleging that the employment continued for 22 months after suit was instituted at $20 per month, and that this sum had not been paid. Judgment was awarded to plaintiff on both complaints, and defendant appealed.

The Supreme Court reversed, finding that the supplemental complaint set up a contract for employment by the month at a certain amount per month which was a different contract from the one sued on in the original complaint and constituted a cause of action distinct and independent from that asserted in the original complaint. Noting that the facts alleged in a supplemental pleading must relate to and be material to the original case, the Court held that the trial court erred in allowing the supplemental complaint to be filed, and that it could not be considered (*127 Cal. 630, 633, 635*).

In ***Flood v. Simpson*** *(1975) 45 Cal. App. 3d 644, 119 Cal. Rptr. 675* , the court of appeal held that, notwithstanding the policy of liberality in permitting supplemental pleadings to allege pertinent "after-occurring" facts, the trial court had not abused its discretion in denying leave to file a supplemental complaint, that would have introduced new causes of action when the case was called for trial, over three years after the original complaint was filed, citing *Brown v. Valley View Mining Co. (1900) 127 Cal. 630, 60 P. 424* , discussed *above*, and other prior California law (*45 Cal. App. 3d 644, 647*).

[4] Additional Authorities

[a] New Cause of Action

The facts and procedural background of *Imperial Land Co. v. Imperial Irrigation Dist. (1916) 173 Cal. 668, 161 P 116* , are discussed in *§ 16.78[3][a]*. There, the Supreme Court held that a supplemental complaint seeking suspension of an assessment until after an election stated a different cause of action from the original complaint which sought to have the assessment ruled invalid. The Court held that the supplemental complaint was therefore not consistent with or in aid of the original complaint. The Court stated that it is well settled that the facts alleged in a supplemental pleading must relate to and be material to the original case, relying on prior California law. The Court also relied on the principle that a

supplemental complaint cannot be the basis for relief when the plaintiff had no cause of action when the original complaint was filed (*173 Cal. 668, 673*).

California Points & Authorities

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Volume 1 Chapters 1-19 WRITING LEGAL MEMORANDA AND BRIEFS; ABATEMENT AND SURVIVAL OF ACTIONS---to---AMENDED AND SUPPLEMENTAL PLEADINGS
CHAPTER 16 AMENDED AND SUPPLEMENTAL PLEADINGS
PART II. FORMS
B. Supplemental Pleadings

1-16 California Points & Authorities § 16.80

§ 16.80 Opposing Motion for Leave to File Supplemental Answer [Code Civ. Proc. § 464(a)]--Insufficient to Assert Defense

[1] FORM Opposing Motion for Leave to File Supplemental Answer [Code Civ. Proc. § 464(a)]--Insufficient to Assert Defense

[*Caption. See § 16.76.*]

THE COURT SHOULD DENY THE MOTION FOR LEAVE TO FILE THE SUPPLEMENTAL ANSWER BECAUSE THE PROPOSED SUPPLEMENT IS INSUFFICIENT TO ESTABLISH A DEFENSE.

A. Statutory Authority. [*See § 16.76[1], Paragraph A.*]

B. No Defense Stated. A court may properly deny leave to file a supplemental answer when the proposed supplement is wholly insufficient to establish a defense (*Horton v. Goodenough (1920) 184 Cal. 451, 459, 194 P 34*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion for leave to file a supplemental answer on the ground that the supplemental answer is not sufficient to establish a defense.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] No Defense Stated

The trial court in *Horton v. Goodenough (1920) 184 Cal. 451, 194 P 34* , denied defendant leave to file a supplemental answer that alleged a judgment against plaintiff in another action brought by plaintiff against defendant. When judgment was entered in plaintiff's favor after trial, defendant appealed, asserting, inter alia, the denial of leave to file the supplemental answer as error. The Supreme Court reversed on other grounds, but since a new trial was necessary, reached the question regarding the supplemental answer. The Court held that defendant's motion had properly been denied because the proposed answer was wholly deficient to show any estoppel against plaintiff (*184 Cal. 451, 459*). The proposed answer had failed to adequately specify that the prior judgment was based on the same issues that were presented in the action in which the proposed answer was to be filed (*184 Cal. 451, 459-460*).

[4] Additional Authorities

[a] No Defense Stated

The facts and procedural background of *Louie Queriolo Trucking, Inc. v. Superior Court (1967) 252 Cal. App. 2d 194, 60 Cal. Rptr. 389* , are discussed in *§ 16.70[3][b]*. There, the court of appeal stated, in dicta, that a trial court may deny the right to file a supplemental pleading if the new matter contained in it fails, as a matter of law, to constitute a defense, relying on *Horton v. Goodenough (1920) 184 Cal. 451, 194 P 34* (discussed in *§ 16.80[3][a]*) and *Key v. Caldwell (1940) 39 Cal. App. 2d 698, 104 P.2d 87* (*252 Cal. App. 2d 194, 198*).

The facts and procedural background of *Louie Queriolo Trucking, Inc. v. Superior Court (1967) 252 Cal. App. 2d 194, 60 Cal. Rptr. 389* , are discussed in *§ 16.70[3][b]*. There, the court of appeal stated, in dicta, that a trial court may deny the right to file a supplemental pleading if the new matter contained in it fails, as a matter of law, to constitute a defense, relying on *Horton v. Goodenough (1920) 184 Cal. 451, 194 P 34* (discussed in *§ 16.80[3][a]*) and *Key v. Caldwell (1940) 39 Cal. App. 2d 698, 104 P.2d 87* (*252 Cal. App. 2d 194, 198*).

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Chapters 17through 19 RESERVED

1-17 California Points & Authorities Chapters 17through 19

RESERVED

Chapters 17RESERVED

California Points & Authorities

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20 ARBITRATION: COMPELLING

2-20 California Points & Authorities 20.syn

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[2] International Arbitration Agreements

[3] Provisional Remedies

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[ii] Responses in Arbitration Proceedings

[iii] Compelling Arbitration

[iv] Jurisdiction to Determine Petitions

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[vi] Consolidating Separate Arbitration Proceedings

[vii] Costs

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[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

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[b] Evidentiary Hearing

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[d] Fact That Presumption of Going Forward With Evidence Was Met Does Not Negate Sufficiency of Evidence to Support Finding That Arbitration Agreement Exists

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[k] Under Federal Arbitration Act, Court, Not Arbitrator, Determines Challenge that Arbitration Provisions Are Unconscionable

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

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[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

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[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

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[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

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[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

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[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[d] Opposing Memoranda

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[b] Argument

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

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[4] Additional Authorities

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

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[f] Arbitrability of Damage Claims Under the Consumer Legal Remedies Act (Civil Code Section 1750 et seq.)

[g] Arbitrability of Damage Claims Under the Unfair Competition Law (Business and Professions Code Section 17200 et seq.)

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[j] Federal Law Preempts Section 1298 of the Code of Civil Procedure

[k] False Claims Act (Government Code Section 12650 et seq.) Claims Are Arbitrable

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[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

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[c] Agreement Interpreted to Require Findings and Conclusions in Award

[d] Agreement Interpreted to Require Employer to Pay Forum Costs of Arbitration

[e] Armendariz May Be Applied Retroactively

[f] Armendariz Minimum Requirements Apply to Tameny Claims

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[h] Consumer Legal Remedies Act Provides for Unwaivable Rights

[i] Vehicle Leasing Act Provides for Unwaivable Rights

[j] Arbitral Costs to Vindicate Rights Under Consumer Protection Statute

[k] Little May Be Applied Retroactively

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[o] Armendariz Minimum Requirements Apply to Claims Under Unfair Competition Law

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[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] General State Law Contract Principles Govern

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[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

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[a] Incorporation by Reference

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[a] Incorporation by Reference

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[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

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[2] Comments

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[b] Argument

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

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[c] Insurer's Duty to Defend Is Broader Than Its Duty to Indemnify

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[a] Arbitration Agreement Applies to Related Tort Claim

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

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[4] Additional Authorities

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

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[b] No Duty to Explain Provision

[c] Reliance Must Be Reasonable

[4] Additional Authorities

[a] Claims of Fraud in Inducement of Contract Containing Arbitration Clause Are Arbitrable

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[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

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[b] Claim Has Been Preserved

[c] Declaration Regarding Workers' Compensation Claim

[d] Issue of Physical Contact With Uninsured Motorist Is Arbitrable Under Policy Language

[e] Whether Insurer Is Bound by Default Judgment Against Driver Who Was at Fault Is Arbitrable

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Legality of Severable Contract Provision Is Arbitrable

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

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[b] Provision for Arbitration of Pre-Contract Claims May Be Adhesive

[c] This Provision for Arbitration of Pre-Contract Claims Is Not Adhesive

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[e] Arbitration Agreement Applies to Later Treatment of Another Condition

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[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Arbitration Agreement Applies to All Aspects of Transaction to Which It Relates

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

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[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

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[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

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[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

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[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

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[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

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[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] Employee Must Arbitrate With Employer That Is Third Party Beneficiary of Employee's Agreement With Professional Organization

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] People Who Have Accepted Benefits of Underlying Agreement

[4] Additional Authorities

[a] People Who Have Accepted Benefits of Underlying Agreement

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] Persons Whose Joinder Was Consented to in Arbitration Agreement

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[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

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[c] Nonsignatory Alleged To Be Alter Ego of Corporate Signatory

[4] Additional Authorities

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[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

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[c] Burden of Proving Waiver Is on Party Asserting It

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[4] Additional Authorities

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[b] Burden of Proving Waiver Is on Party Asserting It

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[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

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[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

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[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[d] Opposing Memoranda

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[4] Additional Authorities

[a] Arbitration Provision in Adhesion Contract Not Unenforceable If Not Contrary to Expectations of Fairness

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[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

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[2] Comments

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[b] Argument

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

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[b] Respondent Failed to Bear Burden of Showing Not All Necessary Parties Signed Arbitration Agreement

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[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

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[b] Severance of Class Arbitration Waiver Is Appropriate

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[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

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[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Foreign Law Governs This Contract and Renders Class Action Waiver Enforceable

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleadings and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleadings and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Enforcement of Unconscionable Arbitration Clause in Credit Card Agreement Cannot Be Enjoined Under California Legal Remedies Act (Civ. Code § 1750 et seq.)

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20 ARBITRATION: COMPELLING
PART I. INTRODUCTION

2-20 California Points & Authorities § 20.01

§ 20.01 Scope of Chapter

This chapter contains memoranda and contentions relating to judicial supervision of contractual arbitration under private agreements pursuant to *Code Civ. Proc. § 1280 et seq.* Most of the forms address the following issues or judicial procedures:

- General principles related to compelling arbitration (*see § 20.10* et seq.).
- Particular claims subject to arbitration (*see § 20.40* et seq.).
- Particular persons bound by arbitration agreement (*see § 20.60* et seq.).
- Negating defenses to arbitration (*see § 20.80* et seq.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsArbitrabilityCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActCoverage & ExceptionsCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActOrders to Compel ArbitrationCivil ProcedureAlternative Dispute ResolutionArbitrationsWaiversContracts LawContract Conditions & ProvisionsArbitration Clauses

California Points & Authorities

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20 ARBITRATION: COMPELLING
PART I. INTRODUCTION

2-20 California Points & Authorities § 20.02

§ 20.02 Governing Law

[1] Federal Arbitration Act

Arbitration of disputes involving maritime law or interstate or foreign commerce are governed by the Federal Arbitration Act (*9 U.S.C. § 1 et seq.*, commonly referred to as the FAA).

[2] International Arbitration Agreements

International arbitration agreements and awards are governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958 [21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 (as implemented by *9 U.S.C. §§ 201-208*)], entered into force for the United States on December 29, 1970. For the text of the Convention, see note to *9 U.S.C. § 201*. Chapter 1 of the FAA (*9 U.S.C. §§ 1-16*) applies to situations governed by Convention [*see 9 U.S.C. § 202*].

In California, judicial enforcement of international commercial arbitration agreements is implemented by Code Civ. Proc. § 1297.100 et seq., which is discussed in California Forms of Pleading and Practice, Ch. 35, *Arbitration and Conciliation of International Commercial Disputes* (Matthew Bender).

[3] Provisional Remedies

Provisional remedies relating to arbitrable issues are available in California, as well as under the FAA and the Convention [*see* California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender)].

Code Civ. Proc. § 1281.8(b) provides that a party to an arbitration agreement may file an application for a provisional remedy in connection with an arbitrable controversy, but only on the ground that the award to which the applicant may be entitled may be rendered ineffectual if provisional relief is not granted. *Code Civ. Proc. § 1281.8(b)* does not supplant the requirements set forth in the code sections governing the specific provisional remedies listed in *Code Civ. Proc. § 1281.8(a)*. Thus, for instance, a showing that the arbitrator's award might be rendered ineffectual is not sufficient to obtain a preliminary injunction. The moving party must also meet the requirements of *Code Civ. Proc. §§*

526, 527 [*Woolley v. Embassy Suites, Inc. (1991) 227 Cal. App. 3d 1520, 1527-1529, 278 Cal. Rptr. 719]* . Nor is an injunction a proper remedy to take possession of property that is subject to a security interest. A writ of possession under the claim and delivery law that meets the requirements of *Code Civ. Proc. §§ 512.010-512.060*, including posting of a bond, is the provisional remedy by which a secured party enforces its rights to take possession of collateral under *Com. Code § 9609*. An injunction to restrain removal of the property from a particular place (to prevent the debtor from putting it beyond the reach of the creditor), may be appropriate. If the only showing made is that all that is necessary to maintain the status quo during arbitration is to restrain removal of the collateral from the debtor's place of business, a writ of possession should not issue [*Simms v. NPCK Enterprises, Inc. (2003) 109 Cal. App. 4th 233, 236-240, 134 Cal. Rptr. 2d 557]* .

Code Civ. Proc. § 1281.8(d) provides that an application for provisional remedy under *Code Civ. Proc. § 1281.8(b)* does not operate to waive any right of arbitration that the applicant may have pursuant to a written agreement to arbitrate, if certain conditions are met.

The Ninth Circuit has interpreted the Federal Arbitration Act to allow a court, pending arbitration, to grant a provisional remedy if it is necessary to preserve the meaningfulness of the arbitration [*see PMS Distributing Co., Inc. v. Huber & Suhner, A.G. (9th Cir. 1988) 863 F.2d 639, 641-642* ; *accord Davenport v. Blue Cross of California (1997) 52 Cal. App. 4th 435, 451-453, 60 Cal. Rptr. 2d 641* (though in neither case was there sufficient showing for provisional remedy)].

[4] Private Arbitration in California

[a] Judicial Proceedings Limited

[i] Petitions Involving Private Arbitration Agreements

Arbitration under private agreements, and judicial proceedings with respect to private arbitration in California, or when the parties choose to be governed by California law, are governed by *Code Civ. Proc. § 1280 et seq.*, and regulated under *Cal. Rules of Ct., Rule 3.1330*.

Ethics Standards for Neutral Arbitrators in Contractual Arbitration, which are applicable to neutral arbitrators who are appointed to serve on or after July 1, 2002 [*see* Cal. Rules of Ct., Appen., Div. VI, Standard 3(a)], are found in Cal. Rules of Ct., Appen., Div. VI. The California Ethics Standards will not apply in any arbitration which the parties have agreed will be conducted in accordance with New York Stock Exchange (NYSE) Arbitration Rules or the National Association of Securities Dealers (NASD) Code of Arbitration Procedure. Both preempt the California Ethics Standards to the extent that the Securities and Exchange Commission has approved those rules and procedures in accordance with the Securities Exchange Act of 1934 [Credit Suisse First Boston Corp. v. Grunwald (9th Cir. 2005) *400 F.3d 1119, 1132 (NASD rules)* ; *Mayo v. Dean Witter Reynolds (N.D. Cal. 2003) 258 F. Supp. 2d 1097, 1112* , as corrected at *260 F. Supp. 2d 979* ; *accord Wilmot v. McNabb (N.D. Cal. 2003) 269 F. Supp. 2d 1203* ; *Jevne v. Superior Court (JB Oxford Holdings, Inc.) (2005) 35 Cal. 4th 935, 949, 28 Cal. Rptr. 3d 685, 111 P.3d 954]* . NYSE Rules and NASD Code of Arbitration Procedure have their own disclosure requirements [*see* NYSE Arbitration Rule 610; NASD Code of Arbitration Procedure, Rule 10312].

A proceeding related to private arbitration in California is commenced by the filing of a petition in accordance with *Code Civ. Proc. § 1290*.

A petition is heard in a summary way in the manner and on the notice provided by law for the making and hearing of motions [*see Code Civ. Proc. § 1290.2*; *§ 20.10[1]*]. *Cal. Rules of Ct., Rule 3.1113(a)* requires a party filing a notice of motion to serve and file with it a memorandum. The absence of the memorandum may be construed by the court as an admission that the motion is not meritorious and as cause for its denial.

Code Civ. Proc. § 1290.4 provides for service of a copy of the petition and a written notice of the time and place of the hearing of the petition and any other papers on which the petition is based.

[ii] Responses in Arbitration Proceedings

Any person named as a respondent in a petition filed under *Code Civ. Proc. § 1280 et seq.* may file a response in accordance with *Code Civ. Proc. § 1290* [*see Ch. 20A, Arbitration: Resisting, Ch. 20A, Arbitration: Resisting, § 20A.10[1]*.

[iii] Compelling Arbitration

A petitioner alleging that he or she, and respondent, are parties to a written agreement to arbitrate a controversy, and that the respondent refuses to arbitrate the controversy, may apply to the appropriate court [*see Code Civ. Proc. § 1292*; set forth in *§ 20.10[1]*], for an order compelling the parties to arbitrate the controversy [*Code Civ. Proc. § 1281.2*; *see § 20.10[1]*].

A defendant may also file a petition to compel arbitration pursuant to *Code Civ. Proc. § 1281.2* in lieu of filing an answer to a complaint. If the petition is denied, the defendant has 15 days from denial to plead to the complaint [*Code Civ. Proc. § 1281.7*].

Cal. Rules of Ct., Rule 3.1330 requires that a petition to compel arbitration or to stay proceedings pursuant to *Code Civ. Proc. §§ 1281.2* and *1281.4* must state the provisions of the written agreement and the paragraph that provides for arbitration. The provisions must be stated verbatim or a copy must be attached to the petition and incorporated by reference.

[iv] Jurisdiction to Determine Petitions

After a petition has been filed under *Code Civ. Proc. § 1280 et seq.* [*see Code Civ. Proc. § 1292* (venue for petition filed before commencement of arbitration), set forth in *§ 20.10[1]*], the court in which the petition was filed retains jurisdiction to determine any subsequent petition involving the same arbitration agreement and the same controversy; any subsequent petition must be filed in that same proceeding [*Code Civ. Proc. § 1292.6*].

Any petition made after the commencement or completion of arbitration is to be filed in a court having jurisdiction in the county where the arbitration is being, or has been, held, or, if the arbitration is, or was, not held exclusively in any one county of California, or if held outside California, then the petition is to be filed as provided in *Code Civ. Proc. § 1292*, which is set forth in *§ 20.10[1]* [*Code Civ. Proc. § 1292.2*].

Superior courts have jurisdiction over arbitration-related petitions whether the matter is a limited or unlimited civil case [*see Cal. Const., art. VI, § 10*; *Code Civ. Proc. § 86(a)(10)(A)*; *see also Code Civ. Proc. § 85* (defining "limited civil case")].

[v] Staying Related Action or Proceeding

If the arbitrable controversy involves an issue that is also involved in an action or proceeding pending in a California court, and the petitioner seeking to compel arbitration is a party to that action or proceeding, the petitioner may move the court to stay the matter before it until the application to compel arbitration is determined and, if arbitration is in fact ordered, until an arbitration is had in accordance with the order (unless the court specifies an earlier time) [*Code Civ. Proc. § 1281.4*]. If such an action or proceeding is pending in the superior court, the motion normally is combined with the petition to compel and supported by the same memorandum, as the petition must be filed in that superior court [*see Code Civ. Proc. § 1292.4*, set forth in *§ 20.10[1]*]. Otherwise, the motion to stay the action or proceeding is to be filed

in the court in which that action is pending [*Code Civ. Proc. § 1292.8*; *see § 20.11[1]*].

[vi] Consolidating Separate Arbitration Proceedings

Code Civ. Proc. § 1281.3 authorizes a court to order the consolidation of separate arbitration proceedings on petition of a party to an arbitration agreement when:

- Separate arbitration agreements or proceedings exist between the same parties, or one party is a party to a separate arbitration agreement or proceeding with a third party;
- The disputes arise from the same transaction or series of related transactions; and
- A common issue or issues of law or fact create the possibility of conflicting rulings by more than one arbitrator or panel of arbitrators.

For a memorandum in support of a petition to consolidate separate arbitration proceedings, see *§ 20.13[1]*.

The court may exercise its discretion to deny consolidation or to consolidate separate arbitration proceedings only concerning certain issues, leaving other issues to be resolved in separate proceedings. If the arbitration agreements in consolidated proceedings contain inconsistent provisions, the court must resolve the conflicts and determine the rights and duties of the various parties, to achieve substantial justice under all the circumstances [*Code Civ. Proc. § 1281.3*].

[vii] Costs

Code Civ. Proc. § 1293.2 provides for costs to be awarded in arbitration proceedings. If the arbitration agreement provides for an award of costs of both arbitration and court proceedings, the court may enforce that provision [*see* Ch. 20C, *Arbitration: Confirming, Correcting, or Vacating the Award*, § 20C.350].

In addition, *Code Civ. Proc. § 998* is applicable to contractual arbitration, so a party who does not receive an award that is more favorable than a pre-arbitration settlement offer will be charged with the offeror's post-offer costs and expert witness fees.

[b] Statutes Relating to Arbitration of Specific Controversies

Agreements to arbitrate certain types of controversies are governed by other specific statutes, including the following:

- *Bus. & Prof. Code § 6200 et seq.* (attorney's fee disputes).
- *Code Civ. Proc. § 1273.010 et seq.* (compensation for property taken by eminent domain).
- *Code Civ. Proc. § 1295* (medical malpractice disputes).
- *Code Civ. Proc. § 1296* (public construction contract disputes).
- *Code Civ. Proc. § 1297.11 et seq.* (international commercial disputes).
- *Code Civ. Proc. § 1298 et seq.* (contracts to convey real property).
- *Ins. Code § 11580.2* (uninsured motorist claims).

- *Lab. Code § 229* (wage claims).
- *Lab. Code § 1700.45* (labor contracts with talent agencies).
- *Lab. Code §§ 6144-6146* (state employees' workers' compensation and insurance).

[5] Judicial Arbitration in California

Judicial arbitration is required in California for certain actions, mainly those in which the amount in controversy does not exceed $50,000. Judicial arbitration is governed by *Code Civ. Proc. § 1141.10 et seq.* and *Cal. Rules of Ct., Rule 3.810 et seq.*, and is the subject of Ch. 131A, *Judicial Arbitration* [*see also* California Forms of Pleading and Practice, Ch. 36, *Judicial Arbitration* (Matthew Bender)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActOrders to Compel ArbitrationCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActStays Pending ArbitrationCivil ProcedureAlternative Dispute ResolutionArbitrationsForeign Arbitral AwardsCivil ProcedureAlternative Dispute ResolutionArbitrationsWaivers

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§ 20.03 How to Use the Forms in This Chapter

[1] Page Limits on Points and Authorities

One of the more significant drafting requirements to keep in mind are page limits: supporting and opposing memoranda must not exceed 15 pages, or 20 pages in a summary judgment proceeding. A reply or closing memorandum may not exceed 10 pages in length [*see Cal. Rules of Ct., Rule 3.1113(d)*]. Exhibits, declarations, attachments, tables of contents and authorities, and proof of service are not counted. Any party must obtain leave of court to file a longer memorandum [*see Cal. Rules of Ct., Rule 3.1113(d), (e)*]. These and other drafting requirements are discussed in *further detail in Chapter 1, Writing Legal Memoranda and Briefs, § 1.05*.

[2] Using the Forms to Build a Draft Memorandum

The forms included in this chapter are designed to be combined with other forms to form a complete memorandum. For detailed discussion on how to select and use the forms in the publication to build a draft memorandum and complete the draft, with detailed discussion of all drafting requirements and strategic or stylistic considerations, see *Ch. 1, Writing Legal Memoranda and Briefs, §§ 1.03 -1.06*. For a skeletal form of memorandum for use in creating a properly formatted outline in which to compile relevant forms from this publication, see *Ch. 1, Writing Legal Memoranda and Briefs, § 1.10*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeContent & FormCivil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPleading & PracticeMotion PracticeSupporting Memoranda

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§ 20.04 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

For detailed legal background discussion, research guides, procedural checklists, and practice forms of motions and other papers relating to private contractual arbitration proceedings, see:

- California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

- California Forms of Pleading and Practice, Ch. 33, *Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding* (Matthew Bender).

- California Forms of Pleading and Practice, Ch. 34, *Contractual Arbitration: Judicial Review* (Matthew Bender).

[2] Related Points and Authorities

Chapters in this publication with related forms include:

- For resisting arbitration, see Ch. 20A, *Arbitration: Resisting* .

- For selecting arbitrators and determining arbitral immunity, see Ch. 20B, *Arbitration: Selecting Arbitrators; Arbitral Immunity* .

- For confirming, correcting, or vacating an arbitration award, see Ch. 20C, *Arbitration: Confirming, Correcting, or Vacating the Award* .

- For dismissing an arbitration, see Ch. 20D, *Arbitration: Dismissing* .

- For determining the effect of an arbitration award, see Ch. 20E, *Arbitration: Effect of Award* .

- For situations in which attorney's fees may be recovered, see Ch. 25, *Attorney's Fees* .

- For contract provisions in general, see Ch. 50, *Contracts* .

- For situations in which contracts may be avoided or declared void, see Ch. 92, *Duress, Menace, Fraud, Undue Influence, and Mistake* .

- For requirements of injunctions, see Ch. 116, *Injunctions* .

- For general principles relating to specific performance of contracts, see Ch. 214, *Specific Performance* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActOrders to Compel ArbitrationCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewContracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawRemediesSpecific Performance

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[Reserved]

§§ 20.05[Reserved]

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PART II. FORMS
A. General Principles Related to Compelling Arbitration

2-20 California Points & Authorities § 20.10

§ 20.10 Supporting Petition to Compel Arbitration [and Motion to Stay Related Action]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF PETITION TO
Petitioner,	)	COMPEL ARBITRATION [AND MOTION TO
vs.	)	STAY ACTION]
_____ [*name*],	)	Date: _____
Respondent.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

PETITIONER, AS A PARTY TO AN ARBITRATION AGREEMENT, IS ENTITLED TO AN ORDER COMPELLING ARBITRATION BECAUSE RESPONDENT HAS REFUSED TO ARBITRATE A CONTROVERSY UNDER THAT AGREEMENT.

A. Court to Order Arbitration Under Agreement. On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy, and that a party thereto refuses to arbitrate the controversy, the court shall order the parties to so arbitrate if it determines that such an agreement exists, unless the right to compel arbitration has been waived, there are grounds for revoking the agreement, or, except as to certain actions against health care providers, a party to the arbitration agreement is a party to a pending court action or special proceeding with a third

party arising out of the same or series of related transactions, and there is a possibility of conflicting rulings on a common issue of law or fact (*Code Civ. Proc. § 1281.2*).

[*EITHER*]

[*Optional*] **B. Venue for Petition Made Prior to Commencement of Arbitration under Private Agreement.** [Except as otherwise provided by this article], [A]ny petition made prior to the commencement of arbitration shall be filed in a court having jurisdiction in (*Code Civ. Proc. § 1292*):

(a) The county where the agreement is to be performed or was made.

(b) If the agreement does not specify a county where it is to be performed and the agreement was not made in any county in California, the county where any party to the court proceeding resides or has a place of business.

(c) In any case not covered by subdivision (a) or (b) of this section, in any county in California.

[*OR*]

[*Optional*] **B. Venue for Petition to Compel Arbitration if Related Action Has Already Been Commenced.** If a controversy referable to arbitration under an alleged agreement is involved in an action or proceeding in a superior court, a petition for an order to arbitrate shall be filed in that action or proceeding (*Code Civ. Proc. § 1292.4*).

C. Proving Existence of Agreement to Arbitrate. When a petition to compel arbitration is filed and accompanied by prima facie evidence of a written agreement to arbitrate the controversy, the court itself must decide whether the agreement exists, and if any defense to its enforcement is raised [--either fraud in the execution voiding the agreement or a statutory defense of waiver or revocation--], whether the agreement is enforceable. Because existence of the agreement is a statutory prerequisite to granting the petition, the petitioner bears the burden of proving its existence by a preponderance of the evidence. [If the party opposing the petition raises a defense to its enforcement, that party bears the burden of proving by a preponderance of the evidence, any fact necessary to the defense] (*see Code Civ. Proc. § 1281.2(a), (b)*; *Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 972, 64 Cal. Rptr. 2d 843, 938 P.2d 903* ; *Rosenthal v. Great Western Fin. Securities Corp. (1996) 14 Cal. 4th 394, 413, 58 Cal. Rptr. 2d 875, 926 P.2d 1061* ; *Hotels Nevada v. L.A. Pacific Center, Inc. (2006) 144 Cal. App. 4th 754, 758, 761, 50 Cal. Rptr. 3d 700*).

[*Optional*] **D. Evidentiary Hearing.** The hearing to determine a petition to compel arbitration pursuant to a contract requires the petitioner to prove by affidavit or declaration and documentary evidence, with oral testimony taken only by the court's discretion. [There is no authority for the proposition that a trial court necessarily abuses its discretion, in a motion proceeding, by resolving evidentiary conflicts without hearing testimony], although the better course would normally be for the trial court to hear oral testimony and allow the parties the opportunity for cross-examination. [A court errs by failing to exercise its authority by holding an evidentiary hearing to determine arbitrability before it rules on a motion to compel arbitration] (*Code Civ. Proc. § 1290.2*; *Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 972-973, 64 Cal. Rptr. 2d 843, 938 P.2d 903* ; *Rosenthal v. Great Western Fin. Securities Corp. (1996) 14 Cal. 4th 394, 413-414, 58 Cal. Rptr. 2d 875, 926 P.2d 1061* ; *Hotels Nevada v. L.A. Pacific Center, Inc. (2006) 144 Cal. App. 4th 754, 758, 761-763, 50 Cal. Rptr. 3d 700*).

[*Optional*] **E. Federal Right to Jury Trial Is Not Applicable in State Court.** Title *9 of the United States Code,*

section 4 does not require a California court to hold a jury trial on the existence of an arbitration agreement, because the California procedure is not contrary to and does not frustrate the federal law (*Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 972, 64 Cal. Rptr. 2d 843, 938 P.2d 903* ; *Rosenthal v. Great Western Fin. Securities Corp. (1996) 14 Cal. 4th 394, 407-410, 58 Cal. Rptr. 2d 875, 926 P.2d 1061*).

[*Optional*] **F. Fact That Presumption of Going Forward With Evidence Was Met Does Not Negate Sufficiency of Evidence to Support Finding That Arbitration Agreement Exists.** Evidence that one party mailed documents containing the arbitration agreement to the other party creates a presumption affecting burden of producing evidence, which the other party can meet by testimony that he or she did not receive those documents. Nevertheless, contradictory evidence that remains is still substantial evidence that will support a finding that the parties agreed to arbitrate (*see Craig v. Brown & Root, Inc. (2000) 84 Cal. App. 4th 416, 421-422, 100 Cal. Rptr. 2d. 818*).

[*Optional*] **G. Arbitrator, Not Court, Should Determine Compliance With [Private] Limitation Period.** A defense that the claim sought to be arbitrated is barred by the statute of limitations is for the arbitrator, not the court, to decide. That the statute of limitations has run on the underlying claims is not one of the legislatively or judicially recognized justifications for denying a petition to compel. Rather, the statute of limitations is an affirmative defense that falls naturally within the plain language of the parties' agreement to arbitrate. [This is true whether the limitation period is a statute or a private limitation period imposed by the parties' agreement or the arbitration rules they have designated as applicable] (*Howsam v. Dean Witter Reynolds, Inc. (2002) 537 U.S. 79, 123 S. Ct. 588, 592-594, 154 L. Ed. 2d 491* ; *Wagner Construction Co. v. Pacific Mechanical Corp. (2007) 41 Cal. 4th 19, 24, 26, 28, 58 Cal. Rptr. 3d 434, 157 P.3d 1029*).

[*Optional*] **H. Under Federal Arbitration Act, Arbitrator, Not Court, Determines Waiver.** The issue of waiver of the right to compel arbitration is determined by the court if the matter is governed by *Code of Civil Procedure Section 1281.2*. However, if the matter is governed by the Federal Arbitration Act (FAA) and there is no explicit choice of California law, the arbitrator determines whether the party seeking to compel arbitration has waived the right to do so, [unless the claim of waiver is based on litigation conduct, in which case the court determines the issue of waiver] (*Howsam v. Dean Witter Reynolds, Inc. (2002) 537 U.S. 79, 84, 123 S. Ct. 588, 592-594, 154 L. Ed. 2d 491* ; *Omar v. Ralphs Grocery Co., Inc. (2004) 118 Cal. App. 4th 955, 962-965, 13 Cal. Rptr. 3d 562* ; *Thorup v. Dean Witter Reynolds, Inc. (1986) 180 Cal. App. 3d 228, 233-235, 225 Cal. Rptr. 521* ; *see 9 U.S.C. § 3*; *see also Wagner Construction Co. v. Pacific Mechanical Corp. (2007) 41 Cal. 4th 19, 24, 25-27, 58 Cal. Rptr. 3d 434, 157 P.3d 1029* (remanding to have trial court determine waiver)).

[*Optional*] **I. Arbitrator, Not Court, Determines Arbitrability.** When the contract provides for arbitration in conformance with rules that specify the arbitrator will decide the scope of his or her own jurisdiction, the parties' intent is clear and unmistakable, even without a recital in the contract, that the arbitrator will decide any dispute over arbitrability (*Rodriguez v. American Technologies, Inc. (2006) 136 Cal. App. 4th 1110, 1123, 39 Cal. Rptr. 3d 437* ; *Dream Theater, Inc. v. Dream Theater (2004) 124 Cal. App. 4th 547, 557, 21 Cal. Rptr. 3d 322*). When parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to the arbitrator (*Greenspan v. LADT, LLC (2010) 185 Cal. App. 4th 1413, 1442, 111 Cal. Rptr. 3d 468)* .

[*Optional*] **J. Federal Arbitration Act Is Not Offended When Arbitrator Allows Court to Determine Legality of Entire Contract.** Part of the issue of the existence of a valid contract for arbitration is the determination of whether the contract as a whole is illegal, which under California law, and thus under a contract governed by the Federal Arbitration Act which includes a California choice of law provision, is for the court to decide. The Federal Arbitration Act (*9 U.S.C. § 1 et seq.*) is not offended when the arbitrator defers to allow the court to determine in the first instance whether the entire contract is illegal (*Hotels Nevada, LLC v. Bridge Banc, LLC (2005) 130 Cal. App. 4th 1431, 1436-1438, 30 Cal. Rptr. 3d 903*).

CAUTION:

The authority in Optional Paragraph J has been overruled by the United States Supreme Court authority in Optional Paragraph K to the extent it holds that California law and *Code Civ. Proc. § 1281* empower the court to determine the legality of the agreement containing the arbitration clause as a whole when the Federal Arbitration Act governs [*Hotels Nevada, LLC v. Bridge Banc, LLC (2005) 130 Cal. App. 4th 1431, 1435-1437]* . *Hotels Nevada* may still have validity in a situation in which the issue has first been presented to the arbitrator, who acknowledged his or her authority to determine that issue, but ceded it to the court for reasons of economy or speedy resolution [*see Hotels Nevada, LLC v. Bridge Banc, LLC (2005) 130 Cal. App. 4th 1431, 1438* (court might have decided differently if matter had not first been submitted to arbitrator)].

[*Optional*] **K. Under Federal Arbitration Act, Arbitrator, Not Court, Determines Illegality.** Under the Federal Arbitration Act, when the challenge is to the validity of the contract as a whole and not just the arbitration clause, the issue of the illegality of that contract is to be determined by the arbitrator (*see 9 U.S.C. § 2*; *Preston v. Ferrer (2008) 552 U.S. 346, 128 S. Ct. 978, 169 L. Ed. 2d 917, 923, 925-926* ; *Buckeye Check Cashing, Inc. v. Cardegna (2006) 546 U.S. 440, 126 S. Ct. 1204, 1208-1210, 163 L. Ed. 2d 1038*).

[*Optional*] **L. *Code of Civil Procedure Section 1281.2* Is Not Applicable to Deny Arbitration for Possible Conflicting Rulings.** By examining the language of the parties' contract, it is clear that they unequivocally adopted both the substantive and procedural sections of the Federal Arbitration Act to govern their arbitration. Thus, *Section 1281.2 of the Code of Civil Procedure* is not applicable, and the court has no discretion but to compel arbitration as to the issues and parties bound by the arbitration agreement (*see Rodriguez v. American Technologies, Inc. (2006) 136 Cal. App. 4th 1110, 1115-1123)* .

[*Optional*] **M. Under Federal Arbitration Act, Court, Not Arbitrator, Determines Challenge that Arbitration Provisions Are Unconscionable.** When the complaint challenges the validity or enforceability of the agreement containing the arbitration provision, the question of whether the agreement, as a whole, is unconscionable must be referred to the arbitrator. When the crux of the complaint is not the invalidity of the contract as a whole, but rather the unconscionability of the arbitration provision itself, then the [federal] court must decide whether the arbitration provision is invalid and unenforceable under the Federal Arbitration Act (*see 9 U.S.C. § 2*; *Nagrampa v. MailCoups, Inc. (9th Cir. 2006) 469 F.3d 1257, 1276-1277* ; *see also Sanchez v. Western Pizza Enterprises, Inc. (2009) 172 Cal. App. 4th 154, 165-166, 90 Cal. Rptr. 3d 818* ; *Bruni v. Didion (2008) 160 Cal. App. 4th 1272, 1283-1290, 73 Cal. Rptr. 3d 395* ; *Baker v. Osborne Development Corp. (2008) 159 Cal. App. 4th 884, 893-894, 71 Cal. Rptr. 3d 854* (because arbitration provisions were ambiguous, there was no "clear and unmistakable" direction that arbitrator determine issue); *Murphy v. Check 'N Go of California, Inc. (2007) 156 Cal. App. 4th 138, 144-146* , *67 Cal. Rptr. 3d 120* (provision for arbitrator to determine unconscionability was itself substantively unconscionable); *Higgins v. Superior Court (Disney/ABC International Television, Inc.) (2006) 140 Cal. App. 4th 1238, 1247, 1249-1251, 45 Cal. Rptr. 3d 293*).

[*Optional*] **N. Under Federal Arbitration Act, Court, Not Arbitrator, Determines Existence of Entire Contract.** Under the Federal Arbitration Act, issues regarding the *validity* or *enforcement* of a putative contract mandating arbitration should be referred to an arbitrator, but challenges to the *existence* of a contract as a whole must be determined by the court prior to ordering arbitration (*Sanford v. Member Works, Inc. (9th Cir. 2007) 483 F.3d 956, 962, 964)* .

[*Optional*] **O. National Association of Security Dealers Class Arbitration Rule.** National Association of Security Dealers (NASD) Code of Arbitration Procedure Rule 12204, approved by the Securities and Exchange Commission in 1992 with the intent to allow investor class actions to proceed in federal court, makes all actions agreed by the parties to be arbitrated under those rules ineligible when sought to be or actually certified as a class. Both the court and the arbitrator have authority to make the determination of ineligibility (*Clark v. First Union Securities, Inc. (2007) 153*

Cal. App. 4th 1595, 1601, 1610-1611, 64 Cal. Rptr. 3d 313).

[*Optional*] **P. Parties' Agreement Gives Court Authority to Award Attorney's Fees for Petition to Compel Arbitration.** Under the particular agreement involved in this case, which specifies that _____ [*describe provision, e.g.,* should any party institute any legal action or administrative proceeding against the other by any method other than arbitration, the responding party is entitled to recover from the initiating party all damages, costs, expenses, and attorney's fees incurred as a result of that action], it is proper for the trial court to award petitioner its attorney's fees reasonably expended in moving this matter to arbitration, even though it is an interim award and even though petitioner may not be the ultimate prevailing party (*Acosta v. Kerrigan (2007) 150 Cal. App. 4th 1124, 1130-1133, 58 Cal. Rptr. 3d 865*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a petition for an order to compel arbitration under a contract when the respondent refuses to arbitrate in accordance with the provisions of that contract calling for arbitration. It sets forth the basic requirements for establishing the existence of an agreement to arbitrate [*Code Civ. Proc. §§ 1281.2, 1290.2*; *Cal. Rules of Ct., Rule 3.1330*].

Optional Paragraph G is for use when counsel want to make sure the issue of compliance with any applicable statute of limitations defense will be determined by the arbitrator. The bracketed language regarding a private limitation period is based on the fact situation in *Howsam v. Dean Witter Reynolds, Inc. (2002) 537 U.S. 79, 123 S. Ct. 588, 154 L. Ed. 2d 491* , discussed at [3][f], *below*. If the matter is governed by the Federal Arbitration Act and counsel anticipates a claim of waiver of the right to compel arbitration based on something other than litigation conduct, use Optional Paragraph H. If the question of whether a particular arbitration agreement should be interpreted to impliedly prevent classwide arbitration is at issue, counsel should include authority from Ch. 20C, *Arbitration: Confirming, Correcting, or Vacating the Award*, § 20C.105 which holds that it is the arbitrator, not the court, who should make that interpretation.

If the matter is one in which the parties have clearly stated their intention that the arbitrator determine arbitrability, counsel should use optional Paragraph I, which also may be used in a petition or other request to the arbitrator or arbitration panel to determine arbitrability. Counsel who use optional Paragraph I should probably cite and attach the particular arbitration rule that provides for the arbitrator to determine arbitrability as well as the part of the arbitration agreement that specifies that rule is to govern.

Optional Paragraph J is for use when the matter is governed by the Federal Arbitration Act and the arbitrator has agreed to defer to the court to allow the court to determine in the first instance whether the entire contract is illegal. Optional Paragraph K is for use to support the contention that the arbitrator, not the court, is to determine any claim of illegality of the agreement containing the arbitration clause as a whole. Optional Paragraph L is to anticipate or rebut an attempt to resist arbitration when there is litigation pending with a party or parties who are not bound by the arbitration agreement and a possibility of conflicting rulings in that litigation and in the arbitration when the arbitration agreement clearly provides that even the procedural aspects of the Federal Arbitration Act have been adopted by the parties. In this situation, the party worried about conflicting rulings may want to move under *Code Civ. Proc. § 1281.4* to have the

litigation stayed during the arbitration.

Optional Paragraph M is for use to make clear that the court, not the arbitrator, has the responsibility to determine a challenge to the arbitration agreement alone (not the entire contract in which it appears) based on unconscionabilty. See Forms *§§ 20.11* and *20.12*.

Optional Paragraph N contains the federal authority for the proposition that under the Federal Arbitration Act, when the existence of the underlying contract (not just the arbitration clause) is contested, the matter is to be determined by the court.

Optional Paragraphs O and P have limited application to particular situations: Paragraph O is for use if the parties have agreed to arbitrate under the NASD Rules of Arbitration Procedure and plaintiff wants to proceed with class arbitration. Paragraph P is for use if the parties' contract provides expressly for attorney's fees on a motion to compel arbitration.

Petitioner may wish to anticipate any opposition on grounds of absence of anagreement, waiver, or revocation as the basis of the respondent's refusal to arbitrate, so that authority contrary to the points to be raised by the respondent is clearly before the court. For that purpose, appropriate memoranda from *§ 20.80* et seq. may be combined with this memorandum.

In addition, if petitioner wishes the order to specify governing law, or the scope of arbitrable issues under the agreement, or that a particular party is bound by the agreement, all applicable authorities from *§§ 20.20* et seq., *20.30* et seq., *20.40* et seq., *20.60* et seq., and Ch. 20C, *Arbitration: Confirming, Correcting, or Vacating the Award*, § 20C.105 should be combined with this memorandum.

If there is an action pending relating to the arbitrable controversy, petitioner probably will want to combine this memorandum with the memorandum at *§ 20.11* to stay that action [*see Marcus v. Superior Court (1977) 75 Cal. App. 3d 204, 212-213, 141 Cal. Rptr. 890* (time during which action is stayed is excluded from the five-year period contemplated by mandatory dismissal statute)]. In that case, the motion to stay may be combined with the petition and supported by the same memorandum.

[b] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, if petitioner wishes to anticipate a claim by respondent that petitioner has waived its right to arbitrate, counsel's argument should focus on the critical points made in the supporting declarations, and in any other pleadings or motions before the court of which petitioner requests to court to take judicial notice [*see Evid. Code § 450 et seq.*] regarding the lack of prejudice to respondent on account of any action taken by petitioner and regarding the fact that none of petitioner's actions were inconsistent with arbitration.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement)].

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California

Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For a form of a petition to compel arbitration that may be supported by this memorandum, and for a notice of hearing on that petition, as well as a notice of motion to stay proceedings, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

[d] Related Memoranda

For additional memoranda to combine with this form, regarding other matters that the petition may need to address, see *§§ 20.11 -20.14, 20.20* et seq., *20.30* et seq., *20.40* et seq., *20.60* et seq., and *20.80* et seq.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda in *Ch. 20A, Arbitration: Resisting, § 20A.10* et seq. may be used in an appropriate case to oppose the memorandum set out in this general form and also to oppose the memoranda designed to be combined with this form.

For a memorandum supporting the proposition that in a matter governed by the Federal Arbitration Act, the arbitrator, not the court, interprets the arbitration provision to determine whether it permits classwide arbitration, see *Ch. 20C, Arbitration: Confirming, Correcting, or Vacating the Award, § 20C.105*. If counsel wishes to challenge a ban on classwide arbitration in a contract governed by the Federal Arbitration Act as unconscionable, see *Ch. 20A, Arbitration: Resisting, § 20A.91*.

[3] Discussion of Authorities

[a] Proving Existence of Agreement to Arbitrate

Engalla v. Permanente Medical Group, Inc. *(1997) 15 Cal. 4th 951, 64 Cal. Rptr. 2d 843, 938 P.2d 903* , arose out of a medical malpractice claim between plaintiffs' decedent and defendant (Kaiser). The claim was to have been arbitrated under the "Service Agreement" between decedent's employer and Kaiser, but decedent died one day after the neutral (third) arbitrator's appointment was acknowledged by Kaiser, which was approximately three months after the 60 days provided in the Service Agreement for the appointment of the neutral arbitrator by the two party-appointed arbitrators. Shortly thereafter decedent's family and representatives refused to continue with the arbitration and filed a complaint for medical malpractice and for fraud, alleging in the fraud claim that Kaiser had fraudulently induced decedent to enter into the service agreement by falsely representing that it intended to abide by the terms of the agreement regarding the expedition of arbitration, in particular the appointment of arbitrators, when in fact it was likely to take two years rather than the 60 days provided for in the agreement for the arbitrators to be appointed. The complaint also alleged that Kaiser engaged in a course of dilatory conduct designed to postpone Engalla's arbitration hearing until after his death. Kaiser petitioned to compel arbitration of the claims in the suit. Plaintiffs opposed the petition on the grounds the agreement had been induced by fraud and that Kaiser had waived its right to arbitrate by bad faith and unreasonable delay in appointment of arbitrators. The trial court agreed, and refused to grant the petition to compel arbitration, but the court of appeal reversed.

The Supreme Court reversed and remanded to the trial court because there were still issues of fact to be determined by the trial court regarding the claims of fraud and waiver. In discussing the proper procedure for resolving a petition to

compel arbitration, the Court held that petitioner bears the burden of proving the existence of a valid arbitration agreement by the preponderance of the evidence, and the party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense (*15 Cal. 4th 951, 972)* [*see also* additional discussion of *Engalla* under [b], *below*].

Rosenthal v. Great Western Fin. Securities Corp. *(1996) 14 Cal. 4th 394, 58 Cal. Rptr. 2d 875, 926 P.2d 1061* , was a suit by 24 investors in stock and bond mutual funds against the brokerage firm, and four of its employees, from whom they bought the funds, an affiliated bank, and the parent company of both. The suit alleged breach of fiduciary duty, fraud, negligent misrepresentation, intentional and negligent infliction of emotional distress, unfair business practices, and invasion of privacy. Defendants petitioned to compel arbitration under the predispute arbitration clause in the agreement plaintiffs executed to purchase the securities. Plaintiffs opposed the petition on the grounds (1) that there was fraud in the inception of the contract and (2) that the contract they signed was permeated with fraud. Plaintiffs submitted declarations in support of their position. Generally the declarations stated that plaintiffs were longtime depositors of the bank, that the brokers represented themselves to be employees of the bank [and in some cases referred to supposedly confidential information about plaintiffs' deposits at the bank], that the brokers materially misrepresented the nature of the investments being sold, and did not tell plaintiffs that the client agreement contained an arbitration clause, but rather that the agreement was merely a formality required to open an account. The trial court agreed with defendants that the Federal Arbitration Act's provision for a jury trial [*9 U.S.C. § 4*] did not apply, and at a nonevidentiary hearing denied the petition to compel arbitration as to all but one of the plaintiffs on the grounds that each of those plaintiffs presented sufficient evidentiary support for their allegations of fraud in the inception of the arbitration agreement. Defendants appealed.

The court of appeal held that the federal jury trial provision was applicable in state court, and did not reach the fraud claims, but remanded for the trial court to determine whether plaintiffs had sufficiently alleged fraud in the making of the arbitration agreement, and if so, to try, by jury if requested, the issue of whether the arbitration agreements were the result of fraud. The Supreme Court granted defendant brokerage firm's petition for review and held:

- That the Federal Arbitration Act's provision for a jury trial [*9 U.S.C. § 4*] does not apply in state court to determine the existence or validity of an arbitration agreement, overruling *Rice v. Dean Witter Reynolds, Inc. (1991) 235 Cal. App. 3d 1016, 1025, 1 Cal. Rptr. 2d 265* ; *Strotz v. Dean Witter Reynolds, Inc. (1990) 223 Cal. App. 3d 208, 272 Cal. Rptr. 680* ; and *Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1977) 67 Cal. App. 3d 19, 136 Cal. Rptr. 378* , to the extent they reach the opposite conclusion (*14 Cal. 4th 394, 407)* . The Supreme Court reversed the judgment of the court of appeal insofar as it directed the trial court to conduct jury trials on plaintiffs' claims of fraud in the inception (*14 Cal. 4th 394, 431)* .

- That the proper procedure is for the trial court to hold an evidentiary hearing to determine if an arbitration agreement exists, and if any defense to its enforcement is raised, whether the agreement is enforceable (*14 Cal. 4th 394, 413)* .

- That the so-called "permeation doctrine" should no longer be recognized in California to the extent that doctrine indicates that an agreement to arbitrate may be found invalid simply because the contract as a whole was induced by fraud [*see Prima Paint Corp. v. Flood & Conklin (1967) 388 U.S. 395, 404, 87 S. Ct. 1801, 18 L. Ed. 2d 1270, 1277]* (*14 Cal. 4th 394, 418-419)* .

- That to the extent that the permeation doctrine is merely another name for fraud in the execution of a contract it is unnecessary (*14 Cal. 4th 394, 418)* .

- That most of the plaintiffs did not present legally sufficient evidence that they reasonably relied on defendants' misrepresentations and therefore did not prove claims of fraud in the inception or execution

of the agreements sufficient to render the agreements void (*14 Cal. 4th 394, 426-427)* . As to those plaintiffs, the Court affirmed the court of appeal's judgment to reverse the order denying the petition to compel arbitration of their claims (*14 Cal. 4th 394, 426-427, 431)* .

- That as to other plaintiffs, who had limited facility with English or were legally blind, remanded to the trial court for determination of claims of fraud in the execution or inception of the agreements (*14 Cal. 4th 394, 427-431)* .

In considering the proper procedure for determining arbitrability, the Court noted that *Code Civ. Proc. §§ 1281.2, 1290.2* establish the procedure for determining the existence or validity of an agreement to arbitrate. When a petition to compel arbitration is filed and accompanied by prima facie evidence of a written agreement to arbitrate the controversy, the court itself must decide whether the agreement exists, and if any defense to its enforcement is raised, whether it is enforceable. Because existence of the agreement is a statutory prerequisite to granting the petition, the petitioner bears the burden of proving its existence by a preponderance of the evidence. If the party opposing the petition raises a defense to its enforcement--either fraud in the execution voiding the agreement or a statutory defense of waiver or revocation [*see Code Civ. Proc. § 1281.2(a), (b)*], that party bears the burden of producing evidence, and of proving by a preponderance of the evidence, any fact necessary to the defense (*14 Cal. 4th 394, 413)* .

Hotels Nevada v. L.A. Pacific Center, Inc. *(2006) 144 Cal. App. 4th 754, 50 Cal. Rptr. 3d 700* , arose out of a purchase and sale agreement for a $75 million property. Plaintiff/seller filed a complaint for rescission based on fraud, cancellation of written instruments based on illegality and conspiracy, alleging that defendant/buyer "manipulated, fabricated, and manufactured" the agreement to in correctly reflecta 60-month holdback period for $5 million of the purchase price rather than the 12-month period to which plaintiff had agreed. Defendant moved to compel arbitration. The trial court denied the motion, concluding that defendant had failed to meet its burden to show that it had an enforceable agreement to arbitrate and that an evidentiary hearing would be necessary to determine whether the parties had a contract. Defendant/seller appealed.

The court of appeal reversed and remanded, stating that the time for the trial court to hold the evidentiary hearing was before it ruled on the motion to compel arbitration, not after (*144 Cal. App. 4th 754, 758, 766)* . The court cited *Rosenthal v. Great Western Fin. Securities Corp. (1996) 14 Cal. 4th 394, 413-414, 58 Cal. Rptr. 2d 875, 926 P.2d 1061* (*Rosenthal*; discussed *above*) for the proposition that the role of the trial court on a motion to compel arbitration is to sit as a trier of fact, weighing any affidavits, declarations, and other documentary evidence, together with oral testimony received at the court's discretion, to reach a determination on the issue of arbitrability (*144 Cal. App. 4th 754, 758*). When a petition to compel arbitration is filed and accompanied by prima facie evidence of a written agreement to arbitrate the controversy, the court itself must determine whether the agreement exists and, if any defense to its enforcement is raised, whether it is enforceable. Because the existence of the agreement is a statutory prerequisite to granting the petition, the petitioner bears the burden of proving its existence by a preponderance of the evidence. If the party opposing the petition raises a defense to enforcement--either fraud in the execution voiding the agreement, or a statutory defense of waiver or revocation--that party bears the burden of producing evidence of, and proving by a preponderance of the evidence, any fact necessary to the defense (*144 Cal. App. 4th 754, 761*). Again citing *Rosenthal*, the court of appeal noted that ordinarily, the facts will be proven by affidavit or declaration and documentary evidence, with oral testimony taken only in the court's discretion. Here, the trial court failed to comply with this authority, by denying the motion to compel arbitration without the benefit of any evidence (*144 Cal. App. 4th 754, 762)* . The trial court erred by denying the motion to compel arbitration on the basis of the complaint's allegations instead of a factual determination made after a hearing (*144 Cal. App. 4th 754, 763*). On remand, the court of appeal directed the trial court to conduct an evidentiary hearing on the motion (*144 Cal. App. 4th 754, 766*).

[b] Evidentiary Hearing

The facts and procedural background of ***Engalla v. Permanente Medical Group, Inc.*** *(1997) 15 Cal. 4th 951, 64 Cal.*

Rptr. 2d 843, 938 P.2d 903 , are discussed in [a], *above*. In discussing the proper procedure for determining arbitrability, the Supreme Court held that in these summary proceedings, the trial court is the trier of fact weighing all the affidavits, declarations, and other documentary evidence as well as oral testimony received at the court's discretion, to reach a final determination (*15 Cal. 4th 951, 972)* . The Court noted that it appeared that the trial court in this case, as in *Rosenthal v. Great Western Fin. Securities Corp. (1996) 14 Cal. 4th 394, 58 Cal. Rptr. 2d 875, 926 P.2d 1061* , incorrectly treated the procedure as a motion for summary judgment in which it was obliged to determine that there was a legitimate factual dispute among the parties but not to resolve that dispute. The Court quoted the trial court's statement that plaintiffs had made a substantive challenge to the arbitration clause and had presented facts tending to show that they were victims of fraud in the inducement and execution of the arbitration clause. The Court said the trial court appeared to have followed *Rowland v. PaineWebber Inc. (1992) 4 Cal. App. 4th 279, 6 Cal. Rptr. 2d 20* , that a trial court must only determine whether there are any facts supporting the allegation of fraud in the inducement (*15 Cal. 4th 951, 972)* . The trial court was apparently of the view that it did not have to definitively decide the fraud issue in order to dispose of the petition because that issue would ultimately be decided in a jury trial in the context of the damage action. Because the trial court, understandably confused by case law [*see* cases cited at *Rosenthal v. Great Western Fin. Securities Corp. (1996) 14 Cal. 4th 394, 407, 58 Cal. Rptr. 2d 875, 926 P.2d 1061]* , apparently abdicated its role as trier of fact in deciding the petition to compel, the Court concluded that the case had to be remanded to the trial court for it to resolve any factually disputed issues, unless there was insufficient support for plaintiffs' claim (*15 Cal. 4th 951, 973)* .

The facts and procedural background of ***Rosenthal v. Great Western Fin. Securities Corp.*** *(1996) 14 Cal. 4th 394, 58 Cal. Rptr. 2d 875, 926 P.2d 1061* , are discussed under [a], *above*. In discussing the evidentiary nature of the hearing to determine the petition to compel arbitration, the Court noted that the hearing contemplated by *Code Civ. Proc. § 1290.2* ("in the manner ... provided by law for the ... hearing of motions") would ordinarily mean the facts are to be proven by affidavit or declaration and documentary evidence, with oral testimony taken only by the court's discretion. Defendant contended that when the documentary evidence and declarations present a material factual dispute, the trial court must proceed to a summary bench trial. The Court said there is no authority for the proposition that a trial court necessarily abuses its discretion, in a motion proceeding, by resolving evidentiary conflicts without hearing testimony, although the Court agreed that, as is common with allegations of fraud, the better course would normally be for the trial court to hear oral testimony and allow the parties the opportunity for cross-examination. The Court noted the trial court's remark that "it's pretty difficult to weigh credibility without seeing the witness" (*14 Cal. 4th 394, 413-414)* . Because the trial court in this case only determined that a factual issue existed, and did not resolve it, to the extent that plaintiffs did produce legally sufficient evidence of fraud to void the agreement, the trial court must determine the factual issues on remand (*14 Cal. 4th 394, 414)* .

Hotels Nevada v. L.A. Pacific Center, Inc. *(2006) 144 Cal. App. 4th 754, 50 Cal. Rptr. 3d 700* , is discussed at [a], *above*.

[c] Federal Right to Jury Trial Is Not Applicable in State Court

The facts and procedural background of ***Engalla v. Permanente Medical Group, Inc.*** *(1997) 15 Cal. 4th 951, 64 Cal. Rptr. 2d 843, 938 P.2d 903* , are discussed in [a], *above*. In discussing the proper procedure for determining arbitrability, the Supreme Court noted that no jury trial is available to determine a petition to compel arbitration (*15 Cal. 4th 951, 972)* .

The facts and procedural background of ***Rosenthal v. Great Western Fin. Securities Corp.*** *(1996) 14 Cal. 4th 394, 58 Cal. Rptr. 2d 875, 926 P.2d 1061* , arediscussed under [a], *above*. All parties agreed that because the case involved interstate commerce, the action was governed by the Federal Arbitration Act. Both *9 U.S.C. § 2* and *Code Civ. Proc. § 1281* provide that arbitration agreements are enforceable except on such grounds as exist for the revocation of any contract. Both *9 U.S.C. § 4* and *Code Civ. Proc. § 1281.2* provide that the court may deny a petition to compel arbitration when the party resisting arbitration did not agree to arbitrate or if the agreement is revocable (*14 Cal. 4th*

394, 406) .

9 U.S.C. § 4 provides that the party resisting arbitration may demand a jury trial on the issue of the existence of the agreement. California law does not provide for a jury trial on that issue, but requires the issue to be determined in the manner provided by law for the making and hearing of motions [*Code Civ. Proc. § 1290.2*]. California courts of appeal have been divided on the availability of the right to a jury trial [*see Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 186, 35 Cal. Rptr. 2d 747* (*9 U.S.C. § 4* provision for jury trial is not applicable in state court); *Rice v. Dean Witter Reynolds, Inc. (1991) 235 Cal. App. 3d 1016, 1025, 1 Cal. Rptr. 2d 265* ; *Strotz v. Dean Witter Reynolds, Inc. (1990) 223 Cal. App. 3d 208, 210, 272 Cal. Rptr. 680* ; and *Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1977) 67 Cal. App. 3d 19, 24-25, 136 Cal. Rptr. 378* (party entitled to jury trial in state court)]. The Supreme Court held that *9 U.S.C. § 4* does not require a California court to hold a jury trial on the existence of an arbitration agreement, and overruled the court of appeal cases cited above to the extent they reach the opposite conclusion (*14 Cal. 4th 394, 407)* . The California procedure is not contrary to and does not frustrate the federal law. Having a court rather than a jury decide whether an arbitration agreement exists will often resolve the dispute more quickly and less expensively; and thus, the California procedure for deciding motions to compel arbitration serves to further, rather than defeat, full and uniform effectuation of the federal law's objectives (*14 Cal. 4th 394, 409-410)* .

The Supreme Court also considered and disagreed with plaintiffs' claims (1) that the California procedure for determining the existence of a contract is impermissible under federal law because it constitutes a special rule for arbitration agreements not applicable to contracts generally (*14 Cal. 4th 394, 410)* and (2) that the right to a jury trial is required by the California constitution. A petition to compel arbitration is in essence a suit in equity to compel specific performance of a contract. Actions for specific performance were not recognized at common law. Thus, the California constitution does not guarantee the parties a jury trial even if the court must determine the existence of the agreement or whether the agreement is void for fraud (*14 Cal. 4th 394, 411-413)* .

[d] Fact That Presumption of Going Forward With Evidence Was Met Does Not Negate Sufficiency of Evidence to Support Finding That Arbitration Agreement Exists

Craig v. Brown & Root, Inc. *(2000) 84 Cal. App. 4th 416, 100 Cal. Rptr. 2d. 818* arose out of plaintiff's termination of employment with defendant. Plaintiff alleged wrongful termination, sexual harassment, gender discrimination, and other causes of action. The arbitration agreement was part of a dispute resolution program that covered all employee disputes. Employer's evidence was that on two occasions, it had mailed the dispute resolution program brochure and memorandum to plaintiff's home and that they were never returned. Plaintiff's testimony was the she never received the materials. After the matter was arbitrated and the award in favor of the employer confirmed, plaintiff appealed, claiming that she never agreed to arbitrate and that the arbitration agreement was unfair, unconscionable, and unenforceable.

The court of appeal affirmed. As to the existence of an agreement to arbitrate, the court said that defendant's introduction of evidence that it mailed the brochure and memorandum to plaintiff and that they had not been returned, created a presumption that plaintiff received them, and shifted the burden of producing evidence to plaintiff [*Evid. Code § 641* (a letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail)] (*84 Cal. App. 4th 416, 421)* . This is a presumption affecting the burden of producing evidence, which, once established, requires the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced to support a finding of its nonexistence. However, the presumption disappears when, as here, it is met with contradictory evidence. Nevertheless, inferences may be drawn from the same circumstances that gave rise to the presumption in the first place. The disappearance of the presumption does *not* mean there is insufficient evidence to support the trial court's finding that an agreement to arbitrate existed (*84 Cal. App. 4th 416, 421)* . Accordingly, there was substantial evidence (1) that plaintiff received the memorandum and brochure; (2) that plaintiff continued to work for defendant after receipt of the memorandum and brochure; and (3) that plaintiff thereby agreed to be bound by the terms of the dispute resolution program, including its provision for binding arbitration (*84 Cal. App. 4th 416, 422)* . The portion of the opinion addressing plaintiff's claim of unconscionability is discussed at *§ 20.23[3][a]*.

[e] Arbitrator, Not Court, Should Determine Compliance with [Private] Limitation Period

Plaintiff in ***Howsam v. Dean Witter Reynolds, Inc.*** *(2002) 537 U.S. 79, 123 S. Ct. 588, 154 L. Ed. 2d 491* entered into a client service agreement with defendant which provided in part that all controversies concerning or arising from any account, any transaction, or the construction, performance or breach of any agreement between them would be determined by arbitration before any self-regulatory organization or exchange of which defendant was a member. The client service agreement also provided that plaintiff could select the arbitration forum. Plaintiff claimed defendant misrepresented the virtues of certain limited partnerships in which she invested between 1986 and 1994. In accordance with the customer service agreement, plaintiff chose the National Association of Securities Dealers (NASD) to arbitrate the dispute and executed a submission agreement which specified that the controversy was submitted for arbitration in accordance with NASD's Code of Arbitration Procedure. That code's § 10304 provides that no dispute is eligible for submission if six (6) years have elapsed from the occurrence or event giving rise to the dispute. After the submission agreement was signed, defendant sued to have the federal district court declare that the dispute was ineligible for arbitration because it was more than six years old and for an injunction prohibiting plaintiff from proceeding in arbitration. Thedistrict court dismissed the action on the ground that the NASD arbitrator, not the court, should interpret and apply the NASD time limit rule. The Court of Appeals for the Tenth Circuit reversed. The United States Supreme Court granted plaintiff's petition for certiorari because Courts of Appeals decisions on the issue were in conflict.

The United States Supreme Court reversed, holding that the arbitrator, not the court, should interpret and apply the NASD time limit rule. The Court began by stating the basic rule that the question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the question of arbitrability, is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise. Certain questions or arbitrability, however, are for the arbitrator to decide. Those are sometimes referred to as procedural issues of arbitrability and include issues such as whether previous steps of a grievance procedure were completed, waiver, delay, and similar defenses to arbitrability. Following this precedent, the Court found that the applicability of the NASD time limit rule was a matter presumptively for the arbitrator, not for the judge (*123 S. Ct. 588, 592-593)* . In addition, the NASD arbitrators, comparatively more expert about the meaning of their own rule, are comparatively better able to interpret and to apply it. Thus, in the absence of any statement to the contrary in the arbitration agreement, the Court found it reasonable to infer that the parties intended the agreement to reflect that. The court concluded that the NASD's time limit rule fell within the class of gateway procedural disputes that do not present what its cases have called "questions of arbitrability" (*123 S. Ct. 588, 593)* .

Defendant also argued that the NASD Code's use of the term "ineligible" indicated the parties' intent for the time limit rule to be resolved by the court prior to arbitration. The Court disagreed, saying the parties to an arbitration contract would normally expect a forum-based decision maker to decide forum-specific procedural gateway matters. In addition, the Court noted that NASD Code § 10324 specifies that arbitrators are empowered to interpret and determine the applicability of all provisions under the NASD Code (*123 S. Ct. 588, 593-594)* .

Wagner Construction Co. v. Pacific Mechanical Corp. *(2007) 41 Cal. 4th 19, 58 Cal. Rptr. 3d 434, 157 P.3d 1029* arose out of a dispute between a contractor and a subcontractor on a public works project. Their agreement provided for arbitration of any disputes arising out of the agreement. Plaintiff first sued defendant for sums owed under the subcontract in January, 1999. After that, both parties were sued for personal injuries relating to the construction. Plaintiff agreed to defend defendant's position in that action and dismissed the suit, for sums owed without prejudice, allegedly pursuant to an agreement between the parties under which the statute of limitations on plaintiff's claims would be tolled until the personal injury suit was resolved. Plaintiff did not allege that the agreement was in writing. Defendant denied there was any agreement. In July, 2004, after the personal injury action was resolved, plaintiff filed a new complaint for monies owed under the subcontract. Plaintiff demanded arbitration and, anticipating defendant's refusal, petitioned to compel arbitration. Defendant opposed the petition, claiming plaintiff had waived the right to arbitrate by failing to seek arbitration within the four-year limitation period of *Code Civ. Proc. § 337* (or the three-year period of *Code Civ. Proc. § 338* applicable to contracts for public works). The trial court denied the petition to compel arbitration on the basis that the statute of limitations had expired and there was no written tolling agreement. Plaintiff appealed,

contending any statute of limitations defense was for the arbitrator, not the court, to decide. While the parties did not argue the waiver issue and the trial court had expressly declined to decide it, the Court of Appeal nevertheless cast its decision in those terms, and concluded that the trial court properly ruled that plaintiff had waived its right to arbitrate by failing to seek arbitration in a timely manner. The California Supreme Court granted plaintiff's petition for review.

The Supreme Court reversed, finding that a statute of limitations defense is for the arbitrator, not the court, to decide, and remanding for the trial court to conduct whatever additional factual and legal inquiries would be necessary to decide the issue of waiver (*41 Cal. 4th 19, 24-25, 31)* . *Code Civ. Proc §§ 1281* and *1281.2* govern petitions to compel arbitration and provide that when the parties to an arbitrable controversy have agreed in writing to arbitrate it and one has refused, the court must grant a petition to compel arbitration absent an exception recognized by statute or judicial decision (*41 Cal. 4th 19, 26)* . That the statute of limitations has run on the underlying claims is not one of the legislatively or judicially recognized justifications for denying a petition to compel. Rather, the assertion that the statute of limitations has run is an affirmative defense that falls naturally within the plain language of the parties' broad agreement to submit the matter to arbitration. An order to arbitrate a controversy may not be refused on the ground that the petitioner's contentions lack substantive merit [*Code Civ. Proc. § 1281.2(c)*] (*41 Cal. 4th 19, 27)* , although petitioner's waiver of the right to compel arbitration is a basis for refusing to order arbitration [*Code Civ. Proc. § 1281.2(c)*]. A petitioner seeking to compel arbitration is not to invoking the jurisdiction of a judicial forum to litigate the merits of his or her underlying claim but is seeking an order that the respondent abide by a contract he or she signed. The Court discussed *Freeman v. State Farm Mut. Auto. Ins. Co. (1975) 14 Cal. 3d 473, 477, 121 Cal. Rptr. 477, 535 P.2d 341* (*Freeman*, discussed at *§ 20.80[4][a]*), misconstrued by respondent as having been decided on the basis of a statute of limitations (*41 Cal. 4th 19, 28)* . *Freeman* denied a petition to compel arbitration under *Code Civ. Proc. § 1281.2(a)* because the plaintiff had *waived* the right to arbitrate by failing to demand arbitration within the time period specifically allowed therefore by *Ins. Code § 11580.2(i)*, which provided at that time that no cause of action would accrue to the insured under any policy or endorsement unless within one year from the date of the accident one of three conditions was satisfied, one of those conditions being the insured's institution of arbitration proceedings (*41 Cal. 4th 19, 27)* . Compliance with former Ins. Code § 11580.2(i) is a condition precedent to arbitration or any other right under the policy. Failure to act within that time limit constituted a waiver of the right to arbitrate, and that waiver may be determined by a court whose jurisdiction is invoked for that purpose of compelling arbitration (*41 Cal. 4th 19, 27)* . *Freeman* properly held that questions of waiver are for the court rather than the arbitrator to decide. Given this legislative mandate, the fact that arbitrators might decide waiver issues differently than courts is of no concern. On the other hand, neither *Code Civ. Proc. § 1281.2* nor any other statute permits a court to deny apetition to compel arbitration based on a party's assertion that the statute of limitations has run on the claims the parties agreed to arbitrate (*41 Cal. 4th 19, 28)* . Delay in demanding or seeking to compel arbitration can, indeed, justify denying a motion to compel, but the rules that enforce the requirements of timely demands and petitions have nothing to do with the statutes of limitation that create affirmative defenses to the underlying claims. A petition to compel arbitration must be brought within four years after the party to be compelled has refused to arbitrate [*Code Civ. Proc. § 337*]. A party to an agreement to arbitrate may not bring an action to compel specific performance of the arbitration provision until he or she can allege not only the existence of the agreement, but also that the opposing party *refuses to arbitrate* the controversy (*41 Cal. 4th 19, 29)* . A cause of action to compel arbitration does not accrue until one party has refused to arbitrate the controversy (*41 Cal. 4th 19, 29)* . Plaintiff's action to compel defendant to arbitrate could not have accrued until sometime after August 18, 2004, when plaintiff first demanded arbitration. Plaintiff's petition to compel, filed on August 20, was timely under the applicable statute of limitations. This does not mean that a party may postpone arbitration indefinitely by delaying the demand. A party may waive the right to compel arbitration by failing to demand arbitration within a time limit specified for that purpose in a statute in the contract. If the contract does not specify a time for demanding arbitration, a party must still demand arbitration within a reasonable time (*41 Cal. 4th 19, 30)* . Although plaintiff may have delayed unreasonably in seeking to compel arbitration, the trial court expressly declined to reach that issue because it erroneously concluded the statutes of limitations on barred plaintiff's claims (*41 Cal. 4th 19, 30)* . Nor did the trial court undertake the factual inquiry necessary to determine waiver. In the absence of any factual record, and because the trial court expressly declined to make a finding regarding waiver in its statement of decision, the Supreme Court could not infer a finding of waiver (*41 Cal. 4th 19, 31*). Thus, the Supreme Court remanded the case

for further proceedings, during which the superior court could conduct whatever additional factual and legal inquiries would be necessary to decide the issue of waiver (*41 Cal. 4th 19, 31*).

[f] Under Federal Arbitration Act, Arbitrator, Not Court, Determines Waiver

9 U.S.C. § 3 provides that a district court, on being satisfied that the issue in controversy is arbitrable and on application of one of the parties, must stay the trial of the action until arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with arbitration.

The facts and procedural background of ***Howsam v. Dean Witter Reynolds, Inc.*** *(2002) 537 U.S. 79, 123 S. Ct. 588, 154 L. Ed. 2d 491* , and the portions of the opinion consider which the private limitations period, are discussed at [e], *above*. In discussing gateway procedural issues in general, the Court mentioned waiver as one type of gateway issue, which the arbitrator--not the court--should decide (*537 U.S. 79, 83-84)* .

Defendant in ***Omar v. Ralphs Grocery Co.*** *(2004) 118 Cal. App. 4th 955, 962-965* , terminated plaintiff's employment for allegedly making offensive comments to another employee. When plaintiff apologized and sought to be reinstated, defendant sent him a notice-of-dispute form, which he claimed he signed and hand-delivered to defendant's vice president of human resources on December 20, 2001. That form stated that plaintiff wanted to participate in mediation as soon as possible but that he did not understand what an arbitration was. Plaintiff signed and returned another dispute form on January 29, 2002, which stated it was to "initiate a complaint or request for dispute resolution under the company's policy against unlawful harassment and discrimination and/or dispute resolution procedure."

On May 2, 2002, defendant wrote to plaintiff advising him that it had determined his termination was proper and that he could either request mediation or demand final and binding arbitration. A copy of the arbitration agreement and request for mediation and arbitration forms were enclosed. The arbitration agreement provided that it was governed by the Federal Arbitration Act (*9 U.S.C. § 1 et seq.*; FAA), that the parties would select the arbitrator by mutual agreement, and that defendant would pay the arbitration fees "in all cases where required by law." Plaintiff signed the request for mediation form, which stated that if the complaint/dispute was not resolved through mediation, he understood that to pursue that matter further, he would have to submit the complaint/dispute to final and binding arbitration pursuant to defendant's policy. Plaintiff's attorney returned this form to defendant on May 10, 2002.

Having heard nothing further from defendant, October 9, 2002, plaintiff's attorney reiterated plaintiff's request for mediation. On October 11, 2002, defendant's in-house lawyer responded, saying that Ralphs had considered plaintiff's request for mediation and determined that the dispute was not appropriate for mediation, but that the dispute could be submitted to final and binding arbitration, and commencement of any other type of formal dispute resolution would be considered by defendant to be a repudiation of the arbitration agreement, for which defendant would seek summary judgment and to recover its damages. Plaintiff's attorney wrote defendant asking about the mechanics of the arbitration and to clarify whether defendant would pay all the costs of an arbitration. Defendant replied that the mechanics of arbitration were clearly spelled out in the arbitration agreement and enclosed another copy of the agreement. On November 12, 2002, plaintiff's attorney again asked defendant to clarify whether defendant was agreeing to pay the costs of arbitration and to advise of defendant's proposed method for choosing an arbitrator. Also on November 12, 2002, plaintiff served the complaint and demand for arbitration "subject to the Court's determination whether the claims are subject to an enforceable arbitration agreement."

Defendant filed a combined motion for summary judgment and to compel arbitration, requesting that the motion to compel be granted in the event summary judgment was denied. The trial court denied the motion for summary judgment on the grounds that four triable issues of material fact existed regarding the enforceability of the arbitration agreement: (1) whether plaintiff received the arbitration policy in September 1991 while working for defendant, (2) whether the arbitration policy was a contract of adhesion, (3) whether the arbitration policy was procedurally and substantively unconscionable, and (4) whether defendant waived the right to request or compel arbitration having given plaintiff the

"royal run-around and delayed it so long." The court also denied the motion to compel arbitration, but did not specify its reasons. Defendant appealed only the denial of the motion to compel arbitration.

The court of appeal reversed and remanded, instructing the trial court to determine whether a valid arbitration agreement exists which covered the parties' disputes, and if so, to compel arbitration, leaving it for the arbitrator to decide any issue of waiver of the right to compel arbitration (*118 Cal. App. 4th 955, 965)* . The court of appeal first noted that the arbitration agreement was governed by the FAA, and that it would review de novo the legal question whether the FAA required the trial court to grant the motion to compel arbitration (*118 Cal. App. 4th 955, 959)* . The court discussed *Howsam v. Dean Witter Reynolds, Inc. (2002) 537 U.S. 79, 83-84, 123 S. Ct. 588, 154 L. Ed. 2d 491* , and found that the trial court erred by not ruling on the gateway issue of arbitration. The trial court was required to decide whether there was an enforceable arbitration agreement between the parties (*118 Cal. App. 4th 955, 961)* . The court of appeal noted that the record below made no distinction between the "pre-dispute agreement to arbitrate" and the "post-dispute agreement to arbitrate" and agreed with defendant that even if the trial court were to find on remand that there had been no valid arbitration agreement between the parties while defendant was still employed, it still had to consider whether the post-dispute agreements--the notice of dispute form plaintiff signed on January 29, 2002, and the form requesting mediation form--were unenforceable. If the trial court were to find an enforceable arbitration agreement between the parties, it would then be obligated then determine the second gateway issue: whether plaintiff's claims are covered by the agreement (*118 Cal. App. 4th 955, 961)* .

Because the trial court's orders were ambiguous regarding whether the court had made a finding of waiver, the court of appeal addressed the issue. Appellant contended, and the court of appeal agreed, that if a matter is governed by the FAA, the arbitrator, not the court, determines any claim of waiver of the right to compel arbitration, citing *Howsam v. Dean Witter Reynolds, Inc. (2002) 537 U.S. 79, 84, 123 S. Ct. 588, 154 L. Ed. 2d 491* , for the proposition that procedural questions which grow out of the dispute and bear on its final disposition are presumptively not for the judge, but for the arbitrator to decide, as are allegations of wavier and delay. Appellant and the court of appeal acknowledged one exception to this rule: if the claimed waiver is based on conduct related to the judicial process, the existence of waiver is a question for the court, even if the matter is governed by the FAA (*118 Cal. App. 4th 955, 962-963)* . Thus, the court of appeal concluded that the issue of waiver had to be determined by an arbitrator because all of plaintiff's waiver allegations involved non-litigation conduct (*118 Cal. App. 4th 955, 964)* . Although on appeal plaintiff claimed that defendant's filing an answer, moving for summary judgment, conducting discovery on the issue of arbitrability, rather than immediately filing a petition to compel arbitration, provided a basis for finding waiver, those grounds for waiver were not asserted in the trial court, and could not be considered on appeal (*118 Cal. App. 4th 955, 964 n.1*). The conduct before the court that was claimed as the basis for defendant's wavier of the right to compel arbitration was (1) unreasonable delay in proceeding under Ralph's dispute resolution program, (2) failure to satisfy a condition precedent by refusing to engage in mediation, (3) failure to confirm whether it would pay all costs associated with an arbitration, and (4) failure to work with plaintiff to select an arbitrator. The arbitration agreement addressed each of those issues, which the court of appeal found to involve contract interpretation and arbitration procedure, thus more properly determined by an arbitrator than by the court (*118 Cal. App. 4th 955, 964)* .

Plaintiff in ***Thorup v. Dean Witter Reynolds, Inc.*** *(1986) 180 Cal. App. 3d 228* made an error in a customer's account, for which defendant reimbursed the customer, and then sought to recover the loss from plaintiff. When plaintiff refused, defendant fired him and sought arbitration under the employment agreement, a standardized form of NYSE employment agreement, to determine plaintiff's responsibility to make good the loss. Plaintiff responded to defendant's request for arbitration by requesting an extension of time to answer and filing suit for wrongful termination. Defendant raised arbitration as an affirmative defense, sought a stay of the court proceedings and an order compelling arbitration. The trial court denied the petition to compel arbitration on the ground that defendant's election to terminate plaintiff constituted a waiver of its right to arbitrate the termination dispute. Defendant appealed.

The court of appeal reversed, finding there had been no waiver (*180 Cal. App. 3d 228, 233)* . Indisputably the employment contract involved commerce and was subject to the Federal Arbitration Act (FAA) (*180 Cal. App. 3d 228,*

233) . Although laches or prejudicial delay in requesting arbitration is itself an arbitrable issue, if the court decides that an arbitration agreement governs the controversy, the question of whether one party is in default under the arbitration agreement by reason of delay in requesting arbitration is solely a question for the arbitrator (*180 Cal. App. 3d 228, 235)* . However, a claim of waiver based on conduct related to the judicial process is a question for the court to decide (*180 Cal. App. 3d 228, 234)* .

Wagner Construction Co. v. Pacific Mechanical Corp. *(2007) 41 Cal. 4th 19, 58 Cal. Rptr. 3d 434, 157 P.3d 1029* , is discussed at [e], *above.*

[g] Arbitrator, Not Court, Determines Arbitrability

Rodriguez v. Am. Techs., Inc. *(2006) 136 Cal. App. 4th 1110* , was an action by insureds against several insurance companies, for breach of contract and breach of the duty of good faith and fair dealing, and against ATI, a remediation company hired by a defendant insurance company to perform remediation and repairs to the insured premises, for professional negligence. The contract between plaintiffs and ATI contained an arbitration provision that stated that pursuant to the Federal Arbitration Act (FAA), any controversy or claim arising out of or related to the agreement would be settled by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect. Although the contract contained references to certain provisions of California law regarding ATI's lien rights, it contained no express choice-of-law provision designating California law generally, and the American Arbitration Association's Construction Industry Arbitration Rules are silent as to the procedure to be followed when related litigation involves third parties. ATI petitioned to compel arbitration and stay the judicial proceeding. Plaintiffs opposed the motion, claiming that *Code Civ. Proc. § 1281.2(c)* was applicable to deny arbitration because the insurance companies were not subject toarbitration, that claims arising out of the same transaction or related transactions presented a possibility of conflicting rulings on a common issue of law or fact. ATI responded that the arbitration agreement was governed by the FAA, and therefore *section 1281.2(c)* did not apply. The court agreed with plaintiffs and denied the motion to compel arbitration. ATI appealed.

The court of appeal reversed, finding that the FAA did indeed govern and left the court no discretion to deny arbitration (*136 Cal. App. 4th 1110, 1114, 1124-1125)* . The portion of the opinion addressing that issue is discussed at [j], *below*. Plaintiffs also contended that two of their grievances fell outside the clause's scope--specifically their claims ATI offered to buy their home "as-is" and made a "low-ball" bid to perform new work. The contract's arbitration clause applies to claims "arising out of or related to" the agreement. Although the scope of an arbitration clause is generally a question for judicial determination, the parties may, by clear and unmistakable agreement, elect to have the arbitrator, rather than the court, decide which grievances are arbitrable. Here, the parties clearly and unmistakably agreed to have the arbitrator determine the scope of the arbitration clause. The contract mandated arbitration in accordance with the American Arbitration Association's Construction Industry Rules. Rule 8(a) of those rules specifies the "arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." By incorporating rule 8(a) into their agreement, the parties clearly evidenced their intention to accord the arbitrator the authority to determine issues of arbitrability. Thus, any issues concerning the scope of the arbitration clause should be determined by the arbitrator in the arbitration proceeding (*136 Cal. App. 4th 1110, 1123)* .

Dream Theater, Inc. v. Dream Theater *(2004) 124 Cal. App. 4th 547, 21 Cal. Rptr. 3d 322* , arose from the sale of a business. One of seller's principals was hired by buyer to run the business. Some months after the purchase, buyers learned that person had multiple sclerosis, which they believed negatively affected his ability to run the business. Buyers claimed that sellers knew about the illness and had a duty to disclose it to them before the purchase was consummated. Buyers claimed this failure caused them to suffer losses approaching $500,000. The purchase and sale contract contained comprehensive dispute resolution provisions and identified the parties' respective obligations to indemnify one another from any and all losses, including losses arising from either party's breach of the contract as well as those arising from third party claims. To assert a claim of loss, the claimant had to give an indemnification notice. If

the other party did not contest the notice, the contract provided for the enforcement of the uncontested claim by way of stipulated judgment. The contract established a period of time to pursue settlement, and required for mandatory, final and binding arbitration after this settlement period elapsed. The contract specified that arbitration would be in accordance with the AAA Commercial Arbitration Rules. Under those rules, provide that the arbitrator had the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement. Buyers served sellers with an indemnification notice, stating their intent to offset their claimed losses by withholding any further payments on a line of credit, which buyers had assumed and sellers guaranteed. The lender eventually received that balance from sellers, who filed a lawsuit seeking to recover that amount and other damages. After sellers filed the lawsuit, buyers allegedly discovered another breach of the contract by sellers: their failure to disclose that the company's largest customer had given notice of termination of its contract with the company only days before the sale. Thus, buyers served sellers with a second indemnification notice asserting losses of approximately $1 million as a result of sellers' failure to disclose the loss of that business. Sellers contested this second indemnification notice; and buyers demanded arbitration of this dispute. Sellers obtained an ex parte order shortening time for the hearing of their motion for an order determining the arbitrability of the claim for damages arising from the alleged failure to disclose the loss of the largest customer's contract. The trial court found that the claim was not arbitrable and stayed the arbitration. Buyer's appealed.

The court of appeal reversed (*124 Cal. App. 4th 547, 558)* . The court found that (1) the parties' agreement determined whether the court or the arbitrator decides if the dispute is subject to arbitration, (2) because the parties' contract, incorporated into their agreement the AAA Commercial Arbitration Rules, which specify the arbitrator will decide arbitrability, it stated a clear and unmistakable agreement that the arbitrator would decide whether the dispute was subject to arbitration, and (3) nothing in the parties' agreement excluded from the arbitrator's jurisdiction the decision whether the dispute must be submitted to arbitration (*124 Cal. App. 4th 547, 549)* .

The court of appeal first noted that because the parties introduced no extrinsic evidence, the trial court's ruling regarding arbitrability was a conclusion of law, requiring the court of appeal to independently interpret the contract. The court discussed several United States Supreme Court cases, citing *First Options of Chicago, Inc. v. Kaplan (1995) 514 U.S. 938, 944-945, 115 S. Ct. 1920, 131 L. Ed. 2d 985* , (discussed in *Ch. 20A, Arbitration: Resisting, § 20A.10[3][d]*) for the propositions that when deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts should apply ordinary state--law principles that govern the formation of contracts; that it should not be assumed the parties intended the arbitrator to decide whether their dispute was arbitrable unless there was clear and unmistakable evidence that they did so; and that if the agreement is silent or ambiguous on that question, the court and not the arbitrator should decide arbitrability so as not to force unwilling parties to arbitrate a matter they reasonably thought a judge, not an arbitrator, would decide (*124 Cal. App. 4th 547, 552)* .

After disagreeing with several of sellers' contentions as to the interpretation of the agreement, including the claim that the term *indemnity*, and therefore arbitration, applied only to third party liability (*124 Cal. App. 4th 547, 555-556)* , the court concluded that the parties' agreement to arbitrate according to the AAA Commercial Arbitration Rules was clear and unmistakable evidence of the intent that the arbitrator should decide whether a contested claim was arbitrable. If a contract provides for arbitration in conformance with rules that specify the arbitrator will decide the scope of his or her own jurisdiction, the parties' intent is clear and unmistakable, even without a recital in the contract that the arbitrator will decide any arbitrability dispute.At the time the appellate court rendered its decision, the parties continued to dispute what claims were arbitrable and what claims no longer presented live controversies. In addition to the claim regarding the failure to disclose the termination of the largest customer's contract, there remained sellers' complaint concerning buyers' offset of claimed damages arising from the manager's disability, which buyers contended sellers had waived by not contesting it pursuant to the dispute resolution provisions and claims under the related consulting agreement, which had no arbitration clause (*124 Cal. App. 4th 547, 557)* . Thus, the court ruled that on remand, the trial court should stay the entire action pending the arbitrator's determination of the scope of his or her jurisdiction to decide the various disputes among the parties (*124 Cal. App. 4th 547, 557-558)* .

Greenspan v. LADT, LLC *(2010) 185 Cal. App. 4th 1413, 111 Cal. Rptr. 3d 468*, affirmed the confirmation of an arbitration decision on a breach of contract claim. On the issue of whether the agreement gave the arbitrator the power to decide arbitrability of issues, the court stated that courts must not conclude that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so (185 Cal. App. 4th 1413, 2010 Cal. App. LEXIS 968 at 43, 45). However, when the parties have a contract that provides for arbitration of some issues, that a particular issue falls outside the scope of the provision calling for arbitration of arbitrability must be shown by clear evidence (*185 Cal. App. 4th 1413, 2010 Cal. App. LEXIS 968 at 44)* . When parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to the arbitrator (*185 Cal. App. 4th 1413, 2010 Cal. App. LEXIS 968 at 49)* . The arbitration agreement did not specify arbitrability, but called for the application of the Comprehensive Arbitration Rules & Procedures of the Judicial Arbitration and Mediation Service (JAMS). Rule 11(c) states, among other things, that jurisdictional and arbitrability disputes, including disputes over the existence, validity, interpretation, or scope of the agreement are to be submitted to and ruled on by the Arbitrator (*185 Cal. App. 4th 1413, 2010 Cal. App. LEXIS 968 at 46)* . Accordingly, the court held that the arbitrator properly determined the arbitrability of the issue of joint and several lliability (185 Cal. App. 4th 1413, 2010 Cal. App. LEXIS 968 at 50), which determination was not subject to merits review, where the agreement did not provide for it (185 Cal. App. 4th 1413, 2010 Cal. App. LEXIS 968 at 51). The portion of the decision on the relationship of the award to the agreement is discussed in *Ch. 20C, Arbitration: Confirming, Correcting, or Vacating the Award, § 20C.91[3][c], below*. The portion of the decision addressing the review of the timeliness of the arbitrator's award is *covered in Ch. 20C, Arbitration: Confirming, Correcting, or Vacating the Award, § 20C.90[3][a], below*. The portion of the decision covering whether the award should be vacated due to the arbitrator's failure to recuse himself is dealt with in Ch. 20C, *Arbitration: Confirming, Correcting, and Vacating the Award, § 20C.80[3][g], below* . The portion of the decision on whether the arbitrator was immune to the suit on which the request for disqualification was based is discussed in *Ch. 20B, Arbitration: Selecting Arbitrators; Arbitral Immunity, § 20B.50[3][a], below*.

[h] Federal Arbitration Act Is Not Offended When Arbitrator Allows Court to Determine Legality of Entire Contract

Hotels Nevada, LLC v. Bridge Banc, LLC *(2005) 130 Cal. App. 4th 1431, 1437, 30 Cal. Rptr. 3d 903* arose out of a loan agreement between plaintiff and defendant. The agreement contained an arbitration clause which provided for arbitration in Los Angeles, California, in accordance with the laws of the State of California. Defendant filed a demand for arbitration, claiming plaintiff had breached the loan agreement. Plaintiff moved to stay the arbitration to allow a court to determine whether the contract was illegal and unenforceable, which plaintiff claimed it was, because defendant was not licensed in California or Nevada as a finance lender, a bank or trust company, a real estate broker, a mortgage company, broker or agent, or any other type of financial institution. The arbitrator granted the stay request, concluding that although he *could* decide the illegality issue, it would be more economical to allow a court to decide that question in the first instance. Plaintiff then commenced an action that sought, among other things, a declaration that the entire contract was illegal and void. Defendant petitioned to compel arbitration of all plaintiff's claims. The trial court denied the petition, finding that the issue of the legality of the contract was a question for it to decide, and scheduling a trial setting conference on the declaratory relief cause of action. Defendant appealed.

The court of appeal affirmed the order denying the petition to compel arbitration (*130 Cal. App. 4th 1431, 1439)* . The court of appeal framed the question before it as whether the Federal Arbitration Act (FAA) would be violated by permitting the trial court to decide the issue of contractual illegality (*130 Cal. App. 4th 1431, 1434)* . The parties' agreement was subject to the FAA. Plaintiff being a Nevada limited liability corporation operating in Las Vegas, Nevada, and defendant being a California limited liability corporation with its office in Los Angeles, the transaction was an interstate lending agreement, which is "a contract evidencing a transaction involving commerce" within the meaning of *9 U.S.C. § 2* (*130 Cal. App. 4th 1431, 1434-1435)* . Hence, the arbitration agreement was subject to the limited preemptive effect of the FAA. Even when the FAA applies, interpretation of an arbitration agreement is governed by state law principles. Under California law, ordinary rules of contract interpretation apply to arbitration

agreements (*130 Cal. App. 4th 1431, 1435)* , and the question whether the contract as a whole is illegal is one for the court to decide (*130 Cal. App. 4th 1431, 1436)* . *Code Civ. Proc. § 1281*, which provides for arbitration of any controversy which arises out of a contract, does not contemplate arbitration of controversies arising out of contracts which are expressly declared by law to be illegal and against the public policy of California. Part of the issue of the existence of a valid contract for arbitration is the determination of whether the contract as a whole is illegal (*130 Cal. App. 4th 1431, 1436-1437)* . The arbitrator was charged with the obligation to enforce California law, which obligates the trial court to decide illegality issues when the entire contract is illegal. The arbitrator decided to allow the trial court to decide the issue of illegality. In this situation, there was no violation of the FAA. The court distinguished five things it was NOT deciding, including the issue of the legality of a single provision of a contract (*130 Cal. App. 4th 1431, 1437)* or whether it would come to the same conclusion if the illegality issue had not first been submitted to the arbitrator (*130 Cal. App. 4th 1431, 1438)* .

[i] Under Federal Arbitration Act, Arbitrator, Not Court, Determines Illegality

Preston v. Ferrer *(2008)552U.S.346, 128 S. Ct. 978, 169 L. Ed. 2d 917* , arose out of a management contract between defendant as manager and plaintiff as personality. Defendant was an attorney and plaintiff was a retired Florida superior court judge who had a television program. Defendant initiated arbitration against plaintiff, seeking to recover fees. Plaintiff filed a motion to stay the arbitration with the arbitrator and also filed a petition to determine controversy with the Labor Commissioner (Commissioner) and a motion asking the Commissioner to stay the arbitration. The issue before the Commissioner was whether the contract was void. The Talent Agency Act (TAA; *Lab. Code § 1700 et seq.*) requires talent agents to procure a license from the Labor Commissioner. An unlicensed person's contract with an artist to provide the services of a talent agent is illegal and void. Courts may void the entire contract when talent agent services regulated by the TAA are inseparable from unregulated managerial services. Defendant moved to dismiss the petition with the Commissioner. The arbitrator denied plaintiff's motion to stay the arbitration, so plaintiff filed a complaint seeking a declaration that the dispute involving the validity of the contract was not subject to arbitration and an injunction restraining defendant from proceeding with the arbitration. Defendant moved the trial court to compel arbitration on the same day that the Commissioner denied defendant's motion to dismiss plaintiff's petition. The Commissioner also denied plaintiff's motion to stay the arbitration, on the grounds that the Labor Commissioner does not have the authority to stay arbitration proceedings. Plaintiff then filed a motion for preliminary injunction, attempting to restrain the defendant from proceeding with the arbitration unless and until the Commissioner determined that he had no further jurisdiction over the parties' dispute. Plaintiff also filed a motion for reconsideration with the arbitrator. The arbitrator granted the motion for reconsideration and stayed the arbitration pending disposition of the matter before the Commissioner. The trial court denied defendant's motion to compel arbitration, granted plaintiff's motion for a preliminary injunction, and stayed the action pending final resolution by the Commissioner. Defendant appealed from the trial court order. The court of appeal affirmed, finding that *Lab. Code § 1700.44(a)* vested exclusive original jurisdiction over the dispute in the Labor Commissioner. The California Supreme Court denied defendant's petition for review; and the United States Supreme Court granted certiorari to determine whether the Federal Arbitration Act (FAA; *9 U.S.C. § 1 et seq.*) overrides a state law vesting initial adjudicatory authority in an administrative agency.

The United State Supreme Court held that when parties agree to arbitrate all disputes arising under their contract, questions concerning the validity of the entire contract are to be resolved by the arbitrator in the first instance, not by a federal or state court; and that state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA (*169 L. Ed. 2d 917, 923*). The Court reversed and remanded for further proceedings consistent with its opinion (*169 L. Ed. 2d 917, 931)* . The Court said the dispositive issue was not whether the FAA preempts the TAA wholesale but simply who decides whether defendant acted as personal manager or as talent agent. The court discussed *9 U.S.C.§ 2*, saying the question who should decide whether grounds exist at law or in equity to invalidate an arbitration agreement has been decided: attacks on the validity of an entire contract, as distinct from attacks aimed at the arbitration clause, are within the arbitrator's ken (*169 L. Ed. 2d 917, 925)* . The Court cited *Buckeye Check Cashing, Inc. v. Cardenga (2006) 546 U.S. 440, 126 S. Ct. 1204, 163 L. Ed. 2d 1038* (*Buckeye*, discussed *below*) as the dispositive case when the matter is pending in a state court (*169 L. Ed. 2d 917, 925-926)* . The

parties agreed that the matter was governed by the FAA. Further, plaintiff sought to invalidate the contract as a whole. He did not make any discrete challenge to the validity of the arbitration clause (*169 L. Ed. 2d 917, 926)* . The TAA allows the court or arbitrator to void the entire contract when talent agency services regulated by the TAA are inseparable from unregulated managerial services (*169 L. Ed. 2d 917, 926)* . The Court reiterated that the only question concerned the forum in which the dispute would be heard (*169 L. Ed. 2d 917, 929)* , and distinguished cases relied on by plaintiff (*169 L. Ed. 2d 917, 929-931)* .

Buckeye Check Cashing, Inc. v. Cardegna *(2006) 546 U.S. 440, 126 S. Ct. 1204, 163 L. Ed. 2d 1038* involved deferred payment contracts challenged as usurious. The contracts contained arbitration clauses, which recited they were governed by the Federal Arbitration Act (FAA *9 U.S.C. § 1* et seq). Buckeye moved in Florida state court to compel arbitration. The Florida trial court denied the motion, finding it was to determine in the first instance whether the contracts were void for illegality. The Florida district court of appeal reversed, holding that because respondents did not challenge the arbitration provision itself, but instead claimed that the entire contract was void, the agreement to arbitrate was enforceable, and the question of the contract's legality should go to the arbitrator. The Florida Supreme Court reversed, again, stating that to enforce an agreement to arbitrate in a contract challenged as unlawful would breathe life into a contract that not only violated state law, but also was criminal in nature. The United States Supreme Court granted certiorari.

The Supreme Court reversed and remanded for further proceedings, holding that regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator (*126 S. Ct. 1204, 1211)* . The Court first discussed the language of *9 U.S.C. § 2,* which states that an agreement in writing to submit to arbitration an existing controversy arising out of that contract is valid, irrevocable, and enforceable, save on grounds as exist at law or in equity for the revocation of any contract (*126 S. Ct. 1204, 1207-1208)* . Challenges on those grounds can be to the arbitration clause or to the underlying agreement as a whole.

In *Prima Paint Corp. v. Flood & Conklin Mfg. Co. (1967) 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270* , the Court addressed the question of who decides these challenges in the context of fraud claims, and concluded that claims to the validity of the underlying contracts as a whole were to be decided by the arbitrator, not the court (*126 S. Ct. 1204, 1208)* . *Prima Paint* involved three holdings: first, that as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract; second, that unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance; and third, that this arbitration law applies in state as well as federal courts. Similarly, the Court decided in *Southland Corp. v. Keating (1984) 465 U.S. 1, 4-5, 104 S. Ct. 852, 79 L. Ed. 2d 1* , that the enforceability of the arbitration agreement did not turn on a state legislature's judgment concerning the forum for enforcement of the state-law cause of action or the severability of the arbitration clause.

Respondents argued that *9 U.S.C. § 2,* only applies when a contract exists and not to "contracts" which are void under state law. The Court would not read "contract" so narrowly. The word appears four times in *9 U.S.C. § 2*. "Contract" as used this last time in *9 U.S.C. § 2* must include contracts that later prove to be void. Otherwise, the grounds for revocation would be limited to those that rendered a contract voidable--which would mean (implausibly) that an arbitration agreement could be challenged as voidable but not as void (*126 S. Ct. 1204, 1209)* . Because the sentence's final use of "contract" so obviously includes putative contracts, the Court chose not to read the same word earlier in the same sentence to have a more narrow meaning. Admittedly, this interpretation permits a court to enforce an arbitration agreement in a contract that the arbitrator later finds to be void. But it is equally true that respondents' approach permits a court to deny effect to an arbitration provision in a contract that the court later finds to be perfectly enforceable. The Court found *Prima Paint's* resolution of this conundrum--in favor of the separate enforceability of arbitration provisions--appropriate. Thus, regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must be decided by the arbitrator (*126 S. Ct. 1204, 1210)* .

[j] Code of Civil Procedure Section 1281.2 Is Not Applicable to Deny Arbitration for Possible Conflicting Rulings

The facts and procedural background of ***Rodriguez v. American Technologies, Inc.*** *(2006) 136 Cal. App. 4th 1110* , and the portion of the opinion addressing the arbitrator's authority to determine arbitrability and the scope of issues to be arbitrated is discussed at [g], *above*. The arbitration provision contained no express choice-of-law provision designating California law generally but stated that pursuant to theFederal Arbitration Act (FAA), any controversy or claim arising out of or related to the agreement would be settled by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect. The court of appeal first discussed California law, noting that unlike the Federal Arbitration Act, *Code Civ. Proc. § 1281.2(c)* gives the court discretion to stay arbitration when a party to an arbitration agreement is also a party to a pending court action with a third party, and there is a possibility of conflicting rulings on a common issue of law or fact (*136 Cal. App. 4th 1110, 1115)* . Under the FAA, the court's only option is to stay the court proceeding and compel the arbitration. The court cited *Cronus Investments, Inc. v. Concierge Services (2005) 35 Cal. 4th 376, 394* , (*Cronus*; discussed in *Ch. 20A, Arbitration: Resisting, § 20A.11[3][b]*)] for the proposition that the parties to an arbitration agreement may expressly designate that any arbitration proceeding should move forward under the FAA's procedural provisions rather than under state procedural law, and concluded that the parties in this case did just that (*136 Cal. App. 4th 1110, 1115-1121)* . Although *9 U.S.C. §§ 3, 4*, by their terms generally do not apply in state court (*136 Cal. App. 4th 1110, 1120)* , this contract specified that claims shall be arbitrated "pursuant to the FAA." The phrase "pursuant to the FAA" was broad and unconditional, unlike the *Cronus* clause, which deferred to the contract's California choice-of-law provision by invoking only "applicable" provisions of the FAA. Thus, there was no ambiguity regarding the parties' intent. They adopted the FAA--all of it--to govern their arbitration. The FAA controls, including section 3 which requires the court to stay the judicial proceeding and compel arbitration.

Thus, the court erred by denying ATI's motion to compel arbitration and stay the court proceeding as to plaintiffs and ATI. The court noted that although the contract did not invoke California arbitration law, that law remained applicable to the pending court action as to the defendant insurance companies, who were not subject to arbitration under the FAA. Thus, in order to avoid conflicting rulings, on remand the court may consider whether to exercise its discretion under *section 1281.2(c)* to stay the action as to the insurance companies pending the outcome of the arbitration. Alternatively, if any party to the court proceeding moved to stay the litigation pursuant to *Code Civ. Proc. § 1281.4*, the court would have to order a stay, except to the extent that arbitrable issues are severable (*136 Cal. App. 4th 1110, 1123)* .

[k] Under Federal Arbitration Act, Court, Not Arbitrator, Determines Challenge that Arbitration Provisions Are Unconscionable

Nagrampa v. MailCoups, Inc. *(9th Cir. 2006) 469 F.3d 1257* , concerned a franchise dispute. The franchise agreement required the parties to arbitrate any dispute arising out of or relating to the agreement in accordance with the rules of the American Arbitration Association (AAA). The arbitration provision further provided that the franchisor could obtain provisional remedies, including injunctions, to protect its service mark; that arbitration was to be conducted in Boston, Massachusetts; that the parties would share the costs of arbitration equally; and that each party would bear its own fees, and expenses. After two years of unprofitable operation of her franchise, franchisee unilaterally terminated the franchise agreement, claiming that franchisor had orally promised she would make a 41 percent profit. Franchisor claimed that franchisee owed it in excess of $80,000 in fees, and demanded arbitration in Los Angeles. Franchisee's attorney objected to the arbitration clause, specifically the requirement that the parties share the arbitration fees and requested that arbitration be conducted in Contra Costa County, where franchisee ran her operation. AAA notified the parties that arbitration would be conducted in Boston. Franchisee refused to arbitrate and filed an action in Contra Costa County Superior Court alleging six causes of action, including fraud and misrepresentation, and violations of the California Franchise Law, the Consumer Legal Remedies Act (*Civ. Code § 1750 et seq.*), the Unfair Competition Law (*Bus. & Prof. Code § 17200 et seq.*). Franchisee also challenged arbitration provision as unconscionable, unilateral, and alleged the franchise agreement was a contract of adhesion. Nowhere in the complaint did plaintiff seek to have the franchise

agreement as a whole invalidated or declared unenforceable. MailCoups removed the matter to federal court on the basis of diversity jurisdiction and moved there to compel arbitration and to have the matter transferred to federal district court in Boston. Although the agreement provided it was governed by Massachusetts law, the parties and all courts involved proceeded on the assumption that California law governed. The district court addressed only whether the arbitration provision was substantively unconscionable and found that it was not and that contract issues were for the arbitrator to decide. It dismissed the action, permitting MailCoups to move in the district court for the district of Massachusetts to compel arbitration. Plaintiff appealed. A three-judge panel held that it need not reach the issue of substantive unconscionability because plaintiff had not carried her burden of proving the contract was a contract of adhesion and that procedural unconscionability was for the arbitrator to decide. That opinion was withdrawn, and an en banc hearing ensued.

The court of appeal reversed (*469 F.3d 1257, 1294)* , holding that when the complaint challenges the validity or enforceability of the agreement containing the arbitration provision, the question of whether the agreement, as a whole, is unconscionable must be referred to the arbitrator. When the crux of the complaint is not the invalidity of the contract as a whole, but rather the arbitration provision itself, then the federal courts must decide whether the arbitration provision is invalid and unenforceable under *9 U.S.C. § 2* (*469 F.3d 1257, 1276-1277)* . A court cannot shirk this obligation simply because controlling substantive state law requires the court to consider, in the course of analyzing the validity of the arbitration provision, the circumstances surrounding the making of the entire agreement. The arbitrability of a particular dispute is a threshold issue to be decided by the courts unless the parties clearly and unmistakably provide otherwise. In analyzing whether an arbitration agreement is valid and enforceable, generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening *9 U.S.C. § 2*. The court discussed *Buckeye Check Cashing, Inc. v. Cardegna (2002) 546 U.S. 440, 126 S. Ct. 1204, 163 L. Ed. 2d 1038* (*Buckeye*), beginning with its characterization of two types of challenges: those challenging specifically the validity of the agreement to arbitrate and those challenging the contract as a whole, either on a ground that directly affects the entire agreement or on theground that the illegality of one of the contract's provisions renders the whole contract invalid (*469 F.3d 1257, 1267*). Unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance (*469 F.3d 1257, 1268)* . The court relied on similar analyses in *Prima Paint Corp. v. Flood & Conklin Mfg., Co. (1967) 388 U.S. 395, 403-404, 87 S. Ct 1801, 18 L. Ed 2d 1270* and *Southland Corp. v. Keating (1984) 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1* . Examining the complaint in this action, the majority found it clear that plaintiff sought to invalidate the arbitration agreement only on the basis of unconscionability. Although the complaint alleged that the contract was one of adhesion, that allegation was not a separate cause of action for which plaintiff sought independent relief, such as rescission or invalidation of the entire contract. Nor did that allegation, though necessary to establish unconscionability of the arbitration provision, serve as a ground that directly affected the entire agreement, unlike the usurious finance ground in *Buckeye* (*469 F.3d 1257, 1270*). When no claim threatens to invalidate or otherwise directly affect the entire contract, the federal court must decide claims attacking the validity of the arbitration provision, even if substantive state law requires an examination of the making of the entire contract as part of that analysis (*469 F.3d 1257, 1271)* . The court went on to discuss the law in other circuits, and found that, with the exception of the Eleventh Circuit, the law was the same: if the claim seek to invalidate the entire contract, then the federal court will send the dispute to arbitration (*469 F.3d 1257, 1271-1277*). If there are separate and independent claims specifically challenging enforcement of the arbitration provision, the federal court will consider the challenge to arbitrability of the dispute. While plaintiff argued that the arbitration provision was procedurally unconscionable because it was contained in a contract of adhesion, the complaint did not seek rescission or invalidation of the entire contract based on it being a contract of adhesion. The contract of adhesion argument may be addressed insofar as it bears on the question of procedural unconscionability of the arbitration provision (*469 F.3d 1257, 1277*). The court determined that plaintiff had not waived her right to challenge the arbitration provision by participating in arbitration (*469 F.3d 1257, 1277-1280*), and went on to consider whether the arbitration provision was unconscionable, finding that it was (*469 F.3d 1257, 1280-1294)* . The court concluded that while the district court properly undertook to decide whether the arbitration provision was valid and enforceable and properly relied on California law in its analysis, it erred by failing to analyze whether there was evidence of procedural unconscionability and to weigh both procedural and substantive unconscionability on a sliding

scale. Thus, the district court erroneously found that the arbitration provision was valid and enforceable and improperly dismissed the action. The court reversed and remanded for further proceedings consistent with its opinion (*469 F.3d 1257, 1294)* .

Sanchez v. Western Pizza Enterprises, Inc. *(2009) 172 Cal. App. 4th 154, 90 Cal. Rptr. 3d 818* , affirmed a trial court order finding a class arbitration waiver and other terms of the agreement unconscionable, and that the agreement therefore was unenforceable. The employer appealing the order contended that the arbitrator, rather than the trial court, had jurisdiction to determine whether the agreement was enforceable. The court relied on the rule that under California law as well as the Federal Arbitration Act, the question whether an arbitration agreement is unenforceable, in whole or in part, based on general contract law principles, is a question for the court to decide, rather than an arbitrator. This includes the determination whether an arbitration agreement is unconscionable or contrary to public policy. The proponent of arbitration of enforceability also argued that the agreement specifically authorized the arbitrator to decide the issue of enforceability. However, while not ruling that a clear authorization in the agreement would be enforceable, the court ruled that the agreement in the case, which stated only that the arbitrator had jurisdiction to decide '"any disputes over the interpretation or application of this Arbitration Agreement,'" did not authorize the arbitrator to determine the issue (*172 Cal. App. 4th 154, 165-166)* . The portion of the opinion and relevant facts dealing with the issue of whether the class action waiver was unenforceable as against public policy is discussed in *Ch. 20A, Arbitration: Resisting, § 20A.22[3][d]*. The portions of the opinion addressing the procedural unconscionability of the arbitration agreement, the substantive unconscionability of the agreement, and the unenforceability of the agreement due to unconscionability are discussed, respectively, in Ch. 20A, *Arbitration: Resisting*, § 20A.91[3][d], [e], and [k].

Bruni v. Didion *(2008) 160 Cal. App. 4th 1272, 73 Cal. Rptr. 3d 395* , involved consolidated construction defect suits by 35 homeowners. Most of the homes came with an express limited warranty, which provided coverage, subject to sweeping exclusions, for the whole home for just one year, and for the electrical, plumbing and mechanical systems for just two years; after that, the only coverage it provided was for load-bearing elements, and then only if the damage to them made the home unsafe, unsanitary, or otherwise unlivable. Some versions of the warranty purported to relieve the builder of any liability except under the warranty. The warranty included arbitration provisions purporting to require the purchaser to arbitrate disputes arising from or related to not only the warranty, but also the home, the sale of the home, and the arbitration provisions themselves. When plaintiffs filed suit against the builders, alleging construction defects, the builders moved to compel arbitration. The trial court denied the motions, because it found that the agreement were unconscionable. Defendants appealed.

The court of appeal affirmed (*160 Cal. App. 4th 1272, 1277, 1296)* , finding the arbitration provisions unconscionable because they were contained in contracts of adhesion and they violated plaintiffs' reasonable expectations (*160 Cal. App. 4th 1272, 1277)* . Defendants raised five contentions, that (*160 Cal. App. 4th 1272, 1276-1277)* :

1. Pursuant to the arbitration provisions, the question of whether the arbitration provisions were unconscionable had to be decided by the arbitrator, not by the trial court.

2. Assuming the trial court was even allowed to consider whether the arbitration provisions were unconscionable, it had to consider them by themselves, not together with the overall warranty.

3. The arbitration provisions, when considered by themselves, were not unconscionable.

4. Even assuming some of the arbitration provisions were unconscionable, the trial court should have severed them and enforced the remaining arbitration provisions.

5. Even assuming the trial court could consider the overall warranty, the overall warranty was not unconscionable or otherwise unenforceable.

The court of appeal held that because plaintiffs were claiming that they never knowingly agreed to the arbitration provisions, the trial court, and not the arbitrator, had to resolve the unconscionability claim (*160 Cal. App. 4th 1272, 1277)* . Before compelling arbitration, the court must initially determine whether the parties agreed to arbitrate the dispute in question. That determination involves two considerations: (1) whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute in question falls within the scope of that arbitration agreement (*160 Cal. App. 4th 1272, 1283)* . When the Federal Arbitration Act (*9 U.S.C. § 1 et seq.*; FAA) applies, arbitration clauses are separable from the contracts in which they are embedded. Thus, an arbitration clause may be enforceable regardless of whether the contract surrounding it is enforceable. A challenge to the entire agreement is for the arbitrator to determine, while a court determines a challenge to the arbitration clause (*160 Cal. App. 4th 1272, 1283)* . One exception to this scheme is a claim that the party resisting arbitration never actually agreed to be bound to the entire contract (*160 Cal. App. 4th 1272, 1284)* . The trial court ruled that the contracts here were within the scope of the FAA; and plaintiffs did not challenge that finding. California has adopted the severability doctrine and made it applicable, as a matter of state law, even to contracts that do not fall under the FAA (*160 Cal. App. 4th 1272, 1285)* . Defendants contended that plaintiffs' unconscionability claim challenged the warranty as a whole, and hence, the trial court should have compelled arbitration without even considering unconscionability. Plaintiffs responded that, at least for purposes of the motion to compel arbitration, their unconscionability claims were directed solely at the arbitration provisions (*160 Cal. App. 4th 1272, 1286)* . The matter was further complicated by the fact that the arbitration provision and the Construction Arbitration Services (CAS) rules under which arbitration was to be conducted provided that any disputes concerning the interpretation or the enforceability of the arbitration agreement, including its revocability or voidability, the scope of arbitrable issues, and any defense based on waiver, estoppel or laches, would be decided by the arbitrator (*160 Cal. App. 4th 1272, 1288)* . The matter hinged on the precise nature of plaintiffs' claims. If plaintiffs admitted that they knowingly agreed to the arbitration provisions, they could be required to arbitrate an unconscionability claim. However, here plaintiffs were claiming that they never knowingly agreed to the arbitration provisions. Thus, the trial court, and not the arbitrator, had to resolve the unconscionability claim (*160 Cal. App. 4th 1272, 1277, 1287, 1290)* . The portions of the opinion addressing unconscionablity are discussed at *§ 20A.91[3][c]* and *[d]*.

Plaintiffs in ***Baker v. Osborne Development Corp.*** *(2008) 159 Cal. App. 4th 884, 71 Cal. Rptr. 3d 854* , sued defendant and various of its subcontractors, alleging the homes they purchased from Osborne suffered from construction defects in design and workmanship, including, among other things, problems from soil movement; foundation deficiencies; plumbing leaks; stucco, window, and roof problems; finish problems relating to cabinets, floor tiles, and countertops; and problems with the framing and electrical, heating, plumbing, and ventilation systems. The complaint alleged causes of action for strict liability, breach of the implied warranty of merchantability, breach of the purchase agreement, negligence, and breach of warranty. Defendant moved to compel arbitration by some of the buyers based on a provision in a warranty administered by Home Buyers Warranty Corporation (HBW). Under the program, defendant Osborne, as the builder, enrolled new homes by paying HBW an enrollment fee and mailing to HBW a builder application for home enrollment (builder application) form signed by the homebuyer and the builder. The builder application stated that by signing where indicated, the buyer acknowledge that he or she had read the builder's copy of the warranty booklet, and consented to its terms, including the binding arbitration provision contained in it. After HBW accepted homes for enrollment in the warranty program, HBW issued warranty booklets to the homeowners. The HBW warranty booklet provided that all claims, disputes and controversies by or between the homeowner, the builder, the warranty insurer and/or HBW, relating to the warranty, the home, any defect in or to the home or the real property on which it was situated, would be submitted to arbitration. The arbitration agreement was to be deemed self-executing and any disputes concerning the interpretation or the enforceability of the arbitration agreement, including without limitation, its revocability or voidability for any cause, the scope of arbitrable issues, and any defense based on waiver, estoppel or laches, were to be decided by the arbitrator. Plaintiffs opposed the motion to compel arbitration. The trial court found that the arbitration agreement was substantively unconscionable because it was not mutual: there was no realistic circumstance in which the builder would be suing the buyer and bringing claims that would be required to be arbitrated under the terms of the agreement. Defendant appealed.

The court of appeal affirmed (*159 Cal. App. 4th 884, 887, 898)* , finding that the trial court correctly ruled that the

arbitration agreement was both procedurally and substantively unconscionable and therefore unenforceable (*159 Cal. App. 4th 884, 897*). The court of appeal began by noting that although the Federal Arbitration Act (FAA) governs the interpretation of arbitration clauses, California law governs whether an arbitration agreement has been formed in the first instance, and whether an arbitration agreement exists is an issue for judicial determination. In general, whether a particular dispute is arbitrable is a threshold issue to be decided by the court unless the parties clearly and unmistakably provided otherwise (*159 Cal. App. 4th 884, 893)* . The trial court found the arbitration agreement was ambiguous on the issue of whether arbitrability was to be determined by the arbitrator. The court of appeal, in its independent judgment, agreed because one provision of the arbitration agreement stated that issues of enforceability or voidability were to be decided by the arbitrator, while another provision indicated that the court might find a provision unenforceable (*159 Cal. App. 4th 884, 893-894)* . Thus, there was no "clear and unmistakable" direction that the arbitrator determine the issue of whether the arbitration agreement was enforceable (*159 Cal. App. 4th 884, 894)* . The portions of the opinion addressing unconscionablity is discussed at *§ 20A.91[3][c], [d],* and *[e]*.

Murphy v. Check 'N Go of California, Inc. *(2007) 156 Cal. App. 4th 138, 67 Cal. Rptr. 3d 120* , involved a claim by an employee alleging that defendant misclassified its salaried retail managers as exempt employees under state labor laws. The suit asserts causes of action on behalf of the class of salaried retail managers for violation of *Bus. & Prof. Code § 17200 et seq.* and failure to pay or provide overtime compensation, accurate itemized wage statements, adequate meal and rest periods, and wages on termination, during the four years prior to the filing of the complaint. The parties' dispute resolution agreement included an arbitration provision which prohibited class and representative actions, stated that it covered "any assertion by you or us that this Agreement is substantively or procedurally unconscionable," and that it was governed by the Federal Arbitration Act. Defendant, an Ohio corporation licensed to do business in California, moved to compel arbitration. In opposing the motion, plaintiff submitted declarations by attorneys experienced in wage and hour cases attesting to the difficulty of prosecuting those cases individually, rather than as class actions. Because of the relatively small sums of money involved in individual cases, it was difficult for plaintiffs to find counsel, despite the availability of statutory attorneys' fees. The attorneys opined that class actions were the only effective way to redress wage and hour violations because businesses had no other real incentive to examine whether their practices complied with the law. As a matter of simple economics, a few individual settlements more than made up exponentially the savings from the decision to (mis)classify employees as exempt and pay them a fixed salary for 45, 50, 55 and or more hours per week. The employees who have no idea their rights are being violated or who can't find attorneys to take on their relatively small individual cases will continue to be exploited by working unpaid overtime hours. The trial court denied the motion to compel arbitration, finding that it had the power to rule on the unconscionability issues; that the parties' agreement was a contract of adhesion; that the class action waiver was substantively unconscionable, as was the provision for arbitration of unconscionability issues; and that the unconscionable terms would not be severed from the agreement. Defendant appealed, contesting all of those findings.

The court of appeal affirmed (*156 Cal. App. 4th 138* , 142, 150), finding that the court was empowered to decide the unconscionability issue and that the class action waiver was unconscionable (*156 Cal. App. 4th 138* , 142). The court began by noting that the question of arbitrability is for judicial determination unless the parties clearly and unmistakably provide otherwise (*156 Cal. App. 4th 138* , 144). While the language of the agreement was clear, plaintiff's alleged assent to the provision was vitiated by the fact that it was set forth in a contract of adhesion, *i.e.,* a standardized contract drafted by the stronger party and presented to the weaker party on a take-it-or-leave-it basis. The court inferred from the evidence that plaintiff reasonably expected that she was required to sign the contract as a condition of continued employment. Substantial evidence supported the trial court's determination that the agreement was a contract of adhesion, and thus procedurally unconscionable. A contract of adhesion, or provision in one, which does not fall within the reasonable expectations of the weaker party, will not be enforced against that party (*156 Cal. App. 4th 138* , 144-145). Also, a contract provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or unconscionable. The court of appeal found that both considerations were applicable: parties would not ordinarily expect that an arbitrator, rather than a court, would determine his or her own jurisdiction and the provision for the arbitrator to determine unconscionability was itself substantively unconscionable (*156 Cal. App. 4th 138* , 145). Defendant argued for the first time on appeal that an

arbitrator must determine theunconscionability issues because those arguments were directed against the agreement as a whole, not just the arbitration provision. Even if this argument was not waived by the failure to raise it below, the court of appeal concluded that it lacked merit. While plaintiff's claim of procedural unconscionability applied to the entire agreement, as a contract of adhesion, the claims of substantive unconscionability were all directed at the arbitration provision. The court agreed with the trial court's conclusion that it had the power to determine the unconscionability issues. (*156 Cal. App. 4th 138* , 146). The portion of the opinion addressing the validity of the class action wavier is discussed in *Ch. 20A, Arbitration: Resisting, § 20A.91[3]*

The facts and procedural background of ***Higgins v. Superior Court (Disney/ABC International Television, Inc.)*** *(2006) 140 Cal. App. 4th 1238, 45 Cal. Rptr. 3d 293* , and the portion of the opinion addressing the general criteria of unconscionability are discussed at *Ch. 20A, Arbitration: Resisting, § 20A.91[3][g]*. The trial court ruled, and the parties did not dispute, that the enforceability of the arbitration clause was governed by the Federal Arbitration Act (FAA) (*140 Cal. App. 4th 1238, 1247*). Under the FAA, a court may not consider a claim that an arbitration provision is unenforceable if it is a subterfuge for a challenge that the entire agreement (in which the arbitration clause is only a part) is unconscionable. That contention must be presented to the arbitrator (*140 Cal. App. 4th 1238, 1249)* . The court of appeal disagreed with the trial court's characterization of petitioners' attack as being against the entire agreement, noting that although there was language in the pleadings and papers that was ambiguous, a careful reading of petitioners' points made clear they sought to attack only the arbitration clause (*140 Cal. App. 4th 1238, 1250-1251*). Although the court of appeal could have remanded to permit the trial court to decide whether the arbitration provision was unconscionable, it chose to make that determination itself because the facts were uncontested, their review de novo, and the issue a matter of law (*140 Cal. App. 4th 1238, 1251*).

[l] Under Federal Arbitration Act, Court, Not Arbitrator, Determines Existence of Entire Contract

Plaintiff in ***Sanford v. Member Works, Inc.*** *(9th Cir. 2007) 483 F.3d 956* alleged telemarketing violations of *39 U.S.C. § 3009*, mailing unordered merchandise. The District Court compelled arbitration, though acknowledging plaintiff's contention that she was unaware that she had enrolled in the Essentials program, explaining that Sanford's challenges to the validity of the whole contract and not specifically the arbitration agreement was an issue for the arbitrator and not the Court to decide. The arbitrator found no contract had been formed; even if a script was read to Sanford, the basic requirements of offer and acceptance were not met. The arbitrator awarded Sanford $72 in damages plus $34.57 in interest and $21,209.28 in arbitration fees, offset by the $72 that Member Works had reimbursed plaintiff, but found for Member Works on Sanford's other claims. The award was confirmed, over Sanford's objections, and she appealed.

The Court of Appeals vacated the orders compelling arbitration and confirming the arbitration award and remanded the case to the district court to determine whether a contract was formed between *Sanford and Member Works (483 F.3d 956, 964-965)* . Member Works argued Sanford could not now challenge the order compelling arbitration because it was an appealable order and she had not appealed it earlier. The Court of Appeals disagreed, noting that under the Federal Arbitration Act, an order compelling arbitration that also dismisses the action without prejudice constitutes an appealable final decision, but an order, like the one in this case, that compels arbitration but only stays the action is not a final decision with respect to the arbitration. Thus, Sanford's appeal of that order was timely (*483 F.3d 956, 960-962)* .

As to the primary question, the Court of Appeal cited *Three Valleys Municipal Water Dist. v. E.F. Hutton & Co. (9th Cir. 1991) 925 F.2d 1136, 1140-1141* (*Three Valleys*) for the correct federal law, that issues regarding the *validity* or *enforcement* of a putative contract mandating arbitration should be referred to an arbitrator, but challenges to the *existence* of a contract as a whole must be determined by the court prior to ordering arbitration (*483 F.3d 956, 962)* . The parties here did not dispute that Sanford challenged the existence of a contract with *(483 F.3d 956, 962)* , and therefore under *Three Valleys* the district court was required to rule upon the contract formation issue before compelling arbitration (*483 F.3d 956, 964)* .

[m] National Association of Security Dealers Class Arbitration Rule

Plaintiff in ***Clark v. First Union Securities, Inc.*** *(2007) 153 Cal. App. 4th 1595, 64 Cal. Rptr. 3d 313* , worked for defendant as an investment consultant candidate. Plaintiff's position required him to hold a license from the National Association of Securities Dealers, Inc. (NASD) and to execute a Securities and Exchange Commission (SEC) approved Uniform Application for Securities Industry Registration or Transfer Form U-4 (Form U-4). The Form U-4 contained an arbitration provision which required arbitration in accordance with the NASD Rules of Arbitration Procedure. The complaint alleged eight causes of action arising from plaintiff's employment, including violations of the Labor Code. The first six causes of action were personal to plaintiff. The seventh cause of action was brought by plaintiff individually and on behalf of others similarly situated for unfair business practices (*Bus. & Prof. Code § 17200*) and sought restoration of all sums wrongfully obtained by defendant as well as injunctive relief. The eighth cause of action was for declaratory relief. Defendant filed a motion to compel arbitration of all of causes of action, except for the injunctive and declaratory relief. The trial court granted the motion. Then the arbitrator ruled that in accordance with NASD Rule 10301(d), and renumbered effective April 16, 2007, as Rule 12204, that the putative class and class action causes of action were not eligible for arbitration. The arbitrator dismissed those causes of action. Thereafter, the trial court, on its own motion, reconsidered its first ruling and held that the putative class and class causes of action were to be heard in the trial court. Defendant appealed.

The court of appeal affirmed. The court first found that the trial court had inherent power to reconsider its prior ruling (*153 Cal. App. 4th 1595, 1608-1609*). The arbitrator's dismissal of the class claims was irrelevant. The question before the arbitrators was whether they could hear the two representative claims. Unlike other dismissals, the arbitrator's decision did not dispose of the two claims nor foreclose the trial court from considering them. The fact that the arbitrators did not remand thematter to the trial court did not alter that conclusion (*153 Cal. App. 4th 1595, 1609)* . Rule 10301(d) [*see now* Rule 12204] makes *ineligible* for arbitration class actions claims submitted as a class action and claims filed by members of a putative or certified class action if the claim is encompassed by a putative or certified class action filed in federal or state court, or is ordered by a court to an arbitral forum. Pursuant to Rule 10301(d)(2) [*see now* Rule 12204(c)] the arbitration panel may decide if a dispute is encompassed by a putative or certified class action. However, either party may elect instead to petition the court to resolve that issue. Petitions to the court must be filed within ten business days of receipt of notice that the Director of Arbitration is referring the dispute to a panel of arbitrators (*153 Cal. App. 4th 1595, 1599-1600)* . The court noted that Rule 10301(d) was adopted by the SEC in 1992. The public notice issued in connection with the approval of Rule 10301(d) stated that NASD and the SEC agreed that the judicial system had already developed the procedures to manage class action claims and that entertaining class claims through arbitration at the NASD would be difficult, duplicative and wasteful (*153 Cal. App. 4th 1595, 1601-1602)* . Defendant also argued that the arbitrator, not the court should decide the meaning and applicability of Rule 12204. The court of appeal distinguished the cases and NASD Rules relied on by defendant, saying that Rule 12204(d) is specific to putative and class claims and permits either the court *or* the arbitrators to decide if claims are encompassed by a putative or certified class action (*153 Cal. App. 4th 1595, 1610-1611)* . Both the court and the arbitrator have authority to make the determination of ineligibility.

[n] Parties' Agreement Gives Court Authority to Award Attorney's Fees for Petition to Compel Arbitration

Acosta v. Kerrigan *(2007) 150 Cal. App. 4th 1124, 58 Cal. Rptr. 3d 865* , arose out of a lease agreement. The trial court initially denied defendants' motion to compel arbitration finding the arbitration clause unconscionable and that defendants had waived their right to arbitration. That ruling was reversed on appeal, and the trial court ordered the matter to arbitration. The lease agreement provided that should any party institute any legal action or administrative proceeding against the other by any method other than arbitration, the responding party would be entitled to recover from the initiating party all damages, costs, expenses, and attorneys' fees incurred as a result of that action. Defendants then moved for $140,000 in attorney's fees claiming their entitlement to those fees was immediate on successfully moving the case to arbitration and was enforceable whether or not they prevailed on the merits at the conclusion of the arbitration proceedings. Plaintiff opposed the attorney's fees request on the grounds that there is no authority permitting

an interim fee award to be made before the conclusion of the arbitration and that fees should be subject to arbitration in the same manner other claims under the agreement. Plaintiff filed a motion to stay the fee proceedings under *Code Civ. Proc. § 1281.4* until it could be determined whether the fee request was subject to arbitration. The trial court interpreted the agreement to allow a fee award before completion of the arbitration and before a prevailing party was identified at the arbitration and awarded defendants $60,000 in attorney fees incurred in connection with successfully compelling arbitration. In doing so, the trial court impliedly denied plaintiff's petition to compel the arbitration of the attorney's fees request. Later the court made that ruling explicit; and plaintiff appealed from both orders: the order grating attorney's fees and the order denying arbitration of the attorney's fees request.

The court of appeal affirmed, agreeing that under the terms of the parties' agreement an interim fee award was permissible and that the court was in the best position to determine that fee request (*150 Cal. App. 4th 1124, 1125, 1133)* . There was a dissent, arguing that the fee request should have been determined by the arbitrator (*150 Cal. App. 4th 1124, 1133-1135*). Given that the trial court must decide the petition to compel arbitration, the court of appeal believed the trial court also should decide the request for fees made in connection with that same petition (*150 Cal. App. 4th 1124, 1130)* . That request for attorney fees was so closely related to the hearing and decision of the petition to compel as to be reasonably considered an integral part of that proceeding which even under the contract is necessarily a judicial not an arbitral proceeding petition. Thus, despite the breadth of the contractual language allocating all issues to decision by an arbitrator, this particular fee award issue appears to fall within the only exception mentioned in the contract--a resort to the courts in order to resist the other party's attempt to avoid the arbitration clause (*150 Cal. App. 4th 1124, 1131)* . This conclusion is both consistent with the contract language and preferable as a matter of practical policy to allow the trial judge rather than an arbitrator to decide the fee award issue which is essentially a part of the proceeding on the petition to compel arbitration decided by that trial judge (*150 Cal. App. 4th 1124, 1131)* . The court discussed other cases dealing with interim fee awards, both under statutes, but noted that it could see no reason why petitioner should have to wait until the end of the case to recover fees he is entitled to by virtue of prevailing on a specific motion, likening the situation to one who is successful in making a discovery motion (*150 Cal. App. 4th 1124, 1132)* . Petitioner was entitled to an interim attorney fee award because he already has prevailed on an independent proceeding contemplated in the contract. The court noted that even the dissent agreed with the conclusion that an interim fee award is permissible under the terms of the parties' agreement (*150 Cal. App. 4th 1124, 1132-1133)* .

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20 ARBITRATION: COMPELLING
PART II. FORMS
A. General Principles Related to Compelling Arbitration

2-20 California Points & Authorities § 20.11

§ 20.11 Supporting [Petition to Compel Arbitration and] Motion to Stay Related Action

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff and Respondent,	)	MEMORANDUM IN SUPPORT OF [PETITION TO COMPEL ARBITRATION AND] MOTION TO STAY ACTION
vs.	)	
_____ [*name*],	)	Date: _____
Defendant and Petitioner.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

PETITIONER, AS A PARTY TO AN ARBITRATION AGREEMENT, IS ENTITLED TO [AN ORDER COMPELLING ARBITRATION BECAUSE RESPONDENT HAS REFUSED TO ARBITRATE A CONTROVERSY UNDER THE AGREEMENT, AND TO] AN ORDER STAYING THIS ACTION UNTIL THE PETITION TO COMPEL ARBITRATION IS DETERMINED AND, IF ORDERED, ARBITRATION IS COMPLETED.

[*EITHER, if application for arbitration is pending*]

A. Action to Be Stayed Until Arbitrability Determined and Arbitration Had. If an application has been made to a

court [of competent jurisdiction, whether or not in California] for an order to arbitrate a controversy, the court in which the _____ [action *or* proceeding] is pending in which such controversy is an issue, on motion of a party therein, shall stay the _____ [action *or* proceeding] until the application is determined, and if arbitration is ordered, until arbitration is had, or such earlier time as the court specifies (Code Civ. Proc. § 1284.1; *see Hayworth v. City of Oakland (1982) 129 Cal. App. 3d 723, 729, 181 Cal. Rptr. 214*). [*Code of Civil Procedure Section 1281.4* is clear and unambiguous: it requires that the trial court stay an action pending before it while an application to arbitrate the subject matter of the action is pending in a court of competent jurisdiction. There is no specific or implied exception contained within Section 1281.4 to preclude its application for dilatory action by a party seeking to arbitrate the matter. Relief based on a claim of delay, as well as any substantive arguments relating to whether arbitration is appropriate under the facts presented, should be presented to the court entertaining the application to arbitrate (*Twentieth Century Fox Film Corp. v. Superior Court (2000) 79 Cal. App. 4th 188, 192, 93 Cal. Rptr. 2d 896*)].

[*OR, if arbitration has already been ordered*]

A. Action to Be Stayed Until Arbitration Had. If arbitration of a controversy has been ordered [by a court of competent jurisdiction, whether or not in California], the court in which the _____ [action *or* proceeding] is pending in which such controversy is an issue, on motion of a party therein, shall stay the _____ [action *or* proceeding] until arbitration has taken place, or such earlier time as the court specifies. A single overlapping issue is sufficient to require imposition of a stay (*Code Civ. Proc. § 1281.4*; *see Heritage Provider Network, Inc. v. Superior Court (Eastland Medical Group) (2008) 158 Cal. App. 4th 1146, 1152-1153, 70 Cal. Rptr. 3d 645* ; *Los Angeles Police Protective League v. City of Los Angeles (1985) 163 Cal. App. 3d 1141, 1148-1149, 209 Cal. Rptr. 890*).

[*CONTINUE*]

[*Optional*] **B. Venue for Motion to Stay Action Relating to Issue That Is Arbitrable Under Private Agreement.** A motion for stay of action pending arbitration must be filed in the court where the action is pending (*Code Civ. Proc. § 1292.8*).

[*Optional*] **C. Severance of Arbitrable Controversy.** If the issue which is the controversy subject to arbitration is severable, the stay may be with respect to that issue only (*Code Civ. Proc. § 1281.4*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to stay a pending action that relates to the arbitrable controversy and is best combined with a petition to compel arbitration. If the motion to stay a related action or proceeding is combined with a petition to compel arbitration, they may be supported by the same memorandum. In that case counsel should combine this form with the memorandum at § 20.10, and as many other related memoranda as are applicable to the particular situation.

[b] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. In particular, argument should stress the similarity of issues before both forums and suggest how the prior determination of such issues in arbitration will expedite the judicial proceeding afterward.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by referencesto the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For a form of a motion to stay an action related to an arbitrable controversy that may be supported by this memorandum, and for a notice of hearing on that motion, as see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

[d] Related Memoranda

For a form of memorandum to combine with this form when the motion seeking the stay is made by a person who is not a party to the arbitration, see *§ 20.12*.

For additional memoranda to combine with this form, regarding other matters that the petition may need to address, see *§§ 20.10*, *20.12-20.14*, *20.20* et seq., *20.30* et seq., *20.40* et seq., *20.60* et seq., and *20.80* et seq.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Action to Be Stayed Until Arbitrability Determined and Arbitration Had

Although the facts on which the alternative writ in ***Twentieth Century Fox Film Corp. v. Superior Court*** *(2000) 79 Cal. App. 4th 188, 93 Cal. Rptr. 2d 896* , was issued changed before the final decision on the petition, and thus resulted in dismissal of the petition as moot, and dissolution of the writ, the case is discussed here because the court of appeal did ascertain that the respondent court acted in excess of its authority by denying the motion for stay (*79 Cal. App. 4th 188, 190, 192-193)* . Real party in interest filed an action in respondent court against petitioner for damages for sexual harassment and discrimination in violation of California Fair Employment and Housing Act (FEHA; *Gov. Code § 12940 (h)* and *(i)*). Petitioner filed a petition in federal district court seeking to compel arbitration based on a collective bargaining agreement (CBA) with the union in which real party was a member. Then, petitioner moved in the state

court action to stay that action pursuant to *Code Civ. Proc. § 1281.4* pending resolution of the federal action. Respondent court denied the motion on the ground that real party's union could not, by the terms of the CBA, bind her to arbitrate statutory claims. Petitioner challenged that ruling by filing a petition for alternative and peremptory writ of mandate.

The court of appeal issued a temporary stay and alternative writ compelling respondent court to either set aside its order and enter a new order granting the stay, or show cause why a peremptory writ of mandate should not issue. The trial court reasoned that *Code Civ. Proc. § 1281.4* does not authorize a trial court to deny a stay based on the merits of the application to compel arbitration pending in another court, or, as was claimed in real party's opposition to the motion for stay, because the party who seeks the stay and has filed the application for arbitration is dilatory in obtaining a hearing on the application for arbitration pending in the other court (*79 Cal. App. 4th 188, 191)* . Discussing the second paragraph of *Code Civ. Proc. § 1281.4*, the court of appeal said that the statute is clear and unambiguous: it requires that the trial court stay an action pending before it while an application to arbitrate the subject matter of the action is pending in a court of competent jurisdiction. There is no specific or implied exception contained within the statute to preclude its application for dilatory action by a party seeking to arbitrate the matter. Relief based on a claim of delay, as well as any substantive arguments relating to whether arbitration is appropriate under the facts presented, should be presented to the court entertaining the application to arbitrate (*79 Cal. App. 4th 188, 192)* . Nevertheless, being informed at oral argument that the federal court had denied the petition to compel arbitration, the court of appeal dissolved the alternative writ and temporary stay and dismissed the petition as moot (*79 Cal. App. 4th 188, 193)* .

In *Hayworth v. City of Oakland (1982) 129 Cal. App. 3d 723, 181 Cal. Rptr. 214* , the court of appeal noted that a defendant sued over a dispute, which defendant contends is subject to arbitration, may elect to demur or to move for summary judgment on the ground plaintiff has failed to exhaust arbitration remedies or to move for a stay of proceedings pending arbitration if defendant also moves to compel arbitration (*129 Cal. App. 3d 723, 729)* .

[b] Action to Be Stayed Until Arbitration Had

Petitioner in ***Heritage Provider Network, Inc. v. Superior Court (Eastland Medical Group)*** *(2008) 158 Cal. App. 4th 1146, 70 Cal. Rptr. 3d 645* , sought to purchase real party, but negotiations failed. Real party sued petitioner, two related medical groups, Regal Medical Group, Inc. (Regal), and West Covina Plan IPA, Inc. (Covina), and four individual physicians who had terminated their relationship with real party and entered into agreements with petitioner. The complaint alleged causes of action for breach of contract against the medical groups and the doctors, and for inducing breach of contract and improper disclosure of confidential information and trade secrets against the medical groups. After the physicians successfully moved tocompel arbitration of real party's breach of contract claims, the trial court denied petitioner's and Regal's motion to stay the litigation notwithstanding its finding that similar issues were involved in the arbitration and court proceedings. Heritage and Regal sought a writ of mandate to compel the trial court to vacate its order denying their motion for a stay and to issue a new order granting a stay of the litigation until the arbitration was complete.

The court of appeal issued the writ directing the superior court to vacate its order denying the motion to stay the court action pending conclusion of the arbitration proceedings and to enter a new order granting the motion, finding that *Code Civ. Proc. § 1281.4* mandates a stay of judicial proceedings pending completion of the arbitration in these circumstances (*158 Cal. App. 4th 1146, 1149, 1155)* . The court of appeal set forth *Code Civ. Proc. § 1281.4* and said that any party to a judicial proceeding is entitled to a stay of those proceedings whenever (1) the arbitration of a controversy has been ordered, and (2) that controversy is also an issue involved in the pending judicial action. The purpose of the statutory stay is to protect the jurisdiction of the arbitrator by preserving the status quo until arbitration is resolved. In the absence of a stay, the continuation of the proceedings in the trial court disrupts the arbitration proceedings and can render them ineffective. Here, the trial court was mistaken in its belief one overlapping issue was insufficient to justify imposition of a stay (*158 Cal. App. 4th 1146, 1152)* . A single overlapping issue is sufficient to require imposition of a stay (*158 Cal. App. 4th 1146, 1152-1153)* . The trial court found the controversy between real

party and the physicians ordered to arbitration shared at least one issue with real party's claims against Heritage and Regal. It denied the stay not because there was no finding of any overlap but because the trial court erroneously believed it had discretion to deny the stay if it concluded there were not enough similar issues (*158 Cal. App. 4th 1146, 1153)* . The court discussed the overlapping claims. In its cause of action for intentional interference with contractual relations, real party alleged Heritage and Regal induced the physicians to breach their agreements by terminating them without 90 days' notice and by disclosing real party's confidential information. One ground for real party's breach of contract claim against the physicians was that they wrongfully solicited real party's health plan members. Whether the physicians did so was also asserted as one aspect of the wrongful conduct underlying real party's claim for intentional interference with prospective business advantage alleged against Heritage and Regal. Also, the claim for unfair competition in violation of *Bus. & Prof. Code § 17200* rested on allegations that Heritage and Regal induced breach of contract by physicians by persuading them to unlawfully solicit real party's health plan members for the purpose of obtaining a competitive advantage over real party (*158 Cal. App. 4th 1146, 1153-1154)* .

Los Angeles Police Protective League v. City of Los Angeles *(1985) 163 Cal. App. 3d 1141, 209 Cal. Rptr. 890* , arose from administrative mandamus proceedings instituted by a police officer regarding a provision of the memorandum of understanding between plaintiff, a bargaining agent for police officers, and the city. Subsequently, plaintiff filed a petition in superior court to compel arbitration. The trial court denied the petition because, among other grounds, relief was available under the mandamus proceedings.

The court of appeal reversed, holding that, pursuant to *Code Civ. Proc. § 1281.4*, any party to the administrative mandamus proceedings is entitled to a stay of proceedings until arbitration is had in accordance with an order compelling arbitration. The purpose of the provision is to promote the expeditious and efficient settlement of disputes and eliminate multiplicity of actions (*163 Cal. App. 3d 1141, 1148-1149)* .

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CHAPTER 20 ARBITRATION: COMPELLING
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2-20 California Points & Authorities § 20.12

§ 20.12 Party Staying Action for Arbitration Need Not Be Party to Arbitration

[1] FORM

MOVING PARTY, AS A PARTY TO THIS _____ [ACTION *or* PROCEEDING] INVOLVING A CONTROVERSY AS TO WHICH ARBITRATION HAS BEEN _____ [APPLIED FOR *or* ORDERED], IS ENTITLED TO AN ORDER STAYING THIS _____ [ACTION *or* PROCEEDING] UNTIL [THE APPLICATION IS DETERMINED, AND IF ARBITRATION IS ORDERED, AND] ARBITRATION HAS TAKEN PLACE.

A. Party Staying Action for Arbitration Is Not Required to Be Party to Arbitration. A party moving to stay proceedings until a court-ordered arbitration has taken place is not required also to be a party to that arbitration (*see Code Civ. Proc. § 1281.4*) so long as the same issue is involved in both the arbitration and the proceeding, and its determination in arbitration may serve to simplify the pending action or prevent multiple litigation of issues (*Federal Ins. Co. v. Superior Court (1998) 60 Cal. App. 4th 1370, 1374-1375, 71 Cal. Rptr. 2d 164* ; *Marcus v. Superior Court (1977) 75 Cal. App. 3d 204, 209, 211-212, 141 Cal. Rptr. 890*).

[2] Comments

[a] Use of Form

This form is designed to be combined with the memorandum at *§ 20.11* and submitted in support of a motion to stay a pending action that relates to the arbitrable controversy when the person seeking to have the action stayed is not a party to the arbitration.

[b] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, argument should note the similarity of issues before both forums and suggest how the prior determination of such issues in arbitration will expedite the judicial proceeding afterward.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filedunverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For a form of a motion to stay an action related to an arbitrable controversy that may be supported by this memorandum, and for a notice of hearing on that motion, as see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

[d] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Party Staying Action for Arbitration Is Not Required to Be Party to Arbitration

Federal Ins. Co. v. Superior Court *(1998) 60 Cal. App. 4th 1370, 71 Cal. Rptr. 2d 164* , was an action by an unpaid subcontractor on a public works project against the primary contractor and its sureties. The contractor moved to compel arbitration and to stay the action pursuant to an agreement between the contractor and the subcontractor that required arbitration of any disputes between them. The court ordered arbitration of the dispute between the contractor and the subcontractor and stayed the action as to the contractor. Plaintiff filed a first amended complaint and served the sureties with requests for discovery. The sureties moved for a stay, but the trial court denied their request. They petitioned for writ of mandate, contending that the stay was mandatory because plaintiff's claim on the bond involved an issue to be decided in the arbitration proceeding.

The court of appeal granted the writ, finding that the trial court should have granted the stay as to the sureties (*60 Cal. App. 4th 1370, 1375-1376)* . Plaintiff contended that the elements of his claim against the contractor differed from the elements of his claims against the sureties, but provided no facts to suggest that his claim against the sureties was truly independent of the matter in arbitration. The court set forth *Code Civ. Proc. § 1281.4* and said that the resolution of dispute between plaintiff and the contractor in arbitration would adjudge "an issue involved in" the action against the sureties (*60 Cal. App. 4th 1370, 1374-1375)* . Without the stay, the arbitration proceedings would be rendered ineffective and plaintiff would be able to ignore the arbitration agreement. The court said its decision did not deny plaintiff the right to a direct action against the sureties [*see Civ. Code § 3248(c)*], but merely delayed the action (*60 Cal. App. 4th 1370, 1375)* .

Marcus v. Superior Court *(1977) 75 Cal. App. 3d 204, 141 Cal. Rptr. 890* , involved a franchisee who alleged that the franchisor corporation had fraudulently induced him to enter the contract. The franchisee joined several individual defendants for whom the corporation was allegedly the alter ego. The corporate defendant successfully petitioned to compel arbitration, as provided for under the franchise agreement, and to stay the action against itself. The individual defendants' motion to stay the action against them was denied by the trial court. Although the court of appeal originally denied those defendants' petition for mandate, the Supreme Court, after hearing, retransferred the proceeding to the intermediate court with instructions to issue an alternative writ.

The court of appeal issued a writ of mandate commanding the trial court to stay the action against the individual defendants. It noted that *Code Civ. Proc. § 1281.4* allows for any party to an action or proceeding to move for a stay thereof until an arbitration that has been ordered by a court, and that is a controversy also at issue in the judicial proceeding, has taken place. The court observed that this provision included any party to the judicial proceeding, whether or not that person also was a party to the arbitration (*75 Cal. App. 3d 204, 209)* . There is no requirement that the arbitrable controversy is one that will have a collateral estoppel effect with respect to the parties seeking to stay the action. While it is true that a favorable judgment for the plaintiff in the action would not prevent the litigation of the same questions involved in the arbitration with respect to the individual defendants, the plaintiff would be limited by any determination in arbitration that the corporate defendant was not liable because he was attempting to hold the individuals liable for the tort allegedly committed by the corporation. Thus, it appeared a stay might well simplify the pending action or prevent multiple litigation of issues in line with obvious purposes of the relevant statute (*75 Cal. App. 3d 204, 211-212)* .

The plaintiff also raised concerns that the stay of his action against the individual defendants might, because they were not parties to the arbitration, allow expiration of the five-year period of limitations prescribed by former Code Civ. Proc. § 583(b) [*now see Code Civ. Proc. § 583.310*] for bringing a case to trial. The court responded that because of the stay being ordered, it would be impossible or impracticable for plaintiff to proceed to trial, and therefore such time period would be excluded from the period for bringing the case to trial (*75 Cal. App. 3d 204, 212-213)* .

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20 ARBITRATION: COMPELLING
PART II. FORMS
A. General Principles Related to Compelling Arbitration

2-20 California Points & Authorities § 20.13

§ 20.13 Supporting Petition to Consolidate Separate Contractual Arbitrations

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF PETITION TO
Petitioner,	)	CONSOLIDATE SEPARATE ARBITRATION
vs.	)	PROCEEDINGS
_____ [*name*],	)	Date: _____
Respondent.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

PETITIONER, AS A PARTY TO AN ARBITRATION PROCEEDING THAT MAY BE AFFECTED BY A SEPARATE ARBITRATION ARISING FROM THE SAME TRANSACTION OR SERIES OF TRANSACTIONS INVOLVING ONE OF THE PARTIES TO THE INSTANT PROCEEDING, IS ENTITLED TO AN ORDER CONSOLIDATING THE PROCEEDINGS BECAUSE THERE _____ [IS *or* ARE] COMMON ISSUE(S) OF _____ [LAW *or* FACT *or* LAW AND FACT] CREATING THE POSSIBILITY OF CONFLICTING RULINGS.

A. Venue for Petition Filed After Commencement of Arbitration. Except as otherwise provided in this article, any petition made after the commencement [or completion] of arbitration shall be filed in a court having jurisdiction in the

county where the arbitration is being [or has been] held, or, if not held exclusively in any one county of California, or if held outside California, then the petition shall be filed as provided in Section 1292 (*Code Civ. Proc. § 1292.2*).

[*OR*]

A. Under Federal Arbitration Act, Arbitrator Determines Whether to Consolidate Separate Arbitrations. If the arbitration agreements are silent as to consolidation[, even if they contain a California choice of law clause], and if the dispute is governed by the Federal Arbitration Act, the arbitrator, not the court, determines whether to consolidate separate arbitrations (*Yuen v. Superior Court (Gemstar--TV Guide International, Inc.) (2004) 121 Cal. App. 4th 1133*).

B. Possibility of Conflicting Rulings on Common Issues of Law or Fact Exists. A court may order the consolidation of separate arbitration proceedings on petition of a party to an arbitration agreement when (1) separate arbitration agreements or proceedings exist between the same parties, or one party is a party to a separate arbitration agreement or proceeding with a third party; (2) the disputes arise from the same transaction or series of related transactions; and (3) a common issue or issues of law or fact create the possibility of conflicting rulings by more than one arbitrator or panel of arbitrators (*Code Civ. Proc. § 1281.3*; *Garden Grove Community Church v. Pittsburgh-Des Moines Steel Co. (1983) 140 Cal. App. 3d 251, 264, 191 Cal. Rptr. 15*).

C. No Substantial Right or Obligation Will Be Impaired. When the requirements for consolidation contained in *Section 1281.3 of the Code of Civil Procedure* are met, there is no reason to deny consolidation unless it would impair a substantial right or obligation of a party under the contract (*Garden Grove Community Church v. Pittsburgh-Des Moines Steel Co. (1983) 140 Cal. App. 3d 251, 264, 191 Cal. Rptr. 15*).

[*Optional*] **D. Consolidated Arbitration Must Be by Three-Arbitrator Panel.** A three-arbitrator panel minimizes the risk of factual or legal errors, which are subject to only limited judicial review. Thus, a three-arbitrator panel is such a substantial contractual right, that when one arbitration agreement involved in a consolidated arbitration provides for a three-arbitrator panel, the court must order the consolidated arbitration by a three-arbitrator panel (*Parker v. McCaw (2005) 125 Cal. App. 4th 1494, 1505-1509, 24 Cal. Rptr. 3d 55*).

[*Optional*] **E. Effect of Clause Prohibiting Consolidation.** Like a clause in an arbitration agreement prohibiting classwide arbitration, a prohibition on consolidation of arbitrations may be unconscionable, and thus, void and unenforceable. The determination of unconscionability is for the court to make. The court has both the duty and the discretion to make that determination (*Independent Assn. of Mailbox Center Owners, Inc. v. Superior Court (Mail Boxes Etc., USA, Inc.) (2005) 133 Cal. App. 4th 396, 408-410, 34 Cal. Rptr. 3d 659*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a petition to consolidate separate arbitration proceedings that have common issues of law or fact that could lead to conflicting decisions if allowed to be decided in separate proceedings. Note, however, that the provisions for consolidation of separate arbitration proceedings do not apply to agreements to arbitrate

disputes concerning the professional negligence of a health care provider made pursuant to *Code Civ. Proc. § 1295* [*Code Civ. Proc. § 1281.3*]. In addition, if the matter is governed by the Federal Arbitration Act, the arbitrator, not the court, decides whether the arbitrations should be consolidated, after the court has determined whether there are binding arbitration agreements that encompass the particular disputes. Thus, the second (alternative) Paragraph A may be used to oppose a court's determination of consolidation or may be used in a petition or other request to the arbitrator or arbitration panel to seek consolidation. Although the court of appeal which decided the authority cited in alternative Paragraph A opined that the AmericanArbitration Association's Supplementary Rules for Class Arbitration provided an administrative mechanism by which the AAA could consider a consolidation issue, counsel should check with the arbitrator or arbitration provider organization involved to determine their current practice with respect to requests for consolidation. Optional Paragraph D is for use when one of the arbitration agreements requires arbitration before a three-arbitrator panel and the other provides for only a single arbitrator.

Optional Paragraph E is for use when to challenge as unconscionable a provision in an arbitration that prohibits consolidation, classwide arbitration, or "group arbitrations." Counsel may wish to combine this with Ch. 20A, *Arbitration: Resisting*, § 20A.91, Optional Paragraph I, containing the seminal authority on unconscionable class arbitration waivers in consumer contracts.

If the arbitrations sought to be combined are contractual arbitration of an uninsured motorist claim and judicial arbitration of related third party claims, counsel may use this form, which relies on *Code Civ. Proc. § 1281.3*, and combine it with the form at *§ 20.14[1]*, which also relies on *Code Civ. Proc. § 1281.3*, or may use the form at *§ 20.15*, which relies on *Code Civ. Proc. § 1281.2(c)*. The authority for the form at *§ 20.14[1]* has been questioned in dicta by *Mercury Insurance Group v. Superior Court (1998) 19 Cal. 4th 332, 351-352, 79 Cal. Rptr. 2d 308, 965 P.2d 1178* , as discussed at *§§ 20.14[2][a]* and *20.15[3][a]*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should show that the disputes arose from the same transaction or, if they arose from separate transactions, that the transactions constituted a series of related transactions. The commonality of the legal or factual issues should also be pointed out, along with the potential for conflict if the disputes are resolved separately and inconsistently.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For a form of a petition to consolidate separate arbitration proceedings that may be supported by the foregoing memorandum, *see* California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and*

Compelling Arbitration (Matthew Bender).

[d] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Venue for Petition Filed After Commencement of Arbitration

Code Civ. Proc. § 1292 is set forth in *§ 20.10[1]*, Paragraph B.

[b] Under Federal Arbitration Act, Arbitrator Determines Whether to Consolidate Separate Arbitrations

Yuen v. Superior Court (Gemstar--TV Guide International, Inc.) *(2004) 121 Cal. App. 4th 1133* , involved separate arbitrations by two employees under restructuring agreements with the same employer/surviving entity (real party). The contracts contained a California choice-of-law provision with an equally broad arbitration clause stating that all disputes relating to the contract should be submitted to arbitration. The complaints were substantially similar; and real party asked the arbitration panel to consolidate the arbitrations. The arbitration panel, which was under the auspices of the American Arbitration Association (AAA) determined it did not have authority to consolidate the arbitrations; and the plaintiffs would not agree to consolidation. Real party moved the court for consolidation in accordance with *Code Civ. Proc. § 1281.3*. The arbitration agreements specified that any action thereunder would be governed by California law. Respondent court granted the motion finding that the facts alleged in the demands for arbitration were virtually identical, many of the same witnesses would testify in both proceedings, counsel were the same in both proceedings, separate arbitrations would be costly, would involve duplicative witnesses, and might result in conflicting rulings by the respective AAA arbitration panels. As to whether *Code Civ. Proc. § 1281.3* applied, neither party cited or discussed *Green Tree Financial Corp. v. Bazzle (2003) 539 U.S. 444, 123 S. Ct. 2402, 156 L. Ed. 2d 414* (*Green Tree*) [*see Ch. 20C, Arbitration: Confirming, Correcting, or Vacating the Award, § 20C.105[3][a]*], and respondent court did not refer to *Green Tree* in its order granting the motion to consolidate. The court found that *Code Civ. Proc. § 1281.3* did apply, based on *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University (1989) 489 U.S. 468, 109 S. Ct. 1248, 103 L. Ed. 2d 488* and earlier cases, which held that the Federal Arbitration Act (FAA) does not preclude a California court from applying California procedural statutes governing arbitration.

Plaintiffs challenged the trial court's ruling by writ of mandate, which the court of appeal granted (*121 Cal. App. 4th 1133, 1139)* , finding that *Green Tree* requires thatthe issue of consolidation be determined by the arbitrator (*121 Cal. App. 4th 1133, 1138)* . Under *Green Tree*, a court decides only the validity of the arbitration clause and its applicability to the underlying dispute between the parties. Other issues, including those concerning what kind of arbitration proceeding the parties have agreed to, are for the arbitrator to decide (*121 Cal. App. 4th 1133, 1138)* . Although the AAA declined to resolve the consolidation issue when requested by real party to do so, it thereafter recognized the impact of *Green Tree*, and adopted Supplementary Rules for Class Arbitration, effective October 8, 2003, which, according to the court of appeal, granted the arbitrator authority to determine consolidation or joinder of claims if the arbitration agreement is silent with respect to class claims [*see* http://www.adr.org., Rules, Supplementary Rules for Class Arbitration] (*121 Cal. App. 4th 1133, 1138-1139)* . Although these rules are specific to class arbitrations, and a request for consolidation may involve somewhat different considerations, the court determined that those rules nonetheless provide an administrative mechanism by which the AAA may consider the consolidation issue raised in the instant case. The court's decision stated that its vacating the order granting defendant's motion to consolidate the arbitrations was without prejudice to submitting the matter to the AAA (*121 Cal. App. 4th 1133, 1139)* .

[c] Possibility of Conflicting Rulings on Common Issues of Law or Fact Exists

In ***Garden Grove Community Church v. Pittsburgh-Des Moines Steel Co.*** *(1983) 140 Cal. App. 3d 251, 191 Cal. Rptr. 15* , a dispute arose between the owner of a construction project and a party who contracted to do substantial construction work. The dispute involved the conduct of the project construction manager, the architect, who had separate contracts with the owner, and the structural engineer, a subcontractor of the architect. When the dispute went to arbitration, the owner sought to consolidate the various arbitrations engendered by the dispute, but the architect argued that the arbitration agreement provided that no other parties would be brought into arbitration without its consent. The trial court agreed and refused to order the architect to participate in a consolidated hearing.

The court of appeal reversed, holding that the proceedings should have been ordered consolidated. The court stated that binding arbitration is favored judicially and by public policy to promote judicial efficiency and to settle disputes quickly and fairly. The importance of obtaining consistent results in disputes involving identical facts and law strongly supports consolidating evidence taken in arbitrations, such as in this case (*140 Cal. App. 3d 251, 263)* . The court held that the three explicit requirements for applicability of *Code Civ. Proc. § 1281.3* were facially met:

- Separate arbitration agreements ran between one party and each of the other parties to the coordinated arbitrations;

- The disputes arose from the same transactions or series of related transactions; and

- Common issues of law or fact created the possibility of conflicting rulings by more than one arbitrator or panel of arbitrators.

The court held that there was no reason to deny consolidation unless it would impair a substantial right or obligation of a party under the contract (*140 Cal. App. 3d 251, 264)* .

[d] No Substantial Right or Obligation Will Be Impaired

The facts and procedural background of ***Garden Grove Community Church v. Pittsburgh-Des Moines Steel Co.*** *(1983) 140 Cal. App. 3d 251, 191 Cal. Rptr. 15* , are discussed under [b], *above.* In *Garden Grove*, the court of appeal reversed the trial court's denial of a petition by an owner of a construction project to consolidate separate arbitration proceedings involving the project manager and the architect pursuant to *Code Civ. Proc. § 1281.3*. There was no reason to deny consolidation unless it would impair a substantial right or obligation of a party under the contract (*140 Cal. App. 3d 251, 264)* . The court held that the consolidation would not have the effect of adding parties to the architect's agreement to submit disputes to arbitration; the arbitrator could not grant relief against the architect in favor of the contractor, because there was no agreement between them that would be the basis for such relief (*140 Cal. App. 3d 251, 265)* . The consolidation would merely resolve all factual and legal issues in the same proceeding, to avoid any potentially conflicting findings that could lead to inconsistent results (*140 Cal. App. 3d 251, 264-265)* .

[e] Consolidated Arbitration Must Be by Three-Arbitrator Panel

Parker v. McCaw *(2005) 125 Cal. App. 4th 1494, 24 Cal. Rptr. 3d 55* arose from two agreements between the same parties: an employment agreement and a stock incentive agreement. Both provided for arbitration by the American Arbitration Association (AAA), but the employment agreement provided for arbitration by a sole neutral arbitrator, while the stock incentive agreement provided for arbitration by a panel of three arbitrators. After plaintiff's employment was terminated and lengthy mediation was unsuccessful, plaintiff filed suit for severance pay under the employment agreement and for payments under the stock incentive agreement. Defendant filed a demand for arbitration with the AAA, setting forth claims of her own, asking that arbitration be before a panel of three arbitrators in accordance with the stock incentive agreement, and petitioned the court to compel arbitration under those terms. Plaintiff requested that defendants bear the cost of arbitration if the court decided to order arbitration by a three-arbitrator panel. The court

ordered consolidated arbitrations under both agreements, but before a single arbitrator who was to assign fees. The arbitrator ruled for plaintiff and awarded $1.4 million in severance pay, $9.75 million under the stock incentive agreement, attorney's fees, and punitive damages. Plaintiff petitioned to confirm the award and defendants petitioned to vacate it. The trial court confirmed the award. Defendants appealed, challenging the consolidation, the award of punitive damages, and the use of a single arbitrator.

The court of appeal reversed the confirmation of the award as to the stock incentive agreement and any attorney's fees awarded thereunder (*125 Cal. App. 4th 1494, 1509)* , finding that the trial court erred in resolving the conflicting arbitration provisions in favor of a single arbitrator. The right to a three-arbitrator panel is a substantial contractual right. A three-arbitrator panel minimizes the risk of factual or legal error, which errors are subject to only limited judicial review. In addition, AAA'sCommercial Dispute resolution Procedures and Arbitration Rules provide for a three-arbitrator panel in all disputes involving $1 million or more unless the parties' contract provides otherwise (*125 Cal. App. 4th 1494, 1506)* . Defendants were not required to object to the use of a single arbitrator in the arbitration: the trial court had rules on the matter, and the arbitrator did not have jurisdiction to reverse that order. Nor were defendants required to challenge the single arbitrator order by writ. There was no requirement that the agreements be construed together, nor did the employment agreement prevail because it was executed after the stock incentive agreement. The trial court was also wrong in supposing that the unconscionability principles of *Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 100-111, 99 Cal. Rptr. 2d 745, 6 P.3d 669* (discussed at *§ 20.23[3][a]*) applied to the employment agreement. Plaintiff, who was an attorney, had the opportunity to negotiate the agreement, and did not assert any statutory claims. The agreement was neither generic nor standard (*125 Cal. App. 4th 1494, 1507)* .

[f] Effect of Clause Prohibiting Consolidation

Independent Assn. of Mailbox Center Owners, Inc. v. Superior Court (Mail Boxes Etc., USA, Inc.) *(2005) 133 Cal. App. 4th 396, 34 Cal. Rptr. 3d 659* , arose from actions by franchisees against the franchisor (MBE) to challenge changes imposed in their store formats. Franchisees stated various common law claims as well as claims under the California Franchise Investment Law (*Corp. Code § 31000 et seq.*), the Cartwright Act (*Bus. & Prof. Code § 16700 et seq.*), the Uniform Trade Secrets Act (*Civ. Code § 3426 et seq.*) and the Unfair Competition Law (*Bus. & Prof. Code § 17200 et seq.*). Some agreements were silent on the issues of consolidation and classwide arbitration and appointed the American Arbitration Association as arbitration administrator. Other agreements prohibited consolidation or classwide arbitration and appointed JAMS as arbitrator. AAA decided as an administrative matter not to consolidate the arbitrations. After the trial court ruled that arbitrations had to be conducted individually and not on a consolidated or classwide basis, the franchisees filed a writ of mandate challenging the order compelling arbitration, denial of consolidation, and related rulings denying or referring to the arbitrators their requests that all arbitral costs relating to their statutory claims be shifted to MBE.

The court of appeal denied the petition in part and granted it in part, (1) upholding the order compelling arbitration, but (2) vacating the order denying consolidation, (3) striking certain unconscionable portions of the arbitration clauses, (4) vacating the order referring the fee-shifting issues to the arbitrator, and (5) requiring the trial court to hold hearings as to allocation of fees. The court of appeal discussed the doctrine of unconscionability, and found these franchise agreements had characteristics of contracts of adhesion. Like a clause in an arbitration agreement prohibiting classwide arbitration [*see* *Discover Bank v. Superior Court (Boehr) (2005) 36 Cal. 4th 148, 30 Cal. Rptr. 3d 76, 113 P.3d 1100* ; (*Discover Bank*), discussed in *Ch. 20A, Arbitration: Resisting, § 20A.91[3][i]*], a prohibition on consolidation of arbitrations may be unconscionable, and thus, void and unenforceable. The determination of unconscionability is for the court to make. The trial court flatly rejected the contention that the franchise agreements were contracts of adhesion, and that, the court of appeal said, was substantively incorrect because it disregarded applicable law concerning adhesion contracts in the franchise context. The court had both the duty and the discretion to resolve conflicts between the two types of arbitration provisions involved. The trial court could exercise this discretion by denying consolidation of separate arbitration proceedings or by allowing consolidation only as to certain issues, leaving others to be resolved in

separate arbitrations. But it was error for the trial court to hold the JAMS arbitration clauses controlled over the AAA arbitration clauses to the extent it prohibited group arbitration proceedings. It was also error to let AAA decide the matter as an administrative proceeding without at least referring the matter to an arbitrator. The franchisees made an adequate showing under *Code Civ. Proc. § 1281.3* that there were common issues of law and fact and that group arbitration would be a preferred means of resolving them.

Whether the issue is decided by an arbitrator or the court, it should not be done as an administrative proceeding without at least referring the matter to an arbitrator.

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20 ARBITRATION: COMPELLING
PART II. FORMS
A. General Principles Related to Compelling Arbitration

2-20 California Points & Authorities § 20.14

§ 20.14 Consolidating Contractual Arbitration of Uninsured Motorist Claims and Judicial Arbitration of Related Third-Party Claims

[1] FORM

THE COURT HAS DISCRETION TO ORDER COMBINED ARBITRATION OF UNINSURED MOTORIST CLAIMS AND THIRD-PARTY CLAIMS SUBJECT TO JUDICIAL ARBITRATION BECAUSE THE CLAIMS ARISE OUT OF THE SAME TRANSACTION AND NO ONE WILL BE PREJUDICED.

A. Consolidating Contractual Arbitration of Uninsured Motorist Claims and Judicial Arbitration of Related Third-Party Claims. When the requirements for consolidation contained in *Section 1281.3 of the Code of Civil Procedure* are met, and impairment of a substantial right or obligation of a party will not result, a court has discretion to order consolidated arbitration of uninsured motorist claims that are arbitrable under *Insurance Code Section 11580.2(f)* and third-party claims arising from the same incident that are subject to judicial arbitration under *Section 1141.10 et seq. of the Code of Civil Procedure* (*Gordon v. G.R.O.U.P, Inc. (1996) 49 Cal. App. 4th 998, 1007, 56 Cal. Rptr. 2d 914* ; *but see* *Mercury Insurance Group v. Superior Court (1998) 19 Cal. 4th 332, 351-352, 79 Cal. Rptr. 2d 308, 965 P.2d 1178* (dictum that consolidation of contractual and judicial arbitrations is not authorized and would be awkward)).

[2] Comments

[a] Use of Form

This form may be combined with the authorities in *§ 20.13* and submitted in support of a petition to consolidate, or "combine" arbitration of uninsured motorist claims pursuant to *Ins. Code § 11580.2(f)* and third-party claims arising from the same accident that are subject to judicial arbitration under *Code Civ. Proc. § 1141.10 et seq.* The primary authority for consolidation of contractual and judicial arbitrations, *Gordon v. G.R.O.U.P, Inc. (1996) 49 Cal. App. 4th 998, 1005-1008, 56 Cal. Rptr. 2d 914* , has been questioned by the California Supreme Court, so counsel may prefer torely on *Code Civ. Proc. § 1281.2*, and use the form at *§ 20.15[1]*, rather than use this form, which relies on *Code Civ. Proc. § 1281.3*. *Code Civ. Proc. § 1281.2(c)* authorizes consolidation of contractual arbitration and related actions "for all purposes, including trial."

If the third-party claims are not subject to judicial arbitration but are the subject of a separate civil action and there is a common question of law or fact, for instance, if comparative fault between and an insured and an insured driver must be apportioned with respect to a single injury, counsel may petition for joinder of the civil action and the uninsured motorist arbitration pursuant to *Code Civ. Proc. § 1281.2(c)*. For a form for use in that situation, see *§ 20.15*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should show that the claims arose from the same accident, that all parties will be represented in the arbitration, and that no party's substantial right or obligation will be impaired.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For a form of a petition to consolidate separate arbitration proceedings that may be supported by the foregoing memorandum, *see* California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

[d] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Consolidating Contractual Arbitration of Uninsured Motorist Claims and Judicial Arbitration of Related Third-Party Claims

The accident in ***Gordon v. G.R.O.U.P., Inc.*** *(1996) 49 Cal. App. 4th 998, 56 Cal. Rptr. 2d 914* , occurred when a van, owned by G.R.O.U.P., Inc. (GROUP) and driven by one of its employees, was struck by a stolen car as it exited a parking lot. The owner of the stolen car was uninsured. The driver of the stolen car fled the scene. The six passengers in the van as well as the driver, sustained injures and incurred medical damages and loss of wages. The passengers sued GROUP (for negligently hiring and supervising the driver), the driver of the van, the owner of the stolen vehicle, and the fleeing driver (as DOE). GROUP was either self-insured or insured by Paratransit. GROUP and its driver answered, denying liability, and cross-complained against the owner of the stolen car and DOE, for indemnity and property

damage. The driver of the van also filed a separate cross-complaint against GROUP, the owner of the stolen vehicle, and Doe, for personal injury and property damage and for indemnity. This second cross-complaint was eventually dismissed and arbitrated separately as an uninsured motorist claim, resulting in an award for the driver of the van. The passengers' claims were arbitrable both as uninsured motorist claims under contractual arbitration, and because of the amounts involved, as third-party claims under *Code Civ. Proc. § 1141.10 et seq.*, governing judicial arbitration. The trial court ordered a combined arbitration, which resulted in an award for the passengers under GROUP's uninsured motorist coverage, implicitly finding DOE wholly responsible. That award was confirmed, and GROUP's request for trial de novo was stricken as unauthorized. GROUP appealed.

The court of appeal affirmed, finding that the trial court had authority to order the consolidation under *Code Civ. Proc. § 1281.3*. Both the specific criteria of *Code Civ. Proc. § 1281.3*, and the judicial policies underlying that provision (the efficient settling of private disputes, judicial economy, and the avoidance of contrary results) were satisfied in this case (*49 Cal. App. 4th 998, 1006-1007)* . There was no indication that any substantial right or obligation of appellants was injured by the consolidation. Appellants had notice of the combined arbitration and made no objection to the forum, the arbitrator, or any other aspect of the court-ordered arbitration. Thus, the court of appeal concluded that the order compelling the parties to participate in the combined arbitration was a proper exercise of the trial court's authority and discretion (*49 Cal. App. 4th 998, 1007)* .

With regard to appellants' contention that it was error to deny them a trial de novo, the court of appeal characterized this as an argument that the proper parties were not present at the arbitration, specifically that Paratransit would not be bound because it was not a party to the arbitration (*49 Cal. App. 4th 998, 1008)* . Even if Paratransit was GROUP's uninsured motorist insurer and was not present at the arbitration, attorneys for both GROUP and Paratransit had actual notice of the arbitration proceeding and a full and fair opportunity to present whatever defenses were available. Furthermore, appellants did not demonstrate any prejudice by the consolidation, and could not: if the uninsured motorist arbitration was conducted first, with the third-party claims beingstayed, the result would have been the same--the arbitrator's award on the uninsured motorist claims would have effectively barred any further litigation between or among the parties to the civil action (*49 Cal. App. 4th 998, 1008-1010)* .

The facts, procedural background, and primary holding of ***Mercury Insurance Group v. Superior Court*** *(1998) 19 Cal. 4th 332, 79 Cal. Rptr. 2d 308, 965 P.2d 1178* , are discussed at *§ 20.15[3][a]*. In concluding, the Court noted that because of the conclusion it reached, it was not required to, and did not, consider the propriety of the decision of the court of appeal insofar as it compelled "consolidated" contractual/judicial arbitration that would result in a decision that would be binding and final as to the uninsured motorist coverage issues, but not binding or final between the parties to the personal injury action. The Supreme Court questioned whether a trial court has authority to make such an order--as *Gordon v. G.R.O.U.P, Inc. (1996) 49 Cal. App. 4th 998, 1005-1008, 56 Cal. Rptr. 2d 914* concluded that it does--and noted that *Code Civ. Proc. § 1281.3*, the purported source of authority for that *Gordon* ruling, appears only to authorize consolidation of separate *contractual* arbitration proceedings. The Court also noted that "consolidation" of contractual arbitration and judicial arbitration would, at best, be awkward, in light of their mutual exclusiveness and independence and their various differences (*19 Cal. 4th 332, 351-352)* .

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20 ARBITRATION: COMPELLING
PART II. FORMS
A. General Principles Related to Compelling Arbitration

2-20 California Points & Authorities § 20.15

§ 20.15 Supporting Petition to Compel Joinder of Contractual Arbitration [of Uninsured Motorist Claims] and Related Civil Action

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF PETITION TO
Petitioner,	)	COMPEL JOINDER OF ARBITRATION PRO-
vs.	)	CEEDINGS AND RELATED CIVIL ACTION
_____ [*name*],	)	Date: _____
Respondent.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT HAS DISCRETION TO ORDER JOINDER OF ARBITRATION OF PETITIONER'S UNINSURED MOTORIST CLAIM AND THIS CIVIL ACTION BECAUSE _____ [*specify common issue of law or fact, e.g.*, THEY BOTH CONTRIBUTED TO PETITIONER'S INJURIES] AND UNLESS THE ACTION AND THE ARBITRATION ARE JOINED, THERE IS A POSSIBILITY OF CONFLICTING RULINGS _____ [*specify common issue of law or fact, e.g.*, WITH REGARD TO THE COMPARATIVE FAULT OF THE INSURED AND UNINSURED MOTORISTS].

A. Court to Order Arbitration Under Agreement. [*See § 20.10[1], Paragraph A.*]

B. Court's Discretion When Faced With Possibility of Conflicting Rulings. If a court determines that a party to an arbitration [agreement] is also a party to a pending court action or proceeding with a third party, arising out of the same transaction or series of transactions, and there is a possibility of conflicting rulings on a common issue of law or fact, the court may (*Code Civ. Proc. § 1281.2(c)*):

(1) Refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or proceeding.

(2) Order intervention or joinder as to all or only certain issues.

(3) Order arbitration among the parties who have agreed to arbitrate and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding.

(4) Stay arbitration pending the outcome of the court action or special proceeding.

C. Court's Authority to Order Joinder When Faced With Possibility ofConflicting Rulings. If a court determines that a party to an arbitration [agreement], [even an uninsured motorist arbitration under *Insurance Code Section 11580.2*], is also a party to a pending court action or proceeding with a third party, arising out of the same transaction or series of transactions, and there is a possibility of conflicting rulings on a common issue of law or fact, the court may consolidate the contractual arbitration proceeding with the pending action for all purposes, including trial (*Code Civ. Proc. § 1281.2(c)*; *Mercury Insurance Group v. Superior Court (1998) 19 Cal. 4th 332, 349-350, 79 Cal. Rptr. 2d 308, 965 P.2d 1178* ; *Prudential Property & Casualty Ins. Co. v. Superior Court (1995) 36 Cal. App. 4th 275, 278-279, 42 Cal. Rptr. 2d 227*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a petition for joinder of an arbitration proceeding and a court action or proceeding that have common issues of law or fact that could lead to conflicting decisions if allowed to be decided in separate forums. Note, however, that the provisions for joinder of arbitration proceedings and court actions are not applicable to agreements to arbitrate disputes concerning the professional negligence of a health care provider made pursuant to *Code Civ. Proc. § 1295* [*Code Civ. Proc. § 1281.2(c)*].

If arbitration has not yet commenced, this form should be combined with the one at *§ 20.10*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should show that the claims arose from the same transaction or series of transactions, and that there is at least one common issue of law or fact that court be decided differently in different forums unless the court joins the proceedings.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [

see Evid. Code § 450 et seq.], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For a form of a petition to consolidate separate arbitration proceedings that may be supported by the foregoing memorandum, *see* California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

[d] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Court's Authority to Order Joinder When Faced With Possibility of Conflicting Rulings

Mercury Insurance Group v. Superior Court *(1998) 19 Cal. 4th 332, 79 Cal. Rptr. 2d 308, 965 P.2d 1178* , arose from an accident involving plaintiffs/real parties (Woosters), a vehicle driven by an employee of Mountain Top, and a third vehicle that fled the scene. Woosters filed a personal injury action against Mountain Top, the employee, and, as DOE, the owner of the vehicle that fled, and made an uninsured motorist claim under their insurance policy with Mercury. Woosters demanded uninsured motorist arbitration; and a contractual arbitration proceeding was commenced. Woosters filed a motion to consolidate the personal injury action and the uninsured motorist arbitration "for all purposes," including trial, in order to avoid conflicting rulings on a common issue of law or fact. The trial court granted the motion, but did not decide to do so "as to trial." The trial court subsequently diverted the then-consolidated action to [non-binding] judicial arbitration, and a judicial arbitration hearing was scheduled. Then, Mercury filed a motion to separate non-binding [judicial] arbitration from binding [uninsured motorist] arbitration and objection to non-binding arbitration. The motion was denied, but in doing so, the trial court clarified that the consolidation of the contractual arbitration proceeding with the personal injury action was "for all purposes, including trial." Mercury petitioned for writ of mandate challenging the ruling on the motion. That was summarily denied. Then Mercury filed an appeal from the trial court's order. Rather than strain to find an appealable order, the court of appeal treated the matter as a petition for an extraordinary writ (*19 Cal. 4th 332, 338-339)* .

The court of appeal mandated the superior court to vacate its order and to make anew order requiring all parties to participate in a "consolidated" contractual/judicial arbitration proceeding that would result in a decision that would be binding and final between Mercury and plaintiffs as to the uninsured motorist coverage issues but would not be binding as between plaintiffs and defendants (*19 Cal. 4th 332, 340)* . Woosters petitioned for review, which the Supreme Court granted.

The Supreme Court reversed, and directed the court of appeals to affirm the order of the superior court denying Mercury's motion for separate judicial and contractual arbitrations (*19 Cal. 4th 332, 340, 352)* . The Supreme Court first discussed the purpose of the four laws involved: the financial responsibility law (*Veh. Code § 16000 et seq.*), uninsured motorist coverage law (*Ins. Code § 11580.2*), the contractual arbitration law (*Code Civ. Proc. § 1280 et seq.*), and the judicial arbitration law (*Code Civ. Proc. § 1141.10 et seq.*), and their interrelationship (*19 Cal. 4th 332, 341-345)* . The Court noted that, unsurprisingly, in light of their mutual exclusiveness and independence, the judicial arbitration law and the contractual arbitration law differ the one from the other in various features, which it went on to list (*19 Cal. 4th 332, 344-345)* . The Court then said that, contrary to the court of appeal's conclusion, there is no preemptive effect arising from any requirement under the uninsured motorist coverage law that, in the event of disagreement between the insurer and the insured, the issues whether the insured is entitled to recover damages, and if so, in what amount, may be resolved *only* by means of contractual arbitration, or at least *only* by means of some kind of "arbitration" resulting in a binding and final decision. There is no such effect and no such requirement (*19 Cal. 4th 332, 347-348)* . The Court further noted that *Gordon v. G.R.O.U.P, Inc. (1996) 49 Cal. App. 4th 998, 1006, 56 Cal. Rptr. 2d 914* (discussed at *§ 20.14[3][a]*) was *not* authority for any preemptive effect arising from the uninsured motorist coverage law because *Gordon* did not consider that issue (*19 Cal. 4th 332, 348)* . The Court went on to discuss *Code Civ. Proc. § 1281.2(c)*, and the options available to a court under that section, noting that there is a specific exception to the court's authority to allow joinder of contractual arbitration proceedings and court actions, but that is with respect to professional negligence of health care providers, not with respect to uninsured motorist coverage provisions (*19 Cal. 4th 332, 347)* . The so-called "right" to contractual arbitration of uninsured motorist coverage issues is only a contractual right. It may be lost in many ways: it may be "revoked" by rescission; it may be lost by waiver; and it may have to yield if there is an issue of law or fact common to the arbitration and a pending action or proceeding with a third party and there is a possibility of conflicting rulings thereon (*19 Cal. 4th 332, 348)* .

The Supreme Court concluded that the court of appeal erred in holding that the trial court's order denying Mercury's motion for separate judicial arbitration and contractual arbitration was erroneous as unauthorized. In denying that motion, the trial court consolidated the contractual arbitration proceeding with the pending action for all purposes, including trial. The trial court could reasonably have so consolidated in order to avoid conflicting rulings on a common issue of law or fact [*see Code Civ. Proc. § 1281.2(c)*]. The contractual arbitration proceeding and the pending action arose "out of the same transaction" and "there [was] a possibility of conflicting rulings on a common issue of law or fact." There is no limitation imposed on the trial court's authority to consolidate in order to avoid conflicting rulings on a common issue of law or fact (*19 Cal. 4th 332, 349-350)* . Nor, as Mercury argued, was the trial court required to choose some other means to avoid conflicting rulings on a common issue of law or fact (*19 Cal. 4th 332, 351)* .

Because of the conclusion it reached, the Supreme Court did not have to consider the propriety of compelling "consolidated" contractual/judicial arbitration that would result in a decision that would be binding and final as to the uninsured motorist coverage issues, but not binding or final as to the other issues. Nevertheless, it did so (*19 Cal. 4th 332, 351-352)* . That portion of the opinion is discussed at *§ 20.14[3][a]*.

Prudential Property & Casualty Ins. Co. v. Superior Court *(1995) 36 Cal. App. 4th 275, 42 Cal. Rptr. 2d 227* , arose from two automobile accidents. Within four weeks, real parties' car was rear-ended by two different vehicles: one insured, the other uninsured. One real party, a jazz dancer, sustained back injuries substantial enough to hinder her career. Real parties filed an action against the insured driver and filed an uninsured motorist claim with their insurer, Prudential Property and Casualty Insurance Company. The uninsured motorist claim was in arbitration when, in order to avoid inconsistent rulings regarding the comparative fault of the two drivers, real parties petitioned the court for joinder of the arbitration proceeding and the civil action under *Code Civ. Proc. § 1281.2(c)*. The court ordered the joinder. Prudential sought a writ of mandate to set aside the order of joinder.

The court of appeal found the joinder proper and denied the writ. The court said that *Code Civ. Proc. § 1281.2(c)* specifically gives the superior court authority to order joinder of an arbitration proceeding and a civil action to avoid the

possibility of conflicting rulings. Prudential, however, insists that is not the case in uninsured motorist arbitration governed by *Ins. Code § 11580.2(f)* because that statute evidences a Legislative intent to provide for expeditious determination of disputes between insurer and insured. While the court of appeal agreed that was true, it perceived no legislative intent to abrogate the overarching power of the superior court to stay or join arbitration in its discretion under the various conditions set forth in *Code Civ. Proc. § 1281.2(c)*, including the potential of inconsistent rulings (*36 Cal. App. 4th 275, 278-279)* . The court of appeal concluded that the superior court had the power to order joinder of the arbitration with the civil action to protect real parties from the danger of inconsistent determinations (*36 Cal. App. 4th 275, 279)* .

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[Reserved]

§§ 20.16[Reserved]

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2-20 California Points & Authorities § 20.20

§ 20.20 Federal Preemption of Matters Involving Admiralty or Interstate Commerce

[1] FORM

THE COURT SHOULD COMPEL ARBITRATION BECAUSE THE GROUND ON WHICH RESPONDENT SEEKS TO AVOID ENFORCEMENT OF THE ARBITRATION CLAUSE IS PRE-EMPTED BY SECTION 2 OF THE FEDERAL ARBITRATION ACT.

A. Arbitration Clauses Are to Be Enforced. Section 2 of the Federal ArbitrationAct provides that "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract" (*9 U.S.C. § 2*).

B. Federal Substantive Law of Arbitrability. The federal substantive law of arbitrability expressed in Section 2 of the Federal Arbitration Act governs any arbitration agreement within the coverage of the Federal Arbitration Act, is enforceable in both state and federal courts, and preempts any state law to the contrary (*Volt Information Sciences v. Board of Trustees (1989) 489 US 468, 476-477, 477 n.6, 109 S. Ct. 1248, 103 L Ed2d 488* ; *Perry v. Thomas (1987) 482 U.S. 483, 489, 107 S. Ct. 2520, 96 L. Ed. 2d 426*).

C. Section 2 of the Federal Arbitration Act Reaches to Full Extent of Congressional Power Under the Commerce Clause. The word "involving" commerce, as used in Section 2 of the Federal Arbitration Act, is equivalent to "affecting" commerce, and signals an intent to exercise Congress' commerce power to the full extent permitted by the Commerce Clause of the United States Constitution. The Federal Arbitration Act encompasses a wider range of transactions than those actually "in commerce", that is, within the flow of interstate commerce. Therefore, it is not necessary for any transaction to be attributable to interstate commerce, or to originated out-of-state, or to have a substantial effect on interstate commerce. The Commerce Clause power may be exercised in individual cases without showing any specific effect on interstate commerce if in the aggregate the economic activity in question represents a

general practice subject to federal control. [Commercial lending is a general practice that has broad impact on the national economy and is heavily regulated by Congress] (*Citizens Bank v. Alafabco, Inc. (2003) 539 U.S. 52, 123 S. Ct. 2037, 2040, 2041], 156 L. Ed. 2d 46* ; *Allied-Bruce Terminix Cos. v. Dobson (1995) 513 U.S. 265, 273-277, 115 S. Ct. 834, 130 L. Ed. 2d 753* ; *Perry v. Thomas (1987) 482 U.S. 483, 490, 107 S. Ct. 2520, 96 L. Ed. 2d 426*).

D. Contemplation of Parties Not Relevant in Determining Whether Contract Is in Interstate Commerce. Section 2 of the Federal Arbitration Act applies to contracts that in fact involve interstate commerce. It is not relevant that the parties did not contemplate that the transaction would involve interstate commerce (*Allied-Bruce Terminix Cos. v. Dobson (1995) 513 U.S. 265, 278-281, 115 S. Ct. 834, 130 L. Ed. 2d 753*).

[*Optional*] **E. Arbitration Clauses Must Be on Equal Footing With Other Contract Clauses.** Under Section 2 of the Federal Arbitration Act, states may regulate contracts, including arbitration clauses, under general contract law principles and may invalidate an arbitration clause on such grounds as exist at law or in equity for the revocation of any contract. States may not, however, decide that a contract is fair enough to enforce all its basic terms (such as price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal footing, directly contrary to the Act's language and Congress' intent (*Allied-Bruce Terminix Cos. v. Dobson (1995) 513 U.S. 265, 281, 115 S. Ct. 834, 130 L. Ed. 2d 753* ; *Southland Corp. v. Keating (1984) 465 U.S. 1, 16, 104 S. Ct. 852, 79 L. Ed. 2d 1*). Respondent seeks to avoid the arbitration clause in this case on a ground applicable only to arbitration clauses. _____ [*Set forth the ground on which the respondent is relying to avoid the arbitration clause and show how it places arbitration clauses on unequal footing from other contract clauses*].

[*Optional*] **F. Employment Contracts Are Excluded Only for Transportation Workers.** The exclusion from coverage by the Federal Arbitration Act of "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" in Section 1 of the Federal Arbitration Act applies only to contracts of employees who actually work in interstate or foreign transportation. Other employment contracts involving interstate commerce are subject to the Act (*Circuit City Stores, Inc. v. Adams (2001) 532 U.S. 105, 119-122, 121 S. Ct. 1302, 149 L. Ed. 2d 234*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a petition to compel arbitration if counsel wishes the court to include in its order a finding that the arbitration is governed by the Federal Arbitration Act (*9 U.S.C. § 1 et seq.*). Optional Paragraph E is for use to attack a specific statute relied on by respondent that could only apply to an arbitration clause and which counsel believes is unenforceable as contrary to, and preempted by, the Federal Arbitration Act. For specific California statutes that have been held preempted by the Federal Arbitration Act, see *§ 20.22*, and incorporate relevant authority from that form.

Optional Paragraph F is to refute any anticipated argument based on the former Ninth Circuit minority position that all contacts of employment are excluded from the coverage of the Federal Arbitration Act.

This form is not intended to be a complete memorandum, but must be combined with the form at *§ 20.10* and any others applicable to the particular situation.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should show that the dispute arose from a transaction involving interstate commerce and that the arbitration clause at

issue is brought enough to encompass the type of claim involved.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, ofgrounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For an additional memorandum relating to arbitrability of federal securities claims, antitrust claims, and claims under the Age Discrimination in Employment Act (*29 U.S.C. § 621 et seq.*), see *§ 20.21*.

For a memorandum addressing specific California statutes that have been held preempted by the Federal Arbitration Act, see *§ 20.22*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Memoranda

For authority asserting that the federal law of substantive arbitrability is not offended by refusal to compel arbitration on the ground of breach of the covenant of good faith and fair dealing, see Ch. 20A, *Arbitration: Resisting*, § 20A.185.

For authority asserting that the federal law of substantive arbitrability is not offended by refusal to compel arbitration on the ground of unconscionability, see *Ch. 20A, Arbitration: Resisting, § 20A.91*.

For authority asserting that *Health & Safety Code § 1363.1*, governing disclosures of arbitration clauses in health care service plans, is not preempted by the Federal Arbitration Act, see Ch. 20A, *Arbitration: Resisting*, § 20A.194.

For authority asserting that the Federal Arbitration Act does not preempt California's rule that an arbitration award cannot be reviewed for errors of law, see *Ch. 20C, Arbitration: Confirming, Correcting, or Vacating the Award, § 20C.90*.

[3] Discussion of Authorities

[a] Federal Substantive Law of Arbitrability

The facts and procedural background of ***Volt Information Sciences v. Board of Trustees*** *(1989) 489 US 468, 109 S. Ct. 1248, 103 L Ed2d 488* , are discussed at *Ch. 20A, Arbitration: Resisting, § 20A.11[3][b]*. In discussing the reach of the Federal Arbitration Act (FAA), the Supreme Court noted that the FAA contains no express preemptive provision,

nor does it reflect a congressional intent to occupy the entire field of arbitration. However, state law may be preempted to the extent that it actually stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress (*489 U.S. 468, 476)* . The goals and policies of the FAA are expressed in its substantive provisions, *9 U.S.C. §§ 1, 2*, which establish a federal policy favoring arbitration and enforcement of agreements to arbitrate. *9 U.S.C. §§ 1, 2* are applicable in state courts (*489 U.S. 468, 476-477, 477)* .

Plaintiff in ***Perry v. Thomas*** *(1987) 482 U.S. 483, 107 S. Ct. 2520, 96 L. Ed. 2d 426* , sued his former employer, an investment brokerage firm, and two of its employees for commissions on the sale of securities. Individual defendants sought to compel arbitration in superior court; the corporate defendant filed a similar petition in federal district court. The demands for arbitration were based on a provision in the Uniform Application for Securities Industry Registration form, in which plaintiff agreed to arbitrate any dispute with his employer in accordance with the by-laws of the organizations with which he registered. Those included the New York Stock Exchange, whose Rule 347 explicitly refers to disputes regarding employment. Plaintiff resisted arbitration on the basis of *Lab. Code § 229*, which authorized him to maintain an action for wages, defined to include commissions, despite the existence of an agreement to arbitrate. Plaintiff relied on *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware (1973) 414 U.S. 117, 94 S. Ct. 383, 38 L. Ed. 2d 348* , which sustained the validity of *Lab. Code § 229* in the face of a challenge based on the Supremacy Clause of the U.S. Constitution. Both courts denied the motions to compel arbitration, believing they were bound by *Ware*, which referred to the Federal Arbitration Act in a footnote. The California Court of Appeal affirmed the superior court's decision; and the California Supreme Court denied appellants' petition for review. The United States Supreme Court accepted jurisdiction and reversed.

The United States Supreme Court noted that Section 2 of the FAA is a congressional declaration of a liberal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of Section 2 is to create a body of federal substantive law of arbitrability, applicable to any agreement within the coverage of the Act. This body of substantive law is enforceable in both state and federal courts (*482 U.S. 483, 489)* . The portion of the opinion addressing the preemption of *Lab. Code § 229* is discussed at *§ 20.22[3][b]*.

[b] Section 2 of the Federal Arbitration Act Reaches to Full Extent of Congressional Power Under the Commerce Clause

Citizens Bank v. Alafabco, Inc. *(2003) 539 U.S. 52, 123 S. Ct. 2037, 156 L. Ed. 2d 46* , began as an Alabama state court action involving a debt restructuring agreement between a bank and a fabrication and construction company. That agreement provided that all disputes, claims, or controversies would be arbitrated and that the Federal Arbitration Act (FAA) would apply to construction, interpretation, and enforcement of the arbitration provision. Defendant bank moved to compel arbitration. The circuit court ordered arbitration. The Supreme Court of Alabama reversed, finding that there was no showing that any part of the restructured debt was actually attributable to interstate transactions; that the funds comprising the debt originated out-of-state; orthat the restructured debt was inseparable from any out-of-state projects. Thus, there was insufficient nexus with interstate commerce to establish FAA coverage of the dispute. Defendant petitioned the United States Supreme Court for certiorari.

The United States Supreme Court granted the petition for certiorari, reversed, and remanded for further proceedings (*123 S. Ct. 2037, 2041)* . The term of art controlling the issue is a transaction or contract "evidencing a transaction involving commerce" [*9 U.S.C. § 2*]. That term and the term "affecting commerce" used in other contexts signal the broadest permissible exercise of Congress' Commerce Clause power. The FAA encompasses a wider range of transactions than those actually "in commerce", that is, within the flow of interstate commerce. Therefore, was not necessary to for any portion of the restructured debt to be attributable to interstate transactions, or that the loans originated out-of-state, or that the restructured debt was inseparable from any out-of-state projects. That evidence might be relevant if the FAA were restricted to transactions actually "in commerce" but it is not (*123 S. Ct. 2037, 2040)* . Nor is the FAA inapplicable because the individual debt-restructuring transactions, taken alone, did not have a "substantial effect on interstate commerce." The Commerce Clause power may be exercised in individual cases without showing any

specific effect on interstate commerce if in the aggregate the economic activity in question--here commercial lending--represents a general practice subject to federal control. Additional indicia of the fact that this debt restructuring "involved (interstate) commerce" are the following (*123 S. Ct. 2037, 2040-2041)* :

- Plaintiff is engaged in business throughout the southeastern United States using substantial loans made to it by defendant bank that were renegotiated and redocumented in the debt-restructuring agreements. Alafabco used the proceeds of those loans in part to finance construction projects in North Carolina, Tennessee, and Alabama,

- The restructured debt was secured by all of Alafabco's business assets, including its inventory of goods assembled from out-of-state parts and raw materials.

- Commercial lending is a general practice that has broad impact on the national economy and is heavily regulated by Congress.

In ***Allied-Bruce Terminix Cos. v. Dobson*** *(1995) 513 U.S. 265, 115 S. Ct. 834, 130 L. Ed. 2d 753* , plaintiff home buyers and cross claimant home sellers sued a franchisee and franchisor (defendants) for breach of a contract to protect a house from termites. The action was brought in Alabama state court. The contract included an arbitration clause, and the defendants asked for a stay to allow arbitration, pointing to Section 2 of the Federal Arbitration Act (*9 U.S.C. § 2*). The court denied the stay, and the Alabama Supreme Court affirmed, holding that the Act did not apply unless the parties contemplated substantial interstate activity and finding that the parties had contemplated a local transaction. The court therefore applied an Alabama statute making written predispute arbitration agreements invalid and unenforceable. The defendants obtained review in the United States Supreme Court.

The Court reversed. The court addressed the reach of *9 U.S.C. § 2*, first focusing on the words "involving commerce," which were unique to this statute (*513 U.S. 265, 273)* . The Court held that this was broad language, equivalent to affecting commerce, which signals an intent to exercise Congress' commerce power to the full extent permitted by the Constitution (*513 U.S. 265, 277)* .

The facts and procedural background of ***Perry v. Thomas*** *(1987) 482 U.S. 483, 107 S. Ct. 2520, 96 L. Ed. 2d 426* , are discussed at [a], *above.* In considering the reach of the FAA, the Court said that Congress' intent in enacting the FAA was to provide for enforcement of arbitration agreements within the full reach of the Commerce Clause (*482 U.S. 483, 490)* .

[c] Contemplation of Parties Not Relevant in Determining Whether Contract Is in Interstate Commerce

The facts and procedural background of ***Allied-Bruce Terminix Cos. v. Dobson*** *(1995) 513 U.S. 265, 115 S. Ct. 834, 130 L. Ed. 2d 753* , are discussed under [b], *above.*

The United States Supreme Court noted that there were two ways of interpreting the phrase "evidencing a transaction" (involving commerce): the "commerce in fact" test and the "contemplation of the parties" test applied by the Alabama Supreme Court in this case. The Supreme Court rejected the latter test, and concluded that the commerce in fact test is more faithful to the statute than the contemplation of the parties test. Under the contemplation of the parties test, *9 U.S.C. § 2* applies only if the parties at the time of contracting contemplated substantial interstate activity. First, the Court said the contemplation of the parties test was too risky in terms of Congress' purpose in enacting the FAA: often the parties would not think about any possible interstate commerce connection when they made their agreement (*513 U.S. 265, 278)* . Second, the commerce in fact test is permitted by the language of *9 U.S.C. § 2* if "evidencing" is interpreted only as a connective word. That interpretation is consistent with earlier drafts of Section 2 which referred to "any contract or maritime transaction involving commerce." Members of Congress might have thought that "any contract" standing alone went beyond its constitutional authority (*513 U.S. 265, 279)* . Finally, the Court

acknowledged *amicus curiae* contentions that the contemplation of the parties test was the only way to protect consumers asked to sign form business contracts. The Court agreed that Congress, in enacting the FAA, had the needs of consumers, as well as others, in mind, but was uncertain how the "objective" version of the contemplation test would help consumers. In any event, the Court said, Section 2 gives states a method for protecting consumers against unfair pressure to agree to a contract with an unwanted arbitration clause: they may regulate arbitration clauses under general contract law principles and invalidate an arbitration clause "upon such grounds as exist at law or in equity for the revocation of *any* contract." Thus, the Court held that Section 2 applies to contracts that in fact involve interstate commerce, regardless of the parties' contemplation (*513 U.S. 265, 280-281)* . Because the parties did not contest that the transaction at issue in fact involved interstate commerce (termite-treating and house-repairing material came from outside Alabama), the Court reversed denial of the stay to allow arbitration (*513 U.S. 265, 282)* .

[d] Arbitration Clauses Must Be on Equal Footing With Other Contract Clauses

The facts and procedural background of ***Allied-Bruce Terminix Cos. v. Dobson*** *(1995) 513 U.S. 265, 115 S. Ct. 834, 130 L. Ed. 2d 753* , are discussed at [b], *above.*

Considering the impact of *9 U.S.C. § 2* on consumers, the United States Supreme Court noted that Section 2 gives states a method for protecting consumers against unfair pressure to agree to a contract with an unwanted arbitration provision in that states may apply general contract law principles to invalidate an arbitration clause on grounds applicable to the revocation of any contract. States may not, however, enforce the basic terms of a contract, such as price, service, and credit, while refusing to enforce its arbitration clause. The Act makes any such policy unlawful because it would place arbitration clauses on an unequal footing (*513 U.S. 265, 281)* .

Southland Corp. v. Keating *(1984) 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1* , is discussed at *§ 20.22[3][a]*. In concluding that California's *Corp. Code § 31512* was preempted by the Federal Arbitration Act, the Supreme Court noted that to allow a party to avoid the FAA by bringing a claim under the Franchise Investment Law in state court would encourage and reward forum-shopping and frustrate the intent of Congress to enact laws addressing matters "involving commerce." Such an intent would frustrate the stated purpose of the FAA to place "an arbitration agreement on the same footing as other contracts, where it belongs" (*465 U.S. 1, 15-16)* .

[e] Employment Contracts Are Excluded Only for Transportation Workers

Circuit City Stores, Inc. v. Adams *(2001) 532 U.S. 105, 121 S. Ct. 1302, 149 L. Ed. 2d 234*) arose out of plaintiff's dismissal from employment with defendant. Adams filed an employment discrimination lawsuit against Circuit City in state court, asserting claims under California's Fair Employment and Housing Act (*Gov. Code § 12900 et seq.*), and other claims based on general tort theories under California law. The application for employment plaintiff had signed provided: "I will settle any and all previously unasserted claims, disputes or controversies arising out of or relating to my application or candidacy for employment, employment and/or cessation of employment with Circuit City, exclusively by final and binding arbitration before a neutral Arbitrator. By way of example only, such claims include claims under federal, state, and local statutory or common law, such as the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, including the amendments of the Civil Rights Act of 1991, the Americans with Disabilities Act, the law of contract and the law of tort." Circuit City filed suit in the United States District Court for the Northern District of California, seeking to enjoin the state-court action and to compel arbitration of Adam's claims pursuant to the Federal Arbitration Act (hereinafter "FAA," *9 U.S.C. § 1 et seq.*). The order was granted. Adams appealed. The Ninth Circuit Court of Appeals ruled in accordance with the minority position articulated in *Craft v. Campbell Soup Co. (1999) 177 F.3d 1083* , that *9 U.S.C. §§ 1* and *2* exclude *all* employment contracts from the FAA. The U.S. Supreme Court granted certiorari to resolve the issue.

The U. S. Supreme Court ruled with the majority of federal circuit courts of appeal that only contracts of employment of transportation workers are excluded from the FAA's coverage (*532 U.S. 105, 119)* . All other employment contracts

"evidencing transactions involving commerce" (*9 U.S.C. § 2*) are governed by the FAA (*532 U.S. 105, 119)* . Thus, the matter was reversed and remanded for an order compelling arbitration (*532 U.S. 105, 124)* . The Court felt that Congress excluded seamen and railroad employees from the FAA to avoid unsettling established or developing statutory dispute resolution schemes covering those specific workers. The exclusion for other workers engaged in foreign or interstate transport serves to reserve for federal legislation employment contracts of others engaged in transportation. (*532 U.S. 105, 121)* .

[4] Additional Authorities

[a] Federal Law of Substantive Arbitrability

See also *Southland Corp. v. Keating (1984) 465 U.S. 1, 10-15, 104 S. Ct. 852, 79 L. Ed. 2d 1* , discussed at *§ 20.22[3][a]*.

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20 ARBITRATION: COMPELLING
PART II. FORMS
A. General Principles Related to Compelling Arbitration

2-20 California Points & Authorities § 20.21

§ 20.21 Federal Statutory Claims That Are Arbitrable Under the Federal Arbitration Act

[1] FORM

THE ARBITRATION AGREEMENT SIGNED BY RESPONDENT ENCOMPASSES CLAIMS UNDER _____ [*specify, e.g.,* SHERMAN ACT] BECAUSE THE CONTRACT CONTAINING THE ARBITRATION AGREEMENT INVOLVES INTERSTATE COMMERCE AND THE FEDERAL SUBSTANTIVE LAW OF ARBITRABILITY PREVAILS.

A. Determining Arbitrability of Statutory Claims. The Federal Arbitration Act itself provides no basis for disfavoring agreements to arbitrate statutory claims by departing from the federal law of substantive arbitrability, which requires any doubts concerning the question of the scope of arbitrable issues to be resolved in favor of arbitration. Arbitration of a statutory claim in accordance with an agreement governed the Federal Arbitration Act is to be denied only when the text or legislative history of the statute on which the claim is based expresses a congressional intention to preclude waiver of judicial remedies for the statutory rights at issue (*Gilmer v. Interstate/Johnson Lane (1991) 500 U.S. 20, 26, 35, 111 S. Ct. 1647, 114 L. Ed. 2d 26* ; *Mitsubishi Motors v. Soler Chrysler-Plymouth (1985) 473 U.S. 614, 625-628, 105 S. Ct. 3346, 87 L. Ed. 2d 444*).

[*Optional*] **B. Arbitrability of Federal Securities Claims.** Arbitration of federal securities claims, whether arising under the Securities Act of 1933 (*15 U.S.C. §§ 77a-77aa*) or the Securities Exchange Act of 1934 (*15 U.S.C. §§ 78a-78 ll*), may be compelled under a predispute agreement that provides for arbitration in accordance with procedures that have been approved by the Securities and Exchange Commission (*Rodriguez de Quijas v. Shearson/Am. Exp. (1989) 490 U.S. 477, 484-486, 109 S. Ct. 1917, 104 L. Ed. 2d 526* [Act of 1933]; *Shearson/American Express, Inc. v. McMahon (1987) 482 U.S. 220, 233-238, 107 S. Ct. 2332, 96 L. Ed. 2d 185, 198-201* [Act of1934]; *Elliot v. Albright (1989) 209 Cal. App. 3d 1028, 1036-1037, 257 Cal. Rptr. 762* [Act of 1933]).

[*Optional*] **C. Arbitrability of Sherman Antitrust Claims.** Antitrust claims arising under the Sherman Act (*15 U.S.C. § 1 et seq.*) are arbitrable (*Mitsubishi Motors v. Soler Chrysler-Plymouth (1985) 473 U.S. 614, 628-629, 640, 105 S. Ct. 3346, 87 L. Ed. 2d 444* ; *Nghiem v. NEC Electronic, Inc. (9th Cir. 1994) 25 F.3d 1437, 1441-1442* .

[*Optional*] **D. Arbitrability of Claims Under the Age Discrimination in Employment Act of 1967.** The Federal Arbitration Act and the policies it seeks to support do not bar arbitration of statutory claims in general, or claims arising under the Age Discrimination in Employment Act (*29 U.S.C. § 621 et seq.*) in particular (*Gilmer v. Interstate/Johnson Lane (1991) 500 U.S. 20, 26-27, 35, 111 S. Ct. 1647, 114 L. Ed. 2d 26*).

[*Optional*] **E. Arbitrability of Claims Under the Fair Labor Standards Act.** Claims for violations of the Fair Labor Standards Act (*29 U.S.C. § 201 et seq.*) are arbitrable under an arbitration agreement that provides for arbitration of any dispute between an employer and an employee in accordance with rules that specifically referred to disputes "arising out of the employment or termination of employment" (*Kuehner v. Dickinson & Co. (9th Cir. 1996) 84 F.3d 316, 319-320)* .

[*Optional*] **F. Claims Under Title VII of the Civil Rights Act.** Claims under Title VII of the Civil Rights Act of 1964 and 1991 (*42 U.S.C. §§ 1981a, 2000e* et seq.) are arbitrable (*EEOC v. Luce, Forward, Hamilton & Scripps (9th Cir. 2003) 345 F.3d 742, 752-754* (*rehearing en banc*); *see also* Pub. L. No. 102-166, 105 Stat. 1071 § 118, published as Note to *42 U.S.C. § 1981*).

[*Optional*] **G. Arbitrability of Claims Under the Racketeer Influenced and Corrupt Organizations Act (RICO).** Claims Under the Racketeer Influenced and Corrupt Organizations Act (RICO; *18 U.S.C. § 1961 et seq.*) claims are arbitrable[, even under an agreement that prohibits an award of punitive, exemplary, or "extra-contractual damages," because RICO's treble-damages provision has been held by case law to be remedial. Thus, it is not clear that an arbitrator would construe the agreement's remedial limitations to deprive claimants of their statutory remedies] (*PacifiCare Health Sys., Inc. v. Book (2003) 538 U.S. 401, 123 S. Ct. 1531, 1534-1536, 155 L. Ed. 2d 578* ; *Shearson/American Express, Inc. v. McMahon (1987) 482 U.S. 220, 242, 107 S. Ct. 2332, 96 L. Ed. 2d 185* ; *see 18 U.S.C. § 1964(c)* (authorizing treble damages)).

[*Optional*] **H. Burden of Proving That Cost of Arbitration Prevents Vindication of Statutory Rights.** Under the Federal Arbitration Act, the fact that an agreement is silent as to who bears the costs of arbitration is not in itself enough to establish that the party seeking to invalidate the arbitration agreement will be burdened with costs so high as to prevent him or her from vindicating his or her statutory rights. The party resisting arbitration has the burden of showing the likelihood of incurring prohibitive costs (*see Green Tree Financial Corp. v. Randolph (2000) 531 U.S. 79, 121 S. Ct. 513, 148 L. Ed. 2d 373, 382-383* (Court did not discuss what showing would be sufficient)).

[2] Comments

[a] Use of Form

This form is to be combined with the form at and submitted in support of a petition to compel arbitration of a claim under a federal statute. Paragraph A sets forth the general rule for determining whether a statutory claim is arbitrable. The optional paragraphs are for use to compel arbitration of a claim under any of those particular federal statutes or to establish that the party resisting arbitration must prove that the costs of arbitration would be prohibitive. Counsel may wish to incorporate authorities from the form at *§ 20.20[1]*, especially Paragraph B of that form, which sets forth the federal rule of substantive arbitrability.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should show that the dispute arose from a transaction involving interstate commerce and that the arbitration clause at issue is broad enough to encompass the type of claim involved.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For a memorandum relating generally to preemption by the Federal Arbitration Act (*9 U.S.C. § 1 et seq.*) and to the federal rule of substantive arbitrability, see *§ 20.20*.

For a memorandum addressing specific California statutes that have been held preempted by the Federal Arbitration Act, see *§ 20.22*.

For a form dealing in more specifics regarding arbitration of federal securities claims, see *§ 20.41*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion andgeneral forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Memoranda

For a memorandum relating to the requirement of a knowing waiver of a judicial forum before a plaintiff can be required to arbitrate a claim under Title VII of the Civil Rights Act of 1964 (§ 700 et seq.; *42 U.S.C. § 2000e et seq.*), see *Ch. 20A, Arbitration: Resisting, § 20A.21*.

[3] Discussion of Authorities

[a] Determining Arbitrability of Statutory Claims

The facts and procedural background of ***Gilmer v. Interstate/Johnson Lane*** *(1991) 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26* , and the portion of the opinion addressing plaintiff/respondent's claims that arbitration is inconsistent with the framework and purposes of the Age Discrimination in Employment Act of 1967 (*29 U.S.C. § 621 et seq.*) (ADEA) are discussed at [d], *below.* Although Gilmer conceded that nothing in the text or legislative history of the ADEA explicitly precluded arbitration (*500 U.S. 20, 26)* , the Supreme Court granted certiorari to resolve a conflict among the Courts of Appeal regarding ADEA claims (*500 U.S. 20, 24)* . Statutory claims may be arbitrated pursuant to an agreement enforceable under the Federal Arbitration Act (*9 U.S.C. § 1 et seq.*) (FAA) unless Congress evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue. Gilmer had the burden of showing that Congress intended to preclude waiver of a judicial forum for ADEA claims. If such an intention existed, it would be in the text of the ADEA, its legislative history, or an "inherent conflict" between arbitration and the ADEA's underlying purpose (*500 U.S. 20, 26)* .

The facts and procedural background of ***Mitsubishi Motors v. Soler Chrysler-Plymouth*** *(1985) 473 U.S. 614, 105 S. Ct. 3346, 87 L. Ed. 2d 444* , are discussed at [c], *below.* An arbitration agreement may encompass claims arising out of statutes designed to protect a class to which the party resisting arbitration belongs. Nothing in the Federal Arbitration Act (*9 U.S.C. § 1 et seq.*) (FAA) implies a presumption against arbitration of statutory claims (*473 U.S. 614, 625)* . The federal law of substantive arbitrability applies with equal force to an arbitration agreement that raises a claim founded on statutory rights (*473 U.S. 614, 626)* . Courts should still consider whether an arbitration agreement resulted from the sort of fraud or overwhelming economic power that would provide grounds "for revocation of any contract." But absent such consideration, the FAA itself provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability. It is the congressional intention expressed in the statute from which the claim arised on which the courts must rely to identify claims as to which agreements to arbitrate will be held unenforceable (*473 U.S. 614, 627)* . By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute but only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition or arbitration. If Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history (*473 U.S. 614, 628)* . The portion of the opinion considering whether any such intent was manifest in the Sherman Act (*15 U.S.C. § 1 et seq.*) is discussed at [c], *below*.

[b] Arbitrability of Federal Securities Claims

Plaintiffs in ***Rodriguez de Quijas v. Shearson/American Express, Inc.*** *(1989) 490 U.S. 477, 109 S. Ct. 1917, 104 L. Ed. 2d 526* , sued to recover sums lost through defendant broker's alleged fraudulent and unauthorized transactions in their account. The complaint included state claims, claims under the Securities Act of 1933 (*15 U.S.C. § 77 l*(s)) and the Securities Exchange Act of 1934. The district court, relying on *Wilko v. Swan (1953) 346 U.S. 427, 74 S. Ct. 182, 98 L. Ed. 168* , ordered arbitration of all claims except these under the Securities Act of 1933. The Fifth Circuit Court of Appeals reversed. The U.S. Supreme Court granted certiorari.

The U.S. Supreme Court noted that *Scherk v. Alberto-Culver Co. (1974) 417 U.S. 506, 520, 94 S. Ct. 2449, 41 L. Ed. 2d 270* , allowed arbitration of securities claims in an international context, and said *15 U.S.C. § 77n*, prohibiting waiver of compliance with any provision of the Securities Act of 1933, could be read to relate to substantive provisions, not the remedy provisions (*490 U.S. 477, 479-480)* . The Court noted that since *Wilko*, the distrust of arbitration has been replaced by a strong endorsement of the federal statutes favoring arbitration, and quoted *Mitsubishi Motors v. Soler Chrysler-Plymouth (1985) 473 U.S. 614, 628, 105 S. Ct. 3346, 87 L. Ed. 2d 444* (discussed at [a], *above* and [c], *below*) (*490 U.S. 477, 481)* . The Court noted with favor its reasoning in *Shearson/American Express, Inc. v. McMahon (1987) 482 U.S. 220, 231-234, 107 S. Ct. 2332, 96 L. Ed. 2d 185* (discussed *below*) with respect to claims under the Securities Exchange Act of 1934 (*490 U.S. 477, 482-484)* . It would be inappropriate to allow arbitration of claims under the Securities Exchange Act of 1934 but not under the Securities Act of 1933, because the language of the Acts prohibiting waiver is the same [*see 15 U.S.C. §§ 77v(a), 78aa*] and because the Acts are interrelated components of the same federal regulatory scheme (*490 U.S. 477, 484-485)* . Resort to arbitration does not inherently undermine any of the substantive rights afforded to petitioners under the Securities Act (*490 U.S. 477, 486)* .

Plaintiff investors in ***Shearson/American Express, Inc. v. McMahon*** *(1987) 482 U.S. 220, 107 S. Ct. 2332, 96 L. Ed. 2d 185* , sued their brokers for damages for violation of § 10(b) of the Securities Act of 1934 (the Act of 1934; *15 U.S.C. § 78j(b)*), and *Rule 10b-5* (*17 C.F.R. § 240.10b-5*) by engaging in fraudulent, excessive trading of plaintiffs' accounts and by making false statements and omitting material facts from advice given. The complaint also alleged a RICO claim, *18 U.S.C. 1962(c)*, and state law claims for breach of fiduciary duties and fraud (*482 U.S. 220, 223)* . Relying on an arbitration provision in the customer agreements that provided for arbitration to be conducted under the rules then in effect of the NASD, or the NYSE and/or the ASE, defendants moved to compel arbitration. The district court found that the agreements were not contracts of adhesion and ordered arbitration of the federal securities claims, but not the RICO claims. The Court of Appeals, relying on *Wilko v. Swan (1953) 346 U.S. 427, 432-437, 74 S. Ct.*

182, 98 L. Ed. 168 , reversed as to thesecurities claim, and affirmed as to the RICO claim (*482 U.S. 220, 224)* . The United States Supreme Court granted certiorari to resolve the conflict among the courts of appeal regarding *Rule 10b-5* claims and RICO claims (*482 U.S. 220, 225)* .

The United States Supreme Court reversed. The Court first noted that the Act of 1934 did not address the arbitrability of § 10(b) claims and rejected plaintiffs' contention that enforcement of the arbitration provision would amount to a prohibited waiver of defendants' compliance obligations (*482 U.S. 220, 227-228)* . The Court then discussed *Wilko and Scherk v. Alberto-Culver Co. (1974) 417 U.S. 506, 520, 94 S. Ct. 2449, 41 L. Ed. 2d 270* , saying that waiver of a judicial forum by an agreement to arbitrate would be unenforceable only when arbitration is inadequate to protect the substantive rights at issue (*482 U.S. 220, 228-229)* . The Securities and Exchange Commission's oversight authority has expanded greatly since 1953, when *Wilko* was decided. In the exercise of its current regulatory authority under § 19 of the Act of 1934 (*15 U.S.C. § 78s*), the SEC has approved the arbitration procedures of the NYSE, the ASE, and the NASD. When, as in this case, the prescribed arbitration procedures are subject to the SEC's § 19 authority, the arbitration agreement does not effect a waiver of the protection of the Act of 1934, and is enforceable (*482 U.S. 220, 233-238)* .

Plaintiffs in ***Elliot v. Albright*** *(1989) 209 Cal. App. 3d 1028, 257 Cal. Rptr. 762* , instituted suit against their securities brokers, alleging state and federal claims for excessive trading and mishandling of their accounts. All but the claim under the Securities Act of 1933 were ordered to be arbitrated. After the U.S. Supreme Court rendered its decision in *Shearson/American Express, Inc. v. McMahon (1987) 482 U.S. 220, 231-234, 107 S. Ct. 2332, 96 L. Ed. 2d 185, 198-201* (discussed *above*), defendants moved to compel arbitration of those claims. The trial court denied the motion, and defendants appealed.

The court of appeal reversed. There was conflict in the lower federal courts regarding whether or not *Shearson/American Express* extended to require arbitrability of claims under the Securities Act of 1933 (*209 Cal. App. 3d 1028, 1033-1034)* ; and the U.S. Supreme Court had granted certiorari in *Rodriguez de Quijas v. Shearson/Am. Exp. (1989) 490 U.S. 477, 109 S. Ct. 1917, 104 L. Ed. 2d 526* (discussed *above*) (*209 Cal. App. 3d 1028, 1035)* . Given the strong policy in favor of arbitrability, the fact that *Wilko*, was seriously undermined by *Shearson/Amercian Express*, and the fact that there was no rationale in the purpose, history, or language of either Act to justify holding 1933 Act claims nonarbitrable and 1934 Act claims arbitrable, the court held that claim under the 1933 Act had to be arbitrated (*209 Cal. App. 3d 1028, 1035-1036)* .

[c] Arbitrability of Sherman Antitrust Claims

Petitioner in ***Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*** *(1985) 473 U.S. 614, 105 S. Ct. 3346, 87 L. Ed. 2d 444* , was a Japanese corporation with its principal place of business in Tokyo. Respondent was a Puerto Rican corporation. They entered into a distributorship agreement and a sales procedure agreement which provided for arbitration of all disputes between the parties. Arbitration was to be held in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association. Respondent was not selling as many vehicles as the agreement called for. Petitioner withheld shipments due to respondent under the agreement, filed an action in the district court in Puerto Rico, and petitioned for an order compelling arbitration before the Japanese Commercial Arbitration Association. The district court ordered arbitration of most of the claims involved, including the antitrust claims. The First Circuit Court of Appeals reversed the part of the order requiring arbitration of the antitrust claims. The United States Supreme Court granted certiorari.

The Supreme Court reversed the Court of Appeals with respect to the antitrust claims and held that they were arbitrable (*473 U.S. 614, 640)* . Neither the Sherman Act nor the Federal Arbitration Act made any explicit exception to arbitration of claims under the Sherman Act (*473 U.S. 614, 628-629)* . The Court of Appeals relied on *American Safety Equipment Corp. v. J. P. Maguire & Co. (2nd Cir. 1968) 391 F.2d 821* , which the Supreme Court discussed, but concluded that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and

sensitivity to the need of the international commercial system for predictability in the resolution of disputes required enforcement of the arbitration agreement even though a contrary result would be forthcoming in a domestic situation (*473 U.S. 614, 629-637)* .

Plaintiff in ***Nghiem v. NEC Electronic, Inc.*** *(9th Cir. 1994) 25 F.3d 1437* , was fired by defendant in June, 1990, and thereafter voluntarily submitted claims of wrongful termination, race discrimination, and antitrust violations to a problem resolution process outlined in defendant's company handbook. Step Four in that process was "final and binding arbitration." Plaintiff participated in the arbitration throughout the spring of 1991, but filed suit in state court on substantially the same issues in June, 1991. After the American Arbitration Association rendered a decision in favor of NEC on November 18, 1991, plaintiff requested a trial de novo and asserted that he was not bound by the arbitration. Meanwhile, NEC removed the state action to federal court and petitioned for confirmation of the arbitration award. The award was confirmed and plaintiff's case dismissed. Plaintiff appealed.

The court of appeals affirmed. Plaintiff contended that antitrust claims were not arbitrable, that the court was bound by *American Safety Equipment Corp. v. J. P. Maguire & Co. (2nd Cir. 1968) 391 F.2d 821* , and *Lake Communications, Inc. v. ICC Corp. (9th Cir. 1984) 738 F.2d 1473, 1479* , and that *Mitsubishi Motors v. Soler Chrysler-Plymouth (1985) 473 U.S. 614, 105 S. Ct. 3346, 87 L. Ed. 2d 444* , was limited to international disputes. The court of appeals held that *Mitsubishi* was not restricted to the international context, in part because the Supreme Court had subsequently cited *Mitsubishi* for the general proposition that antitrust claims can be arbitrated [*Gilmer v. Interstate/Johnson Lane (1991) 500 U.S. 20, 26-27, 111 S. Ct. 1647, 114 L. Ed. 2d 26]* (*25 F.3d 1437, 1441)* . Also, *Mitsubishi* specifically refuted certain aspects of *American Safety's* analysis, including the theory that a private cause of action is fundamental to enforcing antitrust laws (*25 F.3d 1437, 1442)* . The court held that *Mitsubishi* had effectively overruled *American Safety* and its progeny, including *Lake Communications.* Thus, arbitrators are not precluded from deciding antitrust claims (*25 F.3d 1437, 1442)* .

[d] Arbitrability of Claims Under the Age Discrimination in Employment Act of 1967

In ***Gilmer v. Interstate/Johnson Lane*** *(1991) 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26* , respondent Gilmer's employment with defendant/petitioner was terminated when he was 62 years old. He filed an age discrimination charge with the Equal Employment Opportunity Commission (EEOC) and then filed suit in federal district court. Defendant filed a petition to compel arbitration in accordance with the Uniform Application for Securities Industry Registration or Transfer, signed by Gilmer, which provided for arbitration of any dispute with his employer in accordance with the by-laws of the organizations with which he registered. Those included the New York Stock Exchange, whose Rule 347 explicitly refers to disputes regarding employment. The district court refused to compel arbitration, relying on *Alexander v. Gardner-Denver Co. (1974) 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147* , which held that Congress intended to protect claimants under the Age Discrimination in Employment Act of 1967 (*29 U.S.C. § 621 et seq.*) (ADEA) from waiver of a judicial forum. The Court of Appeals for the Fourth Circuit reversed. Because this created a conflict between districts, the United States Supreme Court granted certiorari, and affirmed the judgment of the Court of Appeals (*500 U.S. 20, 23)* .

Gilmer conceded that nothing in the text of the ADEA or its history explicitly precludes arbitration (*500 U.S. 20, 26)* ; however he advanced a host of other reasons why arbitration would be inconsistent with the framework and purposes of the ADEA. The Court was not persuaded by any of those arguments (*500 U.S. 20, 28-33)* , and distinguished *Gardner-Denver*, in which the issue was whether a discharged employee whose grievance had been arbitrated pursuant to a collective bargaining agreement could subsequently pursue a Title VII claim. In *Gardner-Denver* and progeny there was a distinction between the claims which the parties were contractually bound to arbitrate and the statutory claims which were no part of the arbitration agreements. None of those cases involved the Federal Arbitration Act (*9 U.S.C. § 1 et seq.*) (*500 U.S. 20, 34-35)* . The Court concluded that Gilmer had not shown that Congress, in enacting the ADEA, intended to preclude arbitration of claims under that Act (*500 U.S. 20, 35)* .

[e] Arbitrability of Claims Under the Fair Labor Standards Act

Plaintiff in ***Kuehner v. Dickinson & Co.*** *(9th Cir. 1996) 84 F.3d 316* , sued defendant for violations of the Fair Labor Standards Act (*29 U.S.C. § 201 et seq.*) (FLSA) and for wrongful discharge. Plaintiff had signed the Uniform Application for Securities Industry Registration or Transfer (U-4), which provided for arbitration of any dispute that might arise "between me and my firm" that is required to be arbitrated under the rules, constitution, or by-laws of the [National Association of Securities Dealers (NASD)], as may be amended from time to time." The NASD rules were amended between the time plaintiff was fired (November 18, 1992) and the time she filed filed suit (November 17, 1993) to specifically include disputes "arising out of the employment or termination of employment of any associated person(s) with any member." That amendment was approved by the Securities and Exchange Commission. The district court granted defendant's motion to stay the action until after arbitration, finding that even the old NASD rules required arbitration. The district court certified its order for interlocutory appeal to the Ninth Circuit Court of Appeals. Plaintiff appealed.

The court of appeals affirmed. Plaintiff claimed that Congress had restricted enforcement of contracts to arbitrate FLSA claims by requiring a knowing waiver of the right to a judicial forum, but was unable to identify support for this contention in the text or legislative history of the FLSA. She relied on dicta in *Barrentine v. Arkansas-Best Freight System (1981) 450 U.S. 728, 743, 101 S. Ct. 1437, 67 L. Ed. 2d 641* , which the court pointed out had been undermined by *Gilmer v. Interstate/Johnson Lane (1991) 500 U.S. 20, 34 n.5, 35, 111 S. Ct. 1647, 114 L. Ed. 2d 26* , and was not decided under the Federal Arbitration Act (*84 F.3d 316, 319-320)* . The court of appeals concluded that plaintiff had not carried her burden of showing that when Congress enacted the FLSA it imposed a knowing waiver requirement similar to that which exists under Title VII of the Civil Rights Act of 1964 (§ 700 et seq.; *42 U.S.C. § 2000e et seq.*), discussed in *Ch. 20A, Arbitration: Resisting, § 20A.21[3][a]* (*84 F.3d 316, 320)* .

[f] Claims Under Title VII of the Civil Rights Act

EEOC v. Luce, Forward, Hamilton & Scripps *(9th Cir. 2003) 345 F.3d 742* was the opinion on *rehearing en banc* of *EEOC v. Luce, Forward, Hamilton & Scripps (9th Cir. 2003) 303 F.3d 994* . EEOC made a claim on behalf of David Lagatree, who as an application for employment with Luce, Forward, and refused to sign an agreement to arbitrate claims arising from his employment, including claims under Title VII of the Civil Rights Act of 1964 and 1991 (*42 U.S.C. §§ 1981a, 2000e* et seq.). Lagatree worked for Luce, Forward for two days while his refusal to sign the agreement was being discussed. Then he was fired. Lagatree sued in state court for wrongful termination and lost [*Lagatree v. Luce, Forward, Hamilton & Scripps (1999) 74 Cal. App. 4th 1105, 88 Cal. Rptr. 2d 664 review denied 2000 Cal. LEXIS 262 (2000)]* . Pursuant to his claim with them, the EEOC sued Luce, Forward for retaliation in violation of Title VII of the Civil Rights Act of 1964 (*42 U.S.C. § 2000e-3*), the Americans with Disabilities Act of 1990 ("ADA", *42 U.S.C. § 12203(b)*), the Age Discrimination in Employment Act of 1967 ("ADEA", *29 U.S.C. § 623(d)*), and the Equal Pay Act of 1963 ("EPA", *29 U.S.C. § 215(a)(3)*). EEOC sought make-whole relief for Lagatree and a permanent injunction forbidding Luce, Forward from requiring that employees sign arbitration agreements as a condition of employment. EEOC also sought injunctive relief requiring Luce Forward to hire Lagatree based on the theory that its refusal to do so constituted illegal retaliation. The district court refused to award make-whole relief and rejected EEOC's request for an injunction based on the ADA, the ADEA, or the EPA. However, believing itself bound by *Duffield v. Robertson Stephens & Co. (9th Cir. 1998) 144 F.3d 1182 , cert. denied 525 U.S. 982, 119 S. Ct. 445, 142 L. Ed.2d 399* , the district court issued the injunction prohibiting Luce, Forward from requiring employees and applicants to arbitrate title VII claims. The district court did not expressly rule on the EEOC's retaliation theory, apparently considering it to be a subset of the question of monetary relief. Luce, Forward appealed.

The Ninth Circuit Court of Appeals, on *rehearing en banc*, overruled *Duffield* reversed the district court's grant of injunctive relief, and remanded for the district court to address the retaliation theory (*345 F.3d 742, 754)* . The court of appeals noted that Alexander v. Gardner-Denver Co . *(1974) 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147* , which held that a unionized employee's earlier exercise of the compulsory arbitration provision in a collective bargaining

agreement did not preclude him from later pursuing a Title VII discrimination claim in a judicial forum, was specifically limited to the collective bargaining context [*Gilmer v. Interstate/Johnson Lane (1991) 500 U.S. 20, 35, 111 S. Ct. 1647, 114 L. Ed. 2d 26]* . Thus, in the post-*Gilmer* world, *Duffield* stood alone. The court began its reconsideration of *Duffield* by noting that its analysis in that case considered the Civl Rights Act of 1991's text, legislative history, and general purpose to discern whether Congress had evinced an intent to preclude waiver of judicial remedies for the statutory right at issue. That was a mistake. § 118 of the 1991 Act, passed into law six months after *Gilmer*, provides that "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including ... arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title." [Pub. L. No. 102-166, § 118, 105 Stat. 1071 (codified at Notes to *42 U.S.C. § 1981*)]. Nothing in that text, the court concluded, presents any ambiguity suggesting that it may be intended to preclude compulsory arbitration (*345 F.3d 742, 752)* . Because the text of § 118 is unambiguous, the court was precluded from considering legislative history. In holding that an employer may require arbitration of Title VII claims, the court noted that the substantive rights found in the statute are not in any way diminished by holding that arbitration may be compelled, because only the forum--an arbitral rather than a judicial one--is affected, and plaintiff's rights may be as fully vindicated in the former as in the latter. As a result, and primarily because we find the language (*345 F.3d 742, 753)* .

[g] Arbitrability of Claims Under the Racketeer Influenced and Corrupt Organizations Act (RICO)

PacifiCare Health Sys., Inc. v. Book *(2003) 538 U.S. 401, 123 S. Ct. 1531, 155 L. Ed.2d 578* , was an action by a group of physicians against managed-health-care organizations alleging that the defendants unlawfully failed to reimburse them for health-care services that they had provided to patients covered by defendants' health plans. They brought causes of action under various state and federal statutes, including the Racketeer Influenced and Corrupt Organizations Act (RICO; *18 U.S.C. § 1961 et seq.*), as well as claims for breach of contract, unjust enrichment, and in quantum meruit. Two defendants moved to compel arbitration. Plaintiffs opposed the motion on the ground that, because the arbitration provisions prohibit an award of punitive damages, they could not obtain meaningful relief in arbitration for their claims under the RICO statute, which authorizes treble damages [*see 18 U.S.C. § 1964(c)*]. The district court denied the motion to compel arbitration with respect to the RICO claims. Defendants appealed, contending that the issue of whether the remedial limitations rendered their arbitration agreements unenforceable was not a question of "arbitrability," and hence should have been decided by an arbitrator, rather than a court, in the first instance, and that even if this question was one of arbitrability, the remedial limitations did not require invalidation of their arbitration agreements. The Eleventh Circuit Court of Appeals affirmed. The United states Supreme Court granted certiorari.

The United States Supreme Court reversed, finding that it would be premature to address the questions posed at this interlocutory stage, *i.e.,* before it was established what law the arbitrators would apply or that plaintiffs would receive diminished protection as a result (*123 S. Ct. 1531, 1534)* . Two of the four arbitration agreements at issue provided that "punitive damages shall not be awarded [in arbitration]." One provided that "the arbitrators ... have no authority to award any punitive or exemplary damages," and one provided that "the arbitrators ... have no authority to award extra contractual damages of any kind, including punitive or exemplary damages ..." The Court found that neither its precedents nor the ambiguous terms of the contracts made it clear that the arbitrator would be prohibited from awarding statutory treble damages, noting that cases have placed different statutory treble-damages provisions on different points along the spectrum between purely compensatory and strictly punitive awards. The Court cited *Agency Holding Corp. v. Malley-Duff & Associates, Inc. (1987) 483 U.S. 143, 151, 107 S. Ct. 2759, 97 L. Ed. 2d 121* , for the proposition that RICO is designed to remedy economic injury by providing for the recovery of treble damages, costs, and attorney's fees and *Shearson/American Express Inc. v. McMahon (1987) 482 U.S. 220, 241, 107 S. Ct. 2332, 96 L. Ed. 2d 185* , for the fact that RICO's treble-damages provision serves a "remedial function." Given the case law's treatment of statutory treble damages and the uncertainty surrounding the parties' intent with respect to the contractual term "punitive," the application of the disputed language to plaintiffs' RICO claims was in doubt (*123 S. Ct. 1531, 1535)* . Without knowing how the arbitrator would construe the remedial limitations, the questions whether they rendered the parties' agreements unenforceable and whether it was for courts or arbitrators to decide enforceability in the first instance were unusually abstract. Thus, the proper course was to compel arbitration (*123 S. Ct. 1531, 1536)* .

The facts and procedural background of ***Shearson/American Express, Inc. v. McMahon*** *(1987) 482 U.S. 220, 107 S. Ct. 2332, 96 L. Ed. 2d 185* , and the portion of the opinion dealing with the arbitrability of federal securities claims is discussed at [b], *above.* In considering the arbitrability of RICO claims, the Court said that the special incentives necessary to encourage civil enforcement actions against organized crime do not support nonarbitrability of run-of-the-mill civil RICO claims brought against legitimate enterprises. The private attorney general role for the some RICO plaintiffs does not support a finding that there is an irreconcilable conflict between arbitration and enforcement of the RICO statute. The Court found no basis for concluding that Congress intended to prevent enforcement of agreements to arbitrate RICO claims. Plaintiffs may effectively vindicate their RICO claims in an arbitral forum. There is no inherent conflict between arbitration and the purposes underlying *18 U.S.C. § 1964(c)*. Moreover, nothing in RICO's text or legislative history otherwise demonstrates congressional intent to make an exception to the Federal Arbitration Act for RICO claims (*482 U.S. 220, 242)* .

[h] Burden of Proving That Cost of Arbitration Prevents Vindication of Statutory Rights

Green Tree Financial Corp. v. Randolph *(2000) 531 U.S. 79, 121 S. Ct. 513, 148 L. Ed. 2d 373* involved claims under the federal Truth in Lending Act (*15 U.S.C. § 1601 et seq.*, hereinafter "TILA"). The parties' agreement required arbitration but was silent as to who would bear the costs of arbitration. The trial court granted petitioner's motion to compel arbitration despite respondent's assertion that she lacked the resources to arbitrate and as a result, would have to forgo her claims against petitioners. The Eleventh Circuit Court of Appeal, however, agreed with respondent and determined that the arbitration agreement failed to provide minimum guarantees that respondent could vindicate her statutory rights under the TILA. The U.S. Supreme Court granted certiorari.

The U.S. Supreme Court reversed, finding that arbitration could proceed because the record was insufficient to show that the costs of arbitration would be so great as to prevent respondent from vindicating her statutory rights (*148 L. Ed. 2d 373, 382-383)* . Neither party contended that the TILA evinced a legislative intent to require a judicial forum for resolution of claims under it, so the Court made no ruling on that issue (*148 L. Ed. 2d 373, 382)* . The Court stated that a party who seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive bears the burden of showing the likelihood of incurring prohibitive costs. Respondent did not meet that burden. The Court said that it did not need to discuss how detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence, because in this case neither during discovery nor when the case was presented on the merits was there any timely showing at all on the point. (*148 L. Ed. 2d 373, 382-383)* .

[4] Additional Authorities

[a] Determining Arbitrability of Statutory Claims

The facts and procedural background of *Kuehner v. Dickinson & Co. (9th Cir. 1996) 84 F.3d 316* , and the portion of the opinion holding that Congress did not intend to preclude arbitration of claims under the Fair Labor Standards Act (*29 U.S.C. § 201 et seq.*) are discussed at [3][e], *above.* The Federal Arbitration Act (*9 U.S.C. § 1 et seq.*) (FAA) created a rule of contract construction favoring arbitration. Despite the FAA, contracts to arbitrate statutory claims are unenforceable if Congress intended to preclude waiver of the plaintiff's right to a judicial forum, although such congressional intent is seldom found. Plaintiff has the burden of proving that Congress restricted enforcement of contracts to arbitrate specific statutory claims by statements to that effect in the text or legislative history of the particular statute (*84 F.3d 316, 319)* .

See also *Spellman v. Securities Annuities and Ins. Services, Inc. (1992) 8 Cal. App. 4th 452, 460-461, 10 Cal. Rptr. 2d 427* , discussed at *§ 20.22[3][d]*.

[b] Arbitrability of Federal Securities Claims

Leicht v. Bateman Eichler, Hill Richards, Inc. (9th Cir. 1988) 848 F.2d 130 , involved 10(b)-5 (*15 U.S.C. § 78j(b)*) claims under the Securities Act of 1934. Originally, plaintiffs, father and daughter, each signed an agreement to arbitrate claims against the broker. In November 1983, the Securities and Exchange Commission (SEC) declared that broker agreements that required customers to arbitrate were fraudulent, manipulative, and deceptive practices in and of themselves. In response to that ruling, defendant drafted and used a new form of customer agreement, which plaintiff father singed, but plaintiff daughter did not. That agreement provided that any controversy between the parties arising out of the agreement would be settled by arbitration, except that the customer was not required to arbitrate any dispute or controversy arising under federal securities laws. Plaintiffs filed a complaint alleging violations of 10(b) of the Securities Exchange Act of 1934 (*15 U.S.C. 78j(b)*), and various related state law claims. The broker sought to stay the court proceedings and to compel arbitration. The district court granted the stay of proceedings and motion to compel arbitration on the state law claims, but not on the federal claims. After the Supreme Court's decision in *Shearson/American Express, Inc. v. McMahon (1987) 482 U.S. 220, 233-238, 107 S. Ct. 2332, 96 L. Ed. 2d 185* (discussed at [3][b], *above*), the district court reconsidered its earlier order and vacated the part of its previous order that stayed the plaintiffs' federal securities claim. In addition, it dismissed the plaintiffs' action and compelled arbitration of the federal securities claim (*848 F.2d 130, 131)* . Plaintiffs appealed.

The Ninth Circuit Court of Appeals reversed regarding the father and affirmed regarding the daughter (*848 F.2d 130, 132)* . The agreement the daughter signed contained no language suggesting a right to litigate federal securities claims (*848 F.2d 130, 132, 134)* . Defendant argued that the clause in the agreements signed by the father was never intended to take effect but was merely intended as a disclaimer of any liability under the SEC rule. The court found that argument unpersuasive (*848 F.2d 130, 133-134)* .

Badart v. Merrill Lynch, Pierce, Fenner & Smith (9th Cir. 1987) 823 F. 2d 333 , was another case remanded by the Supreme Court to the Ninth Circuit Court of Appeals for reconsideration in light of *Shearson/American Express, Inc. v. McMahon (1987) 482 U.S. 220, 233-238, 107 S. Ct. 2332, 96 L. Ed. 2d 185* (discussed at [3][b], *above*). The case involved investors' claims under §§ 10b-5, 15, and 20(a) of the Securities Act of 1934 (*15 U.S.C. §§ 78j(b), 78o, 78t(a)*). In the original decision, the district court and the court of appeals had refused to compel arbitration. On reconsideration, the court of appeals held that claims under §§ 15 and 20 of the Securities Act of 1934 were no different from claims under § 10(b) of the act, and thus reversed and remanded to compel arbitration of all claims (*823 F. 2d 333*).

California Points & Authorities

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20 ARBITRATION: COMPELLING
PART II. FORMS
A. General Principles Related to Compelling Arbitration

2-20 California Points & Authorities § 20.22

§ 20.22 California Statutory Claims That Are Arbitrable Under the Federal Arbitration Act

[1] FORM

THE ARBITRATION AGREEMENT SIGNED BY RESPONDENT ENCOMPASSES CLAIMS UNDER _____ [*specify, e.g.,* THE FRANCHISE INVESTMENT LAW] BECAUSE THE CONTRACT CONTAINING THE ARBITRATION AGREEMENT INVOLVES INTERSTATE COMMERCE AND THE FEDERAL SUBSTANTIVE LAW OF ARBITRABILITY PREVAILS.

[*Optional*] **A. Federal Law Preempts *Section 31512 of the Corporations Code* (Franchise Investment Law).** The Federal Arbitration Act (*9 U.S.C. § 1 et seq.*) preempts *Corporations Code Section 31512* to the extent that an arbitration provision in a franchise agreement evidencing interstate commerce is enforceable and cannot be considered a prohibited waiver of the right to trial (*Southland Corp. v. Keating (1984) 465 U.S. 1, 10-16, 104 S. Ct. 852, 79 L. Ed. 2d 1*).

[*Optional*] **B. Federal Law Preempts *Section 229 of the Labor Code.*** The Federal Arbitration Act (*9 U.S.C. § 1 et seq.*) preempts *Labor Code Section 229*, so that arbitration of a wage dispute may be compelled under a contract involving interstate commerce (*Perry v. Thomas (1987) 482 U.S. 483, 491-492, 107 S. Ct. 2520, 96 L. Ed. 2d 426* ; *Giuliano v. Inland Empire Personnel, Inc. (2007) 149 Cal. App. 4th 1276, 1284-1288, 58 Cal. Rptr. 3d 5*).

[*Optional*] **C. Arbitrability of Cartwright Antitrust Claims.** Antitrust claims arising under the Cartwright Act (*Bus. & Prof. Code § 16700 et seq.*) are arbitrable (*Crown Homes, Inc. v. Landes (1994) 22 Cal. App. 4th 1273, 1276, 27 Cal. Rptr. 2d 827* ; *see also Wolitarsky v. Blue Cross of California (1997) 53 Cal. App. 4th 338, 61 Cal. Rptr. 2d 629*).

[*Optional*] **D. Arbitrability of Claims Under the Fair Employment and Housing Act (*Government Code Section 12900 et seq.*).** State statutory discrimination claims, including a claim for [wrongful termination due to] racial discrimination in violation of California's Fair Housing and Employment Act (*Gov. Code § 12900 et seq.*) may be compelled to be arbitrated in accordance with a contract involving interstate commerce (*Spellman v. Securities Annuities & Ins. Services, Inc. (1992) 8 Cal. App. 4th 452, 460-465, 10 Cal. Rptr. 2d 427* ; *see also Armendariz v.*

Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 90-103, 99 Cal. Rptr. 2d 745, 6 P.3d 669 (establishing minimum standards for vindication of FEHA rights in arbitration)).

[*Optional*] **E. Arbitrability of Claims Under the Unruh Civil Rights Act (*Civil Code Section 51 et seq.*).** Nothing in the Unruh Civil Rights Act (*Civ. Code § 51 et seq.*) prevents submission of claims under the Act to arbitration. Thus, if the terms of an arbitration agreement are broad enough to encompass claims under the Unruh Civil Rights Act, those claims may be compelled to be arbitrated (*Wolitarsky v. Blue Cross of California (1997) 53 Cal. App. 4th 338, 345-349, 61 Cal. Rptr. 2d 629*).

[*Optional*] **F. Arbitrability of Damage Claims Under the Consumer Legal Remedies Act (*Civil Code Section 1750 et seq.*).** Claims for damages under the Consumer Legal Remedies Act (CLRA; *Civ. Code § 1750 et seq.*) are arbitrable, at least to extent they are governed by Federal Arbitration Act; [however, CLRA claims for injunctive relief in which the plaintiff is acting as private attorney general, such as a claim seeking to enjoin deceptive business practices, are not arbitrable] (*Broughton v. Cigna Healthplans of California (1999) 21 Cal. 4th 1066, 1072, 1079-1080, 1084, 90 Cal. Rptr. 2d 334, 988 P.2d 67*). [Arbitrable damage claims include so-called equitable claims for restitution and/or disgorgement, as well as common law claims for unjust enrichment, whether sought in an individual action or a class action (*Cruz v. PacifiCare Health Sys. (2003) 30 Cal. 4th 303, 320, 133 Cal. Rptr. 2d 58, 66 P.3d 1157*)].

[*Optional*] **G. Arbitrability of Damage Claims Under the Unfair Competition Law (*Business and Professions Code Section 17200 et seq.*).** Damage claims under the Unfair Competition Law (*Bus. & Prof. Code § 17200 et seq.*), specifically so-called equitable claims for restitution and/or disgorgement, as well as common law claims for unjust enrichment, are arbitrable, whether sought in an in individual action or in a class action (*Cruz v. PacifiCare Health Sys. (2003) 30 Cal. 4th 303, 320, 133 Cal. Rptr. 2d 58, 66 P.3d 1157*).

[*Optional*] **H. Arbitrability of Damage Claims Under the False Advertising Law (*Business and Professions Code Section 17500 et seq.*).** Damage claims under the False Advertising Law (*Bus. & Prof. Code § 17500 et seq.*), including so-called equitable claims for restitution and/or disgorgement, as well as common law claims for unjust enrichment, are arbitrable, whether sought in an in individual action or in a class action (*Cruz v. PacifiCare Health Sys. (2003) 30 Cal. 4th 303, 320, 133 Cal. Rptr. 2d 58, 66 P.3d 1157*).

[*Optional*] **I. *Code of Civil Procedure Section 1298.7* Preempted by Federal Arbitration Act.** *Section 1298.7 of the Code of Civil Procedure*, which would otherwise allow a purchaser to pursue a court action against a developer for construction and design defects despite having signed an arbitration agreement is preempted by the Federal Arbitration Act if the transaction involved interstate commerce. A purchaser in that situation can be compelled to arbitrate the construction or design defect claim (*Shepard v. Edward Mackay Enterprises, Inc. (2007) 148 Cal. App. 4th 1092, 1095, 1100-1102, 56 Cal. Rptr. 3d 326* ; *Basura v. U.S. Home Corp. (2002) 98 Cal. App. 4th 1205, 1212, 1214, 120 Cal. Rptr. 2d 328*).

[*Optional*] **J. Federal Law Preempts *Section 1298 of the Code of Civil Procedure.*** *Section 1298 of the Code of Civil Procedure*, which imposes format and initialing requirements on arbitration agreements relating to the purchase and sale of real estate that are not imposed on other agreements, is preempted by the Federal Arbitration Act if the transaction involves interstate commerce (*Hedges v. Carrigan (2004) 117 Cal. App. 4th 578, 585-587, 11 Cal. Rptr. 3d 787*).

[*Optional*] **K. False Claims Act (*Government Code Section 12650 et seq.*) Claims Are Arbitrable.** Despite the fact that *Sections 12651* and *12652 of the Government Code* refer to "a civil action" to recover penalties and damages and to assessments and findings by "the court," claims under the False Claims Act are arbitrable. Further, the arbitrator may award statutory penalties as a form of compensation if those penalties bear a rational relationship to the contract and the breach (*County of Solano v. Lionsgate Corporation (2005) 126 Cal. App. 4th 741, 745, 747-749, 24 Cal. Rptr. 3d 362*). Although False Claims Act penalties do serve a public purpose by deterring false claims by public works contractors, that public purpose may be merely incidental to the primary benefit of compensating the public entity for the expenses

associated with the false claims. Thus, when the public entity's claims implicate no broad public remedy, there is no institutional advantage in a judicial forum that might preclude arbitration of False Claims Act charges (*County of Solano v. Lionsgate Corporation (2005) 126 Cal. App. 4th 741, 749, 24 Cal. Rptr. 3d 362*).

[*Optional*] **L. Administrative Proceedings Pursuant to Labor Code Section1799.44(a) Are Preempted.** State laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the Federal Arbitration Act. Thus, *Labor Code Section 1700.44(a)*, which purports to vest exclusive jurisdiction in the Labor Commissioner to determine application of the Talent Agency Act (TAA; *Labor Code Section 1700 et seq.*), is preempted by the Federal Arbitration Act; and an arbitrator should decide the legality of any contract arguably regulated by and voidable under the *TAA (Preston v. Ferrer (2008)552U.S.346, 128 S. Ct. 978, 169 L. Ed. 2d 917, 923, 927-929)* .

[2] Comments

[a] Use of Form

Any paragraph in this form that is relevant to petitioner's particular case may be submitted in support of a petition to compel arbitration of a claim under one of the California statutes addressed in the form. This form is not intended to be a complete memorandum, but is be combined with the form at *§ 20.10* and any others applicable to the particular situation [*see, e.g., §§ 20.20, 20.21*].

Note that the defendant in *Wolitarsky v. Blue Cross of California (1997) 53 Cal. App. 4th 338, 61 Cal. Rptr. 2d 629* , cited in Paragraph E, did not rely on the Federal Arbitration Act.

Although *Erickson v. Aetna Health Plans of Cal. (1999) 71 Cal. App. 4th 646, 652, 84 Cal. Rptr. 2d 76 (4th Dist., Div. 2)* , found *Health & Safety Code § 1363.1*, which requires various disclosures regarding arbitration by health care service plans, to be preempted by the Federal Arbitration Act with respect to contracts involving interstate commerce, *Smith v. PacifiCare Behavioral Health Plan of California, Inc. (2001) 93 Cal. App. 4th 139, 144, 162, 113 Cal. Rptr. 2d 140 (2nd Dist., Div. 3)* (*rev. den.* S102718), has held otherwise. The *Smith* position is the basis of Ch. 20A, *Arbitration: Resisting*, § 20A.96.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, argument should show that the dispute arose from a transaction involving interstate commerce and that the arbitration clause at issue is broad enough to encompass the type of claim involved.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement)].

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For memoranda relating generally to preemption by the Federal Arbitration Act (*9 U.S.C. § 1 et seq.*) and to the federal rule of substantive arbitrability, see *§ 20.20*.

For authorities addressing specific federal statutes that have been held preempted by the Federal Arbitration Act, see *§ 20.21*.

If counsel uses Optional Paragraph D., relating to the Fair Housing and Employment Act (*Gov. Code § 12900 et seq.*), counsel may wish to incorporate authorities from *§ 20.23*, regarding the minimum standards necessary in arbitration to vindicate statutory rights under the FEHA.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Memoranda

For authority that may be used to oppose the authority in this form on the ground that the transaction or activity at issue does not involve interstate commerce, see *Ch. 20A, Arbitration: Resisting, § 20A.95[1],* Paragraph B.

[3] Discussion of Authorities

[a] Federal Law Preempts Section 31512 of the Corporations Code (Franchise Investment Law)

Southland Corp. v. Keating *(1984) 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1* , involved consolidated actions by franchisees against their franchisor for fraud, misrepresentation, breach of contract, breach of fiduciary duty, and violation of the disclosure requirements of the California Franchise Investment Law (*Corp. Code § 31000 et seq.*). Defendant/franchisor sought to have the controversy arbitrated in accordance with provisions of the franchise agreement. The superior court granted the motion to compel arbitration with respect to all claims except those based on the Franchise Investment Law. The court took *Corp. Code § 31512* to prohibit waiver of judicial consideration of claims under the Franchise Investment Law. The court of appeal reversed the superior court's refusal to compel arbitration of the claims based on the Franchise Investment Law. The California Supreme Court reversed the reversal, holding that *Corp. Code § 31512* did indeed prohibit waiver of a provision of the Franchise Investment Law, including the right conferred therein to judicial resolution of claims under the Act and that *Corp. Code § 31512* was not contrary to the FAA (*9 U.S.C. § 1 et seq.*) (FAA).

The United States Supreme Court invalidated *Corp. Code § 31512* to the extent itbarred enforcement of the arbitration of claims under the Franchise Investment Law (*465 U.S. 1, 16*). In enacting Section 2 of the Federal Arbitration Act (*9 U.S.C. § 2*) Congress declared a federal policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties had agreed to resolve by arbitration (*465 U.S. 1, 10)* . There are only two limitations to this mandate to enforce arbitration clauses (*465 U.S. 1, 11)* :

- They must be part of a maritime contract or a contract involving commerce, and
- Arbitration clauses may be revoked on grounds that exist for the revocation of any contract.

The Court saw nothing in the Act indicating that the broad principle of enforceability is subject to any additional limitations under state law (*465 U.S. 1, 11)* .

The FAA rests on Congressional authority to enact substantive rules under the Commerce Clause. The power to regulate is the power to prescribe rules by which commerce is to be governed (*465 U.S. 1, 11)* . To the Justices who thought that Congress intended the FAA to be a procedural statute, only governing actions in federal court, the majority said it was less likely that Congress intended to address the problem in terms limited only to federal courts than to the enact a body of substantive law that would bind both state and federal courts (*465 U.S. 1, 13-15)* . To allow a party to avoid the FAA by bringing a claim under the Franchise Investment Law in state court would encourage and reward forum-shopping and frustrate the intent of Congress to enact laws addressing matters "involving commerce." Such an intent would frustrate the stated purpose of the FAA to place an arbitration agreement on the same footing as other contracts, where it belongs (*465 U.S. 1, 15-16)* .

[b] Federal Law Preempts Section 229 of the Labor Code

The facts and procedural background of ***Perry v. Thomas*** *(1987) 482 U.S. 483, 107 S. Ct. 2520, 96 L. Ed. 2d 426* , are discussed at *§ 20.20[3][a]*. In explaining why it did not feel itself bound by *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware (1973) 414 U.S. 117, 94 S. Ct. 383, 38 L. Ed. 2d 348* , the Court said that the challenge in *Ware* had been based on the Securities Exchange Act of 1934, and that in examining the language and policies of that Act, the *Ware* court found no Securities and Exchange Commission (SEC) rule or regulation that specified arbitration as a favored means of resolving employer-employee disputes or that revealed a necessity for nationwide uniformity of an exchange's housekeeping affairs. In addition, the fact that Rule 347 was outside the scope of the SEC's authority of review militated against finding a clear federal intent to require arbitration. In contrast, this challenge was based on the Federal Arbitration Act (*9 U.S.C. § 1 et seq.*) (FAA), which embodies Congress' intent to provide for enforcement of arbitration agreements within the full reach of the Commerce Clause (*482 U.S. 483, 490)* . This clear federal policy places Section 2 of the FAA (*9 U.S.C. § 2*) in unmistakable conflict with *Lab. Code § 229*. The oblique reference to the FAA in footnote 15 of *Ware* cannot be considered a definitive holding to the contrary (*482 U.S. 483, 491)* . Thus, Section 2 of the FAA (*9 U.S.C. § 2*) preempts *Lab. Code § 229* (*482 U.S. 483, 492)* .

Giuliano v. Inland Empire Personnel, Inc. *(2007) 149 Cal. App. 4th 1276, 58 Cal. Rptr. 3d 5* , involved claims for breach of employment contract, specifically a $5 million to $8 million profit-sharing bonus and a $500,000 severance payment. Employer sought to compel arbitration. The trial court denied arbitration on the grounds that: (1) the arbitration clause was vague and unintelligible as to which parties were bound by the agreement; (2) the Federal Arbitration Act did not preempt plaintiff's statutory wage claim because his employment contract did not involve interstate commerce; and (3) the arbitration clause was unconscionable and invalid under *Armendariz v. Foundation Health Psychcare Services (2000) 24 Cal. 4th 83* , 99 Cal. Rpt. 2d 745, *6 P.3d 669* (*Armendariz).* The trial court denied defendant's motion for reconsideration, and defendant appealed.

The court of appeal reversed (*149 Cal. App. 4th 1276, 1280, 1293)* , finding first that the *Lab. Code § 229* prohibition on arbitration of wage claims was preempted by the Federal Arbitration Act (*9 U.S.C. § 1 et seq.*) because defendant's business and plaintiff's duties for defendant involved interstate commerce (*149 Cal. App. 4th 1276, 1284-1288)* . Nor did the court find that it needed to apply the *Armendariz* criteria because this case did not involve unwaivable statutory claims for federally mandated overtime and minimum wage payments but a breach of contract claim for a multimillion-dollar bonus and severance payment (*149 Cal. App. 4th 1276, 1289-1291)* . The court found no merit in plaintiff's contention that the agreement was vague and unintelligible with respect to whether related entities were bound by the arbitration agreement. The employment agreement referred to "our Company's affiliated Empire entities" (*149 Cal. App. 4th 1276, 1291)* . Further, the agreement was not unconscionable because it did not provide for discovery, did not require a written award, and did not require defendant to pay arbitration related costs. Those are all requirements imposed by *Armindariz*, and as *Armindariz* did not apply, their lack was not procedurally unconscionable (*149 Cal App. 4th 1276, 1292)* .

[c] Arbitrability of Cartwright Antitrust Claims

In ***Crown Homes, Inc. v. Landes*** *(1994) 22 Cal. App. 4th 1273, 27 Cal. Rptr. 2d 827* , mobile home park residents and corporate mobile home dealerships sued mobile home park owners and another mobile home dealer, alleging that the defendants violated state antitrust laws under the Cartwright Act (*Bus. & Prof. Code § 16700 et seq.*). The trial court granted defendants' motion to compel and the arbitration was held. The defendants moved to confirm the award and plaintiffs moved to vacate it on the ground that the arbitrator exceeded his powers under California law and the arbitration agreement. The trial court granted the defendants' motion and denied the plaintiffs' motion. After the trial court entered judgment for the defendants, the plaintiffs appealed.

The court of appeal affirmed. The plaintiffs argued that the arbitration agreement in the park leases violated California law because it allowed the parties to agree to arbitrate an antitrust cause of action contrary to the decision of *Bos Material Handling, Inc. v. Crown Controls Corp. (1982) 137 Cal. App. 3d 99, 109-111, 186 Cal. Rptr. 740* . *Bos Material Handling* had stated that it followed the mainstream of judicial thought and concluded that parties cannot agree privately to exclude antitrust issues under theCartwright Act from judicial scrutiny and determination. The *Crown Homes* court pointed out that the prevailing judicial thought to which *Bos Material Handling* referred was *American Safety Equipment Corp. v. J.P. Maguire & Co. (2nd Cir. 1968) 391 F.2d 821* . The *Crown Homes* court reviewed subsequent developments and determined that *American Safety* and *Bos Material Handling* are no longer viable authority in light of later case law, beginning with the United States Supreme Court's rejection of *American Safety's* analysis in *Mitsubishi Motors v. Soler Chrysler-Plymouth (1985) 473 U.S. 614, 628-629, 105 S. Ct. 3346, 87 L. Ed. 2d 444* , discussed at *§ 20.21[3][c]* (*22 Cal. App. 4th 1273, 1276-1277, 1283)* .

The court noted that although *Mitsubishi* did not directly overrule *American Safety*, the opinion concluded that nothing in the federal antitrust laws prohibited parties from agreeing to arbitrate antitrust claims that arose out of international commercial transactions. Further, federal courts have interpreted *Mitsubishi* and its progeny to have eroded *American Safety* regarding domestic transactions and concluded that such antitrust claims are subject to arbitration (*22 Cal. App. 4th 1273, 1278-1279)* . Because the Cartwright Act is patterned after the federal Sherman Act (*15 U.S.C. § 1 et seq.*), federal cases interpreting the Sherman Act are applicable in construing the state law. In addition, there is nothing in the state arbitration statutes or the Cartwright Act that indicates that an antitrust claim is not arbitrable (*22 Cal. App. 4th 1273, 1280)* . Thus, the court held that the Cartwright Act claims are subject to arbitration (*22 Cal. App. 4th 1273, 1283)* . The court also held that the claims fell within the scope of the arbitration clause in the parties' lease agreement, which covered "all disputes" (*22 Cal. App. 4th 1273, 1282-1283)* .

Wolitarsky v. Blue Cross of California *(1997) 53 Cal. App. 4th 338, 61 Cal. Rptr. 2d 629* , is discussed at [e], *below*. In disposing of the contention that plaintiff's Cartwright claim had to be determined in a judicial forum, the court of appeals merely cited *Crown Homes* and said that Cartwright claims are arbitrable (*53 Cal. App. 4th 338, 345)* .

[d] Arbitrability of Claims Under the Fair Employment and Housing Act (Government Code Section 12900 et seq.)

Spellman v. Securities Annuities & Ins. Services, Inc. *(1992) 8 Cal. App. 4th 452, 10 Cal. Rptr. 2d 427* , involved a suit for wrongful termination due to racial discrimination in violation of California's Fair Housing and Employment Act (*Gov. Code § 12900 et seq.*). Defendant/former employer petitioned to compel arbitration pursuant to the employment contract, in which plaintiff agreed to abide by the rules of the National Association of Securities Dealers (NASD). Those rules require disputes between employee and employer to be arbitrated. In addition, plaintiff had executed a Uniform Application for Securities Industry Registration and Transfer Form (U-4) in which he agreed to arbitrate any dispute, claim or controversy that might arise between him and his firm, or any other person, that was required to be arbitrated by any of the organizations with which he was to register. He registered with the NASD. Defendant's petition was denied and defendant appealed.

The court of appeal concluded that plaintiff was bound to arbitrate his racial discrimination claim (*8 Cal. App. 4th 452, 455, 465)* . Defendant relied on *Gilmer v. Interstate/Johnson Lane (1991) 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d*

26 , which held, shortly after the appeal in this case was filed, that statutory claims for wrongful termination due to age discrimination are subject to arbitration under the terms of the U-4. The portion of the opinion discussing the incorporation of the NASD rules by reference in the agreements signed by plaintiff is set forth at *§ 20.31[3][a]*.

Plaintiff contended that his employment contract was not governed by the Federal Arbitration Act (FAA) because it was excluded by the language of *9 U.S.C. § 1*: "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." *Gilmer* did not address the scope of Section 1. The court of appeal followed *Matter of Management Recruiters Intern. and Nebel (N.D. Ohio 1991) 765 F. Supp. 419* , which noted that four circuits limited the exception in Section 1 to employees involved in the actual movement of goods in interstate commerce. The court of appeal followed *Nebel's* holding that the FAA applies to non-union employment contracts in the securities industry (*8 Cal. App. 4th 452, 460)* .

With respect to arbitration of statutory claims, the court of appeal said that unless Congress has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue, the strong federal policy favoring arbitration requires that statutory claims be arbitrated (*8 Cal. App. 4th 452, 460-461)* . Following *Gilmer*, disputes alleging violation of statutory prohibitions against discrimination in employment may be subject to arbitration if the arbitration agreement is governed by the FAA (*8 Cal. App. 4th 452, 461)* . Reliance on a state statutory antidiscrimination scheme, rather than on a federal Title VII claim [of the Civil Rights Act of 1964] (§ 700 et seq.; *42 U.S.C. § 2000e et seq.*), discussed in *Ch. 20A, Arbitration: Resisting, § 20A.21[3][a]*, does not alter the analysis of enforceability under the FAA (*8 Cal. App. 4th 452, 462)* .

The NASD rules provide that any dispute, claim or controversy arising out of or in connection with the business of any member of the Association, between or among members, or between or among members and others is eligible for submission to arbitration (*8 Cal. App. 4th 452, 463)* . Plaintiff claimed his suit was based on discrimination, and not a business transaction per se, and therefore, his claim was not subject to arbitration. The court of appeal was not persuaded, and found the language of the NASD rules broad enough to encompass plaintiff's claim, which the court saw as involving significant aspects of plaintiff's employment and defendant's business, including denigration of job performance, withdrawal of accounts, constant monitoring of job performance, and setting impossible job performance goals (*8 Cal. App. 4th 452, 464-465)* .

Armendariz v. Foundation Health Psychcare Services, Inc. *(2000) 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669* is discussed at *§ 20.23[3][a]*.

[e] Arbitrability of Claims Under the Unruh Civil Rights Act (Civil Code Section 51 et seq.)

Wolitarsky v. Blue Cross of California *(1997) 53 Cal. App. 4th 338, 61 Cal. Rptr. 2d 629* , involved a challenge to a health insurance policy provision imposing anadditional $2,000 deductible for maternity benefits. The case involved an insurance policy written before *Health & Safety Code § 1363.1* was enacted [*see* Stats. 1994, ch. 653]. Because *Health & Safety Code § 1363.1* may have been invalidated by *Allied-Bruce Terminix Cos. v. Dobson (1995) 513 U.S. 265, 281, 115 S. Ct. 834, 130 L. Ed. 2d 753* , discussed at *§ 20.20[3][b]* and *[i]*, *Wolitarsky* may also apply to cases involving policies facially governed by *Health & Safety Code § 1363.1*. Plaintiffs challenged the additional deductible as illegally discriminatory in violation of:

- The Unruh Civil Rights Act (*Civ. Code § 51 et seq.*);
- The Federal Pregnancy Discrimination Act (*42 U.S.C. § 2000e et seq.*);
- The California Fair Employment and Housing Act (*Gov. Code § 12900 et seq.*);
- The Cartwright Act (*Bus. & Prof. Code § 16721.5*); and

- *Health & Safety Code § 1365.5*.

Defendant petitioned to compel arbitration pursuant to the policy's arbitration provision. The trial court denied the petition on the ground that arbitration provision did not cover the various causes of action alleged. Defendant appealed.

Plaintiffs claimed that the Unruh Civil Rights Act gave them an independent right to sue for declaratory relief, specifically the language of then *Civ. Code § 52(e)* providing that: "the aggrieved parties shall not only possess a private right of action for violations, but also that such relief under the Act will be independent of any remedy or procedure available" (*53 Cal. App. 4th 338, 345-346)* . The court of appeal considered this a question of first impression. Defendant did not rely on the Federal Arbitration Act [*see 9 U.S.C. § 2*]. Neither plaintiffs nor the court of appeal could cite anything in the Unruh Civil Rights Act preventing submission of claims to arbitration. The court noted that claims under the Age Discrimination in Employment Act (*29 U.S.C. § 621 et seq.*) and under California's Fair Employment and Housing Act (*Gov. Code § 12900 et seq.*) are arbitrable [*see Gilmer v. Interstate/Johnson Lane (1991) 500 U.S. 20, 26-27, 35, 111 S. Ct. 1647, 114 L. Ed. 2d 26* (discussed at *§ 20.21[3][c]*); *Spellman v. Securities Annuities & Ins. Services, Inc. (1992) 8 Cal. App. 4th 452, 10 Cal. Rptr. 2d 427* (discussed at [d], *above*)] (*53 Cal. App. 4th 338, 346-347)* , and concluded that there was nothing in the arbitration agreement to exclude an Unruh Civil Rights Act claim from arbitration (*53 Cal. App. 4th 338, 348)* .

Plaintiffs argued that the arbitration clause was not broad enough to encompass their civil rights claims. The clause stated that: "Any dispute between the Member and Blue Cross regarding the decision of Blue Cross must be submitted to binding arbitration if the amount in dispute exceeds the jurisdictional limits of the small claims court." The court of appeal found that the arbitration clause was broad enough to encompass civil rights claims and that the amount in controversy ($2,000 trebled pursuant to *Civ. Code § 52* = $6,000) exceeded the $5,000 jurisdictional limit for small claims court (*53 Cal. App. 4th 338, 348-349)* .

The portion of the opinion addressing the arbitrability of the question of legality of the maternity deductible is discussed at *§ 20.44[3][a]*.

[f] Arbitrability of Damage Claims Under the Consumer Legal Remedies Act (Civil Code Section 1750 et seq.)

Broughton v. Cigna Healthplans of California *(1999) 21 Cal. 4th 1066, 90 Cal. Rptr. 2d 334, 988 P.2d 67* , was an action by a minor (through his mother as guardian ad litem) and his mother for damages for medical malpractice for injuries caused at birth by, among other things, denial of a medically necessary cesarean delivery, and for damages for violation of the Consumer Legal Remedies Act (*Civ. Code § 1750 et seq.*) based on defendant's deceptive and misleading advertising with respect to the quality of medical services which would be provided under its health care plan. The second cause of action requested actual and punitive damages and attorneys' fees, as well as an order enjoining defendant's deceptive methods, acts, and practices. Defendant moved to compel arbitration based on a mandatory arbitration provision in its combined evidence of coverage and disclosure form. Plaintiffs opposed the motion on several grounds, including that *Civ. Code § 1751* prohibited waiver of a judicial forum for determination of the cause of action under the CLRA. The trial court severed the causes of action, compelling arbitration of the medical malpractice cause of action, but not the cause of action under the CLRA. Defendant appealed.

The court of appeal affirmed the trial court's judgment, holding that because arbitrators may not issue permanent injunctions, arbitration is not an adequate forum for the resolution of CLRA claims. The Supreme Court granted review to decide whether CLRA claims are arbitrable.

The Supreme Court, with three members dissenting, affirmed in part and reversed in part, holding that the claim for damages under the CLRA was fully arbitrable (along with the medical malpractice claim) and should be severed from

the injunctive relief claim (*21 Cal. 4th 1066, 1072, 1088)* , despite the inefficiency of separating the claims and despite the fact that the existence of the arbitration agreement and the application of the Federal Arbitration Act had not been established. The existence of the arbitration agreement and the application of the Federal Arbitration Act were to be determined on remand, and arbitration ordered if both were established, or, in the event it was determined that the FAA did not apply and California law did not require a different result (*21 Cal. 4th 1066, 1087-1088)* .

In considering whether there was an inherent conflict between arbitration and the CLRA, the Court pointed out that although *Civ. Code § 1751* prohibits waiver of any protections of the Act, the remedies provided by the CLRA are not exclusive [*Civ. Code § 1752*] (*21 Cal. 4th 1066, 1077)* . Although the CLRA does not address the question of arbitrability directly, United States Supreme Court cases make clear that statutory claims for damages are fully arbitrable even if the action incidentally vindicates important public interests. Those cases consistently hold that abbreviated discovery, the fact that an arbitral award does not establish binding precedent, and a plaintiff's right to a jury trial do not render the arbitral forum inadequate. Nor does submission of statutory claims to arbitration waive the substantive rights afforded by the statute; the plaintiff is merely deemed to have agreed to submit his or her statutory claim to an arbitral, rather than a judicial, forum. Although the majority conceded that the CLRA could be interpreted to mean that the damages remedy under the CLRA isto be resolved solely in a judicial forum, they construed the CLRA as consistent with the FAA, thus holding that the CLRA permits arbitration of damages claims, at least to the extent the FAA governs the claim (*21 Cal. 4th 1066, 1084)* .

In support of the distinction between CLRA claims for damages and for injunctions, the Court relied in part on the fact that *Civ. Code § 1782(a)* requires a consumer to give notice 30 days before commencing an action under the CLRA for damages, and cannot maintain that action if appropriate repairs are made or other remedy given, but that no such requirement is imposed before commencement of an action seeking an injunction [*see Civ. Code § 1782(c)*]. This distinction indicated to the majority that informal methods of resolution are appropriate for CLRA claims for damages but compromise the public protective purpose of the statute when injunctive relief is sought (*21 Cal. 4th 1066, 1084-1085)* . The portion of the opinion addressing the nonarbitrability of CLRA claims for injunction is discussed in *Ch. 20A, Arbitration: Resisting, § 20A.43[3][a]*. The portion of the opinion addressing a plaintiff's right to attorneys' fees in arbitration of a claim for damages under the CLRA is addressed in Ch. 20C, *Arbitration: Confirming, Correcting, or Vacating the Award*, § 20C.110[3][d].

Plaintiff in ***Cruz v. PacifiCare Health Sys.*** *(2003) 30 Cal. 4th 303, 133 Cal. Rptr. 2d 58, 66 P.3d 1157* , filed an action against defendants alleging claims for unfair competition and false advertising in connection with PacifiCare's sale, marketing, and rendering of medical services. Plaintiff, an enrollee in one of the various health plans offered by PacifiCare, alleged that through its misleading and deceptive material representations and omissions, defendant employed a fraudulent, unlawful, and/or unfair scheme designed to induce persons to enroll in its health plans. Primarily, plaintiff claimed defendant misrepresented that its primary commitment was to maintain and improve the quality of health care provided, when in fact it aggressively implemented internal policies designed to discourage its primary care physicians from delivering medical services and to interfere with their medical judgment. Plaintiff set forth four causes of action, in his individual capacity and on behalf of the general public:

- False advertising in violation of *Bus. & Prof. Code § 17500 et seq.*, for which he sought an order enjoining violations of *Bus. & Prof. Code § 17500* and disgorgement of all defendants' ill-gotten gains and monies wrongfully acquired.

- Violations of various state statutes, which constituted an unfair, unlawful, or fraudulent business act or practice under the Unfair Competition Law (*Bus. & Prof. Code § 17200 et seq.*), that reduced the quality of medical services available to enrollees and decreased the value of their respective health plans. On this cause of action plaintiff also sought an order enjoining defendants' violations of *Bus. & Prof. Code § 17200* and requiring them to disgorge all ill-gotten gains and monies wrongfully acquired.

- Misrepresentations in violation of the Consumer Legal Remedies Act (*Civ. Code § 1750 et seq.*), for which he sought an order enjoining defendants' wrongful acts and practices and requiring defendants to make restitution of all monies paid to them.

- For unjust enrichment, because enrollees had received a lower quality of care than advertised and represented by defendant, for which plaintiff sough restitution, refund, or reimbursement of certain monies paid by or on behalf of enrollees, and disgorgement of the excessive and ill-gotten monies obtained by defendants as a result of the unlawful, fraudulent, or unfair business acts and practices and untrue and misleading advertisements.

Defendants moved to compel arbitration pursuant to several arbitration provisions in the subscriber agreement between defendant and plaintiff's employer, the arbitration provision in the enrollment form signed by plaintiff, and the arbitration provision in the member handbook provided to enrollees. Plaintiff resisted on several grounds, including that the arbitration provisions were unconscionable and that arbitration of the claims for injunctive relief was foreclosed by *Broughton v. Cigna Healthplans (1999) 21 Cal. 4th 1066, 90 Cal. Rptr. 2d 334, 988 P.2d 67* (*Broughton*). The trial court agreed, also reasoning that the claims for disgorgement, restitution, and unjust enrichment were inarbitrable as essentially equitable remedies distinct from damages, and refused to compel arbitration. The court of appeal affirmed. Defendants sought review.

The California Supreme Court granted review. Defendant argued among other things, that *Broughton* was no longer valid law in view of the U.S. Supreme Court's decisions in *Green Tree Financial Corp. v. Randolph (2000) 531 U.S. 79, 121 S. Ct. 513, 148 L. Ed. 2d 373* (*Green Tree*, discussed at *§ 20.21[3][f]*) and *Circuit City Stores, Inc. v. Adams (2001) 532 U.S. 105, 121 S. Ct. 1302, 149 L. Ed. 2d 234* (*Circuit City*, discussed at *§ 20.20[3][e]*). The Supreme Court concluded that *Broughton* was still good law, and that it should be extended to claims for public injunctive relief under *Bus. & Prof. Code § 17200 et seq.* and under *Bus. & Prof. Code § 17500 et seq*, at least under the circumstances of this case (*30 Cal. 4th 303, 315)* , but not to statutory and common law claims for equitable monetary relief by restitution, disgorgement, and unjust enrichment (*30 Cal. 4th 303, 320)* .

Defendants contended that *Green Tree* and *Circuit City* made clear that only Congress, not state legislatures, can create exceptions to the Federal Arbitration Act's (FAA) requirement that arbitration agreements be enforced according to their terms, and that therefore state courts cannot hold that certain requests for public injunctive relief are inarbitrable (*30 Cal. 4th 303, 311)* . The Court disagreed, and after discussing its opinion in *Broughton* at length, said it continued to find valid the inherent conflict analysis it used in *Broughton* (*30 Cal. 4th 303, 311-315)* . Further, the Court said *Circuit City* had little if any bearing on its holding in *Broughton* and neither addressed the question whether public injunctions are arbitrable nor shed any light on the "inherently incompatible" exception to arbitrability (*30 Cal. 4th 303, 315)* . *Green Tree* did not address arbitration of public injunctive claims, but focused on the issue of cost sharing in the arbitration of federal statutory claims. *Green Tree* did not concern federal preemption of state arbitration claims, nor did its reiteration of Congress's strong pro-arbitration policy call *Broughton* into question. In sum, the Court said,nothing that is novel about *Green Tree* or *Circuit City* has any bearing on *Broughton* (*30 Cal. 4th 303, 315)* .

Considering the issue of whether restitutionary claims are arbitrable, the Court first reviewed its holding in *Broughton* that damages claims under the CLRA are arbitrable, notwithstanding that they vindicate important statutory rights (*30 Cal. 4th 303, 317)* . Damages, broadly defined, may include a restitutionary element. Thus, there is no reason why restitutionary claims, like CLRA claims for damages, should not be arbitrable (*30 Cal. 4th 303, 318)* . Nothing in *Broughton*'s functional analysis suggests that the mere designation of restitution as an equitable remedy makes the request for that remedy inarbitrable. Moreover, although plaintiff argued that restitution under the UCL accomplishes a public purpose by deterring unlawful conduct, the same could be said of damages under the CLRA or under various federal statutes. The deterrent effect is incidental to the private benefits obtained by those bringing the restitutionary or damages action. The U.S. Supreme Court has made clear that these actions, notwithstanding the public benefit, are fully arbitrable under the FAA. While a class action may be primarily for the public benefit, that public benefit was only one

of the factors the Court identified in *Broughton* as weighing against arbitrability. Another was the "institutional advantages" of the judicial forum over arbitration in the administration of a public injunction, which are not present in an action for restitution. A class action under the UCL would allow for disgorgement into a fluid recovery fund and distribution by various means. Establishment of such a fund and the distribution of its proceeds do not present the same order of institutional difficulty as does the maintenance of a permanent statewide injunction requiring judicial supervision (*30 Cal. 4th 303, 318)* . The Court agreed with *Arriaga v. Cross Country Bank (S.D.Cal. 2001) 163 F. Supp. 2d 1189, 1197* (discussed in *Ch. 20A, Arbitration: Resisting, § 20A.43[3][a]*) and cited it for the proposition that quoted unlike a public injunction, disgorgement of funds does not need to be continuously monitored because its object is limited in time and scope. Once the profits to be disgorged and the recipients of those funds are identified, there is no need for long term modification and correction necessitating judicial supervision. Therefore, disgorgement of funds is essentially the same as awarding money damages, and within the power of the arbitrators to award. There is no "inherent conflict" between this remedy and arbitration (*30 Cal. 4th 303, 318)* . The Court concluded that the claims for restitution and/or disgorgement, whether brought as an individual or as a class action, were arbitrable (*30 Cal. 4th 303, 328)* . By the same logic, the common law claim for unjust enrichment, which is essentially an action for restitution is also arbitrable (*30 Cal. 4th 303, 320)* . The Court also noted that when there is a severance of arbitrable from inarbitrable claims, the trial court has discretion to stay proceedings on the inarbitrable claims pending resolution of the arbitration [*Code Civ. Proc., § 1281.4*] (*30 Cal. 4th 303, 320)* .

Finally, the Court noted that other of plaintiff's arguments against enforcement of the arbitration provisions--that the claims were outside the scope of the arbitration agreement and because that the agreement was unconscionable--could be reasserted on remand (*30 Cal. 4th 303, 321)* .

[g] Arbitrability of Damage Claims Under the Unfair Competition Law (Business and Professions Code Section 17200 et seq.)

Cruz v. PacifiCare Health Sys. *(2003) 30 Cal. 4th 303, 133 Cal. Rptr. 2d 58, 66 P.3d 1157* , is discussed at [f], *above*, except the portions of the opinion addressing injunctive relief, which are discussed at *Ch. 20A, Arbitration: Resisting, § 20.43[3][a]*, with regard to injunctive relief under the Consumer Legal Remedies Act (*Civ. Code § 1750 et seq.*) and at Ch. 20A, *Arbitration: Resisting*, § 20A.44[3][a] with regard to injunctive relief under *Bus. & Prof. Code § 17200 et seq.* and *Bus. & Prof. Code § 17500 et seq.* For the most part, the Court considered the arbitrability of the restitiutionary damage claims together. The following remarks, however, pertained to the claims under the Unfair Competition Law (*Bus. & Prof. Code § 17200 et seq.*). The Court noted that the language authorizing restitution for misleading advertising practices under *Bus. & Prof. Code § 17535* is virtually identical to the language authorizing restitution found in *Bus. & Prof. Code § 17203* under the UCL. Both declare that a "court may make such orders or judgments" as "may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by" the business practices made unlawful by the statute in question. Therefore, the Court assumed, at least on the issue of arbitrability, those sections should be construed the same way (*30 Cal. 4th 303, 318)* . The Court also noted that remedies under the UCL are limited. A UCL action is equitable in nature; and damages cannot be recovered. Prevailing plaintiffs are generally limited to injunctive relief and restitution. A order for restitution under the UCL compels the defendant to return money obtained through an unfair business practice to those persons in interest from whom the property was taken, that is, to persons who had an ownership interest in the property or those claiming through that person (*30 Cal. 4th 303, 317)* .

Amici curiae argued that *EEOC v. Waffle House, Inc. (2002) 534 U.S. 279, 122 S. Ct. 754, 151 L. Ed. 2d 755* (*Waffle House*) renders all UCL claims inarbitrable. The majority in *Waffle House* held that the EEOC could sue employers not only to enjoin discriminatory employment practices, but also for victim-specific relief, such as reinstatement and back pay, even if the employee on whose behalf it was acting was a party to a binding arbitration agreement. The court reasoned that the EEOC was neither a party to the arbitration agreement nor a mere proxy for the employee on whose behalf the action was brought, but rather an agency charged by Congress with the vindication of the public interest (*30 Cal. 4th 303, 319)* . Amici curiae argued that a private attorney general action brought under *Bus. & Prof. Code § 17024*

is comparable to an action brought by the EEOC. Thus, no one acting in a private attorney general capacity should be bound by an arbitration agreement. Given the strong presumption in favor of enforcing arbitration agreements, the Court did not read *Waffle House* as permitting a party to an arbitration agreement to evade its contractual obligation to settle its own restitutionary claims through arbitration merely by acting as a representative on behalf of other similarly situated claimants (*30 Cal. 4th 303, 320)* .

[h] Arbitrability of Damage Claims Under the False Advertising Law (Business and Professions Code Section 17500 et seq.)

Cruz v. PacifiCare Health Sys. *(2003) 30 Cal. 4th 303, 133 Cal. Rptr. 2d 58, 66 P.3d 1157* , is discussed at [f], *above*, except the portions of the opinion addressing inarbitrability of claims for public injunctive under *Bus. & Prof. Code § 17200 et seq.* and *Bus. & Prof. Code § 17500 et seq.*, which are discussed at *Ch. 20A, Arbitration: Resisting, § 20A.43[3][a]*, For the most part, the Court considered the arbitrability of the restitiutionary damage claims under all three statutes--the Consumer Legal Remedies Act (*Civ. Code § 1750 et seq.*), *Bus. & Prof. Code § 17200 et seq.*, and *Bus. & Prof. Code § 17500 et seq.*--together. That portion of the opinion is discussed at [f], *above.* Remarks about the claims under the Unfair Competition Law (*Bus. & Prof. Code § 17200 et seq.*), including the fact that the language authorizing restitution for misleading advertising practices under *Bus. & Prof. Code § 17535* is virtually identical to the language authorizing restitution found in *Bus. & Prof. Code § 17203*, are discussed at [g], *above.*

[i] Code of Civil Procedure Section 1298.7 Preempted by Federal Arbitration Act

Code Civ. Proc. § 1298.7 that in the event an arbitration provision is included in a contract or agreement covered by *Code Civ. Proc. §§ 1298-1298.8*, it shall not preclude or limit any right of action for bodily injury or wrongful death, or any right of action to which Section 337.1 or 337.15 is applicable.

Shepard v. Edward Mackay Enterprises, Inc. *(2007) 148 Cal. App. 4th 1092, 56 Cal. Rptr. 3d 326* , involved construction and design defects in a home plaintiff purchased from defendant. Plaintiff alleged a leak from an underground plumbing pipe caused extensive damage to the home and its contents. The purchase agreement contained an arbitration clause, and defendant moved to compel arbitration. Plaintiff opposed the motion to compel arbitration on the authority of *Code Civ. Proc. § 1298.7*, and the trial court denied defendants' motion to compel arbitration, relying on *Code Civ. Proc. § 1298.7* and concluding that the defendants' evidentiary showing failed to demonstrate that the transaction involved interstate commerce. Defendant appealed, and on appeal filed the declarations of five materials suppliers, all of which stated that they supplied materials which originated outside of California.

The court of appeal reversed, finding that the Federal Arbitration Act (FAA) has preempted *Code Civ. Proc. § 1298.7* and that the defendants' evidence was sufficient to show that the transaction at issue involved interstate commerce (*148 Cal. App. 4th 1092, 1095, 1101-1102)* . The court of appeal first noted that although plaintiff had pleaded tort as well as contract claims, the arbitration clause was worded broadly enough to embrace both tort and contract claims as long as the claims were rooted in the relationship created by the contract (*148 Cal. App. 4th 1092, 1096)* . The FAA preempts conflicting state anti-arbitration law. Thus, the court considered the phrase "involving commerce" as used in *9 U.S.C. § 2*, saying it is the functional equivalent of the term "affecting commerce," which is a term of art that signals the broadest permissible exercise of Congress' *commerce clause* power and encompasses more than activities within the flow of interstate commerce. Further, it is not necessary for the parties to have contemplated substantial interstate activity at the time they entered into the agreement for the transaction to be one "evidencing commerce." The United States Supreme Court has adopted a "commerce in fact" interpretation, meaning that the transaction must merely turn out, in fact, to have involved interstate commerce (*148 Cal. App. 4th 1092, 1097)* . There are three categories of activity that Congress may regulate under the commerce power: (1) the channels of interstate commerce, (2) the instrumentalities of interstate commerce and persons or things in interstate commerce, and (3) those activities having a substantial relation to interstate commerce. In fact, it is not necessary for the transaction to be actually in interstate commerce, as long as, in the aggregate the economic activity in question would represent a general practice subject to federal control, such a

bank lending (*148 Cal. App. 4th 109, 1098)* . Only that general practice need bear on interstate commerce in a substantial way (*148 Cal. App. 4th 1092, 1098-1099)* . The court of appeal went on to discuss the three California cases that have considered this issue in the context of real estate purchases: *Basura v. U.S. Home Corporation (2002) 98 Cal. App. 4th 1205, 120 Cal. Rptr. 2d 328* (*Basura*, discussed *below*); *Hedges v. Carrigan (2004) 117 Cal. App. 4th 578, 11 Cal. Rptr. 3d 787* (*Hedges*, discussed at [j], *below*); and *Woolls v. Superior Court (Turner) (2005) 127 Cal. App. 4th 197, 25 Cal. Rptr. 3d 426* (*Woolls*, discussed in *Ch. 20A, Arbitration: Resisting, § 20A.95[3][b], below*) (*148 Cal. App. 4th 1092, 1099-1100)* . In *Basura*, the court found the contract involved interstate commerce because the construction project involved building materials and equipment which were manufactured and/or produced outside California; out-of-state design professionals, trade contractors, subcontractors and others; defendant communicated by interstate mail and telephone with out-of-state manufacturers, design professionals, trade contractors, subcontractors and their employees; and engaged in marketing and advertising activities throughout the country using interstate media. The *Hedges* court held in dicta that the contract was one which evidenced a transaction involving commerce because the transaction was financed through the Federal Housing Administration, and because the various copyrighted forms used by the parties could only be utilized by members of the National Association of Realtors *(148 Cal. App. 4th 1092, 1099)* . *Woolls* involved only the renovation of a single residence, not an entire development, such as was involved in *Basura.* Further, the *Woolls* court found that the contractor had not made any evidentiary showing that the transaction involved interstate commerce. The court said that this case did not involve either the channels or instrumentalities of interstate commerce, or persons or things in interstate commerce. Thus, the court had to determine whether the transaction involved an activity having a substantial relation to interstate commerce. According to the suppliers' declarations the carpet, vinyl flooring, doors and windows, hardware, trusses, and kitchen appliances were produced outside California *(148 Cal. App. 4th 1092, 1100)* . The number of building materials shown by defendants to have come from interstate commerce indicated this case was not one involving a merely trivial impact on interstate commerce. Plaintiff argued that the only building material that mattered was the carpet because that was the only component as issue in the case, but the court of appeal disagreed, noting it was not aware of any cases indicating the FAA preempts contrary state law only if the particular dispute is over interstate goods. On the contrary, the language *9 U.S.C. § 2* and United Sates Supreme Court cases indicated the pertinent question is whether the contract evidences a transaction involving interstate commerce, not whether the dispute arises from the particular part of the transaction involving interstate commerce. Finally, the court of appeal disagreed with the trial court's finding regarding the declarations and found instead that the declarations stated that certain materials provided by the declarant were manufactured outside California. These were evidentiary facts based on the declarant's personal knowledge and were sufficient to support a finding on the ultimate legal issue of whether the transaction involved interstate commerce. The court concluded that defendants had met their burden of demonstrating that this transaction substantially affected interstate commerce. Thus, the FAA preempted *Code Civ. Proc. § 1298.7* (*148 Cal. App. 4th 1092, 1101)* .

Basura v. U.S. Home Corp. *(2002) 98 Cal. App. 4th 1205, 120 Cal. Rptr. 2d 328* , was an action by some 60 homeowners against the builder/developer for construction defects, including cracked foundation slabs. Plaintiffs initially filed suit in federal court, but dismissed that action pursuant to a tolling and cooperation agreement whereby the parties attempted to mediate their dispute, but to no avail. Each conveyance was in accordance with a form sales agreement, Paragraph 14 of which provided for arbitration. Home petitioned stay the proceeding and to compel arbitration of plaintiffs' claims. Plaintiffs opposed arbitration on the ground that *Code Civ. Proc. § 1298.7* permits a purchaser to pursue a construction defect case in court even if the purchaser signed an agreement to convey real property containing an arbitration clause. Plaintiffs further argued that the Federal Arbitration Act does not preempt section 1298.7 because the subject real estate purchase agreements did not involve interstate commerce. Home filed reply declarations to establish the agreements in fact involved interstate commerce. The petition to compel arbitration was denied. Home Appealed.

The court of appeal reversed. Courts may not invalidate arbitration agreements under state laws applicable only to arbitration provisions. *Code Civ. Proc. § 1298.7* is a state law applicable only to arbitration agreements (*98 Cal. App. 4th 1205, 1212)* . The court of appeal reviewed the evidence establishing that the construction of the homes involved the receipt and use of building materials and equipment which were manufactured and/or produced in states outside

California, including Nevada, Arizona, Connecticut, Indiana, South Carolina, Pennsylvania, Michigan, Tennessee and Georgia, and which were shipped to the job site in Palmdale. Further, Home contracted with out-of-state design professionals, trade contractors, subcontractors and others, communicated with them by interstate mail and telephone, and engaged in marketing and advertising activities throughout the country using interstate media. These facts compelled the conclusion that the agreements between Home and plaintiffs involved interstate commerce. Therefore, the agreements were governed by the FAA. and *Code Civ. Proc. § 1298.7* could not be used by plaintiffs to avoid the arbitration (*98 Cal. App. 4th 1205, 1214)* .

[j] Federal Law Preempts Section 1298 of the Code of Civil Procedure

Hedges v. Carrigan *(2004) 117 Cal. App. 4th 578, 587, 11 Cal. Rptr. 3d 787* , was an action by a real estate purchaser against the sellers and both brokers based on failure to disclose several defects in the residence. One of the defendants, plaintiff's broker, petitioned to compel arbitration in accordance with the residential purchase agreement. The agreement provided that the arbitration provision would be excluded if all parties did not initial it. Defendants did not initial it. The trial court denied the motion to compel arbitration. Plaintiff appealed.

The court of appeal affirmed, holding that because defendants had not initialed the arbitration provision, it was not enforceable against plaintiffs (*117 Cal. App. 4th 578, 587)* . Although unnecessary to its holding, and over a dissent, the majority opinion considered the effect of the Federal Arbitration Act and determined that because *Code Civ. Proc. § 1298* does not apply to contracts generally, but only to arbitration clauses, it could not be judicially construed to invalidate the arbitration clause at issue (*117 Cal. App. 4th 578, 585)* . The court found the transaction involved interstate commerce because it was financed by an FHA loan (*117 Cal. App. 4th 578, 586-587)* .

[k] False Claims Act (Government Code Section 12650 et seq.) Claims Are Arbitrable

County of Solano v. Lionsgate Corporation *(2005) 126 Cal. App. 4th 741, 24 Cal. Rptr. 3d 362* arose from a contract for replacement of a bridge. The contract incorporated Caltrans Standard Specifications, including an arbitration clause that required arbitration of any claims, defined as demands for monetary compensation or damages, arising under or related to performance of the contract, pursuant to *Public Contract Code § 10240 et seq.* and related regulations. As allowed by *Code Civ. Proc. § 1296*, the arbitration clause also provided that the arbitration decision be decided in accordance with the applicable law, be supported by substantial evidence, and contain the basis for the decision, findings of fact, and conclusions of law. The County filed a complaint in arbitration, charging Lionsgate with breach of the covenant of good faith and fair dealing, fraud, and numerous False Claims Act (*Gov. Code § 12650 et seq.*) violations, and sought a total of $531,783.46 in damages and penalties. Lionsgate objected to the arbitration, contending the contract did not authorize arbitration of False Claims Act causes of action. The arbitrator overruled the objection, and after hearing found Lionsgate's false claims in connection with the bridge contract had caused the County to incur substantial investigative and administrative costs, which, however, were not recoverable as damages. The arbitrator limited the County's recovery to civil penalties under the False Claims Act. The arbitrator also found that Lionsgate had breached the covenant of good faith and fair dealing, but with no resulting damages, and that Lionsgate had not committed fraud due to the absence of detrimental reliance on the County's part. The award was for the County for $210,000 in False Claims Act penalties, offset by a $2,000 award to Lionsgate on its cross-complaint. The County then submitted a petition for $690,247.15 in attorney fees and $32,094.55 in costs. The arbitrator awarded the County $500,000 in attorney fees and $32,094.55 in costs under *Public Contract Code § 10240.13* as well as prejudgment interest on the net $208,000 recovery, running from the date the findings and conclusions were filed. The trial court confirmed the arbitration award, and denied Lionsgate's motion for a new trial. Lionsgate appealed, contending the arbitratorlacked the authority to rule on charges made by the County under the False Claims Act, improperly awarded prejudgment interest and attorney fees, and misinterpreted certain conduct by Lionsgate as amounting to false claims.

The court of appeal mostly affirmed, holding that the arbitrator properly considered the County's False Claims Act charges, but that the County was not entitled to prejudgment interest until after entry of the final arbitration award (*126*

Cal. App. 4th 741, 745) . Lionsgate's primary argument was based on *Gov. Code, §§ 12651, 12652*, which refer to "a civil action" to recover penalties and damages under the False Claims Act and to assessments and findings by "the court." The court of appeal disagreed, noting that it is well settled that statutory claims are not inarbitrable merely because the statute in question refers to actions in court and cited three such cases (*126 Cal. App. 4th 741, 747)* :

- *Cruz v. PacifiCare Health Systems, Inc. (2003) 30 Cal. 4th 303, 317-320, 133 Cal. Rptr. 2d 58, 66 P.3d 1157* , which considered *Bus. & Prof. Code § 17204* ("shall be prosecuted exclusively in a court of competent jurisdiction");

- *Broughton v. Cigna Healthplans (1999) 21 Cal. 4th 1066, 1082, 1085, 90 Cal. Rptr. 2d 334, 988 P.2d 67* , which considered actions under the Consumers Legal Remedies Act, *Civ. Code § 1780(c)* of which formerly specified that actions must be filed in "any court ... having jurisdiction of the subject matter;" and

- *Crown Homes, Inc. v. Landes (1994) 22 Cal. App. 4th 1273, 1283, 27 Cal. Rptr. 2d 827* , which held that statutory antitrust claims under the Cartwright Act are subject to arbitration, despite language in *Bus. & Prof. Code, § 16750(a)* that contemplates civil actions "in any court having jurisdiction."

Lionsgate further argued that it never agreed to arbitrate claims for civil penalties under the False Claims Act, although Lionsgate had never requested severance of the penalty claims. The arbitrator's findings and conclusions clearly indicated that the award was designed not simply to penalize Lionsgate, but to compensate the County for administrative expenses the arbitrator believed were not recoverable as "damages." The imposition of penalties as a form of compensation was within the arbitrator's authority: nothing in the parties' contract limited the remedies available to the arbitrator, and the penalties bore a rational relationship to the contract and the breach (*126 Cal. App. 4th 741, 748)* . Thus, the court did not need to decide whether a purely punitive assessment of monetary penalties under the False Claims Act would have been beyond the scope of the arbitration clause (*126 Cal. App. 4th 741, 749)* .

The court considered two issues not raised by Lionsgate: (1) whether there was an inherent conflict between a statutory remedy and arbitration and (2) whether a judicial forum would have significant institutional advantages over arbitration in the administration of a remedy, as is often the case with claims for injunctive relief on behalf of the public. As to the first, the court found that nothing in this case militated against arbitration of False Claims Act charges. Although False Claims Act penalties do serve a public purpose by deterring false claims by public works contractors, in this case that public purpose was merely incidental to the primary benefit of compensating the County for the expenses associated with the submission of false claims. As to the second issue, the court found that the County's claims implicated no broad public remedy. Thus, there was no institutional advantage in a judicial forum that might preclude arbitration of the False Claims Act charges (*126 Cal. App. 4th 741, 749)* .

The facts and procedural background of ***Preston v. Ferrer*** *(2008)552U.S.346, 128 S. Ct. 978, 169 L. Ed. 2d 917* , and the portion of the opinion addressing whether a court or an arbitrator should determine the legality of the underlying contract are discussed at *§ 20.10[3][i]*. With respect to the preemption issue, the Court held that state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the Federal Arbitration Act (FAA; *9 U.S.C. § 1 et seq.*) (*169 L. Ed. 2d 917, 923)* . The Court discussed the Talent Agency Act (TAA; *Lab. Code § 1700 et seq.*), specifically *Lab. Code § 1700.45*, which permits arbitration in lieu of proceeding before the Labor Commissioner if an arbitration provision in a contract between a talent agency and an artist both provides for reasonable notice to the Labor Commissioner of the time and place of all arbitration hearings and gives the Commissioner the right to attend all arbitration hearings. This demonstrates that there is no inherent conflict between the TAA and arbitration as a dispute resolution mechanism. However, procedural prescriptions of the TAA conflict with the FAA in two basic respects: first, the TAA [*see Lab. Code § 1700.44(a)*] grants the Labor Commissioner exclusive jurisdiction to decide an issue that the parties agreed to arbitrate; and second, the TAA imposes prerequisites to enforcement of an arbitration agreement that are not applicable to contracts generally [*see Lab. Code § 1700.45*] (*169 L. Ed. 2d 917, 927)* . Also,

requiring initial reference of the dispute to the Labor Commissioner would hinder speedy resolution of the controversy, thus frustrating the FAA's prime objective that arbitration agreements allow parties to achieve streamlined proceedings and expeditious results (*169 L. Ed. 2d 917, 928)* . The Court disapproved the distinction between judicial and administrative proceedings drawn by plaintiff and adopted by the appeals court. When parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative (*169 L. Ed. 2d 917, 929)* .

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California Points & Authorities

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20 ARBITRATION: COMPELLING
PART II. FORMS
A. General Principles Related to Compelling Arbitration

2-20 California Points & Authorities § 20.23

§ 20.23 Arbitration Agreement Provides, or Can Be Interpreted to Provide, Minimum Requirements for Vindication of Unwaivable Statutory or Common Law Rights

[1] FORM

ARBITRATION OF RESPONDENT'S _____ [*specify nature of claim, e.g.,* CLAIMS UNDER CALIFORNIA'S FAIR EMPLOYMENT AND HOUSING ACT] SHOULD BE COMPELLED BECAUSE THE ARBITRATION PROCEDURES [CAN BE IMPLIED TO] PROVIDE SUFFICIENT SAFEGUARDS TO ALLOW RESPONDENT TO VINDICATE HIS/HER RIGHTS UNDER _____ [STATUTE *or* CAUSE OF ACTION].

A. Requirements for Arbitration of Unwaivable Statutory or Common Law Right. Claims based on unwaivable rights, such as state statutory discrimination claims, including a claim for wrongful termination due to discrimination on the basisof sexual orientation, under California's Fair Housing and Employment Act (*Gov. Code § 12900 et seq.*) may be compelled to be arbitrated in accordance with an arbitration agreement[, even a mandatory agreement required as a condition of employment], that provides the following safeguards to allow vindication of plaintiff's statutory rights (*Little v. Auto Stiegler, Inc. (2003) 29 Cal. 4th 1064, 130 Cal. Rptr. 2d 892, 63 P.3d 979* ; *Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 90-103, 99 Cal. Rptr. 2d 745, 6 P.3d 669* ; *Fitz v. NCR Corp. (2004) 118 Cal. App. 4th 702, 712-713, 13 Cal. Rptr. 3d 88* ; *Abramson v. Juniper Networks, Inc. (2004) 115 Cal. App. 4th 638, 652-654, 9 Cal. Rptr. 3d 422* ; *Fittante v. Palm Springs Motors, Inc. (2003) 105 Cal. App. 4th 708, 719-720, 129 Cal. Rptr. 2d 659* ; *accord Craig v. Brown & Root, Inc. (2000) 84 Cal. App. 4th 416, 422-423, 100 Cal. Rptr. 2d. 818* ; *see also Camargo v. California Portland Cement Company (2001) 86 Cal. App. 4th 995, 103 Cal. Rptr. 2d 841*):

1. Neutrality of the arbitrator,

2. Adequate discovery,

3. No limitation on the arbitrator's authority to award all types of relief authorized by the statute,

4. A written decision that will permit a limited form of judicial review, and

5. Limitations on the costs of arbitration.

[*Optional*] **B. Implied Agreement to Adequate Discovery.** Whether or not the claim at issue is one for personal injury, which would allow for discovery in accordance with *Code of Civil Procedure Section 1283.05*, when the parties agree to arbitrate statutory claims[, such as a claim under the California Fair Employment and Housing Act (*Gov. Code § 12900 et seq.*)], they also implicitly agree, absent express language to the contrary, to whatever procedures are necessary to vindicate that claim. Thus, plaintiff is entitled to discovery sufficient to adequately arbitrate the statutory claim, including access to essential documents and witnesses, as determined by the arbitrator(s) and subject to limited judicial review pursuant to *Code of Civil Procedure section 1286.2*. Therefore, lack of discovery is not grounds for holding this claim inarbitrable (*Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 104-106, 99 Cal. Rptr. 2d 745, 6 P.3d 669*).

[*Optional*] **C. Agreement Interpreted to Require Findings and Conclusions in Award.** For judicial review of an arbitration award sufficient to vindicate a claimant's statutory rights under the Fair Employment and Housing Act (*Gov. Code § 12900 et seq.*) to be accomplished, an arbitrator in a FEHA case must issue a written arbitration decision that will reveal, however briefly, the essential findings and conclusions on which the award is based. While those written findings and conclusions are not required under the California Arbitration Act (*Code Civ. Proc. § 1283.4*), nothing in the present arbitration agreement precludes written findings, and to the extent it applies to FEHA claims the agreement must be interpreted to provide for those findings (*Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 107, 99 Cal. Rptr. 2d 745, 6 P.3d 669* ; *cf.* *Fittante v. Palm Springs Motors, Inc. (2003) 105 Cal. App. 4th 708, 722, 129 Cal. Rptr. 2d 659* (finding requirement of written award would be satisfied by compliance with *Code Civ. Proc. § 1283.4*).

[*Optional*] **D. Agreement Interpreted to Require Employer to Pay Forum Costs of Arbitration.** A mandatory employment arbitration agreement that contains within its scope the arbitration of claims _____ [*specify nature of claim, e.g.,* under the Fair Employment and Housing Act (*Gov. Code § 12900 et seq.*)], but is silent on the matter of who pays the costs of arbitration, impliedly obliges the employer to pay all types of costs that are unique to arbitration. Accordingly, the arbitration agreement in the present case impliedly requires that the employer bear the arbitration forum costs[, such as the arbitrator's fees, the administrative fee, any filing fee, room rental, and court reporter's fees]. The absence of specific provisions on arbitration costs therefore does not provide grounds for denying the enforcement of this arbitration agreement, but the order compelling arbitration should specify that the employer pay all types of costs that are unique to arbitration. [Nothing in the Federal Arbitration Act or federal cases prohibits this cost-shifting] (*Little v. Auto Stiegler, Inc. (2003) 29 Cal. 4th 1064, 130 Cal. Rptr. 2d 892, 63 P.3d 979* ; *Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 107-108, 110-111, 113, 99 Cal. Rptr. 2d 745, 6 P.3d 669* ; *Fittante v. Palm Springs Motors, Inc. (2003) 105 Cal. App. 4th 708, 129 Cal. Rptr. 2d 659* ; *cf.* *Abramson v. Juniper Networks, Inc. (2004) 115 Cal. App. 4th 638, 654, 661, 668, 9 Cal. Rptr. 3d 422* (court cannot impose implied agreement in face of contrary terms of express agreement)].

[*Optional*] **E. *Armendariz* May Be Applied Retroactively.** Under settled principles of retroactivity, because *Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669* decided an unresolved issue pursued by parties, representing opposing points of view, who were determined to obtain a final decision on the matter from the highest court of this state, that decision may be applied retroactively (*Blake v. Ecker (2001) 93 Cal. App. 4th 728, 733, 741, 113 Cal. Rptr. 2d 422*).

[*Optional*] **F. *Armendariz*** Minimum Requirements Apply to ***Tameny*** Claims. An employee who is required by agreement to arbitrate a claim against his or her employer that he or she was demoted or terminated for a reason contrary to public policy is entitled to have that arbitration conducted in accordance with the minimum requirements set forth in *Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6*

P.3d 669 [, including the requirement that the employer bear all costs unique to the arbitral forum] (*Little v. Auto Stiegler, Inc. (2003) 29 Cal. 4th 1064, 130 Cal. Rptr. 2d 892, 63 P.3d 979* ; *Abramson v. Juniper Networks, Inc. (2004) 115 Cal. App. 4th 638, 653, 660-661, 9 Cal. Rptr. 3d 422* ; *see Tameny v. Atlantic Richfield Co. (1980) 27 Cal. 3d 167, 178, 164 Cal. Rptr. 839, 610 P.2d 1330* (establishing cause of action for termination of employment for reason that is contrary to public policy)).

[*Optional*] **G. *Armendariz* Minimum Requirements Apply to Claims Under *Labor Code Section 970*.** An employee who is required by agreement to arbitrate under *Section 970 of the Labor Code* is entitled to have that arbitration conducted in accordance with the minimum requirements set forth in *Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d669* [, including the requirement that the employer bear all costs unique to the arbitral forum] (*Fittante v. Palm Springs Motors, Inc. (2003) 105 Cal. App. 4th 708, 719-720, 129 Cal. Rptr. 2d 659*).

[*Optional*] **H. Consumer Legal Remedies Act Provides for Unwaivable Rights.** The Consumer Legal Remedies Act (*Civ. Code § 1750 et seq.*) is a consumer protection statute enacted for a public purpose and provides certain unwaivable rights. Thus, a consumer faced with an arbitration provision in attempting to vindicate his or her rights under the Consumer Legal Remedies Act, may contest the arbitration provision on the basis that it contravenes public rights, a defense which is a generally available contract defense, and thus not preempted by the *Federal Arbitration Act (Gutierrez v. Autowest, Inc. (2004) 114 Cal. App. 4th 77, 95, 7 Cal. Rptr. 3d 267*).

[*Optional*] **I. Vehicle Leasing Act Provides for Unwaivable Rights.** The Vehicle Leasing Act (Civ. Code § 2987.5 et seq.) is a consumer protection statute enacted for a public purpose and provides certain unwaivable rights. Thus, a consumer faced with an arbitration provision in attempting to vindicate his or her rights under the Consumer Legal Remedies Act, may contest the arbitration provision on the basis that it contravenes public rights, a defense which is a generally available contract defense, and thus not preempted by the *Federal Arbitration Act (Gutierrez v. Autowest, Inc. (2004) 114 Cal. App. 4th 77, 95, 7 Cal. Rptr. 3d 267*).

[*Optional*] **J. Arbitral Costs to Vindicate Rights Under Consumer Protection Statute.** When the consumer sues under a state consumer protection statute providing for unwaivable rights, the court should not shift all arbitral costs to the nonconsumer party, but should imply an agreement that unaffordable fees will not be allocated to the consumer at any in point in the arbitration process. The determination of what is affordable must be made on a case by case basis, with the consumer bearing the burden of proof as to what he or she cannot afford (*Gutierrez v. Autowest (2004) 114 Cal. App. 4th 77, 83, 96-99, 7 Cal. Rptr. 3d 267*).

[*Optional*] ***K. Little** May Be Applied Retroactively. Little v. Auto Stiegler, Inc. (2003) 29 Cal. 4th 1064, 130 Cal. Rptr. 2d 892, 63 P.3d 979* , which determined that the minimum safeguards for vindication of unwaivable statutory rights should also be required of an arbitration agreement under which one seeks to establish a so-called Tameny claim for wrongful termination in violation of public policy may be given retroactive effect because that decision did not disturb a settled rule of law (*Abramson v. Juniper Networks, Inc. (2004) 115 Cal. App. 4th 638, 660-661, 9 Cal. Rptr. 3d 422* ; *see Tameny v. Atlantic Richfield Co. (1980) 27 Cal. 3d 167, 178, 164 Cal. Rptr. 839, 610 P.2d 1330*).

[*Optional*] **L. Armendariz Minimum Requirements Apply to Claims Under Franchise Investment Act.** The franchise context is similar enough to mandatory employee/employer arbitration that the minimum safeguards first imposed in *Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669* apply to franchisees' claims under the California Franchise Investment Law (*Corp. Code § 31000 et seq.*) (*Independent Assn. of Mailbox Center Owners, Inc. v. Superior Court (Mail Boxes Etc., USA, Inc.) (2005) 133 Cal. App. 4th 396, 416, 34 Cal. Rptr. 3d 659* (only fee-shifting was at issue)).

[*Optional*] **M. Armendariz Minimum Requirements Apply to Claims Under Cartwright Act.** The franchise context is similar enough to mandatory employee/employer arbitration that the minimum safeguards first imposed by

Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669 apply to franchisees' claims under the Cartwright Act (*Bus. & Prof. Code § 16700 et seq.*) (*Independent Assn. of Mailbox Center Owners, Inc. v. Superior Court (Mail Boxes Etc., USA, Inc.) (2005) 133 Cal. App. 4th 396, 416, 34 Cal. Rptr. 3d 659* (only fee-shifting was at issue)).

[*Optional*] **N. Armendariz Minimum Requirements Apply to Claims Under Uniform Trade Secrets Act.** The franchise context is similar enough to mandatory employee/employer arbitration that the minimum safeguards first imposed in *Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669* apply to franchisees' claims under the Uniform Trade Secrets Act (*Civ. Code § 3426 et seq.*) (*Independent Assn. of Mailbox Center Owners, Inc. v. Superior Court (Mail Boxes Etc., USA, Inc.) (2005) 133 Cal. App. 4th 396, 416, 34 Cal. Rptr. 3d 659* (only fee-shifting was at issue)).

[*Optional*] **O. Armendariz Minimum Requirements Apply to Claims Under Unfair Competition Law.** The franchise context is similar enough to mandatory employee/employer arbitration that the minimum safeguards first imposed by *Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669* apply to franchisees' claims under the Unfair Competition Law (*Bus. & Prof. Code § 17200 et seq.*) (*Independent Assn. of Mailbox Center Owners, Inc. v. Superior Court (Mail Boxes Etc., USA, Inc.) (2005) 133 Cal. App. 4th 396, 416, 34 Cal. Rptr. 3d 659* (only fee shifting was at issue)).

[*Optional*] **P. Court Must Make Initial Fee-Shifting Determination Even if Arbitrator Has Authority to Allocate Arbitral Fees and Costs.** When unwaivable statutory rights are involved that affect the public interest, and not just the claimant personally, it is not enough that the rules under which the arbitration will be conducted allow the arbitrator to make an appropriate allocation of arbitral costs and fees. The trial court must conduct proceedings before ordering arbitration to determine if any fee-shifting order is necessary at that point to allow the claimant to go forward in arbitration to vindicate those statutory rights (*Independent Assn. of Mailbox Center Owners, Inc. v. Superior Court (Mail Boxes Etc., USA, Inc.) (2005) 133 Cal. App. 4th 396, 416-417, 34 Cal. Rptr. 3d 659*).

[*Optional*] **Q. Armendariz Minimum Requirements Apply to Claims Under Ralph Civil Rights Act.** The one-way provision allowing attorney-fee awards only to plaintiffs in the Ralph Civil Rights Act, *Civ. Code, § 51.7*, is an unwaivable statutory right and renders the award of attorney fees in this case invalid to the same extent as an award of inappropriate arbitral expenses (*D.C. v. Harvard-Westlake Sch. (2009) 176 Cal. App. 4th 836, 866, 98 Cal. Rptr. 3d 300*).

[*Optional*] **R. Armendariz Minimum Requirements Apply to Claims Under Tom Bane Civil Rights Act.** The one-way provision allowing attorney-fee awards only to plaintiffs in the Tom Bane Civil Rights Act, *Civ. Code, § 52.1*, is an unwaivable statutory right and renders the award of attorney fees in this case invalid to the same extent as an award of inappropriate arbitral expenses (*D.C. v. Harvard-Westlake Sch. (2009) 176 Cal. App. 4th 836, 866, 98 Cal. Rptr. 3d 300*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a petition to compel arbitration of a claim under an unwaivable statutory or common law right when the arbitration agreement at issue provides for the safeguards listed in Paragraph A. These safeguards or minimum requirements were first established in a case involving a claim under California's Fair Employment and Housing Act (*Gov. Code § 12900 et seq.*), and have been explicitly extended to claims under *Lab. Code § 970* (misrepresentation inducing employee to move to accept employment) (Optional Paragraph G) and to the common law cause ofaction for termination of employment for a reason contrary to public policy (Optional Paragraph F). Nevertheless, the authorities also speak in terms of unwaivable rights, whatever their source. If the requirement with

respect to discovery, an award that includes findings and conclusions, or imposition of forum costs on the petitioner is not expressly provided by the agreement, counsel should stipulate to them and/or include the relevant optional paragraph providing for those safeguards to be implied based on the agreement to arbitrate. The bracketed language at the end of optional Paragraph D regarding the federal law and cases is from *Little v. Auto Stiegler, Inc. (2003) 29 Cal. 4th 1064, 130 Cal. Rptr. 2d 892, 63 P.3d 979* (discussed at [3][d], *below*) and should be used if counsel expects a challenge based on the Federal Arbitration Act or cases interpreting the FAA. Optional Paragraphs H and I are for use if rights are sought to be vindicated under either the Consumer Legal Remedies Act or the Vehicle Leasing Act. Optional Paragraph J addresses the cost-shifting mechanism to be applied in a consumer case. This form is not intended to be a complete memorandum, but is to be combined with the form at *§ 20.10* and any others applicable to the particular situation [*see, e.g., §§ 20.20, 20.21*].

Optional Paragraphs L through O are for use to support the contention that claims under those statutes are subject to the minimum *Armendariz* requirements. Optional Paragraph P is for use to support the contention that an immediate hearing regarding allocation of arbitral fees and expenses is necessary to allow the claimant to go forward in arbitration to vindicate unwaivable statutory claims. It will be most useful when the claimant must pay a large fee in order to initiate the arbitration process.

Note that *Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669* was decided at a time when the issue of whether the Federal Arbitration Act applied to employment contracts, with respect to which the Ninth Circuit maintained the minority position that it does not [*see Craft v. Campbell Soup Co. (9th Cir. 1998) 177 F.3d 1083]* , and was before the 2001 United States Supreme Court case of *Circuit City Stores, Inc. v. Adams (2001) 532 U.S. 105, 121 S. Ct. 1302, 149 L. Ed. 2d 234* which has abrogated the Ninth Circuit position. As discussed at [3][a], *below*, *Armendariz* avoided the issue by determining the primary issue under the *California Arbitration Act (Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 97-98, 99 Cal. Rptr. 2d 745, 6 P.3d 669*) although *Little v. Auto Stiegler, Inc. (2003) 29 Cal. 4th 1064, 130 Cal. Rptr. 2d 892, 63 P.3d 979* (discussed at [3][a] and [d], *below*) did consider arguments based on the Federal Arbitration Act and cases interpreting it).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, argument should show that the arbitration clause at issue is broad enough to encompass FEHA claims and should specify the provisions that establish the required safeguards, or at least to not prohibit interpreting the agreement to imply the necessary safeguards.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement)].

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For forms regarding claims by employees whose employment was terminated for a reason contrary to public policy, see Ch. 100, *Employer and Employee: Wrongful Termination and Discipline* .

[d] Opposing Memoranda

For a form to oppose this one and establish that arbitration of claims involving unwaivable rights cannot be compelled because the particular arbitration agreement does not contain the safeguards necessary to vindicate those rights, see *Ch. 20A, Arbitration: Resisting, § 20A.22*.

[3] Discussion of Authorities

[a] Requirements for Arbitration of Unwaivable Statutory or Common Law Right

Plaintiff in ***Little v. Auto Stiegler, Inc.*** *(2003) 29 Cal. 4th 1064, 130 Cal. Rptr. 2d 892, 63 P.3d 979* , sued his former employer for tortious demotion in violation of public policy; tortious termination in violation of public policy; breach of an implied contract of continued employment; and breach of the implied covenant of good faith and fair dealing, claiming defendant had first demoted him, and then terminated his employment, for investigating and reporting warranty fraud. In the first three causes of action, plaintiff sought compensatory and punitive damages. Defendant moved to compel arbitration pursuant to an arbitration provision, the primary provision of which are set out two paragraphs below. That motion was granted. After *Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669* was decided, plaintiff sought reconsideration; and the trial court denied arbitration, in part because the arbitration agreement required plaintiff to share the costs. The court of appeal reversed, finding that *Armendariz* did not apply to nonstatutory claims, thatthe arbitration provision was not unconscionable, and further, that under *Green Tree Financial Corp. v. Randolph (2000) 531 U.S. 79, 121 S. Ct. 513, 148 L. Ed. 2d 373* , silence as to who would bear the costs of arbitration was not a basis for invalidating the agreement. The California Supreme Court granted review.

The Supreme Court affirmed in part and reversed in part, and case remanded with instructions. The Supreme Court considered four issues:

- Was the provision for review of an arbitration award of more than $50,000 by a second arbitrator, unconscionable? (The entire Court held it was.)

- Should the unconscionable arbitral review provision be severed? (The entire Court held it should.)

- Do the *Armendariz* minimum requirements for arbitration of unwaivable statutory claims apply also to claims, such as in this case, by an employee who alleges he or she was terminated in violation of public policy? (The Court held by a four-to-three margin that those minimum requirements were applicable.)

- Must the requirement, imposed by *Armendariz*, that an employer imposing mandatory arbitration on the employee pay all costs unique to arbitration be reconsidered and revised in light of *Green Tree*? (The Court decided by the same four-to-three margin that revision was not necessary.)

Only the last third issue is discussed here. The portion of the opinion considering the unconscionability of the arbitral

review provision is discussed at *Ch. 20A, Arbitration: Resisting, § 20A.91*. The portion of the opinion considering severance of the arbitral review provision is discussed at *§ 20.86[3][a]*. The portion of the opinion considering the imposition of all arbitral costs on the employer is discussed at [d], *below*. The arbitration provision stated in relevant part that any disputes between the parties, (including claims of discrimination and harassment) whether based on tort, contract, statutory, or equitable law, be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act (FAA), in conformity with the procedures of the California Arbitration Act (*Code Civ. Proc. § 1280 et seq.*, including section *1283.05* and all of the act's other mandatory and permissive rights to discovery); provided, however, that: In addition to requirements imposed by law, any arbitrator must be a retired California Superior Court Judge and subject to disqualification on the same grounds as would apply to a judge of a superior court. To the extent applicable in civil actions in California courts, the following were to be applied and observed: all rules of pleading, all rules of evidence, all rights to resolution of the dispute by means of resolution by means of motions for summary judgment, judgment on the pleadings, and judgment under *Code Civ. Proc. § 631.8*. Resolution of the dispute had to be based solely on the law governing the claims and defenses pleaded, and the arbitrator could not invoke any basis other than controlling law, including but not limited to, notions of "just cause." Awards exceeding $50,000.00 had to include the arbitrator's written reasoned opinion and, at either party's written request within 20 days after issuance of the award, could be subject to reversal and remand, modification, or reduction following review of the record and arguments of the parties by a second arbitrator who had to proceed according to the law and procedures applicable to appellate review by the California Court of Appeal of a civil judgment following court trial.

The Supreme Court referred to plaintiff's claims of demotion and termination of employment contrary to public policy as "*Tameny* claims," noting that *Tameny v. Atlantic Richfield Co. (1980) 27 Cal. 3d 167, 178, 164 Cal. Rptr. 839, 610 P.2d 1330* first impinged an employer's power to terminate employees at will by imposing the condition that employment not be terminated for a reason that is contrary to public policy (*29 Cal. 4th 1064, 1083-1084)* . Plaintiff argued that his *Tameny* claims were subject to the minimum requirements set out in *Armendariz*, which considered claims under the Fair Employment and Housing Act (*Gov. Code § 12900 et seq.*). The Supreme Court agreed, and recited those minimum requirements as follows (*29 Cal. 4th 1064, 1084)* :

- The arbitration agreement may not limit the damages normally available under the statute;
- There must be discovery sufficient to arbitrate the statutory claim adequately;
- There must be a written arbitration decision and judicial review sufficient to ensure the arbitrators comply with the requirements of the statute; and
- The employer must pay all types of costs that are unique to arbitration.

Those requirements were founded on the premise that certain statutory rights are unwaivable (*29 Cal. 4th 1064, 1084)* . This unwaivability derives from *Civ. Code §§ 1668, 3513* (*29 Cal. 4th 1064, 1084-1085)* . *Tameny* claims are almost by definition unwaivable (*29 Cal. 4th 1064, 1085)* . The basis for such a claim must be public in that it affects society at large rather than the individual. Thus, a legitimate *Tameny* claim is designed to protect a public interest and therefore cannot be contravened by a private agreement. Accordingly, because an employer cannot ask the employee to waive *Tameny* claims, it also cannot impose on the arbitration of those claims burdens or procedural shortcomings that would preclude their vindication. Thus, the *Armendariz* requirements are as appropriate to the arbitration of *Tameny* claims as to unwaivable statutory claims (*29 Cal. 4th 1064, 1086)* .

The Court then discussed at length *Brown v. Wheat First Securities, Inc. (D.C. Cir. 2001) 257 F.3d 821* (*Brown*), which came to a contrary conclusion with respect to a claim for termination in violation of public policy under District of Columbia law than did *Cole v. Burns Int'l Sec. Servs. (D.C. Cir. 1997) 105 F.3d 1465* , (*Cole*), a case on which *Armendariz* relied, and which set forth requirements for arbitrating claims under title VII of the Civil Rights Act of 1964 similar to the *Armendariz* requirements [*See Armendariz* discussion *below* and at [d], *below*]. *Brown* decided that

those requirements should be limited to federal statutory claims, not state tort claims derived from common law, such as a *Tameny* claim. In deciding not to extend *Cole* statutory claims, the *Brown* court believed any other result would be inconsistent with the FAA (*29 Cal. 4th 1064, 1089)* . Four of the California Supreme Court Justices disagreed with *Brown,* at least insofar as it would preclude extension of the *Armendariz* requirements to *Tameny* claims. The majority felt the underlying rationale, in both *Cole and Gilmer v. Interstate/Johnson Lane Corp. (1991) 500 U.S. 20, 26, 111 S. Ct. 1647, 114 L. Ed. 2d26* (by agreeing to arbitrate a statutory claim, one does not forgo the substantive rights afforded by the statute; *Gilmer,* considered by both *Armendariz* and *Brown* and discussed at *§ 20.21[3][a]* and *[d]*) would apply equally to nonstatutory public rights. Those justices also believed *Brown*'s position that only federal statutory rights could be subject to *Cole*'s requirements, because any attempt to place conditions on arbitration based on state law would be preempted by the FAA, was incorrect because the FAA recognizes that an arbitration agreement is unenforceable on grounds that exist at law or equity for the revocation of any contract [*see 9 U.S.C. § 2*] (*29 Cal. 4th 1064, 1090)* . One such ground for refusing to enforce a contractual term is that it would force a party to forgo unwaivable public rights. The Court noted application of this rule to an employment contract that required the employee to waive claims for asbestos exposure (*29 Cal. 4th 1064, 1091)* .

The Court stated that the *Armendariz* requirements are applications of general state law contract principles regarding the unwaivability of public rights to the context of arbitration, and thus, are not preempted by the FAA. Further, under this logic, there is no need to distinguish between unwaivable statutory rights and unwaivable rights derived from common law (*29 Cal. 4th 1064, 1092)* . The object of the *Armendariz* requirements, is not to compel adjudication in place of arbitration, but to ensure minimum standards of fairness in arbitration so that employees subject to mandatory arbitration agreements can vindicate their public rights in an arbitral forum (*29 Cal. 4th 1064, 1093)* . After some discussion of the issue of costs [*see* [d], *below*], the Court concluded that the *Armendariz* requirements should be applied to an employee seeking to arbitrate a *Tameny* claim (*29 Cal. 4th 1064, 1076-1077)* . Those requirements include the availability of damages, including punitive damages; discovery sufficient to arbitrate the *Tameny* claim adequately; a written arbitration decision and judicial review sufficient to ensure that arbitrators have complied with the law respecting the claims, and allocation of arbitration costs so they will not unduly burden the employee. The Court found the agreement here sufficient, except as cost-sharing (*29 Cal. 4th 1064, 1077)* .

Plaintiffs in ***Armendariz v. Foundation Health Psychcare Services, Inc.*** *(2000) 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669* , had been required, as a condition of their employment, to sign an arbitration agreement that provided their claims of wrongful termination, but no claims of the employer/defendant, would be submitted to binding arbitration pursuant to *Code Civ. Proc. § 1280 et seq.* In that arbitration, their remedies were limited to recovery of a sum equal to the wages that would have been earned from the date of any discharge until the date of the arbitration award; they were not entitled to any other remedy, at law or in equity, including reinstatement and/or injunctive relief. Plaintiffs alleged a cause of action for violation of the Fair Employment and Housing Act ("FEHA" *Gov. Code § 12900 et seq.*) and three additional causes of action for wrongful termination based on tort and contract theories of recovery. The complaint sought general damages, punitive damages, injunctive relief, and the recovery of attorney fees and costs of suit. Defendant moved to compel arbitration. Plaintiffs claimed the arbitration agreement was unconscionable. The trial court agreed. Defendant appealed. The court of appeal reversed, finding that although the contract was one of adhesion and that the damages provision was unconscionable and contrary to public policy, the rest of the arbitration agreement should be enforced. The Supreme Court granted review.

The Supreme Court agreed with the trial court, reversed the court of appeal decision, and remanded to the court of appeal with directions to affirm the judgment of the trial court (*24 Cal. 4th 83, 127)* . The Supreme Court concluded that FEHA claims are in fact arbitrable *if* the arbitration permits an employee to vindicate his or her statutory rights. Such vindication, at a minimum, requires neutrality of the arbitrator, the provision of adequate discovery, a written decision that will permit a limited form of judicial review, and limitations on the costs of arbitration (*24 Cal. 4th 83, 90-91)* . The Court found several provisions of the arbitration agreement to be unconscionable, because they failed to meet the minimum requirements, because the arbitration agreement was not bilateral, and because the damages limitation that was contrary to public policy. Further, the unconscionable provisions rendered the entire arbitration

agreement unenforceable (*24 Cal. 4th 83, 91)* .

First, the Court found *Duffield v. Robertson Stephens & Co. (9th Cir. 1998) 144 F.3d 1182* , which held that the Civil Rights Act of 1991 (Pub. L. No. 102-166, 105 Stat. 1071, prohibits the enforcement of mandatory employment agreements to arbitrate claims under Title VII of the Civil Rights Act of 1964, or equivalent state antidiscrimination statutes, such as the FEHA, to be unpersuasive and concluded that nothing in the 1991 Act prohibits mandatory employment arbitration agreements that encompass state and federal antidiscrimination claims (*24 Cal. 4th 83, 93-96)* . Then, the Court stated that it need not decide the issue of whether the Federal Arbitration Act applies to employment contracts (*24 Cal. 4th 83, 97)* . The Ninth Circuit in *Craft v. Campbell Soup Co. (9th Cir. 1998) 177 F.3d 1083* , has held that the FAA does not apply to employment contracts. That minority position was, at the time of the *Armendariz* decision, before the United States Supreme Court, but has since been overruled (*see Circuit City Stores, Inc. v. Adams (2001) 532 U.S. 105, 121 S. Ct. 1302, 149 L. Ed. 2d 234*). However, because, the California Arbitration Act ("CAA"), specifically *Code Civ. Proc. § 1280(a)*, defines the term "agreement," to include "agreements between employers and employees or between their respective representatives," and because the general reasons for refusing to enforce an arbitration agreement would be the same under the FAA or the CAA, the Court proceeded with its analysis (*24 Cal. 4th 83, 97-98)* . The Court found nothing in the language or the legislative history of the FEHA to suggest it was intended to prohibit arbitration, nor did the Court find any inherent conflict between FEHA's important protections against discrimination and arbitration (*24 Cal. 4th 83, 98)* .

The Court discussed *Cole v. Burns Int'l Sec. Servs. (D.C. Cir., 1997) 105 F.3d 1465, 1482* , which set forth five requirements of a mandatory arbitration agreement to vindicate the employee's statutory rights under Title VII. The agreement is enforceable if it "(1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all of the types of relief that would otherwise be available in court, and (5) does not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to thearbitration forum" (*24 Cal. 4th 83, 101-102)* . The Court said that the neutrality of the arbitrator was not at issue in this case, but that the arbitration agreement failed to measure up to the Cole requirements in all other respects (*24 Cal. 4th 83, 103)* .

The Court discussed each element individually; the damages limitation was contrary to public policy and unlawful (*24 Cal. 4th 83, 103-104)* .

Without deciding whether the employees in this case were entitled to the full range of discovery provided in *Code Civ. Proc. § 1283.05*, the Court said they were at least entitled to discovery sufficient to adequately arbitrate their statutory claim, including access to essential documents and witnesses, as determined by the arbitrator(s) and subject to limited judicial review pursuant to *Code Civ. Proc. § 1286.2*. The Court also held that the employer, by agreeing to arbitrate the FEHA claim, had already impliedly consented to sufficient discovery. Therefore, lack of discovery was not grounds for holding the FEHA claim inarbitrable (*24 Cal. 4th 83, 104-106)* .

As to the written award element, the Court limited its holding to require the arbitrator to issue a written arbitration decision that will reveal, however briefly, the essential findings and conclusions on which the award is based. While written findings and conclusions are not required under the CAA [*see Code Civ. Proc. § 1283.4*], nothing in the present arbitration agreement precluded such written findings, and to the extent it applies to FEHA claims, the agreement must be interpreted to provide for those findings. In all other respects, the employees' claim that they are unable to vindicate their FEHA rights because of inadequate judicial review of an arbitration award was premature (*24 Cal. 4th 83, 106-107)* .

As to the element of costs, the Court said that for arbitration to be an adequate substitute for litigation of FEHA claims, employees cannot be compelled to resolve their antidiscrimination claims in a forum in which they must pay for what is the equivalent of the judge's time and the rental of the courtroom. FEHA implicitly prohibits such costs; and the default provisions of *Code Civ. Proc. § 1284.2* do not displace that prohibition. Therefore, a mandatory employment arbitration

agreement that requires arbitration of FEHA claims impliedly obliges the employer to pay all types of costs that are unique to arbitration; and the absence of specific provisions on arbitration costs would not be grounds for denying the enforcement of an arbitration agreement (*24 Cal. 4th 83, 107-113)* .

Plaintiff in ***Fitz v. NCR Corp.*** *(2004) 118 Cal. App. 4th 702, 13 Cal. Rptr. 3d 88* , sued her former employer for damages for breach of contract, breach of the covenant of good faith and fair dealing, age discrimination in violation of the Fair Housing and Employment Act (FEHA; *Gov. Code § 12940 et seq.*) fraud, and violation of pubic policy. Defendant moved compel arbitration in accordance with its dispute resolution policy. The motion was denied, primarily because the policy did not allow for adequate discovery and required employees to arbitrate wrongful termination claims while exempting NCR from having to arbitrate its claims against employees. Defendant appealed.

The court of appeal affirmed (*118 Cal. App. 4th 702, 708)* . The court noted that a mandatory arbitration agreement in the context of an employee's public rights must meet the following minimum requirements (*118 Cal. App. 4th 702, 712-713)* :

- More than minimal discovery;
- A written award;
- It must permit all types of relief that would be available in court;
- No additional costs for the employee beyond what the employee would incur if he or she were bringing the claim in court; and
- Neutral arbitrators.

The portion of the opinion addressing the inadequacy of the discovery provision is discussed at Ch. 20A, *Arbitration: Resisting,* § 20A.122[3][c].

Plaintiff in ***Abramson v. Juniper Networks, Inc.*** *(2004) 115 Cal. App. 4th 638, 655, 9 Cal. Rptr. 3d 422* , sued his former employer for damages for breach of contract, wrongful termination, fraud, misrepresentation (misrepresentations and false promises, which induced plaintiff to leave his prior employer and join defendant), termination of employment in violation of public policy, unfair competition, and defamation, and for a declaration that the arbitration provision in his employment contract was unconscionable and unenforceable. The trial court ordered the parties to arbitration. The parties disagreed about who should pay the fees to initiate arbitration: in accordance with *Armendariz v. Foundation Health Psychcare Servs., Inc. (2000) 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669* (*Armendariz*), plaintiff claimed that defendant should pay the entire fee; defendant claimed that in accordance with the contract, each party should pay half of the fee. The American Arbitration Association (AAA) refused to act without payment. Plaintiff sought to be allowed to litigate the matter, but the trial court disagreed, saying *Armendariz* was not applicable because plaintiff had made no claim under the Fair Housing and Employment Act (FEHA; *Gov. Code § 12900 et seq.*). Plaintiff advanced $4,250--half of the initial fee, but could not pay the second bill, for an additional $6,450. Based on plaintiff's failure to make further payments, AAA terminated the arbitration proceedings. Defendant then moved for summary judgment on the ground that plaintiff had failed to exhaust his arbitration remedies. Summary judgment was granted and judgment entered thereon. Plaintiff appealed.

The court of appeal reversed, holding the arbitration agreement unconscionable and unenforceable in its entirety (*115 Cal. App. 4th 638, 668)* . The court of appeal first noted that, contrary to defendant's contention, the validity of the arbitration agreement was within the proper scope of review (*115 Cal. App. 4th 638, 648-649)* . The next step in the analysis, the court said, was to determine the nature of the claims involved--whether they implicated public or private rights--because different enforceability standards apply to different types of claims. If unwaivable public rights are

involved (whether statutory or non-statutory), the arbitration agreement must satisfy the minimum requirements set forth in *Armendariz* (*115 Cal. App. 4th 638, 652, 652-654)* :

- The agreement must provide for adequate discovery;
- It must require a written decision allowing limited judicial review;
- The agreement must permit the types of relief that would be available in court;
- It must limit the employee's forum costs; and
- As with all contractual arbitration, an agreement to arbitrate a public policy claim must provide for a neutral arbitrator.

Plaintiff in ***Fittante v. Palm Springs Motors, Inc.*** *(2003) 105 Cal. App. 4th 708, 129 Cal. Rptr. 2d 659* , quit a job in Beverly Hills job and moved his family to the desert on the strength of the defendant/employer's representations of plentiful work of the specialized kind that plaintiff performed. Those representations proved false, but plaintiff stayed on the job, at a reduced income, because he "had very little choice financially." After almost two years, defendant terminated plaintiff's employment, allegedly because plaintiff had defrauded a vehicle repair customer. Plaintiff sued employer for fraud in the inducement, defamation, and wrongful termination in violation of public policy under *Lab. Code § 970* (fraudulently inducing an employee to move to take employment). Defendant petitioned to compel arbitration based on an arbitration agreement in the employment application. The trial court granted the petition and stayed the action pending resolution by binding arbitration. Plaintiff then sought a clarifying order that the employer should be required to bear the entire cost of the arbitrator's fees because, although the arbitration agreement was silent on the matter, the action included a statutory rights claim. The trial court denied the motion to require the employer to pay the arbitrator's fees and dismissed plaintiff's action with prejudice. Plaintiff appealed.

The court of appeal reversed. Plaintiff argued that the arbitration agreement was too vague to be valid or enforceable and that it constituted an unconscionable adhesion contract. The court of appeal concluded that the arbitration agreement was not unlawfully vague, that it was an adhesion contract, but except as to the "appeal" provision, which was severable, was not unconscionable, and that because of a claim based on unwaivable statutory rights under *Lab. Code § 970*, the employer had to bear the cost of the arbitrator's fees (*105 Cal. App. 4th 708, 710, 714-715)* . Defendant claimed the requirements imposed by *Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669* (hereinafter *Armendariz,* discussed *above*) were not applicable here, because *Armendariz* applied only to claims under the Fair Employment and Housing Act (*Gov. Code § 12900 et seq.*) (*105 Cal. App. 4th 708, 717)* . Those requirements mandate the following minimum procedural requirements. The arbitration agreement must do all of the following (*105 Cal. App. 4th 708, 717, 720-721)* :

- Provide for neutral arbitrators,
- Provides for more than minimal discovery,
- Require a written award,
- Provides for all of the types of relief that would otherwise be available in court, and
- Not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum.

The court of appeal acknowledged that although some statutory rights may be waived, others are deemed unwaivable,

specifically statutory rights established for a public reason cannot be waived or otherwise contravened by a private agreement (*105 Cal. App. 4th 708, 717-718)* . The court found that *Lab. Code § 970* was enacted "for a public reason," and to vindicate a public policy. Although its original purpose was to protect migrant workers from the abuses by unscrupulous employers and potential employers, the language of the statute is by no means restricted to agricultural laborers, and has been properly applied to other kinds of employment. The court of appeal noted that an employee's rights under *Lab. Code § 970* had previously been held unwaivable in *Mercuro v. Superior Court (2002) 96 Cal. App. 4th 167, 116 Cal. Rptr. 2d 671* (discussed in *Ch. 20A, Arbitration: Resisting, § 20A.91[3][c],* arbitration agreement found unconscionable and unenforceable) (*105 Cal. App. 4th 708, 719)* . Consequently, an employee's statutory rights under *Lab. Code § 970* are subject to *Armendariz* analysis. That is, any mandatory arbitration of employee grievances must be capable of vindicating the statutory right protected by *Lab. Code § 970* (*105 Cal. App. 4th 708, 719-720)* . After consideration of plaintiff's claims of unconscionability and severance of the unconscionable appeal provision, discussed at *Ch. 20A, Arbitration: Resisting, § 20A.91[3][e]* and *§ 20.86[3][a],* respectively, the court of appeal reversed and remanded with directions that the order for arbitration be modified to indicate that the employer must pay the costs of arbitration, and that the appeal clause of the arbitration agreement not be enforced (*105 Cal. App. 4th 708, 727)* .

The court of appeal found the agreement here passed muster under *Armendariz* (*105 Cal. App. 4th 708, 720)* :

- The agreement incorporated the arbitration rules of the Federal Arbitration Act, and the procedures of the California Arbitration Act, each of which requires neutral arbitrators. Further, the agreement provided that any arbitrator selected be a retired California superior court judge, thus trained and well-versed in the precepts and practices of neutral decision-making (*105 Cal. App. 4th 708, 721)* .

- By virtue of stating that arbitration be conducted in conformity with the procedures of the California Arbitration Act (*Code Civ. Proc. § 1280 et seq.*, including section 1283.05 and all other rights to discovery), the agreement provided for more than minimal discovery (*105 Cal. App. 4th 708, 721-722)* .

- By virtue of incorporating *Code Civ. Proc. § 1283.4,* the arbitration agreement required a written award (*105 Cal. App. 4th 708, 722)* .

- The agreement implicitly complies with the requirement under *Armendariz* that all types of relief otherwise available in court be afforded to vindicate plaintiff's statutory rights (*105 Cal. App. 4th 708, 722-723)* .

- Although the court of appeal acknowledged the sticking point was the *Armendariz* requirement that the employee not be required to bear unreasonable costs or to pay arbitrators' fees as a condition of access to the arbitral forum, and found that the trial court erred in ordering otherwise (*105 Cal. App. 4th 708, 723)* ; it concluded that because the agreement itself was silent on thepayment of arbitration fees, and *Code Civ. Proc. § 1284.2* (fees to be shared pro rata unless agreement provides otherwise), is a default provision which must yield to a more specific legislative intent, the agreement could be construed consistent with the dictates of *Armendariz* (*105 Cal. App. 4th 708, 728-729)* .

The facts and procedural background of ***Craig v. Brown & Root, Inc.*** *(2000) 84 Cal. App. 4th 416, 100 Cal. Rptr. 2d. 818* , are discussed at *§ 20.10[3][a]*. Turning to plaintiff's contention that the arbitration agreement was unconscionable, the court said that *Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 91, 99 Cal. Rptr. 2d 745, 6 P.3d 669* held that mandatory employment arbitration agreements are enforceable if the arbitration permits the employees to vindicate their statutory rights; that is, if the arbitration meets certain minimum requirements, including neutrality of the arbitrator, the provision of adequate discovery, a written decision that will permit a limited form of judicial review, and limitations on the costs of arbitration. The court concluded that defendant's arbitration program meets those requirements (*84 Cal. App. 4th 416, 422-423)* :

- It provides for a neutral arbitrator.

- The cost to the employee is a mere $50, substantially less than the filing fee for a superior court action. The balance is paid by defendant. Those employees who choose to have a lawyer involved in the process can receive up to $2,500 from defendant for that purpose.

- Adequate discovery is available (apparently by virtue of the implied agreement set forth in *Armendariz*).

- All remedies (punitive damages, attorney's fees, injunctive relief, and so on) that would be available in court are available in the arbitration. The arbitration brochure stated: "If you win, you can be awarded anything you might seek through a court of law."

- The arbitrator is required to issue a written award that is subject to judicial review.

- All claims must be arbitrated.

Plaintiff in ***Camargo v. California Portland Cement Company*** *(2001) 86 Cal. App. 4th 995, 103 Cal. Rptr. 2d 841* submitted her grievances based on sex discrimination and sexual harassment to arbitration pursuant to a collective bargaining agreement that required arbitration of any dispute, difference, or grievance between the company and an employee. Although the CBA stated that employer would not discharge or discriminate against any employee because of that employee's race, color, religion, age, sex, or national origin, it did not cite or refer to any federal or state anti-discrimination statute. The arbitrator ruled against plaintiff and the award was confirmed in federal district court. Plaintiff then sued in state court alleging, among others, claims for sex discrimination and sexual harassment under California's Fair Employment and Housing Act (FEHA; *Gov. Code § 12940(h)* and *(i)*). Defendants demurred, contending that the FEHA claims were collaterally estopped by the arbitration award. The trial court sustained the demurrer. Plaintiff appealed.

The court of appeal reversed, finding that the record before them did not show that the arbitration was conducted pursuant to procedures that allowed for the full litigation and fair adjudication of the FEHA claims (*86 Cal. App. 4th 995, 999, 1018-1019, 1021)* .

[b] Implied Agreement to Adequate Discovery

Armendariz v. Foundation Health Psychcare Services, Inc. *(2000) 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669* , is discussed at [a], *above.*

[c] Agreement Interpreted to Require Findings and Conclusions in Award

Armendariz v. Foundation Health Psychcare Services, Inc. *(2000) 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669* , is discussed at [a], *above.*

Fittante v. Palm Springs Motors, Inc. *(2003) 105 Cal. App. 4th 708, 129 Cal. Rptr. 2d 659* , is discussed at [a], *above.*

[d] Agreement Interpreted to Require Employer to Pay Forum Costs of Arbitration

The facts and procedural background of ***Little v. Auto Stiegler, Inc.*** *(2003) 29 Cal. 4th 1064, 130 Cal. Rptr. 2d 892, 63 P.3d 979* , and the portion of the opinion considering the application of the *Armendariz* minimum requirements in

general to a *Tameny* claim are discussed at [a], *above.* Specifically, with regard to arbitration costs, the principle that arbitration costs may prevent arbitration claimants from pursuing their public rights effectively would apply with equal force to *Tameny* claims as to FEHA claims or to federal statutory claims. Nothing in the FAA prevents states from controlling arbitration costs imposed by adhesive contracts so that the remedy of prosecuting state statutory or common law public rights through arbitration is not rendered illusory (*29 Cal. 4th 1064, 1093)* .

Nothing in the United States Supreme Court case law lead the majority to believe that a state requirement shifting arbitration costs in mandatory employment agreements to the employer pursuant to established state law contract doctrine violates the FAA (*29 Cal. 4th 1064, 1094)* . As in *Armendariz*, the majority found *Code Civ. Proc. § 1284.2* (which provides that each party bear a pro rata share of costs unless the agreement provides otherwise) no bar to imposing proportionally greater costs on the employer (*29 Cal. 4th 1064, 1094-1095)* . Thus, an agreement to arbitrate a claim of wrongful termination contrary to public policy must be interpreted to include implicitly an agreement to proportion costs in a manner that is reasonable for the employee/claimant in order to prevent the de facto waiver of unwaivable rights (*29 Cal. 4th 1064, 1095-1096)* .

With respect to the arbitration agreement's silence on the issue of costs, plaintiff contended such silence rendered the agreement unenforceable, while defendant contended that the *Armendariz*'s cost-shifting rule had been supplanted by the United States Supreme Court decision in *Green Tree*, discussed at *§ 20.21[3][f]* (*29 Cal. 4th1064, 1094-1095)* . The majority of the Court disagreed with both contentions. Certainly, silence on the issue of costs would not be grounds for denying enforcement of the agreement, but would instead require the employer to bear the costs unique to arbitral forum (*29 Cal. 4th 1064, 1095)* . The Court discussed *Green Tree* and cases interpreting it, mostly in the employment context (*29 Cal. 4th 1064, 1095)* , and came to the conclusion that while *Green Tree* and *Armendariz* agree on two fundamental tenets: that silence about costs in an arbitration agreement is not grounds for denying a motion to compel arbitration, and that arbitration costs can present significant barriers to the vindication of statutory rights, there might be significant differences between the two cases. Although *Green Tree* did not elaborate on the kinds of cost sharing arrangements that would be unenforceable, dicta in *Green Tree*, and several federal cases interpreting it, suggested that federal law requires only that employers not impose "prohibitively expensive" arbitration costs on the employee, and that determination of whether such costs have been imposed are to be made on a case-by-case basis.

Armendariz, on the other hand, categorically imposes costs unique to arbitration on employers when unwaivable rights pursuant to a mandatory employment arbitration agreement are at stake (*29 Cal. 4th 1064, 1095)* . The Court reiterated its finding that *Armendariz*'s cost-shifting requirements were not preempted by the FAA; nor was it a barrier to the enforcement of arbitration agreements, nor did it improperly disfavor arbitration in comparison to other contract clauses. Rather, it was derived from state contract law principles regarding the unwaivability of certain public rights in the context of a contract of adhesion (*29 Cal. 4th 1064, 1095)* . Further, the Court noted it had rejected the case-by-case approach to apportionment of costs in *Armendariz* because the individualized consideration of an employee's ability to pay arbitration costs would further complicate the case-by-case calculation of prohibitive expense (*29 Cal. 4th 1064, 1095)* . Similarly, *Armendariz* considered and rejected the notion that there was an advantage to apportioning arbitration costs at the conclusion of the arbitration rather than at the outset, believing that postarbitration apportionment would create a sense of risk and uncertainty among employees that could discourage the arbitration of meritorious claims (*29 Cal. 4th 1064, 1095)* . The majority saw no reason to reevaluate these conclusions in light of *Green Tree* and its progeny (*29 Cal. 4th 1064, 1095)* . The majority concluded that it did not believe that the FAA required state courts to adopt precisely the same means as federal courts to ensure that the vindication of public rights would not be stymied by burdensome arbitration costs, and continued to believe that *Armendariz* represents the soundest approach to the problem of arbitration costs in the context of mandatory employment arbitration. On remand the Court directed the trial court to require the employer to pay all types of costs that are unique to arbitration (*29 Cal. 4th 1064, 1095)* .

Armendariz v. Foundation Health Psychcare Services, Inc. *(2000) 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669* , is discussed at [a], *above.* In the beginning of its discussion of the costs issue, the Court again referred to *Cole v.*

Burns Int'l Sec. Servs. (D.C. Cir., 1997) 105 F.3d 1465, 1484 , and noted that *Cole* considered the following fees that an employee might be obliged to pay: arbitrators' fees ranging from $500 to $1,000 per day or more, a $500 filing fee, and administrative fees of $150 per day, in addition to room rental and court reporter fees (*24 Cal. 4th 83, 107-108)* . The Court further noted its decision in *California Teachers Assn. v. State of Cal. (1999) 20 Cal. 4th 327, 355-356, 84 Cal. Rptr. 2d 425, 975 P.2d 622* as precedent for requiring the other party to pay administrative costs to vindicate statutory rights and as confirming the principle that statutory or constitutional rights may be transgressed as much by the imposition of undue costs as by outright denial (*24 Cal. 4th 83, 109)* .

The facts and procedural background of ***Abramson v. Juniper Networks, Inc.*** *(2004) 115 Cal. App. 4th 638, 9 Cal. Rptr. 3d 422* , are discussed at [a], *above.* The portion of the opinion refusing to imply an agreement that employer pay all arbitral costs is discussed in Ch. 20A, *Arbitration: Resisting,* § 20A.122[3][a].

[e] ***Armendariz*** May Be Applied Retroactively

Plaintiff in ***Blake v. Ecker*** *(2001) 93 Cal. App. 4th 728, 113 Cal. Rptr. 2d 422* , worked for defendant. She claimed sexual harassment and that despite her complaints her harasser, rather than she, was allowed to remain employed, while she was fired, on April 28, 1998. On September 10, 1998, she filed her complaint, which contained six causes of action, including one for violation of the Fair Employment and Housing Act (FEHA; *Gov. Code, § 12940 et seq.*). Her complaint also included a demand for a jury trial, but her employment agreement contained an arbitration clause. Defendants moved to compel arbitration. Plaintiff argued the FEHA claim was not subject to arbitration. The motion to compel arbitration was granted on December 3, 1998, and plaintiff's action was ordered stayed pending the arbitration. The next day, December 4, 1998, the Court of Appeal issued its decision in a case entitled *Armendariz v. Foundation Health Psychcare Services, Inc.*, which held that an employer-imposed contractual agreement for arbitration was enforceable, even if it lacked a mutuality of remedies. On March 9, 1999, the California Supreme Court granted review.

While *Armendariz* was pending before the Supreme Court, neither party took any action to initiate the arbitration proceedings ordered by the trial court. On August 24, 2000, the Supreme Court handed down its decision in *Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669* . On October 26, 2000, defendants filed a motion with the trial court to dismiss plaintiff's complaint for failure to prosecute pursuant to *Code Civ. Proc. §§ 583.410* and *583.420* and former Cal Rules of Ct., Rules 372 and 373 [*see now Cal. Rules of Ct., Rules 3.1340* and *3.1342*], arguing that plaintiff had never sought to commence the arbitration, that more than two years had elapsed since plaintiff had commenced the action, and that they had been prejudiced by the delay. Plaintiff filed a motion for an order vacating the prior order compelling arbitration and staying the action, arguing (1) that at the time the motion to compel was heard (Dec. 2, 1998), there was a split of authority on the validity of employment arbitration agreements, (2) that *Armendariz* resolved the issue, (3) and that in accordance with that decision, her arbitration agreement was unenforceable. Therefore, plaintiff contended, the trial court should vacate its original order compelling arbitration and lift the stay of proceedings so that her action could go forward. The motions were heard on the same day. The trial court granted the motion to dismiss and refused to consider plaintiff's motion considering itmoot, given the dismissal. Plaintiff appealed.

The court of appeal reversed, concluding that once the trial court granted defendants' motion to compel arbitration, it no longer had jurisdiction to hear or rule on defendants' motion to dismiss (*93 Cal. App. 4th 728, 733)* . That portion of the opinion is discussed in *Ch. 20D, Arbitration: Dismissing, § 20D.20[3][a]*. Because the trial court should have ruled on plaintiff's motion to vacate the prior order to compel arbitration in light of the Supreme Court's then recent decision in *Armendariz*, the court of appeal also considered, and held that, *Armendariz* must be applied retroactively (*93 Cal. App. 4th 728, 733)* . The court of appeal noted that on remand, the critical question before the trial court will be whether *Armendariz* applies to make the parties' arbitration agreement unenforceable. The first issue as to the applicability of *Armendariz* is retroactivity. For the guidance of the trial court, and in the interests of judicial economy, the court of appeal chose to shall resolve that issue of law. The court noted that the general rule is that judicial decisions are given retroactive effect, although courts sometimes make an exception to this general rule when the decision changed a settled

rule on which the parties had relied. But when a court is merely deciding a legal question, not changing a previously settled rule, there is no reason not to apply a judicial decision to a pending case. While a court might decide not to apply a new Supreme Court decision that overrules an appellate court decision that predated an arbitration, it would be much more likely to deny retroactive application to a Supreme Court decision that overruled an earlier Supreme Court decision (*93 Cal. App. 4th 728, 740)* . It would be even more likely to deny retroactive effect to a decision that disapproved of a long-standing and widespread practice expressly approved by a near-unanimous body of lower court authorities (*93 Cal. App. 4th 728, 740-741)* . Here, however, there was no "settled rule" as to whether, and under what circumstances, an employer/employee arbitration agreement was enforceable, nor was the enforcement of such agreements, regardless of their terms, something that had become " 'a long-standing and widespread practice expressly approved by a near-unanimous body of lower court authorities.' " Rather, this was an unresolved issue pursued by parties, representing opposing points of view, who were determined to obtain a final decision on the matter from the highest court of this state. The decision in *Armendariz* was the result of this legal battle. Thus, under settled principles, *Armandariz* may be applied retroactively (*93 Cal. App. 4th 728, 741)* .

[f] ***Armendariz*** Minimum Requirements Apply to ***Tameny*** Claims

Little v. Auto Stiegler, Inc. *(2003) 29 Cal. 4th 1064, 130 Cal. Rptr. 2d 892, 63 P.3d 979* , is discussed at [a], *above.*

Tameny v. Atlantic Richfield Co. *(1980) 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330* , is discussed in Ch. 100, *Employer and Employee: Wrongful Termination* .

The facts and procedural background of ***Abramson v. Juniper Networks, Inc.*** *(2004) 115 Cal. App. 4th 638, 9 Cal. Rptr. 3d 422* , are discussed at [a], *above.* The portion of the opinion addressing application of the Armendariz standards to Tameny claims is set forth at [k], below.

[g] ***Armendariz*** Minimum Requirements Apply to Claims Under Labor Code Section 970

Fittante v. Palm Springs Motors, Inc. *(2003) 105 Cal. App. 4th 708, 129 Cal. Rptr. 2d 659* , is discussed at [a], *above.*

[h] Consumer Legal Remedies Act Provides for Unwaivable Rights

Plaintiffs in ***Gutierrez v. Autowest, Inc.*** *(2004) 114 Cal. App. 4th 77, 7 Cal. Rptr. 3d 267* , responded to an advertisement by defendant and entered into a vehicle lease. The terms of the lease were different form the terms advertised, and plaintiffs, believing they were the victims of a "bait and switch," sued, for themselves and for others similarly situated, for damages for fraud, negligent misrepresentation, violations of the Vehicle Leasing Act (Civ. Code § 2987.5 et seq.; "VLA"), the Unfair Competition Law (*Bus. & Prof. Code § 17200 et seq.*), the Consumer Legal Remedies Act (*Civ. Code § 1750 et seq.*; "CLRA"), and the false advertising law (*Bus. & Prof. Code § 17500 et seq.*). Though plaintiffs did not know it, the lease agreement required arbitration in accordance with the rules of the American Arbitration Association. Defendant moved to compel arbitration. Plaintiffs resisted arbitration on the ground that they could not afford to pay the initial arbitration fees, estimated to be $8,000. The trial court found the cost provision was not severable and denied the petition to compel arbitration. Defendant appealed.

The court of appeal reversed and remanded with directions to the trial court to reconsider the severance of the provision requiring a fee to initiate the arbitration process in accordance with the rules it discussed (*114 Cal. App. 4th 77, 86-87, 101)* . The court of appeal considered itself faced with two issues: whether the cost provision was unconscionable and whether the arbitration clause constituted a private agreement impairing the exercise of unwaivable statutory rights enacted for a public purpose. The court of appeal found the agreement both procedurally and substantively unconscionable. Substantive unconscionability resulted from the requirement that plaintiffs pay substantial fees to initiate arbitration without any method for them to obtain waiver of costs in excess of their ability to pay. Consumers

seeking to vindicate unwaivable statutory claims are entitled to protection from the imposition of unreasonable forum costs (*114 Cal. App. 4th 77, 86)* . While consumers seeking to vindicate unwaivable statutory claims cannot shift all arbitral costs to the nonconsumer party, the agreement cannot impose forum costs in excess of the consumer's ability to pay (*114 Cal. App. 4th 77, 86-87)* . The arbitration agreement imposed two classes of fees: those that had to be paid before any hearing was held and those imposed only after an arbitrator had exercised discretion to allocate them to a party (*114 Cal. App. 4th 77, 90)* . The portion of the opinion considering severability is discussed at *§ 20.86[3][a]*. The court cited *Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 100-101, 99 Cal. Rptr. 2d 745, 6 P.3d 669* (*Armendariz*) in addressing the defense of impairing unwaivable statutory rights, but did not discuss any of the *Armendariz* criteria except costs (*114 Cal. App. 4th 77, 94-95)* , perhaps because in its consideration of unconscionability, the court found plaintiffs had waived any instances of substantive unconscionability other than the cost provision by not raising them in the trial court (*114 Cal. App. 4th 77, 93)* . The court found that both the CLRA and theVLA were consumer protection statutes enacted for a public purpose and providing certain unwaivable rights. Thus, a consumer faced with an arbitration provision in attempting to vindicate his or her rights under those statutes may contest the arbitration provision on the basis that it contravenes public rights, a defense which is a generally available contract defense, and thus not preempted by the Federal Arbitration Act (*114 Cal. App. 4th 77, 95)* .

[i] Vehicle Leasing Act Provides for Unwaivable Rights

Gutierrez v. Autowest, Inc. *(2004) 114 Cal. App. 4th 77, 7 Cal. Rptr. 3d 267* , is discussed in [h], *above.*

[j] Arbitral Costs to Vindicate Rights Under Consumer Protection Statute

The facts and procedural background of ***Gutierrez v. Autowest, Inc.*** *(2004) 114 Cal. App. 4th 77, 7 Cal. Rptr. 3d 267* , are discussed in [h], *above.*

The court of appeal decided that it would imply in the arbitration clause an agreement that unaffordable fees will not be allocated to the consumer at any point in the arbitration process (*114 Cal. App. 4th 77, 83)* . The court of appeal noted that the *Armendariz* approach to the costs issue, which is to shift unique arbitral costs totally to the other party, has only been applied in the employer-employee context, and was unwilling to apply that approach in a consumer case (*114 Cal. App. 4th 77, 96-97)* . The court of appeal said in a consumer case, the consumer's ability to pay has to be decided on a case by case basis, with the consumer bearing the burden of proof. *Code Civ. Proc. § 1284.3(b)*, while not dispositive, and only applicable to indigents, provides direction (*114 Cal. App. 4th 77, 97)* . Noting that unaffordable fees the consumer must pay to initiate the process of arbitration of unwaivable rights are unconscionable, the court of appeal instructed the trial court to consider severing the provision requiring the consumer to post the administrative fee and enforce the remainder of the agreement (*114 Cal. App. 4th 77, 98-99)* . The arbitrator's fees alone in this case would average $2,500 per day. Although the AAA's own rules allow the arbitrator to allocate costs and expenses "as appropriate," the court of appeal suggested implying an agreement that unaffordable fees would not be allocated to the consumer (*114 Cal. App. 4th 77, 99)* . The court of appeal said if costs were allocated at the time of the award, the arbitrator would know the magnitude of those costs, the size of the award, what the consumers could afford, and whether there were other class members who could share the costs. The cost allocation could be reviewed on a petition to vacate or confirm the award. Although perhaps in excess of the review allowed by the California statutes governing review of an arbitration awards, the court of appeal felt sure this extended review was contemplated by both California and federal cases (*114 Cal. App. 4th 77, 100)* .

[k] ***Little*** May Be Applied Retroactively

The facts and procedural background of ***Abramson v. Juniper Networks, Inc.*** *(2004) 115 Cal. App. 4th 638, 9 Cal. Rptr. 3d 422* , are discussed at [a], *above.* *Little v. Auto Stiegler, Inc. (2003) 29 Cal. 4th 1064, 130 Cal. Rptr. 2d 892, 63 P.3d 979* (*Little*) was decided after the trial court in this case had granted summary judgment. Like *Little*, this case involved a *Tameny* claim for wrongful termination in violation of public policy (*115 Cal. App. 4th 638, 653* ;

Tameny v. Atlantic Richfield Co. (1980) 27 Cal. 3d 167, 178, 164 Cal. Rptr. 839, 610 P.2d 1330). Generally, a judicial decision is given retroactive effect unless that decision changed a settled rule on which the parties had relied. Because *Little* did not disturb a settled rule, the court of appeal failed to see any reason not to retroactively apply *Little* to this case (*115 Cal. App. 4th 638, 660)* . In fact, the court of appeal noted that the trial court itself acknowledged the law in this area was uncertain at the time summary judgment had been granted, given that *Little* was then pending in the Supreme Court. Noting that *Armendariz* had been applied retroactively, the court decided that *Little* also should be applied retroactively, thus making the *Armendariz* minimum requirements applicable to this case (*115 Cal. App. 4th 638, 653, 660-661)* .

[l] Armendariz Minimum Requirements Apply to Claims Under Franchise Investment Act

The facts and procedural background of ***Independent Assn. of Mailbox Center Owners, Inc. v. Superior Court (Mail Boxes Etc., USA, Inc.)*** *(2005) 133 Cal. App. 4th 396, 34 Cal. Rptr. 3d 659* , and the portion of the opinion considering consolidation of the arbitrations is discussed at *§ 20.13[3][f]*. The portion of the opinion addressing the limitations on statutory remedies awardable by the arbitrator is discussed at *Ch. 20A, Arbitration: Resisting, § 20A.91[3][l]*. The trial court refused to allocate the costs of arbitration, finding that the franchisees had failed to show it would be impossible for them to afford arbitration. Franchisees claimed this was error under *Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669* (*Armendariz*), discussed at *§ 20.23[3][a]*. The court had previously, noted and stated again that the franchisee/franchisor situation was similar to the employer/employee situation in that the franchisees' livelihoods were involved and they had relatively less bargaining power. To qualify as a claim that will justify a cost-shifting order, a statutory right must be involved, and that right must invoke substantive and procedural rights not just for the benefit of the individual claimant, but also for public purposes. The court discussed various statutes which have been held to warrant fee-shifting orders and *Boghos v. Certain Underwriters of Lloyd's of London (2005) 36 Cal. 4th 495, 30 Cal. Rptr. 3d 787, 115 P.3d 68* , in which the California Supreme Court refused to extend the *Armendariz* safeguards to insurance disputes involving either breach of contract claims or claims for breach of the covenant of good faith and fair dealing. The court of appeal concluded that the franchisees claims under the California Franchise Investment Law (*Corp. Code § 31000 et seq.*), the Cartwright Act (*Bus. & Prof. Code § 16700 et seq.*), the Uniform Trade Secrets Act (*Civ. Code § 3426 et seq.*) and the Unfair Competition Law (*Bus. & Prof. Code § 17200 et seq.*) affected the public interest and thus appeared to fall all or in part within the rules of *Armendariz*, while noting that there could be no fee-shifting with respect to the franchisees' common law claims for breach of contract, interference with contractual rights and prospective economic advantage, or defamation. Although AAA Rule R-43 gave the arbitrator authority to assess and apportion fees as he or she found appropriate, the court of appeal said that at this point in the proceedings, thefranchisees had made a prima facie showing that some of their statutory claims were the type that is entitled to an advance fee allocation ruling, before the arbitration proceedings take place, to the extent that fee allocation would be necessary to enable them to vindicate those statutory rights. The record was insufficient for the court of appeal to make the allocation, so it instructed the trial court to conduct further proceedings regarding the requests for fee-shifting to determine what fee allocations, in any, were necessary to enable the franchisees to go forward in arbitration to vindicate any unwaivable statutory claims that affect the public interest and were not personal to the franchisees.

[m] Armendariz Minimum Requirements Apply to Claims Under Cartwright Act

Independent Assn. of Mailbox Center Owners, Inc. v. Superior Court (Mail Boxes Etc., USA, Inc.) *(2005) 133 Cal. App. 4th 396, 34 Cal. Rptr. 3d 659* , is discussed at *§ 20.23[3][l]*.

[n] Armendariz Minimum Requirements Apply to Claims Under Uniform Trade Secrets Act

Independent Assn. of Mailbox Center Owners, Inc. v. Superior Court (Mail Boxes Etc., USA, Inc.) *(2005) 133 Cal. App. 4th 396, 34 Cal. Rptr. 3d 659* , is discussed at *§ 20.23[3][l]*.

[o] Armendariz Minimum Requirements Apply to Claims Under Unfair Competition Law

Independent Assn. of Mailbox Center Owners, Inc. v. Superior Court (Mail Boxes Etc., USA, Inc.) *(2005) 133 Cal. App. 4th 396, 34 Cal. Rptr. 3d 659* , is discussed at *§ 20.23[3][l]*.

[p] Court Must Make Initial Fee-Shifting Determination Even if Arbitrator Has Authority to Allocate Arbitral Fees and Costs

Independent Assn. of Mailbox Center Owners, Inc. v. Superior Court (Mail Boxes Etc., USA, Inc.) *(2005) 133 Cal. App. 4th 396, 34 Cal. Rptr. 3d 659* , is discussed at *§ 20.23[3][l]*.

[q] Armendariz Minimum Requirements Apply to Claims Under Ralph Civil Rights Act

In ***D.C. v. Harvard-Westlake Sch.*** *(2009) 176 Cal. App. 4th 836, 865-866, 98 Cal. Rptr. 3d 300* , plaintiffs, a student and his parents, sued defendant private school, alleging it was liable for death threats the student received from classmates who misperceived his sexual orientation. All of plaintiffs' claims were ordered arbitrated. The arbitrator found in favor of the school and awarded it more than $ 521,000 in arbitral expenses and attorney fees. The trial court affirmed the award and the court of appeals reversed (*176 Cal. App. 4th 836, 869)* . The court of appeals noted that the claims were brought under the Ralph Civil Rights Act, *Civ. Code, § 51.7*, and the Tom Bane Civil Rights Act, *Civ. Code, § 52.1*, both of which expressly provide that a court may award attorney fees only to the plaintiff (*176 Cal. App. 4th 836, 864)* . Citing the rule in *Armendariz* (see discussion in [a], above) condemning the imposition of inappropriate arbitral expenses because they would deter the pursuit of unwaivable statutory rights, the court ruled that the claimant cannot be required by agreement to pay for the cost of the arbitration of hate-crime claims under the Ralph Civil Rights Act, *Civ. Code § 51.7*, and the Tom Bane Civil Rights Act, *Civ. Code, § 52.1*, because the right to not pay costs under each Act is a nonwaivable statutory right (*176 Cal. App. 4th 836, 866)* .

[r] Armendariz Minimum Requirements Apply to Claims Under Tom Bane Rights Act

D.C. v. Harvard-Westlake Sch. *(2009) 176 Cal. App. 4th 836, 98 Cal. Rptr. 3d 300* , is discussed in [q], *above*.

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2-20 California Points & Authorities §§ 20.24-20.29

[Reserved]

§§ 20.24[Reserved]

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2-20 California Points & Authorities § 20.30

§ 20.30 General State Law Contract Principles

[1] FORM

THE COURT SHOULD APPLY GENERAL STATE LAW CONTRACT PRINCIPLES IN DETERMINING WHETHER THE PARTIES AGREED TO ARBITRATE THIS CONTROVERSY.

A. General State Law Contract Principles Govern. When deciding whether the parties have agreed to arbitrate a certain issue[, including arbitrability], courts generally should apply ordinary state law principles that govern the formation of contracts (*First Options of Chicago, Inc. v. Kaplan (1995) 514 U.S. 938, 115 S. Ct. 1920, 131 L. Ed. 2d 985, 993* ; *Sanchez v. Western Pizza Enterprises, Inc. (2009) 172 Cal. App. 4th 154, 165-166, 90 Cal. Rptr. 3d 818* ; *Banner Entertainment, Inc. v. Superior Court (1998) 62 Cal. App. 4th 348, 356-357, 72 Cal. Rptr. 2d 598* ; *City of Vista v. Sutro & Co. (1997) 52 Cal. App. 4th 401, 407, 60 Cal. Rptr. 2d 488*).

[2] Comments

[a] Use of Form

This form may be used in support of a petition to compel arbitration to make the point that in determining the enforceability and scope of an arbitration agreement, even one governed by the Federal Arbitration Act (*9 U.S.C. § 1 et seq.*), the court should apply general state law contract principles. This form may be combined with authority from *§ 20.31* et seq. addressing any specific rule of contract construction that may be involved in petitioner's particular case.

This form is not intended as a complete memorandum, but should be combined with the memoranda in *§ 20.10* and any others applicable to the particular situation.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should include and specify any particular state law principle counsel feels is necessary to the desired outcome and

should specify the contract language to which that principle is applicable.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement)].

Affidavits or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*] are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For legal background, research guides, checklists, and forms relating to general contract principles, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For memoranda relating to general contract principles, see Ch. 50, *Contracts* .

[e] Opposing Memoranda

For memoranda regarding general contract principles that are more likely to aid in resisting arbitration, see Ch. 20A, *Arbitration: Resisting* .

[3] Discussion of Authorities

[a] General State Law Contract Principles Govern

First Options of Chicago, Inc. v. Kaplan *(1995) 514 U.S. 938, 115 S. Ct. 1920, 131 L. Ed. 2d 985* , originated from an arbitration concerning a debt owed by MK Investments, Inc. (MKI), and allegedly by its principal, Manual Kaplan, and his wife Carol, to petitioner. First Options was clearing broker for MKI, which lost $1.5 million in 1987 and signed a workout agreement with an arbitration clause. Kaplans did not. In 1989, when MKI lost another $1.5 million, First Options took control of MKI, liquidated certain of its assets, demanded immediate payment of the entire MKI debt, and insisted that Kaplans personally pay any deficiency. When that demand went unsatisfied, MKI initiated arbitration before a panel of the Philadelphia Stock Exchange. Kaplans filed written objections with the panel, denying their agreement was arbitrable. The panel decided it had power to rule and did so in favor of First Options, against MKI and the Kaplans. Kaplans asked the district court to vacate the award. First Options asked the district court to confirm the award. The district court confirmed the award, but the Third Circuit Court of Appeals reversed as to the Kaplans, holding their dispute with First Options was not arbitrable. The Supreme Court granted certiorari.

The Supreme Court affirmed the decision of the Third Circuit Court of Appeals, concluding that, because Kaplans did

not clearly agree to submit the question of arbitrability to arbitration, the Court of Appeals was correct in finding that the arbitrability of the Kaplan/First Options dispute was subject to independent review by the court. The matter turned on how a court should decide whether the parties agreed to submit the arbitrability issue to arbitration and the standard for review of that decision. When deciding whether the parties have agreed to arbitrate a certain issue, (including arbitrability), courts generally should apply ordinary state law principles that govern the formation of contracts, in this case the law of the state where Kaplans objected to arbitrability (*131 L. Ed. 2d 985, 993)* .

Sanchez v. Western Pizza Enterprises, Inc. *(2009) 172 Cal. App. 4th 154, 90 Cal. Rptr. 3d 818* , affirmed a trial court order finding a class arbitration waiver and other terms of the agreement unconscionable, and that the agreement therefore was unenforceable. In resolving the contention that the arbitrator, rather than the trial court, had jurisdiction to determine whether the agreement was enforceable, the court relied on the rule that under California law as well as the Federal Arbitration Act, enforceability of arbitration agreements is limited by the same general contract law principles governing the enforceability of any contract (*172 Cal. App. 4th 154, 165-166)* . The proponent of arbitration of enforceability also argued that the agreement specifically authorized the arbitrator to decide the issue of enforceability. However, while not ruling that a clear authorization in the agreement would be enforceable, the court ruled that the agreement in the case, which stated only that the arbitrator had jurisdiction to decide '"any disputes over the interpretation or application of this Arbitration Agreement,'" did not authorize the arbitrator to determine the issue (*172 Cal. App. 4th 154, 166*). The portion of the opinion and relevant facts dealing with the issue of whether the class action waiver was unenforceable as against public policy is discussed in *Ch. 20A, Arbitration: Resisting, § 20A.22[3][d],* below. The portions of the opinion addressing the procedural unconscionability of the arbitration agreement, the substantive unconscionability of the agreement, and the unenforceability of the agreement due to unconscionability are discussed, respectively, in Ch. 20A, *Arbitration: Resisting,* § 20A.91[3][d], [e], and [k].

Banner Entertainment, Inc. v. Superior Court *(1998) 62 Cal. App. 4th 348, 72 Cal. Rptr. 2d 598* , arose out of negotiations for defendant to act as exclusive sales agent for plaintiff's films in countries outside the United States and Canada. Draft agreements were exchanged by the parties. Those agreements provided, in relevant part: "this agreement *when signed by the parties hereto* will constitute a legal and binding obligation of the parties. [P] *Please acknowledge your approval of the foregoing terms by signing a copy of this letter in the space indicated below.*" Plaintiff never signed the agreement and eventually notified defendant by telephone and by letter that it was terminating their agreement. The letter stated that the parties had not reached agreement on material terms. Defendant filed a demand for arbitration. Plaintiff filed the action and brought a motion to determine the non-arbitrability of the claims defendant had submitted for arbitration. Defendant filed a cross-motion to compel arbitration of all disputes arising out of the relationship. The trial court ordered arbitration; and plaintiff filed a writ of mandate seeking to have the order to arbitrate vacated.

The court of appeal granted the writ directing the trial court to vacate its order granting defendant's petition to compel arbitration, finding that there was no evidence of an agreement to arbitrate (*62 Cal. App. 4th 348, 357, 361-362)* . The court discussed the procedure for determining the existence of an agreement to arbitrate, including the fact that the determination whether there is an enforceable arbitration agreement is based on state law principles related to the formation, revocation and enforcement of contracts (*62 Cal. App. 4th 348, 356-357)* . California law is clear that there is no contract until there has been a meeting of the minds on *all* material points (*62 Cal. App. 4th 348, 357-358)* . The portion of the opinion discussing the lack of evidence to support the existence of an arbitration agreement is discussed at *Ch. 20A, Arbitration: Resisting, §§ 20A.10[3][a]* and *20A.32[3][a].*

City of Vista v. Sutro & Co. *(1997) 52 Cal. App. 4th 401, 60 Cal. Rptr. 2d 488* , involved a dispute between a city and two investment brokerage firms. The contracts at issue had been signed on behalf of the city by its finance director and included arbitration provisions. The general resolution adopted by the city council made no mention of arbitration, but authorized the finance director to "sign warrants, transfers, or invest funds, and sell, assign, and transfer securities, and take other actions deemed necessary to properly administer the funds of the City of Vista." The superior court denied defendants' petition to compel arbitration on the ground that the finance director lacked express authority to enter into

any contract containing and arbitration clause. Defendants appealed.

The court of appeal reversed. The court of appeal began its analysis by noting that whether the parties formed a valid agreement to arbitrate is determined under general California contract law. The record before it lacked substantial evidence to support the conclusion that no arbitration agreement was formed under principles of general California contract law (*52 Cal. App. 4th 401, 407)* .

The court of appeals noted that it has long been recognized that a city may agree to arbitrate any matter which could be the subject of a civil suit. Implicit in the city's power to contract is the power to agree to binding arbitration. A municipal official duly authorized to enter into contracts on the city's behalf has implicit power to agree to arbitrate (*52 Cal. App. 4th 401, 408)* . Interpretation of the municipal resolution was a question of law with regard to which the court was bound to give effect to the language's usual and ordinary meaning. The court concluded that the resolution unambiguously authorized the finance director to enter into client agreements with defendant brokerages because the resolution specifically found that for purposes of expeditious completion of certain investment transactions, investment firms dealing with the city would require written authorization of the city officials' authority toperform actions necessary for proper administration of the city's funds. That express authority necessarily included the power to perform acts incidental to investing the city funds, such as opening brokerage accounts by executing client agreements (*52 Cal. App. 4th 401, 409)* . Implicit in that express authority to contract with investment firms was the power to agree to arbitration provisions. The resolution's silence on the matter of arbitration did not indicate that the authority to agree to arbitration was not conferred on the finance director (*52 Cal. App. 4th 401, 410)* .

The court also found the city's contention that entering into an arbitration agreement constituted an impermissible waiver of its right to jury trial to be without merit, relying on the holding in *Madden v. Kaiser Foundation Hospitals (1976) 17 Cal. 3d 699, 713-714, 131 Cal. Rptr. 882, 552 P.2d 1178* , discussed at *§ 20.61[3][a]*, that a predispute arbitration agreement does not raise any constitutional issue involving waiver of jury trial (*52 Cal. App. 4th 401, 411)* .

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2-20 California Points & Authorities § 20.31

§ 20.31 Incorporation by Reference

[1] FORM

[*EITHER*]

_____ [*Name*] IS BOUND BY THE ARBITRATION CLAUSE IN THE _____ [*identify contract containing text of arbitration clause*] BECAUSE THAT CLAUSE WAS VALIDLY INCORPORATED BY REFERENCE IN THE _____ [*identify contract from which the dispute arises*].

[*OR*]

_____ [*Name*] IS BOUND BY THE ARBITRATION RULES IN THE _____ [*identify arbitration provider rules*] BECAUSE THOSE RULES WERE VALIDLY INCORPORATED BY REFERENCE IN THE _____ [*identify contract from which the dispute arises*].

[*CONTINUE*]

A. Incorporation by Reference. A contract may validly incorporate by reference the terms of another document if the reference is clear and unequivocal and the terms of the incorporated document are known, or easily available to, the contracting parties (*Wolschlager v. Fidelity National Title Ins. Co. (2003) 111 Cal. App. 4th 784, 790-792, 4 Cal. Rptr. 3d. 179* ; *Slaught v. Bencomo Roofing Co. (1994) 25 Cal. App. 4th 744, 748, 30 Cal. Rptr. 2d 618* ; *Spellman v. Securities Annuities & Ins. Services, Inc. (1992) 8 Cal. App. 4th 452, 457, 10 Cal. Rptr. 2d 427*).

[2] Comments

[a] Use of Form

This form may be used in support of a petition to compel arbitration to make the point that in determining the enforceability and scope of an arbitration agreement, even one governed by the Federal Arbitration Act, the court should apply general state law contract principles, specifically the doctrine of incorporation by reference.

This form is not intended as a complete memorandum, but should be combined with the memoranda in *§§ 20.10*, *20.30*, and any others applicable to the particular situation.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the counsel should trace the language of the arbitration agreement, particularly language incorporating rules of any organization whose rules provide for arbitration.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For legal background, research guides, checklists and forms relating to general contract principles, *see* California Forms of Pleading and Practice, Ch.140, *Contracts* (Matthew Bender).

[d] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For memoranda relating to general contract principles, see Ch. 50, *Contracts* .

[e] Opposing Memoranda

For a memorandum opposing this one, see *Ch. 20A, Arbitration: Resisting, § 20A.31*.

For memoranda regarding general contract principles that are more likely to aid in resisting arbitration, see *Ch. 20A, Arbitration: Resisting, § 20A.30,* et seq.

[3] Discussion of Authorities

[a] Incorporation by Reference

Wolschlager v. Fidelity National Title Ins. Co. *(2003) 111 Cal. App. 4th 784, 4 Cal. Rptr. 3d. 179* , involved a claim under a title insurance policy. The preliminary title report made no mention of arbitration or the fact that there would be an arbitration requirement in the final title policy. Instead it included an exhibit which contained selected portions of the proposed policy to be issued, but not the arbitration clause, and instructed that "Copies of the policy forms should be read. They are available from the office which issued this Report." Eventually, the policy was issued and plaintiff filed a claim. By the time plaintiff filed the claim, plaintiff was in possession of the entire policy, including the arbitration provision. Plaintiff was represented by counsel initially during the claims process and plaintiff's counsel admitted knowing about the arbitration clause since the time plaintiff first provided him with a copy of the policy. Defendant denied the claim, without mentioning plaintiff's right to arbitrate, but advised plaintiff of his right to seek redress with the Department of Insurance. Plaintiff filed a lawsuit. Defendant answered without demanding arbitration or raising arbitration as an affirmative defense. Defendant did not demand arbitration until plaintiff served his first discovery. The petition to compel arbitration was denied. Defendant appealed.

The court of appeal reversed, finding that the arbitration clause was properly incorporated by reference (*111 Cal. App. 4th 784, 787, 792-793)* . Although defendant contended that the only actual contract between the parties was the policy itself and the preliminary report nothing more than an offer, the court of appeal said insured's approval and acceptance of the conditions set forth in the preliminary report created a binding contract based on the terms set forth in that report and any materials incorporated therein by reference. Therefore, whether plaintiff was bound by an arbitration clause depends directly on whether that term was set forth in the preliminary report or incorporated therein by reference. It was undisputed that the preliminary report did not itself contain an arbitration clause; thus, the critical question was whether the arbitration clause was sufficiently incorporated into the preliminary title report (*111 Cal. App. 4th 784, 790)* . For the terms of another document to be incorporated into the document executed by the parties the reference must be clear and unequivocal, the reference must be called to the attention of the other party and that party must consent to it. Further, the terms of the incorporated document must be known or easily available to the contracting parties. Here, the preliminary report referred to the policy a number of times and instructed that "Copies of the Policy forms should be read. They are available from the office which issued this Report." The report also listed the form of policy of title insurance contemplated by the report as C.L.T.A. Coverage Policy 1990. Thus, incorporation was both clear and unequivocal. There was no substantive dispute that plaintiff did not actually know about the arbitration clause. Even if plaintiff did not know about the arbitration clause, the policy with the clause was easily available to him. Nothing further was needed to bind the plaintiff (*111 Cal. App. 4th 784, 791)* .

Slaught v. Bencomo Roofing Co. *(1994) 25 Cal. App. 4th 744, 30 Cal. Rptr. 2d 618* , involved a construction dispute. Plaintiff had been hired by owner to construct 58 single family dwellings on owner's property. Their contract called for arbitration of any disputes arising out of the work in accordance with the Construction Industry Rules of the American Arbitration Association. Defendant was a subcontractor of plaintiff. Their agreement had its own arbitration clause, which followed different rules than the primary contract, but also had a provision entitled "Assumption of Principal Contract," which provided in part that subcontractor was bound by all the terms and conditions of the Contract Documents and that all rights and remedies reserved to Owner under the Contract Documents applied to and were possessed by Contractor in its dealings with Subcontractor. Owner and Contract were arbitrating a dispute between them when contractor/plaintiff petitioned to compel arbitration against defendant/subcontractor and to have the contractor-subcontractor arbitration consolidated with the owner-contractor arbitration. The petition was denied, and plaintiff appealed.

The court of appeal reversed. The court of appeal stated that under California law, parties may validly incorporate by reference into their contract the terms of another document. The reference must be clear and unequivocal and the terms of the incorporated document must be known or easily available to the contracting parties (*25 Cal. App. 4th 744, 748)* . Subcontractor did not claim to be unaware of the document being incorporated but stated it had examined the Contract Documents fully (*25 Cal. App. 4th 744, 749)* . Instead, subcontractor argued there was obvious ambiguity because the

two arbitration clauses contained different arbitration procedures. The court of appeal found no ambiguity. Here, the subcontractor's obligation to arbitrate was based on the Assumption clause, which incorporated the Construction Contract, and required subcontractor to join the arbitration between the owner and the contractor (*25 Cal. App. 4th 744, 750-751)* .

The facts and procedural background of ***Spellman v. Securities Annuities & Ins. Services, Inc.*** *(1992) 8 Cal. App. 4th 452, 10 Cal. Rptr. 2d 427* , are discussed at *§ 20.22[3][d]*. In considering whether plaintiff's employment contract and the U-4 form contained arbitration provisions, the court of appeal noted that a contract may validly incorporate by reference the terms of another document if the reference is clear and unequivocal and the terms of the incorporated document are know or easily available to the contracting parties (*8 Cal. App. 4th 452, 457)* . Here the U-4 plaintiff signed had the arbitration clause clearly set forth above the signature line. The employment contract clearly referred to and identified the incorporated document wherein the arbitration clause appeared, the Rules of Fair Practice of the National Association of Securities Dealers, Inc., as set forth in the NASD Manual. Further, it recited that a copy of the NASD Manual would be made available to be plaintiff (*8 Cal. App. 4th 452, 458)* .

[4] Additional Authorities

[a] Incorporation by Reference

See also *Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co. (1992) 6 Cal. App. 4th 1266, 1271-1273, 8 Cal. Rptr. 2d 587* , discussed at *§ 20.65[3][a]*.

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2-20 California Points & Authorities § 20.32

§ 20.32 Attempted Revocation of Stipulation to Arbitrate Comes Too Late

[1] FORM

ARBITRATION SHOULD BE COMPELLED BECAUSE RESPONDENT'S REVOCATION OF ITS AUTHORIZATION TO STIPULATE TO BINDING ARBITRATION WAS NOT COMMUNICATED TO PETITIONER UNTIL AFTER PETITIONER HAD AGREED TO THE STIPULATION.

A. Attempted Revocation of Stipulation to Arbitrate Comes Too Late. Under ordinary contract principles[, and the rules of principal and agent], when a client communicates to its attorney its revocation of authority to stipulate to binding arbitration, but the attorney does not communicate that revocation to opposing counsel until after opposing counsel (not knowing of the revocation) has accepted and filed the stipulation, the parties have a stipulation to arbitration, it is binding, and arbitration should be compelled (*CPI Builders, Inc. v. Impco Technologies, Inc. (2001) 94 Cal. App. 4th 1167, 1174, 114 Cal. Rptr. 2d 851*).

[2] Comments

[a] Use of Form

This form may be used in support of a petition to compel arbitration to make the point that the opposing party's attempted revocation of a stipulation to arbitrate was ineffective because it was not communicated to petitioner until after petitioner had accepted the offer to stipulation. This form may be combined with authority from *§ 20.30* et seq. addressing any other rule of contract construction that may be involved in petitioner's particular case.

This form is not intended as a complete memorandum, but should be combined with the memoranda in *§ 20.10* and any others applicable to the particular situation.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument

should describe the timing of the offer to stipulate and its attempted revocation, as well as the facts and timing of the acceptance of the offer.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747* (overruled on other grounds in *Rosenthal v. Great Western Financial Securities Corp. (1996) 14 Cal. 4th 394, 404, 58 Cal. Rptr. 2d 875*)].

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For legal background, research guides, checklists and forms relating to general contract principles, *see* California Forms of Pleading and Practice, Ch.140, *Contracts* (Matthew Bender).

[d] Related Memoranda

For a memorandum establishing the validity of a stipulation even though unsigned by the client, see *Ch. 20C, Arbitration: Confirming, Correcting, or Vacating the Award, § 20C.60*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For memoranda relating to general contract principles, see Ch. 50, *Contracts* .

[3] Discussion of Authorities

[a] Attempted Revocation of Stipulation to Arbitrate Comes Too Late

CPI Builders, Inc. v. Impco Technologies, Inc. *(2001) 94 Cal. App. 4th 1167, 114 Cal. Rptr. 2d 851* involved breach of a construction contract. There were some discussions between the attorneys regarding mediating or arbitrating the case. During a telephone conversation on September 17, 1999, the attorneys agreed to binding arbitration. In a September 18, 1999 letter, plaintiff's attorney told plaintiff's president and sole shareholder he had tentatively agreed with defendant's attorney to submit the case to binding arbitration, that that would vacate the October trial date, and that he would no longer be able to represent plaintiff. On September 27, 1999, plaintiff's attorney signed a stipulation to submit the matter to binding arbitration and sent it to defendant's attorney. In a conversation around noontime on September 27, 1999, plaintiff's president had authorized plaintiff's attorney to consent to binding arbitration, at least for about 20 hours, but later changed her mind, and left a message at plaintiff's attorney's office at 8:00 a.m. the next day to that effect. Apparently a CPI employee received a telephone call from CPI's attorney's office on September 29, 1999, stating that it was "too late" for CPI to withdraw its stipulation for binding arbitration. Meanwhile, unaware that plaintiff's attorney's authority had been revoked, defendant's attorney signed the stipulation on September 29, 1999, and

lodged it with the court the next day. On October 7, 1999, defendant's attorney received two letters: one was from plaintiff's president, stating she had authorized a new law firm to act on behalf of CPI; the other was from the new law firm stating that CPI had revoked its consent for binding arbitration on September 28, 1999, that plaintiff's previous attorney should have communicated that revocation to defendant's attorney, and demanding the stipulation either not be sent to the court, or if already sent, be retrieved before the court authorized binding arbitration. As it turned out, the court had not entered the order attached to the stipulation for binding arbitration because the 'actual parties' had not signed the stipulation. Defendant filed a motion to compel arbitration, which was granted. Plaintiff then filed a motion for reconsideration, which was also granted; and the prior order that the case proceed to binding arbitration was vacated. Defendant appealed.

The court of appeal reversed (*94 Cal. App. 4th 1167, 1175)* . General California contract law determines whether the parties formed a valid agreement to arbitrate (*94 Cal. App. 4th 1167, 1172)* . In this case, because the facts were not in dispute, the court of appeal reviewed de novo the trial court's determination of the validity of the agreement to arbitrate (*94 Cal. App. 4th 1167, 1172-1173)* . An attorney is authorized to do that which attorneys are normally authorized to do in the course of litigation, but that authority does not include authority to impair the client's substantial rights or the cause of action itself (*94 Cal. App. 4th 1167, 1173)* . The court of appeal distinguished *Blanton v. Womancare, Inc. (1985) 38 Cal. 3d 396* because although Blanton's attorney had stipulated to binding arbitration, Blanton had not given her oral consent to the stipulation. Thus, the *Blanton* court concluded the attorney there lacked the apparent authority to waive the client's substantial rights by entering into binding arbitration without the client's consent. The key distinction is that in this case, plaintiff's president expressly authorized plaintiff's attorney to enter into binding arbitration (*94 Cal. App. 4th 1167, 1174)* .

The court of appeal also distinguished *Sanker v. Brown (1985) 167 Cal. App. 3d 1144, 213 Cal. Rptr. 768* , because the client in that case had not expressly authorized the attorney to stipulate to binding arbitration (*94 Cal. App. 4th 1167, 1175)* . The court cited *Civ. Code § 1587* for that proposition that an offer is properly revoked on the occurrence of one of four events: (1) the communication of revocation to the other party before acceptance is communicated; (2) the lapse of time for acceptance; (3) the failure of the acceptor to fulfill a condition precedent to acceptance; or (4) the death or insanity of the proposer. Because defendant immediately responded, there were no unfulfilled conditions and there was no death or insanity involved, the court had only to decide whether the revocation was communicated before notice of acceptance was received. No attempt to communicate a revocation of the offer to submit the matter to binding arbitration was made until the new law firm wrote defendant on October 7, a week after defendant had accepted by complying with the directions on plaintiff's original attorney's cover letter accompanying the offer: "You may file it directly with the court or return it to my office for filing" (*94 Cal. App. 4th 1167, 1176)* . When defendant's attorney accepted the offer, he was unaware plaintiff had withdrawn its consent. The parties had a contract. The fact that plaintiff's president communicated her revocation to plaintiff's attorney before defendant accepted the offer is of no effect (*94 Cal. App. 4th 1167, 1173-1174)* . The attorney-client relationship, insofar as it concerns the authority of the attorney to bind his or her client by agreement or stipulation, is governed by the principles of agency. When a principal communicates notice of revocation to his or her agent, but the agent fails to communicate the notice to the offeree, the principal is bound on the offeree's acceptance, even though the agent disregarded the principal's express instructions (*94 Cal. App. 4th 1167, 1173-1174)* .

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CHAPTER 20 ARBITRATION: COMPELLING
PART II. FORMS
A. General Principles Related to Compelling Arbitration

2-20 California Points & Authorities § 20.33

§ 20.33 Principal Must Arbitrate Under Agreement Signed by Attorney in Fact

[1] FORM

OWNER WHO GIVES A POWER OF ATTORNEY IS BOUND TO ARBITRATE UNDER AN AGREEMENT SIGNED BY HIS OR HER ATTORNEY IN FACT.

A. Principal Is Bound by Agreement Signed by Attorney in Fact. An attorney in fact under a [durable] power of attorney has authority to enter into arbitration agreements [incidental to admission of the person who executed the power to a residential care facility]. Thus, the principal [and his or her successors] must arbitrate any claims subject to that agreement (*Garrison v. Superior Court (Country Villa Belmont Heights Healthcenter) (2005) 132 Cal. App. 4th 253, 256, 265-267, 33 Cal. Rptr. 3d 350*).

[*Optional*] **B. Agent Under *Probate Code Section 4701* Health Care Power of Attorney Can Bind Principal [and Successor(s)] to Arbitration.** *Probate Code Section 4600 et seq.* together with Civil Code provisions on general agency law, provide that an agent under a *Probate Code Section 4701* health care power of attorney[, in selecting a long-term health care facility], has the power to execute applicable admissions forms, including arbitration agreements, unless that power is restricted by the principal (*Hogan v. Country Villa Health Services (2007) 148 Cal. App. 4th 259, 263-264, 55 Cal. Rptr. 3d 450*).

[2] Comments

[a] Use of Form

This form may be used in support of a petition to compel arbitration if petitioner anticipates a challenge that an arbitration agreement executed by an attorney in fact is not binding. Optional Paragraph B is applicable if the power of attorney is a health care power in the form set forth in *Prob. Code § 4701* without any restrictions. Although the power in *Garrison v. Superior Court (2005) 132 Cal. App. 4th 253, 33 Cal. Rptr. 3d 350* (*Garrison*, discussed at [3][a], *below*), did not involve a standard form *Prob. Code § 4701* document, the power provided that it was created under *Prob. Code § 4600 et seq.*, so *Prob. Code § 4688* was applicable to incorporate the laws of agency.

This form is not intended as a complete memorandum, but should be combined with the memoranda in *§ 20.10* and any others applicable to the particular situation. Counsel may wish to include authority from *§ 20.61*.

As a tactical matter, counsel may wish to reserve these points for oral argument or for a reply memorandum. In deciding whether to reserve these arguments, counsel should consider local court rules and practice, as well as whether the moving partywould be expected to raise these points in initial moving papers, to avoid the possibility of losing the opportunity to raise them.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should set forth the exact terms of the power of attorney and show that the agreement in question was within the scope of that power.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement)].

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For a memorandum supporting the contention that an agent or fiduciary has power to execute an arbitration agreement on behalf of his or her principal, see *§ 20.61*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Principal Is Bound by Agreement Signed by Attorney in Fact

Garrison v. Superior Court (Country Villa Belmont Heights Healthcenter) *(2005) 132 Cal. App. 4th 253, 33 Cal. Rptr. 3d 350* involved two arbitration agreements signed by a decedent's attorney in fact, under a durable power of attorney, when the decedent was admitted to a residential care facility. Garrison has filed suit as decedent's successor in interest pursuant to *Code Civ. Proc. § 377.10 et seq.* and on her own behalf. The complaint alleged that Country Villa Belmont Heights Healthcenter failed to provide sufficient staffing levels; to offer sufficient services to enable patients to attain the highest practicable, physical, mental, and psychological well-being; to create an environment where decedent would not continue to fall; and to properly screen decedent to insure it had the ability to provide her with an adequate level of medical care. The complaint stated causes of action for: negligence; elder abuse; fraud; unlawful business practices; and wrongful death. Defendants moved to compel arbitration, and the motion was granted. Plaintiffs filed a

writ of mandate seeking to set aside the order granting the motion to compel arbitration. The mandate petition was summarily denied, but later, the Supreme Court granted review and ordered us to issue an order to show cause and place the matter on calendar for oral argument.

The court of appeal granted the mandate petition to allow reconsideration of the petition to compel arbitration in light of the views expressed in the opinion, namely, that the attorney in fact had authority to bind decedent to the arbitration agreements (*132 Cal. App. 4th 253, 268)* . The power of attorney was entitled "ADVANCE MEDICAL DIRECTIVE AND POWER OF ATTORNEY FOR HEALTH CARE" and granted plaintiff attorney in fact power to make health care decisions, with full power and authority to make health care decisions to the same extent that decedent could make those decisions for herself if she had the capacity to do so, including all rights granted to the attorney in fact [*Prob. Code § 4600 et seq.*]. It specified the attorney in fact had authority to execute documents involving the refusal to permit treatment; the power to sign any necessary waiver or release from liability required by a hospital or physician, to review any of decedent's medical records, to execute any authorization necessary to facilitate the release of medical information; and to consent to the disclosure of medical information. The court of appeal began its discussion by noting that the question of whether a valid agreement to arbitrate exists is determined by reference to the law applicable to contracts generally (*132 Cal. App. 4th 253, 263)* and that an agent or fiduciary has the authority to require a patient's medical malpractice claims to be arbitrated [*see Madden v. Kaiser Foundation Hospitals (1976) 17 Cal.3d 699, 709, 131 Cal. Rptr. 882, 552 P.2d 1178* (*Madden*, discussed at *§ 20.61[3][a]*)] (*132 Cal. App. 4th 253, 264)* . Plaintiff relied on *Pagarigan v. Libby Center Care, Inc. (2002) 99 Cal. App. 4th 298, 301-302, 120 Cal. Rptr. 2d 892* and *Goliger v. AMS Properties, Inc. (2004) 123 Cal. App. 4th 374, 375-376, 19 Cal. Rptr. 3d 819* , but both were distinguishable because they did not involve powers of attorney and in both cases, the patient was comatose at the time and the child in one case and parent in another signed the admission papers containing the arbitration clause (*132 Cal. App. 4th 253, 264-265)* . The court of appeal said the case was governed by *Prob. Code §§ 4683(a), 4684*, and *4688* (*132 Cal. App. 4th 253, 265-266)* , and concluded that the combined effect of those three provisions of the Health Care Decisions Law, gave plaintiff the authority to enter into the two arbitration agreements on behalf of decedent. The arbitration agreements were executed while making health care decisions (*132 Cal. App. 4th 253, 266)* . Further, the court cited *Madden* for the proposition that *Civ. Code § 2319*, which authorizes a general agent to do everything necessary or proper and usual to effect the purpose of the agency, includes the power to select arbitration as a means of resolving health care disputes (*132 Cal. App. 4th 253, 266-267)* . Thus, the court of appeal concluded that decedent's damage claims were subject to arbitration (*132 Cal. App. 4th 253, 267)* .

[b] Agent Under Probate Code Section 4701 Health Care Power of Attorney Can Bind Principal [and Successor(s)] to Arbitration.

Hogan v. Country Villa Health Services *(2007) 148 Cal. App. 4th 259, 55 Cal. Rptr. 3d 450* , involved the statutory advance health care directive form, i.e., a health care power of attorney [*Prob. Code, §§ 4629, 4701*]. In that document, decedent named her daughter as her agent. When decedent was suffering from Stage II Alzheimer's disease, daughter had her admitted to Country Villa Plaza Healthcare Center, a skilled nursing care facility. At the time of admission, daughter signed two arbitration agreements: one agreeing to arbitrate any medical malpractice claims and one agreeing to arbitrate any other type of claim against the facility, including specifically any claim for alleged violations of the Elder Abuse and Dependent Adult Civil Protection Act [*Welf. & Inst. Code, § 15600 et seq.*]. Each of the two arbitration agreements was optional and each contained a 30-day rescission right. After decedent died, daughter and her three brothers filed a complaint for wrongful death, elder abuse and violation of patient rights, against Country Villa Health Services, Country Villa Plaza Healthcare Center and the administrator of the nursing home. Country Villa filed a motion to compel arbitration of the second cause of action, for elder abuse. The trial court denied the motion, finding that the health care power of attorney did not authorize the daughter to enter into the arbitration agreements on her mother's behalf. Country Villa appealed.

The court of appeal reversed and remanded, finding that, as decedent had not elected to restrict the powers of the daughter as her agent to exclude the power to enter into arbitration agreements, the daughter had the power to execute

arbitration agreements when presented to her by the long-term health care facility as part of the package of admissions documents (*148 Cal. App. 4th 259, 263, 271)* . The court of appeal framed the question before it as whether the provision permitting daughter to select and discharge health care providers and institutions included the authority to execute admissions forms, including arbitration agreements. The standard form health care power of attorney that daughter signed is set forth in *Prob. Code § 4701*, a part of the Health Care Decisions Law (*Prob Code § 4600 et seq.*). *Prob. Code § 4700* explains that the standard form may, but need not, be used to create a health care power of attorney and that other sections of the Health Care Decisions Law govern the effect of a health care power of attorney. *Prob. Code § 4683* permits an agent under a health care power of attorney to make health care decisions for the principal. Section 4617 specifies that the selection and discharge of health care providers and institutions is a health care decision. *Prob. Code § 4688* provides that when the Health Care Decisions Law does not articulate a rule governing a particular question about an agent's powers under a health care power of attorney, the laws of agency shall apply to provide the rule. Those Probate Code provisions, together with Civil Code provisions on general agency law, provide that an agent under a *Prob. Code § 4701* health care power of attorney, in selecting a long-term health care facility, has the power to execute applicable admissions forms, including arbitration agreements, unless that power is restricted by the principal (*148 Cal. App. 4th 259, 264)* . The court of appeal discussed *Garrison v. Superior Court (2005) 132 Cal. App. 4th 253, 33 Cal. Rptr. 3d 350* (*Garrison*, discussed at [a], *above*), which although it did involve a standard form *Prob. Code § 4701* document, provided that it was created under *Prob. Code § 4600 et seq.* and provided that the daughter was authorized to make health care decisions for the mother (*148 Cal. App. 4th 259, 264-268)* . The court noted that *Garrison* had pointed out that *Prob. Code § 4683* states that an agent designated in the power of attorney may make health care decisions for the principal to the same extent the principal could make health care decisions if the principal had the capacity to do so, including decisions that may be effective after the principal's death, which would include how to resolve disputes with the health care provider (*148 Cal. App. 4th 259, 265-266)* . The court of appeal found that the *Garisson* court was correct in characterizing the execution of the arbitration agreements as part of the health care decision-making process, and that the trial court in this matter erred in disregarding *Garrison* and denying the motion to compel arbitration (*148 Cal. App. 4th 259, 268)* . Plaintiffs argued that *Goliger v. AMS Properties, Inc. (2004) 123 Cal. App. 4th 374, 19 Cal. Rptr. 3d 819* , and *Pagarigan v. Libby Care Center, Inc. (2002) 99 Cal. App. 4th 298, 120 Cal. Rptr. 2d 892* were better reasoned, but the court of appeal found them clearly distinguishable because in neither of those cases did the child(ren) admitting the parent into a health care facility hold a health care power of attorney (*148 Cal. App. 4th 259, 268)* . Nor was the court of appeal persuaded that its holding would undermine the public policy principles underlying the *California Constitution and the Elder Abuse and Dependent Adult Civil Protection Act. Clearly, Madden v. Kaiser Foundation Hospitals (1976) 17 Cal. 3d 699, 702-703, 705-709, 131 Cal. Rptr. 882, 552 P.2d 1178* (*Madden*, discussed at *§ 20.61[3][a]*), establishes that an agent can bind his or her principal to arbitrate without violating the principal's constitution right to a jury trial (*148 Cal. App. 4th 259, 268-269)* . With regard to the purposes and goals of the Elder Abuse and Dependent Adult Civil Protection Act, plaintiffs did not raise this issue before the trial court, so the court of appeal treated the point as waived (*148 Cal. App. 4th 259, 269)* . Because not all causes of action were subject to arbitration, it remained to be determined whether a stay should be ordered or certain causes of action should proceed before others. Thus, the court of appeal remanded the matter to the trial court for further consideration of the application of *Code Civ. Proc. §§ 1281.2* and *1281.4* (*148 Cal. App. 4th 259, 270-271)* .

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A. General Principles Related to Compelling Arbitration

2-20 California Points & Authorities §§ 20.34-20.39

[Reserved]

§§ 20.34[Reserved]

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CHAPTER 20 ARBITRATION: COMPELLING
PART II. FORMS
B. Particular Claims Subject to Arbitration

2-20 California Points & Authorities § 20.40

§ 20.40 Arbitration Agreement Applies to Related Tort Claim

[1] FORM

PETITIONER, AS A PARTY TO AN AGREEMENT PROVIDING FOR ARBITRATION OF ANY CONTROVERSY ARISING UNDER THE AGREEMENT, IS ENTITLED TO AN ORDER COMPELLING ARBITRATION OF _____ [*specify tort or torts that are subject of dispute*], WHICH AROSE OUT OF THE AGREED TRANSACTION [AND STAYING ANY PENDING ACTION RELATING TO ARBITRABLE ISSUES].

A. Arbitration Agreement Applies to Related Tort Claim. A provision in an agreement for the arbitration of any dispute arising out of the contract is broad enough to include arbitration of tort as well as contractual questions when the tort claims arose in connection with and were inextricable from the subject matter of the contract claims (*Efund Capital Partners v. Pless (2007) 150 Cal. App. 4th 1311, 1321-1330, 59 Cal. Rptr. 3d 340* ; *Ruiz v. Sysco Food Services (2004) 122 Cal. App. 4th 520, 531, 539-541, 18 Cal. Rptr. 3d 700* ; *Buckhorn v. St. Jude Heritage Medical Group (2004) 121 Cal. App. 4th 1401, 1406-1408, 18 Cal. Rptr. 3d 215* ; *Vianna v. Doctors' Management Co. (1994) 27 Cal. App. 4th 1186, 1189-1190, 33 Cal. Rptr. 2d 188* ; *Berman v. Dean Witter & Co., Inc. (1975) 44 Cal. App. 3d 999, 1003, 1005, 119 Cal. Rptr. 130*).

[*Optional*] **B. Emotional Distress Claims Must Be Arbitrated: Bodily Injury Exclusion Does Not Apply.** The bodily injury exclusion in the arbitration clause [in California standard form of real estate purchase agreement] does not exclude claims for emotional distress derivative of failure to disclose a structural defect. Those claims are not a type the parties would reasonably expect to be excluded and must be arbitrated. [This is true even if the stress and emotional distress are alleged to have caused a physical disease, such as gestational diabetes] (*Gravillis v. Coldwell Banker Residential Brokerage Co. (2006) 143 Cal. App. 4th 761, 766, 49 Cal. Rptr. 3d 531*).

[2] Comments

[a] Use of Form

This form may be used to support a petition to compel arbitration when the petitioner anticipates a challenge that, because the agreement only provided for arbitration of any controversy under the contract, it does not apply to tort claims. The bracketed language in Paragraph A reflects the fact situation in *Ruiz v. Sysco Food Services (2004) 122 Cal. App. 4th 520, 18 Cal. Rptr. 3d 700* , discussed at [3][a], *below.* Optional Paragraph B is to anticipate or rebut the contention that a claim for emotional distress need not be arbitrated because it falls within a bodily injury exclusion to the arbitration clause. The form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in support of compelling arbitration, either alone [*see § 20.10*] or combined with a motion to stay an action [*see § 20.11*].

As a tactical matter, counsel may wish to reserve these points for oral argument or for other form of rejoinder to the respondent's opposing memorandum. In deciding whether or not to reserve these arguments, counsel should consider local court rules and practice, as well as whether the moving party would be expected to be raise these points in initial moving papers, to avoid the possibility of losing the opportunity to raise them.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the language of the arbitration agreement which specifies the subject matter that may be arbitrated should to be quoted or referred to, followed by a statement as to how the controversy in issue is within the scope of that subject matter.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Memoranda

For a form opposing those in this form, see *Ch. 20A, Arbitration: Resisting, § 20A.40*.

[3] Discussion of Authorities

[a] Arbitration Agreement Applies to Related Tort Claim

Plaintiff in ***Efund Capital Partners v. Pless*** *(2007) 150 Cal. App. 4th 1311, 59 Cal. Rptr. 3d 340* , which was in part a shareholder derivative suit, sued various defendants, including RAP Technologies, the nominal defendant (in which it

had invested $500,000), directors, officers, and employees of RAP, and other companies involved inexploiting RAP's primary asset, a loan software program. Causes of action included fraudulent inducement and negligence, breach of fiduciary duty, interference with contractual relations, and conversion, all based on the various officers, directors, and employees diverting the loan proceeds and software program for their personal use. The investment was memorialized in a "strategic relationship agreement," which contained an arbitration clause requiring arbitration of any dispute or other disagreement arising from or out of that agreement. The trial court denied the defendants' motion to compel arbitration on the ground the claims were beyond the scope of the arbitration clause and never reached the issues of the non-signatory defendants' standing to enforce the arbitration clause and waiver. Defendants appealed.

The court of appeal reversed, and after finding the arbitration clause broad enough to encompass the claims alleged, remanded for determination of the issues standing and waiver (*150 Cal. App. 4th 1311, 1314, 1330-1331)* . The court of appeal first discussed the issue of the Federal Arbitration Act (*9 U.S.C. § 1 et seq.*) saying that the limited preemptive aspects of the FAA did not apply because the arbitration agreement stated it was governed by California law (*150 Cal. App. 4th 1311, 1319)* . In considering the language of the strategic relationship agreement's arbitration provision, the court of appeal noted that they applied the ordinary rules of contract interpretation so as to give effect to the parties' intentions, in light of the usual and ordinary meaning of the contractual language and the circumstances under which the agreement was made (*150 Cal. App. 4th 1311, 1321)* . The court discussed various cases, including *Berman v. Dean Witter & Co., Inc. (1975) 44 Cal. App. 3d 999, 1002-1003, 119 Cal. Rptr. 130* (discussed *below*) and *Izzi v. Mesquite Country Club (1986) 186 Cal. App. 3d 1309, 1315-1317, 231 Cal. Rptr. 315* (discussed at [4][a], *below*), noting that such broadly worded arbitration provisions have been construed to encompass tort claims having their roots in the contractual relationship between the parties (*150 Cal App. 4th 1311, 1322-1325)* . In this case, although none of defendants (except RAP Technologies) was a named party to the strategic relationship agreement, it was undisputed that all individual defendants were RAP Technologies's former officers, directors, and employees. The strategic relationship agreement established and governed plaintiff's relationship with RAP Technologies; all causes of action involved either defendants fraudulently inducing plaintiff to enter into the agreement, or actions undertaken by the individual defendants acting as agents, employees, and representatives of each other and acting within the course and scope of their roles created by the agreement. Therefore, the arbitration agreement extended to the disputes alleged in plaintiff's second amended complaint (*150 Cal. App. 4th 1311, 1325-1326)* . The court of appeal discussed the two Ninth Circuit cases relied on by the trial court-- *Tracer Research v. Nat. Environ. Services, Co. (9th Cir. 1994) 42 F. 3d 1292, 1294-1295* (*Tracer*), and *Mediterranean Enterprises, Inc. v. Ssangyong (9th Cir. 1983) 708 F.2d 1458, 1461-1464* (*Mediterranean*)--and found the language in those arbitration agreements, which required arbitration of matters "arising under" the agreements, to be not as broad as the "arising from or out of" of language used in the strategic relationship agreement (*150 Cal. App. 4th 1311, 1326-1328)* . Further, California courts have consistently applied similar language to require arbitration of tort claims; *Mediterranean* and *Tracer* no longer find support in other federal courts (*150 Cal. App. 4th 1311, 1328-1329)* . Therefore, the court of appeal declined to follow the Ninth Circuit cases and concluded the arbitration clause was broad enough to encompass the claims alleged (*150 Cal. App. 4th 1311, 1329-1330)* .

Ruiz v. Sysco Food Services *(2004) 122 Cal. App. 4th 520, 18 Cal. Rptr. 3d 700* , involved an employee's action against his employer for defamation, infliction of emotional distress, and related tort theories, all arising out of an investigation and police report of behavior of plaintiff, which lead to termination of his employment with defendant. Plaintiff was reinstated after he filed a grievance, arbitrated under the collective bargaining agreement (CBA) applicable to union employees of defendant; the arbitrator found that the investigation resulting in plaintiff's termination had not been fair and complete under the standards of the CBA. Plaintiff then filed the tort action, which defendant removed to federal court. The action was remanded, based on a ruling that because the claims did not arise under or require the interpretation of the CBA, there had been no basis for jurisdiction in federal court. In state court, defendant petitioned to compel arbitration under the CBA. The trial court denied the petition, finding that the CBA did not contemplate resolution of these claims, which it found had arisen from allegations outside the investigation conducted by defendant at the time plaintiff's employment was terminated. Furthermore, the trial court ruled that the matter was not subject to the Federal Arbitration Act (FAA, *9 U.S.C. § 1 et seq.*). Defendant appealed the denial of its petition to compel arbitration.

The court of appeal reversed, both initially and on rehearing, and directed the trial court to vacate its previous order in part and to enter a new order granting the petition to compel arbitration under California law, which it found not to be inconsistent with the FAA policy and to be within the scope of the CBA arbitration provision (*122 Cal. App. 4th 520, 539-541)* . The court noted that the express and implied terms of the CBA had been considered to determine the merits of plaintiff's defamation and emotional distress allegations because they arose in connection with and were inextricable from the actual disciplinary or investigative procedures involved, as set forth in the CBA. Because of the factual context and nature of the proceedings in which the claims arose, an arbitrator would have been the appropriate party to make these determinations. Although plaintiff alleged that defendant published information beyond the scope of any personnel who were actually involved in personnel management and who had a need to know about the disciplinary matter, he failed to make an adequate showing that his alleged injury did not derive from rights created by the CBA (specifically the right to the investigation and grievance procedure). Thus, as a preliminary matter, the court concluded that the allegations of the complaint fell within the scope of the arbitration clause in the CBA (*122 Cal. App. 4th 520, 531)* .

Plaintiff physician in ***Buckhorn v. St. Jude Heritage Medical Group*** *(2004) 121 Cal. App. 4th 1401, 18 Cal. Rptr. 3d 215* , sued defendants for wrongful termination and for various torts allegedly committed after he was discharged, including defamation and interference with prospective economic advantage. Defendants moved to compel arbitration in accordance with the arbitration clause in the employment agreement, which provided for mandatory arbitration of disputes "concerning theenforcement or the interpretation of any provisions of this Agreement." Plaintiff argued the arbitration clause did not apply because it only governed "contract related actions," not the tort claims, and also because defendant's tortious conduct occurred after he was terminated. The tort claims were based on a letter defendant sent to Buckhorn's patients explaining that Buckhorn was no longer with the Medical Group and offering to direct patients to other Medical Group physicians. Buckhorn also alleged that patients were alternatively informed Buckhorn had left the group because of marital problems, mental problems, loss of his insurance coverage, and that he was no longer practicing medicine, or that he had "just disappeared." The trial court agreed with plaintiff and denied the motion to compel arbitration. Defendants appealed.

The court of appeal reversed. The court of appeal cited *Vianna v. Doctors' Management Co. (1994) 27 Cal. App. 4th 1186, 1188-1190, 33 Cal. Rptr. 2d 188* (discussed, *below*), which plaintiff sought to distinguish because the tort claims in *Vianna* arose during the employment relationship, whereas plaintiff's tort claims arose after employment had been terminated. The court of appeal said plaintiff's temporal test misconstrued the applicable standard. The issue is whether the tort claims are "rooted" in the contractual relationship between the parties (*121 Cal. App. 4th 1401, 1406-1408)* , not when they occurred. For example, plaintiff's claims for intentional and negligent interference with prospective economic advantage were based on an expectation of future income from his patients, who consulted him in his capacity as an employee of the Medical Group. Therefore, the employment agreement informed the extent of any economic interest. Because plaintiff failed to demonstrate his tort claims were "wholly independent" of the employment agreement, and any doubts must be resolved in favor of arbitration, the court of appeal concluded that all of plaintiff's had to be submitted to arbitration (*121 Cal. App. 4th 1401, 1407-1408)* .

Plaintiff employee in ***Vianna v. Doctors' Management Co.*** *(1994) 27 Cal. App. 4th 1186, 33 Cal. Rptr. 2d 188* , brought an action for termination of employment in violation of public policy, breach of the implied covenant of good faith and fair dealing, negligent infliction of emotional distress, and defamation. The defendant employer moved to compel arbitration under a contract clause that provided "[i]n the event of any dispute of any kind whatsoever, regarding the meaning, interpretation or enforcement of the provisions of this Agreement, both parties agree that the matter shall be resolved through the use of binding arbitration as provided in *California Code of Civil Procedure 1280 et seq.* " The trial court denied the motion to compel arbitration, on the ground the clause was narrow and did not encompass the myriad of claims brought by plaintiff. Defendant appealed.

The court of appeal reversed. The court held that the trial court's finding that the clause did not cover the plaintiff's

claims could not be sustained given the California policy favoring arbitration clauses (*27 Cal. App. 4th 1186, 1189)* . Specifically, the court found that the clause plainly covered the claim for breach the covenant of good faith and fair dealing. It then stated that all the other claims involved duties arising by operation of law, which were allegedly breached during the employment relationship, and that the parties at least arguably agreed to arbitrate those claims. Because it could not be said that the clause clearly did not apply to be those claims, the doubt had to be resolved in favor of arbitration (*27 Cal. App. 4th 1186, 1189-1190)* .

In ***Berman v. Dean Witter & Co., Inc.*** *(1975) 44 Cal. App. 3d 999, 119 Cal. Rptr. 130* , plaintiffs commenced an action against defendant stockbrokers for negligence and breach of fiduciary relationship in the manner of effecting margin purchases of short-term futures in foreign currency for plaintiffs. Plaintiffs had signed a contract with defendants which generally referred to monies, securities, commodities, and other property and provided for an arbitration of any controversy arising out of or relating to the contract. Defendants petitioned to compel arbitration and stay the proceedings. Plaintiffs contended that the currency futures were not securities or commodities and that the dispute sounded in tort; thus, these matters were not subject to the arbitration agreement. Defendants appealed from an order denying their petition.

The court of appeal reversed, holding that arbitration should be compelled and the proceedings stayed. It found the phrase of "any controversy arising out of or relating to the contract" to be broad enough to embrace tort as well as contractual liabilities so long as they had their roots in the relationship created between the parties by the contract. When plaintiffs undertook to order the margin purchases on their established account, the purchases arose out of and were related to the customer agreement; therefore, any dispute concerning the purchases arose out of and was related to the agreement (*44 Cal. App. 3d 999, 1003)* . The court went on to find not only that the terms of the contract generally covered currency futures, but that the arbitration clause was intended by the parties to apply to disputes arising out of transactions based on the client-broker relationship established by the agreement (*44 Cal. App. 3d 999, 1005)* .

[b] Emotional Distress Claims Must Be Arbitrated: Bodily Injury Exclusion Does Not Apply

Gravillis v. Coldwell Banker Residential Brokerage Co. *(2006) 143 Cal. App. 4th 761, 49 Cal. Rptr. 3d 531* , arose from the sale and purchase of a home, which had so much structural damage as to be uninhabitable. Buyers, husband and wife, sued the seller, the seller's brokers, their own brokers, the company that inspected the property, and the individual who owned that company. The complaint alleged that defendants failed to disclose the structural damage to the home. Wife was pregnant at the time of the purchase and was advised that, while on the property, she should wear a mask and special clothing to protect herself and her unborn child from exposure to dry rot, fungus, and other hazardous substances. This advice made both buyers suffer severe emotional distress, worry, depression, anxiety, and fear. Wife contended that the emotional distress caused her to develop a form of diabetes. The contract was written on the standard form California purchase agreement, which required the arbitration of disputes arising out of the agreement or any resulting transaction, but excluded from arbitration any action for bodily injury. The brokers moved to compel arbitration. The trial court denied the motion on the ground that the action was one for bodily injury. The brokers appealed.

The court of appeal reversed (*143 Cal. App. 4th 761, 766*). The court noted several rules of construction: doubts as to whether an arbitration provision applies to a particular dispute are to be resolved in favor of arbitration; an exclusionary clause in an arbitration provision should be narrowly construed; and the burden is on the partyopposing arbitration to show the agreement cannot be interpreted to apply to the dispute (*143 Cal. App. 4th 761, 771-772*). Buyers did not contend they suffered emotional distress as a result of living in the home. They were away when the termite damage was discovered. The only injury they sustained from being on the property was the distress caused by the advice that wife wear a mask and protective clothing to protect herself and her unborn child from dry rot, fungus, and other hazardous substances. Buyers did not allege they were actually exposed to any harmful matter (*143 Cal. App. 4th 761, 774*). In the insurance context, a bodily injury exclusion is limited to physical injury to the body and does not include nonphysical, emotional or mental harm (*143 Cal. App. 4th 761, 775)* . Under California law, plaintiffs could not likely

recover damages for emotional distress given that (1) their claims were based on a broker's alleged failure to disclose property (termite) damage, and (2) the emotional distress was caused solely by what they saw and heard after the property had been damaged (*143 Cal. App. 4th 761, 776)* . Nondisclosure of termite damage, absent exposure to a real or tangible effect of the infestation (for example, the collapse of a wall), rarely threatens a buyer with physical injury (*143 Cal. App. 4th 761, 777)* . That breach of duty usually directly affects only a property or financial interest. Thus, the buyers could not have reasonably expected that a claim for emotional distress would exist against a broker in the circumstances here, much less that the claim would be one for bodily injury (*143 Cal. App. 4th 761, 777-778*). Some degree of emotional distress attends most, if not all, home purchases (*143 Cal. App. 4th 761, 778*). Thus, if emotional distress were considered a bodily injury, the arbitration exclusion in the agreement could apply in virtually every dispute, rendering the arbitration provision a nullity. Few, if any, claims would ever be subject to arbitration. Because the exclusion should not swallow the binding arbitration rule, the court declined to construe "bodily injury" to include purely emotional distress. That conclusion found support in the Legislative history of *Code Civ. Proc. § 1298.7*, which provides that in the event an arbitration provision is included in a contract or agreement to convey real property, it shall not preclude or limit any right of action for bodily injury (*143 Cal. App. 4th 761, 778*). It is unlikely that the buyers can recover emotional distress damages on the facts of this case (*143 Cal. App. 4th 761, 780*). The gist of the action is a dispute involving the failure to disclose termite damage; it is not a claim for personal injuries caused by, for example, defective construction, which comes within the arbitration exclusion. Based on the plain language of the agreement and the legislative history of *Code Civ. Proc. § 1298.7*, the court concluded that the arbitration exclusion for bodily injury did not include the claims for emotional distress. Unlike emotional distress, gestational diabetes is a physical condition (*143 Cal. App. 4th 761, 780)* . However, the parties to a home purchase agreement would not reasonably expect that, as used in the agreement, "bodily injury" would include diabetes caused by emotional distress which, in turn, is caused by learning about termite damage. Accordingly, the trial court erred in denying the motion to compel arbitration based on the bodily injury exclusion (*143 Cal. App. 4th 761, 782)* .

[c] Insurer's Duty to Defend Is Broader Than Its Duty to Indemnify

In ***Food Pro Int'l, Inc. v. Farmers Ins. Exch.*** *(2008) 169 Cal. App. 4th 976,89Cal. Rptr. 3d1* , a food processing and distribution consulting firm tendered defense of a tort action to its insurer under a CGL policy. The underlying action arose when the insured's employee, acting in the capacity of a consultant during the process of relocating the client's food-processing plant to another city, noticed that an electrical contractor hired by the client disconnected the electrical system for a fruit extruder machine while leaving a large hole in the floor. The insured's employee apprised the client's mechanics so that they would address the problem. The mechanics covered the hole but did not secure the covering; and a week later the electrical contractor's foreman fell through the hole to the lower floor, although he had been aware of the hole when he was at the site the previous week. The CGL contained an exclusion entitled "Exclusion--Engineers, Architects or Surveyors Professional Liability," which the insurer contended applied to preclude a duty to defend. The trial court found for the insurer, holding that the bodily injury in the underlying action arose out of the insured's supervisory services, which was excluded. The court of appeal reversed, holding that the duty to defend is both separate from and broader than a duty to indemnify (*169 Cal. App. 4th 976, 985)* . The court construed the exclusion narrowly, noting that to do otherwise would render the CGL policy inapplicable to any incident that occurs while the insured is on a project site as an engineering consultant. Because the insured is an engineering firm, its general liability policy would be essentially useless. To prevail on a claim for breach of duty to defend, the insured need not prove coverage, but only the possibility of coverage at the time the claim is raised (*169 Cal. App. 4th 976, 992)* .

[4] Additional Authorities

[a] Arbitration Agreement Applies to Related Tort Claim

The court of appeal in *Blatt v. Farley (1990) 226 Cal. App. 3d 621, 276 Cal. Rptr. 612* , affirmed an award pursuant to a demand for arbitration that described the dispute as encompassing "unsuitable investment recommendations, misrepresentations and omissions in connection with the sale of securities." The arbitration was conducted under a

player/representative agreement that provided for arbitration of "all disputes arising out of or relating to this Agreement." The court said that the quoted language was broad enough to encompass tort liability (*226 Cal. App. 3d 621, 628)* .

In *Izzi v. Mesquite Country Club (1986) 186 Cal. App. 3d 1309, 231 Cal. Rptr. 315* , plaintiffs entered into a real property purchase and sale contract requiring arbitration of matters "in connection with" the contract, and subsequently brought an action in tort against the sellers, alleging fraudulent nondisclosure of assessment costs of the property. The trial court denied defendants' petition to compel arbitration on the ground that, among other things, the action was outside the scope of the arbitration clause. The court of appeal reversed, holding that the issue of whether critical information was withheld during contract negotiation was clearly connected with the contract (*186 Cal. App. 3d 1309, 1315-1316)* .

In *Merrick v. Writers Guild of America, West, Inc. (1982) 130 Cal. App. 3d 212, 181 Cal. Rptr. 530* , defendant, a union, had brought to arbitration a claim of two of its members against their employer, under terms of the union's collective bargaining agreement with the employer. The arbitrator issued an award denying the claim on its merits. The employer, under the basic agreement, subsequently brought suit against defendant for malicious prosecution and abuse of process, based on defendant's having prosecuted the prior arbitration. Defendant answered and then filed a petition to compel arbitration. The trial court denied the petition based on its finding that the allegations on which plaintiff's suit was based arose out of tort rather than contract and therefore did not come within the arbitration provisions contained in the collective bargaining agreement. Defendant appealed.

The court of appeal reversed the trial court's decision. The court stated that there appeared to be little difference in the premises between state and federal law applicable to the arbitration agreement (*130 Cal. App. 3d 212, 218)* . Citing both federal precedent and *Lewsadder v. Mitchum, Jones & Templeton, Inc. (1973) 36 Cal. App. 3d 255, 259, 111 Cal. Rptr. 405* (discussed *below*), the court held that a complaint sounding in tort will not prevent arbitration if the underlying agreement embraces the disputed matter. In regard to the present case, the court stated that the defendant's allegedly tortious conduct occurred in connection with arbitration proceedings pursuant to the arbitration provision of the agreement, and that plaintiff's action had its roots in the relationship between the parties that was created by the collective bargaining agreement (*130 Cal. App. 3d 212, 219)* . Thus, the court concluded that it could not be said that the dispute engendered by the defendant's alleged conduct was outside the scope of the arbitration proceedings simply because the plaintiff, by its complaint, made such conduct the basis of causes of action for malicious prosecution and abuse of process. The fact that the plaintiff's action sounded in tort rather than contract was not a valid basis for theorder denying the petition to compel arbitration (*130 Cal. App. 3d 212, 219-220)* .

Lewsadder v. Mitchum, Jones & Templeton, Inc. (1973) 36 Cal. App. 3d 255, 111 Cal. Rptr. 405 , concerned a suit for intentional misrepresentation and libel filed by respondent against his employer, a member of the New York Stock Exchange. The employer filed a petition to compel arbitration under an application with the Exchange that respondent had signed as a condition of employment, which provided that any controversy between respondent and any member of the exchange arising out of respondent's employment or its termination would be settled by arbitration. The court of appeal stated that while the intentional torts of fraud and libel are not in themselves associated with arbitration, there is no restriction preventing an agreement from effectively connecting them. The court held that because the term "controversy" is defined in *Code Civ. Proc. § 1280(c)* as any question arising between parties to an agreement, whether of law or fact, the present agreement extending arbitration to any controversy was broad enough to include tort as well as contract liabilities (*36 Cal. App. 3d 255, 259)* . Furthermore, the court found that the causes of action had not arisen independently of respondent's association with petitioner (*36 Cal. App. 3d 255, 259-261)* .

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20 ARBITRATION: COMPELLING
PART II. FORMS
B. Particular Claims Subject to Arbitration

2-20 California Points & Authorities § 20.41

§ 20.41 Arbitration of Federal Securities Claims

[1] FORM

PETITIONER, AS A PARTY TO AN AGREEMENT PROVIDING FOR ARBITRATION OF ANY CONTROVERSY RELATING TO THE ACCOUNT(S) RESPONDENT MAINTAINED WITH PETITIONER, IS ENTITLED TO AN ORDER COMPELLING ARBITRATION OF ALL CLAIMS RAISED BY RESPONDENT.

A. Arbitrability of Federal Securities Claims. [*See § 20.21[1], Paragraph A.*]

[*Optional*] **B. State Court Jurisdiction Under Securities Act of 1933.** State courts have concurrent jurisdiction with federal district courts of all suits in equity and actions at law brought to enforce any liability or duty created by the Securities Act of 1933, Sections 77a through 77aa of Title 15 of the United States Code (*15 U.S.C. § 77v(a)*; *see also Lakewood Bank & Trust Co. v. Superior Court (1982) 129 Cal. App. 3d 463, 468-470, 180 Cal. Rptr. 914*).

[*Optional*] **C. State Court Jurisdiction Under Securities Exchange Act of 1934.** State courts have jurisdiction over claims made under the Securities Exchange Act of 1934 (*15 U.S.C. §§ 78a-78 ll*) and over regulations promulgated under that Act only if the claim is asserted in addition to state claims and is based on common law. Exclusive federal jurisdiction over claims based on the Securities Exchange Act of 1934 extends only to those claims that go beyond common-law rights that state courts could have fully adjudicated prior to passage of the Act (*Twomey v. Mitchum, Jones & Templeton, Inc. (1968) 262 Cal. App. 2d 690, 704-706)* .

[*Optional*] **D. Federal Securities Law Preempts State Law Adhesion Contract Principles.** Because Congress has committed to the Securities and Exchange Commission (SEC) the task of insuring that the federal rights established by the Securities Acts are not compromised by inadequate arbitration procedures, the courts are bound by the SEC's determination that the arbitration procedures adopted by national securities exchanges and securities associations are satisfactory. Any contrary result would frustrate the federal scheme. Thus, state law adhesion contract principles may not be invoked to bar arbitrability, and arbitration under SEC-approved procedures is not unconscionable as a matter of law (*Cohen v. Wedbush, Noble, Cooke, Inc. (9th Cir. 1988) 841 F.2d 282, 286)* .

[2] Comments

[a] Use of Form

This form may be used to support a petition to compel arbitration of a dispute encompassing federal securities claims when the specific arbitration procedures to be used have been approved by the Securities and Exchange Commission (SEC). Formerly, the state securities claims could be arbitrated, but the federal claims could not [*see Dean Witter Reynolds Inc. v. Byrd (1985) 470 U.S. 213, 217, 105 S. Ct. 1238, 84 L. Ed. 2d 158, 163, 165-167* (claim of adhesion contract not discussed)].

The authorities in optional Paragraphs B and C address state court jurisdiction under the federal Securities Acts of 1933 and 1934, respectively.

The authority in optional Paragraph D abrogates California cases to the contrary, specifically *Lewis v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1986) 183 Cal. App. 3d 1097, 1102-1106, 228 Cal. Rptr. 345* , and *Lewis v. Prudential-Bache Securities, Inc. (1986) 179 Cal. App. 3d 935, 944-945, 225 Cal. Rptr. 69* . Optional Paragraph D may be used if the unconscionability issue has been raised, or if counsel anticipates that it might be raised.

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in support of compelling arbitration, either alone [*see § 20.10*] or combined with a motion to stay an action [*see § 20.11*].

As a tactical matter, counsel may wish to reserve these points for oral argument or for other form of rejoinder to the respondent's opposing memorandum. In deciding whether or not to reserve these arguments, counsel should consider local court rules and practice, as well as whether the moving party would be expected to raise these points in initial moving papers, to avoid the possibility of losing the opportunity to raise them.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the counsel should trace the language of the arbitration agreement, particularly language incorporating the SEC approved arbitration rules of a national securities exchange or securities association.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filedunverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

The authorities cited in *§ 20.31* may be combined with those in this form to establish incorporation by reference of rules or bylaws requiring arbitration.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] State Court Jurisdiction Under Securities Act of 1933

In ***Lakewood Bank & Trust Co. v. Superior Court*** *(1982) 129 Cal. App. 3d 463, 180 Cal. Rptr. 914* , the court of appeal reiterated that state courts have jurisdiction, with federal district courts, of all suits in equity and actions at law brought to enforce any liability or duty created by the Securities Act of 1933 (*129 Cal. App. 3d 463, 468-470)* . Because the cross complaint at issue, against a Texas bank, was based on its actions after the sale of the interests in question, it was not based on the Securities Act of 1933. Thus, the court of appeal issued a peremptory writ of mandate requiring the trial court to vacate its order denying motions to dismiss and quash and requiring it to hold further proceedings to determine if the cross defendant had sufficient minimum contacts with California to establish jurisdiction on that basis (*129 Cal. App. 3d 463, 471-474)* .

[b] State Court Jurisdiction Under Securities Exchange Act of 1934

Twomey v. Mitchum, Jones & Templeton, Inc. *(1968) 262 Cal. App. 2d 690, 69 Cal. Rptr. 222* , was an action by an investor for damages for stockbrokers' fraud, misrepresentation, and breach of fiduciary duty. In the course of the trial, plaintiff introduced evidence of SEC rules, rules of the NYSE, and rules of the NASD. For purposes of the appeal, plaintiff admitted that those rules, regarding over-trading and suitability of investments, were relied on in establishing defendants' negligence and fraud. Judgment was for plaintiff, and defendants appealed, in part, on the ground that *15 U.S.C. § 78aa* vests exclusive jurisdiction of claims brought under the Act of 1934 in the federal district courts.

The court of appeal affirmed. The court noted that *15 U.S.C. § 78i(e)* expressly authorizes action by a customer against a broker who has willfully engaged in certain manipulative practices (*262 Cal. App. 2d 690, 699-700)* . The court considered cases from other jurisdictions that held that the exclusive jurisdiction of federal courts extends only to those actions that involve some right of recovery that goes beyond those common-law rights that might have been adjudicated and enforced by appropriate action in a state court before the Act of 1934 was passed (*262 Cal. App. 2d 690, 704)* , and that a state court can entertain a common-law fraud action even though it has been joined with a nonjurisdictional cause of action predicated on an express or implied right under the Act of 1934 (*262 Cal. App. 2d 690, 705)* . The court noted that *15 U.S.C. § 78bb(a)* provides that the remedies provided by the Act of 1934 are in addition to any and all other rights that may exist at law or in equity and concluded that state courts had jurisdiction over the causes of action set forth in plaintiff's complaint (*262 Cal. App. 2d 690, 706)* .

[c] Federal Securities Law Preempts State Law Adhesion Contract Principles

Plaintiff/investors in ***Cohen v. Wedbush, Noble, Cooke, Inc.*** *(9th Cir. 1988) 841 F.2d 282* , brought an action in 1987 against their broker, charging defendant with breach of the agreement between the parties, breach of fiduciary duty, and breach of the covenant of good faith and fair dealing. The suit was based on defendant's sale of $3 million of securities in plaintiffs' margin accounts. Defendant moved to compel arbitration of the claims, and the motion was granted. Plaintiffs appealed.

The court of appeals affirmed. Plaintiffs claimed that the arbitration clause was unenforceable as an unconscionable provision of a contract of adhesion, that they were fraudulently induced to sign the agreement, and that the arbitration provisions in the agreements were unenforceable as fraudulent and manipulative practices under regulations

promulgated by the Securities and Exchange Commission (SEC), that is, SEC Rule 15c2-2, 17 C.F.R. § 240.15c2-2. Plaintiffs based their claim of unconscionability on *Lewis v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1986) 183 Cal. App. 3d 1097, 1102-1106, 228 Cal. Rptr. 345* , and *Lewis v. Prudential-Bache Securities, Inc. (1986) 179 Cal. App. 3d 935, 944-945, 225 Cal. Rptr. 69* , which held that arbitration under the auspices, rules, and panel of the New York Stock Exchange (NYSE) or the National Association of Securities Dealers (NASD) was not sufficiently impartial and, especially when industry practices were challenged, was presumptively biased. In this case, the broker claimed that liquidation of the securities was proper in accordance with industry practice, and plaintiffs challenged those practices as unreasonable. The court of appeals said it respectfully disagreed with the conclusion of the California courts that the doctrine of unconscionability was applicable under these circumstances (*841 F.2d 282, 286)* . As recognized by the *Supreme Court in Shearson/American Express, Inc. v. McMahon (1987) 482 U.S. 220, 233-238, 107 S. Ct. 2332, 96 L. Ed. 2d 185* , the SEC has virtually plenary authority over the arbitration procedures adopted by national securities exchanges and securities associations. Because Congress has committed to the SEC the task of ensuring that the federal rights established by the Securities Acts are not compromised by inadequate arbitrationprocedures, the court of appeals held itself bound by the SEC's determination that the NYSE and NASD procedures here at issue were satisfactory. Any contrary result, it said, would frustrate the federal scheme. Similarly, state law adhesion contract principles may not be invoked to bar arbitrability of disputes under the Federal Arbitration Act. Thus, arbitration under SEC-approved procedures is not unconscionable as a matter of law (*841 F.2d 282, 286)* .

Plaintiffs claimed that they had been fraudulently induced to enter into the agreement to arbitrate, in that the broker had not told them they were waiving significant rights by doing so. Under the federal rule, if the claim of fraud in the inducement goes to the arbitration clause, that claim cannot be arbitrated, but must be adjudicated (*841 F.2d 282, 286)* . However, here the defendant had no duty to disclose the waiver of the right to trial to plaintiffs, and the statement that the agreement did not compromise any of plaintiffs' rights went to the agreement as a whole, and was not one that plaintiffs could reasonably have relied on, reliance not being reasonable when the plaintiff, through the exercise of reasonable diligence, for instance by simply reading the contract, could have ascertained the truth (*841 F.2d 282, 287)* . Thus, the claims did not state a cause of action for fraud (*841 F.2d 282, 288)* .

Regarding plaintiff's claim that the arbitration clause violated SEC Rule 15c2-2, 17 C.F.R. § 240.15c2-2, the court of appeals cited the statement from *Shearson/American Express, Inc. v. McMahon (1987) 482 U.S. 220, 234 n.3, 107 S. Ct. 2332, 96 L. Ed. 2d 185* , that Rule 15c2-2 was not based on any independent analysis by the SEC, but on the premise that prior case law rendered 10b-5 claims unarbitrable. Accordingly, the SEC has rescinded Rule 15c2-2 in light of *Shearson*, and plaintiffs' claim was without foundation (*841 F.2d 282, 288)* .

[4] Additional Authorities

[a] State Court Jurisdiction Under Securities Exchange Act of 1934

In *Lange v. H. Hentz & Co., (N.D. Tex., 1976) 418 F. Supp. 1376* , the United States District Court for the Northern District of Texas cited *Twomey v. Mitchum, Jones & Templeton, Inc. (1968) 262 Cal. App. 2d 690, 69 Cal. Rptr. 222* (discussed at [3][b], *above*), with approval in dismissing an action against a broker for breach of NASD rules and state and federal securities laws, for fraud and negligence, and for breach of fiduciary duty. The court said that erosion of state-defined relationships would no doubt occur if federal law were to expand into the nonfraud areas already claimed by the states (*418 F. Supp. 1376, 1383)* .

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CHAPTER 20 ARBITRATION: COMPELLING
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2-20 California Points & Authorities § 20.42

§ 20.42 Arbitrability of Claims of Fraud in Inducement of Contract Containing the Arbitration Clause

[1] FORM

PETITIONER, AS A PARTY TO AN ARBITRATION PROVISION PROVIDING FOR ARBITRATION OF DISPUTES ARISING FROM A CONTRACT IN WHICH THE PROVISION IS CONTAINED, IS ENTITLED TO AN ORDER COMPELLING ARBITRATION [AND STAYING ANY PENDING ACTION RELATING TO ARBITRABLE ISSUES] OF THE ISSUE OF FRAUD IN INDUCEMENT OF THE CONTRACT BECAUSE THE CLAIM OF FRAUD IS DIRECTED TO THE ENTIRE UNDERLYING AGREEMENT AND NOT TO THE ARBITRATION PROVISION ALONE.

A. Claims of Fraud in Inducement of Contract Containing Arbitration Clause Are Arbitrable. In the absence of contrary intent, and when the arbitration clause is reasonably susceptible of such an interpretation, claims of fraud in the inducement of the contract in which the clause is contained are subject to arbitration if the arbitration provision itself is not subject to a claim of fraud (*Rosenthal v. Great Western Fin. Securities Corp. (1996) 14 Cal. 4th 394, 415-416, 58 Cal. Rptr. 2d 875, 926 P.2d 1061* ; *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street (1983) 35 Cal. 3d 312, 323, 197 Cal. Rptr. 581, 673 P.2d 251* ; *Duffens v. Valenti (2008) 161 Cal. App. 4th 434, 448-451, 74 Cal. Rptr. 3d 311* ; *Larian v. Larian (2004) 123 Cal. App. 4th 751, 761-762, 19 Cal. Rptr. 3d 916*).

[*Optional*] **B. Proving Existence of Agreement to Arbitrate.** [*See § 20.10[1], Paragraph C.*]

[*Optional*] **C. Evidentiary Hearing.** [*See § 20.10[1], Paragraph D.*]

[*Optional*] **D. No Duty to Explain Provision.** When parties are dealing at arms length, neither has any duty to explain the terms of a written contract to the other, particularly when the language of the contract expressly and plainly provides for arbitration of disputes arising out of the contractual relationship (*Rowland v. PaineWebber Inc. (1992) 4 Cal. App. 4th 279, 286, 6 Cal. Rptr. 2d 20*).

[*Optional*] **E. Reliance Must Be Reasonable.** Reliance on an alleged misrepresentation is not reasonable when plaintiff

could have ascertained the truth through the exercise of reasonable diligence. [Reasonable diligence requires a party to read a contract before signing it]. A party cannot use his or her own lack of diligence to avoid an arbitration agreement (*Rosenthal v. Great Western Fin. Securities Corp. (1996) 14 Cal. 4th 394, 421-427, 58 Cal. Rptr. 2d 875, 926 P.2d 1061* ; *Rowland v. PaineWebber Inc. (1992) 4 Cal. App. 4th 279, 286, 6 Cal. Rptr. 2d 20*).

[2] Comments

[a] Use of Form

This form may be used to support a petition to compel arbitration when the petitioner anticipates a challenge that, because the contract in which the arbitration clause is contained was induced by fraud, the arbitration clause is revoked because of the fraud. The optional paragraphs describe the procedure and sufficiency of the evidence used to determine which type of fraud exists and whether the court should grant the motion to compel arbitration. Counsel should use as many of the optional paragraphs as relate to specific contentions or allegations at issue, and argue that the declarations or other evidence submitted in the particular situation are not sufficient to establish fraud in the inception or execution of the principal agreement or fraud in the inducement of the arbitration clause itself.

In addition, counsel should demonstrate that the claims of fraud are directed at the entire agreement, and not at the arbitration provision alone [*see* *Rosenthal v. GreatWestern Fin. Securities Corp. (1996) 14 Cal. 4th 394, 415-417, 58 Cal. Rptr. 2d 875, 926 P.2d 1061* ; *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street (1983) 35 Cal. 3d 312, 323, 197 Cal. Rptr. 581, 673 P.2d 251* (discussed at [3][a], *below*)].

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in support of compelling arbitration, either alone [*see § 20.10*] or combined with a motion to stay an action [*see § 20.11*].

As a tactical matter, counsel may wish to reserve these points for oral argument or for other forms of rejoinder to the respondent's opposing memorandum. In deciding whether or not to reserve these arguments, counsel should consider local court rules and practice, as well as whether or not the moving party would be expected to raise these points in initial moving papers, to avoid the possibility of losing the opportunity to raise them.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the counsel should quote or refer to language of the arbitration agreement that specifies the subject matter that may be arbitrated. Counsel should show that the arbitration agreement may reasonably be construed to encompass claims of fraud relating to the underlying contract.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see* *Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California

Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Memoranda

The points and *authorities in Ch. 20A, Arbitration: Resisting, § 20A.87* generally oppose those in this form on the ground that the fraud in the execution or inception of the entire agreement was so extensive as to vitiate mutual assent or that the fraud was directed only at the arbitration provision, not at the entire contract.

[3] Discussion of Authorities

[a] Claims of Fraud in Inducement of Contract Containing Arbitration Clause Are Arbitrable

The facts and procedural background of ***Rosenthal v. Great Western Fin. Securities Corp.*** *(1996) 14 Cal. 4th 394, 58 Cal. Rptr. 2d 875, 926 P.2d 1061* , and the portions of the opinion addressing the procedure for determining the existence of an arbitration agreement, including any defenses to enforcement thereof, in general, and the evidentiary nature of that hearing are discussed in *§ 20.10[3][a]* and *[b]*, respectively. Defendant contended that plaintiffs' declarations were legally insufficient to raise the issue of the nonarbitrability of the fraud claims because they were not directed specifically at the arbitration clause. In order to defeat a petition to compel arbitration, the parties opposing the petition must show that the asserted fraud claim goes to the making of the agreement to arbitrate rather than to the making of the contract in general (*14 Cal. 4th 394, 415)* . California law distinguishes between fraud in the inducement and fraud in the inception (or execution) of a contract. Fraud in the inception or execution refers to the situation in which the promisor is deceived as to the nature of his or her act and actually does not know what he or she is signing, or does not intend to enter into a contract at all. There being no mutual assent, the contract is void. Fraud in the inducement occurs when the promisor knows what he or she is signing but his or her consent is induced by fraud. Mutual assent is present and a contract is formed, which, by reason of the fraud, is voidable (*14 Cal. 4th 394, 415)* .

Defendant also contended that *Prima Paint v. Flood & Conklin (1967) 388 U.S. 395, 404, 87 S. Ct. 1801, 18 L. Ed. 2d 1270* , requires arbitration of any fraud claim, even one going to the execution of the contract as a whole, except a claim directed to the arbitration clause itself. The portion of the opinion addressing this contention is discussed in *Ch. 20A, Arbitration: Resisting, § 20A.87[3][f]*. The Supreme Court said that arbitration clauses must, under federal law, be viewed as "separable" from other provisions of a contract. However, fraud in the inducement relating to other contractual terms does not render the arbitration agreement unenforceable, even when it might justify rescission of the contract as a whole. By entering into an arbitration agreement, the parties established their intent that disputes coming within the agreement's scope be determined by an arbitrator rather than a court; this contractual intent must be respected even with regard to claims of fraud in the inducement of the contract generally (*14 Cal. 4th 394, 416)* .

Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street *(1983) 35 Cal. 3d 312, 197 Cal. Rptr. 581, 673 P.2d 251* , involved a dispute arising from a lease of office property. The lessee brought an action for rescission of the lease and damages, alleging that the premises were untenantable and that it had beeninduced into entering the lease by the lessor's misrepresentations about the building's condition. The lease contained an arbitration clause by which the parties agreed to arbitrate any dispute arising with respect to the lease, exclusive of disputes over rent. When the lessor petitioned the superior court to compel arbitration of the dispute and stay the civil proceedings, the lessee responded that the arbitration agreement should be revoked because of the lessor's fraud. The trial court denied the petition to stay proceedings and compel arbitration, and the lessor appealed.

The Supreme Court reversed the denial and ordered the superior court to grant the petition. The Court held the fundamental issue to be whether a court, confronted with an agreement containing an arbitration clause and a petition to compel arbitration, will preliminarily entertain and decide a party's claim that the underlying agreement, as distinguished from the agreement to arbitrate, was procured by fraud. The Court noted that this was a question of first impression in California and examined a number of federal and sister-state cases. The Court found the majority rule to be that when there is no claim made that fraud was directed to an arbitration clause itself, a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud. A factor in the majority rule is the policy of promoting arbitration both to accord with the original intention of the parties and to relieve court congestion. The Court held the majority rule to be compatible with California's arbitration statutes and found that the rule was in accord with California's strong public policy in favor of arbitration. This was particularly true of cases in which parties of presumptively equal bargaining power have entered into an agreement containing a commitment to arbitration, and one of the parties seeks to avoid arbitration by asserting that the other party fraudulently induced the agreement because he or she never intended to perform. The Court noted that the difference between a breach of contract and such fraudulent inducement depends on a determination of a party's state of mind at the time of entering the contract, and that the consequences of allowing a party to avoid arbitration by relying on the distinction must be considered (*35 Cal. 3d 312, 322)* . The Court concluded that the majority rule of the federal and sister-state courts should be adopted. In the absence of an indication of contrary intent, and when the arbitration clause is reasonably susceptible of such an interpretation, claims of fraud in the inducement of the contract, as distinguished from claims of fraud directed to the arbitration clause itself, are subject to arbitration (*35 Cal. 3d 312, 323)* .

Duffens v. Valenti *(2008) 161 Cal. App. 4th 434, 74 Cal. Rptr. 3d 311* , involved contracts alleged to be void and unenforceable because of violation of the statutes regulating dating service contracts (*Civ. Code § 1694 et seq.*). Plaintiffs sought general, special, and treble damages based on allegations of fraud and statutory violations in the individual matchmaking consulting agreements sold to them by defendant. Plaintiffs alleged that defendant claimed to have a network of employees who recruited and screened high-level, wealthy, single potential romantic partners throughout the United States and internationally, and promised it had wealthy, successful persons as active clients but in fact never had any suitable matches to introduce to them and had therefore obtained their assent to the agreements through these misrepresentations. Further violations of the statute were alleged in that the retainer fees were nonrefundable, while *Civ. Code § 1694.3(a)* and *(b)* required them to be totally refundable in two instances. Defendant brought a motion to compel arbitration, arguing that the arbitration clause within the matchmaking consulting agreement was severable and enforceable, regardless of any potential defenses to the underlying contract liability. The trial court denied the motion finding the arbitration clause was unenforceable because it was contained within an agreement that lacked essential language required by the statutory scheme, and entered into under misleading circumstances, also a violation of statute (*Civ. Code §§ 1694.3, 1694.4(a)* and *(b)*). Defendant appealed.

The court of appeal affirmed, concluding that under California law, the agreements were part of a small class of contracts regulated by specific statutes that expressly render nonconforming contracts void and unenforceable. Because the agreements sued on violated express requirements of the dating service statutes, they were void and unenforceable, and their arbitration provisions were likewise not enforceable (*161 Cal. App. 4th 434, 441, 456)* . The court of appeal said it could not determine whether the Federal Arbitration Act (FAA; *9 U.S.C. § 1 et seq.*) applied because defendant raised the issue for the first time on appeal and did not provide a record sufficient to allow the court to make that determination (*161 Cal. App. 4th 434, 445, 451)* . The majority of the agreements contained a choice of law and choice of forum clauses that provided they would be governed by, interpreted under, and construed and enforced in accordance with the laws of the State of California (*161 Cal. App. 4th 434, 446)* . The court of appeal said it could not treat this as an FAA case, but would apply the standard annunciated in *Rosenthal v. Great Western Fin. Securities Corp (1996) 14 Cal. 4th 394, 402, 58 Cal. Rptr. 2d 875, 926 P.2d 1061* (*Rosenthal*, discussed *above*) for evaluating the record under California standards for enforceability of an arbitration clause, because the legality of the overall agreement was challenged (*161 Cal. App. 4th 434, 452)* . Before discussing the illegality issue, however, the court of appeal discussed the fraud issue and the distinctions between fraud in the execution and fraud in the inducement and *Rosenthal*'s holding

that the nomenclature "permeation doctrine" no longer be used in California (*161 Cal. App. 4th 434, 448)* . The correct analysis in determining an arbitrability question that is based on a claim of an invalid agreement will use the following definitions. First, an arbitration clause will not be enforced if it is found within an agreement that may properly be judicially determined to be void for fraud in the execution or fraud in the inception, such that there was never any existing agreement in the first place, and this determination includes any arbitration clause within the basic agreement; fraud in the execution voids the entire agreement. Nevertheless, an arbitration clause may be subject to enforcement even when a challenge exists to the validity of the overall agreement, if the challenge is based on fraud in the inducement, and if the FAA applies. Claims of fraud in the inducement of the contract generally--that is, fraud claims not going to the making of the agreement to arbitrate--are to be decided by the arbitrator rather than the court, unless the parties have agreed otherwise (*161 Cal. App. 4th 434, 448)* . California law distinguishes between fraud in the execution or inception of a contract and fraud in the inducement of a contract. In the former case the fraud goes to the inception or execution of theagreement, so that the promisor is deceived as to the nature of his act, and actually does not know what he is signing, or does not intend to enter into a contract at all, mutual assent is lacking, and the contract is *void*. In such a case it may be disregarded without the necessity of rescission. Fraud in the inducement, by contrast, occurs when the promisor knows what he is signing but his consent is induced by fraud, mutual assent is present and a contract is formed, which, by reason of the fraud, is voidable. In order to escape from its obligations the aggrieved party must rescind. This type of analysis requires courts to deem that claims of fraud in the execution of the entire agreement are not arbitrable under either state or federal law. Likewise, claims that a party has employed fraud in inducing consent specifically to the arbitration agreement (e.g., by actively concealing its existence or misrepresenting its meaning or value) are, under federal or state law, to be decided by the court, because they go to the validity of the making of the arbitration clause itself. Here, it is undisputed that respondents knew the nature of their acts when they entered into the contracts, and they are not claiming fraud in the execution or inception. Under *Rosenthal*, claims that the contract as a whole was obtained through fraud in the inducement are, in the absence of evidence of the parties' contrary intent, arbitrable. Included in this rule of arbitrability are claims of a grand scheme of fraud, or fraud permeating the transaction (*161 Cal. App. 4th 434, 449)* . This type of fraud--fraud in the inducement--may result in disappointed expectations that may justify a revocation of the agreement because of a failure of performance. These cases should be distinguished from those in which a party claimed illegality of the underlying agreement. If the underlying agreement is illegal under other accepted standards, its arbitration clause can be avoided. Here, plaintiffs plead that fraud in the inducement occurred, because they knew what they were signing, but they claim their consent was induced by fraud, so that even though there was mutual assent and a contract, the contract, by reason of the fraud, is voidable (*161 Cal. App. 4th 434, 450)* . Claims based on fraudulent inducement of an underlying contractual arrangement normally might be arbitrable, as in a case of disappointed expectations in the performance of the contract. However, plaintiffs' allegations of breaches of statutory duty invoked other governing rules of contract interpretation that had to be considered in determining the arbitrability question (*161 Cal. App. 4th 434, 451)* . That portion of the opinion is discussed at *§ 20A.89[3][a]*.

Plaintiff and defendant in ***Larian v. Larian*** *(2004) 123 Cal. App. 4th 751, 19 Cal. Rptr. 3d 916* , were brothers and business partners. Their partnership was formed in 1979 and later evolved into a corporation. They conveyed 10 percent of the stock to their brother-in-law; the brothers each retained a 45 percent interest in the original corporation, and each successor corporation. Plaintiff and defendant began having disputes over the operation of the business in 1993 and considered having one brother buy out the other's equity interest. An outside appraisal of the company valued the company at $35 million to $40 million. Defendant was more active in the day-to-day operations of the company and allegedly concealed from plaintiff a new product line that would have generated $3 billion in sales within a few years. In March, 2000, defendant offered to purchase plaintiff's interest in the company for $9 million, based on a total valuation of the company at $20 million, which excluded the new product line. In September, 2000, the brothers executed an agreement to arbitrate, in accordance with which their uncle would act as arbitrator to value the company. In December, 2000, the brothers executed an agreement in which plaintiff agreed to sell his shares to defendant for less than $9 million. That agreement provided that any controversy between the parties arising out it would be arbitrated by the uncle, as sole arbitrator, and that his decision would be final and binding on both parties. Plaintiff alleged that he discovered the true facts pertaining to the new line in spring or summer of 2002 and requested rescission and damages.

In January, 2003, plaintiff submitted a list of claims to the arbitrator, based mainly on the concealment of information regarding the new product line and resultant substantial undervaluation of the company. Plaintiff sued, setting forth 10 causes of action including those based on fraud and deceit in the inducement of the arbitration agreement, in the arbitration process and in the December, 2000, agreement, breach of fiduciary duties, and rescission based on mistake. Defendant moved to compel arbitration. The trial court denied the motion, concluding that the allegation of fraud in the execution of the arbitration agreement had to be decided by the court. Defendant appealed.

The court of appeal reversed (*123 Cal. App. 4th 751, 765-766)* . In the absence of indication of contrary intent, and if the arbitration clause is reasonably susceptible of that interpretation, claims of fraud in the inducement of the contract (as distinguished from claims of fraud directed to the arbitration clause itself) are subject to arbitration (*123 Cal. App. 4th 751, 761)* . The court of appeal discussed the distinction, as made in *Rosenthal v. Great Western Fin. Securities Corp. (1996) 14 Cal. 4th 394, 58 Cal. Rptr. 2d 875, 926 P.2d 1061* (discussed *above*), between arbitrable and nonarbitrable fraud claims which are asserted as grounds for voiding an arbitration clause: Claims of fraud in the execution or inception of a contract are based on the promisor's being deceived as to the nature of the act of contracting, so that the promisor actually does not know what he or she is signing, or does not intend to enter into a contract at all; mutual assent is lacking, and the contract is void. Fraud in the inducement, by contrast, occurs if the promisor knows the nature of the document signed, but the consent in signing it was induced by fraud; mutual assent is present and a contract is formed, which, by reason of the fraud, is voidable. The first type of fraud--fraud in the inception or execution--is not arbitrable, on the theory that if the entire contract is void ab initio because of fraud, the parties have not agreed to arbitrate any controversy (*123 Cal. App. 4th 751, 761)* . However, fraud in the inducement relating to contract terms (other than the arbitration clause) does not render the arbitration agreement unenforceable, even if it might justify rescission of the contract as a whole (*123 Cal. App. 4th 751, 761-762)* .

The court of appeal found no evidence of fraud in the inception or execution of the agreement as it related to the arbitration clause; there was no evidence that plaintiff was ignorant of the character or essential terms of either the September 28 or December 4, 2000, arbitration agreements. Rather, the evidence related to misrepresentations concerning the new product line and the company's financial status, which was fraud in the inducement. Whether the alleged fraud concerning the concealment of the value and business prospects of the company was legally or equitably sufficientto warrant non-enforcement of the September 28 or December 4, 2000, arbitration agreements was to be resolved in the arbitrator. Thus, the trial court was required to grant the motion to compel arbitration (*123 Cal. App. 4th 751, 765)* .

[b] No Duty to Explain Provision

Plaintiffs in ***Rowland v. PaineWebber Inc.*** *(1992) 4 Cal. App. 4th 279, 6 Cal. Rptr. 2d 20* , a retired couple, sued individual and corporate broker defendants claiming defendants purchased investments unsuitable for plaintiffs' needs and made misrepresentations and omissions of material fact, causing them financial loss and emotional distress. The allegations related solely to the supervision and handling of plaintiffs' account. There was no allegation of misrepresentation or fraud regarding execution of the Client's Agreement or the arbitration clause in it. In response to defendants' petition to compel arbitration, one plaintiff's declaration stated that (1) they were besieged with a plethora of documents to be signed during the process of opening the account, (2) one of the individual defendants represented to them that the documents for opening the account were simply paperwork necessary to open the account, (3) there was no reason to read the documents because they were for PaineWebber's records and did not affect plaintiffs or their legal rights, and (4) plaintiffs were never given ample time to read the material and trusted the individual broker's explanation. The trial court found this to be an insufficient showing and granted plaintiffs 10 days to amend their complaint to sufficiently allege the claim of fraud. Before plaintiffs filed their amended complaint, which was substantially the same as the original one, the trial court denied the petition to compel arbitration and ordered the parties to proceed to trial on the severed issue of fraud in the inducement. Defendants appealed.

The court of appeal reversed the order denying defendants' petition to compel arbitration, holding that the complaint did

not allege fraud in the inducement of the contract or the arbitration clause and the allegations in plaintiffs' declarations opposing the petition did not tend to show that they were the victims of fraud. The court said the parties mischaracterized the issue as whether plaintiffs' fraud claim related to execution of the entire client's agreement or just to the arbitration provision. The more fundamental question was the sufficiency of their allegations. To be entitled to a jury trial on the issue of fraud in the inducement of the arbitration agreement, plaintiffs must state a cause of action for fraud. Any lesser showing would frustrate the purpose of arbitration agreements (*4 Cal. App. 4th 279, 285)* . When the complaint is devoid of contractual fraud allegations, the trial court should determine whether there are any facts supporting the allegations of fraud in the inducement (*4 Cal. App. 4th 279, 285-286)* . The trial court failed to impose that burden of proof on plaintiffs in this case. The allegations in the declaration were insufficient. The plaintiffs' reliance on the broker's statements about the contract was not reasonable, when they could have read the contract (*4 Cal. App. 4th 279, 286)* .

The court of appeal said that the individual broker's comments related to the client agreement as a whole rather than to the arbitration provision in particular, and thus, cannot be characterized as fraud in the inducement of the arbitration provision. Even assuming that a statement by a nonlawyer regarding a question of law can constitute fraud, when the challenge does not go to the validity of the arbitration clause, the dispute over the enforceability of the arbitration clause is to be arbitrated. The court distinguished *Strotz v. Dean Witter Reynolds, Inc. (1990) 223 Cal. App. 3d 208, 272 Cal. Rptr. 680* (discussed in *Ch. 20A, Arbitration: Resisting, § 20A.87[3][e]* and [g]), as involving a fiduciary relationship between the broker and the client and sufficient allegations of fraud in the inducement in the complaint. There were no facts in this case tending to show that plaintiffs were under defendants' dominion and control (*4 Cal. App. 4th 279, 287)* .

In reversing, the court of appeal held that when parties are dealing at arm's length, neither has any duty to explain the terms of a written contract to the other, particularly express and plain provisions such as the arbitration clause in this agreement. Reliance on an alleged misrepresentation is not reasonable when plaintiff could have ascertained the truth through the exercise of reasonable diligence. Reasonable diligence requires a party to read a contract before signing it. A party cannot use his or her own lack of diligence to avoid an arbitration agreement (*4 Cal. App. 4th 279, 286)* . No facts were presented that plaintiffs were in any way prevented from reading the contract, which it was their duty to do. Failure to read a contract before signing it is not by itself a reason to refuse its enforcement (*4 Cal. App. 4th 279, 287)* .

[c] Reliance Must Be Reasonable

The facts and procedural background of ***Rosenthal v. Great Western Financial Sec.*** *(1996) 14 Cal. 4th 394, 58 Cal. Rptr. 2d 875, 926 P.2d 1061* , and the portions of the opinion addressing the procedure for determining the existence of an arbitration agreement, including any defenses to enforcement thereof, in general, and the evidentiary nature of that hearing are discussed in *§ 20.10[3][a]* and *[b]*, respectively. The portion of the opinion addressing the arbitrability of claims of fraud in the inducement of the contract as a whole is discussed at [a], *above*. In considering the central disputed question, whether plaintiffs could justifiably rely on defendants' misrepresentations as an excuse for their failure to read the documents, the Supreme Court noted that plaintiffs relied on *Lynch v. Cruttenden & Co. (1993) 18 Cal. App. 4th 802, 807, 22 Cal. Rptr. 2d 636* , and *Strotz v. Dean Witter Reynolds, Inc. (1990) 223 Cal. App. 3d 208, 218-219, 272 Cal. Rptr. 680* , which in turn relied on Witkin, Summary of California Law, vol. 1, Contracts, § 407 (9th ed. 1987), for the proposition that, as a general rule, in California, even in the absence of a fiduciary relationship, plaintiff's failure to read a contract is excusable when reliance is placed on the misrepresentation of the other party. However, the Court stated, those cases and Witkin state the rule of excuse too broadly. While some cases hold that equitable relief, such as rescission or reformation of the contract, may be available despite the defrauded party's failure to read the contract, California law is clear that a misrepresentation does not render a written contract void, unless the misled party, before making the agreement, lacked a reasonable opportunity to learn its terms. When the defrauded party had a reasonable opportunity to discover the real terms of the contract, the contract is not void. The defrauded party's failure to learn the nature of the agreement cannot be attributable to his or her own negligence (*14 Cal. 4th 394, 420-421)* .

California law requires that a plaintiff, in failing to acquaint his or her self with thecontents of a written agreement before signing it, not have acted in an objectively unreasonable manner. One party's misrepresentation as to the nature of character or the writing does not negate the other party's apparent manifestation of assent, if the second party had a reasonable opportunity to know of the character and essential terms of the proposed contract. It follows that one party's unreasonable reliance on the other's misrepresentation, resulting in a failure to read a written agreement before signing it, is an insufficient basis, under the doctrine of fraud in the execution, for permitting that party to avoid an arbitration agreement contained in a contract. Whether a fraud claim that is insufficient as a defense to an arbitration demand may, if proven, form the basis for equitable or other relief in the arbitral forum, is a separate issue, with which the Supreme Court was not concerned in this case (*14 Cal. 4th 394, 423)* . Because the facts did not establish that most plaintiffs lacked a reasonable opportunity to learn the character of the documents they signed, they did not prove fraud sufficient to make the contracts wholly void (*14 Cal. 4th 394, 425)* .

Plaintiffs claimed that defendant brokers and brokerage firm had a fiduciary relationship with them. However, the court concluded that at the time these agreements were signed no agency relationship had yet been formed, and those aspects of a broker's duty that derive from his or her role as the investor's agent are not applicable (*14 Cal. 4th 394, 425)* . The Court noted that none of plaintiffs' declarations established any actual concealment by defendant of the arbitration clause in the client agreements. The client agreement was a one-page (legal size) document; and the arbitration clause was in bold print in the center of the page's right column (*14 Cal. 4th 394, 425-426)* . The Court concluded that the statements of defendant's representatives to the effect that the client agreements were merely a formality, or did not need to be read, were insufficient, even in light of the parties' relationship, to warrant a finding of fraud in the inception of the agreements. Hence, as to those plaintiffs whose declarations disclosed no additional evidence of fraud, the petition to compel arbitration should have been granted (*14 Cal. 4th 394, 426-427)* .

The facts and procedural background of ***Rowland v. PaineWebber Inc.*** *(1992) 4 Cal. App. 4th 279, 6 Cal. Rptr. 2d 20* , are discussed under [b], *above*. Additionally, the court of appeal noted that one plaintiff was a former securities broker and PaineWebber employee, so this was not a situation involving a helpless investor lost in the world of stocks and bonds. The court of appeal found plaintiffs' suggestion that they were in a weaker position and somehow were without choice in signing or reading the agreement to be without merit and presumed plaintiff was familiar with all industry contract terms necessary to open an investment account (*4 Cal. App. 4th 279, 286)* . The plaintiffs' reliance on the broker's statements about the contract was not reasonable, because they could have ascertained the truth through the exercise of reasonable diligence, specifically, they could have read the contract. A party cannot use his or her own lack of diligence to avoid an arbitration agreement (*4 Cal. App. 4th 279, 286)* .

[4] Additional Authorities

[a] Claims of Fraud in Inducement of Contract Containing Arbitration Clause Are Arbitrable

Plaintiffs in Hayes Children Leasing Co. v. NCR Corp. (1995) 37 Cal. App. 4th 775, 43 Cal. Rptr. 2d 650 , were a purchaser and a lessee of computer equipment. They sued the manufacturer and some of its employees for fraud and breach of contract relating to the capabilities and performance of the equipment. The purchase contract, which mistakenly referred to the lessee as the purchaser, contained an arbitration provision. Although the arbitration clause specified that its scope included "any claim of misrepresentation, arising out of or related to this Agreement and/or ... the furnishing of any equipment or service by NCR to Customer," plaintiffs successfully opposed defendants' motion to compel arbitration.

The court of appeal reversed as to the purchaser and affirmed as to the lessee, which it agreed was not a party to the purchase agreement (*37 Cal. App. 4th 775, 780)* . Plaintiff/purchaser recognized the general rule that allegations that the contract as a whole were induced by fraud are to be arbitrated, but claimed that the arbitration clause itself was inserted as part of a fraudulent scheme, and therefore, under *Moseley v. Electronic Facilities (1963) 374 U.S. 167,*

171, 83 S. Ct. 1815, 10 L. Ed. 2d 818 , that issue had to be decided by a court. The court of appeal noted that *Moseley* was decided before *Prima Paint v. Flood & Conklin (1967) 388 U.S. 395, 404, 87 S. Ct. 1801, 18 L. Ed. 2d 1270* , and therefore is overruled or limited to the extent it is inconsistent with *Prima Paint* (*37 Cal. App. 4th 775, 781, 787)* . The court of appeal concluded that, under *Prima Paint* and other authorities, it is not enough to allege that the arbitration clause was inserted to further a fraudulent scheme. The question in all cases is simply whether the agreement to arbitrate itself was induced by fraud. This means there must be facts alleged from which it might be concluded that the party resisting arbitration never intended to agree to arbitrate the issues raised in the proceedings, or that its assent to the agreement to arbitrate was the product of wrongful coercion. Absent such an allegation it must be concluded that the parties agreed to arbitrate their differences, including issues of fraud in the inducement of the contract, and the matter should be referred to arbitration (*37 Cal. App. 4th 775, 781)* .

The court of appeal noted that the case involved interstate commerce and was therefore governed by the provisions of the Federal Arbitration Act (*9 U.S.C. § 1 et seq.*). The court of appeal discussed *Prima Paint and Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street (1983) 35 Cal. 3d 312, 197 Cal. Rptr. 581, 673 P.2d 251* ; and noted that in neither case did the misrepresentation affect the parties' intent to arbitrate but affected the contract as a whole (*37 Cal. App. 4th 775, 781-783)* . Similarly, the allegations in this case were nothing more than allegations of fraud in the inducement of the contract as a whole and had no effect on the validity of the arbitration clause (*37 Cal. App. 4th 775, 785)* .

After arbitration in *Britz, Inc. v. Alfa-Laval Food & Dairy Co. (1995) 34 Cal. App. 4th 1085, 40 Cal. Rptr. 2d 700* , plaintiffs petitioned to vacate the award because, among other grounds, the trial court had erred in ordering arbitration. The plaintiffs alleged that fraud permeated the entire contracts, including their arbitration provisionsand that the fraud was directed not only to the contracts as a whole, but to the agreements to arbitrate as well (*34 Cal. App. 4th 1085, 1094)* . In addition to the allegations regarding false representations about the machines that were the subject of the contract, the plaintiffs alleged that the "false representations went not only to the contracts as a whole, but to the agreements to arbitrate, as well. Plaintiffs were led to believe by defendants that plaintiffs had to agree to arbitration as a *sine qua non* for acquisition of the equipment, bags and filling machines." The court stated that neither the complaint nor the declarations alleged that the representation that there could be no contract without an arbitration clause was false (*34 Cal. App. 4th 1085, 1094-1095)* . The court then held that it has been long established that the sort of fraud alleged by plaintiffs does not prevent enforcement of an arbitration clause in a contract, even though contract as a whole might be revocable due to the fraud (*34 Cal. App. 4th 1085, 1095)* . The issue of fraud as to the contracts generally is one for the arbitrator to determine (*34 Cal. App. 4th 1085, 1095-1096)* .

The court of appeal in *King v. Prudential-Bache Securities, Inc. (1990) 226 Cal. App. 3d 749, 277 Cal. Rptr. 214* , affirmed a judgment confirming an arbitration award in favor of plaintiff, who contended that claims of fraud in the inducement and permeating the contract should have been determined by the trial court and should have barred arbitration. The court held that fraud in the inducement of a contract containing an arbitration clause, as opposed to fraud claims directed at the arbitration clause itself, are to be decided by the arbitrator, not by the court (*226 Cal. App. 3d 749, 753)* . The court was satisfied from the record that the arbitrators properly decided the issue of fraudulent inducement (*226 Cal. App. 3d 749, 755)* .

In *Herman Feil, Inc. v. Design Center of Los Angeles (1988) 204 Cal. App. 3d 1406, 251 Cal. Rptr. 895* , the court was directly confronted with the issue of whether a claim of fraud in the inducement directed toward the arbitration clause itself may be resolved in arbitration, but appears to have sidestepped a clear resolution of the issue. A commercial tenant's alleged breach of a lease was compelled to be arbitrated under an arbitration clause in the lease [*see Code Civ. Proc. § 1281.2*]. The tenant alleged that the landlord had fraudulently inserted the arbitration clause into the lease by switching lease forms after a form without the clause had been reviewed and approved by the tenant's counsel. The tenant asked the arbitrator to bifurcate the proceedings and to determine first the claim of fraud in the inducement of the arbitration clause. The arbitrator denied the request for bifurcation, but heard evidence on the issue of fraud. After hearing, the arbitrator awarded the landlord damages for breach of the lease. The trial court vacated the award on the

ground that the issue of fraud in the inducement of the arbitration clause had not been directly or impliedly determined either by the court in compelling the matter to arbitration or by the arbitrator.

In reversing and confirming the award for the landlord, the appellate court noted that a matter may not be compelled to arbitration if grounds exist for the revocation of the arbitration agreement [*see Code. Civ. Proc. § 1281.2*]. The issue of fraud in the inducement of the arbitration agreement was resolved by implication against the tenant by the court's order compelling the matter to arbitration and by denial of appellate intervention by writ as to that order (*204 Cal. App. 3d 1406, 1418)* . However, the court also noted that the arbitrator did in fact hear evidence on the fraud issue, which suggested by implication that the award encompassed a resolution of that issue against the tenant. The court did not expressly endorse the arbitrator's authority to determine the issue, but neither did it suggest that the arbitrator may have exceeded his or her authority (*204 Cal. App. 3d 1406, 1413, 1419)* . Further, the court reviewed the evidence of fraud itself and found that there was none, which suggests that even if the matter was beyond the scope of arbitration and not resolved by the trial court, there was no due process violation because it was subject to judicial consideration on appeal (*204 Cal. App. 3d 1406, 1416-1417)* .

In *Downs v. Prudential-Bache Securities, Inc. (1988) 202 Cal. App. 3d 616, 248 Cal. Rptr. 734* , plaintiff signed an application and an employment agreement when he joined defendant stock brokerage firm, both of which provided for arbitration of any disputes. The employment agreement required arbitration under the rules of the New York Stock Exchange. After a dispute had arisen over trading plaintiff had done for one of his clients, he filed a complaint. Defendant had paid the client the money it had lost and received an assignment of the client's claims against plaintiff. After plaintiff filed the complaint, defendant moved for an order compelling arbitration, staying the court action, and consolidating plaintiff's claims with its arbitration claims. Plaintiff asked for leave to file an amended complaint and for an injunction to prevent defendant from proceeding with its pending arbitration. The amended complaint alleged that defendant induced plaintiff to accept employment by paying him an advance bonus, requiring him to sign a promissory note for that amount, and then falsely representing that it would not enforce the note. Plaintiff alleged that defendant was following an industry-wide practice of recruiting employees of competing firms by paying disguised bonuses for proprietary customer information. The trial court denied defendant's motions and plaintiff's request for an injunction, but granted plaintiff leave to amend his complaint.

The court of appeal reversed and remanded. Plaintiff argued that defendant's false promise to forego enforcement of the note was not arbitrable and that he should be entitled to rescind the entire agreement, including the arbitration clause. The court stated that if no claim is made that the fraud was specifically directed at the arbitration clause, a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud. The court concluded that because the fraud alleged by plaintiff was not specifically directed at the arbitration clause, it too was arbitrable (*202 Cal. App. 3d 616, 620)* .

California Points & Authorities

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20 ARBITRATION: COMPELLING
PART II. FORMS
B. Particular Claims Subject to Arbitration

2-20 California Points & Authorities § 20.43

§ 20.43 Arbitration of Uninsured Motorist Claim, Including Subordinate Issues

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF PETITION TO
Petitioner,	)	COMPEL ARBITRATION
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Respondent.	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

PETITIONER, AS A PARTY TO AN INSURANCE POLICY PROVIDING FOR ARBITRATION OF THE ISSUE OF WHETHER OR NOT HE/SHE IS LEGALLY ENTITLED TO DAMAGES UNDER UNINSURED MOTORIST COVERAGE, IS ENTITLED TO AN ORDER COMPELLING ARBITRATION OF HIS/HER CLAIM FOR BENEFITS UNDER THAT COVERAGE[, INCLUDING ANY LEGAL QUESTION SUBORDINATE TO THAT ISSUE] [AND STAYING ANY PENDING ACTION RELATING TO ARBITRABLE ISSUES].

A. Arbitration of Claims Under Uninsured Motorist Coverage. The determination as to whether the insured shall be legally entitled to recover damages, and if so entitled, the amount thereof, shall be made by agreement between the insured and the insurer or, in the event of disagreement, by arbitration (*Ins. Code § 11580.2(f)*; *see Spear v. California State Automobile Ass'n (1992) 2 Cal. 4th 1035, 1041-1042, 9 Cal. Rptr. 2d 381, 831 P.2d 821* ; *Allstate Ins. Co. v.*

Gonzalez (1995) 38 Cal. App. 4th 783, 789, 45 Cal. Rptr. 2d 491 (insurer's refusal to arbitrate is essential)).

[*EITHER, if petitioner filed timely action for bodily injury*]

B. Claim Has Been Preserved. Petitioner's cause of action against respondent for benefits under the uninsured motorist provision of the policy has been preserved as required by *Insurance Code Section 11580.2(i)(1)* because, on _____ [*date*], which was within two years from the date of the accident, petitioner filed suit for bodily injury against the uninsured motorist, in a court of competent jurisdiction (*Ins. Code § 11580.2(i)(1)(A)*; *see also Spear v. California State Automobile Ass'n (1992) 2 Cal. 4th 1035, 1040-1041, 9 Cal. Rptr. 2d 381, 831 P.2d 821*).

[*OR, if parties reached agreement at to the amount due under the policy*]

B. Claim Has Been Preserved. Petitioner's cause of action against respondent for benefits under the uninsured motorist provision of the policy has been preserved as required by *Insurance Code Section 11580.2(i)(1)* because, on _____ [*date*], which was within two years from the date of the accident, agreement as to the amount due under the policy was concluded (*Ins. Code § 11580.2(i)(1)(B)*; *see also Spear v. California State Automobile Ass'n (1992) 2 Cal. 4th 1035, 1040-1041, 9 Cal. Rptr. 2d 381, 831 P.2d 821*).

[*OR, if petitioner timely instituted arbitration proceedings*]

B. Claim Has Been Preserved. Petitioner's cause of action against respondent for benefits under the uninsured motorist provision of the policy has been preserved as required by *Insurance Code Section 11580.2(i)(1)* because, on _____ [*date*], which was within two years from the date of the accident, petitioner formally instituted arbitration proceedings by notifying the insurer in writing sent by certified mail, return receipt requested, sent to the _____ [insurer *or* agent for process designated by the insurer filed with the department (of insurance)] (*Ins. Code § 11580.2(i)(1)(C)*; *see also Spear v. California State Automobile Ass'n (1992) 2 Cal. 4th 1035, 1040-1041, 9 Cal. Rptr. 2d 381, 831 P.2d 821* ; *Blankenship v. Allstate Ins, Co. (2010) 186 Cal. App. 4th 87, 97, 111 Cal. Rptr. 3d 528*).

[*CONTINUE*]

C. Proving Existence of Agreement to Arbitrate. [*See § 20.10[1], Paragraph C.*]

[*Optional*] **D. Evidentiary Hearing.** [*See § 20.10[1], Paragraph D.*]

E. Declaration Regarding Workers' Compensation Claim. As required by *Insurance Code Section 11580.2(f)*, _____ [petitioner's demand for arbitration contained or this petition to compel arbitration contains] a declaration under penalty of perjury, stating that (i) the insured has _____ [a *or* no] workers' compensation claim; (ii) that claim has [not] proceeded to findings and award or settlement on all issues reasonably contemplated to be determined in that claim; [and (iii) that good cause exists for the arbitration to proceed immediately in that _____ (*state reasons amounting to good cause, e.g.*, the insured will likely die before the proceedings can be completed or before settlement can be reached, and it is imperative that his/her testimony before an arbitrator be taken within the next three months)] (*Ins. Code 11580.2(f)*; *see also Briggs v. Resolution Remedies (2008) 168 Cal. App. 4th 1395, 1399, 86 Cal. Rptr. 3d 396*).

[*Optional*] **F. Issue of Physical Contact With Uninsured Motorist Is Arbitrable Under Policy Language.** Under

policy language that provides for arbitration of a question or questions in dispute after the insured and the insurer have been unable to agree on the amount of damages payable under uninsured motorist coverage, the parties should be compelled to arbitrate the question of [the insured's] physical contact with a hit-and-run vehicle (*Orpustan v. State Farm Mut. Auto. Ins. Co. (1972) 7 Cal. 3d 988, 991-992, 103 Cal. Rptr. 919, 500 P.2d 1119* ; *see also Freeman v. State Farm Mut. Auto. Ins. Co. (1975) 14 Cal. 3d 473, 482, 121 Cal. Rptr. 477, 535 P.2d 341* (regarding terminology in uninsured motorist cases)).

[*Optional*] **G. Whether Insurer Is Bound by Default Judgment Against Driver Who Was at Fault Is Arbitrable.** [When the policy specifies that the insurer will not be bound by any judgment against any person or organization obtained without its written consent,] *Insurance Code Section 11580.2(f)* requires an insured and his or her insurer to arbitrate the tortfeasor's liability and damages owed to the insured, including the binding nature of any default judgment obtained against that tortfeasor. The validity of any default judgment falls squarely within and is subsumed by the questions of liability and damages statutorily subject to arbitration [and overrides any concern with uniformity of decisions] (*Bouton v. USAA Casualty Insurance Company (2008) 43 Cal. 4th 1190, 1194, 1202-1203, 78 Cal. Rptr. 3d 519*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a petition to compel arbitration relating to uninsured motorist insurance coverage. Superior courts have jurisdiction to determine petitions to compel arbitration in accordance with uninsured motorist policy provisions [*see Code Civ. Proc. §§ 85.1, 86(a)(10)(A)* (all uninsured motorist arbitration-related proceedings in accordance with *Ins. Code § 11580.2* are unlimited civil cases)]. Although this form provides a complete memorandum, counsel may wish to incorporate authorities addressing venue from *§ 20.10*] or combine this petition with a motion to stay any related action [*see § 20.11*].

Optional Paragraphs F and G are for use when either of those issues will be involved and counsel wishes to have the court's order make clear that the arbitrator is to determine that issue. The bracketed language at the beginning of Optional Paragraph G reflects the policy language at issue in *Bouton v. USAA Casualty Insurance Company (2008) 43 Cal. 4th 1190, 78 Cal. Rptr. 3d 519* . This issue that whether the insurer is bound by default judgment is arbitrable was resolved by the *California Supreme Court in Bouton v. USAA Casualty Insurance Company (2008) 43 Cal. 4th 1190, 78 Cal. Rptr. 3d 519* , and not addressed in the subsequent case of *Bouton v. USAA Casualty Insurance Company (2008) 167 Cal. App. 4th 412, 84 Cal. Rptr. 3d 152* (holding that coverage questions are not arbitrable).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the language of the insurance policy providing for arbitration of uninsured motorist claims should be quoted or referred to, and, if necessary, a statement of how the legal issue in question is subordinate to, or is a component part of, the central arbitrable issue should be included.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or

declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For a form supporting the proposition the 2003 amendment to *Ins. Code § 11580.2(i)* (effective January 1, 2004, instituting a two-year, rather than a one-year, limitation period) was *not* retroactive, see *Ch. 20A, Arbitration: Resisting, § 20A.45*.

For a form supporting the contention that an arbitrator of an uninsured motorist claim has authority to determine the issue of the insured's physical contact with an uninsured motorist, but arising in the context of confirmation of an award, see *Ch. 20C, Arbitration: Confirming, Correcting, or Vacating the Award, § 20C.63*. Section 20C.63 also addresses an arbitrator's authority to award costs and expenses in an uninsured motorist arbitration when the primary portion of the award is greater than a *Code Civ. Proc. § 998* offer made by the insured which the insurer did not accept.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Memoranda

For a form opposing those in this form on the ground that the uninsured motorist insurance company is not involved, see *Ch. 20A, Arbitration: Resisting, § 20A.42*.

[3] Discussion of Authorities

[a] Arbitration of Claims Under Uninsured Motorist Coverage

Plaintiff in ***Spear v. California State Automobile Ass'n*** *(1992) 2 Cal. 4th 1035, 9 Cal. Rptr. 2d 381, 831 P.2d 821* , was injured in an accident with an uninsured motorist in November, 1984, while acting in the course and scope of his employment. He notified defendant in June, 1985, that he intended to pursue a claim for benefits under the uninsured motorist provisions of his insurance policy. He filed an action against the uninsured motorist in November, 1985. He also pursued a workers' compensation claim, which was resolved in January, 1990, and notified defendant of this settlement in February, 1990. CSAA responded that it would not settle the uninsured motorist claim and that Spear should take whatever steps he thought necessary to compel arbitration. In April, 1990, Spear filed a motion to compel arbitration, which was denied on the ground that the four-year statute of limitations, which the court held began in 1985 when Spear filed the action against the uninsured motorist, had expired.

The court of appeal affirmed this denial, but the Supreme Court reversed. In addressing the commencement of the limitation period the Supreme Court said that under *Code Civ. Proc. § 1281.2*, a party to an agreement to arbitrate may not bring an action to compel specific performance of the arbitration provision until he or she can allege not only the

existence of the agreement, but also that the opposing party refuses to arbitrate the controversy (*2 Cal. 4th 1035, 1041)* . Thus, no cause of action to compel arbitration accrues until one party has refused to arbitrate. While the parties subject to arbitration are negotiating in good faith before submitting to arbitration, or are delaying negotiation and arbitration by mutual consent, there is no breach of the contract. Rather, the contract is breached at the time one party refuses to submit to arbitration (*2 Cal. 4th 1035, 1041-1042)* . The Court therefore held that an insured's cause of action against an insurance company to compel arbitration of uninsured motorist benefits does not accrue, and the statute of limitations does not begin to run, until the insurance company refuses to arbitrate. In this case, CSAA's refusal to arbitrate did not come until early in 1990, so the petition in April, 1990 was timely (*2 Cal. 4th 1035, 1042-1043)* .

Defendant in ***Allstate Ins. Co. v. Gonzalez*** *(1995) 38 Cal. App. 4th 783, 45 Cal. Rptr. 2d 491* , was driving a car owned by the passenger, who was insured by plaintiff, in July, 1986, when they were involved in an accident with an uninsured vehicle. Gonzalez filed a personal injury action against the owner and operator of the uninsured vehicle in July, 1987, and in March, 1989, informed Allstate in a letter that there were uninsured motorist claims arising out of the accident. However, Gonzalez did not file a demand for arbitration until February, 1992. Later that month, Allstate filed a declaratory relief action seeking a declaration that the statute of limitations had expired or that Gonzalez' claim was barred by failure to demand arbitration within a reasonable time. The trial court denied the prayer for declaratory relief; and Allstate appealed, as did Gonazalez.

The court of appeal reversed on the ground that Gonzalez had unreasonably delayed in demanding arbitration (*38 Cal. App. 4th 783, 786)* . The court first discussed the issue of the statute of limitations, stating that under *Code Civ. Proc. § 1281.2*, a party to an agreement to arbitrate may not bring an action to compel specific performance of the arbitration provision until he or she can allege not only the existence of the agreement, but also that the opposing party refuses to arbitrate the controversy. A contract cause of action does not accrue until the contract has been breached. Thus, no cause of action to compel arbitration accrues until one party has refused to arbitrate. In this case, prior to the filing of the declaratory relief action in February, 1992, neither party had refused to arbitrate the uninsured motorist claim. Consequently, Allstate was not entitled to a judicial declaration that Gonzalez' claim was barred by the statute of limitations (*38 Cal. App. 4th 783, 789)* . The portion of the opinion addressing unreasonable delay is discussed at *Ch. 20A, Arbitration: Resisting, § 20A.82[3][a]*.

[b] Claim Has Been Preserved

The time within which one of the actions specified in *Ins. Code § 11580.2(i)(1)* must occur was increased from one year from the date of the accident to 2 years from the date of the accident effective January 1, 2004 [Stats 2003, ch. 56].

The facts and procedural background of ***Spear v. California State Automobile Ass'n*** *(1992) 2 Cal. 4th 1035, 9 Cal. Rptr. 2d 381, 831 P.2d 821* , and the portion of the opinion addressing the fact that a petition to compel arbitration is premature until one party has refused to arbitrate, is discussed at [a], *above*. The court of appeal had relied on *California State Auto. Asso. Inter-Ins. Bureau v. Cohen (1975) 44 Cal. App. 3d 387, 395, 118 Cal. Rptr. 890* , which held that a cause of action for uninsured motorist benefits accrues, and the statute of limitations for demanding arbitration begins to run, when one of the contingencies specified in *Ins. Code § 11580.2(i)* occurs within one year of the date of the accident. The Supreme Court disagreed, saying while it is true that *Ins. Code § 11580.2(i)* establishes a one-year period within which the insured must act to preserve his or her cause of action, and thus, preconditions to accrual, it does not state the time of accrual (*2 Cal. 4th 1035, 1041)* .

In ***Blankenship v. Allstate Ins, Co.*** *(2010) 186 Cal. App. 4th 87, 111 Cal. Rptr. 3d 528* , an insured under a policy was denied a motion to compel arbitration for failure to request arbitration within two years of the accrual of the claim, as required under *Ins. Code § 11580.2(i)*. The insured sought tolling on the basis of his disability of being a minor, but the court ruled that *Ins. Code § 11580.2(i)* imposes an absolute obligation on the insured to comply with its mandates or else the insured forfeits his claim. One of the three events specified therein must occur as a condition precedent to the accrual of a cause of action against the insurer. The insured's evidence of contrary legislative intent did not persuade the

court. Further, the court did not accept the insured's argument that the lack of tolling for minors violated the constitutional right to equal protection under two different theories. Accordingly, the statute for tolling statutes of limitation on filing judicial actions for minors, *Code Civ. Proc. § 352*, does not apply to *Ins. Code § 11580.2(i)*, which concerns itself with arbitration (*186 Cal. App. 4th 87, 97)* . Finally, minority is not a disability for purposes of complying with section 11580.2(i), and there is no evidence here that minority renders compliance with section 11580.2(i) impossible or impractical (*186 Cal. App. 4th 87, 102)* .

[c] Declaration Regarding Workers' Compensation Claim

If the insured has, or may have, rights to benefits, other than occupational disability benefits, under any workers' compensation law, the arbitrator shall not proceed with the arbitration until the insured's physical condition is stationary and ratable. If the insured claims a permanent disability, the claims shall, unless good cause be shown, be adjudicated by award or settled by compromise and release before the arbitration may proceed [*Ins. Code § 11580.2(f)*]. Thus, every demand or petition for arbitration of a claim under an uninsured motorist endorsement of an automobile insurance policy must be accompanied by a declaration stating whether (i) the insured has a workers' compensation claim; (ii) the claim has proceeding to findings and award or settlement on all issues reasonably contemplated to be determined in that claim; and (iii) if not, what reasons amounting to good cause are grounds for the arbitration to proceed to proceed immediately (*Ins. Code § 11580.2(f)*).

In ***Briggs v. Resolution Remedies*** *(2008) 168 Cal. App. 4th 1395* , *86 Cal. Rptr. 3d 396* , plaintiff suffered injuries when an uninsured motorist collided with her company car while she was driving on work-related business. Although the accident took place while plaintiff was acting in the scope of her employment, she declined to file a workers' compensation claim. The parties were not able to agree on whether plaintiff's insurer had a duty to pay plaintiff before there was a determination of her entitlement to workers' compensation benefits. Plaintiff demanded arbitration with her automobile insurance company. The dispute was submitted to arbitration with Resolution Remedies, defendant in this case. Plaintiff's insurance company filed a motion to stay the arbitration, arguing that it was entitled to a stay until after plaintiff pursued workers' compensation benefits pursuant to *Ins. Code, § 11580.2*. The arbitrator granted the motion, ruling that in light of the language of plaintiff's insurance policy and *Ins. Code, § 11580.2*, the insurer was entitled to a stay of the arbitration until plaintiff filed a workers' compensation claim. Thereafter, plaintiff filed a petition for a writ of mandate with the court, challenging the arbitrator's decision. The trial court denied the petition for writ of mandate, stating that the arbitrator properly stayed arbitration pursuant to *Ins. Code § 11580.2* and plaintiff's insurance policy. Plaintiff appealed.

The court of appeal affirmed the trial's court dismissal of plaintiff's writ of mandate simply because the trial court lacked jurisdiction (*168 Cal. App. 4th 1395, 1400*). The court held that the trial court lacked subject matter jurisdiction to review the arbitrator's stay order; thus, it did not need to consider plaintiff's various arguments that the trial court erred in denying her relief from that order (*168 Cal. App. 4th 1395, 1401)* .

[d] Issue of Physical Contact With Uninsured Motorist Is Arbitrable Under Policy Language

In ***Orpustan v. State Farm Mut. Auto. Ins. Co.*** *(1972) 7 Cal. 3d 988, 103 Cal. Rptr. 919, 500 P.2d 1119* , a claimant seeking damages from his insurer under uninsured motorist coverage brought an action to compel arbitration under the terms of the policy. Defendant insurer moved for summary judgment, contending that the court, prior to any arbitration, would have to decide a preliminary independent question of law, the question of physical contact with a hit-and-run vehicle. The policy involved stated that if the parties did "not agree as to the amount payable hereunder" the arbitrators were to "hear and determine the question or questions so in dispute." Some earlier court of appeals decisions had construed similar language as an agreement to arbitrate the physical contact issue [*see, e.g.,* *Felner v. Meritplan Ins. Co. (1970) 6 Cal. App. 3d 540, 543, 546-547, 86 Cal. Rptr. 178* ; *Amercian Ins. Co. v. Gernand (1968) 262 Cal. App. 2d 300, 302, 68 Cal. Rptr. 810]* . *Ins. Code § 11580.2(b)* sets forth the various definitions necessary for interpretation of that section and provides that, with respect to an "uninsured motorist vehicle" whose owner or operator is unknown, (1)

the bodily injury has arisen out of physical contact of the automobile with the insured or with an automobile which the insured is occupying and (2) that the insured or someone on his or her behalf reported the accident within 24 hours to the police department of the city where the accident occurred. Defendant's motion for summary judgment was granted.

The Supreme Court reversed, concluding that the agreement appeared sufficiently comprehensive to include the subordinate legal question of concern to the defendant (*7 Cal. 3d 988, 991-992)* . The Court stated that to hold otherwise would deprive the insured of the value of arbitration as a speedy remedy under the uninsured motorist coverage statute, the procedure which had been contemplated under the insurance policy (*7 Cal. 3d 988, 992)* .

Freeman v. State Farm Mut. Auto. Ins. Co. *(1975) 14 Cal. 3d 473, 121 Cal. Rptr. 477, 535 P.2d 341* , considered the question of the extent of claims that should be arbitrated under an uninsured motorist provision in an insurance policy. Unfortunately, the Court disposed of the issue by holding that the insured's claim was made too late (barred by the one-year statute of limitation under *Ins. Code § 11580.2*). The one-year limitation theory that was the basis of that holding has since been abrogated [*see* *Spear v. California State Automobile Ass'n (1992) 2 Cal. 4th 1035, 1039-1044, 9 Cal. Rptr. 2d 381, 831 P.2d 821* (discussed at *§ 20.43[3][a]*)].

Nevertheless, *Freeman* had important things to say about the terminology used in decisions addressing the extent of issues arbitrable under an uninsured motorist provision. The *Freeman* Court noted that certain cases--*Orpustan* (discussed *above*); *Felner v. Meritplan Ins. Co. (1970) 6 Cal. App. 3d 540, 546, 86 Cal. Rptr. 178* (discussed in *§ 20C.63[3][a]*); and particularly *Van Tassel v. Superior Court (1974) 12 Cal. 3d 624, 627-628, 116 Cal. Rptr. 505, 526 P.2d 969* (discussed at [e], *below*)--referred to the particular kinds of preliminary questions required to be submitted to the arbitrator rather than the court as "jurisdictional facts." *Freeman* repudiated that language as being "certain broad, general language" (*14 Cal. 3d 473, 482)* , and characterized its holding in *Orpustan* as "unfortunately" being "stated in language whose breadth was an invitation to misinterpretation." The Court admitted having conceived a broad classification of preliminary questions for the arbitrator to determine and then "loosely and unfortunately" having termed them "jurisdictional" (*14 Cal. 3d 473, 482, 485)* . The Court held that its use of the term "jurisdictional" in the earlier cases had been meant to include only those preliminary questions requiring determination by an arbitrator before he or she could reach the merits of the controversy (*14 Cal. 3d 473, 485)* .

The facts and procedural background of ***Freeman v. State Farm Mut. Auto. Ins. Co.*** *(1975) 14 Cal. 3d 473, 121 Cal. Rptr. 477, 535 P.2d 341* , are discussed at *§ 20.80[4][a]*. The Court pointed out that when a statute requires a contract to provide for certain matters, the statute becomes part of the contract, imposing an arbitration agreement at least as broad at the statutory specifications (*14 Cal. 3d 473, 479)* . Cases which have analyzed and construed *Ins. Code § 11580.2(f)* have pointed out that "damages" in this section means the damages which the insured is entitled to recover from the uninsured motorist, and that the statute, read literally, requires arbitration on two issues only (*14 Cal. 3d 473, 480)* :

1. Whether the insured is entitled to recover against the uninsured motorist, and

2. If so, the amount of damages.

When the arbitration clause in the insurance policy is broader than the statute, the arbitration of additional issues may be required [*see, e.g.,* *Orpustan v. State Farm Mut. Auto. Ins. Co. (1972) 7 Cal. 3d 988, 991-992, 103 Cal. Rptr. 919, 500 P.2d 1119* ; *Felner v. Meritplan Ins. Co. (1970) 6 Cal. App. 3d 540, 543, 546-547, 86 Cal. Rptr. 178*). Cases involving such arbitration agreements must be distinguished from those which are concerned only with the statutory language (*14 Cal. 3d 473, 481)* .

There is an additional category of cases involving a post-controversy agreement between the parties in which they consented, expressly or by implication, to an arbitration going beyond the statutory requirement [*see, e.g.,* *Felner v. Meritplan Ins. Co. (1970) 6 Cal. App. 3d 540, 544, 86 Cal. Rptr. 178* ; *Jordan v. Pacific Auto. Ins. Co. (1965) 232 Cal. App. 2d 127, 131, 42 Cal. Rptr. 556]* (*14 Cal. 3d 473, 481)* .

[e] Whether Insurer Is Bound by Default Judgment Against Driver Who Was at Fault Is Arbitrable

Bouton v. USAA Casualty Insurance Company *(2008) 43 Cal. 4th 1190, 78 Cal. Rptr. 3d 519* , involved two consolidated cases dealing with the same statute and the same issue: under *Ins. Code § 11580.2(f),* which questions are arbitrable in uninsured and underinsured motorist cases? One of the cases involved an underinsured motorist claim and arose after the insured/claimant had collected the other driver's policy limit. The insurance policy provided that State Farm would not be bound by any judgment against any person or organization obtained without its written consent. Judgment was entered in favor of plaintiff for $2,751,000 in compensatory damages and $1 million in punitive damages. Plaintiff then demanded and received $100,000 from the other driver's insurer. That was the other driver's policy limit. Plaintiff then demanded payment of $900,000 from State Farm, the maximum benefit available under his underinsured motorist coverage. Plaintiff claimed that the default judgment entered against the other driver conclusively established damages. State Farm refused to tender the requested payment, seeking instead to informally evaluate plaintiff's damages prior to tendering any money under the policy. Plaintiff sued State Farm for declaratory relief, breach of contract, and breach of the covenant of good faith and fair dealing, arguing that the default judgment established his damages and he was not required to submit to State Farm's evaluation of the dispute. State Farm demurred, arguing that it was not bound by the declaratory judgment and that the action was premature because no arbitration had occurred as required by the policies and by *Ins. Code § 11580.2(f)*. The trial court granted State Farm's demurrer without leave to amend and dismissed the action. Plaintiff appealed. The court of appeal held that plaintiff had to arbitrate the issues of liability and damages with State Farm, and that the arbitrator was free to consider whether the default judgment against conclusively established his damages. Plaintiff sought review and the Supreme Court granted it.

The Supreme Court affirmed (*43 Cal. 4th 1190, 1204)* , holding that *Ins. Code § 11580.2(f)* requires an insured and his or her insurer to arbitrate the tortfeasor's liability and damages owed to the insured, and the binding nature of a default judgment obtained against that tortfeasor falls squarely within those questions of liability and damages statutorily subject to arbitration (*43 Cal. 4th 1190, 1194)* . The parties did not dispute that the policy and *Ins. Code § 11580.2(f)* provided that arbitration was the appropriate forum in which to address whether the underinsured tortfeasor was liable to the insured for the injuries he sustained in the automobile accident between the two, and, if so, the amount of damages. The parties disputed that arbitration was the appropriate forum in which to address whether State Farm was bound by the default judgment obtained against the underinsured tortfeasor. The question whether State Farm was bound by the default judgment was subsumed within the arbitrable issues of liability and damages. The parties' argument that they did not agree to arbitrate whether State Farm was bound by the default judgment was unavailing. Both parties argued that permitting an arbitrator to determine whether the default judgment obtained against the underinsured motorist bound State Farm would not promote uniformity of decisions (*43 Cal. 4th 1190, 1202)* . The Court said that concerns about uniformity must also be balanced against the strong public policy favoring arbitration of disputes when the parties so agree, including the Legislature's expression of a strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution (*43 Cal. 4th 1190, 1203)* . This issue that whether the insurer is bound by default judgment is arbitrable was resolved by the *California Supreme Court in Bouton v. USAA Casualty Insurance Company (2008) 43 Cal. 4th 1190, 78 Cal. Rptr. 3d 519* , and not addressed in the subsequent case of *Bouton v. USAA Casualty Insurance Company (2008) 167 Cal. App. 4th 412, 84 Cal. Rptr. 3d 152* (holding that coverage questions are not arbitrable).

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20 ARBITRATION: COMPELLING
PART II. FORMS
B. Particular Claims Subject to Arbitration

2-20 California Points & Authorities § 20.44

§ 20.44 Legality of Severable Contract Provision Is Arbitrable

[1] FORM

PETITIONER, AS PARTY TO AN AGREEMENT PROVIDING FOR ARBITRATION OF DISPUTES ARISING UNDER THE AGREEMENT, IS ENTITLED TO AN ORDER COMPELLING ARBITRATION OF THE PRESENT DISPUTE, WHICH INVOLVES THE LEGALITY OF A SINGLE SEVERABLE PROVISION OF THE CONTRACT [AND TO AN ORDER STAYING ANY PENDING ACTION RELATING TO ARBITRABLE ISSUES].

A. Legality of Severable Contract Provision Is Arbitrable. The legality of a single, severable contract provision does not prohibit arbitration. The entire dispute must be arbitrated, and it is for the arbitrator to determine the illegality of the challenged provision (*Wolitarsky v. Blue Cross of California (1997) 53 Cal. App. 4th 338, 344, 61 Cal. Rptr. 2d 629* ; *California State Council of Carpenters v. SuperiorCourt (1970) 11 Cal. App. 3d 144, 157-158, 89 Cal. Rptr. 625*).

[2] Comments

[a] Use of Form

This form may be used in support of a petition to compel arbitration if petitioner anticipates a challenge that a provision of the contract containing the arbitration clause is illegal.

This form is not intended as a complete memorandum, but should be combined with the memoranda in *§§ 20.10, 20.11,* and any others applicable to the particular situation.

As a tactical matter, counsel may wish to reserve these points for oral argument or for a reply memorandum. In deciding whether or not to reserve these arguments, counsel should consider local court rules and practice, as well as whether the moving party would be expected to raise these points in initial moving papers, to avoid the possibility of losing the opportunity to raise them.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should show that the allegedly illegal provision is severable and is not part of the arbitration clause.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For a form that addresses illegality of a single severable contract provision in the context of confirmation of an award, see *Ch. 20C, Arbitration: Confirming, Correcting, or Vacating the Award, § 20C.133*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For memoranda relating to general contract principles, see Ch. 50, *Contracts* .

[d] Opposing Memoranda

For a form that may be modified in an appropriate case to oppose this form on the ground that an entire contract is illegal, and thus, arbitration under it cannot be compelled, see *Ch. 20A, Arbitration: Resisting, § 20A.89*.

[3] Discussion of Authorities

[a] Legality of Severable Contract Provision Is Arbitrable

The facts and procedural background of ***Wolitarsky v. Blue Cross of California*** *(1997) 53 Cal. App. 4th 338, 61 Cal. Rptr. 2d 629* , and the portion of the opinion addressing the arbitrability of claims under the Unruh Civil Rights Act (*Civ. Code § 51 et seq.*), are discussed at *§ 20.22[3][e]*. The case involved plaintiff/insureds' claim that a $2,000 deductible for maternity benefits constituted illegal gender discrimination under various statutes.

The court of appeal reversed the trial court's order denying arbitration, agreeing with defendant's contention that the alleged illegality of a single contractual provision does not prohibit arbitration of the dispute. The court of appeal began its analysis by discussing and quoting from *Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1, 30, 10 Cal. Rptr. 2d 183, 832 P.2d 899* (discussed in *Ch. 20C, Arbitration: Confirming, Correcting, or Vacating the Award, § 20C.133[3][a]*), which considered the issue in the context of confirmation of an arbitration award. *Moncharsh* held that when the alleged illegality goes only to a portion of the contract (that does not include the arbitration provision), the entire controversy,

including the issue of illegality remains arbitrable. Wolitarskys did not seek to have the entire policy declared void, nor did they claim that the entire contract or the arbitration clause was illegal. Instead, they contended that the allegedly discriminatory maternity deductible was grounds for revocation of the entire contract. The court of appeal said it is established that partially illegal contracts may be upheld if the illegal portion is severable from the part which is legal. Finding the maternity deductible to be a severable provision and not grounds for revocation of the entire policy, following the court of appeal concluded that the entire dispute must be arbitrated and that was for the arbitrator to determine the illegality of the challenged deductible (*53 Cal. App. 4th 338, 344)* .

California State Council of Carpenters v. Superior Court *(1970) 11 Cal. App. 3d 144, 89 Cal. Rptr. 625* , involved a collective bargaining dispute between a union and an employers, regarding the illegality of a provision in their agreement prohibiting piecework and compensation based on piecework. Employers sought to enjoin arbitration and the union sought by writ of prohibition to restrain the injunction proceeding.

The court of appeal issued the writ, holding that arbitration should go forward and the arbitrator should determine the legality of the challenged provision. Reviewing the state law of illegality in arbitration matters, and particularly *Loving & Evans v. Blick(1949) 33 Cal. 2d 603, 204 P.2d 23* (discussed in *Ch. 20C, Arbitration: Confirming, Correcting, or Vacating the Award, § 20C.210[3][a]*), the court of appeal stated that illegality in a contract containing an arbitration provision, in order to vitiate the arbitration provision, must render the entire contract illegal and unenforceable. A claim of illegality of one of the incidental clauses of the contract that falls short of affording ground for revocation of the contract is itself subject to arbitration (*11 Cal. App. 3d 144, 157)* . The question whether there is illegality in a subordinate clause of a contract containing provisions for mandatory arbitration is only a question of law, which may be decided by arbitration (*11 Cal. App. 3d 144, 158)* .

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CHAPTER 20 ARBITRATION: COMPELLING
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2-20 California Points & Authorities § 20.45

§ 20.45 Arbitration of Pre-Contract Medical Malpractice Claim

[1] FORM

PETITIONER, AS PARTY TO AN AGREEMENT PROVIDING FOR ARBITRATION OF MEDICAL MALPRACTICE DISPUTES, INCLUDING CLAIMS ARISING FROM TREATMENT RENDERED BEFORE THE AGREEMENT WAS SIGNED, IS ENTITLED TO AN ORDER COMPELLING ARBITRATION OF THE PRESENT DISPUTE, WHICH INCLUDES PRE-CONTRACT CLAIMS[, AND TO AN ORDER STAYING ANY PENDING ACTION RELATING TO ARBITRABLE ISSUES].

A. Agreement to Arbitrate Medical Malpractice May Extend to Pre-Contract Claims. *Section 1295 of the Code of Civil Procedure* neither expressly nor impliedly precludes a retroactive arbitration agreement. As long as the provisions of Section 1295 are met, the parties may legally agree to arbitrate pre-agreement claims subject to the same grounds for revocation that exist for any contract, as stated in *Code of Civil Procedure Section 1281 et seq.* (*Coon v. Nicola (1993) 17 Cal. App. 4th 1225, 1232-1233, 21 Cal. Rptr. 2d 846*).

[*Optional*] **B. Provision for Arbitration of Pre-Contract Claims May Be Adhesive.** A retroactivity provision in an agreement to arbitrate medical malpractice claims requiring arbitration of claims that arose before the agreement was signed is not protected by *Code of Civil Procedure Section 1295(e)* and could be found to be a contract of adhesion depending on the circumstances (*Coon v. Nicola (1993) 17 Cal. App. 4th 1225, 1233-1234, 21 Cal. Rptr. 2d 846*).

C. This Provision for Arbitration of Pre-Contract Claims Is Not Adhesive. A provision for arbitration of medical malpractice claims arising before the arbitration agreement was signed is not adhesive when it [is part of a one-page document that] complies with all the wording requirements of *Code of Civil Procedure Section 1295*, including allowing the patient to revoke the agreement within 30 days, when the patient had a choice as to medical services, when the retroactivity provision is not hidden[, but in fact is made more obvious by being required to be separately initialled], when the physician's liability is not limited in any way, when there are no unconscionable or oppressive terms, and when the parties' reasonable expectations were not frustrated (*Coon v. Nicola (1993) 17 Cal. App. 4th 1225, 1236-1239, 21 Cal. Rptr. 2d 846*).

[*Optional*] **D. Patient's Medicated State Did Not Render Parties' Bargaining Positions Unequal.** A patient's claim that medication caused him or her to be very sleepy and somewhat disoriented when he or she signed an agreement to arbitrate medical malpractice claims does not render the contract one of adhesion due to grossly unequal bargaining positions of the parties when the physician did not know, and thus could not be found to have taken advantage of, the patient's medicated state, no fraud, imposition, or excusable neglect is found, and the contract is not otherwise adhesive (*Coon v. Nicola (1993) 17 Cal. App. 4th 1225, 1238-1239, 21 Cal. Rptr. 2d 846*).

[*Optional*] **E. Arbitration Agreement Applies to Later Treatment of Another Condition.** An arbitration agreement, signed when _____ [*party, e.g.* defendant] first treated _____ [*party, e.g.*, plaintiff], applies to a medical malpractice claim arising from treatment for a different condition _____ [*time span, e.g.*, two years] later because the agreement states that it is intended to bind the patient and the health care provider who "_____ [*quote language of agreement, e.g.*, now or in the future treat[s] the patient]" (*Reigelsperger v. Siller (2007) 40 Cal. 4th 574, 579-580, 53 Cal. Rptr. 3d 887, 150 P.3d 764*).

[*Optional*] **F. Communications With Insurer Are "Medical Services."** Communications between a physician and his or her patient's [disability] insurer, at the request of the patient, regarding the diagnosis and/or treatment of the patient by that physician, constitute the rendering of medical services; and therefore claims that the communications were unauthorized or improper fall within an arbitration clause that applies to "any dispute as to medical malpractice, that is as to whether any medical services rendered under this contract were unnecessary or unauthorized or were improperly, negligently, or incompetently rendered" (*Titolo v. Cano (2007) 157 Cal. App. 4th 310, 314, 318-319, 68 Cal. Rptr. 3d 616*).

[2] Comments

[a] Use of Form

This form may be used in support of a petition to compel arbitration of pre-contract medical malpractice claims when the arbitration agreement otherwise complies with *Code Civ. Proc. § 1295* and is not a contract of adhesion to establish that an arbitration agreement relating to medical malpractice claims may properly govern pre-contract claims and is not inherently adhesive. Counsel should use as many of the optional paragraphs as are applicable to his or her particular situation.

This form is not intended as a complete memorandum, but should be combined with the memoranda in *§§ 20.10, 20.11,* and any others applicable to the particular situation.

As a tactical matter, counsel may wish to reserve these points for oral argument or for a reply memorandum. In deciding whether or not to reserve these arguments, counsel should consider local court rules and practice, as well as whether the moving party would be expected to raise these points in initial moving papers, to avoid the possibility of losing the opportunity to raise them.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his orher case. For example, the argument should show the circumstances under which the agreement was signed and that the patient did not revoke the agreement and in fact continued receiving medical treatment from petitioner after the 30-day revocation period [*see Code Civ. Proc. § 1295(c)*].

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or

declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For memoranda relating to general contract principles, see Ch. 50, *Contracts* .

[d] Opposing Memoranda

For a form of memorandum that may be used in an appropriate case to oppose this form on the ground that the patient did not knowingly consent to arbitration, see *Ch. 20A, Arbitration: Resisting, § 20A.92*.

[3] Discussion of Authorities

[a] Agreement to Arbitrate Medical Malpractice May Extend to Pre-Contract Claims

Defendant/physician in ***Coon v. Nicola*** *(1993) 17 Cal. App. 4th 1225, 21 Cal. Rptr. 2d 846* , performed surgery on plaintiff's fractured wrist, but failed to diagnose a "middle shaft radius fracture" of plaintiff's left arm, which was discovered after the surgery. Defendant told plaintiff of the missed diagnosis after the surgery, but told him it would be all right. About a week after the surgery, in the doctor's office, plaintiff signed an arbitration agreement. In addition to prospective claims, the agreement had a separate provision entitled "Retroactive Effect," which stated that if patient intended the agreement to cover services rendered before the date it was signed, patient should initial below. Plaintiff signed the agreement and initialed the clause agreeing to retroactivity. Later, plaintiff sued defendant for medical malpractice. Plaintiff's declaration submitted in opposition to defendant's petition to compel arbitration stated that he had no memory of discussing or signing the arbitration agreement and that he was heavily medicated at the time, and thus "very sleepy and somewhat disoriented." The trial court denied the petition to compel arbitration finding (1) that *Code Civ. Proc. § 1295* neither authorized or mandated arbitration of pre-contract claims, (2) that the pre-contract claim provision was not insulated by *Code Civ. Proc. § 1295(a), (c)*, and *(e)* from attack as being unconscionable or a contract of adhesion to the extent it retroactively governed the rights of the parties, (3) that plaintiff was heavily medicated when he signed the agreement, and (4) that plaintiff's medicated stated rendered the relative bargaining positions of the parties grossly unequal. Defendant appealed.

The court of appeal reversed. Plaintiff contended that because *Code Civ. Proc. § 1295(c)* refers to *subsequent* transactions, the statute precludes retroactive application of an arbitration agreement. The court of appeal disagreed, finding nothing in the wording of the statute to prevent inclusion of terms in addition to those mandated by the statute. The court held that *Code Civ. Proc. § 1295* neither expressly nor impliedly precludes a retroactive arbitration agreement (*17 Cal. App. 4th 1225, 1232)* . As long as the provisions of *Code Civ. Proc. § 1295* are met, the parties may legally

agree to arbitrate pre-agreement claims subject to the same grounds for revocation as exist for any contract, as stated in *Code Civ. Proc. § 1281 et seq.* (*17 Cal. App. 4th 1225, 1233)* .

[b] Provision for Arbitration of Pre-Contract Claims May Be Adhesive

Code Civ. Proc. § 1295(e) states that such a contract is not a contract of adhesion, nor unconscionable nor otherwise improper, where it complies with subdivisions (a), (b), and (c) of that section.

The facts and procedural background of ***Coon v. Nicola*** *(1993) 17 Cal. App. 4th 1225, 21 Cal. Rptr. 2d 846* , are discussed at [a], *above*. The court of appeal agreed that the parties' agreement in this case was not protected by *Code Civ. Proc. § 1295(e)*, reasoning that because *Code Civ. Proc. § 1295(e)* uses the terminology "such a contract," it is limited to arbitration of disputes arising out of services rendered as provided in *Code Civ. Proc. § 1295* (*17 Cal. App. 4th 1225, 1233)* . Because retroactivity of an agreement is not addressed by the wording of *Code Civ. Proc. § 1295*, a retroactive agreement is subject to revocation on grounds that exist for revocation of any contract; and the provision for retroactivity *could* be found to be a contract of adhesion dependent on the circumstances of adhesion (*17 Cal. App. 4th 1225, 1234)* .

[c] This Provision for Arbitration of Pre-Contract Claims Is Not Adhesive

The facts and procedural background of ***Coon v. Nicola*** *(1993) 17 Cal. App. 4th 1225, 21 Cal. Rptr. 2d 846* , are discussed at [a], *above*. The court of appeal held that this was not a contract of adhesion (*17 Cal. App. 4th 1225, 1234, 1238, 1239)* . Even assuming the patient/physician relationship by its very nature is unequal, in order to beconsidered a contract of adhesion, the terms of which adherent was unaware must be beyond the reasonable expectations of the ordinary person or oppressive or unconscionable (*17 Cal. App. 4th 1225, 1234-1235)* . Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. Although defendant drafted the arbitration form, standardized forms are common and accepted in modern daily life. A standardized form does not in itself render a contract a contract of adhesion. In determining whether a contract is a contract of adhesion, the seminal test is whether the stronger party has disappointed the reasonable expectations of the other party (*17 Cal. App. 4th 1225, 1235)* . Determining that includes analysis of such factors as (1) whether there was an opportunity to question the terms of the agreement; (2) whether there were hidden or ambiguous terms in the agreement; (3) whether adherent would need to sign the agreement or forego necessary treatment; (4) whether the liability of one party was greatly limited; or (5) whether the arbitration process itself was unequal. None of those factors was present in this case. The agreement was a one-page document and all the wording provisions of *Code Civ. Proc. § 1295* were followed, including the 10-point red bold-face type requirement and the 30-day revocation provision required by *Code Civ. Proc. § 1295(c)* (*17 Cal. App. 4th 1225, 1236)* . Plaintiff did not take advantage of the revocation provision but continued receiving treatment from defendant for nine months. The agreement carried no buried terms. The retroactivity provision was addressed as a distinct clause, and was the only clause plaintiff was asked to initial, making more obvious rather than less obvious or hidden. Most significantly, the agreement did not limit defendant's liability in any way but merely provided for a different forum in which to settle disputes (*17 Cal. App. 4th 1225, 1237)* . There was no lack of choice as to medical services, no limitation of liability as to defendant, no unclear terminology or hidden clause in the arbitration agreement form, no unconscionable or oppressive terms. The reasonable expectations of the parties were not frustrated. Thus, the contract was not a contract of adhesion (*17 Cal. App. 4th 1225, 1239)* .

[d] Patient's Medicated State Did Not Render Parties' Bargaining Positions Unequal

The facts and procedural background of ***Coon v. Nicola*** *(1993) 17 Cal. App. 4th 1225, 21 Cal. Rptr. 2d 846* , are discussed at [a], *above*. The trial court supported its finding that the contract was one of adhesion by findings that the relative bargaining positions of the parties were grossly unequal at the time the agreement was signed and that the inequality was attributable to plaintiff's medicated state. The only evidence in the record regarding plaintiff's medicated

state come from his own declaration that he took Vicodin following his release form the hospital, and that like the Demerol he had in the hospital, it made him feel "very sleepy and somewhat disoriented." Plaintiff did not claim he could not read, or even that he did not understand the agreement, and there was no indication that plaintiff was unable to comprehend what he was signing. More importantly, there was no indication in the record that defendant knew plaintiff was disoriented or took advantage of the situation. Thus, defendant could not be said to have taken advantage of plaintiff by having him sign the agreement (*17 Cal. App. 4th 1225, 1238)* . The court of appeal said that when a person with capacity of reading and understanding an instrument signs it, he may not, in the absence of fraud, imposition, or excusable neglect, avoid its terms on the ground he failed to read it before signing it. In this case, the basis of the superior court's ruling was not fraud, imposition, or excusable neglect, but unequal bargaining positions. The court of appeal concluded that the record provided no basis for the superior court's finding of a contract of adhesion due to grossly unequal bargaining power (*17 Cal. App. 4th 1225, 1239)* .

[e] Arbitration Agreement Applies to Later Treatment of Another Condition

Reigelsperger v. Siller *(2007) 40 Cal. 4th 574, 53 Cal. Rptr. 3d 887, 150 P.3d 764* , arose out of defendant chiropractor's treatment of plaintiff. Plaintiff first received treatment from defendant in 2000 for severe back pain. The parties disagreed as to whether they contemplated on ongoing relationship. The agreement signed by plaintiff required the parties to submit any dispute as to medical malpractice to arbitration (Article 1) and stated that it was intended to bind the patient and the health care provider "... who now *or in the future treat[s]* the patient" (Article 2). Plaintiff also signed an informed consent form that appeared on the reverse side of the arbitration agreement and contained a provision that read: "I intend this consent form to cover the entire course of treatment for my present condition *and for any future condition(s)* for which I seek treatment." Plaintiff was treated by defendant again in 2002 for problems with his cervical spine and shoulder. Plaintiff's suit arose out of that second course of treatment. Defendant sought to stay litigation and compel arbitration. The trial court denied that petition; and the Court of Appeal affirmed. The Supreme Court granted review.

The Supreme Court reversed (*40 Cal. 4th 574, 577, 581)* . Plaintiff claimed the agreement was unenforceable because it did not comply with *Code Civ. Proc. § 1295* (*40 Cal. 4th 574, 577)* . However, the agreement did contain the language required by Section 1295 (*40 Cal. 4th 574, 578)* . Section 1295(c) provides that a proper arbitration agreement for medical malpractice claims governs "all subsequent open-book account transactions for medical services for which the contract was signed." The court of appeal concluded that neither Article 1 of the agreement or Article 2 applied because the parties did not have an open-book account relationship. The Supreme Court found this conclusion to be wrong. Regardless of whether the parties had an open-book account relationship within the meaning of Section 1295(c), their obligation to arbitrate under Article 2 of their agreement stood on its own. The agreement contained the language Section 1295 required. Having satisfied the statute, the parties were free to adopt a broader arbitration agreement. Nothing in Section 1295 prevents a medical malpractice arbitration agreement from including provisions in addition to those required by the statute. Thus, the plain language of Article 2 applied to require arbitration (*40 Cal. 4th 574, 579)* . Plaintiff contended that he never intended to return to defendant for treatment; but, his uncommunicated subjective intent was irrelevant (*40 Cal. 4th 574, 579-580)* . The Court of Appeal also held that the phrase "now or in the future treat[s]," could not reasonably be construed to bind the parties in perpetuity.The Supreme Court said the answer to that objection was that, like other contracts, arbitration agreements that do not specify a term of duration are terminable at will after a reasonable time has elapsed. The Court of Appeal also concluded that its construction was supported by the accompanying informed consent agreement, which, it found did not state that it was intended to apply to treatment of future conditions. The Supreme Court found that construction was undermined by both logic and standard rules of construction. The consent agreement stated that it was intended to apply, not only to the "entire course of treatment for my present condition," but also to "any future condition(s) for which I seek treatment." Having concluded that the parties were obligated to arbitrate under Article 2 of their agreement, the Court did not reach the question whether they were also obligated to arbitrate under Article 1 (*40 Cal. 4th 574, 580)* .

Plaintiff in ***Titolo v. Cano*** *(2007) 157 Cal. App. 4th 310, 68 Cal. Rptr. 3d 616* , sued her former treating physician for

breach of fiduciary duty, violation of privacy rights, intentional interference with prospective economic advantage, and negligence based on the physician's communications to plaintiff's disability insurer that plaintiff was not disabled, but was a scam artist and a fraud, and the physician's providing plaintiff's medical file to the disability insurer. Defendant petitioned the trial court to compel arbitration. The trial court denied the petition on the ground that the claims involved were not within the scope of the parties' written arbitration agreement. Defendant appealed.

The court of appeal reversed, holding that communications between a physician and his or her patient's disability insurer, at the request of the patient, regarding the diagnosis and/or treatment of the patient by that physician, constitute the rendering of medical services; and therefore claims that the communications were unauthorized or improper fall within an arbitration clause that applies to "any dispute as to medical malpractice, that is as to whether any medical services rendered under this contract were unnecessary or unauthorized or were improperly, negligently, or incompetently rendered" (*157 Cal. App. 4th 310, 314)* . The arbitration clause complied with *Code Civ. Proc. § 1295*, although the arbitration clause was permissibly broader than Section 1295 (*157 Cal. App. 4th 310, 319)* . The court of appeal first noted that once the existence of a valid arbitration clause has been established, the burden is on the party opposing arbitration to demonstrate that the arbitration clause cannot be interpreted to require arbitration of the dispute. An order to arbitrate a particular claim should not be denied unless the arbitration clause is not susceptible of an interpretation that covers the asserted dispute (*157 Cal. App. 4th 310, 316-317)* . Communications between physicians and insurance companies regarding the diagnosis and treatment of patients are a necessary part of the provision of medical services to those patients. The practice of medicine today requires close interaction among medical professionals, their patients, health care insurers, and health management organizations. Defendant obtained plaintiff's medical information by rendering medical services to her. Further, plaintiff only requested that defendant communicate with defendant's insurer because defendant had provided medical services to her. Plaintiff herself acknowledged that the case was based on defendant's actions and services as a physician and arose out of actions related to defendant's medical treatment of plaintiff (*157 Cal. App. 4th 310, 318)* . The issue hinged on the meaning of the terms "medical services" (*157 Cal. App. 4th 310, 319)* . The court discussed other cases that had interpreted the term in various contexts and concluded that the term embraced communications between the physician and the patient's disability insurer (*157 Cal. App. 4th 310, 319-322)* . Because all plaintiff's claims were based on the same facts and arose out of the same action, all were required to be arbitrated in the same proceeding (*157 Cal. App. 4th 310, 322)* .

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B. Particular Claims Subject to Arbitration

2-20 California Points & Authorities § 20.46

§ 20.46 Arbitration Agreement Applies to All Aspects of Transaction to Which It Relates

[1] FORM

PETITIONER, AS A PARTY TO AN AGREEMENT PROVIDING FOR ARBITRATION OF ANY DISPUTES ARISING UNDER THE AGREEMENT OR ANY TRANSACTION RESULTING FROM THE AGREEMENT, IS ENTITLED TO AN ORDER COMPELLING ARBITRATION OF _____ [*specify claims that are subject of dispute*], WHICH AROSE OUT OF THE _____ [*specify, e.g.,* DISCLOSURE DOCUMENTS PROVIDED IN CONNECTION WITH THE TRANSACTION] [AND STAYING ANY PENDING ACTION RELATING TO ARBITRABLE ISSUES].

A. Arbitration Agreement Applies to All Aspects of Transaction to Which It Relates. An arbitration clause in an agreement that provides for arbitration of any dispute or claim [in law or equity] arising out of the agreement "or any resulting transaction" is broad enough to encompass fraud claims based on documents furnished in accordance with the transaction contemplated by the agreement (*Johnson v. Siegel (2000) 84 Cal. App. 4th 1087, 1095, 1102, 101 Cal. Rptr. 2d 412* ; *see also Bak v. MCL Financial Group, Inc. (2008) 170 Cal. App. 4th 1118, 1126-1127, 88 Cal. Rptr. 3d 800*).

[2] Comments

[a] Use of Form

This form may be used to support a petition to compel arbitration to establish that an arbitration clause applies not only to disputes arising from the agreement in which arbitration clause is contained but also to disputes relating to the transaction contemplated by that agreement. The facts in the authority which is the basis of this form involved a standard form Real Estate Purchase Agreement and the Transfer Disclosure Statement furnished pursuant to *Civ. Code § 1102*. The form does not provide a complete memorandum but is designed to be combined with a general form of memorandum of in support of compelling arbitration, either alone [*see § 20.10*] or combined with a motion to stay an action [*see § 20.11*].

As a tactical matter, counsel may wish to reserve these points for oral argument or for other form of rejoinder to the respondent's opposing memorandum. In deciding whether or not to reserve these arguments, counsel should consider local court rules and practice, as well as whether the moving party would be expected to be raise these points in initial moving papers, to avoid the possibility of losing the opportunity to raise them.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the language of the arbitration agreement which specifies the subject matter that may be arbitrated should to be quoted or referred to, followed by a statement as to how the controversy in issue is within the scope of that subject matter.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Memoranda

For a form opposing those in this form, see Ch. 20A, *Arbitration: Resisting,* § 20A.140.

[3] Discussion of Authorities

[a] Arbitration Agreement Applies to All Aspects of Transaction to Which It Relates

In ***Johnson v. Siegel*** *(2000) 84 Cal. App. 4th 1087, 101 Cal. Rptr. 2d 412* , plaintiff purchased a $475,000 home from defendants. The house flooded during the next rainy season. Defendant had provided a disclosure statement in accordance *Civ. Code § 1102* which stated that sellers were not aware of any problems involving drainage, flooding, grading problems, slippage, or soil problems. Johnson filed suit, seeking rescission of the purchase agreement and damages for fraud and negligent misrepresentation. The arbitration clause in the real estate purchase agreement (a standard California Association of Realtors' residential purchase agreement) provided for arbitration of "any dispute or claim in Law or equity arising between them out of this agreement or any resulting transaction, which is not settled through mediation." The disclosure statement recited, in bold, that it was not intended to be any part of the contract between buyer and seller. Defendants answered, their 14th affirmative defense being that the dispute was required to be arbitrated, and moved for summary judgment on that basis. The motion was granted and judgment entered thereon. Thereafter, plaintiff sought to arbitrate, but defendants contended he could not do so, that the judgment was res judicata

and that plaintiff was without any remedy. After plaintiff's motion for reconsideration was denied, plaintiff appealed.

The court of appeal affirmed the granting of the motion for summary judgment, but held that the granting of summary judgment did not preclude Johnson from filing a petition to compel arbitration (*84 Cal. App. 4th 1087, 1102)* . Although the disclosure statement recited that it was not part of the contract between the parties, the arbitration clause in the purchase agreement was broad enough to encompass the claims of fraud and misrepresentation based on the disclosure statement (*84 Cal. App. 4th 1087, 1095)* . The portion of the opinion addressing plaintiff's right to file a petition to compel arbitration is discussed in *Ch. 20E, Arbitration: Effect of Award, § 20E.31[3][a]*.

Bak v. MCL Financial Group, Inc. *(2008) 170 Cal. App. 4th 1118, 88 Cal. Rptr. 3d 800* , confirmed an award issued by an arbitration panel ordering attorney for defendants to pay $7,500 in sanctions as a result of conduct during a prehearing dispute over the return of documents that plaintiffs claimed were subject to the attorney-client privilege. The arbitration clause authorized the arbitrator to decide any issues arising from the contract. Given that the attorney had submitted to the arbitration panel's jurisdiction by appearing for a party as its agent (*170 Cal. App. 4th 1118, 1125)* , he was subject to sanction by the arbitration panel, regardless of particular legal provisions concerning sanctions in California law or the law of the choice-of-law-clause forum, under the principle that the trial court cannot review for mistakes of law (*170 Cal. App. 4th 1118, 1126*). The portion of the opinion dealing with the confirming trial court's lack of power to correct the arbitration panel's award by deleting the sanctions award is discussed in *Ch. 20C, Arbitration: Confirming, Correcting, or Vacating the Award, § 20C.56*.

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2-20 California Points & Authorities § 20.47

§ 20.47 Malpractice Claim, or Fee Dispute, or Both, May be Arbitrated Because Client Has Waived Arbitration or Respondent Has Rejected Nonbinding Award Under Mandatory Fee Arbitration Act

[1] FORM

RESPONDENT'S [WAIVER OF RIGHTS or REJECTION OF A NONBINDING AWARD] UNDER THE MANDATORY FEE ARBITRATION STATUTES ENTITLES PETITIONER TO AN ORDER COMPELLING ARBITRATION OF ALL CLAIMS, IN ACCORDANCE WITH THE ARBITRATION PROVISION IN THE RETAINER AGREEMENT.

[*EITHER, if client has waived arbitration under the MFAA*]

A. Malpractice Claim, or Fee Dispute, or Both, May Be Arbitrated. An arbitration provision in a written attorney-client retainer agreement is generally enforceable under the California Arbitration Act (*Code Civ. Proc. § 1280 et seq.*), absent the client's exercise of the statutory right to mandatory fee arbitration, in accordance with *Bus. & Prof. Code § 6200 et seq.* (MFAA). A client waives his or her rights under the MFAA by failing to request arbitration within 30 days after receipt of the notice required by *Business and Professions Code Section 6201(a)*. A client also waives his or her rights under the MFAA by filing a malpractice action against the [former] attorney. Thus, a client who does not request arbitration under the MFAA within 30 days of receiving the statutory notice or who files a malpractice action against his or her [former] attorney can be compelled to arbitrate the fee dispute or malpractice claim in accordance with the arbitration provision in the retainer agreement and *Code Civ. Proc. § 1280 et seq.* (*Aguilar v. Lerner (2004) 32 Cal. 4th 974, 984-990, 12 Cal. Rptr. 3d 287, 88 P.3d 24* ; *Ervin, Cohen & Jessup, LLP v. Kassel (2007) 147 Cal. App. 4th 821, 826-830, 54 Cal. Rptr. 3d 685*).

[*OR, if respondent has rejected award under the MFAA*]

A. Respondent's Rejection of Nonbinding Mandatory Award Permits Contractual Arbitration. An award of

attorney fees rendered pursuant to an arbitration under the Mandatory Fee Arbitration Act is nonbinding, and either party may seek a trial de novo under *Bus. & Prof. Code § 6204(a)*, unless the parties have agreed that the MFAA arbitrator's award is binding (*Schatz v. Allen Matkins Leck Gamble & Mallory LLP (2009) 45 Cal. 4th 557, 565, 87 Cal. Rptr. 3d 700, 198 P.3d 1109*). Contractual arbitration under the California Arbitration Act, *Code Civ. Proc. § 1280 et seq.*, may be the proceeding constituting "trial de novo" with respect to the proceeding that follows rejection of the mandatory award by either party (*Schatz v. Allen Matkins Leck Gamble & Mallory LLP (2009) 45 Cal. 4th 557, 566, 87 Cal. Rptr. 3d 700, 198 P.3d 1109*).

[2] Comments

[a] Use of Form

The first version of this form may be used to support a petition to compel arbitration of a legal malpractice claim or a fee dispute if the client has waived mandatory arbitration under the Mandatory Fee Arbitration Act, *Bus. & Prof. Code § 6200 et seq.*, by filing a malpractice action. The second version of the form may be used if the respondent rejected the arbitration award under the MFAA in accordance with *Bus. & Prof. Code § 6204(a)*, but an arbitration agreement still applies.

This form does not provide a complete memorandum; it is designed to be combined with a general form of memorandum in support of compelling arbitration, either alone [*see § 20.10*] or together with a motion to stay an action [*see § 20.11*].

As a tactical matter, counsel may wish to reserve these points for oral argument or for other form of rejoinder to the respondent's opposing memorandum. In deciding whether to reserve these arguments and to avoid the possibility of losing the opportunity to raise them, counsel should consider local court rules and practice, as well as whether the moving party would be expected to raise these points in initial moving papers.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should trace the language of the arbitration agreement, particularly language that expressly refers to fee disputes or malpractice actions.

It is advisable for counsel to submit evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file (including verified pleadings), or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840]* (motion to compel arbitration improperly denied if plaintiff-respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement).

Affidavits or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*] are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For forms relating to complaints for attorney compensation, notices of client's right to mandatory arbitration of fee, petition to correct mandatory fee award, and rejection of fee award, see California Forms of Pleading and Practice, Ch.

72, *Attorney Practice and Ethics* (Matthew Bender), § 72.740 et seq.

[d] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For discussion of requirements and considerations of the mandatory fee arbitration statutes and memoranda relating thereto, see Ch. 25, *Attorney's Fees* .

[3] Discussion of Authorities

[a] Malpractice Claim, or Fee Dispute, or Both May Be Arbitrated

Plaintiff in ***Aguilar v. Lerner*** *(2004) 32 Cal. 4th 974, 12 Cal. Rptr. 3d 287, 88 P.3d 24* , hired defendant as his attorney. The written retainer agreement included an agreement to arbitrate any dispute concerning fees or any other claim relating to plaintiff's legal matter which arose out of the legal representation. Plaintiff sued defendant for malpractice. Defendant cross complained for unpaid fees and costs and petitioned to compel arbitration pursuant to *Code Civ. Proc. § 1281*. The petition was granted. The arbitrator found for defendant on both the malpractice claim and the claim for unpaid fees. The superior court denied plaintiff's motion to vacate the award and granted defendant's motion to confirm the award. Plaintiff appealed, contending the award relating to fees, and possibly the entire award, violated his rights under the Mandatory Fee Arbitration Act (MFAA). The court of appeal affirmed. The Supreme Court granted review and also affirmed.

While noting the limited scope of judicial review of arbitration awards, the Supreme Court held review was appropriate because an award in violation of plaintiff's rights under the MFAA would be in excess of the arbitrator's powers (*32 Cal. 4th 974, 983)* . The MFAA is limited in that it applies only to disputes concerning fees, costs, or both [*Bus. & Prof. Code § 6200(a)*]. It is inapplicable to claims for affirmative relief against the attorney for damages, or otherwise, based on alleged malpractice or professional misconduct [*Bus. & Prof. Code § 6200(b)(2)*] (*32 Cal. 4th 974, 984)* . The MFAA specifically provides that by commencing an action by filing any pleading seeking either judicial resolution of a fee dispute to which the MFAA applies or affirmative relief against the attorney for damages, or otherwise, based on alleged malpractice or professional misconduct, a client waives the right to request or maintain arbitration under its provisions [*Bus. & Prof. Code § 6201(d)*] (*32 Cal. 4th 974, 985)* .

Although the court of appeal had held that plaintiff was judicially estopped to rely on the MFAA, the Supreme Court disagreed because one of the elements of judicial estoppel is that the party being estopped have maintained two inconsistent positions. Plaintiff never did. He always maintained that the order compelling arbitration of the fee claim violated his rights under the MFAA (*32 Cal. 4th 974, 986-987)* . However, by the plain language of the MFAA, plaintiff waived his rights under that statute by filing the malpractice action. It did not matter that the arbitration agreement was signed before any fee dispute arose (*32 Cal. 4th 974, 987-988)* . Plaintiff claimed that he nevertheless retained rights under the MFAA with regard to the fee dispute. The Court found no authority or reasons to support that claim. A client who fails to invoke the MFAA waives MFAA rights entirely; no residual MFAA protections remain (*32 Cal. 4th 974, 988-989)* . Thus, the arbitration agreement was enforceable (*32 Cal. 4th 974, 990)* .

Ervin, Cohen & Jessup, LLP v. Kassel *(2007) 147 Cal. App. 4th 821, 54 Cal. Rptr. 3d 685* , arose from an attorney fee dispute. In January 2004, plaintiff law firm served defendant, its former client, with a notice of client's right to arbitration explaining that the law firm intended to file suit against defendant to recover unpaid fees and costs and that the former client could invoke his right to resolve the fee dispute under the Mandatory Fee Arbitration Act (MFAA; *Bus & Prof. Code § 6200 et seq.*) by filing an application for arbitration with the local bar association within 30 days of the

notice. Defendant did not seek arbitration under the MFAA. Plaintiff filed suit in December, 2005, and filed an application for attachment in January, 2006. In February, 2006, while the application for attachment was pending, plaintiff filed a motion to compel arbitration before the American Arbitration Association (AAA) in accordance with the retainer agreement. Defendant did not dispute that he received the notice or that he never sought to resolve the fee dispute under the MFAA, but nonetheless opposed the motion to compel arbitration. Despite continuing the matter to review *Aguilar v. Lerner (2004) 32 Cal. 4th 974, 12 Cal. Rptr. 3d 287, 88 P.3d 24* (*Aguilar*, discussed *above*), the trial court denied the motion to compel arbitration on the ground that the retainer agreement violated the MFAA, specifically *Bus. & Prof. § 6204(a)*, which provides that agreements for binding arbitration of fee disputes cannot be made before a dispute over fees arises. Plaintiff appealed.

The court of appeal reversed, finding that the former client waived the protections of the MFAA *(147 Cal. App. 4th 821, 824, 830)* . The court of appeal found that defendant had a full and fair opportunity to take advantage of the protections the MFAA affords, but he declined. Having waived his right to proceed under the MFAA, defendant could not later invoke the MFAA to avoid the agreement for binding arbitration of all disputes (*147 Cal. App. 4th 821, 826)* . The court discussed the relevant provisions of the MFAA, including *Bus. & Prof. Code § 6201(a)*, which requires an the attorney to forward a written notice to the client prior to or at the time of service of summons or claim in an action against the client for fees and makes clear that the client's failure to request arbitration within 30 days after receipt of the notice from the attorney is deemed a waiver of the client's right to arbitration under the MFAA. Plaintiff had served defendant with this notice nearly a year before commencing the action (*147 Cal. App. 4th 821, 826-827)* . Defendant failed to request arbitration under the MFAA within 30 days after receipt of plaintiff's notice and never expressed any interest in arbitrating the fee dispute under the MFAA. There was no doubt that defendant waived his rights under the MFAA. *Aguilar* made clear that there is no such thing as a partial waiver of rights under the MFAA: once a client fails to invoke his or her rights under the MFAA, his or her rights are waived entirely and, any preexisting arbitration agreement is enforceable against the client, with no residual MFAA protections standing as an obstacle (*147 Cal. App. 4th 821, 827)* . Defendant claimed that *Bus. & Prof. Code § 6204(a)* requires that an arbitration agreement cannot be made before a fee dispute arises but only "at any time after the dispute over fees, costs, or both, has arisen," and rendered the retainer agreement's arbitration provision invalid and unenforceable. The quoted language was added to the statute by amendment in 1996. *Aguilar* considered an arbitration agreement that was made in 1994. The court of appeal found the 1996 amendments inapplicable. First, because the statute itself made clear they applied only to arbitration awards made pursuant to the MFAA. Secondly, as the *Aguilar* Court explained, once the client had waived his rights under the MFAA, it was irrelevant whether the client entered the arbitration agreement pre- or post-dispute or which version of Section 6204(a) applied to the agreement (*147 Cal. App. 4th 821, 828)* . Section 6204(a) does not render a pre-dispute agreement for binding arbitration invalid or unenforceable so long as the client retains the right to try to resolve the fee dispute via nonbinding arbitration (and a trial after arbitration) under the MFAA. Defendant had the opportunity to exercise these rights and chose to waive them. Thus, he was bound by his agreement to submit all disputes with plaintiff to binding arbitration (*147 Cal. App. 4th 821, 829)* .

[b] Respondent's Rejection of Mandatory Award Permits Contractual Arbitration

In ***Schatz v. Allen Matkins Leck Gamble & Mallory LLP*** *(2009) 45 Cal. 4th 557, 566, 87 Cal. Rptr. 3d 700, 198 P.3d 1109*), the Supreme Court reversed a judgment of the court of appeal affirming trial court's denial of law firm's petition to compel contractual arbitration of a fee dispute with the client. After mandatory arbitration of the attorney-fee dispute under the Mandatory Fee Arbitration Act, *Bus. & Prof. Code § 6200 et seq.*, resulted in award favoring the law firm, the client filed a civil complaint seeking trial de novo under *Bus. & Prof. Code § 6204(a)*, declaratory relief, and refund of attorney fees. The firm then petitioned to compel binding arbitration under the underlying agreement. The Court ruled that the phrase "any other proceeding under a contract between attorney and client" in *Bus. & Prof. Code § 6201(a)*, can be fairly inferred to include contractual arbitration under the California Arbitration Act, *Code Civ. Proc. § 1280 et seq.*, with respect to the resulting proceeding following rejection of the mandatory award by either party (*45 Cal. 4th 557, 566)* .

The Court did not accept client's argument that the references in *Bus. & Prof. Code § 6204* to a trial after MFAA arbitration, by impliedly repealing the CAA. foreclosed the possibility that a case might, following MFAA arbitration, proceed to contractual arbitration under the CAA where a contractual obligation to arbitrate existed (*45 Cal. 4th 557, 573-575)* .

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[Reserved]

§§ 20.48[Reserved]

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C. Particular Persons Bound by Arbitration Agreement

2-20 California Points & Authorities § 20.60

§ 20.60 Nonsignatory Physician Must Arbitrate Under Medical Services Agreement Between Hospital and Subscriber

[1] FORM

PETITIONER, AS AN ENROLLEE IN THE HOSPITAL'S MEDICAL SERVICES AGREEMENT THAT PROVIDES FOR ARBITRATION OF ALL DISPUTES, IS ENTITLED TO AN ORDER COMPELLING ARBITRATION [AND STAYING ANY PENDING ACTION RELATING TO ARBITRABLE ISSUES] BECAUSE RESPONDENT PHYSICIAN, WHO AS AN EMPLOYEE OF THE HOSPITAL ACCEPTS PATIENTS THROUGH ENROLLMENTS, IS BOUND TO ARBITRATION EVEN THOUGH NOT A SIGNATORY TO THE AGREEMENT.

A. Physician Employed by Hospital Is Bound by Arbitration Clause in Medical Services Agreement. As a hospital employee who accepts patients through enrollments in the hospital's medical services agreement, the patient's physician is bound to arbitrate the patient's medical malpractice claim even though the physician is not a signatory to the agreement (*Harris v. Superior Court (1986) 188 Cal. App. 3d 475, 477-479, 233 Cal. Rptr. 186*).

[2] Comments

[a] Use of Form

This memorandum may be submitted by a subscriber to a medical services agreement in support of a petition to compel arbitration under that agreement to address the objection of a physician against whom petitioner has a claim, that the physician did not personally sign the medical services agreement.

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in support of compelling arbitration, either alone [*see § 20.10*] or combined with a motion to stay an action [*see § 20.11*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should show that the physician is employed by the hospital which is a party to the agreement and the benefits the physician derives from that relationship, particularly accepting patients enrolled in the hospital's program.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Physician Employed by Hospital Is Bound by Arbitration Clause in Medical Services Agreement

In ***Harris v. Superior Court*** *(1986) 188 Cal. App. 3d 475, 233 Cal. Rptr. 186* , plaintiffs, the wife and daughter of a man who had signed an arbitration agreement with a hospital on enrolling in the hospital's prepaid health services program, sought a writ of mandate directing the trial court to compel the physician named in plaintiffs' medical malpractice claim to participate in binding arbitration. Plaintiffs originally filed a medical malpractice action against, among others, the hospital and physician, to which defendants raised binding arbitration as an affirmative defense. The trial court granted a motion to compel arbitration brought by the hospital but denied plaintiffs' subsequent motion to compel the physician to participate in the arbitration, reasoning that he was not a party to the agreement.

The court of appeal issued the writ, holding that the physician was bound by the arbitration clause signed by the patient when he enrolled in the health plan even though the physician was not a signatory to the agreement. The court noted the well-established rule that a nonsignatory beneficiary of an arbitration clause is contractually entitled to compel arbitration (*188 Cal. App. 3d 475, 478)* . Whether a nonsignatory beneficiary can be forced to arbitrate is a closer question. The court decided on the facts of this case, that the physician, although not a signatory to the agreement, was nonetheless bound to the arbitration clause by virtue of his employment relationship to the hospital through which he rendered medical care to the hospital's patients (*188 Cal. App. 3d 475, 477-479)* .

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2-20 California Points & Authorities § 20.61

§ 20.61 Subscriber Must Arbitrate Under Medical Services Agreement Signed by Agent/Employer

[1] FORM

PETITIONER, AS A PARTY TO AN ARBITRATION PROVISION UNDER A MEDICAL SERVICES AGREEMENT, IS ENTITLED TO AN ORDER COMPELLING ARBITRATION [AND STAYING ANY PENDING ACTION RELATING TO ARBITRABLE ISSUES] BECAUSE RESPONDENT IS BOUND TO ITS TERMSBY AN AGENT AUTHORIZED TO NEGOTIATE THE ARBITRATION PROVISION.

A. Agent or Fiduciary Negotiating for Medical Care Is Authorized to Provide for Arbitration. An agent or other fiduciary contracting for medical treatment on the beneficiary's behalf retains the authority to enter into an agreement providing for arbitration of malpractice claims and binding the beneficiary to that provision (*Madden v. Kaiser Foundation Hospitals (1976) 17 Cal. 3d 699, 709, 131 Cal. Rptr. 882, 552 P.2d 1178* ; *Hawkins v. Superior Court (1979) 89 Cal. App. 3d 413, 418-419, 152 Cal. Rptr. 491*).

[*Optional*] **B. Health Care Plan Requiring Arbitration Is Not Unconstitutional.** It is not unconstitutional for the California Department of Managed Health Care to approve health care service plans in which the only method for resolution of disputes is mandatory arbitration. An employee presented with the option of enrolling in a plan that requires arbitration of disputes has a choice: (1) to enroll in the plan and give up a right to jury trial, or (2) to decline to enroll and forego coverage under the plan (*Viola v. Dep't of Managed Health Care (2005) 133 Cal. App. 4th 299, 310-312, 314, 34 Cal. Rptr. 3d 626*).

[2] Comments

[a] Use of Form

This memorandum may be submitted by a medical services provider in support of a petition to compel arbitration under the medical services agreement to address the objection, or anticipated objection, of the party who received medical services that he or she is not bound by the agreement because he or she did not sign when his or her agent entered into the agreement on the patient's behalf. Optional Paragraph B is to anticipate any anticipated challenge that a plan

requiring arbitration as the only means of dispute resolution is an unconstitutional deprivation of the right to a jury trial.

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in support of compelling arbitration, either alone [*see § 20.10*] or combined with a motion to stay an action [*see § 20.11*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should show that a particular named agent in fact negotiated the health plan contract on behalf of the respondent subscriber and others similarly situated.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Memoranda

In an appropriate situation, counsel may wish to oppose arbitration on the basis that the enrollment form did not comply with the arbitration disclosure requirements of *Health & Safety Code § 1363.1*, which are the basis of Ch. 20A, *Arbitration: Resisting*, § 20A.94[1].

[3] Discussion of Authorities

[a] Agent or Fiduciary Negotiating for Medical Care Is Authorized to Provide for Arbitration

In ***Madden v. Kaiser Foundation Hospitals*** *(1976) 17 Cal. 3d 699, 131 Cal. Rptr. 882, 552 P.2d 1178* , a medical services contract had been entered into between a board representing state employees and the defendant health plan. Plaintiff, a state employee who had enrolled in the defendant's health plan, contended she was not bound by an amendment to the plan made after she had enrolled, requiring arbitration of her pending dispute with defendant for medical malpractice, for which she filed an action. She maintained she was not aware of the arbitration amendment at the time of her hospitalization. Defendant's motion to compel arbitration and stay the action was denied, and defendant appealed.

In reversing, the Supreme Court noted that in negotiating agreements and amendments pertaining to medical services, the state board acted as the agent or representative of state employees (*17 Cal. 3d 699, 705)* . Under principles of agency, contract provisions, as well as amendments to them, were negotiated by the board within the scope of its authority as an agent, and these provisions bound the employees who enrolled under the contract (*17 Cal. 3d 699, 705-706)* . Observing the evolution of arbitration from a forum of questionable status to one of preferred standing in the law, the Court stated that the agent today who consents to arbitration for a principal follows a proper and usual practice for effecting the purpose of the agency; the agent merely agrees that disputes arising under the contract being negotiated will be resolved by a common, expeditious, and judicially favored method (*17 Cal. 3d 699, 706-707)* . TheCourt recognized that thousands of agreements for arbitration already had been arrived at through collective bargaining (*17 Cal. 3d 699, 708)* . The Court perceived no reason why the implied authority of an agent should not, similarly to that of a parent, include the power to agree to arbitration of the principal's malpractice claims. It concluded that an agent or other fiduciary who contracts for medical treatment on behalf of the beneficiary retains the authority to enter into an agreement providing for arbitration of claims for medical malpractice (*17 Cal. 3d 699, 709)* .

In ***Hawkins v. Superior Court*** *(1979) 89 Cal. App. 3d 413, 152 Cal. Rptr. 491* , plaintiff sought to set aside an order compelling arbitration of her wrongful death claim. The decedent, her husband, had enrolled both himself and his wife in a health plan. The plan's master contract called for mandatory arbitration of claims, including wrongful death actions. The decedent later died of cancer, allegedly as a result of real parties' failure to make an early diagnosis. Plaintiff argued that she had not agreed to the arbitration provision and had not authorized her husband to do so on her behalf, and therefore she could not be compelled to arbitrate her claim.

The court of appeal denied plaintiff's petition for a writ of mandate, relying on *Madden v. Kaiser Foundation Hospitals (1976) 17 Cal. 3d 699, 131 Cal. Rptr. 882, 552 P.2d 1178* (discussed *above*). The court held that plaintiff's husband had implied authority to bind her to the mandatory arbitration provision. This authority is implicit in a spouse's power to contract for a health plan for both spouses pursuant to the duty of support created by former Civ. Code § 242 (*now see Fam. Code § 4300*), as well as in the recognized fiduciary relationship existing between spouses (*89 Cal. App. 3d 413, 418-419)* .

[b] Health Care Plan Requiring Arbitration Is Not Unconstitutional

Plaintiffs in ***Viola v. Dep't of Managed Health Care*** *(2005) 133 Cal. App. 4th 299, 34 Cal. Rptr. 3d 626* , all insureds or individuals seeking health care insurance, sought a judicial declaration that the defendant's approval of health insurance plans containing mandatory arbitration requirements for resolution of any disputes thereunder was in derogation of their constitutional right to a jury trial. They also sought injunctive relief prohibiting defendant from approving any health care plan that did not provide a choice of jury trial for dispute resolution. Each of the plans to which plaintiffs applied or under which they were insured was approved by defendant in accordance with the Knox-Keene Health Care Service Plan Act of 1975 (Knox-Keene; *Health & Safety Code § 1340 et seq.*). Defendants' demurrer was sustained without leave to amend. The trial court found that binding arbitration agreements are constitutional when an agent for the employee has waived the right to jury trial, citing *Madden v. Kaiser Foundation Hospitals (1976) 17 Cal. 3d 699, 131 Cal. Rptr. 882, 552 P.2d 1178* (*Madden*, discussed at [a], *above*). It concluded that there is no constitutional right to medical insurance through a health care service plan, and that the plaintiffs were not compelled to sign the plans containing the waiver of jury trial. After reconsideration, the trial court again sustained the demurrer without leave to amend. Plaintiffs appealed.

The court of appeal affirmed (*133 Cal. App. 4th 299, 304, 314)* . The court of appeal first reviewed the system for approval by the Department of Managed Care (the Department) for approval of health care service plans pursuant to the Knox-Keene (*Health & Safety Code § 1340 et seq.*) (*133 Cal. App. 4th 299, 307-308*), and then determined that plaintiffs' challenge to the Department's approval of health service plans presented an actual controversy proper for resolution through an action for declaratory relief (*133 Cal. App. 4th 299, 309)* . The court found no authority in the federal or state constitutions to support plaintiffs' claim that in the context of a group plan offered by an employer, they

had a constitutional right to choose between arbitration and jury trial (*133 Cal. App. 4th 299, 310)* . Although the *California Constitution, article I, section 16* guarantees the right to jury trial, that right can be waived, in particular, by pre-dispute arbitration agreements [*see Code Civ. Proc. § 1281*] (*133 Cal. App. 4th 299, 310-311)* . The Legislature has expressly approved arbitration as a forum for resolution of disputes under health care service contracts, thus authorizing waiver of jury trial for those disputes [*see Health & Safety Code § 1363.1* (health care service plan that includes terms that require binding arbitration to settle disputes and that restrict, or provide for waiver of, right to jury trial shall include specified language and disclosure)]. Applying a basic rule of statutory construction, the Legislature is deemed to have been aware of statutes and judicial decisions already in existence, specifically Madden (discussed at [a], *above*), when it enacted section 1363.1 in 1994 (*133 Cal. App. 4th 299, 311)* . The enactment of section 1363.1 evinces a legislative intent to allow binding arbitration in health care service plans negotiated by employers acting as agents of their employees (*133 Cal. App. 4th 299, 312)* . The court disagreed with plaintiffs' contention that the trial court misapplied the holding in *Madden*, but agreed with *Madden* that in this circumstance, the employee has only the choice presented to the plaintiffs here: enroll in the plan and give up a right to jury trial, or decline to enroll and forego coverage under the plan. No constitutional or statutory law is violated by approval of health care service plans which contain binding arbitration clauses (*133 Cal. App. 4th 299, 314)* .

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2-20 California Points & Authorities § 20.62

§ 20.62 Spouse Must Arbitrate Under Medical Services Agreement Signed by Spouse Who Received Medical Care

[1] FORM

PETITIONER IS ENTITLED TO AN ORDER COMPELLING ARBITRATION OF THIS ACTION [AND STAYING THIS ACTION (AS TO THE ARBITRABLE ISSUES)] BECAUSE RESPONDENT'S CLAIM FOR LOSS OF CONSORTIUM ARISES OUT OF INJURIES ALLEGEDLY SUFFERED BY HIS/HER SPOUSE WHO SIGNED THE CONTRACT FOR MEDICAL SERVICES CONTAINING THE ARBITRATION CLAUSE.

A. Nonsignatory Spouse Bound. If an arbitration clause provides that it binds all parties whose claims may arise out of or relate to the treatment or services provided by the physician, including any spouse or heirs of the patient, a nonsignatory spouse may be compelled to arbitrate claims arising out of injuries suffered by the signatory spouse (*Mormile v. Sinclair (1994) 21 Cal. App. 4th 1508, 1513, 1514, 26 Cal. Rptr. 2d 725* ; *Gross v. Recabaren (1988) 206 Cal. App. 3d 771, 780-781, 253 Cal. Rptr. 820*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition to compel arbitration of an action brought by a person whose claim arises out of injuries suffered by his or her spouse in the course of medical treatment when the spouse who received the treatment signed an agreement for the provision of medical services that contained an arbitration clause binding the nonsignatory spouse to arbitration.

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in support of compelling arbitration, either alone [*see § 20.10*] or combined with a motion to stay an action [*see § 20.11*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should show the particular agreement involved and that it is broad enough to encompass the spouse's claim.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Memoranda

For a memorandum based on a minority case contrary to and criticized by the authorities cited in this form, see *Ch. 20A, Arbitration: Resisting, § 20A.62.*

[3] Discussion of Authorities

[a] Nonsignatory Spouse Bound

In ***Mormile v. Sinclair*** *(1994) 21 Cal. App. 4th 1508, 26 Cal. Rptr. 2d 725* , respondent's wife signed a contract for medical services that provided: "It is the intention of the parties that this agreement bind all parties whose claims may arise out of or relate to treatment or services provided by the physician, including any spouse or heirs of the patient." When she became dissatisfied with the treatment, she filed a medical malpractice lawsuit, in which respondent asserted a loss of consortium cause of action. The physician petitioned to compel arbitration. The court granted the petition as to the patient/spouse, but denied it as to respondent. Petitioner appealed.

The court of appeal reversed. The court defined the issue as being whether the wife's agreement to arbitrate claims arising out of the physician's professional negligence bound her husband, who never signed the agreement. The court, citing examples, noted that arbitration agreements are enforced with regularity against nonsignatory parties (*21 Cal. App. 4th 1508, 1511)* . The court noted that *Gross v. Recabaren (1988) 206 Cal. App. 3d 771, 253 Cal. Rptr. 820* , had held a nonsignatory spouse bound to arbitrate a loss of consortium claim under a similar arbitration clause (*21 Cal. App. 4th 1508, 1511-1512)* . The court also noted *Bolanos v. Khalatian (1991) 231 Cal. App. 3d 1586, 283 Cal. Rptr. 209* , binding a nonsignatory spouse to arbitration of an emotional distress claim for having witnessed injuries to his wife, and *Michaelis v. Schori (1993) 20 Cal. App. 4th 133, 24 Cal. Rptr. 2d 380* , binding the nonsignatory father of a stillborn baby (*21 Cal. App. 4th 1508, 1512-1513)* .

As to the contrary case of *Baker v. Birnbaum (1988) 202 Cal. App. 3d 288, 248 Cal. Rptr. 336* , discussed at *Ch. 20A, Arbitration: Resisting, § 20A.62[3][a]*, the court first distinguished it on the ground that the arbitration clause in *Baker* did not purport to bind anyone other than the patient. Thus, the *Baker* court had no need to rely on a broader principle it stated, which was that the policy in favor of arbitration does not extend to nonsignatories. The *Mormile* court observed that *Baker* has generally been ignored or questioned and constitutes a minority view, with its overly restrictive reading of the scope of arbitration agreements (*21 Cal. App. 4th 1508, 1513-1514)* . The court went on to find the rationale of *Gross* and its progeny for requiring nonsignatory spouses to arbitrate their claims arising out of injures suffered by the signatory spouse to be compelling (*21 Cal. App. 4th 1508, 1514-1516)* .

Gross v. Recabaren *(1988) 206 Cal. App. 3d 771, 253 Cal. Rptr. 820* , was a medical malpractice action relating to a cancerous skin lesion which was surgically removed in May, 1986. The patient's wife also sued for loss of consortium. Husband alone signed the arbitration agreement at issue, in 1984, when he had other skin lesions removed. It required arbitration of "any dispute as to medical malpractice." The doctors' petition to compel arbitration was denied on the ground that the arbitration agreement did not extend to the 1986 procedure. The doctors appealed.

The court of appeal reversed, first finding that there was a continuing doctor-patient relationship, so the arbitration agreement did apply to the 1986 procedure (*206 Cal. App. 3d 771, 777-778)* . With respect to whether the wife's claim was subject to thearbitration agreement, the court of appeal noted it was in the unhappy position of having to choose between decisions of two of their colleagues, *Baker v. Birnbaum (1988) 202 Cal. App. 3d 288, 248 Cal. Rptr. 336* (discussed at *Ch. 20A, Arbitration: Resisting, § 20A.62[3][a]*), and *Herbert v. Superior Court (1985) 169 Cal. App. 3d 718, 215 Cal. Rptr. 477* (discussed at *§ 20.63[3][a]*), decided by two other divisions of the same district court of appeal, the Second District. Those cases reflect an irreconcilable divergence of views extending beyond any factual differences. The court of appeal discussed the reasoning of both cases, *Herbert* focusing on the impracticality of having everyone sign the agreement and of having separate forums for each heir's cause of action (*206 Cal. App. 3d 771, 779)* , and *Baker*, which merely declined to find that an agreement for one person's health care could bind another to arbitrate a cause of action arising out of that care (*206 Cal. App. 3d 771, 779-780)* . The *Gross* court of appeal decided that the reasoning in *Herbert* was more in line with the practical realities of the situation, more accurately reflected the existing case law governing the applicability of arbitration agreements to nonsignatories, and furthered the judicially-favored preference of joining the loss of consortium and negligence claims (*206 Cal. App. 3d 771, 780-781)* . The court also discussed how cumbersome it would be if a physician had to inquire into a patient's marital status at the time of every visit and postpone treatment if a recently acquired spouse is not present to join in executing a new agreement (*206 Cal. App. 3d 771, 781)* .

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2-20 California Points & Authorities § 20.63

§ 20.63 Heirs Must Arbitrate Wrongful Death Claims Under Medical Services Agreement

[1] FORM

PETITIONER, AS A PARTY TO AN ARBITRATION PROVISION UNDER THE _____ [*specify type of contract, e.g.*, MEDICAL SERVICES AGREEMENT], IS ENTITLED TO AN ORDER COMPELLING ARBITRATION [AND STAYING ANY PENDING ACTION RELATING TO ARBITRABLE ISSUES] BECAUSE RESPONDENT IS AN HEIR OF THE PARTY WHO EXECUTED THE AGREEMENT AND THE AGREEMENT EXPRESSLY BINDS HIS/HER HEIRS TO ARBITRATE.

A. Heirs of Contracting Party May Be Expressly Bound to Arbitrate. An heir of the party who executed an agreement to arbitrate any claim asserted by the party or the party's heirs is bound by the agreement (*Herbert v. Superior Court (1985) 169 Cal. App. 3d 718, 725-727, 215 Cal. Rptr. 477*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition to compel arbitration under a contract containing an arbitration provision that expressly provides that the heirs of the parties to the contract will be bound by the agreement to arbitrate.

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in support of compelling arbitration, either alone [*see § 20.10*] or combined with a motion to stay an action [*see § 20.11*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should show the particular agreement involved was intended to bind the heirs of the contracting party and that the

agreement is otherwise enforceable.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Heirs of Contracting Party May Be Expressly Bound to Arbitrate

In ***Herbert v. Superior Court*** *(1985) 169 Cal. App. 3d 718, 215 Cal. Rptr. 477* , a labor union and defendant health plan had entered into a medical services contract covering the members of the union. The contract included a provision requiring arbitration of any claim asserted by a member of the health plan or a member's heir or personal representative arising from the rendition or failure to render services under the agreement, irrespective of the legal theory on which the claim was asserted. A union member joined the plan on behalf of himself, his wife, and five of his eight children. When the member died after surgery performed by defendant, his widow and all eight children instituted a wrongful death action against defendant. Defendant answered the complaint and moved to compel arbitration pursuant to the agreement. The trial court granted the motion as to the widow and the children who were members of the plan, but denied the motion as to the nonmember heirs, and all parties sought a writ of mandate.

The court of appeal granted the writ sought by defendant, holding that all parties to the wrongful death action were bound by the arbitration agreement (*169 Cal. App. 3d 718, 721)* . The court relied on *Hawkins v. Superior Court (1979) 89 Cal. App. 3d 413, 418-419, 152 Cal. Rptr. 491* (discussed at *§ 20.61[3][a]*) to conclude that the decedent could bind his heirs who were also members of the health plan, i.e., the widow and the five children who were members. The court then relied on two grounds in reaching its conclusion that the arbitration provision also bound the nonmember heirs. First, the court noted that the statutory cause of action for wrongful death created by *Code Civ. Proc. § 377* [*now see Code Civ. Proc. § 377.60 et seq.*] is a joint, single, and indivisible action that may not be split (*169 Cal. App. 3d 718, 722)* . The court held that the reasons for a single wrongful death cause of action, requiring all heirs to be bound by an arbitration agreement executed by the decedent, were more convincing than the arguments in support of the trial court's order that would require two separate and distinct proceedings (*169 Cal. App. 3d 718, 725)* . Second, the court noted the express language of the agreement that bound the heirs to the arbitration provision, as well as the statutory provisions in *Code Civ. Proc. §§ 1283.1(a)* and *1295* that permit arbitration of wrongful death actions by agreement of the parties (*169 Cal. App. 3d 718, 726-727)* . The court found that these provisions evidence a legislative

intent that a patient who signs an arbitration agreement may bind his or her heirs to that agreement, regardless of whether or not the heirs are also members of the plan (*169 Cal. App. 3d 718, 727)* .

The *Herbert* case was distinguished by another court of appeal that then declined to follow it [*see Baker v. Birnbaum (1988) 202 Cal. App. 3d 288, 293-294, 248 Cal. Rptr. 336* (discussed in *Ch. 20A, Arbitration: Resisting, § 20A.62[3][a]*)].

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2-20 California Points & Authorities § 20.64

§ 20.64 Minor Is Bound by Mother's Medical Services Agreement (Prenatal or Postnatal Care)

[1] FORM

PETITIONER IS ENTITLED TO AN ORDER COMPELLING ARBITRATION OF RESPONDENT'S CLAIMS FOR NEGLIGENT PRENATAL AND POSTNATAL MEDICAL TREATMENT [AND STAYING THIS ACTION] BECAUSE RESPONDENT'S PARENT BOUND RESPONDENT TO ARBITRATE ALL CLAIMS AGAINST PETITIONER.

A. Parent May Bind Child to Arbitration of Medical Malpractice Claims Arising From Negligent Prenatal or Postnatal Treatment. A parent may validly bind an expected child, or even a child yet unconceived, to arbitration of all claims for negligence in prenatal and postnatal medical treatment (*Pietrelli v. Peacock (1993) 13 Cal. App. 4th 943, 947, 16 Cal. Rptr. 2d 688* ; *Wilson v. Kaiser Foundation Hospitals (1983) 141 Cal. App. 3d 891, 898-899, 190 Cal. Rptr. 649*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a petition to compel arbitration of a minor's medical malpractice action against a health care provider under a medical services agreement between the minor's parent and the physician when that agreement is broad enough to encompass the claim.

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in support of compelling arbitration, either alone [*see § 20.10*] or combined with a motion to stay an action [*see § 20.11*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument

should quote or refer to language of the arbitration agreement and should explain how the controversy in issue is within the scope of the subject matter covered by the arbitration provision.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see* Code Civ. Proc. § 2015.5]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Memoranda

For a memorandum based on an arbitration clause that was not broad enough to cover an unborn child, see *Ch. 20A, Arbitration: Resisting, § 20A.41*.

[3] Discussion of Authorities

[a] Parent May Bind Child to Arbitration of Medical Malpractice Claims Arising From Negligent Prenatal or Postnatal Treatment

In ***Pietrelli v. Peacock*** *(1993) 13 Cal. App. 4th 943, 16 Cal. Rptr. 2d 688* , defendant physician sought to compel arbitration of a minor's medical malpractice claim. On July 28, 1981, the plaintiff's mother, who was not pregnant at the time, signed acontract in which she agreed to submit any dispute regarding medical services rendered by defendant physician to binding arbitration. The document, entitled "Arbitration Agreement," stated in pertinent part that any controversy between the mother and the physician concerning medical care and any such controversy between the physician and "persons, born or unborn," on behalf of whom the mother had the power to contract, would be required to be submitted to final and binding arbitration. Plaintiff was born on October 3, 1982. On September 12, 1990, plaintiff through his mother as his guardian ad litem, filed a complaint against defendant for medical malpractice, alleging negligence in the care and treatment he received from defendant at or around the time of his birth. Defendant then filed a petition to compel arbitration pursuant to the arbitration agreement with the mother. Plaintiff opposed the motion on the principal ground that he was not a party covered by the agreement. In its order denying the petition, the court found that the language in the arbitration agreement did not bind children not yet conceived at the time the arbitration agreement was signed, and that reference to "persons, born or unborn," did not pertain to those not yet conceived. Defendant appealed.

The court of appeal reversed. It noted that under existing case law, a mother could validly bind her expected child to arbitration of all claims for negligence in prenatal and postnatal medical treatment. Plaintiff attempted to distinguish his

own case on the ground that he was neither born nor conceived at the time his mother entered into the arbitration agreement. The court did not find this distinction significant, and noted that the law in various contexts recognizes the ability of a party to act on behalf of and affect the rights of persons who have not yet come into existence. The court concluded that the arbitration agreement bound both the mother and "persons unborn" whom the mother had authority to bind. At the moment of conception, the plaintiff became an "unborn person" within the definition set forth in the contract. By electing to receive the obstetric services provided for her under the agreement, the plaintiff's mother impliedly agreed to arbitration for her unborn child. And because plaintiff had no cause of action before he was conceived, the election became binding on him at birth (*13 Cal. App. 4th 943, 947-948)* .

Wilson v. Kaiser Foundation Hospitals *(1983) 141 Cal. App. 3d 891, 190 Cal. Rptr. 649* , was a medical malpractice action by parents and their infant son related to allegedly negligent perinatal (shortly before or after birth) care of the infant who suffered epilepsy, brain damage, and other undefined injuries. The mother was a member of defendants' hospital services plan at the time of the child's birth. The plan required arbitration of "any claim arising from alleged violation of a legal duty incident to this agreement" if the claim was asserted by a member, a member's heir or personal representative. The plan provided that newborn children delivered at Kaiser were automatically enrolled in the plan. A parent who wished to circumvent that procedure had to complete a form to do so. Plaintiff mother never did that, instead, she enrolled him in the plan four months after he was born. Defendants petitioned to compel arbitration. Plaintiffs resisted, claiming the child was not a member of the plan at the time of his injuries or at the time of his birth. The trial court granted the petition as to the parents' claims and the child's postnatal claims, but denied the petition as to the claim for prenatal injuries, finding that the child's enrollment in the plan was retroactive to the time of his birth, but not before. Defendants appealed.

The court of appeal reversed, finding that in seeking obstetric care from defendants, the mother elected and expected medical services both for herself and for her unborn child. Because the agreement under which the services were rendered provided for prenatal care to the mother *and* to her unborn child, all such care was rendered subject to the agreement. The arbitration agreement was not limited to claims for services rendered to members, but instead applied to all claims for bodily injury arising from rendition or failure to render services under the agreement (*141 Cal. App. 3d 891, 898)* . The court also discussed former Civ. Code § 29 [*now see Civ. Code § 43.1* (child conceived but unborn is deemed an existing person so far as is necessary for the child's interests in the event of the child's subsequent birth)], and cases decided under it, which held that a child has no cause of action for prenatal injuries until and unless the child is born (*141 Cal. App. 3d 891, 896-898)* . Thus, the child's cause of action for prenatal injuries arose at his birth and at that moment he became a member of the plan; he never had a cause of action before he was a member of the plan (*141 Cal. App. 3d 891, 898)* . The court distinguished *Weeks v. Crow (1980) 113 Cal. App. 3d 350, 169 Cal. Rptr. 830* (discussed in *Ch. 20A, Arbitration: Resisting, § 20A.41[3][a]*), because in *Weeks*, only the mother was named as the patient, and the arbitration agreement, which was found in a blanket admission agreement rather than in a comprehensive prepaid family health plan, compelled arbitration only of claims arising out of treatment of the named patient (*141 Cal. App. 3d 891, 899)* .

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2-20 California Points & Authorities § 20.65

§ 20.65 Surety on Performance Bond Is Bound by Reference to Construction Contract Which Is Incorporated in Bond

[1] FORM

THE PERFORMANCE BOND REQUIRES RESPONDENT TO ARBITRATE THIS CONTROVERSY BECAUSE THAT BOND INCORPORATES THE TERMS OF THE CONSTRUCTION CONTRACT, INCLUDING ITS ARBITRATION PROVISION.

A. Surety Under Performance Bond Is Bound by Arbitration Provision in Related Construction Contract. A contract performance bond will be read with the contract the faithful performance of which it guarantees. Thus, when the language of the bond incorporates the contract, the surety is bound by any arbitration provision in the contract even though it is not a party to the contract (*Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co. (1992) 6 Cal. App. 4th 1266, 1271-1273, 8 Cal. Rptr. 2d 587*).

[2] Comments

[a] Use of Form

This form may be used in support of a petition to compel a surety that issued a performance bond to arbitrate under an arbitration provision in the primary contract.

This form is not intended as a complete memorandum, but should be combined withthe memoranda in *§§ 20.10, 20.11*, and any others applicable to the particular situation.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the counsel should trace the language of the bond referring to the primary contract and the arbitration provision in the primary agreement.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see* Code Civ. Proc. § 2015.5]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For a form setting forth the applicability of incorporation by reference, see *§ 20.31*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Surety Under Performance Bond Is Bound by Arbitration Provision in Related Construction Contract

Owner/plaintiff in ***Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co.*** *(1992) 6 Cal. App. 4th 1266, 8 Cal. Rptr. 2d 587* , contracted with a builder for construction of a recreational facility for $1.2M. The contract contained an arbitration clause requiring the parties to arbitrate "(a)ll claims, disputes, and other matters arising in questions between the Contractor and the Owner arising out of, or relating to, the Contract Documents or the breach thereof ... " Contractor obtained a performance bond from defendant in the sum of $1.2MM. The bond referred to the contract and made it a part of the bond by reference. After the facility was completed, plaintiff complained of defects in construction and withheld final payment on the ground that Contractor failed to perform the contract in a workmanlike manner. In March, 1988, plaintiff filed a demand for arbitration against Contractor. In January, 1991, plaintiff filed an amended demand for arbitration naming defendant Fidelity as an additional party to the arbitration and defining the dispute to be arbitrated as "breach of contract, negligence, professional negligence and claim against Bond No. 61-06-492 [the performance bond]." In February, 1991 the Boys Club petitioned the superior court for an order compelling Fidelity to arbitrate disputes regarding the performance bond. Fidelity opposed the petition on the grounds that it was not a party to the contract which contained the arbitration provision and that plaintiff had waived its right to compel defendant to arbitrate by delay. The court denied the petition to compel, and Boys Club appealed.

The court of appeal reversed. The court commenced its discussion by noting that whether or not an arbitration agreement is operative against a person who has not signed it involves a question of "substantive arbitrability" which is to be determined by the court (*6 Cal. App. 4th 1266, 1271)* . The court then held that an agreement need not expressly provide for arbitration, but may do so in a secondary document which is incorporated by reference. A contract performance bond in particular will be read with the contract because when a party enters into a contract to do certain work on certain terms, and procures a surety to guarantee the faithful performance of the work, the surety necessarily contracts with reference to the contract as made; otherwise it would not know what obligation if was assuming. And this

is particularly so where the bond expressly declares that the contract is made a part of the bond and the terms of the contracts are incorporated into the bond (*6 Cal. App. 4th 1266, 1271-1272)* . After discussing several New York and Ohio cases, the court concluded that by the language in its bond incorporating the contract, Fidelity intended, and agreed, to be bound by the arbitration provision in the contract even though it was not a party to the contract (*6 Cal. App. 4th 1266, 1273)* .

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2-20 California Points & Authorities § 20.66

§ 20.66 Employee Must Arbitrate With Employer That Is Third Party Beneficiary of Employee's Agreement With Professional Organization

[1] FORM

PETITIONER, AS A THIRD PARTY BENEFICIARY OF RESPONDENT'S AGREEMENT WITH _____ [*specify, e.g.*, THE NATIONAL ASSOCIATION OF SECURITIES DEALERS], IS ENTITLED TO AN ORDER COMPELLING ARBITRATION [AND STAYING ANY PENDING ACTION RELATING TO ARBITRABLE ISSUES] BECAUSE RESPONDENT, AS _____ [*specify status, e.g.*, A FORMER EMPLOYEE OF PETITIONER], IS BOUND TO ARBITRATE THE DISPUTE UNDER THE TERMS OF THAT AGREEMENT.

A. Employee Must Arbitrate with Employer that Is Third Party Beneficiary of Employee's Agreement with Professional Organization. An employer that is identified in, and shown to be a third party beneficiary of _____ [a former *or* an] employee's agreement with a professional organization [that the employee was required to join as a condition of his/her employment] may enforce that agreement to compel the employee to arbitrate disputes that are within the scope of the agreementwith the professional organization (*Cione v. Foresters Equity Services, Inc. (1997) 58 Cal. App. 4th 625, 636, 645, 68 Cal. Rptr. 2d 167*).

[2] Comments

[a] Use of Form

This memorandum may be submitted by an employer or former employer in support of a petition to compel its employee or former employee to arbitrate under an agreement between the employee and a professional organization when the employer is a third party beneficiary of that agreement and the dispute is within the scope of that agreement.

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in support of compelling arbitration, either alone [*see § 20.10*] or combined with a motion to stay an action [*see § 20.11*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should show that the employer was mentioned in and intended as a beneficiary of the agreement between the employee and the professional organization.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see* Code Civ. Proc. § 2015.5]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Employee Must Arbitrate With Employer That Is Third Party Beneficiary of Employee's Agreement With Professional Organization

Plaintiff in ***Cione v. Foresters Equity Services, Inc.*** *(1997) 58 Cal. App. 4th 625, 68 Cal. Rptr. 2d 167* , sued defendant (FESCO) for wrongful termination. Their employment agreement was silent on the issue of arbitration, but the Uniform Application for Securities Industry Registration (U-4) plaintiff had signed before signing the employment agreement identified FESCO as plaintiff's employing firm and required plaintiff to arbitrate any controversy that might arise between him and his firm. Defendant moved to compel arbitration under the U-4, but the motion was denied, apparently based on the integration clause in the employment agreement. Defendant appealed.

The court of appeal reversed, finding that the integration clause in the employment agreement did not prohibit its giving effect to the U-4, and that FESCO was a third party beneficiary of the U-4 (*58 Cal. App. 4th 625, 645)* . The intent to benefit FESCO appears from the terms of the U-4, including its requirement that plaintiff arbitrate any controversy that might arise between him and his firm (*58 Cal. App. 4th 625, 636)* . The employment agreement provided that it contained "the entire understanding of the parties hereto with respect to the subject matter contained herein. There are no restrictions, promises, representations, warranties, covenants or undertakings, other than those expressly set forth or referred to in this Agreement." Neither that integration clause or anything else in the agreement suggested that the agreement stated the parties' entire agreement as to all matters or otherwise superceded the U-4 (*58 Cal. App. 4th 625, 638)* . Even were the court to consider the employment agreement fully integrated, it would conclude that the U-4 was not superceded, because the U-4 addressed separate terms not inconsistent with the employment agreement (*58 Cal. App. 4th 625, 639)* .

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2-20 California Points & Authorities § 20.67

§ 20.67 People Who Have Accepted Benefits of Underlying Agreement

[1] FORM

RESPONDENT HAS ACCEPTED THE BENEFITS OF THE _____ [*specify, e.g.*, INSURANCE POLICY] CONTAINING THE ARBITRATION CLAUSE, AND MUST THEREFORE ACCEPT ITS BURDENS AND ARBITRATE.

A. People Who Have Accepted Benefits of Underlying Agreement. One who accepts the benefits of an agreement, or insurance policy, is required to accept the agreement's or policy's obligations, including the obligation to arbitrate, especially when there is an agency or similar relationship between the person who accepted the benefits and one of the parties to the arbitration agreement (*Norcal Mutual Ins. Co. v. Newton (2000) 84 Cal. App. 4th 64, 71-72, 76, 84, 100 Cal. Rptr. 2d 683*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition to compel arbitrationwhen the person resisting arbitration is admittedly not a party to the arbitration agreement, but has accepted so many benefits of the agreement in which the arbitration clause is contained (perhaps even including benefits of the arbitration clause) that he or she should be compelled to arbitrate.

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in support of compelling arbitration, either alone [*see § 20.10*] or combined with a motion to stay an action [*see § 20.11*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel

should show what the nonsignatory did to enjoy the benefits of the contract or insurance policy containing the arbitration clause, especially if the nonsignatory previously demanded arbitration, and then withdrew that demand or otherwise refused to arbitrate.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*].

[c] Related Pleading and Practice Chapters

For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[d] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] People Who Have Accepted Benefits of Underlying Agreement

Plaintiff in ***Norcal Mutual Ins. Co. v. Newton*** *(2000) 84 Cal. App. 4th 64, 100 Cal. Rptr. 2d 683* issued a professional liability insurance policy for a physician. The policy covered the physician and "health care extenders" for whom physician was legally responsible and for whom an endorsement had been issued under the policy, and employees acting within the scope of their employment for physician. The physician's spouse was not in any of those categories. The physician and the physician's spouse, who was not insured under the policy, were sued in an action alleging sexual misconduct by the insured and unauthorized treatment of patients by the spouse. The insurance company agreed to defend both the physician and the spouse, subject to a reservation of rights, including the right to decline to pay or indemnify any settlement and to seek reimbursement of all fees and costs. The case against the physician and spouse was settled, and a dispute arose as to how the settlement would be reported (as required) to the National Practitioner Data Bank (data bank) and to the Medical Board of California. On two occasions, attorneys for spouse demanded arbitration of a number of issues. Later, both physician and spouse "withdrew their request for arbitration." Physician died. Plaintiff petitioned to compel arbitration. The trial court denied the petition on the ground that had not sustained its burden of proving that spouse was a party to the insurance policy or that she had accepted its benefits within the meaning of *Civ. Code § 1589*. Plaintiff appealed.

The court of appeal reversed. The court discussed many cases in which a nonsignatory was required to arbitrate noting that a common thread of those cases is the existence of an agency or similar relationship between the nonsignatory and one of the parties to the arbitration agreement. In the absence of such a relationship, courts have refused to hold nonsignatories to arbitration agreements (*84 Cal. App. 4th 64, 76)* . The court noted that spouse sought the benefits of

the insurance policy by tendering defense of the complaint to plaintiff and accepted those benefits by allowing plaintiff to assume the cost of her defense and, together with physician, requested and participated in plaintiff's settlement of the complaint, and requested arbitration of the ensuing dispute regarding plaintiff's report of the settlement to the data bank. Even after physician's death and spouse's statement of non-consent to arbitration, spouse relied on the terms of the insurance policy to obtain a change of venue (*84 Cal. App. 4th 64, 78)* . The court concluded that having sought and accepted the benefit of the insurance policy in handling the underlying malpractice suit, spouse was required to abide by the policy's requirement of arbitration of disputes (*84 Cal. App. 4th 64, 82)* . The fundamental point, the court said, was that spouse was not entitled to make use of the policy as long as it worked to her advantage, and then attempt to avoid its application in defining the forum in which her dispute with plaintiff should be resolved. The maxim "He who takes the benefit must bear the burden" [*Civ. Code § 3521*] is relevant here (*84 Cal. App. 4th 64, 84)* .

[4] Additional Authorities

[a] People Who Have Accepted Benefits of Underlying Agreement

The court of appeals in *Suh v. Superior Court (2010) 181 Cal. App. 4th 1504, 1513-1514, 105 Cal. Rptr. 3d 585* , affirmed the trial court's ruling that doctors who had a contract with a hospital were not subject to the arbitration clause in a contract between the hospital and a medical group for which they were employed. The doctors were not signatories to the latter contract, and there was no evidence that plaintiffs actually derived any benefits from the other contract either as third party beneficiaries or otherwise.

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§ 20.68 Persons Whose Joinder Was Consented to in Arbitration Agreement

[1] FORM

THE AGREEMENT BETWEEN _____ [*name*] AND _____ [*name*] PROVIDES FOR JOINDER IN THE ARBITRATION OF ANYONE NOT A PARTY TO THE AGREEMENT WHO IS NECESSARY FOR COMPLETE RESOLUTION OF ANY CONTROVERSY REQUIRED TO BE ARBITRATED UNDERTHE AGREEMENT. THUS, ARBITRATION SHOULD COMPELLED.

A. Persons Whose Joinder Was Consented to in Arbitration Agreement. An arbitration agreement that provides for any third party who is not a party to the agreement but is necessary for complete resolution of any matter required to be arbitrated under the agreement, to be joined in the arbitration must be enforced according to its terms and arbitration compelled under that agreement (*Zakarian v. Bekov (2002) 98 Cal. App. 4th 316, 325-327, 119 Cal. Rptr. 2d 623*).

[*Optional*] **B. Rules Provide for Arbitrator to Decide Who Should Be Joined.** An arbitration agreement that provides for any third party who is not a party to the agreement but is necessary for complete resolution of any matter required to be arbitrated under the agreement, to be joined in the arbitration, and which further provides, or incorporates arbitration rules or procedures that provide, that the arbitrator determine who must be joined in the arbitration to provide a complete resolution, must be enforced according to its terms and arbitration compelled under those terms (*Zakarian v. Bekov (2002) 98 Cal. App. 4th 316, 325-327, 119 Cal. Rptr. 2d 623*).

[2] Comments

[a] Use of Form

This memorandum may be submitted by a party seeking to compel arbitration under an agreement, or rules or procedures incorporated into the arbitration agreement, that provides for any third party who is not a party to the agreement but is necessary for complete resolution of any matter required to be arbitrated under the agreement, be joined in the arbitration. Optional Paragraph B is applicable if the agreement, rules, or procedures provide that the arbitrator determine whether anyone must be joined in the arbitration to insure complete resolution of the matter. The

California Hospital Association-California Medical Association Rules for the Arbitration of Hospital and Medical Fee Disputes (CHA-CMA Rules) contain such a provision. Thus, an agreement to be arbitrated under those or similar rules will be enforced to refer the issue of the third party's joinder to the arbitrator.

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in support of compelling arbitration, either alone [*see § 20.10*] or combined with a motion to stay an action [*see § 20.11*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. At a minimum, counsel should attach the agreement and any rules or procedures adopted by the agreement that provide for joinder of third parties in the arbitration and should show who and why any third person is necessary to the resolution of the matter. Counsel should specify whether the court should decide the joinder issue at the same time it determines whether to compel arbitration or if one of the parties will present the matter of joinder to the arbitrator [*see* Optional Paragraph B].

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Persons Whose Joinder Was Consented to in Arbitration Agreement

Zakarian v. Bekov *(2002) 98 Cal. App. 4th 316, 325-327, 119 Cal. Rptr. 2d 623* was a class action commenced by patients of Dr. William Ellis, M.D. and the Ellis Eye and Laser Center of Northern California for damages arising out of laser eye surgery allegedly performed by Dr. Ellis with unapproved illegally imported ophthalmic lasers, which were alleged to have been so negligently serviced, maintained, repaired and calibrated by George Bekov as to have caused plaintiffs' injuries. Bekov was employed by Dr. Ellis to service the ophthalmic lasers and was also a defendant. Plaintiffs had each executed a "Patient-Physician Arbitration Agreement" in accordance with *Code Civ. Proc. § 1295*, which provided in part that "any dispute as to medical malpractice, that is as to whether any medical services rendered under this contract were unnecessary or unauthorized or were improperly, negligently or incompetently rendered, will be determined by submission to arbitration ... ." Most importantly, the arbitration provision also stated: "I also hereby consent to the intervention or joinder in the arbitration proceeding of all parties relevant to a full and complete

settlement of any dispute arbitrated under this Agreement, as set forth in the Medical Arbitration Rules and/or CHA-CMA Rules for the Arbitration of Hospital and Medical Fee Disputes." Ellis and Bekov filed a motion to compel arbitration. The trial court granted the motion to compel arbitration as to Ellis alone and denied arbitration of all issues relating to Bekov. Ellis and Bekov appealed.

The court of appeal reversed as to the denial of the motion to compel arbitration ofarbitrable claims as to Bekov, with directions that the trial court enter a new order referring the issue of Bekov's joinder or intervention to the arbitrator (*98 Cal. App. 4th 316, 322, 327)* . The court of appeal said it could not order arbitration of the merits of the dispute with Bekov, but that plaintiffs, as parties to the arbitration agreement, could not prevent Dr. Ellis from obtaining arbitration of the issue of whether or not Bekov's presence is "relevant to a full and complete settlement of any dispute" within the subject matter of the arbitration agreement. The terms of the arbitration agreement reflect that the parties agreed that the arbitrator, not the court, determine issues of joinder and intervention (*98 Cal. App. 4th 316, 322)* . The court distinguished cases relied on by plaintiffs that refused joinder of third parties and stressed that the critical and distinguishing fact in this case is Dr. Ellis' desire to bring in a willing third party according to the terms of his agreements with his patients. If the arbitration agreement encompasses the issue of joinder of a non-objecting third party, plaintiffs, who agreed to that term, cannot resist arbitration on the ground that the third party did not sign the agreement (*98 Cal. App. 4th 316, 323)* . The court of appeal asked for and received a copy of the latest version of the California Hospital Association and California Medical Association Rules for the Arbitration of Hospital and Medical Fee Disputes that were incorporated by reference in the arbitration agreement (CHA-CMA Rules). Rule 9, concerning intervention and joinder provides: "Prior to the date set for the arbitration hearing, any person ... whose participation is considered by the neutral arbitrator to be material or relevant to a complete resolution of the dispute may intervene in the arbitration. Similarly, any party to the arbitration may make a written request that additional persons ... be joined in the arbitration. If the neutral arbitrator considers the participation of the requested new party to be material or relevant to a complete resolution of the dispute, then the request shall be approved ... . All parties to the arbitration are deemed to have consented to the joinder or intervention of any person when the joinder or intervention is allowed pursuant to this rule ... ." On examination of the complaint, the contract, and the CHA-CMA Rules incorporated by reference, the court of appeal found it obvious that the parties had provided that the issue of whether Bekov could intervene or be joined in the arbitration proceeding was to be determined by the arbitrator (*98 Cal. App. 4th 316, 324)* . The allegations of entanglement between Bekov and Ellis bring the case against Bekov well within the scope of the language of the agreement regarding arbitration of questions of joinder of parties relevant to a full settlement of an arbitrated dispute. By denying the motion to compel arbitration, the trial court did not give effect to the role that the parties had contractually reserved to the arbitrator. The plain language of the arbitration agreement required reversal of the order denying appellants' motion to compel arbitration of the arbitrable claims as to Bekov (*98 Cal. App. 4th 316, 325)* .

Plaintiffs argued that because defendants had not yet applied to the arbitrator for intervention and/or joinder, denial of appellants' motion to compel arbitration had to be affirmed. The court of appeal disagreed, saying that once plaintiffs filed the complaint in this case in superior court, defendants had no choice but to ask that court to refer the issue to arbitration in accordance with the terms of their contract. The court of appeal further stated that its decision merely enforced the terms of an arbitration agreement; it was not forcing an unwilling nonsignatory to submit to arbitration. In this case, Bekov, by seeking arbitration, waived any objection he might have asserted (*98 Cal. App. 4th 316, 325)* . All of the policies favoring arbitration were served by the court's decision and there were no countervailing interests weighing against arbitration (*98 Cal. App. 4th 316, 326)* .

California Points & Authorities

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20 ARBITRATION: COMPELLING
PART II. FORMS
C. Particular Persons Bound by Arbitration Agreement

2-20 California Points & Authorities § 20.69

§ 20.69 Equity Requires Signatory to Arbitrate on Demand of Nonsignatory

[1] FORM

THE FACTS OF RESPONDENT'S CLAIM[S] AGAINST PETITIONER ARE SO INTERTWINED WITH RESPONDENT'S CLAIMS AGAINST OTHER PARTIES TO THE ARBITRATION AGREEMENT THAT EQUITY REQUIRES RESPONDENT TO ARBITRATE ITS CLAIMS AGAINST PETITIONER [IN THE SAME ARBITRATION].

A. Equity Requires Arbitration With Nonsignatory. California recognizes that a party to an arbitration agreement may be required by the doctrine of equitable estoppel to arbitrate claims against a nonsignatory when the claims against the nonsignatory are intimately founded in and intertwined with arbitrable claims against another signatory. [This theory, first recognized in federal courts, is usually applied to situations involving related companies and individual officers or agents of those companies and claims of fraud or conspiracy] (*Alliance Title Company, Inc. v. Boucher (2005) 127 Cal. App. 4th 262, 269-273, 25 Cal. Rptr. 3d 440* ; *Metalclad Corp. v. Ventana Environmental Organizational Partnership (2003) 109 Cal. App. 4th 1705, 1 Cal. Rptr. 3d 328*) *accord Turtle Ridge Media Group, Inc. v. Pacific Bell Directory (2006) 140 Cal. App. 4th 828, 832-835, 44 Cal. Rptr. 3d 817* (when contract governed be Federal Arbitration Act, detrimental reliance need not be shown to compel arbitration of intertwined claim against nonsignatory)).

[*Optional*] **B. Agent of Signatory Can Compel Arbitration.** An agent of a signatory, though he or she did not sign the arbitration agreement, can enforce an arbitration agreement against the principal or can be compelled to arbitrate against the principal. This rule is based on equitable principles (*Nguyen v. Tran (2007) 157 Cal. App. 4th 1032, 1037-1038* ; *Westra v. Marcus & Millichap Real Estate Investment Brokerage Co. (2005) 129 Cal. App. 4th 759, 764-765, 28 Cal. Rptr. 3d 752* (agent of both buyer and seller in real estate transaction)).

[*Optional*] **C. Nonsignatory Alleged To Be Alter Ego of Corporate Signatory.** Like agents, nonsignatory officers alleged to be alter egos of a corporate defendant can compel signatories to arbitrate (*Rowe v. Exline (2007) 153 Cal. App. 4th 1276, 1279, 1284-1285, 63 Cal. Rptr. 3d 787*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition to compel arbitration by a person or entity who is not a party to the arbitration agreement but is closely related to, and whose legal obligations and the facts determining them, are closely intertwined with, another party or party to the arbitration agreement. Nexus betweenclaims by the party resisting arbitration against both the nonsignatory and another signatory require application of the doctrine of equitable estoppel to compel arbitration with the non-party. Although the bracketed language in Paragraph A is from *Metalclad Corp.* [*Metalclad Corp. v. Ventana Environment Organizational Partnership (2003) 109 Cal. App. 4th 1705, 1 Cal. Rptr. 3d 328]* , both cases involved related companies and discuss the federal law as the origin of this doctrine. Optional Paragraph B is for use when the nonsignatory seeking to enforce the arbitration agreement is the agent of a signatory. Optional paragraph C is for use by nonsignatory officers of a corporate party who were alleged to be alter egos of the corporate signatory.

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in support of compelling arbitration, either alone [*see § 20.10*] or combined with a motion to stay an action [*see § 20.11*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should show that the claims of the party resisting arbitration against the nonsignatory are inextricably intertwined with its claims against a signatory with which it is arbitrating, or is willing to arbitrate.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Equity Requires Arbitration With Nonsignatory

Alliance Title Company, Inc. v. Boucher *(2005) 127 Cal. App. 4th 262, 25 Cal. Rptr. 3d 440* arose from an

employment dispute between employee, employer, and the company to which employer transferred all its assets during the term of the agreement (Alliance). Although the employment agreement specified it could not be modified, waived, or discharged except in a writing signed by plaintiff and the original employer, after the transfer of assets, plaintiff was told he was being demoted and that he was obligated to allow unilateral modifications by Alliance to the employment agreement, including lesser incentive compensation. Alliance refused to honor plaintiff's contract with the original employer and plaintiff refused to enter into a new agreement with Alliance. Thereafter, plaintiff's employment was terminated. Plaintiff sued both defendants for nonpayment of wages, breach of the employment contract, breach of the covenant of good faith and fair dealing, unfair business practices, and interference with contractual and prospective economic relations. The same entity is the sole shareholder of the original employer and the majority shareholder of Alliance. Both defendants petitioned to compel arbitration under the terms of the employment agreement. The trial court granted the petition as to the original employer, but denied it as to Alliance. Alliance appealed.

The court of appeal reversed, finding that plaintiff was equitably required to arbitrate his claims against Alliance (*127 Cal. App. 4th 262, 265)* . The Federal Arbitration Act (FAA) governed the dispute, any issue to the contrary having been waived or forfeited (*127 Cal. App. 4th 262, 267)* . Under the FAA the question of whether a nonsignatory can compel a signatory to arbitrate under an agreement is answered not by state law, but by the federal substantive law of arbitrability. The United States Supreme Court has not ruled on this issue. In the absence of controlling United States Supreme Court decisional authority, the court of appeal had to make an independent determination of federal law. The court noted five theories on which the lower federal courts have determined this issue: (1) incorporation by reference, (2) assumption, (3) agency, (4) veil-piercing/alter ego, and (5) estoppel (*127 Cal. App. 4th 262, 268)* . The court then discussed several federal cases involving estoppel, including a 4th Circuit case that required a nonsignatory plaintiff who had an arbitration agreement with a subsidiary corporation to arbitrate claims against the parent company that were based on the same facts and were inherently inseparable from the claims against the subsidiary. The court also discussed *Metalclad Corp. v. Ventana Environment Organizational Partnership (2003) 109 Cal. App. 4th 1705, 1715-1716, 1 Cal. Rptr. 3d 328* [*below*], which involved claims against a nonsignatory parent corporation, that were "intimately founded in and intertwined with" the underlying contract and which were ordered arbitrated (*127 Cal. App. 4th 262, 269-271)* . The court of appeal summarized by noting that a plaintiff who relies on contract terms in a claim against a nonsignatory defendant, even if not exclusively, may be equitably estopped from repudiating the arbitration clause contained in that agreement. The focus is on the nature of the claims asserted by the plaintiff against the nonsignatory defendant. That the claims are cast in tort rather than contract does not avoid the arbitration clause. Nor is the doctrine limited to cases involving parent and subsidiary corporations. Plaintiff's claims against Alliance rely on, make reference to, and presume the existence of the employment agreement. The claims for intentional interference with prospective economic advantage make reference to and presume the existence of the validity of the original employment contract (*127 Cal. App. 4th 262, 272)* . Under those circumstances, plaintiff's claims against Alliance were intimately founded in and intertwined with the original employment agreement (*127 Cal. App. 4th 262, 272-273)* . Therefore, he was equitably estopped from avoiding arbitration of the causes of action against Alliance (*127 Cal. App. 4th 262, 273)* .

Plaintiff in ***Metalclad Corp. v. Ventana Environmental Organizational Partnership*** *(2003) 109 Cal. App. 4th 1705, 1 Cal. Rptr. 3d 328* , agreed to sell a Mexican subsidiary to another company. The purchase agreement contained an arbitration clause that applied to any controversy or claim arising out of or relating to the contract. Buyer's parent company orally agreed to invest $5 million to finance the purchase, but did not enter into a written agreement with plaintiff/seller. Buyer assigned its rights to a third company, which seller claimed was merely a shell. Buyer's parent company never advanced the $5 million. Plaintiff/seller sued buyer, the buyer's parent company, the buyer's assignee, and related companies and individuals on various fraud theories. Assignee compelled arbitration in Mexico. The buyer's parent company, and other affiliated companies, after unsuccessfully seeking to stay the action pending the outcome of the Mexican arbitration, sought to compel arbitration in California. The trial court denied their petition. They appealed.

The court of appeal reversed, agreeing that although petitioner was not a signatory to the arbitration agreement, the doctrine of equitable estoppel precluded plaintiff from raising petitioner's nonsignatory status to oppose arbitration (*109 Cal. App. 4th 1705, 1708, 1719)* . The court first noted that the case was governed by the Federal Arbitration Act

(FAA) because the contract containing the arbitration clause involved transnational commerce. Although state law determines whether there is a valid agreement to arbitrate, federal law governs arbitration clauses related to international commerce. Further, the issue here was not the existence or even the scope of the arbitration agreement, but rather who could invoke it. Thus, whether petitioner, a nonsignatory to that agreement, could compel respondent to arbitration was to be determined by federal law, not state law (*109 Cal. App. 4th 1705, 1712)* . The court then discussed equitable estoppel generally, citing *Norcal Mutual Ins. Co. v. Newton (2000) 84 Cal. App. 4th 64, 71-72, 76, 84, 100 Cal. Rptr. 2d 683* [discussed at *§ 20.67[3][a]*] for the proposition that a party who has *not* signed a contract containing an arbitration clause may nonetheless be compelled to arbitrate when he or she seeks enforcement of other provisions of the same contract that benefit him or her. The court characterized this case as involving an attempt to invoke the doctrine of equitable estoppel against a party that has signed an agreement to arbitrate but attempts to avoid arbitration by suing nonsignatory defendants for claims that are " 'based on the same facts and inherently inseparable' " from arbitrable claims against signatory defendants (*109 Cal. App. 4th 1705, 1713)* . The court of appeal discussed cases from federal courts other than the Ninth Circuit noting that the federal circuits that have considered the doctrine of equitable estoppel have uniformly accepted it, in appropriate factual circumstances, as a basis for compelling signatories to a contract containing an arbitration clause to arbitrate their claims against nonsignatories. The court discussed *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc. (11th Cir. 1993) 10 F.3d 753* , which involved a licensee acquired by and merged into the licensor's competitor. The court noted that neither the Ninth Circuit nor any other California federal courts had addressed equitable estoppel's application under the FAA to questions of arbitrability. Even if they had, because the United States Supreme Court has not accepted or rejected the doctrine, the court noted that they would remain free to reach their own conclusion, consistent with our obligation to interpret and apply federal law (*109 Cal. App. 4th 1705, 1714)* . The nexus here between plaintiff's claims against petitioner and the underlying contract with its subsidiary, the buyer, as well as the integral relationship between the buyer/subsidiary and petitioner/parent, persuaded the curt that equitable estoppel should apply. Just as the plaintiff in *Sunkist* claimed the parent caused its subsidiary to violate the underlying license agreement, plaintiff claims petitioner/parent caused buyer/subsidiary to breach the underlying contract for the acquisition of plaintiff's Mexican subsidiary. Plaintiff's breach of contract claim against the parent company could not be more "intimately founded in and intertwined with" the underlying contract with its subsidiary, the buyer. Plaintiff knew the subsidiary's performance was dependent on its parent investing sufficient working capital in its subsidiary to meet "development objectives" and pay plaintiff the balance due. Indeed, plaintiff sought petitioner's assurances for that very reason, but only in an alleged oral contract without an arbitration clause. Plaintiff agreed to arbitration in the underlying written contract but seeks the benefit of that contract in the form of damages from the parent/petitioner while avoiding its arbitration provision. Estoppel prevents this (*109 Cal. App. 4th 1705, 1717)* . Similarly, plaintiff's allegations that petitioner/parent and buyer/subsidiary colluded to obtain the Mexican subsidiary by a fraudulent contract cannot help but be "intimately founded in and intertwined with" that contract, which plaintiff signed. Thus, he court concluded that plaintiff could not avoid the arbitration obligation imposed by its underlying agreement with the buyer/subsidiary (*109 Cal. App. 4th 1705, 1718)* .

Plaintiff in ***Turtle Ridge Media Group, Inc. v. Pacific Bell Directory*** *(2006) 140 Cal. App. 4th 828, 44 Cal. Rptr. 3d 817* , was too small a company to contract directly with defendant to deliver its phone books, but had a subcontract with a third company, Clientlogic, that was to deliver phonebooks for defendant. After entering into the subcontract, Turtle Ridge began to discover that many of the phonebooks were undeliverable because their delivery addresses were invalid. Defendant's request for bids on the contract had deliberately exaggerated the number of phonebooks Clientlogic and Turtle Ridge were to deliver. Defendant inflated the number because it allowed defendant to charge higher advertising rates to advertisers in the phonebook. Plaintiff alleged it too was defrauded because it had calculated its contract price using the higher number. Turtle Ridge sued defendant for fraud and deceit, unlawful conduct by a public utility, unfair business practices, intentional and negligent interference with prospective economic advantage, and quantum meruit. Defendant moved to compel arbitration based on the fact that Turtle Ridge's subcontract with Clientlogic incorporated the contract between Clientlogic and defendant, which contained an arbitration clause covering any controversy arising under, out of, in connection with,or relating to the contract. The trial court denied the petition for arbitration. Defendant appealed.

The court of appeal reversed (*140 Cal. App. 4th 828, 830, 836*). Because of the mechanics of the subcontract's incorporation clause, the doctrine of incorporation by reference was not applicable (*140 Cal. App. 4th 828, 834 n. 6*). The court of appeal instead analyzed the matter in terms of the doctrine of equitable estoppel. Plaintiff agreed the matter was governed by the Federal Arbitration Act (FAA). Thus, federal law governs its interpretation (*140 Cal. App. 4th 828, 832)* . Under federal law, a nonsignatory may compel a signatory to arbitrate its claims when the signatory's claims are based on and intertwined with a contract containing an arbitration agreement. This doctrine applies when a party has signed an agreement to arbitrate but attempts to avoid arbitration by suing nonsignatory defendants for claims that are based on the same facts and are inherently inseparable from arbitrable claims against signatory defendants. Plaintiff contended its causes of action were not intertwined with its subcontract. The court disagreed (*140 Cal. App. 4th 828, 833)* . Given the contractual and actual relationships among the parties, plaintiff's claims against defendant were legally intertwined with its subcontract with Clientlogic, which contained the incorporated arbitration clause (*140 Cal. App. 4th 828, 833-834)* . Plaintiff also contended that equitable estoppel did not apply because defendant could not show it detrimentally relied on plaintiff's being obligated to submit to arbitration. However, state law does not govern the interpretation of this agreement, which is governed by the FAA (*140 Cal. App. 4th 828, 835)* . Regardless of whether equitable estoppel may require detrimental reliance in other contexts, the test for applying equitable estoppel to an arbitration agreement is whether the causes of action are intertwined with the contract containing the agreement. The court noted that perhaps the phrase "equitable estoppel" was a bit of a misnomer, because detrimental reliance is not necessary. Although the doctrine's name might be confusing, its application is clear: plaintiff's claims rested on the subcontract and therefore it was bound by all the terms of that subcontract (*140 Cal. App. 4th 828, 835)* .

[b] Agent of Signatory Can Compel Arbitration

Nguyen v. Tran *(2007) 157 Cal. App. 4th 1032, 68 Cal. Rptr. 3d 906* , arose out of a real estate transaction. The purchase and sale agreement contained an arbitration clause, but none of the brokers (each party had two brokers) was party to that agreement. Buyers sued sellers and all brokers after discovering that the guesthouse was built without a permit, asserting causes of action for breach of contract against sellers, breach of the implied covenant of good faith and fair dealing and fraud against sellers and all brokers, and a cause of action for breach of fiduciary duty against cooperating (buyer's) brokers. Cooperating brokers petitioned for arbitration based on a clause in the purchase agreement between the buyers and sellers. The agreement provided no place for brokers to agree to arbitration and they did not do so. Buyers and listing brokers opposed the petition to compel arbitration, contending cooperating brokers were not parties to the purchase agreement and third parties were involved. Listing brokers further argued cooperating brokers had no authority to bind them to an arbitration provision they had not signed. The trial court denied the petition, stating cooperating brokers failed to establish they were entitled to enforce the arbitration provision. The cooperating brokers appealed.

The court of appeal reversed as to buyers, but affirmed in all other respects. The court of appeal found that cooperating brokers, as agents of one of the parties to the agreement containing the arbitration clause, could compel their principal to arbitrate but could not compel arbitration against listing brokers, who did not sign the agreement and had no preexisting confidential or contractual relationship with cooperating brokers (*157 Cal. App. 4th 1032, 1034, 1040)* . The court of appeal first discussed the exceptions in which an arbitration agreement may be enforced by or against nonsignatories, including third party beneficiaries and nonsignatories who have a preexisting agency relationship that makes it equitable to impose the duty to arbitrate and focused on whether cooperating brokers were entitled to enforce the arbitration provision as agents for a signatory (*157 Cal. App. 4th 1032, 1036)* . Cooperating brokers conceded they were relying solely on that exception. The purchase agreement listed cooperating brokers as the agents of buyers, who signed the purchase agreement. Thus, the cooperating brokers could have been compelled to arbitrate the claims against them although they did not sign the agreement and were not parties to it (*157 Cal. App. 4th 1032, 1037)* . The arbitration provision expressly stated: "Buyer and Seller agree to mediate and arbitrate disputes or claims involving either or both Brokers ... provided either or both Brokers shall have agreed to such mediation or arbitration prior to, or within a reasonable time after, the dispute or claim is presented to Brokers" *(157 Cal. App. 4th 1032, 1037)* . Under a plain reading of this clause, buyers and sellers agreed to let either or both cooperating brokers and listing brokers decide

whether to arbitrate the claims against them. Cooperating brokers demanded it and no claim was made that the demand was untimely (*157 Cal App. 4th 1032, 1038)* .

The court of appeal arrived at a different conclusion with respect to listing brokers, who, unlike cooperating brokers, did not agree to arbitration. The arbitration provision in the purchase agreement was a contract between buyers and sellers, not one by listing brokers or cooperating brokers. There was no evidence of an agreement to arbitrate by listing brokers (*157 Cal. App. 4th 1032, 1038)* . Nor was there any authority to support the proposition that one nonsignatory party has the right to invoke an arbitration clause against another nonsignatory party based on an agreement signed only by the principals (*157 Cal. App. 4th 1032, 1038)* . It is true the claims of buyers and the defenses of the agents all relate to the same basic issue; and it might be more efficient if the entire dispute, not just the claims against cooperating brokers, were arbitrated. But considerations of judicial efficiency were not determinative. The court noted that its determination that cooperating brokers were entitled to have buyers' claims against them resolved by contractual arbitration was without prejudice to the trial court's consideration of *Code Civ. Proc. § 1281.2(c)* to reject arbitration when third parties are involved. The trial court did not discuss it in its ruling and the issue was not raised on appeal, thus, the court of appeal had no occasion to consider it and offered no opinion on whether it applied (*157 Cal. App. 4th 1032, 1039)* .

Westra v. Marcus & Millichap Real Estate Investment Brokerage Co. *(2005)129 Cal. App. 4th 759, 28 Cal. Rptr. 3d 752* arose from a lawsuit based on fraud claims by purchasers against, among others, seller and seller's real estate broker, both the firm and certain of its employees. The form of purchase agreement used was authored by Marcus & Millichap (MM); they were referred to in the arbitration provision as Agent, and it bound them to arbitrate any disputes. However, while buyer and seller initialed the arbitration provision, there was no place for Agent to do so; and it did not. Nor did MM even sign the purchase agreement, although there was a place for it to do so. The portion of the purchase agreement relating to MM's commission was crossed out. Apparently there was a separate agreement between MM and seller which provided for the commission. Seller and MM petitioned to compel arbitration. The court granted the petition only as to seller. MM appealed.

The court of appeal reversed (*129 Cal. App. 4th 759, 770)* , finding MM was an agent of a signatory and other parties agreed to arbitrate (*129 Cal. App. 4th 759, 763-767)* . The court of appeal felt *Code Civ. Proc. § 1298*, which requires an arbitration provision in a real estate purchase agreement to be initialed by all parties to be effective, could be ignored, because, although there was no discussion of any evidence of interstate commerce involvement in this transaction, other cases have held *Code Civ. Proc. § 1298* to be preempted by the Federal Arbitration Act (*129 Cal. App. 4th 759, 764)* . MM's claim to its right to enforce the arbitration agreement was best based on the rule that an agent of a signatory can enforce an arbitration agreement or can be compelled to arbitrate. This rule is based on equitable principles [*see also Berman v. Dean Witter & Co., Inc. (1975) 44 Cal. App. 3d 999, 1004, 119 Cal. Rptr. 130]* (*129 Cal. App. 4th 759, 764-765)* . As agent of both buyer and seller, MM was both bound by the arbitration provision and entitled to enforce it to compel arbitration of claims against it (*129 Cal. App. 4th 759, 766)* .

[c] Nonsignatory Alleged To Be Alter Ego of Corporate Signatory

Plaintiff in ***Rowe v. Exline*** *(2007) 153 Cal. App. 4th 1276, 63 Cal. Rptr. 3d 787* , was the founder, chief executive officer, and a director of the corporate defendant. He sued the corporation and two other officers who were also founders, shareholders, and directors. Plaintiff resigned from the corporation and entered into a settlement agreement with it in accordance with which he was to transfer his ownership interests in the corporation to the corporation and to resign as a corporate officer. In return, plaintiff was to receive $428,500 in installment payments. Although plaintiff alleged that he entered into the agreement with the two individual defendants, the agreement itself recites that he entered into it with the corporation and according to the signature lines the individual defendants signed on behalf of the corporation, as its secretary and CEO, and its president and COO, respectively. The agreement contained an arbitration clause. When the last installment was not paid, plaintiff sued the corporation and named the individual defendants, alleging the corporation was their alter ego. All three defendants moved to compel arbitration. The trial court denied the motion. Defendants appealed.

The court of appeal reversed (*153 Cal. App. 4th 1276, 1279, 1291*), agreeing that nonsignatories sued as alter egos of a corporate defendant who was a signatory, may compel another signatory party to arbitrate (*153 Cal. App. 4th 1276, 1279)* . The court said it found no reported California case that decided whether a nonsignatory sued as the alter ego of a signatory can enforce an arbitration provision, but likened the situation to that of an agent. A nonsignatory sued as an agent of a signatory may enforce an arbitration agreement (*153 Cal. App. 4th 1276, 1284)* . A nonsignatory who is the agent of a signatory can also be compelled to arbitrate claims against his or her will. While an agent is one who acts on behalf of a corporation, an alter ego is one who, effectively, *is* the corporation (*153 Cal. App. 4th 1276, 1285)* . In addition, a California court has decided that under federal law, alleged alter ego nonsignatories may enforce an arbitration provision (*153 Cal. App.4th 1276, 1285 n. 3*).

[4] Additional Authorities

[a] Equity Requires Arbitration With Nonsignatory

As discussed at [3][c], *above*, the court of appeal in *Rowe v. Exline (2007) 153 Cal. App. 4th 1276, 63 Cal. Rptr. 3d 787* , reversed an order refusing to compel arbitration at the behest of corporate officers sued as individuals alleged to be alter egos of the defendant corporation. There were three other causes of action to which the alter ego theory did not apply [*see Corp. Code §§ 316(a), 1903*. 2009, 2011]. Although appellants raised the equitable estoppel doctrine for the first time on appeal, the court of appeal found it applied to require them to arbitrate the statutory causes of action (*153 Cal. App. 4th 1276, 1286-1288)* . The parties did not dispute that the statutory causes of action were arbitrable with respect to the corporate defendant (*153 Cal. App. 4th 1276, 1286 n. 4*). The court of appeal discussed the doctrine, saying it applied to compel a signatory to an arbitration clause to arbitrate against a nonsignatory when the relevant causes of action rely on and presume the existence of the contract containing the arbitration provision (*153 Cal. App. 4th 1276, 1286-1287)* . In other words, a plaintiff who relies on the contractual terms in a claim against a nonsignatory may be precluded from repudiating the arbitration clause in the contract when he or she sues the nonsignatories as related or affiliated persons with the signatory and the claims are based on the same facts and are inherently inseparable from arbitrable claims against signatory defendant. Claims that rely on, make reference to, or are intertwined with claims under the subject contract are arbitrable. Here, the statutory claims relied on the agreement made reference to, presumed the existence of, and were intertwined with the agreement. All three statutory claims sought recovery of the final payment owed under the agreement. Thus, the statutory claims were also subject to arbitration (*153 Cal. App. 4th 1276, 1287)* .

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[Reserved]

§§ 20.70[Reserved]

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D. Negating Defenses to Arbitration

2-20 California Points & Authorities § 20.80

§ 20.80 Unreasonable Delay in Seeking to Compel Arbitration Does Not Amount to Waiver Unless There Is Some Prejudice to Other Party

[1] FORM

DESPITE PETITIONER'S DELAY IN SEEKING TO COMPEL ARBITRATION, RESPONDENT HAS NOT BEEN PREJUDICED, THEREFORE IT IS PROPER TO COMPEL ARBITRATION.

A. Waiver Is Question of Fact for Court to Decide. Waiver of the right to compel arbitration is a preliminary question of fact, which under *Code of Civil Procedure Section 1281.2(a)*, is for the court to decide (*Saint Agnes Medical Center v. PacifiCare of California (2003) 31 Cal. 4th 1187, 1196, 8 Cal. Rptr. 3d 517, 82 P.3d 727* ; *Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 982-983, 64 Cal. Rptr. 2d 843, 938 P.2d 903* ; *Guess?, Inc. v. Superior Court (2000) 79 Cal. App. 4th 553, 557, 94 Cal. Rptr. 2d 201* ; *Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co. (1992) 6 Cal. App. 4th 1266, 1274, 1276, 8 Cal. Rptr. 2d 587*).

B. Substantial, Unreasonable Delay and Prejudice Required for Waiver. Unreasonable delay in seeking to compel arbitration does not, in itself, warrant a finding of waiver of that right. To constitute waiver, the delay must be substantial, unreasonable, and in spite of the other party's own reasonable diligence. In addition, the party asserting the defense of waiver must show delay amounting to laches, which requires a showing of prejudice, namely, that he or she did or omitted to do something which impaired his or her ability to participate in the arbitration in a meaningful way (*Saint Agnes Medical Center v. PacifiCare of California (2003) 31 Cal. 4th 1187, 1196, 1203-1205, 8 Cal. Rptr. 3d 517, 82 P.3d 727* ; *Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 983-984, 64 Cal. Rptr. 2d 843, 938 P.2d 903* ; *Simms v. NPCK Enterprises, Inc. (2003) 109 Cal. App. 4th 233, 235, 242-244, 134 Cal. Rptr. 2d 557* ; *Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co. (1992) 6 Cal. App. 4th 1266, 1275-1276, 8 Cal. Rptr. 2d 587* ; *see Sawday v. Vista Irrigation Dist. (1966) 64 Cal. 2d 833, 836-837, 52 Cal. Rptr. 1, 415 P.2d 816*).

[*Optional*] **C. Burden of Proving Waiver Is on Party Asserting It.** The burden of proving waiver is on the party resisting arbitration. The defense of waiver, like any other defense, must be proved by a preponderance of the evidence (*Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 984, 64 Cal. Rptr. 2d 843, 938 P.2d 903* ;

Rosenthal v. Great Western Fin. Securities Corp. (1996) 14 Cal. 4th 394, 413, 58 Cal. Rptr. 2d 875, 926 P.2d 1061).

[*Optional*] **D. Insurer Did Not Waive Right to Compel Arbitration.** An insurer that had no reason to know that its insured did not know of the arbitration clause in the policy[, especially when the insured was represented by counsel (who knew of the arbitration provision) during the initial claims process], does not waive its right to compel arbitration by failing to mention the arbitration provision to the insured [or in its answer to the complaint] in a situation in which the arbitration provision is not obscure [but presented in bold in a document which was both properly incorporated by reference into the terms of the parties' agreement and actually in the insured's possession at the time the insured filed the claim], the insurer does not unreasonably delay or act inconsistently with the right to demand arbitration, does not substantively engage in the litigation process, and there is no evidence of any appreciable prejudice to the insured (*Wolschlager v. Fidelity National Title Ins. Co. (2003) 111 Cal. App. 4th 784, 792-793, 4 Cal. Rptr. 3d. 179*).

[2] Comments

[a] Use of Form

This form may be used in support of a petition to compel arbitration if petitioner anticipates a challenge claiming that he or she has waived the right to compel arbitration by delay when respondent was not prejudiced by the delay. Optional Paragraph D. Is for use by an insurer to negate the criteria *set forth in Ch. 20A, Arbitration: Resisting, § 20A.85[1],* which require forfeiture of an insurer's right to compel arbitration. Counsel should use as much of the bracketed language as is applicable to his or her case.

This form is not intended as a complete memorandum, but should be combined with the memoranda in *§§ 20.10, 20.11,* and any others applicable to the particular situation.

As a tactical matter, counsel may wish to reserve these points for oral argument or for a reply memorandum. In deciding whether or not to reserve these arguments, counsel should consider local court rules and practice, as well as whether the moving party would be expected to raise these points in initial moving papers, to avoid the possibility of losing the opportunity to raise them.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should emphasize that the delay has not caused respondent any detriment or impairment of its ability to arbitrate the matter.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* ,and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For another form that negates a claim of waiver of the right to compel arbitration, see *§ 20.81*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Memoranda

For a form opposing this one, see *Ch. 20A, Arbitration: Resisting, § 20A.80*.

For forms that address other acts amounting to waiver of the right to compel arbitration, see *Ch. 20A, Arbitration: Resisting, §§ 20A.81 -20A.86*.

[3] Discussion of Authorities

[a] Waiver Is Question of Fact for Court to Decide

Saint Agnes Medical Center v. PacifiCare of California *(2003) 31 Cal. 4th 1187, 8 Cal. Rptr. 3d 517, 82 P.3d 727* , arose from two health services agreements entered into by the parties in 1994 (the 1994 HSA) and in June 2000 (the June 2000 HSA). PacifiCare filed suit in Los Angeles county, seeking a declaration that the 2000 HSA was void *ab initio* because of the occurrence of a condition subsequent and declaring the parties' rights and obligations under the 1994 HSA as if the 2000 HSA had never existed. The 2000 HSA had an arbitration provision, but the 1994 HSA did not. PacifiCare responded by filing an action in Fresno County for damages for breach of the 2000 HSA. The Los Angeles County action was transferred to Fresno. Each party suggested arbitration of some of the causes of action in each lawsuit, but they did not agree. PacifiCare moved to compel arbitration of portions of the Fresno action and to stay the remainder of the proceedings. Saint Agnes opposed arbitration, contending that PacifiCare had waived its right to invoke arbitration by expressly repudiating the June 2000 HSA and seeking its judicial rescission, further claiming that PacifiCare's delay in seeking arbitration caused it to incur substantial legal fees and costs with respect to both actions. The trial court denied the petition to compel arbitration. The court of appeal reversed. The California Supreme Court granted Saint Agnes' petition for review.

The California Supreme Court affirmed the judgment of the court of appeal: PacifiCare never waived the right to arbitrate (*31 Cal. 4th 1187, 1192, 1206)* . In discussing waiver, the Court said that generally, the determination of waiver is a question of fact, and the trial court's finding, if supported by sufficient evidence, is binding on the appellate court (*31 Cal. 4th 1187, 1196)* .

The facts and procedural background of ***Engalla v. Permanente Medical Group, Inc.*** *(1997) 15 Cal. 4th 951, 64 Cal. Rptr. 2d 843, 938 P.2d 903* , are discussed at *§ 20.10[3][a]*. The Supreme Court reversed and remanded to the trial court because issues of fact remained to be determined by the trial court regarding the claims of fraud and waiver. Plaintiffs contended that Kaiser's various dilatory actions constituted waiver of its right to compel arbitration, while Kaiser contended that waiver was for the arbitrator to decide. The Court said that *Code Civ. Proc. § 1281.2(a)* gives the trial court jurisdiction to decide questions of waiver when the issue is raised in opposition to a petition to compel arbitration (*15 Cal. 4th 951, 982)* . Waiver is a question of fact (*15 Cal. 4th 951, 983)* .

The facts and procedural background of ***Guess?, Inc. v. Superior Court*** *(2000) 79 Cal. App. 4th 553, 94 Cal. Rptr. 2d 201* , and the portion of the opinion discussing the specific factors amounting to waiver are discussed in *Ch. 20A, Arbitration: Resisting, § 20A.83[3][b]*. The court opened its discussion with consideration of waiver generally, noting that a petition to compel arbitration will be denied when the right has been waived by the proponent's failure to properly

and timely assert it [*Code Civ. Proc. §§ 1281, 1281.2(a)*]. Waiver can occur in a variety of contexts; and there is no single determinative test of waiver. The question of waiver is for the trial court and is a question of fact. For the appellate court, the question is whether the trial court's decision is supported by substantial evidence. If it is, the appellate court must affirm. If not, the appellate court may decide the issue as a matter of law (*79 Cal. App. 4th 553, 557)* .

The facts and procedural background of ***Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co.*** *(1992) 6 Cal. App. 4th 1266, 8 Cal. Rptr. 2d 587* , are discussed at *§ 20.65[3][a]*. The court of appeal cited *Code Civ. Proc. § 1281.2(a)* for the proposition that a court must compel arbitration if it determines that there is an agreement to arbitrate, unless it determines that the right to compel arbitration has been waived by the petitioner. Waiver of the right to compel arbitration therefore is a preliminary question which the trial court must decide in considering the motion to compel (*6 Cal. App. 4th 1266, 1274)* . Evidence of waiver is a question of fact (*6 Cal. App. 4th 1266, 1276)* .

[b] Substantial, Unreasonable Delay and Prejudice Required for Waiver

The facts and procedural background of ***Saint Agnes Medical Center v. PacifiCare of California*** *(2003) 31 Cal. 4th 1187, 8 Cal. Rptr. 3d 517, 82 P.3d 727* , are discussed in [a], *above*. In its preliminary discussion of waiver, the Court stated the law of waiver as it applies to arbitration. Waiver of the right to demand arbitration arises in a variety of contexts, ranging from situations in which the party seeking to compel arbitration has previously taken steps inconsistent with an intent to invoke arbitration to instances in which the petitioning party has unreasonably delayed in seeking to compel arbitration. The decisions hold that the "bad faith" or "wilful misconduct" of a party may constitute a waiver and thus justify a refusal to compel arbitration. The Court cited *Sobremonte v. Superior Court (1998) 61 Cal. App. 4th 980, 992, 72 Cal. Rptr. 2d 43* , for the proposition that a court can consider the following in determining waiver (*31 Cal. 4th 1187, 1196)* :

- Whether the party's actions are inconsistent with the right to arbitrate;
- Whether "the litigation machinery has been substantially invoked" and the parties "were well into preparation of a lawsuit" before the party notified the opposing party of an intent to arbitrate;
- Whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay;
- Whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings;
- Whether important intervening steps [*e.g.*, taking advantage of judicial discovery procedures not available in arbitration] had taken place; and
- Whether the delay "affected, misled, or prejudiced" the opposing party.

The remainder of the Court's discussion of prejudice is set forth in *§ 20.81[3][a]*.

The facts and procedural background of ***Engalla v. Permanente Medical Group, Inc.*** *(1997) 15 Cal. 4th 951, 64 Cal. Rptr. 2d 843, 938 P.2d 903* , are discussed at *§ 20.10[3][a]*. In its discussion of the substance of the claim of waiver, the Court noted that the term "waiver" has a number of meanings in statute and case law. Generally, waiver denotes the voluntary relinquishment of a known right. But it can also mean the loss of an opportunity or a right as a result of a party's failure to perform an act it is required to perform, regardless of the party's intent to relinquish the right. The varied meanings of the term waiver are reflected in the case law on the enforcement of arbitration agreements. In the past, California courts have found a waiver of the right to demand arbitration in a variety of contexts, ranging from

situations in which the party seeking to compel arbitration has previously taken steps inconsistent with an intent to invoke arbitration to instances in which the petitioning party has unreasonably delayed in undertaking the procedure. The decisions likewise hold that the bad faith or wilful misconduct of a party may constitute a waiver and thus justify a refusal to compel arbitration. The Court noted that in order to amount to waiver, the delay must be substantial, unreasonable, and in spite of the claimant's own reasonable diligence. In this case, the trial court made no finding on plaintiffs' waiver claim.

The Supreme Court emphasized that waiver is not to be inferred lightly. The Supreme Court concluded that there was ample evidence that claimant was diligent and the Kaiser's delay was unreasonable or in bad faith. Thus, the question of waiver had to be determined by the trial court on remand (*15 Cal. 4th 951, 983-984)* .

Plaintiffs in ***Simms v. NPCK Enterprises, Inc.*** *(2003) 109 Cal. App. 4th 233, 134 Cal. Rptr. 2d 557* , leased commercial property from defendant and granted defendant a security interest in trade fixtures and equipment as security for the faithful performance of the lease. The lease had an arbitration clause. Plaintiffs filed an action against the lessor corporation and one of its principles alleging, among other things, failure to make repairs. The last cause of action was a request for an order compelling arbitration. Plaintiffs alleged they made a formal demand for arbitration and defendants refused to agree to arbitration. Defendants filed an unlawful detainer action against plaintiffs, in which the court ordered all disputes relating to the lease to be submitted to arbitration. Defendants dismissed that action, intentionally circumventing the order for arbitration. Plaintiffs sought a temporary restraining order to prevent defendants from demolishing a structure plaintiffs had built on the property. The temporary restraining order issued, but two weeks later the court denied a preliminary injunction and dissolved the temporary restraining order. Defendants demolished the structure, but did not take possession of two pieces of meat packing equipment in which they had a security interest. Defendants filed an ex parte application for an order compelling plaintiffs to relinquish all fixtures and equipment pursuant to defendants' security interest. Plaintiffs replied that the dispute was subject to arbitration, that the remedy for repossession under a security agreement was a writ of possession, and defendants had not complied with the requirements for such a writ. The court found plaintiffs waived arbitration by filing suit and seeking an injunction without moving to stay the proceedings, denied arbitration, and entered the injunction requiring plaintiffs to relinquish the fixtures and equipment subject to NPCK's security interest. Plaintiffs appealed.

The court of appeal reversed, finding no waiver of arbitration as there was no evidence defendants were prejudiced by plaintiffs' inconsistent actions and delay in seeking arbitration, and that the appropriate prejudgment remedy to recover possession of personal property is a writ of possession under the claim and delivery law, not an injunction (*109 Cal. App. 4th 233, 235)* . The court noted that there is no single test to determine whether arbitration has been waived (*109 Cal. App. 4th 233, 241)* ; and went on to list the things a court can consider in determining whether a party has waived arbitration (*109 Cal. App. 4th 233, 241-242)* . Here the trial court relied on two actions by plaintiffs to find waiver. First, plaintiffs filed suit for damages. However, suing on an arbitrable claim does not per se result in waiver of plaintiffs' right to compel arbitration. To find waiver, the court must be satisfied not only that the party seeking arbitration acted inconsistently with the right to arbitrate but also that the objecting party was prejudiced by such action. While plaintiffs did file suit for damages, the suit also requested arbitration (*109 Cal. App. 4th 233, 242)* . Therefore, the court of appeal concluded that the filing of the lawsuit did not waive plaintiffs' right to arbitration (*109 Cal. App. 4th 233, 243)* . The portion of the opinion addressing possible waiver by seeking and obtaining a provision remedy is discussed at *§ 20.81[3][b]*.

The facts and procedural background of ***Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co.*** *(1992) 6 Cal. App. 4th 1266, 8 Cal. Rptr. 2d 587* , are discussed at *§ 20.65[3][a]*. The court of appeal first noted that no good reason appeared for Boys Club's delay of almost three years between its initial demand for arbitration and its amended demand seeking to make Fidelity a party to the arbitration. Unreasonable delay in asserting a right does not, in itself, warrant a finding of waiver of the right. In addition, the court said, citing *Sawday v. Vista Irrigation Dist. (1966) 64 Cal. 2d 833, 836-837, 52 Cal. Rptr. 1, 415 P.2d 816* (discussed in *Ch. 20A, Arbitration: Resisting, § 20A.82[3][a]*), it must appear that the delay amounted to laches, which requires some showing of prejudice to defendant caused by the

delay. To show prejudice, the party asserting the defense must show he or she did or omitted to do something which detrimentally altered his or her position with regard to the claim asserted. Fidelity made no showing that the delayed filing of the amended demand for arbitration caused it to believe it was not subject to the arbitration provision of thecontract, or that the delay impaired its ability to participate in the arbitration in a meaningful way (*6 Cal. App. 4th 1266, 1275)* . Consequently, the court of appeal rejected Fidelity's claim of waiver (*6 Cal. App. 4th 1266, 1276)* .

Sawday v. Vista Irrigation Dist. *(1966) 64 Cal. 2d 833, 52 Cal. Rptr. 1, 415 P.2d 816* , is discussed in *Ch. 20A, Arbitration: Resisting, § 20A.82[3][a]*.

[c] Burden of Proving Waiver Is on Party Asserting It

The facts and procedural background of ***Engalla v. Permanente Medical Group, Inc.*** *(1997) 15 Cal. 4th 951, 64 Cal. Rptr. 2d 843, 938 P.2d 903* , are discussed at *§ 20.10[3][a]*. In its discussion of the substance of the claim of waiver, the Court noted that the burden of proving waiver is on the party resisting arbitration (*15 Cal. 4th 951, 984)* .

The facts and procedural background of ***Rosenthal v. Great Western Fin. Securities Corp.*** *(1996) 14 Cal. 4th 394, 58 Cal. Rptr. 2d 875, 926 P.2d 1061* , are discussed at *§ 20.10[3][a]*. In discussing the proper procedure for determining a petition to compel arbitration, the Court noted that the burden of producing evidence of, and proving by a preponderance of the evidence, any fact necessary to a defense such as waiver is on the party who raises that defense to enforcement of the arbitration agreement (*14 Cal. 4th 394, 413)* .

[d] Insurer Did Not Waive Right to Compel Arbitration

The facts and procedural background of ***Wolschlager v. Fidelity National Title Ins. Co.*** *(2003) 111 Cal. App. 4th 784, 4 Cal. Rptr. 3d. 179* , are discussed at *§ 20.31[3][a]*. In denying the petition to compel arbitration, the trial court specified that its decision was not based on any finding of waiver because there was no factual basis for finding waiver. However, on appeal, plaintiff contended that the trial court's decision that there was no waiver was not supported by substantial evidence. Specifically, plaintiff asserted that defendant never informed plaintiff of the arbitration clause despite a long claims and negotiations process and that defendant failed to timely raise the issue either prior or subsequent to the filing of the complaint.

The court of appeal first set forth the requirements for waiver, noting that there is no single test for waiver of the right to compel arbitration, but that waiver may be found when the party seeking arbitration has (1) previously taken steps inconsistent with an intent to invoke arbitration, (2) unreasonably delayed in seeking arbitration, or (3) acted in bad faith or with willful misconduct. In the context of an insurer's waiver of the right to arbitrate, an insured must prove that defendant engaged in conduct designed to mislead policyholders. The evaluation of an allegation of forfeiture should focus on the subjective intent of the insurer, consistent with a finding of bad faith and the imposition of a penalty in the form of forfeiture. Conduct designed to mislead can include failure to timely or meaningfully apprise its insureds of their rights to arbitration (*111 Cal. App. 4th 784, 792)* . Although the court said defendant's conduct was somewhat questionable, the arbitration clause here was not obscure, it was presented in bold in a document which was both properly incorporated by reference into the terms of the parties' agreement and actually in plaintiff's possession at the time he filed his claim. Further, defendant had no reason to know that plaintiff was unaware of his arbitration rights. Nor did defendant unreasonably delay or act inconsistently with the right to demand arbitration. Defendant did not substantively engage in the litigation process; and there was no evidence of any appreciable prejudice to the plaintiff. Given the totality of the circumstances, there was no basis for denying the petition to compel arbitration (*111 Cal. App. 4th 784, 793)* .

[4] Additional Authorities

[a] Waiver Is Question of Fact for Court to Decide

Freeman v. State Farm Mut. Auto. Ins. Co. (1975) 14 Cal. 3d 473, 121 Cal. Rptr. 477, 535 P.2d 341 , involved arbitration under an uninsured motorist provision of an automobile insurance policy [*see Ins. Code § 11580.2*]. When plaintiff's action against the driver of one of the cars involved in the accident ended in a verdict for the driver of that car, plaintiff made a claim against defendant for damages under plaintiff's uninsured motorist coverage with respect to a third vehicle involved in the accident. The trial court denied plaintiff's petition to compel arbitration on the ground that the claim was barred by the statute of limitations. Plaintiff appealed, contending that the time limit question was one which should have been decided by an arbitrator.

The Supreme Court, adopting the court of appeal's opinion with modifications, affirmed the lower court orders. *Freeman*'s holding that *Ins. Code § 11580.2* establishes a one-year limitation period for petitions to compel arbitration of uninsured motorist coverage disputes has been abrogated [*see Spear v. California State Automobile Ass'n (1992) 2 Cal. 4th 1035, 1039-1044, 9 Cal. Rptr. 2d 381, 831 P.2d 821* , discussed at *§ 20.43[3][a]*]. However, the Supreme Court stated that the issue of whether the right to compel arbitration has been waived was clearly one for the determination of the court pursuant to the provisions of *Code Civ. Proc. § 1281.2* (*14 Cal. 3d 473, 485)* .

The facts and procedural background of *Sobremonte v. Superior Court (1998) 61 Cal. App. 4th 980, 72 Cal. Rptr. 2d 43* , are discussed in *Ch. 20A, Arbitration: Resisting, § 20A.83[3][a]*. The court of appeal, finding that defendant had waived its right to arbitrate, began its discussion by noting that waiver is a question of fact; and the trial court's determination will not be disturbed on appeal if it is supported by substantial evidence (*61 Cal. App. 4th 980, 991)* .

The facts and procedural background of *Davis v. Continental Airlines, Inc. (1997) 59 Cal. App. 4th 205, 69 Cal. Rptr. 2d 79* , are discussed in *Ch. 20A, Arbitration: Resisting, § 20A.83[3][b]*. The court of appeal, finding that defendants had waived their right to arbitrate, began its discussion by noting that a determination by a trial court that the right to compel arbitration has been waived ordinarily involves a question of fact, which is binding on the appellate court if it is supported by substantial evidence (*59 Cal. App. 4th 205, 211)* .

[b] Burden of Proving Waiver Is on Party Asserting It

The facts and procedural background of *Sobremonte v. Superior Court (1998) 61 Cal. App. 4th 980, 72 Cal. Rptr. 2d 43* , are discussed in *Ch. 20A, Arbitration: Resisting, § 20A.83[3][a]*. The court of appeal found that defendant had waived itsright to arbitrate. In its introductory discussion, the court said that the burden of proving waiver is on the party claiming it, that the court will closely scrutinize claims of waiver, and that the party claiming waiver has a heavy burden of proof (*61 Cal. App. 4th 980, 991)* .

The facts and procedural background of *Davis v. Continental Airlines, Inc. (1997) 59 Cal. App. 4th 205, 69 Cal. Rptr. 2d 79* , are discussed in *Ch. 20A, Arbitration: Resisting, § 20A.83[3][b]*. The court of appeal, found that defendants had waived their right to arbitrate. In its introductory discussion, the court said that the burden of proof is heavy on the party seeking to establish waiver, which should not be lightly inferred in keeping with the public policy favoring arbitration (*59 Cal. App. 4th 205, 211)* .

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20 ARBITRATION: COMPELLING
PART II. FORMS
D. Negating Defenses to Arbitration

2-20 California Points & Authorities § 20.81

§ 20.81 Filing Lawsuit Does Not Necessarily Waive Right to Compel Arbitration

[1] FORM

PETITIONER HAS NOT WAIVED THE RIGHT TO ARBITRATE BY FILING A LAWSUIT, OR IN ANY OTHER WAY, AND AS A PARTY TO AN ARBITRATION AGREEMENT, IS ENTITLED TO AN ORDER COMPELLING ARBITRATION [AND STAYING ANY PENDING ACTION RELATING TO ARBITRABLE ISSUES].

A. Filing of Lawsuit Does Not Necessarily Constitute Waiver of Right to Compel Arbitration. The right to arbitrate a dispute pursuant to contract is not waived by the bringing of a lawsuit[, even one that attacks the validity of the contract containing the arbitration clause], in good faith when the merits of the dispute are not litigated and no prejudice to the other party results from the lawsuit (*Saint Agnes Medical Center v. PacifiCare of California (2003) 31 Cal. 4th 1187, 1192, 1200-1205, 8 Cal. Rptr. 3d 517, 82 P.3d 727* ; *Doers v. Golden Gate Bridge etc. Dist. (1979) 23 Cal. 3d 180, 188, 151 Cal. Rptr. 837, 588 P.2d 1261* ; *Kalai v. Gray (2003) 109 Cal. App. 4th 768, 776-778, 135 Cal. Rptr.2d 449* ; *Simms v. NPCK Enterprises, Inc. (2003) 109 Cal. App. 4th 233, 235, 242-243, 134 Cal. Rptr. 2d 557* ; *Outdoor Services, Inc. v. Pabagold, Inc. (1986) 185 Cal. App. 3d 676, 684-685, 230 Cal. Rptr. 73* , *compare Christensen v. Dewor Developments (1983) 33 Cal. 3d 778, 783-784, 191 Cal. Rptr. 8, 661 P.2d 1088*).

[*Optional*] **B. Burden of Proving Waiver Is on Party Asserting It.** [*See § 20.80[1], Paragraph C.*]

[*Optional*] **C. Seeking Provisional Remedy Does Not Necessarily Waive Right to Arbitration.** *Code of Civil Procedure Section 1281.2(c)* does not expressly state that applying for a provisional remedy without seeking a stay of the action waives the right to arbitrate. Given the strong public policy in favor or arbitration, without an explicit statutory command to find waiver, the failure to include a request for a stay with an application for provisional relief is a fact to consider in determining waiver, but it is not dispositive. When the party claiming waiver does not show any prejudice caused by the provisional remedy, no waiver occurs (*Simms v. NPCK Enterprises, Inc. (2003) 109 Cal. App. 4th 233, 235, 243-245, 134 Cal. Rptr. 2d 557* ; *Jay Bharat Developers, Inc. v. Minidis (2008) 167 Cal. App. 4th 437, 443-447, 84 Cal. Rptr. 3d 267*).

[*Optional*] **D. Contractual Deadline for Demanding Arbitration Tolled by Commencement of Judicial Action.** The commencement of a civil action by a party in a controversy, within the period of time specified in an arbitration agreement for a party to the agreement to demand or initiate arbitration, tolls the applicable time limitations contained in the agreement. The limitations are tolled from the date the civil action is commenced until thirty days after a final determination by the court hearing the action that the party is required to arbitrate the controversy, or thirty days after the final termination of the civil action, whichever date occurs first (*Code Civ. Proc. § 1281.12*; *Pearson Dental Supplies, Inc. v. Superior Court (2010) 48 Cal. 4th 665, 675, 108 Cal. Rptr. 3d 171, 229 P.3d 83*). The end of a tolling period under *Code Civ. Proc. § 1281.12*, i.e., 30 days after the final determination, simply means that the contractual limitations clock begins to run again from where it stopped at the filing of the civil action (*Pearson Dental Supplies, Inc. v. Superior Court (2010) 48 Cal. 4th 665, 675, 108 Cal. Rptr. 3d 171, 229 P.3d 83*).

[*Optional*] **E. Attempts to Settle Do Not Necessarily Waive Right to Arbitration.** Attempts to settle the judicial action that do not result in undue delay are not inconsistent with the right to arbitrate (*Zamora v. Lehman (2010) 186 Cal. App. 4th 1, 20, 111 Cal. Rptr. 3d 335*).

[*Optional*] **F. Demurrer to Complaint Does Not Necessarily Waive Right to Arbitration.** Filing and obtaining a ruling on a demurrer on grounds of it [lacked specificity/failed to allege the timeliness of the claim] is not inconsistent with the right to arbitrate (*Zamora v. Lehman (2010) 186 Cal. App. 4th 1, 20, 111 Cal. Rptr. 3d 335*).

[2] Comments

[a] Use of Form

This form may be used in support of a petition to compel arbitration if petitioner anticipates a challenge based on his or her having already instituted litigation of the controversy. The bracketed language in paragraph A is for use when the lawsuit that is, or will be, claimed to have abrogated the right to arbitration is one that attacks the validity of the contract containing the arbitration clause. The invalidity must not be one that arises from lack of mutual assent or capacity to contract [*see* *Saint Agnes Medical Center v. PacifiCare of California (2003) 31 Cal. 4th 1187, 1200, 8 Cal. Rptr. 3d 517, 82 P.3d 727* discussed in [3][a], *below*]. Optional paragraph D is for use when a contractual deadline for seeking arbitration of a controversy is statutorily tolled by the commencement of a civil action concerning the controversy. Optional paragraph E is for use when the conduct allegedly working a waiver consists of efforts to settle the judicial action. Optional paragraph F is for use when the conduct allegedly working a waiver consists of filing and obtaining a ruling on a demurrer on grounds that the complaint lacked specificity or failed to allege the timeliness of the claim.

This form is not intended as a complete memorandum, but should be combined with the memoranda in *§§ 20.10, 20.11,* and any others applicable to the particular situation.

As a tactical matter, counsel may wish to reserve these points for oral argument or for a reply memorandum. In deciding whether or not to reserve these arguments, counsel should consider local court rules and practice, as well as whether the moving party would be expected to raise these points in initial moving papers, to avoid the possibility of losing the opportunity to raise them.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument may state that the respondent has waived any objection that petitioner has waived the right to arbitrate, or may describe the circumstances that could be challenged as a waiver, and then set forth the factors which preclude a waiver from having occurred, for example, that the lawsuit was dismissed.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [

see Evid. Code § 450 et seq.], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For another form that negates a claim of waiver of the right to compel arbitration, see *§ 20.80*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Memoranda

For a form in opposition to this one, see *Ch. 20A, Arbitration: Resisting, § 20A.84*.

For forms that address other acts that do amount to waiver of the right to compel arbitration, see *Ch. 20A, Arbitration: Resisting, §§ 20A.81 -20A.86*.

[3] Discussion of Authorities

[a] Filing of Lawsuit Does Not Necessarily Constitute Waiver of Right to Compel Arbitration

The facts and procedural background of ***Saint Agnes Medical Center v. PacifiCare of California*** *(2003) 31 Cal. 4th 1187, 8 Cal. Rptr. 3d 517, 82 P.3d 727* , are discussed in *§ 20.80[3][a]*. The portion of the opinion considering the criteria for determining waiver of the right to arbitrate in general is discussed in *§ 20.80[3][b]*. In affirming the Supreme Court said that seeking a declaration of nullity or testing the validity of a contract does not waive or abrogate the right to arbitrate in accordance with that contract (*31 Cal. 4th 1187, 1192)* . The court distinguished situations involving lack of mutual assent, in which there was no contract. PacifiCare never repudiated the existence of the 2000 HSA, but claimed that a condition subsequent rendered it void (*31 Cal. 4th 1187, 1197-1200)* . The trial court had felt itself bound by *Bertero v. Superior Court (1963) 216 Cal. App. 2d 213* , which held that to repudiate a contract is to waive the right to arbitrate in accordance with it (*31 Cal. 4th 1187, 1192, 1197)* . The Supreme Court discussed *Bertero* at length, noting that significant developments in both state and federal law have occurred since 1963, and concluded that *Bertero*'s analysis was outdated, disapproving it. Both federal and California law now hold that, in the absence of a specific attack on an arbitration agreement, the arbitration agreement generally must be enforced even if one party asserts the invalidity of the contract that contains it (*31 Cal. 4th 1187, 1198-1200)* . The Court distinguished this situation from one in which a party did not know it was signing a contract, or did not enter into a contract at all. In those situations, both the contract and its arbitration clause are void for lack of mutual assent. PacifiCare never denied its knowing and voluntary agreement to the June 2000 HSA. Moreover, PacifiCare's petition to compel arbitration reflected its apparent position that it considered itself bound to perform under the June 2000 HSA at least until March 2001, when it notified Saint Agnes that the contract was terminated. Thus, PacifiCare's legal challenge to the validity of

the June 2000 HSA was not inconsistent with an intent to invoke arbitration pursuant to that contract and did not amount to a waiver of its right to compel contractual arbitration (*31 Cal. 4th 1187, 1200)* . Filing of a lawsuit, without more, is not waiver or abandonment of the right to arbitrator (*31 Cal. 4th 1187, 1200-1201)* . Generally, waiver does not occur when the arbitrable issues have not been litigated to judgment. PacifiCare did not initiate the lawsuit in which it now seeks to compel arbitration (the Fresno actions), but it did initiate the Los Angeles action in which it sought to have the agreement containing the arbitration clause declared void *ab initio*. Saint Agnes' arbitrable causes of action have not been litigated to judgment or judicially addressed on their merits. Therefore, PacifiCare's filing of the Los Angeles action does not constitute waiver of its right to arbitration (*31 Cal. 4th 1187, 1201)* .

Under both federal and California law, the critical issue in determining waiver is whether the litigation prejudiced the arbitration. Merely participating in litigation will not prejudice arbitration. Nor do incurring court costs and legal expenses amount to prejudice (*31 Cal. 4th 1187, 1203)* . Prejudice is typically found only if the petitioning party's conduct substantially impaired the other side's ability to arbitrate, for instance when a petitioning party used discovery to obtain information it could not have obtained during the arbitration process or when delays result in lost evidence (*31 Cal. 4th 1187, 1204)* . There is no indication that PacifiCare used the litigation to gain information about Saint Agnes would otherwise been unavailable in arbitration nor does Saint Agnes claim the litigation impaired its ability to have its arbitrable disputes resolved through arbitration (*31 Cal. 4th 1187, 1204)* . PacifiCare's motion for change of venue did not forfeit its right to arbitration. The court reasoned that one should not be required to litigation the in an improper or inconvenient venue (*31 Cal. 4th 1187, 1205)* .

Doers v. Golden Gate Bridge etc. Dist. *(1979) 23 Cal. 3d 180, 151 Cal. Rptr. 837, 588 P.2d 1261* , arose out of a dispute between a bus company employee and a transportation district over proper protection of the employee's interest. Protection of workers' existing interests was a condition of the district's accepting federal assistance under the Urban Mass Transit Act of 1964. The employee originally filed a complaint in the U.S. District Court, but it was dismissed for lack of subject matter jurisdiction. His subsequent petition to compel arbitration filed in the superior court was denied on the ground that he had waived the right to arbitration by bringing the federal action. The Supreme Court took over plaintiff's appeal in order to resolve a conflict in the appellate districts.

The Supreme Court, primarily adopting the court of appeal opinion, reversed the judgment. It recognized that several appellate cases had stated or held that a party waives a contractual arbitration right merely by filing a lawsuit. Examining the leading cases, however, it found that waiver was actually found only in those situations in which the party had litigated a claim (*23 Cal. 3d 180, 185-186)* . Because the arbitrable issues in the instant action were never litigated by the parties in the federal court, the employee had not waived his contractual arbitration rights (*23 Cal. 3d 180, 188)* . The Court did not discount the possibility that a waiver could occur prior to a judgment on the merits, however, if prejudice could be demonstrated (*23 Cal. 3d 180, 188 n.3*). The Court concluded that its approach was the appropriate one in the face of various conflicting authorities, since the result was in line with the strong public policy favoring arbitration (*23 Cal. 3d 180, 189)* .

Plaintiff in ***Kalai v. Gray*** *(2003) 109 Cal. App. 4th 768, 776, 135 Cal. Rptr. 2d 449* , entered into a contract with defendant for construction of improvements to plaintiff's home. The agreement included an arbitration clause, providing that arbitration was the exclusive remedy for any dispute between owner and contractor and that the prevailing party was entitled to recover from the other all reasonable attorney's fees and costs incurred in connection with the arbitration proceedings. Plaintiff however filed a complaint alleging negligence, breach of contract and related claims. Defendant, rather than filing a petition to compel arbitration, filed a motion for summary judgment based on the arbitration agreement. Plaintiff opposed the motion, arguing, among other things, that the arbitration agreement was unenforceable because it did not comply with the statutory requirements for an arbitration provision contained in a contract for residential construction of the type at issue. The court granted the summary judgment, stating in its order that plaintiff had "elected to file a lawsuit ... rather than to file for arbitration, thereby failing to exhaust his administrative remedy." The actual judgment contained an additional finding that plaintiff had waived his right to arbitrate against defendant. After entry of the judgement, plaintiff tired to initiate arbitration of the dispute with the American Arbitration

Association, but defendant filed an objection to the arbitration on the basis that plaintiff"s claim had already been summarily adjudicated against him in the superior court. Plaintiff appealed.

The court of appeal reversed and remanded, with directions to delete any reference to plaintiff having waived his right to arbitration, and to add instead a provision specifying that plaintiff may arbitrate his claim in accordance with the parties' arbitration agreement (*109 Cal. App. 4th 768, 778)* . The court noted that the prejudice necessary to support a waiver of arbitration requires the party to have obtained some advantage by resort to the court system, such as an adjudication of some aspect of the merits, or even access to discovery which would not have been available in the arbitration forum. Merely incurring litigation expense is not sufficient prejudice. If it were, even opposing to a petition to compel arbitration would constitute a waiver of the right to arbitrate. Rather, the court said, there were compelling policy reasons why a plaintiff should not have to forfeit the right to any remedy simply because it chooses to challenge an arbitration agreement. To the extent the reference to plaintiff's "waiver" of arbitration contained in the court's judgment was intended to preclude plaintiff from thereafter initiating arbitration of his claims against defendant, it was in error. Plaintiff did not waive the right to arbitrate merely by filing a claim in court (*109 Cal. App. 4th 768, 776)* . Defendant's motion for summary judgment can only be interpreted as an assertion of the right to enforce the arbitration provision and a refusal to litigate in court. Defendant must submit to arbitration (*109 Cal. App. 4th 768, 777)* .

The facts and procedural background of ***Simms v. NPCK Enterprises, Inc.*** *(2003) 109 Cal. App. 4th 233, 134 Cal. Rptr. 2d 557* , and the portion of the opinion discussing the requirement that the party opposing arbitration have been prejudiced, and was not prejudiced by the filing of the lawsuit, are discussed at *§ 20.80[3][b]*.

Plaintiff in ***Outdoor Services, Inc. v. Pabagold, Inc.*** *(1986) 185 Cal. App. 3d 676, 230 Cal. Rptr. 73* , was a company engaged in the business of purchasing advertising space for clients. Defendant manufacturer and its advertising agent had a contract which specifically provided for the agent to contract with third parties for media time and space. Plaintiff was held to be a third party beneficiary of that contract. The agent had sued the manufacturer for breach of contract and unsuccessfully sought attachment in that action. One of the billboard companies with which plaintiff had placed defendant's advertising sued plaintiff, in response to which plaintiff filed a cross complaint against defendant. Later, the matter was arbitrated, and resulted in an award in favor of plaintiff, which was confirmed. Defendant appealed.

The court of appeal affirmed. The court of appeal held that neither the agent's attempted attachment nor the plaintiff's cross complaint constituted waiver of the right to arbitrate. The court noted that attachment is not available in arbitration and that the cross complaint was essentially a protective measure which was not inconsistent with the intent to arbitrate (*185 Cal. App. 3d 676, 684-685)* .

Christensen v. Dewor Developments *(1983) 33 Cal. 3d 778, 191 Cal. Rptr. 8, 661 P.2d 1088* , is discussed in *Ch. 20A, Arbitration: Resisting, § 20A.84[3][a]*. The Supreme Court found that waiver did arise because prejudice was shown (*33 Cal. 3d 778, 782-784)* [*citing Doers v. Golden Gate Bridge etc. Dist. (1979) 23 Cal. 3d 180, 188, 188 n.3, 151 Cal. Rptr. 837, 588 P.2d 1261* (discussed *above*)].

[b] Seeking Provisional Remedy Does Not Necessarily Waive Right to Arbitration

The facts and procedural background of ***Simms v. NPCK Enterprises, Inc.*** *(2003) 109 Cal. App. 4th 233, 134 Cal. Rptr. 2d 557* , and the portion of the opinion discussing the requirement that the party opposing arbitration have been prejudiced, and was not prejudiced by the filing of the lawsuit, are discussed at *§ 20.80[3][b]*. In addition, the trial court relied on the fact that plaintiffs obtained a temporary restraining order and sought a preliminary injunction, without moving to stay the action. Preliminary injunctions and temporary restraining orders are among the provisional remedies that may be sought pursuant to *Code Civ. Proc. § 1281.8*. An application for a provisional remedy does not waive the right of arbitration if the applicant at the same time moves to stay all other proceedings in the action pending arbitration [*Code Civ. Proc. § 1281.8(c)*] (*109 Cal. App. 4th 233, 243)* . *Code Civ. Proc. § 1281.8(c)* does not expressly state that applying for a provisional remedy without seeking a stay of the action waives the right to arbitrate. Given the strong

public policy in favor or arbitration, without an explicit statutory command to find waiver, the failure to include a request for a stay with an application for provisional relief, is a fact to consider in determining waiver, but it is not dispositive. The temporary restraining order resulted in a three-week delay in defendants' demolition of the structure plaintiffs had erected. Defendants did not claim that delay prejudiced them in any way. The party seeking to establish waiver must show some prejudice as a result of the other party's delay in seeking arbitration. There was no showing of any prejudice to defendants (*109 Cal. App. 4th 233, 244)* . The litigation machinery was not substantially invoked before the request for arbitration, there was no long delay before arbitration was sought, plaintiffs did not take advantage of judicial discovery procedures not available in arbitration, nor did the delay affected, misled or prejudiced the defendants. Simply filing suit for damages, while also requesting arbitration, and then seeking a provisional remedy without a stay is insufficient to support a finding of waiver absent any evidence of prejudice to the opposing party (*109 Cal. App. 4th 233, 245)* .

Jay Bharat Developers, Inc. v. Minidis *(2008) 167 Cal. App. 4th 437, 84 Cal. Rptr. 3d 267* , was an action concerning the termination of a franchise agreement by the franchisor. This dispute was ordered to arbitration pursuant to the franchise agreement. The franchisees alleged that they were fraudulently induced to enter into the franchise agreement. The franchisor filed a cross-complaint and alleged that the franchisees had been in breach of the agreement by failing to pay royalties and advertising fees (*167 Cal. App. 4th 437, 441)* . The franchise agreement contained an arbitration provision that excluded disputes in which injunctive relief was sought (*167 Cal. App. 4th 437, 440)* . A party to an arbitration agreement may file with the court an application for a provisional remedy in connection with an arbitrable controversy, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without provisional relief [*Code Civ. Proc. § 1281.8(b)*] (*167 Cal. App. 4th 437, 446)* .

Although the matter had already been ordered to arbitration, a preliminary injunction was granted by the trial court to prohibit the franchisees from continuing to represent themselves as franchisees and from using franchise trademarks (*167 Cal. App. 4th 437, 441-443*). The court of appeal affirmed the trial court's grant of the injunction, concluding that the franchisors established the likelihood of prevailing on the merits by presenting evidence that the franchisees had failed to make royalty payments and to pay advertising fees. Further, the court found that the franchisor would suffer irreparable harm without the preliminary injunction. After weighing the balance of harms, an injunction prohibiting use of the franchisors' trademark was appropriate (*167 Cal. App. 4th 437, 443-447)* .

[c] Contractual Deadline for Demanding Arbitration Tolled by Commencement of Judicial Action

By statute effective January 1, 2007, if an arbitration agreement requires that arbitration of a controversy be demanded or initiated by a party to the arbitration agreement within a stated period of time, the commencement of a civil action by that party based upon that controversy, within that period of time, tolls the applicable time limitations contained in the agreement, from the date the civil action is commenced until 30 days after a final determination by the court hearing the action that the party is required to arbitrate the controversy, or 30 days after the final termination of the civil action, whichever date occurs first [*Code Civ. Proc. § 1281.12*].

Pearson Dental Supplies, Inc. v. Superior Court *(2010) 48 Cal. 4th 665, 108 Cal. Rptr. 3d 171, 229 P.3d 83* , reversed the court of appeal's reversal of the trial court's ruling under *Code Civ. Proc. § 1281.12*. The Supreme Court held that the end of a tolling period under *Code Civ. Proc. § 1281.12*, i.e., 30 days after the final determination, simply means that the contractual limitations clock begins to run again from where it stopped at the filing of the civil action (*48 Cal. 4th 665, 675, 108 Cal. Rptr. 3d 171, 229 P.3d 83*).

[d] Attempts to Settle Do Not Necessarily Waive Right to Arbitration

In ***Zamora v. Lehman*** *(2010) 186 Cal. App. 4th 1, 111 Cal. Rptr. 3d 335* , the court of appeal reversed the trial court's finding of no waiver by two defendants who had engaged in delay and discovery, but affirmed the trial court's finding of no waiver by a third who had successfully demurred and otherwise substantively made only settlement efforts. The

portion of the decision setting forth the factors for determination of waiver of the right to demand arbitration is *treated in Ch. 20A, Arbitration: Resisting, § 20A.80[3][b], below*. The portion of the decision discussing unreasonable delay in demanding arbitration is *set forth in Ch. 20A, Arbitration: Resisting, § 20A.82[3][a], below*. The portion of the decision discussing waiver by use of prejudicial discovery is located at Ch. 20A, *Arbitration: Resisting, § 20A.83[4][b], below* . The portion of the decision dealing with demurrer as waiver is discussed in [e], *below*. After ruling the third defendant's demurrer was not inconsistent with the right to arbitrate, the court moved on to the issue of the third defendant's settlement efforts. The court noted that the third defendant's continued those efforts for quite some time, until the opposing halted all settlement discussions. Three weeks later, the third defendant moved to compel arbitration. The court ruled that the third defendant's attempt to settle the action was not inconsistent with the right to arbitrate. More interestingly, it also ruled that those efforts did not result in undue delay. The court then cited caselaw favoring settlement efforts (*186 Cal. App. 4th 1, 20)* .

[e] Demurrer to Complaint Does Not Necessarily Waive Right to Arbitration

In ***Zamora v. Lehman*** *(2010) 186 Cal. App. 4th 1, 111 Cal. Rptr. 3d 335* , the court of appeal reversed the trial court's finding of no waiver by two defendants who had engaged in delay and discovery, but affirmed the trial court's finding of no waiver by a third defendant who had successfully demurred and otherwise substantively made only settlement efforts. The portion of the decision covering the factors for determination of waiver of the right to demand arbitration is *set forth in Ch. 20A, Arbitration: Resisting, § 20A.80[3][b], below*. The portion of the decision discussing unreasonable delay in demanding arbitration is *set forth in Ch. 20A, Arbitration: Resisting, § 20A.82[3][a], below*. After that, the court briefly addressed the question of whether the third defendant's demurrer on grounds that the complaint lacked specificity or failed to allege the timeliness of the claim. The court noted that the demurrer was successful and not inconsistent with the right to arbitrate (*186 Cal. App. 4th 1, 20)* . The portion of the decision discussing waiver by use of prejudicial discovery is located at Ch. 20A, *Arbitration: Resisting, § 20A.83[4][b], below* . The portion of the decision dealing with attempts to settle as waiver is discussed in [d], *above*.

[4] Additional Authorities

[a] Filing of Lawsuit Does Not Necessarily Constitute Waiver of Right to Compel Arbitration

Pacific Inv. Co. v. Townsend (1976) 58 Cal. App. 3d 1, 129 Cal. Rptr. 489 , was an action brought by several limited partners against the general partner and certain of his associates involving various allegations of fraudulent management. The partnership agreement provided that in the event of any disagreement between partners and the limited partnership, or with reference to any of the activities of the general partner that could not be settled or adjudicated properly by the latter, the matter would be arbitrated. After the plaintiffs filed a second amended complaint, the general partner and another defendant petitioned to stay proceedings and compel arbitration. Prior to the trial court's final ruling in denying the petition, defendants stipulated to extensions of a hearing on a temporary restraining order, filed an answer to the complaint for the purpose of a hearing on a preliminary injunction, and noticed depositions. After the ruling, they filed a cross complaint for dissolution and abuse of process, while filing an interim appeal from the order denying a stay (which was treated as an appeal from the order refusing to compel arbitration).

Acknowledging that waiver is ordinarily a question of fact for the trial court, the court of appeal nonetheless reversed the ruling disallowing the general partner from compelling arbitration, stating that the facts below did not justify a finding of waiver. Defendants had raised the arbitration question promptly and in the form provided by law. They could not be faulted for beginning to prepare a defense in the lawsuit prior to a final ruling on their petition to compel arbitration or for continuing to defend after an adverse ruling by the trial court. Plaintiffs suffered no unconscionable injury as a result of defendants' conduct. The court noted, as an example, that the case had not gone all the way to judgment before the arbitration issue was raised (*58 Cal. App. 3d 1, 12)* .

Schwartz v. Leibel (1967) 249 Cal. App. 2d 761, 57 Cal. Rptr. 831 , involved arbitration of a dispute between partners,

one of whom had withdrawn from the partnership and was breaching the noncompetition clause in the partnership agreement. Before respondent initiated arbitration, he commenced a lawsuit for injunctive relief. At the hearing to confirm the arbitration award, appellant claimed respondent had waived the right to arbitrate by initiating the lawsuit. The award was confirmed, and appeal followed.

The court of appeal affirmed. Because injunctive relief was not within the power of the arbitrator, respondent's suit for injunction was not an election of remedies barring arbitration. The two remedies are plainly not exclusive and are in no way inconsistent (*249 Cal. App. 2d 761, 763-764)* .

California Points & Authorities

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20 ARBITRATION: COMPELLING
PART II. FORMS
D. Negating Defenses to Arbitration

2-20 California Points & Authorities § 20.82

§ 20.82 Arbitration Provision Is Neither Contract of Adhesion Nor Unconscionable

[1] FORM

PETITIONER, AS A PARTY TO AN ARBITRATION AGREEMENT, IS ENTITLED TO AN ORDER COMPELLING ARBITRATION BECAUSE THE AGREEMENT IS NOT [*include all that apply*: PROCEDURALLY UNCONSCIONABLE [*or*] SUBSTANTIVELY UNCONSCIONABLE [*or*] A CONTRACT OF ADHESION].

A. Contract Containing Arbitration Provision Is Not Adhesion Contract. The contract containing the arbitration provision here at issue is not a contract of adhesion because respondent had both the opportunity to negotiate its terms and the opportunity to look elsewhere for a more favorable contract (*Powers v. Dickson, Carlson & Campillo (1997) 54 Cal. App. 4th 1102, 1110, 63 Cal. Rptr. 2d 261* ; *Spinello v. Amblin Entertainment (1994) 29 Cal. App. 4th 1390, 1396-1398, 34 Cal. Rptr. 2d 695* ; *see also Crippen v. Central Valley RV Outlet, Inc. (2004) 124 Cal. App. 4th 1159, 1166, 22 Cal. Rptr. 3d 189*).

[*AND/OR*]

A. Arbitration Provision Not Shown To Be Contract of Adhesion or Procedurally Unconscionable. The mere fact that an arbitration agreement is part of a form contract that _____ [*state party of other designation, e.g.,* defendant] used with many _____ [*state relationship, e.g.,* customers] does not make it a contract of adhesion and therefore procedurally unconscionable. Procedural unconscionability must be established by evidence; or the relationship of the parties and the contract itself must support an inference that the party seeking to avoid the arbitration provision lacked power to bargain or negotiate or had no meaningful choice, or that the arbitration provision was set in small type or otherwise hidden in a prolix form or involved some surprise or oppression (*Crippen v. Central Valley RV Outlet, Inc. (2004) 124 Cal. App. 4th 1159, 1165-1167, 22 Cal. Rptr. 3d 189*).

[*AND/OR*]

A. Arbitration Provision Not Shown To Be Substantively Unconscionable. Substantive unconscionability addresses the fairness of the term in dispute. Substantive unconscionability traditionally involves contract terms that are so one-sided as to shock the conscience, or that impose harsh or oppressive terms (*Arguelles-Romero v. Superior Ct. (2010) 184 Cal. App. 4th 825, 843-844, 109 Cal. Rptr. 3d 289*).

[2] Comments

[a] Use of Form

This form may be used in support of a petition to compel arbitration if petitioner anticipates a challenge that the contract containing the arbitration provision is a contract of adhesion or is procedurally unconscionable or is substantively unconscionable.

This form is not intended as a complete memorandum, but should be combined with the memoranda in *§§ 20.10, 20.11*, and any others applicable to the particular situation.

As a tactical matter, counsel may wish to reserve these points for oral argument or for a reply memorandum. In deciding whether or not to reserve these arguments,counsel should consider local court rules and practice, as well as whether the moving party would be expected to raise these points in initial moving papers, to avoid the possibility of losing the opportunity to raise them.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should emphasize the negotiations between the parties, or the opportunities for negotiation, and respondent's ability to obtain the service or goods elsewhere. In any event, the argument must address the elements of the specific theory under which the party challenging the enforceability of the arbitration clause is attempting to establish unenforceability. As the courts have noted, *see, e.g.,* *Arguelles-Romero v. Superior Ct. (2010) 184 Cal. App. 4th 825, 842, 843, 109 Cal. Rptr. 3d 289* , parties often argue parts of different theories as if they were parts of the same theory, to their detriment.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see* *Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For a form that addresses the right to compel arbitration under a contract of adhesion if its terms are within the expectations of the weaker party, see *§ 20.83*.

For a form addressing adhesion contract principles in the context of a medical malpractice agreement governed by *Code Civ. Proc. § 1295*, see *§ 20.45*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For memoranda relating to general contract principles, see Ch. 50, *Contracts* .

[d] Opposing Memoranda

For a form that may be used in an appropriate case to oppose this form on the ground that a contract is a contract of adhesion and also unconscionable, see *Ch. 20A, Arbitration: Resisting, § 20A.91*.

[3] Discussion of Authorities

[a] Contract Containing Arbitration Provision Is Not Adhesion Contract

Powers v. Dickson, Carlson & Campillo *(1997) 54 Cal. App. 4th 1102, 63 Cal. Rptr. 2d 261* , was a legal malpractice action arising out of construction defect arbitration. Plaintiffs purchased a luxury home in 1992. They were represented during the purchase by a law firm other than defendant, and commenced arbitration in November, 1992, regarding construction defects. In March, 1993, plaintiffs retained another attorney, who later joined defendant firm. Plaintiffs met with that attorney at his office and signed a four-page "Attorney Retainer and Fee Agreement," which consisted of 12 paragraphs, including an arbitration provision. In July, 1993, that attorney moved to defendant firm. In September, 1993, plaintiffs renegotiated their financial arrangements with defendant from an hourly to a flat fee and signed a "*First Amendment* to Attorney Retainer and Fee Agreement," which was also four pages long and had an arbitration provision. In 1995, plaintiffs commenced a legal malpractice action against both attorneys. Defendant's motion to compel arbitration was denied on the grounds that the arbitration clause was not in bold or otherwise large or distinct print, that plaintiffs were not specifically informed that they were waiving their right to a jury trial of any malpractice action, and that they were not advised to seek independent counsel to advise them regarding the agreement. Defendant appealed.

The court of appeal reversed. Noting first that generally, plaintiffs' contentions that they did not carefully read the agreements, did not understand the significance of the arbitration provision, and did not knowingly waive their right to a jury trial may not be used to invalidate a written arbitration provision. So, the court considered whether other matters, such as the contract being a contract of adhesion, would justify a different result (*54 Cal. App. 4th 1102, 1109)* . The court discussed the characteristics of contracts of adhesion; that they are often standardized contracts drafted by the party with superior bargaining power and that the weaker party lacks not only the opportunity to bargain but also any realistic opportunity to look elsewhere for a more favorable contract, but must adhere to the standardized agreement or forego the needed service. The court of appeal concluded that neither the March, 1993, agreement nor the September, 1993, amendment was a contract of adhesion. Plaintiffs did not enter into a standardized contract on a take it or leave it basis. The retainer agreement and the amendment were negotiated and individualized agreements. Plaintiffs had the freedom to employ the attorney of their choice and bargain for the terms of their choice. Plaintiffs' decision to change counsel and their successful renegotiation of their fee arrangement demonstrate that they possessed substantial bargaining strength (*54 Cal. App. 4th 1102, 1110)* .

Plaintiff in ***Spinello v. Amblin Entertainment*** *(1994) 29 Cal. App. 4th 1390, 34 Cal. Rptr. 2d 695* , sued defendants claiming they had stolen his ideas and were using them for a movie. Plaintiff, who described himself as a motion picture producer, writer, and director with more than 20 years experience in the industry, submitted a script to an Amblin executive, in 1988. The script was returned in January, 1989, with a letter stating Amblin was not interested in it. In February, 1990, plaintiff again submitted thescript to Steven Spielberg at Amblin. Spielberg forwarded it to another

Amblin executive, who wrote to plaintiff stating that Amblin would review the script only if plaintiff signed Amblin's standard submission agreement. Plaintiff discussed the submission agreement with his agent, who told him the agreement was standard, and to sign it. The submission agreement contained the arbitration clause. Amblin again rejected the script in April, 1990. Before and after his two submissions to Amblin, plaintiff submitted copies of the same script to about seventy other studios and producers. In April, 1992, when Amblin and Universal Studios released "Small Soldiers," plaintiff sued. Amblin moved to compel arbitration. The trial court denied the motion finding the arbitration clause was both procedurally and substantively unconscionable and thus unenforceable. Amblin appealed.

The court of appeal reversed, stating that the appropriate question was whether the contract was one of adhesion and concluding that it was not (*29 Cal. App. 4th 1390, 1397, 1399)* . The court of appeal cited cases explaining that in adhesion contracts, the weaker party lacks not only the opportunity to bargain but also any realistic opportunity to look elsewhere for a more favorable contract (*29 Cal. App. 4th 1390, 1396-1397)* . In this case, however, plaintiff could have asked his agent to request deletion or modification or limitation of the arbitration provision, or he could have done so himself. As he admits, he did not. Plaintiff was not a novice. He had 20 years' experience in the entertainment industry and was represented by a literary agent. He believed he had a valuable property and, therefore, a basis for negotiation (*29 Cal. App. 4th 1390, 1397)* . Also, he had the opportunity to go elsewhere, which in fact he did, by submitting the script to approximately 70 other producers, at least several of whom did not require execution of submission agreements--a consideration which the court of appeal said showed that this was not an adhesion contract (*29 Cal. App. 4th 1390, 1397-1398)* .

Crippen v. Central Valley RV Outlet, Inc. *(2004) 124 Cal. App. 4th 1159, 22 Cal. Rptr. 3d 189* , is discussed at [b], *below.*

[b] Arbitration Provision Not Shown to Be Contract of Adhesion or Procedurally Unconscionable

Crippen v. Central Valley RV Outlet, Inc. *(2004) 124 Cal. App. 4th 1159, 22 Cal. Rptr. 3d 189* , arose out of the purchase and sale of an allegedly defective used motor home. The purchase contract contained, on a separate page, an arbitration addendum that required all disputes, claims, or controversies arising from or relating to the contract to be resolved by binding arbitration, except that defendant/seller retained the option to foreclose or to use judicial or non-judicial relief to enforce its security agreement. The arbitration addendum also prohibited purchaser from participating in any class action as a representative or class member. The claim that this latter provision violated the anti-waiver provision of the Consumer Legal Remedies Act (*Civ. Code § 1751*) was raised for the first time on appeal, and the court of appeal declined to consider the issue (*124 Cal. App. 4th 1159, 1167 n.1*). Plaintiff filed a complaint against defendant alleging fraud, negligence, several statutory causes of action, that the motor home was defective, and that the action was brought on behalf of plaintiff and the general public. The complaint sought rescission, restitution, compensatory and punitive damages, attorney fees, injunctive relief, and restoration of funds to the public.

Defendant moved to compel arbitration. Plaintiff opposed the motion, arguing that the arbitration addendum was procedurally and substantively unconscionable: substantively unconscionable because it gave defendant unilateral rights to sue and deprived plaintiff of the right to participate in class actions against defendant. Plaintiff did not rely on any extrinsic evidence of the circumstances under which the arbitration addendum was executed, but contended that procedural unconscionability could be inferred from the document itself, which it described as a contract of adhesion, and from the nature of the relationship between the parties. The trial court denied the motion, without any reference in its ruling or at the hearing, to evidence of procedural unconscionability. It said only that the arbitration clause was unilateral arbitration and unenforceable because it gave defendant the right to enforce the security agreement or to foreclose on the property in a lawsuit. Defendant appealed.

The court of appeal reversed for lack of proof that the arbitration agreement was procedurally unconscionable (*124 Cal. App. 4th 1159, 1162, 1168)* . The court began its discussion by noting that arbitration must be denied if an arbitration agreement is both procedurally and substantively unconscionable (*124 Cal. App. 4th 1159, 1162, 1165)* .

While acknowledging that, in some situations, procedural unconscionability can be established simply by examining the written agreement and the nature of the relationship between the parties without the resort to extrinsic evidence, the record contained no extrinsic evidence of procedural unconscionability, and none was inferable from the agreement itself or the relationship between the parties (*124 Cal. App. 4th 1159, 1162)* . Plaintiff failed to show any procedural unconscionability at all, and did not introduce or rely on any evidence of the circumstances surrounding the execution of the agreement. Thus plaintiff could not show inequality of bargaining power, lack of negotiation, or lack of meaningful choice based on those circumstances.

Plaintiff gave no reason to suppose substantially unequal bargaining power was inherent in his relationship with the seller. Nor did the form of the document itself show procedural unconscionability: it was not set in small type or hidden in a prolix form. It was printed on a separate page, in ordinary type, clearly labeled as an arbitration agreement and signed separately by plaintiff (*124 Cal. App. 4th 1159, 1165)* . Plaintiff argued that because the agreement was a form contract that defendant used with many customers, it must have been a contract of adhesion and therefore procedurally unconscionable. However, the court said, there is no general rule that a form contract used by a party for many transactions is procedurally unconscionable. There was no reason in this case to conclude that plaintiff lacked power to bargain. In general, nothing prevents purchasers of used vehicles from bargaining with dealers, even though dealers use form contracts, and nothing in the record showed that plaintiff could not bargain in this case (*124 Cal. App. 4th 1159, 1166)* .

The court distinguished two cases relied on by plaintiff: *O'Hare v. Municipal Resource Consultants (2003) 107 Cal. App. 4th 267, 132 Cal. Rptr. 2d 116* (*O'Hare*, discussed at *Ch. 20A, Arbitration: Resisting, § 20A.91[3][c] -[e], [i]*) and *Harper v. Ultimo (2003) 113 Cal. App. 4th 1402, 7 Cal. Rptr. 3d 418* (*Harper*, discussed in *Ch.20A, Arbitration: Resisting, § 20A.91[3][c]* and [e]). Procedural unconscionability was inferred in *O'Hare* because the parties' relationship was that of employer and prospective employee, one in which employees are in weak bargaining positions because of the economic pressure exerted by employers. Nothing resembling that economic pressure was at issue in this case. There is nothing in this buyer-seller relationship from which the court could infer a great disparity of bargaining power. Shopping for a motor home is simply not comparable to seeking employment (*124 Cal. App. 4th 1159, 1166)* . In *Harper*, the court based its finding of procedural unconscionability on the surprise and oppression deriving from he fact that the Better Business Bureau arbitration rules were not attached to the agreement, that defendant rejected the plaintiffs' proposals to alter certain other provisions of the contract, and that the Better Business Bureau rules limited plaintiff's recovery to $2,500. Further, that agreement did not say whether the Better Business Bureau rules in effect at the time of signing or the time of arbitration would control, so the customer was almost guaranteed a costly preliminary dispute over what rules would apply. The problems in *Harper* were far worse than those at issue here, merely being a form contract (*124 Cal. App. 4th 1159, 1167)* .

[c] Arbitration Provision Not Shown To Be Substantively Unconscionable

In ***Arguelles-Romero v. Superior Ct.*** *(2010) 184 Cal. App. 4th 825, 109 Cal. Rptr. 3d 28*9, the court of appeal reversed the trial court's ruling that the class action waiver was not substantively unconscionable. The court noted that substantive unconscionability addresses the fairness of the term in dispute. Substantive unconscionability traditionally involves contract terms that are so one-sided as to shock the conscience, or that impose harsh or oppressive terms. The parties did not raise the trial court's determination that the agreement was a contract of adhesion and, therefore, procedurally unconscionable. On substantive unconscionability, the court ruled that the party challenging the agreement failed to provide any evidence in support of its claim that the class action waiver was substantively unconscionable as an exculpatory contract. That party failed to show that the amounts in controversy were too small to be an incentive for individual actions, and to render class action the only viable remedy, in that the party provided little evidence of what the actual amounts would be in any individual cases (184 Cal. App. 4th 825, 844). While the court found a lack of evidence in support of the theory that the agreement was unenforceable on grounds of unconscionability, and therefore vacated the trial court's order for individual arbitration, it ordered the trial court to consider whether the waiver waives unwaivable statutory rights (*184 Cal. App. 4th 825, 845-846)* .

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California Points & Authorities

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20 ARBITRATION: COMPELLING
PART II. FORMS
D. Negating Defenses to Arbitration

2-20 California Points & Authorities § 20.83

§ 20.83 Arbitration Under Contract of Adhesion

[1] FORM

PETITIONER IS ENTITLED TO ENFORCE THE ARBITRATION AGREEMENT [AND TO A STAY OF ANY PENDING ACTION RELATING TO ARBITRABLE ISSUES] EVEN IF THE AGREEMENT IS CONTAINED WITHIN A CONTRACT OF ADHESION, SO LONG AS THE ARBITRATION AGREEMENT MET THE REASONABLE EXPECTATIONS OF RESPONDENT AND DID NOT LEAD TO LOSS OR UNFAIR IMPOSITION.

A. Arbitration Provision in Adhesion Contract Not Unenforceable If Not Contrary to Expectations of Fairness. Even if a contract containing an arbitration provision is one of adhesion, there is no reason to avoid arbitration if it is not shown that the provision is contrary to the reasonable expectations of the parties or that loss or unfair imposition would result (*Keating v. Superior Court (1982) 31 Cal. 3d 584, 594-595, 183 Cal. Rptr. 360, 645 P.2d 1192* (overruled on other grounds in *Southland Corp. v. Keating (1984) 465 U.S. 1, 10-11, 104 S. Ct. 852, 79 L. Ed. 2d 1*); *County of Solano v. Lionsgate Corporation (2005) 126 Cal. App. 4th 741, 24 Cal. Rptr. 3d 362* ; *McManus v. CIBC World Markets Corp. (2003) 109 Cal. App. 4th 76, 92-102, 134 Cal. Rptr. 2d 446* ; *Fittante v. Palm Springs Motors, Inc. (2003) 105 Cal. App. 4th 708, 723-724, 129 Cal. Rptr. 2d 659* ; *Painters Dist. Council No. 33 v. Moen (1982) 128 Cal. App. 3d 1032, 1040-1041, 181 Cal. Rptr. 17* ; *Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1971) 20 Cal. App. 3d 668, 672, 97 Cal. Rptr. 811*).

[2] Comments

[a] Use of Form

This form may be used in support of a petition to compel arbitration if petitioner anticipates a challenge that the contract containing the arbitration provision is a contract of adhesion when, even though the contract is a contract of adhesion, if it is within the reasonable expectations of the weaker party.

This form is not intended as a complete memorandum, but should be combined with the memoranda in *§§ 20.10, 20.11,*

and any others applicable to the particular situation.

As a tactical matter, counsel may wish to reserve these points for oral argument or for a reply memorandum. In deciding whether or not to reserve these arguments, counsel should consider local court rules and practice, as well as whether the moving party would be expected to raise these points in initial moving papers, to avoid the possibility of losing the opportunity to raise them.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should explain why the agreement, although contained in a contract of adhesion, is neither unfair nor contrary to respondent's reasonable expectations in providing for arbitration of the controversy.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For a form for use to argue that a contract is not a contract of adhesion, see *§ 20.82*.

For a form addressing adhesion contract principles in the context of a medical malpractice agreement governed by *Code Civ. Proc. § 1295*, see *§ 20.45*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For memoranda relating to general contract principles, see Ch. 50, *Contracts* .

[d] Opposing Memoranda

For a form that may be used to oppose this form on the ground that a contract is a contract of adhesion and also unconscionable, see *Ch. 20A, Arbitration: Resisting, § 20A.91*.

[3] Discussion of Authorities

[a] Arbitration Provision in Adhesion Contract Not Unenforceable If Not Contrary to Expectations of Fairness

Keating v. Superior Court *(1982) 31 Cal. 3d 584, 183 Cal. Rptr. 360, 645 P.2d 1192* , arose out of a dispute over a franchising agreement. A number of franchises filed actions against the franchisor alleging, among other things, fraud, oral misrepresentation, breach of contract, breach of fiduciary duty, and violation of certain state statutes governing franchise agreements. Each of the franchise agreements at issue contained a clause providing that any controversy or claim arising out of or relating to the agreement must be settled by arbitration in accordance with the Rules of the American Arbitration Association. After the various actions were coordinated, the trial court granted the franchisor's motion to compel arbitration in each of the actions. The franchisees filed a petition for writ of mandate or prohibition seeking relief from the order to arbitrate, arguing, inter alia, that the arbitration provisions were not enforceable because they were contained in an adhesion contract.

The Supreme Court denied the writ. The Court, although accepting the franchisees' characterization of the franchise agreement as an adhesion contract (*31 Cal. 3d 584, 593)* , concluded that the arbitration provisions contained in the agreement were nevertheless enforceable (*31 Cal. 3d 584, 595)* . Relying on *Graham v. Scissor-Tail, Inc. (1981) 28 Cal. 3d 807, 817-820, 171 Cal. Rptr. 604, 623 P.2d 165* (discussed in *Ch. 20A, Arbitration: Resisting, §§ 20A.90[3][a]* and *20A.91[3][a]*), the Court noted that an adhesion contract is fully enforceable according to its terms unless certain other factors are present which operate to render it unenforceable. There are two judicially imposed limitations on enforcement of such contracts. First, such a contract or provision which does not fall within the reasonable expectations of the weaker or adhering party will not be enforced against him. Second, a contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or unconscionable (*31 Cal. 3d 584, 594)* . The Court held, however, that in the absence of some special element of unfair advantage, arbitration is generally considered to be a mutually advantageous process, providing for resolution of disputes in a presumptively less costly, more expeditious, and more private manner by an impartial person or persons typically selected by the parties themselves. Moreover, the Court noted, provision for arbitration in a commercial context is quite common and reasonably to be expected. The Court further observed that the declaration of one of the franchisees made it clear that he was aware of the provision and that, in such a setting, neither he nor the other franchisees were in a position to claim that the arbitration provision did not fall within their reasonable expectations. For these reasons, the Court held that the arbitration provisions were binding and enforceable (*31 Cal. 3d 584, 595)* .

If it should be noted that *Keating v. Superior Court (1982) 31 Cal. 3d 584, 183 Cal. Rptr. 360, 645 P.2d 1192* , was overruled in part by the *United States Supreme Court in Southland Corp. v. Keating (1984) 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1* , which held *Corp. Code § 31512* violated the Supremacy Clause of the United States Constitution. The Supreme Court opinion is discussed at *§ 20.22[3][a]*.

The facts and procedural background of ***County of Solano v. Lionsgate Corporation*** *(2005) 126 Cal. App. 4th 741, 24 Cal. Rptr. 3d 362* , and the portion of the opinion addressing the arbitrability of claims under the False Claims Act (*Gov. Code § 12650 et seq.*) are discussed at *§ 20.22[3][k]*. Lionsgate also argued that the arbitration clause was part of a contract of adhesion, and therefore had to be construed against the County. The court noted that even an arbitration provision in an adhesion contract is legally enforceable if it (1) falls within the reasonable expectations of the weaker party, and (2) is not unduly oppressive or unconscionable. Thus, even if this contract were adhesive, arbitration of the County's claims for compensation related to performance of the contract was within Lionsgate's reasonable expectations and the arbitration clause was neither oppressive nor unconscionable. Lionsgate demonstrated neither procedural nor substantive unconscionability. Thus there was no reason to invalidate the arbitration clause or to construe the clause against the County. The plain terms of the clause bring all claims for contract-related "compensation," as well as "damages," within the scope of arbitration, and as previously noted, the penalties were awarded as a form of "compensation" for administrative expenses occasioned by Lionsgate's bad faith performance of the contract (*126 Cal. App. 4th 741, 750)* .

McManus v. CIBC World Markets Corp. *(2003) 109 Cal. App. 4th 76, 92-102, 134 Cal. Rptr. 2d 446* , involved employment and defamation claims by a plaintiff who had been required as a condition of employment and by state and

federal law to sign an arbitration agreement [*see 17 C.F.R. § 240.15b7-1*; *Cal. Code Reg., tit. 10, § 260.210*]. Actually, plaintiff had signed two arbitration agreements, one in the letter offering employment with defendant, which specified that all disputes arising out of employment or the termination of employment at defendant, including any statutory claims based on discrimination, would be submitted to and resolved exclusively by a panel of arbitrators from NASD Dispute Resolution, Inc. or the New York Stock Exchange, Inc. The second arbitration agreement was in the Securities Exchange Commission (SEC)-approved Uniform Application for Securities Industry Registration or Transfer ("form U-4"). All applicants must sign the form U-4 agreement to arbitrate as a condition of employment in order to register with NASD and NYSE. After plaintiff filed suit, defendants moved to compel arbitration. Plaintiff opposed the motion on the ground the agreements were unenforceable because they were substantively and procedurally unconscionable under California law. The motion was granted. Plaintiff filed a mandate petition with for writ, pursuant to which the trial court set aside and vacated its order granting the motion to compel arbitration and entered a new order denying the motion to compel arbitration. Thereafter, defendants filed a timely notice of appeal from the order denying the motion to compel arbitration.

The court of appeal reversed (*109 Cal. App. 4th 76, 83, 102-103)* . The first issue the court addressed was whether California's law of unconscionability was preempted theextent that it conflicts with the federal system of arbitration created by the SEC's adoption of form U-4 and its approval of the NASD and NYSE arbitration rules. Pursuant to its regulatory authority, the SEC has approved the arbitration procedures of NASD and NYSE, although the court noted that the SEC had also approved amendments to the NASD and NYSE arbitration procedures that exempt employment discrimination claims [NASD Code of Arbitration Procedure rule 10201; NYSE Rule 600] (*109 Cal. App. 4th 76, 88-89)* . The court noted that plaintiff was an experienced businessman, and that there was no evidence he was coerced or defrauded into agreeing to the arbitration clause in his registration application (*109 Cal. App. 4th 76, 90)* . The court concluded that there was no preemption; that the form U-4 was not unconscionable as a matter of law; and that each case should be considered individually (*109 Cal. App. 4th 76, 90-91)* . Although the arbitration clauses were procedurally unconscionable in that they were adhesive, that did not as a matter of law render them unenforceable (*109 Cal. App. 4th 76, 91)* .

Plaintiff argued that the arbitration agreements were substantively unconscionable because (1) there was an unlawful fee allocation scheme; (2) there was no neutral selection of arbitrators but mandatory NASD or NYSE arbitration; (3) with the exception of statutory discrimination claims for which NASD modified its rules, there was no requirement that the arbitrator be a lawyer or judge; (4) there were no discovery rights; (5) the arbitrators were not required to state reasons for the award; and (6) there was no mutual obligation to arbitrate. The court addressed each issue and found only the cost allocation provision to be unconscionable, but held that provision could be severed (*109 Cal. App. 4th 76, 93-102)* :

- Citing *Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 107-108, 110-111, 113, 99 Cal. Rptr. 2d 745, 6 P.3d 669* (discussed at *§ 20.23[3][a]* and *[d]*), the court held that it is unlawful to require an employee who is bound by a mandatory employment arbitration agreement to pay the costs of arbitration and that it is an insufficient judicial response to hold that the fees may ultimately be canceled because that poses a significant risk of chilling the exercise of statutory. Here, plaintiff would be obligated to pay a deposit of $500 plus $1,200 per anticipated hearing session. Thus, the fee provision was unenforceable (*109 Cal. App. 4th 76, 93)* . For discussion of the portion of the opinion considering severance of this fee provision, see *§ 20.86[3][a]*.

- Selection of the arbitrators in accordance with the NASD or NYSE arbitration procedures would not be unconscionable. Those rules require pertinent disclosures by proposed arbitrators and give each party one peremptory challenge and unlimited challenges for cause. Further, this agreement provided that the arbitrator and the arbitration provider were subject to standards 4 through 6 of California's Ethics Standards for Neutral Arbitrators in Contractual Arbitration (*109 Cal. App. 4th 76, 93-97)* .

- Plaintiff's claim that only a lawyer or retired judge could evaluate his statutory wage claims was without authority and without merit (*109 Cal. App. 4th 76, 97)* .

- The extensive discovery procedures under NASD and NYSE provide for document production, information exchanges, and subpoenas. Further, this arbitration agreement specifically provided that all discovery would be conducted in accordance with California state court procedures, making NASD, Rule 10334(f)(2) inapplicable to this case. No substantive unconscionability finding was warranted on inadequate discovery grounds (*109 Cal. App. 4th 76, 97-100)* .

- Under both NASD and NYSE rules, the award has to be in writing, accompanied by a statement of reasons or basis of the award, and contain a summary of issues, a description of the award, and a statement of any other issues resolved. In addition, both NASD and NYSE rules require that a verbatim transcript of the proceedings be maintained. Thus there would be no insufficiency with respect to a written award (*109 Cal. App. 4th 76, 100)* .

- With regard to plaintiff's contention that NASD, rule 10335 was substantively unconscionable because it exempts injunctive relief from the arbitration agreement, and the employer is the party most likely to bring seek such relief, the court disagreed, pointing out other language in the agreements and the rules that made the obligation to arbitrate mutual (*109 Cal. App. 4th 76, 100-101)* .

The facts and procedural background of ***Fittante v. Palm Springs Motors, Inc.*** *(2003) 105 Cal. App. 4th 708, 129 Cal. Rptr. 2d 659* , and the portions of the opinion considering the application of minimum requirements to arbitration of claims under *Lab. Code § 970*, including the requirement that the employer pay all costs unique to arbitration, are discussed at *§ 20.23[3][a]*. Plaintiff also contended that the arbitration agreement was an unconscionable adhesion contract, and therefore unenforceable. The court of appeal agreed that the contract was adhesive, but, with the exception of one specific term which it found severable, held that the arbitration agreement was not unconscionable (*105 Cal. App. 4th 708, 722)* . The court said that a contract of adhesion is "a standardized contract, imposed and drafted by the party of superior bargaining strength, which relegates to the subscribing party only the opportunity to adhere to the contract or reject it" (*105 Cal. App. 4th 708, 722)* . The arbitration agreement here was contained within a standardized employment application, and was presented to plaintiff on a "take it or leave it" basis. The defendant/employer unquestionably had superior bargaining strength, and there was no opportunity to negotiate. Had plaintiff refused to sign the form, his application for employment undoubtedly would not have been considered. The employment application, including the arbitration agreement, meets the definition of an adhesion contract. The fact that a contract is one of adhesion does not, however, affect its enforceability (*105 Cal. App. 4th 708, 723)* . Rather, an adhesion contract remains fully enforceable unless (1) its provisions fall outside the reasonable expectations of the weaker party, or (2) its provisions are unduly oppressive or unconscionable (*105 Cal. App. 4th 708, 723-724)* . Plaintiff asserted both that the arbitration agreement was outside the reasonable expectations of a lay employee applicant, and that its terms are unconscionable. Plaintiff claimed that the arbitration agreement is outside the reasonable expectationsof an applicant for employment because it was vague and over broad (*105 Cal. App. 4th 708, 724)* . Plaintiff argued that the arbitration agreement's exemption for "exclusively monetary claims of less than $5,000" was vague because the term "exclusively monetary claims" was not defined, and no provisions explained whether claims of the same class could, or had to be aggregated. He also suggested that the agreement's provision for arbitration of "any dispute or controversy" requiring or allowing "resort to any court or other governmental dispute resolution forum" could be interpreted to require, e.g., workers' compensation claims or unemployment insurance claims, to be arbitrated (*105 Cal. App. 4th 708, 714-715)* . Plaintiff based his claim of overbreadth on fact that the agreement covered not only disputes between the employee and the company, but included claims relating to the employer's "owners, directors, and officers, and parties affiliated with its employee benefit and health plans" which "arise from, relate to, or have any relationship or connection whatsoever with" the employee's employment, or any other association with, the employer (*105 Cal. App. 4th 708, 715)* . The court of appeal did not dwell on plaintiff's claims of vagueness or overbreadth, saying they presented only phantasms in the present context. Plaintiff's claims in the litigation all arose unquestionably out of his employment or application for

employment with the defendant/employer. The arbitration agreement presented no issues of vagueness respecting the claims or theories plaintiff had alleged (*105 Cal. App. 4th 708, 721)* . Similarly, plaintiff's claims here were plainly within matters which could reasonably be expected to be covered by a proper employment arbitration agreement. That some hypothetical claims might be beyond the reasonable expectations of the adhering party is no reason to reject its application to a matter which is clearly within the reasonable expectations of the parties (*105 Cal. App. 4th 708, 724)* . The portion of the opinion considering unconscionability is discussed at *Ch. 20A, Arbitration: Resisting, § 20A.91[3][h]*.

Painters Dist. Council No. 33 v. Moen *(1982) 128 Cal. App. 3d 1032, 181 Cal. Rptr. 17* , involved an appeal from a trial court order confirming an arbitration award rendered in favor of a painters' union against appellant, a small painting contractor, under a collective bargaining agreement. The agreement involved was a standard-form agreement providing for arbitration of disputes. The union clearly possessed superior bargaining strength and the contractor was not in a position to reject the agreement because a nonunion job would probably have been difficult to obtain.

The court of appeal affirmed the trial court's order confirming the award in favor of the union. The court held that although the agreement was an adhesion contract, it was fully enforceable according to its terms because it was neither contrary to the reasonable expectations of the adhering party (the contractor) nor unduly oppressive or unconscionable (*128 Cal. App. 3d 1032, 1040)* . The court observed that the agreement's procedure for the resolution of disputes provided that the arbitration panel be composed of a joint union-contractor committee with equal representation from both sides. Moreover, the contractor made no showing of any actual bias, unfairness, or misconduct on the part of any of the arbitrators (*128 Cal. App. 3d 1032, 1040)* . The court stated that a balancing of the conflicting policies of a strong judicial preference for arbitration and an equally strong concern for the rights of consumers, against whom unexpected or oppressive provisions of standardized contracts are sought to be enforced, favored confirmation of the award since the procedure for resolving disputes arising under this particular contract was reasonable and fairly concluded (*128 Cal. App. 3d 1032, 1041)* .

Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc. *(1971) 20 Cal. App. 3d 668, 97 Cal. Rptr. 811* , involved a contract dispute between a former employee and employer. As a condition of employment, plaintiff was required to have been approved by the New York Stock Exchange. The application forms of the Exchange contained an agreement to arbitrate any controversies between the employee and any of the exchange employer members. After the employee sued on the former contract, the trial court denied the employer's petition to require arbitration, and the employer appealed.

In reversing the order denying arbitration, the court of appeal noted that failure to read a contract before signing it is not in itself a reason to refuse its enforcement (*20 Cal. App. 3d 668, 671)* . Against the contention that the employer could not enforce the arbitration provision because the employer was not a party to it, the court observed that the application containing the arbitration agreement was an indispensable part of the arrangements through which the plaintiff became employed by defendant. It was part of the larger transaction by which they entered into their employment relationship; therefore, there was no lack of mutuality (*20 Cal. App. 3d 668, 671-672)* . The court recognized that where the bargaining strength of contracting parties is unequal, a contractual provision may be construed to give effect to the reasonable expectations of the weaker party when necessary to avoid injury or unfair imposition, which it is shown would be the result of giving literal effect to the contract terms. In this instance, though, assuming that the contract was adhesory, if it was not shown that arbitration would be contrary to the reasonable expectations of any party or that any loss or unfair imposition would result. Thus, no basis existed to use the doctrine of adhesion contracts to avoid arbitration (*20 Cal. App. 3d 668, 672)* .

[4] Additional Authorities

[a] Arbitration Provision in Adhesion Contract Not Unenforceable If Not Contrary to Expectations of Fairness

In *Izzi v. Mesquite Country Club (1986) 186 Cal. App. 3d 1309, 231 Cal. Rptr. 315* , the court of appeal reversed the trial court's order denying arbitration under a contract claimed to be adhesive in nature. The court of appeal did not find that the contract was adhesive in nature, but noted that an adhesion contract is fully enforceable unless all or part of it falls outside the reasonable expectations of the weaker party or if it is unduly oppressive or unconscionable under applicable principles of equity (*186 Cal. App. 3d 1309, 1317)* . The court said that even if the contract was an adhesion contract, the arbitration provision was enforceable because its provisions did not appear to conflict with the reasonable expectations of an ordinary person or to be unduly oppressive or unconscionable (*186 Cal. App. 3d 1309, 1318)* .

In *Hope v. Dean Witter Reynolds Organization, Inc. (1986) 181 Cal. App. 3d 446, 226 Cal. Rptr. 439* , plaintiff stockbrokers brought suit against defendant, a member of the New York Stock Exchange, for wrongful termination of employment. In theircontracts of employment, the parties agreed to arbitrate, under the rules of the New York Stock Exchange, any controversy arising out of the employment. Plaintiffs claimed the arbitration provisions were unconscionable.

The court of appeal, while noting that the provisions were adhesive in nature, upheld their enforcement on the grounds that they met the required minimum level of integrity and did not leave plaintiffs without any realistic and fair opportunity to prevail in the arbitration (*181 Cal. App. 3d 446, 457-461)* . In upholding the validity of the arbitration provisions, the court relied heavily on the fact that the Securities Exchange Commission had approved the arbitration procedures of the Stock Exchange (*181 Cal. App. 3d 446, 461)* [*see Cohen v. Wedbush, Noble, Cooke, Inc. (9th Cir. 1988) 841 F.2d 282, 286* ; *see also §§ 20.21, 20.41*].

In *Bos Material Handling, Inc. v. Crown Controls Corp. (1982) 137 Cal. App. 3d 99, 186 Cal. Rptr. 740* , the court of appeal reversed the trial court's denial of petition to compel arbitration. The court held that the arbitration provision was enforceable even if it was part of a contract of adhesion. However, the court stated that the clauses in the arbitration agreement selecting the state of Ohio as the forum for arbitration and the laws of the state of Ohio as the applicable law might be special elements of unfair advantage rendering those provisions unenforceable. On remand, the court directed the trial court to grant an evidentiary hearing to petitioner to determine whether or not the agreement was adhesive and, if so, whether the Ohio forum comported with the reasonable expectations of the petitioner, or is unduly oppressive (*137 Cal. App. 3d 99, 108)* .

In *Carpenters 46 Northern Cal. Counties Conf. Bd. v. Valentine (1982) 131 Cal. App. 3d 534, 182 Cal. Rptr. 500* , a contractor entered into an agreement with a union to comply with certain provisions concerning wages, hours, and working conditions. The agreement provided for automatic renewal and for arbitration of any disputes arising between the parties. When the contractor failed to meet his obligations under the agreement, the union submitted the problem to the designated arbitrator. The arbitrator found for the union, and the union petitioned the trial court to confirm the arbitrator's award. The contractor contended that the agreement was a contract of adhesion and could not be enforced because it did not fall within his reasonable expectations. The trial court granted the petition, and the contractor appealed.

The court of appeal affirmed. The court said that collective bargaining agreements were not ordinary contracts; however, the court held that assuming that the doctrine in *Graham v. Scissor-Tail Inc. (1981) 28 Cal. 3d 807, 171 Cal. Rptr. 604, 623 P.2d 165* , was applicable, the agreement was not contrary to the contractor's reasonable expectations. The court found that automatic renewal provisions were common in the construction industry and that the agreement contained no option to avoid coverage by hiring nonunion labor and stated that a contract giving such an option would make an odd contract (*131 Cal. App. 3d 534, 541-542)* .

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2-20 California Points & Authorities § 20.84

§ 20.84 Compulsory Agreement to Arbitrate Employment-Related Disputes Is Enforceable

[1] FORM

THE ARBITRATION AGREEMENT IS ENFORCEABLE AND NOT AGAINST PUBLIC POLICY EVEN THOUGH IT WAS COMPULSORY THAT RESPONDENT SIGN THE AGREEMENT AS A CONDITION OF [CONTINUED] EMPLOYMENT WITH PETITIONER.

A. Compulsory Arbitration Agreement Covering Employment-Related Disputes. Neither California law nor public policy is offended by requiring an employee to waive his or her right to a jury trial as a condition of employment (*Lagatree v. Luce, Howard, Hamilton & Scripps (1999) 74 Cal. App. 4th 1105, 1127-1128, 88 Cal. Rptr. 2d 664*). Nor does the compulsory nature of such a predispute arbitration agreement render the agreement unenforceable on the grounds of coercion or for lack of voluntariness (*Lagatree v. Luce, Howard, Hamilton & Scripps (1999) 74 Cal. App. 4th 1105, 1129, 88 Cal. Rptr. 2d 664* ; *see also Craig v. Brown & Root, Inc. (2000) 84 Cal. App. 4th 416, 422, 100 Cal. Rptr. 2d. 818* ; *IBEW, AFL-CIO Local 1245 v. Citizens Telcoms. Co. (9th Cir. 2008) 549 F.3d 781, 788* ; *accord EEOC v. Luce, Forward, Hamilton & Scripps (9th Cir. 2003) 345 F.3d 742, 752-754* (*rehearing en banc*) (with respect to federal statutory claims under Title VII of the Civil Rights Act of 1964 and 1991)).

[2] Comments

[a] Use of Form

This form may be submitted in support of a petition to compel arbitration to anticipate the objection that the arbitration clause at issue was required of respondent employee as a condition of employment. There was a bill introduced in the 1999-2000 Session of the California Legislature, Assembly Bill No. 858, which would have prohibited employers from requesting or requiring employees to enter into a predispute arbitration agreement. Although that bill did not pass, and case law since that time has consistently upheld mandatory arbitration agreements as a condition of employment, counsel may wish to check to see if similar legislation has been introduced before using this form.

This form does not provide a complete memorandum but is designed to be combined with a general form of

memorandum in support of a petition to compel arbitration [*see § 20.10*]. Counsel may wish to incorporate other authorities, perhaps most appropriately those from *§ 20.83*, which set forth the general rule that an arbitration clause in an adhesion contract is not unenforceable simply because the contract is one of adhesion, those from *§ 20.23*, which set forth the minimum procedural safeguards required in an arbitration program that will address discrimination claims under California's Fair Housing and Employment Act (*Gov. Code § 12900 et seq.*, or any from *§ 20.21* or *20.22* with respect to a particular statutory claim that is involved).

[b] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, a copy of thearbitration agreement should be attached as an exhibit to the memorandum.

Although the issue addressed by this form is mainly one of law, there may be other issues with regard to which counsel will wish to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For forms of petition to compel arbitration and responses to them, as well as a procedural checklist, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

[d] Related Memoranda

For memoranda to combine with this form, regarding other matters that the papers in support of the petition may need to address, see *§§ 20.10* et seq., *20.30* et seq., *20.40* et seq., *20.60* et seq., and *20.80* et seq.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For memoranda addressing general contract principles, see Ch. 50, *Contracts* .

[3] Discussion of Authorities

[a] Compulsory Arbitration Agreement Covering Employment-Related Disputes

Lagatree v. Luce, Howard, Hamilton & Scripps *(1999) 74 Cal. App. 4th 1105, 88 Cal. Rptr. 2d 664* , represents

consolidated appeals from judgments in two suits by the same plaintiff against two former employers, each of which had terminated plaintiff's employment because plaintiff refused to sign an agreement to arbitrate all work-related disputes. Plaintiff had worked for one defendant for several years when, in 1997 that defendant presented him with an agreement to arbitrate any work-related disputes. He refused to sign the agreement and was summarily dismissed. After several months, plaintiff found work with the second defendant, which, on the first day of plaintiff's employment, asked him to sign an agreement to arbitrate all work related disputes. Plaintiff refused to sign the agreement and was told that the agreement was not negotiable and he would be fired if he did not sign it. Plaintiff declined to sign the agreement and was discharged. Plaintiff sued both defendants for wrongful termination in violation of public policy, specifically, for firing him for refusing to waive his constitutional rights to a jury trial and judicial forum, and on other grounds. The defendants demurred and the demurrers were sustained without leave to amend. Plaintiff appealed the dismissals.

The court of appeal affirmed. Based in part on ***Foley v. Interactive Data Corp.*** *(1988) 47 Cal. 3d 654, 254 Cal. Rptr. 211, 765 P.2d 373* , the court found that neither California law nor public policy is offended by requiring an employee to waive his or her right to a jury trial as a condition of employment. The right to a jury trial, although granted by the Constitution, can be waived, even when that waiver is required as a condition of employment. No substantial public policy requires a contrary result (*74 Cal. App. 4th 1105, 1127-1128)* . Even if the arbitration agreements were contracts of adhesion, the compulsory nature of the predispute arbitration agreement did not render it unenforceable on the grounds of coercion or for lack of voluntariness (*74 Cal. App. 4th 1105, 1129-1130)* . Also, an agreement that required the losing party to pay the entire cost of arbitration, was not unenforceable as against public policy, at least as of June 1997. The court was careful to point out that the public policy issue was determined as of the time plaintiff was terminated in 1997 (*74 Cal. App. 4th 1105, 1131, 1136)* . The court also held that predispute arbitration clauses imposed as a condition of employment do not constitute an invalid exculpatory clause (*74 Cal. App. 4th 1105, 1136)* .

The facts and procedural background of ***Craig v. Brown & Root, Inc.*** *(2000) 84 Cal. App. 4th 416, 100 Cal. Rptr. 2d. 818* are discussed at *§ 20.10[3][a]*. The portion of the opinion addressing unconscionability is discussed at *§ 20.23[3][a]*. In upholding the agreement, the court of appeal attributed to Armendariz v. Foundation Health Psychcare Services, Inc . *(2000) 24 Cal. 4th 83, 91, 99 Cal. Rptr. 2d 745, 6 P.3d 669* the holding that mandatory employment arbitration agreements are enforceable if the arbitration permits the employees to vindicate their statutory rights (*84 Cal. App. 4th 416, 422)* .

IBEW, AFL-CIO Local 1245 v. Citizens Telcoms. Co. *(9th Cir. 2008) 549 F.3d 781* , affirmed the district court's order granting a labor union's petition under the Labor Management Relations Act, *29 U.S.C. § 185*, to compel arbitration of a grievance over the employer's cancellation of certain medical benefits for retirees. The court rejected the employer's argument that a consent rule should apply, whereby the union must obtain the consent of retirees before arbitrating claims concerning their benefits (*549 F.3d 781, 788)* .

EEOC v. Luce, Forward, Hamilton & Scripps *(9th Cir. 2003) 345 F.3d 742* was the opinion on *rehearing en banc* of *EEOC v. Luce, Forward, Hamilton & Scripps (9th Cir. 2003) 303 F.3d 994* , and is discussed at *§ 20.21[3][f]*. The case was decided in the context of an EEOC action to challenge an employer's practice of requiring prospective employees to sign arbitration agreements which covered all claims arising from employment, including claims under several specific federal statutes. The district court believed the agreements to be prohibited as to claims under Title VII of the Civil Rights Act (*42 U.S.C. §§ 1981a, 2000e* et seq.). The Ninth Circuit Court of Appeals reversed, holding that § 118 of the 1991 Act specifically approves of arbitration as a forum for vindicating Title VII claims (*345 F.3d 742, 752-754)* .

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2-20 California Points & Authorities § 20.85

§ 20.85 Respondent Must Disprove Existence of Agreement to Arbitrate

[1] FORM

RESPONDENT HAS NOT DISPROVED THE VALIDITY AND/OR ENFORCEABILITY OF THE ARBITRATION AGREEMENT.

[*Optional*] **A. Respondent Failed to Disprove Existence or Enforceability of Arbitration Agreement.** The party seeking to compel arbitration does not have to introduce the agreement into evidence or provide the court with anything more than a copy or recitation of its terms. Under *California Rules of Court, Rule 3.1330*, petitioner need only allege the existence of an agreement and support the allegation as provided in Rule 3.1330. Once the petitioners [have] alleged that the agreement exists, the burden shifts to respondent to prove the falsity of the purported agreement (*Condee v. Longwood Management Corp (2001) 88 Cal. App. 4th 215, 219, 105 Cal. Rptr. 2d 597*).

[*Optional*] **B. Respondent Failed to Bear Burden of Showing Not All Necessary Parties Signed Arbitration Agreement.** Where respondent alleges that an arbitration agreement is not binding on any signatory until it is signed by all because it was conditioned upon execution by all parties, the signatory resisting enforcement of the agreement must affirmatively establish that the signatures of all parties were contemplated as being a condition precedent to the validity of the agreement (*Fagelbaum & Heller LLP v. Smylie (2009) 174 Cal. App. 4th 1351, 1365, 95 Cal. Rptr. 3d 252*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition to compel arbitration when the person resisting arbitration has some objection to the agreement to arbitrate, such as a claim that it was not properly authenticated, but has not introduced any evidence to support that objection. By changing "Failed to" in the title of Paragraph A to "Must" the authority may be used to anticipate a lack of evidence. Note, however, that it is fatal to fail to allege the existence of an agreement to arbitrate [*see Brodke v. Alphatec Spine, Inc. (2008) 160 Cal. App. 4th 1569, 1574-1577, 73 Cal. Rptr. 3d 554* (discussed at *§ 20A.10[3][i]*).

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in support of compelling arbitration, either alone [*see § 20.10*] or combined with a motion to stay an action [*see § 20.11*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should show that petitioner complied with *Cal. Rules of Ct., Rule 3.1330* and that respondent has produced no declaration, document, or other evidence to support it's claim that the agreement is not valid or enforceable.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Memoranda

This memorandum may be opposed by any of the applicable *authorities in § 20A.10*, which contains optional paragraphs for most of the common defects in proof of an arbitration agreement.

[3] Discussion of Authorities

[a] Respondent Failed to Disprove Existence or Enforceability of Arbitration Agreement

The plaintiff in ***Condee v. Longwood Management Corp.*** *(2001) 88 Cal. App. 4th 215, 105 Cal. Rptr. 2d 597* sued the residential care facility in which her brother suffered a fatal fall. When he was admitted to the facility, plaintiff signed the agreement for him which required him to arbitrate any disputes with the facility including actions for injury or death arising from facility's negligence. Plaintiff brought a wrongful death action alleging general negligence, negligent supervision, premises liability and medical malpractice. The trial court denied the petition to compel arbitration, finding the alleged arbitration agreement was not properly authenticated, and denying Longwood's proffer of a declaration of its custodian of records to authenticate the agreement. Defendants appealed from the denial of their petitions to compel arbitration.

The court of appeal reversed, finding that although no evidence was ever introduced to verify the signature's

authenticity, it was never challenged. *Code Civ. Proc. § 1281.2* does not require the petitioner to introduce the arbitration agreement into evidence. A plain reading of that statute indicates that as a preliminary matter the court is only required to make a finding of the agreement's existence, not an evidentiary determination of its validity. The foregoing conclusion is bolstered by former Cal. Rules of Ct., Rule 371 [*see now Cal. Rules of Ct., Rule 3.1330*], which only requires a petitioner to attach a copy of the agreement to the petition or to state its provisions relating to arbitration. Former Rule 371 [*see now* Rule 3.1330] does not require the petitioner to introduce the agreement into evidence or provide the court with anything more than a copy or recitation of its terms. Petitioner need only allege the existence of an agreement and support the allegation as provided in former Rule 371 [*see now* Rule 3.1330]. Defendants met this requirement. Once the petitioners had alleged that the agreement exists, the burden shifted to respondent to prove the falsity of the purported agreement (*88 Cal. App. 4th 215, 219)* . Once a court decides an agreement exists, it must hear and rule on any objections. Thus, it was error for the trial court to deny the petition to arbitrate on the grounds the agreement was not properly authenticated. The court of appeal remanded to permit the trial court to consider the other objections raised to the enforcement of the agreement (*88 Cal. App. 4th 215, 219)* .

[b] Respondent Failed to Bear Burden of Showing Not All Necessary Parties Signed Arbitration Agreement

In ***Fagelbaum & Heller LLP v. Smylie*** *(2009) 174 Cal. App. 4th 1351, 95 Cal. Rptr. 3d 252* , respondent alleged that the agreement to arbitrate fees and costs was unenforceable, because it was not signed by all parties. Respondent cited the rule that where the evidence shows that an arbitration agreement was conditioned upon execution by all parties, the contract is not binding on any signatory until it is signed by all. The court noted that contrary to respondent's contention, the signatory resisting enforcement of the agreement must affirmatively establish that the signatures of all parties were contemplated as being a condition precedent to the validity of the agreement (*174 Cal. App. 4th 1351, 1365)* . However, respondent cited no evidence in support of the contention that all four parties to the agreement were required to sign it, in order for it to bind respondent, and the court noted that the terms of the agreement stated that each signatory was bound individually, thereby disproving respondent's claim (*174 Cal. App. 4th 1351, 1365)* . After disagreeing with respondent's interpretation of other language of the agreement in furtherance of respondent's argument, the court ruled that respondent failed to sustain the burden of showing that he was not bound by the agreement (*174 Cal. App. 4th 1351, 1366)* .

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2-20 California Points & Authorities § 20.86

§ 20.86 Agreement May Be Enforced With Unconscionable Provision(s) Severed

[1] FORM

THE COURT HAS THE AUTHORITY TO COMPEL ARBITRATION UNDER THE AGREEMENT WHILE REFUSING ENFORCEMENT OF THE UNCONSCIONABLE [_____ (*specify, if desired, e.g.,* FORUM SELECTION)] CLAUSE.

A. The Arbitration Agreement Can Be Enforced Without Unconscionable Clause, Which Is Severable. When a single, severable provision in an arbitration agreement is unconscionable, the court has the power, under Code Civil Procedure § 1670.5 to sever the unconscionable clause [_____ (*include any specificity desired, e.g.,* such as the venue provision in this case,)] and enforce the remainder of the agreement requiring arbitration (*Little v. Auto Stiegler, Inc. (2003) 29 Cal. 4th 1064, 1082-1083, 130 Cal. Rptr. 2d 892, 63 P.3d 979* ; *Gutierrez v. Autowest, Inc. (2004) 114 Cal. App. 4th 77, 92-93, 7 Cal. Rptr. 3d 267* ; *McManus v. CIBC World Markets Corp. (2003) 109 Cal. App. 4th 76, 101, 134 Cal. Rptr. 2d 446* ; *Fittante v. Palm Springs Motors, Inc. (2003) 105 Cal. App. 4th 708, 725-727, 129 Cal. Rptr. 2d 659* ; *Bolter v. Superior Court (Harris Research, Inc.) (2001) 87 Cal. App. 4th 900, 909-911, 104 Cal. Rptr. 2d 888*).

[*Optional*] **B. Factors Supporting Severance.** Severance of a single illegal or unconscionable provision prevents the parties from gaining an undeserved benefit or suffering an undeserved detriment as a result of voiding the entire agreement, [particularly when there has been full or partial performance of the contract]. Also, severance conserves a contractual relationship if to do so would not condone an illegal scheme. If the illegality or unconscionability is collateral to the main purpose of the contract, and the illegal or unconscionable provision can be extirpated from the contract by means of severance or restriction, then severance and restriction are appropriate (*Little v. Auto Stiegler, Inc. (2003) 29 Cal. 4th 1064, 1080, 130 Cal. Rptr. 2d 892, 63 P.3d 979* ; *Gutierrez v. Autowest, Inc. (2004) 114 Cal. App. 4th 77, 92-93, 7 Cal. Rptr. 3d 267* ; *McManus v. CIBC World Markets Corp. (2003) 109 Cal. App. 4th 76, 101-103, 134 Cal. Rptr. 2d 446* ; *Fittante v. Palm Springs Motors, Inc. (2003) 105 Cal. App. 4th 708, 726, 129 Cal. Rptr. 2d 659*).

[*Optional*] **C. Provision for Arbitral Review May Be Severed.** A provision for review of an arbitration award exceeding a specified sum by a second arbitrator, while in practice, may likely be invoked only by _____ [*specify party and/or status, e.g.,* defendant/employer], is not central to the implementation of the arbitration agreement and should be severed. Severance of that single provision will not interfere with the main purpose of the arbitration agreement and will allow the parties retain the other benefits of the arbitration agreement (*Little v. Auto Stiegler, Inc. (2003) 29 Cal. 4th 1064, 1082-1083, 130 Cal. Rptr. 2d 892, 63 P.3d 979* ; *Fittante v. Palm Springs Motors, Inc. (2003) 105 Cal. App. 4th 708, 725-727, 129 Cal. Rptr. 2d 659*).

[*Optional*] **D. Provision Requiring Employee to Pay Arbitration Costs May Be Severed.** When the only substantively unconscionable part of an arbitration agreement, [signed as a requirement of employment], is a provision requiring the employee to pay certain costs of arbitration, the cost provision can be severed from the arbitration agreement and the remainder of the agreement enforced (*McManus v. CIBC World Markets Corp. (2003) 109 Cal. App. 4th 76, 101-103, 134 Cal. Rptr. 2d 446*).

[*Optional*] **E. Provision Requiring Consumer to Pay Unaffordable Fees to Initiate Arbitration Process.** When the only substantively unconscionable part of an arbitration agreement [under which a consumer seeks to vindicate unwaivable statutory rights] is a provision requiring the consumer to pay unaffordable fees in order to initiate the arbitration the court should consider severing that provision and enforcing the remainder of the arbitration agreement, [and if necessary, impose an implied agreement that no unaffordable arbitration fees will allocated to the consumer at any in point in the arbitration process] (*Gutierrez v. Autowest (2004) 114 Cal. App. 4th 77, 92-93, 96, 98-99, 7 Cal. Rptr. 3d 267*).

[*Optional*] **F. Severance of Class Arbitration Waiver Is Appropriate.** Severance is particularly appropriate in the case of class arbitration waivers because, unlike limitations on remedies or other limitations that are invalid on their face, class arbitration waivers will only be invalidated after the proper factual showing (*Gentry v. Superior Court (Circuit City Stores, Inc.) (2007) 42 Cal. 4th 443, 466, 64 Cal. Rptr. 3d 773, 165 P.3d 556*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition to compel arbitration when petitioner anticipates that some portion of the arbitration agreement may prove unconscionable to remind the court of its authority to sever the unconscionable provision and enforce the rest of the agreement. Optional Paragraph B may be used to buttress the argument for severance in general. Optional Paragraph C could be used if counsel were fairly sure (or even willing to concede) that a provision for review of the arbitration award would be held unconscionable to support the argument for its severance. Optional Paragraph D is for use when it is a provision regarding the costs of arbitration that is unconscionable and counsel wishes to have severed. Alternatively, an unenforceable cost provision can be interpreted to require the employer to pay the costs of the arbitral forum, as provided in the authority at *§ 20.23[1]*, Optional Paragraph D, which counsel may wish to incorporate in his or her memorandum.

Optional Paragraph E is for use when the cost provision sought to be severed is in a consumer contract rather than one between and employer and employee, in which case counsel may also wish to include the authority in *§ 20.23[1]*, Optional Paragraph J. Optional Paragraph F is to argue for severance of a class arbitration prohibition or waiver.

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in support of compelling arbitration, either alone [*see § 20.10*] or combined with a motion to stay an action [*see § 20.11*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should argue that to refuse enforcement to the entire agreement would be contrary to the parties' intention to resolve their conflicts through arbitration and would amount to "throwing the baby out with the bath water."

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Memoranda

For a memorandum addressing the characteristics of and tests for unconscionability in general, as well as authorities addressing instances in, and reason for which unconscionable provisions have been held not to be severable, see *Ch. 20A, Arbitration: Resisting, § 20A.91*.

[3] Discussion of Authorities

[a] The Arbitration Agreement Can Be Enforced Without Unconscionable Clause, Which Is Severable

The facts and procedural background of ***Little v. Auto Stiegler, Inc.*** *(2003) 29 Cal. 4th 1064, 130 Cal. Rptr. 2d 892, 63 P.3d 979* , and the portions of the opinion considering the application of minimum requirements to arbitration of nonstatutory, but unwaivable claims, including the continued viability, in light of *Green Tree Financial Corp. v. Randolph (2000) 531 U.S. 79, 121 S. Ct. 513, 148 L. Ed. 2d 373* , of requiring an employer in those cases to pay all costs unique to arbitration, are discussed at *§ 20.23[3][a]* and *[d]*. The portion of the opinion discussing unconscionability in general and the unconscionability of the provision for arbitral review, is discussed in *Ch. 20A, Arbitration: Resisting, § 20A.91[3][h]*. For convenience, the arbitral review provision is set forth here. The arbitration agreement provided in part that "awards exceeding $50,000.00 shall include the arbitrator's written reasoned opinion and, at either party's written request within 20 days after issuance of the award, shall be subject to reversal and remand, modification, or reduction following review of the record and arguments of the parties by a second arbitrator who shall, as far as practicable, proceed according to the law and procedures applicable to appellate review by the California Court of Appeal of a civil judgment following court trial." Plaintiff contended this provision was unconscionable. The Supreme Court unanimously agreed that it was unconscionable (*29 Cal. 4th 1064, 1072, 1079)* , but found it should be severed (*29 Cal. 4th 1064, 1083)* .

The Court began its consideration of the severance issue by reviewing the principles regarding the severance of illegal terms from an arbitration agreement. There are two reasons for severing illegal terms rather than voiding the entire contract. First, severance prevents parties from gaining undeserved benefit or suffering undeserved detriment as a result of voiding the entire agreement particularly when there has been full or partial performance of the contract. Second, the doctrine of severance attempts to conserve a contractual relationship if to do so would not condone an illegal scheme. If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. If the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then severance and restriction are appropriate (*29 Cal. 4th 1064, 1080)* . In the context of arbitration agreements, severance will not be appropriate if the agreement contains more than one unlawful provision or lacks mutuality. Multiple defects indicate a systematic effort to impose arbitration on the weaker party not simply as an alternative to litigation, but as an inferior forum that works to the stronger party's advantage. When an agreement lacks mutuality, there is no single provision a court can strike or restrict in order to remove the unconscionable taint from the agreement. Rather, the court would have to reform the contract by augmenting it with additional terms, which is not authorized by either *Civ. Code § 1670.5* (unconscionability) or *Code Civ. Proc. § 1281.2* (enforcement of arbitration agreements) (*29 Cal. 4th 1064, 1081)* . Nor do courts have any inherent power to reform contracts. Neither problem existed here: there was only a single unconscionable provision, and the contract would not need to be reformed if that provision was severed (*29 Cal. 4th 1064, 1082)* . The Court considered the argument by amicus curiae for plaintiff that incorporation of legal formalities into the arbitration agreement--its mandate that the rules of pleading and evidence be observed, that the arbitrator only rely on governing law and not informal principles of "just cause," and that traditional judicial motions such as demur and summary judgment be available to the parties--were unenforceable. The Court said there was nothing unconscionably one-sided in those provisions (*29 Cal. 4th 1064, 1082)* [*compare Crowell v. Downey Community Hospital Foundation (2002) 95 Cal. App. 4th 730, 731, 748-749, 115 Cal.Rptr. 2d 810* (discussed in Ch. 20A, *Arbitration: Resisting*, § 20A.96[3][a], legal formalities rendering arbitration agreement unenforceable)]. The Court also mentioned that it found no bad faith in defendant's inclusion of the arbitral review provision. Despite appellate courts' refusal to enforce similar provisions in *Beynon v. Garden Grove Medical Group (1980) 100 Cal. App. 3d 698, 161 Cal. Rptr. 146* (discussed in Ch. 20A, *Arbitration: Resisting*, § 20A.64[3][a]) and *Saika v. Gold (1996) 49 Cal. App. 4th 1074, 56 Cal. Rptr. 2d 922* (discussed in Ch. 20A, *Arbitration: Resisting*, § 20A.64[3][a]), the law was not so settled as to infer bad faith. The Court therefore concluded that the arbitration agreement was valid and enforceable once the unconscionable appellate arbitration provision was deleted (*29 Cal. 4th 1064, 1083)* .

The facts and procedural background of ***Gutierrez v. Autowest, Inc.*** *(2004) 114 Cal. App. 4th 77, 7 Cal. Rptr. 3d 267* are discussed in *§ 20.23[3][h]*. The court considered the arbitration agreement to impose two classes of fees: those that had to be paid before any hearing was held and those imposed only after an arbitrator had exercised discretion to allocate them to a party (*114 Cal. App. 4th 77, 90)* , and considered them separately. Finding that unaffordable fees the consumer must pay to initiate the process of arbitration of unwaivable rights are unconscionable, the court of appeal instructed the trial court to consider severing the provision requiring the consumer to post the administrative fee and enforce the remainder of the agreement (*114 Cal. App. 4th 77, 98-99)* . The portion of the opinion addressing the implied agreement to allocate costs is discussed in *§ 20.23[3][j]*. The court of appeal disagreed with the trial court's determination that it could not sever the cost provision even if that were the only unconscionable provision. *Civ. Code § 1670.5(a)* provides authority for a court to sever or limit the application of a single unconscionable clause and enforce the remainder of the contract. The court quoted from *Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 124, 99 Cal. Rptr. 2d 745, 6 P.3d 669* (*Armendariz*) that the court should look to the various purposes of the contract. If the central purpose of the contract is illegal, the contract cannot be enforced. But if the illegality is collateral to the main purpose of the contract, the illegal clause can be severed. Because the cost provision was collateral to the main purpose of the arbitration provision, which was to establish the method for resolving any disputes, it could be severed (*114 Cal. App. 4th 77, 92)* . Because the plaintiffs did not argue that any provision of the agreement other than the cost provision was unconscionable, they had waived any argument that multiple defects prevent severance. The court of appeal reiterated from *Armendariz* that a single unconscionable provision is unseverable only if it was drafted in bad faith, and directed the trial court on remand to determine whether the provision requiring

the plaintiffs to pay substantial administrative fees was drafted in bad faith, and then, exercise its discretion to sever the provision or not (*114 Cal. App. 4th 77, 93)* .

The facts and the procedural background of ***McManus v. CIBC World Markets Corp.*** *(2003) 109 Cal. App. 4th 76, 134 Cal. Rptr. 2d 446* , and the portion of the opinion addressing the enforceability of the arbitration provisions, are discussed at *§ 20.83[3][a]*. The court noted, citing *Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 107-108, 110-111, 113, 99 Cal. Rptr. 2d 745, 6 P.3d 669* (discussed at *§ 20.23[3][a]* and *[d]*), that it is unlawful to require an employee who is bound by a mandatory employment arbitration agreement to pay the costs of arbitration and that it is an insufficient judicial response to hold that the fees may ultimately be canceled because that poses a significant risk of chilling the exercise of statutory. Here, plaintiff would be obligated to pay a deposit of $500 plus $1,200 per anticipated hearing session. Thus, the fee provision was unenforceable (*109 Cal. App. 4th 76, 93)* . Considering severance of the unconscionable costs provision, the court of appeal noted that an agreement to arbitrate may be enforced if the unconscionable provisions can be severed from the agreement. The overreaching inquiry in such cases is whether the interests of justice will be furthered by severance. Courts look to the purposes of the contract. If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. If the illegality is collateral to the main purpose of the contract, severance is appropriate (*109 Cal. App. 4th 76, 101)* . Although the arbitration provision here was procedurally unconscionable because plaintiff was required to execute it as a condition of employment, the arbitration agreement was mandated by federal and state law (*109 Cal. App. 4th 76, 101)* . The only substantively unconscionable portion of the agreement at the time of execution was the provision that plaintiff be required to pay prohibited costs (*109 Cal. App. 4th 76, 101-102)* . Thus, the arbitration agreement was not so "permeated" with unconscionable provisions that it could not be saved. The court ordered that the unconscionable provision requiring payment of the fees be severed from the arbitration agreement and the remainder of the agreement enforced (*109 Cal. App. 4th 76, 102-103)* .

The facts and procedural background of ***Fittante v. Palm Springs Motors, Inc.*** *(2003) 105 Cal. App. 4th 708, 129 Cal. Rptr. 2d 659* , and the portions of the opinion considering the application of minimum requirements to arbitration of claims under *Lab. Code § 970,* including the requirement that the employer pay all costs unique to arbitration, are discussed at *§ 20.23[3][a]*. The portion of the opinion discussing unconscionability in general and the unconscionability of the appeal provision is discussed in *Ch. 20A, Arbitration: Resisting, § 20A.91[3][h]*. For convenience, the appeal provision is set forth here. It provided that "at either party's request, awards exceeding $50,000.00 shall be subject to reversal, modification, or reduction following review of the record and arguments of the parties by a second arbitrator who shall, as far as practicable, proceed according to the law and procedures applicable to appellate review by the California Court of Appeal of a civil judgment following court trial" (*105 Cal. App. 4th 708, 722-723)* . The court of appeal found this appeal provision unconscionable (*105 Cal. App. 4th 708, 724)* , but found it could be severed and the remainder of the agreement given effect (*105 Cal. App. 4th 708, 725-727)* . The court of appeal set forth part of *Civ. Code § 1670.5(a)*: If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result. There are two reasons for severing illegal terms rather than voiding the entire contract (*105 Cal. App.4th 708, 725)* . First, it prevents parties from gaining undeserved benefit or suffering undeserved detriment as a result of voiding the entire agreement, particularly when there has been full or partial performance of the contract. Second, the doctrine of severance attempts to conserve a contractual relationship if to do so would not be condoning an illegal scheme. Both these policies are better served here by severance, rather than invalidation of the entire agreement (*105 Cal. App. 4th 708, 726)* . The balance of the provisions in the arbitration agreement were not unduly one-sided, so as to betray merely a desire to maximize advantage to the employer at the expense of the employee. Both parties were bound to the same rules, procedures, limits, advantages and disadvantages of arbitration generally. The appeal clause affects only a post-award proceeding, not the general conduct of the arbitration itself. The court held the appeal clause to be severable from the remainder of the arbitration agreement (*105 Cal. App. 4th 708, 727)* .

Plaintiffs in ***Bolter v. Superior Court (Harris Research, Inc.)*** *(2001) 87 Cal. App. 4th 900, 104 Cal. Rptr. 2d 888* , were franchisees of defendant's "Chem-Dry" dry cleaning franchises. When they entered into their franchise agreements, defendant was headquartered in California. Later, headquarters moved to Utah and the agreements were modified to require arbitration of any disputes in Utah. The American Arbitration Association in Salt Lake City believed it had the authority to have an arbitrator determine the issue of arbitrability. Petitioners applied for a temporary restraining order and OSC in the trial court, seeking to stay the arbitration proceedings. Respondent filed a motion to stay the lawsuit pending resolution of the arbitration. The trial court stayed the arbitration until it could hold hearings to determine whether arbitration should be compelled, and if so, where. On April 18, 2000, the court issued an order granting the motion to compel arbitration in Utah and dismissing the case. The court found that "The arbitration provisions in the franchise agreements, even if adhesive, are not unconscionable and do not impose an unreasonable burden on [petitioners]." Petitioners filed a writ petition, and the court of appeal temporarily stayed the arbitration proceedings.

The court of appeal issued a writ directing the superior court to issue a new order striking the unconscionable clauses delineated and dissolved its previous stay order. The court reiterated that arbitration agreements are not subject to a different standard than other contracts. Under Code Civ. Proc. § 1670.5, if a contract, or clause of a contract, is unconscionable, the court may refuse to enforce it (*87 Cal. App. 4th 900, 909)* . The court set forth the characteristics of unconscionability, and noted that while courts have defined the substantive element in various ways, it traditionally involves contract terms that are so one-sided as to "shock the conscience," or that impose harsh or oppressive terms. In order to assess the reasonableness of this contract's "place and manner" restrictions, the respective circumstances of the parties become relevant. Respondent is a large international corporation and petitioners are small "Mom and Pop" franchisees located in California. Under the circumstances, the "place and manner" terms are unduly oppressive: the agreement requires franchisees wishing to resolve any dispute to close down their shops, pay for airfare and accommodations in Utah, and absorb the increased costs associated in having counsel familiar with Utah law (*87 Cal. App. 4th 900, 910)* . To rub salt in the wound, the agreement provides franchisees are precluded from consolidating arbitrations to share these increased costs among themselves. The potential to recoup expenses with a favorable verdict is limited by the restriction against exemplary or punitive damages. Although finding the "place and manner" provisions unconscionable, the court disagreed with petitioners that the agreement as a whole was unenforceable. That would be throwing the baby out with the bath water, the court said. Instead, the unconscionable provisions can be severed and the rest of the agreement enforced (*87 Cal. App. 4th 900, 910-911)* .

[b] Severance of Class Arbitration Waiver Is Appropriate

The facts and procedural background of ***Gentry v. Superior Court (Circuit City Stores, Inc.)*** *(2007) 42 Cal. 4th 443, 64 Cal. Rptr. 3d 773, 165 P.3d 556* , are discussed in *Ch. 20A, Arbitration: Resisting, § 20A.22[3][d]*. For the guidance of the trial court on remand, the Supreme Court noted that if the trial court invalidated the class arbitration waiver on public policy grounds and did not invalidate the arbitration agreement altogether for unconscionability, the parties could proceed to class arbitration or, if they wished, have the matter brought in court. The Court then added that severance is particularly appropriate in the case of class arbitration waivers because, unlike limitations on remedies or other limitations that are invalid on their face, class arbitration waivers will only be invalidated after the proper factual showing. The presence of a class arbitration waiver in an employee arbitration agreement therefore does not by itself indicate a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage (*42 Cal. 4th 443, 466)* .

[4] Additional Authorities

[a] Provision for Arbitral Review May Be Severed

The court of appeal in ***Finley v. Saturn of Roseville*** *(2004) 117 Cal. App. 4th 1253* , reversed a wrongful termination award and judgment for defendant on the ground that it had no jurisdiction to entertain a motion for arbitral review

before a second arbitrator. The determination whether plaintiff's request for that review was untimely should have been heard by the second arbitrator (*117 Cal. App. 4th 1253, 1260)* . The arbitration agreement provided that any award in excess of $50,000 could be reviewed by a second arbitrator at the option of either party who so requested within 10 days of the issuance of the award. The unpublished portion of the opinion noted that the initial arbitrator struck the $50,000 cap and ruled that either party could request review of an award of any amount. The court of appeal's only mention of the $50,000 cap in the published portion of the opinion was to say in its introduction that in the unpublished portion of the opinion, it concluded that plaintiff was not harmed by an unenforceable provision of the arbitration agreement (*117 Cal. App. 4th 1253, 1255)* .

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2-20 California Points & Authorities § 20.87

§ 20.87 Provision for Review by Second Arbitrator Is Valid and Enforceable

[1] FORM

THE PROVISION FOR REVIEW OF THE INITIAL AWARD BY A SECOND ARBITRATOR FOR ERRORS OF LAW [AND SUBSTANTIAL EVIDENTIARYSUPPORT] IS REASONABLE AND ENFORCEABLE.

A. Provision for Review by Second Arbitrator Is Valid and Enforceable. The point of review of an initial arbitration award by a second arbitrator is usually to do what a trial court or appellate court could not do: review the award for errors of law [and see whether it is supported by substantial evidence]. This contractual review for errors of law is not prohibited by the statutory standards for vacating an award. If there is no significant delay in implementing a review by a second arbitrator and the party who drafted the arbitration agreement pays the cost of that review, it is not unconscionable (*Cummings v. Future Nissan (2005) 128 Cal. App. 4th 321, 330-331, 27 Cal. Rptr. 3d 10* ; *see Code Civ. Proc. § 1286.2*).

[2] Comments

[a] Use of Form

This form may be used in support of a petition to compel arbitration if petitioner anticipates a challenge that a provision for review of the award by a second arbitrator is unconscionable or invalid.

This form is not intended as a complete memorandum, but should be combined with the memoranda in *§§ 20.10, 20.11,* and any others applicable to the particular situation.

As a tactical matter, counsel may wish to reserve these points for oral argument or for a reply memorandum. In deciding whether to reserve these arguments, counsel should consider local court rules and practice, as well as whether the moving party would be expected to raise these points in initial moving papers, to avoid the possibility of losing the opportunity to raise them.

[b] Argument

Counsel should add argument linking the points in this form to the facts of the case. For example, the argument might emphasize that the party who drafted the agreement is paying the costs of the second arbitrator and that the provision for arbitral review is truly mutual.

It is advisable for counsel to submit cognizable evidence in support of factual statements by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Memoranda

For a memorandum that may be used in an appropriate case to oppose this form on the ground that the provision for review by a second arbitrator is unconscionable, see *Ch. 20A, Arbitration: Resisting, § 20A.91*, Optional Paragraph H.

[3] Discussion of Authorities

[a] Provision for Review by Second Arbitrator Is Valid and Enforceable

Cummings v. Future Nissan *(2005) 128 Cal. App. 4th 321, 330-331, 27 Cal. Rptr. 3d 10* involved arbitration under a two-tiered procedure contained in plaintiff's employment contract. The second-tier provided for review of the initial award by a second arbitrator who would, "as far as practicable, proceed according to the law and procedures applicable to appellate review by the California Court of Appeal of a civil judgment following [a] court trial." Plaintiff sued for sexual harassment and wrongful termination, alleging that her dismissal was in retaliation for reporting both the sexual harassment and a co-worker's fraudulent practice of overstating vehicle values in loan applications. The initial arbitrator awarded plaintiff $159,000 for dismissal in violation of public policy, based on reporting the co-worker's fraudulent scheme, but found against her on all other claims. The defendant moved the arbitrator for a modification of the award, which was eventually denied. While that modification motion was pending, plaintiff petitioned the trial court to confirm the initial arbitration award, claiming that the provision for a second level of arbitral review was unconscionable. The trial court denied the petition to confirm as premature, and found nothing in the second-level review to be unconscionable, as long as the defendant bore the costs of the review and it was completed within a reasonable time. The second arbitrator reversed the award for the plaintiff on the legal ground that the public policy she identified was not an issue of such general public importance as to entitle her to damages for a wrongful dismissal in retaliation for her reporting the violation. The defendant moved to confirm the award, and plaintiff to vacate it. The trial court confirmed

the award, and plaintiff appealed, without waiting for a judgment to be entered on the award.

The court of appeal affirmed, agreeing there was nothing unconscionable about the second level review and that the parties could, by contract, invest a second arbitrator with a broader standard of review than a court could apply to the initial award (*128Cal. App. 4th 321, 323, 332)* . The court of appeal treated the notice of appeal as premature and considered the merits of the appeal (*128 Cal. App. 4th 321, 327)* . The court of appeal first found that plaintiff had forfeited the issue of unconscionability in the arbitration clause by failing to raise it in her initial opposition to arbitration. The court found plaintiff's argument that the second arbitrator review clause did not become an issue until after the final arbitration award was entered unpersuasive. A party who is aware of a basis for finding the arbitration process invalid must raise its objection at the outset, or as soon as they learn of it, so that prompt judicial resolution may take place before wasting the time of the adjudicator(s) and the parties. A party who participates in arbitration and does not raise the invalidity until a petition to confirm or vacate the award has forfeited the right to contest the arbitration process at that stage. Any other result would foster gamesmanship and allow waste of time and resources (*128 Cal. App. 4th 321, 328-330)* . The court of appeal agreed with the trial court that almost all the delay was attributable to the plaintiff, and the defendant paid the costs of arbitration. Thus, there was no basis to any claim of unconscionability (*128 Cal. App. 4th 321, 330-331)* . Plaintiff also argued that *Moncharsh* prohibited review for errors of law [*Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1, 10 Cal. Rptr. 2d 183, 832 P.2d 899]* . Again, the court of appeal disagreed, explaining that the second arbitrator was still and arbitrator, not a judge, and that *Moncharsh* has no application to a contractually specified standard of review of the initial arbitration award. In fact, there would be little point to an arbitral review if the second arbitrator could not revisit the questions of law in the initial award (*128 Cal. App. 4th 321, 331)* .

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2-20 California Points & Authorities § 20.88

§ 20.88 Foreign Law Governs This Contract and Renders Class Action Waiver Enforceable

[1] FORM

THE CHOICE OF LAW PROVISION IN THE ARBITRATION AGREEMENT IS ENFORCEABLE AND RENDERS THIS PROHIBITION ON CLASSWIDE ARBITRATION ENFORCEABLE

A. Foreign Law Governs This Contract and Renders Class Action Waiver Enforceable. Under the law of _____ [*state whose law is provided by contract at issue to govern*], class action waivers are enforceable and not unconscionable even in consumer adhesion contracts. _____ [*Name of state whose law governs*] law governs this dispute because the contract so provides and because, under traditional conflicts analysis, _____ [*name of state whose law governs*] has a substantial relationship to the parties and/or their transaction in that _____ [*describe connection, e.g,* defendant is headquartered there and all payments are processed there]. Even assuming, arguendo, that _____ [*name of state whose law governs*]'s law is contrary to a fundamental policy of California, _____ [*name of state whose law governs*] has a materially greater interest than California in determination of the issue because _____ [*specify, e,g.,* the claims are asserted only under Delaware law and none under California law, the putative class is a nationwide one, not a California one, and defendant is domiciled in Delaware] (*Discover Bank v. Superior Court (Boehr) (2005) 134 Cal. App. 4th 886, 889-895, 36 Cal. Rptr. 3d 456* ; *see* Restatement Second of Conflict of Laws, § 187(2)).

[2] Comments

[a] Use of Form

This form may be used to anticipate or rebut a claim that a contractual prohibition on classwide arbitration is unconscionable and unenforceable when the arbitration agreement contains a choice of law provision designating a foreign law under which the class arbitration prohibition would be enforceable.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, the argument should show that the state whose law is designated by the contract has a substantial relationship to the parties or their transaction, and/or that there is some other reasonable basis for the parties' choice of law as well as that the state whose law is designated by the contract has a materially greater interest than California in the determination of the issue.

It is advisable for counsel to submit evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file (including verified pleadings), or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied if plaintiff-respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement)].

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For discussion and forms relating to class actions, and the validity of class action prohibitions in general, see California Forms of Pleading and Practice, Ch. 120, *Class Actions* .

[d] Related Memoranda

For a complete form of authorities supporting a petition to compel arbitration in which this form may be included, see *§ 20.10*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion andgeneral forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memorandum in this form is in opposition to that in Ch. 20A, *Arbitration: Resisting,* § 20A.91, Optional Paragraph I.

[3] Discussion of Authorities

[a] Foreign Law Governs This Contract and Renders Class Action Waiver Enforceable

Discover Bank v. Superior Court (Boehr) *(2005) 134 Cal. App. 4th 886, 36 Cal. Rptr. 3d 456* , is the opinion rendered by the court of appeal on remand from the California Supreme Court, which, after deciding that the classwide arbitration prohibition in the credit card agreement would likely be unconscionable under California law [*see Discover Bank v. Superior Court (Boehr) (2005) 36 Cal. 4th 148, 162-163, 172-174, 30 Cal. Rptr. 3d 76, 113 P.3d 1100* (discussed in *Ch. 20A, Arbitration: Resisting, 20A.91[3][i]*)], charged the court of appeal to decide whether the contractual choice of Delaware law should be respected in determining the enforceability of a class action waiver. Plaintiff did not allege any violations of California substantive law, sued on behalf of a putative nationwide class, and alleged claims for breach of contract and violation of the Delaware Consumer Fraud Act, based on Discover Bank's imposition of late fees on payments that were received on the payment due date but after Discover Bank's undisclosed

1:00 p.m. deadline. The court of appeal concluded that the parties' choice of Delaware law should be respected, and that under Delaware law, the class action waiver was enforceable. Therefore, the court of appeal granted the petition to compel arbitration on an individual basis (*134 Cal. App. 4th 886, 889, 898)* .

Under California law, the enforcement of contractual choice-of-law provisions, including those in consumer adhesion contracts, is governed by section 187, subdivision (2) of the Restatement Second of Conflict of Laws (*134 Cal. App. 4th 886, 890*). Under Restatement § 187(2), the court first determines either: (1) whether the chosen state has a substantial relationship to the parties or their transaction, or (2) whether there is any other reasonable basis for the parties' choice of law. If neither of these tests is met, that is the end of the inquiry, and the court need not enforce the parties' choice of law. However, if either test is met, the court must next determine whether the chosen state's law is contrary to a fundamental policy of California. If there is no such conflict, the court must enforce the parties' choice of law. If there is a fundamental conflict with California law, the court must then determine whether California has a materially greater interest than the chosen state in the determination of the particular issue. If California has a materially greater interest than the chosen state, the choice of law will not be enforced. Discover Bank was domiciled in Delaware, and a Delaware required credit plan be governed by Delaware law. Thus, there was no reason to deny either that Delaware had a substantial relationship to the parties or that there was another reasonable basis for the contractual choice of Delaware law enforced (*134 Cal. App. 4th 886, 891*). Under Delaware law, the class action waiver was enforceable and not unconscionable (*134 Cal. App. 4th 886, 892-893*). The court did not determine whether enforcement of the class action waiver would be contrary to a fundamental policy of California (*134 Cal. App. 4th 886, 894*). Even assuming, arguendo, that enforcement of the waiver would be contrary to a fundamental policy of California, the court of appeal concluded that California did not have a materially greater interest in determination of the issue than Delaware because the claims asserted were under Delaware law and none under California law, the putative class was a nationwide one, not a California one, and defendant was domiciled in Delaware. Delaware's interest was demonstrably greater than California's (*134 Cal. App. 4th 886, 895*).

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2-20 California Points & Authorities § 20.89

§ 20.89 Arbitration Claim Is Not Subject to Motion to Strike Pursuant to Code of Civil Procedure Section 425.16

[1] FORM

THE ARBITRATION CLAIM, FILED ONLY IN THE ARBITRAL FORUM, IS NOT A PLEADING OR COMPLAINT WITHIN THE MEANING OF SECTION 425.16 OF THE CODE OF CIVIL PROCEDURE AND THUS CANNOT BE STRIKEN UNDER AUTHORITY OF THAT SECTION.

A. Arbitration Claim Is Not Subject to Motion to Strike Pursuant to *Code of Civil Procedure Section 425.16*. An arbitration claim filed only in an agreed arbitral forum and not asserted by the claimant in any complaint, cross-complaint or petition filed in court is not a "complaint" within the meaning of *Section 425.16 of the Code of Civil Procedure*. Thus, Section 425.16 does not authorize a superior court to grant a motion to strike an arbitration claim filed only in an agreed arbitral forum and not asserted by the claimant in any complaint, cross-complaint or petition filed in court (*Sheppard v. Lightpost Museum Fund (2006) 146 Cal. App. 4th 315, 319, 323-324, 52 Cal. Rptr. 3d 821*).

[2] Comments

[a] Use of Form

This form may be used to oppose a motion to strike an arbitration claim filed only in an arbitral forum and not in any court proceeding on the ground that *Code Civ. Proc. § 425.16* does not extend to arbitration claims. This form is not intended to be a complete memorandum. Counsel should combine it with authority relating to the particular procedural context, such as opposition to a motion to strike. See Ch. 160, *Motions to Strike* .

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, the argument must show that the arbitration claim is just that and has been filed only in the arbitral forum specified in the parties' contract and not in any judicial proceeding. It is advisable for counsel to submit evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file (including verified pleadings),

or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied if plaintiff-respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement)].

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleadings and Practice Chapters

For a forms and discussion relating to motions to strike pursuant to *Code Civ. Proc. § 425.16*, see California Forms of Pleading and Practice, Ch. 375, *Motions to Strike* (Matthew Bender).

[d] Related Memoranda

For discussion and forms regarding motions to strike, see Ch. 160, *Motions to Strike* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Arbitration Claim Is Not Subject to Motion to Strike Pursuant to Code of Civil Procedure Section 425.16

Sheppard v. Lightpost Museum Fund *(2006) 146 Cal. App. 4th 315, 52 Cal. Rptr. 3d 821* , arose out of an employment dispute. Plaintiff claimed to have been wrongfully terminated. Defendants claimed plaintiff had breached non-disclosure clauses in the employment agreements. The employment agreements provided for binding arbitration before Christian Dispute Resolution Professionals, Inc. (CDRP) of any dispute that arose out of, or related to the agreements, or the breach thereof, or otherwise between the parties. Plaintiff's employment was terminated in September 2003. His wrongful termination claim and defendants' claims of breach of contract and for declaratory relief were submitted to CDRP for binding arbitration in 2004. Defendants asserted that plaintiff had violated the agreements' nondisclosure clauses. The arbitrator awarded no relief to any party. In April, 2005, defendants demanded another arbitration because they claimed plaintiff, after the 2004 arbitration, had turned over confidential documents and testified about confidential information in arbitration proceedings in which he was not a party, and had expressly stated that he was not bound by the nondisclosure clauses. They sought injunctive relief to force plaintiff to return company documents and to immediately stop releasing confidential information. Plaintiff did not file a response with CDRP, but filed a complaint alleging tort causes of action and seeking declaratory relief regarding his right to testify in certain legal actions. Plaintiff also alleged that defendants were attempting to obtain a prior restraint on his constitutional right of free speech be precluding him from writing a book in violation of *Code of Civ. Proc. § 425.16*. Plaintiff filed a special motion to strike the arbitration claims pending before CDRP pursuant to *Code of Civ. Proc. § 425.16*. Defendants opposed that motion, demurred to the tort causes of action, and moved to compel arbitration, claiming that plaintiff's declaratory relief cause of action was identical to the claim pending in arbitration. Defendants did not seek to compel arbitration of their own claim previously asserted in their arbitration demand. Defendants' opposition to the motion to strike was based on the fact that there was no cause of action pending against plaintiff in the court and the arbitration demand was not before the court. The court ruled that it had jurisdiction to address the motion to strike and considered the arbitration claim to have two parts: one part was that plaintiff possess confidential documents that

defendants had a right to have returned, and other part was that plaintiff had disclosed confidential information at arbitration hearings without a subpoena and was writing a book containing confidential information. The court ruled that the first part of the arbitration claim, which was not part of defendants' motion to compel, was subject to arbitration, but the other part of the arbitration claim, which had never been asserted in a complaint, cross-complaint, or petition filed in court, was within the court's jurisdiction under Section 425.16. The trial court granted the motion to strike as to the second part of the claim but denied it as to he first part. Defendants appealed.

The court of appeal reversed, finding that *Code of Civ. Proc. § 425.16* does not authorize a superior court to grant a motion to strike an arbitration claim filed only in an agreed arbitral forum and not asserted by the claimant in any complaint, cross-complaint or petition filed in court (*146 Cal. App. 4th 315, 319, 323-324)* . The court of appeal began by noting that the objective of statutory interpretation is to ascertain and effectuate legislative intent and that Section 425.16 expressly targeted abuse of the judicial process [*Code of Civ. Proc. § 425.16(a)*] (*146 Cal. App. 4th 315, 322, 323)* . Section 425.16 does not expressly make arbitration claims asserted only in an arbitral forum subject to a motion to strike. The court discussed the word "includes" in *Code of Civ. Proc. § 425.16(h)* defining "complaint" to include cross-complaints and petitions, saying that while "includes" is ordinarily a word of enlargement and not of limitation (*146 Cal. App. 4th 315, 322)* , enlargement must be limited to items similar in nature and scope. In this case that would be pleadings filed in courts to initiate judicial proceedings. Complaints, cross-complaints and petitions are *pleadings* which are filed in *courts* to initiate *judicial* proceedings [*Code Civ. Proc. §§ 22, 420, 422.10*]. Arbitration claims filed only in an arbitral forum, while in some ways similar to pleadings, are very different because they are not filed in *courts* and they do not initiate *judicial* proceedings. These distinctions indicate that the Legislature did not intend to include arbitration claims within the term "complaint." In addition, Section 425.16's timing provisions are restricted to terms that are exclusive to actions in court (*146 Cal. App. 4th 315, 323)* . The court concluded that the terms of Section 425.16could not be reconciled with a legislative intent to extend it to arbitration claims filed only in private nonjudicial forums. Thus, the Legislature did not authorize superior courts to strike arbitration claims filed only in arbitral forums under Section 425.15 (*146 Cal. App. 4th 315, 323-324*). Nor could the motion to strike depend for its validity on defendants' motion to compel arbitration. The motion to strike targeted only defendants' arbitration claim, which had been asserted only in the arbitral forum and not as part of a complaint, cross-complaint or petition filed in court. That claim was not subject to Section 425.16. Thus, the superior court erred in partially granting the motion to strike (*146 Cal. App. 4th 315, 324*).

California Points & Authorities

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20 ARBITRATION: COMPELLING
PART II. FORMS
D. Negating Defenses to Arbitration

2-20 California Points & Authorities § 20.90

§ 20.90 Enforcement of Unconscionable Arbitration Clause in Credit Card Agreement Cannot Be Enjoined Under California Legal Remedies Act (Civ. Code § 1750 et seq.)

[1] FORM

THE ISSUANCE OF A CREDIT CARD IS NOT WITHIN THE PURVIEW OF THE CALIFORNIA LEGAL REMEDIES ACT. THUS, THE ALLEGEDLY UNCONSCIONABLE ARBITRATION PROVISION IN THE CARDHOLDER AGREEMENT CANNOT BE ENJOINED AS A DECEPTIVE PRACTICE UNDER THAT ACT.

A. Enforcement of Unconscionable Arbitration Clause in Credit Card Agreement Cannot Be Enjoined Under California Legal Remedies Act (*Civ. Code § 1750 et seq.*). The California Legal Remedies Act (CLRA; *Civ. Code § 1750 et seq.*) applies to transactions intended to result, or which do result, in the sale or lease of goods or services to any consumer. The CLRA does not regulate an extension of credit separate and apart from a sale, which is all that is involved in the mere issuance of the credit card and all that is at issue here. Thus, enforcement of the allegedly unconscionable arbitration clause in the cardholder agreement cannot be enjoined as a deceptive practice (*Berry v. American Express Publishing Co. (2007) 147 Cal. App. 4th 224, 228, 233, 54 Cal. Rptr. 3d 91*).

[2] Comments

[a] Use of Form

This form may be used to support a demurrer or otherwise oppose an attempt to enjoin an allegedly unconscionable arbitration provision in a credit card agreement as a deceptive practice under the California Legal Remedies Act (CLRA; *Civ. Code § 1750 et seq.*). The ground of opposition is that the issuance of a credit card, apart from the sale or lease of a good or service, is not within the purview of the CLRA. This form is not intended to be a complete memorandum. Counsel should combine it with authority relating to the particular procedural context is which the issue is being litigated, such as demurrers. See Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, the argument must show that only an extension of credit is at issue, not the sale or lease of a good or service. It is advisable for counsel to submit evidence in support of factual statements by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file (including verified pleadings), or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied if plaintiff-respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement)].

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleadings and Practice Chapters

For discussion and forms regarding demurrers, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

For a forms and discussion relating the California Legal Remedies Act, see California Forms of Pleading and Practice, Ch. 504, *Sales: Consumers Legal Remedies Act* .

[d] Related Memoranda

For discussion and forms regarding demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Enforcement of Unconscionable Arbitration Clause in Credit Card Agreement Cannot Be Enjoined Under California Legal Remedies Act (Civ. Code § 1750 et seq.)

Plaintiff cardholder in ***Berry v. American Express Publishing Co.*** *(2007) 147 Cal. App. 4th 224, 54 Cal. Rptr. 3d 91* , sought to enjoin enforcement of an allegedly unconscionable arbitration provision in the cardholder agreement with defendants in accordance with the California Legal Remedies Act (CLRA; *Civ. Code § 1750 et seq.*). The arbitration clause prohibited class action relief. Defendants demurred to the complaint on the ground that the CLRA applied only to transactions intended to result or which do result in the sale or lease of goods or services to any consumer, not an extension of credit separate and apart from a sale, which is what defendant contendedwas involved here. The trial court agreed and sustained the demurrer. Plaintiff did not request leave to amend or demonstrate that he could amend the complaint to state a cause of action, so the action was dismissed. Plaintiff appealed.

The court of appeal affirmed (*147 Cal. App. 4th 227, 233-234)* , agreeing with defendants that the issuance of a credit card was not a transaction intended to result or which did result in the sale or lease of goods or services to any consumer and thus not within the purview of the CLRA *(147 Cal App. 4th 224, 228)* . *Civ. Code § 1770(a)(19)* makes it an unlawful and deceptive act to insert an unconscionable provision in a consumer contract (*147 Cal. App. 4th 224, 228)* . The case was one of first impression and the court of appeal relied on the definitions within the CLRA and on the

Legislative history. The credit card, though tangible, was not a "good" within the meaning of *Civ. Code § 1761(a)* (*147 Cal. App. 4th 224, 229)* . Nor is the extension of credit, separate and apart from a specific purchase or lease of a good or service, a "service" covered by the CLRA *(147 Cal. App. 4th 224, 229-230, 232)* . The CLRA was intended to stop deceptive practices. Although earlier drafts included "credit" and "money" within the things sought by a person it defined as a consumer, the final version omitted them (*147 Cal. App. 4th 224, 230)* . Courts must not interpret a statute to include terms the Legislature deleted from earlier drafts. Thus, the deletion of the terms "money" and "credit" from CLRA's definition of consumer indicated that the court of appeal should not stretch the CLRA to include extensions of credit unrelated to the purchase of any specific good or service. The court distinguished cases relied on by plaintiff to allow construction of a statute to include matters apparently deleted within its scope (*147 Cal. App. 4th 224, 231)* . Earlier drafts of CLRA gave standing to any consumer "who *obtains credit*, or purchases or leases, or agrees to purchase or lease, goods or services primarily for personal, family, or household purposes, and who thereby suffers any damage." That terminology was not used in the final version [*see Civ. Code § 1780*] (*147 Cal. App. 4th 224, 232)* . Plaintiff claimed that *Discover Bank v. Superior Court (Boehr) (2005) 36 Cal. 4th 148, 30 Cal. Rptr. 3d 76, 113 P.3d 1100* (*Discover Bank* discussed in *Ch. 20A, Arbitration: Resisting, § 20A.91[3][i]*) acknowledged that CLRA covers credit cards, but the court of appeal pointed out that *Discover Bank* expressly recognized that a cause of action under CLRA had not been alleged [*Discover Bank v. Superior Court (Boehr) (2005) 36 Cal. 4th 148, 160, 30 Cal. Rptr. 3d 76, 113 P.3d 1100]* . The court of appeal concluded that neither the express text of CLRA nor its legislative history supported the notion that credit transactions separate and apart from any sale or lease of goods or services are covered under the Act. Thus, the trial court did not err in sustaining the demurrer (*147 Cal. App. 4th 224, 233)* .

California Points & Authorities

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20A ARBITRATION: RESISTING

2-20A California Points & Authorities 20A.syn

§ 20A.syn Synopsis to Chapter 20A: ARBITRATION: RESISTING

§ 20A.01 Scope of Chapter

§ 20A.02 Governing Law

§ 20A.03 How to Use the Forms in This Chapter

[1] Page Limits on Memoranda

[2] Using the Forms to Build a Draft Memorandum

§ 20A.04 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

[2] Related Points and Authorities Chapters

§§ 20A.05-20A.09 [Reserved]

§ 20A.10 Issue Is Not One Required by Agreement or Statute to Be Arbitrated

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Controversy Not to Be Arbitrated If Not Covered by Arbitration Agreement

[b] Inability to Compel Arbitration of Issue Not Required by Agreement or Statute to Be Arbitrated

[c] Procedure Specified in Agreement at Issue Is Not Arbitration

[d] Court Determines Whether There Is Duty to Arbitrate

[e] Parties Have Not Mediated as Contract Requires Before Arbitration

[f] Only Class Representative Currently Before Court Did Not Sign Arbitration Agreement

[g] Acknowledgement of Receipt Is Not Agreement to Arbitrate

[h] Respondent Will Be Entitled to Attorney's Fees and Costs

[i] Petitioner Did Not Allege Existence of Agreement to Arbitrate

[j] Statute Mandating Arbitration Is Unconstitutional

[k] Arbitration Agreement Was Not Signed By Necessary Parties

[l] Attorney at Law Did Not Have Authority to Bind Client and Client Did Not Ratify or Consent to Agreement

[m] Petition Did Not Plead and Prove Request or Demand for Arbitration Pursuant to and Under Terms of Agreement

[4] Additional Authorities

[a] Controversy Not to Be Arbitrated If Not Covered by Arbitration Agreement

[b] Inability to Compel Arbitration of Issue Not Required by Agreement or Statute to Be Arbitrated

§ 20A.11 Possibility of Conflicting Ruling by Court on Common Issue of Law or Fact

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Party to Arbitration Agreement Is Also Party in Pending Court Action and Conflicting Rulings on Common Issue Are Possible

[b] Application of Code Civ. Proc. § 1281.2 Is Not Preempted by Federal Arbitration Act

[c] Party Invoking Code of Civil Procedure Section 1281.2(c) Need Not Be Party to Litigation

[4] Additional Authorities

[a] Party to Arbitration Agreement Is Also Party in Pending Court Action and Conflicting Rulings on Common Issues Are Possible

§ 20A.12 Court Determines Cases Involving Overlapping Arbitrable and Nonarbitrable Issues

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Court Determines Controversy Containing Arbitrable and Nonarbitrable Issues

§ 20A.13 Oral Agreement Selecting Arbitrator Cannot Be Enforced

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Oral Agreement Regarding Arbitrator Cannot Be Enforced

§ 20A.14 Only Party to Agreement Can Seek to Stay Arbitration

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Only Party to Agreement Can Seek to Stay Arbitration

§ 20A.15 Arbitration Not To Be Ordered When Agreed Method Is No Longer Available

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] Arbitration Not To Be Ordered When Agreed Method Is No Longer Available

§§ 20A.16-20A.19 [Reserved]

§ 20A.20 Congress/Legislature Intended to Preserve Remedies Arbitration Clause Would Waive

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Arbitration Clause Forfeits Important Statutory Rights

§ 20A.21 Congress Intended to Require Knowing Waiver of Right to Jury Trial

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Sexual Discrimination Claims under Title VII of the Civil Rights Act of 1964

[b] Claims under the Americans with Disabilities Act of 1990

§ 20A.22 Agreement Lacks Minimum Criteria for Vindication of Unwaivable Rights

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Costs Will Not Be Imposed on Employer in Face of Agreement to Share

[b] Employer's Offer to Bear All Arbitral Costs Does Not Cure Defect

[c] Discovery Is Inadequate

[d] Class Arbitration Waiver Will Hinder Vindication of Statutory Rights

§ 20A.23 [Reserved]

§ 20A.24 Union Cannot Waive Employee's Right to Jury Trial for the State or Statutory Claim at Issue

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authority

[a] Union Cannot Waive Employee's Right to Jury Trial for the State or Statutory Claim at Issue

[b] State Claim Is Not Preempted by Labor Management Relations Act

§§ 20A.25-20A.29 [Reserved]

§ 20A.30 Applicable Principles of Contract Interpretation

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Ambiguous Term Construed Against Drafter

[b] Construction of General Word Following Enumeration Is Limited

§ 20A.31 Arbitration Provision Was Not Incorporated by Reference

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Arbitration Provision Was Not Incorporated by Reference

§ 20A.32 Parties Did Not Intend Contract to Be Operative Until Signed

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Parties Did Not Intend Contract to Be Operative Until Signed

§ 20A.33 Unilateral Modification of Contract to Include Arbitration Clause

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Unilateral Attempt to Insert Arbitration Clause

[b] Particular Terms Preclude Enforcement

[4] Additional Authorities

[a] Unilateral Attempt to Insert Arbitration Clause

§ 20A.34 Spousal Relationship Is Not Enough to Confer Agency Authority to Agree to Arbitration

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] Spousal Relationship Is Not Enough to Confer Agency Authority to Agree to Arbitration

[b] Statute Does Not Confer Authority to Bind Relative to Arbitrate

§§ 20A.35-20A.39 [Reserved]

§ 20A.40 Language of Agreement Is Not Broad Enough to Cover Tort Claims

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Language of Agreement Is Not Broad Enough to Encompass Tort Claims

[b] Agreement to Settle Controversies Regarding Receipts and Disbursements

[c] Defamation Claims Not Arbitrable

§ 20A.41 Claim for Injuries to Infant Is Not Covered by Expectant Mother's Arbitration Agreement

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Claim for Injuries to Infant Is Not Covered Under Expectant Mother's Arbitration Agreement

§ 20A.42 Controversy Goes Beyond Scope of Uninsured Motorist Statute

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Insurer Is Not Involved in Dispute Between Claimants

[b] Insurer Is Not Required to Arbitrate Total Amount of Damages Caused by Uninsured Motorist

[c] Dollar Amount of Accident Damages Is Not Relevant to Bad Faith Claim Against Uninsured Motorist Insurer

[d] Coverage Questions Are Not Arbitrable

§ 20A.43 Claims for Injunctive Relief Under the Consumer Legal Remedies Act (Civil Code Section 1750 et seq.) Are Not Arbitrable

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Claims for Injunctive Relief Under the Consumer Legal Remedies Act (Civil Code Section 1750 et seq.) Are Not Arbitrable

§ 20A.44 Claims for Public Injunctive Relief Under Business and Professions Code Sections 17200 et seq. and 17500 et seq. Are Not Arbitrable

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] Claims for Public Injunctive Relief Under the Unfair Competition Law (Business and Professions Code Section 17200 et seq.) Are Not Arbitrable

[b] Claims for Public Injunctive Relief of False Advertising Under Business and Professions Code Section 17500 et seq. Are Not Arbitrable

§ 20A.45 Uninsured Motorist Claim Was Not Preserved

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Action Required to Preserve Uninsured Motorist Claim

[b] 2003 Amendment Increasing Time Within Which Action Must Be Taken to Two Years Is Not Retroactive

§ 20A.46 Equitable Contribution Claim Does Not Arise Under Contract

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memorandum

[3] Discussion of Authorities

[a] Equitable Contribution Claim Does Not Arise Under Contract

§§ 20A.47-20A.59 [Reserved]

§ 20A.60 Court Determines Whether Third Party Is Bound by or Can Enforce Arbitration Agreement

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Court Determines Whether Third Party Is Bound by or Can Enforce Arbitration Agreement

[b] Formalities Required in Petition to Compel Arbitration

[c] One Not a Party to Arbitration Agreement Who Seeks Arbitration Must Prove It Was an Intended Beneficiary Under the Contract

§ 20A.61 Heir's Wrongful Death Claim Is Not Covered by Decedent's Arbitration Agreement

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Heir's Wrongful Death Claim Is Not Covered by Decedent's Arbitration Agreement

[4] Additional Authorities

[a] Heir's Wrongful Death Claim Is Not Covered by Decedent's Arbitration Agreement

§ 20A.62 Nonsignatory Spouse's Loss of Consortium Claim Is Not Subject to Arbitration

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Nonsignatory Spouse's Loss of Consortium Claim Is Not Subject to Arbitration

§ 20A.63 Officer Who Signs Arbitration Agreement on Behalf of Corporate Party to Agreement Cannot Be Compelled to Arbitrate Under Agreement

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Officer Who Signs Arbitration Agreement on Behalf of Corporate Party to Agreement Cannot Be Compelled to Arbitrate Under Agreement

§§ 20A.64-20A.79 [Reserved]

§ 20A.80 Petitioner Has Waived the Right to Compel Arbitration

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Arbitration Not to Be Ordered if Waived

[b] Factors To Be Considered in Determining if Arbitration Has Been Waived

[4] Additional Authorities

[a] Factors To Be Considered in Determining if Arbitration Has Been Waived

§ 20A.81 Waiver by Failure to Demand Arbitration Within Time Specified in Contract

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Right to Arbitrate Waived by Failure to Demand Within Contractual Time Limit

§ 20A.82 Waiver by Failure to Demand Arbitration Within a Reasonable Time

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Waiver by Failure to Demand Arbitration Within a Reasonable Time

§ 20A.83 Waiver by Pretrial Procedures or Prejudicial Discovery

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Waiver by Pretrial Procedures or Prejudicial Discovery

[b] Prejudice by Discovery

[c] Delay Until After Answer

[4] Additional Authorities

[a] Waiver by Pretrial Procedures or Prejudicial Discovery

[b] Prejudice by Discovery

§ 20A.84 Waiver by Bad Faith Use of Litigation Machinery

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Waiver by Engaging in Misleading Settlement Tactics

[b] Waiver by Filing Litigation in Bad Faith to Prejudice Defendant

[c] Waiver by Pretrial Litigation in Bad Faith

[4] Additional Authorities

[a] Waiver by Filing Litigation in Bad Faith to Prejudice Defendant

§ 20A.85 Medical Insurer's Bad Faith Failure to Inform Insured of Right to Arbitrate

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Medical Insurer's Bad Faith Failure to Inform Insured of Right to Arbitrate

[b] Federal Arbitration Act Not Offended by Application of Doctrine of Bad Faith

[4] Additional Authorities

[a] Medical Insurer's Bad Faith Failure to Inform Insured of Right to Arbitrate

§ 20A.86 Waiver by Failure to Proceed to Arbitrate in Manner Provided by Contract

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Waiver by Failure to Proceed to Arbitrate in Manner Provided by Contract

§ 20A.87 Arbitration Agreement Vitiated by Fraud and Involuntary Consent

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Arbitration Under Void Agreement Is Not Proper

[b] Promissory Fraud Inducing Arbitration Provision

[c] Reliance May Be Inferred

[d] Agent's Reliance Is Sufficient

[e] Fraud in Inception or Execution of Contract as a Whole

[f] Permeation Doctrine No Longer Recognized in California

[g] Failure to Read Documents

[h] State Law Grounds for Revocation

[4] Additional Authorities

[a] Arbitration Under Void Agreement Is Not Proper

[b] Fraud in Inception or Execution of Contract as a Whole

§ 20A.88 Inconspicuous Arbitration Clause Is Not Binding

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Inadequate Disclosure and Understanding of Arbitration Requirement Result in Lack of Contract

[4] Additional Authorities

[a] Inadequate Disclosure and Understanding of Arbitration Requirement Result in Lack of Contract

§ 20A.89 Agreement Containing Arbitration Clause Is Void Due to Illegality

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Illegality Affects Entire Contract

[b] Contract Contrary to Express Statute or to Policy of Express Statute

[c] Alleged Illegality Creates Potential for Conflicting Rulings

§ 20A.90 Designated Arbitration Tribunal Lacks Minimum Integrity by Being Identified With Petitioner

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Party Not to Be Arbitrator

[b] Union of One Party Is Improper Arbitrator

[c] Design Review Board in Public Works Contract

§ 20A.91 Arbitration Rules Are Unfair and Unconscionable

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Arbitration Rules Are Unfair and Unconscionable

[b] Doctrine of Unconscionability Does Not Offend Federal Arbitration Act

[c] Criteria of Unconscionability

[d] Element of Procedural Unconscionability

[d1] Under Contract of Adhesion

[e] Element of Substantive Unconscionability

[f] Sophistication of Weaker Party Is No Defense to Unconscionability

[g] Permissible Breadth of Order in Class Action

[h] Provision for Arbitral Review Is Unconscionable

[i] Prohibition on Classwide Arbitration Is Unconscionable

[j] Arbitration Agreement May Be Procedurally Unconscionable Despite Opt-Out Provision

[k] Arbitration Agreement Is Wholly Unenforceable on Account of Unconscionable Provisions

[l] Unconscionable Portions of Arbitration Agreement Will Not Be Severed After They Are No Longer Needed by Party Urging Arbitration

[m] Court Must Strike Unconscionable Remedy Limitations Before Ordering Arbitration

[4] Additional Authorities

[a] Criteria of Unconscionability

[b] Element of Procedural Unconscionability

[c] Element of Substantive Unconscionability

[d] Arbitration Agreement Is Wholly Unenforceable on Account of Unconscionable Provisions

[e] Arbitration Rules Are Unfair and Unconscionable

[f] Prohibition on Classwide Arbitration Is Unconscionable

§ 20A.92 Party Signing Medical Services Agreement Is Not Bound by It

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Party Signing Medical Services Arbitration Agreement May Show He or She Is Not Bound Thereby

§ 20A.93 Uninsured Motorist Arbitration Was Not Concluded Within Five Years

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Commencement of Five-Year Period

[d] Related Pleading and Practice Chapters

[e] Related Memoranda

[3] Discussion of Authorities

[a] Insurance Code Section 11580.2(i)(2)(A) Requires Denial

[b] Insurance Code Section 11580.2(i)(2)(A) May Be Applied When Accident Occurred Before Enactment

§ 20A.94 The Health Care Plan Disclosures Do Not Comply With Health and Safety Code Section 1363.1

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Health and Safety Code Section 1363.1 Is Not Preempted by the Federal Arbitration Act

[b] Health and Safety Code Section 1363.1 Is Not Preempted by Medicare Law or Regulations

[c] Substantial Compliance Does Not Save Arbitration Agreement

[d] Arbitration Agreement Cannot Be Enforced Because It Does Not Comply With Health and Safety Code Section 1363.1

[e] Health Plan Cannot Avoid Disclosure Requirements by Using Employer's Form

[f] Courts Have Authority to Refuse to Enforce Arbitration Agreements that Do Not Comply With Health & Safety Code Section 1363.1

[g] As Applied to Non-medical Cause(s) of Action

§ 20A.95 Arbitration Disclosures Did Not Comply With Business and Professions Code Section 7191

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Compliance With Business and Professions Code Section 7191 Is Mandatory

[b] The Federal Arbitration Act Will Not Preempt an Arbitration-Specific Statue Without Evidence That Interstate Commerce Is Involved

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20A ARBITRATION: RESISTING
PART I. INTRODUCTION

2-20A California Points & Authorities § 20A.01

§ 20A.01 Scope of Chapter

This chapter contains memoranda and contentions relating to resisting contractual arbitration under private agreements pursuant to *Code Civ. Proc. § 1280 et seq.* The forms address motions opposing arbitration on the grounds of waiver or failure to agree to arbitrate at all (no contract or voidable contract) or a particular issue, or other contractual defenses, such as that the respondent is not a party to the arbitration agreement (*see § 20A.10* et seq.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsArbitrabilityCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActCoverage & ExceptionsCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActOrders to Compel ArbitrationCivil ProcedureAlternative Dispute ResolutionArbitrationsWaiversContracts LawContract Conditions & ProvisionsArbitration Clauses

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CHAPTER 20A ARBITRATION: RESISTING
PART I. INTRODUCTION

2-20A California Points & Authorities § 20A.02

§ 20A.02 Governing Law

Arbitration of disputes involving maritime law or interstate or foreign commerce are governed by the Federal Arbitration Act (*9 U.S.C. § 1 et seq.*, commonly referred to as the FAA). International arbitration agreements and awards are governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958 [21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 (as implemented by *9 U.S.C. §§ 201-208*)], entered into force for the United States on December 29, 1970. For the text of the Convention, see note to *9 U.S.C. § 201*. Chapter 1 of the FAA (*9 U.S.C. §§ 1-16*) applies to situations governed by Convention [*see 9 U.S.C. § 202*].

In California, judicial enforcement of international commercial arbitration agreements is implemented by Code Civ. Proc. § 1297.100 et seq., which is discussed in California Forms of Pleading and Practice, Ch. 35, *Arbitration and Conciliation of International Commercial Disputes* (Matthew Bender).

The court will order arbitration on a petition to compel arbitration if it determines that an agreement to arbitrate the controversy exists, unless it determines, among other things, that the right to compel arbitration has been waived by the petitioner or grounds exist for the revocation of the agreement [*Code Civ. Proc. § 1281.2*]. A memorandum arguing against an order compelling arbitration and urging that grounds exist for waiver or revocation may constitute the basis of a response to a petition to compel [*see § 20A.10* et seq.].

For memoranda relating to revocation of contracts, see Ch. 50, *Contracts* , and Ch. 92, *Duress, Menace, Fraud, Undue Influence, and Mistake*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActOrders to Compel ArbitrationCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActStays Pending ArbitrationCivil ProcedureAlternative Dispute ResolutionArbitrationsForeign Arbitral AwardsCivil ProcedureAlternative Dispute ResolutionArbitrationsWaiversCivil ProcedureAlternative Dispute Resolution

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2-20A California Points & Authorities § 20A.03

§ 20A.03 How to Use the Forms in This Chapter

[1] Page Limits on Memoranda

One of the more significant drafting requirements to keep in mind are page limits: supporting and opposing memoranda must not exceed 15 pages, or 20 pages in a summary judgment proceeding. A reply or closing memorandum may not exceed 10 pages in length [*see Cal. Rules of Ct., Rule 3.1113(d)*]. Exhibits, declarations, attachments, tables of contents and authorities, and proof of service are not counted. Any party must obtain leave of court to file a longer memorandum [*see Cal. Rules of Ct., Rule 3.1113(d), (e)*]. These and other drafting requirements are discussed in *further detail in Chapter 1, Writing Legal Memoranda and Briefs, § 1.05*.

[2] Using the Forms to Build a Draft Memorandum

The forms included in this chapter are designed to be combined with other memorandum to form a complete memorandum. For detailed discussion on how to select and use the forms in the publication to build a draft memorandum and complete the draft, with detailed discussion of all drafting requirements and strategic or stylistic considerations, see *Ch. 1, Writing Legal Memoranda and Briefs, §§ 1.03 -1.06*. For a skeletal form of memorandum for use in creating a properly formatted outline in which to compile relevant forms from this publication, see *Ch. 1, Writing Legal Memoranda and Briefs, § 1.10*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeContent & FormCivil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPleading & PracticeMotion PracticeSupporting Memoranda

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2-20A California Points & Authorities § 20A.04

§ 20A.04 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

For detailed legal background discussion, research guides, procedural checklists, and practice forms of motions and other papers relating to private contractual arbitration proceedings, see:

- California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

- California Forms of Pleading and Practice, Ch. 33, *Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding* (Matthew Bender).

- California Forms of Pleading and Practice, Ch. 34, *Contractual Arbitration: Judicial Review* (Matthew Bender).

[2] Related Points and Authorities Chapters

Chapters in this publication with related forms include:

- For compelling arbitration, see Ch. 20, *Arbitration: Compelling* .

- For selecting arbitrators and determining arbitral immunity, see Ch. 20B, *Arbitration: Selecting Arbitrators; Arbitral Immunity* .

- For confirming, correcting, or vacating an arbitration award, see Ch. 20C, *Arbitration: Confirming, Correcting, or Vacating the Award* .

- For dismissing an arbitration, see Ch. 20D, *Arbitration: Dismissing* .

- For determining the effect of an arbitration award, see Ch. 20E, *Arbitration: Effect of Award* .

- For situations in which attorney's fees may be recovered, see Ch. 25, *Attorney's Fees* .

- For contract provisions in general, see Ch. 50, *Contracts* .

- For situations in which contracts may be avoided or declared void, see Ch. 92, *Duress, Menace, Fraud, Undue Influence, and Mistake* .

- For requirements of injunctions, see Ch. 116, *Injunctions* .

- For general principles relating to specific performance of contracts, see Ch. 214, *Specific Performance* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActOrders to Compel ArbitrationCivil ProcedureAlternative Dispute ResolutionContracts LawDefensesDuress & Undue InfluenceGeneral Overview

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2-20A California Points & Authorities §§ 20A.05-20A.09

[Reserved]

§§ 20A.05[Reserved]

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CHAPTER 20A ARBITRATION: RESISTING
PART II. FORMS
A. General Principles Relating to Resisting Arbitration

2-20A California Points & Authorities § 20A.10

§ 20A.10 Issue Is Not One Required by Agreement or Statute to Be Arbitrated

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN OPPOSITION TO PETITION
Petitioner,	)	TO COMPEL ARBITRATION [AND MOTION TO
vs.	)	STAY ACTION]
_____ [*name*],	)	[LIMITED CIVIL CASE]
Respondent.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

RESPONDENT CANNOT BE COMPELLED TO ARBITRATE _____ [*describe dispute*] BECAUSE IT IS NOT REQUIRED TO BE ARBITRATED EITHER BY THE AGREEMENT OR BY LAW.

A. Controversy Not to Be Arbitrated If Not Covered by Arbitration Agreement. The court shall not order the parties to arbitrate a controversy if it determines that an agreement to arbitrate the controversy does not exist, or if an agreement exists but grounds exist for its revocation or the right to compel arbitration under it has been waived (*Code Civ. Proc. § 1281.2*; *Lee v. Southern California Univ. For Professional Studies (2007) 148 Cal. App. 4th 782, 786-788, 56 Cal. Rptr. 3d 134* ; *Lopez v. Charles Schwab & Co. (2004) 118 Cal. App. 4th 1224, 1229-1230, 13 Cal.*

Rptr. 3d 544 ; *Banner Entertainment, Inc. v. Superior Court (1998) 62 Cal. App. 4th 348, 356, 72 Cal. Rptr. 2d 598*).

B. Inability to Compel Arbitration of Issue Not Required by Agreement or Statute to Be Arbitrated. Parties to an arbitration agreement cannot be compelled to arbitrate controversies which they did not agree to arbitrate and as to which arbitration is not required by statute (*Freeman v. State Farm Mut. Auto. Ins. Co. (1975) 14 Cal. 3d 473, 481, 121 Cal. Rptr. 477, 535 P.2d 341* ; *Balandran v. Labor Ready, Inc. (2004) 124 Cal. App. 4th 1522, 1529-1530, 22 Cal. Rptr. 3d 441* ; *In re Tobacco Cases I (2004) 124 Cal. App. 4th 1095, 1112, 21 Cal. Rptr. 3d 875* ; *United Public Employees v. San Francisco (1997) 53 Cal. App. 4th 1021, 1031, 62 Cal. Rptr. 2d 440*).

[*Optional*] **C. Procedure Specified in Agreement at Issue Is Not Arbitration.** There is no arbitration agreement between the petitioner and respondent. The procedure referred to in the parties' agreement is not one for arbitration because _____ [*specify all or as many of the following as may be applicable*: (1) there is no third party decision maker; (2) the procedure does not contemplate a final and binding decision; and (3) there is no a mechanism to assure a minimum level of impartiality with respect to the rendering of that decision] (*American Federation of State, County and Municipal Employees v. Metropolitan Water District (2005) 126 Cal. App. 4th 247, 257-259, 24 Cal. Rptr. 3d 285* ; *Cheng-Canindin v. Renaissance Hotel, Inc. (1996) 50 Cal. App. 4th 676, 687-693, 57 Cal. Rptr. 2d 867*).

[*Optional*] **D. Court Determines Whether There Is Duty to Arbitrate.** The court is required under *Code of Civil Procedure Section 1281.2* to make an advance determination of whether or not arbitration is required under the agreement (*Freeman v. State Farm Mut. Auto. Ins. Co. (1975) 14 Cal. 3d 473, 480, 121 Cal. Rptr. 477, 535 P.2d 341* ; *see First Options of Chicago, Inc. v. Kaplan (1995) 514 U.S. 938, 943-944, 115 S. Ct.1920, 131 L. Ed. 2d 985, 993-994* ; *Lawrence v. Walzer & Gabrielson (1989) 207 Cal. App. 3d 1501, 1505, 256 Cal. Rptr. 6*). The question whether an arbitration agreement is unenforceable, in whole or in part, based on general contract law principles is a question for the court to decide, rather than an arbitrator, and includes the determination whether an arbitration agreement is unconscionable or contrary to public policy (*Sanchez v. Western Pizza Enterprises, Inc. (2009) 172 Cal. App. 4th 154, 165-166, 90 Cal. Rptr. 3d 818*).

[*Optional*] **E. Parties Have Not Mediated as Contract Requires Before Arbitration.** When an agreement provides that any dispute between the parties shall be submitted to mediation before resorting to arbitration or litigation and makes mediation an express condition precedent to the hearing of any arbitration but not to litigation, neither party can compel arbitration (*Templeton Development Corp. v. Superior Court (Dick Emard Electric, Inc.) (2006) 144 Cal. App. 4th 1073, 1085, 51 Cal. Rptr. 3d 19*).

[*Optional*] **F. Only Class Representative Currently Before Court Did Not Sign Arbitration Agreement.** Arbitration is not to be ordered when the only person before the court is an individual who did not sign an arbitration agreement merely because that person's complaint was filed as a putative class or representative action and some members of the putative class signed arbitration agreements. The question of whether that person is an adequate class representative for those who did sign arbitration agreements [and all other matters pertaining to whether the action is appropriate for class treatment], should be decided when the putative representative moves to certify the class (*Lee v. Southern California Univ. for Professional Studies (2007) 148 Cal. App. 4th 782, 784, 788-789, 56 Cal. Rptr. 3d 134*).

[*Optional*] **G. Acknowledgement of Receipt Is Not Agreement to Arbitrate.** An acknowledgement of receipt [of an employee handbook discussing the company's arbitration program] without any signature [by the employee] agreeing to arbitrate does not amount to an agreement to arbitrate and is not a basis for compelling arbitration (*Mitri v. Arnel Management Co. (2007) 157 Cal. App. 4th 1164, 1170-1173, 69 Cal. Rptr. 3d 223*).

[*Optional*] **H. Respondent Will Be Entitled to Attorney's Fees and Costs.** When an action is brought solely to compel arbitration of contractual disputes between the parties [and the merits of the claims sought to be arbitrated are not at issue in the proceedings to compel arbitration], the fact that the parties will probably pursue their underlying claims in another action will not lessen respondent's victory in this discrete legal proceeding. Thus, respondent, if

successful in obtaining an order denying the petition to compel arbitration, will be entitled to its attorney's fees incurred in responding to the petition (*Civ. Code § 1717*; *Code Civ. Proc. §§ 1033.5(a)(10)(A), 1293.2*; *Otay River Constructors v. San Diego Expressway (2007) 158 Cal. App. 4th 796, 799, 805-808, 70 Cal. Rptr. 3d 434*).

[*Optional*] **I. Petitioner Did Not Allege Existence of Agreement to Arbitrate.**

A party seeking to compel arbitration must allege the existence of an agreement to arbitrate. Here, petitioner _____ [*specify defect in pleading, e.g.,* contested the existence or validity of the agreements alleged by respondents in their complaint]. Thus, petitioner failed to satisfy the most basic statutory prerequisite to granting the petition. There is no public policy which would compel the enforcement of a contract on behalf of a party who denies its very existence (*Code Civ. Proc. § 1281.2*; *Brodke v. Alphatec Spine, Inc. (2008) 160 Cal. App. 4th 1569, 15674-1577, 73 Cal. Rptr. 3d 554*).

[*Optional*] **J. Statute Mandating Arbitration Is Unconstitutional.** A Petitioner relying on a statutory mandate to compel arbitration is not entitled to an order compelling arbitration when the statute mandating arbitration is unconstitutional (see *County of Sonoma v. Superior Court (2009) 173 Cal. App. 4th 322, 346-347, 355, 93 Cal. Rptr. 3d 39*).

[*Optional*] **K. Arbitration Agreement Was Not Signed By Necessary Parties.** Where the evidence shows that an arbitration agreement was conditioned upon execution by all parties, the contract is not binding on any signatory until it is signed by all (*Fagelbaum & Heller LLP v. Smylie (2009) 174 Cal. App. 4th 1351, 1365, 95 Cal. Rptr. 3d 252*).

[*Optional*] **L. Attorney at Law Did Not Have Authority to Bind Client and Client Did Not Ratify or Consent to Agreement.** In the absence of express authorization of counsel to sign a binding contract, a client is bound by an arbitration agreement signed by his or her counsel only if the client consented to or ratified the agreement [*Toal v. Tardif (2009) 178 Cal. App. 4th 1208, 1221* & n.9, *101 Cal. Rptr. 3d 97]* .

[*Optional*] **L. Petition Did Not Plead and Prove Request or Demand for Arbitration Pursuant to and Under Terms of Agreement.** *Code Civ. Proc. § 1281.2* requires a party filing a petition to compel arbitration to plead and prove that it made a request or demand to the other party or parties for arbitration of the controversy pursuant to and under the terms of their written arbitration agreement (*Mansouri v. Superior Court (2010) 181 Cal. App. 4th 633, 641-642, 104 Cal. Rptr. 3d 824*).

Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a petition for an order to compel arbitration under a contract or statute when the issue sought to be arbitrated is not in fact covered by the agreement or statute, when grounds exist for the revocation of the agreement, when the right to compel arbitration has been waived, when the parties have not completed some express condition precedent to arbitration, or no agreement to arbitrate has been properly alleged. It sets forth the basic reasons for denying a petition to compel arbitration [*Code Civ. Proc. §§ 1281.2, 1290.2*].

Counsel may wish to incorporate authority from Paragraphs C, D, E, or I of the form in *Ch. 20, Arbitration: Compelling, § 20.10[1]* if petitioner did not attach the arbitration provision or if there is a question about the proper procedure to be applied in determining arbitrability. The authority in Optional Paragraph D is opposed by the authority in *Ch. 20, Arbitration: Compelling, § 20.10[1]*, Optional Paragraph I, which is only applicable when the arbitration agreement clearly states that the parties intend the arbitrator to determine arbitrability.

Respondent should combine this form with as many other forms as address the specific grounds for denial involved in his or her particular case, that is, *§§ 20A.01*-20A.02 (procedural matters), 20A.20 et seq. (Congressional or Legislative intent to preserve judicial remedy), 20A.30 et seq. (contract principles), 20A.40 et seq. (issue is beyond scope of arbitration clause), 20A.60 et seq. (respondent is not party to arbitration agreement), and 20A.80 et seq. (waiver and contract defenses). A respondent using Optional Paragraph J must include additional authority concerning the specific constitutional defect(s) in the statute that petitioner alleges mandates arbitration.

[b] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, if respondent claims that petitioner has waived its right to arbitrate, counsel's argument should focus on the critical points made in the supporting declarations, and in any other pleadings or motions before the court of which respondent requests to court to take judicial notice [*see Evid. Code § 450 et seq.*] regarding the prejudice to respondent on account of any action taken by petitioner and regarding the fact that petitioner's actions were inconsistent with arbitration.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement)].

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For a form of response to a petition to compel arbitration that may be supported by this memorandum, as well as a procedural checklist, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

[d] Related Memoranda

For memoranda to combine with this form, regarding other matters that the opposition may need to address, see *§§ 20A.01 -20A.02, 20A.20 et seq., 20A.30 et seq., 20A.40 et seq., 20A.60 et seq., and 20A.80* et seq. Counsel may wish to incorporate authority from Ch. 20C, *Arbitration: Confirming, Correcting, or Vacating the Award*, § 20C.150, which addresses the lack of agreement to arbitrate in the context of a petition to vacate an award.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The authority in Optional Paragraph D is opposed by the authority in *Ch. 20, Arbitration: Compelling, § 20.10[1]*, Optional Paragraph I, which is only applicable when the arbitration agreement clearly states that the parties intend the arbitrator to determine arbitrability.

[3] Discussion of Authorities

[a] Controversy Not to Be Arbitrated If Not Covered by Arbitration Agreement

Code Civ. Proc. § 1281.2 also provides that arbitration is not to be ordered if a partyto the arbitration agreement is also a party to a pending court action or special proceeding arising out of the same transaction and there is a possibility of conflicting rulings on common issues of law and fact [*Code Civ. Proc. § 1281.2(c)*]. This aspect of the statute is addressed by the form at § 20A.11.

Lee v. Southern California Univ. for Professional Studies *(2007) 148 Cal. App. 4th 782, 56 Cal. Rptr. 3d 134* , is discussed at [f], *below.*

Plaintiff in ***Lopez v. Charles Schwab & Co.*** *(2004) 118 Cal. App. 4th 1224, 13 Cal. Rptr. 3d 544* , sued for conversion and intentional infliction of emotional distress. She had applied to defendant and signed an application and an account agreement, which contained an arbitration clause and provided that it would be effective only after Schwab approved the application. Soon, plaintiff received an "account verification" but the very next day received a letter declining to open an account because of a consumer credit report. More than a month later, without any further communication between the parties, a broker with defendant "pulled some strings" and transferred plaintiff's stock from her account with another broker into the Schwab account. Defendant moved to compel arbitration. Plaintiff argued she had never entered into an enforceable contract with defendant. The court ordered arbitration. The arbitrator entered an award for defendant. Plaintiff appealed.

The court of appeal reversed. The right to arbitration depends on contract (*118 Cal. App. 4th 1224, 1229)* and there was no agreement between the parties. Defendant could not unilaterally rescind its rejection; and a reasonable person in plaintiff's position would not have understood that any contract was formed (*118 Cal. App. 4th 1224, 1230)* .

The facts and procedural background of ***Banner Entertainment, Inc. v. Superior Court*** *(1998) 62 Cal. App. 4th 348, 72 Cal. Rptr. 2d 598* , and the portion of the opinion addressing the applicability of state law contract principles in general are discussed in *Ch. 20, Arbitration: Compelling, § 20.30[3][a]*. The court of appeal granted a writ of mandate directing the trial court to vacate its order granting defendant's petition to compel arbitration (*62 Cal. App. 4th 348, 362)* . The court set forth the rule that if there is no valid contract to arbitrate, a petition to compel arbitration must be denied (*62 Cal. App. 4th 348, 356)* . After discussing the evidence, the court found that there was no evidence of an agreement to arbitrate (*62 Cal. App. 4th 348, 357, 361-362)* . The portion of the opinion addressing the principle that when the parties so intend, an agreement is not operative until it is signed is discussed at *§ 20A.32[3][a]*.

[b] Inability to Compel Arbitration of Issue Not Required by Agreement or Statute to Be Arbitrated

The facts and procedural background of ***Freeman v. State Farm Mut. Auto. Ins. Co.*** *(1975) 14 Cal. 3d 473, 121 Cal. Rptr. 477, 535 P.2d 341* , and the portion of the opinion addressing waiver are discussed in *Ch. 20, Arbitration: Compelling, § 20.80[4][a]*. The Supreme Court affirmed the denial of the petition to compel arbitration. *Freeman*'s holding that *Ins. Code § 11580.2* establishes a limitation period for petitions to compel arbitration of uninsured motorist

coverage disputes has been abrogated [*see Spear v. California State Automobile Ass'n (1992) 2 Cal. 4th 1035, 1039-1044, 9 Cal. Rptr. 2d 381, 831 P.2d 821* , discussed in *Ch. 20, Arbitration: Compelling, § 20.43[3][a]*]. However, the Supreme Court noted that while there is a strong policy in favor of enforcing agreements to arbitrate, there is no policy compelling persons to accept arbitration of controversies which they have not agreed to arbitrate and which no statute has made arbitrable (*14 Cal. 3d 473, 481)* . The Court found nothing in the arbitration clause, embodying the provisions of *Ins. Code § 11580.2*, which could be construed as an agreement to arbitrate a claim not asserted within the time limit specified under *Ins. Code § 11580.2(i)* (*14 Cal. 3d 473, 486)* .

Balandran v. Labor Ready, Inc. *(2004) 124 Cal. App. 4th 1522, 22 Cal. Rptr. 3d 441* , involved a complaint, filed as a class action, for illegal gender discrimination in violation of the Fair Employment and Housing Act, wrongful failure to hire in violation of public policy, and related causes of action. Defendants were a temporary employment service and its customer who instructed that only male workers to be sent fill positions. The contract between plaintiffs and the temporary agency provided for arbitration of any disputes arising out of employment, including any claims of discrimination, harassment or wrongful termination and all other employment related issues (excluding only claims arising under the National Labor Relations Act or otherwise within the jurisdiction of the National Labor Relations Board). That contract also provided that the workers were only employed by the agency while they were on a job; registering to work did not constitute employment; employment was on a day-to-day basis; and at the end of a work day, the worker was deemed to have quit until he or she received a work assignment at a later date. Both defendants moved to compel arbitration, the customer claiming the benefit of the arbitration provision as a third party beneficiary of the contract. The trial court denied the petition to compel arbitration, finding the absence of an employment relationship was fatal to defendants' claim. Defendants appealed.

The court of appeal affirmed (*124 Cal. App. 4th 1522, 1524, 1531)* . Defendants conceded that plaintiffs were not Labor Ready's employees, but urged that the pre-employment discrimination claims fell within that part of the arbitration clause that applies to "all other employment related issues." Plaintiffs responded that "all other employment related issues" was not an alternative category of arbitrable claims, but simply one of the categories of claims the arbitration clause included within those disputes arising out of employment. The court of appeal began its discussion by noting that both federal and California law strongly favor arbitration and that any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. The burden is on the party opposing arbitration to show the agreement cannot be interpreted to apply to the dispute. Whether a contract is reasonably susceptible to a party's interpretation can be determined from the language of the contract itself (*124 Cal. App. 4th 1522, 1527)* . The policy in favor of arbitration does not apply when the contract cannot be interpreted in favor of arbitration. There is no policy in favor of arbitrating a dispute the parties did not agree to arbitrate (*124 Cal. App. 4th 1522, 1528)* . The court found that plaintiff's interpretation of the contract was correct (*124 Cal. App. 4th 1522, 1529)* and that the language of the agreement could not reasonablybe construed as an agreement to arbitrate pre-employment discrimination claims (*124 Cal. App. 4th 1522, 1530)* .

In re Tobacco Cases I *(2004) 124 Cal. App. 4th 1095, 21 Cal. Rptr. 3d 875* arose from the 1998 settlement between 46 states, and others, with four manufacturers of tobacco products, known as the original participating manufacturers (OPM's), and subsequent participating manufacturers (SPM's). The dispute concerned whether the Latvian affiliate of one of the SPMs should be reporting sales of its products in the United States to the designated independent auditor and making payments to the settlement fund based on those sales. The SPM demanded arbitration based on Paragraph XI(c) of the master settlement agreement (MSA) which required any dispute relating to calculations or determinations made by the auditor to be submitted to binding arbitration. In support of its position, the SPM relied on a letter and a memorandum written by one of the attorneys for the states after the SPM had signed the MSA to the effect that the auditor would decide the extent to which sales of particular brands of tobacco products would be included within SPM's market share; and that any dispute about that determination would be resolved in arbitration pursuant to MSA § XI(c). In opposing the motion to compel arbitration, the state argued the dispute did not arise out of or relate to calculations performed by the auditor, but depended entirely on interpretation of section VII(e) of the master agreement, which defined the parties bound by the agreement. The state also relied on section VII(a) of the MSA, which provides that the

courts of each settling state have and retain exclusive jurisdiction for the purposes of implementing and enforcing the master agreement and consent decree as to that settling state, except as provided in subsections IX(d), XI(c) and XVII(d). The trial court denied the petition, finding that the dispute did not involve calculations and determinations by the auditor pursuant to Section XI, but interpretation of Section VII(e); and that the plain meaning of Section XI(c) did not require arbitration of the controversy.

The court of appeal affirmed (*124 Cal. App. 4th 1095, 1114)* . Although the matter was governed by the Federal Arbitration Act (FAA), the court of appeal noted in deciding whether the parties agreed to arbitrate a certain matter, courts generally should apply ordinary state-law principles that govern the formation of contracts. The right to arbitration depends on contract; a petition to compel arbitration is simply a suit in equity seeking specific performance of that contract (*124 Cal. App. 4th 1095, 1104)* . In ruling on a petition to compel arbitration, the trial court may consider evidence on factual issues relating to the threshold issue of arbitrability. However, as both parties apparently conceded, if there is no conflicting extrinsic evidence the court of appeal applies a de novo, or independent, standard of review on appeal from a trial court's determination of the issue of whether an arbitration agreement applies to a particular controversy (*124 Cal. App. 4th 1095, 1105)* . Although there is a policy to interpret contracts to favor arbitration, there is no public policy favoring arbitration of disputes which the parties have not agreed to arbitrate. Here, section XI(c) in the context of the entire MSA was not reasonably susceptible to an interpretation that arbitration of the instant controversy was required. Thus, the state and federal presumptions favoring arbitration did not apply. Further, the two items of extrinsic evidence relied on by the SPM were irrelevant and inadmissible on the issue of whether the claims were subject to arbitration because the MSA's provisions were not reasonably susceptible to an interpretation that arbitration was required (*124 Cal. App. 4th 1095, 1112)* .

Plaintiff in ***United Public Emples. v. City & County of San Francisco*** *(1997) 53 Cal. App. 4th 1021, 62 Cal. Rptr. 2d 440* , sought to compel arbitration of a grievance pursuant to the governing collective bargaining agreement. The grievance concerned the random selection of one of plaintiff's members, a car cleaner for the City's Municipal Railway, for drug testing. Cleaners are required at various times to drive transit vehicles. The employee was notified that his job classification was "safety sensitive" under the Omnibus Transportation Employee Testing Act of 1991 (Omnibus Act) [*see 49 U.S.C. § 5331*]. When the employee was selected for testing and the plaintiff sought to compel arbitration of his classification and selection, the trial court denied the petition. The union appealed.

The court of appeal affirmed. The court said that the right to arbitrate depends on the terms of the contract--a petition to compel arbitration is simply a suit in equity seeking specific performance of that contract (*53 Cal. App. 4th 1021, 1026*). The court noted that the preemptive provisions of the Omnibus Act are to nullify state laws that might prevent local transit systems from conducting drug and alcohol testing of their safety sensitive employees (*53 Cal. App. 4th 1021, 1027*). Consistent with this scheme, plaintiff negotiated several memoranda of understanding, which significantly do not contain any agreement to arbitrate the designation of a particular employee or job classification as safety-sensitive (*53 Cal. App. 4th 1021, 1029*). Given the state of the federal Omnibus Act and its implementing regulations and the recognition that the City's classification of positions is specifically carved out from the scope of bargaining, the court of appeal held that the governing agreement did not contemplate arbitration of the employee's submission to federally-mandated, random drug-testing. While the court acknowledged that there is a strong policy in favor of enforcing agreements to arbitrate, there is no policy compelling persons to accept arbitration of controversies which, as here, they have not agreed to arbitrate (*53 Cal. App. 4th 1021, 1031*).

[c] Procedure Specified in Agreement at Issue Is Not Arbitration

American Federation of State, County and Municipal Employees v. Metropolitan Water District *(2005) 126 Cal. App. 4th 247, 24 Cal. Rptr. 3d 285* involved a dispute under a memorandum of understanding (MOU) the provided for a multi-step grievance procedure. The first two levels involved management decisions. After that, management's decision could be appealed to a neutral hearing officer, whose determination was to be final and binding, but could be appealed by writ of mandate [*Code Civ. Proc. § 1094.5*]. The Water District refused to appoint a neutral hearing officer, claiming

the union's request for one came too late. The union claimed the procedure with a neutral hearing office amounted to arbitration and petitioned to compel arbitration of the grievance. The trial court denied the petition. The union appealed.

The court of appeal affirmed, finding that the procedure in the MOU was not arbitration (*126 Cal. App. 4th 247, 260)* . The court noted that the MOU did not referto the procedure before a neutral hearing officer as arbitration, nor were the words "arbitrate" or "arbitrator" used in the MOU. However, that was not determinative (*126 Cal. App. 4th 247, 257)* . The components of arbitration are (1) a third party decision-maker; (2) a final and binding decision; and (3) a mechanism to insure a minimum level of impartiality with respect to the rendering of that decision. It was the second component that the court found lacking (*126 Cal. App. 4th 247, 258)* . The neutral hearing officer's decision was not final and binding because it was subject to review under *Code Civ. Proc. § 1094.5*, which was a much more extensive judicial involvement than that allowed for arbitration [*Code Civ. Proc. §§ 1286.2, 1286.6*] (*126 Cal. App. 4th 247, 259)* .

Plaintiff in ***Cheng-Canindin v. Renaissance Hotel, Assocs.,*** *(1996) 50 Cal. App. 4th 676, 57 Cal. Rptr. 2d 867* , filed a wrongful discharge action against her former employer, which petitioned to compel arbitration in accordance with procedures outlined in an employee handbook and employee guide. Plaintiff had signed a receipt for the handbook which stated in part: "I agree to resolve all disputes concerning my employment with the Hotel by the procedures outlined in this Handbook." The trial court denied the petition to compel arbitration on the ground that the procedures in the handbook did not amount to arbitration. Defendants appealed.

The court of appeal affirmed, finding that there was no arbitration agreement between the parties (*50 Cal. App. 4th 676, 692)* . Under California law, arbitration is recognized as a matter of contract; and a party cannot be forced to arbitrate something in the absence of an agreement to do so. The question of whether the parties agreed to arbitrate is answered by applying state contract law even when it is alleged that the agreement is covered by the FAA. Here, neither the alleged agreement nor any of the literature describing the Hotel's Review Committee procedure employed the term arbitration (*50 Cal. App. 4th 676, 683)* . The failure of the documents to refer to the procedure as arbitration is not fatal. Although California's statutory law governing arbitration agreements (*Code Civ. Proc. 1280 et seq.*) does not define arbitration, the process is generally agreed to require (*50 Cal. App. 4th 676, 687-688)* :

1. A third party decision maker;

2. A final and binding decision; and

3. A mechanism to assure a minimum level of impartiality with respect to the rendering of that decision.

The procedure outlined in the employee handbook was inconsistent with the concept of arbitration because one party to the dispute was effectively the decision maker (*50 Cal. App. 4th 676, 690)* . It was not an arbitration procedure because there was no third party decision maker, the procedure totally lacked impartiality, and was controlled exclusively by one of the parties to the dispute (*50 Cal. App. 4th 676, 692-693)* . In addition, the court of appeal found the parties did not intend to enter into an arbitration agreement. The internal documents referred to the procedure as "an internal problem solving" mechanism, and there was sufficient evidence to support plaintiff's contention that the process was considered voluntary, not mandatory (*50 Cal. App. 4th 676, 691-693)* .

[d] Court Determines Whether There Is Duty to Arbitrate

The facts and procedural background of ***Freeman v. State Farm Mut. Auto. Ins. Co.*** *(1975) 14 Cal. 3d 473, 121 Cal. Rptr. 477, 535 P.2d 341* , and the portion of the opinion addressing waiver are discussed in *Ch. 20, Arbitration: Compelling, § 20.80[4][a]*. The Supreme Court affirmed the denial of the petition to compel arbitration. *Freeman*'s holding that *Ins. Code § 11580.2* establishes a one-year limitation period for petitions to compel arbitration of uninsured motorist coverage disputes has been abrogated [*see* *Spear v. California State Automobile Ass'n (1992) 2 Cal. 4th*

1035, 1039-1044, 9 Cal. Rptr. 2d 381, 831 P.2d 821 , discussed in *Ch. 20, Arbitration: Compelling, § 20.43[3][a]*]. However, in denying arbitration, the Supreme Court stated that the clear purpose and effect of *Code Civ. Proc. § 1281.2* is to require the trial court to determine in advance if there is a duty to arbitrate the controversy which has arisen. The performance of that duty necessarily requires the court to examine and, to a limited extent, construe the underlying agreement. While it is possible for the parties to agree that the arbitrator may determine the scope of his or her authority, it is still necessary in those circumstances for the court to examine the contract to ascertain whether or not the parties, in fact, have thus provided as to the arbitrator's scope of authority (*14 Cal. 3d 473, 480)* .

The facts and procedural background of ***First Options of Chicago, Inc. v. Kaplan*** *(1995) 514 U.S. 938, 115 S. Ct. 1920, 131 L. Ed. 2d 985* , and the portion of the opinion addressing the application of state law contract principles to determine the existence of an agreement to arbitrate are discussed in *Ch. 20, Arbitration: Compelling, § 20.30[3][a]*. The Supreme Court affirmed the decision of the Third Circuit Court of Appeals, concluding that, because Kaplan did not clearly agree to submit the question of arbitrability to arbitration, the Court of Appeals was correct in finding that the arbitrability of the Kaplan/First Options dispute was subject to independent review by the court (*514 U.S. 938, 946-947)* . The matter turned on how a court should decide whether the parties agreed to submit the arbitrability issue to arbitration and the standard for review of that decision. If the parties did not agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely independently. This flows inexorably from the fact that arbitration is simply a matter of contract between the parties, but only for those disputes the parties have agreed to submit to arbitration (*514 U.S. 938, 944-945)* . Courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so. In this matter the law treats silence or ambiguity about "*who* (primarily) should decide arbitrability" different from the way it treats "*whether* a particular merits related dispute is arbitrable because it is within the scope of a valid arbitration agreement". In respect to the latter, the court reverses the presumption [*see Mitsubishi Motors v. Soler Chrysler-Plymouth (1985) 473 U.S. 614, 626, 105 S. Ct. 3346, 87 L. Ed. 2d 444* (any doubt concerning the scope of the arbitrable issues should be resolved in favor of arbitration)] (*514 U.S. 938, 944-945)* .

Sanchez v. Western Pizza Enterprises, Inc. *(2009) 172 Cal. App. 4th 154, 90 Cal. Rptr. 3d 818* , affirmed a trial court order finding a class arbitration waiver and other terms of the agreement unconscionable, and that the agreement therefore was unenforceable. In resolving the contention that the arbitrator, rather than the trial court, had jurisdiction to determine whether the agreement was enforceable, the court relied on the rule that under California law as well as the Federal Arbitration Act, enforceability of arbitration agreements is limited by the same general contract law principles governing the enforceability of any contract. The question whether an arbitration agreement is unenforceable, in whole or in part, based on general contract law principles is a question for the court to decide, rather than an arbitrator. This includes the determination whether an arbitration agreement is unconscionable or contrary to public policy (*172 Cal. App. 4th 154, 165-166)* . The portion of the opinion discussing the application of contract principles to enforceability of a class arbitration waiver is discussed in *Ch. 20, Arbitration: Compelling, § 20.30[3][a]*. The portion of the opinion dealing with the issue of whether the class action waiver was unenforceable as against public policy is discussed in *§ 20A.22[3][d], below*. The portions of the opinion addressing the procedural unconscionability of the arbitration agreement, the substantive unconscionability of the agreement, and the unenforceability of the agreement due to unconscionability are discussed, respectively, in § 20A.91[3][d], [e], and [k], *below*.

The facts and procedural background of ***Lawrence v. Walzer & Gabrielson*** *(1989) 207 Cal. App. 3d 1501, 256 Cal. Rptr. 6* , are discussed at *§ 20A.30[3][b]*. In its preliminary discussion, the court of appeal quoted from *Freeman v. State Farm Mut. Auto. Ins. Co. (1975) 14 Cal. 3d 473, 481, 121 Cal. Rptr. 477, 535 P.2d 341* , for the proposition that "there is indeed a strong policy enforcing agreements to arbitrate, but there is no policy compelling persons to accept arbitration of controversies they have not agreed to arbitrate." Thus, in each case, the threshold issue that must be determined by the court is whether an agreement exists to arbitrate the particular claim involved (*207 Cal. App. 3d 1501, 1505)* .

[e] Parties Have Not Mediated as Contract Requires Before Arbitration

Templeton Development Corp. v. Superior Court (Dick Emard Electric, Inc.) *(2006) 144 Cal. App. 4th 1073, 51 Cal. Rptr. 3d 19* , involved a claim for unpaid labor, materials, and equipment supplied by real party, Dick Emard Electric, Inc, as subcontractor, for construction of an apartment complex in Sacramento. The general contractor, Templeton, was based in Nevada. The parties' agreement required that any dispute which could not be settled through negotiation be submitted to mediation before resorting to arbitration or litigation, unless the parties agreed otherwise. The agreement provided that mediation was an express condition precedent to the hearing of any arbitration demand and had to take place within 20 days of the mediation demand. Mediation or arbitration was to be held in Las Vegas, Nevada. Real party offered to stipulate to stay the action to conduct mediation or arbitration in California, but petitioner refused to do so. Petitioner unsuccessfully moved to dismiss the complaint on the ground of inconvenient forum. The trial court ruled that *Code Civ. Proc. § 410.42* rendered the out-of-state mediation provision unenforceable, finding that the Federal Arbitration Act (FAA) did not apply to mediation and would have no preemptive effect on the result. The trial court also found that because mediation was an express condition precedent to the hearing of any arbitration demand and the parties had failed to mediate, neither could request arbitration. Petitioners filed a petition for writ of mandate asking the court of appeal to set aside the trial court order denying their motion to dismiss, or to order remand for determination whether the FAA preempted Section 410.42.

The court of appeal affirmed, concluding in part that the trial court was correct in ruling that *Code Civ. Proc. § 410.42* controlled and because real party was entitled to file suit under the terms of the subcontract agreement, it did not need to reach the federal preemption issue (*144 Cal. App. 4th 1073, 1077, 1086)* . Petitioner contended that the arbitration provisions of the agreement are severable and enforceable even if the out-of-state mediation provisions were void. Thus, they contended real party was still obligated to arbitrate in Nevada due to its failure to satisfy the contractual mediation requirements. The court of appeal disagreed, beginning by rejecting the contention that Section 410.42 voided the mediation provisions in their entirety (*144 Cal. App. 4th 1073, 1084)* . The court discussed the doctrine of severability of illegal contract terms in general, noting that courts must have the capacity to cure the unlawful contract through severance or restriction of the offending clause. Courts look to the various purposes of the contract. If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. If the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then severance and restriction are appropriate. Here, the court felt the interests of justice were best served by severing only the portion of the contract that violated Section 410.42--the requirement that mediation must take place in Nevada. That provision was clearly collateral to the main purpose of the agreement and easily severed from the remainder of the provisions that deal with mediation. In addition, severing only the requirement that mediation take place in Nevada would prevent petitioners from gaining undeserved benefit as a result of voiding all the mediation provisions (*144 Cal. App. 4th 1073, 1085)* . Regarding whether real party had to arbitrate its dispute in Nevada once the unlawful portion of the mediation provisions were severed from the subcontract agreement, the court focused no the language of Paragraph 11.3.1 that any dispute between the contractor and subcontractor "shall be submitted to mediation ... before resorting to Arbitration or litigation as discussed below ... ." and that "mediation is an express condition precedent to the hearing of any arbitration ... ." The contract did not state that mediation was a condition precedent to litigation, but provided that a party who resorts to arbitration or court action without first attempting to resolve the matter through mediation, in the discretion of the arbitrator or judge, is not entitled to recover its attorney's fees and costs. The record was not in dispute and supported the trial court's finding that petitioners failed to respond to real party's request for mediation when given the opportunity. Thus, under the express terms of paragraph 11.3.1, neither party could request, or force, arbitration in Nevada or anywhere else (*144 Cal. App. 4th 1073, 1085)* . In light of real party's offer to stay court proceedings in order to proceed with mediation or arbitration in California, the court would not say the real party violated the timing terms of the subcontract agreement (*144 Cal. App. 4th 1073, 1085*).

[f] Only Class Representative Currently Before Court Did Not Sign Arbitration Agreement

Lee v. Southern California Univ. for Professional Studies *(2007) 148 Cal. App. 4th 782, 56 Cal. Rptr. 3d 134* , was a

lawsuit by a student who had enrolled at defendant and been unable to complete her courses because of illness. Defendant informed plaintiff that she was not making satisfactory academic progress and was being administratively withdrawn, but refused to refund her tuition. After administrative procedures at the Bureau for Private Postsecondary and Vocational Education (the Bureau)--part of the California Department of Consumer Affairs, by which defendant was regulated--found defendant was required to use the statutory formula for refunds, plaintiff filed suit alleging violations of the Consumer Legal Remedies Act (CLRA: *Civ. Code § 1750 et seq.*) and the unfair competition law (UCL: *Bus. & Prof. Code § 17200 et seq.*). She sought only injunctive relief and filed the case as a putative class action under the CLRA, seeking to represent a class she described as "all adult student consumers who enrolled in and paid the tuition charged for the materials and services supplied in a course program with SCUPS and who subsequently either voluntarily withdrew or were administratively withdrawn by SCUPS and who did not receive a refund of their paid tuition from SCUPS upon their dismissal." Defendant claimed that 519 students had been dropped or dismissed from its program during a four-year period, and of those 408 had signed enrollment agreements containing arbitration clauses. The remaining 111, including plaintiff, signed enrollment agreements that did not include arbitration clauses. Defendant moved to compel arbitration. The trial court denied the motion. Defendant appealed.

The court of appeal affirmed, finding no ground for compelling arbitration when the only plaintiff then before the court never agreed to arbitrate her claims. The court said that the question of whether plaintiff was an adequate class representative for those who did, and all other matters pertaining to whether the action was appropriate for class treatment, were issues for the trial court to decide when plaintiff moved to certify the class (*148 Cal. App. 4th 782, 784, 788-789)* . Defendant offered no authority directly on point, but relied on basic principles favoring arbitration. The court of appeal disagreed for several reasons, the most fundamental being that arbitration requires consent; the parties must mutually agree to resolve their disputes in an alternate forum. The strong public policy in favor of arbitration does not extend to those who are not parties to an arbitration agreement, and a party cannot be compelled to arbitrate a dispute that he has not agreed to resolve by arbitration. It may be that when plaintiff moves to certify the class she will narrow it to those who did not sign arbitration agreements (*148 Cal. App. 4th 782, 786)* . Presently, the only plaintiff before the court was Lee, she was not bound by an arbitration agreement; and therefore could not be compelled to arbitrate (*148 Cal. App. 4th 782, 787-788)* . The portion of the opinion addressing the arbitrability of injunctive relief under the CLRA and the UCL is discussed at *§ 20A.44[3][a]*.

[g] Acknowledgement of Receipt Is Not Agreement to Arbitrate

Mitri v. Arnel Management Co*. (2007) 157 Cal. App. 4th 1164, 69 Cal. Rptr. 3d 223* , involved claims of sexual harassment by two former employees of defendant. Defendants filed a motion to compel arbitration on the ground plaintiffs had each signed a binding arbitration agreement. The trial court denied the motion based on defendants' failure to prove the existence of any agreement to arbitrate. Defendants appealed.

The court of appeal affirmed, because defendants did not produce any evidence of signed arbitration agreements (*157 Cal. App. 4th 1164, 1173-1174)* . The employee handbook stated that as a condition of employment, all employees were required to sign an arbitration agreement and would be provided a copy of their signed arbitration agreement. Defendant contended the handbook was sufficient evidence of an agreement to arbitrate. The court reviewed the principles of mutual assent and found no evidence that either plaintiff ever consented to binding arbitration of claims arising out of the employment relationship (*157 Cal. App. 4th 1164, 1170-1171)* . Nor would an agreement be implied based on the fact that plaintiffs received a copy of the agreement and continued to work after they received those copies (*157 Cal. App. 4th 1164, 1171-1172)* . While both plaintiffs' personnel files contained acknowledgements of receipt of the handbook, neither contained a signed arbitration agreement. Those could not provide the basis for a binding election to arbitrate (*157 Cal. App. 4th 1164, 1173)* .

[h] Respondent Will Be Entitled to Attorney's Fees and Costs

Plaintiff, general contractor, in ***Otay River Constructors v. San Diego Expressway*** *(2007) 158 Cal. App. 4th 796, 70*

Cal. Rptr. 3d 434 , entered into three contracts with defendant, each of which included a dispute resolution provision. Two required binding arbitration; one allowed for litigation. Plaintiff initiated two arbitration proceedings against defendant claiming that the disputes arose under one of the agreements that required arbitration. Defendant denied the claims; and plaintiff petitioned to compel arbitration. Defendant claimed the dispute was not one that was required to be arbitrated. The trial court agreed with defendant and denied the motion to compel arbitration. Plaintiff did not appeal that denial. Defendant later moved for its costs and attorney's fees, claiming it was the prevailing party on the contract because it obtained a final order denying the petition to compel arbitration. After bifurcating the issue of entitlement to attorney fees and costs from the issue of the amount of any award, the trial court denied the motion on the ground defendant was not a prevailing party because the parties contemplated additional litigation. Defendant appealed.

The court of appeal reversed, finding both that an order denying a request for costs and attorney fees under these circumstances is appealable as a special order after final judgment [*Code Civ. Proc. § 1294(e)*] and that a party who succeeds in obtaining an order denying the petition to compel arbitration is a prevailing party in the action on the contract even though the merits of the parties' underlying contractual disputes have not yet been resolved (*158 Cal. App. 4th 796, 799-800, 809)* . The court of appeal cited *Code Civ. Proc. § 1293.2*, which requires the court to award costs in any judicial proceeding under *Code Civ. Proc. § 1280 et seq.* as provided in *Code Civ. Proc. § 1021 et seq.* and *Code Civ. Proc. § 1033.5(a)(10)(A)*, which provides that attorney's fees authorized by contract are recoverable as an item of costs. A petition to compel arbitration is a judicial proceeding covered by this provision (*158 Cal. App. 4th 796, 805)* . The court then discussed *Civ. Code § 1717*, which governs awards of attorney's fees based on a contract and authorizes an award of attorney's fees to a prevailing party in any action on a contract to enforce that contract if the contract provides for an award of attorney's fees. The prevailing party is the one who recovers greater relief and shall be determined by the court (*158 Cal. App. 4th 796, 806)* . Plaintiff argued that defendant could not be a prevailing party because it obtained only an interim procedural victory, but cited no persuasive authority supporting that contention. The court of appeal disagreed, noting that courts have awarded attorney fees to a party obtaining an appealable order or judgment in a discrete legal proceeding even though the underlying litigation on the merits was not final. The cases relied on by plaintiff were distinguishable in that none involved the final resolution of a discrete legal proceeding (*158 Cal. App. 4th 796, 807)* . The merits of the claims sought to be arbitrated were not at issue in the court proceedings to compel arbitration and the fact that the parties would probably pursue those claims in another action did not lessen defendant's victory in the discrete legal proceeding (*158 Cal. App. 4th 796, 808)* . The court of appeal reversed and remanded the matter to the trial court with directions to conduct further proceedings to determine defendant's reasonable attorney fees and costs incurred in connection with the petition to compel arbitration and the appeal (*158 Cal. App. 4th 796, 809)* .

[i] Petitioner Did Not Allege Existence of Agreement to Arbitrate

Plaintiffs in ***Brodke v. Alphatec Spine, Inc****. (2008) 160 Cal. App. 4th 1569, 73 Cal. Rptr. 3d 554* , were four orthopedic surgeons. They sued Alphatec Spine Inc. and other defendants for, among other things, breach of contract and fraud. Plaintiffs alleged they entered into four identical written contracts with Alphatec, in which each promised to make reasonable best efforts to develop a next generation pedicle screw and hook system. In return, Alphatec agreed to pay each plaintiff a 1.5 percent royalty on net sales of all new products developed by plaintiffs and Alphatec. Plaintiffs further allege they created a "next generation" product, but Alphatec terminated the agreements, filed patent applications for the product they created, and began selling the product without paying them royalties. One of the contracts was attached to the complaint and contained an arbitration clause. Defendant, in petitioning to compel arbitration did not actually allege the existence of an arbitration agreement, but alleged that plaintiffs had alleged the existence of "alleged agreements" to arbitrate. Specifically, defendant alleged "[g]ood cause exists for granting [the] Petition because the terms of the alleged Agreements that are at the heart of the allegations of this action, and which Plaintiffs affirmatively allege, compel arbitration of any disputes under the Agreements." Defendants did not themselves affirmatively allege the existence of arbitration agreements and offered no evidence of any. Their evidence consisted solely of counsel's declaration attaching a copy of plaintiffs' complaint, which in turn attached a copy of the Brodke agreement. For their own part, defendants contested the existence of the agreements with plaintiffs, but for purposes of

the petition to compel arbitration only, relied on plaintiffs' allegations. The trial court granted defendants' petition to compel arbitration and plaintiffs petitioned for a writ of mandate.

The court of appeal issued an alternative writ of mandate directing the trial court to set aside and vacate its order granting the petition and to enter a new order denying the petition because it failed to comply with *Code Civ. Proc. § 1281.2*. The trial court complied with the writ; the court of appeal discharged the alternative writ and summarily denied the petition as moot. Defendants timely appealed.

The court of appeal affirmed (*160 Cal. App. 4th 1569, 1571, 1578)* . The court set forth the portions of *Code Civ. Proc. § 1281.2* that recite "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines" there is a defense to enforcing the agreement. It is well settled that a proceeding to compel arbitration is in essence a suit in equity to compel specific performance of a contract. Thus, a party to an agreement to arbitrate may not bring an action to compel specific performance of the arbitration provision until he or she can allege the existence of that agreement. Here, defendants did not affirmatively allege the existence of a written agreement to arbitrate. They did the opposite. They contested the existence or validity of any agreements with plaintiffs. Defendants failed to satisfy the most basic statutory prerequisite to granting the petition--to allege the existence of a written agreement to arbitrate (*160 Cal. App. 4th 1569, 1574)* . Defendants offered several excused for their failure to allege the existence of an arbitration agreement, none of which the court of appeal found to have any merit (*160 Cal. App. 4th 1569, 1575-1577)* . The court distinguished this situation from that involved in *St. Agnes Medical Center v. Pacificare of California (2003) 31 Cal. 4th 1187, 1199, 8 Cal. Rptr. 3d 517, 82 P.3d 727* (*St. Agnes*, discussed at *§ 20.81[3][a]* which upheld the right to move to compel arbitration while at the same time denying the existence of the contracts containing the arbitration clause. *St. Agnes* involved allegations that the contract was void *ab initio* due to an event transpiring after its effective date. Neither party denied its knowing and voluntary agreement to the contract or the terms it contained. Here defendants claim there were no written agreements with plaintiffs. The rule in *St. Agnes* applies where a party challenges the *validity* of a contract, not its very existence. It does not apply when, as here, the moving party claims it never entered into a contract (*160 Cal. App. 4th 1569, 1576)* . A party moving to compel arbitration is not entitled to proceed with their proof of an agreement to arbitrate without first alleging the existence of that agreement. Nor is there a public policy which would compel the enforcement of a contract on behalf of a party who denies the very existence of the contract sought to be enforced. The court of appeal concluded that because defendants have not met their pleading burden under *Code Civ. Proc. § 1281.2*, the court properly denied their petition to compel arbitration (*160 Cal. App. 4th 1569, 1577)* .

[j] Statute Mandating Arbitration Is Unconstitutional

The court in ***County of Sonoma v. Superior Court*** *(2009) 173 Cal. App. 4th 322, 93 Cal. Rptr. 3d 39* , ruled that *Code Civ. Proc. § 1299 et seq.*, added by Stats. 2003, ch. 877, and requiring arbitration of firefighters' and public safety officers' wages when impasse occurs during contract negotiations, but providing for a local governmental veto of the arbitration award, is unconstitutional grant of authority delegated local jurisdictions by *Cal. Const. art. XI, § 1(b)*, to compensate their employees and impermissibly delegates to the arbitration panel the power to interfere with county money and to perform municipal functions in violation of *Cal Const. art. XI, § 11(a)*. On that basis, the court refused to compel arbitration under the statute (*173 Cal. App. 4th 322, 346-347, 355)* .

[k] Arbitration Agreement Was Not Signed By Necessary Parties

Fagelbaum & Heller LLP v. Smylie (2009) 174 Cal. App. 4th 1351, 1365, 95 Cal. Rptr. 3d 252 is discussed in *Ch. 20, Arbitration: Compelling, § 20.85[3][b]*.

[l] Attorney at Law Did Not Have Authority to Bind Client and Client Did Not Ratify or Consent to

Agreement

In ***Toal v. Tardif*** *(2009) 178 Cal. App. 4th 1208, 101 Cal. Rptr. 3d 97* , defendant home sellers appealed a judgment of the Superior Court of Orange County, California, which confirmed an arbitration award in favor of plaintiff buyers in their action for breach of contract, negligence, misrepresentation, and negligent misrepresentation. Each party's attorney had signed a stipulation to resolve the dispute through private arbitration. The court of appeal reversed, noting that in the absence of express authorization of counsel to sign a binding contract, a client is bound by an arbitration agreement signed by his or her counsel only if the client consented to or ratified the agreement. An attorney at law, merely by virtue of his or her employment as such, has no apparent authority to bind a client to an agreement for arbitration. When a client engages an attorney to litigate in a judicial forum, the client has a right to be consulted, and the client's consent obtained, before the dispute is shifted to another, and quite different, forum (*178 Cal. App. 4th 1208, 1221* & n.9). Lacking the signature of the adverse party on the contract to arbitrate, the award's proponent must provide additional substantiation of the agreement sufficient to prove by a preponderance of the evidence that the opposing party expressly authorized counsel to sign on his or her behalf, or evidence the opposing party ratified the unauthorized arbitration contract. The trial court erred by granting plaintiffs' petition to confirm the award without determining whether defendants consented to or ratified the arbitration agreement (*178 Cal. App. 4th 1208, 1223)* . Accordingly, the court of appeal remanded for hearing on the issue of consent or ratification by the defendant (*178 Cal. App. 4th 1208, 1224)* . The portion of the opinion and relevant facts dealing with the issue of raising lack of attorney authority after arbitration has reached an award is discussed in *Ch. 20C, Arbitration: Confirming, Correcting, or Vacating the Award, § 20C.150[1][B], [3][b].*

[m] Petition Did Not Plead and Prove Request or Demand for Arbitration Pursuant to and Under Terms of Agreement

Mansouri v. Superior Court *(2010) 181 Cal. App. 4th 633, 104 Cal. Rptr. 3d 824* , involved an answer to a petition to compel arbitration asserting that the petitioner never requested arbitration in accordance with the terms of the agreement. The court noted that Legislature plainly intended *Code Civ. Proc. § 1281.2* to provide a procedural device for enforcing the parties' written arbitration agreement if one or more of the parties does not comply with the agreement to arbitrate. The only reasonable construction of that statute is to require for a petition to compel arbitration the pleading and proof of a request or demand by one party to the other party or parties for arbitration of such controversy pursuant to and under the terms of their written arbitration agreement. Therefore, a demand for single-arbitrator arbitration under the parties' agreement, which called for three arbitrators, was not valid and the petition to compel arbitration was denied [*181 Cal. App. 4th 633, 642)* .

[4] Additional Authorities

[a] Controversy Not to Be Arbitrated If Not Covered by Arbitration Agreement

Valencia v. Smyth (2010) 185 Cal. App. 4th 153, 110 Cal. Rptr. 3d 180 , turned on the choice of law clause in the arbitration agreement. It called for the application of procedures under the California Code of Civil Procedure, but interpretation of the agreement under the Federal Arbitration Act (FAA). The court of appeals, citing authority to the effect that the FAA does not prevent the enforcement of agreements to arbitrate under different rules than those set forth in the act itself, noted that the CAA and the FAA employ the same rules of contract interpretation anyway, in that the FAA obligates federal courts to apply state law when interpreting an arbitration clause. Interpreting the agreement under the plain meaning rule applicable under the FAA, the court ruled that given that *Code Civ. Proc. § 1281.2* is in the Code of Civil Procedure, it applies. Applying *Code Civ. Proc. § 1281.2(c)* to the facts of the case, the court affirmed the trial court's exercise of discretion to stay the arbitration and consolidate the matter in the trial court.

Mundi v. Union Sec. Life Ins. Co. (9th Cir. 2009) 555 F.3d 1042 , affirmed a district court order denying defendant-insurance company's motion to compel arbitration in plaintiff's survivor's action. The basis for the defendant's

motion was an arbitration clause in a loan agreement concerning the decedent's financing of a purchase of real estate, to which the defendant was not a party. Defendant sought arbitration of its dispute with plaintiff under a policy issued by the defendant covering the decedent's life. In addressing the merits of the motion, the court agreed that the face of the loan agreement indicated that the dispute between plaintiff and defendant was not within the scope of the arbitration provision, in that any disagreement between the borrower and a third party is simply not within the scope of the arbitration agreement (*555 F.3d 1042, 1045)* . Therefore, arbitration could not be compelled on the basis of equitable estoppel because plaintiff's claim that defendant breached the policy was not intertwined with the contract providing for arbitration or on the basis that plaintiff's claim arise out of or related directly to the loan agreement (*555 F.3d 1042, 1046-1047)* .

In *Titan Group, Inc. v. Sonoma County Sanitation Dist. (1985) 164 Cal. App. 3d 1122, 211 Cal. Rptr. 62* , the court of appeal held that arbitration was not required by a construction contract which provided that disputes would be decided by arbitration if the parties mutually agreed or by trial in a court of competent jurisdiction. The provision for arbitration if the parties "mutually agree" was meaningless, since the parties could agree to arbitrate without this clause. The contract also contained a clause stating that controversies "may be subject to the decision of some competent person" to be agreed on by the parties, and provided a procedure to choose arbitrators if the parties couldn't agree on a referee. The court held that this provision only provided a procedure for arbitration in the event the parties agreed to arbitrate. Additionally, the clause did not waive the right to a jury trial, as such a waiver should appear in clear and unmistakable form (*164 Cal. App. 3d 1122, 1127-1129)* .

[b] Inability to Compel Arbitration of Issue Not Required by Agreement or Statute to Be Arbitrated

In a case governed by the Federal Arbitration Act (FAA), *9 U.S.C. § 1 et seq.*, the California court of appeals in *Valentine Capital Asset Management, Inc. v. Agahi (2009) 174 Cal. App. 4th 606, 94 Cal. Rptr. 3d 526* , ruled that while doubts concerning the scope of arbitrable issues must be construed in favor of arbitration, neither the FAA nor public policy requires parties to arbitrate issues that they have not agreed to arbitrate. The policy under federal and California law favoring the arbitration of disputes, which cannot be used to compel arbitration of disputes that are plainly outside the scope of the arbitration agreement, did not relieve former employees of an investment advisor of the burden to provide evidence from which a court might infer that the work they allegedly performed, the trade secrets they allegedly misappropriated, the use to which they allegedly put those trade secrets, or the parties' alleged defamation of each other, arose out of a party's activities as an associated person of a Financial Industry Regulatory Authority (FINRA) member. Due to the lack of that evidence on the record in the appeal, the parties' claims were not subject to arbitration under FINRA Rule 13200 (*174 Cal. App. 4th 606, 627)* .

The Second District, Division Seven court of appeal reversed the trial court's denial of petition to compel arbitration in *Compulink Mgmt. Ctr., Inc. v. St. Paul Fire and Marine Ins. Co. (2008) 169 Cal. App. 4th 289, 87 Cal. Rptr. 3d 72* . The reviewing court disagreed with the trial court about whether any of plaintiff's claims for breach of contract and implied covenant of good faith and fair dealing were within the scope of mandatory arbitration under *Civ. Code § 2860(c)*. While the court of appeals agreed that claims of bad faith took those claims out of the statute's mandate (*169 Cal. App. 4th 289, 300*), it overruled the trial court in holding that any contested issues concerning the amount of *Cumis* attorney's fees allegedly owed are subject to mandatory arbitration of actions filed in California courts (*169 Cal. App. 4th 289, 298)* under the statute (*169 Cal. App. 4th 289, 300)* . Noting that the statute does not contain an exception for fee disputes in cases where other claims or issues also are alleged, the court refused to exempt from arbitration *Cumis* fee disputes that are coupled with additional bad faith claims (*169 Cal. App. 4th 289, 296-297)* . In that respect, the ruling expressly disagreed with the decision of the Second District, Division Four in *Fireman's Fund v. Yunesi*, discussed *below* (*169 Cal. App. 4th 289, 299, 300)* .

Plaintiff insured law firm in *Gray Cary Ware & Freidenrich v. Vigilant Insurance Co. (2004) 114 Cal. App. 4th 1185, 8 Cal. Rptr. 3d 475* undertook to defend themselves in an action in which one of their investigators was also named as defendant. Defendant Vigilant Insurance agreed to defend the firm under a reservation of rights, which triggered a

conflict and entitled plaintiff to independent (*Cumis*) counsel under *Civ. Code § 2860*. Plaintiff decided to defend itself and Vigilant approved. Plaintiff deemed their investigator also needed independent counsel. Without consulting or informing Vigilant, plaintiff paid the legal fees for an independent third party counsel to represent the investigator. When plaintiff sought to recover fees for the investigator's defense from Vigilant, Vigilant denied the claim on the ground the investigator was not an employee of the firm and thus not covered under the policy. Vigilant also refused plaintiff's request to arbitrate the matter under *Civ. Code § 2860(c)*. Plaintiff moved to compel arbitration. The motion was denied, and plaintiff appealed.

The court of appeal affirmed the denial. Both parties agreed that the investigator's attorney's fees and litigation expenses were not covered under the policy. For defendant, that was enough to support denial of the motion to compel arbitration under *Civ. Code § 2860(c)*. However, plaintiff reasoned that as they were *Cumis* counsel, *Civ. Code § 2860(c)* encompassed any defense costs they incurred, which included the attorney's fees for the investigator based on their reasonable determination that their own defense necessarily included defense of one alleged to be their agent. *Civ. Code § 2860(c)* does not define "attorney fees." The court of appeal concluded that although an insurer must pay both *Cumis* attorney fees and *Cumis* defense expenses, *Civ. Code § 2860(c)* does not require arbitration of *Cumis* counsel's defense expenses (*114 Cal. App. 4th 1185, 1192)* .

Mayhew v. Benninghoff (1997) 53 Cal. App. 4th 1365, 62 Cal. Rptr. 2d 27 , was an action by a client against an attorney for conversion, breach of fiduciary duty, and to impose a constructive trust on some $607,000 plaintiff had entrusted to defendant in connection with a side business agreement. Attorney sought to compel arbitration under a 1992 retainer agreement that provided for arbitration of any controversy arising out of or related to the petitioner's engagement for legal matters. Plaintiff opposed the petition, and it was denied. Defendant appealed.

The court of appeal affirmed, holding that defendant could not rely on the arbitration clause in the retainer agreement to require arbitration of disputes arising out of a business transaction with plaintiff involving the transfer of over half a million dollars, whether or not they had an attorney-client relation ship concerning other matters. The retainer agreement does not explain what it covers, but the court of appeal found plaintiff's explanation that he expected it only to cover defendant's legal representation for plaintiff's divorce reasonable (*53 Cal. App. 4th 1365, 1370)* . A party cannot be compelled to arbitrate a dispute that it has not elected to submit to arbitration. Despite California's strong public policy favoring arbitration of fee disputes, the court declined to compel arbitration of litigation that went far beyond the amount of legal fees or hourly billing rates (*53 Cal. App. 4th 1365, 1371-1372)* .

Fireman's Fund v. Younesi (1996) 48 Cal. App. 4th 451, 55 Cal. Rptr. 2d 671 , arose out of a dispute over "*Cumis* counsel" fees under *Civ. Code § 2860(c)*. After defendant had served in that capacity for over two years, and plaintiff had paid the bills as submitted, plaintiff audited the account, and sued for $160,000 alleging fraud, duplicate and excessive billings, negligence, conversion, and other causes of action. Defendant filed a motion to compel arbitration under *Civ. Code § 2860(c)*, which provides that any dispute concerning "*Cumis* counsel's" fees should be decided by mandatory arbitration. The trial court denied the motion. Defendant appealed.

The court of appeal affirmed the denial of the motion to compel arbitration. The case involved numerous causes of action, including fraud and malpractice, which are not subject to arbitration under *Civ. Code § 2860(c)*. The case involved more than a billing dispute. Further, plaintiff would be entitled to a jury trial on the fraud claims. Thus, *Civ. Code § 2860(c)* was not broad enough to compel arbitration of those claims (*48 Cal. App. 4th 451, 457-459)* .

California Points & Authorities

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20A ARBITRATION: RESISTING
PART II. FORMS
A. General Principles Relating to Resisting Arbitration

2-20A California Points & Authorities § 20A.11

§ 20A.11 Possibility of Conflicting Ruling by Court on Common Issue of Law or Fact

[1] FORM

THE PETITION TO COMPEL ARBITRATION SHOULD BE DENIED BECAUSE _____ [*name*] IS ALSO A PARTY TO A PENDING COURT _____ [ACTION *or* SPECIAL PROCEEDING] WITH A THIRD PARTY, ARISING OUT OF _____ [THE SAME TRANSACTION *or* A SERIES OF RELATED TRANSACTIONS], AND THERE IS A POSSIBILITY OF CONFLICTING RULINGS ON A COMMON ISSUE OF LAW OR FACT.

A. Party to Arbitration Agreement Is Also Party in Pending Court Action and Conflicting Rulings on Common Issue Are Possible. Arbitration of a controversy should not be ordered if a party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions, and there is a possibility of conflicting rulings on a common issue of law or fact (*Code Civ. Proc. § 1281.2(c)*; *Best Interiors, Inc. v. Millie and Severson, Inc. (2008) 161 Cal. App. 4th 1320, 1329-1330, 75 Cal. Rptr. 3d 1* ; *Whaley v. Sony Computer Entertainment America, Inc. (2004) 121 Cal. App. 4th 479, 485-486, 17 Cal. Rptr. 3d 88* ; *Henry v. Alcove Investment, Inc. (1991) 233 Cal. App. 3d 94, 284 Cal. Rptr. 255* ; *C.V. Starr & Co. v. Boston Reinsurance Corp. (1987) 190 Cal. App. 3d 1637, 1641, 236 Cal. Rptr. 167*).

[*Optional*] **B. Application of *Code Civ. Proc. § 1281.2* Is Not Preempted by Federal Arbitration Act.** In a dispute to which the Federal Arbitration Action applies, and which arises under a contract providing for arbitration in accordance with California law, the Federal Arbitration Act does not preempt the application of *Code of Civil Procedure Section 1281.2* to stay arbitration pending the outcome of related litigation involving third parties (*Volt Information Sciences v. Board of Trustees (1989) 489 U.S. 468, 476-479, 109 S. Ct. 1248, 103 L. Ed. 2d 488* ; *Cronus Investments, Inc. v. Concierge Services (2005) 35 Cal. 4th 376, 384, 25 Cal. Rptr. 3d 540, 107 P.3d 217* ; *Best Interiors, Inc. v. Millie and Severson, Inc. (2008) 161 Cal. App. 4th 1320, 1325, 75 Cal. Rptr. 3d 1* ; *Mount Diablo Medical Center v. Health Net of California, Inc. (2002) 101 Cal. App. 4th 711, 714, 726-727, 124 Cal. Rptr. 2d 607* ; *Henry v. Alcove Investment, Inc. (1991) 233 Cal. App. 3d 94, 284 Cal. Rptr. 255*).

[*Optional*] **C. Party Invoking *Code of Civil Procedure Section 1281.2(c)* Need Not Be Party to Litigation.** There is no requirement that a party resisting arbitration by invoking *Code of Civil Procedure Section 1281.2(c)* to resist arbitration be a party to the litigation involving the third party (who has not signed the arbitration agreement). Neither the plain language of the statute nor its legislative history imposes such a requirement. It is enough that the party resisting arbitration be a party to the transaction that gave rise to the controversy being litigated and that there is a possibility of conflicting rulings on common issues in the litigation and in any arbitration proceeding (*Whaley v. Sony Computer Entertainment America, Inc. (2004) 121 Cal. App. 4th 479, 485-486, 488, 17 Cal. Rptr. 3d 88*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a petition to compel arbitration when a party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions, and there is a possibility of conflicting rulings on a common issue of law or fact [*see Code Civ. Proc. § 1281.2(c)*]. Paragraph A states the general rule for application of *Code Civ. Proc. § 1281.2(c)*. Paragraph B is only necessary when the dispute would otherwise be governed by the Federal Arbitration Act (*9 U.S.C. § 1 et seq.*). Although the authorities cited in Paragraph B. involved arbitration agreements with choice of law provisions that indicated California law should be applicable, unless some other law is specified as applicable, California law would automatically apply, and a choice of California law clause should not be necessary for *Code Civ. Proc. § 1281.2(c)* to be part of the law under which a California court determines whether arbitration should be ordered. Optional Paragraph C is for use to anticipate or rebut the contention that *Code Civ. Proc. § 1281.2(c)* can only be invoked by a party to the arbitration agreement who is also a party to the related litigation against the third party (who did not sign the arbitration agreement).

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in opposition to one seeking to compel arbitration [*see § 20A.10*].

[b] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, argument should indicate the nature of the pending action, how that action deals with the same transaction, and how a conflicting ruling on a common issue of law or fact is possible.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For a form of response to a petition to compel arbitration that may be supported by this memorandum, as well as a procedural checklist, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

[d] Related Memoranda

For memoranda to combine with this form, regarding other matters that the opposition may need to address, see *§§ 20A.12, 20A.20 et seq., 20A.30 et seq., 20A.40 et seq., 20A.60 et seq., and 20A.80* et seq.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

This form may be opposed by Ch. 20, *Arbitration: Compelling*, § 20.10[1], Optional Paragraph L, when the arbitration agreement clearly provides that the parties have adopted both the procedural and substantive provisions of the Federal Arbitration Act to govern their arbitration.

[3] Discussion of Authorities

[a] Party to Arbitration Agreement Is Also Party in Pending Court Action and Conflicting Rulings on Common Issue Are Possible

Code Civ. Proc. § 1281.2(c) provides that a court is not required to compel arbitration if it determines that a party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party arising out of the same transaction or series of transactions and there is a possibility of conflicting rulings on a common issue of law or facts. For purposes of *Code Civ. Proc. § 1281.2*, a pending court action or special proceeding includes an action or proceeding initiated by the party refusing to arbitrate after the petition to compel arbitration has been filed, but on or before the date of the hearing of the petition [*Code Civ. Proc. § 1281.2*]. *Code Civ. Proc. § 1281.2(c)* is not applicable to an agreement to arbitrate disputes regarding the professional negligence of a health care provider made pursuant to *Code Civ. Proc. § 1295* [*Code Civ. Proc. § 1281.2(c)*].

Best Interiors, Inc. v. Millie and Severson, Inc*. (2008) 161 Cal. App. 4th 1320, 75Cal. Rptr. 3d 1* , was a dispute between an owner, general contractor and a subcontractor. The job was completed, but the subcontractor claimed that more than $ 1.2 million of the contract price remained unpaid; that additional construction costs were owed because of various disruptions to the construction schedule; and that the reasonable value of materials and services it actually furnished for which it had not been paid was more than $ 2 million. The subcontractor sued the contractor, the owner, and two building inspectors, alleged that the contractor's failure to manage, coordinate, and schedule the work properly interfered with, hindered, and delayed it's work on the project, significantly increasing the nature, scope, and duration. As to the inspectors, who were hired by the owner, plaintiff alleged that they conducted improper and unnecessary inspections, which disrupted and hindered its work. Based on arbitration clauses in the subcontract and in the prime contract between the contractor and the owner, the contractor petitioned to compel arbitration of the dispute with plaintiff and to stay plaintiff's lawsuit pending arbitration. Plaintiff opposed the petition, arguing that the inspectors, both of whom had filed cross-complaints, could not be compelled to arbitrate; that arbitration would subject it to a risk of inconsistent results; and that the court had authority under *Code Civ. Proc. § 1281.2* to refuse to enforce the arbitration clause. The trial court initially granted the petition. However, after two more rounds of briefing and hearings, the trial court ending by denying the petition to compel arbitration. Defendants appealed.

The court of appeal affirmed, finding no abuse of discretion (*161 Cal. App. 4th 1320, 1322, 1325, 1331)* . The contractor argued that the Federal Arbitration Act (FAA; *9 U.S.C. § 1 et seq.*) governed and that therefore the court had

no authority to deny arbitration, and even if it did have authority, there was no possibility of conflicting rulings and the court should have ordered arbitration. The FAA governs contracts in interstate commerce, but the FAA does not preempt *Code Civ. Proc. § 1281.2* when the parties have agreed that their arbitration agreement will be governed by the law of California (*161 Cal. App. 4th 1320, 1325)* . The subcontract did not contain a choice-of-law provision but stated that any dispute resolution procedure in the prime contract was incorporated in the subcontract and would apply to any disputes arising under the subcontract (*161 Cal. App. 4th 1320, 1326)* . The prime contract provided that it would be governed by the law of the place where the project was located. Thus, the parties had agreed that California law would govern (*161 Cal. App. 4th 1320, 1327)* . The contractor advanced three reasons why the prime contract's choice of law provision did not control. The court of appeal did not find any of them to have merit (*161 Cal. App. 4th 1320, 1328-1329)* . The court then discussed *Code Civ. Proc. § 1281.2(c)*, noting that it gives the trial court the discretion to refuse to enforce an arbitration agreement if a party to the agreement is also a party to a pending court case with a third party and there is a possibility of conflicting rulings on a common issue of law or fact (*161 Cal. App. 4th 1320, 1329)* . The court reviewed the reasons given by the trial court for concluding that the action should be litigated in a single forum, including the contested issue of whether the inspectors were agents of the owner (*161 Cal. App. 4th 1320, 1329-1330)* . The contractor maintained, however, that there was no possibility of conflicting rulings regarding those issues. The court of appeal pointed out that argument ignored plaintiff's allegation that the improper and illegal inspection activities were carried on with the full knowledge, consent, authorization, or ratification of the contractor, which was in a logical position to know about the inspectors designated to inspect plaintiff's work and to allow inspections and access to the project. The court agreed with plaintiff's assertion that the agency and ratification issues were a central part of its claims against both the contractor and the owner; and plaintiff's claims against the contractor could not be neatly set aside and arbitrated without potentially seriously prejudicing all of the other parties. The court of appeal concluded that the contractor's claim that there was no possibility of conflicting rulings did not survive analysis and that the trial court did not exceed the bounds of reason when it decided, on that basis, to deny the petition to compel arbitration *(161 Cal. App. 4th 1320, 1330)* .

Whaley v. Sony Computer Entertainment America, Inc. *(2004) 121 Cal. App. 4th 479, 17 Cal. Rptr. 3d 88* , is discussed at [c], *below*.

Henry v. Alcove Investment, Inc. *(1991) 233 Cal. App. 3d 94, 284 Cal. Rptr. 255* , was an action by a homeowner against home improvement contractors and the lender that financed the improvements and later foreclosed when plaintiff did not pay the note, which was secured by a trust deed on his home. The complaint alleged that plaintiff was a functional illiterate, that the improvement contracts and loans had been induced by the contractors' (and their agents') fraud, and that plaintiff's signature had been forged or signed to blank contracts and loan documents which were later completed for amounts in excess of those orally agreed. The contractors were alleged to be agents of the lender. The only arbitration clause was in the loan application, to which the contractors and their agents were not parties. The trial court stayed arbitration under *Code Civ. Proc. § 1281.2(c).*

The court of appeal affirmed, finding sufficient possibility for conflicting rulings on the issues of fraud and agency to stay the arbitration (*233 Cal. App. 3d 94*).

C.V. Starr & Co. v. Boston Reinsurance Corp. *(1987) 190 Cal. App. 3d 1637, 236 Cal. Rptr. 167* , involved a dispute concerning apportionment among reinsurers. In addition to a general professional liability insurance policy, an accounting firm obtained two policies of "excess" professional liability insurance from a different insurance carrier. Simultaneously, that insurance carrier obtained reinsurance from various insurers on each of the policies. Sixteen lawsuits filed against the accounting firm for professional misconduct were settled with payments by the insurers. A dispute then arose among the excess carrier's reinsurers regarding the allocation of its payment. Plaintiff, the excess carrier's underwriting manager and assignee, made the allocation to which the reinsurers of the second policy objected. After an agreement meeting among the reinsurers proved unsuccessful, plaintiff filed suit for breach of the reinsurance contracts and for declaratory relief seeking a judicial determination of the question of allocation among the excess insurers. Two of the 11 reinsurers named as defendants moved to stay or dismiss the lawsuit on the ground that the

dispute was subject to arbitration. The trial court deemed the motion as a petition to compel arbitration. Plaintiff opposed the petition, arguing that arbitration was only applicable to one reinsurer, and only under a different type of dispute, and that even if a validarbitration agreement was shown, arbitration should be denied because of the possibility of conflicting rulings. The trial court denied the petition, and two of the reinsurers appealed.

The court of appeal affirmed on the ground that arbitration of the one reinsurer's dispute with plaintiff could lead to conflicting rulings on common issues. The court cited *Code Civ. Proc. § 1281.2(c)* as authority for its ruling. The court found *Code Civ. Proc. § 1281.2(c)* applicable because the controversy concerned the proper allocation of the settlement among the 11 reinsurance carriers, only one of which was subject to arbitration. Thus, the remaining allocation disputes would presumably be determined by court action, and the potential for conflicting rulings was readily apparent. Depending on the apportionment of responsibility by the arbitrator and the court independent of each other, plaintiff could either be overindemnified or underindemnified (*190 Cal. App. 3d 1637, 1641)* . The court did not agree with defendant's argument that the court action could have been stayed until the arbitration was completed and then taken the arbitration award into account when deciding allocation among the others. That would have resulted in giving the arbitrator's decision binding effect on all other reinsurers as well, even though they were not legally bound to arbitrate. The court said that the optimal procedure would be a single proceeding bringing together all the affected parties for an orderly decision on the allocations of each insurer. *Code Civ. Proc. § 1281.2(c)* allows the court to order intervention or joinder of all parties in a single action or special proceeding (*190 Cal. App. 3d 1637, 1642)* .

[b] Application of Code Civ. Proc. § 1281.2 Is Not Preempted by Federal Arbitration Act

Volt Information Sciences v. Board of Trustees *(1989) 489 U.S. 468, 109 S. Ct. 1248, 103 L. Ed. 2d 488* , involved a dispute under a construction contract with a choice of law provision stipulating that the contract was governed by the law of the place of the project, namely California law. Defendant made a formal demand for arbitration. Plaintiff responded by filing an action against defendant in state court alleging fraud and breach of contract and seeking indemnity from two other companies that were involved in the construction project but did not have arbitration agreements with plaintiff. Defendant petitioned to compel arbitration and to stay the litigation, relying on both *9 U.S.C. §§ 3-4* and *Code Civ. Proc. § 1281.2*. Plaintiff opposed the motion on the ground that there were parties necessary for the resolution of the issues who were not party to the arbitration agreement and that to compel arbitration would invite the possibility of conflicting rulings on common issues of law or fact [*see Code Civ. Proc. § 1281.2(c)*]. The court denied the motion to compel arbitration and stayed the arbitration proceeding pending the outcome of the litigation. Defendant appealed.

The California Court of Appeal affirmed. That court acknowledged that the parties' contract involved interstate commerce, that therefore the Federal Arbitration Act (*9 U.S.C. § 1 et seq.*; FAA) was applicable, and that the FAA contained no provision allowing arbitration to be stayed pending resolution of related litigation involving third parties not bound by the arbitration agreement. However, the California Court of Appeal determined that the choice of law provision in the agreement made *Code Civ. Proc. § 1281.2(c)* applicable and that it was not preempted by the FAA (*489 U.S. 468, 471-472)* .

The California Supreme Court denied defendant's petition for discretionary review. The U.S. Supreme Court determined that it had appellate jurisdiction pursuant to *28 U.S.C. § 1257(2)* (*489 U.S. 468, 473)* .

The Supreme Court first rejected defendant's argument that the choice of law provision was invalid and unenforceable as a waiver of the right to compel arbitration. The Court said that *9 U.S.C. § 4* does not confer a right to compel arbitration of any dispute at any time, but only a right to compel arbitration in the manner provided for in the agreement, which in this case meant pursuant to California law, including *Code Civ. Proc. § 1281.2(c)* (*489 U.S. 468, 474-475)* .

Next, the Court considered defendant's contention that the choice of law provision violated the settled federal rule that questions of arbitrability must be resolved with a healthy regard for the federal policy favoring arbitration. Again, the

Court said, there is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy simply ensures the enforceability of arbitration in accordance with the rules agreed to by the parties (*489 U.S. 468, 476)* .

Turning to the more specific question of whether application of *Code Civ. Proc. § 1281.2(c)* was preempted by the FAA, the Court said that the FAA contains no express preemptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration. However, even though Congress has not completely displaced state regulation of arbitration, state law may nonetheless be preempted to the extent that it actually stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress (*489 U.S. 468, 477)* . The particular state law designated by the parties in their contract will not be preempted and will govern arbitration under the contract unless enforcement of the particular state provision would undermine the goals and policies of the FAA (*489 U.S. 468, 477-478)* . The goals and policies of the FAA are expressed in its substantive provisions, *9 U.S.C. §§ 1, 2*, which establish a federal policy favoring arbitration and enforcement of agreements to arbitrate. *9 U.S.C. §§ 1, 2* are applicable in state courts (*489 U.S. 468, 477)* . Those goals and policies do not require arbitration when the parties have not agreed to it, nor do they prevent parties who have agreed to arbitrate from excluding certain claims from the scope of their arbitration agreement or from specifying the rules under which their arbitration will be conducted (*489 U.S. 468, 478-479)* . Thus, the Court concluded that under a contract that provides for arbitration in accordance with California law, *Code Civ. Proc. § 1281.2* is not in conflict with the policies of the FAA and is therefore not preempted by it (*489 U.S. 468, 479)* .

Cronus Investments, Inc. v. Concierge Services *(2005) 35 Cal. 4th 376, 25 Cal. Rptr. 3d 540, 107 P.3d 217* , involved disputes arising from purchase and sale of a business and related noncompetition clauses. Six agreements and 10 parties (including principals and controlling entities) were involved in the complaint and cross-complaints. Four of the applicable agreements contained arbitration clauses which provided that the agreement(s) would be construed and enforced in accordance with, and governed by, California law, without giving effect to the conflict of lawsprovisions thereof, but that the designation of California law would not be deemed an election to preclude application of the Federal Arbitration Act, if it would be applicable. Plaintiffs moved to compel arbitration and stay the litigation. The trial court found that (1) not all of the causes of action and controversies were subject to arbitration, (2) only three of eight cross-complaints were subject to arbitration, (3) some of the parties were not parties to the arbitration agreements, (4) the lawsuit and the arbitration proceedings contained overlapping issues of law and fact, and denied the motion to compel arbitration, stayed arbitration pending outcome of the litigation, and consolidated the three arbitrable cross-claims with the action for all purposes. Plaintiffs appealed. The court of appeal affirmed. The California Supreme Court granted review.

The California Supreme Court affirmed, finding that in this situation, the Federal Arbitration Act (FAA) did not preempt application of *Code Civ. Proc. § 1281.2(c)* (*35 Cal. 4th 376, 384)* . The parties agreed that the contracts at issue involved interstate commerce and thus, fell within the coverage of the FAA. The Court discussed the FAA and *Volt Information Sciences v. Board of Trustees (1989) 489 U.S. 468, 109 S. Ct. 1248, 103 L. Ed. 2d 488* (discussed *above*), noting that the FAA contains no express preemptive provision and does not reflect a congressional intent to occupy the entire field of arbitration. Nevertheless, state law is preempted to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the FAA (*35 Cal. 4th 376, 385)* . However, there is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy simply ensures the enforceability of arbitration in accordance with the rules agreed to by the parties. The parties seemed to agree that their choice of law provision was broad enough to incorporate the California Arbitration Act (CAA; *Code Civ. Proc. § 1280 et seq.*), including *Code Civ. Proc. § 1281.2(c)* and that its explicit reference to enforcement included matters such as whether proceedings to enforce the agreement would occur in court of before an arbitrator (*35 Cal. 4th 376, 387)* . Under the agreements, application of *Code Civ. Proc. § 1281.2(c)* would only be nullified if applicable provisions of the FAA were inconsistent with the CAA. The Court noted that the procedural provisions of the FAA, *9 U.S.C. §§ 3* and *4* are only applicable in federal court (*35 Cal. 4th 376, 388-390)* . Nor does *Code Civ. Proc. § 1281.2(c)* undermine or frustrate *9 U.S.C. § 2*'s policy of enforceability of arbitration agreements, but in fact manifestly encourages resort to the

arbitral process (*35 Cal. 4th 376, 391-392)* .

Federal law has not addressed the practical problems that arise in multiparty contractual disputes in which some or all of the contracts at issue include arbitration agreements. California has taken the lead in fashioning a legislative response to this problem by giving courts authority to consolidate or stay arbitration proceedings in order to minimize the potential for contradictory judgments (*35 Cal. 4th 376, 391-392)* . Unlike the rule at issue in *Mastrobuono v. Shearson Lehman Hutton, Inc. (1995) 514 U.S. 52, 115 S. Ct. 1212, 131 L. Ed. 2d 76* , *Code Civ. Proc. § 1281.2(c)* is an evenhanded law that allows the trial court to stay arbitration proceedings while the concurrent lawsuit proceeds, *or* to stay the lawsuit while arbitration proceeds to avoid conflicting rulings on common issue of fact and law among the interested parties (*35 Cal. 4th 376, 392)* . The Court further expressly declined to follow *Wolsey, Ltd. v. Foodmaker, Inc. (9th Cir. 1998) 144 F.3d 1205* , in concluding that *Code Civ. Proc. § 1281.2(c)* governs the allocation of power between alternative tribunals and limits the authority of arbitrator and disapproved of *The Energy Group, Inc. v. Liddington (1987) 192 Cal. App. 3d 1520, 238 Cal. Rptr. 202* and *Warren-Guthrie v. Health Net (2000) 84 Cal. App. 4th 804, 101 Cal. Rptr. 2d 260* to the extent their holdings were predicated on the conclusion that section 1281.2(c) limits the authority of arbitrators and conflicts with the FAA (*35 Cal. 4th 376, 393, n.8*). The Court concluded by saying that its opinion did not preclude parties from expressly designating that any arbitration proceeding should move forward under the FAA's procedural provisions rather than under state procedural law, but under the "if it would be applicable" language of these arbitration clauses, the FAA did not bar enforcement of *Code Civ. Proc. § 1281.2(c)* (*35 Cal. 4th 376, 394)* .

Best Interiors, Inc. v. Millie and Severson, Inc*. (2008) 161 Cal. App. 4th 1320, 75 Cal. Rptr. 3d 1* , is discussed at [a], above.

The parties in ***Mount Diablo Medical Center v. Health Net of California, Inc.*** *(2002) 101 Cal. App. 4th 711, 124 Cal. Rptr. 2d 607* had a fee for service agreement under which Health Net agreed to pay Mount Diablo specified fees for providing health care services to its members. Health Net also had an agreement with Alta Bates Medical Center, which provided services to plan members at prepaid rates. Alta Bates subcontracted its obligations to individual providers and hospitals, including Mount Diablo. Mount Diablo and Alta Bates had a hospital participation agreement under which Mount Diablo agreed to provide covered services at capitated rates to Health Net members who selected the Alta Bates network of providers. Both hospitals had similar agreements with PacificCare. On May 1, 1999, Mount Diablo purported to terminate its agreement with Alta Bates. The controversy is to determine who is responsible and in what amounts for services that Mount Diablo provided to Health Net members between May 1 and December 31, 1999. The complaint contained causes of action against Health Net, Alta Bates, and East Bay Medical Network (EBMN), the processing agent for Alta Bates. The agreement between Mount Diablo and Health Net had an arbitration clause. The Health Net/Alta Bates Agreement and the hospital participation agreement also contain arbitration provisions but no party other than Health Net attempted to resolve any aspect of the controversy through arbitration. In addition to the arbitration clause, the choice of law clause in the Mount Diablo/Health Net agreement provided that the "validity, construction, interpretation and enforcement of this Agreement shall be governed by the laws of the State of California." Health Net petitioned to compel arbitration. Mount Diablo resisted on the ground that *Code Civ. Proc. § 1281.2(c)* applied and that arbitration would create a risk of rulings that would conflict with rulings in pending litigation involving the other parties. The trial court agreed and denied the petition. Health Net appealed, contending that under *Mastrobuono v. Shearson Lehman Hutton, Inc. (1995) 514 U.S. 52, 115 S. Ct. 1212, 131 L. Ed. 2d 76* and *Warren-Guthrie v. Health Net (2000) 84 Cal. App. 4th 804, 101 Cal. Rptr. 2d 260* the choice of law clause did not incorporate California procedural law and the situation was therefore governed by the Federal Arbitration Act, which hasno provision to deny arbitration on the basis of related litigation involving third parties.

The court of appeal affirmed, finding the choice of law clause broad enough to incorporate California procedural law, specifically *Code Civ. Proc. § 1281.2(c)*, which is not preempted by the Federal Arbitration Act (*101 Cal. App. 4th 711, 714)* . The court of appeal first discussed *Volt Information Sciences v. Board of Trustees (1989) 489 U.S. 468, 474-479, 109 S. Ct. 1248, 103 L. Ed. 2d 488* , (discussed *above*) noting that *Volt* gave its blessing to *Code Civ. Proc. §*

1281.2(c) allowing parties to structure their arbitration agreements by specifying the rules under which they will arbitrate. Enforcing those rules in accordance with their terms is consistent with the FAA (*101 Cal. App. 4th 711, 718)* . In *Volt* though, the U.S. Supreme Court did not interpret the choice of law clause, but felt bound by the California court's interpretation that the parties agreed to arbitrate in accordance with California law. *Mastrobuono v. Shearson Lehman Hutton, Inc. (1995) 514 U.S. 52, 115 S. Ct. 1212, 131 L. Ed. 2d 76* (discussed in *Ch. 20C, Arbitration: Confirming, Correcting, or Vacating the Award, § 20C.122[3][a]*) then raises the question, which California law. Health Net argued that a "generic" choice of law clause is not sufficient to designate California arbitration law in preference to federal arbitration law (*101 Cal. App. 4th 711, 719)* . The clause at issue in *Mastrobuono* provided that the entire contract be governed by the laws of the State of New York. New York's decisional law at the time did not allow arbitrators to award punitive damages, so the question became, could the arbitrator award punitive damages under that choice of law clause. The U.S. Supreme Court answered yes, reasoning that to enforce federal policy favoring arbitration, as well as the common law rule construing ambiguous contract language against the drafter, the "laws of the State of New York" should encompass substantive principles that New York courts would apply but not include special rules limiting the authority of arbitrators (*101 Cal. App. 4th 711, 720)* . The court of appeal noted that Health Net's position was most supported by *Wolsey, Ltd. v. Foodmaker, Inc. (9th Cir. 1998) 144 F.3d 1205* (discussed *below*), which held that when the court has to interpret the choice of law clause at issue, the relevant question is whether *Code Civ. Proc. § 1281.2(c)* is a "substantive principle that California courts would apply" or a "special rule limiting the authority of arbitrators." *Wolsey* held that general choice of law clauses do not incorporate state rules that govern allocation of authority between courts and arbitrators and thus, *Code Civ. Proc. § 1281.2(c)* would not be applicable under such a choice of law clause (*101 Cal. App. 4th 711, 721)* . The clause at issue in *Wolsey* provided that the contract "shall be interpreted and construed under the laws of the State of California." The Court of Appeals noted that the choice of law clause here was much broader, providing that the "validity, construction, interpretation and enforcement of this Agreement shall be governed by the laws of the State of California" (*101Cal. App. 4th 711, 722)* and further disagreed with the implicit determination in *Wolsey* that *Code Civ. Proc. § 1281.2(c)* is a "special rule limiting the authority of arbitrators" and preferred the characterization of *Code Civ. Proc. § 1281.2(c)* in *Volt* as determining only "the efficient order of proceedings" (*101 Cal. App. 4th 711, 726)* . The court stated its view was to interpret a choice of law clause like any contract provision and rejected the approach that a choice of law provision is insufficient to incorporate a state's law concerning arbitration unless there is extrinsic evidence of an intent to contract out of the FAA's default regime. The court felt the latter approach required redundancy and lead logically to the conclusion that other provisions would also need to contain redundant choice (*101 Cal. App. 4th 711, 722)* . Although the choice of law provision here at issue may be "generic" in the sense that it does not mention arbitration or any other specific issue that might become a subject of controversy, it is nonetheless broad, unqualified, and all encompassing in providing that the "validity, construction, interpretation and enforcement of this Agreement shall be governed by the laws of the State of California." The court of appeal said the explicit reference to enforcement reasonably includes such matters as whether proceedings to enforce the agreement shall occur in court of before an arbitrator. Chapter 2 (in which *Code Civ. Proc. § 1281.2(c)* appears) of Title 9 of Part II of the California Code of Civil Procedure is captioned "Enforcement of Arbitration Agreements". Any interpretation of the choice of law clause to exclude reference to that chapter would be strained at best (*101 Cal. App. 4th 711, 722)* . The court of appeal contrasted the clauses at issue in *Wolsey* ("interpreted and construed under the laws of the State of California"), and the provision at issue in *Warren-Guthrie v. Health Net (2000) 84 Cal. App. 4th 804, 101 Cal. Rptr. 2d 260* , which provided only that all arbitration "be conducted in accordance with the California Code of Civil Procedure") (*101 Cal. App. 4th 711, 723)* , and concluded that the choice of law clause at issue clearly required that the decision whether the court should compel compliance with the arbitration provision was a question of enforcement to be resolved under this agreement under California law (*101 Cal. App. 4th 711, 724)* . Nor is *Code Civ. Proc. § 1281.2(c)* hostile to enforcement of arbitration agreements or inconsistent with the policy of the FAA to enforce arbitration procedures chosen by the parties (*101 Cal. App. 4th 711, 724-726)*

The facts of ***Henry v. Alcove Investment, Inc.*** *(1991) 233 Cal. App. 3d 94, 284 Cal. Rptr. 255* , are set forth under [a], *above*. Defendant contended that the action could not be stayed under *Code Civ. Proc. § 1281.2(c)* because credit transactions involving real estate affect interstate commerce and thus the FAA controlled. The court of appeal

disagreed, noting that whether a particular transaction affects interstate commerce is question of fact (*233 Cal. App. 3d 94*). No evidence was presented in the trial court (in fact the issue was first raised on appeal) on the effects of this particular transaction on interstate commerce. Thus, the choice of California law in the deed of trust was operative, and application of *Code Civ. Proc. § 1281.2(c)* to stay the action was not preempted (*233 Cal. App. 3d 94*).

[c] Party Invoking Code of Civil Procedure Section 1281.2(c) Need Not Be Party to Litigation

Whaley v. Sony Computer Entertainment America, Inc. *(2004) 121 Cal. App. 4th 479, 17 Cal. Rptr. 3d 88* , resulted from defendant's acquisition of all the assets of a company called Red Zone, which developed software. Ryan, Whaley, and Walker all worked for Red Zone and entered into an incentive agreement as part of the purchase of assets. Ryan also wanted his wife to receive incentive compensation. According to plaintiffs' version of the facts, defendant and its vice-president Yoshida agreed that Ryan's wife be placed on the payroll of Red Zone and receive incentive compensation. In April, 2003, Sony filed a complaint against Ryan and his wife for conversion, money had and received, fraud by suppression of fact, and fraud by intentional misrepresentation, alleging that Ryan's wife's placement on the payroll and participation in the incentive agreement were obtained by fraud. Ryan cross-complained for wrongful termination, breach of employment contract, breach of third party beneficiary contract, fraud and deceit, intentional interference with prospective economic advantage, implied indemnity, and negligent misrepresentation. Whaley and Walker filed a separate action against Sony and Yoshida for wrongful termination, for breach of employment contract, breach of incentive agreement, unpaid wages, fraud and deceit, intentional interference with prospective economic advantage, and negligent misrepresentation. Though not specifically alleged, the parties did not dispute that Ryan, Whaley and Walker were each terminated for their involvement in the alleged conspiracy to defraud Sony by arranging to have Ryan's wife placed on the payroll. Sony and Yoshida filed a motion to compel arbitration of the claims asserted by Whaley and Walker based on arbitration clauses in the asset purchase agreement, the incentive agreement, and the employment agreements. Whaley and Walker argued that the court should deny arbitration and consolidate their complaint with Ryan's cross-complaint pursuant to *Code Civ. Proc. § 1281.2(c)* because their claims against Sony and Yoshida arose out of the same set of facts as Ryan's cross-complaint and raised the same factual issue: whether Ryan's wife's employment was the result of a fraudulent conspiracy or an agreement between Yoshida, Ryan, Whaley, and Walker. Ryan was not a party to the arbitration agreements and could not be compelled to arbitrate his claims. The trial court denied the motion to compel arbitration. Defendants appealed.

The court of appeal affirmed (*121 Cal. App. 4th 479, 481, 489)* . Defendants conceded that it was a party to arbitration agreements with Whaley and Walker; that it was also a party to related litigation with Ryan arising out of the same transaction; and that there was a possibility of conflicting rulings on common issues in the arbitration proceedings and the Ryan litigation (*121 Cal. App. 4th 479, 485)* . However, Sony contended that *Code Civ. Proc. § 1281.2(c)* is intended solely for the benefit of a party to the arbitration agreement who is also a party to the related litigation against a third party. The court of appeal found this claim to be contrary to the plain language of *Code Civ. Proc. § 1281.2(c)*, which contains no provision stating that it may be invoked only in favor of the party caught "in the middle" between arbitration and litigation. The statute is unambiguous: it allows the trial court to deny a motion to compel arbitration whenever "a party" to the arbitration agreement is also "a party" to litigation with a third party that: (1) arises out of the same transaction or series of related transactions, and (2) presents a possibility of conflicting rulings on a common issue of law or fact. Sony was "a party" to the arbitration agreements and also "a party" to litigation with a third party, Ryan. That satisfied the conditions set forth in the statute. Thus, the trial court had discretion to refuse to compel arbitration in order to avoid the possibility of conflicting rulings (*121 Cal. App. 4th 479, 486)* . The court of appeal also found unpersuasive Sony's argument that the Legislative history reflected any intent to limit the statute in the manner Sony suggested or that there was any latent ambiguity in the unambiguous language of the statute (*121 Cal. App. 4th 479, 486-488)* .

[4] Additional Authorities

[a] Party to Arbitration Agreement Is Also Party in Pending Court Action and Conflicting Rulings on

Common Issues Are Possible

Even if arbitration has to be compelled, the possibility of conflicting rulings may require that the arbitration be stayed until the litigation is completed. That was the conclusion of the court of appeal in *Pioneer Take Out Corp. v. Bhavsar (1989) 209 Cal. App. 3d 1353, 257 Cal. Rptr. 749* , in reversing the trial court's order denying arbitration. The action was one for unlawful detainer arising out of the termination of a franchisee's lease from the franchisor. The license agreement provided for arbitration but the related lease did not. The franchisee and the franchisor were parties to a pending class action regarding the license agreement; and the grounds for the franchisor's termination of the lease were alleged breaches of the same provisions of the license agreement that were the subject of the class action. The court of appeal said that arbitration of the unlawful detainer action had to be compelled but stayed until resolution of class action in order to avoid conflicting rulings (*209 Cal. App. 3d 1353, 1357-1358)* . Even though an action for right of possession is normally subject to priority, the breach of lease and the breach of the licensing agreement were inextricably intertwined (*209 Cal. App. 3d 1353, 1358)* .

California Points & Authorities

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20A ARBITRATION: RESISTING
PART II. FORMS
A. General Principles Relating to Resisting Arbitration

2-20A California Points & Authorities § 20A.12

§ 20A.12 Court Determines Cases Involving Overlapping Arbitrable and Nonarbitrable Issues

[1] FORM

RESPONDENT CANNOT BE COMPELLED TO ARBITRATE A CONTROVERSY CONCERNING OVERLAPPING ARBITRABLE AND NONARBITRABLE ISSUES BECAUSE UNDER CODE OF CIVIL PROCEDURE SECTION 1281.2(c) THE COURT HAS THE POWER TO DETERMINE SUCH CASES.

A. Court Determines Controversy Containing Arbitrable and Nonarbitrable Issues. Under *Code of Civil Procedure Section 1281.2(c)*, the trial court has the discretion to order all issues raised in a plaintiff's complaint tried in a court of law when only some of the issues are covered by the arbitration agreement, [unless a decision by arbitration on an arbitrable issue, such as an accounting, can be harmoniously used in the overall litigation]. The trial court's ruling will not be disturbed unless it exceeded the bounds of reason, which it did not do (*Fitzhugh v. Granada HealthCare and Rehabilitation Center, LLC. (2007) 150 Cal. App. 4th 469, 475, 58 Cal. Rptr. 3d 585* ; *Parker v. Twentieth Century-Fox Film Corp. (1981) 118 Cal. App. 3d 895, 905-906, 173 Cal. Rptr. 639*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a petition to compel arbitration when both arbitrable and nonarbitrable issues are involved to urge that the court exercise its power under *Code Civ. Proc. § 1281.2(c)* to determine cases involving overlapping arbitrable and nonarbitrable issues.

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in opposition to one seeking to compel arbitration [*see § 20A.10*].

[b] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the

facts of his or her case. For example, argument should indicate which issues are arbitrable and which are not under the arbitration agreement and why the trial court should determine the controversy. If relevant to the case in question, argument should also indicate why arbitration on an arbitrable issue cannot be harmoniously used in the overall litigation.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For a form of response to a petition to compel arbitration that may be supported by this memorandum, as well as a procedural checklist, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

[d] Related Memoranda

For memoranda to combine with this form, regarding other matters that the opposition may need to address, see *§§ 20A.20 et seq., 20A.30 et seq., 20A.40 et seq., 20A.60 et seq., and 20A.80* et seq.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Court Determines Controversy Containing Arbitrable and Nonarbitrable Issues

In ***Fitzhugh v. Granada HealthCare and Rehabilitation Center, L.L.C****. (2007) 150 Cal. App. 4th 469, 58 Cal. Rptr. 3d 585* , the husband and sons of a patient of defendant sued for elder abuse, fraud, violations of the Patients *Bill of Rights* (*22 Cal. Code Reg. § 72527*), and wrongful death, claiming her death resulted from a fall she took while she was a resident of Granada. The complaint named as defendants Granada and Skilled Healthcare Group, Inc., and its wholly owned subsidiary, Skilled Healthcare, LLC, entities alleged to have directed, owned, operated, administered, and/or managed Granada, and the administrator of Granada's facility and an agent or employee of Granada during the decedent's stay at the facility. Defendants petitioned to compel arbitration pursuant to agreements signed by husband as decedent's "legal representative/agent." The agreements expressly reserved decedent's right to file lawsuits in court for violations under *Health & Safety Code § 1430* and the Patients *Bill of Rights* (*22 Cal. Code Reg. § 72527*). The agreements bound decedent's successors. The petition to compel arbitration was denied on several grounds. The claims for violations pursuant to *Health & Safety Code § 1430* and for wrongful death were not subject to arbitration nor were the individual claims of plaintiffs. Thus, the trial court exercised its discretion to deny the petition due to the possibility

of conflicting rulings on common issues of law or fact were the claims to proceed in different forums. Defendants appealed.

The court of appeal affirmed (*150 Cal. App. 4th 469, 471, 477*), noting that it would not consider remanding for a determination of whether husband executed the agreement as decedent's agent because there were other sufficient reasons to affirm the judgment (*150 Cal. App. 4th 469, 473)* . Defendants did not dispute that each of the arbitration agreements excluded a patient's claims brought pursuant to *Health & Safety Code § 1430* and the Patients *Bill of Rights* (*22 Cal. Code Reg. § 72527*), but contended those claims did not survive the patient's death. The court of appeal disagreed, citing *Code Civ. Proc.§ 377.20(a)* for the proposition that, except as otherwise provided by statute, a cause of action for or against a person is not lost by reason of the person's death, but survives subject to the applicable limitations period. Thus any cause of action pursuant to *Health & Safety Code § 1430(b)* survived the patient's death and was not subject to arbitration (*150 Cal. App. 4th 469, 473-474)* . Nor was the wrongful death action subject to arbitration. The court of appeal cited *Buckner v. Tamarin (2002) 98 Cal. App. 4th 140, 142-144, 119 Cal. Rptr. 2d 489* (*Buckner,* discussed at *§ 20A.61[3][a]*) for the proposition that wrongful death claims are not usually arbitrable unless the arbitration agreement was signed by the plaintiff in his or her individual capacity, which this agreement was not. It was irrelevant to the wrongful death cause of action whether husband may have signed the arbitration agreements as the decedent's "legal representative/agent." There was no evidence that husband signed the arbitration agreements in his personal capacity, and the sons did not sign any arbitration agreements. Thus, there was no basis to infer that they waived their personal right to jury trial on the wrongful death claim. The court distinguished cases involving arbitration agreements signed pursuant to health care powers of attorney (*150 Cal. App. 4th 469, 474)* . The court also distinguished *Herbert v. Superior Court (1985) 169 Cal. App. 3d 718, 215 Cal. Rptr. 477* (discussed in *Ch. 20, Arbitration: Compelling, § 20.63[3][a]*), as having been decided for practical reasons to require all plaintiffs to try their claims in the same forum. The plaintiffs in this case were not dividing their wrongful death claims between different forums (*150 Cal. App. 4th 469, 474-475)* .

Regarding the trial court's choice, in its discretion under *Code Civ. Proc. § 1281.2(c),* to deny the petition to compel arbitration though some claims were arbitrable, the court of appeal said it would not disturb the trial court's ruling unless it exceeded the bounds of reason (*150 Cal. App. 4th 469, 475)* , which it did not do. There was a potential for inconsistent rulings on a common fact, such as whether any violations of the Patients *Bill of Rights* caused the decedent's injuries or her death (*150 Cal. App. 4th 469, 475-476)* . Nor was the court of appeal persuaded by defendants' argument that arbitration agreements would cease to be enforceable so long as plaintiffs can just "toss in" a cause of action alleging violations of the Patients *Bill of Rights* (*150 Cal. App. 4th 469, 476)* .

In ***Parker v. Twentieth Century-Fox Film Corp.*** *(1981) 118 Cal. App. 3d 895, 173 Cal. Rptr. 639* , the parties had entered into a joint venture agreement to produce, distribute, and otherwise exploit a television series. The agreement provided that if any controversy arose with respect to the receipts and proceeds from the distribution of the series or the expenses pertaining thereto, the question would be submitted to certified public accountants acceptable to the parties, or to be designated by the American Arbitration Association if the parties could not agree. Plaintiff filed a complaint containing 11 causes of action, including causes of action for declaratory relief, fraud, usury, rescission, and restitution, and prayed for an accounting. Defendant filed a petition to compel arbitration, which was denied, and he appealed.

The court of appeal affirmed the denial of the petition, reasoning that there was substantial evidence to support the findings of the trial court and that the scope of the arbitration clause was far too narrow to encompass the issues raised by the complaint. The court noted that by enacting *Code Civ. Proc. § 1281.2(c)* the Legislature recognized that overlapping (arbitrable and nonarbitrable) issues will arise and gave the power to deal with the problem to the court. The court stated, however, that the trial court cannot ignore an arbitration provision between the parties if a decision by arbitration on an arbitrable issue can be harmoniously used in the overall litigation.The court then held that the trial court had jurisdiction over the controversy, but should use the certified public accountant required by the agreement if the need arose (*118 Cal. App. 3d 895, 905-906)* .

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20A ARBITRATION: RESISTING
PART II. FORMS
A. General Principles Relating to Resisting Arbitration

2-20A California Points & Authorities § 20A.13

§ 20A.13 Oral Agreement Selecting Arbitrator Cannot Be Enforced

[1] FORM

LIKE AN AGREEMENT TO ARBITRATE, AN AGREEMENT APPOINTING AN ARBITRATOR, [EVEN ONE THAT PURPORTS TO MODIFY A WRITTEN AGREEMENT], MUST ITSELF BE IN WRITING.

A. Oral Agreement Selecting Arbitrator Cannot Be Enforced. Just as an oral agreement to arbitrate is not ordinarily enforceable because *Section 1281.2 of the Code of Civil Procedure* requires a court to find a written agreement exists before it orders arbitration, an oral agreement to arbitrate [future disputes] before a particular arbitrator may not be enforced by the court on a petition to compel arbitration. [Further, such an oral agreement, if it is claimed to modify a prior written agreement, is not supportable under the definition of "written agreement" in *Section 1280(f) of the Code of Civil Procedure* because that definition includes only written agreements which have been extended or renewed by an oral or implied agreement]. An arbitrator's powers derive from, and cannot exceed, the contract to arbitrate and the parties' submission to arbitration. Thus, election of an arbitrator who is not authorized by the arbitration contract confers no authority on the person selected (*Magness Petroleum Company v. Warren Resources of California, Inc. (2002) 103 Cal. App. 4th 901, 907-909, 127 Cal. Rptr. 2d 159*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that an oral agreement designating a particular arbitrator is enforceable. The bracketed language is based on the facts in the authority cited and should be used only if a similar claim may be raised in counsel's particular case. This form does not provide a complete memorandum, but may be combined memoranda relating to the specific procedural context in which counsel wishes to raise the issue that the oral appointment is unenforceable or with a general memorandum in opposition to a petition to compel arbitration [*see, e.g., § 20A.10*]. If there is in fact no agreement as to a particular arbitrator, or the agreed method of selecting an arbitrator has failed, counsel may wish to file a petition under *Code Civ. Proc. § 1281.6* to have the court appoint the arbitrator. For a memorandum in support of such a petition, see *§ 20B.10*.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, the argument should quote or refer to any written provision designating a particular arbitrator, or the lack of any written agreement on the issue. It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations.

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For a form of response to a petition to compel arbitration that may be supported by this memorandum, as well as a procedural checklist, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

[d] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Oral Agreement Regarding Arbitrator Cannot Be Enforced

The parties in ***Magness Petroleum Company v. Warren Resources of California, Inc.*** *(2002) 103 Cal. App. 4th 901, 127 Cal. Rptr. 2d 159* , were joint venture partners in a multi-million dollar oil-drilling program for the production of oil and gas in an oil field known as the Wilmington Town Unit. Their joint venture agreement called for arbitration of any disputes before the American Arbitration Association (AAA); however, their first two disputes were arbitrated by Keith Wisot, a retired judge associated with Judicial Arbitration and Mediation Services, Inc. (JAMS). Wisot was appointed to determine the first dispute under a written submission agreement executed in December, 1999. The final award regarding the first dispute included a net award to Warren and reserved jurisdiction, "pursuant to the parties' December 2, 1999 Stipulation and Agreement to Arbitrate, to make appropriate Orders to implement this Final Award, including Injunctive Order, as may be necessary." The parties agree that they complied in full with that final award. The second dispute was also heard by Judge Wisot, although Magness sought to have it transferred to AAA or dismissed. Warren initiated the second dispute by seeking an order restraining Magness from drilling three non-joint venture wells in the Wilmington Town Unit. At the show cause hearing on July 7, 2000, Judge Wisot denied Magness's request for transfer, denied Warren's request for a preliminary injunction as moot, because Magness had no intention to drill the wells at that time. Wisot believed, and stated in an interim order dated June 6, 2000, that according to his notes of a hearing on the first dispute on February 28, 2000, the parties stipulated at that time that he retain jurisdiction over future disputes. The third dispute began on August 8, 2001, when Magness filed a demand for arbitration and statement of claim with AAA, seeking dissolution of the joint venture and a final accounting, or in the alternative declaratory relief as to drilling rights of the parties. Warren filed a petition to compel arbitration before Judge Wisot. Magness opposed that petition and filed a counter petition to compel arbitration before AAA. The trial court granted Warren's petition and denied Magness's

petition, based in part on the finding in Judge Wisot's June 6, 2000 order (on the second dispute) that the parties stipulated on February 28, 2000 to his jurisdiction over future disputes as well as Judge Wisot's reservation of jurisdiction in the final award covering the first dispute. Magness appealed and also petitioned for a writ prohibiting enforcement of the trial court's order compelling arbitration before JAMS.

The court of appeal issued a writ of supersedeas staying the trial court's order compelling arbitration before Judge Wisot of JAMS, and eventually reversed, and remanded with directions to the trial court to vacate its order and enter a new order granting Magness's petition and denying Warren's petition (*103 Cal. App. 4th 901, 907, 912)* . The court of appeal said the issue was whether an oral agreement to arbitrate future disputes before a particular arbitrator may be enforced by the court on a petition to compel arbitration, and concluded it may not (*103 Cal. App. 4th 901, 907)* . An oral agreement to arbitrate is not ordinarily enforceable. The statutory scheme applies only to written agreements and expressly requires a court to order arbitration if it finds a written agreement exists [*Code Civ. Proc. § 1281.2*] (*103 Cal. App. 4th 901, 907)* . Even *Code Civ. Proc. § 1280(f)*, which describes the circumstances under which a written agreement to arbitrate is deemed to include an oral or implied provision, does not help Warren because it limits the term "written agreement" to include one which has been extended or renewed by an oral or implied agreement. The ordinary meaning of "extend" or "renew" does not include revision or modification. The statutory definition, and the cases citing it, provide no support for the proposition that a court may enforce an oral modification of a written agreement to arbitrate (*103 Cal. App. 4th 901, 908)* . The only oral agreements enforceable under the statute are oral agreements to extend or renew an expired agreement, not oral agreements to modify an existing written agreement (*103 Cal. App. 4th 901, 908-909)* . Warren claimed the oral stipulation was enforceable because it was not an oral agreement to arbitrate, but merely an oral agreement to use a particular arbitrator. The court of appeal disagreed, saying the powers of the arbitrator derive from and cannot exceed the contract to arbitrate and the parties' submission to arbitration. Selection of an arbitrator who is not authorized by the arbitration contract confers no authority on the person selected (*103 Cal. App. 4th 901, 909)* . There was no showing that waived, or should be estopped from asserting, its rights under the statute permitting courts to enforce only written agreements to arbitrate (*103 Cal. App. 4th 901, 909-910)* . There was no transcript of the proceeding at which counsel are said to have orally stipulated to Judge Wisot's jurisdiction over all future disputes (*103 Cal. App. 4th 901, 911)* and no statement in Judge Wisot's final award on the first dispute purporting to reserve jurisdiction over future disputes (*103 Cal. App. 4th 901, 911-912)* . Moreover, an arbitrator is not competent to testify in a subsequent civil proceeding as to any statement made at the prior proceeding [*see Evid. Code § 703.5*]. Thus, there is no legal basis on which to admit the arbitrator's recollection regarding an oral stipulation between the parties in a prior proceeding as evidence that such a stipulation was entered (*103 Cal. App. 4th 901, 911 n.9*).

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PART II. FORMS
A. General Principles Relating to Resisting Arbitration

2-20A California Points & Authorities § 20A.14

§ 20A.14 Only Party to Agreement Can Seek to Stay Arbitration

[1] FORM

A PARTY TO A LAWSUIT THAT HAS SOME FACTUAL NEXUS WITH AN ARBITRATION TO WHICH IT IS **NOT** A PARTY HAS NO STANDING TO SEEK TO HAVE THE ARBITRATION STAYED PENDING THE OUTCOME OF THE LITIGATION.

A. Only Party to Agreement Can Seek to Stay Arbitration. Subdivision (c) of *Section 1281.2 of the Code of Civil Procedure* cannot be invoked by one who is not a party to the arbitration agreement to seek a stay of arbitration until resolution of a related court action. It is not enough that one be a party to litigation that has some factual nexus to the matters _____ [required to be *or* being] arbitrated. Because the arbitrator's award will have no res judicata or collateral estoppel effect against a person or entity who is was not a party to the arbitration, and does not claim to be in privity with any party to the arbitration, that person's or entity's position in the litigation will not be prejudiced by the arbitration award (*One World Networks Integrated Technologies, Inc. v. Duitch (2002) 103 Cal. App. 4th 1038, 1043-1044, 127 Cal. Rptr. 2d 843*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a petition by one not a party to the arbitration agreement to seek to have the arbitration stayed pending resolution of a related court action. The form does not provide a complete memorandum, but may be combined with memoranda relating to the specific procedural context in which counsel wishes to oppose the stay [*see, e.g., Ch. 20, Arbitration: Compelling, §§ 20.10-20.12*].

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, the argument should make clear that the non-party is not in privity with a party to the arbitration in

any way that might cause it to be bound by the arbitration award [*see Ch. 20E, Arbitration: Effect of Award, §§ 20E.10 -20E.12, 20E.30 -20E.32* (addressing res judicata and collateral estoppel effects of arbitration awards)]. It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations.

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*])are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For discussion of the means and effect of staying arbitration generally, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

[d] Related Memoranda

For memoranda addressing stay of the court action while the arbitration proceeds, see *Ch. 20, Arbitration: Compelling, §§ 20.10*-20.12. For memoranda to combine with this form, regarding other matters in opposition to arbitration that may need to be addressed, see *§§ 20A.11-20A.13, 20A.20 et seq., 20A.30 et seq., 20A.40 et seq., 20A.60 et seq., and 20A.80* et seq. For forms addressing res judicata and collateral estoppel effects of arbitration awards, Ch. 20E, *Arbitration: Effect of Award*, §§ 20E.10-20E.12, 20E.30-20E.32.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Only Party to Agreement Can Seek to Stay Arbitration

Code Civ. Proc. § 1281.2 provides in part that on petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that,

"(c) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact. For purposes of this section, a pending court action or special proceeding includes an action or proceeding initiated by the party refusing to arbitrate after the petition to compel arbitration has been filed, but on or before the date of the hearing on the petition. This subdivision shall not be applicable to an agreement to arbitrate disputes as to the professional negligence of a health care provider made pursuant to Section 1295. If the court determines that a written agreement to arbitrate a controversy exists, an order to arbitrate such controversy may not be refused on the ground that the petitioner's contentions lack substantive merit. If the court determines that there are other issues between the petitioner and the respondent which are not subject to arbitration and which are the subject of a pending action or special proceeding between the petitioner and the respondent and that a determination of such issues may make the arbitration unnecessary, the court may delay its order to arbitrate until the determination of such other issues or until such earlier time as the court specifies. If the court determines that a party to the arbitration is also a party

to litigation in a pending court action or special proceeding with a third party as set forth ... herein, the court (1) may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or special proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action or special proceeding."

Plaintiff in ***One World Networks Integrated Technologies, Inc. v. Duitch*** *(2002) 103 Cal. App. 4th 1038, 127 Cal. Rptr. 2d 843* , sued its former employee and her new employer on various unfair competition theories. Former employee initiated arbitration pursuant to an agreement between herself and the former employer, to resolve a salary dispute with the former employer. The former employer counterclaimed against the former employee in those proceedings. After the arbitrator ruled that the former employer's counterclaims were covered by the arbitration agreement, the former employer dismissed the former employee from the lawsuit. Nevertheless, the current employer/defendant asked the trial court to stay the arbitration of the former employer's counterclaims against the former employee. The request was granted, and the former employer appealed, contending a stay of arbitration may be sought only by a party to the arbitration agreement. Former employer also filed a petition for a writ of supersedeas asking the court of appeal to stay further proceedings in the trial court pending resolution of the appeal.

The court of appeal issued the writ as prayed, and on appeal, reversed the stay order (*103 Cal. App. 4th 1038, 1040)* . The stay order signed by the trial court stated that it was issued under the authority of *Code Civ. Proc. § 1281.2*, the preamble and subdivision (c) of which are set forth in full *above*. The defendant/current employer claimed it had standing to have the arbitration stayed because plaintiff's claims against it arose from actions allegedly taken by the employee after she left One World's employ, and because those were the same actions which were the basis of the former employer's the counterclaims in the arbitration (*103 Cal. App. 4th 1038, 1042)* . Thus, any rulings by the arbitrator regarding the employee's actions would prejudice the current employer's rights in the litigation (*103 Cal. App. 4th 1038, 1042-1043)* . The court of appeal said that was wrong. Because the current employer was not a party to the arbitration, and did not claim to be in privity with the employee, the arbitrator's award would not have any res judicata or collateral estoppel effect with regard to One World's claims against defendant/current employer (*103 Cal. App. 4th 1038, 1043)* . The court of appeal also held that by its plain language, the stay provisions of *Code Civ. Proc. § 1281.2* may be invoked only by a party to an arbitration agreement. That language is neither vague nor ambiguous, and it makes perfectly good sense--becauseno one other than a party to the arbitration agreement ought to be allowed to interfere with the arbitration process. The obvious purpose of the stay provision in *Code Civ. Proc. § 1281.2* is to protect someone in the position that the employee was in before she was dismissed from this lawsuit. The court of appeal concluded that the trial court's ruling was wrong as a matter of law (*103 Cal. App. 4th 1038, 1044)* , reversed the order, and remanded to the trial court with directions to vacate its stay order and enter a new order denying the application for a stay (*103 Cal. App. 4th 1038, 1045)* .

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2-20A California Points & Authorities § 20A.15

§ 20A.15 Arbitration Not To Be Ordered When Agreed Method Is No Longer Available

[1] FORM

THE COURT CANNOT ORDER ARBITRATION BECAUSE THE AGREED METHOD OF ARBITRATION HAS BECOME UNAVAILABLE.

A. Arbitration Not To Be Ordered When Agreed Method Is No Longer Available. If the agreed method of arbitration is not possible, for example, if a party is no longer a member of the organization that was to conduct the arbitration and therefore not entitled to use that organization's services as arbitrator unless the other party consents, and that party does not consent, arbitration cannot be ordered (*Provencio v. WMA Securities, Inc. (2005) 125 Cal. App. 4th 1028, 1032-1033, 23 Cal. Rptr. 3d 524* (defendant no longer member of NASD; plaintiff would not consent to arbitration before NASD)).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a petition for an order to compel arbitration under a contract when the agreed method of arbitration is no longer available [*see Code Civ. Proc. § 1281.2*].

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in opposition to one seeking to compel arbitration [*see § 20A.10*]. Respondent also should combine this form with as many other forms as address the specific grounds for denial involved in his or her particular case, that is, §§ 20A.11-20A.12 (procedural matters), 20A.20 et seq. (Congressional or legislative intent to preserve judicial remedy), 20A.30 et seq. (contract principles), 20A.40 et seq. (issue is beyond scope of arbitration clause), 20A.60 et seq. (respondent is not party to arbitration agreement), and 20A.80 et seq. (waiver and contract defenses).

Although the authority used in this form appears to contradict the portion of *Graham v. Scissor-Tail* cited in Ch. 20B, *Arbitration: Selecting Arbitrators; Arbitral Immunity*, § 20B.10[1], Optional Paragraph B [*Graham v. Scissor-Tail,*

Inc. (1982) 28 Cal. 3d 807, 171 Cal. Rptr. 604, 623 P.2d 165] , stating that when the agreed method of arbitration fails, either party is free to petition the court for appointment of another arbitrator, in fact the cited portion of *Graham* comprised the court's advice for use on remand should the parties be unable to agree on a mutually satisfactory arbitrator, but the opinion further stated that if neither party petitioned for appointment of an arbitrator, the court should proceed to a judicial determination of the controversy [*Graham v. Scissor-Tail, Inc. (1982) 28 Cal. 3d 807, 831, 171 Cal. Rptr. 604, 623 P.2d 165]* .

[b] Argument

Counsel should add argument linking the points in this form to the facts of the case. For example, the argument should set forth the portion of the arbitration clause detailing the agreed method of arbitration and explain why that method was an integral part of the agreement and why it is no longer available.

It is advisable for counsel to submit cognizable evidence in support of factual statements by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Arbitration Not To Be Ordered When Agreed Method Is No Longer Available

Plaintiffs in ***Provencio v. WMA Securities, Inc.*** *(2005) 125 Cal. App. 4th 1028, 23 Cal. Rptr. 3d 524* sued their securities broker for breach of fiduciary duty, fraud, and breach of contract, along with other related causes of action, alleging that they were the victims of bad advice by WMA. WMA responded by petitioning to compel arbitration in accordance with the investment services contracts that plaintiffs signed, which required any disputes to be arbitrated by the National Association of Securities Dealers (NASD), pursuant to the NASD's rules and procedures. Plaintiffs opposed the petition on the grounds that WMA was out of business, no longer a member of NASD, and therefore was not entitled to arbitration by NASD unless plaintiffs consented inwriting, which they refused to do. The trial court denied the petition. Defendant appealed.

The court of appeal affirmed (*125 Cal. App. 4th 1028, 1030, 1034)* . The right to arbitrate depends on the terms of a contract [*Code Civ. Proc. § 1281.2*], and these contracts were by their terms, subject to NASD's rules (*125 Cal. App. 4th 1028, 1031)* . If the parties to a contract agree to arbitrate any disputes before a particular forum, that provision becomes an integral part of their contract. If that forum is not available to hear the dispute, then a petition to compel

arbitration may not be granted. Defendant did not contend that arbitration was appropriate in any forum other than the NASD (*125 Cal. App. 4th 1028, 1032)* . The court of appeal distinguished *Alan v. Superior Court* because here arbitration before the NASD would be allowed [*Alan v. Superior Court (2003) 111 Cal. App. 4th 217, 224, 3 Cal. Rptr. 3d 377]* ; *see Ch. 20B, Arbitration: Selecting Arbitrators; Arbitral Immunity, § 20B.25[3][a]*), but only at the option of plaintiffs (*125 Cal. App. 4th 1028, 1032-1033)* . Strictly speaking, therefore, the issue was not whether NASD was available as a forum: it was available if plaintiffs choose to make it available. Instead, the issues were whether WMA was defunct or no longer a member of NASD and whether, despite WMA's status as a nonmember of NASD, respondents had agreed to arbitrate their dispute in that forum. It was undisputed that WMA was no longer a NASD member and that plaintiffs did not provide written consent to arbitrate a claim before NASD. Defendant submitted the declaration of its president stating that NASD had accepted cases against it for arbitration without the claimant's consent even thought defendant was no longer a member of the NASD. Even if that testimony was believed, NASD's disregard of its own rules could not strip plaintiffs of their contractual right to rely on and enforce those rules (*125 Cal. App. 4th 1028, 1033)* . Therefore, arbitration could not be compelled (*125 Cal. App. 4th 1028, 1034)* .

California Points & Authorities

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20A ARBITRATION: RESISTING
PART II. FORMS
A. General Principles Relating to Resisting Arbitration

2-20A California Points & Authorities §§ 20A.16-20A.19

[Reserved]

§§ 20A.16[Reserved]

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20A ARBITRATION: RESISTING
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A. General Principles Relating to Resisting Arbitration

2-20A California Points & Authorities § 20A.20

§ 20A.20 Congress/Legislature Intended to Preserve Remedies Arbitration Clause Would Waive

[1] FORM

RESPONDENT CANNOT BE COMPELLED TO ARBITRATE THE CONTROVERSY BECAUSE _____ [*specify, e.g.,* THE ARBITRATION PROVISION IN THIS CONTRACT WOULD REQUIRE PLAINTIFF TO FORFEIT IMPORTANT RIGHTS THAT CONGRESS INTENDED TO PRESERVE FOR FRANCHISEES OF PETROLEUM PRODUCTS].

A. Arbitration Clause Forfeits Important Statutory Rights. Arbitration cannot be compelled under an arbitration provision that requires a party to forfeit statutorily-mandated rights that are important to effectuate the policies of a statute that was intended to protect that party [when the provisions forfeiting those rights are an integrated and unseverable part of the arbitration clause] (Graham Oil. v. ARCO Products Co. (9th Cir. 1994) *43 F.3d 1244, 1247-1249 (Petroleum Marketing Practices Act))* .

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a petition to compel arbitration when the arbitration provision at issue would deprive respondent of rights the Congress or Legislature intended he or she not be able to waive.

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in opposition to one seeking to compel arbitration [*see § 20A.10*].

[b] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, argument should indicate either the statutory anti-waiver provision or the legislative history that establishes the enacting body's intent that certain protections not be waived. Argument should

explain how arbitration would do just that.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For a form of response to a petition to compel arbitration that may be supported by this memorandum, as well as a procedural checklist, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

[d] Related Memoranda

For memoranda to combine with this form, regarding other matters that the opposition may need to address, see *§§ 20A.10-20A.12, 20A.21 et seq., 20A.30 et seq., 20A.40 et seq., 20A.60 et seq., and 20A.80* et seq.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Arbitration Clause Forfeits Important Statutory Rights

Graham Oil. v. ARCO Products Co. *(9th Cir. 1994) 43 F.3d 1244* , was an action by a franchisee against its franchisor for wrongful termination of the franchise because plaintiff was not purchasing as much gasoline as the franchise agreement required. Plaintiff claimed defendant had violated the Petroleum Marketing Practices Act (15 U.S.C. § 2700 et seq.; PMPA) by raising its prices so plaintiff would not be able to meet the minimum gasoline purchase requirements. Plaintiff filed a motion for preliminary injunction in federal district court seeking to prevent defendant from terminating the franchise. The district court issued a preliminary injunction for 90 days, but found plaintiff's exclusive remedy was arbitration in accordance with the franchise agreement. The court required the parties to complete arbitration within 90 days. Plaintiff appealed that order and refused to arbitrate. At the expiration of the 90 days, defendant was granted summary judgment, from which plaintiff appealed, contending that the arbitration clause of the agreement was invalid.

The court of appeals reversed and remanded. The court found that the arbitration clause deprived plaintiff of three remedies that Congress intended as important statutory benefits of the PMPA: (1) the right to exemplary damages; (2) the right to recover reasonable attorney's fees if it prevailed on certain of its claims; and (3) the one-year limitation period, which the clause reduced to 90 days (*43 F.3d 1244, 1247-1248)* . The PMPA was enacted to shield franchisees from the gross disparity of bargaining power that exists between them and franchisors. If franchisees can be compelled

to surrender their statutorily-mandated protections as a condition of obtaining a franchise, then franchisors could use their superior bargaining power to deprive franchisees of the PMPA's protections, nullifying the PMPA (*43 F.3d 1244, 1247)* . Each of the three rights is important to the effectuation of the PMPA's policies. The court of appeal considered whether it would be possible to sever the provisions of the arbitration clause pertaining to exemplary damages, attorney's fees, and the statute of limitations, and thus preserve arbitration, but found that the arbitration clause was too highly integrated (*43 F.3d 1244, 1248)* . It included a survival provision that expressly preserved the entire clause in the event the contract was found invalid. The court said its decision to strike the entire arbitration clause rested in part on the fact that the offensive provisions clearly represented an attempt by defendant to achieve through arbitration what Congress had expressly forbidden (*43 F.3d 1244, 1249)* .

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2-20A California Points & Authorities § 20A.21

§ 20A.21 Congress Intended to Require Knowing Waiver of Right to Jury Trial

[1] FORM

RESPONDENT CANNOT BE COMPELLED TO ARBITRATE SEXUAL HARASSMENT CLAIMS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 BECAUSE HE/SHE NEVER MADE A KNOWING WAIVER OF HIS/HER RIGHT TO A JURY TRIAL, AS CONGRESS INTENDED TO REQUIRE.

[*Optional*] **A. Sexual Discrimination Claims under Title VII of the Civil Rights Act of 1964.** In enacting the Civil Rights Act of 1991, Congress intended to require a person claiming sexual harassment or discrimination in violation of that Act to knowingly waive his or her right to a judicial forum. Thus, arbitration cannot be compelled under the arbitration clause at issue, which does not specify those claims as being within its scope (*Renteria v. Prudential Ins. Co. of America (9th Cir. 1997) 113 F.3d 1104, 1108* ; *Prudential Ins. Co. of America v. Lai (9th Cir. 1994) 42 F.3d 1299, 1304-1305 , cert. denied 516 U.S. 812, 116 S. Ct. 61, 133 L. Ed. 2d 24 (1995)* .

[*Optional*] **B. Claims under the Americans with Disabilities Act of 1990.** In enacting the Americans with Disabilities Act of 1990, Congress intended to require a person claiming to have been damaged by a violation of that Act to knowingly waive his or her right to a judicial forum for resolution of his or her claims. Thus, arbitration cannot be compelled under the arbitration clause at issue, which does not specify those claims as being within its scope (*Kummetz v. Tech Mold, Inc. (9th Cir. 1998) 152 F.3d 1153, 1155-1156* ; *Nelson v. Cyprus Bagdad Copper Corp. (9th Cir. 1997) 119 F.3d 756, 761, 763* ; *see also Wright v. Univ. Maritime Serv. Corp. (1998) 525 U.S. 70, 79-80, 119 S. Ct. 391, 142 L. Ed. 2d 361* (union waiver, in collective bargaining agreement, of employees' right to judicial forum for resolution of statutory claims must be clear and unmistakable)).

[2] Comments

[a] Use of Form

The optional paragraphs of this form may be submitted in opposition to a petition to compel arbitration of sexual harassment or discrimination claims under Title VII of the Civil Rights Act of 1964 (§ 700 et seq.; *42 U.S.C. § 2000e et*

seq.) (Paragraph A.) or of claims under the Americans with Disabilities Act of 1990 (*42 U.S.C. § 12101 et seq.*) (Paragraph B.) when the arbitration provision at issue never specifically mentioned those claims as being within its scope.

In using this form, counsel must be aware that *Prudential Ins. Co. of America v. Lai (9th Cir. 1994) 42 F.3d 1299* , restated in *Renteria v. Prudential Ins. Co. of America (9th Cir. 1997) 113 F.3d 1104* , and relied on in *Nelson v. Cyprus Bagdad Copper Corp. (9th Cir. 1997) 119 F.3d 756* , has been extensively criticized as being against the weight of authority [*see, e.g., Maye v. Smith Barney, Inc. (S.D.N.Y. 1995) 897 F. Supp. 100, 107* ; *Cione v. Foresters Equity Services, Inc. (1997) 58 Cal. App. 4th 625, 641, 68 Cal. Rptr. 2d 167* ; *Brookwood v. Bank of America (1996) 45 Cal. App. 4th 1667, 1673 n.5, 53 Cal. Rptr. 2d 515]* , and has impliedly been held unpersuasive and not to be followed in *California by the California Supreme Court in Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 99-101, 99 Cal. Rptr. 2d 745, 6 P.3d 669* , discussed in *Ch. 20, Arbitration: Compelling, § 20.23[3][a]*. *Armendariz* established minimum procedural safeguards for arbitration of claims under California's Fair Employment and Housing Act (*Gov. Code § 12900 et seq.*). The *Armendariz* court never discussed the knowing waiver issue. The arbitration clause at issue wasfairly specific and referred to any termination of employment which employee contended was "wrongful or otherwise in violation of the conditions of employment or was in violation of any express or implied condition, term or covenant of employment, whether founded in fact or in law, including but not limited to the covenant of good faith and fair dealing, or otherwise in violation of any of my rights." *Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 92, 99-100 n.7, 99 Cal. Rptr. 2d 745, 6 P.3d 669* .

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in opposition to one seeking to compel arbitration [*see § 20A.10*].

[b] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, argument should emphasize that the language of the arbitration clause does not specify that this type of claim was one that would be required to be arbitrated.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For a form of response to a petition to compel arbitration that may be supported by this memorandum, as well as a procedural checklist, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

[d] Related Memoranda

For memoranda to combine with this form, regarding other matters that the opposition may need to address, see *§§ 20A.10-20A.12, 20A.30 et seq., 20A.40 et seq., 20A.60 et seq., and 20A.80* et seq.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Sexual Discrimination Claims under Title VII of the Civil Rights Act of 1964

Renteria v. Prudential Ins. Co. of America *(9th Cir. 1997) 113 F.3d 1104* , involved sexual harassment claims under Title VII of the Civil Rights Act of 1964 (§ 700 et seq.; *42 U.S.C. § 2000e et seq.*), and related Nevada statutes. Employer sought to compel arbitration under the Standard Application for Securities Industry Registration Form (U-4), signed by plaintiff, and the National Association of Securities Dealers (NASD) Code, under which the U-4 committed plaintiff to arbitrate any disputes. Before plaintiff filed her complaint, the NASD Code was amended to specifically require arbitration of claims "arising out of employment or termination of employment." Defendants' motion was denied, and defendants appealed.

The court of appeals affirmed, finding itself bound by *Prudential Ins. Co. of America v. Lai (9th Cir. 1994) 42 F.3d 1299, 1304-1305* , and finding no evidence of knowing waiver as required by the text and legislative history of Title VII (*113 F.3d 1104, 1106, 1108)* . Defendants argued that the district court should have held an evidentiary hearing to determine plaintiff's subjective knowledge. The court held that knowing waiver could not occur even under the amended NASD Code, because neither arbitration clause expressly put plaintiff on notice that she was bound to arbitrate Title VII claims (*113 F.3d 1104, 1108)* .

In ***Prudential Ins. Co. of America v. Lai*** *(9th Cir. 1994) 42 F.3d 1299 , cert. denied, 516 U.S. 812, 116 S. Ct. 61, 133 L. Ed. 2d 24 (1995)* , employer sued in federal district court to compel arbitration of employees' statutory sexual harassment and discrimination claims. The only agreement to arbitrate that the employees signed was the Standard Application for Securities Industry Registration Form (U-4), which stated that the employee agreed to arbitrate any dispute, claim or controversy between them and the firm, or a customer, or any other person, that was required to be arbitrated by the rules, constitution, or bylaws of the organizations with which the employees registered. The employees joined the National Association of Securities Dealers (NASD), whose manual required arbitration of disputes between or among members an/or associated persons, arising on connection with the member's business or in connection with the activities of the associated person. The petition to compel arbitration and stay the related state court action was granted, and employees appealed.

The court of appeals reversed because the employees did not knowingly enter into any agreement to arbitrate sexual discrimination or harassment claims under Title VII of the Civil Rights Act of 1964 (§ 700 et seq.; *42 U.S.C. § 2000e et seq.*) (*42 F.3d 1299, 1304-1305)* . The court agreed with appellants that Congress intended there to be at least a knowing agreement to arbitrate employment disputes before any an employee could be deemed to have waived the comprehensive statutory rights, remedies, and procedural protections prescribed in Title VII of the Civil Rights Act of 1964 (§ 700et seq.; *42 U.S.C. § 2000e et seq.*), and related statutes. The court relied on statements in the Congressional Record relative to the enactment of the Civil Rights Act of 1991 that alternative remedies, such as arbitration, be available only when the parties knowingly and voluntarily elect to use those methods (*42 F.3d 1299, 1304-1305)* . In this case, even assuming the employees were aware of the nature of the U-4, they could not have understood that in signing it, they were agreeing to arbitrate sexual discrimination claims. The U-4 did not purport to describe the types of disputes that were to be subject to arbitration; nor would the arbitration clause in the NASD manual have put them on

notice that they were to arbitrate Title VII claims (*42 F.3d 1299, 1305)* .

Note that the knowing waiver requirement in *Prudential Ins. Co. of America v. Lai (9th Cir. 1994) 42 F.3d 1299* , restated in *Renteria v. Prudential Ins. Co. of America (9th Cir. 1997) 113 F.3d 1104* , has been criticized by other federal courts [*see, e.g., Maye v. Smith Barney, Inc. (S.D.N.Y. 1995) 897 F. Supp. 100, 107]* and by California state courts [*see, e.g., Cione v. Foresters Equity Services, Inc. (1997) 58 Cal. App. 4th 625, 641, 68 Cal. Rptr. 2d 167* (criticizing them as contrary to the weight of authority); *Brookwood v. Bank of America (1996) 45 Cal. App. 4th 1667, 1673 n.5, 53 Cal. Rptr. 2d 515]* , and, as discussed at [2][a], *above*, has impliedly been held unpersuasive and not to be followed in *California by the California Supreme Court in Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 99-100 n.7, 99 Cal. Rptr. 2d 745, 6 P.3d 669* .

[b] Claims under the Americans with Disabilities Act of 1990

Defendant in ***Kummetz v. Tech Mold, Inc.*** *(9th Cir. 1998) 152 F.3d 1153* , transferred plaintiff to another position at a reduced rate of pay after it learned of his previous kidney transplant. Plaintiff resigned, claiming that defendant's actions amounted to constructive discharge in violation of the Americans with Disabilities Act of 1990 (*42 U.S.C. § 12101 et seq.*; ADA), and sued defendant under both the ADA and the Arizona Civil Rights Act. About a week after plaintiff began working for defendant he was given an Employee Information Handbook and Information Booklet Acknowledgment. The booklet contained policies and procedures unilaterally imposed by defendant along with a provision requiring plaintiff to arbitrate any disputes with defendant, including employment discrimination, termination, or employment torts. The Acknowledgment made no mention of any arbitration provision, said plaintiff understood and agreed that he was covered by and must abide by the contents of the Booklet, stated that it in no way constituted an employment contract, and that plaintiff remained an at will employee. Defendant moved for summary judgment, claiming plaintiff had to arbitrate. The district court granted the motion, and plaintiff appealed.

The court of appeals reversed, finding plaintiff did not knowingly waive his right to a judicial forum under the ADA (*152 F.3d 1153, 1155-1156)* . The court cited *Nelson v. Cyprus Bagdad Copper Corp. (9th Cir. 1997) 119 F.3d 756, 762* , for the proposition that an agreement to arbitrate disputes under the ADA must at least be knowing, which means that the choice must be explicitly presented to the employee and the employee must explicitly agree to waive the specific right in question. The Acknowledgement did not so notify plaintiff (*152 F.3d 1153, 1155)* . Defendant did not explicitly present the arbitration agreement, and plaintiff did not explicitly accept it. Thus, plaintiff was entitled to have both his ADA claims and his Arizona Civil Rights Act claims resolved in district court (*152 F.3d 1153, 1156)* .

Plaintiff in ***Nelson v. Cyprus Bagdad Copper Corp.*** *(9th Cir. 1997) 119 F.3d 756* , was fired by defendant after attempts to accommodate his medical needs when working rotating 12-hour shifts. Plaintiff sued defendant alleging claims under the Americans with Disabilities Act of 1990 (*42 U.S.C. § 12101 et seq.*; ADA) and Arizona statutes. Defendant moved for summary judgment contending that plaintiff had agreed to resolve the dispute in accordance with the procedure outlined in their employee handbook and further waived any right to a judicial forum by initiating a grievance in accordance with that procedure. The district court analyzed the arbitrability of plaintiff's claims under the waiver standard for Title VII claims set forth in *Prudential Ins. Co. of America v. Lai (9th Cir. 1994) 42 F.3d 1299, 1304-1305* , but found that plaintiff had voluntarily waived his right to a judicial forum and granted the motion for summary judgment. Plaintiff appealed.

The court of appeals reversed, finding plaintiff did not knowingly waive his right to a judicial forum under the ADA (*119 F.3d 756, 763)* . Both parties agreed, and the court of appeals said they were correct, that the waiver analysis set forth in *Lai* applies equally in the context of the ADA (*119 F.3d 756, 761)* , because the legislative history relied on in *Lai* to support its conclusion that knowing waiver of Title VII claims is required mirrors the legislative history to the enactment of *42 U.S.C. § 12212*, the alternative dispute resolution provision of the ADA (*119 F.3d 756, 761 n.9*). The acknowledgement plaintiff signed when he received the handbook did not amount to a knowing waiver. It did not even amount to an agreement to be bound by the procedure contained in the handbook (*119 F.3d 756, 761)* . What

defendant construed as plaintiff's "initiating a grievance in accordance" with their procedure was only writing a letter protesting his firing (*119 F.3d 756, 759, 759 n.3*). Two times, plaintiff refused "appeal" by arbitration, which was the next step of defendant's procedure (*119 F.3d 756, 762 n.11*).

Note that the knowing waiver requirement in *Prudential Ins. Co. of America v. Lai (9th Cir. 1994) 42 F.3d 1299, 1304-1305* , relied on in *Nelson*, has been criticized by federal [*see, e.g., Maye v. Smith Barney, Inc. (S.D.N.Y. 1995) 897 F. Supp. 100, 107]* and by California state courts [*see, e.g., Cione v. Foresters Equity Services, Inc. (1997) 58 Cal. App. 4th 625, 641, 68 Cal. Rptr. 2d 167* (criticizing them as contrary to the weight of authority)], and, as discussed at [2][a], *above*, has impliedly been held unpersuasive and not to be followed in *California by the California Supreme Court in Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 99-100 n.7, 99 Cal. Rptr. 2d 745, 6 P.3d 669* .

Plaintiff in ***Wright v. Univ. Maritime Serv. Corp.*** *(1998) 525 U.S. 70, 119 S. Ct. 391, 142 L. Ed. 2d 361* , was a longshoreman covered by a collective bargaining agreement ("CBA") with a provision that called for arbitration of any dispute that was not settled after resort to a grievance procedure. Plaintiff injured his heel and back in a work-related accident. He settled the claim and was also awarded Social Security disability benefits. About three years after that, plaintiff worked for several days for four stevedoring companies, none of which complained about his work performance. However, when those companies realized plaintiff had previously settled a claim for permanent disability, they informed his union that they would not accept him for further work. Plaintiff asked the union how he could get back to work. Instead of suggesting that he follow the grievance procedure, the union suggested he obtain counsel and file a claim under the Americans with Disabilities Act (*42 U.S.C. § 12101 et seq.*; "ADA"). After obtaining a right-to-sue letter from the EEOC, plaintiff filed an action against six stevedoring companies, alleging among other things, a claim for violation of his rights under the ADA. Defendants moved to dismiss the complaint on the ground that plaintiff failed to exhaust his remedies under the CBA. The Fourth Circuit Court of Appeals affirmed. The U.S. Supreme court granted certiorari.

The Supreme Court unanimously vacated the judgment of the Fourth Circuit and remanded for further proceedings. The Court found it unnecessary to determine whether a union can waive its members' rights to a judicial forum for resolution of ADA claims because no such waiver was involved in this case (*525 U.S. 70, 82)* . Defendants relied primarily on the presumption of arbitrability in *Section 301 of the Labor* Management Relations Act (*29 U.S.C. § 185*), but the Court said that presumption only extended to matters of interpretation and application of the CBA (*525 U.S. 70, 77-78)* . The Court did not discuss the ADA, but rested its decision on the seemingly absolute prohibition of union waiver of employees' federal forum rights for adjudication of statutory claims, granted in *Alexander v. Gardner-Denver Co. (1974) 415 U.S. 36, 49-51, 94 S. Ct. 1011, 39 L. Ed. 2d 147* , saying whether or not that right survives *Gilmer v. Interstate/Johnson Lane Corp. (1991) 500 U.S. 20, 26, 111 S. Ct. 1647, 114 L. Ed. 2d 26* , a union employee's right to a federal judicial forum for resolution of statutory claims is of sufficient importance to be protected against less-than-explicit union waiver in a CBA. Any such waiver must be clear and unmistakable. This CBA referred only to "all matters affecting wages, hours, and other terms of employment," and thus did not constitute a clear and unmistakable waiver of plaintiff's right to a judicial forum for federal claims of employment discrimination (*525 U.S. 70, 80-81)* .

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2-20A California Points & Authorities § 20A.22

§ 20A.22 Agreement Lacks Minimum Criteria for Vindication of Unwaivable Rights

[1] FORM

THE ARBITRATION AGREEMENT CANNOT BE ENFORCED WITH RESPECT TO RESPONDENT'S _____ [*specify nature of claim, e.g.,* CLAIMS UNDER CALIFORNIA'S FAIR EMPLOYMENT AND HOUSING ACT] BECAUSE THE ARBITRATION PROCEDURES SPECIFIED THEREIN DO NOT PROVIDE SUFFICIENT SAFEGUARDS FOR THE VINDICATION OF _____ [*specify, e.g.,* STATUTORY RIGHTS *or* FEHA CAUSE OF ACTION] [AND CANNOT BE IMPLIED TO DO SO].

A. Requirements for Arbitration of Unwaivable Statutory or Common Law Right. [*See § 20A.23[1], Paragraph A.*]

[*Optional*] **B. *Armendariz* Minimum Requirements Apply to Tameny Claims.** [*See § 20A.23[1], Paragraph F.*]

[*Optional*] **C. *Armendariz* Minimum Requirements Apply to Claims under *Labor Code Section 970*** . [*See § 20A.23[1], Paragraph G.*]

[*Optional*] **D. Costs Will Not Be Imposed on Employer in Face of Agreement to Share.** While silence on the issue of costs is not a ground for denying enforcement of an arbitration agreement under which one seeks to vindicate unwaivable rights, an agreement expressly imposing impermissible forum costs on an employee in violation of public policy does not permit an inference that the employer is to pay all cost unique to the arbitral forum. Therefore, the agreement here is illegal and unenforceable (*Abramson v. Juniper Networks, Inc. (2004) 115 Cal. App. 4th 638, 661, 668, 9 Cal. Rptr. 3d 422*).

[*Optional*] **E. Employer's Offer to Bear All Arbitral Costs Does Not Cure Defect.** An offer by the drafting party to modify an unconscionable cost-sharing provision of an arbitration agreement has no effect. The agreement is to be tested at the time of its making. Furthermore, the harm--that inclusion of the unconscionable term has an unacceptable chilling effect on the non-drafting party--has already occurred (*Martinez v. Master Prot. Corp. (2004) 118 Cal. App.*

4th 107, 116-117, 12 Cal. Rptr. 3d 663).

[*Optional*] **F. Discovery Is Inadequate.** An arbitration agreement's limitation of discovery to the sworn depositions of two individuals and any expert witnesses expected to testify at the hearing is not adequate to ensure that a _____ [*type of unwaivable right at issue, e.g.,* employment-discrimination] plaintiff will be entitled to discovery sufficient to adequately arbitrate [his *or* her] claims. In the face of this express agreement to the contrary, the court cannot imply an agreement to provide the non-drafting party with sufficient discovery rights. [Furthermore, the defect is not cured by the fact that the arbitration agreement or policy at issue incorporates the American Arbitration Association's (AAA) National Rules for the Resolution of Employment Disputes, one of which provides that if a party establishes an adverse material inconsistency between the arbitration agreement and the AAA rules, the arbitrator must apply the AAA rule, which provides for whatever discovery the arbitrator considers necessary to a full and fair exploration of the issues in dispute. Replacing the AAA rules with the more restrictive rules in the agreement creates both the potential of preliminary legal battles regarding which rules apply and the risk of disparate enforcement of the rules. Thus, incorporation of the AAA rules cannot be allowed to cure the defect inserted by the drafting party] (*Fitz v. NCR Corp. (2004) 118 Cal. App. 4th 702, 717-721, 13 Cal. Rptr. 3d 88*).

[*Optional*] **G. Class Arbitration Waiver May Hinder Vindication of Statutory Rights.** When it is alleged that the party with superior power has systematically denied the rights of the other parties in a situation that involves unwaivable statutory rights and a class action is requested notwithstanding an arbitration agreement that contains a class arbitration or class action waiver, the trial court must consider the following factors:

- Whether the size of the potential individual recovery is modest,
- The potential for retaliation against members of the class who sue individually,
- Whether absent members of the class may be ill informed about their rights, and
- Other real world obstacles to the vindication of class members' rights if enforced through individual arbitration.

If class arbitration is likely to be a significantly more effective practical means of vindicating the statutory rights of the affected parties than individual litigation or arbitration, and the disallowance of the class action will likely lead to a less comprehensive enforcement of the laws involved, a court must invalidate the class arbitration waiver to ensure that those parties can vindicate their unwaivable rights in an arbitration (*Gentry v. Superior Court (Circuit City Stores, Inc.) (2007) 42 Cal. 4th 443, 463, 64 Cal. Rptr. 3d 773, 165 P.3d 556* ; *Sanchez v. Western Pizza Enterprises, Inc. (2009) 172 Cal. App. 4th 154, 165-166, 90 Cal. Rptr. 3d 818* ; *Franco v. Athens Disposal Co., Inc. (2009) 171 Cal. App. 4th 1277, 1295-1299, 90 Cal. Rptr. 3d 539* ; *Murphy v. Check 'N Go of California, Inc. (2007) 156 Cal. App. 4th 138, 147-149, 67 Cal. Rptr. 3d 120*). [If the trial court invalidates the waiver on public policy grounds, then the parties may proceed to class arbitration, unless the trial court invalidates the arbitration agreement altogether for unconscionability, or, if the parties wish, have the matter brought in court (*Gentry v. Superior Court (2007) 42 Cal. 4th 443, 466, 64 Cal. Rptr. 3d 773, 165 P.3d 556*)].

[2] Comments

[a] Use of Form

This form of memorandum may be submitted in opposition to a petition to compel arbitration of a claim seeking to vindicate unwaivable statutory or common law rights if the arbitration agreement at issue does not provide the safeguards first imposed by *Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669* (*Armendariz*) or to argue that a class arbitration prohibition (waiver) would hinder vindication

of unwaivable statutory rights [Optional Paragraph G]. If counsel seeks class arbitration, in addition to Optional Paragraph G, the memorandum should include Optional Paragraph F from form Ch. 20, *Arbitration: Compelling*, § 20.86, regarding severance of the class arbitration waiver. If counsel seeks to have he entire arbitration provision severed, the memorandum should include authorities from form § 20A.91 regarding unconscionability.

Armendariz involved in a case involving a claim under California's Fair Employment and Housing Act (*Gov. Code § 12900 et seq.*). The *Armendariz* requirements were later explicitly extended to claims under *Lab. Code § 970* and so-called *Tameny* claims for wrongful termination in violation of public policy [*see Tameny v. Atlantic Richfield Co. (1980) 27 Cal. 3d 167, 178, 164 Cal. Rptr. 839, 610 P.2d 1330]* .

Counsel should include other authority from Ch. 20, *Arbitration: Compelling*, § 20.23, as applicable, such as retroactivity or other statutory rights that may be involved. Counsel should use whichever of the optional paragraphs that are applicable, with modification if necessary to accommodate the specific fact of counsel's case.

This form does not provide a complete memorandum, but rather should be combined with a general form of memorandum opposing arbitration [*see § 20A.10*].

[b] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of the case. For example, a copy of the agreement should be attached as an exhibit to the petition, response, or memorandum.

It is advisable for counsel to submit evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file (including verified pleadings), or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840]* (motion to compel arbitration improperly denied if plaintiff-respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement).

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For forms of petition to compel arbitration and responses to them, as well as a procedural checklist, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

[d] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

The *form in Ch. 20, Arbitration: Compelling, § 20.86* supports severance of offensive provisions that do not taint the

entire arbitration agreement. Optional Paragraph F of that form should be used if counsel seeks class arbitration. Form § 20A.91 supports arguments that an arbitration agreement, or parts of it, is unconscionable. If counsel seeks to have the entire arbitration agreement, the memorandum should include authorities from form § 20A.91.

[e] Opposing Memoranda

This form of memorandum generally opposes the authorities in *Ch. 20, Arbitration: Compelling, § 20.23* relating to the minimum safeguards necessary for enforcement of an arbitration provision under which the claimant seeks to vindicate unwaivable rights.

[3] Discussion of Authorities

[a] Costs Will Not Be Imposed on Employer in Face of Agreement to Share

The facts and procedural background of ***Abramson v. Juniper Networks, Inc.*** *(2004) 115 Cal. App. 4th 638, 9 Cal. Rptr. 3d 422* , are discussed in *Ch. 20, Arbitration: Compelling, § 20.23[3][a]*; the portion of the opinion determining that *Little v. Auto Stiegler, Inc. (2003) 29 Cal. 4th 1064, 130 Cal. Rptr. 2d 892, 63 P.3d 979* , applies retroactively to a so-called *Tameny* claim for wrongful termination in violation of public policy is discussed in *Ch. 20, Arbitration: Compelling, § 20.23[3][k]*. The court noted that the only relevant requirement imposed by *Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669* , was the limitation on costs, which provides that an employee seeking to vindicate unwaivable rights may not be compelled to pay forum costs that are unique to arbitration. The court noted that the agreements in both *Armendariz* and *Little* were silent as to forum costs (*115 Cal. App. 4th 638, 654, 661)* , whereas the instant agreement required plaintiff to pay half the costs of the arbitration--which amounted to thousands of dollars--at the very threshold. Those costs were unique to the arbitral forum and were thus impermissible under *Armendariz* and *Little*. While silence on the issue of costs is not a ground for denying enforcement of an arbitration agreement, and in fact permits the court to infer the employer's obligation to pay forum costs unique to arbitration, an agreement expressly imposing impermissible forum costs on the employee in violation of public policy does not permit an inference that the employer is to pay (*115 Cal. App. 4th 638, 661)* . With respect to plaintiff's unwaivable public rights, the court found the cost-sharing provision illegal and unenforceable (*115 Cal. App. 4th 638, 661, 668)* .

[b] Employer's Offer to Bear All Arbitral Costs Does Not Cure Defect

Martinez v. Master Protection Corp. *(2004) 118 Cal. App. 4th 107, 116-117, 12 Cal. Rptr. 3d 663* , was a wrongful termination action which included a claim of discrimination on the basis of national origin under the Fair Employment and Housing Act (FEHA; *Gov. Code § 12940 et seq.*). Defendant petitioned to compel arbitration in accordance with the agreement it required of all employees. Plaintiff contended the agreement was unconscionable and unenforceable. The trial court disagreed, and ordered arbitration. The American Arbitration Association (AAA), the forum specified in the agreement, twice refused the matter, in part because it found the six-month limitation period imposed by the agreement to be impermissibly short. Plaintiff filed a motion asking the trial court to lift the stay so he could litigate the matter, but the court denied the motion and appointed another arbitrator, purportedly in accordance with *Code Civ. Proc. § 1281.6* [*see Ch. 20B, Arbitration: Selecting Arbitrators; Arbitral Immunity, § 20B.25*]. The arbitrator found for defendant, and plaintiff petitioned to vacate the award. The court denied the petition, confirmed the award, and entered judgment thereon. Plaintiff appealed.

The court of appeal reversed (*118 Cal. App. 4th 107, 112, 122)* . Although the case involved a claim under the FEHA, and the opinion often cites *Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669* (*Armendariz*), the court's analysis did not rest on the *Armendariz* minimum criteria for vindication of unwaivable rights, but rested on traditional notions of unconscionability. That portion of the opinion is discussed at *§ 20A.91[3][c] -[e]*. One of the provisions the court of appeal found unconscionable was the requirement that the parties split the cost of the arbitration and post fees in advance of the hearing. The court cited *Armendariz* for

the contention that if an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or process cannot require the employee to bear any type of expense that the employee would not be required to bear if free to bring the action in court (*118 Cal. App. 4th 107, 115-116)* . Defendant conceded that was so, but offered to modify the agreement and bear the costs of arbitration. The court of appeal held that would not cure the defect. The risk that a claimant might bear substantial costs, not just the imposition of those costs, may discourage an employee from the exercise of juridical rights. The critical time for testing the agreement is at the time of its making. No rule of law permits a party to resuscitate a legally defective contract by offering to change it (*118 Cal. App. 4th 107, 116)* . The mere inclusion of the costs provision in the arbitration agreement produces an unacceptable chilling effect (*118 Cal. App. 4th 107, 117)* .

[c] Discovery Is Inadequate

The facts and procedural background of ***Fitz v. NCR Corp.*** *(2004) 118 Cal. App. 4th 702, 13 Cal. Rptr. 3d 88* , are discussed in *Ch. 20, Arbitration: Compelling, § 20.23[3][a]*. Defendant's dispute resolution policy limited discovery to the sworn depositions of two individuals and any expert witnesses expected to testify at the hearing. It also required all exhibits and a list of potential witnesses to be exchanged at least two weeks before the arbitration hearing. The arbitrator could have allowed additional discovery upon a showing that otherwise a fair hearing would be impossible. The court noted that this provision did not have mutual effect because the employer would already have in its possession many of the documents relevant to an employment discrimination case and many of the relevant witnesses would be in its employ (*118 Cal. App. 4th 702, 716)* . Plaintiff estimated she would need to depose eight to ten witnesses. The court noted it would be an unusual employment-discrimination case that could be sufficiently presented through the depositions of only two witnesses. In addition, granting the arbitrator discretion to allow additional discovery was not an adequate safety valve, especially because the arbitrator would be constrained by the "impossibility" standard (*118 Cal. App. 4th 702, 717)* .

Under the agreement at issue, the burden to establish the need for more than two depositions was so high, and the rights to initial discovery so low, that employees could find themselves in the position of being unable to gain access to enough information to prove their claims or to demonstrate the need to the arbitrator for more discovery. Nor could the court imply an agreement to allow sufficient discovery, as it did in *Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669* (*Armendariz*), because there was an express agreement to the contrary (*118 Cal. App. 4th 702, 718)* . The court concluded that the limitations on discovery imposed by defendant's dispute-resolution standards failed to ensure that plaintiff would be entitled to discovery sufficient to adequately arbitrate her claims (*118 Cal. App. 4th 702, 719)* .

Defendant's dispute resolution policy incorporated the American Arbitration Association's (AAA) National Rules for the Resolution of Employment Disputes, one of which provides that if a party establishes an adverse material inconsistency between the arbitration agreement and the AAA rules, the arbitrator is to apply the AAA rule. The AAA rule provides for whatever discovery the arbitrator considers necessary to a full and fair exploration of the issues in dispute. The court of appeal found there was an adverse material inconsistency between defendant's policy and the AAA rule (*118 Cal. App. 4th 702, 720)* , but did not agree that this cured the defects in the defendant's discovery provision. The AAA rules were not attached; there was the potential both for legal battles if AAA modified its rules and for disparate enforcement of the AAA provision. Defendant deliberately replaced the AAA discovery provision with its own more restrictive one, and in so doing failed to ensure that employees would be entitled to discovery sufficient to adequately arbitrate their claims. The court was therefore unwilling to relieve defendant of the effect of the unlawful discovery provision (*118 Cal. App. 4th 702, 721)* .

[d] Class Arbitration Waiver Will Hinder Vindication of Statutory Rights

Gentry v. Superior Court (Circuit City Stores, Inc.) *(2007) 42 Cal. 4th 443, 64 Cal. Rptr. 3d 773, 165 P.3d 556* , involved consideration of class action waivers in the context of employee claims in under minimum wage and overtime

laws [*see Lab. Code §§ 550 et seq.* and *1194*]. The trial court upheld the waiver and ordered plaintiff to arbitrate his claims individually. The court of appeal denied a petition for writ of mandate. The Supreme Court accepted review and deferred briefing until it decided *Discover Bank v. Superior Court (Boehr) (2005) 36 Cal. 4th 148, 30 Cal. Rptr. 3d 76, 113 P.3d 1100* (*Discover Bank* discussed at *§ 20A.91[3][i]*). On remand for reconsideration in light of *Discover Bank*, the court of appeal again denied the writ and distinguished the case from *Discover Bank* on two grounds: (1) that this agreement gave employees 30 days to opt out of the arbitration provision and (2) because the agreement was not adhesive it was not procedurally unconscionable. Plaintiffs again sought review and the Supreme Court again granted it.

The Supreme Court held, in a four-to-three decision, that the class arbitration waivers should not be enforced if a trial court determines that class arbitration would be a significantly more effective way of vindicating the rights of affected employees than individual arbitration and reversed and remanded for determination of whether class arbitration would be significantly more effective (*42 Cal. 4th 443, 450, 473)* . The Supreme Court also held that a finding of procedural unconscionability is not required to invalidate a class arbitration waiver if that waiver implicates unwaivable statutory rights although it is a prerequisite to determining that the arbitration agreement as a whole is unconscionable. The Court concluded the present agreement had an element of procedural unconscionability notwithstanding the opt-out provision, and therefore remanded for a determination of whether provisions of the arbitration agreement were substantively unconscionable (*42 Cal. 4th 443, 451, 473)* . The Court first discussed and cited *Discover Bank* for the proposition that one-sided, exculpatory clause in contracts of adhesion, at least to the extent they operate to insulate a party from liability that otherwise would be imposed under California law, are generally unconscionable and should not be enforced. Not all class action waivers are necessarily unconscionable--only those found in consumer contracts of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money [*Civ. Code § 1668*] (*42 Cal. 4th 443, 453-453)* . The Court went on to consider for the first time whether class action or class arbitration waivers would undermine statutory rights (*42 Cal. 4th 443, 454)* . Clearly, the Legislature intended by *Lab. Code § 1194* that minimum wage and overtime laws should be enforced in part by private action brought by aggrieved employees. The overtime laws serve the important public policy goal of protecting employees in a relatively weak bargaining position, and the statutory right to receive overtime pay embodied in Section 1194 is unwaivable (*42 Cal. 4th 443, 455-456)* . The Court then went on to consider, and concluded, that under some circumstances a class action waiver would undermine an employee's right to vindicate his or her statutory rights to overtime pay (*42 Cal. 4th 443, 457)* . The Court discussed the sums likely to be involved for each individual, whether a person who sued his or her employer individually was likely to be subject to retaliation, and whether some employees might forego their rights because they did not know they had been violated (*42 Cal. 4th 443, 457-461)* . The Court cited a Massachusetts federal district court case which held that those reasons made class arbitration waivers inconsistent with federal minimum wage and overtime laws. The waiver might not only be unfair to employees, but also remove any incentive for the employer to avoid the type of conduct that might lead to class action litigation in the first instance. The Court would not say that all class action waivers in overtime cases were unconscionable (*42 Cal. 4th 443, 462)* , but when it is alleged that the employer has systematically denied proper overtime pay to a class of employees and a class action is requested notwithstanding an arbitration agreement that contains a class arbitration waiver, the trial court must consider the flowing factors (*42 Cal. 4th 443, 463)* :

- The modest size of the potential individual recovery,
- The potential for retaliation against members of the class,
- The fact that absent members of the class may be ill informed about their rights, and
- Other real world obstacles to the vindication of class members' rights to overtime pay through individual arbitration.

If class arbitration is likely to be a significantly more effective practical means of vindicating the rights of the affected

employees than individual litigation or arbitration, and the disallowance of the class action will likely lead to a less comprehensive enforcement of overtime laws for the employees alleged to be affected by the employer's violations, a court must invalidate the class arbitration waiver to ensure that the employees can vindicate their unwaivable rights in an arbitration (*42 Cal. 4th443, 463*). Thus, the Court remanded to the court of appeal with directions to remand to the trial court to determine in light of the above discussion whether, in this particular case, class arbitration would be a significantly more effective means than individual arbitrations of vindicating the right to overtime pay of the group of employees whose rights to their pay had been allegedly violated by Circuit City. If the trial court invalidates the waiver on public policy grounds, then the parties may proceed to class arbitration or, if the parties wish, have the matter brought in court unless the trial court invalidates the arbitration agreement altogether for unconscionability (*42 Cal. 4th 443, 466)* . The portion of the opinion addressing unconscionability is discussed at *§ 20A.91[3][c]*; the portion addressing the particular appropriateness of class arbitration waivers for severance is discussed in *Ch. 20, Arbitration: Compelling, § 20.86[3][b]*.

Sanchez v. Western Pizza Enterprises, Inc. *(2009) 172 Cal. App. 4th 154, 90 Cal. Rptr. 3d 818* , affirmed a trial court order finding a class arbitration waiver and other terms of the agreement unconscionable, and that the agreement therefore was unenforceable. The portion of the opinion discussing the application of contract principles to enforceability of a class arbitration waiver is discussed in *Ch. 20, Arbitration: Compelling, § 20.30[3][a]*. The portion of the opinion dealing with whether the agreement specified that the arbitrator was to decide the issue of enforceability is discussed in *Ch. 20, Arbitration: Compelling, § 20.10[3][k]* and in *§ 20A.10[3][b], above* . The employee claimed that a class arbitration waiver was unenforceable as against public policy. The delivery-driver employee asserted the unwaivability of the public policies of an employee's statutory right to reimbursement of job expenses under *Lab. Code §§ 2802, 2804* and the statutory right to receive minimum wage under *Lab. Code § 1194*, which the court found to be unwaivable. On that basis. the court ruled that the four-part *Gentry* test applied (*172 Cal. App. 4th 154, 170)* .

Reaching only the first three *Gentry* factors, the court of appeals found that any individual recovery of the difference between the amounts paid for reimbursement of delivery expenses and the amounts actually incurred is likely to be modest. The same is true of any individual recovery for the alleged failure to pay minimum wage as a result. Second, the delivery drivers are low wage earners, and the potential for retaliation against members of the class who litigate or arbitrate individually is significant. Third, plaintiff presented evidence that most of the drivers are immigrants with limited English language skills who are likely to be unaware of their legal rights (*172 Cal. App. 4th 154, 170-171)* . Accordingly, the court ruled that the evidence supports the reason stated for the trial court's decision that the class arbitration waiver is unenforceable as against public policy under *Gentry (172 Cal. App. 4th 154, 171)* . The portions of the opinion addressing the procedural unconscionability of the arbitration agreement, the substantive unconscionability of the agreement, and the unenforceability of the agreement due to unconscionability are discussed, respectively, in § 20A.91[3][d], [e], and [k], *below*.

The court of appeals reversed the trial court's grant of class action defendant's motion to compel arbitration in ***Franco v. Athens Disposal Co., Inc.*** *(2009) 171 Cal. App. 4th 1277, 90 Cal. Rptr. 3d 539* . The court found an arbitration agreement containing a class arbitration waiver and a waiver of the right to file an action under the Private Attorneys General Act of 2004 was unconscionable because it was tainted with illegality as a whole and therefore unenforceable. The court of appeals ruled that the substantive claims of violation of meal and rest-period requirements in *Labor Code § 226.7* are not waivable, per *Labor Code § 219* (*171 Cal. App. 4th 1277, 1294)* . Accordingly, the class arbitration waiver must comply with the four-factor *Gentry* test. Under the first factor, the employee's total damages for the meal and rest period violations, as alleged, come to approximately $ 7,750, plus $ 2,500 in civil penalties, an amount too high for a small claims action under *Code Civ. Proc. § 116.221*, and too low, as a practical matter, to be pursued as an individual claim, either in court or through arbitration. Further, the possibility of an award of attorney fees would not provide a sufficient incentive for an attorney to take a case like the employee's as an individual matter. As for the second factor, the fact that the employee no longer works for the employer simply strengthens his status as the representative in a class action or class arbitration because it is reasonably presumed that potential class members still employed by the employer might be unwilling to sue individually or join a suit for fear of retaliation at their jobs. Given

that a number of putative members of the class are current employees, the concern for possible employer reprisal action exists. The employer's stated anti-retaliation policy fails as mitigation in this regard, given the record of the employer's wholesale disregard of the meal and rest period laws with respect to numerous employees over an extended period of time. Third, some workers, particularly those with limited English language skills, may be unfamiliar with labor laws. In a class proceeding, current and former employees would receive written notice of their rights. Respecting the fourth factor, absent effective enforcement, the employer's cost of paying occasional judgments and fines may be significantly outweighed by the cost savings of not paying for missed meal and rest periods. Given that class treatment would be more practical than individual actions, regardless of whether the claims are adjudicated through arbitration or in the trial court, the court of appeals held that the record does not support the trial court's determination that the employees' claims would be so individualized as to render class arbitration treatment significantly less effective than individual arbitrations (*171 Cal. App. 4th 1277, 1295-1299)* . The portion of the opinion dealing with the employee's claim that the arbitration agreement is not enforceable as unconscionable is discussed in *§ 20A.91[3][k], below*.

The facts and procedural background of ***Murphy v. Check 'N Go of California, Inc.*** *(2007) 156 Cal. App. 4th 138, 67 Cal. Rptr. 3d 120* , and the portion of the opinion address the court's authority to determine the issue of unconscionability are discussed in *Ch. 20, Arbitration: Compelling, § 20.10[3][k]*. With regard to the class action waiver, the court of appeal discussed *Discover Bank v. Superior Court (Boehr) (2005) 36 Cal. 4th 148, 30 Cal. Rptr. 3d 76, 113 P.3d 1100* (*Discover Bank* discussed at *§ 20A.91[3][i]*) and cited it for the proposition that one-sided, exculpatory clauses in contracts of adhesion, at least to the extent they operate to insulate a party from liability that otherwise would be imposed under California law, are generally unconscionable and should not be enforced (*156 Cal. App. 4th 138, 147)* . Not all class action waivers are necessarily unconscionable--only those found in consumer contracts of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money [*Civ. Code § 1668*] (*156 Cal. App. 4th 138, 147-148)* . The class action waiver in this case was patently one-sided and, as established by the unopposed declarations of counsel presented by plaintiff, class members would have difficulty securing legal representation for individual cases because of the relatively small sums involved, and class actions were necessary to deter employers like defendant from misclassifying their employees (*156 Cal. App. 4th 138, 148)* . Substantial evidence supported the court's ruling that the class action waiver was an exculpatory clause (*156 Cal. App. 4th 138, 148)* . The court also discussed and cited *Gentry v. Superior Court (Circuit City Stores, Inc.) (2007) 42 Cal. 4th 443, 457, 463, 466, 64 Cal. Rptr. 3d 773, 165 P.3d 556* (*Gentry*, discussed *above*) for the proposition that the question of whether a class action waiver is exculpatory in the context of wage and hour laws is a factual question requiring a showing of real world obstacles to the vindication of class members' rights to overtime pay through individual arbitration, including the modest size of the potential individual recovery, the potential for retaliation against members of the class, and the fact that absent members of the class might be ill informed about their rights. These considerations were all addressed by reasonable plaintiff's declarations of counsel, and defendant failed to controvert them (*156 Cal. App. 4th 138, 148-149)* .

California Points & Authorities

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20A ARBITRATION: RESISTING
PART II. FORMS
A. General Principles Relating to Resisting Arbitration

2-20A California Points & Authorities § 20A.23

[Reserved]

§ 20A.23[Reserved]

California Points & Authorities

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20A ARBITRATION: RESISTING
PART II. FORMS
A. General Principles Relating to Resisting Arbitration

2-20A California Points & Authorities § 20A.24

§ 20A.24 Union Cannot Waive Employee's Right to Jury Trial for the State or Statutory Claim at Issue

[1] FORM

THE ARBITRATION CLAUSE IN THE COLLECTIVE BARGAINING AGREEMENT DOES NOT ENCOMPASS PLAINTIFF'S CAUSE OF ACTION FOR _____ [*specify claim, e.g.,* DISCHARGE IN VIOLATION OF PUBLIC POLICY], AND THEREFORE PLAINTIFF CANNOT BE COMPELLED TO ARBITRATE THAT CLAIM.

A. Union Cannot Waive Employee's Right to Jury Trial for the State or Statutory Claim at Issue. A union cannot prospectively waive an employee's right to a judicial forum for his or her statutory discrimination or state claims by agreeing to arbitration in a collective bargaining agreement (*Zavala v. Scott Brothers Dairy, Inc. (2006) 143 Cal. App. 4th 585, 592-596, 49 Cal. Rptr. 3d 503* ; *Deschene v. Pinole Point Steel Company (1999) 76 Cal. App. 4th 33, 48-49, 90 Cal. Rptr. 2d 15* (termination against public policy and discrimination on basis of health); *Torrez v. Consolidated Freightways, Corp. (1997) 58 Cal. App. 4th 1247, 1259, 68 Cal. Rptr. 2d 792 (FEHA))* . Further, the fact that the (former) employee initiated arbitration of those claims and later withdrew them from arbitration does not preclude judicial action on those claims (*Deschene v. Pinole Point Steel Company (1999) 76 Cal. App. 4th 33, 47-49, 90 Cal. Rptr. 2d 15*).

[*Optional*] **B. State Claim Is Not Preempted by Labor Management Relations Act.** The trigger for Labor Management Relations Act Section 301 (*29 U.S.C. § 185(a)*) preemption is whether application of state law requires interpretation of the terms of a collective bargaining agreement ("CBA"). Claims for termination in violation of public policy and discrimination based on health doe not require interpretation of the CBA and thus are not preempted by the *LMRA (Deschene v. Pinole Point Steel Company (1999) 76 Cal. App. 4th 33, 40-42, 90 Cal. Rptr. 2d 15*).

[2] Comments

[a] Use of Form

Paragraph A of this form may be submitted in opposition to a petition to compel arbitration on the basis of a collective

bargaining agreement to support the contention that the particular claim is not one which a union may bind its members to arbitrate. Optional Paragraph B is for use if petitioner also claims the state action is preempted by *Section 301 of the Labor* Management Relations Act (*29 U.S.C. § 185(a)*). In many cases it will be appropriate to combine the authorities in Paragraph A of this form with those in § 20A.21.

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in opposition to a petition to compel arbitration [*see § 20A.10* et seq.].

[b] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, a copy of the arbitration agreement should be attached as an exhibit to the memorandum.

Although the issue addressed by this form is mainly one of law, there may be other issues with regard to which counsel will wish to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For forms opposing petitions to compel arbitration, as well as a procedural checklist, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

[d] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For forms addressing general contract principles, see Ch. 50, *Contracts* .

[3] Discussion of Authority

[a] Union Cannot Waive Employee's Right to Jury Trial for the State or Statutory Claim at Issue

Zavala v. Scott Brothers Dairy, Inc. *(2006) 143 Cal. App. 4th 585, 592-596, 49 Cal. Rptr. 3d 503* , was a class action by employees alleging that defendant failed to provide them statutory rest breaks and properly itemized wage-statements, in violation of *Lab. Code §§ 226* and *226.7* and wage orders issued by the Industrial Wage Commission (IWC). Defendant moved to compel arbitration based on a collective-bargaining agreement (CBA) which

defined grievances as "all disputes or controversies arising under this Agreement," an article of which required wage-stub itemization and coffee breaks in language similar, but not identical, to the Labor Code and IWC wage orders. Defendant claimed the allegations arose under the CBA and were subject to arbitration. The trial court disagreed, and denied the motion to compel arbitration. Defendant appealed.

The court of appeal affirmed (*143 Cal. App. 4th 585, 596)* . The Legislature declared in *Lab. Code § 219* that no provision of that article, which includes Sections 226 and 266.7, can in any way be contravened or set aside by a private agreement, whether written, oral, or implied (*143 Cal. App. 4th 585, 596)* . The court said the question before it was whether the parties agreed to resolve statutory labor claims by arbitration, and concluded that regardless of whether the CBA includes a broad arbitration provision, that clause was not binding on plaintiffs because the Union could not waive plaintiffs' right to bring statutory labor-rights claims in court and because those claims did not arise under the CBA (*143 Cal. App. 4th 585, 595*). The court discussed federal and U.S. Supreme Court cases, including a 2005 Ninth Circuit Court of Appeal case which held that California's statutorily guaranteed meal periods are not subject to waiver by a collective-bargaining agreement (*143 Cal. App. 4th 585, 592-593)* . These rights devolve on plaintiffs as individual employees, not as members of a collective organization and so they exist independent of the collective-bargaining process. The lawsuit represents an effort to enforce nonwaivable statutory rights, not an attempt to enforce compliance with the CBA (*143 Cal. App. 4th 585, 595*). Plaintiffs did not agree to arbitrate their claims and their dispute does not arise under the CBA (*143 Cal. App. 4th 585, 595*). Plaintiffs are not required to arbitrate this dispute. Moreover, the court held this result was not changed because the Union had already grieved the rest-break issue under the CBA. The itemized wage-statement claim had not been grieved and would not be barred. Further, courts have repeatedly held that the prior submission of certain statutory claims to final and binding arbitration does not bar a subsequent lawsuit where the employees have not waived their statutorily protected rights to a judicial resolution (*143 Cal. App. 4th 585, 595-596)* .

Plaintiff in ***Deschene v. Pinole Point Steel Company*** *(1999) 76 Cal. App. 4th 33, 90 Cal. Rptr. 2d 15* , was fired by defendant, allegedly because of insubordination, disruption of the work flow, and outbursts at his supervisor. Plaintiff contended the work flow was interrupted by problems caused by improper maintenance, denied the outbursts against his supervisor, and contended he was fired because he gave deposition and trial testimony unfavorable to defendant in an asbestos-related action. Plaintiff had diabetes and his previous supervisor had accommodated the illness by letting plaintiff use his office to take insulin injections and relieving plaintiff on the line when plaintiff needed to rest. Plaintiff's supervisor at the time of his discharge refused to make any such accommodation. Plaintiff filed a complaint seeking damages for wrongful termination on theories of breach of contract and of the covenant of good faith and fair dealing as well as termination violative of public policy and of statutory prohibitions against discrimination on the basis of medical condition and as retaliation for giving testimony in a deposition. Plaintiff was a member of the International Association of Machinists and Aerospace Workers and subject to a collectivebargaining agreement ("CBA"). Before filing the lawsuit, plaintiff grieved his termination reprimand on the basis that he was fired because of his health and age in violation of nondiscrimination provisions contained within the CBA. The matter was set for arbitration, but plaintiff withdrew his request for arbitration and filed the suit a month later. Defendants moved for summary judgment on the grounds that all causes of action alleged in the complaint were governed by a collective bargaining agreement, and therefore preempted by section 301 of the Labor-Management Relations Act, (*29 U.S.C. 185*, "LMRA") and that plaintiff failed to dispute that his termination was not in violation of public policy arising out of the testimony and his medical condition. The motion was granted and judgment entered. Plaintiff's motion for new trial was denied, and he appealed.

The court of appeal for the First District, Division Four, reversed as to the causes of action for wrongful termination in violation of public policy and of discrimination on the basis of health and affirmed with respect to the claims for breach of contract and of the covenant of good faith and fair dealing, which they agreed were subject to the CBA and preempted by the LMRA (*76 Cal. App. 4th 33, 49*). The court of appeal contrasted *Alexander v. Gardner-Denver Co. (1974) 415 U.S. 36, 50-51, 94 S. Ct. 1011, 39 L. Ed. 2d 147* , which held that the purpose of Congress in enacting title VII would be defeated by permitting a union to bargain away the protections provided by the statute and that the

employee's decision to submit his contractual claims to the arbitral forum did not effect a waiver of his right to pursue a judicial remedy for the title VII claims [*Alexander v. Gardner-Denver Co. (1974) 415 U.S. 36, 52, 94 S. Ct. 1011, 39 L. Ed. 2d 147]* , with *Gilmer v. Interstate/Johnson Lane Corp. (1991) 500 U.S. 20, 22-23, 111 S. Ct. 1647, 114 L. Ed. 2d 26* , which held it appropriate to compel arbitration of an age discrimination claim in accordance with and arbitration clause in a contract signed by the individual employee (*76 Cal. App. 4th 33, 47)* . The court noted a 1996 Fourth Circuit opinion that required arbitration of both Title VII and ADA claims under a CBA, but also noted that a California case had criticized that decision and refused to follow it [*see Torrez v. Consolidated Freightways, Corp. (1997) 58 Cal. App. 4th 1247, 68 Cal. Rptr. 2d 792* , discussed *below*] (*76 Cal. App. 4th 33, 48)* . The court of appeal concluded that the distinction between CBAs signed by union officials and contracts signed by individuals was crucial. Although plaintiff had personally signed the CBA in question, he was merely one of several union signatories to the agreement, and did not sign it in his individual capacity. Thus, he was not personally agreeing to arbitrate any state law claims he personally might have against his employer (*76 Cal. App. 4th 33, 49)* .

Plaintiff in ***Torrez v. Consolidated Freightways, Corp.*** *(1997) 58 Cal. App. 4th 1247, 1259, 68 Cal. Rptr. 2d 792* , was bound by the terms of a collective bargaining agreement ("CBA") between his employer, defendant Consolidated Freightways Corporation of Delaware, and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. The CBA included provisions governing the discharge of employees, prohibiting discrimination on the basis of sex, age, race, creed, color or national origin, and established a mandatory grievance and binding arbitration procedure. Plaintiff believed he was terminated for things that non-Hispanic co-workers were allowed to do and filed suit against defendant, alleging violations of the FEHA and California Constitution, intentional infliction of emotional distress, and tortious wrongful termination. Defendant's petition to compel arbitration was denied, and defendant appealed.

The court of appeal affirmed as to plaintiff's statutory discrimination claims. The court of appeal discussed *Alexander v. Gardner-Denver Co. (1974) 415 U.S. 36, 50-51, 94 S. Ct. 1011, 39 L. Ed. 2d 147* , and *Gilmer v. Interstate/Johnson Lane Corp. (1991) 500 U.S. 20, 22-23, 111 S. Ct. 1647, 114 L. Ed. 2d 26* , and cases interpreting both of them and summarized, saying it is now clear that an individual may surrender his or her statutory rights in an individual employment contract unless Congress has expressed the intent that a particular right cannot be surrendered. However, that is not the case with respect to statutory rights that a union purports to surrender on behalf of its members in a collective bargaining agreement. Although an individual employment contract can address both contractual and statutory rights, a collective bargaining agreement, by its very nature, may address only the common, contractual rights of the members of the bargaining unit (*58 Cal. App. 4th 1247, 1258)* . Adopting the majority view, the court of appeal concluded that a union may not prospectively waive an employee's right to a judicial forum to hear his or her statutory discrimination claims. The court noted that plaintiff's claim against defendant not based on title VII but on the California FEHA, which was modeled after the federal statute, saying this was a distinction without a difference (*58 Cal. App. 4th 1247, 1259)* and that rights protected by FEHA deserve the same protection that afforded the ADEA and the ADA (*58 Cal. App. 4th 1247, 1260*). The portion of the opinion discussing plaintiff's nonstatutory claims was not published.

[b] State Claim Is Not Preempted by Labor Management Relations Act

The facts and procedural background of ***Deschene v. Pinole Point Steel Company*** *(1999) 76 Cal. App. 4th 33, 90 Cal. Rptr. 2d 15* , are discussed at [a], *above*. Before reaching the issue of whether the CBA required plaintiff to arbitrate the causes of action for termination in violation of public policy and discrimination based on medical condition, the court of appeal considered defendant's contention that those claims were preempted by *Section 301 of the Labor* Management Relations Act (*29 U.S.C. § 185(a)*), which would vest jurisdiction only in the federal district court. The purpose of section 301 is to ensure that the terms in CBAs will be construed to have the same meaning under state and federal law and from state to state. Thus, section 301 requires that federal law preempts state law with respect to the interpretation of the terms of a CBA. The trigger for section 301 preemption is whether the application of state law requires contractual interpretation of the terms in a CBA (*76 Cal. App. 4th 33, 40*). To determine whether a state claim is

preempted by section 301 because it requires interpretation of the CBA, the court looks to the elements of the claim, the terms of the agreement, the facts which plaintiff believes support the cause of action and those the defendant may assert in his defense. After doing so, the court concluded that the relevant questions were factual in nature and therefore would not requireconstruing terms of the CBA and would not be preempted (*76 Cal. App. 4th 33, 41-42)* .

California Points & Authorities

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20A ARBITRATION: RESISTING
PART II. FORMS
A. General Principles Relating to Resisting Arbitration

2-20A California Points & Authorities §§ 20A.25-20A.29

[Reserved]

§§ 20A.25[Reserved]

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20A ARBITRATION: RESISTING
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A. General Principles Relating to Resisting Arbitration

2-20A California Points & Authorities § 20A.30

§ 20A.30 Applicable Principles of Contract Interpretation

[1] FORM

RESPONDENT CANNOT BE COMPELLED TO ARBITRATE THIS CONTROVERSY BECAUSE, APPLYING THE GENERAL RULE OF CONTRACT CONSTRUCTION THAT _____ [*specify, e.g.*, AMBIGUOUS CONTRACT TERMS ARE TO BE CONSTRUED AGAINST THE DRAFTER, IN THIS CASE PETITIONER], _____ [THERE IS NO ARBITRATION PROVISION IN THE AGREEMENT BETWEEN THE PARTIES *or* THE ARBITRATION PROVISION AT ISSUE DOES NOT APPLY TO RESPONDENT *or* THE ARBITRATION PROVISION AT ISSUE IS NOT BROAD ENOUGH TO ENCOMPASS THE CONTROVERSY SOUGHT TO BE ARBITRATED].

[*Optional*] **A. Ambiguous Term Construed Against Drafter.** Ambiguous language in an arbitration clause must be construed against the party who drafted the agreement, especially when the agreement was not the product of negotiation or other elements of adhesion exist (*Civ. Code § 1654*; *Victoria v. Superior Court (1985) 40 Cal. 3d 734, 740-747, 222 Cal. Rptr. 1, 710 P.2d 833* ; *Lawrence v. Walzer & Gabrielson (1989) 207 Cal. App. 3d 1501, 1507, 256 Cal. Rptr. 6*).

[*Optional*] **B. Construction of General Word Following Enumeration Is Limited.** Under the doctrine of *ejusdem generis*, also known as Lord Tenterden's rule, when general words follow an enumeration of a particular class of things, the general words must be interpreted to mean only other things of the same nature or class as those enumerated. [Thus, for instance, an agreement to arbitrate disputes regarding "fees, costs, or any other aspect of" the parties' relationship was only broad enough to require arbitration of financial matters similar to disputes regarding fees and costs] (*Lawrence v. Walzer & Gabrielson (1989) 207 Cal. App. 3d 1501, 1506, 256 Cal. Rptr. 6*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a petition to compel arbitration to assert that the contract at issue, when

interpreted in accordance with one of the general rules of contract interpretation, does not contain an arbitration provision or contains an arbitration provision that either is not broad enough in scope to coverage the controversy at issue or does not include respondent as a party who is bound by the arbitration provision.

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in opposition to one seeking to compel arbitration [*see § 20A.10*]. Counsel may wish to incorporate other authorities, such as those from *Ch. 20, Arbitration: Compelling, § 20.30*, which set forth the rule that general state law contract principles are to be applied in construing the alleged arbitration agreement. If arguing that the arbitration provision is not broad enough to cover the present controversy, counsel may wish to incorporate authorities from the forms at § 20A.40 et seq. If arguing that the arbitration provision does not bind respondent, counsel may wish to incorporate authorities form the forms at § 20A.60 et seq.

[b] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, argument should emphasize the language of the agreement, its ambiguity, and the fact that petitioner drafted it.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For a form of response to a petition to compel arbitration that may be supported by this memorandum, as well as a procedural checklist, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

For discussion of the rules of contract interpretation, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

For memoranda to combine with this form, regarding other matters that the opposition may need to address, see *§§ 20A.10, 20A.12, 20A.21 et seq., 20A.31 et seq., 20A.60 et seq., and 20A.80* et seq.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion andgeneral forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For forms addressing general contract principles, see Ch. 50, *Contracts* .

[3] Discussion of Authorities

[a] Ambiguous Term Construed Against Drafter

Civ. Code § 1654 provides that in cases of uncertainty not removed by the rules of construction set forth in *Civ. Code §§ 1635-1653*, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist.

In ***Victoria v. Superior Court*** *(1985) 40 Cal. 3d 734, 222 Cal. Rptr. 1, 710 P.2d 833* , plaintiff, a member of a health plan, was sexually assaulted by an employee of defendant health plan while hospitalized for treatment in the plan's hospital. Under an arbitration agreement negotiated between plaintiff's employer and defendant, plaintiff agreed to arbitrate all claims "arising from rendition or failure to render services" on the part of the plan. In plaintiff's action against the plan for negligent employment of the orderly who, it was alleged, had a past history of sexual assaults, the trial court granted the plan's motion to compel arbitration.

The Supreme Court reversed. It held that the arbitration agreement was ambiguous regarding whether the arbitration clause was intended to cover intentional torts by the plan's employees that were not related to treatment. It then held that the provision should be interpreted against the drafter under the normal rules that apply to the interpretation of standard form contracts (*40 Cal. 3d 734, 744, 747)* . Although the Court noted the rule that arbitration clauses should be liberally construed in favor of arbitration, it held that this rule did not apply when the term was contained in a standardized form contract, at least in the present case in which it was unlikely that the parties intended that the arbitration provision would apply to suits for sexual assaults (*40 Cal. 3d 734, 747)* .

The facts and procedural background of ***Lawrence v. Walzer & Gabrielson*** *(1989) 207 Cal. App. 3d 1501, 256 Cal. Rptr. 6* , are discussed under [b], below. The court of appeal noted that the arbitration clause at issue was part of a retainer agreement drafted by defendant attorneys and presented to the plaintiff client for signature, and that the agreement was not the product of negotiation. The court cited *Civ. Code § 1654*, and considered its application in affirming the denial of defendants' petition to compel arbitration (*207 Cal. App. 3d 1501, 1507)* .

[b] Construction of General Word Following Enumeration Is Limited

Lawrence v. Walzer & Gabrielson *(1989) 207 Cal. App. 3d 1501, 256 Cal. Rptr. 6* , involved an appeal by defendant attorneys from denial of their petition to compel arbitration of plaintiff's legal malpractice claim. The retainer agreement at issue was three pages long and contained thirteen numbered paragraphs. Paragraph 11 of the agreement provided in part: "In the event of a dispute between us regarding fees, costs, or any other aspect of our attorney-client relationship, the dispute shall be resolved by binding arbitration." Plaintiff would not have signed the agreement had plaintiff been told that signing it would waive the right to trial of, and require arbitration of, any possible future malpractice claim.

The court of appeal focused on the interpretation of the quoted language, and cited *Fiske v. Niagra Fire Ins. Co. (1929) 207 Cal. 355, 357, 278 P. 861* , and *Scally v. Pacific Gas & Electric Co. (1972) 23 Cal. App. 3d 806, 819, 100 Cal. Rptr. 501* , for the statement of the doctrine of *ejusdem generis*. Under that doctrine, also known as Lord Tenterden's rule, when general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. The rule is based on the belief that if the writer had intended the general words to be used in their unrestricted sense, he or she would not have mentioned the particular things or class of things that would in that event be mere surplusage. The words "other" or "any other" following an enumeration of particular classes should be read as "other such like" or read to include others "of like kind or character" (*207 Cal. App. 3d 1501, 1506)* . Thus, the arbitration clause here at

issue was not broad enough to require arbitration of plaintiff's malpractice claim, but was limited in its application to financial matters similar to disputes regarding fees and costs (*207 Cal. App. 3d 1501, 1506)* .

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CHAPTER 20A ARBITRATION: RESISTING
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A. General Principles Relating to Resisting Arbitration

2-20A California Points & Authorities § 20A.31

§ 20A.31 Arbitration Provision Was Not Incorporated by Reference

[1] FORM

RESPONDENT CANNOT BE COMPELLED TO ARBITRATE THIS CONTROVERSY BECAUSE THERE IS NO ARBITRATION PROVISION IN THE AGREEMENT BETWEEN THE PARTIES, NOR IS ANY ARBITRATION PROVISION INCORPORATED BY REFERENCE INTO THAT AGREEMENT.

A. Arbitration Provision Was Not Incorporated by Reference. A party will not be compelled to arbitrate under an agreement that does not contain an arbitration clause, or an agreement that failed to adequately incorporate an arbitration clause by reference (*Adajar v. RWR Homes, Inc. (2008) 160 Cal. App. 4th 563, 569-571, 73 Cal. Rptr. 3d 17* ; *Kleveland v. Chicago Title Ins. Co. (2006) 141 Cal. App. 4th 761, 764-765, 46 Cal. Rptr. 3d 314* ; *Marsch v. Williams (1994) 23 Cal. App. 4th 250, 256, 28 Cal. Rptr. 2d 398* ; *Chan v. Drexel Burnham Lambert, Inc. (1986) 178 Cal. App. 3d 632, 643-645, 223 Cal. Rptr. 838*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a petition to compel arbitration in response to a claim that the parties' agreement incorporated by reference an arbitration provision in some other document, when in fact it did not do so.

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in opposition to one seeking to compel arbitration [*see § 20A.10*]. Counsel may wish to incorporate other authorities, such as those from *Ch. 20, Arbitration: Compelling, § 20.30,* which set forth the rule thatgeneral state law contract principles are to be applied in construing the alleged arbitration agreement.

[b] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the

facts of his or her case. For example, argument should emphasize the language of the parties' agreement and its failure to include any mention of arbitration.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For a form of response to a petition to compel arbitration that may be supported by this memorandum, as well as a procedural checklist, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

[d] Related Memoranda

For memoranda to combine with this form, regarding other matters that the opposition may need to address, see *§§ 20A.10-20A.12, 20A.21 et seq., 20A.30 et seq., 20A.40 et seq., 20A.60 et seq., and 20A.80* et seq.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For forms addressing general contract principles, see Ch. 50, *Contracts* .

[3] Discussion of Authorities

[a] Arbitration Provision Was Not Incorporated by Reference

Adajar v. RWR Homes, Inc. *(2008) 160 Cal. App. 4th 563, 73 Cal. Rptr. 3d 17* , was a construction defect case. Defendant rested its claim of an arbitration agreement on a provision it claimed was incorporated by reference in plaintiffs' applications for warranties. Buyers were alleged to have signed consents acknowledging that they had viewed and received a video about the warranty and read a sample copy of the warranty booklet, which was alleged to contain the arbitration provision. The consent recited that buyers agreed to the binding arbitration provision. Defendant did not submit any copy of the video or the sample copy of the warranty booklet that owners attested to having read but instead submitted copies of two warranty booklets that were issued to buyers after the close of escrow. One version was dated January 1, 2001, and the other version was dated October 1, 2002. Defendant also submitted copies of certificates of warranty insurance that notified the owners their homes were enrolled in the warranty program and specified whether they received the 2001 or the 2002 warranty booklet. Most of the owners submitted declarations stating that they did not receive a video pertaining to the warranty or a copy of the sample warranty booklet. The trial denied the motion on the grounds that (1) arbitration was unavailable because plaintiffs' claims were not for relief under the warranties; and (2)

the only arbitration agreement was set forth in the application for warranty protection, and that application was procedurally unconscionable because there was no specific acknowledgement of the arbitration clause and it was not separately identified in the paragraph, and substantively unconscionable because none of the terms of the arbitration were set forth nor was there any information regarding plaintiffs' waiver of a right to jury trial. Defendant appealed.

The court of appeal affirmed (*160 Cal. App. 4th 563, 566)* . Defendant argued that the trial court erred by finding the applications for warranties were insufficient evidence of an agreement to arbitrate, citing the general rule that the agreement need not expressly provide for arbitration but may incorporate by reference another document containing an arbitration clause. The court of appeal pointed out that the applications plaintiffs signed did not incorporate by reference the terms of arbitration clauses included in the subsequently issued warranty booklets. Rather, the applications provided that by signing the forms, homeowners acknowledged they had viewed and received the video and had read a sample copy of the warranty booklet (*160 Cal. App. 4th 563, 569)* . Defendant did not produce a copy of either the video or the sample warranty booklet referred to in the application, and thus the terms of arbitration to which plaintiffs supposedly agreed could not be determined (*160 Cal. App. 4th 563, 569-570)* . In other words, defendant failed to prove the existence of an arbitration contract and plaintiffs' waiver of their right to a jury trial. The court emphasized that it could not simply infer the 2001 and 2002 warranty booklets issued to plaintiffs after the close of escrow were identical to the sample warranty booklet referred to in the applications, particularly because the 2001 and 2002 warranty booklets contained differences in their arbitration clauses. In fact, it was unexpected that an application for warranty would purport to bind the insured to arbitrate *any* claim or dispute between a homeowner and defendant, whether or not it pertained to the warranties. Further, there was no suggestion the sample warranty booklet, to any extent it actually existed, included such a broad arbitration clause (*160 Cal. App. 4th 563, 570*). Defendantargued that when a party signs a contract affirming that he or she agrees to be bound by provisions contained in a separate document, there is a presumption that the party knows what terms he or she was agreeing to, that plaintiffs had to establish that they did not knowingly or willingly agree to the incorporated provisions because the separate provisions were not reasonably available; and that as a general rule, a party is bound by the provisions of an agreement which he or she signs, even though he or she did not read them and was unaware of their existence (*160 Cal. App. 4th 563, 570-571)* . The court of appeal refused to apply any of those rules, saying it was defendant's burden to prove the existence of an arbitration agreement and no presumption arose as to plaintiffs' knowledge when defendant failed to submit the sample warranty booklet referred to in the application. Even if all parties agreed the application incorporated a sample warranty booklet, arbitration could not be compelled because there was no evidence of its terms. The court recited the rule regarding incorporation by reference, that for the terms of another document to be incorporated into the document executed by the parties the reference must be clear and unequivocal, the reference must be called to the attention of the other party and that party must consent to it, and the terms of the incorporated document must be known or easily available to the contracting parties. Defendant could not claim that the sample warranty ballot was easily available to plaintiffs, when it apparently could not even produce the document itself. The court of appeal found equally unavailing defendant's contention the existence of an arbitration agreement was for the arbitrator to determine. That contention relied on a Construction Arbitration Services, Inc. (CAS) rule that the arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part, and on a provision of the 2001 warranty booklet that stated arbitration would be subject to CAS rules. However, the 2001 warranty booklet and CAS rules were immaterial because there was no evidence that in applying for warranty protection plaintiffs agreed to be bound by them. Given these holding, the court of appeal found it unnecessary to address the trial court's findings that arbitration was unavailable because plaintiffs' claims were unrelated to the warranties, and because of procedural and substantive unconscionability (*160 Cal. App. 4th 563, 571, 571 n3*). The court distinguished various cases relied on be defendant because each involved a situation in which the document or booklet containing the arbitration agreement was provided to homebuyers at the time they signed the consent (*160 Cal. App. 4th 563, 572)* .

Kleveland v. Chicago Title Ins. Co. *(2006) 141 Cal. App. 4th 761, 46 Cal. Rptr. 3d 314* , involved a title insurance policy. The preliminary title insurance report described the real property to be insured, stated the coverage to be afforded and the exceptions and exclusions to that coverage, but did not indicate the policy would include an arbitration clause. The cover sheet stated the policy would be issued in the form of an American Land Title Association (ALTA)

homeowner's policy of title insurance, version 11/98, copies of which were available on request. That policy had an arbitration clause. Defendant Chicago Title subsequently issued a different type of insurance policy, namely a California Land Title Association (CLTA) standard coverage policy, which also contained an arbitration clause applicable to any controversy or claim between the company and the insured arising out of or relating to this policy, any service of the company in connection with its issuance or the breach of a policy provision or other obligation. Plaintiffs filed an action for breach of contract and bad faith against Chicago Title after their discovering an easement on the insured property that was not mentioned in the preliminary title report. Defendant filed a motion to compel arbitration based on the clause in the CLTA policy it had issued. The court trial denied the motion to compel arbitration. After denial of its motion for reconsideration, defendant appealed.

The court of appeal affirmed (*141 Cal. App. 4th 761, 763, 766*). The insured's approval and acceptance of the conditions set forth in a preliminary report create a binding contract based on the terms set forth in that report and any materials that are incorporated therein by reference. Therefore, whether the insured is bound by an arbitration clause depends directly on whether that term was set forth in the preliminary report or incorporated therein by reference (*141 Cal. App. 4th 761, 764*). The parties agree that the preliminary title report did not contain an arbitration clause and did not explicitly state that such a clause would be contained within the policy to be issued. But a contract, including a title insurance policy, may include provisions that are not physically a part of the basic document so long as those provisions are sufficiently incorporated by reference. Incorporation by reference requires that (1) the reference to another document was clear and unequivocal; (2) the reference was called to the attention of the other party, who consented to that term; and (3) the terms of the incorporated documents were known or easily available to the contracting parties. Chicago Title argues that the preliminary report incorporated the ALTA policy and its arbitration clause by reference because it mentioned that policy by name. But the ALTA policy never went into effect. The only arbitration clause that could conceivably be enforced in this case is the one that is a part of the CLTA policy that was actually issued, a policy that was not clearly and unequivocally referred to in the contract. While the court agreed that defendant's argument that it was unfair to deny arbitration when the arbitration clause in the CLTA policy it issued was virtually identical to an arbitration clause contained in the ALTA had a certain "no harm, no foul" appeal, it would be unreasonable to rely on an arbitration clause in a nonexistent policy to deny plaintiffs the right to a jury trial. As the drafter of the preliminary report, Chicago Title was in the best position to avoid this problem (*141 Cal. App. 4th 761, 765)* .

The parties in ***Marsch v. Williams*** *(1994) 23 Cal. App. 4th 250, 28 Cal. Rptr. 2d 398* , were partners in several partnerships, referred to as "the La Jolla partnerships" and Horizon Properties. The agreements relating to the La Jolla partnerships did not contain arbitration clauses. The Horizon Properties agreement did. In 1990, Marschfiled a complaint against Williams alleging fraud, breach of fiduciary duty, and intentional infliction of emotional distress relating to the Horizon partnership. That dispute was arbitrated and resulted in a net award in favor of Williams. That arbitration panel also found that disputes between the partners arising out of the La Jolla partnerships were beyond the scope of the arbitration. In July, 1992, Marsch commenced this action against Williams relating to the La Jolla partnerships. Williams sought to compel arbitration and stay the litigation. The motion was denied on the ground that the La Jolla action did not arise out of or relate to the Horizon partnership and was not controlled by the arbitration clause in the La Jolla agreements. Williams appealed.

The court of appeal affirmed. The court noted the strong policy in favor of arbitration, and the fact that that policy cannot replace an agreement to arbitrate (*23 Cal. App. 4th 250, 255)* . Williams contended the arbitration clause in the La Jolla agreements, which provided for arbitration of "any controversy ... arising out of or related to the contract" was sufficiently broad to include tort as well as contractual liabilities as long as the claims have their roots in the relationship between the parties created by the contract. Williams claimed that Marsch's claim that Williams' attempt to obtain control over Horizon involved undermining Marsch's ability to operate La Jolla. The court of appeal said the "roots of the relationship" theory could not be applied in that manner (*23 Cal. App. 4th 250, 255-256)* . The court distinguished *Pioneer Take Out Corp. v. Bhavsar (1989) 209 Cal. App. 3d 1353, 257 Cal. Rptr. 749* , on the ground that the franchise agreement in *Pioneer* was expressly incorporated into the sublease, making the arbitration clause in the franchise agreement applicable to disputes arising out of the sublease. In this case, the Horizon agreement and the La Jolla

agreements were not closely connected, did not incorporate one another's terms, were not executed at the same time, and breach of the Horizon agreement did not necessarily leads to breach of the La Jollas agreements (*23 Cal. App. 4th 250, 256)* .

In ***Chan v. Drexel Burnham Lambert, Inc.*** *(1986) 178 Cal. App. 3d 632, 223 Cal. Rptr. 838* , a former employee filed a wrongful discharge action against a stock brokerage firm. The employer petitioned to compel arbitration, contending that by the terms of the employment, the employee had agreed to the rules and by-laws of three stock exchanges to which the employee's application was submitted, including the New York Stock Exchange (NYSE) Rule 347 requiring arbitration. The petition was denied, and defendant appealed.

In upholding the denial of the petition, the court of appeal ruled that the arbitration clause had not been incorporated by reference into the employee's application form. The court noted that nowhere in the employment contract was there any reference to arbitration. Rather, the employee would be required to seek out Rule 347 to locate the arbitration clause. Construing the ambiguities within the incorporating document against the drafter, the court held that the reference to rules and by-laws of the various stock exchanges did not clearly and unequivocally draw the employee's attention to the NYSE's Rules of Board, which is where Rule 347 appears. Moreover, because the employment contract did not adequately refer to Rule 347, the terms of the incorporated document were not so known to the employee or so made easily available to her that she would be bound by its terms (*178 Cal. App. 3d 632, 643-645)* .

California Points & Authorities

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20A ARBITRATION: RESISTING
PART II. FORMS
A. General Principles Relating to Resisting Arbitration

2-20A California Points & Authorities § 20A.32

§ 20A.32 Parties Did Not Intend Contract to Be Operative Until Signed

[1] FORM

RESPONDENT CANNOT BE COMPELLED TO ARBITRATE THIS CONTROVERSY BECAUSE THERE IS NO ARBITRATION AGREEMENT BETWEEN THE PARTIES; THE PARTIES DID NOT INTEND THEIR AGREEMENT TO BE OPERATIVE UNTIL IT WAS SIGNED; AND RESPONDENT NEVER SIGNED IT.

A. Parties Did Not Intend Contract to Be Operative Until Signed. When it is clear, from a provision that a proposed written contract will become operative *only* when signed by the parties as well as from any other evidence presented by the parties that both parties contemplated that acceptance of the contract's terms would be signified by signing it, the failure to sign the agreement means no binding contract was created (*Banner Entertainment, Inc. v. Superior Court (1998) 62 Cal. App. 4th 348, 358, 72 Cal. Rptr. 2d 598*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a petition to compel arbitration when it is clear that the parties did not intend the agreement containing the arbitration provision to be operative until it was signed, and that agreement was not signed.

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in opposition to one seeking to compel arbitration [*see § 20A.10*]. Counsel may wish to incorporate other authorities, such as those from *Ch. 20, Arbitration: Compelling, § 20.30,* which set forth the rule that general state law contract principles are to be applied in construing the alleged arbitration agreement.

[b] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the

facts of his or her case. For example, argument should emphasize the language of any letters of intent, drafts of the parties' agreement, or actions by the parties that manifested their intent not to be bound until the contract was signed.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see CodeCiv. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For a form of response to a petition to compel arbitration that may be supported by this memorandum, as well as a procedural checklist, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

[d] Related Memoranda

For memoranda to combine with this form, regarding other matters that the opposition may need to address, see *§§ 20A.10-20A.12, 20A.21 et seq., 20A.30-20A.31, 20A.40 et seq., 20A.60 et seq., and 20A.80* et seq.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For forms addressing general contract principles, see Ch. 50, *Contracts* .

[3] Discussion of Authorities

[a] Parties Did Not Intend Contract to Be Operative Until Signed

The facts and procedural background of ***Banner Entertainment, Inc. v. Superior Court*** *(1998) 62 Cal. App. 4th 348, 72 Cal. Rptr. 2d 598* , and the portion of the opinion addressing the applicability of state law contract principles in general are discussed in *Ch. 20, Arbitration: Compelling, § 20.30[3][a]*. The court of appeal granted a writ of mandate directing the trial court to vacate its order granting defendant's petition to compel arbitration (*62 Cal. App. 4th 348, 362)* . The court set forth the rule that if there is no valid contract to arbitrate, a petition to compel arbitration must be denied (*62 Cal. App. 4th 348, 356)* , and discussed the fact that the determination whether there is an enforceable arbitration agreement is based on state law principles related to the formation, revocation and enforcement of contracts (*62 Cal. App. 4th 348, 356-357)* . One of those principles is that when it is clear, both from a provision that the proposed written contract will become operative *only* when signed by the parties as well as from any other evidence presented by the parties that both parties contemplated that acceptance of the contract's terms would be signified by signing it, the failure to sign the agreement means no binding contract was created (*62 Cal. App. 4th 348, 358)* . The draft agreement forwarded by defendant provided that "this agreement *when signed by the parties hereto* will constitute a legal and

binding obligation of the parties. [P] *Please acknowledge your approval of the foregoing terms by signing a copy of this letter in the space indicated below*." After reviewing the evidence on the matter, the court found that defendant presented no evidence that the parties orally or otherwise discussed, let alone agreed, that any disputes in connection with their agreement would be resolved by arbitration. Nor did defendant present any evidence that final assent to the terms of the parties' agreement would be manifested other than by signing the drafts and returning them to defendant (*62 Cal. App. 4th 348, 360)* . Rather, uncontradicted evidence showed that the parties never reached an agreement which included all the terms contained in the draft agreements. The court of appeal distinguished cases relied on by defendant in which arbitration was compelled on the basis of an unsigned agreement: in one case the parties had past dealings and the unsigned agreement was identical to the earlier signed contracts; in another the parties had ratified the contract by repeatedly acknowledging its validity (*62 Cal. App. 4th 348, 361)* . Although the parties did have an oral agreement which covered marketing and expenses at the Cannes Film Festival in 1996, *before* defendant sent plaintiff the draft agreements, there was no evidence that the arbitration provision had been discussed, let alone agreed on, in connection with that agreement (*62 Cal. App. 4th 348, 362)* .

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20A ARBITRATION: RESISTING
PART II. FORMS
A. General Principles Relating to Resisting Arbitration

2-20A California Points & Authorities § 20A.33

§ 20A.33 Unilateral Modification of Contract to Include Arbitration Clause

[1] FORM

RESPONDENT CANNOT BE COMPELLED TO ARBITRATE THIS CONTROVERSY BECAUSE THERE IS NO ARBITRATION AGREEMENT BETWEEN THE PARTIES. [THE SCOPE OF THE PROVISION ALLOWING PETITIONER TO UNILATERALLY CHANGE THE TERMS OF THE PARTIES' AGREEMENT DID NOT CONTEMPLATE AN ARBITRATION PROVISION].

[*EITHER*]

A. Unilateral Attempt to Insert Arbitration Clause. General contract principles apply to determine whether an arbitration provision added unilaterally after the primary contract is made actually becomes part of the primary contract. Under those principles, there must first be a provision in the primary contract that allows one party to unilaterally change the terms of the agreement. Then, the "change in terms" clause is examined to determine whether addition of a requirement to arbitrate disputes is within the scope of the things that party was allowed to unilaterally change. [Thus, a requirement for arbitration added _____ (*specify how added, e.g.*, in a "bill stuffer") is not binding on _____ (*specify party, e.g.*, credit card holders) when it is beyond the scope of what _____ (*specify party, e.g.*, customers) would reasonably believe _____ (*specify party attempting to make unilateral change, e.g.*, the bank) intended by reserving to itself the power to change terms. That power is reasonably interpreted to reserve to _____ (*specify party attempting to make unilateral change, e.g.*, the bank) the power to change _____ (*specify things within contemplation of "change of terms" clause, e.g.*, financial terms, such as interest rate and service charges), but not to deprive _____ (*specify party, e.g.*, cardholders) of the right to a jury trial to resolve all disputes regarding the agreement] (*Badie v. Bank of America (1998) 67 Cal. App. 4th 779, 790, 797-805, 79 Cal. Rptr. 2d 273*).

[*AND/OR*]

A. Particular Terms Preclude Enforcement. Under particular facts, a unilateral modification of a credit card agreement by the issuer to include an arbitration provision that provides no way for a card holder to opt out, [but provides instead that the arbitration provision will survive termination of the credit card account as well as repayment of all amounts borrowed thereunder], will not be enforced against a card holder who informed the issuer that he or she would not be bound by the arbitration provision and thereafter did not use the credit card. It is not necessary that the card holder immediately pay off any balance owing (*Shea v. Household Bank (SB) (2003) 105 Cal. App. 4th 85, 90, 129 Cal. Rptr. 2d 387*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a petition to compel arbitration when the arbitration clause at issue was unilaterally added by the other party. Counsel should use either or both paragraphs. The first addresses the general contract principle that modifications are only allowed if they are within the scope of a contract provision allowing unilateral modification. The second, which was decided in part under a Nevada statute that allowed credit card issuers to modify the terms of the credit card agreement unilaterally, is for use when the terms of the particular unilateral modification or statute involved provide a basis for the court to imply a requirement that the card holder actively use the card to be bound by the modification. The bracketed language in the second paragraph sets forth the terms of the particular unilateral modification at issue in *Shea v. Household Bank (SB) (2003) 105 Cal. App. 4th 85, 129 Cal. Rptr. 2d 387* .

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in opposition to one seeking to compel arbitration [*see § 20A.10*]. Counsel may wish to incorporate other authorities, such as those from *Ch. 20, Arbitration: Compelling, § 20.30*, which set forth the rule that general state law contract principles are to be applied in construing the alleged arbitration agreement.

[b] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, a copy of the original agreement as well as a copy of the document attempting to insert the arbitration clause should be attached as an exhibit to the memorandum.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For forms or petition to compel arbitration and responses to them, as well as a procedural checklist, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

[d] Related Memoranda

For memoranda to combine with this form, regarding other matters that the opposition may need to address, see *§§ 20A.10-20A.12, 20A.21 et seq., 20A.30-20A.32, 20A.40 et seq., 20A.60 et seq., and 20A.80* et seq.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For forms addressing general contract principles, see Ch. 50, *Contracts* .

[3] Discussion of Authorities

[a] Unilateral Attempt to Insert Arbitration Clause

Plaintiffs in ***Badie v. Bank of America*** *(1998) 67 Cal. App. 4th 779, 79 Cal. Rptr. 2d 273* , sought to enjoin implementation of an alternative dispute resolution provision (ADR) the defendant had attempted to add to existing credit card agreements by sending credit card customers an insert with their monthly account statements (a "bill stuffer"), notifying them of the new term. The court was dealing with several versions of the "change in terms" clause in effect at the time plaintiffs' credit cards were issued. In most versions, dated between April 1988 and June 1992, the change of terms provision stated, "We may change any term, condition, service or feature of your Account at any time. We will provide you with notice of the change to the extent required by law." In two versions of the agreement, the change of terms provision was worded as follows: "WE MAY CHANGE OR TERMINATE ANY TERMS, CONDITIONS, SERVICES OR FEATURES OF YOUR ACCOUNT (INCLUDING INCREASING YOUR **FINANCE CHARGES**) AT ANY TIME. WE MAY IMPOSE ANY CHANGE IN TERMS ON YOUR OUTSTANDING BALANCE, AS WELL AS ON SUBSEQUENT TRANSACTIONS AND BALANCES. We may also add new terms, conditions, services or features to your Account. To the extent required by law,we will notify you in advance of any change in terms by mailing a notice to you at your address as shown on our records." (Upper case and bold in original.) By mid-1992, the two versions of the account agreement that included this wording of the change of terms provision had been superseded. The language expressly allowing defendant to add new terms was deleted from the versions of the agreement that were in effect at the time the ADR "bill stuffers" were mailed to credit account customers. Plaintiffs alleged the addition of the ADR clause to their account agreements violated the Unfair Competition Act (*Bus. & Prof. Code § 17200 et seq.*) and the Consumer Legal Remedies Act (*Civ. Code § 1770(n)* and *(s)* in particular), and sought a declaration as to the validity and enforceability of the ADR clause. A 17-day court trial resulted in a judgment in favor of the defendant. Plaintiffs appealed, but only preserved on appeal the claim for declaratory relief as to the enforceability of the ADR clause.

The court of appeal reversed. The court began by stating the principle that although the law favors arbitration of disputes between parties, there is no policy compelling persons to accept arbitration of controversies which they have not agreed to arbitrate (*67 Cal. App. 4th 779, 788)* . The court said that the trial court put the cart before the horse when it glossed over the threshold issue of consent and concluded that the validity of the modification depended on the manner in which arbitration is viewed under California law. That policy does not even come into play unless it is first determined that the credit card customers agreed to use some form of ADR to resolve disputes regarding their deposit and credit card accounts, and that determination, in turn, requires analysis of the account agreements in light of ordinary state law principles that govern the formation and interpretation of contracts (*67 Cal. App. 4th 779, 790)* .

A party with the unilateral right to modify a contract does not have carte blanche to make any kind of change whatsoever, but can make a modification only if the general subject matter of that modification was anticipated when the contract was entered into (*67 Cal. App. 4th 779, 791)* . The court compared this attempted unilateral modification with the one upheld in *Perdue v. Crocker National Bank (1985) 38 Cal. 3d 913, 216 Cal. Rptr. 345, 702 P.2d 503* , in which addition of a charge for checks drawn on insufficient funds was found to be within the scope of the change in terms clause in the signature card agreement that allowed that bank to change its "rules, regulations, practices and charges" (*67 Cal. App. 4th 779, 794)* . The court described the change in terms provision as the "objectively determined base" which, in addition to the implied covenant of good faith and fair dealing, supplies an implied limitation on the change of terms provision (*67 Cal. App. 4th 779, 797)* . Whether the change of terms provision permitted defendant to add the ADR clause simply by sending a "bill stuffer" depended principally on what the parties intended by the word "terms," not on whether the word "change" also means "add," or on whether defendant used the word "add" in the change of terms provision (*67 Cal. App. 4th 779, 797-798)* .

The court noted that the original contract was ambiguous in that it was capable of more than one reasonable interpretation (*67 Cal. App. 4th 779, 798)* and that based solely on the language of the credit card agreement, it could not conclude that either party's interpretation of the change of terms provision was clearly untenable (*67 Cal. App. 4th 779, 800)* . In such a situation, general contract interpretation principles provide that the court interpret any ambiguous language in the sense in which the promisor believed, at the time the agreements were entered into, that the promisee understood it [*Civ. Code § 1649*] and that any uncertainty not removed by application of the other rules of interpretation, must be interpreted most strongly against the party who prepared the document [*Civ. Code § 1654*] (*67 Cal. App. 4th 779, 801)* . In the court's view, the object, nature and subject matter of these change in terms provisions strongly supported the conclusion that the customers did not intend them to be broad enough to allow waiver of a judicial forum or of the right to a jury trial for resolution of disputes with defendant, and that the customers, as promisors with respect to the change of terms provisions, had no inkling that defendant understood the change in terms provision differently (*67 Cal. App. 4th 779, 801)* . Although the court characterized it as of dubious admissibility, it noted that defendant's senior project manager in the marketing department testified that the change of terms provision referred only to changes in financial terms, grace periods, and the like (*67 Cal. App. 4th 779, 802)* . After analyzing the credit account agreements in light of the standard canons of contract interpretation, the court concluded that when the account agreements were entered into, the parties did not intend that the change of terms provision should allow defendant to add completely new terms such as an ADR clause simply by sending out a notice (*67 Cal. App. 4th 779, 805)* .

[b] Particular Terms Preclude Enforcement

Plaintiff/credit cardholder in ***Shea v. Household Bank (SB)*** *(2003) 105 Cal. App. 4th 85, 129 Cal. Rptr. 2d 387* , sued the defendant/issuer for breach of contract, breach of the implied covenant of good faith and fair dealing, and fraudulent and negligent misrepresentation based on fees and penalties charged for exceeding one's credit limit. Defendant petitioned to have the matter arbitrated pursuant to an arbitration provision it had unilaterally imposed. When plaintiff first obtained the credit card in 1993, the contract allowed defendant to modify it on written notice, stating defendant could "change or terminate any term of this agreement or add any new terms at any time, including without limitation adding or increasing fees." The initial contract also included a choice of law clause that designated Illinois and federal law to govern disputes, which was later changed to designate Nevada and federal law. Defendant notified plaintiff that effective September 10, 2000, his account would require that "any claim, dispute or controversy" be resolved through binding arbitration. Two days before the amendment became effective, plaintiff's attorney contacted defendant's customer service department and informed them that Mr. Shea was refusing to accept the arbitration agreement being unilaterally imposed by defendant, and that Mr. Shea no longer wished to continue using his account. Plaintiff made no more purchases with his credit card, but did not immediately pay off his balance and close his account. The trial court denied the petition to compel arbitration, believing that because plaintiff had not used his credit card after being given notice of the arbitration provision and refused to be bound by it, he could not be compelled to arbitrate. Defendant appealed.

The court of appeal affirmed (*105 Cal. App. 4th 85, 87)* . Defendant contended plaintiff was bound by the arbitration amendment because he kept his account open,and continued to use defendant's money: failure to pay off the balance owing immediately constituted consent to the modification. The court of appeal began its discussion by noting that Nevada law allows parties to consent to enter into a valid agreement to modify a former contract mutually, which consent may be implied from conduct consistent with the asserted modification (*105 Cal. App. 4th 85, 88)* . However, the court did not agree that plaintiff's failure to immediately pay off the balance and cancel the card amounted to a ratification (*105 Cal. App. 4th 85, 88)* . There was no law directly in point. The court of appeal did infer, based on Truth in Lending regulations, specifically *12 C.F.R. § 226.9(c)(1)*, Supp. I. (customer's use of account from which acceptance of changed terms might be implied under state law) that federal law defers to state law to define "use" (*105 Cal. App. 4th 85, 88-89)* . The Nevada statue concerning disclosures of initial credit card terms and conditions considers them to have been accepted by the cardholder only after his or her "actual use" [*see* Nev. Rev. Stat. Ann., § 97A.140, subd. (2)]. In five other instances, the Nevada credit card statutes employ merely the term "use." The court concluded that the common sense meaning of "actual use" denotes some kind of affirmative act; mere inaction would not seem to suffice (*105 Cal. App. 4th 85, 89)* . Unilateral amendment of credit card terms is allowed by Nevada statute. The court of appeal found it unlikely that the Nevada legislature would have required actual use by a consumer to accept the original terms of a credit card agreement but settled for something less definite or overt to signify acceptance of an amendment to that agreement (*105 Cal. App. 4th 85, 90)* .

The court of appeal discussed the practicalities of most card holder's financial situations, and felt defendant's position (and that of the dissent), that a credit card holder is always in a financial position to be able to pay off the entire balance immediately when confronted with an unacceptable change of terms, untrue. Further, the terms of this unilateral modification did not state that plaintiff could pay off the entire balance of his account if he did not agree to arbitration. Instead, it stated that the arbitration agreement would "survive termination of your Account as well as the repayment of all amounts borrowed hereunder." Thus, even if plaintiff had done what defendant argued, he still would have been subject to the arbitration provision; by its terms, there was no way for him to opt out. Based on the particular facts of this case and applicable law, the court of appeal refused to enforce the arbitration provision (*105 Cal. App. 4th 85, 90)* .

Although no argument was made that it was unconscionable not to provide a way for the card holder to opt out, and thus was not a basis for the court's decision, the court stated a good case could be made for unconscionability (*105 Cal. App. 4th 85, 90)* .

[4] Additional Authorities

[a] Unilateral Attempt to Insert Arbitration Clause

MBNA America Bank, N.A. v. Gorman *(2006) 147 Cal. App. 4th Supp. 1, 54 Cal. Rptr. 3d 724* , was an appeal to the Appellate Division of the Superior Court from an order of the superior court. The only issue on appeal was the grant of attorney's fees and costs to defendant, which are discussed in *Ch. 20C, Arbitration: Confirming, Correcting, or Vacating the Award, § 20C.20[3][g]*. The trial court refused to confirm an arbitration award against a card holder for sums owed to the issuer on the ground that under *Badie v. Bank of America (1998) 67 Cal. App. 4th 779, 79 Cal. Rptr. 2d 273* (discussed at [3][a], *above*) a mailed insert or "bill stuffer" cannot serve as a waiver of the procedural right of trial by jury or as a basis for enforcement of an ADR clause by a unilaterally issued change to the original agreement (*147 Cal. App. 4th Supp. 1, 4)* . Although the order denying the petition to confirm the award is not binding precedent and did not formally enjoin appellant from enforcing the arbitration clause, this discussion is included here because it may benefit cardholders similarly situated to respondent.

California Points & Authorities

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20A ARBITRATION: RESISTING
PART II. FORMS
A. General Principles Relating to Resisting Arbitration

2-20A California Points & Authorities § 20A.34

§ 20A.34 Spousal Relationship Is Not Enough to Confer Agency Authority to Agree to Arbitration

[1] FORM

STANDING ALONE, THE SPOUSAL RELATIONSHIP IS NOT ENOUGH TO CONFER AUTHORITY ON ONE SPOUSE, AS THE AGENT OF THE OTHER, TO REQUIRE ARBITRATION.

A. Spousal Relationship Is Not Enough to Confer Agency Authority to Agree to Arbitration. A spousal relationship alone is not sufficient to confer authority on one spouse to waive the other spouse's right to a jury trial and agree to an arbitration provision [in a nursing home admission contract]. It is true that spouses are fiduciaries and owe a duty of support, but that duty does not create the power to contractually bind each other in the agency context (*Warfield v. Summerville Senior Living, Inc. (2007) 158 Cal. App. 4th 443, 447-449, 69 Cal. Rptr. 3d 783* ; *Flores v. Evergreen at San Diego, LLC (2007) 148 Cal. App. 4th 581, 586-589, 594, 55 Cal. Rptr. 3d 823*).

[*Optional*] **B. Statute Does Not Confer Authority to Bind Relative to Arbitrate.** Statutes designed to allow relatives to sign admission contracts when a prospective patient is mentally incompetent and related statutes granting authority over medical decision making and enforcement of rights to family members, specifically *Health & Safety Code Sections 1418.8, 1599.1, 1599.3, 1599.65*, and *1599.81*, do not grant authority to those family members to agree to arbitration (*Flores v. Evergreen at San Diego, LLC (2007) 148 Cal. App. 4th 581, 590-594, 55 Cal. Rptr. 3d 823*).

[2] Comments

[a] Use of Form

This form may be used to resist arbitration when the arbitration agreement at issue was signed by a spouse who did not have the other spouse's power of attorney on the ground that the spousal relationship alone does not confer authority to bind one to arbitration. Optional Paragraph B. addresses specific statutes, applicable in the context of nursing home admissions, that also do not grant the spouse or other relative authority to agree to arbitration on behalf of the person being admitted. This form is not intended to be a complete memorandum. Counsel should combine it with authority from Forms § 20A.10 et seq. if relevant to the particular procedural context is which the issue arises or to any other

issues involved.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, the argument must show that the signatory spouse did not have a power of attorney and that the other spouse did nothing to support the creation of an agency by implication. It is advisable for counsel to submit evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file (including verified pleadings), or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied if plaintiff-respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement)].

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Spousal Relationship Is Not Enough to Confer Agency Authority to Agree to Arbitration

Warfield v. Summerville Senior Living, Inc*. (2007) 158 Cal. App. 4th 443, 69 Cal. Rptr. 3d 783* , was an action by a resident of defendant residential care facility for elder abuse and other claims. Defendant filed a petition to compel arbitration, based on an arbitration agreement plaintiff's husband, also a resident at the time, had signed. Defendant claimed that, even though husband did not hold a power of attorney when he signed the arbitration agreement, he nonetheless had the authority, either as plaintiff's ostensible agent or as her spouse, to bind her to the agreement. Defendant also claimed that plaintiff was estopped to deny the enforceability of the arbitration agreement. The trial court denied the petition and defendant appealed.

The court of appeal affirmed (*158 Cal. App. 4th 443, 445, 451)* , finding that the matter was controlled by *Flores v. Evergreen at San Diego, LLC (2007) 148 Cal. App. 4th 581* (*Flores)*, discussed *below*; and that *Flores* was correctly decided (*158 Cal. App. 4th 443, 447)* . The court of appeal discussed *Flores*, noting that *Flores* considered whether husband had authority as the wife's agent, as her spouse, or under various Health and Safety Code provisions pertaining to skilled nursing facilities, to bind the wife to the arbitration agreements. It answered that question in the negative. Defendant argued that *Flores* was not controlling because it had to do with the statutes and regulations affecting skilled nursing facilities, while this case involved a residential care facilities for the elderly. Nevertheless, defendant made no claim that any statutory basis existed. Thus, *Flores* was dispositive, because its first reason for affirming the order denying the petition to compel arbitration was that the husband had no authority either as agent or as spouse to bind the wife to the arbitration agreements (*158 Cal. App. 4th 443, 447-448)* . The court discussed agency principles, noting that agency can be established either by agreement between the agent and the principal, or it can be founded on ostensible authority, that is, some intentional conduct or neglect on the part the alleged principal to create a belief in the minds of third persons that an agency exists. Thus, the formation of an agency relationship is a bilateral matter. Words

or conduct by both principal and agent are necessary to create the relationship. Here, defendant presented absolutely no evidence of the wife's express or implied consent to have her husband act as her agent. Defendant argued an ostensible agency was created because wife willingly accepted the services elected by her husband to be provided by the facility. The court of appeal disagreed, saying that the failure of a resident suffering from dementia to object to the living arrangements her husband had made would hardly constitute evidence that she had authorized him to act as her agent in waiving her right to a jury trial (*158 Cal. App. 4th 443, 448)* . The creation of an ostensible agency had not been shown. The court reiterated *Flores*' primary holding: although the establishment of an agency relationship between spouses does not require a high level of proof, the marital relationship cannot alone create an agency (*158 Cal. App. 4th 443, 449)* . The court distinguished cases from the medical malpractice context in which the spouse who was the patient bound the other spouse to arbitrate claims arising from the medical treatment, and those involving a spouse who purchased insurance and the other spouse who accepted the benefits of the policy and was estopped to deny the arbitration term of the policy (*158 Cal. App. 4th 443, 449-450)* . Here, wife never sought to make use of the arbitration agreement; thus, she was not estopped to assert that it was unenforceable against her (*158 Cal. App. 4th 443, 451)* .

Flores v. Evergreen at San Diego, LLC *(2007) 148 Cal. App. 4th 581, 55 Cal. Rptr. 3d 823* , was an action by husband and wife against the skilled nursing care facility where wife was confined, for negligence and other causes of action, including husband's loss of consortium action arising from a fall wife took which resulted in a leg fracture and allegedly insufficient and untimely medical treatment. Wife suffered from dementia and other ailments. At the time of admission, husband did not have the wife's power of attorney, nor had he been declared her conservator or guardian. Nevertheless, he signed two arbitration agreements that were consistent with the requirements of *Health & Safety. Code § 1599.61(a)*. The signature lines on the arbitration agreements were labeled: "Legal Rep/Responsible Party/Agent." On the admission agreement, husband signed a line designated agent. On other admission documents he signed lines variously designated legal representative or responsible party. Approximately nine months later, in February 2005, wife signed a power of attorney giving husband authority over a variety of matters, including claims and litigation. Defendant moved to compel arbitration under the two agreements husband had signed at the time of wife's admission. The trial court denied the motion on the ground that husband did not have wife's authority to waive her right to jury trial at the time he signed the admission forms. Defendant appealed.

The court of appeal affirmed (*148 Cal. App. 4th 581, 585, 595)* . Defendant first asserted that husband's status as spouse gave him authority to bind wife to the arbitration agreements. The court of appeal reviewed general agency principles and statutory authority governing nursing homes, and concluded that absent a legislative directive, the spousal relationship alone is insufficient to confer authority to agree to an arbitration provision in a nursing home admission contract (*148 Cal. App. 4th 581, 586-587)* . An agency may be created by oral contract or by implication, but cannot be created by conduct of the agent alone (*148 Cal. App. 4th 581, 587-588*). Defendant asserted that wife's conduct "allowed it to believe" that husband was her agent, but there was no evidence of any conduct by wife giving rise to an agency (*148 Cal. App. 4th 581, 588*). Defendant relied on *Fam. Code § 4300* (general duty to support spouse) and *Hawkins v. Superior Court (Kaiser Foundation Hospital) (1979) 89 Cal.App.3d 413, 418-419, 152 Cal. Rptr. 491* (duty to support spouse includes provision of health care). While the court of appeal acknowledged that spouses are fiduciaries and owe a duty of support, that duty does not create a power to contractually bind each other in the agency context. It is also true that much less evidence is required to establish a principal and agent relationship between husband and wife than between nonspouses, but defendant presented no evidence of agency apart from the marital relationship; and marital relationship cannot alone create an agency (*148 Cal. App. 4th 581, 589)* .

[b] Statute Does Not Confer Authority to Bind Relative to Arbitrate

The facts and procedural background of ***Flores v. Evergreen at San Diego, LLC*** *(2007) 148 Cal. App. 4th 581* , are discussed at [a], *above*. Defendant also contended that certain statutes designed to allow relatives to sign admission contracts when a prospective patient is mentally incompetent and related statutes imposing rigorous disclosure requirements and excluding certain claims from arbitration coverage provided agent's authority to the husband. Although the Legislature has specifically conveyed authority over medical decision-making and enforcement of rights

to family members, it has not conveyed authority over the arbitration decision to family members. The court of appeal viewed this as a significant omission, and concluded there was no statutory authorization for husband to agree to arbitration based solely on a familial relationship with the patient (*148 Cal. App. 4th 581, 590)* . The specific statutes reviewed by the court of appeal were *Health & Safety Code §§ 1418.8, 1599.1, 1599.3*, governing patients' rights (*148 Cal. App. 4th 581, 590-591)* , *Health & Safety Code § 1599.65*, governing admissions, and *Health & Safety Code § 1599.81*, governing arbitration agreement with nursing homes, which the court described as designed to ensure that an arbitration agreement with a nursing home is obtained with the patient's informed consent (*148 Cal. App. 4th 581, 591)* . *Health & Safety Code § 1599.81* requires that a nursing home admission contract clearly indicate that an arbitration agreement is not a precondition for admission or treatment, and requires that the arbitration clause be on a form separate from the rest of the admission contract. Referring back to *Health & Safety Code § 1599.65*, which defines "patient representative" to include "next of kin," the court considered whether the next of kin authority extends to the arbitration decision (*148 Cal. App. 4th 581, 592)* and decided it could not conclude the Legislature intended next of kin to be empowered to make the decision about arbitration when signing a nursing home admission contract (*148 Cal. App. 4th 581, 593)* . The court cited *Pagarigan v. Libby Care Center, Inc. (2002) 99 Cal. App. 4th 298, 302, 120 Cal. Rptr. 2d 892* (*Pagarigan*), with favor and agreed with *Pagarigan* to hold that without a legislative directive to the contrary, spouses are not empowered to bind each other to arbitration (*148 Cal. App. 4th 581, 593-594)* . The Legislature has extensively regulated the issue of arbitration in nursing home contracts, and in other contexts has specified that next of kin may make significant decisions for mentally incompetent patients, but it has failed to specify that next of kin have authority to agree to arbitration. Further, unlike admission decisions and medical care decisions, the decision to agree to an arbitration provision in a nursing home contract is not a necessary decision that must be made to preserve a person's well-being. Thus, a family member who signs an admission agreement cannot by law sign an arbitration agreement. Because there was no express or implied agency created by wife, and because there is no statutory authority for husband to act on wife's behalf when signing an arbitration agreement, the trial court properly denied defendant's petition to compel arbitration (*148 Cal. App. 4th 581, 594)* .

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CHAPTER 20A ARBITRATION: RESISTING
PART II. FORMS
A. General Principles Relating to Resisting Arbitration

2-20A California Points & Authorities §§ 20A.35-20A.39

[Reserved]

§§ 20A.35[Reserved]

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20A ARBITRATION: RESISTING
PART II. FORMS
B. Particular Claims Not Subject to Arbitration

2-20A California Points & Authorities § 20A.40

§ 20A.40 Language of Agreement Is Not Broad Enough to Cover Tort Claims

[1] FORM

RESPONDENT CANNOT BE COMPELLED TO ARBITRATE THIS CONTROVERSY BECAUSE THE ARBITRATION PROVISION IN THE AGREEMENT BETWEEN THE PARTIES IS NOT BROAD ENOUGH TO COVER TORT CLAIMS.

A. Language of Agreement Is Not Broad Enough to Encompass Tort Claims. An agreement that provides for arbitration of "disputes arising from this agreement" is not broad enough to authorize arbitration of tort claims (*Medical Staff of Doctors Medical Center in Modesto v. Kamil (2005) 132 Cal. App. 4th 679, 683-684, 33 Cal. Rptr. 3d 853* ; *Cobler v. Stanley, Barber, Southard, Brown & Associates (1990) 217 Cal. App. 3d 518, 530-532, 265 Cal. Rptr. 868*).

[*Optional*] **B. Agreement to Settle Controversies Regarding Receipts and Disbursements.** An agreement authorizing a certified public accountant to settle controversies regarding receipts and disbursements is far too narrow to authorize arbitration of causes of action for fraud, usury, declaratory relief, and rescission and restitution (*Parker v. Twentieth Century-Fox Film Corp. (1981) 118 Cal. App. 3d 895, 904-905, 173 Cal. Rptr. 639*).

[*Optional*] **C. Defamation Claims Not Arbitrable.** A cause of action for defamation is not arbitrable under a relatively narrow arbitration clause that requires arbitration of controversies among the parties involving the construction or application of any provision of the agreement (*Bono v. David (2007) 147 Cal. App. 4th 1055, 1066-1069, 54 Cal. Rptr. 3d 837*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a petition to compel arbitration to urge that the arbitration provision at issue is not broad enough to cover tort claims. Optional Paragraph B is for use in the unique situation in which an

agreement authorized a form of arbitration only to settle controversies with respect to receipts and disbursements.

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in opposition to one seeking to compel arbitration [*see § 20A.10*]. Counsel may wish to incorporate other authorities, such as those from *Ch. 20, Arbitration: Compelling, § 20.30*, which set forth the rule that general state law contract principles are to be applied in construing the alleged arbitration agreement or those from § 20A.31, regarding construing ambiguities against the drafter.

[b] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, argument should emphasize the language of the parties' agreement and its failure to include any mention of torts and, if appropriate, the fact that the subject matter of the contract is not one that usually gives rise to torts.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For a form of response to a petition to compel arbitration that may be supported by this memorandum, as well as a procedural checklist, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

[d] Related Memoranda

For memoranda to combine with this form, regarding other matters that the opposition may need to address, see *§§ 20A.10-20A.12, 20A.20 et seq., 20A.30 et seq., 20A.60 et seq., and 20A.80* et seq.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For forms addressing general contract principles, see Ch. 50, *Contracts* .

[3] Discussion of Authorities

[a] Language of Agreement Is Not Broad Enough to Encompass Tort Claims

Medical Staff of Doctors Medical Center in Modesto v. Kamil *(2005) 132 Cal. App. 4th 679, 33 Cal. Rptr. 3d 853* concerned a service agreement between a medical group and an insurance provider. It required arbitration of any dispute "concerning the terms of the agreement." The insurance provider sought to terminate the agreement because the medical group performed allegedly unnecessary coronary bypass surgeries. The insurance provider issued press releases claiming that 59 percent of coronary bypasses performed by the group were unnecessary. The medical group and 16 physicians sued the provider and others, claiming defamation and alleging that the provider (Blue Cross) knew that the statements were false, but even after admitting the falsity, continued to maliciously issue press releases claiming unnecessary surgeries had been performed. Blue Cross petitioned to compel arbitration. The trial court denied the petition on the ground that the arbitration clause was not broad enough to encompass the claims alleged. Blue Cross appealed.

The court of appeal affirmed (*132 Cal. App. 4th 679, 681, 686)* . The arbitration clause provided "BLUE CROSS and PHYSICIAN agree to meet and confer in good faith to resolve any problems or disputes that may arise under this Agreement. In the event that any problem or dispute concerning the terms of this Agreement, other than a Utilization Review decision as provided for in Article VII, is not satisfactorily resolved, BLUE CROSS and PHYSICIAN agree to arbitrate such problem or dispute." The court noted that the agreement only applied to disputes that arose under the agreement. Blue Cross argued that a broadly-worded arbitration clause applies to any controversy that has its roots in the contractual relationship. But the court of appeal said the seemingly innocuous phrase "concerning the terms of" the agreement to provide medical care could not reasonably be said to include the malicious destruction of the physicians' personal and professional reputations. Although there may be cases where the alleged defamation is so intimately bound with the terms of the agreement that arbitration is appropriate, this was not such a case (*132 Cal. App. 4th 679, 683)* . The defamation alleged here no more concerned the terms of the agreement, than would a punch in the nose during a dispute over a medical billing. A separate clause governed arbitration of disputes concerning Utilization Review decisions. But under that clause, arbitration was limited to disputes over the payment of claims. The causes of action alleged here, for defamation and violation of *Bus. & Prof. Code § 2056*, were clearly outside the scope of that clause (*132 Cal. App. 4th 679, 684)* .

Cobler v. Stanley, Barber, Southard, Brown & Associates *(1990) 217 Cal. App. 3d 518, 265 Cal. Rptr. 868* , involved arbitration of a dispute between a professional career-consulting agency and a former client of the agency. The arbitration clause in the parties' agreement provided the following: "[s]hould there be a dispute arising from this Agreement, it is mutually agreed that it shall be promptly settled through binding arbitration in accordance with the rules of the American Arbitration Association." Plaintiff, the client, became dissatisfied with the agency, which produced no interviews for plaintiff, and refused to pay the $1,400 balance owing under the contract. The agency demanded arbitration for the balance owing and later amended its claim to include "continual verbal and written allegations and threats" by plaintiff. Plaintiff's counterdemand sought damages for breach of contract and was later amended to seek $75,000 in punitive damages on unspecified grounds. The arbitrator awarded plaintiff $9,853, which included a refund of $1,400 paid under the contract, less $400 for value received, compensation for work time lost and travel expenses to and from Colorado during the week defendant was to have arranged interviews for plaintiff in San Diego, and $7,500 for emotional distress incurred as a result of defendant's conduct. The award stated that defendant had breached the contract and was negligent. The award was confirmed over defendant's objection, and defendant appealed the resulting judgment.

The court of appeal reversed with directions to the trial court to vacate the award of damages for emotional distress and to confirm the award for the balance. Defendant contended the award for damages for emotional distress was in excess of the arbitrator's jurisdiction. The court of appeal said that the powers of an arbitrator are limited and circumscribed by the agreement or stipulation of submission, and noted that the scope of arbitration permitted under this agreement was more limited than it would be under a clause agreeing to arbitrate any controversy arising out of or relating to the agreement (*217 Cal. App. 3d 518, 530)* . The court of appeal said that a contract for professional career consultation is not one within the exception to the general rule that damages for emotional distress do not arise from a breach of contract. Although the arbitrator apparently considered the matter as professional negligence or malpractice, there is no

authority extending those doctrines to career consulting. Therefore, the only basis for the emotional distress award would be that tort issues were properly submitted to the arbitrator (*217 Cal. App. 3d 518, 531)* . Although the parties briefed and argued fraud and emotional distress issues, in view of the limited scope of the agreement, the arbitrator had a duty to keep the proceedings confined to contract issues, despite the excursions of the parties outside them, and had no authority to grant an award of damages for emotional distress (*217 Cal. App. 3d 518, 532)* .

[b] Agreement to Settle Controversies Regarding Receipts and Disbursements

The facts and procedural background of ***Parker v. Twentieth Century-Fox Film Corp.*** *(1981) 118 Cal. App. 3d 895, 173 Cal. Rptr. 639* , and the portion of the opinion addressing the court's right to determine overlapping arbitrable and nonarbitrable issues are discussed at *§ 20A.12[3][a]*. The court of appeal held that the trial court was required to determine whether or not the clause requiring a certified public accountant to settle controversies connected with receipts and disbursements was a contractual agreement to arbitrate, and if so, its scope and application to the many issues, including the causes of action for declaratory relief, fraud, usury, and rescission and restitution, raised by the complaint. The court held that there was substantial evidence to support the findings of the trial court that the scope of the arbitration clause was far too narrow to encompass the issues raised by the complaint (*118 Cal. App. 3d 895, 904-905)* .

[c] Defamation Claims Not Arbitrable

Plaintiff and defendant in ***Bono v. David*** *(2007) 147 Cal. App. 4th 1055, 54 Cal. Rptr. 3d 837* , were tenants in common with four others of a 920 acre parcel of undeveloped land in Lake County. All tenants in common had executed a memorandum of understanding (MOU) which provided that any controversy among the parties involving the construction or application of any provision of the agreement be submitted first to non-binding mediation of a disinterested third-party chosen by a two thirds majority of the parties. If the written determination of the mediator wasunacceptable to any one of the parties involved, the grievance was then to be submitted to binding arbitration in San Francisco, California, arbitration to comply with and be governed by the provisions of the rules of the American Arbitration Association. By March 2004, a number of disagreements had developed among the tenants in common and an individual named Richard Van Donk was designated to try to iron out disagreements between Bono and David. In the course of these efforts, David sent Van Donk an e-mail which contained various aspersions on Bono's emotional stability. Those settlement efforts failed, and the parties filed three lawsuits: in April 2004, the other grantees filed an action against Bono for partition of the property and an accounting; in May 2004, Bono sued two of the tenants in common for a personal injury she allegedly suffered in May 2002 while hiking on that portion of the property which might later revert to their sole ownership; and in July 2004, Bono filed a declaratory relief action against the other tenants in common seeking a declaration as to the parties' respective rights and duties under the MOU. In February, 2005 Bono filed the defamation action. David demurred to the complaint claiming that the e-mail at issue was subject to the mediation privilege under *Civ. Code § 47(b)*, and was thus inadmissible and/or non-actionable. The trial court overruled the demurrer on the basis that it could not determine whether the e-mail was a pre-litigation communication and/or a mediation communication as to which privilege would apply. David filed a motion to consolidate the defamation action with the partition and declaratory relief actions, to compel arbitration of all three actions, and to stay proceedings in them until the arbitration was completed. David's supporting papers cited *Code Civ. Proc. § 1281.2* and claimed "this is all one controversy." David also re-noticed a hearing on her 2005 demurrer, adding the additional ground that Bono had failed to exhaust her remedies of mediation and arbitration. The trial court denied the motion to compel arbitration of the defamation claim, stating that the alleged defamation did not arise from the contract nor did the contract need to be interpreted in order to determine the defamation action. The trial court also overruled the demurrer. Defendant appealed.

The court of appeal affirmed, agreeing with the trial court that the defamation action was a "stand alone action" (*147 Cal. App. 4th 1055, 1058, 1069-1070)* . Among the basic principles discussed by the court of appeal at the outset was the fact that the burden falls on the party opposing arbitration to demonstrate that an arbitration clause *cannot* be

interpreted to require arbitration of the dispute (*147 Cal. App. 4th 1055, 1062)* . The terms of the specific arbitration clause under consideration must reasonably cover the dispute as to which arbitration is requested (*147 Cal. App. 4th 1055, 1063)* . The court discussed arbitration clauses considered in other cases, including those described as "broad," such as those requiring arbitration of "*[a]ny controversy or claim arising out of or relating to any provision of this Agreement or the breach thereof,"* or *"any problem or dispute arising under this Agreement and/or concerning the terms of this Agreement"* (*147 Cal. App. 4th 1055, 1063-1065* , emphasis in original). The court discussed *Medical Staff of Doctors Medical Center in Modesto v. Kamil (2005) 132 Cal. App. 4th 679, 33 Cal. Rptr. 3d 853* (*Kamil*, discussed at [a], *above*) which found a defamation action beyond the scope the arbitration provision because, although the dispute may have had its roots in the contractual relationship agreement, arbitration under the agreement was limited to disputes concerning the terms of the agreement (*147 Cal. App. 4th 1055, 1065-1066)* . The court found *Vianna v. Doctors' Management Co. (1994) 27 Cal. App. 4th 1186, 33 Cal. Rptr. 2d 188* (discussed in *Ch. 20, Arbitration: Compelling, § 20.40[3][a]*), in which the arbitration clause applied to any dispute regarding the meaning, interpretation or enforcement of the provisions of the agreement, to be inapplicable because in this case, plaintiff's defamation action did not involve construction or application of any provision of the real property agreement (*147 Cal. App. 4th 1055, 1066-1067*). Thus, the mandatory mediation and arbitration clause of the agreement did not apply. The court discussed broad arbitration language and characterized this agreement as using narrow terminology (*147 Cal. App. 4th 1055, 1067)*). Further, nothing in the MOU aided the understanding of phrases comprising the alleged defamatory statement (*147 Cal. App. 4th 1055, 1068)* . The court concluded that although whatever was going on between plaintiff and defendant that precipitated the allegedly defamatory e-mail was "related to" their agreement, the terminology of the arbitration clause was much narrower than the fairly standard "related to" or "arising from" (*147 Cal. App. 4th 1055, 1069)* .

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2-20A California Points & Authorities § 20A.41

§ 20A.41 Claim for Injuries to Infant Is Not Covered by Expectant Mother's Arbitration Agreement

[1] FORM

RESPONDENT CANNOT BE COMPELLED TO ARBITRATE THIS CONTROVERSY BECAUSE THE ARBITRATION PROVISION IN THE AGREEMENT AT ISSUE DOES NOT APPLY TO INJURIES TO A PERSON NOT YET BORN AT THE TIME THE AGREEMENT WAS MADE.

A. Claim for Injuries to Infant Is Not Covered Under Expectant Mother's Arbitration Agreement. An expectant mother receiving care for impending childbirth who signs an arbitration agreement to resolve all medical malpractice disputes does not thereby agree to arbitrate controversies over the treatment of the baby if the agreement makes no reference to the expected child (*Weeks v. Crow (1980) 113 Cal. App. 3d 350, 353, 169 Cal. Rptr. 830*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a petition to compel arbitration to respond that the arbitration provision at issue does not cover injuries to a child unborn at the time the agreement was executed. It is possible to draft an agreement broad enough to require arbitration of claims for injuries to children, born, unborn, and even as yet unconceived at the time the agreement is executed [*see Pietrelli v. Peacock (1993) 13 Cal. App. 4th 943, 947, 16 Cal. Rptr. 2d 688]* . To compare the language used in such an agreement to the language used in the agreement in *Weeks*, see *Ch. 20, Arbitration: Compelling, § 20.64[3][a]*.

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in opposition to one seeking to compel arbitration [*see § 20A.10*]. Counsel may wish to incorporate other authorities, such asthose from *Ch. 20, Arbitration: Compelling, § 20.30*, which set forth the rule that general state law contract principles are to be applied in construing the alleged arbitration agreement or those from § 20A.31 regarding construing ambiguities against the drafter.

[b] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, argument should emphasize the language of the parties' agreement and its failure to include any mention of persons unborn or persons whom the patient has the power to bind.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For a form of response to a petition to compel arbitration that may be supported by this memorandum, as well as a procedural checklist, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

[d] Related Memoranda

For memoranda to combine with this form, regarding other matters that the opposition may need to address, see *§§ 20A.10-20A.12, 20A.20 et seq., 20A.30 et seq., 20A.60 et seq., and 20A.80* et seq.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For forms addressing general contract principles, see Ch. 50, *Contracts* .

[3] Discussion of Authorities

[a] Claim for Injuries to Infant Is Not Covered Under Expectant Mother's Arbitration Agreement

In ***Weeks v. Crow*** *(1980) 113 Cal. App. 3d 350, 169 Cal. Rptr. 830* , plaintiff wife entered the hospital for childbirth, at which time she and plaintiff husband signed an agreement providing for arbitration of "any dispute as to medical malpractice." The contract named her alone as patient, and defined "patient" as "the undersigned patient or dependent of patient (whether or not a minor), or the heirs-at-law or personal representative of patient ... ." Plaintiffs brought a medical malpractice action, alleging that the baby born to them during the wife's stay at the hospital died shortly thereafter as a result of negligence in the delivery procedures. Defendants petitioned the court to order arbitration, but the superior court denied the petition, finding the arbitration agreement was inapplicable to an action for the wrongful death of the newborn baby. Defendants appealed.

The lower court ruling was affirmed. The appellate court's examination of the arbitration agreement showed the parties did not agree to arbitrate claims of malpractice in the care and treatment of the baby. Although plaintiff wife entered the hospital for childbirth, the agreement contained no reference to the expected child, and only the expectant mother was named as a patient. The court commented that the parties, if intending to agree to arbitrate claims of negligence in treating the child, easily could have done so by naming the child as a patient. The omission of any reference to the child was found to express an intention not to apply the agreement to malpractice claims arising out of medical services rendered to the child (*113 Cal. App. 3d 350, 353)* .

Because the definition of "patient" in the agreement included dependents of the named patient, defendants insisted the agreement required arbitration of malpractice claims arising out of treatment of dependents, even if they were not named as patients. However, the court determined that the definition was not intended to describe the individuals to whom treatment might be rendered. It included only those individuals who would have a cause of action if negligent medical treatment of the named patient resulted in injury or death. The provision was intended as an enumeration of parties bound by the agreement to arbitrate claims arising out of the treatment of the named patient. The definition did not extend the scope of the arbitration agreement to cover disputes arising out of treatment of persons other than the named patient (*113 Cal. App. 3d 350, 353-354)* .

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2-20A California Points & Authorities § 20A.42

§ 20A.42 Controversy Goes Beyond Scope of Uninsured Motorist Statute

[1] FORM

RESPONDENT INSURER CANNOT BE COMPELLED TO ARBITRATE THIS CONTROVERSY BECAUSE _____ [*specify, e.g.,* DISPUTES BETWEEN INSUREDS THAT DO NOT INVOLVE THE INSURER] ARE BEYOND THE SCOPE OF THOSE REQUIRED TO BE ARBITRATED BY INSURANCE CODE SECTION 11580.29(f) OR BY THE UNINSURED MOTORIST PROVISION IN THE POLICY HERE AT ISSUE.

A. Insurer Is Not Involved in Dispute Between Claimants. An insurer that [has deposited the policy limits with the court and] is not involved in a dispute between claimants [as to the division of those policy proceeds] cannot be compelled to arbitrate under *Insurance Code Section 11580.2(f)* (*Mayflower Ins. Co. v. Pellegrino (1989) 212 Cal. App. 3d 1326, 1333-1335, 261 Cal. Rptr. 224*).

[*AND/OR*]

A. Insurer Is Not Required to Arbitrate Total Amount of Damages Caused by Uninsured Motorist. After the insurer has paid its insured the full amount of its uninsured motorist coverage, the insured cannot be compelled to arbitrate (*State Farm Mutual Automobile Ins. Co. v. Superior Court (Balen) (2004) 123 Cal. App. 4th 1424, 20 Cal. Rptr. 3d 850*).

[*Optional*] **B. Dollar Amount of Accident Damages Is Not Relevant to Bad Faith Claim Against Uninsured Motorist Insurer.** Any damages sustained by the insured attributable to the accident itself that are over and above the uninsured motorist policy limits have no relevance in uninsured motorist arbitration. The insured's damages in any bad faith action against his or her insurer derive from actions taken by the insurer after the accident. Unlike the traditional third party bad faith situation, in an uninsured motorist context, the personal injury and property damage sustained by the insured in the accident occur before any bad faith on the insurer's part, cannot be a proximate result of any bad faith conduct, and cannot serve as a proper measure of damages in any bad faith action (*State Farm Mutual Automobile Ins.*

Co. v. Superior Court (Balen) (2004) 123 Cal. App. 4th 1424, 1432-1434, 20 Cal. Rptr. 3d 850).

[*Optional*] **C. Coverage Questions Are Not Arbitrable.** Questions regarding coverage--that is whether the claimant is an insured within the policy definitions--are not arbitrable but must be determined by a court before the matter is ordered to arbitration (*Bouton v USAA Casualty Insurance Company (2008) 167 Cal. App. 4th 412, 420, 426, 84 Cal. Rptr. 3d 152*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a petition to compel arbitration of a matter which falls outside the scope of *Ins. Code § 11580.2(f)*. Counsel should use whichever of the paragraphs are relevant to his or her situation.

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in opposition to one seeking to compel arbitration [*see § 20A.10*].

[b] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, argument should explain whether the policy language is any broader that the statutory language.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For a form of response to a petition to compel arbitration that may be supported by this memorandum, as well as a procedural checklist, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

[d] Related Memoranda

For memoranda to combine with this form, regarding other matters that the opposition may need to address, see *§§ 20A.10-20A.12, 20A.20 et seq., 20A.30 et seq., 20A.60 et seq., and 20A.80* et seq.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing*

Legal Memoranda and Briefs .

[3] Discussion of Authorities

[a] Insurer Is Not Involved in Dispute Between Claimants

Mayflower Ins. Co. v. Pellegrino *(1989) 212 Cal. App. 3d 1326, 261 Cal. Rptr. 224* , involved an accident in August, 1986, between an uninsured motorist and a vehicle owned and driven by Mayflower's insured, Micheal Pelligrino. John Karastathas, a passenger in Pelligrino's vehicle, was killed in the accident and his widow and children claimed benefits under Pelligrino's uninsured motorist coverage, as did Pelligrino's wife. In March, 1987, Mayflower filed a complaint in interpleader, naming Pelligrinos and Karastathas' widow and children as defendants, pursuant to which Mayflower deposited the policy limit, $300,000, with the Merced County Superior Court. Pelligrinos and Karastathases answered the interpleader complaint. Mayflower was discharged from that action in May, 1988, and trial to determine the distribution of the $300,000 was set for June 21, 1988. In May, 1988, Pelligrinos sought to have the action stayed and arbitration compelled. The court held that the arbitration clause was between Pelligrino and the insurance company and that Karastathases could not be compelled to arbitrate the division of the policy proceeds. The court's order also stated that Pelligrinos had not waived their right to arbitrate by waiting until 21 months after the accident to move to compel arbitration. Pelligrinos appealed.

The court of appeal affirmed. The fact that Karastathases were claiming as third party beneficiaries under Pelligrinos' insurance policy, and thus, were bound by it, was not relevant (*212 Cal. App. 3d 1326, 1331-1332)* . Appellants could not point to any language in the statute to support their contention that it contemplated arbitration of disputes between two or more insured when the insurer was not involved. Both the statute and the policy language only contemplated arbitration between the insurer and the insured. Thus, affirmance of the order denying the petition to compel arbitration was required (*212 Cal. App. 3d 1326, 1333-1335)* .

[b] Insurer Is Not Required to Arbitrate Total Amount of Damages Caused by Uninsured Motorist

Real party in ***State Farm Mutual Automobile Ins. Co. v. Superior Court (Balen)*** *(2004) 123 Cal. App. 4th 1424, 20 Cal. Rptr. 3d 850* , was insured by petitioner. After real party was rear-ended in an automobile accident with an uninsured motorist, petitioner paid real party the full amount of benefits possible under the terms of the uninsured motorist policy provisions. Real party still demanded arbitration, under *Ins. Code § 11580.2(f)*, of the amount of damages she was entitled to collect from the uninsured motorist. Petitioner did not pay the policy limit to real party until after real party's offer to settle for policy limits had expired. Real party therefore claimed that the amount she could recover from the uninsured motorist was relevant in determining the damages that could be awarded her in a suit against the petitioner for bad faith in settling the uninsured motorist claim. The trial court ordered arbitration. Petitioner filed a writ of mandate, seeking an order directing the trial court to vacate its order of arbitration.

The court of appeal issued the writ (*123 Cal. App. 4th 1424, 1429, 1435)* , holding that even if there was bad faith in settling the uninsured motorist claim, any damages to which real party might be entitled must arise from, and be the result of, the petitioner's bad faith conduct. Real party's personal injury and property damage caused by the accident are not relevant in an uninsured motorist arbitration if the insurer has in fact paid full policy benefits (*123 Cal. App. 4th 1424, 1428)* . The court pointed out, citing *Cothron v. Interinsurance Exchange (1980) 103 Cal. App. 3d 853, 860, 163 Cal. Rptr. 240* (discussed in *Ch. 20C, Arbitration: Confirming, Correcting, or Vacating the Award, § 20C.101[3][b]*), that even if an arbitrator were to determine the issues specified in *Ins. Code § 11580.2(f)*, namely (1) whether real party was legally entitled to collect damages from the uninsured motorist, and (2) the amount of those damages, the arbitrator could not make any award greater that the policy limits. Any damages attributable to the accident itself that are over and above the uninsured motorist policy limits has no relevance in uninsured motorist arbitration; and there is no agreement to arbitrate irrelevant matters (*123 Cal. App. 4th 1424, 1432)* . In fact, requiring an arbitrator in an uninsured motorist arbitration to reach a decision on the total amount of damages suffered by the insured because of the uninsured

motorist's actions would frustrate the purpose of uninsured motorist arbitration itself, which is to provide both the insurer and insured with a prompt, inexpensive, and final method of determining liability and damages (*123 Cal. App. 4th 1424, 1433)* .

[c] Dollar Amount of Accident Damages Is Not Relevant to Bad Faith Claim Against Uninsured Motorist Insurer

The facts and procedural background of ***State Farm Mutual Automobile Ins. Co. v. Superior Court (Balen)*** *(2004) 123 Cal. App. 4th 1424, 20 Cal. Rptr. 3d 850* , are discussed at [b], *above*. As to real party's contention that the amount of damages inflicted by the uninsured motorist were relevant to any action she might bring against petitioner for bad faith, the court of appeal distinguished between ordinary third party bad faith actions and bad faith actions under uninsured motorist provisions. Citing *Neal v. Farmers Ins. Exchange (1978) 21 Cal. 3d 910, 925, 148 Cal. Rptr. 389, 582 P.2d 980* , the court noted that in the ordinary third party context, an insurer that declines an offer to settle with the third party for the policy limits is liable for the full amount of any judgment that is later entered in favor of the third party against the insured, in keeping with the rule that an insurer's breach of its duty of good faith and fair dealing renders it liable for any damages which are the proximate result of that breach. The judgment against the insured in excess of policy limits is the result of the insurer's unwarranted refusal to settle within policy limits (*123 Cal. App. 4th 1424, 1433)* . In an uninsured motorist context, the personal injury and property damage sustained by the insured in the accident occur before any bad faith on the insurer's part, cannot be a proximate result of any bad faith conduct, and therefore cannot serve as a proper measure of damages (*123 Cal. App. 4th 1424, 1434)* . Similarly, real party had no right to compel arbitration in order to evaluate any bad faith claim she might have against the petitioner (*123 Cal. App. 4th 1424, 1434)* .

[d] Coverage Questions Are Not Arbitrable

As defined by the Insurance Code, if the named insured is an individual, "insured" means the named insured and the spouse of the named insured and, while residents of the same household, relatives of either while occupants of a motor vehicle or otherwise, heirs and any other person while in or on or entering into or alighting from an insured motor vehicle and any person with respect to damages he or she is entitled to recover for care or loss of services because of bodily injury to which the policy provisions or endorsement apply. If the named insured is an entity other than an individual, "insured" means any person while in or on or entering into or alighting from an insured motor vehicle and any person with respect to damages he or she is entitled to recover for care or loss of services because of bodily injury to which the policy provisions or endorsement apply [*Ins. Code § 11580.2(b)*].

Bouton v. USAA Casualty Insurance Company *(2008) 167 Cal. App. 4th 412, 84 Cal. Rptr. 3d 152* , involved two consolidated cases dealing with the same statute and the same issue: under *Ins. Code § 11580.2(f)*, which questions are arbitrable in uninsured and underinsured motorist cases? One of the cases involved a demand for uninsured motorist arbitration under *Ins. Code § 11580.2(f)*, which the insurer opposed, and refused to arbitrate on the ground that the claimant was not covered by the insurance policy. The policyholder was the claimant's sister. After settling with the other driver for his policy limits, claimant demanded a further sum from his sister's insurer. The insurer denied coverage on the ground that the claimant was not a resident of his sister's household, and was therefore not covered under her insurance policy. "Covered person" was defined as the named insured "or any family member." The policy defined a "family member" as "a person related to [the named insured] by blood, marriage, or adoption who is a resident of [the named insured's] household." Plaintiff contended that he constituted a family member of the named insured, his sister, because they were blood relatives permanently residing in the same household. Claimant moved to compel arbitration. The trial court denied the motion to compel arbitration, finding that because the arbitration provision of the insurance policy was no broader than *Ins. Code § 11580.2(f)*, the issue of coverage was not one that was to be arbitrated. Claimant appealed, and the court of appeal, consistent with *Van Tassel v. Superior Court of Fresno County (1974) 12 Cal. 3d 624, 627, 116 Cal. Rptr. 505, 526 P.2d 696* (*Van Tassel*), reversed. The insurer petitioned for review, which the Supreme Court granted.

The Supreme Court reversed and remanded for further proceedings consistent with its decision (*167 Cal. App. 4th 412, 416-419)* , holding that the "jurisdictional fact" of claimant's coverage was not required to be arbitrated under *Ins. Code 11580.2(f) (167 Cal. App. 4th 412, 420)* . The Court acknowledged it was overruling *Van Tassel*, from which it said it retreated in *Freeman v. State Farm Mut. Auto. Ins. Co. (1975) 14 Cal. 3d 473, 485, 121 Cal Rptr. 477, 535 P. 2d 341* (*Freeman*), and held *Freeman* to be the law: the only two things that are for arbitration under Ins. Code § 1189.2(f) are (1) whether the insured is entitled to recover against the uninsured motorist; and (2) if, so, the amount (*167 Cal. App. 4th 412, 420)* . A court, not an arbitrator, must determine whether claimant was and insured under his sister's policy. Whether claimant was a covered person under the insurance policy was not a question regarding the underinsured tortfeasor's liability to the insured, or the amount of damages. Questions of coverage--that is, whether the claimant is insured and therefore entitled to take advantage of the protection provided by the policy at issue--must be resolved before an arbitrator reaches the two arbitrable question. Because the parties did not agree to arbitrate more than the statute required, the coverage question was for the court to decide (*167 Cal. App. 4th 412, 416)* .

Subsequently, on remand from the Supreme Court, the court of appeal concluded that the trial court erred in denying the petition because it did not decide the question whether Bouton is an insured under the policy. (*167 Cal. App. 4th 412, 422)* . Because that preliminary question of standing is so closely connected and is a predicate to the ultimate determination whether to compel arbitration of the policy's arbitration provision, it is most efficient and logical to have the trial court determine that question. (*167 Cal. App. 4th 412, 426)* . Since the record did not show the trial court considered the evidence submitted, the court of appeal reversed the order denying the petition to compel arbitration and remanded the matter for further proceedings on the question whether claimant is an insured under the policy entitled to enforce the policy's arbitration provision. (*167 Cal. App. 4th 412, 427)* .

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2-20A California Points & Authorities § 20A.43

§ 20A.43 Claims for Injunctive Relief Under the Consumer Legal Remedies Act (Civil Code Section 1750 et seq.) Are Not Arbitrable

[1] FORM

RESPONDENT CANNOT BE COMPELLED TO ARBITRATE CLAIMS FOR INJUNCTIVE RELIEF UNDER THE CONSUMER LEGAL REMEDIES ACT (CIVIL CODE SECTION 175O ET SEQ.)

A. Claims for Injunctive Relief Under the Consumer Legal Remedies Act (*Civil Code Section 1750 et seq.*) Are Not Arbitrable. Despite the inefficiency of arbitrating damage claims under the Consumer Legal Remedies Act (*Civ. Code § 1750 et seq.*) and requiring claims for injunctive relief under the Consumer Legal Remedies Act to be tried by a court, even when they are part of the same cause of action, CLRA claims for injunctive relief in which the plaintiff is acting as private attorney general, such as a claim seeking to enjoin deceptive business practices, are not arbitrable (*Broughton v. Cigna Healthplans of California (1999) 21 Cal. 4th 1066, 1072, 1079-1084, 1088, 90 Cal. Rptr. 2d 334, 988 P.2d 67* ; *Lee v. Southern California Univ. for Professional Studies (2007) 148 Cal. App. 4th 782, 787-788, 56 Cal. Rptr. 3d 134* ; *but see Arriaga v. Cross Country Bank (S.D. Cal. 2001) 163 F. Supp. 2d 1189, 1199-1200* (public injunctive relief under *Bus. & Prof. Code § 17200* is arbitrable in case subject to Federal Arbitration Act)).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a petition to compel arbitration of a claim seeking injunctive relief under the Consumer Legal Remedies Act (*Civ. Code § 1750 et seq.*) when that injunction would vindicate the public purpose of the CLRA more than the respondent's private remedy.

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in opposition to one seeking to compel arbitration [*see § 20A.10*]. Counsel may also wish to include authority from § 20A.21 addressing any failure of the arbitration agreement to specifically mention these claims as within its scope.

[b] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, argument should emphasize the language and scope of the arbitration provision and also of the pleadings.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747* (overruled on other grounds in *Rosenthal v. Great Western Financial Securities Corp. (1996) 14 Cal. 4th 394, 404, 58 Cal. Rptr. 2d 875*)].

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For a form of response to a petition to compel arbitration that may be supported by this memorandum, as well as a procedural checklist, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

For general discussion and forms relating to the Consumer Legal Remedies Act, see California Forms of Pleading and Practice, 504, *Sales: Consumers Legal Remedies Act* (Matthew Bender).

[d] Related Memoranda

For memoranda to combine with this form, regarding other matters that the opposition may need to address, see *§§ 20A.10-20A.12, 20A.21 et seq., 20A.30 et seq., 20A.40 et seq., 20A.60 et seq., and 20A.80* et seq.

For forms addressing the arbitrability of damage claims under the Consumer Legal Remedies Act, see *Ch. 20, Arbitration: Compelling, § 20.22*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Claims for Injunctive Relief Under the Consumer Legal Remedies Act (Civil Code Section 1750 et seq.) Are Not Arbitrable

The facts and procedural background of ***Broughton v. Cigna Healthplans of California*** *(1999) 21 Cal. 4th 1066, 90 Cal. Rptr. 2d 334, 988 P.2d 67* , and the portion of the opinion discussing the arbitrability of damage claims under the Consumer Legal Remedies Act (*Civ. Code § 1750 et seq.*) are discussed in *Ch. 20, Arbitration: Compelling, §*

20.22[3][f]. The portion of the opinion addressing the availability of costs and attorney's fees in arbitration of a CLRA claim for damages is discussed in *Ch. 20C, Arbitration: Confirming, Correcting, or Vacating the Award, § 20C.110[3][d]*.

In considering the arbitrability of the CLRA claim for injunctive relief, the Court considered U.S. Supreme Court cases addressing the arbitrability of claims under federal statutes designed to vindicate public wrongs (antitrust and Racketeer Influenced and Corrupt Organizations Act). The Court found that those opinions established an "inherent conflict" exception applicable when the primary purpose of a statute is not to compensate for an individual wrong but to prohibit and enjoin conduct injurious to the general public, i.e., when the plaintiff's role plausibly goes beyond achieving compensation for his or her private injury and places the plaintiff authentically in the position of a private attorney general (*21 Cal. 4th 1066, 1076-1077)* . Considering whether CLRA claims to enjoin deceptive practices come within this "inherent conflict" exception, the Court noted the "institutional" shortcomings of arbitration: arbitrators, unlike courts, do not have continuing authority to modify or vacate injunctions. The injured party must resort to the relatively cumbersome remedy of initiating a second arbitration proceeding [*see Ch. 20E, Arbitration: Effect of Award, § 20E.33*] (*21 Cal. 4th 1066, 1081)* . Furthermore, as the Court had recently held in *Vandenberg v. Superior Court (1999) 21 Cal. 4th 815, 836-837, 88 Cal. Rptr. 2d, 366, 982 P.2d 229* [*see Ch. 20E, Arbitration: Effect of Award, § 20E.30*], an injunction issued as an arbitration award, even if confirmed and entered as a judgment, could not be enforced by a member of the public injured by the same deceptive practice. Thatplaintiff would have to relitigate the injunction (*21 Cal. 4th 1066, 1081)* . Thus, the Court concluded that the California Legislature did not intend that CLRA injunctive relief claims be arbitrated (*21 Cal. 4th 1066, 1082)* . While the Court acknowledged that the U.S. Supreme Court expressed this capacity to withdraw statutory rights from the scope of arbitration agreements as the prerogative solely of Congress, not state courts or legislatures, and that the U.S. Supreme Court has never directly decided whether a legislature may restrict a private arbitration agreement when it inherently conflicts with a public statutory purpose, the majority, unlike the dissent, found that it would be perverse to preclude states from passing legislation the purposes of which was incompatible with arbitration (*21 Cal. 4th 1066, 1083)* . The Court found nothing in this result to contravene the Federal Arbitration Act, noting that the legislative history of the FAA dealt only with commercial nonstatutory claims, not public injunctions (*21 Cal. 4th 1066, 1083-1084)* .

Additionally, the Court found a basis for treating CLRA claims for damages differently than CLRA claims for injunction in *Civ. Code § 1782*, which does not require notice by a potential plaintiff before commencing an action for injunction, but does require notice by a potential plaintiff before commencing a CLRA claim for damages, and in fact, precludes a suit for damages if appropriate repairs are made or other remedy given [*compare Civ. Code § 1782(a), (b) with Civ. Code § 1782(c)*]. This distinction indicated to the majority that informal methods of resolution are appropriate for CLRA claims for damages but compromise the public protective purpose of the statute when injunctive relief is sought (*21 Cal. 4th 1066, 1084-1085)* . The Court acknowledged the inefficiency of requiring CLRA claims for damages to be vindicated in arbitration while requiring litigation of CLRA claims for injunction, but found this result to be required by federal law (*21 Cal. 4th 1066, 1088)* .

The facts and procedural background of ***Lee v. Southern California Univ. for Professional Studies*** *(2007) 148 Cal. App. 4th 782, 56 Cal. Rptr. 3d 134* , are discussed at *§ 20A.10[3][f]*. The portion of the opinion discussing the fact that claims for injunctive relief under both the CLRA and UCL are not arbitrable is discussed at *§ 20A.44[3][a], below*.

Arriaga v. Cross Country Bank *(S.D. Cal. 2001) 163 F. Supp. 2d 1189* , was a class action by credit card holders against issuers alleging wrongful practices relating to fees and charges. The complaint stated causes of action for fraud, violation of the Truth-in-Lending Act, the Consumer Legal Remedies Act ("CRLA" *Civ. Code § 1720 et seq.*), and *Bus. & Prof. Code § 17200*. Plaintiffs sought damages, disgorgement of profits, and injunction to prohibit the challenged practices and fees. The credit card agreements contained an arbitration provision. Defendants moved to compel arbitration in accordance with the agreement. Plaintiffs opposed on several grounds, including that the agreement was fraudulently induced (they were not given the agreements until after they had incurred charges) and unconscionable, and that the "public" causes of action under *Bus. & Prof. Code § 17200* for disgorgement and injunction were not arbitrable

because the California legislature intended they not be. All parties agreed the matter involved interstate commence and was thus governed by the Federal Arbitration Act (*163 F. Supp. 2d 1189, 1191 n.4*). The district court granted the motion to compel arbitration as to all causes of action, finding (1) that the claim of fraudulent inducement went to the entire agreement, not just the arbitration clause, and so was arbitrable; (2) that the agreement might be a little harsh as to the credit card holder, but not harsh enough to be unconscionable; and (3) that no matter what the California legislature intended, The FAA still required that the arbitration agreement be enforced (*163 F. Supp. 2d 1189, 1196)* . The Supremacy Clause of the United States Constitution, federal cases, and the FAA mandated that only statutes intended by Congress to create claims that were not arbitrable were excepted from arbitration under the FAA (*163 F. Supp. 2d 1189, 1199-1200)* .

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2-20A California Points & Authorities § 20A.44

§ 20A.44 Claims for Public Injunctive Relief Under Business and Professions Code Sections 17200 et seq. and 17500 et seq. Are Not Arbitrable

[1] FORM

RESPONDENT CANNOT BE COMPELLED TO ARBITRATE THE CLAIMS FOR PUBLIC INJUNCTIVE RELIEF UNDER THE _____ [FALSE ADVERTISING STATUTES (BUSINESS AND PROFESSIONS CODE SECTION 17500 ET SEQ.) *and/or* THE UNFAIR COMPETITION LAW (BUSINESS AND PROFESSIONS CODE SECTION 17200 ET SEQ.)].

A. Claims for Public Injunctive Relief Under the Unfair Competition Law (*Business and Professions Code Section 17200 et seq.*) Are Not Arbitrable. Claims for public injunctive relief under the Unfair Competition Law (*Bus. & Prof. Code § 17200 et seq.*), such as a claim by a plaintiff acting as private attorney general seeking to enjoin unfair business practices, must be tried by a court[, even if the same cause of action asserts claims for damages, including claims for restitution and/or disgorgement, that must be arbitrated, because the arbitrable claims may be severed] (*see Bus. & Prof. Code § 17203*; *Cruz v. PacifiCare Health Sys. (2003) 30 Cal. 4th 303, 133 Cal. Rptr. 2d 58, 66 P.3d 1157* ; *Lee v. Southern California Univ. for Professional Studies (2007) 148 Cal. App. 4th 782, 787-788, 56 Cal. Rptr. 3d 134*).

[*AND/OR*]

B. Claims for Public Injunctive Relief of False Advertising Under *Business and Professions Code Section 17500 et seq.* Are Not Arbitrable. Claims for public injunctive relief under the false advertising statutes, *Business and Professions Code Section 17200 et seq.*, such as a claim by a plaintiff acting as private attorney general seeking to enjoin deceptive advertising practices, must be tried by a court[, even if the same cause of action includes damage claims, including claims for restitution and/or disgorgement, that must be arbitrated, because the arbitrable claims may be severed] (*see Bus. & Prof. Code § 17535*; *Cruz v. PacifiCare Health Sys. (2003) 30 Cal. 4th 303, 133 Cal. Rptr. 2d 58, 66 P.3d 1157*).

[2] Comments

[a] Use of Form

The form at [1], *above*, may be submitted in opposition to a petition to compel arbitration of a claim seeking public injunctive relief under the false advertising statutes (*Bus. & Prof. Code § 17500 et seq.*) or the Unfair Competition Law (*Bus. &Prof. Code § 17200 et seq.*), when that injunction would vindicate the public purpose of those laws. The authority on which the form is based considered a case brought by an individual for himself and on behalf of the general public and expressly left open the question whether UCL injunctive relief actions brought by injured business competitors were arbitrable.

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in opposition to one seeking to compel arbitration [*see § 20A.10*]. Counsel may also wish to include authority from § 20A.43, to the effect that claims for public injunctive relief under the Consumer Legal Remedies Act (*Civ. Code § 1750 et seq.*) also must be tried by a court.

[b] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, argument should emphasize the language and scope of the arbitration provision and also of the pleadings.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For memoranda to combine with this form, regarding other matters that the opposition may need to address, see *§§ 20A.10 -20A.12, 20A.21 et seq., 20A.30 et seq., 20A.40 et seq., 20A.60 et seq., and 20A.80* et seq.

For forms addressing the arbitrability of damage claims under the Consumer Legal Remedies Act, the false advertising statutes, and the Unfair Competition Law, see *Ch. 20, Arbitration: Compelling, § 20.22*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Claims for Public Injunctive Relief Under the Unfair Competition Law (Business and Professions Code Section 17200 et seq.) Are Not Arbitrable

The facts and procedural background of ***Cruz v. PacifiCare Health Sys.*** *(2003) 30 Cal. 4th 303, 133 Cal. Rptr. 2d 58, 66 P.3d 1157* , and the portions of the opinion considering the arbitrability of claims for restitution and disgorgement under the Consumer Legal Remedies Act (*Civ. Code § 1750 et seq.*), the Unfair Competition Law (*Bus. & Prof. Code § 17200 et seq.*), and on account of false advertising under *Bus. & Prof. Code § 17500 et seq.*, as well as common law claims for unjust enrichment are discussed at *Ch. 20, Arbitration: Compelling, § 20.22[3][f]*. The Court began its consideration of the arbitrability of claims for injunctive relief under *Bus. & Prof. Code § 17200 et seq.* and *Bus. & Prof. Code § 17500 et seq.* by noting that while there may be occasions on which the injunctive power of the UCL is used primarily to redress injuries to competing businesses and only incidentally for the public benefit, it did not need not decide whether UCL injunctive relief actions brought by injured business competitors were arbitrable (*30 Cal. 4th 303, 315)* . In this case, the request for injunctive relief is clearly for the benefit of health care consumers and the general public by seeking to enjoin defendants' alleged deceptive advertising practices. The claim is virtually indistinguishable from the CLRA claim that was at issue in *Broughton*, which also sought to enjoin a health care company's alleged deceptive advertising of its medical services. The same is true of plaintiff's request to enjoin defendants' alleged misleading advertising under *Bus. & Prof. Code § 17500 et seq.* (*30 Cal. 4th 303, 315-316)* . Plaintiff's injunctive relief claim under *Bus. & Prof. Code § 17535* is essentially requesting the same relief for the same reason as is his UCL claim (*30 Cal. 4th 303, 316)* . Plaintiff's action to enjoin defendants' alleged deceptive business practices is undertaken for the public benefit, whether designated as a claim under the CLRA, *Bus. & Prof. Code § 17200* or *17500*: it is designed to prevent further harm to the public at large rather than to redress or prevent injury to a plaintiff. As such, for the reasons discussed in *Broughton*, there is an "inherent conflict" between arbitration and the underlying purpose of those statutes' injunctive relief remedy. Therefore, the Court concluded that the injunctive relief claims were inarbitrable unless there were indications of legislative intent to the contrary in the UCL or *Bus. & Prof. Code § 17500*. The Court discerned no such intent. *Bus. & Prof. Code §§ 17203* and *17535* both provide that injunctive relief claims are to be brought in "any court of competent jurisdiction." Defendant noted certain features in the CLRA not present in the UCL, such as the CLRA antiwaiver provision [*Civ. Code § 1751*] and the fact that it provides for more extensive remedies than the UCL or *Bus. & Prof. Code § 17500* [*see Civ. Code § 1780*]. But those were not the characteristics the Court relied on in *Broughton* in concluding that requests for injunctive relief under the CLRA are inarbitrable (*30 Cal. 4th 303, 316)* . The absence of these features in the UCL or in *Bus. & Prof. Code § 17500* did not persuade the Court that the Legislature intended to allow arbitration of public injunctive relief requests under these statutes (*30 Cal. 4th 303, 316)* . The Court concluded that each of plaintiff's injunctive reliefrequests was inarbitrable (*30 Cal. 4th 303, 316)* .

The facts and procedural background of ***Lee v. Southern California Univ. for Professional Studies*** *(2007) 148 Cal. App. 4th 782, 56 Cal. Rptr. 3d 134* , are discussed at *§ 20A.10[3][f]*. A further complication was added by the fact that the CLRA and UCL claims sought only injunctive relief, which would not be arbitrable even if plaintiff had consented to an arbitration clause. A claim under the UCL that seeks only injunctive relief on behalf of the public, as opposed to restitution and/or disgorgement of profits, is not arbitrable [*see Cruz v. PacifiCare Health Systems, Inc. (2003) 30 Cal. 4th 303, 315-316, 133 Cal. Rptr. 2d 58, 66 P.3d 1157* (*Cruz*, discussed *above*)]. Thus, if plaintiff had signed an agreement with an arbitration clause, claims for damages under the CLRA would be arbitrable. But her claims for injunctive relief, under either the CLRA or UCL, would not be. The California Supreme Court has said that a judicial forum has significant institutional advantages over arbitration in administering a public injunctive remedy (*148 Cal. App. 4th 782, 787)* . The claim would not be arbitrable even if named representative was a party to an arbitration agreement (*148 Cal. App. 4th 782, 788)* .

[b] Claims for Public Injunctive Relief of False Advertising Under Business and Professions Code Section 17500 et seq. Are Not Arbitrable

The facts and procedural background of ***Cruz v. PacifiCare Health Sys.*** *(2003) 30 Cal. 4th 303, 133 Cal. Rptr. 2d 58,*

66 P.3d 1157 , are discussed in *Ch. 20, Arbitration: Compelling, § 20.22[3][f]*. The portion of the opinion addressing claims for public injunctive relief under the false advertising law *Bus. & Prof. Code § 17500 et seq.*, is discussed at [a], *above*. The portions of the opinion considering the arbitrability of claims for restitution and disgorgement under the Consumer Legal Remedies Act (*Civ. Code § 1750 et seq.*), the Unfair Competition Law (*Bus. & Prof. Code § 17200 et seq.*), and on account of false advertising under *Bus. & Prof. Code § 17500 et seq.*, as well as common law claims for unjust enrichment are discussed at *Ch. 20, Arbitration: Compelling, § 20.22[3][f]*.

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2-20A California Points & Authorities § 20A.45

§ 20A.45 Uninsured Motorist Claim Was Not Preserved

[1] FORM

THIS UNINSURED MOTORIST CLAIM CANNOT BE ARBITRATED BECAUSE THE INSURED DID NOT PRESERVE HIS/HER CLAIM BY DOING ONE OF THE ACTS REQUIRED BY INSURANCE CODE SECTION 11580.2(i)(1) WITHIN THE TIME REQUIRED.

A. **Action Required to Preserve Uninsured Motorist Claim.** No cause of action for uninsured motorist coverage shall accrue to the insured unless one of the following actions has taken place within two years from the date of the accident (*Ins. Code § 11580.2(i)(1)*):

(A) Suit for bodily injury has been filed against the uninsured motorist, in a court of competent jurisdiction.

(B) Agreement as to the amount due under the policy has been concluded.

(C) The insured has formally instituted arbitration proceedings by notifying the insurer in writing sent by certified mail, return receipt requested.

[*Optional*] **B. 2003 Amendment Increasing Time Within Which Action Must Be Taken to Two Years Is Not Retroactive.** The statutory period for completion of one of the prerequisites listed in *Insurance Code Section 11580.2(i)(1)* was increased from one year to two years effective January 1, 2004, but that amendment was not retroactive. Thus, insureds who were injured by an uninsured motorist on _____ [*date before January 16, 2004*], lost any cause of action against their insurer by failing to demand arbitration or file suit against the uninsured motorist until _____ [*date, more than one year after date of injury, on which notice of and demand for arbitration was finally made*] (*Bullard v. California State Automobile Assn. (2005) 129 Cal. App. 4th 211, 218-221,*

28 Cal. Rptr. 3d 225).

[2] Comments

[a] Use of Form

This form may be used to oppose a petition to compel uninsured motorist arbitration when the insured has failed to preserve his or her claim as required by Ins. Code § 1158.2(i)(1). Optional Paragraph B is for use to oppose the argument that the two-year time frame applicable to accidents occurring on or after January 1, 2004, applies to the case.

This form is not intended as a complete memorandum, but should be combined with the points and *authorities in § 20A.10* and any others applicable to the particular situation.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should set forth which action the insured undertook as well as the date of the action.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement)].

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Memoranda

For memoranda that may be used in an appropriate case to oppose this form, see *Ch. 20, Arbitration: Compelling, § 20.43*.

[3] Discussion of Authorities

[a] Action Required to Preserve Uninsured Motorist Claim

Ins. Code § 11580.2 (i)(1) is set forth in paragraph A of the form at § 20A.45[1].

[b] 2003 Amendment Increasing Time Within Which Action Must Be Taken to Two Years Is Not Retroactive

Bullard v. California State Automobile Assn. *(2005) 129 Cal. App. 4th 211, 28 Cal. Rptr. 3d 225* addresses whether the 2003 amendment to *Ins. Code § 11580.2(i)* (effective January 1, 2004, instituting a two-year, rather than a one-year, limitation period) is retroactive. It is not. Plaintiffs were injured by an uninsured motorist on June 16, 2002. On February 10, 2003, they informed CSAA that they intended to pursue an uninsured motorist claim but that letter did not demand arbitration. On June 19, 2003, Bullards filed their personal injury action against the driver and owner of the uninsured vehicle. In September, 2003, CSAA denied Bullard's uninsured motorist claim on the ground that they had failed to preserve their right to arbitration. Bullards claimed the 2003 amendment was retroactive to their situation. CSAA and the trial court disagreed when it denied their motion to compel arbitration, finding also that there was no estoppel. Bullards appealed.

The court of appeal affirmed (*129 Cal. App. 4th 211, 216)* , finding that the plain language of the statute, which did not expressly provide for retroactivity, deposed of the matter (*129 Cal. App. 4th 211, 217, 221)* . Ordinarily, a statute is not retroactive unless the Legislature expressly so states. This amendment was signed by the Governor on July 14, 2003, after Bullard's claim was already time-barred under the then-current statute, to become effective January 1, 2004. Their claim was not revived by the amendment (*129 Cal. App. 4th 211, 218)* . The court of appeal agreed that the 2003 amendment to *Ins. Code § 11580.2(i)* was made to conform to the 2002 amendment to *Code Civ. Proc. §§ 335.1* and *340*, which changed the statute of limitations for assault, battery, personal injury, and wrongful death to two years (from one year) effective January 1, 2003, but disagreed that desire for conformity implied made the two-year limitation period in *Ins. Code § 11580.2(i)* retroactive to the date of the other amendments (*129 Cal. App. 4th 211, 219-220)* .

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2-20A California Points & Authorities § 20A.46

§ 20A.46 Equitable Contribution Claim Does Not Arise Under Contract

[1] FORM

THE CLAIM FOR EQUITABLE CONTRIBUTION CANNOT BE ARBITRATED BECAUSE IT DOES NOT ARISE UNDER THE CONTRACT

A. Equitable Contribution Claim Does Not Arise Under Contract. An equitable contribution claim is not arbitrable because it does not arise from contract but from equity. The right to equitable contribution does not arise from contract, because the multiple insurers who may share responsibility for the same loss have not contracted with each other--only with their insured. Nor can arbitration be compelled on grounds of equitable estoppel or third-party beneficiary status. The insurers do not "stand in the insured's shoes," nor do they attempt to obtain benefits potentially payable to the insured under the insurance contract containing the agreement to arbitrate. This situation is distinguishable from those in which a party seeks direct benefits of the contract containing the arbitration clause. This situation does not involve a claim for direct benefits under the insurance contracts with the insured but is based on the noncontractual ground of equitable contribution (*Crowley Maritime Corp. v. Boston Old Colony Ins. Co. (2007) 158 Cal. App 4th 1061, 1065-1066, 1068-1071, 70 Cal. Rptr. 3d 605*).

[2] Comments

[a] Use of Form

This form of memorandum may be used to resist a petition to compel arbitration of an equitable contribution claim between insurers of the same insured. This form is not intended to be a complete memorandum. Counsel should combine it with authority from § 20A.10 et seq. and any other forms addressing any other relevant issues, such as § 20A.60.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, the argument must

show that the parties seeking equitable contribution and those from which the seek it are not both parties to the same contract or insurance policy, but that claimants are relying on the fact that all parties have policies with the same insured which contain arbitration clauses. It is advisable for counsel to submit evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file (including verified pleadings), or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied if plaintiff-respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement)].

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* ,and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memorandum

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Equitable Contribution Claim Does Not Arise Under Contract

Crowley Maritime Corp. v. Boston Old Colony Ins. Co. *(2007) 158 Cal. App 4th 1061, 70 Cal. Rptr. 3d 605* , involved equitable contribution claims by two insurance companies against other insurers. The insured, plaintiff Crowley Maritime Corporation, received indemnification from two insurers (respondents): Boston Old Colony Insurance Company and Glens Falls Insurance Company. Those companies in turn sued other of plaintiff's insurers (the third-party insurers) for equitable contribution. The third-party insurers sought to compel arbitration of the contribution claims based on the arbitration provisions in their policies with plaintiff. The trail court denied the motion because respondents were not parties or signatories to the third party insurers' arbitration agreements with plaintiff and no exception applied to allow them to compel arbitration. The third-party insurers appealed.

The court of appeal affirmed (*158 Cal. App. 4th 1061, 1065, 1074)* , finding that an equitable contribution claim does not arise from contract but from equity (*158 Cal. App. 4th 1061, 1065, 1069)* , and because there were no applicable exceptions to the general rule that nonsignatories to an arbitration agreement cannot be compelled to arbitrate under it (*158 Cal. App. 4th 1061, 1065, 1066)* . The right to equitable contribution does not arise from contract, because the multiple insurers who may share responsibility for the same loss have not contracted with each other--only with their insured (*158 Cal. App. 4th 1061, 1068)* . The court discussed the exceptions to the rule that a nonsignatory to an arbitration agreement cannot be compelled to arbitrate. A nonsignatory can be compelled to arbitrate when the nonsignatory is a third party beneficiary of the contract containing the arbitration agreement or when a preexisting relationship existed between the nonsignatory and one of the parties to the arbitration agreement, making it equitable to compel the nonsignatory to also be bound to arbitrate his or her claim (*158 Cal. App. 4th 1061, 1069-1070)* . Here, respondents had no preexisting relationship with appellants, nor were they third party beneficiaries of appellants' contracts with plaintiff (*158 Cal. App. 4th 1061, 1070)* . Appellants argued that under federal law, they could compel arbitration based on the principle of equitable estoppel because respondents would be estopped from avoiding arbitration, having knowingly sought the benefits of the contract containing the arbitration clause. They argued that respondents "stood in plaintiff's shoes" and were attempting to obtain benefits potentially payable to the signatory under

the insurance contract containing the agreement to arbitrate (*158 Cal. App. 4th 1061, 1070-1071)* . The court of appeal distinguished all the authorities relied on by appellants as involving parties who sought direct benefits of the contract containing the arbitration clause as opposed to respondents, who were not suing for direct benefits under the insurance contracts with plaintiff, but were suing on the noncontractual ground of equitable contribution. Thus, they did not "stand in plaintiff's shoes" or seek to recover benefits provided to plaintiff (*158 Cal. App. 4th 1061, 1071)* . The court discussed other issues raised for the first time on appeal and concluded that the trial court correctly denied the petition to compel arbitration (*158 Cal. App. 4th 1061, 1071-1073)* .

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20A ARBITRATION: RESISTING
PART II. FORMS
B. Particular Claims Not Subject to Arbitration

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[Reserved]

§§ 20A.47[Reserved]

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20A ARBITRATION: RESISTING
PART II. FORMS
C. Particular Persons Not Bound by Arbitration Agreement

2-20A California Points & Authorities § 20A.60

§ 20A.60 Court Determines Whether Third Party Is Bound by or Can Enforce Arbitration Agreement

[1] FORM

_____ [PETITIONER *or* RESPONDENT] CANNOT _____ [BE COMPELLED TO ARBITRATE *or* COMPEL ARBITRATION OF] THIS CONTROVERSY WITH _____ [PETITIONER *or* RESPONDENT, *and name of other party*] UNLESS AND UNTIL THE COURT DETERMINES WHETHER [PETITIONER *or* RESPONDENT *or name of other entity*], WHICH/WHO IS NOT A PARTY TO THE ARBITRATION AGREEMENT, _____ [HAS STANDING TO ENFORCE *or* IS BOUND BY] THAT AGREEMENT.

A. Court Determines Whether Third Party Is Bound by or Can Enforce Arbitration Agreement. Whether one who is not a signatory to an arbitration agreement is nevertheless bound by it or is entitled to enforce it is a question of fact to be determined by the court before it orders arbitration that will bind that party or determine that party's rights and obligations. The determination of standing to arbitrate as a party to the contractual arbitration agreement is a question of law for the trial court in the first instance [unless the agreement explicitly provides otherwise. Because this is a general principle of law, a statement that the arbitrator is to determine the "scope" of the arbitration provision is not explicit enough to confer authority to the arbitrator to determine standing] (*Smith v. Microskills San Diego, L.P. (2007) 153 Cal. App. 4th 892, 900, 63 Cal. Rptr. 3d 608* ; *City of Hope v. Bryan Cave (2002) 102 Cal. App. 4th 1356, 1369, 126 Cal. Rptr. 2d 283* ; *Valley Casework, Inc. v. Comfort Construction, Inc. (1999) 76 Cal. App. 4th 1013, 1024, 90 Cal. Rptr. 2d 779* ; *American Builder's Assn. v. Au-Yang (1990) 226 Cal. App. 3d 170, 179-180, 276 Cal. Rptr. 262* ; *Unimart v. Superior Court of Los Angeles (1969) 1 Cal. App. 3d 1039, 1045, 1047, 82 Cal. Rptr. 249*).

[*Optional*] **B. Formalities Required in Petition to Compel Arbitration.** A petition to compel arbitration is in essence a suit in equity to compel specific performance of a contract, therefore, the rules covering complaints are applicable to petitions to arbitrate. These rules require a statement of the facts constituting the cause of action, in ordinary and concise language. In the case of a person claiming to be a third party beneficiary, a minimal requirements would be an allegation of a controversy between the parties, facts demonstrating the existence of an arbitrable controversy, the existence of the written agreement, and an allegation that the other party has refused to arbitrate. The petition should

also set forth the written agreement and the arbitration provision verbatim so the court can determine both whether an arbitration agreement exists and who has standing to demand arbitration (*Smith v. Microskills San Diego, L.P. (2007) 153 Cal. App. 4th 892, 898, 63 Cal. Rptr. 3d 608* ; *Matthau v. Superior Court (William Morris Agency, LLC) (2007) 151 Cal. App. 4th 593, 602, 60 Cal. Rptr. 3d 93* ; *City of Hope v. Bryan Cave (2002) 102 Cal. App. 4th 1356, 1369, 126 Cal. Rptr. 2d 283*).

[*Optional*] **C. One Not a Party to Arbitration Agreement Who Seeks Arbitration Must Prove It Was an Intended Beneficiary Under the Contract.** One who claims rights under an arbitration agreement must demonstrate that agreement applies to them personally. A third party's right to enforce an arbitration agreement is predicated on the contracting parties' intent to benefit that third party. Some agreements, such as release agreements containing boilerplate language purporting to excuse everyone in the world from liability can be enforced by persons who are not parties to the agreement. Still, a third party has the burden of proving the parties to the [release] agreement intended to benefit that third party. It is not enough that a literal interpretation of the contract would result in a benefit to the third party (*City of Hope v. Bryan Cave (2002) 102 Cal. App. 4th 1356, 1369-1370, 126 Cal. Rptr. 2d 283*).

[2] Comments

[a] Use of Form

This form may be used to resist arbitration when the court has yet to determine whether some entity that is not a signatory of the arbitration agreement is bound by it and should be compelled to arbitrate or is entitled to enforce the arbitration agreement and may compel the resisting party to arbitrate. It is not appropriate when the arbitration agreement, or rules adopted by the agreement, provide that the arbitrator will determine who is necessary for complete resolution of the controversy [*see Ch. 20, Arbitration: Compelling, § 20.68*]. The bracketed language in Paragraph A is taken from and reflects the fact situation in *Smith v. Microskills San Diego, L.P. (2007) 153 Cal. App. 4th 892, 63 Cal. Rptr. 3d 608* . Optional Paragraphs B and C are to point out omissions in the moving papers of anyone seeking to compel arbitration as a third party beneficiary of the arbitration agreement. They should be used only if the conform to counsel's particular situation.

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in opposition to one seeking to compel arbitration [*see § 20A.10*] and with one or more of the authorities from § 20A.60 et seq., addressing the specifics persons who are not bound by particular arbitration agreements.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should indicate the language of the arbitration agreement at issue and facts about the third party which place it outside the scope of that agreement.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further

legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For a form of response to a petition to compel arbitration that may be supported by this memorandum, as well as a procedural checklist, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

[d] Related Memoranda

For memoranda to combine with this form, regarding other matters that the opposition may need to address, see *§§ 20A.10-20A.12, 20A.20 et seq., 20A.30 et seq., 20A.40 et seq., and 20A.80* et seq.

For a memorandum opposing the contention that an officer who signed an agreement on behalf of a corporation is a third party beneficiary of that agreement, see *§ 20A.63*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For forms addressing general contract principles, see Ch. 50, *Contracts* .

[3] Discussion of Authorities

[a] Court Determines Whether Third Party Is Bound by or Can Enforce Arbitration Agreement

Plaintiff in ***Smith v. Microskills San Diego, L.P.*** *(2007) 153 Cal. App. 4th 892, 63 Cal. Rptr. 3d 608* , attended classes at a postsecondary vocational institution owned and operated by defendant and paid for a portion of his tuition by borrowing funds from Sallie Mae, an educational lender. The note contained an arbitration provision which covered "any claim, dispute or controversy ... arising from or relating to this Note or my application for a loan or advertisements, promotions or oral or written statements related to this Note or the program under which such a loan is or would be made, the relationships which result from this Note (including to the full extent permitted by law, relationships with third parties who are not signatories of this Note) or the validity, enforceability or scope of this Arbitration Provision or the entire Note (collectively, 'Claim')." Plaintiff's amended complaint alleged that defendant had made a number of misrepresentations in order to induce students to enroll in its classes, that the misrepresentations gave rise to liability under the unfair competition law (UCL, *Bus. & Prof. Code § 17200 et seq.*), and that defendant had violated disclosure provisions of the Education Code. Defendant moved to compel arbitration, claiming it was a third party beneficiary of the arbitration provisions of the note. The trial court denied the motion. Defendant appealed.

The court of appeal affirmed (*153 Cal. App. 4th 892, 894, 901)* . The court first noted that whether the defendant was a party to the arbitration agreement and whether the arbitration covered plaintiff's statutory claims were questions of law (*153 Cal. App. 4th 892, 896)* . The court then discussed in general terms the exceptions to the general rule that a nonsignatory to an agreement cannot be compelled to arbitrate and cannot invoke an agreement to arbitrate. A nonsignatory to an agreement to arbitrate may be required to arbitrate, and may invoke arbitration against a party, if a preexisting confidential relationship, such as an agency relationship makes it equitable to impose the duty to arbitrate on the nonsignatory (*153 Cal. App. 4th 892, 896-897)* . However, there was nothing in the record to suggest that defendant acted as Sallie Mae's agent so as to give rise to any equitable reason to grant defendant the benefit of the arbitration clause in the note (*153 Cal. App. 4th 892, 897)* .

Defendant also claimed that because the arbitration clause provided that covered any dispute relating to "the validity, enforceability or scope of this Arbitration Provision," the arbitrator was to determine standing. The court of appeal disagreed, saying that the determination of standing to arbitrate as a party to the contractual arbitration agreement is a question of law for the trial court in the first instance. Although an arbitration provision might expressly provide that the question of standing to demand arbitration is itself arbitrable, here the reference to the "scope" of the agreement does not make the distinct question of standing arbitrable. In light of the general rule making standing a question for the court, a more explicit reference to standing would be required (*153 Cal. App. 4th 892, 900)* .

City of Hope v. Bryan Cave *(2002) 102 Cal. App. 4th 1356, 126 Cal. Rptr. 2d 283* involved consolidated lawsuits for breach of fiduciary duty, legal malpractice, and fraud against two law firms and individual members of those firms, who, while representing plaintiff, were representing, advising, or conspiring with officers of plaintiffs who were eventually fired or resigned. The settlement agreements between plaintiff and the former officers provided that any disputes between them were to be submitted to arbitration. After the lawsuits had been proceeding for about three years, the complaints were amended in 2001 to allege that each of the defendants committed acts in furtherance of a conspiracy, and in committing those acts, each defendant acted as the agent of the other and all of the co-conspirators, including the former officers. After those amendments, because the complaints alleged that the law firms had acted as agents of the former officers, the law firms sought to compel arbitration pursuant to the settlement agreements and to stay the actions. The trial court denied their requests. Defendants appealed.

The court of appeal affirmed, finding that the defendants failed to prove they were third party beneficiaries of the settlement agreements (*102 Cal. App. 4th 1356, 1368, 1371)* . One problem was that defendants did not file formal petitions to compelarbitration (*102 Cal. App. 4th 1356, 1370)* . A petition to compel arbitration is in essence a suit in equity to compel specific performance of a contract, therefore, the rules covering complaints are applicable to petitions to arbitrate. These rules require a statement of the facts constituting the cause of action, in ordinary and concise language. In the case of a person claiming to be a third party beneficiary, a minimal requirements would be an allegation of a controversy between the parties, facts demonstrating the existence of an arbitrable controversy, the existence of the written agreement, and an allegation that the other party has refused to arbitrate. The petition should also set forth the written agreement and the arbitration provision verbatim. Inclusion of the arbitration agreement is necessary because to determine both whether an arbitration agreement exists and who has standing to demand arbitration. A petition to compel arbitration is heard in the same manner as any other motion. Factual issues are resolved the by the trial court based on conflicting affidavits or declarations and, at the court's discretion, even oral testimony. The determination of standing to arbitrate as a party to the contractual arbitration agreement is a question of law for the trial court in the first instance. Because both law firms claimed rights under the contract, it was their duty to demonstrate the promises applied to them personally (*102 Cal. App. 4th 1356, 1369)* .

Valley Casework, Inc. v. Comfort Construction, Inc. *(1999) 76 Cal. App. 4th 1013, 90 Cal. Rptr. 2d 779* , arose from a dispute regarding the quality of materials and workmanship under a contract between the general contractor and a subcontractor. The general contractor's insurer paid the owner/buyer $45,000 to settle the claim and sought to enforce the arbitration clause in the construction contract. The subcontractor moved for a preliminary injunction to prevent arbitration, claiming the insurer had no standing to enforce the arbitration agreement. The trial court denied the injunction and ordered arbitration. The subcontractor did not attend the arbitration but appealed from the judgment entered on the award against it. The appeal also sought reversal of the order denying the preliminary injunction for relief from arbitration.

The court of appeal reversed, ordering (1) that the judgment and award be vacated and (2) that an injunction be issued preventing arbitration so that the subcontractor could proceed in a judicial forum for resolution of the issues (*76 Cal. App. 4th 1013, 1017)* . The court was bound by two different standards on appeal: the denial of the injunction was to be reviewed to determine if the court abused its discretion in denying relief from arbitration (*76 Cal. App. 4th 1013, 1019)* ; the insurer's standing was purely a matter of law to be reviewed de novo (*76 Cal. App. 4th 1013, 1020)* . In the context of the petition for injunction to restrain arbitration, the question was whether requiring contractual arbitration to

proceed, precluding the jury trial that Valley wanted to pursue, amounted to great or irreparable injury to a party to the action (*76 Cal. App. 4th 1013, 1023)* . By denying the injunction, the trial court went beyond the scope of the contractual issues presented, into the equitable arena of subrogation law. The complaint and declarations outlined legal issues that should have remained within the province of the trial court and should never have reached the arbitrator. The only issues within the scope of the arbitration agreement were those regarding the nature and quality of the work performed under the subcontract or the specifications (*76 Cal. App. 4th 1013, 1024)* . The larger issue of the respective liabilities of all parties, including the unresolved issues relating to equitable subrogation were beyond the scope of the agreement. Without a court determination of those issues, the insurer did not have standing to enforce the arbitration agreement either for its own benefit or "on behalf" of the general contractor (*76 Cal. App. 4th 1013, 1024)* .

Plaintiff in ***American Builder's Assn. v. Au-Yang*** *(1990) 226 Cal. App. 3d 170, 276 Cal. Rptr. 262* , as general contractor, entered into an agreement with defendants to renovate a property in North Hollywood. The contract contained an arbitration provision. A dispute arose between the parties, and Au-Yangs filed for arbitration. Arbitration commenced, and determined, among other things, that although defendants were entitled to possession of the property being improved, they did not own it and had made no payments under the contract beyond the initial deposit. Bonita, Inc. owned the property and made the payments. The arbitrator determined that Bonita must be joined in the arbitration proceedings and set a deadline for defendants to amend their demand for arbitration and for plaintiff to respond. Plaintiff objected to arbitration with Bonita, which it considered a stranger to the contract, claimed the arbitrator had exceeding his powers by joining Bonita, and filed a complaint for damages and injunctive relief naming defendants and Bonita, Inc. The trial court denied the preliminary injunction, holding that plaintiff had failed to show that the arbitrator was without jurisdiction to determine whether Au-Yangs had signed the agreement as principals or as agents for Bonita, and that the "all claims" language in the arbitration agreement may have been broad to bind plaintiff to arbitrate with any willing claimant. Plaintiff appealed.

The court of appeal reversed and remanded. The court said that notwithstanding an arbitrator's broad authority to resolve questions presented by a controversy, an arbitrator has no power to determine the rights and obligations of one who is not a party to the arbitration agreement The question of whether a nonsignatory is a party to an arbitration agreement is one for the trial court in the first instance. If an arbitrator rather than a court were to decide whether an arbitration provision bound a nonsignatory, that stranger could be bound by arbitration to which it had not consented and would be without effective review. While a court will vacate an award if the arbitrator exceeded his or her powers, a court will not examine the sufficiency of the evidence. Thus, if plaintiff were to bring a motion to vacate an award claiming the arbitrator exceeded his powers in ordering joinder of Bonita, the trial court, constrained by *Code Civ. Proc. § 1286.2*, would decline to review the arbitrator's factual findings (*226 Cal. App. 3d 170, 179-180)* . The court of appeal remanded for plaintiff to file an amended complaint for declaratory relief as to Bonita's status (*226 Cal. App. 3d 170, 180)* .

Unimart v. Superior Court of Los Angeles *(1969) 1 Cal. App. 3d 1039, 82 Cal. Rptr. 249* , arose out of a union's petition to compel arbitration of a dispute between the union and Unimart, a retail store. The Union alleged that Unimart had opened two stores in the geographic area encompassed by the parties' collective bargaining agreement, but did so in the name of a sister corporation (Two Guys) and refused to apply the collective bargaining agreement to those stores. Arbitration was ordered, and Unimart filed for writ of mandate to vacate that order, claiming that Two Guys was anindispensable party to the arbitration and that the court had to find that Two Guys was the alter ego of Unimart before it could order arbitration.

The court of appeal issued the writ. The court said that in spite of the strong public policy in favor of arbitration, an employer cannot be compelled to arbitrate if the arbitration agreement is not binding on it. An arbitrator has no power to determine the rights and obligations of one who is not a party to the arbitration agreement or arbitration proceedings. Whether or not the arbitration provision are operative against a party who did not sign the arbitration agreement (Two Guys) depends on that party's status and its relation to the party-employer who signed the agreement. This involves a question of substantive arbitrability, which is to be determined by the court (*1 Cal. App. 3d 1039, 1045)* . In this case,

respondent court did not determine whether Two Guys was owned, operated, or controlled by Unimart, nor could it do so in the absence of Two Guys. Rather, the court directed that issue to be determined by the arbitrator. This was error. The present record reflected conflicting allegations which must be decided by the court in an appropriate proceeding on the basis of a factual determination (*1 Cal. App. 3d 1039, 1047)* .

[b] Formalities Required in Petition to Compel Arbitration

The facts and procedural background of ***City of Hope v. Bryan Cave*** *(2002) 102 Cal. App. 4th 1356, 126 Cal. Rptr. 2d 283* , and the portion of the opinion considering the formalities required of a petition by a third party to compel arbitration are discussed at [a], *above*.

[c] One Not a Party to Arbitration Agreement Who Seeks Arbitration Must Prove It Was an Intended Beneficiary Under the Contract

The facts and procedural background of ***Smith v. Microskills San Diego, L.P.*** *(2007) 153 Cal. App. 4th 892, 63 Cal. Rptr. 3d 608* , and the portions of the opinion addressing general theories under which a nonsignatory may enforce an arbitration agreement and the rule that the court makes the determination who has standing to enforce the agreement are discussed at [a], *above*. The court also found that defendant was not a third party beneficiary of the note. The court cited *Civ. Code § 1559* for the proposition that a third party beneficiary contract must be made expressly for the benefit of that third person. A contract need not be exclusively for the benefit of the third party, *i.e.,* he or she need not be the sole or the primary beneficiary, but the intent to benefit a third person must have been understood by the promisor (*153 Cal. App. 4th 892, 898)* . The court discussed and distinguished other cases and concluded that defendant was not a party to the note and could not enforce the arbitration clause (*153 Cal. App. 4th 892, 898-901)* .

Matthau v. Superior Court (William Morris Agency, LLC) *(2007) 151 Cal. App. 4th 593, 60 Cal. Rptr. 3d 93* , was a suit by a talent agency against a deceased actor's son and the "loan out" company through which the actor sometimes provided his services. After the actor's death, his son, who succeeded to the actor's rights under his motion picture employment contracts, ceased to pay the agency's commission on profit participation payments received under the employment contracts. The talent agency sought to compel arbitration with the actor's son and the "loan out" company under various theories. The trial court granted the petition to compel arbitration. The son and loan out company filed a writ of mandate seeking to vacate the order.

The court of appeal granted the writ (*151 Cal. App. 4th 593, 598, 605*), finding no basis on which to allow the contracts to be enforced against the sons or the loan out company (*151 Cal. App. 4th 593, 595, 604)* . The court of appeal discussed various theories under which a nonsignatory may be required to arbitrate, including agency and successor at interest (*151 Cal. App. 4th 593, 602-604)* . The court said there are two categories of cases binding nonsignatories to arbitrate their claims: (1) those where a benefit was conferred on the nonsignatory as a result of the contract, making the nonsignatory a third party beneficiary of the arbitration agreement, and (2) those under which the nonsignatory is bound to arbitrate because of a preexisting relationship between the nonsignatory and one of the parties to the arbitration agreement, making it equitable to compel the nonsignatory to also be bound to arbitrate his or her claim. Neither category applied here (*151 Cal. App. 4th 593, 600)* . A third party beneficiary is someone who may enforce a contract because the contract is made expressly for his or her benefit [*see Civ. Code § 1559*]. The mere fact that a contract results in benefits to a third party does not render that party a third party beneficiary. A third party's rights under a contract are predicated on the contracting parties' intent to benefit the third party. The circumstance that a literal contract interpretation would result in a benefit to the third party is not enough to entitle that party to demand enforcement (*151 Cal. App. 4th 593, 602)* .

The facts and procedural background of ***City of Hope v. Bryan Cave*** *(2002) 102 Cal. App. 4th 1356, 126 Cal. Rptr. 2d 283* , and the portion of the opinion considering the formalities required in a petition by a third party to compel arbitration are discussed at [a], *above*. Considering the burden of proof of one who claims to be a third party beneficiary

of an arbitration agreement, the court of appeal said a third party's right to enforce covenants of a contract is predicated on the contracting parties' intent to benefit that third party. A release agreement containing boilerplate language that purports to excuse everyone in the world from liability can be enforced by persons who are not parties to the agreement. But the third party still has the burden of proving the parties to the release agreement intended to benefit that third party. It is not enough that a literal interpretation of the contract would result in a benefit to the third party. Instead of filing formal petitions to compel arbitration, defendants filed pleadings that relied on an estoppel theory. Bryan Cave stated: "As the alleged agent of Shapero and Leeka, and hence, also an express third party beneficiary of the Settlement Agreements, Bryan Cave is entitled to enforce the arbitration agreements against City of Hope." Estoppel may sometimes allow non-signatories to a contract to demand arbitration. However, the linchpin of equitable estoppel is fairness. Here, there was no fairness principle on which the law firms could rely (*102 Cal. App. 4th 1356, 1370)* . Both firms denied they were ever the agents of the former officers, just as they deny they ever did anything wrong in their representations of City of Hope. Defendants have not shown they were third party beneficiaries of the settlement agreements. Because they did not prove they were intended beneficiaries of the settlement agreements, therewas no error in denying their requests to compel arbitration (*102 Cal. App. 4th 1356, 1371)* .

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CHAPTER 20A ARBITRATION: RESISTING
PART II. FORMS
C. Particular Persons Not Bound by Arbitration Agreement

2-20A California Points & Authorities § 20A.61

§ 20A.61 Heir's Wrongful Death Claim Is Not Covered by Decedent's Arbitration Agreement

[1] FORM

RESPONDENT CANNOT BE COMPELLED TO ARBITRATE THE CONTROVERSY OF THE WRONGFUL DEATH OF A PARTY TO THE ARBITRATION AGREEMENT, BECAUSE THE WRONGFUL DEATH CLAIM BELONGS TO RESPONDENT AND NOT TO DECEDENT.

A. Heir's Wrongful Death Claim Not Covered by Decedent's Arbitration Agreement. Ordinarily, a patient who signs an arbitration agreement covering medical malpractice claims cannot bind anyone else except his or her spouse and minor children to arbitrate any wrongful death claim under that agreement. Thus, adult children cannot usually be compelled to arbitrate wrongful death claims relating to a parent's death. Some agreements will not bind a surviving spouse to arbitrate his or her wrongful death claim (*Buckner v. Tamarin (2002) 98 Cal. App. 4th 140, 142-143, 119 Cal. Rptr. 2d 489* [adult children not required to arbitrate wrongful death claim]; *Rhodes v. California Hosp. Medical Center (1978) 76 Cal. App. 3d 606, 608-610, 143 Cal. Rptr. 59* (husband's signature was as agent for wife, not in his individual capacity) cf. *Herbert v. Superior Court (1985) 169 Cal. App. 3d 718, 725 n.2, 215 Cal. Rptr. 477*).

[2] Comments

[a] Use of Form

This form may be used to resist arbitration of adult children's wrongful death claims, or, if using the bracketed language in Paragraph A, when the arbitration agreement provided for arbitration only of the decedent's personal claims but not for arbitration of the spouse's or children's wrongful death claim. The more generally applicable authorities that require arbitration of a surviving spouse's claim are in *Ch. 20, Arbitration: Compelling, § 20.62* [*see also Hawkins v. Superior Court (1979) 89 Cal. App. 3d 413, 418-419, 419 n.5, 152 Cal. Rptr. 491* (discussed in *Ch. 20, Arbitration: Compelling, § 20.61[3][a]*)].

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in opposition to one seeking to compel arbitration [*see § 20A.10*]. Counsel may also wish to include the

authority from § 20A.60.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should indicate the language of the arbitration agreement at issue and emphasize how that language fails to include wrongful death claims or claims of heirs.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For a form of response to a petition to compel arbitration that may be supported by this memorandum, as well as a procedural checklist, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

[d] Related Memoranda

For memoranda to combine with this form, regarding other matters that the opposition may need to address, see *§§ 20A.10-20A.12, 20A.20 et seq., 20A.30 et seq., 20A.40 et seq., and 20A.80* et seq.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For forms addressing general contract principles, see Ch. 50, *Contracts* .

[3] Discussion of Authorities

[a] Heir's Wrongful Death Claim Is Not Covered by Decedent's Arbitration Agreement

Buckner v. Tamarin *(2002) 98 Cal. App. 4th 140, 119 Cal. Rptr. 2d 489* was a wrongful death action by adult daughters of a man who died following surgery by Dr. Tamarin. Decedent had signed a medical arbitration agreement covering any dispute arising out of or related to the treatment or services provided by Dr. Tamarin, including wrongful death claims any heirs of the patient's heirs. Dr. Tamarin petitioned to compel arbitration. The daughters opposed arbitration, contending their father had no authority to waive their right to sue. The court agreed and denied the petition to arbitrate. Dr. Tamarin appealed.

The court of appeal affirmed. The court said there are only three circumstances under which someone can bind another person to a medical arbitration agreement without that other person's consent. First, an agent can bind a principal [*see, e.g.,* *Madden v. Kaiser Foundation Hospitals (1976) 17 Cal. 3d 699, 706, 131 Cal. Rptr. 882, 552 P.2d 1178* (discussed in *Ch. 20, Arbitration: Compelling, § 20.61[3][a]*)]. Second, spouses can bind each other [*see, e.g., Bolanos v. Khalatian (1991) 231 Cal. App. 3d 1586, 1591, 283 Cal. Rptr. 209* ; *Gross v. Recabaren (1988) 206 Cal. App. 3d 771, 781, 253 Cal. Rptr. 820* (discussed in *Ch. 20, Arbitration: Compelling, § 20.62[3][a]*)]. And, third, a parent can bind a minor child [*see, e.g.,* *Pietrelli v. Peacock (1993) 13 Cal. App. 4th 943, 947, 16 Cal. Rptr. 2d 688* (discussed in *Ch. 20, Arbitration: Compelling, § 20.64[3][a]*)]. In each of the foregoing situations, there is an agency or similar relationship between the nonsignatory and one of the parties to the arbitration agreement (*98 Cal. App. 4th 140, 142)* . Here, the plaintiffs do not fall into any of the foregoing categories. Their father was not their agent, they were not married to him, and they were not minors. He therefore lacked the authority to waive their right to a jury trial of their claims (*98 Cal. App. 4th 140, 143)* . Tamarin contended to the contrary, citing *Herbert v. Superior Court (1985) 169 Cal. App. 3d 718, 722-725, 215 Cal. Rptr. 477* as authority that adult children could be required to arbitrate a wrongful death claim under a medical services agreement signed by their deceased parent. The court of appeal disagreed, saying the result in *Herbert*, is anomalous: because decedent's spouse and five minor children were required to arbitrate their wrongful death claim, rather than try to split an indivisible cause of action, the court required the adult children to arbitrate too (*98 Cal. App. 4th 140, 143)* .

In ***Rhodes v. California Hosp. Medical Center*** *(1978) 76 Cal. App. 3d 606, 143 Cal. Rptr. 59* , decedent's surviving husband and children filed an action for her wrongful death allegedly due to the negligence of defendant hospital. The decedent, and the husband as her "agent," had signed instruments containing provisions for arbitration. Defendant appealed from the trial court's denial of its petition to compel arbitration.

The court of appeal affirmed. While recognizing the strong public policy in favor of arbitration, the court of appeal said that policy does not extend to those who are not parties to an arbitration agreement or who have not authorized anyone to act for them in executing such an agreement (*76 Cal. App. 3d 606, 609)* . The court of appeal recognized that a wrongful death action must rest on a cause of action in the decedent, but held that the decedent's agreement to arbitrate her own possible claim was ineffective to waive her husband's and children's right to a jury trial in their own, independent action for her wrongful death (*76 Cal. App. 3d 606, 609-610)* .

The facts and procedural background of ***Herbert v. Superior Court*** *(1985) 169 Cal. App. 3d 718, 215 Cal. Rptr. 477* , are discussed in *Ch. 20, Arbitration: Compelling, § 20.63[3][a]*. In reaching its conclusion that the heirs were bound by the agreement to arbitrate executed by the decedent, the court noted that the agreement in *Rhodes* did not include a provision whereby the signing party intended his or her heirs to be bound to the arbitration clause (*169 Cal. App. 3d 718, 725 n.2*). Also, as noted *above*, the court in *Buckner v. Tamarin (2002) 98 Cal. App. 4th 140, 143, 119 Cal. Rptr. 2d 489* considered the result in *Herbert* to be for convenience.

[4] Additional Authorities

[a] Heir's Wrongful Death Claim Is Not Covered by Decedent's Arbitration Agreement

The court of appeal in ***Fitzhugh v. Granada HealthCare and Rehabilitation Center, L.L.C.*** *(2007) 150 Cal. App. 4th 469, 58 Cal. Rptr. 3d 585* , affirmed the trial court's denial of a motion to compel arbitration. The facts and procedural background and the portion of the opinion addressing the court's discretion under *Code Civ. Proc. § 1281.2(c)* to deny arbitration of all claims when some are arbitrable is discussed in *§ 20A.12[3][a]*. The husband and sons of a patient of defendant sued for elder abuse, fraud, violations of the Patients Bill of Rights (*22 Cal. Code Reg. § 72527*), and wrongful death, claiming her death resulted from a fall she took while she was a resident of Granada. With respect to the wrongful death claims, the court of appeal said they were not subject to arbitration and cited *Buckner v. Tamarin (2002) 98 Cal. App. 4th 140, 142-144, 119 Cal. Rptr. 2d 489* (*Buckner*, discussed at [3][a], *above*) for the proposition that wrongful death claims are not usually arbitrable unless the arbitration agreement was signed by the plaintiff in his

or her individual capacity, which this agreement was not. It was irrelevant to the wrongful death cause of action whether husband may have signed the arbitration agreements as the decedent's "legal representative/agent." There was no evidence that husband signed the arbitration agreements in his personal capacity, and the sons did not sign any arbitration agreements. Thus, there was no basis to infer that they waived their personal right to jury trial on the wrongful death claim. The court distinguished cases involving arbitration agreements signed pursuant to health care powers of attorney (*150 Cal. App. 4th 469, 474)* . The court also distinguished *Herbert v. Superior Court (1985) 169 Cal. App. 3d 718, 215 Cal. Rptr. 477* (discussed in *Ch. 20, Arbitration: Compelling, § 20.63[3][a]*), as having been decided for practical reasons to require all plaintiffs to try their claims in the same forum. The plaintiffs in this case were not dividing their wrongful death claims between different forums (*150 Cal. App. 4th 469, 474-475)* .

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2-20A California Points & Authorities § 20A.62

§ 20A.62 Nonsignatory Spouse's Loss of Consortium Claim Is Not Subject to Arbitration

[1] FORM

RESPONDENT CANNOT BE COMPELLED TO ARBITRATE HIS/HER CLAIM FOR LOSS OF CONSORTIUM BECAUSE HE/SHE DID NOT SIGN, AND IS NOT BOUND BY, THE ARBITRATION AGREEMENT AT ISSUE.

A. Nonsignatory Spouse's Loss of Consortium Claim Is Not Subject to Arbitration. A party cannot be compelled to arbitrate a dispute when he/she/it has not elected to submit to arbitration either through entering an arbitration agreement or by authorizing someone to act for him/her/it in executing such an agreement (*Baker v. Birnbaum (1988) 202 Cal. App. 3d 288, 291-293, 248 Cal. Rptr. 336*).

[2] Comments

[a] Use of Form

This form may be used to resist arbitration of a nonsignatory spouse's loss of consortium claim in a medical malpractice action arising from treatment of the signatory spouse. This form is based on a minority case, which has generally been questioned and not followed by the cases set forth in the form at *Ch. 20, Arbitration: Compelling, § 20.62*.

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in opposition to one seeking to compel arbitration [*see § 20A.10*]. Counsel may also wish to include the authority from § 20A.60.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should indicate the language of the arbitration agreement at issue and emphasize how that language fails to include claims by the nonsignatory spouse.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For a form of response to a petition to compel arbitration that may be supported by this memorandum, as well as a procedural checklist, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

[d] Related Memoranda

For memoranda to combine with this form, regarding other matters that the opposition may need to address, see *§§ 20A.10-20A.12, 20A.20 et seq., 20A.30 et seq., 20A.40 et seq., and 20A.80* et seq.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For forms addressing general contract principles, see Ch. 50, Contracts.

[3] Discussion of Authorities

[a] Nonsignatory Spouse's Loss of Consortium Claim Is Not Subject to Arbitration

In ***Baker v. Birnbaum*** *(1988) 202 Cal. App. 3d 288, 248 Cal. Rptr. 336* , before undergoing surgery to be performed by defendant physician, plaintiff signed an agreement to arbitrate any dispute concerning medical treatment, which purportedly bound her and anyone else who might have a right to assert a claim on her behalf, as well as other persons for whom she had responsibility, such as her spouse. After she was diagnosed as having cancer, plaintiff filed a professional negligence action against defendant, and her husband alleged a claim for loss of consortium. Citing the arbitration agreement signed by plaintiff, defendant moved to compel arbitration regarding both plaintiff and her husband. The trial court granted the motion regarding plaintiff, but not her husband, concluding that he was not bound by an agreement he did not sign. Defendant appealed.

The court of appeal affirmed. The court explained that public policy favors arbitration as an expeditious and economical method of resolving disputes. However, arbitration assumes an election by the parties involved to use it as an alternative to the judicial process. A party cannot be compelled to arbitrate a dispute it has not elected to submit. The court observed that *Code Civ. Proc. § 1295*, which authorizes arbitration in medical malpractice disputes, does not discuss whether claimants other than signatories may be bound by the agreement to arbitrate. It explained that in some circumstances a person who has authority to contract for medical services on behalf of another may, in the exercise of

that authority, bind that person to an agreement to arbitrate his or her medical malpractice claims (*202 Cal. App. 3d 288, 291)* . However, the court said that was not the situation in plaintiff's case, because she contracted for medical care solely on her own behalf, and the agreement to arbitrate related only to those services provided to her under that contract. The policy favoring arbitration does not extend to those who are not parties to an arbitration agreement or who have not authorized anyone to act for them in executing such an agreement (*202 Cal. App. 3d 288, 292)* . The court found that there was nothing on the face of the contract to extend it to any claim made by plaintiff's husband; the submission to arbitration of any dispute regarding medical malpractice refers to claims asserted by plaintiff on her behalf (*202 Cal. App. 3d 288, 292-293)* .

The court distinguished and declined to follow *Herbert v. Superior Court (1985) 169 Cal. App. 3d 718, 215 Cal. Rptr. 477* , discussed in *Ch. 20, Arbitration: Compelling, § 20.63[3][a]* (*202 Cal. App. 3d 288, 293-294)* .

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2-20A California Points & Authorities § 20A.63

§ 20A.63 Officer Who Signs Arbitration Agreement on Behalf of Corporate Party to Agreement Cannot Be Compelled to Arbitrate Under Agreement

[1] FORM

RESPONDENT'S ONLY CONNECTION WITH THE ARBITRATION AGREEMENT IS HIS/HER SIGNATURE AS AN OFFICER ON BEHALF OF THE CORPORATION. THAT IS NOT ENOUGH TO REQUIRE HIM/HER TO ARBITRATE UNDER THE AGREEMENT

A. Officer Who Signs Arbitration Agreement on Behalf of Corporate Party to Agreement Cannot Be Compelled to Arbitrate Under Agreement. A corporate officer whose only connection with an arbitration agreement is to sign it as a corporate officer on behalf of a corporate party to the agreement cannot be compelled to arbitrate under that agreement any claim he or she may have individually against a party to the arbitration agreement (*Benasra v. Marciano (2001) 92 Cal. App. 4th 987, 990, 112 Cal. Rptr. 2d 358*).

[2] Comments

[a] Use of Form

This form may be used by an individual who signed an arbitration agreement as a corporate officer and has no interest in the agreement (i.e., is not an agent of the corporation or third-party of the agreement) to resist arbitration of an individual claim he or she has against a party to the arbitration agreement.

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in opposition to one seeking to compel arbitration [*see § 20A.10*] and with one or more of the authorities from § 20A.60 et seq., addressing the specifics persons who are not bound by particular arbitration agreements.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument

should indicate that his or her client signed the agreement only as a corporate officer and cannot be construed as an agent of the corporation or a third-party beneficiary of the contract.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For a form of response to a petition to compel arbitration that may be supported by this memorandum, as well as a procedural checklist, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

[d] Related Memoranda

For memoranda to combine with this form, regarding other matters that the opposition may need to address, see *§§ 20A.10-20A.12, 20A.20 et seq., 20A.30 et seq., 20A.40 et seq., and 20A.80* et seq.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For forms addressing general contract principles, see Ch. 50, *Contracts* .

[3] Discussion of Authorities

[a] Officer Who Signs Arbitration Agreement on Behalf of Corporate Party to Agreement Cannot Be Compelled to Arbitrate Under Agreement

Benasra v. Marciano *(2001) 92 Cal. App. 4th 987, 112 Cal. Rptr. 2d 358* , was a libel action in which the defendants (a corporation and its president) claimed the plaintiff (an individual) ought to be compelled to arbitrate simply because he was president of another corporation that had a licensing agreement (that provided for arbitration) with the defendant corporation. Plaintiff signed the licensing agreement as president of the licensee corporation, but was neither an agent of the corporation or a third-party beneficiary of the licensing agreement. The trial court denied defendants' motion to compel arbitration and defendant appealed.

The court of appeal affirmed. The court noted that the strong public policy in favor of arbitration does not extend to those who are not parties to an arbitration agreement, and a party cannot be compelled to arbitrate a dispute that he has not agreed to resolve by arbitration Plaintiff was not a party to the license agreements, but unambiguously signed both as a corporate officer and only as a corporate officer, not in his individual capacity (*92 Cal. App. 4th 987, 990)* . To

avoid this result, defendant contended plaintiff was an agent of the corporation at all relevant times and an intended third-party beneficiary of the license agreements, in part based on a provision in theagreements that provided for their automatic termination if plaintiff failed to remain as the majority owner and controlling officer of the corporation. Defendant claimed this provision benefited plaintiff because it meant he could not be ousted from his company without the company's loss of the Guess contracts. The court disagreed, saying that the provision could just as well have been included for the benefit of defendant corporation, to ensure that it was not stuck with a licensee operated by someone other than plaintiff. It takes more than a provision such as this to create third-party beneficiary status (*92 Cal. App. 4th 987, 992-993)* . The court of appeal distinguished cases relied on by defendant in which a nonsignatory to a contract was allowed to compel arbitration. Here, plaintiff was not the one who wanted to be bound by the arbitration provision in a contract that he signed only in a representative capacity. It is one thing to permit a nonsignatory to relinquish his or her right to a jury trial, but quite another to compel him or her to do so. While the court of appeal did not foreclose the possibility that a nonsignatory third-party beneficiary could in some circumstances be compelled to arbitrate a particular dispute, there was nothing about this case to suggest the need or desirability for that remedy. There was no evidentiary support for defendant's assertions that plaintiff was a third-party beneficiary of the contract (*92 Cal. App. 4th 987, 991-992)* .

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[Reserved]

§§ 20A.64[Reserved]

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2-20A California Points & Authorities § 20A.80

§ 20A.80 Petitioner Has Waived the Right to Compel Arbitration

[1] FORM

RESPONDENT CANNOT BE COMPELLED TO ARBITRATE THE CONTROVERSY PETITIONER SEEKS TO ARBITRATE BECAUSE PETITIONER HAS WAIVED THE RIGHT TO COMPEL ARBITRATION.

A. Arbitration Not to Be Ordered if Waived. The court shall not order parties to an arbitration agreement to arbitrate a controversy if it determines that the right to compel such arbitration has been waived by the petitioner under the circumstances (*Code Civ. Proc. § 1281.2(a)*; *Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 982, 64 Cal. Rptr. 2d 843, 938 P.2d 903* ; *Sawday v. Vista Irrigation Dist. (1966) 64 Cal. 2d 833, 837, 52 Cal. Rptr. 1, 415 P.2d 816* ; Guess?, *Inc. v. Superior Court (2000) 79 Cal. App. 4th 553, 557, 94 Cal. Rptr. 2d 201*).

B. Waiver Is Question of Fact for Court to Decide. [*See Ch. 20, Arbitration: Compelling, § 20.80[1], Paragraph A.*]

[*Optional*] **C. Burden of Proving Waiver Is on Party Asserting It.** [*See Ch. 20, Arbitration: Compelling, § 20.80[1], Paragraph C.*]

D. Factors To Be Considered in Determining if Arbitration Has Been Waived. No single test delineates the nature of the conduct of a party that will constitute waiver of the right to compel arbitration. In determining waiver, a court can consider the following (*Sobremonte v. Superior Court (1998) 61 Cal. App. 4th 980, 992, 72 Cal. Rptr. 2d 43* ; *see Berman v. Health Net (2000) 80 Cal. App. 4th 1359, 1363, 96 Cal. Rptr. 2d 295* ; *Davis v. Continental Airlines, Inc. (1997) 59 Cal. App. 4th 205, 211, 69 Cal. Rptr. 2d 79* ; *Zamora v. Lehman (2010) 186 Cal. App. 4th 1, 111 Cal. Rptr. 3d 335*):

1. Whether the party's actions are inconsistent with the right to arbitrate;

2. Whether the litigation machinery has been substantially invoked and the parties were well into preparation of a lawsuit before the party notified the opposing party of an intent to arbitrate;

3. Whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay;

4. Whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings;

5. Whether important intervening steps had taken place[, such as one party's taking advantage of judicial discovery procedures not available in arbitration]; and

6. Whether the delay affected, misled, or prejudiced the opposing party.

[Assertion of the right to arbitration as an affirmative defense, without more, does not preclude a finding that subsequent conduct waived that right (*Sobremonte v. Superior Court (1998) 61 Cal. App. 4th 980, 993, 998, 72 Cal. Rptr. 2d 43* ; *Davis v. Continental Airlines, Inc. (1997) 59 Cal. App. 4th 205, 217, 69 Cal. Rptr. 2d 79*)].

[2] Comments

[a] Use of Form

This form may be used to resist arbitration when the petitioner has waived the right to compel arbitration.

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in opposition to one seeking to compel arbitration [*see § 20A.10*] and with one or more of the authorities from §§ 20A.81-20A.86, addressing the specifics of various acts that may constitute waiver. Counsel may wish to include authority from *Ch. 20, Arbitration: Compelling, § 20.30* regarding the applicability of general state law contract principles.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should clearly indicate the acts constituting waiver and why those acts amount to waiver.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For a form of response to a petition to compel arbitration that may be supported by this memorandum, as well as a

procedural checklist, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

[d] Related Memoranda

For memoranda to combine with this form, regarding other matters that the opposition may need to address, see *§§ 20A.10-20A.12, 20A.20 et seq., 20A.30 et seq., 20A.40 et seq., and 20A.87* et seq.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For forms addressing general contract principles, see Ch. 50, *Contracts* .

[3] Discussion of Authorities

[a] Arbitration Not to Be Ordered if Waived

The facts and procedural background of ***Engalla v. Permanente Medical Group, Inc.*** *(1997) 15 Cal. 4th 951, 64 Cal. Rptr. 2d 843, 938 P.2d 903* , are discussed in *Ch. 20, Arbitration: Compelling, § 20.10[3][a]*. The Court said that *Code Civ. Proc. § 1281.2(a)* gives the trial court jurisdiction to decide questions of waiver when the issue is raised in opposition to a petition to compel arbitration (*15 Cal. 4th 951, 982)* . Additional portions of the opinion addressing waiver are set forth in *Ch. 20, Arbitration: Compelling, § 20.80[3][a]* and in § 20A.86[3][a].

The facts and procedural background of ***Sawday v. Vista Irrigation Dist.*** *(1966) 64 Cal. 2d 833, 52 Cal. Rptr. 1, 415 P.2d 816* , are discussed at *§ 20A.82[3][a]*. The Supreme Court, in affirming that the petitioner had lost the right to compel arbitration as to the majority of damages in question, stated that a party to an arbitration agreement can waive his or her right to arbitrate. Whether there has been a waiver of such a right is ordinarily a question of fact. The Court went on to hold that a finding of waiver, if supported by sufficient evidence, is binding on an appellate court (*64 Cal. 2d 833, 836)* .

The facts and procedural background of ***Guess?, Inc. v. Superior Court*** *(2000) 79 Cal. App. 4th 553, 94 Cal. Rptr. 2d 201* , and the portion of the opinion discussing the specific factors amounting to waiver, are discussed at *§ 20A.83[3][b]*. The court opened its discussion with consideration of waiver generally, noting that a petition to compel arbitration will be denied when the right has been waived by the proponent's failure to properly and timely assert it [*Code Civ. Proc. §§ 1281, 1281.2(a)*]. This may happen in a variety of contexts, including situations in which the proponent of arbitration has previously taken steps inconsistent with an intent to invoke arbitration and instances in which the proponent has unreasonably delayed in undertaking the procedure. There is no single determinative test of waiver, and the question for the trial court is one of fact. For the appellate court, the question is whether the trial court's decision is supported by substantial evidence. If it is, the court must affirm. If not, the court may decide the issue as a matter of law (*79 Cal. App. 4th 553, 557)* .

[b] Factors To Be Considered in Determining if Arbitration Has Been Waived

In ***Zamora v. Lehman*** *(2010) 186 Cal. App. 4th 1, 111 Cal. Rptr. 3d 335* , the court of appeal reversed the trial court's finding of no waiver by two defendants who had engaged in delay and discovery, but affirmed the trial court's finding of no waiver by a third defendant who had successfully demurred and otherwise substantively made only settlement efforts. The court addressed the assertion that the determination of waiver was subject to the Federal Arbitration Act (FAA) by ruling that the test under the FAA for default under *9 U.S.C. § 3* and the California Arbitration Act for waiver under *Code Civ. Proc. § 1281.2(a)* are the same, citing *St. Agnes Medical Center v. PacifiCare of California (2003) 31 Cal. 4th 1187, 8 Cal. Rptr. 3d 517, 82 P.3d 727* . However, later, the court acknowledges that the Ninth Circuit also

requires knowledge of the existing right to arbitration. In any case, the court cited the factors for determining waiver that are set out in the form in [1][D], *above*. The portion of the decision discussing unreasonable delay in demanding arbitration is *set forth in § 20A.82[3][a], below*. The portion of the decision discussing waiver by use of prejudicial discovery is located at *§ 20A.83[4][b], below* . The portion of the decision dealing with demurrer as waiver is discussed in *Ch. 20, Arbitration: Compelling, § 20.81[3][e], above*. The portion of the decision dealing with attempts to settle as waiver is discussed in *Ch. 20, Arbitration: Compelling, § 20.81[3][d], above*.

The facts and procedural background of ***Sobremonte v. Superior*** *Court (1998) 61 Cal. App. 4th 980, 72 Cal. Rptr. 2d 43* , are discussed at *§ 20A.83[3][a]*. The court of appeal, finding that defendant had waived its right to arbitrate. The court cited *Davis v. Blue Cross of Northern California (1979) 25 Cal. 3d 418, 424, 425-426, 431, 158 Cal. Rptr. 828, 600 P.2d 1060* (discussed at *§ 20A.85[3][a]*) for the proposition that there is no single test for waiver, and proceeded to enumerate the factors set out in theform in [1], *above* (*61 Cal. App. 4th 980, 992)* . The court of appeal also said that delay may be unreasonable even after one has raised the right to arbitrate as an affirmative defense. Mere assertion of the right to arbitration as an affirmative defense, without more, does not preclude a finding that subsequent conduct waived that right (*61 Cal. App. 4th 980, 993, 998)* .

Berman v. Health Net *(2000) 80 Cal. App. 4th 1359, 96 Cal. Rptr. 2d 295* , began as an action against Health Net, Associated Physicians of St. John's, and a number of individual doctors. The claims against Health Net alleged many difficulties getting Health Net to approve appropriate treatments for Renee Berman, who was a plaintiff when the action began, but died in 1998. Health Net demurred to the complaint in May, 1996, and, also beginning in May, 1996, served extensive discovery requests on the Bermans, as well as third-party subpoenas for Renee's medical records. Also in May, 1996, the parties stipulated that Health Net would not be considered to have waived any right to arbitration by reason of filing any motions or pleadings challenging the sufficiency of the complaint, and providing that Health Net would have thirty days after the date on which their answer was due to seek an order compelling arbitration. The Bermans also served Health Net with their own discovery requests. Health Net answered the complaint in October, 1996 and in November, filed a petition to compel arbitration. The petition was denied on the ground a risk of inconsistent rulings existed because the Bermans' claims against the individual physician defendants were not arbitrable. In the fall of 1997, the Bermans settled all claims against the non-Health Net defendants. In April, 1998, Health Net again petitioned to compel arbitration, based on the changed circumstance there would no longer be any risk of conflicting rulings. The petition was denied on the ground that Health Net had waived the right to compel arbitration by engaging in substantial discovery. Health Net appealed.

The court of appeal affirmed. The court pointed out that there is no single test for waiver of the right to compel arbitration, but waiver may be found when the party seeking arbitration has (1) previously taken steps inconsistent with an intent to invoke arbitration, (2) unreasonably delayed in seeking arbitration, or (3) acted in bad faith or with willful misconduct. While engaging in litigation of the matter may be inconsistent with an intent to invoke arbitration, the party who seeks to establish waiver must show that some prejudice has resulted from the other party's delay in seeking arbitration. Here, the trial court reviewed the discovery conducted by the parties and made an implied finding that the Bermans *had* been prejudiced by Health Net's conduct of extensive discovery. The court of appeal found that finding to be supported by substantial evidence (*80 Cal. App. 4th 1359, 1363)* .

The facts and procedural background of ***Davis v. Continental Airlines, Inc.*** *(1997) 59 Cal. App. 4th 205, 69 Cal. Rptr. 2d 79* , are discussed at *§ 20A.83[3][b]*. The court of appeal, finding that defendant had waived its right to arbitrate, began its discussion by noting that there is no single test for waiver of the right to compel arbitration, but waiver may be found if the party seeking arbitration has (1) previously taken steps inconsistent with an intent to invoke arbitration, (2) unreasonable delayed in seeking arbitration, or (3) acted in bad faith or with willful misconduct (*59 Cal. App. 4th 205, 211)* . Later, the court of appeal distinguished the cases on which defendants relied, and said that merely pleading the right to arbitration as an affirmative defense in defendants' answers did not preclude a finding that their subsequent conduct waived their right to compel arbitration (*59 Cal. App. 4th 205, 216-217)* .

[4] Additional Authorities

[a] Factors To Be Considered in Determining if Arbitration Has Been Waived

The facts and procedural background of *Spear v. California State Automobile Ass'n (1992) 2 Cal. 4th 1035, 9 Cal. Rptr. 2d 381, 831 P.2d 821* , are discussed in *Ch. 20, Arbitration: Compelling, § 20.43[3][a]*. The Supreme Court reversed the trial court's denial of a motion to compel arbitration, having determined that the trial court misapplied the statute of limitations. The Court mentioned that its conclusion was not inconsistent with the rule that demand for arbitration can not be unreasonably delayed. What constitutes a reasonable time is a question of fact depending on the situation of the parties, the nature of the transaction, and the facts of the particular case. Among the facts a court may consider is any prejudice the opposing party suffered because of the delay. Here the four-year delay was reasonable because it was consumed by the workers' compensation action. The insurance company informed plaintiff that it would await resolution of the workers' compensation matter before settling the uninsured motorist claim. Plaintiff informed defendant when the workers' compensation matter was settled and demanded arbitration less than three months after resolution of the workers' compensation case. The Court said it was difficult to imagine how the delay in demanding arbitration in these circumstances might prejudice an insurer (*2 Cal. 4th 1035, 1043)* .

The facts and procedural background of Guess?, *Inc. v. Superior Court (2000) 79 Cal. App. 4th 553, 94 Cal. Rptr. 2d 201* , and the portion of the opinion discussing the specific factors that amounted to waiver, are discussed at *§ 20A.83[3][b]*. The portion of the opinion addressing generally the factors that may be considered in determining whether waiver has occurred are discussed at [3][a], *above*.

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2-20A California Points & Authorities § 20A.81

§ 20A.81 Waiver by Failure to Demand Arbitration Within Time Specified in Contract

[1] FORM

RESPONDENT CANNOT BE COMPELLED TO ARBITRATE THE CONTROVERSY PETITIONER SEEKS TO ARBITRATE BECAUSE PETITIONER HAS WAIVED THE RIGHT TO COMPEL ARBITRATION BY FAILING TO DEMAND ARBITRATION WITHIN THE TIME SPECIFIED IN THE PARTIES' CONTRACT.

A. Right to Arbitrate Waived by Failure to Demand Within Contractual Time Limit. When a contract provides that arbitration may be demanded within a stated time, failure to make a demand within that time constitutes a waiver of the right to arbitrate (*Platt Pacific, Inc. v. Andelson (1993) 6 Cal. 4th 307, 321, 24 Cal. Rptr. 2d 597, 862 P.2d 158*).

[2] Comments

[a] Use of Form

This form may be used to resist arbitration when the petitioner has waived the right to compel arbitration by failing to demand arbitration within the time specified in the parties' contract.

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in opposition to one seeking to compel arbitration [*see § 20A.10*] and with the general waiver *authorities in § 20A.80*. If there may be other grounds of waiver, counsel should also use one or more of the authorities from §§ 20A.82-20A.86. Counsel may wish to include authority from *Ch. 20, Arbitration: Compelling, § 20.30* regarding the applicability of general state law contract principles.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should clearly indicate the time specified by the contract for demanding arbitration and petitioner's failure to make timely demand.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For a form of response to a petition to compel arbitration that may be supported by this memorandum, as well as a procedural checklist, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

[d] Related Memoranda

For memoranda to combine with this form, regarding other matters that the opposition may need to address, see *§§ 20A.10-20A.12, 20A.20 et seq., 20A.30 et seq., 20A.40 et seq., and 20A.87* et seq.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For forms addressing general contract principles, see Ch. 50, *Contracts* .

[3] Discussion of Authorities

[a] Right to Arbitrate Waived by Failure to Demand Within Contractual Time Limit

Platt Pacific, Inc. v. Andelson *(1993) 6 Cal. 4th 307, 24 Cal. Rptr. 2d 597, 862 P.2d 158* , involved a petition to compel arbitration in an action to recover funds owed under a home construction contract. After commencement of the suit, the parties entered into an agreement for alternative resolution of their disputes in the event that settlement efforts, in conjunction with a scheduled voluntary settlement conference, were unsuccessful. The agreement provided that the parties must file a demand for arbitration not later than a specified date. Defendant's counsel canceled the settlement conference and plaintiff demanded arbitration approximately two months after the cut-off date. The arbitrator concluded that it did not have authority to arbitrate the matter, and the trial court denied plaintiff's petition to compel arbitration on the ground that plaintiff failed to make a timely demand. The court of appeal affirmed.

The Supreme Court affirmed. The plaintiffs contended that the court of appeal erred in holding that a failure to demand arbitration by the date specified in an arbitration agreement is a waiver of the right to arbitrate. They asserted that determination of waiver requires an evaluation of the state of mind of the party alleged to have waived arbitration, and the extent of prejudice to the other contracting party. The Court disagreed, pointing out that "waiver" has been used to refer to a number of concepts. In addition to the meaning cited by the plaintiffs, waiver can also mean the loss of an

opportunity or a right as a result of a party's failure to perform an act it is required to perform, regardless of the party's intent to abandon or relinquish the right (*6 Cal. 4th 307, 313-315)* . It is this latter construction given by California courts for the rule that arbitration must be demanded within the time agreed on by the parties [*citing Jordan v. Friedman (1946) 72 Cal. App. 2d 726, 727, 165 P.2d 728]* (*6 Cal. 4th 307, 315)* . In support of their position, the plaintiffs cited *Napa Association of Public Employees v. County of Napa (1979) 98 Cal. App. 3d 263, 159 Cal. Rptr. 522* . The Supreme Court, however, held that the portion of *Napa Association* on which plaintiffs' relied was dicta based on distinguishable cases dealing with determining whether an arbitration was timely when it is required to be made within a reasonable time or with whether a party, by conduct inconsistent with arbitration, has abandoned the right to demand it (*6 Cal. 4th 307, 316-318)* . Thus, the Court held that a contractual requirement that a party's demand for arbitration must be made within a certain time is a condition precedent to the right to arbitration. In the absence of a legal excuse or subsequent modification of the parties' agreement, the failure to submit the dispute to arbitration within the agreed time precludes judicial enforcement of the right to arbitrate (*6 Cal. 4th 307, 321)* .

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2-20A California Points & Authorities § 20A.82

§ 20A.82 Waiver by Failure to Demand Arbitration Within a Reasonable Time

[1] FORM

RESPONDENT CANNOT BE COMPELLED TO ARBITRATE THE CONTROVERSY PETITIONER SEEKS TO ARBITRATE BECAUSE PETITIONER HAS WAIVED THE RIGHT TO COMPEL ARBITRATION BY FAILING TO DEMAND ARBITRATION WITHIN A REASONABLE TIME.

A. Waiver by Failure to Demand Arbitration Within a Reasonable Time. When an arbitration agreement does not specify a time within which arbitration must be demanded, a reasonable time is allowed based on the circumstances of the case, after which the right to arbitrate is waived (*Sawday v. Vista Irrigation Dist. (1966) 64 Cal. 2d 833, 836, 837, 52 Cal. Rptr. 1, 415 P.2d 816* ; *Allstate Ins. Co. v. Gonzalez (1995) 38 Cal. App. 4th 783, 793, 45 Cal. Rptr. 2d 491*). Failure to remember that the agreement contained an arbitration provision does not preclude a finding of waiver by unreasonable delay (*Zamora v. Lehman (2010) 186 Cal. App. 4th 1, 18, 111 Cal. Rptr. 3d 335*).

[2] Comments

[a] Use of Form

This form may be used to resist arbitration when the petitioner has waived the right to compel arbitration by failing to demand arbitration within a reasonable time.

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in opposition to one seeking to compel arbitration [*see § 20A.10*] and with the general waiver *authorities in § 20A.80*. If there may be other grounds of waiver, counsel should also use one or more of the authorities from §§ 20A.81, 20A.83-20A.86. Counsel may wish to include authority from *Ch. 20, Arbitration: Compelling, § 20.30* regarding the applicability of general state law contract principles.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should clearly indicate why the delay constitutes an unreasonable time, including, if was the case, respondent's repeated requests for petitioner to demand arbitration.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For a form of response to a petition to compel arbitration that may be supported by this memorandum, as well as a procedural checklist, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

[d] Related Memoranda

For memoranda to combine with this form, regarding other matters that the opposition may need to address, see *§§ 20A.10-20A.12, 20A.20 et seq., 20A.30 et seq., 20A.40 et seq., and 20A.87* et seq.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For forms addressing general contract principles, see Ch. 50, *Contracts* .

[3] Discussion of Authorities

[a] Waiver by Failure to Demand Arbitration Within a Reasonable Time

Sawday v. Vista Irrigation Dist. *(1966) 64 Cal. 2d 833, 52 Cal. Rptr. 1, 415 P.2d 816* , involved parties to a lease under which the lessor, an irrigation district which had financed its purchase by bonds, reserved the right to remove water from the premises. If the lessee was damaged by such removal, the rent was subject to reduction after demand therefor and, in the event of disagreement, arbitration of the claim. The lessee requested rent adjustment for three years after the lessor began removing water but the lessor denied the demand. Many years later, just before the lease expired and could no longer be renewed, the lessee demanded arbitration for claimed damages for the past decade. The lessor appointed an arbitrator but expressly reserved the right to contest the claim on the basis of the statute of limitations, and it thereafter brought an action for declaratory relief, seeking to terminate the arbitration. The lessee petitioned to compel arbitration. On consolidation of the matters, the lower court ruled that the lessee was guilty of laches for most of the years' damages in question, and it ordered arbitration as to the final two years in issue but denied arbitration as to the previous years. The lessee appealed.

The Supreme Court affirmed, holding the lessee waived the right to compel arbitration as to the majority of the years' damages in issue. When the agreement does not specify a time within which arbitration must be demanded, a reasonable time is allowed. What constitutes a reasonable time is a question of fact, depending on thesituation of the parties, the nature of the transaction, and the facts of the particular case (*64 Cal. 2d 833, 836)* . Under the circumstances of the instant case, the Court concluded the lessor was entitled to assume it would receive the full amount of rent provided by the lease in order to meet its bond service requirements, and therefore the lessee should have made a claim for adjustment within one year after the year in which damages were alleged (*64 Cal. 2d 833, 837)* .

The facts and procedural background of ***Allstate Ins. Co. v. Gonzalez*** *(1995) 38 Cal. App. 4th 783, 45 Cal. Rptr. 2d 491* , and the portion of the opinion addressing the accrual of the cause of action to compel specific performance of the uninsured motorist arbitration provision are discussed in *Ch. 20, Arbitration: Compelling, § 20.43[3][a]*. To summarize the time line: the accident occurred in 1986; the injured driver filed a personal injury action against the owner and operator of the uninsured vehicle in 1987; in 1989, the injured driver informed Allstate by letter that there were uninsured motorist claims arising from the accident, but did not make formal demand for arbitration until February, 1992. Although the statute of limitations had not expired, because it did not commence until Allstate refused to arbitrate in February, 1992, the court of appeal held that the delay of three years and several months was unreasonable as a matter of law so as to amount to waiver of the right to arbitration of the uninsured motorist claim (*38 Cal. App. 4th 783, 793)* . During that period, Gonzalez had several attorneys and Allstate had urged him several times to make formal demand for arbitration. In view of what the statue required, the 1989 letter was not a proper demand (*38 Cal. App. 4th 783, 792)* . The burden was on Gonzalez, not the insurance company to pursue arbitration. While lack of prejudice to the other party is a factor to weigh when the claimant has been diligent, given Gonzalez' protracted and unexplained delay in filing a formal demand for arbitration, the court found it unnecessary to address whether Allstate was prejudiced by the delay. Nor did the court of appeal find any merit in Gonzalez' contention that Allstate had acquiesced in the delay (*38 Cal. App. 4th 783, 793)* .

In ***Zamora v. Lehman*** *(2010) 186 Cal. App. 4th 1, 111 Cal. Rptr. 3d 335* , the court of appeal reversed the trial court's finding of no waiver by two defendants who had engaged in delay and discovery, but affirmed the trial court's finding of no waiver by a third defendant who had successfully demurred and otherwise substantively made only settlement efforts. The portion of the decision discussing the factors for determination of waiver of the right to demand arbitration is *set forth in § 20A.80[3][b], above*. The court noted that failure to make a timely demand for arbitration results in a waiver of the right to compel arbitration. Further, none of the cases concerning the failure to timely demand arbitration have used the word "waiver" to mean voluntary relinquishment of a known right. The court then ruled that waiting to file a motion to compel four months before the trial date and one year after the trial court rejected a demurrer based on a statute of limitations defense was an unreasonable delay in making the request and too close to the trial date. The court subsequently ruled that failure to remember that the agreement contained an arbitration provision does not preclude a finding of waiver (*186 Cal. App. 4th 1, 18)* . The portion of the decision discussing waiver by use of prejudicial pretrial procedures and discovery is located at *§ 20A.83[3][a], below* . The portion of the decision dealing with demurrer as waiver is discussed in *Ch. 20, Arbitration: Compelling, § 20.81[3][e], above*. The portion of the decision dealing with attempts to settle as waiver is discussed in *Ch. 20, Arbitration: Compelling, § 20.81[3][d], above*.

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2-20A California Points & Authorities § 20A.83

§ 20A.83 Waiver by Pretrial Procedures or Prejudicial Discovery

[1] FORM

RESPONDENT CANNOT BE COMPELLED TO ARBITRATE THE CONTROVERSY PETITIONER SEEKS TO ARBITRATE BECAUSE PETITIONER HAS WAIVED THE RIGHT TO COMPEL ARBITRATION BY _____ [*specify acts constituting waiver, e.g.*, ENGAGING IN UNILATERAL DISCOVERY WHICH PREJUDICED PLAINTIFF AND WAS INCONSISTENT WITH ARBITRATION].

A. Waiver by Pretrial Procedures or Prejudicial Discovery. Partial litigation of issues in a dispute, through pretrial procedures, or by [unilateral] discovery which prejudices the party resisting arbitration, may justify a finding of waiver of the right to compel arbitration (*Zamora v. Lehman (2010) 186 Cal. App. 4th 1, 19, 111 Cal. Rptr. 3d 335* ; *Sobremonte v. Superior Court (1998) 61 Cal. App. 4th 980, 996, 72 Cal. Rptr. 2d 43* (both); *Davis v. Continental Airlines, Inc. (1997) 59 Cal. App. 4th 205, 214-217, 69 Cal. Rptr. 2d 79* (discovery); *McConnell v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1980) 105 Cal. App. 3d 946, 951, 164 Cal. Rptr. 751* (pretrial proceedings)).

[*Optional*] **B. Prejudice by Discovery.** Prejudice results from the disclosure of defenses and strategies. When one party uses the discovery process to obtain information about the other party's case that they could not obtain in arbitration, and then, having gained that information, seeks to compel arbitration[, in which the party resisting arbitration will not have equivalent discovery rights], the court may reasonably find that the party who conducted discovery has waived its right to compel arbitration (*Sobremonte v. Superior Court (1998) 61 Cal. App. 4th 980, 996-997, 72 Cal. Rptr. 2d 43* ; *Davis v. Continental Airlines, Inc. (1997) 59 Cal. App. 4th 205, 215, 69 Cal. Rptr. 2d 79* ; *see* *Berman v. Health Net (2000) 80 Cal. App. 4th 1359, 1366-1370, 96 Cal. Rptr. 2d 295* (both parties engaged in discovery); Guess?, *Inc. v. Superior Court (2000) 79 Cal. App. 4th 553, 558, 94 Cal. Rptr. 2d 201*).

[*Optional*] **C. Delay Until After Answer.** Delay in seeking to compel arbitration until after the defendant has answered amounts to waiver if procedures and steps taken during the delay are inconsistent with an intent to arbitrate and defendant has suffered prejudice by disclosing its legal strategies in the answer (*Kaneko Ford Design v. Citipark, Inc. (1988) 202 Cal. App. 3d 1220, 1228-1229, 249 Cal. Rptr. 544* ; *see* Guess?, *Inc. v. Superior Court (2000) 79 Cal. App.*

4th 553, 557-558, 94 Cal. Rptr. 2d 201).

[2] Comments

[a] Use of Form

This form may be used to resist arbitration when the petitioner has waived the right to compel arbitration by engaging in pretrial procedures or prejudicial discovery before demanding arbitration. The authorities in this form, except in Optional Paragraph C, involve defendants who engaged in pretrial procedures or prejudicial discovery before seeking to compel arbitration. The *authority in § 20A.84* addresses situations in which either a plaintiff or defendant used the litigation machinery in bad faith.

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in opposition to one seeking to compel arbitration [*see § 20A.10*] and with the general waiver *authorities in § 20A.80*. If there may be other grounds of waiver, counsel should also use one or more of the authorities from §§ 20A.81-20A.82, 20A.84-20A.86. Counsel may wish to include authority from *Ch. 20, Arbitration: Compelling, § 20.30* regarding the applicability of general state law contract principles.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should address the commencement of the litigation, what it involved, and how far it proceeded before petitioner sought to compel arbitration.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For a form of response to a petition to compel arbitration that may be supported by this memorandum, as well as a procedural checklist, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

[d] Related Memoranda

For memoranda to combine with this form, regarding other matters that the opposition may need to address, see *§§ 20A.10-20A.12, 20A.20 et seq., 20A.30 et seq., 20A.40 et seq., 20A.60 et seq., and 20A.87* et seq.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in

this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For forms addressing general contract principles, see Ch. 50, Contracts.

[3] Discussion of Authorities

[a] Waiver by Pretrial Procedures or Prejudicial Discovery

In ***Zamora v. Lehman*** *(2010) 186 Cal. App. 4th 1, 111 Cal. Rptr. 3d 335* , the court of appeal reversed the trial court's finding of no waiver by two defendants who had engaged in delay and discovery, but affirmed the trial court's finding of no waiver by a third defendant who had successfully demurred and otherwise substantively made only settlement efforts. The portion of the decision covering the factors for determination of waiver of the right to demand arbitration is *set forth in § 20A.80[3][b], above*. The portion of the decision discussing unreasonable delay in demanding arbitration is *set forth in § 20A.82[3][a], above*. The court pointed out that the rules of the arbitration service under which the arbitration was to take place did not allow for discovery, yet the party seeking arbitration had undertaken huge quantities of discovery in the judicial action that yielded more than 60,000 documents, among other things. That party failed to show that the contract mistakenly made applicable the wrong set of arbitration rules. Accordingly, the party seeking to compel took advantage of judicial discovery procedures not available in arbitration. Next, the court stated that that party's filing a counterclaim in the judicial action without asking for a stay of the proceedings to pursue arbitration constituted acting inconsistently with the right to arbitrate. Finally, the court ruled that the trial court erred in failing to find waiver by that party, given the prejudice to the other party (*186 Cal. App. 4th 1, 19)* . The portion of the decision addressing lack of waiver by attempting to settle the judicial action is discussed in Ch. 20, Arbitration: Compelling, § 20.91, *above*. The portion of the decision dealing with demurrer as waiver is discussed in *Ch. 20, Arbitration: Compelling, § 20.81[3][e], above*. The portion of the decision dealing with attempts to settle as waiver is discussed in *Ch. 20, Arbitration: Compelling, § 20.81[3][d], above*.

Sobremonte v. Superior Court *(1998) 61 Cal. App. 4th 980, 72 Cal. Rptr. 2d 43* , was an action by bank customers against bank/real party for wrongful setoff of deposit accounts. After the accounts were opened, under terms that allowed the bank to change the terms of the accounts, plaintiffs were allegedly notified of the arbitration provision by inserts included with their periodic account statements. The bank's answer included the affirmative defense that the matter was subject to arbitration, but the bank did not move to compel arbitration until 10 months later, which was only 6 weeks prior to trial. During that time the bank engaged in extensive discovery, filed two demurrers, one cross-complaint, and one motion to transfer the matter to municipal court, participated in five pretrial hearings and two status conferences. Plaintiffs' counsel had spent 200 hours on the matter before defendant moved to compel arbitration. Without making a specific ruling on the issue of waiver, the trial court granted the motion. Plaintiffs sought a writ of mandate to compel the trial court to reverse its order compelling arbitration.

The court of appeal granted the writ, finding that the bank had waived arbitration as a matter of law by delay, by conduct inconsistent with an intent to arbitrate, and by prejudicing plaintiffs (*61 Cal. App. 4th 980, 983-984)* . The court said the bank actively litigated the case and never objected, on the grounds of arbitration, to the setting of a trial date or to discovery propounded by plaintiffs. The bank did, however, object to a number of interrogatories and document requests and sought protective orders and opposed motions by plaintiffs to compel its compliance with discovery. None of those objections or oppositions mentioned arbitration. The court of appeal said it could infer that the bank took advantage of judicial discovery procedures not available in arbitration. The bank also used the judicial process to narrow the scope of the case, demurring to the emotional distress claims and seeking to have the matter transferred to municipal court. The court quoted from *Davis v. Continental Airlines, Inc. (1997) 59 Cal. App. 4th 205, 215, 69 Cal. Rptr. 2d 79* , discussed at [b], *below*, that the vice involved was defendants' use of the discovery process to obtain information about plaintiff's case that they could not have gained in arbitration, and then, having gained that information, sought to change the game to arbitration, in which plaintiff would not have equivalent discovery rights and

that disclosure of defenses and strategies is a prejudice in these circumstances (*61 Cal. App. 4th 980, 995-997)* .

The court of appeal found that plaintiffs had been further prejudiced by their inability to take advantage of the benefits of arbitration as an expedient, efficient, and cost effective method to resolve disputes. Considering the time and money plaintiffs already spent in the judicial system, any benefits they may have achieved from arbitration have been lost (*61 Cal. App. 4th 980, 996)* .

Davis v. Continental Airlines, Inc. *(1997) 59 Cal. App. 4th 205, 69 Cal. Rptr. 2d 79* , is discussed at [b], *below*.

McConnell v. Merrill Lynch, Pierce, Fenner & Smith, Inc. *(1980) 105 Cal. App. 3d 946, 164 Cal. Rptr. 751* , involved a class action suit for usury brought on behalf of margin account customers of the defendant stockbrokers for a three-month period. While all class members had signed agreements with the defendant, only agreements signed after a certain date had arbitration clauses. The defendant answered and had the matter removed to federal court for litigation, but the action was remanded to the state court. On discovery, the defendant affirmed that the later form of agreement was the only one which governed. The plaintiff instituted a lengthy set of class certification hearings, in which defendant filed three separate oppositions. Plaintiff filed two amended complaints during these hearings. The trial court's dismissal of the action for a nonexistent class was appealed, and the Supreme Court returned the action for reconsideration of the class issues. During the second certification contest, the defendant for the first time petitioned to compel arbitration of all claims subject to arbitration, but the trial court ruled the right to compel had been waived, and defendant appealed.

In affirming the order denying arbitration, the court of appeal noted that defendantcited *Doers v. Golden Gate Bridge etc. Dist. (1979) 23 Cal. 3d 180, 151 Cal. Rptr. 837, 588 P.2d 1261* (discussed in *Ch. 20, Arbitration: Compelling, § 20.81[3][a]*) for the proposition that engaging in a lawsuit did not amount to waiver of arbitration until there was a final judgment on the merits. The court disagreed, stating that during the course of a legal action numerous matters can be litigated before there is a final judgment. A party could litigate various issues through demurrers, motions for summary judgment, motions for certification of the class, and the like, yet just before trial demand arbitration. The court concluded that partial or piecemeal litigation of issues in dispute, through pretrial procedures, may in many instances justify a finding of waiver of the right to arbitrate and would be consistent with the law spelled out in *Doers* (*105 Cal. App. 3d 946, 951)* . Reviewing the history of the litigation in the instant case, the court determined there was substantial evidence to support a finding of defendant's waiver of the right to compel arbitration (*105 Cal. App. 3d 946, 952)* .

[b] Prejudice by Discovery

Sobremonte v. Superior Court *(1998) 61 Cal. App. 4th 980, 72 Cal. Rptr. 2d 43* , is discussed at [a], *above*.

Davis v. Continental Airlines, Inc. *(1997) 59 Cal. App. 4th 205, 69 Cal. Rptr. 2d 79* , was an action for sexual harassment in employment brought under California Fair Employment and Housing Act (*Gov. Code §§ 12900* and *12904 et seq.*; FEHA) by a female employee against defendant airline and her male supervisor. Defendants claimed the dispute had to be resolved according to a company procedure specified in the employee handbook. Seven months after filing an answer in which the right to arbitrate was raised as an affirmative defense, defendants moved to compel arbitration. The trial court denied the motion, finding that the procedure in the handbook was not mandatory and that defendants waived any right to compel arbitration by unreasonably delaying their motion until after obtaining extensive discovery from plaintiff. Defendants appealed.

The court of appeal affirmed on the basis of waiver and thus did not reach the issues of whether the employee handbook set forth a binding agreement to arbitrate or whether public policy precludes arbitration of a statutory claim for sexual harassment under FEHA (*59 Cal. App. 4th 205, 207, 217)* . The fact that the party seeking arbitration participated in litigation is not enough; the party who seeks to establish waiver must show that some prejudice has resulted from the other party's delay in seeking arbitration (*59 Cal. App. 4th 205, 212)* . Before moving to compel arbitration, defendants

used discovery procedures to obtain 1,600 pages of documents from plaintiff in 86 categories and took plaintiff's 2-day, 410-page videotaped deposition. Although defendants claimed much of the discovery was designed to prove the agreement to arbitrate, the court of appeal found the record amply supported the trial court's inference that defendants unreasonably delayed their motion to compel arbitration to use discovery to learn plaintiff's strategies, evidence, and witnesses and to pin plaintiff down to a particular version of the facts (*59 Cal. App. 4th 205, 213)* . The deposition covered typical broad-ranging issues, such as plaintiff's attitude towards vulgar remarks and how she handled them. Given its implied finding that defendants engaged in extensive discovery before moving to compel arbitration, the trial court properly found that defendants waived arbitration. Defendants contended that even if they did obtain discovery, plaintiff had not shown prejudice, and in order to establish waiver, plaintiff had to show some prejudice beyond expenses that specifically affected plaintiff's ability to arbitrate, for example faded recollection of witnesses due to delay (*59 Cal. App. 4th 205, 214)* . The court of appeal said there was more prejudice here than incurring of court costs and legal expenses. Defendants used the discovery process to obtain information about plaintiff's case that they could not have gained in arbitration, ad then, having gained that information, sought to change the game to arbitration, in which plaintiff would not have equivalent discovery rights. Prejudice results from the disclosure of defenses and strategies. Although defendants' participation in discovery did not compel a finding of waiver, it presented a question of fact for the trial court. The trial court could reasonably find the discovery conducted was not equivalent for both sides and would work an unfair advantage for defendants if arbitration were ordered. The facts supported the trial court's finding of waiver (*59 Cal. App. 4th 205, 215)* . The extent, significance, and consequences of the discovery were disputed, but reasonable inferences supported the trial court's conclusion that plaintiff suffered prejudice from defendants' delay in seeking arbitration and that defendants therefore waived their right to compel arbitration (*59 Cal. App. 4th 205, 217)* .

The facts and procedural background of ***Berman v. Health Net*** *(2000) 80 Cal. App. 4th 1359, 96 Cal. Rptr. 2d 295* , and the portion of the opinion addressing factors to be considered in determining waiver, are discussed at *§ 20A.80[3][b]*. The court noted that Health Net's discovery included demands for production of documents in 103 categories, several sets of special interrogatories, form interrogatories, notices of deposition (subsequently postponed) and subpoenas for medical records, none of which it would have been able to obtain in an arbitration proceeding. The court agreed with *Davis v. Continental Airlines, Inc. (1997) 59 Cal. App. 4th 205, 215, 69 Cal. Rptr. 2d 79* , discussed *above*, that the vice was in use of discovery processes to gain information which defendants could not have gained in arbitration, and did not require any further specific showing of how that information disadvantaged the plaintiffs; and said that trial court could reasonably infer the discovery revealed information which could not have been gained in arbitration, to the Bermans' prejudice (*80 Cal. App. 4th 1359, 1366)* . The test for prejudice, the court continued, is not whether the discovery reveals secret strategies or confidential information, but whether one party used the discovery processes of the court to gain information about the other party's case which it could not have gained in arbitration. Even discovery responses totally devoid of substantive content can reveal volumes about the strength and weakness of a party's case (*80 Cal. App. 4th 1359, 1367)* . The important fact is that discovery forced the Bermans to reveal their hand (*80 Cal. App. 4th 1359, 1367-1368)* . Health Net contended that Bermans could not prove "specific prejudice" because they also had engaged in discovery; but the court said it could not conclude that prejudice was overcome simply because plaintiff also engaged in discovery (*80 Cal. App. 4th 1359, 1369-1370)* .

The arbitration provisions involved in **Guess?,** ***Inc. v. Superior Court*** *(2000) 79Cal. App. 4th 553, 94 Cal. Rptr. 2d 201* , were in four licensing agreements between petitioner as licensor and PLB as licensee. Petitioner terminated the licensing agreements for nonpayment of royalties and commenced arbitration to recover the royalties owing. While that dispute was being arbitrated, in June, 1999, petitioner sued real party, an investment banker retained by PLB to aid it in a financial turnaround, alleging intentional interference with contractual relations and prospective economic advantage, unfair competition, and related causes of action, not including breach of the licensing agreements. Real party answered the complaint in July, 1999, with a general denial and eight affirmative defenses, none of which mentioned arbitration. Later in July, 1999, petitioner commenced discovery, serving document demands and interrogatories and scheduling more than 10 third-party depositions. Although real party objected to discovery on a variety of grounds, the right to arbitration was not one of them. In August, 1999, real party filed a motion to stay the lawsuit pending the resolution of the Guess/PLB arbitration, but did not suggest that the lawsuit ought to be arbitrated. Real party conceded that it was

not a party to the Guess/PLB arbitration or to the license agreements, but claimed that the lawsuit arose from the same transactions at issue in the arbitration and suggested there was a possibility that the decision in the Guess/PLB arbitration might have some sort of collateral estoppel effect in the lawsuit. The motion was denied. Real party participated in at least four third-party depositions that were conducted during September, 1999. On October 1, 1999, real party moved to compel arbitration in this case, claiming it had negotiated with Guess as PLB's "agent" and that it was therefore entitled to the benefit of the arbitration provisions in the license agreements. Guess opposed the option, pointing out that it had sued real party for real party's own wrongs, not on a theory of derivative liability, and also contending that real party had waived whatever right it had to arbitrate by its delay in raising the point. The trial courted order arbitration. Guess filed a petition for a writ of mandate asking the court of appeal to compel the trial court to vacate that order.

The court of appeal issued the writ without determining whether real party could have compelled arbitration if it sought to do so in a timely manner, but finding that real party had waived any right it might have had to arbitrate (*79 Cal. App. 4th 553, 557, 559)* . The portion of the opinion discussing waiver generally is set forth at § 20A.80[3][a]. In this case, the court of appeal found four factors indicating waiver. First, real party knew about the arbitration provisions in the license agreements since before the lawsuit was filed and served and knew that Guess and PLB were arbitrating pursuant to those provisions. In fact, the same lawyers representing real party in this action represent PLB in the arbitration. Real party never offered any explanation for its decision to defer for three months its demand for arbitration. Second, real party never asserted the right to arbitrate as an affirmative defense (*79 Cal. App. 4th 553, 557)* . At a minimum, the failure to plead arbitration as an affirmative defense is an act inconsistent with the later assertion of a right to arbitrate. Third, real party's other conduct in the lawsuit, specifically moving for the stay and participating in discovery, was wholly inconsistent with a desire to arbitrate. Its participation in discovery took full advantage of the opportunity to test the validity of Guess's claims, both legally and factually, primarily at Guess's expense. Fourth, real party's conduct caused prejudice to Guess in the form of the substantial expense of pretrial discovery and motions that would have been avoided if real party has timely asserted a right to arbitrate and in the form of its disclosure, during the discovery process, of at least some of its trial tactics, which would not have been disclosed in the arbitral arena (*79 Cal. App. 4th 553, 558)* . Without any evidence to support the trial court's refusal to find waiver, the court of appeal found that the motion to compel arbitration should have been denied and issued the writ so ordering (*79 Cal. App. 4th 553, 559)* .

[c] Delay Until After Answer

Kaneko Ford Design v. Citipark, Inc. *(1988) 202 Cal. App. 3d 1220, 249 Cal. Rptr. 544* , was an action by an interior design firm against its client and the owner of the building in which the suite it designed was located. The contract provided for arbitration of any dispute arising out of the contract that the parties could not resolve within 10 days. On August 25, 1986, plaintiff filed a complaint and an ex parte application for stay of the action pending arbitration. Because plaintiff and Citipark were negotiating directly to settle the matter, neither the complaint nor the application was served at that time. The application for stay was denied. Plaintiff served the complaint, but not the application for stay on both defendants in October, 1986. Defendants answered on December 31, 1986. On February 5, 1987, plaintiff filed a motion for stay and request to compel arbitration. Both were denied: the stay was denied because of unreasonable delay in seeking arbitration and resulting prejudice to defendants; arbitration was denied because the owner was not a party to the arbitration agreement and arbitration as to only one defendant might lead to inconsistent results. Plaintiff appealed.

The court of appeal affirmed, finding that plaintiff had unreasonably delayed in seeking arbitration and the procedures and steps it followed were inconsistent with an intent to arbitrate. The cumulative effect of plaintiff's procedures was prejudicial to Citipark (*202 Cal. App. 3d 1220, 1229)* . Even though plaintiff knew after one month that its ex parte application for stay was denied, it did nothing further to obtain the stay or compel arbitration until five and one-half months after filing the complaint. During the negotiations, it failed to inform Citipark of its intent to seek arbitration. By means of Citipark's answer to the complaint, plaintiff obtained information as to Citipark's legal strategies (*202 Cal.*

App. 3d 1220, 1228) . The court said that prejudice had accrued to Citipark from the delay in the forms of time and effort spent, legal expenses and costs incurred, and in the disclosure of its defenses and strategies to plaintiff (*202 Cal. App. 3d 1220, 1229)* .

Guess?, *Inc. v. Superior Court* *(2000) 79 Cal. App. 4th 553, 94 Cal. Rptr. 2d 201* , is discussed at [b], *above*.

[4] Additional Authorities

[a] Waiver by Pretrial Procedures or Prejudicial Discovery

McMillin Development, Inc. Home Buyers Warranty (1998) 68 Cal. App. 4th 896, 80 Cal. Rptr. 2d 611 , was a suit by a builder/insured against its insurer for failure of the insurer to defend a claim (the Spector claim) under a warranty program and builderagreement, which contained an arbitration clause. Plaintiff's other insurers defended the Spector claim, which went to trial and resulted in a defense verdict. Thereafter, plaintiff sued defendant (HBW) for breach of contract, breach of the covenant of good faith and fair dealing, declaratory relief, fraud and negligent misrepresentation, eventually adding causes of action for reformation and rescission. Both parties moved for summary judgment, and it was granted as to the contract claims in favor of HBW. The fraud cause of action was tried to a jury, which found HBW had falsely promised to defend the Spector claim, but also found plaintiff had not suffered any damage by HBW's failure to defend. After a court trial on the remaining causes of action, plaintiff moved for a new trial as to some limited issues. The court ordered a complete new trial. Plaintiff appealed, contending the new trial should have been granted only as to the question of damages. The court of appeal found no abuse of discretion and remanded for retrial of all issues. While that appeal was pending, plaintiff filed a second suit based on HBW's failure to defend another claim (the Mumby claim). HBW removed that case to federal court and obtained an order compelling arbitration of that dispute. On remand of the first suit for retrial, HBW moved to compel arbitration. Plaintiff contended HBW had waived the right to arbitrate, and the trial court agreed. HBW appealed.

The court of appeal affirmed, stating that under well-established legal principles parties may participate in judicial proceedings without losing the right to arbitrate only so long as their participation does not substantially prejudice the rights of their opponents (*68 Cal. App. 4th 896, 909)* . In discussing prejudice, the court said that prejudice can be established when discovery and motions have given the party seeking to arbitrate an opportunity to test both the legal validity and the factual persuasiveness of its opponent's position, usually at considerable expense to that opponent and while depriving that opponent of the efficiencies that would have been available to it by way of arbitration (*68 Cal. App. 4th 896, 910)* .

Weisman v. Johnson (1982) 133 Cal. App. 3d 289, 183 Cal. Rptr. 792 , was an action for accounting, breach of contract, and common counts, arising from three separate loan transactions, the first of which was evidenced by an agreement with an arbitration provision. Plaintiff commenced that action. Defendant resisted. While refusing to stipulate to personal jurisdiction or arbitration in Ontario, Canada, defendant, brought motions to quash service, first as to himself and then as to the company that was his alter ego, and which was added as a defendant by an amended complaint. One month after having lost the last of those motions, defendant sought to compel arbitration. The motion was denied, based on waiver and bad faith, in part due to a letter placed in evidence which the court characterized as showing that the petition to compel arbitration was not brought in good faith, but rather to do everything in defendant's power to avoid litigation, as well as arbitration. Defendant appealed.

The court of appeal affirmed. The court discussed defendant's ownership of a home in Los Angeles as well as the fact that he had filed a petition for dissolution of marriage at about the time the lawsuit was commenced, alleging himself to be a resident of Los Angeles for at least three months. All this the court said was evidence of an attempt to delay a hearing on the merits and of the fact that defendant would not voluntarily submit to arbitration even though it was based on his own demand (*133 Cal. App. 3d 289, 293-295)* . Defendant also contended that a finding of prejudice was required before he could be held to have waived his right to arbitration. The court of appeal said sufficient prejudice to

dismiss a petition to arbitrate is established when a party incurs monetary expense in furtherance of litigation. Such prejudice because of defendant's delaying tactics, was established by plaintiff's opposition to the petition to compel arbitration. The court concluded that when prejudice has been demonstrated to the court, a specific finding of prejudice is not necessary (*133 Cal. App. 3d 289, 296)* .

Lounge-A-Round v. GCM Mills, Inc. (1980) 109 Cal. App. 3d 190, 166 Cal. Rptr. 920 , involved a suit for breach of contract and breach of warranty between a buyer (plaintiff) and seller (defendant) of fabric. The suit was filed in November, 1977, in Los Angeles. Defendant petitioned for arbitration in the United States District Court for the Southern District of New York. In March, 1978, that petition was dismissed with prejudice pursuant to stipulation of the parties and that court's own deliberations. Defendant filed a cross-complaint in the California action in March, 1978, and discovery was undertaken by both parties. In December, 1978, defendant sought to compel arbitration in California. The petition was denied on the grounds of waiver and res judicata, and defendant appealed.

The court of appeal affirmed. While the court of appeal found that the trial court erred in applying California law on the issue of waiver, the error was not reversible because no prejudice resulted (*109 Cal. App. 3d 190, 201-202)* . The court cited a New York case for the proposition that there comes a time in litigation between parties who have agreed to arbitrate when it becomes unfair to permit one side to resort to arbitration over the protest of the other, and that time is when the defendant files an answer on the merits (*109 Cal. App. 3d 190, 200)* . Here, defendant indicated to plaintiff that it would not arbitrate, but would litigate the matter. Defendant filed a cross complaint on a fourth contract that was not covered by the complaint; it answered without asserting any affirmative defenses based on arbitration; and nine months later, it sought to compel arbitration. In the meantime, plaintiff had incurred monetary expense in furtherance of the litigation (*109 Cal. App. 3d 190, 201)* . The court of appeal concluded that the prejudice sustained by plaintiff was sufficient to support the conclusion that defendant waived whatever rights to arbitration it may have had (*109 Cal. App. 3d 190, 202)* .

[b] Prejudice by Discovery

See *McMillin Development, Inc. Home Buyers Warranty (1998) 68 Cal. App. 4th 896, 80 Cal. Rptr. 2d 611* , discussed at [a], *above*.

California Points & Authorities

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20A ARBITRATION: RESISTING
PART II. FORMS
D. Defenses to Arbitration

2-20A California Points & Authorities § 20A.84

§ 20A.84 Waiver by Bad Faith Use of Litigation Machinery

[1] FORM

RESPONDENT CANNOT BE COMPELLED TO ARBITRATE THE CONTROVERSY PETITIONER SEEKS TO ARBITRATE BECAUSE PETITIONER WAIVED THE RIGHT TO COMPEL ARBITRATION BY _____ [e.g., INITIATING LITIGATION OF THIS MATTER IN BAD FAITH] AND TO PREJUDICE RESONDENT(S).

A. Waiver by Engaging in Misleading Settlement Tactics. Although settlement efforts do not usually waive the right to arbitrate if the settlement is not finalized, when a party attempts to obtain settlement by misleading the court and _____ [other parties *or* class members] about the benefits of the proposed settlement and the other party or parties were prejudiced by those tactics, the party who engaged in the misleading tactics has forfeited its right to arbitrate. This result is based in part on the principle that one cannot profit from his or her own misconduct (*Aviation Data, Inc. v. American Express Travel Related Services Company, Inc. (2007) 152 Cal. App. 4th 1522, 1539-1542, 62 Cal. Rptr. 3d 396*).

[*OR*]

A. Waiver by Filing Litigation in Bad Faith to Prejudice Defendant. The mere filing of a lawsuit, if done in bad faith, can constitute a waiver of the right to arbitration if defendant was prejudiced by the plaintiff's conduct (*Christensen v. Dewor Developments (1983) 33 Cal. 3d 778, 783-784, 191 Cal. Rptr. 8, 661 P.2d 1088*).

[*OR*]

A. Waiver by Pretrial Litigation in Bad Faith. The bad faith or willful misconduct of a party may constitute a waiver and thus justify a refusal to compel arbitration (*Adolph v. Coastal Auto Sales, Inc. (2010) 184 Cal. App. 4th 1443,*

1452, 110 Cal. Rptr. 3d 104).

[2] Comments

[a] Use of Form

This form may be used to resist arbitration when the petitioner has waived the right to compel arbitration by initiating litigation of the matter in bad faith and to prejudice defendant/respondent.

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in opposition to one seeking to compel arbitration [*see § 20A.10*] and with the general waiver *authorities in § 20A.80*. If there may be other grounds of waiver, counsel should also use one or more of the authorities from §§ 20A.81-20A.83, 20A.85-20A.86. Counsel may wish to include authority from *Ch. 20, Arbitration: Compelling, § 20.30* regarding the applicability of general state law contract principles.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should address the commencement of the litigation, what it involved, how it prejudiced respondent, and why it appears to have been commenced in bad faith.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For a form of response to a petition to compel arbitration that may be supported by this memorandum, as well as a procedural checklist, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

[d] Related Memoranda

For memoranda to combine with this form, regarding other matters that the opposition may need to address, see *§§ 20A.10-20A.12, 20A.20 et seq., 20A.30 et seq., 20A.40 et seq., and 20A.87* et seq.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For forms addressing general contract principles, see Ch. 50, *Contracts* .

[3] Discussion of Authorities

[a] Waiver by Engaging in Misleading Settlement Tactics

Aviation Data, Inc. v. American Express Travel Related Services Company, Inc. *(2007) 152 Cal. App. 4th 1522, 62 Cal. Rptr. 3d 396* , was a class action alleging violations of *Bus. & Prof. Code §§ 17200, 17500* involving schemes to charge card holders for flight and baggage insurance on flights they did not take. Defendant's computer personnel lied during depositions, falsely claiming that defendant's computer programs could not be reprogrammed to delete charges for cancelled flights. In fact, the programs had already been modified to do so. For more than a year the parties engaged in settlement preparations. The proposed settlement would not provide any monetary recovery to plaintiffs, but only make the changes to the computer program to automatically delete the charges relating to cancelled flights. Then, in January, 2004, it was discovered that the program changes had in fact been in effect since November, 2002, and all the proposed settlement materials and court papers relating to it were inaccurate. After the settlement was terminated, the court certified a class. Defendant moved to compel arbitration and to exclude from the class all cardholders who were subject to arbitration agreements. The court denied that motion on the ground that defendant waived its right to arbitration by invoking the judicial forum to pursue settlement, noting that while one does not usually waive the right to arbitration by invoking the judicial forum to pursue settlement, defendant's misrepresentations reprogramming gave rise to unique considerations. Allowing defendant to appearbefore the Court, seek and obtain Court approval for a class settlement, mislead the Court, send out a misleading class notice, and then, when the settlement fails, assert a contractual right to arbitration that would take the claims out of the judicial system and require each cardholder to arbitrate his or her claims individually would allow defendant to profit from its wrong. Defendant appealed.

The court of appeal affirmed (*152 Cal. App. 4th 1522, 1526, 1543)* . The agreement provided that it was governed by the Federal Arbitration Act. The court first addressed whether the issue of waiver was governed by state or federal law and concluded that under either standard, the court of appeal was to defer to the trial court's factual findings but to independently review issues of law (*152 Cal. App. 4th 1522, 1536)* . There was no discussion of whether the court or the arbitrator should determine if there had been a waiver. The court began its discussion of waiver by noting that the term "waiver" describes the consequences of a party's participation in litigation that results in the loss of the right to arbitrate while more generally it refers to the intentional relinquishment of a right. The court used the terms waiver, or loss or abandonment of the right to arbitrate interchangeably (*152 Cal. App. 4th 1522, 1537 n.10*).

To waive arbitration rights, a party must substantially invoke the litigation machinery in a way that prejudices the other party. Any ambiguity as to the scope of the waiver must be resolved in favor of arbitration. Also relevant are the amount of litigation, the time elapsed from the commencement of litigation to the request for arbitration, and the proximity of a trial date when arbitration is sought, whether the party filing the lawsuit intended to elect a judicial forum rather than the arbitral tribunal, the degree to which the party seeking to compel arbitration has contested the merits of its opponent's claims, whether that party has informed its adversary of the intention to seek arbitration even if it has not yet filed a motion to stay court proceedings, and the extent to which both parties have engaged in discovery (*152 Cal. App. 4th 1522, 1537-1538)* . Under both federal and California law, bad faith or willful misconduct may also constitute waiver (*152 Cal. App. 4th 1522, 1538)* . Defendant itself characterized this case as involving more than two years of intense litigation (*152 Cal. App. 4th 1522, 1540)* .

Under federal law, settlement efforts, even those involving class actions in which court involvement is necessary, are not interpreted as waiving the right to arbitrate if the settlement is not finalized (*152 Cal. App. 4th 1522, 1539)* . The trial court found that defendant's delay in pursuing arbitration affected, misled, or prejudiced plaintiff, which had gone from a litigation track in New York to an objector track in California to a litigation track in California and would be required to move again to an arbitration track (*152 Cal. App. 4th 1522, 1540)* . The trial court also found prejudice to the absent class members by defendant's misleading efforts to get them to use the judicial process to resolve thousands

of potential individual claims in a class settlement, in particular, by the court's order preliminarily approving the settlement which prohibited class members from initiating claims in arbitration or in any other court. It found that the legal prejudice was not ameliorated because the absent class members could have telephoned defendant, which might have agreed to return the overcharges that were the subject matter of the litigation. The court of appeal found no reason to question those findings (*152 Cal. App. 4th 1522, 1541)* . When a party attempts to obtain settlement by misleading the court and proposed class members about the benefits of the proposed settlement and the other party or parties were prejudiced by those tactics, then, based in part on the principle that one cannot profit from his or her own misconduct, the party who engaged in the misleading tactics has forfeited its right to arbitrate (*152 Cal. App. 4th 1522, 1542)* .

[b] Waiver by Filing Litigation in Bad Faith to Prejudice Defendant

Christensen v. Dewor Developments *(1983) 33 Cal. 3d 778, 191 Cal. Rptr. 8, 661 P.2d 1088* , involved a party to an arbitration agreement who filed a comprehensive complaint that acknowledged the arbitrability of the dispute. The rationale for the filing of the complaint was plaintiff's desire to discover the legal theories that defendant would rely on in the arbitration. After the first complaint was successfully demurred to, and while a demurrer to the amended complaint was awaiting hearing, plaintiff dismissed the complaint and filed a petition to compel arbitration. The trial court denied the petition, finding that plaintiff had acted in bad faith in filing the complaint, to the prejudice of defendant, and had thereby waived the right to arbitrate under the agreement.

The Supreme Court affirmed. The trial court found that plaintiff had acted in bad faith in filing the complaint, to the prejudice of defendant, and had thereby waived the right to arbitrate under the agreement. In affirming the denial, the Supreme Court set out factors to be considered in determining whether a waiver has been shown, including whether the party seeking arbitration (1) has previously taken steps inconsistent with an intent to invoke arbitration, (2) has unreasonably delayed in seeking arbitration, or (3) has acted in bad faith or with willful misconduct. The Court noted that, while waiver usually requires judicial litigation of the merits of arbitrable issues, waiver can occur before a judgment on the merits if prejudice can be demonstrated [*citing Doers v. Golden Gate Bridge etc. Dist. (1979) 23 Cal. 3d 180, 188, 188 n.3, 151 Cal. Rptr. 837, 588 P.2d 1261* (discussed in *Ch. 20, Arbitration: Compelling, § 20.81[3][a]*)] (*33 Cal. 3d 778, 782)* .

Turning to the facts of the case, the Court found that plaintiff had acted in bad faith in instituting the lawsuit. The Court relied on plaintiff's awareness of the arbitration provision and its applicability to the dispute to conclude that plaintiff's "procedural gamesmanship" in bringing the action waived the right to arbitration (*33 Cal. 3d 778, 783-784)* . The Court distinguished the *Doers* case by pointing out that in that case, plaintiff had not been a direct party to the arbitration agreement and had therefore not violated any contractual obligation, while in the case before it, the lawsuit was brought in knowing disregard of the arbitration proceeding (*33 Cal. 3d 778, 783)* . The Court also upheld the finding that defendant had been prejudiced by the filing of the lawsuit because of the costs and attorney's fees incurred, the delay that the pretrial proceedings entailed, and the resulting difficulty in obtaining testimony of witnesses and records (*33 Cal. 3d 778, 784)* . The finding of prejudice to defendant permitted a finding of waiver without judicial litigation of the arbitrable dispute's merits (*33 Cal. 3d 778, 782)* .

[c] Waiver by Pretrial Litigation in Bad Faith

The court of appeal in ***Adolph v. Coastal Auto Sales, Inc.*** *(2010) 184 Cal. App. 4th 1443, 110 Cal. Rptr. 3d 104* affirmed the trial court's finding of waiver. Defendant repeatedly used the trial court proceedings for its own purposes by challenging the pleadings with demurrers, while steadfastly remaining uncooperative with the plaintiff's attempts to take depositions. All the while, defendant did not breathe a word about the existence of an arbitration agreement, or a desire to pursue arbitration. Defendant, in fact, withheld production of the arbitration agreement until after the demurrer hearing on the day the demurrer was overruled. The court noted that bad faith is a basis for finding waiver, and quoted the trial court's inference, "To believe that defendant was not aware of its late-asserted right to arbitrate until plaintiff filed its SAC strains our imagination to the breaking point." Although the trial court made no express finding of bad

faith, the Court of Appeals found sufficient evidence for one (184 Cal. App. 4th 1443, 1452).

[4] Additional Authorities

[a] Waiver by Filing Litigation in Bad Faith to Prejudice Defendant

Weisman v. Johnson (1982) 133 Cal. App. 3d 289, 293-296, 183 Cal. Rptr. 792 , discussed at *§ 20A.83[4][a]*, involves a finding that defendant participated in litigation and petitioned for arbitration in bad faith and for only purposes of delay.

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D. Defenses to Arbitration

2-20A California Points & Authorities § 20A.85

§ 20A.85 Medical Insurer's Bad Faith Failure to Inform Insured of Right to Arbitrate

[1] FORM

RESPONDENT CANNOT BE COMPELLED TO ARBITRATE THIS CONTROVERSY BECAUSE PETITIONER WAIVED THE RIGHT TO COMPEL ARBITRATION BY FAILING, IN BAD FAITH, TO ADVISE RESPONDENT OF HIS/HER RIGHT TO ARBITRATE.

A. Medical Insurer's Bad Faith Failure to Inform Insured of Right to Arbitrate. A medical insurer forfeits its right to compel arbitration if, given the totality of the circumstances, its failure to inform its insured adequately of the availability of, or procedure for arbitration, is designed to mislead the insured and amounts to a breach of the covenant of good faith and fair dealing (*Davis v. Blue Cross of Northern California (1979) 25 Cal. 3d 418, 424, 431, 158 Cal. Rptr. 828, 600 P.2d 1060* ; *Chase v. Blue Cross of California (1996) 42 Cal. App. 4th 1142, 1157-1158, 50 Cal. Rptr. 2d 178*).

[*Optional*] **B. Federal Arbitration Act Not Offended by Application of Doctrine of Bad Faith.** The covenant of good faith and fair dealing is a general contract principle. Therefore, application of that principle to deny arbitration to an insurer that has acted in bad faith to mislead its insured does not offend the federal law of substantive arbitrability and is not preempted by the Federal Arbitration Act (*see 9 U.S.C. § 2*; *Chase v. Blue Cross of California (1996) 42 Cal. App. 4th 1142, 1160-1162, 50 Cal. Rptr. 2d 178*).

[2] Comments

[a] Use of Form

This form may be used to resist arbitration when the petitioner is an insurer and has waived, or forfeited, the right to compel arbitration by failing to inform insured respondent of his or her right to arbitration, if, given the totality of the circumstances, that failure amounted to breach of the covenant of good faith and fair dealing. For insurer's actions to amount to bad faith, there must be evidence of the insurer's intent to mislead the policyholder [*Chase v. Blue Cross of California (1996) 42 Cal. App. 4th 1142, 1148, 1157, 50 Cal. Rptr. 2d 178]* .

Optional Paragraph B is to establish that the federal law of substantive arbitrability is not offended by and does not preempt application of the doctrine of bad faith.

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in opposition to one seeking to compel arbitration [*see § 20A.10*] and with the general waiver *authorities in § 20A.80*. If there may be other grounds of waiver, counsel should also use one or more of the authorities from §§ 20A.81-20A.84, 20A.86. Counsel may wish to include authority from *Ch. 20, Arbitration: Compelling, § 20.30* regarding the applicability of general state law contract principles.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should address the placement of the arbitration provision in the policy and any other materials furnished by the insurer to the insured and all other circumstances establishing bad faith.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For a form of response to a petition to compel arbitration that may be supported by this memorandum, as well as a procedural checklist, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

[d] Related Memoranda

For memoranda to combine with this form, regarding other matters that the opposition may need to address, see *§§ 20A.10 -20A.12, 20A.20 et. seq., 20A.30 et. seq., 20A.40 et. seq., 20A.60 et. seq., and 20A.87* et. seq.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For forms addressing general contract principles, see Ch. 50, *Contracts* .

[3] Discussion of Authorities

[a] Medical Insurer's Bad Faith Failure to Inform Insured of Right to Arbitrate

In ***Davis v. Blue Cross of Northern California*** *(1979) 25 Cal. 3d 418, 158 Cal. Rptr. 828, 600 P.2d 1060* , two class actions had been filed against defendant health insurer by a number of individuals insured under its hospitalization policies. The trial court denied defendant's petition to compel arbitration because defendant had failed to apprise its insureds at the time it rejected their claims of the availability of arbitration or the procedure for initiating it. Defendant appealed the order.

Affirming the lower court ruling, the Supreme Court found that the trial court had properly concluded that defendant had breached its duty of good faith and fair dealing by failing to advise its insureds of the availability of, and of the procedure for initiating, arbitration; therefore, the defendant waived or forfeited any right to subsequently compel its insureds to resort to arbitration (*25 Cal. 3d 418, 424, 431)* . The Court noted that defendant had given obscure placement to its information on arbitration to its insureds, and had worded the information ambiguously. Despite knowing that the insureds frequently would be unaware of the right to, or the procedure for, arbitration, it took no steps to apprise them of the procedure. Its routine format in a letter rejecting a claim made no mention of the availability of or procedure for arbitration (*25 Cal. 3d 418, 426)* . Because of the insurer's deliberate action of not so informing its insureds, it had transformed the arbitration clause into a unilateral provision, available only to itself but not subserving the purposes of arbitration policy (*25 Cal. 3d 418, 430)* .

Chase v. Blue Cross of California *(1996) 42 Cal. App. 4th 1142, 50 Cal. Rptr. 2d 178* , involved claims for plaintiff's son's treatment for leukemia, especially a bone marrow transplant for which defendant refused to pay, on the ground that it was excluded as an investigative procedure. During more than two years of the boy's illness, plaintiff received many letters denying coverage, at least 10 of which referred to the arbitration provision in the policy, and many explanation of benefit forms, which explained the arbitration procedure on their reverse sides. The letter denying coverage for the bone marrow transplant, however, did not mention arbitration. Plaintiff wrote requesting reconsideration of that denial. When she had heard nothing from defendant for six months, she contacted the State Department of Insurance. Defendant again denied the claim. Finally, plaintiff commenced an action for damages, and defendant petitioned to compel arbitration. The petition was denied because, even thought the trial court found the arbitration clause was "clear, plain, conspicuous, and unambiguous," defendant had intentionally waived and relinquished its right to compel arbitration because communications between it and Chase did not mention the arbitration provision. Defendant appealed.

The court of appeal reversed and remanding, finding that the trial court erred in basing its decision only on isolated facts of the defendant's contact with plaintiff, because a finding of waiver can only be reached after consideration of all relevant circumstances and requires a determination of bad faith conduct by the insurer (*42 Cal. App. 4th 1142, 1148)* . The court of appeal first discussed the fact that this is not actually waiver, in the sense of an intentional relinquishment of a known right, but a forfeiture, resulting from a failure to perform an obligation under the contract (*42 Cal. App. 4th 1142, 1148-1151)* . The court stated that the covenant of good faith and fair dealing, in the context of insurance contracts, requires the insurer to give at least as much consideration to the welfare of its insured as it gives to its own interests. Part of this duty is to inform the insured of the insurer's rights and obligations under the contract (*42 Cal. App. 4th 1142, 1152)* . However, the court of appeal said this obligation does not go as far as the statement of dictum in the plurality opinion in *Sarchett v. Blue Shield of California (1987) 43 Cal. 3d 1, 15, 233 Cal. Rptr. 76, 729 P.2d 267* , (discussed at [4][a], *below*) that an insurer must take affirmative steps to inform an insured of his or her rights when the insured disputes a denial of coverage. The insurer has no ongoing duty to keep the insured informed of his or her rights once those rights have been clearly set forth in the policy and no duty to inform the insured of the arbitration provision in every communication (*42 Cal. App. 4th 1142, 1155, 1158)* . The court distinguished this situation from the one in *Davis v. Blue Cross of Northern California (1979) 25 Cal. 3d 418, 424, 158 Cal. Rptr. 828, 600 P.2d 1060* , (discussed *above*) because here the arbitration provision was clearly and conspicuously set forth, and there was no finding, as there was in *Davis*, that the insurer deliberately pursued a course of conduct which failed to apprise its insureds of the availability of arbitration (*42 Cal. App. 4th 1142, 1156)* . The court of appeal understood *Davis* and *Sarchett* together to require conduct *designed* to mislead policyholders. Such a requirement balances the enhanced duty of the insurer

against the strong public policy in favor of arbitration. Thus, the court's focus when evaluating an allegation of forfeiture should be on the subjective intent of the insurer. This focus will distinguish the forfeiture from estoppel: forfeiture requires an intent to mislead and is satisfied whether or not the insured is in fact misled. Even if the insured is aware of the right to arbitrate, bad faith tactics designed to mislead merit the sanction of forfeiture. Forfeiture must be established by clear and convincing evidence (*42 Cal. App. 4th 1142, 1157)* . The court concluded that even though it was reversing and remanding because of the lower court's misinterpretation of the governing legal principle, it could not say that forfeiture did not lie here (*42 Cal. App. 4th 1142, 1158)* .

[b] Federal Arbitration Act Not Offended by Application of Doctrine of Bad Faith

The facts and procedural background of ***Chase v. Blue Cross of California*** *(1996) 42 Cal. App. 4th 1142, 50 Cal. Rptr. 2d 178* , and the portion of the opinion addressing the conduct which warrants insurer's forfeiting the right to arbitrate are discussed at [a], *above*. Defendant also contended that the rulings in *Sarchett v. Blue Shield of California (1987) 43 Cal. 3d 1, 15, 233 Cal. Rptr. 76, 729 P.2d 267* , (discussed at [4][a], *below*) and *Davis v. Blue Cross of Northern California (1979) 25 Cal. 3d 418, 424, 158 Cal. Rptr. 828, 600 P.2d 1060* , (discussed at [a], *above*) were preempted by the Federal Arbitration Act (*9 U.S.C. § 1 et seq.*; FAA) under *Allied-Bruce Terminix Companies, Inc. v. Dobson (1995) 513 U.S. 265, 281, 115 S. Ct. 834, 130 L. Ed. 2d 753* , (discussed in *Ch. 20, Arbitration: Compelling, § 20.20[3][b]* and *[d]*). The court of appeal disagreed. The court noted that the covenant of good faith and fair dealingis implied in every contract in California (*42 Cal. App. 4th 1142, 1159)* . The broad purposes of the FAA to countermand judicial reluctance to enforce privately contracted arbitration agreements is not violated merely because general contract law principles preclude enforcement of an arbitration agreement. Federal courts too have held arbitration "waived" by a party who substantially invokes the judicial process to the detriment of the other party. But arbitration agreements are not beyond the reach of ordinary contract principles (*42 Cal. App. 4th 1142, 1160)* . The FAA prevents states from impeding private parties who have agreed to arbitrate or wish to do so, except to the extent the state would intervene ordinarily on general contract grounds. Here, the court said, it was not concerned with a state law designed to frustrate entry into an arbitration agreement or to invalidate the arbitration agreement per se (*42 Cal. App. 4th 1142, 1161)* . This ruling applies only when an insured can demonstrate bad faith by the insurer designed to mislead the insured into not exercising the right to arbitrate for which they had contracted (*42 Cal. App. 4th 1142, 1161-1162)* . Additionally, even if the trial court does declare a forfeiture, it is not of the arbitration clause in toto, but only with respect to a specific claim (*42 Cal. App. 4th 1142, 1162)* .

[4] Additional Authorities

[a] Medical Insurer's Bad Faith Failure to Inform Insured of Right to Arbitrate

Sarchett v. Blue Shield of California (1987) 43 Cal. 3d 1, 233 Cal. Rptr. 76, 729 P.2d 267 , arose from a dispute over defendant's refusal to pay $1,203.05 of hospitalization charges incurred for diagnostic purposes. After six months of correspondence and repeated protests, Blue Shield first mentioned the possibility of peer review, not to plaintiff, but to the hospital's utilization review committee. There was arbitration, which resulted in an award for plaintiff, but that was vacated by the superior court. Plaintiff then filed an action for breach of the covenant of good faith and fair dealing. That resulted in a directed verdict for plaintiff of hospital costs, $20,000 in compensatory damages, and $80,000 in punitive damages. Blue Shield appealed that award.

The Supreme Court reversed and remanded, finding the trial court had erroneously taken from the jury's consideration the issue of whether plaintiff's hospitalization was reasonably intended for the treatment of illness or injury (as required by the policy). The Supreme Court did not find any error in the trial court's directing a verdict that defendant's failure to advise plaintiff of his right to peer review and arbitration breached the duty of good faith and fair dealing, and affirmed the trial court's ruling on that issue. Rather, the Court was uncertain whether plaintiff sustained damages independently attributable to that breach (*43 Cal. 3d 1, 16-17)* . The arbitration clause in the policy was unambiguous on the question of who decides what is "medically necessary." In the event of a dispute the decision is made by a impartial review

committee, subject to further review by arbitration (*43 Cal. 3d 1, 10)* . The Court acknowledged the dissent's point that it appears inconsistent to hold that an arbitration clause is clear and conspicuous, and therefore binding on the insured, but that the insurer was in bad faith because it failed to call the clause to the subscriber's attention. However, the majority found that this apparent inconsistency disappears when reviewed in context. Once it becomes clear to the insurer that its insured disputes its denial of coverage, the duty of good faith does not permit the insurer passively to assume that its insured is aware of his or her rights under the policy. The insurer must instead take affirmative steps to make sure that the insured is informed of his or her remedial rights, which defendant in this case, failed to do at the appropriate time. Further, defendant had reason to know that plaintiff was uninformed about his rights because he repeatedly protested the denial without demanding review by an impartial panel of physicians. Defendant nevertheless denied the claims several times with out mentioning plaintiff's right to review--a course of conduct that the Court concluded appeared designed to mislead subscribers into forfeiting their contractual rights to impartial review and arbitration of disputed claims (*43 Cal. 3d 1, 15)* .

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2-20A California Points & Authorities § 20A.86

§ 20A.86 Waiver by Failure to Proceed to Arbitrate in Manner Provided by Contract

[1] FORM

RESPONDENT CANNOT BE COMPELLED TO ARBITRATE THIS CONTROVERSY BECAUSE PETITIONER WAIVED THE RIGHT TO COMPEL ARBITRATION BY FAILING[, IN BAD FAITH], TO PROCEED WITH ARBITRATION IN THE MANNER PROVIDED BY THE CONTRACT IN THAT HE/SHE/IT _____ [*describe breach of arbitration provision, i.e.,* HAS FAILED TO NOMINATE AN ARBITRATOR WITHIN THE TIME REQUIRED].

A. Waiver by Failure to Proceed to Arbitrate in Manner Provided by Contract. The failure to proceed to arbitrate according to a contractual arbitration provision or to otherwise act in a manner which is clearly inconsistent with an intent to arbitrate may constitute a waiver of the right to arbitrate (*Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 984, 64 Cal. Rptr. 2d 843, 938 P.2d 903* ; *National Farm Workers Service Center, Inc. v. Caratan (1983) 146 Cal. App. 3d 796, 803-804, 194 Cal. Rptr. 617*).

[2] Comments

[a] Use of Form

This form may be used to resist arbitration when the petitioner has waived the right to compel arbitration by failing to proceed with arbitration in the manner provided by the parties' agreement.

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in opposition to one seeking to compel arbitration [*see § 20A.10*] and with the general waiver *authorities in § 20A.80*. If there may be other grounds of waiver, counsel should also use one or more of the authorities from §§ 20A.81-20A.85. Counsel may wish to include authority from *Ch. 20, Arbitration: Compelling, § 20.30* regarding the applicability of general state law contract principles.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his orher case. For example, the argument set forth the portion of the contract that was violated and describe the manner in which petitioner failed to comply with the procedure specified in the contract.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For a form of response to a petition to compel arbitration that may be supported by this memorandum, as well as a procedural checklist, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

[d] Related Memoranda

For memoranda to combine with this form, regarding other matters that the opposition may need to address, see *§§ 20A.10-20A.12, 20A.20 et seq., 20A.30 et seq., 20A.40 et seq., and 20A.87* et seq.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For forms addressing general contract principles, see Ch. 50, *Contracts* .

[3] Discussion of Authorities

[a] Waiver by Failure to Proceed to Arbitrate in Manner Provided by Contract

The facts and procedural background of ***Engalla v. Permanente Medical Group, Inc.*** *(1997) 15 Cal. 4th 951, 64 Cal. Rptr. 2d 843, 938 P.2d 903* , are discussed in *Ch. 20, Arbitration: Compelling, § 20.10[3][a]*. The portion of the opinion addressing the waiver claim in general terms is discussed in *Ch. 20, Arbitration: Compelling, § 20.80[3][b]*. The claim of waiver involved that fact that despite the provision in the arbitration clause that arbitrators be chosen within 60 days, defendant had caused delays so that it had taken over two years, until after the death of the insured, for defendant to acknowledge and agree to the so-called neutral arbitrator. In remanding to the trial court for its determination whether defendant's actions amounted to waiver, the Court concluded that the evidence of Kaiser's course of delay, which was arguably unreasonable or undertaken in bad faith, might provide sufficient grounds for a trier of fact to conclude that Kaiser had waived its arbitration agreement. The court also distinguished the situation in which a delay in choosing arbitrators results from a reasonable and good faith disagreement between the parties; and noted that

in such a situation, a claimant's remedy is a petition under *Code. Civ. Proc. § 1281.6* to have the court appoint the arbitrator(s) (*15 Cal. 4th 951, 984)* .

National Farm Workers Service Center, Inc. v. Caratan *(1983) 146 Cal. App. 3d 796, 194 Cal. Rptr. 617* , was an action for breach of contract. The court of appeal affirmed the trial court's finding that defendant had breached the contract. In its decision the court said that defendant's failure to proceed to arbitrate in the manner and at the time provided in the arbitration provision was a waiver of the right to arbitration. The court noted that defendant had the opportunity to seek arbitration, but instead, acted in a manner clearly inconsistent with an intent to arbitrate (*146 Cal. App. 3d 796, 803-804)* . Defendant's failure to invoke the arbitration machinery was an additional waiver of that right (*146 Cal. App. 3d 796, 804)* .

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2-20A California Points & Authorities § 20A.87

§ 20A.87 Arbitration Agreement Vitiated by Fraud and Involuntary Consent

[1] FORM

THE PETITION TO COMPEL ARBITRATION [AND THE MOTION TO STAY THE ACTION] SHOULD BE DENIED BECAUSE THE AGREEMENT TO ARBITRATE IS UNENFORCEABLE IN THAT RESPONDENT'S ASSENT TO IT WAS NOT VOLUNTARILY OBTAINED.

A. Arbitration Under Void Agreement Is Not Proper. Arbitration should not be compelled if the agreement containing the arbitration provision [or the arbitration provision itself] was induced by fraud, duress, or undue influence such that there was no voluntary mutual assent (*Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 973, 64 Cal. Rptr. 2d 843, 938 P.2d 903* ; *Rosenthal v. Great Western Fin. Securities Corp. (1996) 14 Cal. 4th 394, 416, 58 Cal. Rptr. 2d 875, 926 P.2d 1061* ; *Brown v. Wells Fargo Bank (2008) 168 Cal. App. 4th 938, 954, 85 Cal. Rptr. 3d 817* ; *Jones v. Adams Financial Services (1999) 71 Cal. App. 4th 831, 835, 84 Cal. Rptr. 2d 151* ; *Ford v. Shearson Lehman American Express, Inc. (1986) 180 Cal. App. 3d 1011, 1020, 1024, 1028-1029, 225 Cal. Rptr. 895* ; *Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1977) 67 Cal. App. 3d 19, 32-33, 136 Cal. Rptr. 378*).

[*Optional*] **B. Proving Existence of Agreement to Arbitrate.** [*See Ch. 20, Arbitration: Compelling, § 20.10[1], Paragraph C.*]

[*Optional*] **C. Evidentiary Hearing.** [*See Ch. 20, Arbitration: Compelling, § 20.10[1], Paragraph D.*]

[*Optional*] **D. Federal Right to Jury Trial Is Not Applicable in State Court.** [*See Ch. 20, Arbitration: Compelling, § 20.10[1], Paragraph E.*]

[*Optional*] **E. Promissory Fraud Inducing Arbitration Provision.** *Code of Civil Procedure Section 1281.2(b)* provides that a petition to compel arbitration is not to be granted when there are grounds for rescinding the agreement, including fraud which goes to the making of the agreement to arbitrate rather than to the making of the contract in general. Promissory fraud is a subspecies of fraud and deceit. Promissory fraud is sufficient to defeat an arbitration

provision when the party opposing arbitration proves (1) that the party seeking to compel arbitration misrepresented its arbitration agreement in that it entered into the agreement knowing that at least there was a likelihood it[s agents] would breach some material part of the arbitration provision; (2) that the party seeking to compel arbitration employed that misrepresentation to induce reliance on the part of the party resisting arbitration[, or his or her agent]; and (3) that the party resisting arbitration[, or his or her agent], relied on those representations to his or her detriment. There is no requirement to show pecuniary damage when fraud is used as the basis for a defense to a petition to compel arbitration rather than in an action for damages (*Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 974-975, 64 Cal. Rptr. 2d 843, 938 P.2d 903*).

[*Optional*] **F. Reliance May Be Inferred.** There is a presumption or inference of reliance when the misrepresentation was material. In order to survive a summary judgment-like proceeding, the party seeking to prove fraud need only show the misrepresentation was material; and in the absence of conclusive rebutting evidence, the trier of fact can infer reliance. A representation is material if the person would not, in all reasonable probability, have entered into the contract or transaction in the absence of the representation. It is not necessary that reliance on the misrepresentation be the sole or even the predominant or decisive factor in influencing the person's conduct. It is enough that the representation played a substantial part (*Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 976-977, 64 Cal. Rptr. 2d 843, 938 P.2d 903*).

[*Optional*] **G. Agent's Reliance Is Sufficient.** Because an employer, in negotiating a health care agreement for its employees, is an agent of the employees and their fiduciary, the employer's reliance on a material misrepresentation is attributed to an employee who enrolls in that health plan (*Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 977-979, 64 Cal. Rptr. 2d 843, 938 P.2d 903*).

[*Optional*] **H. Fraud in Inception or Execution of Contract as a Whole.** To defeat arbitration on the ground of fraud in the inception or execution of a contract that contains an agreement to arbitrate, the party resisting arbitration must prove that the party seeking to compel arbitration deceived him or her as to the nature and effect of the documents he or she was signing and that had he or she known the true nature and effect of the documents, he or she would not have signed them (*see* *Hotels Nevada v. L.A. Pacific Center, Inc. (2006) 144 Cal. App. 4th 754, 763-764, 50 Cal. Rptr. 3d 700* ; *Jones v. Adams Financial Services (1999) 71 Cal. App. 4th 831, 835, 84 Cal. Rptr. 2d 151* ; *Brown v. Wells Fargo Bank (2008) 168 Cal. App. 4th 938, 958, 85 Cal. Rptr. 3d 817* ; *Strotz v. Dean Witter Reynolds, Inc. (1990) 223 Cal. App. 3d 208, 218, 272 Cal. Rptr. 680* ; *Ford v. Shearson Lehman American Express, Inc. (1986) 180 Cal. App. 3d 1011, 1028-1029, 225 Cal. Rptr. 895* ; *Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1977) 67 Cal. App. 3d 19, 32-33, 136 Cal. Rptr. 378*).

[*Optional*] **I. Permeation Doctrine No Longer Recognized in California.** To the extent it indicates that an agreement to arbitrate may be found invalid simply because the contract as a whole was induced by fraud, the permeation doctrine conflicts with federal law. To the extent to permeation doctrine is merely another name for fraud in the execution of a contract, it is unnecessary. Thus there is no legally valid use for the theory, and California courts decline to further recognize it (*Rosenthal v. Great Western Fin. Securities Corp. (1996) 14 Cal. 4th 394, 418-419, 58 Cal. Rptr. 2d 875, 926 P.2d 1061* ; *see also* *Duffens v. Valenti (2008) 161 Cal. App. 4th 434, 448, 74 Cal. Rptr. 3d 311* ; *Hayes Children Leasing Co. v. NCR Corp. (1995) 37 Cal. App. 4th 775, 784, 43 Cal. Rptr. 2d 650*).

[*Optional*] **J. Failure to Read Documents.** Plaintiff's failure to read the documents may be excusable in light of evidence of some physical or other impairment, or of a fiduciary relationship and defendant's misrepresentations (*Jones v. Adams Financial Services (1999) 71 Cal. App. 4th 831, 837-839, 84 Cal. Rptr. 2d 151* (physical and mental infirmities); *Brown v. Wells Fargo Bank (2008) 168 Cal. App. 4th 938, 959, 85 Cal. Rptr. 3d 817* ; *see* *Strotz v. Dean Witter Reynolds, Inc. (1990) 223 Cal. App. 3d 208, 218-219, 272 Cal. Rptr. 680*).

[*Optional*] **K. State Law Grounds for Revocation.** Under the Federal Arbitration Act, whether there is a basis for revocation of an arbitration agreement at law or in equity may be determined under California law that applies to

contracts in general (*see 9 U.S.C. § 2*; *Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 971-972, 64 Cal. Rptr. 2d 843, 938 P.2d 903* ; *Ford v. Shearson Lehman American Express, Inc. (1986) 180 Cal. App. 3d 1011, 1024, 225 Cal. Rptr. 895*).

[2] Comments

[a] Use of Form

This form may be used to resist arbitration when the arbitration clause at issue was induced by fraud (Paragraphs A, E, F, G) or when the entire contract is void for fraud in its inducement or execution (Paragraphs A and H). Paragraphs I-K are for use when those issues may be in contention. If using Paragraph G, counsel may wish to include authority from *Ch. 20, Arbitration: Compelling, § 20.61* regarding an agent's ability to commit the principal to arbitrate. If using Paragraph K, counsel may wish to include authority from *Ch. 20, Arbitration: Compelling, § 20.30* regarding the applicability of general state law contract principles.

Note that although arbitration may eventually be denied if the entire agreement was induced by fraud, under the Federal Arbitration Act, applicable in state court, the arbitrator and not the court must determine in the first instance a challenge to the entire agreement (as opposed to the arbitration provision alone) [*see* *Buckeye Check Cashing, Inc. v. Cardegna (2002) 546 U.S. 440, 126 S. Ct. 1204, 163 L. Ed. 2d 1038* (*Buckeye* discussed in *Ch. 20, Arbitration: Compelling, § 20.10[3][i]*); *Rosenthal v. Great Western Fin. Securities Corp. (1996) 14 Cal. 4th 394, 413-414, 58 Cal. Rptr. 2d 875, 926 P.2d 1061* (discussed in *Ch. 20, Arbitration: Compelling, § 20.42[3][a]* and *[3][f], below*)].

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in opposition to one seeking to compel arbitration [*see § 20A.10*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should indicate why the agreement is void or vitiated because of the fraud, duress, or undue influence, or that the arbitration provision itself was induced by fraud. This argument should distinguish the situation from that addressed in *Ch. 20, Arbitration: Compelling, § 20.42*, which involves fraud in the inducement of the contract generally.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see* *Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For a form of response to a petition to compel arbitration that may be supported by this memorandum, as well as a procedural checklist, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and*

Compelling Arbitration (Matthew Bender).

[d] Related Memoranda

For memoranda to combine with this form, regarding other matters that the opposition may need to address, see *§§ 20A.10-20A.12, 20A.20 et seq., 20A.30 et seq., 20A.40 et seq., and 20A.80* et seq.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For forms addressing general contract principles, see Ch. 50, *Contracts* .

[3] Discussion of Authorities

[a] Arbitration Under Void Agreement Is Not Proper

Code Civ. Proc. § 1281.2(b) provides that one of the exceptions in which the court need not compel arbitration is when it determines that grounds exist for the revocation of the contract containing the agreement to arbitrate.

Engalla v. Permanente Medical Group, Inc. *(1997) 15 Cal. 4th 951, 64 Cal. Rptr. 2d 843, 938 P.2d 903* , arose out of a medical malpractice claim between plaintiffs' decedent and defendant (Kaiser). That claim was to have been arbitrated under the Service Agreement between decedent's employer and defendant, but decedent died one day after the neutral (third) arbitrator's appointment was acknowledged by defendant, which was approximately three months after the 60 days provided in the Service Agreement for the appointment of the neutral arbitrator by the two party-appointed arbitrators. Plaintiffs' attorney asked defendant not to capitalize on the death, but to stipulate that, contrary to *Yates v. Pollock (1987) 194 Cal. App. 3d 195* , decedent's wife's claim would not be deemed merged with decedent's. Defendant refused to so stipulate. Shortly thereafter decedent's family and representatives refused to continue with the arbitration and filed a complaint for medical malpractice and for fraud, alleging in the fraud claim that defendant had fraudulently induced decedent to enter into the service agreement by falsely representing that it intended to abide by the terms of the agreement regarding the expedition of arbitration, in particular the appointment of arbitrators, when in fact it was likely to take two years rather than the 60 days provided for in the agreement for the arbitrators to be appointed. The complaint also alleged that Kaiser engaged in a course of dilatory conduct designed to postpone Engalla's arbitration hearing until after his death. Defendant petitioned to compel arbitration of the claims in the suit. Plaintiffs opposed the petition on the grounds the agreement had been induced by fraud and that defendant had waived its right to arbitrate by bad faith and unreasonable delay in appointment of arbitrators. The trial court agreed, and refused to grant the petition to compel arbitration, but the court of appeal reversed.

The Supreme Court reversed and remanded to the trial court because there were still issues of fact to be determined by the trial court regarding the claims of fraud and waiver. The portions of the opinion addressing procedural matters are discussed in *Ch. 20, Arbitration: Compelling, § 20.10[3][a]*. In order to defeat a petition to compel arbitration, the parties opposing arbitration must show that the asserted fraud claim goes specifically "to the 'making' of the agreement to arbitrate" rather than to the making of the contract in general. The Court noted that was what plaintiffs alleged and sought in this case (*15 Cal. 4th 951, 973)* . The remainder of the Court's consideration of plaintiff's burden of proof is discussed under [b] and [c], *below*.

The facts and procedural background of ***Rosenthal v. Great Western Fin. Securities Corp.*** *(1996) 14 Cal. 4th 394, 58 Cal. Rptr. 2d 875, 926 P.2d 1061* , and the portions of the opinion addressing the procedure for determining the existence of an arbitration agreement, including any defenses to its enforcement, in general, and the evidentiary nature of that hearing are discussed in *Ch. 20, Arbitration: Compelling, § 20.10[3][a]* and *[b]*, respectively. The portion of the

opinion addressing the arbitrability of fraud claims is discussed in *Ch. 20, Arbitration: Compelling, § 20.42[3][a]*.

Jones v. Adams Financial Services *(1999) 71 Cal. App. 4th 831, 84 Cal. Rptr. 2d 151* , was an action by a legally blind 79-year old woman, who also suffered from Alzheimer's disease and dementia, to cancel a note and deed of trust based on fraud in their execution. Plaintiff had been visited on several occasions by a Ms. J., who tried in interest her in a "reverse" mortgage. Plaintiff, who lived on social security and a small pension, repeatedly told J she was not interested in a reverse mortgage or any other kind of mortgage. After several visits, however, J persuaded plaintiff to go to defendant's office, where plaintiff was tricked into signing the note and deed of trust. Plaintiff was told by J, in the presence of defendant's president, that the papers she was signing were just authorization to obtain the payoff amount of her existing mortgage. Plaintiff did not have her magnifying glass with her at the time and the papers looked to her like "a lot of blurry lines." The check for the loan proceeds was made payable to and delivered to J, who was not a defendant. The first plaintiff learned of the loan and mortgage was when she received a foreclosure notice. Defendants petitioned to compel arbitration pursuant to a provision in the loan application. The petition was denied. Defendants appealed.

The court of appeal affirmed. The court began its discussion by stating the rule that when fraud goes to the inception or execution of an agreement, so that the promisor is deceived as to the nature of his or her act, and actually does not know what he or she is signing, or does not intend to enter into a contact at all, mutual assent is lacking, and the contract is void. Claims of fraud in the execution of the entire agreement are not arbitrable under either state or federal law (*71 Cal. App. 4th 831, 835)* .

In ***Brown v. Wells Fargo Bank*** *(2008) 168 Cal. App. 4th 938, 85 Cal. Rptr. 3d 817* , plaintiffs were Wells Fargo customers with substantial assets. They were a married couple, with the husband being 93 years old, in failing health and legally blind, and the wife being 81 years old. Wells Fargo assigned a "relationship manager" to plaintiffs in order to ensure that the bank handled all of plaintiff's assets. The relationship manager was a Wells Fargo vice president, who made biweekly visits to the plaintiffs' home office in order to manage their financial paperwork. In essence, the relationship manager induced the plaintiffs to rely on her to help provide for their financial well being. At the relationship manager's urging, plaintiffs met with the Wells Fargo financial consultant and opened a brokerage account with him. That brokerage account agreement contained an arbitration clause. In executing the agreement, Wells Fargo treated plaintiffs as any other customers opening a brokerage account. The court found that Wells Fargo approached the execution of the brokerage account agreement as though it were part of an arm's-length transaction, rather than with a fiduciary duty of care. The trial court denied Wells Fargo's motion to compel arbitration on the basis that the arbitration clause was procedurally unconscionable, although it may not have been substantively unconscionable. Significantly, the trial court also concluded that Wells Fargo had established a fiduciary relationship with the plaintiffs, and that this relationship may have given rise to a fiduciary duty on the part of Wells Fargo to make certain that the plaintiffs understood the material terms of the contract they were signing.

The court of appeal agreed with the trial court but found that the trial court failed to consider and rule upon whether there was fraud in the execution of the brokerage account agreement, which conclusion would necessarily preclude enforcement of any part of that agreement, including the arbitration clause. Therefore, the court of appeal reversed the trial court's order and remanded for further proceedings during which the trial court should determine whether there was fraud in the execution of the agreement. The court indicated that the trial court's further proceedings would be consistent with the views about breach of fiduciary duty expressed in the court of appeal's opinion (*168 Cal. App. 4th 938, 959-962)* .

In ***Ford v. Shearson Lehman American Express, Inc.*** *(1986) 180 Cal. App. 3d 1011, 225 Cal. Rptr. 895* , plaintiff filed suit against his former psychotherapist, his business manager, and a securities broker for breach of fiduciary duty, conversion, and civil conspiracy to commit fraud, among other things. The broker moved to compel arbitration, based on arbitration agreements plaintiff had signed with the broker's predecessors in interest. The trial court denied the motion to compel arbitration, and the broker appealed.

The court of appeal affirmed. The court first stated that the case was governed by the Federal Arbitration Act (*9 U.S.C. § 2*) because the agreements involved securities transactions in interstate commerce (*180 Cal. App. 3d 1011, 1017)* . *9 U.S.C. § 2* provides that an arbitration agreement is unenforceable on such grounds as exist for revocation of any contract at law or in equity. The court concluded that plaintiff had successfully pleaded grounds for revocation. Therefore, the threshold issues of whether the agreements were procured by fraud or not voluntarily assented to had to be determined initially by a court and not by arbitration (*180 Cal. App. 3d 1011, 1024)* . The court's discussion of the "permeation" doctrine is omitted here because that doctrine is no longer recognized in California [*see* discussion of *Rosenthal v. Great Western Fin. Securities Corp. (1996) 14 Cal. 4th 394, 418-419, 58 Cal. Rptr. 2d 875, 926 P.2d 1061* , under [f], *below*]. *Ford* alleged that one defendant was a psychotherapist who began treating plaintiff in the early 1970s and soon gave up the full-time practice of psychotherapy to become plaintiff's business advisor. Using the psychotherapist-patient relationship, that defendant was able to gain plaintiff's complete trust and confidence from 1971 through 1983 and used that dominance and confidence to supervise and control plaintiff's wealth and property and plaintiff's access to it. If plaintiff signed the securities trading agreement containing the arbitration provision, he did so because defendants directed him to sign them at a time when he felt he had to comply and had no opportunity to make an independent judgment about whether to sign them. Plaintiff did not know what the agreements said or what their effect was but signed them because he was told to do so (*180 Cal. App. 3d 1011, 1027-1028)* . The court reviewed *Civ. Code § 1573*, relating to constructive fraud in confidential relations (*180 Cal. App. 3d 1011, 1020)* , and *Civ. Code §§ 1550, 1565*, relating to voluntary assent as an essential element of a contract (*180 Cal. App. 3d 1011, 1028)* . There is a well-known distinction between fraud in the inducement and fraud in the inception, factum, or execution. If the fraud goes to the inception or execution of the agreement so that the promisor is deceived as to the nature of his or her act, and actually does not know what he or she is signing, or does not intend to enter into a contract at all, mutual assent is lacking and the contract is void. In such a case, the contract may be disregarded without the necessity of rescission (*180 Cal. App. 3d 1011, 1028)* . The court concluded that the complaint alleged fraud in the inception, which, if proven, would void the arbitration clause (*180 Cal. App. 3d 1011, 1028-1029)* .

Plaintiff in ***Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*** *(1977) 67 Cal. App. 3d 19, 136 Cal. Rptr. 378* , alleged that she was aged and unschooled in business affairs and did not know the true nature or content of the documents. Although defendants knew of plaintiff's ignorance, defendants nevertheless induced plaintiff to sign the documents by misrepresenting their nature and content, and by failing to disclose the specific significant aspects of the agreements. Defendant's motion to compel arbitration was denied, and they appealed.

The court of appeal affirmed. The controversy was governed by the Federal Arbitration Act (*67 Cal. App. 3d 19, 25)* . Affirmance was based in part on the "permeation" doctrine, which is no longer recognized in California [*see* discussion of *Rosenthal v. Great Western Fin. Securities Corp. (1996) 14 Cal. 4th 394, 418-419, 58 Cal. Rptr. 2d 875, 926 P.2d 1061* , under [f], *below*]. The court also based its affirmance on constructive fraud and defendants' abuse of the confidential relationship, saying the complaint sufficiently alleged fraud and undue influence, not only in the inducement of the entire lending agreement, but also in the inducement of the arbitration clause (*67 Cal. App. 3d 19, 32-33)* .

[b] Promissory Fraud Inducing Arbitration Provision

The facts and procedural background of ***Engalla v. Permanente Medical Group, Inc.*** *(1997) 15 Cal. 4th 951, 64 Cal. Rptr. 2d 843, 938 P.2d 903* , are discussed under [a], *above*. The Court construed *Code Civ. Proc. § 1281.2(b)* to mean that a petition to compel arbitration is not to be granted when there are grounds for rescinding the agreement. Fraud is one of the grounds on which a contract can be rescinded [*Civ. Code § 1689(b)(1)*]. In order to defeat a petition to compel arbitration, the parties opposing the petition must show that the asserted fraud claim goes to the making of the agreement to arbitrate rather than to the making of the contract in general (*15 Cal. 4th 951, 973)* . In this case, plaintiffs alleged and sought to show fraud in the making of the arbitration agreement, in essence a claim of promissory fraud.

Promissory fraud is a subspecies of fraud and deceit. A promise to do something necessarily implies an intention to perform. When a promise is made without that intention, there is an implied misrepresentation of fact that may be actionable fraud. An action for promissory fraud may lie. The Supreme Court set forth the five elements of an action for fraud and deceit and noted that, as to the fifth element, damages, there is no requirement to show pecuniary damage when fraud is used as the basis for a defense to a petition to compel arbitration rather than in an action for damages (*15 Cal. 4th 951, 973-974)* .

Plaintiff claimed (1) that Kaiser misrepresented its arbitration agreement in that it entered into the agreement knowing that at least there was a likelihood its agents would breach the part of the agreement providing for timely appointment of the arbitrator and the expeditious progress towards and arbitration hearing; (2) that Kaiser employed that misrepresentation to induce reliance on the part of decedent and his employer; (3) that decedent relied on those representations to his detriment. The Court examined the evidence supporting each of those claims. Facts supported the allegation that Kaiser entered into the arbitration agreement with knowledge that it would not comply with its own contractual timelines, or with at least reckless indifference as to whether its agents would use reasonable diligence and good faith to comply with them (*15 Cal. 4th 951, 974)* . Studies of Kaiser's arbitration experience in 1984-1986 showed that in only 3 percent of their claims were the arbitrators appointed within 180 days. In most cases, it took 674 days to appoint the arbitrators. These studies were know to Kaiser and its counsel by 1989. The Court said that it was a reasonable inference from the documentary record before it that Kaiser's contractual representations of expedition were made with knowledge of their likely falsity and in fact concealed an unofficial policy or practice of delay system wide (*15 Cal. 4th 951, 974-975)* . This is especially so when Kaiser's program is compared with other health care organization which typically appoint a third party, such as the American Arbitration Association, to neutrally administer the program. Kaiser described itself as a fiduciary in its agreements, but in fact, entrusted administration to outside counsel retained to act as advocates on its behalf. In other words, there is evidence that Kaiser established a self-administered system in which delay for its own benefit and convenience was an inherent part, despite express contractual statements to the contrary and statements to the contrary in newsletter and other information provided to subscribers (*15 Cal. 4th 951, 975-976)* .

The portion of the Court's opinion considering reliance is discussed under [c], *below*.

[c] Reliance May Be Inferred

The facts and procedural background of ***Engalla v. Permanente Medical Group, Inc.*** *(1997) 15 Cal. 4th 951, 64 Cal. Rptr. 2d 843, 938 P.2d 903* , are discussed under [a], *above*. The Court's opinion considering promissory fraud inducing an arbitration provision is discussed under [b], *above*. As to the reliance element of promissory fraud, the Court said intent to induce reliance can be reasonably inferred when the representation is material (*15 Cal. 4th 951, 977)* . Reliance occurs if the plaintiff would not, in all reasonable probability, have entered into the contract or transaction in the absence of the representation (*15 Cal. 4th 951, 976)* . It is not necessary that reliance on the misrepresentation be the sole or even the predominant or decisive factor in influencing the plaintiff's conduct. It is enough that the representation played a substantial part (*15 Cal. 4th 951, 976-977)* . There is a presumption or inference of reliance when the misrepresentation was material. In order to survive a summary judgment-like proceeding, plaintiff need only show the misrepresentation was material, and in the absence of conclusive rebutting evidence, the trier of fact can infer reliance (*15 Cal. 4th 951, 977)* .

The materiality of the misrepresentations is this case was complicated by the fact that decedent's employer was the primary decision maker responsible for selecting Kaiser, not decedent. In negotiating group medical benefits for its employees, the employer is agent for its employees. An agency relationship is a fiduciary one, requiring the agent to act in the best interests of its principal (*15 Cal. 4th 951, 977)* . Thus, a material misrepresentation in this case is one which would have substantially influenced the employer's health plan selection process (*15 Cal. 4th 951, 977-978)* . Expedition is commonly regarded as one of the primary advantages of arbitration. The employer's personnel officer

stated that whether or not a health plan had an arbitration agreement was not material but that an expeditious way of handling disputes was a consideration in favor of a particular health plan. Thus, the Supreme Court concluded there was sufficient evidence to support the claim that the employer actually relied on Kaiser's misrepresentations (*15 Cal. 4th 951, 978-979)* .

[d] Agent's Reliance Is Sufficient

The facts and procedural background of ***Engalla v. Permanente Medical Group, Inc.*** *(1997) 15 Cal. 4th 951, 64 Cal. Rptr. 2d 843, 938 P.2d 903* , are discussed under [a], *above*. The portion of the Court's opinion considering reliance is discussed at [c], *above*.

[e] Fraud in Inception or Execution of Contract as a Whole

The facts and procedural background of ***Hotels Nevada v. L.A. Pacific Center, Inc.*** *(2006) 144 Cal. App. 4th 754, 50 Cal. Rptr. 3d 700* , and the portion of the opinion discussing the need for the trial court to hold an evidentiary hearing before ruling on a motion to compel arbitration are discussed in *Ch. 20, Arbitration: Compelling, § 20.10[3][a]*. The court of appeal discussed the difference between fraud in the inception and fraud in the execution saying that fraud in the inducement is more usual and occurs when the promisor knows what he or she is signing but his or her consent is *induced* by fraud: mutual assent is present and a contract is formed, which, by reason of the fraud, is *voidable*. In order to escape from its obligations the aggrieved party must *rescind*, by prompt notice and offer to restore the consideration received, if any. Fraud in the execution occurs when the promisor is deceived as to the nature of his or her act, and actually does not know what he or she is signing, or does not intend to enter into a contract at all: mutual assent is lacking, and it is *void* and may be disregarded without the necessity of rescission (*144 Cal. App. 4th 754, 763)* . If the entire contract is void at its inception because of fraud, then the parties have not agreed to anything, including the arbitration of any controversy (*144 Cal. App. 4th 754, 764)* . The court of appeal concluded that the complaint had sufficiently alleged facts supporting a claim of fraud in the execution--a claim that could constitute grounds for revocation of the agreement if substantiated by evidentiary support. Plaintiff alleged that it had reached an agreement with appellant to a 12-month holdback period for $5 million of the purchase price of the property that was the subject of their transaction but that the copies of the memorandum and agreement that appellant sought to enforce were not the same documents that it signed, as they contained a 60-month holdback period. According to the complaint, this discrepancy was the result of appellant's "changing, modifying, removing, replacing and otherwise wrongfully and unlawfully altering the memorandum, as well as the agreement" on which it was based. These allegations sufficiently supported a claim of fraud in the execution. A contract void at its inception contains no enforceable agreement to arbitrate. There is no contractual intent to be enforced because the parties cannot have intended arbitration under a contract wholly void for fraud in its execution. Nothing precludes the court from deciding claims of fraud in the execution of the entire contract, even if that will dispose of the entire case on the hearing of the motion to compel arbitration (*144 Cal. App. 4th 754, 764)* .

Jones v. Adams Financial Services *(1999) 71 Cal. App. 4th 831, 84 Cal. Rptr. 2d 151* , is discussed at [a], *above*.

Brown v. Wells Fargo Bank *(2008) 168 Cal. App. 4th 938, 85 Cal. Rptr. 3d 817* , is discussed at [a], *above*.

Plaintiff in ***Strotz v. Dean Witter Reynolds, Inc.*** *(1990) 223 Cal. App. 3d 208, 272 Cal. Rptr. 680* , sued her stock brokers (the individual and the company) after learning they had lost plaintiff's original $180,000 investment, claiming defendants had misrepresented the nature of OEX options by stating that they were low risk investments, had concealed the full extent of plaintiff's losses, and sold plaintiff's stock to cover those losses. When plaintiff opened the account at defendant's Costa Mesa office, she had signed a "Customer's Agreement" and an "Option Client Information" agreement, both of which contained arbitration provisions. Plaintiff alleged that she was fraudulently induced to sign those agreements in that defendants deceived plaintiff as to the nature and effect of the documents plaintiff was signing by telling her that the contracts were simply documents necessary to open the account, that they did not affect her legal

rights, and that it was not necessary to read them. Plaintiff was not given an opportunity to read them and was not told they contained arbitration provisions. Plaintiff alleged she was not told that the "Option Client Information" agreement was actually a contract, the terms of which were set forth on the back of the form. Further, plaintiff alleged that had she known the true nature and effect of the documents, she would not have signed them. Defendants moved to compel arbitration, and the trial court denied their motion because the complaint alleged that defendants had fraudulently induced her to sign the agreement and that the fraud permeated the entire contract, including the arbitration provision. Defendants appealed the order denying the motion.

The court of appeal affirmed. Affirmance was based in part on the "permeation" doctrine, which is no longer recognized in California [*see* discussion of *Rosenthal v. Great Western Fin. Securities Corp. (1996) 14 Cal. 4th 394, 418-419, 58 Cal. Rptr. 2d 875, 926 P.2d 1061* , under [f], *below*], so that part of the discussion is omitted here. The court of appeal agreed with the result in *Ford v. Shearson Lehman American Express, Inc. (1986) 180 Cal. App. 3d 1011, 225 Cal. Rptr. 895* , and *Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1977) 67 Cal. App. 3d 19, 136 Cal. Rptr. 378* , on the alternative theory applied in those cases. In Ford, the plaintiff, at the time the agreement was signed was under complete dominion and control of one of the defendants and if that plaintiff did in fact sign the agreements, he did not know what they were or what their effect was. If a party is unaware he or she is signing any contract, obviously that person is unaware that he or she is agreeing to arbitration (*223 Cal. App. 3d 208, 217)* . Accordingly, an allegation of fraud in the inception or execution of the contract is necessarily directed at both the principal contract and the arbitration provision contained in it (*223 Cal. App. 3d 208, 217-218)* . Similarly, the result in *Main* can be explained and upheld under this theory based on the allegations of a fiduciary relationship, that because of plaintiff's trust and confidence in the defendant, plaintiff was accustomed to signing documents at defendant's request without reading them, that plaintiff did not know the true nature and effect of the documents, and that defendant had misrepresented their nature and effect to plaintiff (*223 Cal. App. 3d 208, 218 n.8*). The court concluded that allegations of fraud in the inception or execution of a contract that contains an agreement to arbitrate, such as those set forth in the complaint, are sufficient to place the issue of fraud before the court and to deny the petition to compel arbitration (*223 Cal. App. 3d 208, 218)* . Further, plaintiff's failure to read the documents may be excusable in light of the allegations of a fiduciary relationship and defendant's misrepresentations (*223 Cal. App. 3d 208, 218-219)* . If the trial court decides the issue of fraud in the execution of the documents in favor of plaintiff, litigation should proceed on the remaining issues, including the fraudulent misrepresentations about the index options. However, if the court finds no fraud in the execution of the documents, plaintiff will be bound by the agreement to arbitrate and the court should enter an order compelling arbitration (*223 Cal. App. 3d 208, 219)* .

Ford v. Shearson Lehman American Express, Inc. *(1986) 180 Cal. App. 3d 1011, 225 Cal. Rptr. 895* , and ***Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*** *(1977) 67 Cal. App. 3d 19, 136 Cal. Rptr. 378* , are discussed at [a], *above*.

[f] Permeation Doctrine No Longer Recognized in California

The facts and procedural background of ***Rosenthal v. Great Western Fin. Securities Corp.*** *(1996) 14 Cal. 4th 394, 58 Cal. Rptr. 2d 875, 926 P.2d 1061* , and the portions of the opinion addressing the procedure for determining the existence of an arbitration agreement, including any defenses to its enforcement, in general, and the evidentiary nature of that hearing are discussed in *Ch. 20, Arbitration: Compelling, § 20.10[3] [a]* and *[b]*, respectively. The portion of the opinion addressing the arbitrability of fraud claims is discussed in *Ch. 20, Arbitration: Compelling, § 20.42[3][a]*. With respect to the burden of proof required to establish fraud in the execution of an agreement, the Court then considered the so-called "permeation doctrine," plaintiff's second theory. The Court described the permeation doctrine as an ill-defined exception to *Prima Paint*'s [*Prima Paint v. Flood & Conklin (1967) 388 U.S. 395, 404, 87 S. Ct. 1801, 18 L. Ed. 2d 1270]* rule of arbitrability. Some cases have considered it synonymous to fraud in the inducement [*see, e.g.,* *Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1977) 67 Cal. App. 3d 19, 27, 31, 136 Cal. Rptr. 378]* . Others have understood it as identical or very similar to fraud in the inception or execution of a contract [*see, e.g.,* *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street (1983) 35 Cal. 3d 312, 323, n 18, 197 Cal. Rptr. 581,*

673 P.2d 251 ; *Hayes Children Leasing Co. v. NCR Corp. (1995) 37 Cal. App. 4th 775, 784, 43 Cal. Rptr. 2d 650* ; *Herman Feil, Inc. v. Design Center of Los Angeles (1988) 204 Cal. App. 3d 1406, 1416, 251 Cal. Rptr. 895]* . The broadest application of the doctrine was in *Ford v. Shearson Lehman American Express, Inc. (1986) 180 Cal. App. 3d 1011, 1019-1028, 225 Cal. Rptr. 895* , which the Supreme Court characterized as ignoring the rule in *Prima Paint* that the arbitration agreement is severable from the principal contract and incorrectly making a distinction between fraud claims going to the performance of the contract and those going to the making of the contract. What *Prima Paint* did was make the distinction between fraud directed at the arbitration agreement and fraud directed at the principal contract and hold that only fraud directed at the making or performance of the arbitration agreement is to be determined by a court (*14 Cal. 4th 394, 417-418)* .

The Supreme Court concluded that the permeation doctrine in fact conflicts with *Prima Paint* to the extent it indicates that an agreement to arbitrate may be found invalid simply because the contract as a whole was induced by fraud. On the other hand, to the extent to permeation doctrine is merely another name for fraud in the execution of a contract, it is unnecessary (*14 Cal. 4th 394, 418)* . Seeing no legally valid use for the theory, the Court declined to further recognize it (*14 Cal. 4th 394, 418-419)* . Claims that a party employed fraud in inducing consent specifically to the arbitration agreement (e.g., by actively concealing its existence of misrepresenting its meaning or value) are, under *Prima Paint*, to be decided by the court, because they go to the valid making of the arbitration clause itself. Claims that, due to fraud in the execution of the agreement as a whole, the parties reached no contract containing an arbitration clause, are to be decided by the court. But claims that the contract as a whole was obtained through fraud in the inducement are, in the absence of evidence of the parties' contrary intent, arbitrable. Included in this rule of arbitrability are claims of a "grand scheme" of fraud or fraud "permeating" the transaction (*14 Cal. 4th 394, 419)* .

The facts and procedural background of ***Duffens v. Valenti*** *(2008) 161 Cal. App. 4th 434, 74 Cal. Rptr. 3d 311* , and the portions of the opinion discussing the inapplicability of the Federal Arbitration Act and the distinction between fraud in the inducement and fraud in the execution are set forth at § 20.42[3][a]. Regarding the permeation doctrine, the court of appeal cited in *Rosenthal v. Great Western Fin. Securities Corp. (1996) 14 Cal. 4th 394, 418-419, 58 Cal. Rptr. 2d 875, 926 P.2d 1061* (*Rosenthal*, discussed *above*), which expressly repudiated an alternative means of expressing the concepts of fraud in the execution and fraud in the inducement, specifically, the "permeation doctrine," because the permeation doctrine concepts are identical or very similar to fraud in the inception or execution of a contract. The permeation doctrine is merely another name for fraud in the execution of a contract and is unnecessary. Seeing no legally valid use for the theory, the *Rosenthal* Court declined further to recognize that term (*161 Cal. App. 4th 434, 448)* .

Hayes Children Leasing Co. v. NCR Corp. *(1995) 37 Cal. App. 4th 775, 43 Cal. Rptr. 2d 650* , is discussed in *Ch. 20, Arbitration: Compelling, § 20.42[4][a]*. The court of appeal agreed that the permeation doctrine was inconsistent with *Prima Paint* [*Prima Paint v. Flood & Conklin (1967) 388 U.S. 395, 404, 87 S. Ct. 1801, 18 L. Ed. 2d 1270]* to the extent it indicates that an agreement to arbitrate may be found invalid simply because the contract as a whole was induced by fraud (*37 Cal. App. 4th 775, 784)* .

[g] Failure to Read Documents

The facts and procedural background of ***Jones v. Adams Financial Services*** *(1999) 71 Cal. App. 4th 831, 84 Cal. Rptr. 2d 151* , are discussed at [a], *above*. Defendants contended that even if they had misrepresented the nature of the documents plaintiff signed, the contract was not void because she had a reasonable opportunity to discover the true nature of the documents and she failed to do so. The court of appeal said that a party does not have a reasonable opportunity to discover the true nature of a writing if that party is prevented from doing so by some physical or other impairment (*71 Cal. App. 4th 831, 837)* . The court discussed other cases and the evidence in this case (in the form of plaintiff's declaration and those of her physicians), and concluded that plaintiff had no reasonable opportunity to discover the true nature of the documents and that her failure to read them was not negligent. The court pointed out that defendant's president knew plaintiff was blind because he guided her hand to the places where she signed the documents

(*71 Cal. App. 4th 831, 838)* . Further, the court said the fact that plaintiff had a three- day "cooling off" period under the Truth-in-Lending law within which to read and rescind the documents did not require her to read them during that period. If she thought they were only an authorization for calculation of payoff amount of her existing mortgage, she would not have had any reason to read them during the cooling off period. The reasonable opportunity to discover the true nature of the documents must come before they are signed (*71 Cal. App. 4th 831, 839)* .

The facts and procedural background of ***Brown v. Wells Fargo Bank*** *(2008) 168 Cal. App. 4th 938, 85 Cal. Rptr. 3d 817* , are discussed at [a], *above*. On the day of execution of the documents which contained the arbitration agreement at issue, the bank representative and the stock broker met with plaintiffs for thirty minutes. The arbitration provision was on the third page of a 17-page document, with eleven of those pages containing double columns of single-spaced fine print. The court of appeal pointed out that plaintiffs apparently did not read the documents, and they signed the documents almost immediately after they received them from the bank representative. Plaintiffs believed that by signing the agreements they were agreeing to open brokerage accounts only. Plaintiffs were unable to read the fine print in the agreement. One of the plaintiffs was visibly frail and could not sign his name where indicated. The stock broker knew that the plaintiff was unable to read the documents and had been told of his limitations during the meeting. The court found that the stock broker did not explain the purpose of the documents to be signed, did not mention the arbitration provision, did not ask plaintiffs whether they had any questions, and did not offer to read any portions of the agreement to them.

The court of appeal opined that when parties are dealing at arm's length, reasonable diligence requires a party to read a contract before signing it. However, when parties are in a fiduciary relationship, the same degree of diligence is not required of the non-fiduciary party, and plaintiffs' failure to read the contract would be reasonable (*168 Cal. App. 4th 938, 959)* . In such a case, the defendant fiduciary's failure to perform its duty would constitute constructive fraud, the plaintiff's failure to read the contract would be justifiable, and constructive fraud in the execution would be established (*168 Cal. App. 4th 938, 959)* . In this case, the trial court found a fiduciary relationship existed between the parties; however, the court expressly did not make a finding on whether constructive fraud existed, stating that this was an issue for the jury. The court of appeal found that the trial court was required to resolve the factual issues raised by the petition to compel arbitration, not simply determine whether sufficient evidence existed to go to a jury, and thus, the court of appeal remanded for the trial court to determine whether there was constructive fraud in the execution of the Agreement (*168 Cal. App. 4th 938, 959-962)* .

Strotz v. Dean Witter Reynolds, Inc. *(1990) 223 Cal. App. 3d 208, 272 Cal. Rptr. 680* , is discussed at [e], *above*. Note that the *Supreme Court in Rosenthal v. Great Western Fin. Securities Corp. (1996) 14 Cal. 4th 394, 420-421, 58 Cal. Rptr. 2d 875, 926 P.2d 1061* , which portion of that opinion is discussed in *Ch. 20, Arbitration: Compelling, § 20.42[3][d]*, criticized as too broad the statement in *Strotz* that even in the absence of a fiduciary relationship, misrepresentation may be regarded as an excuse for failure to read a document. There was no fiduciary relationship involved in *Rosenthal*, but there was in *Strotz* (*223 Cal. App. 3d 208, 218-219)* , so the extent to which the holding in *Strotz* has been abrogated is unclear.

[h] State Law Grounds for Revocation

The facts and procedural background of ***Engalla v. Permanente Medical Group, Inc.*** *(1997) 15 Cal. 4th 951, 64 Cal. Rptr. 2d 843, 938 P.2d 903* , are discussed under [a], *above*. The Supreme Court prefaced its consideration of procedural matters, which are discussed in *Ch. 20, Arbitration: Compelling, § 20.10[3][b]* and *[c]*, by noting that California law incorporates many of the policy objectives of the Federal Arbitration Act, including a presumption in favor of arbitration and a requirement that a contract be enforced on the basis of state law standards that apply to contracts in general (*15 Cal. 4th 951, 971-972)* .

Ford v. Shearson Lehman American Express, Inc. *(1986) 180 Cal. App. 3d 1011, 225 Cal. Rptr. 895* , is discussed at [a], *above*. The controversy was governed by the Federal Arbitration Act, specifically *9 U.S.C. § 2*, because it involved

securities transactions in interstate commerce (*180 Cal. App. 3d 1011, 1017)* . The court of appeal, relying on *Southland Corp. v. Keating (1984) 465 U.S. 1, 10-11, 104 S. Ct. 852, 79 L. Ed. 2d 1* , said that under the Federal Arbitration Act, whether there is a basis for revocation of the agreement at law or in equity may be determined under California law (*180 Cal. App. 3d 1011, 1024)* .

[4] Additional Authorities

[a] Arbitration Under Void Agreement Is Not Proper

The court of appeal in *Bayscene Resident Negotiators v. Bayscene Mobilehome Park (1993) 15 Cal. App. 4th 119, 18 Cal. Rptr. 2d 626* , vacated an award that resulted from arbitration pursuant to a submission agreement that defendants were forced to sign under threat of criminal prosecution. A municipal ordinance required arbitration of disputes regarding rental rates at mobilehome parks when the dispute could not be resolved by negotiation. The city attorney threatened park owners with criminal prosecution, so they signed the submission agreement and submitted to arbitration, albeit with repeated and continual protests. The court of appeal found the ordinance unconstitutional because it deprived owners of their due process rights in that it did not provide for trial de novo or for judicial review of the sufficiency of the evidence supporting the award (*15 Cal. App. 4th 119, 134-135)* . As to the validity of the submission agreement, the court noted that to form an enforceable contract, the parties' consent must be free [*Civ. Code § 1565*]. Apparent consent is not free when obtained, among other ways, through duress, menace, or fraud [*Civ. Code § 1567*]. Threat of criminal prosecution constitutes menace, which destroys free consent and renders any agreement obtained thereby invalid and unenforceable as against public policy (*15 Cal. App. 4th 119, 127, 129)* .

[b] Fraud in Inception or Execution of Contract as a Whole

The plaintiff in *Rice v. Dean Witter Reynolds, Inc. (1991) 235 Cal. App. 3d 1016, 1 Cal. Rptr. 2d 265* , was 75 years old, unsophisticated, and in poor health and relied on her son-in-law to administer her business affairs. The brokerage account containing the arbitration clause was opened at his suggestion, and the complaint alleged that the son-in-law, with the knowledge of the individual broker who was his personal friend, engaged in many unauthorized and speculative transactions. Plaintiff alleged that the son-in-law and the individual broker misrepresented or concealed the true nature of the documents she had signed; that she did not understand the nature of the documents and would not have signed them had she known their true nature and effect. In particular, she would not have assented to the provision permitting Dean Witter to sell her stock and would not have waived her right to a jury trial. The trial court denied the defendant's petition to compel arbitration, and the court of appeal affirmed.

The court discussed the "fraud in the inception" theory, which it described as applicable when the party seeking to avoid arbitration did not enter into *any* contract and thus did not assent to the arbitration clause. The court noted that *Ford v. Shearson Lehman American Express, Inc. (1986) 180 Cal. App. 3d 1011, 1028, 225 Cal. Rptr. 895* , distinguished between fraud in the inducement, i.e, the party knows what he or she is signing but his or her consent is induced by fraud, in which case there is mutual assent and a contract is formed, and fraud in the inception, which involves deception as to the nature of the promisor's act so that the promisor does not know what he or she is signing, or does not intend to enter into a contract at all. When there is fraud in the inception, mutual assent is lacking, any contract is void, and may be disregarded without the necessity of rescission (*235 Cal. App. 3d 1016, 1024)* . Every court in California which has addressed the issue has concluded that fraud in the inception is sufficient to avoid an arbitration clause and that the court--not the arbitrator--must determine if such fraud exists (*235 Cal. App. 3d 1016, 1025)* . The court of appeal also discussed the conflict existing in the California cases with respect to the so-called "permeation" doctrine and suggested that the trial court first determine whether "fraud in inception" vitiated the agreement so that application of permeation doctrine might be rendered moot (*235 Cal. App. 3d 1016, 1026)* .

California Points & Authorities

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20A ARBITRATION: RESISTING
PART II. FORMS
D. Defenses to Arbitration

2-20A California Points & Authorities § 20A.88

§ 20A.88 Inconspicuous Arbitration Clause Is Not Binding

[1] FORM

RESPONDENT CANNOT BE COMPELLED TO ARBITRATE THIS CONTROVERSY BECAUSE THE PROVISION FOR ARBITRATION WAS PLACED IN A FORM INCONSPICUOUSLY, RESPONDENT'S ATTENTION WAS NOT CALLED TO THAT PROVISION, AND RESPONDENT HAD NO KNOWLEDGE OF THE PROVISION.

A. Inadequate Disclosure and Understanding of Arbitration Requirement Result in Lack of Contract. When the provision for arbitration in an agreement is not conspicuous, and a party is not informed and does not know that the agreement contains such a provision, there is no agreement by that party to arbitrate (*Metters v. Ralphs Grocery Co. (2008) 161 Cal. App. 4th 696, 701-704, 74 Cal. Rptr. 3d 210* ; *Windsor Mills, Inc. v. Collins & Aikman Corp. (1972) 25 Cal. App. 3d 987, 994, 101 Cal. Rptr. 347* ; *see also Lawrence v. Walzer & Gabrielson (1989) 207 Cal. App. 3d 1501, 1507-1508, 256 Cal. Rptr. 6*).

[2] Comments

[a] Use of Form

This form may be used to resist arbitration when the arbitration clause was buriedin a form and was not called to the respondent's attention, and in fact the respondent did not know about it. Counsel may wish to include authority from *Ch. 20, Arbitration: Compelling, § 20.30* regarding the applicability of general state law contract principles.

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in opposition to one seeking to compel arbitration [*see § 20A.10*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument

should indicate the inconspicuous placement of the arbitration clause in the contract, point out the nature of the form in which it is contained as being one not liable to raise expectations of containing an agreement to arbitrate related controversies, and show how respondent was not on notice of the presence of the arbitration provision.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For a form of response to a petition to compel arbitration that may be supported by this memorandum, as well as a procedural checklist, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

[d] Related Memoranda

For memoranda to combine with this form, regarding other matters that the opposition may need to address, see *§§ 20A.10-20A.12, 20A.20 et seq., 20A.30 et seq., 20A.40 et seq., 20A.60 et seq., and 20A.80* et seq.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For forms addressing general contract principles, see Ch. 50, *Contracts* .

[3] Discussion of Authorities

[a] Inadequate Disclosure and Understanding of Arbitration Requirement Result in Lack of Contract

Plaintiff in ***Metters v. Ralphs Grocery Co.*** *(2008) 161 Cal. App. 4th 696, 74 Cal. Rptr. 3d 210* , alleged racial discrimination and harassment in violation of the California Fair Employment and Housing Act) (FEHA; *Gov. Code 12940 et seq.*) against his employer and his store manager. Defendant moved to compel arbitration, claiming plaintiff had entered into a binding arbitration agreement when he filled out a dispute resolution form. The trial court denied the motion, finding there was no valid agreement to arbitrate. Defendants appealed.

The court of appeal affirmed (*161 Cal. App. 4th 696, 698, 704)* . Defendant contended the agreement to arbitrate was valid and plaintiff was bound by it. There was no dispute that plaintiff signed the agreement, which stated he received and read the arbitration policy. Defendant argued the agreement must therefore be presumed and that it met its burden to establish a valid agreement to arbitrate by supplying a copy of the agreement and showing that plaintiff signed it. Even given the Federal Arbitration Act's (FAA; *9 U.S.C. § 1 et seq.*) policy in favor of arbitration, that policy does not come

into play until a court has found the parties entered into a valid contract under state law because there is no public policy favoring arbitration of disputes which the parties have not agreed to arbitrate (*161 Cal. App. 4th 696, 701)* . The general rule that one who signs an instrument which on its face is a contract is deemed to assent to all its terms and cannot avoid those terms on the ground that he or she failed to read it before signing it (*161 Cal. App. 4th 696, 701)* , is not applicable if the person signing the instrument is unaware of the contractual provisions, and therefore cannot be said to have agreed to them. This exception applies when the writing does not appear to be a contract and the terms are not called to the attention of the recipient. Then, no contract is formed with respect to the undisclosed term. The court cited *Windsor Mills, Inc. v. Collins & Aikman Corp. (1972) 25 Cal. App. 3d 987, 993, 101 Cal. Rptr. 347* (*Windsor Mills*, discussed *below*), for the proposition that an offeree was not bound by inconspicuous contractual provisions of which he was unaware, contained in a document whose contractual nature is not obvious. This principle of knowing consent applies with particular force to provisions for arbitration. Here, the trial court found the dispute form did not look like a contract and did not alert plaintiff that he was agreeing to binding arbitration. It was entitled "Notice of Dispute & Request for Resolution" and according to plaintiff's declaration, he was told to fill out the form in order to submit his dispute for resolution. His telephone calls to both the personnel manager and the company president produced no results. The letters he received from the personnel manager as well as his conversation with her strongly suggested the form was the only vehicle by which he could have his claims reviewed, and no one told himif he did so, he would automatically agree to arbitration. Defendant argued that plaintiff should have known he could have submitted his dispute without filling out the dispute, but the court said that had defendant wanted to clarify, rather than obfuscate, the grievance procedure, it would have told plaintiff to either fill out the dispute form, under which he would agree to binding arbitration, or to write a letter detailing his dispute (*161 Cal. App. 4th 696, 702)* . The court found the arbitration provisions of the dispute form confusing and full of legalistic references to the unattached policy. The form explains that the policy applies to "Covered Disputes," but fails to define them. It further explains that Covered Disputes will be resolved through "voluntary mediation and/or mandatory final and binding arbitration" if not resolved by informal means. The form then states its ostensible purpose on the employee's behalf: to submit this dispute for informal resolution directly by the Company's management. Defendant argued that the dispute form incorporated the policy by reference, thus plaintiff was presumed to know its terms, which define "Covered Disputes" and explain that participation in formal dispute resolution required binding arbitration. The court of appeal distinguished cases relied on by defendant to support that proposition finding no warning of arbitration being required was contained on the dispute form and that the agreement to arbitrate was not even contained in the employment contract, where it might have been expected, but in a form on which plaintiff was directed to submit his grievance. The context of that form did not alert him he was agreeing to anything, let alone arbitration (*161 Cal. App. 4th 696, 703)* . Further, it is the employer's duty to investigate complaints for discrimination under the FEHA promptly and this affirmative and mandatory duty is not dependent on whether the employee agrees to arbitration (*161 Cal. App. 4th 696, 703-704*). The court of appeal concluded that the record contained substantial evidence to support the trial court's finding that there was no valid agreement to arbitrate the discrimination claim (*161 Cal. App. 4th 696, 704)* .

Windsor Mills, Inc. v. Collins & Aikman Corp. *(1972) 25 Cal. App. 3d 987, 101 Cal. Rptr. 347* , arose out of a dispute over commercial shipments routinely ordered orally by plaintiff from defendant. The orders would be confirmed by printed acknowledgments, the face side of which made reference to conditions in fine print on the reverse side, which included an arbitration clause. Defendant filed a demand for arbitration in New York, plaintiff filed a suit for damages resulting from defects in the goods. Defendant answered and filed a petition to compel arbitration and stay the proceedings. The petition was denied, and defendant was enjoined from carrying on the arbitration it had initiated. Defendant appealed from these rulings.

The court of appeal affirmed the rulings, stating that the principle of knowing consent to contractual proposals applies with particular force to provisions for arbitration (*25 Cal. App. 3d 987, 993)* . The arbitration provision in this case was in small print and inconspicuous. The plaintiff was not advised that the forms contained the provision and in fact did not know that they did. It follows that there was no agreement by plaintiff to arbitrate, regardless of plaintiff's outward manifestations of apparent assent in retention of the order forms without objection and in acceptance of the shipments (*25 Cal. App. 3d 987, 994)* . Defendant also contended that the parties were both merchants, and under *Com. Code §*

2207(1) the act of acceptance or transmission of a written confirmation operates as an acceptance of contractual terms even though these may be added to or different from those originally agreed to unless a new acceptance expressly has been required. *Com. Code § 2207(2)(b)* also provides that additional terms are to be construed as proposals for addition to the contract and between merchants become part of the contract unless, among other things, they materially alter it (*25 Cal. App. 3d 987, 994)* . The court found the scope of an arbitration provision outside the reach of *Com. Code § 2207*, because it is the type of provision which materially alters an offer (*25 Cal. App. 3d 987, 995)* .

The facts and procedural background of ***Lawrence v. Walzer & Gabrielson*** *(1989) 207 Cal. App. 3d 1501, 256 Cal. Rptr. 6* , and the part of the opinion dealing with one basis for its holding are discussed § 20A.30[3][b]. In addition to that basis for its holding, the court of appeal concluded that plaintiff did not agree to arbitrate claims of legal malpractice or breach of fiduciary duty (*207 Cal. App. 3d 1501, 1508)* . The court considered the fact that the arbitration clause at issue was part of a retainer agreement drafted by defendant attorneys and presented to the plaintiff client for signature, that the agreement was not the product of negotiation, and that plaintiff did not understand that the agreement required arbitration of any future malpractice claim. The court noted that although a formal opinion of the State Bar of California holds nothing to be inherently improper with an agreement between an attorney and a client to arbitrate malpractice claims, the client must be fully advised of the consequences of that agreement and that agreement will be closely scrutinized for any unfairness to the client (*207 Cal. App. 3d 1501, 1507)* . The Court cited *Windsor Mills, Inc. v. Collins & Aikman Corp. (1972) 25 Cal. App. 3d 987, 993-994, 101 Cal. Rptr. 347* (discussed *above*) for the proposition that if a party wishes to bind in writing another to an agreement to arbitrate future disputes, that purpose must be accomplished in a way that each party to the agreement will fully and clearly comprehend that the agreement to arbitrate exists and binds both parties (*207 Cal. App. 3d 1501, 1508)* .

[4] Additional Authorities

[a] Inadequate Disclosure and Understanding of Arbitration Requirement Result in Lack of Contract

Chan v. Drexel Burnham Lambert, Inc. (1986) 178 Cal. App. 3d 632, 643-645, 223 Cal. Rptr. 838 , discussed § 20A.31[3][a], is also authority for the proposition that an inconspicuous arbitration clause that one party does not know about will not bind that party.

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20A ARBITRATION: RESISTING
PART II. FORMS
D. Defenses to Arbitration

2-20A California Points & Authorities § 20A.89

§ 20A.89 Agreement Containing Arbitration Clause Is Void Due to Illegality

[1] FORM

THE PETITION TO COMPEL ARBITRATION [AND THE MOTION TO STAY THE ACTION] SHOULD BE DENIED BECAUSE UNCONTROVERTED EVIDENCE ESTABLISHES THAT THE ENTIRE CONTRACT IS VOID DUE TO ILLEGALITY.

A. Illegality Affects Entire Contract. In order to avoid arbitration, the illegality must be such as to render entire agreement illegal and unenforceable (*Duffens v. Valenti (2008) 161 Cal. App. 4th 434, 449-451, 74 Cal. Rptr. 3d 311* ; *Green v. Mt. Diablo Hospital Dist. (1989) 207 Cal. App. 3d 63, 71, 254 Cal. Rptr. 689*).

B. Contract Contrary to Express Statute or to Policy of Express Statute. Arbitration is not to be compelled under a contract when the entire contract is void for illegality because that contract is contrary to an express statute or to the policy of an express statute (*Duffens v. Valenti (2008) 161 Cal. App. 4th 434, 451-456, 74 Cal. Rptr. 3d 331* ; *Green v. Mt. Diablo Hospital Dist. (1989) 207 Cal. App. 3d 63, 72-74, 254 Cal. Rptr. 689* ; *see Civ. Code § 1667*; *Code Civ. Proc. § 1281.2(b)*).

[*Optional*] **C. Alleged Illegality Creates Potential for Conflicting Rulings.** In some situations, especially those involving parties who are not parties to the agreement containing the arbitration provision, arbitration should not be compelled when the agreement containing the arbitration provision is challenged as void for illegality, because arbitration in that situation creates the potential for conflicting rulings that the contract is contrary to an express statute or to the policy of an express statute (*Code Civ. Proc. § 1281.2(c)*; *Green v. Mt. Diablo Hospital Dist. (1989) 207 Cal. App. 3d 63, 75-76, 254 Cal. Rptr. 689*).

CAUTION:

This form retains limited, if any, application since *Buckeye Check Cashing, Inc. v. Cardegna (2006) 546 U.S. 440, 126 S. Ct. 1204, 1210, 163 L. Ed. 2d 1038* (discussed in *Ch. 20, Arbitration: Compelling, § 20.10[3][i]*) held that when the Federal Arbitration Act governs or otherwise as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract, and the

issue of the illegality of that contract as a whole is to be determined by the arbitrator. The court presumably can determine the issue of the validity of the arbitration clause itself if that alone is challenged. The Court acknowledged this rule permits a court to enforce an arbitration agreement in a contract that the arbitrator later finds to be void. For authority to support a petition to vacate an arbitration award based on an illegal contract, see *Ch. 20C, Arbitration: Confirming, Correcting, or Vacating the Award, § 20C.210*.

[2] Comments

[a] Use of Form

This form may be used to resist arbitration when the arbitration clause at issue is part of an agreement that is void due to illegality. The illegality must not be severable [*see Ch. 20, Arbitration: Compelling, § 20.44* (illegality of single, severable provision is arbitrable)] and it must violate an express statute or the public policy to be enforced by an express statute [*see Civ. Code § 1667*; *Code Civ. Proc. § 1281.2(b)*]. Counsel may wish to include authority from *Ch. 20, Arbitration: Compelling, § 20.30* regarding the applicability of general state law contract principles, or from Ch. 20C, *Arbitration: Confirming, Correcting, or Vacating the Award*, § 20C.210, addressing illegality in the context of vacating an arbitration award.

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in opposition to one seeking to compel arbitration [*see § 20A.10*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should include the express statute or policy being violated, discuss the manner in which that statute or policy is violated, and indicate why the illegal provision is not severable.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For a form of response to a petition to compel arbitration that may be supported by this memorandum, as well as a procedural checklist, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

[d] Related Memoranda

For memoranda to combine with this form, regarding other matters that the opposition may need to address, see *§§ 20A.10-20A.12, 20A.20 et seq., 20A.30 et seq., 20A.40 et seq., 60 et seq., and 20A.80* et seq.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For forms addressing general contract principles, see Ch. 50, *Contracts* .

[3] Discussion of Authorities

[a] Illegality Affects Entire Contract

The facts and procedural background of ***Duffens v. Valenti*** *(2008) 161 Cal. App. 4th434, 74 Cal. Rptr. 3d 311* , and the portions of the opinion discussing the inapplicability of the Federal Arbitration Act and the distinction between fraud in the inducement and fraud in the execution are set forth at § 20.42[3][a]. When an illegal contract that is correctly subject to revocation contains an arbitration agreement, the arbitration agreement will not be enforced. However, when the alleged illegality goes to only a portion of the contract (that does not include the arbitration agreement), the entire controversy, including the issue of illegality, remains arbitrable (*161 Cal. App. 4th 434, 449)* . This means that when the underlying agreement is illegal under other accepted standards, its arbitration clause can be avoided (*161 Cal. App. 4th 434, 450)* . Plaintiffs' allegations of breaches of statutory duty invoked the rule that contracts which are contrary to express statutes or to the policy of express statutes are illegal contracts and that illegality voids the entire contract (*161 Cal. App. 4th 434, 451)* . After finding the Federal Arbitration Act in applicable to this contract (*161 Cal. App. 4th 434, 452)* , the court of appeal said it would adhere to the analysis in *Rosenthal v. Great Western Fin. Securities Corp (1996) 14 Cal. 4th 394, 402, 58 Cal. Rptr. 2d 875, 926 P.2d 1061* (*Rosenthal*) for evaluating this record in terms of California standards for enforceability of an arbitration clause, when the legality of the overall agreement is challenged. The court of appeal noted the dating service regulations' placement in division 3, *Obligations,* title 5, *Extinction of Contracts,* and inferred from that that the Legislature was concerned with regulating the manner in which dating service contracts were entered into, for the express purpose of providing the consumer with a means of release from them when exploitative contractual practices were followed. The Legislature used the terms "void and unenforceable" in the dating service statutes, which are a justification for securing "extinction" of a contract. The arbitration statutes, *Code Civ. Proc. § 1281.2* uses the term "revocation" to indicate when a contractual arbitration clause should not be enforced (although rescission is more accurate). All these distinctions and terminology are important in determining whether this form of illegality provides a specific basis for revocation of the arbitration provision. If a contract never existed, due to fraud in the execution or inception, no arbitration can be ordered under it. However, if a contract once existed, but was fraudulently induced, arbitration in some cases can be ordered, as when disappointed expectations are involved, in that performance did not match the promised result (*161 Cal. App. 4th 434, 453)* . Under *Civ. Code § 1694.4(a)* any contract for dating services which does not comply with *Civ. Code § 1694 et seq.* is void and unenforceable. Further, under *Civ. Code § 1694.4(b)* any contract for dating services entered into under willful and fraudulent or misleading information or advertisements of the seller is void and unenforceable. The section then provides for a private right of action for actual damages and treble damages by any buyer injured by a violation. When an alleged illegality goes to only a portion of the contract, not including an arbitration agreement, a court will be justified in ruling that the entire controversy, including the issue of illegality, arbitrable. Not only does the basic agreement fail to contain the mandatory provisions of Section 1694.3, it instead contains language about nonrefundability of payments made that is directly contrary to the required language. Contracts contrary to express statutes or to the *policy* of express statutes are illegal. That illegality voids the entire contract, including the arbitration clause. This particular omission cannot be deemed to be only a peripheral or minor illegality of the contract, because it goes to a major policy promoted by the statutory scheme. The dating services statutes specify that a contract that fails to meet the standards is void and unenforceable, but does not clarify how these the rules apply to an arbitration clause within that contract or agreement (*161 Cal. App. 4th 434, 454*). Specialized types of contracts must meet certain

statutory standards in order to be valid (*e.g.*, a broker's listing contract, or contracts entered into by a school board, city, or county). If a statute prescribes the only method in which a valid contract can be made, a contract that fails to follow that method is void. Required provisions were omitted from these contracts. The power of the arbitrator to determine the rights of the parties is dependent on the existence of a valid contract under which those rights might arise. In the absence of a valid contract no rights can arise and no power can be conferred on the arbitrator to determine nonexistent rights (*161 Cal. App. 4th 434, 455)* . The court concluded that when the agreements were read together with the statutes and authorities, because of the particular manner in which fraud in the inducement was alleged within the context of these statutorily insufficient and illegal agreements and because of the importance of the omitted provisions, the agreements did not belong within the general category allowing severable arbitration clauses. The dating service statutes represent the Legislature's intent to regulate in a particular manner contracts for dating services, and the statutes operate to exclude contracts for dating services from the scope of the general rule that a court will refrain from determining the legality of voidable contracts that contain an arbitration clause, and will instead allow an arbitrator to do so. The defects in these agreements are central to the policy of the statutes, and the express language of the statutes regarding unenforceability applies to the arbitration clauses as well. These conclusions applied to void the arbitration clauses contained within the agreements (*161 Cal. App. 4th 434, 456)* .

Green v. Mt. Diablo Hospital Dist. *(1989) 207 Cal. App. 3d 63, 254 Cal. Rptr. 689* , involved multiple claims by a discharged hospital chief executive officer, as plaintiff, and a taxpayers' action in which the taxpayers (respondents) sought declarations (1) that a 1982 employment contract of a hospital's chief executive officer had expired by its terms, and (2) that the 1985 amendment to that contract and a related "buy-out" agreement were void and unconstitutional. Both the 1982 agreement and the buy-out agreement had arbitration provisions; and plaintiff petitioned to compel arbitration. The taxpayers opposed the petition. The trial court denied the petition, relying on *Code Civ. Proc. § 1281.2(b)* (grounds exist for the revocation of the agreement) and *Code Civ. Proc. § 1281.2(c)* (possibility of conflicting rulings). Plaintiff appealed; the court of appeal affirmed.

The 1982 agreement had an "evergreen" clause that automatically extended the employment term for four years from each subsequent day of the contract period. To terminate plaintiff's employment, the district's board of directors had to agree by majority vote to do so and had to pay severance benefits equal to two years' salary, including housing allowance. The 1985 amendment increased the voting requirement to a four-fifths majority and the severance benefits to four years' salary. In November, 1986, the composition of the board changed and, fearing ouster, plaintiff forwarded tothe district board a termination agreement calling for various payments and benefits, the most substantial of which was that a trust was to be established for the benefit of plaintiff and plaintiff's spouse. The trust was to be funded with $822,614 and was to pay the former officer $95,000 a year for life, with payments to continue to the spouse after plaintiff's death. By a three-to-two vote, the district's board of directors approved the agreement at a closed session.

The grounds of illegality alleged by respondents included the following: (1) the evergreen provision in the 1982 agreement violated *Health & Safety Code § 32121.5*; (2) the 1982 agreement and the buy-out agreement amounted to illegal gifts to public officials [*see Cal. Const., art. XVI, § 6*]; (3) the 1985 amendment violated public policy; (4) the officer initiated private meetings with board members in violation of the Ralph M. Brown Act [*see Gov. Code § 54953*] in order to persuade them to accept the buy-out agreement; and (5) the establishment of the trust fund violated *Health & Safety Code § 32121(e)*. The trial court additionally held that the supermajority requirement in the 1985 amendment was illegal and that the buy-out agreement provided extra compensation to a public official in violation of *Cal. Const., art. XI, § 10(a)* (*207 Cal. App. 3d 63, 68-69)* .

The court of appeal said the question was whether these violations would void the entire agreement or just the illegal provisions. The court of appeal cited *California State Council of Carpenters v. Superior Court (1970) 11 Cal. App. 3d 144, 159, 89 Cal. Rptr. 625* , for the proposition that in order to avoid arbitration, the illegality must be such as to render the entire agreement illegal and unenforceable; a claim of illegality of incidental clauses of a contract that falls short of affording ground for revocation of entire contract is insufficient (*207 Cal. App. 3d 63, 71)* . The court discussed the various challenges to the legality of the buy-out agreement and concluded that those challenges went to the entire

agreement, and were not incidental (*207 Cal. App. 3d 63, 71-73)* . Similarly, because it was impossible to ascertain what part of the consideration for the 1982 agreement was in exchange for the illegal evergreen provision, the attack went to that entire agreement too. However, the court considered arguments regarding the 1982 agreement moot, because even if only the illegal evergreen clause were avoided, the 1982 agreement would have expired by its own terms (*207 Cal. App. 3d 63, 71)* .

The court of appeal noted that *Civ. Code 1667(1), (2)* provides that contracts that are contrary to express statutes or to the policy of express statutes are illegal (*207 Cal. App. 3d 63, 73)* . The court cited *Loving & Evans v. Blick (1949) 33 Cal. 2d 603, 609, 610, 204 P.2d 23* (discussed in *Ch. 20C, Arbitration: Confirming, Correcting, or Vacating the Award, § 20C.210[3][b]*) for the propositions that any such illegality voids the entire contract and that *Code Civ. Proc. § 1281.2* does not contemplate that the parties may provide for arbitration of controversies arising out of contracts that are expressly declared by law to be illegal and against public policy (*207 Cal. App. 3d 63, 73)* .

Plaintiff also challenged whether the grounds for revocation of the contract were supported by uncontroverted evidence. The court of appeal acknowledged that *Loving & Evans v. Blick (1949) 33 Cal. 2d 603, 610, 204 P.2d 23* (discussed in *Ch. 20C, Arbitration: Confirming, Correcting, or Vacating the Award, § 20C.210[3][b]*) did say that arbitration should be denied if it appears to the court from uncontroverted evidence that the contract is illegal, but said that the Court did not condition its holding on the existence of uncontroverted evidence and did not establish a requirement of uncontradicted evidence. Rather, that case merely stands for the proposition that the legality of the underlying agreement should first be judicially determined. In addition, here, although there were contradictory affidavits on the issues of fraud and the closed sessions, there was no controversy regarding the constitutional violations, the ultra vires acts of the board, or the invalidity of the evergreen clause (*207 Cal. App. 3d 63, 74)* .

[b] Contract Contrary to Express Statute or to Policy of Express Statute

The portion of the opinion in ***Duffens v. Valenti*** *(2008) 161 Cal. App. 4th 434, 74 Cal. Rptr. 3d 311* , dealing with the illegality and voidness of the entire agreement is discussed at [b], *above.*

Green v. Mt. Diablo Hospital Dist. *(1989) 207 Cal. App. 3d 63, 254 Cal. Rptr. 689* , is discussed at [a], *above*.

[c] Alleged Illegality Creates Potential for Conflicting Rulings

The facts and procedural background of ***Green v. Mt. Diablo Hospital Dist.*** *(1989) 207 Cal. App. 3d 63, 254 Cal. Rptr. 689* , are discussed at [a], *above*. Plaintiff also challenged the trial court's reliance on *Code Civ. Proc. § 1281.2(c)* (set forth at § 20A.11[1], Paragraph A) in refusing to compel arbitration. The court of appeal disagreed. The court noted that the taxpayers were not subject to arbitration and said it was conceivable that arbitration of the breach of contract and specific performance issues between plaintiff and the hospital district could result in an award in favor of plaintiff, which award would be made moot by finding in the taxpayers' declaratory relief action that the contracts were illegal (*207 Cal. App. 3d 63, 75)* . The court of appeal concluded that the trial court had properly considered the potential for conflicting rules in denying plaintiff's petition to compel arbitration (*207 Cal. App. 3d 63, 76)* .

California Points & Authorities

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20A ARBITRATION: RESISTING
PART II. FORMS
D. Defenses to Arbitration

2-20A California Points & Authorities § 20A.90

§ 20A.90 Designated Arbitration Tribunal Lacks Minimum Integrity by Being Identified With Petitioner

[1] FORM

RESPONDENT CANNOT BE COMPELLED TO ARBITRATE BECAUSE THE ARBITRATION TRIBUNAL DESIGNATED UNDER THE AGREEMENT IS SO IDENTIFIED WITH A PARTY TO THE AGREEMENT AS TO RENDER THE ARBITRATION AGREEMENT ILLUSORY. THE LACK OF MINIMAL INTEGRITY RENDERS THE AGREEMENT UNENFORCEABLE AS UNCONSCIONABLE.

A. Party Not to Be Arbitrator. Especially under circumstances in which there is a contract of adhesion, minimum levels of integrity must be met for private dispute settlement. If one who is a party, or so identified with a party as to be in fact that party,is designated as an arbitrator, the agreement to arbitrate is illusory. If the minimum levels of integrity are not achieved, and the "agreement to arbitrate" should be denied enforcement on the grounds of unconscionability (*Graham v. Scissor-Tail, Inc. (1981) 28 Cal. 3d 807, 825, 826-827, 171 Cal. Rptr. 604, 623 P.2d 165*).

[*Optional*] **B. Union of One Party Is Improper Arbitrator.** Especially under circumstances indicative of adhesion, "minimum levels of integrity" are not achieved when the union of one party is to be the arbitrator of disputes arising out of employment (*Graham v. Scissor-Tail, Inc. (1981) 28 Cal. 3d 807, 826-827, 171 Cal. Rptr. 604, 623 P.2d 165*).

[*Optional*] **C. Design Review Board in Public Works Contract**. In the context of a public works contract, a subcontractor is excused from exhausting the administrative remedy of arbitration before a dispute review board prior to litigation when the interests of the owner and the general contractor are aligned against the subcontractor and they, not the subcontractor, would select the members of the review board. The dispute review process in that situation is presumptively biased against the subcontractor and does not comport with fundamental notions of fairness. Thus, requiring a subcontractor to comply with the dispute review process would be unconscionable (*Sehulser Tunnels/Pre-Con v. Traylor Brothers, Inc./Obayashi Corp. (2003) 111 Cal. App. 4th 1328, 1342-1343, 4 Cal. Rptr. 3d 655*).

[2] Comments

[a] Use of Form

This form may be used to resist arbitration when the arbitration clause at issue provides for an arbitrator that is so identified with a party as to be unfair and improper. Note, however, that arbitration under rules approved by the Securities and Exchange Commission is required by federal law even though those rules provide for industry-affiliated arbitrators [*Cohen v. Wedbush, Noble, Cooke, Inc. (9th Cir. 1988) 841 F.2d 282, 286* ; *see Ch. 20, Arbitration: Compelling, §§ 20.21, 20.41*; *see also McManus v. CIBC World Markets Corp. (2003) 109 Cal. App. 4th 76, 93-97, 134 Cal. Rptr. 2d 446* (in Ch. 20, *Arbitration: Compelling*, § 20.83[3][a], discussing then-current arbitrator selection process under NYSE and NASD arbitration rules and procedures)]. The Securities and Exchange Commission has approved the rules of the New York Stock Exchange, the American Stock Exchange, and the National Association of Securities Dealers.

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in opposition to one seeking to compel arbitration [*see § 20A.10*].

Counsel should be prepared for the fact that, in the absence of other circumstances, the normal result of success under the points urged in this form is that the court will have the parties select a more neutral forum or will appoint the arbitrators at the request of a party. See *Ch. 20B, Arbitration: Selecting Arbitrators; Arbitral Immunity, § 20B.10* for a memorandum in support of a petition to appoint an arbitrator.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should quote or refer to the arbitration provision at issue and explain the connection and unity of interest between the arbitrator and the petitioner.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For a form of response to a petition to compel arbitration that may be supported by this memorandum, as well as a procedural checklist, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

[d] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in

this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For memoranda to combine with this form, regarding other matters that the opposition may need to address, see *§§ 20A.10-20A.12, 20A.20 et seq., 20A.30 et seq., 20A.40 et seq., 20A.60 et seq., and 20A.80* et seq.

[3] Discussion of Authorities

[a] Party Not to Be Arbitrator

Graham v. Scissor-Tail, Inc. *(1981) 28 Cal. 3d 807, 171 Cal. Rptr. 604, 623 P.2d 165* , arose out of a dispute between a promoter and a group of performing musicians over a series of contracts providing for their concert appearances. The contracts were of a standard form promulgated by the musicians' union and one which members ofthe union were required to use whenever contracting to make professional appearances, and which promoters desiring to sponsor their performances had to utilize. The contract form provided for submission of all disputes arising thereunder to the union. The promoter brought an action on various contract grounds, and the musicians petitioned to compel arbitration, which was ordered. The union rendered an original award for the musicians, after arbitrating without notice to or appearance by the parties. When the parties mutually arranged to reopen the controversy, a union arbitrator heard a practically uncontested presentation by the promoter but made the award for the musicians. The musicians petitioned to confirm the award. The promoter petitioned to vacate the award and, on appeal from its confirmation, also challenged the validity of the order compelling arbitration.

The Supreme Court reversed the order confirming the award, and it directed that the order compelling arbitration be vacated. The Court found the agreement providing for arbitration to be a contract of adhesion which the promoter, despite his experience and standing in the industry, had to sign along with the musicians if either wanted to do business by virtue of the controlling position of the musician's union in the industry. The terms that were available for negotiation did not change the nonnegotiable character of the rest of the contract (*28 Cal. 3d 807, 818-819)* . The Court acknowledged, however, that the provisions of the agreement were not contrary to the reasonable expectations of the promoter, who was well aware the union was the sole arbiter under the contract (*28 Cal. 3d 807, 821)* . It also recognized that the arbitration statutes permit the parties to select an arbitrator who is not necessarily neutral (*28 Cal. 3d 807, 821-822)* . The Court noted, however, that when, as in this case, the contract designating such an arbitrator is the product of circumstances suggestive of adhesion, the possibility of overreaching by the dominant party looms large. A contract concluded in such circumstances must be scrutinized with particular care to insure that the party of lesser bargaining power, in agreeing to the contracts, is not left in the position of one deprived of any realistic and fair opportunity to prevail in a dispute under its terms (*28 Cal. 3d 807, 824-825)* .

The Court observed that while the leeway of the arbitration laws may permit the establishment of arrangements which vary to some extent from the dead-center of neutrality, the Court would have to insist, most especially in circumstances smacking of adhesion, that certain minimum levels of integrity be achieved if any such arrangement in question is to pass judicial muster. It is for the courts to determine, largely on a case by case basis, what these minimum levels will be. Although an arbitration agreement sets up contractual machinery to substitute for (although not duplicate) formal judicial proceedings, arbitration still must involve a tribunal which hears and decides disputes. Where the arbitration entity is incapable of deciding on the basis of what it has heard, as where that entity is so identified with a party as to be as good as that party, the agreement to arbitrate is essentially illusory, and devoid of minimal levels of integrity, and it should be denied enforcement as being unconscionable (*28 Cal. 3d 807, 825)* .

The Court stated that the "minimum levels of integrity" which are requisite to a contractual arrangement for the nonjudicial resolution of disputes are not achieved by an arrangement which designates the union of one of the parties as the arbitrator of disputes arising out of employment, especially when, as in the case before the Court, the arrangement is the product of circumstances indicative of adhesion (*28 Cal. 3d 807, 826-827)* . The Court pointed out that a

contract purporting to designate one of the parties as the arbitrator of all disputes arising thereunder is illusory because the designated party has an interest in the outcome which, in the view of the law, will render fair and reasoned decision, based on the evidence presented, a virtual impossibility. The same situation occurs when the designated arbitrator is not the actual party but one whose interests are so allied with those of that party that, for all practical purposes, the arbitrator is subject to the same disabilities which prevent the party from serving. A contractual provision designating either the party or the allied entity as arbitrator must be denied enforcement as an unconscionable one. The Court then determined that the labor union as an arbitrator would have interests identical with those of its members who were parties to the dispute (*28 Cal. 3d 807, 827)* . The Court concluded that the arbitration agreement did not achieve the minimum levels of integrity necessary, and being inimical to the concept of arbitration, would be denied enforcement in any circumstances although especially when arising under an arrangement indicative of adhesion (*28 Cal. 3d 807, 828)* .

[b] Union of One Party Is Improper Arbitrator

Graham v. Scissor-Tail, Inc. *(1981) 28 Cal. 3d 807, 171 Cal. Rptr. 604, 623 P.2d 165* , is discussed at [a], *above*.

[c] Design Review Board in Public Works Contract

Sehulser Tunnels/Pre-Con v. Traylor Brothers, Inc./Obayashi Corp. *(2003) 111 Cal. App. 4th 1328, 4 Cal. Rptr. 3d 655* , arose out of the construction contracts for a 3.5 mile $90 million sewage discharge tunnel under the Pacific Ocean near San Diego. Defendant City of San Diego was the project owner. Defendant Traylor Brothers, Inc./Obayashi (TBO) was the general contractor. Plaintiff was the subcontractor who supplied the precast concrete ring segments lining the tunnel. Disputes arose as to cost overruns. TBO contended that plaintiff was required by the prime contract between TBO and the city to submit its claims to a Dispute Review Board (DRB) before pursuing litigation. The trial court disagreed. A jury awarded plaintiff $2.8 million in damages against TBO. The trial court awarded Sehulster another $1.6 million in attorney fees against TBO. Both defendants appealed, claiming that as a matter of law, plaintiff's claims were barred by its failure to comply with the DRB process.

The court of appeal affirmed, finding that the interests of the general contractor and the owner were adverse to those of the subcontractor, so that the contractually mandated DRB process was presumptively biased and unenforceable as a condition precedent to the subcontractor pursuing litigation (*111 Cal. App. 4th 1328, 1332-1333, 1352)* . The DRB was a three-member panel of construction professionals who issue a nonbinding opinion. It consists of one member selected by the city and approved by TBO, one member selected by TBO and approved by the city, and a third member, who would serve as chairperson, selected by the first two members and approved by both the city and TBO. The court of appeal quoted extensively from *Graham v. Scissor-Tail,Inc. (1981) 28 Cal. 3d 807, 171 Cal. Rptr. 604, 623 P.2d 165* for the propositions that an agreement to submit a dispute to arbitration will not be enforced if the designated decisional body is so associated with a party that it is presumptively biased in favor of that party; that when the contract designating such an arbitrator is the product of circumstances suggestive of adhesion, the possibility of overreaching by the dominant party looms large; that such a contract must be scrutinized with particular care to insure that the party of lesser bargaining power is not left in a position depriving him of any realistic and fair opportunity to prevail in a dispute under its terms; and that the arbitration process must operate within minimum levels of integrity to pass judicial muster (*111 Cal. App. 4th 1328, 1340)* . The court of appeal said that although the DRB selection process might be appropriate and fair for resolving disputes between the owner and general contractor who are the appointing parties, it did not have the appearance of fairness in the context of a subcontractor's claim against the owner and general contractor (*111 Cal. App. 4th 1328, 1341-1342)* . The contract was presented to Sehulster on a take-it-or-leave-it basis. Sehulster had no meaningful opportunity or ability to negotiate the its provisions. The DRB members were appointed and compensated by TBO and the city, parties adverse to Sehulster because it was in the interests of both City and TBO that Sehulster's claim be denied. Such a scheme conflicts with fundamental notions of fairness. Under these circumstances, the court concluded, the DRB was presumptively biased in favor of TBO and the city, thus excusing Sehulster from any obligation to comply with the DRB process before filing suit (*111 Cal. App. 4th 1328, 1342)* .

Requiring the application of the DRB provisions of the prime contract to Sehulster's claim would be unconscionable (*111 Cal. App. 4th 1328, 1343)* .

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CHAPTER 20A ARBITRATION: RESISTING
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2-20A California Points & Authorities § 20A.91

§ 20A.91 Arbitration Rules Are Unfair and Unconscionable

[1] FORM

RESPONDENT CANNOT BE COMPELLED TO ARBITRATE BECAUSE THE RULES OF PROCEDURE PROVIDED UNDER THE ARBITRATION CLAUSE ARE UNFAIR AND UNCONSCIONABLE [AND WOULD OPERATE TO DENY RESPONDENT A FAIR OPPORTUNITY TO PRESENT HIS/HER/ITS POSITION].

A. Arbitration Rules Are Unfair and Unconscionable. When the rules of arbitration procedure designated in the arbitration provision are unfair to the extent of denying a party a fair opportunity to present his or her case, the arbitration provision is unconscionable and arbitration will not be compelled under the agreement (*Graham v. Scissor-Tail, Inc. (1981) 28 Cal. 3d 807, 825-826, 171 Cal. Rptr. 604, 623 P.2d 165* ; *Stirlen v. Supercuts, Inc. (1997) 51 Cal. App. 4th 1519, 1552, 60 Cal. Rptr. 2d 138* ; Treo v. *Kettner Homeowners Assn. v. Superior Court (2008) 166 Cal. App. 4th 1055, 1067, 83 Cal. Rptr. 3d 318* ; *see Civ. Code § 1670.5*).

B. Doctrine of Unconscionability Does Not Offend Federal Arbitration Act. Judicial refusal to enforce an arbitration clause that is clearly unconscionable under a general contract principle not at all hostile to arbitration presents no obstacle to the objective of the Federal Arbitration Act or any other congressional purpose (*Discover Bank v. Superior Court (Boehr) (2005) 36 Cal. 4th 148, 160-167, 30 Cal. Rptr. 3d 76, 13 P.3d 1100* ; *Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 114, 99 Cal. Rptr. 2d 745, 6 P.3d 669* ; *Gutierrez v. Autowest, Inc. (2004) 114 Cal. App. 4th 77, 86, 7 Cal. Rptr. 3d 267* ; *Flores v. Transamerica HomeFirst, Inc. (2001) 93 Cal. App. 4th 846, 856-857, 113 Cal. Rptr. 2d 376* ; *Stirlen v. Supercuts, Inc. (1997) 51 Cal. App. 4th 1519, 1551, 60 Cal. Rptr. 2d 138* ; *see Ingle v. Circuit City Stores, Inc. (9th Cir. 2003) 328 F.3d 1165, 1170)* .

C. Criteria of Unconscionability. Unconscionability has generally been held to include an absence of meaningful choice on the part of one of the two parties together with contract terms that are unreasonably favorable to the other party. Thus, unconscionability has both a "procedural" and a "substantive" element. Both procedural and substantive elements of unconscionability must be present in order for a court to refuse to enforce a contract or clause under the doctrine of unconscionability, but they need not be present in the same degree. A sliding scale is invoked under which

the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa (*Gentry v. Superior Court (Circuit City Stores, Inc.) (2007) 42 Cal. 4th 443, 468-470, 64 Cal. Rptr. 3d 773, 165 P.3d 556* ; *Little v. Auto Stiegler, Inc. (2003) 29 Cal. 4th 1064, 1072, 130 Cal. Rptr. 2d 892, 63 P.3d 979* ; *Parada v. Superior Ct. (2009) 176 Cal. App. 4th 1554, 1569, 98 Cal. Rptr. 3d 743* ; *Bruni v. Didion (2008) 160 Cal. App. 4th 1272, 1277, 1288, 73 Cal. Rptr. 3d 395* ; *Baker v. Osborne Development Corp. (2008) 159 Cal. App. 4th 884, 894, 71 Cal. Rptr. 3d 854* ; *Higgins v. Superior Court (Disney/ABC International Television, Inc.) (2006) 140 Cal. App. 4th 1238, 1249, 45 Cal. Rptr. 3d 293* ; *Nyulassy v. Lockheed Martin Corporation (2004) 120 Cal. App. 4th 1267, 1280, 1282, 1287, 16 Cal. Rptr. 3d 296* (more substantive, less procedural); *Martinez v. Master Prot. Corp. (2004) 118 Cal. App. 4th 107, 113, 12 Cal. Rptr. 3d 663* ; *Abramson v. Juniper Networks, Inc. (2004) 115 Cal. App. 4th 638, 655-656, 9 Cal. Rptr. 3d 422* ; *Gutierrez v. Autowest, Inc. (2004) 114 Cal. App. 4th 77, 86, 7 Cal. Rptr. 3d 267* ; *Jamarillo v. JH Real Estate Partners, Inc. (2003) 111 Cal. App. 4th 394, 400, 3 Cal. Rptr. 3d 525* ; *Gutierrez v. Autowest, Inc. (2004) 114 Cal. App. 4th 77, 87-88, 7 Cal. Rptr. 3d 267* ; *Harper v. Ultimo (2003) 113 Cal. App. 4th 1402, 1406, 7 Cal. Rptr. 3d 418* ; *O'Hare v. Municipal Resource Consultants (2003) 107 Cal. App. 4th 267, 272-273, 132 Cal. Rptr. 2d 116* ; *Fittante v. Palm Springs Motors, Inc. (2003) 105 Cal. App. 4th 708, 725-726, 129 Cal. Rptr. 2d 659* ; *Mercuro v. Superior Court (Countrywide Securities Corp.) (2002) 96 Cal. App. 4th 167, 174, 116 Cal. Rptr. 2d 671* ; *Flores v. Transamerica HomeFirst, Inc. (2001) 93 Cal. App. 4th 846, 853, 113 Cal. Rptr. 2d 376* ; *Kinney v. United Healthcare Services, Inc. (1999) 70 Cal. App. 4th 1322, 1328-1329, 83 Cal. Rptr. 2d 348* ; *Stirlen v. Supercuts, Inc. (1997) 51 Cal. App. 4th 1519, 1531, 1533, 60 Cal. Rptr. 2d 138* ; *Patterson v. ITT Consumer Financial Corp. (1993) 14 Cal. App. 4th 1659, 1663-1664, 1666-1667, 18 Cal. Rptr. 2d 563*).

D. Element of Procedural Unconscionability. The procedural element of unconscionability focuses on two factors: "oppression" and "surprise." "Oppression" arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice. "Surprise" involves the extent to which the supposedly agreed-on terms of the bargain are hidden in the prolix printed form drafted by the party seeking to enforce the disputed terms. [If a contract is one of adhesion, the procedural element of unconscionability is present; procedural unconscionability can be inferred from the arbitration agreement itself when that agreement is so one-sided that it defies credulity to suggest that the weaker party had any input or that any desire of the weaker party to change the contract terms would have been considered or honored]. [Although failure to read a provision does not excuse compliance with it, it may establish actual surprise (the unfairness of which is reinforced by the defendant's failure to call the arbitration clause to the attention of plaintiffs). The circumstances of this transaction established actual surprise. While an agreement need not expressly provide for arbitration, but may do so by incorporating a referenced document that is readily available, the _____ (*specify document, how, and when it was presented for signature, e.g.,* warranty booklet was not provided before or at the time the builder application was presented for signature just before the close of escrow). Thus, substantial evidence supported the trial court's findings of surprise and oppression and the conclusion of procedural unconscionability.] (*Gentry v. Superior Court (Circuit City Stores, Inc.) (2007) 42 Cal. 4th 443, 469-470, 64 Cal. Rptr. 3d 773, 165 P.3d 556* ; *Little v. Auto Stiegler, Inc. (2003) 29 Cal. 4th 1064, 1073, 130 Cal. Rptr. 2d 892, 63 P.3d 979* ; *Parada v. Superior Ct. (2009) 176 Cal. App. 4th 1554, 1569, 98 Cal. Rptr. 3d 743* ; *Sanchez v. Western Pizza Enterprises, Inc. (2009) 172 Cal. App. 4th 154, 165-166, 90 Cal. Rptr. 3d 818* ; *Bruni v. Didion (2008) 160 Cal. App. 4th 1272, 1288* [-1289], *73 Cal. Rptr. 3d 395* ; *Baker v. Osborne Development Corp. (2008) 159 Cal. App. 4th 884, 894-896, 71 Cal. Rptr. 3d 854* ; *Higgins v. Superior Court (Disney/ABC International Television, Inc.) (2006) 140 Cal. App. 4th 1238, 1251-1253, 45 Cal. Rptr. 3d 293* ; *Nyulassy v. Lockheed Martin Corporation (2004) 120 Cal. App. 4th 1267, 1280-1281, 1284-1286, 16 Cal. Rptr. 3d 296* ; *Fitz v. NCR Corp. (2004) 118 Cal. App. 4th 702, 721-722, 13 Cal. Rptr. 3d 88* ; *Martinez v. Master Prot. Corp. (2004) 118 Cal. App. 4th 107, 113-114, 12 Cal. Rptr. 3d 663* ; *Abramson v. Juniper Networks, Inc. (2004) 115 Cal. App. 4th 638, 656, 662-664, 9 Cal. Rptr. 3d 422* ; *Gutierrez v. Autowest, Inc. (2004) 114 Cal. App. 4th 77, 86, 7 Cal. Rptr. 3d 267* ; *Harper v. Ultimo (2003) 113 Cal. App. 4th 1402, 1406, 1408-1410, 7 Cal. Rptr. 3d 418* ; *O'Hare v. Municipal Resource Consultants (2003) 107 Cal. App. 4th 267, 282-283, 284, 132 Cal. Rptr. 2d 116* ; *Fittante v. Palm Springs Motors, Inc. (2003) 105 Cal. App. 4th 708, 725-728, 129 Cal. Rptr. 2d 659* ; *Mercuro v. Superior Court (Countrywide Securities Corp.) (2002) 96 Cal. App. 4th 167, 174, 116 Cal. Rptr. 2d 671* ; *Flores v. Transamerica HomeFirst, Inc. (2001) 93 Cal. App. 4th 846, 853-854, 113 Cal. Rptr.*

2d 376 ; *Kinney v. United Healthcare Services, Inc. (1999) 70 Cal. App. 4th 1322, 1329-1330, 83 Cal. Rptr. 2d 348* ; *Stirlen v. Supercuts, Inc. (1997) 51 Cal. App. 4th 1519, 1532, 1533-1534, 60 Cal. Rptr. 2d 138* ; Treo v. *Kettner Homeowners Assn. v. Superior Court (2008) 166 Cal. App. 4th 1055, 1059-1060, 1066-1067, 83 Cal. Rptr. 3d 318* ; *Patterson v. ITT Consumer Financial Corp. (1993) 14 Cal. App. 4th 1659, 1664, 1667, 18 Cal. Rptr. 2d 563* ; *see Graham v. Scissor-Tail, Inc. (1981) 28 Cal. 3d 807, 826-827, 171 Cal. Rptr. 604, 623 P.2d 165*).

[*Optional*] **D1. Under Contract of Adhesion.** A contract of adhesion is a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it. Although contracts of adhesion are generally enforceable according to their terms, a provision contained in a contract of adhesion cannot be enforced if it does not fall within the reasonable expectations of the weaker or "adhering" party. Failure to pass the "reasonable expectations" test is generally treated as the equivalent of substantive unconscionability. An arbitration provision in a contract of adhesion will be considered unconscionable and will not be enforced if its terms do not fall within plaintiffs' reasonable expectations (*Parada v. Superior Ct. (2009) 176 Cal. App. 4th 1554, 1569, 98 Cal. Rptr. 3d 743* ; *Bruni v. Didion (2008) 160 Cal. App. 4th 1272, 1277, 1288-1289, 73 Cal. Rptr. 3d 395*).

E. Element of Substantive Unconscionabilty. Substantive unconscionability involves a harsh or one-sided allocation of risks between the parties. A contractual term is suspect if it reallocates the risks of the bargain in an objectively unreasonable or unexpected manner, resulting in contract terms so one-sided as to shock the conscience. [Not all unreasonable risk allocations are unconscionable. Unenforceability of the clause is tied to the procedural aspects of unconscionability such that the greater the unfair surprise or inequality of bargaining power, the less unreasonable the risk allocation which will be tolerated] (*Little v. Auto Stiegler, Inc. (2003) 29 Cal. 4th 1064, 1073, 130 Cal. Rptr. 2d 892, 63 P.3d 979* ; *Parada v. Superior Ct. (2009) 176 Cal. App. 4th 1554, 1559, 98 Cal. Rptr. 3d 743* ; *Sanchez v. Western Pizza Enterprises, Inc. (2009) 172 Cal. App. 4th 154, 175, 90 Cal. Rptr. 3d 818* ; *Bruni v. Didion (2008) 160 Cal. App. 4th 1272, 1288-1289, 73 Cal. Rptr. 3d 395* ; *Baker v. Osborne Development Corp. (2008) 159 Cal. App. 4th 884, 894-896, 71 Cal. Rptr. 3d 854* ; *Higgins v. Superior Court (Disney/ABC International Television, Inc.) (2006) 140 Cal. App. 4th 1238, 1253-1254, 45 Cal. Rptr. 3d 293* ; *Nyulassy v. Lockheed Martin Corporation (2004) 120 Cal. App. 4th 1267, 1281-1283, 16 Cal. Rptr. 3d 296* ; *Gutierrez v. Autowest, Inc. (2004) 114 Cal. App. 4th 77, 86, 7 Cal. Rptr. 3d 267* ; *Harper v. Ultimo (2003) 113 Cal. App. 4th 1402, 1406, 1408-1410, 7 Cal. Rptr. 3d 418* ; *Jamarillo v. JH Real Estate Partners, Inc. (2003) 111 Cal. App. 4th 394, 401, 404-406, 3 Cal. Rptr. 3d 525* ; *O'Hare v. Municipal Resource Consultants (2003) 107 Cal. App. 4th 267, 273, 277-278, 132 Cal. Rptr. 2d 116* ; *Fittante v. Palm Springs Motors, Inc. (2003) 105 Cal. App. 4th 708, 726, 129 Cal. Rptr. 2d 659* ; *Mercuro v. Superior Court (Countrywide Securities Corp.) (2002) 96 Cal. App. 4th 167, 175-178, 116 Cal. Rptr. 2d 671* ; *Flores v. Transamerica HomeFirst, Inc. (2001) 93 Cal. App. 4th 846, 854-855, 113 Cal. Rptr. 2d 376* ; *Kinney v. United Healthcare Services, Inc. (1999) 70 Cal. App. 4th 1322, 1330-1332, 83 Cal. Rptr. 2d 348* ; *Stirlen v. Supercuts, Inc. (1997) 51 Cal. App. 4th 1519, 1532, 60 Cal. Rptr. 2d 138* ; Treo v. *Kettner Homeowners Assn. v. Superior Court (2008) 166 Cal. App. 4th 1055, 1059-1060, 1066-1067, 83 Cal. Rptr. 3d 318* ; *Patterson v. ITT Consumer Financial Corp. (1993) 14 Cal. App. 4th 1659, 1664-1667, 18 Cal. Rptr. 2d 563*).

[*Optional*] **F. Sophistication of Weaker Party Is No Defense to Unconscionability.** Even a sophisticated business person may be the victim of unconscionability if presented with a standard form contract the provisions of which are non-negotiable (*Graham v. Scissor-Tail, Inc. (1981) 28 Cal. 3d 807, 818-819, 171 Cal. Rptr. 604, 623 P.2d 165* ; *Dotson v. Amgen, Inc. (2010) 181 Cal. App. 4th 975, 980-982, 104 Cal. Rptr. 3d 341* ; *Stirlen v. Supercuts, Inc. (1997) 51 Cal. App. 4th 1519, 1533-1534, 60 Cal. Rptr. 2d 138*).

[*Optional*] **G. Permissible Breadth of Order in Class Action.** When an arbitration provision is unconscionable and unenforceable, the trial court in a class action has authority to order that the arbitration provision not be enforced against potential class members (*Patterson v. ITT Consumer Financial Corp. (1993) 14 Cal. App. 4th 1659, 1663-1667, 18 Cal. Rptr. 2d 563*).

[*Optional*] **H. Provision for Arbitral Review Is Unconscionable.** A post-arbitration proceeding, either judicial or arbitral, wholly or largely to benefit the party that drafted and imposed the arbitration agreement at the expense of the party on which the arbitration is imposed is unconscionable. Although seemingly neutral on its face,a provision that allows either party to have an award in excess of $50,000 reviewed by a second arbitrator is so one-sided as to be unconscionable. The $50,000 threshold only benefits the party against whom an award of that magnitude is likely to be entered. While an asymmetrical arbitration may be permissible when there is a "legitimate commercial need," that need must be other than the stronger party's desire to maximize its advantage in the arbitration process (*Little v. Auto Stiegler, Inc. (2003) 29 Cal. 4th 1064, 1074, 1077-1079, 130 Cal. Rptr. 2d 892, 63 P.3d 979* ; *Fittante v. Palm Springs Motors, Inc. (2003) 105 Cal. App. 4th 708, 722-724, 129 Cal. Rptr. 2d 659*).

[*Optional*] **I. Prohibition on Classwide Arbitration Is Unconscionable.** A class arbitration prohibition in a consumer contract of adhesion in a setting in which disputes between the contracting parties involve small amounts of damages, when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers of individually small sums of money, [at least to the extent the issue is governed by California law], becomes in practice an exculpatory clause and is unconscionable and unenforceable (*Discover Bank v. Superior Court (Boehr) (2005) 36 Cal. 4th 148, 161, 30 Cal. Rptr. 3d 76, 113 P.3d 1100* (remanding for determination of choice of law issue); *Parada v. Superior Ct. (2009) 176 Cal. App. 4th 1554, 1573, 98 Cal. Rptr. 3d 743* (prohibition on consolidation or joinder); *Gatton v. T-Mobile USA, Inc. (2007 152 Cal. App. 4th 571, 579-581, 61 Cal. Rptr. 3d 344* ; *Cohen v. DirecTV, Inc. (2006) 142 Cal. App. 4th 1442, 1451-1455, 48 Cal. Rptr. 3d 813* ; *Klussman v. Cross Country Bank (2005) 134 Cal. App. 4th 1283, 1290, 1294, 36 Cal. Rptr. 3d 728* (finding California law applicable after choice of law analysis); *Aral v. Earthlink, Inc. (2005) 134 Cal. App. 4th 544, 556-557, 36 Cal. Rptr. 3d 229* (finding California law applicable after choice of law analysis); *see Civ. Code § 1668*).

[*Optional*] **J. Arbitration Agreement May Be Procedurally Unconscionable Despite Opt-Out Provision.** An arbitration agreement may have an element of procedural unconscionability notwithstanding an opt-out provision. The lack of material information about the disadvantageous terms of the arbitration agreement, combined with the likelihood that _____ [*specify, e.g.,* employees felt at least some pressure not to opt out of the arbitration agreement], supports the conclusion that the agreement is not entirely free from procedural unconscionability _____ [*Add situation-specific facts, e.g.,* The one-page description of the advantages and disadvantages of arbitration gave a very one-sided view of arbitration and failed to mention reduced limitation periods, limitation on the length of time for which back pay could be recovered, a cap on punitive damages, that there was no right to attorney's fees and costs, which would be provided by the overtime pay statute, and limited discovery] (*Gentry v. Superior Court (Circuit City Stores, Inc.) (2007) 42 Cal. 4th 443, 451, 468, 470-472, 64 Cal. Rptr. 3d 773, 165 P.3d 556*).

[*Optional*] **K. Arbitration Agreement Is Wholly Unenforceable on Account of Unconscionable Provisions.** Although *Civil Code Section 1670.5(a)* gives a court authority to sever the unconscionable portions of an arbitration clause and enforce the remainder, with respect to an arbitration clause that suffers from multiple problems of unconscionability or unconscionable provisions that are not severable, severing the unconscionable portions of the clause and compelling arbitration is not appropriate (*Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 121-122, 99 Cal. Rptr. 2d 745, 6 P.3d 669* ; *Parada v. Superior Ct. (2009) 176 Cal. App. 4th 1554, 1585-1587, 98 Cal. Rptr. 3d 743* ; *Sanchez v. Western Pizza Enterprises, Inc. (2009) 172 Cal. App. 4th 154, 181, 90 Cal. Rptr. 3d 818* ; *Franco v. Athens Disposal Co., Inc. (2009) 171 Cal. App. 4th 1277, 1303, 90 Cal. Rptr. 3d 539* ; *Murphy v. Check 'N Go of California, Inc. (2007) 156 Cal. App. 4th 138, 149, 67 Cal. Rptr. 3d 120* ; *Fitz v. NCR Corp. (2004) 118 Cal. App. 4th 702, 726-727, 13 Cal. Rptr. 3d 88* ; *Abramson v. Juniper Networks, Inc. (2004) 115 Cal. App. 4th 638, 666-668, 9 Cal. Rptr. 3d 422* ; *O'Hare v. Municipal Resource Consultants (2003) 107 Cal. App. 4th 267, 279, 132 Cal. Rptr. 2d 116* ; *Mercuro v. Superior Court (Countrywide Securities Corp.) (2002) 96 Cal. App. 4th 167, 184, 116 Cal. Rptr. 2d 671* ; *Flores v. Transamerica HomeFirst, Inc. (2001) 93 Cal. App. 4th 846, 857-858, 113 Cal. Rptr. 2d 376*). [Refusing to compel arbitration is especially appropriate when the entire arbitration provision is unilateral, and/or the multiple defects indicate a systematic effort to impose arbitration on the weaker party, not simply as an

alternative to litigation, but as an inferior forum that works to the stronger party's advantage. With an unconscionably unilateral arbitration clause, there is no single provision a court could strike or restrict in order to remove the unconscionable taint from the agreement. The only option would be to reform the agreement to make it bilateral; and a court has no power to do that (*Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 124-125, 99 Cal. Rptr. 2d 745, 6 P.3d 669* ; *Nyulassy v. Lockheed Martin Corporation (2004) 120 Cal. App. 4th 1267, 1287-1288, 16 Cal. Rptr. 3d 296* ; *Fitz v. NCR Corp. (2004) 118 Cal. App. 4th 702, 727-728, 13 Cal. Rptr. 3d 88* ; *Abramson v. Juniper Networks, Inc. (2004) 115 Cal. App. 4th 638, 666-668, 9 Cal. Rptr. 3d 422* ; *O'Hare v. Municipal Resource Consultants (2003) 107 Cal. App. 4th 267, 279, 132 Cal. Rptr. 2d 116* ; *Mercuro v. Superior Court (Countrywide Securities Corp.) (2002) 96 Cal. App. 4th 167, 185, 116 Cal. Rptr. 2d 671* ; *Flores v. Transamerica HomeFirst, Inc. (2001) 93 Cal. App. 4th 846, 857-858, 113 Cal. Rptr. 2d 376*)].

[*Optional*] **L. Unconscionable Portions of Arbitration Agreement Will Not Be Severed After They Are No Longer Needed by Party Urging Arbitration.** When an arbitration agreement is not only permeated with unconscionability, but when the primary agreement has been terminated and the party urging arbitration obtained everything it bargained under that agreement, it is woefully unfair, and justice would not be served, by severing post hoc the offending provisions for which the party urging arbitration no longer has any use, and requiring the party claiming injury to arbitrate its claim (*Flores v. Transamerica HomeFirst, Inc. (2001) 93 Cal. App. 4th 846, 857-858, 113 Cal. Rptr. 2d 376*).

[*Optional*] **M. Court Must Strike Unconscionable Remedy Limitations Before Ordering Arbitration.** Even if the arbitrator has broad discretion to interpret an arbitration agreement, the court has the duty, before compelling arbitration, to strike from the arbitration clause any provisions that would deprive the arbitrator of authority to award statutory remedies or any relief that would otherwise be allowable in court (*Independent Assn. of Mailbox Center Owners, Inc. v. Superior Court (Mail Boxes Etc., USA, Inc.) (2005) 133 Cal. App. 4th 396, 410, 34 Cal. Rptr. 3d 659*).

[2] Comments

[a] Use of Form

This form may be used to resist arbitration under an arbitration clause that is so unfair as to be unconscionable; that is one which the weaker party had no real opportunity to negotiate and which allocates the risks, rights, or remedies in a manner so unfair as to "shock the conscience." The first bracketed sentence in Paragraph D, regarding when it is permissible to infer procedural unconscionability is from the portion of *O'Hare v. Municipal Resource Consultants (2003) 107 Cal. App. 4th 267, 283-284, 132 Cal. Rptr. 2d 116* , discussed at [3][d], *below*. The second bracketed sentence in Paragraph D, regarding the plaintiffs' not having read the arbitration agreement and surprise as evidence of procedural unconscionability, is from *Baker v. Osborne Development Corp. (2008) 159 Cal. App. 4th 884, 895-896, 71 Cal. Rptr. 3d 854* , which points out that defendant never brought the arbitration provision to plaintiffs. Optional paragraph D1 explains how the concept of substantive unconscionability is applied in the context of a contract of adhesion [*see* *Bruni v. Didion (2008) 160 Cal. App. 4th 1272, 1277, 1288-1289, 73 Cal. Rptr. 3d 395* , discussed at [3][c], *below*]. Optional Paragraphs F and G are for use when respondent is a sophisticated business person or in a class action, respectively. Optional Paragraph H is for use when a facially neutral review provision in fact only benefits the party that drafted and imposed the arbitration agreement. Optional Paragraph I is to resist enforcement of a prohibition on or waiver of classwide arbitration. Unenforceability of class arbitration waivers in the context of unwaivable statutory rights is addressed in § 20A.22, Optional Paragraph G. Optional Paragraph J is to argue that an arbitration clause is procedurally unconscionable despite the fact that it has an opt-out provision. Paragraphs K and L are to rebut any argument that the unconscionable portions of the arbitration agreement can be stricken and the remainder enforced.

Optional Paragraph M is for use to argue for an order striking as unconscionable limitations on statutory remedies. The particular appropriateness of class arbitration waivers for severance is addressed in Ch. 20, *Arbitration: Compelling*, § 20.86, Optional Paragraph F.

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in opposition to one seeking to compel arbitration [*see § 20A.10*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should quote or refer to the arbitration provision at issue and the circumstances under which it was negotiated and explain each instance of unequal or unfair bargaining power and allocation of risk. If the party petitioning to compel arbitration has claimed, or counsel anticipates that petitioner will argue, in a reply memoranda, that certain of the unequal risk allocations are necessary for business reasons, the argument should negate any such claim by showing other ways the petitioner has to protect its legitimate business interests.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For a form of response to a petition to compel arbitration that may be supported by this memorandum, as well as a procedural checklist, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

[d] Related Memoranda

For a form addressing adhesion contract principles in the context of a medical malpractice agreement governed by *Code Civ. Proc. § 1295*, see *Ch. 20, Arbitration: Compelling, § 20.45*.

Unenforceability of class arbitration waivers in the context of unwaivable statutory rights is addressed in § 20A.22, Optional Paragraph G. The particular appropriateness of class arbitration waivers for severance is addressed in Ch. 20, *Arbitration: Compelling*, § 20.86, Optional Paragraph F.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For memoranda to combine with this form, regarding other matters that the opposition may need to address, see *§§ 20A.10-20A.12, 20A.20 et seq., 20A.30 et seq., 20A.40 et seq., 20A.60 et seq., and 20A.80* et seq.

For forms addressing general contract principles, including unconscionability, see Ch. 50, *Contracts* .

[e] Opposing Memoranda

The memorandum in *Ch. 20, Arbitration: Compelling, § 20.86* may be used oppose this form by supporting the contention that if the unconscionable portions of the arbitration clause are severable, the remainder of the arbitration clause may be enforced. The authorities in Optional Paragraph H, regarding a provision for review by a second arbitrator, may be opposed by those in *Ch. 20, Arbitration: Compelling, § 20.87*. The memorandum in Optional Paragraph I, regarding the unconscionability and thus unenforceability of a class arbitration waiver may be opposed by those in form *Ch. 20, Arbitration: Compelling, § 20.88* when a choice of foreign law provision in the parties' contract is enforceable and designates a foreign law under which the class arbitration wavier is enforceable.

[3] Discussion of Authorities

[a] Arbitration Rules Are Unfair and Unconscionable

Civ. Code § 1670.5 provides that:

> (a) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> (b) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable, the parties shall have an opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making its determination.

The plaintiff in ***Dotson v. Amgen, Inc.*** *(2010) 181 Cal. App. 4th 975, 980-982, 104 Cal. Rptr. 3d 341* , was a highly educated attorney, who knowingly entered into a contract containing an arbitration provision in exchange for a generous compensation and benefits package. For that reason, the court found a minimum degree of procedural unconscionability, due to the fact that the employment contract offer was presented on a take-it or leave-it basis.

The facts and procedural background of ***Graham v. Scissor-Tail, Inc.*** *(1981) 28 Cal. 3d 807, 171 Cal. Rptr. 604, 623 P.2d 165* , are discussed at *§ 20A.90[3][a]*. Even a proper tribunal is of little consequence if it proceeds under rules which deny a party the fair opportunity to present his or her side of the dispute. If a party resisting arbitration can show that the rules under which arbitration is to proceed will operate to deprive him or her of the common law right of fair procedure, the agreement to arbitrate should not be enforced. When the established procedure denies the resisting party a fair opportunity to present his or her position, the court should refuse to compel arbitration (*28 Cal. 3d 807, 825-826)* . The record in the instant case disclosed nothing to indicate that the union's arbitration procedures operated to deny any party a fair opportunity to present its position (*28 Cal. 3d 807, 825-826)* . However, the Court did find that the contractual arrangement designating the union of one of the parties as the arbitrator of employment disputes, arising out of circumstances indicative of adhesion, lacked minimum levels of integrity and would not be enforced (*28 Cal. 3d 807, 826-827)* .

Plaintiff in ***Stirlen v. Supercuts, Inc.*** *(1997) 51 Cal. App. 4th 1519, 60 Cal. Rptr. 2d 138* , filed a wrongful termination action against his former employer. The employer moved to compel arbitration. The motion was denied on the ground that the employment contract was unconscionable and unenforceable as against public policy in that it violated *Civ. Code § 1668* by exempting the employer from its own willful acts including fraud and violation of law. The court of appeal affirmed, holding, in part, that *Civ. Code § 1670.5* is not preempted by the Federal Arbitration Act (*9 U.S.C. § 2*) (*51 Cal. App. 4th 1519, 1544-1552)* [*see* discussion at [b], *below*].

The employment contract provided that defendant employer could seek protection or redress in state or federal court for violations of paragraphs 7, 8, 9, and 10 of the agreement relating to inventions, trade secrets, confidential and proprietary information, and employee's promise not to compete after termination. Employee was limited to arbitration to resolve all claims related to employment, including tort claims, claims under California Fair Employment and Housing Act (*Gov. Code § 12940 et seq.*), Title VII of the Civil Rights Act of 1964 (§ 700 et seq.; *42 U.S.C. § 2000e et seq.*), the Age Discrimination in Employment Act (*29 U.S.C. § 621 et seq.*), the Americans with Disabilities Act (*42 U.S.C. § 12101 et seq.*), and any other statute. Employee's damages in arbitration were limited to actual damages for breach of contract, less any setoff in mitigation; and "the parties" were not entitled to any other remedy at law or at equity including other monetary damages, injunctive relief, exemplary damages, and/or specific performance. Arbitration was to be held pursuant to the Federal Arbitration Act (*9 U.S.C. § 1 et seq.*) (FAA) and California's *Code Civ. Proc. § 1280 et seq.* Plaintiff's negotiations for the job with defendant centered around compensation, including stock options and bonuses. The contract was not presented to plaintiff until after he had accepted employment. Then, it was presented to him as standard provisions that were not negotiable.

The court of appeal concluded that the arbitration clause at issue was unconscionably one-sided and unfair in numerous respects and therefore unenforceable in its entirety (*51 Cal. App. 4th 1519, 1552)* .

In **Treo v.** ***Kettner Homeowners Assn. v. Superior Court*** *(2008) 166 Cal. App. 4th 1055, 1059, 83 Cal. Rptr. 3d 318* , plaintiff homeowners association of a condominium project sued the developer for alleged construction defects. A provision of the homeowners association's covenants, conditions and restrictions (CC&R's) required that all disputes between the association and the developer be decided by a general judicial reference pursuant to *Code Civ. Proc. § 638* (*166 Cal. App. 4th 1055, 1059)* . The developer moved for an order submitting the case to a judicial referee. The homeowners association opposed the order, arguing that the provision of its CC&R's was not a contract as required by *Code Civ. Proc. § 638*, and that if it was, it was unconscionable and unforceable. The trial court granted developer's motion and ordered the matter to a general judicial referee. The association appealed (*166 Cal. App. 4th 1055, 1059)* .

The court of appeal issued a peremptory writ of mandate directing the superior court to vacate its order granting the motion for general reference and enter an order denying the motion. The court concluded that the CC&R's did not suffice as contract when the issue involved was the waiver pursuant to *Code Civ. Proc. § 638*, of the constitutional right to trial by jury. While it may have been reasonable under the circumstances to bind the owners and the association concerning the governance of the community and the placement of restrictions on the use of property, the Legislature did not intend that CC&R's be sufficient to effectively and permanently waive the constitutional right to trial by jury (*166 Cal. App. 4th 1055, 1067)* . When the Legislature stated in *Code Civ. Proc. § 638* that the right to jury trial could be waived by written contract, it did not mean to include equitable servitudes created by the CC&R's of common interest communities. Treating CCR's as a contract such that they were sufficient to waive the right to trial by jury did not comport with the importance of the right waived (*166 Cal. App. 4th 1055, 1059-1060, 1066-1067)* . Because of this conclusion, it was unnecessary for the court to determine whether the provision is unconscionable (*166 Cal. App. 4th 1055, 1067)* .

[b] Doctrine of Unconscionability Does Not Offend Federal Arbitration Act

In ***Discover Bank v. Superior Court (Boehr)*** *(2005) 36 Cal. 4th 148, 161, 30 Cal. Rptr. 3d 76, 113 P.3d 1100* , plaintiff cardholder, a California resident, alleged that defendant had a fraudulent practice of charging a $29 late fee for payments received after 1:00 p.m. (an undisclosed deadline) on the due date. Defendant successfully moved to compel arbitration in accordance with the cardholder agreement, which provided that it was governed by Delaware law. Contrary to an express provision of the cardholder agreement, plaintiff sought to pursue classwide arbitration, favored by California law, but allowed to be waived by Delaware law. The trial court ruled that the classwide arbitration prohibition was unconscionable and unenforceable. The court of appeal ruled, without disputing that the waiver would be unenforceable under California law and without addressing the choice-of-law issue, that the Federal Arbitration Act

(FAA; *9 U.S.C. § 1 et seq.*) preempted California's rule that classwide arbitration waivers are unconscionable. Plaintiff sought review by the California Supreme Court.

The California Supreme Court reversed and remanded, discussing the circumstances under which a class arbitration prohibition is unconscionable and unenforceable, holding that the FAA does not preempt the state law of unconscionability, and directing the choice of law issue to be determined on remand (*36 Cal. 4th 148, 173-174)* . After discussing California's strong public policy in favor of class proceeding, both in court and in arbitration, as the only practicable means for addressing situations in which business practices damage many individuals, each in small amounts and the unenforceability of class actions waivers, based on the explicit prohibition in the Consumers' Legal Remedies Act [*see Civ. Code § 1751*], the strong public policy evidenced by *Civ. Code § 1668* against exculpatory clauses, tantamount to a class action waiver in some situations, and the doctrine of unconscionability in general (*36 Cal. 4th 148, 174)* , the Court discussed class action waivers and Federal Arbitration Act preemption.

The Court noted the distinction between statutes that govern only arbitration clauses, which are preempted by Section 2 of the FAA [*9 U.S.C. § 2*], and generally applicable contract defenses, such as fraud, duress, and unconscionability, which are not preempted (*36 Cal. 4th 148, 165-166)* . Here, the class action waivers were unconscionable because in the nature of exculpatory clauses, a contract defense they were generally applicable to all contracts. The FAA does not federalize the law of unconscionability or related contract defenses, except to the extent that it forbids the use of those defenses to discriminate against arbitration clauses. There is no such discrimination with respect to California's rule against class action waivers (*36 Cal. 4th 148, 177)* . The Court discussed *Gilmer v. Interstate/Johnson Lane (1991) 500 U.S. 20, 26, 32, 111 S. Ct. 1647, 114 L. Ed. 2d 26* and *Green Tree Financial Corp. v. Bazzle (2003) 539 U.S. 444, 123 S. Ct. 2402, 156 L. Ed.2d 414* , and concluded that neither required a contrary result (*36 Cal. 4th 148, 168-172)* . The court noted that *Green Tree*'s holding was very limited and did not question state courts' rights to enforce general contract rules regarding unconscionability and public policy that preclude class action waivers. Nor did *Green Tree* even address the issue of whether the determination of unconscionability should be made by the court or by the arbitrator (*36 Cal. 4th 148, 172)* . Under California law, specifically *Code Civ. Proc. § 1281.2*, arbitration agreements are valid, irrevocable, and enforceable, except upon grounds supporting revocation of any contract, and as limited by contract principles in law and equity (*36 Cal. 4th 148, 163)* .

The facts and procedural background of ***Armendariz v. Foundation Health Psychcare Services, Inc.*** *(2000) 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669* , and the portion of the opinion addressing the arbitrability of claims under California's Fair Employment and Housing Act (*Gov. Code § 12900 et seq.*), are discussed in *Ch. 20, Arbitration: Compelling, § 20.23[3][a]*. In discussing general principles of unconscionability, the Court noted that a court may not rely on anything that is unique to an arbitration agreement when assessing unconscionability of an agreement governed by the Federal Arbitration Act ("FAA"). The fact that ordinary principles of unconscionability may manifest themselves in forms peculiar to the arbitration context does not mean that application of ordinary principles disfavors or disparages arbitration (*24 Cal. 4th 83, 114, 119)* .

The facts and procedural background of ***Gutierrez v. Autowest, Inc.*** *(2004) 114 Cal. App. 4th 77, 7 Cal. Rptr. 3d 267* , are discussed in *Ch. 20, Arbitration: Compelling, § 20.23[3][h]*. In its initial mention of the defense of unconscionability, the court noted that it was a generally available contract formation defense that does not single out arbitration agreements; thus it does not violate the Federal Arbitration Act (*114 Cal. App. 4th 77, 86)* .

Plaintiffs in ***Flores v. Transamerica HomeFirst, Inc.*** *(2001) 93 Cal. App. 4th 846, 113 Cal. Rptr. 2d 376* , were husband and wife senior citizens who borrowed from defendant under a reverse mortgage using their home as security. When they sold the home and received the final loan payoff demand, plaintiffs discovered for the first time that they were obligated to pay not only the $72,018 in principal they had borrowed plus interest on that principal but also another $75,000 in "contingent interest" which represented 50 percent of the market value appreciation over the two-year loan period. Plaintiffs paid the payoff demand under protest and then filed suit claiming unfair business practices, violations of the Consumer Legal Remedies Act, unconscionability, fraud, unlawful prepayment penalties,

and bad faith. HomeFirst removed the action to federal court on the ground of federal preemption, but the federal court remanded the matter back to state court. HomeFirst then petitioned to compel arbitration pursuant to arbitration clauses contained in the loan agreement and deed of trust signed by plaintiffs. The trial court denied the petition, finding the arbitration unconscionable. Defendant appealed.

The court of appeal affirmed. The loan documents contained an arbitration provision which, among other things, provided that "Notwithstanding anything that may be contained in this Section to the contrary, this Section does not limit your right to foreclose against the Property (whether judicially or non-judicially by exercising your right of sale or otherwise), to exercise self-help remedies such as set-off, or to obtain injunctive relief for the appointment of a receiver from any appropriate court, whether before, during or after any arbitration." Throughout these quoted provisions, the terms "you," "your," and "Lender" refer to HomeFirst. "I" refers to the borrower, which was somewhat confusing, because in the "Important Information for All Borrowers" that accompanied the loan documents, "you" and "your" to referred to the borrower.

The court of appeal began its discussion of unconscionability by noting that an agreement to arbitrate is enforceable, save on such grounds as exist for the revocation of any contract, and that as is true for any contract, an arbitration provision may be held unenforceable if it is unconscionable (*93 Cal. App. 4th 846, 850-851)* . Unconscionability is ultimately a question of law for the court (*93 Cal. App. 4th 846, 851)* . As to Defendant's argument that refusal to enforce the arbitration clause on the ground of unconscionability singled out arbitration agreements and was therefore precluded by the Federal Arbitration Act (hereafter FAA, the court of appeal said that argument was unsound. Section 2 of the FAA contains language virtually identical to that of *Code Civ. Proc. § 1281.2*: a written agreement to arbitrate a controversy "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Generally applicable contract defenses, including unconscionability, may be applied to invalidate arbitration agreements without contravening the FAA. Judicial refusal to enforce an arbitration clause clearly unconscionable under a general contract law principle not at all hostile to arbitration presents no obstacle to the objective of the FAA or any other congressional purpose (*93 Cal. App. 4th 846, 856)* . Requiring a "modicum of bilaterality" in arbitration agreements does not single out arbitration for disfavor. While that form of unconscionability (e.g., one-sided choice of forums) may be peculiar to the context of arbitration,the application of ordinary principles of unconscionability does not disparage arbitration as a favored voluntary remedy (*93 Cal. App. 4th 846, 857)* .

The facts and procedural background of ***Stirlen v. Supercuts, Inc.*** *(1997) 51 Cal. App. 4th 1519, 60 Cal. Rptr. 2d 138* , are discussed at [a], *above*. The matter was not originally before them, but the court had asked for briefs on whether the entire arbitration clause could be invalidated under the state doctrine of unconscionability without offense to the Federal Arbitration Act (*9 U.S.C. § 1 et seq.*; FAA) [*see Allied-Bruce Terminix Cos. v. Dobson (1995) 513 U.S. 265, 115 S. Ct. 834, 130 L. Ed. 2d 753* , discussed in *Ch. 20, Arbitration: Compelling, § 20.20[3][c]*] (*51 Cal. App. 4th 1519, 1543)* . Though some California statutes have been preempted [*see Ch. 20, Arbitration: Compelling, § 20.22*], California statutes by and large are designed to encourage resort to the arbitral process and do not conflict with any policy of the FAA [*see Volt Info. Sciences v. Leland Stanford Jr. Univ. Bd. of Trustees (1989) 489 U.S. 468, 476, n.5, 109 S. Ct. 1248, 103 L. Ed. 2d 488* , discussed in *§ 20A.11[3][b]*] (*51 Cal. App. 4th 1519, 1543-1544)* . The findings that restriction on arbitral remedies was unenforceable as against public policy, and that the arbitration clause was unconscionable were justified by *Civ. Code §§ 1668, 1670.5*, which define "unlawful contracts." Those statutes do not single out arbitration agreements or in any way reflect an antiarbitration policy, nor do they facially conflict with substantive federal law in any particular area. State courts can invalidate an arbitration clause on grounds which "arose to govern issues concerning the validity, revocability, and enforceability of contracts generally" (*51 Cal. App. 4th 1519, 1544)* . The FAA is not offended by the refusal to enforce an arbitration agreement under state law contract principles of unconscionability (*51 Cal. App. 4th 1519, 1547-1548)* , except in situations involving arbitration procedures approved by the Securities and Exchange Commission (*51 Cal. App. 4th 1519, 1548-1550)* . The court of appeal concluded that judicial refusal to enforce an arbitration clause that is clearly unconscionable under a general contract principle not at all hostile to arbitration presents no obstacle to the objective of the FAA or any other congressional purpose (*51 Cal. App. 4th 1519, 1551)* .

Plaintiff in ***Ingle v. Circuit City Stores, Inc.*** *(9th Cir. 2003) 328 F.3d 1165* , was required to sign an arbitration agreement in order for defendant to consider her application for employment. Later, she sued defendant, a Virginia corporation in federal district court for the Southern District of California, alleging sexual harassment, sex discrimination, disability discrimination under the California Fair Employment and Housing Act (FEHA, *Gov. Code § 12940 et seq.*), and sex discrimination and retaliation under Title VII of the Civil Rights Act of 1964 (*42 U.S.C. § 2000e et seq.*). Defendant moved to compel arbitration. The district court denied the motion. Defendant appealed.

The court of appeal affirmed, finding the arbitration agreement unconscionable under California law. The Federal Arbitration Act (FAA) provides that arbitration agreements are valid, irrevocable, and enforceable unless grounds exist at law or in equity for the revocation of any contract [*9 U.S.C. § 2*]. The FAA required arbitration agreements to be on an equal footing with other contracts. Thus, arbitration agreements are subject to all defenses to enforcement that apply to contracts generally. To evaluate the validity of an arbitration agreement, federal courts should apply ordinary state-law principles that govern contracts. Therefore, the district court applied California law. Unconscionability is a generally applicable defense to contracts; thus California courts may refuse to enforce an unconscionable arbitration agreement (*328 F.3d 1165, 1170)* .

[c] Criteria of Unconscionability

The facts and procedural background of ***Gentry v. Superior Court (Circuit City Stores, Inc.)*** *(2007) 42 Cal. 4th 443, 64 Cal. Rptr. 3d 773, 165 P.3d 556* , are discussed in *§ 20A.22[3][d]*. In case the issue of unconscionability was not rendered moot by the decision on remand, the Court discussed the general criteria of unconscionability, noting that unconscionability has both a procedural and a substantive element, the former focusing on "oppression" or "surprise" due to unequal bargaining power, the latter on "overly harsh" or "one-sided" results (*42 Cal. 4th 443, 468-469)* . The procedural element of an unconscionable contract generally takes the form of a contract of adhesion, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it. Substantively unconscionable terms may take various forms, but may generally be described as unfairly one-sided. The prevailing view is that procedural and substantive unconscionability must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability. However, they need not be present in the same degree. A sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves. In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa (*42 Cal. 4th 443, 469)* . A conclusion that a contract contains no element of procedural unconscionability is tantamount to saying that, no matter how one-sided the contract terms, a court will not disturb the contract because of its confidence that the contract was negotiated or chosen freely, that the party subject to a seemingly one-sided term is presumed to have obtained some advantage from conceding the term or that, if one party negotiated poorly, it is not the court's place to rectify these kinds of errors or asymmetries. The Court concluded that the Court of Appeal erred in finding the present agreement free of procedural unconscionability (*42 Cal. 4th 443, 470)* .

The portions of the opinion in ***Little v. Auto Stiegler, Inc.*** *(2003) 29 Cal. 4th 1064, 130 Cal. Rptr. 2d 892, 63 P.3d 979* , considering unconscionability in general and the unconscionability of the provision for review are discussed at [h], *below*.

In ***Parada v. Superior Ct.*** *(2009) 176 Cal. App. 4th 1554, 98 Cal. Rptr. 3d 743* , investor-customers sued defendant-investment company for a determination that the brokerage's arbitration agreement was unenforceable due to unconscionable provisions in it. They sought damages for fraud and related claims. The arbitration agreement required them to arbitrate disputes before a panel of three arbitrators from JAMS and prohibited consolidation or joinder of claims. The customers lost substantial amounts. In opposing the motion to compel arbitration, the customers presented evidence that the advance deposit required by JAMS for a panel of three arbitrators would be prohibitively expensive.

The court of appeals upheld the trial court's determination that the agreement was unenforceable (*176 Cal. App. 4th 1554, 1587)* . In its enforceability analysis, the court of appeals noted that the procedural unconscionability of each provision must be measured in a sliding scale with its substantive unconscionability (*176 Cal. App. 4th 1554, 1569)* . The portion of the opinion discussing procedural unconscionability is *set forth in § 20A.91[3][d], below*. The portion of the opinion considering the nature of the adhesion contract analysis of procedural unconscionability is *set forth in § 20A.91[3][d1], below*. The portion of the opinion dealing with substantive unconscionability is *set forth in § 20A.91[3][e], below*. The portion of the decision handling the issue of the consolidated action waiver is discussed in *§ 20A.91[3][i], below*. The portion of the decision analyzing the issue of the unenforceability of the entire arbitration agreement is *treated in § 20A.91[3][k], below*.

The facts and procedural background of ***Bruni v. Didion*** *(2008) 160 Cal. App. 4th 1272, 73 Cal. Rptr. 3d 395* , and the portion of the opinion discussing whether the court or the arbitrator should decide whether a valid and enforceable contract to arbitrate had been executed by the parties, is set forth at § 20.10[3][k]. The case involved consolidated construction defect suits by 35 homeowners. The court of appeal held that because plaintiffs were claiming that they never knowingly agreed to the arbitrationprovisions, the trial court, and not the arbitrator, had to resolve the unconscionability claim (*160 Cal. App. 4th 1272, 1277)* . The court further held that the arbitration provisions were unconscionable because they were contained in contracts of adhesion, and they violated plaintiffs' reasonable expectations claim (*160 Cal. App. 4th 1272, 1277)* . Before applying the general principles of unconscionability to plaintiffs' claims, the court of appeal reviewed them. Unconscionability has both a procedural and a substantive element. Both elements must be present for a court to invalidate a contract or clause, although the degree to which each must exist may vary. The procedural element of unconscionability focuses on two factors: oppression and surprise. Oppression arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice. Surprise involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms (*160 Cal. App. 4th 1272, 1288)* . Substantive unconscionability focuses on the actual terms of the agreement and evaluates whether they create overly harsh or one-sided results as to shock the conscience (*160 Cal. App. 4th 1272, 1288-1289)* .

The facts and procedural background of ***Baker v. Osborne Development Corp.*** *(2008) 159 Cal. App. 4th 884, 71 Cal. Rptr. 3d 854* , and the portion of the opinion discussing whether the court or the arbitrator should determine The court of appeal found that the trial court correctly ruled that the arbitration agreement was both procedurally and substantively unconscionable and therefore unenforceable (*159 Cal. App.4th 884, 897)* . The court of appeal said that because unconscionability is a defense that applies generally to contracts, courts may refuse to enforce an unconscionable arbitration agreement. Under California law, unconscionability has both procedural and substantive elements, and both elements must be present for a court to invalidate a contract on the ground of unconscionability. The substantive element of unconscionability focuses on the actual terms of the agreement and evaluates whether they create overly harsh or one-sided results, that is, whether contractual provisions reallocate risks in an objectively unreasonable or unexpected manner. To be substantively unconscionable, a contractual provision must shock the conscience (*159 Cal. App. 4th 884, 894)* .

Higgins v. Superior Court (Disney/ABC International Television, Inc.) *(2006) 140 Cal. App. 4th 1238, 45 Cal. Rptr. 3d 293* , arose from an episode of the television program Extreme Makeover: Home Edition (Extreme Makeover) featuring the five plaintiffs/petitioners, who were siblings. Their parents had died, and at the time of the episode, they were living with church acquaintances, who were defendants in the litigation but not involved in writ proceeding. Petitioners and the church acquaintances were chosen to participate in the program in which the church acquaintances' home would be completely renovated. Petitioners allege that, after the show was first broadcast, the church acquaintances informed petitioners that the home was theirs and forced petitioners to leave. The oldest sibling contacted the field producer and asked for help. The producer responded that he could not assist petitioners. Sometime thereafter, the Extreme Makeover episode was rebroadcast. Petitioners filed an action against the television defendants and the church acquaintances claiming intentional and negligent misrepresentation, breach of contract, unfair competition (*Bus. & Prof. Code § 17200 et seq.*), and false advertising (*Bus. & Prof. Code § 17500 et seq.*). The television defendants

petitioned to compel arbitration pursuant to the Federal Arbitration Act (FAA) (*9 U.S.C. § 1 et seq.*). Petitioners opposed the petition on the ground that the arbitration provision was unconscionable. They claimed it was procedurally unconscionable because the parties had unequal bargaining power, the arbitration provision was buried in the agreement, petitioners were given only five to ten minutes before they were asked to sign the agreement, none of the television defendants explained the agreement to them, and copies of the executed documents were withheld from them. Petitioners also argued the agreement was substantively unconscionable because its terms were so one-sided as to shock the conscience. The agreement requires them, but not the television defendants, to arbitrate, limits petitioners' remedies to damages (while the television defendants' remedies are not so limited), precludes only petitioners from appealing, provides that the arbitration will be in accordance with the rules of the American Arbitration Association (which unfairly requires arbitration costs to be borne equally by the parties), and allows the television defendants to change the terms of the agreement at any time. The trial court granted the petition in most respects, conditioned on the television defendants paying all arbitration costs. The court construed petitioners' opposition to the petition to compel arbitration as an attack on the entire agreement and not just on the arbitration provisions contained. Thus, under the FAA, that claim had to be considered by the arbitrator, not the court. Petitioners then filed a writ petition challenging the trial court's ruling.

The court of appeal granted the writ, directed the trial court to vacate its order compelling arbitration and to a new and different order denying the petition to compel arbitration (*140 Cal. App. 4th 1238, 1255)* . First, the court of appeal disposed of the characterization of petitioners' attack as being against the entire agreement. Although there was language in the pleadings and papers that was ambiguous, a careful reading of petitioners' points made clear they sought to attack only the arbitration clause (*140 Cal. App. 4th 1238, 1250-1251)* . The court of appeal then discussed the criteria of unconscionability in general, stating that unconscionability has both a procedural and a substantive element, the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided results. Both procedural and substantive unconscionability must be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability. But they need not be present in the same degree. A sliding scale is invoked. Thus, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa (*140 Cal. App. 4th 1238, 1249)* .

Plaintiff in ***Nyulassy v. Lockheed Martin Corporation*** *(2004) 120 Cal. App. 4th 1267, 16 Cal. Rptr. 3d 296* , sued his employer, alleging that defendant demoted him in retaliation for his protected workplace activity (i.e., complaints about treatment of employees and resistance to employer-sanctioned illegal activity). Plaintiff asserted claims for breach of contract, breach of the covenant of good faith and fair dealing,wrongful demotion in violation of public policy, and violation of *Lab. Code § 6310*. Defendant moved to compel arbitration and stay all proceedings based on a mandatory arbitration clause in plaintiff's employment agreement. Plaintiff had signed that employment agreement, approved as to form by the attorney who represented plaintiff in both actions, as part of a settlement of a wrongful termination action against defendant's predecessor. Except for that fact that plaintiff's employment relationship was terminable only for good cause for a period of three years after the date of his rehire, the employment agreement was defendant's standard mandatory form and was not negotiable. Plaintiff resisted arbitration on the ground that the arbitration agreement was unconscionable and unenforceable. The trial court agreed and denied the motion to compel arbitration.

Defendant appealed. The court of appeal affirmed (*120 Cal. App. 4th 1267, 1271, 1288)* . Although there was some discussion of the *Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669* , minimum standards, because the trial court based its denial of the motion on the ground that the agreement was unconscionable, the court of appeal confined itself to that issue and did not consider whether the arbitration agreement failed to meet the five minimum requirements enunciated in *Armendariz* (*120 Cal. App. 4th 1267, 1278-1280)* . The court discussed the doctrine of unconscionability generally, saying that it is a judicially created doctrine [*see Civ. Code § 1670.5(a)*]. Whether an agreement is unconscionable depends on circumstances at the time it was made. Unconscionability has both a "procedural" and a "substantive" element, the former focusing on "oppression" or "surprise" due to unequal bargaining power, the latter on "overly harsh" or "one-sided" results (*120 Cal. App. 4th*

1267, 1280) . Procedural and substantive unconscionability must both be present in order for a court to refuse to enforce a contract or clause under the doctrine of unconscionability. But they need not be present in the same degree. Essentially a sliding scale is applied under which the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa (*120 Cal. App. 4th 1267, 1282)* . In this case, the court found a high degree of substantive unconscionability, which, coupled with the lower quantum of procedural unconscionability, warranted the conclusion that the mandatory arbitration agreement was unconscionable (*120 Cal. App. 4th 1267, 1287)* .

The facts and procedural background of ***Martinez v. Master Protection Corp.*** *(2004) 118 Cal. App. 4th 107, 12 Cal. Rptr. 3d 663* and the portion of the opinion considering the provision regarding arbitral costs is discussed at *§ 20A.22[3][b]*. The court began its unconscionability analysis by noting that both procedural and substantive unconscionability are required to invalidate an arbitration clause. Procedural unconscionability focuses largely on oppression and the manner in which the agreement was negotiated. Substantive unconscionability focuses on the terms of the agreement and the presence of overly harsh or one-sided results. The two aspects need not be present to the same degree. The more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa (*118 Cal. App. 4th 107, 113)* .

The facts and procedural background of ***Abramson v. Juniper Networks, Inc.*** *(2004) 115 Cal. App. 4th 638, 9 Cal. Rptr. 3d 422* , and the portions of the opinion addressing the arbitration agreement in the context of plaintiff's unwaivable *Tameny* claim for wrongful termination in violation of public policy [*see Tameny v. Atlantic Richfield Co. (1980) 27 Cal. 3d 167, 178, 164 Cal. Rptr. 839, 610 P.2d 1330]* are discussed in *Ch. 20, Arbitration: Compelling, § 20.23[3][a]* and *[k]* and § 20A.22[3][a]. With respect to plaintiff's private rights, the court began its unconscionability discussion by noting that unconscionability is a judicially created doctrine. Whether an agreement is unconscionable depends on circumstances at the time it was made. Unconscionability has procedural and substantive aspects, both of which must be present before a court can refuse to enforce an arbitration provision. However, the two elements need not be present in the same degree (*115 Cal. App. 4th 638, 655)* . The more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa (*115 Cal. App. 4th 638, 656)* .

The facts and procedural background of ***Nyulassy v. Lockheed Martin Corporation*** *(2004) 120 Cal. App. 4th 1267, 16 Cal. Rptr. 3d 296* , and the portions of the opinion addressing unconscionability in general are discussed at [c], *above*. Regarding procedural unconscionability, the court of appeal noted that the procedural element of an unconscionable contract generally takes the form of a contract of adhesion, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it (*120 Cal. App. 4th 1267, 1280-1281)* . The court rejected defendant's contentions that this mandatory employment arbitration agreement was a "postdispute" agreement because it was entered into in settlement of a prior dispute and that, as a general proposition, unconscionability does not apply to an arbitration agreement executed after a dispute has arisen (*120 Cal. App. 4th 1267, 1284-1285)* . Although the court agreed with defendant that there had been no element of "surprise," the fact that plaintiff was represented by an attorney at the time the agreement was executed did not foreclose him from claiming unconscionability (*120 Cal. App. 4th 1267, 1285)* . The court found the agreement procedurally unconscionable because plaintiff was unable to negotiate the standard form arbitration clause and needed employment, having been unemployed for three years at the time the prior case was settled. Plaintiff's ability to negotiate the three year "good cause" provision in the employment agreement did not place him on equal footing with defendant in the negotiation process and had no bearing on the question of whether he had power to negotiate the arbitration provision (*120 Cal. App. 4th 1267, 1286)* .

The facts and procedural background of ***Gutierrez v. Autowest, Inc.*** *(2004) 114 Cal. App. 4th 77, 7 Cal. Rptr. 3d 267* , are discussed in *Ch. 20, Arbitration: Compelling, § 20.23[3][h]*. The court of appeal began its discussion of unconscionability by noting that a court cannot refuse to enforce a contract unless it is both procedurally and substantively unconscionable (*114 Cal. App. 4th 77, 87)* . Though courts refuse to enforce only those agreements that

are both procedurally and substantively unconscionable, the two factors need not each exist to the same degree. The moresubstantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa (*114 Cal. App. 4th 77, 88)* . Unconscionability is a question of law for the court (*114 Cal. App. 4th 77, 89)* .

Plaintiffs in ***Harper v. Ultimo*** *(2003) 113 Cal. App. 4th 1402, 7 Cal. Rptr. 3d 418* , hired defendant to stabilize the soil and re-level a pool on their property. The contract was preprinted and provided that all controversies under, or related to the contract were to be settled in accordance with the uniform rules for Better Business Bureau arbitration. Defendant rejected plaintiffs attempts to add addenda relating to start and stop dates, integration, and notification. Plaintiffs were not provided with a copy of the Better Business Bureau arbitration rules. Defendant broke a sewer pipe in the course of the work which spread concrete into the sewer system and soil, blocking plaintiffs' plumbing system and causing considerable damage to the backyard drainage system. Plaintiffs filed sued alleging causes of action for fraud and negligence as well as for breach of contract and seeking punitive damages. Defendant moved to compel arbitration. The Better Business Bureau arbitration rules provided that consumer remedies were limited to full or partial refund, completion of work, costs of repair or any out of pocket loss or property damage, not to exceed $2,500, caused by the repair. Consumers were prohibited from recovering for "personal injuries" unless all parties so agreed in writing (which defendant would not do). The trial court found the arbitration clause unconscionable and denied the motion. Defendant appealed.

The court of appeal affirmed (*113 Cal. App. 4th 1402, 1412)* . Both procedural and substantive unconscionability must be present for a court to refuse to enforce a contract or clause under the doctrine of unconscionability, yet they need not be present in equal amounts. There is a sliding scale where the greater the evidence of procedural unconscionability, the less evidence is needed of substantive unconscionability, and vice versa. Here, the court said, both procedural and substantive unconscionability were so present it was almost impossible to keep from tripping over them (*113 Cal. App. 4th 1402, 1406)* .

Jamarillo v. JH Real Estate Partners, Inc. *(2003) 111 Cal. App. 4th 394, 3 Cal. Rptr. 3d 525* , arose in the context of a residential lease. Plaintiff/tenants sued for general negligence, intentional tort, premises liability, breach of contract, breach of the implied warranty of habitability, and unfair business practices and false and deceptive advertising, mostly on account of mold infestation, which they alleged caused them to suffer physical injury and severe emotional distress, but also because one tenant slipped and fell on a concrete ramp located on the premises and injured her knee. The lease provided that any dispute between the parties relating to a claim for personal injury, directly or indirectly relating to, or arising from, the condition of the leased premises, or the apartment community, was to be resolved by arbitration conducted by the American Arbitration Association. In small, non-bold print it provided that the arbitration be conducted before three arbitrators and that all administrative fees and costs be shared equally by the landlord and resident, and that "all such fees must be advanced prior to the arbitration." Also in small, non-bold print, the provision specified that nothing would be deemed to limit the landlord's rights in the event of resident's breach or default under the agreement, including the right to bring an action for unlawful detainer. Defendants owner and management company moved to compel arbitration. The motion was denied on the ground that the arbitration provision was unconscionable as lacking mutuality. Defendants appealed.

The court of appeal affirmed. Although the court discussed *Civ. Code §§ 1942.1* and *1953*, concluding that *Civ. Code § 1953(a)(4)* as a general rule prevents a tenant of residential premises from validly agreeing, in the lease agreement itself, to binding arbitration to resolve disputes regarding his or her rights and obligations as a tenant. The court continued, however, by saying that even if they had come to a contrary conclusion regarding section 1953, they would refuse to enforce the arbitration clause on the ground of unconscionability (*111 Cal. App. 4th 394, 404)* . The analysis of unconscionability, the court noted, begins with an inquiry into whether the contract is one of adhesion, which is to say a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it. If the contract is adhesive, the court must then determine whether other factors are present which operate to render it unenforceable. If an adhesive contract or

provision does not fall within the reasonable expectations of the weaker or "adhering" party, it will not be enforced against that party. Even if consistent with the reasonable expectations of the weaker party, the contract or provision will be denied enforcement if it is unduly oppressive or unconscionable. Unconscionability has both a "procedural" and a "substantive" element, the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided results. Both procedural and substantive unconscionability must be present in order for a court to refuse to enforce a contract or clause under the doctrine of unconscionability, but they need not be present in the same degree (*111 Cal. App. 4th 394, 400)* . A sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that such that the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa (*111 Cal. App. 4th 394, 400-401)* . The procedural element of an unconscionable contract generally takes the form of a contract of adhesion (*111 Cal. App. 4th 394, 401)* .

Plaintiff in ***O'Hare v. Municipal Resource Consultants*** *(2003) 107 Cal. App. 4th 267, 132 Cal. Rptr. 2d 116* , sued his former employer for, among other things, wrongful discharge and age discrimination under the Fair Employment and Housing Act (FEHA; *Gov. Code § 12900 et seq.*). After serving plaintiff with special interrogatories, form interrogatories, and a request to produce documents, to which his attorney spent 13 hours responding, defendant moved to compel arbitration. The motion was denied on the ground that the arbitration provision lacked mutuality and did not meet the criteria set forth in *Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669* , (*Armendariz*). Defendant appealed.

The court of appeal affirmed (*107 Cal. App. 4th 267, 270)* . The court of appeal first discussed the concept of unconscionability in general, that it was based on *Civ. Code§ 1670.5*, and that it has both a "procedural" and a "substantive" element, the former focusing on "oppression" or "surprise" due to unequal bargaining power, the latter on "overly harsh" or "one-sided" results (*107 Cal. App. 4th 267, 272-273)* . Substantive unconscionability focuses on the actual terms of the agreement, while procedural unconscionability focuses on the manner in which the contract was negotiated and the circumstances of the parties. Both procedural and substantive unconscionability must be present before a court can refuse to enforce an arbitration provision based on unconscionability. However, the two elements need not be present in the same degree. A sliding scale is invoked: the more substantively oppressive the contract terms, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa (*107 Cal. App. 4th 267, 273)* . The portions of the opinion considering the substantively unconscionable terms of the agreement are discussed at [e], *below.* The court's consideration of why the unconscionable provision should not be severed is discussed at [i], *below.*

The portions of the opinion in ***Fittante v. Palm Springs Motors, Inc.*** *(2003) 105 Cal. App. 4th 708, 129 Cal. Rptr. 2d 659* , considering unconscionability in general and the unconscionability of the provision for review are discussed at [h], *below*.

Mercuro v. Superior Court (Countrywide Securities Corp.) *(2002) 96 Cal. App. 4th 167, 116 Cal. Rptr. 2d 671* began as a suit by plaintiff/petitioner and his wife against his former employer for numerous employment-related torts including age and disability discrimination, fraud, and wrongful termination in violation of public policy. Wife joined as a plaintiff in the causes of action for fraudulent inducement and negligent misrepresentation. Plaintiff worked for defendant/real party from April, 1996 until March, 2000. In 1997, real party asked all its sales personnel to sign a contract agreeing to arbitrate certain disputes which might arise between them and the company. The agreement covered some employment-related claims including employment discrimination but excluded others such as injunctive or other equitable relief for unfair competition, unauthorized disclosure of trade secrets or violation of intellectual property rights. The agreement contained specific provisions in which the employee acknowledged he or she "knowingly and voluntarily" waived his or her right to a jury trial and agreed to certain limitations on his or her ability to conduct discovery. Plaintiff did not want to sign the agreement, but was told by defendant's executive director of sales that he "did not have the option of not signing the agreement" and that a sales person who did not sign the agreement "would find it difficult to make a living at Countrywide." Defendant's CEO told plaintiff that if he did not sign the arbitration

agreement he would be "cut off" and made to "pay big time," his accounts would be removed, his travel expenses would not be approved, and the CEO would take whatever action was necessary to drive plaintiff out. Defendant's chief operating officer (COO) counseled plaintiff that the executive director of sales and the CEO would drive plaintiff out, making it all but impossible for him to earn a living, that plaintiff would be living in California with no income and litigating a court case which would take years to resolve. The COO also warned plaintiff that other employers would likely discover any lawsuit filed against Countrywide and that plaintiff would have difficulty in obtaining other employment. Finally, plaintiff signed the arbitration agreement under duress and coercion. Defendant moved to compel arbitration. Without addressing plaintiff's evidence of coercion or his legal arguments on the unconscionability of the agreements, the trial court ordered arbitration. Plaintiffs petitioned for writ of mandate overturning the order compelling arbitration.

The court of appealed granted the writ. The court of appeal reiterated that under California law, the doctrine of unconscionability has a procedural and a substantive element. Both elements must appear to invalidate a contract or one of its individual terms. The two elements need not be present in the same degree. The more substantively oppressive the contract terms, the less evidence of procedural unconscionability is required to conclude that the term is unconscionable, and vice versa. Procedural unconscionability turns on adhesiveness--a set of circumstances in which the weaker or "adhering" party is presented a contract drafted by the stronger party on a take it or leave it basis. To put it another way, procedural unconscionability focuses on the oppressiveness of the stronger party. The court of appeal concluded that there was no doubt in this case that defendant used oppressive tactics to secure plaintiff's signature on the arbitration agreement [*96 Cal. App. 4th 167, 174*]. The economic pressure defendant exerted on plaintiff through the threats was particularly acute because plaintiff was 52 years of age at the time, had just moved to California from Florida in the past year, and had only been with defendant for approximately a year. Given defendant's highly oppressive conduct in securing plaintiff's consent to its arbitration agreement, the court of appeal said he need only make a minimal showing of the agreement's substantive unconscionability [*96 Cal. App. 4th 167, 175*].

The facts and procedural background of ***Flores v. Transamerica HomeFirst, Inc.*** *(2001) 93 Cal. App. 4th 846, 113 Cal. Rptr. 2d 376* , and consideration of the fact that the doctrine of unconscionability is not precluded by the Federal Arbitration Act are discussed at [b], *above*. With respect to the doctrine of unconscionability in general, the court of appeal explained that unconscionability has both a procedural and a substantive element. Analysis of unconscionability begins with an inquiry into whether the contract is a contract of adhesion--i.e., a standardized contract, imposed on the weaker party without an opportunity to negotiate the terms (*93 Cal. App. 4th 846, 853)* .

Kinney v. United Healthcare Services, Inc. *(1999) 70 Cal. App. 4th 1322, 83 Cal. Rptr. 2d 348* , was a suit by an employee against her employer and her supervisor for employment discrimination and retaliation, breach of contract, infliction of emotional distress, negligent supervision, tortious conduct and interference with prospective economic advantage. The complaint alleged physical sexual harassment by the supervisor and later harassment by the supervisor about plaintiff's work in retaliation plaintiff's complaints to management about the sexual harassment. Plaintiff had been given an employee handbook which set forth a policy requiring her to arbitrate any claim under any federal, state, or local statute, regulation, or common law doctrine regarding or relating to employment discrimination, terms and conditions of employment, or termination of employment including, but not limited to, the following: Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1866, the Civil Rights Act of 1991, the Age Discrimination in Employment Act, the Rehabilitation Act of 1973,the Americans With Disabilities Act, the Employee Retirement Income Security Act of 1974, and all applicable amendments; state human rights or fair employment practices laws; breach of contract, promissory estoppel, or any other contract theory; and defamation, employment negligence, or any other tort theory. The handbook also set forth an internal dispute resolution process which the employee, but not the employer, was required to follow before commencing arbitration. The policy also did not not require the employer to arbitrate any dispute. The handbook precluded an arbitrator from finding that the employment relationship was other than at-will, limited discovery, and limited recovery of compensatory and punitive damages for employment discrimination in accordance with the provisions of Title VII of the Civil Rights Act of 1964 (*42 U.S.C. § 2000e et seq.*), to $300,000. The policy also expressly permitted an award of attorney fees to the employer, but made no similar

provision for the employee to recover attorney's fees. Defendants moved to dismiss or stay the court proceedings, seeking to require arbitration in accordance with the employee handbook. Plaintiff contended that the agreement to arbitrate employment-related claims was unenforceable against as not mutual and unconscionable. The motion was denied, and defendant appealed.

The court of appeal affirmed. The court first discussed the doctrine of unconscionability, as established in *Graham v. Scissor-Tail, Inc. (1981) 28 Cal. 3d 807, 820, 171 Cal. Rptr. 604, 623 P.2d 165* , and after enactment of *Civ. Code § 1670.5*, saying that unconscionability generally arises when there is an absence of meaningful choice on the part of one of the parties, together with contract terms which are unreasonably favorable to the other party. Unconscionability has a procedural and a substantive element. Although both elements must be present before a contract or contract provision is rendered unenforceable on grounds of unconscionability, they are reviewed in tandem and the greater the degree of substantive unconscionability, the less the degree of procedural unconscionability is required to annul the contract or clause (*70 Cal. App. 4th 1322, 1328-1329)* .

The facts and procedural background of ***Stirlen v. Supercuts, Inc.*** *(1997) 51 Cal. App. 4th 1519, 60 Cal. Rptr. 2d 138* , are discussed at [a], *above*. The trial court had described the one-sidedness of the arbitration clause as follows:

> Defendants can use the court system for certain claims, but the plaintiff must use arbitration for all his, with very limited damages. The plaintiff gives up significant rights, and defendant is protected from liability for all fraud, willful injury or violation of law.

The court of appeal reviewed the criteria for determining whether an arbitration clause is unconscionable and thus unenforceable as set forth in *Graham v. Scissor-Tail, Inc. (1981) 28 Cal. 3d 807, 817-820, 171 Cal. Rptr. 604, 623 P.2d 165* [*see* discussion at *§ 20A.90[3][a]*]. There are two limitations on the enforcement of adhesion contracts. First, a contract or provision that does not fall within the reasonable expectations of the weaker or "adhering" party will not be enforced against that party. Second, even if consistent with the reasonable expectations of the parties, a contract will be denied enforcement if it is unduly oppressive or unconscionable (*51 Cal. App. 4th 1519, 1530)* . Neither *Com. Code § 2302* nor *Civ. Code § 1670.5* provide a definition of unconscionability, but mandate an analysis that is not materially different from that described in *Scissor-Tail*. The two approaches were harmonized in *Perdue v. Crocker National Bank (1985) 38 Cal. 3d 913, 925, n.9, 216 Cal. Rptr. 345, 702 P.2d 503* , in which the Court observed that both pathways should lead to the same result. Under the UCC provision, unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the two parties together with contract terms that are unreasonably favorable to the other party: a "procedural" and a "substantive" element (*51 Cal. App. 4th 1519, 1531)* . Both procedural and substantive elements of unconscionability must be present in order for a court to refuse to enforce a contract or clause under the doctrine of unconscionability (*51 Cal. App. 4th 1519, 1533)* .

Plaintiffs filed ***Patterson v. ITT Consumer Financial Corp.*** *(1993) 14 Cal. App. 4th 1659, 18 Cal. Rptr. 2d 563* , as a class action against a group of related companies alleging that defendants had violated the Consumer Legal Remedies Act (*Civ. Code § 1750 et seq.*), engaged in unfair debt collection practices [*see Civ. Code § 1788 et seq.*], unlawfully required them to make other purchases as a condition of obtaining loans, breached the loan agreements with respect to insurance proceeds and refunds, engaged in false advertising, intentionally inflicted emotional distress, and committed fraud. Most of the plaintiffs were of modest means, some self-employed or temporarily jobless, and had borrowed relatively small amounts of money, often in response to advertising promising "guaranteed loans." Before the class was certified, defendants petitioned to compel arbitration pursuant to a provision in the loan agreements that required "binding arbitration by the National Arbitration Forum, Minneapolis, Minnesota" and further provided that "judgment on any award by the arbitrator may be entered in any court having jurisdiction."

The trial court denied the petition, finding the arbitration clauses unconscionable and thus unenforceable. The court further ordered defendants not to seek confirmation of any arbitration awards in the City and County of San Francisco, but permitted defendants to pursue claims in San Francisco in small claims or superior court actions. Defendants

appealed, contended the determination of unconscionability was error and that the order prohibiting them from confirming arbitration awards was improper in that it extended to persons who were not parties to the action.

The court of appeal affirmed. Because unconscionability is a question of law, it is reviewed de novo by an appellate court when there is no evidence extrinsic to the written contract (*14 Cal. App. 4th 1659, 1663)* . The court of appeal stated that there are two alternative analyses for determining unconscionability, though both should lead to the same result (*14 Cal. App. 4th 1659, 1663-1664)* , and did here (*14 Cal. App. 4th 1659, 1666-1667)* . The first approach, established by *Graham v. Scissor-Tail, Inc. (1981) 28 Cal. 3d 807, 171 Cal. Rptr. 604, 623 P.2d 165* , applies to contracts of adhesion, and denies their enforcement if the contract or provision falls outside the reasonable expectations of the weaker party. Even if the contract or provision is within the reasonable expectations of the parties, enforcement will be denied if it is unduly oppressive or unconscionable. The second approach, set out in *A & M Produce Co. v. FMC Corp. (1982) 135 Cal. App. 3d 473, 489, 186 Cal. Rptr. 114* , analyzed thecontract or provision in terms of *Civ. Code § 1670.5*, based on both procedural and substantive components (*14 Cal. App. 4th 1659, 1664)* .

[d] Element of Procedural Unconscionability

The facts and procedural background of ***Gentry v. Superior Court (Circuit City Stores, Inc.)*** *(2007) 42 Cal. 4th 443, 64 Cal. Rptr. 3d 773, 165 P.3d 556* , are discussed in *§ 20A.22[3][d]*. The discussion of the general criteria for unconscionabilty and procedural unconscionabilty are discussed at [c], *above.* Discussion of why there may be procedural unconscionability despite the opt-out provision is discussed at [j], *below.*

The portions of the opinion in ***Little v. Auto Stiegler, Inc.*** *(2003) 29 Cal. 4th 1064, 130 Cal. Rptr. 2d 892, 63 P.3d 979* , considering unconscionability in general and the unconscionability of the provision for review are discussed at [h], *below*.

In ***Parada v. Superior Ct.*** *(2009) 176 Cal. App. 4th 1554, 98 Cal. Rptr. 3d 743* , the court of appeals upheld the trial court's determination that the agreement was unenforceable (*176 Cal. App. 4th 1554, 1587)* . The facts of the case and the portion of the decision discussing the elements of unconscionability are *covered in § 20A.91[3][c], above*. The court of appeals referred to the two methods of determining procedural unconscionability, the common law doctrine of adhesive contracts and the statute-based surprise and oppression elements, and noted that each of the two approaches has generated some confusion in its application. After citing *Morris v. Redwood Empire Bancorp (2005) 128 Cal. App.4th 1305, 1317, 27 Cal. Rptr. 3d 797* , for definitions of the elements surprise and oppression in procedural unconscionability, the court of appeals noted that procedural unconscionability must be measured in a sliding scale with substantive unconscionability, so courts must not only to determine whether procedural unconscionability exists, but more importantly, to what degree it may exist (*176 Cal. App. 4th 1554, 1569)* .

In so doing, the court determined that the defendant's brokerage account agreements exhibited elements of procedural unconscionability in that they were contracts of adhesion; petitioners were in the weaker bargaining position and could not negotiate terms; the requirement of a three-judge arbitration panel and prohibition on consolidation or joinder were beyond petitioners' reasonable expectations; and there was no evidence that the broker called petitioners' attention to the Arbitration Panel paragraphs and No Consolidation paragraphs. The court held that if a contractual provision would defeat the strong expectation of the weaker party, it may also be necessary to call his or her attention to the language of the provision. Thus, while arbitration may be within the reasonable expectations of consumers, a process that builds prohibitively expensive fees into the arbitration process is not. Further, the weaker party would not reasonably expect that his or her claims could not be joined with others in a single proceeding (*176 Cal. App. 4th 1554, 1571-1572)* .

The agreements also exhibited elements *contrary* to procedural unconscionability: The arbitration provisions were not hidden in a prolix form, and petitioners had many realistic alternatives to opening the broker's accounts (*176 Cal. App. 4th 1554, 1573)* . The court of appeals agreed with the trial court that the plaintiffs had alternative venues for their investments, in that the particular type of investments that the defendant brokered, precious metals, were viewed as

fungible with other investments constituting the alternatives, such as stocks and bonds. The court held that the availability of reasonable alternatives is but one factor, along with the absence of power to negotiate terms, used in considering oppression, and its absence does not disprove procedural unconscionability (*176 Cal. App. 4th 1554, 1572-1573)* . Considered as a whole, the elements both supporting and contrary to a finding of procedural unconscionability led to a conclusion of a low to medium degree of procedural unconscionability in the agreements (*176 Cal. App. 4th 1554, 1573)* . The portion of the opinion considering the nature of the adhesion contract analysis of procedural unconscionability is *set forth in § 20A.91[3][d1], below*. The portion of the opinion dealing with substantive unconscionability is *set forth in § 20A.91[3][e], below*. The portion of the decision handling the issue of the consolidated action waiver is discussed in *§ 20A.91[3][i], below*. The portion of the decision analyzing the issue of the unenforceability of the entire arbitration agreement is *treated in § 20A.91[3][k], below*.

Sanchez v. Western Pizza Enterprises, Inc. *(2009) 172 Cal. App. 4th 154, 90 Cal. Rptr. 3d 818* , affirmed a trial court order finding a class arbitration waiver and other terms of the agreement unconscionable, and that the agreement therefore was unenforceable. The portion of the opinion discussing the application of contract principles to enforceability of a class arbitration waiver is discussed in *Ch. 20, Arbitration: Compelling, § 20.30[3][a]*. The portion of the opinion dealing with whether the agreement specified that the arbitrator was to decide the issue of enforceability is discussed in *Ch. 20, Arbitration: Compelling, § 20.10[3][k]* and in *§ 20A.10[3][b], above* . The portion of the opinion and relevant facts dealing with the issue of whether the class action waiver was unenforceable as against public policy is discussed in *§ 20A.22[3][d], above*. The employee claimed that an arbitration agreement was procedurally unconscionable. Upon review, the court noted that the agreement did not set forth a distorted presentation of the benefits of arbitration to the degree necessary for unconscionability. It states that the purpose of the agreement is "to resolve any disputes that may arise between the Parties in a timely, fair and individualized manner," but otherwise does not extol the benefits of arbitration. The arbitration agreement does not limit the limitations periods, the remedies available, or the amount of punitive damages. It requires each party bear its own attorney fees and costs and therefore incorporates any statutory right to recover fees rather than creating a presumption against a fee recovery. Thus, the arbitration agreement neither contains the same types of disadvantages for employees as were present in Gentry nor fails to mention such disadvantageous terms. Moreover, the arbitration agreement expressly states that that the agreement is not a mandatory condition of employment (*172 Cal. App. 4th 154, 173)* . However, the court did find procedural unconscionability in two respects. First, the inequality in bargaining power between the low-wage employees and their employer makes it likely that the employees felt at least some pressure to sign the arbitration agreement. Second, the arbitration agreement suggests that there are multiple arbitrators to chose from and fails to mention that the designated arbitration provider offers only one arbitrator. This fact renders the arbitrator selection process illusory and creates a significant risk that the employer, as a "repeat player" before the same arbitrator, will reap a significant advantage. These circumstances indicate that the employees' decision to enter into the arbitration agreement likely was not a free and informed decision but was marked by some degree of that oppression and unfair surprise constituting procedural unconscionability (*172 Cal. App. 4th 154, 174)* . The portion of the opinion addressing the substantive unconscionability of the arbitration agreement is discussed in [e], *below*. The portion of the opinion determining the unenforceability of the agreement due to unconscionability is discussed in [k], *below*.

The facts and procedural background of ***Bruni v. Didion*** *(2008) 160 Cal. App. 4th 1272, 73 Cal. Rptr. 3d 395* (*Bruni*), and the portions of the opinion discussing whether the court or the arbitrator should determine whether the arbitration provision was unconscionable is set forth at § 20.10[3][k]. The court of appeal held that because plaintiffs were claiming that they never knowingly agreed to the arbitration provisions, the trial court, and not the arbitrator, had to resolve the unconscionability claim (*160 Cal. App. 4th 1272, 1277)* . The case involved consolidated construction defect suits by 35 homeowners. The court of appeal affirmed the trial court's finding that the arbitration provision was unconscionable because it was contained in contracts of adhesion and violated plaintiffs' reasonable expectations (*160 Cal. App. 4th 1272, 1277, 1296)* . The general criteria of unconscionabilty are discussed in the portion of the opinion set forth at [c], *above*. The procedural element of an unconscionable contract generally takes the form of a contract of adhesion, although adhesion is not a prerequisite for unconscionability. A contract term may be held to be unconscionable even if the weaker party knowingly agreed to it (*160 Cal. App. 4th 1272, 1289)* . A contract of

adhesion is a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it. Although contracts of adhesion are generally enforceable according to their terms, a provision contained in a contract of adhesion cannot be enforced if it does not fall within the reasonable expectations of the weaker or "adhering" party. Failure to pass the "reasonable expectations" test is generally treated as the equivalent of substantive unconscionability (*160 Cal. App. 4th 1272, 1289)* . Plaintiffs claimed that they never knowingly agreed to the arbitration provisions. As in most adhesion contract cases, they denied ever reading them. The general rule that one who signs an instrument may not avoid the impact of its terms on the ground that he or she failed to read the instrument before signing it applies only in the absence of overreaching (*160 Cal. App. 4th 1272, 1290-1291)* . Defendants argue that, under *Evid. Code § 622* **,** plaintiffs are bound by the recital in the one-page application form that they had "read a sample copy of the warranty booklet." However, *Evid. Code § 622* does not bar an assertion of fraud or other grounds for rescission. That would be impermissible bootstrapping. For similar reasons, it should not apply to recitals in an adhesion contract. Thus, plaintiffs cannot be required to arbitrate anything--not even arbitrability--until a court has made a threshold determination that they did, in fact, agree to arbitrate something. Turning to the question of whether the purported agreement to arbitrate the question of arbitrability was unconscionable, the court of appeal agreed with the trial court's finding that the arbitration provisions were part of a contract of adhesion (*160 Cal. App. 4th 1272, 1291*). The reality of the transaction was that plaintiffs had to accept the arbitration provisions if they wanted to buy a house. The arbitration provisions were part of a preprinted form contract, presented on a take-it-or-leave-it basis. Even assuming that plaintiffs could have negotiated over some terms of the purchase and sale agreement, such as the purchase price, it seems apparent that any attempt to negotiate over the terms of the warranty would have been fruitless, particularly because it arose out of a three-way relationship between the home buyer; Howard Roberts Development Company (HRD, Didion's joint venture partner and alleged alter ego); and Home Buyers' Warranty Corp (HBW), the administrator, which provided it as a package deal (*160 Cal. App. 4th 1272, 1293)* .

In addition, there was a strong showing of surprise. The arbitration provisions take up roughly one full page in a 30-page booklet. The entire booklet is in single-spaced, 10-point type. The arbitration provisions are not distinguished from the rest of the booklet by either bolding or capitalization. The booklet, in turn, was buried in a voluminous stack of purchase and sale documents (*160 Cal. App. 4th 1272, 1293)* . Most important, plaintiffs were never asked to sign or initial the booklet, much less the arbitration provisions; they were merely asked to sign the one-page application. Admittedly, the application did indicate--in capital letters--that the booklet contained binding arbitration provisions; however, it did not provide any information regarding their scope or effect. It also recited that the home buyer had read a sample booklet, even though plaintiffs were not actually given a sample booklet until after they had signed the whole stack of documents--sometimes not even until they had moved in. HRD's agents lessened any incentive plaintiffs might have had to read the booklet by describing the warranty as a benefit or a bonus. The court of appeal recognized that there was no evidence regarding the availability of similarly priced housing in the area, but found the most recent view to be that the absence of reasonable market alternatives has no bearing on whether a contract is adhesive. Thus, the court of appeal concluded that the arbitration provisions were contained in a contract of adhesion (*160 Cal. App. 4th 1272, 1272-1294)* . Next, the court of appeal considered of the reasonable expectations issue, limiting its consideration to the arbitration provisions themselves, not the other provisions of the warranty. Defendants argued that the arbitration provisions were only to be expected, because residential purchase agreements frequently include arbitration agreements or some form of alternative dispute resolution provision. Here, however, the arbitration provisions were not contained within the main purchase and sale agreement; instead, they were contained in what was labeled as a warranty. Thus, plaintiffs would reasonably expect that the arbitration provisions would apply only to disputes over the warranty.

Instead, the actual scope of the arbitration provisions was unforeseeably broad. They purported to apply not only to disputes "arising from or related to this Warranty," but also to all disputes "arising from or related to ... the subject Home, ... any defect in or to the subject Home ..., or the sale of the subject Home by the Builder... ." This would not have been within plaintiffs' reasonable expectations (*160 Cal. App. 4th 1272, 1295)* . Moreover, at least in the 2001 and 2002 versions, the warranty purported to relieve the builder of any liability, except under the warranty. As a result, any claim against defendants became a claim "arising from or related to" the warranty itself and hence a claim within

the scope of the arbitration provisions. Finally, the arbitration provisions also purported to apply to disputes over arbitrability. As the United States Supreme Court has noted, the question of who should decide arbitrability is rather arcane. A party often might not focus on that question or on the significance of having arbitrators decide the scope of their own powers. Thus, this provision, too, was well beyond a layperson's reasonable expectations order (*160 Cal. App. 4th 1272, 1296)* .

The facts and procedural background of ***Baker v. Osborne Development Corp.*** *(2008) 159 Cal. App. 4th 884, 71 Cal. Rptr. 3d 854* , and the portion of the opinion discussing whether the court or the arbitrator should determine arbitrability is discussed at *§ 20.10[3][k]*. The court of appeal found that the trial court correctly ruled that the arbitration agreement was both procedurally and substantively unconscionable and therefore unenforceable (*159 Cal. App. 4th 884, 897)* . The procedural element of unconscionability involves oppression and surprise. Oppression arises when the parties have unequal bargaining power, leading to no real negotiation and lack of meaningful choice. Surprise may arise when challenged terms are hidden in a prolix printed form drafted by a party in a superior bargaining position (*159 Cal. App. 4th 884, 894)* . Although, failure to read a provision does not excuse compliance with it, it may establish actual surprise the unfairness of which is reinforced by the defendant's failure to call the arbitration clause to the attention of plaintiffs (*159 Cal. App. 4th 884, 895)* . The circumstances of this transaction established actual surprise. While the agreement need not expressly provide for arbitration, but may do so by incorporating a referenced document that is readily available, the warranty booklet was not provided before or at the time the builder application was presented for signature just before the close of escrow (*159 Cal. App. 4th 884, 895-896*). Thus, substantial evidence supported the trial court's findings of surprise and oppression and the conclusion of procedural unconscionability (*159 Cal. App. 4th 884, 896)* .

The facts and procedural background of ***Higgins v. Superior Court (Disney/ABC International Television, Inc.)*** *(2006) 140 Cal. App. 4th 1238, 45 Cal. Rptr. 3d 293* , and the portion of the opinion addressing the general criteria of unconscionability are discussed at [c], *above.* Regarding procedural unconscionability, the court began with whether the parties' agreement was adhesive. A contract of adhesion is a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it (*140 Cal. App. 4th 1238, 1251-1252)* . In this case, the lengthy Agreement was drafted by the television defendants. It was a standardized contract; none of the petitioners' names or other identifying information was included in the body of the document. There was no serious doubt that the television defendants had far more bargaining power than petitioners. From the facts, the court concluded the agreement was presented to petitioners on a take-it-or-leave-it basis by the party with the superior bargaining position who was not willing to engage in negotiations. Accordingly, the court concluded that the agreement and exhibits constituted a contract of adhesion (*140 Cal. App. 4th 1238, 1252)* . Procedural unconscionability focuses on the factors of surprise and oppression, with surprise being a function of the disappointed reasonable expectations of the weaker party. In this case, the arbitration provision appears in one paragraph near the end of a lengthy, single-spaced document. The entire agreement was drafted by the television defendants, who transmitted copies of it to the petitioners. The television defendants knew petitioners were young and unsophisticated, and had recently lost both parents. Indeed, it was petitioners' vulnerability that made them so attractive to the television defendants. The latter made no effort to highlight the presence of the arbitration provision in the agreement. It was entitled "MISCELLANEOUS." In contrast to several other paragraphs, no text in the arbitration provision was highlighted. No words were printed in bold letters or larger font; nor were they capitalized (*140 Cal. App. 4th 1238, 1252-1253*). Although petitioners were required to place their initials in boxes adjacent to six other paragraphs, no box appeared next to the arbitration provision. Although the first page advised petitioners to read the entire agreement before signing it and the second-to-last paragraph stated that the person signing acknowledges doing so, that language did not defeat the otherwise strong showing of procedural unconscionability (*140 Cal. App. 4th 1238, 1253*).

The facts and procedural background of ***Nyulassy v. Lockheed Martin Corporation*** *(2004) 120 Cal. App. 4th 1267, 16 Cal. Rptr. 3d 296* , and the portions of the opinion addressing unconscionability in general are discussed at [c], *above*. Regarding procedural unconscionability, the court of appeal noted that the procedural element of an unconscionable

contract generally takes the form of a contract of adhesion, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it (*120 Cal. App. 4th 1267, 1280-1281*). The court rejected defendant's contentions that this mandatory employment arbitration agreement was a "postdispute" agreement because it was entered into in settlement of a prior dispute and that, as a general proposition, unconscionability does not apply to an arbitration agreement executed after a dispute has arisen (*120 Cal. App. 4th 1267, 1284-1285*). Although the court agreed with defendant that there had been no element of "surprise," the fact that plaintiff was represented by an attorney at the time the agreement was executed did not foreclose him from claiming unconscionability (*120 Cal. App. 4th 1267, 1285)* . The court found the agreement procedurally unconscionable because plaintiff was unable to negotiate the standard form arbitration clause and needed employment, having been unemployed for three years at the time the prior case was settled. Plaintiff's ability to negotiate the three year "good cause" provision in the employment agreement did not place him on equal footing with defendant in the negotiation process and had no bearing on the question of whether he had power to negotiate the arbitration provision (*120 Cal. App. 4th 1267, 1286)* .

The facts and procedural background of ***Fitz v. NCR Corp.*** *(2004) 118 Cal. App. 4th 702, 13 Cal. Rptr. 3d 88* , are discussed in *Ch. 20, Arbitration: Compelling,§ 20.23[3][a]*. The portion of the opinion holding the arbitration agreement's discovery provision inadequate to ensure vindication of unwaivable rights is discussed in *§ 20A.22[3][c]*. The court began its discussion of unconscionability and mutuality by noting that procedural unconscionability focuses on the oppressiveness of the stronger party's conduct, which arises from an inequality of bargaining power and an absence of meaningful choice on the part of the weaker party (*118 Cal. App. 4th 702, 721)* . In this case, plaintiff had no opportunity to negotiate the terms of defendant's arbitration policy. The policy was unilaterally imposed after plaintiff had worked for defendant for 14 years. Few employees are in a position to forfeit a job and the benefits they have accrued for more than a decade solely to avoid the arbitration terms that are forced on them by their employer. These facts establish a high degree of oppressiveness. The arbitration policy was therefore procedurally unconscionable (*118 Cal. App. 4th 702, 722)* .

The facts and procedural background of ***Martinez v. Master Protection Corp.*** *(2004) 118 Cal. App. 4th 107, 12 Cal. Rptr. 3d 663* and the portion of the opinion considering the provision regarding arbitral costs is discussed in *§ 20A.22[3][b]*. The discussion of the general criteria for unconscionability is at [c], above. The procedural aspect of the unconscionability analysis focuses on the manner in which the agreement was negotiated and the oppressiveness of the stronger party's conduct (*118 Cal. App. 4th 107, 113)* . Oppression arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice. Plaintiff was required to execute the arbitration agreement as a prerequisite of his employment by defendant. There was no evidence he had any opportunity to negotiate or refuse to sign the arbitration agreement. An arbitration agreement that is an essential part of a "take it or leave it" employment condition is procedurally unconscionable (*118 Cal. App. 4th 107, 114)* .

The facts and procedural background of ***Abramson v. Juniper Networks, Inc.*** *(2004) 115 Cal. App. 4th 638, 9 Cal. Rptr. 3d 422* , and the portions of the opinion addressing the arbitration agreement in the context of plaintiff's unwaivable *Tameny* claim for wrongful termination in violation of public policy [*see Tameny v. Atlantic Richfield Co. (1980) 27 Cal. 3d 167, 178, 164 Cal. Rptr. 839, 610 P.2d 1330]* are discussed in *Ch. 20, Arbitration: Compelling, § 20.23[3][a]* and *[k]* and § 20A.22[3][a]. The discussion of the general criteria for unconscionability is at [c], *above.* Procedural unconscionability concerns the manner in which the contract was negotiated and the circumstances of the parties at that time. The relevant factors are oppression and surprise. Oppression arises from an inequality of bargaining power of the parties to the contract and an absence of real negotiation or a meaningful choice on the part of the weaker party. Surprise arises if the challenged terms are "hidden in a prolix printed form drafted by the party seeking to enforce them." If an adhesive contract is oppressive, surprise need not be shown. An employee's awareness of the employer's mandate that disputes be resolved in a non-judicial forum does not preclude a finding that the arbitration provision is unenforceable (*115 Cal. App. 4th 638, 656, 662-663)* . In this case, the circumstances demonstrate a high degree of oppressiveness--plaintiff had no meaningful choice about arbitration and lacked equal bargaining power; the arbitration agreement was presented on a take-it-or-leave-it basis (*115 Cal. App. 4th 638, 663)* . Given the oppressiveness of the

contract, the court concluded that even without the element of surprise, the arbitration provision was procedurally unconscionable (*115 Cal. App. 4th 638, 663-664)* .

The facts and procedural background of ***Gutierrez v. Autowest, Inc.*** *(2004) 114 Cal. App. 4th 77, 7 Cal. Rptr. 3d 267* , are discussed in *Ch. 20, Arbitration: Compelling, § 20.23[3][h]*. The procedural element focuses on "oppression" and "surprise." When the parties to the contract have unequal bargaining power and the contract is not the result of real negotiation or meaningful choice, it is oppressive. "Surprise" is defined as "the extent to which the supposedly agreed-on terms are hidden in the prolix printed form drafted by the party seeking to enforce the disputed terms. The procedural element of unconscionability generally takes the form of a contract of adhesion (*114 Cal. App. 4th 77, 87)* . An adhesive contract is "a standardized contract which, imposed and drafted by the party of superior bargaining strength relegates to the subscribing party only the opportunity to adhere to it or to reject it." Simply because a provision within a contract of adhesion is not read or understood by the nondrafting party does not justify a refusal to enforce it. The unbargained-for term may only be denied enforcement if it is substantively unconscionable (*114 Cal. App. 4th 77, 88)* . The court of appeal found that the trial court's implicit conclusion that the lease was adhesive was supported by substantial evidence. The lease was presented to plaintiffs on a "take it or leave it" basis and they were given no opportunity to negotiate any of the preprinted terms. The arbitration clause was particularly inconspicuous, printed in eight-point type face on the opposite side of the signature page of the lease. Plaintiffs were never informed that the lease contained an arbitration clause; nor were they required to initial it. Under these circumstances, the arbitration clause was procedurally unconscionable (*114 Cal. App. 4th 77, 89)* .

The facts and procedural background of ***Harper v. Ultimo*** *(2003) 113 Cal. App. 4th 1402, 7 Cal. Rptr. 3d 418* , and the portion of the opinion considering the general criteria for unconscionability are discussed in [c], *above*. The court said procedural unconscionability focuses on the factors of surprise and oppression, with surprise being a function of the disappointed reasonable expectations of the weaker party. The nasty surprise here was that the customer could have no relief even if out and out fraud was perpetrated and would not be fully compensated for property damage. Oppression resulted from the fact that the inability to receive full relief was artfully hidden by merely referencing the Better Business Bureau arbitration rules and not attaching them (*113 Cal. App. 4th 1402, 1406)* . The trail judge had commented that this was not a contract of adhesion because plaintiffs had market alternatives. The court of appeal took pains to state that while most cases stated that the starting point of any analysis of unconscionability is whether the contract is of adhesion, adhesion is not a prerequisite for unconscionability (*113 Cal. App. 4th 1402, 1408-1409)* . There will be cases, like this one, where procedural unconscionability is obvious without the need to establish that the contract is one of adhesion or to consider market alternatives (*113 Cal. App. 4th 1402, 1410)* .

The facts and procedural background of ***O'Hare v. Municipal Resource Consultants*** *(2003) 107 Cal. App. 4th 267, 132 Cal. Rptr. 2d 116* , are discussed at [c], *above.* The court first considered the substantively unconscionable aspects of the arbitration, which is discussed at [e], *below*, and then considered procedural unconscionability, noting that procedural unconscionability focuses on whether the arbitration provision was the result of oppression or surprise due to unequal bargaining power between the employer and employee (*107 Cal. App. 4th 267, 282-283)* . It turns on adhesiveness--a set of circumstances in which the weaker or 'adhering' party is presented a contract drafted by the stronger party on a take it or leave it basis. Here, no extrinsic evidence about the negotiations, if any, preceding the execution of the employment contract, was presented. However, that did not preclude a finding of procedural unconscionability. In this case, the contract itself created sufficient inference of procedural unconscionability. Given the multiple unlawful provisions in this contact, a very low showing of procedural unconscionability was required to bar enforcement of the arbitration provision (*107 Cal. App. 4th 267, 283)* . The court pointed out that the contract was a typed eight-page boilerplate contract given to all employees who had access to confidential information. It contained multiple generic provisions. The only portion filled in by hand was the amount of plaintiff's salary. Nothing suggested the contract was the product of "give and take." In fact, the arbitration provision was so one-sided the court said it defied credulity to suggest either that plaintiff had any input or that any desire by plaintiff to change the contract terms would have been considered or honored. Thus, the court concluded it was reasonable to infer procedural unconscionability (*107 Cal. App. 4th 267, 284)* .

The portions of the opinion in ***Fittante v. Palm Springs Motors, Inc.*** *(2003) 105 Cal. App. 4th 708, 129 Cal. Rptr. 2d 659* , considering unconscionability in general and the unconscionability of the provision for review are discussed at [h], *below*.

The facts and procedural background of ***Mercuro v. Superior Court (Countrywide Securities Corp.)*** *(2002) 96 Cal. App. 4th 167, 116 Cal. Rptr. 2d 671* , and the portion of the opinion discussing procedural unconscionability are at [c], *above*.

The facts and procedural background of ***Flores v. Transamerica HomeFirst, Inc.*** *(2001) 93 Cal. App. 4th 846, 113 Cal. Rptr. 2d 376* , and consideration of the fact that the doctrine of unconscionability is not precluded by the Federal Arbitration Act are discussed at [b], *above*. The general criteria for unconscionability are discussed at [c], *above*. As to the procedural element of unconscionability, the court of appeal noted that the procedural element focuses on "oppression" or "surprise." Oppression arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice. Surprise involves the extent to which the supposedly agreed-on terms are hidden in a prolix printed form drafted by the party seeking to enforce them. A finding of a contract of adhesion is essentially a finding of procedural unconscionability. In the present case, the arbitration clauses contained in the loan agreement and deed of trust constituted a contract of adhesion. HomeFirst unquestionably had superior bargaining strength in that it presented its preprinted documents, cast in generic language, to plaintiffs for signature. Plaintiffs were offered no opportunity to negotiate. The "IMPORTANT INFORMATION FOR ALL BORROWERS" which plaintiffs received indicated that in order to establish the reverse mortgage plaintiffs were required to sign the standardized loan documents. Plaintiffs were never informed that the documents, much less the arbitration provisions, were negotiable. Moreover, according to plaintiffs' son, HomeFirst's representative told plaintiffs that HomeFirst was the only company in California offering reverse mortgages, thereby indicating that plaintiffs had no real choice of alternate lenders (*93 Cal. App. 4th 846, 853)* . Here, the undisputed facts indicated that the arbitration agreement was imposed on plaintiffs on a "take it or leave it" basis, making it a contract of adhesion and thereby procedurally unconscionable (*93 Cal. App. 4th 846, 854)* .

The facts and procedural background of ***Kinney v. United Healthcare Services, Inc.*** *(1999) 70 Cal. App. 4th 1322, 83 Cal. Rptr. 2d 348* , are discussed at [c], *above*. The court of appeal said that the procedural element of unconscionability focuses on factors of oppression and surprise. Oppression arises from an inequality of bargaining power of the parties to the contract and an absence of real negotiation or a meaningful choice on the part of the weaker party. In this case, the procedural component of unconscionability existed because the handbook was given to the employees, who were required to consent to its terms, including the arbitration provision, as a condition of continued employment. The employees had no opportunity to negotiate regarding the terms of the handbook (*70 Cal. App. 4th 1322, 1329)* . Surprise can arise when the terms to which the party supposedly agreed are hidden in a prolix printed form drafted by the party seeking to enforce them. In this case, after providing the employees assurances that their jobs would not be affected by its takeover of the company, defendant United Healthcare gave plaintiff a copy of the handbook, contained in a large three-ring binder, and pressured her to sign the consent and acknowledgment form that same day. The court found that the language used in the policy to describe its scope was so extensive as to render it difficult for a lay person to read and understand the parameters of the policy. That was particularly true regarding the unilateral nature of the arbitration obligation. Although the acknowledgment form referred to the arbitration policy, it did not specify the details of that policy, or its unilateral nature. Given that these terms worked so clearly to defendant's advantage, to the detriment of its employees, the court concluded that the element of surprise was satisfied (*70 Cal. App. 4th 1322, 1329-1330)* .

The facts and procedural background of ***Stirlen v. Supercuts, Inc.*** *(1997) 51 Cal. App. 4th 1519, 60 Cal. Rptr. 2d 138* , are discussed at [a], *above*. The procedural element focuses on two factors: "oppression" and "surprise." "Oppression" results from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice. "Surprise" involves the extent to which the supposedly agreed-on terms of the bargain are hidden in the prolix

printed form drafted by the party seeking to enforce the disputed terms (*51 Cal. App. 4th 1519, 1532)* . A contract of adhesion is a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it. If a contract is one of adhesion, the procedural element of unconscionability is present (*51 Cal. App. 4th 1519, 1533)* .

The facts and procedural background of **Treo v.** ***Kettner Homeowners Assn. v. Superior Court*** *(2008) 166 Cal. App. 4th 1055, 83 Cal. Rptr. 3d 318* , are discussed at [a], *above*. A developer-written requirement in an association's CC&R's that all disputes between owners and the developer and disputes between the association and the developer be decided by a general judicial reference is not a written contract as the Legislature contemplated the term in the context of *Code Civ. Proc. § 638*. The trial court erred in finding to the contrary. Because of this conclusion, it was unnecessary for the appellate court to reach the Association's claim the jury waiver provision was unconscionable (*166 Cal. App. 4th 1055, 1067)* .

The facts and procedural background of ***Patterson v. ITT Consumer Financial Corp.*** *(1993) 14 Cal. App. 4th 1659, 18 Cal. Rptr. 2d 563* , are discussed at [c], *above*. The procedural components of unconscionability focus on facts of surprise and oppression. Surprise involves the extent to which the supposedly agreed-on term is hidden in a prolix preprinted form drafted by the party seeking to enforce the disputed term. Oppression results when there is no real negotiation of contract terms because of unequal bargaining power. The loan agreements were preprinted forms. The arbitration clause was either the final paragraph of a page entitled "Agreement for Dispute Resolution" or at midpage on a sheet of text, but set apart in bold type. On both versions the provision was clearly title "Arbitration." None of the preprinted clauses had been modified in any manner, which suggested to the court that they were not negotiable. In addition, several of the borrowers stated they believed they would not be able to qualify for bank loans. In these circumstances, the contract was one of adhesion (*14 Cal. App. 4th 1659, 1664)* .

Defendants also argued that plaintiffs failed to establish the oppression factor of procedural unconscionability set forth in *Dean Witter Reynolds, Inc. v. Superior Court (1989) 211 Cal. App. 3d 758, 771-772, 259 Cal. Rptr. 789* , because they did not demonstrate that they could obtain loans only from defendants [*see* *Dean Witter Reynolds, Inc. v. Superior Court (1989) 211 Cal. App. 3d 758, 771-772, 259 Cal. Rptr. 789* (oppression requires plaintiff to show goods or service was not available from another source)]. The court of appeal disagreed and found it sufficient that plaintiffs were individuals of modest resources who believed they would not have qualified for conventional loans from banks and that there was nothing in the record to suggest that plaintiffs had a meaningful choice of reasonably available alternative sources of personal loans from lenders who would not require National Arbitration Forum arbitration (*14 Cal. App. 4th 1659, 1667)* .

[d1] Under Contract of Adhesion

In ***Parada v. Superior Ct.*** *(2009) 176 Cal. App. 4th 1554, 98 Cal. Rptr. 3d 743* , the court of appeals upheld the trial court's determination that the agreement was unenforceable (*176 Cal. App. 4th 1554, 1587)* . The facts of the case and the portion of the decision discussing the elements of unconscionability are *covered in § 20A.91[3][c], above*. The portion of the decision dealing with surprise and oppression in procedural unconscionability analysis is *covered in § 20A.91[3][d], above*. The court of appeals noted that of the two types of procedural unconscionability analysis, the adhesion contract approach often leads to confusion. The court criticized decisions that have reflexively concluded the finding of an adhesion contract alone satisfies the procedural prong, and immediately moved on to the subject of substantive unconscionability. In the court's view, other procedural issues, including surprise, often are ignored when balancing or weighing procedural and substantive unconscionability. Undue reliance on any one procedural factor to the exclusion of others may produce analytical myopia and obscure the larger unconscionability picture (*176 Cal. App. 4th 1554, 1569)* .

As for the brokerage contracts in question, account agreements that were on printed, standardized forms drafted by the broker and presented to petitioners who were school teachers, a delivery driver, and a school janitor with the option of

signing the agreements or rejecting them, in which case petitioner could not open a margin account, were contracts of adhesion, especially where the fact that the agreement contained a clause stating that "Any deletions from, additions to or cutting or mutilation of any portion of this Agreement will render the Agreement unacceptable" controverted the broker's claim that the petitioners were given reasonable notice of the opportunity to negotiate or reject the terms of a contract, and an actual, meaningful, and reasonable choice to exercise that discretion (*176 Cal. App. 4th 1554, 1570-1571)* . The portion of the opinion dealing with substantive unconscionability is *set forth in § 20A.91[3][e], below*. The portion of the decision handling the issue of the consolidated action waiver is discussed in *§ 20A.91[3][i], below*. The portion of the decision analyzing the issue of the unenforceability of the entire arbitration agreement is *treated in § 20A.91[3][k], below*.

The facts and procedural background of ***Bruni v. Didion*** *(2008) 160 Cal. App. 4th 1272, 73 Cal. Rptr. 3d 395* (*Bruni*), and the portions of the opinion discussing whether the court or the arbitrator should determine whether the arbitration provision was unconscionable is set forth at § 20.10[3][k]. The portions of the opinion addressing procedural and substantive unconscionability and contracts of adhesion are discussed at [d], *above.*

[e] Element of Substantive Unconscionability

The portions of the opinion in ***Little v. Auto Stiegler, Inc.*** *(2003) 29 Cal. 4th 1064, 130 Cal. Rptr. 2d 892, 63 P.3d 979* , considering unconscionability in general and the unconscionability of the provision for review are discussed at [h], *below*.

In ***Parada v. Superior Ct.*** *(2009) 176 Cal. App. 4th 1554, 98 Cal. Rptr. 3d 743* , the court of appeals upheld the trial court's determination that the agreement was unenforceable (*176 Cal. App. 4th 1554, 1587)* . The facts of the case and the portion of the decision discussing the elements of unconscionability are *covered in § 20A.91[3][c], above*. The portion of the decision dealing with surprise and oppression in procedural unconscionability analysis is *covered in § 20A.91[3][d], above*. The portion of the opinion dealing with procedural unconscionability under adhesion contract analysis is *set forth in § 20A.91[3][d1], above*. After determining the account agreements exhibited low- to moderate levels of procedural unconscionability, the court of appeals determined that the agreements exhibited a high degree of substantive unconscionability because they called for an unjustified three-arbitrator panel and allowed for high fees compared to the ability to pay of the customers bringing claims against the brokerage. The fact that petitioners were investors did not detract from that finding that the fees of three arbitrators would exceed their reasonable expectations (*176 Cal. App. 4th 1554, 1579-1580)* . The portion of the decision handling the issue of the consolidated action waiver is discussed in *§ 20A.91[3][i], below*. The portion of the decision analyzing the issue of the unenforceability of the entire arbitration agreement is *treated in § 20A.91[3][k], below*.

Sanchez v. Western Pizza Enterprises, Inc. *(2009) 172 Cal. App. 4th 154, 90 Cal. Rptr. 3d 818* , affirmed a trial court order finding a class arbitration waiver and other terms of the agreement unconscionable, and that the agreement therefore was unenforceable. The portion of the opinion discussing the application of contract principles to enforceability of a class arbitration waiver is discussed in *Ch. 20, Arbitration: Compelling, § 20.30[3][a]*. The portion of the opinion dealing with whether the agreement specified that the arbitrator was to decide the issue of enforceability is discussed in *Ch. 20, Arbitration: Compelling, § 20.10[3][k]* and in *§ 20A.10[3][b], above* . The portion of the opinion and relevant facts dealing with the issue of whether the class action waiver was unenforceable as against public policy is discussed in *§ 20A.22[3][d], above*. The portion of the opinion and facts addressing the procedural unconscionability of the arbitration agreement is discussed in [d], *above*. The employee claimed that several provisions of the agreement were substantively unconscionable. Upon review, the court noted that the absence of express provisions requiring a written arbitration award and allowing discovery does not render the arbitration agreement unconscionable. Rather, those terms are implied as a matter of law as part of the agreement (*172 Cal. App. 4th 154, 176)* . Similarly, the matters authorized under the small claims provision of the agreement, while not meeting the standards applicable to a court action, are an ordinary incident of arbitration and thus the small claims provision is not substantively unconscionable (*172 Cal. App. 4th 154, 177)* . However, the court did find substantive unconscionability

in one respect. The designation of a panel of arbitrators consisting of a single arbitrator selected by the employer created a false appearance of mutuality in the selection of an arbitrator. Moreover, the effective designation of a single arbitrator in what appears to be a standard arbitration agreement applicable to a large number of corporate employees gives rise to a significant risk of financial interdependence between the employer and the arbitrator, and an opportunity for the employer to gain an advantage through its knowledge of and experience with the arbitrator. In failing to provide a neutral arbitrator, this arbitrator-selection provision is sufficiently unfairly one-sided to manifest substantive unconscionability (*172 Cal. App. 4th 154, 177)* . The portion of the opinion determining the unenforceability of the agreement due to unconscionability is discussed in [k], *below*.

The facts and procedural background of ***Bruni v. Didion*** *(2008) 160 Cal. App. 4th 1272, 73 Cal. Rptr. 3d 395* (*Bruni*), and the portions of the opinion discussing whether the court or the arbitrator should determine whether the arbitration provision was unconscionable is set forth at § 20.10[3][k]. The portions of the opinion addressing procedural and substantive unconscionability and contracts of adhesion are discussed at [d], *above.*

The facts and procedural background of ***Baker v. Osborne Development Corp.*** *(2008) 159 Cal. App. 4th 884, 71 Cal. Rptr. 3d 854* , and the portion of the opinions addressing whether the court or the arbitrator should decide are discussed at *§ 20.10[3][k]*. The portions of the opinion discussing the criteria of unconscionability are discussed at [d], *above*. The discussion of procedural unconscionability is set forth at [d], *above.* Addressing the issue of substantive unconscionability, the court said that the arbitration agreement was one-sided in that defendant as the builder and seller of the homes, would have no conceivable reason to institute legal proceedings against a homeowner after escrow closed, but virtually every claim the homeowners might raise against not only the builder, but also against subcontractors, materialmen, and others in any way involved in the construction of the homes would be subject to arbitration. That one-sidedness rendered the arbitration agreement substantively unconscionable (*159 Cal. App. 4th 884, 896)* .

The facts and procedural background of ***Nyulassy v. Lockheed Martin Corporation*** *(2004) 120 Cal. App. 4th 1267, 16 Cal. Rptr. 3d 296* , and the portions of the opinion addressing unconscionability in general are discussed at [c], *above*. The discussion of procedural unconscionability is at [d], *above*. Substantive unconscionability focuses on the terms of the agreement and whether those terms are so one-sided as to "shock the conscience." The paramount consideration in assessing substantive unconscionability is mutuality (*120 Cal. App. 4th 1267, 1281)* . The employment agreement had three aspects which rendered it substantively unconscionable: (1) it was totally unilateral, requiring plaintiff only to arbitrate any and all of his employment claims; (2) it required that before proceeding to arbitration, plaintiff discussion any dispute with his supervisors; and (3) it required plaintiff to assert any claim within 180 days of the date of his employment termination or "such other dispute or controversy first arose." Regarding the requirement that plaintiff first discuss any dispute with his supervisors, the court said that while on its face, this provision may present a laudable mechanism for resolving employment disputes informally, it connotes a less benign goal. Given the unilateral nature of the agreement, requiring plaintiff to submit to an employer-controlled dispute resolution mechanism (i.e., one without a neutral mediator) suggested that defendant would receive a "free peek" at plaintiff's case, thereby obtaining an advantage if and when plaintiff were to later demand arbitration (*120 Cal. App. 4th 1267, 1282-1283)* .

The facts and procedural background of ***Higgins v. Superior Court (Disney/ABC International Television, Inc.)*** *(2006) 140 Cal. App. 4th 1238, 45 Cal. Rptr. 3d 293* , and the portion of the opinion addressing the general criteria of unconscionability are discussed at [c], *above*. The portion of the opinion addressing procedural unconscionability is discussed at [d], *above*. Substantively unconscionable terms may generally be described as unfairly one-sided. An agreement may lack a modicum of bilaterality and therefore be unconscionable if the agreement requires arbitration only for the claims of the weaker party but a choice of forums for the claims of the stronger party. In this case, the arbitration provision required only petitioners to submit their claims to arbitration. The clause repeatedly included "I agree" language, with the "I" being a reference to the petitioners. The only time the phrase "the parties" is used is where "the parties" agree that the producer has the right to seek injunctive or other equitable relief in a court of law (*140 Cal. App. 4th 1238, 1253)* . The television defendants claimed the arbitration provision was bilateral, because it provided that all disputes or controversies arising under the agreement would be resolved by binding arbitration (*140 Cal. App. 4th*

1238, 1253-1254). They missed the point: only one side (petitioners) agreed to that clause. The television defendants, though not petitioners, can compel arbitration. Additional elements of substantive unconscionability are found in the provision barring only petitioners from seeking appellate review of the arbitrator's decision and the provision requiring arbitration in accordance with the rules of the American Arbitration Association, which provide that arbitration costs are to be borne equally by the parties. The harsh, one-sided nature of the arbitrationprovision, combined with the elements of procedural unconscionability earlier discussed, led the court of appeal to conclude that the arbitration provision was unconscionable and, therefore, unenforceable (*140 Cal. App. 4th 1238, 1254*).

The facts and procedural background of ***Fitz v. NCR Corp.*** *(2004) 118 Cal. App. 4th 702, 13 Cal. Rptr. 3d 88* , are discussed in *Ch. 20, Arbitration: Compelling, § 20.23[3][a]*. The portion of the opinion holding the arbitration agreement's discovery provision inadequate to ensure vindication of unwaivable rights is discussed in *§ 20A.22[3][c]*. The discussions of procedural unconscionability is at [d], *above.* Substantive unconscionability focuses on overly harsh or one-sidedness, with the paramount consideration being mutuality (*118 Cal. App. 4th 702, 723)* . An agreement may be unfairly one-sided if it compels arbitration of claims more likely to be brought by the weaker party, but exempts from arbitration the types of claims that are more likely to be brought by the stronger party (*118 Cal. App. 4th 702, 724)* . That is what this agreement did. The claims exempted from arbitration--claims relating to noncompetition clauses and intellectual property--are more often brought by employers than employees (*118 Cal. App. 4th 702, 725)* . The court found the defendant's argument that it needed to exempt those claims from arbitration in order to provide for the swift and effective relief of restraining orders necessary to prevent an employee from disclosing trade secrets unpersuasive in view of *Code Civ. Proc. § 1281.8*, which permits parties to an arbitration agreement to obtain just such relief (*118 Cal. App. 4th 702, 725-726)* .

The facts and procedural background of ***Martinez v. Master Protection Corp.*** *(2004) 118 Cal. App. 4th 107, 12 Cal. Rptr. 3d 663* and the portion of the opinion considering the provision regarding arbitral costs is discussed in *§ 20A.22[3][b]*. The discussions of the general criteria for unconscionability and procedural unconscionability are at [c] and [d], *above*, respectively. An arbitration agreement is substantively unconscionable if it requires the employee but not the employer to arbitrate claims, which is precisely what this agreement does (*118 Cal. App. 4th 107, 114)* . Specifically exempted from its terms were any claims by defendant for injunctive or equitable relief, or both, for unfair competition; it also exempted claims based on the use or unauthorized disclosure, or both, of trade secrets and confidential information. The agreement required employees to arbitrate the claims they were most likely to assert against defendant while permitting defendant to litigate the claims it was most likely to assert against its employees (*118 Cal. App. 4th 107, 115)* . The cost-sharing provision was unconscionable (*118 Cal. App. 4th 107, 115-116)* . The six-month limitation period constituted an unlawful attempt to restrict employees' statutory rights (*118 Cal. App. 4th 107, 117)* and was unconscionable (*118 Cal. App. 4th 107, 118)* . Discovery was limited to a single deposition and a single document request, except on a showing of substantial need. Given the relatively straightforward allegations of misconduct involved and the fact that claims for unpaid commissions would rest largely on documentary evidence, the court could not state that the agreement did not afford plaintiff adequate discovery rights to vindicate his statutory claims (*118 Cal. App. 4th 107, 118-119)* .

The facts and procedural background of ***Abramson v. Juniper Networks, Inc.*** *(2004) 115 Cal. App. 4th 638, 9 Cal. Rptr. 3d 422* , and the portions of the opinion addressing the arbitration agreement in the context of plaintiff's unwaivable *Tameny* claim for wrongful termination in violation of public policy [*see Tameny v. Atlantic Richfield Co. (1980) 27 Cal. 3d 167, 178, 164 Cal. Rptr. 839, 610 P.2d 1330]* are discussed in *Ch. 20, Arbitration: Compelling, § 20.23[3][a]* and *[k]* and § 20A.22[3][a]. The discussions of the general criteria for unconscionability and procedural unconscionability are at [c] and [d], *above*, respectively. Substantive unconscionability focuses on the terms of the agreement and whether those terms are so one-sided as to "shock the conscience." Courts have identified a number of factors that may result in substantive unconscionability (*115 Cal. App. 4th 638, 656)* , but the paramount consideration is mutuality--whether the contract terms are so harsh or one-sided that they lack basic fairness (*115 Cal. App. 4th 638, 657-658)* . Here the agreement provided a "carve out" under which the employer did not have to arbitrate, but could litigate claims related to trade secrets, confidential information, and other intellectual property. The court found the

arbitration provision entirely lacking in mutuality and basic fairness, and thus substantively unconscionable (*115 Cal. App. 4th 638, 665-666)* .

The facts and procedural background of ***Gutierrez v. Autowest, Inc.*** *(2004) 114 Cal. App. 4th 77, 7 Cal. Rptr. 3d 267* , are discussed in *Ch. 20, Arbitration: Compelling, § 20.23[3][h]*. The court said that substantive unconscionability focuses on whether the provision is overly harsh or one-sided and is shown if he disputed provision of the contract falls outside the "reasonable expectations" of the nondrafting party or is "unduly oppressive." Some courts have imposed a higher standard: the terms must be "so one-sided as to shock the conscience." When a party with superior bargaining power has imposed contractual terms on another, courts must carefully assess claims that one or more of these provisions are one-sided or unreasonable (*114 Cal. App. 4th 77, 88)* . When a consumer enters into an adhesive contract that mandates arbitration, it is unconscionable to condition that process on the consumer posting fees he or she cannot pay (*114 Cal. App. 4th 77, 89)* . It is self-evident that such a provision is unduly harsh and one-sided, defeats the expectations of the nondrafting party, and shocks the conscience (*114 Cal. App. 4th 77, 89-90)* . While arbitration may be within the reasonable expectations of consumers, a process that builds prohibitively expensive fees into the process is not. It is substantively unconscionable to require a consumer to give up the right to utilize the judicial system while imposing arbitral forum fees that are prohibitively high. Whatever preference for arbitration exists, it is not served by an adhesive agreement that effectively blocks every forum for the redress of disputes, including arbitration itself (*114 Cal. App. 4th 77, 90)* . Unconscionability is determined at the time the contract is made (*114 Cal. App. 4th 77, 91)* . The fact that the AAA rules state that the arbitrator may, in the event of extreme hardship on the part of any party, reduce or defer fees administrative fees is not enough to ensure the fees are affordable (*114 Cal. App. 4th 77, 92)* . The court considered separately the arbitration fees that had to be paid before any hearing was held, which part of the opinion is discussed in *Ch. 20, Arbitration: Compelling, § 20.86[3][a]*, and the fees imposed only after an arbitrator had exercised discretion to allocate them to a party,which part of the opinion is discussed in *Ch. 20, Arbitration: Compelling, § 20.23[3][j]*.

The facts and procedural background of ***Harper v. Ultimo*** *(2003) 113 Cal. App. 4th 1402, 7 Cal. Rptr. 3d 418* , and the portion of the opinion considering the general criteria for unconscionability are discussed in [c], *above*. The court said that substantive unconscionability focuses on the one-sidedness or overly harsh effect of the contract term or clause. This clause was more one-sided than many others that have been found unconscionable: there was not even the possibility of full relief for the consumer (*113 Cal. App. 4th 1402, 1407)* .

The facts and procedural background of ***Jamarillo v. JH Real Estate Partners, Inc.*** *(2003) 111 Cal. App. 4th 394, 3 Cal. Rptr. 3d 525* , and the portion of the opinion addressing the general criteria for unconscionability are discussed at [c], *above*. Substantively unconscionable terms may take various forms, the court of appeal said, but may generally be described as unfairly one-sided. One form of substantive unconscionability involves an arbitration agreement's lack of a modicum of bilaterality, wherein the weaker party's claims against the stronger party, but not the stronger party's claims against the weaker party, are subject to arbitration (*111 Cal. App. 4th 394, 401, 405)* . Defendants argued that the arbitration clause was neutral, applying equally to both landlord and tenants in regard to personal injury disputes arising from the condition of the leased premises (*111 Cal. App. 4th 394, 404)* . However, the court did not agree, saying that the reality is that personal injury claims arising from the condition of the leased premises are largely, if not exclusively, tenant claims. Buried in the small print, the arbitration clause makes those claims subject to arbitration (*111 Cal. App. 4th 394, 405-406)* . Additional factors, such as the requirement that the demand for arbitration had to be made in writing within 180 days after the claim arose, that all administrative fees and costs had to be advanced prior to the arbitration, and that plaintiffs had no opportunity in the printed form lease to decline the provision, as by not initialing it, buttressed the court's conclusion that the arbitration clause lacked sufficient "bilaterality" and was unconscionable (*111 Cal. App. 4th 394, 406)* .

The facts and procedural background of ***O'Hare v. Municipal Resource Consultants*** *(2003) 107 Cal. App. 4th 267, 132 Cal. Rptr. 2d 116* , are discussed at [c], *above.* The court began its consideration of the substantively unconscionable aspects of the arbitration agreement by noting that to be enforceable, there must be a modicum of

bilaterality. It is unfairly one-sided for an employer with superior bargaining power to impose arbitration on the employee as plaintiff but not to accept such limitations when it seeks to prosecute a claim against the employee, without at least some reasonable justification for such one-sidedness based on business realities when there is no justification for the lack of mutuality (*107 Cal. App. 4th 267, 273)* . This agreement required the employee to arbitrate all claims against the employer, but did not require the employee to arbitrate any claims against the employee. Instead it specifically reserved to defendant the right to file a lawsuit seeking injunctive and equitable relief against plaintiff, and was silent about requiring defendant to arbitrate any other claim it may have against plaintiff. Defendant argued that its obligation to arbitrate should be implied because it was not expressly excluded, only its claims for injunctive and equitable relief were specifically excluded (*107 Cal. App. 4th 267, 274)* . The court found this argument unpersuasive for several reasons (*107 Cal. App. 4th 267, 275-277)* . Further, there was no business justification for this unilateral exception. First, the court explained, the agreement did not just except from arbitration defendant's right to obtain injunctive relief against plaintiff; it exempted defendant from arbitrating any claim against plaintiff (*107 Cal. App. 4th 267, 277)* . *Code Civ. Proc. § 1281.8* provides for provisional remedies in connection with an arbitrable controversy; thus, the unilateral right to litigate rather than arbitrate claims cannot be justified by the need for provisional remedies. Injunctive relief would be available both prior to and at the conclusion of arbitration (*107 Cal. App. 4th 267, 277-278)* . The court's consideration of defendant's contention that exception for injunctive relief should be severed is discussed at [i], *below*.

The portions of the opinion in ***Fittante v. Palm Springs Motors, Inc.*** *(2003) 105 Cal. App. 4th 708, 129 Cal. Rptr. 2d 659* , considering unconscionability in general and the unconscionability of the provision for review are discussed at [h], *below*.

The facts and procedural background of ***Mercuro v. Superior Court (Countrywide Securities Corp.)*** *(2002) 96 Cal. App. 4th 167, 116 Cal. Rptr. 2d 671* , and the portions of the opinion discussing the two elements of unconscionability, the fact that the more of one element that appears, the less of the other that need be shown, and procedural unconscionability are at [c], *above*.

Considering the substantive unconscionability of the arbitration agreement, the court of appeal found the agreement to be unfairly one-sided in requiring arbitration of most claims of interest to employees but exempting from arbitration most claims of interest to defendant. Excepted from arbitration were claims for injunctive and/or other equitable relief for intellectual property violations, unfair competition and/or the use and/or unauthorized disclosure of trade secrets or confidential information. Defendant claimed the agreement did not apply to all claims an employee was likely to have: it did not cover workers' compensation, unemployment benefits or benefits under an employee pension plan which has its own arbitration procedure. The court of appeal said that these exceptions do not turn what was essentially a unilateral arbitration agreement into a bilateral one. Workers' compensation and unemployment benefits are governed by their own adjudicatory systems; neither is a proper subject matter for arbitration [*96 Cal. App. 4th 167, 176-177]* . Defendant claimed it had reasonable business justification for not arbitrating claims for injunctive or other equitable relief in cases involving intellectual property violations, unfair competition and unauthorized disclosure of trade secrets or confidential information, namely that monetary damages for the misappropriation of intellectual property assets are often difficult to calculate, and would not protect it from further misappropriation of those assets. Therefore, speedy and effective relief from the misappropriation of intellectual property assets could only be had in the court system. The court of appeal was not persuaded, noting that *Code Civ. Proc. § 1281.8(b)* empowers a court to grant emergency judicial relief in the form of preliminary injunctions and temporary restraining orders to a party in arbitration [*96 Cal. App. 4th 167, 177]* .

Plaintiff also claimed the arbitration was fatally flawed because it did not guaranteea neutral arbitrator. The agreement provided for arbitration by the National Arbitration Forum (NAF) in the federal judicial district in which the employee was last employed by the company. The court of appeal found that in the Central District of California, NAF had eight arbitrators. Given defendant's size, its parent corporation and all its affiliates compared to the relatively few available NAF arbitrators meant employees would be victims of the "repeat player effect". When an employer repeatedly appears

before the same group of arbitrators it obtains distinct advantages over the individual employee. These advantages include knowledge of the arbitrators' temperaments, procedural preferences, styles and the like and the arbitrators' cultivation of further business by taking a "split the difference" approach to damages [*96 Cal. App. 4th 167, 178]* . The court of appeal was unwilling to say without more evidence that the "repeat player effect" was enough to render the arbitration agreement unconscionable. However, given the low threshold of substantive unconscionability in this case, the court of appeal found the lack of mutuality as to arbitrable claims together with the disadvantages to the employee in using NAF as the arbitration provider rendered the arbitration agreement substantively unconscionable [*96 Cal. App. 4th 167, 179]* .

The facts and procedural background of ***Flores v. Transamerica HomeFirst, Inc.*** *(2001) 93 Cal. App. 4th 846, 113 Cal. Rptr. 2d 376* , and consideration of the fact that the doctrine of unconscionability is not precluded by the Federal Arbitration Act are discussed at [b], *above*. The portion of the opinion addressing the general criteria for unconscionability is discussed at [c], *above*, and the portion addressing procedural unconscionability is discussed at [d], *above*. As to the substantive element of unconscionability, the court of appeal noted that the substantive element has to do with the effects of the contractual terms and whether they are overly harsh or one-sided (*93 Cal. App. 4th 846, 853)* . An arbitration agreement is unconscionable unless there is a " 'modicum of bilaterality' " in the arbitration remedy. Although the parties are free to contract for asymmetrical remedies and arbitration clauses of varying scope, the doctrine of unconscionability limits the extent to which a stronger party may, through a contract of adhesion, impose the arbitration forum on the weaker party without accepting that forum for itself. Here, the arbitration provisions did not display a modicum of bilaterality. Under the loan agreement plaintiffs' principal obligation was to repay the sums advanced with interest. In the event of a breach by plaintiffs, HomeFirst was allowed to sell the property. While plaintiffs were required to arbitrate "any controversy" arising out of the loan agreement or deed of trust, HomeFirst was allowed to proceed by judicial or non-judicial foreclosure, by self-help remedies such as set-off, and by injunctive relief to obtain appointment of a receiver. Moreover, the loan documents allowed HomeFirst to proceed with foreclosure despite the pendency of disputes brought to arbitration. The arbitration clauses provided that arbitration "may not ... without [HomeFirst's] consent, delay or adversely affect [HomeFirst's] ability to exercise any of the remedies available to [HomeFirst] under [the loan agreement or deed of trust]." And finally, HomeFirst's remedies were cumulative, and could be exercised concurrently, independently, or successively (*93 Cal. App. 4th 846, 854)* . Realistically, then, the mandatory arbitration provisions applied to claims of the borrower against HomeFirst but not vice-versa. The court concluded that this unilateral obligation to arbitrate is so one-sided as to be substantively unconscionable. HomeFirst argued there was justification for the one-sidedness based on the "business reality" which required it be allowed to foreclose against the property as a legitimate commercial means of ensuring its security for the non-recourse loan. The court was not persuaded, saying that as a practical matter, HomeFirst assured the availability of the only remedy it is likely to need: foreclosure; but also reserved other remedies to itself from the scope of arbitration while confining plaintiffs to arbitration for all purposes (*93 Cal. App. 4th 846, 855)* .

The facts and procedural background of ***Kinney v. United Healthcare Services, Inc.*** *(1999) 70 Cal. App. 4th 1322, 83 Cal. Rptr. 2d 348* , are discussed at [c], *above*, and the portion of the opinion discussing procedural unconscionability is set forth at [d], *above*. The substantive element of unconscionability focuses on the terms of the agreement and whether those terms are so one-sided as to shock the conscience (*70 Cal. App. 4th 1322, 1330)* . Plaintiff contended that, because the arbitration obligation was essentially unilateral, the provision imposing it was substantively unconscionable. After discussing *Grubb & Ellis Co. v. Bello (1993) 19 Cal. App. 4th 231, 241, 23 Cal. Rptr. 2d 281* , which defendant contended allowed for enforcement of a unilateral arbitration provision, and determining that *Bello* had no application except to agreements governed by *Code of Civ. Proc. § 1298(c)* (relating to real estate contracts), the court of appeal agreed that this unilateral agreement to arbitrate was so one-sided as to be substantively unconscionable (*70 Cal. App. 4th 1322, 1330-1332)* . The court of appeal found the arbitration provision's limitation on discovery particularly troublesome noting that defendant was presumably in possession of the vast majority of evidence that would be relevant to employment-related claims against it. Thus, the limitations on discovery, although equally applicable to both parties, would work to curtail the employee's ability to substantiate any claim against defendant. The provision that prohibited an arbitrator finding that the employment relationship was other than at-will precluded an

employee from recovering contract damages that might otherwise be available. Even given the strong policy favoring arbitration, this arbitration provision failed to satisfy even a "modicum of bilaterality" and was so one-sided as so offend the equitable principles underlying the policy favoring arbitration (*70 Cal. App. 4th 1322, 1332)* .

The facts and procedural background of ***Stirlen v. Supercuts, Inc.*** *(1997) 51 Cal. App. 4th 1519, 60 Cal. Rptr. 2d 138* , are discussed at [a], *above*. Substantive unconscionability involves a harsh or one-sided allocation of risks between the parties. A contractual term is suspect if it reallocates the risks of the bargain in an objectively unreasonable or unexpected manner. But not all unreasonable risk allocations are unconscionable. Unenforceability of the clause is tied to the procedural aspects of unconscionability such that the greater the unfair surprise or inequality of bargaining power, the less unreasonable the risk allocation which will be tolerated. The "reasonableness" standard applied in *A & M Produce Co. v. FMC Corp. (1982) 135 Cal. App. 3d 473, 487-487, 186 Cal. Rptr. 114* , has been rejected as inherently subjective and replaced with the traditional standard of unconscionability: contract terms so one-sided as to shock the conscience (*51 Cal. App. 4th 1519, 1532)* .

Supercuts claimed that the one-sidedness of allowing it judicial remedies for violations of paragraphs 7, 8, 9, and 10 of the agreement was justified by business realities that could pose an immediate threat to its operations and therefore would require emergency court-ordered relief. The court of appeal said that those "business realities" would not be justified even if they had been proven, because, under Civ. Code § 1281.8(b), all the emergency judicial relief Supercuts might need would be available to a party compelled to arbitrate (*51 Cal. App. 4th 1519, 1536-1537)* . Even if Supercuts could show that its legitimate dispute resolution needs would not always be met during arbitration, that was also true with respect to employee claims (*51 Cal. App. 4th 1519, 1537-1538)* . The issue in this case was not simply the unilateral nature of the compulsory duty to arbitrate, but a variety of attendant discrepancies all favorable to the employer and prejudicial to the employee (*51 Cal. App. 4th 1519, 1539)* . Among those discrepancies was the fact that while Supercuts was not deprived of any common law or statutory remedies in paragraphs 7-10 of the agreement, remedies available to the employee were seriously curtailed. The employee was denied (*51 Cal. App. 4th 1519, 1539-1540)* :

- Punitive damages for tort claims and other statutory claims.
- Equitable and injunctive relief for claims under the ADEA and ADA.
- The right to recover attorney's fees and costs under most of the statutory claims.

The only remedy left to the employee was actual damages for breach of contract. That might bear no relation to the extent of the wrong and the magnitude of the injuries suffered and would amount to denial of the underlying cause of action, which would be preserved in name only (*51 Cal. App. 4th 1519, 1540)* . The arbitration agreement lacked even a modicum of bilaterality (*51 Cal. App. 4th 1519, 1540-1541)* . The most extreme burden imposed on employees was submission to the loss of his or her job, salary and all other benefits during the pendency of what may prove to be lengthy litigation, "without penalty to the Company," even if employer's claim proved unmeritorious. Supercuts offered no commercial justification for that provision, which the court felt was calculated to intimidate any employee who might otherwise have the temerity to resist Supercuts' claims. The agreement imposed a one-year statute of limitation on all claims by employees and deprived them of otherwise applicable tolling. The arbitration clause provided employer more rights and greater remedies than would otherwise be available and deprived employees of significant rights and remedies they would normally enjoy. Considering the arbitration clause in the light of the commercial context in which it operated, the court concluded it had little difficulty concluding that its terms were so extreme as to appear unconscionable according to the mores and business practices of the time and place (*51 Cal. App. 4th 1519, 1542)* .

The facts and procedural background of **Treo v.** ***Kettner Homeowners Assn. v. Superior Court*** *(2008) 166 Cal. App. 4th 1055, 83 Cal. Rptr. 3d 318* , are discussed at [a], *above*. A developer-written requirement in an association's CC&R's that all disputes between owners and the developer and disputes between the association and the developer be

decided by a general judicial reference is not a written contract as the Legislature contemplated the term in the context of *Code Civ. Proc. § 638*. The trial court erred in finding to the contrary. Because of this conclusion, it was unnecessary for the appellate court to reach the Association's claim the jury waiver provision was unconscionable (*166 Cal. App. 4th 1055, 1067)* .

The facts and procedural background of ***Patterson v. ITT Consumer Financial Corp.*** *(1993) 14 Cal. App. 4th 1659, 18 Cal. Rptr. 2d 563* , are discussed at [c], *above*. The court of appeal said the substantive component of unconscionability looks to whether the contract allocates the risks of the bargain in an objectively reasonable or unexpected manner. To deny enforcement, both procedural and substantive unconscionability must exist (*14 Cal. App. 4th 1659, 1664)* .

While arbitration per se may be within the reasonable expectation of most consumers, arbitration in Minnesota would not be within the reasonable expectations of California consumers. The location of the arbitration was unclear both from the agreement and from the National Arbitration Forum procedures. Borrowers were not given a copy of the National Arbitration Forum procedural rules until after defendant had initiated a claim against them. The court found that the rules of the National Arbitration Forum and fees required of borrowers (approximately $850) seemed designed to discourage borrowers from responding at all (*14 Cal. App. 4th 1659, 1665-1666)* . The procedures might not have met all the *Scissor-Tail* criteria of denying the borrower a fair opportunity to present his or her point of view, but they came perilously close do doing so and are oppressive when applied to unsophisticated borrowers of limited means in disputes over small amounts. Thus, the arbitration clause is beyond the reasonable expectation of the borrower (*14 Cal. App. 4th 1659, 1666)* and unenforceable (*14 Cal. App. 4th 1659, 1667)* .

Analyzed in *A & M Produce* terms, the arbitration procedures bear on the substantive element of unconscionability, in that the contractual risk is weighed heavily against the borrower being able to obtain a participatory hearing, which is particularly unreasonable in light of the much greater bargaining power of defendants and their reluctance to disclose even the mechanics of the arbitration until they make a claim (*14 Cal. App. 4th 1659, 1666)* . This established both substantive and procedural unconscionability and rendered the arbitration provision unenforceable (*14 Cal. App. 4th 1659, 1667)* .

[f] Sophistication of Weaker Party Is No Defense to Unconscionability

The facts and procedural background of ***Graham v. Scissor-Tail, Inc.*** *(1981) 28 Cal. 3d 807, 171 Cal. Rptr. 604, 623 P.2d 165* , are discussed in *§ 20A.90[3][a]*. The Court noted that virtually all concert artists with whom Graham wished to do business belonged to the labor union that prepared the contract at issue, and that those artists were not permitted to sign any form of contract other than the one prepared by the union. Thus, Graham, whatever his asserted prominence in the industry, was required by the realities of his business as a concert promoter to sign the union form contract; he was presented with the nonnegotiable option of accepting the contract as proposed or not at all. The terms that were available for negotiation did not change the nonnegotiable character of the rest of the contract (*28 Cal. 3d 807, 818-819)* .

The plaintiff in *Dotson v. Amgen, Inc. (2010) 181 Cal. App. 4th 975, 980-982, 104 Cal. Rptr. 3d 341* , was a highly educated attorney, who knowingly entered into a contract containing an arbitration provision in exchange for a generous compensation and benefits package. For that reason, the court found a minimum degree of procedural unconscionability, due to the fact that the employment contract offer was presented on a take-it or leave-it basis.

The facts and procedural background of ***Stirlen v. Supercuts, Inc.*** *(1997) 51 Cal. App. 4th 1519, 60 Cal. Rptr. 2d 138* , are discussed at [a], *above*. Supercuts maintained that the contract was not adhesive because Stirlen was not a person desperately seeking employment, but a successful and sophisticated corporate executive hired away from a highly paid position for an annual salary of $150,000 and renumerative extras (*51 Cal. App. 4th 1519, 1533)* . Supercuts argued that Stirlen was estopped from claiming the arbitration provision to be unconscionable because he was too bright and

too experienced in the machinations of corporate management to sign an agreement that was unduly oppressive (*51 Cal. App. 4th 1519, 1534)* . The court of appeal did not agree. For one thing, Stirlen did not even arguably possess the bargaining strength of Bill Graham, plaintiff in *Scissor-Tail* and the dominant rock music impresario of hisgeneration, and even Graham had no choice but to sign the form contracts of the union to which virtually all concert artists belonged. Also, undisputed evidence showed that in this case, the terms of the contract were cast in generic and gender neutral language, were presented to plaintiff after he accepted employment, and were described to him as standard provisions that were not negotiable. The contract was one of adhesion, thus the procedural element of unconscionability was present (*51 Cal. App. 4th 1519, 1533-1534)* . The court referred to *Scissor-Tail* as the Supreme Court's repudiation of the suggestion that a contract or clause cannot be unconscionable if it is accepted by a knowledgeable party. Even a sophisticated businessman can be unfairly surprised by unconscionable contract terms (*51 Cal. App. 4th 1519, 1534-1535)* .

[g] Permissible Breadth of Order in Class Action

The facts and procedural background of ***Patterson v. ITT Consumer Financial Corp.*** *(1993) 14 Cal. App. 4th 1659, 18 Cal. Rptr. 2d 563* , are discussed at [c], *above*. At the time defendants' motion to compel arbitration was denied, the class had not been certified, but a number of petitions by defendants to confirm arbitration awards against potential class members were pending in San Francisco Superior Court. Defendants contended the trial court's order that they not seek confirmation of any arbitration awards based on this arbitration provision in the City and County of San Francisco was error because plaintiffs had no standing to object to confirmation of awards against persons who were not named plaintiffs in the action and because it was overbroad and not necessary under California law. The court of appeal held that the trial court was empowered by *Code Civ. Proc. §§ 187* and *527* to make this order before the class was certified, because the class action was pending and potentially included all California borrowers of defendants. The order was appropriate to effectuate the trial court's conclusion that the arbitration clause is unenforceable. The order was tailored to protect defendants' collection rights by allowing them to pursue claims in San Francisco in small claims or superior court actions, and by preventing a consumer defendant in such an action from obtaining a stay based on the arbitration clause or from seeking to require arbitration under the clause. Thus, the court of appeal concluded, the order was not overbroad (*14 Cal. App. 4th 1659, 1668)* .

[h] Provision for Arbitral Review Is Unconscionable

The facts and procedural background of ***Little v. Auto Stiegler, Inc.*** *(2003) 29 Cal. 4th 1064, 130 Cal. Rptr. 2d 892, 63 P.3d 979* , and the portions of the opinion considering the application of minimum requirements to arbitration of nonstatutory, but unwaivable claims, including the continued viability, in light of *Green Tree Financial Corp. v. Randolph (2000) 531 U.S. 79, 121 S. Ct. 513, 148 L. Ed. 2d 373* , of the requirement that an employer in those cases to pay all costs unique to arbitration, are is discussed in *Ch. 20, Arbitration: Compelling, § 20.23[3][a]* and *[d]*, respectively. The arbitration agreement provided in part that "awards exceeding $50,000.00 shall include the arbitrator's written reasoned opinion and, at either party's written request within 20 days after issuance of the award, shall be subject to reversal and remand, modification, or reduction following review of the record and arguments of the parties by a second arbitrator who shall, as far as practicable, proceed according to the law and procedures applicable to appellate review by the California Court of Appeal of a civil judgment following court trial." Plaintiff contended this provision was unconscionable. The Supreme Court unanimously agreed (*29 Cal. 4th 1064, 1072)* .

The Court began by briefly recapitulating the principles of unconscionability: the doctrine has both a "procedural" and a "substantive" element, the former focusing on "oppression" or "surprise" due to unequal bargaining power, the latter on "overly harsh" or "one-sided" results (*29 Cal. 4th 1064, 1072)* . The procedural element of an unconscionable contract generally takes the form of a contract of adhesion, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it. The Court found it clear in this case, as in most preemployment arbitration contracts, that defendant/employer imposed on an adhesive arbitration agreement employee. Substantively unconscionable terms may take various forms, but may generally be

described as unfairly one-sided. One such form is the arbitration agreement's lack of a "modicum of bilaterality," wherein the employee's claims against the employer, but not the employer's claims against the employee, are subject to arbitration (*29 Cal. 4th 1064, 1073)* .

Another kind of substantively unconscionable provision is one by which the party imposing arbitration mandates a post-arbitration proceeding, either judicial or arbitral, wholly or largely to its benefit at the expense of the party on which the arbitration is imposed. Two Court of Appeal cases have addressed this kind of unconscionability: *Beynon v. Garden Grove Medical Group (1980) 100 Cal. App. 3d 698, 161 Cal. Rptr. 146* (hereinafter *Benyon*; discussed in *Ch. 20C, Arbitration: Confirming, Correcting, or Vacating the Award, § 20C.64[3][a]*) (*29 Cal. 4th 1064, 1074)* and *Saika v. Gold (1996) 49 Cal. App. 4th 1074, 56 Cal. Rptr. 2d 922* (hereinafter *Saika;* discussed in *Ch. 20C, Arbitration: Confirming, Correcting, or Vacating the Award, § 20C.64[3][a]*). Both *Beynon* and *Saika* involved medical malpractice claims. Defendant Auto Stiegler claimed the review provisions in *Beynon* and *Saika* were distinguishable, that the arbitral review provision here applied evenhandedly to both parties and that, unlike the doctor/patient relationship in *Saika*, there was at least the possibility that an employer would become the plaintiff, for example in cases of misappropriation of trade secrets. If that were the case, the Supreme Court said, defendant failed to explain the reason for the $50,000 threshold. From a plaintiff's perspective, the decision to resort to arbitral appeal would be made not according to the amount of the arbitration award but the potential value of the arbitration claim compared to the costs of the appeal. If the plaintiff and his or her attorney estimate that the potential value of the claim is substantial, and the arbitrator rules that the plaintiff takes nothing because of its erroneous understanding of a point of law, then it is rational for the plaintiff to appeal. Thus, the $50,000 threshold inordinately benefits defendants (*29 Cal. 4th 1064, 1077)* . Given the fact that defendant was the party imposing the arbitration agreement and the $50,000 threshold, it is reasonable to conclude it imposed the threshold with the knowledge or belief that it would generally be the defendant. While an asymmetrical arbitration may be permissible when there is a "legitimate commercial need," that need must be other than the employer's desire to maximize its advantage in the arbitration process. The Court found no such justification for the $50,000 threshold, and said the explanation for the threshold offered by amicus curiae--that an award in which there is less than that amount in controversy would not be worth going through the extra step of appellate arbitral review--makes sense only from a defendant's standpoint and cannot withstand scrutiny (*29 Cal. 4th 1064, 1078)* . Defendant also argued that an arbitration appeal is less objectionable than a second arbitration, as in *Benyon*, or a trial de novo, as in *Saika.* The Court saw no significant difference: all three provisions were geared toward giving the arbitral defendant a substantial opportunity to overturn a sizable arbitration award. The Court felt appellate review might be even more favorable to an employer (than trial de novo or a second arbitration) attempting to protect its interests. It is unlikely that an arbitrator who merely acts in an appellate capacity will increase an award against the employer, whereas a trial or arbitration de novo at least runs the risk that the employer would become liable for an even larger sum than that awarded in the initial arbitration. Therefore, the Court concluded that the arbitral appeal provision in this particular agreement was unconscionably one-sided and could not be enforced, and turned to consider whether the provision could be severed, or whether the entire agreement should be invalidated (*29 Cal. 4th 1064, 1079)* . That portion of the Court's opinion is discussed at *Ch. 20, Arbitration: Compelling, § 20.86[3][a].*

The facts and procedural background of ***Fittante v. Palm Springs Motors, Inc.*** *(2003) 105 Cal. App. 4th 708, 129 Cal. Rptr. 2d 659* , and the portions of the opinion considering the application of minimum requirements to arbitration of claims under *Lab. Code § 970*, the requirement that the employer pay all costs unique to arbitration, are discussed at *Ch. 20, Arbitration: Compelling, § 20.23[3][a]*. The portion of the opinion addressing the fact that the arbitration agreement was a contract of adhesion is discussed at *Ch. 20, Arbitration: Compelling, § 20.83[3][a]*. The court of appeal next considered whether the arbitration agreement was unconscionable, and held that, with the exception of one specific term which it found severable, the arbitration agreement was not unconscionable (*105 Cal. App. 4th 708, 722)* . The court of appeal first discussed unconscionability generally, saying unconscionability has both a "procedural" and a "substantive" element. The procedural element focuses on two factors: "oppression" and "surprise." "Oppression" arises from an inequality of bargaining power which results in no real negotiation and 'an absence of meaningful choice' (*105 Cal. App. 4th 708, 725)* . "Surprise" involves the extent to which the supposedly agreed-on terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms (*105 Cal. App. 4th 708, 725-726)* . The

substantive prong of unconscionability encompasses "overly harsh" or "one-sided" results, and looks to whether the contract allocates the risks of the bargain in an objectively unreasonable or unexpected manner. Both procedural and substantive unconscionability must be present to deny enforcement to the contract, but there may be an inverse relation between the two components, such that the greater the unfair surprise or inequality of bargaining power, the less unreasonable the risk reallocation which will be tolerated (*105 Cal. App. 4th 708, 726)* . The procedural component of unconscionability was present here. Plaintiff clearly had no opportunity to negotiate the arbitration agreement; he was presented with the employment application, containing the agreement, on a "take it or leave it" basis. The employer/defendant was clearly in the superior bargaining position. Plaintiff had no meaningful choice; he could accept the agreement or forgo employment. "Surprise" was also present (*105 Cal. App. 4th 708, 727)* . The court of appeal described the arbitration agreement as hidden "in plain sight," being one of several provisions in a dense, single-spaced page at the end of the five-page employment application. While it appeared to be in bold type, so were several other provisions; the typeface was quite small, and not otherwise distinguished from any of the other provisions of the employment application. There were no headings or other obvious indications that an applicant was giving up significant legal rights. On the other hand, the court of appeal found that substantive unconscionability had not been shown, except with respect to the so-called appeal provision, discussed *below*. Unlike other mandatory employment arbitration agreements (and the court discussed several), most of the provisions of the instant agreement were bilateral in form (*105 Cal. App. 4th 708, 728)* . The court of appeal held that this agreement had a "modicum of bilaterality." Nominally, at least, both the employer and plaintiff were bound to submit their claims to arbitration, subject to the same rules and procedures, and the same advantages and disadvantages (*105 Cal. App. 4th 708, 722)* .

The arbitration agreement provided that "at either party's request, awards exceeding $50,000.00 shall be subject to reversal, modification, or reduction following review of the record and arguments of the parties by a second arbitrator who shall, as far as practicable, proceed according to the law and procedures applicable to appellate review by the California Court of Appeal of a civil judgment following court trial" (*105 Cal. App. 4th 708, 722-723)* . The court of appeal noted that although this provision applied facially to both parties, mutuality was largely illusory. Although it is conceivable that an employer might have some claims against an employee which would result in a monetary award, including the possibility of an award of over $50,000.00, such claims would be rare (*105 Cal. App. 4th 708, 723)* . The court of appeal discussed *Saika v. Gold (1996) 49 Cal. App. 4th 1074, 56 Cal. Rptr. 2d 922* [*see Ch. 20C, Arbitration: Confirming, Correcting, or Vacating the Award, § 20C.64[3][a]*], and found this appeal provision, like the rearbitration provision in *Saika,* unenforceable (*105 Cal. App. 4th 708, 724)* . The court of appeal determined that the appeal provision could be severed and the remainder of the agreement given effect (*105 Cal. App. 4th 708, 725-727)* . The portion of the opinion considering severance is discussed in *Ch. 20, Arbitration: Compelling, § 20.86[3][a]*.

Finley v. Saturn of Roseville *(2004) 117 Cal. App. 4th 1253, 12 Cal. Rptr. 3d 561* , is discussed in *Ch. 20, Arbitration: Compelling, § 20.86[3][b]*.

[i] Prohibition on Classwide Arbitration Is Unconscionable

Civil Code Section 1668 provides that all contracts which have for their object, directly or indirectly, exempting anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.

The facts and procedural background of ***Discover Bank v. Superior Court*** *(Boehr) (2005) 36 Cal. 4th 148, 160-167, 30 Cal. Rptr. 3d 76, 113 P.3d 1100* , and the portion of the opinion addressing the fact that the doctrine of unconscionability is not preempted by the Federal Arbitration Act (*9 U.S.C. § 1 et seq.*) are discussed at [b], *above*. The Court discussed the fact that class actions are favored in California, especially in situations in which numerous consumers are exposed to the same dubious practice by the same seller so that individual actions by each of the defrauded consumers is impracticable (*36 Cal. 4th 148, 156-157)* .

Further, class-wide arbitration, though entailing a greater degree of judicial involvement than is normally associated

with arbitration ideally, is accepted in California [*see Keating v. Superior Court (1982) 31 Cal. 3d 584, 613, 183 Cal. Rptr. 360, 645 P.2d 1192* (*overruled on other grounds, Southland Corp. v. Keating (1984) 465 U.S. 1, 10-11, 104 S. Ct. 852, 79 L. Ed. 2d 1*)] (*36 Cal. 4th 148, 152)* .

With respect to class action waivers in contracts designating a foreign law, the Court said that the foreign law would not be given effect if it would violate a strong California public policy or result in an evasion of a California statute protecting its citizens. *Civil Code § 1751* in the Consumer Legal Remedies Act is such a statute. It prevents a consumer's wavier of the right to bring a class action and has been held to override a Virginia choice-of-law and forum-selection provisions in the contracts (*36 Cal. 4th 148, 158-159)* .

Class arbitration waivers have been held unenforceable on the ground of unconscionability. Otherwise, the potential exists for millions of customers to be overcharged small amounts without an effective method of redress. This is not only unconscionable, the Court said, but amounts to giving the defendants a "get out of jail free" card (*36 Cal. 4th 148, 159-160)* . At least some class-action waivers in consumer contracts are unconscionable under California law (*36 Cal. 4th 148, 160)* . Certainly they are unconscionable if they effectively operate as exculpatory clauses [*see Civ. Code § 1668*] to insulate a party from liability that would otherwise be imposed (*36 Cal. 4th 148, 161)* .

The Court discussed cases to the contrary from other jurisdictions, and stated that, while not holding that all class actions waivers are unconscionable, a class action waiver in a consumer contract of adhesion in practice becomes an exculpatory clause and is unconscionable and unenforceable. At least this is so, the Court said, to the extent the issue is governed by California law in a dispute between contracting parties which involves small amounts of damages and in which it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat each of a large numbers of consumers of small sums of money (*36 Cal. 4th 148, 162-163)* .

In ***Parada v. Superior Ct.*** *(2009) 176 Cal. App. 4th 1554, 98 Cal. Rptr. 3d 743* , the court of appeals upheld the trial court's determination that the agreement was unenforceable (*176 Cal. App. 4th 1554, 1587)* . The facts of the case and the portion of the decision discussing the elements of unconscionability are *covered in § 20A.91[3][c], above*. The portion of the decision dealing with surprise and oppression in procedural unconscionability analysis is *covered in § 20A.91[3][d], above*. The portion of the opinion dealing with procedural unconscionability under adhesion contract analysis is *set forth in § 20A.91[3][d1], above*. The portion of the decision handling the issue of substantive unconscionability is *set forth in § 20A.91[3][e], above*. In its procedural unconscionability analysis, the court of appeals held that the weaker party would not reasonably expect that his or her claims could not be joined with others in a single proceeding. Therefore, the consolidation waiver was procedurally unconscionable (*176 Cal. App. 4th 1554, 1571-1572)* . Similarly, the no-consolidation clause in combination with the requirement of three arbitrators generated extremely high costs that translated into a high degree of substantive unconscionability, even though those costs were still less than the cost of going to trial (*176 Cal. App. 4th 1554, 1574, 1582)* . The portion of the decision analyzing the issue of the unenforceability of the entire arbitration agreement is *treated in § 20A.91[3][k], below*.

Gatton v. T-Mobile USA, Inc. *(2007) 152 Cal. App. 4th 571, 61 Cal. Rptr. 3d 344* , were consolidated cases by subscribers against seven cellular phone carriers challenging the carriers' early termination fees and their practice of selling locked handsets that a subscriber cannot use when switching carriers. The contracts were all drafted by T-Mobile and were substantially similar. They provided for mandatory arbitration and included a class action waiver. T-Mobile moved to compel arbitration. The trial court denied the motion on the grounds that the claims for injunctive relief were primarily for the benefit of the public and, consequently, were not subject to arbitration, and that the arbitration provisions were unconscionable and unenforceable. Defendants appealed.

The court of appeal affirmed (*152 Cal. App. 4th 571, 575, 588)* . The court first discussed unconscionability in general and the decision in *Discover Bank v. Superior Court (Boehr) (2005) 36 Cal. 4th 148, 30 Cal. Rptr. 3d 76, 113 P.3d 1100* (*Discover Bank* discussed *above*), citing it for the proposition that when a class arbitration waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small

amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party from responsibility for its own fraud, or willful injury to the person or property of another, and in accordance with *Civ. Code § 1668*, the waiver is unconscionable and should not be enforced (*152 Cal. App 4th 571, 579-581)* . The court of appeal concluded that plaintiffs did not show surprise because the arbitration provision was not disguised or hidden, and T-Mobile made affirmative efforts to bring the provision to the attention of its customers, including by referencing the provision on a sticker placed across the closing seam of the handset shipping box. Nevertheless, the court found the service agreement to be a contract of adhesion because T-Mobile drafted the form agreement, its bargaining strength was far greater than that of individual customers, and customers were required to accept all terms and conditions of the agreement as presented or forgo T-Mobile's telephone service (*152 Cal. App. 4th 571, 582)* . The court was not persuaded otherwise because there were two mobile phone providers whose contracts did not contain class action waivers; the availability of market alternatives was exceedingly slim. The court also rejected the contention that the existence of market choice altogether negates the oppression aspect of procedural unconscionability. The existence of market alternatives is relevant, but not determinative of the issue (*152 Cal. App. 4th 571, 583)* . There was no evidence that the consumers knew or should have known of the existence of alternate providers whose contracts did not have class arbitration waivers. The court said the issue of market choice negates the existence of oppression, not whether choice renders a contract nonadhesive and discussed the issue at length. The court felt that, in accordance with the "sliding scale" balancing rule that the higher degree of substantive unconscionability the lower the degree of procedural unconscionability required, that absent unusual circumstances, use of a contract of adhesion establishes a minimal degree of procedural unconscionability notwithstanding the availability of market alternatives. Courts are not obligated to enforce highly unfair provisions that undermine important public policies simply because there is some degree of consumer choice in the market (*152 Cal. App. 4th 571, 585)* .

T-Mobile argued the $200 termination fee was large compared to the $29 late fee at issue in *Discover Bank* and therefore the case was not within the rule applicable when consumers suffered individually small losses. The court rejected this argument, pointing out that a $1,000 expense had been viewed as a small enough sum to apply*Discover Bank* because many consumers would consider that sum insufficient to warrant individual litigation, and certainly not sufficient to obtain legal assistance in prosecuting the claim. (*152 Cal. App. 4th 571, 587)* .

Cohen v. DirecTV, Inc. *(2006) 142 Cal. App. 4th 1442, 48 Cal. Rptr. 3d 813* was a class action filed by a subscriber against his satellite television programming company. The original subscriber contract did not have an arbitration clause. That was added in a bill stuffer a few months after the original subscription. Six years later, the subscriber upgraded to high definition programming, which cost approximately $11 more per month and necessitated an expenditure of approximately $1,000 in additional equipment. A few months later, the subscriber noticed that DirecTV had degraded several of the premium HDTV channels by switching them to lower, non-standard resolution. A few months after that, DirecTV made another amendment to the subscriber agreement, this one prohibiting joinder or class litigation of claims in arbitration. Plaintiff nevertheless filed a class-action suit against alleging violation of the California Consumers Legal Remedies Act (CLRA; *Civ. Code § 1750 et seq.*) and unlawful, unfair or fraudulent business practices in violation of *Bus. & Prof. Code § 17200*. Cohen sought damages for the costs of equipment and monthly subscription fees, restitution, an injunction preventing DirecTV from representing its channels as HDTV, punitive damages, and reasonable attorney fees. DirecTV moved to compel arbitration, and Cohen resisted, arguing the arbitration clause was unenforceable because the ban on class litigation of claims in arbitration was unconscionable. The trial court denied the motion to compel arbitration finding the arbitration clause procedurally and substantively unconscionable, against public policy, and unenforceable. The trial court found the arbitration clause substantively unconscionable under principles announced in *Discover Bank v. Superior Court (2005) 36 Cal. 4th 148, 30 Cal. Rptr. 3d 76, 113 P.3d 1100* (*Discover Bank*, discussed *above*). DirecTV appealed.

The court of appeal affirmed (*142 Cal. App. 4th 1442, 1455)* . The court of appeal agreed that the provision in the arbitration clause prohibiting class or representative claims in arbitration (class action waiver) was unconscionable and

unenforceable. Further, because the customer agreement expressly prohibited the severance of the class action waiver from the remainder of the arbitration clause, the entire arbitration clause was unenforceable (*142 Cal. App. 4th 1442, 1446-1447*). Because the court concluded the class action waiver was unenforceable and could not be severed from the arbitration clause, they did not address the issue of whether a valid agreement to arbitrate was formed by the amendments in the bill stuffers or by plaintiff's use of the service after receipt of the amendments in the bill stuffers (*142 Cal. App. 4th 1442, 1448*). The court of appeal discussed *Discover Bank* at length (*142 Cal. App. 4th 1442, 1448-1450)* , concluding with its primary holding, that while not all class arbitration waivers are unconscionable and unenforceable, when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party from responsibility for its own fraud, or willful injury to the person or property of another [*see Civ. Code § 1668*], and is unconscionable and unenforceable (*142 Cal. App. 4th 1442, 1450-1451)* . The court found that the class action waiver in DirecTV's customer agreement met the indicia identified in *Discover Bank*, of a waiver that in practice has the potential effect of exempting DirecTV from responsibility for its own fraud, or willful injury. First, DirecTV's customer agreement was a consumer contract of adhesion (*142 Cal. App. 4th 1442, 1451)* . Second, customer agreements with television programming providers occur in a setting in which disputes between the contracting parties predictably involve small amounts of damages. The court was not persuaded that the $1,000 cost of the high definition equipment package negated the premise that the class action waiver occurred in a setting where disputes between the contracting parties would predictably involve small amounts of damages. While $1,000 is not an insignificant sum, many consumers of these services may not view that amount as sufficient to warrant individual litigation, and certainly it is not sufficient to obtain legal assistance in prosecuting the claim (*142 Cal. App. 4th 1442, 1452)* . Third, the allegation that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money was made in plaintiff's allegations that after representing its high-definition package would provide astonishing picture clarity consistent with specified standards and bandwidth, DirecTV reduced its HDTV transmission quality by 33 percent to non-standard levels (*142 Cal. App. 4th 1442, 1452-1453)* . The court of appeal discussed other cases decided since *Discover Bank* in which a class arbitration wavier had been held unconscionable [*see Aral v. EarthLink, Inc. (2005) 134 Cal. App. 4th 544, 36 Cal. Rptr. 3d 229* (discussed *below*); *Klussman v. Cross Country Bank (2005) 134 Cal. App. 4th 1283, 1287, 36 Cal. Rptr. 3d 728* (discussed *below*); *Independent Assn. of Mailbox Center Owners, Inc. v. Superior Court (2005) 133 Cal. App. 4th 396 , 34 Cal. Rptr. 3d 659* (discussed at [f], *above*)], noting that not off of them involved small sums of money (*142 Cal. App. 4th 1442, 1453-1455)* . The court reiterated: DirecTV's customer agreement appeared in a consumer contract of adhesion presented to Cohen on a take it or leave it basis; the class action waiver was indisputably one-sided; the sums involved were sufficiently small that the class action was likely the only effective way to redress conduct that deprives DirecTV's customers of the full high-definition services for which they are paying; the prohibition on class claims effectively operated to insulate DirecTV from liability for its conduct. Thus, the class action waiver was unconscionable and unenforceable (*142 Cal. App. 4th 1442, 1455)* .

Plaintiffs in ***Klussman v. Cross Country Bank*** *(2005) 134 Cal. App. 4th 1283, 36 Cal. Rptr. 3d 728* , sued the bank, its credit card servicing company, and their owner and Chief Executive Officer, alleging that they had earned hundreds of millions of dollars by offering credit cards to these consumers and subsequently engaged in a pattern of unlawful practices such as misrepresenting payoff charges, imposing unauthorized fees, charging late fees for timely payments, automatically subscribing customers to unauthorized and costly programs and using abusive and harassing tactics in collecting fees and charges. The complaint alleged violations of the CaliforniaConsumers Legal Remedies Act (CLRA; *Civ. Code § 1750* et seq.), the California Unfair Competition Law (UCL; *Bus. & Prof. Code § 17200* et seq.), and of the Delaware Unfair Business Practices Act, as well as causes of action for breach of contract, fraud, and imposition of excessive bank fees. The complaint requested damages, restitution, interest, an injunction and attorney fees. The bank was a Delaware corporation headquartered in Delaware. The servicing company was a Delaware corporation headquartered in Florida. The cardholder agreements stated that Delaware law governed except when federal law applied and contained an arbitration provision which specified that arbitration would be before the National Arbitration

Forum (NAF). It gave a phone number from which to obtain the NAF rules and forms and required all claims to be filed at any NAF office, on the World Wide Web, or in Minneapolis, Minnesota. Defendants petitioned to compel arbitration, claiming the matter was governed by the Federal Arbitration Act (FAA). Plaintiffs opposed the motion, arguing that the CLRA and UCL claims for injunctive relief were not subject to arbitration, that the CLRA expressly authorizes class actions, that enforcement of the arbitration clause would preclude class actions under the NAF rules, and that such prohibition was prohibited. The superior court agreed with plaintiffs that the CLRA and UCL claims for injunctive relief were not subject to arbitration, found the FAA and California law applicable, and concluded that the arbitration clause was unenforceable because the NAF restriction on class actions could not be severed. The court denied the motion to compel arbitration. Defendants appealed.

The court of appeal affirmed, concluding that the trial court correctly applied the appropriate choice of law analysis; that under California law the hidden waiver of the right to bring classwide arbitration in this case was unconscionable; and that the arbitration clause was unenforceable (*134 Cal. App. 4th 1283, 1287, 1290)* . The court of appeal agreed that the CLRA and UCL claims for injunctive relief were intended to remedy public wrongs and were not subject to arbitration (*134 Cal. App. 4th 1283, 1290)* . The court noted that the FAA is silent on the issue of class action arbitration and does not preempt a court from ruling on initial matters of state law regarding contractual grounds for revoking an arbitration agreement (*134 Cal. App. 4th 1283, 1287, 1290-1291)* . The court noted that the proper approach for determining the choice of law issue is for the court first to determine either: (1) whether the chosen state has a substantial relationship to the parties or their transaction, or (2) whether there is any other reasonable basis for the parties' choice of law. If neither of these tests is met, that is the end of the inquiry, and the court need not enforce the parties' choice of law. If, however, either test is met, the court must next determine whether the chosen state's law is contrary to a fundamental policy of California (*134 Cal. App. 4th 1283, 1291*). In this case, Delaware had a substantial relationship to the defendants and recognizes the concept of unconscionability in commercial transactions. Delaware would not invalidate an arbitration clause merely because it prohibited class actions (*134 Cal. App. 4th 1283, 1287, 1292)* . However, California law would invalidate class action waivers in the appropriate circumstances, specifically, when the class action waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money. Then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party from responsibility for its own fraud, or willful injury to the person or property of another [*Civ. Code § 1668*], and the waiver is unconscionable under California law and should not be enforced [*Discover Bank v. Superior Court (2005) 36 Cal. 4th 148, 162-163, 30 Cal. Rptr. 3d 76, 113 P.3d 1100* (*Discover Bank*)] (*134 Cal. App. 4th 1283, 1293)* . This resulted in a clear conflict between the law of the two states and required an evaluation of whether this conflict implicates a fundamental public policy in California (*134 Cal. App. 4th 1283, 1294*).

The court of appeal concluded that fundamental California public policy was implicated and that California's interest in the issue was "materially greater" than that of Delaware. (*134 Cal. App. 4th 1283, 1287, 1294-1300*). California's interest was so compelling because: (1) the waiver was not expressed in the agreement, which was presented in the context of a "take it or leave it" arbitration clause; (2) the plaintiffs pleaded causes of action under the CLRA and UCL, which are statutes that seek to vindicate public rights, and (3) plaintiffs seek to represent only California residents, not a nationwide class as was involved in *Discover Bank* (*134 Cal. App. 4th 1283, 1298-1300*). The trial court correctly determined that California law applies, that the waiver is unconscionable under California law, and that it cannot be severed from the arbitration clause (*134 Cal. App. 4th 1283, 1300*). Thus, the court of appeal affirmed the order denying enforcement of the arbitration provision (*134 Cal. App. 4th 1283, 1300-1301*).

Aral v. Earthlink, Inc. *(2005) 134 Cal. App. 4th 544, 36 Cal. Rptr. 3d 229* , was a putative statewide class action. Plaintiff ordered DSL service from defendant in early June 2003, but did not receive the kit containing equipment needed to operate the service for approximately five weeks. He was charged based on the date he ordered service.

Defendant is a Delaware corporation with its principal place of business in Atlanta, Georgia. The DSL service agreement that provided that it was governed by Georgia law "without regard to conflict-of-law provisions;" that any controversy or claim arising out of or relating to the agreement, or the breach thereof, would be settled by arbitration administered by the American Arbitration Association (AAA) under its Commercial Arbitration Rules; and that arbitration would be governed by Georgia law and held in Atlanta, Georgia. It also specifically prohibited class action arbitration. Generally, individuals who install defendant's DSL service using defendant's software cannot complete installation until they click on an icon indicating that they have read and agreed to the terms and conditions of the DSL service agreement. However, plaintiff, a software engineer, installed the service through alternate means that did not require using the software provided or clicking on the icon. The proposed class consisted of California residents who were victims of defendant's practice of charging for services during prior to providing the hardware necessary use the service. The sole cause of action in the complaint was brought under the Unfair Competition Law (UCL; *Bus. & Prof. Code § 17200* et seq.), and sought both injunctive and restitutionary relief. Defendant sought to compel arbitration in Georgia and to dismiss or stay the court proceedings, claiming plaintiff had entered into a binding written arbitration agreement because that agreement was posted on defendant's website and was mailed to plaintiff as part of his User Guide. The trial court denied the motion to compel arbitration, finding that claims for injunctive relief under the UCL are not arbitrable and that, although arbitrable claims such as restitution, disgorgement, and unjust enrichment can generally be severed from nonarbitrable claims, that was not appropriate in this case at bar because the gravamen of the case was the claim for injunctive relief. Defendant appealed.

The court of appeal affirmed arbitration (*134 Cal. App. 4th 544, 548, 564)* , but on a different ground, finding that the claim for injunctive relief could have been severed from the claim for restitution, and the latter sent to arbitration (*134 Cal. App. 4th 544, 548, 551-553)* , but that under *Discover Bank v. Superior Court (2005) 36 Cal. 4th 148, 162-163, 30 Cal. Rptr. 3d 76, 113 P.3d 1100* (*Discover Bank*), provisions in adhesion contacts that preclude class actions are unconscionable when the case involves allegations that a large number of consumers have been cheated out of a small sum of money (*134 Cal. App. 4th 544, 548-549)* . Moreover, defendant sought an order specifying that arbitration of a minor monetary claim by a California resident take place in Georgia, and a forum selection clause that discourages legitimate claims by imposing unreasonable geographical barriers is unenforceable under well-settled California law (*134 Cal. App. 4th 544, 549)* . Although the trial court did not reach the issues of whether the parties had entered into a binding agreement containing a valid arbitration clause and, if so, whether the clause could be enforced, the court of appeal agreed to determine those issues at the request of the parties and amicus curiae Attorney General. The specific issues raised revolve around the provisions prohibiting class actions and requiring consumers to travel to Georgia to raise claims.

The court began its analysis by emphasizing that an arbitration agreement containing a forum selection clause and a clause forbidding class actions must be treated in the same manner as any other contract containing those clauses (*134 Cal. App. 4th 544, 553-554)* . The defense of unconscionability as used to challenge class action waivers as unlawfully exculpatory is a principle of California law that does not specifically apply to arbitration agreements, but to contracts generally. Thus, the court was free to determine whether the class action prohibition and forum selection clause were enforceable under general contract law principles (*134 Cal. App. 4th 544, 555)* .

The ultimate holding in *Discover Bank* is that when a class action waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party from responsibility for its own fraud, or willful injury to the person or property of another [*Civ. Code § 1668*]. Under these circumstances, class arbitration waivers are unconscionable under California law and should not be enforced (*134 Cal. App. 4th 544, 556)* . In the present case, the terms of the agreement were presented on a "take it or leave it" basis either through installation of the software or through materials included in the package mailed with the software with no opportunity to opt out. This is quintessential procedural unconscionability.

With respect to substantive unconscionability, plaintiff alleged in his complaint that defendant began charging customers for DSL service as soon as they ordered the service although the company knew or should have known that the service would not be available until after the modem was delivered, some weeks later. The gravamen of the complaint was that numerous consumers were cheated out of small sums of money through deliberate behavior. Accepting these allegations as true, as the court had to at this stage of the proceedings, the class action waiver had to be deemed unconscionable under California law. The determination of the enforceability of the forum selection clause, as with the class action waiver, is made utilizing general contract law principles without regard to the fact that it appears in an arbitration agreement (*134 Cal. App. 4th 544, 557*). A forum selection clause should not be denied enforcement if it appears in a contract entered into freely and voluntarily by parties who have negotiated at arm's length, even if the forum selection clause is part of a contract having the basic qualities of an adhesion contract--a standardized contract, imposed on the subscribing party without an opportunity to negotiate the terms (*134 Cal. App. 4th 544, 557-558*). Although the forum selection clause here was contained in an adhesion contract, that clause in an adhesion contract would be enforceable even though the defendant did not actually read it as long as the clause provided adequate notice to the plaintiff that he was agreeing to the jurisdiction cited in the contract. However, when the clause does not give adequate notice, the requisite mutual consent to that contractual term is lacking and no valid contract with respect to that clause thus exists (*134 Cal. App. 4th 544, 560)* . A forum selection clause that requires consumer to travel 2,000 miles to recover a small sum is not reasonable under either California or United States Supreme Court law. If trial in the contractual forum will be so gravely difficult and inconvenient that the consumer will for all practical purposes be deprived of his day in court, it is unfair, unjust, and unreasonable to enforce the forum selection provision. The court could not say at that point whether plaintiff's situation represented a one-time aberration or a regular practice. If the latter, there may well be a significant number of California consumers who have suffered losses in the range of $40 to $50 dollars. To expect any or all of them to travel to Georgia in order to obtain redress on a case-by-case basis, whether in a courthouse or in an arbitration hearing room, is unreasonable as a matter of law (*134 Cal. App. 4th 544, 561)* .

Defendant contended that under AAA Consumer Rules, plaintiff and others similarly situated could bring claims in California small claims court. The Hobson's choice of litigation in a distant forum and the limited relief available in small claims court does not cure the problem. Small claims courts do not provide the panoply of relief available in court or before an arbitrator, such as punitive damages and attorney fees. Litigants also have no right to pursue class actions.

Citing *Discover Bank*, the court of appeal was not persuaded that the possibility ofredress in small claims court was enough to enforce a patently unreasonable forum selection clause (*134 Cal. App. 4th 544, 562)* . Considering the choice of law issue, the court of appeal noted that Georgia would not deem a class action waiver unconscionable in these circumstances and that in this case, unlike the situation in *Discover Bank*, plaintiff was seeking to enforce an obligation imposed by California statute. The court found that enforcement of California law with respect to the unconscionability of the class waiver provision was appropriate (*134 Cal. App. 4th 544, 563)* .

The court found there was no dispute that the first part of the Restatement's test had been met: EarthLink had a substantial relationship to Georgia and a reasonable basis for choosing Georgia law because its principle place of business was there. But plaintiff resides in California, sought to represent only California consumers, and relied solely on California's UCL to support his claim. The fundamental policy at issue was not simply the right to pursue a class action remedy, but the right of California to ensure that its citizens have a viable forum in which to recover minor amounts of money allegedly obtained in violation of the UCL. Forcing consumers to travel to a far location and depriving them of any hope of class litigation would pose an insurmountable barrier to recovery of small sums unjustly obtained, and undermine the protections of the UCL. There was no doubt that California had a materially greater interest than Georgia in the determination of this particular issue (*134 Cal. App. 4th 544, 564)* .

[j] Arbitration Agreement May Be Procedurally Unconscionable Despite Opt-Out Provision

The facts and procedural background of ***Gentry v. Superior Court (Circuit City Stores, Inc.)*** *(2007) 42 Cal. 4th 443,*

64 Cal. Rptr. 3d 773, 165 P.3d 556 , are discussed at *§ 20A.22[3][d]*. The discussion of the general criteria for unconscionabilty and procedural unconscionabilty are discussed at [c], *above*.

Regarding the issue of whether the opt-out provision foreclosed a finding of procedural unconscionabilty, the Court noted that a finding of procedural unconscionability is not required to invalidate a class arbitration waiver if that waiver implicates unwaivable statutory rights. But such a finding is a prerequisite to determining that the arbitration agreement as a whole is unconscionable. An arbitration agreement may have an element of procedural unconscionability notwithstanding an opt-out provision (*42 Cal. 4th 443, 451)* . An employee's signature on an arbitration agreement may reasonably lead the employer to believe that the employee's failure to opt out constituted acceptance of the arbitration agreement, but the question whether an arbitration agreement has been validly formed is different from whether that agreement was unconscionable (*42 Cal. 4th 443, 468)* . The lack of material information about the disadvantageous terms of the arbitration agreement, combined with the likelihood that employees felt at least some pressure not to opt out of the arbitration agreement, led the Supreme Court to conclusion that the agreement was, at the very least, not entirely free from procedural unconscionability (*42 Cal. 4th 443, 470-472)* . The one-page description of the advantages and disadvantages of arbitration gave a very one-sided view of arbitration and failed to mention reduced limitation periods, limitation on the length of time for which back pay could be recovered, a cap on punitive damages, that there was no right to attorney's fees and costs, which would be provided by the overtime pay statute, and limited discovery (*42 Cal. 4th 443, 470-472)* .

[k] Arbitration Agreement Is Wholly Unenforceable on Account of Unconscionable Provisions

The facts and procedural background of ***Armendariz v. Foundation Health Psychcare Services, Inc.*** *(2000) 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669* , and the portion of the opinion addressing the arbitrability of claims under California's Fair Employment and Housing Act (*Gov. Code § 12900 et seq.*), are discussed in *Ch. 20, Arbitration: Compelling, § 20.23[3][a]*. The Court considered defendant's contention that the unconscionable portions of the arbitration agreement (limitation on damage, unilateral enforcement against employee) should be severed and the rest of the arbitration agreement enforced. The Court acknowledged that *Civ. Code § 1670.5(a)* empowers a court to do that, but could find no case explaining how to evaluate the appropriateness of severance. The Court discussed illegal contracts and *Civ. Code §§ 1598* and *1599*, noting that the reasons for severing illegal portions of an agreement were to prevent parties from gaining undeserved benefit or suffering undeserved detriment as a result of voiding the entire agreement and to conserve a contractual relationship if to do so would not be condoning an illegal scheme (*24 Cal. 4th 83, 121-124)* .

The Court found these basic principles of severability of illegal contracts fully applicable to the doctrine of unconscionability, but found two factors that made severance inappropriate in this case. First, the arbitration agreement contained more than one unlawful provision; it had both an unlawful damages provision and an unconscionably unilateral arbitration clause (only employee had to arbitrate termination disputes). Those multiple defects indicated to the Court a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage. The Court said that, given the multiple unlawful provisions, the trial court did not abuse its discretion in concluding that the arbitration agreement was totally unenforceable (*24 Cal. 4th 83, 124)* . Further, with respect to the agreement's lack of mutuality, there was no single provision a court could strike or restrict in order to remove the unconscionable taint from the agreement. The court would have to reform the contract, not through severance or restriction, but by augmenting it with additional terms. Neither *Civ. Code § 1670.5* nor *Code Civ. Proc. § 1281.2* authorizes such reformation by augmentation (*24 Cal. 4th 83, 124-125)* . The Court distinguished cases severing provisions about non-neutral arbitrators, such as *Graham v. Scissor-Tail, Inc. (1981) 28 Cal. 3d 807, 831, 171 Cal. Rptr. 604, 623 P.2d 165* and *Lewis v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1986) 183 Cal. App. 3d 1097, 1107, 228 Cal. Rptr. 345* , because in those situations, the offending provision could be severed and the arbitrator could be chosen in accordance with *Code Civ. Proc. § 1281.6*. There is no comparable provision in the arbitration statute that permits courts to reform an unconscionably one-sided agreement (*24 Cal. 4th 83, 126-127)* .

In ***Parada v. Superior Ct.*** *(2009) 176 Cal. App. 4th 1554, 98 Cal. Rptr. 3d 743* , the court of appeals upheld the trial court's determination that the agreement was unenforceable (*176 Cal. App. 4th 1554, 1587)* . The facts of the case and the portion of the decision discussing the elements of unconscionability are *covered in § 20A.91[3][c], above*. The portion of the decision dealing with surprise and oppression in procedural unconscionability analysis is *covered in § 20A.91[3][d], above*. The portion of the opinion dealing with procedural unconscionability under adhesion contract analysis is *set forth in § 20A.91[3][d1], above*. The portion of the decision handling the issue of substantive unconscionability is *set forth in § 20A.91[3][e], above*. The portion of the decision handling the issue of the consolidated action waiver is discussed in *§ 20A.91[3][i], above*. After deciding that the Arbitration Panel and No Consolidation paragraphs of the arbitration agreement exhibited a low- to moderate-degree of procedural unconscionability and a high degree of substantive unconscionability, the court of appeals turned to the balancing of the proof of those two elements. The court ruled that on the sliding scale, the low- to mid-range amount of procedural unconscionability and the high degree of substantive unconscionability rendered clauses requiring three arbitrators and barring consolidation of claims unconscionable and, hence, unenforceable (*176 Cal. App. 4th 1554, 1585-1586)* .

The court then stated that in assessing the severability of unenforceable clauses, courts are to look first to the various purposes of the contract. If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. If (1) the illegality is collateral to the main purpose of the contract, and (2) the illegal provision can be extirpated from the contract by means of severance or restriction, then severance and restriction are appropriate. An unconscionable arbitration term is not to be severed if it was drafted in bad faith, because severing such a term and enforcing the arbitration provision would encourage drafters to overreach (*176 Cal. App. 4th 1554, 1585-1586)* . In this case, the investment company's failure to offer a justification or explanation for requiring three arbitrators barring consolidation in the brokerage account agreements demonstrated that it included them deliberately for the improper purpose of discouraging or preventing its customers from vindicating their rights, rendering them unserverable as being in bad faith. Accordingly, the court upheld the trial court's determination of the unenforceability of the entire arbitration agreement (*176 Cal. App. 4th 1554, 1586-1587)* .

Sanchez v. Western Pizza Enterprises, Inc. *(2009) 172 Cal. App. 4th 154, 90 Cal. Rptr. 3d 818* , affirmed a trial court order finding a class arbitration waiver and other terms of the agreement unconscionable, and that the agreement therefore was unenforceable. The portion of the opinion discussing the application of contract principles to enforceability of a class arbitration waiver is discussed in *Ch. 20, Arbitration: Compelling, § 20.30[3][a]*. The portion of the opinion dealing with whether the agreement specified that the arbitrator was to decide the issue of enforceability is discussed in *Ch. 20, Arbitration: Compelling, § 20.10[3][k]* and in *§ 20A.10[3][b], above* . The portion of the opinion dealing with the issue of whether the class action waiver was unenforceable as against public policy is discussed in *§ 20A.22[3][d], above*. The portion of the opinion addressing the procedural unconscionability of the arbitration agreement is discussed in [d], *above*. The portion of the opinion addressing the substantive unconscionability of the arbitration agreement is discussed in [e], *above*. The employee claimed that the arbitration agreement was unenforceable, because it was unconscionable. Having ruled the class action waiver unenforceable as against public policy, regardless of whether the entire agreement was unenforceable, and the arbitrator selection clause unconscionable, the court ruled that while it may be true that neither of these provisions alone would justify the refusal to enforce the entire arbitration agreement, considered together they indicate an effort to impose on the employee a forum with distinct advantages for the employer. Accordingly, the arbitration agreement is permeated by an unlawful purpose, warranting the trial court's denial of the motion to compel arbitration (*172 Cal. App. 4th 154, 181)* .

The court of appeals reversed the trial court's grant of class action defendant's motion to compel arbitration in ***Franco v. Athens Disposal Co., Inc***. *(2009) 171 Cal. App. 4th 1277, 1303, 90 Cal. Rptr. 3d 539* . The court found an arbitration agreement containing a class arbitration waiver unenforceable, because it precluded the vindication of nonwaivable right of the employee to obtain relief on his substantive claims of violation of meal and rest-period requirements in *Labor Code § 226.7*, per *Labor Code § 219*, in court. The portion of the opinion dealing with the employee's claim that the class action arbitration waiver is not enforceable as against public policy is discussed in *§ 20A.22[3][d], above*. The court next addressed the employee's claim that the arbitration agreement was unenforceable. In addition to the class

arbitration waiver against public policy, the agreement precluded the employee from obtaining relief under the Private Attorneys General Act of 2004 for anyone but himself. While the employee's wage claims themselves were not subject to the Act, the employee's claims under the applicable Wage Order granting penalties constituted PAGA claims, *Cal. Code Reg. Title 8, § 11090*. Therefore, the provision would preclude the employee from seeking civil penalties on behalf of other current and former employees, which constitutes performing the core function of a private attorney general. By thus impeding the comprehensive enforcement of a statutory scheme authorizing the imposition of statutory sanctions and fines, the prohibition of private attorneys general damages for other potential plaintiffs is invalid. On account of the fact that the arbitration agreement contains a class arbitration waiver and also precludes the employee from seeking civil penalties on behalf of other employees, contrary to the PAGA, the agreement as a whole is tainted with illegality and is unenforceable (*171 Cal. App. 4th 1277, 1303)* .

The facts and procedural background of ***Murphy v. Check 'N Go of California, Inc.*** *(2007) 156 Cal. App. 4th 138, 67 Cal. Rptr. 3d 120* , and the portion of the opinionaddress the court's authority to determine the issue of unconscionablity are discussed in *Ch. 20, Arbitration: Compelling, § 20.10[3][k]*. The portion of the opinion addressing the invalidity of the class arbitration waiver is discussed at *§ 20A.22[3][d]*. Defendant argued that the trial court erred by refusing to enforce the entire arbitration agreement, rather than severing the clauses it found to be unconscionable, specifically the provision purporting to give the arbitrator the authority to determine unconscionabilty and the class arbitration waiver. The court of appeal disagreed, pointing out that under *Civ. Code § 1670.5*, a court has discretion to refuse to enforce an entire agreement if the agreement is permeated by unconscionability (*156 Cal. App. 4th 138* , 149). An employment arbitration agreement can be considered permeated by unconscionability if it contains more than one unlawful provision. Multiple defects indicate a systematic effort to impose arbitration on employees not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage. This agreement contained at least two unconscionable aspects. Thus, the trial court did not abuse its discretion in concluding that the arbitration agreement was permeated by an unlawful purpose and refused to enforce it in its entirety. The court distinguished *Gentry v. Superior Court (Circuit City Stores, Inc.) (2007) 42 Cal. 4th 443, 457, 463, 466, 64 Cal. Rptr. 3d 773, 165 P.3d 556* (*Gentry*, portion of opinion addressing severability is discussed in *Ch. 20, Arbitration: Compelling, § 20.86[3][b]*) as involving only a single term that violated public policy (*156 Cal. App. 4th 138, 149)* .

The facts and procedural background of ***Nyulassy v. Lockheed Martin Corporation*** *(2004) 120 Cal. App. 4th 1267, 16 Cal. Rptr. 3d 296* , and the portions of the opinion addressing unconscionability in general are discussed at [c], *above*. The discussion of procedural unconscionability is at [d], *above*. Substantive unconscionability is discussed at [e], *above*. Regarding severance, the court of appeal noted there are two instances in which severance is not appropriate: one concerns the existence of multiple unlawful provisions; the other concerns such a lack of mutuality that there is no single provision a court can strike or restrict in order to remove the unconscionable taint from the agreement (*120 Cal. App. 4th 1267, 1287)* . Given the lack of mutuality, the defendant-controlled prearbitration resolution procedure, and the severe limitation on the time within which plaintiff could demand arbitration, the court concluded that the arbitration clause was permeated by unconscionability and refusal to sever or restrict the unconscionable provisions was proper (*120 Cal. App. 4th 1267, 1287-1288)* .

The facts and procedural background of ***Fitz v. NCR Corp.*** *(2004) 118 Cal. App. 4th 702, 13 Cal. Rptr. 3d 88* , are discussed in *Ch. 20, Arbitration: Compelling, § 20.23[3][a]*. The portion of the opinion holding the arbitration agreement's discovery provision inadequate to ensure vindication of unwaivable rights is discussed at *§ 20A.22[3][c]*. The discussions of procedural and substantive unconscionability are at [d] and [e], *above*, respectively. The existence of more than one unconscionable provision weighs against severance. Here there were two: the lack of mutuality with respect to the types of claims required to be arbitrated and the cost provision (*118 Cal. App. 4th 702, 726-727)* . There was no single provision the court could strike to remove the unconscionability (*118 Cal. App. 4th 702, 727)* . The court felt the interest of justice would not be served by severing either unconscionable provision, but would grant an undeserved benefit to defendant, which drafted the agreement not to provide an alternative to litigation, but as a means to compel arbitration as an inferior forum that works to its advantage (*118 Cal. App. 4th 702, 728)* .

The facts and procedural background of ***Abramson v. Juniper Networks, Inc.*** *(2004) 115 Cal. App. 4th 638, 9 Cal. Rptr. 3d 422* , and the portions of the opinion addressing the arbitration agreement in the context of plaintiff's unwaivable *Tameny* claim for wrongful termination in violation of public policy [*see Tameny v. Atlantic Richfield Co. (1980) 27 Cal. 3d 167, 178, 164 Cal. Rptr. 839, 610 P.2d 1330]* are discussed in *Ch. 20, Arbitration: Compelling, § 20.23[3][a]* and *[k]* and § 20A.22[3][a]. The discussions of the general criteria for unconscionability, procedural unconscionability, and substantive unconscionability are at [c], [d], and [e], *above*, respectively. The court concluded that this agreement lacked mutuality, was permeated with unconscionability, and that there was no single provision the court could strike or restrict in order to remove the unconscionable [or illegal] taint from the agreement (*115 Cal. App. 4th 638, 666-668)* .

The facts and procedural background of ***O'Hare v. Municipal Resource Consultants*** *(2003) 107 Cal. App. 4th 267, 132 Cal. Rptr. 2d 116* , are discussed at [c], *above.* The portion of the opinion addressing the substantively unconscionable aspects of the arbitration agreement is discussed at [e], *above.* Defendant contended that the "carve-out" for injunctive relief should be severed. The court of appeal disagreed, finding defendant did not simply "carve out" a provision entitling it to file a lawsuit for injunctive relief; it drafted a completely one-sided agreement compelling plaintiff to arbitrate all of its claims while allowing defendant to file a lawsuit on any claim it had against plaintiff. Because unconscionability permeated the entire agreement, severance was not appropriate. There was no single provision that could be stricken or restricted to remove the unconscionable taint through severance (*107 Cal. App. 4th 267, 279)* .

The facts and procedural background of ***Mercuro v. Superior Court (Countrywide Securities Corp.)*** *(2002) 96 Cal. App. 4th 167, 116 Cal. Rptr. 2d 671* , and the portions of the opinion discussing the two elements of unconscionability, the fact that the more of one element that appears, the less of the other that need be shown, and procedural unconscionability are at [c], *above*. The portion of the opinion discussing substantive unconscionability is at [e], *above*.

Defendant urged that the arbitration agreement be enforced without the offensive provisions. The court of appeal noted that when a court finds a contract unconscionable or illegal it may sever the offending clause, or limit the application of the offending clause, so as to avoid the unconscionable or illegal result. That approach works when the unconscionability or illegality is collateral to the main purpose of the contract. However, if the central purpose of the contract is "permeated" or "tainted" with unconscionability or illegality then the contract as a whole cannot be enforced [*96 Cal. App. 4th 167, 184]* . The court of appeal concluded that the Countrywide arbitration agreement was unenforceable because it was permeated with unconscionability and illegality and it could not be cured by "hacking off" the offending provisions--it would have to rewrite the contract, which it did not have the power to do. The court found the threats leveled at plaintiff to obtain his signature on the arbitration agreement together with the lack of mutuality as to arbitrable claims, and the disadvantages to an employee of using NAF as the arbitrator indicated a systematic effort by defendant to impose arbitration on an employee as an inferior forum that works to the employer's advantage [*96 Cal. App. 4th 167, 185]* .

The facts and procedural background of ***Flores v. Transamerica HomeFirst, Inc.*** *(2001) 93 Cal. App. 4th 846, 113 Cal. Rptr. 2d 376* , and consideration of the fact that the doctrine of unconscionability is not precluded by the Federal Arbitration Act are discussed at [b], *above*. The portion of the opinion addressing the general criteria for unconscionability is discussed at [c], *above*; the portion addressing procedural unconscionability is discussed at [d], *above*; and the portion addressing substantive unconscionability is discussed at [e], *above*. The portion of the opinion addressing severance of the unconscionable portions of the arbitration agreement is discussed at [j], *below*.

[l] Unconscionable Portions of Arbitration Agreement Will Not Be Severed After They Are No Longer Needed by Party Urging Arbitration

The facts and procedural background of ***Flores v. Transamerica HomeFirst, Inc.*** *(2001) 93 Cal. App. 4th 846, 113 Cal. Rptr. 2d 376* , and consideration of the fact that the doctrine of unconscionability is not precluded by the Federal

Arbitration Act are discussed at [b], *above*. The portion of the opinion addressing the general criteria for unconscionability is discussed at [c], *above*; the portion addressing procedural unconscionability is discussed at [d], *above*; and the portion addressing substantive unconscionability is discussed at [e], *above*. HomeFirst contended that the court of appeal should sever the provisions which reserved its remedies (foreclosure, set-off, and appointment of a receiver) from arbitration, and still require plaintiffs to arbitrate their claims. The court of appeal declined to do so. First, a court need not sever the invalid arbitration provisions when a unilateral arbitration agreement is "permeated" with unconscionability: such permeation is indicated by the fact that there is no single provision a court can strike or restrict in order to remove the unconscionable taint from the agreement. The court would have to reform the contract by augmenting it with additional terms, which the court has no inherent to do. Here the court was faced with an arbitration agreement in which no single provision could be stricken to remove the unconscionable taint. The lack of bilaterality consisted not only in the reservation of remedies of foreclosure, set-off, appointment of receiver, but also in allowing HomeFirst to proceed with its remedies despite a claim pending in arbitration, and giving HomeFirst all remedies "afforded by law and equity." In addition, the court found it would be woefully unfair to plaintiffs to allow HomeFirst--after a dispute had arisen and after the reverse mortgage was terminated--to refute the unconscionable aspects of the arbitration agreement HomeFirst itself drafted (*93 Cal. App. 4th 846, 857)* . The court did not believe justice would be served by an effort to save the arbitration agreement by removing post hoc offending provisions for which HomeFirst no longer had any use (*93 Cal. App. 4th 846, 857-858)* .

[m] Court Must Strike Unconscionable Remedy Limitations Before Ordering Arbitration

The facts and procedural background of ***Independent Assn. of Mailbox Center Owners, Inc. v. Superior Court (Mail Boxes Etc., USA, Inc.)*** *(2005) 133 Cal. App. 4th 396, 34 Cal. Rptr. 3d 659* , and the portion of the opinion considering consolidation of the arbitrations is discussed in *Ch. 20, Arbitration: Compelling, § 20.13[3][f]*. The arbitration agreements also provided that the arbitrator did not have power to award punitive damages, consequential, or incidental damages. Some of the other agreement also prohibited the arbitrator from awarding damages for lost wages or profits, attorney's fees and/or costs and limited damages to the amount the of the franchise fee and the cost of building out the MailBox Center. Franchisees sought compensatory and punitive damages, as authorized by the various statutes, as well as injunctive relief regarding unfair trade practices, restitution, disgorgement of illegal gains, and statutory penalties under the unfair competition law. AAA Rule R-43, which was applicable, allows the arbitrator to grant any remedy or relief the arbitrator deems just and equitable and within the scope of the parties' agreement. The court of appeal said it was not within the scope of the writ proceedings to decide the availability of the substantive relief requested under the various statutory schemes, but to the extent the arbitration clauses purported to deny the arbitrator the ability to award full relief according to the merits of the respective showings, the arbitration clauses are contrary to statute and unduly restrictive, possible amounting to unconscionable waivers of statutory rights. Thus, the trial court should have stricken any provisions that would deprive the arbitrator of authority to award statutory remedies or any relief that would otherwise be allowable in court.

[4] Additional Authorities

[a] Criteria of Unconscionability

Dotson v. Amgen, Inc. (2010) 181 Cal. App. 4th 975, 980, 104 Cal. Rptr. 3d 341 , discusses the criteria of unconscionability in the course of finding a restriction on discovery not uneforceable due to unconscionability.

The criteria of unconscionability are discussed in *Lhotka v. Geographic Expeditions, Inc. (2010) 181 Cal. App. 4th 816, 820-821, 104 Cal. Rptr. 3d 844* , in the course of holding a recreational release unconscionable.

[b] Element of Procedural Unconscionability

Requiring employees to sign a printed form "Waiver and Agreement" binding them to the agreement without giving them an opportunity to see that agreement and as a condition of practicing anesthesiology at the hospital was

procedurally unconscionable in *Suh v. Superior Court (2010) 181 Cal. App. 4th 1504, 1516-1517, 105 Cal. Rptr. 3d 585* .

Dotson v. Amgen, Inc. (2010) 181 Cal. App. 4th 975, 980-982, 104 Cal. Rptr. 3d 341 , discusses the element of procedural unconscionability in the course of finding a restriction on discovery to has a low level of procedural unconscionability, due to the fact that the contract offer was presented on a take-it or leave-it basis, because the plaintiff was an attorney knowingly entered into a contract containing an arbitration provision in exchange for a generous compensation and benefits package.

In *Lhotka v. Geographic Expeditions, Inc. (2010) 181 Cal. App. 4th 816, 822-824, 104 Cal. Rptr. 3d 844* , the court held that the nonessential nature of recreational activities is a factor to be taken into account in assessing whether a contract is oppressive, but it is not necessarily the dispositive factor. Nonetheless, the court ruled that terms and conditions of a recreational release agreement that are nonnegotiable, and defendant's statement that plaintiffs would encounter the same requirements with any other recreational company, made the agreement have a sufficient level of oppression to support a finding of procedural unconscionability.

[c] Element of Substantive Unconscionability

The trial court's finding that the provisions of the American Health Lawyers Association Alternative Dispute Resolution Service Rules of Procedure for Arbitration limiting remedies are severe and substantively unconscionable was upheld in *Suh v. Superior Court (2010) 181 Cal. App. 4th 1504, 1515-1516, 105 Cal. Rptr. 3d 585* .

Dotson v. Amgen, Inc. (2010) 181 Cal. App. 4th 975, 980, 982-985, 104 Cal. Rptr. 3d 341 , discusses the element of substantive unconscionability in the course of finding a restriction on discovery not narrow enough to be unconscionable, because although the agreement purported to limit discovery to one deposition of a natural person, the agreement gave the arbitrator broad discretion to order the discovery needed to sufficiently litigate the parties' claims.

A limitation of the amount of recovery to the cost of a recreational trip in a recreational-activity release was found without more substantively unconscionable in *Lhotka v. Geographic Expeditions, Inc. (2010) 181 Cal. App. 4th 816, 825-826, 104 Cal. Rptr. 3d 844* .

[d] Arbitration Agreement Is Wholly Unenforceable on Account of Unconscionable Provisions

In *Suh v. Superior Court (2010) 181 Cal. App. 4th 1504, 1517, 105 Cal. Rptr. 3d 585* , the court of appeal refused to sever unconscionable remedy limitations in the applicable American Health Lawyers Association Alternative Dispute Resolution Service Rules of Procedure for Arbitration, because the rules by their own terms were a cohesive whole that could not be applied only in part and thus permeated the arbitration agreement.

The court of appeals ruled in *Lhotka v. Geographic Expeditions, Inc. (2010) 181 Cal. App. 4th 816, 826, 104 Cal. Rptr. 3d 844* , that the trial court properly exercised its discretion in refusing to sever offending provisions from the contract and to enforce the entire arbitration clause of the contract that included provisions greatly limiting plaintiffs' recovery, and requiring plaintiffs to indemnify the other party for its legal costs and fees if plaintiffs pursued any claims covered by the release agreement, and to pay half of any mediation fees and mediate and arbitrate in defendant's choice of venue, far from plaintiffs.

[e] Arbitration Rules Are Unfair and Unconscionable

In *Pokorny v. Quixtar, Inc. (9th Cir. 2010) 601 F.3d 987* , the federal Ninth Circuit Court of Appeals ruled that the arbitration provision was unenforceable because it was procedurally and substantively unconscionable. The Court noted that under the Federal Arbitration Act, whether an arbitration provision is unconscionable is governed by state contract

law (*601 F.3d 987, 994)* . After citing California law on unconscionability of agreements (*601 F.3d 987, 996)* , the court analyzed and found procedural (*601 F.3d 987, 996-997*) and substantive (601 F.3d 987, 997-1005) unconscionability in the terms of the arbitration agreement. Finding the offending arbitration provisions unenforceable, the Court addressed the severability of those arbitration provisions, ruled that they were unseverable, and voided the entire arbitration agreement (*601 F.3d 987, 1005)* .

[f] Prohibition on Classwide Arbitration Is Unconscionable

The federal Ninth Circuit Court of Appeals found in *Omstead v. Dell, Inc. (9th Cir. 2010) 594 F.3d 1081*, that a class action waiver was unenforceable, because it was unconscionable under California contract law. The Court noted that under the Federal Arbitration Act, whether an arbitration provision is unconscionable is governed by state contract law (594 F.3d 1081, 1085). The Court cited California caselaw setting forth the elements necessary for a finding that a class action waiver is unconscionable under California law if (1) the waiver is found in a consumer contract of adhesion, (2) the contractual setting is one in which disputes between the contracting parties predictably involve small amounts of damages, and (3) it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, and noted the trial court's findings relevant to the three elements, and affirmed that trial court's conclusion that the waiver in question met all three elements of the test (*594 F.3d 1081, 1086 & n.3*). The Court then reversed the trial court's ruling that the waiver was severable, and voided the arbitration provision (594 F.3d 1081, 1087).

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2-20A California Points & Authorities § 20A.92

§ 20A.92 Party Signing Medical Services Agreement Is Not Bound by It

[1] FORM

RESPONDENT CANNOT BE COMPELLED TO ARBITRATE THIS CONTROVERSY BECAUSE RESPONDENT EXECUTED THE MEDICAL SERVICES CONTRACT _____ [UNDER COERCION *or* WITHOUT READING THE WAIVER NOTICES AND DID NOT UNDERSTAND IT PROVIDED FOR ARBITRATION] AND IS NOT BOUND BY ITS ARBITRATION PROVISIONS.

A. Party Signing Medical Services Arbitration Agreement May Show He or She Is Not Bound Thereby. *Section 1295 of the Code of Civil Procedure* permits a party to seek to show that he or she was coerced into signing or did not read the waiver notices provided in a medical services arbitration agreement provided for by that section and did not realize that it provided for binding arbitration (*Ramirez v. Superior Court (1980) 103 Cal. App. 3d 746, 756, 163 Cal. Rptr. 223*).

[2] Comments

[a] Use of Form

This form of memorandum may be used by a consumer to resist arbitration under a medical services contract with an arbitration clause governed by *Code Civ. Proc. § 1295* when the consumer signed the agreement either under coercion or withoutrealizing it provided for arbitration. A contract that complies with *Code Civ. Proc. § 1295(a)-(c)* is not a contract of adhesion, nor unconscionable, nor otherwise improper [*Code Civ. Proc. § 1295(d)*]. Respondent will have a very difficult burden in showing coercion in signing and particularly in showing lack of knowledge concerning arbitrability of disputes under the medical services contract, as well as in explaining failure to rescind arbitrability [*see Ramirez v. Superior Court (1980) 103 Cal. App. 3d 746, 756-757, 163 Cal. Rptr. 223* , discussed at [3][a], *below*]. Counsel should give particular heed to the guidelines of this case in setting out argument in connection with the foregoing form.

This form does not provide a complete memorandum but is designed to be combined with a general form of

memorandum in opposition to one seeking to compel arbitration [*see § 20A.10*]. Counsel may also wish to incorporate authority from *Ch. 20, Arbitration: Compelling, § 20.30,* regarding the applicability of general contract principles.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should explain what constituted coercion in signing, how respondent managed not to notice the bold red arbitration notice immediately before the signature line [*see Code Civ. Proc. § 1295(b)*], and why the agreement was not rescinded in accordance with *Code Civ. Proc. § 1295(c).*

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450* et seq.], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747* (overruled on other grounds in *Rosenthal v. Great Western Financial Securities Corp. (1996) 14 Cal. 4th 394, 404, 58 Cal. Rptr. 2d 875*)].

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For a form of response to a petition to compel arbitration that may be supported by this memorandum, as well as a procedural checklist, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

[d] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For memoranda to combine with this form, regarding other matters that the opposition may need to address, see *§§ 20A.10-20A.12, 20A.20 et seq., 20A.30 et seq., 20A.40 et seq., 20A.60 et seq., and 20A.80* et seq.

For forms addressing contract principles generally, see Ch. 50, *Contracts* .

[3] Discussion of Authorities

[a] Party Signing Medical Services Arbitration Agreement May Show He or She Is Not Bound Thereby

Ramirez v. Superior Court *(1980) 103 Cal. App. 3d 746, 163 Cal. Rptr. 223* , concerned a plaintiff mother who brought her sick infant to defendant hospital for pediatric examination. The child was mistakenly discharged after an examination in the emergency room. The mother had been handed and was required to sign a Spanish language version of the medical care arbitration agreement specified in *Code Civ. Proc. § 1295* before her child would be treated. The

infant died, allegedly from failure of the hospital to make a timely diagnosis of the child's illness, and plaintiff brought a medical malpractice action. When defendant petitioned to compel arbitration, plaintiff claimed that she had not realized she was agreeing to arbitrate claims against the defendant The trial court granted defendant's petition to compel arbitration. Although the court recognized that the mother probably was more concerned about the treatment for her ill baby than about the language of the document, the court concluded nonetheless that *Code Civ. Proc. § 1295(e)* removed the aura of adhesion from the contract and that *Code Civ. Proc. § 1295* was a legislative directive to move medical services disputes to the arbitration forum. The mother sought a writ of mandate to vacate the order compelling arbitration.

The court of appeal granted the writ, directing the superior court to vacate its order and reconsider the question of compelling arbitration. The appellate court concluded that in order to avoid constitutional infirmity, *Code Civ. Proc. § 1295* must be read as permitting a very limited species of attack by one who has signed an agreement in proper form, basing its decision on the constitutional right to trial by jury in civil cases (*103 Cal. App. 3d 746, 755)* . The court determined that the Legislature may not establish a conclusive presumption that one signing an agreement meeting the requirements of *Code Civ. Proc. § 1295* has in fact consented to arbitration. Therefore, the statute must be read as permitting a party to seek to show that he or she was coerced into signing or did not read the many waiver notices provided and did not realize that the agreement was one to arbitrate (*103 Cal. App. 3d 746, 756)* . Because the trial court did not resolve the factual issues of coercion in signing and knowledgeas to what the agreement was, the court or appeal was constrained to annul the ruling and return the matter for redetermination (*103 Cal. App. 3d 746, 757)* .

The court speculated that because of the nature of the warnings on the form prescribed by *Code Civ. Proc. § 1295*, a party attacking the arbitration agreement would have a difficult time in doing so. The party would have to explain how the 10-point red type above the signature line was overlooked, and why no questions were asked about the document being signed. The party would have to show that no one explained the document or asked that it be read before being signed. Finally, the party would have to explain why he or she did not rescind the agreement within 30 days after it was signed as provided by the statute. The trial court then would make a factual ruling on the questions of coercion and of whether the party actually knew or reasonably should have known that he or she was waiving jury trial rights and agreeing to arbitrate any medical malpractice controversy. Although this procedure might impose a special burden on the trial court, the court of appeal concluded that constitutional provisions for right to jury trial [*see U.S. Const., amend. VII*; *Cal. Const., art. I, § 16*] nevertheless required it (*103 Cal. App. 3d 746, 756-757)* .

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2-20A California Points & Authorities § 20A.93

§ 20A.93 Uninsured Motorist Arbitration Was Not Concluded Within Five Years

[1] FORM

RESPONDENT CANNOT BE COMPELLED TO ARBITRATE THIS UNINSURED MOTORIST CLAIM BECAUSE PETITIONER COULD HAVE CONCLUDED THIS ARBITRATION WITHIN FIVE YEARS AS REQUIRED BY SECTION 11580.2(i)(2)(A) OF THE INSURANCE CODE, BUT FAILED TO DO SO.

A. *Insurance Code Section 11580.2(i)(2)(A)* Requires Denial. Any uninsured motorist arbitration instituted pursuant to *Section 11580.2 of the Insurance Code*[, other than one in which the insured also has a workers' compensation claim], shall be concluded within five years from the institution of the arbitration proceeding. If the claimant does not conclude the arbitration within that five-year period and he or she cannot establish any basis for waiver or estoppel of the five-year period for completion of arbitration, any petition to compel that arbitration must be denied (*Ins. Code § 11580.2(i)(2)(A)*; *Santangelo v. Allstate Insurance Company (1998) 65 Cal. App. 4th 804, 812, 816-818, 76 Cal. Rptr. 2d 735*).

[*Optional*] **B. *Insurance Code Section 11580.2(i)(2)(A)* May Be Applied When Accident Occurred Before Enactment.** Application of *Section 11580.2(i)(2)(A) of the Insurance Code* to refuse to compel arbitration arising out of an accident that occurred before enactment of the five-year limitation is proper if, under the circumstances of the particular case, petitioner had a reasonable time after the legislation became operative within which to conclude the arbitration and failed to do so (*Santangelo v. Allstate Insurance Company (1998) 65 Cal. App. 4th 804, 815-818, 76 Cal. Rptr. 2d 735*).

[2] Comments

[a] Use of Form

This form may be used by an insurance company to resist a motion to compel arbitration of an uninsured motorist claim if that motion is not brought until more than five years after arbitration was demanded or otherwise instituted [*Ins. Code § 11580.2(i)(2)(A)*]. This form does not provide a complete memorandum but is designed to be combined with a general

form in opposition to one seeking to compel arbitration [*see § 20A.10*]. Counsel may also wish to incorporate authority from §§ 20A.80-20A.82 or 20A.86 addressing other aspects and means of waiver.

The five-year limitation in *Ins. Code § 11580.2(i)(2)(A)* was enacted by 1995 legislation and became effective on January 1, 1996. Paragraph B is for use if the accident that is the basis for the arbitration occurred before January 1, 1996, but the party pursing the claim still had a reasonable amount of time to bring the arbitration to conclusion within the five-year period. In the case cited in Paragraph B, the five-year period expired on March 4, 1996, but given the circumstances of the case [*see* [3][a], *below*], the two-month interval was considered reasonable.

[b] Argument

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. The argument should show the date of the accident, when the arbitration was demanded, agreed to, or otherwise instituted, when and whether any action was commenced and stayed. If the accident occurred before January 1, 1996, counsel should trace the history of the litigation and arbitration to show that the parties were ready to proceed with the arbitration hearing and that the arbitration could have been concluded within what remained of the five-year period.

[c] Commencement of Five-Year Period

In *Santangelo v. Allstate Insurance Company (1998) 65 Cal. App. 4th 804, 76 Cal. Rptr. 2d 735* , the arbitration was deemed instituted on the date plaintiff sent a letter to defendant demanding arbitration even though that letter referred to an agreement to postpone the arbitration hearing until after a medical examination scheduled for the next month [*Santangelo v. Allstate Insurance Company (1998) 65 Cal. App. 4th 804, 812, 76 Cal. Rptr. 2d 735]* .

[d] Related Pleading and Practice Chapters

For discussion of the split of authority on this issue, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

[e] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For other memoranda addressing uninsured motorist arbitration, see *Ch. 20,Arbitration: Compelling, § 20.43*, and § 20A.42.

[3] Discussion of Authorities

[a] Insurance Code Section 11580.2(i)(2)(A) Requires Denial

Ins. Code § 11580.2(i)(2) was amended effective January 1, 1996 to provide that any arbitration instituted pursuant to *Ins. Code § 11580.2* had to be concluded either:

> (A) Within five years from the institution of the arbitration proceeding.
>
> (B) If the insured has a workers' compensation claim arising from the same accident, within three years of the date the claim is concluded, or within the five-year period set forth in (A), whichever occurs later.

The doctrines of estoppel, waiver, impossibility, impracticality, and futility apply to excuse a party's compliance with

the statutory time frame, as determined by the court [*Ins. Code § 11580.2(i)(3)*]. Also, that parties to the insurance contract may stipulate in writing to extending the time to conclude arbitration [*Ins. Code § 11580.2(i)(4)*].

Santangelo v. Allstate Insurance Company *(1998) 65 Cal. App. 4th 804, 76 Cal. Rptr. 2d 735* , arose out of an accident that occurred on March 3, 1990. On March 4, 1991, plaintiff's attorney sent a demand for arbitration to defendant. That letter stated in part that the parties agreed to await an April, 1991 medical examination "prior to initiating the arbitration proceedings." There was a tentative settlement in March, 1993, but it was never finalized. In October, 1994 and March, 1995, Allstate sent letters to plaintiff demanding arbitration. By the time the five-year limitation went into effect on January 1, 1996, the parties had picked an arbitrator. On January 18, 1996, plaintiff wrote to defendant to "go ahead and schedule the Arbitration Hearing 90 days from today." After expiration of the five years, defendant wrote to plaintiff pointing out that she had failed to comply with *Ins. Code § 11580.2(i)(2)*, and that she was prohibited from pursuing her claim further. Plaintiff then filed a motion to compel arbitration, but presented no reason whatsoever why the arbitration hearing could not have been held by March 4, 1996, the five-year mark. She did not contend that she could not obtain a hearing date; she did not even try. The motion was denied. Plaintiff appealed.

The court of appeal affirmed. The court of appeal held that the March 4, 1991 letter constituted formal institution of arbitration pursuant to *Ins. Code § 11580.2(i)*; that reference in that letter to the medical examination referred only to deferral of scheduling the hearing, and did not amount to a waiver of the one-year period for institution of arbitration. Allstate's subsequent demands for arbitration were made in an effort to get the case moving and did not "restart the clock" on the time to complete arbitration (*65 Cal. App. 4th 804, 812)* . Further, the court of appeal found no basis for plaintiff's claim that Allstate had waived or was estopped to assert the five-year period for completion of arbitration (*65 Cal. App. 4th 804, 817)* .

[b] Insurance Code Section 11580.2(i)(2)(A) May Be Applied When Accident Occurred Before Enactment

The facts and procedural background of ***Santangelo v. Allstate Insurance Company*** *(1998) 65 Cal. App. 4th 804, 76 Cal. Rptr. 2d 735* , are discussed at [a], *above*. Plaintiff argued that application of the five-year limitation of *Ins. Code § 11580.2(i)(2)(A)* to her case would constitute a retroactive application in violation of her constitutional rights. The court of appeal disagreed (*65 Cal. App. 4th 804, 812)* . Even before the 1995 amendment of *Ins. Code § 11580.2(i)*, plaintiff would not have had an unlimited time within which to conclude arbitration, either by application of *Code Civ. Proc. § 583.310 et seq.* [*see forms in Ch. 20D, Arbitration: Dismissing, §§ 20D.10 et seq., 20D.20* et seq.] or by extension of the principle that one cannot unreasonably delay initiation of arbitration without waiving the right to arbitration to require one to conclude arbitration within a reasonable time (*65 Cal. App. 4th 804, 813-814)* . Under the circumstances of this case, the court found that two months [after the effective date of the amendment] was a reasonable amount of time for plaintiff to conclude the arbitration (*65 Cal. App. 4th 804, 816)* .

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2-20A California Points & Authorities § 20A.94

§ 20A.94 The Health Care Plan Disclosures Do Not Comply With Health and Safety Code Section 1363.1

[1] FORM

THE HEALTH CARE PLAN DISCLOSURES DO NOT COMPLY WITH HEALTH AND SAFETY CODE SECTION 1363.1, WHICH IS NOT PREEMPTED BY THE FEDERAL ARBITRATION ACT[, OR BY MEDICARE LAW OR REGULATIONS], AND THEREFORE THIS ARBITRATION AGREEMENT MAY NOT BE ENFORCED.

A. Health and Safety Code Sec 1363.1 Is Not Preempted by the Federal Arbitration Act. Petitioner is engaged in the business of insurance and *Health and Safety Code Section 1363.1* clearly purports to regulate an important aspect of that business relating to the performance and enforcement of the policy, which takes the form of the health care plan and subscriber agreement. Because Section 1363.1 regulates the business of insurance within the meaning of the McCarran-Ferguson Act, the Federal Arbitration Act, a federal statute of general application, which does not "specifically relate" to insurance, is foreclosed from application to prevent the operation of Section 1363.1. As a result, the arbitration provisions of the health care plan's subscriber agreement may not be enforced because of their failure to satisfy the specific and unambiguous disclosure requirements imposed by Section 1363.1 (*Smith v. PacifiCare Behavioral Health Plan of California, Inc. (2001) 93 Cal. App. 4th 139, 144, 162, 113 Cal. Rptr. 2d 140* , Second Appellate District, Division Three, *cert. denied, (2002) 537 U.S. 818, 123 S. Ct. 92, 154 L. Ed. 2d 23* ; *accord Imbler v. PacifiCare of California, Inc. (2002) 103 Cal. App. 4th 567, 576-577, 126 Cal. Rptr. 2d 715 (Fourth Appellate District, Division Two)* ; *Pagarigan v. Superior Court (Aetna U.S. Health Care of California, Inc.) (2002) 102 Cal. App. 4th 1121, 1134, 126 Cal. Rptr. 2d 124 (Second Appellate District, Division Seven))* .

[*Optional*] **B. *Health and Safety Code Section 1363.1* Is Not Preempted by Medicare Law or Regulations.** [With respect to plan enrollment documents for Medicare+Choice plans submitted to the Health Care Financing Administration for approval before December 21, 2000, neither *or* Neither] Medicare law or regulationspreempt state laws, such as *Health and Safety Code Section 1363.1*, which require specific terms, language, or placement of disclosures in plan enrollment documents, or "marketing materials" as the term is used in Medicare law (*Zolezzi v. PacifiCare of California (2003) 105 Cal. App. 4th 573, 576, 583-588, 129 Cal. Rptr. 2d 526* ; *Pagarigan v. Superior*

Court (Aetna U.S. Health Care of California, Inc.) (2002) 102 Cal. App. 4th 1121, 1134, 1147-1150, 1150 n.23, 126 Cal. Rptr. 2d 124).

[*Optional*] **C. Substantial Compliance Does Not Save Arbitration Agreement.** The doctrine of substantial compliance excuses literal noncompliance only when there has been actual compliance in respect to the substance essential to every reasonable objective of the statute. The essential objective of *Health & Safety Code Section 1363.1* is to ensure that the enrollee knowingly waived his or her right to a jury trial. Thus, if a health care plan enrollment form does not have the arbitration disclosure immediately before the enrollee's signature and prominently displayed, and there is no indication that the enrollee knowingly waived his or her right to a jury trial, the statutory objective is not met, and the arbitration agreement cannot be enforced. This is true even if the notice requirement was later satisfied with actual notice (*Rodriguez v. Blue Cross of California (2008) 162 Cal. App. 4th 330, 338, 340, 75 Cal. Rptr. 3d 754* ; *Burks v. Kaiser Foundation Health Plan, Inc. (2008) 160 Cal. App. 4th 1021, 1028-1029, 73 Cal. Rptr. 3d 257* ; *Zembsch v. Superior Court (Health Net of California, Inc.) (2006) 146 Cal. App. 4th 153, 166-167, 53 Cal. Rptr. 3d 69* ; *Robertson v. Health Net of California, Inc. (2005) 132 Cal. App. 4th 1419, 1431, 34 Cal. Rptr. 3d 547* ; *Malek v. Blue Cross of California (2004) 121 Cal. App. 4th 44, 61-64, 72-73, 16 Cal. Rptr. 3d 687*).

[*Optional*] **D. Arbitration Agreement Cannot Be Enforced Because It Does Not Comply With *Health and Safety Code Section 1363.1*.** The enrollment form does not comply with the statutory requirement of *Health and Safety Code Section 1363.1(b)* that the arbitration disclosure be prominently displayed. Thus, noncompliance with the statute renders the arbitration agreement unenforceable (*Rodriguez v. Blue Cross of California (2008) 162 Cal. App. 4th 330, 338, 75 Cal. Rptr. 3d 754* ; *Burks v. Kaiser Foundation Health Plan, Inc. (2008) 160 Cal. App. 4th 1021, 1028-1029, 73 Cal. Rptr. 3d 257* ; *Zembsch v. Superior Court (Health Net of California, Inc.) (2006) 146 Cal. App. 4th 153, 156, 163-168, 53 Cal. Rptr. 3d 69* ; *Imbler v. PacifiCare of Cal., Inc. (2002) 103 Cal. App. 4th 567, 578-579, 126 Cal. Rptr. 2d 715*).

[*Optional*] **E. Health Plan Cannot Avoid Disclosure Requirements by Using Employer's Form.** An arbitration disclosure in the master agreement between and employer and a health plan is no substitute for compliance with the arbitration disclosure requirements of *Health & Safety Code Section 1363.1*. Further, the plan cannot avoid compliance by using a form provided by the employer to evidence an employee's election to enroll in the plan. If the an employer-prepared form does not provide the required disclosures, the health plan must provide its own form for that purpose (*Medeiros v. Superior Court (Health Net of California) (2007) 146 Cal. App. 4th 1008, 1016-1019, 53 Cal. Rptr. 3d 307*).

[*Optional*] **F. Courts Have Authority to Refuse to Enforce Arbitration Agreements that Do Not Comply With *Health & Safety Code Section 1363.1*.** Administrative remedies handed down by the Department of Managed Health Care are not the exclusive means of enforcing the disclosure requirements of *Health & Safety Code Section 1363.1*. Because the disclosure requirements are mandatory, disclosure is necessary to create an enforceable arbitration provision in a health care service plan, regardless of whether the subscriber actually had notice of the term requiring arbitration. Courts have the authority to refuse to enforce an arbitration agreement based on failure to comply with the mandatory disclosure requirements (*Medeiros v. Superior Court (Health Net of California) (2007) 146 Cal. App. 4th 1008, 1019, 53 Cal. Rptr. 3d 307* ; *Zembsch v. Superior Court (Health Net of California, Inc.) (2006) 146 Cal. App. 4th 153, 167-168, 53 Cal. Rptr. 3d 69* ; *Malek v. Blue Cross of California (2004) 121 Cal. App. 4th 44, 67, 69, 72, 16 Cal. Rptr. 3d 687*).

[*Optional*] **G. As Applied to Non-Medical Cause(s) of Action.** A disclosure does not meet the requirement of *Health & Safety Code Section 1363.1(c)* that it *clearly state* whether the subscriber or enrollee is waiving his or her right to a jury trial for medical malpractice, other disputes relating to the delivery of service under the plan, or both when there is no indication that the subscriber is waiving his or her right to a jury trial for the "delivery of service under the plan" other than malpractice. In a case alleging causes of action other than medical malpractice, confusion as to the extent of the enrollee's waiver undermines the fundamental purpose of the statute--to ensure a knowing waiver of the right to a jury trial--and renders the arbitration provision unenforceable (*Rodriguez v. Blue Cross of California (2008) 162 Cal.*

App. 4th 330, 338-340, 75 Cal. Rptr. 3d 754).

[2] Comments

[a] Use of Form

The form at [1], *above*, may be used to resist a motion to compel arbitration by a health care service plan when the plan disclosures do not comply with *Health & Safety Code § 1363.1*. Most commonly, the health care service plan will argue that *Health & Safety Code § 1363.1* is preempted by the Federal Arbitration Act, because it is not applicable to contracts in general, but governs only arbitration contracts. There is authority to that effect [*see Erickson v. Aetna Health Plans of Cal. (1999) 71 Cal. App. 4th 646, 652, 84 Cal. Rptr. 2d 76* , Fourth Appellate District, Division Two]. However, the better view seems to be that expressed by the authority used in this form. Optional Paragraph B may be of limited application, because effective December 21, 2000, Medicare law [*42 U.S.C. § 1395w-26(b)(3)(B)(iv)*; *see* Pub. L. No. 106-554, 114 Stats. 2763, 2763A-560-561] was amended to provide for preemption of state law with respect to "marketing materials" of Medicare+Choice health plans, which most cases have assumed without much argument or discussion include the enrollment form in which the arbitration disclosure required by *Health & Safety Code § 1363.1* has to appear. Consistent with the position of the Health Care Financing Administration (HCFA), the federal entity that administers the Medicare program, optional Paragraph B specifies that it is applicable to Medicare+Choice plan enrollment documents submitted to HCFA for approval before December 21, 2000. Optional Paragraph C isfor use to anticipate or rebut a claim that the defect in the disclosure was only technical and therefore the arbitration agreement should be enforced. Optional Paragraph D is for use when the arbitration agreement does not comply with the "prominently displayed" requirement of *Health & Safety Code § 1363.1*, but the contention that Section 1363.1 is preempted by the Federal Arbitration Act has not been made. Paragraph D incorporates authority from Paragraph A. Optional Paragraph G is for use when the disclosure does not meet the requirement of *Health & Safety Code § 1363.1(c)* because there is confusion about whether the arbitration requirement applies to causes of action other than those relating to the delivery of medical services.

This form does not provide a complete memorandum but is designed to be combined with a general form in opposition to one seeking to compel arbitration [*see § 20A.10*]. Counsel may also wish to incorporate authority from § 20A.90 et seq.

[b] Argument

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. The subscriber agreement should be attached to show clearly the way or ways in which its arbitration provisions do not comply with *Health and Safety Code § 1363.1*.

Although the issue addressed by this form is mainly one of law, there may be other issues with regard to which counsel will wish to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747* (overruled on other grounds in *Rosenthal v. Great Western Financial Securities Corp. (1996) 14 Cal. 4th 394, 404, 58 Cal. Rptr. 2d 875*)].

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further

legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For general discussion of compelling and resisting arbitration, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

[d] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Health and Safety Code Section 1363.1 Is Not Preempted by the Federal Arbitration Act

Smith v. PacifiCare Behavioral Health Plan of California, Inc. *(2001) 93 Cal. App. 4th 139, 113 Cal. Rptr. 2d 140* , Second Appellate District, Division Three, *cert. denied, (2002) 537 U.S. 818, 123 S. Ct. 92, 154 L. Ed. 2d 23* , was consolidated actions based on identical subscriber agreements of PacifiCare of California and related affiliates. PacifiCare admitted that the agreements did not comply with *Health & Safety Code § 1363.1* in the placement of the disclosures required by that section, but argued, based on *Erickson v. Aetna Health Plans of Cal. (1999) 71 Cal. App. 4th 646, 652, 84 Cal. Rptr. 2d 76* , Fourth Appellate District, Division Two, that *Health & Safety Code § 1363.1*, was preempted by the Federal Arbitration Act with respect to contracts involving interstate commerce. In one case arbitration was denied. In the other, it was compelled. In the case in which arbitration was compelled, subscriber sought a writ of mandate vacating the order compelling arbitration. In the case in which the order did not compel arbitration, PacifiCare appealed.

The court of appeal affirmed the judgment refusing to compel arbitration and issued the writ vacating the order compelling arbitration, finding that the McCarran-Ferguson Act (*15 U.S.C. § 1012*) nullified the Federal Arbitration Act's attempt to preempt *Health & Safety Code § 1363.1*, a state statute which specifically regulates the business of insurance (*93 Cal. App. 4th 139, 144, 162)* . McCarran-Ferguson was enacted in 1946, in response to a U.S. Supreme Court decision, to return to the states the plenary power to regulate the business of insurance. Under McCarran-Ferguson, an act of Congress may not be construed to "invalidate, impair, or supercede" a state law enacted "for the purpose of regulating the business of insurance" unless the federal act "specifically relates to the business of insurance." (*15 U.S.C. § 1012(b)*). There was no dispute between the parties that the application of the FAA would have the effect of invalidating, impairing and superceding the operation of Section 1363.1; indeed, it would absolutely preclude its use to regulate the wording and organization of PacifiCare's arbitration clauses. Similarly, there was no argument that the FAA is a statute of general application which does not specifically relate to the business of insurance. Thus, in order for the court of appeal to conclude that McCarran-Ferguson does preclude the application of the FAA, the court had to address only the integrally related questions (1) whether health care service plans, such as PacifiCare, are engaged in the business of insurance and (2) whether Section 1363.1 is a statute enacted "for the purpose of regulating the business of insurance" (*93 Cal. App. 4th 139, 154)* . The court answered both questions in the affirmative: (1) health care service plans are engaged in the business of insurance (*93 Cal. App. 4th 139, 155-159*); and (2) *Health& Safety Code § 1363.1* was enacted to regulate the relationship between insurer and its insureds, thus "for the purpose of regulating the business of insurance" (*93 Cal. App. 4th 139, 159-162)* . The court of appeal concluded that McCarran-Ferguson prevented FAA's preemption of and required compliance with *Health & Safety Code § 1363.1* by a health care service plan before its arbitration clauses can be enforced (*93 Cal. App. 4th 139, 162)* .

Plaintiff in ***Imbler v. PacifiCare of Cal. Inc.*** *(2002) 103 Cal. App. 4th 567, 126 Cal. Rptr. 2d 715 (Fourth Appellate District, Division Two)* , was diagnosed with cancer when his employer was changing health plans and enrolled in defendant's plan based in part on its representation that it would pay for the treatment recommended, which it did not do. Plaintiff sued defendant. Defendant petitioned to compel arbitration. The trial court denied the petition. Defendant appealed.

The court of appeal affirmed (*103 Cal. App. 4th 567, 579)* , finding both that *Health & Safety Code § 1363.1* is not preempted by the Federal Arbitration Act (FAA) (*103 Cal. App. 4th 567, 577)* , and that defendant's enrollment documents did not comply with *Health & Safety Code § 1363.1* (*103 Cal. App. 4th 567, 579)* . The court of appeal agreed with *Smith v. PacifiCare Behavioral Health of Cal., Inc. (2001) 93 Cal. App. 4th 139, 113 Cal. Rptr. 2d 140* , that the McCarran-Ferguson Act prevents the FAA from preempting *Health & Safety Code § 1363.1* (*103 Cal. App. 4th 567, 577)* . The McCarran-Ferguson Act sets forth a policy declaration that the primary regulation of the business of insurance be by the states, not the national government (*103 Cal. App. 4th 567, 571)* and specifically provides that no federal law may be construed to "invalidate, impair, or supersede" a state law "enacted for the purpose of regulating the business of insurance" unless the federal law "specifically relates to the business of insurance" [*15 U.S.C., § 1012(b)*] (*103 Cal. App. 4th 567, 572-573)* . The FAA is a statute of general application which does not specifically relate to the business of insurance. Thus, in order to conclude that McCarran-Ferguson does preclude the application of the FAA, the court had only to answer two questions: (1) whether health care service plans, such as PacifiCare, are engaged in the business of insurance and (2) whether *Health & Safety Code § 1363.1* is a statute enacted for the purpose of regulating the business of insurance (*103 Cal. App. 4th 567, 573)* . The court of appeal answered both in the affirmative (*103 Cal. App. 4th 567, 574, 576-577)* . Plaintiff urged that the plan's enrollment documents failed in three respects to comply with *Health & Safety Code § 1363.1*. The court considered only one: the failure of the arbitration provision to be prominently displayed on the enrollment form signed by each subscriber or enrolled [*see Health & Safety Code § 1363.1(b)*] (*103 Cal. App. 4th 567, 578)* . Here, the disclosure sentence was written in the middle of the authorization for the release of medical records and an authorization for payroll deduction of premiums. The disclosure was in the same font as the rest of the paragraph, and was not bolded, underlined or italicized. The disclosure sentence neither stood out nor was readily noticeable (*103 Cal. App. 4th 567, 579)* .

Pagarigan v. Superior Court (Aetna U.S. Health Care of California, Inc.) *(2002) 102 Cal. App. 4th 1121, 126 Cal. Rptr. 2d 124 (Second Appellate District, Division Seven)* was a writ of mandate proceeding arising out of an action by survivors of an enrollee in a Medicare HMO health plan offered by Aetna U.S. Health Care of California, Inc., in fact, the very same plan that was at issue in *Erickson v. Aetna Health Plans of California, Inc. (1999) 71 Cal. App. 4th 646, 84 Cal. Rptr. 2d 76* (hereinafter "*Erickson*"). The enrollment form signed by decedent did not include any mention of arbitration, nor did the Evidence of Coverage (EOC) manual supplied for 1996-1999. Decedent first enrolled in 1995 and died in June, 2000. Aetna based its motion to compel arbitration on the 2000 EOC, which mentioned arbitration as an unpaginated amendment located about 75 pages into a document of more than 100 pages. The arbitration provision in the 2002 EOC had been approved by Health Care Financing Administration (HCFA), the federal entity that administers the Medicare program. The trial court granted the motion to compel arbitration, believing itself bound by *Erickson*. Thereafter, the Second Appellate District, Division Three, issued its decision in *Smith v. PacifiCare Behavioral Health of Cal., Inc. (2001) 93 Cal. App. 4th 139, 113 Cal. Rptr. 2d 140* (hereinafter "*Smith*", discussed *above*); and the survivors moved for reconsideration. The trial court again ordered arbitration, reasoning that (1) *Smith* did not consider a Medicare plan, (2) *Erickson* upheld federal preemption with respect to a Medicare health plan, (3) federal regulation of the Medicare program, including Medicare health plans, is extensive, and thus, (4) *Smith* is distinguishable. The survivors filed a writ of mandate arguing that Aetna could not enforce the arbitration provision because it failed to comply with *Health & Safety Code § 1363.1*, which is not preempted by either the Federal Arbitration Act (FAA) or the Medicare scheme.

The court of appeal agreed and issued the writ, directing the trial court to deny Aetna's petition to compel arbitration (*102 Cal. App. 4th 1121, 1151)* . The court of appeal noted that although *Erickson* made mention of the fact that the plan involved was a Medicare plan, that figured in its preemption analysis only for the purpose of assessing whether the

contract at issue involved interstate commerce as required for the FAA to apply. There was no discussion whatsoever of whether *Health & Safety Code § 1363.1* was independently preempted under the Medicare scheme (*102 Cal. App. 4th 1121, 1131)* . The court of appeal agreed with *Smith*'s conclusion that the McCarran-Ferguson Act applies to the FAA, with the result that the FAA, a federal statute of general application, which does not specifically relate to insurance, is foreclosed from application to prevent the operation of *Health & Safety Code § 1363.1* (*102 Cal. App. 4th 1121, 1134)* .

[b] Health and Safety Code Section 1363.1 Is Not Preempted by Medicare Law or Regulations

Plaintiff in ***Zolezzi v. PacifiCare of California*** *(2003) 105 Cal. App. 4th 573, 575, 129 Cal. Rptr. 2d 526* enrolled in defendant's Secure Horizons Medicare+Choice plan on January 1, 2000, and shortly thereafter suffered a fractured shoulder. Defendant refused to authorize surgery, which a second opinion provided was necessary to avoid amputation. Plaintiff appealed the denial, and an administrative hearing was held on December 15. On February 6, 2001, not having received a decision by the administrative law judge, plaintiff underwent surgery to repair her fractured humerus. The surgery was performed by a non-plan surgeon at plaintiff's expense. On February7 the administrative decision upheld defendant's denial of the surgical referral authorization. Plaintiff filed a complaint against defendant alleging seven causes of action:

- Breach of the duty of good faith and fair dealing;
- Conspiracy to breach the covenant of good faith and fair dealing;
- Negligent interference with a contractual relationship;
- Intentional interference with a contractual relationship;
- Intentional infliction of emotional distress;
- Breach of fiduciary duty; and
- Unfair business practices in violation of *Bus. & Prof. Code § 17200*.

Defendant moved to compel arbitration. Both parties agreed the plan documents did not comply with *Health & Safety Code § 1363.1*, but defendant contented that *Health & Safety Code § 1363.1* was preempted by the Federal Arbitration Act and by Medicare law. The trial court denied the motion to compel arbitration, and defendant appealed.

The court of appeal affirmed (*105 Cal. App. 4th 573, 576)* . The 1997 Balanced Budget Act (BBA) authorized Medicare+Choice (M+C) plans [42 U.S.C. § 1395w21 et seq.] (*105 Cal. App. 4th 573, 579)* . At the time of the acts complained of, the law which defendant contended preempted *Health & Safety Code § 1363.1--42 U.S.C. § 1395w-26(b)(3)(B)*--explicitly superseded state law with respect only to (1) benefit requirements, (2) requirements relating to inclusion or treatment of providers, and (3) coverage determinations (including related appeals and grievance processes). On December 21, 2000, *42 U.S.C. § 1395w-26(b)(3)(B)* was amended to add a fourth category of specifically preempted state standards: requirements relating to marketing materials and summaries and schedules of benefits regarding a Medicare+Choice plan (*105 Cal. App. 4th 573, 580)* . The court of appeal, relying on *McCall v. PacifiCare of Cal., Inc. (2001) 25 Cal. 4th 412, 423-426, 106 Cal. Rptr. 2d 271, 21 P.3d 1189* , which considered the state of the law prior to the enactment of the BBA amendments, believed the preemption of coverage determinations should be narrowly construed and would relate only to procedures for obtaining payment or reimbursement for medical services. Other state law causes of action against an HMO arising out of its denial of services under a Medicare-subsidized health plan were not preempted by the Medicare statute (*105 Cal. App. 4th 573, 583-584)* . The court noted that the Health Care Financing Administration (HCFA), the federal entity that administers the Medicare

program, stated, in soliciting comments to its regulations after enactment of the BBA, that it was adopting a narrow interpretation of the scope of preemption of coverage determinations [*see 63 Fed. Reg. 34968, 35013]* (*105 Cal. App. 4th 573, 583-584)* . The regulation as adopted, *42 C.F.R. § 422.204(b)(3)*, provides that preemption extends to coverage determinations (including related appeal and grievance processes for all benefits included under an M+C contract), but that determinations on issues other than whether a service is covered under an M+C contract, and the extent of enrollee liability under the M+C plan for that service, are not considered coverage determinations for purposes of this preemption (*105 Cal. App. 4th 573, 585)* . The court of appeal concluded that neither *42 U.S.C. § 1395w-26(b)(3)(B)(iii)* nor the regulation preempted state law causes of action that do not seek payment or reimbursement of a Medicare claim or otherwise fall within the Medicare administrative review process for coverage determinations (*105 Cal. App. 4th 573, 586)* . Thus, *42 U.S.C. § 1395w-26(b)(3)(B)(iii)* also does not preempt state law tort claims or state consumer protection statutes, such as *Health & Safety Code § 1363.1* (*105 Cal. App. 4th 573, 587)* . *Health & Safety Code § 1363.1* does not provide an alternative to Medicare's exclusive review process for coverage determinations; Thus *42 U.S.C. § 1395w-26(b)(3)(B)(iii)* does not preempt it. "Appeals" and "grievances" as used in *42 U.S.C. § 1395w-26(b)(3)(B)(iii)* relate to underlying "coverage determinations," which term relates to decisions on claims seeking payment or reimbursement of a Medicare claim (*105 Cal. App. 4th 573, 587)* .

Although defendant conceded that the December 21, 2000 amendment of *42 U.S.C. § 1395w-26(b)(3)(B)(iv)* to add marketing materials to the matters specifically preempted was prospective only, it argued for preemption on the ground that the relevant law was that in effect on the date the court ruled on the motion to compel arbitration or the date when plaintiff filed her complaint (*105 Cal. App. 4th 573, 586-588)* . The court of appeal disagreed, saying the relevant acts were plaintiff's enrollment in the plan and the actions and omissions of defendant and its health care providers with respect to plaintiff's fracture, all of which occurred before December 21, 2000. Because defendant did not comply with the arbitration disclosure requirements of *Health & Safety Code § 1363.1* during that relevant period, *42 U.S.C. § 1395w-26(b)(3)(B)(iv)* did not preempt application of section 1363.1 and therefore defendant could enforce the arbitration provision (*105 Cal. App. 4th 573, 588)* .

The facts and procedural background of ***Pagarigan v. Superior Court (Aetna U.S. Health Care of California, Inc.)*** *(2002) 102 Cal. App. 4th 1121, 126 Cal. Rptr. 2d 124* , and the portion of the opinion addressing Federal Arbitration Act preemption of *Health & Safety Code § 1363.1* are discussed at [a], *above*. Aetna argued that the Medicare scheme, as federal legislation "specifically related" to insurance, prevails over the McCarran-Ferguson Act (*102 Cal. App. 4th 1121, 1135)* . The court of appeal agreed that because Medicare is a federal statutory scheme "specifically related to the business of insurance," the McCarran-Ferguson Act is inapplicable to Medicare, but the preemptive effect of the Medicare laws on state laws still had to be considered (*102 Cal. App. 4th 1121, 1135)* . Aetna claimed two bases for Medicare's preemption of *Health & Safety Code § 1363.1*: either (1) the "all encompassing federal regulatory scheme governing the Medicare program and its contracted Medicare health care service plans" generally or (2) the fact that the form and substance of its arbitration provision pursuant to federal regulation, were subject to, and received, approval from HCF as the arbitration provision was within the definition of "marketing materials" governed by *42 C.F.R. § 422.80*. The court of appeal noted that in enacting Medicare, Congress did not intend to displace state tort remedies for claims unrelated to Medicare coverage determinations, such claims being considered collateral to, and not inextricably intertwined with, Medicare benefit claims (*102 Cal. App. 4th 1121,1136-1137)* . The Medicare HMO plan here at issue (a Medicare+Choice plan in the language of the statute) is governed by the Balanced Budget Act of 1997 (*42 U.S.C. §§ 1395w-21* to 1395w-28), which has been held noteworthy for its addition of an express limited preemption provision to the Medicare Act (*102 Cal. App. 4th 1121, 1137)* . There is no express preemption statement in the Medicare Act. Rather *42 U.S.C. § 1395* explicitly states an intent to minimize federal intrusion in the area of medical services for the elderly (*102 Cal. App. 4th 1121, 1138)* . *42 U.S.C. § 1395w-26(b)(3)* authorizes the creation of standards under the Medicare+Choice program and delineates the limited preemptive effect of those standards: those standards supersede state law or regulation to the extent the law or regulation is inconsistent with the standards (*102 Cal. App. 4th 1121, 1140)* . 42 C.F.R. § 22.80, the federal authority on which Aetna primarily relied, addresses the "approval of marketing materials and election forms," defined to include "membership communication materials such as membership rules, subscriber agreements (evidence of coverage) [and] member handbooks ..." and requires their submission to HCFA for

review at least 45 days before their distribution (*102 Cal. App. 4th 1121, 1141)* . *42 C.F.R. § 422.402(a), (b)* provide, with exceptions for benefit requirements and treatment of providers and suppliers and coverage determinations which are specifically superseded, that the standards supersede state laws, regulations, contract requirements, or other standards only to the extent that the state laws are inconsistent with the standards established under that part. Otherwise, nothing in *42 C.F.R. 422.402* may be construed to affect or modify the provisions of any other law or regulation that imposes or preempts a specific state authority [*42 C.F.R. § 422.402(c)*] (*102 Cal. App. 4th 1121, 1143)* . The court of appeal also noted that comments to interim regulations promulgated by HCFA stated that unless specific preemptions apply, state laws or standards that are more strict than Medicare standards would not be preempted unless they prevented compliance with Medicare requirements and that there were likely to be quality and consumer protection standards imposed by state law that all Medicare plans must comply with, and for which there is no Federal preemption [*see 63 Fed. Reg. 34967, 35012 (Jun. 26, 1998)]* (*102 Cal. App. 4th 1121, 1144)* . The Knox-Keene Health Care Service Plan Act of 1975 (*Health & Safety Code § 1340 et seq.*), of which Section 1363.1 by its express terms applies to plans accepting Medicare beneficiaries as enrollees [*see, e.g., Health & Safety Code §§ 1363, 1363.05, 1367.12* & *1367.15*] (*102 Cal. App. 4th 1121, 1145)* . The court of appeal found no inconsistency between the Medicare statutes and regulations and *Health & Safety Code § 1363.1* but in fact found section 1363.1 wholly consistent with Medicare standards (*102 Cal. App. 4th 1121, 1148)* .

Although *42 U.S.C. § 1395w-26(b)(3)(B)(iv)* was amended, effective December 21, 2000 [*see* Pub. L. No. 106-554, Dec. 21, 2000, 114 Stats. 2763, 2763A-560-561], to add Medicare plan marketing materials to the matters expressly preempting state laws, and authorized regulations providing model language for marketing materials, the court of appeal noted that the amendment and any regulations that might be adopted pursuant to it, were prospective only and did not apply to this case (*102 Cal. App. 4th 1121, 1149-1151)* . The court cited a letter from the HCFA informing states of the amendment and also advising that the new specific prohibition against state regulation of marketing materials applies to marketing materials submitted after December 21, 2000 (*102 Cal. App. 4th 1121, 1149 n.3*).

42 C.F.R. § 422.402 as discussed in *Pagarigan, above,* is quoted as it was at that time. Since January, 2005, it has stated only that the standards established by the Code of Federal Regulations supersede any state law or regulation (other than state licensing laws or state laws relating to plan solvency) with respect to the Medicare Advantage plans.

[c] Substantial Compliance Does Not Save Arbitration Agreement

Rodriguez v. Blue Cross of California *(2008) 162 Cal. App. 4th 330, 75 Cal. Rptr. 3d 754* , and ***Burks v. Kaiser Foundation Health Plan, Inc.*** *(2008) 160 Cal. App. 4th 1021, 73 Cal. Rptr. 3d 257* , are discussed at [d], *below.*

Zembsch v. Superior Court (Health Net of California, Inc.) *(2006) 146 Cal. App. 4th 153, 53 Cal. Rptr. 3d 69* , involved an action by an insured against a health insurance provider and the physician group that provided medical care. A member of the insured family had a life threatening condition for which the insured sought a standing referral to a specialist in Delaware. The insurance plan provides for standing referrals if the primary care physician, Health Net's medical director, and the member deem it necessary. Defendants refused to issue a standing referral until two days after plaintiffs filed suit. Plaintiffs considered the referral they issued then to be inadequate because it was for consultation only. Both Health Net and Alta Bates moved to compel arbitration and stay the action. Plaintiffs opposed the motions on various grounds, including the failure of the arbitration disclosure on Health Net's enrollment form to comply with *Health & Safety Code § 1363.1* because that disclosure was not "prominently displayed." The trial court granted defendants' motions and ordered the matter to arbitration, saying that while there was no doubt that the disclosure could have been made *more* prominent, it adequately fit the standard definition of prominent, i.e. standing out or readily noticeable. Plaintiffs filed a petition for writ of mandate and/or prohibition seeking review of the trial court order compelling arbitration.

The court of appeal issued a peremptory writ of mandate directing the trial court to vacate its order compelling arbitration, and to enter an order denying the motions to compel arbitration and dissolving the stay order (*146 Cal.*

App. 4th 153, 169) . The court of appeal held that the enrollment form did not comply with the statutory requirement of *Health & Safety Code § 1363.1(b)* that the arbitration disclosure be prominently displayed and that noncompliance with the statute rendered the arbitration agreement unenforceable (*146 Cal. App. 4th 153, 156*). The court first discussed why review by writ was available and appropriate in these circumstances (*146 Cal. App. 4th 153, 160-162*). Because the material facts were undisputed, the issue of the enforceability of the arbitration agreement was decided de novo (*146 Cal. App. 4th 153, 162)* . The single page enrollment form was Appendix A to the opinion. The arbitration agreement appeared beneath a boldface black line at the very bottom of the page. Under the boldface line were two single-spaced, unindented "paragraphs" printed in the smallest typeface used on the form. The first and longer of these two paragraphs concerned the enrollee's authorization for the release of medical information. The arbitration agreement appeared immediately above the signature line. The court discussed the law applying to Section 1363.1(b), specifically that the requirement that the arbitration disclosure be "prominently displayed," had been interpreted in *Imbler v. PacifiCare of Cal., Inc. (2002) 103 Cal. App. 4th 567, 579, 126 Cal. Rptr. 2d 715* (*Imbler*, discussed at [a], *above), Malek v. Blue Cross of California (2004) 121 Cal. App. 4th 44, 61-62,* (*Malek*, discussed *above*), and *Robertson v. Health Net of California, Inc. (2005) 132 Cal. App. 4th 1419, 1426-1429, 34 Cal. Rptr. 3d 547 (Robertson, discussed above)* meant the disclosure had to stand out or project beyond a surface or line, or be readily noticeable (*146 Cal. App. 4th 153, 163-165)* . The court concluded that the arbitration disclosure was not prominently displayed because it did not stand out or project beyond the surface line nor was it readily noticeable (*146 Cal. App. 4th 153, 164-165)* . Like the disclosure in *Robertson*, the disclosure in this case was printed in the same font or typeface as most of the form. The disclosure heading appeared to be in faint boldface type. The disclosure was the second of two single-spaced paragraphs of small, condensed type located at the bottom of the enrollment form. Neither the disclosure nor the preceding paragraph was indented, and the two paragraphs were not separated from each other by any lines or spacing. The disclosure was in the same font as the preceding paragraph, and it was not bolded, underlined or italicized. In contrast, some of the text of the form was printed in boldface type, in all capitals or in larger fonts, so Health Net clearly could have made the text of the disclosure more prominent had it chosen to do so. The disclosure does not stand out from the remainder of the document and is not readily noticeable (*146 Cal. App. 4th 153, 165)* . In fact, the court found this disclosure *less* prominent than those in *Malek* and *Robertson*. The disclosure in *Robertson* was set off from the remainder of the text by blank lines before the first and after the last sentences. That spacing gave it greater prominence and made it easier to read than the disclosure being considered here. The disclosure in *Malek* was preceded by the heading "**ARBITRATION AGREEMENT**" in clear, boldface type and was contained in a separate numbered paragraph. Neither of these two distinguishing features was present here. Thus, the arbitration disclosure on the enrollment form signed by Zembsch was not "prominently displayed" and, therefore, does not comply with the terms of Section 1363.1(b) (*146 Cal. App. 4th 153, 165)* .

The court also considered Health Net's claim that the arbitration disclosure substantially complied with *Health & Safety Code § 1363.1*. Health Net argued that the purpose of Section 1363.1 had been served because Zembsch never claimed not to have read or understand the arbitration disclosure: thus, the statute's objective--to safeguard against patients unknowingly waiving their constitutional right to a jury trial--has been achieved. The court of appeal noted that there is some doubt whether Section 1363.1 permits mere substantial compliance with its provisions. Without a proper disclosure, the court could not be certain that the subscriber knowingly waived the right to a jury trial. Health Net's failure to display its disclosure with the prominence required by the statute cast doubt on whether Zembsch knowingly waived his rights; and the court was therefore unwilling to hold that there had been "actual compliance in respect to the substance essential to every reasonable objective of the statute" (*146 Cal. App. 4th 153, 166*). The court rejected the claim of substantial compliance (*146 Cal. App. 4th 153, 167*).

Health Net also claimed that the arbitration agreement could be enforced despite the violation of *Health & Safety Code § 1363.1* because the only remedies for violations of Section 1363.1 are the administrative enforcement remedies contained in the Knox-Keene Health Care Service Plan Act of 1975 (*Knox-Keene Act; Health & Safety Code § 1340 et seq.*). *Malek* rejected a very similar argument, and the court of appeal followed its reasoning Health Net relied on cases holding that various provisions of the Knox-Keene Act do not create either private rights of action or independent bases for liability. Plaintiffs did not assert any private right of action against defendants. Their reliance on Section 1363.1 was

purely defensive. They did not assert that Health Net was liable to them, in damages or otherwise. The court was not persuaded that the Legislature intended that the sole consequence of a violation of Section 1363.1 should be administrative penalties imposed by the Department of Managed Health Care. The notice requirements of Section 1363.1 were intended to ensure consent to a binding agreement to arbitrate; to make certain that the parties have agreed to be bound to contractual arbitration (*146 Cal. App. 4th 153, 167)* . The court agreed with the well-reasoned conclusion in *Malek* that it would be absurd to impose an administrative penalty on a health service plan provider for failure to comply with the arbitration disclosure requirements but permit arbitration to go forward under those circumstances (*146 Cal. App. 4th 153, 167-168)* . The lack of language in Section 1363.1 specifying that a noncomplying arbitration agreement be unenforceable is of no consequence. The statute is phrased in mandatory terms, and any result other than denying enforcement would lead to the absurd result of compelling arbitration under an undisclosed agreement. A violation of section 1363.1 renders an arbitration agreement unenforceable. The trial court erred in compelling plaintiffs to arbitrate (*146 Cal. App. 4th 153, 168)* .

Plaintiff in ***Robertson v. Health Net of California, Inc.*** *(2005) 132 Cal. App. 4th 1419, 34 Cal. Rptr. 3d 547* was a member of a health plan issued by defendant. When the plan was cancelled, plaintiff filed a lawsuit against Health Net claiming breach of contract, breach of the covenant of good faith and fair dealing, fraud, unfair competition, and violation of the Consumer Legal Remedies Act (CRLA: *Civ. Code § 1780* et seq.). Health Net filed a motion to compel arbitration, attaching a copy of Robertson's enrollment form, which included the claimed arbitration agreement. The trial court denied the motion to compel arbitration, ruling that the arbitration clause was unenforceable because it failed to meet two of the mandatory display requirements set forth in *Health & Safety Code § 1363.1*. The agreement failed to comply with *section 1363.1(d)*, which requires a health plan to display its arbitration agreement "immediately before" the signature line provided for the enrollee on the enrollment form. It also failed to comply with *section 1363.1(b)*, which requires a health plan to prominently display its arbitration agreement on the plan enrollment form. Health Net appealed.

The court of appeal affirmed (*132 Cal. App. 4th 1419, 1432)* . *Health & Safety Code § 1363.1(d)* directs a health plan to place its arbitration agreement "immediatelybefore the signature line provided for the individual enrolling in the health care service plan." The court said it would be hard to imagine that the Legislature's directive to health care plan providers could have been clearer. In plain and ordinary language, "immediately before" means that the arbitration agreement must be typed in directly before the signature line provided for the individual on the enrollment form without any intervening language (*132 Cal. App. 4th 1419, 1426)* . According to Health Net, it complied with this requirement given the fact that only five sentences separate its arbitration agreement and enrollee signature line. Health Net argued that immediately means "close by." The court of appeal disagreed (*132 Cal. App. 4th 1419, 1427)* . As to the requirement that the arbitration clause be prominently displayed, Health Net argued that "prominently displayed" only means that the arbitration agreement must stand out and be readily noticeable on the plan enrollment form and contended that its separated and bolded arbitration clause fulfilled this requirement. Again, the court disagreed, observing that the arbitration clause itself was not highlighted or bolded. Only the title of the clause was bolded. Moreover, both the bolded title and the text of the disclosure itself, are printed in the same typeface as that used in the rest of the enrollment form (*132 Cal. App. 4th 1419, 1428)* . Given the facts that: (1) the provision is some distance from the enrollees' signature line, (2) the provision is printed in the same font or typeface as the rest of the form, and (3) only the title is in bolded type, the court of appeal concluded that the arbitration clause also failed to meet the mandatory prominence requirement of *section 1363.1(b)* and was unenforceable for this additional reason (*132 Cal. App. 4th 1419, 1429)* . The court of appeal said that the rules governing the doctrine of substantial compliance are well settled: the doctrine excuses literal noncompliance only when there has been actual compliance in respect to the substance essential to every reasonable objective of the statute. The essential objective of *Health & Safety Code § 1363.1* is to ensure a knowing waiver of the right to a jury. Because of the lack of prominent display of the arbitration clause, the space between the arbitration agreement and enrollee signature line, and the intervening language, Health Net had not actually complied with the essential purpose of the statute and there was doubt whether Robertson knowingly waived her right to a jury trial. Consequently, the court could not excuse Health Net's violation of *Health & Safety Code § 1363.1* based on a theory of substantial compliance trial (*132 Cal. App. 4th 1419, 1431)* .

Plaintiffs in ***Malek v. Blue Cross of California*** *(2004) 121 Cal. App. 4th 44, 16 Cal. Rptr. 3d 687* filed a complaint based on defendant's allegedly improper denial of benefits for infertility treatment. Although the arbitration disclosure in the plan enrollment form did not comply with *Health & Safety Code § 1363.1*, the trial court granted defendant's petition to compel arbitration, with the exception of a claim for injunctive relief brought under the Consumer Legal Remedies Act (CLRA), based on *Erickson v. Aetna Health Plans of California, Inc. (1999) 71 Cal. App. 4th 646, 84 Cal. Rptr. 2d 76* , which held that the Federal Arbitration Act (FAA) preempted the requirements of *Health & Safety Code § 1363.1*. *When Smith v. PacifiCare Behavioral Health of Cal., Inc. (2001) 93 Cal. App. 4th 139, 113 Cal. Rptr. 2d 140* , *cert. denied, (2002) 537 U.S. 818, 123 S. Ct. 92, 154 L. Ed. 2d 23* (*Smith*) was decided, plaintiffs moved to vacate the trial court's order compelling arbitration based on that decision, but the trial court denied the motion, holding it lacked jurisdiction to consider the matter. Then, plaintiffs moved the arbitrator to dismiss the arbitration. That motion was also based on *Pagarigan v. Superior Court (2002) 102 Cal. App. 4th 1121, 126 Cal. Rptr. 2d 124* , and *Imbler v. PacifiCare of Cal., Inc. (2002) 103 Cal. App. 4th 567, 126 Cal. Rptr. 2d 715* (*Imbler*). Defendant argued that the arbitrator could not reverse the trial court's order finding the existence of a valid arbitration agreement and compelling arbitration, but the arbitrator granted the motion and dismissed the arbitration. Defendant filed a petition to vacate the arbitrator's decision to dismiss the arbitration on the ground that the arbitrator exceeded his powers under the arbitration agreement. The trial court concluded that the arbitrator's dismissal order was an award, and vacated it, finding that the arbitrator exceeded his power by making the determination that he lacked jurisdiction to proceed with the arbitration. After notice to the parties, the trial court reconsidered its original order, and based on the change in the law, entered an order denying defendant's petition to compel arbitration. Both parties appealed. Plaintiffs contended that the trial court erred in vacating the dismissal, and should have confirmed it, because even if the arbitrator had exceeded his authority, any error in the award could have been corrected without affecting the merits of the decision. Defendant contended the trial court lacked subject matter jurisdiction to reconsider the issue and that the arbitration provision in the enrollment form was enforceable even though it did not strictly comply with *Health & Safety Code § 1363.1*.

The court of appeal affirmed the trial court's order denying the petition to compel arbitration, and the orders vacating the arbitrator's award and vacating its original decision to grant the petition to compel arbitration (*121 Cal. App. 4th 44, 50-51, 73)* . The portion of the opinion addressing the issue of the arbitrator's exceeding his authority is discussed in *Ch. 20C, Arbitration: Confirming, Correcting, or Vacating the Award, § 20C.192[3][a]*. The court of appeal distinguished the authorities relied on by defendant in arguing that the trial court had no jurisdiction to reconsider the petition to compel arbitration [*see Code Civ. Proc. § 1281.4*], and based its position on *Blake v. Ecker (2001) 93 Cal. App. 4th 728, 113 Cal. Rptr. 2d 422* (*121 Cal. App. 4th 44, 59)* . A change in the law required the trial court to reconsider its prior ruling compelling arbitration [*see Code Civ. Proc. § 1008(c)*] (*121 Cal. App. 4th 44, 59-60)* . The progress of the arbitration is not material when considering a change in the law affecting whether the arbitral forum was a correct one (*121 Cal. App. 4th 44, 60)* . The court of appeal said that a violation of *Health & Safety Code § 1363.1* renders a contractually binding arbitration provision in a health service plan enrollment form unenforceable. Although the court did not foreclose the possibility that under the appropriate circumstances the doctrine of substantial compliance might apply, it concluded that the enrollment format issue here did not substantially comply with *section 1363.1* (*121 Cal. App. 4th 44, 50)* .

Defendant conceded that its enrollment form did not meet the requirements of *Health & Safety Code § 1363.1(d)* because the arbitration provision did not appear immediately before the signature line (*121 Cal. App. 4th 44, 61-62)* . The court ofappeal also concluded that the enrollment form did not meet the prominence requirement of *Health & Safety Code § 1363.1(b)* (*121 Cal. App. 4th 44, 62)* . The court of appeal agreed with *Imbler*, that noncompliance with *Health & Safety Code § 1363.1* renders the arbitration provision unenforceable (*121 Cal. App. 4th 44, 63)* . The plain language of *section 1363.1* is clear--the arbitration disclosure requirements are mandatory (*121 Cal. App. 4th 44, 64)* . Defendant argued that because *section 1363.1* is silent on the consequences of failing to comply with the disclosure requirements, the Legislature must have concluded that failure to comply would not render an arbitration provision unenforceable (*121 Cal. App. 4th 44, 67)* . But the court of appeal felt the statutory language itself implied that an enrollment form complying with the notice requirements would be enforced, and that such a contract could not be

enforced against a party who did not knowingly waive his or her right to a jury trial. There was no need to explicitly state the consequences of failure to comply when this statutory language was clear and unambiguous (*121 Cal. App. 4th 44, 68)* .

The court of appeal also rejected defendant's argument that the only remedy for violations of section 1363.1 were the administrative penalties set forth in the Knox-Keene Act (*121 Cal. App. 4th 44, 68)* . Nor did the court agree that defendant had substantially complied with the requirements of section 1363.1. *Section 1363.1* is not just a notice statute; it is also to ensure a knowing waiver of the right to a jury trial. The signature of the individual enrolling in the health service plan is required to ensure a knowing waiver of his or her rights (*121 Cal. App. 4th 44, 72)* . The court found it disputable whether the arbitration provision satisfied the prominence requirement, but even if the notice requirement was satisfied with actual notice at a later date, there was no indication that the plaintiffs knowingly waived their right to a jury trial based on the juxtaposition of the signature line. The arbitration provision was on the left-hand side of the enrollment form while the signature line was on the lower right-hand side of the form. The signature line appeared directly below the authorization to obtain or release medical information. This placement was not a technical defect of form because it left in doubt whether the plaintiffs knowingly waived their right to a jury trial. Under those circumstances, the statutory objectives of *section 1363.1* had not been met (*121 Cal. App. 4th 44, 73)* .

[d] Arbitration Agreement Cannot Be Enforced Because It Does Not Comply With Health and Safety Code Section 1363.1

Rodriguez v. Blue Cross of California *(2008) 162 Cal. App. 4th 330, 75 Cal. Rptr. 3d 754* , was a class action containing causes of action for violation of the unfair competition law, declaratory relief, breach of contract, breach of the implied covenant of good faith and fair dealing, and breach of the Consumers Legal Remedies Act (CLRA; *Civ. Code § 1750 et seq.*). The complaint alleged that Blue Cross had a practice of speaking in Spanish to Spanish-speaking potential purchasers but then sending applications in English and that Blue Cross rescinded plaintiff's agreement based on unintentional misstatements. Blue Cross petitioned to compel arbitration, but the trial court denied the petition, finding that the language in the arbitration agreement was not prominently displayed; the provision and the language above the signature line were limited to medical malpractice disputes. Because this case did not involve medical malpractice, the trial court found the arbitration provision was unenforceable. Blue Cross appealed.

The court of appeal affirmed (*162 Cal. App. 4th 330, 333, 342)* . The court discussed *Health & Safety Code § 1363.1* and cases interpreting it, noting that the doctrine of substantial compliance cannot save a disclosure that does not actually comply with the essential purpose of the statute, which is to ensure the knowing waiver of the jury trial right by the health plan enrollee (*162 Cal. App. 4th 330, 335-338)* . The court acknowledged that the disclosure complied with the requirements of Section 1363.1 because it was set off in a separate paragraph, the title was emphasized, a majority of the text was bolded, the most important notices were written in bold with uppercase lettering, and it was the last disclosure on the page with no intervening language before the signature. However, that was only applicable to the portions of the disclosure dealing with the arbitration of medical malpractice disputes; it was therefore inapplicable to this case. The portion in bold concerns "any dispute as to medical malpractice" and the language immediately above the signature line in capital letters referred only to "any issue of medical malpractice." There was only one sentence in the disclosure that was more expansive and did not expressly limit arbitration to medical malpractice lawsuits. That was the first sentence, which provided that "Blue Cross requires binding arbitration to settle all dispute against Blue Cross, including claims of medical malpractice." Considered in isolation, that sentence failed to comply with the requirements of *Health & Safety Code § 1363.1(b)* and *(d)*: it was in plain text, was not prominently displayed because it was not readily noticeable. When one considers the emphasis of the other sentences, the first sentence recedes from the forefront because it is in plain text and is not immediately above the signature line. It is artificial to separate that sentence from the disclosure as a whole (*162 Cal. App. 4th 330, 338)* . Once the entire disclosure is considered, the disclosure does not meet the requirement of *Health & Safety Code § 1363.1(c)* that it *clearly state* whether the subscriber or enrollee is waiving his or her right to a jury trial for medical malpractice, other disputes relating to the delivery of service under the plan, or both (*162 Cal. App. 4th 330, 338-339)* . Significantly absent from the disclosure is any indication that the

subscriber is waiving his or her right to a jury trial for the "delivery of service under the plan" other than malpractice. The discrepancy between the first sentence, which is expansive, and the remainder of the disclosure, which is limited to medical malpractice, creates confusion. And that confusion regarding the extent of the jury trial waiver violates Section 1363.1(c). The court of appeal agreed with plaintiff that the emphasis on the arbitration of disputes involving medical malpractice served to de-emphasize, rather than make prominent, the general reference to arbitration of "all disputes against Blue Cross" (*162 Cal. App. 4th 330, 339*) The court again considered the doctrine of substantial compliance, noting that it was not met in this case with respect to a lawsuit involving a dispute other than medical malpractice. "Substantial compliance," as the phrase is used in the decisions, means *actual* compliance in respect to the substance essential to every reasonable objective of the statute. When there is compliance as to all matters of substance technical deviations are not to be given the stature of noncompliance. The express language in the disclosure limiting arbitration to disputesinvolving malpractice rendered it impossible to conclude that Rodriguez knowingly waived his right to a jury trial or court trial with respect to disputes other than medical malpractice. The majority of the disclosure and all of the emphasized language limited arbitration to disputes of medical malpractice claims. Even though the first sentence supported Blue Cross's contrary interpretation, it conflicted with the remainder of the disclosure and rendered unclear the extent of Rodriguez's waiver. The confusion as to the extent of Rodriguez's waiver undermined the fundamental purpose of the statute--to ensure a knowing waiver of the right to a jury trial. Noncompliance with Section 1363.1 rendered the arbitration provision unenforceable (*162 Cal. App. 4th 330, 340)* .

Plaintiff in ***Burks v. Kaiser Foundation Health Plan, Inc.*** *(2008) 160 Cal. App. 4th 1021, 73 Cal. Rptr. 3d 257* , sued defendants alleging that he received egregious treatment while suffering from renal failure and awaiting a kidney transplant. Defendants petitioned to compel arbitration under the arbitration provision in the membership agreement between Burks and Kaiser. Plaintiff opposed the petition on the ground the arbitration provision was unenforceable because the disclosure in the enrollment form was not prominently displayed as required by *Health & Safety Code 1363.1(b)*. The arbitration disclosure appeared in a single paragraph just beneath the line forming the bottom of the box, immediately above the space provided for the enrollee's signature. The arbitration disclosure was printed in typeface that was substantially the same or smaller than the typeface used on the rest of the enrollment form, and was not highlighted, italicized, or bolded. The notice lacked any kind of heading. It was simply a paragraph of small text at the end of the enrollment form immediately above the space for the enrollee's signature. The trial court found the disclosure was not prominently displayed and refused to compel arbitration. Defendants appealed.

The court of appeal affirmed (*160 Cal. App. 4th 1021, 1024, 1030)* , finding that the arbitration disclosure was not prominently displayed on the enrollment form because there was nothing that made the disclosure stand out from the remainder of the form, so that it could be reasonably expected to command the notice of a person filling out the form (*160 Cal. App. 4th 1021, 1024, 1028)* . The court also rejected the argument that the enrollment form substantially complied with *Health & Safety Code § 1363.1* because an enrollment form that does not have the required arbitration disclosure prominently displayed on it cannot be deemed to substantially comply with that statute. *Health & Safety Code § 1363.1* provides that a health care service plan that requires binding arbitration to settle disputes with its members must disclose that arbitration requirement in a separate article in the agreement issued to the employer group or individual subscriber. That disclosure must be prominently displayed on the enrollment form signed by each subscriber or enrollee. A violation of Section 1363.1 renders a contractually binding arbitration provision in a health service plan enrollment form unenforceable (*160 Cal. App. 4th 1021, 1029)* .

Zembsch v. Superior Court (Health Net of California, Inc.) *(2006) 146 Cal. App. 4th 153, 53 Cal. Rptr. 3d 69* , is discussed at [c], *above.*

Imbler v. PacifiCare of Cal., Inc. *(2002) 103 Cal. App. 4th 567, 579, 126 Cal. Rptr. 2d 715* , is discussed at [a], *above.*

[e] Health Plan Cannot Avoid Disclosure Requirements by Using Employer's Form

Medeiros v. Superior Court (Health Net of California) *(2007) 146 Cal. App. 4th 1008, 53 Cal. Rptr. 3d 307* , involved a health care plan administered by the County of San Bernardino, for which both plaintiffs worked. The County entered into a group service agreement with Health Net. That agreement required members to arbitrate all disputes, except medical malpractice, between a member and Health Net regarding the performance, interpretation or breach of the agreement between the County and Health Net. Medeiros did not sign an "enrollment form" supplied by Health Net but in June, 2002, signed a "benefits election form" supplied by and returned to the County, which then submitted it to Health Net. The benefits election form recited that the member would be bound the rules of binding arbitration as described in the Evidence of Coverage (EOC), but plaintiffs were not provided with the EOC until November, 2005. Health Net did not receive any application form signed by the member. Plaintiffs contended the arbitration provision in the benefits election agreement was unenforceable because it did not comply with the mandatory disclosure requirements set forth in *Health & Safety Code § 1363.1* in that the arbitration provision was not prominently displayed and was not located immediately before the signature line as required by the statute. Health Net claimed the disclosure requirements applied only to the application for group service agreement and the group service agreement with the County, not the benefits election agreement. On reconsideration of the motion to compel arbitration, the trial court agreed with Health Net, that the disclosure in the group service agreement controlled, not an individual benefit election form, and compelled arbitration. Medeiros filed a petition for writ of mandate challenging the trial order.

The court of appeal granted the writ and ordered the trial court vacate its order compelling arbitration and to issue an order denying Health Net's motion to compel arbitration (*146 Cal. App. 4th 1008, 1011, 1019-1020)* . The court of appeal noted that neither the benefits election agreement nor the EOC satisfied the disclosure requirements of *Health & Safety Code § 1363.1,* but Health Net did not claim they did. Instead, Health Net claimed no signed individual arbitration disclosures or agreements were required by *Health & Safety Code § 1363.1*. Health Net gave three reasons, each of which the court of appeal rejected (*146 Cal. App. 4th 1008, 1015)* . First, Health Net claimed plaintiffs were bound by the arbitration provisions in the group service application and group service agreement between Health Net and the County, even if plaintiffs never received any other disclosures. This argument was based on *Madden v. Kaiser Foundation Hospitals (1976) 17 Cal. 3d 699, 702-703, 705-709, 131 Cal. Rptr. 882, 552 P.2d 1178* (*Madden*, discussed in *Ch. 20, Arbitration: Compelling, § 20.61[3][a]*), which held that an agent of a group of employees has authority to enter into a group health plan with a binding arbitration provision on their behalf. *Madden* was decided 15 years before enactment of *Health & Safety Code § 1363.1*. The Legislature was aware of *Madden* when it enacted Section 1363.1, and rather than abrogating *Madden*, the Legislature imposed the requirement of individual disclosureto each enrolling employee (*146 Cal. App. 4th 1008, 1016)* . Thus, when an employer negotiates a health care plan which imposes binding arbitration on employees who enroll in it, the employees have the choice to enroll in the plan and give up a right to jury trial, or to decline to enroll in the plan. Disclosure to the employer, but not to the individual employees who enroll in a plan, does not satisfy the requirements of Section 1363.1 (*146 Cal. App. 4th 1008, 1017)* . Health Net's second argument was that nothing in the Knox-Keene Act requires a health plan to use its own enrollment form and compliance with the disclosure requirements of *Health & Safety Code § 1363.1* is mandatory only if a health plan uses its own enrollment form or application. The court of appeal found this argument was not reasonable and elevated form over substance. Employees who sign a document called an enrollment form provided by the insurance company should not receive more protection than employees who sign a document called a benefits election agreement provided by their employer. If an employer-prepared form does not provide the required disclosures, the health plan must provide its own form for that purpose (*146 Cal. App. 4th 1008, 1018)* .

[f] Courts Have Authority to Refuse to Enforce Arbitration Agreements that Do Not Comply With Health & Safety Code Section 1363.1

The facts and procedural background of ***Medeiros v. Superior Court (Health Net of California)*** *(2007) 146 Cal. App. 4th 1008, 53 Cal. Rptr. 3d 307* , and the portion of the opinion considering whether individual disclosure to an enrolling member is necessary are discussed at [e], *above*. Health Net also argued that the only remedy for noncompliance with the disclosure requirements of *Health & Safety Code § 1363.1* is an administrative remedy handed down by the Department of Managed Health Care: courts do not have the authority to refuse to enforce an arbitration agreement

based on failure to comply with the mandatory disclosure requirements (*146 Cal. App. 4th 1008, 1018)* . This issue was disposed of in *Malek v. Blue Cross of California (2004) 121 Cal. App. 4th 44, 67, 69, 72, 16 Cal. Rptr. 3d 687* (*Malek*, discussed *below*), with which the court of appeal agreed, saying that although nothing in the Knox-Keene Act explicitly states an arbitration provision which does not comply with Section 1363.1 is unenforceable, any other result would be absurd. Because the disclosure requirements are mandatory, disclosure is necessary to create an enforceable arbitration provision in a health service plan, regardless of whether the subscriber actually had notice of the term requiring arbitration. What protection would the statute afford a consumer if courts would enforce arbitration provisions which do not comply with the mandatory disclosure requirements? The court of appeal concluded by saying the disclosure requirements of Section 1363.1 are mandatory; plaintiffs were entitled to the same disclosure from Health Net concerning the arbitration provisions as any individual subscriber who signed an enrollment form, and they did not receive it (*146 Cal. App. 4th 1008, 1019)* .

Zembsch v. Superior Court (Health Net of California, Inc.) *(2006) 146 Cal. App. 4th 153, 53 Cal. Rptr. 3d 69* , is discussed at [d], *above.*

The facts and procedural background of ***Malek v. Blue Cross of California*** *(2004) 121 Cal. App. 4th 44, 16 Cal. Rptr. 3d 687* , and the portion of the opinion considering the doctrine of application of the doctrine of substantial compliance are discussed at [c], *above.* Blue Cross contended that because *Health & Safety Code § 1363.1* is silent on the consequences of failing to comply with the disclosure requirements, the Legislature must have concluded that failure to comply would not render an arbitration provision unenforceable, citing other sections in which the consequences of failure to comply were specified (*121 Cal. App. 4th 44, 67-68)* . The court of appeal found this argument unpersuasive because of the mandatory language of Section 1363.1 and because the waiver of a jury was involved. Other principles of statutory construction did not apply here because their application would contravene the plain meaning of Section 1363.1. The court of appeal also rejected Blue Cross' contention that penalties for noncompliance were within the exclusive enforcement powers of the Department of Managed Health Care *(121 Cal. App. 4th 44, 68)* .

[g] As Applied to Non-medical Cause(s) of Action

Rodriguez v. Blue Cross of California *(2008) 162 Cal. App. 4th 330, 75 Cal. Rptr. 3d 754* , is discussed at [d], *above.*

California Points & Authorities

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20A ARBITRATION: RESISTING
PART II. FORMS
D. Defenses to Arbitration

2-20A California Points & Authorities § 20A.95

§ 20A.95 Arbitration Disclosures Did Not Comply With Business and Professions Code Section 7191

[1] FORM

BECAUSE PETITIONER NEITHER COMPLIED WITH BUSINESS AND PROFESSIONS CODE SECTION 7191 NOR ESTABLISHED THAT THE TRANSACTION INVOLVED INTERSTATE COMMERCE, THE ARBITRATION PROVISION CANNOT BE ENFORCED.

A. Compliance With *Business and Professions Code Section 7191* Is Mandatory. Despite the words "may not enforce," *Section 7191 of the Business and Professions Code* is mandatory. Thus, if an arbitration provision does not comply with that statute, a court has no discretion and cannot enforce the arbitration provision against anyone except the licensee. [This is true even if the homeowner is an attorney or otherwise realizes that agreeing to arbitration is effectively a waiver of the right to a jury trial] (*Woolls v. Superior Court (Turner) (2005) 127 Cal. App. 4th 197, 205-210[, 214], 25 Cal. Rptr. 3d 426*).

B. The Federal Arbitration Act Will Not Preempt an Arbitration-Specific Statute Without Evidence That Interstate Commerce Is Involved. Although the Federal Arbitration Act will preempt any state law that is applicable only to arbitration provisions, courts are reluctant to infer preemption. The party claiming that the Federal Arbitration Act preempts a particular state law has the burden of proving that the contract involves interstate commerce. If the contract is not shown to involve interstate commerce and the statute is not complied with, arbitration cannot be ordered (*Woolls v. Superior Court (Turner) (2005) 127 Cal. App. 4th 197, 211-214, 25 Cal. Rptr. 3d 426*).

[2] Comments

[a] Use of Form

This form may be used to resist arbitration under a contract for improvement of a one-to-four unit residential property if the arbitration provision in the contract did not comply with *Bus. & Prof. Code § 7191* (set forth at [3][a], *below*) and if the petition seeking the order compelling arbitration was not supported by evidence establishing that the transaction involved interstate commerce.

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in opposition to one seeking to compel arbitration [*see § 20A.10*]. Respondent also should combine this form with as many other forms as address the specific grounds for denial involved in his or her particular case, that is, §§ 20A.10-20A.12 (procedural matters), 20A.20 et seq. (Congressional or Legislative intent to preserve judicial remedy), 20A.30 et seq. (contract principles), 20A.40 et seq. (issue is beyond scope of arbitration clause), 20A.60 et seq. (respondent is not party to arbitration agreement), and 20A.80 et seq. (waiver and contract defenses).

[b] Argument

Counsel should add argument linking the points in this form to the facts of the case. For example, the argument should set forth the arbitration clause and discuss the ways it did not comply with *Bus. & Prof. Code § 7191*, as well as negate any out-of-state connection with the project.

It is advisable for counsel to submit cognizable evidence in support of factual statements by request for judicial notice [*see Evid. Code § 450 et seq.*] and by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Memoranda

For a memorandum that oppose this form on the ground that the transaction at issue does involve interstate commerce and that particular arbitration-specific statute is thus preempted by the Federal Arbitration Act, see *Ch. 20, Arbitration: Compelling, § 20.22*.

[3] Discussion of Authorities

[A] Compliance With Business and Professions Code Section 7191 Is Mandatory

Business and Professions Code Section 7191 provides that if a contract for work on residential property with four or fewer units contains a provision for arbitration of a dispute between the principals in the transaction, the provision shall be clearly titled "ARBITRATION OF DISPUTES." If a provision for arbitration is included in a printed contract, it shall be set out in at least 10-point roman boldface type or in contrasting red print in at least 8-point roman boldface type, and if the provision is included in a typed contract, it shall be set out in capital letters [*Bus. & Prof. Code § 7191(a)*]. Immediately before the line or space provided for the parties to indicate their assent or nonassent to the

arbitration provision and immediately following that arbitration provision, the following shall appear [*Bus. & Prof. Code § 7191(b)*]:

"NOTICE: BY INITIALING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY CALIFORNIA LAW AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF THE BUSINESS AND PROFESSIONS CODE OR OTHER APPLICABLE LAWS. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY." "WE HAVE READ AND UNDERSTAND THE FOREGOING AND AGREE TO SUBMIT DISPUTES ARISING OUT OF THE MATTERS INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION TO NEUTRAL ARBITRATION."

If the provision set forth above is included in a printed contract, it shall be set out either in at least 10-point roman boldface type or in contrasting red print in at least 8-point roman boldface type, and if the provision is included in a typed contract, it shall be set out in capital letters [*Bus. & Prof. Code § 7191(b)*].

A provision for arbitration of a dispute between a principal in a contract for work on a residential property with four or fewer units that does not comply with *Bus. & Prof. Code § 7191* may not be enforceable against any person other than the licensee [*Bus. & Prof. Code § 7191(c)*]. However, *Bus. & Prof. Code § 7191* does not limit the board's authority to investigate complaints or to discipline a licensee for violations of the Business and Professions Code [*Bus. & Prof. Code § 7191(d)*].

Woolls v. Superior Court (Turner) *(2005) 127 Cal. App. 4th 197, 25 Cal. Rptr. 3d 426* , arose out of a contract for renovation and expansion of Woolls's single-family residence, with Turner as contractor. Both that agreement and a related but unsigned document which contained specifications for the project contained arbitration clauses. Neither of these arbitration provisions included an advisement that by agreeing to arbitration, a party waives the right to a court or jury trial, as required by *Bus. & Prof. Code § 7191*, nor a space for the parties to initial the provisions, also as required by *Bus. & Prof. Code § 7191*. Problems developed, and Woolls hired someone else to finish the renovations. Turner's lumber supplier filed a mechanics' lien and sued to foreclose that lien. Woolls answered and filed a cross-complaint against the lumber supplier and Turner. Turner initiated an arbitration proceeding against Woolls. Woolls submitted written objections to the arbitrator, contending the arbitration agreement failed to comply with *Bus. & Prof. Code § 7191*, but the arbitrator issued an award against Woolls for $46,881.58, administrative fees, the arbitrator's compensation, and expenses. Turner filed a petition to confirm the award and Woolls filed a petition to vacate the award. After a full hearing on the matter, the trial court concluded that the arbitration provision was enforceable against Woolls, despite noncompliance with the requirements set forth in *Bus. & Prof. Code § 7191*, in part because Woolls was an attorney, and continued the hearing for consideration of Woolls's claim of fraud in the inducement of the contract. Prior to that hearing, Woolls filed a petition for writ of mandate to set aside the trial court's order denying his petition to vacate the arbitration award.

The court of appeal granted the petition, finding that an arbitration provision that does not comply with *Bus. & Prof. Code § 7191* cannot be enforced against anyone other than the licensee (*127 Cal. App. 4th 197, 200, 215)* . The court of appeal first discussed *Bus. & Prof. Code § 7191* and concluded that there was a total failure of the arbitration provisions to comply with *Bus. & Prof. Code § 7191* (*127 Cal. App. 4th 197, 205-207)* . Turner argued that because the statute said it "may not" be enforced against anyone but the licensee in cases of noncompliance, the court had discretion to enforce the arbitration provision despite its failure to comply with the statute. The court of appeal disagreed. As a matter of statutory construction, although the word "may" is permissive, "may not" is prohibitory. Thus,

Bus. & Prof. Code § 7191(c) leaves the court no discretion to enforce an arbitration provision that does not comply with the statute (*127 Cal. App. 4th 197, 208-209)* . The court also considered the legislative history of *Bus. & Prof. Code § 7191*, stating that at the time of the final vote on the bill which became *section 7191*, the Legislature understood and intended that an arbitration provision which fails to satisfy *section 7191* "shall not be enforceable." Thus, an arbitration provision which fails to comply with *section 7191* cannot be enforced against any person other than the licensee (*127 Cal. App. 4th 197, 210)* . Addressing Turner's argument that because Woolls was a licensed attorney, he was fully aware signing the arbitration provision was a waiver of his right to a jury trial and his right to appeal, the court found those factors militated against enforcing *section 7191*. The court said it would not rewrite the statute. Doing so would only result in additional litigation causing parties in future cases to contest whether the consumer was aware that he or she was giving up the basic right to a court or jury trial, notwithstanding a contract's failure to comply with *section 7191*. That would be at odds with *section 7191*, which imposes mandatory notice provisions as a condition to the enforceability of an agreement to arbitrate (*127 Cal. App. 4th 197, 214)* .

[b] The Federal Arbitration Act Will Not Preempt an Arbitration-Specific Statue Without Evidence That Interstate Commerce Is Involved

The facts and procedural background of ***Woolls v. Superior Court (Turner)*** *(2005) 127 Cal. App. 4th 197, 25 Cal. Rptr. 3d 426* , and the portion of the opinion addressing the nondiscretionary nature of *Bus & Prof. Code § 7191*, are discussed at [a], *above*. Turner also contended that *Bus. & Prof. Code § 7191* was preempted by the Federal Arbitration Act (FAA; *9 U.S.C. § 1 et seq.*), and therefore noncompliance with *section 7191* was not a ground to invalidate the arbitration agreement (*127 Cal. App. 4th 197, 211)* . The court found this argument meritless because Turner failed to introduce any evidence or authority that the transaction involved interstate commerce (*127 Cal. App. 4th 197, 211, 213-214)* . The FAA applies to any contract evidencing a transaction involving commerce and will preempt any state law that is applicable only to arbitration provisions. However, courts are reluctant to infer preemption; and the party claiming that the FAA preempts a particular state law has the burden of proving that the contract involves interstate commerce (*127 Cal. App. 4th 197, 211)* . Turner did not cite any authority for the proposition that an agreement between a California homeowner and a California contractor to renovate a single family residence in La Canada, California, involves interstate commerce so as to implicate the FAA. The court discussed *Allied-Bruce Terminix Cos. v. Dobson (1995) 513 U.S. 265, 115 S. Ct. 834, 130 L. Ed. 2d 753* (discussed in *Ch. 20, Arbitration: Compelling, § 20.20[3][b]* and *[d]*), and *Basura v. U.S. Home Corp. (2002) 98 Cal. App. 4th 1205, 120 Cal. Rptr. 2d 328* (discussed in *Ch. 20, Arbitration: Compelling, § 20.22[3][i]*) by way of comparison and went into detail about the out-of-state suppliers, design professionals, trade contractors, subcontractors, and advertising involved in the large scale development project at issue in *Basura* (*127 Cal. App. 4th 197, 212-213)* . The court contrasted those cases with Turner's total lack of any evidentiary showing that this transaction involved interstate commerce (*127 Cal. App. 4th 197, 213-214)* . The court concluded that Turner failed to meet his burden of establishing the FAA precluded enforcement of *section 7191* (*127 Cal. App. 4th 197, 214)* .

California Points & Authorities

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20B ARBITRATION: SELECTING ARBITRATORS; ARBITRAL IMMUNITY

2-20B California Points & Authorities 20B.syn

§ 20B.syn Synopsis to Chapter 20B: ARBITRATION: SELECTING ARBITRATORS; ARBITRAL IMMUNITY

§ 20B.01 Scope of Chapter

§ 20B.02 Governing Law

[1] Appointment of Arbitrator

[2] Immunity

§ 20B.03 How to Use the Forms in This Chapter

[1] Page Limits on Points and Authorities

[2] Using the Forms to Build a Draft Memorandum

§ 20B.04 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

[2] Related Points and Authorities

§§ 20B.05-20B.09 [Reserved]

§ 20B.10 Supporting Petition to Appoint Arbitrator When Agreed Method of Selection Failed or Is Unenforceable

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Court Appoints Arbitrator When No Selection Is Produced Under the Agreement

[b] Method of Selection Is Unenforceable

[c] Arbitrator for Public Works Contract Dispute

§§ 20B.11-20B.24 [Reserved]

§ 20B.25 Court Has No Authority to Appoint Arbitrator If Chosen Arbitration Service Provider Has Refused to Act

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Court Has No Authority to Appoint Arbitrator

§ 20B.26 Court Does Not Have Authority to Appoint Second Arbitrator for First Arbitrator's Failure to Make Award

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] Court Had No Authority to Appoint Successor Arbitrator

§§ 20B.27-20B.49 [Reserved]

§ 20B.50 Arbitrator Is Immune From Civil Liability for Acts Done in Capacity of Arbitrator

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Arbitral Immunity

[b] Inclusive Definition of Agreement

[c] Insurance Appraiser Is Entitled to Arbitral Immunity

§ 20B.51 Arbitral Immunity Extends to Sponsoring Organization

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Sponsoring Organization's Immunity

[b] Scope of Organization's Immunity

[4] Additional Authorities

[a] Sponsoring Organization's Immunity

§ 20B.52 Arbitral Immunity Does Not Extend to Breach of Agreement to Conduct Arbitration

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[d] Related Memoranda

[3] Discussion of Authorities

[a] Arbitral Immunity Will Not Protect Arbitrator or Arbitration Service Provider from Liability for Beach of Contract to Conduct Arbitration

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20B ARBITRATION: SELECTING ARBITRATORS; ARBITRAL IMMUNITY
PART I. INTRODUCTION

2-20B California Points & Authorities § 20B.01

§ 20B.01 Scope of Chapter

This chapter contains memoranda and contentions relating to selecting arbitrators (*see § 20B.10* et seq.) and immunity of arbitrators and sponsoring organizations (*see § 20B.50* et seq.) under private agreements pursuant to *Code Civ. Proc. § 1280 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActCoverage & ExceptionsContracts LawContract Conditions & ProvisionsArbitration Clauses

California Points & Authorities

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20B ARBITRATION: SELECTING ARBITRATORS; ARBITRAL IMMUNITY
PART I. INTRODUCTION

2-20B California Points & Authorities § 20B.02

§ 20B.02 Governing Law

[1] Appointment of Arbitrator

If arbitration cannot proceed because the agreed method for appointment of an arbitrator has failed for any reason, unless the parties stipulate to another arbitrator, either party may petition for appointment of an arbitrator, and the court will appoint one [*Code Civ. Proc. § 1281.6*; *see § 20B.10*].

[2] Immunity

Former Code Civ. Proc. § 1280.1 granted arbitrators the same immunity a judicial officer would have for acts done in the capacity of an arbitrator. Former Code Civ. Proc. § 1280.1 was repealed by its own terms effective January 1, 1997, and no similar statute has been enacted. Nevertheless, case law, both before enactment and after repeal of former Code Civ. Proc. § 1280.1, recognize arbitral immunity, for both the individual arbitrator and the sponsoring organization arbitrator [*see Stasz v. Charles R. Schwab (2004) 121 Cal. App. 4th 420, 433-434, 17 Cal. Rptr. 3d 116* ; *Olson v. NASD (8th Cir. 1996) 85 F.3d 381, 382-383*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute Resolution

California Points & Authorities

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CHAPTER 20B ARBITRATION: SELECTING ARBITRATORS; ARBITRAL IMMUNITY
PART I. INTRODUCTION

2-20B California Points & Authorities § 20B.03

§ 20B.03 How to Use the Forms in This Chapter

[1] Page Limits on Points and Authorities

One of the more significant drafting requirements to keep in mind are page limits: supporting and opposing memoranda must not exceed 15 pages, or 20 pages in a summary judgment proceeding. A reply or closing memorandum may not exceed 10 pages in length [*see Cal. Rules of Ct., Rule 3.1113(d)*]. Exhibits, declarations, attachments, tables of contents and authorities, and proof of service are not counted. Any party must obtain leave of court to file a longer memorandum [*see Cal. Rules of Ct., Rule 3.1113(d), (e)*]. These and other drafting requirements are discussed in *further detail in Chapter 1, Writing Legal Memoranda and Briefs, § 1.05*.

[2] Using the Forms to Build a Draft Memorandum

The forms included in this chapter are designed to be combined with other forms to form a complete memorandum. For detailed discussion on how to select and use the forms in the publication to build a draft memorandum and complete the draft, with detailed discussion of all drafting requirements and strategic or stylistic considerations, see *Ch. 1, Writing Legal Memoranda and Briefs, §§ 1.03 -1.06*. For a skeletal form of memorandum for use in creating a properly formatted outline in which to compile relevant forms from this publication, see *Ch. 1, Writing Legal Memoranda and Briefs, § 1.10*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeContent & FormCivil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPleading & PracticeMotion PracticeSupporting Memoranda

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PART I. INTRODUCTION

2-20B California Points & Authorities § 20B.04

§ 20B.04 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

For detailed legal background discussion, research guides, procedural checklists, and practice forms of motions and other papers relating to private contractual arbitration proceedings, see:

- California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

- California Forms of Pleading and Practice, Ch. 33, *Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding* (Matthew Bender).

- California Forms of Pleading and Practice, Ch. 34, *Contractual Arbitration: Judicial Review* (Matthew Bender).

[2] Related Points and Authorities

Chapters in this publication with related forms include:

- For compelling arbitration, see Ch. 20, *Arbitration: Compelling* .

- For resisting arbitration, see Ch. 20A, *Arbitration: Resisting* .

- For confirming, correcting, or vacating an arbitration award, see Ch. 20C, *Arbitration: Confirming, Correcting, or Vacating the Award* .

- For dismissing an arbitration, see Ch. 20D, *Arbitration: Dismissing* .

- For determining the effect of an arbitration award, see Ch. 20E, *Arbitration: Effect of Award* .

- For situations in which attorney's fees may be recovered, see Ch. 25, *Attorney's Fees* .

- For contract provisions in general, see Ch. 50, *Contracts* .

- For situations in which contracts may be avoided or declared void, see Ch. 92, *Duress, Menace, Fraud, Undue Influence, and Mistake* .

- For requirements of injunctions, see Ch. 116, *Injunctions* .

- For general principles relating to specific performance of contracts, see Ch. 214, *Specific Performance* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedureAlternative Dispute ResolutionContracts LawDefensesDuress & Undue InfluenceGeneral Overview

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PART I. INTRODUCTION

2-20B California Points & Authorities §§ 20B.05-20B.09

[Reserved]

§§ 20B.05[Reserved]

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CHAPTER 20B ARBITRATION: SELECTING ARBITRATORS; ARBITRAL IMMUNITY
PART II. FORMS
A. Selecting Arbitrators

2-20B California Points & Authorities § 20B.10

§ 20B.10 Supporting Petition to Appoint Arbitrator When Agreed Method of Selection Failed or Is Unenforceable

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM IN SUPPORT OF PETITION TO
_____ [*name*],	)	APPOINT ARBITRATOR
Petitioner, vs.	)	[LIMITED CIVIL CASE]
_____ [*name*],	)	Date: _____
Respondent.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

PETITIONER, AS A PARTY TO AN ARBITRATION AGREEMENT IN WHICH THE METHOD OF APPOINTING AN ARBITRATOR _____ [HAS BEEN OMITTED *or* HAS FAILED *or* IS UNENFORCEABLE], IS ENTITLED TO AN ORDER APPOINTING AN ARBITRATOR BECAUSE THE PARTIES HAVE NOT BEEN ABLE TO AGREE ON ANY OTHER METHOD OF APPOINTMENT.

A. Court Appoints Arbitrator When No Selection Is Produced Under the Agreement. In the absence of a provision in the arbitration agreement providing an agreed method of appointing an arbitrator, or if an agreed method fails or for any reason cannot be followed, or when an appointed arbitrator fails to act and a successor has not been

appointed, the court, on petition of a party to the arbitration agreement, shall appoint the arbitrator (*Code Civ. Proc. § 1281.6*; *see Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 979-981, 64 Cal. Rptr. 2d 843, 938 P.2d 903* (situations in which party need not resort to Section 1281.6 petition)).

[*Optional*] **B. Method of Selection Is Unenforceable.** Although the method of selection of an arbitrator contained in an agreement may be unenforceable, the parties should still be allowed to proceed to arbitration by either party's petitioning the court to appoint an arbitrator if the parties cannot otherwise agree on a suitable arbitrator (*Graham v. Scissor-Tail, Inc. (1981) 28 Cal. 3d 807, 831, 171 Cal. Rptr. 604, 623 P.2d 165*).

[*Optional*] **C. Venue for Petition Made Prior to Commencement of Arbitration under Private Agreement.** [*See Ch. 20, Arbitration: Compelling, § 20.10[1], Paragraph B.*]

[*Optional*] **D. Jurisdiction Over Petition as Limited Civil Case.** Superior courts have jurisdiction over arbitration-related petitions whether the matter is a limited or unlimited civil case (*see Cal. Const., art. VI, § 10*; *Code Civ. Proc. § 86(a)(10)(A)*).

[*Optional*] **E. Arbitrator for Public Works Contract Dispute.** If the arbitration involves a dispute with regard to a project governed by the Public Contract Code, an arbitrator appointed pursuant to *Code Civ. Proc. § 1281.6* must be from the list of arbitrators approved by the Public Works Contract Arbitration Board [*See Pub. Contract Code § 10240 et seq.*] (*Brutoco Engineering & Construction, Inc. v. Superior Court (United Engineering Technology, Inc.) (2003) 107 Cal. App. 4th 1326, 1334-1335, 132 Cal. Rptr. 2d 866*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be used to support a petition for appointment of an arbitrator when the arbitration agreement fails to provide a method of selecting an arbitrator and the parties have been unable to agree on one, or when the method provided by the arbitration agreement for selecting an arbitrator has failed or is unenforceable [*Code Civ. Proc. § 1281.6*; *see also Health & Safety Code § 1373.20* (presumptions regarding failure of selection under health care service plan that does not use independent dispute resolution organization)]. Optional Paragraph B is for use when the agreed method is unenforceable, and which at first appears to contradict *Provencio v. WMA Securities, Inc. (2005) 125 Cal. App. 4th 1028, 1032-1033, 23 Cal. Rptr. 3d 524* , which is the basis of Ch. 20A, *Arbitration: Resisting,* § 20A.15[1] and which involved a party who resisted arbitration on the ground that the agreed method or forum (NASD) was no longer available. Neither party in *Provencio* petitioned for appointment of another arbitrator under *Code Civ. Proc. § 1281.6.* No party in *Graham v. Scissor-Tail, Inc. (1982) 28 Cal. 3d 807, 831, 171 Cal. Rptr. 604, 623 P.2d 165* petitioned for appointment an arbitrator under *Code Civ. Proc. § 1281.6* either. In *Graham*, the sole arbitrator specified by the contract was identified with one party, and disqualified by the court on appeal on that ground after arbitration. The portion of the opinion sited in Paragraph B comprised the court's advice for use on remand should the parties be unable to agree on a mutually satisfactory arbitrator. *Graham* also stated that if neither party petitioned for appointment of an arbitrator, the court should proceed to a judicial determination of the controversy (*28 Cal. 3d 807, 831)* . Optional Paragraph E. is for use when the contract at issue is governed by the Public Contract Code.

If the failure to appoint an arbitrator or arbitrators is due to one party's misfeasance, the other party is not required to bring a petition under *Code Civ. Proc. § 1281.6*, nor is a petition under *Code Civ. Proc. § 1281.6* a precondition to successfully opposing a petition to compel arbitration [*see Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 980-981, 64 Cal. Rptr. 2d 843, 938 P.2d 903* (discussed at [3][a], *below*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should show whether the agreement provided a method for selecting arbitrators, and if so, how the method provided in the agreement is unenforceable. While the very filing of a petition for appointment suggests that no agreement has been reached either as to a method or as to appointment of an arbitrator, it may be advisable for the argument to disclose whether the parties have attempted to reach an agreed method or have attempted to agree on an arbitrator, and, if so, that agreement has not been possible. It is also probably appropriate to attach a copy of the arbitration provision.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement)].

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For a form of petition to appoint neutral arbitrator that may be supported by this memorandum, as well as discussion of the procedure the court will use to select the arbitrator and presumptions applicable in cases involving health care service plans, and a procedural checklist, see California Forms of Pleading and Practice, Ch. 33, *Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding* (Matthew Bender).

[d] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Court Appoints Arbitrator When No Selection Is Produced Under the Agreement

Under *Code Civ. Proc. § 1281.6*, if the arbitration agreement does not provide a method for appointing an arbitrator, the parties to an arbitration proceeding may agree on a method of appointment. It would appear, therefore, that the parties may always amend the arbitration agreement, such as by stipulation, to provide for a new method of selection prior to a request by a party that the court appoint an arbitrator [*see Code Civ. Proc. §§ 1280(f), 1281*].

The facts and procedural background of ***Engalla v. Permanente Medical Group, Inc.*** *(1997) 15 Cal. 4th 951, 64 Cal.*

Rptr. 2d 843, 938 P.2d 903 , are discussed at *Ch. 20, Arbitration: Compelling, § 20.10[3][a]*.

Defendant (Kaiser), contrary to its representations regarding the expeditiousness of its procedure and contrary to the parties' agreement, delayed selection of the third (neutral) arbitrator by a series of excuses until the patient died. One of Kaiser's contentions on appeal was that its misrepresentations could not have been material because plaintiffs always had the option of petitioning for appointment of the neutral arbitrator under Code *Civ. Proc. § 1281.6*. The Court said that *Code Civ. Proc. § 1281.6* does not render a party's systemic delay irrelevant. A party's success in having a *Code Civ. Proc. § 1281.6* petition granted is not assured, nor is it costless, nor is it in accord with normal expectations of arbitration participants (*15 Cal. 4th 951, 979)* . *Code Civ. Proc. § 1281.6* did not excuse Kaiser's alleged misfeasance by providing a way to resolve breakdowns in the arbitrator selection process or absolve Kaiser of its duties under the arbitration agreement to timely select an arbitrator and not to obstruct the progress towards arbitration (*15 Cal. 4th 951, 980-981)* . Nothing in the language of *Code Civ. Proc. § 1281.6* compels a party to seek that, nor does the language of Section 1281.6 suggest that resort to it is a precondition of successfully opposing a petition to compel arbitration when the petitioning party has engaged in fraud. In contrast, when delay in the selection of arbitrators is the result of reasonable and good faith disagreement between the parties, the remedy for that delay may be a Section 1281.6 petition (*15 Cal. 4th 951, 981)* .

[b] Method of Selection Is Unenforceable

The facts and procedural background of ***Graham v. Scissor-Tail, Inc.*** *(1981) 28 Cal. 3d 807, 171 Cal. Rptr. 604, 623 P.2d 165* , are discussed in *Ch. 20A, Arbitration: Resisting, § 20A.90[3][a]*. The Supreme Court determined that the particular provision of the parties' agreement providing for a particular arbitrator (the union of one party) was unconscionable and unenforceable. However, in light of the strong public policy in favor of arbitration, the Court believed the parties should not be precluded from availing themselves of arbitration. The Court concluded that on remand the trial court should afford the parties a reasonable opportunity to agree on a suitable arbitrator and, if agreement could not be reached, the court, on petition of either party, should appoint the arbitrator in the manner specified under *Code Civ. Proc. § 1281.6*. In the absence of an agreement or petition to appoint, the court was ordered to proceed to a judicial determination of the instant controversy (*28 Cal. 3d 807, 831)* .

[c] Arbitrator for Public Works Contract Dispute

Brutoco Engineering & Construction, Inc. v. Superior Court (United Engineering Technology, Inc.) *(2003) 107 Cal. App. 4th 1326, 1334-1335, 132 Cal. Rptr. 2d 866* , arose out of a state highway project for which Brutoco was the prime contractor and United was a subcontractor. United filed a claim for cost overruns, which was denied. United then filed a complaint in arbitration against the state, naming Brutoco as a real party in interest. The parties made efforts to agree on an arbitrator, but without success. Brutoco then requested the superior court to appoint an arbitrator pursuant to *Code Civ. Proc. § 1281.6*. The contract provided arbitration was to be conducted in accordance with *Pub. Contract Code § 10240* et seq. *Pub. Contract Code § 10240.3*, differs in significant respects from *Code Civ. Proc. § 1281.6* and provides that unless the parties agree otherwise, the arbitration must be conducted by a single arbitrator selected by the parties from the certified list created by the Public Works Contract Arbitration Committee. If the parties cannot agree on the arbitrator, either party may petition the superior court to appoint one from the panel of arbitrators certified by the Public Works Contract Arbitration Committee. After several arbitrators from the list were either unavailable to serve or disqualified by one of the parties, Brutoco petitioned the court or appeal for an order declaring the statutory scheme to be unconstitutional, arguing that the trial court had the power to nominate persons not on the list.

The court of appeal denied the writ, agreeing with the trial court that it could nominate or otherwise consider only persons who were on the certified list (*107 Cal. App. 4th 1326, 1335)* . Brutoco argued the list was unconstitutional because the only arbitrators on it were people who had indicated they would favor the state. The court concluded that Brutoco failed to demonstrate that the selection process was or could have been manipulated by any of the state representatives on the Arbitration Committee (*107 Cal. App. 4th 1326, 1332)* . The court discussed the statute and

implementing regulations and concluded that the state could agree with the other parties on an arbitrator not on the certified list; but in the absence of such agreement, the proposed arbitrator must come from a prescreened and prequalified panel. A person not on the certified list cannot be appointed over the objection of the state (*107 Cal. App. 4th 1326, 1334)* .

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2-20B California Points & Authorities §§ 20B.11-20B.24

[Reserved]

§§ 20B.11[Reserved]

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2-20B California Points & Authorities § 20B.25

§ 20B.25 Court Has No Authority to Appoint Arbitrator If Chosen Arbitration Service Provider Has Refused to Act

[1] FORM

CONTRACT SPECIFICATION FOR ARBITRATION IN ACCORDANCE WITH PROCEDURES OF _____ [*name arbitration service provider, e.g.,* AMERICAN ARBITRATION ASSOCIATION] AMOUNTS TO A CHOICE OF FORUM, AND _____'S [*name arbitration service provider, e.g.,* AMERICAN ARBITRATION ASSOCIATION] REFUSAL TO ACT DOES NOT CONFER AUTHORITY ON THIS COURT TO APPOINT ANOTHER ARBITRATOR.

A. Court Has No Authority to Appoint Arbitrator. There is a vital distinction between the failure of an agreed method for choosing an arbitrator and the chosen agency's refusal to conduct the arbitration. If the chosen agency refuses to conduct the arbitration, *Section 1281.6 of the Code of Civil Procedure* does not permit a court to choose an alternative forum by appointing substitute arbitrators. Upon _____ [*name of arbitration service provider specified in parties' agreement*]'s refusal to conduct the arbitration, the court should have returned the matter to the civil active list. [An agreement for arbitration "in accordance with" American Arbitration Association procedures has been held to mean that the arbitration had to take place before that agency] (*Martinez v. Master Prot. Corp. (2004) 118 Cal. App. 4th 107, 120-121, 12 Cal. Rptr. 3d 663 (AAA)* ; *see also Alan v. Superior Court (2003) 111 Cal. App. 4th 217, 227-228, 3 Cal. Rptr. 3d 377 (NASD) compare Reddam v. KPMG LLP (9th Cir. 2006) 457 F.3d 1054, 1061* (under New York or federal law, implied choice of NASD was not so integral to agreement as to deprive court of authority to compel arbitration when NASD refused to act)).

[2] Comments

[a] Use of Form

This form may be used to oppose a petition for appointment of an arbitrator if the arbitration agreement provides for arbitration in accordance with the rules or procedures of a specific arbitration service provider and that entity has refused to act [*see Code Civ. Proc. § 1281.6*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, the argument should show that although the agreement provided for arbitration in accordance with a specific arbitration service provider's rules or procedures, that entity has refused to act. If strategically appropriate, counsel may also include facts and argument disclosing whether the parties have attempted to reach agreement on an alternative provider. It is also appropriate to attach a copy of the arbitration provision.

It is advisable for counsel to submit evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file (including verified pleadings), or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied if plaintiff-respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement)].

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For a form of petition to appoint neutral arbitrator that may be supported by this memorandum, as well as discussion of the procedure the court will use to select the arbitrator and presumptions applicable in cases involving health care service plans, and a procedural checklist, see California Forms of Pleading and Practice, Ch. 33, *Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding* (Matthew Bender).

[d] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

This form generally opposes the memorandum in *§ 20B.10* relating to appointment of an arbitrator pursuant to *Code Civ. Proc. § 1281.6* if the agreed method of appointment has failed.

[3] Discussion of Authorities

[a] Court Has No Authority to Appoint Arbitrator

The facts and procedural background of ***Martinez v. Master Protection Corp.*** *(2004) 118 Cal. App. 4th 107, 12 Cal. Rptr. 3d 663* and the portion of the opinion considering the provision regarding arbitral costs is discussed at *Ch. 20A, Arbitration: Resisting, § 20A.23[3][b]*. The discussions of the unconscionability are at Ch. 20A, *Arbitration: Resisting*, § 20A.91[c]-[e]. Plaintiff contended that the trial court erred in appointing an arbitrator after the American Arbitration Association ("AAA") refused to act. The court of appeal agreed, saying that the arbitration agreement's requirement for resolution of the dispute "in accordance with" AAA procedures means that the arbitration must take place before that agency, that is, in an AAA forum (*118 Cal. App. 4th 107, 120)* . *Code Civ. Proc. § 1281.6* does not permit the trial

court to choose an alternative forum if the forum designated in the agreement refuses to hear the case. The judgment confirming the award had to be reversed. The trial court erred in denying plaintiff's motion to restore the matter to the civil active litigation calendar after AAA refused to conduct the arbitration (*118 Cal. App. 4th 107, 121)* .

Alan v. Superior Court *(2003) 111 Cal. App. 4th 217, 227-228, 3 Cal. Rptr. 3d 377* , was an action by an investor brought against his securities broker alleging mismanagement of his account. The account agreement required disputes to be arbitrated by one of the securities industry's self-regulatory organizations (SROs). Plaintiff refused to choose an organization. Defendant had chosen NASD, but NASD refused to conduct an arbitration in California because of an objection to complying with the California Judicial Council's ethics standards for arbitrators. Nevertheless, defendant moved to compel arbitration provided plaintiff would waive the ethics standards or agree to arbitration outside California. Plaintiff refused to do either, but the trial court ordered arbitration. Plaintiff filed a writ of mandate seeking to have that order vacated.

The court of appeal issued the writ, instructing the trial court to vacate the order, and to order NASD to choose a place of arbitration outside California, subject to the trial court's determination that the location was proper, i.e., reasonable and just. Subject to satisfying that standard, the arbitration could be held there. If not, the case should be litigated in California (*111 Cal. App. 4th 217, 230-231)* . Defendant argued that the trial court should appoint another arbitrator pursuant to *Code Civ. Proc. § 1281.6*, but the court of appeal found *Code Civ. Proc. § 1281.6* was not relevant. The problem was not the appointment of an arbitrator, but the unavailability of the designated arbitral forum (*111 Cal. App. 4th 217, 227)* . The court had no power to compel arbitration in an alternate forum by appointing substitute arbitrators (*111 Cal. App. 4th 217, 228)* .

Reddam v. KPMG LLP *(9th Cir. 2006) 457 F.3d 1054* , began as an action by investors against joint venture partners that were to provide them tax shelters and a securities broker they had to use to invest in those shelters. The action was originally brought in Orange County Superior Court but was transferred to federal district court in accordance with *9 U.S.C. § 205*, relating to arbitration agreements under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, because the venture partners and broker were German entities. The brokerage agreements provided for arbitration of all controversies which might arise concerning any transaction. The arbitration was to be conducted pursuant to the rules then in effect of the National Association of Securities Dealers, Inc. [NASD], "as the undersigned you may elect." Before NASD, the investor deleted all reference to the broker from its complaint and then asserted that as the broker was not a party, the NASD did not have jurisdiction. The NASD agreed and refused to take jurisdiction over the arbitration because no named party was a member or associated person of the NASD. Then the investor moved for remand to state court because the NASD, and thus, arbitration, was no longer available. The venture partners argued that the district court has jurisdiction under *9 U.S.C. § 5* to appoint a substitute arbitrator rather than to remand. The district court agreed with the investor and declined to proceed, finding the claims no longer subject to arbitration because the NASD had declined to proceed. The venture partners appealed.

The Ninth Circuit Court of Appeals reversed, finding that NASD's refusal to conduct the arbitration neither rendered the district court powerless to compel arbitration nor deprived it of jurisdiction (*457 F. 3d 1054, 1058-1059)* . In interpreting the agreement, the court pointed out that it did not (as later versions of the brokerage firm's customer agreement did), specify that arbitration was to be before NASD, but noted that several courts have held that an agreement which adopts the rules of an organization like NASD implicitly chooses that organization as the, or an, arbitrator. The court treated the implied choice of NASD as a forum selection clause. The agreement contained a choice of law clause providing it be governed by New York law. However, whether governed by New York law or federal law, the court found that the implied choice of NASD as arbitrator was not so integral that the arbitration agreement became unenforceable between the parties when the NASD bowed out. There was no evidence that naming of the NASD was so central to the arbitration agreement that the unavailability of that arbitrator brought the agreement to an end (*457 F. 3d 1054, 1061)* .

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2-20B California Points & Authorities § 20B.26

§ 20B.26 Court Does Not Have Authority to Appoint Second Arbitrator for First Arbitrator's Failure to Make Award

[1] FORM

THERE HAS BEEN NO FAILURE TO ACT WITHIN THE MEANING OF CODE OF CIVIL PROCEDURE SECTION 1281.6, SO THE COURT HAS NO AUTHORITY TO APPOINT A SUCCESSOR ARBITRATOR.

A. Court Had No Authority to Appoint Successor Arbitrator. Although a trial court has authority to set a completion date within which the arbitrator must render his or her award, and although an arbitrator may be removed for failure to act, when the delays in concluding the arbitration are not chargeable to the arbitrator, but to the parties and/or the arbitration administrator, there is no failure to act within the meaning of *Code of Civil Procedure Section 1281.6*; and a court has no authority to remove that arbitrator and appoint a successor. When a court removes an arbitrator and appoints a successor without authority, any award made by the successor is void (*Code Civ. Proc. § 1281.6*; *Bosworth v. Whitmore (2006) 135 Cal. App. 4th 536, 546-553, 37 Cal. Rptr. 3d 560*).

[2] Comments

[a] Use of Form

This form may be used to oppose a petition for appointment of a successor arbitrator when original arbitrator has not failed to act within the meaning of *Code Civ. Proc. § 1281.6*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, the argument should show that any failure to complete the arbitration is due to factors beyond the arbitrator's control. It is also appropriate to attach a copy of the arbitration provision.

It is advisable for counsel to submit evidence in support of factual statements, by request for judicial notice [*see Evid.*

Code § 450 et seq.], by references to the court's file (including verified pleadings), or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied if plaintiff-respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement)].

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Court Had No Authority to Appoint Successor Arbitrator

Code Civ. Proc. § 1281.6 provides in part that when an arbitrator appointed fails to act and his or her successor has not been appointed, the court, on petition of a party to the arbitration agreement, shall appoint the arbitrator.

Bosworth v. Whitmore *(2006) 135 Cal. App. 4th 536, 37 Cal. Rptr. 3d 560* , arose out of a contract for the construction of a home. The contract contained an arbitration provision requiring arbitration in accordance with Construction Industry Arbitration Rules of the American Arbitration Association (AAA). Buyers sued the corporate builder and its president, as its alter ego, for breach of contract and fraud, alleging that the unfinished home had not been constructed in accord with the plans and specifications and that defendant had accepted disbursement of funds from their construction loan before the work was completed. Plaintiffs demanded arbitration and an arbitrator was appointed. The arbitration was not heard because defendants did not pay their arbitration fees. Plaintiffs moved for and obtained an order that arbitration be completed by March 31, 2002. When the arbitrator was unable to represent that the arbitration would be completed by March 31, plaintiffs moved ex parte for appointment of a new arbitrator. The court found that the arbitrator's inability to guarantee completion by the court-ordered deadline constituted a failure to act under *Code Civ. Proc. § 1281.6*, justifying the appointment of a new arbitrator and directed each side to present a list of five candidates within five days. A second arbitrator was appointed and scheduled a pre-arbitration hearing for February 20. Defendants objected and declined to participate in the proceeding because the arbitration agreement required the parties and the court to follow the AAA process of selecting and replacing arbitrators, and that second arbitrator, and JAMS, by which the second arbitrator was employed, had no standing or authority to proceed in the matter. Defendants did not participate in the arbitration, but the second arbitrator conducted a hearing and entered an award for plaintiffs. Plaintiffs petitioned to confirm the arbitration award, and defendants petitioned to vacate it. The trial court confirmed the arbitration award and denied the defense petition to vacate it. Both defendants filed for Chapter 7 bankruptcy on the day the judgment was entered and their trustee in bankruptcy was substituted and appealed.

The court of appeal reversed, finding that absent a completion date set by agreement, *Code Civ. Proc. § 1283.8* gives the trial court the authority, on petition by a party to the arbitration, to set a date by which the arbitration proceeding must be concluded. Although the trial court properly set a completion date, it abused its discretion when it later removed the arbitrator who had been handling the case. On the record presented, the arbitrator's reluctance to promise

completion by the court's deadline did not constitute a failure to act under *Code Civ. Proc. § 1281.6* so as to justify his removal. Therefore, the court's appointment of a successor arbitrator was unauthorized, and the successor arbitrator's award was void (*135 Cal. App. 4th 536, 539)* . *Code Civ. Proc. § 1283.8* provides in relevant part that the arbitration award shall be made within the time fixed therefore by the agreement or, if not so fixed, within such time as the court orders on petition of a party to the arbitration. Defendant argued that Code Civ. Proc. § 1283.8 grants authority to the court only to set a date after completion of the evidentiary hearing within which the arbitrator must render his award and that the trial court has no jurisdiction to set a deadline by which the entire arbitration proceeding must be concluded. Plaintiffs claim *section 1283.8* gives the trial court the power to regulate the duration of the arbitration proceeding itself (*135 Cal. App. 4th 536, 545)* . After reviewing the legislative history, the court of appeal concluded that in the absence of an arbitration completion date set by agreement, *section 1283.8* was intended to authorize the trial court to fix a deadline within which the arbitration proceeding must be completed and the award rendered (*135 Cal. App. 4th 536, 546-550)* . Any date chosen must be reasonable in light of the circumstances presented by the particular arbitration. Thus, in the present case, the trial court had the authority to grant the request to set a March 31, 2002 deadline for completion of the arbitration (*135 Cal. App. 4th 536, 550)* . Although an arbitrator's inability to meet a court ordered deadline might in some circumstances constitute a failure to act justifying removal, the record does not support that finding here (*135 Cal. App. 4th 536, 551-552)* . To the contrary, since his appointment in May 2000, the arbitrator had been performing his duties as arbitrator: he had conducted preliminary hearings; he had made various rulings, including ordering the plaintiffs to prepare their statement of damages, set a deadline for the defense to file its claims against the subcontractors, directed the defense to produce documents, and ordered the plaintiffs to permit defendant to conduct an inspection of the home. With the consent of the parties, he continued the hearing for two months so that proper notice could be given to the subcontractors after the AAA had failed to do so. Thus, for almost two years, the arbitrator had been fulfilling his obligations as arbitrator (*135 Cal. App. 4th 536, 552)* .

Even if the first arbitrator could not complete the arbitration by March 31, this inability was not caused by his failure to act within the meaning of *section 1281.6*. The arbitration had been delayed for various reasons, none of which were attributable to the arbitrator. Plaintiffs themselves failed to comply with the arbitrator's order to provide their final defect list, damages estimate, and expert reports by October 15, 2000. Because the record does not support a finding that the first arbitrator failed to act within the meaning of *section 1281.6*, the trial court's removal of that arbitrator was an abuse of discretion (*135 Cal. App. 4th 536, 552)* . Because the arbitrator's removal was improper under section 1281.6, the court was not authorized by that statute to appoint a successor. When the court is not authorized to appoint an arbitrator, *section 1281.6* requires that the arbitrator be appointed by the method provided in the parties' arbitration agreement. Here, the parties' agreement incorporated the applicable AAA rules, which provide a procedure for selection of an arbitrator, including the selection of a successor if the present arbitrator is unable to perform the duties of the office (AAA Rule R-22). Thus, the trial court's appointment of the second arbitrator violated the parties' contract, and that arbitrator's award in favor of plaintiffs is void [*see American Home Assurance Co. v. Benowitz (1991) 234 Cal. App. 3d 192, 200-201*] (*135 Cal. App. 4th 536, 553*). The court of appeal reversed the judgment and remanded the matter is remanded for proceedings consistent with the views expressed in its opinion (*135 Cal. App. 4th 536, 554*).

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[Reserved]

§§ 20B.27[Reserved]

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B. Arbitral Immunity

2-20B California Points & Authorities § 20B.50

§ 20B.50 Arbitrator Is Immune From Civil Liability for Acts Done in Capacity of Arbitrator

[1] FORM

THE ACTS COMPLAINED OF AROSE FROM DEFENDANT'S ACTIVITIES AS AN ARBITRATOR PURSUANT TO _____ [STATUTE *or* CONTRACT], THUS MAKING DEFENDANT IMMUNE FROM CIVIL LIABILITY.

A. Arbitral Immunity. An arbitrator is immune from civil liability for actions taken in his or her capacity as an arbitrator under any statute or contract. This immunity shields the arbitrator from liability for any misconduct, professional negligence, or fraud, and does not depend on whether the act at issue is discretionary, ministerial, or administrative. The scope of arbitral immunity is defined by the functions it protects and serves. It shields all functions which are integrally related to the arbitral process. Thus, arbitrators are exempt from civil liability for failure to exercise care or skill in the performance of their arbitral functions[, even corrupt or biased actions for which the proper remedy is to have the award vacated] (*Wasyl, Inc. v. First Boston Corp. (9th Cir. 1987) 813 F.2d 1579, 1582* ; *Greenspan v. LADT, LLC (2010) 185 Cal. App. 4th 1413, 1458, 111 Cal. Rptr. 3d 468* ; *Stasz v. Charles R. Schwab (2004) 121 Cal. App. 4th 420, 431-432, 439-440, 17 Cal. Rptr. 3d 116* ; *Coopers & Lybrand v. Superior Court (1989) 212 Cal. App. 3d 524, 536, 260 Cal. Rptr. 713*).

[*Optional*] **B. Inclusive Definition of Agreement.** An agreement within the meaning of the statutes governing contractual arbitration includes but is not limited to agreements providing for valuation, appraisals, and similar proceedings and agreements between employers and employees or between their respective representatives (*Code Civ. Proc. § 1280(a)*; *see Wasyl, Inc. v. First Boston Corp. (9th Cir. 1987) 813 F.2d 1579, 1582* ; *Coopers & Lybrand v. Superior Court (1989) 212 Cal. App. 3d 524, 536, 260 Cal. Rptr. 713*).

[*Optional*] **C. Insurance Appraiser Is Entitled to Arbitral Immunity.** A fire insurance appraisal pursuant to *Insurance Code Section 2071* is an arbitration governed by *Code of Civil Procedure Section 1280 et seq.*, even though the procedures are different and an appraiser does not have the same powers as arbitrator. Thus, an appraiser, even one appointed by a party, is entitled to the immunity of an arbitrator when performing the function of resolving disputes

between parties or of adjudicating private rights (*Lambert v. Carneghi (2008) 158 Cal. App. 4th 1120, 1129-1134, 1136-1137, 70 Cal. Rptr. 3d 626*).

[2] Comments

[a] Use of Form

This form may be used to support the contention that a person who acted as arbitrator has no liability to any party to the arbitration for any acts done in his or her capacity as arbitrator. It may be necessary to examine the particular agreement and proceeding under which the arbitration occurred to determine whether the proceeding was an arbitration. Optional Paragraph B is for use in that situation because it will be necessary to infer from the obligations undertaken by the "neutral" that the parties intended him or her to function as an arbitrator. Optional Paragraph C is for use when the person seeking immunity functioned as a appraiser in a proceeding under *Ins. Code § 2071*. There may be additional bases for immunity, such as the statutory immunity granted to arbitrators and their sponsoring association in conducting arbitration of attorney's fee disputes [*see Bus. & Prof. Code § 6200(e)*]. However, former Code Civ. Proc. § 1280.1, on which cases decided between January 1, 1986, and December 31, 1996, were based, gave arbitrators the immunity of judicial officers and may have provided a broader immunity than the common-law immunity recognized before and after that time [*see 79 Ops. Cal. Atty. Gen. 294 (1996)]* .

This form does not provide a complete memorandum but should be combined with forms relating to the procedural context in which this issue is raised [*see, e.g.*, Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* , and Ch. 221, *Summary Judgments*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. It is probably appropriate to attach copies of the arbitration agreement and the award to the papers supporting the memorandum. The argument should establish that the acts on which liability is sought to be based were done within the scope of the arbitration agreement and proceeding or were necessary to carrying out the duties imposed on the arbitrator.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For discussion of the immunity or arbitrators and their sponsoring associations in arbitrating attorney's fee disputes, see *California Forms of Pleading and Practice, Ch. 72, Attorney Practice and Ethics, § 72.430 et seq.* (Matthew Bender).

For legal discussion and forms relating to demurrers, as well as a procedural checklist and research guide, see

California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender).

For legal discussion and forms generally relating to summary judgment, as well as a procedural checklist and research guide, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[d] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Arbitral Immunity

Plaintiffs in ***Wasyl, Inc. v. First Boston Corp.*** *(9th Cir. 1987) 813 F. 2d 1579* , were former partners for whom defendant served as the third, "neutral" appraiser in valuing the partnership. Plaintiffs sued First Boston for breach of contract and gross negligence claiming the partnership was undervalued by $10 million. The district court granted defendant's motion for summary judgment, finding defendant entitled to arbitral immunity. Plaintiffs appealed.

The court of appeals affirmed. The case was decided under the Federal Arbitration Act (*9 U.S.C. § 1 et seq.*), which does not provide for arbitral immunity, but case law does. Arbitrators' decision-making process and judgments have the same need for independent judgment free from threat of lawsuits as do those used by judges and hearing examiners. Arbitral immunity is essential to protect the decision-making process from reprisals by dissatisfied litigants. Thus, immunity extends to arbitrators for acts done within the scope of their duties and within their jurisdiction (*813 F.2d 1579, 1582)* .

Greenspan v. LADT, LLC *(2010) 185 Cal. App. 4th 1413, 111 Cal. Rptr. 3d 468* , affirmed the confirmation of an arbitration decision on a breach of contract claim. The portion of the decision on whether the agreement gave the arbitrator the power to decide arbitrability of issues is discussed in *Ch. 20, Arbitration: Compelling, § 20.10[3][g], above*. The portion of the decision dealing with review of the arbitrator's determination of arbitrability of the issue of joint and several liability is *covered in Ch. 20C, Arbitration: Confirming, Correcting, and Vacating the Award, § 20C.91[3][c], below*. The portion of the decision addressing the review of the timeliness of the arbitrator's award is *covered in Ch. 20C, Arbitration: Confirming, Correcting, and Vacating the Award, § 20C.90[3][a], below*. The portion of the decision covering whether the award should be vacated due to the arbitrator's failure to recuse himself is dealt with in Ch. 20C, *Arbitration: Confirming, Correcting, and Vacating the Award, § 20C.80[3][g], below* . Finally, the court discussed whether arbitral immunity barred a suit against the arbitrator that was alleged to be the basis for vacating the award, because the arbitrator did not recuse himself. The lawsuit was filed against the arbitrator by an officer of an entity party to the arbitration in this case seeking costs and fees in another arbitration. Noting that immunity does not apply to the arbitrator's breach of contract by failing to make any decision at all, the court ruled that given that the arbitrator made an award in the other arbitration, arbitral immunity barred the suit (*185 Cal. App. 4th 1413, 1458)* .

Stasz v. Charles R. Schwab *(2004) 121 Cal. App. 4th 420, 17 Cal. Rptr. 3d 116* , involved three consolidated arbitrations arising from the same settlement agreement. The settlement agreement, between Stasz and the individual defendant Quackenbush, provided for confidentiality and that any disputes thereunder would be determined by arbitration. The published portion of the opinion addressed plaintiff's claims against the American Arbitration Association (AAA), which conducted the consolidated arbitration. Plaintiff claimed that the AAA had no jurisdiction to conduct the arbitration because an appeal was pending relating to the arbitration procedure and that the AAA breached

their contract by failing to provide a neutral arbitrator but instead provided an arbitrator who was biased by familiarity with an attorney at the law firm representing Quackenbush and because that firm was a member of the AAA. The trial court sustained the AAA's demurrer to the complaint against it, agreeing that AAA enjoyed immunity. Plaintiff appealed.

The court of appeal affirmed, finding that neither the alleged bias of the arbitrator or the AAA, nor a clear absence of jurisdiction deprived the AAA of the arbitral immunity afforded by California common law (*121 Cal. App. 4th 420, 443-444)* . The court noted that the case was governed by the common law of arbitral immunity, not former Code Civ. Proc. § 1280.1, which was in effect from 1986 through 1996, but was repealed by its own terms three years before the Quackenbush-Stasz arbitration began (*121 Cal. App. 4th 420, 434-436)* . With respect to the common law of arbitral immunity, the court of appeal noted that arbitrators have been extended the protection of judicial immunity, because the role that they exercise is analogous to that of a judge and arbitral immunity, like judicial immunity, promotes fearless and independent decision making (*121 Cal. App. 4th 420, 430-431)* . The application of arbitral immunity does not turn on whether the act at issue is discretionary instead of ministerial or administrative. Such an analysis misses the mark. The scope of arbitral immunity is defined by the functions it protects and serves. Thus, it shields all functions which are integrally related to the arbitral process (*121 Cal. App. 4th 420, 431-432)* . Arbitrators are exempt from civil liability for failure to exercise care or skill in the performance of their arbitral functions. Federal common law is in accord: arbitral immunity protects all acts within the scope of the arbitral process, even corrupt or biased actions, unless there is a clear absence of jurisdiction (*121 Cal. App. 4th 420, 432)* . Both California and federal common law extend arbitral immunity to both the arbitrator and the sponsoring arbitration provider organization (*121 Cal. App. 4th 420, 433-434)* .

The court noted commentators and texts to the effect that since the repeal of former Code Civ. Proc. § 1280.1, it is unclear whether an arbitrator can be held liable for breach of contract (*121 Cal. App. 4th 420, 436-437)* . Former Code Civ. Proc. § 1280.1 was enacted to overrule the decision in *Baar v. Tigerman (1983) 140 Cal. App. 3d 979, 189 Cal. Rptr. 834, 211 Cal. Rptr. 426* , in which the court held that an arbitrator and a sponsoring organization (the AAA) were not entitled to the same immunity as a judge and could be found liable for breach of contract based on the arbitrator's failure to make a timely award. Former Code Civ. Proc. § 1280.1 provided that arbitral immunity was the same as the immunity of a judicial officer when the arbitrator is acting in the capacity of arbitrator under any statute or contract. Thus, there could be no civil liability imposed on the arbitrator for failing to issue an award (*121 Cal. App. 4th 420, 434-435)* . The court of appeal cited with favor one commentator who noted that virtually any claim of misconduct in arriving at an arbitration award can be stated as a breach of contract, and that arbitral immunity would be effectively circumvented by labeling those wrongs as a contract breaches (*121 Cal. App. 4th 420, 437)* . The court of appeal found that the real issue here was one of bias, for which the proper remedy is to have the award vacated [*see Code Civ. Proc. § 1286.2(a)(1)-(3)*] (*121 Cal. App. 4th 420, 439-440)* . Bias is a type of arbitrator corruption or misconduct to which immunity applies to shield both the arbitrator and the sponsoring organization (*121 Cal. App. 4th 420, 441)* .

Nor did the court of appeal find that the AAA's continuing with the arbitration during the pendency of an appeal (unsuccessfully) challenging the validity of the arbitration provision was such a clear absence of jurisdiction as to strip the AAA of immunity (*121 Cal. App. 4th 420, 441-442)* . That argument was based on *Code Civ. Proc. § 916(a)*, which provides that the perfecting of an appeal stays proceedings in the trial court on the judgment or order appealed from. Plaintiff twice presented this automatic stay argument to the arbitrator and twice to the trial court. Each time, it was rejected. Even assuming, without deciding, that *Code Civ. Proc. § 916(a)* mandated a delay in the arbitration proceedings, that would not effect a clear absence of jurisdiction or divest the arbitrator of jurisdiction to hear the matter. It would only affect the timing of the proceedings. The proper remedy for an alleged violation of *Code Civ. Proc. § 916(a)* was to seek a stay of the arbitration proceedings and, possibly, to petition the trial court to vacate the award on that ground, not to seek to impose liability on the AAA (*121 Cal. App. 4th 420, 443)* .

The court of appeal in ***Coopers & Lybrand v. Superior Court*** *(1989) 212 Cal. App. 3d 524, 260 Cal. Rptr. 713* , affirmed the sustaining of a demurrer to a complaint seeking to impose civil liability on an accountancy firm that had

performed valuation services for the real party, because a factual determination was required to determine whether the parties intended valuation to be arbitration within the meaning of *Code Civ. Proc. § 1280(a)*. The court said that arbitral immunity attaches not because of the professional credentials of the arbitrator, nor because of the ethical canons of the profession to which the arbitrator belongs, but because a proceeding is deemed to be an arbitration. If arbitral immunity has attached, a party to the arbitration has no cause of action arising from the arbitrator's misconduct, professional negligence, or fraud. The party's recourse, unless the particular arbitration agreement adopts alternative procedures, is to seek to have the award vacated pursuant to *Code Civ. Proc. § 1286.2* (*212 Cal. App. 3d 524, 536)* .

[b] Inclusive Definition of Agreement

Code Civ. Proc. § 1280(a) provides that as used in *Code Civ. Proc. § 1280 et seq.*, "agreement" includes, but is not limited to, agreements that provide for valuations, appraisals, and similar proceedings and agreements between employers and employees or between their respective representative.

The facts and procedural background of ***Wasyl, Inc. v. First Boston Corp.*** *(9th Cir. 1987) 813 F. 2d 1579* , are discussed under [a], *above*. After noting that the Federal Arbitration Act (*9 U.S.C. § 1 et seq.*) preempts only inconsistent state law, the court applied *Code Civ. Proc. § 1280(a)* (in accordance with the parties' choice of California law) to conclude that the process called for by the contracts was arbitration (*813 F. 2d 1579, 1582)* .

The procedural background of ***Coopers & Lybrand v. Superior Court*** *(1989) 212 Cal. App. 3d 524, 260 Cal. Rptr. 713* , and the portion of the opinion discussing immunity, are discussed at [a], *above*. In discussing the facts to be considered in determining whether the accountancy firm functioned as arbitrator, the court of appeal said that by application of *Code Civ. Proc. § 1280(a)*, an accountant making a valuation for the parties would be entitled to arbitral immunity if, under the terms of the particular agreement, the parties intended the accountant to function as an arbitrator with respect to specific issues (*212 Cal. App. 3d 524, 536)* .

[c] Insurance Appraiser Is Entitled to Arbitral Immunity

Plaintiffs in ***Lambert v. Carneghi*** *(2008) 158 Cal. App. 4th 1120, 70 Cal. Rptr. 3d 626* , sued defendants, who were the appraiser and their expert witness for negligence over their alleged failure to adequately advance their position in a fire insurance appraisal proceeding pursuant to *Ins. Code § 2071*. Plaintiffs and the insurer each party appointed an appraiser; and there was a neutral umpire, who allegedly misunderstood the term "replacement cost." Defendants both demurred, claiming immunity. The trial court sustained the demurrers. Plaintiffs appealed.

The court of appeal affirmed as to the appraiser, but reversed as to the expert (*158 Cal. App. 4th 1120, 1126, 1145)* . The court of appeal noted that is it well established that a fire insurance appraisal pursuant to *Ins. Code § 2071* is an arbitration governed by *Code Civ. Proc. § 1280 et seq.*, even though the procedures are different and an appraiser does not have the same powers as arbitrator (*158 Cal. App. 4th 1120, 1129-1133)* . Plaintiffs argued that because defendant appraiser was a party-appointed advocate, he was not subject to arbitral immunity. Although the court of appeal found that no case has specifically extended arbitral immunity to appraisers, they reasoned that given the similarities between arbitrations and appraisals, immunity should apply. Although plaintiffs failed to address the issue in their opening brief, instead focusing their argument on the fact that a fire insurance appraisal is not an arbitration, they contended that the Legislature has not provided a shield to those who are hired to do a job for a party to a fire insurance appraisal and through their negligence fail to do it and thereby cause injury to the party employing them. Arbitrators have been extended the protection of judicial immunity, because they perform the function of resolving disputes between parties, or of authoritatively adjudicating private rights (*158 Cal. App. 4th 1120, 1133-1134)* . The court distinguished, *Coopers & Lybrand v. Superior Court (1989) 212 Cal. App. 3d 524, 260 Cal. Rptr. 713* , relied on by plaintiffs, as not involving an arbitration but a valuation that was merely an audit. Plaintiffs argued that the duties of party appraisers are analogous to those of lawyers, and that appraisers therefore should not be subject to arbitral immunity, claiming that party-appraisers advocate their appraisals to the umpire just as lawyers advocate their client's positions before a judge,

or that it is their duty to write appraisals and present them to the other side's appraiser, argue his or her positions. The court of appeal disagreed (*158 Cal. App. 4th 1120, 1134)* . As to the argument that providing arbitral immunity to appraisers could lead to unintended and disastrous results, because arbitrators may escape liability when they ignore irrefutable proof that supports a party's position, the court noted that the remedy for arbitrator misconduct lies in vacation of the award; and that plaintiffs had not petitioned to vacate the award (*158 Cal. App. 4th 1120, 1136)* . The court concluded that it was proper for the trial court to sustain the party appraiser's demurrer without leave to amend (*158 Cal. App. 4th 1120, 1137, 1145)* .

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2-20B California Points & Authorities § 20B.51

§ 20B.51 Arbitral Immunity Extends to Sponsoring Organization

[1] FORM

THE ACTS COMPLAINED OF AROSE FROM DEFENDANT'S ACTIVITIES AS SPONSORING ORGANIZATION OF AN ARBITRATOR, AND BOTH THE ARBITRATOR AND DEFENDANT ARE THEREFORE IMMUNE FROM LIABILITY.

A. Arbitral Immunity. [*See § 20B.50, Paragraph A.*]

B. Sponsoring Organization's Immunity. The immunity of an arbitrator necessarily extends to the arbitrator's sponsoring organization (*Stasz v. Charles R. Schwab (2004) 121 Cal. App. 4th 420, 433-434, 17 Cal. Rptr. 3d 116* ; *Thiele v. RML Realty Partners (1993) 14 Cal. App. 4th 1526, 1528-1530, 18 Cal. Rptr. 2d 416* ; *American Arbitration Ass'n v. Superior Court (1992) 8 Cal. App. 4th 1131, 1133, 10 Cal. Rptr. 2d 899*).

[*Optional*] **C. Scope of Organization's Immunity.** The scope of sponsoring organization's arbitral immunity is defined by the functions it protects and serves. Acts that are integrally related to the arbitral process and sufficiently associated with the adjudicative phase of arbitration[, such as sending out the award], are protected by the immunity (*Stasz v. Charles R. Schwab (2004) 121 Cal. App. 4th 420, 431-432, 17 Cal. Rptr. 3d 116* ; *Thiele v. RML Realty Partners (1993) 14 Cal. App. 4th 1526, 1530, 1532, 18 Cal. Rptr. 2d 416*).

[2] Comments

[a] Use of Form

This form may be used to support the contention that an organization sponsoring an arbitration has no liability to any party to the arbitration for any acts done in its capacity as an arbitration sponsoring organization. It may be necessary to examine the particular agreement and proceeding under which the arbitration occurred to determine whether the proceeding was an arbitration. If so, Optional Paragraph B from *§ 20B.50[1]* should be combined with this form. There may be additional bases for immunity, such as the statutory immunity granted to arbitrators and their sponsoring

association in conducting arbitration of attorney's fee disputes [*see Bus. & Prof. Code § 6200(e)*].

Note that former Code Civ. Proc. § 1280.1, on which cases decided between January 1, 1986, and December 31, 1996, were based, gave arbitrators the immunity of judicial officers and may have provided a broader immunity than the common-law immunity recognized before and after that time [*see 79 Ops. Cal. Atty. Gen. 294 (1996)]* .

This form does not provide a complete memorandum but should be combined with authorities relating to the procedural context in which this issue is raised [*see, e.g.*, Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* , and Ch. 221, *Summary Judgments*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. It is probably appropriate to attach copies of the arbitration agreement and the award to the papers supporting the memorandum. The argument should establish that the acts on which liability is sought to be based were done within the scope of the arbitration agreement and the sponsoring organization's responsibilities in furthering that agreement and the arbitration proceeding.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For discussion of the immunity or arbitrators and their sponsoring associations in arbitrating attorney's fee disputes, see *California Forms of Pleading and Practice, Ch. 72, Attorney Practice and Ethics, § 72.430 et seq.* (Matthew Bender).

For legal discussion and forms relating to demurrers, as well as a procedural checklist and research guide, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender).

For legal discussion and forms generally relating to summary judgment, as well as a procedural checklist and research guide, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[d] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Sponsoring Organization's Immunity

Stasz v. Charles R. Schwab *(2004) 121 Cal. App. 4th 420, 17 Cal. Rptr. 3d 116* , is discussed at *§ 20B.50[3][a]*.

Plaintiff in ***Thiele v. RML Realty Partners*** *(1993) 14 Cal. App. 4th 1526, 18 Cal. Rptr. 2d 416* , sued defendant American Arbitration Association (AAA) for negligence and breach of contract. After the hearing in the underlying arbitration hearing, plaintiff and the primary defendant settled their dispute. Plaintiff then told the AAA not to release their arbitration award because the matter had been settled. AAA released their award, for a sum less than the settlement; and the primary defendant refused to abide by the settlement agreement. The trial court sustained AAA's demurrer on the ground of arbitral immunity and dismissed the complaint.

The court of appeal affirmed, noting that the Legislature adopted then *Code Civ. Proc. § 1280.1* in direct response to *Baar v. Tigerman (1983) 140 Cal. App. 3d 979, 986-987, 189 Cal. Rptr. 834, 211 Cal. Rptr. 426* , which based its denial of immunity for the sponsoring organization on the fact that the arbitrator had no immunity for failing to render an award. Thus, former Code Civ. Proc. § 1280.1 did not limit immunity to individual arbitrators but also served to shield the sponsoring organization from civil liability (*14 Cal. App. 4th 1526, 1528-1529)* . Immunity for the sponsoring organization is a natural and necessary product of the policies underlying arbitral immunity (*14 Cal. App. 4th 1526, 1529)* . The fact that former Code Civ. Proc. § 1280.1 did not mention sponsoring organizations, which *Bus. & Prof. Code § 6200(f)* does, was not dispositive because the Legislative intent was clear (*14 Cal. App. 4th 1526, 1529-1530)* . Public policy requires that independent decision-makers be free from fear of legal action arising out of the exercise of their arbitral functions (*14 Cal. App. 4th 1526, 1531)* .

The court of appeal in ***American Arbitration Ass'n v. Superior Court*** *(1992) 8 Cal. App. 4th 1131, 10 Cal. Rptr. 2d 899* , mandated the sustaining of the AAA's demurrer to a complaint by a participant in an arbitration, without leave to amend, and mandated the dismissal of the complaint, with prejudice. Plaintiff had failed to prosecute diligently the underlying arbitration; and the AAA had given notice that it would close the matter, with prejudice, unless a plaintiff responded by a specified date. After that date, notwithstanding the lack of a response, the AAA reopened the matter. Plaintiff had wanted the matter to remain closed and sued the AAA for damages and declaratory relief. The AAA demurred on the ground of arbitral immunity under former Code Civ. Proc. § 1280.1, and the superior court overruled the demurrer.

In opposing the AAA's petition to the court of appeal for a writ of mandate, plaintiff argued that the immunity statute did not mention the arbitrator's sponsoring organization, whereas a similar arbitral immunity statute, *Bus. & Prof. Code § 6200(f)*, does specify the organization as well as the arbitrator. The court held the omission did not establish a Legislative intent not to extend immunity under former Code Civ. Proc. § 1280.1 to sponsoring organizations. On the contrary, extension of that immunity to the sponsoring organization was implicitly required in order to make the arbitrator's immunity real. Unless the organization is equally immune, the result is not immunity from liability but merely a shifting of liability (*8 Cal. App. 4th 1131, 1133)* .

[b] Scope of Organization's Immunity

The facts and procedural background of ***Thiele v. RML Realty Partners*** *(1993) 14 Cal. App. 4th 1526, 18 Cal. Rptr. 2d 416* , are discussed at [a], *above*. The point is not whether the challenged act was ministerial, administrative, or discretionary, but that the scope of arbitral immunity be defined by the functions it protects and serves. Acts sufficiently associated with the adjudicative phase of arbitration are protected by the immunity. Sending out the award is integrally related to the arbitral process and sufficiently associated with the adjudicative phase of the arbitration to justify immunity (*14 Cal. App. 4th 1526, 1530)* . Not extending immunity for these acts to the sponsoring organization, an entity as indispensable to the arbitrator's job of arbitrating as are the courts to the judge's job of judging, would frustrate the purpose and effectiveness of arbitral immunity (*14 Cal. App. 4th 1526, 1532)* .

[4] Additional Authorities

[a] Sponsoring Organization's Immunity

Plaintiff in *Olson v. NASD (8th Cir. 1996) 85 F.3d 381* , sued the arbitrator and the sponsoring organization after an award against him was vacated for evident partiality of the arbitrator. The district court did not have jurisdiction over the arbitrator and dismissed the action against the sponsoring organization. Plaintiff appealed.

The court of appeals affirmed. Because an arbitrator's role is functionally equivalent to a judge's role, immunity is extended to arbitrators. Arbitral immunity is necessary to protect decisionmakers from undue influence and the decision-making process from attack by dissatisfied litigants. To give effect to these underlying policies, arbitral immunity extends to organizations sponsoring arbitration (*85 F.3d 381, 382)* . Without this extension, arbitral immunity would be almost meaningless because liability would simply be shifted from individual arbitrators to the sponsoring organizations. Appointment of arbitrators is a necessary part of arbitration administration, and thus protected by arbitral immunity (*85 F.3d 381, 383)* .

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§ 20B.52 Arbitral Immunity Does Not Extend to Breach of Agreement to Conduct Arbitration

[1] FORM

THIS SITUATION FALLS WITHIN THE NARROW EXCEPTION TO ARBITRAL IMMUNITY APPLICABLE WHEN THE ARBITRATOR, FOR NO LEGAL REASON, REFUSES TO COMPLETE THE ARBITRATION AND FAILS TO RENDER AN AWARD.

A. Arbitral Immunity Will Not Protect Arbitrator or Arbitration Service Provider from Liability for Beach of Contract to Conduct Arbitration. Neither an arbitrator nor any related arbitration services provider is protected by arbitral immunity from liability for breach of a contract to conduct an arbitration if the arbitrator withdraws from an arbitration proceeding for no stated ethical reason [following evidence and argument, and offers to continue mediation efforts] and refuses to render an arbitration award (*Morgan Phillips, Inc. v. JAMS/Endispute, L.L.C. (2006) 140 Cal. App. 4th 795, 800-804, 44 Cal. Rptr. 3d 782*).

[2] Comments

[a] Use of Form

This form may be used to oppose a demurrer or otherwise support an action for breach of contract to conduct an arbitration or provide arbitration services against an arbitrator or arbitration service provider to anticipate or rebut a claim that the action is barred by arbitral immunity. It is for use when the facts of the situation fall within the exception to arbitral immunity. This is not a complete memorandum, but should be combined with authorities relating to the procedural contest involved.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, the argument should show that there was no issue regarding the arbitrator's ability to be fair or impartial nor any ethical reason for the arbitrator to recuse himself or herself, but just an unjustified refusal to complete the arbitration and render an award. It

is advisable for counsel to submit evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file (including verified pleadings), or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied if plaintiff-respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement)].

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Related Memoranda

This authority is in opposition to those at §§ 20B.50 and 20B.51.

[3] Discussion of Authorities

[a] Arbitral Immunity Will Not Protect Arbitrator or Arbitration Service Provider from Liability for Beach of Contract to Conduct Arbitration

Morgan Phillips, Inc. v. JAMS/Endispute, L.L.C. *(2006) 140 Cal. App. 4th 795, 44 Cal. Rptr. 3d 782* , began with a dispute between a mattress retailer and two of its suppliers. Plaintiff retailer engaged defendants John B. Bates, JAMS/Endispute, L.L.C., and JAMS, Inc. to mediate the dispute, which resulted in a settlement that provided for any further disputes regarding the matter to be submitted to Bates for binding resolution. Such a dispute arose in 2002. JAMS, Bates, and Morgan Phillips then entered a contract that was partly written, oral, and implied by law under which JAMS and Bates agreed to conduct a binding arbitration pursuant to the terms of the settlement agreement. Bates conducted a four-hour hearing in the matter after which he informed the parties that if they were unable to settle the dispute, he would render a binding arbitration decision. Bates knew that Morgan Phillips was in severe financial distress as a result of suppliers' breach, and would likely be unable to continue in business if the dispute was not decided promptly. After the arbitration hearing was concluded and the case was ready for decision, Bates tried to settle the case without rendering an arbitration award. When no settlement was forthcoming, Bates announced, with no lawful justification, that he was withdrawing as the arbitrator. He thereafter failed and refused to issue a binding arbitration award. Morgan Phillips alleged that Bates' conduct was part of an unlawful plan and scheme to coerce Morgan Phillips to settle the dispute. The complaint contained causes of action against both JAMS and Bates for breach of contract and for negligent breach of the duty to provide binding arbitration services, and against JAMS alone a representative action for unfair competition and false advertising, in violation of *Bus. & Prof. Code §§ 17200* and *17500*. JAMS and Bates demurred to the complaint on several grounds, including arbitral immunity. The trial court sustained the demurrer on that ground. Plaintiff appealed.

The court of appeal reversed, agreeing with plaintiff, that Bates improperly withdrew from the arbitration proceeding, without cause, and was not protected by arbitral immunity (*140 Cal. App. 4th 795, 800, 804)* . Since repeal of former Code Civ. Proc. § 1280.1 California common law has provided arbitrators with immunity coextensive to that of judicial

officers when acting in the capacity of arbitrator under any statute or contract. That immunity protects arbitrators from civil liability for conduct in their quasi-judicial capacity (*140 Cal. App. 4th 795, 800)* . However, California common law recognizes a narrow exception to arbitral immunity: the immunity does not apply to the arbitrator's breach of contract by failing to make any decision at all. The rationale is that failure to render an arbitration award is not integral to the arbitration process but rather a breakdown of that process. For nonfeasance by a judge, litigants can petition for an extraordinary writ to compel action. For nonfeasance by an arbitrator, the parties' only remedy is a civil suit for specific performance or damages. The scope of the exception is best explained in *Baar v. Tigerman (1983) 140 Cal. App. 3d 979, 983-985* (*140 Cal. App. 4th 795, 801*). Mindful of the need to protect arbitrators from vexatious litigation arising from conduct in their quasi-judicial function, the court of appeal still felt that the allegations portrayed conduct that was the antithesis of the adjudicatory purpose of arbitration and thus, could not be used to immunize the unprincipled abandonment of the arbitration and refusal to make a decision (*140 Cal. App. 4th 795, 802)* . The court discussed authorities and commentators cited by defendants to the effect that only complete nonperformance would bar immunity, saying if those authorities and commentators indicated that conducting some or all of the arbitration proceeding creates immunity for the unjustified failure to render an award, they disagreed Bates' alleged unjustified abandonment of the arbitration and refusal to render an award while offering to continue mediation (if true) was effectively a complete nonperformance of the ultimate object of the arbitration he contracted to conduct. The court emphasized that this situation was not a decision to withdraw because of substantial doubt of the ability to be fair and impartial, or because of a conflict of interest, which would be entitled to immunity. Nor did they mean to suggest that parties to an arbitration proceeding are entitled to litigate the validity of an arbitrator's stated ethical grounds for recusal in a later civil suit against the arbitrator or the sponsoring organization for breach of the duty to conduct a binding arbitration. In this case, accepting the allegations as true, Bates withdrew without justification in order to coerce a settlement. That amounted to a breach of his contractual duty to conduct a binding arbitration (*140 Cal. App. 4th 795, 803)* .

California Points & Authorities

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20C ARBITRATION: CONFIRMING, CORRECTING, OR VACATING THE AWARD

2-20C California Points & Authorities 20C.syn

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[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

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[b] Award Presumed Valid

[c] Request for Correction Comes Too Late

[d] Venue for Filing Petition to Confirm Award

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Time for Filing Response Requesting Confirmation of Award

§ 20C.12 Supporting Petition or Response Requesting Award Be Corrected and Confirmed as Corrected

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

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[c] Tolling of Time for Filing Petition Requesting Correction

[4] Additional Authorities

[a] Grounds for Correcting Award

§ 20C.13 Order Compelling Arbitration Was Made by Disqualified Judge

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] Order Compelling Arbitration Was Made by Disqualified Judge

§ 20C.14 [Reserved]

§ 20C.15 Corrected Award Served Late and Making Corrections Beyond Arbitrator's Powers Is Not To Be Given Effect

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Corrected Award Served More than 30 Days After Service of Award

[b] Arbitrator Cannot Correct Award for Errors of Law

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§ 20C.20 Supporting Petition to Vacate Arbitration Award

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Misconduct of Neutral Arbitrator

[b] Arbitrators Exceeded Their Powers

[c] Arbitrator Failed to Disqualify Self

[d] Deemed Admission If Response Untimely

[e] Time for Filing Petition to Vacate Award

[f] Arbitrator's Testimony May Not Be Considered

[g] Party Who Had Award Vacated Is Entitled to Post-Arbitration Costs and Attorney's Fees

[h] Prejudicial Conduct by Arbitrators

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Time for Filing Response Requesting Vacation or Correction

§ 20C.22 Request for Order for Rehearing of Controversy After Arbitration Award Is Vacated

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Arbitration Award That Is Uncertain on Any Submitted Issue Must Be Reheard

§§ 20C.23-20C.29 [Reserved]

§ 20C.30 Correcting Award by Striking Matters In Excess of Arbitrator's Power

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] Correcting Award by Striking Portion in Excess of Arbitrators' Authority

[b] Court May Correct Award by Striking Portion Requiring Employee to Pay Arbitral Expenses

§ 20C.31 Correcting Award by Striking Attorney's Fees

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] Award of Attorney's Fees Not Authorized

§ 20C.32 Correcting Award by Striking Matters Beyond Powers of Uninsured Motorist Arbitrator

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] Reducing Uninsured Motorist Award to Policy Limits

[b] Extent of Coverage Was Not Submitted to Arbitrator for Determination

§§ 20C.33-20C.39 [Reserved]

§ 20C.40 Correcting Award by Striking Surplusage

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] Correcting Award by Striking Surplusage

§§ 20C.41-20C.49 [Reserved]

§ 20C.50 Correcting Award by Changing Name of Party to One Over Whom Arbitrator Had Personal Jurisdiction

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] Correcting Award Because of Lack of Personal Jurisdiction

§§ 20C.51-20C.54 [Reserved]

§ 20C.55 Court Cannot Correct Award Regarding Attorney's Fees After Issue Was Submitted to Arbitrator

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Court Cannot "Correct" Award to Add Attorney's Fees

[b] Court Cannot "Correct" Award to Delete Attorney's Fees

§ 20C.56 Court Cannot Correct Award Regarding Sanctions on Attorney of Party Under Arbitration Agreement Allowing Arbitration of Any Issues Arising from Contract

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Court Cannot "Correct" Award to Delete Sanctions Against Attorney Under Arbitration Agreement Allowing Arbitration of Any Issues Arising from Contract

§§ 20C.57-20C.59 [Reserved]

§ 20C.60 Stipulation to Arbitrate Was Valid and Binding

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] Stipulation to Arbitrate Was Valid and Binding

[b] Oral Stipulation Was Binding

§ 20C.61 "Self-Executing" Agreement Did Not Require an Order to Compel Arbitration

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] "Self-Executing" Type of Agreement Needs No Order to Compel

[4] Additional Authorities

[a] "Self-Executing" Type of Agreement Needs No Order to Compel

§ 20C.62 Defense Is Unavailable as Outside the Scope of the Matters Committed to Arbitration

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] Nonarbitrable Defense Is Unavailable Against Petition to Confirm Award

§ 20C.63 Arbitrators of Uninsured Motorist Claim Have Power to Determine Subordinate Issues

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] Physical Contact With Uninsured Motor Vehicle Is Fact Necessary to Determine to Uninsured Motorist Claim

[b] Parties Submitted to Arbitrator Issue of Workers' Compensation Setoff

[c] Arbitrator May Award Section 998 Costs In Excess of Uninsured Motorist Coverage Limit

§ 20C.64 Unilateral Rearbitration Clause in Health Services Contract Is Unenforceable

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] Unilateral Rearbitration Clause in Health Services Contract Is Unenforceable

§ 20C.65 Agreement Authorizes Costs to Be Assessed Against Disaffirming Party

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] Agreement Authorizes Award Costs of Both Arbitration and Court Proceeding

§ 20C.66 Attorney's Dismissal of Action for Fees Repudiated Rejection of Award in Mandatory Fee Arbitration under Bus. & Prof. Code § 6203

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Other Party's Dismissal of Civil Action Repudiated Rejection of Award Under Bus. & Prof. Code § 6203

§§ 20C.67-20C.69 [Reserved]

§ 20C.70 Award Has Not Been Shown to Result from Undue Means

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Impact or Nexus Must Be Shown

§§ 20C.71-20C.79 [Reserved]

§ 20C.80 Arbitrator Was Not Improperly Biased

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Impression of Arbitrator's Bias Must Be Reasonable One

[b] No Close Business Relationship Shown Between Arbitrator and Party

[c] Party Arbitrator Able to Be Partisan

[d] Personal Relationship Between Arbitrator and Party Does Not Establish Bias

[e] Limitation on Arbitrator's Testimony in Determining Bias

[f] Arbitrator Did Not Know of Potential Conflict Until After Rendition of Award

[g] Existence of Bias Is Determined by Trier of Fact

[h] Proposed Arbitrator Was Not Required to Disclose Prior Service as Uncompensated Mediator

[i] Parent Company Was Not Party So Disclosure of Business Relationship Was Not Required

[j] Board Membership in Professional Organization Need Not Be Disclosed

[k] $500 Contribution to Mayoral Campaign Need Not Be Disclosed

[l] Unrequired Disclosure Is Not Grounds for Vacating Award

[m] Failure to Disclose All Details of Prior Arbitrations Is Not Necessarily Grounds for Vacation of Arbitration Award

[n] Arbitrator Has No Duty to Disclose Arbitrator's Law Firm's Past Representation of Third Party Who Had Adversarial Relationship With a Party.

[4] Additional Authorities

[a] Impression of Arbitrator's Bias Must Be Reasonable One

[b] Party Arbitrator Able to Be Partisan

[c] Unrequired Disclosure Is Not Grounds for Vacating Award

§ 20C.81 Party's Recognition of Arbitrator from Earlier Mediation, Waiver, and Participation in Arbitration Foreclosed Need to Vacate Award Based on Arbitrator's Failure to Make Additional Disclosure

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] Party's Knowledge and Arbitrator's Disclosure Foreclose Need to Vacate Award

§§ 20C.82-20C.89 [Reserved]

§ 20C.90 Mistake of Law Generally Does Not Prevent Confirmation or Justify Vacating Award

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] Arbitrator's Mistake of Law Does Not Prevent Confirmation or Require Vacation of Award in Absence of Clear Agreement to Contrary

[a1] Parties Have Not Clearly Agreed to Judicial Review for Errors of Law

[b] Award Is Not Invalidated by Arbitrator's Unsound Reasoning

[c] Uninsured Motorist Award Is Not Invalidated by Arbitrator's Mistake of Law

[d] Federal Arbitration Act Does Not Require Review for Manifest Disregard of Law

[4] Additional Authorities

[a] Arbitrator's Mistake of Law Does Not Prevent Confirmation or Require Vacation of Award

[b] Award Is Not Invalidated by Arbitrator's Unsound Reasoning

§ 20C.91 Arbitration Awards May Be Based on Broad Principles of Equity and Justice

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Arbitrators May Base Their Decision on Broad Principles of Equity and Justice

[b] Arbitrator May Grant Relief That Would Exceed Power of Court to Grant

[c] Arbitrator's Grant of Relief Bears Rational Relationship to Breach

§ 20C.92 Relief Granted by Arbitration Award Need Not Be Specifically Provided for by Contract

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Relief Granted Need Not Be Specifically Authorized by Contract

§§ 20C.93-20C.99 [Reserved]

§ 20C.100 Arbitrators May Award Damages for Breach of Contract Though Not Submitted as an Issue for Determination

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] Arbitrators May Award Damages for Breach of Contract, Though Not Submitted as an Issue for Determination

§ 20C.101 Arbitrators Disposed of All Issues Which Had to Be Decided

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] Issues Submitted to Arbitration Are Presumed to Have Been Resolved

[b] Arbitrator Need Only Determine Necessary Issues

[c] Arbitrators Decide Which Are "Necessary" Issues

[d] Arbitrator May Determine Legal Issues as Distinct From Factual Ones

[e] The Fact That An Award Is Not Enforceable as Judgment Is Not Grounds for Vacating the Award

[4] Additional Authorities

[a] Arbitrators Decide Which Are "Necessary" Issues

§ 20C.102 Failure to Find on Issue That Was Not Expressly Raised and Supported

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] Award Is Proper Despite Failure to Determine Claim That Was Not Expressly Raised and Supported

§ 20C.103 Arbitrator May Amend Award on Own Initiative to Correct Inadvertent Omission

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Amendment of Award by Arbitrator on Own Initiative

§ 20C.104 Arbitrator Does Not Exceed Powers by Failing to Award Discovery Sanctions

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] Power Not to Impose Discovery Sanction

§ 20C.105 Arbitrator Not Court Decides Whether Agreement Impliedly Prevents Classwide Arbitration

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Arbitrator Not Court Decides Whether Agreement Impliedly Prevents Classwide Arbitration

§ 20C.106 Arbitrator Does Not Exceed Powers by Determining Matter in Telephonic Pre-Hearing Conference

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Arbitrator May Determine Matter in Prehearing Telephonic Conference

§ 20C.107 Arbitrator Did Not Exceed Powers by Determining Second Dispute Under Same Agreement

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleadings and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Arbitrator Did Not Exceed Powers by Deciding Second Dispute

§ 20C.108 Arbitrator Does Not Exceed Powers by Excusing Futile Performance of a Condition

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Arbitrator Has Inherent Power to Excuse Performance That Would Be Futile

§ 20C.109 [Reserved]

§ 20C.110 Agreement Authorizes Award of Attorney's Fees to Prevailing Party

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] Agreement Authorizes Award of Attorney's Fees to Prevailing Party

[b] Court Has No Authority to Modify Arbitrator's Decision Regarding Which Party Prevailed

[c] Stipulation to Arbitrate Injured Worker's Claim Authorizes Award of Statutory Attorney's Fees

[d] Arbitration Agreement Covering Damage Claims Under the Consumer Legal Remedies Act (Civil Code Section 1750 et seq.) Incorporates Provision for Award of Costs and Attorney's Fees

[4] Additional Authorities

[a] Agreement Authorized Award of Attorney's Fees to Prevailing Party

§ 20C.111 Private Arbitration Rules Applied by Agreement Allocate Costs

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] Arbitration Rules Made Applicable by Agreement Allocate Costs

[b] Applicable Rules Allocate Costs Equally

§§ 20C.112-20C.119 [Reserved]

§ 20C.120 Punitive Damages in Medical Malpractice Arbitration

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] Language of Agreement in Medical Services Contract Is Susceptible to Interpretation to Include Claims or Issues Relating to Punitive Damages

[b] Limitations on Recovery of Noneconomic Losses in Medical Malpractice Action Do Not Preclude Award of Punitive Damages Based on Fraud, Willful Neglect, and Malicious Acts

[c] Arbitrator May Base Decision on Justice and Equity

§ 20C.121 Punitive Damages Expressly Provided for By Agreement

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] Parties' Pleadings and Conduct Indicate Agreement

[b] Written Agreement

§ 20C.122 Punitive Damages Implied by Agreement With Subject Matter Likely to Give Rise to Claims for Punitive Damages

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] Agreement Contemplated Arbitration of Claims Giving Rise to Punitive Damages

§ 20C.123 Party's Conduct Empowered Arbitrator to Strike Unconscionable Damage Limitation

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] Parties Conduct Empowered Arbitrator to Award Consequential Damages

§§ 20C.124-20C.129 [Reserved]

§ 20C.130 Arbitration Rehearing Was Not Required on Previously Available Evidence

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] Arbitrators Need Not Reopen Hearing for Evidence Previously Presented or Available

[b] Arbitrator's Determination of Issue by Summary Adjudication Does Not Amount to Failure to Hear Evidence

§ 20C.131 Arbitrator Was Not Required to Continue Hearing so Doctors Could Testify

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] Arbitrator Did Not Exceed Powers by Refusing to Postpone Hearing

[b] Arbitrator Need Not Continue Hearing for Testimony When Written Records Are Available

§ 20C.132 Method of Selecting Arbitrators Was Not Unconscionable

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] Selection Method Not Unconscionable

[4] Additional Authorities

[a] Selection Method Not Unconscionable

§ 20C.133 Illegality of Contract Provision Does Not Void Entire Award

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] Award Is Not Incompatible With Statutory Right

[b] Legal and Illegal Transactions Under Same Contract

[c] No Waiver by Failing to Object to Arbitration

[4] Additional Authorities

[a] Award Not Incompatible With Statutory Right

§§ 20C.134-20C.149 [Reserved]

§ 20C.150 No Agreement to Arbitrate Existed

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] Award Unenforceable When No Agreement to Arbitrate Existed

[b] When Attorney at Law Did Not Have Authority to Bind Client and Client Did Not Ratify or Consent to Agreement, No Agreement to Arbitrate Existed

[4] Additional Authorities

[a] Award Unenforceable When No Agreement to Arbitrate Existed

§ 20C.151 Award Procured by Undue Means

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] Fraud of Party

§§ 20C.152-20C.169 [Reserved]

§ 20C.170 Neutral Arbitrator Failed to Reveal Possibility of Bias

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Statutory Disclosures Required of Neutral Arbitrators

[b] Neutral Arbitrator to Reveal Any Possibility of Bias

[c] Sporadic Business Dealings Are Sufficient for Vacating Award

[d] Neutral Arbitrator to Reveal Past Service as Party Arbitrator

[e] Neutral Arbitrator to Disclose Service as Attorney in Second Arbitration in Which Attorney for Party to Present Arbitration Serves as Arbitrator

[f] Neutral Fire Insurance Appraiser to Reveal Any Possible Interest

[g] Arbitrator Failed to Disclose Acceptance of Employment as Neutral During Pendency of Arbitration

[h] Ties to Party's Insurer Had to Be Disclosed

[4] Additional Authorities

[a] Neutral Arbitrator to Reveal Any Possibility of Bias

§ 20C.171 Parties' Agreement Supercedes Normal Standards

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Arbitrator Has No Power to Consider Extrinsic Evidence

§§ 20C.172-20C.189 [Reserved]

§ 20C.190 Arbitrator Exceeded Powers by Awarding Relief Not Provided for by Law or Parties' Agreement

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] Arbitrator Exceeded Power by Award Contrary to Parties' Agreement

[b] Insurance Appraiser Had No Authority to Determine Coverage

§ 20C.191 Arbitrator Exceeded Powers by Deciding Issues Which Only Receiver Had Standing to Tender

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] Arbitrator Exceeded Power by Award Determining Claims of Entity in Receivership

§ 20C.192 Arbitrator Exceeded Powers by Dismissing Arbitration

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] Arbitrator Had No Power to Dismiss Arbitration for Change in Law

§ 20C.193 Arbitrator's Refusal to Postpone Hearing Was Prejudicial

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] Refusal to Postpone Hearing

§ 20C.194 Arbitrator Made Error of Law Subject to Judicial Review by Clear Term of Arbitration Agreement

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] The California Arbitration Act Permits Enforcement of Clear Agreements for Judicial Review of Merits of Arbitration Award

[b] The Federal Arbitration Act Does Not Preempt California Rule Allowing Arbitration Agreements to Expand Scope of Judicial Review

§§ 20C.195-20C.209 [Reserved]

§ 20C.210 Award Based on Illegal Contract or Contract Contrary to Public Policy Is Unenforceable

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] Award Contrary to Public Policy Is Unenforceable

[b] Award Based on Illegal Contract Is Unenforceable

[c] License Is Required to Confirm Award if License Is Required to Bring Action

[d] Objection Is Not Waived if Used to Oppose Confirmation

[e] Minor Was Entitled to, and Did, Disaffirm Contract Requiring Arbitration

[f] Award Against Unrepresented Minor Must Be Vacated

[4] Additional Authorities

[a] Award Contrary to Public Policy Is Unenforceable

[b] Award Based on Illegal Contract Is Unenforceable

§ 20C.211 Award That Cannot Be Reconciled With Terms of Court Order Must Be Vacated

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Award That Cannot Be Reconciled With Terms of Court Order Must Be Vacated

§ 20C.212 Award Taken Through Mistake, Inadvertence, Surprise, or Excusable Neglect

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Conditions for Relief Under Code Civ. Proc. § 473

[b] Relief From Nonjudicial Arbitration Award Taken Through Mistake, Inadvertence, Surprise, or Excusable Neglect

California Points & Authorities

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CHAPTER 20C ARBITRATION: CONFIRMING, CORRECTING, OR VACATING THE AWARD
PART I. INTRODUCTION

2-20C California Points & Authorities § 20C.01

§ 20C.01 Scope of Chapter

This chapter contains memoranda and contentions relating to correcting, confirming, or vacating arbitration awards under private agreements pursuant to *Code Civ. Proc. § 1280 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsArbitrabilityCivil ProcedureAlternative Dispute ResolutionCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActOrders to Compel ArbitrationContracts LawContract Conditions & ProvisionsArbitration Clauses

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PART I. INTRODUCTION

2-20C California Points & Authorities § 20C.02

§ 20C.02 Governing Law

[1] Correcting, Confirming, or Vacating Award

A party to an arbitration may petition the court to confirm the award within four years of issuance of the award [*Code Civ. Proc. §§ 1285, 1288*; *see §§ 20C.10, 20C.60* et seq.].

A response may be filed in opposition to the petition to confirm and, if it is not exclusively in the form of a request to vacate the award, may include such a request [*Code Civ. Proc. § 1285.2*; *see § 20C.21[1*]].

A petition to vacate an award or correct an award must be served and filed within 100 days after issuance of the award [*Code Civ. Proc. § 1288*; *see §§ 20C.20[1*] (vacate); 20C.12[1] (correct)].

Procedural requirements for vacating an award are set out in *Code Civ. Proc. § 1286.4*. The grounds specified in *Code Civ. Proc. § 1286.2* for vacating an award are considered exclusive bases for setting aside the award [*State Farm Mut. Auto. Ins. Co. v. Guleserian (1972) 28 Cal. App. 3d 397, 402, 104 Cal. Rptr. 683*]. The major grounds for vacating an award are substantial prejudice to the rights of a party by misconduct of a neutral arbitrator, or by any conduct of the arbitrators contrary to the provisions of the governing law, including failure to make timely disclosure of any grounds for disqualification or to disqualify himself or herself on timely demand of a party, for any of the grounds specified in *Code Civ. Proc. § 170.1* [*see Code Civ. Proc. § 1286.2(a)(3), (a)(5), (a)(6)*].

If the award is vacated, a rehearing may be ordered pursuant to *Code Civ. Proc. § 1287*. A request for rehearing may be combined with a petition or request to vacate the award [*see § 20C.22*].

If a petition to vacate is filed, a response may be filed in opposition to the petition. A response may request the court to confirm the award, and would be based on the same grounds as a petition to confirm the award [*Code Civ. Proc. § 1285.2*; *see §§ 20C.11[1], 20C.60* et seq.].

Code Civ. Proc. § 1286 requires the court to confirm the award if it does not vacate the award, or to correct and then confirm the award, or to dismiss the proceeding. *Code Civ. Proc. § 1287.2* provides for dismissal when the court

determines that a particular person named as a respondent was not bound by the award and was not a party to the arbitration [*compare* § 20C.50[1] (correcting award to reflect name of party over whom arbitrator did have jurisdiction); Ch. 20E, *Arbitration: Effect of Award*, § 20E.13[1] (court's modification of judgment confirming award to name alter ego as additional judgment debtor)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionCivil ProcedureAlternative Dispute ResolutionValidity of ADR Methods

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2-20C California Points & Authorities § 20C.03

§ 20C.03 How to Use the Forms in This Chapter

[1] Page Limits on Points and Authorities

One of the more significant drafting requirements to keep in mind are page limits: supporting and opposing memoranda must not exceed 15 pages, or 20 pages in a summary judgment proceeding. A reply or closing memorandum may not exceed 10 pages in length [*see Cal. Rules of Ct., Rule 3.1113(d)*]. Exhibits, declarations, attachments, tables of contents and authorities, and proof of service are not counted. Any party must obtain leave of court to file a longer memorandum [*see Cal. Rules of Ct., Rule 3.1113(d), (e)*]. These and other drafting requirements are discussed in *further detail in Chapter 1, Writing Legal Memoranda and Briefs, § 1.05*.

[2] Using the Forms to Build a Draft Memorandum

The forms included in this chapter are designed to be combined with other forms to form a complete memorandum. For detailed discussion on how to select and use the forms in the publication to build a draft memorandum and complete the draft, with detailed discussion of all drafting requirements and strategic or stylistic considerations, see *Ch. 1, Writing Legal Memoranda and Briefs, §§ 1.03 -1.06*. For a skeletal form of memorandum for use in creating a properly formatted outline in which to compile relevant forms from this publication, see *Ch. 1, Writing Legal Memoranda and Briefs, § 1.10*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeContent & FormCivil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPleading & PracticeMotion PracticeSupporting Memoranda

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2-20C California Points & Authorities § 20C.04

§ 20C.04 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

For detailed legal background discussion, research guides, procedural checklists, and practice forms of motions and other papers relating to private contractual arbitration proceedings, see:

- California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

- California Forms of Pleading and Practice, Ch. 33, *Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding* (Matthew Bender).

- California Forms of Pleading and Practice, Ch. 34, *Contractual Arbitration: Judicial Review* (Matthew Bender).

[2] Related Points and Authorities

Chapters in this publication with related forms include:

- For compelling arbitration, see Ch. 20, *Arbitration: Compelling* .

- For resisting arbitration, see Ch. 20A, *Arbitration: Resisting* .

- For selecting arbitrators and determining arbitral immunity, see Ch. 20B, *Arbitration: Selecting Arbitrators; Arbitral Immunity* .

- For dismissing an arbitration, see Ch. 20D, *Arbitration: Dismissing* .

- For determining the effect of an arbitration award, see Ch. 20E, *Arbitration: Effect of Award* .

- For situations in which attorney's fees may be recovered, see Ch. 25, *Attorney's Fees* .

- For contract provisions in general, see Ch. 50, *Contracts* .

- For situations in which contracts may be avoided or declared void, see Ch. 92, *Duress, Menace, Fraud, Undue Influence, and Mistake* .

- For requirements of injunctions, see Ch. 116, *Injunctions* .

- For general principles relating to specific performance of contracts, see Ch. 214, *Specific Performance* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActOrders to Compel ArbitrationContracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawRemediesSpecific Performance

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2-20C California Points & Authorities §§ 20C.05-20C.09

[Reserved]

§§ 20C.05[Reserved]

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PART II. FORMS
A. Procedures for Confirming, Correcting, or Vacating Award

2-20C California Points & Authorities § 20C.10

§ 20C.10 Supporting Petition to Confirm Arbitration Award

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF PETITION TO
Petitioner,	)	CONFIRM AWARD
vs.	)	[LIMITED CIVIL CASE]
_____ [*name*],	)	Date: _____
Respondent.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THE AWARD SHOULD BE CONFIRMED BECAUSE IT IS PRESUMED TO BE VALID IN THE ABSENCE OF A SHOWING THAT IT IS NOT VALID.

A. Petition to Confirm Award. A party to an arbitration in which an award has been made may petition the court to confirm the award (*Code Civ. Proc. § 1285*).

B. Confirmation of Award Unless Otherwise Ordered. If a petition or response under *Code of Civil Procedure Sections 1285 through 1287.6* is duly served and filed after an award has been rendered, the court shall confirm the award as made[, whether rendered in California or another state], unless, in accordance with those statutes, it corrects

the award and confirms it as corrected, vacates the award, or dismisses the proceeding (*Code Civ. Proc. § 1286*; *see Weinberg v. Safeco Ins. Co. of America (2004) 114 Cal. App. 4th 1075, 1083, 8 Cal. Rptr. 3d 224* ; *Pacific Law Group: USA v. Gibson (1992) 6 Cal. App. 4th 577, 581-582, 7 Cal. Rptr. 2d 878*).

C. Award Presumed Valid. Every presumption is in favor of the validity of an arbitration award. The party claiming invalidity has the burden of supporting that claim with evidence (*United Brotherhood of Carpenters Etc., v. De Mello (1973) 22 Cal. App. 3d 838, 840, 100 Cal. Rptr. 564* ; *Walter v. National Indem. Co. (1970) 3 Cal. App. 3d 630, 633, 83 Cal. Rptr. 803*).

[*Optional*] **D. Time for Filing Petition to Confirm Award.** A petition to confirm an award must be served and filed not later than four years after the date of service of a signed copy of the award on petitioner (*Code Civ. Proc. § 1288*).

[*Optional*] **E. Earliest Time Petition May Be Filed.** No petition may be served and filed under *Code of Civil Procedure Sections 1285-1288.8* until at least 10 days after service of a signed copy of the award on petitioner (*Code Civ. Proc. § 1288.4*).

[*Optional*] **F. Request for Correction Comes Too Late.** The award must be confirmed as written and cannot be corrected as/if requested by _____ [*name or status of party, e.g.,* respondent] because the request for correction comes too late: it was required to have been filed within 100 days after the award was served, or in this case, on or before _____ [*date*] (*Code Civ. Proc. §§ 1288* (petition), *1288.2* (response); *Weinberg v. Safeco Ins. Co. of America (2004) 114 Cal. App. 4th 1075, 1083-1084, 8 Cal. Rptr. 3d 224*).

[*Optional*] **G. Venue for Filing Petition to Confirm Award.** Except as otherwise provided in *Code of Civil Procedure Sections 1292-1293.2*, any petition made after the commencement or completion of arbitration shall be filed in a court having jurisdiction in the county where the arbitration is being or has been held, or, if not held exclusively in any one county of California, or if held outside California, then the petition shall be filed as provided in Section 1292 (*Code Civ. Proc. § 1292.2*).

[*Optional*] **H. Jurisdiction of Petition to Confirm[, Correct, or Vacate] Award as Limited Civil Case.** Superior courts have jurisdiction over arbitration-related petitions whether the matter is a limited or unlimited civil case (*see Cal. Const., art. VI, § 10*; *Code Civ. Proc. § 86(a)(10)(A)*).

[*Optional*] **I. Post-Award, Pre-Judgment Interest.** A successful party to arbitration is entitled to "recover damages certain" within the meaning of *Civil Code Section 3287(a)* on the date the arbitrator renders the award. The arbitration award itself is a new and fixed liability regardless of the elements that comprised that liability. Thus, _____ [an order *or* a judgment] confirming an arbitration award should include interest on the award from the date of the award to the date of judgment (*County of Solano v. Lionsgate Corporation (2005) 126 Cal. App. 4th 741, 752-754, 24 Cal. Rptr. 3d 362* ; *Pierotti v. Torian (2000) 81 Cal. App. 4th 17, 27-28, 96 Cal. Rptr. 2d 553* ; *Britz, Inc. v. Alfa-Laval Food & Dairy Co. (1995) 34 Cal. App. 4th 1085, 1106-1107, 40 Cal. Rptr. 2d 700*).

[*Optional*] **J. Partial Final Award.** As long as the arbitrator has not improperly left undecided issues necessary in order to determine the controversy, and the partial final award bears a rational relationship to the contract and the breach, a partial final award meets the requirements of *Code Civil Procedure, Section 1283.4*. A partial final award may settle some issues and reserve jurisdiction over other issues. The partial final award may be confirmed and an interlocutory judgment entered thereon (*Roehl v. Ritchie (2007) 147 Cal. App. 4th 338, 351-352, 54 Cal. Rptr. 3d 185* ; *Hightower v. Superior Court (O'Dowd) (2001) 86 Cal. App. 4th 1415, 1441, 104 Cal. Rptr. 2d 209*).

[*Optional*] **K. Post-Arbitration Attorney's Fees.** Because the arbitration clause provided that the prevailing party be awarded his or her attorney's fees and the arbitrator named the prevailing party, [and even though the arbitrator determined that each party bear its own attorney's fees for the arbitration], _____ [*name*], as the

prevailing party, is entitled by the [mandatory] language of the contractual attorney fees clause and *Code of Civil Procedure, Section 1293.2* to reasonable attorney feesand costs incurred in the post-arbitration judicial proceedings (*Carole Ring & Associates v. Nicastro (2001) 87 Cal. App. 4th 253, 255, 260-262, 104 Cal. Rptr. 2d 519*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

Optional Paragraph I. may be used even if the petition to confirm the arbitration award contained no prayer for post-award pre-judgment interest under *Civ. Code § 3287(a)* [*see Britz, Inc. v. Alfa-Laval Food & Dairy Co. (1995) 34 Cal. App. 4th 1085, 1106, 40 Cal. Rptr. 2d 700]* . In addition, if the dispute involves personal injury and interest is claimed under *Civ. Code § 3291* and *Code Civ. Proc. § 998* (interest at the legal rate from date of plaintiff's first offer that exceeded amount of award), but the arbitrator did not award interest on that basis, counsel may wish to include authority from Ch. 121, *Interest*, § 121.43. Optional Paragraph J. is for use in the unusual situation in which the arbitrator has issued a partial final award. If counsel uses Optional Paragraph J., he or she may want to include authority from § 20C.90. Optional Paragraph K. is for use when the petitioner is entitled to attorney's fees for post-arbitration judicial proceeding in accordance with the parties' agreement and the arbitrator's finding that the petitioner is the prevailing party. The bracketed language is for use when the arbitrator denied petitioner its attorney's fees for the arbitration. For other memoranda addressing the right to attorney's fees, see *§§ 20C.55, 20C.110*.

This form does not provide a complete memorandum but is designed to be combined with forms from § 20C.60 et seq. addressing any issue that petitioner anticipates may be in contention.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should show that no petition to vacate has yet been filed, when the award was served on petitioner, and that the petition for confirmation is timely. Generally, it will be appropriate to attach a copy of the award [*see Shepherd v. Greene (1986) 185 Cal. App. 3d 989, 994, 230 Cal. Rptr. 233* (*discussed under § 20C.12[3][a]*)].

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840]* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement).

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For a form of petition to confirm an arbitration award that may be supported by this memorandum, as well as a procedural checklist, see California Forms of Pleading and Practice, Ch. 34, *Contractual Arbitration: Judicial Review* (Matthew Bender).

[d] Related Memoranda

For memoranda to combine with this form, regarding other matters that the petition may need to address, see *§ 20C.60* et seq.

If the dispute involves personal injury and interest is claimed under *Civ. Code § 3291* and *Code Civ. Proc. § 998* (interest at the legal rate from date of plaintiff's first offer that exceeded amount of award), but the arbitrator did not award interest on that basis, counsel may wish to include authority from Ch. 121, *Interest*, § 121.43.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

For a form that opposes this form, see *§ 20C.20*.

For a form for use by an insurer to make a timely petition to have an uninsured motorist award corrected to reflect that its liability does not exceed its policy limits [to avoid the situation in the authority in Optional Paragraph F (discussed in [3][c], *below*)], see *§ 20C.32*.

[3] Discussion of Authorities

[a] Confirmation of Award Unless Otherwise Ordered

Weinberg v. Safeco Ins. Co. of America *(2004) 114 Cal. App. 4th 1075, 8 Cal. Rptr. 3d 224* , is discussed in [c], *below*.

The court of appeal in ***Pacific Law Group: USA v. Gibson*** *(1992) 6 Cal. App. 4th 577, 7 Cal. Rptr. 2d 878* , affirmed an award that, in part, determined a corporate officer was not personally liable for attorney's fees incurred by the corporation. Plaintiff raised the argument that only awards for payment of sums that remain unpaid may be confirmed. *Code Civ. Proc. § 1285* or *1286* neither expressly not impliedly imposesthat condition. All awards are entitled to confirmation, not just unpaid ones (*6 Cal. App. 4th 577, 581-582)* .

[b] Award Presumed Valid

In ***United Brotherhood of Carpenters Etc., v. De Mello*** *(1973) 22 Cal. App. 3d 838, 100 Cal. Rptr. 564* , written notice of an arbitration award in favor of the union was sent to the employer, but it was signed by only one arbitrator contrary to the provisions of *Code Civ. Proc. § 1283.4*, which requires signature of the arbitrators concurring in the award. The award was confirmed, and the employer appealed.

The court of appeal affirmed, holding that the irregularity did not vitiate the award. Noting that courts must give every intendment to validity of an award, the court observed that the only course open to the employer's benefit for such an error would be vacation of the award. To achieve that result, the employer would have to demonstrate substantial prejudice in addition to error, as required under former Code Civ. Proc. § 1286.2(c) (requiring substantial prejudice to

vacate on the ground of conduct of arbitrators contrary to arbitration statutes) [*now see Code Civ. Proc. § 1286.2(a)(3)* and *(5)*]. However, no prejudice was shown in this case (*22 Cal. App. 3d 838, 840)* .

Walter v. National Indem. Co. *(1970) 3 Cal. App. 3d 630, 83 Cal. Rptr. 803* , involved a claim, by the heir of a passenger killed in a car driven by an insured, against the driver's uninsured motorist carrier. The award in favor of the heir was signed on the same day the heir died. There was no evidence whether the award was signed before or after the heir's time of death. The award in the name of the heir was confirmed, and defendant insurer appealed.

The court of appeal reversed because the deceased heir's personal representative was the necessary and proper party to petition for confirmation. However, with respect to the award, the court stated that, as a settled proposition, every intendment and presumption is in favor of the validity of an arbitration award, and that the burden is on the party claiming any invalidity to support that claim with evidence. Because there was no such evidence in the record, the court held as a matter of law that the heir should be deemed to have been alive at the moment when the arbitrator signed the award (*3 Cal. App. 3d 630, 633)* .

[c] Request for Correction Comes Too Late

Weinberg v. Safeco Insurance Co. *(2004) 114 Cal. App. 4th 1075, 8 Cal. Rptr. 3d 224* , involved consolidated appeals: an appeal of a judgment confirming an uninsured motorist arbitration award and a bad faith judgment in the insurer's favor. On March 3, 2000, the uninsured motorist arbitrator had awarded the injured insured damages far in excess of his policy limits. The insurer paid the insured the policy limits. The insured sued the insurer for bad faith; judgment was for the insurance company, but it appealed the ruling on the insured's post-judgment motion to tax costs. Just before the trial in the bad faith case, on January 25, 2003, the insured petitioned to have the uninsured motorist award confirmed into a money judgment. Safeco's response sought neither to vacate the award not to have it corrected. The petition was granted; and Safeco appealed that judgment, contending the award should not have been confirmed because the arbitrator did not determine its liability to the insured, only the uninsured motorist's liability to the insured.

The court of appeal affirmed both judgments (*114 Cal. App. 4th 1075, 1079, 1085, 1087-1088)* . Both in response to the petition to confirm the award and on appeal, Safeco argued that uninsured motorist arbitration awards cannot be confirmed because they are not liability assessments against the insurer. The policy adhered to the statutory language [*see Ins. Code § 11580.2(f)*], which provides that when the insured and insurer are unable to agree, an arbitrator must decide (1) whether the insured is entitled to recover damages against the uninsured motorist, and if so, (2) in what amount (*114 Cal. App. 4th 1075, 1082)* . The trial court stated, and the appellate court eventually agreed, it had no jurisdiction to do anything other than confirm the award, because no request to correct or vacate the award had been filed (*114 Cal. App. 4th 1075, 1083)* . Typically the insured will not have the uninsured motorist award confirmed, but will accept settlement from the insurer in the amount of the policy limits and then seek to recover the remainder from the uninsured motorist. The court noted the problem with the uninsured motorist statute, saying that unless and until the Legislature provides a mechanism to address what is to be done when the arbitrator is not asked to determine the insurer's liability, but issues an award of damages in excess of the policy limits, it is incumbent on the insurer to file a timely request to have the award corrected or vacated (*114 Cal. App. 4th 1075, 1084)* .

[d] Venue for Filing Petition to Confirm Award

Code Civ. Proc. § 1292 is set forth at *Ch. 20, Arbitration: Compelling, § 20.10[1]*, Paragraph B.

[e] Post-Award, Pre-Judgment Interest

The facts and procedural background of ***County of Solano v. Lionsgate Corporation*** *(2005) 126 Cal. App. 4th 741, 24 Cal. Rptr. 3d 362* , and the portion of the opinion addressing the arbitrability of claims under the False Claims Act (*Gov. Code § 12650 et seq.*) are discussed in *Ch. 20, Arbitration: Compelling, § 20.22[3][k]*. Lionsgate argued that the award

of prejudgment interest was improper both because the False Claims Act (*Gov. Code § 12650 et seq.*) does not provide for prejudgment interest and because there was no award of "damages" on which prejudgment interest could be granted. The court held that prejudgment interest could be awarded under *Civ. Code § 3287* even if it was not specifically authorized by the statute underlying the plaintiff's claims (*126 Cal. App. 4th 741, 752)* . Although the penalties were not "damages," the court found that they were sufficient under *Civ. Code § 3287(a)* to support an award of prejudgment interest as of the day they were made certain, that is, the date of the final award, which itself became a contractual obligation at that point. Case law establishes the County's right to postaward, prejudgment interest running from the date the final award was entered (*126 Cal. App. 4th 741, 753)* . The trial court should have vacated that portion of the award granting the County prejudgment interest for the period prior to entry of the final arbitration award. Thus, the court of appeal reversed that part of the judgment and directed the trail court to vacate thatportion of the award, but in all other respects affirmed (*126 Cal. App. 4th 741, 753-754)* .

The parties to ***Pierotti v. Torian*** *(2000) 81 Cal. App. 4th 17, 96 Cal. Rptr. 2d 553* , were automobile dealers, and agreed to develop an "auto mall" in Fremont where they would share space. In 1987, defendant negotiated with a seller of land for the purchase of 75 acres for the mall. Defendant received a 3 percent commission on the sale. The letter of understanding which memorialized the terms of the purchase did not mention defendant's commission, nor did defendant mention it to the other dealers until after the transaction was completed. In 1990, the dealers entered into a partnership agreement which contained an arbitration provision, which entitled the prevailing party in arbitration to reasonable attorney's fees and costs. Plaintiff's dealerships were the only ones at the mall from November, 1991, until June, 1992, when he closed them. Due to a slack economy, the mall did not become an economic reality until 1995. Plaintiff brought two claims against defendant; one alleging fraud and breach of contract by inducing plaintiff to move his dealerships to the mall when defendant never had any intention of moving his dealership there; and another for breach of fiduciary duty by not disclosing the commission to the other dealers until after that purchase was completed. Defendant compelled arbitration of both claims pursuant to the arbitration clause in the partnership agreement. The arbitrator found for defendant on the first claim and for plaintiff on the second claim, awarding plaintiff $345,726 of the $850,000 commission. The arbitrator also awarded $700,000 in punitive damages, found that plaintiff and the other claimants were prevailing parties within the meaning of the partnership agreement, and awarded them costs and $363,513 in attorney's fees. Plaintiff moved for confirmation of the award and for post-arbitration, pre-judgment interest on the award. Defendant moved to have the award corrected on the ground the arbitrator exceeded his powers by awarding attorney's fees. The curt confirmed the award, but did not award post-arbitration, pre-judgment interest. Both parties appealed, plaintiff challenging the denial of post-arbitration, pre-judgment interest, and defendant challenging the award of attorney's fees.

The court of appeal affirmed the judgment except that it remanded to the trial court to calculate and award post-award, pre-judgment interest. In upholding the award of attorney's fees, the court of appeal sanctioned defendant and its attorneys for engaging in a frivolous appeal with respect to those fees (*81 Cal. App. 4th 17, 37)* . That portion of the opinion is discussed at *§ 20C.110[3][b]*. With respect to the interest, the court of appeal noted that defendant had not contested the award of interest in the trial court, and the court offered no explanation for denying them (*81 Cal. App. 4th 17, 27)* . The court of appeal said that a successful party to arbitration is entitled to "recover damages certain" within the meaning of *Civ. Code § 3287(a)* on the date the arbitrator renders the award. The arbitration award itself results in a new and fixed liability regardless of the elements that comprised that liability. Thus, a judgment confirming an arbitration award should include interest on the award from the date of the award to the date of judgment (*81 Cal. App. 4th 17, 27-28)* . Denying the successful party interest would punish that party for using arbitration instead of the court system (*81 Cal. App. 4th 17, 27)* .

Britz, Inc. v. Alfa-Laval Food & Dairy Co. *(1995) 34 Cal. App. 4th 1085, 1106-1107, 40 Cal. Rptr. 2d 700* , arose out of equipment sales and lease transactions amounting to approximately $1.5 million. Arbitration was compelled over plaintiffs' objections that fraud in the inducement of the contract containing the arbitration clause prohibited arbitration. The portion of the opinion addressing the fraud issue is discussed in *Ch. 20, Arbitration: Compelling, § 20.42[4][a]*. The arbitrator issued a final award in defendants' favor for $587,425, plus costs and attorney fees in an unspecified

amount. After additional submissions by the parties, the arbitrator issued a supplemental award of $1,412,953.75 for defendants' attorney fees and $696,747.45 as costs. Plaintiffs sought to vacate the award on the grounds of fraud and the bias of one of the arbitrators. The trial court dismissed the petition to vacate the award and granted defendants' petition to confirm the award, including attorney fees and costs, with interest from the date of the award through entry of judgment. Plaintiffs appealed, contending among other things, that the trial court erred in awarding prejudgment interest, asserting three separate reasons.

The court of appeal reversed and remanded with instructions to the trial court to hold evidentiary hearings on specific matters relating to bias. The portion of the opinion addressing the issue of bias is discussed at *§ 20C.170[4][a]*. With respect to post-award, pre-judgment interest, plaintiffs claimed it was error to award interest because it was not demanded in the petition to confirm the award. The court of appeal said that in a contested action, prejudgment interest may be awarded, when the plaintiff is entitled to it, even though the complaint contains no prayer for interest; and there is no reason to distinguish between the award of interest on a complaint and on a petition to confirm an arbitration award (*34 Cal. App. 4th 1085, 1106)* . Plaintiffs' second contention was that defendants' claims were unliquidated and therefore could not be the subject of an interest award under *Civ. Code § 3287*, which provides, in part: "Every person who is entitled to recover damages certain, ... and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day [with certain exceptions not relevant here]." Interest was awarded not on the unliquidated contract claims, but solely on the arbitration award from the date of the award. As of the date of the award, defendants were entitled to "recover damages certain" through entry of judgment confirming the award (*34 Cal. App. 4th 1085, 1106)* . Third, plaintiffs argued, as to attorney fees and costs, the award of prejudgment interest thereon "pile[s] 'damages' (interest) on top of other 'damages' (attorneys' fees and costs) which were themselves awarded on Alfa-Laval's modest breach of contract damage claim." The court said that this argument misconceived the subject of the superior court petition. The petition was not for an award of damages and attorney fees on the original contracts. That underlying dispute was the subject of the arbitration, and had been concluded by the time of the superior court petition to confirm the award. The arbitration award itself resulted in a new and fixed liability. Regardless of the individual elements that comprised that liability, defendants were entitled to payment of the fixed sum on issuance of the award. In the context of a judicial judgment, interest after judgment accrues as to the entire award, including attorney fees. Prejudgment interest awarded after arbitration serves the same purpose. Although the interest was pre-"judicial judgment," it was post-"contractual judgment." Any result that denied defendants this postaward interest would punish them for using arbitration instead of the court system to resolve their dispute with plaintiffs (*34 Cal. App. 4th 1085, 1107)* .

[f] Partial Final Award

Roehl v. Ritchie *(2007) 147 Cal. App. 4th 338, 54 Cal. Rptr. 3d 185* , arose out of a dispute regarding distribution of trust assets and involved two arbitration awards, both of which had been confirmed. The trust, established by husband and wife, provided for binding arbitration of any disputes arising under it. The first award, rendered on March 1, 2004, considered many things, but definitively resolved only the issue of a note from Rho-Chem. Matters considered but not resolved involved the family home, which was occupied by wife, husband having died. Wife's rights were challenged by husband's sons from a previous marriage. The first award noted that in light of developments since the valuation date of the assets involved, a different distribution of assets than that suggested in the valuation exhibit would benefit the estate. Wife died one week after the first award was rendered and her niece succeeded to her position. The sons moved to vacate the award and the niece to confirm it. The award was confirmed. Sons appealed that confirmation. During the pendency of the appeal, the trustee submitted requests to the arbitrator for instructions regarding pending issues, including the valuation date of the family home and Niece's entitlement to reimbursement of payments made to Wife's caregivers. The second award, rendered on October 28, 2005, approved Niece's reimbursement, valued assets, and allocated various assets to the three subtrusts. The second award also reserved jurisdiction to make further supplemental awards, specifically those relating to accountings filed by the trustee and the reasonableness of the trustee's fees and his attorney's fees. The second award was confirmed, and Niece appealed, contending that under *Code Civ. Proc. § 1284*, the arbitrator had no jurisdiction to make the second award.

The court of appeal affirmed (*147 Cal. App. 4th 338, 356)* , noting that its consideration was limited to the second award, because the appeal of confirmation the first award had already been determined (*147 Cal. App. 4th 338, 347*). The court also noted that substantial deference is owed to an arbitrator's determination of his or her own authority. Thus, any doubts about arbitrator's power to decide specific issues must be resolved in the arbitrator's favor (*147 Cal. App. 4th 338, 347-348*). Niece claimed that the second award was void because it modified the first arbitration award 15 months after the trial court had confirmed it. The court of appeal agreed that an arbitrator does not have power to modify an award after it has been confirmed, but found nothing in the second award to be a modification of the first (*147 Cal. App. 4th 338, 349)* . The first award determined ownership of the Rho-Chem note, ownership of the family home (75% to wife, now niece, 25% interest to sons), and that sons' counsel could not recover his attorney fees from the trust. The first award did not determine the value of all assets for purpose of distribution but specifically left the door open for the trustee to suggest modifications to the distribution in exhibit 20 in light of new developments. The court of appeal found it significant that the first award did not incorporate the values expressed in exhibit 20 and did not attach exhibit 20 as an exhibit to the award. Plainly, future developments did occur, including a phenomenal boom in California residential real estate prices, which had the effect of increasing the value of sons' interest in the home. Thus, the court of appeal deferred to the arbitrator's powers to determine the scope of his contractual authority, and resolved any doubts in favor of upholding the second arbitration award (*147 Cal. App. 4th 338, 350)* .

Niece claimed the arbitrator had no power to reserve jurisdiction in the first arbitration award to make incremental decisions, arguing this amounted to intentionally leaving issues unresolved and rendering the first arbitration award void under *Code Civ. Proc. § 1283.4*, which requires any arbitration award to include a determination of all questions submitted to the arbitrators the decision of which is necessary in order to determine the controversy. Niece agreed that California law permits arbitrators to reserve jurisdiction over postconfirmation disputes, but argued that rule only applied in very narrow circumstances not applicable here. The court of appeal disagreed, citing *Hightower v. Superior Court (O'Dowd) (2001) 86 Cal. App. 4th 1415, 1431, 1434, 104 Cal. Rptr. 2d 209* (discussed *below*), for the proposition that an arbitrator may use a multiple incremental or successive award process as a means, in an appropriate case, of finally deciding all submitted issues (*147 Cal. App. 4th 338, 351)* . Regarding Niece's challenge to reservation, in the second award, of jurisdiction to determine later issues, the court of appeal noted that arbitration awards may contemplate future proceedings, and that in fact, the ongoing and changing nature of trust administration may require them--for instructions, to settle accounts, to fix compensation, and to allow, compromise or settle claims. Thus, the arbitrator did not abuse his discretion in fashioning a remedy to resolve ongoing matters relating to trust administration, costs, and fees (*147 Cal. App. 4th 338, 352)* .

Niece also claimed that the second arbitration award was void, because the arbitrator expressly relinquished the power he had reserved (in the first award) over future questions in a letter dated June 11, 2004, which she characterized as an order of distribution. In fact, the letter said that "After thinking of the various issues, I believe that the appropriate approach at this time is to leave the distribution as originally done." The court of appeal disagreed (*147 Cal. App. 4th 338, 355)* . The letter never described itself as final; it did not contain an order for distribution; and it contained the qualifier "at this time" (*147 Cal. App. 4th 338, 353)* . It was not part of the first arbitration award, was never sought to be confirmed as a correction or amendment to that award, and was not included with other post-award correspondence with Niece's petition to confirm that award (*147 Cal. App. 4th 338, 353-354*). Because the letter was not written within 30 days after the first award, the arbitrator did not have the power to use it to make corrections or modifications to the original award (*147 Cal. App. 4th 338, 354*).

Hightower v. Superior Court (O'Dowd) *(2001) 86 Cal. App. 4th 1415, 104 Cal. Rptr. 2d 209* , involved a dispute between the two 50 percent shareholders of a corporation. Their shareholders agreement provided for arbitration of any disputes arising under it and procedures by which either could buy out the other's shares. D obtained financing and offered to buy H's shares. H set out to obtain financing topurchase D's shares. Employees and officers of the company wrote to the entities from which H was seeking financing and told them they would resign if H acquired D's interests. H demanded arbitration of claims against D including interference with contract and breach of fiduciary duties by inciting

the officers' and employees' actions. The arbitrator ruled in favor of D and found that D was legally entitled to complete the purchase of H's shares on September 24, 1998. However, the award was not entered until April 25, 2000, and D's financing had expired by that date. The arbitrator issued an award, designated a "partial final award," which gave D six months from the date of confirmation of that award to obtain financing and complete the purchase and reserved jurisdiction to determine specific additional issues, such as the amount to be awarded to D for additional costs incurred to obtain new financing. H petitioned to have the award vacated pursuant to *Code Civ. Proc. § 1286.2*. The petition was denied. H then petitioned the court of appeal by writ of mandate to require the trial court to either (1) vacate its order denying the petition to vacate the partial final award and enter a new order granting it, or (2) enter an order confirming the partial final award and entering judgment thereon.

The court of appeal issued a peremptory writ of mandate directing the trial court to (1) supplement its order denying the petition to vacate the partial final award by adding to it an order confirming that award, (2) enter an interlocutory judgment thereon, and (3) order the matter back to the arbitrator for further proceedings as might be required to permit the issuance of a final award resolving all remaining issues (*86 Cal. App. 4th 1415, 1441)* . The court of appeal noted that under *Advanced Micro Devices, Inc. v. Intel Corp. (1994) 9 Cal. 4th 362, 36 Cal. Rptr. 2d 581, 885 P.2d 994* (discussed at *§ 20C.91[3][a] -[c]*), substantial deference is given to the arbitrator's own assessment of his or her authority to resolve an issue and to the scope of his or her authority regarding the arbitrator's choice of a remedy. It is only necessary that the award bear some rational relationship to the contract and the breach (*86 Cal. App. 4th 1415, 1437)* , which the court found it did (*86 Cal. App. 4th 1415, 1440)* . Once the arbitrator determined that H had breached the shareholders agreement and had thereby frustrated D's attempt to complete the purchase of H's shares, the arbitrator had to fashion a remedy that would give D the benefit of his bargain. To accomplish this, the arbitrator provided that D had the right, but not the obligation, to purchase, on certain designated conditions, H's shares within six months of the date of the confirmation of the award. The court of appeal viewed this incremental process as reasonably necessary, if not essential, to the effectiveness of the remedy that the arbitrator had fashioned and found no violation of *Code Civ. Proc. § 1283.4*. The arbitrator did not improperly leave undecided any issues necessary in order to determine the controversy, but determined all issues that are necessary to the resolution of the essential dispute arising from H's breach. The arbitrator's judgment on this point must be respected (*86 Cal. App. 4th 1415, 1439)* .

With regard to H's contention that the partial final award left him in "judicial limbo" and unable to seek appellate review, the court noted that the partial final award was subject to confirmation. After confirmation, the trial court could issue an interlocutory judgment setting forth the terms of the award, and the issues and matters resolved. Appellate relief from the interlocutory judgments would be available by application for an extraordinary writ (*86 Cal. App. 4th 1415, 1440)* .

[g] Post-Arbitration Attorney's Fees

Carole Ring & Associates v. Nicastro *(2001) 87 Cal. App. 4th 253, 104 Cal. Rptr. 2d 519* , was based on an agreement under which defendant/appellant listed property with plaintiff/respondent. During the term of the listing, defendant executed a lease of the property, which plaintiff claimed was a breach of the agreement and entitled it to the commission. The lessee agreed to move out in 30 days if there the property was sold. The arbitrator ruled for defendant, and found that defendant was the prevailing party, but also provided that each party bear their own attorney's fees and costs. After moving for reconsideration, defendant moved to vacate the award. That motion was granted, but reversed by the court of appeal. On remand after reversal, defendant sought attorney's fees and confirmation of the award. The court confirmed the award, but denied attorney's fees. Defendant appealed again, contending that the superior court abused its discretion in refusing to remand the issue of attorney fees and costs incurred at the arbitration level to the arbitrator, and in denying his request for attorney fees and costs incurred in post-arbitration judicial proceedings.

The court of appeal held that the judgment confirming the award conclusively determined the issue of attorney's fees for the arbitration, but reversed and remanded, ordering the trial court to determine defendant's reasonable attorney's fees for post-arbitration judicial proceedings (*87 Cal. App. 4th 253, 255, 262)* . The court of appeal said that the superior

court was not required by the arbitrator's denial of attorney fees to deny attorney fees for post-arbitration judicial proceedings. In fact, on the record before it, the superior court was required to award defendant, as the party prevailing on the contract, reasonable attorney fees and costs for post-arbitration judicial proceedings. The court said that *Code Civ. Proc. § 1293.2* addresses the matter of costs in judicial proceedings relating to arbitration, such as a petition to confirm, correct or vacate an award, and in this case, the appeal and the proceedings on remand (*87 Cal. App. 4th 253, 255, 260)* . The court of appeal said that *Code Civ. Proc. § 1293.2* was mandatory and incorporated *Code Civ. Proc. § 1033.5(a)(10)(A)*, under which attorney's fees are recoverable as costs when the contract authorizes them. Thus, as the prevailing party, defendant was entitled to its attorney's fees and costs for the post-arbitration judicial proceedings (*87 Cal. App. 4th 253, 255, 260-262)* .

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20C ARBITRATION: CONFIRMING, CORRECTING, OR VACATING THE AWARD
PART II. FORMS
A. Procedures for Confirming, Correcting, or Vacating Award

2-20C California Points & Authorities § 20C.11

§ 20C.11 Opposing Petition to Vacate Arbitration Award and Requesting Confirmation of Award

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN OPPOSITION TO PETITION
Petitioner,	)	TO VACATE AWARD
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Respondent.	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THE AWARD SHOULD NOT BE VACATED. RATHER, THE AWARD SHOULD BE CONFIRMED, AS IT IS NOT PROPER TO CORRECT OR VACATE IT, OR TO DISMISS THE PROCEEDING.

A. Response to Petition to Vacate Award and Request to Confirm. A person named as respondent in a petition respecting an arbitration award may file a response requesting that the award be confirmed, vacated or corrected, or that the petition be dismissed (*Code Civ. Proc. §§ 1285.2, 1290*).

B. Confirmation of Award Unless Otherwise Ordered. [*See § 20C.10[1], Paragraph B.*]

C. Award Presumed Valid. [*See § 20C.10[1], Paragraph C.*]

[*Optional*] **D. Time for Filing Response Requesting Confirmation of Award.** A response to a petition must be served and filed within 10 days after service of the petition[, except that if the petition is served in the manner provided in *Code of Civil Procedure Section 1290.4(b)(2)*, the response must be served and filed within 30 days after service of the petition]. [This time may be extended by application of *Code of Civil Procedure Section 1013*] (*Code Civ. Proc. § 1290.6* [*see Hirsch v. Ensign (1981) 122 Cal. App. 3d 521, 530, 176 Cal. Rptr. 17]*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This form may be used to support a response opposing a petition to vacate an arbitration award and to request confirmation of that award. If the other party has not yet filed a petition to vacate the award, use the form at § 20C.10 instead of this one. If the award needs to be corrected before it is confirmed, combine this form with appropriate portions of the form at § 20C.12.

This form does not provide a complete memorandum but is designed to be combined with memoranda from § 20C.60 et seq. addressing any issue placed in contention by the petition seeking to vacate the award and any other issue that respondent anticipates may be in contention.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should show when the award was served, when the petition to vacate the award was served, and that this response requesting confirmation is timely. Generally, it will be appropriate to attach a copy of the award [*see Shepherd v. Greene (1986) 185 Cal. App. 3d 989, 994, 230 Cal. Rptr. 233* (*discussed under § 20C.12[3][a]*)].

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For a form of petition to confirm an arbitration award that may be supported by this memorandum, as well as a procedural checklist, see California Forms of Pleading and Practice, Ch. 34, *Contractual Arbitration: Judicial Review* (Matthew Bender).

[d] Related Memoranda

For memoranda to combine with this form, regarding other matters that the responsemay need to address, see *§ 20C.60* et seq.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Time for Filing Response Requesting Confirmation of Award

Code Civ. Proc. § 1290.6 provides that the time stated therein for serving and filing a response may be extended by an agreement in writing between the parties to the court proceeding or, for good cause, by order of the court.

Code Civ. Proc. § 1290.4(b)(2) provides that service outside California must be made by mailing the copy of the petition and notice and other papers by registered or certified mail. Personal service is the equivalent of service by mail. Proof of service by mail must be made by affidavit showing mailing together with the return receipt of the United States Post Office bearing the signature of the person on whom service was made. Notwithstanding any other provision on arbitration (*Code Civ. Proc. § 1280 et seq.*), if service is made in the manner provided in this paragraph, the petition may not be heard until at least 30 days after the date of service.

Hirsch v. Ensign *(1981) 122 Cal. App. 3d 521, 176 Cal. Rptr. 17* , is discussed at *§ 20C.21[3][a]*.

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CHAPTER 20C ARBITRATION: CONFIRMING, CORRECTING, OR VACATING THE AWARD
PART II. FORMS
A. Procedures for Confirming, Correcting, or Vacating Award

2-20C California Points & Authorities § 20C.12

§ 20C.12 Supporting Petition or Response Requesting Award Be Corrected and Confirmed as Corrected

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Petitioner,	)	MEMORANDUM IN SUPPORT OF
vs.	)	_____ [PETITION *or* RESPONSE]
_____ [*name*],	)	REQUESTING CORRECTION OF ARBITRATION
Respondent.	)	AWARD [AND CONFIRMATION OF AWARD AS
	)	CORRECTED]
	)	Date: _____
	)	Time: _____
	)	Location: _____
		[Judge: _____]
		Date Action Filed: _____
		Trial Date: none

_____

THE AWARD SHOULD BE CORRECTED BY _____ [*specify, e.g.*, DELETING THE AWARD OF ATTORNEY'S FEES] AND CONFIRMED AS CORRECTED BECAUSE _____ [*specify, e.g.*, THE AWARD OF ATTORNEY'S FEES WAS BEYOND THE ARBITRATOR'S JURISDICTION AND CORRECTING THE AWARD WILL NOT AFFECT THE MERITS OF THE DECISION].

[*EITHER*]

A. Grounds for Correcting Award: Evident Miscalculation of Figures or Mistake in Description. Subject to *Code of Civil Procedure Section 1286.8*, the court, unless it vacates the award must correct the award and confirm it as corrected if the court determines that there was an evident miscalculation of figures or an evident mistake in the description of any person, thing, or property referred to in the award (*Code Civ. Proc. § 1286.6(a)*; *see Shepherd v. Greene (1986) 185 Cal. App. 3d 989, 994, 230 Cal. Rptr. 233* (burden of establishing error)).

[*AND/OR*]

A. Grounds for Correcting Award: Arbitrator Exceeded Power and Award Is Correctable Without Affecting Merits. Subject to *Code of Civil Procedure Section 1286.8*, the court, unless it vacates the award must correct the award and confirm it as corrected if the court determines that the arbitrators exceeded their powers but the award may be corrected without affecting the merits of the decision on the controversy submitted (*Code Civ. Proc. § 1286.6(b)*; *Baldwin Co. v. Rainey Construction Co. (1991) 229 Cal. App. 3d 1053, 1057-1059, 280 Cal. Rptr. 499* ; *see also Wade v. Schrader (2008) 168 Cal. App. 4th 1039, 1045-1049, 85 Cal. Rptr. 3d 865* (since nonsettling defendants were entitled to settlement credit as a matter of law, and since the arbitrator did not take the settlement credit into account in making the arbitration award, applying the settlement credit in satisfaction of the judgment was not really a modification of the arbitration award)).

[*AND/OR*]

A. Grounds for Correcting Award: Imperfect Form Not Affecting Merits. Subject to *Code of Civil Procedure Section 1286.8*, the court, unless it vacates the award must correct the award and confirm it as corrected if the court determines that the award is imperfect in a matter of form, not affecting the merits of the controversy (*Code Civ. Proc. § 1286.6(c)*).

[*CONTINUE*]

[*Optional*] **B. Correction of Award in Response to Request Therefor.** The court may correct an award if a petition or response requesting that the award be corrected has been duly served and filed (*Code Civ. Proc. § 1286.8(a)*).

[*Optional*] **C. Correction of Award in Response to Request That Award Be Vacated.** The court may correct an award if a petition or response requesting that the award be vacated has been duly served and filed and (1) all petitioners and respondents are before the court; or (2) all petitioners and respondents have been given reasonable notice that the court will be requested at the hearing to correct the award or that the court on its own motion has determined to correct the award and all petitioners and respondents have been given an opportunity to show why the award should not be corrected (*Code Civ. Proc. § 1286.8(b)*).

[*Optional*] **D. Time for Filing Petition Requesting Correction.** A petition to correct an award must be served and filed not later than 100 days after the date of the service of a signed copy of the award on petitioner (*Code Civ. Proc. § 1288*).

[*Optional*] **E. Earliest Time Petition May Be Filed.** [*See § 20C.10[1], Paragraph E*]

[*Optional*] **F. Time for Filing Response Requesting Vacation or Correction.** [*See § 20C.21[1], Paragraph I.*].

[*Optional*] **G. Tolling of Time for Filing Petition Requesting Correction.** When[, pursuant to *Business and Professions Code Section 6203(b)*], a party files a complaint relating to the matter that has been arbitrated, the time for

filing a petition to correct the arbitration award is tolled from the date the complaint is filed until adjudication of that action becomes final (*Shepherd v. Greene (1986) 185 Cal. App. 3d 989, 993, 230 Cal. Rptr. 233*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This form may be used to support a petition or response that requests the court to correct an arbitration award and to confirm that award as corrected [*Code Civ. Proc. § 1286.6*; *compare Code Civ. Proc. § 1288.6* (application to arbitrators for correction)]. The optional paragraphs related to the procedural and timing requirements are for use when appropriate in particular situations. This form does not provide a complete memorandum but is designed to be combined with memoranda from § 20C.30 et seq., addressing the particular basis for correction, as well as memoranda from § 20C.60 et seq., addressing any particular challenge that has been made or may be anticipated with regard to confirmation of the award.

If the other party has not yet filed a petition to vacate the award, and counsel wishes to initiate proceedings to correct and confirm the award, combine this form with the appropriate portions of the form at § 20C.10. If correction is being sought in response to a request that the award be vacated, combine this form with appropriate portions of the form at § 20C.11.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should show when the award was served, whether and when any petition to confirm or to vacate the award was served, and that this request or response requesting correction is timely. Generally, it will be appropriate to attach a copy of the award [*but see Shepherd v. Greene (1986) 185 Cal. App. 3d 989, 994, 230 Cal. Rptr. 233* (discussed under [3][a], *below*)].

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For forms of petition and response requesting correction of an arbitration award that may be supported by this memorandum, as well as a procedural checklist, see California Forms of Pleading and Practice, Ch. 34, *Contractual Arbitration: Judicial Review* (Matthew Bender).

[d] Related Memoranda

For memoranda to combine with this form, regarding the basis for correction of the award, see *§ 20C.30* et seq.

For a memorandum asserting that an arbitrator can correct an award on his or her own initiative to include an inadvertently omitted finding, see *§ 20C.103*.

If the "correction" that is required is the addition of a party's alter ego as judgment debtor, see *Ch. 20E, Arbitration: Effect of Award, § 20E.13*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Grounds for Correcting Award: Evident Miscalculation of Figures or Mistake in Description

The facts and procedural background of ***Shepherd v. Greene*** *(1986) 185 Cal. App. 3d 989, 230 Cal. Rptr. 233* , are discussed under [b], *below*. The court noted that even if the petition was considered timely, it was error to grant the correction because no miscalculation was apparent on the face of the award. The appellate record did not contain the award, the arbitration record, or a transcript of the proceedings in the trial court. Thus, the court of appeal had nothing to review but the one-page judgment, and was bound by the rule that a judgment or order of a lower court is presumed correct and that all intendments and presumptions are indulged in to support it on matters as to which the record is silent; error must be affirmatively shown (*185 Cal. App. 3d 989, 994)* .

[b] Grounds for Correcting Award: Arbitrator Exceeded Power and Award Is Correctable Without Affecting Merits

Baldwin Co. v. Rainey Construction Co. *(1991) 229 Cal. App. 3d 1053, 280 Cal. Rptr. 499* , involved a construction dispute. The contract included a warranty retention provision, under which the owner was entitled to withhold $10,000 for a year following recordation of the notice of completion, then to be paid less any claims made for warranty performance and correction of construction deficiencies. As of the arbitration date, no notice of completion had been filed. The arbitrator found in the contractor's favor for $57,109.20. In addition, the award found that the contractor was entitled to payment of the $10,000 withheld as a warranty retention pursuant to the contract less any claims made for warranty performance and correction of construction deficiencies. The trial court rejected the portion of the award related to the warranty retention and confirmed the balance of the award.

The court of appeal affirmed. The year (from recordation of notice of completion) had not elapsed. Therefore, that portion of the award was clearly beyond the arbitrator's jurisdiction. The merits of the decision were not affected by the correction, because the court merely severed out that portion of the award, without prejudice to further litigation in that regard (*229 Cal. App. 3d 1053, 1058)* . Under *Code Civ. Proc. § 1286.6(b)*, a court has power to confirm part of an award and reject another part (*229 Cal. App. 3d 1053, 1057-1059)* .

In ***Wade v. Schrader*** *(2008) 168 Cal. App. 4th 1039, 1045-1049, 85 Cal. Rptr. 3d 865* , plaintiff initially sued defendants (Schraders) and others, claiming that they had wrongfully deprived plaintiff of his stock. Plaintiff settled his

claims against several defendants. Plaintiff's claims against Schraders were resolved through binding arbitration. Although the arbitrator ruled in plaintiff's favor, the amount of the award was less than the total plaintiff had received from the settling codefendants. Schraders moved for an order compelling satisfaction of the judgment, arguing that the proceeds from plaintiff's pre-arbitration settlements completely offset the judgment against them, and the trial court granted the motion.

The court of appeal affirmed the trial court's decision. Pursuant to *Code Civ. Proc. 877*, a court has the authority to offset an arbitration award against a nonsettling defendant by awarding a settlement credit for a pre-arbitration settlement of the same matter. Since Schraders were entitled to the settlement credit as a matter of law, and since the arbitrator did not take the settlement credit into account in making the arbitration award, applying the settlement credit in satisfaction of the judgment was not really a modification of the arbitration award upon which the judgment was based. Allowing the nonsettling defendants a credit against a future judgment promotes equitable sharing of fault and prevents the plaintiff from obtaining an unfair double recovery (*168 Cal. App. 4th 1039, 1045-1049)* .

[c] Tolling of Time for Filing Petition Requesting Correction

Defendant in ***Shepherd v. Greene*** *(1986) 185 Cal. App. 3d 989, 230 Cal. Rptr. 233* , was plaintiffs' attorney in a medical malpractice action. The fee agreement provided for a 40 percent contingency fee, which amounted to $260,000. Plaintiff claimed that figure was in excess of the fee allowed by *Bus. & Prof. Code § 6146*. Defendant retained $260,000 of the settlement proceeds. The dispute was submitted to arbitration pursuant to *Bus. & Prof. Code § 6200 et seq.* On December 27, 1984, the State Bar arbitrators awarded plaintiff $101,450 plus interest from July 9, 1984. The award was served on the parties on January 3, 1985. Defendant filed a civil complaint against plaintiff on February 1, 1985, seeking trial after arbitration pursuant to *Bus. & Prof. Code § 6203(b)*. Plaintiff's demurrer to that action was sustained without leave to amend and judgment of dismissal was entered. On April 26, 1985, 113 days after service of the arbitration award, plaintiff filed a petition to correct the award and to confirm it as corrected. The award was corrected to $137,969.95, apparently to reflect proper calculation of interest, and confirmed. Judgment was entered thereon and defendant appealed.

The court of appeal affirmed. Defendant contended that the petition to correct and confirm was untimely, as beyond the 100-day limitation in *Code Civ. Proc. § 1288.2*. Plaintiff contended, and the court agreed, that defendant's filing of the complaint tolled the 100-day limitation from the time the complaint was filed until a final adjudication in the superior court action (*185 Cal. App. 3d 989, 993)* . The superior court action was appealed and did not become final until May 29, 1985. Thus, under the scheme envisioned by *Bus. & Prof. Code §§ 6203-6204*, the petition to correct and confirm the award was actually premature, in that it should not have been filed until the appeal of the superior court action had become final; but because defendant had a full hearing on the merits, defendant would not be prejudiced by affirmance of the judgment confirming the award (*185 Cal. App. 3d 989, 994)* .

[4] Additional Authorities

[a] Grounds for Correcting Award

See also *Bellflower Education Assn. v. Bellflower Unified School Dist. (1991) 228 Cal. App. 3d 805, 812-813, 279 Cal. Rptr. 179* , discussed at *§ 20C.20[3][b]*.

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2-20C California Points & Authorities § 20C.13

§ 20C.13 Order Compelling Arbitration Was Made by Disqualified Judge

[1] FORM

THE AWARD NEED NOT BE VACATED BUT A NEW JUDGE MUST DETERMINE WHETHER ARBITRATION SHOULD BE COMPELLED.

A. Order Compelling Arbitration Was Made by Disqualified Judge. If a judge who is disqualified does not disclose the disqualification but instead hears and determines the petition to compel arbitration, the order compelling arbitration must be vacated, because a disqualified judge's rulings are void regardless of their legal correctness. Another judge must reconsider the petition to compel arbitration. The arbitration award based on the arbitration ordered by the disqualified judge does not necessarily need to be vacated. Should the trial court conclude the motion to compelshould be granted, the parties may petition to vacate and/or confirm the arbitration award. The appropriate standard is whether a person aware of the facts might reasonably entertain a doubt that the arbitrator(s) would be able to be impartial. Only if the trial court concludes that the arbitration was tainted by the original trial court judge, or should be vacated on other grounds, should the trial court vacate the arbitration award. [On the renewed petition(s) to confirm and/or vacate the award, the parties may submit whatever supplemental evidence and argument the court may deem appropriate] (*Rossco Holdings Inc. v. Bank of America (2007) 149 Cal. App. 4th 1353, 1363-1368, 58 Cal. Rptr. 3d 141*).

[2] Comments

[a] Use of Form

This form may be used to resist a petition to vacate an arbitration award when the order compelling arbitration was made by a disqualified judge but there has been no determination of whether the arbitrator(s) might appear biased. The form describes the correct procedure to be followed in that situation. This form is not intended to be a complete memorandum. Counsel should combine it with authority from Ch. 20D, *Arbitration: Dismissing*, § 20D.10 et seq. and any other forms addressing any other relevant issues.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, the argument must show that the judge who ordered arbitration was disqualified and that the basis for the disqualification existed when the order compelling arbitration was made. It is advisable for counsel to submit evidence in support of factual statements by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file (including verified pleadings), or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied if plaintiff-respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement)].

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Order Compelling Arbitration Was Made by Disqualified Judge

The judge who heard and determined the petition to compel arbitration in ***Rossco Holdings Inc. v. Bank of America*** *(2007) 149 Cal. App. 4th 1353, 58 Cal. Rptr. 3d 141* , was disqualified because he had had discussions regarding employment with a dispute resolution service [*see Code Civ. Proc. § 170.1(a)(8)*], but never disclosed that nor disqualified himself. In fact, he did not know of the law rendering him disqualified, and when he learned of it, opined it was a "ridiculous law that basically disqualifies not for reasons of actual conflict by virtue of having some contact with the parties before you, but by virtue of having contact with an industry." After an award was rendered (after two weeks of arbitration at a cost in excess of $700,000 in arbitrator's fees alone), the parties made cross-motions to vacate and to confirm the award. At that point, the trial court judge disqualified himself. After various stay, continuances, and reconsideration, the case was transferred to a new judge who vacated both the order compelling arbitration and the arbitration award. Bank of America appealed.

The court of appeal reversed and remanded finding the trial court did not err in vacating the order compelling arbitration, but that it was premature to vacate the arbitration award (*149 Cal. App. 4th 1353, 1356, 1361, 1368)* . The court of appeal noted that *Code Civ. Proc. § 170.1* does not disqualify only those judges who have actual bias; it disqualifies judges in situations in which the Legislature has presumed bias, or the appearance of possible bias may exist and a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial. Orders made by a disqualified judge are void (*149 Cal. App. 4th 1353, 1362*), regardless of whether they happen to have been legally correct (*149 Cal. App. 4th 1353, 1367)* . Disqualification occurs when the facts creating disqualification arise, not when the disqualification is established. Thus, the trial court judge was disqualified at the time he heard the motion to compel arbitration because he had within the past two years participated in discussions regarding prospective employment as a dispute resolution neutral. He was disqualified from the case, regardless of his lack of knowledge of the law providing for his disqualification. His order compelling arbitration was therefore void (*149 Cal.*

App. 4th 1353, 1363) . However, it does not necessarily follow that the arbitration award should also have been vacated (*149 Cal. App. 4th 1353, 1364)* . The parties are entitled to a reconsideration of the motion to compel arbitration before a new judge (*149 Cal. App. 4th 1353, 1366*). Should the trial court conclude the motion to compel should be granted, the next step will be to determine whether the arbitration which has already occurred should be given legal effect (*149 Cal. App. 4th 1353, 1366-1367)* . The appropriate course would be for the parties to move ahead with their cross-petitions to vacate and confirm the arbitration award. In reconsidering the cross-petitions to vacate and confirm the arbitration award, the appropriate standard is whether a person aware of the facts might reasonably entertain a doubt that the arbitrators would be able to be impartial. Only if the trial court concludes that thearbitration was tainted by the original trial court judge, or should be vacated on other grounds, should the trial court vacate the arbitration award. On the renewed cross-petitions to confirm and vacate the award, the parties may submit whatever supplemental evidentiary matters and argument the court may deem appropriate (*149 Cal. App. 4th 1353, 1367)* .

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2-20C California Points & Authorities § 20C.14

[Reserved]

§ 20C.14[Reserved]

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2-20C California Points & Authorities § 20C.15

§ 20C.15 Corrected Award Served Late and Making Corrections Beyond Arbitrator's Powers Is Not To Be Given Effect

[1] FORM

THE CORRECTED AWARD MADE BY THE ARBITRATOR ON _____ [*date*], BUT NOT SERVED UNTIL _____ [*date*] IS OF NO EFFECT; [FURTHER, IT PURPORTS TO MAKE CORRECTIONS FOR _____ (*specify*, *e.g*, ERRORS OF LAW), THUS EXCEEDING THE ARBITRATOR'S POWER].

A. Corrected Award Served More than 30 Days After Service of Award. If an arbitrator purports to correct an award but does not serve the corrected award until more than 30 days after service of the original award, the purported corrected award is of no effect, having been deemed denied when not served within that 30-day period (*Code Civ. Proc. § 1284*; *Landis v. Pinkertons, Inc. (2004) 122 Cal. App. 4th 985, 990, 993, 18 Cal. Rptr. 3d 890*).

B. Arbitrator Cannot Correct Award for Errors of Law. The grounds set forth in *Code of Civil Procedure Section 1286.6(a)* and *(c)*, on which an arbitrator is authorized to correct an award, do not include errors of law. Thus, a corrected award evidencing changes based on errors of law exceeds the arbitrator's power and is not enforceable (*Code Civ. Proc. § 1286.6(a), (c)*; *Landis v. Pinkertons, Inc. (2004) 122 Cal. App. 4th 985, 992, 18 Cal. Rptr. 3d 890*).

[2] Comments

[a] Use of Form

This form may be used to support a petition or response that requests the court to vacate or refuse to give effect to a corrected award made by the arbitrator, but not served, or served too late and/or making corrections other than those the arbitrator is empowered by *Code Civ. Proc. § 1286.6(a), (c)* to make.

If the original (uncorrected) award has not yet been confirmed or vacated, counsel may wish to combine this form with the appropriate portions of the form at § 20C.10 (to confirm) or § 20C.20 (to vacate).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should show when the award was served, whether and when any petition to confirm or to vacate the award was served, and whether the request or response requesting correction was timely. Generally, it will be appropriate to attach a copy of both the original and the corrected awards [*but see Shepherd v. Greene (1986) 185 Cal. App. 3d 989, 994, 230 Cal. Rptr. 233]* .

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For forms of petition and response requesting correction of an arbitration award that may be supported by this memorandum, as well as a procedural checklist, see California Forms of Pleading and Practice, Ch. 34, *Contractual Arbitration: Judicial Review* (Matthew Bender).

[d] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

For a memorandum asserting that an arbitrator can correct an award on his or her own initiative to include an inadvertently omitted finding, see *§ 20C.103*. For a form for use when the arbitration clause includes a valid provision for review by a second arbitrator who has authority to correct errors of law, see *Ch. 20, Arbitration: Compelling, § 20.87*.

[3] Discussion of Authorities

[a] Corrected Award Served More than 30 Days After Service of Award

Code Civ. Proc. § 1284 provides that the arbitrators, on written application of a party to the arbitration, may correct the award on any of the grounds set forth in *Code Civ. Proc. § 1286.6(a)* and *(c)* not later than 30 days after service of a signed copy ofthe award on the applicant. An application for correction must be made not later than 10 days after service of a signed copy of the award on the applicant. On or before making the application, the applicant must deliver or mail a copy of the application to all of the other parties to the arbitration. Any party to the arbitration may make

written objection to an application for correction. The objection must be made not later than 10 days after the application is delivered or mailed to the objector. On or before making an objection, the objector must deliver or mail a copy of the objection to the applicant and all the other parties to the arbitration.

Code Civ. Proc. § 1284 further provides that the arbitrators must either deny the application or correct the award. The denial of the application or the correction of the award must be in writing and signed by the arbitrators concurring therein, and the neutral arbitrator is to serve a signed copy of the denial or correction on each party to the arbitration personally or by registered or certified mail or as provided in the agreement. If no denial of the application or correction of the award is served within the 30-day period provided in this section, the application for correction is to be deemed denied on the last day thereof.

***Landis v. Pinkertons, Inc**. (2004) 122 Cal. App. 4th 985, 18 Cal. Rptr. 3d 890* , arose from arbitration of a wrongful termination claim and an award in plaintiff's favor for damages, including damages for emotional distress. Defendant filed a request for correction of the award by deletion of damages for emotional distress. Plaintiff did not file a motion to confirm the award but instead filed a motion to amend the pleadings to conform to proof by adding causes of action for negligent and intentional infliction of emotional distress. The motions were argued on August 22, 2002. On August 30, the arbitrator signed an amended award, striking the damages for emotional distress and denying plaintiff's motion to amend the pleadings to conform to proof. The amended award was not served on the parties until October 14, 2002; however, on September 13, consistent with faxed notice to defendant's attorney, plaintiff filed an ex parte application to enforce the original August 5, 2002, arbitration award or, in the alternative, to prevent the issuance of an amended award due to lack of jurisdiction. Defendant opposed the motion. The trial court confirmed the original award and entered judgment accordingly, taking the position with regard to the lack of a noticed motion, that even if the matter had been heard on a noticed motion, defendant's counsel could do nothing further for his clients in representing their interests. Defendant appealed.

The court of appeal affirmed (*122 Cal. App. 4th 985, 993)* . As to the corrected award, the court noted that *Code Civ. Proc. § 1284* provides that an arbitrator may correct the award on any of the grounds set forth in *Code Civ. Proc. § 1286.6(a)* and *(c)* not later than 30 days after service of a signed copy of the award. It further provides that if no denial of the application or correction of the award is served within the 30-day period provided, the application for correction shall be deemed denied on the last day of that period. Inasmuch as the corrected arbitration award was not served by September 4, 2002, 30 days after service of the original award, defendant's application for correction of the award was deemed denied (*122 Cal. App. 4th 985, 990)* .

[b] Arbitrator Cannot Correct Award for Errors of Law

The grounds for correcting an award set forth in ***Code Civ. Proc. § 1286.6(a), (c)*** are (1) that there was an evident miscalculation of figures or an evident mistake in the description of any person, thing, or property referred to in the award; and (2) that the award is imperfect in a matter of form, not affecting the merits of the controversy.

The facts and procedural background of ***Landis v. Pinkertons, Inc**. (2004) 122 Cal. App. 4th 985, 18 Cal. Rptr. 3d 890* , and the portion of the opinion discussing the arbitrator's failure to timely serve the corrected award are discussed at [a], *above*. The court noted that an arbitrator's power to correct an award after it has been issued to the parties is limited to evident miscalculations of figures or descriptions of persons, things, or property [*Code Civ. Proc. § 1286.6(a)*] and nonsubstantive matters of form that do not affect the merits of the controversy [*Code Civ. Proc. § 1286.6(c)*]. An arbitrator may not correct an award because of having later determined a factual or legal error had been made in the award. An arbitrator may issue an amended or supplemental award for having inadvertently omitted a ruling on a submitted issue in the original award, but the amended award here did not fall within this category. Thus, it was beyond the arbitrator's power to make this correction (*122 Cal. App. 4th 985, 992)* .

As to the contention that the arbitrator exceeded his powers by issuing an award for damages for emotional distress, the

court noted that defendant never moved to vacate the award, and did not raise this ground in opposition to the motion to confirm the award. Because defendant did not raise this issue below, the court of appeal could not reverse the judgment on that ground. Moreover, the arbitrator did not exceed his authority in issuing the original arbitration award; at most, he made an error of law as to what damages could be awarded in the action. An error of law is not a basis for correcting the original award (*122 Cal. App. 4th 985, 991-992)* .

As to the fact that the motion to confirm the award was made ex parte, the court of appeal agreed with the trial court: defendants was not prejudiced by this procedural impropriety and had the opportunity to oppose confirmation as if plaintiff filed a petition in accordance with *Code Civ. Proc. § 1285* (*122 Cal. App. 4th 985, 993)* .

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2-20C California Points & Authorities §§ 20C.16-20C.19

[Reserved]

§§ 20C.16[Reserved]

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2-20C California Points & Authorities § 20C.20

§ 20C.20 Supporting Petition to Vacate Arbitration Award

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF PETITION TO
Petitioner,	)	VACATE AWARD [AND ORDER REHEARING
vs.	)	OF CONTROVERSY]
_____ [*name*],	)	Date: _____
Respondent.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		Trial Date: none

_____

THE AWARD SHOULD BE VACATED BECAUSE _____ [OF CORRUPTION OF A PARTY *or* OF CORRUPTION OF AN ARBITRATOR *or* OF MISCONDUCT OF AN ARBITRATOR *or* THE ARBITRATORS EXCEEDED THEIR POWERS *or* THE ARBITRATORS ACTED CONTRARY TO THE ARBITRATION STATUTES].

A. Petition to Vacate Award. A party to an arbitration in which an award has been made may petition the court to vacate the award (*Code Civ. Proc. § 1285*).

B. Grounds for Vacating Award. If the requirements of *Section 1286.4 of the Code of Civil Procedure* are met, the

court must vacate an award on the grounds set out in *Section 1286.2 of the Code of Civil Procedure* (*see Code Civ. Proc. § 1286.2*).

[*EITHER*]

C. Award Procured by Undue Means. The court shall vacate the award on a determination that the award was procured by corruption, fraud, or other undue means (*Code Civ. Proc. § 1286.2(a)(1)*).

[*AND/OR*]

D. Corruption of Arbitrator. The court shall vacate the award on a determination that there was corruption in any of the arbitrators (*Code Civ. Proc. § 1286.2(a)(2)*).

[*AND/OR*]

E. Misconduct of Neutral Arbitrator. The court shall vacate the award on a determination that the rights of the party seeking an order vacating the award were substantially prejudiced by conduct of a neutral arbitrator (*Code Civ. Proc. § 1286.2(a)(3)*).

[*AND/OR*]

F. Arbitrators Exceeded Their Powers. The court shall vacate the award on a determination that the arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision on the controversy submitted (*Code Civ. Proc. § 1286.2(a)(4)*; *Sunnyvale Unified Sch. Dist. v. Jacobs (2009) 171 Cal. App. 4th 168, 175, 89 Cal. Rptr. 3d 546* (affirming vacation of award); *DiMarco v. Chaney (1995) 31 Cal. App. 4th 1809, 1814-1815, 37 Cal. Rptr. 2d 558* ; *see also Bellflower Education Assn. v. Bellflower Unified School Dist. (1991) 228 Cal. App. 3d 805, 812-813, 279 Cal. Rptr. 179* (confirming as corrected)).

[*AND/OR*]

G. Prejudicial Conduct by Arbitrators. The court shall vacate the award on a determination that the rights of the party seeking an order vacating the award were substantially prejudiced by the refusal of the arbitrators to postpone the hearing on sufficient cause being shown therefor, by the refusal of the arbitrators to hear evidence material to the controversy, or by other conduct of the arbitrators contrary to the provisions of *Sections 1280 through 1294.2 of the Code of Civil Procedure* (*Code Civ. Proc. § 1286.2(a)(5)*; *Burlage v. Superior Ct. (2009) 178 Cal. App. 4th 524, 531-532, 100 Cal. Rptr. 3d 531* (affirming vacation of award for prejudice due to exclusion of admissible, material evidence)).

[*AND/OR*]

H. Arbitrator Failed to Disqualify Self. The court shall vacate an award on a determination that an arbitrator making the award either:

- Failed to disclose within the time required for disclosure a ground for disqualification of which the

arbitrator was then aware. When the matter the proposed neutral arbitrator failed to disclose in a timely fashion was one of the matters required to be disclosed by *Code of Civil Procedure Section 1281.9(a)*, the court is required by *Code of Civil Procedure Section 1286.2(a)(6)(A)* to vacate the award. There is no room for argument that the undisclosed matter is not one that might cause a reasonable person to question the arbitrator's impartiality. By its 2001 amendments to *Code of Civil Procedure Sections 1281.9* and *1286.2(a)(6)(A)*, the Legislature intended that failure to disclose any of the matters enumerated in *Code of Civil Procedure Section 1281.9(a)* satisfy the "might cause a reasonable person to question" standard [*Section 1286.2(a)(6)(A)* is not preempted by the Federal Arbitration Act]. [A party who fails to obtain disqualification within the time allowed by *Code of Civil Procedure Section 1281.91(c)* still has the right to have the award vacated in accordance with *Code of Civil Procedure Section 1286.2(a)(6)(A)*]. [The right to have an award vacated in accordance with *Code of Civil Procedure Section 1286.2(a)(6)(A)* cannot be waived by agreeing to arbitrate under rules that state the arbitration provider's determinations regarding disqualification will be conclusive. The statutes were passed to advance a public purpose of crucial importance over which the state retained ultimate control] (*Code Civ. Proc. 1286.2(a)(6)(A)*; *Advantage Medical Services, LLC v. Hoffman (2008) 160 Cal. App. 4th 806, 820-823, 72 Cal. Rptr. 3d 935* ; *Ovitz v. Schulman (2005) 133 Cal. App. 4th 830, 835, 849-854, 35 Cal. Rptr. 3d 117* ; *International Alliance of Theatrical Stage Employees, etc. v. Laughon (2004) 118 Cal. App. 4th 1380, 1386-1387, 1392-1394, 14 Cal. Rptr. 3d 341*); or

- Was subject to disqualification on grounds specified in *Code Civ. Proc.§ 1281.91*, but failed on receipt of timely demand to disqualify himself or herself as required by that provision (*Code Civ. Proc. § 1286.2(a)(6)(B)*; *see Code Civ. Proc. § 1281.91(d)* (refers to grounds for disqualification of judge in *Code Civ. Proc. § 170.1*) [The right to disqualify a proposed neutral arbitrator in accordance with *Code of Civil Procedure Sections 1281.9* and *1281.91* cannot be waived by agreeing to arbitrate in accordance with rules that provide some other means of determining whether the proposed neutral arbitrator is to be disqualified. The statutory scheme is designed to primarily to serve the public purpose of promoting public confidence that the arbitration process allows individual rights to take precedence (*Azteca Construction, Inc. v. ADR Consulting, Inc. (2004) 121 Cal. App. 4th 1156, 1168, 18 Cal. Rptr. 3d 142*)].

[*CONTINUE*]

[*Optional*] **I. Deemed Admission If Response Untimely.** The allegations in a petition to vacate an arbitration award are deemed admitted if the opposing party did not file a response within the time period set out in *Section 1290.6 of the Code of Civil Procedure* (*Code Civ. Proc. § 1290*; *Evans Products Co. v. Millmen's Union No. 550 (1984) 159 Cal. App. 3d 815, 819, 205 Cal. Rptr. 731*).

[*Optional*] **J. Time for Filing Petition to Vacate Award.** A petition to vacate an award must be served and filed not later than 100 days after the date of service of a signed copy of the award on petitioner (*Code Civ. Proc. § 1288*; *Louise Gardens of Encino Homeowners' Association, Inc. v. Truck Insurance Exchange (2000) 82 Cal. App. 4th 648, 658-659, 98 Cal. Rptr. 2d 378* ; *Louise Gardens of Encino Homeowners' Association, Inc. v. Truck Insurance Exchange (2000) 82 Cal. App. 4th 648, 658-659, 98 Cal. Rptr. 2d 378* ; *Knass v. Blue Cross of California (1991) 228 Cal. App. 3d 390, 395-396, 279 Cal. Rptr. 124*).

[*Optional*] **K. Earliest Time Petition May Be Filed.** [*See § 20C.10[1], Paragraph E.*]

[*Optional*] **L. Arbitrator's Testimony May Not Be Considered.** An arbitrator's testimony concerning the arbitration is expressly prohibited (except in circumstances not relevant here) by *Evidence Code § 703.5*. Therefore, it is inappropriate to rely on the arbitrator's _____ [*specify, i.e.,* declaration] in determining whether to confirm or vacate this award [*Evid. Code § 703.5*; *Trabuco Highlands Community Assn. v. Head (2002) 96 Cal. App.*

4th 1183, 1191, 117 Cal. Rptr. 2d 842] .

[*Optional*] **M. Party Who Had Award Vacated Is Entitled to Post-Arbitration Costs and Attorney's Fees.** *Code of Civil Procedure Section 1293.2* is applicable to petitions to vacate awards and is mandatory. The court's determination under *Code of Civil Procedure Section 1293.2* which party, if either, is the prevailing party in a post-arbitration judicial proceeding is a judicial function distinct from the arbitrator's decision to award or not to award fees in the arbitration itself. The prevailing party in a proceeding to vacate an award is entitled to costs, including attorney's fees incurred in that post arbitration judicial proceeding if they are provided for by the contract (*Code Civ. Proc. § 1293.2*; *Marcus & Millichap Real Estate Investment Brokerage Co. v. Woodman Investment Group, Inc. (2005) 129 Cal. App. 4th 508, 513-516, 28 Cal. Rptr. 3d 584* (distinguishing situation in which it may be too soon to tell which is prevailing party for purposes of award of costs and attorney's fees); *see MBNA America Bank, N.A. v. Gorman (2006) 147 Cal. App. 4th Supp. 1, 7-10, 54 Cal. Rptr. 3d 724* (on denial of petition to confirm; also upholding alternate ground of fee award pursuant to *Code Civ. Proc. § 1021.5*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be used to support a petition to vacate an arbitration award. It does not provide a complete memorandum, but should be combined with particular memoranda addressing each ground petitioner asserts for vacating the award [*see § 20C.150* et seq.]. Any of the bracketed language in Paragraph H. that is applicable to counsel's situation should be used. The propositions that one still has the right to vacate under *Code Civ. Proc. § 1286.2(a)(6)(A)* if one missed the deadline for disqualification specified in 1281.91 and that the right to vacate in accordance with 1286.2(a)(6)(A) cannot be waived (first bullet) are from *Advantage Medical Services, LLC v. Hoffman (2008) 160 Cal. App. 4th 806, 72 Cal. Rptr. 3d 935* , discussed at [3][c], *below.* The proposition that the Federal Arbitration Act does not preempt *Code Civ. Proc. 1286.2(a)(6)(A)* (first bullet) is based on *Ovitz v. Schulman (2005) 133 Cal. App. 4th 830, 35 Cal. Rptr. 3d 117* , also discussed at [3][a], *below.* In addition to the statutory grounds for vacating an arbitration award set forth in *Code Civ. Proc. § 1286.2*, courts have recognized two other grounds for vacating an award: (1) mistake, inadvertence, surprise or excusable neglect under *Code Civ. Proc. § 473*, which is the subject of the form at § 20C.212, and (2) illegality that contravenes public policy [*see § 20C.210*]. Optional Paragraph M is for use in the admittedly unusual situation in which rehearing is not ordered in the same proceeding [*see* discussion at *§ 20C.20[3][g]*].

Venue and jurisdiction for petitions to vacate arbitration awards are the same as for petitions to confirm awards [*see Code Civ. Proc. §§ 86(a)(10)(A), 1292.2*; (*set forth in § 20C.10[1*], Optional Paragraphs F and G)].

If the other party has already filed a petition to confirm the award, counsel should use the form at § 20C.21 instead of this one. If counsel wishes to obtain an order for rehearing after the award has been vacated, use the form at § 20C.12 in addition to this one.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his orher case. For example, the argument should show that no petition to confirm the award has been filed, when the award was served, and that the request to vacate the award is timely. Generally, it will be appropriate to attach a copy of the award [*see Shepherd v. Greene*

(1986) 185 Cal. App. 3d 989, 994, 230 Cal. Rptr. 233 (*discussed under § 20C.12[3][a]*)].

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For a form of petition to vacate an arbitration award that may be supported by this memorandum, as well as a procedural checklist, see California Forms of Pleading and Practice, Ch. 34, *Contractual Arbitration: Judicial Review* (Matthew Bender).

[d] Related Memoranda

For memoranda to combine with this form addressing the particular grounds for vacating the award, see *§ 20C.150* et seq.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Misconduct of Neutral Arbitrator

Comments to Ethics Standards for Neutral Arbitrators [*see* Cal. Rules of Ct., Appen., Div. VI], adopted effective July 1, 2002, indicate that in addition to providing grounds for vacatur of an arbitrator's award based on a neutral arbitrator's failure to comply with disclosure requirements, other obligations under the standards may also constitute grounds for vacating an arbitration award under *Code Civ. Proc. § 1286.2(a)(3)* if the rights of a party were substantially prejudiced by a violation of those standards [*see* Cal. Rules of Ct., Appen., Div. VI, Comment to Standard 1].

[b] Arbitrators Exceeded Their Powers

Sunnyvale Unified Sch. Dist. v. Jacobs *(2009) 171 Cal. App. 4th 168, 89 Cal. Rptr. 3d 546* , ostensibly affirmed the trial court's vacation of the arbitration award ordering reinstatement of a probationary teacher to his teaching position with respondent school district, after the district allegedly refused to reelect the teacher in retaliation for his participation in protected activities. The trial court's ruling vacated a portion of the arbitration award. The court of appeals noted that an order partially vacating an arbitration award is not authorized by *Code Civ. Proc. § 1286* and, after analyzing the ruling, treated it as a vacation of the entire arbitration award (*171 Cal. App. 4th 168, 174-175)* . On the merits, the court of appeal reiterated that under *Educ. Code § 44929.21*, nonreelection of probationary employees is not

subject to collective bargaining and, therefore, a proper subject of arbitration (*171 Cal. App. 4th 168, 176, 179)* . It then determined that the same reasoning applies to claims of nonreelection for retaliatory reasons (*171 Cal. App. 4th 168, 180-181)* .

The arbitration clause in the contract involved in ***DiMarco v. Chaney*** *(1995) 31 Cal. App. 4th 1809, 37 Cal. Rptr. 2d 558* , provided that "the prevailing party shall be entitled to reasonable attorney's fees and costs." The arbitrator denied the relief plaintiff requested and denied all requests for attorney's fees and costs. The defendant moved the trial court to correct the arbitration award, contending that the arbitrator exceeded his power by not applying the attorney fee provision. The trial court ultimately granted a second motion to correct and confirm the award as corrected, and entered judgment awarding defendant $19,575 in attorney's fees. Plaintiff appealed.

The court of appeal affirmed in part and reversed in part. The court held that under the clause, the award of attorney's fees to the prevailing party was mandatory; the arbitrator had exceeded his power in denying them. The court had power to correct the award in this respect (*31 Cal. App. 4th 1809, 1814-1815)* . The trial court erred by determining the amount of attorney's fees to be awarded, because this was a matter for the arbitrator. The trial court should have remanded the matter to the arbitrator to make this determination (*31 Cal. App. 4th 1809, 1816-1817)* .

Bellflower Education Assn. v. Bellflower Unified School Dist. *(1991) 228 Cal. App. 3d 805, 279 Cal. Rptr. 179* , involved allegations by a teacher that proper probationary and evaluation procedures had not been used in "not reelecting" her to her position for a third academic year. The teacher had been on probation for the previous two years. The school district contended that *Educ. Code § 44929.21* provides that nonreelection of probationary employees may not be subject to arbitration. However, the violation of evaluation procedures was within the scope of collective bargaining. The arbitrator held that the district had violated its evaluation procedures, and ordered the district to cease and desist from conducting further evaluations in violation of these procedures and to reinstate the grievant. The arbitrator's award was vacated, and appeal followed.

The court of appeal reversed the judgment vacating the arbitration award, but remanded to the trial court to issue a judgment confirming the award after correcting it to delete the order of reinstatement. Under *Educ. Code § 44929.21*, nonreelection of probationary employees may not be subject to arbitration. An arbitration award that exceeds the powers vested by the agreement may be vacated (*228 Cal. App. 3d 805, 812)* . By confirming the award except for the reinstatement provision, the trial court could correct the award without affecting the merits of the decision and thereby avoid vacating the award in its entirety (*228 Cal. App. 3d 805, 812-813)* .

[c] Arbitrator Failed to Disqualify Self

Code Civ. Proc. § 1286.2(a)(6) does not apply to arbitration proceedings conducted under collective bargaining agreements between employers and employees or between their respective representatives.

Code Civ. Proc. § 1281.9 requires proposed neutral arbitrators to disclose six categories of potential grounds for disqualification,including the existence of any grounds specified in *Code Civ. Proc. § 170.1*, for disqualification of a judge [*see Code Civ. Proc. § 1281.9(a)(1)*], and any disclosures required by the by far broader Ethics Standards for Neutral Arbitrators in Contractual Arbitration, Cal. Rules of Ct., Appen., Div. VI, Standards 7 and 12, adopted effective July 1, 2002, and Cal. Rules of Ct., Appen., Div. VI, Standard 8, effective January 1, 2003 [*Code Civ. Proc. § 1281.9(a)(2)*]. If any ground specified in *Code Civ. Proc. § 170.1* exists, a neutral arbitrator must disqualify himself or herself on demand of any party made before the conclusion of the arbitration proceeding [*Code Civ. Proc. § 1281.91(d)*; Cal. Rules of Ct., Appen., Div. VI, Standard 10(a)(5)]. For all other grounds of disqualification, a party must serve notice of disqualification within the times specified in Code Civ. Proc. *§ 1281.91(a)* or (b) or the grounds for disqualification are waived unless the proposed neutral arbitrator made a material omission or a material misrepresentation in his or her disclosure [*Code Civ. Proc. § 1281.91(c)*; Cal. Rules of Ct., Appen., Div. VI, Standard 10(a)(1)-(4)].

Notwithstanding any contrary request, consent, or waiver by the parties, an arbitrator must disqualify himself or herself if he or she concludes at any time during the arbitration that he or she is not able to conduct the arbitration impartially [Cal. Rules of Ct., Appen., Div. VI, Standard 10(c)].

NOTE:

The California Ethics Standards will not apply in any arbitration in which the parties have agreed to arbitrate in accordance with New York Stock Exchange (NYSE) Arbitration Rules or the National Association of Securities Dealers (NASD) Code of Arbitration Procedure. Both preempt the California Ethics Standards to the extent that the Securities and Exchange Commission has approved those rules and procedures in accordance with the Securities Exchange Act of 1934 [*Credit Suisse First Boston Corp. v. Grunwald (9th Cir. 2005) 400 F.3d 1119, 1147-1148* (NASD rules); *Mayo v. Dean Witter Reynolds (N.D. Cal. 2003) 258 F. Supp. 2d 1097, 1112* , as corrected at *260 F. Supp. 2d 979* ; *accord Wilmot v. McNabb (N.D. Cal. 2003) 269 F. Supp. 2d 1203* ; *Jevne v. Superior Court (JB Oxford Holdings, Inc.) (2005) 35 Cal. 4th 935, 28 Cal. Rptr. 3d 685, 111 P.3d 954]* . NYSE Rules and NASD Code of Arbitration Procedure have their own disclosure requirements [*see* NYSE Arbitration Rule 610; NASD Code of Arbitration Procedure, Rule 10312].

Advantage Medical Services, LLC v. Hoffman *(2008) 160 Cal. App. 4th 806, 72 Cal. Rptr. 3d 935* , involved wage claims, which were arbitrated through the American Arbitration Association (AAA). After the arbitrator issued an interim award in favor of plaintiffs, defendant learned that the arbitrator and his law firm represented several protection and indemnity clubs which provided insurance and other business services. These clubs procured reinsurance support from syndicates of Lloyd's of London (Lloyd's). Plaintiff was insured through Lloyd's syndicates, and a representative from Lloyd's was present throughout the arbitration. The AAA rejected defendant's requests to disqualify the arbitrator. Defendant filed a petition in trial court seeking an order (1) disqualifying the arbitrator for his failure to disclose his and his law firm's ties to Lloyd's, and (2) vacating the interim award. The trial court granted the petition. Plaintiff appealed.

The court of appeal affirmed after modifying the trial court's order to delete any reference to disqualification of the arbitrator under *Code Civ. Proc. § 1281.91(a)* because the statute does not provide for the disqualification of an arbitrator after the arbitrator has ruled on an issue of contested fact (*160 Cal. App. 4th 806, 809-810, 823)* . The portion of the opinion addressing the need for disclosure is set forth at § 20C.170[3][h]. The court of appeal found that the statutory right to petition a trial court to vacate an arbitration award based on an arbitrator's failure to make required disclosures cannot be waived by the AAA rule stating its determinations regarding disqualification are conclusive (*160 Cal. App. 4th 806, 809, 818)* . The petition for an order disqualifying the arbitrator was filed under *Code Civ. Proc. § 1281.91(a)(1)* and *(2)* and the petition to vacate the award was filed under *Code Civ. Proc. § 1286.2(a)(6)* (*160 Cal. App. 4th 806, 813)* . The court began by noting that its review was deferential (*160 Cal. App. 4th 806, 816)* . The court noted that the duty of disclosure is a continuing duty, applying from service of the notice of the arbitrator's proposed nomination or appointment until the conclusion of the arbitration proceeding (*160 Cal. App. 4th 806, 817)* . And that was an issue. *Code Civ. Proc. § 1281.91(c)* provides that a party waives his or her right to disqualify a proposed neutral arbitrator if the party fails to serve the notice to disqualify pursuant to the times set forth in that section, unless the proposed nominee or appointee makes a material omission or material misrepresentation in his or her disclosure; and in no event may a notice of disqualification be given after a hearing of any contested issue of fact relating to the merits of the claim or after any ruling by the arbitrator regarding any contested matter (*160 Cal. App. 4th 806, 819-820)* . Still, subdivision (c) does not limit the right of a party to vacate an award pursuant to *Code Civ. Proc. § 1286.2* or to disqualify an arbitrator pursuant to any other law or statute. California Rules of Court, Ethics Standards for Neutral Arbitrators in Contractual Arbitration (*Standards*) Standard 10(a)(4) states that an arbitrator is disqualified if a party becomes aware that an arbitrator has made a material omission or material misrepresentation in his or her disclosure and, within 15 days after becoming aware of the omission or misrepresentation and within the time specified in *Code Civ. Proc. § 1281.91(c)*, the party serves a notice of disqualification that clearly describes the material omission or material misrepresentation and how and when the party became aware of this omission or misrepresentation. Standard

10(a)(4) does not provide for disqualification after any ruling by the arbitrator regarding any contested matter. Defendant did not investigate the arbitrator's connections to Lloyd's until after the arbitrator issued the interim award. Thus, the trial court erred by granting the petition to the extent it sought an order of disqualification under *Code Civ. Proc. § 1281.91(c)* (*160 Cal. App. 4th 806, 820)* . That left defendants' only recourse to seek vacatur of the interim award under to *Code Civ. Proc. § 1286.2(a)(6)(A),* which mandates that a court must vacate an arbitrator's award if the arbitrator making the award failed to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware. The arbitrator was on notice as of the hearing on the motion for summaryjudgment that plaintiff was insured through Lloyd's syndicates but repeatedly and utterly failed to make the required disclosures. Thus, defendants had a statutory right to vacatur of the interim award (*160 Cal. App. 4th 806, 822)* . Plaintiffs claimed however that the AAA rule 17, which provided that AAA's determinations regarding disqualification were conclusive, controlled. The court of appeal found otherwise, noting that the statutes were passed to advance a public purpose of crucial importance over which he state retained ultimate control (*160 Cal. App. 4th 806, 820-822)* . Thus, the court affirmed the judgment vacating the award, but deleted references to *Code Civ. Proc. § 1281.91(c)* (*160 Cal. App. 4th 806, 823)* .

Ovitz v. Schulman *(2005) 133 Cal. App. 4th 830, 35 Cal. Rptr. 3d 117* , arose out of defendant's employment with plaintiffs' joint venture. The employment agreement contained an arbitration provision. Dispute arose regarding whether defendant resigned or was wrongfully terminated. After the parties agreed to arbitration in accordance with the American Arbitration Association (AAA)'s Rules for Resolution of Employment Disputes, the proposed neutral arbitrator submitted a worksheet, purportedly making the required disclosures. The worksheet did not in fact contain the disclosure required by Cal. Rules of Ct., Appen., Div. VI, Standard 12(b) regarding the proposed neutral arbitrator's intention, while that arbitration was pending, to entertain offers of employment from a party or a lawyer for a party, including offers to serve as a dispute resolution neutral in another case. Arbitration began on September 8, 2003. After 23 days of hearings and twenty-one witnesses, the arbitrator ruled on May 12, 2004, that the joint venture and related parties were entitled to $1,878,739.15 in attorney fees and costs.

On May 27, 2004, after the joint venture parties had circulated a proposed draft of the award, the AAA informed all parties' attorneys that the arbitrator had accepted employment in another arbitration in which the law firm representing the joint venture parties was representing a party. The arbitrator conducted a preliminary hearing in the second arbitration as early as March 1, 2004. The precise date of the arbitrator's appointment in the second case was not clear, but declarations suggested that the arbitrator and the attorneys for the law firm representing the joint venture parties had discussions in the second case as early as January or February 2004. On June 3 and 14, 2004, defendant's counsel sent letters to the AAA requesting the arbitrator's disqualification for failure to disclose that he would entertain offers of employment from the law firm representing the joint venture parties, and further failed to disclose his employment by that firm in the second arbitration. The AAA denied that disqualification request. The trial court denied the joint venture parties' petition to confirm the award, and granted defendant's cross-petition to vacate the award. After denial of their motion for reconsideration, the joint venture parties appealed.

The court of appeal affirmed (*133 Cal. App. 4th 830, 856)* . The portions of the opinion considering the failures of disclosure are discussed at *§ 20C.170[3][g]*. After deciding that *Code Civ. Proc. § 1286.2(a)(6)(A)* required the award to be vacated, the court of appeal considered joint venture parties' contention that *Code Civ. Proc. § 1286.2(a)(6)(A)* is preempted by the Federal Arbitration Act (FAA; *9 U.S.C. § 1* et seq.). The court of appeal concluded after reviewing the relevant statutory language, that the congressional purpose of the FAA, did not result in the FAA's preemption of section 1286.2(a)(6)(A). Under the FAA, an award must be vacated if there "was evident partiality or corruption in the arbitrators, or either of them" [*9 U.S.C. § 10(a)(2)*]. The joint venture parties argued that, for two reasons, section 10(a)(2) of the FAA preempted *Code Civ. Proc. § 1286.2(a)(6)(A)*. First, the FAA's "evident partiality" permits vacating an arbitration award for inadequate disclosure only if the undisclosed facts create a reasonable impression of partiality, and second, that a party who has constructive knowledge of a ground for disqualification but remains silent is deemed to have waived the right to disqualify.

The court of appeal disposed of the second contention first, saying that federal rule, based on a case, not statute, was not accepted in all federal courts (*133 Cal. App. 4th 830, 849)* . Also, the only evidence that defendant had constructive knowledge was presented in the declarations filed in support of the motion for reconsideration, and the trial court did not find them credible. Finally, the waiver rule could have no greater preemptive effect than section 10(a)(2) itself; and the court of appeal chose to rest its decision on consideration of the preemptive effect of section 10(a)(2) alone.

The court considered the language of *9 U.S.C. § 10(a)(2)* (*133 Cal. App. 4th 830, 850)* , and the fact that that language strongly suggests that section 10 applies only in federal court proceedings: "the United States court in and for the district wherein the award was made." Similarly, section 12 of the FAA, which provides the procedure for presenting a motion to vacate, refers to a motion in district court (*133 Cal. App. 4th 830, 851)* . Further, *Code Civ. Proc. § 1286.2(a)(6)(A)* is not inconsistent with the purpose of the FAA. Absent an express preemption provision, federal statutory language does not resolve the question of preemption. Rather, there is no evidence that Congress intended to preempt post-award and state court litigation rules so long as the basic policy upholding the enforceability of arbitration agreements is given full effect court (*133 Cal. App. 4th 830, 852)* .

By its terms, *section 1286.2(a)(6)(A)* does not undermine the enforceability of arbitration agreements. It merely requires the vacating of an award if the arbitrator failed timely to disclose a ground for disqualification of which he was aware. Indeed, because it applies to vacating an arbitration award, section 1286.2(a)(6)(A) presupposes that the arbitration agreement has been enforced and the arbitration held. Further, the legislative purpose of section 1286.2(a)(6)(A) and the California disclosure requirements as a whole seek to enhance both the appearance and reality of fairness in arbitration proceedings, thereby instilling public confidence. The court didnot agree with the joint venture parties that the disclosure rules undermine the arbitration process by allowing a party to seize on a technicality to vacate an arbitration award (*133 Cal. App. 4th 830, 853)* . Nor was section 1286.2(a)(6)(A) inconsistent with the parties' arbitration agreement, which specified that the intended their arbitration to be subject to all of the disclosure requirements imposed by the AAA and the California Code of Civil Procedure. From the outset of the arbitration proceeding, the parties contemplated that the California disclosure requirements applied, in addition to AAA disclosure requirements (*133 Cal. App. 4th 830, 854)* . The arbitration agreement provided that judicial review would be limited as provided by *Code Civ. Proc. § 1286.2* or other applicable law. Even if "other applicable law" meant the FAA, section 10(a)(2) of the FAA does not preempt *Code Civ. Proc. § 1286.2(a)(6)(A)* (*133 Cal. App. 4th 830, 855)* .

Defendant/appellant in ***International Alliance of Theatrical Stage Employees, etc. v. Laughon*** *(2004) 118 Cal. App. 4th 1380, 14 Cal. Rptr. 3d 341* sued plaintiff/respondent for sex discrimination and entered into a settlement agreement by which they agreed that any dispute about the terms of the settlement agreement would be submitted to binding arbitration before one of four named arbitrators, one of whom was John Kagel. A dispute arose that was submitted to arbitration before Kagel, who was informed of his selection as arbitrator on April 23, 2001. Kagel had previously served as the neutral arbitrator in one noncollective bargaining arbitration involving another union represented in that arbitration by the same firm that represented plaintiff in this arbitration and in numerous collective bargaining cases in which that law firm served as counsel. Kagel never disclosed this prior service. On the first day of the arbitration hearing between these parties, plaintiff/respondent introduced as an exhibit Kagel's June 13, 2001, decision in the noncollective bargaining matter. Kagel did not acknowledge that he had failed to disclose his service as an arbitrator in that matter nor did he alert defendant's counsel that his service as an arbitrator might be grounds for disqualification. The award was introduced to support of claims of plaintiff regarding breaches of confidentiality agreements or follow-up of settlement agreements. Kagel issued an award largely in favor of plaintiff, which defendant petitioned to vacate on the ground that Kagel had failed to disclose certain matters that might serve as a basis for his disqualification, including his prior employment as an arbitrator in cases involving plaintiff or its counsel. The trial court denied the petition to vacate and confirmed the award, finding that there was no obvious bias or prejudice in the manner in which Kagel conducted the hearings and that when the prior award was introduced as evidence, defendant made a knowing, voluntary and intelligent waiver of the grounds disclosed therein for disqualification. Defendant appealed.

The court of appeal reversed, concluding that pursuant to *Code Civ. Proc. § 1281.9(a)(4)*, the arbitrator was required to

disclose his service as a neutral arbitrator in the noncollective bargaining matter, his failure to do so was not waived, and the nondisclosure of this required disclosure was a ground for vacation under *Code Civ. Proc. § 1286.2(a)(6)(A)* (*118 Cal. App. 4th 1380, 1382)* . *Code Civ. Proc. § 1281.9(a)(4)* specifies that an arbitrator must disclose the names of the parties to all prior or pending noncollective bargaining cases involving any party to the arbitration or lawyer for a party for which the proposed neutral arbitrator served or is serving as neutral arbitrator. The proposed neutral arbitrator must disclose all matters required to be disclosed to all parties in writing within 10 calendar days of service of notice of the proposed nomination or appointment [*Code Civ. Proc. § 1281.9(b)*]. Thus, 10 days after he was proposed as the neutral arbitrator in the matter, Kagel was required to disclose his service as neutral arbitrator in the prior matter. Had Kagel done so, defendant would have been entitled to disqualify him within 15 days after the disclosure statement was served [*Code Civ. Proc. § 1281.91 (b)(1)*] (*118 Cal. App. 4th 1380, 1385)* .

A party who does not move to disqualify an arbitrator prior to the commencement of arbitration may nevertheless seek vacation of an arbitration award on the ground that the arbitrator failed to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware [*Code Civ. Proc. § 1286.2(a)(6)(A)*]. This statute provides that if such a failure occurs, "the court shall vacate the award" (*118 Cal. App. 4th 1380, 1385-1386)* . The explicit language of the statute supported defendant's argument that the trial court was required to vacate the arbitration award once it was shown that Kagel had failed to make the required disclosure in a timely fashion. Thus, *Code Civ. Proc. § 1286.2,* as amended in 2001, mandates that a court "shall" vacate an arbitration award if, among other reasons, the arbitrator making the award "failed to disclose ... a ground for disqualification of which the arbitrator was then aware." The grounds include those enumerated in the six subparagraphs of *Code Civ. Proc. § 1281.9(a).* Those subparagraphs are preceded by general description of the matters which must be disclosed (a description also added in 2001) as "all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial, including all of the following:" [*Code Civ. Proc. § 1281.9(a)*].

This statutory language makes clear that, when it amended both *Code Civ. Proc. §§ 1281.9* and *1286.2(a)(6)(A)* in 2001, the Legislature intended that the failure to disclose the sort of prior relationship involved in this case necessarily satisfies the "might cause a reasonable person to question" standard (*118 Cal. App. 4th 1380, 1386)* . The court further found that because no effective disclosure of the disqualifying information took place, the trial court erred in finding that defendant "knowingly" waived any objection to Kagel's failure to disclose his prior service as a neutral arbitrator by failing to object when the opinion in the prior arbitration was offered into evidence during the arbitration. At the very least, defendant was entitled to the functional equivalent of the disclosure mandated by statute, i.e., an explicit, formal proffer of the disqualifying information [*Code Civ. Proc. § 1281.9*] and an opportunity to object [*Code Civ. Proc. § 1281.91*] (*118 Cal. App. 4th 1380, 1390-1392)* .

The parties in ***Azteca Construction, Inc. v. ADR Consulting, Inc.*** *(2004) 121 Cal. App. 4th 1156, 18 Cal. Rptr. 3d 142* , agreed to private arbitration in accordance with the American Arbitration Association's (AAA) then entitled "Construction Industry Dispute Resolution [Rules and] Procedures" (AAA Rules). Those rules stated that if one party objects to the continued service of an arbitrator, the AAA decided whether the arbitrator should be disqualified. Nevertheless, plaintiff demanded disqualification of the proposed arbitrator in accordance with *Code Civ. Proc. § 1281.91(b)(1)* within 15 days after receiving the arbitrator's disclosure statement, which revealed that the proposed neutral arbitrator had, within the preceding five years, served as a neutral arbitrator on matters in which defendant's counsel represented one or more parties, and that he had a prior relationship with that counsel in approximately 1985 for about a year, during which he and the counsel were employed by the same construction company. In addition, the disclosure statement noted that a conflicts check made by the law firm to which the proposed neutral arbitrator was "of counsel" revealed a case in which plaintiff was listed as a potential adverse party to one of its clients, although the proposed neutral arbitrator stated that he had no personal recollection of any knowledge of the matter, nor had he made inquiry of the attorney at his firm responsible for handling it. AAA determined that there was no good cause for disqualification, affirmed the appointment of the arbitrator, and the arbitration proceeded to its conclusion. Plaintiff filed a petition to vacate the arbitration award for the arbitrator's refusal to disqualify himself. The trial court ruled that

plaintiff had waived the right to disqualify the proposed neutral arbitrator in accordance with *Code Civ. Proc. § 1281.91(b)(1)* by agreeing to AAA arbitration, and denied the petition. Plaintiff appealed.

The court of appeal reversed, directing the trial court to grant the petition to vacate (*121 Cal. App. 4th 1156, 1169-1170)* . The court began by noting that the issue involved statutory construction and the ascertainment of legislative intent, which it reviewed de novo (*121 Cal. App. 4th 1156, 1164)* . It also observed that because arbitrators wield such mighty and largely unchecked power, the Legislature has taken an increasingly more active role in protecting the fairness of the process. In 1997, the Legislature added as an addition ground for vacating an award that the arbitrator "was subject to disqualification upon grounds specified in *Section 1281.9* but failed upon receipt of timely demand to disqualify himself or herself as required by that provision" [*see* former Code Civ. Proc. § 1286.2(f)] (*121 Cal. App. 4th 1156, 1163)* . The court set forth and discussed *Civ. Code § 3513*, which provides that anyone may waive the advantage of a law intended solely for his benefit, but a law established for a public reason cannot be contravened by a private agreement (*121 Cal. App. 4th 1156, 1166)* . The court concluded that the right to disqualify a proposed neutral arbitrator in accordance with *Code Civ. Proc. §§ 1281.9, 1281.91* cannot be waived by agreeing to arbitrate in accordance with rules that provide some other means of determining whether the proposed neutral arbitrator is to be disqualified. The neutrality of the arbitrator is of such crucial importance that the Legislature cannot have intended its regulation be delegable. The statutory scheme is designed primarily to serve the public purpose of promoting public confidence in the arbitration process by allowing individual rights to take precedence (*121 Cal. App. 4th 1156, 1168)* .

[d] Deemed Admission If Response Untimely

Evans Co. v. Millmen's Union No. 550 *(1984) 159 Cal. App. 3d 815, 205 Cal. Rptr. 731* , involved arbitration of a dispute under a collective bargaining agreement. After the award was made by the arbitrator, the employer timely filed a petition to vacate the award. The union failed to file a response to the petition within the period prescribed by *Code Civ. Proc. § 1290.6*. The trial court held that the employer's allegations in the petition to vacate were deemed admitted. The trial court ultimately granted the petition, after applying substantive federal law, and the union appealed.

The court of appeal affirmed, holding that the union's untimely response was not "duly filed" as required by *Code Civ. Proc. § 1290*. Therefore, the trial court had properly concluded that the allegations in petitioner's petition were deemed admitted (*159 Cal. App. 3d 815, 819)* .

[e] Time for Filing Petition to Vacate Award

Plaintiff in ***Louise Gardens of Encino Homeowners' Association, Inc. v. Truck Insurance Exchange*** *(2000) 82 Cal. App. 4th 648, 98 Cal. Rptr. 2d 378* , demanded an appraisal of the amount of loss it sustained in the 1994 Northridge earthquake. The appraisal was conducted in accordance with *Ins. Code § 2071*, which provides that each party select a competent and disinterested appraiser and then they select a competent and disinterested umpire. The appraisers appraise the loss; and if they cannot agree, submit their differences to the umpire. The appraiser chosen by defendant disclosed his prior associations with defendant and its affiliates, including that during the three years immediately preceding his appointment by defendant, he had served as an appraiser designated by the defendant or its affiliates on 15 occasions, 11 of which involved appraisals which were then still pending. In addition, he had served four times during the same period as a consultant to the law firm which was then representing defendant in these proceedings. Based on those disclosures, plaintiff demanded defendant's appraiser be replaced and filed a petition for his removal. The trial court denied the petition, under former Code Civ. Proc. § 1282(e), which provided grounds for disqualification of party arbitrators. Admittedly, that denial was not appealable. Later, defendant commenced a declaratory relief action against plaintiff claiming plaintiff had breached the cooperation provisions of the policy and was therefore estopped to claim any benefits under it. That action was still pending in the trial court, but had been stayed pending resolution of the issues raised in this appeal. When the appraisal was returned, plaintiff accepted $440,000, which represented the difference between the appraisal award and the amount previously paid by defendant. Plaintiff never sought to vacate the award, much less within the 100 day period specified in *Code Civ. Proc. § 1288*. Instead, it filed a cross complaint

in defendant's declaratory relief action. Still later, over 14 months after its receipt of the appraisal award, plaintiff filed a petition to confirm the award so that plaintiff could appeal the ruling refusing to remove the appraiser. The petition was granted, and judgment entered thereon. Plaintiff appealed, and defendant filed a timely cross appeal.

The court of appeal affirmed the judgment. An agreement to conduct an appraisal contained in a policy of insurance constitutes an "agreement" within the meaning of *Code Civ. Proc. § 1280(a)*, and therefore is considered an arbitration agreement subject to the statutory contractual arbitration law. While the court recognized that one of the grounds for vacating an appraisal award is the failure of an arbitrator who was subject to disqualification on the grounds set out in former Code Civ. Proc. § 1282 (e) [*now Code Civ. Proc. § 1281.9(a)(1)* (applicable only to neutral arbitrators)] to disqualify himself or herself as required by former Code Civ. Proc. § 1286.2(f), [*now Code Civ. Proc. § 1286.2(a)(6)(B)*] relief must be sought in a timely manner. A court cannot vacate an award unless a petition requesting that relief has been duly filed and served not later than 100 days after the date of service of a signed copy of the award on the petitioning party [*Code Civ. Proc. § 1288*] (*82 Cal. App. 4th 648, 658)* . A party to an arbitration may not circumvent the 100 day time requirement in which to seek the vacation of an award by attempting to raise his or her objections to the award in an appeal from the judgment entered following an order of confirmation. A party who fails to timely file a petition to vacate under *Code Civ. Proc. § 1286* may not thereafter attack that award by other means on grounds which would have supported an order to vacate (*82 Cal. App. 4th 648, 659)* . The court concluded that plaintiff could not avoid the consequences of its failure to file a timely petition to vacate by appealing from the post-confirmation judgment (*82 Cal. App. 4th 648, 660)* . As a further ground for affirming the judgment confirming the award, the court of appeal noted that plaintiff had accepted the benefits of the judgment, which resulted in waiver of the right to appeal from it (*82 Cal. App. 4th 648, 661)* .

The parties in ***Knass v. Blue Cross of California*** *(1991) 228 Cal. App. 3d 390, 279 Cal. Rptr. 124* , stipulated to binding arbitration of a pending lawsuit. An award in defendant's favor was served in July, 1989. In September, the court ordered judgment entered in defendant's favor, and notice of entry of judgment was served on plaintiff in November. In January, 1990, plaintiff appealed, contending that the arbitrator's award should be vacated.

The court of appeal affirmed the award for defendant, holding that *Code Civ. Proc. § 1287.4* does not allow a party to challenge an arbitration award for the first time on appeal. The 100-day time limit in *Code Civ. Proc. § 1288* may not be circumvented by appealing the judgment confirming the award (*228 Cal. App. 3d 390, 395-396)* .

[f] Arbitrator's Testimony May Not Be Considered

Evid. Code § 703.5 provides that no person presiding at any judicial or quasi-judicial proceeding, and no arbitrator or mediator, is competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could do any of the following:

- Give rise to civil or criminal contempt.
- Constitute a crime.
- Be the subject of investigation by the State Bar or Commission on Judicial Performance.
- Give rise to disqualification proceedings under *Code Civ. Proc. § 170.1(a)(1)* or *(6)*.

Evid. Code § 703.5 does not apply to a mediator with regard to any mediation under *Fam. Code § 3160 et seq.*

Trabuco Highlands Community Assn. v. Head *(2002) 96 Cal. App. 4th 1183, 117 Cal. Rptr. 2d 842* involved a dispute between a condominium association and member/homeowners. They stipulated to arbitration, but the

homeowners always maintained they did not agree to "binding" arbitration. There were letters evidencing an agreement for nonbinding arbitration, but the association claimed the homeowners orally modified the agreement during the arbitration hearing to agree to binding arbitration. The award issued (in favor of the association) was entitled "Binding Arbitration Award and Decision". Homeowners made it clear at association meetings that they did not agree to binding arbitration, but did nothing until, some five months after issuance of the award, the association moved to have it confirmed. Homeowners opposed the confirmation and both parties submitted declarations. The arbitrator submitted a letter indicating his notes conformed with the association's position and that the homeowners agreed to "seek a final resolution of this dispute". Homeowners objected that the letter was not a declaration and was hearsay, but the court referred to the letter in ruling that the arbitration was binding and confirming the award. After losing a motion for reconsideration, the homeowners appealed.

The court of appeal reversed, finding that the trial court reached its decision by impermissible means [*96 Cal. App. 4th 1183, 1188]* . The court of appeal remarked that the trial court expressly noted that it was relying on the letter by the arbitrator. By doing so, the trial court abdicated its function to determine whether the arbitrator exceeded his powers in a most fundamental way: by issuing a binding award after the parties agreed to nonbinding arbitration [*96 Cal. App. 4th 1183, 1190]* . The court of appeal said the problem went beyond the fact that the arbitrator's letter was hearsay: arbitrator testimony concerning the arbitration is expressly prohibited (except in circumstances not relevant here) by *Evid. Code § 703.5*. Therefore, it was inappropriate to rely after the fact on the arbitrator's characterization of the arbitration as binding. Because the trial court appeared to have relied on the arbitrator's statement, reversal was required for proper consideration of whether the parties agreed to binding arbitration [*96 Cal. App. 4th 1183, 1191]* .

[g] Party Who Had Award Vacated Is Entitled to Post-Arbitration Costs and Attorney's Fees

Code Civ. Proc. § 1293.2 provides that the court must award costs, as provided in *Code Civ. Proc. §§ 1021-1038*, in any judicial proceeding under *Code Civ. Proc. §§ 1280-1294.2* connected with arbitration. This includes attorney's fees pursuant to Code Civ. Proc. § 1033.3(a)(10)(A) when they are authorized by the contract.

Plaintiff in ***Marcus & Millichap Real Estate Investment Brokerage Co. v. Woodman Investment Group*** *(2005) 129 Cal. App. 4th 508, 28 Cal. Rptr. 3d 584* , sought to recover a real estate brokerage commission. The arbitrator awarded the commission to plaintiff Marcus & Millichap (MM), which petitioned to confirm the award. Woodman, and its managing partner, who was also named in the award, petitioned to vacate the award. That petition was granted, as was Woodman's petition for post-award costs and attorney's fees incurred in the judicial proceedings. The award was vacated on the ground that the managing partner was not a signatory of the arbitration agreement and that the arbitrator exceeded her powers by entering an award against him. Plaintiff sought to have the award corrected to delete Woodman's managing partner. When that motion was denied, plaintiff filed a petition to compel the managing partner to arbitrate. That petition was granted. MM did not appeal the ordervacating the arbitration award, but did appeal the order granting defendants' costs and attorney's fees. The basis for seeking to set aside the order awarding post-award costs and attorney's fees under *Code Civ. Proc. § 1293.2* was that the matter had not yet been resolved, so no one was yet the prevailing party.

The court of appeal affirmed the award of post-award costs and attorney's fees, although with a dissent which claimed the majority treated the matter too technically, and should have come to a contrary result based on equitable principles (*129 Cal. App. 4th 508, 518)* . The award of costs pursuant to *Code Civ. Proc. § 1293.2*, including attorney's fees when authorized by the contract, is mandatory. The court's determination under *Code Civ. Proc. § 1293.2* which party, if either, is the prevailing party in a post-arbitration judicial proceeding is a judicial function distinct from the arbitrator's decision to award or not to award fees in the arbitration itself (*129 Cal. App. 4th 508, 513)* [*see Code Civ. Proc. § 1032(a)(4)* (defining "prevailing party")]. As a matter of law, with respect to the postarbitration judicial proceedings Woodman and its managing partner were the prevailing parties (*129 Cal. App. 4th 508, 514)* . They were entitled to post-award costs and attorney's fees despite the order for another arbitration, because the order vacating the award without ordering rehearing was final and appealable [*see Code Civ. Proc. § 1294(c)*] (*129 Cal. App. 4th 508, 514-515)*

. Because no rehearing was ordered and the order vacating the arbitration award was not appealed, no claim of either party remained before the court or otherwise subject to judicial determination, the trial court's rulings are final. Further, the defendants did not have to prevail on the contract claim to be entitled to postarbitration fees and costs. The listing agreement provided for attorney's fees "in any litigation, arbitration or other legal proceedings." That contract language, as well as *Code Civ. Proc. § 1293.2* required postarbitration judicial proceedings be considered a discrete legal proceeding for purposes of determining entitlement to attorney's fees (*129 Cal. App. 4th 508, 516)* .

MBNA America Bank, N.A. v. Gorman *(2006) 147 Cal. App. 4th Supp. 1, 54 Cal. Rptr. 3d 724* , was an appeal to the Appellate Division of the Superior Court from an order of the superior court denying plaintiff's petition to confirm an arbitration award against defendant card holder for sums owed to plaintiff on the ground that under *Badie v. Bank of America (1998) 67 Cal. App. 4th 779, 79 Cal. Rptr. 2d 273* (discussed in *Ch. 20A, Arbitration: Resisting, § 20A.33[3][a]*) a mailed insert or "bill stuffer" cannot serve as a waiver of the procedural right of trial by jury or as a basis for enforcement of an ADR clause by a unilaterally issued change in the original agreement (*147 Cal. App. 4th Supp. 1, 4*). After plaintiff's petition was denied, defendant moved for costs and attorney's fees under both the attorney's fee provision in the credit card agreement and the private attorney general doctrine codified at *Code Civ. Proc. § 1021.5*. The trial court awarded defendant costs and fees in the amount of $23,490.77, finding that he was the prevailing party in this proceeding. The plaintiff appealed. The only issue on appeal was the grant of attorney's fees and costs to defendant.

The Appellate Division affirmed (*147 Cal. App. 4th Supp. 1, 13)* , also awarding defendant his costs and attorney's fees on the appeal (*147 Cal. App. 4th Supp. 1, 13-14)* . Plaintiff contended the order denying the petition to confirm was not a final award as required before contractual attorney's fees can be awarded under *Civ. Code § 1717* because there was no final determination of the contractual rights giving rise to the dispute. The Appellate Division noted that *Code Civ. Proc. § 1293.2* mandates that the court award costs in any judicial proceeding under *Code Civ. Proc. § 1280 et seq.* as provided in *Code Civ. Proc. § 1021 et seq.* A petition to confirm or vacate an arbitration award is covered by *Code Civ. Proc. § 1280 et seq.* [*see Code Civ. Proc. § 1285*]. *Code Civ. Proc. § 1032(a)(4)* defines "prevailing party" to include a defendant as against whom plaintiffs who do not recover any relief. Thus, defendant was the prevailing party in the judicial proceeding on plaintiff's petition to confirm the arbitration award: the petition was denied and plaintiff did not recover any relief against defendant. Thus, under the mandate in Section 1293.2, the trial court was required to award defendant his costs, which under *Code Civ. Proc. § 1033.5(a)(10)* includes attorney's fees if they are authorized by contract, statute, or law. The credit card agreement contained a unilateral attorney's fees provision in favor of plaintiff; but *Civ. Code § 1717(a)* implies a bilateral right to attorney's fees (*147 Cal. App. 4th Supp. 1, 7)* . The Appellate Division discussed other tests for who is a prevailing party, each of which bolstered its conclusion that defendant was the prevailing party on petition to confirm the award (*147 Cal. App. 4th Supp. 1, 7-8)* . Because the trial court's order was silent on the legal basis for the award, the Appellate Division also considered whether the trial court properly granted attorney's fees under *Code Civ. Proc. § 1021.5*, and affirmed the award on that basis too (*147 Cal. App. 4th Supp. 1, 8-14)* . Although plaintiff contended the award under the private attorney general doctrine could not be upheld because the denial of the petition to confirm the award was not "binding precedent," the Appellate Division said that although the order did not formally enjoin plaintiff from enforcing the arbitration agreement against other customers, it should effectively deter plaintiff from doing so at least with regard to customers similarly situated to defendant (*147 Cal. App. 4th Supp. 1, 10)* . By similarly situated, the Appellate Division meant those of plaintiff's customers against whom the arbitration agreement would be unenforceable for the same reasons it was found to be unenforceable against plaintiff in the trial court proceedings (*147 Cal. App. 4th Supp. 1, 10 n. 2*).

[h] Prejudicial Conduct by Arbitrators

The court of appeals in ***Burlage v. Superior Ct.*** *(2009) 178 Cal. App. 4th 524, 531-532, 100 Cal. Rptr. 3d 531* , affirmed the trial court's vacation of award for prejudice due to exclusion of admissible, material evidence. The court ruled that an arbitrator's refusal in contravention of *Code Civ. Proc. § 1286.2(a)(5)* to admit admissible, material evidence that directly affects the issue of damages substantially prejudices the proffering party's ability to dispute the

amount of damage and constitutes grounds for vacating an award. While not every evidentiary ruling by an arbitrator can or should be reviewed by a court, that is not to say that no evidentiary ruling can or should be reviewed by a court. In the case of excluded evidence, the trial judge cannot consider what he or she has refused to "hear." Legally speaking the admission of evidence is to hear it, and the weighing of it is to give it consideration (*178 Cal. App. 4th 524, 530-532)* .

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20C ARBITRATION: CONFIRMING, CORRECTING, OR VACATING THE AWARD
PART II. FORMS
A. Procedures for Confirming, Correcting, or Vacating Award

2-20C California Points & Authorities § 20C.21

§ 20C.21 Opposing Petition to Confirm Arbitration Award and Requesting Award Be Vacated

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Petitioner,	)	MEMORANDUM IN OPPOSITION TO PETITION
vs.	)	TO CONFIRM ARBITRATION AWARD [AND
_____ [*name*],	)	ORDER REHEARING OF CONTROVERSY]
Respondent.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		Trial Date: none

_____

THE AWARD SHOULD NOT BE CONFIRMED; RATHER THE AWARD SHOULD BE VACATED BECAUSE _____ [OF CORRUPTION OF A PARTY *or* OF CORRUPTION OF AN ARBITRATOR *or* OF MISCONDUCT OF AN ARBITRATOR *or* THE ARBITRATORS EXCEEDED THEIR POWERS *or* THE ARBITRATORS ACTED CONTRARY TO THE ARBITRATION STATUTES].

A. Response to Petition to Confirm Award and Request to Vacate. A person name as a respondent in a petition may file a response to the petition requesting that the court dismiss the petition or confirm, correct, or vacate the award (*Code Civ. Proc. §§ 1285.2, 1290*).

B. Grounds for Vacating Award. [*See § 20C.20[1], Paragraph B.*]

[*EITHER*]

C. Award Procured by Undue Means. [*See § 20C.20[1], Paragraph C.*]

[*AND/OR*]

D. Corruption of Arbitrator. [*See § 20C.20[1], Paragraph D.*]

[*AND/OR*]

E. Misconduct of Neutral Arbitrator. [*See § 20C.20[1], Paragraph E.*]

[*AND/OR*]

F. Arbitrators Exceeded Their Powers. [*See § 20C.20[1], Paragraph F.*]

[*AND/OR*]

G. Prejudicial Conduct by Arbitrators. [*See § 20C.20[1], Paragraph G.*]

[*AND/OR*]

H. Arbitrator Failed to Disqualify Self. [*See § 20C.20[1], Paragraph H.*]

[*Optional*] **I. Time for Filing Response Requesting Vacation or Correction.** A response requesting that an award be vacated or that an award be corrected must be served and filed within 10 days after service of the petition, [except that if the petition is served in the manner provided in *Code of Civil Procedure Section 1290.4(b)(2)*, the response shall be served and filed within 30 days after service of the petition], and not later than 100 days after the date of service of a signed copy of the award on (a) the respondent, if the respondent was a party to the arbitration, or (b) the respondent's representative if the respondent was not a party to the arbitration (*Code Civ. Proc. §§ 1288.2, 1290.6*; *Eternity Investments, Inc. v. Brown (2007) 151 Cal. App. 4th 739, 60 Cal. Rptr. 3d 134* ; *Hirsch v. Ensign (1981) 122 Cal. App. 3d 521, 530-531, 176 Cal. Rptr. 17* ; *De Mello v. Souza (1973) 36 Cal. App. 3d 79, 83-84, 111 Cal. Rptr. 274*). Where the other party has filed a petition to confirm, only the 10-day deadline applies to the filing of the response, beginning upon the service of the petition (*Oaktree Cap. Mgmt., L.P. v. Bernard (2010) 182 Cal. App. 4th 60, 66, 67, 106 Cal. Rptr. 3d 16*); and that time for service of the response is extended by two court days when respondents serve the petition by overnight mail (*Code Civ. Proc. § 1013(c)*).

[*Optional*] **J. Arbitrator's Testimony May Not Be Considered.** [*See § 20C.20[1], Paragraph L.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]

By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be used to support a response opposing a petition to confirm an arbitration award and requesting vacation of the award. It does not provide a complete memorandum but should be combined with particular memoranda addressing each ground respondent urges for vacating the award [*see § 20C.150* et seq.]. In addition to the statutory grounds for vacating an arbitration award set forth in *Code Civ. Proc. § 1286.2*, courts have recognized two other grounds for vacating an award: (1) mistake, inadvertence, surprise or excusable neglect under *Code Civ. Proc. § 473*, which is the subject of the form at § 20C.212, and (2) illegality that contravenes public policy [*see § 20C.210*].

If the other party has not yet filed a petition to confirm the award, use the form at § 20C.20 instead of this one. If counsel wishes to obtain an order for rehearing after the award has been vacated, use the form at § 20C.22 in addition to this one.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should show when the award was served, when the petition to confirm that award was served, and that this response and request for vacatur is timely. Generally, it will be appropriate to attach a copy of the award [*see Shepherd v. Greene (1986) 185 Cal. App. 3d 989, 994, 230 Cal. Rptr. 233* (*discussed under § 20C.12[3][a]*)].

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For a form of response to a petition to confirm an arbitration award that may be supported by this memorandum, as well as a procedural checklist, see California Forms of Pleading and Practice, Ch. 34, *Contractual Arbitration: Judicial Review* (Matthew Bender).

[d] Related Memoranda

For memoranda to combine with this form addressing the particular ground or grounds for vacating the award, see *§ 20C.150* et seq.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Time for Filing Response Requesting Vacation or Correction

Eternity Investments, Inc. v. Brown *(2007) 151 Cal. App. 4th 739, 60 Cal. Rptr. 3d 134* , involved an award issued on August 26, 2005, in Eternity's favor, and served on September 5, 2005. On January 6, 2006, Eternity filed a petition in the trial court to confirm the award. The Browns had not filed a petition to vacate or correct the award, and more than 100 days had elapsed since the service of the award [*see Code Civ. Proc. § 1288*]. However, on February 8, 2006, the Browns filed both opposition papers and a petition of their own, seeking to vacate the arbitration award. They argued primarily that the arbitrator had exceeded his authority by awarding compensation to an unlicensed contractor [*see Bus & Prof. Code § 7031(a), (e)*; *Loving & Evans v. Blick (1949) 33 Cal. 2d 603, 609-614 Loving*, discussed at *§ 20C.210[3][b]*; *Lindenstadt v. Staff Builders, Inc. (1997) 55 Cal. App. 4th 882, 64 Cal. Rptr. 2d 484* discussed at *§ 20C.210[3][b]*]. The trial court confirmed the award. The Browns appealed.

The court of appeal affirmed, finding that defendants' response seeking to vacate the award was untimely (*151 Cal. App. 4th 739, 742* . 748). A petition to vacate an award or correct an award must be served and filed not later than 100 days after the date of the service of a signed copy of the award on the petitioner [*Code Civ. Proc. § 1288*]. Similarly, a response requesting that an award be vacated or corrected must be served and filed not later than 100 days after the date of service of a signed copy of the award [*Code Civ. Proc. § 1288.2*]. In addition, a response must be served and filed within 10 days after service of the petition in California; 30 days is permitted if the petition is served outside the state [*Code Civ. Proc. § 1290.6*]. If the party who lost in the arbitration does not serve and file a petition to vacate or a response to a petition to confirm within the 100-day period from the date of service of the award, the award must be treated as final. Failure to file a timely response prevents a party from vacating an award (*151 Cal. App. 4th 739, 745*). Defendants did not serve or file a petition or response to correct or vacate the award before the 100-day period expired. Plaintiff filed a petition to confirm 121 days after service of the award, when it was too late for the defendants to seek correction or vacatur. Under the plain language of the statute, the trial court had no alternative but to confirm the award as made (*151 Cal. App. 4th 739, 742, 746)* .

The award in ***Hirsch v. Ensign*** *(1981) 122 Cal. App. 3d 521, 176 Cal. Rptr. 17* , was issued on December 5, 1979. On December 20, plaintiff filed a motion to have the award confirmed and mailed it to defendant's counsel. On January 21, 1980, defendant filed a motion to vacate the award. The court heard the motion on January 25, 1980, confirmed the award and entered judgment thereon. Defendant appealed.

The court of appeal affirmed. The court noted that under *Code Civ. Proc. §§ 1290.6* and *1013*, defendant had 15 days from December 20, 1979, to file a response to the motion to confirm the award and had exceeded that period (*122 Cal. App. 3d 521, 530-531)* . While *Code Civ. Proc. § 1288* allows four years for filing a petition to confirm an award, it requires a petition to vacate or correct an award to be served and filed within 100 days after service of the award on petitioner. That same 100-day limitation applies by virtue of *Code Civ. Proc. § 1288.2* when vacation or correction is sought by response. However, if another party petitions the court to confirm the award before the expiration of the 100-day period, a response seeking to vacate or correct the award is also subject to *Code Civ. Proc. § 1290.6* and must be served and filed within 10 days after service of the petition. When no response is duly served and filed within the 10-day period, under *Code Civ. Proc. § 1290* the allegations of the petition are deemed to be admitted by respondent (*122 Cal. App. 3d 521, 531)* .

The award in ***De Mello v. Souza*** *(1973) 36 Cal. App. 3d 79, 111 Cal. Rptr. 274* , was signed and transmitted to the

parties on March 27, 1970. Plaintiff filed a petition for confirmation of the award on April 26, 1971, and served defendants on May 3, 1971. On June 17, 1971, defendant filed a response requesting correction of the award to conform to a stipulation of the parties regarding what it claimed was an error in calculation. The trial court corrected the award as requested by defendant, confirmedthe award as corrected, and entered judgment thereon. Plaintiff appealed, contending that the trial court had no authority to correct the award.

The court of appeal agreed with plaintiff and reversed with directions to the trial court to confirm the award as originally entered and to enter judgment thereon (*36 Cal. App. 3d 79, 87)* . If a party petitions to confirm the award within the 100-day period, a response to that petition requesting correction or vacation of the award must be served and filed within the 10-day period set forth in *Code Civ. Proc. § 1290.6* (*36 Cal. App. 3d 79, 83)* . The conclusion was inescapable that defendant violated both the 100-day statute of limitation set forth in *Code Civ. Proc. § 1288.2* and the 10-day limitation contained in *Code Civ. Proc. § 1290.6* (*36 Cal. App. 3d 79, 83-84)* . Pursuant to *Code Civ. Proc. § 1286.8* (*set forth in § 20C.12[1]*), the court may not correct an award unless a response requesting that the award be corrected or vacated has been duly filed and served. Because defendant failed to duly file and serve the response under both *Code Civ. Proc. §§ 1288.2* and *1290.6*, the trial court was barred from correcting the award (*36 Cal. App. 3d 79, 84)* .

The court of appeal affirmed the trial court's ruling in ***Oaktree Cap. Mgmt., L.P. v. Bernard*** *(2010) 182 Cal. App. 4th 60, 67, 106 Cal. Rptr. 3d 16* , that the response to the petition to confirm was timely. The filing did not comply with the 100-day deadline under *Code Civ. Proc. § 1288*. In response, the court ruled that where the other party has filed a petition to confirm, only the 10-day deadline in *Code Civ. Proc. § 1290.6* applies to the filing of the response, beginning upon the service of the petition [*182 Cal. App. 4th 60, 66]* . The 10-day period was extended for two court days because respondents served the petition by overnight mail under *Code Civ. Proc. § 1013(c)* and for the period of time from its removal to federal court until its remand back to state court [*182 Cal. App. 4th 60, 67]* . The aspect of the case addressing whether the language of the agreement provided for judicial review of errors of law is *covered in § 20.90[3][a1], below*.

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A. Procedures for Confirming, Correcting, or Vacating Award

2-20C California Points & Authorities § 20C.22

§ 20C.22 Request for Order for Rehearing of Controversy After Arbitration Award Is Vacated

[1] FORM

THE ENTIRE CONTROVERSY SHOULD BE SUBMITTED TO REHEARING AFTER THE AWARD IS VACATED BECAUSE _____ [*specify grounds, e.g.*, THE ARBITRATORS FAILED TO FIND ON A SUBMITTED ISSUE].

A. Rehearing on Award Being Vacated. If an award is vacated, the court may order a rehearing before new arbitrators (*Code Civ. Proc. § 1287*).

[*Optional*] **B. Rehearing Before Original Arbitrators.** If the award is vacated either pursuant to *Code of Civil Procedure Section 1286.2(a)(4)* on the ground that the arbitrators exceeded their powers or pursuant to *Section 1286.2(a)(5)* on the ground that the arbitrators' conduct was prejudicial and contrary to those provisions, the court, with the consent of the parties to the court proceeding, may order a rehearing before the original arbitrators (*Code Civ. Proc. § 1287*).

[*Optional*] **C. Arbitration Award That Is Uncertain on Any Submitted Issue Must Be Reheard.** A rehearing in arbitration must be ordered with respect to the entire controversy subject to arbitration when the award reveals the arbitrators have not decided all questions submitted (*M.B. Zaninovich, Inc. v. Teamster Farmworker Local Union 946 (1978) 86 Cal. App. 3d 410, 415-416, 150 Cal. Rptr. 233*).

[2] Comments

[a] Use of Form

This form may be used with a petition or response seeking to have an award vacated to support a request that the matter be ordered reheard. It does not provide a complete memorandum but should be combined with the memorandum supporting the petition [*see § 20C.20*] or response [*see § 20C.21*] seeking to have the award vacated.

Optional Paragraph B is for use if rehearing should be before the original arbitrators. Optional Paragraph C is for when the arbitrators have failed to decide all issues submitted to them. The case on which Paragraph C is based has been questioned in *Rodrigues v. Keller (1980) 113 Cal. App. 3d 838, 841, 170 Cal. Rptr. 349* , which is discussed in *§ 20C.101[3][a]*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should show when the award was served, if and when any petition to confirm that award was served, and that the response and request for rehearing are timely.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For forms of petition requesting rehearing and order granting it that may be supported by this memorandum, as well as a procedural checklist, see California Forms of Pleading and Practice, Ch. 34, *Contractual Arbitration: Judicial Review* (Matthew Bender).

[d] Related Memoranda

For memoranda to combine with this form, see *§§ 20C.20* and *20C.11*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

For a memorandum opposing Paragraph C of this form and asserting that the arbitrators have disposed of all issues that had to be decided, see *§ 20C.101*.

[3] Discussion of Authorities

[a] Arbitration Award That Is Uncertain on Any Submitted Issue Must Be Reheard

M.B. Zaninovich, Inc. v. Teamster Farmworker Local Union 946 *(1978) 86 Cal. App. 3d 410, 150 Cal. Rptr. 233* , arose out of a labor contract dispute. Among the questions submitted for arbitration was the amount, if any, owing to the

union for the employer's failure to withhold certain amounts owed to the union by employees from their wages and to transmit these to the union. The award required the employer to remit to the union dues and initiation fees, which the employer had failed to withhold and which were due from a certain date. The employer's petition to set aside the award was denied, and the employer appealed.

The court of appeal reversed, holding that failure to find on one of the issues submitted rendered the award fatally uncertain. It then considered whether a rehearing should be ordered as to the entire controversy subject to arbitration, or whether the award should be confirmed except for the part which was uncertain. The court found that precedent was solidly against the second alternative (*86 Cal. App. 3d 410, 415)* . The early case of *Muldrow v. Norris (1859) 12 Cal. 331, 339, 344* , was found still to be controlling on the point that if arbitrators do not decide all questions submitted to them, the entire award is void and the entire cause should be returned for redetermination. Moreover, the same result follows from *Code Civ. Proc. § 1286.6*, which sharply curtails the authority of the court to correct awards. This case did not fall within any of the categories mentioned for correction, which are exclusive (*86 Cal. App. 3d 410, 416)* .

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[Reserved]

§§ 20C.23[Reserved]

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B. Ways in Which Court May Correct Award

2-20C California Points & Authorities § 20C.30

§ 20C.30 Correcting Award by Striking Matters In Excess of Arbitrator's Power

[1] FORM

THE AWARD MAY BE CORRECTED BY STRIKING _____ [*specify, e.g.,* THE PORTION OF THE AWARD DETERMINING TITLE TO LOTS 14 AND 15] AND CONFIRMED AS CORRECTED BECAUSE NOTHING IN THE UNDERLYING AGREEMENT[, THE SUBMISSION TO ARBITRATION, OR RULE _____ (*number*) OF THE _____ (*specify any incorporated rules, e.g.,* AMERICAN ARBITRATION ASSOCIATION)] GRANTED THE ARBITRATOR AUTHORITY TO MAKE AN AWARD _____ [*specify, e.g.,* DETERMINING TITLE TO THOSE TWO LOTS].

A. Correcting Award by Striking Portion in Excess of Arbitrators' Authority. When the arbitrators exceed their powers but the award may be corrected without affecting the merits of the decision on the controversy submitted, that portion of the award in excess of the arbitrators' jurisdiction may be stricken and the award, as corrected, may be confirmed (*Code Civ. Proc. § 1286.6(b)*; *Allstate Ins. Co v. Superior Court (Jessel) (2006) 142 Cal. App. 4th 356, 362* -364, *48 Cal. Rptr. 3d 266* ; *Jones v. Humanscale Corporation (2005) 130 Cal. App. 4th 401, 412, 29 Cal. Rptr. 3d 881* ; *In re Connor (1900) 128 Cal. 279, 282-283, 60 P. 862* ; *Luster v. Collins (1993) 15 Cal. App. 4th 1338, 1347-1350, 19 Cal. Rptr. 2d 215*).

[*Optional*] **B. Court May Correct Award by Striking Portion Requiring Employee to Pay Arbitral Expenses.** When the criteria set forth in *Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 101-112, 99 Cal. Rptr. 2d 745, 6 P.3d 669* are applicable because an employee or former employee is seeking to vindicate an unwaivable statutory right, an award requiring the employee or former employee to pay a portion of arbitral expenses is in excess of the arbitrator's powers. Such an award should not be vacated, but may be corrected by striking that portion and directing instead that the employer or former employer to pay all arbitral costs (*Jones v. Humanscale Corporation (2005) 130 Cal. App. 4th 401, 412, 29 Cal. Rptr. 3d 881*).

[2] Comments

[a] Use of Form

This form may be used to support a petition or response that requests the court to correct an arbitration award by striking a portion of the award that was in excess of the arbitrator's power to make and to confirm that award as corrected [*Code Civ. Proc. § 1286.6*; *cf. Code Civ. Proc. § 1288.6* (application to arbitrators for correction)]. This form does not provide a complete memorandum but is designed to be combined with memoranda from § 20C.12, addressing in general terms the ground for correction and any relevant timing or procedural matters relating to correction, as well as memoranda from § 20C.60 et seq. addressing any particular challenge that has been made or may be anticipated with regard to confirmation of the award. OptionalParagraph B is for use when the correction sought is to have the court strike the portion of the award requiring an employee or former employee who stated a claim involving an unwaivable statutory right to pay all or a portion of the arbitral costs and expenses.

Counsel may wish to include appropriate portions of the form at § 20C.10 or the form at § 20C.11, relating to confirmation.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should set forth and compare the award and the particular arbitration provision, submission agreement, and any rules adopted by the parties for the conduct of the arbitration to demonstrate what in the award exceeded the arbitrator's powers. Generally, it will be appropriate to attach a copy of the award [*see Shepherd v. Greene (1986) 185 Cal. App. 3d 989, 994, 230 Cal. Rptr. 233* (discussed at *§ 20C.12[3*][a])].

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For a memorandum to combine with this form, regarding correction of an award by striking attorney's fees, see *§ 20C.31*.

For a memorandum to combine with this form, regarding correction of an uninsured motorist award by striking portions in excess of the arbitrator's powers, see *§ 20C.32*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Correcting Award by Striking Portion in Excess of Arbitrators' Authority

Allstate Ins. Co. v. Superior Court (Jessel) *(2006) 142 Cal. App. 4th 356, 48 Cal. Rptr. 3d 266* , was an appeal from a nonappealable order which the court of appeal chose to treat as a petition for a writ of mandate. The matter arose from damage to a home owned by real parties during the 1994 Northridge earthquake. After real parties sued Allstate, the parties entered into a mediation and arbitration agreement, which provided in part that the arbitrator's decision would be final and not subject to review, reconsideration or appeal, and would be issued without a written opinion other than to indicate which party prevailed, and how much, if anything, Allstate should pay to Jessels. The scope of the arbitration was limited Jessels' claims and Allstate's defenses. Mediation failed and the matter proceeded to arbitration. Evidentiary hearings were held in 2002 and 2003. On December 20, 2004, the arbitrator issued his ruling, which, contrary to the parties' agreement was five pages long and spelled out his reasoning. The award was for Jessels, for $400,000.00, less credit for any sums already paid. Although the ruling left issue of costs and attorneys' fees to be determined, the arbitrator stated that the ruling constituted a final award.

Jessel filed a petition to vacate the December 2004 ruling, contending the arbitrator had exceeded his powers because the ruling had been based on an affirmative defense that was not raised in Allstate's answer. Over Allstate's opposition, the trial court granted Jessel's petition, vacated the arbitrator's December 2004 award, and remanded the matter back to the same arbitrator--finding that he had yet to resolve all the issues. Allstate appealed.

The court of appeal construed the appeal as a petition for a writ of mandate, granted the writ, and directed the trial court (1) to vacate its order vacating the arbitration award; (2) to enter a new order correcting the arbitration award by deleting the introduction and discussion and leaving only the conclusion; and (3) denying Jessel's petition to vacate the arbitration award (*142 Cal. App. 4th 356, 364)* . The court treated as surplusage all language of the award that went beyond the arbitrator's statement of the amount to be recovered by Jessel (*142 Cal. App. 4th 356, 362*). The only possible basis for the trial court's order was a finding that the arbitrator exceeded his powers and the award could be corrected. The court of appeal agreed that the arbitrator exceeded his powers insofar as he stated the reasons for his decision, but the award could easily be corrected by deleting the surplusage so that the award was limited to the amount due to Jessel (*142 Cal. App. 4th 356, 363*).

Plaintiff in ***Jones v. Humanscale Corporation*** *(2005) 130 Cal. App. 4th 401, 29 Cal. Rptr. 3d 881* was a sales consultant for defendant pursuant to an agreement that contained a noncompetition clause, an arbitration provision, and a New Jersey choice of law clause. In 2002, defendant fired plaintiff and later made demand in New Jersey for arbitration of claims of breach of the noncompetition clause. Plaintiff commenced the California action for wages owed, declaratory relief, and unfair competition. In that action, plaintiff sought to have the New Jersey arbitration stayed, while defendant sought to have the action stayed while the New Jersey arbitration proceeded.Meanwhile, defendant had commenced an action in New Jersey, in which the parties were ordered to proceed to arbitration. The California court stayed the California action pending the arbitration. The New Jersey arbitrator found for defendant, awarding $17,500. as damages for breach of the noncompetition clause, finding defendant did not owe plaintiff any wages, and ordering arbitral costs to be shared equally, plaintiff's half amounting to $12,194. Defendant petitioned in the California action to confirm the award. Plaintiff petitioned to vacate it, claiming it was based on an illegal contract that violated California law regarding noncompetition agreements, that the wage claim ruling was improper, and that the division of arbitral expenses violated California law. The trial court granted plaintiff's petition, finding California law applied and was violated, both as to the noncompetition clause [*see Bus & Prof. Code § 16600*] and by directing employee to pay half of the arbitral costs. Defendant appealed.

The court of appeal reversed and remanded with directions to the trial court to correct the award by requiring defendant to pay all arbitral costs, and to confirm the award as corrected (*130 Cal. App. 4th 401, 405, 417)* . Because the arbitration dealt with plaintiff's wage claim, unwaivable statutory rights were involved [*Lab. Code §§ 201, 203, 218.5*], and the minimum requirements set forth in *Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 101-112, 99 Cal. Rptr. 2d 745, 6 P.3d 669* (discussed in *Ch. 20, Arbitration: Compelling, § 20.23[3][a]*), were

applicable. One of those requirements is that the employee cannot be required by the arbitration agreement or the arbitration process to bear any of the arbitral fees or costs (*130 Cal. App. 4th 401, 411-412)* . Here, the division of arbitral fees was based on the award alone because the arbitration agreement did not require that parties to share arbitral costs. Thus, the arbitration agreement was not unconscionable (*130 Cal. App. 4th 401, 416)* . A court may correct an award and confirm it as corrected if it determines that the arbitrator exceeded his or her powers and the correction can be made without affecting the merits of the decision on the matters submitted [*Code Civ. Proc. § 1286.6(b)*]. To remedy the improper allocation of arbitral fees to plaintiff/employee, the trial court should have corrected the award, not vacated it (*130 Cal. App. 4th 401, 412)* .

In re Connor *(1900) 128 Cal. 279, 60 P. 862* , involved arbitration of the amounts owing from the parties to each other for certain real estate transactions. The matter was submitted to arbitrators pursuant to stipulation. The award was in favor of appellant, who moved to modify the award to extend the period during which appellant was entitled to interest on the principal amount owing and to strike a finding regarding ownership of two lots or to vacate the award. The trial court struck the finding regarding ownership of lots 14 and 15 but did not modify the award with regard to interest.

The Supreme Court affirmed. With respect to the interest, the Court said that matter would require evidence, which was not before it, and that any error committed was not a ground for modification under former Code Civ. Proc. § 1287 or 1288 (*128 Cal. 279, 282)* . With respect to the stricken reference to ownership of lots 14 and 15, the Court said that modification was proper as an instance in which the arbitrators had exceeded their powers. Under former Code Civ. Proc. § 1288(2), modification of a part of an award on matters not submitted was proper when that part could be separated from the other parts without affecting the decision on the matters submitted (*128 Cal. 279, 282-283)* .

Luster v. Collins *(1993) 15 Cal. App. 4th 1338, 19 Cal. Rptr. 2d 215* , involved continuing disputes regarding an easement. Defendant's parcel was burdened with an easement in favor of plaintiff. After their first dispute, the parties entered into an agreement negotiated with the help of a retired judge. The agreement provided for operation of the easement. It covered issues such as maintenance of the easement, the locking of gates along it, and the control of the gates. It also provided that the agreement could be confirmed as an arbitration award and that future disputes regarding the easement be submitted to arbitration. Defendant was required by the terms of a 1989 arbitration award to remove trees along the easement. Plaintiff sold the benefitted parcel to his daughter and her husband during the time period encompassed by the several disputes and arbitrations, but continued the proceedings in his own name. The son-in-law was not a party to the original arbitration agreement and that agreement was never modified to require defendant to arbitrate disputes against the son-in-law. Three years after the original agreement and award, plaintiff sought confirmation of three awards, one of which awarded plaintiff monetary sanctions against defendant of $50 per day per tree for each tree not removed from the easement and $500 in favor of petitioner's son-in-law as damages for harassment (while attempting to use easement). The awards were confirmed, and defendant appealed.

The court of appeal reversed with instructions to the trial court to set aside portions of the order confirming one award. The portions to be stricken related to the fine and to the award in favor of the son-in-law. Both matters were in excess of the arbitrator's power, as granted either by statute or by the original agreement, or beyond the charge of the original agreement of the parties. The remainder of the judgment was affirmed (*15 Cal. App. 4th 1338, 1350)* . Although *Code Civ. Proc. § 1283.4* confers on arbitrators the power to fashion equitable remedies as necessary to determine the controversy submitted by the parties, when the value of the use of the easement was nominal (less than $3,500), a fine of almost $100,000 (which had accumulated by the time the appeal was argued) was beyond the charge in the original agreement to arbitrate "future violations" (*15 Cal. App. 4th 1338, 1347-1350)* .

[b] Court May Correct Award by Striking Portion Requiring Employee to Pay Arbitral Expenses

Jones v. Humanscale Corporation *(2005) 130 Cal. App. 4th 401, 29 Cal. Rptr. 3d 881* , is discussed at *§ 20C.30[3][a]*.

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2-20C California Points & Authorities § 20C.31

§ 20C.31 Correcting Award by Striking Attorney's Fees

[1] FORM

THE AWARD OF ATTORNEY'S FEES SHOULD BE STRICKEN BECAUSE NOTHING IN THE UNDERLYING AGREEMENT[, THE SUBMISSION TO ARBITRATION, NOR RULE _____ (*number*) OF THE _____ (*specify any incorporated rules, e.g.*, CONSTRUCTION INDUSTRY RULESOF THE AMERICAN ARBITRATION ASSOCIATION)] GRANTED THE ARBITRATOR AUTHORITY TO AWARD ATTORNEY'S FEES TO THE PREVAILING PARTY.

A. Correcting Award by Striking Portion in Excess of Arbitrators' Authority [*see § 20C.30[1], Paragraph A.*]

B. Award of Attorney's Fees Not Authorized. If the underlying agreement[, the submission to arbitration, and any arbitration rules incorporated into the parties' agreement] is/are silent on the matter of attorney's fees, the arbitrator has no jurisdiction to award attorney's fees to the prevailing party; and the award may be corrected by striking the attorney's fees award and confirmed as corrected (*Thompson v. Jespersen (1990) 222 Cal. App. 3d 964, 967-969, 272 Cal. Rptr. 132*).

[2] Comments

[a] Use of Form

This form may be used in support of a petition or response that requests the court to correct an arbitration award by striking an award of attorney's fees and to confirm that award as corrected [*Code Civ. Proc. § 1286.6*; *cf. Code Civ. Proc. § 1288.6* (application to arbitrators for correction)]. This form does not provide a complete memorandum but is designed to be combined with memoranda from § 20C.12, addressing in general terms the ground for correction and any relevant timing or procedural matters relating to correction, as well as memoranda from § 20C.60 et seq., addressing any particular challenge that has been made or may be anticipated with regard to confirmation of the award.

Counsel may wish to include appropriate portions of the form at § 20C.10 or the form at § 20C.11, relating to

confirmation.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should set forth the scope of the particular arbitration provision, submission agreement, and any rules adopted by the parties for the conduct of the arbitration. Generally, it will be appropriate to attach a copy of the award [*see Shepherd v. Greene (1986) 185 Cal. App. 3d 989, 994, 230 Cal. Rptr. 233* (discussed at *§ 20C.12[3*][a])].

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For a memorandum to regarding correction of an uninsured motorist award by striking portions in excess of the arbitrator's powers, see *§ 20C.32*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Award of Attorney's Fees Not Authorized

Plaintiffs in ***Thompson v. Jespersen*** *(1990) 222 Cal. App. 3d 964, 272 Cal. Rptr. 132* , contracted with defendant for the construction of a single family residence. The contract provided for arbitration. Plaintiffs were dissatisfied with defendant's performance and submitted a demand for arbitration, claiming significant damages. Defendant made a counterclaim for $50,000. Arbitration was conducted in accordance with the construction industry rules of the American Arbitration Association (AAA), which were incorporated into the parties' agreement. The arbitrators awarded plaintiffs $10 in damages and $75,000 in attorney's fees. Plaintiffs petitioned for judgment confirming the award. Defendant responded by requesting that the award be corrected by deleting the grant of attorney's fees, which it contended was beyond the jurisdiction of the arbitrators. The court confirmed the award in its entirety and entered judgment. Defendant appealed.

The court of appeal reversed the judgment insofar as it confirmed the award of attorney's fees, and in all other respects affirmed. An arbitrator cannot make an award based on an issue not properly submitted because his or her jurisdiction or authority to act is derived from, and limited by, the arbitration agreement or submission (*222 Cal. App. 3d 964, 967)* . Applying those principles, the court concluded that the arbitrators were without jurisdiction to consider the issue of

attorney's fees. Plaintiffs admitted that the contract was silent on the subject of attorney's fees in the event arbitration or court action was required to settle a dispute but urged that Rule 43 of the AAA's construction industry rules permitted the award of attorney's fees. Rule 43 permits an arbitrator to "grant any remedy or relief that is just, equitable, and within the terms of the agreement between the parties." The court determined that Rule 43 did not contain any express or implied provision for awarding attorney's fees to the prevailing party when the parties' agreement is silent on this issue (*222 Cal. App. 3d 964, 968)* .

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2-20C California Points & Authorities § 20C.32

§ 20C.32 Correcting Award by Striking Matters Beyond Powers of Uninsured Motorist Arbitrator

[1] FORM

THE AWARD SHOULD BE CORRECTED BY REDUCING THE AMOUNT AWARDED TO $_____ BECAUSE NOTHING IN SECTION 11580.2 OF THE INSURANCE CODE, [OR] THE UNDERLYING INSURANCE POLICY[, (OR) THE SUBMISSION TO ARBITRATION] GRANTED THE ARBITRATOR AUTHORITY TO AWARD SUMS IN EXCESS OF THE POLICY LIMITS [OR TO DETERMINE THE AMOUNT OF COVERAGE].

A. Correcting Award by Striking Portion in Excess of Arbitrators' Authority. [*See § 20C.30[1], Paragraph A.*]

B. Reducing Uninsured Motorist Award to Policy Limits. Unless the insurance policy is broader than *Insurance Code Section 11580.2(f)* or the parties voluntarily agree to submit additional issues to the arbitrator, the arbitrator has no power to determine the extent of coverage or the amount of money the insurance company is obligated to pay the insured; and the trial court may correct an award in excess of the policy limits by reducing the award to the amount of the policy limits (*Furlough v. Transamerica Ins. Co. (1988) 203 Cal. App. 3d 40, 45-47, 249 Cal. Rptr. 703* ; *Campbell v. Farmers Ins. Exch. (1968) 260 Cal. App. 2d 105, 112-113, 67 Cal. Rptr. 175*).

[*Optional*] **C. Extent of Coverage Was Not Submitted to Arbitrator for Determination.** Unless there is some written record of the submission to the arbitrator of the issue of the amount of coverage[, for example mention of the issue in the parties' arbitration briefs], the court cannot find that the coverage issue was submitted to the arbitrator, and the superior court may determine that issue (*Furlough v. Transamerica Ins. Co. (1988) 203 Cal. App. 3d 40, 46-47, 249 Cal. Rptr. 703*).

[2] Comments

[a] Use of Form

This form may be used in support of a petition or response that requests the court to correct an uninsured motorist

arbitration award by striking the portions of the award the were in excess of the arbitrator's authority and to confirm that award as corrected [Code *Civ. Proc. § 1286.6*; *cf. Code Civ. Proc. § 1288.6* (application to arbitrators for correction)]. This form does not provide a complete memorandum but is designed to be combined with memoranda from § 20C.12, addressing in general terms the ground for correction and any relevant timing or procedural matters relating to correction, as well as memoranda from § 20C.60 et seq., addressing any particular challenge that has been made or may be anticipated with regard to confirmation of the award.

Counsel may wish to include appropriate portions of the form at § 20C.10 or the form at § 20C.11, relating to confirmation.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should set forth the scope of the particular insurance policy, submission agreement, and any rules adopted by the parties for the conduct of the arbitration. Generally, it will be appropriate to attach a copy of the award [*see Shepherd v. Greene (1986) 185 Cal. App. 3d 989, 994, 230 Cal. Rptr. 233* (discussed at *§ 20C.12[3*][a])].

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For memoranda to addressing the scope of issues to be decided by the arbitrator in uninsured motorist cases, in procedural contexts other than correction of the award, see *Ch. 20, Arbitration: Compelling, § 20.43* and § 20C.63.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Reducing Uninsured Motorist Award to Policy Limits

Furlough v. Transamerica Ins. Co. *(1988) 203 Cal. App. 3d 40, 249 Cal. Rptr. 703* , involved an uninsured motorist claim by the lessee of a tractor-trailer rig against the lessor's insurer. While driving the rig, plaintiff was forced off the road by a hit-and-run vehicle. Defendant issued a comprehensive business policy (primary policy) which included uninsured motorist coverage with a limit of $300,000 per accident. Defendant also issued a personal umbrella policy which provided uninsured motorist coverage with a $25,000 limit per accident and a commercial umbrella policy which did not mention uninsured motorist coverage and limited liability to $1,000,000. Plaintiff's amended demand for

arbitration sought $1,300,000, claiming that the commercial umbrella policy included uninsured motorist coverage. The arbitratorawarded plaintiff $744,695, which was reduced to $641,796 to reflect sanctions against plaintiff. Plaintiff petitioned for confirmation of the award, and defendant responded seeking that the award be corrected by reducing it to $325,000, which defendant claimed was the applicable limit of uninsured motorist coverage. The superior court agreed, reduced the award to $325,000, and confirmed the award as reduced. Plaintiff appealed.

The court of appeal affirmed. The policy language tracked the statutory language; thus arbitration of only two issues was required: (1) whether the insured was entitled to recover damages from the uninsured motorist, and (2) if so, the amount of damages (*203 Cal. App. 3d 40, 45)* . Unless the parties voluntarily agree to submit additional issues to the arbitrator, the arbitrator has no power to determine the extent of coverage or the amount of money the insurance company is obligated to pay the insured (*203 Cal. App. 3d 40, 45-46)* . Plaintiff argued the extent of coverage had been submitted to arbitration, but the record did not support that contention. The record on appeal did not include the papers purportedly submitted in the arbitration proceeding; and the trial court issued no statement of decision, none having been requested. Thus, the trial court's decision was presumed to be correct and impliedly determined that the issue of the extent of uninsured motorist coverage was not submitted to the arbitrator. Thus, that issue was left for the court's determination because an arbitration award that embraces matters outside the agreement and not submitted to the arbitrator is subject to modification under *Code Civ. Proc. 1286.6(b)* (*203 Cal. App. 3d 40, 46-47)* . The trial court correctly reduced the award because the commercial umbrella policy could not be read to include uninsured motorist coverage. Not only was there no express mention of uninsured motorist coverage in the commercial umbrella policy, but *Ins. Code § 11580.2* specifically excludes from its application automobile liability coverage provided on an "excess or umbrella basis" [*see Ins. Code § 11580.2(a)(1)*] (*203 Cal. App. 3d 40, 47)* .

Campbell v. Farmers Ins. Exch. *(1968) 260 Cal. App. 2d 105, 67 Cal. Rptr. 175* , arose from a claim under the uninsured motorist clause of plaintiffs' policy. An arbitration award was entered in favor of plaintiffs awarding $10,000 to one plaintiff spouse for bodily injuries and $4,000 to the other spouse for loss of the injured spouse's services. The policy provided a maximum of $10,000 could be paid in respect of an incident in which only one person suffered bodily injury, so defendant petitioned to have the award corrected. The trial court denied the petition and confirmed the award. Defendant appealed.

The court of appeal reversed with directions to correct the award by limiting recovery to $10,000 less the amount of medical payments found by the arbitrator to have been paid and to enter judgment accordingly. The agreement to arbitrate did not confer on the arbitrator the power to make a determination that the policy limits were greater than provided in the policy (*260 Cal. App. 2d 105, 112)* . Defendant's failure to object to the demand in excess of the policy limits or to the introduction of evidence in support of the plaintiffs' claims could not be deemed waiver of its right to seek correction or vacation of an award in excess of the policy limit (*260 Cal. App. 2d 105, 112-113)* . The award being in excess of the powers of the arbitrator, the petition for correction should have been granted pursuant to *Code Civ. Proc. § 1286.6* (*260 Cal. App. 2d 105, 113)* .

[b] Extent of Coverage Was Not Submitted to Arbitrator for Determination

Furlough v. Transamerica Ins. Co. *(1988) 203 Cal. App. 3d 40, 249 Cal. Rptr. 703* , is discussed at [a], *above*.

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2-20C California Points & Authorities §§ 20C.33-20C.39

[Reserved]

§§ 20C.33[Reserved]

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2-20C California Points & Authorities § 20C.40

§ 20C.40 Correcting Award by Striking Surplusage

[1] FORM

THE AWARD MAY BE CORRECTED BY STRIKING _____ [*specify, e.g.*, ITEM 4] AND CONFIRMED AS CORRECTED BECAUSE THAT ITEM MAY BE STRICKEN AS A MATTER OF FORM THAT DOES NOT AFFECT THE MERITS OF THE CONTROVERSY.

A. Correcting Award by Striking Surplusage. A court may correct an arbitration award by striking portions of the award that are mere surplusage when the portions to be stricken do not affect the merits of the controversy, and then may confirm the award as corrected (*see Code Civ. Proc. § 1286.6(c)*; *Allstate Ins. Co. v. Superior Court (Jessel) (2006) 142 Cal. App. 4th 356, 362-364, 48 Cal. Rptr. 3d 266* ; *San Jose Federation etc. Teachers v. Superior Court (1982) 132 Cal. App. 3d 861, 868, 183 Cal. Rptr. 410*).

[2] Comments

[a] Use of Form

This form may be used in support of a petition or response that requests the court to correct an arbitration award by striking a portion of the award that is "mere surplusage" and to confirm that award as corrected [*Code Civ. Proc. § 1286.6*; *cf. Code Civ. Proc. § 1288.6* (application to arbitrators for correction)]. This form does not provide a complete memorandum but is designed to be combined with memoranda from § 20C.12, addressing in general terms the ground for correction and any relevant timing or procedural matters relating to correction, as well as memoranda from § 20C.60 et seq., addressing any particular challenge that has been made or may be anticipated with regard to confirmation of the award.

Counsel may wish to include appropriate portions of the form at § 20C.10 or the form at § 20C.11, relating to confirmation.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should set forth the scope of the particular arbitration provision, submission agreement, and any rules adopted by the parties for the conduct of the arbitration. Generally, it will be appropriate to attach a copy of the award [*see Shepherd v. Greene (1986) 185 Cal. App. 3d 989, 994, 230 Cal. Rptr. 233* (discussed at *§ 20C.12[3*][a])].

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Correcting Award by Striking Surplusage

Allstate Ins. Co. v. Superior Court (Jessel) *(2006) 142 Cal. App. 4th 356, 48 Cal. Rptr. 3d 266* , is discussed at *§ 20C.30[3][a]*.

San Jose Federation etc. Teachers v. Superior Court *(1982) 132 Cal. App. 3d 861, 183 Cal. Rptr. 410* , involved arbitration of a grievance filed by a teacher who did not receive a position she had been offered because it was given to another teacher. The award ordered that the teacher receive back pay as if she had taught the course and be given priority to teach the course the next time it was offered. The award also provided that the arbitrator retain jurisdiction to determine the amount of compensation due in the event the parties could not agree and in the event there was a dispute regarding the aggrieved party's priority to teach the class the next time it was offered. The school district petitioned to have the award vacated on the ground that the arbitrator's retention of jurisdiction was in excess of his authority. The court vacated the award. The teachers' union petitioned to have that order set aside.

The court of appeal ordered issuance of a peremptory writ, directing the trial court to vacate its prior order and to enter an order correcting the award, by striking the item regarding retention of jurisdiction by the arbitrator in the event a dispute arose with regard to implementing aggrieved party's priority to teach the class the next time it was offered, and confirming the award as corrected (*132 Cal. App. 3d 861, 868)* . The extent of an arbitrator's authority is governed by the underlying agreement and by the dispute submitted by the parties (*132 Cal. App. 3d 861, 864)* . The collective bargaining agreement under which the dispute was submitted to arbitration provided that the decision of the arbitrator would be final and binding. The award did not become final until that amount of back pay was in fact calculated (*132*

Cal. App. 3d 861, 866) . Thus, the arbitrator did not exceed his powers by retaining jurisdiction to determine the amount of pay owing the aggrieved party in the event the parties could not agree (*132 Cal. App. 3d 861, 867)* . The fact that the award of priority to the aggrieved party to teach the class the next time it was offered had an indirect effect on the other teacher did not render the award in excess of the arbitrator's jurisdiction. Nevertheless, retention of jurisdiction over the issue of the aggrieved party's entitlement to priority in teaching was unnecessary and improper. The remedy was self-executing. Thus, retention of jurisdiction was surplusage and should be stricken (*132 Cal. App. 3d 861, 868)* .

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2-20C California Points & Authorities §§ 20C.41-20C.49

[Reserved]

§§ 20C.41[Reserved]

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2-20C California Points & Authorities § 20C.50

§ 20C.50 Correcting Award by Changing Name of Party to One Over Whom Arbitrator Had Personal Jurisdiction

[1] FORM

THE AWARD SHOULD BE CORRECTED BY INSERTING THE NAME OF _____ [*specify party against whom award should have been made*] AS THE PARTY AGAINST WHOM THE AWARD WAS MADE IN LIEU OF THE NAME OF _____ [*specify person against whom award actually was made*] BECAUSE THE ARBITRATOR HAD NO BASIS FOR EXERCISING JURISDICTION OVER _____ [*specify person against whom award actually was made*].

A. Correcting Award Because of Lack of Personal Jurisdiction. A court may correct an arbitration award by changing the name of the party against whom the award was made when the arbitrator had jurisdiction over the proper party but had no basis for exercising personal jurisdiction over the person against whom the award actually was made (*Ikerd v. Warren T. Merrill & Sons (1992) 9 Cal. App. 4th 1833, 1842-1843, 12 Cal. Rptr. 2d 398*).

[2] Comments

[a] Use of Form

This form may be used in support of a petition or response that requests the court to correct an arbitration award by changing the name of the party against whom the award was made, when the award was made against a party over whom the arbitrator did not have personal jurisdiction, as long as the arbitrator had person jurisdiction over the proper party, and to confirm that award as corrected [*Code Civ. Proc. § 1286.6*; *cf. Code Civ. Proc. § 1288.6* (application to arbitrators for correction)]. This form does not provide a complete memorandum but is designed to be combined with memoranda from § 20C.12, addressing in general terms the ground for correction and any relevant timing or procedural matters relating to correction, as well as memoranda from§ 20C.50 et seq., addressing any particular challenge that has been made or may be anticipated with regard to confirmation of the award.

Counsel may wish to include appropriate portions of the form at § 20C.10 or the form at § 20C.11, relating to

confirmation.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should set forth the name or the party over whom the arbitrator had jurisdiction and detail that party's participation in the arbitration and should describe the lack of participation by the party improperly named, and also show that the party improperly named was not a party to the arbitration agreement or any submission agreement. Generally, it will be appropriate to attach a copy of the award [*see Shepherd v. Greene (1986) 185 Cal. App. 3d 989, 994, 230 Cal. Rptr. 233* (discussed at *§ 20C.12[3*][a])].

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Correcting Award Because of Lack of Personal Jurisdiction

In ***Ikerd v. Warren T. Merrill & Sons*** *(1992) 9 Cal. App. 4th 1833, 12 Cal. Rptr. 2d 398* , the arbitrator of a dispute between a building owner and a construction corporation concluded that the president of the corporation was personally liable for breach of the construction contract, under the rule that an agent for an undisclosed principal is personally liable on a contract that the agent makes for the principal. The arbitrator accordingly made an award against the president personally. However, the president had not been made a party, and the arbitrator had no basis for exercising personal jurisdiction over the president. The corporation opposed the building owner's petition for confirmation, on the ground of the arbitrator's lack of jurisdiction over the president. The trial court corrected the award by inserting the corporation's name in place of the president's name. The award as corrected was confirmed, and judgment was entered accordingly. The owner appealed.

The court of appeal affirmed, noting that the president was not formally made a party to the arbitration. He was neither named nor served as a respondent. His participation in the arbitration was not a general appearance because he participated solely in his capacity as president of the respondent corporation. He never personally filed a responsive pleading. When the arbitrator requested briefs on the president's possible liability under the undisclosed-principal rule, the corporation submitted a brief, but the president did not personally submit a brief (*9 Cal. App. 4th 1833, 1842-1843)*

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2-20C California Points & Authorities §§ 20C.51-20C.54

[Reserved]

§§ 20C.51[Reserved]

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2-20C California Points & Authorities § 20C.55

§ 20C.55 Court Cannot Correct Award Regarding Attorney's Fees After Issue Was Submitted to Arbitrator

[1] FORM

THE COURT HAS NO AUTHORITY TO "CORRECT" THE AWARD BY _____ [DELETING THE AWARD OF *or* MAKING AN ADDITIONAL AWARD FOR] ATTORNEY'S FEES BECAUSE THAT ISSUE WAS SUBMITTED TO AND DECIDED BY THE ARBITRATOR.

[*EITHER*]

A. Court Cannot "Correct" Award to Add Attorney's Fees. Under the standard of limited review of possible errors of law or fact made by an arbitrator, once the issue(s) of [contract interpretation, determination of prevailing party, and] whether a prevailing party is entitled to attorney's fees has/have been submitted to the arbitrator, and the arbitrator has either failed to designate a prevailing party or explained why he or she did not award attorney's fees to the prevailing party, the court has no authority under *Sections 1286.2(a)(4)* or *1286.6(b) of the Code of Civil Procedure*, or otherwise, to correct the award by making award of attorney's fees (*Moore v. Bank of San Luis Obispo (2000) 22 Cal. 4th 782, 786-788, 94 Cal. Rptr. 2d 603, 996 P.2d 706* ; *Moshonov v. Walsh (2000) 22 Cal. 4th 771, 774, 779, 94 Cal. Rptr. 2d 597, 996 P.2d 699* ; *Corona v. Amherst Partners (2003) 107 Cal. App. 4th 701, 706-707, 131 Cal. Rptr. 2d 250*).

[*OR*]

A. Court Has No Authority to Modify Arbitrator's Decision Regarding Which Party Prevailed. [*See § 20C.110[1], Optional Paragraph B.*]

[*OR*]

A. Court Cannot "Correct" Award to Delete Attorney's Fees. Even if the arbitrator makes an error of law in awarding attorney's fees, the trial court has no authority to correct that mistake by deleting the attorney's fees from the judgment or award (*Taylor v. Van-Catlin Construction (2005) 130 Cal. App. 4th 1061, 1064, 1068, 30 Cal. Rptr. 3d 690* (arbitrator in fact did not misconstrue statute under which fees were awarded)).

[*CONTINUE*]

[*Optional*] **B. Grounds for Correcting Award: Arbitrator Exceeded Power and Award Is Correctable Without Affecting Merits.** [*See § 20C.12[1], Second Alternative Paragraph A*].

[2] Comments

[a] Use of Form

The form in [1], *above*, may be submitted in opposition to a petition to correct an arbitration award by either striking an award of attorney's fees (Second or Third Alternative Paragraph A) or awarding attorney's fees to the prevailing party when that issue was submitted to the arbitrator and the arbitrator either found there was no prevailing party or explained why no award of fees was made to the prevailing party (First Alternative Paragraph A). In many cases it will be appropriate to combine the memorandum in this form with those in §§ 20C.90, 20C.91, 20C.101 and 20C.102.

This form is not applicable if the arbitrator designated a prevailing party but then failed either to award attorney's fees to that party or to explain his or her reason for not making an award of attorney's fees. That situation is governed by *DiMarco v. Chaney (1995) 31 Cal. App. 4th 1809, 1815-1817, 37 Cal. Rptr. 2d 558* , which is discussed at *§ 20C.20[3][b]*.

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum supporting confirmation or opposing vacation of an award [*see § 20C.10* et seq.].

[b] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, a copy of the arbitration agreement and any submission agreement or other statements or transcriptions defining the scope of the matters submitted to the arbitrator should be attached as exhibits to the memorandum.

Although the issue addressed by this form is mainly one of law, there may be other issues with regard to which counsel will wish to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice*

(Matthew Bender).

[c] Related Pleading and Practice Chapters

For form relating to correcting, confirming, and vacating arbitration awards, as well as a procedural checklist, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Judicial Review* (Matthew Bender).

[d] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For memoranda addressing the limited scope of judicial review of arbitrator's errors after contractual arbitration, see *§§ 20C.90*, *20C.91*, *20C.101* and *20C.102*. For a memorandum addressing an arbitrator's ability to correct an award on his or her own initiative, see *§ 20C.103*.

For forms addressing general contract principles, see Ch. 50, *Contracts* .

[3] Discussion of Authorities

[a] Court Cannot "Correct" Award to Add Attorney's Fees

Moore v. Bank of San Luis Obispo *(2000) 22 Cal. 4th 782, 94 Cal. Rptr. 2d 603, 996 P.2d 706* , arose out of loan transactions in which plaintiffs pledged their personal residences to secure loans to a corporation in which they were shareholders. Plaintiffs alleged many causes of action, including one to enjoin Bank from foreclosing on plaintiffs' property. Bank cross-complained for judicial foreclosure of the deeds of trust and for deficiency judgments. Both plaintiffs' complaint and the Bank's cross-complaint prayed for an award of attorney fees. The loan agreements contained arbitration clauses as well as a provision by which the plaintiff borrowers agreed to pay the Bank's "collection costs," including "our [the Bank's] attorneys' fees." The incorporated deeds of trust contained a provision entitling the Bank, but not the borrowers, to reasonable attorney fees "[i]f Lender institutes any suit or action to enforce any of the terms of this Deed of Trust ... ." Bank petitioned to compel arbitration, and arbitration was had. The award required the Bank (1) to cancel all obligations under the loan agreements, deeds of trust and liens, (2) to reconvey the deeds of trust, and (3) to execute releases from the liens and promissory notes, but also found that no money was owed to plaintiffs. Without any explanation, the award provided that each party pay its own attorney's fees. Bank petitioned for confirmation of the award, while plaintiffs petitioned for correction of the award pursuant to *Code Civ. Proc. § 1286.6(b)*, so as to award them their attorney fees. The superior court granted the petition to confirm and denied the petition to correct, finding the question of fees had been submitted to and decided by the arbitrators and was, therefore, unreviewable by the court. Plaintiffs appealed. The court of appeal affirmed; and the Supreme Court granted review.

The Supreme Court affirmed also, finding that the recovery or nonrecovery of fees was one of the contested issues of law and fact submitted to the arbitrator for decision, that the arbitrators' decision not to award fees was final, was at most an error of law, and could not be judicially reviewed for error in accordance with the narrow scope of permissible review established in *Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1, 28, 10 Cal. Rptr. 2d 183, 832 P.2d 899* (discussed at *§ 20C.90[3][a]*) and *Advanced Micro Devices, Inc. v. Intel Corp. (1994) 9 Cal. 4th 362, 376-381, 36 Cal. Rptr. 2d 581, 885 P.2d 994* (discussed at *§ 20C.91[3][a] -[c]*) (*22 Cal. 4th 782, 786-787)* . The Court pointed out that the arbitrators were asked, but failed, to designate plaintiffs as prevailing parties, perhaps because plaintiffs' prevailed on equitable issues but were not awarded any money damages. The Court specifically distinguished *DiMarco v. Chaney (1995) 31 Cal. App. 4th 1809, 1815, 37 Cal. Rptr. 2d 558* , discussed at *§ 20C.20[3][b],* in which the arbitrator expressly designated a prevailing party but refused to award that party fees as mandated by the contract (*22 Cal. 4th 782, 787-788)* .

Moshonov v. Walsh *(2000) 22 Cal. 4th 771, 94 Cal. Rptr. 2d 597, 996 P.2d 699* , was a multiparty dispute arising out of a real estate purchase that was submitted to arbitration by stipulation of all parties. The arbitrator found for defendants, the sellers. Although the real estate purchase agreement contained a clause providing for reasonable attorney fees to the prevailing party in an "arbitration or suit ... brought to enforce the terms of this contract or any obligation herein," and although the arbitrator found defendants were the prevailing parties, the arbitrator refused to award defendants any fees, reasoning that the contractual attorney fees clause was not broad enough to encompass the noncontractual claims on which defendants prevailed. Defendants moved to correct the award under *Code Civ. Proc. § 1286.6* to include an award of attorney fees. The motion was denied, and defendants appealed. The Court of Appeal affirmed; and the Supreme Court granted review.

The Supreme Court also affirmed, reasoning that when an arbitrator's denial of fees to a prevailing party rests on the arbitrator's interpretation of a contractual provision within the scope of the issues submitted for binding arbitration, the arbitrator has not "exceeded [his or her] powers" under former Code Civ. Proc. § 1286.2(d) [*now see Code Civ. Proc. § 1286.2(a)(4)*] or *Code Civ. Proc. § 1286.6(b)* (*22 Cal. 4th 771, 774)* . The issue of contractual interpretation was committed to final adjudication by the arbitrator. Regardless of whether the arbitrator's contractual interpretation and consequent denial of fees was legally correct, it was final and binding by agreement of the parties, at most an error of law, and not subject to review by the court, in accordance with the narrow scope of review established in *Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1, 28, 10 Cal. Rptr. 2d 183, 832 P.2d 899* and *Advanced Micro Devices, Inc. v. Intel Corp. (1994) 9 Cal. 4th 362, 376-381, 36 Cal. Rptr. 2d 581, 885 P.2d 994* (*22 Cal. 4th 771, 779)* : namely that a court may not vacate or correct the award because of the arbitrator's legal or factual error, even an error appearing on the face of the award (*22 Cal. 4th 771, 775)* . The Court again distinguished *DiMarco v. Chaney (1995) 31 Cal. App. 4th 1809, 1815, 37 Cal. Rptr. 2d 558* , discussed at *§ 20C.20[3][b]*, by pointing out that in *DiMarco*, the arbitrator gave no interpretation of the contract but merely stated a belief he had discretion not to award attorney's fees, despite the mandatory terms of the agreement (*22 Cal. 4th 771, 779)* .

The parties in ***Corona v. Amherst Partners*** *(2003) 107 Cal. App. 4th 701, 706-707, 131 Cal. Rptr. 2d 250* , had entered into a standard real estate purchase contract. Defendant sold the property to someone else, and plaintiff sued, demanding arbitration in accordance with the contract. The arbitrator found in plaintiff's favor and awarded him $10,000. Plaintiff moved to confirm the award and for an award of $28,257.50 in attorney fees and $6,302.32 in costs. The superior court confirmed theaward, but denied the motion for fees and costs on the ground that only the arbitrator had the authority to make that award and that it was incumbent on plaintiff to have sought it from the arbitrator. Plaintiff appealed.

The court of appeal affirmed. The record on appeal did not include a copy of the contractual arbitration provision, but did include the parties' notice of contractual arbitration. Because the parties' stipulation did not limit the issues to be resolved through arbitration, the issue of plaintiff's entitlement to attorney fees and costs, as requested in the complaint, was subject to determination in arbitration proceedings. Plaintiff did not request that the arbitrator decide the issue of his entitlement to recover attorney fees and costs, and contended that therefore his situation was different from those in which a court cannot review an arbitrator's determination whether to award attorney fees. The court of appeal did not agree. Judicial intervention is limited to reviewing the award to see if statutory grounds for vacating or correcting the award exist. Under the statutory scheme, a party's failure to request the arbitrator to determine a particular issue within the scope of the arbitration is not a basis for vacating or correcting an award. Allowing a party to request that the trial court make an award that was within the scope of the arbitration but not pursued in that forum is inconsistent with the policies underlying the statutory private arbitration scheme (*107 Cal. App. 4th 701, 706)* . Therefore, plaintiff could not recover an award of attorney fees and costs incurred in the arbitration in the judicial proceedings that followed the arbitration. He could, however, recover the attorney fees and costs he incurred in the judicial proceedings and the court of appeal remanded the matter for further proceedings on the issue of the amount of fees and costs to be awarded (*107 Cal. App. 4th 701, 707)* .

[b] Court Cannot "Correct" Award to Delete Attorney's Fees

Plaintiffs/appellants in ***Taylor v. Van-Catlin Construction*** *(2005) 130 Cal. App. 4th 1061, 1064, 1068, 30 Cal. Rptr. 3d 690* , petitioned the superior court to confirm an arbitration award they had obtained against their construction contractor. The contractor asked that the award be corrected pursuant to *Code Civ. Proc. § 1286.6* by deleting the attorney's fees portion of the award on the ground that the arbitrator had exceeded his powers in granting attorney fees. Although the parties' contract did not provide for attorney's fees, American Arbitration Association's Rule 44[d], permitted such an award. The trial court granted contractor's request and deleted the fees. Plaintiffs appealed.

The court of appeal reversed (*130 Cal. App. 4th 1061, 1064, 1070)* . The court of appeal first discussed the difference between a court's authority under *Code Civ. Proc. § 1286.6* to correct an award if the arbitrators exceeded their powers but the award may be corrected without affecting the merits of the decision [*Code Civ. Proc., § 1286.6(b)*] and the fact that a court cannot substitute its judgment for the arbitrator's. Arbitrators do not exceed their powers by rendering a decision that is erroneous on a legal or factual issue, so long as the issue was within the scope of the controversy submitted to the arbitrators. Courts cannot reevaluate the merits of a particular remedy (*130 Cal. App. 4th 1061, 1065-1066)* . Defendant had requested attorney's fees, pursuant to *Code Civ. Proc. § 1033.5(a)(10)(C)* and *Civ. Code § 3260*. The court of appeal disagreed with the trial court and found that *Civ. Code § 3260* was applicable (*130 Cal. App. 4th 1061, 1067-1070)* .

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C. When Court Has No Authority to Correct Award

2-20C California Points & Authorities § 20C.56

§ 20C.56 Court Cannot Correct Award Regarding Sanctions on Attorney of Party Under Arbitration Agreement Allowing Arbitration of Any Issues Arising from Contract

[1] FORM

THE COURT HAS NO AUTHORITY TO "CORRECT" THE AWARD UNDER CODE CIV. PROC. § 1286.6 BY DELETING THE AWARD OF SANCTIONS AGAINST _____[PLAINTIFF'S or DEFENDANT'S] ATTORNEY.

A. Court Cannot "Correct" Award to Delete Sanctions Against Party's Attorney. In accordance with the general rule that a trial court may not decline to confirm an arbitration award under *Code Civ. Proc. § 1286.6* because it disagrees with the merits of the decision, a trial court may not delete an award of sanctions against a party's attorney from a contractual arbitration award (*Bak v. MCL Financial Group, Inc. (2008) 170 Cal. App. 4th 1118, 1127, 88 Cal. Rptr. 3d 800*).

[*Optional*] B. Grounds for Correcting Award: Arbitrator Exceeded Power and Award is Correctable Without Affecting Merits. [*See § 20C.12[1], Second Alternative Paragraph A*].

[2] Comments

[a] Use of Form

This form is designed for use in a memorandum in opposition to a petition to correct an arbitration award by striking an award of sanctions against the attorney for a party when that issue was submitted to the arbitrator and the arbitrator awarded sanctions. In many cases, it will be appropriate to combine the memorandum in this form with those in §§ 20C.90, 20C.91, 20C.101 and 20C.102.

This form does not provide a complete memorandum, but is designed to be combined with a general form of memorandum supporting confirmation or opposing vacation of an award [*see § 20C.10 et seq.*].

[b] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, the argument should cite the provision of the arbitration agreement showing that the scope of the arbitrator's jurisdiction includes award of sanctions and the award itself.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* . For example, a copy of the arbitration agreement, and any submission agreement or other statements or transcripts defining the scope of the matters submitted to the arbitrator, along with the arbitration award should be attached as exhibits to the memorandum.

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, Affidavits, Certificates, and Declarations, and Ch. 321, Judicial Notice (Matthew Bender).

[c] Related Pleading and Practice Chapters

For form relating to correcting, confirming, and vacating arbitration awards, as well as a procedural checklist, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Judicial Review* (Matthew Bender).

[d] Related Memoranda

For discussion of requirements and considerations for drafting memoranda and how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For memoranda addressing the limited scope of judicial review of arbitrator's errors after contractual arbitration, see *§§ 20C.90*, *20C.91*, *20C.101*, and *20C.102*. For a memorandum addressing an arbitrator's ability to correct an award on his or her own initiative, see *§ 20C.103*.

For forms addressing general contract principles, see Ch. 50, *Contracts* .

[3] Discussion of Authorities

[a] Court Cannot "Correct" Award to Delete Sanctions Against Attorney Under Arbitration Agreement Allowing Arbitration of Any Issues Arising from Contract

Bak v. MCL Financial Group, Inc. *(2008) 170 Cal. App. 4th 1118, 88 Cal. Rptr. 3d 800* , confirmed an award issued by an arbitration panel ordering attorney for defendants to pay $7,500 in sanctions as a result of conduct during a prehearing dispute over the return of documents that plaintiffs claimed were subject to the attorney-client privilege. The arbitration clause authorized the arbitrator to decide any issues arising from the contract. The portion of the opinion dealing with the arbitration panel's jurisdiction over the attorney is discussed in *Ch. 20, Arbitration: Compelling, § 20.46[3][a]*. The reviewing court deemed the request to vacate the respective portion of the award a request for

correction of the award under *Code Civ. Proc. § 1286.6* (*170 Cal. App. 4th 1118, 1123*). For the trial court to vacate the sanctions award would result in "a classic case of the trial court declining to confirm an arbitration award because it disagree[d] with the merits of the decision" (*170 Cal. App. 4th 1118, 1127)* .

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[Reserved]

§§ 20C.57[Reserved]

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2-20C California Points & Authorities § 20C.60

§ 20C.60 Stipulation to Arbitrate Was Valid and Binding

[1] FORM

THE AWARD SHOULD BE CONFIRMED BECAUSE THE STIPULATION TO ARBITRATE WAS AUTHORIZED AND RATIFIED BY RESPONDENT, AND THUS WAS VALID AND BINDING.

A. Stipulation to Arbitrate Was Valid and Binding. When a party knows his/her attorney has stipulated to binding arbitration, participates in that arbitration, and never seeks to repudiate the stipulation, he/she has ratified the stipulation; and the resulting award may properly be confirmed (*Caro v. Smith (1997) 59 Cal. App. 4th 725, 732-733, 69 Cal. Rptr. 2d 306*).

[*Optional*] **B. Oral Stipulation Was Binding.** While *Code of Civil Procedure Section 1281 et seq.* permit courts to enforce only written agreements to arbitrate, once the parties have arbitrated and a written award is made, courts can enforce an award even if the underlying agreement to arbitrate was oral (*CalFarm Ins. Co. v. Krusiewicz (2005) 131 Cal. App. 4th 273, 284-286, 31 Cal. Rptr. 3d 619* ; *Law Offices of Ian Herzog v. Law Offices of Joseph M. Fredrics (1998) 61 Cal. App. 4th 672, 677, 71 Cal. Rptr. 2d 771*).

[2] Comments

[a] Use of Form

This form may be used with a memorandum in support of a petition or response seeking to have an arbitration award confirmed to assert that the stipulation under which arbitration was conducted was valid and binding despite the fact that one party did not sign the stipulation. It does not provide a complete memorandum but should be combined with the memorandum supporting the petition [*see § 20C.10*] or response [*see § 20C.11*] seeking to have the award confirmed.

Optional Paragraph B is for use in the stipulation for arbitration was oral.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should show that the party who did not sign the stipulation knew of it, authorized, and participated in the arbitration without objection. Generally, it will be appropriate to attach a copy of the award [*see Shepherd v. Greene (1986) 185 Cal. App. 3d 989, 994, 230 Cal. Rptr. 233* (*discussed under § 20C.12[3][a]*)].

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For memoranda to combine with this form, see *§§ 20C.10* and *20C.11*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Stipulation to Arbitrate Was Valid and Binding

Respondents in ***CalFarm Ins. Co. v. Krusiewicz*** *(2005) 131 Cal. App. 4th 273, 31 Cal. Rptr. 3d 619* obtained a judgment against appellant's insured, Laynescape, Inc., which constructed retaining walls on the respondents' property. Respondents sought to enforce an arbitrator's award against CalFarm under the theory of promissory estoppel, based on representations made by Laynescape's attorney at a settlement conference. Respondents believed Laynescape's attorney represented both Laynescape and CalFarm. In return for agreeing to binding arbitration, respondents agreed to dismiss some of their claims. The arbitrator made a lump sum award of $475,000 in favor of the respondents and awarded them $129,082.96 in attorney fees. Judgment was entered on the arbitration award. CalFarm paid all but $80,000 of the award and sued respondents for declaratory relief and reimbursement. Respondents cross complained on several theories. The trial court verdict was for respondents. Defendant appealed.

The court of appeal affirmed, except as to punitive damages, which were based on a cause of action for breach of the covenant of good faith and fair dealing (*131 Cal. App. 4th 273, 292)* . The court of appeal found the jury's verdict supported by evidence of the promise and that respondents' reliance was reasonable, as was their belief that Laynescape's counsel was CalFarm's agent (*131 Cal. App. 4th 273, 284-286)* .

The facts and procedural background of ***Caro v. Smith*** *(1997) 59 Cal. App. 4th 725, 69 Cal. Rptr. 2d 306* , and the portion of the opinion addressing plaintiff's entitlement to statutory attorney's fees are discussed at *§ 20C.110[3][c]*.

The stipulation to arbitrate was reduced to writing and signed by plaintiff and attorneys for both parties. Defendant's attorney told plaintiff's attorney he was "authorized and instructed" to stipulate to binding arbitration. At the commencement of the arbitration, the arbitrator asked both parties if they understood that this was binding arbitration and that there would be no appeal of his award. Both parties answered "Yes." Defendant did not submit a declaration in opposition to the motion to confirm the award, but her attorney's did.

In affirming the judgment based on the award, the court of appeal found that defendant's attorneys were authorized to stipulate to binding arbitration and that the stipulation was valid. Unlike the situations in cases the court distinguished, defendant in this case ratified the stipulation by expressly assenting to arbitration and never claiming her consent was fraudulently induced or seeking to repudiate it (*59 Cal. App. 4th 725, 732-733)* .

[b] Oral Stipulation Was Binding

Law Offices of Ian Herzog v. Law Offices of Joseph M. Fredrics *(1998) 61 Cal. App. 4th 672, 71 Cal. Rptr. 2d 771* , arose from a fee dispute between attorneys. Defendant associated plaintiff as co-counsel on a matter which was successfully terminated in favor of their client; and plaintiff wanted to be paid. At first defendant refused to stipulate to arbitration unless the stipulation provided that an award in his favor would be considered a favorable termination for purposes of a malicious prosecution action. Later, defendant and an attorney for plaintiff appeared in court, orally stipulated to binding arbitration, asked the court to order binding arbitration, and stated no written stipulation would be necessary: that the oral stipulation on the record would be sufficient if the court ordered arbitration. After an award for plaintiff, defendant filed a request for trial de novo. Plaintiff petitioned for confirmation of the award. The award was confirmed pursuant to the procedures applicable to contractual arbitration [*Code Civ. Proc. § 1287.4*]; and judgment entered thereon. Defendant appealed, contending what the parties had was judicial arbitration, because the court had no power to order contractual arbitration based only on an oral agreement to arbitrate.

The court of appeal affirmed, saying that while *Code Civ. Proc. § 1281 et seq.* permit courts to enforce only written agreements to arbitrate, once the parties have arbitrated and a written award is made, courts can enforce the award even if the underlying agreement to arbitrate was oral (*61 Cal. App. 4th 672, 677)* . Fredrics did not dispute that under *Horn v. Gurewitz (1968) 261 Cal. App. 2d 255, 258-259, 67 Cal. Rptr. 791* , the court could enforce a written award even if the arbitration was the result of an oral agreement but contended instead that as there was no written agreement to arbitrate, the order to arbitrate, and thus the award, were void. The court of appeal said that Fredrics could, and did, waive his right to require a written agreement to arbitrate as the basis for the court's order to arbitrate. Fredrics orally stipulated in open court that the parties could be ordered to arbitrate, expressly stating that no written stipulation was required (*61 Cal. App. 4th 672, 677-678)* . Alternatively, under the doctrine of judicial estoppel, Fredrics could not change his position to Herzog's detriment after arbitration to contend that a written arbitration agreement was required before the court could order him to arbitrate (*61 Cal. App. 4th 672, 679)* .

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2-20C California Points & Authorities § 20C.61

§ 20C.61 "Self-Executing" Agreement Did Not Require an Order to Compel Arbitration

[1] FORM

THE AWARD SHOULD BE CONFIRMED BECAUSE THE ARBITRATION AGREEMENT IS SELF-EXECUTING, AND, WHEN RESPONDENT REFUSED TO ARBITRATE, PETITIONER WAS ENTITLED TO PROCEED TO ARBITRATION WITHOUT AN ORDER COMPELLING ARBITRATION.

A. Arbitration Under "Self-Executing" Type of Agreement Needs No Order to Compel. If an arbitration agreement incorporates rules by which arbitration can be proceed ex parte if a party refuses to arbitrate, it is not necessary to obtain an order to compel arbitration in order to proceed (*Brink v. Allegro Builders, Inc. (1962) 58 Cal. 2d 577, 579-580, 25 Cal. Rptr. 556, 375 P.2d 436* ; *Kustom Kraft Homes v. Leivenstein (1971) 14 Cal. App. 3d 805, 810-811, 92 Cal. Rptr. 650*).

[2] Comments

[a] Use of Form

This form may be used with a memorandum in support of a petition or response seeking to have an arbitration award confirmed to assert that the agreement under which arbitration was had was "self-executing," and no order compelling arbitration was necessary to initiate the proceeding or to give it validity [*see Code Civ. Proc. § 1281.2*]. It does not provide a complete memorandum but should be combined with the memorandum supporting the petition [*see § 20C.10*] or response [*see § 20C.11*] seeking to have the award confirmed.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should show in what respects the arbitration agreement was self-executing, providing for proceeding in the face of one party's refusal to arbitrate. Generally, it will be appropriate to attach a copy of the award [*see Shepherd v. Greene (1986) 185 Cal. App. 3d 989, 994, 230 Cal. Rptr. 233* (*discussed under § 20C.12[3][a]*)].

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant)necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For memoranda to combine with this form, see *§§ 20C.10* and *20C.11*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] "Self-Executing" Type of Agreement Needs No Order to Compel

Brink v. Allegro Builders, Inc. *(1962) 58 Cal. 2d 577, 25 Cal. Rptr. 556, 375 P.2d 436* , arose out of a construction contract dispute. A provision in the contract recited that all matters in dispute thereunder were subject to arbitration by either one or three arbitrators, and that at any point of refusal or neglect to proceed by either party, the arbitration procedure could continue ex parte. The landowner raised certain claims under the contract; when the contractor demanded arbitration, the landowner appointed an arbitrator. The contractor refused to appoint an arbitrator, contending the dispute was outside the scope of the arbitration provision. The landowner proceeded to arbitration unilaterally. The contractor appeared at the landowner's ex parte arbitration hearing, stating it was not waiving its objections, and presented evidence. The arbitrator made an award in the landowner's favor. The trial court denied confirmation and instead granted the contractor's motion to vacate the award. Landowner appealed.

The Supreme Court reversed, stating that when a contract contains express provisions permitting one arbitrator to proceed, as in this case, the party not in default is not compelled to seek court aid in invoking the arbitration clause. The statutory procedure to compel arbitration by court order was designed to afford a remedy when the parties have not provided for the particular contingency that has arisen or when the contractual scheme has failed. The contract in the instant case provided for the very contingency that arose; therefore, it was unnecessary to follow the statutory procedure for compelling arbitration (*58 Cal. 2d 577, 579-580)* .

In ***Kustom Kraft Homes v. Leivenstein*** *(1971) 14 Cal. App. 3d 805, 92 Cal. Rptr. 650* , plaintiff contractors alleged breach of a construction contract. Defendant demurred on the ground that the complaint failed to allege that the matter had been submitted to arbitration, as provided for in the contract, which arbitration was to proceed in accordance with the rules of the American Arbitration Association. The demurrer was sustained, and the action was abated pending arbitration. Defendant refused to recognize the arbitration process which plaintiff thereafter initiated. Plaintiff received

the award following an ex parte arbitration and had it confirmed. Defendant appealed, stating there had been no order compelling arbitration.

The court of appeal affirmed, though it ordered certain corrections to be made in the record below, stating that an arbitration agreement may be self-executing, and its provisions may obviate the need to resort to statutory procedure to compel arbitration, citing *Brink, above*. The arbitration clause in this case imported into the contract the entire scheme for arbitration as established by the rules of the American Arbitration Association. When those rules were read into the contract, the court concluded, it then appeared to be comprehensive enough to be self-executing *14 Cal. App. 3d 805, 810-811)* .

[4] Additional Authorities

[a] "Self-Executing" Type of Agreement Needs No Order to Compel

The court of appeal in *National Marble Co. v. Bricklayers & Allied Craftsmen (1986) 184 Cal. App. 3d 1057, 229 Cal. Rptr. 653* , confirmed an award against the employer despite the fact that there had been no order compelling arbitration under *Code Civ. Proc. § 1281.2*. An arbitration agreement is self-executing if it provides for arbitration under rules incorporated or set forth in it (*184 Cal. App. 3d 1057, 1063)* . When an arbitration agreement is self-executing, no court order to arbitrate under *Code Civ. Proc. § 1281.2* is necessary (*184 Cal. App. 3d 1057, 1062-1063)* . When arbitration proceeds under a self-executing agreement, the objecting party is required to participate in the arbitration proceeding and then may raise its objections by petition to vacate the award under *Code Civ. Proc. § 1286.2* or by opposing a petition to confirm the award (*184 Cal. App. 3d 1057, 1063)* .

In *King v. Larsen Realty, Inc. (1981) 121 Cal. App. 3d 349, 175 Cal. Rptr. 226* , a member of the California Association of Realtors requested interboard arbitration over a controversy between members of two boards of realtors concerning a sales commission. Defendants objected to the arbitration and refused to attend the hearing. The trial court granted plaintiffs' petition to confirm the arbitration award, and defendants appealed on the grounds that they had not entered into a written agreement to arbitrate interboard disputes and, therefore, plaintiffs were required to secure a prior court order to compel arbitration pursuant to *Code Civ. Proc. § 1281.2*.

The court of appeal affirmed, reasoning that the contracts for local board membership, which defendants had signed, were comprehensive enough to be self-executing arbitration agreements because the contracts incorporated the board's bylaws that imposed a duty to arbitrate and contained a scheme for conducting such arbitration. Relying on *Brink v. Allegro Builders, Inc. (1962) 58 Cal. 2d 577, 579-580, 25 Cal. Rptr. 556, 375 P.2d 436* , the court then held that a self-executing arbitration agreement obviates the need to resort to statutory proceedings to compel arbitration (*121 Cal. App. 3d 349, 356)* .

Mitchum, Jones & Templeton, Inc. (1977) 72 Cal. App. 3d 596, 140 Cal. Rptr. 160 , held an arbitration clause containing the rules of the New York Stock Exchange to be "self-executing." That clause read: "If any of the parties, after due notice, fails to be present or represented at a hearing or any adjourned hearing, the arbitrators may, nevertheless, in their own discretion, proceed with the adjudication of the controversy" (*72 Cal. App. 3d 596, 602)* .

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2-20C California Points & Authorities § 20C.62

§ 20C.62 Defense Is Unavailable as Outside the Scope of the Matters Committed to Arbitration

[1] FORM

THE AWARD SHOULD BE CONFIRMED BECAUSE RESPONDENT'S PROFFERED DEFENSE IS BASED ON A DISPUTE OUTSIDE THE SCOPE OF ARBITRATION AND OF THIS PROCEEDING.

A. Nonarbitrable Defense Is Unavailable Against Petition to Confirm Award. A hearing to confirm an arbitration award is a special proceeding, and litigation of a nonarbitrable dispute through cross complaint or defense of setoff is beyond the scope of the proceeding (*Airfloor Co. of Cal., Inc. v. Regents of Univ. of Cal. (1978) 84 Cal. App. 3d 1004, 1007, 1009, 149 Cal. Rptr. 130*).

[2] Comments

[a] Use of Form

This form may be used with a memorandum in support of a petition or response seeking to have an arbitration award confirmed to assert that a defense that was not raised in the arbitration proceeding cannot be considered by the court as part of its consideration of a petition to confirm the award. It does not provide a complete memorandum but should be combined with the memorandum supporting the petition [*see § 20C.10*] or response [*see § 20C.11*] seeking to have the award confirmed.

As a tactical matter, counsel may wish to reserve these points for oral argument or for other form of rejoinder to the respondent's opposing memorandum. In deciding whether or not to reserve these arguments, counsel should consider local court rules and practice, as well as whether the moving party would be expected to be raise these points in initial moving papers, to avoid the possibility of losing the opportunity to raise them.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument

should point out the language of the agreement which defines the nature of the disputes the parties agreed to arbitrate, or any broader language in any submission agreement, stipulation, or order, and indicate why the defense the other party seeks, or is likely to raise, is outside the scope of that agreement. Generally, it will be appropriate to attach a copy of the award [*see Shepherd v. Greene (1986) 185 Cal. App. 3d 989, 994, 230 Cal. Rptr. 233* (*discussed under § 20C.12[3][a]*)].

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For memoranda to combine with this form, see *§§ 20C.10* and *20C.11*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Nonarbitrable Defense Is Unavailable Against Petition to Confirm Award

In ***Airfloor Co. of Cal., Inc. v. Regents of Univ. of Cal.*** *(1978) 84 Cal. App. 3d 1004, 149 Cal. Rptr. 130* , a dispute arose over the construction of college facilities. On receiving an arbitration award for extra work performed in that construction, plaintiff petitioned for confirmation of the award. Defendant did not contest the award but claimed entitlement to set off an alleged debt, not subject to arbitration, and arising out of a different contract. The trial court confirmed the award, and defendant appealed.

The court of appeal affirmed, stating the issue as being whether certain affirmative defenses could be raised in response to a petition to confirm an award. Hearings to confirm an arbitration award are special proceedings, not actions. The court's jurisdiction in those proceedings is limited by statutes which reflect an intent to free the hearings from delays incident to ordinary court trials (*84 Cal. App. 3d 1004, 1007-1008)* . The totality of the legislative scheme is inconsistent with the use of those proceedings to resolve nonarbitrable disputes (*84 Cal. App. 3d 1004, 1007, 1009)* . Furthermore, the provisions for compulsory cross complaints do not apply to special proceedings, and permissive cross complaints are allowed only when in response to complaints, not petitions [*see Code Civ. Proc. §§ 426.60, 428.10*]. A setoff may be alleged in an action, not a special proceeding [*see Code Civ. Proc. § 431.70*]. The defendant could have moved to abate the confirmation hearings pending determination of litigation involving the debt; if that litigation had been resolved in defendant's favor, it could have set off the judgment in the confirmation proceedings with the judgment at law. Even at the moment, on remand, defendant could ask the trial court to stay execution until the other litigation

might be decided (*84 Cal. App. 3d 1004, 1009)* .

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2-20C California Points & Authorities § 20C.63

§ 20C.63 Arbitrators of Uninsured Motorist Claim Have Power to Determine Subordinate Issues

[1] FORM

THE AWARD SHOULD BE CONFIRMED BECAUSE _____ [INSURANCE CODE SECTION 11580.2(f) *and/or* THE POLICY *and/or* THE AGREEMENT SUBMITTING THE MATTER TO ARBITRATION] PROVIDES FOR ARBITRATION OF THE QUESTION OF WHETHER PETITIONER IS LEGALLY ENTITLED TO RECOVERY, AND THAT NECESSARILY AUTHORIZES THE ARBITRATORS TO DETERMINE ALL [LEGAL] ISSUES SUBORDINATE TO THAT QUESTION, [SUCH AS WHETHER PETITIONER'S INJURY WAS CAUSED BY PHYSICAL CONTACT WITH AN UNINSURED MOTOR VEHICLE].

A. Physical Contact With Uninsured Motor Vehicle Is Fact Necessary to Determine to Uninsured Motorist Claim. An agreement to submit to the arbitrator the question of whether the insured is legally entitled to recover damages from the owner or operator of an uninsured automobile is sufficiently comprehensive to include the subordinate issue of whether the vehicle which caused the accident was an uninsured automobile within the meaning of the policy (*Felner v. Meritplan Ins. Co. (1970) 6 Cal. App. 3d 540, 543, 86 Cal. Rptr. 178*).

[*Optional*] **B. Issue of Physical Contact With Uninsured Motorist Is Arbitrable Under Policy Language.** [*See Ch. 20, Arbitration: Compelling, § 20.43[1], Paragraph F.*]

[*Optional*] **C. Claimant's Status as "Insured" Is Arbitrable.** [*See Ch. 20, Arbitration: Compelling, § 20.43[1], Paragraph G.*]

[*Optional*] **D. Parties Submitted to Arbitrator Issue of Workers' Compensation Setoff.** Even if the issue is not a "coverage question," and even if the policy bars the arbitrator from considering it, if the parties' briefs in arbitration plainly show that the amount of a workers' compensation setoff was in dispute, [for example if each party produces a different total for the amount of damages to which claimant is legally entitled because of different assumptions about the proper amount of the setoff], the parties are deemed to have submitted that issue for arbitration and cannot later complain that the arbitrator exceeded his or her powers by determining the issue (*Porter v. Golden Eagle Ins. Co.*

(1996) 43 Cal. App. 4th 1282, 1291, 51 Cal. Rptr. 2d 338).

[*Optional*] **E. Arbitrator May Award Section 998 Costs In Excess of Uninsured Motorist Coverage Limit**. *Code of Civil Procedure Section 998* applies to uninsured motorist arbitration under *Insurance Code Section 11580.2*. Further, the "maximum liability" provision of *Insurance Code Section 11580.2(p)(4)* does not preclude recovery of costs under Section 998, even if those costs, when added to the arbitration award, exceed the coverage limits. Although prejudgment interest is not available because an uninsured motorist arbitration is not an action for "personal injury" within the meaning of *Civil Code Section 3291*, deposition and exhibit preparation expenses are recoverable (*Pilimai v. Farmers Ins. Exchange Co. (2006) 39 Cal. 4th 133, 137, 139, 145, 45 Cal. Rptr. 3d 760, 137 P.3d 939*).

[2] Comments

[a] Use of Form

This form may be used with a memorandum in support of a petition or response seeking to have an arbitration award confirmed to assert that arbitrators determining an uninsured motorist claim have the authority to determine subordinate issues, such as physical contact with an uninsured vehicle as the cause of the insured's injury. This form does not provide a complete memorandum but should be combined with the memorandum supporting the petition [*see § 20C.10*] or response [*see § 20C.11*] seeking to have the award confirmed.

As a tactical matter, counsel may wish to reserve these points for oral argument or for other form of rejoinder to the respondent's opposing memorandum. In deciding whether or not to reserve these arguments, counsel should consider local court rules and practice, as well as whether the moving party would be expected to be raise these points in initial moving papers, to avoid the possibility of losing the opportunity to raise them.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should show how the question of "legal entitlement to damages" encompasses any other legal issue that has, or might be, called into question, including whether or not the parties' evidence and briefs in arbitration amounted to submission of that "subordinate" issue. Generally, it will be appropriate to attach a copy of the award [*see Shepherd v. Greene (1986) 185 Cal. App. 3d 989, 994, 230 Cal. Rptr. 233* (*discussed under § 20C.12[3][a]*)].

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For memoranda to combine with this form, see *§§ 20C.10* and *20C.11*.

For a memorandum addressing arbitrators' authority in uninsured motorist cases in the context of petitions to compel arbitration, see *Ch. 20, Arbitration: Compelling, § 20.43*.

For a memorandum asserting that the general rule that an arbitration award is not to be vacated for errors of law applies to uninsured motorist arbitration, see *§ 20C.90*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Physical Contact With Uninsured Motor Vehicle Is Fact Necessary to Determine to Uninsured Motorist Claim

Felner v. Meritplan Ins. Co. *(1970) 6 Cal. App. 3d 540, 86 Cal. Rptr. 178* , arose out of a claim for damages by an insured under uninsured motorist coverage. The policy, as required by *Ins. Code § 11580.2(f)*, provided that the parties either would agree as to whether the insured was legally entitled to recover damages from the uninsured automobile owner or operator, and in what amount, or they would arbitrate the matter. At the hearing in superior court to confirm the award made by the arbitrator, the insurer contended that the court should conduct a new evidentiary hearing on a crucial legal issue necessary to determine if an uninsured motorist was involved: whether the injury was the result of physical contact by a hit-and-run automobile as defined in *Ins. Code § 11580.2(b)*. The trial court disagreed and confirmed the award. Defendant appealed.

The court of appeal affirmed, finding the agreement to submit to the arbitrator the question of legal entitlement to recovery as sufficiently comprehensive to include submission of the subordinate legal question involved (*6 Cal. App. 3d 540, 543)* .

[b] Parties Submitted to Arbitrator Issue of Workers' Compensation Setoff

Porter v. Golden Eagle Ins. Co. *(1996) 43 Cal. App. 4th 1282, 51 Cal. Rptr. 2d 338* , arose out of an accident that caused injury to plaintiff/truck driver. Defendant provided the employer's workers' compensation insurance as well as its uninsured/underinsured motorist coverage. Defendant, as workers' compensation insurer, paid plaintiff $17,192.67. Plaintiff settled with the other driver for $15,000. Plaintiff retained $11,000 of that settlement and defendant received $4,000. Then, plaintiff claimed additional compensation under the underinsured motorist coverage, which was limited to $60,000. Defendant's arbitration brief argued that plaintiff could receive no more than $27,808.33 because his recovery had to be offset by the $17,192.67 in workers' compensation benefits he had already received and by the $15,000 settlement from the other driver. The arbitrator awarded plaintiff $72,490, minus the $11,000 he had received from the other driver, for a net award of $61,490. The arbitrator found that defendant had waived its right to assert its workers' compensation setoff by earlier acceptance of the $4,000 in settlement with the other driver. Plaintiff petitioned to have the award confirmed. Defendant petitioned to have the award vacated or corrected, claiming that (1) the award was erroneous as a matter of law because it failed to subtract the workers' compensation setoff from plaintiff's recovery, and (2) the arbitrator had exceeded his powers by deciding a coverage dispute that the parties did not submit to him. The trial court found that defendant's arbitration brief submitted the issue of the workers' compensation setoff to the arbitrator, notwithstanding any contrary language in the policy. Defendant appealed.

The court of appeal affirmed. The court first determined that the rule enunciated in *Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1, 11, 10 Cal. Rptr. 2d 183, 832 P.2d 899* , that an award cannot be reviewed for errors of law or fact, applies to arbitrations pursuant to *Ins. Code § 11580.2(f)* as well as to contractual arbitration in accordance with *Code*

Civ. Proc. § 1281 et seq. (*43 Cal. App. 4th 1282, 1289-1290)* . That portion of the opinion is discussed at *§ 20C.90[3][c]*. Regarding the question of the arbitrator's power to decide the workers' compensation setoff, the court noted that parties may submit for decision issues they were not contractually compelled to submit to arbitration. In those situations, courts look both to the contract and to the scope of the submissions to determine the arbitrator's authority. Here, the parties' briefs in arbitration plainly showed that an issue in dispute was the amount of the workers' compensation. The parties produced different totals for the amount of damages which plaintiff was "legally entitled to recover" starting from different assumptions as to the proper amount of the setoff. Thus, the court concluded, the issue was unequivocally submitted for arbitration and defendant could not now complain that the arbitrator exceeded his powers. The court said any other result would be intolerable, because it would let a party play fast and loose with the administration of justice (*43 Cal. App. 4th 1282, 1291)* . The court distinguished *Furlough v. Transamerica Ins. Co. (1988) 203 Cal. App. 3d 40, 249 Cal. Rptr. 703* , (discussed at *§ 20C.32[3][a]*) on which defendant relied, because the parties in *Furlough* made no showing regarding what issues they had submitted to the arbitrator, and did not request, or receive, a statement of decision from the trial court (*43 Cal. App. 4th 1282, 1291-1292)* .

[c] Arbitrator May Award Section 998 Costs In Excess of Uninsured Motorist Coverage Limit

Pilimai v. Farmers Ins. Exchange Co. *(2006) 39 Cal. 4th 133, 45 Cal. Rptr. 3d 760* involved an uninsured motorist arbitration conducted pursuant to *Ins. Code § 11580.2*. The uninsured coverage limit in the policy was $250,000. The insured made a Section 998 offer to settle for $85,000, which offer the insurer refused. The arbitrator returned an award of $556,972, less $15,000 credit that the insurer was entitled to, or the amount of the uninsured motorist policy limits. The award was silent on the matter of costs and prejudgment interest. Both parties moved to confirm the award, but Farmers wanted it confirmed at the policy limits, less $15,000, ($235,000) while the insured sought to have his costs and interest, pursuant to *Code Civ. Proc. § 998* and *Civ. Code § 3291*, included in the award. The trial court entered judgment in the amount of$235,000. Although the trial court believed both *Code Civ. Proc. § 998* and *Civ. Code § 3291* applied to uninsured motorist arbitration and that the insured was entitled to both, it believed *Ins. Code § 11580.2(p)(4)*'s limit prevented entry of any judgment in excess of the policy limits, less the $15,000 credit. The insured appealed. The court of appeal affirmed in part but reversed the judgment with respect to costs and prejudgment interest. The California Supreme court granted review.

The Supreme Court also affirmed in part and in reversed in part, remanding for the trial court to determine the proper cost award. The Supreme Court concluded that (1) *Code Civ. Proc. § 998* applies to uninsured motorist arbitration; (2) the "maximum liability" provision of *Ins. Code § 11580.2(p)(4)* does not preclude recovery of costs under Section 998, even if those costs, when added to the arbitration award, exceed the coverage limits; (3) prejudgment interest was not available because the case was not an action for "personal injury" within the meaning of *Civ. Code § 3291*; but (4) the insured's deposition and exhibit preparation expenses were recoverable under Section 998 (*39 Cal. 4th 133, 137)* . The Court first considered whether uninsured motorist arbitration pursuant to *Ins. Code 11580.2* was arbitration within the meaning of the California Arbitration Act (CAA; *Code Civ. Proc. § 1281 et seq.*) by considering the purpose and meaning of each statute. *Code Civ. Proc 998* applies to arbitration as provided in *Code Civ. Proc. § 1281* or *1295*, and its purpose is to encourage settlement by providing a strong financial disincentive to a party who fails to achieve a better result than that party could have achieved by accepting his or her opponent's settlement offer *39 Cal. 4th 133, 139)* .

Ins. Code § 11580.2 governs uninsured and underinsured motorist arbitration, and requires that every automobile liability insurance policy covering damages that a third party shall be legally entitled to recover for bodily injury from the insured owner or operator shall also cover damages that the insured owner or operator shall be legally entitled to recover for bodily injury from an uninsured owner or operator (*39 Cal. 4th 133, 140)* . Every policy also must provide that the determination of whether insured shall be legally entitled to recover damages, and if so entitled, the amount thereof, shall be made by agreement between the insured and the insurer or, in the event of disagreement, by arbitration, meaning *contractual* arbitration. In this aspect, the purpose of *Ins. Code § 11580.2* is to offer a means of resolving disputes that is more expeditious and less expensive than litigation. This benefits both the insurer and the insured, who are each given a right against litigating, and the courts, which are freed from entertaining uninsured motorist litigation (

39 Cal. 4th 133, 140) .

The insurer claimed that Section 1281 refers only to voluntary arbitrations subject to written agreements not those mandated by statute, such as uninsured motorist arbitration pursuant to *Ins. Code § 11580.2* (*39 Cal. 4th 133, 140-141)* . The court did not agree, but said the issue had been decided in *Mercury Ins. Group v. Superior Court (1998) 19 Cal. 4th 332, 337-342* . *Mercury* considered whether the CAA governed uninsured motorist arbitrations so as to allow consolidation of the arbitration with a civil case pursuant to *Code Civ. Proc. § 1281.2(c)*, and found that uninsured motorist arbitration is a form of contractual arbitration governed by the CAA. The automobile liability insurance policy is the contract that provides for arbitration. The Court concluded that an uninsured motorist arbitration, although mandated by statute, nonetheless is a contractual arbitration subject to the provisions of the CAA (*39 Cal. 4th 133, 141-142*).

Considering whether the limitation of *Ins. Code § 11580.2(p)(4)* prevented an award of costs pursuant to *Code Civ. Proc. § 998* if they would exceed the coverage limitation, the Court noted that Section 998 explicitly states that it augments *Code Civ. Proc. § 1032*, the general costs statute. Section 1032 in turn states that it is applicable unless another statue *expressly provides* otherwise (*39 Cal. 4th 133, 143)* . *Ins. Code 11580.2* contains no such express provision. In fact, it does not mention costs at all (*39 Cal. 4th 133, 144-145)* . The Court concluded that the maximum liability provision of *Ins. Code § 11580.2(p)(4)* does not preclude an award of costs pursuant to *Code Civ. Proc. § 998*, even if the costs, in addition to the damage award, would exceed the insurance policy's maximum coverage (*39 Cal. 4th 133, 145)* . The particular costs and expenses claimed included prejudgment interest under *Civ. Code § 3291*, which the Court concluded were not recoverable, because an uninsured motorist arbitration is not a personal injury action, but a contractual action brought against one's insurer (*39 Cal. 4th 133, 145-147)* . The insurer argued that even the insured could recover costs pursuant to *Code Civ. Proc. § 998*, those costs were limited to expert witness fees, which are specifically mentioned in *Code Civ. Proc. § 998(d)*, and thus, the only exception to *Code Civ. Proc. § 1284.2*, which provides that unless the arbitration agreement otherwise provides or the parties to the arbitration otherwise agree, each party must pay his or her pro rata share of the expenses and fees of the neutral arbitrator, together with witness fees or other expenses incurred by a party for his own benefit. The Court disagreed, saying the starting point was *Code Civ. Proc. § 1032* because Section 998 specifies that costs allowable under Section 1032 are to be allowed or withheld as provided in Section 998 (*39 Cal. 4th 133, 148)* . The costs allowed by Section 1032 are enumerated in *Code Civ. Proc. § 1033.5* and include deposition costs [*Code Civ. Proc. § 1033.5(a)(3)*] and costs of exhibits [Code Civ. Proc. § 1033.4(a)(12)], the costs Pilimai was claiming (*39 Cal. 4th 133, 148)* . The Court distinguished *Austin v. Allstate Ins. Co. (1993) 16 Cal. App. 4th 1812, 21 Cal. Rptr. 2d 56* , relied on by Farmers because *Austin* did not involve a Section 998 claim (*39 Cal. 4th 133, 149)* . The Court discussed the wording of Section 998(d), specifically the phrase "in addition to plaintiff's costs;" and concluded that those words were not superfluous, that Section 998(d) was intended to apply to arbitrations as well as trials, and that Subsections 998(a) and (d) had to be interpreted consistently to apply equally to plaintiffs and defendants (*39 Cal. 4th 133, 149-151*). Thus, the insured was entitled to recover deposition and exhibit preparation costs pursuant Section 998(d) (*39 Cal. 4th 133, 151)* .

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2-20C California Points & Authorities § 20C.64

§ 20C.64 Unilateral Rearbitration Clause in Health Services Contract Is Unenforceable

[1] FORM

THE AWARD SHOULD BE CONFIRMED BECAUSE THE PROVISION IN THE HEALTH PLAN CONTRACT FOR REARBITRATION OF A DISPUTE AT THEOPTION OF THE HEALTH PLAN UNREASONABLY DEFEATED THE EXPECTATIONS OF SUBSCRIBERS AND IS INVALID AND UNENFORCEABLE AS AGAINST PUBLIC POLICY.

A. Unilateral Rearbitration Clause in Health Services Contract Is Unenforceable. A provision in a health plan master agreement requiring rearbitration at the option of the health plan personnel or medical services provider, which provision is part of a contract of adhesion and is not brought to the attention of the plan subscriber, is contrary to arbitration policy and the expectation of the subscriber, and is unenforceable (*Saika v. Gold (1996) 49 Cal. App. 4th 1074, 1079-1082, 56 Cal. Rptr. 2d 922* ; *Beynon v. Garden Grove Medical Group (1980) 100 Cal. App. 3d 698, 706, 708, 161 Cal. Rptr. 146*). Because the rearbitration clause is unenforceable, the award should be confirmed (*see Saika v. Gold (1996) 49 Cal. App. 4th 1074, 1082, 56 Cal. Rptr. 2d 922* ; *Beynon v. Garden Grove Medical Group (1980) 100 Cal. App. 3d 698, 714, 161 Cal. Rptr. 146*).

[2] Comments

[a] Use of Form

This form may be used with a memorandum in support of a petition or response seeking to have an arbitration award confirmed to assert that a unilateral rearbitration provision renders arbitration illusory and unenforceable. Both cases used in the form arose in the context of health services agreements, but there is no reason to think that application of the general principle is limited to health care contracts.

It does not provide a complete memorandum but should be combined with the memorandum supporting the petition [*see § 20C.10*] or response [*see § 20C.11*] seeking to have the award confirmed.

As a tactical matter, counsel may wish to reserve these points for oral argument or for other form of rejoinder to the respondent's opposing memorandum. In deciding whether or not to reserve these arguments, counsel should consider local court rules and practice, as well as whether the moving party would be expected to be raise these points in initial moving papers, to avoid the possibility of losing the opportunity to raise them.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should point out the language of the rearbitration provision as well as any failure of the party who claims the right to unilateral rearbitration to point that provision out to the party who opposes it. Generally, it will be appropriate to attach a copy of the award [*see Shepherd v. Greene (1986) 185 Cal. App. 3d 989, 994, 230 Cal. Rptr. 233* (*discussed under § 20C.62[3][a]*)].

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For memoranda to combine with this form, see *§§ 20C.10* and *20C.11*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Unilateral Rearbitration Clause in Health Services Contract Is Unenforceable

Saika v. Gold *(1996) 49 Cal. App. 4th 1074, 56 Cal. Rptr. 2d 922* , resulted from a medical malpractice claim against a plastic surgeon. Plaintiff claimed she was badly burned when Dr. Gold treated her with a chemical face peel. Arbitration in accordance with their agreement resulted in a $325,000 award for plaintiff. Defendant sought trial de novo, as was his unilateral right under the contract in any instance in which the award exceeded $25,000. Plaintiff petitioned to confirm the award. The trial court refused to confirm the award, and plaintiff appealed.

The court of appeal reversed, finding this unilateral trial de novo provision so one-sided as to make the very existence of an agreement questionable. The effect of the arbitration clause was to make arbitration for the patient illusory: a patient would never have an end to the controversy--hardly consistent with the salutary aims of arbitration (*49 Cal. App. 4th 1074, 1079-1082)* . Enforcement of an arbitration clause is an action in equity for specific performance of a contract and can be denied on general equitable principles. The net effect of the trial de novo clause is to deny

arbitration to one party. There is no reason in equity to enforce such a clause. Thus, the court directed the superior court to enter a new order confirming the award (*49 Cal. App. 4th 1074, 1082)* .

In ***Beynon v. Garden Grove Medical Group*** *(1980) 100 Cal. App. 3d 698, 161 Cal. Rptr. 146* , plaintiff had enrolled in an employees' medical plan after reading a pamphlet referring to a master agreement and policy (which she never saw). After a dispute over some medical treatment she received under the plan, plaintiff filed amedical malpractice action. She then was advised that the plan called for arbitration, and she gave no opposition to a petition to compel arbitration. She joined defendants in submitting the controversy to a panel of attorneys, and she received the award. Defendants then gave notice they were invoking a further provision of the policy which allowed them, in questions of medical services quality, to reject the award and demand submission to a new panel composed of doctors. Plaintiff filed a petition to confirm the award, maintaining she never was made aware of the rearbitration provision, and contending that it was against public policy. The court denied the petition, and plaintiff appealed.

In reversing the denial of confirmation and ordering that the award be confirmed, the court of appeal observed that the master plan and agreement was a contract of adhesion and that the informational brochure never referred to the rearbitration provision but only to the fact that disputes would have to be arbitrated (*100 Cal. App. 3d 698, 705)* . The rearbitration provision was found to limit the obligations of the health plan unreasonably and defeat the reasonable expectations of one enrolling in the plan. Whereas arbitration should import a dispute resolution procedure which is speedy, economical, and bears equally on the parties, this special provision was weighted in favor of the health plan and against its members, and it rendered arbitration protracted and expensive. Plaintiff, therefore, would not be bound by the special provision (*100 Cal. App. 3d 698, 706)* . While no showing had been made that the health care plan had been negotiated with employees' representatives, the court concluded that even if it had, no such agency relationship would authorize the inclusion in the policy of the extraordinary rearbitration provision, granting a unilateral right to one party to reject an arbitration award without cause and to require a second arbitration before a special panel (*100 Cal. App. 3d 698, 707)* . The court also determined that there had not been fair disclosure of the rearbitration provision, rendering the single reference in the pamphlet to arbitration misleading (*100 Cal. App. 3d 698, 709)* .

The court also separately determined that the rearbitration provision was violative of public policy and therefore invalid. The court noted the recent legislative trend toward requiring health care service contracts to be fair and reasonable. In light of the almost universal public reliance on prepaid health plan service contracts and insurance, provisions which can render arbitration as a one-sided procedure weighted against the subscriber are manifestly harmful to the public interest (*100 Cal. App. 3d 698, 712)* . It found that the master agreement provided a complete and valid arrangement for arbitration without the rearbitration clause; the invalid provision was severable and did not taint the rest of the agreement and, therefore, the original award could be confirmed (*100 Cal. App. 3d 698, 713, 714)* .

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2-20C California Points & Authorities § 20C.65

§ 20C.65 Agreement Authorizes Costs to Be Assessed Against Disaffirming Party

[1] FORM

ON CONFIRMATION OF THE AWARD, THE PARTY SEEKING CONFIRMATION SHOULD BE AWARDED ALL COSTS FOR BOTH ARBITRATION AND JUDICIAL PROCEEDINGS BECAUSE THE AGREEMENTS PROVIDES THAT THE PARTY DISAFFIRMING THE AWARD MUST PAY COSTS OF BOTH ARBITRATION AND COURT PROCEEDINGS.

A. Agreement Authorizes Award Costs of Both Arbitration and Court Proceedings. When the arbitration agreement provides that a party disaffirming an arbitration award which is then confirmed by judicial order is subject to assessment for all costs in both proceedings, the court may assess such costs at the conclusion of the court action (*Tipton v. Systron Donner Corp. (1979) 99 Cal. App. 3d 501, 508, 160 Cal. Rptr. 303*).

[2] Comments

[a] Use of Form

This form may be used with a memorandum in support of a petition or response seeking to have an arbitration award confirmed to assert that the court has the power, on determining to confirm an award, to award costs of both the arbitration proceeding and the court proceedings against the party who resisted confirmation. With appropriate modification, the form may be used when the wording of the arbitration agreement is somewhat different but leads to a similar result.

This form does not provide a complete memorandum but should be combined with the memorandum supporting the petition [*see § 20C.10*] or response [*see § 20C.11*] seeking to have the award confirmed.

As a tactical matter, counsel may wish to reserve these points for oral argument or for other form of rejoinder to the respondent's opposing memorandum. In deciding whether or not to reserve these arguments, counsel should consider local court rules and practice, as well as whether the moving party would be expected to be raise these points in initial

moving papers, to avoid the possibility of losing the opportunity to raise them.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should indicate the precise language in the agreement providing for costs, and show how seeking to vacate the award or just not beginning payments under the award, fits the conduct described as authorizing the imposition of costs. Generally, it will be appropriate to attach a copy of the award [*see Shepherd v. Greene (1986) 185 Cal. App. 3d 989, 994, 230 Cal. Rptr. 233* (*discussed under § 20C.12[3][a]*)].

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*])are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For memoranda to combine with this form, see *§§ 20C.10* and *20C.11*.

For a memorandum addressing arbitrators' authority to award costs and attorney's fees under the terms of the agreement, see *§ 20C.110*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Agreement Authorizes Award Costs of Both Arbitration and Court Proceeding

In ***Tipton v. Systron Donner Corp.*** *(1979) 99 Cal. App. 3d 501, 160 Cal. Rptr. 303* , the parties had entered into a shareholders' agreement which provided for arbitration of any dispute. Petitioner was dismissed from employment by one of the respondents, and the parties agreed that this issue would be submitted to arbitration under the shareholder agreement. The shareholders' agreement provided that while the costs of any arbitration would be borne equally by the parties, if one party refused to abide by the award, then, should the award be confirmed by the court, all costs, including those incurred in the court proceeding, would be assessed against and borne by the disaffirming party. The award was for respondents, and petitioner filed a petition to vacate the award alleging, among other things, that the arbitrator appointed by respondent was biased and partial. The lower court denied the petition to vacate and confirmed the award. Petitioner appealed.

No award of costs was made in the arbitration proceeding, and the petitioner seeking to vacate the award complained

the court should not award both arbitration and court costs. The court of appeal observed that although the arbitration might have terminated when the award was made, under the agreement a party's right to "all costs" could arise only after the other party had refused to abide by the award and court action was required to pass on the propriety of awarding those costs. The parties thereby vested the court with jurisdiction to make the dual cost award (*99 Cal. App. 3d 501, 508)* .

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2-20C California Points & Authorities § 20C.66

§ 20C.66 Attorney's Dismissal of Action for Fees Repudiated Rejection of Award in Mandatory Fee Arbitration under Bus. & Prof. Code § 6203

[1] FORM

THE MANDATORY FEE ARBITRATION AWARD UNDER BUS. & PROF. CODE § 6203 SHOULD BE CONFIRMED BECAUSE THE DISMISSAL OF RESPONDENT'S CIVIL ACTION REPUDIATED [HIS or HER] REJECTION OF THE AWARD.

A. Other Party's Dismissal of Civil Action Repudiated Rejection of Award Under *Bus. & Prof. Code § 6203*. The [voluntary *or* involuntary] dismissal of the respondent's complaint constituted a repudiation of respondent's prior rejection of the arbitration award under the Mandatory Fee Arbitration Act, *Bus. & Prof. Code § 6203*. Once the respondent repudiates the rejection of the award, the petitioner is thus entitled to apply for and obtain an order confirming the arbitration award and a judgment entered on the confirmation of the award under *Bus. & Prof. Code § 6203* and *Code Civ. Proc. §§ 1285, 1287.4* (*Perez v. Grajales (2008) 169 Cal. App. 4th 580, 605, 86 Cal. Rptr. 3d 784*).

[2] Comments

[a] Use of Form

This form is designed for use in a memorandum in support of a petition to confirm a mandatory attorney-fee arbitration award granted under the Mandatory Fee Arbitration Act, *Bus. & Prof. Code § 6200 et seq.*, or a response seeking to have such an award confirmed after the respondent's civil action repudiating the award has been voluntarily or involuntarily dismissed. It does not provide a complete memorandum, but should be combined with the memorandum supporting the petition in § 20C.10, or the response in § 20C.11, seeking to have the award confirmed.

[b] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the

facts of his or her case. For example, the argument should cite the issuance of the arbitration award and the decision of the trial court dismissing the civil action.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* . For example, a copy of the arbitration award and the court's dismissal of and judgment in the civil action, and any other statements or transcripts defining the scope of the matters submitted to the arbitrator should be attached as exhibits to the memorandum.

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, Affidavits, Certificates, and Declarations, and Ch. 321, Judicial Notice (Matthew Bender).

[c] Related Pleading and Practice Chapters

For forms relating to complaints for attorney compensation, notices of client's right to mandatory arbitration of fee, petition to correct mandatory fee award, and rejection of fee award, see California Forms of Pleading and Practice, Ch. 72, *Attorney Practice and Ethics* (Matthew Bender), § 72.740 et seq.

[d] Related Memoranda

For discussion of requirements and considerations for drafting memoranda and how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For discussion of resolving fee disputes, see *Ch. 25, Attorney's Fees, § 25.06*. For memoranda concerning mandatory arbitration, see *Ch. 25, Attorney's Fees, § 25.73* et seq. For memoranda concerning actions for fees, see *Ch. 25, Attorney's Fees, § 25.30* et seq.

For forms addressing general contract principles, see Ch. 50, *Contracts* .

[3] Discussion of Authorities

[a] Other Party's Dismissal of Civil Action Repudiated Rejection of Award Under Bus. & Prof. Code § 6203

Perez v. Grajales *(2008) 169 Cal. App. 4th 580, 86 Cal. Rptr. 3d 784* , reversed the trial court's order denying client's motion to confirm a mandatory attorney-fee arbitration award under the Mandatory Fee Arbitration Act (MFAA), *Bus. & Prof. Code § 6203*, and to enter judgment. The client sought confirmation after the attorney's civil action rejecting the arbitration award was involuntarily dismissed for failure to prosecute the case to trial within five years under *Code Civ. Proc. §§ 583.310, 583.360*. The court ruled that the involuntary dismissal of the attorney's complaint constituted a repudiation of the attorney's prior rejection of the arbitration award under the MFAA (*169 Cal. App. 4th 580, 601, 605*). The court relied on authorities involving voluntary dismissals, and found the principle equally applicable to the facts of involuntary dismissal. Thus, the involuntary dismissal of the complaint effectively reinstated the initially rejected MFAA award (*169 Cal. App. 4th 580, 602)* . The attorney having repudiated the award, the client was thus entitled to

apply for and obtain an order confirming the arbitration award and a judgment entered on such confirmation of the award under *Bus. & Prof. Code § 6203* and *Code Civ. Proc. §§ 1285, 1287.4* (*169 Cal. App. 4th 580, 605)* .

The court rejected the notion that the rejection nullified the award. The only way to stop an arbitration award from becoming a final judgment is to either settle the case, or go through a trial de novo. If a party fails to do either, then he or she has had his or her day in court (*169 Cal. App. 4th 580, 603)* . Similarly, the client's filing of a counterclaim in the eventually dismissed civil action did not constitute a waiver of arbitration rights under *Bus. & Prof. Code § 6201*, because at the time of the filing of the counterclaim, the attorney's rejection of the arbitration award had rendered the award nonexistence for purposes of the waiver provision (*169 Cal. App. 4th 580, 603-604)* .

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[Reserved]

§§ 20C.67[Reserved]

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2-20C California Points & Authorities § 20C.70

§ 20C.70 Award Has Not Been Shown to Result from Undue Means

[1] FORM

TO THE AWARD _____ [MAY BE CONFIRMED *or* SHOULD NOT BE VACATED] BECAUSE _____ [PETITIONER *or* RESPONDENT] HAS FAILED TO DEMONSTRATE BY CLEAR AND CONVINCING EVIDENCE THAT TO THE UNDUE MEANS [EXISTED OR] HAD A SUBSTANTIAL IMPACT ON TO THE AWARD.

A. Impact or Nexus Must Be Shown. In order to vacate an arbitration award under *Code of Civil Procedure Section 1286.2(a)(1)* on the basis that it was procured by [fraud, corruption, or other] under means, the party challenging the award must show by clear and convincing evidence that the [fraud or] undue means existed and that it had a substantial impact on the arbitrator's decision. The court must not presume that evidence procured by undue influence had an impact on the arbitrator. The party challenging the award must demonstrate a nexus between the award and the alleged undue means used to attain it (Pour Le Bebe, Inc. v. Guess? *(2003) 112 Cal. App. 4th 810, 833-837, 5 Cal. Rptr. 3d 442*).

[2] Comments

[a] Use of Form

This form may be used with a memorandum in support of a petition or response seeking to have an arbitration award confirmed, to anticipate or respond to a claim that the award was procured by fraud, corruption or other undue means [*see Code Civ. Proc. § 1286.2(a)(1)*]. The authority on which the form is based involved a challenge based only on undue influence, but it should be equally applicable to any ground of vacatur mentioned in *Code Civ. Proc. § 1286.2(a)(1)*. This form does not provide a complete memorandum but should be combined with the memorandum supporting the petition [*see § 20C.10*] or response [*see § 20C.11*] seeking to have the award confirmed.

As a tactical matter, counsel may wish to reserve these points for oral argument or for other form of rejoinder to the respondent's opposing memorandum. In deciding whether or not to reserve these arguments, counsel should consider

local court rules and practice, as well as whether the moving party would be expected to be raise these points in initial moving papers, to avoid the possibility of losing the opportunity to raise them.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should disclose factors that militate against the arbitrator having relied on the undue influence, for example by showing that the factual basis for the award need not have touched on the matters to which the undue influence related. Generally, it will be appropriate to attach a copy of the award [*see Shepherd v. Greene (1986) 185 Cal. App. 3d 989, 994, 230 Cal. Rptr. 233* (*discussed under § 20C.12[3][a]*)].

It is advisable for counsel to submit cognizable evidence in support of factualstatements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For memoranda to combine with this form, see *§§ 20C.10* and *20C.11*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Memoranda

For a form opposing this form on the ground that an award was based on undue influence amounting to extrinsic fraud, see *§ 20C.151*.

[3] Discussion of Authorities

[a] Impact or Nexus Must Be Shown

Pour Le Bebe, Inc. v. Guess? *(2003) 112 Cal. App. 4th 810, 5 Cal. Rptr. 3d 442* arose out of license agreements that turned sour in 1999. During the litigation and arbitration, defendant licensor was represented by an attorney and a law firm that had represented plaintiff in a few legal matters and had also performed substantial immigration work for principals and employees of the plaintiff company and their family members. Plaintiff tried to disqualify defendant's counsel and presented the matter to the arbitration panel, which refused to disqualify the attorney [*see Benasra v. Mitchell Silberberg & Knupp (2002) 96 Cal. App. 4th 96, 116 Cal. Rptr. 2d 644* ("Benasra" discussed in *Ch. 20E, Arbitration: Effect of Award, § 20E.32[3*][a], separate suit against law firm for breach of loyalty)]. The arbitrators rendered an award for defendant licensor, which was confirmed over plaintiff's objection. The trial court held that the

alleged conflict, even if true, would not fit within the "procured, by undue means" rubric of *Code Civ. Proc. § 1286.2(a)(1)*, and that that ground for vacatur would apply only if plaintiff did not know about the issue or raise it before the arbitrators. Plaintiff appealed.

The court of appeal affirmed (*112 Cal. App. 4th 810, 813)* . First considering the conflict of interest, the court of appeal concluded that plaintiff had at least a colorable claim that the law firm engaged in conflicted representation or violated its duty of loyalty by undertaking the representation of defendant in the underlying arbitration (*112 Cal. App. 4th 810, 825)* . Defendant contended that only extrinsic fraud was sufficient to vacate an award pursuant to *Code Civ. Proc. § 1286.2(a)(1)*, while plaintiff argued that "other undue means" includes representation of the prevailing party by an attorney with a potential conflict of interest, or any conduct that might be described as unfair. The court of appeal disagreed with both views (*112 Cal. App. 4th 810, 826)* . The court cited from the Law Revision Commission that considered the arbitration statutes in 1960 and from a case that "any conduct which amounts to fraud or which results in depriving either of the parties of a fair and impartial hearing to their substantial prejudice may be grounds for setting the award aside" (*112 Cal. App. 4th 810, 827)* , saying that rule strongly resembles the description of extrinsic fraud necessary to vacate a final court judgment. However, courts do not equate the conduct necessary for setting aside a judgment with the conduct necessary for vacating an arbitration award (*112 Cal. App. 4th 810, 828)* . A party in a trial is required to meet and expose perjury or other intrinsic fraud during the trial, but parties to an arbitration are not afforded the full panoply of procedural rights available to civil litigants, lacking for example the right to an appeal or to extensive discovery. Thus, courts generally take a more lenient approach when examining intrinsic fraud in the context of a motion to vacate an arbitration award (*112 Cal. App. 4th 810, 829)* . The court discussed federal cases dealing with awards challenged on the basis of intrinsic fraud and noted that when the award had not been vacated, the party who challenged the award had suspected forgery during the arbitration hearing, but failed to subpoena the alleged forger or otherwise exercise due diligence to uncover it during the arbitration (*112 Cal. App. 4th 810, 829-830)* . Rather than rely on the distinction between intrinsic and extrinsic fraud, federal courts use a three part test to determine whether an arbitration award should be vacated for fraud (*112 Cal. App. 4th 810, 830)* :

- First, the movant must establish the fraud by clear and convincing evidence.

- Second, the fraud must not have been discoverable on the exercise of due diligence prior to or during the arbitration.

- Third, the person seeking to vacate the award must demonstrate that the fraud materially related to an issue in the arbitration.

Defendant argued that under this test, plaintiff could not prevail because it knew about the alleged undue means, had presented them to the arbitrators, and should not be given "a second bite of the apple." The court of appeal did not agree that plaintiff had had a first bite, citing *Pacific Crown Distributors v. Brotherhood of Teamsters (1986) 183 Cal. App. 3d 1138, 1148-1149, 228 Cal. Rptr. 645* , discussed in *§ 20C.151[3][a]*, for the proposition that vacatur is required when the prevailing party's tactics deprived the other party of a chance to make its challenge at the arbitration hearing (*112 Cal. App. 4th 810, 831-832)* . The court quoted from its opinion in *Benasra* that the question of whether a conflict prevented the law firm from representing defendant in the arbitration was raised as an ancillary or collateral issue and appellants have neverhad an opportunity to prosecute a full-blown claim for breach of duty of loyalty; the arbitration panel only considered the single issue of whether the representation of defendant in the arbitration required use of confidential information. Thus, it could not say that plaintiff ever had an opportunity to discover and reveal the alleged undue means at the arbitration hearing. Nevertheless, the conclusion that plaintiff did not receive a full hearing on its conflict of interest/breach of duty of loyalty contention did not mean that the alleged breach was the type of "fraud, corruption, or other undue means" needed to vacate the award. The court could not presume that evidence procured by undue means had an impact on the arbitrators, but had to presume instead that the arbitrators took a permissible route to the award (*112 Cal. App. 4th 810, 833)* . Thus, plaintiff needed to demonstrate a nexus between the award and the alleged undue means used to attain it (*112 Cal. App. 4th 810, 834)* , but failed to highlight any aspect of the award that

might have been impacted by any confidential information allegedly obtained by defendant's counsel in the course of its representation of plaintiff and its officers and employees (*112 Cal. App. 4th 810, 835)* . The court distinguished cases relied on by plaintiff involving judgments vacated because conflicted counsel was engaged in dual representation. Here, plaintiff was represented by independent counsel in the arbitration (*112 Cal. App. 4th 810, 836)* and a much more limited review applies to arbitration awards than to judgments (*112 Cal. App. 4th 810, 837)* . Again, the court said plaintiff had not pointed to any particular impact the conflicted law firm's continued representation of defendant had on the award (*112 Cal. App. 4th 810, 836)* . The court concluded that plaintiff had failed to make the showing necessary to vacate the arbitration award. It failed to show by clear and convincing evidence that a conflict existed and that it had a substantial impact on the panel's decision. Accordingly, the trial court did not err in refusing to vacate the award on the ground that it was procured by undue means (*112 Cal. App. 4th 810, 837)* .

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[Reserved]

§§ 20C.71[Reserved]

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2-20C California Points & Authorities § 20C.80

§ 20C.80 Arbitrator Was Not Improperly Biased

[1] FORM

THE AWARD _____ [MAY BE CONFIRMED *or* SHOULD NOT BE VACATED] BECAUSE THERE WAS NO SHOWING OF A REASONABLE IMPRESSION OF BIAS.

A. Impression of Arbitrator's Bias Must Be Reasonable One. The established test for determining whether an arbitration award must be vacated for misconduct or bias of a neutral arbitrator when a party asserts prejudice because of an arbitrator's conflict of interest is whether the record reveals facts that might create an impression of possible bias. The test is an objective one--whether such an impression is created in the eyes of the hypothetical reasonable person. Each case must be considered in light of its particular circumstances (*Casden Park La Brea Retail LLC v. Ross Dress for Less, Inc. (2008) 162 Cal. App. 4th 468, 478, 75 Cal. Rptr. 3d 763* ; *Dornbirer v. Kaiser Foundation Health Plan, Inc. (2008) 166 Cal. App. 4th 831, 841-843, 83 Cal. Rptr. 3d 116* ; *Agri-Systems v. Foster Poultry Farms (2008) 168 Cal. App. 4th 1128, 1136, 85 Cal. Rptr. 3d 917* ; *Guseinov v. Burns (2006) 145 Cal. App. 4th 944, 959-961, 51 Cal. Rptr. 3d 903* ; *San Luis Obispo Bay Properties, Inc. v. Pacific Gas & Elec. Co. (1972) 28 Cal. App. 3d 556, 567-568, 104 Cal. Rptr. 733*).

[*Optional*] **B. No Close Business Relationship Shown Between Arbitrator and Party.** There is no basis for an inference that the arbitrator was biased when the facts alleged do not show that any close business relationship existed between the arbitrator and a party or the party's attorneys (*Luce, Forward, Hamilton & Scripps, LLP v. Koch (2008) 162 Cal. App. 4th 720, 733-734, 75 Cal. Rptr. 3d 869* ; *Park Plaza, Ltd. v. Pietz (1987) 193 Cal. App. 3d 1414, 1419, 239 Cal. Rptr. 51*). The existence of bias depends on whether one can draw an inference of favoritism not because the arbitrator may receive money but because the arbitrator has a business-connected relationship that may lead him or her to place unusual trust or confidence in one side as opposed to the other (*Mahnke v. Superior Court (2009) 180 Cal. App. 4th 565, 580-581, 103 Cal. Rptr. 3d 197*).

[*Optional*] **C. Party Arbitrator Able to Be Partisan.** When the agreement provides that each party may select an arbitrator, a party's arbitrator allowably may be partial in favor of that party (*see* *Tate v. Saratoga Savings & Loan*

Assn. (1989) 216 Cal. App. 3d 843, 859-860, 265 Cal. Rptr. 440 ; *Tipton v. Systron Donner Corp. (1979) 99 Cal. App. 3d 501, 506, 160 Cal. Rptr. 303*).

[*Optional*] **D. Personal Relationship Between Arbitrator and Party Does Not Establish Bias.** The fact that a personal relationship, i.e., acquaintance, exists between a party and an arbitrator does not require vacation of an award for possible bias (*Ray Wilson Co. v. Anaheim Memorial Hospital Assn. (1985) 166 Cal. App. 3d 1081, 1087-1088, 213 Cal. Rptr. 62* ; *compare Code Civ. Proc. § 1281.9(a)(6)*; Cal. Rules of Ct., Appen., Div. VI, Standard 7(d)(3), (8)).

[*Optional*] **E. Limitation on Arbitrator's Testimony in Determining Bias.** *Evidence Code Section 703.5* is applicable to limit the competency of an arbitrator to testify regarding anything that occurred at or in connection with the arbitration. Thus, a court may not consider that portion of an arbitrator's declaration describing the basis for the award. However, a court may consider testimony of the arbitrator that addresses the arbitrator's qualifications and bias, or the lack of bias (*Cobler v. Stanley, Barber, Southard, Brown & Associates (1990) 217 Cal. App. 3d 518, 528-529, 265 Cal. Rptr. 868*).

[*Optional*] **F. Arbitrator Did Not Know of Potential Conflict Until After Rendition of Award.** If the arbitrator made a reasonable effort to inform _____ [himself *or* herself] of any matters that a would cause a person aware of the facts to reasonably entertain a doubt that he or she would be able to be impartial and still did not know of a potential conflict until after the arbitration award had been rendered, the arbitration award need not be vacated but may be confirmed [Cal. Rules of Ct., Appen., Div. VI, Standard 7(d), 9(a); *Cobler v. Stanley, Barber, Southard, Brown & Associates (1990) 217 Cal. App. 3d 518, 528-529, 265 Cal. Rptr. 868* ; *see also* Cal. Rules of Ct., Appen., Div. VI, Standard 9(b)-(e) (requirements for sufficiency of proposed arbitrator's inquiry with regard to particular relationships, including those of proposed arbitrator's extended family)].

[*Optional*] **G. Existence of Bias Is Determined by Trier of Fact.** Whether a particular business relationship between an arbitrator and a party or a party's representative requires disclosure is a factual question to be decided by the trier of fact in each case (*Cobler v. Stanley, Barber, Southard, Brown & Associates (1990) 217 Cal. App. 3d 518, 527, 265 Cal. Rptr. 868*). A trial court considering a petition to confirm or vacate an arbitration award is required to determine, de novo, whether the circumstances disclose a reasonable impression of arbitrator bias, when that issue is properly raised by a party to the arbitration (*Greenspan v. LADT, LLC (2010) 185 Cal. App. 4th 1413, 1457, 111 Cal. Rptr. 3d 468*). An arbitration service's determination under its rules on request for the disqualification of an arbitrator is subject to de novo judicial review (*Greenspan v. LADT, LLC (2010) 185 Cal. App. 4th 1413, 1457, 111 Cal. Rptr. 3d 468*).

[*Optional*] **H. Proposed Arbitrator Was Not Required to Disclose Prior Service as Uncompensated Mediator.** A proposed neutral arbitrator has no duty to disclosehis or her prior service as an uncompensated mediator in a mediation in which an attorney for one of the parties to the arbitration served as attorney for one of the parties in the mediation. *Code of Civil Procedure Section 1281.9(a)* and Ethical Standards for Neutral Arbitrators in Contractual Arbitration, Standard 7(d)(5) do not require disclosure of uncompensated service as a dispute resolution neutral; nor does acting as an uncompensated mediator in a single mediation in which an attorney for one of the parties to the arbitration represented a party to the mediation constitute a professional relationship that would require disclosure pursuant to *Code of Civil Procedure Section 1281.9(a)(6)* or Standard 7(d)(8). Similarly, this single contact between the arbitrator and attorney would not cause a reasonable person to entertain doubt whether the arbitrator was impartial, and thus would not require disclosure pursuant to *Code of Civil Procedure Sections 170.1, 1281.9(a)(1)* or Standard 7(d)(14)(A). Thus, it is not error for a trial court to refuse to vacate an arbitration award because the arbitrator failed to disclose prior service as an uncompensated mediator (*Guseinov v. Burns (2006) 145 Cal. App. 4th 944, 958-959, 961, 51 Cal. Rptr. 3d 903*).

[*Optional*] **I. Parent Company Was Not Party So Disclosure of Business Relationship Was Not Required.** The relevant definition of "party" is found in *Code of Civil Procedure Section 170.1(a)(8)(B)(ii)*, which defines party to include "the parent, subsidiary, or other legal affiliate of any entity that is a party and is involved in the transaction,

contract, or facts that gave rise to the issues subject to the proceeding." The parent company was not involved in the transactions that gave rise to the arbitration; therefore the arbitrator did not have to disclose his business contacts with the parent company. [Further, the parent company did not acquire the party until after the (interim) award had been issued and disclose will not be required on the basis of potential successor liability] *(Hayden v. Robertson Stephens, Inc. (2007) 150 Cal. App. 4th 360, 366-368, 58 Cal. Rptr. 3d 333*).

[*Optional*] **J. Board Membership in Professional Organization Need Not Be Disclosed.** An arbitrator is not required to disclose that _____ [*specify party or lawyer with whom arbitrator has relationship, e.g.,* one of a party's counsel and a proposed expert witness] were _____ [*describe board, e.g.,* attorneys with whom he sat on 36-number] board of a professional association. Membership in a professional organization does not provide a credible basis for inferring an impression of bias. Rather, to create an impression of possible bias that requires disclosure, a business relationship must be substantial and involve financial consideration. Ordinary and insubstantial business dealings arising from participation in the business or legal community do not necessarily require disclosure (*Luce, Forward, Hamilton & Scripps, LLP v. Koch (2008) 162 Cal. App. 4th 720, 734-736, 75 Cal. Rptr. 3d 869*).

[*Optional*] **K. $500 Contribution to Mayoral Campaign Need Not Be Disclosed.** Only significant or substantial business relationships between a [proposed] neutral arbitrator and a party or its representative must be disclosed; ordinary and insubstantial business dealings do not require disclosure. A $500 contribution to a party arbitrator's mayoral campaign was ordinary and insubstantial and did not require disclosure. Similarly, a neutral arbitrator who had no financial interest in or knowledge of a party's, party arbitrator's, employer's, or fellow employees' contributions to the same campaign had no duty to disclose those transactions (*Casden Park La Brea Retail LLC v. Ross Dress for Less, Inc. (2008) 162 Cal. App. 4th 468, 476-478, 75 Cal. Rptr. 3d 763*).

[*Optional*] **L. Unrequired Disclosure Is Not Grounds for Vacating Award.** An arbitrator's voluntary disclosure of a matter that is not required to be disclosed and would not raise a suspicion of bias in a reasonable person, does not give a party the right to disqualify the arbitrator or have the award vacated under *Code of Civil Procedure Section 1286.2(a)(6)(A)* (*Luce, Forward, Hamilton & Scripps, LLP v. Koch (2008) 162 Cal. App. 4th 720, 736, 75 Cal. Rptr. 3d 869*).

[*Optional*] **M. Failure to Disclose All Details of Prior Arbitrations Is Not Necessarily Grounds for Vacation of Arbitration Award.** Arbitrators *should* disclose all dates and other details of prior arbitrations with a party, pursuant to *Code Civ. Proc. § 1281.9*. However, an arbitration award is not required to be vacated when an arbitrator generally disclosed the grounds for disqualification, i.e. his or her relationships and prior interactions with the parties to the arbitration and/or their attorneys, but did not provide dates and other specific details, particularly where the parties agreed to go forward with the arbitration despite being aware of the incomplete disclosure (*Dornbirer v. Kaiser Foundation Health Plan, Inc. (2008) 166 Cal. App. 4th 831, 842-843, 846-847, 83 Cal. Rptr. 3d 116*).

[*Optional*] **N. Arbitrator Has No Duty to Disclose Arbitrator's Law Firm's Past Representation of Third Party Who Had Adversarial Relationship With a Party.** An arbitrator's law firm's past representation of a third party who had an adversarial relationship with a party to the arbitration need not be disclosed. Pursuant to *Code Civ. Proc., § 1281.9(a),* a proposed neutral arbitrator shall disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial. A court must look at the entirety of the facts in a case to determine if an objective person would not reasonably doubt the arbitrator's ability to be impartial [*Agri-Systems v. Foster Poultry Farms (2008) 168 Cal. App. 4th 1128, 1136, 85 Cal. Rptr. 3d 917*].

[2] Comments

[a] Use of Form

This form may be used with a memorandum in support of a petition or response seeking to have an arbitration award

confirmed, to anticipate or respond to a claim that one of the arbitrators was biased. This form attempts to establish a lack of bias under the general requirement that a proposed neutral arbitrator disclose any matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial [*see Code Civ. Proc. § 1281.9*; Cal. Rules of Ct., Ethics Standards for Neutral Arbitrators, Standard 7(d)]. Counsel should use whichever of the Optional Paragraphs in this form address his or her particular fact situation. The question of whether any possible impression of bias is a reasonable one does not arise, and this form should not be used, if the relationship that was not disclosed was one that was required to be disclosed by *Code Civ. Proc. §§ 170.1, 1281.9* or Cal. Rules of Ct., Ethics Standards for Neutral Arbitrators, Standard 7(d). Failure to disclose any of those relationships is grounds for vacating an award [*Code Civ. Proc. § 1282.6(a)(A)*]. For a summary of the relationships required to be disclosed by *Code Civ. Proc. §§ 170.1, 1281.9* and Cal. Rules of Ct., Ethics Standards for Neutral Arbitrators, Standard 7(d), see *§ 20C.170[3][a]*. For more detailed discussion of the relationships required to be disclosed, see California Forms of Pleading and Practice, Ch. 33, *Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding* .

This form does not provide a complete memorandum but should be combined with the memorandum supporting the petition [*see § 20C.10*] or response [*see § 20C.11*] seeking to have the award confirmed.

As a tactical matter, counsel may wish to reserve these points for oral argument or for other form of rejoinder to the respondent's opposing memorandum. In deciding whether or not to reserve these arguments, counsel should consider local court rules and practice, as well as whether the moving party would be expected to be raise these points in initial moving papers, to avoid the possibility of losing the opportunity to raise them.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should disclose factors that militate against the arbitrator having any particular bias against the party who has challenged or maychallenge an arbitrator's impartiality despite the arbitrator's having a background that could lead a reasonable person to suspect bias. Generally, it will be appropriate to attach a copy of the award [*see Shepherd v. Greene (1986) 185 Cal. App. 3d 989, 994, 230 Cal. Rptr. 233* (*discussed under § 20C.12[3][a]*)].

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For memoranda to combine with this form, see *§§ 20C.10* and *20C.11*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in

this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Memoranda

For a form opposing this form on the ground that a neutral arbitrator failed to disclose possible bias, see *§ 20C.170*.

[3] Discussion of Authorities

[a] Impression of Arbitrator's Bias Must Be Reasonable One

Casden Park La Brea Retail LLC v. Ross Dress for Less, Inc*. (2008) 162 Cal. App. 4th 468, 75 Cal. Rptr. 3d 763* , involved an arbitration between a commercial landlord and its tenant before a panel of three real estate brokers, one selected by each party and a neutral arbitrator selected by the two-party arbitrators. After the arbitrators rendered an award in favor of the tenant, the landlord petitioned to vacate the award, contending the neutral arbitrator had failed to disclose prior business dealings between the neutral arbitrator's employer (an international real estate firm) and the tenant and its party arbitrator. The trial court agreed with the landlord and vacated the award, notwithstanding the fact that the neutral arbitrator had no financial or other interest in his employer's dealings. Tenant appealed.

The court of appeal reversed (*162 Cal. App. 4th 468, 471)* , finding the neutral arbitrator had no duty to disclose any of his employer's transactions in which he had no financial interest, and no duty to seek out information about business transactions or political contributions unknown to him at the time his disclosures were made (*162 Cal. App. 4th 468, 476)* . The court of appeal set forth portions of *Code Civ. Proc. § 1281.9(a)* focusing on subdivisions (1) regarding the existence of any ground specified in Section 170.1 for disqualification of a judge, (2) relating to any matters required to be disclosed by the ethics standards for neutral arbitrators adopted by the Judicial Council, and (6) governing professional or significant personal relationships the proposed neutral arbitrator ... has or has had with any party to the arbitration proceeding or lawyer for a party. Only significant or substantial business relationships between the neutral arbitrator and a party or his representative must be disclosed (*162 Cal. App. 4th 468, 476*); ordinary and insubstantial business dealings do not necessarily require disclosure (*162 Cal. App. 4th 468, 477)* . Because these real estate broker arbitrators were selected for their familiarity with the type of business dispute involved, they were not expected to be entirely without business contacts in the field, but they had to disclose any repeated or significant contacts which they may have with a party to the dispute, his attorney or his chosen arbitrator. Other than those disclosed, the neutral arbitrator had no significant or substantial business dealings with either party or the parties' representatives. By any reasonable definition, his $500 contribution to the tenant's party arbitrator's 2001 mayoral campaign was ordinary and insubstantial. The court of appeal disagreed with the trial court's finding that the disclosure of that contribution would have caused landlord to entertain a doubt about the neutral arbitrator's impartiality--particularly because the landlord and its party arbitrator each contributed $1,000 to that same campaign. Because the neutral arbitrator had no financial interest in or knowledge of tenant and tenant's party arbitrator's dealings with other of his employer's brokers or the contributions made to the tenant's party arbitrator's campaign by others at his employer or the employer itself, the neutral arbitrator had no duty to disclose those transactions (*162 Cal. App. 4th 468, 477)* . Because it is undisputed that the neutral arbitrator was unaware of his coworkers' business dealings with tenant and tenant's party arbitrator, and equally unaware of their contributions to the tenant's party arbitrator's political campaign, it follows that he had no duty to disclose those transactions (*162 Cal. App. 4th 468, 477-478)* . Another reason the neutral arbitrator did not have to disclose those transactions was because he had no financial interest in them and did not benefit from any of them, financially or otherwise. Also, they would not have caused a reasonable person to entertain a doubt about the neutral arbitrator's ability to be impartial. The court of appeal distinguished cases relied on by landlord, and agreed with tenant that a neutral arbitrator who has no pecuniary interest in profits generated by his employer's business relationship with a party or a party's representative has no substantial business relationship with the party or its representative and, therefore, no duty to disclose those transactions. For that reason and because public policy favors the finality of arbitration awards, the court concluded that the trial court erred in vacating the arbitrators' award and should, instead,

have confirmed it (*162 Cal. App. 4th 468, 478)* .

Dornbirer v. Kaiser Foundation Health Plan, Inc. *(2008) 166 Cal. App. 4th 831, 83 Cal. Rptr. 3d 116* , involved a neutral arbitrator who acknowledged a prior relationship with both the defendant health care provider and its counsel, and he disclosed pursuant to *Code Civ. Proc., § 1281.9*, that he had served as an arbitrator in a number of prior arbitrations involving them. He did not provide specific dates and other details of those prior arbitrations (*166 Cal. App. 4th 831, 835-836, 840)* . The trial court denied plaintiff's motion to vacate the arbitration award, holding that the disclosure clearly put plaintiff on notice that the arbitrator had a significant history of arbitrating in cases in which defendant was a party (*166 Cal. App. 4th 831, 841)* .

The court of appeal affirmed the trial court's judgment denying patient's petition to vacate the arbitration award, holding that the patient, by consenting to proceed with arbitration despite being aware of deficiencies in the arbitrator's disclosure, waived her right to disqualify the arbitrator, and could not later challenge the arbitration award on the ground of inadequate disclosure (*166 Cal. App. 4th 831, 841-843, 846)* . The information that the arbitrator disclosed was sufficient to put plaintiff on notice of any potential bias on the arbitrator's part (*166 Cal. App. 4th 831, 834)* . The court clarified that there is no question that arbitrator *should* have disclosed all details of his prior arbitrations with defendant pursuant to *Code Civ. Proc. § 1281.9*. However, *Code Civ. Proc., § 1286.2*, cannot be read to nullify every arbitration award stemming from an arbitration in which the arbitrator failed to disclose all of the details of prior arbitrations, particularly where neither party challenged the arbitrator despite being aware of the incomplete disclosure (*166 Cal. App. 4th 831, 842-843, 847)* . The court interpreted *Code Civ. Proc., § 1286.2* to refer to a failure to disclose the existence and nature of any relationship between the arbitrator and the parties or the parties' attorneys, not the specifics of each such relationship (*166 Cal. App. 4th 831, 842)* .

Plaintiff consented to proceed with the arbitration despite being aware of deficiencies in the arbitrator's disclosure. Plaintiff waived her right to disqualify the arbitrator and cannot later challenge the arbitration award based upon the arbitrator's failure to provide the dates, the outcomes, and the names of other attorneys involved in his prior arbitrations. By failing to raise that issue earlier, plaintiff waived the right to disqualify the arbitrator based on an inadequate disclosure that did not amount to a material omission or misrepresentation (*166 Cal. App. 4th 831, 846)* .

In the case of ***Agri-Systems v. Foster Poultry Farms*** *(2008) 168 Cal. App. 4th 1128, 85 Cal. Rptr. 3d 917* , a neutral arbitrator heard a matter involving a breach of construction agreement and issued an award against plaintiff who was a general contractor. The trial court confirmed the arbitration award against plaintiff. Subsequently, plaintiff filed a motion for an order correcting or vacating the arbitration award, alleging that the arbitrator had an undisclosed conflict of interest since arbitrator's law firm represented a third party who had an adversarial relationship with plaintiff in another matter. The trial court denied plaintiff's motion, finding that the arbitrator had no duty to disclose because the relationship between the arbitrator's law firm (not the arbitrator himself) and a third party adversary of plaintiff was not substantial. Plaintiff challenged the trial court's decision to confirm an arbitration award, contending the award should have been vacated because the arbitrator violated his disclosure obligation.

The court of appeal affirmed. Plaintiff argued that the arbitrator was required to disclose his law firm's past representation of a company that owed plaintiff over $3 million. The court's record showed the following: (1) another attorney in the arbitrator's law firm represented the debtor company at the beginning of a bankruptcy proceeding; (2) the debtor company's interests were adverse to plaintiff's interests; (3) those adverse interests resulted in litigation between the debtor company and plaintiff; (4) the arbitrator's law firm had withdrawn from representing the debtor company before the litigation between the debtor company and plaintiff began; and (5) the arbitrator was appointed in the present case a year and a half after his firm's withdrawal as attorney of record for the debtor company in its bankruptcy proceeding. The court of appeal held that the applicable rule of law was the general requirement of *Code Civ. Proc., § 1281.9(a)* that a proposed neutral arbitrator must disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial. Based on the entirety of the facts, the court of appeal found that there was adequate support for the trial court's finding that an objective person

would not reasonably doubt the arbitrator's ability to be impartial; thus, the arbitrator's law firm's prior representation of a third party who had an adversarial relationship with plaintiff was not required to be disclosed (*168 Cal. App. 4th 1128, 1140)* .

Guseinov v. Burns *(2006) 145 Cal. App. 4th 944, 51 Cal. Rptr. 3d 903* arose from a dispute between former business associates and was arbitrated pursuant to a settlement agreement and stipulation. The first time the attorneys met with the arbitrator, on or about August 12, 2004, the arbitrator asked plaintiff's counsel if they had previously met. Plaintiff's counsel replied that the arbitrator had earlier served as a volunteer superior court mediator in an unrelated matter in which plaintiff's counsel had represented a party. The arbitrator did not recall the prior mediation. The attorneys representing defendant at that time acknowledged the disclosure, agreed to the arbitrator, and did not make an immediate effort to secure disqualification of the arbitrator. On May 20, 2005, during the arbitration, defendant filed a motion to disqualify plaintiff's counsel because he had initiated unauthorized settlement negotiations with defendant when defendant's counsel was not present. The arbitrator denied the motion, deeming it a matter for the State Bar to consider. Just prior to closing argument on June 3, 2005, defendant sought to disqualify the arbitrator by serving a notice of disqualification. The arbitrator denied the request. The arbitrator's award was issued in September, 2005. The parties filed cross-petitions to vacate and confirm the arbitration award. The trial court granted plaintiff's petition to confirm the award and denied defendant's petition to vacate it, concluding that defendant failed to show grounds to vacate the award. Disclosure of the arbitrator's prior service as a pro-bono mediator was not a matter requiring disqualification under the Ethics Standards. Nor would the arbitrator's prior service as a mediator in an unrelated case cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial. Even if disclosure were required, the absence of a written disclosure did not require vacation of the award. Defendant appealed.

The court of appeal affirmed (*145 Cal. App. 4th 944, 947, 962)* . First, the court construed the language of the settlement agreement not to be specific enough to waive the right of appeal from a judgment confirming the award (*145 Cal. App. 4th 944, 952-955)* . Defendant asserted three grounds on which it claimed the award should have been vacated because of the failure to disclose matters required by Standard 7(d) to be disclosed: the arbitrator served as a dispute resolution neutral and expected to receive compensation from that service [Standard. 7(d)(5)]; the arbitrator had a professional relationship with plaintiff's counsel [*Code Civ. Proc. § 1281.9(a)(6)*; Standard 7(d)(8)]; and a person aware of the facts might reasonably entertain a doubt that the arbitrator would be impartial [*Code Civ. Proc. §§ 170.1(a)(6)(A)(iii), 1281.9(a)*; Standard 7(d)(14) *(A)] (145 Cal. App. 4th 944, 958)* . The portion of the opinion addressing the first two contentions is discussed at [h], *below*. With regard to the claim that disclosure was required because the prior mediation contact was a matter that would cause a person aware of the facts to reasonably doubt that the arbitrator would be able to be impartial, the court traced the standard back to *Commonwealth Corp. v. Casualty Co. (1968) 393 U.S. 145, 148-149, 89 S. Ct. 337, 21 L. Ed.2d 301* , emphasizing that the test for partiality is an objective one (*145 Cal. App. 4th 944, 959-960)* . Here, there were no facts that would cause a reasonable person to entertain a doubt whether the arbitrator was impartial: the mediator was an unpaid volunteer, the mediation took place a year before the arbitration; and there was no ongoing relationship between the mediator and plaintiff's counsel (*145 Cal. App. 4th 944, 960-961)* . The fact that plaintiff's counsel testified at the arbitration in connection with the motion to disqualify him was not relevant. The arbitrator could have reasonably concluded that that testimony did not relate to the merits of the arbitrated dispute (*145 Cal. App. 4th 944, 961)* .

In ***San Luis Obispo Bay Properties, Inc. v. Pacific Gas & Elec. Co.*** *(1972) 28 Cal. App. 3d 556, 104 Cal. Rptr. 733* , one party subleased certain property to the other in return for loan guarantees, with the maximum amount of the loan guarantees periodically adjusted according to appraisals of the leasehold interests. Each party was to appoint an appraiser, and in the event of disagreement the latter two would select a third, who would reach conclusions in matters not agreed on by the first two. The sublessor refused to accept the appraisal of the third appraiser and petitioned to vacate the arbitration award. One ground raised by the sublessor was that the third arbitrator had undisclosed relationships with the sublessee. The court denied that petition and instead granted the sublessee's petition to confirm the award, and the sublessor appealed.

The court of appeal affirmed. The alleged bias arose from the fact that the neutral arbitrator belonged to the same professional organization as the appraiser appointed by the sublessee, and that each had referred business to the other. Membership in the same professional organization does not per se create an impression of bias (*28 Cal. App. 3d 556, 567)* , and that mutual referrals suggest no bias as a matter of law, absent a showing of favoritism or unusual preference. The court stated that if the impression of possible bias rule is not to emasculate the policy of the law in favor of the finality of arbitration, the impression of bias must be a reasonable one. In the final analysis, each case must depend on its own facts. In the instant case, the evidence was insufficient to create a reasonable impression of possible bias regardless of whether the issue was viewed as one of law or fact, or a mixed question of law and fact (*28 Cal. App. 3d 556, 568)* .

The court also viewed as insufficient certain evidence alleging a business relationship between the neutral arbitrator and a corporation which employed a person who also worked for the sublessee. Both the sublessee and the other corporation were legal entities distinct from their mutual employee, absent any evidence that they served merely as his alter ego (*28 Cal. App. 3d 556, 568-569)* .

[b] No Close Business Relationship Shown Between Arbitrator and Party

Luce, Forward, Hamilton & Scripps, LLP v. Koch *(2008) 162 Cal. App. 4th 720, 75 Cal. Rptr. 3d 869* , involved a dispute over attorneys' fees which was arbitrated under the auspices of Judicial Arbitration and Mediation Services (JAMS), in accordance with the retainer agreement. The neutral arbitrator, out of an abundance of caution and not because he believed he was required to do so, disclosed that one of the law firm's counsel and a proposed expert witness were attorneys with whom he had sat on the board of the Business Trial Lawyers Association, an association that had between 500 and 700 members and of which there were three dozen members of the board. The arbitrator stated that this would in no way affect his ability to be fair and impartial to all sides in the case, but he wanted them to hear of the association fromhim rather than hear it from somebody else and wonder why he hadn't told them. Defendants (clients) requested that the arbitrator disqualify himself because of the disclosure. The attorney for the firm offered to withdraw that witness from the firm's witness list, and argued disqualification was not required. The arbitrator stated that there was no social relationship; he had never been in the attorney's home, nor the attorney in his. They had participated in professional boards together. There was no close personal friendship or any kind of business relationships. The arbitrator said he had been actively involved in the legal community for over 30 years, and the attorney for over 40; and that any time you're talking with lawyers or judges who have been around that long, they know each other. The arbitrator had not read the expert witness's report, would not do so, and would strike her name from the witness list. The law firm's attorney made similar representations about their relationship, but defendants moved to disqualify the arbitrator, who denied the challenge. Defendants then asked that JAMS decide the disqualification issue rather than the arbitrator, but JAMS concurred in the arbitrator's decision. The arbitrator issued a final arbitration award, finding that defendants breached their contract with plaintiff and awarded the firm $301,508.09 in fees, the full amount it sought. Plaintiff petitioned to confirm the arbitration award, and defendants petitioned to vacate the award on the ground the arbitrator was disqualified from hearing the matter because of his disclosures pertaining to the firms' counsel and the person who had been expert on the firms' witness list as an expert witness. The trial court confirmed the award, determining that because the arbitrator was not required to disclose he served on professional boards with the plaintiff's attorney, there was no basis for his disqualification on the ground he nonetheless revealed that information. Judgment was entered against defendants, and they appealed.

The court of appeal affirmed (*162 Cal. App. 4th 720, 725)* . Defendants argued that the arbitrator was required to disclose his board memberships, and even if he had no duty to disclose them, his voluntary disclosures were sufficient to trigger a right of disqualification (*162 Cal. App. 4th 720, 731)* . The court of appeal independently reviewed the question of whether there was a statutory ground for vacation of the arbitration award (*162 Cal. App. 4th 720, 731)* . The court discussed and distinguished cases relied on by defendants, which were decided before the enactment of the disclosure statues, but which the court of appeal considered might still be instructive. Those cases involved

acquaintanceship based on a substantial business relationship (*162 Cal. App. 4th 720, 731-733)* . There was no authority for the proposition that an arbitrator's duty of disclosure arises when he or she has served on a board of directors of a professional organization with a party, a party's attorney or an expert witness. The court discussed several authorities holding that membership in a professional organization does not provide a credible basis for inferring an impression of bias. Rather, to create an impression of possible bias that requires disclosure, a business relationship must be substantial and involve financial consideration (*162 Cal. App. 4th 720, 733*). Ordinary and insubstantial business dealings arising from participation in the business or legal community do not necessarily require disclosure (*162 Cal. App. 4th 720, 734)* . The court of appeal disagreed with defendants' contention that *Code Civ. Proc. §§ 1281.9(a), 1281.91(b)(1),* or *1286.2(a)(6)(B),* required disqualification for any disclosure other than a disclosure that is required to be made. *Code Civ. Proc. § 1281.91* does not indicate that when an arbitrator makes additional oral disclosures at the arbitration that he or she was not required to make, disqualification is a matter of right. The court of appeal said it would not interpret statutes in a manner that results in absurd and unintended consequences. It could not attribute to the Legislature an intent to upset arbitration awards based on disclosures not legally required, but made out of an abundance of caution, given this state's strong public policy in favor of finality of arbitration awards (*162 Cal. App. 4th 720, 736)* .

In ***Park Plaza, Ltd. v. Pietz*** *(1987) 193 Cal. App. 3d 1414, 239 Cal. Rptr. 51* , an arbitration to resolve a dispute arising from a joint venture agreement was conducted by a retired superior court judge. The losing party subsequently petitioned to vacate the award on the ground that the arbitrator earlier had served as a court-appointed discovery referee in an unrelated case litigated by the same attorneys who represented the prevailing party in the arbitration. The trial court affirmed the award and petitioner appealed.

The court of appeal affirmed, holding that the arbitrator's failure to disclose his relationship with the prevailing party's attorneys did not constitute corruption under former Code Civ. Proc. § 1286.2(b) [*now see Code Civ. Proc. § 1286.2(a)(2)*] (*193 Cal. App. 3d 1414, 1418-1419)* . Citing *Commonwealth Corp. v. Casualty Co. (1969) 393 U.S. 145, 89 S. Ct. 337, 21 L. Ed. 2d 301* , for the proposition that an award should be vacated when there is a failure to disclose a close business connection between the arbitrator and one of the parties, the appellate court found that the facts failed to demonstrate the existence of any such business relationship. Because a referee is appointed by a court as a subordinate judicial officer and is in no sense an employee or an independent contractor of the parties involved or of their attorneys, there was no reasonable basis for an inference that the arbitrator's service as a referee impugned his neutrality as an arbitrator (*193 Cal. App. 3d 1414, 1419)* .

NOTE:

The holding in *Park Plaza* is applicable only to the extent that the neutral arbitrator completed his or her service as a referee (or other dispute resolution neutral) before January 1, 2002 or was appointed to serve as neutral arbitrator before July 1, 2002 [Cal. Rules of Ct., Appen., Div. VI, Standards 3(a), 7(d)(5)(A); *see* Cal. Rules of Ct., Appen., Div. VI, Standard 2(f) (defining dispute resolution neutral to include referee)]. Otherwise, the Ethics Standards for Neutral Arbitrators in Contractual Arbitration, adopted effective July 1, 2002, require a neutral arbitrator to disclose certain particulars about his or her compensated service as a dispute resolution neutral (other than an arbitrator) in another pending or prior noncollective bargaining case involving a party or lawyer in the current arbitration, or a lawyer who is currently associated in the private practice of law with a lawyer in the arbitration, if the arbitrator's service as dispute resolution neutral concluded within two years prior to the date of his or her appointment, excluding any case in which the arbitrator completed his or her service as dispute resolution neutral before January 1, 2002 [Cal. Rules of Ct., Appen., Div. VI, Standards 3(a), 7(d)(5)]. Failure to make that disclosure is grounds for vacating an award [*Code Civ. Proc. § 1286.2(a)(6)(A)*; *see also Code Civ. Proc. § 1281.9(a)(2)* (requiring disclosures in accordance with Ethics Standards)] .

The court of appeal in ***Mahnke v. Superior Court*** *(2009) 180 Cal. App. 4th 565, 576-578, 103 Cal. Rptr. 3d 197* , noted that jointly selected, or court-appointed, proposed neutral arbitrator or, in the case of a contested appraisal

proceeding, the competent and disinterested umpire. Accordingly, it applied the disclosure requirement of *Code Civ. Proc. § 1281.9(e)* to appraisers appointed under *Ins. Code § 2071*. In response to a demand for automatic disqualification on the grounds of a prior business relationship between such an appraiser and the opposing party, the court declined to recognize an automatic and unlimited right of disqualification for disclosures made by those appraisers (*180 Cal. App. 4th 565, 578)* . In this case, the appraiser's disclosure declaration disclosed, that he was currently engaged as a construction expert for another client of the law firm representing one party. In assessing the need for disqualification on this basis, the court presumed that the appraiser was being compensated by the other client and stated that although compensation for services is often relevant to the question of ability to serve impartially, it is not determinative in the instance of a party-selected appraiser because any party-selected appraiser will necessarily be paid by the retaining party. The existence of bias depends on whether one can draw an inference of favoritism not because the arbitrator may receive money but because the arbitrator has a business-connected relationship that may lead him or her to place unusual trust or confidence in one side as opposed to the other (*180 Cal. App. 4th 565, 580-581)* . Citing the experience qualifying the appraiser to act as a "competent" appraiser and his broad client base distinguishing him from those professionals who regularly perform services for particular clients or attorneys and become financially dependent on them, the court held that a reasonable person would not require that the appraiser be disqualified on account of the business relationship properly disclosed (*180 Cal. App. 4th 565, 582)* .

[c] Party Arbitrator Able to Be Partisan

Tate v. Saratoga Savings & Loan Assn. *(1989) 216 Cal. App. 3d 843, 265 Cal. Rptr. 440* , involved a dispute among three joint venturers--two individuals and a savings and loan association. The arbitration agreement provided for arbitration of any controversy between the parties concerning the joint venture agreement, the specific construction project it was formed to undertake, or the rights and duties of any party under the agreement. The savings and loan association brought an action against the individual venturers for nonpayment of a note. One of the individual venturers filed a second lawsuit, based on disputes concerning the venture. Arbitration was first compelled in the second suit, and later in the association's suit when it became clear that the note related to the venture. The association unsuccessfully opposed both petitions to compel arbitration. The arbitration panel found that the association had breached the venture agreement and its fiduciary duty. Each individual venturer was awarded $2,000,000 in compensatory damages and $150,000 in punitive damages, less a $250,000 offset for payments owing on the promissory note. The association unsuccessfully opposed the petitions to confirm the awards, and appealed the judgment confirming the awards.

The court of appeal affirmed. Defendant claimed that an impression of bias required vacation of the award. The court said that much of the defendant's efforts to support that claim faltered because it attempted to discredit the arbitrators chosen by plaintiff, and bias in a party arbitrator is expected and furnishes no ground for vacating an arbitration award unless it amounts to corruption. That arbitrator had once represented defendant's president and chairman of the board as an attorney; they had become embroiled in a fee dispute, and the president had made a complaint to the State Bar and filed a malpractice suit against the attorney. Because the State Bar complaint was dismissed, and the attorney did not learn of the malpractice action until after the arbitration, it did not constitute sufficient bias or corruption to require vacating the award (*216 Cal. App. 3d 843, 858)* . The court of appeal concluded that another prong of the attack amounted to nothing more than miscommunication between party arbitrators regarding the availability of a specific person as the neutral arbitrator (*216 Cal. App. 3d 843, 859)* . The third prong of the attack charged that same party arbitrator with intimidating and usurping the powers of the neutral arbitrator by questioning witnesses and interrupting and disagreeing with counsel for other parties. The court of appeal said that the conduct showed only that the party arbitrator was an active arbitrator (*216 Cal. App. 3d 843, 859-860)* .

The facts and procedural background of ***Tipton v. Systron Donner Corp.*** *(1979) 99 Cal. App. 3d 501, 160 Cal. Rptr. 303* , are discussed at *§ 20C.65[3][a]*. As an additional basis for challenging the award petitioner claimed that the arbitrator appointed by respondent was biased and partial. In affirming, the court of appeal noted that there is no statutory requirement that the arbitrators appointed by the parties be neutral or impartial, nor did the agreement in the case provide for such requirement (*99 Cal. App. 3d 501, 505)* . The court noted a Law Revision Commission comment

that the arbitrators representing the parties frequently behave more like advocates than arbitrators and quoted with approval a New York case stating that in the typical situation in which two nonneutral arbitrators sit on a tripartite board, the parties must be deemed to have intended that each party was to be free to appoint any arbitrator desired. The agreement easily can specify otherwise; but if the parties so choose, they are free to have their disputes resolved by a body consisting of two partisan arbitrators and a third neutral arbitrator. A special relationship between the nonneutral arbitrator and that arbitrator's client is implicit in the nature of the tripartite format freely adopted by the parties in the case. Furthermore, there was no evidence that there was any misconduct or impropriety on the part of respondents' arbitrator (*99 Cal. App. 3d 501, 506)* . Petitioner also charged that the arbitrator had failed to disclose his fiduciary relationship with respondents. The court stated that absent a showing of corrupt intent and prejudice to petitioner, the failure of the arbitrator to disclose his relationship to defendant would not vitiate his right to act as a party arbitrator under the terms of the agreement, and statutory and case law (*99 Cal. App. 3d 501, 506-507)* .

Counsel should distinguish the situation in the *Tipton* case, discussed *above*, from that in *Graham v. Scissor-Tail, Inc. (1981) 28 Cal. 3d 807, 171 Cal. Rptr. 604, 623 P.2d 165* , discussed in *Ch. 20A, Arbitration: Resisting, § 20A.90[3][a]*. The *Graham* decision is concerned with the makeup of the entire tribunal and the ability of each party to have a fair hearing within it; if the tribunal is so identified with one of the parties that the other cannot receive a fair hearing within it, the arbitration provision is illusory (*28 Cal. 3d 807, 825-826)* . *Tipton*, however, contemplates the normal type of tribunal under the arbitration statutes in which each party selects an arbitrator, and the two "partisan" arbitrators select a third "neutral" arbitrator.

[d] Personal Relationship Between Arbitrator and Party Does Not Establish Bias

Since January 1, 1998, a proposed neutral arbitrator has been required to disclose any professional or significant personal relationship the proposed neutral arbitrator or his or her spouse or minor child living in the household has or has had with any party to the arbitration proceeding or lawyer for a party [*Code Civ. Proc. § 1281.9(a)(6)*; *see* Cal. Rules of Ct., Appen., Div. VI, Standard 7(d)(3), (8) (requiring disclosure of same relationships); *see also* Cal. Rules of Ct., Appen., Div. VI, Standard 2(n), (o) (father is not member of immediate family but of extended family); Cal. Rules of Ct., Appen., Div. VI, Standard 2(s) (significant personal relationship includes close personal friendship)]. Also, the Ethics Standards applicable to neutral arbitrators appointed on or after July 1, 2002, require the proposed neutral arbitrator to make a reasonable effort to inform himself or herself of any matters that a would cause a person aware of the facts to reasonably entertain a doubt that he or she would be able to be impartial [Cal. Rules of Ct., Appen., Div. VI, Standards 7(d), 9(a)]. An arbitration award may be vacated if an arbitrator making the award failed to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware [*Code Civ. Proc. § 1286.2(a)(6)(A)*]. Note that the relationship involved in *Ray Wilson Co. v. Anaheim Memorial Hospital Assn. (1985) 166 Cal. App. 3d 1081, 213 Cal. Rptr. 62* , was not one of those required to be disclosed under *Code Civ. Proc. § 1281.9(a)(6).*

In ***Ray Wilson Co. v. Anaheim Memorial Hospital Assn.*** *(1985) 166 Cal. App. 3d 1081, 213 Cal. Rptr. 62* , a contractor had demanded arbitration on behalf of a subcontractor against a hospital with regard to a dispute over the construction and remodeling of the hospital. In the course of appointment of the arbitrators, on being questioned by defendant hospital's attorney, the third member of the three-member panel of arbitrators indicated that he had a long-standing acquaintance with the father of the president of the contracting company and that they had been members of the same professional association. The attorney for the hospital objected to the appointment of that arbitrator on the ground of bias, but the two other arbitrators overruled the objection. The arbitration proceeded to conclusion over a period of several months, and a substantial award was made against the hospital. The hospital opposed plaintiff's petition to confirm the award. The trial court vacated the award based on several grounds, one of which was that one arbitrator was not impartial and neutral. The contractor appealed.

The court of appeal reversed, stating that a personal relationship of acquaintance between an arbitrator and a party to the arbitration does not require vacation of an award for possible bias (*166 Cal. App. 3d 1081, 1088)* . Because arbitrators

are selected for their familiarity with the type of business dispute involved, they are not expected to be entirely without business contacts in the particular field. The fact that an arbitrator and a party to the arbitration are members of the same professional organization is not a credible basis for inferring even an impression of bias (*166 Cal. App. 3d 1081, 1087-1088)* .

[e] Limitation on Arbitrator's Testimony in Determining Bias

Evid. Code § 703.5 provides that no person presiding at any judicial or quasi-judicial proceeding, and no arbitrator, shall be competent to testify, in any subsequent civil proceeding, about any statement, conduct, decision or ruling, occurring at or in conjunction with the prior proceeding, except in regard to a statement or conduct that could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of an investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings under *Code Civ. Proc. § 170.1(a)(1)* or *(6)*.

The facts and procedural background of ***Cobler v. Stanley, Barber, Southard, Brown & Associates*** *(1990) 217 Cal. App. 3d 518, 265 Cal. Rptr. 868* , and the portion of the opinion addressing the fact that the language of the parties' agreement was not broad enough to encompass tort claims, are discussed in *Ch. 20A, Arbitration: Resisting, § 20A.40[3][a]*. The court of appeal reversed in part a judgment confirming the award, requiring the trial court to vacate the award of damages for emotional distress and to confirm the award for the balance, which was based on a contract claim. Two of defendant's other contentions on appeal related to alleged bias on the part of the arbitrator. Defendant claimed that under case law and the rules of the American Arbitration Association, the arbitrator was required to disqualify himself because one of the arbitrator's law partners represented a major competitor of defendant in an unfair trade practices suit initiated by defendant. Further, defendant claimed that the trial court erred in considering the arbitrator's declaration. The court of appeal noted that the applicable standard requires vacation of an award pursuant to *Code Civ. Proc. § 1286.2* if the arbitrator fails to disclose to the parties any dealings that might create an impression of possible bias. Whether a particular business relationship between an arbitrator and a party or a party's representative requires disclosure is a factual question to be decided by the trier of fact in each case (*217 Cal. App. 3d 518, 527)* [*but now see Code Civ. Proc. § 1281.9(a)(6)*, set forth at [d], *above*]. Thus, the trial judge decides the issue of bias. The court set forth *Evid. Code § 703.5* and said that arbitrators are not required to explain their awards or provide reasons for their conclusions (*217 Cal. App. 3d 518, 528)* . Although *Code Civ. Proc. § 170*, referred to in *Evid. Code § 703.5(d)*, applies expressly to judges, compelling reasons of public policy favoring neutrality of arbitrators indicate the same criteria should apply to nonjudicial dispute resolution, including arbitration (*217 Cal. App. 3d 518, 528-529)* . Thus, while the trial court should not have considered the portions of the arbitrator's declaration explaining the reasons for the decision or the merits of the controversy, the trial court had the power to consider those statements in the declaration that addressedthe arbitrator's qualifications and bias, or the lack of bias. The declaration stated that the arbitrator was unaware of any potential conflict of interest on his part until after the decision was made (*217 Cal. App. 3d 518, 529)* .

The trial court also considered the declaration of one of defendant's principals and sole shareholder of its parent company, to the effect that he did not know at the time of the arbitration that the arbitrator was a partner of the attorney who represented its competitor in an unfair trade practices suit, although the principal had been deposed by the partner for five days in the other action and although the name of the arbitrator's law firm was noted on the biography supplied by the American Arbitration Association. The court of appeal concluded that the record supported the trial court's finding that there was no actual bias and that defendant had waived any claim for apparent bias and was estopped from late assertion of such a claim (*217 Cal. App. 3d 518, 529)* .

[f] Arbitrator Did Not Know of Potential Conflict Until After Rendition of Award

Cal. Rules of Ct., Appen., Div. VI, Standards 7(d), 9(a), part of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration, applicable to neutral arbitrators appointed to serve on or after July 1, 2002, require the proposed arbitrator to make a reasonable effort to inform himself or herself of any matters that a would cause a person

aware of the facts to reasonably entertain a doubt that he or she would be able to be impartial. With respect to consumer arbitrations in which the arbitrator was appointed on or after January 1, 2003, and in which a dispute resolution provider organization is coordinating, administering, or providing the arbitration services, the proposed arbitrator must disclose any significant past, present, or currently expected financial or professional relationship or affiliation between that dispute resolution provider organization and a party or lawyer in the arbitration [Cal. Rules of Ct., Appen., Div. VI, Standard 8].

NOTE:

The California Ethics Standards will not apply in any arbitration in which the parties have agreed to arbitrate in accordance with New York Stock Exchange (NYSE) Arbitration Rules or the National Association of Securities Dealers (NASD) Code of Arbitration Procedure. Both preempt the California Ethics Standards to the extent that the Securities and Exchange Commission has approved those rules and procedures in accordance with the Securities Exchange Act of 1934 [Credit Suisse First Boston Corp. v. Grunwald (9th Cir. 2005) *400 F.3d 1119, 1124 (NASD rules)* ; *Mayo v. Dean Witter Reynolds (N.D. Cal. 2003) 258 F. Supp. 2d 1097, 1112* , as corrected at *260 F. Supp. 2d 979* ; *accord Wilmot v. McNabb (N.D. Cal. 2003) 269 F. Supp. 2d 1203* ; *Jevne v. Superior Court (JB Oxford Holdings, Inc.) (2005) 35 Cal. 4th 935, 28 Cal. Rptr. 3d 685, 111 P.3d 954]* . NYSE Rules and NASD Code of Arbitration Procedure have their own disclosure requirements [*see* NYSE Arbitration Rule 610; NASD Code of Arbitration Procedure, Rule 10312].

As of January 1, 2003, no private arbitration company may administer a consumer arbitration [*see* Cal. Rules of Ct., Appen., Div. VI, Standard 2(d), (e) (definitions)], or provide any other services related to a consumer arbitration, if:

- The company has, or within the preceding year has had, a financial interest, as defined in *Code Civ. Proc. § 170.5*, in any party or attorney for a party [*Code Civ. Proc. § 1281.92(a)*]; or

- If any party or attorney for a party has, or within the preceding year has had, any type of financial interest in the private arbitration company [*Code Civ. Proc. § 1281.92(b)*].

Code Civ. Proc. § 1281.92 became operative January 1, 2003, and operates only prospectively so as not to prohibit the administration of consumer arbitrations on the basis of financial interests held prior to January 1, 2003 [*Code Civ. Proc. § 1281.92(c), (e)*]. *Code Civ. Proc. § 1281.92* applies to all consumer arbitration agreements subject to *Code Civ. Proc. §§ 1280-1294.2*, and to all consumer arbitration proceedings conducted in California [*Code Civ. Proc. § 1281.92(d)*].

Except as to the information relating to any financial relationship or affiliation the arbitrator has with the provider organization other than receiving referrals of cases, an arbitrator may rely on information supplied by the provider organization in making the disclosures required by Standard 8. If the information that must be disclosed is available on the Internet, the arbitrator may comply with the obligation to disclose this information by providing the Internet address at which the information is located and notifying the party that the arbitrator will supply hard copies of this information on request [Cal. Rules of Ct., Appen., Div. VI, Standard 8(a)(1)].

An arbitrator can fulfill his or her obligation under Standard 9 to inform himself or herself of the information that is required to be disclosed under Standard 8 by [Cal. Rules of Ct., Appen., Div. VI, Standard 9(e)]:

- Asking the dispute resolution provider organization for this information; and

- Declaring in writing that he or she has made that inquiry and attaching to the declaration copies of his or her inquiry and any response from the provider organization.

Similar provisions apply with respect to the proposed arbitrator's duty of inquiry regarding relationships or other matters

involving his or her extended family and former spouse [Cal. Rules of Ct., Appen., Div. VI, Standard 9(b)], relationships with associates of a lawyer hired to represent any party in the arbitration [Cal. Rules of Ct., Appen., Div. VI, Standard 9(c)], and service as a dispute resolution neutral, other than an arbitrator, administered by a dispute resolution provider organization and commenced prior to July 1, 2002 [Cal. Rules of Ct., Appen., Div. VI, Standard 9(d)].

With respect to a proposed arbitrator's duty to inform himself or herself of relationships or other matters involving his or her extended family and former spouse that are required to be disclosed under Standard 7, the arbitrator can fulfill that duty by [Cal. Rules of Ct., Appen., Div. VI, Standard 9(b); *see* Cal. Rules of Ct., Appen., Div. VI, Standard 2(h), (o) ("member of the arbitrator's extended family" means the arbitrator's parents, grandparents, great-grandparents, children, grandchildren, great-grandchildren, siblings, uncles, aunts, nephews, and nieces or the arbitrator's spouse or domestic partner [as defined in *Fam. Code § 297*] or the spouse of such person)]:

- Seeking information about those relationships and matters from the members of his or her immediate family and any members of his or her extended family living in his or her household; and

- Declaring in writing that he or she has made that inquiry.

Cobler v. Stanley, Barber, Southard, Brown & Associates *(1990) 217 Cal. App. 3d 518, 265 Cal. Rptr. 868* , is discussed at [e], *above*.

[g] Existence of Bias Is Determined by Trier of Fact

Greenspan v. LADT, LLC *(2010) 185 Cal. App. 4th 1413, ___ Cal. Rptr. 3d ___* , affirmed the confirmation of an arbitration decision on a breach of contract claim. The portion of the decision on whether the agreement gave the arbitrator the power to decide arbitrability of issues is discussed in *Ch. 20, Arbitration: Compelling, § 20.10[3][g], above*. The portion of the decision dealing with review of the arbitrator's determination of arbitrability of the issue of joint and several liability is *covered in § 20C.91[3][c], below*. The portion of the decision addressing the review of the timeliness of the arbitrator's award is *covered in § 20C.90[3][a], below*. Next, the court treated the claim that the award should be vacated because the arbitrator failed to recuse himself on grounds that he was aware of the facts that might reasonably have justified entertaining a doubt that the he would be able to be impartial, as required by § 170.1, subd. (a)(6)(A)(iii). The allegedly disqualifying facts centered on a lawsuit filed against the arbitrator by an officer of an entity party to the arbitration in this case seeking costs and fees in another arbitration. The applicable Judicial Arbitration and Mediation Service (JAMS) rules required that JAMS determine disqualification, which it did by denying the challengers request (*185 Cal. App. 4th 1413, 1456*). A trial court considering a petition to confirm or vacate an arbitration award is required to determine, de novo, whether the circumstances disclose a reasonable impression of arbitrator bias, when that issue is properly raised by a party to the arbitration. Given that, and public policy favoring neutral arbitrators, an arbitration service's determination on disqualification is subject to de novo judicial review (185 Cal. App. 4th 1413, 1457). The portion of the decision on whether the arbitrator was immune to the suit on which the request for disqualification was based is discussed in *Ch. 20B, Arbitration: Selecting Arbitrators; Arbitral Immunity, § 20B.50[3][a], above*. Based on the arbitrator's immunity to the suit, the arbitrator was not required to recuse himself and the trial court order vacating the award was error.

Cobler v. Stanley, Barber, Southard, Brown & Associates *(1990) 217 Cal. App. 3d 518, 265 Cal. Rptr. 868* , is discussed at [e], *above*.

[h] Proposed Arbitrator Was Not Required to Disclose Prior Service as Uncompensated Mediator

The facts and procedural background of ***Guseinov v. Burns*** *(2006) 145 Cal.App. 4th 944, 51 Cal. Rptr. 3d 903* and the portion of the opinion addressing the contention hat the facts might cause a person to reasonably entertain a doubt that

the arbitrator would be impartial are discussed at [a], *above*. Regarding the arbitrator's prior service as a pro-bono mediator, the court of appeal quickly disposed of that issue by noting that the undisputed evidence was that the arbitrator did not secure and did not expect to receive any form of compensation for serving as a mediator volunteer in the prior matter. Thus, the Standard 7(d)(5) disqualification ground was inapplicable. Regarding the claim that the single mediation amounted to a professional relationship that had to be disclosed, the court of appeal found that under these circumstances, acting as an uncompensated mediator in a single matter did not constitute a professional relationship between the arbitrator and plaintiff's counsel. Arbitration awards need not be vacated in every case in which there has been some contact between the arbitrator and counsel, particularly when the contact is slight or attenuated (*145 Cal. App. 4th 944, 958)* . Substantial evidence supported the trial court's finding that no professional relationship existed between plaintiff's counsel and the arbitrator because of the single prior uncompensated mediation within the terms of *Code Civ. Proc. § 1281.9(a)(6)* and Standard 7(d)(8) (*145 Cal. App. 4th 944, 959)* . The court of appeal found it noteworthy that when the prior mediation was disclosed to defendant's then counsel, albeit orally rather than in writing, that counsel did not object to the arbitrator serving as such. Because the court of appeal concluded there was no ground for disqualification that the arbitrator was required to disclose, it did not address defendant's additional contentions that the oral disclosure did not comply with the statutory requirements (*145 Cal. App. 4th 944, 961)* .

[i] Parent Company Was Not Party So Disclosure of Business Relationship Was Not Required

Plaintiff in ***Hayden v. Robertson Stephens, Inc.*** *(2007) 150 Cal. App. 4th 360, 58 Cal. Rptr. 3d 333* , borrowed money from defendant brokerage firm, secured by stock, and defaulted on the loan when the stock lost value. Plaintiff sued the brokerage firm for alleged breach of fiduciary duty in giving financial advice; the brokerage firm cross-complained to collect on the loan. Defendant's parent company, FleetBoston Financial Corporation (FleetBoston), was also a party to the arbitration agreement. After arbitration held over the course of five days, the arbitrator issued an interim award on October 23, 2003, finding in favor defendant on both the complaint and cross-complaint, and inviting defendant, as the prevailing party, to file an application for attorney fees and costs. Before the final award was issued, Bank of America Corporation announced that it was buying FleetBoston. Plaintiff maintained that Bank of America Corporation and its subsidy, Bank of America, N.A., were then parties to the arbitration and demanded that the arbitrator disclose all present and prospective relationships with them. Plaintiff later sought to disqualify the arbitrator because he worked for Judicial Arbitration & Mediation Services (JAMS), which provided arbitration services to Bank of America Corporation or its related entities (hereinafter "Bank of America"). JAMS reviewed the request for disqualification, and denied it in April 2004, finding that Bank of America was not a party to the arbitration, making disclosures unnecessary. The final award was issued in June, 2004. Defendant moved to confirm the arbitration award, and plaintiff moved to vacate it. The trial court confirmed the arbitration award. Plaintiff then petitioned the court of appeal for a writ of mandate, which was summarily denied. The collateral for the loan was foreclosed. Plaintiff moved for a new trial, which was denied. Plaintiff appealed.

The court of appeal affirmed (*150 Cal. App. 4th 360, 363, 369)* , finding that Bank of America was not a party to the proceeding for arbitral disclosure purposes and therefore, the arbitrator was not required to disclose past, present, or prospective employment relationships with the bank (*150 Cal. App. 4th 360, 365)* . The relevant definition of "party" is found in *Code Civ. Proc. § 170.1(a)(8)(B)(ii)*, which defines party to include "the parent, subsidiary, or other legal affiliate of any entity that is a party and is involved in the transaction, contract, or facts that gave rise to the issues subject to the proceeding" (*150 Cal. App. 4th 360, 366-367)* . Plaintiff argued that "and is involved in the transaction, contract, or facts that gave rise to the issues subject to the proceeding" refers to the original named party, and the legal affiliate's connection to the arbitration proceeding is irrelevant: all affiliates of a named party are parties, even those with no connection to the issues in arbitration. The court of appeal disagreed, saying that plainly, it is the legal affiliate (not the entity that was the original named party) that must be involved in the transaction, contract, or facts that gave rise to the issues subject to the proceeding. An interpretation of the statute in which only the named party must be involved in the underlying matter being arbitrated, would make most of the statutory definition surplusage (*150 Cal. App. 4th 360, 367*). A party is necessarily involved in the transaction, contract, or facts that gave rise to the issues subject to the proceeding (*150 Cal. App. 4th 360, 367-368)* . The entire qualifying clause requiring involvement in the

underlying matter would be meaningless if the clause modified "any entity that is a party." A construction rendering some words surplusage is to be avoided. For the qualifying clause to have any meaning, it must be read to modify "parent, subsidiary, or other legal affiliate." It is this legal affiliate that must be "involved in the transaction, contract, or facts that gave rise to the issues subject to the proceeding" (*150 Cal. App. 4th 360, 367)* . Plaintiff also argued that Bank of America Corp. was involved in the underlying matter because it was liable forFleetBoston's conduct as a successor corporation. The court disagreed, noting that the statute does not deem a corporation a party to the proceeding based on potential successor liability: a parent corporation must be "involved in the transaction, contract, or facts that gave rise to the issues subject to the proceeding" to be a party. Further, plaintiff claimed Bank of America was involved because it held deeds of trust on property securing $9.5 million in bank loans to plaintiff. Defendant Robertson Stephens held junior deeds of trust on those same properties and, when the bank began foreclosure proceedings, Robertson Stephens bought the bank loans to safeguard its junior liens on the properties. In the arbitration agreement, plaintiff waived any claims against Robertson Stephens or FleetBoston arising out of the acquisition of the bank loans and liens, and Robertson Stephens made no claim in the arbitration proceeding for balances due on the bank loans assigned to it (*150 Cal. App. 4th 360, 368)* . Thus, while plaintiff had disputes with Bank of America, N.A., those disputes were unrelated to "the transaction, contract, or facts that gave rise to the issues subject to the proceeding," which were restricted to Robertson Stephens's broker relationship and margin loans. Bank of America, N.A., was not a party to the arbitration proceeding. The arbitrator had no obligation to disclose prospective employment with either Bank of America Corp. or Bank of America, N.A., as they were not parties to the proceeding. Finally, plaintiff argued that there existed substantial doubt about the JAMS arbitrator's impartiality because Bank of America, N.A., is a frequent client of JAMS in consumer litigation. The court of appeal found that Bank of America, N.A.'s retention of JAMS for arbitration services provided no evidence of bias. The bank was not a party to the arbitration or otherwise involved in the arbitrated dispute, nor was there any evidence that arbitrator bias played any role in the award. The interim award had resolved all liability issues adverse to plaintiff before Bank of America Corp. acquired a party to the arbitration. No one could reasonably entertain a concern that the arbitrator's decision was motivated by partiality for Bank of America Corp. or its subsidiary (*150 Cal. App. 4th 360, 368)* .

[j] Board Membership in Professional Organization Need Not Be Disclosed

Luce, Forward, Hamilton & Scripps, LLP v. Koch *(2008) 162 Cal. App. 4th 720, 75 Cal. Rptr. 3d 869* , is discussed at [b], *above.*

[k] $500 Contribution to Mayoral Campaign Need Not Be Disclosed

Casden Park La Brea Retail LLC v. Ross Dress for Less, Inc*. (2008) 162 Cal. App. 4th 468, 75 Cal. Rptr. 3d 763* , is discussed at [a], *above.*

[l] Unrequired Disclosure Is Not Grounds for Vacating Award

Luce, Forward, Hamilton & Scripps, LLP v. Koch *(2008) 162 Cal. App. 4th 720, 75 Cal. Rptr. 3d 869* , is discussed at [b], *above.*

[m] Failure to Disclose All Details of Prior Arbitrations Is Not Necessarily Grounds for Vacation of Arbitration Award

Dornbirer v. Kaiser Foundation Health Plan, Inc. *(2008) 166 Cal. App. 4th 831, 83 Cal. Rptr. 3d 116* , is discussed at [a], *above.*

[n] Arbitrator Has No Duty to Disclose Arbitrator's Law Firm's Past Representation of Third Party Who Had Adversarial Relationship With a Party.

Agri-Systems v. Foster Poultry Farms *(2008) 168 Cal. App. 4th 1128, 85 Cal. Rptr. 3d 917* , is discussed at [a],

above.

[4] Additional Authorities

[a] Impression of Arbitrator's Bias Must Be Reasonable One

Lagstein v. Certain Underwriters at Lloyd's, London (9th Cir., 2010) 607 F.3d 634 , overturned the trial court's ruling vacating the arbitration award subject to the Federal Arbitration Act (FAA) on grounds that it was excessive. The portion of the decision discussing manifest disregard of the law is *set forth in § 20C.90[4][a], below*. The portion of the decision discussing whether the award was irrational is located at *§ 20C.90[4][b], below* . The FAA, *9 U.S.C.S. § 10(a)(2)*, requires vacatur where there was evident partiality or corruption in the arbitrator (607 F.3d 634, 654) . To show evident partiality in an arbitrator, the complainant either must establish specific facts indicating actual bias toward or against a party or show that the arbitrator failed to disclose to the parties information that creates a reasonable impression of bias (*607 F.3d 634, 646)* . The portion of the decision addressing the arbitrators' unrequired disclosure of past misconduct is discussed at [c], *below*.

Woods v. Saturn Distribution Corp. (9th Cir. 1996) 78 F.3d 424 , discussed at *§ 20C.132[4][a]*, states that in cases governed by the Federal Arbitration Act, *9 U.S.C. § 10(a)(2)* (award to be vacated for evident partiality of arbitrators) requires, in nondisclosure cases, that there be a reasonable impression of bias in order to vacate an award (*78 F.3d 424, 427)* .

The court of appeal in *Betz v. Pankow (1993) 16 Cal. App. 4th 919, 20 Cal. Rptr. 2d 834* , affirmed the judgment confirming the award, holding that gender bias of two male arbitrators was not established. The court of appeal said that an arbitrator should not be disqualified unless a person aware of the facts might reasonably entertain a doubt that the arbitrator would be able to be impartial.

[b] Party Arbitrator Able to Be Partisan

In *Good v. Kaiser Foundation Hospital (1984) 152 Cal. App. 3d 819, 199 Cal. Rptr. 581* , petitioners sought to vacate an arbitration award under former Code Civ. Proc. § 1286.2(c) [*now see Code Civ. Proc. § 1286.2(a)(3)*], due to evidence indicating bias on the part of respondents' appointed arbitrator. The court of appeal rejected this contention, holding that former Code Civ. Proc. § 1286.2(c) [*now see Code Civ. Proc. § 1286.2(a)(3)*] applied only to the misconduct of a neutral arbitrator, not that of an arbitrator selected by a party (*152 Cal. App. 3d 819, 822)* . Party-appointed arbitrators are not expected to be neutral, and the special relationship existing between the nonneutral arbitrator and his or her client is implicit in the nature of the tripartite format adopted freely by the parties. Thus, the court also held that a party-appointed arbitrator's expression of disagreement with testimony presented by the other party was not in itself prejudicial (*152 Cal. App. 3d 819, 823)* .

[c] Unrequired Disclosure Is Not Grounds for Vacating Award

Lagstein v. Certain Underwriters at Lloyd's, London (9th Cir., June 10, 2010) 607 F.3d 634 , overturned the district court's ruling vacating the arbitration award subject to the Federal Arbitration Act (FAA) on grounds that it was excessive. The portion of the decision discussing manifest disregard of the law is *set forth in § 20C.90[4][a], below*. The portion of the decision discussing whether the award was irrational is located at *§ 20C.90[4][b], below* . The FAA, *9 U.S.C.S. § 10(a)(2)*, requires vacatur where there was evident partiality or corruption in the arbitrator (*2010 U.S. App. LEXIS 11836 at 24)* . To show evident partiality in an arbitrator, the complainant either must establish specific facts indicating actual bias toward or against a party or show that the arbitrator failed to disclose to the parties information that creates a reasonable impression of bias. In this case, the complainant failed to do so (*2010 U.S. App. LEXIS 11836 at 25)* . The portion of the decision discussing partiality or corruption of arbitrator is set forth at [a], *above*.

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2-20C California Points & Authorities § 20C.81

§ 20C.81 Party's Recognition of Arbitrator from Earlier Mediation, Waiver, and Participation in Arbitration Foreclosed Need to Vacate Award Based on Arbitrator's Failure to Make Additional Disclosure

[1] FORM

GIVEN THE UNIQUE CIRCUMSTANCES OF _____ [PLAINTIFF *or* DEFENDANT]'S KNOWLEDGE OF THE PRIOR PROCEEDING INVOLVING _____ [HIM *or* HER]SELF AND THE ARBITRATOR, AND HIS/HER WAIVER OF ANY POTENTIAL CONFLICT RESULTING FROM THAT PROCEEDING, IT IS NOT NECESSARY TO VACATE THE AWARD.

A. Party's Knowledge and Arbitrator's Disclosure Foreclose Need to Vacate Award. It would be absurd to construe *Code of Civil Procedure Section 1286.2(a)(6)* without regard to evidence and require vacating an award when credible evidence shows that the party claiming the failure of disclosure _____ [*specify evidence, e.g.,* knew of the prior proceeding, and in fact was a party to it, consented to the arbitrator's service after all parties were advised of the prior proceeding, participated in the arbitration, and waited until after an adverse award to make any objection] (*Fininen v. Barlow (2006) 142 Cal. App. 4th 185, 190-191, 47 Cal. Rptr. 3d 687*).

[2] Comments

[a] Use of Form

This form may be used to oppose a motion to vacate an arbitration award for failureof the arbitrator to disclose a prior mediation or arbitration involving a party to the present arbitration when that party knew of the prior proceeding, waived any potential conflict arising from that proceeding, participated in the arbitration and waited until after an adverse award to make any objection.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, the argument must show credible evidence to support the other party's knowledge of the prior proceeding, waiver or conflict, and

participation in the arbitration. It is advisable for counsel to submit evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file (including verified pleadings), or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied if plaintiff-respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement)].

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Party's Knowledge and Arbitrator's Disclosure Foreclose Need to Vacate Award

Plaintiffs in ***Fininen v. Barlow*** *(2006) 142 Cal. App. 4th 185, 47 Cal. Rptr. 3d 687* , hired defendant to do design and remodeling work. A variety of problems in their construction projects led plaintiffs to file a complaint against defendant for breach of contract, negligence, fraud and misrepresentation, and violation of contractors' licensing laws. The parties finally agreed to arbitrate the matter and entered into a stipulation for binding arbitration naming McCollum as arbitrator. McCollum sent the parties and their counsel an arbitration agreement which disclosed that he had previously mediated several cases for plaintiffs' counsel and also mediated and/or arbitrated several cases for defendant's counsel and that McCollum would provide additional information about these matters on request. The agreement also stated that all parties and their counsel had undertaken all investigation and due diligence they deemed necessary regarding the use of McCollum as arbitrator and agreed to waive any other disclosure requirements.

When all parties, counsel and McCollum appeared for the arbitration, Barlow and McCollum recognized each other. Barlow had in fact settled a matter which McCollum had mediated. McCollum had recommended that settlement. McCollum apparently did not remember the mediation, and Barlow suggested that McCollum had presided in a Santa Maria mediation in which Barlow was a plaintiff. Barlow also stated that the mediation had occurred a year or two previously, involved the collection of money owed Barlow for a construction project, and that it was held at the law offices of Kirk & Simas. McCollum then advised all parties and counsel that he had mediated a matter in which Barlow was a party, without providing the name of the other party. McCollum also disclosed that the mediation was in Santa Maria and that Barlow indicated it was a construction collection dispute. McCollum indicated that he could only continue to serve as an arbitrator in the matter if everyone were willing to waive any conflicts arising from the disclosure concerning the prior Barlow mediation and a separate, unrelated disclosure. All parties and counsel agreed to proceed with the arbitration. The arbitration lasted several months, and in a 22-page arbitration award, McCollum founding in favor of plaintiffs. Approximately six weeks later, McCollum served his ruling on the parties' motions concerning costs and fees. Barlow filed a petition to vacate the arbitration award claiming McCollum failed to disclose his involvement in a prior similar case involving Barlow and that if he had known these facts, he would not have agreed to Mr. McCollum as the arbitrator. The trial court denied the petition to vacate the arbitration award, finding that *Code Civ. Proc. § 1281.9* does not apply as it requires disclosures only regarding prior arbitrations, not prior mediations, and

that even if section 1281.9 did apply, Barlow had waived the need for further disclosures. The trial court confirmed the arbitration award. Defendant appealed.

The court of appeal affirmed (*142 Ca. App. 4th 185, 187, 191)* . Barlow relied on *Code Civ. Proc. § 1286.2(a)(6)* and cases decided thereunder. The court of appeal distinguished all those cases because none involved an award based on the arbitrator's nondisclosure of a prior, settled case brought by a party who (1) participated in the nondisclosed case; (2) had access to his own file regarding that nondisclosed case before, during and after the arbitration hearings; (3) recognized the arbitrator visually before the arbitration hearing commenced; (4) failed to request a continuance to investigate the arbitrator; (5) consented to proceed with the arbitration when the arbitrator partially described the nondisclosed case to all parties; and (6) failed to notify the arbitrator or the other parties that he objected to the arbitrator's participation until nine months after signing the stipulation naming the arbitrator, six months after seeing and recognizing the arbitrator, and nearly two months after the arbitrator issued the award in favor of his opponents. When read literally, and without regard to the evidence presented below, *Code Civ. Proc. § 1286.2(a)(6)* could support Barlow's contention that the trial court was required to vacate the award. In denying Barlow's motion to vacate the award, the trial court considered and gave credence to the evidence that, before the arbitration, Barlow recognized McCollum and knew of his participation with Barlow in the prior mediation; that Barlow consented to McCollum as the arbitrator after McCollum advised all parties, in Barlow's presence, that he could not serve without the consent of all parties; that Barlow then waited many months either to check his own files regarding the prior mediation or to object to McCollum's continued participation; and that Barlow objected only after McCollum issued an award in favor of plaintiffs (*142 Cal. App. 4th 185, 190)* . In view of these circumstances, it would be absurd to construe Section 1286.2(a)(6) to require that the arbitration award be vacated based on an incomplete or untimely disclosure concerning the prior mediation involving Barlow *(142 Cal. App. 4th 185, 191)* .

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2-20C California Points & Authorities §§ 20C.82-20C.89

[Reserved]

§§ 20C.82[Reserved]

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2-20C California Points & Authorities § 20C.90

§ 20C.90 Mistake of Law Generally Does Not Prevent Confirmation or Justify Vacating Award

[1] FORM

THE AWARD SHOULD _____ [BE CONFIRMED *or* NOT BE VACATED] BECAUSE GENERALLY NEITHER AN ARBITRATOR'S MISTAKE OF LAW NOR UNSOUND REASONING _____ [PREVENTS CONFIRMATION OF *or* REQUIRES VACATING] AN AWARD.

A. Arbitrator's Mistake of Law Does Not Prevent Confirmation or Require Vacation of Award. An arbitrator's decision is not generally reviewable (by the trial court) for errors of law, whether or not the error appears on the face of the award and causes substantial injustice to the parties (*Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1, 6, 33, 10 Cal. Rptr. 2d 183, 832 P.2d 899* ; *Gravillis v. Coldwell Banker Residential Brokerage Co. (2010) 182 Cal. App. 4th 503, 521, 106 Cal. Rptr. 3d 70* ; *Oaktree Cap. Mgmt., L.P. v. Bernard (2010) 182 Cal. App. 4th 60, 71, 106 Cal. Rptr. 3d 16* ; *Baize v. Eastridge Companies (2006) 142 Cal. App. 4th 293, 300-302, 47 Cal. Rptr. 3d 763* ; *Harris v. Sandro (2002) 96 Cal. App. 4th 1310, 1313-1314, 117 Cal. Rptr. 2d 910* ; *accord Cable Connection, Inc. v. DIRECTV, Inc. (2008) 44 Cal. 4th 1334, 1345, 82 Cal. Rptr. 3d 229, 190 P.3d 586*).

[*AND/OR*]

A1. Parties Have Not Clearly Agreed to Judicial Review for Errors of Law. The parties to an arbitration agreement may only take themselves out of the general rule that the merits of the award are not subject to judicial review by clearly agreeing that legal errors are an excess of arbitral authority reviewable by the courts under *Code Civ. Proc. §§ 1286.2, 1286.6* (*Cable Connection, Inc. v. DIRECTV, Inc. (2008) 44 Cal. 4th 1334, 1361, 82 Cal. Rptr. 3d 229, 190 P.3d 586*). To so provide unambiguously, the parties must have expressly agreed to deprive the arbitrators of the power to commit legal error and to specifically provide for judicial review of such error (*Baize v. Eastridge Companies (2006) 142 Cal. App. 4th 293, 300, 47 Cal. Rptr. 3d 763* ; *see Cable Connection, Inc. v. DIRECTV, Inc. (2008) 44 Cal. 4th 1334, 1361, 82 Cal. Rptr. 3d 229, 190 P.3d 586*).

B. Award Is Not Invalidated by Arbitrator's Unsound Reasoning. Erroneous reasoning does not invalidate an otherwise proper award (*Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1, 11, 10 Cal. Rptr. 2d 183, 832 P.2d 899* ; *Grunwald-Marx, Inc. v. Los Angeles Joint Bd. (1959) 52 Cal. 2d 568, 589, 343 P.2d 23*).

[*Optional*] **C. Uninsured Motorist Award Is Not Invalidated by Arbitrator's Mistake of Law.** The rule that an arbitrator's award is not invalidated by an error of law applies to arbitration of uninsured motorist disputes required to be arbitrated by *Insurance Code Section 11580.2(f)* (*Porter v. Golden Eagle Ins. Co. (1996) 43 Cal. App. 4th 1282, 1289-1290, 51 Cal. Rptr. 2d 338*).

[*Optional*] **D. Federal Arbitration Act Does Not Require Review for Manifest Disregard of Law.** In cases governed by the Federal Arbitration Act (*9 U.S.C. § 1 et seq.*), the California rule that generally prevents reweighing of the merits of an arbitrator's ruling is not preempted by Sections 10 and 12 of the Federal Arbitration Act (*9 U.S.C. §§ 10, 12*) nor by the federal common law rule which allows review of an arbitration award in federal court for "manifest disregard of the law" (*Siegel v. Prudential Insurance Company (1998) 67 Cal. App. 4th 1270, 1290-1291, 79 Cal. Rptr. 2d 726*).

[2] Comments

[a] Use of Form

This form may be used to support a petition to confirm an arbitration award or a response to a petition to vacate an arbitration award to assert the principle that neither a mistake of law nor unsound reasoning prevents confirmation of, or requires vacating, an arbitration award. Alternative Paragraphs A1 and B are for the applicable basis for arguing that confirmation should not be denied, whether that is because the parties did not clearly agree to judicial review on the merits or the unsound reasoning of the decision is not grounds for denial of confirmation or for vacating the award. Optional Paragraph C is for use when the award is question relates to an uninsured motorist dispute which was required to be arbitrated by *Ins. Code § 11580.2(f)*. Optional Paragraph D is for use when the matter is governed by the Federal Arbitration Act to counter an actual or anticipated assertion that the federal rule allowing review of an arbitration award for "manifest disregard of the law" applies.

It does not provide a complete memorandum but should be combined with the memorandum supporting the petition [*see § 20C.10*] or response [*see § 20C.11*] seeking confirmation of the award. Counsel may also wish to combine this form with § 20C.91 or 20C.92, which also address the breadth of arbitrators' usual powers in this regard.

As a tactical matter, counsel may wish to reserve these points for oral argument or for other form of rejoinder to the respondent's opposing memorandum. In deciding whether or not to reserve these arguments, counsel should consider local court rules and practice, as well as whether the moving party would be expected to be raise these points in initial moving papers, to avoid the possibility of losing the opportunity to raise them.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should show that there is no restrictive language in the arbitration agreement or the rules under which the arbitration was conducted to deprive the arbitrators of their usual power. It may also be appropriate to argue that all parties understood that in choosing arbitration, they intended to risk the possibility of legal error in return for a less expensive and more expeditious procedure than litigation.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence,

by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purposeis to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Arbitrator's Mistake of Law Does Not Prevent Confirmation or Require Vacation of Award in Absence of Clear Agreement to Contrary

Moncharsh v. Heily & Blase *(1992) 3 Cal. 4th 1, 10 Cal. Rptr. 2d 183, 832 P.2d 899* , did not involve an error of law on the face of the award. Nevertheless, the Supreme Court extensively reviewed conflicting authorities on the issue and held, with two justices dissenting, that an arbitrator's decision is not generally reviewable for errors of law, whether or not the error appears on the face of the award and causes substantial injustice to the parties (*3 Cal. 4th 1, 6, 33)* . Plaintiff was an attorney employed by defendant pursuant to an agreement that provided that if plaintiff ceased to work for defendant and continued to represent clients who had been clients of the firm, the firm was entitled to 80 percent of any fees earned from those clients. The agreement also provided for arbitration of any disputes between the parties. After plaintiff left defendant's employ, plaintiff continued to represent six clients that had been clients of the firm. The firm offered to settle for a quantum meruit share of the fees. Plaintiff refused, and the parties proceeded to arbitration. Before the arbitrator, plaintiff raised the issues of the illegality of the fee-split provision, claiming it was unconscionable, illegal, and contrary to public policy as expressed in the State Bar Rules of Professional Conduct. The arbitrator held for the firm except with respect to the sixth client, as to whom the arbitrator found an 80-20 fee split would be unconscionable. As to the other five clients, the arbitrator held that the 80-20 arrangement was not unconscionable and did not violate the rules of professional conduct. Plaintiff petitioned to have the award vacated or corrected. Defendant sought to have it confirmed. The trial court confirmed the award, finding that the arbitrator's findings on questions of both law and fact were conclusive and that there was no error of law on the face of the award. That result was affirmed on appeal, and by the Supreme Court.

The Supreme Court, in upholding the arbitrator's award, stated that because it vindicates the intentions of the parties that the award be final, and because an arbitrator is not ordinarily constrained to decide according to the rule of law, the merits of a controversy are not subject to review and courts will not review the validity of the arbitrator's reasoning. The rule that arbitrators' decisions cannot be reviewed for errors of law is based on two factors. First, the risk of error is something the parties agree to bear in return for a quick, inexpensive, and conclusive resolution of their dispute (*3 Cal. 4th 1, 11)* . Second, the Legislature, by enacting *Code Civ. Proc. §§ 1286.2* and *1286.6*, substantially reduced the risk of certain types of error. The residual risk to the parties of an erroneous decision is an acceptable cost of obtaining the expedience and financial savings that the arbitration process provides compared to the judicial process (*3 Cal. 4th 1, 12)* . The Court discussed the Law Revision Commission studies that culminated in the revision of the arbitration provisions by Stats. 1961, ch. 461, and inferred that the Legislature intended to reject the rule (of earlier cases) allowing

review to prevent substantial injustice, and instead to adopt the position that in the absence of some limiting clause in the arbitration agreement, the merits of the award, either on questions of law or fact, may not be reviewed except as provided by statute (*3 Cal. 4th 1, 25)* . *Code Civ. Proc. § 1296*, which governs public construction contract arbitration, *does* provide for vacating awards that are based on errors of law. This allows the inference that the Legislature intended that difference (*3 Cal. 4th 1, 25-26)* . In California and in states that have adopted the Uniform Arbitration Act (section 12 of the which is substantially similar to *Code Civ. Proc. § 1286.2*), most case opinions agree that the statutory grounds are the exclusive grounds for vacating an award (*3 Cal. 4th 1, 26-27)* . The Court concluded that the Legislature intended to exclude nonstatutory grounds for vacating an award, and disapproved all cases allowing review for an error of law on the face of an award causing substantial injustice (*3 Cal. 4th 1, 27-28, 33)* .

Greenspan v. LADT, LLC *(2010) 185 Cal. App. 4th 1413, 111 Cal. Rptr. 3d 468* , affirmed the confirmation of an arbitration decision on a breach of contract claim. The portion of the decision on whether the agreement gave the arbitrator the power to decide arbitrability of issues is discussed in *Ch. 20, Arbitration: Compelling, § 20.10[3][g], above*. The portion of the decision dealing with review of the arbitrator's determination of arbitrability of the issue of joint and several liability is *covered in § 20C.91[3][c], below*. Next, the court treated the claim that the award should be vacated because the arbitrator failed to render a decision in a timely manner under the applicable Judicial Arbitration and Mediation Service (JAMS) rules. However, the court noted those rules made the arbitrator's decision on timeliness final and not subject to judicial review on the merits, so the court deferred to the decision of the arbitrator and could not vacate the award on grounds of untimely award [*185 Cal. App. 4th 1413, 111 Cal. Rptr. 3d 468, 2010 Cal. App. LEXIS 968 at 67-82]* . The portion of the decision covering whether the award should be vacated due to the arbitrator's failure to recuse himself is dealt with in *§ 20C.80[3][g], above* . The portion of the decision on whether the arbitrator was immune to the suit on which the request for disqualification was based is discussed in *Ch. 20B, Arbitration: Selecting Arbitrators; Arbitral Immunity, § 20B.50[3][a], above*.

Baize v. Eastridge Companies *(2006) 142 Cal. App. 4th 293, 47 Cal. Rptr. 3d 763* , involved consolidated actions relating to plaintiff's wrongful termination. Defendants were several companies that developed public/private projects, especially in the field of education. Baize was hired to work on some established projects and to develop new projects. Each project usually involved the creation of a new legal entity for that project. As part of Baize' compensation, he was to be given an ownership interest in any of the entities created for projects he developed. Thus, the wrongful termination suit sought interests in various entities which received compensation for the projects he worked on. The arbitration agreement provided that (1) the arbitrator have the authority of a sitting judge with respect to handling the matter and had to apply California law; (2) the arbitrator apply the substantive law (and the law of remedies, if applicable) of the state of California, as applicable to the issues presented; the arbitrator was without jurisdiction to apply any different substantive law or the law of remedies; and (3) notwithstanding any provision to the contrary that may be contained in the rules governing the arbitration, the arbitrator was constrained by the rule of law and any arbitration award had to be based thereon. The arbitration resulted in an award in favor of Baize, who petitioned to confirm it. The Eastridge Companies opposed confirmation on, among others, the ground that the arbitrator exceeded his authority by failing to correctly apply controlling law. The trial court confirmed the award, on the basis that it lacked authority to review the arbitrator's decision for errors of law. Judgment was entered in favor of Baize.

The court of appeal affirmed (*142 Cal. App. 4th 293, 299, 305)* . The court first discussed *Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1, 6, 10 Cal. Rptr. 2d 183, 832 P.2d 899* (discussed *above*), which held that the decisions of arbitrators are not generally reviewable for errors of fact or law, in part because it vindicates the intentions of the parties that the award be final. The merits of the controversy between the parties generally are not subject to judicial review. Further, courts will not review the validity of the arbitrator's reasoning (*142 Cal. App. 4th 293, 300)* . The questions whether an arbitrator's decision is judicially reviewable when the arbitrator is constrained to decide according to the rule of law and whether the parties could and in fact did provide for judicial review by agreement are discussed in *§ 20C.90[3][a1], below*.

Harris v. Sandro *(2002) 96 Cal. App. 4th 1310, 117 Cal. Rptr. 2d 910* , arose out of arbitration initiated at

plaintiff/appellant's request to determine if he had exercised an option to purchase land, as plaintiff contended, and for specific performance of the option. Defendant sought to quiet title to the property that was the subject of the option. The arbitrator denied plaintiff's claim for specific performance of the option agreement and found that plaintiff had no estate, title or interest in the property. Finding that defendant offered no proof for the counterclaim for quiet title, that was also denied. Defendant was awarded attorney's fees and costs. The award was confirmed judgment entered thereon. Plaintiff appealed.

The court of appeal affirmed. Plaintiff contended that the arbitrator exceeded his powers when he determined that plaintiff had no estate, title or interest in the property, failed to compel specific performance of the option agreement, and awarded attorneys' fees and costs to defendant. Plaintiff also contended that the arbitrator committed misconduct by failing to provide a basis for the award. The court of appeal noted that California courts have repeatedly emphasized that the merits of a controversy that has been submitted to arbitration are generally not subject to judicial review concerning the validity of the arbitrator's reasoning, the sufficiency of the evidence supporting the award, or any errors of fact or law that may be included in the award. Each of plaintiff's contentions runs afoul of the well-established limits on a court's power to review an arbitration award. The contentions that the arbitrator exceeded his powers by failing to compel specific performance of the option agreement, by determining that Harris had no estate, title or interest in the property, and by failing to give a "basis" for his decision are nothing more than claims that the award contains legal and factual errors, and thus, not reviewable by the court of appeal. The court found nothing inconsistent in the findings that plaintiff had not estate, title, or interest in the property and that defendant was not entitled to a judgment quieting her title: a ruling that one person lacks an interest in real property is fully consistent with a ruling that the interest of another cannot yet be determined. In addition, the court of appeal awarded defendant/respondent sanctions pursuant to *Code Civ. Proc. § 907*, finding that the appeal was frivolous and taken solely for delay. By any objective measure, the court said, the appeal was indisputably without merit given the clarity and frequency with which the California Supreme Court has rejected attempts to obtain judicial review of arbitration awards.

Marsch v. Williams *(1994) 23 Cal. App. 4th 238, 28 Cal. Rptr. 2d 402* , involved the appeal of a partner in a general partnership from an order of the Superior Court of San Diego County (California), which confirmed an arbitration award appointing a receiver to oversee the dissolution of the partnership and the sale of the partnership property. The court of appeals affirmed in part, and held that *Code Civ. Proc. § 1286.2* provided that a court could not vacate an arbitration award though it contained a legal or factual error on its face which resulted in substantial injustice (*23 Cal. App. 4th 238, 244)* . The portion of the opinion covering the right of judicial review under the terms of the agreement is discussed in *§ 20C.90[3][a1], below*.

In ***Pacific Gas & Electric Co. v. Superior Court*** *(1993) 15 Cal. App. 4th 576, 19 Cal. Rptr. 2d 295* , the parties' agreement made arbitration subject to a statute that requires statements of decision from trial courts in ordinary civil cases. Given this qualification on arbitration, the losing party argued the arbitrators exceeded their powers in failing to issue a statement of decision that met the requirements of the statute. Even where application of a particular law or body of law is required by the parties' arbitration agreement, an arbitrator's failure to apply such a law is not in excess of an arbitrator's powers within the meaning of *Code Civ. Proc. § 1286.2(d)* (*15 Cal. App. 4th 576, 588-589)* . In rejecting the contention that a qualification as to the law governing an arbitration defines the scope of arbitrators' powers, the court stated: "The consideration that the submission agreement is qualified affords no persuasive reason to broaden the scope of judicial review. The fact that the parties restrict the arbitrator to a decision of the issues in the manner of a court of law does not mean that they expect that the decision is reviewable. The mode of decision and its reviewability are separate questions" (*15 Cal. App. 4th 576, 589)* .

State Farm Mut. Auto. Ins. Co. v. Guleserian *(1972) 28 Cal. App. 3d 397, 104 Cal. Rptr. 683* , arose out of a claim by an insured's widow for damages caused by an uninsured motorist. The dispute was submitted to a single arbitrator who, although he found the claimant to have been contributorily negligent, interpreted the Insurance Code as imposing absolute liability on the uninsured motorist insurance carrier in a hit-and-run situation and made an award accordingly. The insurance carrier petitioned to vacate the award, the superior court granted the petition, and the claimant appealed.

In reversing the order, the court of appeal disputed the insurance company's contention that an award should be set aside for an egregious error of law. *Code Civ. Proc. § 1286.2* sets out the exclusive grounds for vacating an arbitration award, such as corruption, fraud, or other undue means, or substantial prejudice flowing from the conduct of the arbitrator--but not an error of law. The court reviewed the cases to find awards being upheld despite erroneous application of legal doctrines, consideration of inadmissible evidence, or conflict with substantive law and concluded that an award may not be vacated for an arbitrator's mistake of law alone, no matter how grievous (*28 Cal. App. 3d 397, 402-403)* .

[a1] Parties Have Not Clearly Agreed to Judicial Review for Errors of Law

Cable Connection, Inc. v. DIRECTV, Inc. *(2008) 44 Cal. 4th 1334, 82 Cal. Rptr. 3d 229, 190 P.3d 586* , enforced a provision of an arbitration provision allowing for judicial review on the merits of the arbitration award. The court reiterated the rule that in the absence of some limiting clause in the arbitration agreement, the merits of the award, either on questions of fact or of law, may not be reviewed except as provided in the California Arbitration Act (*44 Cal. 4th 1334, 1340, 1345)* . The court stated that the agreement must clearly show that the parties agreed to judicial review of legal error by the arbitrator (*44 Cal. 4th 1334, 1361*). The portion of the decision addressing the court's ruling that the preclusion in the Federal Arbitration Act on contractual expansion of judicial review of the merits of arbitration awards is discussed in *§ 20C.194[3][b], below*. The portion of the decision addressing the ability of the parties and the procedure to contractually expand the scope of judicial review of the merits of an arbitration award is discussed in *§ 20C.194[3][a], below*. The portion of the decision vacating the award and remanding the case to the arbitration panel for proper determination on the basis of contractual interpretation and applicable arbitration rules whether arbitration could proceed on a class basis is discussed in *§ 20C.105[3][a], below*.

In ***Gravillis v. Coldwell Banker Residential Brokerage Co.*** *(2010) 182 Cal. App. 4th 503, 521, 106 Cal. Rptr. 3d 70* , the trial court and the court of appeal confirmed the arbitration award and denied a motion to vacate it. The agreement provided that: "The arbitrator ... shall render an award in accordance with substantive California Law" [*182 Cal. App. 4th 503, 508]* . After reviewing the applicable case law, the court of appeal ruled that that provision does not confer power on the courts to review the arbitrator's award for errors of law. Neither "apply" nor "in accordance with," when used in an arbitration provision to identify the governing substantive law, evinces an agreement that an award be reviewed for legal error (*182 Cal. App. 4th 503, 518-519)* . The portion of the opinion dealing with the allocation of costs is discussed in *§ 20C.111, below*.

The court of appeal affirmed the trial court's ruling in ***Oaktree Cap. Mgmt., L.P. v. Bernard*** *(2010) 182 Cal. App. 4th 60, 71, 106 Cal. Rptr. 3d 16* , that the arbitration agreement did not confer upon the courts the power to review the arbitrator's award for errors of law. The aspect of the case addressing whether the response to the petition to confirm was timely filed is *covered in § 20.21[3][a], above*. The agreement stated: "The arbitrator shall make all rulings in accordance with ... governing law ... and shall have authority equivalent to that of a California Superior Court judge, including the right to grant equitable relief, to the same extent as such relief would be available in an action pending in the Los Angeles Superior Court in which all parties have appeared." Citing *Baize*, discussed *below*, the court noted that while the agreement required application of California law, it did not expressly state that a court could review the arbitrator's application of that law (*182 Cal. App. 4th 60, 71)* .

In ***Baize v. Eastridge Companies*** *(2006) 142 Cal. App. 4th 293, 47 Cal. Rptr. 3d 763* , the court of appeals affirmed the trial court's ruling that it lacked authority to review the arbitrator's decision for errors of law. The portion of the opinion setting forth general facts and the ruling on the issue of the arbitrator's error of law is discussed in *§ 20C.90[3][a], above*. The court of appeal affirmed the trial court's ruling that even if the arbitration agreement limits the arbitrator to applying the law, judicial review is barred unless the arbitration agreement specifically provides for expanded judicial review (*142 Cal. App. 4th 293, 300)* . Regarding the parties' ability to expressly provide by their agreement that the arbitrator's errors of law are reviewable, the court criticized the holding in *Crowell v. Downey Community Hospital Foundation (2002) 95 Cal. App. 4th 730, 115 Cal. Rptr. 2d 810* (disapproved on this point by

Cable Connection, Inc. v. DIRECTV, Inc. (2008) 44 Cal. 4th 1334, 1361, 82 Cal. Rptr. 3d 229, 190 P.3d 586), that such a provision is void (*142 Cal. App. 4th 293, 301 n5*). While the arbitration agreement here expressly limited the arbitrator to the application of California law, in that the agreement provided that the arbitrator "shall apply California law" and "shall be constrained by the rule of law," it did not expressly expand the scope of judicial review. Facing that language in the agreement, the court of appeal refused not deviate from the rule of *Moncharsh*. Thus, arbitrator's decision was not reviewable (*142 Cal. App. 4th 293, 302)* .

In ***Marsch v. Williams*** *(1994) 23 Cal. App. 4th 238, 28 Cal. Rptr. 2d 402* , the court of appeals affirmed the trial court ruling that the arbitration agreement did not provide a right to judicial review of the legal conclusions in the arbitration award. The portion of the opinion setting forth general facts and the ruling on the issue of the arbitrator's error of law as being in excess of jurisdiction is discussed in *§ 20C.90[3][a], above*. The court also affirmed the trial court ruling that the requirement that the arbitrator apply the law did not by itself engender the right to judicial review of the arbitrator's legal conclusion, where the agreement provided that California law "shall govern [the] interpretation and effect" of the contract. The court noted that it was "not concerned about what law the parties have chosen." Rather, it focused on "whether the parties have agreed that an arbitrator's mistake in either determining the appropriate law or applying it are reviewable in a court of law. The court based its holding on the rule that where application of a particular law or body of law is required by the parties' arbitration agreement, an arbitrator's failure to apply such a law is not in excess of an arbitrator's powers within the meaning of *Cal. Code Civ. Proc. § 1286.2(d)*. The lack of an explicit reference in the agreement to judicial review precluded it (*23 Cal. App. 4th 238, 244-245)* .

[b] Award Is Not Invalidated by Arbitrator's Unsound Reasoning

Moncharsh v. Heily & Blase *(1992) 3 Cal. 4th 1, 10 Cal. Rptr. 2d 183, 832 P.2d 899* , is discussed at [a], *above*.

The facts and procedural background of ***Grunwald-Marx, Inc. v. Los Angeles Joint Bd.*** *(1959) 52 Cal. 2d 568, 343 P.2d 23* , and the portion of the opinion addressing the arbitrators' power to award damages for breach of contract when only the issue of breach has been expressly submitted, are discussed at *§ 20C.100[3][a]*. The Supreme Court affirmed the lower court rulings. In referring to the union's interpretation of the award, the Supreme Court noted that even if the reasoning of the arbitrators was unsound, it would not invalidate the award, because it is well settled that erroneous reasoning will not invalidate an otherwise proper award. Every intendment of validity must be given an award, and doubts must be resolved in favor of the award (*52 Cal. 2d 568, 589)* .

[c] Uninsured Motorist Award Is Not Invalidated by Arbitrator's Mistake of Law

The facts and procedural background of ***Porter v. Golden Eagle Ins. Co.*** *(1996) 43 Cal. App. 4th 1282, 51 Cal. Rptr. 2d 338* , and the portion of the opinion addressing the arbitrator's authority to determine the workers' compensation setoff, are discussed at *§ 20C.63[3][b]*. Defendant claimed the general rule that an award is not reviewable for or invalidated by errors of law should not apply to uninsured motorist arbitrations under *Ins. Code § 11580.2(f)*. Defendant contended that the rationale for allowing an award based on an error of law to stand is that the parties agreed to accept the risk of errors of law in return for the other benefits of arbitration, but that rationale does not apply when the arbitration is mandated by statute. The court of appeal disagreed. First, the statutory scheme of which *Code Civ. Proc. § 1286.2* (exclusive grounds for vacating arbitration award) is a part encompasses all "private," "contractual" arbitration whether the parties contract for arbitration of their own volition or whether they are required by statute to incorporate arbitration into their agreement. Second, the public policy underlying the encouragement of contractual arbitration applies equally to all forms of arbitration. Whether the parties arbitrate because they have agreed to do so or because the Legislature has decided to compel arbitration, the attributes of speed, efficiency, and economy which distinguish arbitration from the judicial process remain constant. Judicial review of the merits of arbitration awards would vitiate those attributes whether the arbitration is mandated by statute or chosen by contract (*43 Cal. App. 4th 1282, 1289)* .

Defendant also argued that because *Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1, 26, 33, 10 Cal. Rptr. 2d 183, 832*

P.2d 899 , cited *Allen v. Interinsurance Exchange (1969) 275 Cal. App. 2d 636, 80 Cal. Rptr. 247* , which affirmed a trial court order vacating an award in an uninsured motorist dispute due to the arbitrator's legal error, *Moncharsh* leaves an opening for judicial review of the merits of awards under *Ins. Code § 11580.2(f)* (*43 Cal. App. 4th 1282, 1289-1290)* . The court of appeal pointed out that *Moncharsh* cited *Allen* for the proposition that *Code Civ. Proc. § 1286.2* defines the exclusive grounds for judicial review of arbitration awards and thus, buttresses *Moncharsh*'s holding that arbitration awards may not be vacated for errors of fact or law (*43 Cal. App. 4th 1282, 1290)* .

[d] Federal Arbitration Act Does Not Require Review for Manifest Disregard of Law

Siegel v. Prudential Insurance Company *(1998) 67 Cal. App. 4th 1270, 79 Cal. Rptr. 2d 726* , was an action for wrongful termination by an employee who alleged he had been terminated for reporting wrongdoing ("policy churning") by other employees. The arbitration award was for the plaintiff and included $1,000,000 in punitive damages for acting with oppression, fraud, and malice in discharging plaintiff and damages for emotional distress, although there was no evidence that plaintiff suffered severe mental injury. Because of these last two elements of the award, defendants opposed plaintiff's petition for confirmation of the award and petitioned for the award to be vacated on the ground that the Federal Arbitration Act applied so that sections 10 and 12 of the FAA (*9 U.S.C. §§ 10, 12*) allowed the merits of the award to be reviewed because there had been a manifest disregard of the law by the arbitrator. The trial court confirmed the award, and defendants appealed.

The court of appeal affirmed. The court of appeal said that California's rule precluding on the merits review of an arbitration award does not stand an obstacle to full effectuation of the purpose of the FAA--enforcement of arbitration agreements. In fact, California's rule furthers the use of arbitration by more strictly limiting judicial review of the merits of an award and thus furthers, rather than defeats, full effectuation of the federal law's objectives (*67 Cal. App. 4th 1270, 1283-1284)* . State law is preempted only to the extent that it actually conflicts with federal law--that is, to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress (*67 Cal. App. 4th 1270, 1285)* . Although it has never directly confronted the issue, the United States Supreme Court has never held that sections 10 and 12 of the FAA apply to post-arbitration proceedings in state courts or that the federal rule allowing judicial review of an award for a manifest disregard of the law preempts a different state rule (*67 Cal. App. 4th 1270, 1287)* . The manifest disregard of the law standard for vacating an arbitration award is a judicially created standard; it is not part of the FAA (*67 Cal. App. 4th 1270, 1289)* . The manifest disregard of the law doctrine is not statutorily based but is premised on federal common law. Further, the court noted that the language of Sections 10 and 12, which refer to courts of the United States and the "district" where the award was made is inconsistent with those sections being applicable to litigation in state courts (*67 Cal. App. 4th 1270, 1290)* . Thus, the court concluded that neither Sections 10 and 12 of the FAA nor the manifest disregard of the law rule preempt *Code Civ. Proc. § 1286.2* or the California rule which prevents reweighing the merits of an arbitrator's decision (*67 Cal. App. 4th 1270, 1290-1291)* .

[4] Additional Authorities

[a] Arbitrator's Mistake of Law Does Not Prevent Confirmation or Require Vacation of Award

Lagstein v. Certain Underwriters at Lloyd's, London (9th Cir., 2010) 607 F.3d 634 , overturned the district court's ruling vacating the arbitration award subject to the Federal Arbitration Act (FAA) on grounds that it was excessive. The FAA, *9 U.S.C.S. § 10(a)(4)*, permits vacatur where the arbitrators exceed their powers. This is a high standard for vacatur. It is not enough to show that the panel committed an error, or even a serious error. Arbitrators exceed their powers not when they merely interpret or apply the governing law incorrectly, but when the award is completely irrational, or exhibits a manifest disregard of law (*607 F.3d 634, 641)* . Manifest disregard of the law means something more than just an error in the law or a failure on the part of the arbitrators to understand or apply the law. To vacate an arbitration award on this ground, it must be clear from the record that the arbitrators recognized the applicable law and then ignored it (*607 F.3d 634, 641)* . Under the facts in the record, the arbitration award did not exhibit a manifest

disregard of the law (*607 F.3d 634, 641-642)* . The portion of the decision on whether the award was irrational is discussed at [b], *below*. The portion of the decision covering partiality or corruption of arbitrator is set forth at *§ 20C.80[4][a], above* . The portion of the decision addressing the arbitrators' unrequired disclosure of past misconduct is discussed at *§ 20C.80[4][c], above*.

The decision in *Comedy Club, Inc. v. Improv West Associates (9th Cir. 2009) 553 F.3d 1277* , was rendered after remand to consider the effects of the Supreme Court's decision in *Hall Street Associates L.L.C. v. Mattel, Inc., 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008)* , discussed in Ch. 20A, *Arbitration: Resisting*, § 20A.96[3][a]. The Ninth Circuit determined that the Court's ruling in *Hall* did not determine the outcome in this case, and held that vacatur on grounds that the arbitrator's award manifestly disregarded the law was still valid under the Federal Arbitration Act, *9 U.S.C. § 10(a)(4)*, in the Ninth Circuit (*553 F.3d 1277, 1281, 1290)* . For an arbitrator's award to be in manifest disregard of the law, it must be clear from the record that the arbitrator recognized the applicable law and then ignored it. In discussing the arbitrator's enforcement of an in-term covenant not to compete in light of *Bus. & Prof. Code § 16600*, court observed that it is well established that broad covenants not to compete are void unless they involve a situation where a person sells the goodwill of a business or where a partner agrees not to compete in anticipation of dissolution of a partnership. Neither party asserted an exception (*553 F.3d 1277, 1290)* . The court then determined that the arbitrator misinterpreted the ruling in *Dayton Time Lock Service, Inc. v. Silent Watchman Corp., 52 Cal. App. 3d 1, 124 Cal. Rptr. 678 (1975)* , in a manner that effectively quarantines the party subject to the noncompete from engaging in its business in forty-eight states until 2019 and does not follow well-established California law. Thus, the court determined that the arbitrator's validation of the noncompete covenant was in manifest disregard of the law and must be vacated in part (*553 F.3d 1277, 1293)* .

G.C. & K.B. Investments, Inc. v. Wilson (9th Cir. 2003) 326 F.3d 1096 , arose out of a franchise agreement between defendants, plaintiff, and plaintiff's predecessor. Defendants bought their franchise to operate a car service business in Hawaii in 1992 from a California-based sub-franchisor of a Louisiana corporation. In 1997, the California Department of Corporations won a judgment against the franchisor and sub-franchisor for misleading misrepresentations and failure to disclose material facts in the uniform franchise offering circular. They were enjoined from further sales in violation of California law. Defendants stopped paying royalties and advertising fees and stopped reporting sales to plaintiff, claiming franchisor had orally promised certain corporate support that it did not provide. The franchise agreement contained an arbitration clause that provided for arbitration at the AAA office "located nearest the office of the [franchisor's] Region" and that litigation to enforce any award "be held in San Bernardino County, California, or the federal court located nearest thereto." Plaintiff filed a demand for arbitration with the New Orleans, Louisiana office of AAA. Defendants refused to participate in the arbitration, reading the franchise agreement tocall for arbitration in California, and instead filed suit in Hawaii state court seeking relief from the franchise agreement. In February, 2000, the arbitrator in Louisiana entered an award in favor of plaintiff. On March 14, 2000, plaintiff filed an application for an order confirming the award in the federal district court for the Central District of California. On August 14, 2000 the district court confirmed the award and defendants appealed.

The court of appeal affirmed. Defendants claimed, among other things, that the district court failed to consider the legality of the sale and offer of the underlying franchise agreement in light of the California securities violations and that the arbitration should have taken place in California. The Court of Appeals said under *9 U.S.C. §§ 9-11*, a court must grant a confirmation order unless the award is vacated, modified, or corrected for one of the grounds available under the FAA. Confirmation of an award is required even in the face of errors of law. An arbitration award must be upheld unless it is completely irrational or constitutes a manifest disregard of the law (*326 F.3d 1096, 1105)* , which defendants did not claim. The district court made no error in failing to consider the legality of the underlying agreement (*326 F.3d 1096, 1106)* . Further, the provision defendants relied on to claim California as the proper place for arbitration was a notice provision, not a venue provision. Louisiana was the proper place to hold the arbitration (*326 F.3d 1096, 1108)* .

In *Christensen v. Smith (2009) 171 Cal. App. 4th 931, 90 Cal. Rptr. 3d 57* , the parties' arbitration agreement provided

that the arbitrator was required to render an award in accordance with substantive California law. One of the parties argued that that provision conferred the right to judicial review on the merits of the arbitration award. However, the agreement by its terms was governed by the Federal Arbitration Act, which does not permit parties to contract for judicial review for legal error. Accordingly, the court affirmed the trial court's judgment that judicial review on the merits of the arbitration award was not appropriate (*171 Cal. App. 4th 931, 937-938)* .

The court of appeal in *Pacific Gas & Electric Co. v. Superior Court (1993) 15 Cal. App. 4th 576, 19 Cal. Rptr. 2d 295* , issued a peremptory writ of mandate compelling the superior court to rescind its order vacating an arbitration award and granting ancillary relief and to issue a new order confirming the award. The award was challenged as being illegal, contrary to law, and in excess of the arbitrator's powers [*see Code Civ. Proc. § 1286.2(a)(4)*]. The court noted that generally, arbitrators are not constrained by rule of law, but may base their decision on broader equitable considerations. An award is not reviewable simply because the arbitrator makes a simple error of law or fact. Only an error that amounts to a such completely irrational construction of the contract provision in dispute as to remake the parties' contract will justify vacation of an award as beyond the scope of the arbitrator's power (*15 Cal. App. 4th 576, 587-591)* . Specifically, an award should not be vacated when the arbitrator's construction of the contract is clearly within the range of ambiguity. If the arbitrator's construction is within the ordinary bounds of semantic permissibility, the contract has not been arbitrarily remade. The test is one of arbitrariness, not correctness (*15 Cal. App. 4th 576, 591-594)* .

The court of appeal in *Southern Cal. Rapid Transit Dist. v. United Transportation Union (1992) 5 Cal. App. 4th 416, 6 Cal. Rptr. 2d 804* , affirmed a judgment confirming an award in plaintiff's favor requiring the union and the district to meet and confer regarding appropriate remedies for drivers on 14 routes transferred to another district in violation of the collective bargaining agreement. First, plaintiff sued to enjoin the transfer. The court held their only remedy was arbitration. Then the parties stipulated to arbitration, subject to defendant's objection that plaintiff had waived its right to arbitrate. The stipulation provided that waiver was to be determined by arbitrator. In that situation, the court of appeal said, waiver was a matter of law, which is not subject to review by a court, even if there was an error of law (*5 Cal. App. 4th 416, 423)* .

[b] Award Is Not Invalidated by Arbitrator's Unsound Reasoning

Lagstein v. Certain Underwriters at Lloyd's, London (9th Cir., 2010) 607 F.3d 634 , overturned the district court's ruling vacating the arbitration award subject to the Federal Arbitration Act (FAA) on grounds that it was excessive. The portion of the decision discussing manifest disregard of the law is set forth in [a], *above*. The FAA, *9 U.S.C.S. § 10(a)(4)*, permits vacatur where the arbitrators exceed their powers. This is a high standard for vacatur. It is not enough to show that the panel committed an error, or even a serious error. Arbitrators exceed their powers not when they merely interpret or apply the governing law incorrectly, but when the award is completely irrational, or exhibits a manifest disregard of law. An award is completely irrational only where the arbitration decision fails to draw its essence from the agreement. An arbitration award draws its essence from the agreement if the award is derived from the agreement, in light of the agreement's language and context, as well as other indications of the parties' intentions . The scope of review does not include whether the award is irrational in light of the facts, i.e., whether the findings are supported by the record. Under the facts in the record, the arbitration award did not exhibit a manifest disregard of the law . Likewise, the arbitrators' interpretation of an agreement does not constitute irrationality where it draws its essence from the agreement and is plausible. In all respects, the arbitrators' interpretation was plausible and rational (*607 F.3d 634, 642-643)* . The portion of the decision covering partiality or corruption of arbitrator is set forth at *§ 20C.80[4][a], above* . The portion of the decision addressing the arbitrators' unrequired disclosure of past misconduct is discussed at *§ 20C.80[4][c], above*.

California Points & Authorities

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20C ARBITRATION: CONFIRMING, CORRECTING, OR VACATING THE AWARD
PART II. FORMS
D. Circumstances That Do Not Prevent Confirmation or Require Vacating Award

2-20C California Points & Authorities § 20C.91

§ 20C.91 Arbitration Awards May Be Based on Broad Principles of Equity and Justice

[1] FORM

THE AWARD SHOULD _____ [BE CONFIRMED *or* NOT BE VACATED] BECAUSE THE ARBITRATORS MAY MAKE THEIR DETERMINATION ON BROAD PRINCIPLES OF JUSTICE AND EQUITY WITHOUT RESPECT TO HOW A COURT WOULD DECIDE.

A. Arbitrators May Base Their Decision on Broad Principles of Equity and Justice. Unless specifically required to do so by the arbitration agreement, arbitrators are not bound by principles of dry law, but may base their decisions on broad principles of justice and equity (*Advanced Micro Devices, Inc. v. Intel Corp. (1994) 9 Cal. 4th 362, 374-375, 389, 36 Cal. Rptr. 2d 581, 885 P.2d 994* ; *Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1, 10-11, 10 Cal. Rptr. 2d 183, 832 P.2d 899*).

[*Optional*] **B. Arbitrator May Grant Relief That Would Exceed Power of Court to Grant.** A court may not vacate an award because the arbitrator has exceeded the power the court would have, or would have had if the parties had chosen to litigate, rather than arbitrate the dispute (*Advanced Micro Devices, Inc. v. Intel Corp. (1994) 9 Cal. 4th 362, 388, 36 Cal. Rptr. 2d 581, 885 P.2d 994*).

[*Optional*] **C. Arbitrator's Grant of Relief Bears Rational Relationship to Breach.** An arbitration award that grants relief not specifically authorized by the contract will be upheld as long as there is a rational relationship between the breach and award. Often that rational relationship will be found in the fact the arbitrator has awarded the injured party relief of the same general type that a jury or court could have provided had the claim been litigated, even if the quantity, extent or parameters of the award differ in some respects from that to which the party was legally entitled (*Advanced Micro Devices, Inc. v. Intel Corp. (1994) 9 Cal. 4th 362, 381, 386-387, 36 Cal. Rptr. 2d 581, 885 P.2d 994* ; *Greenspan v. LADT, LLC (2010) 185 Cal. App. 4th 1413, 1448, 111 Cal. Rptr. 3d 468* ; *Hightower v. Superior Court (O'Dowd) (2001) 86 Cal. App. 4th 1415, 1437, 104 Cal. Rptr. 2d 209*).

[2] Comments

[a] Use of Form

This form may be used to support a petition to confirm an arbitration award or a response to a petition to vacate an arbitration award to assert that the arbitrators are usually allowed to utilize broad principles of law and equity in arriving at their decision as long as the result bears some rational relationship to the type relief a court could grant in the same situation.

It does not provide a complete memorandum but should be combined with the memorandum supporting the petition [*see § 20C.10*] or response [*see § 20C.11*] seeking confirmation of the award. Counsel may wish to combine this form with § 20C.90 or 20C.92, which also address the breadth of arbitrators' usual powers in this regard.

As a tactical matter, counsel may wish to reserve these points for oral argument or for other form of rejoinder to the respondent's opposing memorandum. In deciding whether or not to reserve these arguments, counsel should consider local court rules and practice, as well as whether the moving party would be expected to be raise these points in initial moving papers, to avoid the possibility of losing the opportunity to raise them.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should show that there is no restrictive language in the arbitration agreement or the rules under which the arbitration was conducted to deprive the arbitrators of their usual power. Generally, it will be appropriate to attach a copy of the award [*see Shepherd v. Greene (1986) 185 Cal. App. 3d 989, 994, 230 Cal. Rptr. 233* (*discussed under § 20C.12[3][a]*)].

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For memoranda to combine with this form, see *§§ 20C.10* or *20C.11*, *20C.90*, and *20C.92*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Memoranda

For a memorandum opposing this form and asserting that, under the integration clause in the agreement at issue, the

arbitrators were not allowed to use extrinsic evidence to interpret the agreement, and thus, could not award reformation, see *§ 20C.171*.

[3] Discussion of Authorities

[a] Arbitrators May Base Their Decision on Broad Principles of Equity and Justice

Advanced Micro Devices, Inc. v. Intel Corp. *(1994) 9 Cal. 4th 362, 36 Cal. Rptr. 2d 581, 885 P.2d 994* , arose out of an agreement between two makers of computer chips. Under the agreement, the parties would share information so that each could develop products suitable for sale as an alternate source for products developed by the other. Either party could elect to be a second source for products the other offered it. It would then receive the necessary technical information and licenses it needed to make and sell the part and would pay a royalty to the developing company. The relevant part of the dispute involved Intel's refusal to accept products developed by AMD which would have allowed AMD access to Intel's 80386 microprocessor chip. The arbitrator found that Intel had decided to take no more products from AMD to avoid having to give AMD the 80386. The arbitrator also found and that AMD unnecessarily delayed seeking alternative ways to develop a competitive chip. The arbitrator declined to award AMD the hundreds of millions it sought in lost 80386 profits, finding that AMD's actual lost profits were immeasurable and that a nominal damage award would be inequitable. Instead, the arbitrator awarded AMD a permanent, nonexclusive and royalty-free license to any Intel intellectual property embodied in the chip AMD ultimately reverse-engineered, the AM386, as well as a two-year extension of patent and copyright licenses.

AMD petitioned the superior court to confirm the award. Intel petitioned for the award to be corrected by vacating those two items of relief on the ground they exceeded the arbitrator's powers. The superior court affirmed the award, but the court of appeal reversed. The Supreme Court granted review and in a four to three decision, upheld the award.

The Court framed the issue as being to determine the standard of review of the remedies fashioned by the arbitrator and held that under the proper standard, courts generally defer to an arbitrator's finding that determination of a particular question is within the scope of his or her contractual authority (*9 Cal. 4th 362, 372)* . The court then stated that because determination of appropriate relief also constitutes decision on an issue, these two aspects of an arbitrator's authority are not always neatly separable (*9 Cal. 4th 362, 373)* . The Court cited *Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1, 10-11, 10 Cal. Rptr. 2d 183, 832 P.2d 899* , for the general point on the breadth of an arbitrator's authority set out in Paragraph A of the form (*9 Cal. 4th 362, 374-375)* . The Court concluded that the parties' contract contained no limitation compelling the arbitrator to follow legal rules, so that the arbitrator did not exceed his authority in fashioning the remedy (*9 Cal. 4th 362, 389)* . The contract clause the Court construed was identical to the American Arbitration Association, Commercial Arbitration Rules (1993), Rule 43 (*9 Cal. 4th 362, 383)* .

The facts and procedural background of ***Moncharsh v. Heily & Blase*** *(1992) 3 Cal. 4th 1, 10 Cal. Rptr. 2d 183, 832 P.2d 899* , and the portion of the opinion addressing the fact that an award will not be vacated for an error of law, are discussed at *§ 20C.90[3][a]*. The Supreme Court traced the history and development of the issue,beginning with the early cases that developed the rule allowing review for error of law on the face of the award, and continuing with the 1927 amendments to the Code of Civil Procedure, which replaced the common law of arbitration and thereafter exclusively governed (*3 Cal. 4th 1, 8-28)* . In holding that an error of law on the face of an award causing substantial injustice is not grounds for vacating an award, the Court noted that arbitrators are not generally required to act in conformity with rules of law, but may base their decisions on broad principles of justice and equity (*3 Cal. 4th 1, 10-11)* .

[b] Arbitrator May Grant Relief That Would Exceed Power of Court to Grant

The facts and procedural background of ***Advanced Micro Devices, Inc. v. Intel Corp.*** *(1994) 9 Cal. 4th 362, 36 Cal. Rptr. 2d 581, 885 P.2d 994* , and the portion of the opinion addressing arbitrators' usual power to base their awards on

broad principles of equity and justice are discussed at [a], *above*. In upholding the arbitrator's award, the Court held that an arbitrator may award relief that would not be within the power of a court to award (*9 Cal. 4th 362, 388)* . Rejecting the dissent's contention that the remedy should be limited to specific performance of the contract, the court found that the parties agreement had not restricted the arbitrator to remedies available in a court of law (*9 Cal. 4th 362, 388-389)* . Counsel should note that the contract clause the Court construed was identical to the American Arbitration Association, Commercial Arbitration Rules (1993), Rule 43 (*9 Cal. 4th 362, 383)* .

Hightower v. Superior Court (O'Dowd) *(2001) 86 Cal. App. 4th 1415, 104 Cal. Rptr. 2d 209* , another case on this topic, is discussed in *§ 20C.10[3][e]*.

[c] Arbitrator's Grant of Relief Bears Rational Relationship to Breach

The facts and procedural background of ***Advanced Micro Devices, Inc. v. Intel Corp.*** *(1994) 9 Cal. 4th 362, 36 Cal. Rptr. 2d 581, 885 P.2d 994* , and the portion of the opinion addressing arbitrators' usual power to base their awards on broad principles of equity and justice are discussed at [a], *above*. In upholding the arbitrator's award, the Court enunciated the standard of review of the remedy fashioned by an arbitrator. The Court held that arbitrators are not obliged to read contracts literally, and an award may not be vacated merely because the court is unable to find the relief granted was authorized by a specific term of the contract. The remedy need only bear some rational relationship to the contract and the breach. The award will be upheld so long as it was even arguably based on the contract; it may be vacated only if the reviewing court is compelled to infer the award was based on an extrinsic source (*9 Cal. 4th 362, 381)* . The court found that the remedy awarded bore a rational relationship to the breach even though it awarded AMD a license that did not correspond in all its terms with a license that could have been earned through performance of the agreement (*9 Cal. 4th 362 386-387)* .

Greenspan v. LADT, LLC *(2010) 185 Cal. App. 4th 1413, 111 Cal. Rptr. 3d 468* , affirmed the confirmation of an arbitration decision on a breach of contract claim. The portion of the decision on whether the agreement gave the arbitrator the power to decide arbitrability of issues is discussed in *Ch. 20, Arbitration: Compelling, § 20.10[3][g], above*. After determining that the arbitrator had authority to determine arbitrability of the issue of joint and several liability and that the arbitrator's determination was not subject to merits review, the court, citing *Advanced Micro Devices, Inc. v. Intel Corp. (1994) 9 Cal. 4th 362, 36 Cal. Rptr. 2d 581, 885 P.2d 994*, stated that the award is subject to review only on the test whether the remedy awarded bears some rational relationship to the contract and the breach. Noting that joint and several liability is a remedy for these purposes, the court found that the award was rationally related to the agreement and breach (185 Cal. App. 4th 1413, 1448). The portion of the decision addressing the review of the timeliness of the arbitrator's award is *covered in § 20C.90[3][a], above*. The portion of the decision covering whether the award should be vacated due to the arbitrator's failure to recuse himself is dealt with in *§ 20C.80[3][g], above* . The portion of the decision on whether the arbitrator was immune to the suit on which the request for disqualification was based is discussed in *Ch. 20B, Arbitration: Selecting Arbitrators; Arbitral Immunity, § 20B.50[3][a], above*.

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CHAPTER 20C ARBITRATION: CONFIRMING, CORRECTING, OR VACATING THE AWARD
PART II. FORMS
D. Circumstances That Do Not Prevent Confirmation or Require Vacating Award

2-20C California Points & Authorities § 20C.92

§ 20C.92 Relief Granted by Arbitration Award Need Not Be Specifically Provided for by Contract

[1] FORM

THE AWARD SHOULD _____ [BE CONFIRMED *or* NOT BE VACATED] BECAUSE THE ARBITRATORS NEED NOT CONFINE THE RELIEF GRANTED IN THEIR AWARDS TO RELIEF SPECIFICALLY AUTHORIZED IN THE CONTRACT [BUT INSTEAD MAY MAKE THEIR AWARD ON THE BASIS OF BROAD PRINCIPLES OF JUSTICE AND EQUITY (WITHOUT RESPECT TO HOW A COURT WOULD DECIDE)].

A. Relief Granted Need Not Be Specifically Authorized by Contract. Arbitrators are not obliged to read contracts literally, and an award may not be vacated merely because the court is unable to find the relief granted was authorized by a specific term of the contract. The remedy need only bear some rational relationship to the contract and the breach. The award will be upheld so long as it was even arguably based on the contract; it may be vacated only if the reviewing court is compelled to infer the award was based on an extrinsic source (*San Francisco Housing Auth. v. Service Employees Int'l Union, Local 790 (2010) 182 Cal. App. 4th 933, 945, 107 Cal. Rptr. 3d 62* ; *Advanced Micro Devices, Inc. v. Intel Corp. (1994) 9 Cal. 4th 362, 381, 36 Cal. Rptr. 2d 581, 885 P.2d 994*) or conflicts with an express provision of the agreement (*San Francisco Housing Auth. v. Service Employees Int'l Union, Local 790 (2010) 182 Cal. App. 4th 933, 945, 107 Cal. Rptr. 3d 62*)).

[*Optional*] **B. Arbitrator's Grant of Relief Within Court's Power Supports Rational Relationship.** [*See § 20C.91[1], Paragraph C.*]

[2] Comments

[a] Use of Form

This form may be used to support a petition to confirm an arbitration award or a response to a petition to vacate an arbitration award to assert the principle that the arbitrators are generally not bound to limit the relief granted in an award to that specified in the contract.

It does not provide a complete memorandum but should be combined with the memorandum supporting the petition [*see § 20C.10*] or response [*see § 20C.11*] seeking confirmation of the award. Counsel may wish to combine this form with § 20C.90 or 20C.91, which also address the breadth of arbitrators' usual powers in this regard.

As a tactical matter, counsel may wish to reserve these points for oral argument or for other form of rejoinder to the respondent's opposing memorandum. In deciding whether or not to reserve these arguments, counsel should consider local court rules and practice, as well as whether the moving party would be expected to be raise these points in initial moving papers, to avoid the possibility of losing the opportunity to raise them.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should show that there is no restrictive language in the arbitration agreement or the rules under which the arbitration was conducted to deprive the arbitrators of their usual power. Generally, it will be appropriate to attacha copy of the award [*see Shepherd v. Greene (1986) 185 Cal. App. 3d 989, 994, 230 Cal. Rptr. 233* (*discussed under § 20C.12[3][a]*)].

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For memoranda to combine with this form, see *§§ 20C.10* or *20C.11*, 20C90, and 20C.91.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Memoranda

For a memorandum opposing this form and asserting that, under the integration clause in the agreement at issue, the arbitrators were not allowed to use extrinsic evidence to interpret the agreement, and thus, could not award reformation, see *§ 20C.171*.

[3] Discussion of Authorities

[a] Relief Granted Need Not Be Specifically Authorized by Contract

In ***San Francisco Housing Authority v. Service Employees Internat. Union, Local 790*** *(2010) 182 Cal. App. 4th 933, 946, 107 Cal. Rptr. 3d 62* , the trial court vacated an arbitrator's award on grounds that the award violated a provision of the arbitration agreement. The court of appeal reversed, holding that the arbitrator's interpretation of the contract in deciding whether the employer improperly laid off a particular employee allowed her to frame a remedy that, although not expressly provided for in the agreement, was reasonably related to the arbitrator's interpretation of the contract and was not prohibited by it (*182 Cal. App. 4th 933, 951)* .

The facts and procedural background of ***Advanced Micro Devices, Inc. v. Intel Corp.*** *(1994) 9 Cal. 4th 362, 36 Cal. Rptr. 2d 581, 885 P.2d 994* , and the portion of the opinion addressing arbitrators' usual power to base their awards on broad principles of equity and justice are discussed at *§ 20C.91[3][a]*. In upholding the arbitrator's award, the Court enunciated the standard of review of the remedy fashioned by an arbitrator. Arbitrators are not obliged to read contracts literally; and an award may not be vacated merely because the court is unable to find the relief granted was authorized by a specific term of the contract. The remedy need only bear some rational relationship to the contract and the breach. The award will be upheld so long as it was even arguably based on the contract; it may be vacated only if the reviewing court is compelled to infer the award was based on an extrinsic source (*9 Cal. 4th 362, 381)* . The court found that the remedy awarded bore a rational relationship to the breach contract even though it awarded AMD a license that did not correspond in all its terms with a license that could have been earned through performance of the agreement (*9 Cal. 4th 362 386-387)* .

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[Reserved]

§§ 20C.93[Reserved]

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2-20C California Points & Authorities § 20C.100

§ 20C.100 Arbitrators May Award Damages for Breach of Contract Though Not Submitted as an Issue for Determination

[1] FORM

THE AWARD SHOULD _____ [BE CONFIRMED *or* NOT BE VACATED] BECAUSE THE ARBITRATORS HAVE THE POWER TO AWARD DAMAGES WHEN THEY FIND A BREACH OF CONTRACT, EVEN IF THE ISSUE OF DAMAGES WAS NOT SUBMITTED FOR DETERMINATION.

A. Arbitrators May Award Damages for Breach of Contract, Though Not Submitted as an Issue for Determination. When the issue of breach of contract has been submitted to arbitration, and all necessary evidence has been submitted, the arbitrators properly may determine the amount of damages although the specific issue of damages has not been submitted (*Grunwald-Marx, Inc. v. Los Angeles Joint Bd. (1959) 52 Cal. 2d 568, 589-590, 343 P.2d 23*).

[2] Comments

[a] Use of Form

This form may be used with a memorandum in support of a petition or response seeking to have an arbitration award confirmed, to anticipate or respond to a claim that the arbitrator improperly awarded damages for breach of contract. This form does not provide a complete memorandum but should be combined with the memorandum supporting the petition [*see § 20C.10*] or response [*see § 20C.11*] seeking to have the award confirmed, and if desired, § 20C.101[1], regarding the general power of arbitrators to determine which issues are necessary for resolution of the entire controversy.

As a tactical matter, counsel may wish to reserve these points for oral argument or for other form of rejoinder to the respondent's opposing memorandum. In deciding whether or not to reserve these arguments, counsel should consider local court rules and practice, as well as whether the moving party would be expected to be raise these points in initial moving papers, to avoid the possibility of losing the opportunity to raise them.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should point out that the issue of breach of contract was properly raised, submitted, and supported, and that the arbitrators foundthat there was a breach of contract. Generally, it will be appropriate to attach a copy of the award [*see Shepherd v. Greene (1986) 185 Cal. App. 3d 989, 994, 230 Cal. Rptr. 233* (*discussed under § 20C.12[3][a]*)].

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For memoranda to combine with this form, see *§§ 20C.10, 20C.11*, and *20C.101*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Arbitrators May Award Damages for Breach of Contract, Though Not Submitted as an Issue for Determination

Grunwald-Marx, Inc. v. Los Angeles Joint Bd. *(1959) 52 Cal. 2d 568, 343 P.2d 23* , arose out of a dispute between a union and an employer, in which the company filed a petition for an order directing arbitration. The parties were ordered to arbitrate. As an arbitration award was being drafted, the union filed a motion with the arbitrators to reopen the hearing and present additional evidence. The motion was denied, first, because the issue sought to be reopened had been admitted in the pleadings of the union, and second, because the new evidence could have been offered during the hearing and no showing of excusable neglect or surprise had been made. The union additionally raised the issue that the award was erroneous in that the issue of damages had not been submitted to arbitration, and the arbitrators "rewrote" the contract by awarding damages. The award and supplemental award were confirmed on the company's motion. The union appealed from denial of its motion to vacate, modify, and correct.

The Supreme Court, determining the state court had jurisdiction of the particular matters in issue, affirmed the lower court rulings. The Court found that damages for breach of a particular contract provision were clearly a part of any "dispute" which had been agreed to be submitted to arbitration. Even if the damages issue had not been submitted specifically, damages were properly included in the award (*52 Cal. 2d 568, 589-590)* . The Court found this conclusion inherent in the reasoning of *Sapp v. Barenfeld (1949) 34 Cal. 2d 515, 212 P.2d 233* (discussed at *§ 20C.102[3][a]*), a

case which reversed an order vacating an award for failing to grant damages, the appellate decision finding no proof of damage had been offered to the arbitrators. The court in *Sapp* was found to have implied clearly that when a contract breach has been submitted to arbitration although damages are not included expressly in the submission, if proper proof is made, damages may and should be awarded. The present Court found this conclusion to be in accord with common sense. All the necessary facts were before the arbitrators. In the instant case, all the evidence necessary on the issue was introduced. The damages were liquidated. The union made, and could make, no claim of surprise or prejudice. No useful purpose would be served in such a case by limiting the arbitrators to determining that there had been a breach of contract and then relegating the parties to a new proceeding to fix damages (*52 Cal. 2d 568, 590)* .

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2-20C California Points & Authorities § 20C.101

§ 20C.101 Arbitrators Disposed of All Issues Which Had to Be Decided

[1] FORM

THE AWARD SHOULD _____ [BE CONFIRMED *or* NOT BE VACATED] BECAUSE THE ARBITRATORS PROPERLY DISPOSED OF ALL ISSUES NECESSARY [AND ABLE] TO BE DETERMINED IN MAKING THE AWARD.

A. Issues Submitted to Arbitration Are Presumed to Have Been Resolved. There is a presumption that all issues submitted in arbitration have been resolved, and the objecting party has the burden of proving otherwise (*Rosenquist v. Haralambides (1987) 192 Cal. App. 3d 62, 67, 237 Cal. Rptr. 260* ; *Rodrigues v. Keller (1980) 113 Cal. App. 3d 838, 842, 170 Cal. Rptr. 349*).

B. Arbitrator Need Only Determine Necessary Issues. There is no general rule that an arbitrator must find facts. It is the determination of issues necessary in order to determine the controversy which is required (*Rodrigues v. Keller (1980) 113 Cal. App. 3d 838, 843, 170 Cal. Rptr. 349* ; *Cothron v. Interinsurance Exch. (1980) 103 Cal. App. 3d 853, 860, 163 Cal. Rptr. 240*).

C. Arbitrators Decide Which Are "Necessary" Issues. Because the award must include a determination of all questions submitted which must be determined in order to determine the controversy, it is for the arbitrators and not the court, to determine which issues are "necessary" to the ultimate decision (*Morris v. Zuckerman (1968) 69 Cal. 2d 686, 690, 72 Cal. Rptr. 880, 446 P.2d 1000* ; *Hall v. Superior Court (1993) 18 Cal. App. 4th 427, 22 Cal. Rptr. 2d 376* ; *see Code Civ. Proc. § 1283.4*).

[*Optional*] **D. Arbitrator May Determine Legal Issues as Distinct From Factual Ones.** An arbitrator clearly has the power to pass on legal, as distinct from factual, issues if they are part of the arbitrable controversy (*Marcus v. Superior Court (1977)75 Cal. App. 3d 204, 210, 141 Cal. Rptr. 890*).

[*Optional*] **E. The Fact That An Award Is Not Enforceable as Judgment Is Not Grounds for Vacating the Award.**

The failure of a contractual arbitration award to be enforceable as a judgment does not itself provide grounds for vacating the award (*Mossman v. City of Oakdale (2009) 170 Cal. App. 4th 83, 90, 87 Cal. Rptr. 3d 764*). The principle of arbitral finality does not preclude the arbitrator from making a final disposition of a submitted matter in more than one award (*Mossman v. City of Oakdale (2009) 170 Cal. App. 4th 83, 91, 87 Cal. Rptr. 3d 764*). The normal course of action when the financial terms of an award are unenforceable due to ambiguity is to remand the matter to the original arbitrator for clarification (*Mossman v. City of Oakdale (2009) 170 Cal. App. 4th 83, 92, 87 Cal. Rptr. 3d 764*).

[2] Comments

[a] Use of Form

This form may be used with a memorandum in support of a petition or response seeking to have an arbitration award confirmed, to anticipate or respond to a claim that the arbitrator failed to dispose of all necessary issues or improperly disposed of one or more issues. This form does not provide a complete memorandum but should be combined with the memorandum supporting the petition [*see § 20C.10*] or response [*see § 20C.11*] seeking to have the award confirmed. If applicable to the particular case, counsel should also include the memoranda from § 20C.100 or 20C.102, regarding award of damages for breach of contract and failure to determine an issue not expressly raised and supported, respectively.

Use optional paragraph E where the arbitrator made all necessary findings of fact and law, but failed to fully set forth details of the remedy.

As a tactical matter, counsel may wish to reserve these points for oral argument or for other form of rejoinder to the respondent's opposing memorandum. In deciding whether or not to reserve these arguments, counsel should consider local court rules and practice, as well as whether the moving party would be expected to be raise these points in initial moving papers, to avoid the possibility of losing the opportunity to raise them.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should point out what the necessary issues were and show that the award disposes of them all, and otherwise indicate that any other issues disposed of were necessarily within the province of the arbitrators to decide. Generally, it will be appropriate to attach a copy of the award [*see Shepherd v. Greene (1986) 185 Cal. App. 3d 989, 994, 230 Cal. Rptr. 233* (*discussed under § 20C.12[3][a]*)]. Similarly, where optional paragraph E applies, carefully distinguish how the arbitrator made all necessary findings of fact and law, but simply did not fully set forth all necessary details of the remedy. Consider giving examples of details of the remedy that the arbitrator could set forth on remand based on the findings of fact and law actually made that would complete the award.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further

legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For memoranda to combine with this form, see *§§ 20C.10* and *20C.11, 20C.100*, and *20C.102*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Issues Submitted to Arbitration Are Presumed to Have Been Resolved

In ***Rosenquist v. Haralambides*** *(1987) 192 Cal. App. 3d 62, 237 Cal. Rptr. 260* , the initial award included an entitlement to attorney's fees, but while each party had requested fees in their postarbitration hearing briefs, neither had submitted information on which a determination could have been made as to the amount of fees. Nevertheless, the corrected award included an award of the amount of attorney's fees that one party was ordered to pay the other party.

The court of appeal refused to vacate the corrected award, holding that because the parties had requested attorney's fees in their briefs, it was implicit in the procedure that the parties had agreed that the amount of fees would be determined subsequent to the arbitrator's decision on the merits (*192 Cal. App. 3d 62, 67)* .

Rodrigues v. Keller *(1980) 113 Cal. App. 3d 838, 170 Cal. Rptr. 349* , arose out of a dispute on dissolution of a partnership which was submitted to arbitration. One partner then sought to have the award vacated on various grounds and appealed after the lower court denied the petition.

The court of appeal affirmed. The court stated that it is presumed that all issues submitted for decision in an arbitration have been passed on and resolved; and the burden of proving otherwise is on the party challenging the award. To discharge that burden, the party attacking the award must demonstrate that a particular claim was expressly raised at some time before the award, and that the arbitrator failed to consider it (*113 Cal. App. 3d 838, 842)* .

[b] Arbitrator Need Only Determine Necessary Issues

The facts and procedural background of ***Rodrigues v. Keller*** *(1980) 113 Cal. App. 3d 838, 170 Cal. Rptr. 349* , are discussed at [a], *above*. In affirming the ruling below, the court of appeal noted that the failure of an arbitrator to make a finding on an express claim does not invalidate the award so long as that award serves to settle the entire controversy, citing *Sapp v. Barenfeld (1949) 34 Cal. 2d 515, 522-523, 212 P.2d 233* , discussed at *§ 20C.102[3][a]*. The court of appeal described the point as a corollary of the proposition that arbitrators are not obliged to find facts or give reasons for their award. The court further cited as illustrative of the point the instance described in *Sapp*, that a decision simply that one of the parties should pay the othera sum of money is sufficiently determinative of all items embraced in the submission (*113 Cal. App. 3d 838, 843)* .

Cothron v. Interinsurance Exch. *(1980) 103 Cal. App. 3d 853, 163 Cal. Rptr. 240* , arose out of a claim in arbitration under the plaintiff's automobile insurance policy for damages caused by an uninsured motorist. *Ins. Code § 11580.2(f)* requires that the policy provide that the determination as to whether the insurer is legally entitled to recover damages, and in what amount, must be made by agreement between the insured and insurer, and that any disagreement must be settled by arbitration. The arbitrator awarded the policy limit, less, as stipulated between the parties, the sum of medical expenses previously paid by the insurer. In fact, however, the insurer thereafter paid the claimant the full policy limit

amount without deductions. The arbitrator found that the claimant would be entitled to recover from the uninsured motorist an amount far in excess of the policy limit. The claimant petitioned to vacate the arbitration award on the ground that the arbitrator did not decide the total amount of damages to which the claimant was legally entitled nor the correct amount of coverage under the policy. The trial court denied the petition.

The court of appeal affirmed, finding that the arbitrator's determination that the damages far exceeded the policy limit was sufficient to determine all of the questions submitted to the arbitrator which were necessary in order to determine the controversy (*103 Cal. App. 3d 853, 859)* . Reviewing the cases on vacating an award for failure to find on all issues submitted, it noted that the failure referred to is not failure to find facts but the failure to determine each issue necessary for the ultimate decision of the arbitrator, as required under *Code Civ. Proc. § 1283.4*, set forth at [c], *below*. Thus, failure to determine a particular issue submitted would not be error unless the determination was necessary to determine the entire controversy (*103 Cal. App. 3d 853, 859-860)* . Because an arbitrator in an uninsured motorist proceeding may not award an amount in excess of policy limits, an award of the entire policy limit determines the entire controversy and leaves nothing remaining for determination (*103 Cal. App. 3d 853, 860)* . The court speculated that in an award of less than the policy limit, the total amount of a claimant's damages might be relevant in arriving at the award figure and for certain related statutory purposes, but the fact of potential relevancy still would not mean in itself that the damages must be found separately (*103 Cal. App. 3d 853, 861-862)* .

[c] Arbitrators Decide Which Are "Necessary" Issues

Code Civ. Proc. § 1283.4 provides that an award shall be in writing and signed by the arbitrators concurring therein. It shall include a determination of all the questions submitted to the arbitrators the decision of which is necessary in order to determine the controversy.

In ***Morris v. Zuckerman*** *(1968) 69 Cal. 2d 686, 72 Cal. Rptr. 880, 446 P.2d 1000* , a dispute arose between successor parties to a real estate development agreement as to whether the defendant was required to execute certain documents to expedite a transaction. The controversy was submitted to arbitration, as provided for by the agreement. The arbitrators awarded the relief requested by plaintiff, but on certain conditions, including plaintiff's modification of the proposed transaction. Plaintiff petitioned to vacate the award mainly on the ground that the arbitrators had exceeded their powers [*see Code Civ. Proc. § 1286.2(a)(4)*], but the superior court confirmed the award and denied the petition to vacate.

The Supreme Court, in affirming the judgment on plaintiff's appeal, noted that *Code Civ. Proc. § 1283.4* required the award to include a determination of all the questions submitted to the arbitrators, the decision of which is necessary in order to determine the controversy. It is for the arbitrators to determine which issues are actually "necessary" to the ultimate decision. Any doubts as to the meaning or extent of an arbitration agreement are for the arbitrators and not the court to resolve. Although the court may vacate an award if it determines the arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision, the court may not substitute its judgment for that of the arbitrators (*69 Cal. 2d 686, 690-691)* . The controversy submitted clearly involved the enforcement of the original agreement, which spelled out the relationship of the parties to each other, and the parties advised the arbitrators that their contentions involved the issue of their relationships. They submitted evidence on these issues and argued for their adjudication, so that none of the parties could be heard to say the arbitrators exceeded their authority in deciding these issues (*69 Cal. 2d 686, 694)* .

Hall v. Superior Court *(1993) 18 Cal. App. 4th 427, 22 Cal. Rptr. 2d 376* , was an action by sellers of real property against the real estate brokers who had listed the property for sale. The brokers withheld from plaintiffs information about the financial problems of the buyer, who defaulted. The arbitrator made an award in plaintiffs' favor, which they sought to have confirmed. The trial court confirmed the award against one defendant and vacated the award as to a second defendant. As to the vacated portion of the award, the trial court determined that the arbitrator erred in finding that a partnership agreement existed between the parties when the pleadings did not raise the issue and that the arbitrator failed to allow rehearing so one broker could submit evidence that, under custom and practice in the real estate industry,

an oral agreement between brokers to share fees does not create a partnership. Plaintiffs sought be writ of mandate to have the vacated portion of the award reinstated.

The court of appeal ordered that a writ of mandate be issued directing the trial court to set aside its order vacating the arbitration award and enter a new order confirming the award. Citing *Felner v. Meritplan Ins. Co. (1970) 6 Cal. App. 3d 540, 543-544, 86 Cal. Rptr. 178* [*see § 20C.63[3][a]*], the court stated that it is for the arbitrators to determine which issues were actually "necessary" to the ultimate decision (*18 Cal. App. 4th 427*). Thus, the arbitrator properly concluded that partnership was among the issues the complaint raised, because he was entitled to reach that conclusion either by broadly construing the agency allegations of the complaint to include partnership, or by submitting all the issues in the complaint, which incorporated the parties' agreement to submit all issues between them (*18 Cal. App. 4th 427*).

[d] Arbitrator May Determine Legal Issues as Distinct From Factual Ones

The facts and procedural background of *Marcus v. Superior Court (1977) 75 Cal. App. 3d 204, 141 Cal. Rptr. 890* , are discussed at *Ch. 20, Arbitration: Compelling,§ 20.12[3][a]*. The court of appeal issued a writ of mandate commanding the trial court to stay the action against the individual defendants until arbitration was completed.

The court of appeal characterized as being without merit plaintiff's contention that an arbitrator cannot pass on legal issues as distinct from factual issues. *Code Civ. Proc. § 1280(c)* includes in its definition of "controversy" any question of law or fact or both. *Code Civ. Proc. § 1283.4* requires the award to include a determination of all questions submitted which are needed to determine the controversy. The grounds on which an award may be vacated, as enumerated in *Code Civ. Proc. § 1286.2*, make no reference to errors of law. The court concluded that the entire statutory arbitration scheme is designed to give the arbitrator the broadest possible powers, including the power to pass on legal issues as distinct from factual issues, so long as they are part of the controversy subject to arbitration (*75 Cal. App. 3d 204, 210)* .

[e] The Fact That An Award Is Not Enforceable as Judgment Is Not Grounds for Vacating the Award

In ***Mossman v. City of Oakdale*** *(2009) 170 Cal. App. 4th 83, 87 Cal. Rptr. 3d 764* , the court of appeals reversed the judgment of the superior court, affirmed the order that denied the motion to vacate the arbitration award on grounds that it failed to decide all issues presented to the arbitrator, affirmed the order that confirmed the award as written, and remanded to the trial court with instructions to remand to the arbitrator. The arbitrator's award indicated that an employee who alleged that the city had failed to follow its personnel rules by not allowing her to fill an existing vacancy in another department instead of being laid off was to be reinstated and made whole. However, the arbitrator did not order employee's reinstatement into a specific position and did not calculate the exact amount of lost wages and benefits to be paid to the employee.

The court held that the failure of a contractual arbitration award to be enforceable as a judgment does not itself provide grounds for vacating the award (*Mossman v. City of Oakdale (2009) 170 Cal. App. 4th 83, 90, 87 Cal. Rptr. 3d 764*). In this case, there was no question that the arbitrator awarded the employee all lost wages and benefits. The failure to name reinstatement to a specific position as the remedy, or make a calculation on the basis of findings made of the amount of damages, did not require vacating the award, because the principle of arbitral finality does not preclude the arbitrator from making a final disposition of a submitted matter in more than one award (*Mossman v. City of Oakdale, 170 Cal. App. 4th 83, 91, 87 Cal. Rptr. 3d 764*). The normal course of action when the financial terms of an award are unenforceable due to ambiguity is to remand the matter to the original arbitrator for clarification, and the court so ordered. Also, the fact that the arbitrator ordered the parties to file papers on any remaining issues within thirty days after the issuance of the award did not deprive the court of authority to remand, because the agreement expressly provided for continuing jurisdiction of the arbitrator to hear additional issues (*Mossman v. City of Oakdale, 170 Cal. App. 4th 83, 92, 87 Cal. Rptr. 3d 764*).

[4] Additional Authorities

[a] Arbitrators Decide Which Are "Necessary" Issues

The facts and procedural background of ***Jones v. Humanscale Corporation*** *(2005) 130 Cal. App. 4th 401, 29 Cal. Rptr. 3d 881* , and the portion of the opinion considering the court's power to correct the award by striking the portion that required the former employee to pay half of the arbitral costs is discussed at *§ 20C.30[3][a]*. Plaintiff claimed the arbitrator's consideration of the wage claims was in excess of his powers, because plaintiff had not asked for them to be determined. The court of appeal disagreed, citing *Code Civ. Proc. § 1283.4*. Based on an admittedly partial record, the arbitrator made clear to the parties that he would determine plaintiff's wage claim, and did not exceed his powers by doing so. Determination of the wage claim was necessary because any wages owed would be an offset to damages owed by plaintiff to defendant for breach of the covenant not to compete (*130 Cal. App. 4th 401, 413-414)* .

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20C ARBITRATION: CONFIRMING, CORRECTING, OR VACATING THE AWARD
PART II. FORMS
D. Circumstances That Do Not Prevent Confirmation or Require Vacating Award

2-20C California Points & Authorities § 20C.102

§ 20C.102 Failure to Find on Issue That Was Not Expressly Raised and Supported

[1] FORM

THE AWARD SHOULD _____ [BE CONFIRMED *or* NOT BE VACATED] BECAUSE THE ARBITRATORS NEED NOT DETERMINE A CLAIM THAT HAS NOT BEEN EXPRESSLY RAISED AND SUPPORTED, SUCH AS _____ [*specify, e.g.,* THE AMOUNT REQUIRED TO REPAIR THE ELECTRICAL SYSTEM].

A. Award Is Proper Despite Failure to Determine Claim That Was Not Expressly Raised and Supported. A claim of a party must be expressly raised before an award is made; if it is not supported by evidence but only implied from the facts, the arbitrator's failure to consider it is not reviewable in the absence of fraud (*Sapp v. Barenfeld (1949) 34 Cal. 2d 515, 523, 524, 212 P.2d 233* ; *Grill v. Hunt (1992) 6 Cal. App. 4th 73, 78-79, 7 Cal. Rptr. 2d 768*).

[2] Comments

[a] Use of Form

This form may be used with a memorandum in support of a petition or response seeking to have an arbitration award confirmed, to anticipate or respond to a claim that the arbitrator improperly failed to find on an issue when that issue was not expressly raised or supported. This form does not provide a complete memorandum but should be combined with the memorandum supporting the petition [*see § 20C.10*] or response [*see § 20C.11*] seeking to have the award confirmed, and if desired, the memorandum from § 20C.101, regarding the general power of arbitrators to determine which issues are necessary for resolution of the entire controversy.

As a tactical matter, counsel may wish to reserve these points for oral argument or for other form of rejoinder to the respondent's opposing memorandum. In deciding whether or not to reserve these arguments, counsel should consider local court rules and practice, as well as whether the moving party would be expected to be raise these points in initial moving papers, to avoid the possibility of losing the opportunity to raise them.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should point out that the issue in question was not raised and that no evidence was presented at the arbitration proceeding to support the issue. Generally, it will be appropriate to attach a copy of the award [*see Shepherd v. Greene (1986) 185 Cal. App. 3d 989, 994, 230 Cal. Rptr. 233* (*discussed under § 20C.12[3][a]*)].

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For memoranda to combine with this form, see *§§ 20C.10, 20C.11*, and *20C.101*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Award Is Proper Despite Failure to Determine Claim That Was Not Expressly Raised and Supported

Sapp v. Barenfeld *(1949) 34 Cal. 2d 515, 212 P.2d 233* , arose out of a dispute between the owners of a building and the contractors they had hired to rehabilitate it after a fire. The owners had failed during the arbitration proceeding to introduce any evidence of the damage claim the arbitrators allegedly overlooked. When the contractors petitioned to confirm the award rendered after arbitration of the dispute, the owners asked that the award be vacated, contending in part that the arbitrators had failed to pass on that particular claim. The court vacated the award, and the contractors appealed.

The Supreme Court reversed the order vacating the award and ordered the award confirmed. It stated that a claim of a party must be raised expressly at some time before the award. If it only can be implied from the facts alleged, the failure to consider it is only an error of judgment that in the absence of fraud or gross misconduct is not subject to judicial review (*34 Cal. 2d 515, 523)* . A party who asserts a claim in an arbitration proceeding must produce evidence in support of that claim; failing to do so, the party cannot attack the award on the ground the claim was not considered by the arbitrators (*34 Cal. 2d 515, 524)* .

Grill v. Hunt *(1992) 6 Cal. App. 4th 73, 7 Cal. Rptr. 2d 768* , involved a sale of land from defendant to plaintiff. Plaintiff buyer, contrary to the contract, graded the lot, and in the process, damaged the leach field, thus decreasing the

property's value. Thereafter, errors were discovered in engineering reports on which county certification of the lot was based. The parties agreed to mutual rescission, but the seller, although agreeing to rescission, refused to return any money. Plaintiff buyer brought suit for rescission and return of amounts owed by the seller. The parties submitted the action to binding arbitration in which the arbitrator found that rescission had been accomplished but also found that he could not adjust the equities with respect to the diminished value of the lot and the portion of the price the buyer had already paid, because of a failure of proof. On plaintiff's motion, the court vacated the arbitration award and the granted plaintiff's motion for summary judgment, awarding plaintiff the reimbursement he sought. The defendant appealed.

The court of appeal reversed, finding that the arbitrator's failure to award restitution was neither error of law nor failure to determine an issue presented which would warrant vacation. Plaintiff had the burden of proving that the land returned had not decreased in value or had decreased by less than payments made to defendant, thus, no restitution could properly be awarded (*6 Cal. App. 4th 73, 78-79)* .

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20C ARBITRATION: CONFIRMING, CORRECTING, OR VACATING THE AWARD
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2-20C California Points & Authorities § 20C.103

§ 20C.103 Arbitrator May Amend Award on Own Initiative to Correct Inadvertent Omission

[1] FORM

THE AWARD _____ [SHOULD BE CONFIRMED *or* NEED NOT BE VACATED] BECAUSE AN ARBITRATOR HAS THE POWER TO AMEND AN AWARD ON HIS OR HER OWN INITIATIVE BEFORE THE ORIGINAL AWARD IS JUDICIALLY CONFIRMED, WHEN THE AMENDMENT IS NOT INCONSISTENT WITH THE OTHER FINDINGS IN THE AWARD AND DOES NOT CAUSE DEMONSTRABLE PREJUDICE TO ANY PARTY.

A. Amendment of Award by Arbitrator on Own Initiative. Although there is no statute granting an arbitrator the authority to do so, an arbitrator has the power to amend an award to include a finding on an issue omitted from the original award through the arbitrator's own mistake, inadvertence or excusable neglect if the amendment (*Delaney v. Dahl (2002) 99 Cal. App. 4th 647, 657-660, 121 Cal. Rptr. 2d 663* ; *Century City Medical Plaza v. Sperling, Isaacs & Eisenberg (2001) 86 Cal. App. 4th 865, 867, 881-883, 103 Cal. Rptr. 2d 605* ; *A.M. Classic Const. v. Tri-Build Dev. Co. (1999) 70 Cal. App. 4th 1470, 1476-1478, 83 Cal. Rptr. 2d 449*):

- Is (requested and) made before judicial confirmation of the original award.

[- Is requested and acted on within the time allowed for the correction of an award by either statute or any controlling rules applicable to the arbitration;]

- Does not alter the merits and is not inconsistent with other findings on the merits of the controversy, and

- Does not cause demonstrable prejudice to the legitimate interest of any party.

[2] Comments

[a] Use of Form

This form may be used with a memorandum in support of a petition or response seeking to have an arbitration award confirmed to assert that the arbitrator's correction of the award on his or her own initiative was proper when the correction was based on evidence already in the record or in the arbitrator's possession and relates to a matter the parties submitted to arbitration, but as to which the arbitrator inadvertently neglected to make a finding.

The second requirement in bulleted list in [1], *above* (that the request for amendment and amendment be made within the time required by statute for correction of an award) has been imposed by only one of the three cases cited, *Century City Medical Plaza v. Sperling, Isaacs, & Eisenberg (2001) 86 Cal. App. 4th 865, 881, 103 Cal. Rptr. 2d 605* . As discussed at [3][a], *below*, *Delaney v. Dahl (2002) 99 Cal. App. 4th 647, 659-660, 121 Cal. Rptr. 2d 663* specifically rejected the idea that the time requirement for correction of awards be imported.

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum supporting the petition [*see § 20C.10*] or response [*see § 20C.11*] seeking to have the award confirmed.

[b] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, argument should set forth evidence adduced at the hearing that provided the basis for the amendment and should attach copies of any submission agreement or proposed decisions to establish that the subject matter of the correction was placed before the arbitrator by the parties.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For forms of petition to confirm and arbitration award and of response to a petition to vacate an award, as well as a procedural checklist, see California Forms of Pleading and Practice, Ch. 34, *Contractual Arbitration: Judicial Review* (Matthew Bender).

[d] Related Memoranda

For a form setting forth the ways and times in and within which a court may correct an arbitration award, see *§§ 20C.12, 20C.30* et seq.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing*

Legal Memoranda and Briefs .

[3] Discussion of Authorities

[a] Amendment of Award by Arbitrator on Own Initiative

Delaney v. Dahl *(2002) 99 Cal. App. 4th 647, 121 Cal. Rptr. 2d 663* involved arbitration of a legal malpractice claim and a counterclaim for the fees allegedly earned in the primary action that resulted in an adverse judgment against plaintiffs in the malpractice action. The retainer agreement under which the primary action was litigated and the malpractice action was arbitrated related to representation of two corporations, parent and subsidiary, in the primary action. Delaney and another principal were joined in the primary action, and a supplemental retainer agreement was executed, which made clear that the principals would have no liability for attorney's fees: the corporations were providing their legal services. The retainer agreement included a provision stating that "[i]n the event attorney's fees and related costs are incurred to enforce this agreement or to resolve a dispute under this agreement, the prevailing party shall be entitled to recover, in addition to damages allowed by law, reasonable attorney's fees and costs." The arbitration resulted in an initial award in favor of the attorneys and law firm, determining that they were the prevailing parties and entitled to recover their attorney's fees and costs incurred in the arbitration. After additional written briefs were submitted to the arbitrator on the issues of costs and fees and the law firm's right to recover from the principals individually, the arbitrator issued the final award which determined that the principals were personally liable for the law firm's attorney fees and costs incurred in the arbitration. In the body of the final award, dated March 9th, Delaney's name was omitted from the relevant paragraph under the heading "AWARD," which stated that the corporations take nothing on their claim for legal malpractice. On April 1 and 2, the law firm requested in writing that the arbitrator amend or correct the March 9 final award to add Delaney's name to paragraph 4 of the "AWARD." The arbitrator issued a corrected final award dated April 7, apparently without having received Delaney's opposition to the law firm's request. The parties agreed the arbitrator should withdraw the April 7 corrected final award and consider Delaney's opposition, which he did. On April 28, the arbitrator issued a new final award which listed Delaney's name in the relevant paragraph of the "AWARD" section, indicating the arbitrator also found against Delaney with regard to the malpractice claim. The corrected award also included a discussion of the arbitrator's authority to change the March 9 award, stating the earlier omission of Delaney's name was a mistake and not an attempt to leave unresolved Delaney's malpractice claim. The law firm petitioned to confirm the final award or, in the alternative, to correct or amend the March 9 award. Delaney opposed the petition to confirm and filed a petition to vacate all three of the awards issued by the arbitrator--the March 9 award, the April 7 corrected award, and the April 28 final award. The April 28 final award was confirmed and judgment entered thereon. Delaney appealed.

The court of appeal affirmed. The portion of the opinion addressing the attorney's fees award is discussed at *§ 20C.110[3][a]*. Regarding the arbitrator's authority to amend the award to include Delaney as taking nothing on his malpractice claim, the court of appeal noted that while an amendment such as this one is not within an arbitrator's statutory authority under *Code Civ. Proc. § 1286.6*, as recognized by *A.M. Classic Const. v. Tri-Build Dev. Co. (1999) 70 Cal. App. 4th 1470, 1478, 83 Cal. Rptr. 2d 449* , (discussed *below*) an arbitrator can amend an award to include matters inadvertently omitted if the amendment is consistent with other findings on the merits and does not prejudice the legitimate interests of a party (*99 Cal. App. 4th 647,657-658)* . Delaney also contended that the amendment was untimely because it was not sought within 10 days of, nor made within 30 days of, receipt of a signed copy of the March 9 final award. The court of appeal acknowledged that those time requirements were imposed on corrections pursuant to *Code Civ. Proc. § 1284* and also on amendments under *Century City Medical Plaza v. Sperling, Isaacs, & Eisenberg (2001) 86 Cal. App. 4th 865, 881, 103 Cal. Rptr. 2d 605* , (discussed *below*) but concluded that as long as the amendment was made before the award was confirmed, the additional time requirements were unwarranted (*99 Cal. App. 4th 647, 659-660)* . *A.M. Classic*, the first case to validate an amendment of an award by the arbitrator, did not import the time requirements of *Code Civ. Proc. § 1284*. The court of appeal said the nature of the change is reason to differentiate between correction and amendment of an award in terms of the time within which either must be made and that it would be irrational, a harsh result serving no legitimate purpose, and contrary to the policies recognized in

Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1, 10 Cal. Rptr. 2d 183, 832 P.2d 899 to discard all the time and money spent by the parties and deny an arbitrator the authority to complete his or her task (*99 Cal. App. 4th 647, 659-660)* .

Although Delaney contended otherwise, the court of appeal found there was sufficient evidence to conclude the amendment was made to correct an inadvertent mistake and did not indicate an attempt to leave Delaney's malpractice claim unresolved. In *A.M. Classic*, the arbitrator submitted a declaration to the trial court, stating that the failure to address an issue in the original award was inadvertent. In *Century City Medical Plaza*, there was a question whether the need for an amended award was due to the arbitrator's inadvertent omission of an issue, and the matter was remanded for factual findings as to the reason for the change. Here, the court of appeal noted, the award itself discussed and explained the reason for the amendment and there was no evidence to the contrary (*99 Cal. App. 4th 647, 660)* .

Century City Medical Plaza v. Sperling, Isaacs & Eisenberg *(2001) 86 Cal. App. 4th 865, 103 Cal. Rptr. 2d 605* was a landlord-tenant dispute arbitrated pursuant to a stipulation that provided the arbitrator could award interest, attorney's fees, and costs to the prevailing party if authorized by the contract or the parties' statutory rights. The original award was in favor of the landlord, but did not award attorney's fees, interest, or costs. After entry of the original award, the arbitrator made a second award, denominated the "Final Award," that awarded costs, interest, and attorney's fees to the landlord. The trial court confirmed the original award and vacated the second award pursuant to *Code Civ. Proc. § 1286.2(d)* on the ground that the arbitrator exceeded his powers by issuing the second award. Tenant appealed.

The court of appeal reversed, directing the trial court to hold an evidentiary hearing and to confirm the second award if the evidence established that the arbitrator's failure to include an award of attorney's fees, costs, and interest in the original award was due to an *inadvertent omission* and that the modification or amendment (1) was requested and done in a timely manner prior to the confirmation of the original award, (2) did not alter the merits of the result set out in the original award, and (3) occasioned no prejudice to the legitimate interests of any party (*86 Cal. App. 4th 865, 867)* . The court discussed *A.M. Classic Const. v. Tri-Build Dev. Co. (1999) 70 Cal. App. 4th 1470, 83 Cal. Rptr. 2d 449* [*see below*], and said the critical distinction is the one between an *inadvertent omission and the correction of an error in an intended ruling*. An arbitrator's power to "correct" a factual or legal error in an award is limited and circumscribed by specific statutory language of *Code Civ. Proc. § 1286.6* (*86 Cal. App. 4th 865, 877)* . The court of appeal agreed with *A.M. Classic*, however, that when an omission in the original award was the product of inadvertence or mistake, it would elevate form over substance to deny the arbitrator the authority to complete his or her task by issuing an amended award including the missing findings (*86 Cal. App. 4th 865, 880)* . The court of appeal stated the requirements for issuance of a supplemental award slightly differently than did *A.M. Classic*, saying the requirements were that the supplemental award (*86 Cal. App. 4th 865, 881)* :

- Must be requested and acted on within the time allowed for the correction of an award by either statute or any controlling rules applicable to the arbitration,

- Must be made prior to confirmation of the original award (so that they both may be considered for confirmation together as would have been the case but for the inadvertent omission),

- Is not inconsistent with other findings on the merits of the controversy, and

- Does not cause demonstrable prejudice to the legitimate interests of any party.

Recognizing that whether those four conditions has been satisfied raised factual questions, as to which the burden of proof must be borne by the party seeking to sustain the supplemental or final award, the court remanded for determination of those issues (*86 Cal. App. 4th 865, 881-883)* .

A.M. Classic Const. v. Tri-Build Dev. Co. *(1999) 70 Cal. App. 4th 1470, 1478, 83 Cal. Rptr. 2d 449* , was a suit by a subcontractor against the contractor and the school district for which the building was built. All parties stipulated to

arbitration. The arbitrator issued an award against the contractor and in favor of the subcontractor, which was sent to all parties. Before any party had moved to confirm the award, subcontractor's counsel wrote a letter to the arbitrator and pointed out that the award failed to make any finding as to the stop notice cause of action against the school district, which was the only way the subcontractor could collect from the school district, and that the proposed judgments submitted by all parties included findings on the stop notice cause of action. Four days later, subcontractor's counsel called the arbitrator, who acknowledged the mistake, and receipt of the letter, and stated that he would make an amended award in a few days. In determining whether the amended award was proper, the court of appeal noted the following:

- All the information the arbitrator needed to make the award on the stop notice cause of action was already available in the record and in the arbitrator's notes (*70 Cal. App. 4th 1470, 1475)* ;

- Although the arbitrator should have informed the other parties of the ex parte communication and of the fact that he was going to amend the award, because there was no showing that the arbitrator considered evidence outside the original record [*see Code Civ. Proc. § 1282.2(g)*], there was no fraud,corruption, undue influence, or misconduct of the arbitrator so as to require vacating the amended award under former Code Civ. Proc. § 1286.2(a), (b), or (c) [*now see Code Civ. Proc. § 1286.2(a)(1), (2),* or *(3)*] (*70 Cal. App. 4th 1470, 1476)* ;

- This was not a situation that came within the scope of *Code Civ. Proc. § 1286.6(a)* or *(c)*, relating to correction of awards, because the mistake was more than a miscalculation or a mistake as to form (*70 Cal. App. 4th 1470, 1476)* ;

- Older cases holding that an incomplete award is a nullity and must be vacated and the entire matter re-arbitrated were to be disregarded as inconsistent with the current California Arbitration Act and the views expressed in *Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1, 12, 10 Cal. Rptr. 2d 183, 832 P.2d 899* ; that to discard all the time and money spent on the first arbitration or to deny arbitrators the power to complete their tasks would be irrational and elevate form over substance (*70 Cal. App. 4th 1470, 1476-1478)* ; and

- That the opinion should not be read to condone the ex parte communications by A.M. Classic's counsel, which were inappropriate and under other circumstances might require vacation of the award (*70 Cal. App. 4th 1470, 1478)* .

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2-20C California Points & Authorities § 20C.104

§ 20C.104 Arbitrator Does Not Exceed Powers by Failing to Award Discovery Sanctions

[1] FORM

THE AWARD MAY BE CONFIRMED BECAUSE FAILING TO AWARD DISCOVERY SANCTIONS IS WITHIN THE ARBITRATOR'S POWER.

A. Power Not to Impose Discovery Sanction. *Code of Civil Procedure, Section 1283.05(b)* gives an arbitrator the power, but not the duty, to impose discovery sanctions. Thus, it is not in excess of an arbitrator's power so as to require vacating an award for an arbitrator to order that a resisting party _____ [*specify, e.g.*, respond to requests for admission without objection] instead of _____ [*specify the sanction that was not imposed, e.g.*, deeming the unanswered requests to have been admitted] as would have been required in a court [*if desired specify code section, e.g.*, under Code of Civil Procedure § 2033(k)] (*Code of Civil Procedure §§ 2033.280, 2033.290*, effective July 1, 2005; *Alexander v. Blue Cross of California (2001) 88 Cal. App. 4th 1082, 106 Cal. Rptr. 2d 431*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition or response seeking to confirm an award to support the contention that an arbitrator does not exceed his or her powers by failing to impose a discovery sanction that a court would be required to impose in similar circumstances.

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum supporting the petition [*see § 20C.10*] or response [*see § 20C.11*] seeking to confirm the award.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should show the facts indicating the circumstances involved.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For memoranda to combine with this form, see *§§ 20C.10* and *20C.11*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Power Not to Impose Discovery Sanction

Alexander v. Blue Cross of California *(2001) 88 Cal. App. 4th 1082, 106 Cal. Rptr. 2d 431*), arose out of a medical malpractice action in which plaintiff alleged that Blue Cross was negligent in investigation of her doctor, whose examination of her she alleged was sexually motivated and inappropriate. In the course of the arbitration, The arbitrator decided that because of its delay in responding, Blue Cross had waived all objections to nearly all the requests for discovery, but did not impose the sanction requested by plaintiff of treating the requests for admissions as admitted. Code Civ. Proc. § 2033(k) (*Code Civ. Proc. §§ 2033.280, 2033.290*, effective July 1, 2005) would have required a court faced with the same conduct to deem the requests admitted. The arbitrator ruled for defendant. The award was confirmed, despite plaintiff's petition to vacate it. Plaintiff appealed the ensuing judgment, claiming in part, that the arbitrator exceeded his powers by failing to consider the requests admitted.

The court of appeal affirmed. *Code Civ. Proc. §§ 1283.1* and *1283.05* grant arbitrators broad authority to order discovery in certain types of arbitration proceedings. Both sections applied in this case, and the arbitrator ordered discovery pursuant to *Code Civ. Proc. § 1283.05. Code Civ. Proc. § 1283.05(b)* gives an arbitrator the "power ... to enforce the rights, remedies, procedures, duties, liabilities, and obligations of discovery by the imposition of the same terms, conditions, consequences, liabilities, sanctions, and penalties as can be or may be imposed in like circumstances in a civil action by a superior court of this state." The court of appeal said that it is one thing for the Legislature to give an arbitrator the power to impose the discovery sanctions available to a trial court in the same circumstances but quite another for the Legislature to say that the arbitrator must impose the precise sanctions a trial court would impose. The Legislature did not go so far as to require the arbitrator to impose the sanctions a trial court could impose. Therefore, the arbitrator did not exceed his powers in failing to impose the sanction requested by plaintiff (*88 Cal. App. 4th 1082*).

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2-20C California Points & Authorities § 20C.105

§ 20C.105 Arbitrator Not Court Decides Whether Agreement Impliedly Prevents Classwide Arbitration

[1] FORM

IT IS FOR THE ARBITRATOR NOT THE COURT TO DETERMINE WHETHER A PARTICULAR ARBITRATION AGREEMENT IMPLIEDLY PREVENTS CLASSWIDE ARBITRATION.

A. Arbitrator Not Court Decides Whether Agreement Impliedly Prevents Classwide Arbitration. When an arbitration clause is silent on the issue of classwide arbitration, the question of whether it permits classwide arbitration is one for the arbitrator to decide. The decision is a threshold issue that concerns arbitration procedure. The relevant question is what kind of arbitration proceeding the parties agreed to. [Thus, an arbitration agreement that provides that one party will choose the arbitrator, with the concurrence of the other, may impliedly prevent classwide arbitration. The members of the class can be implied to concur in the choice of arbitrator if they do not opt out of the class; but, it can be argued, the party who chose the arbitrator to resolve the initial dispute with the named opposing party or parties did not get to chose that arbitrator to resolve its disputes with the rest of the class] (*Green Tree Financial Corp. v. Bazzle (2003) 539 U.S. 444, 123 S. Ct. 2402, 2407-2409, 156 L. Ed. 2d 414* ; *Cable Connection, Inc. v. DIRECTV, Inc. (2008) 44 Cal. 4th 1334, 1365-1366, 82 Cal. Rptr. 3d 229, 190 P.3d 586* ; *Garcia v. DIRECTV, Inc. (2004) 115 Cal. App. 4th 297, 301-303, 9 Cal. Rptr. 3d 190*).

[2] Comments

[a] Use of Form

This form may be submitted to support the contention that it is the arbitrator, not the court, that is empowered to determine whether a particular arbitration agreement impliedly prevents classwide arbitration. This authority may be included in a memorandum at any stage of the proceedings--a petition to compel arbitration [*see, e.g, Ch. 20, Arbitration: Compelling, § 20.10*]. or a motion to confirm or vacate an award [*see, e.g*, §§ 20C.10-20C.21]. The bracketed portion of the authority sets forth the particular arbitration provision at issue in *Green Tree Financial Corp. v. Bazzle (2003) 539 U.S. 444, 123 S. Ct. 2402, 156 L. Ed. 2d 414* . Counsel should use it or not depending on whether it is similar enough to the arbitration agreement involved in counsel's case to aid his or her argument. This form does not

provide a complete memorandum, but may be combined with memoranda relating to the specific procedural context in which counsel wishes to raise the issue that the arbitrator, not the court, interprets the agreement to decide if it prevents classwide arbitration.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, the argument should quote or refer to the description of matters to be arbitrated, any provision specifically addressing the matter of classwide arbitration (or the lack thereof), and the other provisions claimed to impliedly prevent or require classwide arbitration. It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations.

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For a form of petition to compel arbitration that may be supported by this memorandum, as well as a procedural checklist, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

[d] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Arbitrator Not Court Decides Whether Agreement Impliedly Prevents Classwide Arbitration

Green Tree Financial Corp. v. Bazzle *(2003) 539 U.S. 444, 123 S. Ct. 2402, 156 L. Ed. 2d 414* , began as two separate actions by consumers under substantially identical loan agreements that were governed by South Carolina law and contained arbitration clauses governed by the Federal Arbitration Act (FAA). Plaintiffs sought damages for defendant's failure to provide them with certain documents and disclosures required by South Carolina statutes. The agreements further provided that arbitration would be conducted by "one arbitrator selected by us/Green Tree with consent of you/the Buyer or Buyers above signed." The arbitration provision applied to "disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract" and granted the arbitrator "all powers provided by the law and the contract. These powers shall include all legal and equitable remedies, including, but not limited to, money damages, declaratory relief, and injunctive relief." Plaintiffs in the first action (Lackey and Buggs) sought class certification; and Green Tree moved to compel arbitration. The trial court denied arbitration, but on appeal, the South Carolina Court of Appeals reversed. The parties chose an arbitrator, who certified a class in arbitration in December, 1998, and ultimately awarded that class $9,200,00 in statutory damages and attorneys' fees. The trial court confirmed the award, and Green Tree appealed, contending, among other things, that class arbitration was not legally permissible under the agreement. Plaintiffs in the Bazzle action moved for class

certification; and defendant moved to compel arbitration. In that action, the trial court certified the class and compelled arbitration. Green Tree, with Bazzles' consent, selected the arbitrator, in fact the same person who was selected as arbitrator in the first action. In the Bazzle action, the arbitrator awarded the class $10,935,000 in damages plus attorneys fees. The award was confirmed. Green Tree appealed, again contending that class arbitration was not legally permissible under the agreement. The South Carolina Supreme Court withdrew both proceedings from the Court of Appeals, assumed jurisdiction, consolidated the proceedings, and held that the contracts were silent on the issue of class arbitration, that they consequently authorized class arbitration, and that class arbitration was proper. The United States Supreme Court granted certiorari to consider whether that holding was consistent with the FAA.

The Untied States Supreme Court reversed, and remanded, without addressing the issue of whether the FAA allowed or prohibited class arbitration, holding instead that the matter was one of contract interpretation, which the parties' intended be resolved by the arbitrator, not the court. Thus, on remand, the arbitrator was to decide the question of class certification. Green Tree contended that the arbitration provision prohibited class certification because in a class action it would not get to independently select the arbitrator who considered claims of the class members other than the named plaintiffs. The unnamed plaintiff class members consented to that arbitrator by agreeing to proceed in the class action, but Green Tree's selection of the arbitrator was meant only to apply to the claims of the named plaintiff. The arbitration clause stated that all "disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract" would be arbitrated. The majority opinion characterized the relevant question as what kind of arbitration proceeding the parties agreed to, a question that did not concern a state statute or judicial proceeds, but like the issue in *Volt Information Sciences v. Board of Trustees (1989) 489 U.S. 468, 109 S. Ct. 1248, 103 L. Ed. 2d 488* , a question of contract interpretation and arbitration procedures. Although the arbitrator chosen in the Lakcey action wrote that 'I determined that a class action should proceed in arbitration based on my careful review of the broadly drafted arbitration clause prepared by Green Tree," the majority believed the arbitrator's decision reflected the court's interpretation of the contracts rather than the arbitrator's and remanded for the arbitrator to decide again whether to proceed with class arbitration (*539 U.S. 444, 123 S. Ct. 2402, 2406-2408)* .

Justice Stevens, who joined in the majority opinion so there would be a controlling judgment of the court, wrote a concurring and dissenting opinion in which he reasoned that South Carolina law governed the agreement and allowed class-action arbitration if not prohibited by the applicable arbitration agreement. Because this agreement was silent on the issue, the South Caroline Supreme Court reached the correct conclusion as a matter of law. The fact that the interpretation of the contract arguably should have been made by the arbitrator made no difference, because petitioner challenged only the merits of the decision to order class arbitration without claiming that the decision was made by the wrong decision-maker. Thus, there was no need to remand the case to correct that possible error (*539 U.S. 444, 123 S. Ct. 2402, 2408-2409)* .

Three dissenting Justices believed the interpretation of the contract was a matter for the court to decide and that the contract clearly prohibited class arbitration. Therefore, the Supreme Court of South Carolina was wrong when it ordered class arbitration. This dissent believed the choice of arbitrator is as important a component of the arbitration agreement as is the choice of what is to be submitted to that arbitrator, and thus, is not a procedural matter for the arbitrator to decide, but a matter for the court to decide. Although the FAA does not prohibit parties from choosing to proceed on a class-wide basis, these parties chose not to do so, and to enforce the arbitration agreement other than as written was not within the power of the South Carolina Supreme Court (*539 U.S. 444, 123 S. Ct. 2402, 2409-2411)* .

Judge Thomas would have affirmed the judgement of the South Carolina Supreme Court on the ground that the FAA does not apply in state courts, and thus, could not be a ground for pre-empting a state court's interpretation of a private arbitration agreement (*539 U.S. 444, 123 S. Ct. 2402, 2411)* .

The California Supreme Court held in ***Cable Connection, Inc. v. DIRECTV, Inc.*** *(2008) 44 Cal. 4th 1334, 82 Cal. Rptr. 3d 229, 190 P.3d 586* , that the arbitration award should be vacated and the case remanded to the arbitration panel for proper determination on the basis of contractual interpretation and applicable arbitration rules whether arbitration

could proceed on a class basis. The portion of the decision addressing the general rule that judicial review of the merits of an arbitration award is not available is discussed in *§ 20C.90[3][a1], above*. The portion of the decision addressing the court's ruling that the preclusion in the Federal Arbitration Act on contractual expansion of judicial review of the merits of arbitration awards is discussed in *§ 20C.194[3][b], below*. The portion of the decision addressing the ability of the parties and the procedure to contractually expand the scope of judicial review of the merits of an arbitration award is discussed in *§ 20C.194[3][a], below*. Having determined its authority to review the merits of the award, the court turned to the merits. It noted that two of the three arbitrators decided the proponents of class arbitration could pursue arbitration on a classwide basis, although the parties' contract did not mention classwide arbitration. The Court of Appeal agreed with this determination. The contract called for the arbitrators to apply California substantive law, while following the procedural requirements of AAA rules and the Federal Arbitration Act. The Court held firstly that the arbitrators improperly relied on caselaw concerning adhesion contracts, because those decisions only addressed the power of the courts to order class arbitration in the face of unconscionable contract provisions, and there was no adhesion contract in question. Secondly, the Court found error in that the arbitrators did not address squarely the fact that the applicable AAA rules permitted class arbitration where the arbitration agreement is silent on the issue of classwise arbitration, as was the case here. Looking to the plurality opinion in *Bazzle* (discussed in the preceding paragraphs) calling for arbitrator determination of the availability of classwise arbitration, the Court decided to "permit the arbitration panel to reconsider the availability of classwide arbitration as a matter of contract interpretation and AAA arbitration procedure" (*44 Cal. 4th 1334, 1364-1366)* .

Plaintiff in ***Garcia v. DIRECTV, Inc**. (2004) 115 Cal. App. 4th 297, 9 Cal. Rptr. 3d 190* subscribed to digital home satellite television services through the network of independent dealers maintained by defendant, DIRECTV. Plaintiff filed a class action demand for arbitration with the American Arbitration Association. Before the arbitration was heard, plaintiff filed a class action lawsuit, in which defendant petitioned for arbitration. The trial court found that it, and not the arbitrator, should determine class action issues (including whether classwide arbitration was prohibited by the terms of the parties' agreement(s) [*see Blue Cross of California v. Superior Court (1998) 67 Cal. App. 4th 42, 78 Cal. Rptr. 2d 779]* . The agreement was silent on the issue of classwide arbitration and did not explicitly prohibit it. Claims seeking less than $250,000 were to be decided by one arbitrator. Other matters would be decided by a panel of three arbitrators: one chosen by each party and the third selected by the other two. Matters exempted from arbitration were defendant's trade secrets, the validity of defendant's right to offer its services to the public, and any claims seeking injunctions, attachments, writs of possession, or other provisional remedies. The trial court found that classwide arbitration was not prohibited by the agreement, and granted defendant's motion to compel arbitration. The court of appeal originally affirmed that decision, but the United States Supreme Court vacated that decision when it granted certiorari in *Green Tree Financial Corp. v. Bazzle (2003) 539 U.S. 444, 123 S. Ct. 2402, 156 L. Ed. 2d 414* (discussed *above*; hereinafter "Green Tree"). After the United States Supreme Court issued its opinion in *Green Tree*, that Court remanded the case to the California Court of Appeal for further consideration in light of *Green Tree* [*see Hughes Elec. Corp. v. Garcia (2003) 124 S. Ct. 102, 157 L. Ed.2d 12* (remand)].

The court of appeal reversed and remanded to the trial court with directions to remand the matter to the arbitrator (*115 Cal. App. 4th 297, 304)* , stating that indeed *Green Tree* has changed California law on the subject: in cases governed by the Federal Arbitration Act, the arbitrator, not the court, must decide whether a particular agreement prohibits classwide arbitration (*115 Cal. App. 4th 297, 298)* . Plaintiff pointed out that the arbitration provision under review purported to afford judicial review of any arbitral decision for errors of law, an attempt to re-write California statues that has rendered at least some arbitration provisions totally invalid under California law [*see, e.g., Crowell v. Downey Community Hospital Foundation (2002) 95 Cal. App. 4th 730, 748-749, 115 Cal. Rptr. 2d 810* (discussed in Ch. 20A, *Arbitration: Resisting*, § 20A.96[3][a] and [b])], but the court of appeal did not address the issue. The court of appeal agreed with defendant that *Green Tree* was dispositive: The propriety of classwide arbitration was a "threshold issue" for the arbitrator to decide (*115 Cal. App. 4th 297, 301-302)* . The court of appeal noted that the arbitrator would be free to decide either way and that there were unresolved issues as to the application of the doctrine of unconscionability under the Federal Arbitration Act [*see AT&T v. Ting (9th Cir. 2003) 319 F.3d 1126, 1150, n.14* (prohibition on classwide consumer arbitration is so one-sided as to be dispositive of unconscionability issue); *Ingle v. Circuit City*

Stores, Inc. (9th Cir. 2003) 328 F.3d 1165, 1175-1176 (doctrine of unconscionability is not preempted by Federal Arbitration Act, but consistent with it; discussed in *Ch. 20A, Arbitration: Resisting, § 20A.91[3][b]*)]. The court of appeal also noted that some of these issues were before the California Supreme Court in *Discover Bank v. Superior Court (2003) 105 Cal. App. 4th 326 , rev. granted* April 9, 2003, S113725 (*115 Cal. App. 4th 297, 304 n.4*).

The concurrence found it unfortunate that the court of appeal issued an opinion rather than just dismissing the appeal and sending the matter to the trial court with a citation to *Green Tree*. The concurrence felt the majority opinion implied that the trial judge was incapable of reading *Green Tree* and following it without some amplification from the court of appeal. Further, the concurrence pointed out, there was nothing to review; there was nothing properly before the court of appeal (*115 Cal. App. 4th 297, 304-305)* .

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2-20C California Points & Authorities § 20C.106

§ 20C.106 Arbitrator Does Not Exceed Powers by Determining Matter in Telephonic Pre-Hearing Conference

[1] FORM

WHEN THE PARTIES HAVE ADOPTED A SET OF RULES TO GOVERN THEIR ARBITRATION THAT PROVIDES FOR A TELEPHONIC PRE-HEARING CONFERENCE, THE ARBITRATOR HAS THE POWER TO DISPOSE OF THE MATTER AT SUCH A CONFERENCE.

A. Arbitrator May Determine Matter in Prehearing Telephonic Conference. Under an arbitration agreement and submission agreement which stated that the arbitration was to be governed by the _____ [*name of organization, e.g.*, National Association of Securities Dealers (NASD)] _____ [*name of applicable rules, e.g.*, Code of Arbitration Procedure], Section _____ [*specify, e.g.*, 10321] of which provides for telephonic pre-hearing conference, arbitrators do not exceed their powers by disposing of the entire matter at such a pre-hearing conference (*Reed v. Mutual Service Corporation (2003) 106 Cal. App. 4th 1359, 1369, 131 Cal. Rptr. 2d 524* .)

[2] Comments

[a] Use of Form

This form may be submitted to support the contention that it an arbitrator did not exceed his or her powers by disposing of the entire matter to be arbitrated at a pre-hearing telephonic conference. Of course, the authority is only applicable if the parties have chosen that their arbitration be conducted in accordance with a set of rules that provides for telephonic prehearing conferences and is most suitable when a single issue, such as a statute of limitations disposes of the entire. This form does not provide a complete memorandum, but may be combined with memoranda relating to the specific procedural context in which counsel wishes to raise the issue that the arbitrator was empowered to dispose of the entire matter at a telephonic pre-hearing conference.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, the argument should set forth the portions of the arbitration agreement and/or submission agreement adopting the rules for arbitration and the particular rule that provides for telephonic pre-hearing conferences. It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations.

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see CodeCiv. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For discussion and forms relating to correcting, confirming, and vacating arbitration awards, as well as a procedural checklist, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Judicial Review* (Matthew Bender).

[d] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Arbitrator May Determine Matter in Prehearing Telephonic Conference

Plaintiff/investors ***Reed v. Mutual Service Corporation*** *(2003) 106 Cal. App. 4th 1359, 131 Cal. Rptr. 2d 524* , submitted claims against their securities brokers to arbitration under submission agreements stating that they had read the procedures and rules of the National Association of Securities Dealers (NASD) relating to arbitration, and acknowledging that the proceeding would be governed by the NASD Code of Arbitration Procedure. Rule 10321 of that Code provides for a telephonic pre-hearing conference. Rule 10304 of that Code provides that no claim is eligible for arbitration if six years have elapsed from date of the occurrence or event giving rise to the dispute. Plaintiffs acknowledged their claims were barred by the 6-year limitation. Defendants moved in the arbitration proceeding to dismiss the arbitration based on the 6-year limitation period. Plaintiffs opposed that motion. A panel of three arbitrators conducted a telephonic pre-hearing conference in which the parties' attorneys, but not the parties themselves, participated. Based on that conference, and the pleadings, testimony, and evidence presented at that conference, the arbitrators issued an award granting the motion to dismiss the claim with prejudice. Defendants petitioned to confirm the award. Plaintiffs petitioned to vacate it, in part on the ground the that by deciding the matter based solely on the parties' pleadings and documentary evidence, and without a formal arbitration hearing, the arbitrators exceeded their powers. The trial court confirmed the award. Plaintiffs appealed.

The court of appeal affirmed (*106 Cal. App. 4th 1359, 1373)* . NASD Code of Arbitration Procedure, Rule 10321 provides that, at the request of a party or an arbitrator, a telephonic pre-hearing conference must be convened to give the parties an opportunity to exchange documents, information, witness lists, etc., and to address "any other matters which will expedite the arbitration proceedings." Rulings on issues raised in the course of the pre-hearing conference may be issued by one or more members of the arbitration panel, and "shall be made upon the papers submitted by the parties,

unless the arbitrator calls a hearing" (*106 Cal. App. 4th 1359, 1366-1367)* The court considered NASD Arbitrators' Training Manual, which provided that any party could file a dispositive motion--that is, a motion to dismiss all or part of a claim--prior to hearing (*106 Cal. App. 4th 1359, 1367)* . The court was not swayed by the failure of the NASD's Code to make explicit provision for the (pre-arbitration hearing) motion at issue here. The lack of explicit authorization does not mean dispositive motions are precluded. Implicit in the arbitrators' express power to deem a claim ineligible for arbitration is the corresponding authority to make that determination in advance of and without the necessity for a full hearing on the merits (*106 Cal. App. 4th 1359, 1368)* . In both their initial agreement to arbitrate and in the uniform submission agreements plaintiffs signed at the time they instituted the arbitration proceedings, they declared their familiarity with and their agreement to be bound by NASD's arbitration procedures (*106 Cal. App. 4th 1359, 1368-1369)* . The court concluded that was no merit to the plaintiffs' contention that, by disposing of their case at the pre-hearing stage, the arbitrators exceeded their authority and "employed a decision-making procedure to which [they] never agreed, and which is expressly prohibited by the arbitration agreement" (*106 Cal. App. 4th 1359, 1369)* .

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2-20C California Points & Authorities § 20C.107

§ 20C.107 Arbitrator Did Not Exceed Powers by Determining Second Dispute Under Same Agreement

[1] FORM

THE ARBITRATION AGREEMENT COULD BE INTERPRETED TO GIVE THE ARBITRATOR AUTHORITY TO DECIDE A SECOND DISPUTE ARISING UNDER IT.

A. Arbitrator Did Not Exceed Powers by Deciding Second Dispute. An arbitrator who issued an award in an initial dispute between the parties does not exceed his or her powers by hearing and deciding a second arbitration when the parties' agreement provided that all disputes of any nature arising from the agreement would be settled by one arbitrator _____ [*show how the second dispute is connected to the agreement or to the first dispute, e.g.,* the first award denied an accounting, without prejudice, and the second arbitration dealt with expenses and charges that would be considered in an accounting] (*Patchett v. Bergamot Station, Ltd. (2006) 143 Cal. App. 4th 1390, 1392, 1395-1398, 49 Cal. Rptr. 3d 941*).

[2] Comments

[a] Use of Form

This form may be used to support a motion to confirm or oppose a motion to vacate a second arbitration award by the same arbitrator when the arbitration agreement provided for a single arbitrator to determine all disputes under it. This form is not intended to be a complete memorandum but should be combined it with authority relating to the particular procedural context involved, such as a motion to confirm or vacate an award [*see, e.g.,* Forms §§ 20C.10, 20C.11]. Counsel may also want to include memoranda from § 20C.90[1] to establish that even if the arbitrator was mistaken in interpreting the agreement to empower him or her to decide the second arbitration, that mistake would amount only to an error of law, which would notprevent confirmation of the second award.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, the argument must

show the particular language in the arbitration agreement providing for a single arbitrator to determine all disputes thereunder. It is advisable for counsel to submit evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file (including verified pleadings), or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied if plaintiff-respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement)].

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notices* (Matthew Bender).

[c] Related Pleadings and Practice Chapters

For forms and discussion relating to confirming and vacating arbitration awards generally, see California Forms of Pleading and Practice, Ch. 34, *Contractual Arbitration: Judicial Review* (Matthew Bender).

[d] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Arbitrator Did Not Exceed Powers by Deciding Second Dispute

Patchett v. Bergamot Station, Ltd. *(2006) 143 Cal. App. 4th 1390, 49 Cal. Rptr. 3d 941* , arose from arbitration between former partners. Their first dispute was settled and memorialized by an agreement that allowed defendant to buy out plaintiff's interest in their galleries and allowed plaintiff to occupy a portion of the premises rent free, although he was responsible for paying common area maintenance charges. The settlement provided that disputes of any nature arising from the settlement, including the arbitrability of any claim, would be "settled by one arbitrator, who shall be a mutually-acceptable retired Judge of the California Superior or appellate courts." In February, 2001, plaintiff demanded arbitration of two issues relating to occupancy and maintenance charges. The parties agreed on Judge Thomas as the arbitrator. That arbitration ended with an award declaring plaintiff's right to hold special events on the property, but denying him monetary damages or an accounting of management charges on the ground of insufficient evidence. In July, 2001, plaintiff served a renewed demand for arbitration, seeking declaration regarding the components of maintenance charges he was obligated to pay. Defendant objected to the re-litigation of the matter and would not agree to Judge Thomas serving as the arbitrator in any new arbitration proceeding. Judge Thomas granted plaintiff's motion for renewed arbitration, and denied defendant's objection to his serving as the arbitrator, finding that the June 2001 award by its terms did not preclude a further determination of maintenance charges issues. Further, the original settlement agreement did not provide for a different arbitrator to hear each new issue. When defendant still resisted the second arbitration, plaintiff brought a petition to compel the second arbitration before Judge Robert W. Thomas, and a petition to confirm the first arbitration award. Both were granted by the trial court and defendant's petition to correct the first award to state the maintenance charges claim was denied with prejudice, and to confirm the award as corrected, was denied. Defendant applied to the court of appeal for a writ of prohibition or mandate to set aside that decision. Defendant appealed, and after more than a year, that appeal was dismissed pursuant to stipulation. The second arbitration resulted in a monetary award for plaintiff based on findings that he was being charged maintenance fees

beyond those charged other tenants. After that award was confirmed, defendant appealed.

The court of appeal affirmed (*143 Cal. App. 4th 1390, 1399)* . Although the court found the use of the term "renewed" unfortunate, that did not affect the underlying facts (*143 Cal. App. 4th 1390, 1395)* , which supported the arbitrator's authority to determine the second arbitration on both procedural and substantive grounds (*143 Cal. App. 4th 1390, 1396)* . Procedurally, the court of appeal declined to revisit the appeal, saying that had defendant wished to preserve its objections, it should have expressly delineated the basis for the requested dismissal. Not having done so, defendant was bound by the order authorizing the second arbitration, and Judge Thomas to hear it (*143 Cal. App. 4th 1390, 1396*). As a substantive matter, the arbitrator interpreted the settlement agreement to mean that the arbitrator mutually selected by the parties was to decide all claims. As a matter of law, the court of appeal could not say that the arbitrator's construction of the agreement was erroneous. While the arbitrator's interpretation of the arbitration clause did not, strictly speaking, address the question of arbitrability--which involves the arbitrator's authority over the subject matter of the dispute--it was substantively no different, as it necessarily concerned the individual arbitrator's jurisdiction over the dispute. An agreement that grants the arbitrator the power to decide any controversy "of whatever nature ... in relation to the interpretation" of the agreement, expressly including the jurisdictional issue o f arbitrability, logically and necessarily gives the arbitrator the power to interpret the agreement's provisions governing arbitral selection (*143 Cal. App. 4th 1390, 1397*). Defendant insisted that the language "shall be settled by one arbitrator, who shall be a mutually-acceptable retired Judge" did not mean that the parties would pick onearbitrator "for life," but merely that each dispute would be settled by one arbitrator rather than three, and that a new arbitrator (or further consent) was required for each new dispute. While the language of the arbitration clause may be susceptible to the meaning defendant urged, it is equally susceptible to the meaning given it by the arbitrator. Even if the interpretation of the agreement was not as defendant contended, an arbitrator does not exceed his powers because of errors of fact or law (*143 Cal. App. 4th 1390, 1398)* .

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2-20C California Points & Authorities § 20C.108

§ 20C.108 Arbitrator Does Not Exceed Powers by Excusing Futile Performance of a Condition

[1] FORM

THE AWARD SHOULD BE CONFIRMED BECAUSE THE ARBITRATOR DID NOT EXCEED _____ [HIS *or* HER] POWERS BY EXCUSING FUTILE PERFORMANCE OF A CONDITION

A. Arbitrator Has Inherent Power to Excuse Performance That Would Be Futile. Unless there is an explicit provision prohibiting excuse of conditions, an arbitrator has inherent power to excuse the performance of a condition that would be futile, for instance, giving notice of a breach that could not be cured. An arbitrator has the authority to find the facts, interpret the contract, and award any relief rationally related to his or her factual findings and contractual interpretation. This includes the authority to allow for equitable excusal of the notice-and-cure condition by making a factual finding that notice would have been an idle act (*Gueyffier v. Ann Summers, Ltd. (2008) 43 Cal. 4th 1179, -- Cal. Rpr. 3d --, 184 P.3d 739*).

[2] Comments

[a] Use of Form

This form of points and authorities may be used to support a petition or response seeking to confirm an arbitration award on the ground that the arbitrator had inherent power to excuse performance of a condition that would have been futile. This form is not intended to be a complete memorandum. Counsel should combine it with authority from § 20C.10 or § 20C.11.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, the argument must show that performance of the excused condition would have been futile and that the arbitration agreement did not explicitly prevent the arbitrator from excusing performance. It is advisable for counsel to submit evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file

(including verified pleadings), or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied if plaintiff-respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement)].

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Arbitrator Has Inherent Power to Excuse Performance That Would Be Futile

Gueyffier v. Ann Summers, Ltd*. (2008) 43 Cal. 4th 1179* ,--Cal. Rpr. 3d--, *184 P.3d 739* , involved a dispute under a franchise agreement and a failed attempted store opening. Each party claimed that the other had breached their agreement. As the contract required, the matter was arbitrated, and the arbitrator found for Gueyffier (plaintiff/franchisee), concluding that defendant had failed to provide promised training, guidance and assistance. In the written award, the arbitrator found that for plaintiff to have given defendant written notice and at least 60 days to cure these breaches, as the contract provided, would have been an idle act because the breaches were not curable. The superior court confirmed the award but the court of appeal revered, finding the arbitrator had violated the contract's express prohibition against an arbitrator modifying or changing a material term of the contract, thereby exceeding his powers within the meaning of *Code Civ. Proc. § 1286.2(a)(4)* by excusing plaintiff's performance of the notice-and-cure clause. Plaintiff petitioned for review and the Supreme Court granted it.

The Supreme Court reversed, finding that absent an express and unambiguous limitation in the contract or the submission to arbitration, an arbitrator has the authority to find the facts, interpret the contract, and award any relief rationally related to his or her factual findings and contractual interpretation (*43 Cal. 4th 1179, 1182, 1188-1189)* . All the arbitrator did here was to allow for equitable excusal of the notice-and-cure condition or by making a factual finding that notice would have been an idle act. The award therefore was not subject to vacation (*43 Cal. 4th 1179, 1182*). An arbitration agreement ordinarily contemplates that the arbitrator will have the power to decide any question of contract interpretation, historical fact or general law necessary, in the arbitrator's understanding of the case, to reach a decision. That includes the possibility the arbitrator may err in deciding some aspect of the case. Arbitrators do not ordinarily exceed their contractually created powers simply by reaching an erroneous conclusion on a contested issue of law or fact, and arbitralawards (*43 Cal. 4th 1179, 1184)* . Defendant and the court of appeal claimed that the parties did effectively limit the arbitrator's powers by stating in the agreement that an arbitrator would have no power to modify or change any material term of the contract, which included the notice-and-cure provision. The Supreme Court disagreed, saying that the agreement did not unambiguously prohibit the arbitrator from *excusing performance* of a contractual condition when the arbitrator concluded performance would have been an idle act. To excuse performance of a contract term in a specific factual setting is not, in ordinary usage at least, to modify or change the term (*43 Cal. 4th 1179, 1185)* . The no-modification clause did not explicitly and unambiguously bar the arbitrator from deciding that the

notice-and-cure provision was *inapplicable* on the facts of the case as he found them. The no-modification clause could perhaps be *interpreted* as also precluding equitable excusal of a condition, but the arbitrator evidently did not adopt such an interpretation. As construction of the contract was for the arbitrator, not the courts, we cannot say he exceeded his powers by failing to adopt a particular interpretation of the agreement (*43 Cal. 4th 1179, 1186*). The Court discussed other cases relied on by the parties and concluded that arbitrator did not exceed his powers by declining, on equitable grounds, to enforce the notice-and-cure condition against plaintiff (*43 Cal. 4th 1179, 1187-1188)* . Thus, there was no reason to vacate the award (*43 Cal. 4th 1179, 1188*).

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2-20C California Points & Authorities § 20C.109

[Reserved]

§ 20C.109[Reserved]

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2-20C California Points & Authorities § 20C.110

§ 20C.110 Agreement Authorizes Award of Attorney's Fees to Prevailing Party

[1] FORM

THE AWARD OF ATTORNEY'S FEES SHOULD BE CONFIRMED BECAUSE THE AGREEMENT PROVIDED AUTHORITY FOR THE ARBITRATOR TO AWARD THEM TO THE PREVAILING PARTY.

A. Agreement Authorizes Award of Attorney's Fees to Prevailing Party. An agreement that authorizes an award of attorney's fees to the prevailing party in any action related to the contract or in the event that a party is required to bring suit on the contract is broad enough to authorize an award of attorney's fees and costs to the prevailing party in an arbitration (*Tate v. Saratoga Savings & Loan Assn. (1989) 216 Cal. App. 3d 843, 856-857, 265 Cal. Rptr. 440* ; *Taranow v. Brokstein (1982) 135 Cal. App. 3d 662, 665-666, 185 Cal. Rptr. 532*).

[*Optional*] **B. Court Has No Authority to Modify Arbitrator's Decision Regarding Which Party Prevailed.** A trial court does not have authority to reverse or modify the arbitrator's prevailing party finding, [or to strike an award of attorney's fees to that party], which constitutes a ruling on an issue the arbitrator was authorized to decide. When the contract gives the arbitrator the power to award attorney's fees, the arbitrator does not exceed his or her powers by awarding attorney's fees if that award is based on a reasonable interpretation of the contract involved and evidence submitted at the arbitration hearing (*Kahn v. Chetcuti (2002) 101 Cal. App. 4th 61, 67-68, 123 Cal. Rptr. 2d 606* ; *Delaney v. Dahl (2002) 99 Cal. App. 4th 647, 655-657, 121 Cal. Rptr. 2d 663* ; *Pierotti v. Torian (2000) 81 Cal. App. 4th 17, 24-26, 96 Cal. Rptr. 2d 553* ; *Creative Plastering, Inc. v. Hedley Builders, Inc. (1993) 19 Cal. App. 4th 1662, 1666, 24 Cal. Rptr. 2d 216*).

[*Optional*] **C. Stipulation to Arbitrate Injured Worker's Claim Authorizes Award of Statutory Attorney's Fees.** When parties to an action arising out of a worker's injury which allegedly occurred within the course and scope of his/her employment stipulate to arbitrate all issues of liability as well as damages, the employer has no workers' compensation insurance, and the employer's negligence is found to have been the cause of the employee's injury, the arbitrator has authority to award the employee his/her attorney's fees as provided in *Labor Code Section 3709* (*Caro v. Smith (1997) 59 Cal. App. 4th 725, 734-735, 69 Cal. Rptr. 2d 306*).

[*Optional*] **D. Arbitration Agreement Covering Damage Claims Under the Consumer Legal Remedies Act (*Civil Code Section 1750 et seq.*) Incorporates Provision for Award of Costs and Attorney's Fees.** When parties agree to resolve claims for damages under the Consumer Legal Remedies Act (*Civ. Code § 1750 et seq.*) through arbitration, it is reasonable to infer that they have consented to abide by the substantive and remedial provisions of the CLRA, including *Civil Code Section 1780(d)*, which mandates an award of costs and attorney's fees for a prevailing plaintiff (*Broughton v. Cigna Healthplans of California (1999) 21 Cal. 4th 1066, 1086-1087, 90 Cal. Rptr. 2d 334, 988 P.2d 67*).

[2] Comments

[a] Use of Form

This form may be used with a memorandum in support of a petition or response seeking to have an arbitration award confirmed to assert that the arbitrator's award of attorney's fees and costs to the prevailing party was not in excess of the arbitrator's powers, but was authorized by the parties' agreement or by a statute within the scope of that agreement, and should be confirmed. If counsel uses optional Paragraph B, counsel may wish to include the memorandum from § 20C.55, which, although they arose from situations in which no attorney's fees were awarded, are California Supreme Court cases holding that an arbitrator's determination of the prevailing party cannot be reviewed by a court.

Optional Paragraph C is for use only in an arbitration of an injured worker's claim against an employer who did not have workers' compensation insurance [*see Lab. Code § 3709*].

Optional Paragraph D is for use when the claim which was arbitrated was a claim for damages under the Consumer Legal Remedies Act (*Civ. Code § 1750 et seq.*).

This form does not provide a complete memorandum but should be combined with the memorandum supporting the petition [*see § 20C.10*] or response [*see § 20C.11*] seeking to have the award confirmed.

As a tactical matter, counsel may wish to reserve these points for oral argument or for other form of rejoinder to the respondent's opposing memorandum. In deciding whether or not to reserve these arguments, counsel should consider local court rules and practice, as well as whether the moving party would be expected to be raise thesepoints in initial moving papers, to avoid the possibility of losing the opportunity to raise them.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should indicate the precise language in the agreement or statute providing for an award of attorney's fees and costs to the prevailing party. Generally, it will be appropriate to attach a copy of the award [*see Shepherd v. Greene (1986) 185 Cal. App. 3d 989, 994, 230 Cal. Rptr. 233* (*discussed under § 20C.12[3][a]*)].

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to

establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For memoranda to combine with this form, see *§§ 20C.10*, *20C.11*, and *20C.55*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Agreement Authorizes Award of Attorney's Fees to Prevailing Party

The facts and procedural background of ***Tate v. Saratoga Savings & Loan Assn.*** *(1989) 216 Cal. App. 3d 843, 265 Cal. Rptr. 440* , are discussed in *§ 20C.80[3][c]*. The trial court's judgment confirming the awards also awarded costs and attorney's fees to each of the individual venturers. The association appealed, contending the awards of attorney's fees and costs were unauthorized.

In affirming, the court of appeal quoted from the arbitration agreement, which provided that "if any action at law or in equity, including an action for declaration [sic] relief, is brought to enforce or interpret the provisions of this Agreement, the prevailing party shall be entitled to reasonable attorney's fees which may be set by the court in the same action, or in a separate action brought for that purpose, in addition to other relief to which the prevailing party may be entitled." Absent a contrary agreement between the parties, *Code Civ. Proc. § 1284.2* provides that each party to the arbitration pay his or her pro rata share of the expenses and fees of the neutral arbitrator or other expenses incurred by the party for his or her own benefit (*216 Cal. App. 3d 843, 856)* . A contract provision for recovery of attorney's fees if a party is required to bring suit is broad enough to include fees arising in arbitration (*216 Cal. App. 3d 843, 856-857)* . If any dispute under the contract must be submitted to arbitration, any other result would make the attorney's fee provision in the contract meaningless (*216 Cal. App. 3d 843, 857)* . The association also contended that both the costs and attorney's fee awards were premature because a party has not prevailed until all appellate remedies are exhausted. While that may be true as a practical matter, neither the arbitrators nor the trial court erred in regarding the individual venturers as the prevailing party at each level of the proceeding (*216 Cal. App. 3d 843, 857)* .

Taranow v. Brokstein *(1982) 135 Cal. App. 3d 662, 185 Cal. Rptr. 532* , involved arbitration under a partnership agreement that provided in part, "Should any partner be forced to bring suit to enforce the terms of this partnership agreement, the prevailing partner shall be awarded his or her costs of suit incurred therein and his or her reasonable attorney's fees. ... In the event of a controversy or claim arising out of this agreement which cannot be settled by the partners or their legal representatives, it shall be settled by arbitration in accordance with the rules of the American Arbitration Association and judgment on the award may be entered by any court having jurisdiction." The award, which was confirmed, required the defendant to pay the plaintiff $14,600. Both parties agreed that the award included attorney's fees of an undetermined amount. Defendant appealed, claiming the award of attorney's fees was in excess of the arbitrator's jurisdiction.

The court of appeal affirmed. The court considered various legal texts and dictionaries and cases from other jurisdiction that said that the term "suit" is broader than the term "action" in that "action" may refer only to actions at law, but "suit" includes any civil legal proceeding brought by one person against another, and includes actions at law and in equity (*135 Cal. App. 3d 662, 665-666*). New York cases specifically held that the term "suit" embraces arbitration proceedings

(*135 Cal. App. 3d 662, 666)* . Relying on *Civ. Code §§ 1641* and *1643,* the court also noted that the attorney's fee provision would be rendered meaningless if any other interpretation were given to the term "suit." Every controversy or claim arising out of the agreement was required to be settled by arbitration. If "suit" did not include arbitration proceedings, attorney's fees could never be awarded under the contract provision (*135 Cal. App. 3d 662, 667)* .

[b] Court Has No Authority to Modify Arbitrator's Decision Regarding Which Party Prevailed

Kahn v. Chetcuti *(2002) 101 Cal. App. 4th 61, 123 Cal. Rptr. 2d 606* arose under a contract for the sale of real property which required any disputes arising under that agreement to be mediated, and if that was unsuccessful, to be submitted to binding arbitration. The agreement also provided that the prevailing party in any arbitration or other legal proceedings was entitled to reasonable attorney fees, except that attorney's fees were not to be awarded to a party whom the arbitrator determined resisted mediation. Respondents filed a complaint prior to mediation because their statute of limitations was about to run and appellants would not agree to waive it. They never intended to pursue the litigation, and never served the complaint. The mediation wasunsuccessful and the parties proceeded to arbitration. Appellant purchaser was unsuccessful in the arbitration. The award granted respondents their attorney's fees. Appellant appealed, contending that the arbitrator exceeded his powers in awarding attorney fees and costs to respondents.

The court of appeal affirmed. The pivotal question, the court of appeal said, is whether an arbitrator exceeds his or her powers when the arbitrator has the authority to rule on a particular issue under the terms of the controlling arbitration agreement (*101 Cal. App. 4th 61, 65)* . Clearly the agreement authorized attorney's fees to the prevailing party, but respondent argued attorney's fees could not be awarded under the facts of the case. One dispute or claim the arbitrator was authorized to decide under the language of the agreement was whether respondents had in fact attempted a court action before attempting to mediate. The arbitrator's granting costs and attorney's fees indicated he had impliedly concluded respondents had not attempted court action before mediating (*101 Cal. App. 4th 61, 66)* . An arbitrator's decision on an issue that has been submitted to arbitration is not subject to judicial review. Thus, the court could not review the validity of the arbitrator's reasoning, the sufficiency of the evidence supporting the award, or any errors of fact or law that may be included in the award (*101 Cal. App. 4th 61, 67)* . Nevertheless, the court of appeal said that from the evidence before the arbitrator, he could reasonably conclude that respondents did not, in any real sense, attempt a court action before mediating (*101 Cal. App. 4th 61, 67-68)* .

The facts and procedural background of ***Delaney v. Dahl*** *(2002) 99 Cal. App. 4th 647, 121 Cal. Rptr. 2d 663* are discussed in *Ch. 20A, Arbitration: Resisting, § 20A.03[3][a]*. The retainer agreement under which the primary action was litigated and the supplemental retainer agreement signed when the firm undertook to represent the two principals were interlineated to show that Delaney and the other principal would have no liability for attorney's fees in the primary action. No changes where made to the clause that provided "[i]n the event attorney's fees and related costs are incurred to enforce this agreement or to resolve a dispute under this agreement, the prevailing party shall be entitled to recover, in addition to damages allowed by law, reasonable attorney's fees and costs." The arbitrator awarded the law firm their attorney's fees and costs in the arbitration and awarded those costs again the corporations and Delaney. After Delaney was unsuccessful in his attempt to have the award vacated, he appealed from the resulting judgment, contending, among other things, that the arbitrator had exceeded his powers in finding him liable for the prevailing parties' attorney's fees and costs of the arbitration.

The court of appeal affirmed. The court noted that judicial intervention and review of an arbitration award are to be minimized, and that under *Advanced Micro Devices, Inc. v. Intel Corp. (1994) 9 Cal. 4th 362, 381, 36 Cal. Rptr. 2d 581, 885 P.2d 994* an arbitration award must be upheld if it bears a rational relationship to the arbitration contract (*99 Cal. App. 4th 647, 655)* . Here, the arbitrator interpreted the retainer agreements to provide for an award of attorney's fees against Delaney for fees incurred in the arbitration proceeding (*99 Cal. App. 4th 647, 655-656)* . The arbitrator considered Delaney's handwritten changes to the supplemental retainer agreement. The retainer agreement and the supplemental retainer agreement made numerous references to attorney's fees, both in connection with the primary litigation and any later arbitrable dispute between the law firm and its clients. The issue in this case was whether certain

language applied to Delaney. The arbitrator interpreted the contract on this issue. The award did not exceed the arbitrator's powers as conferred by the retainer agreement, but interpreted the agreement. Contractual interpretation is precisely the type of decision by an arbitrator to which courts must defer. The arbitrator decided the question of whether under the contract Delaney owed attorney's fees for the arbitration, as distinguished from fees owed for litigation the primary action (*99 Cal. App. 4th 647, 656)* . Based on his interpretation of the arbitration agreement and all the evidence, the arbitrator made a decision regarding the award of attorney's fees incurred in the arbitration. That award is entitled to deference by the court and could not be vacated (*99 Cal. App. 4th 647, 657)* .

The facts and procedural background of ***Pierotti v. Torian*** *(2000) 81 Cal. App. 4th 17, 96 Cal. Rptr. 2d 553* , are discussed at *§ 20C.10[3][d]*. In upholding the award of attorney's fees, the court of appeal sanctioned defendant and its attorneys for engaging in a frivolous appeal with respect to those fees (*81 Cal. App. 4th 17, 37)* . The court characterized defendant's claim that the arbitrator erred by finding plaintiff was the prevailing party under the partnership agreement's attorney fees clause as an attack on the "arbitrator's reasoning" or, at best, an assertion of "an error of law apparent on the face of the award," and disagreed with defendant's attempt to characterize the award as in excess of the arbitrator's powers. There was no question that the arbitrator had the power to award attorney fees; the partnership agreement which contained the arbitration clause expressly granted that power (*81 Cal. App. 4th 17, 24)* . Nor was there any evidence that the award of attorney's fees was an unauthorized remedy or that the arbitrator decided an unsubmitted issue (*81 Cal. App. 4th 17, 25)* . The only question was whether the arbitrator exercised the power to award attorney's fees correctly. The court cited *Creative Plastering, Inc. v. Hedley Builders, Inc. (1993) 19 Cal. App. 4th 1662, 1666, 24 Cal. Rptr. 2d 216* , discussed *below*, for the proposition that a court lacks the authority to reverse or modify the arbitrator's prevailing party finding, which constitutes a ruling on an issue the arbitrator was authorized to decide (*81 Cal. App. 4th 17, 24)* . Arbitrators do not exceed their authority because they erroneously decide a contested issue of law or fact. The court also noted that while this case was pending, the California Supreme Court decided closely related issues in *Moshonov v. Walsh (2000) 22 Cal. 4th 771, 94 Cal. Rptr. 2d 597, 996 P.2d 699* and *Moore v. Bank of San Luis Obispo (2000) 22 Cal. 4th 782, 94 Cal. Rptr. 2d 603, 996 P.2d 706* , both discussed at *§ 20C.55[3][a], above* (*81 Cal. App. 4th 17, 25)* . Although both *Moshonov* and *Moore* deal with the denial of attorney's fees, they make clear that when the issue of entitlement of a party to attorney fees is within the scope of the issues submitted for binding arbitration, arbitrators do not exceed their powers by making an error with respect to a party's request for fees, even if the finding would be reversible legal error if made by a court in civil litigation. The court went on to distinguish *Thompson v. Jespersen (1990) 222 Cal. App. 3d 964, 272 Cal. Rptr. 132* , discussed at *§ 20C.31[3][a]*, in which the underlying agreement did not authorizeattorney's fees, and concluded that who is the prevailing party is a mixed question of law and fact and a court simply has no power to review an arbitrator's decision on that issue (*81 Cal. App. 4th 17, 26)* .

Creative Plastering, Inc. v. Hedley Builders, Inc. *(1993) 19 Cal. App. 4th 1662, 24 Cal. Rptr. 2d 216* , was a dispute between a subcontractor (plaintiff) and a contractor over sums owed. Contractor stipulated that it owed $13,099.60 under the contract but contended it was entitled to $22,176 delay damages. Subcontractor claimed the delay was due to weather and should not subject it to liability. The agreement provided for arbitration of "all matters in question arising out of or relating to, the subcontract" as well as for attorney's fees and costs for the prevailing party. The arbitrator found for subcontractor in the amount of $11,251 under the contract, with $1,549 interest, and also awarded the subcontractor $11,178 in attorney's fees. Contractor filed a petition to vacate the award, or in the alternative to strike the attorney's fees because it claimed subcontractor was not the prevailing party. The trial court refused to vacate the entire award but did strike the attorney's fees, ruling that the subcontractor was not the prevailing party because it recovered less than the amount stipulated to be owing (forgetting apparently that subcontractor prevailed on the delay claim). Subcontractor appealed.

The court of appeal reversed the striking of attorney's fees, but affirmed the judgment in other respects. Contractor claimed that the arbitrator exceeded his powers because subcontractor was not legally the prevailing party. The court of appeal disagreed, saying that the trial court had no authority to reverse or modify the arbitrator's prevailing party finding, which constitutes a ruling on an issue the arbitrator was authorized to decide. Even if the decision as to the

prevailing party constituted or was generated by the arbitrator's error of fact or law, it binds the parties and is immune from judicial interference (*19 Cal. App. 4th 1662, 1666)* .

[c] Stipulation to Arbitrate Injured Worker's Claim Authorizes Award of Statutory Attorney's Fees

Plaintiff in ***Caro v. Smith*** *(1997) 59 Cal. App. 4th 725, 69 Cal. Rptr. 2d 306* , worked for defendant performing secretarial and other duties, including holding a horse while it received acupuncture treatment. The horse bolted and seriously injured plaintiff. Defendant had no workers' compensation insurance. Plaintiff sued in tort; and shortly after the mandatory settlement conference, the parties stipulated to binding arbitration (contractual, not judicial) of "all issues of liability, as well as damages." The arbitrator found that plaintiff was acting within the course and scope of her employment when she was injured and that her injuries were caused by defendant's negligence [*see Lab. Code § 3708* (presumption of employer's negligence)]. The arbitrator awarded plaintiff $331,111 in compensatory damages and $59,500 in statutory attorney's fees as provided in *Lab. Code § 3709*. Plaintiff then dismissed the lawsuit and petitioned to have the award confirmed. Defendant's attorneys opposed confirmation on the ground that defendant had not signed the stipulation. The trial court found defendant knew that the stipulation was binding, confirmed the award, and entered judgment thereon in the amount of $390,611. Following entry of judgment, the court also awarded plaintiff $73,431 in prejudgment interest based on her recovery of a more favorable judgment than her pretrial statutory offer [*see Code Civ. Proc. § 998*; *Civ. Code § 3291*] and $2,234 in other costs. Defendant appealed, challenging both the enforceability of the stipulation and the award of attorney's fees. In a separate appeal, both parties challenged the post-judgment order.

The court of appeal affirmed as to both appeals. The court of appeal found the stipulation to be binding (*59 Cal. App. 4th 725, 732)* . As to the award of attorney's fees, defendant contended the arbitrator exceeded his authority under the stipulation. The court of appeal noted the broad language of the stipulation and said the arbitrator quite reasonably concluded that the stipulation included plaintiff's entitlement to attorney's fees under *Lab. Code § 3709*. There was nothing in the stipulation that specifically restricted the arbitrator from awarding statutory attorney's fees as damages. The court said it was the Legislature, not the arbitrator, that adopted a positive statutory provision mandating attorney's fees for employees not covered by workers' compensation insurance. A reasonable interpretation of the scope of an agreement to arbitrate an employee's tort claim against an employer would include statutory attorney's fees contemplated by the Labor Code (*59 Cal. App. 4th 725, 734-735)* .

[d] Arbitration Agreement Covering Damage Claims Under the Consumer Legal Remedies Act (Civil Code Section 1750 et seq.) Incorporates Provision for Award of Costs and Attorney's Fees

Civ. Code § 1780(d) provides that the court shall award court costs and attorney's fees to a prevailing plaintiff in litigation filed pursuant to that section and that reasonable attorney's fees may be awarded to a prevailing defendant on a finding by the court that the plaintiff's prosecution of the action was not in good faith.

The facts and procedural background of ***Broughton v. Cigna Healthplans of California*** *(1999) 21 Cal. 4th 1066, 90 Cal. Rptr. 2d 334, 988 P.2d 67* , and the portion of the opinion discussing the arbitrability of damage claims under the Consumer Legal Remedies Act (*Civ. Code § 1750 et seq.*) are discussed at *Ch. 20, Arbitration: Compelling, § 20.22[3][f]*. The portion of the opinion addressing the nonarbitrability of CLRA claims for injunction is discussed in *Ch. 20A, Arbitration: Resisting, § 20A.43[3][a]*.

One of plaintiffs' objections to arbitration of any of the CLRA claims was that arbitration costs and attorneys fees mandated for a prevailing plaintiff by *Civ. Code § 1780(d)* would not be available in arbitration, thus depriving them of an important remedy provided under the CLRA. This argument relied on the fact that *Code Civ. Proc. § 1284.2* provides that "each party to the arbitration shall pay his pro rata share of the expenses and fees of the neutral arbitrator" and bear his own attorneys fees unless "the arbitration agreement otherwise provides." The Court agreed that the availability of costs and attorneys fees to prevailing plaintiffs is integral to making the CLRA an effective piece of consumer legislation, increasing the financial feasibility of bringing suits under the statute. Following the rule which

requires that potentially conflicting statutes be harmonized if reasonably possible, the Court reasoned that any potential conflict between the California Arbitration Act and the CLRA was easily resolved by viewing *Code Civ. Proc. § 1284.2* as a default provision and not operativewhen the parties agree to resolve statutory claims through arbitration. The reasonable inference when parties agree to arbitrate statutory claims is that they consent to abide by the substantive and remedial provisions of the statute. Thus, *Code Civ. Proc. § 1284.2* gives way to the remedial provisions of the CLRA when parties have agreed to arbitrate claims under that statute and presents no barrier to the enforcement of an arbitration agreement governing a CLRA claim (*21 Cal. 4th 1066, 1086-1087)* .

[4] Additional Authorities

[a] Agreement Authorized Award of Attorney's Fees to Prevailing Party

In *Severtson v. Williams Construction Co. (1985) 173 Cal. App. 3d 86, 220 Cal. Rptr. 400* , the court of appeal affirmed a judgment based on an award that included attorney's fees and costs. The construction contract in the case provided that "in the event Contractor shall employ an attorney or bring suit ... Contractor shall be entitled to reasonable attorney's fees and expenses of litigation." The court of appeal noted that *Civ. Code § 1717* makes that clause mutual. The court said that while some attorney's fees clauses may be inapplicable to the arbitration process, the use of the term "suit" in the contract was broad enough to embrace arbitration. Thus, attorney's fees and costs were properly awarded by the arbitrator (*173 Cal. App. 3d 86, 95)* .

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2-20C California Points & Authorities § 20C.111

§ 20C.111 Private Arbitration Rules Applied by Agreement Allocate Costs

[1] FORM

THE AWARD OF COSTS SHOULD BE CONFIRMED BECAUSE THE ARBITRATOR ALLOCATED COSTS IN ACCORDANCE WITH THE APPLICABLE ARBITRATION RULES.

A. Arbitration Rules Made Applicable by Agreement Allocate Costs. An arbitration agreement or agreement between parties to an arbitration agreement may allocate arbitration costs between the parties (*Code Civ. Proc. § 1284.2*). If that agreement applies private arbitration rules to the arbitration, the provisions of the rules allocating costs govern (*Gravillis v. Coldwell Banker Residential Brokerage Co. (2010) 182 Cal. App. 4th 503, 520, 106 Cal. Rptr. 3d 70*).

[*Optional*] **B. Applicable Private Arbitration Rules Allocate Costs Equally** _____ [*cite to provision of the applicable private arbitration rules*] of the applicable private arbitration rules, _____ [*insert name of rules*], provide that costs shall be shared equally, and given that the award allocated costs accordingly, the award should be confirmed (*Gravillis v. Coldwell Banker Residential Brokerage Co. (2010) 182 Cal. App. 4th 503, 520, 106 Cal. Rptr. 3d 70*).

[2] Comments

[a] Use of Form

This form may be used with a memorandum in support of a petition or response seeking to have an arbitration award confirmed to assert that the arbitrator's award of attorney's fees and costs to the prevailing party was not in excess of the arbitrator's powers, but was authorized by the parties' agreement, was undertaken in accordance with the agreement, and should be confirmed. Optional Paragraph B is for use when the rules made applicable by the agreement call for allocating costs equally.

This form does not provide a complete memorandum but should be combined with the memorandum supporting the

petition [*see § 20C.10*] or response [*see § 20C.11*] seeking to have the award confirmed.

As a tactical matter, counsel may wish to reserve these points for oral argument or for other form of rejoinder to the respondent's opposing memorandum. In deciding whether or not to reserve these arguments, counsel should consider local court rules and practice, as well as whether the moving party would be expected to be raise these points in initial moving papers, to avoid the possibility of losing the opportunity to raise them.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should indicate the precise language in the agreement providing for an award of attorney's fees and costs to the prevailing party. Generally, it will be appropriate to attach a copy of the award [*see Shepherd v. Greene (1986) 185 Cal. App. 3d 989, 994, 230 Cal. Rptr. 233* (*discussed under § 20C.12[3][a]*)].

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For memoranda to combine with this form, see *§§ 20C.10, 20C.11*, and *20C.55*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Arbitration Rules Made Applicable by Agreement Allocate Costs

In ***Gravillis v. Coldwell Banker Residential Brokerage Co.*** *(2010) 182 Cal. App. 4th 503, 520, 106 Cal. Rptr. 3d 70* , the trial court and the court of appeal confirmed the arbitration award allocating costs equally. The portion of the opinion dealing with the extent of judicial review of error of law in the award is discussed in *§ 20C.90[3][a], above*. The agreement provided that the arbitration rules of ADR Services, Inc., which contained rules for allocating costs, applied to arbitration of disputes arising from the agreement. The court of appeal noted that an arbitration agreement or agreement between parties to an arbitration agreement may allocate arbitration costs between the parties under *Code Civ. Proc. § 1284.2*. Accordingly, the court affirmed the trial court's ruling that the allocation of costs between the parties was to be determined under the cost allocation provisions of the rules of ADR Services, Inc. *(182 Cal. App. 4th 503, 520)* . The portion of the opinion dealing with the equal allocation of costs is discussed in *§ 20C.111[3][b], below*.

[b] Applicable Rules Allocate Costs Equally

The court of appeal ruled that the trial court correctly allocated arbitration costs between the parties in ***Gravillis v. Coldwell Banker Residential Brokerage Co.*** *(2010) 182 Cal. App. 4th 503, 520, 106 Cal. Rptr. 3d 70* . The portion of the opinion dealing with the extent of judicial review of error of law in the award is discussed in *§ 20C.90[3][a], above*. The portion of the opinion dealing with the application of cost allocation rules in private arbitration rules is discussed in *§ 20C.111[3][a], above*. After ruling that the trial court correctly viewed the cost allocation rules of the applicable priviate arbitration rules, namely, the rules of ADR Services, Inc. as governing the allocation of costs, the court of appeal determined that the ADR Services rules required equal allocation of costs and that the trial court correctly confirmed the award of costs calculated on that basis (*182 Cal. App. 4th 503, 520)* .

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[Reserved]

§§ 20C.112[Reserved]

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2-20C California Points & Authorities § 20C.120

§ 20C.120 Punitive Damages in Medical Malpractice Arbitration

[1] FORM

THE AWARD SHOULD BE CONFIRMED BECAUSE THE ARBITRATOR HAS THE AUTHORITY UNDER THE ARBITRATION AGREEMENT TO AWARD PUNITIVE DAMAGES.

A. Language of Agreement in Medical Services Contract Is Susceptible to Interpretation to Include Claims or Issues Relating to Punitive Damages. An agreement providing for arbitration of "any" issue of medical malpractice under the language of *Code of Civil Procedure Section 1295(a)* and *(b)* may authorize an arbitrator to award punitive damages in arbitration of a medical malpractice claim if the language of the agreement is susceptible to interpretation to include claims or issues relating to punitive damages (*Baker v. Sadick (1984) 162 Cal. App. 3d 618, 626, 208 Cal. Rptr. 676*).

[*Optional*] **B. Limitations on Recovery of Noneconomic Losses in Medical Malpractice Action Do Not Preclude Award of Punitive Damages Based on Fraud, Willful Neglect, and Malicious Acts.** *Civil Code Section 3333.2*, limiting recovery to $250,000 for noneconomic losses in actions against health care providers based on professional negligence, does not preclude an arbitration award of punitive damages when the patient's claim is based on fraud, willful neglect, and malicious acts (*Baker v. Sadick (1984) 162 Cal. App. 3d 618, 627, 208 Cal. Rptr. 676*).

[*Optional*] **C. Arbitrator May Base Decision on Justice and Equity.** When the terms of an arbitration agreement do not specify that the arbitrator must act in conformity with rules of law, the arbitrator may base his or her decision on broad principles of justice and equity, without regard to any limit imposed by *Civil Code Section 3333.2(b)*, and generally will be immune from judicial review (*Nogueiro v. Kaiser Foundation Hospitals (1988) 203 Cal. App. 3d 1192, 1194-1195, 250 Cal. Rptr. 478*).

[2] Comments

[a] Use of Form

This form may be used with a memorandum in support of a petition or response seeking to have an arbitration award confirmed when the claims were submitted for arbitration under an agreement with language as broad as that at *Code Civ. Proc. § 1295*, for example language providing for arbitration of "any dispute as to the professional negligence of a health care provider," to assert that the arbitrator had the authority under the particular agreement to award punitive damages.

This form does not provide a complete memorandum but should be combined with the memorandum supporting the petition [*see § 20C.10*] or response [*see § 20C.11*] seeking to have the award confirmed. Counsel may also wish to include the memorandum from § 20C.121, if the award of punitive damages might also be based on express authority in the arbitration agreement, or from § 20C.122, if the award might be based on the fact that punitive damages were contemplated by the type of claim to be arbitrated.

As a tactical matter, counsel may wish to reserve these points for oral argument or for other form of rejoinder to the respondent's opposing memorandum. In deciding whether or not to reserve these arguments, counsel should consider local court rules and practice, as well as whether the moving party would be expected to be raise these points in initial moving papers, to avoid the possibility of losing the opportunity to raise them.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should indicate the precise language in the agreement, as well as any relevant conduct of the parties, that demonstrates the parties' mutual intent. Generally, it will be appropriate to attach a copy of the award [*see Shepherd v. Greene (1986) 185 Cal. App. 3d 989, 994, 230 Cal. Rptr. 233* (*discussed under § 20C.12[3][a]*)].

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For memoranda to combine with this form, see *§§ 20C.10* and *20C.11*.

For memoranda to combine with this form, basing the award of punitive damages on express authority in the arbitration agreement, or on the fact that punitive damages were contemplated by the type of claim to be arbitrated, see *§§ 20C.121* and *20C.122*, respectively.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Language of Agreement in Medical Services Contract Is Susceptible to Interpretation to Include Claims or Issues Relating to Punitive Damages

Baker v. Sadick *(1984) 162 Cal. App. 3d 618, 208 Cal. Rptr. 676* , involved arbitration of a patient's medical malpractice claims against her physician, including claims based on negligence as well as on intentional tort principles. On plaintiff's petition for confirmation of the arbitration award, the trial court confirmed the award, including an award for punitive damages. Defendant physician appealed, contending the arbitration agreement did not authorize an award of punitive damages.

The court of appeal affirmed, holding that the arbitration agreement, providing for arbitration of "any" issue of medical malpractice under the language of *Code Civ. Proc. § 1295(a)* and *(b)*, and containing language identical to that found in those code sections, authorized the arbitration panel to award punitive damages because the language of the agreement was susceptible to interpretation to include claims or issues relating to punitive damages. The court construed the ambiguity concerning the agreement's coverage of claims based on intentional tort principles against the physician because the physician drafted the agreement, it was the physician who sought to limit the agreement to exclude punitive damages, the patient's claim rested on intentional tort principles, both patient and physician submitted the claim to arbitration, and the issues of liability for punitive damages were submitted to arbitration without objection by either party (*162 Cal. App. 3d 618, 626)* .

The court noted that even though a proceeding in arbitration has been held not to be an action for purposes of discovery, it does not follow that it is not an action for purposes of recovery of punitive damages under *Civ. Code § 3294*. That conclusion disregards the purpose of arbitration as a substitute for proceedings in court (*162 Cal. App. 3d 618, 628)* . Additionally, an award of punitive damages in arbitration of a medical malpractice claim required to be submitted to arbitration by an agreement containing clauses as broad as those contained in *Code Civ. Proc. § 1295(a)* and *(b)* does not divest the parties of their powers to control the scope of arbitration by the terms of their agreement (*162 Cal. App. 3d 618, 630)* .

[b] Limitations on Recovery of Noneconomic Losses in Medical Malpractice Action Do Not Preclude Award of Punitive Damages Based on Fraud, Willful Neglect, and Malicious Acts

The facts and procedural background of ***Baker v. Sadick*** *(1984) 162 Cal. App. 3d 618, 208 Cal. Rptr. 676* , are discussed at [a], *above*. The court of appeal held that *Civ. Code § 3333.2* (limiting recovery to $250,000 for noneconomic losses in actions against health care providers based on professional negligence) does not preclude an arbitration award of punitive damages when the patient's claim, as in the case at bar, is based on fraud, willful neglect, and malicious acts. Punitive damages that may be asserted in court may also be asserted under the arbitration clauses in *Code Civ. Proc. § 1295(a)* and *(b)* when the issue is submitted by the patient or with the consent of both parties (*162 Cal. App. 3d 618, 627)* .

[c] Arbitrator May Base Decision on Justice and Equity

In ***Nogueiro v. Kaiser Foundation Hospitals*** *(1988) 203 Cal. App. 3d 1192, 250 Cal. Rptr. 478* , a disputed medical malpractice claim was submitted to arbitration pursuant to a health plan agreement between the parties. The arbitrators determined that defendants were required to pay plaintiffs $40,000 in special damages and $310,000 in general damages. Defendants unsuccessfully sought to reduce the general damages to $250,000, the maximum sum allowable for noneconomic damages under *Civ. Code § 3333.2(b)*.

The court of appeal affirmed, holding that unless specifically required under the terms of an arbitration agreement to act in conformity with rules of law, arbitrators may base their decision on broad principles of justice and equity. As a

consequence, arbitration awards are generally immune from judicial review, even for an error of law. Even if the arbitrators' award in this case had resulted from an erroneous refusal to apply *Civ. Code § 3333.2*, the error of law did not invalidate the award (*203 Cal. App. 3d 1192, 1194-1196)* .

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2-20C California Points & Authorities § 20C.121

§ 20C.121 Punitive Damages Expressly Provided for By Agreement

[1] FORM

THE PUNITIVE DAMAGES AWARD SHOULD BE CONFIRMED BECAUSE THE PARTIES BY EXPRESS AGREEMENT CONFERRED AUTHORITY ON THE ARBITRATOR TO AWARD PUNITIVE DAMAGES.

[*EITHER*]

A. Parties' Pleadings and Conduct Indicate Agreement. When the parties'contractual arbitration provision neither expressly permits nor specifically prohibits punitive damages, the arbitrator has the authority to award punitive damages if the parties' pleadings and conduct clearly establish their mutual intent to arbitrate the entire case, including the claim for punitive damages (*Belko v. AVX Corp. (1988) 204 Cal. App. 3d 894, 907-908, 251 Cal. Rptr. 557*).

[*OR*]

A. Written Agreement. Punitive damages may be awarded if there is an express provision authorizing such relief in the arbitration agreement or pursuant to a stipulated submission order or its legal equivalent (*see Barnes v. Logan (9th Cir. 1997) 122 F.3d 820, 823-824* ; *Belko v. AVX Corp. (1988) 204 Cal. App. 3d 894, 900, 251 Cal. Rptr. 557*).

[2] Comments

[a] Use of Form

This form may be used with a memorandum in support of a petition or response seeking to have an arbitration award confirmed, when the award includes punitive damages and the parties, either by written agreement or by their conduct, have agreed to submit the issue of punitive damages to the arbitrator.

This form does not provide a complete memorandum but should be combined with the memorandum supporting the petition [*see § 20C.10*] or response [*see § 20C.11*] seeking to have the award confirmed. Counsel may also wish to include the memorandum from § 20C.120, if the award of punitive damages might also be based on interpretation of an agreement for medical services with language as broad as that in *Code Civ. Proc. § 1295(a)* and *(b)*, and from § 20C.122 if the award might be based on the fact that punitive damages were contemplated by the type of claim to be arbitrated.

As a tactical matter, counsel may wish to reserve these points for oral argument or for other form of rejoinder to the respondent's opposing memorandum. In deciding whether or not to reserve these arguments, counsel should consider local court rules and practice, as well as whether the moving party would be expected to be raise these points in initial moving papers, to avoid the possibility of losing the opportunity to raise them.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should indicate the precise language in the agreement, as well as any relevant conduct of the parties, that demonstrates the parties' mutual intent to submit the issue of punitive damages to the arbitrator. Generally, it will be appropriate to attach a copy of the award [*see Shepherd v. Greene (1986) 185 Cal. App. 3d 989, 994, 230 Cal. Rptr. 233* (*discussed under § 20C.12[3][a]*)].

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For memoranda to combine with this form, see *§§ 20C.10* and *20C.11*.

For memoranda to combine with this form, basing the award of punitive damages on an arbitration agreement for disputes regarding medical care with language as broad as that in *Code Civ. Proc. § 1295(a)* and *(b)*, or on the fact that punitive damages were contemplated by the type of claim to be arbitrated, see *§§ 20C.120* and *20C.122*, respectively.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Parties' Pleadings and Conduct Indicate Agreement

In ***Belko v. AVX Corp.*** *(1988) 204 Cal. App. 3d 894, 901, 905, 251 Cal. Rptr. 557* , plaintiff brought an action against his employer requesting compensatory and punitive damages for wrongful termination. The contract provided for the resolution by arbitration of all controversies and claims arising from the contract. The parties submitted briefs as to their positions on the issues the arbitrator was to resolve. Plaintiff's brief expressly sought punitive damages. Defendant's brief addressed the issue only on the merits, contending there was no intent or conduct sufficiently outrageous to merit punitive sanction. After receiving an adverse arbitration award, defendant requested that the court vacate the punitive damages award as exceeding the scope of the arbitrator's jurisdiction. The court confirmed the award in its entirety and defendant appealed.

The court of appeal affirmed, holding that, when the parties' contractual arbitration provision neither expressly permits nor specifically prohibits a punitive damages award, the parties can by express agreement confer jurisdiction on the arbitrator to make such an award (*204 Cal. App. 3d 894, 899, 901)* . Looking to out-of-state courtsand other jurisdictions for guidance, the court refused to follow the many decisions holding that an arbitrator may never award punitive damages. The better rule is simply that punitive damages should not be awarded absent an express provision authorizing such relief in the arbitration agreement or pursuant to a stipulated submission order or its legal equivalent (*204 Cal. App. 3d 894, 900-901)* . This view recognizes the disfavored character of punitive damages in arbitration contracts but allows the parties' express intent to govern (*204 Cal. App. 3d 894, 901-903)* . There is no countervailing public policy significant enough to restrict the right of contracting parties to vest agreed-upon arbitrators with the authority to consider and resolve claims for punitive damages (*204 Cal. App. 3d 894, 903-904)* . The court noted that an absolute prohibition is most inappropriate when both tort and contract claims arise from the same facts because separate adjudications would be a waste of court resources (*204 Cal. App. 3d 894, 905)* . Considering defendants' failure to reserve an exception for the punitive damages claim in its answer, defendants' choice to address the punitive damages claim on the merits in its arbitration brief, and defendant's failure to file a written challenge to the arbitrator's authority to address punitive damages until after receiving an adverse arbitration award, the court concluded that the pleadings, written trial briefs, and the parties' conduct clearly established their mutual intent to arbitrate the entire case, including the claim for punitive damages (*204 Cal. App. 3d 894, 907-908)* .

[b] Written Agreement

Barnes v. Logan *(9th Cir. 1997) 122 F.3d 820* , was an arbitration between investors and their brokers under an agreement that provided for application of Minnesota law. The award included punitive damages, expressly "pursuant to *Section 3294 of the California Civil Code* and pursuant to *Mastrobuono*" (discussed at *§ 20C.122[3][a]*). The award was confirmed. Defendants appealed, contending Minnesota law only allowed punitive damages in cases of personal injury.

The court of appeals affirmed. While agreeing that the award pursuant to California law was beyond the arbitrators' authority, the court found the error was harmless (*122 F.3d 820, 823, 824)* . There was a case from the Minnesota Supreme Court affirming an award of punitive damages in a case not involving personal injury. However, question before the court of appeal was not what the Minnesota law of punitive damages was, but whether the arbitrators acted in manifest disregard of Minnesota law in awarding punitive damages (*122 F.3d 820, 823)* . The court held they did not (*122 F.3d 820, 823-824)* .

The factual and procedural background of ***Belko v. AVX Corp.*** *(1988) 204 Cal. App. 3d 894, 251 Cal. Rptr. 557* , is discussed under [a], *above*. In holding that the parties' pleadings and conduct demonstrated an intent to arbitrate the issue of punitive damages, the court expressed the general rule that punitive damages cannot be awarded unless there is an express provision authorizing such relief in the arbitration agreement or pursuant to a stipulated submission order or its legal equivalent (*204 Cal. App. 3d 894, 900-901)* . The court declined to adopt a contrary rule, followed in other states, that prohibits arbitrators from awarding punitive damages, even if agreed on by the parties (*204 Cal. App. 3d 894, 902)* .

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2-20C California Points & Authorities § 20C.122

§ 20C.122 Punitive Damages Implied by Agreement With Subject Matter Likely to Give Rise to Claims for Punitive Damages

[1] FORM

THE PUNITIVE DAMAGE AWARD SHOULD BE CONFIRMED BECAUSE THE AGREEMENT WAS BROAD ENOUGH TO REQUIRE ARBITRATION OF CLAIMS GIVING RISE TO PUNITIVE DAMAGES.

A. Agreement Contemplated Arbitration of Claims Giving Rise to Punitive Damages. If the particular arbitration provision contemplates arbitration of claims giving rise to punitive damages, the arbitrators have authority to award punitive damages. An express agreement to allow punitive damages is not necessary to confer that authority (*Mastrobuono v. Shearson Lehman Hutton (1995) 514 U.S. 52, 59-63, 15 S. Ct. 1212, 131 L. Ed. 2d 76* ; *Tate v. Saratoga Savings & Loan Assn. (1989) 216 Cal. App. 3d 843, 854-856, 265 Cal. Rptr. 440*).

[2] Comments

[a] Use of Form

This form may be used with a memorandum in support of a petition or response seeking to have an arbitration award confirmed, when the award includes punitive damages and the parties' agreement contemplated arbitration of claims giving rise to punitive damages, to assert that this reflected the parties' intention to empower the arbitrator to award punitive damages.

This form does not provide a complete memorandum but should be combined with the memorandum supporting the petition [*see § 20C.10*] or response [*see § 20C.11*] seeking to have the award confirmed. Counsel may also wish to include the memorandum from § 20C.120, if the award of punitive damages might also be based on interpretation of an agreement for medical services with language as broad as that in *Code Civ. Proc. § 1295(a)* and *(b)*, or from § 20C.121, if the award of punitive damages might also be based on the fact that the arbitration agreement expressly authorized the arbitrators to award punitive damages.

As a tactical matter, counsel may wish to reserve these points for oral argument or for other form of rejoinder to the respondent's opposing memorandum. In deciding whether or not to reserve these arguments, counsel should consider local court rules and practice, as well as whether the moving party would be expected to be raise these points in initial moving papers, to avoid the possibility of losing the opportunity to raise them.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should indicate the precise language in the agreement that demonstrates the parties' mutual intent to submit the issue of punitive damages to the arbitrator. Generally, it will be appropriate to attach a copy of the award [*see Shepherd v. Greene (1986) 185 Cal. App. 3d 989, 994, 230 Cal. Rptr. 233* (*discussed under § 20C.12[3][a]*)].

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For memoranda to combine with this form, see *§§ 20C.10* and *20C.11*.

For memoranda to combine with this form, basing the award of punitive damages on an arbitration agreement for disputes regarding medical care with language as broad as that in *Code Civ. Proc. § 1295(a)* and *(b)*, or on the fact that the arbitration agreement expressly authorized the award of punitive damages, see *§§ 20C.120* and *§ 20C.121*, respectively.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Agreement Contemplated Arbitration of Claims Giving Rise to Punitive Damages

Mastrobuono v. Shearson Lehman Hutton, Inc. *(1995) 514 U.S. 52, 115 S. Ct. 1212, 131 L. Ed. 2d 76* , arose from an action in the United States District Court for the Northern District of Illinois by investors against their securities broker for mishandling of their account. In accordance with the parties' agreement providing for arbitration pursuant the rules of the National Association of Securities Dealers (NASD), a panel of three arbitrators heard the matter and awarded petitioners $159,327 in compensatory damages and $400,000 in punitive damages. Respondent paid the compensatory damage portion of the award, but moved to vacate the award of punitive damages. The District Court granted the motion, and the Court of Appeals for the Seventh Circuit affirmed. Both courts relied on the choice of law

paragraph in the parties' agreement, which specified that the contract be governed by New York law. A New York court of appeals case held that punitive damages can only be awarded by judicial tribunals, not by arbitrators. The United States Supreme Court granted certiorari to resolve a conflict between Courts of Appeals as to whether a contractual choice of law provision may preclude an arbitral award of punitive damages that would otherwise be proper (*131 L. Ed. 2d 76, 82-83)* .

The United States Supreme Court reversed. Although the agreement contained no express reference to claims for punitive damages, respondents claimed that the choice of law provision amounted to an express agreement that punitive damages not be awarded in the arbitration of any dispute arising under the contract. However, the NASD rules specified in the agreement indicate that arbitrators may award "damages and other relief." Again, while that rule does not make specific reference to punitive damages, the manual provided to NASD arbitrators contains a provision that states:

> "B. Punitive Damages
>
> "The issue of punitive damages may arise with great frequency in arbitration. Parties to arbitration are informed that arbitrators can consider punitive damages as a remedy."

After applying the general contract principles that ambiguous language must be construed against the drafter and that the two provisions should be harmonized to give effect to both and to render them consistent with each other, and after noting that the New York case did not apply to the substantive "laws of the State of New York," but was a special rule limiting the authority of arbitrators, the Supreme Court concluded that the Court of Appeals had misinterpreted the parties' agreement, and that the punitive damage award should have been enforced as within the scope of the contract (*131 L. Ed. 2d 76, 85-88)* .

The facts and procedural background of ***Tate v. Saratoga Savings & Loan Assn.*** *(1989) 216 Cal. App. 3d 843, 265 Cal. Rptr. 440* , are discussed at *§ 20C.90[3][c]*. The portion of the opinion addressing the prevailing party's entitlement to costs and attorney's fees are discussed at *§ 20C.110[3][a]*.

In affirming, the court of appeal discussed *Baker v. Sadick (1984) 162 Cal. App. 3d 618, 622-626, 208 Cal. Rptr. 676* [*see § 20C.120[3][a]*], which it characterized as the leading California authority on the authority of an arbitrator to award punitive damages. *Baker* reasoned that if the parties intended to substitute an arbitral forum for a judicial one and intended presentation of tort claims in the arbitral forum, then they also must have intended the usual judicial remedies to be available in arbitration (*216 Cal. App. 3d 843, 854)* . The crucial question is whether the arbitration agreement contemplated arbitration of claims giving rise to punitive damages (*216 Cal. App. 3d 843, 854-855)* . When contracts provide for arbitration of "any controversy arising out of or relating to the contract," the language is considered sufficiently broad to include tort as well as contract claims as long as the tort claims have their roots in the relationship between the parties that was created by the contract [*see Ch. 20, Arbitration: Compelling, § 20.40*]. While somewhat narrower than the quoted language, the language of the joint venture agreement is still very broad and inclusive. In fact, the court noted that the trial court's order compelling arbitration specifically included tort claims. The venture agreement allowed for arbitration of tort claimswithout expressly allowing or precluding a punitive-damage award. Thus, it is hardly irrational to conclude that the parties contemplated the possibility of punitive damages. The award was not, as a matter of law, in excess of the arbitrators' powers (*216 Cal. App. 3d 843, 855)* .

The association also argued that it is unconstitutional to allow punitive damages in arbitration without an express agreement to allow them. The Supreme Court's decision in *Browning-Ferris v. Kelco Disposal (1989) 492 U.S. 257, 263-264, 109 S. Ct. 2909, 106 L. Ed. 2d 219* , had disposed of that issue. The court of appeal concluded that the Supreme Court decision afforded no basis for the association's claim that some other constitutional provision requires an express agreement before arbitrators are empowered to award punitive damages (*216 Cal. App. 3d 843, 856)* .

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2-20C California Points & Authorities § 20C.123

§ 20C.123 Party's Conduct Empowered Arbitrator to Strike Unconscionable Damage Limitation

[1] FORM

THE PARTIES SUBMITTED EVIDENCE ON AND ARGUED THE _____ [*specify, e.g.,* UNCONSCIONABILITY OF THE DISCLAIMER AND DAMAGE LIMITATION], THUS, THE ARBITRATOR WAS EMPOWERED TO _____ [*specify, e.g.,* STRIKE THE DAMAGE LIMITATION AND] AWARD _____ [*specify, e.g.,* CONSEQUENTIAL] DAMAGES.

A. Parties Conduct Empowered Arbitrator to Award Consequential Damages. Because _____ [*party, e.g,* defendant] expressly responded to the claim of unconscionability, presented evidence on the issue, and failed to assert, at any time before or during the arbitration proceeding, that the arbitrator's power to find the disclaimer and damage limitation clause unconscionable or unenforceable was limited by the arbitration clause, _____ [*e.g.,* it] cannot not complain that the arbitrator exceeded his authority by _____ [*specify, e.g.,* awarding consequential damages]. Parties may submit for decision issues they were not contractually compelled to submit to arbitration, so courts look both to the contract and to the scope of the submissions to determine the arbitrator's authority (*J.C. Gury Co. v. Nippon Carbide Indus. (USA), Inc. (2007) 152 Cal. App. 4th 1300, 1302, 1304-1307, 62 Cal. Rptr. 3d 118*).

[2] Comments

[a] Use of Form

This form may be used to resist a petition to vacate an arbitration award when the parties submitted an issue for arbitration that they were not required by their contract to submit. Counsel should combine it with authority from Ch. 20D, *Arbitration: Dismissing,* § 20D.10 et seq. and any other form addressing any other relevant issues.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, the argument must

show that the parties submitted evidence on the issue not covered by the arbitration agreement. It is advisable for counsel to submit evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file (including verified pleadings), or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied if plaintiff-respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement)].

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Parties Conduct Empowered Arbitrator to Award Consequential Damages

The plaintiff in ***J.C. Gury Co. v. Nippon Carbide Indus. (USA), Inc****. (2007) 152 Cal. App. 4th 1300, 62 Cal. Rptr. 3d 118* , manufactured reflective signs using sheeting manufactured by defendant. Plaintiff did not experience any problems for years, but after defendant moved its plant to China, plaintiff experienced cracking, separation, and peeling in over 37,000 reflective signs, for which it had to reimburse its customers. Plaintiff sought to recover some $90,000 in reimbursement costs from defendant. Defendant refused, relying in part on the warranty disclaimer and the consequential damage exclusion in the parties' contract, which restricted plaintiff's relief to product replacement and precluded any liability for additional damages for breach of warranty of fitness for intended. The contract also provided that any controversy arising out of the parties' sales contract would be settled by arbitration, but specified the arbitrator had no power to make an award that had the effect of changing, modifying or altering any provision of the parties' contract. The arbitrator's award concluded that a clause disclaiming warranties and excluding consequential damages was unconscionable and unenforceable, and awarded damages to the buyer on that basis. Plaintiff sought to confirm, and defendant to vacate, the award. The trial court confirmed the award. The seller appealed, contending that the arbitrator exceeded his powers because the award altered, indeed nullified, a contractual provision.

The court of appeal affirmed, because the seller expressly responded to the buyer's claim of unconscionability and failed to assert, at any time before or during thearbitration proceeding, that the arbitrator's power to find the clause unconscionable or unenforceable was limited by the arbitration clause. A party cannot wait until after an award is made to claim that an issue expressly presented to the arbitrator for decision is beyond his authority (*152 Cal. App. 4th 1300, 1302, 1306-1307)* . The court of appeal found that, while the arbitration clause limited the scope of the arbitrator's power, the conduct of the parties at the arbitration proceeding operated to waive that limitation. Although defendant contended at the arbitration that the warranty disclaimer and consequential damage exclusion clause should be enforced, it never argued that the arbitrator had no authority to find the clause unenforceable. Consequently, defendant could not complain on appeal that the arbitrator exceeded his authority. Despite the clear language of the arbitration clause, the court noted that parties may submit for decision issues they were not contractually compelled to submit to arbitration, so it would look both to the contract and to the scope of the submissions to determine the arbitrator's authority (*152 Cal.*

App. 4th 1300, 1304-1305) . The court concluded that defendant had submitted the issue of unconscionability to the arbitrator for decision, and therefore could not argue that an adverse decision on the issue exceeded the arbitrator's powers. In support of its conclusion, the court noted that both parities devoted considerable portions of their arbitration briefs to the issue of the unconscionability of the warranty disclaimer and damage limitation provision, but defendant's brief never contended that the issue of unconscionability exceeded the arbitrator's authority powers (*152 Cal. App. 4th 1300, 1305*). During the two-day arbitration hearing the parties offered related to issues concerning the course of dealing, lack of notice and discussion about product specification changes, warranty disclaimer and damage limitation exclusion, relative bargaining position, and measure of damages--all going to unconscionability, but defendant never objected to consideration of any of those issues or to evidence relating to them on the ground that the arbitrator was prohibited from finding a contractual term unconscionable or unenforceable (*152 Cal. App. 4th 1300, 1305-1306)* . Despite defendant's argument that it never agreed to waive the contractual limitation on the arbitrator's powers, defendant never reminded the arbitrator of the contractual limitation on the scope of his authority. The record supported only one conclusion: that both parties unequivocally submitted the issue of unconscionability to arbitration. Having done so, defendant may not now complain that the arbitrator exceeded his authority (*152 Cal. App. 4th 1300, 1306)* .

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[Reserved]

§§ 20C.124[Reserved]

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2-20C California Points & Authorities § 20C.130

§ 20C.130 Arbitration Rehearing Was Not Required on Previously Available Evidence

[1] FORM

THE AWARD SHOULD_____ [BE CONFIRMED *or* NOT BE VACATED] BECAUSE A REHEARING IN ARBITRATION WAS NOT REQUIRED FOR EVIDENCE WHICH WAS, OR COULD HAVE BEEN, PRESENTED IN THE ARBITRATION. THEREFORE, THE AWARD SHOULD BE CONFIRMED.

A. Arbitrators Need Not Reopen Hearing for Evidence Previously Presented or Available. While parties to arbitration must be given every reasonable opportunity to present their evidence, they must be diligent in offering it at the proper time; the arbitrators need not reopen a case to hear material evidence which was or could have been presented earlier (*Grunwald-Marx, Inc. v. Los Angeles Joint Bd. (1959) 52 Cal. 2d 568, 587-588, 343 P.2d 23* ; *see also Hall v. Superior Court (1993) 18 Cal. App. 4th 427, 427-428, 22 Cal. Rptr. 2d 376* (two-step review process)).

[*Optional*] **B. Arbitrator's Determination of Issue by Summary Adjudication Does Not Amount to Failure to Hear Evidence.** An arbitrator's obligation under *Code of Civil Procedure Section 1286.2(a)(5)* "to hear evidence" does not mean that the evidence must be orally presented or that live testimony, or the opportunity to cross-examine witnesses, is required. This, and the fact that *Code of Civil Procedure Section 1282.2(c)* grants arbitrators "all power relating to the conduct of the hearing" give arbitrators authority to hear and determine motions for summary adjudication (*Schlessinger v. Rosenfeld, Meyer & Susman (1995) 40 Cal. App. 4th 1096, 1105-1109, 47 Cal. Rptr. 2d 650*).

[2] Comments

[a] Use of Form

This form may be used with a memorandum in support of a petition or response seeking to have an arbitration award confirmed, to anticipate or respond to a claim that the arbitrator improperly failed to order rehearing based on evidence proffered subsequent to the original hearing, but which was available during the time of that hearing, if not actually presented at that hearing. Optional Paragraph B is for use to assert that the arbitrator's determination of the issue by way

of summary adjudication was proper. This form does not provide a complete memorandum but should be combined with the memorandum supporting the petition [*see § 20C.10*] or response [*see § 20C.11*].

As a tactical matter, counsel may wish to reserve these points for oral argument or for other form of rejoinder to the respondent's opposing memorandum. In deciding whether or not to reserve these arguments, counsel should consider local court rules and practice, as well as whether the moving party would be expected to be raise these points in initial moving papers, to avoid the possibility of losing the opportunity to raise them.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should point out in what respects and to what extent the evidence being offered as a basis for rehearing was actually before the arbitrators at the original hearing or was available at that time to the party now seeking to challenge the award. If relevant, counsel may also wish to point out the lack of substantive impact the proffered evidence would have on the case if introduced at this point. Generally, it will be appropriate to attach a copy of the award [*see Shepherd v. Greene (1986) 185 Cal. App. 3d 989, 994, 230 Cal. Rptr. 233* (*discussed under § 20C.12[3][a]*)].

It is advisable for counsel to submit cognizable evidence in support of factualstatements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For memoranda to combine with this form, see *§§ 20C.10* and *20C.11*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Arbitrators Need Not Reopen Hearing for Evidence Previously Presented or Available

The facts and procedural background of ***Grunwald-Marx, Inc. v. Los Angeles Joint Bd.*** *(1959) 52 Cal. 2d 568, 343 P.2d 23* , and the portion of the opinion addressing the arbitrators' power to award damages for breach of contract despite the fact that damages were not expressly submitted as a separate issue is discussed at *§ 20C.100[3][a]*. In affirming, the Supreme Court found that the statute allowing an award to be vacated if a party was prejudiced by the arbitrator's refusal to hear evidence pertinent and material to the case (former Code Civ. Proc. § 1288(c), now *Code Civ. Proc. § 1286.2(a)(5)*, requiring substantial prejudice by refusal to hear material evidence) could not be interpreted to mean that, after a hearing at which full opportunity was given to each side to produce evidence, the arbitrators, as a

matter of law, must grant a motion to reopen if the proffered evidence is relevant. A motion to reopen is a matter of discretion with the trier of fact, and that discretion cannot be upset on appeal in the absence of a clear showing of an abuse of that discretion. No abuse of discretion appeared in this case. Arbitrators are not required to admit all relevant testimony whenever it may be offered or submitted to them. The orderly administration of justice requires that, within reason, evidence must be offered at the proper time. The parties must be diligent (*52 Cal. 2d 568, 587)* . Here the union had made a crucial admission in its pleadings in the case, made the same admission at the arbitration hearing, and offered no evidence on the issue. Only when an award was about to be issued did the union then offer some qualification to the point admitted and attempt to introduce evidence on the subject. The Court concluded there was no abuse of discretion in the denial to reopen (*52 Cal. 2d 568, 588)* .

The facts and procedural background of ***Hall v. Superior Court*** *(1993) 18 Cal. App. 4th 427, 22 Cal. Rptr. 2d 376* , and the portion of the opinion addressing the arbitrator's reliance on partnership principles are discussed at *§ 20C.101[3][c]*. In issuing a writ of mandate requiring the trial court to set aside its order to vacate the award, the court of appeal discussed one broker's claim that he had been prejudiced by the arbitrator's refusal to reopen the arbitration hearing to permit presentation of evidence on the issue of the partnership. The court of appeal said former Code Civ. Proc. § 1286.2(e) [*now see Code Civ. Proc. § 1286.2(a)(5)*] authorized a two-step review process. Because a transcript of an arbitration proceeding is not generally available, if a superior court has to review the arbitrator's decision on materiality before reaching the question of substantial prejudice, the legislative goal of arbitral finality will be unattainable (*18 Cal. App. 4th 427, 428)* . Instead, the reviewing court should first determine whether the complaining party was substantially prejudiced by the arbitrator's refusal to reopen the hearing, and need only consider materiality if it finds substantial prejudice. In this case, it was clear from the award that the arbitrator believed a partnership existed as a matter of law between the brokers once they agreed to share fees, and that the proffered evidence would not have changed that decision (*18 Cal. App. 4th 427, 427-428)* .

[b] Arbitrator's Determination of Issue by Summary Adjudication Does Not Amount to Failure to Hear Evidence

Schlessinger v. Rosenfeld, Meyer & Susman *(1995) 40 Cal. App. 4th 1096, 47 Cal. Rptr. 2d 650* , involved a dispute regarding payments due to a lawyer on his resignation from defendant law firm. The partnership agreement provided for arbitration in accordance with the rules of the American Arbitration Association (AAA). The principal issue in contention was whether the "tolls" for the former partner's competition with the firm were reasonable and thus valid. The arbitrator determined this issue by way of two motions for summary adjudication, i.e, by consideration of evidence submitted in written form. The evidence submitted on the second motion included declarations from plaintiff, his attorney, and his accountant, excerpts from depositions of two partners of the firm, and portions of plaintiff's deposition. The arbitrator concluded that the tolls were valid and reasonable; and the parties then stipulated that plaintiff had been paid in full. The arbitrator issued an award in defendant's favor. Plaintiff petitioned to have the award vacated, claiming his rights were substantially prejudiced by refusal of the arbitrator to hear evidence, contrary to the provisions of *Code Civ. Proc. § 1286.2(e)*. The petition was dismissed, and plaintiff appealed.

The court of appeal affirmed. Plaintiff contended that *Code Civ. Proc. § 1282.2(d)* required a hearing at which he could cross-examine witnesses. The court of appeal disagreed, saying that an arbitrator's obligation under former Code Civ. Proc. § 1286.2(e) [*now see Code Civ. Proc. § 1286.2(a)(5)*] "to hear evidence" does not mean that the evidence must be orally presented or that live testimony, or the opportunity to cross-examine witnesses, is required (*40 Cal. App. 4th 1096, 1105)* . *Code Civ. Proc. § 1282.2(d)* entitles a party to cross-examine witnesses *if* they appear at the hearing, but it does not give a party the absolute right to present oral testimony in every case. *Code Civ. Proc. § 1282.2(c)* provides that arbitrators "shall rule on ... questions of hearing procedure and shall exercise all powers relating to the conduct of the hearing." The provisions of *Code Civ. Proc. § 1282.2* are prefaced by the words "unless the arbitration agreement provides otherwise." Here, the AAA rules provided that the arbitrator hold a preliminary hearing to consider matters that would expedite the proceedings and gave the arbitrator authority to vary the hearing procedures, including the right to receive and consider evidence by affidavit. The court of appeal said those rules implicitly sanctioned the use of

summary adjudication motions (*40 Cal. App. 4th 1096, 1106-1107)* . The court of appeal noted that the question of an arbitrator's authority to determine matters by summary adjudication motions was a matter of first impression in California and considered commentators and cases from other jurisdictions, which were divided in their holdings (*40 Cal. App. 4th 1096, 1108-1109)* . The court then concluded that in this case, *Code Civ. Proc. § 1281 et seq.* and the AAA rules gave the arbitrator authority to entertain the parties' motions for summary adjudication (*40 Cal. App. 4th 1096, 1109)* .

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2-20C California Points & Authorities § 20C.131

§ 20C.131 Arbitrator Was Not Required to Continue Hearing so Doctors Could Testify

[1] FORM

THE AWARD SHOULD _____ [BE CONFIRMED *or* NOT BE VACATED] BECAUSE NO [*specify, e.g.,* CAUSE WAS SHOWN WHY POSTPONEMENT WAS NECESSARY AND NO PREJUDICE RESULTED FROM THE FAILURE TO POSTPONE THE ARBITRATION HEARING].

A. Arbitrator Did Not Exceed Powers by Refusing to Postpone Hearing. An arbitrator does not exceed his or her powers by refusing to postpone the arbitration hearing for a party who has delayed asking for the postponement, who shows no reasonable cause for needing the postponement, and who was not prejudiced by the failure of the arbitrator to postpone the hearing (SWAB Financial, LLC v. E* *Trade Securities, LLC (2007) 150 Cal. App. 4th 1181, 1196-1198, 58 Cal. Rptr. 3d 904* ; *see also 9 U.S.C. § 10(a)(3)*; *Code Civ. Proc. § 1286.2(a)(5)*).

B. Arbitrator Need Not Continue Hearing for Testimony When Written Records Are Available. An award may be confirmed even though the arbitrator relied on doctors' written records rather than their oral testimony when the proponent did not make any offer of proof why the records were insufficient to establish the desired points, did not make any attempt to ascertain when the doctors would be available to testify, [and the arbitrator stated that if the doctors' testimony was necessary, s/he would hear it at a later date] (*Roitz v. Coldwell Banker Residential Brokerage Co. (1998) 62 Cal. App. 4th 716, 724-726, 73 Cal. Rptr. 2d 85*).

[2] Comments

[a] Use of Form

This form may be used with a memorandum in support of a petition or response seeking to have an arbitration award confirmed to anticipate or rebut the claim that the arbitrator improperly failed to postpone the hearing. The first paragraph establishes the general proposition. Paragraph B is for use when the opposing party is claiming that the arbitrator improperly failed to continue the hearing to hear medical evidence when the doctors' records were available and no showing was made that those written records were insufficient or that any attempt had been made to determine

when the doctors could testify [*see Code Civ. Proc. § 1286.2(a)(5)*]. This form does not provide a complete memorandum but should be combined with the memorandum supporting the petition [§ 20C.10] or response [§ 20C.11].

As a tactical matter, counsel may wish to reserve these points for oral argument or for other form of rejoinder to the respondent's opposing memorandum. In deciding whether or not to reserve these arguments, counsel should consider local court rules and practice, as well as whether the moving party would be expected to be raise these points in initial moving papers, to avoid the possibility of losing the opportunity to raise them.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should point out any previous delays by the party requesting the postponement, the lack of any showing of good cause for the postponement, and the lack of prejudice resulting from the failure to postpone the hearing. Generally, it will be appropriate to attach a copy of the award [*see Shepherd v. Greene (1986) 185 Cal. App. 3d 989, 994, 230 Cal. Rptr. 233* (*discussed under § 20C.12[3][a]*)].

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For memoranda to combine with this form, see *§§ 20C.10* and *20C.11*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Arbitrator Did Not Exceed Powers by Refusing to Postpone Hearing

SWAB Financial, LLC v. E*Trade Securities, LLC *(2007) 150 Cal. App. 4th 1181, 58 Cal. Rptr. 3d 904* , was an action by an investor against its securities broker for fraud and other causes of action. After asking for a continuance, but providing no reason therefore, plaintiff served notice of nonappearance. The arbitration proceeded without plaintiff and resulted in a denial of all relief requested. Plaintiff sought to vacate the award. Defendant countered that prejudice to plaintiff arose from the failure to appear at the arbitration hearing, not from the denial of the continuance request. The trial court ordered a second hearing to address whether plaintiff had requested a continuance in a timely manner. At the conclusion of that hearing, the trial court granted plaintiff's petition to vacate the arbitration award, finding that

plaintiff's rights had been substantially prejudiced by the failure of the arbitrators to postpone the arbitration hearing on sufficient cause being shown. Additionally, the court ordered plaintiff's claims under *Bus. & Prof. Code § 17200* to be arbitrated in the then pending arbitration before NASD. Defendant appealed.

The court of appeal reversed (*150 Cal. App. 4th 1181, 1202)* , finding at the outset that the order to arbitrate the Bus. & Prof. Code claims was not a rehearing that would prevent an appeal under *Code Civ. Proc. § 1294* (*150 Cal. App. 4th 1181, 1195)* . NASD Rule 10319(a) provides that the arbitrator(s) may, in their discretion, adjourn any hearing(s) either on their own initiative or on the request of any party to the arbitration. The Federal Arbitration Act (FAA) is similar to *Code Civ. Proc. § 1286.2(a)(5)* and provides that an award be vacated if the arbitrators were guilty of misconduct in refusing to postpone the hearing, on sufficient cause being shown [*9 U.S.C. § 10(a)(3)*] (*150 Cal. App. 4th 1181, 1196-1197)* . Chapter 1 of the FAA does not preempt California's statutory grounds for vacating an arbitration award, and California courts are not required to apply *9 U.S.C. § 10*. Thus, when the arbitrator exercises his or her discretion to deny a postponement of the hearing, there are two questions to be considered in determining whether vacatur is required: whether the arbitrator abused his or her discretion by refusing to postpone the hearing on sufficient cause being shown; and if so, whether the party seeking the postponement suffered substantial prejudice as a result (*150 Cal. App. 4th 1181, 1198)* . The court of appeal found there was no abuse of discretion by the arbitrators, and recapped the history of plaintiff's delays, which included filing three lawsuits, all of which were either dismissed or stayed so the arbitration could continue, challenging an arbitrator, who recused himself, seeking to add a new claim almost a year after the arbitration was originally set for hearing, and failing to appear at the arbitration hearing, which was reset approximately one year after it had been originally scheduled. The request for continuance came more than three years after plaintiff first initiated the arbitration, more than one year beyond the original arbitration date, and after plaintiff had already once refused to appear at the arbitration hearing. Plaintiff offered no excuse for failing to earlier assert its additional claims, which arose out of the same facts. Under these circumstances, the arbitrators could reasonably conclude there was no good cause to further delay the arbitration (*150 Cal. App. 4th 1181, 1198-1199)* . Further, the trial court had no authority to order the arbitrators to expand the scope of the pending arbitration to include the new claims under *Bus. & Prof. Code § 17000* (*150 Cal. App. 4th 1181, 1198-1199)* . Nor did the trial court have any discretion to vacate the award based on the arbitrator's refusal to include the *Bus. & Prof. Code § 17000* claims (*150 Cal. App. 4th 1181, 1200-1201*). Thus, the vacatur had to be reversed (*150 Cal. App. 4th 1181, 1202)* .

[b] Arbitrator Need Not Continue Hearing for Testimony When Written Records Are Available

Roitz v. Coldwell Banker Residential Brokerage Co. *(1998) 62 Cal. App. 4th 716, 73 Cal. Rptr. 2d 85* , involved 10 causes of action arising form plaintiff's termination as an independent contractor for defendant. The date for the arbitration hearing was set two months in advance. Defendant waited until two weeks before the hearing date to serve subpoenas on two doctors it wished to have testify. There was no indication in the record of any attempt by defendant to contact the doctors to ascertain if the arbitration dates were convenient or to make other arrangements to preserve their testimony. When the arbitrator refused to continue the hearing because of the doctors' unavailability, defendant's counsel departed; and the matter proceeded to default. An award of $260,000 was made in favor of plaintiff. Plaintiff petitioned to have the award confirmed, and defendant to have it vacated on the grounds that the arbitrator refused to hear testimony and was biased. The alleged bias was based on the arbitrator's refusal to continue the hearing or to waive his fee. The trial court confirmed the award. Defendant appealed.

The court of appeal affirmed, finding that defendant did not demonstrate good cause for the continuance. Defendant made no showing why the doctors needed to be at the hearing. The arbitrator had the various medical records and could refer to them. No offer of proof was made why the records were insufficient to establish the point defendant desired to make through either of those witnesses. It is common practice at arbitrations to use medical records, declarations, and deposition transcripts in lieu of live testimony (*62 Cal. App. 4th 716, 724)* . The court also found the timeliness of the request to be highly questionable. The date for the arbitration hearing and the arbitrator's policy on fees and continuances were made know to the parties two months before the hearing date. Further, the arbitrator did not refuse to hear the doctors' testimony, but stated "if ... I have to have them come in at a later date, I will listen to their testimony" (

62 Cal. App. 4th 716, 725) . Thus, the record demonstrated no prejudice to defendant from the failure to continue the hearing to hear the oral testimony of the doctors (*62 Cal. App. 4th 716, 726)* .

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2-20C California Points & Authorities § 20C.132

§ 20C.132 Method of Selecting Arbitrators Was Not Unconscionable

[1] FORM

THE AWARD SHOULD _____ [BE CONFIRMED *or* NOT BE VACATED], BECAUSE THE METHOD OF SELECTING THE PANEL OF ARBITRATORS WAS REASONABLE WHEN THE PARTIES FORMED THEIR CONTRACT.

A. Selection Method Not Unconscionable. There is no inherent unconscionability in a multiple-party agreement that provides for each party to appoint an arbitrator and for those arbitrators to select a neutral arbitrator to complete the panel. Such an agreement is not made unconscionable or unfair by the fact that two or more of the parties' interests have become aligned against the other party or parties' interests at some point after the arbitration agreement is formed (*Tate v. Saratoga Savings & Loan Assn. (1989) 216 Cal. App. 3d 843, 852-854, 265 Cal. Rptr. 440*).

[2] Comments

[a] Use of Form

This form may be used with a memorandum in support of a petition or response seeking to have an arbitration award confirmed, to anticipate or respond to a claim that the selection process by which the arbitration panel was chosen was inherently unfair when in fact it was not until after the contract had been executed that the parties' interests became aligned against the party challenging the award. This form does not provide a complete memorandum but should be combined with the memorandum supporting the petition [*see § 20C.10*] or response [*see § 20C.11*].

As a tactical matter, counsel may wish to reserve these points for oral argument or for other form of rejoinder to the respondent's opposing memorandum. In deciding whether or not to reserve these arguments, counsel should consider local court rules and practice, as well as whether the moving party would be expected to be raise these points in initial moving papers, to avoid the possibility of losing the opportunity to raise them.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should detail the history of the parties' agreement and the facts surrounding its drafting, including whether counsel who drafted it was employed by all parties or only some of them and what the respective bargaining positions of the parties were at the time the agreement was executed. Generally, it will be appropriate to attach a copy of the award [*see Shepherd v. Greene (1986) 185 Cal. App. 3d 989, 994, 230 Cal. Rptr. 233* (*discussed under § 20C.12[3][a]*)].

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For memoranda to combine with this form, see *§§ 20C.10* and *20C.11*.

For memoranda addressing adhesion contracts and unconscionability in the context of compelling or resisting arbitration, see *Ch. 20, Arbitration: Compelling, §§ 20.82, 20.83* (arbitration proper), and Ch. 20A, *Arbitration: Resisting*, §§ 20A.90, 20A.91 (arbitration not proper).

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Selection Method Not Unconscionable

The facts and procedural background of ***Tate v. Saratoga Savings & Loan Assn.*** *(1989) 216 Cal. App. 3d 843, 265 Cal. Rptr. 440* , are discussed at *§ 20C.80[3][c]*. The portion of the opinion addressing the prevailing party's entitlement to costs and attorney's fees are discussed at *§ 20C.110[3][a]*. The arbitration agreement provided that each of the three joint venturers was to select one arbitrator, and those arbitrators were to select a neutral fourth arbitrator. The president and chairman of the board of the savings and loan association and one of the individual venturers had been friends and business associates since 1962. The two individual venturers formed their first venture in 1979. The joint venture agreement originally contemplated three individual venturers. The first three drafts of the venture agreement were drafted by an attorney who had worked for all of the venturers and the president and chairman. The last draft was revised by counsel for the association after the third individual decided not to participate in the venture.

On appeal, the association did not contend that the joint venture agreement was an adhesion contract, but argued that there is a constitutional requirement for a certain minimum level of integrity, which was not met by the

arbitrator-selection process provided for by the agreement, and that as applied, that provision was unconscionable because it did not give the association a realistic and fair opportunity to prevail. The court of appeal disagreed.

The court noted that *Civ. Code § 1670.5* requires unconscionability to be determined at the time the agreement was made (*216 Cal. App. 3d 843, 852-853)* . The interests of the individual venturers were not necessarily aligned when the agreement was made. One put up the initial $500,000 deposit for the property, and one was apparently closer to the chairman. The court said that it reasonably appeared from the terms of the agreement and the evidence of the relationships among the venturers that any potential alignment in the event of a dispute would depend on who breached what promise to whom. When the superior court was petitioned to compel arbitration, one individual venturer was named as a respondent along with the association, and it was unclear what issues existed among the venturers, as well as what their positions were. Thus, the court concluded, there was no inherent unconscionability in the arbitration agreement (*216 Cal. App. 3d 843, 853)* . The court said it was disinclined to rewrite the agreement to favor the association, particularly considering that the association had already had the final opportunity to do so (*216 Cal. App. 3d 843, 854)* .

[4] Additional Authorities

[a] Selection Method Not Unconscionable

Woods v. Saturn Distribution Corp. (9th Cir. 1996) 78 F.3d 424 , arose out of dealership terminations under an agreement governed by the Federal Arbitration Act (*9 U.S.C. § 1 et seq.*; FAA). The arbitration was conducted in accordance with Saturn's Dealer Dispute Resolution Guide, which provided for arbitration by a panel of two Saturn dealers and two Saturn employees chosen from a pool of dealers and employees trained in Saturn's dispute resolution process. Though plaintiff at first objected to the composition of the panel and claimed in lacked fundamental fairness and was inherently biased against a dealer and in favor of Saturn, he later agreed to arbitrate. The award upheld the termination of plaintiff's dealerships but required Saturn to pay plaintiff approximately $90,000. The award was confirmed, and plaintiff appealed.

The court of appeal affirmed. The FAA (*9 U.S.C. § 10(a)(2)*) allows an award to be vacated for evident partiality of the arbitrators. In nondisclosure cases, a reasonable impression of bias is sufficient to vacate an award (*78 F.3d 424, 427)* . In this case, however, the standard for actual bias was applicable. Plaintiff failed to show that the decision of the arbitrators was a result of their financial relationships with Saturn, that they would be more likely to decide in favor of Saturn, or that they would benefit from deciding in favor of Saturn. Further, plaintiff knew of those relationships when he agreed to the arbitration procedure (*78 F.3d 424, 428-430)* .

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2-20C California Points & Authorities § 20C.133

§ 20C.133 Illegality of Contract Provision Does Not Void Entire Award

[1] FORM

THE AWARD SHOULD _____ [BE CONFIRMED *or* NOT BE VACATED] BECAUSE THE CLAIMED ILLEGALITY DOES NOT GO TO THE ENTIRE CONTRACT [OR TRANSACTION] AND THERE IS NO SHOWING THAT ANY STATUTORY RIGHT OF A PARTY WOULD BE LEFT UNPROTECTED BY CONFIRMING THE AWARD.

A. Award Is Not Incompatible With Statutory Right. An award may not be vacated because of a claim that a provision of the contract construed or applied by the arbitrator is illegal or contrary to public policy except in rare cases when according finality to the arbitrator's decision would be incompatible with the protection of a statutory right (*Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1, 33, 10 Cal. Rptr. 2d 183, 832 P.2d 899*).

[*Optional*] **B. Legal and Illegal Transactions Under Similar Contracts.** When an award covers a series of transactions under the same or similar contracts, all of which are challenged as illegal, the trial court should review the evidence de novo on a transaction by transaction basis. If only some of the transactions were illegal, and the policy of the statute involved would not be furthered by requiring one party to forfeit the benefits of the contract with respect to the legal transactions, an award regarding the legal transactions should not be vacated because other transactions were illegal (*Lindenstadt v. Staff Builders, Inc. (1997) 55 Cal. App. 4th 882, 888-889, 893-895, 64 Cal. Rptr. 2d 484* (involving finder's exception to real estate licensing law [*see Bus. & Prof. Code §§ 10130, 10131, 10136*])].

[*Optional*] **C. No Waiver by Failing to Object to Arbitration.** Unless a party is claiming that the entire contract is illegal or that the arbitration agreement itself is illegal, he or she need not raise the illegality question prior to participating in the arbitration process so long as the issue is raised before the arbitrator (*Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1, 31, 10 Cal. Rptr. 2d 183, 832 P.2d 899*).

[2] Comments

[a] Use of Form

This form may be used with a memorandum in support of a petition or response seeking to have an arbitration award confirmed, to assert the point that confirmation of the award is not precluded by the fact that some provision of the underlying agreement other than the arbitration provision is illegal or contrary to public policy.

This form does not provide a complete memorandum but should be combined with the memorandum supporting the petition [*see § 20C.10*] or response [*see § 20C.11*] seeking to have the award confirmed. Counsel may also wish to include memoranda from §§ 20C.90-20C.92.

As a tactical matter, counsel may wish to reserve these points for oral argument or for other form of rejoinder to the respondent's opposing memorandum. In deciding whether or not to reserve these arguments, counsel should consider local court rules and practice, as well as whether the moving party would be expected to be raise these points in initial moving papers, to avoid the possibility of losing the opportunity to raise them.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should (1) indicate the language of the illegal provision in the contract, (2) show that the illegality does not implicate the entire contract, and (3) explain why confirmation of the award, or a portion of it, not would violate any public policy or express statute. Generally, it will be appropriate to attacha copy of the award [*see Shepherd v. Greene (1986) 185 Cal. App. 3d 989, 994, 230 Cal. Rptr. 233* (*discussed under § 20C.12[3][a]*)].

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

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[c] Related Memoranda

For memoranda to combine with this form, see *§§ 20C.10* and *20C.11*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Award Is Not Incompatible With Statutory Right

The facts and procedural background of ***Moncharsh v. Heily & Blase*** *(1992) 3 Cal. 4th 1, 10 Cal. Rptr. 2d 183, 832 P.2d 899* , and the portion of the opinion addressing the issue of whether an award can be confirmed in the face of errors

of law are discussed at *§ 20C.80[3][a]*. Plaintiff contended that the fee-splitting provision of the employment contract was illegal and contrary to public policy, and that despite the limited scope of judicial review of arbitration awards, review has historically been available when one party alleges that the underlying contract, or part of it, or the resulting award is illegal or in violation of public policy. The Court first distinguished cases such as *Loving & Evans v. Blick (1949) 33 Cal. 2d 603, 204 P.2d 23* (discussed in *§ 20C.210[3][b]*), and *All Points Traders, Inc. v. Barrington Associates (1989) 211 Cal. App. 3d 723, 259 Cal. Rptr. 780* . Both of those cases involved transactions by unlicensed persons, who were required to have licenses to enter into the contracts, construction and investment brokerage, respectively. Thus, in those cases the issue was the illegality of the entire contract or transaction (*3 Cal. 4th 1, 31-32)* . The Court said that while it recognized there might be some limited and exceptional circumstances justifying judicial review of an arbitrator's decision when a party claims illegality affecting only a portion of the underlying contract, those cases would involve situations in which affirming the award would be inconsistent with the protection of a party's statutory rights. Without an explicit legislative express of public policy, courts should be reluctant to invalidate an award on this ground (*3 Cal. 4th 1, 32)* . Nothing in the Rules of Professional Conduct at issue in this case suggested that resolution by an arbitrator of what is essentially an ordinary fee dispute would be inappropriate or would improperly protect the public interest. Accordingly, judicial review of the claimed illegality was unavailable (*3 Cal. 4th 1, 33)* .

[b] Legal and Illegal Transactions Under Same Contract

Defendant in ***Lindenstadt v. Staff Builders, Inc.*** *(1997) 55 Cal. App. 4th 882, 888-889, 64 Cal. Rptr. 2d 484* , acquired, franchised, and managed home health care businesses. Plaintiff assisted defendant in it acquisition efforts. Over a five-year period, the parties entered into 25-30 contracts, covering over 100 prospects. In 1995, plaintiff initiated arbitration to collect four finders fees. Defendant contended that plaintiff was not entitled to fees because he was not licensed under the Real Estate Law (*Bus. & Prof. Code § 10000*). Plaintiff contended that as a finder, not a broker, his activities fell within the finder's exception [*see Bus. & Prof. Code §§ 10130, 10131, 10136*]. The arbitrator found for plaintiff as to two transactions but found that in the other two transactions, he had acted as unlicensed broker and could not recover fees. Plaintiff sought to confirm the award for the two fees. Defendant opposed confirmation, urging that the trial court had the obligation to review the arbitrator's findings de novo and make its own determination regarding illegality. The trial court confirmed the award without de novo review. Defendant appealed, contending both that de novo review of the legality of each transaction was required and that if plaintiff acted a broker in *some* of the transactions, the finder's exception could not be applied to any of the transactions and the award would have to be vacated.

The court of appeal reversed and remanded to the trial court for de novo review of the legality of each transaction, but did not agree with defendant's contention that the award had to be vacated as to all transactions if plaintiff acted as broker in *some* of the transactions (*55 Cal. App. 4th 882, 889, 893, 895)* . The court of appeal noted that although the trial court may not generally review an award for errors of law, there is an exception when a unlicensed party seeks to recover (*55 Cal. App. 4th 882, 889)* . In such a case, the trial court should independently determine whether the parties' contact was illegal. Absent a license, the parties' agreement is illegal and unenforceable (*55 Cal. App. 4th 882, 890-891)* . If plaintiff acted as an unlicensed real estate broker on a transaction, the arbitrator exceeded her powers to the extent she awarded compensation for that work [*Code Civ. Proc. § 1286.2(a)(4)*] (*55 Cal. App. 4th 882, 893)* . The court of appeal discussed the finder's exception and noted that neither considerations of competency or trust are of importance when the undertaking is merely to find and introduce the principals. The public policy underlying the licensing requirements for brokers does not apply to enforcement of the promise to pay a finder's fee. The goal of the licensing law is adequately served by denying plaintiff any compensation on those transactions in which he crossed the line from finder to broker. By applying thefinder's exception on a transaction by transaction basis, defendant will be justifiably required to perform its contractual duty (*55 Cal. App. 4th 882, 894)* .

[c] No Waiver by Failing to Object to Arbitration

The facts and procedural background of ***Moncharsh v. Heily & Blase*** *(1992) 3 Cal. 4th 1, 10 Cal. Rptr. 2d 183, 832 P.2d 899* , and the portion of the opinion addressing the issue of whether an award can be confirmed in the face of errors of law are discussed at *§ 20C.90[3][a]*. Before addressing the merits of the illegality issue, the Court considered whether the issue had been adequately preserved for appellate review. Defendant contended that plaintiff waived the issue of illegality by failing to object to arbitration on that ground. The Court noted that while *Code Civ. Proc. § 1281.2(b)*, which requires arbitration except when grounds exist for the revocation of the agreement, does not specify whether grounds must exist to revoke the entire contract, the arbitration agreement only, or some other provision in the contract, a fair reading of the statutory scheme reveals that the Legislature must have meant revocation of the arbitration agreement. If a contract includes an arbitration agreement and grounds exist to revoke the entire contract, those grounds would also vitiate the arbitration agreement. Thus, if an otherwise enforceable arbitration agreement is contained in an illegal contract, a party may avoid arbitration altogether (*3 Cal. 4th 1, 29)* .

In contrast, when the alleged illegality goes only to a portion of the contract (other than the arbitration agreement), the entire controversy, including the issue of illegality, remains arbitrable (*3 Cal. 4th 1, 30)* . The Court distinguished *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street (1983) 35 Cal. 3d 312, 197 Cal. Rptr. 581, 673 P.2d 251* (discussed in *Ch. 20, Arbitration: Compelling, § 20.42[3][a]*), and cases dealing with entire agreements vitiated by fraud in the inducement, although the issue of fraud in the inducement is determined by the arbitrator (*3 Cal. 4th 1, 30 n.13*). However, the issue would have been waived had plaintiff failed to raise it before the arbitrator (*3 Cal. 4th 1, 30)* . Unless a party is claiming that the entire contract is illegal or that the arbitration agreement itself is illegal, he or she need not raise the illegality question prior to participating in the arbitration process so long as the issue is raised before the arbitrator (*3 Cal. 4th 1, 31)* .

[4] Additional Authorities

[a] Award Not Incompatible With Statutory Right

The procedural background of *Pacific Gas & Electric Co. v. Superior Court (1993) 15 Cal. App. 4th 576, 19 Cal. Rptr. 2d 295* , and the portion of the opinion addressing the breadth of the arbitrator's powers are discussed at *§ 20C.90[4][a]*. *Pacific Gas & Electric* involved three separate challenges by seller/real party at interest, claiming that the award should be vacated because it required buyer/petitioner to pay more for gas than the ceiling price imposed by Natural Gas Policy Act of 1978 (*15 U.S.C. § 3301 et seq.*). In each respect, the court of appeal said that the arbitration award did not compel the seller to do an illegal act. The proper remedy would be to correct the award (by adjusting the price down to the ceiling) and affirming the award as corrected. As neither party sought correction, however, the court of appeal merely vacated the order vacating the award and ordered the award confirmed (*15 Cal. App. 4th 576, 612-613)* .

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D. Circumstances That Do Not Prevent Confirmation or Require Vacating Award

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[Reserved]

§§ 20C.134[Reserved]

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2-20C California Points & Authorities § 20C.150

§ 20C.150 No Agreement to Arbitrate Existed

[1] FORM

THE AWARD SHOULD _____ [NOT BE CONFIRMED *or* BE VACATED] BECAUSE NO AGREEMENT TO ARBITRATE EXISTED.

A. Award Unenforceable When No Agreement to Arbitrate Existed. When no agreement to arbitrate existed, an arbitrator's award exceeds the power of the arbitrators and the award must be vacated (*Villacreses v. Molinari (2005) 132 Cal. App. 4th 1223, 1230-1233, 34 Cal. Rptr. 3d 281* ; *Lopez v. Charles Schwab & Co. (2004) 118 Cal. App. 4th 1224, 1229-1230, 13 Cal. Rptr. 3d 544* ; *Northern Cal. Dist. Council of Laborers v. Robles Concrete Co. (1983) 149 Cal. App. 3d 289, 294, 196 Cal. Rptr. 776* ; *see Heenan v. Sobati (2002) 96 Cal. App. 4th 995, 1001, 1003-1004, 117 Cal. Rptr. 2d 532* (order confirming award and judgment thereon were void)).

[*Optional*] **B. When Attorney at Law Did Not Have Authority to Bind Client and Client Did Not Ratify or Consent to Agreement, No Agreement to Arbitrate Existed.** In the absence of express authorization of counsel to sign a binding contract, a client is bound by an arbitration agreement signed by his or her counsel only if the client consented to or ratified the agreement (*Toal v. Tardif (2009) 178 Cal. App. 4th 1208, 1221 & n.9, 101 Cal. Rptr. 3d 97*).

[2] Comments

[a] Use of Form

This form may be used to support a petition or response seeking to vacate an arbitration to assert that there was never any agreement to arbitrate [*see Code Civ. Proc. § 1286.2(a)(4)* (arbitrators acted in excess of their powers)]. This form does not provide a complete memorandum but should be combined with the memorandum supporting the petition [*see § 20C.20*] or response [*see § 20C.21*] seeking to vacate the award.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should show that no agreement to arbitrate existed. If there was a contract between the parties that included an arbitration clause, but that contract, or the arbitration clause, has been rescinded or has otherwise become unenforceable, counsel should discuss the facts supporting that contention [*see § 20C.80* et seq. (defenses to arbitration based on voidness, waiver, or unenforceability)]. Generally, it will be appropriate to attach a copy of the award [*see Shepherd v. Greene (1986) 185 Cal. App. 3d 989, 994, 230 Cal. Rptr. 233* (*discussed under § 20C.12[3][a]*)].

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement)].

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For memoranda to combine with this form, see *§ 20C.20* or *20C.21*.

For memoranda that may be appropriate to combine with this form addressing defenses to arbitration based on lack of an agreement to arbitrate in general or the subject matter that was arbitrated, or voidness, waiver, or unenforceability of an such agreement, see *§§ 20C.10, 20C.40 et seq., or 20C.80* et seq.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Award Unenforceable When No Agreement to Arbitrate Existed

Villacreses v. Molinari *(2005) 132 Cal. App. 4th 1223, 34 Cal. Rptr. 3d 281* arose out of the sale of defendants' home to plaintiffs. The agreement of sale was apparently drafted by the parties themselves and did not contain any arbitration clause. Later the parties executed an escrow agreement, on a standardized form prepared by the escrow company, which recited that it was the only agreement between the parties relating to the transaction and did contain an arbitration provision. All parties initialed the arbitration provision in the escrow agreement. When plaintiffs discovered problems with the house after they moved in, they filed a complaint for breach of contract and rescission, among other things. Defendants petitioned to compel arbitration. The petition was granted over plaintiff's objection that the arbitration provision related only to the escrow, not to the underlying purchase and sale. The arbitrator found defendants had breached their obligations regarding disclosures relating to additions and permits, but found buyers suffered no damages on account of that breach, denied any relief to buyers, and awarded sellers $30,000 in costs. Defendants petitioned to confirm the award and plaintiffs to vacate it. The trial court confirmed the award, and plaintiffs appealed.

The court of appeal reversed (*132 Cal. App. 4th 1223, 1233)* . An order compelling arbitration is not appealable, but the party challenging arbitration is entitled to have the order reviewed on appeal from the judgment confirming the award (*132 Cal. App. 4th 1223, 1229)* . In determining whether a valid arbitration agreement exists, the initial burden is on the party seeking to compel arbitration. The escrow agreement provided for arbitration of "all disputes to which it applies," rather than to all disputes between the parties and admits of some limitations on its scope (*132 Cal. App. 4th 1223, 1230)* . Defendants did not give the court any extrinsic evidence of what "it" meant and gave the court no basis to conclude that the language was intended by the parties to cover this particular dispute. Defendants failed to meet their initial burden to demonstrate any agreement to arbitrate this dispute (*132 Cal. App. 4th 1223, 1231)* . In fact, the language in the escrow agreement appeared to have been taken in part from the mandatory language required by *Code Civ. Proc. § 1298* to *accompany* an arbitration provision in a real estate sale and purchase agreement (*132 Cal. App. 4th 1223, 1231-1232)* .

Lopez v. Charles Schwab & Co. *(2004) 118 Cal. App. 4th 1224, 13 Cal. Rptr. 3d 544* is discussed in *Ch. 20A, Arbitration: Resisting, § 20A.10[3][a]*.

Northern Cal. Dist. Council of Laborers v. Robles Concrete Co. *(1983) 149 Cal. App. 3d 289, 196 Cal. Rptr. 776* , arose from an arbitration proceeding to enforce a prehire agreement made by an employer under *29 U.S.C. § 158(f)* that agreed to the terms and conditions of a previous collective bargaining agreement that provided for arbitration to resolve any dispute under the agreement. The employer notified the union that it intended to cancel the prehire agreement and hired no union employees thereafter. The union later filed a grievance alleging that the employer had not complied with the terms of the agreement, the arbitration board agreed with the union. The union petitioned to confirm the award. The employer petitioned to vacate the award, arguing that the prehire agreement had been repudiated by the employer's notice to the union and its subsequent conduct in not hiring union employees. The trial court agreed and vacated the award, and the union appealed.

The court of appeal affirmed. The court agreed with the trial court that the employer had effectively repudiated the prehire agreement, rendering the agreement void and unenforceable (*149 Cal. App. 3d 289, 294)* . The court held that former Code Civ. Proc. § 1286.2(d) [*now see Code Civ. Proc. § 1286.2(a)(4)*] requires a court to vacate an arbitration award when the arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision on the controversy submitted (*149 Cal. App. 3d 289, 294)* . The court concluded that because no agreement to arbitrate existed in the case before it, the arbitration board's decision exceeded its powers, and the trial court correctly vacated the arbitration award (*149 Cal. App. 3d 289, 294)* .

The parties in ***Heenan v. Sobati*** *(2002) 96 Cal. App. 4th 995, 117 Cal. Rptr. 2d 532* , stipulated to "binding judicial arbitration" before a sitting superior court judge. The judge entered a "Final Binding Award of Arbitration" in favor of plaintiffs. Plaintiffs moved to confirm the award under *Code Civ. Proc. § 1295* and also filed a memorandum of costs and moved for an order fixing attorney's fees. The motion to confirm was granted and judgement was entered on the award, but the commissioner who heard the motion declined to award costs or attorney's fees. From this, the plaintiffs appealed.

The court of appeal reversed after asking for supplemental briefing on the jurisdictional defect regarding a sitting judge's capacity to conduct contractual arbitration. The court started its analysis by dismissing a fictional creature that appears as often as reports of the Loch Ness monster: the stipulation's oxymoronic reference to "judicial binding arbitration" by a sitting judge. There is no such statutorily created beast. Regrettably, the court said, this case provides yet another example of incoherent hybrids and bizarre mutations of supposed agreements for judicial or contractual arbitration. There are two statutory frameworks: nonbinding judicial arbitration under the Judicial Arbitration Act (JAA) [*Code Civ. Proc. § 1141.10 et seq.*] and binding contractual arbitration under the California Arbitration Act (CAA) [*Code Civ. Proc. § 1280 et seq.*]; and the two are mutually exclusive [*96 Cal. App. 4th 995, 1000]* . The parties agreed they did not stipulate to judicial arbitration; but stipulations to contractual arbitration cannot stand as to sitting judges [*96 Cal. App. 4th 995, 1001]* . The court of appeal concluded that what the parties had agreed to was a bench

trial in which they waived a court reporter and the right of appeal [*96 Cal. App. 4th 995, 1003]* . Therefore, there was no "arbitration" award to be confirmed. The power to issue a judgment, and to correct or modify it on post-trial review, rests with the judge who conducted the bench trial. The judgment and order on the motion to confirm the arbitration award are invalid [*96 Cal. App. 4th 995, 1004]* . The matter of attorney's fees should have been determined by the judge who issued the "award" [*96 Cal. App. 4th 995, 1005]* . Thus the court of appeal remanded with directions that the trial court vacate the void judgment and order under the California Arbitration Act and transfer the matter to the judge who heard the matter for all further proceedings, including the entry of judgment, and any post-judgment matters concerning costs and attorney fees [*96 Cal. App. 4th 995, 1006]* .

[b] When Attorney at Law Did Not Have Authority to Bind Client and Client Did Not Ratify or Consent to Agreement, No Agreement to Arbitrate Existed

In ***Toal v. Tardif*** *(2009) 178 Cal. App. 4th 1208, 101 Cal. Rptr. 3d 97* , defendant home sellers appealed a judgment of the Superior Court of Orange County, California, which confirmed an arbitration award in favor of plaintiff buyers in their action for breach of contract, negligence, misrepresentation, and negligent misrepresentation. The facts and the portion of the opinion discussing the court of appeal ruling that in the absence of express authorization of counsel to sign a binding contract, a client is bound by an arbitration agreement signed by his or her counsel only if the client consented to or ratified the agreement are discussed in *Ch. 20A, Arbitration: Resisting, § 20A.10[1][L], [3][l]*. The court of appeals went on to rule that a client does not necessarily ratify an attorney's unauthorized arbitration stipulation simply by allowing the arbitration to proceed to an award. At the same time, allowing a party to object to an allegedly unauthorized stipulation to binding arbitration after an adverse decision has been reached raises the possibility of manipulation--of withholding an objection unless and until an unfavorable decision is announced (*178 Cal. App. 4th 1208, 1222)* . The court of appeal remanded for hearing on the issue of consent or ratification by the defendant (*178 Cal. App. 4th 1208, 1224)* .

[4] Additional Authorities

[a] Award Unenforceable When No Agreement to Arbitrate Existed

Although the court of appeal in *National Marble Co. v. Bricklayers & Allied Craftsmen (1986) 184 Cal. App. 3d 1057, 229 Cal. Rptr. 653* , confirmed an award against an employer in part because the employer did not sustain its burden of proof in establishing that the agreement was a prehire agreement under *29 U.S.C. § 158(f)*, it said that the right to repudiate such a prehire agreement is a matter of federal law regardless of the terms of the agreement. An employer is entitled to repudiate a *29 U.S.C. § 158(f)* prehire agreement at any time before the union achieves majority status among its employees (*184 Cal. App. 3d 1057, 1064)* . The court clarified that an agreement may be a prehire agreement under *29 U.S.C. § 158(f)* even if it covers only one employee, and that in order for an agreement to be a *29 U.S.C. § 158(f)* prehire agreement, the employer must be primarily engaged in the construction and building business (*184 Cal. App. 3d 1057, 1065)* .

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2-20C California Points & Authorities § 20C.151

§ 20C.151 Award Procured by Undue Means

[1] FORM

GROUNDS EXIST FOR _____ [REFUSING TO CONFIRM *or* VACATING] THE AWARD PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 1286.2(a)(1) BECAUSE IT WAS PROCURED BY _____ [PETITIONER'S *or* RESPONDENT'S] FRAUD IN _____ [*specify conduct constituting fraud, e.g.*, FAILING TO ABIDE BY ITS STIPULATION].

A. Fraud of Party. Extrinsic fraud of a party, such as failure to abide by astipulation, is undue influence within the meaning of *Code of Civil Procedure Section 1286.2(a)(1)* sufficient to require vacating any resulting award (*Pacific Crown Distributors v. Brotherhood of Teamsters (1986) 183 Cal. App. 3d 1138, 1146-1148, 228 Cal. Rptr. 645*).

[2] Comments

[a] Use of Form

This form may be used to support a petition or response seeking to vacate an arbitration award to assert that the award must be vacated because of the extrinsic fraud of a party [*Code Civ. Proc. § 1286.2(a)(1)*]. This form does not provide a complete memorandum but should be combined with the memorandum supporting the petition [*see § 20C.20*] or response [*see § 20C.11*] seeking to vacate the award, or a memorandum seeking rehearing after the award is vacated [*see § 20C.12*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should show the particular conduct constituting extrinsic fraud. Generally, it will be appropriate to attach a copy of the award [*see Shepherd v. Greene (1986) 185 Cal. App. 3d 989, 994, 230 Cal. Rptr. 233* (*discussed under § 20C.12[3][a]*)].

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For memoranda to combine with this form, see *§§ 20C.20* or *20C.21*, and *20C.22*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Fraud of Party

Pacific Crown Distributors v. Brotherhood of Teamsters *(1986) 183 Cal. App. 3d 1138, 228 Cal. Rptr. 645* , was a dispute between an employer and a union, on behalf of a discharged worker, under a collective bargaining agreement. There was concern regarding whether Section 9.2(1) was finalized, accepted, and part of the agreement. Section 9.2(1) required that in all cases except proven theft, intoxication, or insubordination, an employee to be discharged shall be allowed to remain on the job without loss of pay unless and until the discharge is sustained under the grievance procedure. Prior to the arbitration hearing, the parties agreed that Section 9.2(1) would not apply in the arbitration proceeding. At the arbitration hearing, both parties stipulated that the only issue submitted to the arbitrator was whether or not the discharge was in accordance with the collective bargaining agreement, and if not, what was to be the remedy. No mention was made of Section 9.2(1) at the hearing. However, the union's posthearing brief argued that Section 9.2(1) had been violated because the employee had not been allowed to remain on the job until the grievance procedure was finished. The arbitrator found that the discharge was in accordance with the collective bargaining agreement but awarded back pay on the ground Section 9.2(1) had been violated. The superior court vacated that portion of the decision awarding back pay. The union appealed.

The court of appeal affirmed. Former Code Civ. Proc. § 1286.2(a) [*now see Code Civ. Proc. § 1286.2(a)(1)*] requires judicial vacation of an arbitration award procured by corruption, fraud, or other undue means, and applies when fraud is perpetrated by either the arbitrator or a party involved. The fraud must be extrinsic as opposed to intrinsic (*183 Cal. App. 3d 1138, 1146-1147)* . The court held that raising the Section 9.2(1) issue in the posthearing brief in violation of the agreement between the parties was extrinsic fraud (*183 Cal. App. 3d 1138, 1147-1148)* .

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[Reserved]

§§ 20C.152[Reserved]

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2-20C California Points & Authorities § 20C.170

§ 20C.170 Neutral Arbitrator Failed to Reveal Possibility of Bias

[1] FORM

THE AWARD SHOULD _____ [NOT BE CONFIRMED *or* BE VACATED] BECAUSE THE NEUTRAL ARBITRATOR FAILED TO REVEAL EXISTING FACTS, UNKNOWN TO _____ [PETITIONER *or* RESPONDENT], WHICH COULD REASONABLY HAVE CREATED THE IMPRESSION THAT THE ARBITRATOR POSSIBLY WAS BIASED.

A. Statutory Disclosures Required of Neutral Arbitrators. Within 10 calendar days of service of notice of the proposed nomination or appointment, a neutral arbitrator must disclose to the parties any information required by *Code of Civil Procedure Section 1281.9(a)*, which includes the information required to be disclosed by *Code of Civil Procedure Section 170.1*, relating to disqualification of judges and the information required to be disclosed by the Ethics Standards for Neutral Arbitrators in Contractual Arbitration, California Rules of Court, Appendix, Division VI, applicableto neutral arbitrators appointed to serve on or after July 1, 2002 (*Code Civ. Proc. § 1281.9(a)*).

B. Arbitrator Failed to Disqualify Self. [*See § 20C.20[1], Paragraph H.*]

[*AND/OR*]

B. Neutral Arbitrator to Reveal Any Possibility of Bias. An award may be vacated if the neutral arbitrator failed to disclose to the parties any facts that might create an impression of possible bias in the eyes of a hypothetical, reasonable person (*Ceriale v. AMCO Ins. Co. (1996) 48 Cal. App. 4th 500, 504, 506 . 55 Cal. Rptr. 2d 685* ; *Kaiser Foundation Hospitals, Inc. v. Superior Court (1993) 19 Cal. App. 4th 513, 517, 23 Cal. Rptr. 2d 431* ; *see also* Cal. Rules of Ct., Appen., Div. VI, Standards 7(d)(4) (service as party arbitrator) and 7(d)(7) (attorney-client relationships); *but see Dornbirer v. Kaiser Foundation Health Plan, Inc. (2008) 166 Cal. App. 4th 831, 842-847, 83 Cal. Rptr. 3d 116* (court did not vacate award where arbitrator did not disclose all of the details of prior arbitrations); and *Agri-Systems v. Foster Poultry Farms (2008) 168 Cal. App. 4th 1128, 1136, 85 Cal. Rptr. 3d 917* (arbitrator's law firm's past

representation of a third party who had an adversarial relationship with a party to the arbitration need not be disclosed)).

[*Optional*] **C. Sporadic Business Dealings Are Sufficient for Vacating Award.** A neutral arbitrator's failure to disclose even sporadic business relationships with a party to the arbitration constitutes legal cause for vacating the award (*Kaiser Foundation Hospitals, Inc. v. Superior Court (1993) 19 Cal. App. 4th 513, 517, 23 Cal. Rptr. 2d 431* ; *Johnston v. Security Ins. Co. (1970) 6 Cal. App. 3d 839, 842, 86 Cal. Rptr. 133*).

[*Optional*] **D. Neutral Arbitrator to Reveal Past Service as Party Arbitrator.** The neutral arbitrator's duty of disclosure requires disclosing the fact that in previous arbitrations he or she was the party arbitrator selected by one of the parties to the present arbitration, and it is not enough merely to disclose that he or she was an arbitrator in previous arbitrations involving that party (*Code Civ. Proc. § 1281.9(a)(3)*; Cal. Rules of Ct., Ethics Standards for Neutral Arbitrators, Standard 7(d)(4)(A)(ii); *Neaman v. Kaiser Foundation Hospital (1992) 9 Cal. App. 4th 1170, 1177, 11 Cal. Rptr. 2d 879*); *but see Dornbirer v. Kaiser Foundation Health Plan, Inc. (2008) 166 Cal. App. 4th 831, 842-847, 83 Cal. Rptr. 3d 116* (court did not vacate award where arbitrator did not disclose all of the details of prior arbitrations); and *Agri-Systems v. Foster Poultry Farms (2008) 168 Cal. App. 4th 1128, 1136, 85 Cal. Rptr. 3d 917* (arbitrator's law firm's past representation of a third party who had an adversarial relationship with a party to the arbitration need not be disclosed)).

[*Optional*] **E. Neutral Arbitrator to Disclose Service as Attorney in Second Arbitration in Which Attorney for Party to Present Arbitration Serves as Arbitrator.** Even if there is no actual bias, an award must be vacated if the neutral arbitrator failed to disclose to the parties that at the time he or she was serving as their neutral arbitrator, he/she was acting as attorney in another arbitration in which the attorney for one of the parties to the arbitration was acting as arbitrator (*Ceriale v. AMCO Ins. Co. (1996) 48 Cal. App. 4th 500, 504, 506 . 55 Cal. Rptr. 2d 685*).

[*Optional*] **F. Neutral Fire Insurance Appraiser to Reveal Any Possible Interest.** *Insurance Code Section 2071* requires a higher degree of impartiality from fire insurance appraisers than from arbitrators generally, such that nondisclosure of any business relationship existing between the insurer or the insurer's appraiser and the neutral appraiser during the pendency of the appraisal procedure is a sufficient ground for vacating an award under *Insurance Code Section 2071* and *Code of Civil Procedure Section 1286.2(a)(1)*, regardless of the significance of the relationship (*Figi v. New Hampshire Ins. Co. (1980) 108 Cal. App. 3d 772, 777-778, 166 Cal. Rptr. 774*).

[*Optional*] **G. Arbitrator Failed to Disclose Acceptance of Work as Neutral During Pendency of Arbitration.** If an arbitrator intends to entertain other offers of employment from the parties or their lawyers while the current arbitration is pending, the arbitrator must disclose that intention in writing within 10 calendar days of service of notice of the arbitrator's proposed nomination or appointment. An arbitrator who does not disclose an intent to entertain additional offers from the parties or their lawyers, and despite the prohibition of Standard 12(c), accepts such an offer, must disclose that fact to the parties in writing within 10 calendar days. If an arbitrator who has not disclosed his or her intention to accept employment from a party of lawyer for a party accepts employment as a dispute resolution neutral from a party or lawyer while the arbitration is pending and fails to disclose that fact, any award rendered by that arbitrator must be vacated (*Code Civ. Proc. § 1286.2(a)(6)(A)*; Cal Rules of Ct, Appen., Div. VI, Standards. 7(d), (d)(4)(A)(i), 12(b), (c); *Ovitz v. Schulman (2005) 133 Cal. App. 4th 830, 838-845, 35 Cal. Rptr. 3d 117*).

[*Optional*] **H. Ties to Party's Insurer Had to Be Disclosed.** The arbitrator was required to disclose that he and his law firm represented several protection and indemnity clubs which provided insurance and other business services and procured reinsurance support from syndicates of the company through which plaintiff was insured[. A representative from that insurer was present throughout the arbitration]. This relationship "could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial" within the meaning of *Code of Civil Procedure Section 1281.9(a)* and thus had to be disclosed (*Advantage Medical Services, LLC v. Hoffman (2008) 160 Cal. App. 4th 806, 809, 817, 72 Cal. Rptr. 3d 935*).

[2] Comments

[a] Use of Form

This form may be used to support a petition or response seeking to vacate an arbitration award on the ground that the neutral arbitrator failed to disclose facts which would create an impression of possible bias in the eyes of a reasonable person [*see Code Civ. Proc. § 1286.2(a)(1), (2), (6)*] or one of the matters required to be disclosed by *Code Civ. Proc. §§ 170.1, 1281.9* or Cal. Rules of Ct., Appen., Div. VI, Standard 7(d) or 12 [*but see* NOTE at [3][a], *below*]. Failure to disclose any of those relationships is grounds for vacating an award [*Code Civ. Proc. § 1282.6(a)(A)*]; thus, if failure to make one of the required disclosures is involved, Paragraph H from § 20C.20[1] should be included in the memorandum. The Optional Paragraphs are for use if they correspond to the facts of counsel's particular situation.

This form does not provide a complete memorandum but should be combined with the memorandum supporting the petition [*see § 20C.20*] or response [*see § 20C.21*] seeking to vacate the award, or one supporting a request for rehearing after the award is vacated [*see § 20C.12*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should show the facts indicating the arbitrator's possible bias, that the party seeking to vacate the award was unaware of those facts at the time of the arbitration, how those facts were revealed, and how the facts indicate possible bias on the part of the neutral arbitrator. Generally, it will be appropriate to attach a copy of the award [*see Shepherd v. Greene (1986) 185 Cal. App. 3d 989, 994,230 Cal. Rptr. 233* (*discussed under § 20C.12[3][a]*)].

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For discussion of the facts to be disclosed by neutral arbitrators and procedures for their disqualification, see California Forms of Pleading and Practice, Ch. 33, *Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding* (Matthew Bender).

[d] Related Memoranda

For memoranda to combine with this form, see *§§ 20C.20* or *20C.21*, and *20C.22*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing*

Legal Memoranda and Briefs .

[3] Discussion of Authorities

[a] Statutory Disclosures Required of Neutral Arbitrators

NOTE:

The California Ethics Standards will not apply in any arbitration in which the parties have agreed to arbitrate in accordance with New York Stock Exchange (NYSE) Arbitration Rules or the National Association of Securities Dealers (NASD) Code of Arbitration Procedure. Both preempt the California Ethics Standards to the extent that the Securities and Exchange Commission has approved those rules and procedures in accordance with the Securities Exchange Act of 1934 [Credit Suisse First Boston Corp. v. Grunwald (9th Cir. 2005) *400 F.3d 1119, 1134-1136 (NASD rules)* ; *Mayo v. Dean Witter Reynolds (N.D. Cal. 2003) 258 F. Supp. 2d 1097, 1112* , as corrected at *260 F. Supp. 2d 979* ; *accord Wilmot v. McNabb (N.D. Cal. 2003) 269 F. Supp. 2d 1203* ; *Jevne v. Superior Court (JB Oxford Holdings, Inc.) (2005) 35 Cal. 4th 935, 28 Cal. Rptr. 3d 685, 111 P.3d 954]* . NYSE Rules and NASD Code of Arbitration Procedure have their own disclosure requirements [*see* NYSE Arbitration Rule 610; NASD Code of Arbitration Procedure, Rule 10312].

Code Civ. Proc. §§ 170.1, 1281.9(a) and Cal. Rules of Ct., Appen., Div. VI, Standards 7, 8, and 12 require a proposed neutral arbitrator, except one who is to conduct an arbitration pursuant to a public or private sector collective bargaining agreement, to disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial, including the following enumerated items [*see Code Civ. Proc. § 1281.9(a)(1)* (which requires disclosure of any ground specified in *Code Civ. Proc. § 170.1* for disqualification of a judge); Cal. Rules of Ct., Appen., Div. VI, Standards 7(d), 12(b); *see also Code Civ. Proc. §§ 1281.85(b), 1281.9(e)*]:

- Family relationships between the arbitrator and his or her immediate or extended family and any party, party's spouse or domestic partner, officer, director, or trustee of a party, lawyer in the arbitration, a spouse or domestic partner of a lawyer in the arbitration, or a lawyer currently associated in the private practice of law with a lawyer in the arbitration [*Code Civ. Proc. § 170.1(a)(4), (5)*; Cal. Rules of Ct., Appen., Div. VI, Standard 7(d)(1), (2); *see* Cal. Rules of Ct., Appen., Div. VI, Standard 9(c) (inquiry of proposed arbitrator into relationships of lawyers associated in practice with lawyer in arbitration)].

- Whether or not he or she has a current arrangement concerning prospective employment or other compensated service as a dispute resolution neutral, or is participating in, or within the last two years has participated in, any discussions regarding such prospective employment or service with a party to the proceeding [*Code Civ. Proc. §§ 170.1(a)(8), 1281.9(a)(1)*; Cal. Rules of Ct., Appen., Div. VI, Standards 7(d)(6)].

- Particulars of prior or pending cases in which the proposed neutral arbitrator has acted or is acting as any of the following:

  - A neutral arbitrator [*Code Civ. Proc. § 1291(a)(4)*; Cal. Rules of Ct., Appen., Div. VI, Standard 7(d)(4)(A)(i), (iii)].

  - A party arbitrator [*Code Civ. Proc. § 1291(a)(3)*; Cal. Rules of Ct., Appen., Div. VI, Standard 7(d)(4)(A)(ii)].

  - An other compensated dispute resolution neutral [Cal. Rules of Ct., Appen., Div. VI,

Standard 7(d)(5)].

- Attorney-client, and other professional or significant personal relationships, including those of the arbitrator's family, with any party or lawyer for a party [*Code Civ. Proc. §§ 170.1(a)(2), 1291(a)(5), (6)*; Cal. Rules of Ct., Appen., Div. VI, Standard 7(d)(3), (7)-(8)].

- Financial interests of the arbitrator and his or her immediate family in a partyof the subject matter of the arbitration, or other interests of theirs that could be substantially affected by the outcome of the arbitration [*Code Civ. Proc. § 170.1(a)(3)*; Cal. Rules of Ct., Appen., Div. VI, Standard 7(d)(9)-(11)].

- Physical or scheduling problems that might effect his or her ability to perform as arbitrator [*Code Civ. Proc. § 170.1(a)(7)*; Cal. Rules of Ct., Appen., Div. VI, Standard 7(e)].

- The arbitrator or a member of the arbitrator's immediate or extended family has personal knowledge of disputed evidentiary facts relevant to the arbitration or is likely to be a material witness in the proceeding [*Code Civ. Proc. § 170.1(a)(1)*; Cal. Rules of Ct., Appen., Div. VI, Standard 7(d)(12)].

- The arbitrator's membership in any organization that practices invidious discrimination on the basis of race, sex, religion, national origin, or sexual orientation [Cal. Rules of Ct., Appen., Div. VI, Standard 7(b)(13)].

- Any other matter that might cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial [*Code Civ. Proc. § 170.1(a)(6)(A)(iii)*; Cal. Rules of Ct., Appen., Div. VI, Standard 7(b)(14)(A)].

- Any other matter that leads the proposed arbitrator to believe either of the following:

  - There is a substantial doubt as to his or her capacity to be impartial, including, but not limited to, bias or prejudice toward a party, lawyer, or law firm in the arbitration [*Code Civ. Proc. § 170.1(a)(6)(A)(ii), (B)*; Cal. Rules of Ct., Appen., Div. VI, Standard 7(b)(14)(B)].

  - The proposed neutral arbitrator's disqualification will further the interests of justice [*Code Civ. Proc. § 170.1(a)(6)(A)(i)*; Cal. Rules of Ct., Appen., Div. VI, Standard 7(b)(14)(C)].

- If, while that arbitration is pending, he or she will entertain offers of employment or new professional relationships in any capacity other than as a lawyer, expert witness, or consultant from a party or a lawyer for a party, including offers to serve as a dispute resolution neutral in another case [Cal. Rules of Court, Appen., Div. VI, Standard 12(b)].

- Beginning January 1, 2003, in any consumer arbitration in which a dispute resolution provider organization is coordinating, administering, or providing the arbitration services, certain particulars of any significant past, present, or currently expected financial or professional relationship or affiliation exists between the dispute resolution provider organization and a party or lawyer in the arbitration [Cal. Rules of Ct., Appen., Div. VI, Standard 8]. Note that if the financial relationship or affiliation between the provider organization and the party or attorney in the arbitration is a "financial interest," as defined in *Code Civ. Proc. § 170.5*, that provider organization is prohibited from administering a consumer arbitration or providing any other services related to the consumer arbitration [*Code Civ. Proc. § 1281.92*].

All of the foregoing are subject to the definitions set forth in *Code Civ. Proc. § 1291(c)-(e)* and Cal. Rules of Ct., Appen., Div. VI, Standards 2 and 7 and are more fully discussed in California Forms of Pleading and Practice, Ch. 33, *Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding* .

[b] Neutral Arbitrator to Reveal Any Possibility of Bias

Cal. Rules of Ct., Appen., Div. VI, Standards 7(d)(4)(ii), (B), regarding disclosure of a neutral arbitrator's prior service as party arbitrator is set forth at [d], *below*.

Cal. Rules of Ct., Appen., Div. VI, Standards 7(d)(7) requires a proposed neutral arbitrator to disclose any attorney-client relationship the arbitrator has or has had with a party or a lawyer for a party [*see* Cal. Rules of Ct., Appen., Div. VI, Standard 2(m) (definition of "lawyer for a party")]. Attorney-client relationship includes the following [Cal. Rules of Ct., Appen., Div. VI, Standard 7(d)(7)]:

> (A) An officer, a director, or a trustee of a party is or, within the preceding two years, was a client of the arbitrator in the arbitrator's private practice of law or a client of a lawyer with whom the arbitrator is or was associated in the private practice of law;
>
> (B) In any other proceeding involving the same issues, the arbitrator gave advice to a party or a lawyer in the arbitration concerning any matter involved in the arbitration [*see* Cal. Rules of Ct., Appen., Div. VI, Standard 2(l) (definition of "lawyer in the arbitration" set forth at [c][vi], *below*)]; and
>
> (C) The arbitrator served as a lawyer for or as an officer of a public agency which is a party and personally advised or in any way represented the public agency concerning the factual or legal issues in the arbitration.

Ceriale v. AMCO Ins. Co. *(1996) 48 Cal. App. 4th 500, 55 Cal. Rptr. 2d 685* , arose out of an automobile accident involving an uninsured motorist. Plaintiff was represented by the firm of Carrington & Nye. Victoria Lindenhauer was appointed arbitrator. She did not disclose that sometime between 1986 and 1992 she had been an associate in a firm with Nye and Richard Hardin, who at the time of the arbitration, was the managing partner of the firm representing AMCO. AMCO was aware of this past association, and made no objection to Lindenhauer's appointment. The arbitration in the Ceriale matter was continued for three months, during which time, Nye was appointed arbitrator in a judicial arbitration in which Lindenhauer represented a party. Lindenhauer did not disclose to the parties to the Ceriale arbitration that she represented a party in the case in which Nye was appointed arbitrator. Nye heard that arbitration while Lindenhauer was ill, so another attorney appeared at the hearing. Although Nye ruled in favor of Lindenhauer's client and had written up that decision, to avoid even the appearance of attempting to influence Lindenhauer, Nye did not mail that decision until he learned that Lindenhauer's decision in the Ceriale matter had been placed in the mail. Lindenhauer awarded Ceriale $278,169. AMCO moved to vacate the award and Ceriale to have it confirmed. AMCO contended, among other things, that Lindenhauer should have disclosed the past association and the fact that Nye was appointed arbitrator in a case in which she represented a party. The trial court denied AMCO's motion and confirmed the award. AMCO appealed.

The court of appeal reversed. The standard to be applied is whether the record reveals facts which might create an impression of possible bias in the eyes of a hypothetical reasonable person (*48 Cal. App. 4th 500, 504)* . The trial court repeatedly stated that Lindenhauer, Nye, and Carrington were above reproach. The court of appeal stated it had no cause to dispute that, but the question is not one of actual bias, but whether a person aware of the facts might reasonably entertain a doubt that the arbitrator would be able to be impartial given the circumstances (*48 Cal. App. 4th 500, 506)* .

Kaiser Foundation Hospitals, Inc. v. Superior Court *(1993) 19 Cal. App. 4th 513, 23 Cal. Rptr. 2d 431* , involved a

wrongful death action by a decedent's survivors against a hospital. The dispute was submitted to binding arbitration under the medical and hospital service agreement between the decedent and the hospital. After the arbitrators rendered an award in favor of the hospital, the survivors discovered that the neutral arbitrator had served as the hospital's party arbitrator on a number of prior occasions. The survivors moved to vacate the arbitration award and the trial court granted the motion. The hospital petitioned the court of appeal, seeking a writ of mandate to direct the trial court to set aside its order.

The court of appeal denied the petition for writ of mandate. The court pointed out that *Code Civ. Proc. § 170.1*, provides that a judge is to be disqualified if a person aware of the fact might reasonably entertain a doubt that the judge would be able to be impartial. Further, according to *Johnston v. Security Ins. Co. (1970) 6 Cal. App. 3d 839, 842, 86 Cal. Rptr. 133* , discussed at [c], *below*, arbitrators are required to disclose to the parties "any dealings that might create an impression of possible bias." Thus, the court concluded that the arbitrator's prior relationship with the hospital was one that he was required to disclose and he failed to do so (*19 Cal. App. 4th 513, 517)* . In addition, the court held that an artfully drafted letter by hospital's counsel, which was claimed to have put the opposing party on notice of the situation, did not relieve the arbitrator of his obligation disclose (*19 Cal. App. 4th 513, 516)* .

Dornbirer v. Kaiser Foundation Health Plan, Inc. *(2008) 166 Cal. App. 4th 831, 83 Cal. Rptr. 3d 116* , involved a neutral arbitrator who acknowledged a prior relationship with both the defendant health care provider and its counsel, and he disclosed pursuant to *Code Civ. Proc., § 1281.9*, that he had served as an arbitrator in a number of prior arbitrations involving them. He did not provide dates and other details of those prior arbitrations (*166 Cal. App. 4th 831, 835-836, 840)* . The trial court denied plaintiff's motion to vacate the arbitration award, holding that the disclosure clearly put plaintiff on notice that the arbitrator had a significant history of arbitrating in cases in which defendant was a party (*166 Cal. App. 4th 831, 841)* .

The court of appeal affirmed the trial court's judgment denying patient's petition to vacate the arbitration award, holding that the patient, by consenting to proceed with arbitration despite being aware of deficiencies in the arbitrator's disclosure, waived her right to disqualify the arbitrator, and could not later challenge the arbitration award on the ground of inadequate disclosure (*166 Cal. App. 4th 831, 841-843, 846)* . The information that the arbitrator disclosed was sufficient to put plaintiff on notice of any potential bias on the arbitrator's part (*166 Cal. App. 4th 831, 834)* . The court clarified that there is no question that arbitrator *should* have disclosed all details of his prior arbitrations with defendant pursuant to *Code Civ. Proc. § 1281.9*; however, *Code Civ. Proc., § 1286.2*, cannot be read to nullify every arbitration award stemming from an arbitration in which the arbitrator failed to disclose all of the details of prior arbitrations, particularly where neither party challenged the arbitrator despite being aware of the incomplete disclosure (*166 Cal. App. 4th 831, 842-843, 847)* . The court interpreted *Code Civ. Proc., § 1286.2* to refer to a failure to disclose the existence and nature of any relationship between the arbitrator and the parties or the parties' attorneys, not the specifics of each such relationship (*166 Cal. App. 4th 831, 842)* .

In the case of ***Agri-Systems v. Foster Poultry Farms*** *(2008) 168 Cal. App. 4th 1128, 85 Cal. Rptr. 3d 917* , a neutral arbitrator heard a matter involving a breach of construction agreement and issued an award against plaintiff who was a general contractor. The trial court confirmed the arbitration award against plaintiff. Subsequently, plaintiff filed a motion for an order correcting or vacating the arbitration award, alleging that the arbitrator had an undisclosed conflict of interest since arbitrator's law firm represented a third party who had an adversarial relationship with plaintiff in another matter. The trial court denied plaintiff's motion, finding that the arbitrator had no duty to disclose because the relationship between the arbitrator's law firm (not the arbitrator himself) and a third party adversary of plaintiff was not substantial. Plaintiff challenged the trial court's decision to confirm an arbitration award, contending the award should have been vacated because the arbitrator violated his disclosure obligation.

The court of appeal affirmed. Plaintiff argued that the arbitrator was required to disclose his law firm's past representation of a company that owed plaintiff over $3 million. The court's record showed the following: (1) another attorney in the arbitrator's law firm represented the debtor company at the beginning of a bankruptcy proceeding; (2) the

debtor company's interests were adverse to plaintiff's interests; (3) those adverse interests resulted in litigation between the debtor company and plaintiff; (4) the arbitrator's law firm had withdrawn from representing the debtor company before the litigation between the debtor company and plaintiff began; and (5) the arbitrator was appointed in the present case a year and a half after his firm's withdrawal as attorney of record for the debtor company in its bankruptcy proceeding. The court of appeal held that the applicable rule of law was the general requirement of *Code Civ. Proc., § 1281.9(a)* that a proposed neutral arbitrator must disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial. Based on the entirety of the facts, the court of appeal found that there was adequate support for the trial court's finding that an objective person would not reasonably doubt the arbitrator's ability to be impartial; thus, the arbitrator's law firm's prior representation of a third party who had an adversarial relationship with plaintiff was not required to be disclosed (*168 Cal. App. 4th 1128, 1140)* .

[c] Sporadic Business Dealings Are Sufficient for Vacating Award

The facts and procedural background of ***Kaiser Foundation Hospitals, Inc. v. Superior Court*** *(1993) 19 Cal. App. 4th 513, 23 Cal. Rptr. 2d 431* , are discussed at [b], *above*. In holding that a trial court did not abuse its discretion in ordering that an arbitration award be set aside when a neutral arbitrator failed to disclose that he had served as a party arbitrator for the opposing party on a number of occasions, the court stated that a neutral arbitrator's failure to disclose even sporadic business relationships with a party to the arbitration constitutes legal cause for vacating the award, *citing Johnston v. Security Ins. Co. (1970) 6 Cal. App. 3d 839, 842, 86 Cal. Rptr. 133* , discussed *below* (*19 Cal. App. 4th 513, 517)* .

In ***Johnston v. Security Ins. Co.*** *(1970) 6 Cal. App. 3d 839, 86 Cal. Rptr. 133* , the parties to a fire insurance policy resorted to arbitration over differences concerning fire loss benefits. Each was allowed under the policy to appoint a "competent and disinterested" appraiser, and the latter, in turn, were to appoint a "competent and disinterested umpire." After an award for the claimant, the claimant petitioned to confirm the award. The insurer petitioned to vacate it on the ground that the neutral umpire failed to disclose his relationships with the claimant's counsel and the appraiser appointed by the claimant. The trial court denied confirmation and vacated the award, and the claimant appealed.

The court of appeal, in affirming, found that federal and state law were practically identical in allowing vacation of an award for corruption, fraud, or partiality [*cf. 9 U.S.C. § 10*; *Code Civ. Proc. § 1286.2(a)*]. The court found persuasive the U.S. Supreme Court's approach in this area [*see Commonwealth Coatings Corp. v. Continental Cas. Co. (1968) 393 U.S. 145, 148-149, 89 S. Ct. 337, 21 L. Ed. 2d 301]* , that even in the absence of any showing of actual fraud, corruption, or possible partiality on the part of a neutral arbitrator, arbitrators should disclose to the parties any dealings that might create an impression of possible bias (*6 Cal. App. 3d 839, 843-844)* ; and that the arbitrator's failure to disclose even sporadic but substantial business relationships with a party to the arbitration constituted legal cause for vacating the award (*6 Cal. App. 3d at 841-842*). The fact that no actual fraud or bias was charged or proved against the arbitrator was immaterial. The neutral arbitrator was under a duty to disclose to the parties any dealings that might create an impression of possible bias at the outset of the hearings, and that included the facts that opposing counsel had been associated with the neutral arbitrator on various cases, had been referred cases by him, and on the date of the hearing opposing counsel was representing a client referred by the arbitrator (*6 Cal. App. 3d 839, 843-844)* .

[d] Neutral Arbitrator to Reveal Past Service as Party Arbitrator

If a proposed neutral arbitrator is serving, or within the preceding five years, has served as a party-appointed arbitrator in another prior or pending noncollective bargaining case for either a party to the current arbitration or a lawyer for a party, *Code Civ. Proc. § 1281.9(a)(3)* and Cal. Rules of Ct., Appen., Div. VI, Standard 7(d)(4)(A)(ii), (B) require him or her to disclose in writing to all of the parties, the names of the parties to each prior or pending case, and where applicable, the name of the attorney representing the party in the current arbitration who is involved in the pending case or was involved in the prior case, or whose current associate is involved in the pending case or was involved in the prior

case, together with the results of each case arbitrated to conclusion, including the following:

- The date of the arbitration award.
- Identification of the prevailing party.
- The names of the parties' attorneys.
- The amount of monetary damages awarded, if any.

To preserve confidentiality, it is sufficient to give the name of any party who is not a party to the pending arbitration as "claimant" or "respondent" if that party is an individual and not a business or corporate entity [*Code Civ. Proc. § 1281.9(a)(3)*; Cal. Rules of Ct., Appen., Div. VI, Standard 7(b)(3)].

In ***Neaman v. Kaiser Foundation Hospital*** *(1992) 9 Cal. App. 4th 1170, 11 Cal. Rptr. 2d 879* , the court of appeal vacated the award in a medical malpractice arbitration on the ground that the neutral arbitrator was required but failed to disclose that in atleast five previous arbitrations involving the same health care provider, he had served as the party arbitrator selected by the health care provider. The court concluded that the neutral arbitrator's duty of disclosure was not met by disclosing merely that he had served as an arbitrator in five previous arbitrations involving the same health care provider (without disclosing that he had been selected as that party's arbitrator) (*9 Cal. App. 4th 1170, 1177)* .

Dornbirer v. Kaiser Foundation Health Plan, Inc. *(2008) 166 Cal. App. 4th 831, 83 Cal. Rptr. 3d 116* , involved a neutral arbitrator who acknowledged a prior relationship with both the defendant health care provider and its counsel, and he disclosed pursuant to *Code Civ. Proc., § 1281.9*, that he had served as an arbitrator in a number of prior arbitrations involving them. He did not provide dates and other details of those prior arbitrations (*166 Cal. App. 4th 831, 835-836, 840)* . The trial court denied plaintiff's motion to vacate the arbitration award, holding that the disclosure clearly put plaintiff on notice that the arbitrator had a significant history of arbitrating in cases in which defendant was a party (*166 Cal. App. 4th 831, 841)* .

The court of appeal affirmed the trial court's judgment denying patient's petition to vacate the arbitration award, holding that the patient, by consenting to proceed with arbitration despite being aware of deficiencies in the arbitrator's disclosure, waived her right to disqualify the arbitrator, and could not later challenge the arbitration award on the ground of inadequate disclosure (*166 Cal. App. 4th 831, 841-843, 846)* . The information that the arbitrator disclosed was sufficient to put plaintiff on notice of any potential bias on the arbitrator's part (*166 Cal. App. 4th 831, 834)* . The court clarified that there is no question that arbitrator *should* have disclosed all details of his prior arbitrations with defendant pursuant to *Code Civ. Proc. § 1281.9*; however, *Code Civ. Proc., § 1286.2*, cannot be read to nullify every arbitration award stemming from an arbitration in which the arbitrator failed to disclose all of the details of prior arbitrations, particularly where neither party challenged the arbitrator despite being aware of the incomplete disclosure (*166 Cal. App. 4th 831, 842-843, 847)* . The court interpreted *Code Civ. Proc., § 1286.2* to refer to a failure to disclose the existence and nature of any relationship between the arbitrator and the parties or the parties' attorneys, not the specifics of each such relationship (*166 Cal. App. 4th 831, 842)* .

In the case of ***Agri-Systems v. Foster Poultry Farms*** *(2008) 168 Cal. App. 4th 1128, 85 Cal. Rptr. 3d 917* , a neutral arbitrator heard a matter involving a breach of construction agreement and issued an award against plaintiff who was a general contractor. The trial court confirmed the arbitration award against plaintiff. Subsequently, plaintiff filed a motion for an order correcting or vacating the arbitration award, alleging that the arbitrator had an undisclosed conflict of interest since arbitrator's law firm represented a third party who had an adversarial relationship with plaintiff in another matter. The trial court denied plaintiff's motion, finding that the arbitrator had no duty to disclose because the relationship between the arbitrator's law firm (not the arbitrator himself) and a third party adversary of plaintiff was not substantial. Plaintiff challenged the trial court's decision to confirm an arbitration award, contending the award should

have been vacated because the arbitrator violated his disclosure obligation.

The court of appeal affirmed. Plaintiff argued that the arbitrator was required to disclose his law firm's past representation of a company that owed plaintiff over $3 million. The court's record showed the following: (1) another attorney in the arbitrator's law firm represented the debtor company at the beginning of a bankruptcy proceeding; (2) the debtor company's interests were adverse to plaintiff's interests; (3) those adverse interests resulted in litigation between the debtor company and plaintiff; (4) the arbitrator's law firm had withdrawn from representing the debtor company before the litigation between the debtor company and plaintiff began; and (5) the arbitrator was appointed in the present case a year and a half after his firm's withdrawal as attorney of record for the debtor company in its bankruptcy proceeding. The court of appeal held that the applicable rule of law was the general requirement of *Code Civ. Proc., § 1281.9(a)* that a proposed neutral arbitrator must disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial. Based on the entirety of the facts, the court of appeal found that there was adequate support for the trial court's finding that an objective person would not reasonably doubt the arbitrator's ability to be impartial; thus, the arbitrator's law firm's prior representation of a third party who had an adversarial relationship with plaintiff was not required to be disclosed (*168 Cal. App. 4th 1128, 1140)* .

[e] Neutral Arbitrator to Disclose Service as Attorney in Second Arbitration in Which Attorney for Party to Present Arbitration Serves as Arbitrator

Ceriale v. AMCO Ins. Co. *(1996) 48 Cal. App. 4th 500, 55 Cal. Rptr. 2d 685* , is discussed at [b], *above*.

[f] Neutral Fire Insurance Appraiser to Reveal Any Possible Interest

Figi v. New Hampshire Ins. Co. *(1980) 108 Cal. App. 3d 772, 166 Cal. Rptr. 774* , concerned a disputed insurance claim for fire loss which was arbitrated pursuant to the policy's standard appraisal clause mandated by *Ins. Code § 2071*. Plaintiff insured petitioned to vacate the award for fraud and corruption under former Code Civ. Proc. § 1286.2(a) [*now see Code Civ. Proc. § 1286.2(a)(1)*] on the ground that an undisclosed business relationship between the neutral appraiser and the appraiser appointed by defendant insurer gave the appearance of bias. Although the business relationship was not shown to involve defendant insurer, it was found to have existed during the pendency of the appraisal. Plaintiff appealed the lower court's confirmation of the award.

The court of appeal reversed, reasoning that a higher standard of impartiality was imposed on fire insurance appraisers than on arbitrators generally. This higher standard arises from a specific requirement in *Ins. Code § 2071* that such appraisers be "disinterested," as well as from the general duty of good faith and fair dealing owed by insurers to their insureds (*108 Cal. App. 3d 772, 776-777)* . In this case, the court held that the existence of the business relationship during the pendency of the appraisal, regardless of its significance, was a sufficient basis to vacate the award under *Ins. Code § 2071* and former Code Civ. Proc. § 1286.2(a) [*now see Code Civ. Proc. § 1286.2(a)(1)* and *(6)*], read together (*108 Cal. App. 3d 772, 778)* .

[g] Arbitrator Failed to Disclose Acceptance of Employment as Neutral During Pendency of Arbitration

Cal Rules of Ct, Appen., Div. VI, Standard 12(b) provides that, in addition to the disclosures required by Standards 7 and 8, within 10 calendar days of service of notice of the proposed nomination or appointment, a proposed arbitrator must disclose to all parties in writing if, while that arbitration is pending, he or she will entertain offers of employment or new professional relationships in any capacity other than as a lawyer, expert witness, or consultant from a party or a lawyer for a party, including offers to serve as a dispute resolution neutral in another case. A party may disqualify the arbitrator based on this disclosure by serving notice of disqualification in the manner and within the time specified in *Code Civ. Proc. § 1281.91(b)*.

Cal Rules of Ct., Appen., Div. VI, Standard 12(c) provides that if an arbitrator fails to make the disclosure required by subdivision (b) of this standard, from the time of appointment until the conclusion of the arbitration the arbitrator must not entertain or accept any such offers of employment or new professional relationships, including offers to serve as a dispute resolution neutral.

The facts and procedural background of ***Ovitz v. Schulman*** *(2005) 133 Cal. App. 4th 830, 35 Cal. Rptr. 3d 117* , and the portion of the opinion addressing the fact that *Code Civ Proc. § 1286.2(a)(6)(A)* is not preempted by the Federal Arbitration Act are discussed at *§ 20C.20[3][c]*. As to the matter of disclosure, the court of appeal determined that without the disclosure required by Standard 12(b), the arbitrator's acceptance of employment in the second arbitration violated Standard 12(c) and the arbitrator's failure to disclose that employment within 10 calendar days violated both Standards 7(c) and 7(d)(4)(A)(i) (*133 Cal. App. 4th 830, 838)* .

The court discussed the governing statutes and California Ethical Standards for Disclosures by Neutral Arbitrators in Contractual Arbitration [Cal. Rules of Court, Appen., Div. VI]. Standard 12(a) prohibits the arbitrator from entertaining or accepting an offer of employment as a lawyer, an expert witness, or a consultant from a party or lawyer in the pending arbitration. An arbitrator may entertain offers from the parties or their lawyers to serve in other capacities, if the arbitrator discloses that intent pursuant to Standard 12(b). The parties can disqualify the arbitrator based on such a disclosure (*133 Cal. App. 4th 830, 838-839)* . Further, under Standard 12(c), the arbitrator's failure to make the disclosure required by Standard 12(b) precludes the arbitrator from entertaining or accepting any offer of employment from the parties or their lawyers from the time of appointment until the conclusion of the arbitration. Under Standard 7(c) and (d)(4)(A)(i), an arbitrator serving as a neutral arbitrator in another prior or pending non-collective bargaining case involving a party to the current arbitration or a lawyer for a party must disclose that to the parties in writing within 10 calendar days after the arbitrator becomes aware of the matter (*133 Cal. App. 4th 830, 840)* . Under Standard 7(b), if an arbitrator has disclosed to the parties that he or she will entertain offers of employment or of professional relationships from a party or lawyer for a party while the arbitration is pending as required by Standard 12(b), the arbitrator is not required to disclose to the parties in that arbitration any such offer from a party or lawyer for a party that he or she subsequently receives or accepts while that arbitration is pending (*133 Cal. App. 4th 830, 840-841)* . However, if the arbitrator does not disclose an intent to entertain additional offers from the parties or their lawyers, the arbitrator cannot accept any such offer until the current arbitration is concluded. If, despite this prohibition, the arbitrator accepts such an offer, the arbitrator must disclose that fact to the parties in the current arbitration in writing within 10 calendar days [Cal Rules of Ct., Appen., Div. VI, Standard 7(c)] (*133 Cal. App. 4th 830, 841)* .

Here, the arbitrator's initial disclosure did not disclose an intent to entertain offers of employment or new professional relationships from a party or a lawyer for a party (*133 Cal. App. 4th 830, 842-843)* . Having failed to comply with Standard 12(b), the arbitrator was precluded from serving as an arbitrator in any other matter involving theparties or any lawyer for the parties until the arbitration was completed [Cal Rules of Ct., Appen., Div. VI, Standard 12(c)]. However, the arbitrator accepted appointment in a second case in which he knew a party was represented by the same law firm that representing the joint venture parties. Besides being prohibited by Standard 12(c), the arbitrator's service in the second arbitration was a matter covered by the disclosure requirement of Standard 7(d)(4)(A)(i), which under Standard 7(c), the arbitrator was required to disclosure, in writing, within 10 calendar days of his appointment in the second case. Although the first hearing in the second arbitration was held on March 1, 2004, the arbitrator did not make any written disclosure until May 27, 2004, by which time the arbitrator had orally ruled and directed the joint venture parties to draft a proposed arbitration award. The arbitrator's failure to comply timely with his disclosure obligations has a severe consequence: the vacating of any arbitration award rendered by the arbitrator [*Code Civ. Proc. § 1286.2(a)(6)(A)*] (*133 Cal. App. 4th 830, 844*). These failures require that the arbitration award be vacated. Further, defendant did not forfeit her right to vacate the award based on any disclosure violation (*133 Cal. App. 4th 830, 845*). Under *Code Civ. Proc. § 1281.91(c)*, a party is deemed to have waived the right to disqualify the arbitrator if the party fails to act within the 15-day time period provided in *section 1281.91(a)* or *(b)*, unless the proposed nominee or appointee makes a material omission or material misrepresentation in his or her disclosure. Here, the arbitrator's initial disclosure statement contained a material omission: it failed to disclose under Standard 12(b) that he intended to entertain other offers of

employment from the parties or their attorneys. Even if not initially material, it certainly became material when, in violation of Standard 12(c), the Arbitrator accepted appointment in the second case, and failed timely to disclose it under Standards 7(d)(4)(A)(i) and 7(c). Thus, defendant did not waive her right to challenge the arbitrator. The waiver rule of *section 1281.91(c)* manifestly applies only when the proposed arbitrator has made the requisite disclosure (*133 Cal. App. 4th 830, 846)* .

[h] Ties to Party's Insurer Had to Be Disclosed

The court of appeal found substantial evidence to support the trial court's finding that disclosure of the arbitrator's and his law firm's ties to plaintiff's insurer "could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial" within the meaning of *Code Civ. Proc. § 1281.9(a)* and the arbitrator's failure to disqualify himself warranted vacating the award (*160 Cal. App. 4th 806, 809, 816)* . The court discussed *Code Civ. Proc. § 1281.9(a)(2)* and *(6)* and Standard 7(d)(14)(A) of the California Rules of Court, Ethics Standards for Neutral Arbitrators in Contractual Arbitration (*Standards*). *Code Civ. Proc. § 1281.9(a)(2)* and *(6)* require disclosure of any matters required to be disclosed by the ethics standards and any professional or significant personal relationship the proposed neutral arbitrator has or has had with any party to the arbitration proceeding or lawyer for a party. Standard 7(d)(14)(A) requires disclosure of any matter even if it is not specifically enumerated in the standard, if it might cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial. This duty is a continuing duty, applying from service of the notice of the arbitrator's proposed nomination or appointment until the conclusion of the arbitration proceeding (*160 Cal. App. 4th 806, 817)* .

[4] Additional Authorities

[a] Neutral Arbitrator to Reveal Any Possibility of Bias

Schmitz v. Zilveti (9th Cir. 1994) 20 F.3d 1043 , concerned a dispute in which a post-award investigation revealed that the neutral arbitrator's law firm represented the parent corporation of an opposing party in at least 19 cases during a period of 35 years, with the most recent representation ending approximately 21 months before the current arbitration was submitted. A party to the arbitration challenged the arbitration award in district court, alleging that the award should be vacated because the arbitrator was evidently partial under federal statute allowing vacation of an arbitration award. The district court upheld the award and the party appealed.

The Ninth Circuit court of appeals reversed, vacating the arbitration award. The court held that the arbitrator had a duty under the arbitration association's rules to make a reasonable effort to inform himself of his firm's representation of the opposing party. The arbitrator did nothing to fulfill that duty, and although he lacked actual knowledge, he had constructive knowledge. Given his constructive knowledge and the presence of conflict, the arbitrator's failure to inform the parties to the arbitration of his law firm's representation resulted in a reasonable impression of partiality warranting vacatur of the award (*20 F.3d 1043, 1049)* .

In *Britz, Inc. v. Alfa-Laval Food & Dairy Co. (1995) 34 Cal. App. 4th 1085, 40 Cal. Rptr. 2d 700* , plaintiffs petitioned to vacate an arbitration award on the basis of, among other grounds, the arbitrator's conflict of interest. Before arbitration was ordered and while it was pending, the defendants were represented in the trial court by a law firm (McCormick) that had made referrals to the arbitrator and occasionally retained him as an expert witness. A different law firm represented defendants in the arbitration proceeding, except on one occasion, when an attorney in the McCormick firm wrote a letter on firm letterhead to the arbitrator regarding issuance of a subpoena in the matter. After liability was determined (the arbitration was bifurcated), plaintiffs requested the arbitrator to disclose all past and present relationships with McCormick, and learned that the arbitrator had been retained by McCormick as an expert witness in two matters in November and December of 1991, matters in which he was still involved at the time of making the disclosure. Plaintiffs requested the AmericanArbitration Association (AAA) to appoint a new arbitrator, and when the AAA refused, sought relief from the court, which was also denied. Plaintiffs again raised this issue on their

later petition to vacate the award, which the trial court denied. Plaintiff appealed.

The court of appeal reversed, holding that, although the arbitrator had not then disclosed his prior involvement with the McCormick firm, plaintiffs had adequate knowledge of the referrals of business so that they had waived any objection based on these facts by their initial acceptance of the arbitrator without seeking further disclosure (*34 Cal. App. 4th 1085, 1097)* . However, the trial court erred as a matter of law in holding that plaintiffs had waived the objection based on the expert witness relationship that began just a few weeks before arbitration commenced (*34 Cal. App. 4th 1085, 1097-1099)* . The AAA decision on the issue of bias was not entitled to the same degree of finality that is afforded any other issue submitted for determination by an arbitrator, but is subject to de novo review by the trial court on a petition to confirm or vacate an award (*34 Cal. App. 4th 1085, 1099-1103)* . The applicable test was that the arbitrator was under a duty to disclose any dealings that might create an impression of possible bias (*34 Cal. App. 4th 1085, 1104)* .

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2-20C California Points & Authorities § 20C.171

§ 20C.171 Parties' Agreement Supercedes Normal Standards

[1] FORM

THE AWARD SHOULD _____ [NOT BE CONFIRMED *or* BE VACATED] BECAUSE THE _____ [*specify, e.g.*, INTEGRATION CLAUSE IN THIS CONTRACT PREVENTED THE ARBITRATOR FROM CONSIDERING EXTRINSIC EVIDENCE]. THEREFORE, IT IS/WAS NOT WITHIN THE _____ [TRIAL COURT'S *or* ARBITRATOR'S] POWER TO _____ [MAKE *or* REVIEW] THE AWARD IT THIS CASE, WHICH CLEARLY _____ [*specify, e.g.*, WAS BASED ON THAT EXTRINSIC EVIDENCE].

A. Arbitrator Had No Power to Consider Extrinsic Evidence. The agreement under which the parties arbitrated this case contains an integration clause that specifically prohibits introduction of any extrinsic evidence whatsoever in any judicial or arbitration proceeding involving the contract. Because the award in this case is clearly based on consideration of extrinsic evidence, it must be vacated as in excess of the arbitrator's powers (*Bonshire v. Thompson (1997) 52 Cal. App. 4th 803, 810-812, 60 Cal. Rptr. 2d 716*).

[2] Comments

[a] Use of Form

This form may be used to support a petition or response seeking to vacate an arbitration award when the parties' agreement provides special terms limiting the arbitrator's power [*see Code Civ. Proc. § 1286.2(a)(4)*], in this instance, in the manner provided in the case cited. The parties' ability to provide for special rules of evidence or review is limited. For example, the parties may not require judicial review for errors of law (or fact) [*see Oakland-Alameda County Coliseum Authority v. CC Partners (2002) 101 Cal. App. 4th 635, 638, 645-647, 124 Cal. Rptr.2d 363* , discussed at § 20C.96[3][a]]. See also *§§ 20C.90 -20C.92*, addressing the extent to which an arbitrator may award relief not specifically authorized by the contract, but may grant any rationally related relief based on broad equitable principles.

This form does not provide a complete memorandum but should be combined with the memorandum supporting the

petition [*see § 20C.20*] or response [*see § 20C.21*] seeking to vacate the award, or one supporting a request for rehearing after the award is vacated [*see § 20C.22*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should set forth the exact language relied on to prohibit consideration of extrinsic evidence and should emphasize every brief, memorandum, and piece of documentary evidence that constitutes or refers to the extrinsic evidence. Counsel should also demonstrate that it would have been impossible for the arbitrator to make the award that was made except on the basis of that extrinsic evidence. Generally, it will be appropriate to attach a copy of the award [*see Shepherd v. Greene (1986) 185 Cal. App. 3d 989, 994, 230 Cal. Rptr. 233* (*discussed under § 20C.12[3][a]*)].

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For memoranda to combine with this form, see *§§ 20C.20* or *20C.21*, and *20C.22*.

[d] Opposing Memoranda

For a form opposing this form and supporting the contention that the parties' attempt to confer jurisdiction on the trial court to review an arbitration award for errors of law and sufficiency of the evidence renders the entire arbitration provision void unenforceable, see § 20C.96.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Arbitrator Has No Power to Consider Extrinsic Evidence

Bonshire v. Thompson *(1997) 52 Cal. App. 4th 803, 60 Cal. Rptr. 2d 716* , arose from the sale of all the stock of a business. Defendants/sellers contended that in addition to the stated purchase price, they were entitled to the cash in the company's bank account at the time of the sale as well as all payments on accounts receivable through close of escrow, less payables and expenses. Sellers instituted arbitration proceedings under the contract which stated in part that its terms were the final expression of the parties' intent "any may not be contradicted by evidence of any prior agreement or contemporaneous oral agreement. The parties further intend that this agreement constitutes the complete and exclusive

statement of its terms and that no extrinsic evidence whatsoever may be introduced in any judicial or arbitration proceeding, if any, involving this agreement." Sellers' arbitration brief sought reformation of the contract based on unilateral or bilateral mistake. The award was in favor of sellers, granting them the excess sums they sought. Buyer sought to have the award vacated as excess of the arbitrator's powers, but the trial court confirmed the award, and granted judgment thereon. Plaintiff/buyer appealed.

The court of appeal reversed. The sum awarded was identical to the sum sought by sellers in their arbitration briefs and their responses to the petition to vacate. From that record, the court said it was compelled to conclude that the arbitrator had relied on extrinsic evidence (*52 Cal. App. 4th 803, 810)* . Sellers argued that under *Advanced Micro Devices, Inc. v. Intel Corp. (1994) 9 Cal. 4th 362, 381, 36 Cal. Rptr. 2d 581, 885 P.2d 994* (discussed at *§ 20C.91[3][c]*), the award should be upheld because it bore a rational relationship to the contract and the breach. *Intel* also held that the parties may specifically agree to compel the arbitrator to follow legal rules and that the powers of an arbitrator are derived from, and are limited by, the agreement to arbitrate [*Advanced Micro Devices, Inc. v. Intel Corp. (1994) 9 Cal. 4th 362, 374-375, 381, 36 Cal. Rptr. 2d 581, 885 P.2d 994]* (*52 Cal. App. 4th 803, 810)* . In this case, the contract established that the parties agreed to limit the powers of the arbitrator by prohibiting the introduction of, and reliance on extrinsic evidence. In light of that limitation, an award based on a term that extrinsic evidence established was omitted from the contract, wasnot rationally related to the contract. Rather, the arbitrator exceeded his powers within the meaning of former Code Civ. Proc. § 1286.2(d) [*now see Code Civ. Proc. § 1286.2(a)(1)* and *(6)*] (*52 Cal. App. 4th 803, 811)* . The parties' express prohibition on reformation of the contract in the integration clause disposed of sellers' reliance on general principles regarding reformation of contracts and required that the award adding the terms regarding cash and receivables be vacated as in excess of the arbitrator's powers (*52 Cal. App. 4th 803, 812)* .

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[Reserved]

§§ 20C.172[Reserved]

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2-20C California Points & Authorities § 20C.190

§ 20C.190 Arbitrator Exceeded Powers by Awarding Relief Not Provided for by Law or Parties' Agreement

[1] FORM

THE AWARD MUST BE VACATED BECAUSE THE ARBITRATOR EXCEEDED [HIS *or* HER] POWERS BY AWARDING RELIEF NOT PROVIDED FOR BY THE PARTIES' CONTRACT [OR LAW], SPECIFICALLY, BY _____ [*specify, e.g.,* AWARDING FORFEITURE OF THE WITHDRAWING PARTNERS' CAPITAL ACCOUNTS].

A. Arbitrators Exceeded Their Powers. [*See § 20C.20[1], Paragraph F.*]

B. Arbitrator Exceeded Power by Award Contrary to Parties' Agreement. An arbitrator acts exceeds his or her powers by ordering relief that is contrary to the parties' agreement[, which prohibited any remedy not available in a court of law, and which did not provide that a wrongfully withdrawing partner forfeit his or her capital account] (*O'Flaherty v. Belgum (2004) 115 Cal. App. 4th 1044, 1056-1061, 9 Cal. Rptr. 3d 286*).

[*Optional*] **C. Insurance Appraiser Had No Authority to Determine Coverage.** Under *Insurance Code Section 2071*, appraisers have power only to determine a specific question of fact, namely, the actual cash value of the insured item. It is certainly not their function to resolve questions of coverage and interpret provisions of the policy. When an appraisal panel exceeds its powers by deciding coverage issues, and the award cannot be corrected without affecting the merits of the decision, the decision must be vacated (*Kacha v. Allstate Ins. Co. (2006) 140 Cal. App. 4th 1023, 1026, 1032-1033, 45 Cal. Rptr. 3d 92*).

[2] Comments

[a] Use of Form

This form may be used to support a petition or response seeking to vacate an arbitration award if the arbitrator has exceeded his or her powers by awarding relief contrary to the parties' agreement [*see Code Civ. Proc. § 1286.2(a)(4)*].

Optional Paragraph C is for use to challenge a fire insurance appraisal award under *Ins. Code § 2071* when the appraisers exceeded the statutory authority by deciding coverage issues.

This form does not provide a complete memorandum and should be combined with the memorandum supporting the petition [*see § 20C.20*] or response [*see § 20C.21*] seeking to vacate the award, or one supporting a request for rehearing after the award is vacated [*see § 20C.22*]. If the parties' agreement prohibits an award that would not be available in a court of law, or is not authorized by law, counsel should add authority relating to that particular law.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, the argument should set forth the exact language of the parties' agreement and the specific portions of the award that are contrary to that agreement. Counsel should also demonstrate that the parts of the award that are contrary to the parties' agreement are inextricably intertwined with the remainder of the award so that it is impossible to correct to award by merely deleting the portions of it that contravene the parties' agreement. Generally, it will be appropriate to attach a copy of the award [*see Shepherd v. Greene (1986) 185 Cal. App. 3d 989, 994, 230 Cal. Rptr. 233* (*discussed under § 20C.12[3][a]*)].

It is advisable for counsel to submit evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file (including verified pleadings), or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840]* (motion to compel arbitration improperly denied if plaintiff-respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement).

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For memoranda to combine with this form, see *§§ 20C.20* or *20C.21*, and *20C.22*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Arbitrator Exceeded Power by Award Contrary to Parties' Agreement

O'Flaherty v. Belgum *(2004) 115 Cal. App. 4th 1044, 9 Cal. Rptr. 3d 286* , involved several actions between withdrawing partners and remaining partners of a dissolvinglaw partnership, O'Flaherty & Belgum ("OB"). Claims included breach of contract, intentional violation of fiduciary duty, conversion, appointment of an impartial receiver, an accounting, and judicial dissolution of the partnership. A receiver was appointed to hold the partnership's property and wind up the partnership's affairs during the parties' dispute-resolution process, in part to insure the effect of any arbitration award and resulting judgment specifying how the partnership should be wound up and liquidated. The receiver's powers included enforcing and collecting debts, instituting lawsuits on behalf of OB to preserve and protect

the partnership's assets, discharging obligations of OB from the funds in its possession, and engaging the services of counsel.

Arbitration was ordered in accordance with the partnership agreement, but the receiver chose not to participate. His position was that under the court order the partners were to complete arbitration of all disputes *between them* and not to involve the receiver on behalf of OB. Nevertheless, the withdrawing partners' attorney purported to represent OB in connection with the arbitration proceedings. The receiver first demanded in writing that the attorney cause the dismissal of OB from the action in which arbitration was ordered because the receiver was the only person authorized to bring a lawsuit on behalf of OB, and he did not authorize that attorney to file the action on behalf of OB.

Later, the receiver sent a letter by fax to the withdrawing partners' attorney stating that the receiver was the only authorized representative of OB and that he had not retained or authorized anyone to represent OB or the receiver in the arbitration proceeding. That letter was transmitted to the arbitrator. Nevertheless, the arbitrator's interim findings included several establishing liability of the withdrawing partners to OB. The receiver then advised the arbitrator that he, the receiver, had not authorized anyone to take part in the arbitration on behalf of OB, and the person who had purportedly made an appearance for OB was not authorized to do so. The receiver requested that the arbitrator strike the counterclaims in OB's name from the order. The receiver sought instructions in the receivership action concerning how to proceed with the interim arbitration award in favor of OB and was instructed not to participate and to allow the arbitration to proceed as it had been proceeding. The final award again awarded sums to OB from the withdrawing partners and found that because of the withdrawing partners' breaches of their contractual and fiduciary duties, they had forfeited all rights under the partnership agreement and it was therefore not necessary to calculate their capital accounts. The award was confirmed, and judgment entered thereon. The withdrawing partners appealed.

The court of appeal reversed, finding the award had to be vacated because the arbitrator exceeded his powers. The court based its decision on only two of the grounds urged for error: the forfeiture of the withdrawing partners accounts and jurisdiction by the arbitrator over a partnership in receivership over the objection of the receiver (*115 Cal. App. 4th 1044, 1055, 1063-1064)* . One way an arbitrator can exceed his or her powers is by acting in a manner not authorized by the contract or by law (*115 Cal. App. 4th 1044, 1056)* . The partnership agreement provided for arbitration and also provided that the arbitrator did not have the power to alter, amend, modify or change any terms of the partnership agreement or grant any remedy prohibited by the terms of the agreement, or not available in a court of law.

The forfeiture was contrary to partnership law, the partnership agreement, and decisional law. The partnership was governed by the 1994 Uniform Partnership Act, which provided that a partner is entitled to a settlement of all partnership accounts on winding up the partnership business [*see Corp. Code § 16807(b)*, Stats. 1996, ch. 2003 § 2]. A partner who "wrongfully disassociates" from the partnership is liable for damages [*Corp. Code § 16602(c)*], but there is no statutory reference to a forfeiture of an account. Among the various remedies in the Uniform Partnership Act, there is no provision for a forfeiture of a capital account. Nor did the partnership agreement provide for forfeiture of a partner's capital account, even in the event of a partner's wrongful withdrawal from the firm or involuntary termination of a partner for cause. To the contrary, the agreement provided for a return of capital, even to a wrongfully withdrawing partner (*115 Cal. App. 4th 1044, 1057)* . California case law does not support a forfeiture of a capital account (*115 Cal. App. 4th 1044, 1058)* . The majority rejected the dissent's view that application of the doctrine of unclean hands would allow the arbitrator to award the forfeiture (*115 Cal. App. 4th 1044, 1059-1061*). This award exceeded the arbitrator's powers and was not susceptible to correction (*115 Cal. App. 4th 1044, 1063)* . The forfeiture of the capital accounts also potentially affected the damage award. Had the capital accounts not been forfeited, an accounting would have been required. The award had to be vacated (*115 Cal. App. 4th 1044, 1064)* .

[b] Insurance Appraiser Had No Authority to Determine Coverage

Kacha v. Allstate Ins. Co. *(2006) 140 Cal. App. 4th 1023, 45 Cal. Rptr. 3d 92* , involved a fire insurance appraisal award. In October, 2003, plaintiffs' home and personal property were damaged by heat and smoke in a wildfire

designated the Cedar Fire. Allstate provided Kacha homeowners insurance and valued the cost to clean the home and contents at $25,799.77. It paid that amount to Kacha, who retained a licensed public adjuster, and demanded an appraisal, as provided by the insurance policy if the parties could not agree on the amount of loss. Plaintiffs claimed $639,688.82 in covered losses, which included the cleaning the damaged property when applicable and the repair or replacement of permanently damaged property. Plaintiffs petitioned the superior court to compel an appraisal and appoint an umpire. The trail court did so, and the appraisal was held at Kacha's home, on November 15 and 16, 2004, and January 4, 2005. Allstate presented an appraisal brief claiming this was not a standard appraisal because more than the value of the loss was at issue and that damage to numerous items was not caused by smoke or heat from the Cedar Fire. Throughout the process, plaintiffs' counsel urged that there could not be a determination of coverage or cause of loss by the appraisal panel. In January, 2005, the panel delivered an appraisal award for $163,792 in replacement cost value and $155,993 in actual cash value. Allstate sent Kacha two checks totaling $138,010.07, representing the $163,792 sum, less the amount it already paid on the claim. Kacha, however, did not endorse or negotiate the checks, but applied to the appraisal panel to correct the award, arguing the panel had exceeded its authority by making coverage determinations reserved to Allstate. Two of the three appraisers denied the request to correct theaward, claiming the parties had stipulated to the coverage determinations. Kacha then filed a petition in superior court to vacate the appraisal award, which was also denied. The award was confirmed. Plaintiffs appealed.

The court of appeal reversed, noting that it is settled that appraisers have the power only to determine a specific question of fact, namely, the actual cash value of the insured item (*140 Cal. App. 4th 1023, 1025-1026, 1038)* . The court agreed with plaintiffs' contention that the trial court erred by finding consent to the form of the appraisal award constituted a waiver of rights under *Ins. Code § 2071*. Since its enactment in 1909, Section 2071 has directed that the standard form for fire insurance policies include an appraisal provision to settle disagreements concerning the amount of loss. The function of appraisers is to determine the amount of damage resulting to various items submitted for their consideration. It is certainly not their function to resolve questions of coverage and interpret provisions of the policy. There is no authority suggesting that an appraisal panel is empowered to determine whether an insured lost what he or she claimed to have lost or something different (*140 Cal. App. 4th 1023, 1032)* . An insurer is free to litigate whether the insured has misrepresented what he or she lost; but it is beyond the scope of an appraisal. When an appraisal panel exceeds its powers by deciding coverage issues, and the award cannot be corrected without affecting the merits of the decision, the decision must be vacated (*140 Cal. App. 4th 1023, 1033)* . The court of appeal discussed the waiver issue at length, admitting that the introductory language of the appraisal award form was ambiguous but concluded that, standing alone, it did not establish a waiver of rights so as to authorize the appraisers to decide whether actual damage to claimed items was caused by the Cedar Fire. The court concluded that the trial court's finding of waiver was not supported by substantial evidence (*140 Cal. App. 4th 1023, 1033-1035*). Accordingly, the trial court erred by denying his motion to vacate the appraisal award as exceeding the panel's jurisdiction (*140 Cal. App. 4th 1023, 1035-1036*).

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2-20C California Points & Authorities § 20C.191

§ 20C.191 Arbitrator Exceeded Powers by Deciding Issues Which Only Receiver Had Standing to Tender

[1] FORM

THE AWARD MUST BE VACATED BECAUSE THE ARBITRATOR EXCEEDED [HIS *or* HER] POWERS BY ADJUDICATING CLAIMS OF AN ENTITY IN RECEIVERSHIP WITHOUT THE PARTICIPATION OF[, AND OVER THE OBJECTIONS OF], THE RECEIVER.

A. Arbitrators Exceeded Their Powers. [*See § 20C.20[1], Paragraph F.*]

B. Arbitrator Exceeded Power by Award Determining Claims of Entity in Receivership. If a receiver has been appointed for a party to the arbitration, generally only the receiver will have standing to represent that party. If the receiver declines to participate in the arbitration, any award purporting to determine claims of the entity in receivership will be in excess of the arbitrator's powers [*see O'Flaherty v. Belgum (2004) 115 Cal. App. 4th 1044, 1061-1063, 9 Cal. Rptr. 3d 286* (receiver of dissolving partnership declined to participate in arbitration)].

[2] Comments

[a] Use of Form

This form may be used to support a petition or response seeking to vacate an arbitration award if the arbitrator has exceeded his or her powers by determining the claims of an entity in receivership without the receiver's participation in the arbitration, and possibly over the receiver's objection [*see Code Civ. Proc. § 1286.2(a)(4)*].

This form does not provide a complete memorandum and should be combined with the memorandum supporting the petition [*see § 20C.20*] or response [*see § 20C.21*] seeking to vacate the award, or one supporting a request for rehearing after the award is vacated [*see § 20C.22*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should set forth the exact language of both the order appointing the receiver and the order compelling arbitration. Any correspondence between the receiver and the arbitrator or any specific instructions by the receivership court relating to the arbitration should also be included. Counsel should also demonstrate that the parts of the award relating to the entity in receivership are inextricably intertwined with the remainder of the award so that it is impossible to correct to award by deleting the portions of it relating to the entity in receivership. Generally, it will be appropriate to attach a copy of the award [*see Shepherd v. Greene (1986) 185 Cal. App. 3d 989, 994, 230 Cal. Rptr. 233* (*discussed under § 20C.12[3][a]*)].

It is advisable for counsel to submit evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file (including verified pleadings), or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied if plaintiff-respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement)].

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For memoranda to combine with this form, see *§§ 20C.20* or *20C.21*, and *20C.22*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For discussion of forms relating to receiverships, see Ch. 200, *Receivers* .

[3] Discussion of Authorities

[a] Arbitrator Exceeded Power by Award Determining Claims of Entity in Receivership

The facts and procedural background of ***O'Flaherty v. Belgum*** *(2004) 115 Cal. App. 4th 1044, 9 Cal. Rptr. 3d 286* , and the portion of the opinion pertaining to the arbitrator's award of forfeiture of capital accounts, which was in excess of his powers, is discussed at *§ 20C.190[3][a]*.

Another basis on which vacation of the award was sought was the arbitrator's exercise of jurisdiction, the objection of the receiver notwithstanding, over a partnership in receivership ("OB"). The order appointing the receiver directed the receiver to "operate and conduct the Partnership in the ordinary and usual course of its business other than practicing law" pending the resolution of the arbitration between the individual partners. The trial court's orders and rulings compelling arbitration were specifically limited to the individual partners and did not encompass the dissolving partnership. Nevertheless, the attorney for the withdrawing partners, over the objection of the receiver, filed an action and then a counter-demand for arbitration on behalf of OB (*115 Cal. App. 4th 1044, 1061)* .

In the absence of a specific order to the contrary, a receiver appointed for a dissolved partnership has the sole authority

to commence an action on behalf of that partnership [*Code Civ. Proc. § 568*]. An arbitrator may not encroach on the jurisdiction of the receivership court. The receivership is in the hands of the receiver, and is under the control and continuous supervision of the court. Like an executor or bankruptcy trustee, who are real parties in interest over their estates, a receiver is the real party in interest over the receivership estate. Because individual partners may not sue for damages to the partnership or their interests in the partnership, only the receiver for the partnership may maintain those claims. The attorney for the withdrawing partners did not have the power or right to prosecute any claims on behalf of OB in the arbitration, and the arbitrator did not have jurisdiction to consider them (*115 Cal. App. 4th 1044, 1062)* .

Although the receivership court was aware of the actions of the attorney for the withdrawing partners on behalf of OB over the opposition of the receiver, the receivership court never expressly authorized or ratified those actions. The arbitrator exceeded his jurisdiction in purporting to adjudicate OB's claims. That adjudication could not be severed from the award. The arbitrator's determination that the withdrawing partners violated OB's rights are intertwined with findings as to other parties. The arbitrator based the award, in part, on his determination that the withdrawing partners improperly caused the appointment of the receiver. The court declined to say that the presence of, and those portions of the award relating to, OB did not affect the remaining portion of the award, or if they did, what effect the adjudication of the OB claims had on the award. Thus, the court ruled that entire award be vacated. The fact that the receiver had then been discharged was of no consequence (*115 Cal. App. 4th 1044, 1063)* .

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2-20C California Points & Authorities § 20C.192

§ 20C.192 Arbitrator Exceeded Powers by Dismissing Arbitration

[1] FORM

THE AWARD MUST BE VACATED BECAUSE THE ARBITRATOR EXCEEDED HIS [*or* HER] POWERS BY DISMISSING THE ARBITRATION[, EVEN FOR A CHANGE IN THE LAW SINCE THE COURT ORDERED ARBITRATION].

A. Arbitrators Exceeded Their Powers. [*See § 20C.20[1], Paragraph F.*]

B. Arbitrator Had No Power to Dismiss Arbitration for Change in Law. The question of whether the parties are bound by a particular arbitration agreement is a question for the court. An arbitrator exceeds his [*or* her] authority by reexamining whether the parties were bound by the arbitration provision; and [even if the law changes while the matter is being arbitrated], the legal validity of the arbitration provision is a matter for determination by the court (*Malek v. Blue Cross of California (2004) 121 Cal. App. 4th 44, 56, 16 Cal. Rptr. 3d 687*).

[2] Comments

[a] Use of Form

This form may be used to support a petition or response seeking to vacate the dismissal of an arbitration when the arbitrator exceeded his or her powers by reexamining whether the parties were bound by the arbitration agreement [*see Code Civ. Proc. § 1286.2(a)(4)*]. Presumably, the correct procedure when the law changes during arbitration is to petition the trial court to reconsider its original order compelling arbitration [*see Code Civ. Proc. § 1008(c)*; *Malek v. Blue Cross of California (2004) 121 Cal. App. 4th 44, 59-60, 16 Cal. Rptr. 3d 687* (that portion of opinion discussed in *Ch. 20A, Arbitration: Resisting, § 20A.94[3][c]*)].

This form does not provide a complete memorandum but should be combined with the memorandum supporting the petition [*see § 20C.20*] or response [*see § 20C.21*] seeking to vacate the award, or one supporting a request for rehearing after the award is vacated [*see § 20C.22*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Generally, it will be appropriate to attach a copy of the order of dismissal or award [*see Shepherd v. Greene (1986) 185 Cal. App. 3d 989, 994, 230 Cal. Rptr. 233* (*discussed under § 20C.12[3][a]*)].

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, ofgrounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For memoranda to combine with this form, see *§§ 20C.20* or *20C.21*, and *20C.22*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Arbitrator Had No Power to Dismiss Arbitration for Change in Law

The facts and procedural background in ***Malek v. Blue Cross of California*** *(2004) 121 Cal. App. 4th 44, 16 Cal. Rptr. 3d 687* , and the portion of the opinion dealing with the consequences of failure to comply with *Health & Safety Code § 1363.1* are discussed in *Ch. 20A, Arbitration: Resisting, § 20A.94[3][c]*. Briefly, arbitration was ordered at a time when *Health & Safety Code § 1363.1* was held to be preempted by the Federal Arbitration Act (FAA), even though the arbitration provision involved admittedly did not comply with *Health & Safety Code § 1363.1*. *After Smith v. PacifiCare Behavioral Health of Cal., Inc. (2001) 93 Cal. App. 4th 139, 113 Cal. Rptr. 2d 140 , cert. denied, (2002) 537 U.S. 818, 123 S. Ct. 92, 154 L. Ed. 2d 23* (*Smith*, discussed in *Ch. 20A, Arbitration: Resisting, § 20A.94[3][a]*) was decided, and the trial court denied plaintiffs' motion to vacate its original order compelling arbitration based on the change in law, plaintiffs moved the arbitrator to dismiss the arbitration. The arbitrator did so. The trial court considered the dismissal an award, and vacated it.

The court of appeal affirmed (*121 Cal. App. 4th 44, 50-51, 73)* . One of the grounds for which the court must vacate an award is if the arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision on the controversy submitted [*Code Civ. Proc. § 1286.2(a)(4)*] (*121 Cal. App. 4th 44, 55)* . The court of appeal concluded that both the statutory requirements of *Code Civ. Proc. § 1286.2(a)(4)* were met. The question of whether the parties are bound by a particular arbitration agreement is a question for the court. The arbitrator exceeded his authority by reexamining whether the parties were bound by the arbitration provision in the enrollment form. The

legal validity of the arbitration provision is a judicial determination, which the trial court made in its June order. Plaintiffs asserted that the award was not wrong because the trial court ultimately agreed with the arbitrator. The court of appeal found no merit in that argument. The second requirement of *Code Civ. Proc. § 1286.2(a)(4)*, that the award cannot be corrected without affecting the merits of the decision, does not require that in order to vacate an arbitration award it must be wrong on the merits (*121 Cal. App. 4th 44, 56)* . It means that the arbitration award cannot be corrected without affecting the arbitrator's decision (whether right or wrong) on the merits. Here, there was no way to correct the award without affecting the merits of the decision, which was a determination of arbitrability, which rested solely with the trial court, not the arbitrator. The only way to correct the award would have been to reverse the arbitrator, which affects the merits of the decision (*121 Cal. App. 4th 44, 57)* .

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2-20C California Points & Authorities § 20C.193

§ 20C.193 Arbitrator's Refusal to Postpone Hearing Was Prejudicial

[1] FORM

GROUNDS EXIST FOR _____ [REFUSING TO CONFIRM *or* VACATING] THE AWARD PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 1286.2(a)(5) BECAUSE THE ARBITRATOR REFUSED TO POSTPONE THE HEARING, WHICH WAS PREJUDICIAL TO _____ [PETITIONER *or* RESPONDENT].

A. Refusal to Postpone Hearing. An award may be vacated when it was based on a hearing that the arbitrator refused to postpone after a party established good cause for the postponement (*Humes v. MarGil Ventures, Inc. (1985) 174 Cal. App. 3d 486, 495-497, 220 Cal. Rptr. 186*).

[2] Comments

[a] Use of Form

This form may be used to support a petition or response seeking to vacate an arbitration award when party seeking to vacate the award was prejudiced by the arbitrator's refusal to postpone the hearing when good cause existed for the postponement [*Code Civ. Proc. § 1286.2(a)(5)*]. This form does not provide a complete memorandum but should be combined with the memorandum supporting the petition [*see § 20C.20*] or response [*see § 20C.21*] seeking to vacate the award, or one supporting a request for rehearing after the award is vacated [*see § 20C.22*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should describe the situation that constituted good cause for postponement, detail how the arbitrator was informed of that cause and asked for postponement, and show the prejudice that resulted from the arbitrator's refusal to postpone the hearing. Generally, it will be appropriate to attach a copy of the award [*see Shepherd v. Greene (1986) 185 Cal. App. 3d 989, 994, 230 Cal. Rptr. 233* (*discussed under § 20C.12[3][a]*)].

It is advisable for counsel to submit cognizable evidence in support of factualstatements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For memoranda to combine with this form, see *§§ 20C.20* or *20C.21*, and *20C.22*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Refusal to Postpone Hearing

Humes v. MarGil Ventures, Inc. *(1985) 174 Cal. App. 3d 486, 220 Cal. Rptr. 186* , involved a controversy under the artists' managers act and arbitration under *Lab. Code § 1700.44*. Defendant had written a letter to the Labor Commissioner requesting that the hearing be postponed because defendant would not be able to attend due to his present incarceration. *Code Civ. Proc. § 1280 et seq.* applied to the hearing officer, who ignored his power under *Code Civ. Proc. § 1282.2(b)* to postpone the hearing for good cause on request of a party, and held the hearing in defendant's absence. Plaintiff obtained a default judgment, and filed a petition in superior court seeking its confirmation. Defendant wrote a letter to the trial court explaining his inability to be heard at the original hearing, and asked for a stay of proceedings. The letter, was deemed a response, but was filed more than 100 days after the date of service of the award on him. The superior court granted the petition for confirmation, and defendant appealed.

The court of appeal reversed, and directed the superior court to conduct a full adversary hearing to consider defendant's response seeking vacation of the award. The court of appeal held that the fact of defendant's incarceration, his sending the letter requesting a delay of the hearing before the Labor Commissioner because of his inability to appear at hearing due to his incarceration, and the hearing officer's holding the hearing in defendant's absence in disregard of the request for a delay, raised grounds that might support the vacation of the determination under former Code Civ. Proc. § 1286.2(e) [*now see Code Civ. Proc. § 1286.2(a)(5)*]. The court also held that the superior court was to determine whether defendant had presented sufficient cause for postponement to the hearing officer, and whether the officer's refusal to postpone substantially prejudiced defendant's rights (*174 Cal. App. 3d 486, 495-497)* . Finally, the court held that defendant's failure to timely file his response seeking vacation of the award was an excusable mistake due to his disability of imprisonment, that he had acted diligently in seeking relief from the court once he became aware of the need to act, and that the defense he sought to present had potential merit. Thus, the court used its inherent equitable power to relieve defendant of default and to deem the request to have been timely filed in the superior court (*174 Cal.*

App. 3d 486, 498-500) .

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2-20C California Points & Authorities § 20C.194

§ 20C.194 Arbitrator Made Error of Law Subject to Judicial Review by Clear Term of Arbitration Agreement

[1] FORM

THE AWARD SHOULD NOT BE CONFIRMED BUT SHOULD BE VACATED BECAUSE IT IS BASED ON ERROR OF LAW SUBJECT TO JUDICIAL REVIEW BY CLEAR TERMS OF ARBITRATION AGREEMENT.

A. The California Arbitration Act Permits Enforcement of Clear Agreements for Judicial Review of Merits of Arbitration Award. The California rule is that the parties may obtain judicial review of the merits by express agreement (*Cable Connection, Inc. v. DIRECTV, Inc. (2008) 44 Cal. 4th 1334, 1340, 82 Cal. Rptr. 3d 229, 190 P.3d 586*). Parties to an arbitration agreement may take themselves out of the general rule that the merits of the award are not subject to judicial review by clearly agreeing that legal errors are an excess of arbitral authority reviewable by the courts under *Code Civ. Proc. §§ 1286.2, 1286.6* (*Cable Connection, Inc. v. DIRECTV, Inc. (2008) 44 Cal. 4th 1334, 1361, 82 Cal. Rptr. 3d 229, 190 P.3d 586*).

[*Optional*] **B. The Federal Arbitration Act Does Not Preempt California Rule Allowing Arbitration Agreements to Expand Scope of Judicial Review.** The Federal Arbitration Act (FAA) and decisions under it prohibiting expansion of judicial review of arbitration awards by express agreement of the parties do not require state law to conform with its limitations. A reading of the California Arbitration Act that permits the enforcement of agreements for merits review is fully consistent with the FAA policy guaranteeing the enforcement of private contractual arrangements (*Cable Connection, Inc. v. DIRECTV, Inc. (2008) 44 Cal. 4th 1334, 1354, 82 Cal. Rptr. 3d 229, 190 P.3d 586*).

[2] Comments

[a] Use of Form

This form may be used to support a petition or response seeking to vacate an arbitration award on the ground that the arbitration award is based on an error of law and the arbitration agreement both required the arbitrator to apply the law and *clearly* expands the scope of judicial review to include errors of law in the arbitration award. This is to be distinguished from the situation in which the arbitration agreement requires the arbitrator to apply the law, but does not

expressly include a clear right to judicial review of legal error [*see § 20C.90, above*, addressing error of law generally precluding judicial review].

This form does not provide a complete memorandum, but is designed to be combined with a general form of memorandum supporting confirmation or opposing vacation of an award [*see § 20C.10* et seq.].

[b] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, the argument should cite the provision of the arbitration agreement clearing setting forth the requirements that the arbitrator apply the law and the authorization for judicial review of the arbitration award for errors of law.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* . For example, a copy of the arbitration agreement, and any submission agreement or other statements or transcripts defining the scope of the matters submitted to the arbitrator, along with the arbitration award should be attached as exhibits to the memorandum.

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For form relating to correcting, confirming, and vacating arbitration awards, as well as a procedural checklist, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Judicial Review* (Matthew Bender).

[d] Related Memoranda

For discussion of requirements and considerations for drafting memoranda and how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For memoranda addressing the limited scope of judicial review of arbitrator's errors after contractual arbitration, see *§§ 20C.90, 20C.91, 20C.101*, and *20C.102*. For a memorandum addressing an arbitrator's ability to correct an award on his or her own initiative, see *§ 20C.103*.

For forms addressing general contract principles, see Ch. 50, *Contracts* .

[3] Discussion of Authorities

[a] The California Arbitration Act Permits Enforcement of Clear Agreements for Judicial Review of Merits of Arbitration Award

The court in ***Cable Connection, Inc. v. DIRECTV, Inc.*** *(2008) 44 Cal. 4th 1334, 82 Cal. Rptr. 3d 229, 190 P.3d 586* , enforced a provision of an arbitration provision allowing for judicial review on the merits of the arbitration award. The portion of the decision addressing the general rule that judicial review of the merits of an arbitration award is not available is discussed in *§ 20C.90[3][a1], above*. The portion of the decision addressing the court's ruling that the preclusion in the Federal Arbitration Act on contractual expansion of judicial review of the merits of arbitration awards is discussed in *§ 20C.194[3][b], below*. In response to the argument of the party seeking review to the effect that the provision of the arbitration agreement allowing judicial review on the merits of the arbitration award should be enforced, the court noted that the California rule is that the parties may obtain judicial review of the merits by express agreement, and that there is a statutory as well as a contractual basis for this rule, in that one of the grounds for review of an arbitration award is that "[t]he arbitrators exceeded their powers," as provided by *Code Civ. Proc. §§ 1286.2(a)(4), 1286.6(b)* (*44 Cal. 4th 1334, 1340)* . However, in accordance with the special status of arbitration in the legal system, the court held that parties to an arbitration agreement may only take themselves out of the general rule that the merits of the award are not subject to judicial review by clearly agreeing that legal errors are an excess of arbitral authority reviewable by the courts under *Code Civ. Proc. §§ 1286.2, 1286.6*. To so provide unambiguously, the parties may have to have expressly agreed both to (1) deprive the arbitrators of the power to commit legal error and (2) expressly provide for judicial review of such error. The court disapproved of decisions by the Courts of Appeals to the contrary, including the lower court's ruling in this case (*44 Cal. 4th 1334, 1361)* .

The arbitration agreement in this case provided that "[t]he arbitrators shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected on appeal to a court of competent jurisdiction for any such error" (*44 Cal. 4th 1334, 1340)* . The court affirmed the trial court's conclusion that this provision of the arbitration agreement clearly and expressly reflected the agreement of the parties to allow judicial review of legal error by the arbitrator (*44 Cal. 4th 1334, 1361*). The portion of the decision vacating the award and remanding the case to the arbitration panel for proper determination on the basis of contractual interpretation and applicable arbitration rules whether arbitration could proceed on a class basis is discussed in *§ 20C.105[3][a], above*.

[b] The Federal Arbitration Act Does Not Preempt California Rule Allowing Arbitration Agreements to Expand Scope of Judicial Review

In ***Cable Connection, Inc. v. DIRECTV, Inc.*** *(2008) 44 Cal. 4th 1334, 82 Cal. Rptr. 3d 229, 190 P.3d 586* , the court enforced a provision of the arbitration provision allowing for judicial review on the merits of the arbitration award. The portion of the decision addressing the general rule that judicial review of the merits of an arbitration award is not available is discussed in *§ 20C.90[3][a1], above*. The court next addressed the argument by the party opposing review of the award that the ruling in *Hall Street Associates, L.L.C. v. Mattel, Inc. (2008) 552 U.S. 576, 128 S.Ct. 1396, 170 L. Ed. 2d 254* , to the effect that the Federal Arbitration Act (FAA) grounds for judicial review are exclusive should preempt state law on the subject. However, after considering the language of the FAA, the California Supreme Court ruled that the *Hall Street* holding is restricted to proceedings to review arbitration awards under the FAA, and does not require state law to conform with its limitations (*44 Cal. 4th 1334, 1354)* . The portion of the decision addressing the ability of the parties to contractually expand the scope of judicial review of the merits of an arbitration award is discussed in *§ 20C.194[3][a], above*. The portion of the decision vacating the award and remanding the case to the arbitration panel for proper determination on the basis of contractual interpretation and applicable arbitration rules whether arbitration could proceed on a class basis is discussed in *§ 20C.105[3][a], above*.

California Points & Authorities

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20C ARBITRATION: CONFIRMING, CORRECTING, OR VACATING THE AWARD
PART II. FORMS
E. Grounds for Vacating and Preventing Confirmation of Award

2-20C California Points & Authorities §§ 20C.195-20C.209

[Reserved]

§§ 20C.195[Reserved]

California Points & Authorities

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2-20C California Points & Authorities § 20C.210

§ 20C.210 Award Based on Illegal Contract or Contract Contrary to Public Policy Is Unenforceable

[1] FORM

THE AWARD SHOULD NOT BE CONFIRMED BUT SHOULD BE VACATED BECAUSE IT IS [BASED ON AN ILLEGAL CONTRACT AND] CONTRARY TO PUBLIC POLICY.

A. Award Contrary to Public Policy Is Unenforceable. An arbitration award made contrary to public policy is illegal, void, and unenforceable (*Black v. Cutter Laboratories (1955) 43 Cal. 2d 788, 798-799, 278 P.2d 905*).

B. Award Based on Illegal Contract Is Unenforceable. Because one may not bring an action based on an illegal contract, one may not attempt to confirm an award based on an illegal a contract. The issue of illegality of an entire transaction raised in a proceeding for the enforcement of an arbitration award is one for judicial determination. The arbitrator's determination on legality is not binding on the court (*Loving & Evans v. Blick (1949) 33 Cal. 2d 603, 609, 611-612, 204 P.2d 23* ; *Lindenstadt v. Staff Builders, Inc. (1997) 55 Cal. App. 4th 882, 889-893, 64 Cal. Rptr. 2d 484*).

[*Optional*] **C. License Is Required to Confirm Award if License Is Required to Bring Action.** If a law requires a party bringing an action to enforce a claim to prove that he or she is licensed as required by that law, as in the case of contractors, the party may not confirm an arbitration award based on such a claim without showing substantial compliance with such law (*Franklin v. Nat C. Goldstone Agency (1949) 33 Cal. 2d 628, 632-633, 204 P.2d 37* ; *All Points Traders, Inc. v. Barrington Associates (1989) 211 Cal. App. 3d 723, 736-738, 259 Cal. Rptr. 780*).

[*Optional*] **D. Legal and Illegal Transactions Under Similar Contracts.** [*See § 20C.133[1], Paragraph B.*]

[*Optional*] **E. Objection Is Not Waived if Used to Oppose Confirmation.** Illegality of the contract under which arbitration was compelled is not waived by failure to move to vacate the arbitration award within 100 days, but may be raised inopposition to the other party's petition to confirm the award (*South Bay Radiology Medical Associates v. Asher (1990) 220 Cal. App. 3d 1074, 269 Cal. Rptr. 15*).

[*Optional*] **F. Minor Was Entitled to, and Did, Disaffirm Contract Requiring Arbitration.** In addition to the limited statutory grounds for vacating an arbitrator's award, exceptional circumstances justify judicial review of an arbitrator's decision when the decision would be inconsistent with the protection of a party's statutory rights. The statutory rights of a minor, [even one who has missed the deadline to petition to vacate the award], give the minor the power to disaffirm [both] the original agreement containing the arbitration provision [and the arbitration award itself], which is what the minor clearly did here (*Berg v. Traylor (2007) 148 Cal. App. 4th 809, 816-820, 56 Cal. Rptr. 3d 140*).

[*Optional*] **G. Award Against Unrepresented Minor Must Be Vacated.** An award should be vacated against a minor for whom no guardian ad litem was appointed [especially in a situation in which the parent's interests were in conflict with the minor's and the minor was not represented at the arbitration hearing but the matter was treated as a default matter]. A minor in that situation is entitled to disaffirm the arbitration award, and any subsequent judgment rendered against _____ [him *or* her] (*Berg v. Traylor (2007) 148 Cal. App. 4th 809, 821-822, 56 Cal. Rptr. 3d 140*).

[2] Comments

[a] Use of Form

This form may be used to support a petition or response seeking to vacate an arbitration award on the ground that the contract under which the arbitration was conducted is contrary to public policy or wholly illegal. This is to be distinguished from the situation in which only a single provision of the contract is challenged as illegal [*see Ch. 20, Arbitration: Compelling, § 20.44*, and § 20C.133].

This form does not provide a complete memorandum but should be combined with the memorandum supporting the petition [*see § 20C.20*] or response [*see § 20C.21*] seeking to vacate the award. Counsel may wish to include the memorandum from Ch. 20A, *Arbitration: Resisting*, § 20A.89, addressing illegality in the context of a defense to compelling arbitration.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should describe the law that voids the contract or the public policy contravened by the contract. Generally, it will be appropriate to attach a copy of the award [*see Shepherd v. Greene (1986) 185 Cal. App. 3d 989, 994, 230 Cal. Rptr. 233* (*discussed under § 20C.12[3][a]*)].

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For memoranda to combine with this form, see *§ 20C.20* or *20C.21*.

For memoranda addressing illegality of the contract as a grounds for resisting arbitration, see *Ch. 20A, Arbitration: Resisting, § 20A.89*.

For forms addressing unenforceability of void and illegal contracts in general, see Ch. 50, *Contracts* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Award Contrary to Public Policy Is Unenforceable

Black v. Cutter Laboratories *(1955) 43 Cal. 2d 788, 278 P.2d 905* , arose out of a dispute over the discharge of an employee for concealment on her employment application of a number of her prior activities, including being a member of the Communist Party. The arbitration award ordered her reinstated, and the trial court confirmed the award and entered judgment thereon. Employer appealed.

The Supreme Court reversed the judgment affirming of the award and remanded the case to the trial court for proceedings not inconsistent with the Court's opinion (*43 Cal. 2d 788, 809)* . The Court agreed with the employer's contention that an arbitration award which directed that a member of the Communist Party who was dedicated to that party's program of sabotage, force, violence and the like be reinstated to employment in a plant which produced antibiotics used by both the military and civilians was against public policy, as expressed in both federal and state laws, and was therefore illegal and void and not to be enforced by the courts (*43 Cal. 2d 788, 798-799)* . The Court cited former Code Civ. Proc. § 1288 [*now see Code Civ. Proc. § 1286.2(a)(4)*] which provided for vacating an award where the arbitrators exceeded their powers (*43 Cal. 2d 788, 798)* .

Black arose in a political context and might not lead to the same result in a subsequent era; however, the holding appears to remain valid that, when any set offacts is determined to contravene public policy in a severe enough manner, an award based on those facts will not be enforced in the courts.

[b] Award Based on Illegal Contract Is Unenforceable

Loving & Evans v. Blick *(1949) 33 Cal. 2d 603, 204 P.2d 23* , arose out of a dispute between a building contractors' partnership and a party who had hired their services under an agreement requiring arbitration of disputes. The latter party contended that the partnership, as well as one of the partners individually, was unlicensed and therefore could not enforce the agreement. An award was granted for the contractors, and confirmed. The hiring party appealed.

The Supreme Court reversed. The Court found that there was a clear violation of the statutes regulating the contracting business, and noted that a contract made contrary to the terms of a law designed to protect the public and containing a penalty for violation is illegal and void, and no action may be brought to enforce the contract (*33 Cal. 2d 603, 607)* . A claim arising from an illegal transaction is not a proper subject matter for submission to arbitration. An award stemming from an illegal contract, which no court can enforce, cannot be supported any better than the contract itself (*33 Cal. 2d 603, 610)* . There is no distinction between bringing an action on an illegal contract and attempting to confirm an award based on one. Because laws in support of general public policy and in enforcement of public morality cannot be set aside by arbitration, persons with claims are forbidden by law are not allowed to enforce them through the transforming process of arbitration (*33 Cal. 2d 603, 611-612)* . The Court stated that the rules which give finality to the arbitrator's

determination of ordinary questions of fact or of law are inapplicable when the issue of illegality of the entire transaction is raised in a proceeding for the enforcement of the arbitrator's award. When so raised, the issue is one for judicial determination on the evidence presented to the trial court. Any preliminary determination of legality by the arbitrator, whether a pure question of law or a mixed question of fact and law, is not binding on the trial court (*33 Cal. 2d 603, 609, 614)* . If uncontradicted evidence establishes that the contract is illegal, the court should deny confirmation and should vacate any award granting relief under the illegal contract on the ground that the arbitrator exceeded his or her powers in making the award (*33 Cal. 2d 603, 610)* [former Code Civ. Proc. § 1288, *now see Code Civ. Proc. § 1286.2(a)(4)*]. A party seeking confirmation cannot rely on the arbitrator's conclusion of legality because paramount considerations of public policy require that this vital issue be determined by the court (*33 Cal. 2d 603, 614)* .

The facts and procedural background of ***Lindenstadt v. Staff Builders, Inc.*** *(1997) 55 Cal. App. 4th 882, 64 Cal. Rptr. 2d 484* , and the portion of the opinion addressing the proper procedure when both legal and illegal transactions are involved under the same or similar contracts, are discussed at *§ 20C.133[3][b]*. The court of appeal said there is an exception to the general rule that an arbitration award may not be set aside even if the arbitrator made an error of law, and that exception applies when the entire contract is illegal. Failure of a party to the contract to be licensed as required by law renders the contract illegal and unenforceable (*55 Cal. App. 4th 882, 889-890)* . The court of appeal then quoted the portions of *Loving & Evans v. Blick (1949) 33 Cal. 2d 603, 609-614, 204 P.2d 23* (discussed *above*), holding that the arbitrator's power is dependent on the existence of a valid contract under which rights may arise; and in the absence of a valid contract, no rights arise and no power can be conferred on the arbitrator. The question of the validity of the contract is basically a judicial one and remains such whether it is presented in a proceeding for an order directing arbitration or in a proceeding for an order confirming or vacating an award. A claim arising from an illegal contract is not a proper subject for arbitration and cannot stand on any higher ground than the contract itself. A party seeking confirmation cannot rely on the arbitrator's conclusion of legality because such paramount consideration so public policy require this vital issue to be committed to the court's defemination (*55 Cal. App. 4th 882, 890-891)* . Thus, it did not matter that the arbitrator had decided the issue of illegality; the trial court is the tribunal which must determine the issue of illegality (*55 Cal. App. 4th 882, 892)* . To the extent the arbitrator awarded plaintiff compensation for any transaction in which plaintiff acted as an unlicensed broker, the arbitrator exceeded her powers [*Code Civ. Proc. § 1286.2(a)(4)*] (*55 Cal. App. 4th 882, 893)* .

[c] License Is Required to Confirm Award if License Is Required to Bring Action

Effective January 1, 1993, *Bus. & Prof. Code § 7031(a), (d)* require licensure to be alleged, but it need be proven only if controverted.

Franklin v. Nat C. Goldstone Agency *(1949) 33 Cal. 2d 628, 204 P.2d 37* , arose out of a dispute regarding services performed by interior decorators. The parties submitted their dispute to arbitration, and the award was in favor of the decorators. The decorators applied for an order confirming the award, but in the application failed to mention that they were licensed contractors. At the hearing, the attorney for the hiring party filed an affidavit on information and belief stating that neither of the decorators was licensed and that no allegation or proof of their license had been made during the arbitration. No counteraffidavit was filed, and the court confirmed the award. The hiring party appealed.

The Supreme Court reversed. The Court found no error on the face of the award and found that the affidavit by the attorney for the hiring party was based on hearsay with no proof of facts. This was not relevant, however, because the decorators were required by *Bus. & Prof. Code § 7031* to demonstrate licensed capacity. The fact that they were not bringing an action but attempting to have the award confirmed made no difference. They were seeking the aid of the court through judicial proceedings in affirmance of alleged rights arising from a contract which violates public policy *33 Cal. 2d 628, 631-632)* . The policy is for the safety and protection of the public, and it may not be circumvented according to the manner in which application is first made to a court for relief. Furthermore, a judgment entered in conformity with an order confirming an award has the same force and effect as a judgment in an action, and may be enforced likewise [*see Code Civ. Proc. § 1287.4*] (*33 Cal. 2d 628, 632)* . Accordingly, the application for confirmation

was an action for the collection of compensation as envisioned by *Bus. & Prof. Code § 7031,* and proof of at least substantial compliance with licensing requirements was essential for recovery in the confirmation proceeding (*33 Cal. 2d 628, 632-633)* .

Plaintiff in ***All Points Traders, Inc. v. Barrington Associates*** *(1989) 211 Cal. App.3d 723, 259 Cal. Rptr. 780* , was an investment banker who had arranged the sale of all defendant's stock. Plaintiff had neither a real estate and business opportunity broker's license nor a security broker's license, and considered itself exempt from the security broker's licensing requirements by virtue of *10 Cal. Code Reg. § 260.204.5*. Defendant did not dispute that exemption. Thus, the lack of a real estate and business opportunity broker's license was the only issue before the court (*211 Cal. App. 3d 723, 735 n.13*). The trial court confirmed an arbitration award of a commission to plaintiff, and entered judgment thereon. Defendant appealed.

The court of appeal reversed. The court said that one type of error of law that will warrant vacating an award is an award based on an illegal contract. The issue of the legality of the underlying agreement is a matter for judicial determination, although an arbitrator may make a preliminary finding that is not binding on the court. Vacating an award based on an illegal contract is required under the general rule that an illegal contract cannot be enforced and a claim arising out of an illegal transaction is not a proper matter for submission to arbitration, the court said, citing *Loving & Evans v. Blick (1949) 33 Cal. 2d 603, 607, 609-610, 204 P.2d 23* . Citing former Code Civ. Proc. 1286.2(d) [*now see Code Civ. Proc. § 1286.2(a)(4)*] and *Abbott v. California State Auto Assn (1977) 68 Cal. App. 3d 763, 770-771, 137 Cal. Rptr. 580* , the court stated that in these situations, the award based on an error in law is set aside on the ground that it is in excess of the arbitrator's powers (*211 Cal. App. 3d 723, 736-738)* .

Note that the real estate and business opportunity broker licensing requirements do not apply to a person licensed as security broker [*Bus. & Prof. Code § 10008.5*; *see* Stats 1989, ch. 1116, § 8 (statement of legislative intent that rights and obligations of parties in *All Point Traders* are not affected)].

[d] Objection Is Not Waived if Used to Oppose Confirmation

South Bay Radiology Medical Associates v. Asher *(1990) 220 Cal. App. 3d 1074, 269 Cal. Rptr. 15* , involved a dispute between a partner and fellow partners. After defendant was injured, the other partners declared that as a result of disability, defendant was a "dissolving partner" within the meaning of the partnership agreement and demanded the defendant submit the question of the value of his interest to arbitration so they could buy that interest. Defendant objected that the partnership agreement was illegal and void under *Bus. & Prof. Code § 16602* in that it contained a covenant that defendant would not compete with the partnership but the valuation formula did not take goodwill into account. The arbitrator disagreed and issued an award valuing defendant's interest. Defendant did not file a petition to vacate or correct that award, but commenced a lawsuit regarding a related business. In conjunction with their demurrer, the continuing partners petitioned for confirmation of the arbitrator's award. The trial court affirmed the award, and defendant appealed.

The court of appeal upheld the procedural propriety of raising the issue of illegality in opposition to a petition to confirm the award, but affirmed the confirmation, finding that in fact the contract was not illegal. If a contract is void as against public policy, no rights can arise and no power can be conferred on the arbitrator to determine those nonexistent rights. Because the question of the validity of the contract is essentially a judicial one, it remains whether presented in a proceeding for an order directing arbitration under *Code Civ. Proc. § 1282* or in a proceeding for an order confirming or vacating an award under *Code Civ. Proc. § 1287* or *1288* (*220 Cal. App. 3d 1074, 1080)* . Thus, the illegality defense may be raised for the first time in opposition to a motion to confirm (*220 Cal. App. 3d 1074, 1080-1081)* . The laws in support of a general public policy and in enforcement of public morality cannot be set aside by arbitration, nor can persons with a claim forbidden by the law be permitted to enforce it through the process of arbitration. The illegality raised by defendant, if established, would constitute a defect in the arbitrator's award that would not be waived by failure to petition to vacate the award within 100 days as required by *Code Civ. Proc. § 1288*. Thus, defendant was free

to raise the alleged violation of *Bus. & Prof. Code § 16602* in response to the petition to confirm (*220 Cal. App. 3d 1074, 1081)* .

[e] Minor Was Entitled to, and Did, Disaffirm Contract Requiring Arbitration

Berg v. Traylor *(2007) 148 Cal. App. 4th 809, 56 Cal. Rptr. 3d 140* , was an action by plaintiff personal manager against defendants child star and the star's mother for unpaid commissions and loans. The contract was signed in 1999, when the child star was 10 years old. The contract was signed only by the mother, not by the child star, and expressly provided that any action the child star might take in the future pertaining to disaffirmance of the agreement, whether successful or not, would not affect mother's liability for any commissions due plaintiff. The agreement also provided that any disputes concerning payment or interpretation of the agreement would be determined by arbitration in accordance with the rules of Judicial Arbitration and Mediation Services, Inc. (JAMS). Four months prior to the expiration of the agreement, mother informed plaintiff that the agreement was terminated. Three years later, in 2004, plaintiff sued defendants for breach of the agreement, breach of the implied covenant of good faith and fair dealing, breach of an oral loan agreement, conversion and declaratory relief. After continuance to accommodate mother's hospitalization, the arbitration hearing commenced on February 7, 2005. Defendants' counsel failed to appear at the hearing, as did child star, but mother appeared, with child star's then talent agent, with whose assistance and advice mother presented her case. They argued that the agreement was invalid because the child star was a minor at the time it was executed and there had been no court approval of the agreement. Nevertheless, pursuant to JAMS rules, the arbitrator entered an award against both defendants, for commissions and interest of $154,714.15, repayment of personal loans and interest of $5,094, and attorney fees and costs of $13,762. He also awarded Berg $405,000 for future earnings projected on a minimum of 6 years for national syndication earnings, to vest and become final as monies earned after February 7, 2005, become due and payable. The award was served on February 14, 2005. Plaintiff petitioned to confirm the award, and defendants petitioned to vacate it but not until August 18, 2005, clearly beyond the 100 day limit provided by *Code Civ. Proc. § 1288*. Child star also filed a "Notice of Disaffirmance of Arbitration Award by Minor," which stated that in addition to his disaffirmance of the agreement in 2001, child star was also disaffirming the arbitration award and all other proceedings and orders arising out of the parties' dispute. The trial court confirmed the award against both defendants, finding defendants' response and petition to vacate untimely. Judgment was entered; both defendants appealed.

The court of appeal reversed as to child star and affirmed as to the mother, finding that the minor had the statutory right to, and did, disaffirm the original contract, the arbitration award, and the judgment against him, both as a minor and because he was unrepresented at the arbitration hearing, but that mother had not provided any authority to support her challenge to the award (*148 Cal. App. 4th 809, 812, 823-824)* . The court of appeal said it had no difficulty in reaching the conclusion that the minor was permitted to and did disaffirm the agreement and any obligations stemming from it, while the mother remained liable under the agreement and resulting judgment. The court was stunned that counsel, the arbitrator, and the trial court repeatedly and systematically ignored the minor's interests in the matter. From the time the mother signed the agreement, her interests were not aligned with the minor's. Given that conflict, a guardian ad litem should have been appointed for the minor (*148 Cal. App. 4th 809, 816)* . The court discussed the limited grounds for review of an arbitration award, noting that in addition to the statutory grounds for vacating an arbitrator's award, some limited and exceptional circumstances justify judicial review of an arbitrator's decision. Those limited exceptions include cases in which granting finality to an arbitrator's decision would be inconsistent with the protection of a party's statutory rights. The court agreed with the minor: that despite missing the deadline to petition to vacate the award, the minor had the statutory right to disaffirm both the original agreement containing the arbitration provision and the arbitration award itself. The child star's minority status coupled with the absence of the appointment of guardian ad litem entitled him to disaffirm the arbitration award and judgment even after the statutory deadline for moving to vacate the arbitration award had passed (*148 Cal. App. 4th 809, 817)* . The court discussed *Fam. Code §§ 6700, 6710* and the reasons behind them. *Fam. Code § 6710* allows a minor to disaffirm a contract before majority or within a reasonable time afterwards. The statute is intended to shield minors from their lack of judgment and experience, even if the disaffirmance is a hardship on those who deal with the minor. Plaintiff argued that *Fam. Code § 6710* was inapplicable

because the mother had signed the contract and because the contract was for necessities. The court of appeal disagreed with both contentions (*148 Cal. App. 4th 809, 818-820)* . The court distinguished cases holding a minor to arbitrate under health care contracts signed by the parent on several grounds. Those cases involved a parent's duty to care for a child; the child was only a beneficiary under those contracts, and not, as here, a principal on whom the contract imposed significant obligations. An agreement for personal management services does not implicate a parent's fundamental duty to provide for the child. Further, there is a statutory procedure governing minor's contracts to render artistic services [*see Fam. Code, §§ 6750, 6751(a)*], which requires court approval of the contract, and which was not followed in this case (*148 Cal. App. 4th 809, 818-819)* . The court distinguished the cases rejecting a minor's attempt to disaffirm a liability release signed by the parent on the ground that those cases involved a public policy to enforce releases, which was not applicable in this case (*148 Cal. App. 4th 809, 819)* . Regarding the contention that the contract was one for necessities, the court found that the requirements of *Fam. Code § 6712* were not met both in that the contract was not one for necessities and that there was no evidence that the mother was unable to provide for the family at the time the contract was signed. There is no special language required to disaffirm a contract. Both the notice given on September 11, 2001 and the one filed on August 8, 2005, adequately conveyed the minor's intent to repudiate the agreement. Thus, the court concluded that the minor was entitled to and did disaffirm the agreement which required him to arbitrate, which in turn required that the judgment confirming the arbitration award be reversed as to the minor (*148 Cal. App. 4th 809, 820)* . The court found no basis for the mother to avoid her independent obligations under the agreement. Nor was there any excuse for her failure to file a timely petition to vacate the arbitration award. Thus, she was barred from challenging the judgment confirming the award (*148 Cal. App. 4th 809, 823)* .

[f] Award Against Unrepresented Minor Must Be Vacated

The facts and procedural background of ***Berg v. Traylor*** *(2007) 148 Cal. App. 4th 809, 56 Cal. Rptr. 3d 140* , are discussed at [e], *above.* Although unnecessary to its holding, the court also found that the award should be vacated as to the minor because he was never represented by an appointed guardian ad litem, despite the fact that his mother's interests were in conflict with his own, rendering her unable to adequately represent him (*148 Cal. App. 4th 809, 821)* . The court reiterated that the agreement expressly provided that if even the minor disaffirmed, the mother would remain liable for commissions due defendant. Therefore, it was not in the mother's interest to have the minor disaffirm the agreement because defendant would look to her, personally, for satisfaction of the minor's obligations under the agreement (*148 Cal. App. 4th 809, 821-822)* . It was clear that the mother, as the minor's guardian, could not adequately represent his interests. When there is a potential conflict between a perceived parental responsibility and an obligation to assist the court in achieving a just and speedy determination of the action, a court has the right to select a guardian ad litem who is not a parent if that guardian would best protect the child's interests. Thus, it was necessary for the minor to have a guardian ad litem appointed to separately represent his interests. It was irrelevant that the minor was represented on and off throughout the litigation by counsel also representing his mother. There was no evidence that counsel treated his interests separately from his mother's. Further, at the most crucial juncture of the proceedings--the arbitration hearing--no attorney appeared to represent the minor and the matter was treated as a default prove-up hearing. Thus, the minor was also entitled to disaffirm the arbitration award, and the subsequent judgment rendered against him on this second ground (*148 Cal. App. 4th 809, 822)* .

[4] Additional Authorities

[a] Award Contrary to Public Policy Is Unenforceable

In *American & Nat. Etc. Assn. v. Major League Baseball Players Assn. (1976) 59 Cal. App. 3d 493, 130 Cal. Rptr. 626* , the club sought to vacate an award in favor of a player because it contained an annuity that the club urged was an attempt to evade taxes. The petition was denied. The court of appeal affirmed, but in discussing theissue, cited *Black v. Cutter Laboratories (1955) 43 Cal. 2d 788, 278 P.2d 905* (discussed at [3][a], *above*) to the effect that if an award commands an act which is unlawful or against public policy it will be vacated (*59 Cal. App. 3d 493, 498)* .

The facts and procedural background of *California State Council of Carpenters v. Superior Court (1970) 11 Cal. App. 3d 144, 89 Cal. Rptr. 625* , are discussed in *Ch. 20, Arbitration: Compelling, § 20.44[3][a]*. The court of appeal held that the matter had to be arbitrated because the challenge only involved the legality of a single several provision of the contract, but in discussing the state of the law, the court noted that jurisdiction to determine the question of the illegality of a contract provision does not permit the making of an award the carrying out of which would require or permit the commission of a crime or illegal act (*11 Cal. App. 3d 144, 157)* .

[b] Award Based on Illegal Contract Is Unenforceable

Bayscene Resident Negotiators v. Bayscene Mobilehome Park (1993) 15 Cal. App. 4th 119, 18 Cal. Rptr. 2d 626 , involved arbitration under a municipal ordinance that required arbitration of disputes regarding rental rates at mobilehome parks when the dispute could not be resolved by negotiation. The city attorney threatened park owners with criminal prosecution, so they signed the submission agreement and submitted to arbitration, albeit with repeated and continual protests. Arbitration resulted in an award against the owners, which they appealed.

The court of appeal in vacated the award and found the ordinance unconstitutional because it deprived owners of their due process rights in that it did not provide for trial de novo or for judicial review of the sufficiency of the evidence supporting the award (*15 Cal. App. 4th 119, 134-135)* . The court of appeal also found that submitting to arbitration had not constituted waiver of the right to attack the constitutionality of the arbitration requirement in the ordinance because the owners continually raised the constitutional challenge both before and during the proceeding (*15 Cal. App. 4th 119, 129)* .

South Bay Radiology Medical Associates v. Asher (1990) 220 Cal. App. 3d 1074, 269 Cal. Rptr. 15 , discussed at [3][d], *above*, is authority for the proposition that an illegal contract will not support judicial action, arbitration, or an arbitration award (*220 Cal. App. 3d 1074, 1080-1081)* .

Joe A. Freitas & Sons v. Food Packers (1985) 164 Cal. App. 3d 1210, 211 Cal. Rptr. 157 , arbitration by a noncertified employee organization pursuant to a collective-bargaining agreement. *Lab. Code §§ 1153(f)* and *1159* prohibit agreements between employers and employee organizations that are not certified for employee representation by the Agricultural Labor Relations Board. The trial court affirmed an award in favor of the noncertified employee organization. Employer appealed.

The court of appeal vacated the award, holding that the agreement violated *Lab. Code §§ 1153(f)* and *1159*, and thus the agreement was void (*164 Cal. App. 3d 1210, 1215-1218)* .

California Points & Authorities

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20C ARBITRATION: CONFIRMING, CORRECTING, OR VACATING THE AWARD
PART II. FORMS
E. Grounds for Vacating and Preventing Confirmation of Award

2-20C California Points & Authorities § 20C.211

§ 20C.211 Award That Cannot Be Reconciled With Terms of Court Order Must Be Vacated

[1] FORM

THE ARBITRATION AWARD _____ [*specify what it does, e.g.,* REINSTATING JOHN DOE AS FOREMAN], _____ [CANNOT BE CONFIRMED *or* MUST BE VACATED] AS CONTRARY TO PUBLIC POLICY BECAUSE IMPLEMENTING THE AWARD WOULD REQUIRE DISOBEDIENCE TO THE _____ [INJUNCTION *or* COURT ORDER] ISSUED ON _____ [*date*].

A. Award Contrary to Public Policy Is Unenforceable. [*See § 20C.210[1], Paragraph A.*]

B. Award That Cannot Be Reconciled With Terms of Court Order Must Be Vacated. There is a strong public policy requiring obedience to judicial orders, as established by the fact that disobedience to judicial orders is punishable by civil contempt. Thus, an arbitration award that cannot be enforced without resulting in a violation of a court order is contrary to public policy and must be vacated (*City of Palo Alto v. Service Employees Internat. Union (1999) 77 Cal. App. 4th 327, 338-340*).

[2] Comments

[a] Use of Form

This form may be used to support a petition or response seeking to vacate an arbitration award on the ground that the award is contrary to public policy because implementing the award would require disobedience to a court order.

This form does not provide a complete memorandum but is designed to be combined with the memorandum supporting the petition [*see § 20C.20*] or response [*see § 20C.21*] seeking to vacate the award. Counsel may wish to include the memorandum from § 20C.210 expressing the general rule that public policy may provide grounds for vacating an award.

[b] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. Certainly, the order which would be offended should be described in detail, a copy attached, and a request for judicial notice of that order made. Argument should specify the ways in which implementation of the award will require disobedience to the court order.

Counsel will wish to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For forms seeking to vacate an arbitration, as well as a procedural checklist, see California Forms of Pleading and Practice, Ch. 34, *Contractual Arbitration: Judicial Review* (Matthew Bender).

[d] Related Memoranda

For memoranda to combine with this form, see *§§ 20C.20, 20C.21*, and *20C.210*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Award That Cannot Be Reconciled With Terms of Court Order Must Be Vacated

City of Palo Alto v. Service Employees Internat. Union *(1999) 77 Cal. App. 4th 327* , arose from one employee's threat to shoot and kill a co-worker and that co-worker's wife and child. The employee who made the threats had two previous disciplinary actions for violence or threats of violence. The employer, ("City") sought and obtained an injunction under *Code Civ. Proc. § 527.8*, which provided, among other things, that the employee who made the threats not make any contact with the threatened employee, and stay at least 100 yards away from the threatened employee, that employee's residence, place of work, children's school or place of child care, and the City's "Utility Department-Water/Wastewater/Gas Division work crew sites." City then terminated the employee who made the threats. The employee contested the termination and the matter was submitted to arbitration pursuant to a Memorandum of Understanding between City and the Union. The arbitrator ruled in favor of the employee, and awarded that he be reinstated to his former position as "leadman" with back pay, finding that the threats were merely "tough talk" and that City could find ways to insure the threatened employee's workplace safety, as required by *Lab. Code § 6400 et seq.* without terminating the employee who made the threats. The City petitioned to vacate the arbitration award on the grounds that it violated "the express legislated public policy of the State of California requiring employer intervention

against threats of violence and it commands an illegal act." The Union cross-petitioned to confirm the award. The trial court confirmed the award, and the City appealed.

The court of appeal reversed. The court first cited the exception to the general rule of limited judicial review of an arbitration award applicable in those rare cases when according finality to the arbitrator's decision would be incompatible with the protection of a statutory right or when the award contravenes an explicit legislative expression of public policy. Vacating an award on this ground requires a clear expression of illegality or public policy (*77 Cal. App. 4th 327, 334)* . The court discussed *Lab. Code § 6400* et seq. and the policy behind it, but concluded that the City failed to establish that public policy requires an employer to automatically fire any employee who makes a threat of violence against another employee (*77 Cal. App. 4th 327, 334-338)* . With respect to the injunction; however, which was based on clear and convincing evidence, the court of appeal said that a strong public policy requires obedience to judicial orders. In fact disobedience to judicial orders is punishable by civil contempt [*see Code Civ. Proc. § 1209(a)(5)*]. Furthermore, enforcement of certain protective-type orders, including orders issued pursuant to *Code of Civ. Proc. § 527.8*, is considered even more important: violation of those orders may be punishable as criminal contempt [*see Pen. Code §§ 166(c), 273.6*] (*77 Cal. App. 4th 327, 338-339)* . Because the injunction could not be complied with if the award was confirmed and the discharged employee was reinstated, the public policy requiring obedience to court orders required the award to be vacated (*77 Cal. App. 4th 327, 339-340)* .

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2-20C California Points & Authorities § 20C.212

§ 20C.212 Award Taken Through Mistake, Inadvertence, Surprise, or Excusable Neglect

[1] FORM

THE AWARD SHOULD _____ [NOT BE CONFIRMED *or* BE VACATED] BECAUSE IT WAS TAKEN AGAINST _____ [PETITIONER *or* RESPONDENT] THROUGH HIS/HER _____ [*specify ground(s) for relief pursuant to Code Civ. Proc. § 473, e.g.*, EXCUSABLE NEGLECT].

A. Relief From Nonjudicial Arbitration Award Taken Through Mistake, Inadvertence, Surprise, or Excusable Neglect. An arbitration award entered in a nonjudicial arbitration proceeding may be vacated pursuant to *Code of Civil Procedure Section 473* when the award was taken against the party seeking relief through his or her mistake, inadvertence, surprise, or excusable neglect (*MJM, Inc. v. Tootoo (1985) 173 Cal. App. 3d 598, 604, 219 Cal. Rptr. 100*).

[2] Comments

[a] Use of Form

This form may be used to support a petition or response seeking to vacate an arbitration award on the ground that the award was taken through mistake, inadvertence, surprise, or excusable neglect [*Code Civ. Proc. § 473*]. The authority on which this form is based was decided before *Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1, 25-28, 10 Cal. Rptr. 2d 183, 832 P.2d 899* , reiterated the exclusivity of the statutory grounds specified in *Code Civ. Proc. § 1286.2* for setting aside an award. Nevertheless, a situation calling for relief under *Code Civ. Proc. § 473* might be distinguishablein that it would be based on facts other than the arbitrator's decision, while *Moncharsh* addressed the standards for review of an arbitrator's decision. In addition, counsel and/or the party seeking to vacate the award on this basis should be prepared to pay reasonable compensatory legal fees and costs to the opposing party [*see Code Civ. Proc. § 473(c)*, discussed at [3][a], *below*].

This form does not provide a complete memorandum but should be combined with the memorandum supporting the

petition [*see § 20C.20*] or response [*see § 20C.21*] seeking to vacate the award. Counsel may wish to include the memorandum from § 20C.22, to seek rehearing after the award has been vacated. It appears that a petition or response seeking to vacate an award pursuant to *Code Civ. Proc. § 473* is not governed by the time limits imposed by *Code Civ. Proc. § 473* (reasonable time and in any event no later than six months after the judgment, order, or other proceeding was taken), but by those set forth in *Code Civ. Proc. § 1288* [*see MJM, Inc. v. Tootoo (1985) 173 Cal. App. 3d 598, 604, 219 Cal. Rptr. 100]* .

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should describe the facts constituting mistake, inadvertence, surprise, or excusable neglect. Generally, it will be appropriate to attach a copy of the award [*see Shepherd v. Greene (1986) 185 Cal. App. 3d 989, 994, 230 Cal. Rptr. 233* (*discussed under § 20C.12[3][a]*)].

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For discussion and forms addressing relief pursuant to Code Civ. Proc. § 473, as well as a research guide, and a procedural checklist, see California Forms of Pleading and Practice, Ch. 489, *Relief from Judgments and Orders* (Matthew Bender).

[d] Related Memoranda

For memoranda to combine with this form, see *§§ 20C.20* or *20C.21*, and *20C.22[1]*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For discussion and memoranda supporting motions to set aside a default or default judgment for mistake, inadvertence, surprise, or excusable neglect, see Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders* .

[3] Discussion of Authorities

[a] Conditions for Relief Under Code Civ. Proc. § 473

Code Civ. Proc. § 473 generally permits the trial court to relieve a party from a judgment or order against him or her on

the grounds specified and on "any terms as may be just." Courts have long construed this phrase to allow payment of costs or attorney's fees to the adverse party to compensate that party for any losses or expenses suffered by the *Code Civ. Proc. § 473* motion [*Hearst v. Ferrante (1987) 189 Cal. App. 3d 201, 204, 234 Cal. Rptr. 385]* .

When relief from default is based on a sworn declaration of fault by the defaulting party's attorney, the court is required to order that attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties [*Code Civ. Proc. § 473(c)*]. In addition, courts granting relief from default under *Code Civ. Proc. § 473* are expressly authorized to impose a penalty of up to $1,000 on an offending attorney or party, and to direct that an offending attorney pay up to $1,000 to the State Bar Client Security Fund [*Code Civ. Proc. § 473(c)(1)*]. However, when the court grants relief from default based on the affidavit of the defaulting party's attorney attesting to the attorney's mistake, inadvertence, surprise, or neglect, the relief is not to be made conditional on the attorney's payment of compensatory legal fees or costs or monetary penalties imposed by the court, or on compliance with other sanctions ordered by the court [*Code Civ. Proc. § 473(c)(2)*].

[b] Relief From Nonjudicial Arbitration Award Taken Through Mistake, Inadvertence, Surprise, or Excusable Neglect

MJM, Inc. v. Tootoo *(1985) 173 Cal. App. 3d 598, 219 Cal. Rptr. 100* , petitioner and respondents entered into a contract whereby petitioner was to perform construction work on respondents' home. A dispute arose, and petitioner commenced arbitration proceedings pursuant to the terms of the contract. After arbitration proceedings that were conducted in respondents' absence, an award was entered in petitioner's favor. Petitioner then filed a petition to confirm the award. Respondents filed a response to the petition, requesting that the award be vacated under both former Code Civ. Proc. § 1286.2(a) [*now see Code Civ. Proc. § 1286.2(a)(1)*] and *Code Civ. Proc. § 473*. A supporting declaration of one of the respondents stated that he had a limited education and a poor understanding of the English language. Consequently, hewas unaware of the nature of the arbitration proceeding or of the documents mailed to him concerning that proceeding. He believed that he had effectively canceled the contract. The trial court denied the petition to confirm the award and ordered the award vacated. Petitioner appealed.

The court of appeal affirmed. The court noted its earlier decision in *Alvarado v. City of Port Hueneme (1982) 133 Cal. App. 3d 695, 184 Cal. Rptr. 154* , in which it held that relief under *Code Civ. Proc. § 473* was available in judicial arbitration proceedings conducted under *Code Civ. Proc. § 1141.10 et seq.* The court held by analogy that the same relief was also available in nonjudicial arbitration proceedings. Applying this rule, the court concluded that respondent's declaration was sufficient to support a determination of excusable neglect justifying relief from the arbitration award under *Code Civ. Proc. § 473* (*173 Cal. App. 3d 598, 604)* .

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CHAPTER 20D ARBITRATION: DISMISSING

2-20D California Points & Authorities 20D.syn

§ 20D.syn Synopsis to Chapter 20D: ARBITRATION: DISMISSING

§ 20D.01 Scope of Chapter

§ 20D.02 Governing Law

§ 20D.03 How to Use the Forms in This Chapter

[1] Page Limits on Memoranda

[2] Using the Forms to Build a Draft Memorandum

§ 20D.04 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

[2] Related Points and Authorities Chapters

§§ 20D.05-20D.09 [Reserved]

§ 20D.10 Supporting Motion to Dismiss Arbitration and Stayed Action When Party Failed to Bring Claim to Arbitration Within Five Years

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Split in Authority Regarding Court's Jurisdiction to Dismiss Arbitration Proceeding

[d] Commencement of Five-Year Period

[e] Related Pleading and Practice Chapters

[f] Related Memoranda

[g] Opposing Memoranda

[3] Discussion of Authorities

[a] Dismissal for Delay in Bringing Matter to Arbitration

[b] Jurisdiction to Dismiss Stayed Action

[c] Jurisdiction to Dismiss Arbitration Proceeding

[d] Calculation of Five-Year Period

[e] Period Not Tolled Absent Showing of Reasonable Diligence

§ 20D.11 Supporting Motion to Dismiss Arbitration and Stayed Action When Party Failed to Exercise Diligence in Prosecuting Claim as Required by Agreement

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Dismissal of Arbitration and Stayed Action for Lack of Reasonable Diligence Required Under Agreement

§ 20D.12 Supporting Motion to Dismiss Arbitration Proceeding When Party Failed to Comply With Discovery Order

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Dismissal of Arbitration Is Appropriate Sanction for Failure to Comply With Discovery Order

§§ 20D.13-20D.19 [Reserved]

§ 20D.20 Opposing Motion to Dismiss Arbitration and/or Stayed Action

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Court Does Not Have Authority to Dismiss Arbitration or Stayed Action

[4] Additional Authorities

[a] Court Does Not Have Authority to Dismiss Arbitration or Stayed Action

§ 20D.21 Opposing Motion to Dismiss Arbitration and Stayed Action--Plaintiff Has Exercised Reasonable Diligence in Prosecuting Arbitration

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Dismissal of Action Improper When Plaintiff Has Exercised Reasonable Diligence

[b] Calculation of Five-Year Period

[4] Additional Authorities

[a] Dismissal of Action Improper When Plaintiff Has Exercised Reasonable Diligence

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2-20D California Points & Authorities § 20D.01

§ 20D.01 Scope of Chapter

This chapter contains memoranda and contentions relating to dismissing contractual arbitration under private agreements pursuant to *Code Civ. Proc. § 1280 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsArbitrabilityCivil ProcedureAlternative Dispute ResolutionCivil ProcedureAlternative Dispute ResolutionArbitrationsWaiversContracts LawContract Conditions & ProvisionsArbitration Clauses

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2-20D California Points & Authorities § 20D.02

§ 20D.02 Governing Law

Code Civ. Proc. § 1286 requires the court to confirm an arbitration award if it does not vacate the award, or to correct and then confirm the award, or to dismiss the proceeding [*see* Ch. 20C, *Arbitration: Confirming, Correcting, or Vacating the Award*]. Arbitration may be dismissed for several reasons, including when the plaintiff fails to bring the action to arbitration within five years after the complaint was commenced [*Code Civ. Proc. §§ 583.310, 583.360(a)*; *see § 20D.10*], and when a party fails to comply with a discovery order [*see § 20D.12*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsArbitration ClausesCivil ProcedureAlternative Dispute ResolutionArbitrationsWaivers

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2-20D California Points & Authorities § 20D.03

§ 20D.03 How to Use the Forms in This Chapter

[1] Page Limits on Memoranda

One of the more significant drafting requirements to keep in mind are page limits: supporting and opposing memoranda must not exceed 15 pages, or 20 pages in a summary judgment proceeding. A reply or closing memorandum may not exceed 10 pages in length [*see Cal. Rules of Ct., Rule 3.1113(d)*]. Exhibits, declarations, attachments, tables of contents and authorities, and proof of service are not counted. Any party must obtain leave of court to file a longer memorandum [*see Cal. Rules of Ct., Rule 3.1113(d), (e)*]. These and other drafting requirements are discussed in *further detail in Chapter 1, Writing Legal Memoranda and Briefs, § 1.05*.

[2] Using the Forms to Build a Draft Memorandum

The forms included in this chapter are designed to be combined with other forms to form a complete memorandum. For detailed discussion on how to select and use the forms in the publication to build a draft memorandum and complete the draft, with detailed discussion of all drafting requirements and strategic or stylistic considerations, see *Ch. 1, Writing Legal Memoranda and Briefs, §§ 1.03 -1.06*. For a skeletal form of memorandum for use in creating a properly formatted outline in which to compile relevant forms from this publication, see *Ch. 1, Writing Legal Memoranda and Briefs, § 1.10*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeContent & FormCivil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPleading & PracticeMotion PracticeSupporting Memoranda

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2-20D California Points & Authorities § 20D.04

§ 20D.04 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

For detailed legal background discussion, research guides, procedural checklists, and practice forms of motions and other papers relating to private contractual arbitration proceedings, see:

- California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

- California Forms of Pleading and Practice, Ch. 33, *Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding* (Matthew Bender).

- California Forms of Pleading and Practice, Ch. 34, *Contractual Arbitration: Judicial Review* (Matthew Bender).

[2] Related Points and Authorities Chapters

Chapters in this publication with related forms include:

- For compelling arbitration, see Ch. 20, *Arbitration: Compelling* .

- For resisting arbitration, see Ch. 20A, *Arbitration: Resisting* .

- For selecting arbitrators and determining whether an arbitrator is immune from suit, see Ch. 20B, *Arbitration: Selecting Arbitrators; Arbitral Immunity* .

- For confirming, correcting, or vacating an arbitration award, see Ch. 20C, *Arbitration: Confirming, Correcting, or Vacating the Award* .

- For determining the effect of an arbitration award, see Ch. 20E, *Arbitration: Effect of Award* .

- For situations in which attorney's fees may be recovered, see Ch. 25, *Attorney's Fees* .

- For contract provisions in general, see Ch. 50, *Contracts* .

- For situations in which contracts may be avoided or declared void, see Ch. 92, *Duress, Menace, Fraud, Undue Influence, and Mistake* .

- For requirements of injunctions, see Ch. 116, *Injunctions* .

- For general principles relating to specific performance of contracts, see Ch. 214, *Specific Performance* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActOrders to Compel ArbitrationCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewContracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawRemediesSpecific Performance

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2-20D California Points & Authorities §§ 20D.05-20D.09

[Reserved]

§§ 20D.05[Reserved]

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2-20D California Points & Authorities § 20D.10

§ 20D.10 Supporting Motion to Dismiss Arbitration and Stayed Action When Party Failed to Bring Claim to Arbitration Within Five Years

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION TO DISMISS ARBITRATION AND STAYED ACTION
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	Trial Date: none

_____

THE ARBITRATION PROCEEDING AND STAYED ACTION SHOULD BE DISMISSED BECAUSE PLAINTIFF HAS FAILED TO BRING THE ACTION TO ARBITRATION WITHIN FIVE YEARS AFTER THE COMPLAINT WAS COMMENCED AGAINST THE DEFENDANT.

A. Five-Year Limit to Bring Action to Trial. An action must be brought to trial within five years after the action is commenced against the defendant; if not brought to trial within the five-year period, the action must be dismissed by the court on its own motion or on motion of the defendant (*Code Civ. Proc. §§ 583.310, 583.360(a)*).

B. Dismissal for Delay in Bringing Matter to Arbitration. In determining whether an action pending arbitration should be dismissed, the five-year mandatory dismissal period applies (*Lockhart-Mummery v. Kaiser Foundation Hospitals (1980) 103 Cal. App. 3d 891, 896, 163 Cal. Rptr. 325*).

C. Jurisdiction to Dismiss Stayed Action. A court has jurisdiction to dismiss an action in which arbitration proceedings are pending (*Lockhart-Mummery v. Kaiser Foundation Hospitals (1980) 103 Cal. App. 3d 891, 898, 163 Cal. Rptr. 325*).

D. Jurisdiction to Dismiss Arbitration Proceeding. A court has the power to dismiss the arbitration proceedings, as well as the stayed action, for delay in bringing the matter to arbitration (*Preston v. Kaiser Foundation Hospitals (1981) 126 Cal. App. 3d 402, 406, 178 Cal. Rptr. 882*).

E. Calculation of Five-Year Period. In calculating whether the matter has been brought to arbitration within five years, the entire period from the date the action is commenced against the defendant is considered (*Lockhart-Mummery v. Kaiser Foundation Hospitals (1980) 103 Cal. App. 3d 891, 896, 163 Cal. Rptr. 325*).

[*Optional*] **F. Period Not Tolled Absent Showing of Reasonable Diligence.** A period of time may not be excluded from calculation of the five-year period on the ground of impossibility, impracticality, or futility unless the plaintiff has demonstrated that he or she exercised reasonable diligence in prosecuting the cause of action during this period (*Boutwell v. Kaiser Foundation Health Plan (1988) 206 Cal. App. 3d 1371, 1374, 254 Cal. Rptr. 173*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be used to support a motion to dismiss an arbitration proceeding and an action stayed, pending arbitration, if the party pursuing a claim in the arbitration proceedings has failed to bring it to hearing within five years from the filing of the action. There is significant authority holding that the court lacks power to entertain the motion supported by this form, and criticizing the cases cited in this form [*see* [c], *below*].

Optional Paragraph F may be used if counsel wishes to anticipate opposition to the motion based on the ground that the five-year period has been tolled due to impossibility, impracticality, or futility [*see § 20D.21*]. Alternatively, this paragraph may be adapted for use in a supplemental memorandum to be submitted in reply to such opposition [see *Cal. Rules of Ct., Rule 3.1342(c)* (permitting a supplemental memorandum in response to opposition to motion for discretionary dismissal for delay in prosecution of action)].

The use of the motion format contemplates that a petition to compel arbitration has been granted earlier in the matter, or that a motion to stay a proceeding involving the controversy that is the subject of arbitration has been granted; the present motion would be brought in the same judicial proceeding. The motion to dismiss the arbitration would be joined with one to dismiss the action as well. The memorandum in this form is for use in dismissing an action as well as the related arbitration.

For memorandum supporting a motion for dismissal based on a period of time required under the arbitration agreement

for prosecution of a claim, *see § 20D.11*.

[b] Argument

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. The argument should show the date when the action was commenced and trace the lengthy history of the litigation and arbitration. In addition, counsel should review the contrary authorities and considerpolicy reasons to defend the minority view reflected in this form.

[c] Split in Authority Regarding Court's Jurisdiction to Dismiss Arbitration Proceeding

There is a split of authority regarding the court's power to dismiss a contractual arbitration proceeding and the action in which the order directing arbitration was made. The cases cited in this form, *Lockhart-Mummery v. Kaiser Foundation Hospitals (1980) 103 Cal. App. 3d 891, 898, 163 Cal. Rptr. 325* (court properly dismissed both), discussed under [3][a], *below*, and *Preston v. Kaiser Foundation Hospitals (1981) 126 Cal. App. 3d 402, 406, 178 Cal. Rptr. 882* (effect of dismissing action is to terminate the arbitration), discussed under [3][c], *below*, uphold that power.

However, more recent cases have criticized this view [*see, e.g., Byerly v. Sale (1988) 204 Cal. App. 3d 1312, 251 Cal. Rptr. 749* (dismissal of a previously stayed complaint has absolutely no effect on the pending arbitration because the parties had agreed by contract to arbitrate the dispute under *Code Civ. Proc. § 1295*)]. The court in *Byerly* said it was not aware of any authority of the trial court, in dismissing the court action, to dismiss the arbitration, even if it desired to accomplish that result [*Byerly v. Sale (1988) 204 Cal. App. 3d 1312, 1314-1315, 251 Cal. Rptr. 749]* . The court did acknowledge the contrary statement in *Preston*, but said that "[t]o the extent that *Preston* may be cited for the notion that dismissal of a complaint somehow includes termination of a pending arbitration matter, it is unsupported, and unsupportable, in law or logic; and we decline to follow it" [*Byerly v. Sale (1988) 204 Cal. App. 3d 1312, 1316 fn.3, 251 Cal. Rptr. 749* ; *see also Kuzmanoff v. Kron (1988) 207 Cal. App. 3d Supp. 1, 5, 255 Cal. Rptr. 168*]. Further, in *Cardiff Equities, Inc. v. Superior Court (2008) 166 Cal. App. 4th 1541, 1549-1550, 83 Cal. Rptr. 3d 699* , the court held that there is nothing to preclude a plaintiff's dismissal of a complaint after a case has been ordered into arbitration, but before an arbitration has commenced. That court of appeal declined to exercise its discretion to review the trial court's order compelling arbitration and stated that an order compelling arbitration is nonappealable; however, the court also stated that after plaintiff's dismissal, the trial court no longer has jurisdiction to order the parties to complete the arbitration [*Cardiff Equities, Inc. v. Superior Court (2008) 166 Cal. App. 4th 1541, 1552-1553, 83 Cal. Rptr. 3d 699]* .

The contrary authorities are discussed in *§ 20D.20*.

[d] Commencement of Five-Year Period

Several court of appeal decisions have rejected the assertion in *Lockhart-Mummery v. Kaiser Foundation Hospitals (1980) 103 Cal. App. 3d 891, 896, 163 Cal. Rptr. 325* , discussed under [3][a], *below*, that the five-year period for mandatory dismissal is to be calculated from the filing of the complaint. These cases hold that, in the context of cases subject to contractual arbitration, the five-year period normally should be calculated from the date of the order for arbitration, as opposed to the date of the filing of the complaint [*see, e.g., Gainey v. Occidental Land Research (1986) 186 Cal. App. 3d 1051, 1054, 231 Cal. Rptr. 249* (citing *Preston v. Kaiser Foundation Hospitals (1981) 126 Cal. App. 3d 402, 178 Cal. Rptr. 882*)]. However, this is based on the rationale that the period between the filing of the complaint and the order for arbitration should ordinarily be excluded as time during which it was not possible or practical for the plaintiff to prosecute the arbitration proceeding [*see Preston v. Kaiser Foundation Hospitals (1981) 126 Cal. App. 3d 402, 408-410, 178 Cal. Rptr. 882]* . Another court of appeal has held that this rationale does not apply when the plaintiff fails to exercise reasonable diligence in prosecuting his or her cause of action, and hence in this event the filing of the complaint and the order for arbitration is not excluded [*see Boutwell v. Kaiser Foundation Health Plan (1988) 206 Cal. App. 3d 1371, 1374, 254 Cal. Rptr. 173* (discussed in [3][e] *below*)].

[e] Related Pleading and Practice Chapters

For discussion of the split of authority on this issue, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

For discussion and forms relating to dismissal of actions in general, see California Forms of Pleading and Practice, Ch. 212, *Dismissal* (Matthew Bender).

[f] Related Memoranda

For memoranda addressing dismissal of civil actions in general, see Ch. 90, *Dismissal* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[g] Opposing Memoranda

The memorandum *set out in § 20D.20*, and in an appropriate case, that *set out in § 20D.21*, may be used to oppose a motion to dismiss supported by the foregoing memorandum.

[3] Discussion of Authorities

[a] Dismissal for Delay in Bringing Matter to Arbitration

In ***Lockhart-Mummery v. Kaiser Foundation Hospitals*** *(1980) 103 Cal. App. 3d 891, 163 Cal. Rptr. 325* , defendant was granted an order to stay plaintiff's action and compel arbitration under the agreement between the parties. Plaintiff refused to answer defendant's interrogatories until a neutral arbitrator was selected. Defendant had appointed its arbitrator under the agreement, but plaintiff had failed to appoint its arbitrator, and thus a third, neutral arbitrator to be appointed by the two prior arbitrators had not been selected. A provision of the arbitration agreement stated that the claim would be waived or barred if the claimant failed to pursue the claim with reasonable diligence.

More than three years after the filing of the complaint, defendant moved to dismiss both the action and the arbitration proceedings. After denial of the motion without prejudice, the plaintiff appointed an arbitrator, after which the neutral arbitrator was chosen. Plaintiff paid his portion of the arbitrator's fee well over a half year later. A year later, more than five years after the complaint was filed, defendant again moved to dismiss. Plaintiff appealed the dismissal of the action and arbitration.

The court of appeal upheld the dismissal. It agreed with a noted commentator that practical consequences adverse to arbitration policy would arise if arbitrators did not abide by the regular statutes of limitations (*103 Cal. App. 3d 891, 895-896)* . It noted that some standard should be set up to prevent matters from drifting on for unlimited periods. The time-tested series of limitations prescribed by the Legislature for lawsuits are well founded in common sense and practicality and should be applied in arbitration proceedings. It held that former Code Civ. Proc. § 583(b) (*now see Code Civ. Proc. §§ 583.310, 583.360*), which provides that an action must be dismissed if not brought to trial within five years from filing of the action, should apply to contractual arbitration cases. As an alternative holding, the court upheld the dismissal because "reasonable diligence" required by the arbitration agreement had not been demonstrated by plaintiff (*103 Cal. App. 3d 891, 896)* .

The court in *Lockhart-Mummery* applied former Code Civ. Proc. § 583(b) as if the issue were failure to bring the case to trial rather than failure to bring the case to arbitration. However, another court of appeal has applied the statute only as a guideline in determining whether plaintiff had exercised due diligence as required by an arbitration agreement [*see*

Preston v. Kaiser Foundation Hospitals (1981) 126 Cal. App. 3d 402, 409, 178 Cal. Rptr. 882 (discussed in [b], below and in § 20D.21[3][a])].

[b] Jurisdiction to Dismiss Stayed Action

Lockhart-Mummery v. Kaiser Foundation Hospitals *(1980) 103 Cal. App. 3d 891, 163 Cal. Rptr. 325* , is discussed under [a], *above.* In discussing whether the court has jurisdiction to dismiss an action in which arbitration proceedings are pending, the court found support for such authority in *Kaplan v. Eldorado Ins. Co. (1976) 55 Cal. App. 3d 587, 591, 127 Cal. Rptr. 699* . The court in *Lockhart-Mummery* stated that if during arbitration the courts have jurisdiction to dismiss for refusal of discovery, as was held in *Kaplan,* they also should be empowered to dismiss if there has been no exercise of reasonable diligence. The court stated that to hold otherwise would place a defendant in an untenable position as it would be unable, without the appointment of plaintiff's arbitrator, to move the litigation along nor could it seek dismissal despite the passage of three years of inaction (*103 Cal. App. 3d 891, 898)* .

[c] Jurisdiction to Dismiss Arbitration Proceeding

The facts and procedural background of ***Preston v. Kaiser Foundation Hospitals*** *(1981) 126 Cal. App. 3d 402, 178 Cal. Rptr. 882* are discussed in *§ 20D.21[3][a]*. Although the court in that case reversed the trial court's dismissal, it stated that the effect of the dismissal was to vacate the order for arbitration and terminate the arbitration itself (*126 Cal. App. 3d 402, 406)* .

Other courts of appeal have expressly declined to follow *Preston* on this point [*see Byerly v. Sale (1988) 204 Cal. App. 3d 1312, 1316 n.3, 251 Cal. Rptr. 749* ; *see also Cardiff Equities, Inc. v. Superior Court (2008) 166 Cal. App. 4th 1541, 1552-1553, 83 Cal. Rptr. 3d 699* ; for discussion of these cases, *see § 20D.20*]. For further discussion, see [2][c], *above.*

[d] Calculation of Five-Year Period

The facts and procedural background of ***Lockhart-Mummery v. Kaiser Foundation Hospitals*** *(1980) 103 Cal. App. 3d 891, 163 Cal. Rptr. 325* , are discussed under [a], *above.* In affirming the trial court's dismissal of the action, the court in *Lockhart* stated that, in calculating whether the matter was brought to arbitration within five years, the entire period beginning with the date the action is commenced against the defendant is considered (*103 Cal. App. 3d 891, 896)* .

Other courts of appeal have regarded the *Lockhart* decision as unnecessarily broad on this point, and have held that the five-year period should normally be calculated from the date of the order for arbitration, as opposed to the date of the filing of the complaint [*see, e.g., Gainey v. Occidental Land Research (1986) 186 Cal. App. 3d 1051, 1054, 231 Cal. Rptr. 249]* . For further discussion, see [2][d], *above,* and the discussion of *Boutwell v. Kaiser Foundation Health Plan (1988) 206 Cal. App. 3d 1371, 254 Cal. Rptr. 173* under [e], *below.*

[e] Period Not Tolled Absent Showing of Reasonable Diligence

Boutwell v. Kaiser Foundation Health Plan *(1988) 206 Cal. App. 3d 1371, 254 Cal. Rptr. 173* was an action for medical malpractice filed on December 22, 1980. On January 12, 1983, the parties stipulated to stay proceedings pending arbitration under a contractual arbitration provision. Four years and ten months after the complaint was filed, plaintiff designated her arbitrator and scheduled a hearing date. The matter lay dormant until October, 1985, when plaintiff designated her arbitrator, informed defendants of the name of her expert witness, and told defendants that she intended to arbitrate the matter on December 16, 1985. In response to defendants' conflict with that date, she offered to reschedule the hearing if defendants stipulated to extend the time for trial for 90 days. Defendants refused to so stipulate but selected their arbitrator and agreed not to move for an immediate dismissal if plaintiff promptly pursued her arbitration. However, more than a year elapsed and the arbitration never took place. In December, 1986, plaintiff moved for an order directing arbitration on a date certain. In response, defendants moved for mandatory dismissal under *Code*

Civ. Proc. § 583.310. The trial court dismissed the action, finding that plaintiff had not been reasonably diligent in pursuing her claim, and plaintiff appealed.

The court of appeal affirmed the dismissal. The court held that the rule followed in *Preston v. Kaiser Foundation Hospitals (1981) 126 Cal. App. 3d 402, 409, 178 Cal. Rptr. 882* (discussed in [c], *above* and in § 20D.21[3][a]), under which the time between the filing of the complaint and the order for arbitration is excluded from calculation of the five-year period on the ground that it was impossible, impracticable, or futile for plaintiff to bring the matter to arbitration or trial, does not apply when the plaintiff has not exercised reasonable diligence in pursuing his or her cause of action (*206 Cal. App. 3d 1371, 1374)* . Looking for guidance to cases construing the impossibility, impracticability, or futility exception to *Code Civ. Proc. § 583.310*, the court held that the exception did not apply because plaintiff's delay in scheduling her arbitration hearing was caused by matters within her control (*206 Cal. App. 3d 1371, 1374-1375)* . The court observed that a claimant in arbitration can petition the court for assistance in expediting the proceedings by moving to appoint a neutral arbitrator, moving to set an arbitration date, moving to strike a defendant's answer, or entering a defendant's default (*206 Cal. App. 3d 1371, 1374)* . Plaintiff, the court found, did not show due diligence in locating an expert witness, could have moved to set the arbitration date in a more timely fashion instead of attempting to schedule the hearing only days before the five-year period, and made a belated motion to set an arbitration date (*206 Cal. App. 3d 1371, 1374-1375)* .

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20D ARBITRATION: DISMISSING
PART II. FORMS

2-20D California Points & Authorities § 20D.11

§ 20D.11 Supporting Motion to Dismiss Arbitration and Stayed Action When Party Failed to Exercise Diligence in Prosecuting Claim as Required by Agreement

[1] FORM

[*Caption. See § 20D.10[1].*]

THE ARBITRATION PROCEEDING AND STAYED ACTION SHOULD BE DISMISSED BECAUSE THE CLAIMANT HAS FAILED TO EXERCISE REASONABLE DILIGENCE, AS REQUIRED UNDER THE ARBITRATION AGREEMENT, IN PROSECUTING HIS/HER/ITS CLAIM.

Dismissal of Arbitration and Stayed Action for Lack of Reasonable Diligence Required Under Agreement. If the arbitration agreement provides that the claimant must pursue the arbitration claim with reasonable diligence, the arbitration proceeding and any action stayed therefor may be dismissed on a showing that the claimant failed to exercise such diligence in prosecuting the matter (*Lockhart-Mummery v. Kaiser Foundation Hospitals (1980) 103 Cal. App. 3d 891, 896, 898, 163 Cal. Rptr. 325*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form of memorandum may be used to support a motion to dismiss an arbitration proceeding and stayed action if the arbitration agreement requires a claimant to exercise reasonable diligence in pursuing a claim, but the claimant has not prosecuted the claim diligently. There is significant authority holding that the court lacks power to entertain the

motion supported by this form, and criticizing the case cited in this form [*see § 20D.10[2][c]*].

For a memorandum supporting a motion to dismiss the arbitration and stayed action for failure to prosecute the claim within five years, *see § 20D.10*.

[b] Argument

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Counsel should identify the portion of the arbitration agreement requiring reasonable diligence in prosecuting the claim and lay out the facts that show the failure of the opposing party to exercise such diligence.

[c] Opposing Memoranda

The memorandum *set out in § 20D.20* may be used to oppose a motion to dismiss supported by the foregoing memorandum.

[3] Discussion of Authorities

[a] Dismissal of Arbitration and Stayed Action for Lack of Reasonable Diligence Required Under Agreement

The facts and procedural background of ***Lockhart-Mummery v. Kaiser Foundation Hospitals*** *(1980) 103 Cal. App. 3d 891, 163 Cal. Rptr. 325* , are discussed at *§ 20D.10[3][a]*.

As a basis for its holding that the complaint and arbitration proceeding must be dismissed, the court concluded that whether or not the mandatory dismissal provision of former Code Civ. Proc. § 583(b) was applicable, reasonable diligence as required by the arbitration agreement had not been demonstrated by the plaintiff (*103 Cal. App. 3d 891, 896)* . It observed that a precise contractual or judicial definition of the term "reasonable diligence" need not be delineated to perceive that the plaintiff's claim should be barred because of his delay, and that the plaintiff's activities could not measure up to any standard of the term (*103 Cal. App. 3d 891, 895)* . The court noted that an earlier appellate court had dismissed an arbitration matter because during arbitration proceedings the plaintiff in that case had failed to comply with discovery orders issued by the court. The present court of appeal reasoned that if during arbitration the courts have jurisdiction to dismiss for refusal of discovery, a court also should be empowered to dismiss where there has been no exercise of reasonable diligence by the plaintiff. The court concluded by commenting that all the factors in the present case left the court unsympathetic to the contention of the plaintiff that he had been deprived of his day in court, for the court observed that such deprivation was caused by his own lack of reasonable diligence, and he had failed to sustain the burden of showing that the trial court abused its discretion in dismissing the action and arbitration (*103 Cal. App. 3d 891, 898)* .

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2-20D California Points & Authorities § 20D.12

§ 20D.12 Supporting Motion to Dismiss Arbitration Proceeding When Party Failed to Comply With Discovery Order

[1] FORM

[*Caption. See § 20D.10[1].*]

THE ARBITRATION PROCEEDING SHOULD BE DISMISSED BECAUSE PETITIONER HAS FAILED TO COMPLY WITH A DISCOVERY ORDER.

Dismissal of Arbitration Is Appropriate Sanction for Failure to Comply With Discovery Order. In keeping with the rule that a party's persistent refusal to make discovery results is a presumption that the claims asserted are without merit, arbitration compelled under *Code of Civil Procedure Section 1281.2* should be dismissed, with prejudice, when petitioner refuses to comply with a discovery order (*California Teachers Assn. v. Governing Board (1984) 161 Cal. App. 3d 393, 399-400, 207 Cal. Rptr. 659*).

[*OR, in uninsured motorist matter*]

Dismissal of Arbitration Is Appropriate Sanction for Failure to Comply With Discovery Order. Discovery in uninsured motorist arbitration is governed by *Section11580.2(f) of the Insurance Code*, which adopts the entire California Civil Discovery Act (*Code Civ. Proc. § 2016.010 et seq.*) and grants jurisdiction to the court, rather than to the arbitrator, to hear and determine discovery motions, including sanctions. Thus, the superior court has jurisdiction to dismiss uninsured motorist arbitration based on the insured's refusal to authorize release of medical records in accordance with a previous order. The court did not abuse its discretion by dismissing the arbitration rather than imposing some lesser sanction (*Miranda v. 21st Century Ins. Co. (2004) 117 Cal. App. 4th 913, 920-921, 926, 928-929, 12 Cal. Rptr. 3d 159*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]

By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form of memorandum may be used to support a motion to dismiss an arbitration proceeding when the party pursuing the claim has failed or refused to comply with a discovery order. The first option is for use in ordinary arbitrations pursuant to *Code Civ. Proc. § 1280 et seq.*, in which discovery decisions are made by the arbitrator. The second options is for use in uninsured motorist matters, in which the superior court has jurisdiction over discovery matters, which may be conducted at any time after the accident, even before arbitration has been commenced [*Ins. Code § 11580.2(f)*]. The form contemplates that a petition to compel arbitration has been granted earlier and that the petitioner has then failed to comply with discovery.

[b] Argument

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Argument should disclose the discovery order or orders that have been made and any attempts to force compliance prior to this request for the ultimate sanction.

[c] Related Pleading and Practice Chapters

For discussion and forms relating to dismissal of actions in general, see California Forms of Pleading and Practice, Ch. 212, *Dismissal* (Matthew Bender).

For discussion and forms relating to dismissal as a discovery sanction, see California Forms of Pleading and Practice, Ch. 192, *Discovery: Sanctions for Discovery Misuse* (Matthew Bender).

[d] Related Memoranda

For forms of memoranda supporting motions to impose sanctions for failure to comply with discovery, see Ch. 82, *Discovery: Sanctions for Discovery Misuse* . For memoranda addressing dismissal of civil actions in general, see Ch. 90, *Dismissal* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memorandum *set out in § 20D.20* may be used to oppose a motion to dismiss supported by the foregoing memorandum.

[3] Discussion of Authorities

[a] Dismissal of Arbitration Is Appropriate Sanction for Failure to Comply With Discovery Order

In ***California Teachers Assn. v. Governing Board*** *(1984) 161 Cal. App. 3d 393, 207 Cal. Rptr. 659* , a teachers Association and another association representing teachers in the district (the associations) brought a petition for writ of

mandate to compel arbitration relating to a provision in the contract with the school district requiring the district to compel the payment by nonmember teachers of a service fee to the associations. The court issued an alternative writ directing the district to commence arbitration or to compel payment of the service fees. Arbitration was commenced, and eventually an order was made by the court requiring the associations to produce certain financial records or suffer dismissal of the arbitration proceeding. After continued failure of the associations to comply, the court dismissed with prejudice both the arbitration proceeding and the writ proceeding. Both parties filed memoranda for costs, the district also seeking attorney's fees pursuant to an indemnity provision in the contract. Both cost bills were stricken. The district appealed.

The court of appeal upheld the dismissal of the arbitration proceeding, and the dismissal being a judgment on the merits, upheld the payment to the district, as prevailing party, of its attorney's fees pursuant to an indemnity clause in the contract. The association's contention on appeal was that the trial court had no jurisdiction to award costs after the writ of mandate was issued compelling arbitration and that it had been the prevailing party because of the writ. The court of appeal said that mandate had been a misnomer; there had been only one type of relief available and that was to compel arbitration under *Code Civ. Proc. § 1281.2*. Mandate (*Code Civ. Proc. § 1085*) could not issue to compel arbitration because mandate could compel only acts required by law and the arbitration was pursuant to contract. In addition, the remedy of *Code Civ. Proc. § 1281.2* was an adequate remedy at law, the existence of which also prevents the issuance of a writ of mandate. A waiver by the district of its claim to costs did not amount to a waiver of its right to attorney's fees (*161 Cal. App. 3d 393, 398-401)* .

Miranda v. 21st Century Ins. Co. *(2004) 117 Cal. App. 4th 913, 12 Cal. Rptr. 3d 159* , arose from an accident plaintiff had with an underinsured motorist. She filed suit and after settling with that motorist, demanded underinsured motorist arbitration against her insurer. The insurer subpoenaed medical records relating to a prior medical condition of the insured. The medical facility refused to comply with the subpoena unless plaintiff authorized the release of the records. Plaintiff refused to do so. Defendant obtained an order from the superior court requiring plaintiff to authorize therelease of the medical records. When plaintiff still refused to sign the release, the insurer sought and obtained the ultimate sanction of dismissal of the arbitration and the action. Plaintiff appealed.

The court of appeal affirmed. The court discussed the procedure for discovery set forth in *Ins. Code § 11580.2(f)*. Discovery in uninsured motorist arbitration is governed by *Ins. Code § 11580.2(f)*, which adopts the entire California Civil Discovery Act (*Code Civ. Proc. § 2016.010 et seq.*) and grants jurisdiction to the court, rather than arbitrator, to hear and determine discovery motions, including sanctions (*117 Cal. App. 4th 913, 920-921)* . Thus, the superior court had jurisdiction to dismiss uninsured motorist arbitration for the insured's refusal to authorize release of medical records in accordance with a previous order (*117 Cal. App. 4th 913, 926)* . One rationale for having the court rather than the arbitrator determine motions with respect to uninsured motorist discovery is that discovery in uninsured motorist matters may take place any time after the accident, including before an arbitrator is appointed (*117 Cal. App. 4th 913, 923)* . Discovery motions relating to uninsured motorist claims may be heard in the superior court in and for any county that is a proper county for the filing of a suit for bodily injury against the uninsured motorist, or any county specified in the policy or an endorsement thereto as a proper county for arbitration or action thereon [*Ins. Code § 11580.2(f)(1)*] (*117 Cal. App. 4th 913, 921)* . It was not an abuse of discretion for the court to dismiss the arbitration rather than impose some lesser sanction. No other sanction would have sufficed nor provided defendant with the information it needed (*117 Cal. App. 4th 913, 928-929)* .

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2-20D California Points & Authorities §§ 20D.13-20D.19

[Reserved]

§§ 20D.13[Reserved]

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2-20D California Points & Authorities § 20D.20

§ 20D.20 Opposing Motion to Dismiss Arbitration and/or Stayed Action

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM OPPOSING MOTION TO DIS-
	)	MISS ARBITRATION [AND STAYED ACTION]
_____ [*name*],	)	Date: _____
Petitioner,	)	Time: _____
vs.	)	Location: _____
_____ [*name*],	)	[Judge: _____]
Respondent.	)	Date Action Filed: _____
	)	Trial Date: none
	)	
	)	
	)	
	)	
	)	
_____		

NEITHER THE ARBITRATION PROCEEDING NOR THE AND STAYED ACTION MAY BE DISMISSED BECAUSE THE COURT HAS NO POWER TO DISMISS THE STAYED ACTION WHILE THE ARBITRATION IS PENDING, AND THE COURT HAS NO POWER TO TERMINATE THE ARBITRATION.

A. Court Does Not Have Authority to Dismiss Arbitration or Stayed Action. While an action is stayed under *Code of Civil Procedure Section 1281.4* pending a nonjudicial arbitration, the court has no power to dismiss the action under

Code of Civil Procedure Section [583.360 (failure to bring it to trial within five years *or 583.410* (failure to bring it to trial within two years)]. Nor has the court any power to order terminate the arbitration, even if the arbitration is not being pursued diligently (*Blake v. Ecker (2001) 93 Cal. App. 4th 728, 733, 737-738, 113 Cal. Rptr. 2d 422 (2nd Dist., Div. 3)* ; *Titan/Value Equities Group, Inc. v. Superior Court (1994) 29 Cal. App. 4th 482, 487-488, 35 Cal. Rptr. 2d 4 (4th Dist., Div. 1)* ; *Burgess v. Kaiser Foundation Hospitals (1993) 16 Cal. App. 4th 1077, 1081, 20 Cal. Rptr. 2d 488 (1st Dist., Div. 5)* ; *Brock v. Kaiser Foundation Hospitals (1992) 10 Cal. App. 4th 1790, 1801, 1805, 1808, 13 Cal. Rptr. 2d 678 (3rd Dist.))* .

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be used to oppose a motion in the trial court seeking dismissal of the arbitration and/or the related stayed action on the ground that the court does not have authority to dismiss either one.

The form sets forth the majority view on this issue, as held by courts of appeal in the First, Third, and Fourth Appellate Districts and in the Second District, Division Three. In the Second District, Divisions One, Two, and Five have held that a court may dismiss a stayed action [*see* *Lockhart-Mummery v. Kaiser Foundation Hosp. (1980) 103 Cal. App. 3d 891, 898, 163 Cal. Rptr. 325 (2nd Dist., Div. 1)* (dismissing both action and arbitration); *Gainey v. Occidental Land Research (1986) 186 Cal. App. 3d 1051, 1054, 231 Cal. Rptr. 249 (2nd Dist., Div. 5)* ; *Preston v. Kaiser Foundation Hospitals (1981) 126 Cal. App. 3d 402, 406, 178 Cal. Rptr. 882 (2nd Dist., Div. 2)* (effect of dismissing action is to terminate arbitration)], although the Second District, Division Two, has also agreed that the arbitrator may dismiss the arbitration [*Young v. Ross-Loos Medical Group, Inc. (1982) 135 Cal. App. 3d 669, 673, 185 Cal. Rptr. 536 (2nd Dist., Div. 2)* (arbitrator's dismissal is in effect an award that plaintiff take nothing; arbitrator was in as good a position to administer test of reasonable diligence as was trial court in which proceedings had been stayed)].

Counsel may wish to incorporate memoranda from Ch. 90, *Dismissal*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should note that the action was stayed and ask that judicial notice be taken of the order staying the action. Argument may also describe the facts constituting his or her client's reasonable diligence in trying to bring the arbitration to hearing and explain how every delay was caused by the other party or the other party's arbitrator, counsel, or witnesses. In this regard, it will be important to note any court intervention that has been necessary [*see* *Titan/Value Equities Group, Inc. v. Superior Court (1994) 29 Cal. App. 4th 482, 488, 35 Cal. Rptr. 2d 4 (4th Dist., Div. 1)* (discussed at [3][a], *below*); *Brock v. Kaiser Foundation Hospitals (1992) 10 Cal. App. 4th 1790, 1801, 13 Cal. Rptr. 2d 678 (3rd Dist.)* (discussed at [3][a], *below*); *Boutwell v. Kaiser Foundation Health Plan (1988) 206 Cal. App. 3d 1371, 1374, 254 Cal. Rptr. 173 (1st Dist., Div. 5)]* .

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement)].

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For discussion of the split of authority on this issue, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

For discussion and forms relating to dismissal of actions in general, see California Forms of Pleading and Practice, Ch. 212, *Dismissal* (Matthew Bender).

[d] Related Memoranda

For memoranda addressing dismissal of civil actions in general, see Ch. 90, *Dismissal* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Court Does Not Have Authority to Dismiss Arbitration or Stayed Action

The facts and procedural background of ***Blake v. Ecker*** *(2001) 93 Cal. App. 4th 728, 113 Cal. Rptr. 2d 422 (2nd Dist., Div. 3)* , and the portion of the opinion addressing retroactive application of *Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669* are discussed in *Ch. 20, Arbitration: Compelling, § 20.23[3][e]*. Regarding the trial court's dismissal of the action after it had issued an order compelling arbitration, the court of appeal concluded that once the trial court granted defendants' motion to compel arbitration, it no longer had jurisdiction to hear or rule on defendants' motion to dismiss (*93 Cal. App. 4th 728, 733)* . Once the trial court stayed plaintiff's civil action, it was stayed for all purposes during the arbitration proceedings. Defendants' only avenue for redress when plaintiff failed to timely prosecute the arbitration was in the arbitration proceeding (*93 Cal. App. 4th 728, 737)* . The court of appeal quoted from *Brock v. Kaiser Foundation Hospitals (1992) 10 Cal. App. 4th 1790, 1796, 1797-1801* , that "Once a court grants the petition to compel arbitration and stays the action at law, the action at law sits in the twilight zone of abatement with the trial court retaining merely a vestigial jurisdiction over matters submitted to arbitration. This vestigial jurisdiction over the action at law consists solely of making the determination, upon conclusion of the arbitration proceedings, of whether there was an award on the merits (in which case the action at law should be dismissed because of the res judicata effects of the arbitration award. [Citations.])." The court also retains a separate, limited jurisdiction over the contractual arbitration which was the subject of the section 1281.2 petition: "After a petition has been filed under this title [i.e., "title 9" (§§ 1280-1294.2)], the court in which such

petition was filed retains jurisdiction to determine any subsequent petition involving the same agreement to arbitrate and the same controversy, and any such subsequent petition shall be filed in the same proceeding." (*93 Cal. App. 4th 728, 737-738)* . Thus, rather than seek relief from the trial court for plaintiff's failure to proceed, defendants should have sought relief in the arbitration proceeding, by pursuing the remedies available under the arbitration agreement and the rules of the arbitration association designated therein. The trial court had no jurisdiction to grant the motion to dismiss, and its order dismissing the action must be reversed (*93 Cal. App. 4th 728, 738)* .

Petitioners in ***Titan/Value Equities Group, Inc. v. Superior Court*** *(1994) 29 Cal. App. 4th 482, 35 Cal. Rptr. 2d 4 (4th Dist., Div. 1)* , opened securities accounts with Titan/Value Equities Group in 1992, and in so doing, signed an agreement that required them to submit any disputes between the parties to arbitration. In 1992, plaintiffs filed suit against Titan/Value, another company and its principal, and two Titan employees for alleged losses suffered in connection with the trading. In response to Titan's petition to compel arbitration, plaintiffs stipulated to arbitrate. They filed a submission of claims with the National Association of Securities Dealers (NASD), agreeing that the matter be determined in accordance with the NASD's Code of Arbitration Procedure. In December, 1992, the court in which the petition to compel arbitration was filed dismissed the petition as moot, in view of the stipulation, and stayed the plaintiffs' action against Titan.

The arbitration never took place: (1) the employee defendants filed bankruptcy, and investors were not granted relief from the stay until December, 1993, (2) there were discovery disputes, and (3) there were scheduling conflicts. In February, 1994, at a progress conference before the Superior Court, which defendants did not attend, investors' counsel expressed frustration with the arbitration and asked the court to "take control of the case." The trial court reasserted jurisdiction, set the case for trial on June 10, 1994, and agreed that an informal notice of ruling should be sent to Titan. After receiving the notice, Titan defendants filed a motion seeking reconsideration, confirmation of their right to arbitrate, and order staying the superior court action, or, alternatively, an order compelling arbitration. The other company also moved to compel arbitration. The trial court compelled arbitration, required the Titan defendants to respond fully to discovery, and required arbitration to proceed by June 30, even though it kept the June 10 trial date on calendar and required all counsel to appear then and report the status of the arbitration. Defendants filed writs of prohibition and mandate contending that the trial court could not order a case to arbitration and stay the lawsuit while at the same time reserving authority over the arbitration.

The writs were granted (*29 Cal. App. 4th 482, 489)* . The court of appeal said that once a court stays an action submitted to arbitration, it has only vestigial jurisdiction over the matter [*see, e.g., Code Civ. Proc. §§ 1281.4, 1281.8(b), 1285* (things court can do after staying action)]. The arbitrator takes over. It is the job of the arbitrator, not the court, to resolve all questions needed to determine the controversy (*29 Cal. App. 4th 482, 487)* , including deciding questions of procedure and discovery and granting relief from delay. In ordering arbitration to proceed under the stated conditions subject to reinstatement on the trial calendar, the trial court exceeded its jurisdiction (*29 Cal. App. 4th 482, 488)* . Under the procedures stipulated to by the parties, the director of the NASD proceedings sets the time and place of the hearing and has, among other things established procedures for discovery (*29 Cal. App. 4th 482, 489)* .

The parties in ***Burgess v. Kaiser Foundation Hospitals*** *(1993) 16 Cal. App. 4th 1077, 20 Cal. Rptr. 2d 488 (1st Dist., Div. 5)* , stipulated to arbitration on June 20, 1986. The two party arbitrators did not appoint the third arbitrator until April, 1989. In April, 1990, the neutral arbitrator demanded a nonrefundable $1,000 deposit from each side before the scheduled hearing in July, 1990. In June, 1990, defendant designated eight experts. Plaintiffs did not pay the fee and made no further attempt to bring the matter to a hearing. In November, 1991, defendant requested the arbitrator to dismiss the matter. The arbitrator did so. Plaintiffs moved the court to vacate that order, arguing that the five-year period was tolled by (1) the arbitrator's demand for the fee, which plaintiffs contended was misconduct [*Code Civ. Proc. § 1286.2(a)(3)* and *(5)*], (2) the defendant's burdensome designation of eight experts, and (3) the time taken by the party arbitrators' delay in appointing the third arbitrator. The trial court confirmed the order of dismissal, and plaintiffs appealed.

The court of appeal reversed the order confirming an arbitrator's dismissal and remanded with instructions to the superior court. The court of appeal agreed that the arbitrator, not the court, has authority to dismiss the arbitration for a party's failure to proceed with reasonable diligence (*16 Cal. App. 4th 1077, 1081)* . None of the causes advanced by plaintiffs tolled the five-year period. However, because there was no law on point at the time, plaintiffs' belief that it was tolled did not amount to failure of reasonable diligence (*16 Cal. App. 4th 1077, 1082)* . Plaintiffs' appropriate remedy, for delay by the arbitrator, relief from the reservation fee, or the burdensome designation of experts was to petition the court for an appropriate order expediting the arbitration proceeding (*16 Cal. App. 4th 1077, 1081-1082)* .

In ***Brock v. Kaiser Foundation Hospitals*** *(1992) 10 Cal. App. 4th 1790, 13 Cal. Rptr. 2d 678 (3rd Dist.)* , a medical malpractice action had been stayed pending conclusion of an arbitration between the patient and the health care provider. Five years and one month after the arbitration was begun, the health care provider moved the court to dismiss both the stayed action and the arbitration, on the grounds of (1) failure to bring the action to trial within five years [*see Code Civ. Proc. §§ 583.310, 583.360*] and (2) failure to prosecute the arbitration diligently, as required by the arbitration agreement. The trial court granted the motion and ordered entry of a judgment dismissing the action and the arbitration. Plaintiff appealed.

The court of appeal reversed. Regarding dismissal of the stayed action, the court concluded that during the period while an action is stayed, the trial court has no power to dismiss it for failure to bring it to trial within five years (*10 Cal. App. 4th 1790, 1801)* . By statute, the applicable five-year period excludes any period during which the action is stayed [*Code Civ. Proc. § 583.340(b)*]; therefore, while the stay is in effect,the five-year period cannot expire. The court cited with approval *Byerly v. Sale (1988) 204 Cal. App. 3d 1312, 1314, 251 Cal. Rptr. 749* (discussed at [4][a], *below*), which reached the same conclusion by slightly different reasoning based on a related statutory exclusion [*see Code Civ. Proc. § 583.340(c)*] (*10 Cal. App. 4th 1790, 1797)* . The *Brock* court criticized and declined to follow cases supporting the view that the stayed action may be dismissed for failure to bring it to trial [*see Boutwell v. Kaiser Foundation Hospital Plan (1988) 206 Cal. App. 3d 1371, 1373-1375, 254 Cal. Rptr. 173 (1st Dist. Div. 5)* ; *Preston v. Kaiser Foundation Hospitals (1981) 126 Cal. App. 3d 402, 406-410, 178 Cal. Rptr. 882 (2nd Dist., Div. 2)* ; *Lockhart-Mummery v. Kaiser Foundation Hosp. (1980) 103 Cal. App. 3d 891, 893-896, 163 Cal. Rptr. 325 (2nd Dist., Div. 1)]* (*10 Cal. App. 4th 1790, 1797-1801)* .

Regarding dismissal of the arbitration, the court of appeal concluded that a trial court has no power to terminate a nonjudicial arbitration, even if a party fails to prosecute the arbitration diligently and thus violates a provision of the arbitration agreement (*10 Cal. App. 4th 1790, 1805)* . The court criticized and declined to follow cases supporting the view that a court has power to dismiss, or otherwise terminate, a nonjudicial arbitration (*10 Cal. App. 4th 1790, 1801-1805)* , and noted other cases holding a trial court has no power to terminate a nonjudicial arbitration once it has been ordered (*10 Cal. App. 4th 1790, 1805-1807)* . A court's power respecting a pending arbitration is limited to confirming (or correcting and confirming) an award or vacating an award, then rendering judgment accordingly [*Code Civ. Proc. § 1285 et seq.*]. Only the arbitrator has power to terminate the arbitration. If a party has been dilatory or has violated a provision of the arbitration agreement requiring diligent prosecution of the arbitration, the arbitrator has power to terminate the arbitration with a take-nothing award against that party. Once the arbitration has been terminated, the trial court in which the stayed action is pending has power, on being petitioned for confirmation of the award, to lift the stay, confirm the award, and then dismiss the action on the ground that every claim at issue is res judicata [*Young v. Ross-Loos Medical Group, Inc. (1982) 135 Cal. App. 3d 669, 673-674, 185 Cal. Rptr. 536 (2nd Dist., Div. 2)]* (*10 Cal. App. 4th 1790, 1808)* .

[4] Additional Authorities

[a] Court Does Not Have Authority to Dismiss Arbitration or Stayed Action

The court of appeal in *Byerly v. Sale (1988) 204 Cal. App. 3d 1312, 251 Cal. Rptr. 749 (4th Dist., Div. 3)* , held that once the related action is stayed, a trial court has no authority to dismiss the action; that is for the arbitrator to do (*204*

Cal. App. 3d 1312, 1315-1316) . The court of appeal criticized *Preston v. Kaiser Foundation Hospitals (1981) 126 Cal. App. 3d 402, 406, 178 Cal. Rptr. 882* , for its holding that dismissal of a previously stayed complaint terminates the underlying action, saying that mere dismissal of a previously stayed complaint has absolutely no effect on the pending arbitration because the parties had agreed by contract to arbitrate the dispute. The court said it was not aware of any authority of the trial court, in dismissing the court action, to dismiss the arbitration, even if it desired to accomplish that result (*204 Cal. App. 3d 1312, 1314-1315)* . The court said that "[t]o the extent that *Preston* may be cited for the notion that dismissal of a complaint somehow includes termination of a pending arbitration matter, it is unsupported, and unsupportable, in law or logic; and we decline to follow it" (*204 Cal. App.3d 1312, 1316 n.3*).

However, the case of *Cardiff Equities, Inc. v. Superior Court (2008) 166 Cal. App. 4th 1541, 1549-1550, 83 Cal. Rptr. 3d 699* , did not involve a stayed action; rather, the plaintiff voluntarily dismissed his complaint. The court held that there is nothing to preclude a plaintiff's dismissal of a complaint after a case has been ordered into arbitration, but before an arbitration has commenced. That court of appeal declined to exercise its discretion to review the trial court's order compelling arbitration and stated that an order compelling arbitration is nonappealable; however, the court also stated that after plaintiff's dismissal, the trial court no longer has jurisdiction to order the parties to complete the arbitration [*Cardiff Equities, Inc. v. Superior Court (2008) 166 Cal. App. 4th 1541, 1552-1553, 83 Cal. Rptr. 3d 699*].

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20D ARBITRATION: DISMISSING
PART II. FORMS

2-20D California Points & Authorities § 20D.21

§ 20D.21 Opposing Motion to Dismiss Arbitration and Stayed Action--Plaintiff Has Exercised Reasonable Diligence in Prosecuting Arbitration

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OPPOSING MOTION TO DIS-
Plaintiff,	)	MISS ARBITRATION AND STAYED ACTION
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	Trial Date: none

_____

THE ARBITRATION PROCEEDING AND STAYED ACTION SHOULD NOT BE DISMISSED BECAUSE PLAINTIFF HAS AT ALL TIMES EXERCISED REASONABLE DILIGENCE IN PROSECUTING THE ARBITRATION PROCEEDING.

A. Dismissal of Action Improper When Plaintiff Has Exercised Reasonable Diligence. The mandatory dismissal statute's five-year period merely provides a measuring rod to determine whether plaintiff has pursued his or her contractual arbitration claim with reasonable diligence (*Preston v. Kaiser Foundation Hospitals (1981) 126 Cal. App. 3d 402, 408, 178 Cal. Rptr. 882*).

[*Optional*] **B. Calculation of Five-Year Period.** When it was impossible or impractical for plaintiff to bring the matter

to arbitration during the period between the filing of the complaint and the order for arbitration, the point for commencing the running of the five-year period is the order for arbitration (*Preston v. Kaiser Foundation Hospitals (1981) 126 Cal. App. 3d 402, 409, 178 Cal. Rptr. 882*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be used to oppose a motion to dismiss an arbitration proceeding and an action stayed, pending arbitration, for failure to bring the matter to arbitration within five years. The ground for the motion is that dismissal is not warranted when the plaintiff can demonstrate that he or she has exercised reasonable diligence at all times in prosecuting the arbitration proceeding. Thus, for example, the time between the filing of the complaint and the date of the order compelling arbitration should be excluded from calculation of the five-year period when it was impossible, impractical, or futile for plaintiff to prosecute the action [Optional Paragraph B].

Counsel may wish to combine this form with the memorandum *set out in § 20D.20*, which presents a line of cases holding that the court lacks power to dismiss either an arbitration proceeding or an action stayed pending arbitration [*see, e.g.,* *Burgess v. Kaiser Foundation Hospitals (1993) 16 Cal. App. 4th 1077, 1081, 20 Cal. Rptr. 2d 488* (discussed in *§ 20D.20[3][a]*)].

In an appropriate case, this form may be used to oppose a motion to dismiss supported by the memoranda *set out in §§ 20D.10* and *20D.11*.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. The argument should highlight, for example, facts demonstrating plaintiff's exercise of reasonable diligence at all times, and point out how delay was caused by the other party or external sources for which the plaintiff was not responsible.

[3] Discussion of Authorities

[a] Dismissal of Action Improper When Plaintiff Has Exercised Reasonable Diligence

Preston v. Kaiser Foundation Hospitals *(1981) 126 Cal. App. 3d 402, 178 Cal. Rptr. 882* , involved an arbitration proceeding pursuant to a contract that required the claimant to pursue the arbitration claim with "reasonable diligence." Slightly over one year after plaintiff filed the complaint, defendants moved to stay the action, pending arbitration. The stay was granted approximately 11 months later. Because of delay caused by disputes over selection of the arbitrator, arbitration proceedings had not yet begun when five years passed from the date the complaint was filed. The trial court dismissed the action for failure to bring it to trial, because nearly six years had passed since the complaint was filed.

The court of appeal reversed the dismissal, remanding the case to the trial court for further proceedings. The court agreed with *Lockhart-Mummery v. Kaiser Foundation Hospitals (1980) 103 Cal. App. 3d 891, 896, 163 Cal. Rptr. 325* (discussed in *§ 20D.10[3][a]*), that the five-year mandatory dismissal period contained in former Code Civ. Proc. § 583

[*now see Code Civ. Proc. §§ 583.310, 583.360(a)*] may be applied in contractual arbitration proceedings to provide a measuring rod to determine whether plaintiff has pursued his or her arbitration claim with reasonable diligence, as required by the contract (*126 Cal. App. 3d 402, 408)* . However, the court gave a much less restrictive reading than *Lockhart-Mummery* to the term "measuring rod." Whereas *Lockhart-Mummery* held that the arbitration order does not toll the statute oflimitations and that the case should be dismissed if it has not been brought to arbitration within five years, *Preston* held that expiration of the five-year period alone does not justify dismissal of an arbitration case (*126 Cal. App. 3d 402, 408)* . The court emphasized that the real test to be applied was whether the plaintiff had in fact exercised reasonable diligence, and that the period set forth in former Code Civ. Proc. § 583 should only be used as a guideline (*126 Cal. App. 3d 402, 408-409)* .

[b] Calculation of Five-Year Period

The facts and procedural background of ***Preston v. Kaiser Foundation Hospitals*** *(1981) 126 Cal. App. 3d 402, 178 Cal. Rptr. 882* , are discussed under [a], *above.* In *Preston,* the court of appeal held that it was improper to dismiss the action, which had been stayed pending arbitration, when the dismissal was based solely on an elapse of five years between the filing of the complaint and the motion for dismissal (*126 Cal. App. 3d 402, 410*). The court stated that language of the decision in *Lockhart-Mummery,* under which an arbitration should be dismissed after five years from the filing of the complaint, was unnecessarily broad. Instead, the court held that the real test is whether plaintiff pursued the arbitration claim with "reasonable diligence," as required by the arbitration contract (*126 Cal. App. 3d 402, 408*). In setting forth the principles for the trial court to apply on remand, the court held that the five-year limit of Code Civ. Proc. § 583 [*now see Code Civ. Proc. §§ 583.310, 583.360(a)*] cannot be imported into the test of reasonable diligence without also importing the judicially developed exceptions to the statute based on impossibility or impracticability [*now see Code Civ. Proc. § 583.340(c)*]. Under the exceptions, the five-year statute is tolled during the time when it is impossible or impractical to bring an action to trial (*126 Cal. App. 3d 402, 408-409)* . The court observed that, during the period between the filing of the complaint and the order for arbitration, it is generally not possible or practical for the plaintiff to bring the matter to arbitration or trial. Therefore, the court stated, the point for commencing the running of the five-year period will not ordinarily be the filing of the complaint but rather the order for arbitration (*126 Cal. App. 3d 402, 409)* .

[4] Additional Authorities

[a] Dismissal of Action Improper When Plaintiff Has Exercised Reasonable Diligence

The court of appeal in ***Burgess v. Kaiser Foundation Hospitals*** *(1993) 16 Cal. App. 4th 1077, 20 Cal. Rptr. 2d 488* , reversed an order confirming an arbitrator's dismissal and remanded with instructions to the superior court. The arbitrator dismissed the arbitration at defendant's request based on plaintiffs' alleged failure to diligently prosecute the matter. The parties stipulated to arbitration on June 20, 1986. The two party arbitrators did not appoint the third arbitrator until April, 1989. In April, 1990, the neutral arbitrator demanded a nonrefundable $1,000 deposit from each side before the scheduled hearing in July, 1990. In June, 1990, defendant designated eight experts. Plaintiffs did not pay the fee and made no further attempt to bring the matter to a hearing. In November, 1991, defendant requested the arbitrator to dismiss the matter. The arbitrator did so. Plaintiffs moved the court to vacate that order, arguing that the five-year period was tolled by (1) the arbitrator's demand for the fee, which plaintiffs contended was misconduct [*Code Civ. Proc. § 1286.2(a)(3)* and *(5)*], (2) the defendant's burdensome designation of eight experts, and (3) the time taken by the party arbitrators' delay in appointing the third arbitrator.

The court of appeal said that none of those causes tolled the five-year period, but since there was no law on point at the time, plaintiffs' belief that it was tolled did not amount to failure of reasonable diligence (*16 Cal. App. 4th 1077, 1082)* . Plaintiffs' appropriate remedy, for delay by the arbitrator, relief from the reservation fee, or the burdensome designation of experts was to petition the court for an appropriate order expediting the arbitration proceeding (*16 Cal. App. 4th 1077, 1081-1082)* .

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20E ARBITRATION: EFFECT OF AWARD

2-20E California Points & Authorities 20E.syn

§ 20E.syn Synopsis to Chapter 20E: ARBITRATION: EFFECT OF AWARD

§ 20E.01 Scope of Chapter

§ 20E.02 Governing Law

§ 20E.03 How to Use the Forms in This Chapter

[1] Page Limits on Points and Authorities

[2] Using the Forms to Build a Draft Memorandum

§ 20E.04 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

[2] Related Points and Authorities

§§ 20E.05-20E.09 [Reserved]

§ 20E.10 Judgment Confirming Award Is Not Subject to Collateral Attack

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Judgment Confirming Award Is Not Subject to Collateral Attack

[4] Additional Authorities

[a] Judgment Confirming Award Is Not Subject to Collateral Attack

§ 20E.11 Unconfirmed Award May Be Given Res Judicata Effect

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Res Judicata Effect of Unconfirmed Arbitration Award

§ 20E.12 Judgment Based on Arbitration Award Bars Subsequent Suit on Same Claim

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Res Judicata Bars Subsequent Suit on Claim That Was Arbitrated

[4] Additional Authorities

[a] Res Judicata Bars Subsequent Suit on Claim That Was Arbitrated

§ 20E.13 Court May Amend Judgment Based on Arbitration Award to Add Alter Ego

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Court May Amend Judgment Based on Award to Add Alter Ego

§§ 20E.14-20E.29 [Reserved]

§ 20E.30 Person Who Was Not Party to Arbitration Cannot Assert Collateral Estoppel Effect of Award

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] No Collateral Estoppel Effect Without Arbitral Parties' Agreement

§ 20E.31 Res Judicata Does Not Prohibit Filing of Petition to Compel Arbitration

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Res Judicata Does Not Prohibit Filing of Petition to Compel Arbitration

§ 20E.32 Judgment on Arbitration Award Does Not Bar This Lawsuit on the Basis of Res Judicata

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Res Judicata Is Not Applicable

§ 20E.33 Arbitrator, Not Court, May Modify or Dissolve Injunction Issued by Arbitrator

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Court Has No Power to Modify or Dissolve Injunction Issued by Arbitrator

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20E ARBITRATION: EFFECT OF AWARD
PART I. INTRODUCTION

2-20E California Points & Authorities § 20E.01

§ 20E.01 Scope of Chapter

This chapter contains memoranda and contentions relating to the effect of an arbitration award under private agreements pursuant to *Code Civ. Proc. § 1280 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsArbitrabilityCivil ProcedureAlternative Dispute ResolutionContracts LawContract Conditions & ProvisionsArbitration Clauses

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CHAPTER 20E ARBITRATION: EFFECT OF AWARD
PART I. INTRODUCTION

2-20E California Points & Authorities § 20E.02

§ 20E.02 Governing Law

Once an arbitration award has been made, but has not been confirmed or vacated, it has the same force and effect as a written contract between the parties to the arbitration [*Code Civ. Proc. § 1287.6*; *see § 20E.11[1]*]. If the award is confirmed, judgment is entered in conformity with the award, and is treated and may be enforced like any other judgment in a civil action [*Code Civ. Proc. § 1287.4*].

Unlike a judicial arbitration award, a favorable award in a contractual arbitration proceeding is not a "prior action" that will provide the basis for a cause of action for malicious prosecution [*Brennan v. Tremco Incorporated (2001) 25 Cal. 4th 310, 105 Cal. Rptr. 2d. 790, 20 P.3d 1086* , approving *Sagonowsky v. More (1998) 64 Cal. App. 4th 122, 125, 134, 75 Cal. Rptr. 2d 118* , and disapproving, to the extent it is inconsistent, *Rogers v. Peinado (2000) 85 Cal. App. 4th 1, 8-9, 101 Cal. Rptr. 2d 817*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionCivil ProcedureAlternative Dispute ResolutionArbitrationsWaivers

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2-20E California Points & Authorities § 20E.03

§ 20E.03 How to Use the Forms in This Chapter

[1] Page Limits on Points and Authorities

One of the more significant drafting requirements to keep in mind are page limits: supporting and opposing memoranda must not exceed 15 pages, or 20 pages in a summary judgment proceeding. A reply or closing memorandum may not exceed 10 pages in length [*see Cal. Rules of Ct., Rule 3.1113(d)*]. Exhibits, declarations, attachments, tables of contents and authorities, and proof of service are not counted. Any party must obtain leave of court to file a longer memorandum [*see Cal. Rules of Ct., Rule 3.1113(d), (e)*]. These and other drafting requirements are discussed in *further detail in Chapter 1, Writing Legal Memoranda and Briefs, § 1.05*.

[2] Using the Forms to Build a Draft Memorandum

The forms included in this chapter are designed to be combined with other forms to form a complete memorandum. For detailed discussion on how to select and use the forms in the publication to build a draft memorandum and complete the draft, with detailed discussion of all drafting requirements and strategic or stylistic considerations, see *Ch. 1, Writing Legal Memoranda and Briefs, §§ 1.03 -1.06*. For a skeletal form of memorandum for use in creating a properly formatted outline in which to compile relevant forms from this publication, see *Ch. 1, Writing Legal Memoranda and Briefs, § 1.10*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeContent & FormCivil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPleading & PracticeMotion PracticeSupporting Memoranda

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§ 20E.04 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

For detailed legal background discussion, research guides, procedural checklists, and practice forms of motions and other papers relating to private contractual arbitration proceedings, see:

- California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

- California Forms of Pleading and Practice, Ch. 33, *Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding* (Matthew Bender).

- California Forms of Pleading and Practice, Ch. 34, *Contractual Arbitration: Judicial Review* (Matthew Bender).

[2] Related Points and Authorities

Chapters in this publication with related forms include:

- For compelling arbitration, see Ch. 20, *Arbitration: Compelling* .

- For resisting arbitration, see Ch. 20A, *Arbitration: Resisting* .

- For selecting arbitrators and determining whether an arbitrator is immune from suit, see Ch. 20B, *Arbitration: Selecting Arbitrators; Arbitral Immunity* .

- For confirming, correcting, or vacating an arbitration award, see Ch. 20C, *Arbitration: Confirming, Correcting, or Vacating the Award* .

- For dismissing an arbitration proceeding, see Ch. 20D, *Arbitration: Dismissing* .

- For situations in which attorney's fees may be recovered, see Ch. 25, *Attorney's Fees* .

- For contract provisions in general, see Ch. 50, *Contracts* .

- For situations in which contracts may be avoided or declared void, see Ch. 92, *Duress, Menace, Fraud, Undue Influence, and Mistake* .

- For requirements of injunctions, see Ch. 116, *Injunctions* .

- For general principles relating to specific performance of contracts, see Ch. 214, *Specific Performance* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewContracts LawDefensesDuress & Undue InfluenceGeneral Overview

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[Reserved]

§§ 20E.05[Reserved]

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2-20E California Points & Authorities § 20E.10

§ 20E.10 Judgment Confirming Award Is Not Subject to Collateral Attack

[1] FORM

THE ARBITRATION AWARD WAS JUDICIALLY CONFIRMED [AS TO ALL ISSUES PENDING IN THIS CASE] AND IS NOT SUBJECT TO COLLATERAL ATTACK BY THIS ACTION.

A. Judgment Confirming Award Has Same Effect as Judgment in Civil Action. If an award is confirmed, judgment must be entered in conformity with it. The judgment so entered has the same force and effect as, and is subject to all the provision of law relating to, a judgment in a civil action of the same jurisdictional classification; and it may be enforced like any other judgment of the court in which it is entered, in an action of the same jurisdictional classification (*Code Civ. Proc. § 1287.4*).

B. Judgment Confirming Award Is Not Subject to Collateral Attack. The judgment confirming an arbitration award has the same force and effect as a judgment in a civil action, carrying the effect of res judicata and not ordinarily subject to collateral attack (*Division of Labor Standards Enforcement v. Williams (1981) 121 Cal. App. 3d 302, 309, 175 Cal. Rptr. 347* ; *Klubnikin v. California Fair Plan Assn. (1978) 84 Cal. App. 3d 393, 398, 148 Cal. Rptr. 563* ; *see also Kelly v. Vons Companies, Inc. (1998) 67 Cal. App. 4th 1329, 1335-1337, 1341, 79 Cal. Rptr. 2d 763* (upholding collateral estoppel effect of prior labor arbitration award without mentioning whether award had been confirmed)).

[2] Comments

[a] Use of Form

This form may be used to support the contention that an arbitration award that has been confirmed as a judgment its not subject to collateral attack. This form does not provide a complete memorandum but should be combined with authorities relating to the procedural context in which this issue is raised [*see, e.g.*, Ch. 221, *Summary Judgments*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. A copy of the judgment

entered on the award should be attached as an exhibit to the memorandum, or a declaration in support of it; and the memorandum or a declaration in support of it should request judicial notice be taken of the judgment. The argument should explain how the issues determined in the arbitration encompass those attempted to be litigated in the action in which the motion is made.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For discussion of the scope of res judicata and collateral estoppel and a form of answer which raises the defense that the issue between the same parties was determined in a prior action, see California Forms of Pleading and Practice, Ch. 491, *Res Judicata* (Matthew Bender).

For a form of summary judgment that may be used to raise the issue of res judicata, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[d] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Judgment Confirming Award Is Not Subject to Collateral Attack

Division of Labor Standards Enforcement v. Williams *(1981) 121 Cal. App. 3d 302, 175 Cal. Rptr. 347* , involved a dispute between the State Division of Labor Standards, Department of Industrial Relations, and several restaurants that was submitted to binding arbitration. The arbitration award was in favor of the restaurants, and the superior court confirmed the award. The department then brought an action for damages and an injunction against the employers, and the superior court granted defendants' motion for summary judgment.

The court of appeal affirmed, citing language from the opinion in *Lehto v. Underground Constr. Co. (1977) 69 Cal. App. 3d 933, 939, 138 Cal. Rptr. 419* , that arbitration is a voluntary procedure for settling disputes, leading to a final determination of the rights of the parties. The policy of the law is to favor arbitration, and every reasonable intendment is indulged to give effect to those proceedings. Once a valid award is made by the arbitrator, it is conclusive on matters of fact and law, and all matters in the award are res judicata (*121 Cal. App. 3d 302, 309)* .

In ***Klubnikin v. California Fair Plan Assn.*** *(1978) 84 Cal. App. 3d 393, 148 Cal. Rptr. 563* , an insured under a fire policy and the insurer submitted their dispute over a fire loss to appraisers. The insured did not file a petition to vacate the resultant low-figure award. Instead, he filed an action for breach of contract, asking for the amount of loss coverage under the policy, and also attacking the procedure employed during arbitration. The insurer filed a petition to confirm the award, answered the insured's amended complaint, which added a request for declaratory relief, and moved for summary judgment in the action. The insurer's petition to confirm the award was granted, and no appeal was taken. Thereafter, the insurer's motion was heard and summary judgment was granted. The insured appealed from that judgment.

Affirming the judgment, the court of appeal noted that the judgment confirming the arbitration award had the same force and effect as a judgment in a civil action. It was not subject to collateral attack except for grounds that would be available to attack any other civil judgment. The binding res judicata effect of the confirmed award barred the relief the insured sought on appeal. The proper remedy would have been to seek to vacate or correct the award within the prescribed 100-day time period [*see Code Civ. Proc. §§ 1288, 1288.2*]. Otherwise, the award must be treated as final. The filing of the original complaint during that time period would not stop the time bar from running even if the complaint could be construed as seeking vacation or correction of the award, because it also must have been served; but there was no evidence the original complaint had ever been served within the statutory period (*84 Cal. App. 3d 393, 398)* .

Kelly v. Vons Companies, Inc. *(1998) 67 Cal. App. 4th 1329, 1335-1337, 1341, 79 Cal. Rptr. 2d 763* was an action for fraud and misrepresentation by 28 union members who lost their jobs when defendant closed its Santa Maria facility. When defendant acquired that facility, it assumed the collective bargaining agreement then in effect with plaintiffs' union. The union representing drivers at defendant's Los Angeles facility filed a grievance claiming the drivers from the Santa Maria facility had to join their union. During that grievance, which was eventually submitted to arbitration, defendant informed the Santa Maria drivers that they did not anticipate any job losses for those drivers as a result of that dispute. That dispute ended with an arbitration award finding that the members of the Los Angeles union were entitled to the Santa Maria work and awarding the union in excess of $250,000. Less than a year after that award was made, defendant closed the Santa Maria trucking facility for "economic reasons" and offered the drivers from that facility jobs in the Los Angeles area, although they were not all full-time positions. The union representing the Santa Maria drivers then filed a grievance, which went to arbitration, protesting the closure of the Santa Maria facility. That arbitration was terminated in favor of defendant, the award finding that the reason for closing the Santa Maria facility was economic and legitimate and that the decision in favor of the Los Angeles union, although it had a direct financial and operational impact on defendant's transportation system, was not the reason for closing the Santa Maria facility. Defendant moved for summary judgment on the ground that plaintiffs were collaterally estopped from seeking damages for misrepresentations about the labor dispute with the union representing the Los Angeles drivers because the award in the arbitration with the Santa Maria union necessarily determined that defendant closed the Santa Maria plant f economic reasons not related to the labor dispute and thus any alleged misrepresentations about that dispute could not have caused plaintiffs' damages. The trial court granted summary judgment. Plaintiffs appealed.

The court of appeal affirmed. Plaintiffs contended that collateral estoppel does not apply to findings made during a labor arbitration under a collective bargaining agreement. The court of appeal disagreed, and held that collateral estoppel does apply to such findings, so long as the customary elements required for the application of that doctrine are met (*67 Cal. App. 4th 1329, 1335)* , which they found them to be in this case (*67 Cal. App. 4th 1329, 1335-1337, 1339-1341)* .

[4] Additional Authorities

[a] Judgment Confirming Award Is Not Subject to Collateral Attack

G.C. & K.B. Investments, Inc. v. Wilson (9th Cir. 2003) 326 F.3d 1096 , involved a judgment of the federal district

court for the Central District of California confirming an arbitration award in favor of plaintiff/franchisor. The arbitration had taken place in New Orleans pursuant to the arbitration clause [*see Ch. 20C, Arbitration: Confirming, Correcting, or Vacating the Award, § 20C.90[4][a]*]. Defendants refused to participate in the arbitration, and instead filed suit in Hawaii state court seeking relief from the franchise agreement. The franchise was to operate a car service business in Hawaii. The federal court's order confirming the award was issued on August 14, 2000. Defendants appealed, claiming, among other things, that collateral estoppel and res judicata, based on two orders in the Hawaiian state court action, barred the order and judgment of the federal district court. One order from the Hawaiian state court was issued on June 27, 2000, and compelled arbitration of the claims asserted in the Hawaiian action in California, not Louisiana. The second was an order issued October 18, 2000, and enjoined plaintiff from any attempt to enforce its federal court judgment against defendants in Hawaii state court. Plaintiff applied for, and in March, 2001, received, an injunction from the federal district court preventing defendants from interfering any further with its attempts to enforce its judgment. On April 30, 2001, plaintiff obtained an order from the Hawaii state court finding the Louisiana arbitration award void, vacated, and that the federal district court had no subject matter jurisdiction over the proceedings. On the basis of that order, defendants applied for post-judgment relief in federal district court. That relief was denied, and defendants were sanctioned $19,350, which the court determined was plaintiff's reasonable attorneys fees for opposing the motion for post-judgment relief, their motion for reconsideration, and for seeking an injunction against the defendants' attempts to block the enforcement of judgment in Hawaii state court.

The court of appeal affirmed. Defendants claimed that the Rooker-Feldman doctrine divested the federal district court of jurisdiction to enter judgment based on the arbitration award [*see D.C. Court of Appeals v. Feldman (1983) 460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d 206* ; *Rooker v. Fidelity Trust Co. (1923) 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362]* . Rooker-Feldman provides that a United States district court has no authority to review judgments of a state court in judicial proceedings, including decisions of lower state courts, even those interlocutory in nature (*326 F.3d 1096, 1102)* . The court of appeal noted that the claims at issue in Hawaii were raised after the arbitration took place. Further, in confirming the arbitration award, the district court did not have to find that the Hawaii state court order was wrong. It simply dealt with the confirmability of the award pursuant to the FAA, as opposed to the arbitrability of new claims raised in an amended complaint filed after the arbitration took place. There was no prohibited review of the Hawaii state court order and no collateral attack on any judgment of the Hawaiian state court. The district court had jurisdiction to issue the order confirming the arbitration award (*326 F.3d 1096, 1104-1105)* . Defendants also claimed the Anti-Injunction Act (*28 U.S.C. § 2283*) prevented the March, 2001, injunction of the federal district court. The court of appeals disagreed, noting that the Anti-Injunction Act does not prevent a federal district court from enjoining a state court from preventing, or interfering with, enforcement of the federal court's judgment. This "relitigation" exception grants a federal court the authority to issue injunctions in aid of its jurisdiction and to protect or effectuate its judgments (*326 F.3d 1096, 1107)* . The court of appeals affirmed the denial of defendants' motion for post-judgment relief, citing a 10th Circuit case for the proposition that it is error *not* to enjoin collateral attack by state court action on the validity of a federal judgment and pointing out that the motion was based on an order the defendants were properly enjoined from pursuing in the first place (*326 F.3d 1096, 1108)* . Lastly, the court affirmed the award of sanctions (*326 F.3d 1096, 1109-1111)* .

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2-20E California Points & Authorities § 20E.11

§ 20E.11 Unconfirmed Award May Be Given Res Judicata Effect

[1] FORM

THE AWARD DATED _____ AND ARISING OUT OF THE ARBITRATION BETWEEN _____ [*name*] AND _____ [*name*] MEETS THE REQUIREMENTS FOR APPLICATION OF RES JUDICATA AND SHOULD BE GIVEN THAT EFFECT.

A. Effect of Unconfirmed Arbitration Award. An award that has not been confirmed or vacated has the same force and effect as a contract in writing between the parties to the arbitration (*Code Civ. Proc. § 1287.6*).

B. Res Judicata Effect of Unconfirmed Arbitration Award. An unconfirmed arbitration award should be given res judicata effect to bar an action by one party to the arbitration against a party in privity with the other party to the arbitration if the subject of the subsequent action was raised and should have been fully determined in the arbitration (*Thibodeau v. Crum (1992) 4 Cal. App. 4th 749, 756-761, 6 Cal. Rptr. 2d 27*).

[2] Comments

[a] Use of Form

This form may be used to support the contention that an unconfirmed arbitration award is entitled to res judicata effect in the present action so as to bar an attempt to litigate an issue that was, or should have been, totally resolved by a prior arbitration award. The claim sought to be barred should have been raised and completely addressed in the prior arbitration, and the arbitration must have been between the same parties or their privies as the subsequent litigation [*see Thibodeau v. Crum (1992) 4 Cal. App. 4th 749, 754-758, 6 Cal. Rptr. 2d 27* (discussed at [3][a], *below*)].

This form does not provide a complete memorandum but should be combined with authorities relating to the procedural context in which this issue is raised [*see, e.g.,* Ch. 221, *Summary Judgments*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Counsel should also attach a copy of the award as an exhibit to the papers in support of the memorandum. The argument should establish that the parties to the arbitration were the same as, or in privity with, the parties in the litigation and should show the extent to which the issues sought to be litigated were, or should have been, addressed in the prior arbitration.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For discussion of the scope of res judicata and collateral estoppel and a form of answer that raises the defense that the issue between the same parties was determined in a prior action, see California Forms of Pleading and Practice, Ch. 491, *Res Judicata* (Matthew Bender).

For a form of summary judgment that may be used to raise the issue of res judicata, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[d] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

For a form for use to oppose Paragraph B of this form when a person who was not a party to the arbitration seeks to invoke collateral estoppel effect of the prior award against one of the parties to that arbitration, see *§ 20E.30*.

[3] Discussion of Authorities

[a] Res Judicata Effect of Unconfirmed Arbitration Award

Thibodeau v. Crum *(1992) 4 Cal. App. 4th 749, 6 Cal. Rptr. 2d 27* , began with arbitration between plaintiffs and the contractor who built their house, which, after setoffs for poor workmanship and unexcused delay, still resulted in a net award for the contractor. The arbitrator, believing he had no discretion in the matter, awarded the contractor attorney's fees as the prevailing party. In August, 1989, plaintiffs petitioned the court to correct the award to account for outstanding mechanics' liens that had not been considered, and contending that after the offsets, the contractor was not the prevailing party. The petition also sought confirmation of the award as corrected. The petition for correction and confirmation was never heard because the contractor filed bankruptcy and the automatic stay prevented continuation of

the matter. Plaintiffs made no claim and sought no relief in the bankruptcy case, but in September, 1989, commenced the instant action against defendant, who was the subcontractor responsible for constructing the driveway. Judgment was entered for plaintiffs for $23,933, which reflected a deduction of the amount credited to plaintiffs by the arbitration award for driveway repairs. Defendant appealed.

The court of appeal reversed, holding that the action was barred by res judicata. The court of appeal said res judicata precludes parties or their privies from relitigating a cause of action that has been finally determined by a court of competent jurisdiction (*4 Cal. App. 4th 749, 754)* and applies not only to judicial proceedings but also to arbitration proceedings (*4 Cal. App. 4th 749, 755)* . The court of appeal found that if the cracks in the driveway were not encompassed in the arbitration, they most certainly should have been. The driveway problems were within the scope of the arbitration and were mentioned several times in the arbitration award (*4 Cal. App. 4th 749, 756)* . The court distinguished cases involving different plaintiffs and different defects (*4 Cal. App. 4th 749, 756-757)* . This case did not involve successive breaches of obligations, separate and distinct torts, or new rights that accrued after the first proceeding. The arbitration award was mandated by the construction contract and was intended to settle all existing claims between the plaintiffs and their general contractor and/or subcontractors regarding the project (*4 Cal. App. 4th 749, 758)* .

With respect to the fact that the award had not been confirmed, the court acknowledged that application of the doctrine of res judicata ordinarily requires a prior final judgment and that a contract between the parties [*see Code Civ. Proc. § 1287.6*] is ordinarily not the same thing as a final judgment but said that a valid arbitration award is conclusive on matters of fact and law and all matters in the award are res judicata. This is because of the very limited judicial review afforded arbitration awards (*4 Cal. App. 4th 749, 759)* . The court of appeal distinguished *Kahn v. Pelissetti (1968) 260 Cal. App. 2d 832, 67 Cal. Rptr. 517* , relied on by plaintiffs, in which the court denied res judicata effect to an unconfirmed award involving uninsured motorist coverage. The award had been in favor of an insurance company which had argued that its insured's injury was not caused by the uninsured motorist. In a later action between the insured and the uninsured motorist, the court denied res judicata effect to the award. The *Thibodeau* court noted that *Kahn* did not hold that an unconfirmed arbitration award can never have a res judicata effect. In *Kahn*, the parties to the insurance contract did not intend to benefit or affect uninsured motorists in general or that defendant in particular, while the construction contract in this case anticipated the involvement of third parties and was intended to affect and encompass all issues arising out of the work, including work done by subcontractors and any disputes regarding work done by subcontractors. Defendant's contract with the general contractor was subject to plaintiffs' contract with the general contractor. The arbitration concerned work done by the general contractor and by subcontractors, including defendant (*4 Cal. App. 4th 749, 761)* .

The court concluded by noting the pendency of the petition to correct the award was of no import because the only matter challenged was the determination that the general contractor was the prevailing party and as such entitled to attorney's fees. An eventual decision on that petition to correct would not effect the substance of the arbitration award (*4 Cal. App. 4th 749, 761)* .

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2-20E California Points & Authorities § 20E.12

§ 20E.12 Judgment Based on Arbitration Award Bars Subsequent Suit on Same Claim

[1] FORM

THE JUDGMENT ENTERED ON _____ [*date*] _____ [AGAINST *or* IN FAVOR OF] _____ [*name*] AND BASED ON THE ARBITRATION AWARD DATED _____ AND ARISING OUT OF ARBITRATION BETWEEN _____ [*name*] AND _____ [*name*] MEETS THE REQUIREMENTS FOR THE APPLICATION OF THE DOCTRINE OF RES JUDICATA AND BARS THIS ACTION.

A. Res Judicata Bars Subsequent Suit on Claim That Was Arbitrated. A judgment based on a confirmed arbitration award should be given claim preclusion, or strict res judicata, effect, to bar a subsequent lawsuit on the same cause of action or another cause of action based on the same primary right [especially a cause of action that is totally derivative of the one that was arbitrated] (*Richard B. LeVine, Inc. v. Higashi (2006) 131 Cal. App. 4th 566, 575-579, 32 Cal. Rptr. 3d 244* ; (*Brinton v. Bankers Pension Services, Inc. (1999) 76 Cal. App. 4th 550, 557-558, 90 Cal. Rptr. 2d 469* ; *accord Grinham v. Fielder (2002) 99 Cal. App. 4th 1049, 1054-1055, 121 Cal. Rptr. 2d 468* (based on collateral estoppel)).

[2] Comments

[a] Use of Form

This form may be used to support the contention that a judgment based on an arbitration award is entitled to res judicata effect in the present action so as to bar an attempt to litigate a claim that was resolved in the arbitration, including a claim that is derivative of the one determined by arbitration. This form does not provide a complete memorandum but is designed to be combined with authorities relating to the procedural context in which the issue is raised [*see, e.g.,* Ch. 221, *Summary Judgments*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, argument should

establish that the parties to the arbitration where the same as, or in privity with, the parties in the litigation and should show that the claim sought to be vindicated in the litigation redresses the same primary right as the one that was the subject of the arbitration. Counsel should attach to the memorandum a copy of the arbitration award, any order confirming the award, and the judgment based on the award and/or request that judicial notice be taken of those documents. Counsel also should attach any other documents that establish privity or any other element of res judicata. For instance, in the case on with this form is based, the request for arbitration stated that the individual involved in the arbitration was the agent of the defendant in the subsequent lawsuit.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For discussion of the effect of arbitration awards, see California Forms of Pleading and Practice, Ch. 34, *Contractual Arbitration: Judicial Review* (Matthew Bender).

For discussion of the scope of res judicata and collateral estoppel and a form of answer which raises the defense that the issue between the same parties was determined in a prior action, see California Forms of Pleading and Practice, Ch. 491, *Res Judicata* (Matthew Bender).

For a form of summary judgment that may be used to raise the issue of res judicata, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[d] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For forms addressing res judicata in particular procedural contexts, see Ch. 10 *Abatement and Survival of Actions* , Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* , and Ch. 131, *Judgments* .

[e] Opposing Memoranda

For a form opposing application of collateral estoppel effect of an arbitration award against a person who was not a party to the arbitration, see *§ 20E.30*.

[3] Discussion of Authorities

[a] Res Judicata Bars Subsequent Suit on Claim That Was Arbitrated

Plaintiff in ***Richard B. LeVine, Inc. v. Higashi*** *(2005) 131 Cal. App. 4th 566, 570, 32 Cal. Rptr. 3d 244* , was a partner in a medical partnership that engaged defendant to provide accounting services to the partnership, including the calculation of each partner's share of the partnership profits and the amount of each partner's capital account. Dr. LeVine died in June 1995, and his wife became plaintiff's sole shareholder and president. The medical partnership bought out plaintiff's interest and paid plaintiff $239,501 as its share of profits accruing in 1995 before Dr. LeVine's death. The widow initiated an arbitration proceeding against the partnership and its partners pursuant to an arbitration provision in the partnership agreement. The arbitrator ruled that under the partnership agreement plaintiff was not entitled to partnership profits accruing after Dr. LeVine's death, and that plaintiff was not entitled to additional profits for 1995. The final arbitration award was made on September 7, 2000. In November, 2001, plaintiff sued Higashi alleging constructive and actual fraud, negligence, and conspiracy. The court sustained Higashi's demurrer to the constructive and actual fraud causes of action and later court granted Higashi's summary judgment to the remaining causes of action. Plaintiff appealed.

The court of appeal affirmed, finding that the arbitration award between plaintiff, the partnership, and its partners collaterally estopped plaintiff from proceeding on the conspiracy claim. "Res judicata" describes the preclusive effect of a final judgment on the merits. Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them. Collateral estoppel, or issue preclusion, precludes relitigation of issues argued and decided in prior proceedings. Under the doctrine of res judicata, if a plaintiff prevails in an action, the cause is merged into the judgment and may not be asserted in a subsequent lawsuit; a judgment for the defendant serves as a bar to further litigation of the same cause of action. Although the trial court invoked the narrower prong of the doctrine, collateral estoppel, the court of appeal thought it was more accurate to invoke the strict res judicata, or claim preclusion, aspect of the doctrine. Whatever name one attaches to the legal principle, the result is the same: plaintiff was precluded from pursuing this particular claim against Higashi. Any liability Higashi may have had to plaintiff was dependent on the commission of an underlying tort by the partnership and its partners, a claim decided adversely to plaintiff in the prior arbitration (*131 Cal. App. 4th 566, 573)* . The arbitrator's findings had to be given preclusive effect. Those findings were based on Higashi's calculation of profits. Thus, the arbitrator's award in favor of the partners on plaintiff's claims of breach of fiduciary duty and conversion precluded the claims of civil conspiracy and aiding and abetting made against Higashi in the litigation (*131 Cal. App. 4th 566, 575)* . Plaintiff, citing *Vandenberg v. Superior Court (1999) 21 Cal. 4th 815, 88 Cal. Rptr. 2d 366, 982 P.2d 229* (*Vandenberg*), contended that res judicata cannot be based on the arbitration award against it because Higashi was not a party to the arbitration. The court of appeal said *Vandenberg* did not apply because it does not bar application of res judicata to arbitration awards that eliminate the basis for a nonarbitrating party's derivative liability (*131 Cal. App. 4th 566, 576)* . The court went on to discuss other cases in which a claim preclusion or res judicata defense was available in situations where the liability of one of the parties would be derivative only (*131 Cal. App. 4th 566, 576-579)* . The primary right asserted by plaintiff was not invaded--the partners did not breach their fiduciary duty, and plaintiff's rightful share of the partnership profits was not diverted. It would be anomalous to hold Higashi liable for conspiring to commit a tort, or for aiding and abetting its commission, when plaintiff has already asserted those rights against the direct tortfeasor, and it was determined plaintiff's rights were not violated (*131 Cal. App. 4th 566, 579)* .

Plaintiff in ***Brinton v. Bankers Pension Services, Inc.*** *(1999) 76 Cal. App. 4th 550, 90 Cal. Rptr. 2d 469* arbitrated fraud claims against an individual securities representative and one of the brokerage firms for which the representative worked. The statement requesting arbitration said that the individual was acting as agent of two brokerage firms, but only one firm was party to the arbitration agreement, so the other firm declined to arbitrate. After the arbitration award in favor of one firm and the individual representative was confirmed and judgment entered thereon, plaintiff filed suit against the second brokerage firm. That firm moved for summary judgment, claiming the arbitration award should be given res judicata effect to bar the lawsuit. The trial court granted defendant's motion for summary judgment and dismissed the action. Plaintiff appealed.

The court of appeal affirmed. The court first discussed *Vandenberg v. Superior Court (1999) 21 Cal. 4th 815, 824 n.2, 88 Cal. Rptr. 2d 366, 982 P.2d 229* [*see § 20E.30[3][a]*], noting that *Vandenberg* specifically limited its holding to its facts and made clear that nothing in that decision imposed or implied any limitation on strict res judicata or the claim preclusion effect of a California private arbitration award (*76 Cal. App. 4th 550, 556-557)* . The court of appeal set forth the elements of res judicata (*76 Cal. App. 4th 550, 556)* , applied the primary rights theory to the record before it, and concluded that the claim that was arbitrated and the lawsuit sought recovery for the same injury (*76 Cal. App. 4th 550, 557)* . Further, the lawsuit sought to hold defendant firm liable based on the agency theory. Thus, the claim asserted in the lawsuit was derivative of plaintiff's claim against the individual representative, so it was not necessary for defendant to have been a party to the arbitration in order to assert the claim preclusion defense (*76 Cal. App. 4th 550, 557-558)* .

Grinham v. Fielder *(2002) 99 Cal. App. 4th 1049, 121 Cal. Rptr. 2d 468* , arose from the cross-complaint in an action in Ventura County by Triple A Machine Shop against Grinham to set aside allegedly fraudulent property transfers by Grinham so Triple A could satisfy a judgment it had obtained against Grinham in Contra Costa County. The initial (Contra Costa County) judgment was based on an arbitration award entered against Grinham on a contract he entered into with Triple A. Grinham executed that contract as "Hydrex Termite Pest Control Co. San Jose," which did not exist. Fielders, Grinham's employers, did business as "Hydrex Pest Control of Santa Clara County." Triple A was dissatisfied with the work performed and brought the initial action for breach of contract against Grinham and "Hydrex Termite Pest Control Co. San Jose," joining the Fielders and "Hydrex Pest Control of Santa Clara County," when it learned that "Hydrex Termite Pest Control Co. San Jose" did not exist. The Fielders were not parties to the contract with Triple A, but appeared before the arbitrator to make that objection. Fielders participated in the arbitration and presented testimony regarding their non-liability. Grinham, although hospitalized, offered his declaration and appeared through his attorney. The arbitrator decided that Grinham was liable to Triple A for $14,822, plus interest; that the Fielders, both individually and doing business as Hydrex Pest Control of Santa Clara County were not liable to Triple A because Grinham exceeded the scope of his authority as their actual or ostensible agent; that Grinham used "an unregistered fictitious business name of Hydrex Pest Control San Jose" in order "to mislead" Triple A; that the "exact identity" of the contractor was "the subject of this dispute;" and that the dispute concerned "a question of credibility," because Grinham's declaration and the Fielders' testimony regarding the scope of his authority as their employee and agent differed. After the award was confirmed and judgment entered thereon, Triple A attempted to satisfy the judgment, could not, and bright the second action. Grinham cross-complained against Fielders for declaratory relief (with regard to comparative indemnity) and contribution. The Fielders answered the cross-complaint and pleaded the defenses of res judicata and collateral estoppel. They also sought summary judgment based on those defenses. Summary judgment was granted based on principles of collateral estoppel. Grinham appealed, contending that the Fielders, as non-parties to the construction agreement and the arbitration, cannot rely on the arbitrator's findings and decision.

The court of appeal affirmed. The court noted that the party seeking collateral estoppel must establish that an issue raised in the present action is identical to one litigated in a prior proceeding, that the prior proceeding resulted in a final judgment on the merits, and that the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding. The court acknowledged that under *Vandenberg v. Superior Court (1999) 21 Cal. 4th 815, 833-834, 88 Cal. Rptr. 2d 366, 982 P.2d 229* (discussed at *§ 20E.30[3][a]*), preclusive effect of an arbitration award can have no collateral estoppel effect in favor of third persons unless the arbitrating parties have agreed that third parties may apply the doctrine to the arbitrator's findings. However, the court of appeal concluded that the circumstances here differed enough from the situation in *Vandenburg* that it was proper for the trial court to grant summary judgment. The issues of Grinham's actual or ostensible agency and the Fielders' liability for his actions were determined in the arbitration proceeding. The arbitrator specifically found that Grinham acted outside his actual agency or scope of employment when he entered into the Triple A agreement under a fictitious business name but with the Fielders' business address and telephone number. True, Fielders were not parties to the contract with Triple A; but they participated in the arbitration completely, and presented testimony and raised legal arguments concerning Grinham's actual and ostensible authority to bind Hydrex Pest Control of Santa Clara County. Moreover, the arbitration award recognized the Fielders and Hydrex Pest Control of Santa Clara County as parties to the proceeding who contested

liability and who were entitled to recover costs of suit (*99 Cal. App. 4th 1049, 1054)* . As to the claim for declaratory relief (comparative indemnity), the court of appeal said that cause of action is rooted in equity; and the arbitrator's findings that Grinham committed "wrongful" acts with the intent to mislead Triple A, and that he acted "in conscious disregard of the rights" of the Fielders were conclusive regarding that cause of action (*99 Cal. App. 4th 1049, 1055)* .

[4] Additional Authorities

[a] Res Judicata Bars Subsequent Suit on Claim That Was Arbitrated

The Ninth Circuit Bankruptcy Appellate Panel in ***In re Khaligh*** *(2006 9th Cir. BAP) 338 B.R. 817* , *aff'd 506 F.3d 956, 957 (9th Cir. 2007)* , affirmed the bankruptcy court's summary judgment in an adversary proceeding establishing a debt as malicious and willful, and therefore nondischargeable under *11 U.S.C. 523(a)(6)*, based on a state court judgment confirming an arbitration award for defamation. The award and judgment included punitive damages and were entitled to preclusive effect in the adversary proceeding because all pertinent issues regarding the defamation had been actually and necessarily litigated. Thus, except for attorney's fees and costs, the judgment was excepted from discharge in the amount of $100,000 in damages (plus judgment interest) established in the state court judgment (*338 B.R. 817, 830-832)* .

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CHAPTER 20E ARBITRATION: EFFECT OF AWARD
PART II. FORMS

2-20E California Points & Authorities § 20E.13

§ 20E.13 Court May Amend Judgment Based on Arbitration Award to Add Alter Ego

[1] FORM

THE AWARD SHOULD BE AMENDED BY INSERTING THE NAME OF _____ [*specify alter ego*] AS THE ALTER EGO OF _____ [*specify person or party against whom award actually was made*] BECAUSE THE ARBITRATOR HAD NO BASIS FOR EXERCISING JURISDICTION OVER _____ [*specify person against whom award actually was made*].

A. Judgment Confirming Award Has Same Effect as Judgment in Civil Action. [*See § 20E.10[1], Paragraph A.*]

B. Court May Amend Judgment Based on Award to Add Alter Ego. An arbitrator has no power to determine rights and obligations of one who is not a party to the arbitration proceedings. Nor can an arbitrator correct an award to add an alter ego. Only the superior court has jurisdiction to amend a judgment based on an arbitration award to add an alter ego (*Hall, Goodhue, Haisley & Barker, Inc. v. Marconi Conf. Center Bd. (1996) 41 Cal. App. 4th 1551, 49 Cal. Rptr. 2d 286*).

[2] Comments

[a] Use of Form

This form may be used to support the contention that an the court, not the arbitrator, has jurisdiction to amend a judgment based on an arbitration award to include a corporate party's alter ego as an additional judgment debtor.

This form does not provide a complete memorandum but should be combined with authorities relating to the procedural context in which this issue is raised [*see, e.g.*, Ch. 52, *Corporations*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should establish that the entity sought to be added had control over a party to the arbitration.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840]* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement).

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For a form of motion to amend a judgment to add an alter ego which this memorandum may support, as well as legal discussion and a procedural checklist, see California Forms of Pleading and Practice, Ch. 160, *Corporations* (Matthew Bender).

For discussion and forms generally relating to judgments, see California Forms of Pleading and Practice, Ch. 318, *Judgments* (Matthew Bender).

[d] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Court May Amend Judgment Based on Award to Add Alter Ego

Hall, Goodhue, Haisley & Barker, Inc. v. Marconi Conf. Center Bd. *(1996) 41 Cal. App. 4th 1551, 49 Cal. Rptr. 2d 286* , arose from a dispute between an architect and the owner of a conference center. The record on appeal was less than clear. There were two agreements between the parties: one dated May 23, 1990, signed by and identifying respondent conference center as "Owner" and another dated April 27, 1990, executed by and identifying the California State Department of Parks and Recreation as "Owner." Both related to the same architectural services (phase two of the center). The architectural firm relied on the May agreement; and the conference center relied on the April agreement. The arbitration award recited that the arbitration provision was part of an agreement entered into on April 27, 1989. An arbitration award was entered in June, 1992. The award was confirmed and judgment entered thereon, awarding the architectural firm almost $100,000 in damages and attorney's fees. When the architectural firm tried to levy on respondent's bank accounts, it found that the only accounts were in the name of Marconi Conference Center Operating Corporation (MCCOC), a California nonprofit public benefit corporation. The architectural firm moved twice unsuccessfully to have the judgment amended under *Code Civ. Proc. § 187* to add MCCOC as additional defendant and judgment debtor. In support of the second motion appellant submitted an agreement dated December, 1989, between California State Department of Parks and Recreation and MCCOC which vested the management of the conference center in MCCOC. The motions were denied on the ground that the court was without jurisdiction to make factual findings necessary to modify a previously confirmed arbitration award. The architectural firm appealed.

The court of appeal reversed with instructions to the trial court to conduct a hearing on the motion to amend the judgment (*41 Cal. App. 4th 1551, 1555-1556)* . The court of appeal noted that *Code Civ. Proc. § 1287.4* gives a judgment entered in conformity with an arbitration award the same force and effect as a judgment in a civil action and renders that judgment subject to the provisions of law relating to judgments in civil actions, including *Code Civ. Proc. § 187* (*41 Cal. App. 4th 1551, 1554)* , which provides for amendment of a judgment to add as an additional judgment debtor any person or entity that is the alter ego of the original judgment debtor. Amendment of a judgment to add an alter ego is an equitable procedure and provides a complete method to bind new defendants when it can be demonstrated that in their capacity as alter ego of the corporation they in fact had control of the previous litigation, and thus were virtually represented in the lawsuit. Given that an arbitrator has no power to determine rights and obligations of one who is not a party to the arbitration proceedings and that *Code Civ. Proc. § 1284* forecloses the arbitrator from correcting an award to add an alter ego, only the superior court has jurisdiction to amend the award to add an alter ego (*41 Cal. App. 4th 1551, 1555)* .

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[Reserved]

§§ 20E.14[Reserved]

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2-20E California Points & Authorities § 20E.30

§ 20E.30 Person Who Was Not Party to Arbitration Cannot Assert Collateral Estoppel Effect of Award

[1] FORM

_____ [*Name of entity seeking to assert collateral estoppel effect of award*] CANNOT ENFORCE ANY COLLATERAL ESTOPPEL EFFECT OF THE ARBITRATION AWARD DATED _____ AND ARISING OUT OF ARBITRATION BETWEEN _____ [*name*] AND _____ [*name*] BECAUSE THOSE PARTIES NEVER AGREED THAT THE AWARD SHOULD BE GIVEN COLLATERAL ESTOPPEL EFFECT.

A. No Collateral Estoppel Effect Without Arbitral Parties' Agreement. A private arbitration award, even if judicially confirmed, can have no collateral estoppel effect in favor of third persons unless the parties to the arbitration agreed, in the particular case, that such a consequence should apply (*Vandenberg v. Superior Court (1999) 21 Cal. 4th 815, 836-837, 88 Cal. Rptr. 2d 366, 982 P.2d 229* ; *Cuevas v. Truline Corp. (2004) 118 Cal. App. 4th 56, 62, 12 Cal. Rptr. 3d 706*).

[2] Comments

[a] Use of Form

This form may be used to oppose the contention that an arbitration award is entitled to collateral estoppel effect in favor of a person or entity who was not party to the arbitration when the parties to the arbitration did not specifically provide that the award be given collateral estoppel effect in favor of third parties. This California rule is admittedly a minority position [*see* *Vandenberg v. Superior Court (1999) 21 Cal. 4th 815, 834, 88 Cal. Rptr. 2d 366, 982 P.2d 229]* and was not intended to limit *Thibodeau v. Crum (1992) 4 Cal. App. 4th 749, 756-761, 6 Cal. Rptr. 2d 27* , or *Kelly v. Vons Companies, Inc. (1998) 67 Cal. App. 4th 1329, 1335-1337, 1341, 79 Cal. Rptr. 2d 763* (relating to collateral estoppel implications of arbitrations conducted under collective bargaining agreements) on which § 20E.11[1], Paragraph B, is based [*see* *Vandenberg v. Superior Court (1999) 21 Cal. 4th 815, 824 n.2, 88 Cal. Rptr. 2d 366, 982 P.2d 229]* .

This form does not provide a complete memorandum but should be combined with authorities relating to the procedural context in which this issue is raised [*see, e.g.*, Ch. 221, *Summary Judgments*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Counsel should also attach a copy of the award and of the agreement or stipulation to arbitrate as exhibits to the papers opposing application of collateral estoppel. The argument should establish that the parties to the arbitration did not intend the award to have nonmutual collateral estoppel effect with respect to the third party who is asserting the award as a basis for collateral estoppel.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840]* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement).

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For discussion of the scope of res judicata and collateral estoppel and a form of answer that raises the defense that the issue between the same parties was determined in a prior action, see California Forms of Pleading and Practice, Ch. 491, *Res Judicata* (Matthew Bender).

For a form of summary judgment that may be used to raise the issue of res judicata, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[d] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

This form may be used under appropriate facts to oppose the *authorities in § 20E.11*.

[3] Discussion of Authorities

[a] No Collateral Estoppel Effect Without Arbitral Parties' Agreement

Vandenberg v. Superior Court *(1999) 21 Cal. 4th 815, 88 Cal. Rptr. 2d 366, 982 P.2d 229* , began with an action by a real property owner against Vandenberg, who had leased the property for 30 years, for damages for contamination of the soil and groundwater with oil waste from underground tanks. During those 30 years, Vandenberg had six liability insurers, to which he tendered the defense of the action. Only United States Fidelity & Guaranty Company ("USF&G") agreed to provide a defense. Owner, Vandenberg, and USF&G agreed to share the cost of remediation. Owner and Vandenberg agreed to arbitrate the breach of lease claim with USF&G providing Vandenberg's defense, while reserving

the coverage and indemnity issues. The arbitrator entered an award for owner for over $4 million, finding that the contamination was caused by improper installation, maintenance, and use of the tanks. That award was confirmed by the superior court.

Vandenberg then sued the insurers. Some of the policies excluded claims for damages caused by pollution unless the discharge was sudden or accidental. Two insurers moved for summary judgment claiming the arbitration judgment precluded litigation of the issues of the source and cause of the contamination. All insurers moved for summary judgment on the ground that the arbitrator's decision was an award for damages for breach of lease, a contract cause of action not covered by a general liability insurance policy. The trial court granted both motions. Vandenberg petitioned for writs of mandate, and the court of appeal issued writs reversing both grants of summary judgment. The Supreme Court granted insurers' petitions for review.

The Supreme Court affirmed the decision of the court of appeal, holding that a judgment based on an arbitration award cannot be given collateral estoppel effect in favor of a third party unless the parties to the arbitration agreed that such a consequence should apply (*21 Cal. 4th 815, 836-838)* . The Court distinguished res judicata, which precludes parties or their privies from relitigating a cause of action. Res judicata fosters finality by precluding maintenance of a second action by the same parties or parties in privity. Collateral estoppel, which is what the court was concerned with in this case, need not be mutual. Ordinarily, it is not necessary that the earlier and later proceeding involve the same parties or their privies. Only the party against whom the doctrine is invoked must be bound by the prior proceeding. Thus, collateral estoppel may allow one who was not a party to prior litigation to take advantage, in a later unrelated proceeding, of findings made against his or her current adversary in an earlier proceeding. Collateral estoppel is intended to preserve the integrity of the judicial system, promote judicial economy, and protect litigants from harassment by vexatious litigation (*21 Cal. 4th 815, 828-829)* . Nevertheless, the Court continued, there are minimal prerequisites for invocation of collateral estoppel, including fairness, consistency with public policy, the judicial nature of the prior forum, its legal formality, and procedural safeguards, particularly the opportunity for judicial review of adverse ruling. The Court was particularly concerned with the lack of opportunity for judicial review implicit in private contractual arbitration in California and felt that parties who agreed to final and binding arbitration would generally not contemplate such remote and collateral ramifications as giving collateral estoppel effect to the award in a later action with some third party (*21 Cal. 4th 815, 829)* . Accordingly, the Court concluded that a private arbitration award, even if judicially confirmed, can have no collateral estoppel effect in favor of third persons unless the parties to the arbitration agreed in the particular case that such a consequence should apply (*21 Cal. 4th 815, 833-834)* . The court noted that it's holding was narrowly circumscribed, and did not imply any limitations on the res judicata effect of a private arbitration award, and did not address the collateral estoppel effect of a private arbitration award in subsequent litigation between the same parties on a different cause of action, or whether the Federal Arbitration Act (*9 U.S.C. § 1 et seq.*) would have any affect on the ruling. Nor does the decision affect case law on arbitrations conducted under federal or state labor relations law or other statutory schemes (*21 Cal. 4th 815, 824 n.2*).

The Court noted that some commentators and most other courts addressing the issue have taken a contrary approach but found the premises on which those decisions and commentaries were based unpersuasive as giving insufficient weight to the voluntary, contractual, and informal nature of private arbitration agreements and to the reasonable expectations of the parties to the arbitration (*21 Cal. 4th 815, 834-835)* . The Court also addressed the dissenting opinion but reiterated that fairness and public policy counsel against application of nonmutual collateral estoppel unless the parties specifically agree to it. That California treats confirmed arbitration awards as judgments does not compel a contrary conclusion. Thus, the court adopted the rule that a private arbitration award cannot have nonmutual collateral estoppel effect unless the parties to the arbitration so agreed (*21 Cal. 4th 815, 835-837* and n.10), and found no such agreement in this case, especially in view of the language used to reserve the coverage and indemnity issued between Vandenberg and USF&G (*21 Cal. 4th 815, 837-838)* .

Cuevas v. Truline Corp. *(2004) 118 Cal. App. 4th 56, 12 Cal. Rptr. 3d 706* , arose an automobile accident in which plaintiff's ward suffered catastrophic brain injuries. Defendants included the owner and driver of the car in which the

ward was a passenger and the owner and driver of a big rig that hit the car after the car ran a stop sign. The owner's and driver's insurers refused to settle for their policy limits. Owner and driver sued the insurers for bad faith. Because resolution of the bad faith action required a judgment in the underlying action, plaintiffs agreed to arbitrate the owner's and driver's liability for negligence. The arbitrator awarded plaintiffs $14.7 million in damages against owner and driver, only, whom they found to be 99% responsible for the accident. Though the owner and driver of the big rig did not participate in the arbitration, the arbitrator found them one percent responsible. The arbitrator's award was entered as a judgment against the owner and driver of the car in which the ward was a passenger. The driver and owner of the big rig moved for summary judgment. The court concluded that the earlier judgment confirming the arbitration award prohibited any recovery from the owner and driver of the big rig, granted the motion for summary judgment, and dismissed the complaint. Plaintiffs appealed.

The court of appeal reversed (*118 Cal. App. 4th 56, 62)* . Owner and driver of the big rig argued that the one-final-judgment rule barred any judgment against them. The court of appeal found their position misguided. The one-final-judgment rule applies to appellate proceedings and does not prohibit separate or partial judgments against some, but not all, defendants. What the one-final-judgment rule prohibits is appealing from partial disposition while other unresolved matters remain pending. The fact that judgment had been entered as to some parties based on arbitration did not mean the trial court was prohibited by the one-final-judgment rule from hearing matters relating to the parties who did not participate in the arbitration (*118 Cal. App. 4th 56, 60-61)* . The court of appeal said that the trial court perhaps had believed any further proceedings against the driver and owner of the big rig would not the result in the same apportionment of fault and would result in inconsistent verdicts. That belief was wrong; the arbitrator's finding of one percent fault did not bind the court. A private arbitration award cannot have non-mutual collateral estoppel effect unless the parties to the arbitration so agree. Thus, the arbitrator's finding of one percent liability was a nullity as to the owner and driver of the big rig, and it did not matter if a jury found a different degree of responsibility (*118 Cal. App. 4th 56, 62)* .

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2-20E California Points & Authorities § 20E.31

§ 20E.31 Res Judicata Does Not Prohibit Filing of Petition to Compel Arbitration

[1] FORM

PETITIONER HAS NOT WAIVED HIS/HER RIGHT TO ARBITRATION MERELY BY FILING AN ACTION, AND THE RESULTING JUDGMENT IN THAT ACTION IS NOT RES JUDICATA WITH RESPECT TO THIS PETITION TO COMPEL ARBITRATION.

A. Res Judicata Does Not Prohibit Filing of Petition to Compel Arbitration. When a judgment is entered based on a motion for summary judgment or other method of establishing that the controversy was required to be arbitrated, the resulting judgment is not res judicata so as to prevent the plaintiff in that action from filing a petition to compel arbitration unless and until there is a finding that the plaintiff waived his or her right to arbitration (*Johnson v. Siegel (2000) 84 Cal. App. 4th 1087, 1099-1100, 1102, 101 Cal. Rptr. 2d 412*).

[2] Comments

[a] Use of Form

This form may be used in support of a petition to compel arbitration to anticipate any argument that a prior judgment establishing that the matter was subject to arbitration was res judicata as to petitioner's right to arbitrate. In many cases, petitioner's prior conduct may have amounted to waiver of his or her right to arbitrate, but unless the prior action was based on a finding of waiver, the judgment does not foreclose petitioner's remedies altogether as some cases have suggested.

This form is not intended as a complete memorandum, but should be combined with the memoranda in *Ch. 20, Arbitration: Compelling, §§ 20.10, 20.11,* and any others applicable to the particular situation. Petitioner may also wish to include authority from *Ch. 20, Arbitration: Compelling, §§ 20.80* and *20.81* to support the argument that no waiver has occurred.

As a tactical matter, counsel may wish to reserve these points for oral argument or for a reply memorandum. In deciding whether or not to reserve these arguments, counsel should consider local court rules and practice, as well as whether the

moving party would be expected to raise these points in initial moving papers, to avoid the possibility of losing the opportunity to raise them.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should emphasize that any delay has not caused respondent any detriment or impairment of its ability to arbitrate the matter.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840]* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement).

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Memoranda

For other forms that negates a claim of waiver of the right to compel arbitration, see *Ch. 20, Arbitration: Compelling, §§ 20.80, 20.81*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Memoranda

For a form opposing this one, see *Ch. 20A, Arbitration: Resisting, § 20A.80*.

For forms that address other acts amounting to waiver of the right to compel arbitration, see *Ch. 20A, Arbitration: Resisting, §§ 20A.81 -20A.86*.

[3] Discussion of Authorities

[a] Res Judicata Does Not Prohibit Filing of Petition to Compel Arbitration

The facts and procedural background of ***Johnson v. Siegel*** *(2000) 84 Cal. App. 4th 1087, 101 Cal. Rptr. 2d 412* are discussed in *Ch. 20, Arbitration: Compelling, § 20.46[3][a]*. Defendants also contended that the summary judgment precluded any further action on plaintiff's part, specifically, a petition to compel arbitration. Defendants relied on six cases: *Charles J. Rounds Co. v. Joint Council of Teamsters No. 42 (1971) 4 Cal. 3d 888, 899-900, 95 Cal. Rptr. 53, 484 P.2d 1397* ; *Gunderson v. Superior Court (1975) 46 Cal. App. 3d 138, 144, 120 Cal. Rptr. 35* ; *Berman v. Renart Sportswear Corp. (1963) 222 Cal. App. 2d 385, 35 Cal. Rptr. 218* , *Case v. Kadota Fig Asso. (1950) 35 Cal. 2d 596, 220 P.2d 912* ; *Platt Pacific, Inc. v. Andelson (1993) 6 Cal. 4th 307, 24 Cal. Rptr. 2d 597, 862 P.2d 158* ; and *24 Hour Fitness, Inc. v. Superior Court (1998) 66 Cal. App. 4th 1199, 1216, 78 Cal. Rptr. 2d 533* , for the proposition that

once a person commences an action, he or she waives his or her right to arbitration. The court of appeal distinguished all those cases (*84 Cal. App. 4th 1087, 1096-1099)* , and said that when, as here, no deadline for demanding arbitration is specified in the agreement, a party is allowed a reasonable time within which to demand arbitration before being considered to have waived the right to arbitrate. Furthermore, a plaintiff's suing on an arbitrable claim does per se result in a waiver of plaintiff's right to compel arbitration. The court concluded that plaintiff was not barred by res judicata from filing a petition to compel arbitration, but expressed no opinion on how the court should rule on such a petition if one was filed, saying that the trial court should weigh the same factors it would weigh in any case on a petition to compel arbitration: whether plaintiff took steps inconsistent with an intent to invoke arbitration, wether plaintiff unreasonably delayed in seeking arbitration, and whether defendant was prejudiced by any delay (*84 Cal. App. 4th 1087, 1099-1100)* . The court of appeal affirmed the judgment without prejudice to plaintiff's filing a new petition to compel arbitration (*84 Cal. App. 4th 1087, 1102)* .

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 20E ARBITRATION: EFFECT OF AWARD
PART II. FORMS

2-20E California Points & Authorities § 20E.32

§ 20E.32 Judgment on Arbitration Award Does Not Bar This Lawsuit on the Basis of Res Judicata

[1] FORM

THE CLAIM SOUGHT TO BE VINDICATED AND THE RELIEF SOUGHT IN THIS _____ [LAWSUIT *or* MOTION FOR SUMMARY JUDGMENT] WERE NOT DETERMINED IN THE ARBITRATION BETWEEN _____ [*name*] AND _____ [*name*]; THUS, THE JUDGMENT RESULTING FROM THAT ARBITRATION AWARD DOES NOT BAR THIS _____ [LAWSUIT *or* MOTION].

A. Res Judicata Is Not Applicable. The claim for _____ [*specify*] raised by _____ [*name*] in the earlier arbitration against _____ [*name*] did not _____ [seek any redress against _____ (*name*) *and/or* did not address the same relief sought in this _____ (lawsuit *or* motion)]. Therefore, the judgement entered on the award in that arbitration does not bar this _____ (lawsuit *or* motion) on the basis of res judicata (*see* *Cuevas v. Truline Corp. (2004) 118 Cal. App. 4th 56, 60-62, 12 Cal. Rptr. 3d 706* ; *Benasra v. Mitchell Silberberg & Knupp (2002) 96 Cal. App. 4th 96, 111, 114, 116 Cal. Rptr. 2d 644* .

[2] Comments

[a] Use of Form

This form may be used to oppose the contention that a judgment based on an arbitration award bars a later lawsuit or motion on the basis of res judicata when it can be shown that the claim or relief obtained or sought in the arbitration is different from, and not duplicative or derivative of, the claim or relief sought in the lawsuit or motion.

This form does not provide a complete memorandum but should be combined with authorities relating to the procedural context in which this issue is raised [*see, e.g.*, Ch. 221, *Summary Judgments*] or authority from § 20E.30, that an arbitration award ordinarily will have no effect on anyone who was not a party to the arbitration.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Counsel should also attach a copy of the judgment entered on the award. The argument should establish that the relief sought in the lawsuit is different from and not duplicative or derivative of the relief awarded or sought in the arbitration.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840]* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement).

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For discussion of the scope of res judicata and collateral estoppel and a form of answer that raises the defense that the issue between the same parties was determined in a prior action, see California Forms of Pleading and Practice, Ch. 491, *Res Judicata* (Matthew Bender).

For a form of summary judgment that may be used to raise the issue of res judicata, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[d] Related Memoranda

If the arbitration was between parties who are not party to the lawsuit, or are not named in the current motion, counsel may wish to add authority from § 20E.30.

[e] Opposing Memoranda

This form may be used under appropriate facts to oppose the *authorities in § 20E.12*.

[3] Discussion of Authorities

[a] Res Judicata Is Not Applicable

Cuevas v. Truline Corp. *(2004) 118 Cal. App. 4th 56, 12 Cal. Rptr. 3d 706* , is discussed at *Ch. 20D, Arbitration: Dismissing, § 20D.20[3][a]*.

Plaintiffs in ***Benasra v. Mitchell, Silberberg & Knupp*** *(2002) 96 Cal. App. 4th 96, 116 Cal. Rptr. 2d 644* were a corporation and its officers. They sued defendant law firm for breach of loyalty based on the firm's representation of an opposing party in an earlier arbitration. The arbitration involved a license dispute in which plaintiff corporation was licensee and the opposing party in the arbitration was licensor. The license agreement soured in May, 1999. Prior to that time, defendant law firm had represented the corporate plaintiff in a few legal matters and had also performed substantial immigration work for principals and employees of the company and their family members. Plaintiffs also alleged that prior to May, 1999, defendant represented licensor in determining whether to terminate the licenses held by

the corporate plaintiff before demanding arbitration and that as a result of defendant's representation of each of them, defendant was privy to confidential information which precluded its representation of a client adverse to them even after the representation ceased. Plaintiffs, though not all parties to the arbitration, made a motion to disqualify defendant. The arbitration panel denied the motion and eventually rendered an award for licensor. That award was confirmed. Defendant moved for summary judgment to bar plaintiff's lawsuit for breach of loyalty on the ground that it was foreclosed by res judicata on the basis of the unsuccessful motion to disqualify. The trial court granted the motion. Plaintiffs appealed.

The court of appeal reversed. The court began its analysis by discussing res judicata and the related doctrine of collateral estoppel. Res judicata, it said, gives conclusive effect to a former judgment in subsequent litigation involving the same controversy. The prior judgment is complete bar to a new action because it results in a merger, superseding the plaintiff's claim by the judgment. In a second action on a different cause of action, the former judgment is not a complete merger or bar, but is effective as a collateral estoppel, i.e., it is conclusive on issues actually litigated between the parties in the former action. The primary aspect of res judicata is sometimes referred to as "claim preclusion"; the secondary aspect is referred to as "collateral estoppel" or "issue preclusion". The rule of claim preclusion is that a party ordinarily may not assert a civil claim arising from a transaction with respect to which he or she has already prosecuted a claim, whether or not the two claims wholly correspond to each other. The rule of issue preclusion (collateral estoppel) is that a party ordinarily may not relitigate an issue that he or she fully and fairly litigated on a previous occasion. The parties agreed that, based on *Vandenberg v. Superior Court (1999) 21 Cal. 4th 815, 836, 88 Cal. Rptr. 2d 366, 982 P.2d 229* (discussed at *§ 20E.30[3][a]*), collateral estoppel cannot be used to foreclose later litigation on issues decided by private arbitrators. *Vandenberg* held that determinations on particular legal or factual issues made in private arbitrations do not be give collateral estoppel effect unless the parties clearly agreed otherwise. While the *Vandenberg* court was clear that an arbitration decision could not have collateral estoppel effect on later litigation, it recognized that claim preclusion was a different matter, stating in a footnote: "Nothing in our decision imposes or implies any limitations on the strict res judicata, or 'claim preclusive,' effect of a California law private arbitration award" [*Vandenberg v. Superior Court (1999) 21 Cal. 4th 815, 824, n.2, 88 Cal. Rptr. 2d 366, 982 P.2d 229]* .

The court of appeal said that, in light of the foregoing distinction, the crucial issue here was whether the arbitrators' denial of the motion to disqualify was properly asserted as a complete bar to the present action for breach of duty of loyalty, or whether the trial court improperly used the arbitration panel's determination of a legal or factual issue for collateral estoppel purposes in violation of *Vandenberg*. Defendant urged the court to use a primary rights analysis, but the court found it had to compare the relief available in the arbitration proceeding. Although defendant argued that the ruling on the motion for disqualification was the functional equivalent of a request for permanent injunction, the court of appeal noted that the ruling on the motion for disqualification could only preclude the law firm from undertaking representation of a single client in a single matter; unlike a permanent injunction, an order of disqualification would not contain any broad or general prohibition against accepting representation of certain categories of clients or certain categories of disputes (*96 Cal. App. 4th 96, 111)* . In addition to this distinction, the court of appeal noted that the parties involved in the litigation were not the same parties involved in the arbitration. Most importantly, defendant law firm, which was alleged to have inflicted the injury sought to be redressed by the later action, was not a party to the arbitration.

The court discussed a number of other authorities on this issue, many from the Ninth Circuit, and pointed out that plaintiffs never had an opportunity to prosecute a full-blown claim for breach of duty of loyalty against defendant in any forum. The single issue of whether the representation of the licensor/opposing in the arbitration required use of confidential information was presented in summary fashion to the panel of arbitrators. On these facts, there was no true claim presented against defendant in the arbitration, and the claim preclusion aspect of res judicata is inapplicable (*96 Cal. App. 4th 96, 114)* . The court was also unpersuaded by defendant's claim that plaintiffs should be considered to have voluntarily become parties to the arbitration by their requests to disqualify defendant. The court did not consider plaintiffs' actions on those motions voluntary: corporate plaintiff agreed to arbitrate its contractual claims against licensor, but it did not agree to arbitrate its claims with defendant law firm or to allow licensor to have access to

confidential information through employment of its former counsel (*96 Cal. App. 4th 96, 114)* .

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2-20E California Points & Authorities § 20E.33

§ 20E.33 Arbitrator, Not Court, May Modify or Dissolve Injunction Issued by Arbitrator

[1] FORM

ALTHOUGH THE INJUNCTION ISSUED BY THE ARBITRATOR MAY BE MODIFIED IN ACCORDANCE WITH *CIVIL CODE SECTION 3424*, IT IS THE ARBITRATOR, NOT THE COURT, THAT HAS AUTHORITY TO DO SO BECAUSE THE PARTIES HAVE AGREED THAT THEIR DISPUTES WILL BE SETTLED BY ARBITRATION RATHER THAN BY RESORT TO THE JUDICIAL SYSTEM.

A. Arbitrator, Not Court, May Modify or Dissolve Injunction Issued by Arbitrator. An injunction issued as part of an arbitration award[, which has been confirmed and entered as a judgment], may be modified or dissolved in accordance with *Civil Code Section 3424* on a showing of material change in circumstances; but because the parties to the injunction have agreed to arbitrate their disputes, the court that confirmed the award and entered judgment thereon is not the proper tribunal in which to seek modification or dissolution. The party seeking modification or dissolution should initiate a new arbitration proceeding. The arbitrator's authority to act on a request for modification or dissolution does not arise only on referral by the superior court; and it is not necessary for the arbitrator to have reserved jurisdiction to modify the injunction (*Swan Magnetics, Inc. v. Superior Court (1997) 56 Cal. App. 4th 1504, 1509-1512, 66 Cal. Rptr. 2d 541*).

[2] Comments

[a] Use of Form

This form may be used to support the contention that the arbitrator, and not the court that confirmed the award and entered judgment on it, is the proper entity to modify or dissolve an injunction issued as part of an arbitration award [*see Civ. Code § 3424* (conditions for modification of dissolution of injunction)]. The authority on which this form is based suggests that it will not be necessary to obtain a court order compelling arbitration of the issue of changed circumstances [*see Swan Magnetics, Inc. v. Superior Court (1997) 56 Cal. App. 4th 1504, 1512, 66 Cal. Rptr. 2d 541]* , presumably because the original order compelling arbitration determined the existence and validity of the parties' agreement to arbitrate.

This form does not provide a complete memorandum but should be combined with authorities relating to the procedural context in which this issue is raised [*see, e.g.*, Ch. 116, *Injunctions* , and Ch. 155, *Motions After Trial*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. It is probably appropriate to attach copies of the arbitration agreement and the award to the papers supporting the memorandum. Argument should establish that modification or dissolution of the injunction remains within the scope of the arbitration agreement and should show why submission of the issue to a court would require redetermination of issues already decided in the initial arbitration.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For discussion and forms relating to injunctions, as well as a procedural checklist and research guide, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender).

For discussion and forms generally relating to motions after trial, as well as a procedural checklist and research guide, see California Forms of Pleading and Practice, Ch.371, *Motions After Trial* (Matthew Bender).

[d] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Court Has No Power to Modify or Dissolve Injunction Issued by Arbitrator

Swan Magnetics, Inc. v. Superior Court *(1997) 56 Cal. App. 4th 1504, 66 Cal. Rptr. 2d 541* , began as a dispute under an exclusive license agreement between Swan, as licensee, and Antek Peripherals, Inc, as licensor. Swan wanted to use Antek's "air-bearing" technology in the manufacture of high-speed disk drives it was developing. The agreement provided that Antek would not engage in any product development that competed with Swan's use of the licensed technology and also provided for arbitration of any disputes regarding interpretation of the agreement. Swan sued Antek, claiming Antek and Mitsumi Electric Co. had agreed to develop a disk drive using the technology licensed to Swan. The suit resulted in an arbitration award that enjoined Antek from developing the Antek/Mitsumi product or any

substantially similar product. The injunction was to remain in effect as long as Swan made timely payments under the license agreement. The award was confirmed and judgment was entered on it. Antek then filed notice of intent to move for a new trial, or in the alternative to vacate the judgment, because of drastic changes in circumstance, namely, Mitsumi's acquisition of Swan. Antek also sought discovery orders to obtain the facts regarding the Swan's and Mitsumi's agreement and plans. Swan contended the court had no authority to order discovery. The trial court found it had authority to modify the injunction, and ordered the discovery to allow Antek to gather the facts it would need to support modification. Swan petitioned for writ of mandate to vacate the discovery order.

The court of appeal issued the writ (*56 Cal. App. 4th 1504, 1512-1513)* . If the superior court could modify or vacate the injunction, it properly allowed discovery for purpose of pursuing that motion. Antek maintained that *Civ. Code § 3424* and *Code Civ. Proc. § 1287.4* [*see § 20E.10[1*], Paragraph A] authorized the court to dissolve or modify the injunction. *Civ. Code § 3424*, which provides for modification or dissolution of an injunction on a showing of material change in the facts or law on which the injunction was based or if it would serve the ends of justice, unquestionably permits modification and dissolution of court-ordered final injunctions (*56 Cal. App. 4th 1504, 1508-1509)* . Nothing in the statutory scheme for arbitration indicates that this rule of modifiability is inapplicable to an arbitrated controversy. An injunction does not acquire greater finality merely by being the product of arbitration. The court concluded that injunctions issued by an arbitrator may be modified or dissolved on a material change in circumstances, but that the trial court was not the proper tribunal in which to do so (*56 Cal. App. 4th 1504, 1509-1510)* . The court found that *Code Civ. Proc. § 1287.4* did not aid either party (*56 Cal. App. 4th 1504, 1510)* . The court relied on the judicial policy of deference to the judgment of arbitrators and the expectation of parties to an arbitration agreement that their dispute be resolved without necessity for any contact with the courts. A judicial decision on the continuing appropriateness of the injunction would require resolution of the merits of the parties' continuing dispute and invite reexamination of facts the arbitrator had previously determined. To permit renewal of litigation in the judicial arena would contravene the parties' expectations to resolve their differences through arbitration. Thus, the issue of the continued appropriateness of the injunction was not properly before the court. Antek's remedy was to initiate a new arbitration to address the new facts (*56 Cal. App. 4th 1504, 1511-1512)* . The arbitrator's authority to act on a request for modification does not arise only on referral by the superior court. Nor was it necessary for the arbitrator to reserve jurisdiction to modify the injunction. The arbitrator's authority arises from the inherent modifiability of injunctions and the parties' agreement to arbitrate their disputes. Should Antek renew its request in the proper forum, the resulting arbitration would be a new proceeding, not a reopening of a final determination. Although the injunction was subject to modification or dissolution on a showing of changed circumstances, any assertion of that change had to be raised and presented through arbitration, not in superior court (*56 Cal. App. 4th 1504, 1512)* .

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 21 ASSAULT AND BATTERY

2-21 California Points & Authorities 21.syn

§ 21.syn Synopsis to Chapter 21: ASSAULT AND BATTERY

§ 21.01 Scope of Chapter

§ 21.02 Governing Statutes

§ 21.03 Related Discussion and Forms

[1] Related Pleading and Practice Forms

[2] Related Points and Authorities

§§ 21.04-21.19 [Reserved]

§ 21.20 Supporting Contention That Defendant Is Liable for Assault--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Basis of Civil Action for Assault

[b] Elements of Civil Assault

[c] Apparent Unlawful Intent to Inflict Injury Sufficient

[d] Apparent Present Ability to Inflict Injury Sufficient

[e] Physical Injury Not Required

§ 21.21 Supporting Contention That Defendant Is Liable for Battery [Penal Code § 242]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Applicability of Definition of Criminal Battery

[b] Elements of Battery

[c] Intent to Inflict Harm as Not Necessary if Act Unlawful or Wrongful

§ 21.22 Supporting Contention That Defendant Is Liable for Assault and Battery--Doctrine of Transferred Intent Applies if Defendant Aims at One Person but Hits Another

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Doctrine of Transferred Intent

§ 21.23 Supporting Contention That Defendant Is Liable for Battery--Defendant Performed Medical Treatment Without Consent

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Treatment Without Consent as Battery

[b] Skillful Performance of Treatment Without Consent as Battery

§ 21.24 Supporting Contention That Defendant Is Liable for Battery--Defendant Did Not Have Consent to Perform Medical Treatment Because He or She Failed to Disclose Nature of Treatment

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] No Consent if Nature of Treatment Not Disclosed

[4] Additional Authorities

[a] No Consent if Nature of Treatment Not Disclosed

§ 21.25 Supporting Contention That Defendant Is Liable for Battery--Defendant Exceeded Scope of Consent to Perform Medical Treatment

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Willful Disregard of Conditional Consent

[b] Removing Organ Beyond Scope of Consent

[4] Additional Authorities

[a] Exceeding Scope of Consent

§ 21.26 Supporting Contention That Defendant Is Liable for Battery--Consent for Medical Treatment Vitiated When Treatment Not for Therapeutic Purpose

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Consent Vitiated by Nontherapeutic Purpose

§ 21.27 Supporting Contention That Defendant Is Liable for Sexual Battery [Civ. Code § 1708.5]

[1] FORM

[2] Comments

[a] Use of Form

[b] Cause of Action for Sexual Battery

[c] Related Pleading and Practice Forms

§ 21.28 Supporting Contention That Defendant Is Liable for Tort of Stalking

[1] FORM

[2] Comments

[a] Use of Form

[b] Cause of Action for Tort of Stalking

[c] Related Pleading and Practice Forms

§ 21.29 Supporting Contention That Defendant Is Liable for Tort of Domestic Violence

[1] FORM

[2] Comments

[a] Use of Form

[b] Cause of Action of Domestic Violence

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Damages Recoverable for Abuse Occurring More Than Three Years Before Suit Filed

§ 21.30 Supporting Contention That Defendant Is Liable for Assault and Battery--Defendant's Acts Did Not Constitute Self-Defense Because Plaintiff's Acts Were Not Violent or Hostile

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Failure to Establish Prima Facie Case of Self-Defense

§ 21.31 Supporting Contention That Defendant Is Liable for Assault and Battery--Defendant Used Unreasonable Force in Defense of Himself or Herself

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Use of Unreasonable Force

§ 21.32 Supporting Contention That Defendant Is Liable for Assault and Battery--Defendant Used Unreasonable Force in Defense of His or Her Property

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] No Privilege for Unreasonable Force

§ 21.33 Supporting Contention That Defendant Is Liable for Assault and Battery--Defendant Did Not Have Right to Forcibly Retake Chattel Because Plaintiff Had Rightfully Acquired Possession

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] No Right to Forcibly Retake Chattel if Possession Rightfully Acquired

[4] Additional Authorities

[a] No Right to Forcibly Retake Chattel if Possession Rightfully Acquired

§ 21.34 Supporting Contention That Defendant Is Liable for Assault and Battery--Defendant Failed to Warn Plaintiff, a Nonviolent Trespasser, Before Forcibly Ejecting Him or Her

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Warning Required to Eject Nonviolent Trespasser

§ 21.35 Supporting Contention That Defendant Is Liable for Assault and Battery--Defendant Directed Intentional Tort Specifically at Public Employee in Performance of His or Her Duties

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Intentional Tort Specifically Directed at Public Employee

§ 21.36 Supporting Contention That Defendant Is Liable for Assault and Battery--Defendant at Time of Inflicting Injury to Plaintiff Knew or Should Have Known That Plaintiff Was Peace Officer, Firefighter, or Emergency Medical Personnel Employed by Public Entity [Civ. Code § 1714.9(a)(1)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Liability for Injury to Peace Officer, Firefighter, or Emergency Medical Personnel

[b] Sufficiency of Allegation That Conduct Causing Injury Consisted of "Slumping or Going Limp"

[c] Defense of Assumption of Risk

§ 21.36A Supporting Contention That Defendant Is Liable for Battery--Battery Action Against Police Officer Based on Unreasonable Use of Excessive Force in Effecting Arrest Is Not Precluded by Plaintiff's Conviction for Resisting Arrest

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Authorities

[3] Discussion of Authorities

[a] Battery Action Would Not Challenge Validity of Criminal Conviction

§ 21.37 Opposing Contention That Defendant Is Liable for Assault and Battery--Plaintiff Consented to Participation in Illegal Act

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Consent as a Complete Defense

§ 21.38 Opposing Contention That Defendant Is Liable for Battery--Defendant Had Implied Consent to Perform Medical Treatment Due to Emergency

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Implied Consent in Emergency

§ 21.39 Opposing Contention That Defendant is Liable for Battery--Defendant Lacked Intent to Perform Procedure Without Complying With Conditions Placed on Patient's Consent

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Physician Must Have Knowledge of Conditions Placed on Consent to Treatment

[b] Physician Must Have Specific Intent to Perform Without Abiding by Condition

§ 21.40 Opposing Contention That Defendant Is Liable for Assault and Battery--Defendant Acted in Self-Defense and/or Defense of Relative, Household Member, or Guest [Civ. Code § 50]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Force Must Be Reasonable

[b] Determining if Force Excessive

[c] Reasonable Belief of Danger Required

[d] Person Confronted Not Bound to Retreat

§ 21.41 Opposing Contention That Defendant Is Liable for Assault and Battery--Defendant Acted in Defense of Third Person Who Was Not Relative, Household Member, or Guest

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Defense of Third Person

§ 21.42 Opposing Contention That Defendant Is Liable for Assault and Battery--Defendant Acted in Defense of His or Her Property and/or Property of Relative, Household Member, or Guest [Civ. Code § 50]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Force Must Be Reasonable

§ 21.43 Opposing Contention That Defendant Is Liable for Assault and Battery--Defendant Had Right to Eject Plaintiff Because He or She Was a Trespasser

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Right to Eject Trespasser

[b] Prior Warning Not Required to Eject Felonious Trespasser

[c] Second Warning Not Required

§ 21.44 Opposing Contention That Defendant Is Liable for Assault and Battery--Battery Action Is Not Proper When Purpose of Physician's Statement Inducing Plaintiff's Consent Was Therapeutic

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Essential Character of Action Was Therapeutic

§ 21.45 Opposing Contention That Defendant Is Liable for Assault and Battery--Battery Action Against Police Officer Based on Excessive Force in Effecting Arrest Precluded if Plaintiff Has Valid Conviction for Resisting or Obstructing Police Officer

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Plaintiff Has Valid Conviction for Resisting or Obstructing Police Officer

§ 21.46 Opposing Contention That Defendant is Liable for Battery--Teacher Not Liable for Reasonable Contact With Students Not Intended to Harm

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Teacher Lacked Intent to Harm Student

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2-21 California Points & Authorities § 21.01

§ 21.01 Scope of Chapter

This chapter contains memoranda of points and authorities relating to civil actions for assault, battery, or both. The chapter contains memoranda of points and authorities supporting [*see §§ 21.20 -21.22, 21.23 -21.28, 21.30*-21.36A] and opposing [*see §§ 21.37, 21.38, 21.40*-21.46] liability in such actions. Included are general forms for use in supporting a civil action for assault [*see § 21.20*] and a civil action for battery [*see § 21.21*]. This chapter also contains more specific forms to be used with the general forms as may be required by the specific fact situation of the case in question.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsAssault & BatteryGeneral Overview

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2-21 California Points & Authorities § 21.02

§ 21.02 Governing Statutes

Civil actions for assault and battery are based on *Civ. Code § 43*, which states that every person has, subject to the qualifications and restrictions provided by law, the right of protection from bodily restraint or harm [*see Lowry v. Standard Oil Co. (1944) 63 Cal. App. 2d 1, 7, 146 P.2d 57]* . In addition, *Civ. Code § 1708* provides that every person is bound, without contract, to abstain from injuring the person or property of another, or infringing on any of his or her rights. The elements of the crime of battery are set forth in *Penal Code § 242*, which states that a battery is any willful and unlawful use of force or violence on the person of another; the elements of civil battery are the same as for criminal battery [*Bartosh v. Banning (1967) 251 Cal. App. 2d 378, 386, 59 Cal. Rptr. 382]* . The rights of self-defense, defense of family or household member, and defense of property are governed by *Civ. Code § 50*, which states that any necessary force may be used to protect from wrongful injury the person or property of oneself, or of a wife, husband, child, parent, or other relative or member of one's family, or of a ward, servant, master, or guest.

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesCrimes Against PersonsAssault & BatteryGeneral OverviewTortsIntentional TortsAssault & BatteryGeneral OverviewTortsIntentional TortsAssault & BatteryDefensesTortsIntentional TortsAssault & BatteryElements of Battery

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§ 21.03 Related Discussion and Forms

[1] Related Pleading and Practice Forms

For a discussion of and forms of complaints for use in actions for damages for assault and battery, see California Forms of Pleading and Practice, Ch. 58, *Assault and Battery* (Matthew Bender). For a discussion and forms relating to medical malpractice, see California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice* (Matthew Bender). For a discussion and forms relating to tort damages generally, see *California Forms of Pleading and Practice, Ch. 177, Damages, § 177.40 et seq.* (Matthew Bender).

[2] Related Points and Authorities

Related memoranda of points and authorities that may be useful in particular assault and battery cases may be found in the following chapters:

Ch. 15A, *Alcoholic Beverages: Civil Liability for Furnishing*.

Ch. 64, *Damages: Tort*.

Ch. 114, *Husband and Wife*.

Ch. 117, *Insane and Incompetent Persons: Actions Involving Mental Patients*.

Ch. 141, *Landlord and Tenant*.

Ch. 100A, *Employer and Employee: Respondeat Superior*.

Ch. 175, *Physicians and Surgeons: Medical Malpractice*.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesCompensatory DamagesGeneral OverviewTortsDamagesPunitive DamagesGeneral OverviewTortsIntentional TortsAssault & BatteryGeneral OverviewTortsMalpractice & Professional LiabilityHealthcare Providers

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2-21 California Points & Authorities §§ 21.04-21.19

[Reserved]

§§ 21.04[Reserved]

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2-21 California Points & Authorities § 21.20

§ 21.20 Supporting Contention That Defendant Is Liable for Assault--General Form

[1] FORM [*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS LIABLE FOR ASSAULT BECAUSE HE/SHE DEMONSTRATED AN UNLAWFUL INTENT TO INFLICT IMMEDIATE INJURY ON THE PERSON OF PLAINTIFF.

A. Basis of Civil Action for Assault. A civil action for assault is based on *Section 43 of the Civil Code* which states that every person has, subject to the qualifications and restrictions provided by law, the right of protection from bodily restraint or harm (*Lowry v. Standard Oil Co. (1944) 63 Cal. App. 2d 1, 7, 146 P.2d 57*).

B. Elements of Civil Assault. Civil assault consists of (1) a demonstration of an unlawful intent by one person (2) to inflict immediate injury on the person of another then present (*Lowry v. Standard Oil Co. (1944) 63 Cal. App. 2d 1, 6-7, 146 P.2d 57*).

[*Optional*] **C. Apparent Unlawful Intent to Inflict Injury Sufficient.** A civil action for assault may be maintained if there is an apparent or mere demonstration of an unlawful intent, as well as if there is an actual intent to inflict injury (*Lowry v. Standard Oil Co. (1944) 63 Cal. App. 2d 1, 7, 146 P.2d 57*).

[*Optional*] **D. Apparent Present Ability to Inflict Injury Sufficient.** In a civil action for assault, the defendant need not have the actual present ability to inflict the threatened injury; all that is necessary is that defendant have the apparent present ability, unless the plaintiff knows that the defendant does not have the actual ability (*Lowry v. Standard Oil Co. (1944) 63 Cal. App. 2d 1, 7, 146 P.2d 57*).

[*Optional*] **E. Physical Injury Not Required.** For purposes of civil actions for assault, the term violent injury contemplated in *Section 240 of the Penal Code* (which defines criminal assault as an unlawful attempt, coupled with a present ability, to commit violent injury on the person of another), includes any wrongful act committed by means of physical force against the person of another, even though only the feelings of such person are injured by the act (*Ware v. Dunn (1947) 80 Cal. App. 2d 936, 942, 183 P.2d 128*).

[*If appropriate, add further points and authorities relating to the particular fact situation in question (see, e.g., §§ 21.22, 21.30- 24).*]

[2] Comments

CAUTION:

Counsel should use this memorandum of points and authorities with caution. Some courts have applied the statutory definition of criminal assault [*see Penal Code § 240*] to civil assault cases [*see Fraguglia v. Sala (1936) 17 Cal. App. 2d 738, 62 P.2d 783* ; *McChristian v. Popkin (1946) 75 Cal. App. 2d 249, 171 P.2d 85]* . *Penal Code § 240* defines criminal assault as an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another. It should be noted, however, that in civil actions for assault, courts are not limited by a statutory definition and may expand the concept of civil assault beyond the criminal definition of *Penal Code § 240*, as the court did in *Lowry v. Standard Oil Co. (1944) 63 Cal. App. 2d 1, 6, 146 P.2d 57* [*see § 21.20[3][a]*].

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that defendant is civilly liable for assault because he or she demonstrated an unlawful intent to inflict immediate injury on the person of plaintiff. This form is a general one that sets out the statutory basis for civil assault [*Civ. Code § 43*] and the elements that a party must show to establish that an assault was committed, which include a demonstration of an unlawful intent by one person to inflict immediate injury on the person of another then present. When appropriate, this general form may be combined with the points and authorities in *§§ 21.22* and *21.30 -21.36*.

This form may also be used if the assault in question involves an apparent unlawful intent rather than an actual intent to inflict injury (optional Paragraph C) or if the assault involves an apparent rather than present ability to inflict the injury (optional Paragraph D). The arguments supported by this memorandum may be raised in an action for damages for assault.

These points and authorities may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the commission of an assault. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should also insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a description of the act in question, and a discussion of any evidence showing the defendant's actual or apparent intent to inflict immediate injury, and the defendant's actual or apparent ability to inflict immediate injury.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities in *§§ 21.37, 21.38,* and *21.40 -21.43* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Basis of Civil Action for Assault

In ***Lowry v. Standard Oil Co.*** *(1944) 63 Cal. App. 2d 1, 146 P.2d 57* , plaintiff was assaulted by defendant's service station manager, who chased him from the station with an unloaded revolver in the belief that plaintiff was the accomplice of a bandit who was robbing the station. In running away from the station, plaintiff stumbled and received

serious injuries for which he sued to recover damages. Plaintiff appealed from a judgment in defendant's favor.

The court of appeal stated that a civil action for assault is based on an invasion of the right of a person to live without being put in fear of personal harm. Citing *Civ. Code § 43*, the court went on to state that every person has the right of protection from bodily restraint or harm. It is clear, the court noted, that a person's right to live in society free from being put in fear of personal harm is invaded if he believes that an unloaded firearm being pointed at him is loaded; the pointing of a gun at another in a threatening manner is sufficient to cause fear of personal injury unless it is known by the person at whom the weapon is pointed that the gun is in fact unloaded (*63 Cal. App. 2d 1, 7)* . The court of appeal, therefore, reversed the judgment in favor of defendant.

[b] Elements of Civil Assault

The facts and procedural background of ***Lowry v. Standard Oil Co.*** *(1944) 63 Cal. App. 2d 1, 146 P.2d 57* , are discussed in *§ 21.20[3][a]*. The court of appeal stated that civil actions for assault are based on *Civ. Code § 43*, which states that every person has the right of protection from bodily restraint or harm. The court of appeal then defined an assault as a demonstration of an unlawful intent by one person to inflict immediate injury on the person of another then present. Applying this definition to the facts at hand, the court held that plaintiff established a prima facie case of assault when he presented evidence showing that the defendant chased him, pointed a gun at him, and clicked it (*63 Cal. App. 2d 1, 6-7)* . The court of appeal, therefore, reversed the judgment in favor of defendant. The court of appeal further held that the pointing of an unloaded gun in a threatening manner is sufficient to cause fear of personal injury and, therefore, is sufficient to constitute an assault, unless the person at whom the weapon is pointed knows that it is not loaded. Thus, an apparent ability to inflict immediate injury was held to be sufficient to constitute an assault (*63 Cal. App. 2d 1, 7)* .

[c] Apparent Unlawful Intent to Inflict Injury Sufficient

The facts and procedural background of ***Lowry v. Standard Oil Co.*** *(1944) 63 Cal. App. 2d 1, 146 P.2d 57* , are discussed in *§ 21.20[3][a]*. The court of appeal stated that civil actions for assault are based on *Civ. Code § 43*, which states that every person has the right of protection from bodily restraint or harm.

[d] Apparent Present Ability to Inflict Injury Sufficient

The facts and procedural background of ***Lowry v. Standard Oil Co.*** *(1944) 63 Cal. App. 2d 1, 146 P.2d 57* , are discussed in *§ 21.20[3][a]*. The court of appeal stated that civil actions for assault are based on *Civ. Code § 43*, which states that every person has the right of protection from bodily restraint or harm. The court of appeal further held that it was not necessary for the plaintiff to show that defendant's conduct was unlawful. Plaintiff established a prima facie case of assault when he presented evidence showing that the defendant chased him, pointed a gun at him, and clicked it. Thus, an apparent intent to inflict injury was held to be sufficient to constitute an assault (*63 Cal. App. 2d 1, 7)* .

[e] Physical Injury Not Required

In ***Ware v. Dunn*** *(1947) 80 Cal. App. 2d 936, 183 P.2d 128* , plaintiffs were assaulted by defendants when defendants, who were police officers, entered plaintiffs' hotel room and searched, detained, and questioned plaintiffs without a warrant, without plaintiffs' permission, and without a suspicion that plaintiffs had committed a felony. Defendants appealed from a judgment for plaintiffs.

The court of appeal affirmed the judgment, holding that it was not necessary that plaintiffs sustain physical injury or bodily harm to maintain a civil action for assault and false imprisonment. Applying the criminal definition of assault found in *Penal Code § 240* to the civil action, the court stated that the "violent injury" contemplated in *Penal Code § 240* (which defines criminal assault as an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another), is not synonymous with bodily harm; violent injury includes any wrongful act committed by means of physical force against the person of another, even though only the feelings of such person are injured by the

act (*80 Cal. App. 2d 936, 942)* .

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2-21 California Points & Authorities § 21.21

§ 21.21 Supporting Contention That Defendant Is Liable for Battery [Penal Code § 242]--General Form

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief]*.

DEFENDANT IS LIABLE FOR BATTERY BECAUSE HE/SHE COMMITTED AN ACT THAT CONSTITUTED A WILLFUL AND UNLAWFUL USE OF FORCE OR VIOLENCE ON THE PERSON OF ANOTHER.

A. Applicability of Definition of Criminal Battery. Civil actions for battery are generally governed by the rules of criminal law that define assault and battery (*Bartosh v. Banning (1967) 251 Cal. App. 2d 378, 386, 59 Cal. Rptr. 382*).

B. Elements of Battery. A battery is any willful and unlawful use of force or violence on the person of another (*Penal Code § 242*; *see also Fluharty v. Fluharty (1997) 59 Cal. App. 4th 484, 497, 69 Cal. Rptr. 2d 244*).

[*Optional*] **C. Intent to Inflict Harm as Not Necessary if Act Unlawful or Wrongful.** In a case of civil battery, if the defendant committed an unlawful or wrongful act that was likely to prove injurious to another, he or she is answerable for the consequence that directly and naturally resulted from the conduct, even though he or she did not intend the particular injury that followed (*Lopez v. Surchia (1952) 112 Cal. App. 2d 314, 318, 246 P.2d 111*); in such a case intent is implied from the commission of wrongful acts evidencing wanton, willful, or reckless disregard for human safety (*Newman v. Larsen (1964) 225 Cal. App. 2d 22, 24, 36 Cal. Rptr. 883*).

[*If appropriate, add further points and authorities relating to the particular fact situation in question (see §§ 21.22 -21.24*)].

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that defendant is liable for battery

because defendant's act constituted a willful and unlawful use of force or violence on the person of plaintiff. The form is a general one that sets out the elements that a party must show to establish that an assault was committed, including any willful and unlawful use of force or violence on the person of another.

This form may also be used if the battery in question involves an unlawful or wrongful act without an intent to inflict injury (optional Paragraph C). The arguments supported by this memorandum may be raised in an action for damages for battery if the defendant contends that the conduct in question did not constitute a battery.

These points and authorities may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the commission of a battery. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should also insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a description of the act in question, a discussion of any facts showing that the act was willful, and a discussion of facts showing that the act was either wrongful and unlawful or performed with intent to inflict harm.

[3] Discussion of Authorities

[a] Applicability of Definition of Criminal Battery

In ***Bartosh v. Banning*** *(1967) 251 Cal. App. 2d 378, 59 Cal. Rptr. 382* , plaintiff filed a civil action for battery for damages claimed to have been sustained as a result of an altercation between two defendants. During this fight, one defendant pushed the other defendant into plaintiff causing her injuries. Plaintiff appealed from a judgment of nonsuit in favor of one defendant and a judgment entered on the verdict in favor of the other.

The court of appeal held that a civil action for battery is generally governed by the rules of criminal law that define assault and battery and the right of self-defense, except as to proof beyond a reasonable doubt (*251 Cal. App. 2d 378, 386)* . Applying these rules, the court of appeal then reversed the judgment of nonsuit and the judgment entered on the verdict.

[b] Elements of Battery

In ***Fluharty v. Fluharty*** *(1997) 59 Cal. App. 4th 484, 69 Cal. Rptr. 2d 244* , a son sued his father for assault and battery occasioned by his father's attempted suicide. Immediately after murdering plaintiff's mother, the father telephoned the son, told him what he had done, and advised him that he intended to take his own life. Plaintiff and his wife immediately drove to the father's home where he found his father with a shotgun pointed at his chin. He pleaded with him not to shoot himself and wrestled for control of the gun when it discharged, very slightly injuring plaintiff's wife. The court of appeal held that substantial evidence supported the trial court's implicit finding the conduct alleged to have constituted a battery was not unlawful or wrongful. It reasoned that the law imposed no criminal sanction for intentional acts of self-destruction; and that in the face of the attempted suicide, plaintiff initiated the physical contact between himself and defendant, defendant sought to avoid it and struggled with plaintiff to gain control of the shotgun in order to accomplish his goal of self-destruction. Because there was no intent to harm anyone other than himself, plaintiff's assault and battery claim was properly rejected (*59 Cal. App. 4th 484, 497)* .

[c] Intent to Inflict Harm as Not Necessary if Act Unlawful or Wrongful

In ***Lopez v. Surchia*** *(1952) 112 Cal. App. 2d 314, 246 P.2d 111* , plaintiff brought an action to recover damages resulting from a battery by defendant. During an altercation between defendant's son and another person, defendant came out of his house with a gun in his hand and fired two shots, one of them striking plaintiff, who was a bystander. Defendant appealed from a judgment awarding damages to plaintiff.

The court of appeal held that in order to establish a case of civil battery, all that is necessary is that the evidence show that plaintiff's injury was caused by defendant's violence, or that defendant acted with wanton, willful, or reckless disregard of plaintiff's rights. The general rule is that every person is presumed to intend the natural and probable consequences of his or her acts; if the cause of action is an alleged battery committed in the performance of an unlawful or wrongful act, the intent of the wrongdoer to injure is immaterial. In other words, if defendant committed an illegal act that was likely to prove injurious to another, he is answerable for the consequence that directly and naturally resulted from the conduct, even though he did not intend the particular injury that followed. Since defendant was acting unlawfully when he fired the gun and not in justifiable self-defense, the intent to commit plaintiff's gunshot injury was presumed (*112 Cal. App. 2d 314, 318)* . The court of appeal then affirmed the judgment.

In ***Newman v. Larsen*** *(1964) 225 Cal. App. 2d 22, 36 Cal. Rptr. 883* , plaintiff brought a civil action for damages for assault and battery after defendant was convicted in a prior criminal proceeding for assault with a deadly weapon. Defendant appealed from a judgment awarding damages to plaintiff.

The court of appeal held that specific intent is not necessary for the crime of assault with a deadly weapon [citing *People v. Sandoval (1963) 222 Cal. App. 2d 348, 351, 35 Cal. Rptr. 227]* . Intent may be implied from the commission of wrongful acts evidencing wanton, willful, or reckless disregard for human safety [*see* *Lopez v. Surchia (1952) 112 Cal. App. 2d 314, 318, 246 P.2d 111* ; *Lowry v. Standard Oil Co. (1944) 63 Cal. App. 2d 1, 7, 146 P.2d 57* ; *see also § 21.20[3*][c]]. Thus, the minimal intent requirement of the crime for which defendant stood convicted, and therefore an issue necessarily decided in the criminal case, was that defendant had so acted with a wanton, willful disregard for human safety. The court concluded that if defendant's actions in committing the assault were such that his intent to injure is necessarily implied, then, with respect to any injury that resulted from the battery accomplished as a consequence of the assault, his intent to injure is also necessarily implied (*225 Cal. App. 2d 22, 24)* . The court of appeal then affirmed the judgment.

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2-21 California Points & Authorities § 21.22

§ 21.22 Supporting Contention That Defendant Is Liable for Assault and Battery--Doctrine of Transferred Intent Applies if Defendant Aims at One Person but Hits Another

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with the general points and authorities set forth in Forms 1 and/or 2.*]

DEFENDANT IS LIABLE FOR ASSAULT AND BATTERY BECAUSE PLAINTIFF'S INJURY WAS THE DIRECT, NATURAL, AND PROBABLE CONSEQUENCE OF DEFENDANT'S WRONGFUL ACT, ALTHOUGH DEFENDANT AIMED AT ANOTHER PERSON.

Doctrine of Transferred Intent. If defendant unlawfully aims at one person and hits another, he or she is guilty of assault and battery on the party he or she hit because plaintiff's injury was the direct, natural, and probable consequence of defendant's wrongful act (*Lopez v. Surchia (1952) 112 Cal. App. 2d 314, 318, 246 P.2d 111* ; *see* *Singer v. Marx (1956) 144 Cal. App. 2d 637, 301 P.2d 440*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that the defendant is liable for assault and battery because the doctrine of transferred intent renders a defendant liable to the person he or she hits, even though the defendant aimed at another person. The arguments supported by this memorandum may be raised in an action for damages for assault and battery.

These points and authorities may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the commission of an assault and battery. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should also insert argument in this form, showing the relationship between the facts of the case and the points

of law stated. Thus, counsel should include a description of the act in question and a discussion of any facts showing that defendant's act caused plaintiff to be injured even though defendant was not aiming at plaintiff.

[3] Discussion of Authorities

[a] Doctrine of Transferred Intent

The facts and procedural background of ***Lopez v. Surchia*** *(1952) 112 Cal. App. 2d 314, 246 P.2d 111* , are discussed in *§ 21.21[3][c]*. The court of appeal held that if a defendant unlawfully aims at one person and hits another, he or she is guilty of assault and battery on the party he or she hit, the injury being the direct, natural, and probable consequence of the wrongful act (*112 Cal. App. 2d 314, 318)* .

In ***Singer v. Marx*** *(1956) 144 Cal. App. 2d 637, 301 P.2d 440* , plaintiff was hit in the eye by a rock thrown by defendant. It was not clear from the evidence if defendant was aiming at plaintiff or another person when he threw the rock. Plaintiff sued defendant and his parents for damages in a civil action for negligence and battery. The trial court granted a nonsuit from which plaintiff appealed.

The court of appeal held that even though the evidence warranted an inference that defendant threw at another and inadvertently struck plaintiff, the doctrine of transferred intent rendered him liable to plaintiff (*144 Cal. App. 2d 637, 642)* . The court of appeal therefore reversed the judgment as to defendant.

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2-21 California Points & Authorities § 21.23

§ 21.23 Supporting Contention That Defendant Is Liable for Battery--Defendant Performed Medical Treatment Without Consent

[1] FORM

[The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with the general points and authorities set forth in *§ 21.21*].

DEFENDANT IS LIABLE FOR BATTERY BECAUSE DEFENDANT PERFORMED MEDICAL TREATMENT WITHOUT PLAINTIFF'S CONSENT.

A. Treatment Without Consent as Battery. If a person has been subjected to medical treatment without his or her consent, such treatment constitutes a battery (*Estrada v. Orwitz (1946) 75 Cal. App. 2d 54, 57, 170 P.2d 43* ; *Valdez v. Percy (1939) 35 Cal. App. 2d 485, 491, 96 P.2d 142*).

[*Optional*] **B. Skillful Performance of Treatment Without Consent as Battery.** If the plaintiff did not give his or her consent to the treatment, the performance of the treatment constitutes a technical battery whether or not the treatment was skillfully performed (*see* *Berkey v. Anderson (1969) 1 Cal. App. 3d 790, 803, 82 Cal. Rptr. 67* ; *Pedesky v. Bleiberg (1967) 251 Cal. App. 2d 119, 123, 59 Cal. Rptr. 294*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of plaintiff's contention that defendant is liable for battery because defendant performed medical treatment without the consent of plaintiff. These points and authorities may also be used to support a contention that a battery was committed due to lack of consent even though the treatment in question was performed skillfully [optional Paragraph B]. The arguments supported by this memorandum may be raised in an action for damages for battery.

These points and authorities may be combined with points and authorities relating to the specific procedural context in

which counsel wishes to raise the issue of the commission of a battery. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should also insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a description of the medical treatment in question and a discussion of any facts showing that plaintiff did not consent to the treatment.

[3] Discussion of Authorities

[a] Treatment Without Consent as Battery

Plaintiff in ***Estrada v. Orwitz*** *(1946) 75 Cal. App. 2d 54* , filed an action for wrongful, unauthorized, and improper extraction of teeth. Plaintiff claimed that he consented to the extraction of one tooth, but defendant in fact extracted six teeth. Defendant appealed from a judgment for plaintiff.

The court of appeal commented that there can be no doubt that an action based on the theory that an operation is performed without consent of the patient charges an assault and battery, and that negligence has nothing to do with such an action (*75 Cal. App. 2d 54, 57)* .

In ***Valdez v. Percy*** *(1939) 35 Cal. App. 2d 485, 96 P.2d 142* , plaintiff filed an action to recover damages for alleged malpractice on the part of several defendants in performing an operation on plaintiff that resulted in the removal of an organ. Plaintiff claimed that she did not consent to removal of an organ but to a different operation on a different part of her body. Defendants contended that plaintiff did consent to the operation by signing a standard consent form on entering the hospital. Plaintiff appealed from a judgment of nonsuit.

The court of appeal reversed the judgment as to the defendants who diagnosed and performed the operation, holding that if a person has been subjected to an operation without his or her consent, such an operation constitutes technical assault and battery. As to the agreement that plaintiff signed, the court held that it did not constitute a consent to perform operations other than the one for which the operating surgeons were engaged by plaintiff to perform unless necessity for another operation arose during the authorized operation (*35 Cal. App. 2d 485, 491)* .

[b] Skillful Performance of Treatment Without Consent as Battery

Berkey v. Anderson *(1969) 1 Cal. App. 3d 790, 82 Cal. Rptr. 67* , involved an action against two defendants for prescription and performance of treatment without consent of plaintiff. It was not clear from the evidence if the treatment was negligently performed. Plaintiff appealed from a judgment for defendants.

The court of appeal reversed the judgment, noting that if plaintiff did not give his informed or knowledgeable consent, the performance of the treatment would constitute a technical battery, for which defendant would be liable for all damages proximately resulting, whether or not the treatment was skillfully performed (*1 Cal. App. 3d 790, 803)* .

NOTE:

In cases that involve the issue of informed consent [*see § 21.24[3][a]*], the Supreme Court has limited the application of the battery theory of *Berkey v. Anderson (1969) 1 Cal. App. 3d 790, 804-805, 82 Cal. Rptr. 67* , to cases in which defendant performed a treatment that was substantially different from the treatment consented to by plaintiff. The battery theory is not applicable to cases involving the occurrence of an undisclosed inherent complication that required different and/or further treatment not consented to by plaintiff; such cases should be pleaded in negligence [*Cobbs v. Grant (1972) 8 Cal. 3d 229, 239, 104 Cal. Rptr. 505, 502 P.2d 1]* .

Plaintiff in ***Pedesky v. Bleiberg*** *(1967) 251 Cal. App. 2d 119* , filed an action claiming that the operation in question

was negligently performed and that she did not consent to it. The trial court refused to instruct the jury on all aspects of plaintiff's battery theory. Plaintiff appealed from a judgment in favor of defendant.

The court of appeal reversed the judgment. The court held that the trial court must, when requested, instruct on all vital issues involved and noted that the plaintiff, in her battery theory, may concede that the operation accomplished was performed skillfully (*251 Cal. App. 2d 119, 123)* .

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2-21 California Points & Authorities § 21.24

§ 21.24 Supporting Contention That Defendant Is Liable for Battery--Defendant Did Not Have Consent to Perform Medical Treatment Because He or She Failed to Disclose Nature of Treatment

[1] FORM

[The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with the general points and authorities set forth in *§ 21.20*].

No Consent if Nature of Treatment Not Disclosed. If the defendant doctor fails to disclose the nature of the treatment in obtaining consent from the plaintiff patient, there is no consent to perform that treatment, and a battery will result if it is performed (*Berkey v. Anderson (1969) 1 Cal. App. 3d 790, 803, 82 Cal. Rptr. 67*).

[2] Comments

CAUTION:

Counsel should use this memorandum of points and authorities with caution. Two different legal theories, negligence and battery, are relevant in pleading a cause of action against a physician for injuries resulting from a medical treatment that was performed without sufficient information for knowledgeable consent. Since battery is an intentional tort, the battery theory should be reserved for those circumstances in which a doctor performs an operation to which the patient has not consented. The battery theory applies, therefore, if the patient gives permission to perform one type of treatment and the doctor performs another because the requisite element of deliberate intent to deviate from the consent is present. Thus, an action involving a physician's failure to disclose to the patient the known nature of the treatment that he or she intends to perform before he or she performs it sounds in battery. On the other hand, an action involving a physician's failure to disclose a risk involved in the treatment to be performed sounds in negligence because deliberate intent to deviate from the consent is not present [*Nelson v. Gaunt (1981) 125 Cal. App. 3d 623, 634, 178 Cal. Rptr. 167* ; *see* *Cobbs v. Grant (1972) 8 Cal. 3d 229, 240, 104 Cal. Rptr. 505, 502 P.2d 1*)].

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that defendant is liable for battery based on unauthorized medical treatment because defendant did not have consent to perform the medical treatment since he or she failed to disclose the nature of the treatment to plaintiff. The arguments supported by this memorandum may be raised in an action for damages for battery.

These points and authorities may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the commission of the battery. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a description of the medical treatment in question and a discussion of any evidence showing that defendant did not disclose the nature of the treatment to plaintiff.

[3] Discussion of Authorities

[a] No Consent if Nature of Treatment Not Disclosed

In ***Berkey v. Anderson*** *(1969) 1 Cal. App. 3d 790, 82 Cal. Rptr. 67* , plaintiff brought an action for malpractice based on the prescription of treatment by defendant without the informed consent of plaintiff. Plaintiff claimed that all defendant had told him about the treatment in question, which was a serious operation involving a puncture of the spine, was that the treatment would be simply exploratory, that he had nothing to worry about, and that he would feel no discomfort. Plaintiff appealed from a judgment granting nonsuit.

The court of appeal characterized this issue in the case as whether defendant gave plaintiff sufficient information about the nature of the treatment so that plaintiff could intelligently decide whether he wished to have it. The court then stated that if defendant had not given sufficient information, he would be liable for all injury plaintiff sustained in the course of the treatment, whether or not the injury was the result of negligence. The court reasoned that because defendant did not contend that he had explained the nature of the treatment to plaintiff and accepting plaintiff's statement that defendant had characterized the treatment as simply exploratory, nothing to worry about, and nothing involving discomfort, the jury could have found that defendant had given plaintiff no information that would give him any conception of the procedure; in fact, the information given would have a tendency to mislead plaintiff in making his decision (*1 Cal. App. 3d 790, 804-805)* . The court of appeal therefore reversed the judgment.

[4] Additional Authorities

[a] No Consent if Nature of Treatment Not Disclosed

In *Nelson v. Gaunt (1981) 125 Cal. App. 3d 623, 178 Cal. Rptr. 167* , an action for assault and battery, fraud, and intentional infliction of emotional distress, defendant described a dangerous and disapproved of procedure as a simple and inexpensive treatment that was free of side effects. Based on defendant's characterization, plaintiff consented to the procedure that resulted in serious injuries to her. The court of appeal held that the evidence justified pleading a cause of action in battery because the procedure to which plaintiff consented was substantially different from that which was performed (*125 Cal. App. 3d 623, 635)* .

In *Stone v. Foster (1980) 106 Cal. App. 3d 334, 164 Cal. Rptr. 901* , an action for medical malpractice and fraud, defendant failed to inform plaintiff of certain inherent risks involved in surgery performed on plaintiff, which later caused plaintiff injuries. Citing *Cobbs v. Grant (1972) 8 Cal. 3d 229, 240-241, 104 Cal. Rptr. 505, 502 P.2d 1* , the court of appeal held that plaintiff must plead the action in negligence rather than fraud, due to policy factors such as the availability of punitive damages and the possibility of lack of malpractice insurance coverage in an intentional tort situation (*106 Cal. App. 3d 334, 346-347)* .

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2-21 California Points & Authorities § 21.25

§ 21.25 Supporting Contention That Defendant Is Liable for Battery--Defendant Exceeded Scope of Consent to Perform Medical Treatment

[1] FORM

[The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with the general points and authorities set forth in *§ 21.21*].

DEFENDANT IS LIABLE FOR BATTERY BECAUSE DEFENDANT EXCEEDED HIS/HER SCOPE OF CONSENT TO PERFORM MEDICAL TREATMENT.

A. Willful Disregard of Conditional Consent. An intent to willfully disregard plaintiff's conditional consent exists if a physician performed a type of treatment other than the one for which the patient gave permission (*Ashcraft v. King (1991) 228 Cal. App. 3d 604, 613, 278 Cal. Rptr. 900*).

[*Optional*] **B. Removing Organ Beyond Scope of Consent.** Consent to an operation carries with it a consent to remove an organ or body tissue that is a normal incident to the operation, but such a consent does not carry with it permission to remove a different organ or one that is not normally excised as an incident to the operation consented to (*Rainer v. Community Mem'l Hosp. (1971) 18 Cal. App. 3d 240, 256, 95 Cal. Rptr. 901*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of plaintiff's contention that defendant is liable for battery because he or she exceeded his or her scope of consent to perform medical treatment. Optional Paragraph B is for use if the physician's conduct involved the removal of an organ beyond the scope of the patient's consent. The arguments supported by this memorandum may be raised in an action for damages for battery.

These points and authorities may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the commission of a battery. The points and authorities set forth in this form

may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a description of the medical treatment in question and a discussion of any evidence showing that the additional treatment was beyond the scope of the patient's conditional consent.

[3] Discussion of Authorities

[a] Willful Disregard of Conditional Consent

In ***Ashcraft v. King*** *(1991) 228 Cal. App. 3d 604, 278 Cal. Rptr. 900* , plaintiff brought a medical-malpractice action that included a cause of action for battery, based on the surgeon's use of hospital-supply blood in an operation to which she had consented provided only blood donated by her family would be used. Several years after the operation, the hospital discovered that the blood used in plaintiff's surgery contained blood from an HIV-positive donor, and plaintiff's blood subsequently tested HIV-positive. The trial court granted defendant's motion for nonsuit on the battery cause of action. The jury found in favor of the defendant on the cause of action in negligence, and plaintiff appealed.

The court of appeal reversed with respect to the battery cause of action, affirming the judgment in other respects (*228 Cal. App. 3d 604, 608, 617)* . The court noted that one who gives informed consent to a surgery cannot recover for resulting harm under a theory of battery (*228 Cal. App. 3d 604, 609)* . However, a person may place conditions on the consent, and the rule of conditional consent has been applied in battery actions against physicians and surgeons. The court stated that plaintiff's claim of battery rested on the theory that although the operation was consented to, the consent was subject to a specific condition: only family-donated blood would be used. If plaintiff could establish the existence of this condition and its breach by the physician, she would establish a battery (*228 Cal. App. 3d 604, 610)* . The court stated that to avoid a nonsuit, plaintiff had to introduce evidence of a battery, which is any intentional, unlawful, and harmful contact by one person with the person of another. A harmful contact, intentionally done, is the essence of a battery; a contact is "unlawful" if it is unconsented to. In order to recover on a theory of battery, plaintiff had to establish: (1) her consent to the operation was conditioned on the use of only family-donated blood; (2) defendant intentionally violated this condition while performing the operation; and (3) plaintiff suffered harm as a result of defendant's violation of the condition (*228 Cal. App. 3d 604, 611)* . The court concluded that plaintiff's evidence was sufficient to meet this test, and therefore to overcome the motion for nonsuit (*228 Cal. App. 3d 604, 612)* . The court stated that in an action for civil battery, the element of intent is satisfied if the evidence shows that defendant acted with a "willful disregard" of the plaintiff's rights. In the context of battery in a medical procedure, if the patient gives permission to perform one type of treatment and the doctor performs another, the requisite element of deliberate intent to deviate from the consent given is present. The court observed that evidence in the instant case showed that defendant had permission to operate on condition he use family-donated blood, but that he operated using blood from the hospital's general supply. It stated that this evidence was sufficient to allow the jury to infer an intent to willfully disregard plaintiff's conditional consent. The court found no support for the defendant's assertion that even if plaintiff's consent to surgery was conditioned on the use of family-donated blood, his violation of that condition did not result in a battery because the condition related only to a "collateral matter" (*228 Cal. App. 3d 604, 613)* . The court also rejected defendant's contention that if the trial court erred, the error was harmless; the trial court's failure to give instructions on battery was not cured by giving instructions on negligence, especially when the instructions omitted plaintiff's theory of conditional consent (*228 Cal. App. 3d 604, 615-616)* .

[b] Removing Organ Beyond Scope of Consent

Plaintiff in ***Rainer v. Community Mem'l Hosp.*** *(1971) 18 Cal. App. 3d 240* , filed an action for malpractice claiming damages as the result of several operations performed by plaintiff. Plaintiff alleged that she only consented to the repair of an abnormal passage (fistula) and not to removal of an organ (coccyx); defendant admitted that there was not specific consent to remove the coccyx but claimed that such removal was incident to the fistula repair. Plaintiff appealed from a

judgment in defendant's favor.

Concerning the issue of plaintiff's consent, the court of appeal held that the foreclosure of that issue from the jury's determination required reversal of the judgment. The court noted that consent to an operation carries with it a consent to remove an organ or body tissue that is a normal incident to the operation [*see Bradford v. Winter (1963) 215 Cal. App. 2d 448, 454, 30 Cal. Rptr. 243]* , but such a consent does not carry with it permission to remove a different organ or one that is not normally excised as an incident to the operation consented to [*see Hundley v. St. Francis Hosp. (1958) 161 Cal. App. 2d 800, 803, 806, 327 P.2d 131* (discussed in *§ 21.25[4*][a]); *Valdez v. Percy (1939) 35 Cal. App. 2d 485, 491, 96 P.2d 142* (discussed in *§ 21.23[3][a]*)] (*18 Cal. App. 3d 240, 256)* .

[4] Additional Authorities

[a] Exceeding Scope of Consent

In *Hundley v. St. Francis Hosp. (1958) 161 Cal. App. 2d 800, 327 P.2d 131* , an action for malpractice and technical battery, there was evidence that plaintiff did not consent to the removal of organs, and uncontradicted evidence established that the removal of the organs was not necessary. The court of appeal affirmed the judgment in plaintiff's favor, commenting that surgical removal of portions of the body not authorized by the patient is actionable unless, in the course of the authorized surgery, a condition arose or was disclosed that necessitated further surgery (*161 Cal. App. 2d 800, 806)* .

The facts and procedural background of *Valdez v. Percy (1939) 35 Cal. App. 2d 485, 96 P.2d 142* , are discussed in *§ 21.23[3][a]*. The court held that the signing of a general consent agreement did not constitute consent to perform operations other than the one for which defendant was engaged to perform unless necessity for the additional operations arose during the authorized operation (*35 Cal. App. 2d 485, 491)* .

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2-21 California Points & Authorities § 21.26

§ 21.26 Supporting Contention That Defendant Is Liable for Battery--Consent for Medical Treatment Vitiated When Treatment Not for Therapeutic Purpose

[1] FORM

[The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with the general points and authorities in *§ 21.21*].

PLAINTIFF'S CONSENT DOES NOT NEGATE DEFENDANT'S LIABILITY FOR BATTERY BECAUSE DEFENDANT INTENTIONALLY MISREPRESENTED TO PLAINTIFF THAT HIS/HER CONDUCT WAS THERAPEUTICALLY NECESSARY WHEN IT IN FACT HAD A NONTHERAPEUTIC PURPOSE.

Consent Vitiated by Nontherapeutic Purpose. A patient's consent to harmful or offensive touching as a therapeutic treatment is vitiated if the consent was given pursuant to the defendant's intentional misrepresentation that the touching was therapeutically necessary and the defendant actually administered such touching with improper ulterior and nontherapeutic motives (*Rains v. Superior Court (1984) 150 Cal. App. 3d 933, 941, 198 Cal. Rptr. 249*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of plaintiff's contention that plaintiff's consent to specified harmful or offensive touching for therapeutic purposes is vitiated by the fact that defendant actually administered the touching for improper ulterior and nontherapeutic motives. The arguments supported by this memorandum may be raised in an action for damages for battery.

These points and authorities may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the commission of battery. The points and authorities in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of

law stated, including facts and arguments showing the improper nontherapeutic purpose for which defendant engaged in his or her behavior or the ways in which this behavior failed to serve a therapeutic purpose.

[3] Discussion of Authorities

[a] Consent Vitiated by Nontherapeutic Purpose

In ***Rains v. Superior Court*** *(1984) 150 Cal. App. 3d 933, 198 Cal. Rptr. 249* , plaintiffs were patients in a residential group psychiatric treatment program maintained by defendants that included a technique sometimes referred to as "sluggo therapy," which involved the infliction of physical violence on patients for purportedly therapeutic purposes. Plaintiffs sued defendants for battery and other causes of action. Plaintiffs' second amended complaint conceded that they had consented to the use of physical violence against them as an aspect of psychiatric treatment. The trial court sustained defendants' demurrer to the cause of action for battery without leave to amend. Plaintiffs subsequently filed a motion for reconsideration and leave to file a third amended complaint, which alleged that the real purpose for which defendants had inflicted violence on plaintiffs was to subjugate them and control their behavior to defendants' personal advantage. The trial court allowed the proposed third amended complaint, but struck the battery count. Plaintiffs petitioned for a writ of mandate.

The court of appeal granted the writ. The court stated that whether consent to an act otherwise constituting battery is vitiated by fraud or mistake depends on whether the fraud or mistake extends to the essential character of the act itself, rather than to some collateral matter that merely operates as an inducement (*150 Cal. App. 3d 933, 939)* . The court stated that although there appeared to be no California case on point, out-of-state cases supported a determination that a physician's intentional misrepresentation that an otherwise offensive touching is medically necessary vitiates the consent given in ignorance of the true nontherapeutic character of the touching (*150 Cal. App. 3d 933, 940)* . Thus, if a physician intentionally misrepresented to a patient that an unneeded operation was necessary for the sole secret purpose of generating a fee, the consent so obtained would be legally ineffective. The court concluded that the therapeutic versus nontherapeutic purpose of touching by a psychiatrist goes to the "essential character of the act itself" and thus vitiates consent obtained by fraud as to that character (*150 Cal. App. 3d 933, 941)* . The court rejected defendants' argument that according to *Cobbs v. Grant (1972) 8 Cal. 3d 229, 239-241, 104 Cal. Rptr. 505, 502 P.2d 1* , consent could only be vitiated when the act performed was qualitatively different from the act consented to. The court stated that *Cobbs* required only an intentional deviation from the consent given for the consent to be vitiated, and that such an intentional deviation exists when a physician intends to perform treatment for a nontherapeutic purpose after consent was given only for a therapeutic purpose (*150 Cal. App. 3d 933, 941-942)* .

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2-21 California Points & Authorities § 21.27

§ 21.27 Supporting Contention That Defendant Is Liable for Sexual Battery [Civ. Code § 1708.5]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial appellate brief.*]

DEFENDANT IS LIABLE FOR SEXUAL BATTERY WITHIN THE MEANING OF *CIVIL CODE SECTION 1708.5*, BECAUSE HIS/HER CONDUCT AS ALLEGED CONSTITUTES ACTS RESULTING IN SEXUALLY OFFENSIVE CONDUCT WITH PLAINTIFF AS DESCRIBED IN *CIVIL CODE SECTION 1708.5(a)*.

[*EITHER*]

A. Contact With Intimate Part of Another. A person commits a sexual battery who acts with the intent to cause a harmful or offensive contact with an intimate part of another, and a sexually offensive contact with that person directly or indirectly results (*Civ. Code § 1708.5(a)(1)*).

[*AND/OR*]

B. Contact by Use of Intimate Part. A person commits a sexual battery who acts with the intent to cause a harmful or offensive contact with another by use of his or her intimate part, and a sexually offensive contact with that person directly or indirectly results (*Civ. Code § 1708.5(a)(2)*).

[*AND/OR*]

C. Imminent Apprehension of Conduct. A person commits a sexual battery who acts to cause an imminent apprehension of the conduct described in *Civil Code section 1708.5(a)(1)* or (2), and a sexually offensive contact with that person directly or indirectly results (*Civ. Code § 1708.5(a)(3)*).

[*CONTINUE*]

D. "Intimate Part" Defined. "Intimate part" means the sexual organ, anus, groin, or buttocks of any person, or the breast of a female (*Civ. Code § 1708.5(d)*).

E. "Offensive Contact" Defined. "Offensive contact" means contact that offends a reasonable sense of personal dignity (*Civ. Code § 1708.5(f)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of plaintiff's contention that defendant is liable for sexual battery [*see Civ. Code § 1708.5*].

These points and authorities may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the commission of a sexual battery. They may also be adopted for use in a trial or appellate brief.

Counsel should insert argument in this form, and in any other relevant points and authorities combined with this form, to show the relationship between the facts of the case and the points of law stated. For example, counsel should show that the conduct alleged to have been committed by defendant is proscribed under *Civ. Code § 1708.5*.

[b] Cause of Action for Sexual Battery

A person who commits a sexual battery on another is liable to that person for damages, including, but not limited to, general damages, special damages, and punitive damages [*Civ. Code § 1708.5(b)*]. The court in an action pursuant to *Civ. Code § 1708.5* may award equitable relief, including, but not limited to, an injunction, costs, and any other relief the court deems proper [*Civ. Code § 1708.5(c)*]. The rights and remedies provided in *Civ. Code § 1708.5* are in addition to any other rights and remedies provided by law [*Civ. Code § 1708.5(e)*].

[c] Related Pleading and Practice Forms

For discussion and forms regarding statutory sexual battery, see California Forms of Pleading and Practice, Ch. 58, *Assault and Battery* (Matthew Bender).

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2-21 California Points & Authorities § 21.28

§ 21.28 Supporting Contention That Defendant Is Liable for Tort of Stalking

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial appellate brief*]

DEFENDANT IS LIABLE FOR THE TORT OF STALKING WITHIN THE MEANING OF *CIVIL CODE SECTION 1708.7* BECAUSE HIS OR HER CONDUCT AS ALLEGED CONSTITUTES A PATTERN OF CONDUCT THE INTENT OF WHICH WAS TO FOLLOW, ALARM, OR HARASS PLAINTIFF.

A. Pattern of Conduct to Stalk Another. A person is liable for the tort of stalking by engaging in a pattern of conduct the intent of which is to follow, alarm, or harass another (*Civ. Code § 1708.7(a)(1)*). A "pattern of conduct" means conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of "pattern of conduct" (*Civ. Code § 1708.7(b)(1)*).

B. Reasonable Fear for Safety. A person is liable for the tort of stalking when, as a result of the person's pattern of conduct, another reasonably fears for his or her safety, or the safety of an immediate family member (*Civ. Code § 1708.7(a)(2)*).

[*Optional*] **C. "Immediate Family" Defined.** "Immediate family" means a spouse, parent, child, any person related by consanguinity or affinity within the second degree, or any person who regularly resides, or, within the six months preceding any portion of the pattern of conduct, regularly resided, in the same household (*Civ. Code § 1708.7(a)(2)*).

[*EITHER*]

D. Credible Threat Made and Not Abated After Demand to Cease. A person is liable for the tort of stalking if he or she, as a part of the pattern of conduct intended to follow, harass, or alarm, made a credible threat with the intent to

place another in reasonable fear for his or her safety, or the safety of an immediate family member and, on at least one occasion, the person who is the target of the threat clearly and definitively demanded that the person cease and abate his or her pattern of conduct and the person persisted in his or her pattern of conduct (*Civ. Code § 1708.7(a)(3)(A)*).

E. "Credible Threat" Defined. "Credible threat" means a verbal or written threat, including that communicated by means of an electronic communication device, or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct, made with the intent and apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family (*Civ. Code § 1708.7(b)(2)*).

[*AND/OR*]

F. Violation of Restraining Order. A person is liable for the tort of stalking for having violated a restraining order, including, but not limited to, any order issued pursuant to *Code of Civil Procedure Section 527.6*, prohibiting any act described in *Civil Code Section 1708.7(a)* (*Civ. Code § 1708.7(a)(3)(B)*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of plaintiff's contention that defendant is liable for the tort of stalking [*see Civ. Code § 1708.7*].

These points and authorities may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the pattern of conduct constituting the tort of stalking. They may also be adopted for use in a trial or appellate brief.

Counsel should insert argument in this form, and in any other relevant points and authorities combined with this form, to show the relationship between the facts of the case and the points of law stated. For example, counsel must support plaintiff's allegations of defendant's pattern of conduct with independent corroborating evidence [*see Civ. Code § 1708.7(a)(1)*].

[b] Cause of Action for Tort of Stalking

A person who commits the tort of stalking on another is liable to that person for damages, including, but not limited to, general damages, special damages, and punitive damages [*Civ. Code § 1708.7(c)*]. The court in an action under *Civ. Code § 1708.7* may grant equitable relief, including, but not limited to, an injunction [*Civ. Code § 1708.7(d)*]. The rights and remedies provided in *Civ. Code § 1708.7* are cumulative and in addition to any other rights and remedies provided by law [*Civ. Code § 1708.7(e)*]. *Civ. Code § 1708.7* shall not be construed to impair any constitutionally protected activity, including, but not limited to, speech, protest, and assembly [*Civ. Code § 1708.7(f)*].

[c] Related Pleading and Practice Forms

For discussion and forms regarding the statutory tort of stalking, see California Forms of Pleading and Practice, Ch. 58, *Assault and Battery* (Matthew Bender).

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2-21 California Points & Authorities § 21.29

§ 21.29 Supporting Contention That Defendant Is Liable for Tort of Domestic Violence

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT IS LIABLE FOR THE TORT OF DOMESTIC VIOLENCE UNDER *CIVIL CODE SECTION 1708.6* BECAUSE DEFENDANT'S CONDUCT AS ALLEGED CONSTITUTES DOMESTIC ABUSE.

A. Tort of Domestic Violence. A person is liable for the tort of domestic violence if the plaintiff proves both: (1) that injury resulting from abuse, as defined in *Penal Code Section 13700(a)*, was inflicted on the plaintiff; and (2) that the abuse was committed by the defendant, a person having a relationship with the plaintiff as defined in *Penal Code section 13700(b)* (*Civ. Code § 1708.6*).

B. Definition of Abuse. Abuse means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or to another (*Penal Code § 13700(a)*).

C. Definition of Domestic Violence. Domestic violence means abuse commit ted against an adult or a fully emancipated minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship (*Penal Code § 13700(b)*).

D. Definition of Cohabitant. A "cohabitant" is one of two unrelated adult persons living together for a substantial period of time, resulting in some permanency of relationship. Factors that may determine whether persons are cohabiting include, but are not limited to: (1) sexual relations between the parties while sharing the same living quarters; (2) sharing of income or expenses; (3) joint use or ownership of property; (4) whether the parties hold themselves out as husband and wife; (5) the continuity of the relationship; and (6) the length of the relationship (*Penal Code § 13700(b)*).

[Optional] **E. Damages Recoverable for Abuse Occurring More Than Three Years Before Suit Filed.** Although the three-year statute of limitations of *Code of Civil Procedure Section 340.15(a)* uses the "last act" of domestic violence as a trigger, a plaintiff may recover for domestic violence occurring more than three years before suit is brought if plaintiff proves a continuing course of abusive conduct and files suit within three years of the last act (*Pugliese v. Superior Court (2007) 146 Cal. App. 4th 1444, 1451, 53 Cal. Rptr. 3d 681*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the plaintiff's contention that the defendant is liable for the tort of domestic violence [*see Civ. Code 1708.6*].

These points and authorities may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of domestic violence. They may also be adopted for use in a trial or appellate brief.

Counsel should insert argument into this form, and in any other relevant points and authorities combined with this form, to show the relationship between the facts of the case and the points of law stated.

[b] Cause of Action of Domestic Violence

A person is liable for the tort of domestic violence if the plaintiff proves both of the following elements [*Civ. Code 1708.6(a)*]:

- The infliction of injury on the plaintiff resulting from abuse, defined by *Penal Code § 13700(a)* as intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another; and

- That the abuse was committed by the defendant, a person having a relationship with the plaintiff as defined in *Penal Code § 13700(b)*.

Domestic violence means abuse committed against an adult or a fully emancipated minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship. A "cohabitant" is one of two unrelated adult persons living together for a substantial period of time, resulting in some permanency of relationship. Factors that may determine whether persons are cohabiting include, but are not limited to: (1) sexual relations between the parties while sharing the same living quarters; (2) sharing of income or expenses; (3) joint use or ownership of property; (4) whether the parties hold themselves out as husband and wife; (5) the continuity of the relationship; and (6) the length of the relationship [*Penal Code § 13700(b)*].

A person who commits an act of domestic violence is liable to the victim for damages, including, but not limited to, general damages, special damages, and punitive damages [*Civ. Code 1708.6(b)*]. In a domestic violence action, the court, may grant to a prevailing plaintiff equitable relief, an injunction, costs, and any other relief that the court deems proper, including reasonable attorney's fees [*Civ. Code 1708.6(c)*].

An action based on the tort of domestic violence must be brought within three years after the date of the last act of domestic violence by the defendant against the plaintiff or within three years after the date that the plaintiff discovers or reasonably should have discovered that an injury or illness resulted from an act of domestic violence by the defendant against the plaintiff [*Civ. Code § 1708.6(e)*; *Code Civ. Proc. § 340.15*].

[c] Related Pleading and Practice Forms

For discussion and forms regarding the statutory tort of domestic violence, see California Forms of Pleading and Practice, Ch. 58, *Assault and Battery* (Matthew Bender).

[3] Discussion of Authorities

[a] Damages Recoverable for Abuse Occurring More Than Three Years Before Suit Filed

In *Pugliese v. Superior Court (2007) 146 Cal. App. 4th 1444, 53 Cal. Rptr. 3d 681* , plaintiff filed suit against her husband in April 2004 for assault and battery, intentional infliction of emotional distress, and civil rights violations based on a pattern of physical and mental abuse beginning shortly after their marriage in 1989. Plaintiff alleged that the physical abuse ended in April 2001, although the emotional abuse continued until April 2004. Defendant filed a motion in limine to exclude evidence of any assaults and batteries that occurred more than three years before suit was filed, arguing that plaintiff could not recover damages for acts occurring before that time because the three-year limitations period of *Code Civ. Proc. § 340.15* barred recovery. The trial court agreed and granted the motion. Plaintiff sought a writ overturning the trial court's order.

The court of appeal granted the writ of mandate. The court first held that plaintiff's assault and battery claims were barred by the applicable two-year statute of limitations (*146 Cal. App. 4th 1444, 1450)* . However, the court also noted that while plaintiff did not specifically allege a cause of action under the domestic abuse statute, *Civ. Code § 1708.6*, her allegations described conduct that constituted abuse under that statute. As such, the three-year limitations period of *Code Civ. Proc. § 340.15* applied to determine whether she had stated a timely claim for relief under the domestic abuse statute. Because suit was filed within three years of the date that the last act of physical domestic abuse was alleged to have occurred in April 2001, the domestic abuse cause of action was timely filed (*146 Cal. App. 4th 1444, 1450-1451)* . The court then held that plaintiff was entitled to seek damages for acts of abuse that occurred more than three years before suit was filed. The court concluded that by using the "last act" of domestic violence as the trigger to begin the limitations period, the Legislature adopted a continuing torts theory under which a domestic violence victim could recover damages for all acts of domestic violence occurring during the marriage, provided that the victim proves a continuous course of abusive conduct and files suit within three years of the last act of abuse (*146 Cal. App. 4th 1444, 1451)* . The court noted statements in the legislative history of *Civ. Code § 1708.6* suggesting that the Legislature intended to provide a mechanism for victims to recover completely for the harm caused by domestic violence and that they understood the tort of domestic violence to encompass a series of acts and an oppressive, continuous atmosphere of control (*146 Cal. App. 4th 1444, 1455)* .

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CHAPTER 21 ASSAULT AND BATTERY
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2-21 California Points & Authorities § 21.30

§ 21.30 Supporting Contention That Defendant Is Liable for Assault and Battery--Defendant's Acts Did Not Constitute Self-Defense Because Plaintiff's Acts Were Not Violent or Hostile

[1] FORM

[The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with the general points and authorities set forth in *§ 21.20* and/or *21.21*].

DEFENDANT IS LIABLE FOR ASSAULT AND BATTERY BECAUSE PLAINTIFF'S ACTS WERE NOT HOSTILE OR VIOLENT AND THEREFORE, DEFENDANT DID NOT ACT IN SELF-DEFENSE.

Failure to Establish Prima Facie Case of Self-Defense. A prima facie case of self-defense is not established unless defendant shows a specific overt act of hostility or threat of violence on the part of plaintiff that would justify the actions of defendant (*Villines v. Tomerlin (1962) 206 Cal. App. 2d 448, 456, 23 Cal. Rptr. 617*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of plaintiff's contention that defendant is liable for assault and battery when defendant failed to establish a prima facie case of self-defense. The argument supported by this memorandum may be raised in an action for damages for assault and battery.

These points and authorities may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of self-defense. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a description of the act in question and a discussion of any facts showing that plaintiff did not act in a violent or hostile way so as to justify defendant's act.

[3] Discussion of Authorities

[a] Failure to Establish Prima Facie Case of Self-Defense

Plaintiff in ***Villines v. Tomerlin*** *(1962) 206 Cal. App. 2d 448* , filed an action for damages for assault and battery against defendant for allegedly pushing plaintiff and injuring him. On the night in question, plaintiff became intoxicated at defendant's bar and was asked to leave by defendant. Plaintiff proceeded to leave after apologizing to defendant and shaking his hand. On route to a waiting cab, plaintiff slammed a glass door causing defendant to shout at him. Defendant then followed plaintiff on his way to the cab and when he caught plaintiff he shoved him. Plaintiff fell to the ground and severely injured an ankle. Defendant appealed from a judgment for plaintiff.

The court of appeal affirmed the judgment, holding in part, that because defendant did not establish a prima facie case of self-defense, testimony of prior and collateral acts of misconduct by plaintiff could not be admitted into evidence. The court stated that unless the defendant can show a specific overt act of hostility or threat of violence on the part of an aggressor plaintiff tending to justify the actions of defendant as defense of self or property, and thereby establishing a prima facie case of self-defense, testimony of prior acts of plaintiff could not be admitted into evidence. Because the evidence did not depict defendant as an innocent person suddenly confronted with imminent danger of great bodily harm or destruction of his or her property at the hands of plaintiff, defendant failed to establish a prima facie case of self-defense (*206 Cal. App. 2d 448, 456)* .

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2-21 California Points & Authorities § 21.31

§ 21.31 Supporting Contention That Defendant Is Liable for Assault and Battery--Defendant Used Unreasonable Force in Defense of Himself or Herself

[1] FORM

[The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with the general points and authorities set forth in *§ 21.20* and/or *21.21*].

DEFENDANT IS LIABLE FOR ASSAULT AND BATTERY BECAUSE HE/SHE USED UNREASONABLE FORCE IN DEFENSE OF HIMSELF/HERSELF.

Use of Unreasonable Force. A defendant's actions do not constitute self-defense if the force used by the defendant was more than would appear reasonably necessary judged by the situation as it reasonably appeared to the defendant at the time of the assault (*Lopez v. Surchia (1952) 112 Cal. App. 2d 314, 318-319, 246 P.2d 111*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of plaintiff's contention that defendant is liable for assault and battery because defendant used unreasonable force in defense of himself or herself. The argument supported by this memorandum may be raised in an action for damages for assault and battery in response to defendant's contention that he or she is not liable because he or she acted in self-defense.

These points and authorities may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of self-defense. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a description of act in question and a discussion of any facts showing that defendant used unreasonable force in defense of himself or herself.

[3] Discussion of Authorities

[a] Use of Unreasonable Force

The facts and procedural background of ***Lopez v. Surchia*** *(1952) 112 Cal. App. 2d 314, 246 P.2d 111* , are discussed in *§ 21.21[3][c]*. The court held that the firing of the gun was unlawful because the evidence did not warrant a finding that defendant had cause to believe that his son was in imminent danger of death or great bodily harm. There was no evidence that the boy who had fought with defendant's son was armed in any way; on the contrary, the conflict appeared to be nothing more than the not unusual fist fight between men or boys (*112 Cal. App. 2d 314, 317-319)* . The court, therefore, held that the force used was more than would appear reasonably necessary judged by the situation as it reasonably appeared to defendant at the time of the assault (*112 Cal. App. 2d 314, 317-319)* .

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2-21 California Points & Authorities § 21.32

§ 21.32 Supporting Contention That Defendant Is Liable for Assault and Battery--Defendant Used Unreasonable Force in Defense of His or Her Property

[1] FORM

[The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with the general points and authorities in *§ 21.20* and/or *21.21*].

DEFENDANT IS LIABLE FOR ASSAULT AND BATTERY BECAUSE HE/SHE USED UNREASONABLE FORCE IN DEFENSE OF HIS/HER PROPERTY.

No Privilege for Unreasonable Force. The actor is not privileged to use any means of defending his or her land or chattels from intrusion that are intended or likely to cause bodily harm or confinement in excess of that which the actor correctly or reasonably believes to be necessary to prevent or terminate the other's intrusion (*Deevy v. Tassi (1942) 21 Cal. 2d 109, 130 P.2d 389*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a plaintiff's contention that defendant is liable for assault and battery because defendant used unreasonable force in defense of his or her property. The arguments supported by this memorandum may be raised in an action for damages for assault and battery in response to, or in anticipation of, defendant's argument that he or she is not liable because he or she was acting in defense of his or her property.

These points and authorities may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of defense of property. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a description of the act in question and a discussion of any facts showing that

the force defendant used in defense of his or her property was unreasonable.

[3] Discussion of Authorities

[a] No Privilege for Unreasonable Force

In ***Deevy v. Tassi*** *(1942) 21 Cal. 2d 109, 130 P.2d 389* , plaintiffs filed an action for assault and battery that arose, in part, out of an altercation between one of the plaintiffs and one of the defendants. The altercation was over defendant's right, under a chattel mortgage, to take possession of cattle that were in plaintiff's possession. In attempting to recover the cattle, defendant struck plaintiff with a leather lash and rode a horse against her and over her. Defendants appealed from a judgment in favor of plaintiffs.

The Supreme Court affirmed the judgment, stating that the attack with the leather lash and the horse on plaintiff, a 55-year-old woman, by defendant, a 180-pound man, was shockingly out of proportion to that which would have been reasonably necessary to offset or interrupt her efforts to control the herd of cattle. The rule in such a case is that the actor is not privileged to use any means of defending his or her land or chattels from intrusion that are intended or likely to cause bodily harm or confinement in excess of that which the actor correctly or reasonably believes to be necessary to prevent or terminate the other's intrusion (*21 Cal. 2d 109)* . Defendant's use of force, therefore, was not privileged.

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2-21 California Points & Authorities § 21.33

§ 21.33 Supporting Contention That Defendant Is Liable for Assault and Battery--Defendant Did Not Have Right to Forcibly Retake Chattel Because Plaintiff Had Rightfully Acquired Possession

[1] FORM

[The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with the general points and authorities in *§ 21.20* and/or *21.21*].

DEFENDANT IS LIABLE FOR ASSAULT AND BATTERY BECAUSE PLAINTIFF HAD RIGHTFULLY ACQUIRED POSSESSION OF THE CHATTEL AND THEREFORE, DEFENDANT DID NOT HAVE THE RIGHT TO FORCIBLY RETAKE IT.

No Right to Forcibly Retake Chattel if Possession Rightfully Acquired. The use of force against another for the purpose of recapture of a chattel, which the other is tortiously withholding from the actor, is not privileged if the other's possession was rightfully acquired (*Deevy v. Tassi (1942) 21 Cal. 2d 109, 130 P.2d 389*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of plaintiff's contention that defendant is liable for assault and battery because plaintiff had rightfully acquired possession of the chattel in question and therefore, defendant did not have the right to forcibly retake it. The arguments supported by this memorandum may be raised in an action for damages for assault and battery in response to, or in anticipation of, defendant's argument that he or she had the right to use force to retake a chattel that belonged to him or her.

These points and authorities may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of defense of property. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of

law stated. Thus, counsel should include a description of the act in question and a discussion of any facts showing that the chattel was rightfully acquired by plaintiff.

[3] Discussion of Authorities

[a] No Right to Forcibly Retake Chattel if Possession Rightfully Acquired

The facts and procedural background of ***Deevy v. Tassi*** *(1942) 21 Cal. 2d 109, 130 P.2d 389* , are discussed in *§ 21.32[3][a]*. The Supreme Court held that the assumed fact that plaintiffs were in default under the terms of the chattel mortgage and that defendant had a legal right to acquire possession of some or even all of the cattle he attempted to take did not justify the commission of assault and battery in effecting recaption. The Court stated that the use of force against another for the purpose of recaption of a chattel, which the other is tortiously withholding from the actor, is not privileged if the other's possession was rightfully acquired (*21 Cal. 2d 109)* .

[4] Additional Authorities

[a] No Right to Forcibly Retake Chattel if Possession Rightfully Acquired

In *Rogers v. Kabakoff (1947) 81 Cal. App. 2d 487, 184 P.2d 312* , an action for assault and battery, defendant forcibly took his car from the possession of a parking attendant after a disagreement over the price of the parking. Defendant urged that his conduct was not unlawful because plaintiff made an excessive and unlawful charge for parking defendant's car and was unlawfully withholding the car. The court of appeal ruled that the fact that defendant was entitled to the right of possession of the automobile did not entitle him to take the same from respondent, who was in the actual rightful possession, by force or violence (*81 Cal. App. 2d 487, 490)* .

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2-21 California Points & Authorities § 21.34

§ 21.34 Supporting Contention That Defendant Is Liable for Assault and Battery--Defendant Failed to Warn Plaintiff, a Nonviolent Trespasser, Before Forcibly Ejecting Him or Her

[1] FORM

[The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with the general points and authorities in *§ 21.20* and/or *21.21*].

DEFENDANT IS LIABLE FOR ASSAULT AND BATTERY BECAUSE PLAINTIFF, A NONVIOLENT TRESPASSER, WAS NOT REQUESTED OR WARNED BY DEFENDANT TO LEAVE PRIOR TO BEING FORCIBLY EJECTED BY DEFENDANT.

Warning Required to Eject Nonviolent Trespasser. A property owner should request or warn a trespasser to leave before forcibly ejecting him or her if the trespasser is not engaged in a violent act that would call for his or her immediate forcible ejectment (*see Chapell v. Schmidt (1894) 104 Cal. 511, 513-514, 38 P 892*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of plaintiff's contention that defendant is liable for assault and battery because plaintiff, a nonviolent trespasser, was not requested or warned by defendant to leave prior to being forcibly ejected by defendant. The arguments supported by this memorandum may be raised in an action for damages for assault and battery in response to, or in anticipation of, defendant's contention that he or she had the right to forcibly eject plaintiff from his or her land.

These points and authorities may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of defense of property. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of

law stated. Thus, counsel should include a description of the act in question and a discussion of any facts showing that plaintiff was a nonviolent trespasser and that defendant failed to request him or her to leave prior to forcibly ejecting him or her.

[3] Discussion of Authorities

[a] Warning Required to Eject Nonviolent Trespasser

Plaintiff in ***Chapell v. Schmidt*** *(1894) 104 Cal. 511,* , filed an action through his guardian to recover damages for an assault and battery committed by defendant. Defendant had observed plaintiff, an elderly man, picking flowers in defendant's garden. Without giving any request to leave or warning to plaintiff, defendant rushed into the garden and beat plaintiff very severely, causing injuries from which plaintiff never recovered. Defendant appealed from a judgment in favor of plaintiff.

The Supreme Court affirmed the judgment, holding that plaintiff was not using such force and violence as would have justified defendant to assault and beat him without any warning whatsoever (*104 Cal. 511, 514)* .

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2-21 California Points & Authorities § 21.35

§ 21.35 Supporting Contention That Defendant Is Liable for Assault and Battery--Defendant Directed Intentional Tort Specifically at Public Employee in Performance of His or Her Duties

[1] FORM

[The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with the general points and authorities in *§ 21.20* and/or *21.21*].

DEFENDANT IS LIABLE FOR ASSAULT AND BATTERY BECAUSE DEFENDANT DIRECTED AN INTENTIONAL TORT SPECIFICALLY AT A PUBLIC EMPLOYEE IN THE PERFORMANCE OF HIS/HER DUTIES.

A. Intentional Tort Specifically Directed at Public Employee. If defendant directs an intentional tort, such as an assault or battery, specifically against a public employee with the intention of interfering with or preventing the performance of the employee's duties, he or she is liable for the injuries caused to such employee because this risk is not one that the public employee necessarily assumes (*Krueger v. City of Anaheim (1982) 130 Cal. App. 3d 166, 171-172, 181 Cal. Rptr. 631*).

[*Optional*] **B. Injury to Peace Officer, Firefighter, or Emergency Medical Personnel.** Notwithstanding statutory or decisional law to the contrary, any person is responsible not only for the results of that person's willful acts causing injury to a peace officer, firefighter, or any emergency medical personnel employed by a public entity, but also for any injury occasioned to that person by the want of ordinary care or skill in the management of the person's property or person when the conduct causing the injury was intended to injure the peace officer, firefighter, or emergency medical personnel (*Civ. Code § 1714.9(a)(3)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that the defendant is liable for assault and battery because he or she directed the assault and battery specifically at a public employee in the performance of his

or her duties. Optional Paragraph B may be used in support of a party's contention that a defendant is liable for injury to a peace officer, firefighter, or emergency medical personnel employed by a public entity under the circumstances in *Civ. Code § 1714.9(a)(3).*

The arguments supported by this memorandum may be raised in an action for damages for assault and battery in response to, or in anticipation of, defendant's contention that liability is precluded by the "firefighter's rule" [*see § 21.35[3][a]*].

These points and authorities may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the commission of an assault and battery. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should also insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a description of the act in question and a discussion of any facts showing that defendant directed the assault and battery at plaintiff who was a public employee in performance of his or her duties.

[3] Discussion of Authorities

[a] Intentional Tort Specifically Directed at Public Employee

In ***Krueger v. City of Anaheim*** *(1982) 130 Cal. App. 3d 166, 181 Cal. Rptr. 631* , plaintiff brought an action for injuries received during his encounter with stadium security guards. One of the guards and the city cross complained for damages, seeking reimbursement for workers' compensation payments made to the guard. The trial court granted plaintiff's motion for summary judgment, holding that the "fireman's rule" prevented recovery for any of the security guard's injuries.

The court of appeal reversed, stating that the "fireman's rule," which provides that firemen and policemen, whose occupations by their very nature expose them to particular risks of harm, cannot complain of negligence because they knowingly confront the hazard, is not applicable to cases in which the defendant directs an intentional tort specifically at a public employee in performance of his or her duties. The court held that the person who intentionally interferes with a fireman or policeman in the performance of his or her duties should be liable for the injuries that the person may cause because this risk is not one that the public employee necessarily assumes (*130 Cal. App. 3d 166, 171-172)* .

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2-21 California Points & Authorities § 21.36

§ 21.36 Supporting Contention That Defendant Is Liable for Assault and Battery--Defendant at Time of Inflicting Injury to Plaintiff Knew or Should Have Known That Plaintiff Was Peace Officer, Firefighter, or Emergency Medical Personnel Employed by Public Entity [Civ. Code § 1714.9(a)(1)]

[1] FORM

[The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with the general points and authorities in *§§ 21.20* and *21.21*].

DEFENDANT IS LIABLE FOR ASSAULT AND BATTERY BECAUSE PLAINTIFF WAS A _____ [PEACE OFFICER *or* FIREFIGHTER *or* EMERGENCY MEDICAL PERSONNEL] EMPLOYED BY A PUBLIC ENTITY AND DEFENDANT KNEW, OR SHOULD HAVE KNOWN, OF HIS/HER PRESENCE.

A. Liability for Injury to Peace Officer, Firefighter, or Emergency Medical Personnel. Notwithstanding statutory or decisional law to the contrary, any person is responsible not only for the results of that person's willful acts causing injury to a peace officer, firefighter, or any emergency medical personnel employed by a public entity, but also for any injury occasioned to that person by the want of ordinary care or skill in the management of the person's property or person when the conduct causing the injury occurs after the person knows or should have known of the presence of the peace officer, firefighter or emergency medical personnel (*Civ. Code § 1714.9(a)(1)*; *see Gibb v. Stetson (1988) 199 Cal. App. 3d 1008, 1012-1016, 245 Cal. Rptr. 283*).

[*Optional*] **B. Sufficiency of Allegation That Conduct Causing Injury Consisted of "Slumping or Going Limp."** An allegation in a complaint for personal injuries suffered by a court bailiff to the effect that when the judge ordered plaintiff to take defendant in a criminal prosecution into custody, defendant's act of "slumping or going limp" caused plaintiff's knee to be injured is generally sufficient to state cause of action for negligence or assault and battery (*Gibb v. Stetson (1988) 199 Cal. App. 3d 1008, 1012, 245 Cal. Rptr. 283*).

[*Optional*] **C. Defense of Assumption of Risk.** The doctrine of assumption of the risk does not negate the cause of action, because the cause of action is expressly authorized by *Section 1714.9 of the Civil Code* (*Gibb v. Stetson (1988)*

199 Cal. App. 3d 1008, 1012, 245 Cal. Rptr. 283).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a plaintiff's contention that the defendant is liable for assault and battery or negligence because defendant knew at the time of the conduct causing plaintiff's injury that plaintiff was a peace officer, firefighter, or emergency medical personnel employed by a public entity [see *Civ. Code § 1714.9(a)(1)*].

These points and authorities may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the liability of a tortfeasor for injury to a peace officer, firefighter, or emergency medical personnel employed by a public entity. For example, they may be used in opposition to a general demurrer to a complaint by the public employee for damages or to a defense motion for summary judgment predicated on the ground that the action is barred by the fireman's rule. The points and authorities in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should point out that at the time of the injury he or she was a public employee working as a peace officer, firefighter, or emergency medical personnel; describe the tortious conduct in question; and describe his or her injury.

[3] Discussion of Authorities

[a] Liability for Injury to Peace Officer, Firefighter, or Emergency Medical Personnel

Gibb v. Stetson *(1988) 199 Cal. App. 3d 1008, 245 Cal. Rptr. 283* , was an action by a municipal court bailiff for personal injuries sustained when, while taking defendant, who was appearing as the accused in a criminal case, into custody on the judge's order, defendant "slumped and went limp," causing her body weight to fall against plaintiff's right leg and right knee causing injury. From a summary judgment for defendant on the ground the action was barred by the fireman's rule, plaintiff appealed. The appellate court reversed. The court acknowledged that the fireman's rule, which provides that negligence in causing a fire furnishes no basis for liability to a professional firefighter injured fighting the fire, applies to police officers as well (*199 Cal. App. 3d 1008, 1010 n.2, 1013)* and that a deputy marshal acting as a bailiff is a peace officer under *Penal Code § 830.1* (*199 Cal. App. 3d 1008, 1015 n.4*), but held that the case came within the exception to the rule established by *Civ. Code § 1714.9*, in part in Paragraph A (*199 Cal. App. 3d 1008, 1012-1016)* .

[b] Sufficiency of Allegation That Conduct Causing Injury Consisted of "Slumping or Going Limp"

Gibb v. Stetson *(1988) 199 Cal. App. 3d 1008, 245 Cal. Rptr. 283* , is discussed in *§ 21.36[3][a]*. The plaintiff's complaint alleged that defendant's act of "slumping or going limp" caused his knee to be injured. The court said that such an allegation is generally sufficient to state a cause of action for negligence or assault and battery (*199 Cal. App. 3d 1008, 1012)* .

[c] Defense of Assumption of Risk

Gibb v. Stetson *(1988) 199 Cal. App. 3d 1008, 245 Cal. Rptr. 283* , is discussed in *§ 21.36[3][a]*. In reversing the summary judgment for defendant, the court of appeal said that defendant's alternate argument that summary judgment was properly granted because plaintiff assumed the risk that caused the injury was not well taken. After the decision in *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 829, 119 Cal. Rptr. 858, 532 P.2d 1226* , assumption of the risk of the sort

involved here is not a complete defense but is part of the evaluation of comparative negligence. In any event, the doctrine of assumption of the risk could not provide a complete defense, since *Civ. Code § 1714.9* permits the present cause of action, "[n]otwithstanding statutory or decisional law to the contrary" (*199 Cal. App. 3d 1008, 1016 n.5*).

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2-21 California Points & Authorities § 21.36A

§ 21.36A Supporting Contention That Defendant Is Liable for Battery--Battery Action Against Police Officer Based on Unreasonable Use of Excessive Force in Effecting Arrest Is Not Precluded by Plaintiff's Conviction for Resisting Arrest

[1] FORM

[*The following may be included in a memorandum or in a trial or appellate brief.*]

PLAINTIFF MAY PURSUE A BATTERY ACTION AGAINST DEFENDANT POLICE OFFICER BASED ON DEFENDANT'S UNREASONABLE USE OF EXCESSIVE FORCE WHEN EFFECTING PLAINTIFF'S ARREST BECAUSE SUCCESS IN THE CIVIL ACTION WOULD NOT CALL INTO QUESTION THE VALIDITY OF PLAINTIFF'S ARREST AND CRIMINAL CONVICTION.

Battery Action Would Not Challenge Validity of Criminal Conviction. Despite plaintiff's standing conviction for resisting arrest, a battery claim brought against a police officer based on the unreasonable use of excessive force when effecting the arrest is not barred when such claim would not call into question the validity of plaintiff's arrest and conviction (*Yount v. City of Sacramento (2008) 43 Cal. 4th 885, 898-900, 902, 76 Cal. Rptr. 3d 787, 183 P.3d 471*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a plaintiff's cause of action for battery brought against a police officer is not barred despite the fact that the plaintiff's criminal conviction for resisting arrest has not been invalidated. The basis for the contention supported by this form is that plaintiff's claim that defendant police officer used unreasonably excessive force to effect the arrest would not call into question the validity of plaintiff's arrest and criminal conviction.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the contention that the battery action is not barred. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law stated. Thus, counsel should include facts describing the circumstances of plaintiff's arrest and defendant's use of force to effect that arrest, and include argument that the force used was unreasonable and excessive under the circumstances.

[c] Opposing Authorities

In an appropriate case, the points and authorities *set out in § 21.45* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Battery Action Would Not Challenge Validity of Criminal Conviction

In ***Yount v. City of Sacramento*** *(2008) 43 Cal. 4th 885, 902, 76 Cal. Rptr. 3d 787, 183 P.3d 471* , plaintiff, attempting to drive while very drunk, was stopped in his vehicle by a police officer in the parking lot of a convenience store. Plaintiff strenuously resisted his arrest, at one point shattering a window on the police car, and several more police officers arrived on the scene to help subdue him. The police managed to pin plaintiff to the ground, although he continued to resist, and one police officer, under the mistaken belief that he had drawn his taser from his holster, shot plaintiff in the buttock with his firearm. Plaintiff subsequently pleaded no contest to driving under the influence and resisting a police officer. He was sentenced to time in jail, a fine, and five years probation. He then brought suit against the city and the officer who shot him, eventually proceeding on one claim for federal civil rights violations under *42 U.S.C.S. § 1983* and one claim for battery brought under state law. Plaintiff's claims were based on allegations that plaintiff posed no real threat to the officers at the time he was shot and that the officer's use of his firearm to effectuate the arrest was excessive, unnecessary, and unlawful. The parties agreed to bifurcate the trial and first try before the court the issue of whether the civil rights action was precluded under the United States Supreme Court's holding in *Heck v. Humphrey (1994) 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383* , which bars a plaintiff from prosecuting an action under *42 U.S.C.S. § 1983* that would necessarily imply the invalidity of his or her criminal conviction or sentence until that conviction or sentence has first been invalidated, and whether the battery action was precluded for the same reasons under *Susag v. City of Lake Forest (2002) 94 Cal. App. 4th 1401, 115 Cal. Rptr. 2d 269* , discussed in *§ 21.45[3][a]*. The trial court ruled that the civil claims were barred under these legal authorities and entered judgment for defendants. The court of appeal reversed, disagreeing with the analysis of *Susag* and finding that the officer's alleged use of excessive force may have been temporally distinct from the acts that formed the basis of the no contest plea to resisting the officers sufficient to avoid the bar imposed by *Heck.*

The California Supreme Court granted review and affirmed the court of appeal in part and reversed in part. The Supreme Court first addressed the federal civil rights claim and the application of *Heck* to the facts of this case. The trial court had found that plaintiff's criminal conviction established his culpability during the entire episode with the police officers, and the Supreme Court concluded that this finding was supported by sufficient evidence. Thus, any civil action that would be inconsistent with even a portion of plaintiff's conviction for resisting the officers would be barred under *Heck* (*43 Cal. 4th 885, 896)* . However, while recognizing that this conclusion meant that plaintiff could not sustain a claim that the officers had no right to utilize reasonable force to effect his arrest, the Supreme Court noted that the misconduct alleged by plaintiff was that the deadly force employed against him when he was shot was unjustified and excessive. Because the record developed at trial did not justify the use of deadly force against plaintiff, nor did plaintiff's criminal conviction in itself establish a justification for the use of deadly force, the Court held that plaintiff's claim that the deadly force used against him was unreasonable and excessive was not barred. Concluding otherwise would mean that any arrestee who offers resistance to the police could be subdued by any force the police chose to employ, with no possibility that the police could be held civilly liable for using excessive force (*43 Cal. 4th 885, 898-900)* . The Court made explicit, however, that it had not been asked to decide whether plaintiff could recover

damages under *42 U.S.C.S. § 1983* for an officer's *accidental* use of deadly force (*43 Cal. 4th 885, 900 n.2*). Noting that the parties had not separately addressed the effect of plaintiff's criminal conviction on his claim for battery brought under state law, the Court concluded that the analysis of the state law claim mirrored that of the federal claim brought under *42 U.S.C.S. § 1983*. Thus, so long as plaintiff did not deny that he resisted the officers and they thus had the right to employ reasonable force, plaintiff could proceed on a battery action that would require plaintiff to prove that the force used against him was unreasonable (*43 Cal. 4th 885, 902)* .

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CHAPTER 21 ASSAULT AND BATTERY
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2-21 California Points & Authorities § 21.37

§ 21.37 Opposing Contention That Defendant Is Liable for Assault and Battery--Plaintiff Consented to Participation in Illegal Act

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS NOT LIABLE FOR ASSAULT AND BATTERY BECAUSE PLAINTIFF CONSENTED TO PARTICIPATION IN THE ILLEGAL ACT.

Consent as a Complete Defense. Plaintiff's consent to participation in an illegal act with defendant is a complete defense to a claim that such act constituted an assault and battery on plaintiff by defendant (*see Sayadoff v. Warda (1954) 125 Cal. App. 2d 626, 629-632, 271 P.2d 140*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to plaintiff's contention that defendant is liable for assault and battery when plaintiff consented to participation in the illegal act in question. The form sets out the rule that consent is a complete defense to such an action.

These points and authorities may be combined with points and authorities relating to the specific procedural context in which counsel wishes to oppose in the issue of consent to the alleged assault and battery. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should also insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a description of the act in question and a discussion of any facts showing that plaintiff consented to his or her participation in the act in question.

[3] Discussion of Authorities

[a] Consent as a Complete Defense

In ***Sayadoff v. Warda*** *(1954) 125 Cal. App. 2d 626, 271 P.2d 140* , plaintiff brought an action based on a conspiracy by defendant boyfriend to commit assaults and batteries on plaintiff by arranging an abortion for plaintiff that resulted in injuries. Plaintiff appealed from a judgment of nonsuit.

The court of appeal held that plaintiff consented to the abortion. As to plaintiff's ability to consent to participation in an illegal act, the court stated that admittedly the court should discourage the violation of the penal statutes of this state, but that it is highly doubtful that this end should be sought through the medium of civil litigation because the court doubted that any deterrent would be afforded by allowing damages in such a case as this. The court reasoned that such a holding might well encourage a line of conduct such as this, that is, the submission to abortions with no complaint if they are successful but with the assurance of financial reward if the woman participant is injured (*125 Cal. App. 2d 626, 631)* . The court of appeal therefore affirmed the judgment.

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2-21 California Points & Authorities § 21.38

§ 21.38 Opposing Contention That Defendant Is Liable for Battery--Defendant Had Implied Consent to Perform Medical Treatment Due to Emergency

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS NOT LIABLE FOR BATTERY BECAUSE DEFENDANT HAD IMPLIED CONSENT TO PERFORM MEDICAL TREATMENT DUE TO AN EMERGENCY.

Implied Consent in Emergency. In cases of emergency or unanticipated conditions when some immediate action is found necessary for the preservation of the life or health of a patient and it is impracticable to first obtain consent to the operation or treatment that the surgeon deems to be immediately necessary, the surgeon is justified in extending the operation to remove and overcome such conditions without the express consent of the patient thereto (*Preston v. Hubbell (1948) 87 Cal. App. 2d 53, 58, 196 P.2d 113*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to plaintiff's contention that defendant is liable for battery when defendant had implied consent to perform medical treatment due to an emergency. The form sets out the rule that when it is impracticable to obtain express consent due to an emergency, consent to perform necessary medical treatment will be implied, and such implied consent is a complete defense to such an action.

These points and authorities may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of implied consent to medical treatment. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a description of the medical treatment in question and a discussion of facts

showing that an emergency situation existed that made the treatment in question necessary and that made it impracticable to obtain plaintiff's consent in advance.

[3] Discussion of Authorities

[a] Implied Consent in Emergency

Preston v. Hubbell *(1948) 87 Cal. App. 2d 53, 196 P.2d 113* , involved an action for damages resulting from alleged negligence in the removal of a tooth. The operation was a difficult one and during the procedure a fracture occurred, which defendant repaired. At a later date the jaw became infected and plaintiff was required to have another operation. Plaintiff appealed from a judgment in favor of defendant.

Although the court of appeal reversed the judgment on other grounds, the court noted that the only rational answer to the question of consent is that plaintiff must be deemed to have consented to the repair of the fracture. It was necessary that the broken jaw be repaired promptly. It is the general rule that in cases of emergency or unanticipated conditions when some immediate action is found necessary for the preservation of the life or health of a patient and it is impracticable to first obtain consent to the operation or treatment that the surgeon deems to be immediately necessary, the surgeon is justified in extending the operation to remove and overcome such conditions without the express consent of the patient thereto (*87 Cal. App. 2d 53, 57-58)* .

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2-21 California Points & Authorities § 21.39

§ 21.39 Opposing Contention That Defendant is Liable for Battery--Defendant Lacked Intent to Perform Procedure Without Complying With Conditions Placed on Patient's Consent

[1] FORM

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

DEFENDANT IS NOT LIABLE FOR BATTERY BECAUSE DEFENDANT LACKED INTENT TO PERFORM MEDICAL TREATMENT WITHOUT ABIDING BY KNOWN CONDITION ON CONSENT TO TREATMENT IMPOSED BY PATIENT.

A. Physician Must Have Knowledge of Conditions Placed on Consent to Treatment. If general consent to medical treatment is conditioned on obtaining additional consent before administering a specific treatment, a physician is not personally liable for battery for failing to abide by the condition unless the physician has knowledge of that condition (*Piedra v. Dugan (2004) 123 Cal. App. 4th 1483, 1498, 21 Cal. Rptr. 3d 36*).

B. Physician Must Have Specific Intent to Perform Without Abiding by Condition. To be liable for performing a medical procedure while failing to abide by a known condition imposed by the patient, the doctor must have intended to perform the procedure without abiding by the condition, and negligent failure to abide by the condition is an insufficient basis for liability for battery (*Dennis v. Southard (2009) 174 Cal. App. 4th 540, 544, 94 Cal. Rptr. 3d 559*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a physician may be liable for battery for failing to obtain consent before performing certain medical procedures. The grounds for the opposition are that even though the plaintiff may have placed conditions on consent otherwise given for medical treatment, the physician had no knowledge of those conditions or did not otherwise have the specific intent to perform the procedure without abiding by the condition imposed by plaintiff.

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law raised. Thus, counsel should include facts showing that the defendant lacked knowledge that the plaintiff had placed any conditions on the consent to treatment otherwise given.

These points and authorities may be combined with a memorandum of points and authorities relating to the specific procedural context in which counsel is responding to the contention that a physician may be liable for battery. For example, it may be used in support of a demurrer to a complaint or in a motion for summary judgment. It may also be adapted for use in a trial or appellate brief.

[3] Discussion of Authorities

[a] Physician Must Have Knowledge of Conditions Placed on Consent to Treatment

In ***Piedra v. Dugan*** *(2004) 123 Cal. App. 4th 1483, 21 Cal. Rptr. 3d 36* , the plaintiff was a child who brought suit (through his parents) against a physician after medical treatment for seizures and cardiac arrest left the plaintiff in a vegetative state. When the plaintiff was admitted to the hospital, his parents filled out an admissions form through which they consented to treatment for their child's condition. However, because their child had suffered serious reactions to medication that he was given in the past, his mother told the admitting person, two nurses, and one physician that they were not to give her son any medication without her knowledge and approval. The next day, the defendant, a physician, was providing treatment to the child, whose condition was serious and deteriorating, and he administered drugs without first notifying the child's parents. However, the defendant had no knowledge of the statements made by the child's mother about receiving specific consent before administering drugs. During the treatment, the child suffered cardiac arrest as a rare adverse effect of one of the administered drugs, resulting in severe brain damage. The plaintiff sued the defendant and other parties, but went to trial only against the defendant. The trial court granted a nonsuit on the plaintiff's battery claim, and the jury found for the defendant on a claim of negligence and failure to inform. The plaintiff appealed.

The court of appeal affirmed. The court first found that there was substantial evidence to support the jury's verdict on the claim of negligent failure to inform, because the drug administered was considered very safe and was administered under emergency situations (*123 Cal. App. 4th 1483, 1490-1491)* . As to the battery claim, the court noted initially that the consent clause contained in the admissions form was sufficient to constitute general consent to treatment (*123 Cal. App. 4th 1483, 1496)* . The court then held that although a patient or his or her representative may give consent to a general course of treatment, it is possible for that consent to be made conditional, as the plaintiff's mother apparently did in this particular case. However, the court held that the defendant could not be liable for administering drugs without obtaining further consent from the child's parents, because neither the parents nor the hospital staff informed the defendant about the condition placed on the consent, and the condition was not noted on the child's chart. Because battery is an intentional tort, the defendant could not have the requisite intent to commit battery without that knowledge (*123 Cal. App. 4th 1483, 1498)* .

[b] Physician Must Have Specific Intent to Perform Without Abiding by Condition

In ***Dennis v. Southard*** *(2009) 174 Cal. App. 4th 540, 94 Cal. Rptr. 3d 559* , plaintiff conditioned her consent to knee surgery on the use of prostheses not manufactured by a particular company. The doctor performed successful surgery using a prosthesis manufactured by another company. Four months later, plaintiff returned for similar surgery on the other knee, but in the meantime, the hospital had switched to using prostheses manufactured by the company disfavored by the plaintiff. The doctor completed the surgery using a prosthesis from that company, and also inadvertently damaged plaintiff's medial collateral ligament. Plaintiff sued the doctor for malpractice and included a cause of action for battery for performing the surgery while failing to abide by the condition plaintiff placed on her consent. The jury found for the physician and plaintiff appealed.

The court of appeal affirmed the judgment. The court rejected plaintiff's argument that the trial court erred in instructing the jury with CACI No. 530B, which requires a finding that the defendant intended to perform the procedure with knowledge that the condition had not occurred. The court noted that intent to perform the procedure itself is not sufficient intent to impose liability for battery. Instead, in a case of conditional consent, the requisite element of deliberate intent to deviate from the consent given cannot be presumed simply from the act itself, but requires proof that the physician intended to perform the procedure without abiding by the condition placed on the patient's consent. Without such a requirement, a jury could impose liability for battery when a physician was merely negligent in failing to abide by the patient's stated condition (*174 Cal. App. 4th 540, 544)* .

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2-21 California Points & Authorities § 21.40

§ 21.40 Opposing Contention That Defendant Is Liable for Assault and Battery--Defendant Acted in Self-Defense and/or Defense of Relative, Household Member, or Guest [Civ. Code § 50]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS NOT LIABLE FOR ASSAULT AND BATTERY BECAUSE DEFENDANT ACTED IN _____ [SELF-DEFENSE *and/or* DEFENSE OF A _____ (RELATIVE *and/or* HOUSEHOLD MEMBER *and/or* GUEST)].

A. Scope of Privilege. Any necessary force may be used to protect from wrongful injury the person of oneself, or of a wife, husband, child, parent, or other relative, or member of one's family, or of a ward, servant, master, or guest (*Civ. Code § 50*).

B. Force Must Be Reasonable. The force that one may use in self-defense is that which reasonably appears necessary, in view of all the circumstances of the case, to prevent the impending injury (*Vaughn v. Jonas (1948) 31 Cal. 2d, 586, 600, 191 P.2d 432*).

C. Determining if Force Excessive. In determining whether the particular means used is or is not excessive, the amount of force exerted, the means or instrument by which it is applied, the manner or method of applying it, and the circumstances under which it is applied are factors to be considered (*Fraguglia v. Sala (1936) 17 Cal. App. 2d 738, 745, 62 P.2d 783*).

D. Reasonable Belief of Danger Required. The rule for determining when a person may act on appearances is whether a reasonable person, situated as defendant was, seeing what he or she saw, and knowing what he or she knew, would be justified in believing himself or herself in danger (*Lowry v. Standard Oil Co. (1942) 54 Cal. App. 2d 782, 790-791, 130 P.2d 1*).

[*Optional*] **E. Person Confronted Not Bound to Retreat.** A person confronted or attacked is not bound to retreat but

is entitled to stand and defend himself or herself and act as a reasonable person under the circumstances to prevent the injury (*McAfee v. Ricker (1961) 195 Cal. App. 2d 630, 635, 15 Cal. Rptr. 920*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to plaintiff's contention that defendant is liable for assault and battery when defendant was acting in self-defense or in defense of a relative, household member, or guest. The arguments supported by this memorandum may be used to oppose an action for damages for assault and battery.

These points and authorities may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of self-defense. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a description of the act in question and a discussion of any facts showing that defendant acted in self-defense or in defense of a relative, household member, or guest.

[3] Discussion of Authorities

[a] Force Must Be Reasonable

Vaughn v. Jonas *(1948) 31 Cal. 2d 586, 191 P.2d 432* , involved an action for damages against defendant for shooting and severely wounding plaintiff. The shooting took place following an argument between plaintiff and defendant after which defendant claimed plaintiff advanced toward him in a threatening manner with a rock in his hands. Defendant appealed from a judgment for plaintiff.

The Supreme Court affirmed the judgment, commenting that the court below had incorrectly stated the rule regarding the use of reasonable force. The Supreme Court then stated that the correct rule for determining the force that one may use in self-defense is that one may use force that reasonably appears necessary, in view of all circumstances of the case, to prevent the impending jury (*31 Cal. 2d 586, 600)* . In the case at hand, however, the Court found that the error was not prejudicial.

[b] Determining if Force Excessive

Plaintiff in ***Fraguglia v. Sala*** *(1936) 17 Cal. App. 2d 738, 62 P.2d 783* , filed an action against defendant for assault and battery. The altercation in question occurred when defendant, a sub-boss on a garbage truck, gave plaintiff, an employee on the truck, an order that resulted in a fight. Defendant appealed from a judgment in plaintiff's favor.

The court of appeal reversed the judgment, due in part to an incorrect instruction given on the subject of excessive force. The instruction stated that if the jury found it to be a fact that plaintiff was not free from fault, the jury was nevertheless not prevented from rendering a verdict in favor of plaintiff if it further found that the resulting assault and battery on plaintiff by defendant was accompanied by greater force than was reasonably necessary for the purpose of self-defense. The court held that the instruction was based on a misconception of the law because if excessive violence and unnecessary force is used in repelling an assault, one becomes liable as a trespasser and subject to an action for assault and battery. In determining whether the particular means used is or is not excessive, the amount of force exerted, the means or instrument by which it is applied, the manner or method of applying it, and the circumstances under which it is applied are all factors to be considered (*17 Cal. App. 2d 738, 745)* .

[c] Reasonable Belief of Danger Required

The facts of ***Lowry v. Standard Oil Co.*** *(1942) 54 Cal. App. 2d 782, 130 P.2d 1 (Lowry I)* , are the same as those in *Lowry v. Standard Oil Co. (1944) 63 Cal. App. 2d 1, 146 P.2d 57 (Lowry II)* , which is discussed in *§ 21.20[3][a]*. The plaintiff obtained judgment against defendant, and the court of appeal reversed, in part, because of erroneous jury instructions given by the trial court. The instructions amounted to a pronouncement that there could be no justification under any circumstances if the plaintiff was not in fact an actual participant in the holdup out of which the alleged assault arose. The court of appeal noted that the effect of the instruction would be to unduly restrict a person in the exercise of his or her right to defend himself or herself or his or her property, or to apprehend the perpetrator of a felony when as an ordinary, reasonable person, he or she has reasonable cause for believing that a person has committed a felony. The court then held that the test for determining whether a person may act on appearances is whether a reasonable person, situated as defendant was, seeing what he or she saw, and knowing what he or she knew, was justified in believing himself or herself to be in danger (*54 Cal. App. 2d 782, 790-791)* .

[d] Person Confronted Not Bound to Retreat

McAfee v. Ricker *(1961) 195 Cal. App. 2d 630, 15 Cal. Rptr. 920* , arose out of an assault and battery action filed against a neighbor for his alleged attack on plaintiffs. Plaintiffs claimed that defendant came out on the street where their car was parked and struck both of them several times because they had parked their car in front of defendant's house. Defendant claimed that he was acting in self-defense because one of the plaintiffs had taken off his jacket and glasses and was gesturing in a threatening manner with his fists clenched, seeking and inviting combat with defendant. Defendant appealed from a judgment in favor of plaintiffs.

The court of appeal affirmed the judgment, stating that from the evidence the trial court had a right to believe that defendant had knocked plaintiffs down on two occasions without sufficient justification or provocation and without either plaintiff turning a hand indicating a fist fight with defendant; therefore, the continuance of the assault was unnecessary, and accordingly, defendant exceeded the right of self-defense. The court then stated in dicta that a person confronted or attacked is not bound to retreat but is entitled to stand and defend himself or herself and act reasonably under the circumstances as they may appear to him or her (*195 Cal. App. 2d 630, 635)* .

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2-21 California Points & Authorities § 21.41

§ 21.41 Opposing Contention That Defendant Is Liable for Assault and Battery--Defendant Acted in Defense of Third Person Who Was Not Relative, Household Member, or Guest

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS NOT LIABLE FOR ASSAULT AND BATTERY BECAUSE DEFENDANT ACTED IN DEFENSE OF A THIRD PERSON.

Defense of Third Person. If one goes to the assistance of another being assaulted by a third person, and uses no more force than necessary to prevent the assault, he or she is acting within his or her legal right in preventing the commission of a public offense (*Ward v. De Martini (1930) 108 Cal. App. 745, 748, 292 P 192*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to plaintiff's contention that defendant is liable for assault and battery when plaintiff acted in defense of a third person. The argument supported by this memorandum may be raised by defendant in an action for damages for assault and battery.

These points and authorities may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of defense of a third person. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a description of the act in question and a discussion of any facts showing that defendant acted in defense of a third person to prevent the commission of a public offense.

[3] Discussion of Authorities

[a] Defense of Third Person

Ward v. De Martini *(1930) 108 Cal. App. 745, 292 P 192* , arose out of an action for assault and battery filed against defendant for his alleged attack on plaintiff, which took place during an altercation between defendant and a third person. Plaintiff had attempted to separate defendant and the third person because defendant, who was the larger man, was beating the third person with his fists. Defendant claimed that there was no evidence that an assault was being committed and therefore, plaintiff was not justified in intervening. Defendant appealed from a judgment for plaintiff.

The court of appeal affirmed the judgment, stating that if one goes to the assistance of a third person being assaulted by another, and uses no more force than necessary to prevent the assault, he or she is acting within his or her legal right in preventing commission of a public offense. The court then held that there was sufficient evidence to show that an offense was being committed by defendant at the time plaintiff intervened (*108 Cal. App. 745, 748-749)* .

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2-21 California Points & Authorities § 21.42

§ 21.42 Opposing Contention That Defendant Is Liable for Assault and Battery--Defendant Acted in Defense of His or Her Property and/or Property of Relative, Household Member, or Guest [Civ. Code § 50]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS NOT LIABLE FOR ASSAULT AND BATTERY BECAUSE DEFENDANT ACTED IN DEFENSE OF _____ [HIS/HER PROPERTY *and/or* THE PROPERTY OF A _____ (RELATIVE *and/or* HOUSEHOLD MEMBER *and/or* GUEST)].

A. Scope of Privilege. Any necessary force may be used to protect from wrongful injury the property of oneself, or of a wife, husband, child, parent, or other relative, or member of one's family or of a ward, servant, master, or guest (*Civ. Code § 50*).

B. Force Must Be Reasonable. The degree of force that may be used by a person in defense of his or her property must be limited to such force as would have appeared to be necessary to a reasonable person in all of the circumstances, knowing what the defendant knew, and facing the facts that presented themselves at the time to the defendant (*Boyer v. Waples (1962) 206 Cal. App. 2d 725, 727, 24 Cal. Rptr. 192*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to plaintiff's contention that defendant is liable for an assault and battery on plaintiff when defendant acted in defense of his or her property or the property of a relative, household member, or guest. The argument supported by this memorandum may be raised in an action for damages for assault and battery.

These points and authorities may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of defense of property. The points and authorities set forth in this form may also

be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a description of the act in question and a discussion of any facts showing that defendant was acting in defense of his or her property, or the property of a relative, household member, or guest.

[3] Discussion of Authorities

[a] Force Must Be Reasonable

In ***Boyer v. Waples*** *(1962) 206 Cal. App. 2d 725, 24 Cal. Rptr. 192* , an action for assault and battery, plaintiffs sued for injuries that they sustained while trespassing at night on the home property of defendant. Defendant, allegedly acting in defense of his family and his home, fired shots from a.22 rifle, three of which took effect in each of plaintiffs. Plaintiffs had indulged in a long series of acts of misconduct toward defendant and his family and on the night in question approached defendant's house, despite several warning shots fired by defendant, carrying an object that defendant thought was dynamite. Plaintiffs appealed from a judgment in favor of defendant.

The court of appeal affirmed the judgment, ruling that the degree of force that may be used by a person in defense of himself or herself, his or her family, or his or her property must be limited to such force as would have appeared to be necessary to a reasonable person in all of the circumstances, knowing what defendant knew, and facing the facts that presented themselves at the time to defendant (*206 Cal. App. 2d 725, 727)* . The court of appeal then held that the trial court had substantial evidence before it on which to base the finding that defendant justifiably acted in defense of his family and his home and that the force employed by him was not excessive (*206 Cal. App. 2d 725, 730)* .

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 21 ASSAULT AND BATTERY
PART II. FORMS

2-21 California Points & Authorities § 21.43

§ 21.43 Opposing Contention That Defendant Is Liable for Assault and Battery--Defendant Had Right to Eject Plaintiff Because He or She Was a Trespasser

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS NOT LIABLE FOR ASSAULT AND BATTERY BECAUSE PLAINTIFF WAS A TRESPASSER AND DEFENDANT, THEREFORE, HAD A RIGHT TO FORCIBLY EJECT HIM/HER.

A. Right to Eject Trespasser. An owner has the right to forcibly eject trespassers, and if the force used is not excessive, the trespasser has no personal action against the owner (*MacLeod v. Fox W. Coast Theatres Corp. (1937) 10 Cal. 2d 383, 389, 74 P.2d 276*).

[*Optional*] **B. Prior Warning Not Required to Eject Felonious Trespasser.** In the case of a felonious trespasser, defendant has a right as a reasonably prudent person to assume that if he or she gave any warning, he or she would have to pay for his or her charity with his or her own life or to his or her great bodily harm (*Nakashima v. Takase (1935) 8 Cal. App. 2d 35, 39, 46 P.2d 1020*).

[*Optional*] **C. Second Warning Not Required.** A trespasser does not have to be given more than one notice or request or order; if plaintiff has been ordered to remain away from the premises on a prior occasion, it is not a requirement that on reentry he or she should again be ordered to leave (*Phelps v. Arnold (1931) 112 Cal. App. 518, 524, 297 P 31*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to plaintiff's contention that defendant is liable for assault and battery when plaintiff was a trespasser on defendant's property. These points and authorities may also be used to support the contentions that a prior warning is not required to eject a felonious trespasser [optional Paragraph B] or that a second warning is not required [optional Paragraph C].

The argument supported by this memorandum may be raised in an action for damages for assault and battery.

These points and authorities may be combined with points and authorities relating to the specific procedural context in which counsel wishes to oppose the issue of defense of property or ejectment of a trespasser. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a description of the act in question and a discussion of any facts showing that plaintiff was a trespasser on defendant's property.

[3] Discussion of Authorities

[a] Right to Eject Trespasser

Plaintiff in ***MacLeod v. Fox W. Coast Theatres Corp.*** *(1937) 10 Cal. 2d 383, 74 P.2d 276* , filed an action against defendant for forcibly ejecting plaintiff from the lobby of defendant's theatre. Defendant had agreed with a film corporation to hold a preshowing of a certain film. Part of the agreement was that the audience to this preshowing be restricted to members of the press and a limited number of the film corporation's employees. Contrary to this agreement, an employee of the film corporation invited plaintiff, then a radio announcer for a rival motion picture producer, to attend the preshowing. When plaintiff tried to attend the preshowing, he was ejected from the theatre lobby by police officers, after being told several times that he would not be allowed admission into the theatre. Defendant appealed from a judgment in favor of plaintiff.

The Supreme Court stated that an owner has the right to forcibly eject trespassers, and if the force used is not excessive, the trespasser has no personal action against the owner (*10 Cal. 2d 383, 389)* . The Court then held that in ejecting plaintiff from the theatre, neither excessive force nor more force than reasonably necessary was exerted, and plaintiff thus had no cause of action against defendants (*10 Cal. 2d 383, 388)* .

[b] Prior Warning Not Required to Eject Felonious Trespasser

In ***Nakashima v. Takase*** *(1935) 8 Cal. App. 2d 35, 46 P.2d 1020* , plaintiff filed an action against defendant for allegedly shooting plaintiff's son, which resulted in his death. The deceased was allegedly shot by defendant after he and a third person had burglarized defendant's business at night and were apparently in the act of committing a theft. Earlier on the day in question defendant had noticed that the glass surrounding the lock in the door to his business had been cut but not removed. After contacting the police, he returned to his business and waited in the dark with a gun. When deceased and the third person broke into defendant's business and approached the area where he was standing, defendant allegedly fired one shot that hit deceased and later resulted in his death. Defendant appealed from a judgment for plaintiff.

The court of appeal held that when two people feloniously break into the premises of another, the person in rightful possession is not called on to give any warning to prevent another felony, such as theft of property, when, as a reasonably prudent person, he or she is justified in concluding from the circumstances of the entry that the felons have not only already committed one crime, burglary, but are about to commit another, theft, both with force and violence. In this case, there was force and violence used in the act of breaking in, and defendant, as a reasonable person, had a right to assume that the two burglars were armed (although evidence in this case showed that they were not), and that, if interfered with, they would use further force and violence to consummate the theft they had planned or to make good their escape. Under such circumstances, defendant had a right as a reasonably prudent person to assume that if he gave any warning, he would have to pay for his charity with his own life or to his great bodily harm (*8 Cal. App. 2d 35, 38-39)* .

[c] Second Warning Not Required

Phelps v. Arnold *(1931) 112 Cal. App. 518, 297 P 31* , concerned an action for assault and battery against defendants for forcibly ejecting plaintiff from defendants' home and property. Prior to the occasion of the ejectment, a feud had arisen between plaintiff and defendants that resulted in defendants ordering plaintiff to remain away from their home and property. Despite this order, plaintiff entered defendants' property for the purpose of serving them with a demand letter. During the presentation of this letter, plaintiff alleged that defendants forcibly ejected her from their property and that such forcible ejectment constituted an assault and battery. Defendants appealed from a judgment in favor of plaintiff.

The court of appeal reversed the judgment, ruling that a trespasser does not have to be given more than one notice, request, or order. After an unfriendly feeling has developed, culminating in a quarrel and an encounter, and plaintiff has then been ordered to remain away from the premises, it is not a requirement that on reentry he or she should again be ordered to leave, it being apparent that his or her entry was hostile and in defiance of the former order (*112 Cal. App. 518, 524)* .

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2-21 California Points & Authorities § 21.44

§ 21.44 Opposing Contention That Defendant Is Liable for Assault and Battery--Battery Action Is Not Proper When Purpose of Physician's Statement Inducing Plaintiff's Consent Was Therapeutic

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS NOT LIABLE FOR ASSAULT AND BATTERY BECAUSE DEFENDANT'S STATEMENT INDUCING PLAINTIFF'S CONSENT TO TREATMENT HAD AS ITS ESSENTIAL CHARACTER A THERAPEUTIC PURPOSE.

Essential Character of Action Was Therapeutic. If the essential character of a statement made by a physician to induce acceptance of treatment is therapeutic, an action for battery is not proper, even if the particular therapy was misapplied because of negligence or deception (*Freedman v. Superior Court (1989) 214 Cal. App. 3d 734, 738-739, 263 Cal. Rptr. 1*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to plaintiff's contention that defendant committed a battery by inducing plaintiff's acceptance of an improper therapy. The argument supported by this memorandum may be raised in an action for damages for assault and battery.

These points and authorities may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of therapeutic purpose. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a description of the act in question and a discussion of any facts showing that the essential character of defendant's action was therapeutic.

[3] Discussion of Authorities

[a] Essential Character of Action Was Therapeutic

In ***Freedman v. Superior Court*** *(1989) 214 Cal. App. 3d 734, 263 Cal. Rptr. 1* , plaintiff's battery action against her doctor was based on damages from complications arising from his prescribing a drug for her while she was in labor. Plaintiff claimed that the doctor told her the drug's purpose was to avoid infection while she was in labor but that the drug's actual purpose was to induce labor, and that its use caused augmentation of labor contractions, resulting in the necessity of pain medication and anesthesia, and ultimately, the need for a caesarian section. The trial court granted a demurrer, stating that although a case in fraud might have been proper, the therapeutic nature of the doctor's actions precluded a battery cause of action. Plaintiff applied for an extraordinary writ.

The court of appeal denied the petition, concluding that the trial court decision was correct. The court stated that a cause of action for battery was not proper since the intended purpose of a prescribed drug is therapeutic, even if it is improperly prescribed. Thus, the essential character of defendant's act was therapeutic. The court stated that the proper pleading of such a case should be restricted to negligence, or possibly, under appropriate facts, deceit (*214 Cal. App. 3d 734, 737-741)* .

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2-21 California Points & Authorities § 21.45

§ 21.45 Opposing Contention That Defendant Is Liable for Assault and Battery--Battery Action Against Police Officer Based on Excessive Force in Effecting Arrest Precluded if Plaintiff Has Valid Conviction for Resisting or Obstructing Police Officer

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

PLAINTIFF MAY NOT PURSUE AN ASSAULT AND BATTERY CLAIM AGAINST DEFENDANT BASED ON DEFENDANT'S ALLEGED USE OF EXCESSIVE FORCE IN EFFECTING THE ARREST OF PLAINTIFF BECAUSE PLAINTIFF WAS PREVIOUSLY CONVICTED OF RESISTING OR OBSTRUCTING A POLICE OFFICER BASED ON THE SAME EVENTS AND THAT CONVICTION HAS NOT BEEN INVALIDATED THROUGH POSTCONVICTION RELIEF.

Plaintiff Has Valid Conviction for Resisting or Obstructing Police Officer. A plaintiff may not pursue state-law tort claims against a police officer based on the conduct of the officer in effecting the plaintiff's arrest, including claims for assault and battery, if the plaintiff was convicted of resisting or obstructing a police officer, based on the same events, and the plaintiff has not previously been granted postconviction relief that invalidates that conviction (*Susag v. City of Lake Forest (2002) 94 Cal. App. 4th 1401, 1413, 115 Cal. Rptr. 2d 269*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to the contention that a police officer may be sued for assault and battery based on the use of excessive force in effecting an arrest. The grounds for the opposition are that the plaintiff's common law tort claims are precluded because the plaintiff was previously convicted for resisting or obstructing a police officer, based on the same arrest, and that conviction has not been invalidated through postconviction relief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the point of law

stated. Thus, counsel should include facts showing that the plaintiff was previously convicted for resisting or obstructing a police officer based on the same arrest and that this conviction has not been invalidated through postconviction relief.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which these points are raised. They may also be adapted for use in a trial or appellate brief.

[3] Discussion of Authorities

[a] Plaintiff Has Valid Conviction for Resisting or Obstructing Police Officer

In ***Susag v. City of Lake Forest*** *(2002) 94 Cal. App. 4th 1401, 115 Cal. Rptr. 2d 269* , the plaintiff was arrested after he tried to prevent a deputy sheriff from towing a vehicle with an expired registration while it was parked in front of an auto body shop owned by the plaintiff's family. The plaintiff attempted to drive away in the vehicle, resisted orders to get out of the car, cursed at the deputy, and physically resisted. The plaintiff eventually got out of the car and went inside the auto body shop, where he was joined by his father and brother. Following the arrival of nine other deputies at the scene and an altercation with the plaintiff's father, the plaintiff was finally handcuffed and taken away. After a jury trial, the plaintiff was convicted of the misdemeanor charge of resisting or obstructing a peace officer. The plaintiff and his father then brought a civil action against the 10 deputies and the relevant public entities for violation of their civil rights, assault and battery and use of excessive force, false imprisonment, and intentional infliction of emotional distress. The defendants successfully moved for summary judgment against the plaintiff on the ground that his valid criminal conviction precluded his action as a matter of law. The plaintiff appealed.

The court of appeal affirmed. The court first noted that under United States Supreme Court precedent, in order to pursue a federal civil rights action to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a plaintiff must prove that the conviction or sentence has been invalidated through postconviction relief. Because he failed to prove that the conviction for resisting or obstructing a police officer had been invalidated, the court held that the plaintiff's civil rights action was precluded (*94 Cal. App. 4th 1401, 1408-1410)* . Applying the same rationale, the court then held that the plaintiff could not pursue his state law tort claims based on the conduct of the officers in effecting the plaintiff's arrest, including claims for assault and battery and false imprisonment, if the plaintiff's criminal conviction had not previously been invalidated through postconviction relief. Because the earlier criminal conviction necessarily included a determination that the deputies' conduct in effecting the arrest was reasonable, and that conviction had not been invalidated, the plaintiff's state law claims were barred (*94 Cal. App. 4th 1401, 1413)* . In justifying this conclusion, the court noted that its decision was consistent with the rule under California case law that as a prerequisite to an action for attorney malpractice against a criminal defense attorney, the plaintiff must prove actual innocence of the underlying criminal charges, and that if the plaintiff was convicted in the underlying criminal proceeding, the plaintiff must obtain reversal or other exoneration by postconviction relief to establish actual innocence (*94 Cal. App. 4th 1401, 1411-1412)* .

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2-21 California Points & Authorities § 21.46

§ 21.46 Opposing Contention That Defendant is Liable for Battery--Teacher Not Liable for Reasonable Contact With Students Not Intended to Harm

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT TEACHER MAY NOT BE HELD LIABLE FOR BATTERY WHEN PHYSICAL CONTACT WITH STUDENT WAS REASONABLE, EVEN IF MADE WITHOUT THE CONSENT OF THE STUDENT, AND DEFENDANT HAD NO INTENT TO HARM.

Teacher Lacked Intent to Harm Student. To hold a teacher liable for battery of a student, the plaintiff must prove that the contact with the student was unreasonable and the teacher intended to harm the student (*Austin B. v. Escondido Union School Dist. (2007) 149 Cal. App. 4th 860, 872-876, 57 Cal. Rptr. 3d 454*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a school teacher may be liable for battery when making physical contact with a student that is reasonable under the circumstances, in the absence of proof that the teacher intended to harm the student.

These points and authorities may be combined with points and authorities relating to the specific procedural context in which the issue of defendant's liability arises, or combined with other forms in this chapter, as appropriate. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law stated. Thus, counsel should include those facts explaining and justifying the defendant teacher's physical contact with

the student and argue that the contact was made without an intent to harm the student.

[3] Discussion of Authorities

[a] Teacher Lacked Intent to Harm Student

In *Austin B. v. Escondido Union School Dist. (2007) 149 Cal. App. 4th 860, 57 Cal. Rptr. 3d 454* , plaintiffs were two autistic children who sued their special education preschool instructor, the school, and several other school employees. Plaintiffs sued for battery and related causes of action based on abusive conduct allegedly committed by the instructor at school. Plaintiffs presented evidence suggesting that the instructor was using excessive force when responding to his students' behavior, although defendant instructor testified that his conduct was appropriate and denied harming or inflicting pain on any student. At trial, the jury found for the defendants and awarded attorneys' fees and costs to defendants. Plaintiffs appealed, arguing in part that the trial court erred when instructing the jury that the plaintiffs were required to prove that the instructor intended to harm the children and that his touching was unreasonable.

The court of appeal affirmed. The court held that the trial court did not err in requiring plaintiffs to prove that the instructor intended to harm the children when he touched them, as well as show that the touching was unreasonable. The court noted that under both the Restatement (Second) of Torts and standard jury instructions approved by the Judicial Counsel for use in California, intent to cause a harmful or offensive contact was an element of a cause of action for battery (*149 Cal. App. 4th 860, 872)* . The court also stressed that a school teacher stands in loco parentis to the students. The court noted that teaching autistic children by touching and guiding them is not unlawful, and students, by virtue of their attendance at a school, consent to some amount of touching as necessary to control and protect them and other students. Despite plaintiffs' claim that the instructor's conduct was unlawful as a matter of law, the evidence as to whether the instructor's conduct was appropriate under the circumstances was hotly disputed at trial, and plaintiffs failed to request a specific finding by the jury that the instructor's conduct was unlawful (*149 Cal. App. 4th 860, 873-876)* .

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CHAPTER 22 ASSOCIATIONS AND CLUBS

2-22 California Points & Authorities 22.syn

§ 22.syn Synopsis to Chapter 22: ASSOCIATIONS AND CLUBS

§ 22.01 Scope of Chapter

§ 22.02 Remedies for Improper Expulsion or Exclusion

§ 22.03 Related Discussion and Forms

[1] Related Pleading and Practice Forms

[2] Related Points and Authorities

§§ 22.04-22.19 [Reserved]

§ 22.20 Supporting Contention That Expulsion From Membership in an Association Was Improper--Not Based on Violation of Rules or Objects of Association

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Court Review of Grounds

[b] Court Intervention to Protect Member's Property Interests

[c] Membership Itself Protected

[d] Member's Expulsion Must Be Based on Violation of Association's Rules or Objects

[4] Additional Authorities

[a] Membership Itself Protected

§ 22.21 Supporting Contention That Expulsion From Membership in an Association Was Improper--Based on Rule Which Is Unreasonable, Contrary to Public Policy, or Substantively Capricious

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Rule and Its Interpretation Must Be Reasonable

[b] Rule and Its Interpretation Cannot Be Contrary to Public Policy

[c] Rule and Its Interpretation Cannot Be Substantively Capricious

[4] Additional Authorities

[a] Rule and Its Interpretation Must Be Reasonable

[b] Rule and Its Interpretation Cannot Be Contrary to Public Policy

§ 22.22 Supporting Contention That Exclusion From Membership in an Association Was Improper--Exclusion Arbitrary, Unreasonable, or Contrary to Public Policy

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Substantial Economic Advantages as Prerequisite for Judicial Intervention

[b] Exclusion Cannot Be Arbitrary, Unreasonable, or Contrary to Public Policy

[c] Association's Standards for Admission Cannot Be Unreasonably Susceptible of Arbitrary or Discriminatory Application

[4] Additional Authorities

[a] Exclusion Cannot Be Arbitrary, Unreasonable, or Contrary to Public Policy

[b] Association's Standards for Admission Cannot Be Unreasonably Susceptible of Arbitrary or Discriminatory Application

§ 22.23 Supporting Contention That Expulsion or Exclusion From Membership in an Association Was Improper--Procedure Unfair

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Fair Procedure Required

[b] Fair Procedure Includes Notice and an Opportunity to Defend Oneself

[c] Association's Adjudicators Must Be Impartial

[4] Additional Authorities

[a] Fair Procedure Required

[b] Fair Procedure Includes Notice and an Opportunity to Defend Oneself

[c] Association's Adjudicators Must Be Impartial

§ 22.24 Supporting Contention That Discipline by Association Less Than Expulsion or Exclusion Was Improper--Procedure Unfair

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Private Organization With Public Stature May Not Discipline Member Without Fair Proceeding

[b] Public Censure as Affecting Substantial Property, Contract, or Other Economic Rights

[4] Additional Authorities

[a] Private Organization With Public Stature May Not Discipline Member Without Fair Proceeding

§ 22.25 Supporting Contention That an Action for Damages Is Proper--Intentional Interference With Right to Pursue Profession--Lack of Sufficient Justification

[1] FORM

[2] Comments

[a] Use of Form

[b] Alternate Action for Restraint of Trade

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Action for Damages Lies

[b] Determining Sufficient Justification

§ 22.26 Supporting Contention That Court Can Review the Association's Decision to Expel or Exclude Person From Membership--Exhaustion of Association's Internal Remedies Excused

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Exhaustion of Internal Remedies Subject to Certain Exceptions

[b] Association's Remedies Inadequate or Unavailable

[c] Association Violated Own Rules for Review

[d] Invocation of Remedies Would Prove Futile

[4] Additional Authorities

[a] Association's Remedies Inadequate or Unavailable

§ 22.27 Supporting Contention That Action Was Not Protected by Freedom of Association

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Only Intimate or Expressive Associations Are Constitutionally Protected

[b] Commercial Associations Are Not Constitutionally Protected

§ 22.28 Opposing Contention That Expulsion From Membership in an Association Was Improper--Expulsion for Violating Rules of Association

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Association's Rules Are Controlling

[b] Expulsion Proper for Violating Rules

[4] Additional Authorities

[a] Association's Rules Control

§ 22.29 Opposing Contention That Expulsion From Membership in an Association Was Improper--Expulsion Based on Rule Which Is Reasonable and Reasonably Interpreted

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Reasonable Rules Reasonably Construed Will Be Upheld

[4] Additional Authorities

[a] Reasonable Rules Reasonably Construed Will Be Upheld

§ 22.30 Opposing Contention That Court Can Review Association's Decision to Exclude Person From Membership--Substantial Economic Interests Not Affected

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Right to Practice or Gain Specialist Recognition Must Be Affected

§ 22.31 Opposing Contention That Exclusion From Membership in an Association Was Improper--Not Arbitrary or Unreasonable

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Associations Permitted to Make Rules and Regulations Governing Admission

[b] Court Will Uphold Exclusion When Not Arbitrary or Unreasonable

[4] Additional Authorities

[a] Court Will Uphold Exclusion When Not Arbitrary or Unreasonable

§ 22.32 Opposing Contention That Expulsion or Exclusion From Membership in an Association Was Improper--Procedure Followed Was Fair

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Procedure Fair

[b] Formal Procedures Not Required

§ 22.33 Opposing Contention That an Action for Damages Is Proper--Intentional Interference With Right to Pursue Profession--Sufficient Justification

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Association's Action Justified

[4] Additional Authorities

[a] Association's Action Justified

§ 22.34 Opposing Contention That Court Can Review the Association's Decision to Expel or Exclude Person From Membership--Internal Remedies Not Exhausted

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Exhaustion of Association's Internal Remedies Required

[4] Additional Authorities

[a] Exhaustion of Association's Internal Remedies Required

§ 22.35 Opposing Contention That Association May Be Required to Divulge the Names of Its Members

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Intimate Associations Are Constitutionally Protected

[b] Constitutional Protection Extends to Nondisclosure of Membership List

[c] Forced Disclosure Requires Compelling State Interest

§ 22.36 Opposing Contention that Association May Be Required to Accept Individual As Member

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities Forms

[3] Discussion of Authorities

[a] Expressive Associations Are Constitutionally Protected

[b] Only Compelling State Interest that Is Unrelated to Context and Unachievable Through Less Restrictive Means Justifies Infringement on Expressive Associations

[c] Compelling State Interest Cannot Justify Severe Intrusion on Freedom of Expressive Association

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CHAPTER 22 ASSOCIATIONS AND CLUBS
PART I. INTRODUCTION

2-22 California Points & Authorities § 22.01

§ 22.01 Scope of Chapter

This chapter contains points and authorities relating to actions challenging membership decisions of an association. It contains forms of points and authorities for use in supporting [*see §§ 22.20 -22.23*] and opposing [*see §§ 22.28, 22.29, 22.31,* and *22.32*] the contention that expulsion or exclusion from membership in an association was improper, and for use in supporting [*see § 22.25*] and opposing [*see § 22.33*] an action for damages from the association's intentional interference with the member's or applicant's right to pursue a profession. It contains forms supporting [*see § 22.26*] and opposing [*see §§ 22.30* and *22.34*] the court's right to review the association's decision, as well as a form supporting the contention that an action is not protected by the constitutional right of freedom of association [*see § 22.27*]. Finally, this chapter contains a form opposing the contention that an association may be required to divulge the names of its members [*see § 22.35*] and a form opposing the contention that an association may be required to accept certain members [*see § 22.36*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawUnincorporated AssociationsConstitutional LawBill of RightsFundamental FreedomsFreedom of Association

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2-22 California Points & Authorities § 22.02

§ 22.02 Remedies for Improper Expulsion or Exclusion

A party who has been improperly excluded or expelled from membership in an association or society has a number of possible judicial remedies available to him or her. First, he or she may seek to compel admission or reinstatement to membership in the association by traditional mandate under *Code Civ. Proc. § 1085* [*see generally* Ch. 150, *Mandate and Prohibition*]. If the law requires that the association grant the member or applicant an evidentiary hearing, the association's final administrative decision may be reviewed by administrative mandate under *Code Civ. Proc. § 1094.5* [*see generally* Ch. 195, *Public Administrative Law*]. Alternatively, the applicant or member may seek injunctive relief against the association [*see generally* Ch. 116, *Injunctions*]. Although no appellate decision has explicitly addressed the question of when relief should be sought by injunction rather than mandate, it appears that injunctive relief is generally sought to prevent a threatened expulsion or exclusion [*see, e.g., Riviello v. Journeymen Barbers etc. Union (1952) 109 Cal. App. 2d 123, 124, 240 P.2d 361]* . Mandate, on the other hand, is sought after the expulsion or exclusion has occurred [*see, e.g., Otto v. Tailors' P. & B. Union (1888) 75 Cal. 308, 311, 17 P. 217]* . In addition to or in lieu of seeking admission or reinstatement, an aggrieved applicant or member may bring an action for damages for intentional interference with the right to pursue a profession [*see, e.g., Willis v. Santa Ana etc. Hospital Assn. (1962) 58 Cal. 2d 806, 810, 26 Cal. Rptr. 640, 376 P.2d 568]* . The points and authorities set out in the forms in this chapter may be used in any of the above types of proceedings.

A person excluded or expelled from membership in an unincorporated membership on a basis prohibited by the Unruh Civil Rights Act [*Civ. Code § 51*] may also bring an action for damages and injunctive relief under that Act [*see, e.g., Warfield v. Peninsula Golf & Country Club (1995) 10 Cal. 4th 594, 42 Cal. Rptr. 2d 50, 896 P.2d 776]* . For points and authorities for use in actions under the Unruh Civil Rights Act, see Ch. 35, *Civil Rights: Unruh Civil Rights Act* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawUnincorporated AssociationsCivil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusTortsBusiness TortsCommercial InterferenceBusiness RelationshipsGeneral OverviewTortsBusiness TortsCommercial InterferenceEmployment RelationshipsGeneral Overview

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§ 22.03 Related Discussion and Forms

[1] Related Pleading and Practice Forms

For discussion of and forms for use in actions involving associations and clubs, see California Forms of Pleading and Practice, Ch. 61, *Associations and Clubs* . For discussion of injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* . For discussion of mandate proceedings generally, see California Forms of Pleading and Practice, Ch. 358, *Mandate and Prohibition* . For discussion of judicial review of a final administrative order by administrative mandate under Code Civ. Proc. § 1094.5, see California Forms of Pleading and Practice, Ch. 474C, *Procedures in Reviewing Agency Decisions* .

For discussion of liability for interference with contractual and other business relationships, see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* .

[2] Related Points and Authorities

For memoranda of points and authorities relating to injunctive relief generally, see Ch. 116, *Injunctions* in this set. For memoranda of points and authorities relating to mandate proceedings generally, see Ch. 150, *Mandate and Prohibition* . For memoranda of points and authorities relating to judicial review of administrative decisions by administrative mandate under *Code Civ. Proc. § 1094.5*, see Ch. 195, *Public Administrative Law* . For memoranda of points and authorities relating to intentional interference with business relationships generally, see Ch. 122, *Interference* .

For points and authorities for use in an action under the Unruh Civil Rights Act to challenge an association's allegedly discriminatory membership decisions, see Ch. 35, *Civil Rights: Unruh Civil Rights Act* .

For memoranda of points and authorities relating to conspiracy to interfere with a trade or business, see Ch. 46, *Conspiracy* .

For a discussion of how to use the forms in this chapter to draft a memorandum of points or authorities or a trial or appellate brief, and for a sample of a completememorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* at the beginning of Volume 1.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawUnincorporated AssociationsCivil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusTortsBusiness TortsCommercial InterferenceBusiness RelationshipsGeneral OverviewTortsBusiness TortsCommercial InterferenceEmployment RelationshipsGeneral Overview

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2-22 California Points & Authorities §§ 22.04-22.19

[Reserved]

§§ 22.04[Reserved]

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PART II. FORMS

2-22 California Points & Authorities § 22.20

§ 22.20 Supporting Contention That Expulsion From Membership in an Association Was Improper--Not Based on Violation of Rules or Objects of Association

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

EXPULSION FROM MEMBERSHIP IN THE ASSOCIATION WAS IMPROPER BECAUSE EXPULSION WAS NOT BASED ON THE MEMBER'S VIOLATION OF THE ASSOCIATION'S RULES, WHICH WERE SUBSCRIBED OR ASSENTED TO BY THE MEMBERS AND THAT PROVIDE FOR EXPULSION FOR SUCH VIOLATION, OR ON CONDUCT THAT VIOLATED THE OBJECTS OF THE ASSOCIATION.

A. Court Review of Grounds. In the matter of expulsion, an association acts in a quasi-judicial character, and so far as it confines itself to the exercise of the powers vested in it, and in good faith pursues the methods prescribed by its laws, such laws not being in violation of the laws of the land or any inalienable right of the member, its sentence is conclusive. The courts will, however, decide whether the ground for expulsion is well taken (*Otto v. Tailors' P & B. Union (1888) 75 Cal. 308, 314, 17 P 217*).

B. Court Intervention to Protect Member's Property Interests. Courts will interfere with an association's decisions for the purpose of protecting property rights of its members (*Otto v. Tailors' P. & B. Union (1888) 75 Cal. 308, 313, 17 P 217*).

C. Membership Itself Protected. Membership in an association, with its associated privileges, once attained, is a valuable interest which cannot be arbitrarily withdrawn (*Ezekial v. Winkley (1977) 20 Cal. 3d 267, 273, 142 Cal. Rptr. 418, 572 P.2d 32*).

D. Member's Expulsion Must Be Based on Violation of Association's Rules or Objects. The right of expulsion from an association must be based and upheld on either of two grounds: (1) a violation of the established rules of the association that have been subscribed or assented to by the members and that provide expulsion for such violation; or (2) conduct that clearly violates the fundamental objects of the association, which, if persisted in and allowed, would

thwart those objects or bring the association into disrepute (*Otto v. Tailors' P. & B. Union (1888) 75 Cal. 308, 314, 17 P 217*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be used in support of the contention that expulsion from membership in an association was improper because expulsion was not based on the member's violation of the association's rules, which were subscribed to by the members and that provide for expulsion for such violation, or on conduct that violated the objects of the association.

The argument supported by this form may be raised in a petition for a writ of mandate under *Code Civ. Proc. § 1086* to seek reinstatement to membership in the association. If the law required the association to grant the member an administrative trial, the member may petition the court for a writ of mandate under *Code Civ. Proc. § 1094.5* to review the administrative decision and order reinstatement. The argument can also be used when a member is seeking an injunction against the association. Although the cases do not specify when to seek an injunction rather than a writ of mandate, it appears that an injunction rather than writ of mandate, it appears that an injunction is sought prior to the actual expulsion as a prohibitive measure [see, *e.g.,* *Riviello v. Journeymen Barbers etc. Union (1952) 109 Cal. App. 2d 123, 124, 240 P.2d 361]* . A writ of mandate would be sought once expulsion had been completed [see, *e.g.,* *Otto v. Tailors' P. & B. Union (1888) 75 Cal. 308, 311, 17 P 217]* . This argument may also be used to support the contention that damages should be awarded for improper expulsion [see, *e.g.,* *Smetherham v. Laundry Workers' Union (1941) 44 Cal. App. 2d 131, 135, 111 P.2d 948]* .

These points and authorities may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the substantive issue that the member's expulsion was improper because it was not based on violation of the rules or objects of the association. The points and authorities set out in this form may also be adapted for use in a trial or appellate court.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. To demonstrate that the association wrongfully expelled the member, counsel should show that the member did not violate any rules or objects of the association or, if the member did violate a rule of the association, that either the rule was not assented to by the members or the penalty proscribed for violation of the rule did not include expulsion.

[b] Related Pleading and Practice Forms

For pleading and practice forms relating to actions involving associations and clubs, see Ch. 61, *Associations and Clubs* in California Forms of Pleading and Practice. For discussion, procedural checklist, and forms relating to injunctive relief, see Ch. 303, *Injunctions* in that set. For discussion and forms for use in mandate proceedings generally, see Ch. 358, *Mandate and Prohibition* . For discussion and forms of petitions for judicial review of a final administrative order by administrative mandate under Code Civ. Proc. § 1094.5, see Ch. 474C, *Procedures in Reviewing Agency Decisions* .

[c] Related Points and Authorities

For memoranda of points and authorities relating to mandate proceedings generally, see Ch. 150, *Mandate and Prohibition* . For memoranda of points and authorities relating to injunctive relief generally, see Ch. 116, *Injunctions* . For memoranda of points and authorities for use in mandate proceedings to review administrative decisions under *Code Civ. Proc. § 1094.5*, see Ch. 195, *Public Administrative Law* .

[d] Opposing Points and Authorities

The points and authorities set out in *§ 22.28* may be used in an appropriate case to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Court Review of Grounds

In ***Otto v. Tailors' P. & B. Union*** *(1888) 75 Cal. 308, 17 P. 217* , an association (a union) expelled one of its members for working for a firm which the association had called a strike against. The rules of the association provided that members working for parties against whom a strike was declared were subject to a fine. The expelled member petitioned the superior court for a writ of mandate compelling the association to reinstate him to membership. The superior court granted the writ. The association appealed, and the Supreme Court affirmed the decision.

The Court held that the expulsion was improper because petitioner had violated an association rule for which the only penalty prescribed was a fine. In so finding, the Court stated that the courts would decide whether the ground for expulsion on which the association based its decision was well taken (*75 Cal. 308, 314)* .

[b] Court Intervention to Protect Member's Property Interests

The facts and procedural background of ***Otto v. Tailors' P. & B. Union*** *(1888) 75 Cal. 308, 17 P. 217* , are discussed in *§ 22.20[3][a]*. In *Otto*, the superior court granted petitioner a writ of mandate ordering his reinstatement to membership in the society. The society appealed, and the Supreme Court affirmed the decision. The Court stated that it would interfere with an association's decision to expel a member for the purpose of protecting property rights of the members (*75 Cal. 308, 313)* . In this case, the Court found that plaintiff, as a member of the associationin good standing who had paid all his dues and assessments and who was thereby entitled to participate in a benefit feature of the association, had a property right involved (*75 Cal. 308, 314)* . The Court found that these rights were violated when the member was expelled and that the court could therefore interfere with the association's decision (*75 Cal. 308, 316)* .

[c] Membership Itself Protected

Ezekial v. Winkley *(1977) 20 Cal. 3d 267, 142 Cal. Rptr. 418, 572 P.2d 32* , was an action by a physician for damages and injunctive relief against the chief of surgery and others at the hospital at which he was a resident. Plaintiff was encouraged by defendants to join the residency program at the hospital. One month after he was rehired to the residency program for the second year, plaintiff was told that his residency would be terminated in six months. Because plaintiff was given no reasons for the hospital's decision and was afforded neither a hearing nor opportunity to respond, he contended that his dismissal did not comport with the common law right of fair procedure. The trial court sustained defendant hospital's demurrer to the complaint without leave to amend and dismissed the action. The Supreme Court reversed the judgment of dismissal and remanded with directions to overrule the demurrer.

The Court held that plaintiff had stated a valid claim for wrongful denial of the common law right of fair procedure and was entitled to judicial protection from arbitrary exclusion because of his membership status. The Court explained that the common law protection against arbitrary expulsion was of broader application than that against arbitrary exclusion and had been extended not only to labor unions and professional and trade organizations but to mutual benefit societies and other fraternal and social groups (*20 Cal. 3d 267, 272-273)* . It found that the underlying theme of the decisions granting protection from arbitrary expulsion was that membership, with its associated privileges, once attained, was a valuable interest which could not be arbitrarily withdrawn (*20 Cal. 3d 267, 273)* . Therefore, the Court held that as a member or participant in the residency program, plaintiff was entitled to fair-procedure protection prior to his dismissal from the residency program (*20 Cal. 3d 267, 275)* .

In ***Curran v. Mount Diablo Council of the Boy Scouts*** *(1983) 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 , app. dismissed, 468 U.S. 1205, 104 S. Ct. 3574, 82 L. Ed. 2d 873 (1984) , on review after remand, 17 Cal. 4th 670, 72 Cal. Rptr. 2d 410, 952 P.2d 218 (1998)* , plaintiff sued the Boy Scouts for unfair procedure and violation of the Unruh Civil Rights Act (*Civ. Code § 51*) after he was expelled from the Boy Scouts and rejected as a "Scouter" on the basis of his status as a homosexual. The court of appeal held that plaintiff stated a cause of action against the organization under both theories. The issue arose as to whether the fair procedure cause of action was one for expulsion from membership already attained or exclusion from becoming a member. The court stated that if the case involves expulsion, the determination of whether a cause of action is stated turns on the application of the broader principle applicable to an important benefit or privilege that has already been conferred, (*147 Cal. App. 3d 712, 722* , citing *Ezekial v. Winkley (1977) 20 Cal. 3d 267, 273, 142 Cal. Rptr. 418, 572 P.2d 32* (discussed in *§ 22.20[3][c]*) . The court concluded that the case did involve expulsion and found that an expulsion from a private association under the circumstances before it was both procedurally unfair and substantively unreasonable (*147 Cal. App. 3d 712, 723)* . Counsel should note that subsequently the California Supreme Court held that the Boy Scouts is not a "business establishment" subject to the Unruh Act for the purposes of its membership decisions, but is subject to the Unruh Act to the extent it engages in business transactions with nonmembers (*17 Cal. 4th 670, 696-700)* . For discussion, see Ch. 35, *Civil Rights: Unruh Civil Rights Act* .

[d] Member's Expulsion Must Be Based on Violation of Association's Rules or Objects

The facts and procedural background of ***Otto v. Tailors' P. & B. Union*** *(1888) 75 Cal. 308, 17 P. 217* , are discussed in *§ 22.20[3][a]*. In *Otto,* the Supreme Court affirmed the trial court's decision to grant a writ of mandate ordering plaintiff's reinstatement to membership in the society. The Court found that petitioner's expulsion was improper because the only penalty prescribed in the rules for petitioner's behavior was a fine. The Court held that expulsion from an association must be based and upheld on either of two grounds; (1) a violation of the established rules of the association that have been subscribed or assented to by the members and that provide expulsion for such violation; or (2) conduct that clearly violates the fundamental objects of the association, which, if persisted in and allowed, would thwart those objects or bring the association into disrepute (*75 Cal. 308, 314)* .

[4] Additional Authorities

[a] Membership Itself Protected

Dingwall v. Amalgamated Asso. (1906) 4 Cal. App. 565, 88 P. 597 , was a proceeding in mandamus for an order commanding plaintiff's reinstatement to membership in defendant association. Plaintiff was charged with violating his obligation to the association by holding secret meetings and conspiring against the welfare of the union. He was found guilty of the charges and expelled from the association. The trial court granted plaintiff's petition for a writ of mandate. Defendant appealed, and the court of appeal affirmed the trial court's decision.

The court of appeal stated that membership in a social or beneficial association was a personal right and that the holder of the right was entitled to be protected in its enjoyment against any unauthorized act of the association. The court said that the right of a member to retain his or her membership was subject to the termsand conditions contained in the constitution articles, bylaws, and rules as may be adopted by the members, and that whenever it was sought to deprive a person of membership, the person has the right to insist upon a strict observance of the rules (*4 Cal. App. 565, 569)* . The court found that the rules that plaintiff had violated did not provide expulsion as a penalty. Therefore, it held that the action of the defendant in expelling plaintiff was without authority (*4 Cal. App. 565, 570)* .

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2-22 California Points & Authorities § 22.21

§ 22.21 Supporting Contention That Expulsion From Membership in an Association Was Improper--Based on Rule Which Is Unreasonable, Contrary to Public Policy, or Substantively Capricious

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

EXPULSION FROM MEMBERSHIP IN THE ASSOCIATION WAS IMPROPER BECAUSE EXPULSION WAS BASED ON [AN INTERPRETATION OF] A RULE WHICH IS _____ [UNREASONABLE *and/or* CONTRARY TO PUBLIC POLICY *and/or* SUBSTANTIVELY CAPRICIOUS].

A. Court Review of Grounds. [*See § 22.20, Paragraph A.*]

B. Court Intervention to Protect Member's Property Interests. [*See § 22.20, Paragraph B.*]

C. Membership Itself Protected. [*See § 22.20, Paragraph C.*]

[*EITHER*]

D. Rule and Its Interpretation Must Be Reasonable. An association's rules must be reasonable, and it must be presumed that the association intended its rules to be reasonably construed. When one construction would make a rule unusual or extraordinary, courts are to disregard such construction if the rule may reasonably be subject to a construction which is fair and just (*see Smetherham v. Laundry Workers' Union (1941) 44 Cal. App. 2d 131, 138, 111 P.2d 948*).

[*AND/OR*]

E. Rule and Its Interpretation Cannot Be Contrary to Public Policy. An association's rule that is contrary to public

policy will not stand. If the rule can be interpreted consistently with public policy, the court will do so (*see Curran v. Mount Diablo Council of the Boy Scouts (1983) 147 Cal. App. 3d 712, 720-721, 195 Cal. Rptr. 325 , app. dismissed, 468 U.S. 1205, 104 S. Ct. 3574, 82 L. Ed. 2d 873 (1984) , on review after remand, 17 Cal. 4th 670, 72 Cal. Rptr. 2d 410, 952 P.2d 218 (1998)* ; *Bernstein v. Alameda etc. Med. Assn. (1956) 139 Cal. App. 2d 241, 246-247, 293 P.2d 862*).

[*AND/OR*]

F. Rule and Its Interpretation Cannot Be Substantively Capricious. An expulsion from membership in an association cannot rest on a rule that is substantively capricious (*Curran v. Mount Diablo Council of the Boy Scouts (1983) 147 Cal. App. 3d 712, 720-721, 195 Cal. Rptr. 325 , app. dismissed, 468 U.S. 1205, 104 S. Ct. 3574, 82 L. Ed. 2d 873 (1984) , on review after remand, 17 Cal. 4th 670, 72 Cal. Rptr. 2d 410, 952 P.2d 218 (1998)* .

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be used in support of the contention that expulsion from membership in an association was improper because the rule on which the member's expulsion was based was unreasonable, contrary to public policy, or substantively capricious.

The argument supported by this form may be raised in a petition for a writ of mandate under *Code Civ. Proc. § 1086* to seek reinstatement to membership in the association. If the law required the association to grant the member an administrative trial, the member may petition the court for a writ of mandate under *Code Civ. Proc. § 1094.5* to review the administrative decision and order reinstatement. The argument may also be used when a member is seeking an injunction against the association. Although the cases do not specify when to seek an injunction rather than a writ of mandate, it appears that an injunction is sought prior to the actual expulsion as a prohibitive measure [*see, e.g., Riviello v. Journeymen Barbers etc. Union (1952) 109 Cal. App. 2d 123, 124, 240 P.2d 361]* . A writ of mandate would be sought once expulsion had been completed [*see, e.g., Otto v. Tailors' P. & B. Union (1888) 75 Cal. 308, 311, 17 P. 217]* . This argument may also be used to support the contention that damages should be awarded for improper expulsion [*see, e.g., Smetherham v. Laundry Workers' Union (1941) 44 Cal. App. 2d 131, 135, 111 P.2d 948]* .

These points and authorities may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the substantive issue that the member's expulsion was improper because the rule on which expulsion was based was unreasonable, contrary to public policy, or substantively capricious. The points and authorities set out in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form showing the relationship between the facts and the case and the points of law stated. If the rule on which expulsion was based is unambiguous, counsel should demonstrate that it is unreasonable, contrary to public policy, substantively capricious, or that the association attempted to change its meaning by unreasonably construing the provision. If the rule is ambiguous, counsel should show that the association has interpreted it in a manner that is unreasonable, contrary to public policy, or substantively capricious.

[b] Related Pleading and Practice Forms

For pleading and practice forms relating to associations and clubs, see California Forms of Pleading and Practice, Ch. 61, *Associations and Clubs* (Matthew Bender). For discussion, procedural checklist, and forms relating to injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* . For discussion and forms for use in mandate proceedings generally, see California Forms of Pleading and Practice, Ch. 358, *Mandate and Prohibition* .

For discussion and forms of petitions for judicial review of a final administrative order by administrative mandate under Code Civ. Proc. § 1094.5, see California Forms of Pleading and Practice, Ch. 474, *Availability of Judicial Review of Agency Decisions* et seq.

[c] Related Points and Authorities

For memoranda of points and authorities relating to injunctive relief generally, see Ch. 116, *Injunctions* . For memoranda of points and authorities relating to mandate proceedings generally, see Ch. 150, *Mandate and Prohibition* . For memoranda of points and authorities for use in mandate proceedings to review administrative decisions under *Code Civ. Proc. § 1094.5*, see Ch. 195, *Public Administrative Law* .

[d] Opposing Points and Authorities

The points and authorities set out in *§ 22.29* may be used in an appropriate case to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Rule and Its Interpretation Must Be Reasonable

Smetherham v. Laundry Workers' Union *(1941) 44 Cal. App. 2d 131, 111 P.2d 948* , was a proceeding in mandamus seeking reinstatement to membership in defendant association. Plaintiff was expelled for assaulting another member of the union. Her expulsion was based on a bylaw that stated that no member could injure the interests of another member by undermining him or her in wages or in any other willful manner, by which "the interests of the other may be placed in jeopardy." The trial court granted plaintiff's petition for the writ of mandate. Defendant appealed, and the court of appeal affirmed. The court found that the union's bylaw did not purport to regulate the personal conduct of members of the union which did not affect their interests in relation to the organization or their employment. Therefore, the court held that plaintiff was wrongfully expelled (*44 Cal. App. 2d 131, 136)* . It said that to hold otherwise, one must read into the bylaw something beyond a reasonable and proper construction. The court held that when one construction would make a contract unusual or extraordinary, courts are to disregard that construction if the contract may reasonably be subject to a construction which is fair and just (*44 Cal. App. 2d 131, 138)* .

[b] Rule and Its Interpretation Cannot Be Contrary to Public Policy

Curran v. Mount Diablo Council of the Boy Scouts *(1983) 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 , app. dismissed, 468 U.S. 1205, 104 S. Ct. 3574, 82 L. Ed. 2d 873 (1984) , on review after remand, 17 Cal. 4th 670, 72 Cal. Rptr. 2d 410, 952 P.2d 218 (1998)* , was an action by a boy who was expelled from the Boy Scouts because he was a homosexual. Plaintiff brought causes of action based on unfair procedure and violation of the Unruh Civil Rights Act (*Civ. Code § 51*) against the organization. The trial court sustained defendant's demurrer.

The court of appeal reversed, holding that plaintiff had stated a cause of action against the organization under both theories. Regarding plaintiff's cause of action for denial of the right to fair procedure, the court stated that a two-step analysis must be made. First, the court must determine whether the procedure was fair and afforded the expelled person adequate notice of the charges and a reasonable opportunity to respond. Second, the court must determine whether or not the expulsion rests on a rule that is substantively capricious or contrary to public policy (*147 Cal. App. 3d 712, 720-721)* . The court held that based on the facts alleged in the case before it, the expulsion of plaintiff was both procedurally unfair and substantively unreasonable because plaintiff was not given adequate notice and reasonable opportunity to be heard and because an expulsion from an association on the basis of a person's homosexual orientation is both capricious and offensive to public policy. The court said that the mere status of homosexuality without more does not connote immorality and that the inhibition of an association member's public and civic rights in this way is contrary to public policy (*147 Cal. App. 3d 712, 723)* . The court stated that before homosexual conduct may lawfully

be used as a basis to expel a person from membership in an organization, a connection must be demonstrated between the homosexual conduct and any significant danger of harm to the association resulting from that person's continued membership (*147 Cal. App. 3d 712, 725)* .

Bernstein v. Alameda etc. Med. Assn. *(1956) 139 Cal. App. 2d 241, 293 P.2d 862* , was an action by a physician seeking a writ of mandate to restore him to membership in a medical association and for monetary damages for injuries sustained as a result of his expulsion from it. The association based his expulsion on the finding that he had violated seven of the Principles of Medical Ethics adopted by the association. The association contended that plaintiff had violated medical ethics by giving a report to the attorney of the widow of a deceased patient. This report identified the cause of death as industrial injury and criticized the pathological report done at the time of death. The trial court, finding plaintiff guilty of this charge and others, gave judgment for defendant. Plaintiff appealed, and the court of appeal reversed as to this charge.

The court found that the physician's report was a privileged publication sinceit was requested by a litigant for use as evidence in a judicial proceeding, that the report was prepared and delivered by the doctor solely for that purpose, and was put to that very use by the litigant (*139 Cal. App. 2d 241, 245)* . Public policy dictates that publications be privileged to alleviate parties' and witnesses' fears of being subject to slander and libel actions so that the administration of justice would not be hampered or the judicial process throttled. The court held that this policy would ban a medical association bylaw which threatens each member with expulsion if in his or her testimony before a court or other judicial body he or she disparages, by comment or insinuation, another physician (*139 Cal. App. 2d 241, 246)* . The court, however, found that it was not necessary to ban the bylaw because it could be interpreted consistently with public policy. The court said that since the bylaw did not contain language about the duty of one physician toward another when testifying as a witness in a judicial proceeding, it could be inferred from such silence that the association did not intend to arrogate to itself the state's prerogative of defining the duties of witnesses in judicial proceedings and the proscribing of penalties for the violation of those duties, and therefore, that the physician had not by his actions violated the bylaw (*139 Cal. App. 2d 241, 247)* .

[c] Rule and Its Interpretation Cannot Be Substantively Capricious

Curran v. Mount Diablo Council of the Boy Scouts *(1983) 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 , app. dismissed, 468 U.S. 1205, 104 S. Ct. 3574, 82 L. Ed. 2d 873 (1984) , on review after remand, 17 Cal. 4th 670, 72 Cal. Rptr. 2d 410, 952 P.2d 218 (1998)* , is discussed in *§ 22.21[3][b]*.

[4] Additional Authorities

[a] Rule and Its Interpretation Must Be Reasonable

Gonzales v. Internat. Asso. of Machinists (1956) 142 Cal. App. 2d 207, 298 P.2d 92 , was a proceeding in mandamus to compel a union to restore membership to plaintiff and to recover damages. Plaintiff, believing that the Grand Lodge's International Representative to the local union had instigated a rejected applicant to physically assault him, filed suit against both for his injuries. The International Representative thereupon filed charges with the local against plaintiff for violation of a provision of the Grand Lodge's constitution which prohibited any member from circulating false or malicious statements about any officer of the association. The penalty for violation of this provision was a fine, expulsion, or both. The local's trial committee tried plaintiff, found him guilty, and recommended his expulsion. The local's constitution required a majority vote by secret ballot to uphold the committee's finding and provided that the membership could substitute another punishment for that recommended by the committee. The constitution itself contained no provision for rescinding a vote but incorporated Robert's Rules which required that a vote be rescinded in the same manner as originally taken. The membership originally voted by secret ballot not to sustain the committee's finding, then rescinded it by a standing vote. The membership then revoted to sustain the finding. Plaintiff appealed this decision to the Grand Lodge's president. The president upheld the membership's action in convicting plaintiff, but

changed the penalty from expulsion to a fine and an apology. The trial court granted plaintiff a writ of mandate and damages. The court of appeal affirmed. The court, stating that a clearly erroneous administrative construction of a definite and unambiguous provision of the constitution cannot operate to change its meaning, held that the actions of the president, in interpreting the constitutions to allow the rescission, and change of penalty by him to something other than a fine or expulsion, were not reasonable (*142 Cal. App. 2d 207, 216-217)* .

Mandracio v. Bartenders Union, Local 41 (1953) 41 Cal. 2d 81, 256 P.2d 927 , was an action to recover damages for loss of wages during the time plaintiff was refused membership by defendant union. Plaintiff was a member of a local bartenders union in San Diego which was affiliated with the Hotel and Restaurant Employees and Bartenders International Union. The International's constitution provided that local unions shall be compelled to recognize and admit members who travel from one city to another and that members so admitted shall be allowed to participate in all of the work coming under the jurisdiction of the local subject to the rules for employment prevailing in the local accepting the traveler. Plaintiff moved to San Francisco and applied for membership, but he was not admitted due to a policy of the local which restricted admission of travelers until all local members had been placed in jobs. Defendant local contended that this policy was authorized under its president's interpretation of the International constitution. This interpretation allowed local unions to subject travelers to their local work rules. The trial court, finding that the local union was governed by the International Union's constitution and that the action taken by the local with respect to plaintiff's admission was in accordance with the provisions of the constitution, gave judgment for defendant. Plaintiff appealed and the Supreme Court reversed.

The Court found that the provisions of the constitution were plain and unambiguous and that they clearly require a local union to grant admission to a member from another city who tenders properly authenticated credentials. Therefore, the Court held that denial of membership was improper. The Court further held that if the president interpreted the union's constitution as permitting the procedure followed in this case, then his construction was not a reasonable one, was not binding on the members of the union, and would not be recognized by the courts (*41 Cal. 2d 81, 85)* .

[b] Rule and Its Interpretation Cannot Be Contrary to Public Policy

Malibou Lake Mountain Club, Ltd. v. Robertson (1963) 219 Cal. App. 2d 181, 33 Cal. Rptr. 74 , was an action by a club, owning vacation property on which it licensed its members to construct dwellings, to expel one of its members and fordeclaratory relief as to its right to do so. The bylaws of plaintiff association provided that a member's license for dwellings was terminable by forfeiture for failure to pay dues, assessments, and for conduct unbecoming a member. Plaintiff expelled defendant from membership in its association and terminated his license to use the property for conduct unbecoming a member. Plaintiff based this charge on defendant's activities in prosecuting a receivership action against the association. The trial court gave judgment for defendant member. Plaintiff appealed, and the court of appeal affirmed.

The court held that defendant's conduct was not a legally adequate cause for expulsion from the association. The court based its decision on the fact that by expelling defendant for his participation in the receivership action, the association would be prosecuting the defendant for exercising a legal right. Since this is against public policy, the court held that this particular conduct could not fall within the category of conduct unbecoming a member as prescribed by the bylaws (*219 Cal. App. 2d 181, 186)* .

California Points & Authorities

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 22 ASSOCIATIONS AND CLUBS
PART II. FORMS

2-22 California Points & Authorities § 22.22

§ 22.22 Supporting Contention That Exclusion From Membership in an Association Was Improper--Exclusion Arbitrary, Unreasonable, or Contrary to Public Policy

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

EXCLUSION FROM MEMBERSHIP IN THE ASSOCIATION WAS IMPROPER BECAUSE THE EXCLUSION DEPRIVED THE APPLICANT OF SUBSTANTIAL ECONOMIC ADVANTAGES AND WAS ARBITRARY, UNREASONABLE, AND CONTRARY TO PUBLIC POLICY.

A. Substantial Economic Advantages as Prerequisite for Judicial Intervention. By showing that exclusion from membership in an association deprives him or her of substantial economic advantages, a person establishes a right to judicial intervention with respect to the denial of his or her application for membership (*Pinsker v. Pacific Coast Society of Orthodontists (1969) 1 Cal. 3d 160, 164-165, 81 Cal. Rptr. 623, 460 P.2d 495*).

B. Exclusion Cannot Be Arbitrary, Unreasonable, or Contrary to Public Policy. An association must not exercise its power to exclude persons from membership in an arbitrary or unreasonable manner, and its decisions cannot be contrary to public policy (*James v. Marinship Corp. (1944) 25 Cal. 2d 721, 731-732, 739, 155 P.2d 329*).

[*Optional*] **C. Association's Standards for Admission Cannot Be Unreasonably Susceptible of Arbitrary or Discriminatory Application.** An association cannot adopt standards for admission to membership whose terms are unreasonably susceptible of arbitrary or discriminatory application (*Miller v. Eisenhower Medical Center (1980) 27 Cal. 3d 614, 627, 166 Cal. Rptr. 826, 614 P.2d 258*).

[2] Comments

[a] Use of Form

These points and authorities may be used to support the contention that exclusion from membership in an association was improper because the exclusion was arbitrary, unreasonable, or contrary to public policy.

The argument supported by this form may be raised in a petition for a writ of mandate under *Code Civ. Proc. § 1086* to seek admission to membership in an association. If the law required the association to grant the applicant an administrative trial or hearing, the applicant may raise the argument supported by this form in support of a petition to the court for a writ of mandate under *Code Civ. Proc. § 1094.5* to review the administrative decision and order admission. The argument may also be used when an applicant is seeking an injunction against the association. Although the cases do not specify when to seek an injunction rather than a writ of mandate, it appears that an injunction is sought prior to the actual denial of the applicant's request for admission as a prohibitive measure [*see, e.g., Pinsker v. Pacific Coast Society of Orthodontists (1969) 1 Cal. 3d 160, 164, 81 Cal. Rptr. 623, 460 P.2d 495]* . A writ of mandate would be sought once the application had been denied [*see, e.g., Miller v. Eisenhower Medical Center (1980) 27 Cal. 3d 614, 618, 166 Cal. Rptr. 826, 614 P.2d 258]* . This argument may also be used to support the contention that damages would be awarded for improper exclusion [*see, e.g., Directors Guild of America, Inc. v. Superior Court (1966) 64 Cal. 2d 42, 43, 48 Cal. Rptr. 710, 409 P.2d 934]* .

These points and authorities may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the substantive issue that the applicant's exclusion from the association was improper because the exclusion was arbitrary, unreasonable, or contrary to public policy. The points and authorities set out in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. To demonstrate that the association has arbitrarily excluded the applicant, counsel may show, for example, that although the applicant was qualified for membership, the association excluded the applicant because of his or her race [*see, e.g., James v. Marinship Corp. (1944) 25 Cal. 2d 721, 736-737, 745, 155 P.2d 329]* or because he or she was not a relative of an existing member [*see, e.g., Directors Guild of America, Inc. v. Superior Court (1966) 64 Cal. 2d 42, 45, 48 Cal. Rptr. 710, 409 P.2d 934]* .

Optional Paragraph C should be used when the standards governing admission to the association are so vague or ambiguous that they pose a danger of being applied arbitrarily or discriminatorily.

[b] Related Pleading and Practice Forms

For pleading and practice forms relating to associations and clubs, see Ch. 61, *Associations and Clubs* in California Forms of Pleading and Practice. For discussion, procedural checklist, and forms relating to injunctive relief, see Ch. 303, *Injunctions* in that set. For discussion and forms for use in mandate proceedings generally, see Ch. 358, *Mandate and Prohibition* . For discussion and forms of petitions for judicial review of a final administrative order by administrative mandate under Code Civ. Proc. § 1094.5, see Ch. 474C, *Procedures in Reviewing Agency Decisions* .

[c] Related Points and Authorities

For memoranda of points and authorities relating to injunctive relief generally, see Ch. 116, *Injunctions* . For memoranda of points and authorities relating to mandate proceedings generally, see Ch. 150, *Mandate and Prohibition* . For memoranda of points and authorities for use in mandate proceedings to review administrative decisions under *Code Civ. Proc. § 1094.5*, see Ch. 195, *Public Administrative Law* .

[d] Opposing Points and Authorities

The points and authorities set out in *§ 22.31* may be used in an appropriate case to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Substantial Economic Advantages as Prerequisite for Judicial Intervention

In ***Pinsker v. Pacific Coast Society of Orthodontists*** *(1969) 1 Cal. 3d 160, 81 Cal. Rptr. 623, 460 P.2d 495* , a dentist was denied admission into the American Association of Orthodontists (AAO). Membership, if not absolutely essential, was at least extremely helpful in obtaining certification by the American Board of Orthodontics (ABO). Membership may also have been a prerequisite to attaining membership in certain foundations dedicated to special orthodontic techniques and to being admitted to certain advanced educational programs. The dentist sued to enjoin the AAO from excluding him from membership in the organization. The trial court denied the injunction, but the Supreme Court reversed and remanded the case to the trial court with instructions to issue an injunction compelling the association to set aside the rejection of the dentist's application and to reconsider the application.

The Court held that the doctrine of strict economic necessity as a prerequisite to judicial intervention, established in *James v. Marinship Corp. (1944) 25 Cal. 2d 721, 155 P.2d 329* (discussed in *§ 22.22[3][b]*), did not apply when membership was necessary to achieve the higher financial advantages of a professional specialization (*1 Cal. 3d 160, 166)* . The Court said that plaintiff could, by showing that exclusion from membership in defendant association deprived him or her of substantial economic advantages, establish a right to judicial intervention with respect to the denial of his or her application for membership. The Court found that membership in this association was the only available sanction of specialized professional qualification. The Court also noted that membership, although not essential in order for the dentist to practice orthodontics, would nevertheless mean an increase in the amount of money that he could earn and would have a direct bearing on the number of referrals he received (*1 Cal. 3d 160, 165)* .

[b] Exclusion Cannot Be Arbitrary, Unreasonable, or Contrary to Public Policy

James v. Marinship Corp. *(1944) 25 Cal. 2d 721, 155 P.2d 329* , was an appeal from an order of the superior court issuing a preliminary injunction to restrain an employer from discharging black employees because they were not members of a union with which the employer had a closed shop agreement. The union excluded the blacks because of their race. The Supreme Court sustained the order. The Court said that when a union has a monopoly of the supply of labor it occupies a quasi-public position and has certain corresponding obligations. It may no longer claim the same freedom from legal restraint enjoyed by golf clubs or fraternal associations. The union's asserted right to choose its own members does not merely relate to social relations but affects the fundamental right to work for a living (*25 Cal. 2d 721, 731)* . The Court expounded the principle that the holder of a monopoly could not exercise its power to exclude in an arbitrary, unreasonable manner so as to bring injury to others (*25 Cal. 2d 721, 732)* . The Court found that the union held a monopoly and held that the exclusion of blacks from the union was arbitrary, unreasonable, and contrary to public policy (*25 Cal. 2d 721, 739-740)* .

It should be noted that although the Court in *James* seemed to require the association to have a monopoly over the supply of labor, the Court did not determine the issue (*25 Cal. 2d 721, 734)* . It is obvious that subsequent cases have liberalized this requirement [*see, e.g.,* *Ezekial v. Winkley (1977) 20 Cal. 3d 267, 277, 142 Cal. Rptr. 418, 572 P.2d 32* , in which the Court stated that the application of the common law rule did not depend on the existence of monopoly power; *Ascherman v. Saint Francis Memorial Hosp. (1975) 45 Cal. App. 3d 507, 511, 119 Cal. Rptr. 507* , in which the court held that the availability of other nearby hospitals was not a bar to a claim for wrongful denial of staff privileges; *Williams v. Int. etc. of Boilermakers (1946) 27 Cal. 2d 586, 589, 165 P.2d 903* , in which the Court stated that failure to allege monopoly power was not fatal to the case]. The*James* Court also seemed to require that the association's decision affect the applicant's fundamental right to work. This standard has also been liberalized [*see, e.g., Pinsker v. Pacific Coast Society of Orthodontists (1969) 1 Cal. 3d 160, 165-166, 81 Cal. Rptr. 623, 460 P.2d 495* , in which the Court found that, although not essential to plaintiff's practice of orthodontics, membership in defendant association would provide plaintiff with substantial economic advantages and therefore held that he had a right to judicial intervention with respect to denial of his application for membership].

[c] Association's Standards for Admission Cannot Be Unreasonably Susceptible of Arbitrary or

Discriminatory Application

Miller v. Eisenhower Medical Center *(1980) 27 Cal. 3d 614, 166 Cal. Rptr. 826, 614 P.2d 258* , was a proceeding in mandamus to order defendant hospital to grant staff membership and privileges to plaintiff. Plaintiff's application for staff membership was denied on the basis of recommendations from references. The hospital bylaws required an applicant for staff membership to possess an ability to work with others. From plaintiff's references, defendant concluded that sufficient doubt existed concerning plaintiff's ability to work with others to warrant his exclusion. Plaintiff contended that the hospital's requirement that a physician be able to work with others was so vague and uncertain that it provided a substantial danger of arbitrary or discriminatory application. The trial court denied plaintiff's petition for a writ of mandate. The Supreme Court reversed with directions for the lower court to issue a peremptory writ of mandate directing defendant to either admit plaintiff or undertake further proceedings consistent with the Court's opinion.

The Court stated that a hospital may not adopt rules for admission to membership which permit exclusion on an arbitrary or irrational basis, and that a rule governing the admission to membership could not stand if it established a standard for admission which was substantively irrational or otherwise unreasonably susceptible of arbitrary or discriminatory application (*27 Cal. 3d 614, 626-627)* . The Court held that the hospital's requirement would not be invalid under this rule if the rejection was accompanied by a showing that the applicant's inability to work with others in the hospital setting would present a real and substantial danger that patients treated by the applicant might receive other than a high quality of medical care at the facility if he or she were admitted to membership (*27 Cal. 3d 614, 628-629)* . In this case, the Court found that the hospital had failed to make such a showing (*27 Cal. 3d 614, 632)* .

The rule stated in this case appears to be applicable to associations in general, since the courts have dealt with hospitals in various exclusion cases in the same manner as other associations.

[4] Additional Authorities

[a] Exclusion Cannot Be Arbitrary, Unreasonable, or Contrary to Public Policy

In *Gay Law Students Assn. v. Pacific Tel. & Tel., Co. (1979) 24 Cal. 3d 458, 156 Cal. Rptr. 14, 595 P.2d 592* , a group of law students instituted a suit against a utility company, seeking declaratory and injunctive relief, and monetary damages for discrimination in hiring, firing, and promotion of homosexuals. The trial court sustained defendant's demurrer to the complaint without leave to amend and entered judgment for defendants. The Supreme Court reversed the judgment. The Court held that it need not directly decide whether California common law prohibits a public utility from arbitrarily discriminating in employment because the common law had been codified in this instance to specifically prohibit this type of action by a public utility. However, the Court stated in dicta that in the past two decades numerous California decisions have explicitly established that professional and business associations and public and private hospitals are bound, under common law principles, to refrain from arbitrary exclusion of individuals from employment opportunities (*24 Cal. 3d 458, 483)* .

Directors Guild of America, Inc. v. Superior Court (1966) 64 Cal. 2d 42, 48 Cal. Rptr. 710, 409 P.2d 934 , was a proceeding in prohibition to restrain further prosecution of a pending superior court action in which plaintiff (real party in interest) sought relief by way of damages and injunction on the ground that a labor union arbitrarily excluded him from membership. Because plaintiff was offered employment as a second-assistant director for the filming of a television series, he applied for union membership. His membership was rejected because he was not a relative of an existing member and the union officers did not choose to admit him for reasons of personal friendship or favoritism. Because plaintiff was refused membership in the union, his prospective employer refused to employ him. The Supreme Court granted the union a peremptory writ.

The Court recognized that a union cannot arbitrarily exclude from membership a person employed in the craft or

industry whose employees are represented by the union even when the union does not have a union shop contract. The Court, however, held that relief in such a situation could only be afforded to those who are employed in such a craft or industry because the basis for membership lies in the right and desirability of representation, not in the union's economic control of jobs (*64 Cal. 2d 42, 51, 54)* . Finding that plaintiff had not alleged that he had actually been employed as a second-assistant director, the Court held that he could not be granted any relief (*64 Cal. 2d 42, 51)* .

In *Olympic Club v. Superior Court (1991) 229 Cal. App. 3d 358, 282 Cal. Rptr. 1* , a city brought an action against a private club, alleging that it discriminated in its membership policies by excluding blacks from membership. In its investigatory efforts, the city asked the club for a list of the names and business addresses of the applicants rejected for membership. The club resisted, asserting the associational privacy rights of the rejected applicants. The court of appeal issued a writ of mandate directing the trial court to order the club to produce the names and to establish notification procedures enabling rejected applicants to seek a protective order to preserve their anonymity (*229 Cal. App. 3d 358, 361-365)* . The issue of whether exclusion of blacks from membership is permissible was not raised by either side, each tacitly acknowledging that such exclusion is prohibited by the Unruh Civil Rights Act (*Civ. Code § 51*). For discussion and forms of memoranda of points and authorities for actions under the Unruh Civil Rights Act, *see* Ch. 35, *Civil Rights: Unruh Civil Rights Act* .

Kronen v. Pacific Coast Society of Orthodontists (1965) 237 Cal. App. 2d 289, 46 Cal. Rptr. 808 , was an action by a dentist for declaratory and injunctive relief to determine his eligibility for membership in two professional organizations for orthodontists. The trial court denied relief, and the court of appeal affirmed. The court of appeal, citing a New Jersey case for the proposition that the power of exclusion should be exercised in a reasonable and lawful manner, held that it was within the province of the trial court to review and inquire into the facts and circumstances pertinent to the alleged exclusion of plaintiff from defendant organizations to determine whether the power of these groups was exercised arbitrarily or unlawfully to prevent plaintiff from successfully practicing orthodontics (*237 Cal. App. 2d 289, 305)* . In this instance, however, the doctor had not complied with a rational requirement for admission. Thus, the exclusion was held to be proper (*237 Cal. App. 2d 289, 307)* .

Thorman v. Intl. Alliance etc. Employees (1958) 49 Cal. 2d 629, 320 P.2d 494 , was a proceeding in mandamus to compel a union to admit plaintiff to membership in the union. Plaintiff, an experienced moving-picture machine operator and a member of local subsidiary of the union, applied for membership in the union. Plaintiff's application was rejected because it failed to receive a favorable two-thirds vote of the members voting, as required by the union's constitution. Plaintiff was subsequently ousted from his job as a moving-picture machine operator and replaced by a union member. The trial court granted plaintiff a writ of mandate ordering his admission to membership in the union. Defendant appealed, and the Supreme Court affirmed.

The Court found that the union exercised a monopoly over all employment in the occupation of moving-picture machine operators by maintaining and enforcing closed shop agreements with all employers who own or operate motion picture theaters covering the employment of moving-picture machine operators (*49 Cal. 2d 629, 632-633)* . The court held that it was clear that plaintiff's cause of action fell within the principles announced in *James v. Marinship Corp. (1944) 25 Cal. 2d 721, 155 P.2d 329* (discussed in *§ 22.22[3][b]*) (*49 Cal. 2d 629, 634)* . The Court, by thus holding, apparently found the requirement that an application must receive a two-thirds vote to be arbitrary.

Williams v. Int. etc. of Boilermakers (1946) 27 Cal. 2d 586, 165 P.2d 903 , was an action for injunctive relief to restrain defendants from interfering with plaintiffs' employment or reemployment because plaintiffs were not members of the local labor union. Because plaintiffs were black they could only be members of the union if they consented to segregation into separate auxiliaries. As members of the auxiliaries, plaintiffs would have been in an unequal and disadvantageous position as compared with other members of the local unions. Plaintiffs contended this was equivalent to denial of membership. The trial court sustained defendants' demurrers to the complaint and dismissed the action. The Supreme Court reversed the judgment of dismissal.

The Court held that these rules and practices of the union were held discriminatory in *James v. Marinship Corp. (1944) 25 Cal. 2d 721, 737-739, 155 P.2d 329* (*27 Cal. 2d 586, 593)* . The Court further held that plaintiffs' failure to allege a monopoly of labor was not fatal to their cause of action (*27 Cal. 2d 586, 590)* . The Court said that although the court in the *James* case treated the existence of such a monopoly as an important reason for granting relief, the decision was not made dependent thereon (*27 Cal. 2d 586, 589)* .

[b] Association's Standards for Admission Cannot Be Unreasonably Susceptible of Arbitrary or Discriminatory Application

Rosner v. Eden Township Hospital Dist. (1962) 58 Cal. 2d 592, 25 Cal. Rptr. 551, 375 P.2d 431 , was a proceeding in mandamus to compel the admission of plaintiff to membership on the medical staff of a hospital maintained by defendant hospital district. Because plaintiff had made criticisms relating to the treatment of patients and hospital practices, defendant denied his application for staff membership on the grounds that he was not temperamentally suitable for hospital staff practice. The trial court denied plaintiff's petition for a writ of mandate. Plaintiff appealed, and the Supreme Court reversed, holding that the fact that a doctor was "unable to get along with" some doctors or hospital personnel was not a sufficient ground on which to exclude plaintiff. The Court stated that a hospital district should not be permitted to adopt standards for the exclusion of doctors from the use of its hospital which are so vague and ambiguous as to provide a substantial danger of arbitrary discrimination in their application. It found that in this case there was a danger that the hospital's requirement of temperamental suitability would be applied as a subterfuge when considerations having no relevance to fitness were present (*58 Cal. 2d 592, 598)* .

Martino v. Concord Community Hosp. Dist. (1965) 233 Cal. App. 2d 51, 43 Cal. Rptr. 255 , was a proceeding in mandamus to compel defendant hospital district to act on plaintiff's application for appointment to the hospital's medicalstaff and to enjoin the hospital from denying the application on the grounds that plaintiff refused to take an examination covering those areas of medicine and surgery in which the hospital required its staff to be qualified. Defendant contended that plaintiff had not completed his application for membership because he had not taken the hospital's examination. Plaintiff contended that the examination requirement was invalid because it was vague, ambiguous, and uncertain. The trial court denied the writ of mandate and injunction on the ground that plaintiff had not exhausted the association's internal remedies and the trial court declined to determine the validity of the examination requirement. The court of appeal reversed. The court found that the hospital's credentials committee had no standards to guide it in determining what tests to require of an applicant or in determining whether an applicant had successfully passed whatever tests it may have required (*233 Cal. App. 2d 51, 59)* . Therefore, the court held that the examination requirement was vague and ambiguous and could not be enforced (*233 Cal. App. 2d 51, 60)* .

Wyatt v. Tahoe Forest Hospital Dist. (1959) 174 Cal. App. 2d 709, 345 P.2d 93 , involved a mandamus action to compel a hospital to admit a physician to staff membership. The trial court denied relief, and the court of appeal reversed, holding that the hospital's rules regarding admission were too vague and uncertain to be used as the basis for the exclusion (*174 Cal. App. 2d 709, 715)* . The court said that a hospital district, in the exercise of its duty to prescribe reasonable rules and regulations, must set up standards or qualifications for those who wish to serve in the hospital which are general, but not arbitrary or discriminatory. These rules should be clear, not vague, ambiguous, or uncertain (*174 Cal. App. 2d 709, 715)* .

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 22 ASSOCIATIONS AND CLUBS
PART II. FORMS

2-22 California Points & Authorities § 22.23

§ 22.23 Supporting Contention That Expulsion or Exclusion From Membership in an Association Was Improper--Procedure Unfair

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [EXPULSION *or* EXCLUSION] FROM MEMBERSHIP IN THE ASSOCIATION WAS IMPROPER BECAUSE THE PROCEEDING FOLLOWED BY THE ASSOCIATION IN REACHING THE DECISION TO _____ [EXPEL *or* EXCLUDE] THE _____[MEMBER *or* APPLICANT] WAS NOT FAIR.

[*EITHER, if member improperly expelled*]

A. Membership Itself Protected. [*See § 22.20, Paragraph C.*]

[*OR, if applicant improperly denied membership*]

A. Substantial Economic Advantages as Prerequisite for Judicial Intervention. [*See § 22.22, Paragraph A.*]

B. Fair Procedure Required. Whenever a private association is legally required to refrain from arbitrary action, the association's action must be procedurally fair (*Pinsker v. Pacific Coast Society of Orthodontists (1974) 12 Cal. 3d 541, 550, 116 Cal. Rptr. 245, 526 P.2d 253* ; *Potvin v. Metropolitan Life Ins. Co. (1997) 54 Cal. App. 4th 936, 947-950, 63 Cal. Rptr. 2d 202* ; *Rosenblit v. Superior Court (1991) 231 Cal. App. 3d 1434, 1445, 282 Cal. Rptr. 819*).

C. Fair Procedure Includes Notice and an Opportunity to Defend Oneself. Fair procedure requires that before expulsion or denial of an application, the member or applicant must be notified of the reason for the proposed expulsion or rejection and given a fair opportunity to defend himself or herself (*Ezekial v. Winkley (1977) 20 Cal. 3d 267, 278,*

142 Cal. Rptr. 418, 572 P.2d 32 ; *Pinsker v. Pacific Coast Society of Orthodontists (1974) 12 Cal. 3d 541, 555, 116 Cal. Rptr. 245, 526 P.2d 253*).

[*Optional*] **D. Association's Adjudicators Must Be Impartial.** Fair procedure rights include impartiality of the adjudicators, who must be free from any practical probability of unfairness (*Rosenblit v. Superior Court (1991) 231 Cal. App. 3d 1434, 1448-1449, 282 Cal. Rptr. 819* ; *Applebaum v. Board of Directors (1980) 104 Cal. App. 3d 648, 656-657, 659, 163 Cal. Rptr. 831*).

[2] Comments

[a] Use of Form

These points and authorities may be used to support the contention that expulsion or exclusion from membership in an association was improper because the procedure followed by the association in reaching the decision to expel or exclude was not fair.

The argument supported by this form may be raised in a petition for a writ of mandate under *Code Civ. Proc. § 1086* to seek reinstatement or admission to membership in the association. If the law required the association to grant the member or applicant an administrative trial, the member or applicant might raise the argument supported by this form in support of a petition to the court for a writ of mandate under *Code Civ. Proc. § 1094.5* to review the administrative decision and order reinstatement or admission. The argument may also be used when a member or applicant is seeking an injunction against the association. Although the cases do not specify when to seek an injunction rather than a writ of mandate, it appears that an injunction is sought prior to the actual expulsion of a member or the denial of an applicant's request for admission as a prohibitive measure [*see, e.g., Pinsker v. Pacific Coast Society of Orthodontists (1974) 12 Cal. 3d 541, 116 Cal. Rptr. 245, 526 P.2d 253]* . A writ of mandate would be sought once a member had been expelled or an applicant's request for admission had been denied [*see, e.g., Applebaum v. Board of Directors (1980) 104 Cal. App. 3d 648, 163 Cal. Rptr. 831]* . This argument may also be used to support the contention that damages should be awarded for improper expulsion or exclusion [*see, e.g., Cason v. Glass Bottle Blowers Asso. (1951) 37 Cal. 2d 134, 146-147, 231 P.2d 6* ; *Ascherman v. San Francisco Medical Society (1974) 39 Cal. App. 3d 623, 630, 664, 114 Cal. Rptr. 681]* .

These points and authorities may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the substantive issue that the member's expulsion or the applicant's exclusion from membership was improper because the procedure followed by the association in reaching the decision to expel or exclude was not fair. The points and authorities set out in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. To demonstrate that the member or applicant was expelled or excluded in violation of the fair procedure requirement, counsel may show, for example, that (1) no notice was given to the plaintiff of the reasons for his or her rejection, (2) the plaintiff was not given an opportunity to respond to the charges against him or her, or (3) the people making the decision to expel or exclude plaintiff were not or may not have been impartial.

When a person is or was a member of the association seeking to expel him or her, the first alternative Paragraph A should be used to assert the jurisdiction of the court to review the association's decision. If the person is applying for membership, the second alternative Paragraph A should be used.

Optional Paragraph D should be used when the member or applicant was denied fair procedure because the adjudicators deciding to exclude or expel the applicant or member were not impartial. Counsel may show that the adjudicators were not impartial by showing, for example, that members of the investigative body or the accuser were part of the

decision-making body.

[b] Related Pleading and Practice Forms

For pleading and practice forms relating to associations and clubs, see Ch. 61, *Associations and Clubs* in California Forms of Pleading and Practice. For discussion, procedural checklist, and forms relating to injunctive relief, see Ch. 303, *Injunctions* in that set. For discussion and forms for use in mandate proceedings generally, see Ch. 358, *Mandate and Prohibition* . For discussion and forms of petitions for judicial review of a final administrative order by administrative mandate under Code Civ. Proc. § 1094.5, see Ch. 474C, *Procedures in Reviewing Agency Decisions* .

[c] Related Points and Authorities

For memoranda of points and authorities relating to injunctive relief generally, see Ch. 116, *Injunctions* . For memoranda of points and authorities relating to mandate proceedings generally, see Ch. 150, *Mandate and Prohibition* . For memoranda of points and authorities for use in mandate proceedings to review administrative decisions under *Code Civ. Proc. § 1094.5*, see Ch. 195, *Public Administrative Law* .

[d] Opposing Points and Authorities

The points and authorities *set out in § 22.32* may be used in an appropriate case to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Fair Procedure Required

The issue in ***Pinsker v. Pacific Coast Society of Orthodontists*** *(1974) 12 Cal. 3d 541, 116 Cal. Rptr. 245, 526 P.2d 253* (*Pinsker II*), was whether or not a dentist who was denied membership in respondent association was entitled to notice and an opportunity to respond to charges against him. *The Supreme Court in Pinsker v. Pacific Coast Society of Orthodontists (1969) 1 Cal. 3d 160, 81 Cal. Rptr. 623, 460 P.2d 495* (*Pinsker I*) (discussed in *§ 22.22[3][a]*), remanded the case to the trial court with instructions to order the American Association of Orthodontists (AAO) to reconsider the dentist's application and give a reason for rejection. The AAO reconsidered the dentist's application for membership and again rejected it. The association based their denial of the application on the ground of the dentist's continuing violation of one of the society's "Principles of Ethics" prohibiting an orthodontist from "delegating to a person less qualified any services or operation which requires the professional competence of an orthodontist." The AAO did not give the dentist an opportunity to respond to these charges. The dentist sought to enjoin the AAO from denying his application. The trial court denied the request for the injunction.

The Supreme Court reversed the trial court's denial. The Court held that whenever a private association is legally required to refrain from arbitrary action (as the Court required of the AAO in *Pinsker I*), the association's action must be both substantively rational and procedurally fair (*12 Cal. 3d 541, 550)* . In this case, the Court held that the procedure followed by the association in rejecting the dentist's application was not fair because the dentist was not given an opportunity to respond to the charges (*12 Cal. 3d 541, 556)* .

In ***Rosenblit v. Superior Court*** *(1991) 231 Cal. App. 3d 1434, 282 Cal. Rptr. 819* , plaintiff, an endocrinologist, made a timely request for a review hearing after his staff privileges at a hospital were suspended. The hospital scheduled thehearing and notified plaintiff that legal counsel would not be allowed. Through letters from his counsel, plaintiff requested a postponement of the hearing and a more complete statement of the charges, including the specific acts or omissions alleged. He also objected to denial of his right to counsel at the hearing and requested a list of the members of the review committee in order to investigate any bias, a list of witnesses, and copies of all medical charts and records. The hospital denied all of plaintiff's requests, and the hearing panel upheld his suspension. After exhausting the review

process within the hospital, plaintiff filed a petition for a writ of mandate to compel the hospital to reinstate his medical staff membership and clinical privileges, claiming he was denied a fair hearing. The trial court denied the petition, and plaintiff appealed.

The court of appeal reversed and directed the trial court to grant the petition for a writ of mandate compelling the hospital to afford plaintiff a fair hearing. Plaintiff contended he was denied his right to a fair procedure because: (1) he was given inadequate notice of the charges against him; (2) he was not provided an opportunity to copy the medical records in the cases in which his professional judgment was challenged; (3) the ultimate decision to revoke his staff privileges was vague and conclusory; (4) he was not provided a meaningful opportunity through voir dire to determine any potential bias of those colleagues charged with judging him; and (5) the hospital improperly shifted to him the burden of proving his innocence. The court of appeal agreed with plaintiff, explaining that there is a common-law right to fair procedure protecting individuals from arbitrary exclusion or expulsion from private organizations that control important economic interests. Such a private organization's actions must be both substantively rational and procedurally fair. What constitutes a fair procedure is not fixed or judicially prescribed. The associations themselves should retain the initial and primary responsibility for devising a method that provides an applicant adequate notice of the charges against him or her and a reasonable opportunity to respond. In drafting such a procedure the organization should consider the nature of the tendered issue and should fashion its procedure to insure a fair opportunity for an applicant to present his or her position. Although the association retains discretion in formalizing such procedures, the courts remain available to afford relief if that discretion is abused. In evaluating whether the hospital provided plaintiff a fair hearing, the court said the inadequacy of the notice, the refusal to permit copying of medical records, and the vagueness of the administrative findings are inextricably related. Having reviewed the cumulative impact of the manner in which the hospital initiated its proceedings, responded to plaintiff's repeated requests for specificity, and ultimately rendered judgment on his professional competency, the court concluded the proceedings had a notable stench of unfairness (*231 Cal. App. 3d 1434, 1445)* .

In ***Potvin v. Metropolitan Life Ins. Co.*** *(1997) 54 Cal. App. 4th 936, 63 Cal. Rptr. 2d 202* , defendant, a mutual insurance company offering networks of health care providers, delisted plaintiff physician under their physician agreement, which provided that plaintiff was an independent contractor and that the agreement could be terminated by either party on 30 days' notice with or without cause. After several requests by plaintiff for the reason for the termination, defendant gave the reason as plaintiff's malpractice history. Although plaintiff attempted to explain the history, i.e. that the malpractice insurer had settled a claim against him although he had not been at fault, and requested a hearing, defendant never provided the hearing. As a result of the termination, plaintiff lost a large percentage of his patients, was terminated by other managed care entities, was rejected by physician groups that require that members be one of defendant's health care providers, and lost referrals from physicians who were members of defendant's health care provider networks. Plaintiff sued for, inter alia, violation of fair procedure. The trial court granted defendant's motion for summary judgment.

The court of appeal reversed. The court found that the common law right of fair procedure is applicable to professional organizations in which membership may be an economic necessity for pursuit of the profession, or which wield such power as to affect significant economic and professional concerns, clothing them with a public interest. Defendant in this case also controls substantial economic interests. This extends to health care providers' membership in provider networks, and overrides the provision in the agreement allowing termination without cause. The question was whether plaintiff's delistment was arbitrary, capricious or contrary to public policy as a matter of law, which would entitle plaintiff to summary adjudication as a matter of law under *Code. Civ. Proc. § 437c*. The court found that plaintiff had presented at least a triable issue of fact as to whether it was arbitrary, but had not yet demonstrated entitlement to summary adjudication of the cause of action for violation of the common law right to fair procedure.

[b] Fair Procedure Includes Notice and an Opportunity to Defend Oneself

The facts and procedural background of ***Ezekial v. Winkley*** *(1977) 20 Cal. 3d 267, 142 Cal. Rptr. 418, 572 P.2d 32* ,

are discussed in *§ 22.20[3][c]*. In *Ezekial*, the Supreme Court reversed the trial court's judgment of dismissal and remanded the case with directions to overrule defendant's demurrer. Plaintiff had alleged that the circumstances of his dismissal did not comport with common law right of fair procedure because he was not given any reasons for the dismissal nor was he afforded a hearing or an opportunity to respond. The Court held that plaintiff had stated a valid claim for wrongful denial of the common law protection of fair procedure, and that fair procedure at a minimum required some meaningful opportunity for the adversely affected individual to be heard in his or her defense. The Court noted that it had not set a rigid procedure for associations to follow, but that the associations themselves were to devise practical methods of providing anadversely affected individual with adequate notice of the charges and a reasonable opportunity to respond (*20 Cal. 3d 267, 278)* .

In ***Pinsker v. Pacific Coast Society of Orthodontists*** *(1974) 12 Cal. 3d 541, 116 Cal. Rptr. 245, 526 P.2d 253* , the facts of which are *set out in § 22.23[3][a]*, the Supreme Court held that fair procedure requires that before the denial of an application, an applicant must be notified of the reason for the proposed rejection and be given a fair opportunity to defend himself or herself (*12 Cal. 3d 541, 555)* . Because the dentist was not given a chance to respond to the society's rejection, the Court held that he was not accorded fair procedure (*12 Cal. 3d 541, 556)* . Therefore, the Court reversed the trial court's decision denying relief to the dentist (*12 Cal. 3d 541, 561)* .

[c] Association's Adjudicators Must Be Impartial

The facts and procedural background of ***Rosenblit v. Superior Court*** *(1991) 231 Cal. App. 3d 1434, 282 Cal. Rptr. 819* , are discussed in *§ 22.23[3][a]*. In *Rosenblit*, the court of appeal directed the trial court to grant the petition for a writ of mandate compelling the hospital to afford plaintiff a fair hearing. In discussing the specific reasons why plaintiff was not afforded a fair hearing, the court examined his contention that he was not provided a meaningful opportunity through voir dire to determine any potential bias of those colleagues charged with judging him. The court said that the right to a fair procedure includes the right to impartial adjudicators. Fairness requires a practical method of testing impartiality. Plaintiff contended the secret voir dire of the hearing panel impermissibly compromised his ability to obtain a fair hearing. The hospital argued that by his failure to object at the time of the secret voir dire, plaintiff waived his right to object. The court disagreed, saying that without his counsel, plaintiff hardly could be expected to risk the wrath of those sitting in judgment by challenging their representation of impartiality. Because members of review committees are under no explicit or statutory duty to recuse themselves, the court said that a physician must be afforded the opportunity to conduct a liberal and probing oral examination of the committee members that is calculated to discover possible bias or conflicts of interest. The chairmen of the two in-house hospital review committees had been treating physicians on one of the cases under scrutiny. In these circumstances, an opportunity to expose bias is essential. The court said plaintiff was denied any semblance of fairness by the secret unreported voir dire conducted by the members themselves (*231 Cal. App. 3d 1434, 1448-1449)* .

Applebaum v. Board of Directors *(1980) 104 Cal. App. 3d 648, 163 Cal. Rptr. 831* , was a proceeding in mandamus for judicial review of defendant hospital's administrative decision to suspend plaintiff from its staff. Plaintiff was accused of poor medical judgment and incompetence in the performance of obstetrical deliveries and in the care of the newborn. The hospital's ad hoc committee, on which plaintiff's accuser sat, found plaintiff guilty of these charges and recommended his suspension. The executive committee, which consisted of 12 members, five of whom were on the ad hoc committee, suspended plaintiff. Plaintiff appealed internally, and the appeal committee, two out of three of whom later became members of the executive committee, after agreeing to refrain from future consideration of plaintiff's case before the executive committee, upheld the suspension. Plaintiff contended that the hospital proceedings violated due process because the committees were prejudiced against him. The trial court, finding that the hospital's proceedings were impermissibly tainted by the role of plaintiff's accuser in the adjudicatory process, issued an order compelling the hospital to reinstate plaintiff as a member of its staff. The hospital appealed, and the court of appeal affirmed.

The court of appeal held that the hospital had violated plaintiff's fair procedure rights by not having impartial tribunals. The court found that these tribunals were not impartial because of the presence of judges on more than one committee.

The court held that this, apart from any question of bias on the part of those involved, presents a violation of fair procedure rights to an impartial tribunal by virtue of a practical probability of unfairness (*104 Cal. App. 3d 648, 659)* .

[4] Additional Authorities

[a] Fair Procedure Required

Cason v. Glass Bottle Blowers Asso. (1951) 37 Cal. 2d 134, 231 P.2d 6 , involved a mandate action by a union member who was suspended from membership in the union without notice or a hearing. The trial court granted a writ ordering his reinstatement. The Supreme Court affirmed. The Court held that it would intervene in an association's decision to expel one of its members if the accused member has not been afforded those rudimentary rights that provide a reasonable opportunity to defend himself or herself against the charges made (*37 Cal. 2d 134, 143)* . The Court also held that it is a fundamental principle of justice that no person may be condemned or prejudiced in his or her rights without an opportunity to make a defense and that this principle is applicable not only to courts, but also to labor unions and similar organizations (*37 Cal. 2d 134, 143)* .

In *Youngblood v. Wilcox (1989) 207 Cal. App. 3d 1368, 255 Cal. Rptr. 527* , plaintiffs, a husband and wife who were members of defendant country club, sued defendant and its president, alleging that their membership had been wrongfully terminated in retaliation for plaintiff husband's proper and lawful activities as president of a homeowners' association. After a hearing, the trial court issued a preliminary injunction restraining defendant from interfering with plaintiffs' rights as lifetime members of defendant. The court of appeal affirmed. The court explained that common-law protections are available to members of private unincorporated associations. The expulsion of a person from membership in such an association is deemed arbitrary and in violation of the common-law right of fairprocedure when the expulsion is substantively unreasonable, internally irregular, or procedurally unfair. Procedural fairness requires adequate notice of the charges and a reasonable opportunity to respond. Furthermore, an expulsion cannot properly rest on a rule that is substantively capricious or contrary to public policy (*207 Cal. App. 3d 1368, 1373-1374)* .

A two-step analysis is used by the court to determine whether expulsion was arbitrary. First, it determines if the procedure followed by the association is fair. Second, it determines whether the expulsion rests on a rule that is substantively capricious or contrary to public policy. The court said that membership in an association, with its associated privileges, once attained, is a valuable interest that cannot be arbitrarily withdrawn. The fair procedure requirements are not limited to expulsions from organizations that have the power to foreclose a person's participation in a trade or profession (*207 Cal. App. 3d 1368, 1374)* . In response to defendant's contention that plaintiffs' rights were circumscribed by the terms of their membership contract, which incorporated the club by-laws, including the provision that the club could terminate membership at will, the court said a member of an unincorporated association may not be suspended or expelled without charges, notice, and a hearing, even though the rules of the association make no provision for any of those things. The requirements of notice, hearing, and a fair trial before expulsion are so fundamental that they are imposed on an association even though its own constitution, charter, or rules fails to make such provision (*207 Cal. App. 3d 1368, 1375)* .

Curran v. Mount Diablo Council of the Boy Scouts (1983) 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 , app. dismissed, 468 U.S. 1205, 104 S. Ct. 3574, 82 L. Ed. 2d 873 (1984) , on review after remand, 17 Cal. 4th 670, 72 Cal. Rptr. 2d 410, 952 P.2d 218 (1998) , involved the expulsion of a member of the Boy Scouts because of his homosexuality. Prior to his expulsion plaintiff was given no notice or opportunity to be heard. Plaintiff's suit against the Boy Scouts based on unfair procedure and civil rights violations was dismissed by the trial court after defendant's demurrer was sustained. The court of appeal reversed, stating that the use of the status of homosexuality as a basis for expulsion is substantively arbitrary and therefore violative of the common-law right of fair procedure (*147 Cal. App. 3d 712, 717)* . The court held that the elements of adequate notice of charge and reasonable opportunity to respond are basic to common law fair procedure and that expulsion based on homosexuality is capricious and offensive to public policy. Before homosexuality could be used as a basis to expel, a rational basis must be demonstrated between homosexual conduct

and any significant danger of harm to the association resulting from the continuing membership of the homosexual person (*147 Cal. App. 3d 712, 725)* .

Hackethal v. California Medical Assn. (1982) 138 Cal. App. 3d 435, 187 Cal. Rptr. 811 , involved a mandate action by a medical doctor who had been expelled from the state and county medical societies. The court of appeal affirmed the trial court's granting a writ of mandate ordering reinstatement pending a proper administrative hearing. The court held that when a private organization consisting of licensed professional persons attempts to expel a member, the common-law principle of fair procedure applies (*138 Cal. App. 3d 435, 441-442)* .

[b] Fair Procedure Includes Notice and an Opportunity to Defend Oneself

In *Lasko v. Valley Presbyterian Hospital (1986) 180 Cal. App. 3d 519, 225 Cal. Rptr. 603* , a physician brought a petition for writ of mandate to compel, inter alia, a hospital to admit him to its medical staff, alleging that the hospital had violated due process requirements in conducting proceedings against him when it denied him permission to conduct voir dire of the examining panel regarding possible bias against him. The trial court denied the writ, and the court of appeal reversed and remanded (for determination of the issue of laches), holding that basic notions of fairness dictate that a person whose right to practice a livelihood at a particular hospital is being revoked has a right to examine the members of the tribunal for possible bias against him (*180 Cal. App. 3d 519, 530)* .

Curran v. Mount Diablo Council of the Boy Scouts (1983) 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 , app. dismissed, 468 U.S. 1205, 104 S. Ct. 3574, 82 L. Ed. 2d 873 (1984) , on review after remand, 17 Cal. 4th 670, 72 Cal. Rptr. 2d 410, 952 P.2d 218 (1998) , is discussed in *§ 22.23[3][a]*.

The facts and procedural background of *Hackethal v. California Medical Assn. (1982) 138 Cal. App. 3d 435, 187 Cal. Rptr. 811* , are discussed in *§ 22.23[4][a]*. In that case, the court of appeal noted that adequate notice of charges and a reasonable opportunity to respond are basic to both due process and fair procedure (*138 Cal. App. 3d 435, 442)* . The court held that a medical doctor was denied the right to a fair procedure, including the opportunity to defend himself when he and his attorney were excluded from private executive sessions of the disciplinary panel hearing his case, thus depriving the member of the right to know accusations made against him, the right to confront and cross examine, and the right to refute or present evidence (*138 Cal. App. 3d 435, 442-444)* .

[c] Association's Adjudicators Must Be Impartial

The facts and procedural background of *Hackethal v. California Medical Assn. (1982) 138 Cal. App. 3d 435, 187 Cal. Rptr. 811* , are discussed in *§ 22.23[4][a]*. In that case, the court of appeal noted that fair procedure requires that an individual faced with expulsion from a professional organization has a right to a tribunal that meets the prevailing standards of impartiality (*138 Cal. App. 3d 435, 442)* . The court held that a medical doctor was denied an impartial hearing when the hearing panel restricted the member's right to question the panel and to challenge members who the member believed may have been biased against him.The hearing panel's restriction, the court stated, necessarily had the effect of reducing the member's opportunity to expose facts that would require disqualification of individuals on the panel (*138 Cal. App. 3d 435, 443)* .

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CHAPTER 22 ASSOCIATIONS AND CLUBS
PART II. FORMS

2-22 California Points & Authorities § 22.24

§ 22.24 Supporting Contention That Discipline by Association Less Than Expulsion or Exclusion Was Improper--Procedure Unfair

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE _____ [*specify discipline less than expulsion or exclusion, e.g.,* PUBLIC CENSURE] BY THE _____ [*specify private organization or association having public stature or purpose, e.g.,* NATIONAL DENTAL SOCIETY] WAS IMPROPER BECAUSE THE PROCEEDING FOLLOWED BY THE _____ [*specify organization or association, e.g.,* NATIONAL DENTAL SOCIETY] IN REACHING THE DECISION TO _____ [*specify discipline, e.g.,* PUBLICLY CENSURE] PLAINTIFF WAS NOT FAIR.

A. Private Organization With Public Stature May Not Discipline Member Without Fair Proceeding. A private organization, if tinged with public stature or purpose, may not expel or discipline a member by adversely affecting substantial property, contract, or other economic rights, except as a result of fair proceedings that may be provided for in organization bylaws, and carried forward in an atmosphere of good faith and fair play (*Salkin v. California Dental Ass'n. (1986) 176 Cal. App. 3d 1118, 1125, 224 Cal. Rptr. 352*).

[*Optional*] **B. Public Censure as Affecting Substantial Property, Contract, or Other Economic Rights.** Public censure by a professional organization imminently threatens irreparable injury because it tends to impair a person's opportunity to earn a livelihood through the practice of his or her chosen profession (*Salkin v. California Dental Ass'n. (1986) 176 Cal. App. 3d 1118, 1124, 224 Cal. Rptr. 352*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that disciplinary action taken by an association that is less than expulsion or exclusion is improper if it is the result of an unfair proceeding. If a private organization is

tinged with public stature or purpose, such as a professional organization, it may not expel or otherwise discipline a member by adversely affecting the member's substantial property, contract, or other economic rights unless the discipline is the result of a fair proceeding [*Salkin v. California Dental Ass'n. (1986) 176 Cal. App. 3d 1118, 1124-1125, 224 Cal. Rptr. 352]* . Optional Paragraph B has been provided for use in cases where a member is subject to public censure by a professional organization. However, this form may also be useful in cases involving other types of discipline less than expulsion or exclusion, such as suspension [*see Salkin v. California Dental Ass'n (1986) 176 Cal. App. 3d 1118, 1123, 224 Cal. Rptr. 352* (noting that courts have squarely held that suspension cases will be afforded the same scrutiny accorded those involving expulsion)].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a proceeding in which a private organization decided to discipline one of its members was unfair. For example, a member of a professional organization may wish to petition for a writ of mandate to compel the organization to give him or her a fair proceeding. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that the member's substantial property, contract, or other economic rights have been interfered with. For example, petitioner may argue that the organization has deprived him or her of the opportunity to earn a livelihood.

[3] Discussion of Authorities

[a] Private Organization With Public Stature May Not Discipline Member Without Fair Proceeding

In ***Salkin v. California Dental Ass'n.*** *(1986) 176 Cal. App. 3d 1118, 224 Cal. Rptr. 352* , petitioner orthodontist was publicly censured by two related state and national private dental organizations of which he was a member. A local member organization peer review committee held a hearing relating to petitioner's treatment of two minor patients. Neither petitioner nor his attorney were permitted to attend the hearing. After the hearing and the committee's findings, the committee recommended that petitioner be expelled unless he returned fees collected from the parents of the two patients. The state organization informed petitioner that he would be expelled unless he complied. Petitioner was also advised that he could appeal the decision based on sufficiency of the evidence or any defects in the procedure of the local committee. However, the state organization denied the request of petitioner's attorney to review the evidence offered at the hearing, and any transcript or record of the proceedings. Petitioner appealed to the national organization, which reduced the proposed penalty from expulsion to public censure. The national organization conceded that petitioner's case was not handled fairly or in accordance with the bylaws. Petitioner sought a writ of mandate in the superior court to overturn the censure and require a new hearing. He alleged that he was denied due process in violation of the bylaws, andsuffered damage to his dental practice and reputation as a result. The court granted defendant organizations' demurrers, finding that judicial review of disciplinary procedures of private professional organizations is, as a matter of law, only available when the punishment is expulsion or exclusion from membership. Petitioner appealed.

The court of appeal reversed, holding that a private organization, if tinged with public stature or purpose, may not expel or discipline a member by adversely affecting substantial property, contract or other economic rights, except as a result of fair proceedings that may be provided for in organization bylaws and carried forward in an atmosphere of good faith and fair play (*176 Cal. App. 3d 1118, 1125)* . The court held that both defendant dental associations were of "quasi-public significance." Public censure by such organizations threaten imminent irreparable injury that tends to impair the opportunity to earn a livelihood through the practice of a chosen profession. This is because membership may appear to be a tangible demonstration of professional competence and skill, professional responsibility, and acceptance by one's professional peers (*176 Cal. App. 3d 1118, 1124)* . Thus, the court held that due process considerations come into play. The court also held that even if the organizations did not have quasi-public status, the discipline imposed was public censure, and the organizations could be seen to have created their own exception (*176*

Cal. App. 3d 1118, 1125) .

[b] Public Censure as Affecting Substantial Property, Contract, or Other Economic Rights

Salkin v. California Dental Ass'n. *(1986) 176 Cal. App. 3d 1118, 224 Cal. Rptr. 352* , is discussed in *§ 22.24[3][a]*.

[4] Additional Authorities

[a] Private Organization With Public Stature May Not Discipline Member Without Fair Proceeding

Delta Dental Plan v. Banasky (1994) 27 Cal. App. 4th 1598, 33 Cal. Rptr. 2d 381 , involved a dispute between plaintiff dentists and defendant, an organization that operated the largest dental health plan in California, covering over 8,000,000 individuals. Plaintiffs, who were participating dentists in defendant's dental plan, challenged defendant's decision to lower the fee rate it would pay on claims by plaintiffs' patients. The plan's rules provided for review of fee decisions by a review committee, whose decision was final and binding on both the dentists and the defendant plan. Plaintiffs sought to require defendant to arbitrate their fee dispute under a separate provision of the defendant's rules. The trial court declined to compel arbitration and instead granted defendant an injunction barring plaintiffs from attempting to submit the dispute to arbitration or to any other forum. The court of appeal reversed in part. Though agreeing that the dispute was not arbitrable (*27 Cal. App. 4th 1598, 1605)* , the court held that the defendant's rules were infirm to the extent they purported to preclude further review of the review committee's decision. The court noted that California courts have long recognized a common law right to fair procedure protecting individuals from arbitrary exclusion or expulsion from organizations that control important economic interests. The court stated that fair procedure comes into play when organizations are tinged with public stature or purpose or attain a quasi-public significance, as contrasted with private associations that have no larger purpose or stature than pleasant, friendly, and congenial relationships. The court further noted that the right to fair procedure with respect to membership actions is not limited to matters of exclusion or expulsion. Because defendant controlled an important economic interest as the largest dental plan in California, the court held that continued membership on defendant's panel of participating dentists, and defendant's modification of a participating dentist's list of usual, customary, and reasonable fees, implicate the right to fair procedure (*27 Cal. App. 4th 1598, 1607)* . The court further held that though the plaintiff dentists must submit disputes over usual, customary, and reasonable fees to the defendant's internal review procedure, that procedure must include notice and a hearing, and the review committee's decision will be subject to judicial review by administrative mandate under *Code Civ. Proc. § 1094.5* (*27 Cal. App. 4th 1598, 1608)* .

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CHAPTER 22 ASSOCIATIONS AND CLUBS
PART II. FORMS

2-22 California Points & Authorities § 22.25

§ 22.25 Supporting Contention That an Action for Damages Is Proper--Intentional Interference With Right to Pursue Profession--Lack of Sufficient Justification

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

AN ACTION FOR DAMAGES IS PROPER BECAUSE THE ASSOCIATION INTENTIONALLY INTERFERED WITH THE _____ [MEMBER'S *or* APPLICANT'S] RIGHT TO PURSUE A PROFESSION AND THE ASSOCIATION DID NOT HAVE SUFFICIENT JUSTIFICATION FOR SUCH INTERFERENCE.

A. Action for Damages Lies. An action for damages against an association will lie when the association has intentionally interfered with a person's right to pursue a lawful business, calling, trade, or occupation, either by unlawful means or means otherwise lawful when there is a lack of sufficient justification (*Willis v. Santa Ana etc. Hospital Assn. (1962) 58 Cal. 2d 806, 810, 26 Cal. Rptr. 640, 376 P.2d 568 , overruled on another ground* in *Cianci v. Superior Court (1985) 40 Cal. 3d 903, 925, 221 Cal. Rptr. 575, 710 P.2d 375*).

B. Determining Sufficient Justification. Whether there is justification is determined not by applying precise standards, but by balancing, in the light of allthe circumstances, the respective importance to society and the parties of protecting the activities interfered with on the one hand and permitting the interference on the other hand (*Willis v. Santa Ana etc. Hospital Assn. (1962) 58 Cal. 2d 806, 810, 26 Cal. Rptr. 640, 376 P.2d 568 , overruled on another ground* in *Cianci v. Superior Court (1985) 40 Cal. 3d 903, 925, 221 Cal. Rptr. 575, 710 P.2d 375*).

[2] Comments

[a] Use of Form

These points and authorities may be used to support the contention that a member of or applicant to an association should be awarded damages because the association intentionally interfered with his or her right to pursue a profession when the association did not have sufficient justification for such interference.

These points and authorities may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the substantive issue that damages should be awarded for intentional interference with the right to pursue a profession. The points and authorities in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Counsel must show that the interference by the association with the member's or applicant's right to pursue a lawful business, calling, trade, or occupation was intentional, and that the interference was either by unlawful means, such as an illegal contract, or that the association used lawful means but did not have sufficient justification for such interference, such as limiting admission to reduce competition.

[b] Alternate Action for Restraint of Trade

Willis v. Santa Ana etc. Hospital Assn. (1962) 58 Cal. 2d 806, 810, 26 Cal. Rptr. 640, 376 P.2d 568 , on which this form is based, held that the Cartwright Act (*Bus. & Prof. Code §§ 16700-16758* [*now Bus. & Prof. Code §§ 16700-16770*]) did not apply to professions, but that the complaint involved stated a common-law cause of action for intentional interference with a right to pursue a lawful business, calling, trade, or occupation. With respect to the holding that the Cartwright Act did not apply to professions, *Willis* was overruled in *Cianci v. Superior Court (1985) 40 Cal. 3d 903, 925, 221 Cal. Rptr. 575, 710 P.2d 375* .

Cianci was an action to dissolve a limited partnership comprised of medical doctors, for an accounting and damages, and to impress a constructive trust. The case arose out of a dispute among the doctors over the establishment, funding, and operation of a hyperbaric medicine department at a city hospital. One of the defendant doctors filed a cross complaint against plaintiffs and their attorneys setting forth nine causes of action. The first six alleged intentional and negligent interference and conspiracy to interfere with the right to practice hyperbaric medicine. The seventh and eighth alleged violation of, and conspiracy to violate, the Racketeer Influenced and Corrupt Practices Act (RICO, *18 U.S.C. §§ 1961-1968*). The ninth alleged a conspiracy to violate the Cartwright Act. Demurrers to the seventh, eighth, and ninth causes of action were sustained on the grounds that federal courts had exclusive jurisdiction over RICO claims and that the Cartwright Act did not apply to the professions. Review of the order sustaining the demurrers was sought by prerogative writ. In ordering issuance of a writ of mandate, the Supreme Court held that state courts have concurrent jurisdiction over RICO claims and that the Cartwright Act does apply to professions.

The first six causes of action, relating to interference, were not before the Supreme Court; consequently, the Court did not rule on their sufficiency or the desirability of pleading them. *A fortiori*, the Court did not rule that such causes of action were improper or unnecessary. Nevertheless, if the facts of a case would bring it within the proscriptions of the Cartwright Act, counsel will no doubt want to sue under the act, rather than under the common-law action, because the Cartwright Act authorizes recovery of treble damages, interest on actual damages, and attorney fees, as well as costs [*Bus. & Prof. Code § 16750(a)*].

For discussion and forms relating to actions under the Cartwright Act for restraint of trade, see *California Forms of Pleading and Practice, Ch. 565, Unfair Competition, § 565.70 et seq.*

[c] Related Pleading and Practice Forms

For pleading and practice forms relating to associations and clubs, see California Forms of Pleading and Practice, Ch. 61, *Associations and Clubs* (Matthew Bender). For discussion and forms relating to conspiracy to interfere with business relationships, see Ch. 126, *Conspiracy* . For discussion and forms relating to unfair interference with business relations, see Ch. 565, *Unfair Competition* .

[d] Related Points and Authorities

For memoranda of points and authorities relating to intentional interference with business relationships generally, see Ch. 122, *Interference* . For memoranda of points and authorities relating to conspiracy to interfere with a trade or business, see Ch. 46, *Conspiracy* .

[e] Opposing Points and Authorities

The points and authorities in *§ 22.33* may be used in an appropriate case to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Action for Damages Lies

Willis v. Santa Ana etc. Hospital Assn. *(1962) 58 Cal. 2d 806, 26 Cal. Rptr. 640, 376 P.2d 568* , overruled on another ground in *Cianci v. Superior Court (1985) 40 Cal. 3d 903, 925, 221 Cal. Rptr. 575, 710 P.2d 375* (discussed in *§ 22.25[2][b]*), was an action by an osteopathic physician against defendant hospital association for damages for alleged conspiracy of defendants to dominate and control the practice of osteopathic medicine in the county and for alleged interference with plaintiff's practice. The trial court dismissed the action after it had sustained demurrers to the complaint with leave to amend and plaintiff declined to amend. The Supreme Court reversed, holding that the complaint stated a cause of action at common law. The Court held that an action for damages would lie when the right to pursue a lawful business, calling, trade, or occupation is intentionally interfered with either by unlawful means or by means otherwise lawful when there is a lack of sufficient justification. The Court found that plaintiff's complaint stated a cause of action in that it alleged that a physician of the highest qualifications was denied access to necessary hospital facilities as the result of a conspiracy designed to restrain competition and deprive him of his practice in order to benefit competing members of the conspiracy (*58 Cal. 2d 806, 810)* .

[b] Determining Sufficient Justification

The facts and procedural background of ***Willis v. Santa Ana etc. Hospital Assn.*** *(1962) 58 Cal. 2d 806, 26 Cal. Rptr. 640, 376 P.2d 568 , overruled on another ground* in *Cianci v. Superior Court (1985) 40 Cal. 3d 903, 925, 221 Cal. Rptr. 575, 710 P.2d 375* (discussed in *§ 22.25[2][b]*), are discussed in *§ 22.25[3][a]*. The *Willis* Court held that plaintiff's complaint had stated a cause of action for damages and should not have been dismissed. In holding that an action for damages would lie for intentional interference with one's right to pursue a lawful business, calling, trade, or occupation by lawful means without sufficient justification, the Court established a guide for determining sufficient justification. The Court said that whether there is justification is to be determined by balancing, in the light of all the circumstances, the respective importance to society and the parties of protecting the activities interfered with on the one hand and permitting the interference on the other hand (*58 Cal. 2d 806, 810)* .

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CHAPTER 22 ASSOCIATIONS AND CLUBS
PART II. FORMS

2-22 California Points & Authorities § 22.26

§ 22.26 Supporting Contention That Court Can Review the Association's Decision to Expel or Exclude Person From Membership--Exhaustion of Association's Internal Remedies Excused

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE _____ [MEMBER *or* APPLICANT] CAN SEEK RELIEF FROM THE COURT FOR IMPROPER _____ [EXCLUSION *or* EXPULSION] FROM MEMBERSHIP IN THE ASSOCIATION BECAUSE THE _____ [MEMBER *or* APPLICANT] WAS EXCUSED FROM EXHAUSTING THE ASSOCIATION'S INTERNAL REMEDIES.

A. Exhaustion of Internal Remedies Subject to Certain Exceptions. The rule that internal remedies must be exhausted before seeking relief from the courts is subject to certain exceptions (*Mooney v. Bartenders Union Local No. 284 (1957) 48 Cal. 2d 841, 844, 313 P.2d 857*).

[*Optional*] **B. Association's Remedies Inadequate or Unavailable.** The rule that a party must exhaust his or her administrative remedies prior to seeking relief in the courts has no application in a situation in which an administrative remedy is unavailable or inadequate (*Anton v. San Antonio Community Hosp. (1977) 19 Cal. 3d 802, 829, 140 Cal. Rptr. 442, 567 P.2d 1162*).

[*Optional*] **C. Association Violated Own Rules for Review.** When an association violates its rules regulating procedure on appeal, a claimant is excused from exhausting the association's internal remedies (*Schou v. Sotoyome Tribe, No. 12 (1903) 140 Cal. 254, 259* ; *Bush v. International Alliance (1942) 55 Cal. App. 2d 357, 365, 130 P.2d 788*).

[*Optional*] **D. Invocation of Remedies Would Prove Futile.**A member or applicant for membership in an association is not required to pursue the association's administrative remedies when to do so would prove a futile, useless, and idle act (*Thorman v. Intl. Alliance etc. Employees (1958) 49 Cal. 2d 629, 635, 320 P.2d 494*).

[2] Comments

[a] Use of Form

These points and authorities may be used in support of the contention that the court can grant relief to a member or applicant from an association's actions because the member or applicant was excused from exhausting the association's internal remedies.

The argument supported by this form may be raised in support of a petition fora writ of mandate under *Code Civ. Proc. § 1086*, when petitioner is seeking reinstatement or admission to membership in the association. If the law required the association to grant the member or applicant an administrative trial, the member or applicant may raise the argument in support of a petition to the court for a writ of mandate under *Code Civ. Proc. § 1094.5* to review the administrative decision. The argument might also be raised by plaintiff in an action against the association for injunctive relief or damages.

These points and authorities may be used in response to the association's argument that judicial relief is not proper because of the member's or applicant's failure to exhaust the association's internal remedies, or in anticipation of such an argument.

These points and authorities may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the substantive issue that the member or applicant was excused from exhausting the association's internal remedies. It may also be combined with other points and authorities relating to the specific relief being sought from the court. The points and authorities set out in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. To demonstrate that the member or applicant was excused from exhausting the association's internal remedies, counsel may show that the association's remedies were inadequate or not available [*see* optional Paragraph B], that the association violated its own rules for review [*see* optional Paragraph C], or that invocation of the association's remedies would prove futile [*see* optional Paragraph D].

[b] Related Pleading and Practice Forms

For pleading and practice forms relating to associations and clubs, see Ch. 61, *Associations and Clubs* in California Forms of Pleading and Practice. For discussion, procedural checklist, and forms relating to injunctive relief, see Ch. 303, *Injunctions* in that set. For discussion and forms for use in mandate proceedings generally, see Ch. 358, *Mandate and Prohibition* . For discussion and forms of petitions for judicial review of a final administrative order by administrative mandate under Code Civ. Proc. § 1094.5, see Ch. 474C, *Procedures in Reviewing Agency Decisions* .

[c] Related Points and Authorities

For other memoranda of points and authorities relating to exhaustion of internal remedies, see Ch. 67, *Declaratory Relief* . For memoranda of points and authorities relating to injunctive relief generally, see Ch. 116, *Injunctions* . For memoranda of points and authorities relating to mandate proceedings generally, see Ch. 150, *Mandate and Prohibition* . For memoranda of points and authorities for use in mandate proceedings to review administrative decisions under *Code Civ. Proc. § 1094.5*, see Ch. 195, *Public Administrative Law* .

[3] Discussion of Authorities

[a] Exhaustion of Internal Remedies Subject to Certain Exceptions

Mooney v. Bartenders Union Local No. 284 *(1957) 48 Cal. 2d 841, 313 P.2d 857* , was a proceeding in mandamus to compel a labor union to permit a member to inspect its books and records. Plaintiff demanded an itemized accounting of

all income and expenses of the union because it appeared that expenditures had exceeded income and there was no detailed explanation as to certain large outlays. Plaintiff's request was denied. The union's constitution provided an appeal procedure which plaintiff followed except for the last step. Defendant contended that plaintiff was thereby barred from seeking relief from the courts. The trial court gave judgment for the plaintiff. Defendant appealed, and the Supreme Court affirmed. The Court held that the requirement that internal remedies be exhausted was subject to certain exceptions and that the internal procedure must be such as will afford a member substantial justice. The Court specified that further pursuit of internal relief is excused when a union violates its rules for review or when invocation of those rules would be futile. In the application of the principles excusing exhaustion of internal remedies and determining the appropriate internal procedure, the Court held that both the protection of the rights of the individual members in the specific matter involved and the right of the union to govern itself must be weighed. In this case, the Court found that to deny a member access to the records and require him to exhaust all internal remedies in the preliminary matter of inspection would unduly hamper the member's right and possibly defeat the purpose of the investigation. In addition, the Court found that it was in the best interests of the union that any misuse of its funds be immediately revealed (*48 Cal. 2d 841, 844)* . Therefore, the Court held that plaintiff need not exhaust all internal remedies before resorting to the court (*48 Cal. 2d 841, 845)* .

[b] Association's Remedies Inadequate or Unavailable

In ***Anton v. San Antonio Community Hosp.*** *(1977) 19 Cal. 3d 802, 140 Cal. Rptr. 442, 567 P.2d 1162* , a physician petitioned for a writ of mandate to compel a private, nonprofit hospital to reappoint him to its medical staff. He had been a staff member for 13 years when his privileges were suspended. The hospital granted him a preliminary hearing and a formal hearing. At both, his suspension was upheld. When the physician sought judicial relief, he raised for the first time the issue of the validity of a bylaw. The hospital contended that the doctor could not raise this issue before the trial court because it violated the doctrine of exhaustion of administrative remedies. The trial court agreed and denied the petition. The Supreme Court reversed. The Court noted that the physician hadlacked an appropriate opportunity to raise the issue at an earlier stage and held that he need not exhaust the hospital's administrative remedies (*19 Cal. 3d 802, 828-829)* . The Court held that the rule that a party must exhaust his or her administrative remedies prior to seeking relief in the courts had no application in a situation where an administrative remedy is unavailable or inadequate (*19 Cal. 3d 802, 829)* .

[c] Association Violated Own Rules for Review

Schou v. Sotoyome Tribe, No. 12 *(1903) 140 Cal. 254* , was an action to recover sick benefits due to a member of the defendant tribe. The constitution and bylaws of defendant provided for sick benefits to be paid when a member was disabled by sickness or accident unless caused by intemperance or immoral conduct. Plaintiff's husband became insane, and plaintiff applied for the benefits. The tribe denied benefits. Appealing from an order denying a new trial, defendant contended that plaintiff was barred from seeking relief from the courts because she had not exhausted the tribe's internal remedies. The Supreme Court affirmed the decision denying a new trial. The Court held that plaintiff was excused from exhausting the tribe's remedies because the tribe had not observed its rules regulating procedure on appeal (*140 Cal. 254, 259)* .

In ***Bush v. International Alliance*** *(1942) 55 Cal. App. 2d 357, 130 P.2d 788* , a union member was expelled from a union for extorting money from a deceased union member's widow. The expelled member petitioned the trial court for a writ of mandate to compel reinstatement. The trial court granted the petition. The court of appeal reversed, holding that petitioner had not exhausted the union's internal remedies. The court noted that when an organization has violated its own laws and regulations and has arbitrarily violated a member's property rights, the member need not exhaust his or her remedies within the organization before resorting to the courts, but held that this exception was not involved in this case (*55 Cal. App. 2d 357, 365)* .

[d] Invocation of Remedies Would Prove Futile

Thorman v. Intl. Alliance etc. Employees *(1958) 49 Cal. 2d 629, 320 P.2d 494* (also discussed in *§ 22.22[4][a]*), was a proceeding in mandamus to compel a union to admit plaintiff to membership. Plaintiff's application was rejected by defendant union because it did not receive a favorable two-thirds vote of the voting members. Plaintiff contended that his exclusion was arbitrary and therefore improper. Defendant contended that plaintiff had not exhausted the union's internal remedies and was barred from seeking judicial relief. The trial court granted plaintiff relief. The Supreme Court affirmed. The Court held that plaintiff was not required to pursue the union's administrative remedies because to do so would have been a futile, useless, and idle act (*49 Cal. 2d 629, 635)* .

[4] Additional Authorities

[a] Association's Remedies Inadequate or Unavailable

Westlake Community Hosp. v. Superior Court (1976) 17 Cal. 3d 465, 131 Cal. Rptr. 90, 551 P.2d 410 , was a suit for damages resulting from, among other things, denial of plaintiff's application for staff privileges at a hospital. The hospital's bylaws gave a right to appeal to a member, but did not mention an applicant, and the hospital did not inform plaintiff that she had such a right. Plaintiff did not appeal internally, and defendant contended that she could not seek relief from the courts. The trial court denied a motion by defendant for summary judgment. Defendant appealed, and the Supreme Court denied relief. The Court held that, although plaintiff must exhaust all available internal remedies before instituting any judicial action, in this case the hospital did not provide a remedy (*17 Cal. 3d 465, 478)* .

Martino v. Concord Community Hosp. Dist. (1965) 233 Cal. App. 2d 51, 43 Cal. Rptr. 255 (also discussed in *§ 22.22[4][b]*), was a mandamus proceeding to compel defendant hospital to act on plaintiff's application for appointment to their medical staff and to enjoin the hospital from denying the application on the grounds that plaintiff refused to take an examination covering those areas of medicine and surgery in which the hospital required its staff to be qualified. The hospital's bylaws provided that a person whose application had been denied or rejected could appeal internally. Plaintiff's application was deferred on the ground that it was incomplete. Plaintiff did not appeal the decision. Defendant contended that plaintiff was barred from seeking relief from the courts because he had not exhausted the hospital's internal remedies. The trial court agreed and denied plaintiff relief. The court of appeal reversed, holding that the rule that a party must exhaust his or her administrative remedies prior to seeking relief in the courts had no application in a situation when an administrative remedy is unavailable or inadequate. Here the court found that no internal remedy was available to plaintiff since his application had been deferred, not rejected or denied (*233 Cal. App. 2d 51, 56)* .

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2-22 California Points & Authorities § 22.27

§ 22.27 Supporting Contention That Action Was Not Protected by Freedom of Association

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE ACTIONS TAKEN BY THE ASSOCIATION IN _____ [*specify, e.g.,* EXCLUDING PLAINTIFF FROM MEMBERSHIP *or* IMPLEMENTING ITS HIRING POLICIES] ARE NOT WITHIN THE PROTECTION OF THE CONSTITUTIONAL RIGHT TO FREEDOM OF ASSOCIATION BECAUSETHEY DO NOT INVOLVE AN INTIMATE ASSOCIATION OR AN ASSOCIATION FORMED FOR THE PURPOSES OF EXPRESSION.

A. Only Intimate or Expressive Associations Are Constitutionally Protected. The constitutional right of freedom of association protects only the formation and maintenance of intimate associations and associations formed for purposes of expression encompassed by the *First Amendment*--speech, assembly, petition for the redress of grievances, and the exercise of religion (*see Bd. of Dirs. of Rotary Int'l v. Rotary Club (1987) 481 U.S. 537, 544-546, 107 S. Ct. 1940, 95 L. Ed. 2d 474* ; *Warfield v. Peninsula Golf & Country Club (1995) 10 Cal. 4th 594, 624, 42 Cal. Rptr. 2d 50, 896 P.2d 776* ; *Bohemian Club v. Fair Employment & Housing Com. (1986) 187 Cal. App. 3d 1, 12, 231 Cal. Rptr. 769*).

[*Optional*] **B. Commercial Associations Are Not Constitutionally Protected.** Associations that are "commercial" in nature, or involve primarily business activities, such as the formation of business deals or the making of personal contacts that are valuable for business purposes, employment, and professional advancement, and involve regular participation by nonmembers, are not protected by the right of freedom of association (*see New York State Club Ass'n. v. NYC (1988) 487 U.S. 1, 12-14, 108 S. Ct. 2225, 101 L. Ed. 2d 1*).

[2] Comments

[a] Use of Form

These points and authorities may be used to support the contention that an action is not protected by the right of freedom of association.

The argument supported by this form may be raised in support of a petition for a writ of mandate, an action for declaratory or injunctive relief, or other similar procedure. The argument may be raised by a member or potential member seeking either membership or the application of state law to an association.

These points and authorities may be used in response to an association's argument that judicial relief is not proper because its action is protected by freedom of association.

These points and authorities may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the substantive issue that an action is not protected by freedom of association. The points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel may demonstrate lack of intimacy in the association by including facts showing the lack of selectivity in the membership.

[b] Related Pleading and Practice Forms

For pleading and practice forms relating to associations and clubs, see California Forms of Pleading and Practice, Ch. 61, *Associations and Clubs* (Matthew Bender). For discussion, procedural checklist, and forms relating to the Unruh Civil Rights Act, see California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities relating to the Unruh Civil Rights Act, see Ch. 35, *Civil Rights: Unruh Civil Rights Act* .

[3] Discussion of Authorities

[a] Only Intimate or Expressive Associations Are Constitutionally Protected

In ***Bd. of Dirs. of Rotary Int'l v. Rotary Club*** *(1987) 481 U.S. 537, 107 S. Ct. 1940, 95 L. Ed. 2d 474* , plaintiff, a local Rotary Club, admitted three women to active membership in violation of defendant international club rules that limited membership to men. After its charter membership in the international association was revoked and its membership terminated, plaintiff brought suit against defendant, alleging a violation of the prohibition in the Unruh Civil Rights Act (*Civ. Code § 51*) of discrimination against women, and seeking injunctive and declaratory relief. The trial court judgment in favor of defendant was reversed by the state court of appeals. Defendant appealed.

The United States Supreme Court affirmed. The Court discussed the two protections from unjustified government interference afforded by the *First Amendment* freedom of association: an individual's right to enter into and maintain certain intimate relationships, and the right to freely associate for the purpose of engaging in protected speech or religious activities (*481 U.S. 537, 544-546)* . The Court concluded that neither one was interfered with by application of the Unruh Act. The *First Amendment* protects those intimate relationships that presuppose deep attachments and commitments to the necessarily few other individuals with whom one shares a special community of thoughts, experiences, and beliefs, as well as distinctively personal aspects of one's life (*481 U.S. 537, 545)* . The Court found that the relationship among club members was not the kind of intimate or private relation to warrant constitutional protection, and its purpose did not suggest the kind of private or personal relationship to which protection under the *First Amendment* has been afforded. Thus, the application of the Unruh Act to local Rotary Clubs did not interfere unduly with the members' freedom of private association (*481 U.S. 537, 546-547)* .

The Court then addressed the second protection afforded by the *First Amendment*, the right to associate with others in pursuit of a wide variety of political, social, or similar ends. The Court said there was no evidence that admitting women to the club would affect in any significant way the existing members' ability to carry out their various purposes. The Unruh Act did not require the clubs to abandon or alter any of their activities, basic goals, classification system, or to admit members who do not reflect a cross section of the community. Thus, its application would not violate the right of expressive association afforded by the *First Amendment* (*481 U.S. 537, 548-549)* .

Warfield v. Peninsula Golf & Country Club *(1995) 10 Cal. 4th 594, 42 Cal. Rptr. 2d 50, 896 P.2d 776* , involved a country club that had a policy of excluding women from proprietary membership. Plaintiff's husband had a proprietary family membership in the defendant club, under which plaintiff was permitted to use the club's facilities. When plaintiff and her husband dissolved their marriage, the family law court awarded the family membership to plaintiff. The defendant then terminated the membership, tendering plaintiff the "redemption value" of the family membership. Plaintiff sued defendant for violation of the Unruh Civil Rights Act (*Civ. Code § 51*). The trial court granted defendant a directed verdict, in part on the ground that the club was not a "business establishment" within the meaning of the Act. The court of appeal affirmed.

On review, the California Supreme Court reversed. The Court first held that the defendant club was a "business establishment" within the meaning of the Unruh Civil Rights Act under the facts of this case (*10 Cal. 4th 594, 621-623)* . The Court then rejected the defendant's contention that application of the Act to prohibit the club from excluding women from proprietary membership would represent an unconstitutional infringement of the club members' rights of association and privacy under the federal and California constitutions (*10 Cal. 4th 594, 624-630)* . The Court reviewed previous U.S. Supreme Court decisions, including *Rotary Club* (discussed *above*) and *New York State Club Ass'n. v. NYC (1988) 487 U.S. 1, 108 S. Ct. 2225, 101 L. Ed. 2d 1* (discussed in *§ 22.27[3][b]*), and noted that, in the context of private club memberships, the constitutional freedom of association has two aspects: (1) the freedom of intimate association; and (2) the freedom of expressive association (*10 Cal. 4th 594, 624)* . The Court stated that the teachings of U.S. Supreme Court precedent make clear that the application of *Civ. Code § 51* to the defendant club in *Warfield* did not violate the club members' federal constitutional right of association. First, the Court noted, the defendant did not contend that it was organized for, or regularly engaged in, the type of expressive activities that fall within the protection of the *First Amendment*. Thus, application of *Civ. Code § 51* to the club would have no appreciable effect on club members' freedom of expressive association (*10 Cal. 4th 594, 628-629)* . Second, the Court found untenable any claim that application of *Civ. Code § 51* infringes on club members' freedom of intimate association. Comparing defendant's characteristics and activities to those of the associations considered by the U.S. Supreme Court in its previous decisions, the California Court noted that the size of defendant's membership, about 700 members, was considerably larger than the clubs found not to be protected in the prior cases, and that the 700-member figure significantly understated the number of persons with unrestricted access to the club. Furthermore, as with the organizations involved in the prior U.S. Supreme Court decisions, the premises and activities of the defendant club were not narrowly restricted to club members (or their families), but were open to numerous nonmembers, including invited guests, participants in sponsored events, and patrons of the club's golf and tennis pro shops. Finally, and in the Court's view most importantly, the defendant could not persuasively claim that elimination of the men-only requirement for proprietary membership would fundamentally alter the nature of the club or its specific purposes, since the club's recreational facilities have generally been open to women and women have routinely held nonproprietary classes of membership within the club (*10 Cal. 4th 594, 629)* . The Court also rejected the defendant's claim that the California constitutional right to freedom of association under *Cal. Const., art. I, § 1*, provided a greater protection to discriminatory membership policies of a large private club than that afforded by the federal constitution (*10 Cal. 4th 594, 629-630)* .

Bohemian Club v. Fair Employment & Housing Com. *(1986) 187 Cal. App. 3d 1, 231 Cal. Rptr. 769* , involved a private nonprofit association whose membership was limited to men professing devotion to the arts. Members were chosen by a highly selective process that involved extensive interviewing. The Department of Fair Employment and Housing filed an accusation against the club for alleged violation of the Fair Employment and Housing Act by pursuing

a discriminatory hiring policy that systematically excluded women. The club contested the accusation, and after a hearing, the administrative law judge found in its favor. The Fair Employment and Housing Commission rejected that finding and ordered the club to institute an affirmative action program. The club filed a petition for writ of mandate pursuant to *Code Civ. Proc. § 1094.5*. The Department opposed the petition and filed its own petition in intervention to set aside a ruling regarding backpay. The trial court granted the club's petition, denied the intervention petition as moot, and dismissed the underlying accusation. The club was awarded costs, but was denied attorney's fees. Both parties appealed.

The court of appeal reversed and gave directions to the trial court to reinstate the commission's findings. The issue of the nature of the associational interests of the club's members arose in the context of determining the proper standard of review for the trial court to have applied in reviewing the administrative law judge's decision. The court of appeal concluded that since the members' associational rights did not rise to the level of a fundamental vested interest for which an independent judicial evaluation and judgment was required, the substantial evidence test was the proper standard of review (*187 Cal. App. 3d 1* ,10-11). The nature of the members' associational rights was discussed in detail. Petitioner argued that the forced hiring of women violated the members' constitutional right of association. The court observed that most association cases involve the relationship of member to member and not member to employee, and cited *Roberts v. United States Jaycees (1984) 468 U.S. 609, 617-618, 104 S. Ct. 3244, 82 L. Ed. 2d 462* , for an articulation of the essence of the right of association. The United States Constitution protects only intimate and expressive associational rights. The first aspect protects the formation and preservation of some highly personal relationships. An individual's choice to enter into and maintain certain intimate human relationships must be secure against undue intrusion by the state because of the role of those relationships in safeguarding individual freedom. The second aspect encompasses an individual's right to associate for the purpose of engaging in those activities protected by the *First Amendment*--speech, assembly, petition for the redress of grievances, and the exercise of religion. This right is constitutionally guaranteed as an indispensable means of preserving other individual liberties (*187 Cal. App. 3d 1, 12)* . The court said that because the instant case concerned the impact of women employees on the club, and did not concern the separate issue of women as members, the first inquiry was whether hiring females would unduly interfere with the members' intimate associational rights. In determining the intimacy of a relationship and the corresponding entitlement to protection from state intrusion, pertinent factors to consider are the size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent. While the club's membership was selective, and the consequent relationship among members was intimate in associational terms, the same was not true for the associational rights of members and employees. The hiring procedure was not selective and little was known concerning employees at hiring (*187 Cal. App. 3d 1, 12-13)* .

The court next considered whether the club's purposes of promoting male fellowship and appreciation of the arts would be undermined by hiring female employees in selective capacities. The court said the existence of the rule prohibiting employees from fraternizing with the members rendered implausible any assertion that the members' intimate associational rights would be infringed by hiring female employees. Moreover, even though the club contended that the mere presence of women on a regular basis would change the spirit of the organization and destroy the bohemian feeling, those feelings are not afforded constitutional protection, since the right to freedom of association only protects highly personal relationships (*187 Cal. App. 3d 1, 13)* . The members' relationship with the employees could not reasonably be termed intimate within the letter or spirit of that term. Even if the members' associational rights would be constricted by forcing the club to hire women, that infringement would be justified by the state's compelling interest in eradicating employment discrimination (*187 Cal. App. 3d 1, 14)* .

[b] Commercial Associations Are Not Constitutionally Protected

In ***New York State Club Ass'n. v. NYC*** *(1988) 487 U.S. 1, 108 S. Ct. 2225, 101 L. Ed. 2d 1* , defendant city amended its Human Rights Law to prohibit discrimination in private clubs that were determined to be "public" in nature. The statutory amendment was based on defendant's findings that in some membership organizations in which business deals are made and personal contacts are formed for business purposes, employment, or professional advancement,

discriminatory practices created a barrier to the advancement of women and minorities in business and professional life, and that the public interest in equal opportunity outweighs the interest in private association of club members. By the statute defendant extended anti-discrimination to any "public" club, that is, a club that has more than 400 members, provides regular meal service, and regularly receives payment for dues, fees, use of space, facilities, services, meals, or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business. After the statute became effective plaintiff, a consortium of private clubs and associations, filed suit in state court, seeking a declaration that the law is invalid on various state grounds and is unconstitutional on its face under the *First* and *Fourteenth Amendments* and requesting that defendants be enjoined from enforcing it. On cross motions for summary judgment, the trial court upheld the law against all challenges. Higher levels of the state appellate courts affirmed. Plaintiff appealed.

The United States Supreme Court affirmed. The Court explained that to succeed on its challenge of the constitutionality of the statute on its face, plaintiff must demonstrate that the statute could never be applied in a valid manner, or that, even though it may be validly applied to plaintiff and others, it nevertheless is so broad that it may inhibit the constitutionally protected speech of third parties. The first kind of facial challenge will not succeed unless a court finds that every application of the statute creates an impermissible risk of suppression of ideas. The second kind of facial challenge will not succeed unless the statute is substantially overbroad, which requires a court to find a realistic danger that the statute itself will significantly compromise recognized *First Amendment* protections of parties not before the court (*487 U.S. 1, 11-12)* . The Court found that plaintiff was unable to succeed in either of these facial challenges. Plaintiff conceded that the anti-discrimination provisions of the statute could be constitutionally applied to large clubs. The Court pointed out that the clubs covered under the statute contain at least 400 members, and are comparable in size to local chapters of a national association that were not protected private associations. The Court also observed that clubs within the statute provide regular meal service and receive regular payments directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business. The Court said these two characteristics are significant in pinpointing organizations that are "commercial" in nature, in that members often make business deals and form personal contacts valuable forbusiness purposes, employment, and professional advancement. The Court observed that while a considerable amount of private or intimate association occurs in such a setting, that fact alone does not afford the entity as a whole any constitutional immunity to practice discrimination when the government has bared it from doing so (*487 U.S. 1, 11-12)* . The Court also observed that the statute did not infringe on every club member's right of expressive association. It explained that the ability and opportunity to combine with others to advance one's views is a powerful means of ensuring the perpetuation of the freedoms the *First Amendment* has guaranteed to individuals. Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. However, this does not mean that in every setting in which individuals exercise some discrimination in choosing associates, their selective process of inclusion and exclusion is protected by the Constitution. The Court said that on its face the statute does not affect in any significant way the ability of individuals to form associations that will advocate public or private viewpoints. It does not require the clubs to abandon or alter any activities that are protected by the *First Amendment*. If a club seeks to exclude individuals who do not share the views that the club's members wish to promote, the statute does not erect any obstacles. Instead, it merely prevents an association from using race, sex, and other specified characteristics as shorthand measures in place of more legitimate criteria for determining membership. It is conceivable that an association might be able to show that it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example, or the same religion (*487 U.S. 1, 13-14)* . The Court found that plaintiff also failed on the challenge that the statute was overbroad (*487 U.S. 1, 14)* .

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2-22 California Points & Authorities § 22.28

§ 22.28 Opposing Contention That Expulsion From Membership in an Association Was Improper--Expulsion for Violating Rules of Association

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

EXPULSION FROM MEMBERSHIP IN THE ASSOCIATION WAS PROPER BECAUSE EXPULSION WAS BASED ON A VIOLATION OF THE ASSOCIATION'S RULES THAT WERE SUBSCRIBED OR ASSENTED TO BY THE MEMBERS AND WHICH PROVIDE FOR EXPULSION FOR SUCH VIOLATION.

A. Association's Rules Are Controlling. Members of an association may prescribe rules of conduct for themselves with penalties for the violation of such rules. The rules constitute an agreement and, unless they contravene some law of the land, are regarded in the same light as the terms of any other contract (*Lawson v. Hewell (1897) 118 Cal. 613, 618-619, 50 P. 763*).

B. Expulsion Proper for Violating Rules. An association may expel a member for violation of established rules of the association that have been subscribed or assented to by the members and that provide for expulsion for such violation (*Smith v. Kern County Medical Asso. (1942) 19 Cal. 2d 263, 270, 120 P.2d 874*).

[2] Comments

[a] Use of Form

These points and authorities may be used in opposition to the contention that expulsion from membership in an association was improper because expulsion was not based on a violation of the association's rules [*see § 22.20*].

The argument supported by this form may be raised in opposition to a petition for a writ of mandate under *Code Civ. Proc. § 1086* or in opposition to a petition for a writ of mandate under *Code Civ. Proc. § 1094.5* to review an administrative decision, when the member is seeking reinstatement in the association. The argument can also be used to oppose an application for an injunction to restrain the association from expelling the member or to oppose an action for

damages.

These points and authorities may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the substantive issue that the member's expulsion was proper because it was based on violation of the rules of the association. The points and authorities in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. To show that expulsion was proper, counsel should show that the association had rules governing the conduct of the members, that the members had agreed to these rules, that the member's expulsion was for violation of these rules, and that expulsion was the prescribed penalty for such violation.

[b] Related Pleading and Practice Forms

For pleading and practice forms relating to associations and clubs, see California Forms of Pleading and Practice, Ch. 61, *Associations and Clubs* (Matthew Bender). For discussion, procedural checklist, and forms relating to injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender). For discussion and forms for use in mandate proceedings generally, see California Forms of Pleading and Practice, Ch. 358, *Mandate and Prohibition* (Matthew Bender). For discussion and forms of petitions for judicial review of a final administrative order by administrativemandate under Code Civ. Proc. § 1094.5, see California Forms of Pleading and Practice, Ch. 474C, *Procedures in Reviewing Agency Decisions* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities relating to injunctive relief generally, see Ch. 116, *Injunctions* . For memoranda of points and authorities relating to mandate proceedings generally, see Ch. 150, *Mandate and Prohibition* . For memoranda of points and authorities for use in mandate proceedings to review administrative decisions under *Code Civ. Proc. § 1094.5*, see Ch. 195, *Public Administrative Law* .

[3] Discussion of Authorities

[a] Association's Rules Are Controlling

In ***Lawson v. Hewell*** *(1897) 118 Cal. 613, 50 P. 763* , plaintiff was accused of conduct unbecoming a mason and charges were brought against him within the association. Plaintiff brought an action to restrain the association from proceeding with a trial on the charges. The trial court sustained a demurrer to the complaint, and plaintiff appealed. In affirming the judgment, the Supreme Court held that the members of an association may prescribe rules of conduct for themselves during their membership, with penalties for the violation of such rules (*118 Cal. 613, 618)* . The Court said that these rules constituted the members' agreement and would be regarded in the same light as the terms of any other contract (*118 Cal. 613, 619)* . It held that the courts would assume jurisdiction only when there is an abuse of discretion and a clear, unreasonable, and arbitrary invasion of private rights (*118 Cal. 613, 620)* . This was not the case here (*118 Cal. 613, 621-622)* .

[b] Expulsion Proper for Violating Rules

In ***Smith v. Kern County Medical Asso.*** *(1942) 19 Cal. 2d 263, 120 P.2d 874* , a physician sought a writ of mandate to compel his reinstatement in the county medical society. His petition was denied by the superior court, and he appealed from the judgment dismissing the proceeding. The Supreme Court affirmed the judgment. The Court found that the association was governed by a constitution and bylaws and that membership of qualified applicants was acquired by signing the constitution and bylaws of the society (*19 Cal. 2d 263, 265)* . The society adopted a rule requiring members to resign from the staff of a particular hospital because unsatisfactory conditions existed at that hospital.

Failure to resign was to be construed as a violation of the society's ethics and expulsion was provided as a possible penalty (*19 Cal. 2d 263, 266)* . The society expelled appellant for failing to resign from the offending hospital. The Court held that expulsion from an association could be based on and upheld for violation of established rules of the association that have been subscribed or assented to by the members and that provide for expulsion for such violation. It held that because appellant had violated the society's rule, his expulsion was valid (*19 Cal. 2d 263, 270)* .

[4] Additional Authorities

[a] Association's Rules Control

In *Anderson v. Los Angeles County Employee Relations Com. (1991) 229 Cal. App. 3d 817, 280 Cal. Rptr. 415* , plaintiff, a sheriff sergeant, was expelled for dual unionism from the union that was the certified bargaining representative for his bargaining unit when he helped organize a rival union. After the rival union was dissolved, the certified union denied plaintiff's application for reinstatement, and plaintiff filed charges with the county employee relations commission. When he did not receive the relief he sought, plaintiff filed a petition for a writ of mandate seeking a peremptory writ ordering the certified union to reinstate him. The court of appeal upheld the trial court's denial of that petition. Though most of its opinion focused on rules specific to labor unions, the court said that in reviewing the expulsion of a member from a voluntary unincorporated association, the only function a court may perform is to determine whether the association has acted within its powers in good faith in accord with its laws and with the laws of the land. An organization has the natural right of self-preservation, and may with properly expel members who show their disloyalty by joining a rival organization. The sole question in such a case is whether the disloyal members were tried and expelled in accord with the constitution and bylaws of the association (*229 Cal. App. 3d 817, 826)* .

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CHAPTER 22 ASSOCIATIONS AND CLUBS
PART II. FORMS

2-22 California Points & Authorities § 22.29

§ 22.29 Opposing Contention That Expulsion From Membership in an Association Was Improper--Expulsion Based on Rule Which Is Reasonable and Reasonably Interpreted

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

EXPULSION FROM MEMBERSHIP IN THE ASSOCIATION WAS PROPER BECAUSE THE ASSOCIATION'S RULE ON WHICH THE EXPULSION WAS BASED, AND ITS INTERPRETATION OF THAT RULE, IS REASONABLE.

Reasonable Rules Reasonably Construed Will Be Upheld. The practical and reasonable construction of the constitution and bylaws of a voluntary organization by its governing board is binding on the membership and will be recognized by the courts (*DeMille v. American Fed. of Radio Artists (1947) 31 Cal. 2d 139, 147, 187 P.2d 769*).

[2] Comments

[a] Use of Form

These points and authorities may be used in opposition to the contention that expulsion from membership in an association was improper because the rule on which expulsion was based was unreasonable [*see § 22.21*].

The argument supported by this form may be raised in opposition to a petition for a writ of mandate under *Code Civ. Proc. § 1086* or in opposition to a petition for a writ of mandate under *Code Civ. Proc. § 1094.5* to review an administrative decision, when the member is seeking reinstatement in the association. The argument can also be used to oppose an application for an injunction to restrain the association from expelling the member or to oppose an action for damages.

These points and authorities may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the substantive issue that the member's expulsion was proper because the rule on which the member's expulsion was based was reasonable, not contrary to public policy, and reasonably construed. The points

and authorities in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. If the rule is unambiguous, counsel should show that it is reasonable and that the association did not try to change its meaning by interpreting it unreasonably [*see, e.g., Sanchez v. Grain Growers Asso. (1981) 123 Cal. App. 3d 444, 451, 176 Cal. Rptr. 655]* . If the rule is ambiguous, counsel should show that the association construed it in a practical and reasonable manner [*see, e.g., DeMille v. American Fed. of Radio Artists (1947) 31 Cal. 2d 139, 147, 187 P.2d 769]* .

[b] Related Pleading and Practice Forms

For pleading and practice forms relating to associations and clubs, see California Forms of Pleading and Practice, Ch. 61, *Associations and Clubs* (Matthew Bender). For discussion, procedural checklist, and forms relating to injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender). For discussion and forms for use in mandate proceedings generally, see California Forms of Pleading and Practice, Ch. 358, *Mandate and Prohibition* (Matthew Bender). For discussion and forms of petitions for judicial review of a final administrative order by administrative mandate under Code Civ. Proc. § 1094.5, see California Forms of Pleading and Practice, Ch. 474C, *Procedures in Reviewing Agency Decisions* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities relating to injunctive relief generally, see Ch. 116, *Injunctions* . For memoranda of points and authorities relating to mandate proceedings generally, see Ch. 150, *Mandate and Prohibition* . For memoranda of points and authorities for use in mandate proceedings to review administrative decisions under *Code Civ. Proc. § 1094.5*, see Ch. 195, *Public Administrative Law* .

[3] Discussion of Authorities

[a] Reasonable Rules Reasonably Construed Will Be Upheld

DeMille v. American Fed. of Radio Artists *(1947) 31 Cal. 2d 139, 187 P.2d 769* , was an action to restrain a union from suspending plaintiff for failure to pay an assessment. Defendant union's local board voted to assess every member $1 to help pay for a fight against anti-labor legislation. The local board prescribed automatic suspension for failure to pay. The local board's actions were subsequently approved by the union's national board. Plaintiff did not pay the assessment. Plaintiff contended, among other things, that the union had no authority under its constitution and bylaws to levy the assessment, and that if it did, the power was not duly exercised. The trial court sustained a demurrer to the complaint and dismissed the action. The Supreme Court affirmed.

The Court found that the union's constitution and bylaws cover opposition to contemplated legislation (*31 Cal. 2d 139, 144-145)* and although the constitution does not explicitly grant the power to levy assessments it does give the national board power to interpret the constitution and bylaws. The Court held that a practical and reasonable construction of the constitution and bylaws of a voluntary organization by its governing board was binding on the membership and would be recognized by the courts. The Court found the national board's interpretation in this case to be reasonable and held that plaintiff was bound by it (*31 Cal. 2d 139, 147)* .

[4] Additional Authorities

[a] Reasonable Rules Reasonably Construed Will Be Upheld

Sanchez v. Grain Growers Asso. (1981) 123 Cal. App. 3d 444, 176 Cal. Rptr. 655 , was an action for money due, declaratory relief, and an accounting. Defendant association expelled plaintiffs, but refused to return any contributions

made by plaintiffs. The association's bylaws provided that contributions known as retains, which were the source of capital for the association's operation, could be paid only at the end of a crop year and only if there was a surplus. The bylaws also state that the member's interest in the association has no intrinsic value. Plaintiff contended that these bylaws were void. The trial court agreed and gave judgment for plaintiffs. The court of appeal reversed. The court said that bylaws must be given a reasonable construction and when reasonably susceptible, should be given a construction that will sustain their validity (*123 Cal. App. 3d 444, 451)* . Thecourt held that the association's bylaws were reasonable in that they promoted fiscal stability of the association and that plaintiffs were contractually bound by them (*123 Cal. App. 3d 444, 452-453)* .

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CHAPTER 22 ASSOCIATIONS AND CLUBS
PART II. FORMS

2-22 California Points & Authorities § 22.30

§ 22.30 Opposing Contention That Court Can Review Association's Decision to Exclude Person From Membership--Substantial Economic Interests Not Affected

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

JUDICIAL REVIEW OF THE ASSOCIATION'S DECISION TO EXCLUDE _____ [*name*] FROM MEMBERSHIP IS IMPROPER BECAUSE THE DECISION TO EXCLUDE DID NOT SIGNIFICANTLY AFFECT THE APPLICANT'S SUBSTANTIAL ECONOMIC INTEREST IN THAT THE APPLICANT'S RIGHT TO PRACTICE IN A CHOSEN OCCUPATION WAS NOT AFFECTED AND MEMBERSHIP WOULD NOT INDICATE ANY QUALIFICATION FOR ANY SPECIALIZED FIELD.

Right to Practice or Gain Specialist Recognition Must Be Affected. Admission to membership in a voluntary association will not be ordered, even though denial of admission affects a person's professional and economic interests, if membership does not affect his or her right to practice in a chosen occupation or indicate any qualification for any specialized field (*Blatt v. University of So. California (1970) 5 Cal. App. 3d 935, 942, 85 Cal. Rptr. 601*).

[2] Comments

[a] Use of Form

These points and authorities may be used in opposition to the contention that exclusion from membership in an association was improper [*see §§ 22.22* and *22.23*]. The ground of opposition set forth is that the courts may not review the applicant's exclusion from membership because the association's decision to not admit the applicant does not affect a substantial economic interest of the applicant.

The argument supported by the form may be raised in opposition to a petition for a writ of mandate under *Code Civ. Proc. § 1086* or in opposition to a petition for a writ of mandate under *Code Civ. Proc. § 1094.5* to review an administrative decision, when the applicant is seeking admission to the association. The argument can also be used to oppose an application for an injunction to restrain the association from denying admission to the applicant.

These points and authorities may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the substantive issue of the impropriety of judicial review of the association's decision to exclude the applicant. The points and authorities in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. To demonstrate that the court should not interfere with the association's decision to exclude the applicant, counsel should show that exclusion from the association would not deprive the applicant of his or her right to practice, nor would membership indicate his or her qualification for a specialized field of practice.

[b] Related Pleading and Practice Forms

For pleading and practice forms relating to associations and clubs, see California Forms of Pleading and Practice, Ch. 61, *Associations and Clubs* (Matthew Bender). For discussion, procedural checklist, and forms relating to injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender). For discussion and forms for use in mandate proceedings generally, see California Forms of Pleading and Practice, Ch. 358, *Mandate and Prohibition* (Matthew Bender). For discussion and forms of petitions for judicial review of a final administrative order by administrative mandate under Code Civ. Proc. § 1094.5, see California Forms of Pleading and Practice, Ch. 474C, *Procedures in Reviewing Agency Decisions* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities relating to injunctive relief generally, see Ch. 116, *Injunctions* . For memoranda of points and authorities relating to mandate proceedings generally, see Ch. 150, *Mandate and Prohibition* . For memoranda of points and authorities for use in mandate proceedings to review administrative decisions under *Code Civ. Proc. § 1094.5*, see Ch. 195, *Public Administrative Law* .

[3] Discussion of Authorities

[a] Right to Practice or Gain Specialist Recognition Must Be Affected

Blatt v. University of Southern California *(1970) 5 Cal. App. 3d 935, 85 Cal. Rptr. 601* , involved an action by an attorney seeking to compel his admission to membership in a university chapter of a national honorary society. Plaintiff, an attorney, alleged that refusal of membership would affect his professional and economic interest. The trial court sustained defendant's general demurrer to plaintiff's second amended complaint and entered a judgment of dismissal.

The court of appeal affirmed, holding that because membership in the societydid not affect an attorney's right to practice or indicate any qualification for any specialized field of practice, plaintiff had failed to plead any justiciable issue (*5 Cal. App. 3d 935, 942)* . The court said that to adopt the contention that the court may compel admission to membership in voluntary organizations in any situation in which membership may enhance or affect one's professional or economic interests would subject to judicial review the membership selection activity and policies of every voluntary organization, because it is difficult to conceive of any organization that does not in some respect involve or affect professional or economic interests of its members (*5 Cal. App. 3d 935, 942)* .

Counsel should note that the court in *Blatt* gave a very narrow interpretation to the substantial economic effect rule set out in *Pinsker v. Pacific Coast Society of Orthodontists (1969) 1 Cal. 3d 160, 164-165, 81 Cal. Rptr. 623, 460 P.2d 495* , and it is not clear whether the Supreme Court intended that its holding in *Pinsker* be limited to situations in which the association's decision affected the applicant's right to practice a profession or gain specialist recognition.

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PART II. FORMS

2-22 California Points & Authorities § 22.31

§ 22.31 Opposing Contention That Exclusion From Membership in an Association Was Improper--Not Arbitrary or Unreasonable

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

EXCLUSION FROM MEMBERSHIP IN THE ASSOCIATION WAS PROPER BECAUSE THE EXCLUSION WAS NOT ARBITRARY OR UNREASONABLE.

A. Associations Permitted to Make Rules and Regulations Governing Admission. Under California law, a voluntary association need not open its membership rolls to all who apply; the availability of judicial review does not prevent the association from setting reasonable standards for admission (*Marin County Bd. of Realtors, Inc. v. Palsson (1976) 16 Cal. 3d 920, 938, 130 Cal. Rptr. 1, 549 P.2d 833*).

B. Court Will Uphold Exclusion When Not Arbitrary or Unreasonable. Exclusion for failure to comply with reasonable and nonarbitrary requirements for membership in an association will not be interfered with by the courts (*see Kronen v. Pacific Coast Society of Orthodontists (1965) 237 Cal. App. 2d 289, 305-307, 46 Cal. Rptr. 808*).

[2] Comments

[a] Use of Form

These points and authorities may be used in opposition to the contention that exclusion from membership in an association was improper because it was arbitrary or unreasonable [*see § 22.22*].

The argument supported by the form may be raised in opposition to a petition for a writ of mandate under *Code Civ. Proc. § 1086* or in opposition to a petition for a writ of mandate under *Code Civ. Proc. § 1094.5* to review an administrative decision, when the applicant is seeking admission to the association. The argument can also be used to oppose an application for an injunction to restrain the association from denying admission to the applicant or to oppose an action for damages.

These points and authorities may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the substantive point that the applicant's exclusion was proper because it was not arbitrary or unreasonable. The points and authorities in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. To demonstrate that the exclusion was not arbitrary or unreasonable, counsel may show, for example, that the rules governing admission to the association dealt only with the professional qualifications of the applicant and were not applied in an arbitrary or discriminatory manner [*see Kronen v. Pacific Coast Society of Orthodontists (1965) 237 Cal. App. 2d 289, 307, 46 Cal. Rptr. 808]* .

[b] Related Pleading and Practice Forms

For pleading and practice forms relating to associations and clubs, see California Forms of Pleading and Practice, Ch. 61, *Associations and Clubs* (Matthew Bender). For discussion, procedural checklist, and forms relating to injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender). For discussion and forms for use in mandate proceedings generally, see California Forms of Pleading and Practice, Ch. 358, *Mandate and Prohibition* (Matthew Bender). For discussion and forms of petitions for judicial review of a final administrative order by administrative mandate under Code Civ. Proc. § 1094.5, see California Forms of Pleading and Practice, Ch. 474C, *Procedures in Reviewing Agency Decisions* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities relating to injunctive relief generally, see Ch. 116, *Injunctions* . For memoranda of points and authorities relating to mandate proceedings generally, see Ch. 150, *Mandate and Prohibition* . For memoranda of points and authorities for use in mandate proceedings to review administrative decisions under *Code Civ. Proc. § 1094.5*, see Ch. 195, *Public Administrative Law* .

[3] Discussion of Authorities

[a] Associations Permitted to Make Rules and Regulations Governing Admission

In ***Marin County Bd. of Realtors, Inc. v. Palsson*** *(1976) 16 Cal. 3d 920, 130 Cal. Rptr. 1, 549 P.2d 833* , a real estate salesman who was denied membership in the county board of realtors on the ground that he was not primarily engaged in the real estate business contested the board's decision. The board filed an action seeking a declaration that the exclusion was valid. The salesman filed a cross complaint seeking declaratory relief and an injunction granting him board membership. The trial court ruled in favor of the board. The Supreme Court reversed. The Court held that an association could set reasonable standards for admission (*16 Cal. 3d 920, 938)* . In this case, however, the Court concluded that the bylaw, requiring that a person be primarily engaged in the real estate business in order to be admitted to membership on the board, was not reasonable (*16 Cal. 3d 920, 940)* .

[b] Court Will Uphold Exclusion When Not Arbitrary or Unreasonable

Kronen v. Pacific Coast Society of Orthodontists *(1965) 237 Cal. App. 2d 289, 46 Cal. Rptr. 808* , was an action by a dentist for declaratory and injunctive relief to enjoin respondent association from denying his application to membership. The trial court denied him relief, and the court of appeal affirmed the trial court's judgment. The society had denied his application for membership because he did not have two sponsors, as required by the society's rules. The court of appeal found that this requirement was directed only at petitioner's professional qualifications and held that it was not arbitrary or unreasonable, or applied in an arbitrary, unreasonable, or wrongful manner (*237 Cal. App. 2d 289, 307)* .

[4] Additional Authorities

[a] Court Will Uphold Exclusion When Not Arbitrary or Unreasonable

Lewin v. St. Joseph Hospital of Orange (1978) 82 Cal. App. 3d 368, 146 Cal. Rptr. 892 , was a proceeding in mandamus to gain admission to defendant hospital's renal hemodialysis facility. Defendant operated this facility on a closed-staff basis. Plaintiff contended that it was the legal duty of the hospital to refrain from interfering with plaintiff's legitimate practice of his profession and that the exclusive contract for the use of the facilities was therefore unlawful. The trial court granted plaintiff a writ of mandate.

Defendant appealed, and the court of appeal reversed. The court held that a rule or policy decision of general application adopted by the governing authority of a hospital or professional society impinging upon the right of a physician to practice his or her profession fully will not be set aside by a court unless it is substantively irrational, unlawful, contrary to established public policy, or procedurally unfair (*82 Cal. App. 3d 368, 385)* . The court found that defendant hospital's decision to maintain a closed-staff operation in the renal hemodialysis facility was not substantively irrational, arbitrary, capricious, or wholly lacking in evidentiary support. The hospital had determined that this method of operation was preferable because it would facilitate hospital administration and improve patient care (*82 Cal. App. 3d 368, 391)* . Therefore, the court held that plaintiff was not entitled to admission (*82 Cal. App. 3d 368, 394)* .

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2-22 California Points & Authorities § 22.32

§ 22.32 Opposing Contention That Expulsion or Exclusion From Membership in an Association Was Improper--Procedure Followed Was Fair

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [EXPULSION *or* EXCLUSION] FROM MEMBERSHIP IN THE ASSOCIATION WAS PROPER BECAUSE THE PROCEDURE FOLLOWED BY THE ASSOCIATION IN _____ [EXPELLING *or* EXCLUDING] THE _____ [MEMBER *or* APPLICANT] WAS FAIR.

A. Procedure Fair. The common law requirement of fair procedure is fulfilled when the accused is afforded notice and an opportunity to be heard by the association (*Smith v. Kern County Medical Asso. (1942) 19 Cal. 2d 263, 268-269, 120 P.2d 874*).

B. Formal Procedures Not Required. Fair procedure does not compel the association to provide a member or applicant with formal proceedings having all the embellishments of a court trial, nor does it require that the association adhere to a single mode of process (*Anton v. San Antonio Community Hosp. (1977) 19 Cal. 3d 802, 829, 140 Cal. Rptr. 442, 567 P.2d 1162* ; *Pinsker v. Pacific Coast Society of Orthodontists (1974) 12 Cal. 3d 541, 555, 116 Cal. Rptr. 245, 526 P.2d 253*).

[2] Comments

[a] Use of Form

These points and authorities may be used in opposition to the contention that expulsion or exclusion from membership in an association was improper because the procedure followed by the association in making the decision was not fair [*see § 22.23*].

The argument supported by the form may be raised in opposition to a petition for a writ of mandate under *Code Civ. Proc. § 1086* or in opposition to a petition for a writ of mandate under *Code Civ. Proc. § 1094.5* to review an

administrative decision, when a member or applicant is seeking reinstatement or admission to the association. The argument can also be used to oppose an application for an injunction to restrain the association from expelling the member or excluding the applicant or to oppose an action for damages for such expulsion or exclusion.

These points and authorities may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the substantive issue of the fairness of the procedure followed in making the decision to expel or exclude. The points and authorities in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. To demonstrate that the procedure provided by the association was fair, counsel may show, for example, that the member or applicant was given notice of the charges against him or her, that he or she was given an opportunity to respond, and that the association's adjudicators were impartial.

[b] Related Pleading and Practice Forms

For pleading and practice forms relating to associations and clubs, see California Forms of Pleading and Practice, Ch. 61, *Associations and Clubs* (Matthew Bender). For discussion, procedural checklist, and forms relating to injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender). For discussion and forms for use in mandate proceedings generally, see California Forms of Pleading and Practice, Ch. 358, *Mandate and Prohibition* (Matthew Bender). For discussion and forms of petitions for judicial review of a final administrative order by administrative mandate under Code Civ. Proc. § 1094.5, see California Forms of Pleading and Practice, Ch. 474C, *Procedures in Reviewing Agency Decisions* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities relating to injunctive relief generally, see Ch. 116, *Injunctions* . For memoranda of points and authorities relating to mandate proceedings generally, see Ch. 150, *Mandate and Prohibition* . For memoranda of points and authorities for use in mandate proceedings to review administrative decisions under *Code Civ. Proc. § 1094.5*, see Ch. 195, *Public Administrative Law* .

[3] Discussion of Authorities

[a] Procedure Fair

The facts and procedural background of ***Smith v. Kern County Medical Asso.*** *(1942) 19 Cal. 2d 263, 120 P.2d 874* , are discussed in *§ 22.28[3][b]*. In affirming the superior court's judgment denying relief to petitioner, the Supreme Court held that the requirements of the law are fulfilled when the accused is afforded notice and an opportunity to be heard. In this case, the society followed the procedure provided by its rules and the petitioner was accorded every opportunity to defend himself. Therefore, the Court held that his exclusion was valid (*19 Cal. 2d 263, 268-269)* .

[b] Formal Procedures Not Required

Anton v. San Antonio Community Hosp. *(1977) 19 Cal. 3d 802, 140 Cal. Rptr. 442, 567 P.2d 1162* , was a mandamus proceeding in which plaintiff sought reinstatement to membership on defendant hospital's medical staff. Plaintiff contended, among other things, that the proceedings at which defendant decided to expel him were unfair because he was required to proceed with a hearing without the assistance of counsel and because the hospital's bylaw placed the burden of proof on him.

The trial court denied plaintiff a writ of mandate, and plaintiff appealed. The Supreme Court reversed the judgment, but held that the denial of representation by counsel and the enforcement of the bylaw placing the burden of proof on plaintiff did not constitute an abuse of the association's discretion in formalizing the procedures that would afford the

affected party a fair opportunity to present his or her position (*19 Cal. 3d 802, 829)* and, therefore, that these rules were not violations of the standard of fair procedure (*19 Cal. 3d 802, 827)* .

The facts and procedural background of ***Pinsker v. Pacific Coast Society of Orthodontists*** *(1974) 12 Cal. 3d 541, 116 Cal. Rptr. 245, 526 P.2d 253* , are discussed in *§ 22.23[3][a]*. In *Pinsker,* the Supreme Court held that the association's exclusion of an applicant must be procedurally fair. However, the Court said that fair procedure does not compel formal proceedings with all the embellishments of a court trial, or adherence to a single mode of process; fair procedure may be satisfied by any one of a variety of procedures which afford a fair opportunity for an applicant to present his or her position. Therefore, the court should not attempt to fix a rigid procedure that must invariably be observed. Instead, the associations themselves should retain the initial and primary responsibility for devising a method that provides an applicant adequate notice of the charges against him or her and a reasonable opportunity to respond (*12 Cal. 3d 541, 555-556)* .

In ***Tiholiz v. Northridge Hospital Foundation*** *(1984) 151 Cal. App. 3d 1197* , *199 Cal. Rptr. 338* , the court of appeal affirmed the trial court's denial of a writ of administrative mandate. The petitioner, a physician, was suspended from access to a hospital following his violation of the hospital's bylaws. The court explained that an institution affected with a public interest may not deprive an individual of fundamental interests without affording the individual fair procedure rights, and that a physician's access to a hospital is a protected fundamental interest. Fair procedure does not require rigid adherence to any particular procedure or timetable and must be assessed on an individual case basis; it requires, at a minimum, adequate notice of the administrative action proposed and a reasonable opportunity to be heard (*151 Cal. App. 3d 1197, 1202)* . Petitioner's failure to attend meetings of the executive committee prior to the formal decision to suspend his access rights, necessitating that the hearing be held after suspension began, was considered by the court. Because he was partially responsible for the delay and was given the opportunity to defend himself, these facts did not invalidate the hearing decision (*151 Cal. App. 3d 1197, 1203)* .

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 22 ASSOCIATIONS AND CLUBS
PART II. FORMS

2-22 California Points & Authorities § 22.33

§ 22.33 Opposing Contention That an Action for Damages Is Proper--Intentional Interference With Right to Pursue Profession--Sufficient Justification

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DAMAGES SHOULD NOT BE AWARDED TO THE _____ [MEMBER *or* APPLICANT] OF THE ASSOCIATION FOR THE ASSOCIATION'S ALLEGED INTENTIONAL INTERFERENCE WITH THE _____ [MEMBER'S *or* APPLICANT'S] RIGHT TO PURSUE A PROFESSION BECAUSE THE ASSOCIATION HAD SUFFICIENT JUSTIFICATION FOR SUCH INTERFERENCE.

Association's Action Justified. An association is not liable for damages for intentional interference with a lawful business, calling, trade, or occupation if its actions are justified. Unless the action of the association is unreasonable, arbitrary, or capricious, it is valid and justified (*Centeno v. Roseville Community Hospital (1979) 107 Cal. App. 3d 62, 69, 73-74, 167 Cal. Rptr. 183*).

[2] Comments

[a] Use of Form

These points and authorities may be used in opposition to the contention that damages should be awarded to a member of or applicant to an association when the association intentionally interfered with the member's or applicant's right to pursue a profession [*see § 22.25*].

These points and authorities may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the substantive point that damages should not be awarded to the member or applicant for the association's intentional interference with the member's or applicant's right to pursue a profession because the association's action was justified. The points and authorities in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. If the association involved is a hospital, counsel may show, for example, that the interference was reasonable in that it promoted the welfare of the hospital and its patients.

[b] Related Pleading and Practice Forms

For pleading and practice forms relating to associations and clubs, see California Forms of Pleading and Practice, Ch. 61, *Associations and Clubs* (Matthew Bender). For discussion, procedural checklist, and forms relating to injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender). For discussion and forms for use in mandate proceedings generally, see California Forms of Pleading and Practice, Ch. 358, *Mandate and Prohibition* (Matthew Bender). For discussion and forms of petitions for judicial review of a final administrative order by administrative mandate under Code Civ. Proc. § 1094.5, see California Forms of Pleading and Practice, Ch. 474C, *Procedures in Reviewing Agency Decisions (Matthew Bender).*

[c] Related Points and Authorities

For memoranda of points and authorities relating to injunctive relief generally, see Ch. 116, *Injunctions* . For memoranda of points and authorities relating to mandate proceedings generally, see Ch. 150, *Mandate and Prohibition* . For memoranda of points and authorities for use in mandate proceedings to review administrative decisions under *Code Civ. Proc. § 1094.5*, see Ch. 195, *Public Administrative Law* .

[3] Discussion of Authorities

[a] Association's Action Justified

Centeno v. Roseville Community Hospital *(1979) 107 Cal. App. 3d 62, 167 Cal. Rptr. 183* , involved an action for declaratory judgment, injunctive relief, and damages from defendant hospital. The hospital refused to allow plaintiff to use its radiology facilities once he had withdrawn from a partnership with which the hospital had an exclusive contract. The trial court entered judgment for defendant. On appeal, the plaintiff challenged the exclusive contract on the grounds that itwas not justified under a standard of balancing the hardships to him versus those to the hospital. Affirming the trial court's decision, the court of appeal held that an action for damages did not lie because the association's action was justified. The court held that whether there was justification for the contract is determined by a balancing test, in the light of all the circumstances, weighing the respective importance to society and the parties of protecting the activities interfered with on the one hand and permitting the interference on the other hand (*107 Cal. App. 3d 62, 69)* . The court further held that unless the hospital's action was unreasonable, arbitrary, or capricious, it was valid and justified under the balancing test (*107 Cal. App. 3d 62, 73-74)* . The court, finding that the contract was reasonable, not against public policy, and therefore valid and justified, held that plaintiff was not entitled to relief (*107 Cal. App. 3d 62, 77)* .

[4] Additional Authorities

[a] Association's Action Justified

Blank v. Palo Alto-Stanford Hospital Center (1965) 234 Cal. App. 2d 377, 44 Cal. Rptr. 572 , was an action for injunctive relief and damages for wrongful exclusion from hospital facilities. The board of directors of the hospital had adopted an exclusive contract method of operating their diagnostic x-ray department. Plaintiff applied to use the facilities, but was denied its use because of the exclusive contract. Plaintiff contended that his exclusion from the hospital facilities was unreasonable and arbitrary, that the hospital and its staff had combined and agreed to exclude him from using the hospital facilities without sufficient justification, and that they were therefore liable for the resulting damage. Plaintiff took the position that the test of whether an exclusion is unreasonable or arbitrary involved the same criteria and considerations as the test to determine whether persons combining to restrict the activities of another had sufficient justification for their actions. The trial court gave judgment for defendants. Plaintiff appealed, and the court of

appeal affirmed.

The court found that the contract method of operating the diagnostic radiology department was adopted by the hospital board because it would result in better patient care and more efficient hospital administration. Therefore, the court held that the hospital board's decision was not unreasonable, but was justified in view of the ends to be accomplished (*234 Cal. App. 2d 377, 394)* .

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PART II. FORMS

2-22 California Points & Authorities § 22.34

§ 22.34 Opposing Contention That Court Can Review the Association's Decision to Expel or Exclude Person From Membership--Internal Remedies Not Exhausted

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE _____ [MEMBER *or* APPLICANT] OF THE ASSOCIATION SHOULD BE BARRED FROM SEEKING JUDICIAL RELIEF BECAUSE THE _____ [MEMBER *or* APPLICANT] DID NOT EXHAUST THE ASSOCIATION'S INTERNAL REMEDIES.

Exhaustion of Association's Internal Remedies Required. A member of or applicant for membership in an association must exhaust the association's internal remedies before seeking judicial relief (*Westlake Community Hosp. v. Superior Court (1976) 17 Cal. 3d 465, 474, 131 Cal. Rptr. 90, 551 P.2d 410* ; *Holderby v. Internat. Union etc. Engrs. (1955) 45 Cal. 2d 843, 846, 291 P.2d 463*).

[2] Comments

[a] Use of Form

These points and authorities may be used in opposition to the contention that the court can review an association's decision. The argument may be made by the association whenever a member or applicant is seeking some form of judicial relief, if he or she has not exhausted the association's internal remedies.

The argument supported by the form may be raised in opposition to a petition for a writ of mandate under *Code Civ. Proc. § 1086* or in opposition to a petition for a writ of mandate under *Code Civ. Proc. § 1094.5* to review an administrative decision, when a member or applicant is seeking reinstatement or admission to an association. The argument can also be used to oppose an application for an injunction to restrain the association from expelling the member or excluding the applicant or to oppose an action for damages resulting from improper expulsion or exclusion and from intentional interference with right to pursue a profession.

These points and authorities may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the substantive point that the member or applicant is barred from seeking judicial relief because he or she did not exhaust the association's internal remedies. This issue is likely to be raised either by demurrer to the petition or complaint or by a motion for summary judgment. The points and authorities in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. To demonstrate that the member or applicant has not exhausted the association's internal remedies, counsel may show that remedies were available to the member or applicant and that he or she was not excused from exhausting these remedies [*see § 22.26*].

[b] Related Pleading and Practice Forms

For pleading and practice forms relating to associations and clubs, see California Forms of Pleading and Practice, Ch. 61, *Associations and Clubs* (Matthew Bender). For discussion, procedural checklist, and forms relating to injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender). For discussion and forms for use in mandate proceedings generally, see California Forms of Pleading and Practice, Ch. 358, *Mandate and Prohibition* (Matthew Bender). For discussion and forms of petitions for judicial review of a final administrative order by administrative mandate under Code Civ. Proc. § 1094.5, see California Forms of Pleading and Practice, Ch. 474C, *Procedures in Reviewing Agency Decisions* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities relating to injunctive relief generally, see Ch. 116, *Injunctions* . For memoranda of points and authorities relating to mandate proceedings generally, see Ch. 150, *Mandate and Prohibition* . For memoranda of points and authorities for use in mandate proceedings to review administrative decisions under *Code Civ. Proc. § 1094.5*, see Ch. 195, *Public Administrative Law* .

[3] Discussion of Authorities

[a] Exhaustion of Association's Internal Remedies Required

Westlake Community Hosp. v. Superior Court *(1976) 17 Cal. 3d 465, 131 Cal. Rptr. 90, 551 P.2d 410* (also discussed in *§ 22.26[4][a]*), was a suit for damages resulting from, among other things, denial of plaintiff's application for staff privileges at defendant hospital. Defendant contended that plaintiff could not seek relief from the courts because she had not appealed internally. The trial court denied a motion by defendant for summary judgment. Defendant sought a writ of mandate to reverse the decision, but the Supreme Court denied relief. The Court noted that plaintiff was required to exhaust all available internal remedies of the association before seeking relief from the courts, but found that defendant hospital did not provide such an internal remedy (*17 Cal. 3d 465, 478)* .

In ***Holderby v. Internat. Union Engrs.*** *(1955) 45 Cal. 2d 843, 291 P.2d 463* , a union member instituted an action seeking reinstatement in a union as a member in good standing and for damages for unlawful exclusion. The trial court rendered judgment for plaintiff. Defendant union appealed, and the Supreme Court reversed. The Court held that one who seeks judicial relief against an organization of which he or she is a member must first invoke and exhaust the remedies provided by the organization that are applicable to his or her grievance (*45 Cal. 2d 843, 846)* . Because plaintiff made no attempt to obtain an internal appeal when one was open to him, the Court held that he had no right to invoke the aid of the courts (*45 Cal. 2d 843, 849)* .

[4] Additional Authorities

[a] Exhaustion of Association's Internal Remedies Required

Zepeda v. Internat. Hodcarriers' etc. Union (1956) 143 Cal. App. 2d 609, 300 P.2d 251 , was a proceeding in mandamus to compel a union to post a member's name in its hiring hall and to dispatch the member to prospective employers from those lists in the same manner as other members of the union. Plaintiff, a union member, contended that the union wrongfully refused to dispatch him to jobs. The union contended that plaintiff was not qualified or fit for the jobs, and that he was barred from seeking judicial relief because he had not exhausted the union's internal remedies. The court of appeal affirmed a summary judgment in favor of defendant. It held that if the internal appeal process is not invoked, an aggrieved party foregoes the right to a judicial review. The court found that none of the exceptions to the exhaustion of remedies requirement were present, and that plaintiff was barred from seeking judicial relief (*143 Cal. App. 2d 609, 614-615)* .

Plaintiff in DeVaughn Peace, M.D., Inc. v. St. Francis Medical Center (1994) 28 Cal. App. 4th 454, 33 Cal. Rptr. 2d 459 , brought a civil action alleging various tort causes of action against a hospital based on the hospital's alleged wrongful deprivation of his medical staff privileges at the hospital during a 3-month period. Plaintiff's privileges had been summarily suspended for failure to comply with certain rules of the hospital's pediatrics department. Plaintiff never filed an appeal with the hospital medical staff's judicial review committee, as required by the medical staff bylaws. Later, his privileges were reinstated. The trial court granted the defendant a judgment of nonsuit, and the court of appeal affirmed. Citing *Westlake Community Hosp. v. Superior Court (1976) 17 Cal. 3d 465, 131 Cal. Rptr. 90, 551 P.2d 410* (discussed in *§ 22.34[3][a]*), the court of appeal held the plaintiff's failure to exhaust intra-organizational remedies and, thereafter, to file a petition for writ of mandate as provided in the medical staff bylaws, was fatal to his claim (*28 Cal. App. 4th 454, 459-460)* .

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2-22 California Points & Authorities § 22.35

§ 22.35 Opposing Contention That Association May Be Required to Divulge the Names of Its Members

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE ASSOCIATION IS AN INTIMATE ASSOCIATION PROTECTED BY THE *FIRST AMENDMENT'S* FREEDOM OF ASSOCIATION, AND IT IS NOT REQUIRED TO DISCLOSE THE IDENTITIES OF ITS MEMBERS.

A. Intimate Associations Are Constitutionally Protected. The right to intimate association is constitutionally protected. Whether or not a particularassociation warrants protection as an intimate association depends on its size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent (*Pacific-Union Club v. Superior Court (1991) 232 Cal. App. 3d 60, 71-73, 283 Cal. Rptr. 287* ; *see Hart v. Cult Awareness Network (1993) 13 Cal. App. 4th 777, 788-789, 16 Cal. Rptr. 2d 705*).

[*Optional*] **B. Constitutional Protection Extends to Nondisclosure of Membership List.** The constitutional protection afforded an association extends to protect its membership list from forced disclosure when the organization makes a prima facie showing that disclosure of the list would cause an objective chilling of associational rights, such as harassment or loss of membership (*Pacific-Union Club v. Superior Court (1991) 232 Cal. App. 3d 60, 75-78, 283 Cal. Rptr. 287* (specter of tax audit is sufficiently chilling)).

[*Optional*] **C. Forced Disclosure Requires Compelling State Interest.** The protection from forced disclosure may only be overcome if disclosure is both justified by a compelling state interest and is the least intrusive method to satisfy that interest. Only the gravest abuses, endangering a paramount state interest, give occasion for permissible limitation. Moreover, even if such a compelling interest is present, it cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved (*Pacific-Union Club v. Superior Court (1991) 232 Cal. App. 3d 60, 78, 283 Cal. Rptr. 287*).

[2] Comments

[a] Use of Form

These points and authorities may be used in opposition to the contention that an association may be required to reveal its membership list.

These points and authorities may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the substantive point that the association should not be compelled to disclose the identities of its members. The points and authorities in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Counsel should include the specific characteristics of the association that indicate its intimate nature, such as its small size and its highly selective membership procedures.

Optional Paragraph B sets forth the federal test. Although California cases seem to assume that once a group qualifies for the right of associational privacy, any disclosure of members is adverse, there has been no clear and unequivocal articulation of a rule different from the federal one [*see Pacific-Union Club v. Superior Court (1991) 232 Cal. App. 3d 60, 76, 283 Cal. Rptr. 287]* .

[b] Related Pleading and Practice Forms

For pleading and practice forms relating to associations and clubs, see California Forms of Pleading and Practice, Ch. 61, *Associations and Clubs* (Matthew Bender). For discussion and forms for use in mandate proceedings generally, see California Forms of Pleading and Practice, Ch. 358, *Mandate and Prohibition* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities relating to mandate proceedings generally, see Ch. 150, *Mandate and Prohibition* .

[3] Discussion of Authorities

[a] Intimate Associations Are Constitutionally Protected

In ***Pacific-Union Club v. Superior Court*** *(1991) 232 Cal. App. 3d 60, 283 Cal. Rptr. 287* , the Franchise Tax Board issued an administrative subpoena duces tecum for a private club's membership list, including the names, addresses, and Social Security numbers of its members, for the purpose of determining whether members deducted club-related business expenses on their state income tax returns in violation of a ban against such deductions. The Board indicated that the list would be used to conduct random audits of individual club members' state income tax returns, even though it had no evidence that any club member took improper deductions and it did not expect to find much noncompliance. The club had informed its membership that business deductions for club expenses were illegal.

After the club resisted the subpoena, citing its members' *First Amendment* right of associational privacy, the Board petitioned the trial court for an order for its enforcement. The club is an organization with a solely social purpose. It maintains a restaurant and other facilities for the exclusive use of members and a few guests. Members are prohibited from conducting business on club premises, and must certify that charges incurred for use of any club facilities were not incurred in the furtherance of any business. Membership is limited, and is very selective, without any advertising or recruiting. The membership list is not revealed to outsiders. Club functions are private, with photographs or public descriptions prohibited. Admission is a deliberate qualification process, with a waiting period of up to one year, throughout which the candidate is continuously and subjectively evaluated for congeniality and compatibility with members. Membership is ultimately decided by a secret ballot, in which only two negative votes defeat the application. The club admits that it discriminates on the basis of age by requiring all prospective members to be at least 25. It is

widely reputed to discriminate against women. The trial court granted the motion for enforcement of the order and directed disclosure of the membership list, but stayed its order pending theappellate challenge. The club petitioned for a writ of mandate to compel the trial court to vacate its order enforcing the subpoena.

The court of appeal issued a peremptory writ of mandate commanding the trial court to vacate its order and to enter a new order denying the motion for enforcement. The court began its analysis by explaining that the freedom of association has two components: the freedom of intimate association and the freedom of expressive association. It said that the club, as a purely social organization, must base its associational privacy claim on the freedom of intimate association. Intimate association is protected because choices to enter into and maintain certain relationships must be secured against undue intrusion by the state because of the role those relationships play in safeguarding individual freedom (*232 Cal. App. 3d 60, 71)* . The court reviewed the qualitative continuum of personal relationships, from the most intimate which are protected by the freedom of association, to the most public and impersonal, which are not. It said that the determination of which relationships in between the extreme ends of the continuum warrant protection is based on a careful assessment of where that relationship's objective characteristics locate it on the spectrum. Relevant factors are size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent (*232 Cal. App. 3d 60, 72-73)* .

The court distinguished the associational characteristics of the club from those of organizations to which the right to protected association did not apply [*see* cases discussed in *§ 22.27*]. It said the club was near the intimate end of the spectrum. Specific determinative features included the club's small membership, organizational structure, and geographic focus, its fixed membership, the limited geographic area in which most of its members live, its lack of affiliation with any formal national organization, and its failure to advertise or recruit new members (*232 Cal. App. 3d 60, 73)* . The court also discussed the club's very limited purpose: it exists solely for the enjoyment of social intercourse among members carefully chosen for their congeniality and social compatibility. It makes no pretense of any civic or community objectives. Further, the club bars its doors, does not publicize itself, and prohibits members from describing or photographing its proceedings. The court concluded that the club's carefully enforced intimacy clearly made it a purely private social group that is entitled to the protection of freedom of intimate association (*232 Cal. App. 3d 60, 74-75)* .

In ***Hart v. Cult Awareness Network*** *(1993) 13 Cal. App. 4th 777, 16 Cal. Rptr. 2d 705* , after plaintiff, a member of the Church of Scientology, was denied membership in defendant, an organization devoted to informing the public about the harmful effects of mind control and the unethical practices employed by cults, he filed an action for damages and preliminary and permanent injunctive relief alleging that defendant's actions constituted religious discrimination in violation of the Unruh Civil Rights Act. Defendant opposed the action, arguing that it was a truly private association to which the Unruh Act did not apply. When the trial court denied the application for preliminary injunction, plaintiff appealed.

The court of appeal affirmed. The court explained that the freedom of association encompasses two freedoms: the freedom of private association, and the freedom of expressive association (*13 Cal. App. 4th 777, 787)* . The freedom of private association refers to the freedom to enter into and carry on certain intimate or private relationships. Although the precise boundaries of this freedom have not been drawn, it protects those relationships that presuppose deep attachments and commitments to those individuals with whom one shares not only a special community of thought, experiences, and beliefs, but also distinctively personal aspects of one's life. The court said that determining the limits of state authority over an individual's freedom to enter into a particular association entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments. The factors that may be relevant include size, purpose, policies, selectivity, and congeniality (*13 Cal. App. 4th 777, 788)* . The court found that the relationship among defendant's members is the type of intimate and private relationship that warrants constitutional protection, and enumerated some of the factors it found relevant. Defendant is not a large and basically unselective group; membership is only open to families and former members of destructive groups and others committed to exposing these groups. Membership is subject to approval by the

membership committee, which has great discretion, and requires a very detailed and personalized application. Finally, defendant is a well-defined subgroup whose membership is highly restricted and selective, based on shared opinions, thoughts, and concerns with respect to destructive cults. The court distinguished defendant from groups that have been found not to be truly private associations. Its purpose is narrow and its membership is limited; it carefully inquires into the background of its prospective members and examines their reasons for wanting to join. Moreover, it does not offer any goods and services to the general public; rather, it counsels and provides support to its very selective membership. Thus, the court concluded that the relationship between defendant's members primarily involves the intimate personal concerns and activities deserving of a high level of constitutional protection. Application of the Unruh Act to defendant would infringe on its members' rights of private association (*13 Cal. App. 4th 777, 788-789)* .

[b] Constitutional Protection Extends to Nondisclosure of Membership List

The facts and procedural background of ***Pacific-Union Club v. Superior Court*** *(1991) 232 Cal. App. 3d 60, 283 Cal. Rptr. 287* , are discussed in *22.35[3][a]*. After concluding that the club was a purely private social group entitled to the protection of freedom of intimate association, the court addressedthe issue of whether or not that protection extends to the membership list. The board argued that disclosure to a duly authorized taxing authority would be an insignificant infringement on any right to associational privacy that the club might have. It argued that disclosure would not alter, restrict, or otherwise tangibly impair the social relationships among club members because the governmental activity involved is not the prevention of their association.

The court observed that in the federal cases, to maintain the confidentiality of its membership list, an organization must make a prima facie showing that the disclosure of that list would cause an objective chilling of associational rights, such as harassment or loss of membership. Under that test, a merely subjective fear of reprisal or other adverse impact is insufficient to show an infringement of associational rights. The court went on to observe that the California cases seem to assume that once a group qualifies for the right of associational privacy, any disclosure of members is adverse. Without indicating which it thought was the proper test, the court opined that the club had easily met the federal test. It found the testimony by various members compelling. The members cherished their personal relationships, which had been established after a painstaking selection process. The elimination of privacy would change the environment of the club, discourage present members from maintaining their memberships, and inhibit applications for new members. Additionally, submission to a tax audit solely because of club membership would be harassing and annoying. Public criticism might subject members to public abuse and contempt if the fact of their membership was disclosed. The court concluded that all these concerns exceeded merely subjective concerns. It suggested that the specter of a tax audit solely because of membership in a group alone is sufficiently chilling (*232 Cal. App. 3d 60, 76)* . The court was not persuaded by the Board's argument that the club's concern over public disclosure is ill founded because the members' identities will be kept confidential. The club's main privacy objection is to the dissemination to the Board itself, which would use the previously confidential information to conduct a tax audit on selected club members. The court said the right to privacy exists to permit citizens to shield themselves from the prying eyes of government agents; government intrusion must have some oher justification than the promise that the information will not be shared (*232 Cal. App. 3d 60, 77)* .

The court also rejected the Board's attempt to discriminate between expressive and intimate associations, through its contention that only expressive associations enjoy membership list protection. The court felt that intimate associations are just as entitled to constitutional protection, perhaps even more so. It concluded that the club's membership list is protected by its members' *First Amendment* right of intimate associational privacy (*232 Cal. App. 3d 60, 77-78)* .

[c] Forced Disclosure Requires Compelling State Interest

The facts and procedural background of ***Pacific-Union Club v. Superior Court*** *(1991) 232 Cal. App. 3d 60, 283 Cal. Rptr. 287* , are discussed in *22.35[3][a]*. After concluding that the club's membership list is protected by its members' *First Amendment* right of intimate associational privacy, the court said that right is not absolute. The state may

overcome that right if disclosure is both justified by a compelling state interest *and* is the least intrusive method to satisfy that interest. The court explained that the state bears a particularly heavy burden of establishing a compelling state interest. No showing merely of a rational relationship to some colorable state interest is sufficient; only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. Moreover, even if such a compelling interest is present, it cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved (*232 Cal. App. 3d 60, 78)* . The Board implied that the regulation against tax deductions for discriminatory club expenses furthers the public policy against discrimination by preventing taxpayer subsidization of that behavior. While not disagreeing with the Board, the court said it confused public discrimination, which is illegal, and private discrimination, which seems not to be. The court framed the issue before it as whether the list may be disclosed to enforce the regulation against prohibited tax deductions (*232 Cal. App. 3d 60, 79)* . That depends on whether the state's interest in combating discrimination is sufficiently compelling to require disclosure of a constitutionally protected list of intimate associates.

The court concluded that the Board has no compelling state interest because it had no reason to suspect that club members are violating the regulation. Instead, the Board was fishing, and it wanted the membership list so it could determine whether or not a violation occurred by conducting random audits of club members. The court observed that the only evidence of possible violations showed compliance, and that the Board had no factual basis for a compelling state interest sufficient to overcome the club's right of privacy. Government administrative agencies are not permitted to subpoena constitutionally protected information regarding an individual's intimate personal associations simply to seek assurance the law is not violated (*232 Cal. App. 3d 60, 79-80)* . Moreover, the court continued, even assuming a compelling state interest, the Board would have to establish that disclosure is the least intrusive method available to achieve its objective. Random audits of persons based solely on their membership in a private organization are serious intrusions. The court said there are alternative, less intrusive, methods of making this determination, including audits focusing on wealthier male Bay Areans with certain occupations, certain income levels, and excessive business deductions, or amendment of state tax forms to require attachment of a schedule listing the names of all organizations to whom the taxpayer has paid business expenses that are deducted. The court concluded the club is constitutionally entitled to protect its membership list from disclosure (*232 Cal. App. 3d 60, 80-81)* .

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2-22 California Points & Authorities § 22.36

§ 22.36 Opposing Contention that Association May Be Required to Accept Individual As Member

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE ASSOCIATION IS AN EXPRESSIVE ASSOCIATION PROTECTED BY THE *FIRST AMENDMENT'S* FREEDOM OF ASSOCIATION, AND IT IS NOT REQUIRED TO ACCEPT AS A MEMBER A PERSON WHO WOULD IMPEDE ITS ABILITY TO ENGAGE IN PROTECTED EXPRESSIVE ACTIVITIES.

A. Expressive Associations Are Constitutionally Protected. The freedom to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends is constitutionally protected. This freedom encompasses the right not to associate, and an association need not admit as members persons who would impede its ability to engage in protected activities and to disseminate its preferred views (*Boy Scouts of America v. Dale (2000) 530 U.S. 640, 120 S. Ct. 2446, 147 L. Ed. 2d 554* ; *Hart v. Cult Awareness Network (1993) 13 Cal. App. 4th 777, 790, 16 Cal. Rptr. 2d 705*).

[*Optional*] **B. Only Compelling State Interest that Is Unrelated to Context and Unachievable Through Less Restrictive Means Justifies Infringement on Expressive Association.** Although the right to associate for expressive purposes is not absolute, infringements on that right may only be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms (*Boy Scouts of America v. Dale (2000) 530 U.S. 640, 120 S. Ct. 2446, 147 L. Ed. 2d 554* ; *Hart v. Cult Awareness Network (1993) 13 Cal. App. 4th 777, 791, 16 Cal. Rptr. 2d 705*).

[2] Comments

[a] Use of Form

These points and authorities may be used in opposition to the contention that an association may be required to accept as a member a specified individual. The form is based on the right of expressive association. If the facts indicate that the right of intimate association is also implicated, counsel may include authorities from *§ 22.35*.

These points and authorities may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the substantive point that the association should not be compelled to accept certain persons as members. The points and authorities set out in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Counsel should include the specific activities and views of the association that indicate its expressive purposes, as well as how admission of the person seeking membership would interfere with its right of expressive association.

These points and authorities may be used in an appropriate case to oppose the contention set forth in *§ 22.27*.

[b] Related Pleading and Practice Forms

For pleading and practice forms relating to associations and clubs, see Ch. 61, *Associations and Clubs* , in California Forms of Pleading and Practice (Matthew Bender). For discussion and forms relating to the Unruh Act, see California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments* . For discussion and forms relating to injunctions, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* .

[c] Related Points and Authorities Forms

For memoranda of points and authorities relating to the Unruh Act, see Ch. 35, *Civil Rights: Unruh Civil Rights Act* . For memoranda of points and authorities relating to injunctions, see Ch. 116, *Injunctions* .

[3] Discussion of Authorities

[a] Expressive Associations Are Constitutionally Protected

In ***Boy Scouts of America v. Dale*** *(2000) 530 U.S. 640, 120 S. Ct. 2446, 147 L. Ed. 2d 554* , the Boy Scouts of America revoked the adult membership of an assistant scoutmaster on learning that he was gay and a gay rights activist, on the ground that the Boy Scouts specifically forbid membership to homosexuals. The assistant scoutmaster filed a complaint against the Boy Scouts in New Jersey Superior Court alleging that his expulsion violated New Jersey's public accommodations law, which prohibits discrimination on the basis of sexual orientation in places of public accommodation. The New Jersey Superior Court granted summary judgment in favor of the Boy Scouts on the ground that the Boy Scouts was not a place of public accommodation and, alternatively, the Boy Scouts is a distinctly private group exempted from coverage under the public accommodations statute. The New Jersey Superior Court's Appellate Division reversed, holding that the public accommodations law applied to the Boy Scouts, and the Boy Scouts violated it. The New Jersey Supreme Court affirmed the Appellate Division, and held that application of the public accommodations law did not violate the Boy Scouts' federal constitutional associational rights, because the Boy Scouts' size, nonselectivity, inclusive rather than exclusive purpose, and practiceof inviting or allowing nonmembers to attend meetings establish that the Boy Scouts is not sufficiently personal or private to warrant constitutional protection, and that the assistant scoutmaster's membership does not violate the Boy Scouts' right of expressive association because his inclusion would not affect in a significant way existing members' ability to carry out their purposes; further, the court held that New Jersey has a compelling interest in eliminating discrimination and the public accommodations law abridges no more speech than is necessary to effect that purpose.

The United States Supreme Court reversed. The Court found that there is implicit in the *First Amendment* is a right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends [*530 U.S. 640, 647* , citing *Roberts v. United States Jaycees (1984) 468 U.S. 609, 622]* . The Court found that the Boy Scouts is protected by the *First Amendment* associational right because it seeks to transmit a system of values, thus engaging in expressive activity [*530 U.S. 640, 647-650*]. The Court also found that the forced inclusion of an

unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints [*530 U.S. 640, 649*], and held that the forced inclusion of a gay man as an assistant scoutmaster would significantly affect the Boy Scouts' ability to advocate public or private viewpoints, since the Boys Scouts sincerely hold the view that homosexuality is inconsistent with the Boy Scout requirement that a Boy Scout be morally straight and the presence of an gay rights activist would significantly burden the Boy Scouts' desire not to promote homosexual conduct [*530 U.S. 640*].

The facts and procedural background of ***Hart v. Cult Awareness Network*** *(1993) 13 Cal. App. 4th 777, 16 Cal. Rptr. 2d 705* , are discussed in *§ 22.35[3][a]*. In *Hart,* after finding that the association of defendant and its members was truly private and warranted constitutional protection, the court of appeal addressed the issue of the freedom of expressive association (*13 Cal. App. 4th 777, 790)* . It said that this freedom refers to the freedom to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends. This freedom plainly presupposes a freedom not to associate. The court said there was substantial evidence to support the conclusion that admitting plaintiff and other Scientologists as members would impede defendant's ability to engage in protected activities and to disseminate its preferred views. Plaintiff's admitted purpose was to change defendant's belief that Scientology is a destructive cult. Obviously, this purpose is incompatible with defendant's work in counseling and providing support for ex-cult followers and the families of current cult followers. The court concluded that application of the Unruh Act would place a heavy burden on defendant's constitutionally protected freedom of expressive association (*13 Cal. App. 4th 777, 790)* .

[b] Only Compelling State Interest that Is Unrelated to Context and Unachievable Through Less Restrictive Means Justifies Infringement on Expressive Associations

The facts and procedural background of ***Hart v. Cult Awareness Network*** *(1993) 13 Cal. App. 4th 777, 16 Cal. Rptr. 2d 705* , are discussed in *§ 22.35* under Discussion of Authorities, Intimate Associations Are Constitutionally Protected. In *Hart,* after finding that application of the Unruh Act would interfere with defendant's constitutionally protected freedom of expressive association, the court of appeal cautioned that the right to associate for expressive purposes is not absolute. It said that infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms. Plaintiff contended that the privacy rights of defendant's members are outweighed by the state's compelling interest in eradicating religious discrimination. The court said that plaintiff did not identify any compelling state interest unrelated to the suppression of ideas that justified application of the Unruh Act to defendant, and explained that what plaintiff characterized as religious discrimination is defendant's expression of its own ideas and beliefs in a private and highly selective forum. Under the circumstances, any state action compelling defendant to accept Scientologists as members would be tantamount to governmental sponsorship or promotion of one group's religious beliefs at the expense of another group. Courts may not interfere with the expression of *First Amendment* freedoms on the ground that they view a particular expression as unwise or irrational (*13 Cal. App. 4th 777, 791)* . The court also observed that in light of the *establishment clause of the U. S. Constitution* and the religion clause of the California Constitution, it is difficult to postulate any state interest that would justify application of the Unruh Act. It concluded that plaintiff failed to identify any state interest, let alone one which is sufficiently countervailing or compelling, as to justify the infringements on the constitutional right of defendant which would occur were the Unruh Act applied (*13 Cal. App. 4th 777, 791-792)* .

[c] Compelling State Interest Cannot Justify Severe Intrusion on Freedom of Expressive Association

The facts and procedural background of ***Boy Scouts of America v. Dale*** *(2000) 530 U.S. 640, 120 S. Ct. 2446, 147 L. Ed. 2d 554* are discussed in *§ 22.36[3][a]*. In *Dale,* after concluding that the Boy Scouts is protected by the *First Amendment* associational right and that the forced inclusion of a gay rights activist as an assistant scoutmaster would significantly burden the Boy Scouts' desire not to promote homosexual conduct, the Court found that although the state has a compelling interest in eliminating discrimination, that interest did not justify enforcement of New Jersey's public

accommodations law prohibiting discrimination on the basis of sexual orientation against the Boy Scouts since it would besuch a severe intrusion on the Boy Scouts' rights to freedom of expressive association [*530 U.S. 640, 655-657*].

California Points & Authorities

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CHAPTER 23 ATTACHMENT

2-23 California Points & Authorities 23.syn

§ 23.syn Synopsis to Chapter 23: ATTACHMENT

§ 23.01 Scope of Chapter

§ 23.02 Governing Statutes

§ 23.03 Page Limits on Memoranda

§ 23.04 Related Pleading and Practice Chapters

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§§ 23.06-23.19 [Reserved]

§ 23.20 Supporting Defendant's Notice of Opposition to Plaintiff's Application for Right to Attach Order [Code Civ. Proc. § 484.060(a)]--Action Is One in Which Attachment Unauthorized--Action Based on Noncontractual Claim [Code Civ. Proc. § 483.010(a)]

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[3] Discussion of Authorities

[a] Attachment Authorized Only in Action Based on Contract

[b] Strict Construction of Attachment Law

[c] Fundamental Basis for Cause of Action as Determinative

[d] Attachment Unauthorized in Tort or Equity Actions

[e] Action for Breach of Duty Growing Out of Contract

[4] Additional Authorities

[a] Fundamental Basis for Cause of Action as Determinative

[b] Strict Construction of Attachment Law

[c] Attachment Unauthorized in Tort or Equity Actions

§ 23.21 Supporting Defendant's Notice of Opposition to Plaintiff's Application for Right to Attach Order [Code Civ. Proc. § 484.060(a)]--Action Is One in Which Attachment Unauthorized--Action Not Based On Claim for Money [Code Civ. Proc. § 484.010(a)]

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[3] Discussion of Authorities

[a] Breach of Obligation Other Than Payment of Money

§ 23.22 Supporting Defendant's Notice of Opposition to Plaintiff's Application for Right to Attach Order [Code Civ. Proc. § 484.060(a)]--Action Is One in Which Attachment Unauthorized--Action on Claim Not Arising Out of Individual Defendant's Trade, Business, or Profession [Code Civ. Proc. § 483.010(c)]

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[3] Discussion of Authorities

[a] Personal, Family, or Household Claim Against Individual

§ 23.23 Supporting Defendant's Notice of Opposition to Plaintiff's Application for Right to Attach Order [Code Civ. Proc. § 484.060(a)]--Action Is One in Which Attachment Unauthorized--Action on Claim Secured by Real Property [Code Civ. Proc. § 483.010(b)]

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[3] Discussion of Authorities

[a] Secured Claim

[b] Executory Contract for Sale of Realty

[c] Waiver of Security

[d] Inadequacy of Security at Time of Giving Mortgage

§ 23.24 Supporting Defendant's Notice of Opposition to Plaintiff's Application for Right to Attach Order [Code Civ. Proc. § 484.060(a)]--Action Is One in Which Attachment Unauthorized--Sum Claimed Not Readily Ascertainable Amount of $500 or More [Code Civ. Proc. § 483.010(a)]

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[3] Discussion of Authorities

[a] Necessity of Determining Measure of Liability

§ 23.25 Supporting Defendant's Notice of Opposition to Plaintiff's Application for Right to Attach Order [Code Civ. Proc. § 484.060(a)]--Application or Accompanying Affidavit Fails to Meet Statutory Requirements [Code Civ. Proc. §§ 484.020, 484.030]

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[b] Insufficient Affidavit

[3] Additional Authorities

[a] Application as Required to Describe Property and State That Such Property Is Subject to Attachment

§ 23.26 Supporting Defendant's Notice of Opposition to Plaintiff's Application for Right to Attach Order [Code Civ. Proc. § 484.060(a)]--Failure of Plaintiff to Establish Probable Validity of Claim or That Attachment Sought for Legitimate Purpose [Code Civ. Proc. § 484.090(a)(2), (3)]

[1] FORM

[2] Comments

[a] Use of Form

§ 23.27 Supporting Claim of Exemption [Code Civ. Proc. §§ 484.070, 484.350]--Property Exempt From Attachment [Code Civ. Proc. § 487.020(a)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Liberal Construction of Exemption Statutes

[c] Plaintiff's Failure to Oppose Exemption Claim

[3] Discussion of Authorities

[a] Application of Execution Law to Attachment Law

§ 23.28 Supporting Claim of Exemption [Code Civ. Proc. §§ 484.070, 484.350]--Property Necessary for Support of Defendant or Family or Compensation for Personal Services [Code Civ. Proc. §§ 487.020(b), (c), 706.011]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Property Necessary for Support of Individual or Household as Exempt

[4] Additional Authorities

[a] Compensation for Personal Services as Exempt

§ 23.29 Supporting Claim of Exemption [Code Civ. Proc. §§ 484.070, 484.350]--Property Not Subject to Attachment Is Exempt From Attachment [Code Civ. Proc. § 487.020(d)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Property Not Subject to Attachment as Exempt

§ 23.30 Supporting Defendant's Motion of Objection to Plaintiff's Required Undertaking [Code Civ. Proc. §§ 489.210, 995.930, 995.940]

[1] FORM

[2] Comments

[a] Use of Form

§ 23.31 Supporting Motion for Recovery of Damages for Wrongful Attachment [Code Civ. Proc. §§ 490.010, 490.020, 996.440]--By Defendant [Code Civ. Proc. §§ 996.410, 996.430, 996.460]--General Form

[1] FORM

[2] Comments

[a] Use of Form

§ 23.32 Supporting Defendant's Application to Vacate or Stay Attachment--Action Against Service Member [Mil. & Vet. Code § 403(c)(2)]

[1] FORM

[2] Comments

[a] Use of Form

§ 23.33 Reply to Notice of Opposition to Plaintiff's Application for Right to Attach Order [Code Civ. Proc. § 484.060(c)]--Action Based on Quasi-Contract

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[3] Discussion of Authorities

[a] Contracts Implied in Law

[b] Failure of Consideration

[c] Waiver of Tort

[d] Recovery of Funds Collected From Third Persons

[e] Action Based on Judgment

[f] Establishment of Tort Immaterial

[g] Joinder of Contract Count With Other Counts

§ 23.34 Reply to Notice of Opposition to Plaintiff's Application for Right to Attach Order [Code Civ. Proc. § 484.060(c)]--Proceeding to Confirm Arbitration Award [Code Civ. Proc. § 1285]

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[3] Discussion of Authorities

[a] Attachment Permissible in Proceeding to Confirm Arbitration Award

§ 23.35 Reply to Notice of Opposition to Plaintiff's Application for Right to Attach Order [Code Civ. Proc. § 484.060(c)]--Action Is on Claim Arising out of Defendant's Trade, Business, or Profession [Code Civ. Proc. § 484.010(c)]

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[3] Discussion of Authorities

[a] Individual Engaged in Trade, Business, or Profession

[b] Activities of Guarantor

[c] Personal Borrowing for Loan to Partnership

§ 23.36 Reply to Notice of Opposition to Plaintiff's Application for Right to Attach Order [Code Civ. Proc. § 484.060(c)]--Action Against Guarantor Who by Express Contract Has Waived All Rights in Security

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[3] Discussion of Authorities

[a] Waiver of Security by Express Contract

§ 23.37 Reply to Notice of Opposition to Plaintiff's Application for Right to Attach Order [Code Civ. Proc. § 484.060(c)]--Real Property Securing Claim Sued on Has Become Valueless or Decreased in Value to Less Than Amount Owing [Code Civ. Proc. § 483.010(b)]

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[3] Discussion of Authorities

[a] Inadequate Security

[b] Security Only as Required to Be Valueless

§ 23.38 Reply to Notice of Opposition to Plaintiff's Application for Right to Attach Order [Code Civ. Proc. § 484.060(c)]--Damages Readily Ascertainable and Their Basis for Computation Reasonable and Definite

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[3] Discussion of Authorities

[a] Satisfaction of Requirement That Claim Be for Readily Ascertainable Amount

[b] Damages as Not Required to Be Known by Plaintiff

§ 23.39 Reply to Notice of Opposition to Plaintiff's Application for Right to Attach Order [Code Civ. Proc. § 484.060(c)]--Verified Complaint in Lieu of Affidavit Is Insufficient to Support Opposition [Code Civ. Proc. §§ 446, 482.040]

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] When Verified Pleading Cannot Be Considered as Affidavit

[b] When Verification Limitations of Code Civ. Proc. § 446 Apply to Code Civ. Proc. § 482.040

§ 23.40 Opposing Motion for Recovery of Damages for Wrongful Attachment [Code Civ. Proc. §§ 490.020, 996.440]--Plaintiff's Liability Limited by Amount of Undertaking [Code Civ. Proc. § 490.020(b)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Limitation on Plaintiff's Liability

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2-23 California Points & Authorities § 23.01

§ 23.01 Scope of Chapter

This chapter contains forms of memoranda for use in supporting [*see §§ 23.20 -23.26*] and opposing [*see §§ 23.33 -23.38*] a defendant's notice of opposition to a plaintiff's application for a right to attach order and writ of attachment, in supporting a claim of exemption [*see §§ 23.27 -23.29*], in supporting a defendant's objection to plaintiff's required undertaking [*see § 23.30*] in supporting [*see § 23.31*] and opposing [*see § 23.40*] a motion for recovery for damages for wrongful attachment, and in supporting defendant/service member's application to stay or vacate a writ of attachment [*see § 23.32*].

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2-23 California Points & Authorities § 23.02

§ 23.02 Governing Statutes

The Attachment Law, as it may be known and cited [*see Code Civ. Proc. § 482.010*], is governed by *Code Civ. Proc. §§ 481.010-493.060*.

The Uniform Fraudulent Transfer Act (*Civ. Code §§ 3439.01-3439.12*) allows a creditor to attach an asset, or its proceeds, that has been fraudulently transferred by the debtor, whether the creditor's claim has matured or not [*Civ. Code § 3439.07(a)(2), (b)*]. Limitations on attachment of the fraudulently transferred asset in the hands of the transferee are governed by *Civ. Code §§ 3439.08-3439.09*.

Legal Topics:

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

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2-23 California Points & Authorities § 23.03

§ 23.03 Page Limits on Memoranda

Generally, a memorandum must not exceed 15 pages, or in the case of a motion for summary judgment or summary adjudication, 20 pages. A reply or closing memorandum may not exceed 10 pages [*see Cal. Rules of Ct., Rule 3.1113(d)*]. Any party desiring to file a longer memorandum must obtain leave of court [*see Cal. Rules of Ct., Rule 3.1113(e)*]. For further discussion of the page limitations under *Cal. Rules of Ct., Rule 3.1113*, and of other basic format requirements of memoranda of points and authorities, see *Ch. 1, Writing Legal Memoranda and Briefs, § 1.05*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureSummary JudgmentSupporting MaterialsMemoranda of LawCivil ProcedureRemediesProvisional RemediesAttachments

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2-23 California Points & Authorities § 23.04

§ 23.04 Related Pleading and Practice Chapters

For a discussion and forms for use in attachment proceedings, see California Forms of Pleading and Practice, Ch. 62, *Attachment* (Matthew Bender).

For a discussion and forms for use in other proceedings involving attachments, see in that set the following chapters:

- Ch. 40, *Appeal: An Overview*, et seq.
- Ch. 135, *Contempt.*
- Ch. 254, *Executions and Enforcement of Judgments*.
- Ch. 276, *Garnishment.*
- Ch. 292, *Habeas Corpus.*
- Ch. 294, *Homesteads.*
- Ch. 350, *Logs and Timber*.
- Ch. 361, *Mechanics' Liens.*

Legal Topics:

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

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2-23 California Points & Authorities § 23.05

§ 23.05 Related Points and Authorities Chapters

For a discussion of how to use the forms in this chapter to draft a memorandum or a trial or appellate brief, and for a sample of a complete memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureAppealsBriefs

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2-23 California Points & Authorities §§ 23.06-23.19

[Reserved]

§§ 23.06[Reserved]

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PART II. FORMS

2-23 California Points & Authorities § 23.20

§ 23.20 Supporting Defendant's Notice of Opposition to Plaintiff's Application for Right to Attach Order [Code Civ. Proc. § 484.060(a)]--Action Is One in Which Attachment Unauthorized--Action Based on Noncontractual Claim [Code Civ. Proc. § 483.010(a)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____ _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN SUPPORT OF NOTICE OF OPPOSITION
vs.	)	TO RIGHT TO ATTACH ORDER
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

AN ATTACHMENT MAY NOT BE ISSUED IN AN ACTION ON A CLAIM WHICH IS NOT BASED ON AN EXPRESS OR IMPLIED CONTRACT.

A. Notice of Opposition Against Issuance of Right to Attach Order. A defendant who desires to oppose the issuance of the right to attach order sought by plaintiff, or who objects to the amount sought to be secured by the attachment, must file and serve on plaintiff, no later than five court days prior to the date set for the hearing, a notice of opposition

stating the grounds on which defendant opposes the issuance of the order or objects to the amount sought to be secured by the attachment. The notice must be accompanied by an affidavit supporting any factual issues raised and points and authorities supporting any legal issues raised. A claim of exemption pursuant to *Section 484.070 of the Code of Civil Procedure* may be included in the notice of opposition (*Code Civ. Proc. § 484.060(a), (b)*).

B. Required Court Findings. At the hearing on the plaintiff's application for a right to attach order, the court may issue such order only if it finds, among other findings, that the claim on which the attachment is based is one on which an attachment may be issued (*Code Civ. Proc. § 484.090(a)*).

C. Attachment Authorized Only in Actions Based on Contract. Except as otherwise provided by statute, an attachment may be issued only in an action on a claim or claims for money, each of which is based on a contract, express or implied (*Code Civ. Proc. § 483.010(a)*).

D. Strict Construction of Attachment Law. Proceedings by attachment are statutory and special, and the provisions of the statute must be strictly followed or no rights will be acquired thereunder (*Sousa v. Lucas (1909) 156 Cal. 460, 463, 105 P. 413*).

E. Fundamental Basis of Cause of Action as Determinative. When a party seeks the remedy of attachments, it is the fundamental basis of his/her cause of action, rather than the form or phraseology of his/her pleadings, which determines his/her right to the writ (*DeMirjian v. Ideal Heating Corp. (1949) 91 Cal. App. 2d 905, 908, 206 P.2d 20*).

F. Attachment Unauthorized in Tort or Equity Actions. A writ of attachment is unauthorized where the foundation of the action is in tort or is a demand for equitable relief (*Hallidie v. Enginger (1917) 175 Cal. 505, 508-509, 166 P. 1*).

[*Optional*] **G. Action for Breach of Duty Growing Out of Contract.** A writ of attachment may not be granted in an action in which plaintiff's complaint seeks damages which arise out of the breach of a duty growing out of contract between plaintiff and defendant, since the claim for damages lies in the breach of the duty imposed by law, and the allegations of the contract relations between the parties are made merely for the purpose of showing that plaintiff was not a trespasser or that he/she was lawfully in the position or situation at the time defendant's breach occurred (*DeMirjian v. Ideal Heating Corp. (1949) 91 Cal. App. 2d 905, 909, 206 P.2d 20*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a defendant's notice of opposition to the issuance of a right to attach order soughtby a plaintiff in an action on a claim which is not based on an express or implied contract [*see Code Civ. Proc. §§ 483.010(a), 484.060(a)* (points and authorities supporting any legal issues

raised as required to accompany notice of opposition)].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law raised. In addition, counsel must attach affidavits or declarations which support any factual issues raised in the notice of opposition [*see Code Civ. Proc. § 484.060(a)*].

[i] Related Uses

With appropriate modifications, this points and authorities may be submitted in support of a notice of motion for an order to set aside a right to attach order, quash a writ of attachment, and release property levied on pursuant to the writ where defendant's property has been attached pursuant either to a writ issued ex parte under *Code Civ. Proc. §§ 485.010-485.540*, (issuance of attachment on showing of great or irreparable injury) [*see Code Civ. Proc. § 485.240(a), (b)* (points and authorities supporting any legal issues raised in notice of motion as required to accompany notice)], or to a writ issued ex parte under *Code Civ. Proc. §§ 492.010-492.090* (nonresident attachment) [*see Code Civ. Proc. § 492.050(a), (b)* (points and authorities supporting any legal issues raised in notice of motion as required to accompany notice)].

[3] Discussion of Authorities

[a] Attachment Authorized Only in Action Based on Contract

The Law Revision Commission Comment to *Code Civ. Proc. § 484.010(a)* sets forth the following statutes which specifically provide for the right to have an attachment issued in actions in which the underlying claim is noncontractual in nature: *Fin. Code § 3144* (right of attachment of Superintendent of Banks in action to collect sums due on assessment from stockholder of bank who fails to pay in full); *Food & Agric. Code § 281* (attachment by Director of Agriculture in suit in name of people for recovery of license or fee); *Health & Safety Code § 11501* (right of attachment in action maintained by State of California against person engaged in unlawful sale of controlled substances for recovery of public funds); *Lab. Code § 5600* (attachment by Workman's Compensation Appeals Board on behalf of injured employee); and *Rev. & Tax. Code §§ 6713* (attachment in action by Attorney General to collect taxes), *7864* (attachment in action by Attorney General to recover unpaid license tax, interest, penalties, and costs), *8972* (attachment in action by Attorney General to recover fuel tax), *11473* (attachment in action by Attorney General to recover private car tax), *12680* (action by Attorney General to recover tax assessed against insurer), former § 18883 (attachment in action by Attorney General or counsel for Franchise Tax Board to recover personal income tax), 26351 (attachment in action by Attorney General or counsel for Franchise Tax Board to collect tax due under Bank and Corporation Tax Law), *30302* (attachment in action by Attorney General to collect cigarette tax), *32352* (attachment in action by Attorney General to recover alcoholic beverage tax).

In addition, notwithstanding *Code Civ. Proc. § 483.010*, an attachment may be issued in any action for the recovery of money brought against a nonresident individual, an unqualified foreign corporation, or a foreign partnership which has not filed a designation pursuant to *Corp. Code § 15700* [*Code Civ. Proc. § 492.010*]. However, after the defendant has filed a general appearance in the action, only nonexempt property of the defendant may be levied upon, and property previously levied upon which is exempt under *Code Civ. Proc. § 487.020* [*see §§ 23.27 -23.29*] must be released on order of the court [*Code Civ. Proc. § 492.040*]. The Law Revision Commission Comment to this section states that a defendant who has made a general appearance may, in addition, secure a release of all property attached if there is authorization for the attachment apart from the provisions of *Code Civ. Proc. §§ 492.010-492.090* governing nonresident attachment [*see Code Civ. Proc. § 492.050* (at hearing of defendant's application for quash of attachment, court as required to determine whether plaintiff entitled to right to attach order)].

[b] Strict Construction of Attachment Law

Sousa v. Lucas *(1909) 156 Cal. 460, 105 P. 413* , was an action for the foreclosure of a chattel mortgage given on a

growing crop of hay. The hay had been previously attached by a defendant sheriff acting for a second defendant in an action commenced against the person who had given the mortgage. The trial court denied defendants' motion for nonsuit and, on defendants' appeal, the Supreme Court affirmed. In pertinent part, the defendants argued that the complaint was insufficient to warrant entitling the plaintiff to any relief. However, the Court held that the prior chattel mortgage was valid and sufficient to give plaintiff priority over any interest which could have been acquired by the attachment. Because the attaching sheriff failed to follow the statutory procedures then in force in order to afford plaintiff protection for his secured claim, the defendant, thus, had no lien on or legal right to the property. In support of this conclusion, the Court stated that proceedings by attachment are statutory and special, and that the provisions of the statute must be strictly followed or no rights will be acquired thereunder (*156 Cal. 460, 463)* .

[c] Fundamental Basis for Cause of Action as Determinative

In ***DeMirjian v. Ideal Heating Corp.*** *(1949) 91 Cal. App. 2d 905, 206 P.2d 20* , a lessor sued his lessee for damage to the leased premises and to the lessor's adjoining property from a fire caused by the lessee's storage of flammable materials on the leased premises. The first three causes of action were based oncontract and predicated on a lease provision that the lessee would hold the lessor harmless from the use, misuse, and neglect of the premises. The lessor obtained a writ of attachment and levied upon the lessee's bank account. The lessee moved to have the writ discharged, and, on the trial court's denial of his motion, the lessee appealed. The court of appeal reversed and held that, despite plaintiffs' artfully contrived attempt to state causes of action within the scope of former Code Civ. Proc. § 537(1) [*now see Code Civ. Proc. § 483.010(a)*], they had failed to do so. The court stated that when a party seeks the remedy of attachment, it is the fundamental basis of the cause of action, rather than the form or phraseology of the pleadings which determines the party's right to the writ. The court noted that, although there are certain situations in which a plaintiff may elect to sue on a contract theory, rather than on a tort theory, it invariably appears that the alleged tortious conduct is merely incidental to the contractual liability relied upon, and that it was unnecessary in these situations to prove the commission of a tort in order to make the contract counts good. The court further explained that, if the complaint states a cause of action for breach of a promise set forth in the contract, the action is regarded as ex contractu, but, if it seeks damages arising out of the breach of a duty growing out of the contract, the action will be regarded as ex delicto. In such cases, the tort which is the basis of the claim for damages lies in the breach of the duty imposed by law, and the allegations of the contract relations between the parties are made merely for the purpose of showing that the plaintiff was not a trespasser or that he or she was lawfully in the position or situation at the time the defendant's breach occurred. The court found that these principles had governed such prior California decisions as *Williamson v. Pacific Greyhound Lines (1944) 67 Cal. App. 2d 250, 153 P.2d 990* (motion for change of venue to defendant's residence granted where cause of action against carrier for personal injuries, although pleaded as breach of contract for safe conveyance, sounded in tort); *Automobile Ins. Co. v. Union Oil Co. (1948) 85 Cal. App. 2d 302, 193 P.2d 48* (statute of limitations as not barring action for injury to property caused by defective product, although pleaded in terms of breach of warranty); and *Harding v. Liberty Hosp. Corp. (1918) 177 Cal. 520, 171 P. 98* (one-year statute of limitations for negligence as applicable in action for malpractice based on alleged breach of contract to provide competent medical care). In applying these principles, the court concluded that the relationship between plaintiffs and defendant was created by contract, but that the duty to exercise reasonable care and to respond in damages for a failure to do so was imposed by force of law, independent of any contract or the terms thereof (*91 Cal. App. 2d 905, 909)* .

[d] Attachment Unauthorized in Tort or Equity Actions

Hallidie v. Enginger *(1917) 175 Cal. 505, 166 P. 1* , was an action by a trustee for stockholders of a corporation brought against a defendant who had allegedly fraudulently induced the corporation to sell certain shares of another corporation to the defendant for a mere fraction of their real value. Plaintiff levied a writ of attachment which defendant moved to discharge. The motion was granted and plaintiff appealed contending that her action was upon an implied contract for the payment of money and that, therefore, the attachment was legal. The Supreme Court, however, affirmed and held that plaintiff's action sounded in tort for fraud. The Court observed that the attachment law, insofar as it limited the type of action in which an attachment may issue to an action on contract, express or implied, was derived from the

common-law distinction between actions ex contractu and ex delicto. The distinguishing features of the two actions consisted in the nature of the obligation violated, since a tort was a violation of a duty imposed by the general law on all persons occupying the relation involved in a given transaction, while a breach of contract was a violation of a specific duty created by the contract. Although the law of contract had evolved to include contracts implied by law, so that a plaintiff whose watch had been stolen could treat the theft as a contract of sale and sue in like manner ex contractu, such a plaintiff could not sue in both tort and contract. Thus, if the plaintiff waived his or her contract and sued in tort, the complaint alleged only a cause of action in tort. The Court stated that these distinctions were still valid for purposes of attachment law and that, thus, the statute limiting attachment to actions arising on contract leaves no room for using it in actions founded in tort. The Court added that for the same reasons, the writ is unauthorized in actions where the foundation of the demand is for equitable relief, unless it could be stated that the exercise of the curt's equitable powers, such as in settling accounts and striking a balance, was incidentally involved in the action. In the case before it, the Court noted that at common law it would have been an action of trespass on the case damages for deceit. The allegations touching the contract of sale of stock were useful and valuable only as showing the relationship of the parties by virtue of which the fraud has been perpetrated and not as establishing the nature of the action itself (*175 Cal. 505, 508-509)* .

[e] Action for Breach of Duty Growing Out of Contract

DeMirjian v. Ideal Heating Corp. *(1949) 91 Cal. App. 2d 905, 909, 206 P.2d 20* , is discussed in *§ 23.20[c]*.

[4] Additional Authorities

[a] Fundamental Basis for Cause of Action as Determinative

In *San Francisco Iron & Metal Co. v. Abraham (1931) 211 Cal. 552, 296 P. 82* , plaintiff's complaint was in two counts, one specifically pleading a cause of action for deceit and the second pleading a cause of action for money had and received. It was stipulated at trial that both counts were but different methods of pleading one transaction which arose out of a dissolution of partnership agreement between plaintiff and defendant by which the defendant transferred to plaintiff all of his interest and the plaintiff assumed all of the obligations of the partnership. The trialcourt granted defendant's motion for an order discharging an attachment, and, on plaintiff's appeal, the Supreme Court affirmed. The plaintiff contended that his count for money had and received sounded in contract and that he was, thus, entitled to a writ of attachment. The Court pointed out, however, that it was not what the plaintiff pleaded, but what in truth and in fact, was his grievance which was determinative. In this respect, the count for money had and received was evidence on the issue before the Court but no more conclusive than any other item of evidence before the Court. The Court added that, although the same act or transaction may constitute a cause of action in contract and tort permitting a plaintiff to elect to pursue either remedy, for the purpose of the attachment law, a right of action in contract cannot be created on the theory of waiving the tort which gave rise to the action.

[b] Strict Construction of Attachment Law

In *Vershbow v. Reiner (1991) 231 Cal. App. 3d 879, 282 Cal. Rptr. 684* , the court of appeal affirmed an order denying an application for an order that would authorize the sale of real property attached to satisfy the judgment, because plaintiff had failed to post a bond before the writ of attachment was issued as required by both the Attachment Law statutes (*Code Civ. Proc. §§ 489.210, 489.220*) and a court order. The court of appeal said that the Attachment Law statutes (*Code Civ. Proc. § 481.010 et seq.*) are subject to strict construction because they are purely the creation of the Legislature (*231 Cal. App. 3d 879, 882)* .

In *Bank of America v. Salinas Nissan, Inc. (1989) 207 Cal. App. 3d 260, 254 Cal. Rptr. 748* , the court of appeal, in reversing that portion of trial court's order granting plaintiff the right to attach assets claimed to be exempt, which claim was neither opposed in writing by plaintiff nor argued at the hearing, said that attachment procedures are solely creatures of statute and the statutes must be strictly construed (*207 Cal. App. 3d 260, 270)* .

Nakasone v. Randall (1982) 129 Cal. App. 3d 757, 181 Cal. Rptr. 324 , was an appeal by defendant from the trial court's order denying her motion for an order quashing a writ of attachment and release of the attached property, in an action for breach of contract to sell real property. The right to attach order had been issued pursuant to *Code Civ. Proc. § 492.010* on the ground that defendant was a nonresident. Thereafter, defendant filed an answer to the complaint and moved to set aside the right to attach order, to quash the writ of attachment, and to release the attached property [*see Code Civ. Proc. § 492.050*]. The motion was denied apparently on the ground that the claim arose out of defendant's conduct of a trade, business, or profession [*see Code Civ. Proc. § 483.010*]. In reversing the order on the ground the evidence did not support the trial court's implied finding that defendant was engaged in a trade, business, or profession, the court of appeal said that inasmuch as the attachment procedures are purely the creation of the Legislature, the statute is subject to strict construction (*129 Cal. App. 3d 757, 761)* .

[c] Attachment Unauthorized in Tort or Equity Actions

In *Waffer Internat. Corp. v. Khorsandi (1999) 69 Cal. App. 4th 1261, 82 Cal. Rptr. 2d 241* , an action for breach of contract, negligence, fraud and conversion, in reversing a summary judgment on the tort claims in defendants' favor based on the doctrine of election of remedies, the court of appeal, quoting in part from *Baker v. Superior Court (1983) 150 Cal. App. 3d 140, 146-147, 197 Cal. Rptr. 480* noted that the Legislature has determined attachments may properly issue only to secure anticipated recoveries on contract claims in fixed and readily ascertainable amounts. By necessary implication, attachments are generally unavailable on tort claims due to their unascertainable amounts and because under *Code Civ. Proc. § 483.010(a)* attachment is available only on claims based on a contract, express or implied. Thus, unless perhaps a tort claim were characterized as a claim of implied contract or quasi-contract, attachment would not be available on a tort claim due to the necessity of satisfying the contract element. Quoting further from *Baker*, the court noted, however, it does not automatically follow that where contract and tort causes of action are joined the creditor loses his or her right to attach. Attachment should always be available to secure liquidated contract claims seeking damages completely separate from those sought under a tort claim even when the claims are based on common facts (*69 Cal. App. 4th 1261, 1277)* .

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PART II. FORMS

2-23 California Points & Authorities § 23.21

§ 23.21 Supporting Defendant's Notice of Opposition to Plaintiff's Application for Right to Attach Order [Code Civ. Proc. § 484.060(a)]--Action Is One in Which Attachment Unauthorized--Action Not Based On Claim for Money [Code Civ. Proc. § 484.010(a)]

[1] FORM

[*Caption. See § 23.20.*]

AN ATTACHMENT MAY NOT BE ISSUED IN AN ACTION NOT BASED ON A CLAIM OR CLAIMS FOR MONEY.

A. Notice of Opposition. [*See § 23.20, Paragraph A.*]

B. Required Court Finding. [*See § 23.20, Paragraph B.*]

C. Claim as Required to Be for Money. Unless otherwise provided by statute, an attachment may be issued only in an action on a claim or claims for money (*Code Civ. Proc. § 483.010(a)*).

D. Strict Construction of Attachment Law. [*See § 23.20, Paragraph D.*]

[*Optional*] **E. Breach of Obligation Other Than Payment of Money.** Where damages are sought for breach of an express obligation to do something other than pay money, a common count does not lie and an attachment is not authorized (*Allen v. Merchants Elec. Co. (1960) 54 Cal. 2d 67, 69, 4 Cal. Rptr. 527, 351 P.2d 799* [decided under former Code Civ. Proc. § 537(1); *now see Code Civ. Proc. § 483.010(a)*]).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a defendant's notice of opposition to the issuance of a right to attach order sought by a plaintiff in an action to enforce a claim other than one for money as required by *Code Civ. Proc. § 483.010(a)* [*see Code Civ. Proc. § 484.060(a)* (points and authorities supporting legal issues raised as required to accompany notice of opposition)].

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law raised. In addition, counsel must attach affidavits or declarations which support any factual issues raised in the notice of opposition [*see Code Civ. Proc. § 484.060(a)*].

[i] Related Uses

With appropriate modifications, these points and authorities may be submitted in other attachment proceedings. For a discussion of these related uses, see *§ 23.20[2]*.

[3] Discussion of Authorities

[a] Breach of Obligation Other Than Payment of Money

Allen v. Merchants Elec. Co. *(1960) 54 Cal. 2d 67, 4 Cal. Rptr. 527, 351 P.2d 799* , was an appeal from an order discharging a writ of attachment. The sole question presented was whether the action in which the attachment was issued on a contract for the direct payment of money as required by former Code Civ. Proc. § 537(1) [*now see Code Civ. Proc. § 483.010(a)* set forth in Paragraph C of this form]. The complaint was in four counts and, in general, alleged the breach of three contracts for the furnishing and installation of certain electrical equipment. The breach caused plaintiff damages representing the reasonable value of the work not performed, other reasonable costs expended in obtaining substitute labor, and an unascertained amount for injury to plaintiff's business. The third count apparently stated a cause of action for the restitution of money paid on two of the contracts. The Supreme Court stated that the three counts stated causes of action for damages for breach of express contractual obligations to do things other than pay money, and that nothing had been alleged from which an obligation to pay money could be implied in fact. Although such an obligation may be implied in law in situations where a common count would lie, it was settled that, where damages were sought for breach of an express obligation to do something other than pay money, a common count does not lie and the attachment is, thus, unauthorized (*54 Cal. 2d 67, 69)* .

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2-23 California Points & Authorities § 23.22

§ 23.22 Supporting Defendant's Notice of Opposition to Plaintiff's Application for Right to Attach Order [Code Civ. Proc. § 484.060(a)]--Action Is One in Which Attachment Unauthorized--Action on Claim Not Arising Out of Individual Defendant's Trade, Business, or Profession [Code Civ. Proc. § 483.010(c)]

[1] FORM

[*Caption. See § 23.20.*]

AN ATTACHMENT MAY NOT BE ISSUED ON A CLAIM AGAINST AN INDIVIDUAL DEFENDANT WHICH _____ [DOES NOT ARISE OUT OF THE CONDUCT OF SUCH DEFENDANT OF A TRADE, BUSINESS, OR PROFESSION *or* IS BASED ON _____ (THE SALE OR LEASE OF PROPERTY *OR* A LICENSE TO USE PROPERTY *OR* THE FURNISHING OF SERVICES *OR* THE LOAN OF MONEY) WHEN THE _____ (PROPERTY SOLD OR LEASED *or* PROPERTY LICENSED FOR USE *OR* SERVICES FURNISHED *OR* MONEY LOANED) WAS USED BY SUCH INDIVIDUAL PRIMARILY FOR PERSONAL, FAMILY, OR HOUSEHOLD PURPOSES].

A. Notice of Opposition. [*See § 23.20, Paragraph A.*]

B. Required Court Finding. [*See § 23.20, Paragraph B.*]

C. Personal, Family, or Household Claim Against Individual. An attachment may not be issued on a claim against an individual which is based on the sale or lease of property, a license to use property, the furnishing of services, or the loan of money when the property sold or leased, or licensed for use, the services furnished, or the money loaned was used by the individual primarily for personal, family, or household purposes (*Code Civ. Proc. § 483.010*; *Medford v. Superior Court (1983) 140 Cal. App. 3d 236, 239-240, 189 Cal. Rptr. 227* (lease of property); *Nakasone v. Randall (1982) 129 Cal. App. 3d 757, 761-763, 181 Cal. Rptr. 324* (sale of property)).

D. Strict Construction of Attachment Law. [*See § 23.20, Paragraph D.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of an individual defendant's notice of opposition to the issuance of a right to attach order sought by a plaintiff in an action on a claim which either does not arise out of the conduct by the defendant of a trade, business, or profession, or is based on the sale or lease of property, a license to use property, the furnishing of services, or the loan of money when the property sold or leased, or licensed for use, the services furnished, or the money loaned was used by the defendant primarily for personal, family, or household purposes as required by *Code Civ. Proc. § 483.010(c)* [*see Code Civ. Proc. § 484.060(a)* (points and authorities supporting legal issues raised as required to accompany notice of opposition)].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law raised. In addition, counsel must attach affidavits or declarations which support any factual issues raised in the notice of opposition [*see Code Civ. Proc. § 484.060(a)*].

[i] Related Uses

With appropriate modifications, these points and authorities may be submitted in other attachment proceedings. For a discussion of these related uses, see *§ 23.20[2]*.

[3] Discussion of Authorities

[a] Personal, Family, or Household Claim Against Individual

In *Medford v. Superior Court (1983) 140 Cal. App. 3d 236, 189 Cal. Rptr. 227* , petitioner was defendant in an unlawful detainer action. After she abandoned possession of the premises, she sought to cross-complain against her landlord and others. The trial court (on its own motion) required her to deposit with the court $3,050 in back rent alleged to be owing on the unlawful detainer complaint before the cross-complaint would be allowed. When the court later denied a motion for the return of this deposit, the petition for a writ of mandate followed. The court of appeal granted the writ, holding that the deposit was in effect a prejudgment attachment against a residential tenant, which is prohibited by *Code Civ. Proc. § 483.010(c)* (*140 Cal. App. 3d 236, 239-240)* . The court held that the prohibited attachment could not be imposed in the guise of a condition for the exercise of the trial court's discretion, here, to permit the filing of a cross-complaint after the filing of an answer (*140 Cal. App. 3d 236, 240)* .

Nakasone v. Randall (1982) 129 Cal. App. 3d 757, 181 Cal. Rptr. 324 , was an action for damages for breach of a sale contract of real property. Plaintiff secured issuance of a right to attach order and writ of attachment on the ground that defendant was a nonresident [*see Code Civ. Proc. § 492.010*]. Thereafter, defendant filed an answer to the complaint and moved to set aside the right to attach order, to quash the writ of attachment, and to release the attached property [*Code Civ. Proc. § 492.050*]. The motion was denied, and defendant appealed.

The court of appeal reversed. The court pointed out that under *Code Civ. Proc. § 492.050*, since defendant filed a general appearance (answer), the right to attach order had to be set aside unless it could be supported by the statutory provisions on ordinary attachment and that the burden of showing such support was on plaintiff (*129 Cal. App. 3d 757, 761)* . The court stated that under *Code Civ. Proc. § 483.010*, the availability of prejudgment attachment is limited to specific types of claim and that there are four restrictions on the kinds of actions in which attachment is authorized: (1) the action must be on a claim for money based on contract; (2) the total amount of the claim must be fixed or readily ascertainable and not less than $500; (3) the claim must not be secured or the security must be valueless; and (4) if the action is against an individual, the claim must arise out of the individual's trade, business, or profession (*129 Cal. App. 3d 757, 761-762)* . The court held that there was no substantial evidence to support the trial court's implied finding that defendant, an 86-year-old woman in poor health who was selling her own real property for her own account, was engaged in a trade, business, or profession, and that her activity was not the type to which the attachment statute was intended to apply (*129 Cal. App. 3d 757, 762-763)* . The court concluded that plaintiff had failed to sustain his burden and reversed the trial court's order denying defendant's motion (*129 Cal. App. 3d 757, 765)* .

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2-23 California Points & Authorities § 23.23

§ 23.23 Supporting Defendant's Notice of Opposition to Plaintiff's Application for Right to Attach Order [Code Civ. Proc. § 484.060(a)]--Action Is One in Which Attachment Unauthorized--Action on Claim Secured by Real Property [Code Civ. Proc. § 483.010(b)]

[1] FORM

[*Caption. See § 23.20.*]

AN ATTACHMENT MAY NOT BE ISSUED ON A CLAIM WHICH IS SECURED BY ANY INTEREST IN REAL PROPERTY ARISING FROM AGREEMENT, STATUTE, OR OTHER RULE OF LAW.

A. Notice of Opposition. [*See § 23.20, Paragraph A.*]

B. Required Court Finding. [*See § 23.20, Paragraph B.*]

C. Secured Claim. An attachment may not be issued on a claim which is secured by any interest in real property arising from agreement, statute, or other rule of law (including any mortgage or deed of trust of realty and any statutory, common law, or equitable lien, but excluding any security interest in fixtures subject to *Commercial Code Section 9101 et seq.* (security interests in personal property and fixtures)) (*Code Civ. Proc. § 483.010(b)*).

[*Optional*] **D. Executory Contract for Sale of Realty.** A Seller under an executory contract for the sale of real property, who retains title until all payments are made as security for the payment of the purchase price, has security which prevents him/her from obtaining an attachment in a legal or equitable action to recover the unpaid balance on the contract. (In this situation, in contrast to the implied equitable lien rule applicable when title has passed to the buyer, the security title to the realty retained by the seller acts as security for the full purchase price of both the realty and any personalty which was to pass to the buyer under the contract) (*Lencioni v. Dan (1954) 128 Cal. App. 2d 105, 109, 111-112, 275 P.2d 101*).

[*Optional*] **E. Waiver of Security.** Although a seller retaining title may waive his/her security by suing at either law or

equity, such seller does not, thus, become an unsecured creditor for purposes of the Attachment Law permitting him/her to secure an attachment to replace the waived security (*Lencioni v. Dan (1954) 128 Cal. App. 2d 105, 111, 275 P.2d 101* [dictum]).

[*Optional*] **F. Inadequacy of Security at Time of Giving Mortgage.** If the value of the security at the time of the giving of a mortgage was valueless, that fact does not give a plaintiff the right to maintain an action on the obligation secured without foreclosure, and consequently does not give him/her the right to maintain the attachment (*Barbieri v. Ramelli (1890) 84 Cal. 154, 157-158, 23 P. 1086* ; *Giandeini v. Ramirez (1936) 11 Cal. App. 2d 469, 471-472, 54 P.2d 91*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a defendant's notice of opposition to the issuance of a right to attach order sought by a plaintiff in an action on a claim which is secured by an interest in real property which arises from agreement, statute, or other rule of law as provided in *Code Civ. Proc. § 483.010(b)* [*see Code Civ. Proc. § 484.060(a)* (points and authorities supporting any legal issues raised as required to accompany notice of opposition)].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law raised. In addition, counsel must attach affidavits or declarations which support any factual issues raised in the notice of opposition [*see Code Civ. Proc. § 484.060(a)*].

[i] Related Uses

With appropriate modifications these points and authorities may be submitted in other attachment proceedings. For a discussion of these related uses, see *§ 23.20[2]*.

[3] Discussion of Authorities

[a] Secured Claim

Before January 1, 1990, *Code Civ. Proc. § 483.010(b)* also prohibited an attachment on a claim secured by any interest in personal property, including any security interest in fixtures subject to *Com. Code § 9101 et seq.* (security interests in personal property and fixtures). Starting January 1, 1996, this prohibition is reinstated [*see Code Civ. Proc. § 483.010(b), (c)* (Stats. 1990, ch. 943, § 1.5)].

[b] Executory Contract for Sale of Realty

In *Lencioni v. Dan (1954) 128 Cal. App. 2d 105, 275 P.2d 101* , plaintiffs brought an action to compel performance by defendants of their written agreement to pay the purchase price of certain real and personal property, or, in thealternative, to recover the brokerage commission fee paid in connection with the sale. After plaintiffs secured a writ of attachment, defendants moved to dissolve the attachment, which motion was denied. On appeal, the defendants contended that the attachment should not have been issued because the plaintiffs were secured creditors within the meaning of former Code Civ. Proc. § 537(1) [*now see Code Civ. Proc. § 483.010(b)*]. In reversing the trial court, the court of appeal agreed with the defendants' contention and held that the contract was an executory contract of sale under the terms of which plaintiffs retained title as security for the payment of the purchase price. A seller under such a contract has security which prevents him or her from obtaining an attachment in a legal or equitable action to recover the unpaid balance on the contract. The plaintiffs contended in return, that since part of the property involved was personal property, the security which was stated to be in the nature of an implied vendor's lien did not exist as to the personal property where title and possession had passed. Although the court noted that this was undoubtedly the law with respect to personal property, the security of the plaintiffs as sellers of the real property was not that of an implied lien where title had passed to the defendants, but that based on the terms of the contract under which title did not pass. In such a situation, the security title to the realty retained by the seller acts as security for the full purchase price of both the realty and personalty.

[c] Waiver of Security

In *Lencioni v. Dan (1954) 128 Cal. App. 2d 105, 275 P.2d 101* , the facts of which are discussed in *§ 23.23[3][b]*, the plaintiffs also argued on appeal that if the obligation sued upon was originally secured, they have waived such security by bringing their action, which they urged to be one at law on the debt. Although the court found that, in fact, the plaintiffs had not waived their security, it suggested in a footnote that, although a seller retaining title may waive his or her security and sue either at law or in equity, such a seller does not thus become an unsecured creditor and entitled to secure an attachment to replace the security. The policy of the law is that a creditor holding security may not resort to attachment until the security has been exhausted. The court thought it could be argued that such a policy would be violated if a secured creditor were permitted to waive his or her security at will and then seek further security by way of attachment.

It should be noted that in *Engelman v. Bookasta (1968) 264 Cal. App. 2d 915, 71 Cal. Rptr. 120* , the court explicitly found this dictum in *Lencioni* inapplicable to the case before it. In *Engelman*, plaintiff was permitted to have an attachment in his suit on a secured note against the guarantor of the note who had executed a written, express waiver of all rights in the security. The court held that this was an effective waiver and permitted the plaintiff to state in his affidavit that his action was on an unsecured claim. The court stated that it could see no reason why a guarantor should not be permitted to waive his or her right by contract to require the creditor to proceed against security provided by the principal debtor.

[d] Inadequacy of Security at Time of Giving Mortgage

In *Barbieri v. Ramelli (1890) 84 Cal. 154, 23 P. 1086* , plaintiff sought to recover a sum of money lent to defendants. Under the loan agreement, defendants executed a mortgage on a tract of land to secure payment. At the time of suit, when payment was due, prior mortgages on the land made plaintiff's security valueless, since defendants had made no improvements on the land from the time of their agreement with plaintiff to equal the amount of the sums due on the indebtedness secured by the prior mortgages. The trial court gave judgment in favor of plaintiff, and defendants appealed, contending that *Code Civ. Proc. § 726* controlled. This section provides, in pertinent part, that only one action may be brought for the recovery of a debt secured by a mortgage. The Supreme Court agreed and reversed the trial court's judgment. The Court held that under this statute, plaintiff could only bring a foreclosure action. Although plaintiff apparently sought no attachment on the filing of its action, it contended that former Code Civ. Proc. § 537(1) [*now see Code Civ. Proc. § 483.010(b)*] allows an attachment to issue where the debt is secured and the security, without any act of plaintiff, had become valueless. However, the Court noted that the original value of the land did not

appear, nor was it clear, whether the land had depreciated. Former Code Civ. Proc. § 537(1) applies only where the security has changed in the value it had when originally taken, and has no reference to a case where there had been no evident change of value. Thus, having elected to take the security at the value it possessed when the mortgage was originally executed, and no change in value having since occurred, the plaintiff could not be allowed to urge, in order to evade compliance with *Code Civ. Proc. § 726*, that the land had become valueless.

Giandeini v. Ramirez (1936) 11 Cal. App. 2d 469, 54 P.2d 91 , involved an action on a note which was secured by a mortgage on real property, but which plaintiffs alleged to be valueless at the time the note was given. Plaintiffs obtained a writ of attachment which defendant moved to dissolve. On the trial court's order refusing to dissolve, defendant appealed. The court of appeals reversed, holding that the debt had originally been secured and that it had not later become valueless. The court followed the *Barbieri* decision and found that, applying the principle of that case to the one at bar, it was scarcely necessary to state that if the security had no value at the time it was given, it could not have become less valuable thereafter.

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2-23 California Points & Authorities § 23.24

§ 23.24 Supporting Defendant's Notice of Opposition to Plaintiff's Application for Right to Attach Order [Code Civ. Proc. § 484.060(a)]--Action Is One in Which Attachment Unauthorized--Sum Claimed Not Readily Ascertainable Amount of $500 or More [Code Civ. Proc. § 483.010(a)]

[1] FORM

[*Caption. See § 23.20.*]

AN ATTACHMENT MAY NOT ISSUE IN AN ACTION ON A CLAIM IN WHICH THE TOTAL SUM CLAIMED IS NOT A FIXED OR READILY ASCERTAINABLE AMOUNT OF FIVE HUNDRED DOLLARS ($500) OR MORE, EXCLUSIVE OF COSTS, INTEREST, AND ATTORNEY'S FEES.

A. Notice of Opposition. [*See § 23.20, Paragraph A.*]

B. Required Court Finding. [*See § 23.20, Paragraph B.*]

C. Claim as Required to Be for Readily Ascertainable Amount. Unless otherwise provided by statute, an attachment may be issued only in an action on a claim or claims for money in which the total sum claimed is a fixed or readily ascertainable amount not less than five hundred dollars ($500), exclusive of costs, interest, and attorney's fees (*Code Civ. Proc. § 483.010(a)*).

D. Strict Construction of Attachment Law. [*See § 23.20, Paragraph D.*]

E. Necessity of Determining Measure of Liability. Where the contract does not furnish the measure of the liability of the defendant, and the damages are unliquidated, an attachment cannot be had (*Hathaway v. Davis (1867) 33 Cal. 161, 167-168* ; *Lewis v. Steifel (1950) 98 Cal. App. 2d 648, 650, 220 P.2d 769*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a defendant's notice of opposition to a plaintiff's application for a right to attach order and writ of attachment on the grounds that plaintiff's action is not one in which an attachment is authorized in that the total sum claimed is not a readily ascertainable amount of $500 or more, exclusive of costs, interest, and attorney's fees.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law raised. In addition, counsel must attach affidavits or declarations supporting any factual issues raised in the notice of opposition [*see Code Civ. Proc. § 484.060(a)*].

[i] Related Uses

With appropriate modifications, this memorandum may be submitted in other attachment proceedings. For a discussion of these related uses, see *§ 23.20[2]*.

[3] Discussion of Authorities

[a] Necessity of Determining Measure of Liability

Hathaway v. Davis (1867) 33 Cal. 161 , is the leading case in construing the terms "direct payment of money" as those terms were used in former Code Civ. Proc. § 537(1) with respect to the types of actions in which attachments may issue. Although present *Code Civ. Proc. § 483.010(a)* substitutes the terms "fixed or readily ascertainable amount," the Law Revision Commission Comment to this subdivision states that these terms continue former law. In *Hathaway*, defendant appealed from the trial court's order denying defendant's motion to dissolve an attachment. Defendant contended that plaintiff's action was not for the "direct payment of money." Although the Supreme Court upheld the trial court's order, it limited the types of actions in which an attachment may issue. The Court found that, based on legislative intent and statutory construction, the plaintiff's right to an attachment is confined to cases of contract, when the liability of the defendant can be ascertained with certainty and is not in doubt until after trial, or, in other words, when the amount to be paid is fixed by the terms of the contract, or can be readily ascertained from the information which it affords. The Court added that every such case is clearly within the policy of the Attachment Law, which is designed for the benefit of acknowledged creditors, and not those who may or may not turn out to be such according to the finding of the jury.

Lewis v. Steifel (1950) 98 Cal. App. 2d 648, 220 P.2d 769 , is referred to in the Law Revision Commission Comment to *Code Civ. Proc. § 483.010* as authority for the fact that the limitation on actions in which attachments may issue to a claim or claims for money when the total amount is a fixed or readily ascertainable amount continues the limitation which existed under former attachment law. In *Lewis*, plaintiff sued defendants for breach of an oral one-year employment contract on being discharged after three months' service. Plaintiff alleged that the contract included plaintiff's weekly salary and the time at which plaintiff's services were to commence. Defendants moved to discharge the attachment on the ground, among others, that plaintiff's claim was not one for the"direct payment of money," but one for damages for breach of contract and that such damages were unascertainable, speculative, and uncertain. The

trial court discharged the attachment, and plaintiff appealed. Plaintiff contended on appeal that his claim came within the rule that an attachment will lie on a cause of action for damages for breach of contract when the damages were readily ascertainable by reference to the contract and when the basis of the computation of damages appears to be reasonable and definite. Finding that plaintiff's contention was well taken since it stated a well-recognized rule of law in California, the court reversed the trial court. However, quoting from *Force v. Hart (1928) 205 Cal. 670, 673, 272 P 583* , the court did note that the contract sued upon must furnish a standard by which the amount due may be clearly ascertained and that there must exist a basis on which the damages can be determined by proof.

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2-23 California Points & Authorities § 23.25

§ 23.25 Supporting Defendant's Notice of Opposition to Plaintiff's Application for Right to Attach Order [Code Civ. Proc. § 484.060(a)]--Application or Accompanying Affidavit Fails to Meet Statutory Requirements [Code Civ. Proc. §§ 484.020, 484.030]

[1] FORM

[*Caption. See § 23.20.*]

A PLAINTIFF'S _____ [APPLICATION FOR A RIGHT TO ATTACH ORDER AND WRIT OF ATTACHMENT *or* ACCOMPANYING AFFIDAVIT] IS DEFECTIVE WHEN IT DOES NOT STATE THE INFORMATION OR OTHERWISE MEET STATUTORY REQUIREMENTS.

A. Notice of Opposition. [*See § 23.20, Paragraph A.*]

[*EITHER*]

B. Statement in Application as Required to Show That Claim Is One on Which Attachment May Issue. The application for a right to attach order and a writ of attachment must include a statement showing that the attachment is sought to secure the recovery on a claim on which an attachment may be issued (*Code Civ. Proc. § 484.020(a)*).

[*OR*]

B. Application as Required to Describe Property and State That Such Property Is Subject to Attachment. The application for a right to attach order and a writ of attachment must include a description of the property to be attached under the writ of attachment and a statement that the plaintiff is informed and believes that such property is subject to attachment (when the defendant is a natural person, the description of the property must be reasonably adequate to permit the defendant to identify the specific property sought to be attached) (*Code Civ. Proc. § 484.020(e)*).

[*OR*]

B. Application as Required to State Claim Not Barred by Bankruptcy Proceeding. The application for a right to attach order and a writ of attachment must include a statement that the applicant has no information or belief that the claim is discharged or that the prosecution of the action is stayed in a proceeding under Title 11 of the United States Code (Bankruptcy) (*Code Civ. Proc. § 484.020(d)*).

[*OR*]

B. Application as Required to State Attachment Is for Recovery of Claim. The application for a right to attach order and a writ of attachment must include a statement that the attachment is not sought for a purpose other than the recovery on the claim on which the attachment is based (*Code Civ. Proc. § 484.020(c)*).

[*OR*]

B. Application as Required to State Amount of Claim. The application for a right to attach order and a writ of attachment must include a statement of the amount to be secured by the attachment (*Code Civ. Proc. § 484.020(b)*).

[*OR*]

B. Affidavit Required to Support Application. An application for a right to attach order and a writ of attachment must be supported by an affidavit showing that the plaintiff on the facts presented would be entitled to a judgment on the claim on which the attachment is based (*Code Civ. Proc. § 484.030*).

C. Strict Construction of Attachment Law. [*See § 23.20, Paragraph D.*]

[*Optional*] **D. Facts Required to Be Stated in Affidavit.** The facts stated in each affidavit must be set forth with particularity. Except when matters are specifically permitted by the Attachment Law to be shown by information and belief, each affidavit must show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated therein. As to matters shown by information and belief, the affidavit must state the facts on which the affiant's belief is based, showing the nature of his or her information and the reliability of the informant (*Code Civ. Proc. § 482.040*).

[*Optional*] **E. Insufficient Affidavit.** A writ of attachment should not be issued when the statutory requirements with respect to affidavits for attachment have not been strictly complied with (*Anaheim Nat'l Bank v. Kraemer (1932) 120 Cal. App. 63, 65, 7 P.2d 765* (decided under former Code Civ. Proc. § 338; *now see Code Civ. Proc. §§ 482.040, 484.030*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a defendant's notice of opposition to the issuance of a right to attach order sought by plaintiff when the application or the accompanying affidavit does not meet the statutory requirements with respect to the information required to be stated in the application or affidavit [*see Code Civ. Proc. § 484.060(a)* (points and authorities supporting any legal issues raised as required to accompany notice of opposition)].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should show that the description of the property to be attached contained in the application fails to include information about location or parcel size and is inadequate to permit identification of the property by defendant. In addition, counsel must attach affidavits or declarations that support any factual issues raised in the notice of opposition [*see Code Civ. Proc. § 484.060(a)*].

[i] Related Uses

With appropriate modifications, this points and authorities may be submitted in other attachment proceedings. For a discussion of these related uses, see *§ 23.20[2]*.

[b] Insufficient Affidavit

Anaheim Nat'l Bank v. Kraemer *(1932) 120 Cal. App. 63, 7 P.2d 765* , illustrates the strictness of procedures which courts under former attachment law required plaintiffs to follow in obtaining writs of attachment. It should be noted, however, that at least in the noticed hearing procedure provided for in *Code Civ. Proc. §§ 484.010-484.110*, a defect in the plaintiff's application or affidavit, which the plaintiff could correct, and which is not prejudicial to the defendant may now not be a ground for denying the plaintiff's application for a right to attach order.

In *Anaheim*, defendant moved to dissolve an attachment issued to plaintiff on the ground that the statement in plaintiff's affidavit, which was to the effect that the debt sued upon was secured by a mortgage which had been rendered valueless without the act of plaintiff or any person to whom the security was given, was insufficient, since it failed to negative the existence of any security other than that specified. The statute in force at the time required the affidavit to specify that the plaintiff had, in addition, no lien or mortgage on personal property or a pledge of personal property. The trial court ordered the writ discharged and, on plaintiff's appeal, the court of appeal affirmed. The court noted that proceedings by attachment are statutory and special, and the provisions of the statute must be strictly followed or no right will be acquired thereunder. What the statute required to be stated in the affidavit must be stated, and truly stated in the affidavit; and if not stated in the affidavit, the attachment should be dissolved. The court concluded that the necessary fact which must have appeared is the lack of security and that this was required to be indicated by language so clear and unambiguous as to leave it free from any doubt (*120 Cal. App. 63, 65)* .

The precise objection defendant had to plaintiff's affidavit in *Kraemer* may be meritorious under *Code Civ. Proc. § 484.020(a)*, since that subdivision requires the application for a right to attach order to include a statement that the attachment is sought to secure the recovery on a claim on which an attachment may issue which may require plaintiff to state the nonexistence of any form of security provided in *Code Civ. Proc. § 483.010(b)*.

[3] Additional Authorities

[a] Application as Required to Describe Property and State That Such Property Is Subject to Attachment

Code Civ. Proc. § 484.020(e) allows an attachment application simply to request attachment of all corporate property that is subject to attachment when the defendant is a corporation, but when defendant is a natural person the description of the property must be reasonably adequate to permit the defendant to identify the specific property to be attached. In construing this latter provision, the court in *Bank of America v. Salinas Nissan, Inc. (1989) 207 Cal. App. 3d 260, 254 Cal. Rptr. 748* , stated that the requirement of specificity appears designed to avoid unnecessary hearings in which an individual defendant is willing to concede that certain described property is subject to attachment. The court did not understand the requirement that prohibited a plaintiff from targeting for attachment everything an individual defendant owns; so long as the property descriptions are adequate, *Code Civ. Proc. § 484.020(e)* allows for the possibility that a plaintiff may want to make such a comprehensive attempt, possibly in order to provoke and resolve an individual defendant's exemption claims all at once. When a plaintiff notices a hearing on an attachment application, the defendant must assert any exemption claims for targeted personal property not less than five court days before the hearing or such claims are deemed waived, absent a change of circumstances (citing *Code Civ. Proc. §§ 484.070(a), (e)* (subsequently amended by Stats. 1998, ch. 932, § 14, to add word "court" before "days"), 482.100) (*207Cal. App. 3d 260, 268)* . The court concluded that the plaintiff's application in the case before it, though all-inclusive, was reasonably adequate to inform the defendants what property was targeted for attachment (*207 Cal. App. 3d 260, 268)* . Plaintiff's application was to attach all of the following types of property owned by defendants: real property, personal property, equipment, motor vehicles, chattel paper, negotiable and other instruments, securities, deposit accounts, safe deposit boxes, accounts receivable, general intangibles, property subject to pending actions, final money judgments, and personalty in estates of decedents (*207 Cal. App. 3d 260, 264)* .

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2-23 California Points & Authorities § 23.26

§ 23.26 Supporting Defendant's Notice of Opposition to Plaintiff's Application for Right to Attach Order [Code Civ. Proc. § 484.060(a)]--Failure of Plaintiff to Establish Probable Validity of Claim or That Attachment Sought for Legitimate Purpose [Code Civ. Proc. § 484.090(a)(2), (3)]

[1] FORM

[*Caption. See § 23.20.*]

AN ATTACHMENT MAY NOT BE ISSUED IF _____ [THE PLAINTIFF HAS NOT ESTABLISHED THE PROBABLE VALIDITY OF HIS/HER CLAIM *or* IT IS SOUGHT FOR A PURPOSE OTHER THAN THE RECOVERY ON THE CLAIM] ON WHICH THE ATTACHMENT IS BASED.

A. Notice of Opposition. [*See § 23.20, Paragraph A.*]

[*EITHER*]

B. Required Court Determination. At the hearing on the plaintiff's application for a right to attach order, the court must issue such order only if it finds, among other findings, that the plaintiff has established the probable validity of the claim on which the attachment is based (*Code Civ. Proc. § 484.090(a)(2)*).

[*OR*]

B. Required Court Determination. At the hearing on the plaintiff's application for a right to attach order, the court must issue such order only if it finds, among other findings, that the attachment is not sought for a purpose other than the recovery on the claim on which the attachment is based (*Code Civ. Proc. § 484.090(a)(3)*).

[*Optional*] **C. Affidavit Required to Support Application.** [*See § 23.25, Paragraph B.*]

D. Strict Construction of Attachment Law. [*See § 23.20, Paragraph D.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a defendant's notice of opposition to plaintiff's application for a right to attach order where the plaintiff has failed to establish either by his or her affidavit the probable validity of the claim sued on or that the attachment is not sought for a purpose other than the recovery on the claim on which the attachment is based [*see Code Civ. Proc. § 484.060(a)* (points and authorities supporting any legal issues raised as required to accompany notice of opposition)].

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law raised. In addition, counsel must attach affidavits or declarations which support any factual issues raised in the notice of opposition [*see Code Civ. Proc. § 484.060(a)*].

With appropriate modifications, these points and authorities may be submitted in other attachment proceedings. For a discussion of these related uses, see *§ 23.20[2]*.

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2-23 California Points & Authorities § 23.27

§ 23.27 Supporting Claim of Exemption [Code Civ. Proc. §§ 484.070, 484.350]--Property Exempt From Attachment [Code Civ. Proc. § 487.020(a)]--General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORIT-
vs.	)	IES IN SUPPORT OF CLAIM OF EXEMPTION
	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

PROPERTY _____ [*describe property exempt from execution, e.g.,* CONSISTING OF HOUSEHOLD FURNISHINGS, APPLIANCES, AND WEARING APPAREL USED BY A DEBTOR AND HIS/HER RESIDENT FAMILY] WHICH IS EXEMPT FROM EXECUTION UNDER SECTION _____ [*specify code section relied on for claim of exemption, e.g.,* 704.020 OF THE CODE OF CIVIL PROCEDURE] IS EXEMPT FROM ATTACHMENT.

A. Claim of Exemption. If a defendant claims that the property described in the plaintiff's application for a right to attach order and a writ of attachment, or a portion of such property, is exempt from attachment, he or she may claim the

exemption as provided in *Section 484.070 of the Code of Civil Procedure* (*Code Civ. Proc. § 484.070(a), (b)*). If the court determines that property of the defendant is exempt from attachment, in whole or in part, the right to attach order must describe the exempt property and prohibit attachment of the property (*Code Civ. Proc. § 484.090(c)*).

B. Liberal Construction of Exemption Statutes. Statutes exempting personal property from forced sale are remedial in character and are to be liberally construed, so as to effectuate the humane purpose designed by the lawmakers (*In re McManus (1890) 87 Cal. 292, 294)* .

C. Application of Execution Law to Attachment Law. All property exempt from enforcement of a money judgment by writ of execution is exempt from attachment except as provided in *Section 3439.07(a)(2) of the Civil Code* (*Code Civ. Proc. § 487.020(a)*; *see Code Civ. Proc. § 699.010*).

D. Property Exempt Under Section _____ [*specify specific code section relied on in claim of exemption, e.g., 704.020 of the Code of Civil Procedure*]. The following property is exempt from execution: _____ [*set forth property exempt under statute, e.g.,* household furnishings, appliances, provisions, wearing apparel, and other personal effects ordinarily and reasonably necessary to, and personally used or procured for use by, the judgment debtor and members of his or her family at the judgment debtor's principal place of residence (Code Civ. Proc. § _____ [*specify section number(s) as above, e.g.,* 704.020]).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a defendant's claim of exemption in which defendant claims that property described in plaintiff's application for a right to attach order and writ of attachment under *Code Civ. Proc. § 484.010*, or in plaintiff's application for a writ of attachment under *Code Civ. Proc. § 484.310*, is exempt from attachment under *Code Civ. Proc. § 487.020(a)* which exempts property from attachment if such property is exempt from enforcement of a money judgment. This is a general form which may be used whenever property sought to be attached is exempt from execution.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should show that the property for which the exemption is being claimed consists entirely of household furnishings and personal effects used by the judgment debtor personally in his or her principal place of residence and is thus exempt under *Code Civ. Proc. § 704.020(a)*. In addition, counsel must attach affidavits or declarations which support any factual issues raised in the claim of exemption [*see Code Civ. Proc. §§ 484.070(d), 484.350(c)*].

[b] Liberal Construction of Exemption Statutes

In re McManus *(1890) 87 Cal. 292, 25 P. 413* , involved an application of that portion of the Insolvent Act which required a court having jurisdiction of insolvency proceedings to exempt and set apart for the use and benefit of the insolvent such property which is exempt from execution. The insolvent was engaged in the business of a jeweler and watch-repairer and owned and used in his business a jeweler's safe. Against the objections of certain creditors, and on the basis of certain evidence respecting the necessity of such a safe in the jeweler's business, the court set apart the safe as property exempt from execution under former Code Civ. Proc. § 690(4) [*now see Code Civ. Proc. § 704.060*]. On the creditors' appeal, the Supreme Court affirmed. The Court stated that statutes exempting personal property from forced sale are remedial in character, and are evidently intended to protect and enable the debtor to follow his or her vocation, and thus earn a support for himself or herself and family. The Court stated further that the general rule is that such statutes are to be liberally construed, so as to effectuate the humane purpose designed by the lawmakers. In applying these general principles to the ruling of the lower court, the Court could see no error.

[c] Plaintiff's Failure to Oppose Exemption Claim

A plaintiff's failure to oppose a timely exemption claim concedes its propriety, and absent such opposition, defendant is not required to prove the claim. Moreover, the trial court has no discretion, absent some opposition by plaintiff, to ignore the claim [*Bank of America v. Salinas Nissan, Inc. (1989) 207 Cal. App. 3d 260, 270, 254 Cal. Rptr. 748]* .

[3] Discussion of Authorities

[a] Application of Execution Law to Attachment Law

The reference in *Code Civ. Proc. § 487.020* to *Civ. Code § 3439.07(a)(2)* reflects the right of a creditor under the Uniform Fraudulent Transfer Act (*Civ. Code § 3439.01 et seq.*) to attach a fraudulently transferred asset, or its proceeds, in the hands of the transferee even if the creditor's claim has not matured [*Civ. Code § 3439.07(a)(2)*]. If the creditor's claim has matured, attachment of the fraudulently transferred asset or its proceeds in the hands of the transferee in an action on that claim is authorized by *Civ. Code § 3439.07(b)*. Limitations on attachment of the fraudulently transferred asset in the hands of the transferee are governed by *Civ. Code §§ 3439.08-3439.09*.

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2-23 California Points & Authorities § 23.28

§ 23.28 Supporting Claim of Exemption [Code Civ. Proc. §§ 484.070, 484.350]--Property Necessary for Support of Defendant or Family or Compensation for Personal Services [Code Civ. Proc. §§ 487.020(b), (c), 706.011]

[1] FORM

[*Caption. See § 23.27.*]

ALL _____ [PROPERTY NECESSARY FOR THE SUPPORT OF DEFENDANT OR HIS/HER FAMILY WHEN THE FAMILY IS SUPPORTED IN WHOLE OR IN PART BY DEFENDANT *and/or* COMPENSATION PAID OR PAYABLE TO DEFENDANT AS AN EMPLOYEE FOR PERSONAL SERVICES PERFORMED] IS EXEMPT FROM ATTACHMENT EXCEPT AS PROVIDED IN SECTION 3439.07(a)(2) OF THE CIVIL CODE.

A. Claim of Exemption. [*See § 23.27, Paragraph A.*]

B. Liberal Construction of Exemption Statutes. [*See § 23.27, Paragraph B.*]

[*EITHER*]

C. Property Necessary for Support of Individual or Household as Exempt. Property which is necessary for the support of defendant who is a natural person and members of his or her household is exempt from attachment except as provided in *Section 3439.07(a)(2) of the Civil Code* (*Code Civ. Proc. § 487.020(b)*).

[*AND/OR*]

D. Compensation for Personal Services as Exempt. All compensation payable by an employer to an employee for personal services performed by such employee whether denominated as wages, salary, commission, bonus, or otherwise

is exempt from attachment except as provided in *Section 3439.07(a)(2) of the Civil Code* (*Code Civ. Proc. §§ 487.020(c), 706.011*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of adefendant's claim of exemption in which defendant claims that property described in plaintiff's application for a right to attach order and writ of attachment under *Code Civ. Proc. § 484.010*, or in plaintiff's application for a writ of attachment under *Code Civ. Proc. § 484.310*, is exempt from attachment under *Code Civ. Proc. § 487.020(b)* or *(c)*. That is, the property sought to be attached is property necessary for the support of the defendant and members of his or her household [*Code Civ. Proc. § 487.020(b)*] or is compensation payable by an employer to an employee for personal services performed [*see Code Civ. Proc. §§ 487.020(c), 706.011*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should show that the property for which the exemption is claimed consists entirely of wages and bonuses paid by his or her employer to defendant for personal services performed by defendant. In addition, counsel must attach affidavits or declarations that support any factual issues raised in the claim of exemption [*see Code Civ. Proc. §§ 484.070(d), 484.350(c)*].

[3] Discussion of Authorities

[a] Property Necessary for Support of Individual or Household as Exempt

The reference in *Code Civ. Proc. § 487.020* to ***Civ. Code § 3439.07(a)(2)*** reflects the right of a creditor under the Uniform Fraudulent Transfer Act (*Civ. Code §§ 3439.01-3439.12*) to attach a fraudulently transferred asset, or its proceeds, in the hands of the transferee even if the creditor's claim has not matured [*Civ. Code § 3439.07(a)(2)*]. If the creditor's claim has matured, attachment of the fraudulently transferred asset or its proceeds in the hands of the transferee in an action on that claim is authorized by *Civ. Code § 3439.07(b)*. Limitations on attachment of the fraudulently transferred asset in the hands of the transferee are governed by *Civ. Code §§ 3439.08-3439.09*.

[4] Additional Authorities

[a] Compensation for Personal Services as Exempt

California State Employees' Assn. v. State of California (1988) 198 Cal. App. 3d 374, 243 Cal. Rptr. 602 , involved a plan by the State of California to make certain deductions from the salaries of state employees to recoup prior overpayments, pursuant to *Gov. Code § 17051* (procedure for payment of a warrant drawn against the state when the validity or amount is in question). The California State Employees' Association appealed the trial court's denial of its

petition for a writ of mandate to compel the state to make salary payments without the deductions. The court of appeal reversed, holding, inter alia, that the attachment law (*Code Civ. Proc. §§ 481.010-493.060*) takes precedence over the general provisions of *Gov. Code § 17051* (*198 Cal. App. 3d 374, 378)* and expressly prohibits any prejudgment attachment or levy of execution against wages (*Code Civ. Proc. § 487.020(c)*) (*198 Cal. App. 3d 374, 377)* .

California Points & Authorities

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2-23 California Points & Authorities § 23.29

§ 23.29 Supporting Claim of Exemption [Code Civ. Proc. §§ 484.070, 484.350]--Property Not Subject to Attachment Is Exempt From Attachment [Code Civ. Proc. § 487.020(d)]

[1] FORM

[*Caption. See § 23.27.*]

ALL PROPERTY NOT SUBJECT TO ATTACHMENT PURSUANT TO SECTION 487.010 OF THE CODE OF CIVIL PROCEDURE IS EXEMPT FROM ATTACHMENT EXCEPT AS PROVIDED IN SECTION 3439.07(a)(2) OF THE CIVIL CODE.

A. Claim of Exemption. [*See § 23.27, Paragraph A.*]

B. Liberal Construction of Exemption Statutes. [*See § 23.27, Paragraph B.*]

C. Property Not Subject to Attachment as Exempt. All property not subject to attachment pursuant to *Section 487.010 of the Code of Civil Procedure* is exempt from attachment except as provided in *Section 3439.07(a)(2) of the Civil Code* (*Code Civ. Proc. § 487.020(d)*).

[*EITHER*]

D. Property of Natural Person Subject to Attachment. When the defendant is a natural person, only the following property is subject to attachment: (1) interests in real property except leasehold estates with unexpired terms of less than one year; (2) accounts receivable, chattel paper, and general intangibles arising out of the conduct by defendant of a trade, business, or profession, except any such individual claims with a principal balance of less than $150; (3) equipment; (4) farm products; (5) inventory; (6) final money judgments arising out of the conduct by defendant of a trade, business, or profession; (7) money on the premises where a trade, business, or profession is conducted and, except for the first $1,000, money located elsewhere than on such premises and deposit accounts; however, if the defendant has

more than one deposit account or has at least one deposit account and money located elsewhere than on such premises, the plaintiff may apply for an order that the writ of attachment be levied so that an aggregate amount of $1,000 in the form of such money and in such accounts remains free of levy; (8) negotiable documents of title; (9) instruments; (10) securities; and (11) minerals or the like (including oil and gas) to be extracted (*Code Civ. Proc. § 487.010(c)*).

[*OR*]

D. Property of Corporate Defendant Subject to Attachment. When thedefendant is a corporation, corporate property is not subject to attachment unless it is corporate property for which a method of levy is provided by *Sections 488.300 through 488.430 of the Code of Civil Procedure* (*Code Civ. Proc. §§ 487.010(a), 487.020(b)*).

[*OR*]

D. Partnership Property Subject to Attachment. When the defendant is a partnership or other unincorporated association, partnership or association property is not subject to attachment unless it is property for which a method of levy is provided by *Sections 488.300 through 488.430 of the Code of Civil Procedure* (*Code Civ. Proc. §§ 487.010(b), 487.020(d)*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a defendant's claim of exemption in which defendant claims that property described in plaintiff's application for a right to attach order and writ of attachment under *Code Civ. Proc. § 484.010*, or in plaintiff's application for a writ of attachment under *Code Civ. Proc. § 484.310*, is not subject to attachment under *Code Civ. Proc. § 487.010* and is, therefore, exempt from attachment under *Code Civ. Proc. § 487.020(d)*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should show that the property for which the right to attach order is sought is not subject to attachment because it consists entirely of inventory with a unit retail value of less than $500, held for sale by defendant, a retail merchant as defined by *Code Civ. Proc. § 488.405(c)(2)*. In addition, counsel must attach affidavits or declarations that support any factual issues raised in the claim of exemption [*see Code Civ. Proc. §§ 484.070(d), 484.350(c)*].

[3] Discussion of Authorities

[a] Property Not Subject to Attachment as Exempt

The reference in *Code Civ. Proc. § 487.020* to *Civ. Code § 3439.07(a)(2)* reflects the right of a creditor under the Uniform Fraudulent Transfer Act (*Civ. Code §§ 3439.01-3439.12*) to attach a fraudulently transferred asset, or its proceeds, in the hands of the transferee even if the creditor's claim has not matured [*Civ. Code § 3439.07(a)(2)*]. If the creditor's claim has matured, attachment of the fraudulently transferred asset or its proceeds in the hands of the transferee in an action on that claim is authorized by *Civ. Code § 3439.07(b)*. Limitations on attachment of the fraudulently transferred asset in the hands of the transferee are governed by *Civ. Code §§ 3439.08-3439.09*.

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2-23 California Points & Authorities § 23.30

§ 23.30 Supporting Defendant's Motion of Objection to Plaintiff's Required Undertaking [Code Civ. Proc. §§ 489.210, 995.930, 995.940]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORIT-
vs.	)	IES IN SUPPORT OF MOTION OF OBJECTION
	)	TO UNDERTAKING
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

A COURT MUST ORDER THE REQUIRED UNDERTAKING, FILED BY PLAINTIFF PURSUANT TO SECTION 489.210 OF THE CODE OF CIVIL PROCEDURE, TO BE REFILED WITH SUFFICIENT SURETIES IN A SUFFICIENT AMOUNT IF IT DETERMINES ON DEFENDANT'S OBJECTION THAT THE UNDERTAKING IS INSUFFICIENT.

A. Objection to Undertaking. A beneficiary on noticed motion may object to an undertaking on the ground(s) that the _____ [sureties are insufficient *and/or* the amount of the undertaking is insufficient *and/or* the

undertaking, from any other cause, is insufficient] (*Code Civ. Proc. §§ 995.210(b), 995.920, 995.930*).

B. Plaintiff's Required Undertaking. Before issuance of a _____ [writ of attachment *or* temporary protective order *or* order under *Section 491.415(b) of the Code of Civil Procedure*], the plaintiff must file an undertaking to pay the defendant any amount the defendant may recover for any wrongful attachment by the plaintiff in the action (*Code Civ. Proc. § 489.210*).

C. Required Court Determination. If the court determines that an undertaking is insufficient, it must specify in what respect it is insufficient and order that an undertaking with sufficient sureties and in a sufficient amount be given within five days. If a sufficient undertaking is not given within the time required by the court order, all rights obtained by giving the undertaking immediately cease and the court may on ex parte motion order the cessation of those rights (*Code Civ. Proc. §§ 995.210(b), 995.960(b)(1)*.

D. When Probable Recovery Exceeds Amount of Undertaking. If, on objection to the undertaking, the court determines that the probable recovery for wrongful attachment exceeds the amount of the undertaking, it must include in its order that the amount of the undertaking be increased to the amount it determines to be the probable recovery for wrongful attachment if it is ultimately determined that the attachment was wrongful. (*Code Civ. Proc. § 489.220(b)*; *see Code Civ. Proc. § 996.010*).

[*Optional*] **E. Amount of Undertaking Generally.** Except as provided in subdivision (b) of *Section 489.220 of the Code of Civil Procedure*, the amount of an undertaking filed pursuant to *Code Civ. Proc. §§ 489.210 through 489.320* must be ten thousand dollars ($10,000) (*Code Civ. Proc. § 489.220(a)*).

[*Optional*] **F. Number of Sureties.** Unless the statute providing for the undertaking requires execution by an admitted surety insurer, an undertaking must be executed by two or more sufficient personal sureties, by one admitted surety insurer, or by any combination of sufficient personal sureties and admitted surety insurers (*Code Civ. Proc. §§ 995.210(b), 995.310*).

[*Optional*] **G. Personal Sureties Not Sufficient.** A personal surety on an undertaking is sufficient only if all the following conditions are satisfied: (1) the surety is a person other than the principal and is not an officer of the court or a member of the State Bar; (2) the surety is a resident, and either an owner of real property or householder, within the state; and (3) the surety is worth the amount of the undertaking in real or personal property, or both, situated in this state, over and above all debts and liabilities, exclusive of property exempt from enforcement of a money judgment (see *Code Civ. Proc. §§ 995.210(b), 995.510*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a defendant's motion objecting to the sufficiency of plaintiff's undertaking required under *Code Civ. Proc. § 489.210*. This is a general form and may be used tosupport the specific ground of objection stated in defendant's motion whether the objection is based on the insufficiency of the sureties, the insufficiency of the amount of the undertaking, or the insufficiency of the undertaking for any other cause [*see Code Civ. Proc. § 995.920*].

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, if the ground for objection is that the amount of undertaking is insufficient, counsel should explain why the amount is insufficient, include an estimate of the amount that will be sufficient, and argue the reasons therefor [*see Code Civ. Proc. § 995.930(a)*]. If the ground for objection is the insufficiency of a personal surety, counsel should explain how the surety does not meet the qualifications set out in *Code Civ. Proc. § 995.510* and may refer to the affidavit of qualifications that each personal surety must submit [*see Code Civ. Proc. § 995.520*]. If counsel objects to the sufficiency of an admitted surety insurer, he or she should explain the reasons why the surety insurer is not sufficient, for example, because the certificate of authority of the surety has been revoked and not renewed [*see Code Civ. Proc. § 995.650(a)*]. An objection made on this ground must be accompanied by a certificate by the county clerk and an affidavit stating facts that establish the insufficiency of the insurer [*see Code Civ. Proc. § 995.650(a), (b)*]. Furthermore, if the objection is made on any of the aforementioned grounds, counsel should attach affidavits or declarations supporting any factual issues raised in the motion.

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2-23 California Points & Authorities § 23.31

§ 23.31 Supporting Motion for Recovery of Damages for Wrongful Attachment [Code Civ. Proc. §§ 490.010, 490.020, 996.440]--By Defendant [Code Civ. Proc. §§ 996.410, 996.430, 996.460]--General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN SUPPORT OF MOTION FOR RECOVERY
vs.	)	OF DAMAGES FOR WRONGFUL ATTACHMENT
	)	[*Code Civ. Proc. §§ 490.020, 996.440*]
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Dept.: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

THE DEFENDANT SHOULD RECOVER DAMAGES PROXIMATELY CAUSED BY THE WRONGFUL ATTACHMENT AND ALL COSTS AND EXPENSES, INCLUDING ATTORNEY'S FEES, REASONABLY EXPENDED IN DEFEATING THE ATTACHMENT WHEN _____ [THE ATTACHMENT WAS LEVIED UNDER A WRIT OF ATTACHMENT *or* A PROTECTIVE ORDER WAS SERVED]
_____ [ON PROPERTY EXEMPT FROM ATTACHMENT *or* IN AN ACTION IN WHICH
_____ (AN ATTACHMENT WAS NOT AUTHORIZED *or* PLAINTIFF DID NOT RECOVER

JUDGMENT)].

A. Recovery of Damages for Wrongful Attachment. A defendant may recover damages for wrongful attachment by motion made in the trial court without necessity of an independent action (*see Code Civ. Proc. § 996.440(a)*; *see also Code Civ. Proc. § 490.020*).

B. Liability for Wrongful Attachment. The liability of a plaintiff for causing a wrongful attachment includes all damages proximately caused to the defendantby the wrongful attach ment, and all costs and expenses, including attorney's fees, reasonably expended in defeating the attachment (*Code Civ. Proc. § 490.020(a)(1), (2)*).

C. Liability Limited to Amount of Undertaking. The liability of a plaintiff for wrongful attachment pursuant to *Section 490.010 of the Code of Civil Procedure* is limited by the amount of the undertaking (*Code Civ. Proc. § 490.020(b)*).

[*EITHER*]

D. Action in Which Attachment Unauthorized. A wrongful attachment consists of the _____ [levy under a writ of attachment *or* service of a protective order] in an action in which attachment is not authorized (*Code Civ. Proc. § 490.010(a)*).

[*OR*]

D. Plaintiff's Failure to Recover Judgment. A wrongful attachment consists of the _____ [levy under a writ of attachment *or* service of a protective order] in an action in which the plaintiff does not recover judgment (*Code Civ. Proc. § 490.010(b)*).

[*OR*]

D. Levy on Property Exempt From Attachment. A wrongful attachment consists of the levy of exempt property under a writ of attachment obtained ex parte _____ [pursuant to *Sections 484.510-484.530 of the Code of Civil Procedure or* pursuant to *Section 485.010 of the Code of Civil Procedure*], unless the plaintiff shows that he or she reasonably believed that the property attached was not exempt from attachment (*Code Civ. Proc. § 490.010(c)*).

[*Optional*] **E. Joinder of Sureties.** The defendant may join in his or her motion for recovery of damages for wrongful attachment the sureties on an undertaking for wrongful attachment liability, and any judgment of liability binds the plaintiff and sureties jointly and severally (*see Code Civ. Proc. §§ 996.430(a), 996.460(a)*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities is a general form which may be submitted in support of a motion for damages for wrongful attachment if the attachment was wrongful under *Code Civ. Proc. § 490.010*.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should state facts showing that the attachment was wrongful under *Code Civ. Proc. § 490.010* and should discuss the damages proximately caused by the wrongful attachment and the costs and expenses reasonably expended in defeating the attachment [*see Code Civ. Proc. § 490.020(a)(1), (2)*]. Since the action is on an undertaking filed by plaintiff pursuant to *Code Civ. Proc. § 489.210*, the Bond and Undertaking Law (*Code Civ. Proc. §§ 995.010-996.560*) governs any subsequent action on the undertaking [*see Code Civ. Proc. §§ 995.040(a), 996.410-996.495*]. Therefore, counsel is advised to consult this law in addition to the law regarding wrongful attachments when moving for the recovery of damages and costs in an action involving a wrongful attachment [*see Code Civ. Proc. §§ 490.010-490.060*].

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2-23 California Points & Authorities § 23.32

§ 23.32 Supporting Defendant's Application to Vacate or Stay Attachment--Action Against Service Member [Mil. & Vet. Code § 403(c)(2)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*]	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN SUPPORT OF APPLICATION TO VACATE
vs.	)	OR STAY ATTACHMENT AGAINST SERVICE
_____ [*name*]	)	MEMBER
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

AN ATTACHMENT ISSUED AGAINST A SERVICE MEMBER MAY BE VACATED OR STAYED.

A. Stay of Attachment for Service Members. In any action against a service member, before or during the period of the service, or within 60 days thereafter, the court may vacate or stay any attachment (*Mil. & Vet. Code § 403(c)(2)*).

B. "Service Members" Defined. "Service members" include officers and enlisted members of the National Guard called or ordered into active state service by the Governor or into active federal service by the President (*Mil. & Vet. Code § 400(a)(1)*). "Service members" also include reservists of the United States Military Reserve who have been

called to full-time active duty (*Mil. & Vet. Code § 400(a)(2)*).

C. Court's Authority. The court must grant the stay upon application by the service member or some person on his or her behalf (*Mil. & Vet. Code § 403(c)*). The court may deny the motion only if in the opinion of the court the defendant's ability to comply with the order entered or sought is not materially affected by reason of his or her military service (*Mil. & Vet. Code § 403(c)*).

D. Length of Stay. A stay of attachment ordered by any court may be ordered for the period of military service and three months thereafter or any part of that period, and subject to those terms as may be just, including terms with respect to payment in installments of those amounts at those times as the court may fix (*Mil. & Vet. Code § 403(d)*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be used to support a defendant's application to stay or vacate an attachment because the defendant is a service member pursuant to *Military & Veterans Code § 403(c)(2)*.

Counsel should add argument linking the points in this form with the facts of his or her case. In this instance, for example, counsel may argue that the defendant's ability to comply with the order entered or sought has been materially affected by reason of his or her military service (*see Mil. & Vet. Code § 403(c)*).

In addition, it is advisable for counsel to attach affidavits or declarations which support any factual issue raised in the application. For further legal background, research guides, and forms relating to affidavits and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* (Matthew Bender).

For related legal background, research and procedural guides, and forms of declarations in support of this application, see California Forms of Pleading and Practice, Ch. 62, *Attachment* (Matthew Bender).

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2-23 California Points & Authorities § 23.33

§ 23.33 Reply to Notice of Opposition to Plaintiff's Application for Right to Attach Order [Code Civ. Proc. § 484.060(c)]--Action Based on Quasi-Contract

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff	)	IES IN REPLY TO NOTICE OF OPPOSITION TO
vs.	)	RIGHT TO ATTACH ORDER
_____ [*name*],	)	[*Code Civ. Proc. § 484.060(c)*]
Defendant	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

AN ATTACHMENT MAY BE ISSUED WHERE PLAINTIFF'S ACTION IS BASED ON QUASI-CONTRACT.

A. Reply to Defendant's Notice of Opposition. A plaintiff may file and serve a reply to defendant's notice of opposition on the opposing party two court days prior to the date set for the hearing (*Code Civ. Proc. § 484.060(c)*).

B. Contracts Implied in Law. Where plaintiff's action is based on a quasi-contract, that is, on a promise implied by

law, the plaintiff may have a writ of attachment (*McCall v. Superior Court (1934) 1 Cal. 2d 527, 533, 36 P.2d 642* ; *Goldstein v. Barak Construction (2008) 164 Cal. App. 4th 845, 853-854, 79 Cal. Rptr. 3d 603*).

[*Optional*] **C. Failure of Consideration.** Where there has been a total failure of consideration as to one party, the law implies a promise on the part of the other to repay what has been received by him/her under the contract; and in such a case an attachment, even though there was no rescission by plaintiff, will lie (*Bennett v. Superior Court (1933) 218 Cal. 153, 162, 21 P.2d 946*).

[*Optional*] **D. Waiver of Tort.** Where the facts show _____ [a misappropriation of funds *or* that personal property was wrongfully converted *or* fraud *or* misappropriation of funds by agent in breach of his/her fiduciary duty to his/her principal *or state other facts showing tortious conduct in which law implies promise to pay money*], one may waive the tort and sue on an implied contract for money had and received. Such an action, although based on tort, is one ex contractu in which the plaintiff may have a writ of attachment (*Hill v. Superior Court (1940) 16 Cal. 2d 527, 530-531, 106 P.2d 876* (misappropriation of funds); *Bank of America Nat. Trust & Sav. Ass'n v. Hill (1937) 9 Cal. 2d 495, 499-500, 71 P.2d 258* (conversion); *McCall v. Superior Court (1934) 1 Cal. 2d 527, 538-540, 36 P.2d 642* (fraud); *Arcturus Mfg. Corp. v. Rork (1961) 198 Cal. App. 2d 208, 213, 17 Cal. Rptr. 758* (breach of fiduciary duty)).

[*Optional*] **E. Recovery of Funds Collected From Third Persons.** A contract implied in law, qualifying as a basis for attachment, is not confined to instances where one seeks to get back what he/she has paid out under circumstances permitting a rescission, but also includes instances wherein the defendant is in possession of funds collected by him/her from third persons for which he/she is under a legal duty to account to the plaintiff (*Samuels v. Superior Court (1969) 276 Cal. App. 2d 264, 267, 81 Cal. Rptr. 216* [decided under former Code Civ. Proc. § 537(1), now *Code Civ. Proc. § 483.010(a)*]).

[*Optional*] **F. Action Based on Judgment.** An action based on a judgment is an action based on a contract, since the judgment becomes a debt which the judgment debtor is obligated to pay and the law implies a contract on his part to pay it (*Minor v. Minor (1959) 175 Cal. App. 2d 277, 279, 345 P.2d 954*).

[*Optional*] **G. Establishment of Tort Immaterial.** It is immaterial that one may have to establish a tort in order to arrive at the contract implied in law on which the attachment is based (*Samuels v. Superior Court (1969) 276 Cal. App. 2d 264, 268, 81 Cal. Rptr. 216* ; *Klein v. Benaron (1967) 247 Cal. App. 2d 607, 609-610, 56 Cal. Rptr. 5* [decided under former Code Civ. Proc. § 537(1), now *Code Civ. Proc. § 483.010(a)*]).

[*Optional*] **H. Joinder of Contract Count With Other Counts.** Joinder of a contract count with other counts claiming damages, which are unliquidated, or which sound in tort, does not militate against a party's right to an attachment on the contract count within the attachment statute (*Samuels v. Superior Court (1969) 276 Cal. App. 2d 264, 267, 81 Cal. Rptr. 216* [decided under former Code Civ. Proc. § 537(1), now *Code Civ. Proc. § 483.010(c)*]).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted by counsel for plaintiff in opposition to a defendant's notice of opposition which opposes plaintiff's application for a right to attach order on the ground that plaintiff's action against defendant is based on an express or implied contract as required by *Code Civ. Proc. § 483.010(a)*.

This memorandum, however, should be used with caution in the light of the decision in *Gill v. De Sanz (1975) 52 Cal. App. 3d 457, 466-467, 125 Cal. Rptr. 384* . The court there held that under former Code Civ. Proc. § 537.1, an interim section of the attachment law enacted in 1972, a plaintiff could not frame his or her grievance in the form of a common count based on a fictitious promise in order to have an attachment issue. However, the Legislature, in enacting former Code Civ. Proc. § 537.1, deleted the reference to contracts "express or implied" in former Code Civ. Proc. § 537(1), in force prior to 1972. Thus, it would appear that this holding does not apply to present *Code Civ. Proc. § 483.010(a)*, since this section specifically retains the language in former Code Civ. Proc. § 537(1) requiring attachments to issue only in actions on contracts, express or implied.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law raised. In addition, counsel should attach affidavits or declarations which support any factual issues raised in opposing defendant's notice of opposition [*see Code Civ. Proc. § 484.060(a)* (affidavits supporting any factual issues raised as required to accompany defendant's notice of opposition)].

[i] Related Uses

With appropriate modifications, these points and authorities may be submitted in opposition to a defendant's notice of motion for an order to set aside a right to attach order, quash a writ of attachment, and release property levied on pursuant to the writ where defendant's property has been attached pursuant either to a writ issued ex parte under *Code Civ. Proc. §§ 485.010-485.540* [*see Code Civ. Proc. § 485.240*] or to a writ issued ex parte under *Code Civ. Proc. §§ 492.010-492.090* (nonresident attachment) [*see Code Civ. Proc. § 492.050*].

In addition, it should be noted that, although the code does not require points and authorities to accompany a plaintiff's application for a right to attach order and writ of attachment under *Code Civ. Proc. § 484.010* in a notice hearing procedure pursuant to *Code Civ. Proc. §§ 484.010-484.110*, local court rule or custom may require points and authorities in support of any legal issues raised to accompany the application. In such a case, these may also be submitted in support of such an application where plaintiff's claim is based on quasi-contract.

[3] Discussion of Authorities

[a] Contracts Implied in Law

In ***McCall v. Superior Court*** *(1934) 1 Cal. 2d 527, 36 P.2d 642* , the trial court gave its decree, as prayed for by plaintiffs, for restoration of the consideration plaintiffs paid to defendants following the court's confirmation of plaintiffs' rescission of their contract to purchase land with defendants. The rescission had been based on fraudulent representations on material matters inducing the purchase. An attachment had been issued in the action, and, after the trial court gave its judgment, one defendant sought a writ of mandate to compel the trial court to discharge the attachment. Although the Supreme Court granted the requested relief conditioned on the failure of plaintiffs to show that their security had become valueless, since plaintiffs failed to make such a showing in the trial court, the Court held that the action before it was of the type in which an attachment could issue. The Court stated the basic rule that, where a party to an executory contract parts with money or goods as the result of fraudulent representations as to material elements of the transaction, he or she has an election of remedies, one of which is to waive the tort, rescind the contract, and sue in assumpsit, on the promise implied by law, for a return of the consideration paid. In such a case, where

nothing has been received, the plaintiff may sue on the common counts. In turning to the language of former Code Civ. Proc. § 537(1) [*now Code Civ. Proc. § 483.010(a)*] permitting attachments to issue only on contracts, express or implied, the Court stated that there are at least three classes of promises to pay--an express promise, a promise implied from the facts of the case, and a promise implied by law, and that this latter promise was ex contractu in its nature. The Court concluded that, so far as attachment was concerned, it could not see any distinctions among the three promises. Although there was good reason not to allow a plaintiff to have an attachment where the action sounded n damages, since the value of the property encumbered may be out of all proportion to the sum finally recovered, in assumpsit, where the tort is waived, the sum sued for is the benefit unjustly retained by the defendant, not the damage to the plaintiff, usually more uncertain in amount.

In ***Goldstein v. Barak Construction*** *(2008) 164 Cal. App. 4th 845, 853-854, 79 Cal. Rptr. 3d 603* , the plaintiffs and the defendants entered into a construction contract to remodel the plaintiffs' home. The defendants represented to the plaintiffs that they were licensed contractors. The defendants were not licensed contractors. They performed shoddy work and abandoned the job before it was completed. The plaintiffs sued for fraud, negligent misrepresentation, concealment, negligence, breach of implied warranties, breach of contract and unfair business practices, and pursuant to the Contractors' State License Law, *Bus. & Prof. Code § 7000 et seq.* (CSLL), sought recovery of money paid to an unlicensed contractor. After the defendants filed their verified answer, the plaintiffs filed an application for a right to attach order and order for issuance of a writ of attachment against the defendants, which the trial court granted.

On appeal, the defendants argued that the claim was not one upon which attachment can be issued because the plaintiffs sought attachment based upon a statute, the CSLL, rather than upon an express or implied contract. The court of appeal discussed the background and purpose of the CSLL and held that a claim brought under the CSLL against an unlicensed contractor may form the basis for a right to attach order because the claim is based on an agreement for the performance of services (*164 Cal. App. 4th 845, 853)* .

[b] Failure of Consideration

In ***Bennett v. Superior Court*** *(1933) 218 Cal. 153, 21 P.2d 946* , plaintiffs obtained a writ of attachment in their action to rescind an agreement with defendants for the purchase of a certain piece of land and for return of the consideration paid for the land. The basis for plaintiffs' rescission was the defendants' failure to deliver the land. One defendant moved for the dissolution of the writ on the ground that the court was without jurisdiction to issue the attachment, since the complaint and prayer invoked the aid of the equity side of the court. Based on the announced intention of the trial court to dissolve the writ,plaintiffs sought a writ of prohibition which the Supreme Court granted. In pertinent part, the Court stated that the fact that plaintiffs prayed for a rescission of the agreement did not make the case exclusively one of equitable cognizance. Plaintiffs, by their act and in accordance with statutory procedures, had extinguished the contract and, thus, there was no occasion to invoke the equity side of the court. However, once the rescission was completed, plaintiffs were entitled to the aid of the court in securing to themselves the results of their rescission. The Court stated that, in such a case, it is settled law that, where the consideration has totally failed, an implied promise to repay the money paid under the rescinded agreement arises. An action brought for this repayment is an action ex contractu, and, thus, an attachment in such an action is proper.

[c] Waiver of Tort

In ***Hill v. Superior Court*** *(1940) 16 Cal. 2d 527, 530-531, 106 P.2d 876* , petitioner sought a writ of prohibition to restrain the trial court from dissolving a writ of attachment which had been issued to petitioner in his action as administrator of an estate to recover money from his predecessor who was alleged to have embezzled the money from the estate. The principal contention of the defendant in opposing the issuance of the writ was that the complaint did not state a cause of action in contract on which an attachment could issue. Based on the allegations of the complaint, the Supreme Court disagreed and granted the writ. The Court held that by the first count of the complaint, since petitioner charged that defendant converted property to his own use, petitioner stated a cause of action ex delicto which could not

be the basis of an attachment. However, in the other counts of petitioner's complaint, there was alleged an implied contract for money had and received. The Court stated that petitioner was permitted to plead thus in the form of common counts since, where the facts show a misappropriation of funds, a plaintiff may waive the tort and sue on an implied contract for money had and received. Such an action, although based on the tort of embezzlement, is one ex contractu, in which petitioner was permitted to have a writ of attachment.

In ***Bank of America Nat. Trust & Sav. Ass'n v. Hill*** *(1937) 9 Cal. 2d 495, 499-500, 71 P.2d 258* , plaintiff sought to foreclose its trust deed on property which previously had been attached and executed upon in an action against the person who had executed the trust deed. Plaintiff contended that the judgment rendered in the prior action was for the recovery of damages only in an action in tort, and that, thus, the attachment was extinguished or discharged by the judgment. The pertinent causes of action stated in the complaint in the prior action were for conversion of personal property and to recover a certain indebtedness, both of which were based on the same transaction. After a trial on the merits, the trial court gave judgment for defendant.

Plaintiff appealed, and the Supreme Court affirmed. The Court held that, based on a reading of the trial court's findings and judgment in the prior action, there was no doubt but that that action had been in assumpsit and that the court had given judgment to plaintiff on his debt. The Court stated that, where personal property is wrongfully converted, the owner thereof may sue ex delicto for the wrong, or may waive the wrong and sue either for the value of property converted or for the money had and received. Where the complaint is thus framed on the theory of an implied contract, court is not without jurisdiction to issue an attachment.

The facts of ***McCall v. Superior Court*** *(1934) 1 Cal. 2d 527, 538-540, 36 P.2d 642* , are discussed in *§ 23.33[3][a]*. In holding that an attachment may issue in an action on a common count for money had and received where the money was obtained by fraudulent representations, the Court overruled the decision in *Stone v. Superior Court (1931) 214 Cal. 272, 4 P.2d 777* . In that case the plaintiff had made a proper rescission and brought an action in assumpsit to secure a return of consideration paid for worthless stock received based on the fraudulent representations of the defendant. The Court in *Stone* held that the plaintiff was not entitled to an attachment. In overruling this decision, the Court in *McCall* stated that it would be perplexing to have the right of an attachment in all other quasi-contract cases and to deny it in cases of fraud. Since the law implies the quasi-contractual promise and affords an added remedy if the injured party elects to follow it, the action is not on the fraud, failure of consideration, or duress, but on the quasi-contract imposed by law.

In ***Arcturus Mfg. Corp. v. Rork*** *(1961) 198 Cal. App. 2d 208, 17 Cal. Rptr. 758* , plaintiff sought in the first cause of action of his complaint to recover secret profits and kickbacks which defendant had received as an employee of plaintiff and in breach of his fiduciary duty to plaintiff. In the second cause of action, plaintiff alleged that defendant received to and for the use and benefit of plaintiff certain sums of money. Defendant moved to dissolve an attachment which had been issued to plaintiff, which motion the trial court denied. On defendant's appeal, the court of appeal affirmed. Defendant contended on appeal that (1) the second cause of action based on a common count would not support an attachment if the first cause of action was in tort, and (2) that the gravamen of the first cause of action was in tort. The court held, however, that the gist of the action as pleaded was in quasi-contract to recover property belonging to plaintiff. Although fraud was involved, and there was alleged a breach of a fiduciary obligation, the gravamen of the complaint was to recover against the defendant agent on the promise implied by law to pay to the plaintiff principal the specific secret profits and kickbacks received. This suit on the promise to disgorge secret profits and kickbacks was ex contractu and, thus, supported the attachment.

[d] Recovery of Funds Collected From Third Persons

In ***Samuels v. Superior Court*** *(1969) 276 Cal. App. 2d 264, 81 Cal. Rptr. 216* , plaintiff's complaint alleged 11 separate causes of action. In pertinent part, thecomplaint sought to quiet title to certain real property based on defendants' breach of contract, and of certain fiduciary obligations, to rescind a deed on the ground of fraud and set

forth a common count for money had and received by defendants in the form of rent while defendants were in possession of the property. One defendant moved to quash a writ of attachment which had been issued plaintiffs. On the trial court's denial of the motion, the defendant sought a writ of mandate to compel the trial court to dissolve the writ. In denying the issuance of the writ of mandate, the court of appeal held that the action was a proper one in which to issue an attachment. The court stated that the complaint, along with the declaration of the attorney for plaintiffs, set forth an implied contract for the payment of money within the meaning of former Code Civ. Proc. § 537(1) [*now Code Civ. Proc. § 483.010(a)*]. The joinder of the contract count with other counts claiming damages which were unliquidated or which sounded in tort did not militate against plaintiff's right to an attachment on the contract count. Moreover, a contract implied in law, qualifying as a basis for attachment is not confined to instances where one seeks to get back what had been paid out under circumstances permitting rescission. It also includes instances wherein the defendant is in possession of funds collected from third persons for which he or she is under a legal duty to account to the plaintiff.

It should be noted that plaintiffs' attachment consisted of a garnishment of the rental monies payable to petitioner but alleged to be owed to plaintiffs. Although the court held this was a proper levy, since the defendants' right to the fund garnished was such that they could have instituted an action for debt at common law against the holder of the fund, the court stated that the more appropriate procedure for impounding the rentals pendente lite to assure their application in conformity with any final judgment to be rendered would be through a receiver.

[e] Action Based on Judgment

Minor v. Minor *(1959) 175 Cal. App. 2d 277, 345 P.2d 954* , involved the question of whether a writ of attachment may issue for unpaid installments in a property settlement agreement. Plaintiff's complaint alleged in pertinent part that in consideration for plaintiff's waiver of her claim to alimony, defendant was to pay a certain sum of money on an installment basis; that plaintiff, thereafter, secured an interlocutory decree of divorce which incorporated plaintiff's agreement with defendant; and that defendant failed to make the payments and repudiated the agreement. After a writ of attachment was issued to plaintiff, defendant moved to dissolve it on the ground that the decree did not incorporate the agreement and that the complaint showed that only a small portion of the amount claimed was due. On defendant's appeal from the trial court's denial of the motion, the court of appeal affirmed. The court stated that, although it was unclear if the divorce court decree awarding plaintiff the sum of money sued upon was based on plaintiff's agreement with defendant, this was immaterial, since if the contract were a part of the decree, it was well settled that an action based on a judgment is an action based on a contract. The judgment becomes a debt which the judgment debtor is obligated to pay and the law implies a contract on the debtor's part to pay it. Thus, if the agreement was merged in the decree and the attachment was based thereon or if it was based on the agreement itself, an attachment would lie under former Code Civ. Proc. § 537(1) [*now Code Civ. Proc. § 483.010(a)*], providing that an attachment may be had in an action on a contract, express or implied.

[f] Establishment of Tort Immaterial

In ***Samuels v. Superior Court*** *(1969) 276 Cal. App. 2d 264, 81 Cal. Rptr. 216* , the facts of which are discussed in *§ 23.33[3][d]*, the court stated that it was immaterial that one may have to establish a tort in order to arrive at the contract implied in law on which the attachment is based. In support of this rule, the court cited *Klein v. Benaron (1967) 247 Cal. App. 2d 607, 56 Cal. Rptr. 5* , a case in which defendant fraudulently induced plaintiff to part with a large sum of money in return for nearly worthless stock. Plaintiff's complaint was drafted in five counts, the first of which was in fraud, with exemplary damages requested, and the fourth in the form of a common count (money had and received) for the sum of money lent. On defendant's motion, the trial court dissolved a writ of attachment issued to plaintiff, and plaintiff appealed. The court of appeal reversed the trial court, stating that, in the situation before it, the plaintiff had a choice between two causes of action, on one of which an attachment could issue, and the plaintiff had acted upon that one. Although it was beyond question that the first cause of action was one in fraud, a tort, the facts of that tort revealed plaintiff's money going from his hand to defendant's based on defendant's misrepresentations and, thus, presented a case where the law implies a promise on defendant's part to repay it.

It should be noted that the court added that plaintiff, by his election, had possibly elected to have the case tried on the basis of the common count, thereby ending his chances of recovering exemplary damages.

[g] Joinder of Contract Count With Other Counts

This portion of *Samuels v. Superior Court (1969) 276 Cal. App. 2d 264, 267, 81 Cal. Rptr. 216* , is discussed in *§ 23.33[3][d]*.

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2-23 California Points & Authorities § 23.34

§ 23.34 Reply to Notice of Opposition to Plaintiff's Application for Right to Attach Order [Code Civ. Proc. § 484.060(c)]--Proceeding to Confirm Arbitration Award [Code Civ. Proc. § 1285]

[1] FORM

[*Caption. See § 23.33.*]

AN ATTACHMENT MAY ISSUE ON THE PETITION OF A PLAINTIFF TOCONFIRM AN ARBITRATION AWARD.

A. Reply to Defendant's Notice of Opposition. [*See § 23.33, Paragraph A.*]

B. Effect of Arbitration Award. An arbitration award which has not been confirmed or vacated has the same force and effect as a contract in writing between the parties to the arbitration (*Code Civ. Proc. § 1287.6*).

C. Attachment Permissible in Proceeding to Confirm Arbitration Award. Upon the petition for confirmation of an arbitration award pursuant to *Section 1285 of the Code of Civil Procedure*, a plaintiff is entitled to the issuance of an attachment to secure the satisfaction of any judgment which might be entered on the award (*Ross v. Blanchard (1967) 251 Cal. App. 2d 739, 743-744, 59 Cal. Rptr. 783*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted by counsel for plaintiff in opposition to defendant's notice of opposition which opposes the plaintiff's application for a right to attach order on the ground that the action is not one based on a contract, express or implied as required by *Code Civ. Proc. § 483.010(a)*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law raised. In addition, counsel should attach affidavits or declarations which support any factual issues raised in opposing defendant's notice of opposition [*see Code Civ. Proc. § 484.060(a)* (affidavits supporting factual issues raised as required to accompany defendant's notice of opposition)].

[i] Related Uses

With appropriate modifications, these points and authorities may be submitted in other attachment proceedings. For a discussion of these related uses, see *§ 23.33[2]*.

[3] Discussion of Authorities

[a] Attachment Permissible in Proceeding to Confirm Arbitration Award

Ross v. Blanchard *(1967) 251 Cal. App. 2d 739, 59 Cal. Rptr. 783* , was an appeal from an order discharging an attachment entered by the trial court at the time of its confirmation of an arbitration award. The writ had been issued to plaintiffs after commencement of their action for breach of contract and before the filing of defendant's affirmative defense of a demand for arbitration and subsequent stay of the action until disposition of the arbitration. The order discharging the attachment was apparently based on the defendants' argument that, since plaintiffs were bound to arbitrate under the contract, their filing of the lawsuit was wrongful, and they should not be allowed to profit from their own wrong. The court of appeal reversed the trial court, concluding that provisional remedies, in general, are available in whole or in part to a party which has contracted to arbitrate disputes which may thereafter arise. The court stated, as part of its reasoning, that plaintiff was not precluded by arbitration law from initially resorting to the courts. Therefore, since the plaintiffs complied with arbitration and obtained an award, they became eligible to secure confirmation of the award and entry of judgment. At this stage, by virtue of *Code Civ. Proc. § 1287.6* [*see* Paragraph A of this form], plaintiffs occupied the position of litigants seeking judgment on a written contract, who would have available for their security various provisional remedies, including attachment.

It should be noted that the court recognized the right of defendants at any time from the stay of the action by the trial court to apply for a vacation of the attachment. However, by itself the stay of the action kept all matters relating to the attachment in status quo.

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2-23 California Points & Authorities § 23.35

§ 23.35 Reply to Notice of Opposition to Plaintiff's Application for Right to Attach Order [Code Civ. Proc. § 484.060(c)]--Action Is on Claim Arising out of Defendant's Trade, Business, or Profession [Code Civ. Proc. § 484.010(c)]

[1] FORM

[*Caption. See § 23.33.*]

AN ATTACHMENT MAY ISSUE ON A CLAIM ARISING OUT OF THE CONDUCT OF A BUSINESS INVOLVING AN ACTIVITY ENGAGED IN FOR PROFIT WITH FREQUENCY AND CONTINUITY IN CASES IN WHICH THE ISSUANCE OF THE ATTACHMENT IS OTHERWISE CONSISTENT WITH THE PURPOSE OF THE ATTACHMENT LAW.

A. Reply to Defendant's Notice of Opposition. [*See § 23.33, Paragraph A.*]

B. Individual Engaged in Trade, Business, or Profession. The conduct of a business by an individual for the purpose of permitting an attachment in an action against such individual encompasses almost any activity engaged in for profit with frequency and continuity when such interpretation is consistent with the purpose of the attachment law (*Advance Transformer Co. v. Superior Court (1974) 44 Cal. App. 3d 127, 139, 118 Cal. Rptr. 350* [construing former Code Civ. Proc. § 537.1, requiring individual defendant to be engaged in trade or business]).

[*Optional*] **C. Activities of Guarantor.** Where the sum total of the factual circumstances justifies the conclusion that a guarantor occupied himself/herself to a substantial degree and on a continuing basis in promoting his/her own profit through the providing of credit or management to the primary obligor, a guarantee executed in the course of such activity may properly be considered an obligation arising out of the conduct of the guarantor's business (*Advance Transformer Co. v. Superior Court (1974) 44 Cal. App. 3d 127, 144, 118 Cal. Rptr. 350* [construing former Code Civ. Proc. § 537.1, requiring individual defendant to be engaged in trade or business]).

[*Optional*] **D. Personal Obligation for Partnership Business.** An attachment against an individual is proper in an

action on an obligation signed in a personal capacity, if the proceeds of the obligation were used in the business of a general partnership in which he or she is a partner (*Security Pacific National Bank v. Matek (1985) 175 Cal. App. 3d 1071, 1073-1077, 223 Cal. Rptr. 288*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted by counsel for plaintiff in opposition to an individual defendant's notice of opposition which opposes plaintiff's application for a right to attach order on the ground that plaintiff's claim against defendant does not arise out of his or her conduct of a trade, business, or profession.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law raised. In addition, counsel should attach affidavits or declarations which support any factual issues raised in opposing defendant's notice of opposition [*see Code Civ. Proc. § 484.060(a)* (affidavits supporting factual issues raised in defendant's notice of opposition as required to accompany such notice)].

[i] Related Uses

With appropriate modifications, these points and authorities may be submitted in other attachment proceedings. For a discussion of these related uses, see *§ 23.33[2]*.

[3] Discussion of Authorities

[a] Individual Engaged in Trade, Business, or Profession

In ***Advance Transformer Co. v. Superior Court*** *(1974) 44 Cal. App. 3d 127, 118 Cal. Rptr. 350* , plaintiff brought suit against Supreme Lighting, a corporation, and Joseph and Margery Shapiro on a note representing the amount due on account resulting from a series of business transactions between plaintiff and Supreme Lighting. The note was executed by the Shapiros both on behalf of the corporation and individually, as guarantors of the corporate obligation. Plaintiff applied for an attachment in a noticed hearing under the interim attachment law (effective 1972-1976). The trial court decided that in the absence of any alter-ego allegations, a writ of attachment could not be issued on any attachable assets of the Shapiros since, otherwise, the requirements of former Code Civ. Proc. § 537(c) [*now Code Civ. Proc. § 483.010(c)*], limiting attachments in actions against individual defendants to attachable assets of individuals engaged in a trade or business, would not be met. Therefore, the application was granted only insofar as it affected attachable assets of the corporation. Plaintiff then sought a writ of mandamus to compel the trial court to grant a new hearing on his application for an attachment against the Shapiros. The court of appeal granted the writ and held that the trial court had adopted an erroneous standard for determining the availability of the attachment remedy, since to require the establishment of identify between the defendant guarantor and the primary obligor on the basis of the alter-ego doctrine resulted in the failure to find facts which properly governed the determination of whether the Shapiros were engaged in

a trade or business. The court of appeal stated that this determination required the trial court to find first whether the Shapiros were involved in any activity which could be considered a "business." Based on prior California decisions, the court defined a "business" as embracing any activity engaged in for profit or for gain. Secod, the trial court must find whether the Shapiros were "engaged in business," which the court stated to be generally held to imply a business activity of a frequent or continuous nature. This latter definition was based on the court's examination of a number of California decisions, interpreting various business license acts, and federal decisions, interpreting the income tax and bankruptcy laws. Thus, the proper standard for determining whether a defendant guarantor or accommodation maker is engaged in business so as to make issuable an attachment against him orher is the application of these general principles as stated in these authorities, giving due consideration to the purposes of the attachment law. If the defendant is engaged generally in the business of guaranteeing for consideration the debts of others, that is, lending credit, any liability incurred as a result is a debt arising out of the conduct of his or her business. At the opposite extreme, a retired person, with no financial stake in the success of the primary obligor, cannot properly be held engaged in business solely by virtue of an isolated instance in which he or she guarantees a commercial obligation out of friendship and without compensation. Cases falling between these extremes will require the exercise of judgment on a case-to-case basis to determine whether the defendant's activity with respect either to the extension of credit generally, or to the business of the primary obligor, is such as to justify the conclusion that the guarantee of the primary obligor's debt sued upon is part and parcel of an activity which occupies the time, attention, and effort of the guarantor for the purpose of livelihood or profit on a continuing basis. Finally, in cases involving guarantees by principal shareholders of closely held corporations, if the sum total of the circumstances justifies the conclusion that the guarantor occupied himself or herself to a substantial degree and on a continuing basis in the business of the primary obligor, a guarantee executed in the course of that activity may properly be considered an obligation arising out of the conduct of the guarantor's business.

It should be noted that the court limited the scope of former Code Civ. Proc. § 537(c) by authorizing attachments in actions against individual defendants to those actions arising out of the conduct of the individual's trade, business, or profession. This limitation has been codified in *Code Civ. Proc. § 483.010(c)*. It would appear, therefore, that *Advance Transformer* is good authority for the necessary factual findings which must be made in determining whether an attachment is authorized under *Code Civ. Proc. § 483.010(c)* in an action against an individual.

[b] Activities of Guarantor

Advance Transformer Co. v. Superior Court (1974) 44 Cal. App. 3d 127, 118 Cal. Rptr. 350 , is discussed in *§ 23.35[3][a]*.

[c] Personal Borrowing for Loan to Partnership

Security Pacific National Bank v. Matek *(1985) 175 Cal. App. 3d 1071, 223 Cal. Rptr. 288* , was an action on a note signed by defendant as an individual. Defendant earned his livelihood as a real estate broker and claimed he was only a passive investor in the general partnership to which he reloaned the proceeds. Further, he contended that even though the partnership agreement specified that the partnership was a general one, it was in fact a limited one because the agreement delegated day-to-day management to partners other than defendant. Plaintiff had made secured loans to the partnership. The partnership could not meet installment payments on the secured loans, and plaintiff refused to extend it unsecured credit. The managing partner asked defendant to borrow sufficient funds in his own name and reloan them to the partnership. Plaintiff conditioned the loan to defendant on the immediate transmittal of the loan proceeds to the partnership. The trial court granted a prejudgment attachment pursuant to *Code Civ. Proc. § 483.010(c)*, and defendant appealed.

The court of appeal affirmed. The court noted that in the absence of substantial compliance with *Corp. Code § 15502*, a general partnership is formed and all partners are treated as general partners, even if day-to-day management is delegated to less than all of them (*175 Cal. App. 3d 1071, 1075-1076)* . Each partner is an agent of the partnership and his or her actions will bind the partnership even if he or she signs as an individual. There was no dispute here that the

loan proceeds were used in the partnership business. *Code Civ. Proc. § 483.010(c)* makes no distinction between those sued individually as partners and those sued as sole proprietors (*175 Cal. App. 3d 1071, 1076-1077)* .

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2-23 California Points & Authorities § 23.36

§ 23.36 Reply to Notice of Opposition to Plaintiff's Application for Right to Attach Order [Code Civ. Proc. § 484.060(c)]--Action Against Guarantor Who by Express Contract Has Waived All Rights in Security

[1] FORM

[*Caption. See § 23.33.*]

AN ATTACHMENT MAY BE ISSUED IN AN ACTION ON A SECURED OBLIGATION BROUGHT AGAINST A GUARANTOR OF THAT OBLIGATION IF THE GUARANTOR HAS WAIVED BY EXPRESS CONTRACT ALL RIGHTS IN THE SECURITY.

A. Reply to Defendant's Notice of Opposition. [*See § 23.33, Paragraph A.*]

B. Waiver of Security by Express Contract. When a defendant guarantor waives by contract any and all rights arising out of, or incidental to, the existence of a security given by the defendant debtor and is without limitation, the defendant may not oppose the right of a plaintiff to an attachment on the ground that the obligation sued upon was secured (*Engelman v. Bookasta (1968) 264 Cal. App. 2d 915, 918, 71 Cal. Rptr. 120*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted by counsel for plaintiff in opposition to a defendant's notice of opposition which opposes the plaintiff's application for a right to attach order on the ground that the claim sued upon was secured by an interest in real or personal property arising from an agreement, statute, or other rule of law as provided in *Code Civ. Proc. § 483.010(b)*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law raised. In addition, counsel should attach affidavits or declarations which support any factual issues raised in opposing defendant's notice of opposition [*see Code Civ. Proc. § 484.060(a)* (affidavits supporting factual issues raised in defendant's notice of opposition as required to accompany such notice)].

[i] Related Uses

With appropriate modifications, these points and authorities may be submitted in other attachment proceedings. For a discussion of these related uses, see *§ 23.33[2]*.

[3] Discussion of Authorities

[a] Waiver of Security by Express Contract

In ***Engelman v. Bookasta*** *(1968) 264 Cal. App. 2d 915, 71 Cal. Rptr. 120* , plaintiffs sued defendant on his guaranty of a note for which the primary obligor had executed a trust deed and an assignment of rents as security for the payment of the note. Defendant had waived in a written agreement any right to require the holder of the note to proceed against the maker or to apply any security it may hold, or to proceed to first exhaust any security it may hold. The trial court denied defendant's motion to dissolve an attachment which had been issued to plaintiff. The denial of the motion was on the ground that former Code Civ. Proc. § 537(1) [*now Code Civ. Proc. § 483.010(b)*], limiting attachments to unsecured claims, was inapplicable in view of defendant's waiver. Plaintiff appealed and the court of appeal affirmed the trial court's order. The court interpreted the defendant's waiver as expressing an intention to waive any and all rights arising out of, or incidental to, the existence of the security given by the maker of the note. The waiver was without limitation, and it constituted a contract between the plaintiffs and the defendant that for all purposes the debt of the defendant created by his guaranty was to be considered as unsecured. In light of this interpretation, the court was unable to entertain any argument which stated that plaintiffs' claim was secured since such an argument was relying on rights which defendant had waived (*264 Cal. App. 2d 915, 918)* .

The court, in addition, explicitly rejected the argument in a dictum in the decision in *Lencioni v. Dan (1954) 128 Cal. App. 2d 105, 275 P.2d 101* . The footnote had stated that it could be argued that it would violate the policy of the law to permit a creditor to waive his or her security and sue and attach property of the debtor. However, it should be noted that the plaintiff in *Lencioni* was arguing that, merely by suing on his debt rather than foreclosing on his security, he was waiving his rights in his security and, thus, should be permitted to attach defendant's property. In *Engleman*, the defendant, not the plaintiff, had executed a waiver which was express and in writing (*264 Cal. App. 2d 915, 918)* .

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2-23 California Points & Authorities § 23.37

§ 23.37 Reply to Notice of Opposition to Plaintiff's Application for Right to Attach Order [Code Civ. Proc. § 484.060(c)]--Real Property Securing Claim Sued on Has Become Valueless or Decreased in Value to Less Than Amount Owing [Code Civ. Proc. § 483.010(b)]

[1] FORM

[*Caption. See § 23.33.*]

AN ATTACHMENT MAY ISSUE ON A CLAIM ORIGINALLY SECURED BY REAL PROPERTY IF WITHOUT ANY ACT OF THE PLAINTIFF OR THE PERSON TO WHOM THE SECURITY WAS GIVEN, THE SECURITY HAS BECOME VALUELESS OR DECREASED IN VALUE TO LESS THAN THE AMOUNT THEN OWING ON THE CLAIM.

A. Reply to Defendant's Notice of Opposition. [*See § 23.33, Paragraph A.*]

B. Inadequate Security. An attachment may be issued when the claim was originally secured by an interest in real property arising from an agreement, statute, or other rule of law as provided in *Section 483.010(b) of the Code of Civil Procedure* and, without any act of the plaintiff or the person to whom the security was given, has become either valueless or decreased in value to less than the amount then owing on the claim (*Code Civ. Proc. § 483.010(b)*; *Bank of America v. Salinas Nissan, Inc. (1989) 207 Cal. App. 3d 260, 273, 254 Cal. Rptr. 748*).

C. Security Only as Required to Be Valueless. The requirement that the security be rendered valueless in order to permit an attachment to issue does not mean that the property secured must itself become valueless; it is sufficient if property secured has ceased to have any value as a security (*see Williams v. Hahn (1896) 113 Cal. 475, 477, 45 P. 815* ; *Western Bd. of Adjusters, Inc. v. Covina Pub., Inc. (1970) 9 Cal. App. 3d 659, 672, 88 Cal. Rptr. 293* (decided under former Code Civ. Proc. § 537(1), *now see Code Civ. Proc. § 483.010(b)*)).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted by counsel for plaintiff in opposition to a defendant's notice of opposition which opposes the plaintiff's application for a right to attach order on the ground that the claim sued on is secured by an interest in real property arising from an agreement, statute, or other rule of law as provided in *Code Civ. Proc. § 483.010(b)*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law raised. In addition, counsel should attach affidavits or declarations which support any factual issues raised in opposing defendant's notice of opposition [*see Code Civ. Proc. § 484.060(a)* (affidavits supporting factual issues raised in defendant's notice of opposition as required to accompany such notice)].

[i] Related Uses

With appropriate modifications, these points and authorities may be submitted in other attachment proceedings. For a discussion of these related uses, see *§ 23.33[2]*.

[3] Discussion of Authorities

[a] Inadequate Security

Code Civ. Proc. § 483.101(b) authorizes an attachment, as an exception to the general prohibition on issuance of an attachment on a secured claim, when the security has decreased in value through no fault of the plaintiff. Under these circumstances, the amount to be secured by the attachment must not exceed the lesser of (1) the amount of the decrease, or (2) the difference between the value of the security and the amount then owing on the claim.

In ***Bank of America v. Salinas Nissan, Inc.*** *(1989) 207 Cal. App. 3d 260, 254 Cal. Rptr. 748* , a bank brought an action against defendant car dealerships for breach of "flooring and security" contracts, under which the bank financed defendants' purchase of new cars and defendants agreed to repay the bank from the proceeds once the cars were sold. The agreements were secured by defendants' inventory, among other property. The bank applied for an attachment order under *Code Civ. Proc. § 483.010(b)*, which prohibited any attachment on a claim secured by an interest in real or personal property but made an exception when, without any act of the plaintiff, the security became valueless or decreased in value to less than the amount owing on the claim. Plaintiff submitted a declaration that defendants' security was less than the debt owing and offered evidence of defendants' contract breaches. Plaintiff did not, however, expressly disclaim responsibility for any diminution in the value of its security. The trial court issued the order of attachment and defendants appealed.

The court of appeal affirmed, holding that a plaintiff seeking to attach on an originally secured contract has the burden to prove (1) the security has diminished in value and (2) plaintiff was not responsible for the diminution, but these averments do not need to appear in plaintiff's affidavit in support of the application for attachment (*207 Cal. App. 3d 260, 273)* . In addition, the court held that the trial court was not required to make a specific finding that the security's

value had diminished through no fault of plaintiff because that finding was implied in the court's order and was supported by the evidence (*207 Cal. App. 3d 260, 273-274)* . The court recognized that cases interpreting former Code Civ. Proc. §§ 537, 538 did require that the plaintiff's affidavit aver that the plaintiff had not caused the security to become valueless (*207 Cal. App. 3d 260, 271)* . The court analyzed the conflicting indications in the newer, applicable statutes. On the one hand, (1) the attachment statutes do not expressly require an applicant's affidavit to contain every fact specified elsewhere in the statutes, (2) an application for a right to attach must be supported by an affidavit showing that the plaintiff on the facts presented would be entitled to a judgment on the claim on which the attachment is based (citing *Code Civ. Proc. § 484.030*), and (3) the affidavit should be geared to establishing the probable validity of the plaintiff's claim (citing *Code Civ. Proc. §§ 484.090(a)(2), 481.190*) (*207 Cal. App. 3d 260, 272)* . On the other hand, (1) the application must be executed under oath and must include a statement showing that the attachment is sought to secure recovery on a claim on which an attachment may be issued (citing *Code Civ. Proc. § 484.020(a)*), and (2) plaintiff is required to establish that the claim on which the attachment is based is one on which an attachment may be issued (citing *Code Civ. Proc. § 484.090(a)(1)*) (*207 Cal. App. 3d 260, 272)* . The court looked to other parts of the attachment law to find what claims warrant attachment, "since elated statutory provisions should be harmonized," and said that *Code Civ. Proc. § 483.010* spells out what claims authorize attachment (*207 Cal. App. 3d 260, 272)* . The court further pointed out that under the attachment law, the court will generally evaluate the attachment application based solely on the pleadings and supporting affidavits without taking additional evidence (citing *Code Civ. Proc. § 484.090(d)*) (*207 Cal. App. 3d 260, 272-273)* . Reading these parts of the statute together, the court concluded that it remained the plaintiff's burden to prove that the security's value had diminished through no fault of plaintiff but that it is no longer necessary for the plaintiff's affidavit to contain such averments. Such averments are still prudent, because thetrial court need not consider additional evidence at the attachment application hearing without good cause (*207 Cal. App. 3d 260, 273)* .

Counsel should note that the statute construed by the court in *Bank of America* prohibited issuance of an attachment on a claim secured by personal property. This prohibition has been deleted from *Code Civ. Proc. § 483.010(b).*

[b] Security Only as Required to Be Valueless

In ***Williams v. Hahn*** *(1896) 113 Cal. 475, 45 P. 815* , defendant executed a promissory note for $2,000 secured by collateral security consisting of a quantity of wine. On the defendant's failure to pay the note, plaintiff sold the wine pursuant to his agreement with defendant, and thereafter, commenced this action to recover the amount remaining due on the note. After a writ of attachment was issued to plaintiff, defendant moved to dissolve it, on the ground that the note was originally secured by a pledge of personal property, and that the same had not become valueless. The court denied the motion, and, on defendant's appeal, the Supreme Court affirmed. The Court stated that the language used in former Code Civ. Proc. § 537 [*now Code Civ. Proc. § 483.010(b)*] should not be construed to mean that the property pledged must itself have become valueless before the plaintiff can have an attachment, but rather, that the property pledged has ceased to have any value as a security. That is to say, if the property has been disposed of in accordance with the very terms under which it was given and held as a security, the "security" has ceased to exist, and is therefore valueless (*113 Cal. 475, 477)* .

In ***Western Bd. of Adjusters, Inc. v. Covina Pub., Inc.*** *(1970) 9 Cal. App. 3d 659, 88 Cal. Rptr. 293* , plaintiff brought an action against several defendants on two notes and for money had and received by defendants. Plaintiff obtained one writ of attachment in order to gain protection for collection of judgment on one note. The declaration supporting the attachment recited that the amount of the note was secured but that the security had become valueless. Two defendants moved to quash the writ on the ground that the conceded security had not become valueless. The security consisted of an assignment of copyrights and negatives of publications owned by one defendant and of accounts receivable and general intangibles then owed, or to become owed, to this defendant. After an extensive hearing, the trial court denied the motion after finding that the security had been rendered valueless, or that its worth was incapable of being determined. The defendants appealed and the court of appeal affirmed. In pertinent part, the court stated that the primary issue was whether the evidence supported the finding, implied from the term "rendered valueless," that at least some of

the security had value when given and had become valueless as such at the time the writ of attachment was applied for. It is enough, in answering this question, that part of the security had value. In addition, the degree of worthlessness need only be that for security purposes. In reviewing the trial court's findings, the court found substantial evidence to justify the trial court's conclusion (*9 Cal. App. 3d 659, 672)* .

The rule that the degree of worthlessness need only be that for security purposes has, in effect, been codified in *Code Civ. Proc. § 483.010(b)*, which now permits an attachment to issue on secured claim where the security, without any act of plaintiff or the person to whom the security was given, has decreased in value to less than the amount then owing on the claim.

Counsel should note that the statute construed by the court in *Williams* and *Western Bd. of Adjusters* prohibited issuance of an attachment on a claim secured by personal property. This prohibition, has been deleted from *Code Civ. Proc. § 483.010(b)*.

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Volume 2 Chapters 20-23 ARBITRATION---to---ATTACHMENT
CHAPTER 23 ATTACHMENT
PART II. FORMS

2-23 California Points & Authorities § 23.38

§ 23.38 Reply to Notice of Opposition to Plaintiff's Application for Right to Attach Order [Code Civ. Proc. § 484.060(c)]--Damages Readily Ascertainable and Their Basis for Computation Reasonable and Definite

[1] FORM

[*Caption. See § 23.33.*]

AN ATTACHMENT MAY ISSUE IN AN ACTION ON A CLAIM WHERE THE DAMAGES ARE READILY ASCERTAINABLE BY REFERENCE TO THE CONTRACT AND THE BASIS FOR THE COMPUTATION OF DAMAGES APPEARS TO BE REASONABLE AND DEFINITE.

A. Reply to Defendant's Notice of Opposition. [*See § 23.33, Paragraph A.*]

B. Satisfaction of Requirement That Claim Be for Readily Ascertainable Amount. An attachment will lie on a cause of action for damages for breach of contract where the damages are readily ascertainable by reference to the contract and the basis for the computation of damages appears to be reasonable and definite (*Force v. Hart (1928) 205 Cal. 670, 673, 272 P. 583*).

[*Optional*] **C. Damages as Not Required to Be Known by Plaintiff.** It is unnecessary to support an attachment that the complaint show the entire amount due or that the amount owing be fixed with absolute certainty. Thus, an attachment is proper even though the exact amount due is unknown to the attaching party (*Peninsula Properties Co. v. Santa Cruz County (1950) 34 Cal. 2d 626, 213 P.2d 489*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted by counsel for plaintiff in opposition to a defendant's notice of opposition which opposes plaintiff's application for a right to attach order on the ground that the sum claimed in plaintiff's complaint or affidavit is not a fixed or readily ascertainable amount as required by *Code Civ. Proc. § 483.010(a)*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law raised. In addition, counsel should attach affidavits or declarations which support any factual issues raised in opposing defendant's notice of opposition [*see Code Civ. Proc. § 484.060(a)* (affidavits supporting factual issues raised as required to accompany defendant's notice of opposition)].

[i] Related Uses

With appropriate modifications, these points and authorities may be submitted in other attachment preceedings. For a discussion of these related uses, see *§ 23.33[2]*.

[3] Discussion of Authorities

[a] Satisfaction of Requirement That Claim Be for Readily Ascertainable Amount

Force v. Hart *(1928) 205 Cal. 670, 272 P. 583* , was an appeal from an order denying defendant's motion to discharge an attachment. Defendant sought to have an attachment issued to plaintiff on plaintiff's cause of action for breach of contract. This contract was for the construction of an apartment house which the defendant allegedly refused to allow to be built. Plaintiff was to receive $68,500 under the contract, and he alleged that he had been damaged in the sum of $5,700. Defendant argued that, since the contract was mainly executory--performance having progressed merely to the point of securing a permit for the erection of the building--the contract as pleaded left as a matter of conjecture the cost to the plaintiff of the construction of the building. However, it was apparently conceded that, if the pleading had alleged that the cost of the building to the plaintiff would have been $62,800, an affidavit under the attachment law then in effect, which stated that the defendant was indebted to plaintiff in the sum of $5,700, would have been justified. The Supreme Court affirmed the trial court's order and held that the damages were readily ascertainable by reference to the contract and the basis of the computation of damages appeared to be reasonable and definite. The obligation by the defendant was fixed by contract. The difference between the contract price and the cost of the building appeared in effect in the allegations of the complaint and of the affidavit. The damages alleged appeared to be the direct and immediate consequences of the repudiation of the contract by defendant. The cost of labor and materials for construction appeared to be capable of definite ascertainment and the pecuniary value of the contract right taken from the plaintiff, thus, was fixed at the trial.

[b] Damages as Not Required to Be Known by Plaintiff

The pertinent portion of *Peninsula Properties Co. v. Santa Cruz County (1950) 34 Cal. 2d 626, 213 P.2d 489* , involved an attachment issued on a cross-complaint which sought to recover rents, issues, and profits taken and retained by cross-defendants after cross-complainant allegedly became owner of certain property. Cross-defendants moved to dissolve the attachment, and, on the trial court's denial of the motion, the cross-defendants appealed. In affirming the trial court's order, the Supreme Court stated, in response to the contentions that the amount sued upon was not definite

and certain, that it was unnecessary in order to support an attachment that the complaint show the entire amount due. The fact that the amount claimed was alleged on information and belief was not in violation of the statutory requirements for the issuance of an attachment since the amount owing need not be fixed with absolute certainty, and an attachment was proper even though the exact amount due was unknown to the attaching party.

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CHAPTER 23 ATTACHMENT
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2-23 California Points & Authorities § 23.39

§ 23.39 Reply to Notice of Opposition to Plaintiff's Application for Right to Attach Order [Code Civ. Proc. § 484.060(c)]--Verified Complaint in Lieu of Affidavit Is Insufficient to Support Opposition [Code Civ. Proc. §§ 446, 482.040]

[1] FORM

[*Caption. See § 23.33.*]

AN ATTACHMENT SHOULD ISSUE BECAUSE DEFENDANT HAS FAILED TO MAKE A VALID EVIDENTIARY SHOWING IN OPPOSITION TO PLAINTIFF'S APPLICATION; DEFENDANT'S OPPOSITION IS ACCOMPANIED ONLY BY A COMPLAINT VERIFIED BY _____ [A CORPORATE OFFICER *or* A PUBLIC AGENCY OFFICER *or* DEFENDANT'S ATTORNEY], AND IS OTHERWISE UNACCOMPANIED BY AN AFFIDAVIT SUPPORTING ANY FACTUAL ISSUES RAISED.

A. Reply to Defendant's Notice of Opposition. [*See § 23.33, Paragraph A.*]

B. When Verified Pleading Cannot Be Considered as Affidavit. When verification is made on behalf of a corporation or public agency by an officer of the corporation or agency, or when verification is made by an attorney because the parties are either absent from the county where the attorney has his or her officeor otherwise unable to verify, the pleadings shall not otherwise be considered as an affidavit or declaration establishing the facts alleged (*Code Civ. Proc. § 446*; *Lorber Industries v. Turbulence, Inc. (1985) 175 Cal. App. 3d 532, 536, 221 Cal. Rptr. 233*).

C. When Verification Limitations of *Code Civ. Proc. § 446* Apply to *Code Civ. Proc. § 482.040*. The limitations of *Section 446 of the Code of Civil Procedure*, on verified pleadings that may be considered as affidavits, antedate and apply to *Section 482.040 of the Code of Civil Procedure*. Therefore a verified complaint may not be used in lieu of an affidavit to accompany an opposition to an application for a right to attach order when the complaint is verified on behalf of a corporation or public agency by one of its officers, or when the complaint is verified by an attorney because the parties are either absent from the county where the attorney has his or her office or otherwise unable to verify it (*see Code Civ. Proc. §§ 446, 482.040, 484.060(a)*; *Lorber Industries v. Turbulence, Inc. (1985) 175 Cal. App. 3d 532, 536,*

221 Cal. Rptr. 233).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted by counsel for plaintiff in opposition to a defendant's notice of opposition to plaintiff's application for a right to attach order. The form is for use when plaintiff opposes defendant's opposition to the application on the ground that defendant's verified complaint, submitted in lieu of the required affidavit under *Code Civ. Proc. § 484.060(a)*, cannot support defendant's opposition to the application because the complaint is verified by (1) a corporate officer on behalf of a corporation, or (2) an officer of a public agency on behalf of the agency, or (3) an attorney because the parties are either absent from the county where the attorney has his or her office or otherwise unable to verify it. *Code Civ. Proc. § 446* provides that, in these cases, pleadings shall not otherwise be considered as an affidavit or declaration establishing the facts alleged [*Code Civ. Proc. § 446*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

With appropriate modifications, these points and authorities may be submitted in other attachment proceedings. For a discussion of these related uses, see *§ 23.33[2]*.

[b] Related Pleading and Practice Forms

For general forms of affidavits and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* (Matthew Bender). For discussion and forms for use in verifying pleadings, see Ch. 572, *Verification* in that publication.

[3] Discussion of Authorities

[a] When Verified Pleading Cannot Be Considered as Affidavit

In ***Lorber Industries v. Turbulence, Inc.*** *(1985) 175 Cal. App. 3d 532, 221 Cal. Rptr. 233* , plaintiff was a corporation engaged in manufacturing and printing textiles, and defendant was a corporation engaged in the distribution of wearing apparel. The parties entered into a series of written agreements under which defendant ordered fabrics from plaintiff, and plaintiff prepared and delivered the materials. These deliveries continued until the company that financed plaintiff's accounts receivable charged plaintiff several thousand dollars for defendant's alleged failure to pay for goods received. As a result of these chargebacks, plaintiff filed a complaint against defendant for money damages, alleging that defendant owed a stated sum for goods delivered. Thereafter, plaintiff filed a notice of application for a right to attach

order and writ of attachment. Defendant then filed a cross complaint, alleging that the material was defective when received, and filed its opposition to plaintiff's application for a right to attach order. The trial court found that plaintiff had established the probable validity of its claim under the attachment law and granted the application. Defendant appealed from the judgment granting the order.

The court of appeal affirmed the judgment, holding that defendant made no valid evidentiary showing in opposition to plaintiff's application. In so holding, the court noted that, in opposing the application, defendant relied on its cross complaint, which was verified by its vice president and had documentary evidence attached. Defendant did not dispute the price of delivery of the materials. It argued that the damaged condition of the merchandise showed that plaintiff had not established the probable validity of its claim, or at least entitled defendant to an offset. The court held that the trial court properly rejected defendant's arguments because defendant could not base them on the verified cross complaint. The court held that, under *Code Civ. Proc. § 446*, when the verification is made on behalf of a corporation or public agency by any of its officers, the pleadings shall nototherwise be considered as an affidavit or declaration establishing the facts alleged (*175 Cal. App. 3d 532, 536)* .

[b] When Verification Limitations of Code Civ. Proc. § 446 Apply to Code Civ. Proc. § 482.040

The facts stated in each affidavit filed pursuant to *Code Civ. Proc. §§ 482.010-493.060* (the attachment law) shall be set forth with particularity. Except when matters are specifically permitted by *Code Civ. Proc. §§ 482.010-493.060* to be shown by information and belief, each affidavit shall show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated. In regard to matters shown by information and belief, the affidavit shall state the facts on which the affiant's belief is based, showing the nature of his or her information and reliability of his or her informant. The affiant may be any person, whether or not a party to the action, who has knowledge of the facts. A verified complaint that satisfies the requirements of *Code Civ. Proc. § 482.040* may be used in lieu of or in addition to an affidavit [*Code Civ. Proc. § 482.040*].

The facts and procedural background of *Lorber Industries v. Turbulence, Inc. (1985) 175 Cal. App. 3d 532, 221 Cal. Rptr. 233* , are discussed in *§ 23.39[3][a]*. In *Lorber*, the court of appeal harmonized the provisions of *Code Civ. Proc. § 484.060(a)* (providing that an opposition to attachment must be accompanied by an affidavit supporting any factual issues raised), *Code Civ. Proc. § 482.040* (providing that a verified complaint may be used in lieu of or in addition to an affidavit, and discussed supra), and *Code Civ. Proc. § 446* (governing verification of pleadings, generally, and discussed in *§ 23.39[4][a]*). The court held that the specification in *Code Civ. Proc. § 446* that when verification is made on behalf of a corporation or public agency by any of its officers, the pleadings shall not otherwise be considered as an affidavit or declaration establishing the facts alleged, and that such a situation governs *Code Civ. Proc. § 482.040*. Therefore, a verified cross complaint cannot support an opposition to an application for a right to attach order when the verification is made by a corporate officer on behalf of a corporation. The court also noted that *Code Civ. Proc. § 446* antedates both *Code Civ. Proc. §§ 482.040* and *484.060* (*175 Cal. App. 3d 532, 536)* .

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CHAPTER 23 ATTACHMENT
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2-23 California Points & Authorities § 23.40

§ 23.40 Opposing Motion for Recovery of Damages for Wrongful Attachment [Code Civ. Proc. §§ 490.020, 996.440]--Plaintiff's Liability Limited by Amount of Undertaking [Code Civ. Proc. § 490.020(b)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____ _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORIT-
vs.	)	IES IN OPPOSITION TO MOTION FOR RECOV-
_____ [*name*],	)	ERY OF DAMAGES FOR WRONGFUL ATTACH-
Defendant.	)	MENT
	)	[*Code Civ. Proc. §§ 490.020, 996.440*]
	)	Date: _____
	)	Time: _____
		Location: _____
		[Trial Date: _____]

_____

PLAINTIFF'S LIABILITY FOR WRONGFUL ATTACHMENT IS LIMITED BY THE AMOUNT OF UNDERTAKING FILED BEFORE ISSUANCE OF THE _____ [WRIT OF ATTACHMENT *OR* PROTECTIVE ORDER].

A. Limitation on Plaintiff's Liability. The liability of a plaintiff for wrongful attachment pursuant to *Section 490.010 of the Code of Civil Procedure* is limited by the amount of the undertaking which the plaintiff must file before the issuance of a writ of attachment or a protective order (*Code Civ. Proc. §§ 489.210, 490.020*).

[*Optional*] **B. Damages Reduced by Unsatisfied Amounts Owed to Plaintiff.** The amount of any recovery for wrongful attachment must be offset insofar as possible against any unsatisfied amounts owed to the plaintiff by the defendant on the judgment in the action for which wrongful attachment damages are awarded (*Code Civ. Proc. § 490.040*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted by counsel for plaintiff in opposition to a defendant's motion for recovery for damages for wrongful attachment.

Counsel should insert argument in this memorandum, showing the relation between the facts of the case and the points of law raised.

In 1982, the Legislature repealed *Code Civ. Proc. § 490.030*, which set forth the procedures regarding the recovery of damages for wrongful attachment. In its place, the Legislature enacted more general procedural statutes in the Bond and Undertaking Law (*Code Civ. Proc. §§ 995.010-996.560*). The procedures for enforcing the liability on a bond or undertaking against the principal and sureties are now contained in *Code Civ. Proc. §§ 996.410-996.495*.

[3] Discussion of Authorities

[a] Limitation on Plaintiff's Liability

It would appear that the limitation on liability of a plaintiff for wrongful attachment set forth in *Code Civ. Proc. § 490.020(b)* is a limitation on the total amount which the defendant could recover on his or her motion and does not affect the type of damages which may be recovered as described in *Code Civ. Proc. § 490.020(a)*.

Two references are made to the limitation on plaintiff's liability in the Law Revision Commission Comment. In its Comment to *Code Civ. Proc. § 490.010*, the Commission states that the plaintiff's liability is limited to the amount of undertaking he has filed only if he has proceeded by way of a noticed hearing. In its Comment to *Code Civ. Proc. § 490.020*, the Commission notes that the liability of the surety and the plaintiff together is limited to the amount of the undertaking, but that this limitation does not apply where an independent action is brought based on a common-law theory of recovery [*see Code Civ. Proc. § 490.060* (nothing in *Code Civ. Proc. §§ 490.010-490.060* as limiting right to recover damages for wrongful attachment on common-law theory of recovery)].

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 24 ATTORNEYS AT LAW: SUBSTITUTION, WITHDRAWAL, DISQUALIFICATION, AND AUTHORITY TO APPEAR

2A-24 California Points & Authorities 24.syn

§ 24.syn Synopsis to Chapter 24: ATTORNEYS AT LAW: SUBSTITUTION, WITHDRAWAL, DISQUALIFICATION, AND AUTHORITY TO APPEAR

§ 24.01 Scope of Chapter

§ 24.02 Governing Statutes

§ 24.03 Rules of Court

§ 24.04 Rules of Professional Conduct

§ 24.05 Related Pleading and Practice Chapters

§ 24.06 Related Points and Authorities Chapters

§§ 24.07-24.19 [Reserved]

§ 24.20 Supporting Motion for Order Permitting Substitution of Attorney on Application of Client [Code Civ. Proc. § 284(2)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Power and Right to Discharge

[b] Right Independent of Statutory Authority

[c] Detriment to Attorney as Immaterial

[d] Substitution as Unaffected by Contingent Fee Agreements

[e] No Statutory Rights of Attorney/Employee Affected

[4] Additional Authorities

[a] Detriment to Attorney as Immaterial

[b] Substitution is Unaffected by Contingent Fee Agreement

§ 24.21 Opposing Client's Motion for Order Permitting Substitution of Attorney [CCP § 284(2)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Interest of Attorney

[b] Attorney in Representative Capacity

[4] Additional Authorities

[a] Interest of Attorney

§ 24.22 Supporting Motion for Order Permitting Withdrawal of Attorney From Case [Code Civ. Proc. § 284(2)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Discretion of Court to Allow Withdrawal

[b] Withdrawal Normally Permitted

[c] Corporate Client

[d] Refusal to Pay Attorney's Fees

[e] Withdrawal to Prevent Frivolous Appeal or Delaying Tactics

[4] Additional Authorities

[a] Discretion of Court to Allow Withdrawal

[b] Withdrawal Normally Permitted

§ 24.23 Opposing Attorney's Motion for Order Permitting Withdrawal From Case [Code Civ. Proc. § 284(2)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Discretion of Court to Deny Withdrawal

[b] Injustice to Third Party

[c] Prejudice to Client

[d] Refusal to Consent to Increase in Attorney's Fee Insufficient Reason for Withdrawal

§ 24.24 Supporting Motion for Order Disqualifying Attorney From Engaging in Representation Adverse to Former Client [Bus. & Prof. Code § 6068(e)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Injunctive Relief

[c] Related Pleading and Practice Forms

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Motion to Disqualify

[b] Attorney's Duty to Client

[c] Rule Against Conduct or Disclosure Adverse to Former Client

[d] Rules of Professional Conduct Prohibit Adverse Representation

[e] Actual Misuse of Confidential Information Not Necessary

[f] Prejudice to Adverse Party Irrelevant

[g] Injury to Former Client Presumed

[h] No Joint Client Exception

[i] Disqualification of Former Judicial Officer and Officer's Law Firm

[j] Disqualification of Law Firm That Formerly Represented Parent Corporation of Adverse Corporate Party

[k] Disqualification of Entire Public Law Office When Attorney Leaves Private Practice to Become Head of Public Law Office

[4] Additional Authorities

[a] Rule Against Conduct or Disclosure Adverse to Former Client

[b] Rules of Professional Conduct Prohibit Adverse Representation

[c] Actual Misuse of Confidential Information Not Necessary

§ 24.25 Supporting Motion for Order Disqualifying Attorney Who Communicated With Represented Adverse Party

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Authorities

[3] Discussion of Authorities

[a] Disqualification of Attorney for Communication With Adverse Party

[4] Additional Authorities

[a] Disqualification of Attorney for Communication With Adverse Party

§ 24.26 Supporting Motion for Order Disqualifying Attorney Who Concurrently Represents Adverse Party

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Disqualification of Attorney for Adverse Concurrent Representation

[b] Withdrawal of Representation Before Hearing Does Not Cure Violation

[4] Additional Authorities

[a] Disqualification of Attorney for Adverse Concurrent Representation

[b] Withdrawal of Representation Before Hearing Does Not Cure Violation

§ 24.27 Supporting Motion for Order Disqualifying Opposing Attorney Who Retained Expert Witness Previously Interviewed by Moving Party

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Disqualification of Opposing Attorney for Retaining Previously Interviewed Expert Witness

§ 24.28 Opposing Motion for Order Disqualifying Attorney From Engaging in Representation Adverse to Former Client [Bus. & Prof. Code § 6068(e)]--No Actual Attorney-Client Relationship Existed

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Confidential Attorney-Client Relationship Required

[b] Attorney for Corporation

[4] Additional Authorities

[a] Confidential Attorney-Client Relationship Required

§ 24.29 Opposing Motion for Order Disqualifying Attorney From Engaging in Representation Adverse to Former Client [Bus. & Prof. Code § 6068(e)]--Client Consented to Adverse Representation

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Client's Consent Prevents Disqualification

[b] Substantial Relationship Test Is Not Necessarily Dispositive in Case Involving Former Joint Clients

[4] Additional Authorities

[a] Client's Consent Prevents Disqualification

§ 24.30 Opposing Motion for Order Disqualifying Attorney From Engaging in Representation Adverse to Former Client [Bus. & Prof. Code § 6068(e)]--Previous Mutual Representation of Parties

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Former Mutual Representation May Prevent Disqualification

[4] Additional Authorities

[a] In General

§ 24.31 Opposing Motion for Order Disqualifying Attorney From Engaging in Representation Adverse to Former Client [Bus. & Prof. Code § 6068(e)]--Present Representation Not in Conflict With Previous Representation

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] No Conflict With Earlier Employment

[b] Former Government Employee's Current Law Firm

[c] Former Judicial Officer's Current Law Firm

[d] No Confidential Information Obtained in Earlier Employment

[e] Confidential Information Obtained in Mediation in Related Action Against Same Defendant

[f] No Disqualification of Lawyer's Former Firm Required When No Opportunity for Confidential Information to Be Divulged

[g] Presumption of Automatic Vicarious Disqualification is Rebuttable

[4] Additional Authorities

[a] No Conflict With Earlier Employment

[b] No Confidential Information Obtained in Earlier Employment

§ 24.32 Opposing Motion for Order Disqualifying Attorney From Engaging in Representation Adverse to Former Client [Bus. & Prof. Code § 6068(e)]--Extreme Delay of Moving Party in Bringing Motion Constitutes Implied Waiver of Right to Disqualify

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Extreme Delay Constitutes Implied Waiver

[4] Additional Authorities

§ 24.33 Opposing Motion for Order Disqualifying Attorney Who Communicated With Represented Adverse Party

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] When Ex Parte Communication Permitted

[b] Who Is a Party Represented by Counsel

[4] Additional Authorities

[a] When Ex Parte Communication Permitted

§ 24.34 Supporting Motion by Client or Adverse Party to Dismiss Complaint Based on Attorney's Lack of Authority to File Suit

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Pleading and Practice Discussions

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Motion to Dismiss Proper

[b] Motion by Supposed Client or Opposing Party

[c] Presumption of Authority Rebuttable

[d] Client's Death or Incapacity

[e] Inadequate Substitution

[4] Additional Authorities

[a] Motion to Dismiss Proper

§ 24.35 Supporting Motion by Defendant to Withdraw Defendant's Appearance and Strike Answer or by Plaintiff to Strike Answer Based on Attorney's Lack of Authority to File Answer

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Pleading and Practice Discussions

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Motion to Strike Proper

[b] Motion to Withdraw Proper

[4] Additional Authorities

[a] Motion to Strike Proper

§ 24.36 Opposing Motion by Plaintiff or Defendant to Dismiss Complaint on Asserted Ground That Attorney Unauthorized to File Suit

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Presumption of Authority

[b] License Prima Facie Evidence of Authority

[c] Burden of Proof

[d] Motion to Dismiss Denied on Finding of Authorization

[e] Insufficient Declaration by Moving Party

[f] Indirect Authorization

[4] Additional Authorities

[a] Presumption of Authority

[b] License Prima Facie Evidence of Authority

[c] Motion to Dismiss Denied on Finding of Authorization

§ 24.37 Opposing Motion by Defendant to Withdraw Defendant's Appearance and Strike Answer or by Plaintiff to Strike Answer on Asserted Grounds That Attorney Unauthorized to Defend Action

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Motion to Strike Should Be Denied

§ 24.38 Supporting Defendant's Motion to Strike Complaint of Corporation Appearing in Propria Persona, or by Agent Who Is Not Licensed Attorney [Code Civ. Proc. §§ 435-437]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Corporation Must Appear Through Attorney

[b] Court Will Strike Complaint by Corporation Without Attorney

[4] Additional Authorities

[a] Corporation Must Appear Through Attorney

§ 24.39 Supporting Defendant's Motion to Strike Complaint of Unincorporated Association or Club Appearing in Propria Persona, or by Agent Who Is Not Licensed Attorney [Code Civ. Proc. §§ 435-437]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Memoranda

[3] Discussion of Authorities

[a] Unincorporated Association Must Appear Through Attorney

§ 24.40 Supporting Defendant's Motion to Compel Trustee Who Is Not Licensed Attorney But Appears as Attorney For Trust to Withdraw and Hire Licensed Member of Bar to Prosecute or Defend Lawsuit [Bus. & Prof. Code § 6125]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Nonattorney Trustee May Not Represent Trust in Court Action

§ 24.41 Opposing Motion for Order Disqualifying Attorney Based on Contact With Opposing Party's Expert Witness--No Presumption that Confidential Information Was Imparted Exists When There Is No Impediment to Opposing Party's Ability to Obtain Information From Expert Regarding What Actually Was Disclosed

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Moving Party Has Burden of Proving Expert's Improper Disclosure of Confidential Information to Opposing Party's Attorney When Expert Remains Under Control of Moving Party.

California Points & Authorities

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
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PART I. INTRODUCTION

2A-24 California Points & Authorities § 24.01

§ 24.01 Scope of Chapter

This chapter contains memoranda relating to an attorney's substitution, withdrawal, removal, and authority to appear in actions or proceedings.

It includes memoranda for use in supporting [*see § 24.20*] and opposing [*see § 24.21*] motions for substitution of an attorney.

In most cases, substitution is by mutual consent of the attorney and the client. In those cases, the one-page Substitution of Attorney form approved by the Judicial Council as MC-050 (or the substitution of attorney form prescribed by local rule in that particular county, such as Los Angeles) should be used. For a blank form of Judicial Council Form MC-050 that counsel can reproduce and fill in, see California Forms of Pleading and Practice, Judicial Council Forms (Matthew Bender); for an illustrative, filled-in version of Judicial Council Form MC-050, see *California Forms of Pleading and Practice, Ch. 72, Attorney Practice and Ethics, § 72.350 et seq.* (Matthew Bender).

If the parties do not agree, and the case is already under the jurisdiction of a court, motions for change in attorney representation are necessary. This part also includes memoranda for use in supporting [*see § 24.22*] and opposing [*see § 24.23*] motions for withdrawal of an attorney from a case, supporting [*see §§ 24.24 -24.27*] and opposing [*see §§ 24.28 -24.33, 24.41*] motions to disqualify opposing counsel for conflicting representation, supporting [*see §§ 24.34, 24.35*] and opposing [*see §§ 24.36, 24.37*] motions to dismiss a complaint or strike an answer for lack of the attorney's authority, supporting [*see §§ 24.38, 24.39*] motions to strike a complaint filed by a corporation or unincorporated association in propria persona, and supporting [*see § 24.40*] motions to compel trustee to hire licensed member of bar to prosecute or defend lawsuit.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselDisqualificationsCivil ProcedureCounselSubstitutionsCivil ProcedureCounselWithdrawals

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2A-24 California Points & Authorities § 24.02

§ 24.02 Governing Statutes

Substitution and withdrawal are governed by *Code Civ. Proc. §§ 284*, *285*, and *285.2-285.4*. *Code Civ. Proc. § 284* sets forth when and how an attorney may be changed during an action, and *Code Civ. Proc. § 285* provides requirements for notice to the adverse party. *Code Civ. Proc. §§ 285.2-285.4* establish procedures for the withdrawal of a legal service agency attorney when a reduction in public funding for legal service materially impairs his or her ability to represent an indigent client. Regarding disqualification of opposing counsel, *Bus. & Prof. Code § 6068(e)* defines the attorney's duty to maintain a former client's confidences. *Code Civ. Proc. § 1029.8* allows the recovery of treble damages, and costs and attorney's fees at the discretion of the court, when an unlicensed person causes injury or damage to another while providing goods or performing services for which specified licenses are required.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselDisqualificationsCivil ProcedureCounselSubstitutionsCivil ProcedureRemediesDamagesGeneral OverviewLegal EthicsClient RelationsConfidentiality of InformationLegal EthicsUnauthorized Practice of Law

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2A-24 California Points & Authorities § 24.03

§ 24.03 Rules of Court

Cal. Rules of Ct., Rule 3.1362, governs the procedure for obtaining an order relieving counsel. *Cal. Rules of Ct., Rule 3.1115*, provides special format requirements for a paper substituting a party as attorney in propria persona.

Legal Topics:

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

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2A-24 California Points & Authorities § 24.04

§ 24.04 Rules of Professional Conduct

The Board of Governors of the State Bar has adopted, and the Supreme Court has approved, Rules of Professional Conduct to regulate professional conduct of members of the State Bar. These rules contain several provisions concerning the topics discussed in this part, violation of which may be cause for attorney discipline [*see Cal. Rules Prof. Conduct, Rules 2-100* (communication with a represented party), 3-310 (avoiding representation of adverse interests), 3-700 (termination of employment), 5-210 (restriction on attorney acting as advocate and testifying witness in single proceeding); *see also Cal. Rules Prof. Conduct, Rule 1-100* (State Bar authorized to discipline attorney for wilful breach of Rules)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselDisqualificationsCivil ProcedureCounselSubstitutionsLegal EthicsClient RelationsConflicts of InterestLegal EthicsProfessional ConductOpposing Counsel & PartiesLegal EthicsSanctionsGeneral Overview

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2A-24 California Points & Authorities § 24.05

§ 24.05 Related Pleading and Practice Chapters

- For discussion and forms relating to admission of an attorney to the bar and attorney discipline, see Ch. 70, *Attorney Admission* , and Ch. 71, *Attorney Discipline* .

- For discussion and forms relating to an attorney's association, substitution, withdrawal, removal and authority to appear, see Ch. 72, *Attorney Practice and Ethics* .

- For discussion and forms relating to legal malpractice, see Ch. 76, *Attorney Professional Liability* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselDisqualificationsCivil ProcedureCounselSubstitutionsLegal EthicsClient RelationsConflicts of InterestLegal EthicsSanctionsGeneral OverviewTortsMalpractice & Professional LiabilityAttorneys

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2A-24 California Points & Authorities § 24.06

§ 24.06 Related Points and Authorities Chapters

- For discussion regarding attorney malpractice, see Ch. 24A, *Attorney at Law: Malpractice* .
- For collecting or defending against the collection of attorney's fees from clients, see Ch. 25, *Attorney's Fees* .
- For obtaining attorney's fees from the opposing party on motion, see Ch. 60, *Costs* .
- For contractual issues and defenses generally, see Ch. 50, *Contracts* .
- For sanctions that may be imposed during discovery proceedings, see Ch. 82, *Discovery: Sanctions for Discovery Misuse* .
- For proceedings for and defending against claims for indemnity and contribution, see Ch. 115, *Indemnity and Contribution* .
- For intervention generally, see Ch. 124, *Intervention* .
- For negligence generally, see Ch. 165, *Negligence* .
- For a discussion of how to use the forms in this Chapter to draft a memorandum of points or authorities or a trial or appellate brief, and for a sample of a complete memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsLegal EthicsClient RelationsAttorney FeesGeneral

OverviewTortsMalpractice & Professional LiabilityAttorneysTortsNegligenceGeneral OverviewTortsProcedureMultiple DefendantsIndemnityGeneral Overview

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2A-24 California Points & Authorities §§ 24.07-24.19

[Reserved]

§§ 24.07[Reserved]

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PART II. FORMS

2A-24 California Points & Authorities § 24.20

§ 24.20 Supporting Motion for Order Permitting Substitution of Attorney on Application of Client [Code Civ. Proc. § 284(2)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF MOTION FOR
Plaintiff,	)	SUBSTITUTION OF ATTORNEY
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

A PARTY TO AN ACTION OR PROCEEDING HAS BOTH THE POWER AND THE RIGHT TO SUBSTITUTE ATTORNEYS, AT ANY TIME, WITH OR WITHOUT CAUSE.

A. Motion to Substitute. The attorney in an action or special proceeding may be changed at any time before or after judgment or final determination, by an order of the court on the client's application after notice to the attorney (*Code Civ. Proc. § 284(2)*).

B. Power and Right to Discharge. The client has the power and right to discharge or substitute attorneys, with or without cause and at any time (*Fracasse v. Brent (1972) 6 Cal. 3d 784, 790, 100 Cal. Rptr. 385, 494 P.2d 9* ; *see*

General Dynamics Corp. v. Superior Court (1994) 7 Cal. 4th 1164, 1173-1177 ; *Santa Clara County Counsel Attys. Assn. v. Woodside (1994) 7 Cal. 4th 525, 555, 28 Cal. Rptr. 2d 617, 869 P.2d 1142*).

C. Right Independent of Statutory Authority. Inherent in the attorney-client relationship is the basic, implied right of the client to discharge the attorney, and such right would exist without statutory provision for it (*Fracasse v. Brent (1972) 6 Cal. 3d 784, 791, 100 Cal. Rptr. 385, 494 P.2d 9* ; *Echlin v. Superior Court (1939) 13 Cal. 2d 368, 371*).

D. Detriment to Attorney as Immaterial. Unless the attorney has an interest in the subject matter of the action, which exists apart from the attorney-client relationship, the client's right to discharge remains absolute, and the fact that the attorney has performed labor or expended money in behalf of the client is immaterial (*Estate of Cazaurang (1934) 1 Cal. 2d 712, 714, 36 P.2d 1069*).

[*Optional*] **E. Substitution as Unaffected by Contingent Fee Agreements.** A discharged attorney employed under a contingent fee contract has adequate remedies for recovering fees, and he or she cannot prevent substitution (*Fracasse v. Brent (1972) 6 Cal. 3d 784, 791-792, 100 Cal. Rptr. 385, 494 P.2d 9* ; *Estate of Cazaurang (1934) 1 Cal. 2d 712, 714, 716, 717, 36 P.2d 1069*).

[*Optional*] **F. No Statutory Rights of Attorney/Employee Affected.** The client is not discharging the attorney primarily for asserting his or her statutory rights as an employee, but for providing inadequate representation (*Santa Clara County Counsel Attys. Assn. v. Woodside (1994) 7 Cal. 4th 525, 555, 28 Cal. Rptr. 2d 617, 869 P.2d 1142*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

When substitution is by mutual consent of the attorney and the client, the one-page Substitution of Attorney form approved by the Judicial Council as MC-050 (or the substitution of attorney form prescribed by local rule in the particular county, such as Los Angeles) should be used. For the Judicial Council form, see California Forms of Pleading and Practice, Judicial Council Forms (Matthew Bender). If the parties do not agree, and the case is already under the jurisdiction of a court, motions for change in attorney representation are necessary. This memorandum may be submitted in support of a client's motion to substitute attorneys, if the attorney sought to be discharged does not consent to the substitution.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

The caption shown on this form complies with the requirements of *Cal. Rules of Court, Rule 3.1110* for a memorandum filed separately from a notice of motion and motion. However, to the extent practicable, a memorandum supporting a motion must be attached to the notice of motion [*Cal. Rules of Court, Rule 3.1113*]. When the memorandum is attached to the notice of motion, the caption on the notice of motion will include the memorandum in the title of the paper describing the nature of the documents being filed [*Cal. Rules of Court, Rule 3.1112*]. Thus, a supporting memorandum should be filed separately, and have its own caption, only if it is not practicable to attach it to the notice of motion.

[b] Related Uses

This memorandum may be adapted for use in support of a writ of mandate to compel a lower court to grant substitution [*see Downer v. Norton (1860) 16 Cal. 436, 440* (mandate proper)].

This may also be adapted for use in criminal actions or proceedings [*see People v. Bouchard (1957) 49 Cal. 2d 438, 441-442, 317 P.2d 971]* .

[c] Related Pleading and Practice Forms

For forms of notice of motion, supporting declaration, and order granting a motion for substitution of attorneys, see California Forms of Pleading and Practice, Ch. 72, *Attorney Practice and Ethics* (Matthew Bender).

[3] Discussion of Authorities

[a] Power and Right to Discharge

General Dynamics Corp. v. Superior Court *(1994) 7 Cal. 4th 1164* , involved a complaint for wrongful termination filed by in-house counsel against his former employer. The employer claimed that the California Supreme Court's decision in *Fracasse v. Brent (1972) 6 Cal. 3d 784, 100 Cal. Rptr. 385, 494 P.2d 9* (discussed *below*) was dispositive of all issues raised by the plaintiff in his complaint because the client has an absolute right to substitute attorneys at any time. In rejecting this contention, the Supreme Court noted that although *Fracasse* stands for the proposition that a personal injury client has the right and power to discharge his or her attorney with or without cause, it is not the rule that all clients may unilaterally terminate the attorney-client relationship under all circumstances without consequences. While the client's unfettered right to discharge an attorney at any time is an important right that should be upheld in most cases, the legal consequences of the discharge will vary depending on the competing interests involved in a particular case. The Court concluded that, although the employer had the right to discharge its in-house counsel, it was not immune from liability for wrongful termination (*7 Cal. 4th 1164, 1173-1177)* .

In ***Santa Clara County Counsel Attys. Assn. v. Woodside*** *(1994) 7 Cal. 4th 525, 28 Cal. Rptr. 2d 617, 869 P.2d 1142* , an attorneys' association made up of and representing attorneys in a county counsel's office brought a mandate action against the county for breach of its duty to bargain in good faith under the Meyers-Milias-Brown Act (*Gov. Code § 3500 et seq.*) (right to form local public employee organizations). The Association asked the court to enjoin the county from discharging any of its members after filing the mandate petition. The request was made in response to the county counsel's opinion that the association's members were required to resign before filing the petition. The trial court granted this injunctive relief (*7 Cal. 4th 525, 555 n.11*).

On appeal, the Supreme Court addressed the issue of whether the client has the right to discharge an attorney in whom the client has purportedly lost faith. The Court noted that this question is distinct from the question of attorney loyalty to the client. Regardless of an attorney's actual loyalty, a public employer should, nonetheless, have the right to discharge the attorney, for example, because of inadequate job performance, or nonobservance of the Rules of Professional Conduct. The Court noted that *Code Civ. Proc. § 284* gives clients, beyond the context of litigation, the power to discharge an attorney, with or without cause. The statute recognizes that the client's interest in successful prosecution or defense of an action is superior to the attorney's interest, in continued employment (*7 Cal. 4th 525, 555)* . The Court, however, also recognized that the client's right to discharge an attorney may be limited by statute (discussed in *§ 24.20[3][e]*).

In ***Fracasse v. Brent*** *(1972) 6 Cal. 3d 784, 100 Cal. Rptr. 385, 494 P.2d 9* , the plaintiff, an attorney, filed an action against defendant client for breach of a contingency fee agreement. The agreement stated that plaintiff would receive a percentage by settlement or judgment in the client's personal injury action. Prior to settlement of the suit, the client discharged plaintiff, and substituted another attorney. Plaintiff alleged that the substitution was made without cause, and

the complaint sought declaratory judgment by the trial court that the contingent fee contract was enforceable, and that plaintiff had a specific percentage interest in the client's ultimate recovery. The trial court sustained the client's general demurrer, without leave to amend, on the basis that the complaint failed to state a cause of action. The Supreme Court affirmed, and held that discharging an attorney cannot amount to a breach of contract, since the right to discharge is implied in the attorney-client relationship (*6 Cal. 3d 784, 791)* . The power to do so is necessarily absolute to assure protection of the client's legal interests (*6 Cal. 3d 784, 790)* .

[b] Right Independent of Statutory Authority

The facts and procedural background of ***Fracasse v. Brent*** *(1972) 6 Cal. 3d 784, 100 Cal. Rptr. 385, 494 P.2d 9* , are discussed in *§ 24.20[3][a]*. The Supreme Court held that the client's right to discharge his or her attorney, with or without cause, is inherent in the attorney-client relationship. That relationship, the Court said, is unique, since it exists to protect the client's rights and interests, and the client is therefore justified in terminating it at will (*6 Cal. 3d 784, 790-791)* .

In ***Echlin v. Superior Court of San Mateo County*** *(1939) 13 Cal. 2d 368* , plaintiff in a pending personal injury suit sought an order granting substitution. The trial court denied substitution on the basis of a 1935 amendment to *Code Civ. Proc. § 284(2)*. The amendment, which was later repealed, stated that substitution of an attorney who had a contingent fee contract was to be treated differently from other cases of attorney substitution, such that when substitution was sought in such cases, the court would determine the attorney's compensation under the contract.

Plaintiff sought a writ of mandate compelling the trial court to order substitution. The Supreme Court held for petitioner, and issued a writ of mandate compelling substitution. Aside from its holding that the 1935 amendment was unconstitutional (*13 Cal. 2d 368, 374-375)* , the Court also held that a client's right to substitute attorneys is not affected by attorney's fees considerations, and in fact exists at common law apart from the statutory authority of *Code Civ. Proc. § 284(2)* (*13 Cal. 2d 368, 371-372)* .

[c] Detriment to Attorney as Immaterial

In ***Estate of Cazaurang*** *(1934) 1 Cal. 2d 712, 36 P.2d 1069* , the client, during an appeal, made a motion to substitute a new attorney in place of the law firm that had been representing her. The law firm opposing the motion and the client each submitted affidavits regarding grievances alleged by the client against the law firm. Attorneys from the law firm argued that due to their contractual agreement with the client, their interest in the action rendered their employment irrevocable. The Court, relying on the leading case of *Gage v. Atwater (1902) 136 Cal. 170, 68 P. 581* (discussed in *§ 24.20[3][a]*), granted the client's motion, and held that unless the attorney has a relation to the subject matter of the action which exists outside the employment relation, the attorney's powers, interests, contributions, or expenditures in an action do not affect the client's right to discharge (*1 Cal. 2d 712, 714)* . This applies in spite of contractual provisions attempting to establish an irrevocable employment of the attorney (*1 Cal. 2d 712, 716)* .

[d] Substitution as Unaffected by Contingent Fee Agreements

The facts and procedural background of ***Fracasse v. Brent*** *(1972) 6 Cal. 3d 784, 100 Cal. Rptr. 385, 494 P.2d 9* , are discussed in *§ 24.20[3][a]*; The Court in *Fracasse* stated that a client has the power to discharge an attorney without cause, even when the attorney is employed under a contingent fee contract, and the client discharges him or her just prior to trial or settlement (*6 Cal. 3d 784, 791)* . Some circumstances may justify a finding that the entire fee was the reasonable value of the attorney's services. The substitution of an attorney and compensation for his or her services are two separate issues. Whether compensation is owed is not properly discussed or determined by a court at the time an attorney is discharged (*6 Cal. 3d 784, 790-791)* . A cause of action for compensation pursuant to a contingent fee contract does not accrue until the contingency has occurred, and is adjudicated in a separate action (*6 Cal. 3d 784, 792)* .

The facts and procedural background of ***Estate of Cazaurang*** *(1934) 1 Cal. 2d 712, 36 P.2d 1069* , are discussed in *§ 24.20[3][c]*. The Court held that a contingent fee contract, regardless of its language, cannot itself create any rights in the attorney sufficient to affect a client's right to substitute (*1 Cal. 2d 712, 716)* .

[e] No Statutory Rights of Attorney/Employee Affected

The facts and legal background of ***Santa Clara County Counsel Attys. Assn. v. Woodside*** *(1994) 7 Cal. 4th 525, 28 Cal. Rptr. 2d 617, 869 P.2d 1142* , are discussed *above,* under Power and Right to Discharge. The Supreme Court concluded that the Meyer-Milias-Brown Act (*Gov. Code § 3500 et seq.*) creates an exception to the general rule of *Code Civ. Proc. § 284* that a client may discharge an attorney at will. The Act prohibits a public employer from terminating an attorney solely or chiefly because he or she has engaged in lawful union activity (*7 Cal. 4th 525, 554-556)* .

The Court held that the Legislature could legitimately decide that the general rule that a client's interest in selecting representation is paramount should be altered in those limited class of cases in which the attorney is the client's employee, and the attorney is being discharged primarily for the assertion of his or her statutory rights as an employee, rather than for providing inadequate representation. Accordingly, attorneys who believe that they have been discriminated against for engaging in activity protected by statute, have standing to bring an antidiscrimination action against their employer (*7 Cal. 4th 525, 557)* .

[4] Additional Authorities

[a] Detriment to Attorney as Immaterial

For additional cases holding that compensation owed by the client to the attorney in the form of fees, or proceeds from the litigation, will not preclude substitution, see *Gage v. Atwater (1902) 136 Cal. 170, 172, 68 P. 581* ; *Meadow v. Superior Court (1963) 59 Cal. 2d 610, 616, 30 Cal. Rptr. 824, 381 P.2d 648* ; *Scott v. Superior Court (1928) 205 Cal. 525, 531, 271 P. 906* ; *Wright v. Security-First Nat'l Bank (1939) 13 Cal. 2d 139, 141-142, 88 P.2d 125* ; *Joseph E. Di Loreto, Inc. v. O'Neill (1991) 1 Cal. App. 4th 149* (attorney may be able to recover "expectation interest" of contract).

[b] Substitution is Unaffected by Contingent Fee Agreement

The Court of Appeals in *Jalali v. Root (2003) 109 Cal. App. 4th 624, 633-634, 135 Cal. Rptr. 2d 168* relied upon *Fracasse v. Brent (1972) 6 Cal. 3d 784, 100 Cal. Rptr. 385, 494 P.2d 9* in reiterating that a client has "the unilateral right to discharge his or her attorney with or without cause at any time" regardless of the existence of a contingency fee contract.

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 24 ATTORNEYS AT LAW: SUBSTITUTION, WITHDRAWAL, DISQUALIFICATION, AND AUTHORITY TO APPEAR
PART II. FORMS

2A-24 California Points & Authorities § 24.21

§ 24.21 Opposing Client's Motion for Order Permitting Substitution of Attorney [CCP § 284(2)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN OPPOSITION TO MOTION
Plaintiff,	)	FOR SUBSTITUTION OF ATTORNEY
vs.	)	[*Code Civ. Proc. § 284(2)*]
	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THE CLIENT MAY NOT SUBSTITUTE BECAUSE THE ATTORNEY HAS AN INTEREST IN THE SUBJECT MATTER OF THE ACTION WHICH IS UNRELATED TO COMPENSATION FOR HIS/HER SERVICES AS AN ATTORNEY.

A. Interest of Attorney. A client may not substitute an attorney out of an action if the attorney has a specific, beneficial interest in the subject matter of the litigation, other than that arising from his or her employment as an attorney in the action (*see O'Connell v. Superior Court (1935) 2 Cal. 2d 418, 421-423, 41 P.2d 334* ; *Redevelopment*

Agency v. Superior Court (1961) 195 Cal. App. 2d 591, 595, 16 Cal. Rptr. 45).

[*Optional*] **B. Attorney in Representative Capacity.** If the attorney opposing substitution is acting in a representative capacity, representing both the client and some separate entity, that entity's interest in the action may prevent substitution (*Redevelopment Agency v. Superior Court (1961) 195 Cal. App. 2d 591, 594-595, 16 Cal. Rptr. 45*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted by an attorney in opposition to his or her client's motion for substitution of attorney, if the attorney has an interest in the subject matter of the action which is unrelated to compensation for his or her services as an attorney in the action.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Interest of Attorney

O'Connell v. Superior Court *(1935) 2 Cal. 2d 418, 41 P.2d 334* , was a mandate proceeding to compel a superior court to grant a motion for substitution. The employment agreement between client and attorney provided that the attorney was entitled to a one-half share of the client's interest in the contract being litigated. The attorney argued that he could not be substituted out of the case because he had a beneficial interest in the subject matter of the action. The Supreme Court acknowledged that there is an exception to a client's right of substitution when the attorney has an interest in the subject matter of the litigation (*2 Cal. 2d 418, 421)* . The attorney's interest must be present, specific, beneficial, and must exist apart from his or her employment as an attorney (*2 Cal. 2d 418, 421-423)* . Under the facts of this case however, the Court compelled substitution because the interest conveyed was intended as compensation for the attorney's services, and therefore did not exist apart from his employment (*2 Cal. 2d 418, 424-425)* .

In ***Redevelopment Agency v. Superior Court*** *(1961) 195 Cal. App. 2d 591, 16 Cal. Rptr. 45* , a city redevelopment agency brought two eminent domain actions to condemn land belonging to third parties. The city attorney represented the agency. However, while the matter was pending, the agency sought to substitute its own attorney instead. The city attorney did not consent to a substitution. The agency then made a motion in each action for an order of substitution. The court denied the motions, and the agency petitioned the court of appeal for a writ of mandate compelling substitution.

The court of appeal denied the writ, relying on earlier California law [*see* *O'Connell v. Superior Court (1935) 2 Cal. 2d 418, 41 P.2d 334* (discussed *above*); *Todd v. Superior Court of San Francisco (1919) 181 Cal. 406, 184 P. 684* (discussed in *§ 24.21[4][a]*], which recognized the exception to a client's right of substitution when the attorney has an interest in the subject matter of the action (*195 Cal. App. 2d 591, 593)* . The court listed the necessary elements of an attorney's interest in an action sufficient to prevent substitution. The interest must be specific, it must be an interest in the subject matter of the action itself, and it must be beneficial (*195 Cal. App. 2d 591, 595)* . Because this particular

case involved a city attorney, the court analyzed the city's interest in the subject matter of the action, and applied its holding to the attorney in his representative capacity, rather than as an individual (*195 Cal. App. 2d 591, 595)* . In denying substitution, the court noted that in eminent domain actions, the city has an interest in the funding and implementation of redeveloping the subject land, and the beneficial use of that land by its citizens (*195 Cal. App. 2d 591, 594-595)* .

Counsel should note that in this case substitution was prevented by the interest of a municipality, rather than the interest of an individual attorney, and the court's holding applies to the attorney only in his representative capacity for the city. In cases in which an attorney seeks to show an individual power and interest, opposition to substitution has been less successful (*Todd v. Superior Court of San Francisco (1919) 181 Cal. 406, 184 P. 684* (discussed in *§ 24.21[4][a]*); *O'Connell v. Superior Court (1935) 2 Cal. 2d 418, 41 P.2d 334* (discussed *above*)].

[b] Attorney in Representative Capacity

The case of ***Redevelopment Agency v. Superior Court*** *(1961) 195 Cal. App. 2d 591, 16 Cal. Rptr. 45* , is discussed in *§ 24.21[4][a]*.

[4] Additional Authorities

[a] Interest of Attorney

In *Todd v. Superior Court of San Francisco (1919) 181 Cal. 406, 184 P. 684* , the superior court in a probate proceeding denied a motion for substitution of an attorney. The Supreme Court issued a writ of mandate to compel substitution, but at the same time established the existence of an exception to the client's right of substitution. An attorney cannot be substituted, the Court said, when he or she has a beneficial interest in the subject matter of the action, apart from the proceeds arising from performance of his or her services as an attorney (*181 Cal. 406, 413)* . The exception did not apply in the case at hand, however. Although the employment contract between attorney and client expressed the employment in irrevocable terms, and granted the attorney a share of the client's interest in the subject estate, the attorney's interest was not a separate interest in the subject matter of the employment because it was intended merely as compensation for his services (*181 Cal. 406, 419)* .

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
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PART II. FORMS

2A-24 California Points & Authorities § 24.22

§ 24.22 Supporting Motion for Order Permitting Withdrawal of Attorney From Case [Code Civ. Proc. § 284(2)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____ _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF
Plaintiff,	)	_____'s [*name of attorney*] MO-
vs.	)	TION FOR PERMISSION TO WITHDRAW AS AT-
_____ [*name*],	)	TORNEY OF RECORD
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT IN ITS DISCRETION SHOULD NORMALLY PERMIT THE ATTORNEY TO WITHDRAW FROM THE CASE AT ANY TIME.

A. Motion for Withdrawal. An attorney in an action or special proceeding may be permitted to withdraw at any time before or after judgment or final determination, by an order of the court, on the attorney's application, after notice to the client (*Code Civ. Proc. § 284(2)*).

B. Discretion of Court to Allow Withdrawal. It is within the court's sound discretion to allow an attorney to withdraw from a case (*People v. Prince (1968) 268 Cal. App. 2d 398, 406, 74 Cal. Rptr. 197* ; *Jones v. Green (1946) 74 Cal. App. 2d 223, 231, 168 P.2d 418*).

C. Withdrawal Normally Permitted. When a reason is given, an attorney should normally be permitted to withdraw, unless prejudice to any party would result, or some other compelling reason exists forcing him or her to continue in the case (*Ramirez v. Sturdevant (1994) 21 Cal. App. 4th 904, 914-916, 26 Cal. Rptr. 2d 554* ; *People v. Prince (1968) 268 Cal. App. 2d 398, 406, 74 Cal. Rptr. 197* ; *Heple v. Kluge (1951) 104 Cal. App. 2d 461, 462, 231 P.2d 505* ; *Linn v. Superior Court (1926) 79 Cal. App. 721, 725, 250 P. 880*).

[*Optional*] **D. Corporate Client.** An attorney may be permitted to withdraw, whether the client is an individual or a corporation (*Ferruzzo v. Superior Court (1980) 104 Cal. App. 3d 501, 504, 163 Cal. Rptr. 573*).

[*Optional*] **E. Refusal to Pay Attorney's Fees.** Withdrawal may be permitted when the client fails or refuses to pay or secure the proper attorney's fees after being reasonably requested to do so (*People v. Prince (1968) 268 Cal. App. 2d 398, 406-407, 74 Cal. Rptr. 197*).

[*Optional*] **F. Withdrawal to Prevent Frivolous Appeal or Delaying Tactics.** The high ethical and professional standards as a bar member and court officer require an attorney to inform his or her client that the attorney's professional responsibility precludes him or her from pursuing an appeal that is frivolous or taken for the purpose of delay and to withdraw from representation of the client (*Cosenza v. Kramer (1984) 152 Cal. App. 3d 1100, 1103* ; *see Code Civ. Proc. § 907*; *Cal. Rules of Ct., Rule 8.272*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form memorandum may be submitted in support of an attorney's motion to withdraw from a criminal or civil case, where the client does not consent to the withdrawal. It is advisable to always afford the client the opportunity to consent to substitution, preferably documented in writing. The attorney should also be very careful not to reveal or imply any facts detrimental to the client's cause of action, or from which a negative inference could be drawn. The court will always consider any possible prejudice to the client. See *Cal. Rules Prof. Conduct, Rule 3-700*. Most courts will also consider the effect of substitution on the court's calendar, particularly in "fast-track" cases.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

The caption shown on this form complies with the requirements of Cal. Rules of Court, Rule 3.1111 for a memorandum filed separately from a notice of motion and motion. However, to the extent practicable, a memorandum supporting a motion must be attached to the notice of motion [*Cal. Rules of Court, Rule 3.1113*]. When the memorandum is attached to the notice of motion, the caption on the notice of motion will include the memorandum in the title of the paper describing the nature of the documents being filed [*Cal. Rules of Court, Rule 3.1112*]. Thus, a supporting memorandum

should be filed separately, and have its own caption, only if it is not practicable to attach it to the notice of motion.

[b] Related Pleading and Practice Forms

For forms of notice of motion, supporting declaration, order granting the motion, and notice of withdrawal, as well as a form of withdrawal by mutual consent when a motion is not necessary, see California Forms of Pleading and Practice, Ch. 72, *Attorney Practice and Ethics* (Matthew Bender).

[3] Discussion of Authorities

[a] Discretion of Court to Allow Withdrawal

People v. Prince *(1968) 268 Cal. App. 2d 398, 74 Cal. Rptr. 197* , was an appeal from a judgment in superior court against a defendant in a criminal case. One of the contentions on appeal was that the trial court had improperly allowed defendant's attorney to withdraw. The court of appeal held that with respect to withdrawal, the lower court had acted properly. The court stated that under *Code Civ. Proc. § 284(2)*, an attorney for a defendant in a criminal case may move the court for withdrawal, and granting or denying the motion lies within the court's sound discretion (*268 Cal. App. 2d 398, 406)* .

Jones v. Green *(1946) 74 Cal. App. 2d 223, 168 P.2d 418* , was an appeal from a judgment in a paternity suit. The appellant's principal contention was that the trial court had abused its discretion in granting his attorney's motion to withdraw, and, without granting a continuance, in proceeding immediately thereafter to trial. The court of appeal reversed one part of the judgment on other grounds, but affirmed the judgment against appellant. The court held that it is within a court's sound discretion to permit withdrawal, and that in most cases it is proper to do so (*74 Cal. App. 2d 223, 231)* . In this case, because no meritorious defense had been shown, and appellant had said that he had no money to pay an attorney and was ready to proceed to trial, the lower court had not abused its discretion (*74 Cal. App. 2d 223, 230-231)* .

[b] Withdrawal Normally Permitted

In ***Aceves v. Superior Court*** *(1996) 51 Cal. App. 4th 584, 59 Cal. Rptr. 2d 280* , the supervising deputy in a public defender's office asked that the deputy assigned as trial counsel and the public defender's office as a whole be allowed to withdraw from representing defendant because of a conflict of interest. The supervising deputy asserted that he was unable to relate the facts that generated the conflict without breaching client confidences. He was able to tell the court, however, that the conflict was created by a statement from the client that caused a complete breakdown of the attorney-client relationship. The trial court conditioned withdrawal on divulging the facts underlying the conflict and denied the motion (*51 Cal. App. 4th 584, 587)* . The court of appeal held that where the duty not to reveal confidences prevented counsel from further disclosure and the trial court accepted the good faith of counsel's representations, the trial court should have found the conflict sufficiently established and permitted withdrawal *51 Cal. App. 4th 584, 592)* .

In ***Ramirez v. Sturdevant*** *(1994) 21 Cal. App. 4th 904, 26 Cal. Rptr. 2d 554* , the attorney informed the client of his intention to withdraw from the case after judgment unless the client agreed to enter into a new retainer agreement that would apply to prosecution of the appeal of the judgment. The initial retainer agreement between the attorney and the client provided that the attorney, on notice, might withdraw at any time. The client contended that, absent cause for withdrawal, the attorney was unconditionally obligated to prosecute her appeal (*21 Cal. App. 4th 904, 914-915)* .

The court of appeal held that there is no basis in the law, or in logic, for a conclusion that an attorney may never withdraw from a case except for cause. Although an attorney violates his or her ethical duty by abandoning a client or by withdrawing at a critical point in the litigation and thereby prejudicing the client's case, there is no authority preventing an attorney from withdrawing from a case if withdrawal can be accomplished without undue prejudice to the client's interests. Implicit in *Code Civ. Proc. § 284* and *Rules of Professional Conduct, Rule 3-700,* is that an attorney is

entitled to withdraw, either with the consent of the client, or without that consent if withdrawal is approved by the court. The court of appeal concluded that there was no reason in this case why a court might decline to permit withdrawal, since the attorney was prepared to file a notice of appeal and appropriate post-judgment motions to protect the client's interests, whether or not he continued as her attorney (*21 Cal. App. 4th 904, 915)* .

People v. Prince *(1968) 268 Cal. App. 2d 398, 74 Cal. Rptr. 197* , is discussed in *§ 24.22[3][a]*. In that case, the court of appeal held that where a motion is properly made, an attorney is warranted in withdrawing from the case, so long as the attorney's withdrawal will not result in prejudice to the rights or interests of any party to the case (*268 Cal. App. 2d 398, 406-407)* .

In ***Heple v. Kluge*** *(1951) 104 Cal. App. 2d 461, 231 P.2d 505* , attorneys for one of the parties made a motion for withdrawal during an appeal. Although they opposed the motion, the clients had earlier expressed distrust of the attorney's willingness to represent the clients' best interests in the case. The court of appeal granted the motion, holding that because an attorney's position is one of the highest confidence, whenever a client questions an attorney's good faith, the attorney is justified in seeking to withdraw, and should be permitted to do so, absent some very compelling reason indicating otherwise (*104 Cal. App. 2d 461, 462)* .

In ***Linn v. Superior Court*** *(1926) 79 Cal. App. 721, 250 P. 880* , an attorney petitioned the court of appeal for a writ of mandate compelling the superior court to grant his motion to withdraw from a pending case. The court of appeal denied the writ, but stated that as a rule, an attorney should be permitted to withdraw in most cases unless withdrawal would work an injustice on a third party (*79 Cal. App. 721, 725)* . The exception applied in this case because the motion was brought the day before trial, and a possible injury to a third party existed. The trial court's decision had therefore not been an abuse of its discretion (*79 Cal. App. 721, 725-726)* .

[c] Corporate Client

In ***Ferruzzo v. Superior Court*** *(1980) 104 Cal. App. 3d 501, 163 Cal. Rptr. 573* , an attorney represented a corporation, and individuals connected with the corporation, in three separate actions. For each action, the attorney brought a motion in the superior court for permission to withdraw. The motions were granted with respect to the individuals, and denied with respect to the corporation. The court believed it had no discretion to grant a motion for withdrawal since the corporation would be left without an attorney, in violation of the rule that a corporation cannot appear in propria persona.

The court of appeal issued a writ of mandate directing that the attorney be permitted to withdraw. It held that proper grounds apply to permit withdrawal, whether the client is an individual or a corporation (*104 Cal. App. 3d 501, 504)* . A court's permission for withdrawal by an attorney is governed by a separate rule from that forbidding a corporation's self-representation. The rule that an attorney may be allowed to withdraw is not inconsistent with the rule forbidding a corporation to represent itself, since permitting withdrawal simply requires the corporation to obtain another attorney (*104 Cal. App. 3d 501, 504)* .

[d] Refusal to Pay Attorney's Fees

People v. Prince *(1968) 268 Cal. App. 2d 398, 74 Cal. Rptr. 197* , is discussed in *§ 24.22[3][a], [b]*. In that case, the court of appeal held that if a client refuses or fails to pay attorney's fees after a reasonable request to do so, or if he or she deliberately disregards an agreement or obligation to pay such fees, the attorney is justified in seeking withdrawal from the case (*268 Cal. App. 2d 398, 406-407)* . In such a case, the court may properly permit withdrawal, absent a showing of prejudice or injustice (*268 Cal. App. 2d 398, 406)* .

[e] Withdrawal to Prevent Frivolous Appeal or Delaying Tactics

Cosenza v. Kramer *(1984) 152 Cal. App. 3d 1100* , was a contract action for the balance owed for roofing work. Defendant filed a cross-complaint alleging breach of contract and fraud. Judgment was given in favor of plaintiff on the complaint and against defendant on the cross-complaint. Defendant appealed and the court of appeal affirmed and imposed a penalty on defendant and his attorney pursuant to *Code Civ. Proc. § 907* and *Cal. Rules of Ct., Rule 8.272*.

The court found that defendant and his attorney had joined together to misuse the appellate process to delay the payment of a legitimate obligation. The court stated that an attorney in a civil case is not a hired gun required to carry out every direction given by the client. It held that counsel has a professional responsibility not to pursue an appeal that is frivolous or taken for purpose of delay just because the client instructs him or her to do so. The court further held that under such circumstances the high ethical and professional standards as a bar member and court officer require the attorney to inform the client that the attorney's professional responsibility precludes him or her from pursuing such an appeal and to withdraw from representation of that client (*152 Cal. App. 3d 1100, 1103)* .

[4] Additional Authorities

[a] Discretion of Court to Allow Withdrawal

Hodcarriers, Bldg. & Common Laborers Local Union v. Miller (1966) 243 Cal. App. 2d 391, 52 Cal. Rptr. 251 , involved an appeal from a superior court judgment in an intraunion controversy. One of the issues on appeal was whether the lower court should have granted one of the party's attorneys' motion to withdraw, where the attorneys had asserted conflict of interest. The trial court had denied the motion, which had been brought during the trial. The court of appeal affirmed the judgment and the lower court's decision on the motion. It held that since during a trial the court must retain ultimate control, the determination of an attorney's motion to withdraw must remain within its sound discretion (*243 Cal. App. 2d 391, 395)* . A court should have wide latitude in deciding such questions, considering such factors as possible injustice to other parties in the case (*243 Cal. App. 2d 391, 395)* .

[b] Withdrawal Normally Permitted

Jones v. Green (1946) 74 Cal. App. 2d 223, 168 P.2d 418 , is discussed in *§ 24.22[3][a]*. There, in affirming the trial court's decision to allow withdrawal, the court of appeal cited *Linn v. Superior Court (1926) 79 Cal. App. 721, 250 P. 880* discussed in *§ 24.22[3][b]*, and emphasized that case's holding that in most instances the attorney should be permitted to withdraw (*74 Cal. App. 2d 223, 231)* .

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CHAPTER 24 ATTORNEYS AT LAW: SUBSTITUTION, WITHDRAWAL, DISQUALIFICATION, AND AUTHORITY TO APPEAR
PART II. FORMS

2A-24 California Points & Authorities § 24.23

§ 24.23 Opposing Attorney's Motion for Order Permitting Withdrawal From Case [Code Civ. Proc. § 284(2)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN OPPOSITION TO
vs.	)	_____'s [*name of attorney*] MOTION FOR PERMISSION TO WITHDRAW AS ATTORNEY OF RECORD
_____ [*name*],	)	[*Code Civ. Proc. § 284(2)*]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT IN ITS DISCRETION SHOULD DENY _____'s [*name of attorney*] MOTION TO WITHDRAW BECAUSE _____ [WITHDRAWAL WOULD WORK AN INJUSTICE ON A THIRD PARTY *or* WITHDRAWAL WOULD RESULT IN PREJUDICE TO THE CLIENT'S INTEREST].

A. Discretion of Court to Deny Withdrawal. A court may act in its discretion to deny an attorney's motion to withdraw from a case (*Hodcarriers, Bldg. & Common Laborers Local Union v. Miller (1966) 243 Cal. App. 2d 391, 395, 52 Cal. Rptr. 251* ; *People v. McCracken (1952) 39 Cal. 2d 336, 350, 246 P.2d 913*).

[*EITHER, if third party opposing withdrawal*]

B. Injustice to Third Party. A court should deny an attorney's motion to withdraw if withdrawal would result in injustice to a third party (*Manfredi & Levine v. Superior Court (1998) 66 Cal. App. 4th 1128, 1132, 78 Cal. Rptr. 2d 494* ; *Linn v. Superior Court (1926) 79 Cal. App. 721, 725, 250 P. 880*).

[*OR, if client opposing withdrawal*]

B. Prejudice to Client. An attorney's motion to withdraw from a case should be denied when the withdrawal would result in possible prejudice to the client (*Vann v. Shilleh (1975) 54 Cal. App. 3d 192, 197, 126 Cal. Rptr. 401* ; *People v. Prince (1968) 268 Cal. App. 2d 398, 406, 74 Cal. Rptr. 197*).

[*Optional*] **C. Refusal to Consent to Increase in Attorney's Fee Insufficient Reason for Withdrawal.** When the attorney and client have agreed to a certain fee, the client's refusal to consent to an increase in the fee is not a sufficient reason to permit the attorney's withdrawal from the case (*Cassel v. Gregori (1937) 28 Cal. App. 2d Supp. 769, 771, 70 P.2d 721*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to an attorney's motion to withdraw from a case, by a party to the litigation or proceeding other than the client, who would be affected by the withdrawal, or the client who does not consent to withdrawal.

If appropriate, the alternate paragraphs in the form may both be used when there are arguments that withdrawal will result in both an injustice to a third party and prejudice to the client.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Discretion of Court to Deny Withdrawal

Hodcarriers, Bldg. & Common Laborers Local Union v. Miller *(1966) 243 Cal. App. 2d 391, 52 Cal. Rptr. 251* , is discussed in *§ 24.22[4][a]*. One issue in that case was whether the lower court should have granted an attorney's motion to withdraw during the trial. The court of appeal affirmed the judgment, and held that the trial court had properly denied

the motion to withdraw. The court stated that allowing or disallowing an attorney's withdrawal is within the sound discretion of the court (*243 Cal. App. 2d 391, 395)* . This is especially true if the motion to withdraw is brought during trial, when the court must retain ultimate control, and therefore should have wide latitude in determining such questions considering such factors as possible injustice to other parties in the case (*243 Cal. App. 2d 391, 395)* .

People v. McCracken *(1952) 39 Cal. 2d 336, 246 P.2d 913* , was an appeal from a criminal conviction in superior court. One argument asserted on appeal was that the trial court's refusal to permit defendant's court-appointed attorney to withdraw had resulted in prejudice to the defendant. The attorney had made two motions to withdraw: one before, and one following the first of defendant's two trials. Each motion had been denied. Defendant claimed that had withdrawal been permitted, the public defender, who would have been substituted, could have afforded to hire independent experts, which defendant otherwise could not obtain. The Supreme Court affirmed the judgment, and held that a court may, in its discretion, refuse permission to withdraw, having in mind such considerations as whether injustice could result (*39 Cal. 2d 336, 350)* .

[b] Injustice to Third Party

In ***Manfredi & Levine v. Superior Court*** *(1998) 66 Cal. App. 4th 1128, 78 Cal. Rptr. 2d 494* , plaintiff's counsel moved to withdraw for an alleged, but undisclosed, conflict of interest. The trial court summarily denied counsel's motion after counsel declined the court's request to disclose the nature of the conflict to the court. The court expressed its concern that counsel's withdrawal motion was merely a delaying tactic. Counsel petitioned the court of appeal for a writ of mandate to compel the trial court to grant the withdrawal motion. The defendants in the underlying action sought to oppose the writ petition.

The court of appeal denied without prejudice the petition for a writ of mandate, holding that the trial court did not abuse its discretion in denying counsel's withdrawal motion where counsel had declined to explain the true nature of the alleged conflict to the trial court (*66 Cal. App. 4th 1128, 1136)* . The trial court need not accept a sweeping claim of conflict and "rubber-stamp" counsel's request to withdraw (*66 Cal. App. 4th 1128, 1134)* , especially where counsel could have requested an *in camera* hearing to provide sufficient information to the trial court regarding counsel's alleged conflict (*66 Cal. App. 4th 1128, 1136)* . Additionally, the court stated that granting a motion to be relieved as counsel may work an injustice on a third party and, as such, held that the defendants in the underlying action had standing to oppose counsel's writ petition as parties whose interests would be directly affected by the writ proceeding (*66 Cal. App. 4th 1128, 1132)* .

In ***Linn v. Superior Court*** *(1926) 79 Cal. App. 721, 250 P. 880* , an attorney petitioned the court of appeal for a writ of mandate to compel the superior court to grant his motion to withdraw from a pending case. The attorney asserted that he had an unqualified right to withdraw at any time, and that the client had breached their agreement regarding the attorney's compensation. The court of appeal found that the trial court had not abused its discretion in refusing to permit withdrawal. The court held that an attorney does not have an unqualified right to withdraw (*79 Cal. App. 721, 723)* . The motion to withdraw had been brought the day before trial, the attorney had represented the client for over two and half years and had collected fees from her, and the trial court had advanced trial of the case on the court calendar. The court held that all of these facts should be considered in deciding a motion to withdraw (*79 Cal. App. 721, 725)* . In this case, permitting withdrawal would have required that the court grant a continuance, and might have worked an irreparable injury on a third party (*79 Cal. App. 721, 725)* . Although the court does not specifically discuss either the identity of the third party, or the possible injury to it, aside from a reference to hardship on "members of the profession," the court stated that the trial court must be presumed to have had important reasons for advancing the case on its calendar (*79 Cal. App. 721, 725-726)* . In addition, the court pointed out that in a pending case, the client and his or her attorney both have obligations to the court and the adversary to proceed with the trial (*79 Cal. App. 721, 724)* . It can be inferred from the court's discussion then, that if either the court or the adversary may be injured by an attorney's withdrawal from a pending case, the motion for withdrawal should be denied

[c] Prejudice to Client

In ***Aceves v. Superior Court*** *(1996) 51 Cal. App. 4th 584, 59 Cal. Rptr. 2d 280* , the supervising deputy in a public defender's office asked that the deputy assigned as trial counsel and the public defender's office as a whole be allowed to withdraw from representing defendant because of a conflict of interest. The supervising deputy asserted that he was unable to relate the facts that generated the conflict without breaching client confidences. He was able to tell the court, however, that the conflict was created by a statement from the client that caused a complete breakdown of the attorney-client relationship. The trial court conditioned withdrawal on divulging the facts underlying the conflict and denied the motion (*51 Cal. App. 4th 584, 587)* . The court of appeal held that where the duty not to reveal confidences prevented counsel from further disclosure and the trial court accepted the good faith of counsel's representations, the trial court should have found the conflict sufficiently established and permitted withdrawal. (*51 Cal. App. 4th 584, 592)* .

Vann v. Shilleh *(1975) 54 Cal. App. 3d 192, 126 Cal. Rptr. 401* , involved an appeal from a superior court judgment in a breach of contract case. The appellant challenged the judgment on several grounds, one of which was that the court had improperly denied his motion for continuance, following his attorney's withdrawal from the case. The court of appeal reversed the judgment, and held that continuance should have been granted, to allow the appellant time to obtain new counsel.

The court of appeal discussed the attorney's right to withdraw from the case. In his motion to withdraw, the attorney had asserted noncooperation of the client, when just before trial the client refused to accept a negotiated settlement that he had earlier authorized. The attorney withdrew the next day, which was the Friday before the Monday morning of trial. The court of appeal held that the right of an attorney to withdraw from a case is not absolute. An attorney should not be permitted to withdraw until he or she has taken reasonable steps to avoid foreseeable prejudice to the client's rights. It is the duty of a trial court to see that a client is protected from the consequences of an attorney's abandonment of a case (*54 Cal. App. 3d 192, 197)* .

People v. Prince *(1968) 268 Cal. App. 2d 398, 74 Cal. Rptr. 197* , was an appeal from a superior court conviction in a criminal case. One of the appellant's contentions was that the lower court should not have granted his attorney's motion to withdraw. The court of appeal found that the trial court had not abused its discretion in granting the motion. The court held that although the question of an attorney's withdrawal lies within the sound discretion of the trial court, that court must consider whether withdrawal would result in any injustice in the handling of the case (*268 Cal. App. 2d 398, 406)* . Distinguishing the case at hand from those in which withdrawal was denied, the court said that it is proper to deny a motion to withdraw when possible prejudice to the interests of the client, or any other interested party will result (*268 Cal. App. 2d 398, 406)* .

[d] Refusal to Consent to Increase in Attorney's Fee Insufficient Reason for Withdrawal

In ***Cassel v. Gregori*** *(1937) 28 Cal. App. 2d Supp. 769, 70 P.2d 721* , a client appealed an order granting his attorney's motion to withdraw. The attorney had submitted an affidavit in support of the motion, stating only that mutual disagreements had arisen between client and attorney, making it impossible for the attorney to continue. The client's counter-affidavit stated that initially a contingent fee agreement had been made, and later the attorney had asked that it be changed to provide a fixed monthly retainer. The client had not consented. The court of appeal reversed the order granting withdrawal, and held that a client's refusal to consent to an increase in attorney's fees is not a sufficient reason for the attorney's withdrawal from the case (*28 Cal. App. 2d Supp. 769, 771*).

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 24 ATTORNEYS AT LAW: SUBSTITUTION, WITHDRAWAL, DISQUALIFICATION, AND AUTHORITY TO APPEAR
PART II. FORMS

2A-24 California Points & Authorities § 24.24

§ 24.24 Supporting Motion for Order Disqualifying Attorney From Engaging in Representation Adverse to Former Client [Bus. & Prof. Code § 6068(e)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM IN SUPPORT
_____ [*name*],	)	OF MOTION TO DISQUALIFY
Plaintiff,	)	_____ [*name of attorney*] FROM
vs.	)	REPRESENTATION ADVERSE TO FORMER CLI-
_____ [*name*],	)	ENT
Defendant.	)	[*Bus. & Prof. Code § 6068(e)*]
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

_____ [*Name of attorney*] SHOULD BE DISQUALIFIED FROM THE CASE BECAUSE HE/SHE IS REPRESENTING AN INTEREST ADVERSE TO THAT OF A FORMER CLIENT, AND MAY EITHER INJURE THE FORMER CLIENT, OR BE REQUIRED TO DISCLOSE CONFIDENTIAL INFORMATION OBTAINED

FROM THE FORMER CLIENT.

A. Motion to Disqualify. When an attorney, or the law firm to which he or she belongs, is representing an interest adverse to that of a former client, and there exists the potential for injury to the former client or the attorney's disclosure of confidential information obtained from the former client, that client as a party to the action may properly make a motion in the trial court at any time to disqualify the attorney from the case (*Meehan v. Hopps (1955) 45 Cal. 2d 213, 214, 216, 288 P.2d 267* ; *Big Bear Mun. Water Dist. v. Superior Court (1969) 269 Cal. App. 2d 919, 927, 75 Cal. Rptr. 580* ; *Earl Scheib, Inc. v. Superior Court of Los Angeles County (1967) 253 Cal. App. 2d 703, 709*).

B. Attorney's Duty to Client. It is the duty of an attorney to maintain inviolate the confidence, and, at every peril to himself or herself, to preserve the secrets of his or her client (*Bus. & Prof. Code § 6068(e)*; *Styles v. Mumbert (2008) 164 Cal. App. 4th 1163, 1167, 79 Cal. Rptr. 3d 880*).

C. Rule Against Conduct or Disclosure Adverse to Former Client. An attorney is forbidden from doing anything which will injure a former client in any matter in which the attorney formerly represented him or her, or in any use of confidential information gained in the course of the former employment (*Wutchumna Water Co. v. Bailey (1932) 216 Cal. 564, 573-574, 15 P.2d 505* ; *Meza v. H. Muehlstein & Co. (2009) 176 Cal. App. 4th 969, 977-978, 98 Cal. Rptr. 3d 422* ; *Metro-Goldwyn-Mayer, Inc. v. Tracinda Corp. (1995) 36 Cal. App. 4th 1832, 1843-1845, 43 Cal. Rptr. 2d 327*).

D. Rules of Professional Conduct Prohibit Adverse Representation. A member of the State Bar may not, without the informed written consent of the client or former client, accept employment adverse to the client or former client when, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment (*Cal. Rules Prof. Conduct, Rule 3-310(E)*; *Farris v. Fireman's Fund Insurance Company (2004) 119 Cal. App. 4th 671, 679-681, 14 Cal. Rptr. 3d 618* ; *Henriksen v. Great American Savings & Loan (1992) 11 Cal. App. 4th 109, 14 Cal. Rptr. 2d 184*).

E. Actual Misuse of Confidential Information Not Necessary. The subsequent representation of another against a former client is forbidden not merely when the attorney will actually be called upon to use confidential information obtained in the course of the former employment, but in every case when, by reason of such subsequent employment, he or she may potentially be called upon to use such confidential information (*Galbraith v. State Bar (1933) 218 Cal. 329, 332-333, 23 P.2d 291*).

F. Prejudice to Adverse Party Irrelevant. On hearing a motion to disqualify an attorney from representing a party adverse to a former client, the issue of possible prejudice to the adverse party is irrelevant (*Earl Scheib, Inc. v. Superior Court of Los Angeles County (1967) 253 Cal. App. 2d 703, 709*).

G. Injury to Former Client Presumed. On considering a motion to disqualify an attorney who engages in representation adverse to a former client, absent contrary proof, injury to the former client will be presumed (*Weidekind v. Water Co. (1887) 74 Cal. 386, 389, 19 P. 173* ; *Earl Scheib, Inc. v. Superior Court (1967) 253 Cal. App. 2d 703, 709, 61 Cal. Rptr. 386*).

[*Optional*] **H. No Joint Client Exception.** There is no joint client exception to the prohibition against representation adverse to a former client (*Western Continental Operating Co. v. Natural Gas Corp. (1989) 212 Cal. App. 3d 752, 761, 261 Cal. Rptr. 100*).

[*Optional*] **I. Former Judicial Officer Who Participated in Action as Judicial Officer and Officer's Current Law Firm May Be Prohibited from Later Participation in Identical Case.** A former judicial officer who received confidential information during settlement discussions must be disqualified from later participation in the same case. The judicial officer's firm must also be disqualified, regardless of any screening provisions the firm may have in place (

Cho v. Superior Court (1995) 39 Cal. App. 4th 113, 119-126, 45 Cal. Rptr. 2d 863).

[*Optional*] **J. Law Firm That Formerly Represented Parent Corporation May Be Disqualified From Later Representation of Party Adverse to Subsidiary of Parent Corporation.** A law firm that received confidential information during a prior representation of a parent corporation may be disqualified from later representation of a party in an action against a wholly-owned subsidiary of the parent corporation (*Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft (1999) 69 Cal. App. 4th 223, 81 Cal. Rptr. 2d 425*).

[*Optional*] **K. When Attorney Leaves Private Practice to Become Head of Public Law Office, Vicarious Disqualification of Entire Public Law Office Required.** When an attorney leaves private practice to become the head of a public law office, vicarious disqualification of the entire public law office generally is required in all matters substantially related to the head of office's earlier private representations (*City and County of San Francisco v. Cobra Solutions, Inc. (2004) 119 Cal. App. 4th 304, 316, 14 Cal. Rptr. 3d 400*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a party's motion to disqualify an opposing attorney or law firm from further participation in the case, when the moving party is the former client of the attorney or firm now representing interests adverse to, and conflicting with, those of the moving party.

Counsel should note that the motion to disqualify is available only when the former client is also a party to the action, since only a party to an action may bring a motion pertaining to it [*see Difani v. Riverside County Oil Co. (1927) 201 Cal. 210, 214, 256 P. 210]* . When the former client seeks to disqualify an attorney from participating in a suit to which that client is not a party, he or she should seek an alternate remedy [*see § 24.24[2][a]*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Injunctive Relief

A former client may also bring a separate action to enjoin an attorney from participating in a case, or from revealing confidential information obtained from the former client [*see Wutchumna Water Co. v. Bailey (1932) 216 Cal. 564, 567, 15 P.2d 505* ; *Meehan v. Hopps (1955) 45 Cal. 2d 213, 216, 288 P.2d 267]* . However, if an action was filed to evade a disqualification order in a prior action, the former client need not file a collateral action, and may make the motion in the pending action [*Machado v. Superior Court (2007) 148 Cal. App. 4th 875, 881-882, 55 Cal. Rptr. 3d 902]* .

[c] Related Pleading and Practice Forms

For forms for a notice of motion for an order disqualifying an attorney, and an order granting the motion, see Ch. 72, *Attorney Practice and Ethics* , in California Forms of Pleading and Practice (Matthew Bender).

[d] Opposing Memoranda

The memoranda set out in *§§ 24.28 -24.32* may be used in an appropriate case to oppose a motion supported by this memorandum.

[3] Discussion of Authorities

[a] Motion to Disqualify

Meehan v. Hopps *(1955) 45 Cal. 2d 213, 288 P.2d 267* , concerned a motion to dismiss an appeal from a superior court order in a pending civil case. The trial court denied a motion to disqualify opposing counsel, who was formerly defendant's attorney, from participating in the case and from disclosing confidential information pertaining to it. Defendant appealed the trial court's order to the Supreme Court. Plaintiffs then moved the Supreme Court to dismiss the appeal, contending that the lower court order was not appealable, and that the appropriate review would be an appeal from final judgment. The Supreme Court denied the motion to dismiss, stating that the court's order was final for the purposes of appeal (*45 Cal. 2d 213, 217-218)* . In the course of its opinion, the Court held that a motion to disqualify an attorney is appropriate, and may properly be made directly to the trial court, although if he or she chooses, the former client may also bring an independent action seeking injunction (*45 Cal. 2d 213, 216)* .

In ***Big Bear Mun. Water Dist. v. Superior Court*** *(1969) 269 Cal. App. 2d 919, 75 Cal. Rptr. 580* , plaintiff in an eminent domain action brought a motion to disqualify the attorney for an intervening party, on the grounds that the attorney had previously represented the plaintiff in connection with the action. The superior court originally believed it lacked jurisdiction to decide the issue, and denied the motion. On reconsideration, the court granted the motion. The intervening party, as the attorney's current client, petitioned the court of appeal for a writ of mandate compelling the trial court to dismiss the action on unrelated grounds, and to vacate its order disqualifying the attorney. The court of appeal denied the writ as to both matters. With regard to the disqualification order, it held that a former client may properly bring a motion in the trial court to disqualify an attorney from adverse representation (*269 Cal. App. 2d 919, 927)* . The motion may be heard on affidavits, and the trial court's resolution of conflicting evidence will be conclusive on appeal (*269 Cal. App. 2d 919, 927)* .

Earl Scheib, Inc. v. Superior Court of Los Angeles County *(1967) 253 Cal. App. 2d 703* , involved a writ of mandate to compel the superior court to hear and determine a motion to disqualify a law firm from a pending action. A partner in the defendants' attorneys' law firm had previously been a member of plaintiff's attorneys' law firm, and had had access to confidential information relevant to the pending action. The superior court denied plaintiff's motion to disqualify defendants' law firm, by issuing a minute order saying that because the motion was brought during trial instead of at the outset of the case, the delay was prejudicial to the defendants. Plaintiff then brought a motion for reconsideration, which the trial court also denied. The court of appeal issued the writ of mandate, and held that the trial court had abused its discretion in refusing to hear the motion on its merits. It held that a motion to disqualify an attorney or law firm should not be denied because it is filed late (*253 Cal. App. 2d 703, 707)* . A former client can raise the issue of his or her attorney's adverse representation in any one of several ways, and at any time during a pending action (*253 Cal. App. 2d 703, 709)* .

[b] Attorney's Duty to Client

In ***Styles v. Mumbert*** *(2008) 164 Cal. App. 4th 1163, 1167, 79 Cal. Rptr. 3d 880* , Styles sued Mumbert, and Mumbert retained Pagkas to represent him. While Pagkas represented Mumbert, the trial court ordered terminating sanctions against Mumbert for failing to respond to discovery. The trial court ultimately entered a default judgment against Mumbert. Mumbert filed a separate suit against Pagkas for malpractice. In that suit, Pagkas cross-complained for quantum meruit for services rendered.

While Mumbert's appeal from the default judgment was pending, Styles assigned her rights to the judgment to Pagkas. Pagkas sought to substitute into the appeal as the respondent. Claiming that he and Mumbert were adverse parties as a result of the malpractice action, Pagkas argued that he should be allowed to substitute in as the respondent in the appeal of the default judgment in order to offset any malpractice award against him.

Mumbert argued that Pagkas and Mumbert were adverse parties in the malpractice litigation, but that in the default appeal, Pagkas was Mumbert's former attorney and continued to owe him professional duties. The court of appeal agreed. It held that even though Pagkas no longer represented Mumbert, he continued to owe Mumbert the duty to protect their prior confidential relationship [*164 Cal. App. 4th 1163, 1167*]. If a substantial legal and factual relationship exists between a former representation and the attorney's current position, the court held, a presumption arises that the attorney possesses confidential information about the former client which would be compromised if an attorney were allowed to take an adverse position after the representation ended [*164 Cal. App. 4th 1163, 1167*]. In the default appeal, Pagkas was not only attempting to represent the opposing side, he was trying to be the opposing side. This, the court held, was more than merely a substantial legal and factual relationship between the prior representation and the current appeal [*164 Cal. App. 4th 1163, 1168*].

Pagkas contended that he should be entitled to reveal Mumbert's confidences to defend himself. The court held that there was no legal support for his position; while he could reveal confidences to defend against the malpractice claim or in a fee dispute, this case was not the malpractice action. The court held that under any analysis, it was certain that Pagkas possessed confidential information adverse to Mumbert which would be compromised if Pagkas were allowed to be in the case [*164 Cal. App. 4th 1163, 1168*].

[c] Rule Against Conduct or Disclosure Adverse to Former Client

In ***Wutchumna Water Co. v. Bailey*** *(1932) 216 Cal. 564, 15 P.2d 505* , a water company brought suit against its former attorney, seeking to enjoin him from representing its adversaries in pending litigation and from disclosing information obtained through his employment with it. The attorney had for several years been the water company's receiver and sole attorney. He had attended meetings of directors, and had advised and represented the company in actions to determine its water rights. The company fired the attorney, who later brought the pending litigation against it on behalf of other water companies and involving the same issues of water rights. The superior court found for the attorney, and the water company appealed.

The Supreme Court reversed the judgment, and held that with regard to former clients, an attorney will be enjoined from doing either of two things. First, the attorney may not do anything injuriously affecting a former client in any matter in which the attorney formerly represented the client (*216 Cal. 564, 573)* . Second, the attorney may not use against the client any information acquired confidentially from the client in the course of the former employment (*216 Cal. 564, 574)* . Because the relation of attorney and client is one of highest confidence, the rule applies in spite of the fact that the former client discharged the attorney without justification (*216 Cal. 564, 571)* .

Meza v. H. Muehlstein & Co. *(2009) 176 Cal. App. 4th 969, 977-978, 98 Cal. Rptr. 3d 422* , involved a personal injury action against 17 defendants for damages caused by exposure to toxic chemicals. Defendant Joe's Plastics was represented by attorney Drouet. The defendants' counsel, including Drouet, entered into a joint cost sharing agreement whereby the defendants shared discovery and trial strategy. The trial court entered judgment in favor of the defendants on the ground that the plaintiff failed to show any admissible expert evidence establishing causation. The plaintiff appealed. While the appeal was pending, Drouet became an associate of the firm representing the plaintiff. The plaintiff dismissed Joe's Plastics from the lawsuit. Several defendants filed a motion disqualifying Drouet's new firm from representing the plaintiff. In opposition, the plaintiff filed Drouet's declaration in which he stated that he never directly communicated with defendants other than Joe's Plastics, and that counsel for the other defendants never disclosed to him any communications they had with their clients. The trial court granted the defendants' motion to disqualify Drouet and his firm from representing the plaintiff.

The court of appeal held that when an attorney successively represents clients with adverse interests, the attorney has a potential conflict of interest. If there is a substantial relationship between the subjects of the representations, the attorney must be disqualified [*176 Cal. App. 4th 969, 977-978*]. The court held that Drouet was clearly disqualified from representing the plaintiff in that there was more than a mere substantial relationship between the plaintiff's suit and Drouet's representation of Joe's Plastics. The court held this was a per se conflict of interest under *Rules Prof. Conduct, Rule 3-310(C)(2)* [*176 Cal. App. 4th 969, 977-978*].

In addition, the court held that Drouet's entire firm was disqualified from representing the plaintiff. The court held that as a general rule in California, if an attorney is disqualified from representation, the entire law firm is vicariously disqualified as well, especially when the attorney's disqualification is due to his or her prior representation of the opposing side during the same lawsuit [*176 Cal. App. 4th 969, 978*]. The court also held that the moving defendants had standing to move to disqualify Drouet even though he did not represent them, because they had an interest in protecting confidential attorney work product disclosed to Drouet [*176 Cal. App. 4th 969, 980-981*].

In ***Metro-Goldwyn-Mayer, Inc. v. Tracinda Corp.*** *(1995) 36 Cal. App. 4th 1832, 43 Cal. Rptr. 2d 327* , counsel represented Metro-Goldwyn-Mayer ("MGM") and Tracinda Corp. ("TC"). Counsel had been MGM's corporate counsel for a number of years, including during a very significant earlier transaction, a merger which had been completed. Counsel continued to represent MGM in a class action which was initiated before the merger. Counsel later was retained by "TC" to represent it in a lawsuit involving financing which related to the valuation of stock in MGM, but in which MGM was not a party. When it became apparent to MGM that TC's interest in the financing suit rested on facts which were adverse to MGM's interests, MGM brought a motion to disqualify counsel from representing TC, citing *Cal. Rules Prof. Conduct, Rule 3-310*. TC opposed the motion on the basis that counsel did not represent MGM and TC in the same matter. The trial court denied the motion to disqualify and MGM appealed.

The court of appeal reversed, finding that it was unnecessary for the clients to be parties to the same matter (*36 Cal. App. 4th 1832, 1843)* . The proscription against representing concurrent adverse interests exists where counsel's employment is adverse to the interests of a client or former client and can exist even when a prior client is not a party to the litigation. Based on counsel's past employment by MGM as corporate counsel and on the specific current representation in the merger which gave rise to the financing lawsuit, the court of appeal reversed the trial court and disqualified counsel (*36 Cal. App. 4th 1832, 1843-1845)* .

[d] Rules of Professional Conduct Prohibit Adverse Representation

In ***Farris v. Fireman's Fund Insurance Company*** *(2004) 119 Cal. App. 4th 671, 14 Cal. Rptr. 3d 618* , attorney James H. Wilkins and his prior law firm, McCormick Barstow Sheppard Wayte and Carruth, LLP (McCormick), represented Fireman's Fund Insurance Company for many years. McCormick's work for Fireman's consisted primarily of advising it regarding insurance coverage issues. While at McCormick, Wilkins issued formal coverage opinions, gave informal advice, consulted on coverage matters, and handled the litigation of coverage disputes and bad faith cases. Wilkins was hired as an associate at McCormick in 1984 and became a partner in 1990. During his entire tenure at McCormick, Wilkins worked as key member of the firm's insurance coverage department. Wilkins was an experienced and valued coverage attorney for McCormick, personally responsible for 27 percent of the work Fireman's sent to McCormick from 1984 to 1997. Wilkins left McCormick in 1997 to start Wilkins, Drolshagen & Czeshinski (WDC).

While working at WDC, Wilkins was retained by respondents Jason Farris and others to sue Fireman's for alleged bad faith and breach of an insurance contract issued by Fireman's. Respondents' complaint asserted that Fireman's wrongfully failed to provide benefits under the insurance contract and wrongfully denied coverage by failing to defend Farris in a personal injury action.

In the trial court, Fireman's moved to disqualify Wilkins and WDC from representing Farris against Fireman's pursuant

to *Cal. Rules Prof. Conduct, Rule 3-310(E)*, arguing that Wilkins had previously represented Fireman's, and, as a result, had access to confidential information material to the action brought by Farris. In response, Wilkins argued that the bulk of his work for Fireman's while at McCormick consisted of issuing coverage opinions, which he said consisted of applying the facts and circumstances of a case to the particular terms and provisions of the policy in issue. Wilkins characterized this as a "very factual and legally specific" analysis. The trial court denied Fireman's motion on the ground that there had been no showing that the Wilkins's services as a "coverage" attorney for Fireman's were substantially related to the services a lawyer would perform defending a bad faith action (*119 Cal. App. 4th 671, 678)* . Fireman's appealed.

The court of appeal applied the two-part test set forth in *Jessen v. Hartford Casualty Insurance Company (2003) 111 Cal. App. 4th 698, 3 Cal. Rptr. 3d 877* . Under that test, the trial court must first identify where the former representation placed the attorney with respect to the prior client. If the placement was direct and personal, the court must then determine whether there was a connection between the two successive representations. This analysis may not include an "inquiry into the actual state of the lawyer's knowledge" acquired while representing the former client (*119 Cal. App. 4th 671, 678-679)* .

The court of appeal held that it was undisputed that Wilkins's relationship with Fireman's was personal and direct. Wilkins acted as a coverage attorney for Fireman's for 13 years and actively participated, by personal contacts with key Fireman's employees, in representing Fireman's with respect to coverage and bad faith cases (*119 Cal. App. 4th 671, 679)* .

Because Wilkins's representation of Fireman's was direct, the only issue before the court was whether there was a substantial relationship between the work Wilkins did for Fireman's and what Wilkins sought to do for Farris. Successive representations are substantially related when "information material to the evaluation, prosecution, settlement or accomplishment of the former representation given its factual and legal issues is also material to the evaluation, prosecution, settlement or accomplishment of the current representation given its factual and legal issues" (*119 Cal. App. 4th 671, 679)* . The court held that the information acquired during the first representation must be "material" to the second representation; that is, it must be directly at issue in, or have some critical importance to, the second representation (*119 Cal. App. 4th 671, 680)* . The trial court found that Wilkins's services for Fireman's were not "substantially related to the services that a litigator/trial lawyer would perform defending a bad faith action (*119 Cal. App. 4th 671, 681)* ." However, the court of appeal held, the attorney's services do not determine whether disqualification is required. Rather, it is "the similarities between the legal problem involved in the former representation and the legal problem involved in the current representation" (*119 Cal. App. 4th 671, 681)* . Whether Wilkins actually possessed confidential information that would work to his advantage in representing Farris is not the test. The proper test is whether a substantial relationship exists between the subjects of the two compared representations (*119 Cal. App. 4th 671, 683)* .

In ***Henriksen v. Great American Savings & Loan*** *(1992) 11 Cal. App. 4th 109, 14 Cal. Rptr. 2d 184* , plaintiffs sought review of an order that disqualified plaintiffs' law firm from representing them. The law firm, during the course of the lawsuit, hired an attorney from the defendants' law firm as an associate. The associate had previously participated in the same lawsuit on behalf of the defendants' law firm, spending over 200 hours in preparation, including court appearances and discovery. After the attorney joined the plaintiffs' law firm, defendants formally moved to disqualify plaintiffs' entire law firm from representing plaintiffs in the action. In opposition, plaintiffs argued that it would "unfairly prejudice" their ability to try the "ready for trial" case and subject them to a "financial hardship in having to bring a replacement law firm up to speed." The plaintiffs' firm alleged that it had and would continue to isolate the new associate from any involvement in or discussion about the lawsuit. Despite firm's attempts at building an ethical wall, the trial court ruled that the plaintiffs' entire firm was disqualified from further representing plaintiffs in the lawsuit. Plaintiffs appealed.

The court of appeal affirmed the order of disqualification, finding no abuse of discretion (*11 Cal. App. 4th 109, 113,*

117) . The court noted that under Cal. Rules Prof. Conduct, former Rule 3-310(D) [*now see Cal. Rules Prof. Conduct, Rule 3-310(E)*], an attorney may not represent a new client whose interests are adverse to those of a former client on a matter in which the attorney has obtained confidential information (*11 Cal. App. 4th 109, 113)* . Clearly, the associate would be disqualified under the rule, because he possessed confidential information while representing the defendants (*11 Cal. App. 4th 109, 114)* . With respect to disqualification of the entire firm, an on-point and controlling case with facts similar to those in the instant case, *Dill v. Superior Court (1984) 158 Cal. App. 3d 301, 306, 205 Cal. Rptr. 671* (discussed in *§ 24.24[4][b]*), requires that the entire firm be disqualified (*11 Cal. App. 4th 109, 111, 115)* . The court noted that California cases have not endorsed the ethical-wall concept where a nongovernmental attorney armed with confidential information switches sides during the pendency of litigation (*11 Cal. App. 4th 109, 115)* . It held that when an attorney is disqualified because he or she formerly represented and therefore possesses confidential information regarding the adverse party in the current litigation, vicarious disqualification of the entire firm is compelled as a matter of law (*11 Cal. App. 4th 109, 117)* .

Henriksen was decided under a prior version of the Rules of Professional Conduct, Cal. Rules Prof. Conduct, former Rule 3-310(D). *Cal. Rules Prof. Conduct, Rule 3-310(E)*, the current rule on adverse representation, is similar to the former rule, with only minor technical changes; it provides that a State Bar member cannot, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment. For purposes of Rule 3-310(E), "informed written consent" means the client's or former client's written agreement to the representation following written disclosure [*Cal. Rules Prof. Conduct, Rule 3-310(A)(2)*]. "Disclosure" means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client [*Cal. Rules Prof. Conduct, Rule 3-310(A)(2)*]. "Written" means any writing as defined in *Evid. Code § 250* [*Cal. Rules Prof. Conduct, Rule 3-310(A)(3)*].

[e] Actual Misuse of Confidential Information Not Necessary

Galbraith v. State Bar *(1933) 218 Cal. 329, 23 P.2d 291* , was a Supreme Court review of the State Bar's recommendation to suspend an attorney for misconduct. The attorney had, in several cases, used information obtained confidentially from client who was a criminal defendant, to bring a subsequent civil action on behalf of the victim against the former client. The Supreme Court ordered suspension for a violation of the Rules of Professional Conduct. It held that the correct interpretation of the rule forbidding adverse representation is a broad one. The rule should be imposed not merely when the attorney will be required to use confidential information against a former client, but in every case when he or she may be required to do so (*218 Cal. 329, 332-333)* .

Yorn v. Superior Court *(1979) 90 Cal. App. 3d 669, 153 Cal. Rptr. 295* , is discussed in *§ 24.24[4][b]*. The court of appeal held that the rules governing an attorney's conduct prohibit adverse employment involving prior confidential information when there is potential, as well as actual use of such information (*90 Cal. App. 3d 669, 675)* .

[f] Prejudice to Adverse Party Irrelevant

Earl Scheib, Inc. v. Superior Court *(1967) 253 Cal. App. 2d 703, 61 Cal. Rptr. 386* , is discussed in *§ 24.24[3][a]*. In that case, the trial court refused to hear a motion to disqualify an attorney on the ground that delay in bringing the motion was prejudicial to the adverse party being represented by the attorney in question. The court of appeal held that possible prejudice to the adverse party is not a valid reason for denying a motion to disqualify the attorney (*253 Cal. App. 2d 703, 707)* . The proper issue for consideration by the court is prejudice to the former client, and possible prejudice to the adverse party as the attorney's current client is irrelevant (*253 Cal. App. 2d 703, 709)* .

Counsel should note ***River West, Inc. v. Nickel*** *(1987) 188 Cal. App. 3d 1297, 234 Cal. Rptr. 33* , discussed in *§ 24.32[3][a]*, which states, contrary to the rule in *Earl Scheib, Inc., above*, that delay in bringing a disqualification motion for conflict of interest, and consequent prejudice to the adverse party, can properly be considered by the court.

The court in *River West* found that the defendant's delay in making a disqualification motion (47 months after answer was filed) was so great that the law must assume an implied waiver of the right to disqualify opposing counsel (*188 Cal. App. 3d 1297, 1313)* . The court noted that the *Earl Scheib* court acknowledged federal cases indicating that the motion for disqualification is equitable in nature and that reasonable diligence is required. The delay in *Earl Scheib* was only four months, and the *Earl Scheib* court distinguished the case at hand from two federal cases in which there were four-year and twenty-year delays. The *River West* court assumed that the reference in *Earl Scheib* to the federal cases was a recognition that delay and prejudice might be relevant under circumstances other than those present in the *Earl Scheib* case (*188 Cal. App. 3d 1297, 1305)* .

Counsel should also note ***Chambers v. Superior Court*** *(1981) 121 Cal. App. 3d 893, 902-903, 175 Cal. Rptr. 575* , discussed in *§ 24.31[3][b]*, dealing with the issue of vicarious disqualification. That case held that when a court decides a motion by the state to disqualify an adverse party's law firm because one of its members used to represent the state, the adverse effect on the current client is one important basis for a policy of requiring evidence that confidential information was previously acquired, and that it could be used against the state.

[g] Injury to Former Client Presumed

In ***Weidekind v. Water Co.*** *(1887) 74 Cal. 386, 19 P. 173* , a plaintiff in a civil action appealed a superior court judgment and order refusing a new trial. Plaintiff's original attorney was discharged after judgment for defendant in the original trial. The attorney had a contingent fee agreement, and received no compensation. Two appeals and two new trials followed, in which the attorney was not involved. At the most recent trial, however, the attorney appeared for defendant, and the court denied plaintiff's motions to disqualify him. The Supreme Court reversed the judgment and order, and remanded the case for a new trial. It held that it is a trial court's right and duty to forbid an attorney from changing sides in the same action, even if there are different trials involved (*74 Cal. 386, 388)* . In that situation, in the absence of contrary proof, injury to the former client must be presumed (*74 Cal. 386, 389)* .

Earl Scheib, Inc. v. Superior Court *(1967) 253 Cal. App. 2d 703, 61 Cal. Rptr. 386* , is discussed in *§ 24.24[3][a], [e]*. In that case, the court held that when a former client brings a motion to disqualify an adverse party's attorney, the question raised is whether the former client has been prejudiced (*253 Cal. App. 2d 703, 709)* . The court stated that when the attorney is representing interests that conflict with those of a former client, injury to the former client will be presumed (*253 Cal. App. 2d 703, 709)* .

[h] No Joint Client Exception

In ***Western Continental Operating Co. v. Natural Gas Corp.*** *(1989) 212 Cal. App. 3d 752, 261 Cal. Rptr. 100* , the law firm for the plaintiffs in the underlying action represented both the plaintiffs and defendants jointly in a prior dispute against a third party. Defendants moved to disqualify plaintiffs' law firm. The trial court granted the motion based on a finding that the plaintiff's firm had previously represented the defendant in a substantially related matter. Plaintiffs appealed.

The court of appeal affirmed. On appeal, plaintiffs contended that the State Bar rule prohibiting representation adverse to a former client [Cal. Rules Prof. Conduct, former Rule 4-101; *now see Cal. Rules Prof. Conduct, Rule 3-310(E)*] had a "joint client exception" applicable if the attorney jointly represented the parties in the former matter. In support of this argument, plaintiffs relied on *Evid. Code § 962*, which sets forth a joint client exception to the evidentiary privilege accorded to attorney-client communications. The court of appeal rejected the plaintiff's argument, noting that the issue at hand was not the discovery of allegedly privileged communications, but the propriety of an attorney's representation adverse to a former client (*212 Cal. App. 3d 752, 761)* . The court noted that the rule against representing conflicting interests is broader than the attorney-client evidentiary privilege (*212 Cal. App. 3d 752, 761-762)* . The court also noted evidence that, in the prior dispute, the disclosures made to plaintiff's counsel by defendants were made with an expectation of confidentiality (*212 Cal. App. 3d 752, 762-763)* .

[i] Disqualification of Former Judicial Officer and Officer's Law Firm

In ***Cho v. Superior Court*** *(1995) 39 Cal. App. 4th 113, 45 Cal. Rptr. 2d 863* , a former judge had an "of counsel" relationship with a law firm after retiring from the bench. The law firm represented a client in an action in which the former judge had conducted three settlement conferences before retiring. The plaintiff moved to disqualify the entire law firm because the former judge had acquired confidential information from the parties during settlement discussions. The trial court denied the plaintiff's motion, based on the law firm's argument that it had put extensive screening provisions in place to shield the firm from any confidential information the former judge had acquired before the screening measures. The plaintiff appealed. The court of appeal reversed.

The court found that this case was distinguishable from *Higdon v. Superior Court (1991) 227 Cal. App. 3d 1667, 278 Cal. Rptr. 588* , discussed in *§ 24.03[3][c]*. In *Higdon,* the court held that the law firm's screening measures were sufficient to prevent disqualification. The former judge had not been in a position to acquire confidential information, and any appearance of impropriety could be dispelled by appropriate screening measures. In *Cho,* however, the court held that even with the extensive screening mechanisms in place, the vital importance of maintaining confidences disclosed in settlement discussions required disqualification of the entire firm. The paramount objective is the maintenance public confidence in the court and the legal profession (*39 Cal. App. 4th 113, 125-126)* .

[j] Disqualification of Law Firm That Formerly Represented Parent Corporation of Adverse Corporate Party

In ***Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft*** *(1999) 69 Cal. App. 4th 223, 81 Cal. Rptr. 2d 425* , the trial court granted a preliminary injunction enjoining a law firm from representing a client in an action against a wholly-owned subsidiary of a parent corporation the law firm had represented previously. In the current matter, the law firm represented a water district in a negligent construction dispute with a construction company. Although the law firm never represented the construction company, it had previously represented the construction company's parent corporation (Morrison) as a defendant on negligent engineering and construction management claims. Additionally, for a substantial period of time continuing up until the time of the current dispute, the law firm had been retained by insurance underwriters of the parent corporation to monitor defense attorneys the parent corporation retained on errors and omissions claims.

The court of appeal affirmed the disqualification, holding that the trial court had reasonable basis to find that a substantial relationship existed between the law firm's former representation of the parent corporation and its current representation of a client against the parent corporation's wholly-owned subsidiary (*69 Cal. App. 4th 223, 235-236)* . The current and former representations involved similar construction defect issues, and in defending the parent company previously, the law firm held in-depth discussions with the parent corporation regarding construction defect litigation and settlement strategies that were relevant to the current matter (*69 Cal. App. 4th 223, 235-236)* . The court also upheld the disqualification based on the law firm's ongoing representation of the insurance underwriters of the parent corporation. Although the law firm never represented the parent corporation, it was privy to confidential information about the parent corporation's financial condition, gained through the law firm's representation of the insurance underwriters, that could be useful to an adversary and was substantially related to the law firm's representation in the current matter (*69 Cal. App. 4th 223, 236-238)* .

In determining whether the parent corporation and its wholly owned subsidiary should be treated as one entity for conflict of interest purposes, the court first applied the traditional "alter ego" test, but acknowledged that neither parent nor subsidiary claimed to be the alter ego of the other in this case (*69 Cal. App. 4th 223, 248)* . The court then applied a "unity of interest" test, and held that the insurance underwriters, the parent corporation and its subsidiary were related closely enough to be treated as one entity for conflict of interest disqualification (*69 Cal. App. 4th 223, 238-252)* .

[k] Disqualification of Entire Public Law Office When Attorney Leaves Private Practice to Become Head of

Public Law Office

In ***City and County of San Francisco v. Cobra Solutions, Inc.*** *(2004) 119 Cal. App. 4th 304, 14 Cal. Rptr. 3d 400* , Dennis Herrera, San Francisco's City Attorney, was a lawyer in private practice when Cobra Solutions, Inc. retained him and his firm to represent it in a range of business matters, including dealings with the City of San Francisco and an ongoing dispute with the City's Department of Building Inspections. About a year later, Herrera was elected San Francisco City Attorney and left private practice.

Under Herrera's predecessor, the San Francisco City Attorney's Office began to investigate the City's technology contracting. The investigation turned up evidence that Marcus Armstrong, the head of the City's Department of Building Inspections, had authorized prepayments on a city contract with Government Computer Sales, Inc. (GCSI) in violation of City law, and that GCSI had failed to fulfill the contract. The City sued GCSI, Armstrong, and others, alleging that GCSI paid Armstrong kickbacks through various fictitious business entities in order to have him select GCSI for the contract and authorize illegal prepayments. Further investigation uncovered evidence of payments by Cobra to Armstrong's fictitious business entities, and the City added Cobra as a defendant in the GCSI lawsuit.

Cobra moved to disqualify Herrera and the entire City Attorney's Office. It argued that Herrera had previously represented it in matters substantially related to the GCSI lawsuit, and that therefore both Herrera and the City Attorney's Office were barred from representing the City against Cobra. The City Attorney's Office responded that it had instituted an ethical screen immediately upon discovering Cobra's alleged involvement in the kickback scheme.

The trial court granted the motion to disqualify Herrera and the City Attorney's Office. The trial court based its ruling on the grounds that Herrera had personally represented Cobra, that he had obtained confidential information from Cobra, and that the subject of the prior representation was substantially related to the current lawsuit.

The court of appeal reviewed the cases decided under *Cal. Rules Prof. Conduct, Rule 3-310(E)*. However, it noted that to date, California civil cases had dealt exclusively with migration from private office to private office, from public office to private office, and from public office to public office. None had addressed migration from private office to public office (*119 Cal. App. 4th 304, 315-316)* . To decide the case, the court did not determine what the general rule should be, because this case involved a unique subset of private-public migration in which the attorney left private practice to become the head of a public law office. Where the attorney leaves private practice to become the head of a public law office, the court held that vicarious disqualification of the entire public law office generally is required in all matters substantially related to the head of office's earlier private representations (*119 Cal. App. 4th 304, 316)* . The court held that when the disqualified attorney is the head of a public law office, an ethical screen cannot adequately address the special issues that may arise, particularly the preservation of the public trust in the administration of justice and the integrity of the bar (*119 Cal. App. 4th 304, 318)* .

[4] Additional Authorities

[a] Rule Against Conduct or Disclosure Adverse to Former Client

Grove v. Grove Valve & Regulator Co. (1963) 213 Cal. App. 2d 646, 29 Cal. Rptr. 150 , was an appeal from a superior court order enjoining a law firm and one of its members from appearing in an action, and from disclosing confidential information, when the individual attorney had formerly represented the defendant corporation as its patent attorney, and currently represented the plaintiff, a former employee of the company, in a dispute over rights to the employee's inventions. The court of appeal affirmed the order enjoining the attorney and his firm from appearing, and stated the general rule prohibiting employment adverse to a former client, which is injurious to the former client because of its relation to the subject matter of the previous employment, or because of the potential for using confidential information against the former client (*213 Cal. App. 2d 646, 651-652)* .

The court added, however, that there are some generally recognized exceptions to this rule. They are when the relationship of attorney and client never in fact existed between the attorney and the complaining party, when the new employment is not inconsistent with the former employment, and when the client expressly or impliedly consents to the adverse representation (*213 Cal. App. 2d 646, 652-653)* . When exceptions do not apply, as in this case, the general rule disqualifying the attorney from adverse representation will control (*213 Cal. App. 2d 646, 653)* .

[b] Rules of Professional Conduct Prohibit Adverse Representation

In *United States Fire Ins. Co. v. Sheppard, Mullin, Richter & Hampton (2009) 171 Cal. App. 4th 1617, 1625-1629, 90 Cal. Rptr. 3d 669* , a law firm was accused of breaching its duty of confidentiality under *Cal. Rules Prof. Conduct, Rule 3-310(E)*. The law firm claimed its challenged litigation activity was protected under *Code Civ. Proc. § 425.16*, the anti-Strategic Lawsuit Against Public Participation (anti-SLAPP) statute. The court of appeal disagreed, holding that the main issue in the disqualification suit was the firm's representation of a client adverse to the former client. The evidence regarding the actual litigation was to explain the disqualification issue and thus was not protected under *Code Civ. Proc. § 425.16*.

In *American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton (2002) 96 Cal. App. 4th 1017* , plaintiff airline company sued an attorney and his law firm for breach of fiduciary duty and professional negligence when, after the law firm terminated the representation without the consent of the airline, the attorney agreed to be the Federal Rule 30(b)(6) spokesperson for an aircraft broker in a matter against an aircraft manufacturer. The court found that the attorney and the his law firm breached their fiduciary duty to the former client.

The court recognized that the proscription against adverse representation may exist in circumstances where an attorney assumes a role other than as an attorney adverse to an existing client; the proscription also exists when a former client was not a party to the litigation (*96 Cal. App. 4th 1017, 1039)* . The attorney could not avoid his fiduciary duty by promising to maintain the confidences of the former client because that would be entirely dependant on his self-assumed position as arbiter of his own fidelity (*96 Cal. App. 4th 1017, 1039)* .

In *Klein v. Superior Court (1988) 198 Cal. App. 3d 894, 244 Cal. Rptr. 226* , one of the partners in the law firm representing the plaintiffs had been associated with a firm that provided general tax advice and immigration assistance to the defendants. The trial court disqualified the attorney, finding that the attorney may have received confidential information at his previous firm that was possibly relevant to the lawsuit at hand. The defendants subsequently petitioned for a writ of mandate to have the attorney's present firm disqualified. The court of appeal reviewed previous cases, and found that as a general rule, California courts do not permit disqualification of an individual attorney for a conflict without disqualifying the entire firm. The court held that when an attorney is disqualified from representation because of his or her prior receipt of confidential information and the attorney's law firm makes no attempt to screen the attorney from the litigation at hand (the law firm in the instant case made no such attempt), the entire law firm must also be disqualified from the litigation (*198 Cal. App. 3d 894, 913-914)* .

In *Dill v. Superior Court (1984) 158 Cal. App. 3d 301, 205 Cal. Rptr. 671* , plaintiff sought a writ of mandate to compel the superior court to grant a motion to disqualify the law firm representing defendant in the underlying civil action because one of the attorneys in the firm had accepted employment adverse to petitioner, a former client, in violation of Cal. Rules Prof. Conduct, former Rule 4-101 [*now see Cal. Rules Prof. Conduct, Rule 3-310(E)*]. The court of appeal granted the writ. The court held that actual possession of confidential information is not required for disqualification under former Rule 4-101 (*158 Cal. App. 3d 301, 304)* . When a substantial relationship has been shown to exist between the former representation and the current representation, and when it appears by virtue of the nature of the former representation or relationship of the attorney to the former client that confidential information material to the current dispute would normally have been imparted to the attorney, the attorney's knowledge of confidential information is presumed (*158 Cal. App. 3d 301, 304-305)* .

In *Woods v. Superior Court (1983) 149 Cal. App. 3d 931, 197 Cal. Rptr. 185* , the wife in a dissolution proceeding moved to disqualify her husband's attorney, who was also counsel for a family business that was a focus of the dissolution proceeding. The trial court denied the motion, and the court of appeal reversed. The court held that as counsel for the family business, the husband's attorney was continuing to represent the wife, and therefore his representation of the husband in the dissolution matter was barred by former Rule 4-101 of the Rules of Professional Conduct [*now see* Rule 3-310(E)] (*149 Cal. App. 3d 931, 934-935)* .

In *Global Van Lines, Inc. v. Superior Court (1983) 144 Cal. App. 3d 483, 192 Cal. Rptr. 609* , defendant in an action for breach of contract moved to disqualify opposing counsel on the ground that the attorney had been defendant's former general counsel and had participated in the establishment of the contract at issue. The trial court denied the motion but the court of appeal reversed, stating that the ethics of the legal profession prohibit a lawyer from accepting employment adverse to a former client relating to a matter in reference to which he or she has obtained confidential information by reason of or in the course of the former employment. In the present case, a substantial relationship existed between the attorney's former representation of defendant and his current representation as opposing counsel, and he therefore should have been disqualified (*144 Cal. App. 3d 483, 487-488)* .

In *Yorn v. Superior Court (1979) 90 Cal. App. 3d 669, 153 Cal. Rptr. 295* , a codefendant in a criminal action petitioned the court of appeal for a writ of mandate to reverse the superior court's order granting the other codefendant's motion to disqualify petitioner's attorney. The motion had been made on the grounds of a prior attorney-client relationship which conflicted with the attorney's representation of petitioner. The court of appeal denied the writ, and upheld the disqualification. It held that former Rule 4-101 of the Rules of Professional Conduct [*now see* Rule 3-310(E)] applies in civil and criminal cases to prohibit an attorney's acceptance of employment adverse to his or her former client, if it would result in a conflict of interests (*90 Cal. App. 3d 669, 675)* . The purpose of the rule is to prevent dishonest conduct, and also to avoid placing an attorney in a position where he or she would be required to choose between conflicting duties (*90 Cal. App. 3d 669, 675)* .

[c] Actual Misuse of Confidential Information Not Necessary

The factual background of *American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton (2002) 96 Cal. App. 4th 1017* is discussed in *§ 24.24[4][b]*. In finding the attorney breached his fiduciary duty to a former client, the court held that the actual use or misuse of confidential information does not determine whether an attorney has breached his professional responsibilities to a current or former client; it is the possibility of breach of confidence that controls (*96 Cal. App. 4th 1017, 1043)* .

The factual and procedural background of *Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft (1999) 69 Cal. App. 4th 223, 81 Cal. Rptr. 2d 425* are discussed in *§ 24.24[3][i]*. The court of appeal upheld the disqualification of a law firm from representing a client in an action against a wholly-owned subsidiary of a corporation it had previously represented, as well as its ongoing representation of the parent corporation's insurance underwriters, on the grounds that, *inter alia*, although the law firm had never represented the wholly-owned subsidiary being sued, the firm was privy to confidential information about the parent corporation's financial condition, gained through the law firm's ongoing representation of the insurance underwriters, which could be useful to an adversary and was substantially related to the law firm's representation in the current matter (*69 Cal. App. 4th 223, 236-238)* .

The facts and procedural background of *Woods v. Superior Court (1983) 149 Cal. App. 3d 931, 197 Cal. Rptr. 185* , are discussed in *§ 24.24[4][b]*. The court of appeal in *Woods* held that the husband's attorney in a dissolution proceeding who was also the attorney for a family business should be disqualified even though there was no showing that the attorney had in fact obtained confidential information from his position as counsel for the business. Ethical considerations require disqualification not only when it is clear that the attorney will be adverse to his or her former client, but also when it appears that he or she might (*149 Cal. App. 3d 931, 936)* .

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 24 ATTORNEYS AT LAW: SUBSTITUTION, WITHDRAWAL, DISQUALIFICATION, AND AUTHORITY TO APPEAR
PART II. FORMS

2A-24 California Points & Authorities § 24.25

§ 24.25 Supporting Motion for Order Disqualifying Attorney Who Communicated With Represented Adverse Party

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*]	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION TO
vs.	)	DISQUALIFY _____ [*name of attorney*] FROM REPRESENTATION OF CLIENT
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____ [*Name of attorney*] SHOULD BE DISQUALIFIED FROM THE CASE BECAUSE HE/SHE HAS IMPROPERLY COMMUNICATED WITH AN ADVERSE PARTY, KNOWING THAT THE PARTY WAS REPRESENTED BY COUNSEL, WITHOUT THE CONSENT OF SUCH COUNSEL, IN VIOLATION OF *RULES OF PROFESSIONAL CONDUCT, RULE 2-100*.

A. Disqualification of Attorney for Communication With Adverse Party. When an attorney violates *Rules of*

Professional Conduct, Rule 2-100, the rule restricting ex parte communications on a subject of controversy between an attorney and a represented adverse party, the trial judge may disqualify the attorney from acting as counsel in an action related to the subject of controversy, when the misconduct will have a continuing effect on the proceedings before the court (*Mills Land & Water Co. v. Golden West Refining Co. (1986) 186 Cal. App. 3d 116, 131-133, 230 Cal. Rptr. 461* ; *Chronometrics, Inc. v. Sysgen, Inc. (1980) 110 Cal. App. 3d 597, 607, 168 Cal. Rptr. 196*).

B. Prohibition on Communication With Adverse Party. When representing a client, a State Bar member must not communicate directly or indirectly about the subject of the representation with a party known to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer (*Cal. Rules Prof. Conduct, Rule 2-100(A)*).

[*Optional*] **C. Officer, Director, or Managing Agent as Party.** For purposes of *Rules of Professional Conduct, Rule 2-100,* restricting communications between attorneys and represented adverse parties, the term "party" includes an officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership (*Cal. Rules Prof. Conduct, Rule 2-100(B)(1)*).

[*Optional*] **D. Employee or Association Member as Party.** For purposes of *Rules of Professional Conduct, Rule 2-100,* restricting communications between attorneys and represented adverse parties, the term "party" includes an association member or an employee of an association, corporation, or partnership, if the subject of the communication is any act or omission of such person in connection with the matter that (1) may be binding on or imputed to the organization for purposes of civil or criminal liability or (2) whose statement may constitute an admission on the part of the organization (*Cal. Rules Prof. Conduct, Rule 2-100(B)(2)*).

[*Optional*] **E. Class Members as Party**. For purposes of Rules of Professional Conduct, Rule 2 100, restricting communications between attorneys and represented adverse parties, the term "party" includes class members after the court conditionally certified the class [*Hernandez v. Vitamin Shoppe Industries Inc. (2009) 174 Cal. App. 4th 1441, 1459-1461, 95 Cal. Rptr. 3d 734*].
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a party's motion to disqualify an opposing attorney from further participation in a case, when the opposing attorney has communicated about the subject of the case with a party represented by another attorney, without obtaining the other attorney's consent.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should allege facts concerning the opposing counsel's contact with the represented party, and show how the communication will have a continuing effect on the proceedings at hand.

[b] Opposing Authorities

The memoranda set out in *§ 24.33* may be used in an appropriate case to oppose a motion supported by this memorandum.

[3] Discussion of Authorities

[a] Disqualification of Attorney for Communication With Adverse Party

Hernandez v. Vitamin Shoppe Industries Inc. *(2009) 174 Cal. App. 4th 1441, 1459-1461, 95 Cal. Rptr. 3d 734* , involved various class actions against the defendant for alleged nonpayment of overtime wages, meal and rest period violations, and other labor violations. The parties in one action reached a settlement and moved for preliminary approval. Despite opposition by Spencer, counsel for the plaintiffs in another action, the court approved the settlement. After the court had conditionally certified the class and approved the notice of proposed class settlement, but before the claims administrator sent the notice to the putative class members, Spencer sent letters to the putative class members advising them to oppose the settlement, opt out of the class, and join the class he was representing in a separate action. Pursuant to Cal. Rules of Prof. Conduct, Rule 2 100, the class counsel moved to enjoin Spencer from communicating with class members, disqualify him from further participation in the action, and impose monetary sanctions against him. Spencer argued that his letters were proper because he had sent them as counsel in a separate action and that the recipients were not yet represented by class counsel, but were members of a conditionally certified class. The trial court enjoined Spencer and imposed sanctions against him.

On appeal, the court held that Spencer did not have the right to unilaterally contact class members after the court conditionally certified the class and appointed and designated other class counsel. The court held that Rule 2-100 was triggered by the court's conditional certification of the class, even if notice had not yet been sent to the class members, and that absent class members of a conditionally certified class are "parties" represented by class counsel [*174 Cal. App. 4th 1441, 1460*]. In addition, the court held that Rule 2-100 is not limited to communications by opposing counsel, but by any counsel [*174 Cal. App. 4th 1441, 1460*]. The court also rejected Spencer's argument that if class counsel is not required to notify an unnamed class member of a settlement offer pursuant to *Rules of Professional Conduct, Rule 3-510,* then the party can not be considered a represented party for purposes of Rule 2-100 either. The court held that just because class counsel may have heightened obligations to named representatives with respect to settlement offer communications does not mean that class counsel does not represent the entire class [*174 Cal. App. 4th 1441, 1461*].

Mills Land & Water Co. v. Golden West Refining Co. *(1986) 186 Cal. App. 3d 116, 230 Cal. Rptr. 461* , was an appeal from a trial court order directing the disqualification of defendant's law firm in an unlawful detainer action. Plaintiff corporation had originally consented to an assignment of a lease to defendant of certain of the corporation's real property. However, after a change in corporate management, plaintiff corporation filed an unlawful detainer action that in effect repudiated the consent to the assignment. Defendant's attorney arranged a meeting with the plaintiff corporation's former president, who had consented to the original assignment while he was president. At this meeting, the former president (who was also a current director of plaintiff corporation) informed the attorney of various matters of record, but disclosed nothing confidential.

The court of appeal affirmed the order disqualifying the attorney who communicated with the former president, but reversed the order disqualifying the attorney's entire firm (*186 Cal. App. 3d 116, 121, 138)* . Construing Cal. Rules Prof. Conduct, former Rule 7-103 [*now see Cal. Rules Prof. Conduct, Rule 2-100*], which prohibited ex parte communication on a subject of controversy with a party known to be represented by counsel, the court held that when the represented party is a corporation, the prohibition on ex parte communication extends to corporate directors, as well as current employees of the corporation (*186 Cal. App. 3d 116, 129)* . The court held that the defendant's attorney violated former Rule 7-103, at least insofar as he failed to seek leave of court to interview the former president of plaintiff corporation without the participation of plaintiff corporation's counsel (*186 Cal. App. 3d 116, 131)* . It found that the trial court's disqualification was proper, and that the trial court was justified in finding that the attorney might possess an unfair advantage due to his ex-parte contact with the former president (*186 Cal. App. 3d 116, 133)* . However, it found that disqualification of the entire law firm was unduly punitive in the absence of some showing that prejudice actually resulted to plaintiff (*186 Cal. App. 3d 116, 136)* .

In ***Chronometrics, Inc. v. Sysgen, Inc.*** *(1980) 110 Cal. App. 3d 597, 168 Cal. Rptr. 196* , defendants and cross complainants in a civil action appealed from a court order that their law firm be disqualified. An attorney in the law firm was president of Chronometrics, one of the defendants and cross complainants. He communicated with a cross defendant respecting a subject of controversy in the civil action. The attorney knew that the cross defendant was represented by counsel. However, he did not obtain the consent of cross defendant's counsel prior to the communications.

The court of appeal modified the trial court order to provide for the disqualification of the cross complainants' attorney, rather than the entire firm (*110 Cal. App. 3d 597, 608)* . The court noted that, prior to its decision, there apparently had been no reported California cases in which an attorney had been disqualified for communications with a represented party (*110 Cal. App. 3d 597, 603)* . The court reviewed several California and federal cases involving disqualification in other contexts, and detected a common theme: If the status or misconduct that is urged as a ground for disqualification will have a continuing effect on the judicial proceedings that are before the court, a court is justified in refusing to permit the lawyer to participate in such proceedings. If, on the other hand, the court's purpose is to punish a transgression that has no substantial continuing effect on the judicial proceedings to occur in the future, neither the court's inherent power to control its proceedings, nor *Code Civ. Proc. § 128* (enumerating the statutory powers of courts) can be stretched to support the disqualification. In applying these principles to the instant case, the court found that the information learned by the cross complainants' attorney could not be unlearned and that, whether the attorney was disqualified as counsel, he could use the information this information as president of Chronometrics. Still, as counsel, the attorney would have the improperly obtained facts instantly available in his mind in questioning witnesses, making and responding to objections, and addressing the court and jury. The attorney would be in quite a different position from a substituted counsel who might acquire the information second hand by discussions with the attorney before or after court sessions or during recesses. Therefore, the trial court did not abuse its discretion in refusing to permit the wrongfully obtained information to be used by the attorney directly in the readings before the court. However, the extension of disqualification to the attorney's entire law firm would have no purpose but a punitive one (*110 Cal. App. 3d 597, 607-608)* .

In ***Continental Insurance Co. v. Superior Court*** *(1995) 32 Cal. App. 4th 94, 37 Cal. Rptr. 2d 843* , the defendants brought a motion to disqualify plaintiffs' attorney because of improper contact with two former employees of defendants. Defendants alleged that plaintiffs' counsel communicated with the former employees in violation of *Cal. Rules of Prof. Conduct, Rule 2-100*. The trial court denied the motion to disqualify, but prohibited plaintiffs from using the testimony of the two former employees, finding that plaintiffs' counsel's contact was improper and in violation of Rule 2-100 (*32 Cal. App. 4th 94, 107)* .

The court of appeal agreed that plaintiffs' counsel should not be disqualified (*32 Cal. App. 4th 94, 103)* , but vacated the order prohibiting the testimony of the former employees. The court found that plaintiffs' counsel's communications with the former employees was not improper and was not in violation of Rule 2-100 (*32 Cal. App. 4th 94, 111)* . The court discussed at length the policy, history and cases relating to that rule, and then held that *Cal. Rules of Prof. Conduct, Rule 2-100* does not apply to *former* employees not represented by counsel (*32 Cal. App. 4th 94, 118)* .

[4] Additional Authorities

[a] Disqualification of Attorney for Communication With Adverse Party

In *County of Los Angeles v. Superior Court (1990) 222 Cal. App. 3d 647* , a medical malpractice action, the plaintiff's attorney contacted a physician who had been withdrawn as the defendant's expert but who remained as a medical consultant to the defendant. The plaintiff's attorney interviewed the physician and obtained information about a report the physician had prepared for the defendant's attorneys in preparation for trial. The court of appeal held that the plaintiff's attorney would have to be disqualified from the case, because he obtained the opposing attorney's work product, which was privileged under Code Civ. Proc. § 2018 (*Code Civ. Proc. § 2018.030* effective July 1, 2005), and

there was no way the attorney could separate that knowledge from his preparation of the case (*222 Cal. App. 3d 647, 658)* .

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 24 ATTORNEYS AT LAW: SUBSTITUTION, WITHDRAWAL, DISQUALIFICATION, AND AUTHORITY TO APPEAR
PART II. FORMS

2A-24 California Points & Authorities § 24.26

§ 24.26 Supporting Motion for Order Disqualifying Attorney Who Concurrently Represents Adverse Party

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*]	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION TO DISQUALIFY _____ [*name of attorney*] FROM REPRESENTATION OF CLIENT
vs.	)	
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

_____ [*Name of attorney*] SHOULD BE DISQUALIFIED FROM THE CASE BECAUSE (1) HE/SHE CURRENTLY REPRESENTS MOVANT IN A SEPARATE MATTER, AND (2) REPRESENTATION OF THE ADVERSE PARTY IN THIS CASE WAS ACCEPTED WITHOUT CONSENT OF MOVANT IN VIOLATION OF *RULE 3-310(B) OF THE RULES OF PROFESSIONAL CONDUCT*.

A. Disqualification of Attorney for Adverse Concurrent Representation. An attorney violates *Rule 3-310(C) of the Rules of Professional Conduct* when he or she, while representing a party in an unrelated matter, agrees to represent an adverse party in the case in issue (*Gilbert v. National Corp. For Housing Partnerships (1999) 71 Cal. App. 4th 1240, 84 Cal. Rptr. 2d 204* ; *State Farm Mutual Automobile Ins. Co. v. Federal Insurance Co. (1999) 72 Cal. App. 4th 1422,*

86 Cal. Rptr. 2d 20 ; *Metro-Goldwyn-Mayer, Inc. v. Tracinda Corp. (1995) 36 Cal. App. 4th 1832, 1845, 43 Cal. Rptr. 2d 327* ; *Truck Ins. Exchange v. Fireman's Fund Ins. Co. (1992) 6 Cal. App. 4th 1050, 1054-1055, 8 Cal. Rptr. 2d 228*).

B. Withdrawal of Representation Before Hearing Does Not Cure Violation. An attorney may not cure a violation of the concurrent representation rule by withdrawing from the adverse representation before the hearing on the motion to disqualify (*Cal West Nurseries, Inc. v. Superior Court (2005) 129 Cal. App. 4th 1170, 1175, 29 Cal. Rptr. 3d 170* ; *Truck Ins. Exchange v. Fireman's Fund Ins. Co. (1992) 6 Cal. App. 4th 1050, 1056-1060, 8 Cal. Rptr. 2d 228*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a party's motion to disqualify an opposing attorney from further participation in a case, when the opposing attorney is concurrently representing the party in an unrelated matter.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that the attorney for the opposing party also represents the moving party in an unrelated matter, and that the attorney did not obtain the moving party's informed consent before undertaking representation of the opposing party.

[3] Discussion of Authorities

[a] Disqualification of Attorney for Adverse Concurrent Representation

In ***Gilbert v. National Corp. For Housing Partnerships*** *(1999) 71 Cal. App. 4th 1240, 84 Cal. Rptr. 2d 204* , the court of appeal upheld an order disqualifying plaintiff's counsel based upon a conflict of interest, when the attorney simultaneously represented other clients in a different action against the same defendant.

In the instant matter, the attorney represented a plaintiff in a wrongful termination action brought against a corporation. In another matter, the attorney represented four plaintiffs in a racial harassment and discrimination action brought against the same corporation. The four plaintiffs in the other matter had signed individual settlement agreements with the defendant corporation. These agreements, negotiated by the attorney, each contained a confidentiality clause. Subsequently, the attorney attempted to advance his client's interests in the instant matter by calling one or more of the four plaintiffs from the other matter to testify as witnesses in the client's case.

The court of appeal found that the attorney represented currently and simultaneously both the plaintiff in the instant matter and the four plaintiffs in the other matter (*71 Cal. App. 4th 1240, 1252*). The court found that an inherent conflict of interest existed where the attorney had a duty to advance his client's interests in the instant matter by offering testimony favorable to his client, while having a simultaneous, competing duty to assist his other four clients in avoiding potential breach of the confidentiality clauses in their settlement agreements (*71 Cal. App. 4th 1240, 1254*). The court found no evidence that the attorney had obtained the informed written consent of any of his clients to this conflict of interest, as required by *Cal. Rules Prof. Conduct, Rule 3-310(C)*, relating to simultaneous representation of clients whose interests conflict (*71 Cal. App. 4th 1240, 1255*). As a result, the court of appeal concluded that the trial

court's disqualification of the attorney was proper (*71 Cal. App. 4th 1240, 1256*).

In ***State Farm Mutual Automobile Ins. Co. v. Federal Insurance Co.*** *(1999) 72 Cal. App. 4th 1422, 86 Cal. Rptr. 2d 20* , a law firm represented State Farm in an action against Federal Insurance Company for declaratory relief and subrogation damages arising from a coverage dispute, and, at the time the action was filed, represented Federal and its insured in an unrelated case that settled three months later. Federal brought motion to disqualify the law firm from representing State Farm, alleging a conflict of interest. In denying this motion, the trial court utilized the "substantial relationship" test, which applies to conflicts of interest in *successive* representations. Under this test, when a court finds that there is a substantial relationship between the subjects of a current and a former representation, it will presume that confidences disclosed in the former representation may have value in the current representation, and disqualification may therefore be proper after a "balancing of competing interests" (*72 Cal. App. 4th 1422, 1430)* .

The court of appeal vacated the trial court order of denial and directed the trial court to enter a new order granting disqualification (*72 Cal. App. 4th 1422, 1435)* . The appellate court reasoned that, since Federal was a client of the law firm at the time the law firm filed its action against Federal on behalf of State Farm, the adverse representation was *concurrent* rather than successive. In adverse concurrent representations, the fiduciary value at stake is the attorney's duty of loyalty, and mandatory disqualification is proper for the protection of this value. In contrast, the fiduciary value protected in adverse successive representations is client confidentiality, which requires a discretionary rather than mandatory rule of disqualification. The trial court erred when it failed to apply the proper rule under which disqualification was mandatory (*72 Cal. App. 4th 1422, 1430-1433)* .

In ***Metro-Goldwyn-Mayer, Inc. v. Tracinda Corp.*** *(1995) 36 Cal. App. 4th 1832, 43 Cal. Rptr. 2d 327* counsel represented Metro-Goldwyn-Mayer ("MGM") and Tracinda Corp. ("TC"). Counsel had been MGM's corporate counsel for a number of years, including during a very significant earlier transaction, a merger which had been completed. Counsel continued to represent MGM in a class action which was initiated before the merger. Counsel later was retained by "TC" to represent it in a lawsuit involving financing which related to the valuation of stock in MGM, but in which MGM was not a party. When it became apparent to MGM that TC's interest in the financing suit rested on facts which were adverse to MGM's interests, MGM brought a motion to disqualify counsel from representing TC, citing *Cal. Rules Prof. Conduct, Rule 3-310*. TC opposed the motion on the basis that counsel did not represent MGM and TC in the same matter. The trial court denied the motion to disqualify and MGM appealed.

The court of appeal reversed, finding that it was unnecessary for the clients to be parties to the same matter (*36 Cal. App. 4th 1832, 1843)* . The proscription against representing concurrent adverse interests exists where counsel's employment is adverse to the interests of a client or former client and can exist even when a prior client is not a party to the litigation. Based on counsel's past employment by MGM as corporate counsel and on the specific current representation in the merger which gave rise to the financing lawsuit, the court of appeal reversed the trial court and disqualified counsel (*36 Cal. App. 4th 1832, 1843-1845)* .

In ***Truck Ins. Exchange v. Fireman's Fund Ins. Co.*** *(1992) 6 Cal. App. 4th 1050, 8 Cal. Rptr. 2d 228* , plaintiff (Truck) sought indemnification from defendant (FFIC) for maintaining a defense of Kaiser Corporation in asbestos-related bodily injury lawsuits. After FFIC successfully brought a motion to disqualify Truck's counsel, Truck asked another law firm (Crosby) to represent it. Crosby discovered that it also represented an affiliate of FFIC in two unrelated wrongful termination lawsuits. When FFIC objected to the concurrent representation, Crosby sought to withdraw from the wrongful termination cases. FFIC then filed a motion to disqualify Crosby from representing Truck on the ground that FFIC did not consent to Crosby's representation of Truck and that Crosby thereby breached its duty of loyalty to FFIC. Such a breach would result in a per se disqualification. Truck argued that because of Crosby's withdrawal from representing FFIC in the unrelated matters, FFIC was a former client. Thus, since there was no factual or legal connection between the present case and the wrongful termination cases, the per se disqualification rule did not apply. Crosby could continue to represent Truck because it possessed no confidential information that could be misused to FFIC's prejudice. After a hearing, the trial court ruled that although the situation presented an existing representation

with an intent to depart, the per se disqualification rule applied because Crosby was concurrently representing FFIC and Truck.

On appeal, the court affirmed the trial court's disqualification order. The court of appeal reviewed the trial court's ruling using the abuse of discretion standard. Truck argued that the trial court erred in failing to exercise its discretion as required by the "former client rule" and in applying the per se rule. The court of appeals disagreed, holding that the undisputed facts established adverse concurrent representation, that Crosby did not obtain FFIC's informed written consent to represent Truck, and proceeded to represent Truck anyway. Thus, Crosby violated *Cal. Rules Prof. Conduct, Rule 3-310(B)* (*now see Cal. Rules of Prof. Conduct, Rule 3-310(C)*) on its face (*6 Cal. App. 4th 1050, 1055-1056)* .

[b] Withdrawal of Representation Before Hearing Does Not Cure Violation

In ***Cal West Nurseries, Inc. v. Superior Court*** *(2005) 129 Cal. App. 4th 1170, 1175, 29 Cal. Rptr. 3d 170* a corporation that was sued in personal injury action, cross-complained against a nursery and a construction company for equitable contribution and indemnity. The nursery cross-complained against the corporation and construction company for implied indemnity and comparative apportionment. After the parties settled the underlying personal injury action, the cross-complaints remained in effect. The corporation and the construction company filed association of counsel designating Lewis Brisbois Bisgaard & Smith as counsel on the cross-complaints. When the firm discovered it represented the nursery in unrelated litigation, it filed a "disassociation of counsel" in which it sought to cease it representation of the corporation and the construction company only insofar as the pleadings involved rights and duties between its two clients. The nursery moved to disqualify the firm from continuing to represent the corporation and construction company. The trial court denied the motion on the ground that the nursery did not make any showing that the law firm obtained any material confidential information. The nursery petitioned for a writ of mandate.

The court of appeal reversed. It held that in a case involving concurrent representation, the absence of a violation of confidentiality is irrelevant (*129 Cal. App. 4th 1170, 1175)* . It held that absent informed written consent, a lawyer may not concurrently represent clients who have actual or potential conflicts; nor may a lawyer represent one client against another in an unrelated matter. It is immaterial whether the lawyer possesses confidential information that could be misused to the prejudice of either client (*129 Cal. App. 4th 1170, 1175)* . The court held that the corporation was still adverse to the nursery by virtue of its cross-complaint against the nursery. The fact that Lewis did not represent the corporation on that cross-complaint did not eliminate the adverse relationship between the two parties. A client who learns that his or her lawyer is also representing a litigation adversary, even with respect to a matter wholly unrelated to the one for which counsel was retained, cannot long be expected to sustain the level of confidence and trust in counsel that is one of the foundations of the professional relationship (*129 Cal. App. 4th 1170, 1176)* .

The facts and procedural background of ***Truck Ins. Exchange v. Fireman's Fund Ins. Co.*** *(1992) 6 Cal. App. 4th 1050, 8 Cal. Rptr. 2d 228* , are discussed in *§ 24.26[3][a]*. *Truck* held that Crosby violated *Cal. Rules Prof. Conduct, Rule 3-310(B)* (*now see Cal. Rules of Prof. Conduct, Rule 3-310(C)*) by concurrently representing Truck and FFIC without obtaining FFIC's informed consent (*6 Cal. App. 4th 1050, 1055-1056)* . The court also held that Crosby, by unilaterally withdrawing prior to the disqualification hearing, could not transform concurrent representation into former representation (*6 Cal. App. 4th 1050, 1060)* .

[4] Additional Authorities

[a] Disqualification of Attorney for Adverse Concurrent Representation

In *McPhearson v. The Michaels Company (2002) 96 Cal. App. 4th 843, 117 Cal. Rptr. 2d 489* , an attorney represented a client in an action against the client's former employer for discrimination and harassment. At the time of the filing of the action, the attorney also represented another client in a similar action against the same employer and intended to have the former client testify as a witness against the employer notwithstanding the former client was subject to a

confidential settlement agreement.

The court in McPhearson distinguished *Gilbert v. National Corp. for Housing Partnerships (1999) 71 Cal. App. 4th 1240, 84 Cal. Rptr. 2d 204* , which is discussed in *§ 24.26[3][a]*.

In *Gilbert*, the attorney for former clients who were subject to a confidential settlement agreement intended to call one or more of the former clients as witnesses in the second similar matter. The *Gilbert* court upheld an order disqualifying plaintiff's counsel based on the conflict of interest created when, in an effort to advance the interests of the current client, he placed the former clients in a position to breach the confidential settlement agreement if they testified against the defendant.

The court in *McPhearson* held that the disqualification of McPhearson's attorney was not warranted stating that *Gilbert* exaggerated the conflict of interest posed by the confidentiality agreements, particularly when, unlike in fact in *Gilbert*, both the plaintiff and the employee who entered into the settlement agreement waived the conflict posed by the representation (*96 Cal. App. 4th 843, 845)* .

In *In re Cliffton B. (2000) 81 Cal. App. 4th 415, 96 Cal. Rptr. 2d 778* , the court of appeal found that the trial court's appointment of a single attorney to represent two brothers concurrently in a permanency hearing created conflict of interest where the trial court was considering post-termination sibling visitation issues. The court of appeal found that an actual conflict of interest existed in the concurrent representation of the two brothers that resulted in ineffective assistance of counsel (*81 Cal. App. 4th 415, 427-428*).

The facts and procedural background of *Forrest v. Baeza (1997) 58 Cal. App. 4th 65, 67 Cal. Rptr. 2d 857* , are discussed in *§ 24.28[3][b]*. In that case, the court of appeal affirmed the trial court's disqualification of counsel who simultaneously represented two closely held corporations and two of the corporations' three shareholders in a shareholder's derivative action, but permitting counsel to continue to represent the two majority shareholders. The court held that under *Cal. Rules of Prof. Conduct, Rule 3-310(C)*, counsel could not simultaneously represent the corporations and the two majority shareholders in the action because the two shareholders, as directors, were accused of embezzling from the corporations, which created a conflict of interest between the corporations and the two majority shareholders (*58 Cal. App. 4th 65, 74)* . Due to this conflict, the majority shareholders' prior consent on behalf of the corporations to the lawyer's simultaneous representation of the corporations and the majority shareholders was not valid under either *Cal. Rules of Prof. Conduct, Rules 3-310* or *3-600* (*58 Cal. App. 4th 65, 74-76)* . In permitting the lawyer to continue to represent the majority shareholders, the court reasoned that counsel would likely hold a residual bias in favor of the majority shareholders, even where the court permitted counsel to continue representation of the corporations only. The court rejected the argument that the lawyer should be disqualified under *Cal. Rules of Prof. Conduct, Rule 3-310(E)* for possessing confidential information that could prejudice the corporations. The court found that there was no confidential information particular to the corporations, in that the majority shareholders were "the sole repositories" of all corporate information (*58 Cal. App. 4th 65, 81-82)* .

In *Brooklyn Navy Yard Cogeneration Partners v. Superior Court (1997) 60 Cal. App. 4th 248, 70 Cal. Rptr. 2d 419* , the trial court granted plaintiff corporation's motion to disqualify defendant's counsel for a conflict of interest where defendant's counsel represented plaintiff's subsidiaries in unrelated litigation. The court of appeal ordered issuance of a writ of mandate directing the trial court to vacate its disqualification ruling and to rehear the motion on defendant's application. The court held that while the duty of loyalty embodied in *Cal. Rules of Prof. Conduct, Rule 3-310(C)*, prohibits an attorney from undertaking a representation that is directly adverse to an existing client (*60 Cal. App. 4th 248, 255-256)* , in the corporate context it is only where one corporation is the alter ego of the other that parent and subsidiary corporations should be treated as the same entity for conflict purposes (*60 Cal. App. 4th 248, 257-258)* . The court directed the trial court to reconsider whether an alter ego relationship existed between the parent and subsidiary corporations in the instant matter.

[b] Withdrawal of Representation Before Hearing Does Not Cure Violation

In *People ex rel. Dept. of Corporations v. Speedee Oil Change Systems (1999) 20 Cal. 4th 1135, 86 Cal. Rptr. 2d 816* , the California Supreme Court disqualified plaintiff's law firm for a conflict of interest when an attorney who was "of counsel" to the law firm had consulted with the defendant in the same case. An "of counsel" attorney is considered under *Cal. Rules Prof. Conduct, Rule 1-400(E)(8)* to have a "close, personal, continuous, and regular" relationship with the law firm to which the attorney is publicly affiliated as "of counsel" (*20 Cal. 4th 1135, 1153-1154)* . This publicized, close relationship justified the same rule of vicarious disqualification that is applied to partners and associates in a law firm (*20 Cal. 4th 1135, 1152-1154)* . The Court held that when the of counsel consulted with the opposing party and gained confidential information, the law firm was vicariously disqualified from further representation along with its of counsel, even where the of counsel's consultation with, and representation of, the opposing party terminated quickly, in advance of the disqualification hearing (*20 Cal. 4th 1135, 1147-1156)* .

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PART II. FORMS

2A-24 California Points & Authorities § 24.27

§ 24.27 Supporting Motion for Order Disqualifying Opposing Attorney Who Retained Expert Witness Previously Interviewed by Moving Party

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*]	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION FOR
vs.	)	ORDER DISQUALIFYING OPPOSING ATTOR-
_____ [*name*],	)	NEY _____ [*name of attorney*]
Defendant.	)	WHO RETAINED EXPERT WITNESS PREVI-
	)	OUSLY INTERVIEWED BY MOVING PARTY
	)	Date: _____
	)	Time: _____
	)	Location: _____
		[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

_____ [*Name of opposing attorney*] SHOULD BE DISQUALIFIED FROM REPRESENTING _____ [*specify opposing party, e.g.,* DEFENDANT] IN THIS CASE BECAUSE HE/SHE RETAINED _____ [*name of expert*] AS AN EXPERT WITNESS IN THIS CASE AFTER THIS EXPERT HAD BEEN INTERVIEWED BY _____ [*name of moving party's attorney*] ON _____ [*specify moving party, e.g.,* PLAINTIFF]'S BEHALF AND HAD RECEIVED CONFIDENTIAL INFORMATION ABOUT _____ [*specify moving party, e.g.,* PLAINTIFF].

Disqualification of Opposing Attorney for Retaining Previously Interviewed Expert Witness. An attorney may be disqualified from representing an opposing party if that attorney interviewed an expert witness already interviewed by the moving party's attorney when the moving party's attorney imparted confidential information to the expert before deciding not to retain the expert as a witness in the case (*Shadow Traffic Network v. Superior Court (1994) 24 Cal. App. 4th 1067, 1078-1088, 29 Cal. Rptr. 2d 693* ; *see also Western Digital Corporation v. Superior Court (1998) 60 Cal. App. 4th 1471, 71 Cal. Rptr. 2d 179*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a party's motion to disqualify an opposing attorney from further participation in the case, when the opposing attorney has retained an expert witness previously interviewed by the moving party's attorney and to whom the moving party's attorney imparted confidential information before deciding not to retain the expert as a witness in the case.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that the attorney for the moving party imparted confidential information to the expert about the case with the reasonable expectation that this information would remain confidential and subsequently decided not to retain the expert as a witness in the case, and that the opposing attorney thereafter retained the same expert as a witness for the opposing party.

In an appropriate case, the memoranda in this form may be rebutted by those in § 24.41, which deal with shifting the burden of proof in these types of cases when the expert remains under the control of the moving party, or is otherwise fully accessible to that party.

[3] Discussion of Authorities

[a] Disqualification of Opposing Attorney for Retaining Previously Interviewed Expert Witness

In ***Shadow Traffic Network v. Superior Court*** *(1994) 24 Cal. App. 4th 1067, 29 Cal. Rptr. 2d 693* , the trial court granted the plaintiff's motion to disqualify the defendant's attorneys from representing the defendant in the action, on the basis that the defendant's attorneys had retained as an expert witness an accounting firm previously interviewed by the plaintiff's attorneys for the same lawsuit. After imparting confidential information about the case to the accounting firm, including their factual and legal theories about the case, the plaintiff's attorneys decided not to retain the firm as an expert witness for the plaintiff (*24 Cal. App. 4th 1067, 1071-1078)* .

The court of appeal denied the defendant's petition for a writ of mandate, holding that substantial evidence supported the trial court's finding that the plaintiff's attorneys had imparted confidential information to the firm with the reasonable expectation that this information would remain confidential. The fact that the plaintiff's attorneys decided not to retain the accounting firm as an expert witness did not, as a matter of law, render the imparted information nonconfidential. The court held that communications made to a potential expert in a retention interview can be considered confidential and therefore subject to protection from subsequent disclosure even if the expert is not

thereafter retained, as long as there was a reasonable expectation of confidentiality; the existence of a formal relationship between the expert and the attorney is just one factor the court should consider in making this determination. Once a court finds that confidential information was disclosed, there is a presumption that the expert disclosed this information to the attorneys who subsequently retained the expert. These attorneys then have the burden of showing, by a preponderance of the evidence, that the confidential information was not disclosed to them (*24 Cal. App. 4th 1067, 1078-1088)* .

NOTE:

Counsel opposing a motion to disqualify an opposing attorney based on *Shadow Traffic* should review *Collins v. State of California (2004) 121 Cal. App. 4th 1112, 1127-1129* ; *18 Cal. Rptr. 3d 112* and *Shandralina G. v. Homonchuk (2007) 147 Cal. App. 4th 395, 412, 54 Cal. Rptr. 3d 207* , discussed in *§ 24.41[3][a]*, in which the court held that the rebuttable presumption established in *Shadow Traffic* was inapplicable because there were no legal impediment to the defendant's ability to obtain evidence from the expert regarding the content of the communication.

Western Digital Corporation v. Superior Court *(1998) 60 Cal. App. 4th 1471, 71 Cal. Rptr. 2d 179* , was an action by a computer manufacturer against a hard disk manufacturer, in which plaintiff's counsel interviewed but did not retain members of a consulting firm as expert witnesses. Following disclosure of confidences to the consulting firm, a new member joined the consulting firm and was later hired by defense counsel as an expert witness. Thereafter, applying the holding in *Shadow Traffic Network v. Superior Court (1994) 24 Cal. App. 4th 1067, 29 Cal. Rptr. 2d 693* , the trial court granted plaintiff's motion to disqualify defendant's counsel and the expert witness for a conflict of interest on the grounds that plaintiff had disclosed confidential information about the lawsuit to members of the consulting firm.

The court of appeal ordered issuance of a writ of mandate directing the trial court to vacate its order and to enter a new order denying the disqualification motion, on defendant's application. The court found that substantial evidence supported the trial court's finding that confidential information had been disclosed by the plaintiff to the consulting firm, thereby creating a rebuttable presumption under *Shadow Traffic* that the disqualified expert shared plaintiff's confidential information with defense counsel (*60 Cal. App. 4th 1471, 1480, 1485)* . However, examining the facts before it, the court found that the instant matter was distinguishable from *Shadow Traffic,* in which the expert hired by defense counsel had personally participated in the initial interview with plaintiff's counsel. Here, the expert was retained by the consulting firm following the interview with plaintiff's counsel and had not personally participated in that interview. Additionally, the court found that defense counsel presented a preponderance of evidence to rebut the presumption that any of the plaintiff's confidential information had been disclosed to the new member of the consulting firm retained as an expert by the defense (*60 Cal. App. 4th 1471, 1488)* . The court held that disqualification of an expert (and, by extension, the law firm that retained the expert) can only be justified where the moving party establishes that the expert actually possesses confidential attorney-client information materially related to the proceedings before the court (*60 Cal. App. 4th 1471, 1487)* . Showing merely potential access to confidences without actual exposure is insufficient. The threat to confidentiality must be real, not hypothetical (*60 Cal. App. 4th 1471, 1487)* .

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2A-24 California Points & Authorities § 24.28

§ 24.28 Opposing Motion for Order Disqualifying Attorney From Engaging in Representation Adverse to Former Client [Bus. & Prof. Code § 6068(e)]--No Actual Attorney-Client Relationship Existed

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN OPPOSITION TO MOTION
Plaintiff,	)	TO DISQUALIFY _____ [*name of*
vs.	)	*attorney*] FROM REPRESENTATION ADVERSE
_____ [*name*],	)	TO FORMER CLIENT
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

_____ [*Name of attorney*] SHOULD NOT BE DISQUALIFIED FROM REPRESENTING AN INTEREST ADVERSE TO THE COMPLAINING PARTY BECAUSE NO CONFIDENTIAL ATTORNEY-CLIENT RELATIONSHIP EVER EXISTED BETWEEN _____ [*name of attorney*] AND THAT PARTY.

A. Confidential Attorney-Client Relationship Required. An attorney will not be disqualified from representing a

party on the ground that he or she formerly represented an adverse party if there is no showing that a confidential attorney-client relationship actually existed between the attorney and the complaining party (*Med-Trans Corporation v. City of California City (2007) 156 Cal. App. 4th 655, 666-669, 68 Cal. Rptr. 3d 17* ; *Adams v. Aerojet-General Corporation (2001) 86 Cal. App. 4th 1324, 1334-1337, 1340, 104 Cal. Rptr. 2d 116* ; *Strasbourger Pearson Tulcin Wolff Inc. v. Wiz Technology, Inc. (1999) 69 Cal. App. 4th 1399, 1404, 82 Cal. Rptr. 2d 326* ; *Responsible Citizens v. Superior Court (1993) 16 Cal. App. 4th 1717, 1733, 20 Cal. Rptr. 2d 756* ; *In re Marriage of Zimmerman (1993) 16 Cal. App. 4th 556, 563, 20 Cal. Rptr. 2d 132* ; *Maruman Integrated Circuits, Inc. v. Consortium Co. (1985) 166 Cal. App. 3d 443, 448-449, 212 Cal. Rptr. 497*).

[*Optional*] **B. Attorney Represents Only Corporation.** An attorney for a corporation represents the corporation and only represents its shareholders and officers in their representative capacity, and there is no confidential attorney-client relationship between the attorney and any individual in the corporation (*Meehan v. Hopps (1956) 144 Cal. App. 2d 284, 290, 301 P.2d 10*).

[*Optional*] **C. Attorney Represents Both Closely-Held Corporation and Shareholders.** When an attorney jointly represented a closely-held corporation and the majority stockholders individually, the attorney may continue to represent one of the clients, since no confidential information was obtained (*Forrest v. Baeza (1997) 58 Cal. App. 4th 65, 67 Cal. Rptr. 2d 857*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a party's motion to disqualify an attorney from further participation in the case when no confidential attorney-client relationship ever in fact existed between the moving party and the attorney for the opposing party. Depending on the facts of the case, counsel may combine this form with §§ 24.29-24.31.

This form may be used in opposition to a memorandum in support of a motion to disqualify an attorney from further participation in the case, such as the memorandum set out in *§ 24.24*.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Confidential Attorney-Client Relationship Required

In ***Med-Trans Corporation v. City of California City*** *(2007) 156 Cal. App. 4th 655, 666-669, 68 Cal. Rptr. 3d 17* , the plaintiff transportation company sued the defendant city for breach of a contract to provide air ambulance services for the defendant. During the course of the litigation, it was disclosed that the defendant's attorney had met with the defendant's fire chief several years earlier. In that meeting, the attorney was representing a third party in a federal lawsuit against Kern County for antitrust violations based on Kern County's alleged failure to issue ambulance service permits to qualified applicants. The plaintiff's attorney had approached the chief, and they had discussed, among other

things, the federal lawsuit against Kern County and the defendant's potential joinder in it.

The defendant moved for the disqualification of the plaintiff's attorney, arguing that the meeting constituted a preliminary consultation giving rise to duties of loyalty and confidentiality to the defendant on the part of the attorney with respect to the subject matter communicated at the meeting. The defendant argued that when the attorney later exploited the meeting and the matters discussed therein as a basis for potential liability in the present lawsuit against the defendant, it allegedly resulted in a conflict of interest warranting the attorney's disqualification [*156 Cal. App. 4th 655, 661-662]* .

The trial court granted the motion for disqualification. It held that there was sufficient evidence that the plaintiff's attorney had solicited the defendant's participation in the federal lawsuit against Kern County, which gave rise to discussions involving the subject of the instant case. In view of the substantial relationship between the subject matter of the prior conversations and the current litigation, the court concluded that disqualification was necessary. The plaintiff appealed.

The court of appeal reversed. It held that as a matter of law the substantial relationship test was not met because there was no evidence that any confidential information was discussed at the meeting. The court held that for purposes of a conflict of interest analysis, if the former contact with the attorney was a preliminary conversation that did not result in professional employment or services, the party seeking disqualification must show, directly or by reasonable inference, that the attorney acquired confidential information in the conversation; in other words, the presumption that confidential information was conveyed does not apply [*156 Cal. App. 4th 655, 668]* .

In ***Adams v. Aerojet-General Corporation*** *(2001) 86 Cal. App. 4th 1324, 1341, 104 Cal. Rptr. 2d 116* , the trial court disqualified plaintiff's lawyer and his law firm for an alleged conflict of interest, based upon a finding that the lawyer's former law firm had represented the defendant on a similar matter, while the lawyer was a member of that former firm. The court of appeal reversed and remanded, stating that disqualification should not be ordered where there is no reasonable probability that the firm-switching lawyer had access to confidential information while at the former firm that is related to the current representation (*86 Cal. App. 4th 1324, 1335-1336, 1340*).

When the representation undertaken by a lawyer's old firm is substantially related to the lawyer's current representation, but the lawyer did not personally represent the former client who now seeks disqualification, the court of appeal specified the following review approach for trial courts. The trial court should apply a modified version of the "substantial relationship" test described in *H.F. Ahmanson & Co. v. Salomon Brothers, Inc. (1991) 229 Cal. App. 3d 1445* (*86 Cal. App. 4th. 1324, 1340*). The trial court should determine whether confidential information material to the current representation would normally have been imparted to the lawyer during his or her tenure at the former firm. It should focus on the relationship, if any, between the lawyer and the former client's representation. It should consider any time spent by the lawyer working on behalf of the former client and the lawyer's possible exposure to formulation of policy or strategy in matters relating to the current dispute. The trial court should also take into account whether the lawyer worked out of the same branch office that handled the former client's litigation, or whether the lawyer's administrative or management duties may have placed the lawyer in a position where he or she would have been exposed to matters relevant to the current dispute. If a substantial relationship is shown, the lawyer whose disqualification is sought should carry the burden of proof that he or she had no exposure to confidential information relevant to the current action while a member of the former law firm (*86 Cal. App. 4th 1324, 1340-1341*).

Strasbourger Pearson Tulcin Wolff Inc. v. Wiz Technology, Inc. *(1999) 69 Cal. App. 4th 1399, 82 Cal. Rptr. 2d 326* , was an action by an investment banking firm brought an action against a corporation for which it acted as underwriter for the corporation's public stock offering. The trial court disqualified the plaintiff's law firm for a conflict of interest pursuant to *Cal. Rules Prof. Conduct, Rule 3-310(E)*, finding that the law firm represented plaintiff in connection with the underlying stock offering and the representation had been paid for by the corporation.

The court of appeal reversed, holding that an attorney-client relationship must have existed before disqualification is proper (*69 Cal. App. 4th 1399, 1404)* . The fact that the defendant had paid the law firm's attorney fees pursuant to the underlying underwriting agreement was not determinative in itself and the defendant did not thereby show the requisite attorney-client relationship necessary to disqualify the law firm from the case (*69 Cal. App. 4th 1399, 1404, 1409)* . Additionally, any information the law firm had concerning the defendant came from the investment banking firm, its client, and as such could not form the basis for disqualification (*69 Cal. App. 4th 1399, 1411)* .

In ***Responsible Citizens v. Superior Court*** *(1993) 16 Cal. App. 4th 1717, 20 Cal. Rptr. 2d 756* , petitioner's law firm provided legal services to a partnership of which respondent was a partner. The trial court found that, as a matter of law, an attorney-client relationship existed between the law firm and respondent. Accordingly, the trial court disqualified petitioner's law firm on the grounds of conflict of interest.

In vacating the trial court's order, the appellate court stated that an attorney representing a partnership does not necessarily have an attorney-client relationship with an individual partner for purposes of applying the conflict of interest rules. Whether a relationship exists turns on finding an agreement, express or implied, that the attorney also represented the partner. Some factors that might support or undercut the implication of an attorney-client relationship with an individual partner in any particular case include the type and size of the partnership, the nature and scope of the attorney's engagement by the partnership, the kind and extent of the contact between the attorney and the individual partner, and the attorney's access to information relating to the individual partner's interests (*16 Cal. App. 4th 1717, 1733)* .

In re Marriage of Zimmerman *(1993) 16 Cal. App. 4th 556, 20 Cal. Rptr. 2d 132* , was a post dissolution proceeding in which the ex-wife sought to disqualify her former husband's attorney. The ex-wife claimed that she had contacted a partner of her former husband's attorney concerning the matter. The contact consisted of a phone call in which the partner concluded by suggesting that the wife contact an attorney with domestic relations expertise. The partner never represented the ex-wife in the matter. He did not recall that he had spoken to her, nor did he take any notes of the conversation. The trial court denied the motion to disqualify.

In affirming the lower court's decision, the appellate court used the "substantial relationship" test. Under this test, possession of confidential information is presumed if two criteria are met. First, a substantial relationship must have existed between the former representation and the current representation. Second, it must appear that, by virtue of the nature of the former representation or the relationship of the attorney to the former client, confidential information material to the current dispute would normally have been imparted to the attorney. The appellate court concluded that there was no disputing the substantiality of the relationship between the former and the instant litigation since they both involved the same matter (*16 Cal. App. 4th 556, 563)* . However, the second prong of the test was not met. The ex-wife failed to provide evidence that any confidential information had actually been imparted. Further, the nature of the relationship of the partner was preliminary and peripheral. Consequently, the relationship was not such that confidential information material to the current dispute would normally have been imparted to the attorney (*16 Cal. App. 4th 556, 564-565)* .

Maruman Integrated Circuits, Inc. v. Consortium Co. *(1985) 166 Cal. App. 3d 443, 212 Cal. Rptr. 497* , was a declaratory relief action by a corporation against its former chief executive officer and the developers of a facility contemplated in a long-term lease, to declare the lease void. Plaintiff moved to disqualify defendant officer's attorney on the ground that another of plaintiff's former employees had disclosed confidential information to defendant's attorney. The former employee was an administrator and assistant to the corporate secretary while in plaintiff's employ and later went to work for defendant officer, after defendant officer left plaintiff's employ. Plaintiff specifically claimed that former employee's revelations of conversations she had with plaintiff's attorneys while in plaintiff's employ and her postemployment delivery to defendant's attorney of two letters written between plaintiff and plaintiff's attorneys required disqualification of the attorney. The trial court denied the motion, heard one day before the date set for trial, stating that the motion was unmeritorious and taken for the purpose of delaying trial. Plaintiff appealed.

The court of appeal affirmed. It held that the communications revealed by the former employee were not obtained during an attorney-client relationship between plaintiff and defendant's attorney, and, therefore, plaintiff could not complain of a breach of duty to maintain plaintiff's confidences. Citing *Cooke v. Superior Court (1978) 83 Cal. App. 3d 582, 591, 147 Cal. Rptr. 915* , the court reasoned that confidences acquired in the course of an attorney-client relationship are protected by preventing the recipient of those confidences from representing an adverse party. There was no prior representation of plaintiff by defendant's attorney here (*166 Cal. App. 3d 443, 448-449)* . The court noted that the *Cooke* court declined to extend the general rule of confidentiality of attorney-client communications to the situation in which confidential information is communicated by a third party, outside the attorney-client relationship. The policy underlying the rule, to protect a relationship of confidence and trust between client and attorney, did not warrant an extension of the rule (*166 Cal. App. 3d 443, 447-448)* .

[b] Attorney for Corporation

In ***Forrest v. Baeza*** *(1997) 58 Cal. App. 4th 65, 67 Cal. Rptr. 2d 857* , the attorney represented two related closely-held corporations and two of the three shareholders of both corporations in a series of actions. The third shareholder moved to disqualify the attorney from representing any of the parties. The trial court disqualified the attorney from concurrently representing the corporations and majority shareholders, but ruled that the attorney could continue to represent the majority shareholders.

The court of appeal affirmed. The court held that a case involving a corporation and shareholders is distinguishable from other cases involving more separate parties (*58 Cal. App. 4th 65, 80)* . The attorney's representation of the multiple parties was originally a joint representation, not a situation in which there was an existing client and a new client (*58 Cal. App. 4th 65, 80-82)* . The attorney received no information that was confidential as between the clients, and therefore no consent by the corporations was required (*58 Cal. App. 4th 65, 82)* .

Meehan v. Hopps *(1956) 144 Cal. App. 2d 284, 301 P.2d 10* , was an action brought by policyholders, creditors, and stockholders of an insurance company against certain officers and directors for managing company business in violation of their fiduciary duties. Defendants made a motion in the trial to enjoin plaintiffs' law firm from further participation in the case, and from disclosure of confidential information relating to the case. The law firm had represented the corporation, and had obtained information from one of the defendants. The trial court denied the motion.

Defendants appealed the order, and the court of appeal affirmed. The court held that the attorney for a corporation represents the corporation and its stockholders and officers in their representative, not individual capacities (*144 Cal. App. 2d 284, 290)* . It is a corporate officer's duty to disclose all necessary information to the corporation's attorney, and in doing so, the officer has not disclosed any information confidential to himself or herself (*144 Cal. App. 2d 284, 293)* . The attorney is not disqualified from representing the corporation in an action brought by it against one of its officers, since a confidential attorney-client relationship between the attorney and the officer personally never existed (*144 Cal. App. 2d 284, 290)* .

[4] Additional Authorities

[a] Confidential Attorney-Client Relationship Required

In *Ochoa v. Fordel, Inc. (2007) 146 Cal. App. 4th 898, 53 Cal. Rptr. 3d 277* , the court of appeal held that mere access to or opportunity to obtain confidential information does not create a substantial relationship that mandates attorney disqualification (*146 Cal. App. 4th 898, 911-912)* .

In *Derivi Construction & Architecture, Inc. v. Wong (2004) 118 Cal. App. 4th 1268, 14 Cal. Rptr. 3d 329* , the court of appeal held that an attorney was not disqualified from representing a client solely because the attorney's spouse worked

for a firm that had previously been disqualified in that suit. The court agreed that, under the imputed knowledge theory, knowledge by any member of a law firm is imputed to all attorneys in the firm, whether partners or associates, and that disqualification of an attorney extends vicariously to the entire firm (*118 Cal. App. 4th 1268, 1273)* . The court rejected the argument, however, that there should be a double imputation of knowledge from the disqualified firm to the firm of the spouse of an attorney in the disqualified firm (*118 Cal. App. 4th 1268, 1275-1276)* .

In *Ward v. Superior Court (1977) 70 Cal. App. 3d 23, 138 Cal. Rptr. 532* , the court of appeal issued a writ of mandate compelling the superior court to vacate its order disqualifying the county counsel from the case. The suit involved a county assessor who sued county supervisors and certain city employees for defamation and violation of civil rights. The assessor argued that because the county counsel had worked with the tax assessor's office, and now represented the defendants, the county counsel should be disqualified. The court of appeal held that because the county counsel's client is the county, and not any individual officer, and because the counsel's relations with the assessor dealt with the operation of the tax assessor's office, which was public information, no confidential attorney-client relationship existed between the counsel and the complaining party (*70 Cal. App. 3d 23, 34-35)* . When no attorney-client relationship ever existed, it is error for a trial court to grant a motion disqualifying the attorney from participation in the case (*70 Cal. App. 3d 23, 36)* .

Kraus v. Davis (1970) 6 Cal. App. 3d 484, 85 Cal. Rptr. 846 , involved a case in which certain defendants refused to testify at depositions, and argued against a motion to compel answers, alleging that the attorney for plaintiffs formerly held an attorney-client relationship with some of the defendants. The motion to compel was granted, and defendants appealed the order. Plaintiffs moved to dismiss the appeal. At the hearing on the motion to dismiss, both parties stipulated that the appeal should be heard as an appeal from the lower court order overruling defendants' objection to the participation of plaintiffs' attorney.

The court of appeal sustained the lower court's ruling that the attorney was not disqualified. The attorney had previously practiced law with one of the defendants, who had served as attorney for some of the other defendants. There was no evidence indicating that the attorney had acquired any knowledge of confidential affairs of any of the parties, or that he had ever represented them either alone or in association with another attorney. Under those circumstances, no attorney-client relationship was found (*6 Cal. App. 3d 484, 491)* . The court of appeal held that if the relationship of attorney and client was never in fact created between the attorney and the complaining party, the attorney will not be disqualified for acting against that party, on behalf of another (*6 Cal. App. 3d 484, 490)* .

In *Towns v. Towns (1939) 36 Cal. App. 2d 88, 96 P.2d 971* , plaintiff brought an action to cancel an assignment of a portion of his interest in an estate. Plaintiff and his brothers had originally agreed to each make such assignments to defendant, and defendant's attorney had drawn up the requested documents. The trial court found for defendant, and plaintiff appealed the judgment. One contention on appeal was that the trial court erred in permitting defendant's attorney to participate, since he had earlier performed services for plaintiff. The court of appeal upheld the judgment, and said that because the attorney had merely prepared documents for plaintiff, there was no evidence of confidentiality in the relationship between the two. An attorney-client relationship sufficient to disqualify the attorney from representing an adverse party must also be a confidential relationship (*36 Cal. App. 2d 88, 91)* .

California Points & Authorities

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 24 ATTORNEYS AT LAW: SUBSTITUTION, WITHDRAWAL, DISQUALIFICATION, AND AUTHORITY TO APPEAR
PART II. FORMS

2A-24 California Points & Authorities § 24.29

§ 24.29 Opposing Motion for Order Disqualifying Attorney From Engaging in Representation Adverse to Former Client [Bus. & Prof. Code § 6068(e)]--Client Consented to Adverse Representation

[1] FORM

[*Caption. See § 24.28.*]

_____ [*Name of attorney*] SHOULD NOT BE DISQUALIFIED FROM THE CASE BECAUSE THE COMPLAINING PARTY CONSENTED TO THE ATTORNEY'S ADVERSE REPRESENTATION.

A. Client's Consent Prevents Disqualification. The rule prohibiting an attorney from engaging in representation adverse to a client or former client does not apply when that client has expressly or impliedly consented to the adverse representation (*People v. Rocco (1930) 209 Cal. 68, 72-73, 285 P. 704* ; *Sharp v. Next Entertainment, Inc. (2008) 163 Cal. App. 4th 410, 78 Cal. Rptr. 3d 37* ; *Zador Corp. v. Kwan (1995) 31 Cal. App. 4th 1285, 1303, 37 Cal. Rptr. 2d 754* ; *Cornish v. Superior Court (1989) 209 Cal. App. 3d 467, 478, 257 Cal. Rptr. 383* ; *People v. Johnson (1980) 105 Cal. App. 3d 884, 892, 164 Cal. Rptr. 746* ; *see Rules of Professional Conduct, Rule 3-310(E)*).

[*Optional*] **B. Substantial Relationship Test Is Not Necessarily Dispositive in Case Involving Former Joint Clients.** When the former representation involves joint clients, whether the attorney may be disqualified turns more upon whether the subsequent representation is within the scope of the consent of the former joint clients, as opposed to whether there is a substantial relationship between the subsequent and former representation (*Zador Corp. v. Kwan (1995) 31 Cal. App. 4th 1285, 1294-1295, 37 Cal. Rptr. 2d 754*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a party's motion to disqualify an attorney from further participation in a civil or criminal case, when the moving party has given express or implied consent to the adverse representation. Depending on the facts of the case, counsel may combine this form with §§ 24.28, 24.30-24.32.

This form may be used in opposition to a memorandum in support of a motion to disqualify an attorney from further participation in the case, such as the memorandum set out in *§ 24.24*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should refer to facts in declarations and attached exhibits submitted in opposition to the motion that tend to establish consent by the former client to the adverse relationship. For example, counsel may refer in his or her argument to a written waiver signed by the former client; to evidence tending to establish that advice was rendered to the former client to retain separate counsel; and to admissions made at a deposition.

[b] Related Pleading and Practice Forms

For forms for written consent and disclosure to joint representation, and to consent by former client to adverse subsequent representation, see *California Forms of Pleading and Practice, Ch. 72, Attorney Practice and Ethics, § 72.190 et seq.*

[3] Discussion of Authorities

[a] Client's Consent Prevents Disqualification

People v. Rocco *(1930) 209 Cal. 68, 285 P. 704* , was an appeal by one of two codefendants from a superior court judgment of conviction in a criminal case. Among other contentions, the appellant argued that the trial court erred in not permitting the two attorneys appointed to represent the two defendants to withdraw. The attorneys had acted jointly in preparing the defense and had received confidential communications from each of the defendants. On receipt of the information, the two attorneys determined that it would be unethical for them to continue, either jointly or separately, and moved the court to withdraw, intimating that the defenses of the two defendants were adverse to each other. The superior court denied the motion to withdraw after lengthy discussion with counsel and with defendants separately.

The Supreme Court affirmed the judgment and the lower court's refusal to permit withdrawal. The record showed that defendants had knowledge of any possible conflicts of interest, and because they expressly consented to the continued representation of the attorneys in spite of that knowledge, they waived any of the rights to disqualify counsel that were being asserted on their behalf (*209 Cal. 68, 72-73)* .

In ***Sharp v. Next Entertainment, Inc.*** *(2008) 163 Cal. App. 4th 410, 78 Cal. Rptr. 3d 37* , the Writer's Guild of America investigated litigation against reality television employers for wage and house litigation. The Guild recruited employees of the reality television shows to act as named plaintiffs in two class action suits. A law firm that had represented the Guild in previous cases represented the employees in the suits. The employees were informed that the Guild would subsidize the cost of the litigation. Each of the employees signed a conflict waiver acknowledging that the Guild would subsidize the attorney's fees for the class action lawsuits and that the firm represented the Guild in other matters.

The defendants brought a motion to disqualify the plaintiff's law firm, arguing that the Guild conceived, developed, and implemented the class action lawsuits to advance its efforts to organize employees working on reality television programming. The trial court denied the disqualification motion, holding that the Guild had not taken any direct action

to interfere with the efforts to obtain maximum compensation for class members nor any steps to ascertain the defendants' counter-organizing strategy. However, the trial court was concerned about potential conflicts of interests and the hypothetical possibility that the Guild would control, influence, or interfere with the lawsuits.

The court of appeal held that, while there was a potential conflict, the plaintiffs had adequately consented in writing under Rule 3-310(A)(2) to continued representation by the Guild's attorneys [*163 Cal. App. 4th 410, 431*]. The court further held that each potential class member was not required to sign a waiver because the class certification process would address any potential conflict [*163 Cal. App. 4th 410, 432-433*]. In addition, the court noted the fact that the motion to disqualify was brought by opposition parties who are not directly touched by the purported conflict. The court stated that it was skeptical of the defendants' motive for making the motion [*163 Cal. App. 4th 410, 432-433*].

In ***Zador Corp. v. Kwan*** *(1995) 31 Cal. App. 4th 1285, 37 Cal. Rptr. 2d 754* , counsel at one point represented both Zador and Kwan in a lawsuit regarding a transfer of property. Several cross-complaints were filed between the numerous parties. After counsel advised Kwan to retain a separate attorney, Zador sued Kwan. Kwan moved to disqualify counsel based on his previous representation of Kwan. The trial court granted the motion and Zador appealed (*31 Cal. App. 4th 1285, 1292)* .

The court of appeal discussed at length the policy, history and cases involving disqualification of counsel for one party after there had been joint representation of both parties. The court then reviewed the details of this case. The court found that counsel, before undertaking to represent Kwan, gave Kwan an extensive "consent form" which set out the potential conflicts and advised that actual conflicts might arise. The consent form stated that if an actual conflict arose, counsel would so advise Kwan, but provided that if that should occur, Kwan would not seek to disqualify counsel from representing Zador. Kwan studied the consent form, discussed it with counsel, and then signed it. Some time later, it appeared to counsel that there was a likely conflict. He so advised Kwan and suggested that he retain a separate attorney. Counsel again asked Kwan to agree that he could continue to represent Zador and Kwan agreed. Counsel confirmed their discussion in writing. Later, after Kwan had retained an independent attorney, Zador cross-complained against Kwan. Kwan moved to disqualify counsel (*31 Cal. App. 4th 1285, 1300)* .

The court of appeal reversed the trial court and held that not every conflict of interest requires disqualification. Where one party has executed detailed informed consent and has explicitly agreed that counsel could continue to represent the other party, disqualification was improper. The court of appeal also observed that Kwan had waited almost three years after the conflict became apparent to move to disqualify counsel. The court noted that motions to disqualify are sometimes used as litigation tactics and that fact could be considered in its determination (*31 Cal. App. 4th 1285, 1300-1303)* .

In ***Cornish v. Superior Court*** *(1989) 209 Cal. App. 3d 467, 257 Cal. Rptr. 383* , the court of appeal denied a peremptory writ of mandate to a plaintiff who sought to disqualify defense counsel on the ground that defense counsel had represented plaintiff in prior matters related to the litigation at hand and had thereby acquired confidential information. At the time defendant's counsel represented plaintiff in the prior matters, plaintiff had maintained an attorney-client relationship with his own personal attorney. Prior to agreeing to represent plaintiff, defendant's counsel wrote to plaintiff's personal attorney advising him that it (defendant's counsel) would only represent plaintiff on the condition that no conflict of interest would be deemed to exist if plaintiff and defendant became adversaries in future litigation. The court found that at the time of the prior representation, plaintiff knew that defendant's counsel considered defendant its primary client and knew that in the event of a conflict between plaintiff and defendant, defendant's counsel would continue to represent defendant (*209 Cal. App. 3d 467, 478)* .

People v. Johnson *(1980) 105 Cal. App. 3d 884, 164 Cal. Rptr. 746* , involved an appeal from a superior court judgment of conviction in a criminal case. The defendant appealed, arguing that his motion to suppress evidence should have been granted, and contending for the first time on appeal that the district attorney should have been disqualified because his law firm had represented the defendant in an earlier action based on the same facts.

The court of appeal affirmed the judgment, and held that the motion to suppress had properly been denied. With regard to the district attorney, the court said that it would not be proper for a district attorney to prosecute a client or former client, without the client's consent, when the attorney had obtained confidential information from the client regarding the subject matter of the case. Therefore, the superior court could have disqualified the district attorney from the case (*105 Cal. App. 3d 884, 891)* . However, because defendant had not made the appropriate motion, there was no evidence that either the superior court or the district attorney was aware of the potential conflict. Since defendant was in the best position to assert that conflict, and since he never raised the issue at trial, he impliedly consented to the adverse representation. When the former client either expressly or impliedly consents to the adverse representation, the attorney will not be disqualified (*105 Cal. App. 3d 884, 892)* .

Counsel should note that some cases cited in this memorandum were decided prior to the enactment of *Cal. Rules Prof. Conduct, Rule 3-310*, the current rule prohibiting an attorney from engaging in representation adverse to a client or former client. *Cal. Rules Prof. Conduct, Rule 3-310(E)* provides that a member must not, without the informed written consent of the client or former client, accept employment adverse to the client or former client when, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.

[b] Substantial Relationship Test Is Not Necessarily Dispositive in Case Involving Former Joint Clients

In ***Zador Corp. v. Kwan*** *(1995) 31 Cal. App. 4th 1285, 37 Cal. Rptr. 2d 754* , a corporate client appealed after the trial court disqualified its attorney. The disqualification was a ruling on a motion made by a former client of the attorney, in consideration of which the trial court concluded that there was a substantial relationship between the current action and the attorney's prior representation of the former client and moving party.

The Court of appeal reversed, noting that the present and former clients had been joint clients in the former representation by the attorney. In a joint client case, disqualification does not turn on a substantial relationship test, but on whether subsequent representation is within the scope of the consent of the former joint clients. A substantial relationship between the former joint representation and the subsequent representation is inherent; it determines whether confidences that could impact the subsequent representation were disclosed in former representation, and such disclosure necessarily occurs in a joint client situation (*31 Cal. App. 4th 1285, 1294-1295)* . In this instance, the record showed that, in fact, the former joint client had executed a detailed waiver and consent form agreeing not to disqualify the attorney notwithstanding any adversity that might subsequently develop between the joint clients. Thus the court concluded that the trial court erred in granting a disqualification based on a test that was not dispositive under the circumstances of the case (*31 Cal. App. 4th 1285, 1300-1303)* .

[4] Additional Authorities

[a] Client's Consent Prevents Disqualification

Grauberger v. Light (1932) 127 Cal. App. 576, 16 P.2d 188 , was an appeal from a judgment against plaintiff in an action to rescind a contract of employment between plaintiff and her attorneys. Plaintiff was the administrator of her deceased husband's estate in California, and hired defendant attorneys to represent her interests in his estate in Colorado. The attorneys sought to enforce a claim against the estate in California on behalf of a third party. Plaintiff alleged that the attorneys fraudulently induced her to enter into the contract with them, and used her knowledge of the estate against her. The superior court ruled in favor of defendants. The court of appeal affirmed the judgment. The evidence indicated that the third-party claim had been filed against the estate before plaintiff hired defendants to represent her in Colorado. Plaintiff knew the attorneys represented the claimant at the time she hired them. The court of appeal held that although an attorney may not assume a position adverse to a client, there is an exception when the client gives informed consent to the adverse representation (*127 Cal. App. 576, 579)* .

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California Points & Authorities

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CHAPTER 24 ATTORNEYS AT LAW: SUBSTITUTION, WITHDRAWAL, DISQUALIFICATION, AND AUTHORITY TO APPEAR
PART II. FORMS

2A-24 California Points & Authorities § 24.30

§ 24.30 Opposing Motion for Order Disqualifying Attorney From Engaging in Representation Adverse to Former Client [Bus. & Prof. Code § 6068(e)]--Previous Mutual Representation of Parties

[1] FORM

[*Caption. See § 24.28.*]

_____ [*Name of attorney*] SHOULD NOT BE DISQUALIFIED WHEN HE/SHE FORMERLY REPRESENTED BOTH THE COMPLAINING AND THE OPPOSING PARTY ON A MATTER OF MUTUAL INTEREST, AND CURRENTLY REPRESENTS ONLY ONE OF THEM.

Former Mutual Representation Prevents Disqualification. When the attorney previously represented both the complaining and the opposing party together in a matter of their common interest with their consent, and with the attorney's full disclosure to both, the attorney will not be disqualified for later representing one against the other in the same matter (*Arden v. State Bar (1959) 52 Cal. 2d 310, 317-319, 341 P.2d 6* ; *Zador Corp. v. Kwan (1995) 31 Cal. App. 4th 1285, 1303, 37 Cal. Rptr. 2d 754* ; *Croce v. Superior Court (1937) 21 Cal. App. 2d 18, 20, 68 P.2d 369*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a party's motion to disqualify an attorney from further participation in the case, when the attorney formerly represented both the complaining and the opposing party on a

matter of mutual interest. Depending on the facts of the case, counsel may combine this form with §§ 24.28, 24.29, 24.31.

This form may be used in opposition to a memorandum in support of a motion to disqualify an attorney from further participation, such as the memorandum set out in *§ 24.24*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Former Mutual Representation May Prevent Disqualification

Arden v. State Bar *(1959) 52 Cal. 2d 310, 341 P.2d 6* , was a proceeding to review a recommendation by the Board of Governors of the State Bar that an attorney be suspended for misconduct. The attorney represented both a woman seeking adoption of her child and the couple who adopted the child. The attorney later assisted in the representation of the couple at a hearing on the woman's petition to revoke consent to the adoption. A committee of the State Bar found that the attorney had violated the Rule of Professional Conduct prohibiting an attorney from accepting employment adverse to a client or former client without the client's consent.

The Supreme Court ruled against suspension and held that the attorney had not violated the rule against adverse employment. The Court stated that when an attorney who represents one party in an action formerly represented both parties mutually, the representation is proper. The Court reasoned that the common employment of the attorney removed the communications of the parties to each other and to the attorney from being privileged. Since the communications are not confidential when the adverse party already has heard them, there is no impropriety in later adverse representation on the same matter by the attorney (*52 Cal. 2d 310, 318)* . The Court added, however, that this exception to the rule against adverse employment would apply only when there is full disclosure of all information between the attorney and all clients during the time of mutual representation (*52 Cal. 2d 310, 319)* .

In ***Zador Corp. v. Kwan*** *(1995) 31 Cal. App. 4th 1285, 37 Cal. Rptr. 2d 754* , counsel at one point represented both Zador and Kwan in a lawsuit regarding a transfer of property. Several cross-complaints were filed between the numerous parties. After counsel advised Kwan to retain a separate attorney, Zador sued Kwan. Kwan moved to disqualify counsel based on his previous representation of Kwan. The trial court granted the motion, and Zador appealed (*31 Cal. App. 4th 1285, 1292)* .

The court of appeal discussed at length the policy, history and cases involving disqualification of counsel for one party after there had been joint representation of both parties. The court then reviewed the details of this case and found that counsel, before undertaking to represent Kwan, gave Kwan an extensive "consent form" which set out the potential conflicts and advised that actual conflicts might arise. The consent form stated that if an actual conflict arose, counsel would so advise Kwan, but provided that if that should occur, Kwan would not seek to disqualify counsel from representing Zador. Kwan studied the consent form, discussed it with counsel, and then signed it. Some time later, it appeared to counsel that there was a likely conflict. He so advised Kwan and suggested that he retain a separate attorney. Counsel again asked Kwan to agree that he could continue to represent Zador and Kwan agreed. Counsel confirmed their discussion in writing. Later, after Kwan retained an independent attorney, Zador cross-complained against Kwan. Kwan moved to disqualify counsel (*31 Cal. App. 4th 1285, 1300)* .

The court of appeal reversed the trial court and held that not every conflict of interest requires disqualification. When one party executed detailed informed consent and explicitly agreed that counsel could continue to represent the other party, disqualification was improper. The court also observed that Kwan waited almost three years after the conflict became apparent to move to disqualify counsel. The court noted that motions to disqualify are sometimes used as

litigation tactics and that fact could be considered in its determination (*31 Cal. App. 4th 1285, 1300-1303)* .

Croce v. Superior Court *(1937) 21 Cal. App. 2d 18, 68 P.2d 369* , involved litigation of the issue of whether a partnership existed. The parties disputing the matter had earlier been represented by one attorney, who handled their business enterprise and later represented only one client, plaintiff, in the litigation against the other business associates. Defendants moved to disqualify plaintiff's attorney, asserting that he had acquired confidential information from defendants that he would be in a position to use against them in the case. The trial court denied the motion, and defendants petitioned for a writ of mandate to compel disqualification. The court of appeal sustained the trial court's ruling. The court held that when two or more parties hire the same attorney to handle a matter of common interest, the communications between the parties and the attorney are not confidential and privileged as between any of the parties and the attorney. When a previous confidential communication is presented as the basis for disqualifying an attorney from later representing one party against the other, the motion to disqualify should be denied (*21 Cal. App. 2d 18, 20)* .

It should be noted that at least one case has questioned, but not overruled *Croce* [*see Industrial Indem. Co. v. Great American Ins. Co. (1977) 73 Cal. App. 3d 529, 536, 538, 140 Cal. Rptr. 806]* . In that case, the court said that the joint-clients exception to the rule against representation adverse to a former client should only apply when the joint representation was undertaken with full disclosure of conflicting interests, and with written consent of the clients (*73 Cal. App. 3d 529, 538)* .

[4] Additional Authorities

[a] In General

The facts and procedural background of *Forrest v. Baeza (1997) 58 Cal. App. 4th 65, 67 Cal. Rptr. 2d 857* , are discussed in *§ 24.28[3][b]*. There, the court of appeal affirmed the trial court's order disqualifying counsel from representing the corporations but permitting counsel to continue to represent the two majority shareholders on the ground that counsel could not simultaneously represent the corporations and the two majority shareholders in the action because the two shareholders, as directors, were accused of embezzling from the corporations, which created a conflict of interest between the corporations and the two majority shareholders (*58 Cal. App. 4th 65, 74)* . In permitting the lawyer to continue to represent the majority shareholders, the court reasoned that counsel would likely hold a residual bias in favor of the majority shareholders, even if the court permitted counsel to continue representation of the corporations only (*58 Cal. App. 4th 65, 81)* . The court rejected the argument that the lawyer should be disqualified under *Cal. Rules of Prof. Conduct, Rule 3-310(E)* for possessing confidential information that could prejudice the corporations, finding that there was no confidential information particular to the corporations, because the majority shareholders were "the sole repositories" of all corporate information (*58 Cal. App. 4th 65, 82)* .

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 24 ATTORNEYS AT LAW: SUBSTITUTION, WITHDRAWAL, DISQUALIFICATION, AND AUTHORITY TO APPEAR
PART II. FORMS

2A-24 California Points & Authorities § 24.31

§ 24.31 Opposing Motion for Order Disqualifying Attorney From Engaging in Representation Adverse to Former Client [Bus. & Prof. Code § 6068(e)]--Present Representation Not in Conflict With Previous Representation

[1] FORM

[*Caption. See § 24.28.*]

_____ [*Name of attorney*] SHOULD NOT BE DISQUALIFIED BECAUSE HIS/HER REPRESENTATION OF THE MOVING PARTY WAS UNRELATED TO, OR NOT IN CONFLICT WITH, HIS/HER REPRESENTATION OF AN ADVERSE PARTY IN THIS ACTION.

A. No Conflict With Earlier Employment. An attorney will not be disqualified from representing a party on the grounds that he or she formerly represented an adverse party, if the former employment involved matters unrelated to, or not in conflict with, the present representation (*In re Charlisse C. (2008) 45 Cal. 4th 145, 84 Cal. Rptr. 3d 597, 194 P.3d 330* ; *Abbott v. United States Internal Revenue Service (9th Cir. 2005) 399 F.3d 1083, 1086-1087* ; *Rhaburn v. Superior Court (2006) 140 Cal. App. 4th 1566, 1581, 45 Cal. Rptr. 3d 464* ; *see Wutchumna Water Co. v. Bailey (1932) 216 Cal. 564, 573, 15 P.2d 505*).

[*Optional*] **B. Former Government Employee's Current Law Firm.** A motion by the government for vicarious disqualification of the adverse party's law firm, made on the ground that one of the firm's members used to be a government employee, should be denied when there is no evidence that the member had acquired pertinent confidential information while employed by the government, and when the law firm has screened that member from participation in the subject action (*see Chambers v. Superior Court (1981) 121 Cal. App. 3d 893, 903, 175 Cal. Rptr. 575*).

[*Optional*] **C. Former Judicial Officer's Current Law Firm.** A motion for vicarious disqualification of the adverse party's law firm, made on the ground that one of the firm's members was formerly a judicial officer who had heard earlier proceedings in the subject action, should be denied when there is no showing of an actual conflict of interest and when any appearance of impropriety is overcome by a showing that the firm screened the attorney from participation in the subject action (*see Higdon v. Superior Court (1991) 227 Cal. App. 3d 1667, 1680, 278 Cal. Rptr. 588*).

[*Optional*] **D. No Confidential Information Obtained in Earlier Employment.** An attorney may accept employment adverse to a former client if the matter has no relationship to confidential information acquired by reason of or in the course of employment by the former client. Confidential information is initially determined by whether the former representation is substantially related to the current representation (*Elliott v. McFarland Unified School Dist. (1985) 165 Cal. App. 3d 562, 568-569, 211 Cal. Rptr. 802*). If there has been a determination that the former representation is substantially related to the current representation, then the court must determine whether the nature of the contact with the attorney was such that confidential information material to the dispute would have been disclosed (*In re Marriage of Zimmerman (1993) 16 Cal. App. 4th 556, 563-564, 20 Cal. Rptr. 2d 132*).

[*Optional*] **E. Earlier Representation of a Different Plaintiff in Mediation in a Related Case Against the Same Defendant Does Not Require Disqualification.** An attorney who represented a different plaintiff in an earlier, related case against the same defendant need not be disqualified from representing the plaintiff in the instant action, even if the attorney may have acquired confidential information regarding the defendant during a mediation in the previous case (*Barajas v. Oren (1997) 57 Cal. App. 4th 209, 67 Cal. Rptr. 2d 62*).

[*Optional*] **F. No Disqualification of Lawyer's Former Firm Required When No Opportunity for Confidential Information to Be Divulged.** An attorney's presumed possession of confidential information concerning a former client does not automatically cause the attorney's former firm to be vicariously disqualified when no one other than the departed attorney had any dealings with the client or obtained confidential information (*Goldberg v. Warner/Chappell Music, Inc. (2005) 125 Cal. App. 4th 752, 762-766, 23 Cal. Rptr. 3d 116*).

[*Optional*] **G. Presumption of Automatic Vicarious Disqualification is Rebuttable.** The presumption that an attorney's entire law firm is vicariously disqualified from representing a client adverse to the attorney's former client may be rebutted by evidence of effective ethical screening (*Kirk v. First American Title Ins. Co. (2010) 183 Cal. App. 4th 776, 108 Cal. Rptr. 3d 620*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a party's motion to disqualify an attorney from further participation in the case when the attorney's relationship with the moving party either does not conflict with the attorney's representation of an adverse party in the present action, or does not involve the same subject matter as that of the present action. Depending on the facts of the case, counsel may combine this form with §§ 24.28-24.30.

This form may be used in opposition to a memorandum in support of a motion to disqualify an attorney from further participation in the case such as the memorandum set out in *§ 24.24*.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] No Conflict With Earlier Employment

In re Charlisse C. *(2008) 45 Cal. 4th 145, 84 Cal. Rptr. 3d 597, 194 P.3d 330* , involved the Children's Law Center of Los Angeles (CLC), a publically-funded, nonprofit law office that represented parties in dependency court. CLC included three units: a core unit (Unit 1) and two conflict units (Units 2 and 3). Unit 3 represented Charlisse when a juvenile dependency petition was filed alleging that she was at substantial risk of being abused or neglected due to the emotional and mental problems of her mother, Shadonna C. Shadonna was a former client of CLC's Unit 1, and objected to CLC's representation of Charlisse. Shadonna argued that CLC's prior representation of her substantially related to CLC's current representation of Charlisse, that disqualification was appropriate unless CLC showed that it maintained ethical walls among its units, and that CLC's overlapping administrative structure created a de facto conflict of interest for every client with an adverse interest to another client. The juvenile court granted the disqualification motion, holding that CLC breached any purported ethical walls between its units and thereby created the appearance of a conflict of interest.

The court of appeal reversed, holding that in a successive representation case such as this one, disqualification turned on the likelihood that confidential information relating to the prior representation would be shared with or be readily accessible to the current attorney. The court of appeal held that Shadonna failed to establish such a likelihood, and, therefore, disqualification was unwarranted.

The California Supreme Court agreed. It held that the juvenile court applied the stricter standard required in simultaneous representation cases instead of the standard applicable in successive representation cases. It held that in successive representation cases, the primary fiduciary value to be protected is client confidences, whereas in simultaneous representation cases the primary fiduciary value is loyalty [*45 Cal. 4th 145, 159-160*]. The Court held that in this successive representation case, involving vicarious disqualification of the entire CLC, the juvenile court should have determined whether CLC adequately protected, and would continue to adequately protect, Shadonna's confidences through timely, appropriate, and effective screening measures and/or structural safeguards [*45 Cal. 4th 145, 165*]. The Court also noted that the standard for a nonprofit law firm should be less strict. A nonprofit law firm does not have the same financial incentives as a private firm insofar as the clients do not pay for the services; therefore no single client becomes more important than others [*45 Cal. 4th 145, 165*]. The Court held that whether CLC's disqualification is warranted turns on the likelihood that the Unit 3 attorney representing Charlisse had obtained or would acquire, either intentionally or inadvertently, confidential information CLC acquired through Unit 1's prior representation of Shadonna [*45 Cal. 4th 145, 166*].

The Court also held that the evidentiary burden on the disqualification issue should not fall on Shadonna, the party seeking disqualification. Instead, the Court held, the burden should be on CLC to show that the confidential information acquired during Unit 1's prior representation of Shadonna had been, and would be, adequately protected during Unit 3's representation of Charlisse. The Court held that CLC should have this burden because it has unique access to the relevant information [*45 Cal. 4th 145, 166*].

In ***Abbott v. United States Internal Revenue Service*** *(9th Cir. 2005) 399 F.3d 1083, 1086-1087* , Ann Sexton Peterson was executor of the estate of Lucille Abbott Sexton. On behalf of the estate, Peterson filed a tax return, which the IRS audited. The IRS ruled that the estate owed substantially more tax. During settlement negotiations with the IRS, Peterson was represented by Dennis Harkavy, a lawyer and CPA. During the period he represented the estate, Harkavy was also employed as a consultant by the IRS in an unrelated matter. When Peterson learned of this employment, she moved the Tax Court to set aside the settlement agreement on the ground that the estate had not been properly represented. The Tax Court denied her motion, holding that there was "no credible evidence" that Harkavy failed to properly represent the estate. Peterson appealed.

The Ninth Circuit affirmed the Tax Court's judgment. The court held there was no evidence that Harkavy's employment by the IRS was adverse to the estate. In addition, the court held there was no evidence that Harkavy disclosed any

confidential information of the estate to the IRS (*399 F.3d 1083, 1086-1087)* .

In ***Rhaburn v. Superior Court*** *(2006) 140 Cal. App. 4th 1566, 45 Cal. Rptr. 3d 464* , at issue was whether a public defender whose office had previously represented a witness for the prosecution was subject to automatic disqualification for conflict of interest under *Cal. Rules of Prof. Conduct, Rule 3-310(E)*. The trial court held that the public defender should be disqualified.

The court of appeal disagreed. It held that the trial court erred in applying a rigid rule of vicarious disqualification. Here, the public defender did not have a direct and personal relationship with the witness, and the direct acquisition of confidential information should not have been presumed. Instead, the appellate court held, the trial court should have evaluated the totality of the circumstances in determining whether there was a reasonable possibility that the individual attorney representing defendant either had obtained confidential information about the witness collected by his or her office, or might inadvertently acquire such information through file review, office conversation, or otherwise. The court held that in cases that do not involve direct and personal representation of the witness, trial courts should accept counsel's representation that he or she had not come into possession of any confidential information acquired from the witness and would not seek to do so (*140 Cal. App. 4th 1566, 1581)* .

Wutchumna Water Co. v. Bailey *(1932) 216 Cal. 564, 15 P.2d 505* , is discussed in *§ 24.24[3][b]*. An attorney switched sides in an action, and one of the parties brought suit in superior court to enjoin him from further participation in the case. The lower court found for the attorney, and the Supreme Court reversed. Analyzing a wide range of authority, the Court attempted to clarify when conduct opposing a former client is impermissible, and when it is proper. The Court noted that text writers condensed earlier case law into a rule that an attorney who represented one client is not precluded from accepting employment adverse to that client in a matter that is unrelated to the previous employment. Nor is the attorney precluded from representing a second client even in the same general matter when the second employment is not actually adverse to the first (*216 Cal. 564, 573)* .

[b] Former Government Employee's Current Law Firm

In ***Chambers v. Superior Court*** *(1981) 121 Cal. App. 3d 893, 175 Cal. Rptr. 575* , plaintiffs sued the state for negligence in a personal injury action. The state moved to disqualify plaintiffs' law firm on the ground that a member of the firm was previously employed by the state. The state contended that the attorney in question, while employed by the state, had access to confidential information from similar cases, and had discussed the subject case itself with another employee. An opposing declaration by the attorney in question, stated that while employed by the state he had never worked on the subject case, and had only briefly discussed its facts with another attorney. Further, the declaration stated that the attorney's current firm screened him from any participation in the subject suit, and that he had specifically conditioned his employment with the firm on a refusal to discuss any cases he had worked on as a state employee. The trial court granted the state's motion and denied plaintiffs' motion for reconsideration. Plaintiffs then sought a writ of mandate in the court of appeal.

The court of appeal issued the writ, compelling the trial court to deny the state's motion. The court noted initially that vicarious disqualification of a former government employee's current law firm was an issue of first impression in California (*121 Cal. App. 3d 893, 894)* . It then stated that a conflict in representation requires a threatened disclosure of confidential information acquired from the former client (*121 Cal. App. 3d 893, 897)* . The court cited with approval several federal cases dealing with vicarious disqualification of former government employees' current law firms, that held that when there is no actual threatened disclosure of confidential information acquired from the government, as, for example, when a law firm has screened the attorney in question from participation in the action, other policy considerations outweigh any need to disqualify. Such policy considerations include, among others, the interest of the government and law firms in hiring attorneys, the interest of attorneys in finding jobs after leaving employment with the government, and the interests of the client both in hiring the law firm of his or her choice, and in avoiding prejudice resulting from having to change law firms during the course of litigation (*121 Cal. App. 3d 893, 900-902)* . The court

applied this reasoning to the case at hand, and held that the trial court had abused its discretion by disqualifying the plaintiffs' law firm, since, under the facts, there was no evidence of a threatened disclosure of confidential information. The court added that disqualification of plaintiffs' attorneys some three years after the action was commenced, would result in undue prejudice and delay (*121 Cal. App. 3d 893, 903)* .

[c] Former Judicial Officer's Current Law Firm

Higdon v. Superior Court *(1991) 227 Cal. App. 3d 1667, 278 Cal. Rptr. 588* , involved two marital dissolution actions in which the wives sought to disqualify the law firm representing their husbands. One of the associates for the husbands' law firm had been a judicial officer and had heard earlier proceedings in the dissolution actions. The wives cited no actual conflict of interest, but claimed that the representation was improper because it created the appearance of impropriety. The trial court granted the motions for disqualification of the husbands' entire law firm, holding that the representation would indeed give the appearance of impropriety.

The court of appeal reversed, holding that the vicarious disqualification, made without an inquiry into whether the associate was screened from the two dissolution cases, was an abuse of judicial discretion. The court stressed that there had been no actual conflict shown, and noted that generally, a judge's role in a court proceeding does not afford the opportunity for receipt of confidential information. The court directed the trial court to conduct a further hearing at which the husbands' law firm would have the burden to show that effective screening had taken place. The court noted that appropriate screening would include both screening from participation in and receipt of fees from the dissolution cases (*227 Cal. App. 3d 1667, 1680)* .

However, in ***Cho v. Superior Court*** *(1995) 39 Cal. App. 4th 113, 45 Cal. Rptr. 2d 863* , discussed in *§ 24.24[3][h]*, a former judge was now "of counsel" to one of the parties' law firms but had acquired confidential information from the parties during settlement discussions in the same case while still on the bench. The court of appeal distinguished that case from *Higdon*, and held that even with the extensive screening mechanisms in place, the vital importance of maintaining confidences disclosed in settlement discussions required disqualification of the entire firm.

The 9th Circuit addressed the disqualification of a former judicial officer's current law firm in ***In re County of Los Angeles (Forsyth)*** *(9th Circuit 2000) 223 F.3d 990* , also discussed in *§ 24.24[3][h]*. The court, predicting California law based on the recent development in California case law, held that the vicarious disqualification of a law firm does not automatically follow the personal disqualification of a former settlement judge, when the former settlement judge presided over negotiations that were substantially related, but not identical, to a current case involving a law firm client (*223 F.3d 990, 997)* . As in *Higdon*, the court held that screening mechanisms that are implemented in a timely and effective way, can rebut the presumption that a lawyer has contaminated the entire firm (*223 F.3d 990, 996)* .

[d] No Confidential Information Obtained in Earlier Employment

In ***Elliott v. McFarland Unified School Dist.*** *(1985) 165 Cal. App. 3d 562, 211 Cal. Rptr. 802* , defendant school district (original district) employed plaintiff teacher for four years, during which time he accumulated unused vacation time. When he was transferred to the newly created defendant school district (new district), he was partially paid for the unused vacation time. After plaintiff's demand for payment or credit was refused, he filed a writ of mandate to compel payment. A school legal services organization (the organization) initially represented both defendants in the mandamus proceedings. The organization provided legal services to school districts under a joint powers agreement. After the organization filed memoranda on behalf of both defendants and arranged a continuance, the organization called to the new district's attention a conflict in the legal positions of defendants. The new district substituted county counsel for the organization as its legal representative. Four days before trial, the new district filed a cross complaint against the original district, an objection to counsel, and a demand to disqualify counsel of the original district. The trial court denied the objection without prejudice. Defendant new district appealed.

The court of appeal affirmed. The court described a joint powers agreement to which both defendants were parties, which included a paragraph constituting written consent to the organization's continued representation of the original district. The court noted that if the organization were to be disqualified in plaintiff's proceeding it would have to be for violation of former Rules of Professional Conduct, Rule 4-101 (protecting confidential information obtained from former client; *now see* (*Rules of Prof. Cond., Rule 3-310*). Rule 4-101 is aimed to protect the confidential relationship between attorney and client, but nothing in the rule prohibits an attorney from accepting employment adverse to a former client if the matter has no relationship to confidential information acquired by reason of or in the course of employment by the former client. Confidential information is initially determined by whether the former representation is substantially related to the current representation (*165 Cal. App. 3d 562, 568-569)* . Absent a showing of a substantial relationship, courts have been reluctant to disqualify attorneys despite misgivings about the attorney's conduct. The organization merely filed a memorandum brief arguing plaintiff's petition was without merit; no presumption of disclosure of confidential information arose from that relationship. The organization did not advise the new district how to handle plaintiff's claim to minimize the possibility of liability or how to preserve a claim for indemnity against the original district and then later represent the latter. In addition, the parties entered into an agreement to preserve the benefits of common representation while anticipating the situation that arose. To permit disqualification without a showing that privileged or confidential information was imparted to the organization in connection with the prior representation would defeat the purpose of the agreement. The declarations filed by the new district to support a finding of the imparting of confidential information contained only conclusory allegations and set forth nothing to show the nature of alleged confidential communications or their relationship to any factual issue or tactical decision. A party seeking disqualification is not required to disclose the actual communications it contends are confidential, but conclusory statements are insufficient. A requirement that there be some showing of the nature of the communications or a statement of how they relate to the current representation without disclosing what was actually communicated is not burdensome or prejudicial (*165 Cal. App. 3d 562, 570-572)* . By signing the joint powers agreement, the new district waived its right to disqualify the organization from representing other signatures to that agreement based on a presumption of a substantial relationship between the organization's former representation and its current representation. It did not waive its right to disqualify the organization if the organization acquired in the former representation confidential information pertaining to the current representation. However, the new district offered no substantial evidence that it had imparted confidential information to the organization (*165 Cal. App. 3d 562, 573)* .

For a discussion of *In re Marriage of Zimmerman (1993) 16 Cal. App. 4th 556, 20 Cal. Rptr. 2d 132* , see *§ 24.28[3][a]*.

[e] Confidential Information Obtained in Mediation in Related Action Against Same Defendant

In ***Barajas v. Oren*** *(1997) 57 Cal. App. 4th 209, 67 Cal. Rptr. 2d 62* , the defendant moved to disqualify plaintiffs' attorney on the ground that he previously represented a different plaintiff in an earlier related case against the same defendant. The defendant alleged that plaintiffs' attorney had obtained confidential information regarding the defendant in the successful mediation of the previous case. The trial court granted the motion, based on the proposition that, to promote full disclosure at mediations, *Evid. Code § 1152.5(a)(3)*, requiring that all communications by and between participants in a mediation remain confidential, mandates that an attorney who represents a plaintiff in a mediation is disqualified from representing a different plaintiff in a related case against the same defendant.

The court of appeal reversed. The court found that the language and history of *Evid. Code § 1152.5* reflect an intent to promote and encourage mediation, and that although the trial court's mediation-disqualification interpretation of *Evid. Code § 1152.5* might encourage defendants to be forthcoming in mediation, it would discourage plaintiffs from agreeing to mediate (*57 Cal. App. 4th 209, 213)* . The court also found that if disqualification in different-but-related cases after mediation were required, disqualification in the very same case would necessarily also be required after unsuccessful mediation (*57 Cal. App. 4th 209, 215)* . Examining the language and history of *Evid. Code § 1152.5* and mediation practices common at the time of enactment of that section, the court found that a mediation-disqualification rule conflicts with legislative intent of *Evid. Code § 1152.5*, so that an attorney may participate in mediation without

exposing himself or herself to disqualification in other cases (*57 Cal. App. 4th 209, 217-219)* .

[f] No Disqualification of Lawyer's Former Firm Required When No Opportunity for Confidential Information to Be Divulged

In ***Goldberg v. Warner/Chappell Music, Inc.*** *(2005) 125 Cal. App. 4th 752, 762-766, 23 Cal. Rptr. 3d 116* , Ilene Goldberg sued her former employer for wrongful termination. Goldberg moved to disqualify the employer's counsel, Mitchell Silberberg & Knupp LLP (MS&K). Goldberg claimed that six years earlier she had consulted with J. Eugene Salomon, a former partner with MS&K who had left the firm three years prior to the underlying lawsuit. The consultation involved Goldberg's written contract with her employer. MS&K argued in opposition to the disqualification motion that the consultation had been brief and informal, and that no one else at MS&K had any knowledge concerning either the consultation or any confidential information imparted to Salomon. The trial court denied the motion to disqualify. Goldberg appealed.

The court of appeal upheld the trial court's denial of the disqualification motion. The court first summarized the relevant law: *Cal. Rules Prof. Conduct, Rule 3-310(E)* provides that an attorney "shall not, without the informed written consent of the client or former client, accept employment adverse to the client, or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment" (*125 Cal. App. 4th 752, 759)* . The court held that an attorney must be disqualified when representing a party adverse to a former client if the attorney possesses confidential information that could be helpful to the new client and hurtful to the old (*125 Cal. App. 4th 752, 759)* . In addition, if a substantial relationship exists between the former representation and the current representation, and if it appears that confidential information material to the current dispute would normally be imparted to the attorney or to subordinates for whose legal work the attorney was responsible, the attorney's knowledge of confidential information is presumed (*125 Cal. App. 4th 752, 759)* . The court further noted that if an attorney is disqualified from representation due to an ethical conflict, the disqualification extends to the entire firm (*125 Cal. App. 4th 752, 759)* .

However, the court noted a limited exception to the conclusive presumption if the attorney can show there was no opportunity to divulge confidential information (*125 Cal. App. 4th 752, 760)* . If Salomon were still working at MS&K, MS&K would likely be disqualified from the Goldberg litigation because there would be no practical way of ensuring that, despite his best intentions, Salomon would not inadvertently disclose confidential information. But, the court held, Salomon was no longer with MS&K. Therefore, there was no possibility that he would inadvertently pass on confidential information to his colleagues. It was appropriate for the trial court to assess whether Salomon actually passed on confidential information. Since the court found he had not, there was no basis for disqualification (*125 Cal. App. 4th 752, 762)* .

[g] Presumption of Automatic Vicarious Disqualification is Rebuttable

Kirk v. First American Title Ins. Co. *(2010) 183 Cal. App. 4th 776, 108 Cal. Rptr. 3d 620* , arose from four related class actions brought against the defendant for violation of various consumer protection laws. While the case was pending, plaintiffs' counsel contacted the chief counsel for another insurer, seeking to employ him as a consultant regarding insurance matters. During the conversation, plaintiffs' counsel disclosed privileged attorney work product regarding the case. The prospective consultant declined the consultant position, citing a possible conflict between his employer and the defendant. About a year later, the attorney in question became a partner in a law firm. Soon after, the defendant's lawyers joined the same law firm, although none were in the same office as the attorney who had been approached as a consultant. When alerted by the plaintiffs' counsel about a possible conflict, the law firm established an ethical wall around the attorney, prohibiting firm employees from disclosing any confidences or secrets relating to the class actions to any lawyer working on the defendant's defense. The attorney did some work for the defendant in another case, however, and some of the legal research done in that case applied in the class actions.

The plaintiffs moved to disqualify the entire law firm from representing the defendant. The trial court granted the motion, holding that when an attorney possesses disqualifying confidential client information, vicarious disqualification of the law firm is automatic, regardless of any ethical wall. In addition, the trial court held that the ethical wall was not successful insofar as the attorney worked on a matter for the defendant with arguments similar to those in the class actions. The attorney in question subsequently left the law firm.

On appeal, the court noted that the law regarding vicarious disqualification of an entire law firm is based on decisional law, rather than statute. The court discussed the development of the case law regarding vicarious disqualification, from *Chambers v. Superior Court (1981) 121 Cal. App. 3d 893, 175 Cal. Rptr. 575* , through *Meza v. H. Muehlstein & Co., Inc. (2009) 176 Cal. App. 4th 969, 98 Cal. Rptr. 3d 422* (183 Cal. App. 4th 776, 793-800). The court concluded that the current law required a case-by-case analysis based on the circumstances present in, and policy interests implicated by, the case, and automatic vicarious disqualification only in cases when a tainted attorney possessing actual confidential information switches sides in the same case (183 Cal. App. 4th 776, 800). The court also cited three factors that led to its conclusion that ethical walls should be recognized in California and that vicarious disqualification is not automatic (183 Cal. App. 4th 776, 801-805): (1) the changing realities in the practice of law which undermine the rationale for an automatic rule of vicarious disqualification; (2) California's favorable experience with ethical walls in other circumstances; and (3) an understanding of policy considerations which support the recognition of ethical walls in proper cases.

The court held that an effective ethical screen must include the following (183 Cal. App. 4th 776, 810-814): imposition of the screen when the conflict first arises; physical, geographic, and departmental separation of attorneys; prohibitions against and sanctions for discussing confidential matters; established rules and procedures preventing access to confidential information and files; procedures preventing a disqualified attorney from sharing in the profits from the representation; the disqualified attorney having no supervisory powers over the attorneys involved in the litigation, and vice versa; and notice to the former client. Thus, the court concluded that when a tainted attorney moves from one private law firm to another, the law gives rise to a rebuttable presumption of imputed knowledge to the law firm, which may be rebutted by evidence of effective ethical screening (183 Cal. App. 4th 776, 814-815).

With respect to the attorney's departure from the law firm, the court of appeal remanded the case to the trial court to determine whether the attorney transmitted any confidences to the defendant's counsel. The court held that the trial court should deny the motion for disqualification if the law firm could overcome the rebuttable presumption that confidential information was transmitted by offering sufficient evidence that confidential information was not, in fact, transmitted and if the trial court, in the exercise of its discretion, concluded that the implicated policy considerations favor allowing the law firm to remain as counsel (183 Cal. App. 4th 776, 816).

[4] Additional Authorities

[a] No Conflict With Earlier Employment

In *H. F. Ahmanson & Co. v. Salomon Brothers, Inc. (1991) 229 Cal. App. 3d 1445, 280 Cal. Rptr. 614* , defendants' attorneys had provided legal advice to plaintiffs in a prior matter. Plaintiffs moved to disqualify defendants' attorneys on the ground of conflict of interest, but the trial court denied the motion. The court of appeal affirmed. The appellate court adopted the analytical framework proposed in *Silver Chrysler Plymouth, Inc. v. Chrysler Mot. Corp. (9th Cir. 1975) 518 F.2d 751, 760* (conc. opn. of Adams, J.). It compared the prior representation of plaintiff with the current representation of defendant, focusing on the legal questions posed and on the similarities between the factual situations (*229 Cal. App. 3d 1445, 1456-1457)* . It also examined the nature and extent of the attorneys' involvement with plaintiff, examining the time spent by the attorneys on the earlier representation, the type of work performed, and the attorneys' possible exposure to formulation of policy or strategy (*229 Cal. App. 3d 1445, 1457-1458)* . The court concluded that plaintiffs failed to establish a substantial relationship between the defense attorneys' representation of plaintiffs in the prior matter and representation of defendants in the current matter (*229 Cal. App. 3d 1445, 1459)* .

Grove v. Grove Valve & Regulator Co. (1963) 213 Cal. App. 2d 646, 29 Cal. Rptr. 150 , was an appeal from a superior court order enjoining a law firm from representing one party to an action when one member of the firm formerly represented a corporation as its patent attorney, and currently represented an ex-employee who was suing the company over rights to certain inventions. The court of appeal affirmed the order. In the course of its discussion however, the court reiterated a generally recognized exception to the rule prohibiting adverse representation when the attorney's new employment is not inconsistent with his or her former employment (*213 Cal. App. 2d 646, 652)* .

[b] No Confidential Information Obtained in Earlier Employment

The facts and procedural background of *Forrest v. Baeza (1997) 58 Cal. App. 4th 65, 67 Cal. Rptr. 2d 857* , are discussed in *§ 24.28[3][b]*. In *Forrest*, the court of appeal affirmed that trial court's disqualification of counsel from representing the corporations but permitting counsel to continue to represent the two majority shareholders, on the ground that counsel could not simultaneously represent the corporations and the two majority shareholders in the action because the two shareholders, as directors, were accused of embezzling from the corporations, which created a conflict of interest between the corporations and the two majority shareholders (*58 Cal. App. 4th 65, 74)* . In permitting the lawyer to continue to represent the majority shareholders, the court rejected the argument that the lawyer should be disqualified under *Cal. Rules of Prof. Conduct, Rule 3-310(E)* for possessing confidential information that could prejudice the corporations, finding that there was no confidential information particular to the closely held corporations, because the majority shareholders were "the sole repositories" of all corporate information (*58 Cal. App. 4th 65, 82)* .

In *In re Jessica B. (1989) 207 Cal. App. 3d 504, 254 Cal. Rptr. 883* , a district attorney who had concurrently represented a brain-damaged infant and a local social services department in a proceeding to determine parental visitation rights concerning the infant, withdrew from representing the infant when it became apparent that he could not represent the child's interests and the department's interests at the same time. The attorney continued to represent the social services department. On appeal from a trial court order adjudicating parental rights, one of the parents asserted that at the time the district attorney recognized the conflict of interest between the department and the infant, he should have recused or disqualified himself from representing either. The court of appeal disagreed. The court refused to presume prejudice merely because of the substantial relationship between the attorney's former representation of the infant and current representation of the department, since there was no possibility of communication between the attorney and the brain-damaged infant. The court concluded that the attorney's continued representation of the department could not have resulted in prejudice to the infant (*207 Cal. App. 3d 504, 512)* .

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2A-24 California Points & Authorities § 24.32

§ 24.32 Opposing Motion for Order Disqualifying Attorney From Engaging in Representation Adverse to Former Client [Bus. & Prof. Code § 6068(e)]--Extreme Delay of Moving Party in Bringing Motion Constitutes Implied Waiver of Right to Disqualify

[1] FORM

[*Caption. See § 24.28.*]

_____ [*Name of attorney*] SHOULD NOT BE DISQUALIFIED, BECAUSE THE MOVING PARTY'S DELAY IN MAKING THE DISQUALIFICATION MOTION IS SO UNREASONABLE, AND THE RESULTING PREJUDICE SO GREAT, THAT THE LAW MUST ASSUME AN IMPLIED WAIVER OF THE RIGHT TO DISQUALIFY _____ [*name of attorney*].

Extreme Delay Constitutes Implied Waiver. An attorney will not be disqualified from representing a party on the ground that he or she formerly represented an adverse party when the party moving to disqualify the attorney has engaged in extreme delay in bringing the motion and disqualification would cause extreme prejudice to the represented party. Under such circumstances, the court will find an implied waiver of the right to disqualify the attorney (*Zador Corp. v. Kwan (1995) 31 Cal. App. 4th 1285, 1292, 37 Cal. Rptr. 2d 754* ; *River West, Inc. v. Nickel (1987) 188 Cal. App. 3d 1297, 1313*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a party's motion to disqualify an attorney from further participation in the case when the moving party has engaged in extreme delay in bringing the motion. Depending on the facts of the case, counsel may combine this form with §§ 24.28-24.31.

This form may be used in opposition to a memorandum in support of a motion to disqualify an attorney from further participation in the case, such as the memorandum set out in *§ 24.24*.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Extreme Delay Constitutes Implied Waiver

In ***River West, Inc. v. Nickel*** *(1987) 188 Cal. App. 3d 1297, 234 Cal. Rptr. 33* , defendant brought a motion in superior court to disqualify plaintiff's counsel during litigation concerning water rights. Defendant alleged that one of plaintiffs' attorneys had represented defendant approximately 30 years earlier in litigation concerning the same general subject matter as the present litigation. The superior court granted defendant's motion, despite the fact that defendant made the motion to disqualify 47 months after filing its answer to plaintiff's complaint, and that plaintiffs' disqualified counsel had engaged in over 3,000 hours of litigation effort at a cost to plaintiffs of $387,000. Plaintiffs appealed the trial court's disqualification order.

The court of appeal reversed, finding that the delay in making the disqualification motion was so unreasonable and the resulting prejudice so great that the law would have to assume an implied waiver of the right to disqualify plaintiff's counsel (*188 Cal. App. 3d 1297, 1313)* . The court also held that the implied waiver of objection would extend to co-counsel associated with the formerly disqualified attorney (*188 Cal. App. 3d 1297, 1313)* . It rejected defendant's argument that an earlier motion for disqualification would have been futile because of a change of venue, judicial disqualifications, and the parties' difficulty in locating an "acceptable" judge to hear the case (*188 Cal. App. 3d 1297, 1311-1312)* .

In ***Zador Corp. v. Kwan*** *(1995) 31 Cal. App. 4th 1285, 37 Cal. Rptr. 2d 754* , discussed in *§ 24.30[3][a]*, the trial court granted a motion to disqualify an attorney who had at one point represented both of the now-opposing parties in the litigation. The court of appeal reversed on the ground that the party moving to disqualify had executed a detailed informed consent and explicitly agreed that the attorney could continue to represent the other party. The court also observed that Kwan had waited almost three years after the conflict became apparent to move to disqualify counsel. The court noted that motions to disqualify are sometimes used as litigation tactics and that fact could be considered in its determination (*31 Cal. App. 4th 1285, 1300-1303)* .

[4] Additional Authorities

The facts and procedural background of *Forrest v. Baeza (1997) 58 Cal. App. 4th 65, 67 Cal. Rptr. 2d 857* , are discussed in *§ 24.28[3][b]*. There the court of appeal affirmed the trial court's disqualification of counsel from representing the corporations but permitting counsel to continue to represent the two majority shareholders, on the ground that the evidence supported the trial court's implied finding that any delay was insufficiently extreme to warrant denial of the disqualification motion. Although inexcusable delay may occasion denial of a disqualification motion, the court stated the common law rule that the delay must be extreme in terms of time and consequence (*58 Cal. App. 4th 65, 77)* . In *Forrest*, however, the two majority shareholders (and by inference, the two closely held corporations) had notice of the third shareholder's wish to disqualify their counsel as a result of an earlier disqualification motion brought by the third shareholder at the time the third shareholder obtained independent counsel following the breakdown of the

relationship between the majority shareholders and the third shareholder. Any perceived delay in bringing the subsequent disqualification motion (based on different grounds than the first disqualification motion) was a result of settlement negotiations between the parties. Following repudiation of the settlement agreement, the third shareholder had obtained a deposition transcript containing admissions of fraud and embezzlement against the corporations by one of the two majority shareholders, and thereafter promptly filed his disqualification motion. Thus, neither the two majority shareholders nor their counsel could have been misled into thinking that the third shareholder had consented to counsel's adverse representation. Additionally, neither the corporations nor the two majority shareholders suggested extreme time delay or extreme prejudice as a result of the allegedly latest qualification motion (*58 Cal. App. 4th 65, 77-79)* .

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2A-24 California Points & Authorities § 24.33

§ 24.33 Opposing Motion for Order Disqualifying Attorney Who Communicated With Represented Adverse Party

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*]	)	MEMORANDUM IN OPPOSITION TO MOTION
Plaintiff,	)	TO DISQUALIFY _____
vs.	)	[*name of attorney*] FROM REPRESENTATION OF
_____ [*name*],	)	CLIENT
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

_____ [*Name of attorney*] SHOULD NOT BE DISQUALIFIED FROM THE CASE BECAUSE HIS/HER EX PARTE COMMUNICATIONS WITH THE _____ [PRESENT *and/or* FORMER] EMPLOYEES OF AN ADVERSE PARTY ARE PERMITTED UNDER *RULES OF PROFESSIONAL CONDUCT, RULE 2-100*.

A. When Ex Parte Communication Permitted. When the opposing party is a corporation, opposing counsel may initiate ex parte contacts with unrepresented former employees of the corporation, and present employees of the corporation (other than officers, directors, or managing agents) who are not separately represented, so long as the communication does not involve the employee's act or failure to act in connection with the matter that may bind the corporation, be imputed to it, or constitute an admission of the corporation for purposes of establishing liability (*Jorgensen v. Taco Bell (1996) 50 Cal. App. 4th 1398, 1401-1403, 58 Cal. Rptr. 2d 178* ; *Continental Insurance Co. v. Superior Court (1995) 32 Cal. App. 4th 94, 118, 37 Cal. Rptr. 2d 843* ; *Triple A Machine Shop, Inc. v. State of California (1989) 213 Cal. App. 3d 131, 140, 261 Cal. Rptr. 493* ; *see Cal. Rules Prof. Conduct, Rule 2-100*).

[*OR*]

A. When Ex Parte Communication Permitted. When the opposing party is a corporation, opposing counsel may initiate ex parte contact with current employees of that corporation, where opposing counsel has no actual knowledge that the corporation or its employees are represented by counsel on the matter at the time of the ex parte contact (*Truitt v. Superior Court (1997) 59 Cal. App. 4th 1183* ; *see Cal. Rules Prof. Conduct, Rule 2-100*).

B. Who Is a Party "Represented by Counsel." As part of routine pre-litigation investigation, there is no proscription against counsel interviewing employees of a corporation that is a potential defendant, if those employees are not individuals specified in *Cal. Rules of Prof. Conduct, Rule 2-100(B)(1),* and if those individuals are not represented by counsel (*Jorgensen v. Taco Bell (1996) 50 Cal. App. 4th 1398, 1401-1402, 58 Cal. Rptr. 2d 178*).

[*OR*]

B. Who Is a Party "Represented by Counsel." When a party has dismissed the party's claims in an action prior to the communication with counsel, he or she is no longer a party represented by counsel; this is true notwithstanding the fact that *Cal. Rules of Prof. Conduct, Rule 2-100(B)(1)* is not limited to litigants (*Jackson v. Ingersoll-Rand Co. (1996) 42 Cal. App. 4th 1163, 1168, 50 Cal. Rptr. 2d 66*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion to disqualify an attorney from further participation in a case, when the ground for the disqualification motion is that the attorney has communicated about the subject of the case with a party represented by another attorney, without obtaining the other attorney's consent, in violation of *Cal. Rules Prof. Conduct, Rule 2-100* [*see Mills Land & Water Co. v. Golden West Refining Co. (1986) 186 Cal. App. 3d 116, 230 Cal. Rptr. 461* (upholding disqualification of attorney who violated Cal. Rules Prof. Conduct, former Rule 7-103, predecessor of *Cal. Rules Prof. Conduct, Rule 2-100*)]. This form may be used when the communications at issue are not prohibited under *Cal. Rules Prof. Conduct, Rule 2-100*.

This form may be used in opposition to a disqualification motion supported by the memoranda set out in *§ 24.25*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should allege facts concerning the corporate position of the contacted parties.

[3] Discussion of Authorities

[a] When Ex Parte Communication Permitted

In ***Triple A Machine Shop, Inc. v. State of California*** *(1989) 213 Cal. App. 3d 131, 261 Cal. Rptr. 493* , the trial court issued a preliminary injunction prohibiting state and local authorities from contacting all present and certain former employees of a corporation in connection with civil and criminal proceedings against the corporation for alleged unlawful disposal of hazardous wastes. On seeking the injunction, the corporation alleged that state and local authorities contacted its high level managerial employees without its notice or consent, in violation of the California Rules of Professional Conduct. The state and local authorities appealed the injunction.

The court of appeal reversed the order granting the preliminary injunction, finding that no evidence was presented that the authorities violated *Cal. Rules Prof. Conduct, Rule 2-100*, prohibiting ex parte contacts with represented adverse parties (*213 Cal. App. 3d 131, 140, 146)* . The court noted that *Cal. Rules Prof. Conduct, Rule 2-100*, permits opposing counsel to initiate ex parte contacts with unrepresented former employees, and present employees (other than officers, directors, or managing agents) who are not separately represented, so long as the communication does not involve the employee's act or failure to act in connection with matter that may bind the corporation, be imputed to it, or constitute an admission of the corporation for purposes of establishing liability. In the instant case, none of the persons contacted were represented by counsel, none except for one was a present employee of the corporation, and none were officers, directors, or managing agents of the corporation. The court concluded that there was no basis for the injunction under *Cal. Rules Prof. Conduct, Rule 2-100*; no persons covered by the rule were actually contacted, and governmental authorities had no plans to contact persons covered by the rule in the future (*213 Cal. App. 3d 131, 140)* .

In ***Truitt v. Superior Court*** *(1997) 59 Cal. App. 4th 1183* , an employee brought an action against his corporate employer under the Federal Employers' Liability Act. Following the filing of the employee's complaint, but prior to receiving service of the defendant corporation's answer, an investigator for the plaintiff's attorneys interviewed and obtained a written statement from a corporate employee who had struck the plaintiff while operating a front-end loader. After obtaining the written statement and receiving defendant's answer, the plaintiff's attorneys noticed the deposition of the employee-operator of the front-end loader. The corporation then filed a motion to quash the deposition subpoena for the employee-operator and for a protective order as well as evidentiary and monetary sanctions. The trial court granted the motion in part, permitting the deposition to go forward but requiring plaintiff's attorneys to turn over to corporation's counsel the original and all copies of the employee-operator's written statement, as well as all notes pertaining to the statement. The trial court also prohibited the plaintiff's attorneys from using the written statement or its contents for any purpose, but denied the request for monetary sanctions against the plaintiff's attorneys. The trial court held that the plaintiff's attorneys violated *Cal. Rules of Prof. Conduct, Rule 2-100*, because they knew at the time of their ex parte contact, that the corporation was represented by counsel on the matter. The court of appeal, on plaintiff's application, issued a writ of mandate directing the trial court to vacate its order, and to enter a new and different order denying the motion to quash and for sanctions in its entirety (*59 Cal. App. 4th 1183, 1191*).

The court of appeal held that although *Cal. Rules of Prof. Conduct, Rule 2-100*, prohibits an attorney, either before or after the commencement of litigation, from communicating ex parte with a covered employee of a corporation about a matter where the attorney actually knows the corporation and its employees are represented by an attorney in the matter at the time of the ex parte communication, constructive or presumptive knowledge of representation is insufficient to bring the ex parte contact prohibition into play (*59 Cal. App. 4th 1183, 1190*). Under the facts of the case, there was no evidence that the plaintiff's attorneys or their investigator had any actual knowledge that the corporation and its employees were represented by counsel at the time of the interview with the covered employee.

[b] Who Is a Party Represented by Counsel

In ***Jorgensen v. Taco Bell*** *(1996) 50 Cal. App. 4th 1398, 58 Cal. Rptr. 2d 178* , defendant brought a motion to disqualify plaintiff's counsel for interviewing defendant's employees (not officers, directors, managing agents, or other employees specified in *Cal. Rules of Prof. Conduct, Rule 2-100(B)(1)*) who were potential witnesses to the subject of the law suit, without permission of defendant's counsel. The interviews took place before any lawsuit was filed, and the employees were not represented by counsel. Defendants alleged that the employees were represented by defendant's

"house counsel" even though no lawsuit had yet been filed. The trial court denied the motion on the basis that there was no lawsuit pending, and that the employees were not represented by counsel in the matter. Defendant appealed.

The court of appeal affirmed the trial court's order on the basis that the employees were not represented by counsel in the matter (*50 Cal. App. 4th 1398, 1401-1402)* . The court found that this was a routine prelitigation investigation to determine if a lawsuit should be filed. The court also held that *Cal. Rules Prof. Conduct, Rule 2-100* is not limited to matters in litigation, if the attorney knows in fact that the employee being interviewed is represented by counsel when that interview is being conducted (*50 Cal. App. 4th 1398, 1401-1402)* .

In ***Jackson v. Ingersoll-Rand Co.*** *(1996) 42 Cal. App. 4th 1163, 50 Cal. Rptr. 2d 66* , plaintiff's counsel brought a motion to disqualify defendants' counsel for communicating with plaintiff's former wife, whose loss of consortium cause of action had been dismissed more than two years prior to the communication. The trial court granted the motion and found that defendants' counsel had violated *Cal. Rules Prof. Conduct, Rule 2-100* (*42 Cal. App. 4th 1163, 1166)* . Defendants appealed.

The court of appeal reversed the trial court's disqualification order and found that there was no violation of *Cal. Rules Prof. Conduct, Rule 2-100*. The court held that the rule is not limited to litigants, so the fact that the former wife's cause of action was dismissed was not determinative. The court found, however, that the former wife was no longer represented by counsel in the matter, and therefore was not a party represented by counsel (*42 Cal. App. 4th 1163, 1168)* .

[4] Additional Authorities

[a] When Ex Parte Communication Permitted

In *McMillan v. Shadow Ridge at Oak Park Homeowner's Association (2008) 165 Cal. App. 4th 960, 965-968, 81 Cal. Rptr. 3d 550* , the plaintiff was representing herself. An attorney, not of record, told the defendant's counsel that he would be making occasional appearances in the case. When the defendant's counsel contacted the plaintiff directly to discuss the case, the plaintiff filed a motion to disqualify the defendant's counsel on the ground that the conversation violated *Cal. Rules Prof. Conduct, Rule 2-100*. The court of appeal rejected the disqualification motion, holding that *Cal. Rules Prof. Conduct, Rule 2-100* does not bar an attorney from communicating directly with the opposing party not represented by counsel of record. The court held that attorneys have the right to rely on the current court records to determine whether a party is represented by counsel [*165 Cal. App. 4th 960, 965-968]* .

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2A-24 California Points & Authorities § 24.34

§ 24.34 Supporting Motion by Client or Adverse Party to Dismiss Complaint Based on Attorney's Lack of Authority to File Suit

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF_____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION TO
vs.	)	DISMISS COMPLAINT
	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

WHEN THE ATTORNEY PURPORTING TO REPRESENT THE PLAINTIFF LACKS THE AUTHORITY TO DO SO, THE ATTORNEY'S AUTHORITY MAY BE CHALLENGED AND A MOTION TO DISMISS THE COMPLAINT SHOULD BE GRANTED.

A. Motion to Dismiss Proper. When the attorney purportedly bringing an action is without authority to do so, a motion to dismiss is properly granted (*Ventura County v. Clay (1897) 119 Cal. 213, 216, 51 P. 189* ; *see also People v. Madden (1901) 133 Cal. 347, 348, 65 P. 741*).

B. Motion by Supposed Client or Opposing Party. Proper challenge to an attorney's authority to appear may be made either by the attorney's supposed client, or by an opposing party in the action (*Clark v. Willett (1868) 35 Cal. 534, 540)* .

C. Presumption of Authority Rebuttable. The presumption that an attorney has authority to appear on behalf of the party for whom he or she purports to appear, is rebuttable (*Sullivan v. Dunne (1926) 198 Cal. 183, 190, 244 P. 343* ; *Wilson v. Barry (1951) 102 Cal. App. 2d 778, 780, 228 P.2d 331*).

[*Optional*] **D. Client's Death or Incapacity.** The death, incapacity, or insanity of a client terminates an attorney's authority to represent that client (*see Civ. Code § 2356(a)(2)* (termination of agency on death of principal); *Deiter v. Kiser (1910) 158 Cal. 259, 262, 110 P. 921* ; *Swartfager v. Wells (1942) 53 Cal. App. 2d 522, 527-528, 128 P.2d 128* ; *Sullivan v. Dunne (1926) 198 Cal. 183, 192, 244 P. 343*).

[*Optional*] **E. Inadequate Substitution.** An attorney will not have authority to appear on behalf of his or her purported client when substitution of the attorney into the case has failed to provide effective notice to the client and the court (*In re Marriage of Park (1980) 27 Cal. 3d 337, 343, 165 Cal. Rptr. 792, 612 P.2d 882*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion brought either by plaintiff or defendant, to dismiss a complaint filed by an attorney on behalf of a plaintiff, but without authority to file it.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms of notice of motion for order dismissing complaint, supporting declaration, and order granting the motion, see California Forms of Pleading and Practice, Ch. 72, *Attorney Practice and Ethics* and Ch. 76, *Attorney Professional Liability* (Matthew Bender).

[c] Related Pleading and Practice Discussions

In an appropriate case, counsel may wish to move to strike the complaint. For a discussion of motions to strike complaints, see California Forms of Pleading and Practice, Ch. 375, *Motions to Strike* (Matthew Bender).

[d] Opposing Memoranda

the memoranda set out in *§ 24.36* may be used in an appropriate case to oppose a motion supported by this memorandum.

[3] Discussion of Authorities

[a] Motion to Dismiss Proper

In ***Ventura County v. Clay*** *(1897) 119 Cal. 213, 51 P. 189* , the district attorney, on behalf of the county, sued to recover money from the county treasurer and others. The defendants moved to dismiss the action on the ground that the district attorney had no statutory authority to bring the suit. The trial court denied the motion initially, but granted it later on rehearing. The plaintiff appealed to the Supreme Court, arguing first that the district attorney had the required authority, and second, that once the superior court denied dismissal, it was an abuse of discretion to permit renewal of the motion to dismiss based on the same grounds. The Supreme Court upheld the dismissal. The Court stated that when the authority of the plaintiff's attorney is challenged, a motion to dismiss is the proper procedure (*119 Cal. 213, 215)* . Where no authority is found, a motion to dismiss is properly granted (*119 Cal. 213, 216)* . Further, the Court held that where a trial court has reason to believe it has erred in denying a motion, it is proper to permit a renewal and rehearing of the motion (*119 Cal. 213, 215)* .

People v. Madden *(1901) 133 Cal. 347, 65 P. 741* , was an appeal from a judgment dismissing an action brought by the county to recover money from county employees. An intervener in the suit brought a motion in superior court to dismiss, on the ground that the district attorney commenced the action without the authority of any government officials. The county board of supervisors and the grand jury later ratified the attorney's actions. The superior court granted the motion to dismiss, but the Supreme Court reversed. In the course of its discussion, however, the Court stated the rule that a defendant has the right, absent subsequent ratification by a plaintiff, to move to dismiss an action for lack of authority of the plaintiff's attorney. This right exists in order to protect a party from the possibility of having to litigate the same cause of action twice (*133 Cal. 347, 348)* .

[b] Motion by Supposed Client or Opposing Party

In ***Clark v. Willett*** *(1868) 35 Cal. 534* , plaintiffs sued for an injunction to prevent defendants from continuing construction work which allegedly interfered with the plaintiff's irrigation rights. Following judgment for defendants, plaintiffs appealed first to the court of appeal, then to the Supreme Court. In addition to their arguments regarding the merits of the case, plaintiffs alleged that the trial court had erred in granting the motion by one of the plaintiffs to dismiss the suit on his behalf. The attorneys for plaintiffs believed they were authorized to instigate a cause of action on behalf of the entire group of plaintiffs, all of whom owned real property affected by defendant's construction. One plaintiff however, asserted that he had never granted the attorney authority to bring the suit, and therefore wanted the action discontinued as to him. The trial court granted the motion.

The Supreme Court upheld the dismissal. It held that because an attorney is an officer of the court, and is answerable to it, the court has the power to inquire as to the attorney's authority to appear on behalf of a supposed client (*35 Cal. 534, 539)* . It is proper for the court to require an attorney to produce evidence of his or her authority, either on application of the supposed client, or on motion by the opposing party (*35 Cal. 534, 540)* . The Court found that in this case counsel was employed by the plaintiffs to represent the entire group, though apparently at some point, one plaintiff expressed his opposition to the suit, and his desire to discontinue it. Such a situation could potentially occur often, the Court stated, and no misconduct should be imputed to the attorneys (*35 Cal. 534, 541)* .

[c] Presumption of Authority Rebuttable

Sullivan v. Dunne *(1926) 198 Cal. 183, 244 P. 343* , involved a petition to the Supreme Court for a writ of mandate to compel a superior court judge to certify a transcript. The case originated when two parties filed a petition in superior court for an order declaring their relative to be legally incompetent. The court so ordered, and appointed the petitioners as legal guardians of the relative. A party claiming to be the relative's attorney filed a notice of appeal from the order, and a notice to the clerk of the court to prepare a transcript of the proceeding. The superior court judge refused to certify

the transcript, on the grounds that the attorney had no authority to represent the relative.

The Supreme Court denied the writ, and held the attorney had no authority. It stated that although an attorney's appearance on behalf of a party raises a presumption of the attorney's authority to represent that party, the presumption is rebuttable. The fact that an attorney may be authorized to represent a client in one action is not evidence of his or her authority to do so in a separate action (*198 Cal. 183, 190)* . In this case, the Court held that even if the attorney had previously been authorized to represent the client, that authority was terminated once the client became legally incompetent (*198 Cal. 183, 192)* .

In ***Wilson v. Barry*** *(1951) 102 Cal. App. 2d 778, 228 P.2d 331* , plaintiffs in a civil case filed a complaint naming several defendants. In response, an attorney filed a demurrer and motion for summary judgment on behalf of all defendants, supported by an affidavit of one of the defendants. The attorney later filed a demurrer to the amended complaint, again on behalf of all defendants. Shortly thereafter, the same attorney filed a motion to withdraw the appearances of most of the defendants, on the grounds that he had merely assumed from conversations with one of them that he was to represent them all, being unaware that the others had not authorized anyone to appear for them. The superior court granted the motion to withdraw appearances, and the plaintiffs appealed.

The court of appeal reversed the order with respect to the defendant who had submitted the affidavit in support of summary judgment, saying that doing so amounted to a general appearance (*102 Cal. App. 2d 778, 781)* . The court affirmed the order as to the other defendants, however. It held that although an attorney's authority to represent a supposed client is presumed, the presumption is disputable. The attorney's affidavit explaining his mistake was sufficient evidence to rebut the presumption with regard to most of the defendants (*102 Cal. App. 2d 778, 780)* .

[d] Client's Death or Incapacity

Deiter v. Kiser *(1910) 158 Cal. 259, 110 P. 921* , was a motion to dismiss an appeal from a superior court judgment in favor of defendants, and to dismiss an appeal from an order denying a new trial. The attorney who filed the appeals had appeared for the plaintiff and cross defendants from the outset of the case. The plaintiff died shortly after entry of the judgment, and before the appeals were filed. The respondents argued that the attorney no longer had authority to appear on behalf of the plaintiff. The Supreme Court agreed, and dismissed the appeals as to the plaintiff. It held that a client's death terminates the authority of an attorney to act on his or her behalf (*158 Cal. 259, 262)* .

Swartfager v. Wells *(1942) 53 Cal. App. 2d 522, 128 P.2d 128* , was a quiet title action. The plaintiff was an attorney who had represented his client in a previous title action involving the same property. Pending trial in the previous action, the client executed a deed to the land to the attorney, then died. Subsequently, judgment in favor of the adverse party was entered, and the attorney brought another quiet title action against him. The trial court found against the attorney, and held that the previous suit was res judicata and conclusive of the issues. Plaintiff appealed, contending that the former decree was void, in part because the client's estate's administrator had hired a different attorney to prosecute the suit to final judgment. The court of appeal affirmed, and held that the death of the client terminated absolutely the authority of his attorney to represent him in the suit (*53 Cal. App. 2d 522, 527-528)* . The administrator was properly substituted as a party in the pending litigation, and had a right to hire his own attorney. To assert an interest in the action, the attorney should have moved to substitute himself as a party in the place of the former client, but he had no right to continue as the attorney representing the former client's interests (*53 Cal. App. 2d 522, 528)* .

Sullivan v. Dunne *(1926) 198 Cal. 183, 244 P. 343* , is discussed in *§ 24.34[3][c]*. In that case, the Supreme Court held that because an agent's power is terminated by the incapacity of a principal to contract, a proper application of the law of principal and agent dictates that an attorney's authority is terminated by the insanity or incapacity of the client (*198 Cal. 183, 192)* .

[e] Inadequate Substitution

In re Marriage of Park *(1980) 27 Cal. 3d 337, 165 Cal. Rptr. 792, 612 P.2d 882* , involved a wife's appeal from a superior court's denial of her motion to vacate a judgment of dissolution of marriage. The wife had been suddenly deported to Korea, just before the dissolution hearing, and had been unable to notify her attorney. The husband had been the only other person aware of her deportation. Prior to the hearing, the wife's attorney had asked another attorney to take over the case in his place, and to appear at the hearing on behalf of the wife. No formal substitution was filed. At the hearing, the new attorney apparently did nothing more than appear, and the husband was awarded child custody, and most of the community property.

On her return to the United States a short time later, the wife learned what had happened, immediately hired a new attorney, and moved to vacate the judgment. The superior court denied her motion. The Supreme Court reversed, holding that the wife had not received a fair trial. One of the bases for the Court's holding was that the attorney who purported to represent her at the hearing lacked the authority to do so. The Court stated that when a substitution, rather than a mere association of attorneys is attempted, if it does not comply with the requirements of *Code Civ. Proc. § 284* so as to provide notice to the client and the court, the attorney has no authority to appear (*27 Cal. 3d 337, 343)* .

[4] Additional Authorities

[a] Motion to Dismiss Proper

Title Insurance & Trust Co. v. California Dev. Co. (1914) 168 Cal. 397, 143 P. 723 , involved motions to dismiss appeals from a superior court judgment. One of the grounds for the motions was that a corporate appellant's attorney had no authority to make the appeal on the corporation's behalf. The attorney for appellant argued that he had acted in good faith in assuming his client's authorization, and that the corporate board later ratified his actions. The Court granted the motions to dismiss. It held that where it is clearly shown that an attorney has no authority, the supposed client can claim no rights from the unauthorized acts of the attorney. In this case, the client's ratification occurred after the time for appeal had expired. The Court, citing *Civ. Code § 2313*, stated that although a client's ratification would ordinarily be treated as precedent authorization, an unauthorized act cannot be validated retroactively to the detriment of any third person without that person's consent (*168 Cal. 397, 401)* .

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 24 ATTORNEYS AT LAW: SUBSTITUTION, WITHDRAWAL, DISQUALIFICATION, AND AUTHORITY TO APPEAR
PART II. FORMS

2A-24 California Points & Authorities § 24.35

§ 24.35 Supporting Motion by Defendant to Withdraw Defendant's Appearance and Strike Answer or by Plaintiff to Strike Answer Based on Attorney's Lack of Authority to File Answer

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF MOTION TO
Plaintiff,	)	[WITHDRAW APPEARANCE AND] STRIKE AN-
vs.	)	SWER
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

WHEN THE ATTORNEY PURPORTING TO REPRESENT THE DEFENDANT IN AN ACTION LACKS THE AUTHORITY TO DO SO, THE ATTORNEY'S AUTHORITY MAY BE CHALLENGED, AND A MOTION TO [WITHDRAW THE DEFENDANT'S APPEARANCE AND] STRIKE THE ANSWER SHOULD BE GRANTED.

A. Motion to Strike Proper. When the attorney purporting to appear for the defendant in an action lacks authority to do so, a motion to strike the answer is properly granted (*Kellar v. Hendey (1961) 189 Cal. App. 2d 86, 87-88, 10 Cal.*

Rptr. 748 ; *People v. Honey Lake Valley Irrigation Dist. (1926) 77 Cal. App. 367, 374, 246 P. 819*).

B. Motion by Supposed Client or Opposing Party. [*See § 24.34, Paragraph B.*]

[*For use if defendant is moving party*]

C. Motion to Withdraw Proper. When the attorney purporting to represent a defendant is unauthorized to do so, a motion by defendant to withdraw his or her appearance in the action is properly granted (*Wilson v. Barry (1951) 102 Cal. App. 2d 778, 780, 228 P.2d 331*).

D. Presumption of Authority Rebuttable. [*See § 24.34, Paragraph C.*]

[*Optional*] **E. Client's Death or Incapacity.** [*See § 24.34, Paragraph D.*]

[*Optional*] **F. Inadequate Substitution.** [*See § 24.34, Paragraph E.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

CAUTION:
Code Civ. Proc. § 437(a), enacted in 1982, provides that the grounds for a motion to strike must appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice. A motion to strike that purports to rely on evidence extrinsic to the pleadings or matters subject to judicial notice should be treated as a motion for summary judgment under *Code Civ. Proc. § 437c* [*Vesely v. Sager (1971) 5 Cal. 3d 153, 168-169, 95 Cal. Rptr. 623, 486 P.2d 151* ; *see Pianka v. State of California (1956) 46 Cal. 2d 208, 211, 293 P.2d 458]* . Since a motion to strike a pleading on the grounds that the attorney was not authorized to file it must usually rely on extrinsic evidence, this motion will now probably be required to meet the requirements of *Code Civ. Proc. § 437c*. For discussion and forms supporting and opposing motions for summary judgment, see Ch. 221, *Summary Judgments* .

[a] Use of Form

This memorandum may be submitted in support of a motion by the plaintiff, or motion by special appearance of the defendant, to withdraw the defendant's appearance and strike an answer filed by an attorney without the defendant's authorization. Paragraph C of the form should be used only when defendant is the moving party, and seeks to withdraw defendant's appearance in addition to striking the answer.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should insert facts and argument showing that the attorney purporting to represent defendant in the instant action lacks authority to do so.

[b] Related Pleading and Practice Forms

For forms of notice of motion by defendant to withdraw appearance and strike answer, supporting declaration, and order

granting the motion, see California Forms of Pleading and Practice, Ch. 72, *Attorney Practice and Ethics* (Matthew Bender).

[c] Related Pleading and Practice Discussions

If applicable, counsel may also wish to base the motion on *Code Civ. Proc. §§ 435-437*. See California Forms of Pleading and Practice, Ch. 375, *Motions to Strike* (Matthew Bender).

[d] Opposing Memoranda

The memoranda in *§ 24.37* may be used in an appropriate case to oppose a motion supported by this memorandum.

[3] Discussion of Authorities

[a] Motion to Strike Proper

Kellar v. Hendey *(1961) 189 Cal. App. 2d 86, 10 Cal. Rptr. 748* , was an appeal from a superior court order denying a motion to intervene. Two rival factions within a corporation each sought to file an answer on behalf of the corporation. After the first group answered the complaint, the second group moved to strike the answer. The court of appeal affirmed the lower court's order denying the motion, and held that the second group did not show sufficient cause why it should be permitted to intervene on behalf of the corporation instead of the first group. The court held, however, that a motion to strike would properly be granted if an answer was filed without authority, or by a stranger to the action (*189 Cal. App. 2d 86, 87-88)* . Counsel should note that this case was decided before the enactment of *Code Civ. Proc. § 437(a)* [*see* CAUTION in § 24.35[2]].

People v. Honey Lake Valley Irrigation Dist. *(1926) 77 Cal. App. 367, 246 P. 819* , was an appeal from a superior court judgment. An intervening party sought to collect money from the defendant, and the trial court ruled in defendant's favor. One contention on appeal was that defendant's attorney had never been properly authorized to appear on defendant's behalf. The court affirmed the judgment for other reasons, and also held that a challenge to the attorney's authority should have been made in the trial court. The court stated that by analogy to cases establishing the propriety of a motion to dismiss where the plaintiff's attorney lacks authority, a motion in trial court to strike the answer is the proper procedure to challenge the authority of a defendant's attorney (*77 Cal. App. 367, 374*). Counsel should note that this case was decided before the enactment of *Code Civ. Proc. § 437(a)* [*see* CAUTION in § 24.35[2]].

[b] Motion to Withdraw Proper

In ***Wilson v. Barry*** *(1951) 102 Cal. App. 2d 778, 228 P.2d 331* , plaintiffs filed a suit naming several defendants. An attorney who had communicated with only one defendant, brought two demurrers and a motion for summary judgment on behalf of all the defendants. Defendants then brought a motion in superior court to withdraw their appearances due to the attorney's lack of authority to appear for them. The trial court granted the motion, and the court of appeal affirmed, with the exception of the defendant who had been in communication with the attorney. The court of appeal held that when an attorney lacks authority to appear on behalf of a defendant, no appearance made by the attorney is binding, and a motion for an order permitting defendant's withdrawal is properly granted (*102 Cal. App. 2d 778, 780)* .

[4] Additional Authorities

[a] Motion to Strike Proper

In *Corcoran v. Arouh (1994) 24 Cal. App. 4th 310, 29 Cal. Rptr. 2d 326* , an attorney entered an appearance on behalf of all defendants. The parties entered into a stipulated judgment, which was signed by the attorney. Subsequently, one of the defendants filed a motion to quash service and to vacate the judgment on the grounds that he had never

authorized the attorney to enter an appearance on his behalf. The court of appeal reversed the trial court's order denying the defendant's motion, concluding that the attorney had no express or actual authority from the defendant to appear on his behalf. The attorney's understanding from a co-defendant that he had the authority to act on the defendant's behalf was insufficient to confer authority on the attorney to act on the defendant's behalf (*24 Cal. App. 4th 310, 315-316)* .

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CHAPTER 24 ATTORNEYS AT LAW: SUBSTITUTION, WITHDRAWAL, DISQUALIFICATION, AND AUTHORITY TO APPEAR
PART II. FORMS

2A-24 California Points & Authorities § 24.36

§ 24.36 Opposing Motion by Plaintiff or Defendant to Dismiss Complaint on Asserted Ground That Attorney Unauthorized to File Suit

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN OPPOSITION TO MOTION
vs.	)	TO DISMISS COMPLAINT
	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

WHEN A LICENSED ATTORNEY APPEARS ON BEHALF OF A PARTY, THERE IS BOTH A PRESUMPTION AND PRIMA FACIE EVIDENCE OF AUTHORITY, AND ABSENT A CLEAR SHOWING TO THE CONTRARY, A MOTION TO DISMISS FOR LACK OF AUTHORITY SHOULD BE DENIED.

A. Presumption of Authority. When an attorney appears on behalf of a party, it is presumed that he or she has the authority to do so (*Turner v. Caruthers (1861) 17 Cal. 431, 432-433* ; *Clark Equip. Co. v. Wheat (1979) 92 Cal. App. 3d 503, 523, 154 Cal. Rptr. 874*)

B. License Prima Facie Evidence of Authority. An attorney's license is prima facie evidence of his or her authority to appear on behalf of a purported client (*People v. Mariposa Co. (1870) 39 Cal. 683, 684)* .

C. Burden of Proof. The party challenging an attorney's authority has the burden of proving a lack of authority by a clear preponderance of the evidence (*Clark Equip. Co. v. Wheat (1979) 92 Cal. App. 3d 503, 523, 154 Cal. Rptr. 874* ; *see also People v. Mariposa Co. (1870) 39 Cal. 683, 685)* .

D. Motion to Dismiss Denied on Finding of Authorization. A finding of authorization, even if by subsequent ratification of the attorney's actions, dispels the reason for a motion to dismiss, and on such a finding, the motion will be denied (*People v. Madden (1901) 133 Cal. 347, 348, 65 P. 741*).

[*Optional*] **E. Insufficient Declaration by Moving Party.** An affidavit or declaration based on information and belief which is submitted by the moving party is insufficient to overcome the presumption of an attorney's authority (*People v. Mariposa Co. (1870) 39 Cal. 683, 685)* .

[*Optional*] **F. Indirect Authorization.** When a client's authorization is indirect, the attorney will still be presumed to have authority to represent him or her (*Kraus v. Walt Disney Prod. (1963) 221 Cal. App. 2d 736, 741-742, 34 Cal. Rptr. 702*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted by the attorney whose authority is challenged, in opposition to a motion by a plaintiff to dismiss the complaint on the asserted grounds that the attorney has no authority to appear, or by a plaintiff in opposition to a motion by defendant to dismiss the complaint on the grounds that the plaintiff's attorney has no authority.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should insert argument and facts showing the absence of a clear showing that the attorney was not authorized to appear.

[3] Discussion of Authorities

[a] Presumption of Authority

In ***Turner v. Caruthers*** *(1861) 17 Cal. 431* , a husband and wife together owned certain real property, on which they resided. The husband abandoned the wife, who rented the property to defendant, while she was away on business. While defendant was in possession of the property, the husband sold it to defendant without the wife's consent. The wife brought suit on behalf of her husband and herself, to eject the defendant from the property. The husband moved to dismiss, but the trial court refused to dismiss him, and granted judgment for plaintiffs. Defendant appealed, and asserted by pleading in abatement, that plaintiffs' attorney had no authority to bring the suit. The Supreme Court affirmed judgment for plaintiffs, and held that when a suit is instituted in the name of plaintiffs by an attorney it is to be

presumed that the attorney is authorized to appear on their behalf. A mere suggestion, without supporting affidavits, that an attorney has no authority is not enough to rebut the presumption (*17 Cal. 431, 432-433)* .

In ***Clark Equip. Co. v. Wheat*** *(1979) 92 Cal. App. 3d 503, 154 Cal. Rptr. 874* , plaintiffs in a civil suit appealed a superior court judgment. One issue on appeal was whether the wrongful acts of one plaintiff's attorney against the defendants were authorized by the plaintiff, and were therefore within the scope of employment so as to make the plaintiff liable for punitive damages. The court of appeal held that because the attorney was hired by the plaintiff to handle the case against defendants, he was presumed to have authority to commit the acts in question. The court restated the general rule that when an attorney appears or acts on behalf of a client, there is a presumption that he or she is authorized to do so, and in this particular case, the court applied the presumption of authority even when the attorney's acts were tortious (*92 Cal. App. 3d 503, 523*).

[b] License Prima Facie Evidence of Authority

People v. Mariposa Co. *(1870) 39 Cal. 683* , was an appeal from a district court order dismissing a defendant's motion to set aside a judgment. The lower court refused to hear the motion, on the grounds submitted by the plaintiff's attorney, that the defendant's attorney had no authority to appear on defendant's behalf. The plaintiff's attorney's affidavit had merely asserted a lack of authority on information and belief. In reply, the defendant's attorney had produced his license to practice law. The Supreme Court reversed the order dismissing the motion and held that although the lower court had the power to question the attorney's authority, it should not have determined a lack of authority based on the evidence submitted. The Court stated that an attorney's license is prima facie evidence of his or her authority to represent the supposed client (*39 Cal. 683, 684)* . The attorney's actual appearance in the case, combined with the prima facie evidence of a license, will create a presumption of authority. This presumption will prevail unless the party questioning authority states facts, or grounds and reasons inducing him or her to believe that authority does not exist (*39 Cal. 683, 685)* .

[c] Burden of Proof

Clark Equip. Co. v. Wheat *(1979) 92 Cal. App. 3d 503, 154 Cal. Rptr. 874* , is discussed in *§ 24.36[3][a]*. The court of appeal held that when the attorney is presumed to have authority to appear or act for a client, the party denying the authority has the burden of proving a lack of authority by a clear preponderance of the evidence (*92 Cal. App. 3d 503, 523)* .

People v. Mariposa Co. *(1870) 39 Cal. 683* , is discussed in *§ 24.36[3][b]*. The Supreme Court held that the presumption of an attorney's authority will prevail, unless the challenging party makes a specific showing to the contrary. A mere assertion, on information and belief, that authority does not exist in insufficient to overcome the presumption of authority (*39 Cal. 683, 685)* .

[d] Motion to Dismiss Denied on Finding of Authorization

People v. Madden *(1901) 133 Cal. 347, 65 P. 741* , was an action by the district attorney against the county treasurer and others for mishandling county funds. An intervening party in the action brought a motion to dismiss based on allegations that the district attorney had received no authorization to bring the suit. Official authorization as required by local statute, whether or not received at the outset of the case, was given by the county board of supervisors and the grand jury by subsequent ratification of the district attorney's actions, and by express direction to him to continue prosecution. The trial court nevertheless dismissed the action, and the plaintiff appealed. The Supreme Court reversed the dismissal. It held that motions to dismiss a suit to lack of authority are permitted so that a defendant will not have to litigate the same cause of action twice. This reason disappears once the client's authorization can be shown, and a motion to dismiss should then be denied (*133 Cal. 347, 348)* .

[e] Insufficient Declaration by Moving Party

People v. Mariposa Co. *(1870) 39 Cal. 683* , is discussed in *§ 24.36[3][b]*. In that case, an attorney's authority to appear for the defendant was challenged by the plaintiff's attorney. The lower court denied a hearing on defendant's motion because the plaintiff's attorney had submitted an affidavit asserting a lack of authority on information and belief. The Supreme Court reversed, and held that a statement of information and belief was insufficient to overcome a presumption of authority. To challenge an attorney's authority successfully, the opposing party must instead submit facts showing a lack of authority, or in the alternative, grounds and reasons why he or she believes the attorney lacks authority (*39 Cal. 683, 685)* .

[f] Indirect Authorization

Kraus v. Walt Disney Prod. *(1963) 221 Cal. App. 2d 736, 34 Cal. Rptr. 702* , was a personal injury case in which the plaintiff appealed a superior court judgment in favor of the defendants, an individual and his corporate employer. One contention on appeal was that the answer filed on behalf of the individual defendant was unauthorized, and the defendant was therefore in default. The same attorney represented both defendants. The employee had not seen the answer filed on his behalf and had no personal contact with the attorney. The court of appeal affirmed the judgment for defendants. It held that because it is a common practice for an employee to turn over the litigation to his or her employer when both are sued jointly, the employee's lack of communication with the attorney does not defeat the presumption of the attorney's authority to appear on the employee's behalf (*221 Cal. App. 2d 736, 741-742)* .

[4] Additional Authorities

[a] Presumption of Authority

In *Pacific Paving Co. v. Vizelich (1903) 141 Cal. 4* , one of two defendants moved the superior court to dismiss the action as to him, on the grounds that the attorney who had purportedly appeared on his behalf was never authorized to do so. The defendant asserted that since he made no appearance, the plaintiff was required to return summons within three years under former Code Civ. Proc. § 581(7), now *Code Civ. Proc. §§ 583.210-583.250*. Three years had elapsed, and the plaintiff had not returned summons, relying instead on the filing of a demurrer, purportedly on defendant's behalf, as an appearance by defendant. The defendant had been personally served, and had had knowledge of the attorney's filing of the demurrer.

The superior court dismissed the action as to the moving defendant, but the Supreme Court reversed. The Court held that in the absence of a specific statutory requirement that an attorney's authority be in writing, the authority of an attorney appearing on behalf of a purported client will be presumed (*141 Cal. 4, 8*). When an attorney appears on behalf of a supposed client, and that client has notice of the action and does not repudiate the appearance, the other parties have a right to treat the appearance as an authorized one (*141 Cal. 4, 9-10*). The client will not be permitted to deny authorization later, to the detriment of the other party (*141 Cal. 4, 10*).

[b] License Prima Facie Evidence of Authority

Pacific Paving Co. v. Vizelich (1903) 141 Cal. 4 , is discussed in *§ 24.36[4][a]*. In that case, the Supreme Court cited with approval the rule that an attorney's position as an officer of the court gives all parties the right, prima facie, to regard him or her as the authorized representative of any party the attorney purports to represent (*141 Cal. 4, 9*).

[c] Motion to Dismiss Denied on Finding of Authorization

In *Baker v. Boxx (1991) 226 Cal. App. 3d 1303, 277 Cal. Rptr. 409* , the trial court granted the defendant's motion to dismiss under *Code Civ. Proc. § 583.250* (three-year mandatory dismissal) for delay in prosecution. The motion was brought on the ground that plaintiff's amended complaint, filed shortly before the lapse of the three-year period, was filed and served by an attorney who had been substituted into the case without a formal substitution in accordance with

Code Civ. Proc. §§ 284(1) and *285*. The court of appeal reversed the dismissal, holding that the procedural lapse was insufficient to justify mandatory dismissal, given that the original complaint had never been served by the plaintiff's original attorney and there was no showing that the lack of a formal substitution misled or prejudiced the defendants (*226 Cal. App. 3d 1303, 1308-1311)* .

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2A-24 California Points & Authorities § 24.37

§ 24.37 Opposing Motion by Defendant to Withdraw Defendant's Appearance and Strike Answer or by Plaintiff to Strike Answer on Asserted Grounds That Attorney Unauthorized to Defend Action

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN OPPOSITION TO MOTION
Plaintiff,	)	TO STRIKE ANSWER
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

WHEN A LICENSED ATTORNEY APPEARS ON BEHALF OF A PARTY, THERE IS BOTH A PRESUMPTION AND PRIMA FACIE EVIDENCE OF AUTHORITY, AND ABSENT A CLEAR SHOWING TO THE CONTRARY, A MOTION TO STRIKE FOR LACK OF AUTHORITY SHOULD BE DENIED.

A. Presumption of Authority. [*See § 24.36, Paragraph A.*]

B. License Prima Facie Evidence of Authority. [*See § 24.36, Paragraph B.*]

C. Burden of Proof. [*See § 24.36, Paragraph C.*]

D. Motion to Strike Should Be Denied. When the presumption of authority prevails, a motion to strike the answer should be denied (*see Kraus v. Walt Disney Prod. (1963) 221 Cal. App. 2d 736, 741, 34 Cal. Rptr. 702*).

[*Optional*] **E. Insufficient Declaration by Moving Party.** [*See § 24.36, Paragraph E.*]

[*Optional*] **F. Indirect Authorization.** [*See § 24.36, Paragraph F.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

CAUTION:
Code Civ. Proc. § 437(a), enacted in 1982, provides that the grounds for a motion to strike must appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice. Since a motion to strike a pleading for lack of authority on the part of the attorney will usually rely on extrinsic evidence, a motion to strike is now technically improper and will probably be treated by the court as a motion for summary judgment under *Code Civ. Proc. § 437c* [*see Pianka v. State of California (1956) 46 Cal. 2d 208, 211, 293 P.2d 458* ; *Vesely v. Sager (1971) 5 Cal. 3d 153, 168-169, 95 Cal. Rptr. 623, 486 P.2d 151]* . For discussion and forms supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[a] Use of Form

This memorandum may be submitted by the defendant in opposition to a motion by the plaintiff to strike the answer on the asserted ground that defendant's attorney has no authority to appear, or by the plaintiff in opposition to a motion by special appearance of the defendant, to withdraw the defendant's appearance and strike the answer on the ground of defendant's attorney's lack of authority.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should insert argument and facts showing an appearance by a licensed attorney and the absence of a clear showing that the attorney was not authorized to appear on behalf of the client.

[3] Discussion of Authorities

[a] Motion to Strike Should Be Denied

Kraus v. Walt Disney Prod. *(1963) 221 Cal. App. 2d 736, 34 Cal. Rptr. 702* , was a personal injury case in which the plaintiff appealed a superior court judgment in favor of the defendants, an individual and his corporate employer. One contention on appeal was that the answer filed on behalf of both defendants was unauthorized by the individual defendant employee, who had therefore made no appearance, and was in default. The employee had not seen the answer filed on his behalf in response to the unverified complaint, and had had no personal contact with the attorney. He had turned over the litigation to his codefendant employer, who had in turn dealt with the attorney. The court of appeal affirmed the judgment for defendants. It held that even when a defendant's authorization is indirect, the presumption of the attorney's authority to file an answer will prevail (*221 Cal. App. 2d 736, 741-742)* .

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
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PART II. FORMS

2A-24 California Points & Authorities § 24.38

§ 24.38 Supporting Defendant's Motion to Strike Complaint of Corporation Appearing in Propria Persona, or by Agent Who Is Not Licensed Attorney [Code Civ. Proc. §§ 435-437]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION TO
vs.	)	STRIKE COMPLAINT
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THE COMPLAINTS SHOULD BE STRICKEN BECAUSE PLAINTIFF IS A CORPORATION NOT APPEARING THROUGH A LICENSED ATTORNEY.

A. Motion to Strike Complaint. Any party, within the time allowed to respond to a pleading, may serve and file a notice of motion to strike the whole or any part of the pleading. [This time limitation does not apply to a motion to strike when an amended pleading is filed and the moving party contends that the pleading is filed after the time to file an amended pleading has expired or that the pleading is in violation of the court's prior ruling on the motion] (*Code of Civ. Proc. §§ 435(b)(1), 438(i)(1)(A)*).

B. Corporation Must Appear Through Attorney. A corporation cannot represent itself in court, either in propria persona, or by an agent who is not a licensed attorney (*Merco Constr. Eng'rs, Inc. v. Municipal Court (1978) 21 Cal. 3d 724, 729, 147 Cal. Rptr. 631, 581 P.2d 636* ; *Vann v. Shilleh (1975) 54 Cal. App. 3d 192, 199, 126 Cal. Rptr. 401* ; *Paradise v. Nowlin (1948) 86 Cal. App. 2d 897, 898, 195 P.2d 867*).

C. Court Will Strike Complaint by Corporation Without Attorney. Where a corporation has filed a complaint in propria persona, or by an officer or agent who is not an attorney, a motion to strike the complaint will be granted (*Himmel v. City Council (1959) 169 Cal. App. 2d 97, 101, 336 P.2d 996*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion by the defendant or cross defendant to strike a complaint or cross complaint when the corporation filing the complaint or cross complaint does not appear through a licensed attorney.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Corporation Must Appear Through Attorney

In ***Merco Constr. Eng'rs, Inc. v. Municipal Court*** *(1978) 21 Cal. 3d 724, 147 Cal. Rptr. 631, 581 P.2d 636* , a corporate litigant sought a writ of mandate in superior court to compel the municipal court to allow it to appear through an officer who was not an attorney. The corporation cited *Code Civ. Proc. § 90* [recodified as *Code Civ. Proc. § 87* and repealed in 1998], which had allowed a corporation to appear in municipal court through a director, officer, or employee who is not an attorney. *Code Civ. Proc. § 87* was repealed in 1998 as an unconstitutional intrusion on the power of the court to set minimum standards on who may appear on behalf of a corporation.

The superior court denied the writ, and the Supreme Court affirmed. It held that if a conflict exists between legislative enactments and the judiciary's rules regarding the qualifications required the practice law, the Legislature must give way (*21 Cal. 3d 724, 728-729)* . The Court then reiterated the rule developed by the courts that a corporation cannot represent itself in court, either by an agent who is not a licensed attorney, or in propria persona (*21 Cal. 3d 724, 729)* . The rule cannot be legislated out of existence because the qualifications of a person representing any person or entity in court are of vital concern to the judiciary (*21 Cal. 3d 724, 730)* . A person representing a corporation is engaged in the practice of law, and should be subject to the ethical standards and restraints of an attorney (*21 Cal. 3d 724, 730, 733)* . Otherwise, the representation could afford a corporation the opportunity to take unfair advantage of individual parties (*21 Cal. 3d 724, 732)* .

Vann v. Shilleh *(1975) 54 Cal. App. 3d 192, 126 Cal. Rptr. 401* , was a breach of contract action against a corporation and its individual shareholder. The defendants' attorney withdrew from the case on the Friday before a Monday trial

date, on the ground that the individual defendant refused to accept a negotiated settlement that he had earlier authorized. The trial court denied the defendants' motion for continuance to obtain new counsel, and the individual shareholder was thereby put in a position of representing both himself and the corporation. The court entered judgement for the plaintiffs, and the defendants appealed.

The court of appeal reversed the judgment. It held that the trial court's denial of a motion to continue was an abuse of discretion, in that it was arbitrary, peremptory, and made without any consideration of the facts (*54 Cal. App. 3d 192, 198-199)* . The court held first that the trial court had a duty to protect the defendants from the unethical abandonment by their attorney (*54 Cal. App. 3d 192, 197)* . Further, California law forbids a corporation from appearing in propria persona (*54 Cal. App. 3d 192, 199)* . By denying a continuance to give defendants time to obtain new counsel, the trial court had improperly forced the corporate defendant to make an unlawful appearance (*54 Cal. App. 3d 192, 199)* .

In ***Paradise v. Nowlin*** *(1948) 86 Cal. App. 2d 897, 195 P.2d 867* , the defendant brought a motion in the court of appeal to dismiss the appeal by a corporate plaintiff, on the ground that the appellant failed to pay the required filing fee. The court of appeal granted the motion, but added that on its own motion it would dismiss on more important grounds, that a corporation may not appear in propria persona. The court held that it is a well sustained rule that because a corporation is an artificially created entity rather than a natural person, it cannot appear in propria persona (*86 Cal. App. 2d 897, 898)* .

[b] Court Will Strike Complaint by Corporation Without Attorney

In ***Himmel v. City Council*** *(1959) 169 Cal. App. 2d 97, 336 P.2d 996* , plaintiffs appealed from superior courts orders dismissing two of their amended complaints. Plaintiffs, apparently consisting of a corporation and one of its officers, filed several complaints. The first amended complaint named the corporation as plaintiff, and was signed and verified by an individual as an officer. No attorney or person in propria persona appeared. In a later amended complaint, plaintiffs were listed as being the individual officer, as trustee for the corporation, and the corporation itself. Again, no attorneys or persons suing as individuals in propria persona appeared. The court of appeal affirmed the orders dismissing the complaints, and stated that the rule in California clearly prohibits a corporation from suing in propria persona. In court, a corporation can only act through licensed attorneys, and it cannot appear by an officer who is not an attorney (*169 Cal. App. 2d 97, 100)* . The court held that when a complaint is filed by a corporation in propria persona, or by an officer who is not a licensed attorney, it will properly be stricken (*169 Cal. App. 2d 97, 101)* .

[4] Additional Authorities

[a] Corporation Must Appear Through Attorney

In *Johnson v. Hayes Cal. Builders, Inc. (1963) 60 Cal. 2d 572, 35 Cal. Rptr. 618, 387 P.2d 394* , a corporate defendant, after filing its answer, substituted itself in propria persona in place of its attorneys. Thereafter, the plaintiff sent interrogatories directly to the corporation, rather than to its former attorneys. When the corporation failed to answer the interrogatories, the plaintiff moved to strike the answer. The superior court struck the answer, and after the required time period, entered a default judgment. The corporation's surety filed a motion in superior court to intervene, and a motion to set aside the default judgment. The court granted the motions, and the plaintiff appealed. The Supreme Court affirmed the order permitting intervention, but reversed the order setting aside the judgment. It held that even if a corporation cannot appear in propria persona, it will be able to receive and be bound by notices that are served on it when it substitutes itself as attorney. Otherwise, a corporation could disrupt or delay litigation by filing notice of substitution of itself in propria persona (*60 Cal. 2d 572, 577)* .

In *Channel Lumber Co., Inc. v. Simon (2000) 78 Cal. App. 4th 1222, 93 Cal. Rptr. 2d 482* , a corporation brought an unsuccessful legal malpractice action against its former outside trail counsel. Relying on *Corp. Code § 317*, requiring corporations to indemnify corporate "agents," the trial court ordered the corporation to indemnify its former counsel for

attorneys fees and expenses incurred in defending against the corporation's malpractice action. The corporation appealed the order. The court of appeal reversed, holding that an outside trial attorney, retained by a corporation to represent it at a trial, is not acting as an "agent" of the corporation within the meaning and purpose of *Corp. Code § 317,* and is not entitled to indemnification under that section when the corporation later sues the attorney for legal malpractice (*78 Cal. App. 4th 1222, 1232*). In reaching its holding, the court of appeal stated that a corporation cannot represent itself in court, and must appoint a licensed attorney to represent it in court (*78 Cal. App. 4th 1222, 1228*).

In *Ferruzzo v. Superior Court (1980) 104 Cal. App. 3d 501, 163 Cal. Rptr. 573* , an attorney who represented a corporation had been refused permission to withdraw from the case by the trial court. The court believed that because withdrawal would leave the corporate client without an attorney, a formal substitution of attorneys should be required instead. The court of appeal granted the attorney's petition for a writ of mandate, and ordered the trial court to permit withdrawal. It held that while it is clear that a corporation cannot appear in propria persona except in small claims court (*104 Cal. App. 3d 501, 503)* , the rule is not inconsistent with that permitting an attorney to withdraw from a case (*104 Cal. App. 3d 501, 504)* . The court stated that the effect of such withdrawal would be merely to compel the corporation to obtain new counsel in order to pursue its case (*104 Cal. App. 3d 501, 504)* .

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2A-24 California Points & Authorities § 24.39

§ 24.39 Supporting Defendant's Motion to Strike Complaint of Unincorporated Association or Club Appearing in Propria Persona, or by Agent Who Is Not Licensed Attorney [Code Civ. Proc. §§ 435-437]

[1] FORM

[*Caption. See § 24.38.*]

THE COMPLAINT SHOULD BE STRICKEN BECAUSE PLAINTIFF IS AN UNINCORPORATED ASSOCIATION OR CLUB NOT APPEARING THROUGH A LICENSED ATTORNEY.

A. Motion to Strike Complaint. [*See § 24.38, Paragraph A.*]

B. Unincorporated Association Must Appear Through Attorney. An unincorporated association or club resembles a corporation more than it does an individual, and must be represented in court by a licensed attorney (*see Clean Air Transport Systems v. San Mateo County Transit Dist. (1988) 198 Cal. App. 3d 576, 579, 243 Cal. Rptr. 799*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion by the defendant or cross defendant to strike a complaint or cross complaint when an unincorporated association or club does not appear through a licensed attorney. With appropriate modifications, the memoranda may be used to support a motion to strike an answer filed by a defendant that is an

unincorporated association or club and is not represented by a licensed attorney.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Memoranda

For forms of memoranda relating to motions to strike generally, see Ch. 160, *Motions to Strike* .

[3] Discussion of Authorities

[a] Unincorporated Association Must Appear Through Attorney

In ***Clean Air Transport Systems v. San Mateo County Transit Dist.*** *(1988) 198 Cal. App. 3d 576, 579, 243 Cal. Rptr. 799* , a woman who was not an attorney brought an action as an individual and on behalf of an unincorporated association against the San Mateo County Transit District, alleging that the county did not receive an adequate environmental impact report before it approved the building of a park-and-ride facility. The county demurred to the complaint, raising as one of the issues that the woman could not legally appear in court as the association's representative. The trial court ruled that the association could be represented only by a licensed attorney, and it gave the association leave to amend the complaint, specifying that the complaint could not name the association as plaintiff unless it was represented by a licensed attorney. Neither the association nor the woman as an individual amended the complaint, and the court entered a judgment of dismissal against both in favor of defendants. The woman and the association appealed.

The court of appeal affirmed the judgment of dismissal. The court relied on the Supreme Court's analysis in *Merco Constr. Eng'rs, Inc. v. Municipal Court (1978) 21 Cal. 3d 724, 729-730, 147 Cal. Rptr. 631, 581 P.2d 636* , discussed in *§ 24.38[3][a]*, that a corporation is a distinct legal entity, separate from its shareholders and officers, and cannot appear in court except through an agent lawfully engaged in the practice of law. The court held that this reasoning also applies by analogy to an unincorporated association, which resembles a corporation more than it does an individual, and therefore must be represented in legal proceedings by a licensed attorney (*198 Cal. App. 3d 576, 579)* .

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2A-24 California Points & Authorities § 24.40

§ 24.40 Supporting Defendant's Motion to Compel Trustee Who Is Not Licensed Attorney But Appears as Attorney For Trust to Withdraw and Hire Licensed Member of Bar to Prosecute or Defend Lawsuit [Bus. & Prof. Code § 6125]

[1] FORM

[*Caption. See § 24.38.*]

THE TRUSTEE IS NOT A LICENSED ATTORNEY AND SHOULD BE COMPELLED TO WITHDRAW FROM REPRESENTING THE TRUST AND TO HIRE A LICENSED MEMBER OF THE BAR TO [PROSECUTE *or* DEFEND] THIS LAWSUIT.

A. A Nonattorney Trustee May Not Represent a Trust in a Court Action. A trustee who is not a licensed attorney may not represent the trust in an action in court and may be compelled to withdraw from that representation and to hire a licensed member of the bar to represent the trust. The nonattorney trustee, by representing the trust in court, represents and affects the interests of the trust beneficiaries and thus engages in the unauthorized practice of law in violation of *Bus. & Prof. Code § 6125*, which prohibits one who is not a licensed attorney from appearing in court for another person (*Ziegler v. Nickel (1998) 64 Cal. App. 4th 545, 547-549, 75 Cal. Rptr. 2d 312*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion by a party to compel a nonattorney trustee representing a trust in a court action to withdraw from representation and hire a licensed member of the bar to prosecute or defend the action. Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion and forms related to the unauthorized practice of law generally, see California Forms of Pleading and Practice, Ch. 72, *Attorney Practice and Ethics* (Matthew Bender).

[3] Discussion of Authorities

[a] Nonattorney Trustee May Not Represent Trust in Court Action

In ***Ziegler v. Nickel*** *(1998) 64 Cal. App. 4th 545, 75 Cal. Rptr. 2d 312* , the trustee of a trust commenced an action alleging that sellers of a mobilehome to the trust intentionally failed to disclose material defects. The defendant-sellers concurrently demurred to the complaint and moved for an order compelling the trustee to withdraw as attorney for the trust and to hire a member of the bar to prosecute the lawsuit, on the ground that the trustee was not an attorney so that his representation constituted the unauthorized practice of law in violation of *Bus. & Prof. Code § 6125*. The trial court ordered the trustee to withdraw as attorney for the trust and to hire an attorney within 30 days to represent the trust. The trustee appealed the order.

The court of appeal affirmed the trial court's order. The court found that California cases regarding representation of a corporation were distinguishable from the situation involving a trust, since a corporation is a distinct legal entity separate from stockholders and corporate officers, and is deemed a person within many legal constructs, but a trust is not a person but rather a fiduciary relationship with respect to property, and an ordinary express trust is not an entity separate from its trustees (*64 Cal. App. 4th 545, 548)* . However, citing out-of-state cases since no California case addressed the question of whether a trustee who is not an attorney could represent the trust in action to protect trust property, the court found that because the trustee must always act solely in the beneficiaries' interest, actions of the trustee affecting the trust estate affect the interest of the beneficiaries, so that representing the trust in court is representing and affecting the interests of the beneficiaries, so that it is the unauthorized practice of law under *Bus. & Prof. Code § 6125* (*64 Cal. App. 4th 545, 548-549)* .

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2-24 California Points & Authorities § 24.41

§ 24.41 Opposing Motion for Order Disqualifying Attorney Based on Contact With Opposing Party's Expert Witness--No Presumption that Confidential Information Was Imparted Exists When There Is No Impediment to Opposing Party's Ability to Obtain Information From Expert Regarding What Actually Was Disclosed

[1] FORM

[*Caption. See § 24.28.*]

_____ [*Name of attorney*] SHOULD NOT BE DISQUALIFIED FROM REPRESENTING _____ [*specify party, e.g.,* PLAINTIFF] IN THIS CASE BASED ON THE CONTACT BETWEEN _____ [*name of attorney*] AND _____ [*other party, e.g.,* DEFENDANT]'S EXPERT, _____ [*name of expert*], BECAUSE NO LEGAL IMPEDIMENT EXISTS TO _____ [*other party, e.g.,* DEFENDANT]'S ABILITY TO OBTAIN EVIDENCE FROM _____ [*name of expert*] REGARDING WHAT INFORMATION ACTUALLY WAS IMPARTED; THE PRESUMPTION THAT CONFIDENTIAL INFORMATION WAS IMPARTED TO _____ [*name of attorney*] THEREFORE IS INAPPLICABLE AND _____ [*other party, e.g.,* DEFENDANT], AS MOVING PARTY, HAS THE BURDEN OF PROVING THAT CONFIDENTIAL INFORMATION WAS IMPARTED--A BURDEN WHICH _____ [*other party, e.g.,* DEFENDANT] HAS FAILED TO MEET UNDER THE FACTS OF THIS CASE.

A. Moving Party Has Burden of Proving Expert's Improper Disclosure of Confidential Information to Opposing Party's Attorney When Expert Remains Under Control of Moving Party. The presumption that an expert witness improperly imparted confidential information to opposing party's counsel is inapplicable when no legal impediment exists to the moving party's ability to obtain evidence from the expert regarding what information was actually imparted. In such a situation, the moving party has the burden of proving that confidential information it imparted to its expert witness has been transmitted to the opposing party, and _____ [*moving party, e.g.,* Defendant] in this case has failed to do so [*Collins v. State of California (2004) 121 Cal. App. 4th 1112, 1127-1129* ; *18 Cal. Rptr. 3d 112* , *Shandralina G. v. Homonchuk (2007) 147 Cal. App. 4th 395, 412, 54 Cal. Rptr. 3d 207]* .

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a party's motion to disqualify an opposing attorney from further participation in the case when the opposing attorney is alleged to have obtained confidential information as a result of contact with an expert previously consulted by the moving party. Generally, the rule is that when one side imparts confidential information to a potential expert witness, and the other side later consults with or retains that expert, there is a rebuttable presumption that the expert disclosed the confidential information to the attorney [*see Shadow Traffic Network v. Superior Court (1994) 24 Cal. App. 4th 1067, 29 Cal. Rptr. 2d 693* , discussed in *§ 24.27*]. However, the cases cited in this form hold that this rebuttable presumption is inapplicable, and the burden of proof shifts back to the moving party (i.e., the party seeking disqualification), when the expert remains under the moving party's control or no legal impediment exists to the moving party's ability to obtain evidence from the expert regarding what information, if any, actually was imparted to the other party [*see* [3], *below*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that (1) there was no reason why the moving party could not have obtained information from the expert regarding what confidential information actually was or was not disclosed; and (2) the moving party has failed to show that any disclosure of confidential information actually occurred.

[3] Discussion of Authorities

[a] Moving Party Has Burden of Proving Expert's Improper Disclosure of Confidential Information to Opposing Party's Attorney When Expert Remains Under Control of Moving Party.

In ***Collins v. State of California*** *(2004) 121 Cal. App. 4th 1112, 18 Cal. Rptr. 3d 112* , an auto accident personal injury case, one of the lawyers from the plaintiffs' law firm hired an expert witness on the subject of windshields, unaware that one year earlier counsel for the defendants had hired the same expert as a consultant for the defendants on the same subject matter. The expert later told plaintiffs' lawyer that he had been retained "by an attorney from Los Angeles" and that he had completely forgotten about it at the time he was contacted by plaintiffs' lawyers. After plaintiffs' lawyers disclosed the expert as a retained expert witness, defendant moved to disqualify plaintiffs' counsel, and the court granted the motion. Plaintiffs appealed [*121 Cal. App. 4th 1112, 1116]* .

The appellate court reversed. The court held that disqualification of the plaintiffs' law firm was unwarranted. That firm had no notice of the expert's dual status until defense counsel raised the issue because the expert had never disclosed his dual retention. Further, the plaintiffs' firm ceased all direct contact with the expert after his dual role was revealed. Most importantly, the undisputed evidence demonstrated that no confidential information originating with defendants or their attorneys was transmitted by the expert to the plaintiffs' firm [*121 Cal. App. 4th 1112, 1116]* .

In ordering disqualification, the trial court had relied heavily on *Shadow Traffic Network v. Superior Court (1994) 24 Cal. App. 4th 1067, 29 Cal. Rptr. 2d 693* [*discussed in § 24.27*]. On appeal, plaintiffs contended that (1) the evidence failed to demonstrate that defendants provided confidential information to the expert; (2) the *Shadow Traffic* rebuttable presumption should not apply because defendants had retained access to the expert witness and plaintiffs could not ethically speak with the expert; and (3) the evidence provided by plaintiffs' law firm decisively rebutted the presumption. The appellate court rejected the first contention, but agreed with the second argument, and further concluded that the undisputed evidence established that no material confidential information was disclosed to the plaintiffs' law firm [*121 Cal. App. 4th 1112, 1127-1129]* .

Under *Shadow Traffic*, once confidential information has been shared with an expert, a rebuttable presumption arises that the same information has been used by or disclosed to the expert's subsequent employer. The court explained that as

stated by the court in *Shadow Traffic*, shifting the burden of proof to the party opposing disqualification is a "rule by necessity" because the party seeking disqualification will be at a loss to prove what was actually disclosed--that would be known only by the adversary's attorneys and legal staff. In this case however, the expert witness remained a consultant for defendants' counsel. Thus, the most important source of the information from which to ascertain whether the expert had passed on any confidential information to plaintiffs' counsel--the expert himself--remained in the defendant's hands. The court reasoned that under these circumstances, the reason for shifting the burden of proof to the opposing party does not exist, and that application of the normal burden of proof, under which the party moving for relief must establish its right to it, is appropriate. The court concluded that when the expert has remained under the control of the moving party, and there is no evidence counsel knowingly retained the opposing party's expert or that the expert intentionally advised both sides, the *Shadow Traffic* rebuttable presumption does not apply. Instead, the moving party has the burden of proving that the confidential information it imparted to its expert witness has been transmitted to the opposing party. Note, however, that the court expressed no opinion as to whether the burden of proof should shift if the expert is no longer communicating with the party that originally retained him or her [*121 Cal. App. 4th 1112, 1129]* .

After reviewing the undisputed evidence in the case, the court concluded that defendant failed to demonstrate that any confidential attorney work product was transmitted from the expert to plaintiffs' counsel. The court further stated that recusal would be inappropriate because the plaintiffs' firm was innocent of wrongdoing when it hired the expert and acted ethically after the issue was discovered [*121 Cal. App. 4th 1112, 1130-1131]* .

In ***Shandralina G. v. Homonchuk*** *(2007) 147 Cal. App. 4th 395, 54 Cal. Rptr. 3d 207* , a medical malpractice action, the defense counsel hired a doctor as a confidential medical consultant. The plaintiff's counsel, who was unaware that the doctor had been hired by defendant, subsequently contacted the doctor and asked him if he was familiar with the case. When the doctor said he was not, plaintiff's counsel sent the doctor medical records from the case and designated the doctor as an expert witness. The defendant then moved to disqualify plaintiff's counsel from the case, arguing that under *Shadow Traffic Network v. Superior Court (1994) 24 Cal. App. 4th 1067, 29 Cal. Rptr. 2d 693* [*discussed in § 24.27*], a rebuttable presumption existed that plaintiff's counsel had improperly obtained confidential information during his telephone call with the doctor, and that the plaintiff did not sustain the burden of showing that her counsel had not obtained confidential information. The plaintiff opposed the motion, asserting that the *Shadow Traffic* rebuttable presumption was not applicable because the doctor remained under the defendant's control and, therefore, the defendant had the burden of persuasion to affirmatively show that the plaintiff's counsel obtained confidential information from the doctor. The plaintiff also argued that even if she had the burden of demonstrating that her counsel did not obtain confidential information during the conversation, she had satisfied that burden. The trial court granted the motion to disqualify the plaintiff's counsel, and plaintiff appealed.

The court of appeal concluded that the trial court erroneously placed the burden of persuasion on the plaintiff to disprove confidential information was imparted to her counsel, and instead should have placed the burden of proof on the defendant to prove confidential information was imparted to plaintiff's counsel. Relying on *Collins v. State of California (2004) 121 Cal. App. 4th 1112, 18 Cal. Rptr. 3d 112* , discussed *above*, the court opined that is was error to apply the *Shadow Traffic* presumption under the facts of the case because there was no legal impediment to defendant's ability to obtain evidence from the doctor on the content of the conversation. The court stated that when the reason for shifting the burden of proof to the opposing party does not exist, application of the normal burden of proof, under which the moving party must establish its right to relief, is appropriate. Based on the facts of the case, the court of appeal held that the defendant failed to meet this burden [*147 Cal. App. 4th 395, 412]* .

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CHAPTER 24A ATTORNEYS AT LAW: MALPRACTICE

2A-24A California Points & Authorities 24A.syn

§ 24A.syn Synopsis to Chapter 24A: ATTORNEYS AT LAW: MALPRACTICE

§ 24A.01 Scope of Chapter

§ 24A.02 Governing Statutes

§ 24A.03 Liability of Attorney for Sanctions

§ 24A.04 Related Pleading and Practice Chapters

§ 24A.05 Related Points and Authorities Chapters

§§ 24A.06-24A.19 [Reserved]

§ 24A.20 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--By Defendant--No Duty to Plaintiff Because No Attorney-Client Relationship Existed

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Elements Required for Cause of Action

[b] Absence of Duty Requires Judgment for Defendant

[c] Attorney-Client Relationship Required to Show Duty

[d] Discontinued Relationship Precludes Duty

[e] Attorney-Client Relationship Terminated by Operation of Labor Code Section 3755

[f] Malpractice Claims Not Assignable

[g] District Attorney Owes No Duty of Care to Caretaker Parent With Respect to Enforcement of Support Obligation

[h] No Attorney-Client Relationship Between Reinsurer and Attorney Hired by Insurer

[4] Additional Authorities

[a] Absence of Duty Requires Judgment for Defendant

[b] Attorney-Client Relationship Required to Show Duty

[c] Malpractice Claims Not Assignable

§ 24A.21 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--By Defendant--Plaintiff as Third Party to Whom Defendant Owed No Duty

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] No Duty to Third Parties

[b] Absent Client Testator's Clear Intent, No Duty to Nonbeneficiary of Will

[c] No Duty to Client's Adversary

[d] No Duty to Client's Former or Subsequent Attorneys

[e] No Duty Owed to Co-Counsel

[f] No Duty to Potential Beneficiary Named in Unsigned Will

[g] No Duty to Will Beneficiaries to Determine Testamentary Capacity of Testator

[h] Signed Document Memorializing Testator's Intent Required to Hold Attorney Liable for Failure to Execute That Intent

[i] Attorney's Signature on Contract Not Basis for Tort Liability to Attorney for Other Party

[4] Additional Authorities

[a] No Duty to Third Parties

[b] No Duty to Client's Adversary

[c] No Duty to Will Beneficiaries to Determine Testamentary Capacity of Testator

§ 24A.22 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--By Defendant--No Duty Owed to New or "Prospective" Client Because Such Duty Would Conflict With Duty to Existing Client

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[3] Discussion of Authorities

[a] No Duty to Prospective Client if There Is Conflicting Duty to Existing Client

§ 24A.23 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--By Defendant--Defendant Owed No Duty to Present Client in Favorable Public Light

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Memoranda

[3] Discussion of Authorities

[a] No Duty to Present Client in Favorable Public Light

§ 24A.24 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--By Defendant--No Liability When Either Public Duty or Reasonableness Indicates Plaintiff's Action Is Meritless, Unjust, or to No Avail

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Memoranda

[3] Discussion of Authorities

[a] No Duty to Pursue Meritless Action

[4] Additional Authorities

[a] No Duty to Pursue Meritless Action

§ 24A.25 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--By Defendant--No Liability for Mistake on Debatable Legal Issue

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] No Liability for Mistake on Doubtful Area of Law

[b] No Duty to Advise Client of Unsettled Nature of Legal Issue

§ 24A.26 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--By Defendant--No Liability Where Causation Cannot Be Established

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Causation Not Established

[b] "But For" Test of Causation Applicable to Actions for Transactional Malpractice

[4] Additional Authorities

[a] Causation Not Established

[b] "But For" Test of Causation Applicable to Actions for Transactional Malpractice

§ 24A.27 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--By Defendant--No Cause of Action Against Defendant When No Actual Harm to Plaintiff Resulted

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Judgment for Defendant Proper When No Harm to Plaintiff

[b] Legal Fees Incurred Trying to Overturn Earlier Settlement or Judgment Not Recoverable as Damages

[c] Legal Fees Paid to Negligent Attorney Not Recoverable as Tort Damages

[d] No Provable Damages When Statute of Limitations in Underlying Suit Had Expired Before Client Hired Attorney

[4] Additional Authorities

[a] Judgment for Defendant Proper When No Harm to Plaintiff

§ 24A.28 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--By Defendant--Representation of Partnership Did Not Require Defendant to Obtain Informed Written Consent of Partners

With Conflicting Interests

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[3] Discussion of Authorities

[a] Representation of Partnership Regarding Agreement Between Partners

§ 24A.29 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--By Defendant--Action Barred by Statute of Limitations

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Opposing Memoranda

[d] Statute of Limitations Does Not Bar Defensive Use of Legal Malpractice

[e] Statute of Limitations Does Not Bar Actions Based on Nonlegal Services

[3] Discussion of Authorities

[a] Summary Judgment Proper When Statute of Limitations Bars Action

[b] Statute of Limitations for Legal Malpractice

[c] Statute Commences When Plaintiff Suffers Actual Injury

[d] Statute Commences When Client's Cause of Action Is Proscribed

[e] Statute Commences on Entry of Adverse Judgment or Order of Dismissal

[f] Statute Commences When Facts Should Put Plaintiff on Inquiry

[g] Statute Not Tolled Once Defendant No Longer Represents Plaintiff as Attorney

[h] Negligent Attorney's Continued Representation Does Not Toll Statute On Claims Against Attorney's Former Law Firm

[i] Equitable Tolling Doctrine Inapplicable to Statute

[j] Statute Applicable in Action Based on Breach of Fiduciary Duty

[k] Actual Injury May Occur When Incurring Legal Fees Caused by Defendant's Malpractice

[4] Additional Authorities

[a] Statute of Limitations for Legal Malpractice

[b] Statute Commences When Plaintiff Suffers Actual Injury

[c] Statute Not Tolled Once Defendant No Longer Represents Plaintiff as Attorney

[d] Plaintiff in Malpractice Action Against Criminal Defense Attorney Must Comply With Statute of Limitations Even While Seeking Reversal or Other Postconviction Relief in Underlying Criminal Action

§ 24A.30 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--By Defendant--Attorney Retained by Union Immune From Malpractice Suit by Individual Union Member [29 U.S.C.S. § 185(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] When Immunity Unavailable

[c] Related Memoranda

[3] Discussion of Authorities

[a] Immunity of Attorney Retained in Collective Bargaining Process by Union

§ 24A.31 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--By Defendant--No Recovery for Emotional Distress Damages When Malpractice Results in Only Economic Loss

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] No Recovery for Emotional Distress Damages When Attorney Malpractice Results in Only Economic Loss

§ 24A.32 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--By Defendant--No Cause of Action Against Criminal Defense Attorney Absent Proof That Plaintiff Was Not Guilty in Prior Criminal Action

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Plaintiff Must Show Factual Innocence of Criminal Charges in Prior Action

[b] Plaintiff Must Obtain Reversal or Other Postconviction Relief in Underlying Criminal Action

[c] Plaintiff's Showing of Factual Innocence Extends to Lesser-Included Offenses

[d] Plaintiff's Required Showing of Factual Innocence and Exoneration Extends to Transactionally Related Offenses

[4] Additional Authorities

[a] Plaintiff Must Show Factual Innocence of Criminal Charges in Prior Action

§ 24A.33 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--By Defendant--Collateral Estoppel Bars Action Based on Same Facts Determined in Prior Proceeding

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[3] Discussion of Authorities

[a] Elements of Collateral Estoppel

[b] Privity Defined

[c] Collateral Estoppel Proper When Malpractice Complaint Is Based on Same Factual Allegations of Attorney Neglect That Were Determined In Prior Habeas Corpus Proceeding

[d] Court Approval of Settlement Procedures in Class Action Will Collaterally Estop Class Member From Suing for Insufficient Settlement Notification Procedures

§ 24A.34 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--By Defendant--Outside Counsel Hired by Corporation Not Subject to Derivative Malpractice Suit Brought by Shareholder

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Shareholder May Not Prosecute Derivative Malpractice Suit Against Outside Corporate Counsel

§ 24A.34A Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--By Defendant--Public Policy Prohibits Malpractice Action if Plaintiff Seeks Damages for Willful Commission of Own Crime

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Malpractice Action Not Permitted When Plaintiff's Conduct Was Criminal

§ 24A.35 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--By Cross Defendant--Cross Complaint Against Subsequent Attorney for Indemnity Not Allowed

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] No Cross Complaint Against Subsequent Attorney for Indemnity

[4] Additional Authorities

[a] No Cross Complaint Against Subsequent Attorney for Indemnity

§ 24A.36 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--By Cross Defendant--Cross Complaint for Indemnity Not Allowed Between Insured's Defense Attorney and Separate Attorney Representing Insurer's Interests

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[3] Discussion of Authorities

[a] Cross Complaint for Indemnity By Insurer-Provided Defense Attorney Against Insured's Independent Counsel Not Allowed

[b] Attorney Paid by Client's Insurer Not Entitled to Indemnity From Separate Counsel Hired by Insurer to Monitor Case

§ 24A.37 Supporting Motion for Summary Adjudication [Code Civ. Proc. § 437c(f)(1)]--By Defendant--No Damages Allowed for Judgment Paid by Insurance Company

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Memoranda

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Motion for Summary Adjudication by Defendant

[b] Adjudication Proper When No Actual Harm

[c] Judgment Paid by Insurance Company

§ 24A.38 Supporting Motion for Summary Adjudication [Code Civ. Proc. § 437c(f)]--By Defendant--No Damages Allowed for Settlement in Earlier Action Paid on Behalf of Client's Codefendant in That Action

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Memoranda

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Payment of Settlement in Earlier Action on Behalf of Client's Codefendant in That Action

§ 24A.39 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--Attorney-Client Relationship Creating Duty to Client Existed Without Formal Agreement

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Memoranda

[3] Discussion of Authorities

[a] Rules Governing Summary Judgment Procedure

[b] Moving Party's Burden to Negate Existence of Duty

[c] Employment Agreement or Fee Not Required for Relationship

[d] Legal Advice Establishes Relationship

[e] Attorney Making Special Appearance in Court for Another Attorney's Client Establishes Attorney-Client Relationship

[4] Additional Authorities

[a] Legal Advice Establishes Relationship

§ 24A.40 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--Attorney-Client Relationship Creating Duty to Client Existed With Partner or Former Partner in Law Firm

[1] FORM

[2] Comments

[a] Use of Form

[b] Former Partner Released From Liability

[c] Related Uses

[d] Related Memoranda

[3] Discussion of Authorities

[a] Each Member of Law Firm Partnership Has Duty to Client

§ 24A.41 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--Successor Fiduciary Representing Estate in Probate Has Standing to Sue Attorney Hired by Predecessor for Damage to Estate

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Successor Fiduciary Representing Estate in Probate Has Standing to Sue Attorney Hired by Predecessor for Malpractice

§ 24A.42 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--Defendant Owed Duty to Plaintiff as Intended Beneficiary

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Memoranda

[3] Discussion of Authorities

[a] Duty to Third Party as Intended Beneficiary

[b] Duty to Intended Beneficiary Under a Will

[c] Duty to Trust Beneficiaries

[d] Duty to Disclose Dual Representation to Third Party Trust Beneficiaries

[e] Duty to Creditor When Collection Agency Is Client

[f] Duty to Client and Investors

[g] Duty to Inform Personal Injury Client's Spouse of Potential Claim for Loss of Consortium

[h] Attorney for Insurer May Be Liable for Fraud to Claimant Under Policy

[i] Attorney Agreeing to Serve as Mediator in Dispute Involving Client Owes Duty to Disclose Facts Affecting Impartiality

[j] Lawyer May Be Liable for Fraud Against Third Party

[4] Additional Authorities

[a] Duty to Third Party as Intended Beneficiary

§ 24A.43 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--Failure to Segregate Funds Constitutes Professional Negligence

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] Attorney's Failure to Place Client's Funds in Trust Account Is Actionable Legal Malpractice

§ 24A.44 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--Class Action Attorney's Duty to Advise Class of Potential Claims Not Limited to Claims Included in Class Certification Order

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Class Attorney Owes Duty to Consider and Advise Class Members on Additional Potential Claims Arising From Same Underlying Facts

§ 24A.45 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--Defendant Had Duty to Research Unsettled Area of Law

[1] FORM

[2] Comments

[a] Use of Form

[b] Type of Duty

[c] Related Uses

[d] Related Memoranda

[3] Discussion of Authorities

[a] Duty to Research Unsettled Issue

[b] Duty to Avoid Involving Client in Doubtful Area of Law

[4] Additional Authorities

[a] Duty to Research Unsettled Issue

§ 24A.46 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--Defendant Had Duty to Refer Client to Specialist

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Memoranda

[3] Discussion of Authorities

[a] Duty to Refer to Specialist

[b] Duty to Refer to Specialist in Tax Matters

§ 24A.47 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--Liability for Malpractice Normally Question of Fact

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Memoranda

[3] Discussion of Authorities

[a] Liability for Malpractice Normally Question of Fact

[b] Malpractice of Legal Specialist as Question of Fact

§ 24A.48 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--Issues of Fact Remain as to Possible Damage to Plaintiff as a Result of Defendant's Conduct

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Memoranda

[3] Discussion of Authorities

[a] Summary Judgment Denied When Damages Possible

§ 24A.49 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437(c)] in Legal Malpractice Action--Subsequent Litigation Constitutes Damage

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Subsequent Litigation Constitutes Damage

§ 24A.50 Opposing Defendant's Motion For Summary Judgment [Code Civ. Proc. § 437c] In Legal Malpractice Action--Burden Of Proving Causation May Be Shifted To Defendant When Malpractice Is Failure To Preserve Evidence Critical To Underlying Lawsuit

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Burden of Proving Causation May Be Shifted to Defendant

§ 24A.51 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--Fee Award for Attorney Under Fee Arbitration Statute [Bus. & Prof. Code § 6200 et seq.] Does Not Bar Subsequent Malpractice Action

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Malpractice Action Not Barred by Arbitrator's Award in Favor of Attorney in Attorney's Fee Dispute

§ 24A.52 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--Statute of Limitations Does Not Commence Until Plaintiff Discovers Wrongful Act or Omission [Code Civ. Proc. § 340.6(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Memoranda

[3] Discussion of Authorities

[a] No Summary Judgment If Question of When Discovery Occurred

[b] Statute of Limitations Commences Only for Act or Omission Discovered

[c] Constructive Discovery Depends on Plaintiff's Knowledge and Opportunity

[d] Confidential Relationship Excuses Failure to Discover Attorney Malpractice

[e] Defendant Bears Burden of Proving When Discovery Occurred or Should Have Occurred

§ 24A.53 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--Statute of Limitations Tolled Until Plaintiff Sustains Injury [Code Civ. Proc. § 340.6(a)(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Memoranda

[3] Discussion of Authorities

[a] No Summary Judgment if Question of When Injury Occurred

[b] Statute Commences on Conclusion of Litigation or Negotiation When Adequacy of Advice Is Subject of Dispute

[4] Additional Authorities

[a] No Summary Judgment if Question of When Injury Occurred

§ 24A.54 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--Statute of Limitations Tolled While Attorney Continues to Represent Plaintiff [Code Civ. Proc. § 340.6(a)(2)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Memoranda

[3] Discussion of Authorities

[a] No Summary Judgment if Question of When Representation Ended

[b] Participation in Fee Arbitration Does Not Preclude Continued Representation

[c] Continued Representation Tolling Applies Unconditionally

[d] Continued Representation Tolling Applicable if Client Returns to Attorney With Problem In Transactional Documents

[e] Continued Representation Determined Through Client's Reasonable Subjective Belief

[4] Additional Authorities

[a] No Summary Judgment if Question of When Representation Ended

§ 24A.55 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--Statute of Limitations Tolled While Plaintiff Is Under Legal or Physical Disability [Code Civ. Proc. § 340.6(a)(4)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Memoranda

[3] Discussion of Authorities

[a] Statute of Limitations Tolled During Time When Plaintiff Was Under Legal or Physical Disability

[b] Imprisonment Is Legal Disability for Two Years

[c] Defendant's Presence Out of State Tolls Limitations Period in Legal Malpractice Action

§ 24A.56 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--Defendant Equitably Estopped From Asserting Statute of Limitations Defense

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[3] Discussion of Authorities

[a] Equitable Estoppel May Prevent Defendant From Asserting Statute of Limitations

§ 24A.56A Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--Criminal Defendant Not Required to Prove Actual Innocence of Underlying Criminal Charges

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Fee Dispute Does Not Require Showing of Actual Innocence

[b] Claim Based on Failure to Secure Return of Seized Property Does Not Require Showing of Actual Innocence

§ 24A.57 Opposing Cross Defendant's Motion for Summary Judgment in Legal Malpractice Action Based on Contention That Cross Complaint for Indemnity Is Not Allowable--Cross Complaint Allowable Because Subsequent Attorney Was Negligent and His or Her Conduct Did Not Involve Exercise of Professional Judgment

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[3] Discussion of Authorities

[a] Cross Complaint for Indemnity Allowed When No Exercise of Professional Judgment by Cross Defendant

[b] No Summary Judgment When Cross Defendant Failed to Mitigate Plaintiff's Damages

[4] Additional Authorities

[a] Cross Complaint for Indemnity Allowed When No Exercise of Professional Judgment by Cross Defendant

§ 24A.58 Opposing Cross Defendant's Contention That Cross Complaint for Indemnity Is Not Allowable--Claim for Indemnity May Be Permitted Against Concurrent Counsel If Policy Considerations Do Not Bar Claim Under Facts of Case

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Case-by-Case Analysis Required

[b] Claim Allowable If Public Policy Concerns Not Implicated

[c] Indemnification of Expert Witness From Hiring Attorney

§ 24A.59 Opposing Cross Defendant's Motion for Summary Judgment in Legal Malpractice Action Based on Contention That Cross Complaint for Indemnity Is Not Allowable--Cross Complaint for Indemnity Allowed Against Predecessor Attorney

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[3] Discussion of Authorities

[a] Cross Complaint for Indemnity May Be Brought by Successor Attorney Against Predecessor Attorney

§ 24A.60 Supporting Motion for Lien on Proceeds of Remaining Legal Action

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Lien Proper to Avoid Double Recovery

§ 24A.61 Supporting Motion for New Trial [Code Civ. Proc. § 659] in Legal Malpractice Action--By Defendant--Because Insufficient Showing Plaintiff's Original Case Had Merit [Code Civ. Proc. § 657(6)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

[3] Discussion of Authorities

[a] Judgment for Plaintiff Requires Proof That Plaintiff's Original Case Had Merit

[4] Additional Authorities

[a] Judgment for Plaintiff Requires Proof That Plaintiff's Original Case Had Merit

§ 24A.62 Supporting Motion for New Trial [Code Civ. Proc. § 659] in Legal Malpractice Action--By Defendant--Absence of Expert Testimony

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Expert Testimony Required to Establish Malpractice

[b] Suit Against Legal Specialist

[c] Duty to Investigate Case Further

§ 24A.63 Supporting Motion for New Trial [Code Civ. Proc. § 659] in Legal Malpractice Action--By Defendant--No Showing of Proximate Cause

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Judgment for Plaintiff Requires Proof of Causation

§ 24A.64 Supporting Motion for New Trial [Code Civ. Proc. § 659] in Legal Malpractice Action--By Defendant--Error to Allow Expert Testimony on Probable Outcome of Underlying Litigation

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[3] Discussion of Authorities

[a] Expert Testimony on Probable Outcome of Underlying Litigation Not Allowed

§ 24A.65 Supporting Contention That Compensatory Damages for Lost Claim for Punitive Damages Are Not Allowed

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] No Compensatory Damages for Lost Punitive Damages Claim

§ 24A.66 Supporting Contention That Civil Code Section 1431.2 Does Not Apply to Damages Obtained in Legal Malpractice Action

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Civil Code Section 1431.2 Does Not Apply in Attorney Malpractice Action

§ 24A.66A Opposing Contention That Civil Code Section 1431.2 Does Not Apply to Damages Obtained in Legal

Malpractice Action--Primary Damages Sought are Noneconomic

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[3] Discussion of Immunities

[a] Proposition 51 Applicable to Legal Malpractice Action Seeking Primarily Noneconomic Damages

§ 24A.67 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 659] in Legal Malpractice Action--Expert Testimony Not Necessary

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

[3] Discussion of Authorities

[a] Expert Testimony Unnecessary

[4] Additional Authorities

[a] Expert Testimony Unnecessary

§ 24A.68 Supporting Motion for Dismissal in Legal Malpractice Action--Attorney-Client Privilege Prevents Proper Defense of Suit

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Attorney-Client Privilege Prevents Proper Defense of Suit

California Points & Authorities

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 24A ATTORNEYS AT LAW: MALPRACTICE
PART I. INTRODUCTION

2A-24A California Points & Authorities § 24A.01

§ 24A.01 Scope of Chapter

This chapter contains memoranda which may be submitted in legal malpractice actions and proceedings. It includes memoranda for use in supporting [*see §§ 24A.20 -24A.23*] and opposing [*see §§ 24A.39 -24A.42*] motions for summary judgment relating to duty; supporting motions for summary judgment relating to liability when client's original action is without merit, unjust, or to no avail [*see § 24A.24*], supporting [*see § 24A.25*] and opposing [*see §§ 24A.45 -24A.47*] motions for summary judgment relating to liability for mistake, or liability as a matter of law; supporting [*see § 24A.27*] and opposing [*see § 24A.48*] motions for summary judgment relating to existence of harm to plaintiff; and supporting [*see § 24A.29*] and opposing [*see § 24A.53*] motions for summary judgment relating to the bar of the statute of limitations. It also includes memoranda supporting [*see § 24A.35*] and opposing [*see §§ 24A.56, 24A.57*] motions for summary judgment relating to cross complaints against other attorneys for indemnity, and a memorandum supporting a lien against plaintiff's remaining legal action [*see § 24A.60*]. Other memoranda include those supporting motions for summary adjudication of the issue of allowable damages [*see §§ 24A.37, 24A.38*], supporting motions for new trial relating to a showing that client would have won the original case [*see § 24A.61*], expert testimony [*see §§ 24A.62, 24A.64*], proximate cause [*see § 24A.63*], a form supporting the contention that an award of compensatory damages based on a lost claim for punitive damages is not allowed [*see § 24A.65*], and forms supporting and opposing the contention that *Civ. Code § 1431.2* does not apply to damages obtained in a legal malpractice action [*see §§ 24A.66, 24A.66A*]. A memorandum is also included opposing a motion for new trial on the grounds that expert testimony on duty of care is not required [*see § 24A.67*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsTortsDamagesCompensatory DamagesGeneral OverviewTortsMalpractice & Professional LiabilityAttorneysTortsNegligenceCausationProximate CauseGeneral OverviewTortsProcedureMultiple DefendantsIndemnityGeneral Overview

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CHAPTER 24A ATTORNEYS AT LAW: MALPRACTICE
PART I. INTRODUCTION

2A-24A California Points & Authorities § 24A.02

§ 24A.02 Governing Statutes

The statute of limitations for legal malpractice actions is governed by *Code Civ. Proc. § 340.6*.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsTortsMalpractice & Professional LiabilityAttorneys

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 24A ATTORNEYS AT LAW: MALPRACTICE
PART I. INTRODUCTION

2A-24A California Points & Authorities § 24A.03

§ 24A.03 Liability of Attorney for Sanctions

Pursuant to statutory authorization, a court may impose monetary liability on an attorney as a sanction. For example, the court may impose a sanction of up to $1,000 on an attorney who files a sworn affidavit of fault to relieve a client from a default judgment or dismissal [*Code Civ. Proc. § 473*]. Furthermore, a judicial officer may impose a sanction of up to $1,500, payable to the county in which the judicial officer is located, for any violation of a lawful court order done without good cause or substantial justification [*Code Civ. Proc. § 177.5*; *see Caldwell v. Samuels Jewelers (1990) 222 Cal. App. 3d 970, 975-979, 272 Cal. Rptr. 126]* .

A number of statutes require attorneys to pay the costs or attorney's fees, or both, of the opposing party. For example, a monetary sanction of reasonable expenses, including attorney's fees, for frivolous actions or bad-faith tactics is governed by *Code Civ. Proc. § 128.7* for actions and proceedings started after 1994, and by *Code Civ. Proc. § 128.5* applicable only to actions or proceedings pending as of December 31, 1994 [*Code Civ. Proc. §§ 128.5(b)(1), 128.7(i)*; *see also Code Civ. Proc. §§ 128.6, 128.7*]. For memoranda regarding the recovery of attorney's fees, see Ch. 60, *Costs* .

Under *Cal. Rules of Ct., Rule 8.276*, the court may require an attorney to pay penalties for unreasonable infractions of the rules governing appeals [*Cal. Rules of Ct., Rule 8.276(e)*; *see, e.g., Hummel v. First Nat'l Bank (1987) 191 Cal. App. 3d 489, 496, 236 Cal. Rptr. 449]* . In addition, an attorney who engages in misuse of the discovery process, as defined in *Code Civ. Proc. § 2023.010*, may be required to pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of the misconduct [*Code Civ. Proc. § 2023.030(a)*]. For memoranda relating to discovery sanctions, see Ch. 82, *Discovery: Sanctions for Discovery Misuse* .

Courts also have power to fine attorneys up to $1,000, and to require payment of reasonable attorney's fees and costs, for contempt of court [*Code Civ. Proc. § 1218*]. For memoranda concerning contempt proceedings and review of contempt proceedings, see Ch. 47, *Contempt* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedurePretrial JudgmentsDefaultGeneral OverviewCivil

ProcedureSanctionsBaseless FilingsBad Faith MotionsCivil ProcedureSanctionsBaseless FilingsFrivolous LawsuitsCivil ProcedureSanctionsContemptCivil Contempt

California Points & Authorities

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 24A ATTORNEYS AT LAW: MALPRACTICE
PART I. INTRODUCTION

2A-24A California Points & Authorities § 24A.04

§ 24A.04 Related Pleading and Practice Chapters

For discussion and forms relating to legal malpractice actions, see California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsMalpractice & Professional LiabilityAttorneys

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
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PART I. INTRODUCTION

2A-24A California Points & Authorities § 24A.05

§ 24A.05 Related Points and Authorities Chapters

- For discussion regarding attorney withdrawal, substitution, disqualification, and authority to appear, see Ch. 24, *Attorneys at Law: Substitution, Withdrawal, Disqualification, and Authority to Appear* .

- For collecting or defending against the collection of attorney's fees from clients, see Ch. 25, *Attorney's Fees* .

- For obtaining attorney's fees from the opposing party on motion, see Ch. 60, *Costs* .

- For contractual issues and defenses generally, see Ch. 50, *Contracts* .

- For sanctions that may be imposed during discovery proceedings, see Ch. 82, *Discovery: Sanctions for Discovery Misuse* .

- For proceedings for and defending against claims for indemnity and contribution, see Ch. 115, *Indemnity and Contribution* .

- For intervention generally, see Ch. 124, *Intervention* .

- For negligence generally, see Ch. 165, *Negligence* .

- For a discussion of how to use the forms in this Chapter to draft a memorandum of points or authorities or a trial or appellate brief, and for a sample of a complete memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

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

ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral Overview

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[Reserved]

§§ 24A.06[Reserved]

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 24A ATTORNEYS AT LAW: MALPRACTICE
PART II. FORMS

2A-24A California Points & Authorities § 24A.20

§ 24A.20 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--By Defendant--No Duty to Plaintiff Because No Attorney-Client Relationship Existed

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM IN SUPPORT OF SUMMARY
_____ [*name*],	)	JUDGMENT
Plaintiff,	)	[*Code Civ. Proc. § 437c*]
vs.	)	[Limited Civil Case]
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THE COURT SHOULD GRANT SUMMARY JUDGMENT IN DEFENDANT'S FAVOR BECAUSE NO ATTORNEY-CLIENT RELATIONSHIP EXISTED BETWEEN PLAINTIFF AND DEFENDANT AND THEREFORE DEFENDANT OWED NO DUTY TO PLAINTIFF.

A. Summary Judgment. A defendant may move for summary judgment in any action or proceeding if it is contended that the action has no merit. Such motion shall be granted if all papers submitted show that there is no triable issue as to

any material fact, and that the defendant is entitled to a judgment as a matter of law (*Code Civ. Proc. § 437c*).

B. Elements Required for Cause of Action. To state a cause of action for legal malpractice, the following elements are required: (1) duty of the attorney, owed to the plaintiff, to use the standard of care commonly exercised by other members of the legal profession; (2) breach of that duty; (3) proximate causation between breach and plaintiff's injury; and (4) actual loss or damage to plaintiff as a result. The absence of any of these elements results in judgment for the defendant (*Budd v. Nixen (1971) 6 Cal. 3d 195, 200, 98 Cal. Rptr. 849, 491 P.2d 433* ; *Baldock v. Green (1980) 109 Cal. App. 3d 234, 238, 167 Cal. Rptr. 157*).

C. Absence of Duty Requires Judgment for Defendant. Duty of care is the most important element of a cause of action for legal malpractice, and when circumstances establish its absence, there is no valid case against the defendant (*Zalta v. Billips (1978) 81 Cal. App. 3d 183, 191, 144 Cal. Rptr. 888* ; *Ventura County Humane Soc'y v. Holloway (1974) 40 Cal. App. 3d 897, 902, 906-907, 115 Cal. Rptr. 464*).

D. Attorney-Client Relationship Required to Show Duty. An attorney has no duty to act in a particular transaction unless the attorney-client relationship exists with respect to that transaction, and in the absence of such a relationship, summary judgment for the defendant will be granted (*Zenith Ins. Co. v. Cozen O'Connor (2007) 148 Cal. App. 4th 998, 1010-1011, 55 Cal. Rptr. 3d 911* ; *Brandlin v. Belcher (1977) 67 Cal. App. 3d 997, 999, 1001, 134 Cal. Rptr. 1*).

[*Optional*] **E. Discontinued Relationship Precludes Duty.** When the attorney-client relationship has been discontinued, unless the client reestablishes it, the attorney has no duty to act for the client, and summary judgment for the defendant will be granted (*Brandlin v. Belcher (1977) 67 Cal. App. 3d 997, 999, 1000, 134 Cal. Rptr. 1*).

[*Optional*] **F. Attorney-Client Relationship Terminated by Operation of *Labor Code Section 3755*.** If a workers' compensation insurer hires an attorney to represent the insurer and the insured employer in a workers' compensation claim, the attorney's representation of the employer terminates by operation of *Lab. Code § 3755* when the insurer notifies the injured employee and the workers' compensation appeals board that the insurer accepts liability for the claim, and thereafter the insurer's attorney owes no duties to the employer (*Canton Poultry & Deli, Inc. v. Stockwell, Harris, Widom & Woolverton (2003) 109 Cal. App. 4th 1219, 1226-1228, 135 Cal. Rptr. 2d 695*).

[*Optional*] **G. Malpractice Claims Not Assignable.** Public policy considerations and the nature of the relationship require that the attorney-client relationship and its obligations be restricted to the parties involved, and that malpractice claims not be subject to assignment (*Goodley v. Wank & Wank, Inc. (1976) 62 Cal. App. 3d 389, 396, 397, 133 Cal. Rptr. 83*).

[*Optional*] **H. District Attorney Owes No Duty of Care to Caretaker Parent With Respect to Enforcement of Support Obligation.** The statutory scheme empowering the district attorney to establish, modify, and enforce support obligations in the name of the county on behalf of children and caretaker parents does not create an attorney-client relationship or other basis for a duty of care between the district attorney and caretaker parents (*Jager v. County of Alameda (1992) 8 Cal. App. 4th 294, 297-298, 10 Cal. Rptr. 2d 293*).

[*Optional*] **I. No Attorney-Client Relationship Between Reinsurer and Attorney Hired by Insurer.** If an insurer contracts with a reinsurer to obtain reimbursement coverage for some of the insurer's coverage liabilities, and the insurer subsequently hires an attorney to represent it when a claim is brought against its insured, the reinsurer on that claim does not become a client of the insurer's attorney in the absence of an express agreement between the retained attorney and the reinsurer (*Zenith Ins. Co. v. O'Connor (2007) 148 Cal. App. 4th 998, 1006-1007, 55 Cal. Rptr. 3d 911*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted by defendant in support of a motion for summary judgment in a legal malpractice action, on the basis that defendant did not owe any duty to plaintiff, because there was no attorney-client relationship between plaintiff and defendant.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations which support the motion [*see Code Civ. Proc. § 437c*], and which include a showing of the absence of an attorney-client relationship between defendant, or defendant's law firm, and plaintiff.

[b] Related Uses

With appropriate modifications, this form may be used to support a general demurrer to a malpractice complaint, or a motion for judgment on the pleadings, when it appears on the face of the complaint that no attorney-client relationship existed and therefore the defendant owes no duty to the plaintiff.

[c] Related Memoranda

For memoranda relating to summary judgments generally, see Ch. 221, *Summary Judgments* .

[d] Opposing Memoranda

The points in *§§ 24A.39* and *24A.40* may be used in an appropriate case to oppose a motion for summary judgment supported by this memorandum.

[3] Discussion of Authorities

[a] Elements Required for Cause of Action

Budd v. Nixen *(1971) 6 Cal. 3d 195, 98 Cal. Rptr. 849, 491 P.2d 433* , was a malpractice action in which a client alleged that his attorney failed to assert a crucial defense on his behalf in a contract action. Several years after the alleged negligence, the client filed the malpractice action. The trial court sustained the attorney's motion for summary judgment on the ground that the statute of limitations barred the client's action, and the client appealed. The major issue in the case was when the statute of limitations commences in a negligence action. The Supreme Court reversed the summary judgment because the question of whether the client had suffered damage had not been resolved (*6 Cal. 3d 195, 203-204)* . In the course of its opinion, the Court also discussed the requirement of actual damage and noted that the elements required to show malpractice include duty to use the skill, prudence, and diligence commonly exercised by members of the profession, breach of that duty, proximate causation, and actual loss or damage to the plaintiff (*6 Cal. 3d 195, 200)* .

In ***Baldock v. Green*** *(1980) 109 Cal. App. 3d 234, 167 Cal. Rptr. 157* , plaintiffs were beneficiaries of a remainder

interest under their grandmother's will. The executor of the deceased's estate held a life estate, which at his death was to go half to decedent's daughter, and half to plaintiffs. The defendant was the executor's attorney, and had handled the estate's distribution in probate court. Subsequent to the final account in probate court, and his discharge as executor, the life tenant deposited the estate assets in a savings account, which named only the daughter as having a remainder interest. On his death, the funds were released to the daughter only. The grandchildren brought a suit against the daughter, and a malpractice action against the attorney. The complaint against the attorney alleged first that he had breached his duty to advise and direct the executor so that the intended beneficiaries would receive their interest, and second that he had negligently represented to the probate court that the executor had properly carried out his duties.

The trial court sustained the defendant's demurrer to the third amended complaint, and on plaintiffs' failure to amend, dismissed the action. Plaintiffs appealed the judgment of dismissal, and the court of appeal affirmed. The court of appeal stated first that the required elements of a cause of action for professional negligence are duty, breach, proximate cause, and actual loss or damage to plaintiff as a result (*109 Cal. App. 3d 234, 238)* . The court then held that the defendant represented the executor, not the estate, the life tenant, or holders of the remainder interest, and that he thus had no duty to assure the actual delivery of the remainder interest after the executor was discharged (*109 Cal. App. 3d 234, 240-241)* . In this situation, because the attorney owed no duty to plaintiffs, the complaint failed to state a cause of action, and the dismissal was proper (*109 Cal. App. 3d 234, 239-240, 241)* .

[b] Absence of Duty Requires Judgment for Defendant

Zalta v. Billips *(1978) 81 Cal. App. 3d 183, 144 Cal. Rptr. 888* , was an appeal from the trial court's dismissal, after sustaining demurrers, of the appellants' malpractice action against their attorneys. The complaint alleged that during the litigation of a medical malpractice action against appellants and others, a settlement conference was held in open court at which a settlement was reached. Under the settlement terms, the appellants were not required to contribute to the settlement fund, although because the defendant attorneys did not announce that fact in open court, newspaper accounts listed appellants as among the defendants paying the settlement. The complaint also alleged that the attorneys' omission amounted to negligence, and that as a result of that negligence, the appellants were damaged by adverse publicity.

The court of appeal affirmed, and held that although an attorney has a duty to represent his or her client to the best of his or her ability, there is no duty to insure the client's public reputation (*81 Cal. App. 3d 183, 189)* . The court also stated that its decision to affirm dismissal was based on defendants' lack of duty, and was buttressed by a failure to establish proximate causation (*81 Cal. App. 3d 183, 190-191)* . The court held that when there is no reasonable doubt as to the absence of either duty or proximate cause, the court must resolve the issues as questions of law, and in sustaining the demurrers, the trial court had correctly resolved those issues as a matter of law (*81 Cal. App. 3d 183, 191)* .

In ***Ventura County Humane Soc'y v. Holloway*** *(1974) 40 Cal. App. 3d 897, 115 Cal. Rptr. 464* , the plaintiff appealed from the trial court's dismissal, on defendant's demurrer, of a legal malpractice action. The plaintiff, a humane society, brought an action against a law firm whose members had prepared a will designating one beneficiary as either a local or national SPCA. The executors of the estate eventually distributed the funds to an organization other than the plaintiff. The complaint alleged that drafting the will in such ambiguous terms constituted negligence, and by incurring expenses in an unsuccessful attempt to prove itself a rightful beneficiary, plaintiff had been damaged as a result.

The court of appeal affirmed the dismissal, and stated that an attorney drafting a will owes a duty to testamentary beneficiaries only if the testamentary intent is frustrated, and the clearly designated beneficiaries lose their inheritance as a result (*40 Cal. App. 3d 897, 903)* . The opinion held that the absence of any of the required elements negates a plaintiff's cause of action, and added that this especially applies to the element of duty (*40 Cal. App. 3d 897, 902)* . The court stated that duty is the most vital element of a cause of action for malpractice (*40 Cal. App. 3d 897, 906-907)* , and when the plaintiff does not show a direct duty owed to him or her, the action fails (*40 Cal. App. 3d 897, 902)* .

[c] Attorney-Client Relationship Required to Show Duty

In ***Zenith Ins. Co. v. Cozen O'Connor*** *(2007) 148 Cal. App. 4th 998, 1010-1011, 55 Cal. Rptr. 3d 911* , plaintiff insurance company entered into a reinsurance contract with another insurer under which plaintiff agreed to reinsure 100 percent of the other insurer's exposure under certain liability policies. After claims were asserted against the insured, the other insurer retained defendant law firm to defend the claims. Subsequently, plaintiff reinsurer sued the law firm for professional negligence, alleging that an attorney-client relationship existed between plaintiff and defendant based on (1) an implied in fact contract and (2) the theory that plaintiff was an intended beneficiary of the legal services to be performed by the law firm for the other insurer. The trial court granted the law firm's demurrer to plaintiff's claim, and plaintiff's cause of action against defendant was dismissed with prejudice.

The court of appeal affirmed. It held that an essential predicate for establishing an attorney's duty of care under an "intended beneficiary" theory is that both the attorney and the client intend the third party to be a beneficiary of legal services the attorney is to render [*148 Cal. App. 4th 998, 1008]* . In this case, the first insurer, not plaintiff reinsurer, hired the law firm. The firm was retained to advise the first insurer regarding its coverage obligations and to avoid any potential bad faith liability of the first insurer to its insured. Any advice the law firm gave to the first insurer to settle or resolve a claim would be given in that context and might not necessarily be in the reinsurer's best interests. The court noted that the interests of the first insurer and plaintiff reinsurer were not identical, and in fact were potentially adverse. Thus, the law firm could not ethically represent both the first insurer and plaintiff reinsurer. In such circumstances, the court held, it would be impossible to conclude that either the first insurer or the law firm ever intended to confer beneficiary status on the reinsurer for legal services the law firm performed for the first insurer [*148 Cal. App. 4th 998, 1008]* .

In addition, the court held, the reinsurer's allegation that it "paid" the law firm's legal fees was irrelevant. The reinsurance agreement obligated the reinsurer to reimburse the first insurer for indemnity and claims expenses, which necessarily included legal fees that the first insurer paid the law firm. Thus, the reinsurer did not actually pay the law firm, but simply reimbursed the first insurer for the law firm's fees. Moreover, the court held that the mere payment of attorneys' fees does not necessarily establish an attorney-client relationship [*148 Cal. App. 4th 998, 1009]* .

Finally, the court held that it was inconsequential that the law firm had multiple communications with the reinsurer. The reinsurer was entitled by statute to information regarding claim status, and the first insurer was required by statute to communicate to the reinsurer all the information it had regarding reinsured liability. By communicating with the reinsurer, the law firm, as the first insurer's retained counsel, was only discharging it's client's statutory obligation [*148 Cal. App. 4th 998, 1009]* .

In ***Brandlin v. Belcher*** *(1977) 67 Cal. App. 3d 997, 134 Cal. Rptr. 1* , an attorney had handled a client's divorce and will, and had assisted her in setting up an inter vivos trust, with a bank as trustee. About two years later, the client discussed with an officer of the bank her desire to amend the trust, and to add some of her children as beneficiaries. The bank officer suggested that the client contact the attorney, but she failed to do so. The officer then contacted the attorney, who said the client should contact him personally if she wanted to alter the trust. The client died before the trust was changed, and without having contacted the attorney. The client's children, as intended beneficiaries of the trust, brought a malpractice action against the attorney. The trial court granted the attorney's motion for summary judgment, and the plaintiffs appealed.

The court of appeal affirmed the summary judgment, and stated that although a formal agreement or retainer is not required to show the attorney-client relationship, that relationship must exist with respect to a particular transaction in order to establish the attorney's duty to act in that transaction (*67 Cal. App. 3d 997, 1001)* . Here, the attorney had not been under a retainer to the client, had not contacted her since completing his services in her divorce action, and had specifically articulated through the trustee that he would not do further work on the trust without her contacting him. The court held that the attorney therefore had no continuing employment relationship with the client sufficient to

establish the attorney-client relationship, and thus had no duty, with respect to the transaction in question (*67 Cal. App. 3d 997, 1000, 1001)* . Further, the court stated that the attorney had actively discharged any possible duty the prior relationship imposed, by his request that the client contact him personally (*67 Cal. App. 3d 997, 1001)* .

[d] Discontinued Relationship Precludes Duty

Brandlin v. Belcher *(1977) 67 Cal. App. 3d 997, 134 Cal. Rptr. 1* , is discussed in *§ 24A.20[3][c]*. Summary judgment was granted in favor of the defendant by the trial court, and affirmed by the court of appeal. The court held that when an attorney has been hired by the client to perform specific services, such as handling a divorce, preparing a will, and setting up an inter vivos trust, when he or she is not under retainer to the client, and has not remained in contact since completing the specific services, the relationship has been discontinued for the purposes of imposing duty (*67 Cal. App. 3d 997, 1000, 1001)* . Unless the client reestablishes the relationship, the attorney has no further duty to act, even with regard to matters relating to the prior employment (*67 Cal. App. 3d 997, 1001)* . For the attorney to do so would arguably violate former Cal. Rules Prof. Conduct, Rule 2-101 [*now see Cal. Rules Prof. Conduct, Rule 1-400*] which precludes an attorney from soliciting employment (*67 Cal. App. 3d 997, 1001-1002)* .

[e] Attorney-Client Relationship Terminated by Operation of Labor Code Section 3755

In ***Canton Poultry & Deli, Inc. v. Stockwell, Harris, Widom & Woolverton*** *(2003) 109 Cal. App. 4th 1219, 135 Cal. Rptr. 2d 695* , the plaintiffs' employee filed a workers' compensation claim, the plaintiffs' insurer hired a law firm to handle the compensation claim, and subsequently the insurer agreed to accept liability for the compensation claim. The employee then notified the insurer's law firm that the employee intended to pursue a civil suit against the plaintiffs, desired to negotiate a global settlement of both the compensation claim and the lawsuit, and was willing to settle both claims for an additional $4,000. The insurer's law firm told the employee that the separate lawsuit against the employer was not their concern, and they never informed the employer of the employee's stated desire to reach a global settlement. The plaintiffs subsequently settled the separate lawsuit against them for $6,500 and expended over $10,000 on costs and attorney's fees. The plaintiffs then sued the insurer and the insurer's law firm for malpractice in failing to inform the plaintiffs of the employee's stated desire to reach a global settlement for $4,000. The trial court sustained the law firm's demurrer on the grounds that the firm's attorneys owed no duty to the plaintiffs by operation of *Lab. Code § 3755*, and the plaintiffs appealed.

The court of appeal affirmed. The court noted that if a workers' compensation insurer hires an attorney to represent the insurer and the insured employer in a workers' compensation claim, the attorney's representation of the employer terminates by operation of *Lab. Code § 3755* when the insurer notifies the injured employee and the workers' compensation appeals board that the insurer accepts liability for the claim. At that moment, the employer is relieved of potential liability and dismissed from the claim. Thereafter, the insurer's attorney owes no duties to the employer. Because the employee's desire to reach a global settlement was communicated to the insurer's attorneys after the insurer had given notification that the insurer had accepted liability for the claim, the attorney-client relationship between those attorneys and the plaintiffs had terminated, and the attorneys had no duty to notify the plaintiffs of that offer. Therefore, the attorneys were not liable to the plaintiffs (*109 Cal. App. 4th 1219, 1226-1228)* . The court also noted that if circumstances indicate that an insured might be misled as to the extent of an attorney's representation, the attorney has a duty to make clear to the insured that the attorney represents only the insurer. However, the court concluded that the complaint in this particular case did not allege any such circumstances (*109 Cal. App. 4th 1219, 1228)* .

[f] Malpractice Claims Not Assignable

In ***Goodley v. Wank & Wank, Inc.*** *(1976) 62 Cal. App. 3d 389, 133 Cal. Rptr. 83* , attorneys for the wife in a dissolution proceeding negligently failed to take precautions with regard to her insurance policies, which the husband later cancelled without her knowledge. The wife eventually made a written assignment of her malpractice claim to the plaintiff, who brought the malpractice action. The attorneys' motion for summary judgment was granted by the trial

court on the ground that an action in tort is not assignable, and plaintiff appealed.

The court of appeal affirmed the summary judgment for defendants. It first noted that tort actions involving injury or damage of a personal nature are not assignable (*62 Cal. App. 3d 389, 393-394)* . The holding followed that although a cause of action for malpractice arises out of a contract of employment, it remains a tort action for negligence (*62 Cal. App. 3d 389, 395)* . Further, the relationship between attorney and client is of necessity a confidential and very personal one, and the duties arising from it should be restricted to the parties involved (*62 Cal. App. 3d 389, 395-396)* . The court finally noted that public policy dictates that if malpractice claims were assignable, an undue burden would be placed on the legal profession, the attorney-client relationship would be undermined, and attorneys would have to be selective in choosing clients, thus restricting the availability of legal services (*62 Cal. App. 3d 389, 397-398)* .

[g] District Attorney Owes No Duty of Care to Caretaker Parent With Respect to Enforcement of Support Obligation

In ***Jager v. County of Alameda*** *(1992) 8 Cal. App. 4th 294, 10 Cal. Rptr. 2d 293* , plaintiff brought an action in which she alleged that the county district attorney was professionally negligent in failing to collect the full amount of child support and interest that was due her under a prior court judgment, and that the district attorney improperly released a child support judgment lien. The trial court sustained defendants' demurrer without leave to amend. Plaintiff appealed.

The court of appeal affirmed. The court noted that one of the requisite elements of a legal malpractice claim is the existence of an attorney-client relationship or other basis for a duty of care owed by the attorney. The statutory framework that authorized the district attorney's actions in the case, *Welf. & Inst. Code §§ 11350.1, 11475.1* (repealed January 1, 2000), did not create an attorney-client relationship between a parent seeking child support enforcement and the district attorney. In child support recovery proceedings the "client" is the county, notwithstanding the collateral benefit to the custodial parent (*8 Cal. App. 4th 294, 297)* .

[h] No Attorney-Client Relationship Between Reinsurer and Attorney Hired by Insurer

In *Zenith Ins. Co. v. O'Connor (2007) 148 Cal. App. 4th 998, 55 Cal. Rptr. 3d 911* , plaintiff was a reinsurer under contract with another insurer to provide reimbursement coverage for certain of the insurer's insurance coverage liabilities. The insurer hired an attorney to defend claims brought against an insured and the attorney eventually settled for an amount in excess of $3 million. The reinsurer was liable for full reimbursement to the insurer on these claims, although the reinsurer paid only $500,000. The reinsurer filed suit against the insurer, alleging that the insurer had mishandled the adjustment of several of the claims, and against the insurer's attorney, alleging that the attorney had failed to pursue contribution and indemnity claims against other parties in a timely manner. The trial court sustained the attorney's demurrer, holding that the reinsurer had failed to demonstrate an attorney-client relationship with the attorney and the attorney owed no duty of care to the reinsurer. The reinsurer appealed.

The court of appeal affirmed. The court of appeal held that if an insurer contracts with a reinsurer to obtain reimbursement coverage for some of the insurer's coverage liabilities, and the insurer subsequently hires an attorney to represent it when a claim is brought against its insured, the reinsurer on that claim does not become a client of the insurer's attorney in the absence of an express agreement between the retained attorney and the reinsurer (*148 Cal. App. 4th 998, 1006)* . The court noted that contracts for reinsurance are between the insurer and reinsurer, not between the reinsurer and the insured policyholder, and when a valid claim is made implicating the reinsurance, the reinsurer pays the insurer, not the insured. The insurer in this case also expressly retained the exclusive power to investigate, defend, and settle any claim on such terms as it, in its discretion, deemed expedient. The reinsurer had no right or authority under its contract to participate in the underlying claim investigation or settlement (*148 Cal. App. 4th 998, 1007)* . As the insurer had the authority to settle the underlying claims in a manner that was not in the best interests of the reinsurer, the court also concluded that the reinsurer was not a third-party beneficiary of the attorney's services given the potential, if not actual, conflict of interest between the insurer and the reinsurer (*148 Cal. App. 4th 998, 1008-1009*

). Finally, despite any subjective belief of the reinsurer to the contrary, the court rejected the reinsurer's suggestion that there was an implied contract between the reinsurer and the attorney because of communications between the reinsurer and the attorney. The reinsurer had a statutory right to receive certain claims information, and the provision of that information could not establish an undertaking by the attorney to represent the reinsurer (*148 Cal. App. 4th 998, 1010-1011*).

[4] Additional Authorities

[a] Absence of Duty Requires Judgment for Defendant

In *Foster v. County of San Luis Obispo (1993) 14 Cal. App. 4th 668, 17 Cal. Rptr. 2d 730* , the appellant was represented in a criminal action by a public defender appointed by the county. The public defender appointed was not an employee of the county; rather, he was an independent contractor. The appellant sued the county that had appointed the public defender alleging that the county had committed malpractice. The trial court entered a summary judgment on behalf of the county, finding that there was no statutory basis for the county's alleged duty to supervise the acts of its public defender, such supervision would constitute a miscarriage of justice, and the county had no right to practice law.

The court of appeal affirmed, stating that the public defender's representation of the appellant was the result of acts of his own discretion, for which the county was not liable pursuant to *Gov. Code § 815.4* (*14 Cal. App. 4th 668, 672)* . Consequently, when the indigent defendant is provided with free and licensed legal assistance throughout the criminal proceedings, when there is no claim or evidence that the defendant's attorney did not have the required expertise to handle the case, and when the attorney was not employed by the local government entity responsible for providing the defendant with legal representation, the government entity owes no duty to the defendant to control the performance of the publicly provided lawyer (*14 Cal. App. 4th 668, 674-675)* .

[b] Attorney-Client Relationship Required to Show Duty

In *American Cas. Co. v. O'Flaherty (1997) 57 Cal. App. 4th 1070, 67 Cal. Rptr. 2d 539* , a hospital and a number of its professional staff, including a nurse, were sued by the heirs of a patient for wrongful death. The insurance carrier for the hospital undertook the defense of the institution and its staff, and hired defense counsel for that purpose. The nurse had her own liability policy. Her insurance carrier refused to contribute toward a possible settlement. The verdict exceeded the limits of the hospital's primary policy, and the underlying case settled for the amount of the verdict before judgment was entered. The nurse's insurer sued defense counsel for legal malpractice based on counsel's refusal of an offer to dismiss the nurse from the underlying complaint and failure to adequately advise the nurse of the settlement and of her right to independent counsel. The trial court granted defense counsel's motion for summary judgment on the ground that it owed no duty to the nurse's insurer because it had no attorney-client relationship with the company, and the insurer appealed. The court of appeal affirmed, holding that defense counsel had no attorney-client relationship with and owed no duty of care to the nurse's own liability insurer when the liability insurer neither retained defense counsel nor had anything to do with the services the firm rendered (*57 Cal. App. 4th 1070, 1077)* .

In *Assurance Co. of Am. v. Haven (1995) 32 Cal. App. 4th 78, 38 Cal. Rptr. 2d 25* , a liability insurer sued the attorney for the insured for negligence in defending an action brought against the insured by a third party. Although the attorney began the third-party defense as the attorney for both the insured and the insurer, a conflict of interest arose and the attorney became the representative of the insured alone. The attorney was then negligent in failing to assert a statute of limitations defense in a timely manner and in failing to demur to or motion for summary judgment on a cause of action for peculiar risk. Due to these negligent actions, and because the attorney failed to keep the insurer informed about the third-party action as required by *Civ. Code § 2860*, the insurer was forced to settle with the third party for the full amount of the liability policy. The insurer then sued the insured's attorney for his negligence, but the attorney demurred on the grounds that the attorney owed no duty to the insurer. The demurrer was sustained, and the insurer appealed.

The court of appeal reversed. The court held that the insurer had a cause of action for any violations of duties imposed on the attorney by *Civ. Code § 2860*, the statute that governs the provision of an attorney for an insured in actions by third parties, when violation of those duties prevented the insurer from timely and completely defending the action brought against the insured. These statutory duties included the duties to consult with the insurer in a timely manner, to disclose all known and nonprivileged information to the insurer, and to cooperate in exchanging information with the counsel for the insurer. However, the court also held that the insurer had no cause of action for duties that fell outside those imposed by the statute. Thus, the attorney could not be held liable to the insurer for failing to investigate, prepare, assert, establish, or perform other similar functions regarding the defense (*32 Cal. App. 4th 78, 83)* .

In *Kane, Kane & Kritzer, Inc. v. Altagen (1980) 107 Cal. App. 3d 36, 165 Cal. Rptr. 534* , an attorney had been sued by a corporate client for negligence in handling the client's collection claim. Following judgment in its favor, the client appealed, on the grounds that the trial court had erred in finding that the attorney had only a limited duty, and in reducing the client's damages by the amount of contingent fee the attorney would have received had the collection been successful. The latter question became the major issue on appeal, but the court of appeal first affirmed the lower court's finding of limited duty.

The court noted that in the relationship between attorney and client, a pattern of dealing had developed in which the attorney made phone calls and sent letters to the client's debtors, but rarely filed lawsuits, only doing so after specific instructions from the client. Often the client contacted the debtor and settled the matter without further participation of the attorney. The court held that the attorney's duty to act with respect to a particular transaction does not arise unless the attorney-client relationship is established with respect to that transaction (*107 Cal. App. 3d 36, 40)* . Because of the nature of the dealings between attorney and client in this situation, only a limited attorney-client relationship existed with respect to each transaction. Therefore, the attorney had no duty to file a complaint prior to the client's instruction, or to advise the client with regard to filing the complaint at a particular time (*107 Cal. App. 3d 36, 42)* .

[c] Malpractice Claims Not Assignable

In *Curtis v. Kellogg & Andelson (1999) 73 Cal. App. 4th 492, 86 Cal. Rptr. 2d 536* , a physician and his medical corporation filed an action against an accounting firm and a law firm stemming from erroneous tax advice that had resulted in an assessment against the corporation of back taxes plus penalties and interest. Prior to the filing of the action, the medical corporation had filed for bankruptcy, although through an agreement with the bankruptcy trustee that was approved by the bankruptcy court, the physician purported to purchase all of the corporation's potential causes of action. As to the action against the law firm, the trial court ruled that the malpractice action was not assignable and sustained the firm's demurrer. The court of appeal affirmed. The court recognized the general rule in California that legal malpractice actions are not assignable and concluded that this rule applied equally to a cause of action belonging to a corporation in bankruptcy. Because the cause of action had not been brought prior to bankruptcy, the malpractice action could only be asserted by the trustee of the bankrupt estate, and any attempt by the trustee to transfer to the physician the right to bring the cause of action was ineffective. Furthermore, the court noted that the agreement made it clear that the physician was not prosecuting the malpractice action for the benefit of the bankrupt estate, because any proceeds of the action would go directly to the physician (*73 Cal. App. 4th 492, 505-506)* .

In *Baum v. Duckor, Spradling & Metzger (1999) 72 Cal. App. 4th 54, 84 Cal. Rptr. 2d 703* , a creditor of two corporations brought a legal malpractice action against the corporations' former legal counsel for their role in allegedly fraudulently transferring the assets of the corporations to the corporations' principal prior to filing for bankruptcy. The creditor argued that pursuant to an agreement approved by the bankruptcy court between the creditor and the trustees for the corporations in bankruptcy, the right to prosecute the malpractice action had been transferred to the creditor. However, the trial court sustained the defendants' demurrer without leave to amend and the court of appeal affirmed. The court of appeal agreed that in conformity with the rule in California, the trustee of a bankruptcy estate for a corporation may not assign a legal malpractice claim belonging to the estate to a creditor of the corporation or to any other person (*72 Cal. App. 4th 54, 69)* . The court recognized that under federal law, a bankruptcy estate may have

property rights to legal malpractice claims arising under state law and that a debtor's legal malpractice claims are involuntarily transferred to the bankruptcy estate. However, the court concluded that the nature and extent of these property rights are defined by state law, not bankruptcy law, and thus any attempted assignment to another party was ineffective in California (*72 Cal. App. 4th 54, 69-72)* .

In *Fireman's Fund Ins. v. McDonald, Hecht & Sol (1994) 30 Cal. App. 4th 1373, 36 Cal. Rptr. 2d 424* , three liability insurers paid over $10,000,000 in settlement of a lawsuit brought by homeowners against the insured developer. The homeowners had alleged misrepresentations in the sale of certain residential units. After settling, the developer brought a malpractice action against the law firm that handled the sale of the development project, alleging that the law firm was responsible for the misrepresentations. The developer had agreed as part of the settlement to reimburse the insurers up to the limits of the policies from any proceeds gained from the suit against the law firm. The insurers then joined the malpractice suit as plaintiffs under a theory of subrogation. The law firm demurred, arguing successfully that the prohibition on the assignment of legal malpractice claims precluded the insurance companies from joining as subrogation plaintiffs. The insurance companies appealed their dismissal, but the court of appeal upheld the trial court's decision (*30 Cal. App. 4th 1373, 1378)* . The court of appeal noted that California law was well settled that the uniquely personal and confidential nature of the attorney-client relationship prevented the assignment of malpractice claims and concluded that allowing the insurers to join as subrogees under those facts would effectively constitute an assignment of the claim (*30 Cal. App. 4th 1373, 1378-1379)* .

In *Jackson v. Rogers & Wells (1989) 210 Cal. App. 3d 336, 258 Cal. Rptr. 454* , the court of appeal upheld a judgment of dismissal in an action for "fraud" that was based on an assigned attorney malpractice claim. The purported fraud involved the defendants' performance of unnecessarily extensive and improper legal services for the assignors. The court found that the gravamen of the fraud claim was legal malpractice, and that the claim was not assignable under applicable authority (*210 Cal. App. 3d 336, 348)* . The court also pointed out that causes of action for fraud are generally not assignable unless they involve deprivation of a specific item of the plaintiff's property. Here, the disputed billings were not sufficiently analogous to a specific, identifiable piece of property to support a finding of assignability (*210 Cal. App. 3d 336, 345-347)* .

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 24A ATTORNEYS AT LAW: MALPRACTICE
PART II. FORMS

2A-24A California Points & Authorities § 24A.21

§ 24A.21 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--By Defendant--Plaintiff as Third Party to Whom Defendant Owed No Duty

[1] FORM

[*Caption. See § 24A.20.*]

SUMMARY JUDGMENT SHOULD BE GRANTED IN FAVOR OF DEFENDANT BECAUSE DEFENDANT OWED NO DUTY TO PLAINTIFF, SINCE PLAINTIFF IS A THIRD PARTY NOT INTENDED TO BENEFIT FROM DEFENDANT'S SERVICES TO HIS/HER CLIENT.

A. Summary Judgment. [*See § 24A.20, Paragraph A.*]

B. Elements Required for Cause of Action. [*See § 24A.20, Paragraph B.*]

C. Absence of Duty Requires Judgment for Defendant. [*See § 24A.20, Paragraph C.*]

D. No Duty to Third Parties. Existence of duty is a question of law, and an attorney owes no duty of care to a third party, unless the client intends the third party to be a beneficiary of the attorney's services. Whether the third party is such an intended beneficiary is determined by a balancing of the following factors: the extent to which the transaction was actually intended to benefit that party, foreseeability of harm to that party, certainty of injury to that party, the closeness of connection between defendant's negligence and the injury, moral blame attached to defendant's conduct, and the policy of preventing the same type of future harm (*Goodman v. Kennedy (1976) 18 Cal. 3d 335, 342-344, 134 Cal. Rptr. 375, 556 P.2d 737*).

[*Optional*] **E. Absent Client Testator's Clear Intent, No Duty to Nonbeneficiary of Will.** For an attorney drafting a will to have any duty to a third party who is not the client, the client must have clearly intended the third party to benefit, beyond the actual benefit received, from the will, and that intent must be frustrated as a direct result of the attorney's negligence (*Ventura County Humane Soc'y v. Holloway (1974) 40 Cal. App. 3d 897, 903, 115 Cal. Rptr. 464* ; *Hiemstra v. Huston (1970) 12 Cal. App. 3d 1043, 1048, 91 Cal. Rptr. 269*).

[*Optional*] **F. No Duty to Client's Adversary.** An attorney owes no legal duty to a third party who is his or her client's adversary, and if a malpractice action is brought against the attorney by such a party, summary judgment for defendant will be granted (*Weaver v. Superior Court (1979) 95 Cal. App. 3d 166, 182, 156 Cal. Rptr. 745* ; *Parnell v. Smart (1977) 66 Cal. App. 3d 833, 837-838, 136 Cal. Rptr. 246*).

[*Optional*] **G. No Duty to Client's Former or Subsequent Attorneys.** An attorney has no duty to his or her client's previous or subsequent attorneys, both as a matter of policy, and because dealings with the client are not intended to benefit other attorneys (*Mason v. Levy & Van Bourg (1978) 77 Cal. App. 3d 60, 67-68, 143 Cal. Rptr. 389*).

[*Optional*] **H. No Duty Owed to Co-Counsel.** To avoid imposing duties on an attorney that may conflict with the attorney's undivided duty of loyalty to the client, an attorney does not owe a duty to co-counsel that will support an action by that co-counsel if the result of the representation has caused the complaining co-counsel to recover a smaller attorney's fee than would otherwise have been received (*Beck v. Wecht (2002) 28 Cal. 4th 289, 297-298, 121 Cal. Rptr. 2d 384, 48 P.3d 417* ; *Joseph A. Saunders, P.C. v. Weissburg & Aronson (1999) 74 Cal. App. 4th 869, 872-874, 87 Cal. Rptr. 2d 405*).

[*Optional*] **I. No Duty to Potential Beneficiary Named in Unsigned Will.** An attorney does not owe a duty to a beneficiary named in an unexecuted will to inquire of the client whether additional assistance is needed to complete a change in testamentary disposition (*Radovich v. Locke-Paddon (1995) 35 Cal. App. 4th 946, 950, 41 Cal. Rptr. 2d 573*).

[*Optional*] **J. No Duty to Will Beneficiaries to Determine Testamentary Capacity of Testator.** An attorney preparing or amending a will for a testator owes no duty to the beneficiary of the will, or to the beneficiary of a previous will, to ascertain and document the testamentary capacity of the testator (*Boranian v. Clark (2004) 123 Cal. App. 4th 1012, 1017-1021, 20 Cal. Rptr. 3d 405* ; *Moore v. Anderson Zeigler Disharoon Gallagher & Gray (2003) 109 Cal. App. 4th 1287, 1298, 135 Cal. Rptr. 2d 888*).

[*Optional*] **K. Signed Document Memorializing Testator's Intent Required to Hold Attorney Liable for Failure to Execute That Intent.** Attorney liability to third-party beneficiaries of estate documents is limited to instances in which the testator's intent was explicitly memorialized in a signed will or trust document, but negligence on the part of the attorney in drafting or executing the document caused the testator's intent as stated in the document to be frustrated (*Chang v. Lederman (2009) 172 Cal. App. 4th 67, 81-82, 90 Cal. Rptr. 3d 758*).

[*Optional*] **L. Attorney's Signature on Contract Not Basis for Tort Liability to Attorney for Other Party.** An attorney who, on behalf of a client, signs a contract that contains a signature recital reading "approved as to form and content"' does not by doing so make a representation to the attorney for the other contracting party that may form the basis for tort liability to that other attorney (*Freedman v. Brutzkus (2010) 182 Cal. App. 4th 1065, 1070, 106 Cal. Rptr. 3d 371*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted by defendant in support of a motion for summary judgment in a legal malpractice action when the motion is made on the basis that plaintiff is a third party who was not intended to benefit from defendant's services to his or her client, and defendant therefore owes no duty to plaintiff.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations that support the motion [*see Code Civ. Proc. § 437c*], and include a declaration establishing the relationship of plaintiff to defendant and client, and the lack of the client's intention to benefit plaintiff, or to benefit plaintiff to a greater extent than actually occurred.

[b] Related Uses

With appropriate modifications, this form may be used to support defendant's general demurrer to the complaint or a motion for judgment on the pleadings where it appears on the face of the complaint that plaintiff is a third party to whom defendant owes no duty.

[c] Related Memoranda

For memoranda relating to summary judgments generally, see Ch. 221, *Summary Judgments* .

[d] Opposing Memoranda

The points in *§ 24A.42* may be used in an appropriate case to oppose a motion for summary judgment supported by the points this form.

[3] Discussion of Authorities

[a] No Duty to Third Parties

Goodman v. Kennedy *(1976) 18 Cal. 3d 335, 134 Cal. Rptr. 375, 556 P.2d 737* , was a malpractice action by purchasers of stock against the attorney and law firm for the sellers. The complaint alleged, among other things, that the attorney had negligently advised his clients regarding the SEC regulations' effect on the stock sale, and that in the course of the purchase negotiations, the buyers had relied on the incorrect information to their detriment. The trial court sustained the defendants' demurrer to the complaint, and dismissed the action against them. The plaintiffs appealed.

The Supreme Court affirmed the dismissal, and held that the attorney owed no duty of care to the plaintiffs (*18 Cal. 3d 335, 343, 344)* . Whether or not a duty to a third person exists is a question of law, and involves a judicial balancing of factors, including the extent to which the transaction was intended to benefit the plaintiff, foreseeability of harm to plaintiff, certainty of actual injury to plaintiff, the closeness of connection between defendant's negligence and the injury, moral blame attached to defendant's conduct, and the policy of preventing future harm of the same type (*18 Cal. 3d 335, 342-343)* . An attorney has no duty to third parties who deal with the client at arm's length and are not intended beneficiaries of the attorney's services (*18 Cal. 3d 335, 344)* . The Court stated that if an attorney giving negligent advice were to be liable to any party with whom the client deals at arm's length, the attorney's concern with possible claims of negligence would interfere with his or her duty to protect the client's interests (*18 Cal. 3d 335, 344)* .

[b] Absent Client Testator's Clear Intent, No Duty to Nonbeneficiary of Will

Ventura County Humane Soc'y v. Holloway *(1974) 40 Cal. App. 3d 897, 115 Cal. Rptr. 464* , is discussed in *§ 24A.20[3][b]*. After losing its claim to qualify as a beneficiary under a will, the plaintiff sued a law firm for negligence

in drafting the will. The will had named as beneficiary the "Society for the Prevention of Cruelty to Animals," either the local or national branch, and the plaintiff was a particular local humane society. The trial court granted defendants' general demurrer, and dismissed the suit. Plaintiff appealed.

The court of appeal affirmed the dismissal, and held that an attorney may be liable to a third party for negligence in drafting a will only if the attorney's negligence frustrated the testamentary intent, and caused the third party as a clearly designated beneficiary to lose his, her, or its legacy as a direct result (*40 Cal. App. 3d 897, 903)* . In this case, the court held that although there were ambiguities in the specific identity of beneficiaries, the purpose and intent of the testator was clear, and could be implemented under the will (*40 Cal. App. 3d 897, 905)* . Further, since the plaintiff was not a named beneficiary, it failed to show the critical elements of foreseeability of harm, degree of certainty of injury, and closeness of connection between defendants' conduct and plaintiff's alleged loss (*40 Cal. App. 3d 897, 906)* . Such elements provide a necessary foundation for the existence of an attorney's duty to a third party who is not a client (*40 Cal. App. 3d 897, 903, 906)* .

In ***Hiemstra v. Huston*** *(1970) 12 Cal. App. 3d 1043, 91 Cal. Rptr. 269* , plaintiff, the son of a deceased testator, brought a malpractice action against his father's attorneys, alleging that they had negligently drafted a will without proper instructions from the testator, and without knowledge of his testamentary intent. Plaintiff alleged that as a direct result of defendant's negligence, the bequests to him were substantially reduced. Defendants brought a demurrer, and the trial court sustained it, dismissing the action. On appeal by plaintiff, the court of appeal affirmed the dismissal. It held that a plaintiff has no cause of action against an attorney for negligence in drafting a will unless the alleged negligence resulted in a legal defect in the will, which frustrates the testator's express intent. When the testator does not express an intention to benefit the plaintiff, beyond the actual benefit received, the plaintiff has no claim against the attorneys who drafted the will (*12 Cal. App. 3d 1043, 1048)* .

[c] No Duty to Client's Adversary

In ***Weaver v. Superior Court*** *(1979) 95 Cal. App. 3d 166, 156 Cal. Rptr. 745* , defendant attorney's client had brought a medical malpractice suit against the legal malpractice plaintiff. Subsequent to judgment for the plaintiff in the medical malpractice action, plaintiff brought an action against defendant and his client for malicious prosecution, and against defendant for legal malpractice in negligently filing the suit against plaintiff, without adequate factual or legal research. The trial court granted defendant's motion for summary judgment as to the cause of action for malpractice. On appeal by plaintiff, the court of appeal affirmed. It held that an attorney owes no duty to parties adverse to his or her client in litigation (*95 Cal. App. 3d 166, 182)* . Such a duty would directly conflict with the attorney's duties to his or her client, and would subvert the public policy of free access to the courts (*95 Cal. App. 3d 166, 179, 182-183)* . In addition, the third party's action for malicious prosecution would be an adequate remedy in such a situation (*95 Cal. App. 3d 166, 183)* .

In ***Parnell v. Smart*** *(1977) 66 Cal. App. 3d 833, 136 Cal. Rptr. 246* , plaintiff had brought an uninsured motorist claim against an insurance company. The insurance company hired defendant attorneys to represent it. Prior to the arbitration hearing, the plaintiff made several settlement offers to defendant attorneys, who allegedly failed to convey the offers to the insurance company. Following judgment for plaintiff, plaintiff brought a malpractice action against defendants for negligence in failing to procure a settlement. The trial court sustained defendants' demurrer, and dismissed the suit against them. Plaintiff appealed. The court of appeal affirmed dismissal. Although plaintiff asserted that in an uninsured motorist proceeding a close relationship exists between the insurance company, its attorneys, and the claimant, the court pointed out that it is still an adversary proceeding. The attorneys were under a duty to protect their client's interests against the plaintiff's interests (*66 Cal. App. 3d 833, 837-838)* , and an attorney owes no legal duty to his or her client's adversary. Cases extending an attorney's duty to a third party do not apply in this situation, since the adversary is clearly not intended to benefit by the subject attorney-client relationship (*66 Cal. App. 3d 833, 838)* .

[d] No Duty to Client's Former or Subsequent Attorneys

In ***Mason v. Levy & Van Bourg*** *(1978) 77 Cal. App. 3d 60, 143 Cal. Rptr. 389* , an attorney brought suit against his former client's present attorneys for breach of contract, fraud and misrepresentation, and negligence. Plaintiff had transferred his client's cases to defendants by an agreement that defendants would pay plaintiff a percentage of the contingent fee they charged the client. Plaintiff alleged defendants failed to follow his advice, and had failed to exercise their best efforts to prevail in the cases. Consequently, no contingent fee was charged. Defendants demurred to the complaint, and the trial court dismissed the case. Plaintiff appealed. The court of appeal affirmed dismissal, and held that with regard to the action for negligence, as a matter of policy, an attorney owes no duty to a third party unless that party was intended to benefit by the attorney's performance in a transaction (*77 Cal. App. 3d 60, 68)* . The Court held that although both the client and another of the client's attorneys might benefit from a client's recovery, their interests are not identical, and an attorney's loyalty to his or her client should not be diluted by imposing another duty which could interfere with it (*77 Cal. App. 3d 60, 66-67)* .

[e] No Duty Owed to Co-Counsel

In ***Beck v. Wecht*** *(2002) 28 Cal. 4th 289, 121 Cal. Rptr. 2d 384, 48 P.3d 417* , the plaintiff was an attorney who filed suit for breach of fiduciary duty against another attorney, alleging that while the two were engaged in the joint representation of a client, the defendant breached a duty owed to the plaintiff to settle the underlying case for $6 million as instructed by the client. The underlying claim went to trial, resulting in a defense verdict. The plaintiff then brought this suit, arguing that the defendant's mishandling of the underlying case cost the plaintiff the fees he would have recovered had the defendant settled as instructed. The defendant filed a cross-complaint, and the trial court granted summary judgment for the defendant on all claims. The plaintiff appealed, and the court of appeal affirmed.

The Supreme Court affirmed. The Court recognized that the court of appeal had reached conflicting results in different cases on the issue of whether one co-counsel could sue another for breach of fiduciary duty if the latter's actions reduce or eliminate the amount of the former's fee. After reviewing the decisions in *Pollack v. Lytle (1981) 120 Cal. App. 3d 931, 175 Cal. Rptr. 81* , which had recognized the right to recover from co-counsel, and *Joseph A. Saunders, P.C. v. Weissburg & Aronson (1999) 74 Cal. App. 4th 869, 87 Cal. Rptr. 2d 405* , which reached a contrary result, the Supreme Court agreed with *Saunders*. The Court held as a matter of law that co-counsel do not owe one another a fiduciary duty to conduct their joint representation in a manner that does not diminish or eliminate the fees each expects to collect in the case, because recognition of such a duty could interfere with each attorney's undivided duty of loyalty to the client. The Court also noted that in some cases, allowing one counsel to sue another could jeopardize the attorney-client privilege between the client in the underlying case and the attorney being sued (*28 Cal. 4th 289, 297-298)* .

In ***Joseph A. Saunders, P.C. v. Weissburg & Aronson*** *(1999) 74 Cal. App. 4th 869, 87 Cal. Rptr. 2d 405* , the plaintiff and the defendant served as co-counsel pursuant to a written agreement in contingency fee litigation representing a large group of hospitals in an action brought against the Medicare program. That litigation was ultimately settled by the hospitals and the plaintiff was paid both a contingency fee and a consulting fee under the terms of the representation agreement. However, the plaintiff later filed suit against the defendant and others, alleging that misrepresentations were made to the plaintiff and to members of the group of hospitals that affected their assessment of the settlement offer and caused the litigation to be settled in a manner that favored certain hospitals and the defendant's fee recovery to the detriment of other hospitals and the plaintiff's contingency fee recovery. Summary judgment was entered for the defendants, and the plaintiff appealed.

The court of appeal affirmed. The court reviewed the holding and rationale of *Mason v. Levy & Van Bourg (1978) 77 Cal. App. 3d 60, 143 Cal. Rptr. 389* [*see § 24A.21[3][d]*], and concluded that the argument for not imposing a duty on a successor attorney that runs to a predecessor attorney applies equally to attorneys who serve as co-counsel. The court of appeal held that to avoid imposing duties on an attorney that may conflict with the attorney's undivided duty of loyalty to the client, the attorney in this case owed no duty to co-counsel, especially in light of the fact that the clients themselves were satisfied with the results of the representation (*74 Cal. App. 4th 869, 872-874)* . In reaching its

decision, the court also specifically disagreed with the analysis in *Pollack v. Lytle (1981) 120 Cal. App. 3d 931, 175 Cal. Rptr. 81* , in which the court majority held that an attorney may bring an action against an associated attorney who is acting as an agent of the principal attorney (*74 Cal. App. 4th 869, 873)* .

[f] No Duty to Potential Beneficiary Named in Unsigned Will

In ***Radovich v. Locke-Paddon*** *(1995) 35 Cal. App. 4th 946, 41 Cal. Rptr. 2d 573* , a husband sued the attorney who had drafted a new will for the husband's deceased wife. The draft was sent to the decedent two months before she died, but was not signed. Prior to their marriage, the husband and decedent had signed a form of prenuptial agreement stating that each party's property would remain his or her separate property, and that no community property would exist during the marriage. In 1973, decedent executed a will which provided a specific gift to her husband, and the residue of her estate to two charitable remainder trusts. In June 1991, decedent met with the defendant to discuss drafting a new will under which her husband would receive 100% of the testamentary trust income for the rest of his life. Defendant learned at this time that decedent had been diagnosed as suffering from breast cancer, and had received chemotherapy treatments. Defendant delivered a rough draft of a proposed new will to decedent in October 1991, for her review and comments. The decedent died in December 1991, without executing the new will and without further communication with the defendant. Decedent's 1973 will was admitted to probate, and her husband then brought an action for legal malpractice against defendant, alleging negligence in "failing to obtain the decedent's due execution" of the 1991 draft will. Defendant moved for summary adjudication on the ground that no duty was owed to the plaintiff, and the trial court granted summary adjudication as requested.

The court of appeal affirmed the judgment for defendant, framing the issue as whether an attorney's duty to use professional skill, prudence, and diligence extends beyond the client to an individual who would have benefited had the client executed a will consistent with a draft prepared by the attorney (*35 Cal. App. 4th 946, 954)* . The husband characterized the June meeting between the decedent and defendant as a significant commitment to a particular testamentary disposition. However, the court noted both practical and policy reasons for requiring more evidence of commitment than was furnished by the direction to prepare a will with specified provisions. The court reasoned that, from a practical standpoint, potential testators may change their minds more than once after the first meeting; and from a policy standpoint, the potential for misunderstanding and the difficulties of proof in this sort of dispute required the clearest manifestation of commitment the circumstance will permit. The court concluded that under the circumstances, including the fact that the decedent had two months to sign the will, and did not do so, the June meeting and the preparation of the October draft were insufficient to manifest a commitment by the decedent to benefit her husband (*35 Cal. App. 4th 946, 964)* . The court acknowledged that it would have been professionally appropriate for the defendant to have inquired of the decedent whether she had any question or wished further assistance in completing the discussed change of testamentary disposition, but held that the attorney did not owe a duty to the plaintiff to have made such an inquiry (*35 Cal. App. 4th 946, 965)* .

[g] No Duty to Will Beneficiaries to Determine Testamentary Capacity of Testator

In ***Boranian v. Clark*** *(2004) 123 Cal. App. 4th 1012, 1017-1021, 20 Cal. Rptr. 3d 405* , the plaintiffs were the decedent's adult children who brought a malpractice suit against Clark, the attorney who executed the decedent's final will. They argued that on the day the decedent signed the will, her body was failing, she was taking morphine for pain, and she was confused, lethargic, hallucinating, and in great pain. Under that will, the decedent left a laundromat to her male companion and made the plaintiffs responsible for the mortgage payments on the laundromat.

After the decedent's death, her children sued in the probate court to determine which will would govern the disposition of her property. The decedent's daughter offered a 1979 will for probate, and the decedent's companion offered the will prepared by Clark. A will contest ensued, and the decedent's companion ultimately agreed to settle the matter and give up all claim to the laundromat in exchange for $5,000.

The plaintiffs then sued Clark for professional negligence and breach of fiduciary duty. At a court trial, Clark moved for a nonsuit on the ground that, as a matter of law, he did not owe a duty to the plaintiffs. The trial court denied the motion. The trial court found in favor of plaintiffs, determined that Clark was negligent, and that his joint representation of the decedent and her companion constituted a conflict of interest. The court also found that the decedent lacked testamentary capacity, but it never addressed the issue of duty. Clark appealed.

The court of appeal held that it is an "elementary proposition" that an attorney, by accepting employment to give legal advice or to render legal services, impliedly agrees to use ordinary judgment, care, skill and diligence in the performance of the tasks he undertakes (*123 Cal. App. 4th 1012, 1017)* . In elaborating on this duty, the court held that an attorney who agrees to prepare a will incurs a duty not only to the testator client, but also to the intended beneficiaries. Lack of privity does not preclude the testamentary beneficiary from maintaining an action against the attorney based on either the contractual theory of third party beneficiary or the tort theory of negligence (*123 Cal. App. 4th 1012, 1017)* .

However, the court held, a lawyer's liability to the intended beneficiary is not automatic or absolute, and there is no liability where the testator's capacity is placed in issue by the allegedly intended beneficiary. Whether liability exists in a specific case is a matter of policy and involves the balancing of various factors, including (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the lawyer's conduct and the injury suffered, (5) the moral blame attached to the lawyer's conduct, (6) the policy of preventing future harm, (7) the likelihood that imposition of liability might interfere with the attorney's ethical duties to the client, and (8) whether the imposition of liability would impose an undue burden on the profession (*123 Cal. App. 4th 1012, 1017)* .

While an attorney has a duty to act with due care with regard to the interests of an intended beneficiary, the court held that the scope of the duty owed to the beneficiary is determined by reference to the attorney-client relationship. The attorney's primary duty is to the testator-client; the attorney's paramount obligation is to serve and carry out the testator's intentions. When, as here, the extension of that duty to a third party could improperly compromise the lawyer's primary duty of undivided loyalty by creating an incentive for him to exert pressure on his client to complete her estate planning documents summarily, or by making him the arbiter of a dying client's true intent, the courts will not impose that insurmountable burden on the lawyer (*123 Cal. App. 4th 1012, 1020)* . Here, the court held, Clark's sole duty was to the decedent, and he did not owe a duty to her beneficiaries to evaluate or ascertain his client's capacity to make a new will.

Further, the court held, ascertaining testamentary capacity is often difficult; the potential for liability to beneficiaries who might deem an investigation inadequate would unjustifiably deny many persons the opportunity to make or amend their wills. Factors which might suggest lack of testamentary capacity do not necessarily denote a lack of capacity. For example, old age, feebleness, forgetfulness, failure to recognize old friends or relatives, absent-mindedness, and mental confusion are not necessarily grounds for holding that a testator lacked testamentary capacity. An attorney might resolve any doubts as to capacity by refusing to draft the will as the testator decided, turning the presumption of testamentary capacity on its head and requiring the testator to prove his or her competency (*123 Cal. App. 4th 1012, 1020)* . On the other hand, beneficiaries of a will executed by an incompetent testator have a remedy in the probate court. They may contest the probate and challenge the will on the ground that the testator lacked testamentary capacity at the time of executing the will. That is precisely what happened in this case. The plaintiffs challenged the will in the probate court, and the issue of testamentary capacity would have been resolved there had they not settled the matter with the decedent's companion (*123 Cal. App. 4th 1012, 1021-1022)* . Thus, the court reversed the judgment against Clark.

In ***Moore v. Anderson Zeigler Disharoon Gallagher & Gray*** *(2003) 109 Cal. App. 4th 1287, 135 Cal. Rptr. 2d 888* , the plaintiffs were the adult children of a decedent who brought suit against the attorney who executed the decedent's final, amended will and trust documents. They argued that the decedent was terminally ill, extremely weak, and under

the influence of pain medications at the time he instructed the attorney to amend his will and trust documents, under which the plaintiffs received less than they would have under the previously executed will and trust documents. After the decedent's death, litigation was brought to determine which will and trust documents would govern the disposition of the decedent's property. A settlement was finally reached under which the plaintiffs received more than they would have under the final executed documents, but less than they would have received prior to the final amendments. In bringing a malpractice suit against the attorney, the plaintiffs alleged that the attorney had a duty to ascertain the testamentary capacity of the decedent before executing the final amendments, that the attorney should have recognized that the decedent's testamentary capacity was questionable at the time the final instructions for amendment were given, and that the attorney was required to document his confirmation of his client's testamentary capacity. The trial court sustained the attorney's demurrer on the grounds that he owed no duty to the plaintiffs to ascertain the decedent's testamentary capacity, and the plaintiffs appealed.

The court of appeal affirmed. The court held that an attorney preparing or amending a will for a testator owes no duty to the beneficiary of the will, or to the beneficiary of a previous will, to ascertain and document the testamentary capacity of the testator. In contrast to the cases that have imposed a duty that runs to a will beneficiary, the court concluded that imposing a duty on the attorney to determine testamentary capacity that runs to third-party beneficiaries would compromise the duty of loyalty that the attorney owes to the client. The attorney who is persuaded of the client's testamentary capacity through personal observation fulfills his or her duty of loyalty to the client by drafting the will according to the client's wishes. If a duty to third parties were recognized, the testator's attorney would face potential liability either to the beneficiaries disinherited if the attorney prepares the will or to the potential beneficiaries of the new will if the attorney refuses to prepare it in accordance with the testator's stated desires. Not only would the attorney face potential conflicting duties between the client and the beneficiaries, but also conflicting duties between different sets of beneficiaries (*109 Cal. App. 4th 1287, 1298-1299)* . The court also recognized the difficulties that an attorney might have in properly evaluating a lack of testamentary capacity, as well as the problems of proving that a testator actually intended something other than what was in the final will, and noted that aggrieved beneficiaries are not left without a remedy, because they may challenge the testator's testamentary capacity in probate court (*109 Cal. App. 4th 1287, 1300)* .

[h] Signed Document Memorializing Testator's Intent Required to Hold Attorney Liable for Failure to Execute That Intent

In ***Chang v. Lederman*** *(2009) 172 Cal. App. 4th 67, 90 Cal. Rptr. 3d 758* , plaintiff sued her deceased husband's estate attorney for legal malpractice and related causes of action. Approximately six months before he married plaintiff, the decedent had hired the attorney to establish a revocable trust under which plaintiff would receive $15,000 and some household furnishings upon decedent's death, with the remainder going to the decedent's son from a previous marriage. In addition, the decedent's ex-wife would succeed the decedent as trustee. The following year, about six weeks before his death, the decedent, who was seriously ill at the time, informed the attorney that he wanted to revise the trust to leave all trust assets to plaintiff, to whom he was then married, with the understanding that she would make a payment of $250,000 to the decedent's son when he turned 25 years of age. The attorney refused to make the requested changes, claiming that he would be subject to suit by the decedent's first wife, and advised the decedent that he should have a psychiatric evaluation before making any changes to the trust. The decedent died without any changes being made to the trust. Based on the existing trust instructions, plaintiff was told to move from her house within 30 days, and thereafter unsuccessfully challenged the trust. Plaintiff then sued her husband's attorney for failing to amend the trust to increase her bequest as requested by her husband before his death. The court sustained a demurrer to plaintiff's second amended complaint, finding that the operative facts did not give rise to a duty owed to plaintiff by the attorney. Plaintiff appealed.

The court of appeal affirmed. After reviewing existing case law establishing the scope of an estate attorney's duty to estate beneficiaries, the court concluded that attorney liability to third-party beneficiaries of estate documents was limited to instances in which the testator's intent was explicitly memorialized in a signed will or trust document, but

negligence on the part of the attorney in drafting or executing the document caused the testator's stated intent to be frustrated (*172 Cal. App. 4th 67, 81-82)* . However, in the case before the court, although the beneficiary was listed in the trust as a beneficiary of a stated bequest, there was no written document memorializing the change that the beneficiary argued the decedent intended to make. Recognizing a duty in such a case would, according to the court, impose an undue burden on the profession by exposing attorneys to potential liability that was almost limitless, as any potential beneficiary could argue that the now-deceased testator intended to change the estate plan but failed to do so due to the attorney's negligence. Moreover, without requiring an explicit manifestation of the testator's intentions, the existence of a duty owed by the attorney, which is a question of law, would always turn on the resolution of disputed facts and could never be decided as a matter of law. In addition, the results in such lawsuits would inevitably be speculative, as the claim necessarily would arrive only after the testator's death, depriving the court of the one person who could definitively explain what he or she intended (*172 Cal. App. 4th 67, 82-86)* .

[i] Attorney's Signature on Contract Not Basis for Tort Liability to Attorney for Other Party

In ***Freedman v. Brutzkus*** *(2010) 182 Cal. App. 4th 1065, 106 Cal. Rptr. 3d 371* , plaintiff attorney represented a clothing company in contractual negotiations with another company for whom the attorney had previously provided legal services. Plaintiff had specifically told the other company that he would withdraw from representing the clothing company in the negotiations if the fact of his prior representation of the other party made them uncomfortable, but the principals for the other company did not object to his representing the clothing company in the matter. The other company hired its own attorney and the parties eventually reached an agreement. The agreement contained a statement that plaintiff was representing only the clothing company, with the consent of the other company, and the other company had waived any potential conflicts of interest based on plaintiff's prior representation. The attorneys for both parties signed the agreement below a recital that stated, "Approved as to Form and Content." A dispute eventually arose between the clients, and the clothing company was forced into bankruptcy. The other company then sued plaintiff, arguing that he had represented them in the negotiations and had represented to them that the clothing company would pay the amount due under the agreement. In the course of this lawsuit, plaintiff deposed the other attorney from the previous negotiations, at which point plaintiff learned that the principals for the other company had told this attorney during the contractual negotiations that they were relying on plaintiff because of their long-standing professional relationship with him. Despite this knowledge, this attorney said nothing to plaintiff during the negotiations, even though the final agreement signed by the attorneys contained representations specifically stating that plaintiff was representing only the clothing company. Plaintiff's malpractice insurers settled the lawsuit with the other company. Plaintiff then brought suit against the other attorney based on intentional misrepresentation and fraudulent concealment. Plaintiff's suit alleged that the other attorney's signature following the recital "Approved as to Form and Content" in the underlying agreement constituted an actionable misrepresentation in light of the fact that the other attorney knew that his clients were in fact relying on plaintiff to represent their interests, despite the statements to the contrary contained in the agreement. The trial court sustained defendant's demurrer. Plaintiff appealed.

The court of appeal affirmed. The court held that an attorney who, on behalf of a client, signs a contract that contains a signature recital reading "approved as to form and content" does not by doing so make a representation to the attorney for the other contracting party that may form the basis for tort liability to that other attorney. The court concluded that the signature recital simply means that the signing attorney is agreeing that he or she is the attorney for his or her client and that the document is in the proper form and embodies the deal made between the parties (*182 Cal. App. 4th 1065, 1070)* .

[4] Additional Authorities

[a] No Duty to Third Parties

In *Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370, 11 Cal. Rptr. 2d 51, 834 P.2d 745* , the Supreme Court concluded that an accountant owes no general duty of care regarding the conduct of an audit to persons other than the

client (*3 Cal. 4th 370, 376)* . The Court also held, however, that an auditor may be liable for negligent misrepresentations in an audit report to those persons who act in reliance on those misrepresentations in a transaction that the auditor intended to influence (*3 Cal. 4th 370, 407-412)* .

In *Hall v. Superior Court (2003) 108 Cal. App. 4th 706, 133 Cal. Rptr. 2d 806* , a wife sued her mother-in-law for the wrongful death of her child, who drowned in a backyard pool at her mother-in-law's home. The husband was present at his mother's home at the time of the accident, but the wife was not. The wife settled her wrongful death action, and the husband, who by then was seeking a divorce from his wife, sued her and her attorney for failing to advise him of his rights in the action or join him in the action as required by statute. In holding that the husband had no action against his ex-wife's attorney, the court of appeal noted that the trial court was justified in inferring that the attorney was aware of a potential conflict of interest in representing both spouses, given that the husband was present at the time of the drowning and the wife was not. The court also emphasized that the husband never met with the attorney to discuss his potential claims, and that neither the husband nor the wife had any expectation that the husband would benefit from the legal services the attorney provided to the wife. Under the circumstances, the wife's attorney owed no duty to seek out the husband, who was by then separated from his wife, to advise him of his rights or to suggest that he contact another attorney to protect his rights (*108 Cal. App. 4th 706, 714)* . Although the husband might have an action against his ex-wife for failing to join him in the wrongful death action as required by the wrongful death statute, he did not have an action against his ex-wife's attorney for the omission (*108 Cal. App. 4th 706, 714-715)* .

In *B.L.M. v. Sabo & Deitsch (1997) 55 Cal. App. 4th 823, 64 Cal. Rptr. 2d 335* , the court of appeal affirmed the trial court's grant of summary judgment for defendant attorneys on the ground that no duty was owed to plaintiff. Plaintiff was a housing developer which had approached a city council with a proposal to develop senior housing. The city council appointed defendant as special counsel and bond counsel for the project. Plaintiff alleged that defendants provided incorrect information to plaintiff regarding the need to pay the prevailing wage on the project. Plaintiff further contended that the appointment of defendants as bond counsel created a professional relationship between plaintiff and defendants. The court rejected this argument, reasoning that it would undermine the very nature of the attorney-client relationship. The court stated that for a duty to be owed to a third party beneficiary of a legal services agreement, the third party must show that it was the intention of the purchaser of the services to impose such a duty (*55 Cal. App. 4th 823, 832*).

In *Burger v. Pond (1990) 224 Cal. App. 3d 597, 273 Cal. Rptr. 709* , the court of appeal held that an attorney who was retained by a husband to obtain a divorce from the husband's first wife owed no duty of care to the husband's second wife, and consequently had no liability to the second wife for professional negligence (*224 Cal. App. 3d 597, 607)* . The court based its holding primarily on the fact that the attorney never agreed to perform legal services intended directly to benefit the second wife (*224 Cal. App. 3d 597, 605, 607)* .

In *Goldberg v. Frye (1990) 217 Cal. App. 3d 1258, 266 Cal. Rptr. 483* , involving, inter alia, a malpractice suit by estate beneficiaries against the attorney for the administrator of the decedent's estate, the court of appeal held that summary judgment was properly granted by the trial court. The court of appeal found it significant that there was no showing that the principal purpose of the attorney's retention was to provide legal services for the legatees' benefit. The court noted that the attorney was hired to represent the administrator, not the estate; any benefit incurred by the legatees was incidental and no duty was directly owed the legatees by the attorney (*217 Cal. App. 3d 1258, 1267-1269)* .

[b] No Duty to Client's Adversary

In *Assurance Co. of Am. v. Haven (1995) 32 Cal. App. 4th 78, 38 Cal. Rptr. 2d 25* , a liability insurer sued the attorney for the insured for negligence in defending an action brought against the insured by a third party. Although the attorney began the third-party defense as the attorney for both the insured and the insurer, a conflict of interest arose and the attorney became the representative of the insured alone. The attorney was then negligent in failing to assert a statute of limitations defense in a timely manner and in failing to demur to or motion for summary judgment on a cause of action

for peculiar risk. Due to these negligent actions, and because the attorney failed to keep the insurer informed about the third-party action as required by *Civ. Code § 2860*, the insurer was forced to settle with the third party for the full amount of the liability policy. The insurer then sued the insured's attorney for his negligence, but the attorney demurred on the grounds that the attorney owed no duty to the insurer. The demurrer was sustained, and the insurer appealed.

The court of appeal reversed. The court held that the insurer had a cause of action for any violations of duties imposed on the attorney by *Civ. Code § 2860*, the statute that governs the provision of an attorney for an insured in actions by third parties, when violation of those duties prevented the insurer from timely and completely defending the action brought against the insured. These statutory duties included the duties to consult with the insurer in a timely manner, to disclose all known and nonprivileged information to the insurer, and to cooperate in exchanging information with the counsel for the insurer (*32 Cal. App. 4th 78, 83)* . However, the court also held that the insurer had no cause of action for duties that fell outside those imposed by the statute. Thus, the attorney could not be held liable to the insurer for failing to investigate, prepare, assert, establish, or perform other similar functions regarding the defense (*32 Cal. App. 4th 78, 83)* .

In *Schick v. Bach (1987) 193 Cal. App. 3d 1321, 238 Cal. Rptr. 902* , the plaintiff, a patient of a psychotherapist, brought an action for professional malpractice against the therapist's attorney, alleging that he had been injured because of the attorney's negligent advice to the therapist. The attorney had advised the therapist that he could legally execute a declaration, to be filed in a family law matter, that contained confidential information about the plaintiff-patient. In affirming summary judgment for the attorney, the court considered the interests of the patient to be adverse to those of the therapist in regard to the matters about which the attorney was consulted. The court held that an attorney has no duty to protect the interests of an adverse party or of a party with whom the client deals at arm's length. The public policy in maintaining and strengthening the attorney-client relationship outweighs any consequences to the public if liability is withheld (*193 Cal. App. 3d 1321, 1329-1332)* .

[c] No Duty to Will Beneficiaries to Determine Testamentary Capacity of Testator

In *Boranian v. Clark (2004) 123 Cal. App. 4th 1012, 20 Cal. Rptr. 3d 405* , the plaintiffs were the adult son and daughter of a decedent who brought suit against their mother's attorney for executing a will and gift confirmation document while their mother was terminally ill, bedridden, and suffering intermittent periods of disorientation and confusion. The attorney had been hired by the decedent's live-in boyfriend at the request of the decedent to execute the documents in order to provide that a laundromat recently purchased by the decedent would be transferred to the boyfriend as a gift, with the new will providing that the remainder of the estate would go to the adult children. After the decedent's death, the plaintiffs challenged these documents in probate and reached a settlement with the boyfriend in which he would get $5,000 and they would receive the rest of the estate. They then sued the attorney for preparing the documents without taking sufficient steps to ascertain their mother's intent or testamentary capacity. After a trial court judgment for the plaintiffs, the court of appeal reversed, finding that the attorney owed no such duty to the beneficiaries. The court of appeal agreed with the reasoning of *Moore v. Anderson Zeigler Disharoon Gallagher & Gray (2003) 109 Cal. App. 4th 1287, 135 Cal. Rptr. 2d 888* [*see § 24A.21[3][g]*], and concluded that an attorney, if persuaded of the client's testamentary capacity by his or her own observations and experience, has no further duty to beneficiaries to ascertain testamentary capacity (*123 Cal. App. 4th 1012, 1019)* . The court noted evidence showing that when the attorney arrived at the decedent's bedside, he observed the decedent talking to others, he asked her name, address, phone number, age, and other such questions, conversed with her about the will and her intentions, and was convinced that she was of sound mind on that particular morning (*123 Cal. App. 4th 1012, 1019 n.1*)

California Points & Authorities

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 24A ATTORNEYS AT LAW: MALPRACTICE
PART II. FORMS

2A-24A California Points & Authorities § 24A.22

§ 24A.22 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--By Defendant--No Duty Owed to New or "Prospective" Client Because Such Duty Would Conflict With Duty to Existing Client

[1] FORM

[*Caption. See § 24A.20.*]

DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT BECAUSE DEFENDANT OWED NO DUTY TO PLAINTIFF, A NEW OR "PROSPECTIVE" CLIENT, BECAUSE DEFENDANT OWED AN IRRECONCILABLY CONFLICTING DUTY OF LOYALTY TO AN EXISTING CLIENT AND THEREFORE HAD A MANDATORY DUTY NOT TO UNDERTAKE REPRESENTATION OF PLAINTIFF.

A. Summary Judgment. [*See § 24A.20, Paragraph A.*]

B. Elements Required for Cause of Action. [*See § 24A.20, Paragraph B.*]

C. Absence of Duty Requires Judgment for Defendant. [*See § 24A.20, Paragraph C.*]

D. No Duty to Prospective Client if There Is Conflicting Duty to Existing Client. When severing a relationship with a new or prospective client after learning that the representation would conflict irreconcilably with the duty of loyalty owed to an existing client, the requirement of undivided loyalty to the first client negates any duty on the part of the attorney to inform the second client of the statute of limitations applicable to a proposed lawsuit on behalf of the new client or even of the advisability of seeking alternative counsel (*Flatt v. Superior Court (1994) 9 Cal. 4th 275, 289-290, 36 Cal. Rptr. 2d 537, 885 P.2d 950*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted by defendant in support of a motion for summary judgment in a legal malpractice action, when the basis of the motion is that no duty to plaintiff existed, because defendant's duty of undivided loyalty to another existing client imposed a mandatory duty on defendant not to represent plaintiff, and negated the existence of any duty to plaintiff.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence regarding the relationship of plaintiff to defendant, the duty of defendant to the first client, the irreducible and mandatory duty of defendant to withdraw from the representation of plaintiff, and the lack of substantial prejudice to the interests of the plaintiff arising out of the withdrawal of defendant from the representation of plaintiff [*see Flatt v. Superior Court (1994) 9 Cal. 4th 275, 289-290, 36 Cal. Rptr. 2d 537, 885 P.2d 950]* .

[c] Related Pleading and Practice Forms

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[d] Related Memoranda

For memoranda relating to summary judgment generally, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] No Duty to Prospective Client if There Is Conflicting Duty to Existing Client

In ***Flatt v. Superior Court*** *(1994) 9 Cal. 4th 275, 36 Cal. Rptr. 2d 537, 885 P.2d 950* , plaintiff and defendant attorney met and discussed plaintiff's potential cause of action against another attorney regarding a previous business transaction. During this meeting, plaintiff disclosed confidential information to defendant attorney concerning the conduct of the other attorney in structuring the previous business transaction, and the defendant attorney told plaintiff that he "definitely" had a claim for legal malpractice against the other attorney. In a letter dated a week after this meeting, defendant attorney returned plaintiff's documents and advised him that she could not represent him in an action against the other attorney because her firm had a conflict in that it was representing the other attorney in an unrelated matter. Almost two years later, plaintiff filed a legal malpractice action against both the other attorney for actions regarding the previous business transaction, and against the defendant attorney for failing to advise him of the statute of limitations governing his claims against the other attorney and to see other counsel in order to avoid having those claims time-barred. Defendant attorney moved for summary judgment on the ground that she owed no duty to advise plaintiff as alleged in the complaint because any such advice would have been contrary to the interests of the firm's existing client. The trial court declined to grant the summary judgment motion on the ground that there were triable issues of fact material to the issue of whether an attorney-client relationship had arisen between defendant attorney and plaintiff. The court of appeal affirmed the ruling of the trial court, confining it's reasoning to the question of whether plaintiff had

become a client of defendant attorney and her firm, and concluding that a professional relationship could have been formed.

The Supreme Court reversed, remanding the cause with directions to order that defendant attorney's motion for summary judgment be granted. The Court stressed the duty of loyalty to the existing client, noting that this duty is so inviolate that an attorney cannot evade it by withdrawing from the relationship (*9 Cal. 4th 275, 288)* . Furthermore, the Court stated that the attorney's duty to protect a client is such that it is a violation of that duty for the attorney to assume a position adverse or antagonistic to the client without the client's free and intelligent consent given after full knowledge of all the facts and circumstances. Thus, by virtue of this rule, an attorney is precluded from assuming any relation that would prevent the attorney from devoting his or her entire energies to the client's interests. Since the duty of loyalty to a client forbids any act that would interfere with the dedication of the attorney's entire energies to the client's interests, the defendant attorney had no duty to give plaintiff advice that would have aided in advancing his contemplated lawsuit against defendant attorney's existing client (*9 Cal. 4th 275, 289)* . The Court acknowledged the possibility that in a different factual situation, such as one involving the lapse of considerable time and the expenditure of substantial resources before discovery of the conflicting dual representation, an attorney's mere withdrawal from the second representation may not be sufficient in itself to resolve all ethical responsibilities. However, since any advice to plaintiff would have run counter to the interests of an existing client and of the obligation of undivided loyalty to that client, defendant attorney had no duty to give plaintiff any advice (*9 Cal. 4th 275, 290)* .

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CHAPTER 24A ATTORNEYS AT LAW: MALPRACTICE
PART II. FORMS

2A-24A California Points & Authorities § 24A.23

§ 24A.23 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--By Defendant--Defendant Owed No Duty to Present Client in Favorable Public Light

[1] FORM

[*Caption. See § 24A.20.*]

SUMMARY JUDGMENT SHOULD BE GRANTED IN FAVOR OF DEFENDANT BECAUSE DEFENDANT OWED NO DUTY TO PRESENT PLAINTIFF IN A FAVORABLE PUBLIC LIGHT.

A. Summary Judgment. [*See § 24A.20, Paragraph A.*]

B. Elements Required for Cause of Action. [*See § 24A.20, Paragraph B.*]

C. Absence of Duty Requires Judgment for Defendant. [*See § 24A.20, Paragraph C.*]

D. No Duty to Present Client in Favorable Public Light. An attorney does not have a duty to represent his or her client so as to insure the client's public reputation, or to present the client in a favorable public light (*Zalta v. Billips (1978) 81 Cal. App. 3d 183, 189, 190, 144 Cal. Rptr. 888*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted by defendant in support of a motion for summary judgment in a legal malpractice action, on the basis that defendant had no duty to plaintiff to insure plaintiff's favorable reputation, or to present plaintiff in a favorable public light.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations which support the motion [*Code Civ. Proc. § 437c*], and which include a declaration showing that the acts or omissions alleged by plaintiff as defendant's negligence amount to a mere failure to present plaintiff in a favorable public light.

[b] Related Uses

With appropriate modifications, this form may be used to support defendant's general demurrer to the complaint or a motion for judgment on the pleadings where it appears on the face of the complaint that the duty alleged is the duty to present the plaintiff in a favorable public light.

[c] Related Memoranda

For memoranda relating to summary judgments generally, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] No Duty to Present Client in Favorable Public Light

In ***Zalta v. Billips*** *(1978) 81 Cal. App. 3d 183, 144 Cal. Rptr. 888* , defendant attorneys represented a doctor and a medical group in a medical malpractice action, in which there were many others being sued, who were represented by other counsel. A settlement was reached in open court, and under the settlement agreement terms, defendants' clients were not required to contribute to a settlement fund to be paid to the plaintiff. Because defendant attorneys did not announce this provision in open court, newspaper accounts included their client's names as among those paying a settlement in the action. The clients brought suit against the attorneys and others, alleging against the attorneys' professional negligence in failing to protect the clients from a public inference that they were guilty of medical malpractice.

The trial court dismissed the action against defendants, and plaintiff clients appealed. The court of appeal affirmed dismissal. It noted that no cases have held attorneys liable for injury resulting from public reaction to the legal proceedings involving their clients (*81 Cal. App. 3d 183, 188)* . The court held that an attorney does not have a duty to insure the client's self-esteem, or his or her public reputation, or actively to publicize the client's freedom from liability (*81 Cal. App. 3d 183, 189, 190)* .

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2A-24A California Points & Authorities § 24A.24

§ 24A.24 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--By Defendant--No Liability When Either Public Duty or Reasonableness Indicates Plaintiff's Action Is Meritless, Unjust, or to No Avail

[1] FORM

[*Caption. See § 24A.20.*]

SUMMARY JUDGMENT SHOULD BE GRANTED IN FAVOR OF DEFENDANT BECAUSE DEFENDANT IS NOT LIABLE FOR REFUSING TO PURSUE FURTHER PLAINTIFF'S ACTION WHICH DEFENDANT BELIEVED TO BE _____[UNJUST *or* WITHOUT MERIT *or* TO NO AVAIL].

A. Summary Judgment. [*See § 24A.20, Paragraph A.*]

B. No Duty to Pursue Meritless Action. An attorney is not liable to the client for refusing to maintain or pursue a cause of action on the client's behalf which the attorney believes to be unjust, without merit, or to no avail, unless the choice was so erroneous that no prudent attorney would have made it (*Kirsch v. Duryea (1978) 21 Cal. 3d 303, 309-310, 146 Cal. Rptr. 218, 578 P.2d 935* ; *Hays v. Ewing (1886) 70 Cal. 127, 128, 11 P. 602* ; *see Floro v. Lawton (1960) 187 Cal. App. 2d 657, 671, 672, 10 Cal. Rptr. 98*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted by defendant in support of a motion for summary judgment in a legal malpractice action on the basis that defendant is not liable for failure to maintain or pursue further the client's action which defendant believed to be unjust, without merit, or to no avail.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations which support the motion [*Code Civ. Proc. § 437c*], and which include a declaration showing the reasonableness of defendant's conclusion that plaintiff's action was either without merit, or that to pursue the action would conflict with the administration of justice, or would be useless. Although the holdings do not express such requirement, the facts of the cases cited in support of this motion indicate that it is most likely necessary to make a showing that the attorney had a basis for his or her belief.

[b] Related Uses

With appropriate modifications, this form may be used to support a defendant's general demurrer to the complaint, or a motion for judgment on the pleadings where it appears on the face of the complaint that the client's original action was either without merit, unjust, or could not have been won.

[c] Related Memoranda

For memoranda relating to summary judgments generally, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] No Duty to Pursue Meritless Action

In ***Kirsch v. Duryea*** *(1978) 21 Cal. 3d 303, 146 Cal. Rptr. 218, 578 P.2d 935* , plaintiff was referred to defendant attorney to prosecute a medical malpractice action a few days before the statute of limitations would bar the suit. Defendant filed the complaint, and shortly thereafter, plaintiff moved out of state, so that all further communication between the two was by mail or telephone. After researching the case, but without opposing any of the doctors involved, defendant concluded that there was insufficient evidence to prosecute plaintiff's case. About four years after the complaint was filed, defendant informed plaintiff by letter that he would not try the case. He informed plaintiff that a substitution of attorneys form had to be filed within a certain time, mailed plaintiff the form, told plaintiff he had to act in propria persona until he hired a new attorney, offered cooperation and assistance to plaintiff's new attorney, and stressed that the case had to be brought to trial within the five-year period, giving plaintiff a specific deadline date. After receiving no response, defendant sent a second letter stating that if the substitution form was not returned by a certain date, defendant would move for withdrawal. Defendant received no response, and made a motion for withdrawal which was granted. Plaintiff consulted with various attorneys on receipt of defendant's first letter, and eventually employed two to handle his case. The suit was dismissed for failure to prosecute within five years. Plaintiff then sued defendant for legal malpractice. The trial court entered a judgment for plaintiff, following a jury trial, and defendant appealed.

The Supreme Court reversed, and held that the evidence was insufficient to support the judgment. The opinion noted that courts have granted attorneys some latitude in choosing alternative legal strategies (*21 Cal. 3d 303, 309)* . The Court then stated that such latitude should also exist when the attorney is confronted with conflicting ethical obligations (*21 Cal. 3d 303, 309)* . Such conflicts would frequently arise, since an attorney has the duty not only to protect his or her client, but also a duty to protect the interests of fellow bar members, the judiciary, and the administration of justice (*21 Cal. 3d 303, 309)* . An attorney's duty to prosecute a client's case does not include a duty to maintain an action he or she believes is unjust, or lacking merit (*21 Cal. 3d 303, 309-310)* . When the defendant must choose between advancing the client's case, and a duty to the administration of justice to refuse to prosecute a meritless action, a choice to honor the public duty does not constitute malpractice unless the choice was so clearly erroneous that no prudent

attorney would have made it (*21 Cal. 3d 303, 309)* . The Supreme Court held that in this particular case, the attorney had made a reasonable decision, and had acted responsibly in delaying his withdrawal, and in notifying the client regarding substitution requirements and the need for quick action in the case (*21 Cal. 3d 303, 310, 311)* .

In ***Hays v. Ewing*** *(1886) 70 Cal. 127, 11 P. 602* , a client brought a malpractice action against the attorney for mishandling the client's suit, which had been barred by the statute of limitations. The client asserted that the attorney should have pled the defendants' absence during the statutory period, and that the attorney should have appealed the judgment. The attorney demurred to the complaint generally, and on the specific grounds that the malpractice action was barred by the statute of limitations. The trial court sustained the demurrer, and entered judgment for defendant. On plaintiff's appeal, the Supreme Court affirmed. It held that the statute of limitations barred any action regarding the attorney's conduct prior to judgment in the client's previous suit (*70 Cal. 127, 128)* . With regard to the allegation that defendant was negligent in failing to appeal the case, the Court held that the defendant had no duty to do so when the appeal would have been to no avail (*70 Cal. 127, 128)* .

In ***Floro v. Lawton*** *(1960) 187 Cal. App. 2d 657, 10 Cal. Rptr. 98* , defendants in a legal malpractice action were two attorneys who had prosecuted a client's suit for slander, false arrest, and malicious prosecution. After obtaining permission from the client to use his discretion in the matter, one attorney decided at trial not to try and prove the false arrest cause of action, but to merge it with the malicious prosecution action. The trial court judge made certain findings in support of a judgment against plaintiff, and mailed a letter regarding the findings to the attorneys. One defendant answered the letter and pointed out the judge's error in finding against the plaintiff on the malicious prosecution issue, including authority for his point. The judge had also ordered that the defendant attorney prepare findings of fact and conclusions of law in accordance with the findings in the judge's letter, however. The defendant attorney did so, and judgment was entered against plaintiff. Subsequently, defendants consulted with plaintiff regarding an appeal, and plaintiff stated that he did not want an appeal, then negotiated his own settlement, and entered satisfaction of judgment without consulting defendants.

In the malpractice action, plaintiff alleged that the attorneys had breached their contract with plaintiff, and that they were negligent in abandoning a false imprisonment cause of action. The trial court entered a judgment of nonsuit in favor of defendants, and plaintiff appealed. The court of appeal affirmed, and held that there was no abandonment of the action when the acting attorney believed that there was no merit to an action for false arrest or false imprisonment, and in accordance with his legal research on the matter, merged the false arrest action into a related action which contained all the allegations necessary to prove either false arrest or false imprisonment (*187 Cal. App. 2d 657, 672)* . In addition, the court stated that an attorney is not negligent when after the judge releases initial findings, and the attorney informs the judge that he or she disagrees, supporting his or her position with legal authority, the attorney then yields to the judge's final decision against the attorney (*187 Cal. App. 2d 657, 671)* . In addition, once judgment is entered against the client, an attorney has no obligation to appeal the case, even if an appeal would be meritorious, without the consent of the client (*187 Cal. App. 2d 657, 672)* . The court concluded that under the facts of the case, there was no evidence to show that the defendants had been negligent in failing to pursue a particular cause of action they had initiated on behalf of their client (*187 Cal. App. 2d 657, 676)* .

[4] Additional Authorities

[a] No Duty to Pursue Meritless Action

In *Redante v. Yockelson (2003) 112 Cal. App. 4th 1351, 6 Cal. Rptr. 3d 10* , a criminal defendant who was convicted of numerous sex crimes with minors brought a malpractice action against his defense attorney for failing to file a timely habeas petition and failing to raise all arguable issues on appeal. The criminal defendant's primary arguments stemmed from his belief that because the sex acts were consensual, his attorney should have argued that his conduct was not illegal in most countries, given that the age of consent was lower in most countries, and that his conviction was thus a "travesty of justice." The court of appeal held that the attorney was entitled to summary judgment for three reasons.

First, a criminal defense attorney could not be liable for choosing not to raise issues on appeal that the attorney reasonably believed had no potential for success (*112 Cal. App. 4th 1351, 1357)* . Second, a criminal defendant has no right to effective assistance of counsel in collateral proceedings such as a habeas corpus proceeding. Third, a criminal defendant must establish actual innocence to pursue a malpractice action against defense counsel (*112 Cal. App. 4th 1351, 1357)* .

California Points & Authorities

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 24A ATTORNEYS AT LAW: MALPRACTICE
PART II. FORMS

2A-24A California Points & Authorities § 24A.25

§ 24A.25 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--By Defendant--No Liability for Mistake on Debatable Legal Issue

[1] FORM

[*Caption. See § 24A.20.*]

SUMMARY JUDGMENT SHOULD BE GRANTED IN FAVOR OF DEFENDANT BECAUSE DEFENDANT IS NOT LIABLE TO PLAINTIFF FOR A MISTAKE ON A DOUBTFUL OR DEBATABLE POINT OF LAW.

A. Summary Judgment. [*See § 24A.20, Paragraph A.*]

B. No Liability for Mistake on Doubtful Area of Law. An attorney's duty to his or her client, or to an intended beneficiary is limited to a use of the skill, prudence, and diligence of a lawyer of ordinary skill and capacity, and liability will not be imposed for mistakes which involve areas of law debatable or doubtful to reasonable attorneys (*Lucas v. Hamm (1961) 56 Cal. 2d 583, 591, 15 Cal. Rptr. 821, 364 P.2d 685* ; *Sprague v. Morgan (1960) 185 Cal. App. 2d 519, 523, 8 Cal. Rptr. 347*). This rule applies so long as the mistake is based on the exercise of an informed judgment (*Davis v. Damrell (1981) 119 Cal. App. 3d 883, 887, 174 Cal. Rptr. 257*).

[*Optional*] **C. No Duty to Advise Client of Unsettled Nature of Legal Issue.** An attorney's basic obligation to provide a client with sound advice does not include a duty to inform the client of the unsettled state of the law with regard to a particular legal issue (*Davis v. Damrell (1981) 119 Cal. App. 3d 883, 889, 174 Cal. Rptr. 257*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

CAUTION:

In using this form, counsel should be aware of *Smith v. Lewis (1975) 13 Cal. 3d 349, 118 Cal. Rptr. 621, 530 P.2d 589* , a malpractice case in which the Supreme Court rejected defendant's argument that the law regarding the characterization of retirement benefits was clearly debatable, and that he was therefore shielded from liability for any mistakes pertaining to it. The Court favored a characterization of liability for the attorney's mistake on a debatable issue as a question of fact, rather than one of law [*Smith v. Lewis (1975) 13 Cal. 3d 349, 358-360, 118 Cal. Rptr. 621, 530 P.2d 589]* . The Court took a limited view of the rule in *Lucas v. Hamm (1961) 56 Cal. 2d 583, 15 Cal. Rptr. 821, 364 P.2d 685* [*see § 24A.25[3][a]*]. In *Smith,* the Court stated that even in an unsettled area of law, an attorney has the duty to undertake reasonable research in an effort to make an educated decision in the matter [*Smith v. Lewis (1975) 13 Cal. 3d 349, 359, 118 Cal. Rptr. 621, 530 P.2d 589]* . It added that an attorney may be negligent in choosing the trial tactic of refraining from pursuing a debatable point, when the decision is based on ignorance [*Smith v. Lewis (1975) 13 Cal. 3d 349, 359, 118 Cal. Rptr. 621, 530 P.2d 589]* . The Court went on to distinguish the facts of the case before it from the facts in *Lucas,* and stated that the *Lucas* rule applied to so esoteric an issue (the Rule Against Perpetuities) that the defendant could not reasonably have been expected to be aware of it or its probable resolution [*Smith v. Lewis (1975) 13 Cal. 3d 349, 359, 118 Cal. Rptr. 621, 530 P.2d 589]* .

Accordingly, whether or not courts will consider a defendant's mistake on a debatable legal issue as a question of law, and therefore as a basis for summary judgment, seems questionable. However, *Lucas* has not been overruled, and according to the court of appeal in *Wright v. Williams (1975) 47 Cal. App. 3d 802, 121 Cal. Rptr. 194* , there are cases on which reasonable minds could not differ regarding whether an attorney's mistake satisfies his or her duty of care, and such cases would properly be resolved as a matter of law [*Wright v. Williams (1975) 47 Cal. App. 3d 802, 809, 121 Cal. Rptr. 194]* . One such case, decided after *Smith, is Davis v. Damrell (1981) 119 Cal. App. 3d 883, 174 Cal. Rptr. 257* , in which a court of appeal held that as a matter of law an attorney was not liable for a mistake, when he had researched the unsettled issue of military pensions as community property, and had made an informed decision that later turned out to be wrong [*Davis v. Damrell (1981) 119 Cal. App. 3d 883, 888-889, 174 Cal. Rptr. 257]* . Aside from *Lucas* and *Davis,* however, the courts seem to prefer treating liability for mistake as a question of fact. The *Wright* court, for example, expresses some doubt that even the *Lucas* case presents a problem esoteric enough, in view of the current state of the art, to absolve mistakes on it as a matter of law [*see Wright v. Williams (1975) 47 Cal. App. 3d 802, 809 n.2, 121 Cal. Rptr. 194]* . Therefore, it appears that unless counsel can clearly demonstrate that the attorney's mistake related to an issue so esoteric that reasonable minds could not differ in refusing to impose liability, it is possible that the defendant's liability for mistake would not be considered a proper basis for a summary judgment motion.

[a] Use of Form

This memorandum may be submitted by defendant in support of a motion for summary judgment in a legal malpractice action on the basis that defendant is not liable as a matter of law since his or her alleged mistake involved a clearly debatable or doubtful point of law.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations which support the motion [*see Code Civ. Proc. § 437c*], and which include a declaration establishing that the attorney's alleged mistake related to an area of law which is

clearly doubtful or debatable.

[b] Related Uses

With appropriate modifications, this form may be used to support defendant's general demurrer to the complaint, or a motion for judgment on the pleadings where it appears on the face of the complaint that defendant's mistake related to a doubtful or debatable point of law.

[c] Related Memoranda

For memoranda relating to summary judgments generally, see Ch. 221, *Summary Judgments* .

[d] Opposing Memoranda

The points in *§§ 24A.45 -24A.47* may be used in an appropriate case to oppose a motion for summary judgment supported by this memorandum.

[3] Discussion of Authorities

[a] No Liability for Mistake on Doubtful Area of Law

In ***Lucas v. Hamm*** *(1961) 56 Cal. 2d 583, 15 Cal. Rptr. 821, 364 P.2d 685* , beneficiaries under a will brought a legal malpractice action against the testator's attorney. The complaint alleged that defendant had negligently drafted the will, by including a clause which, due to the Rule Against Perpetuities, invalidated the residual estate in trust which was intended to go to plaintiffs. On demurrer by defendant, the trial court dismissed the case, and plaintiffs appealed. The Supreme Court affirmed the dismissal. It held first that an attorney may be liable for negligence to the intended beneficiaries of his or her client's will (*56 Cal. 2d 583, 591)* . The Court went on to say that an attorney's liability for negligence is based on his or her duty to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise. This standard of care does not impose a duty on the attorney to insure that his or her services are devoid of mistakes. An attorney will not be liable for negligence in making a mistake as to a question of law on which well-informed lawyers may have reasonable doubt (*56 Cal. 2d 583, 591)* . In this case, because the Rule Against Perpetuities is so complex and confusing, the Court held that an error relating to it is not a violation of an attorney's required standard of care (*56 Cal. 2d 583, 593)* .

In ***Davis v. Damrell*** *(1981) 119 Cal. App. 3d 883, 174 Cal. Rptr. 257* , defendant was an attorney who had represented the plaintiff in a dissolution proceeding. Plaintiff had questioned defendant about community property rights to her husband's vested military pension benefits, and defendant had concluded that she had no claim to such benefits. Several years later, a California Supreme Court decision held that such benefits were subject to community property division. Plaintiff brought a legal malpractice action against defendant. The trial court granted summary judgment for defendant, and plaintiff appealed.

The court of appeal affirmed. It held that in view of *Smith v. Lewis (1975) 13 Cal. 3d 349, 118 Cal. Rptr. 621, 530 P.2d 589* , which imposed on attorneys a duty to research unsettled areas of law, an attorney is not liable for mistake as a matter of law if (1) the legal issue on which he or she was mistaken was unsettled at the time he or she advised the client, and (2) the attorney's legal advice was based on the exercise of an informed judgment (*119 Cal. App. 3d 883, 887)* . In this case, because the question of the community nature of pension benefits was clearly unsettled at the time defendant advised the plaintiff, and because defendant had demonstrated experience and familiarity with the area of community property law as of that time, summary judgment had been properly granted in his favor (*119 Cal. App. 3d 883, 888-889)* .

Sprague v. Morgan *(1960) 185 Cal. App. 2d 519, 8 Cal. Rptr. 347* , involved a client who brought suit against her

attorney for allegedly negligently handling her worker's compensation claim. Following an award to her of a disability payment rating, the client consulted defendant regarding her worsened condition, and requested that defendant obtain an order for further medical treatment from the Industrial Accident Commission. The attorney petitioned for the order, but did not request an increase in plaintiff's disability rating. Defendant believed that the law required him to obtain the order for further treatment prior to petitioning for a rating increase, and that filing a petition for the order would toll the five-year limitation that existed for obtaining disability rating. The trial court entered judgment for defendant, and plaintiff appealed.

The court of appeal affirmed. It held that the degree of care and skill that an attorney owes his or her client is limited to that of an attorney of ordinary skill and capacity, and does not impose liability for lack of knowledge as to the true state of the law on a debatable legal issue (*185 Cal. App. 2d 519, 523)* . In this case, the court held that the issue involved was clearly debatable at the time of defendant's conduct, and therefore no liability could be imposed (*185 Cal. App. 2d 519, 523)* .

[b] No Duty to Advise Client of Unsettled Nature of Legal Issue

Davis v. Damrell *(1981) 119 Cal. App. 3d 883, 174 Cal. Rptr. 257* , is discussed in *§ 24A.25[3][a]*. The court of appeal held that an attorney is not liable for a mistaken interpretation of an unsettled legal issue, so long as the mistake was based on the exercise of an informed judgment (*119 Cal. App. 3d 883, 887)* . The court held further that to require the attorney to inform the client as to possible alternative interpretations of the unsettled issue would render the attorney's exercise of professional judgment meaningless. The court stated that as a matter of policy, an attorney owes no duty to a client to give advice regarding the unsettled nature of relevant legal principles (*119 Cal. App. 3d 883, 889)* .

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2A-24A California Points & Authorities § 24A.26

§ 24A.26 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--By Defendant--No Liability Where Causation Cannot Be Established

[1] FORM

[*Caption. See § 24A.20*].

THE COURT SHOULD GRANT SUMMARY JUDGMENT FOR DEFENDANT BECAUSE PLAINTIFF CANNOT ESTABLISH THAT DEFENDANT'S NEGLIGENCE CAUSED INJURY TO PLAINTIFF.

A. Summary Judgement. [*See § 24A.20, Paragraph A*].

B. Causation Not Established. Plaintiff cannot establish a claim for legal malpractice if the element of causation cannot be established. (*Kurinij v. Hanna & Morton (1997) 55 Cal. App. 4th 853, 863-864, 64 Cal. Rptr. 2d 324*).

[*Optional*]. **C. "But For" Test of Causation Applicable to Actions for Transactional Malpractice.** If the alleged malpractice occurs when advice is given, or documents are being prepared for, a business transaction, and if the harm is not caused by concurrent independent causes, a plaintiff is required to prove that but for the malpractice, the plaintiff would more likely than not have obtained a more favorable result (*Viner v. Sweet (2003) 30 Cal. 4th 1232, 1240-1244, 135 Cal. Rptr. 2d 629, 70 P.3d 1046*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion for summary judgment by a defendant attorney in an action for legal malpractice, on the basis that defendant's negligence did not cause injury to plaintiff.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should show that the issue of causation may be decided as a matter of law because there is no room for a reasonable difference of opinion under undisputed facts.

[3] Discussion of Authorities

[a] Causation Not Established

In ***Kurinij v. Hanna & Morton*** *(1997) 55 Cal. App. 4th 853, 64 Cal. Rptr. 2d 324* , plaintiff brought a legal malpractice action based on an allegation that defendant attorneys negligently failed to appeal a jury verdict which had found plaintiff liable for $1.00 in damages in an underlying fraud action. Although they did not concede negligence, defendant attorneys contended that plaintiffs could not establish that their failure to appeal was the cause of damage. Defendant attorneys argued that there was no certainty that the verdict would have been reversed even if it had been appealed. The trial court agreed with defendants, and entered summary judgment.

Plaintiffs argued that the $1.00 award was a nominal award; that the jury had found that there were no actual damages. Plaintiffs then argued that the judgment was reversible because without actual damages there is no fraud. However, the court of appeal concluded that the jury had found actual damages in support of the fraud cause of action, so that plaintiff's argument lacked its necessary factual basis. The court affirmed the summary judgment for defendant attorneys (*55 Cal. App. 4th 853, 866)* .

[b] "But For" Test of Causation Applicable to Actions for Transactional Malpractice

In ***Viner v. Sweet*** *(2003) 30 Cal. 4th 1232, 135 Cal. Rptr. 2d 629, 70 P.3d 1046* , the plaintiffs were the founders of a successful company that made primarily audio books. About a decade after the company was formed, the company made its initial public stock offering, and the plaintiffs entered into long-term employment contracts with their company. Within a few years, however, the plaintiffs entered into negotiations with another party for the purchase of the plaintiffs' stock in the company and the termination of their employment. The defendant, an attorney, and his law firm represented the plaintiffs in the negotiations leading up to and the drafting of the securities purchasing agreement and employment termination agreement, which the plaintiffs eventually signed. However, disagreements between the parties to the agreements as to their meaning led to several arbitration proceedings, which the plaintiffs lost. The plaintiffs then brought a malpractice action against the defendant and his law firm, alleging various errors in negotiating and drafting the agreements. The jury found for the plaintiffs and awarded damages. The court of appeal reduced the amount of damages, but otherwise affirmed. The court noted that the plaintiffs did not attempt to prove that in the absence of the attorney's negligence, the other party would have given the plaintiffs better terms on the contracts. However, the court held that a plaintiff alleging malpractice in a business transaction is not required to prove that but for the negligence, the harm would not have occurred. The defendants appealed, and the California Supreme Court granted review limited to that narrow issue.

The Supreme Court reversed. The Court held that plaintiffs in a transactional malpractice case are required to prove that but for the alleged negligence, the plaintiffs would have obtained a more favorable result. The Court noted that the rule of causation with respect to negligence cases generally is that the plaintiff must prove causation with evidence that but

for the negligence, the harm would not have occurred, with one exception--if the negligence was a concurrent independent cause of the harm. The case before the court did not involve the concurrent independent cause exception, so the issue was whether there was any reason to depart from the traditional "but for" test of causation in the context of transactional malpractice cases. The Court concluded that there was not (*30 Cal. 4th 1232, 1240-1242)* . The Court did note, however, that a plaintiff may use circumstantial evidence to satisfy the burden and need not extract an express concession from the other parties to the transaction that they would have accepted other or additional terms if not for the malpractice. The Court also pointed out that absolute certainty of proof is not required, but only evidence allowing a factfinder to conclude that it is more likely than not that the malpractice was an actual cause of the plaintiff's harm (*30 Cal. 4th 1232, 1242-1243)* .

[4] Additional Authorities

[a] Causation Not Established

In *New Plumbing Contractors, Inc. v. Edwards, Sooy & Byron (2002) 99 Cal. App. 4th 799, 121 Cal. Rptr. 2d 472* , the plaintiff was a plumbing contractor with insurance coverage that included a consent clause giving the insurer the right to investigate and settle any claim or suit brought against the plaintiff. The insurer hired a law firm, to defend the plaintiff in one case, which the insurer eventually settled within its policy limits on the law firm's recommendation. The plaintiff, who was apparently not notified of the settlement negotiations, then sued the law firm for negligence and breach of fiduciary duty, arguing that the insurer failed to properly defend the action and as a result the settlement subjected the plaintiff to higher premiums, lower coverage, and higher deductibles. The trial court granted summary judgment for the law firm, and the court of appeal affirmed. The court held that because the insurer had the contractual right to settle the case as the insurer saw fit, without consulting the insured and regardless of whether the claim was defensible, the law firm's conduct in recommending the settlement to the insurer was not a cause of any harm that the contractor may have suffered. Because causation could not be established, summary judgment for the law firm was appropriate (*99 Cal. App. 4th 799, 801-802)* .

[b] "But For" Test of Causation Applicable to Actions for Transactional Malpractice

The factual background of *Viner v. Sweet (2004) 117 Cal. App. 4th 1218, 12 Cal. Rptr. 3d 533* is discussed in *§ 24A.26[3][b]*. On remand from the California Supreme Court, the court of appeal held that as to five of the plaintiffs' seven claims, the plaintiffs had presented no substantial evidence that they would have reached a more favorable result if their attorneys had not been negligent when drafting and negotiating the agreement to sell the plaintiffs' ownership interest in their former company. Therefore, the trial court erred in not granting judgment notwithstanding the verdict as to those five claims. At trial, the uncontradicted testimony of the principal of the purchasing company showed that certain provisions of the agreement as executed, including a nonsolicitation clause in the employment termination agreement and the value of offered stock provisions, were essential elements of any agreement and would not have been negotiable even in the absence of any negligence by the plaintiffs' attorneys (*117 Cal. App. 4th 1218, 1224-1225)* . In addition, although the plaintiffs presented evidence that they would have walked away from the transaction if they had known of the nonsolicitation clause, they failed to present any evidence that they would have been better off economically by walking away than they were under the agreement as executed (*117 Cal. App. 4th 1218, 1227)* . The court of appeal also held that even though the jury was free to disbelieve the testimony of the buying company's principal that the company would not have agreed to more favorable terms for the plaintiffs on any of the five disputed claims, that disbelief was not evidence that a more favorable result would have been obtained. The plaintiffs still had the burden of showing with actual evidence that a more favorable result was likely without the negligence, a burden that the plaintiffs never attempted to meet as to the five disputed claims (*117 Cal. App. 4th 1218, 1229-1231)* .

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2A-24A California Points & Authorities § 24A.27

§ 24A.27 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--By Defendant--No Cause of Action Against Defendant When No Actual Harm to Plaintiff Resulted

[1] FORM

[*Caption. See § 24A.20.*]

SUMMARY JUDGMENT SHOULD BE GRANTED IN FAVOR OF DEFENDANT BECAUSE PLAINTIFF SUFFERED NO ACTUAL HARM AS A RESULT OF DEFENDANT'S CONDUCT.

A. Summary Judgment. [*See § 24A.20, Paragraph A.*]

B. Elements Required for Cause of Action. [*See § 24A.20, Paragraph B.*]

C. Judgment for Defendant Proper When No Harm to Plaintiff. Unless and until plaintiff has suffered actual, appreciable harm as a consequence of defendant's conduct, plaintiff cannot establish a cause of action for malpractice, and judgment for defendant is proper (*Alhino v. Starr (1980) 112 Cal. App. 3d 158, 176, 169 Cal. Rptr. 136* ; *see Kirtland & Packard v. Superior Court (1976) 59 Cal. App. 3d 140, 144, 131 Cal. Rptr. 418*).

[*Optional*] **D. Legal Fees Incurred Trying to Overturn Earlier Settlement or Judgment Not Recoverable as Damages.** Although legal fees paid to another attorney to correct the negligence of a malpractice defendant generally constitute actual harm and may be recovered by a malpractice plaintiff (for example, if the attorney's negligence forces the plaintiff to bring or defend an action against a third party), a malpractice plaintiff dissatisfied by the quality of an attorney's services cannot generate recoverable tort damages merely by hiring new attorneys and incurring legal fees unsuccessfully attempting to challenge or overturn an earlier settlement or judgment (*Orrick Herrington & Sutcliffe v. Superior Court (2003) 107 Cal. App. 4th 1052, 1058-1060, 132 Cal. Rptr. 2d 658*).

[*Optional*] **E. Legal Fees Paid to Negligent Attorney Not Recoverable as Tort Damages.** A malpractice plaintiff cannot prove recoverable tort damages merely by seeking to recover the fees paid to the allegedly negligent attorney (*Orrick Herrington & Sutcliffe v. Superior Court (2003) 107 Cal. App. 4th 1052, 1058, 132 Cal. Rptr. 2d 658*).

[*Optional*] **F. No Provable Damages When Statute of Limitations in Underlying Suit Had Expired Before Client Hired Attorney.** A client has no malpractice action for failing to achieve a better result in underlying litigation if the statute of limitations had already expired on that underlying suit before the client first consulted the attorney, as the client cannot prove that he or she suffered any damages caused by the attorney (*Slovensky v. Friedman 142 Cal. App. 4th 1518, 1527-1528, 49 Cal. Rptr. 3d 60*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted by defendant in support of a motion for summary judgment in a legal malpractice action, on the basis that plaintiff suffered no actual harm as a result of defendant's conduct.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations which support the motion [*see Code Civ. Proc. § 437c*], and which include a showing that plaintiff suffered no actual loss or injury as a result of defendant's conduct.

[b] Related Uses

With appropriate modifications, this form may be used to support a general demurrer to a complaint for legal malpractice, or a motion for judgment on the pleadings where it appears on the face of the complaint that plaintiff suffered no actual loss or injury as a result of defendant's conduct.

[c] Related Memoranda

For memoranda relating to summary judgments generally, see Ch. 221, *Summary Judgments* .

[d] Opposing Memoranda

The points in *§§ 24A.48* and 24A.49 may be used in an appropriate case to oppose a motion for summary judgment supported by this memorandum.

[3] Discussion of Authorities

[a] Judgment for Defendant Proper When No Harm to Plaintiff

Alhino v. Starr *(1980) 112 Cal. App. 3d 158, 169 Cal. Rptr. 136* , involved two actions consolidated for jury trial. Plaintiff, as executor of her husband's will and as an individual, brought an action against real estate brokers for fraudulent misrepresentation in sales of real estate by plaintiff and her husband to an insolvent buyer. Plaintiff, in the same dual capacity, also brought a malpractice action against her previous attorneys for their alleged negligence in

consultations regarding the sale and the handling of plaintiff's case against the buyer. In the malpractice action, the trial court entered judgment on a directed verdict in favor of defendants, and plaintiff appealed.

The court of appeal affirmed. It held that plaintiff had failed to show any actual harm resulting from defendants' conduct (*112 Cal. App. 3d 158, 176 176)* . When the buyer defaulted on payments, defendants filed a suit against him and against the real estate brokers on plaintiff's behalf, alleging several causes of action. Defendants later dismissed the action in exchange for a reformed promissory note. Several months later the buyer died, and defendants filed a claim on his estate in plaintiff's behalf. The claim was approved, but the estate was declared insolvent. The court noted that initially the acting attorney had merely advised plaintiff as to the buyer's financial status in a limited fashion, and had suggested that for a definitive determination, further investigation would be necessary. Plaintiff's husband had declined to authorize such investigation. The record also indicated that defendants had investigated alternative settlement arrangements, of which plaintiff had disapproved. The court concluded that since plaintiff had made no showing of actual harm resulting from defendants' conduct, the judgment in favor of defendants must be affirmed. The court stated that when a defendant's conduct, even if negligent, does not cause actual damage, there is no cause of action against him or her. Nominal damages, speculative harm, or threat of future harm will not establish injury sufficient to sustain plaintiff's cause of action (*112 Cal. App. 3d 158, 176)* .

In ***Kirtland & Packard v. Superior Court*** *(1976) 59 Cal. App. 3d 140, 131 Cal. Rptr. 418* , a physician, who along with another had been sued for medical malpractice, brought a legal malpractice action against the attorneys his insurance company had hired to represent him. The medical malpractice action resulted partly in a settlement, and partly in a judgment against both physicians. Payments were made by the insurance company; nothing was paid by the plaintiff in this action. Among the damages resulting from legal malpractice, plaintiff alleged the settlement and judgment against him. The defendant attorneys filed two motions for summary adjudication of the issue, contending that plaintiff could not recover either of the alleged amounts, since he had not suffered any actual losses. The trial court denied both motions, and the attorneys petitioned the court of appeal for a writ of mandate.

The court of appeal issued the writ. It held that until the client suffers appreciable harm as a result of the attorney's negligence, there is no cause of action for malpractice (*59 Cal. App. 3d 140, 144)* . The court also rejected plaintiff's application of the collateral source rule, which states that when an injured person receives compensation from a source independent of the tortfeasor, the tortfeasor is still liable for the damages. The collateral source rule was held not to apply, since the insurance company, which had hired defendant attorneys, was not independent of them (*59 Cal. App. 3d 140, 145)* . The court expressly refused to adjudicate certain items of damages, such as loss of reputation, higher insurance rates, or future judgments against plaintiff based on the initial suit, but concluded that with regard to the award of judgment against him, since the plaintiff had not yet suffered any actual injury, the trial court had abused its discretion in denying defendants' motions for summary adjudication (*59 Cal. App. 3d 140, 143, 144, 146)* . A writ of mandate was issued, compelling the trial court to order that plaintiff could not recover that item of alleged damages as a matter of law (*59 Cal. App. 3d 140, 147)* .

[b] Legal Fees Incurred Trying to Overturn Earlier Settlement or Judgment Not Recoverable as Damages

In ***Orrick Herrington & Sutcliffe v. Superior Court*** *(2003) 107 Cal. App. 4th 1052, 132 Cal. Rptr. 2d 658* , the plaintiff brought a malpractice action against his former attorneys for alleged negligence in drafting a marital settlement agreement that the plaintiff claimed could expose him to future legal liabilities. The defendants moved for summary adjudication or summary judgment, arguing that the plaintiff could not prove actual damages. Based on discovery responses, the plaintiff could not show either that absent the alleged errors, the plaintiff's ex-wife would have accepted a lesser settlement, or that any legal claims had been filed against him because of the alleged settlement deficiencies. However, the plaintiff argued that he suffered recoverable damages in the form of the fees that he paid his former attorneys for their inadequate representation, as well as the hundreds of thousands of dollars in fees that the plaintiff paid to other attorneys in his unsuccessful attempt to overturn the settlement agreement. The trial court denied the motions, finding triable issues of fact as to damages. The defendants filed a petition for writ of mandate or prohibition.

The court of appeal issued the writ. The court rejected the plaintiff's claimed damages under the circumstances of the case. The court first recognized the established rule that a plaintiff alleging legal malpractice in the prosecution or defense of a legal claim must prove that but for the attorney's negligence, a better result would have been obtained in the underlying action. However, the court specifically rejected the notion that a malpractice plaintiff dissatisfied by the quality of an attorney's services can generate recoverable tort damages merely by hiring new attorneys and incurring legal fees in attempting to challenge or overturn an earlier settlement or judgment. Similarly, the court found absurd the notion that a malpractice plaintiff can prove recoverable tort damages merely by seeking to recover the fees paid to the allegedly negligent attorney. According to the court, a contrary conclusion on either point would obviate the need to prove that in the absence of the attorney's negligence, the plaintiff would have achieved a better result (*107 Cal. App. 4th 1052, 1058)* . In this particular case, no claims had been made against the plaintiff because of the settlement, and therefore there was no compelling reason for him to spend hundreds of thousands of dollars attempting to overturn it, although the court recognized that had a claim actually been filed against him, the plaintiff might be able to recover as tort damages the fees expended in defending the claim (*107 Cal. App. 4th 1052, 1060)* . As for the fees paid to the attorneys for their allegedly deficient representation, these appeared to the court to be contract, rather than tort, damages, and therefore the plaintiff's only remedy was to try and prove a claim for breach of contract (*107 Cal. App. 4th 1052, 1060-1061)* .

[c] Legal Fees Paid to Negligent Attorney Not Recoverable as Tort Damages

Orrick Herrington & Sutcliffe v. Superior Court *(2003) 107 Cal. App. 4th 1052, 132 Cal. Rptr. 2d 658* is discussed in *§ 24A.27[3][b]*.

[d] No Provable Damages When Statute of Limitations in Underlying Suit Had Expired Before Client Hired Attorney

In ***Slovensky v. Friedman*** *142 Cal. App. 4th 1518, 49 Cal. Rptr. 3d 60* , plaintiff hired defendant attorneys to file a lawsuit against her former apartment complex based on injuries suffered due to toxic mold exposure while she was living in the complex. Although plaintiff was on actual or constructive notice of her cause of action for toxic mold exposure sometime in 1997 or 1998, plaintiff did not consult with the attorneys about a possible lawsuit until March 2000. Although it appeared the one-year statute of limitations had expired on her claim before she first consulted the attorneys, the defendants in the underlying suit nonetheless agreed to a settlement of claims brought by dozens of plaintiffs who were suing for the same mold exposure. After settling, plaintiff filed an action for malpractice and breach of fiduciary duty against her attorneys for not adequately handling her claim and for coercing her into accepting a settlement that plaintiff considered to be inadequate. The trial court granted defendants' motion for summary judgment on the grounds that the statute of limitations on her toxic mold claims had expired before she first consulted defendants, and as such, had her case gone to trial she would not have achieved a better result than she actually achieved. Thus, she could not prove that defendants' alleged misconduct caused her any harm. Plaintiff appealed.

The court of appeal affirmed. The court agreed that plaintiff was on actual or constructive notice of her claim for toxic mold exposure well before the spring of 1999, but did not consult with defendants until March 2000. Given the one-year limitations period on that claim, plaintiff was entitled to no recovery. Thus, the settlement defendants obtained for her was a windfall and defendants' alleged wrongdoing leading to her acceptance of the settlement caused her no damage (*142 Cal. App. 4th 1518, 1527-1528)* . To the extent that plaintiff's claim for breach of fiduciary duty alleged the same damages, that claim failed for the same reason (*142 Cal. App. 4th 1518, 1533)* .

[4] Additional Authorities

[a] Judgment for Defendant Proper When No Harm to Plaintiff

In *Lazy Acres Market, Inc. v. Tseng (2007) 152 Cal. App. 4th 1431, 62 Cal. Rptr. 3d 378* , a market hired a security

firm to catch shoplifters and this security firm had their own insurer. An employee of the firm apprehended an alleged shoplifter, who subsequently filed suit against the market, the security firm, and the firm's employee. The security firm's insurer agreed to defend and indemnify the market without asserting a reservation of rights and provided an attorney to handle the defense for all of the defendants. The market eventually determined that the attorney hired by the insurer had an actual conflict of interest in representing both the market and the security firm and decided to provide its own attorney. However, the insurer did not respond to the market's requests for payment of its fees and costs. The insurer subsequently settled the underlying lawsuit at no cost to the market. The market then sued the insurer's attorney for malpractice and breach of fiduciary duty for failing to advise the market of the conflict of interest earlier in the proceedings, asserting its defense fees and costs incurred in the underlying action as damages. The court of appeal affirmed a demurrer in favor of the attorney. The court held that even assuming that the attorney breached a duty in failing to disclose any actual or potential conflict of interest, the market had alleged no damages caused by any such breach. The complaint alleged that the insurer, not the attorney, had the duty to pay the fees and costs incurred in defending the underlying action. Plaintiff alleged no facts showing that anything the attorney did influenced the insurer's decision not to pay plaintiff's costs and fees. Plaintiff had paid nothing in settlement of the underlying claim. The court noted that it would be pure speculation to suggest that the outcome would have been any different had the attorney declared a conflict at the beginning of the case (*152 Cal. App. 4th 1431, 1436)* .

In *Barnard v. Langer (2003) 109 Cal. App. 4th 1453, 1 Cal. Rptr. 3d 175* , the plaintiffs brought a malpractice action against their former attorneys for alleged misconduct that caused them to settle their underlying inverse condemnation action against the City of Los Angeles for less than it was worth. The trial court granted nonsuit for the defendants on the grounds that the plaintiffs' claim for damages was too speculative. The court of appeal affirmed and imposed $20,000 in sanctions against the plaintiffs for pursuing a frivolous appeal. The court held that even assuming negligence on the part of the defendants, the plaintiffs failed to prove that but for that negligence, the plaintiffs would have settled the underlying action for more or recovered more at trial. It was insufficient for the plaintiffs merely to claim as they did that it was possible to obtain a better settlement or judgment at trial. Because none of the evidence offered by the plaintiffs did any more than suggest speculative harm, nonsuit was proper (*109 Cal. App. 4th 1453, 1461-1463)* .

In *Jalali v. Root (2003) 109 Cal. App. 4th 1768, 1 Cal. Rptr. 3d 689* , the court of appeal held that a malpractice plaintiff had failed to prove that her attorney caused her any damages in an underlying sexual harassment action when she accepted a settlement offer of $2.75 million based on her attorney's incorrect advice that she would not be liable for taxes on the share of the settlement allocated to his fees. In the malpractice action, the plaintiff did not try to prove that she would have received a better monetary outcome if she had rejected the settlement offer, and in fact, the evidence suggested that she probably received the best possible amount from her case by taking the settlement. However, she argued that if she had known her true tax liability on the settlement, she would have rejected the settlement and gone to trial to receive the emotional satisfaction of airing the defendant's alleged wrongful conduct publicly in court. The court of appeal, in reversing a trial court judgment for the plaintiff, held that the plaintiff failed to prove that the erroneous tax advice had caused her any damages (*109 Cal. App. 4th 1768, 1777-1779)* .

In *Marshak v. Ballesteros (1999) 72 Cal. App. 4th 1514, 86 Cal. Rptr. 2d 1* , the plaintiff sued the attorney who had represented him in his marital dissolution action, alleging that the attorney had negligently failed to object to the alleged undervaluation of the marital residence, which was awarded to the plaintiff's ex-wife, and to the alleged overvaluation of the accounts receivable from the plaintiff's medical practice, which were charged to the plaintiff. The defendant successfully moved for summary judgment on the grounds that the plaintiff could not establish that he suffered any damages as a result of the alleged negligence. The court of appeal affirmed. The court of appeal noted that the plaintiff had offered no evidence to establish the value of his underlying settlement case, other than his own declaration stating that the family residence was worth more than the valuation suggested by the ex-wife and used in the settlement and stating that the accounts receivable were worth less than the settlement valuation. The court also noted that the plaintiff offered no evidence to prove that his ex-wife would have settled for less than she did or that the judge would have entered a more favorable judgment. Absent competent evidence to prove these elements of damages, the plaintiff could not show with sufficient certainty that he suffered harm from the alleged malpractice, and summary judgment was

proper (*72 Cal. App. 4th 1514, 1519)* .

In *Loube v. Loube (1998) 64 Cal. App. 4th 421, 74 Cal. Rptr. 2d 906* , the malpractice plaintiffs received $25,000 in compensatory damages and $200,000 in punitive damages following a default judgment and prove-up hearing in the underlying action, although their original award of compensatory damages had been reduced from $248,102 due to their attorneys' negligent failure to specify an amount of damages in the complaint. At trial in the malpractice action, the plaintiffs argued that their attorneys' negligence cost them the additional amount of compensatory damages originally awarded. However, the trial court in the malpractice action required a "trial within a trial" in order to ascertain the value of the underlying action, and the proof showed that had the underlying action gone to trial, the plaintiffs would have only been able to prove compensatory damages of $12,850 and no punitive damages. The trial court granted the defendants' motion for judgment on the grounds that plaintiffs had proven no damages. The court of appeals agreed that plaintiffs had not been damaged by their attorneys' negligence, since plaintiffs in the underlying action received an award vastly greater than the damages they actually sustained. The court of appeal also noted that it was pure speculation that, but for the negligent failure to specify in the complaint the amount of damages sought, plaintiffs would have still received a default judgment awarding compensatory damages of $248,102 to each (*64 Cal. App. 4th 421, 425-427)* .

In *Sisco v. Cosgrove, Michelizzi, Schwabacher, Ward & Bianchi (1996) 51 Cal. App. 4th 1302, 59 Cal. Rptr. 2d 647* , plaintiff, the mother of a boy who had been entitled to proceeds from a structured settlement, brought an action against the boy's attorneys for a failure to name her as his sole beneficiary in the settlement documents. Plaintiff claimed that the attorneys had told her that she was the sole beneficiary of the settlement funds until the boy reached the age of 18. However, the settlement agreement provided that any payments to be made after the boy's death were to be paid to his estate, and after his death his father claimed one-half of the settlement funds. The court of appeal disagreed with the mother's contention that she could have been designated as beneficiary, stating that a minor lacks legal capacity to designate a beneficiary, and thus can neither disinherit a parent nor contract around this prohibition by assigning a future interest to just one parent. Stating that it is axiomatic that there is no cause of action for legal malpractice without damages proximately caused by the malpractice, the court affirmed a trial court judgment dismissing the action (*51 Cal. App. 4th 1302, 1305)* .

In *In re Easterbrook (1988) 200 Cal. App. 3d 1541, 244 Cal. Rptr. 652* , the court of appeal struck a criminal defendant's complaint against his attorney for malpractice. This complaint sought $500,000 in damages, and was filed during the attorney's representation of the client in a criminal matter. The court noted that the complaint was devoid of any showing of actual harm incurred by the client, and merely recited instances of the attorney's allegedly negligent conduct in handling his case. Damages may not be based on sheer speculation and surmise, and the mere possibility or even probability that damage will result from wrongful conduct does not render it actionable. The court noted that there was as yet no verdict in the criminal case, and that the client, at most, suffered only speculative harm (*200 Cal. App. 3d 1541, 1544)* .

Ventura County Humane Soc'y v. Holloway (1974) 40 Cal. App. 3d 897, 115 Cal. Rptr. 464 , is discussed in *§ 24A.20[3][b]*. The plaintiffs claimed to be intended beneficiaries of a will, and brought a malpractice action against the attorney who drafted the will for negligently failing to clarify the identity of the beneficiary. The trial court dismissed the action following the sustaining of a demurrer. The court of appeal affirmed the judgment of dismissal, and held that the required elements of a cause of action for professional negligence are duty, breach, proximate cause, and actual loss or damage. The absence of any of these elements is fatal to plaintiff's case (*40 Cal. App. 3d 897, 902)* . The court discussed the issue of duty, and went on to discuss actual damage. It held that because plaintiffs did not allege that the testator intended to leave part of his estate to plaintiffs specifically, it could not be determined that plaintiffs had suffered any harm (*40 Cal. App. 3d 897, 906-907)* . The court added that damages may not be based on speculation, or the possibility or probability that they will result from defendant's negligence. Unless there is certainty that actual damage to plaintiff exists, the plaintiff has no action (*40 Cal. App. 3d 897, 907)* .

California Points & Authorities

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 24A ATTORNEYS AT LAW: MALPRACTICE
PART II. FORMS

2A-24A California Points & Authorities § 24A.28

§ 24A.28 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--By Defendant--Representation of Partnership Did Not Require Defendant to Obtain Informed Written Consent of Partners With Conflicting Interests

[1] FORM

[*Caption. See § 24A.20.*]

SUMMARY JUDGMENT FOR DEFENDANT SHOULD BE GRANTED BECAUSE DEFENDANT'S REPRESENTATION OF A PARTNERSHIP FOR THE PURPOSE OF DOCUMENTING AN AGREEMENT BETWEEN THE PARTNERS DID NOT TRIGGER THE REQUIREMENT FOR INFORMED WRITTEN CONSENT OF CLIENTS WITH CONFLICTING INTERESTS, BECAUSE THE REPRESENTATION OF THE PARTNERSHIP DID NOT CONSTITUTE A CONCURRENT REPRESENTATION ADVERSE TO AN INDIVIDUAL PARTNER.

A. Summary Judgment. [*See § 24A.20, Paragraph A.*]

B. Elements Required for Cause of Action. [*See § 24A.20, Paragraph B.*]

C. Representation of Partnership Regarding Agreement Between Partners. The requirement of *Rule 3-310(B) of the Rules of Professional Conduct* of the State Bar of California, stating that a member shall not concurrently represent clients whose interests conflict without obtaining the clients' informed written consent, does not apply to the representation of a partnership for the purpose of documenting an agreement between the partners (*Buehler v. Sbardellati (1995) 34 Cal. App. 4th 1527, 1539, 41 Cal. Rptr. 2d 104*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted by defendant in support of a motion for summary judgment in a legal malpractice action, when the basis of the motion is that plaintiff did not have a duty to obtain informed written consent of partners before the plaintiff could represent the partnership for the purpose of documenting an agreement between the partners.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence of a prior agreement between the partners regarding the matter that the plaintiff agreed to document, and should argue that the matter which was documented as part of the representation of the partnership did not constitute a concurrent representation adverse to an individual partner who was already an existing client [*see Buehler v. Sbardellati (1995) 34 Cal. App. 4th 1527, 1539, 41 Cal. Rptr. 2d 104]* .

[c] Related Pleading and Practice Forms

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[d] Related Memoranda

For memoranda relating to summary judgment generally, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Representation of Partnership Regarding Agreement Between Partners

In ***Buehler v. Sbardellati*** *(1995) 34 Cal. App. 4th 1527, 41 Cal. Rptr. 2d 104* , defendant attorney was hired to document a business transaction consisting of a real estate investment by a limited partnership that included the plaintiff as a limited partner. Prior to this transaction, the defendant had represented both the plaintiff and the general partner in other matters. The plaintiff and the general partner had agreed to the purchase of the real estate prior to meeting with the defendant, and the evidence indicated that they told the defendant that he was not to make any decisions about the partnership agreement, but just to make sure that the agreement complied with California law. Defendant informed both parties that he could document their agreement in a written partnership agreement, but that if the dealings between them became adversarial he could not represent both of them, and he could not participate in any negotiation or representation of one contrary to the other. Evidence also indicated that, based on knowledge from his prior representation of the general partner, defendant had some concern about the possibility that the property could fail to perform, but did not disclose this concern to plaintiff. Under these circumstances, a limited partnership agreement was drafted by defendant and executed by plaintiff and the general partner. The investment subsequently failed, and the lender was successful in an action against plaintiff to enforce a personal guarantee for the loan. Plaintiff then sued defendant for legal malpractice, claiming that the defendant failed to provide him with the advice and counsel to be expected of an attorney with undivided loyalty and commitment to the client. After a special jury verdict finding that defendant was not negligent, plaintiff claimed error in the trial court's refusal to instruct the jury that an attorney cannot avoid the requirement of informed written consent by narrowing the scope of representation.

The court of appeal upheld the refusal to give the requested instruction, and affirmed the judgment. The court noted that the requirement to obtain informed written consent of clients whose interests conflict applies only when there is a concurrent representation of clients whose interests conflict (*34 Cal. App. 4th 1527, 1538)* . In this situation, the defendant and his preexisting clients agreed to have the defendant represent the partnership, and not the individual partners, and the plaintiff understood that the defendant could not participate in any negotiation or representation of one partner contrary to the other. Thus, defendant's representation of the partnership did not constitute a limitation of his representation of defendant and the requested jury instruction was properly refused (*34 Cal. App. 4th 1527, 1539)* .

California Points & Authorities

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 24A ATTORNEYS AT LAW: MALPRACTICE
PART II. FORMS

2A-24A California Points & Authorities § 24A.29

§ 24A.29 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--By Defendant--Action Barred by Statute of Limitations

[1] FORM

[*Caption. See § 24A.20.*]

THE COURT SHOULD GRANT SUMMARY JUDGMENT IN DEFENDANT'S FAVOR BECAUSE THE STATUTE OF LIMITATIONS BARS THE ACTION.

A. Summary Judgment. [*See § 24A.20, Paragraph A.*]

B. Summary Judgment Proper When Statute of Limitations Bars Action. When affidavits or declarations clearly establish that a plaintiff's action is barred by the statute of limitations, summary judgment is properly granted (*Chavez v. Carter (1967) 256 Cal. App. 2d 577, 580, 64 Cal. Rptr. 350*).

C. Statute of Limitations for Legal Malpractice. A legal malpractice action must be brought within one year after the plaintiff discovers, or should have discovered through reasonable diligence, the facts constituting wrongful conduct, or four years from the date of wrongful conduct, whichever is first. If the plaintiff is required to establish his or her factual innocence for an underlying criminal charge as an element of his or her malpractice claim, the action must be commenced within two years after the plaintiff achieves post-conviction exoneration in the form of a final judicial disposition of the criminal case. Except for claims in which the plaintiff is required to establish his or her factual innocence for an underlying criminal conviction, in no event will the time permitted for bringing suit exceed four years from the date of the wrongful conduct, unless the period is tolled (*Code Civ. Proc. § 340.6*; *Ruchti v. Goldfein (1980) 113 Cal. App. 3d 928, 934-935, 170 Cal. Rptr. 375*).

[*Optional*] **D. Statute Commences When Plaintiff Suffers Actual Injury.** The statute of limitations begins to run when the plaintiff suffers actual injury, regardless of whether that injury is irremediable (*Laird v. Blacker (1992) 2 Cal. 4th 606, 609, 615, 7 Cal. Rptr. 2d 550, 828 P.2d 691* ; *Turley v. Wooldridge (1991) 230 Cal. App. 3d 586, 593, 281 Cal. Rptr. 441*). Actual injury has occurred when the plaintiff has sustained any damages compensable in a legal action, other than one for actual fraud, against an attorney for a wrongful act or omission arising in the performance of

professional services (*Jordache Enters., Inc. v. Brobeck, Phleger & Harrison (1998) 18 Cal. 4th 739, 751, 76 Cal. Rptr. 2d 749, 958 P.2d 1062*).

[*Optional*] **E. Statute Commences When Client's Cause of Action Is Proscribed.** In malpractice cases based on an attorney's failure to file an action on behalf of a client within the appropriate

statute of limitations, plaintiff suffers actual injury, and the statute of limitations begins to run, when the client's cause of action is proscribed (*Finlayson v. Sanbrook (1992) 10 Cal. App. 4th 1436, 1444, 13 Cal. Rptr. 2d 406*).

[*Optional*] **F. Statute Commences on Entry of Adverse Judgment or Order of Dismissal.** When the malpractice occurs during the course of litigation, plaintiff suffers actual injury, and the statute of limitations begins to run, when an adverse judgment or order of dismissal is entered against plaintiff in the action on which the malpractice action is based, absent continuous representation by the malpracticing attorney to a postjudgment or postdismissal stage of the litigation (*Laird v. Blacker (1992) 2 Cal. 4th 606, 609, 615, 7 Cal. Rptr. 2d 550, 828 P.2d 691*). The fact that an appeal has been taken does not alter the fact that an adverse judgment injured the client (*see* *Safine v. Sinnott (1993) 15 Cal. App. 4th 614, 617, 19 Cal. Rptr. 2d 52*).

[*Optional*] **G. Statute Commences When Facts Should Put Plaintiff on Inquiry.** The statute of limitations begins running when the facts should put plaintiff on further inquiry, and not when plaintiff becomes aware of legal theories pertaining to a malpractice claim (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP (2005) 133 Cal. App. 4th 658, 35 Cal. Rptr. 3d 31* ; *McGee v. Weinberg (1979) 97 Cal. App. 3d 798, 803, 804, 159 Cal. Rptr. 86*).

[*Optional*] **H. Statute Not Tolled Once Defendant No Longer Represents Plaintiff as Attorney.** The statute of limitations is tolled while an attorney continues to represent the client regarding the specific subject matter in which the alleged wrongful act or omission occurs but is not tolled while the attorney acts in a separate and distinct role other than as an attorney for the client (*Code Civ. Proc. § 340.6(a)(2)*; *Von Rott v. Johnson (1983) 148 Cal. App. 3d 608, 612-613, 196 Cal. Rptr. 55*).

[*Optional*] **I. Negligent Attorney's Continued Representation Does Not Toll Statute On Claims Against Attorney's Former Law Firm.** Even though a negligent attorney continues to represent the plaintiff, the statute of limitations is not tolled under the continued representation tolling provision on claims brought against the negligent attorney's former law firm (*Beal Bank, SSB v. Arter & Hadden, LLP (2007) 42 Cal. 4th 503, 505, 66 Cal. Rptr. 3d 52, 167 P.3d 666* ; *Crouse v. Brobeck, Phleger, & Harrison (1998) 67 Cal. App. 4th 1509, 1538-1539, 80 Cal. Rptr. 2d 94*).

[*Optional*] **J. Equitable Tolling Doctrine Inapplicable to Statute.** The equitable tolling doctrine, under which a plaintiff may be relieved of the effects of a statute of limitations in certain cases in order to prevent a technical forfeiture and unjustifiably prevent a trial on the merits, does not apply to apply to attorney malpractice actions subject to *Code of Civil Procedure Section 340.6* (*Gordon v. Law Offices of Aguirre & Meyer (1999) 70 Cal. App. 4th 972, 979-980, 83 Cal. Rptr. 2d 119*).

[*Optional*] **K. Statute Applicable in Action Based on Breach of Fiduciary Duty.** *Code of Civil Procedure Section 340.6* applies in legal malpractice actions based on breach of fiduciary duty (*Stoll v. Superior Court (1992) 9 Cal. App. 4th 1362, 1363-1364, 1366-1369, 12 Cal. Rptr. 2d 354*).

[*Optional*] **L. Actual Injury May Occur When Incurring Legal Fees Caused by Defendant's Malpractice.** If the alleged malpractice consists of negligent advice that prompts plaintiff to sign a contract he or she later seeks to rescind, actual injury may be sustained when the plaintiff hires a new attorney to pursue rescission, as plaintiff at that point incurs liability for legal fees due to the first attorney's malpractice (*Truong v. Glasser (2009) 181 Cal. App. 4th 102, 114-115, 103 Cal. Rptr. 3d 811*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted by defendant in support of a motion for summary judgment in a legal malpractice action on the basis that the action is barred by the statute of limitations under *Code Civ. Proc. § 340.6*. Optional Paragraph E is included for use when the alleged malpractice consisted of failing to file a suit within the period of limitation. Optional Paragraph F is included for use when the alleged malpractice has arisen out of litigation. When using either Optional Paragraph E or F, Optional Paragraph D should also be used. Optional Paragraph G is for use when the defendant is contending that the plaintiff had been put on inquiry of his or her claim so as to start the period of limitation running at an earlier time than plaintiff contends. Optional Paragraph H is included for use when plaintiff has argued, or it appears likely that the plaintiff will argue, that the running of the statute of limitations was tolled under *Code Civ. Proc. § 340.6(a)(2)*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations that support the motion [*see Code Civ. Proc. § 437c(b)*], and include a showing of facts determining when the statutory period commenced running.

[b] Related Uses

With appropriate modifications, this form may be used to support a general demurrer to a malpractice complaint, or a motion for judgment on the pleadings when it appears on the face of the complaint that the statute of limitations provided by *Code Civ. Proc. § 340.6* bars the action [*see Ruchti v. Goldfein (1980) 113 Cal. App. 3d 928, 170 Cal. Rptr. 375* (defendant's general demurrer sustained and action dismissed on basis of *Code Civ. Proc. § 340.6*); *see also McGee v. Weinberg (1979) 97 Cal. App. 3d 798, 159 Cal. Rptr. 86* (general demurrer proper when statute of limitations bars suit)].

[c] Opposing Memoranda

The points in *§§ 24A.53, 24A.54*, or *24A.55* may be used in an appropriate case to oppose a motion for summary judgment supported by this memorandum.

[d] Statute of Limitations Does Not Bar Defensive Use of Legal Malpractice

Under some circumstances, a client may be able to assert an attorney's legal malpractice as a set-off to a claim by the attorney for fees, even though the malpractice action would otherwise be barred by the statute of limitations. If the attorney's fee claim coexisted with the malpractice claim at a time when neither claim would have been barred by the statute of limitations, the client may assert the attorney's malpractice as a defense in his or her answer to the attorney's complaint for fees. If the statute of limitations has run on the malpractice claim at the time the answer was filed, the malpractice claim may nevertheless be allowed up to an amount not exceeding the amount of fees found to be owing to the attorney [*see Safine v. Sinnott (1993) 15 Cal. App. 4th 614, 618-619, 19 Cal. Rptr. 2d 52* ; *Code Civ. Proc. § 431.70*].

For memoranda pertaining to actions for recovery of fees by an attorney, see Ch. 25, *Attorney's Fees* .

[e] Statute of Limitations Does Not Bar Actions Based on Nonlegal Services

The legal malpractice statute of limitations, *Code Civ. Proc. § 340.6*, does not apply to all professional services performed by an attorney, only to legal services. Thus, for example, *Code Civ. Proc. § 340.6* will not bar a legal malpractice action against a lawyer who provides administrative consulting services on behalf of a client [*Quintilliani v. Mannerino (1998) 62 Cal. App. 4th 54, 65, 72 Cal. Rptr. 2d 359* (term "professional services" must mean services performed by attorney that can be judged against skill, prudence, and diligence commonly possessed by other attorneys)].

[3] Discussion of Authorities

[a] Summary Judgment Proper When Statute of Limitations Bars Action

Chavez v. Carter *(1967) 256 Cal. App. 2d 577, 64 Cal. Rptr. 350* , was a legal malpractice action in which plaintiff alleged that defendant was negligent in failing to prepare and enter an interlocutory decree in a dissolution proceeding, thus causing title to defendant's property to be clouded. In the trial court, defendant filed a motion for summary judgment, based on the contention that the statute of limitations had barred the suit, and the motion was granted.

Plaintiff appealed from the judgment, and the court of appeal reversed. It held that when a statute of limitations bars an action, it is proper to grant summary judgment for defendant. The action was not barred in this case, however. At the time of this case, the statute of limitations applicable to legal malpractice actions was two years under Civ. Code § 339(1) (*256 Cal. App. 2d 577, 580)* . The court held that the defendant's alleged negligent act did not occur on the date the court directed a granting of interlocutory decree of dissolution, but rather the facts tended to show that defendant was not able to prepare such a decree for some time, and in fact that defendant had a continuing duty since he was still the attorney of record for plaintiff in the matter (*256 Cal. App. 2d 577, 581)* . Because the negligent act did not occur more than two years prior to the malpractice suit, the statutory period of two years did not bar the action, and summary judgment for defendant was held improper (*256 Cal. App. 2d 577, 581, 583)* .

[b] Statute of Limitations for Legal Malpractice

In ***Ruchti v. Goldfein*** *(1980) 113 Cal. App. 3d 928, 170 Cal. Rptr. 375* , plaintiff brought a malpractice action against the attorneys who had represented her in dissolution proceedings. Plaintiff alleged that attorneys were negligent in failing to assert her community property rights to her husband's military retirement benefits. One of the defendants demurred on the ground that the statute of limitations barred the action, and the demurrer was sustained without leave to amend.

Plaintiff appealed and the court of appeal affirmed. It held first that at the time of the dissolution proceeding, plaintiff had no cause of action against defendant since nonvested pension benefits were not characterized as community property (*113 Cal. App. 3d 928, 932)* . When the law later changed in that regard, the change did not apply retroactively to dissolution decrees that had become final (*113 Cal. App. 3d 928, 933)* . The court held further that even if defendant's conduct had been negligent in failing to appeal the decree or to research the developing law and inform plaintiff of its uncertain nature, the statute of limitations barred plaintiff's action. In the event of such negligence, the damage occurs when the unclaimed rights become terminated, or when defendant allows the judgment to become final (*113 Cal. App. 3d 928, 934)* . Since the plaintiff failed to bring the action within four years of that time, the statute of limitations under *Code Civ. Proc. § 340.6* effectively barred it (*113 Cal. App. 3d 928, 935)* .

[c] Statute Commences When Plaintiff Suffers Actual Injury

In ***Laird v. Blacker*** *(1992) 2 Cal. 4th 606, 7 Cal. Rptr. 2d 550, 828 P.2d 691* , plaintiff television writer retained counsel to commence an action against a television production company for the company's unauthorized use of one of her scripts. After serving the complaint, counsel failed to pursue the case, and plaintiff retained other counsel to prosecute the same case. The suit was subsequently dismissed for lack of prosecution, and plaintiff then discharged the later retained counsel and filed a notice of appeal in propria persona. Thereafter, she settled with the television production company and voluntarily dismissed her appeal.

Nineteen months after the trial court dismissed her action against the production company, and 17 months after she discharged her later-retained counsel, but only eight months after she dismissed her appeal, plaintiff filed a legal malpractice action against both her originally retained and later-retained counsel. Plaintiff then settled with the originally retained counsel and proceeded to trial against the later-retained counsel. These defendants moved for a nonsuit, asserting the one-year limitation period of *Code Civ. Proc. § 340.6(a)* began to run when plaintiff's suit against the production company was dismissed, regardless of her ensuing appeal. Plaintiff asserted her cause of action for legal malpractice did not accrue until the date she dismissed her appeal and her injury due to the malpractice became irremediable. The court denied defendants' motion, and a jury awarded plaintiff damages. Defendants then moved for a judgment notwithstanding the verdict. The court denied the motion, and defendants appealed.

The court of appeal reversed and remanded with directions to enter judgment in favor of defendants. It held that under *Code Civ. Proc. § 340.6(a)*, plaintiff sustained actual injury on the date that her case against the production company was dismissed and judgment was entered against her. Plaintiff then appealed that decision to the Supreme Court.

The Supreme Court affirmed, construing both prior case law and the legislative history of *Code Civ. Proc. § 340.6* to find that while the injury suffered by the malpractice plaintiff must be actual, it need not be irremediable to be actionable and to commence the running of the statute. Additionally, the Court rejected plaintiff's proposal that the limitations period be tolled until any resultant injury to the client becomes irremediable (*2 Cal. 4th 606, 615-620)* . Finally, the Court disapproved prior case law on the issue of irremediable harm to the extent that those cases conflict with this holding [*see* *Heyer v. Flaig (1969) 70 Cal. 2d 223, 74 Cal. Rptr. 225, 449 P.2d 161* ; *Robinson v. McGinn (1987) 195 Cal. App. 3d 66, 240 Cal. Rptr. 423* ; *Bell v. Hummel (1982) 136 Cal. App. 3d 1009, 186 Cal. Rptr. 688* ; *Southland Mech. Constructors Corp. v. Nixen (1981) 119 Cal. App. 3d 417, 173 Cal. Rptr. 917]* (*2 Cal. 4th 606, 617)* .

The Court also held its decision to be retroactive, because its holding followed the majority of court of appeal cases on the irremediability issue, despite a split of authority on the issue, and therefore did not represent a departure from established law (*2 Cal. 4th 606, 620)* .

In ***Turley v. Wooldridge*** *(1991) 230 Cal. App. 3d 586, 281 Cal. Rptr. 441* , plaintiff hired defendant attorney to advise her regarding a marriage termination agreement. Plaintiff then signed the agreement, which was approved by the court in an interlocutory judgment of dissolution entered four months later. The final judgment of dissolution was entered almost three months later. Five years after signing the agreement, plaintiff filed a complaint for legal malpractice against defendant, alleging that as a result of defendant's negligence, plaintiff received substantially less than half of the community property and failed to receive the spousal support to which she was entitled after 20 years of marriage. Defendant moved for summary judgment on the ground the action was barred by the four-year limitations period of *Code Civ. Proc. § 340.6*. Plaintiff contended her action was timely because she did not suffer actual injury until she was no longer able to modify the final judgment of dissolution under *Code Civ. Proc. § 473* relief from judgment taken by mistake, inadvertence, surprise, or excusable neglect) or the court's equitable powers to set aside a fraudulent agreement or judgment. Thus, by her calculations, plaintiff did not suffer actual injury until six months after entry of final judgment and less than four years before she filed her complaint. The trial court granted defendant's motion and entered judgment in defendant's favor. Plaintiff appealed.

The court of appeal affirmed. The court agreed with the trial court in finding that any actual injury from the unequal community property division took place when plaintiff executed the marriage termination agreement, because the

agreement became effective on execution. At that point, plaintiff's damages were not speculative, but appreciable. The court also agreed with the trial court in finding that any actual injury from the spousal support arrangement took place when the family law court entered its interlocutory judgment of dissolution. The fact that plaintiff could have challenged the agreement in an action for rescission or other contract relief, or the interlocutory judgment under *Code Civ. Proc. § 473* or the court's equitable powers, did not affect the date she suffered actual harm (*230 Cal. App. 3d 586, 592-594)* .

In ***Jordache Enters., Inc. v. Brobeck, Phleger & Harrison*** *(1998) 18 Cal. 4th 739, 76 Cal. Rptr. 2d 749, 958 P.2d 1062* , plaintiffs retained defendant law firm in 1984 to defend them in a lawsuit brought against them alleging that they were marketing clothing that was a "knockoff" of another company's clothing. Soon after the 1984 action was filed, plaintiffs contacted their insurance broker and requested information on insurance coverage for the action and were told that their insurers provided no coverage for the action. Based on that information, plaintiffs failed to give the actual insurers notice of the lawsuit. Plaintiffs did not request from defendants any advice concerning insurance coverage for the lawsuit, and defendant law firm did not advise, ask about, or otherwise investigate as to whether there might be a potential for insurance coverage that would trigger a duty on the part of an insurer to defend the lawsuit.

In 1987, plaintiffs hired new attorneys to replace defendant in the 1984 action. These new attorneys advised plaintiffs of the potential insurance coverage and plaintiffs submitted a demand for a defense through its insurance broker. In December 1987, plaintiffs again hired new counsel and plaintiffs by that time were aware of defendant's alleged negligence in failing to notify or advise plaintiffs to notify its insurers of the 1984 lawsuit. In early 1988, following a formal tender of defense of the 1984 action to plaintiffs' insurers, plaintiffs sued the insurers for failing to provide a defense and wrongfully refusing to acknowledge coverage. In that action, plaintiffs sought reimbursement for $30 million allegedly paid for attorney fees and other costs in the 1984 lawsuit, and also asserted the loss to their companies of millions of dollars in profits because the funds spent on legal fees would otherwise have been used for profitable investments. In denying liability, one insurer alleged that late notice of the lawsuit had caused it substantial prejudice. The 1984 lawsuit was settled in 1990, and in July 1990, plaintiffs settled their insurance coverage disputes for $12.5 million.

In February 1991, plaintiffs filed suit for legal malpractice against defendant for omissions in investigating and advising as to the possibility for insurance coverage in the 1984 lawsuit. Defendant moved for summary judgment under *Code Civ. Proc. § 340.6*, arguing that plaintiffs knew of the omissions no later than 1987 and sustained actual injury in the form of lost profits from business investments caused by moneys diverted to defense costs for the 1984 lawsuit, as well as foregone insurance benefits for defense costs incurred prior to tendering defense of the 1984 action to their insurers. Plaintiffs opposed the motion on the grounds that they did not sustain actual injury until the insurance coverage suits were settled. The trial court granted summary judgment, finding actual injury in the lost business profits. The court of appeal reversed, holding that no actual injury was sustained for purposes of *Code Civ. Proc. § 340.6* until the insurance coverage suits were settled, since settlement of those suits was required to determine whether defendants' actions actually caused plaintiffs any damages.

The Supreme Court reversed the court of appeal. The Court first reaffirmed that the legislature's enactment of *Code Civ. Proc. § 340.6* was largely intended to codify the approach taken in the Court's earlier opinion in *Budd v. Nixen (1971) 6 Cal. 3d 195, 98 Cal. Rptr. 849, 491 P.2d 433* , which, while it did not use the phrase "actual injury," held that the statute of limitations began to run when the plaintiff sustained sufficient loss or damage from the attorney's negligence to assert a malpractice cause of action. The Court then specifically held for the first time that the test for actual injury under *Code Civ. Proc. § 340.6* is whether the plaintiff has sustained any damages compensable in a legal action, other than one for actual fraud, against an attorney for a wrongful act or omission arising in the performance of professional services (*18 Cal. 4th 739, 751)* . The Court then rejected the approach taken by the court of appeal, which suggested that establishing a causal nexus between the attorney's negligent acts and an invasion of the client's legally protected interests required the conclusion of any related litigation. In applying the Court's approach to the facts in the instant case, the Court concluded that the undisputed facts established that plaintiffs sustained actual injury as a result of

defendant's alleged neglect no later than December 1987, since by then the plaintiffs had lost millions of dollars in both unpaid insurance benefits for defense costs and in lost profits from the diversion of investment funds. These lost millions were sufficiently manifest, nonspeculative, and mature that plaintiffs had tried to recover them as damages in the insurance coverage suits (*18 Cal. 4th 739, 752)* . The Court also rejected the court of appeal's conclusion that plaintiffs' injury was only speculative until settlement of the coverage lawsuits. Instead, the Court concluded that the coverage lawsuits were only relevant to the legal malpractice suit in that they potentially affected the amount of damages; they did not affect the existence of the defendant's negligence nor the diminishment of plaintiffs' right to liability insurance sustained in the first instance because of the alleged negligence (*18 Cal. 4th 739, 753-754)* . The Court rejected the creation or application of a general rule that would toll the limitations period until a related lawsuit establishes a causal connection between the attorney's error and any resulting error injury, adopting instead an approach that takes into consideration the precise circumstances of the particular case (*18 Cal. 4th 739, 754-755)* .

Finally, after rejecting plaintiffs' policy arguments for construing the statute of limitations narrowly in order to avoid forfeiture of a plaintiff's rights, the Court considered the effect of its holding on the approach taken in other recent Supreme Court and court of appeal decisions addressing the question of what constitutes actual injury under *Code Civ. Proc. § 340.6*. While the Court was able to distinguish on their facts some cases that had required the conclusion of a related proceeding in order support a finding of actual injury, including *Sirott v. Latts (1992) 6 Cal. App. 4th 923, 8 Cal. Rptr. 2d 206* , *Foxborough v. Van Atta (1994) 26 Cal. App. 4th 217, 31 Cal. Rptr. 2d 525* , and *Baltins v. James (1995) 36 Cal. App. 4th 1193, 42 Cal. Rptr. 2d 896* , the Court explicitly overruled its own prior holding in *ITT Small Business Fin. Corp. v. Niles (1994) 9 Cal. 4th 245, 36 Cal. Rptr. 2d 552, 885 P.2d 965* , in which the Court had attempted to establish a bright-line rule that actual damages are sustained in transactional malpractice cases in which the adequacy of the documentation is the subject of the dispute only upon entry of adverse judgment, settlement, or dismissal of the underlying action (*18 Cal. 4th 739, 758-763)* .

[d] Statute Commences When Client's Cause of Action Is Proscribed

In ***Finlayson v. Sanbrook*** *(1992) 10 Cal. App. 4th 1436, 13 Cal. Rptr. 2d 406* , plaintiff client alleged causes of action for legal malpractice, negligent misrepresentation, and negligent infliction of emotional distress against defendant law firm; all causes of action were based on the defendant's alleged failure to file an action that became time-barred. Plaintiff allegedly had suffered injuries from exposure to asbestos and asbestos-related materials while employed as a sheet metal worker from 1952 to 1981. In 1981, plaintiff hired an attorney from defendant law firm to represent him on a workers' compensation claim and to pursue the possibility of other remedies of compensation for his injuries. Defendant advised plaintiff that he would protect plaintiff's legal right regarding any and all claims arising out of his asbestos-related illness. However, the attorney failed to bring a third-party action against the manufacturers and suppliers of the asbestos within one year after plaintiff discovered that his disability was caused by exposure to asbestos, as required by *Code Civ. Proc. § 340.2*. In 1983, plaintiff, through a new attorney, did file a third-party action against the asbestos manufacturers and suppliers he claimed defendant should have brought suit against; several of these defendants obtained summary judgment in 1988 on limitations grounds. On February 9, 1989, plaintiff filed a legal malpractice action alleging that he sustained actual injury on or about May 26, 1988, when summary judgment on limitations grounds was granted against plaintiff in the third-party action. Defendant law firm demurred to the complaint on the ground that the cause of action for legal malpractice was time-barred. The court sustained without leave to amend the demurrer as to the legal malpractice and negligent misrepresentation causes of action. Later, the court granted summary judgment as to the remaining cause of action for negligent infliction of emotional distress. Plaintiff appealed.

The court of appeal affirmed. The court held that in cases in which the malpractice consists of not filing an underlying action within the applicable statute of limitations, actual injury for purposes of *Code Civ. Proc. § 340.6* occurs when the client's underlying action becomes time-barred (*10 Cal. App. 4th 1436, 1444)* . The court also noted that after the underlying action becomes time-barred, plaintiff's attempts to remedy his or her injury do not delay accrual of the statute of limitations for attorney malpractice (*10 Cal. App. 4th 1436, 1443)* . Under the facts of the case, plaintiff's

legal malpractice action became time-barred in 1984, which was one year after the plaintiff discovered the defendant's wrongful act or omission (*10 Cal. App. 4th 1436, 1444-1445)* .

[e] Statute Commences on Entry of Adverse Judgment or Order of Dismissal

The facts and procedural background of ***Laird v. Blacker*** *(1992) 2 Cal. 4th 606, 7 Cal. Rptr. 2d 550, 828 P.2d 691* , are discussed in *§ 24A.29[3][c]*. The plaintiff contended that her actual injury occurred when her appeal of right in the underlying litigation was dismissed, rather than when that litigation was dismissed in the trial court through counsel's malpractice. The Supreme Court disagreed, and held that when legal malpractice arises out of litigation, the "actual injury" sustained by the plaintiff under *Code Civ. Proc. § 340.6* is the entry of an adverse judgment or a final order of dismissal in that litigation, rather than the finality of an appeal from the judgment or order (*2 Cal. 4th 606, 609)* . Therefore, the statute of limitations begins to run on entry of the judgment or order. In the case at bar, plaintiff sustained actual injury when the trial court dismissed her action against the production company and she was compelled to incur legal costs and expenses in pursuing an appeal. Additionally, her case lost considerable settlement value and potential interest on any monetary award that would have been made absent the malpractice, once the action was dismissed (*2 Cal. 4th 606, 615)* . In so holding, the Court expressly disagreed with plaintiff's contentions that actual injury should be defined in terms of monetary amount and that a successful appeal negates the client's ability to file a malpractice action. On the contrary, according to the Court, the focus of *Code Civ. Proc. § 340.6* is on the occurrence and discovery of the malpractice and actual injury, rather than on success on appeal or proof of the total amount of monetary damages suffered by the former client (*2 Cal. 4th 606, 614)* .

In ***Safine v. Sinnott*** *(1993) 15 Cal. App. 4th 614, 19 Cal. Rptr. 2d 52* , a judgment was entered against the client for an amount that included money he did not owe. This mistake was a result of the attorney's negligence. Before the client realized the mistake, he paid the judgment. On a motion by new counsel, the trial court modified its judgment. On appeal, the appellate court reversed because the trial court did not have jurisdiction to modify the judgment.

In response to the client's action for malpractice, the former attorney asserted the statute of limitation. The former attorney argued that the client incurred actual injury on the date he paid the judgment as opposed to the date on which the modified judgment was reversed by the appellate court. In accepting the attorney's argument, the appellate court stated that the client was injured when he paid the money he did not owe, and he was injured again when he incurred costs and attorney's fees in attempting to recoup those funds (*15 Cal. App. 4th 614, 617)* .

[f] Statute Commences When Facts Should Put Plaintiff on Inquiry

In ***Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP*** *(2005) 133 Cal. App. 4th 658, 35 Cal. Rptr. 3d 31* , the plaintiffs were investors that sued attorneys representing a company perpetrating a Ponzi scheme. The plaintiffs claimed that the attorneys' negligence and affirmative misconduct helped the perpetrators of the scheme avoid detection and prosecution by securities regulators. The attorneys filed a special motion to strike the complaint as a SLAPP suit under *Code Civ. Proc. § 425.16(b)(1)*, arguing that the complaint should be dismissed because it targeted the attorneys' constitutionally protected speech or petitioning activity. The attorneys argued that the plaintiffs could not establish the requisite likelihood of success because their claims were barred by the statute of limitations. The trial court denied the motion.

The court of appeal reversed. It concluded that the motion to strike should have been granted in part because the plaintiffs' claims were partially based on protected activity and because some plaintiffs did not establish the requisite likelihood of prevailing. Specifically, the court concluded that the plaintiffs' claims were barred by the applicable statute of limitations (*133 Cal. App. 4th 658, 682-685)* . The parties agreed that *Code Civ. Proc. § 340.6* provided the applicable limitations period. The court of appeal held that the facts showed that the plaintiffs knew or should have known of their claims against the attorneys more than one year before they filed their claim (*133 Cal. App. 4th 658, 682-685)* . For example, the plaintiffs knew more than one year earlier that they had been damaged by the Ponzi scheme

and that the attorneys were representing the company (*133 Cal. App. 4th 658, 682)* . They also had access to reports by a receiver appointed to represent the company that blamed the attorneys for much of what had gone wrong (*133 Cal. App. 4th 658, 683)* . The court held that the only fact that the plaintiffs discovered less than one year after they filed their complaint was that the attorneys had information about individual investors' contributions to the funds involved in the scheme. However, this fact was ancillary to the allegations of misconduct in the complaint, and it was merely evidence cited by the plaintiffs to support the theory that the attorneys owed them duties of care and loyalty (*133 Cal. App. 4th 658, 685)* .

McGee v. Weinberg *(1979) 97 Cal. App. 3d 798, 159 Cal. Rptr. 86* , was a malpractice action in which plaintiff sued the attorney who represented her in a dissolution proceeding for failure to provide in the judgment of dissolution that the husband was required to maintain plaintiff as the irrevocable beneficiary of his life insurance policy. The husband had failed to maintain the policy, and when he died, plaintiff did not receive any proceeds. The interlocutory judgment of dissolution was entered in 1963, and the husband died in 1973. In 1975, plaintiff consulted another attorney on an unrelated matter, and learned she had a cause of action against defendant. She filed the malpractice action in 1976.

Defendant demurred to the complaint, contending the statute of limitations barred the suit, and the trial court sustained the demurrer without leave to amend. The plaintiff appealed, and the court of appeal affirmed, and ordered dismissal of the action. The court held that the statute of limitations commenced at the husband's death, as that was the time plaintiff suffered harm by failing to recover the insurance proceeds, and that was also when plaintiff discovered the loss, and should have been put on inquiry regarding defendant's negligence (*97 Cal. App. 3d 798, 802, 803)* . Although plaintiff argued that she was not aware she had a cause of action against defendant until later, the court held that it is a plaintiff's knowledge of facts sufficient to put a reasonable person on notice that further inquiry or investigation is required, that begins the running of the statute of limitations (*97 Cal. App. 3d 798, 803)* . Whether or not a plaintiff has discovered or is aware of legal rights, is immaterial to the running of the statute (*97 Cal. App. 3d 798, 803, 804)* . Because in this case the plaintiff was put on such notice of inquiry at the time of the husband's death, the statute of limitations began running at that time, and the action against defendant was barred (*97 Cal. App. 3d 798, 804, 805)* .

[g] Statute Not Tolled Once Defendant No Longer Represents Plaintiff as Attorney

Von Rott v. Johnson *(1983) 148 Cal. App. 3d 608, 196 Cal. Rptr. 55* , was an action for legal malpractice based on defendant's alleged negligence in structuring a sale of plaintiff's business. Under the terms of the transaction, defendant was to remain a pledgeholder of the shares of the business, to be sold if the purchaser defaulted. Defendant's last legal act on behalf of plaintiff was taken in June 1978; after the purchaser declared bankruptcy in January 1979, the action was filed in August 1979. Defendant's motion for summary judgment was granted, and plaintiff appealed.

The court of appeal affirmed, holding that defendant's role as pledgeholder did not constitute continued representation of plaintiff within the meaning of *Code Civ. Proc. § 340.6(a)(2)* (*148 Cal. App. 3d 608, 612-613)* . The court held that by its terms, *Code Civ. Proc. § 340.6* applies only to actions arising out of the performance of professional services by attorneys (*148 Cal. App. 3d 608, 612)* . The court noted that one need not be an attorney to be a pledgeholder and that one acting as a pledgeholder is not performing legal services, and concluded that defendant's status as pledgeholder was only tangentially related to the legal representation of plaintiff and therefore did not operate to toll the statute of limitations. The court observed that a contrary result could have meant that defendant would have acted as plaintiff's attorney for the 15-year term of the sale agreement despite plaintiff's awareness of the alleged malpractice and her retention of new counsel to represent her in the transaction (*148 Cal. App. 3d 608, 613)* .

[h] Negligent Attorney's Continued Representation Does Not Toll Statute On Claims Against Attorney's Former Law Firm

In *Beal Bank, SSB v. Arter & Hadden, LLP (2007) 42 Cal. 4th 503, 66 Cal. Rptr. 3d 52, 167 P.3d 666* , plaintiff was a bank that had hired a law firm to represent it in pursuing a claim in bankruptcy court against a debtor who had defaulted

on a loan. The bank's claim was rejected by the bankruptcy court, and while an appeal was pending, the individual attorney who was representing plaintiff left his law firm to start his own firm and plaintiff's representation followed him to the new firm. Plaintiff eventually lost on appeal from the bankruptcy ruling. Plaintiff then sued all of the attorneys and law firms for malpractice, alleging that they failed to conduct any legal research on the relevant issue and advise plaintiff that the claim was likely to be rejected. The law firm that had originally been hired to represent plaintiff in the bankruptcy proceeding demurred, arguing that the suit against it was untimely because the statute of limitations ceased to be tolled under the continued representation exception when the individual attorney representing plaintiff left the firm and plaintiff left with him. Recognizing a conflict in court of appeal opinions on the issue, the trial court sustained the demurrer, holding that the continued representation exception ceased to toll any action against the former law firm when that firm ceased representing plaintiff. Plaintiff appealed, and the court of appeal reversed, concluding that the tolling exception had not ceased against the original firm when the attorney left that firm. Defendant appealed.

The California Supreme Court reversed the court of appeal. The Supreme Court held that if an attorney leaves a law firm and takes the representation of a particular client with him or her, the statute of limitations does not continue to toll under the continued representation exception on a malpractice action that the client may have against the attorney's former law firm or any of the other attorneys in that firm (*42 Cal. 4th 503, 505)* . In so holding, the California Supreme Court concluded that this result was more consistent with the language of *Code Civ. Proc. § 340.6*, which extends this tolling exception to the period during ongoing representation by "the attorney" (*42 Cal. 4th 503, 508-509)* . The Court also concluded that the purposes underlying the continued representation exception--to avoid disruption of the attorney-client relationship while providing the attorney an opportunity to correct or minimize any error, and to prevent an attorney from defeating a malpractice action by continuing to represent the client until the limitations period on the malpractice claim has expired--are only minimally implicated when the individual defendant attorney actually providing representation has left a defendant law firm. There is no longer any risk a defendant firm that is no longer providing representation to plaintiff will try to stall until the expiration period on the malpractice claim has expired by providing assurances to the plaintiff. Conversely, the law firm loses all ability to mitigate any potential damage to the client and there is no longer any attorney-client relationship to protect (*42 Cal. 4th 503, 511-512*). Moreover, a contrary rule, according to the Court, would subject the former law firm to an indeterminate period of potential liability over which it has no control, frustrating one goal of the statute of limitations (*42 Cal. 4th 503, 512)* . The Court also noted that voluntary tolling agreements and stays of litigation could be used to reduce the impact of any lawsuit brought against the former employing firm, which when sued might counter with an indemnity suit against the individual attorney that continues to represent the client (*42 Cal. 4th 503, 505*).

In ***Crouse v. Brobeck, Phleger, & Harrison*** *(1998) 67 Cal. App. 4th 1509, 80 Cal. Rptr. 2d 94* , plaintiff brought a malpractice action against her attorney, the attorney's former law firm, and the attorney's current firm. The attorney and his former law firm had represented the plaintiff in 1987 and 1988 as she sold her interest in a limited partnership to the partnership's general partners. As part of that transaction, a promissory note that was to be due and payable in 1990 was made out to plaintiff, although the note was delivered to defendant attorney, who took no steps to ensure the note would be held in a secure location. After defendant attorney left this law firm in August 1989 to join the attorney's current firm, the former law firm continued to represent plaintiff with respect to the transaction until March 1990. When plaintiff learned in early 1990 that the obligors on the note wished to renegotiate the terms of the note, plaintiff retained defendant attorney and his current law firm to represent her in those renegotiations, and her file was then transferred from the attorney's former firm to his current firm. In April 1990, plaintiff and defendant attorney discovered that they could not locate the promissory note, and while the attorney continued to negotiate the restructuring, he did nothing during the next six months to try to locate the note, nor did he assess the legal significance of not having the note on the restructuring. On the day for closing the restructuring, the attorney for the other parties aborted the restructuring when plaintiff was unable to produce the note, believing erroneously that the note was negotiable and that a holder of the note would later be entitled to demand payment. A few days later, despite lack of the original note, a new note-restructuring agreement was reached, although on terms less favorable to plaintiff than those aborted earlier. By October 1990, plaintiff had consulted independent counsel who advised her the loss of the note was negligence, as was the failure to search for the note, explain to plaintiff the significance of loss of the note, and make alternative arrangements in lieu of

producing the note at the closing. Defendant attorney and his current firm continued to represent plaintiff until July 1993 in matters related to the restructured note transaction.

Plaintiff sued defendant attorney and both law firms for malpractice, with December 1993 the relevant filing date for purposes of the statute of limitations. Defendant attorney and his current firm cross-complained for equitable indemnity against the attorney's former law firm. Former law firm successfully moved for summary judgment against plaintiff on the grounds that, as to it, the one-year statute of limitations had begun to run in October of 1990 and was not tolled by defendant attorney's continued representation of plaintiff. The trial court also extended the summary judgment to those claims brought against defendant attorney for his actions while he was with his former firm. Defendant attorney and his current law firm also successfully moved for summary judgment or judgment on the pleadings against plaintiff, arguing principally that the action was barred by the statute of limitations. Attorney's former law firm also obtained summary adjudication and judgment on the cross claims for equitable indemnity.

The court of appeal affirmed in part and reversed in part. As part of its decision, the court affirmed that plaintiff's claim against the attorney's former law firm was barred by the one-year statute of limitations. The court rejected plaintiff's argument that under a prior decision [*Beane v. Paulsen (1993) 21 Cal. App. 4th 89, 26 Cal. Rptr. 2d 486] , overruled in part, Beal Bank, SSB v. Arter & Hadden, LLP (2007) 42 Cal. 4th 503* , defendant attorney's continued representation of plaintiff tolled the limitations period even as to his former firm. The court noted that the tolling provision of *Code Civ. Proc. § 340.6(a)(2)* is designed to serve two purposes: to prevent the attorney from defeating a malpractice claim by continuing to represent the client until the limitations period on the malpractice claim has expired, and to avoid forcing a client to file a lawsuit that would disrupt an ongoing attorney-client relationship and thereby prevent the attorney from attempting to correct or minimize the damage caused by the attorney's error (*67 Cal. App. 4th 1509, 1535)* .

Distinguishing the facts of the *Beane* case and disagreeing with that opinion's policy analysis, the court, noting that the right to assert a limitations defense is a privilege personal to a defendant, concluded that to toll the statute on the claims brought against the attorney's former firm would subject the former partners to the tolled limitations period without having elected to continue to represent the former client and without obtaining the benefit of being able to participate in eliminating or minimizing their liability for damages through continued representation (*67 Cal. App. 4th 1509, 1538-1539)* . The court recognized that forcing plaintiffs to sue a negligent attorney's former law firm promptly might trigger cross-complaints against the negligent attorney and impede efforts to remedy or minimize the attorney's own error. The court therefore concluded that this detriment should equitably be borne by the negligent attorney and not the former law partners (*67 Cal. App. 4th 1509, 1539)* .

[i] Equitable Tolling Doctrine Inapplicable to Statute

In ***Gordon v. Law Offices of Aguirre & Meyer*** *(1999) 70 Cal. App. 4th 972, 83 Cal. Rptr. 2d 119* , plaintiffs were Arizona residents who filed an attorney malpractice action in Arizona state court against a San Diego law firm that had represented plaintiffs in an underlying class action involving alleged violations of securities laws. The Arizona malpractice action was removed to federal district court, where it was dismissed for lack of personal jurisdiction over the San Diego firm. Less than two months after dismissal, plaintiffs refiled the malpractice action against the law firm in California state court. Defendant demurred to the California action on the grounds that the action was barred by the one-year limitations period of *Code Civ. Proc. § 340.6*, and the trial court agreed, rejecting plaintiff's argument that the California statute was equitably tolled while the Arizona action was pending. Plaintiffs appealed.

The court of appeal affirmed the trial court's ruling. The court noted that prior court opinions had interpreted the language of *Code Civ. Proc. § 340.6(a)*, which provides that "in no event" shall the limitations period be tolled except under the circumstances specified in the statute, as evidence of a legislative intent to disallow tolling in any other circumstances (*70 Cal. App. 4th 972, 979-980)* . Thus, despite any lack of prejudice to the defendants, the court of appeal held that the equitable tolling doctrine, under which a plaintiff may be relieved of the effects of a statute of

limitations in certain cases in order to prevent a technical forfeiture and unjustifiably prevent a trial on the merits, does not apply to attorney malpractice actions subject to *Code Civ. Proc. § 340.6* (*70 Cal. App. 4th 972, 980)* . However, the court also suggested that the equitable tolling doctrine would not apply under the facts in any event, since trial on the merits was not denied due to an error of the trial court or through forces outside of the plaintiffs' control, but because the plaintiffs mistakenly filed suit in Arizona against California defendants (*70 Cal. App. 4th 972, 980 n.8*).

[j] Statute Applicable in Action Based on Breach of Fiduciary Duty

In ***Stoll v. Superior Court*** *(1992) 9 Cal. App. 4th 1362, 12 Cal. Rptr. 2d 354* , plaintiff brought an action for breach of fiduciary duty against his former attorney. Defendant demurred to the complaint on the ground that the pleading actually sounded in legal malpractice and was therefore time-barred under the one-year malpractice statute of limitations under *Code Civ. Proc. § 340.6*. The trial court overruled the demurrer, concluding that the complaint for breach of fiduciary duty was governed by the "catch-all" limitations period of four years under *Code Civ. Proc. § 343*. Defendant sought review by extraordinary writ.

The court of appeals issued a peremptory writ of mandate commanding the trial court to vacate its order overruling petitioner's demurrer and to enter a new and different order sustaining the demurrer without leave to amend (*9 Cal. App. 4th 1362, 1369)* . The court stated that "wrongful act or omission," as used in *Code Civ. Proc. § 340.6* refers to all legal malpractice excepting actual fraud. The court held that *Code Civ. Proc. § 340.6* applies in legal malpractice actions based on breach of fiduciary duty (*9 Cal. App. 4th 1362, 1363-1364, 1366-1369)* .

The court (First Dist., Div. Five) declined to follow *David Welch Co. v. Erskine & Tulley (1988) 203 Cal. App. 3d 884, 893, 250 Cal. Rptr. 339 (First Dist., Div. Four)* , which holds that a cause of action based on an attorney's breach of fiduciary duties is subject to the four-year catchall statute set forth in *Code Civ. Proc. § 343*. The court noted that the *David Welch Co.* case lacked extensive analysis behind its conclusions and failed to examine applicable legislative history and case authority (*9 Cal. App. 4th 1362, 1369)* .

[k] Actual Injury May Occur When Incurring Legal Fees Caused by Defendant's Malpractice

In ***Truong v. Glasser*** *(2009) 181 Cal. App. 4th 102, 103 Cal. Rptr. 3d 811* , plaintiff was a company that manufactured printed circuit boards and defendant was an attorney who reviewed a proposed lease for commercial property at the request of plaintiff. Plaintiff signed the lease only to discover that the property needed more work than anticipated before the company could occupy the property. After a dispute with the landlord over the necessary property improvements, plaintiff sent to defendant a lease addendum designed to resolve the dispute. Although the parties disagreed over whether the attorney advised plaintiff to sign the addendum or not, plaintiff did sign it. Three months later, with the plaintiff dissatisfied with the landlord's work on the improvements, plaintiff hired a different attorney to pursue litigation against the landlord, litigation that included an attempt to rescind the lease addendum. A year and a half later, judgment was entered against plaintiff in that lawsuit. The following month, plaintiff filed a malpractice action against defendant attorney, alleging that defendant was negligent and breached his fiduciary duties by not properly advising plaintiff regarding the lease and lease addendum. Defendant filed a motion for summary judgment on the grounds that the action was barred by the one-year statute of limitations of *Code Civ. Proc. § 340.6*. The trial court granted the motion. Plaintiff appealed.

The court of appeal affirmed. The court rejected plaintiff's argument that the plaintiff did not suffer actual injury, thereby triggering the statute of limitations, until judgment was rendered in the lawsuit against the landlord. The court held instead that plaintiff suffered actual injury sufficient to begin the limitations period when plaintiff hired an attorney to pursue litigation against the landlord to escape the consequences of having signed the lease, as at that point plaintiff incurred legal fees allegedly caused by the negligent conduct of defendant attorney (*181 Cal. App. 4th 102, 114-115)* .

[4] Additional Authorities

[a] Statute of Limitations for Legal Malpractice

In *Bell v. Hummel (1982) 136 Cal. App. 3d 1009, 186 Cal. Rptr. 688* , plaintiffs brought a legal malpractice action against defendants for failure to assert a valid claim for damages on their behalf in a prior action. Defendants' demurrer, based on the statute of limitations, was sustained, and plaintiffs appealed. The court of appeal affirmed. Citing *Code Civ. Proc. § 340.6* in deciding the statute of limitations issue, the court held that the limitations period for legal malpractice is tolled during the times, inter alia, that plaintiff has not sustained actual injury or the errant attorney continues to represent the plaintiff regarding the specific matter in which the malpractice occurred (*136 Cal. App. 3d 1009, 1015, 1017-1018)* .

[b] Statute Commences When Plaintiff Suffers Actual Injury

In *Village Nurseries v. Greenbaum (2002) 101 Cal. App. 4th 26, 123 Cal. Rptr. 2d 555* , the plaintiff was a landscaping and irrigation systems company that performed extensive work for a building contractor. The building contractor filed for Chapter 11 bankruptcy, and the plaintiff recorded several mechanic's liens for amounts that the contractor owed. The plaintiff specifically inquired from its attorneys about whether, to protect its liens, a Notice of Perfection of Security Interest needed to be filed with the Bankruptcy Court under *11 U.S.C.S. § 546(b)*. The attorneys were of the opinion that a Notice was not necessary, but that suit needed to be filed in state court to protect the liens. The following year, both the bankruptcy trustee and the bankruptcy court indicated their opinion that the liens were invalid due to the failure to file a Section 546 notice. The plaintiff eventually filed a malpractice suit against the attorneys after the bankruptcy court ruled that the liens were in fact invalid. The trial court rejected the defendants' summary judgment motion to the extent that it was based on the statute of limitations, although it granted summary judgment for the defendants on other grounds. The court of appeal held that the defendants were entitled to summary judgment on the grounds that the statute of limitations had run before suit was filed. The plaintiff had failed to file the lawsuit within one year after learning that the bankruptcy trustee and the bankruptcy court were of the opinion that the liens were invalid. Although suit was filed within a year after the court's eventual ruling on the invalidity of the liens, the settlement value of the plaintiff's claims for payment was impaired once the trustee questioned the validity of the liens. It was on that date that the plaintiff sustained actual injury, thus triggering the statute of limitations. The court rejected the defendants' argument that the statute did not begin to run until the court actually invalidated the liens (*101 Cal. App. 4th 26, 41-42)* .

In *Gailing v. Rose, Klein & Marias (1996) 43 Cal. App. 4th 1570, 51 Cal. Rptr. 2d 381* , a deceased's estate brought a malpractice action against the deceased's attorneys for the failure to resolve a personal injury action for asbestos exposure, and thus losing the right to general damages. However, the estate delayed filing the malpractice action until the underlying wrongful death action concluded based on its belief that the statute of limitations would not begin to run on the malpractice action until final damage was sustained, with final damage defined as occurring at the completion of the underlying action. The malpractice action was thus filed more than a year after the deceased's death. The attorneys moved for summary judgment on the ground that the statute of limitations had run, and the trial court granted the motion. The court of appeal recognized that in *Laird v. Blacker (1992) 2 Cal. 4th 606, 7 Cal. Rptr. 2d 550, 828 P.2d 691* , the Supreme Court stated that the statute of limitations for legal malpractice actions commences on entry of adverse judgment or final order of dismissal. However, the court stated that *Adams v. Paul (1995) 11 Cal. 4th 583, 46 Cal. Rptr. 2d 594, 904 P.2d 1205* , removed any notion that *Laird* created a bright line rule regarding the tolling of the statute of limitations (*43 Cal. App. 4th 1570, 1574)* . *Adams* demonstrated that the determination of when a plaintiff in a legal malpractice case has sustained actual injury is predominantly a factual rather than a legal determination (*43 Cal. App. 4th 1570, 1576)* . Applying this reasoning, the court stated that when a plaintiff in a personal injury action dies, the right to general damages for pain and suffering is extinguished. Therefore, a negligent failure to bring a case to trial before the plaintiff's death is akin to missing a statute of limitations for pain and suffering damages (*43 Cal. App. 4th 1570, 1577)* . Concluding that actual injury occurred immediately on death when the estate was deprived of the opportunity to collect pain and suffering damages, the court affirmed the summary judgment for defendants.

In *Fantazia v. County of Stanislaus (1996) 41 Cal. App. 4th 1444, 49 Cal. Rptr. 2d 177* , plaintiff sued a county and its

public defender for legal malpractice with regard to the legal representation provided him in defense of criminal sexual offense charges. Plaintiff was originally convicted on all counts and sentenced to prison, but after substituting private counsel and obtaining an order for a new trial, the charges were dismissed and plaintiff was ordered discharged. Plaintiff then filed his malpractice action against the county. The county moved for summary judgment on the basis of the statute of limitations, and the trial court granted the motion. Plaintiff contended that the statute of limitations was tolled until the charges against him were dismissed, because until then he did not know whether his counsel's inadequate representation was harmless. The court of appeal cited *Laird v. Blacker (1992) 2 Cal. 4th 606, 7 Cal. Rptr. 2d 550, 828 P.2d 691* , for the rule that actual injury occurs upon entry of the underlying adverse judgment or order of dismissal. While fitting criminal malpractice litigation into forms designed for civil cases may not always work, the court did not find this case to require a departure from the standards evolved in civil malpractice (*41 Cal. App. 4th 1444, 1454)* . The court thus concluded that Laird compelled finding that the limitations period commenced at the latest on the date when plaintiff's sentence to prison in the underlying case was executed (*41 Cal. App. 4th 1444, 1452)* . The summary judgment ordered by the trial court was thus affirmed.

In *Bennett v. McCall (1993) 19 Cal. App. 4th 122, 23 Cal. Rptr. 2d 268* , the court of appeal held that a client suffers damage when he or she is compelled, as a result of the attorney's error, to incur or pay attorney fees. The plaintiff knew about the defendant attorney's alleged negligence by June 1986, and paid a $1,500 retainer fee to another attorney on March 5, 1987, to represent him in the dissolution action and rectify the alleged negligence of defendant. The court of appeal held that the lower court correctly determined that the statute of limitations began running at the latest on March 5, 1987 (*19 Cal. App. 4th 122, 126)* .

[c] Statute Not Tolled Once Defendant No Longer Represents Plaintiff as Attorney

The factual and procedural background of *Truong v. Glasser (2009) 181 Cal. App. 4th 102, 103 Cal. Rptr. 3d 811* , is described in [3][k], *above*. The court of appeal in that case rejected plaintiff's claim that the attorney malpractice action was tolled by the continuous representation exception. The court concluded that plaintiff had failed to present evidence showing that defendant attorney continued to represent plaintiff on the subject of the lease documents after providing his last advice on the subject in December 2005. Because the malpractice lawsuit was not filed until September 2007, the continued representation exception could not be used to overcome defendant's defense that the lawsuit was untimely. The court noted also that defendant provided no advice or assistance to plaintiff when plaintiff hired a new attorney in March 2006 to pursue litigation against the landlord with respect to the lease (*181 Cal. App. 4th 102, 116-117)* .

In *Foxborough v. Van Atta (1994) 26 Cal. App. 4th 217, 31 Cal. Rptr. 2d 525* , there was a four-year gap between an attorney's representation of a client in a real estate development matter and his subsequent acts of serving as a consultant and expert in litigation arising out of that transaction. The court distinguished continuous, non-sporadic representation regarding a specific subject matter from the existence of a continuing attorney-client relationship and concluded as a matter of law that the continuous representation requirement had not been met because of the client's retention of new counsel, the lack of contact between the attorney and the client during the four-year period, and the significant change in the attorney's role in the later litigation (*26 Cal. App. 4th 217, 229)* .

Hensley v. Caietti (1993) 13 Cal. App. 4th 1165, 16 Cal. Rptr. 2d 837 , arose out of a marital settlement agreement that was approved orally by the court after a hearing, effective immediately. One party to the agreement became dissatisfied with its terms before her attorney prepared the written judgment. After reviewing the proposed judgment in her attorney's office, she refused to agree to it, and the two became embroiled in a heated argument. The party filed a legal malpractice action over one year later, but less than one year after formally obtaining a substitution of attorney in the dissolution matter. The court of appeal affirmed summary judgment in favor of defendant in the legal malpractice action on the ground that it was time-barred under *Code Civ. Proc. § 340.6*. Representation is discontinued according to the perspective of the client rather than the attorney. Under the facts, the attorney-client relationship was terminated when the disagreement occurred in the attorney's office, not when the substitution was formally made (*13 Cal. App.*

4th 1165, 1170-1173) .

Panattoni v. Superior Court (1988) 203 Cal. App. 3d 1092, 250 Cal. Rptr. 390 , was an appeal from a superior court's denial of defendant attorneys' motion for summary judgment. The defendant had neglected to file a meritorious third-party claim in social security and workers' compensation proceedings arising out of a construction accident. Several years after the termination of these proceedings, the attorneys attempted to reinstate social security benefits and reopen the workers' compensation action. The court of appeal held that this latter representation did not toll the statute under the "continued representation" exception, and it issued a writ of mandate directing the superior court to enter judgment in defendants' favor (*203 Cal. App. 3d 1092, 1097-1098)* . The court stated that legal representation in a matter terminates when no court or administrative tribunal retains jurisdiction over the matter and nothing remains to be done with regard to the proceedings in which legal representation was rendered (*203 Cal. App. 3d 1092, 1097)* .

In *Rubinstein v. Barnes (1987) 195 Cal. App. 3d 276, 240 Cal. Rptr. 535* , the court of appeal affirmed the trial court's summary judgment in favor of defendant attorney, on the ground that the plaintiff's malpractice action was barred under *Code Civ. Proc. § 340.6*. The action was based on defendant's alleged negligence in representing plaintiff during a 1974 marriage dissolution proceeding. Plaintiff argued that defendant continued to represent her until 1986 (and that the statute was thereby tolled), because the court retained jurisdiction over the issue of spousal support until that year. The court rejected this argument, noting that the plaintiff, by her own admission, had only one contact with defendant following the final judgment of dissolution, and that after this discussion in late 1974, she never asked defendant to do anything further in connection with the dissolution (*195 Cal. App. 3d 276, 283-284)* .

In *Shapero v. Fliegel (1987) 191 Cal. App. 3d 842, 236 Cal. Rptr. 696* , plaintiff, who had retained defendant attorney to represent her in a divorce action, brought a malpractice action against the attorney. The trial court granted summary judgment to defendant, finding the action was barred under *Code Civ. Proc. § 340.6(a)*. Plaintiff appealed, claiming that the statute of limitations had been tolled because the attorney never formally withdrew as her attorney of record under *Code Civ. Proc. § 285.1*. The court of appeal affirmed, holding that failure to withdraw formally as attorney of record, standing alone, will not toll the statute of limitations under the rubric of continued representation (*191 Cal. App. 3d 842, 846)* .

[d] Plaintiff in Malpractice Action Against Criminal Defense Attorney Must Comply With Statute of Limitations Even While Seeking Reversal or Other Postconviction Relief in Underlying Criminal Action

In *Ovando v. County of Los Angeles (2008) 159 Cal. App. 4th 42, 71 Cal. Rptr. 3d 415* , a former criminal defendant sued his criminal defense attorney and the attorney's employer, the county, for attorney malpractice resulting in his false conviction. A jury verdict was rendered in favor of plaintiff and he was awarded substantial damages, but the trial court granted a new trial because of juror misconduct. The court of appeal affirmed the new trial order, but also held that the lower court had erred in ruling that plaintiff's malpractice action had not accrued until his convictions were set aside in habeas corpus proceedings and that plaintiff's claim filed with the county had therefore been timely. Citing the analysis of the Supreme Court in *Coscia v. McKenna & Cuneo (2001) 25 Cal. 4th 1194, 1209-1211, 108 Cal. Rptr. 2d 471, 25 P.3d 670* , discussed in [3][k], *above*, the court of appeal held that while proving actual innocence requires exoneration through postconviction relief, the lack of postconviction relief does not stay the running of the statute of limitations on an attorney malpractice action that has otherwise accrued. The appropriate remedy for a convicted criminal defendant who has been the victim of attorney malpractice but has not yet been exonerated is to file the malpractice action within the statute of limitations and to seek a stay of that action until exoneration on the criminal charges can be obtained. Thus, for the new trial, plaintiff would be required to plead and prove facts demonstrating either compliance with the government claims presentation requirement or an excuse for noncompliance (*159 Cal. App. 4th 42, 68-70)* .

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 24A ATTORNEYS AT LAW: MALPRACTICE
PART II. FORMS

2A-24A California Points & Authorities § 24A.30

§ 24A.30 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--By Defendant--Attorney Retained by Union Immune From Malpractice Suit by Individual Union Member [29 U.S.C.S. § 185(b)]

[1] FORM

[*Caption. See § 24A.20.*].

SUMMARY JUDGMENT SHOULD BE GRANTED IN FAVOR OF DEFENDANT BECAUSE DEFENDANT'S REPRESENTATION OF PLAINTIFF'S INTERESTS TOOK PLACE WHILE DEFENDANT WAS FUNCTIONING AS A UNION AGENT IN THE COLLECTIVE BARGAINING PROCESS, AND DEFENDANT IS THEREFORE IMMUNE FROM LIABILITY FOR MALPRACTICE UNDER TITLE *29 UNITED STATES CODE SECTION 185(b)*.

A. Summary Judgment. [*See § 24A.20, Paragraph A.*]

B. Immunity of Attorney Functioning as Union Agent in Collective Bargaining Process. Counsel functioning as union agents in the collective bargaining process are immune from malpractice suits brought by individual union members (*Aragon v. Pappy, Kaplon, Vogel & Phillips (1989) 214 Cal. App. 3d 451, 262 Cal. Rptr. 646* ; *see 29 U.S.C.S. § 185(b)*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted by defendant in support of a motion for summary judgment, on the ground that defendant's representation of plaintiff's interests was in connection with defendant's function as a union agent in the collective bargaining process.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should allege facts showing that the representation of plaintiff took place in the context of defendant's role as a union agent in the collective bargaining process.

With appropriate modifications, this form may be used to support a general demurrer to a complaint, or a motion for judgment on the pleadings.

[b] When Immunity Unavailable

Immunity from malpractice actions by aggrieved individual labor union members is unavailable under *29 U.S.C.S. § 185(b)* if either of the following is true [*Peterson v. Kennedy (9th Cir. 1985) 771 F.2d 1244, 1259* ; *Aragon v. Pappy, Kaplon, Vogel & Phillips (1989) 214 Cal. App. 3d 451, 462, 262 Cal. Rptr. 646]* :

- The aggrieved union member has personally retained the attorney or firm to process grievances on his or her behalf, even though the attorney or firm also serves as the union's regular outside counsel and is employed at the union's suggestion; or

- The legal services provided by the attorney or firm are wholly unrelated to the collective bargaining process, whether or not the attorney or firm is employed by the union.

If either of these immunity exceptions apply, this form should not be used.

[c] Related Memoranda

For memoranda relating to summary judgments generally, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Immunity of Attorney Retained in Collective Bargaining Process by Union

In ***Aragon v. Pappy, Kaplon, Vogel & Phillips*** *(1989) 214 Cal. App. 3d 451, 463, 262 Cal. Rptr. 646* , plaintiff, a discharged employee, brought an action against a law firm and attorney retained by her union to represent its members in grievance and arbitration proceedings as provided by a collective bargaining agreement. The complaint included allegations of professional malpractice. The defendants moved for summary judgment, contending that the immunity from individual liability generally provided to union members, officials, and agents pursuant to *29 U.S.C.S. § 185(b)* is available to attorneys and law firms on retainer to unions in a cause of action for professional malpractice. The trial court granted the motion for summary judgment and entered judgment accordingly. Plaintiff appealed.

The court of appeal affirmed the judgment. The court followed *Peterson v. Kennedy (9th Cir. 1985) 771 F.2d 1244, 1256* , in which the Ninth Circuit held that under *29 U.S.C.S. § 185(b)*, attorneys who perform services for and on behalf of a union may not be held liable in malpractice to individual grievants when the services the attorneys perform constitute a part of the collective bargaining process (*214 Cal. App. 3d 451, 460)* . The attorney defendants in *Peterson* were in-house counsel, rather than hired on retainer, but the court found this difference would not make the immunity doctrine inapplicable in the instant case. The court rejected plaintiff's contention that attorney immunity would unduly interfere with the state interest in protecting citizens from the harm caused by negligent attorneys; the court stated that

nothing in the *Peterson* case would prevent a dissatisfied union member from complaining to the State Bar regarding negligent acts. Furthermore, in egregious situations related to the collective bargaining process, the union member may bring an action against the union, which may in turn sue its counsel (*214 Cal. App. 3d 451, 463)* .

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2A-24A California Points & Authorities § 24A.31

§ 24A.31 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--By Defendant--No Recovery for Emotional Distress Damages When Malpractice Results in Only Economic Loss

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

A CLIENT MAY NOT RECOVER EMOTIONAL DISTRESS DAMAGES FOR ATTORNEY MALPRACTICE CAUSING ONLY ECONOMIC LOSS.

No Recovery for Emotional Distress Damages When Attorney Malpractice Results in Only Economic Loss. Emotional distress damages are not recoverable in an attorney malpractice action alleging only economic loss regardless of whether the malpractice occurred in the context of litigation or tax advice (*Camenisch v. Superior Court (1996) 44 Cal. App. 4th 1689, 1691, 52 Cal. Rptr. 2d 450*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a defendant's contention in a legal malpractice action that a plaintiff may not recover emotional distress damages where the malpractice leads only to economic loss.

This form may be combined with points pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that plaintiff may not recover emotional distress damages, for example in a general demurrer or motion for summary judgment. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence of the type of loss sustained by plaintiff [*see Camenisch v. Superior Court (1996) 44 Cal. App. 4th 1689, 1693, 52 Cal. Rptr. 2d 450]* .

[3] Discussion of Authorities

[a] No Recovery for Emotional Distress Damages When Attorney Malpractice Results in Only Economic Loss

In ***Camenisch v. Superior Court*** *(1996) 44 Cal. App. 4th 1689, 52 Cal. Rptr. 2d 450* , a client brought an action for negligent infliction of emotional distress and legal malpractice against an attorney. Plaintiff had hired defendant to prepare trust and estate documents, including a life insurance trust in favor of his daughters, and informed defendant that he wanted to ensure financial security for his wife and daughters and that he did not want the proceeds to become a taxable part of his estate. Defendant prepared the life insurance trust, and assured plaintiff that the proceeds would not be taxed. When plaintiff discovered that the trust was incorrectly formed and estate taxes would result he sued for emotional distress damages. Defendant demurred, but the trial court overruled the demurrer.

The court of appeal disagreed, and issued a writ of mandate to strike all allegations directed toward emotional distress. The court held that the law does not recognize a protectable interest in freedom from the emotional distress involved in paying taxes, even if the taxes might have been avoided by skilled legal advice and drafting. Therefore, a lawyer may not be held liable for the emotional distress of a client who learns that the attorney's negligence may have thwarted the client's tax avoidance goal. The fact that the alleged negligence did not take place in a litigation context did not defeat the general rule that emotional distress damages are not recoverable for attorney malpractice when the malpractice leads only to economic loss (*44 Cal. App. 4th 1689, 1691)* .

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2A-24A California Points & Authorities § 24A.32

§ 24A.32 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--By Defendant--No Cause of Action Against Criminal Defense Attorney Absent Proof That Plaintiff Was Not Guilty in Prior Criminal Action

[1] FORM

[*Caption. See § 24A.20.*]

THE COURT SHOULD GRANT SUMMARY JUDGMENT IN FAVOR OF DEFENDANT BECAUSE PLAINTIFF HAS FAILED TO PROVE HIS/HER FACTUAL INNOCENCE OF THE CRIME FOR WHICH HE/SHE WAS CHARGED IN THE PRIOR CRIMINAL ACTION.

A. Summary Judgment. [*See § 24A.20 Paragraph A*].

B. Elements Required for Cause of Action. [*See § 24A.20, Paragraph B.*]

C. Plaintiff Must Show Factual Innocence of Criminal Charges in Prior Action. In order for a former criminal defendant to establish a legal malpractice action against his or her criminal defense attorney, plaintiff must prove, by a preponderance of the evidence, not only that the former attorney was negligent, but that plaintiff was innocent of the criminal charges (*Wiley v. County of San Diego (1998) 19 Cal. 4th 532, 545, 79 Cal. Rptr. 2d 672, 966 P.2d 983*).

D. Plaintiff Must Obtain Reversal or Other Postconviction Relief in Underlying Criminal Action. To establish factual innocence of the underlying criminal charges and successfully pursue a malpractice action against a criminal defense attorney, an individual convicted of a criminal offense must first obtain reversal of the conviction or other exoneration by postconviction relief (*Coscia v. McKenna & Cuneo (2001) 25 Cal. 4th 1194, 1201, 108 Cal. Rptr. 2d 471, 25 P.3d 670*).

[*Optional*] **E. Plaintiff's Showing of Factual Innocence Extends to Lesser-Included Offenses.** The factual innocence requirement applies not just to the criminal charges actually brought against the criminal defendant, but to lesser-included criminal offenses as well (*Sangha v. LaBarbera (2006) 146 Cal. App. 4th 79, 88, 52 Cal. Rptr. 3d 640*).

[*Optional*] **F. Plaintiff's Required Showing of Factual Innocence and Exoneration Extends to Transactionally Related Offenses.** The factual innocence and exoneration requirement applies not just to the criminal actually brought against the criminal defendant, but to all transactionally related offenses stemming from the same criminal event, even those that do not necessarily qualify as lesser-included offenses (*Wilkinson v. Zelen (2008) 167 Cal. App. 4th 37, 48, 83 Cal. Rptr. 3d 779*).

[2] Comments

[a] Use of Form

This form may be submitted by defendant in support of a motion for summary judgment in an action for damages based on defendant's alleged malpractice in defending plaintiff in a prior criminal action. They are for use when the plaintiff has failed to meet his or her burden of showing, by a preponderance of evidence, that he or she was not in fact guilty.

This form may be modified for use in another procedural context in which counsel wishes to raise the substantive issue. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should include specific facts showing that a reasonable cause exists to believe that the plaintiff committed the offense for which he or she was arrested, and should argue that plaintiff's opposing papers fail to meet his or her burden to show his or her innocence of the charges by a preponderance of evidence.

In supporting or opposing a motion for summary judgment, it is necessary to produce evidentiary facts that support or oppose a finding that there is triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. Thus counsel for the moving party must submit a statement of undisputed facts supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations. Affidavits or declarations supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit. References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see Cal. Rules of Ct., Rule 3.1113(k)*].

Although the issue of a plaintiff's factual innocence of the earlier criminal charges may be decided by a court on summary judgment if there are no triable issues of fact, the plaintiff otherwise has the right to have a jury determination of the issue [*Salisbury v. County of Orange (2005) 131 Cal. App. 4th 756, 764-766, 31 Cal. Rptr. 3d 831]* .

[c] Related Pleading and Practice Forms

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[d] Related Memoranda

For additional points supporting a motion for summary judgment against a plaintiff who was a former criminal defendant, see *§ 24A.29[4]*. For memoranda relating to summary judgment generally, see Ch. 221, *Summary Judgments* .

[e] Opposing Memoranda

For points in opposition to the points raised in this memorandum, see *§ 24A.56A.*

[3] Discussion of Authorities

[a] Plaintiff Must Show Factual Innocence of Criminal Charges in Prior Action

In ***Wiley v. County of San Diego*** *(1998) 19 Cal. 4th 532, 79 Cal. Rptr. 2d 672, 966 P.2d 983* , plaintiff was a former criminal defendant whose conviction for battery resulted in a four-year prison sentence that was eventually overturned through a petition for habeas corpus. The evidence supporting the petition demonstrated that a key witness for the prosecution in the underlying criminal action had lied in testifying that plaintiff was at the scene of the battery and that the public defender assigned to plaintiff had failed to interview witnesses that would have testified that someone other than plaintiff had been at the scene of the alleged battery and been shouting at the victim. Following the invalidation of plaintiff's conviction, plaintiff brought a legal malpractice action against the public defender and the county. Prior to trial, the court determined that plaintiff's innocence was not an issue and refused to require proof on the matter or submit the issue to the jury, who subsequently found in favor of the plaintiff. The defendants challenged the ruling on the issue of actual innocence, citing *Tibor v. Superior Court (1997) 52 Cal. App. 4th 1359, 61 Cal. Rptr. 2d 326* [*see § 24A.32[4]*], in which the court of appeal concluded that a former criminal defendant must prove his or her innocence of the underlying criminal charges in order to prove proximate causation in a legal malpractice action against the defense attorney in the criminal action. The court of appeal reversed the judgment on evidentiary grounds unrelated to the issue of the plaintiff's actual innocence, but rejected the argument that plaintiff was required to prove his actual innocence of the criminal charges in order to recover for legal malpractice. The Supreme Court granted review to resolve the dispute between the court of appeal decision and the decision in *Tibor*.

The Supreme Court affirmed the court of appeal's decision to reverse the trial court judgment, but did so by holding that in an attorney malpractice action involving an underlying criminal defense, the malpractice plaintiff must prove by a preponderance of the evidence his or her actual innocence as a necessary element of the cause of action (*19 Cal. 4th 532, 545)* . The Supreme Court noted that the clear majority of courts in other jurisdictions that had considered the issue had required proof of actual innocence in criminal malpractice actions as an additional element of the cause of action and that common to these court decisions was a public policy concern with preventing a guilty criminal defendant from recovering in a civil malpractice action. In reaching its decision, the Supreme Court found compelling this policy concern with preventing a factually guilty criminal defendant from benefiting from his or her wrongful actions and concluded that only an innocent person wrongly convicted due to inadequate representation has suffered a compensable injury (*19 Cal. 4th 532, 538-539)* .

The Court recognized that guilty criminal defendants who are harmed by their attorney's negligence in ways other than conviction, such as through the imposition of a longer sentence, would be without a civil remedy for that negligence. However, the Court noted that in the this context, the criminal defendant's own criminal act remains the ultimate source of his or her predicament irrespective of counsel's subsequent negligence (*19 Cal. 4th 532, 540)* . The Court also noted that procedural protections designed to protect a criminal defendant's constitutional rights, while afforded to protect and vindicate fundamental values, are not intended to confer direct benefit outside the context of the criminal justice system. Thus, a criminal defense attorney's negligent failure to secure an acquittal for a guilty defendant does not give rise to civil liability, although post-conviction criminal procedures might offer relief (*19 Cal. 4th 532, 541-543)* .

The Court distinguished the alternative remedies available to a defendant in a criminal case from the lack of alternative remedies when the malpractice takes place in a civil case. The Court also noted the fact that while damages in the civil context are usually easily translated into money damages, that is not the case when the malpractice occurs in the criminal context (*19 Cal. 4th 532, 543)* . Finally, the Court reinforced its decision by noting the pragmatic difficulties that would accompany an attempt to prove causation if the plaintiff's actual innocence were not an element. Without that requirement, a plaintiff would be required to "prove by a preponderance of the evidence that, but for the negligence of [his or her] attorney, the jury could not have found [the plaintiff] guilty beyond a reasonable doubt" (*19 Cal. 4th*

532, 544) .

[b] Plaintiff Must Obtain Reversal or Other Postconviction Relief in Underlying Criminal Action

In ***Coscia v. McKenna & Cuneo*** *(2001) 25 Cal. 4th 1194, 108 Cal. Rptr. 2d 471, 25 P.3d 670* , the plaintiff was an attorney indicted on federal charges of securities fraud and related offenses. During plea negotiations, he discussed with his attorney the possibility of offering the government information about another ongoing securities fraud scheme in exchange for the prosecutor's agreement to a misdemeanor plea. However, his attorney advised him not to make the offer, stating that it would not be worth her time to even discuss it with the prosecutor. Relying on his attorney's advice, the plaintiff did not make the offer and instead accepted a felony plea offer. He was then sentenced to two years' probation and fined $5,000. Following the conviction, his license to practice law in California was suspended, causing him economic and emotional damage. The plaintiff then learned, through discussions with a U.S. Attorney and an F.B.I. agent, that his attorney had made a mistake by not offering the plaintiff's information in exchange for a better plea, because plea deals such as the plaintiff proposed were commonly made. The plaintiff then brought a malpractice suit against the attorney and her firm. The defendants successfully demurred without leave to amend on the grounds that the plaintiff's criminal conviction precluded relief in the malpractice action, based on principles of collateral estoppel. The court of appeal reversed, holding that a plaintiff in a criminal malpractice action who pleaded guilty to the underlying offense is not collaterally estopped from proving actual innocence.

The California Supreme Court agreed that the trial court's ruling should be reversed, but disagreed with the analysis of the court of appeal. The Court first reviewed its earlier analysis in *Wiley v. County of San Diego (1998) 19 Cal. 4th 532, 79 Cal. Rptr. 2d 672, 966 P.2d 983* [*see § 24A.32[3][a]*]. Then, addressing a point explicitly left unanswered in *Wiley*, the Court held that an individual convicted of a criminal offense must obtain reversal of the conviction, or other exoneration by postconviction relief, to establish actual innocence in a criminal malpractice case. The Court noted that the public policy considerations reviewed in *Wiley* require that only an innocent person who is wrongly convicted be deemed to have suffered legally compensable harm (*25 Cal. 4th 1194, 1201)* . The Court reasoned that an individual who was convicted and has not obtained postconviction relief should not be permitted to shift responsibility for his or her predicament to the former defense counsel. The Court also briefly noted other policy concerns that supported their holding: protection against inconsistent verdicts, such as might result if a legal malpractice judgment were won by the plaintiff while his or her criminal conviction remained intact; promotion of judicial economy by eliminating frivolous malpractice actions if postconviction relief is denied; and encouraging the representation of criminal defendants by reducing the risk of baseless malpractice actions (*25 Cal. 4th 1194, 1204)* . Thus, an intact conviction, regardless of whether it results from a trial or a plea of guilty or nolo contendere, bars proof of actual innocence in a legal malpractice action even if ordinary collateral estoppel principles might not otherwise be controlling (*25 Cal. 4th 1194, 1204-1205)* . The Court suggested that the requisite postconviction relief may be in the form of acquittal after retrial, reversal on appeal with directions to dismiss, reversal followed by the People's refusal to continue the prosecution, or a grant of habeas corpus relief (*25 Cal. 4th 1194, 1205)* .

After holding that the plaintiff was still required to comply with the applicable limitations period (*25 Cal. 4th 1194, 1210-1211)* , the Court remanded to the trial court to allow the plaintiff to attempt to amend his pleading to allege actual innocence, because the complaint in the case was filed before the Supreme Court's opinion in *Wiley* (*25 Cal. 4th 1194, 1211)* .

[c] Plaintiff's Showing of Factual Innocence Extends to Lesser-Included Offenses

In ***Sangha v. LaBarbera*** *(2006) 146 Cal. App. 4th 79, 52 Cal. Rptr. 3d 640* , plaintiff was charged with making a felony criminal threat and misdemeanor violations for vandalism and petty theft after an altercation with his girlfriend. On the advice of his attorney, plaintiff accepted a plea bargain under which he would plead guilty to felony vandalism and be placed on probation for three years, after which the felony conviction would be changed to a misdemeanor and cold be expunged from his record. When plaintiff was subsequently unable to renew his license to deal securities

because of the felony conviction, he hired new counsel. This attorney successfully convinced a court to set aside the felony conviction and enter a misdemeanor conviction instead, which was eventually expunged. Plaintiff then sued his original attorney for malpractice, but the trial court granted summary judgment for the attorney. The trial court concluded that plaintiff failed to raise a triable issue as to his actual innocence and postconviction exoneration. Plaintiff appealed.

The court of appeal affirmed. Plaintiff had argued that he was only required to show that he was factually innocent of felony vandalism, which required destruction of property worth at least $400. The court disagreed, holding that plaintiff was required to show that he was factually innocent of the lesser-included offense of misdemeanor vandalism, which applies when the property damage is less than $400 but is otherwise the same crime. The court noted that the factual innocence requirement is designed to limit malpractice damages to those criminal defendants who are factually innocent of any criminal conduct. Plaintiff conceded that he was guilty of misdemeanor vandalism, disputing only the value of the damage, and as such he could not prove his factual innocence (*146 Cal. App. 4th 79, 88-89)* .

[d] Plaintiff's Required Showing of Factual Innocence and Exoneration Extends to Transactionally Related Offenses

In ***Wilkinson v. Zelen*** *(2008) 167 Cal. App. 4th 37, 48, 83 Cal. Rptr. 3d 779* , a criminal defendant was convicted by a jury of felony battery on a custodial officer, misdemeanor driving under the influence, and failing to stop at the scene of an accident. She filed a direct appeal and a petition for writ of habeas corpus, arguing that her attorney had been incompetent in providing representation to her. Her convictions were affirmed on direct appeal, but her petition for writ of habeas corpus based on ineffective assistance of counsel was successful, resulting in the vacating of her three convictions. Pursuant to a plea bargain, she then entered no contest pleas to two misdemeanor counts, one for driving under the influence and one for interference with an officer in the performance of his or her duties, and given probation. She then sued her defense attorney for malpractice. The trial court sustained defendant's demurrer without leave to amend, concluding that plaintiff had shown neither factual innocence of all criminal charges relating to the action nor exoneration. Plaintiff appealed.

The court of appeal affirmed. The court first concluded that plaintiff could not allege factual innocence under the *Wiley* standard described in [3][a], *above.* The court noted that plaintiff had entered no contest pleas to two misdemeanors in order to compromise the charges that were the basis for her earlier convictions, a result inconsistent with factual innocence. Moreover, the court also noted that no court had ever suggested that plaintiff was factually innocent of any of the charged offenses, including the original felony charge of battery on a custodial officer (*167 Cal. App. 4th 37, 46)* . Relying in part on the rationale of *Sangha v. LaBarbera,* discussed in [3][c], *above,* the court next held that the factual innocence and exoneration requirements applied to all transactionally related offenses, even those that failed to qualify as necessarily lesser-included offenses. Because plaintiff pleaded no contest to two misdemeanors that were transactionally related to the felony charge of battery in order to settle the criminal action, plaintiff could not plead exoneration from all criminal charges stemming from that one criminal event. The court noted that plaintiff had received appropriate relief from her attorney's alleged negligence when she was successful on her habeas petition and eventually received a lighter punishment (*167 Cal. App. 4th 37, 48)* .

[4] Additional Authorities

[a] Plaintiff Must Show Factual Innocence of Criminal Charges in Prior Action

In *Tibor v. Superior Court (1997) 52 Cal. App. 4th 1359, 61 Cal. Rptr. 2d 326* , plaintiff, a criminal defendant, brought a legal malpractice action against his former public defender. The charges against plaintiff in the underlying action had ultimately been dismissed, but plaintiff sought damages for his alleged 655 days in jail between the time of his arrest and his release upon dismissal. The malpractice action was based on two theories. The first was that defendant was negligent in failing to timely request DNA testing of plaintiff, and the second was that defendant was negligent in

failing to act more quickly in locating and interviewing alibi witnesses. Defendant moved for summary judgment. The trial court denied the motion, finding that a triable issue of material fact existed as to whether defendant had been negligent in representing plaintiff. Defendant then filed a petition for writ of mandate, which was denied by the court of appeal. Defendant sought review in the Supreme Court, which issued an order directing the appeals court to vacate its order denying the writ petition and to set the matter for hearing.

The court of appeal granted the writ and directed the trial court to set aside its order denying defendant's summary judgment motion and to enter a new order granting the motion. Defendant argued on review that he was entitled to summary judgment on either or both of two theories: (1) he had not breached his duty of care; (2) alternatively, even if he had been negligent, there was no proximate cause between his acts and defendant's resulting harm in the absence of a showing by plaintiff that he was innocent of the charges brought against him. The court concluded as to the first theory that there was a triable issue of fact regarding defendant's negligence. But the court accepted defendant's alternative theory and held, as a matter of sound public policy, that a former criminal defendant, in order to establish proximate cause in a legal malpractice action against his or her former criminal defense attorney, must prove by a preponderance of the evidence not only that the former attorney was negligent, but also that the plaintiff was innocent of the criminal charges against him or her (*52 Cal. App. 4th 1359, 1373)* .

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CHAPTER 24A ATTORNEYS AT LAW: MALPRACTICE
PART II. FORMS

2A-24A California Points & Authorities § 24A.33

§ 24A.33 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--By Defendant--Collateral Estoppel Bars Action Based on Same Facts Determined in Prior Proceeding

[1] FORM

[*Caption. See § 24A.20.*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, BECAUSE UNDISPUTED FACTS SHOW THAT PLAINTIFF'S ALLEGATIONS OF DEFENDANT'S PROFESSIONAL NEGLIGENCE ARE BASED ON FACTS IDENTICAL TO THOSE PREVIOUSLY DETERMINED IN A PRIOR PROCEEDING AND PLAINTIFF IS THEREFORE BARRED FROM PROSECUTING THE PRESENT ACTION.

A. Elements of Collateral Estoppel. Collateral estoppel bars relitigation of an issue decided at a prior proceeding if (1) the issue necessarily decided at the prior proceeding is identical to the one sought to be relitigated, (2) the previous proceeding resulted in a final judgment on the merits, and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior proceeding (*Mooney v. Caspari (2006) 138 Cal. App. 4th 704, 717, 41 Cal. Rptr. 3d 728*).

[*Optional*] **B. Privity Defined.** A party is in privity with another if the two share a mutual or successive relationship to the same rights of property, or if there is such an identification in interest of one person with another as to represent the same legal rights (*Mooney v. Caspari (2006) 138 Cal. App. 4th 704, 718, 41 Cal. Rptr. 3d 728*).

[*Optional*] **C. Collateral Estoppel Proper When Malpractice Complaint Is Based on Same Factual Allegations of Attorney Neglect That Were Determined In Prior Habeas Corpus Proceeding.** If a plaintiff's civil malpractice complaint is based on the same factual allegations of attorney neglect which were actually determined against the plaintiff after a full evidentiary hearing in a prior habeas corpus proceeding, the action is barred by collateral estoppel (*Younan v. Caruso (1996) 51 Cal. App. 4th 401, 414, 59 Cal. Rptr. 2d 103*).

[*Optional*] **D. Court Approval of Settlement Procedures in Class Action Will Collaterally Estop Class Member From Suing for Insufficient Settlement Notification Procedures.** When, after a class action has settled, a member of the plaintiff class sues class counsel for negligence, collateral estoppel will defeat any malpractice claim based on the

alleged insufficiency of the settlement notification procedures utilized, at least when the trial court approved the final settlement and notice procedures after providing class members an opportunity to object (*Martorana v. Marlin & Saltzman (2009) 175 Cal. App. 4th 685, 694-697, 96 Cal. Rptr. 3d 172*).

[2] Comments

[a] Use of Form

This form may be submitted by defendant in support of a motion for summary judgment in an action for damages based on defendant's alleged legal malpractice. They are for use when the plaintiff's action is based on facts that were fully determined in a prior proceeding.

This form may be modified for use in another procedural context in which counsel wishes to raise the substantive issue. For example, they may be modified to support a motion to dismiss, the procedural device used by the defendant in *Younan v. Caruso (1996) 51 Cal. App. 4th 401, 414, 59 Cal. Rptr. 2d 103* , or to support a demurrer when the prior proceeding is subject to judicial notice and determined issues identical to those alleged in the complaint. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should show that the prior proceeding determined legal issues identical to those raised in the malpractice action, that the standard of proof in both proceedings were the same, and that the decision against plaintiff in the prior proceeding was final as to the facts adjudicated [*see Younan v. Caruso (1996) 51 Cal. App. 4th 401, 414, 59 Cal. Rptr. 2d 103]* .

In supporting or opposing a motion for summary judgment, it is necessary to produce evidentiary facts that support or oppose a finding that there is triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. Thus counsel for the moving party must submit a statement of undisputed facts supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations. Affidavits or declarations supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit. References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see Cal. Rules of Ct., Rule 3.1113(k)* . In this case, the evidentiary facts will necessarily be based on copies of relevant portions of the prior proceeding, attached to a separate request for judicial notice [*see Evid. Code § 452*; *Cal. Rules of Ct., Rules 3.1113(l), 3.1306(c)*].

[c] Related Pleading and Practice Forms

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[d] Related Memoranda

For additional points supporting a motion for summary judgment against a plaintiff who was former criminal defendant, see *§ 24A.32*. For memoranda relating to summary judgment generally, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Elements of Collateral Estoppel

In ***Mooney v. Caspari*** *(2006) 138 Cal. App. 4th 704, 41 Cal. Rptr. 3d 728* , the plaintiff was a real estate broker who

lost a large potential commission when a real estate development project fell through because the city failed to agree to a freeway interchange to be built adjacent to the planned development. Without the freeway interchange, the landowner pulled out of a joint venture agreement with a real estate developer to develop the land for commercial office space. The landowner subsequently filed for bankruptcy and sought to quiet title to the property, which the developer opposed unsuccessfully, with substantial participation from the real estate broker. While this was proceeding, the developer's contractual right to develop the property expired. The developer then brought a legal malpractice action against the attorney who handled the bankruptcy action, and although the real estate broker was not a plaintiff in this action, once again he participated extensively. After trial on the merits, the attorney was found not liable for malpractice. The real estate broker then sued the attorney who prosecuted the legal malpractice action for failing to prosecute a legal malpractice action on his behalf against the developer's former attorney. A jury awarded $1.5 million to the broker, and the attorney appealed.

The court of appeal reversed, holding that the doctrine of collateral estoppel prevented the broker from proving any damages from the lost legal malpractice claim. The court reaffirmed the traditional formulation for application of collateral estoppel, which may be used to bar relitigation of an issue decided at a prior proceeding if (1) the issue necessarily decided at the prior proceeding is identical to the one sought to be relitigated, (2) the previous proceeding resulted in a final judgment on the merits, and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior proceeding (*138 Cal. App. 4th 704, 717)* .

[b] Privity Defined

The factual and procedural background of ***Mooney v. Caspari*** *(2006) 138 Cal. App. 4th 704, 41 Cal. Rptr. 3d 728* , is described in § 24A.33[3][a]. The court of appeal recognized that the real estate broker was not a party to the earlier legal malpractice action against the developer's former attorney. However, the court concluded that the broker was in privity with the developer, because privity occurs if two parties share a mutual or successive relationship to the same rights of property, or if there is such an identification in interest of one person with another as to represent the same legal rights. The court noted that the real estate broker participated extensively in assisting the developer, and that the two parties shared virtually the same interest in preventing the landowner from backing out of the development project. The court concluded that because the developer's former attorney was found not liable for malpractice, any action against the developer's current attorney based on failure to file a malpractice action against the former attorney would fail for lack of damages. Although the broker was not a party to the developer's malpractice action, the broker's interest in the litigation was interconnected with the developer's to such a close degree that the broker was in privity with the developer, and application of collateral estoppel was therefore appropriate (*138 Cal. App. 4th 704, 718-721)* .

[c] Collateral Estoppel Proper When Malpractice Complaint Is Based on Same Factual Allegations of Attorney Neglect That Were Determined In Prior Habeas Corpus Proceeding

In ***Younan v. Caruso*** *(1996) 51 Cal. App. 4th 401, 59 Cal. Rptr. 2d 103* , plaintiff, who was convicted of molesting his stepdaughter, sued defendant, the lawyer who defended him in that criminal prosecution, for legal malpractice in connection with the lawyer's defense of the molestation charge. The complaint alleged that (1) defendant failed to investigate the charges and to call professional witnesses on plaintiff's behalf, (2) defendant negligently and carelessly failed to interview witnesses to support the position of the plaintiff and to investigate the claim of the prosecution or to call witnesses to testify on plaintiff's behalf. Defendant moved to dismiss on the ground that the earlier denial of plaintiff's habeas corpus petition, based on a constitutional claim of ineffective assistance of counsel, collaterally estopped plaintiff from relitigating the issue of defendant's competence. The trial court granted defendant's motion to dismiss. Plaintiff appealed, contending that collateral estoppel did not apply because the standards and burdens of proof placed on him in connection with his habeas corpus petition were far greater than those required to prove a claim for simple negligence.

The court of appeal affirmed the order of the trial court, holding that where a plaintiff's civil malpractice complaint is

based on the same factual allegations of attorney neglect which were actually determined against the plaintiff after a full evidentiary hearing in a prior habeas corpus proceeding, the action is barred by collateral estoppel (*51 Cal. App. 4th 401, 414)* . The court first determined that the habeas standard for gauging the effectiveness of trial counsel was the same as in a legal malpractice action, whether counsel performed as a reasonable lawyer would have under prevailing professional norms. Next it determined that the threshold requirements of collateral estoppel were met: plaintiff was a party to both actions; the burden of proof on the issue of counsel's effectiveness and the legal issues raised at the habeas corpus hearing were the same as those raised in plaintiff's legal malpractice complaint; and the decision denying plaintiff's request for habeas relief was final as to the facts adjudicated. As to the final judgment requirement the court acknowledged that an order denying a habeas corpus writ is not res judicata. However, given the judicially created policy against repetitious habeas corpus petitions, the decision denying plaintiff's writ request was, for all intents and purposes, final. Lastly, the court stated that there were a number of policy reasons for application of collateral estoppel in this case: the specter of inconsistent verdicts, should plaintiff prevail on his malpractice claim, would cast great doubt on the fact-finding process by which the trial court determined that defendant's trial conduct was competent; and allowing the malpractice claim would run counter to the policy prohibiting successive habeas petitions based on factual allegations already determined in prior habeas proceedings. On the other hand, disallowing the malpractice claim promoted the important policy of judicial economy by eliminating repetitive litigation (*51 Cal. App. 4th 401, 413-414)* .

[d] Court Approval of Settlement Procedures in Class Action Will Collaterally Estop Class Member From Suing for Insufficient Settlement Notification Procedures

In ***Martorana v. Marlin & Saltzman*** *(2009) 175 Cal. App. 4th 685, 96 Cal. Rptr. 3d 172* , plaintiff was a member of a plaintiff class in an earlier class action brought against an insurance company for the company's failure to pay overtime pay and related penalties. Class counsel negotiated a settlement in that suit, which the trial court approved after a fairness hearing, and claim notices were mailed to all class members at their most recent addresses. Plaintiff, who would have received $65,000 under the terms of the settlement, failed to submit a claim by the deadline imposed and was denied his share of the recovery. Although he admitted that he received the settlement notification and claims form, plaintiff had recently been diagnosed with cancer and was feeling the physical effects of his disease and treatment, causing him to neglect his obligation to respond to the notification or return the claim form in the allotted time. Plaintiff then sued the attorneys who represented the plaintiff class, alleging that they were negligent in failing to negotiate a settlement notification procedure under which class counsel would be notified before the claim filing deadline as to which class members had not responded, so that counsel could then contact those members to determine why they had not responded. Plaintiff also alleged counsel could be held liable for failing to contact him personally once counsel knew or should have known that he had not submitted a timely claim form. The trial court sustained class counsels' demurrer without leave to amend. Plaintiff appealed.

The court of appeal affirmed the sustaining of the demurrer. The court held that the doctrine of collateral estoppel defeated plaintiff's claim that class counsel could be liable for failing to negotiate a different notification procedure. The court noted that the trial court in the underlying class action held a fairness hearing before approving the settlement, which necessarily meant that the court found that the notice procedure used by the parties complied with the requirements of due process and that the settlement itself was fair, adequate, and reasonable. Plaintiff had an opportunity to file a written objection to the settlement or the notice procedures and appear at the fairness hearing, but he failed to do so. Under those circumstances, the court held that plaintiff was estopped from relitigating the sufficiency of the settlement notification in his subsequent negligence suit. The court also concluded that allowing a malpractice claim challenging the adequacy of a judicially approved notice of settlement would undermine the authority of the trial court to determine the form and content of the notice to class members (*175 Cal. App. 4th 685, 694-697)* . The court also rejected plaintiff's claim that class attorneys utilizing an approved procedure for providing mass notification of settlement claims procedures to class members have an additional duty to follow up with individual class members who do not respond by the deadline for doing so (*175 Cal. App. 4th 685, 697*).

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2A-24A California Points & Authorities § 24A.34

§ 24A.34 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--By Defendant--Outside Counsel Hired by Corporation Not Subject to Derivative Malpractice Suit Brought by Shareholder

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

A SHAREHOLDER OF A CORPORATION MAY NOT BRING A DERIVATIVE ACTION FOR MALPRACTICE AGAINST OUTSIDE COUNSEL HIRED BY THE CORPORATION, BECAUSE THE CORPORATE CLIENT HOLDS THE ATTORNEY-CLIENT PRIVILEGE AND IN THE ABSENCE OF A WAIVER OF THE PRIVILEGE BY THE CORPORATION, THE ATTORNEY SUED BY SHAREHOLDERS WOULD BE PREVENTED FROM MOUNTING ANY MEANINGFUL DEFENSE TO THE MALPRACTICE CLAIM FOR ACTIONS TAKEN WHILE REPRESENTING THE CORPORATION.

Shareholder May Not Prosecute Derivative Malpractice Suit Against Outside Corporate Counsel. A shareholder of a corporation may not bring a derivative action for malpractice against outside counsel hired by the corporation, because the corporate client holds the attorney-client privilege and in the absence of a waiver of the privilege by the corporation, the attorney sued by shareholders would be prevented from mounting any meaningful defense to the malpractice claim for actions taken while representing the corporation (*McDermott, Will & Emery v. Superior Court (2000) 83 Cal. App. 4th 378, 384-385, 99 Cal. Rptr. 2d 622*).

[2] Comments

[a] Use of Form

This memorandum may be submitted to support the contention that a shareholder of a corporation may not bring a shareholder derivative action for malpractice against outside counsel hired by the corporation. This contention is based on the fact that the corporate client holds the attorney-client privilege, and in the absence of a waiver of the privilege by the corporation, the attorney sued by shareholders would be prevented from mounting any meaningful defense to the malpractice claim for actions taken while representing the corporation.

This form may be combined with points relating to the specific procedural context in which counsel wishes to raise the issue that a malpractice action brought by a stockholder may not be maintained against outside counsel. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include facts showing that the attorney was representing the corporation and that the corporation has not waived the attorney-client privilege with respect to that representation.

[3] Discussion of Authorities

[a] Shareholder May Not Prosecute Derivative Malpractice Suit Against Outside Corporate Counsel

In ***McDermott, Will & Emery v. Superior Court*** *(2000) 83 Cal. App. 4th 378, 99 Cal. Rptr. 2d 622* , five shareholders of a corporation with approximately 1,200 shareholders brought a derivative action against a law firm for alleged malpractice in representing the corporation. Before discovery was commenced, the law firm filed a motion for judgment on the pleadings, arguing that the derivative action against outside counsel constituted an impermissible assignment of the malpractice action and was against public policy because it required the firm to defend the malpractice action without the ability to disclose privileged information in connection with that defense. The trial court denied the motion for judgment on the pleadings. The law firm petitioned for writ of mandate.

The court of appeal issued a peremptory writ directing the trial court to vacate its order and enter a new order granting judgment on the pleadings. The court first held that because the cause of action in a shareholder derivative suit belongs to and remains with the corporation, allowing the derivative suit does not constitute an impermissible assignment of the malpractice action to dissident shareholders (*83 Cal. App. 4th 378, 382)* . The court also held that the business judgment rule did not necessarily preclude the action (*83 Cal. App. 4th 378, 382-383)* . However, the court nonetheless concluded that due to concerns over the attorney-client privilege, a shareholder may not bring a derivative action for malpractice against outside counsel hired by the corporation. Because the attorney-client privilege is held not by shareholders, but by the corporate client, in the absence of a waiver of the privilege by the corporation, the attorney sued by shareholders would be prevented from mounting any meaningful defense to the malpractice claim for actions taken while representing the corporation (*83 Cal. App. 4th 378, 383-385)* .

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2A-24A California Points & Authorities § 24A.34A

§ 24A.34A Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--By Defendant--Public Policy Prohibits Malpractice Action if Plaintiff Seeks Damages for Willful Commission of Own Crime

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF'S LEGAL MALPRACTICE ACTION IS BARRED BY PUBLIC POLICY BECAUSE EVEN IF DEFENDANT PROVIDED ERRONEOUS LEGAL ADVICE TO PLAINTIFF, PLAINTIFF CANNOT RECOVER DAMAGES SUSTAINED IF PLAINTIFF'S UNDERLYING CONDUCT CONSTITUTED A CRIME.

Malpractice Action Not Permitted if Plaintiff's Conduct Was Criminal. Public policy prohibits a plaintiff from pursuing a legal malpractice action if the receipt of bad legal advice led to the commission of a crime by the plaintiff (*Chapman v. Superior Court (2005) 130 Cal. App. 4th 261, 276-277, 29 Cal. Rptr. 3d 852*).

[2] Comments

[a] Use of Form

This form may be submitted by the defendant in a legal malpractice action if the plaintiff seeks to recover for damages sustained from the plaintiff's own criminal conduct, even though the defendant's legal advice may have prompted the commission of the crime.

This form may be combined with points pertaining to the specific procedural context in which these points are raised, such as a motion for summary judgment. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form showing the relationship between the facts of the case and the point of law stated. Thus, for example, counsel should include facts showing that plaintiff is seeking to recover damages caused by

plaintiff's own criminal conduct.

[3] Discussion of Authorities

[a] Malpractice Action Not Permitted When Plaintiff's Conduct Was Criminal

In ***Chapman v. Superior Court*** *(2005) 130 Cal. App. 4th 261, 29 Cal. Rptr. 3d 852* , the plaintiff was a former public official pursuing a legal malpractice action against counsel for the public board on which the plaintiff formerly served. While serving as a board member, the plaintiff was a founding member of a firm that entered into contracts with energy companies and communities that wanted to decommission aging power plants. The plaintiff's firm entered into a contract with a specific energy company under which the firm was paid $20,000 per month, during a period in which that energy company was also involved in contracts with the plaintiff's public board. The plaintiff disclosed this conflict of interest to the attorney serving as the public board's counsel, and this attorney advised the plaintiff that the proper course of conduct was to reveal his conflict of interest and excuse himself from any votes involving this particular energy company. However, when the plaintiff's self-serving deals became public knowledge, he was forced to resign, and he became the target of several criminal investigations by the district attorney. As a result, the plaintiff eventually pleaded guilty to a felony for having financial interests in public contracts made by the board, in willful violation of *Gov. Code § 1090*, under which the plaintiff should have resigned from the board when he entered into the self-serving financial deals. The plaintiff then sued the board's counsel for providing erroneous advice on how to handle the conflicts of interest. The trial court denied the defendant's motion for summary judgment, and the defendant petitioned for a writ of mandate.

The court of appeal granted the petition for writ of mandate, directing the trial court to grant the summary judgment motion. The court noted that under *Gov. Code § 1090*, a holder of public office is prohibited from having a financial interest in a public contract made by a board or commission of which the officer is a member. Moreover, case law had established that a public officer cannot escape liability for a violation of this statute merely by abstaining from voting or participating in discussions or negotiations. Case law had also established that reliance on the advice of counsel was not an excuse (*130 Cal. App. 4th 261, 274)* . The court then held that public policy prohibited the plaintiff from seeking what would amount to indemnification from the public counsel and his employer for the damages that the plaintiff sustained by virtue of his commission of a felony. The court noted that *Gov. Code § 1090* was designed to serve as a disincentive to officers who might be tempted to take personal advantage of their office, and this purpose would be thwarted if the officer were allowed to recoup his or her losses attributable to a violation of the statute. The court noted that the plaintiff should have recognized the wrongfulness of his conduct when he entered into self-serving private financial contracts and failed to relinquish his seat on the board, especially in light of the fact that the plaintiff's contract with the energy company specified that the plaintiff was to place the energy company's interests ahead of any interests of the public board (*130 Cal. App. 4th 261, 276-277)* .

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 24A ATTORNEYS AT LAW: MALPRACTICE
PART II. FORMS

2A-24A California Points & Authorities § 24A.35

§ 24A.35 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--By Cross Defendant--Cross Complaint Against Subsequent Attorney for Indemnity Not Allowed

[1] FORM

[*Caption. See § 24A.20.*]

SUMMARY JUDGMENT SHOULD BE GRANTED IN FAVOR OF CROSS DEFENDANT BECAUSE A CROSS COMPLAINT FOR INDEMNITY IS NOT ALLOWED AGAINST THE CLIENT'S SUBSEQUENT ATTORNEY.

A. Summary Judgment. [*See § 24A.20, Paragraph A.*]

B. No Cross Complaint Against Subsequent Attorney for Indemnity. The defendant in a legal malpractice suit may not file a cross complaint for indemnity against the plaintiff's subsequent attorney who was hired to extricate plaintiff from the damage caused by defendant's negligence, because the possibility of such liability would inhibit the subsequent attorney's ability to act in the client's best interests (*Gibson, Dunn & Crutcher v. Superior Court (1979) 94 Cal. App. 3d 347, 356, 156 Cal. Rptr. 326* ; *Held v. Arant (1977) 67 Cal. App. 3d 748, 752, 134 Cal. Rptr. 422*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in a legal malpractice action by the client's subsequent attorney who is a cross defendant against whom the defendant is seeking indemnity, on the grounds that such a cross complaint is not allowed.

However, at least one later case has limited the rule stated in this form disallowing such cross complaints to cases in which the subsequent attorney was required to exercise his or her professional judgment in choosing a course of conduct to extricate the client from the first attorney's negligence [*see Parker v. Morton (1981) 117 Cal. App. 3d 751, 767, 173 Cal. Rptr. 197* ; *but see Holland v. Thacher (1988) 199 Cal. App. 3d 924, 934-935, 245 Cal. Rptr. 247* (rejecting *Parker* case as untenable departure from majority rule); *see also Copenbarger v. International Ins. Co. (1996) 46 Cal. App. 4th 961, 966, 54 Cal. Rptr. 2d 1* (although *Parker* has been disagreed with, it has not been overturned)].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations which support the motion [*see Code Civ. Proc. § 437c*].

[b] Related Uses

With appropriate modifications, this form may be used to support a general demurrer to a cross complaint, or a motion for judgment on the pleadings, where it appears on the face of the cross complaint that cross defendant is an attorney, hired by the client subsequent to the first attorney's negligence.

[c] Related Memoranda

For memoranda relating to summary judgments generally, see Ch. 221, *Summary Judgments* .

[d] Opposing Memoranda

The points in *§ 24A.57* may be used in an appropriate case to oppose a motion for summary judgment supported by this form.

[3] Discussion of Authorities

[a] No Cross Complaint Against Subsequent Attorney for Indemnity

In ***Gibson, Dunn & Crutcher v. Superior Court*** *(1979) 94 Cal. App. 3d 347, 156 Cal. Rptr. 326* , plaintiff sued a debtor and the law firm which had been hired to prepare a loan transaction, for negligence in failing to provide a valid, enforceable security interest for plaintiff. Defendants cross complained against plaintiff's subsequent attorney for negligently representing plaintiff in its attempts to collect the interest, thereby contributing to plaintiff's loss. Cross defendant demurred to the cross complaint of one defendant, which was essentially the same as the other cross complaint. The trial court overruled the demurrer, and cross defendant appealed.

The court of appeal reversed, sustaining the demurrer, and dismissing the cross complaint. It held that an attorney undertaking to represent a client who is seeking to extricate himself or herself from a prior attorney's negligence, should not be subject to cross complaints for comparative negligence by the prior attorney (*94 Cal. App. 3d 347, 355)* . The court reasoned that the second attorney, whose alternatives in handling the client's case may be more limited than those of the first attorney, should not be required to face potential conflicts between loyalty to the client, and the desire to protect himself or herself from exposure to a cross complaint for indemnity (*94 Cal. App. 3d 347, 356)* . Potential liability to a client's adversaries, including a previous attorney the client is suing for malpractice, would interfere with the second attorney's duty to follow whatever course of action he or she deemed to be in the client's best interest (*94 Cal. App. 3d 347, 355, 356)* .

In ***Held v. Arant*** *(1977) 67 Cal. App. 3d 748, 134 Cal. Rptr. 422* , plaintiff brought a malpractice action against the attorney who represented him in dealings with a third party after the plaintiff had been sued by the third party for fraud in those dealings. The plaintiff had hired subsequent attorneys to defend him in the fraud case, which was settled. The first attorney, defendant in the malpractice suit, brought a cross complaint for indemnity against the subsequent attorneys for recommending that the client settle legally defensible claims, which injured the client and also foreseeably damaged the first attorney by exposing him to liability for malpractice. The subsequent attorneys demurred to the cross complaint, and the trial court dismissed it.

The defendant and cross complainant appealed, and the court of appeal affirmed. It held that there were two grounds on which to dismiss the cross complaint. First, an attorney may be liable for negligence only to an intended beneficiary of his or her actions, and the client's prior attorney is not an intended beneficiary (*67 Cal. App. 3d 748, 751)* . Therefore, there could be no liability to defendant for direct negligence by the subsequent attorneys (*67 Cal. App. 3d 748, 751)* . In addition, an attorney attempting to extricate a client from a prior attorney's negligence, who must choose between alternative courses of conduct in protecting the client's interest, cannot be inhibited by the possibility that he or she will be liable to the earlier attorney for making one choice over another (*67 Cal. App. 3d 748, 751-752)* .

[4] Additional Authorities

[a] No Cross Complaint Against Subsequent Attorney for Indemnity

In *Lewis v. Purvin (1989) 208 Cal. App. 3d 1208, 256 Cal. Rptr. 827* , the defendant in an attorney malpractice suit cross complained for equitable indemnity against his former client's attorney. The defendant claimed this attorney was "entirely or jointly responsible" for the complained-of malpractice because the attorney had represented plaintiffs as their attorney of record before, during, and after the alleged malpractice, and had failed to protect plaintiffs from the consequences of his (defendant's) advice (*208 Cal. App. 3d 1208, 1214, 1215)* . The court of appeal affirmed the trial court's judgment dismissing the defendant's cross complaint against the attorney (*208 Cal. App. 3d 1208, 1219)* .

In *Holland v. Thacher (1988) 199 Cal. App. 3d 924, 245 Cal. Rptr. 247* , defendants in an attorney malpractice suit cross complained for equitable indemnity against their former client's new counsel. The trial court sustained the new counsel's demurrer, and the attorney malpractice defendants appealed. The court of appeal affirmed, deeming the order sustaining the demurrer to incorporate a judgment of dismissal (*199 Cal. App. 3d 924, 927 n.1*). The court held that sound public policy reasons prohibit predecessor attorneys sued for malpractice by a former client from cross complaining for equitable indemnity against a successor attorney hired to extricate the client from the condition created by the predecessor attorneys (*199 Cal. App. 3d 924, 926)* . The court also noted that the prohibition on cross complaints was not inconsistent with and did not violate *Civ. Code § 1432*, which governs the right of contribution between obligors (*199 Cal. App. 3d 924, 936)* . In addition, the court noted that the prohibition imposes no burden on the predecessor attorney, because he or she may assert the successor attorney's negligence as an affirmative defense (*199 Cal. App. 3d 924, 929)* .

Goldfisher v. Superior Court (1982) 133 Cal. App. 3d 12, 183 Cal. Rptr. 609 , was an action involving an attorney's malpractice in which the subsequently hired attorney petitioned for a writ of mandamus, directing the trial court to vacate its order overruling his general demurrer to a cross complaint for equitable indemnity filed against him by the first attorney, to sustain the demurrer without leave to amend, and to enter a judgment against the first attorney. The court of appeal granted his petition, noting that the first attorney's cross complaint was against public policy. The court stated that the consequence of allowing such cross complaints would be to corrode the sacred attributes of complete confidentiality and undivided loyalty that are the heart of the relationship between lawyer and client (*133 Cal. App. 3d 12, 22)* .

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
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PART II. FORMS

2A-24A California Points & Authorities § 24A.36

§ 24A.36 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--By Cross Defendant--Cross Complaint for Indemnity Not Allowed Between Insured's Defense Attorney and Separate Attorney Representing Insurer's Interests

[1] FORM

[*Caption. See § 24A.20.*]

SUMMARY JUDGMENT SHOULD BE GRANTED IN FAVOR OF CROSS DEFENDANT BECAUSE INDEMNITY IS NOT ALLOWED BETWEEN AN ATTORNEY REPRESENTING THE INTERESTS OF AN INSURED AND AN ASSOCIATED ATTORNEY REPRESENTING OR PROTECTING THE INTERESTS OF THE INSURER IN THE SAME ACTION.

A. Summary Judgment. [*See § 24A.20, Paragraph A.*]

[*Optional*] **B. Cross Complaint for Indemnity By Insurer-Provided Defense Attorney Against Insured's Independent Counsel Not Allowed.** An attorney appointed by an insurer to provide a defense for an insured under a reservation of the insurer's rights under the insurance policy is barred from obtaining indemnity for malpractice liability from the attorney who provided the insured with independent counsel in the same action (*Kroll & Tract v. Paris & Paris (1999) 72 Cal. App. 4th 1537, 1540, 86 Cal. Rptr. 2d 78*).

[*Optional*] **C. Attorney Paid by Client's Insurer Not Entitled to Indemnity From Separate Counsel Hired by Insurer to Monitor Case.** If an attorney whose fees were paid by the client's insurer is sued by the insurer for malpractice, the attorney is not entitled to indemnity from separate attorneys retained by the insurer to "monitor" the case (*Shaffery v. Wilson, Elser, Moskowitz, Edelman & Dicker (2000) 82 Cal. App. 4th 768, 769, 98 Cal. Rptr. 2d 419*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a claim for equitable indemnity in a legal malpractice action stemming from an underlying third-party action in which an insurer has provided an insured with defense counsel and also provided separate counsel either to participate in defending the action under a reservation of the insurer's rights or to monitor the action [*see Civ. Code § 2860*]. The grounds for the opposition to the claim for indemnity are that indemnity is not allowed between an attorney representing the interests of an insured and an associated attorney representing or protecting the interests of the insurer in the same action.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations that support the motion [*see Code Civ. Proc. § 437c*].

[b] Related Uses

With appropriate modifications, this form may be used to support a general demurrer to a cross-complaint, or a motion for judgment on the pleadings, if it appears on the face of the cross complaint that indemnity is not permitted.

[c] Related Pleading and Practice Forms

For related discussion of insurance defense generally, see California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender).

[d] Related Memoranda

For memoranda relating to insurance defense cases generally, see Ch. 120, *Insurance* . For memoranda relating to summary judgments generally, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Cross Complaint for Indemnity By Insurer-Provided Defense Attorney Against Insured's Independent Counsel Not Allowed

In ***Kroll & Tract v. Paris & Paris*** *(1999) 72 Cal. App. 4th 1537, 86 Cal. Rptr. 2d 78* , an insured was sued in an action in which the liability insurer provided defense counsel under a full reservation of rights under the policy, and a second law firm was associated to serve as independent counsel for the insured. Both firms actively participated in the defense until 10 days before trial, when the insured's independent counsel asked the insurer's appointed counsel to take on the full defense. The insured lost the lawsuit and sued the insurer-provided firm for allegedly mishandling the case. The second, independent law firm was not named as a defendant in the malpractice action. The insurer-provided firm filed a cross complaint for indemnity against the second law firm. That firm successfully demurred to the cross complaint on the grounds that public policy considerations barred the indemnity. The insurer-provided law firm appealed.

The court of appeal affirmed. The court recognized the well-established exception to the ordinary rules of equitable indemnity that bars a legal malpractice defendant from seeking indemnity against the former client's successor attorney. The court then held that the policy concerns that bar an attorney from seeking indemnity from a client's successor

attorney also bar an indemnity cross complaint between two independent attorneys who concurrently represented the client under the circumstances present in this case, when one attorney represented the client as a defense counsel provided by an insurance company and the other counsel represented the client as independent counsel. Under those circumstances, the loyalties of the independent counsel representing the insured are to the insured, while the loyalties of the counsel provided by the insurer run to the insurer as well as to the insured and may conflict, given the insurer's reservation of rights under the policy. Thus, according to the court of appeal, the concern with protecting both an attorney's undivided loyalty and the preservation of the attorney-client privilege caution against allowing an action for indemnity between those attorneys, even if the client's independent counsel no longer represents the client (*72 Cal. App. 4th 1537, 1542-1545)* . As noted by the court, if the indemnity claim were allowed, the independent counsel would be put into the position of having to defend itself without revealing client confidences that may have been revealed during the representation, in violation of the attorney-client privilege, which runs to the client rather than to the attorney (*72 Cal. App. 4th 1537, 1544)* .

[b] Attorney Paid by Client's Insurer Not Entitled to Indemnity From Separate Counsel Hired by Insurer to Monitor Case

In ***Shaffery v. Wilson, Elser, Moskowitz, Edelman & Dicker*** *(2000) 82 Cal. App. 4th 768, 98 Cal. Rptr. 2d 419* , an insurer filed a legal malpractice action against an attorney who had been hired to defend the insured against a sexual harassment claim. Although the attorney was initially hired by the insured, defense of the underlying case was eventually tendered to the insurer, who agreed to provide a defense and subsequently entered into an agreement with the attorney for his continued representation of the insured. The insurer also hired a separate law firm to act as "monitoring counsel" for the harassment case. The underlying plaintiff won the harassment case after the insurer refused to settle the suit for an amount within the policy limits. The client filed a claim against the insurer for bad faith refusal to settle, and that action was eventually settled. The insurer then filed the legal malpractice claim. The defendant in that claim (the attorney) filed a cross-complaint for indemnity against the insurer's "monitoring counsel," alleging that if the attorney's own negligence contributed to the client's loss in the harassment suit, then so did the negligence of the monitoring counsel in failing to properly oversee the work done by the attorney. The demurrer of the monitoring firm was sustained, and the attorney appealed.

The court of appeal affirmed the trial court's decision. The court first reviewed the numerous opinions that have dealt with the issue of whether an attorney sued for malpractice may seek indemnity from other attorneys for their role in causing the loss suffered by the malpractice plaintiff. The court then specifically reviewed the facts and analysis in *Kroll & Tract v. Paris & Paris(1999) 72 Cal. App. 4th 1537, 86 Cal. Rptr. 2d 78* [*see § 24A.36[3][a]*]. The court of appeal concluded that although the parties were not in precisely the same position as the parties in *Kroll & Tract,* the two cases were analytically indistinguishable. Under the analysis of that earlier case, the associated counsel could not be sued for indemnity if that counsel actively participated in the underlying case. Therefore, the "monitoring counsel" in this case also could not be sued for indemnity. The court added that even if the monitoring counsel was in some fashion representing the underlying client as well as the insurer, that relationship could not support a claim for indemnity for the same reasons that a successor lawyer cannot seek indemnity from a predecessor attorney (*82 Cal. App. 4th 768, 777-778)* .

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2A-24A California Points & Authorities § 24A.37

§ 24A.37 Supporting Motion for Summary Adjudication [Code Civ. Proc. § 437c(f)(1)]--By Defendant--No Damages Allowed for Judgment Paid by Insurance Company

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION FOR
vs.	)	SUMMARY ADJUDICATION OF ISSUE OF AL-
_____ [*name*],	)	LOWABLE DAMAGES
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

AN ORDER THAT DAMAGES FOR A PRIOR JUDGMENT AGAINST THE CLIENT ARE NOT ALLOWED IS PROPER, BECAUSE THE JUDGMENT WAS PAID BY AN INSURANCE COMPANY, AND CAUSED THE CLIENT NO APPRECIABLE HARM.

A. Motion for Summary Adjudication by Defendant. A defendant may move for summary adjudication as to one or more causes of action within an action, one or more claims for damages, or one or more issues of duty, if the defendant contends that the cause of action has no merit, or that there is no merit to a claim for damages, as specified in *Civil Code Section 3294*, or that one or more defendants did not owe a duty to plaintiff or plaintiffs. A motion for summary

adjudication shall be granted only if it completely disposes of a cause of action, a claim for damages, or an issue of duty (*Code Civ. Proc. § 437c(f)(1), (n)*).

B. Adjudication Proper When No Actual Harm. When certain alleged damages did not result in an actual loss to plaintiff, the court should grant a summary adjudication and order that the plaintiff cannot recover those damages from defendant as a matter of law (*Kirtland & Packard v. Superior Court (1976) 59 Cal. App. 3d 140, 144, 146-147, 131 Cal. Rptr. 418*).

C. Judgment Paid by Insurance Company. When the client in a legal malpractice action alleges as damages a judgment against him or her in a previous action, such judgment did not cause appreciable harm, and is not a proper element of damages when it was paid by the client's insurance company (*Kirtland & Packard v. Superior Court (1976) 59 Cal. App. 3d 140, 145, 147, 131 Cal. Rptr. 418*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted by defendant in support of a motion for summary adjudication of a cause of action for legal malpractice action when the plaintiff alleges an earlier judgment as damages, and that judgment was paid by an insurance company.

When appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations which support the motion [*Code Civ. Proc. § 437c*], and which include a showing that the alleged damages reflect no actual loss or injury to plaintiff as a result of defendant's conduct.

[b] Related Memoranda

For memoranda relating to motions for summary adjudication generally, see Ch. 221, *Summary Judgments* .

[c] Opposing Memoranda

With appropriate modifications, The points in *§ 24A.48* may be used in an appropriate case to oppose a motion supported by this memorandum.

[3] Discussion of Authorities

[a] Motion for Summary Adjudication by Defendant

Kirtland & Packard v. Superior Court *(1976) 59 Cal. App. 3d 140, 131 Cal. Rptr. 418* , is discussed in *§§ 24A.27[3][a]* and *24A.37[2][a]*. The court of appeal issued a writ of mandate compelling the trial court to grant

defendants' motion for summary adjudication of the issue that no damages were recoverable for an award of judgment against the client in an earlier action, when the judgment was paid by the client's insurance company (*59 Cal. App. 3d 140, 147)* . Because the insurance company had paid the damages alleged, the client suffered no appreciable harm, and the amount of judgment was therefore not a proper element of damages (*59 Cal. App. 3d 140, 145, 147)* .

[b] Adjudication Proper When No Actual Harm

Kirtland & Packard v. Superior Court *(1976) 59 Cal. App. 3d 140, 131 Cal. Rptr. 418* , is discussed in *§§ 24A.27[3][a]* and *24A.37[2][a]*.

[c] Judgment Paid by Insurance Company

Kirtland & Packard v. Superior Court *(1976) 59 Cal. App. 3d 140, 131 Cal. Rptr. 418* , is discussed in *§§ 24A.27[3][a]* and *24A.37[2][a]*.

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2A-24A California Points & Authorities § 24A.38

§ 24A.38 Supporting Motion for Summary Adjudication [Code Civ. Proc. § 437c(f)]--By Defendant--No Damages Allowed for Settlement in Earlier Action Paid on Behalf of Client's Codefendant in That Action

[1] FORM

[*Caption. See § 24A.37.*]

AN ORDER THAT DAMAGES FOR A SETTLEMENT IN A PREVIOUS SUIT ARE NOT ALLOWED IS PROPER, BECAUSE THE SETTLEMENT WAS REACHED AND PAID ON BEHALF OF THE CLIENT'S CODEFENDANT IN THAT SUIT, AND CAUSED THE CLIENT NO APPRECIABLE HARM.

A. Motion for Summary Adjudication by Defendant. [*See § 24A.37, Paragraph A.*]

B. Adjudication Proper When No Actual Harm. [*See § 24A.37, Paragraph B.*]

C. Payment of Settlement in Earlier Action on Behalf of Client's Codefendant in That Action. When the client was a defendant in a previous action, and a settlement was reached and paid on behalf of a codefendant, the client may not recover that settlement payment as a proper element of damages, since it caused him or her no appreciable harm (*Kirtland & Packard v. Superior Court (1976) 59 Cal. App. 3d 140, 145, 131 Cal. Rptr. 418*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted by defendant in support of a motion for summary adjudication of a cause of action for legal malpractice action when the client alleges a settlement in an earlier action as damages, and that settlement was reached and paid on behalf of the client's codefendant in that action.

When appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations which support the motion [*Code Civ. Proc. § 437c*], and which include a showing that the alleged damages reflect no actual loss or injury to plaintiff as a result of defendant's conduct.

[b] Related Memoranda

For memoranda relating to motions for summary adjudication generally, see Ch. 221, *Summary Judgments* .

[c] Opposing Memoranda

With appropriate modifications, The points in *§ 24A.48* may be used in an appropriate case to oppose a motion supported by this memorandum.

[3] Discussion of Authorities

[a] Payment of Settlement in Earlier Action on Behalf of Client's Codefendant in That Action

Kirtland & Packard v. Superior Court *(1976) 59 Cal. App. 3d 140, 131 Cal. Rptr. 418* , is discussed in *§§ 24A.27[3][a]* and *24A.37[3][c]*. The court of appeal issued a writ of mandate requiring that defendants' motion for summary adjudication be granted regarding damages for payment of a settlement agreement reached on behalf of client's codefendant in the earlier suit (*59 Cal. App. 3d 140, 145)* . The amount paid in satisfaction of the settlement agreement reflected no appreciable harm to the client, because the client had never been liable for it, since the settlement was made on behalf of the codefendant only (*59 Cal. App. 3d 140, 145)* .

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2A-24A California Points & Authorities § 24A.39

§ 24A.39 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--Attorney-Client Relationship Creating Duty to Client Existed Without Formal Agreement

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
	)	MEMORANDUM IN OPPOSITION TO MOTION
_____ [*name*],	)	FOR SUMMARY JUDGMENT
Defendant.	)	[*Code Civ. Proc. § 437c*]
	)	
	)	

_____

SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE THERE IS A TRIABLE ISSUE OF FACT AS TO WHETHER OR NOT AN ATTORNEY-CLIENT RELATIONSHIP EXISTED WITHOUT A FORMAL AGREEMENT.

A. Rules Governing Summary Judgment Procedure. It is proper for a court to grant a motion for summary judgment only if the affidavits supporting the motion establish every element necessary to sustain a judgment in favor of the moving party and the opposing party has not presented any facts which give rise to a triable issue. In ruling on the motion, the moving party's affidavits are strictly construed, and doubts as to the propriety of granting the motion should be resolved in favor of the opposing party (*Corwin v. Los Angeles Newspaper Serv. Bureau, Inc. (1971) 4 Cal. 3d 842, 851 fn. 6, 851-852, 94 Cal. Rptr. 785, 484 P.2d 953*). The court may not properly grant summary judgment based

on inferences reasonably deducible from the papers submitted, if such inferences are contradicted by other inferences that raise a triable issue of fact (*Hepp v. Lockheed-Cal. Co. (1978) 86 Cal. App. 3d 714, 717-718, 150 Cal. Rptr. 408*).

B. Moving Party's Burden to Negate Existence of Duty. On a summary judgment motion, the moving party has the burden of negating all of the opposing party's claims, and in a malpractice action, when the moving party fails to make an uncontradicted showing negating the existence of duty, summary judgment must be denied (*Miller v. Metzinger (1979) 91 Cal. App. 3d 31, 42, 154 Cal. Rptr. 22*).

C. Employment Agreement or Fee Not Required for Relationship. Formal arrangements or agreements regarding employment or fees are not necessary to show that an attorney-client relationship existed (*Arden v. State Bar (1959) 52 Cal. 2d 310, 315, 341 P.2d 6* ; *Miller v. Metzinger (1979) 91 Cal. App. 3d 31, 39, 154 Cal. Rptr. 22*).

[*Optional*] **D. Legal Advice Establishes Relationship.** A party's seeking and obtaining legal advice from an attorney establishes the attorney-client relationship prima facie, whether or not an employment agreement is reached (*C. J. Perkins v. West Coast Lumber Co. (1900) 129 Cal. 427, 429, 62 P. 57* ; *Miller v. Metzinger (1979) 91 Cal. App. 3d 31, 39, 154 Cal. Rptr. 22*).

[*Optional*] **E. Attorney Making Special Appearance in Court for Another Attorney's Client Establishes Attorney-Client Relationship.** If one attorney, as a courtesy to another attorney, appears on behalf of that other attorney's client at a court hearing, the attorney making the special appearance in court is associated to the attorney of record, has established an attorney-client relationship with the client, and owes a duty of care to the client (*Streit v. Covington & Crowe (2000) 82 Cal. App. 4th 441, 444-447, 98 Cal. Rptr. 2d 193*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted by a plaintiff in opposition to a motion for summary judgment in a legal malpractice action when the motion was based on the contention that there was no attorney-client relationship creating a duty to the plaintiff. The ground of opposition is that there is a triable issue of fact as to whether or not an attorney-client relationship existed without a formal agreement.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations which oppose the motion [*see Code Civ. Proc. § 437c*], and which include a showing of the attorney-client relationship between the defendant attorney and the plaintiff, or between the defendant attorney and a third party intending to benefit the plaintiff by his or her employment of the attorney [see *§ 24A.42*].

This form may be used in an appropriate case to oppose a motion for summary judgment supported by The points in *§*

24A.20.

[b] Related Uses

With appropriate modifications, this form may be used to oppose a general demurrer to the complaint, or to oppose a motion for judgment on the pleadings, where it appears on the face of the complaint that the attorney-client relationship existed between plaintiff and defendant.

[c] Related Memoranda

For memoranda relating to summary judgment generally, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Rules Governing Summary Judgment Procedure

In ***Corwin v. Los Angeles Newspaper Serv. Bureau, Inc.*** *(1971) 4 Cal. 3d 842, 94 Cal. Rptr. 785, 484 P.2d 953* , the plaintiffs filed an action against the defendants for violations of *Bus. & Prof. Code § 16726* (prohibited restraints on trade under Cartwright Act). The trial court granted defendants' motion for summary judgment and plaintiffs appealed from the judgment entered in favor of defendants. The Supreme Court concluded that the trial court had erroneously granted the summary judgment and reversed the judgment. In reviewing the trial court's action, the Court commented that summary judgment is a drastic procedure to be used with caution so that it does not become a substitute for the open trial method of determining facts and repeated its previous summary of the rules governing summary judgment procedure set out in Paragraph A of this form (*4 Cal. 3d 842, 851-852)* .

Hepp v. Lockheed-Cal. Co. *(1978) 86 Cal. App. 3d 714, 150 Cal. Rptr. 408* , was an action for breach of contract and fraud. The trial court granted summary judgment for defendant, and the court of appeal reversed the judgment of dismissal. The court of appeal reviewed the rules for granting summary judgment. Relying on *Code Civ. Proc. § 437c*, it stated that summary judgment may not be granted on the basis of inferences that are contradicted by other inferences that raise a triable issue of fact (*86 Cal. App. 3d 714, 717-718)* .

[b] Moving Party's Burden to Negate Existence of Duty

In ***Miller v. Metzinger*** *(1979) 91 Cal. App. 3d 31, 154 Cal. Rptr. 22* , plaintiffs sued a law firm and its attorneys for negligently handling plaintiffs' wrongful death claim. The plaintiffs had consulted with defendants on the matter of bringing suit, and the defendants had declined to accept the case, suggesting a second firm, which plaintiffs contacted shortly before the statute of limitations had run. The second firm filed the action, which was subsequently barred by the statute of limitations. Plaintiffs alleged that defendants were negligent in waiting so long to refer the case, and in failing to advise plaintiffs as to the statute of limitations issue. The trial court granted summary judgment for defendants. Although it is not clear on what grounds the summary judgment was granted, a discussion of the papers submitted for hearing on the motion indicate that they may have addressed the issue of whether or not a duty was owed to plaintiff, and whether there was a breach. Plaintiffs appealed. The court of appeal reversed the summary judgment, and held that the defendants had not established the absence of an attorney-client relationship merely because they refused to take the case (*91 Cal. App. 3d 31, 39)* . When the moving party fails to negate the existence of duty by an uncontradicted showing and duty therefore remains an unresolved question of fact, summary judgment will be denied (*91 Cal. App. 3d 31, 42)* .

[c] Employment Agreement or Fee Not Required for Relationship

Arden v. State Bar *(1959) 52 Cal. 2d 310, 341 P.2d 6* , was a proceeding to review the State Bar's recommendation to suspend an attorney. The attorney had represented the natural mother and the adoptive parents in arranging and handling

an adoption proceeding. Subsequently, the natural mother initiated proceedings to have the adoption set aside, and the attorney, representing the adoptive parents, made threats to the mother in order that the adoptive parents would prevail. The Supreme Court held that the attorney could properly represent both parties during the adoption, with their consent, and then represent one of them later, adversely to the other (*52 Cal. 2d 310, 318)* . It also held that the attorney had acted reprehensibly in threatening the mother, and concluded that he should be disciplined by public reprimand (*52 Cal. 2d 310, 321)* .

During the course of its opinion, the Court also discussed the issue of whether or not the attorney-client relationship had existed between the attorney and the mother. The attorney had initially consulted with the mother, had made arrangements for her regarding a place to live, a false mailing address, and introductions to prospective parents, all without pay (*52 Cal. 2d 310, 314)* . The Court held that the attorney-client relationship clearly existed under the circumstances. It is immaterial to the existence of the attorney-client relationship that the attorney is not paid for his or her services, or that no formal employment arrangements between attorney and client are made (*52 Cal. 2d 310, 315)* .

Miller v. Metzinger *(1979) 91 Cal. App. 3d 31, 154 Cal. Rptr. 22* , is discussed in *§ 24A.39[3][b], [d]*. Clients appealed from a summary judgment granted by the trial court in the defendant attorney's favor. One client had consulted with the attorney regarding the prosecution of a wrongful death claim. The attorney had consulted with the client, and investigated and evaluated the case, concluding finally that he would not take it, and referring the client to another law firm. The evidence was conflicting as to whether or not the attorney and client had made any agreement of employment prior to the attorney's referral of the client to the other firm. There were other unresolved factual questions also, leading the court of appeal to reverse the summary judgment. The court noted in its opinion however, that even if it were established that the attorney and client had never made any employment agreement, the attorney-client relationship could still exist. The absence of any agreement as to fees or employment does not prevent the relationship from arising, and if a party seeks legal advice, consults an attorney, and obtains the advice, the relationship is established prima facie (*91 Cal. App. 3d 31, 39)* .

[d] Legal Advice Establishes Relationship

C. J. Perkins v. West Coast Lumber Co. *(1900) 129 Cal. 427, 62 P. 57* , was an action in which an attorney sought to recover fees for his services. The defendant client filed a cross complaint alleging that the attorney negligently gave advice, to the client's damage. Judgment for the client followed, and the attorney appealed. On appeal, the attorney contended that at the time he allegedly gave the negligent advice, no attorney-client relationship existed, since he had not yet been retained by the client, and was never paid for giving the advice. The court of appeal affirmed the judgment, and held that when a party consults an attorney for legal advice, and obtains the advice, an attorney-client relationship is established prima facie. The court reasoned that the relationship existed because the attorney would be able to recover fees for his or her services in such a situation (*129 Cal. 427, 429)* .

Miller v. Metzinger *(1979) 91 Cal. App. 3d 31, 154 Cal. Rptr. 22* , is discussed in *§ 24A.39[3][b]*. The client had consulted with the attorney, who after some investigation, decided not to take the case, and referred the client to another law firm. The court noted that if legal advice is sought and given, on consultation with an attorney, the attorney-client relationship is established prima facie (*91 Cal. App. 3d 31, 39)* .

[e] Attorney Making Special Appearance in Court for Another Attorney's Client Establishes Attorney-Client Relationship

In ***Streit v. Covington & Crowe*** *(2000) 82 Cal. App. 4th 441, 98 Cal. Rptr. 2d 193* , the plaintiff sued her former law firm and individual firm members for legal malpractice. The plaintiff later added an additional law firm and one of its member attorneys as defendants, based on that attorney's representation of the plaintiff at a court hearing on a motion for summary judgment in the underlying action, a court appearance that was made as a professional courtesy for the plaintiff's attorney of record. After the action against the original defendants was settled and dismissed, the trial court

granted summary judgment for the other attorney and his firm, finding that they were not associated as counsel for the plaintiff, did not participate in any advice or recommendations to the plaintiff, and appeared in court solely as an accommodation to the other attorneys and their firm. The plaintiff appealed.

The court of appeal reversed. Noting that the attorney-client relationship normally arises from an express contract between the attorney and the client, the court recognized that it may also arise by implication or from a simple association for a particular case. The court then held that, contrary to the defendants' assertions, an attorney making a special appearance for a client's attorney of record is associated with the attorney of record for purposes of the case, is representing the interests of the client, and has a professional attorney-client relationship with the client. The fact that the association is limited to a single appearance is a distinction of degree, not of kind (*82 Cal. App. 4th 441, 444-446)* . The court noted that its holding was consistent with the rule that the act of making a court appearance on behalf of a party creates a presumption that the attorney is authorized to do so and is strongly presumptive of an attorney-client relationship (*82 Cal. App. 4th 441, 446)* . However, the court also noted that although the associated attorney owed a duty of care to the client, the precise scope of the duty would have to be determined under the particular facts of the case (*82 Cal. App. 4th 441, 447)* .

[4] Additional Authorities

[a] Legal Advice Establishes Relationship

In *Wood v. Jamison (2008) 167 Cal. App. 4th 156, 83 Cal. Rptr. 3d 877* , a decedent's trustee sued an attorney who, immediately prior to decedent's death, had helped secure a $250,000 loan against the decedent's residence. The attorney was originally representing a third party who falsely claimed to be the decedent's nephew, and the loan proceeds were distributed directly to this third party for investment in a nightclub. In facilitating the loan, the attorney met with the decedent and her "nephew" in his office to discuss financing for the nightclub, located a lender for the decedent, advised the decedent about various lenders, selected a lender, gathered documents necessary to close the loan, completed the loan application, transmitted documents on his letterhead, communicated with the lender and title company, reviewed the loan documents, and attended close of escrow with the decedent. In upholding a judgment for the trustee on his action for malpractice and breach of fiduciary duty, the court of appeal held that the record provided ample evidence that an attorney-client relationship existed between the attorney and the decedent based on the work performed by the attorney (*167 Cal. App. 4th 156, 163)* .

California Points & Authorities

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 24A ATTORNEYS AT LAW: MALPRACTICE
PART II. FORMS

2A-24A California Points & Authorities § 24A.40

§ 24A.40 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--Attorney-Client Relationship Creating Duty to Client Existed With Partner or Former Partner in Law Firm

[1] FORM

[*Caption. See § 24A.39.*]

SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE THERE IS A TRIABLE ISSUE OF FACT AS TO WHETHER OR NOT THE DUTIES ACCOMPANYING AN ATTORNEY-CLIENT RELATIONSHIP WERE OWED TO PLAINTIFF BY DEFENDANT, AS A PARTNER OR FORMER PARTNER OF THE LAW FIRM.

A. Rules Governing Summary Judgment Procedure. [*See § 24A.39, Paragraph A.*]

B. Moving Party's Burden to Negate Existence of Duty. [*See § 24A.39, Paragraph B.*]

C. Each Member of Law Firm Partnership Has Duty to Client. When a law firm represents a client, each individual partner owes the client the duty of care which accompanies the attorney-client relationship (*see Redman v. Walters (1979) 88 Cal. App. 3d 448, 453, 152 Cal. Rptr. 42* ; *cf. Beane v. Paulsen (1993) 21 Cal. App. 4th 89, 97-98, 26 Cal. Rptr. 2d 486 , overruled in part, Beal Bank, SSB v. Arter & Hadden, LLP (2007) 42 Cal. 4th 503*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted by a plaintiff in opposition to a motion for summary judgment in a legal malpractice action when the motion was based on the contention that there is no attorney-client relationship creating a duty to the plaintiff. The ground of opposition is that there is a triable issue of fact as to whether or not the duties accompanying the attorney-client relationship are owed by the defendant who brought the motion, when that defendant is a partner or former partner in the law firm hired by plaintiff, or hired by a third party when the plaintiff was the intended beneficiary of the firm's services to the client [*see § 24A.42*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations that oppose the motion [*see Code Civ. Proc. § 437c*] and include a showing of defendant's membership, or former membership, in the law firm partnership at the time that the plaintiff, or third party intending to benefit the plaintiff, hired the law firm, and showing also the attorney-client relationship between the law firm and the plaintiff or third party who intended to benefit the plaintiff.

This form may be used in an appropriate case to oppose a motion for summary judgment supported by The points in *§ 24A.20*.

[b] Former Partner Released From Liability

This form would not be appropriate if the law firm had filed a substitution of attorneys in the client's case, signed by the client, and reflecting the termination of the former partner's relationship to the firm. In that case, the former partner would be released from liability, since the client would have consented to that partner's discontinued involvement [*see Redman v. Walters (1979) 88 Cal. App. 3d 448, 453, 152 Cal. Rptr. 42]* .

[c] Related Uses

With appropriate modifications, this form may be used to oppose a general demurrer to the complaint, or to oppose a motion for judgment on the pleadings, when it appears on the face of the complaint that defendant was a member or partner in a law firm when an attorney-client relationship existed between the law firm and the plaintiff.

[d] Related Memoranda

For memoranda relating to summary judgment generally, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Each Member of Law Firm Partnership Has Duty to Client

In ***Beane v. Paulsen*** *(1993) 21 Cal. App. 4th 89, 26 Cal. Rptr. 2d 486 , overruled in part, Beal Bank, SSB v. Arter & Hadden, LLP (2007) 42 Ca. 4th 503,* , a client brought a malpractice action against two attorneys whose law corporation had been associated with plaintiff's original attorney in plaintiff's bankruptcy matter. Defendants claimed they severed their relationship with their former partner and corporation by the time plaintiff was given notice of the break-up of the firm, and thus they could not be held liable for their former partner's failure to prosecute the bankruptcy proceeding before the break-up (*21 Cal. App. 4th 89, 93-94) , overruled in part, Beal Bank, SSB v. Arter & Hadden, LLP (2007) 42 Cal. 4th 503* . The court held that the defendants were guarantors of the corporation's financial responsibility for malpractice, and had joint and several liability to plaintiff as a former client of their corporation (*21 Cal. App. 4th 89, 96) , overruled in part, Beal Bank, SSB v. Arter & Hadden, LLP (2007) 42 Cal. 4th 503* . The court distinguished *Redman v. Walters (1979) 88 Cal. App. 3d 448, 152 Cal. Rptr. 42* , which cautioned law firms that a

partner can only terminate prospective liability if the client knows of the partner's withdrawal and consents to terminating that individual's obligations. In this case, however, the negligent acts had been committed before the break-up of the firm and there had been no showing that the client was consciously relinquishing the right to sue (*21 Cal. App. 4th 89, 97-98) , overruled in part, Beal Bank, SSB v. Arter & Hadden, LLP (2007) 42 Cal. 4th 503* .

Redman v. Walters *(1979) 88 Cal. App. 3d 448, 152 Cal. Rptr. 42* , involved a malpractice action against a law firm partnership, and one of its individual members. The plaintiff had hired the firm to handle his case, which was dismissed five years later for failure to prosecute under former Code Civ. Proc. § 583 [*now see Code Civ. Proc. § 583.310 et seq.*]. The individual attorney sued had never met the plaintiff, had never known about the case, and had severed his relationship with the partnership one year after the plaintiff hired the firm to take the case. No formal substitution had ever been filed in plaintiff's case reflecting defendant's discontinued involvement, and the plaintiff had never consented to any change of attorneys. All of the plaintiff's dealings with the firm had been through an attorney other than the individual defendant. The defendant attorney brought a motion for summary judgment, which was granted by the trial court, partly on the grounds that since the defendant was not a member of the partnership at the time of the negligent act, there was no attorney-client relationship between the parties creating a duty of the defendant to perform.

The court of appeal disagreed, and reversed the summary judgment. It held that when there is an attorney-client relationship between the client and the partnership, the duties accompanying that relationship are owed to the client by each individual partner (*88 Cal. App. 3d 448, 453)* . According to partnership law, the dissolution of a law firm does not terminate an individual partner's existing duties to the client, absent the implied or express consent of the client, or the client's waiver or estoppel to assert the partner's liability (*88 Cal. App. 3d 448, 453, 455)* . Because no formal substitution had been filed in this case, it could not be presumed that the plaintiff had consented to a substitution releasing the defendant from liability as a partner (*88 Cal. App. 3d 448, 451, 454)* . When it is an unresolved question of fact whether or not such consent, or waiver or estoppel exists, the absence of an attorney-client relationship has not been established, and summary judgment will be denied (*88 Cal. App. 3d 448, 454, 455)* .

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 24A ATTORNEYS AT LAW: MALPRACTICE
PART II. FORMS

2A-24A California Points & Authorities § 24A.41

§ 24A.41 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--Successor Fiduciary Representing Estate in Probate Has Standing to Sue Attorney Hired by Predecessor for Damage to Estate

[1] FORM

[*Caption. See § 24A.39.*]

SUMMARY JUDGMENT FOR DEFENDANT SHOULD BE DENIED BECAUSE PLAINTIFF, A FIDUCIARY REPRESENTING AN ESTATE IN PROBATE, HAS STANDING TO SUE AN ATTORNEY HIRED BY A PREDECESSOR FIDUCIARY TO RECOVER FOR MALPRACTICE THAT CAUSED DAMAGE TO THE ESTATE.

A. Rules Governing Summary Judgment Procedure. [*See § 24A.39, Paragraph A.*]

B. Successor Fiduciary Representing Estate in Probate Has Standing to Sue Attorney Hired by Predecessor for Malpractice. The fiduciary representative of an estate may sue for malpractice an attorney hired by the fiduciary representative to provide legal services for the estate, and this right to sue extends to successor fiduciaries who replace the original fiduciary that hired the attorney (*Borissoff v. Taylor & Faust (2004) 33 Cal. 4th 523, 530, 15 Cal Rptr. 3d 735, 93 P.3d 337* ; *see Prob. Code §§ 8524(c), 9820(a)*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion for summary judgment brought by an attorney who is a defendant in a legal malpractice claim, if the basis for the motion for summary judgment is that the defendant owed no duty to the plaintiff, who is a successor fiduciary to an estate in probate, because the defendant was hired by the plaintiff's predecessor, not by the plaintiff, to provide legal services to the estate.

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law raised. Thus, counsel should include facts showing that the plaintiff's predecessor hired the defendant to provide legal services to the estate in probate, that the defendant committed malpractice while performing those services, that this malpractice damaged the estate, and that the plaintiff was appointed as a successor fiduciary for the estate, with all the powers and duties of the original fiduciary.

This form may be modified for use in other procedural contexts, such as to oppose a demurrer to the plaintiff's complaint.

[3] Discussion of Authorities

[a] Successor Fiduciary Representing Estate in Probate Has Standing to Sue Attorney Hired by Predecessor for Malpractice

In ***Borissoff v. Taylor & Faust*** *(2004) 33 Cal. 4th 523, 15 Cal Rptr. 3d 735, 93 P.3d 337* , the plaintiff was appointed as the fiduciary representative of a decedent's estate, replacing an earlier fiduciary who had been appointed to serve in that role while a dispute as to the validity of competing wills was resolved. While the original fiduciary was representing the estate, he hired a law firm to provide tax services for the estate, which they did for a time, before they withdrew from representing the fiduciary. The original fiduciary died shortly thereafter, and the estate's file was turned over to another attorney. At that time, there were only two months left for the estate to file certain tax forms to extend the estate's time for claiming a tax refund. This form was never filed, causing the estate to lose the right to claim the refund. After the will dispute was resolved and the plaintiff was finally appointed as the executor of the decedent's will, he brought a malpractice action against both sets of attorneys that had earlier provided services to the estate for malpractice in failing to file the appropriate tax form in a timely manner. The defendants asserted as affirmative defenses that they owed no duty to the plaintiff, because they were not in privity of contract with him, and that the claims were barred by the applicable statute of limitations. The trial court agreed with both arguments and entered judgment for the defendants. The plaintiff appealed, the court of appeal affirmed on the basis of lack of privity, without deciding the merits of the statute of limitations defense, and the plaintiff appealed again.

The California Supreme Court reversed on the issue of the plaintiff's standing and remanded to the court of appeal to decide the statute of limitations issue. The Supreme Court held that the fiduciary representative of an estate that hires an attorney to provide legal services for the estate may sue that attorney for malpractice to recover for damage caused to the estate, and that this right to sue extends to successor fiduciaries who replace the original fiduciary that hired the attorney. The Court based its decision on *Prob. Code § 8524(c)*, which gives an estate representative the power to commence and maintain actions and proceedings for the benefit of the estate, combined with *Prob. Code § 8524(c)*, which gives to any successor representative all the powers and duties in representing the estate that the former representative would have had. Because *Prob. Code § 10801(b)* gives to a representative the right to hire a tax attorney for the estate and pay for those services from the estate's funds, a successor representative, like the original representative that actually did the hiring, has the right to sue for malpractice if the services of those tax attorneys causes damage to the estate (*33 Cal. 4th 523, 530)* .

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2A-24A California Points & Authorities § 24A.42

§ 24A.42 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--Defendant Owed Duty to Plaintiff as Intended Beneficiary

[1] FORM

[*Caption. See § 24A.39.*]

SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE THERE IS A TRIABLE ISSUE OF FACT AS TO WHETHER OR NOT DEFENDANT OWES A DUTY TO PLAINTIFF AS AN INTENDED BENEFICIARY OF DEFENDANT'S SERVICES.

A. Rules Governing Summary Judgment Procedure. [*See § 24A.39, Paragraph A.*]

B. Moving Party's Burden to Negate Existence of Duty. [*See § 24A.39, Paragraph B.*]

C. Duty to Third Party as Intended Beneficiary. An attorney's duty to his or her client, to perform to the standard that attorneys of ordinary skill and capacity commonly exercise, extends also to the intended beneficiaries of the attorney's services. In determining whether defendant is liable to plaintiff as such a beneficiary, the court should balance various factors, including the extent to which plaintiff was intended to benefit, foreseeability of harm to plaintiff, degree of certainty of injury, closeness of connection between defendant's conduct and plaintiff's injury, moral blame attached to defendant's conduct, and the policy of preventing future harm (*Heyer v. Flaig (1969) 70 Cal. 2d 223, 228-229, 74 Cal. Rptr. 225, 449 P.2d 161* ; *Osornio v. Weingarten (2004) 124 Cal. App. 4th 304, 330-335, 21 Cal. Rptr. 3d 246* ; *Donald v. Garry (1971) 19 Cal. App. 3d 769, 771-772, 97 Cal. Rptr. 191*).

[*Optional*] **D. Duty to Intended Beneficiary Under a Will.** An attorney preparing a will owes a duty not only to the client testator, but also to the intended beneficiaries, who may properly bring a cause of action against the attorney for professional negligence (*Heyer v. Flaig (1969) 70 Cal. 2d 223, 228, 229, 74 Cal. Rptr. 225, 449 P.2d 161* ; *Osornio v. Weingarten (2004) 124 Cal. App. 4th 304, 329-335, 21 Cal. Rptr. 3d 246*).

[*Optional*] **E. Duty to Trust Beneficiaries.** An attorney representing a trustee owes a duty to the trust beneficiaries to use ordinary judgment, care, and skill in the performance of his or her legal services (*Bucquet v. Livingston (1976) 57*

Cal. App. 3d 914, 921, 922, 129 Cal. Rptr. 514).

[*Optional*] **F. Duty to Disclose Dual Representation to Third Party Trust Beneficiaries.** An attorney for a trustee owes a duty to the trust beneficiaries to disclose any dual representation in transactions involving the trust (*Morales v. Field, DeGoff, Huppert & MacGowan (1979) 99 Cal. App. 3d 307, 316, 160 Cal. Rptr. 239*).

[*Optional*] **G. Duty to Creditor When Collection Agency Is Client.** An attorney for a collection agency has a duty to the creditor whose claims the agency handles, because the agency is merely the intermediary between the attorney and the creditor as intended beneficiary of the attorney's services (*Donald v. Garry (1971) 19 Cal. App. 3d 769, 772, 97 Cal. Rptr. 191*).

[*Optional*] **H. Duty to Client and Investors.** Part and parcel of effectively protecting a client, and thus discharging the attorney's duty of care, is to protect the client from the liability that may flow from promulgating a false or misleading offering to investors. An important duty of securities counsel is to make a reasonable and independent investigation to detect and correct false or misleading materials (*FDIC v. O'Melveny & Meyers (9th Cir. 1992) 969 F.2d 744, 748-749 , rev'd on other grounds, O'Melveny & Meyers v. F.D.I.C. (1994) 512 U.S. 79, 114 S. Ct. 2048, 129 L. Ed. 2d 67*).

[*Optional*] **I. Duty to Inform Personal Injury Client's Spouse of Potential Claim for Loss of Consortium.** When a husband and wife consult an attorney about a personal injury action against a third party on account of personal injury to one of them, and the other spouse has a potential claim for loss of consortium of which the attorney is or ought to be aware, the attorney has a duty to inform that spouse of the consortium cause of action (*Meighan v. Shore (1995) 34 Cal. App. 4th 1025, 1029, 40 Cal. Rptr. 2d 744*).

[*Optional*] **J. Attorney for Insurer May Be Liable for Fraud to Claimant Under Policy.** An attorney for an insurer can be liable for fraud to claimants under an insurance policy who have obtained a judgment against the insured, if the attorney provides knowingly false information about the amount of coverage under the policy (*Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone (2003) 107 Cal. App. 4th 54, 74-77, 131 Cal. Rptr. 2d 777*).

[*Optional*] **K. Attorney Agreeing to Serve as Mediator in Dispute Involving Client Owes Duty to Disclose Facts Affecting Impartiality.** If an attorney representing a client in a dispute agrees to serve as a mediator between that client and the opposing party, the attorney owes a duty to the opposing party to disclose all facts and circumstances that may affect the impartiality of the attorney while acting as mediator (*Furia v. Helm (2003) 111 Cal. App. 4th 945, 954-955, 4 Cal. Rptr. 3d 357*).

[*Optional*] **L. Lawyer May Be Liable for Fraud Against Third Party.** A lawyer communicating on behalf of a client with a nonclient may not knowingly make a false statement of material fact to the nonclient [*Vega v. Jones, Day, Reavis & Pogue (2004) 121 Cal. App. 4th 282, 291, 17 Cal. Rptr. 3d 26]* .
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted by a plaintiff in opposition to a motion for summary judgment in a legal malpractice action when the motion is based on the contention that plaintiff is a third party to whom defendant owed no duty. The ground of opposition is that there is a triable issue of fact as to whether or not plaintiff was an intended beneficiary of defendant's services.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations that oppose the motion [*see Code Civ. Proc. § 437c*], and include a showing of plaintiff's status as an intended beneficiary of defendant's services to the client.

This form may be used in an appropriate case to oppose a motion for summary judgment supported by The points in *§ 24A.21*.

[b] Related Uses

With appropriate modifications, this form may be used to oppose a general demurrer to the complaint, or to oppose a motion for judgment on the pleadings, when it appears on the face of the complaint that plaintiff was an intended beneficiary of defendant's services.

[c] Related Memoranda

For memoranda relating to summary judgment generally, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Duty to Third Party as Intended Beneficiary

Heyer v. Flaig *(1969) 70 Cal. 2d 223, 74 Cal. Rptr. 225, 449 P.2d 161* , was a legal malpractice action brought by the beneficiaries of a will against the deceased testator's attorney. The testator told defendant at the time the will was prepared that the estate was to be left to plaintiffs, her daughters. She also told defendant that she intended to marry. The husband was not mentioned in the will, except to be named executor, and consequently, he later claimed a portion of the estate as a post-testamentary spouse. Plaintiffs' share in the estate was thereby substantially diminished, and they alleged that defendant was negligent in failing to include a provision in the will expressing the testator's intent not to include the spouse as beneficiary. The trial court dismissed the case on defendant's demurrer, on the grounds that the statute of limitations commenced at the time of the negligent act, and that the action was therefore barred. The Supreme Court reversed, holding that with regard to a negligently drafted will, the statute commences to run at the testator's death, and since plaintiffs here filed less than two years later, the case was not barred (*70 Cal. 2d 223, 233-234)* .

The Supreme Court also held that defendant owed a duty to plaintiffs as beneficiaries of the will (*70 Cal. 2d 223, 229)* . In determining whether or not an attorney, in a specific case, should be liable to a third party who is not in privity of contract with the attorney, a court should balance various factors, including the extent to which plaintiff was intended to benefit by the attorney's services, foreseeability of harm to plaintiff, degree of certainty that plaintiff was injured, closeness of connection between defendant's negligence and the injury, moral blame attached to defendant's negligence, and the policy of preventing the same type of harm in the future (*70 Cal. 2d 223, 227)* . The Court stated that when an attorney undertakes to perform services for the client, the attorney's duty to perform at the standard that lawyers of ordinary skill and capacity commonly exercise extends to an intended beneficiary, whose interests are certain and foreseeable (*70 Cal. 2d 223, 228-229)* . Here, the attorney had breached his duty to the intended beneficiaries by failing to take the precautions that a reasonably prudent attorney would, with regard to the potential claims of a post-testamentary spouse (*70 Cal. 2d 223, 229)* .

In ***Osornio v. Weingarten*** *(2004) 124 Cal. App. 4th 304, 21 Cal. Rptr. 3d 246* , the decedent retained the defendant, a licensed California attorney, to draft her will. The decedent subsequently asked the defendant to prepare a new will that would revoke her prior wills and codicils and name the plaintiff as the executor and sole beneficiary. When the decedent died, the plaintiff, as the care custodian to the decedent, who was a dependent adult, was presumptively disqualified under *Prob. Code § 21350(a)* from receiving a donative transfer of property under the will, and a probate court subsequently held that the plaintiff had not overcome the presumption of disqualification under *Prob. Code § 21351*. The plaintiff sued the defendant, alleging in the complaint that the defendant was negligent in failing to include with the will a Certificate of Independent Review pursuant to *Prob. Code § 21351*, which would have been sufficient to overcome the presumption of disqualification. The trial court granted the defendant's demurrer without leave to amend, and the plaintiff appealed.

The court of appeal first noted that an attorney's liability for professional negligence does not ordinarily extend beyond the client, except in limited circumstances (*124 Cal. App. 4th 304, 320)* . However, the court noted that the plaintiff could have alleged that the defendant negligently failed to advise the decedent that the intended beneficiary under her will, the plaintiff, would be presumptively disqualified because she was the decedent's care custodian. Under this theory, the defendant was negligent for failing to advise the decedent of these consequences and for failing to refer the decedent to independent counsel to advise her and to provide a Certificate of Independent Review as required by *Prob. Code § 21351* (*124 Cal. App. 4th 304, 329)* .

The court then applied the following factors for finding that an attorney had a duty to a nonclient, as set forth in *Lucas v. Hamm (1961) 56 Cal. 2d 583, 588-589, 15 Cal. Rptr. 821, 364 P.2d 685* : (1) the extent to which the transaction was intended to affect the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury; (5) the policy of preventing future harm; and (6) whether the recognition of liability to beneficiaries of wills negligently drawn by attorneys would impose an undue burden on the profession. The court held that each of these factors weighed in favor of the plaintiff, and therefore the court remanded the case to the trial court to allow the plaintiff to amend her complaint (*124 Cal. App. 4th 304, 330-335)* .

In ***Donald v. Garry*** *(1971) 19 Cal. App. 3d 769, 97 Cal. Rptr. 191* , a creditor brought a malpractice action against the attorney representing the collection agency handling the creditor's claim. The plaintiff alleged that by defendant's negligence to delay, a valid, collectible claim was dismissed for lack of prosecution. The trial court sustained defendant's general demurrer on the ground that defendant owed no duty of care to plaintiff, and dismissed the case. On appeal by plaintiff, the court of appeal reversed. It held that an attorney has a duty to the party intended to benefit from the attorney's services, regardless of a lack of privity of contract (*19 Cal. App. 3d 769, 771)* . In this case, the collection agency client was a mere intermediary, and the attorney's services were clearly intended to benefit the creditor (*19 Cal. App. 3d 769, 772)* .

[b] Duty to Intended Beneficiary Under a Will

Heyer v. Flaig *(1969) 70 Cal. 2d 223, 74 Cal. Rptr. 225, 449 P.2d 161* , is discussed in *§ 24A.42[3][a]*. The Supreme Court held that when an attorney performs legal services for a prospective testator, the attorney's duty extends to the intended beneficiaries (*70 Cal. 2d 223, 229)* . Unless the beneficiary had a cause of action against the attorney for negligence in such a situation, no one would bring suit, the attorney would in fact never have liability for negligently drafting a will, and the public policy of preventing future harm would be frustrated (*70 Cal. 2d 223, 228)* .

In ***Osornio v. Weingarten*** *(2004) 124 Cal. App. 4th 304, 21 Cal. Rptr. 3d 246* , the plaintiff was the named executor and sole beneficiary under a will. However, because she was the care custodian to the decedent, who was a dependent adult, the plaintiff was presumptively disqualified under *Prob. Code § 21350(a)* from receiving a donative transfer of property under the will, and a probate court subsequently held that the plaintiff had not overcome the presumption of disqualification under *Prob. Code § 21351*. The plaintiff sued the attorney who prepared the will, alleging in the

complaint that the attorney was negligent in failing to include with the will a Certificate of Independent Review pursuant to *Prob. Code § 21351*, which would have been sufficient to overcome the presumption of disqualification. The trial court granted the defendant's demurrer without leave to amend, and the plaintiff appealed.

The court of appeal agreed that the complaint, as written, failed to state a cause of action, but held that the trial court abused its discretion in failing to grant leave to amend. The court reviewed the relevant sections of the Probate Code, as well as past court decisions that had established that the intended beneficiary of a will may, under the appropriate circumstances, state a cause of action in negligence against the testator's attorney for failing to achieve the testator's intentions (*124 Cal. App. 4th 304, 317-328)* . The court then held that the plaintiff's complaint, in basing the claim on the defendant's failure to include with the will a Certificate of Independent Review pursuant to *Prob. Code § 21351*, failed to allege a duty owed by the defendant to the plaintiff. Under the Probate Code, a Certificate of Independent Review must be supplied by an independent counsel, not by the drafter of the transferring instrument, with the original Certificate then given to the client and a copy provided to the drafter of the transferring instrument. Contrary to the plaintiff's allegations, the testator's attorney is not responsible for supplying the Certificate, and a Certificate is not required to accompany a will (*124 Cal. App. 4th 304, 328-329)* . However, the court concluded that the plaintiff should have been given the opportunity to amend the complaint to allege that the defendant owed a duty, running to the intended beneficiary, to advise the testator that the proposed transfer, if challenged, would have a significant likelihood of failing unless steps were taken under *Prob. Code § 21351* to exempt the transfer from the statutory presumption of disqualification. In addition, the attorney owed a duty to recommend to the client that she seek independent counsel in an effort to obtain a Certificate of Independent Review as described in *Prob. Code § 21351(b)* (*124 Cal. App. 4th 304, 334)* . The court noted that the existence of this duty of care did not mean that an attorney would automatically be liable if the duty were not met. For example, the attorney might avoid liability if the intended beneficiary was unable to establish that the attorney's negligence was the cause of the failed transfer, because, for instance, it is shown to be unlikely that the intended beneficiary could have obtained a Certificate of Independent Review (*124 Cal. App. 4th 304, 335)* .

[c] Duty to Trust Beneficiaries

In ***Bucquet v. Livingston*** *(1976) 57 Cal. App. 3d 914, 129 Cal. Rptr. 514* , defendant was an attorney employed to plan the settlor's estate, which included an inter vivos trust. The attorney allegedly neglected an important tax aspect, and drafted the trust so that problems arose later, reducing the corpus of the trust. The trust beneficiaries brought a professional negligence action against the attorney. The defendant moved for a judgment on the pleadings, asserting that the complaint did not state a cause of action, in part, because he had no duty to plaintiffs. The plaintiffs appealed, and the court of appeal reversed. It held that the attorney owed a duty to plaintiffs as the intended beneficiaries of the trust (*57 Cal. App. 3d 914, 925-926)* . The attorney's duty to use ordinary judgment, care, and skill in the performance of his or her legal services extends not only to the client, but also to intended beneficiaries, despite a lack of privity (*57 Cal. App. 3d 914, 921)* . This rule applies not only to wills, but to inter vivos trusts as well (*57 Cal. App. 3d 914, 922)* .

[d] Duty to Disclose Dual Representation to Third Party Trust Beneficiaries

In ***Morales v. Field, DeGoff, Huppert & MacGowan*** *(1979) 99 Cal. App. 3d 307, 160 Cal. Rptr. 239* , plaintiff was a beneficiary of her mother's estate. The mother's will left her separate property to a trust, of which her husband was life beneficiary, and plaintiff the remainderperson. A bank was named as executor and trustee, and was represented by defendant law firm. Plaintiff alleged that defendants breached their duty to her as a beneficiary with regard to two transactions. In one transaction, the testator had earlier guaranteed loans by a second bank to a corporation. As part of the settlement of the lending bank's claim against the estate, it agreed to refinance the original loans guaranteed by the testator. To refinance, defendants arranged for executor bank to execute a new loan guarantee. Defendants did not notify plaintiff of the transaction, which would affect the estate, and thus her interest, and did not disclose to the court authorizing the guarantee that defendants represented the corporation's shareholders as well as the executor. Plaintiff brought suit, alleging, among other things, defendants' professional negligence. On general demurrer by defendants, the

trial court granted a judgment of dismissal, and plaintiff appealed.

The court of appeal reversed the dismissal with respect to the loan guarantee transaction, and held that defendants did owe a duty to plaintiff as trust beneficiary (*99 Cal. App. 3d 307, 316)* . The court stated that whether or not the attorney for a trustee owes a duty to the beneficiary for negligent conduct depends on a judicial weighing of policy considerations, and a balancing of factors such as the extent to which plaintiff was an intended beneficiary of the transaction, foreseeability of harm to plaintiff, degree of certainty of harm, closeness of the connection between defendant's conduct and the harm, moral blame attached to defendant's conduct, and the policy of preventing future harm (*99 Cal. App. 3d 307, 315)* . Looking at the facts of the case, the court said that when an attorney for the trustee and executor also represents third parties involved in transactions with the estate, there is clear foreseeability of harm to any trust beneficiaries. In addition, because a trustee is bound to act in the highest good faith toward beneficiaries, an attorney for the trustee is obligated to do so as well (*99 Cal. App. 3d 307, 316)* . The court concluded that defendants owed to plaintiff at least the duty to disclose their mutual representation of the trustee/executor and the corporate shareholders benefitting from the estate's loan guarantee. The court added that to require the trustee's attorney to disclose to beneficiaries such a dual representation would eliminate the need for lawsuits of the type involved here (*99 Cal. App. 3d 307, 316)* .

[e] Duty to Creditor When Collection Agency Is Client

Donald v. Garry *(1971) 19 Cal. App. 3d 769, 97 Cal. Rptr. 191* , is discussed in *§ 24A.42[3][a]*. A creditor sued the attorney representing the collection agency hired by the creditor. After balancing various factors, the court of appeal held that, under these circumstances, the attorney clearly owed a duty to the plaintiff. Because the collection agency was a mere intermediary between the plaintiff creditor and the attorney hired to prosecute the creditor's claim, harm to the plaintiff by defendant's negligence was clearly foreseeable, the degree of certainty of harm was definite, and the connection between the defendant's negligence and plaintiff's harm was direct. In addition, there is some moral blame attached to the defendant's procrastination, and there exists a policy that lawsuits should be diligently prosecuted (*19 Cal. App. 3d 769, 772)* .

[f] Duty to Client and Investors

In ***FDIC v. O'Melveny & Meyers*** *(9th Cir. 1992) 969 F.2d 744* , *rev'd on other grounds, O'Melveny & Meyers v. FDIC (1994) 512 U.S. 79, 114 S. Ct. 2048, 129 L. Ed. 2d 67* , the Federal Deposit Insurance Corporation (FDIC) sued defendant law firm, claiming professional negligence in connection with its legal advice and services to a failed savings and loan association. Defendant had assisted the failed institution in preparing Private Placement Memoranda for two real estate syndications. The district court granted defendant's motion for summary judgment.

The appellate court reversed the summary judgment. Defendant admitted the existence of a duty by a principal and its agent of complete and accurate disclosure to potential investors in a securities offering. But defendant argued that the investors were fully compensated, and that as an agent it owed no additional duty to the principal's successor in interest to make inquiries and disclose information that the principal already knew and was trying to conceal. The court rejected the implication that if the client happens to be committing a fraud, of which the attorney may or may not be aware, the presence of the fraud cancels the attorney's duty to use due care. The court found no reported exception to the general rule that a lawyer has to act competently to avoid public harm when he or she learns that the client is dishonest. The court also stated defendant's distinction between a duty to investors, which defendant conceded, and a duty to clients, which it denied, was false. Part and parcel of effectively protecting a client, and thus discharging the attorney's duty of care, is to protect the client from the liability that may flow from promulgating a false or misleading offering to investors. An important duty of securities counsel is to make a reasonable and independent investigation to detect and correct false or misleading materials (*969 F.2d 744, 748-749)* .

NOTE:

The United States Supreme Court granted certiorari in the *O'Melveny & Meyers* case and reversed the Court of Appeals [*see O'Melveny & Meyers v. FDIC (1994) 512 U.S. 79, 83-89, 114 S. Ct. 2048, 129 L. Ed. 2d 67]* . However, the Supreme Court's reversal was based on the narrow question of whether California or federal common law governed the determination of whether certain knowledge of corporate officers could be imputed to the corporation and whether that knowledge could be imputed to the FDIC when it sued as the corporation's receiver. The Court ruled that California law governed and remanded the case [*see O'Melveny & Meyers v. FDIC (1994) 512 U.S. 79, 83-89, 114 S. Ct. 2048, 129 L. Ed. 2d 67]* . The Court did not address the substantive issues of the law firm's duties to the failed savings and loan association or to the FDIC.

[g] Duty to Inform Personal Injury Client's Spouse of Potential Claim for Loss of Consortium

In ***Meighan v. Shore*** *(1995) 34 Cal. App. 4th 1025, 40 Cal. Rptr. 2d 744* , a wife brought an action against the attorney who had represented her husband in the husband's personal injury claim on the ground that the attorney was negligent for failing to inform her of her right to pursue a cause of action for loss of consortium. The husband and wife felt that the husband had been the victim of medical malpractice. The wife sought out an attorney, and both husband and wife met with the attorney to discuss the case. The attorney agreed to take the case, telling the wife that her husband, rather than she, was the client. Nothing was said during the interview about the wife's right to pursue an action in her own right for loss of consortium, and neither the wife nor her husband had any idea that there was such a tort. The attorney filed a suit for medical malpractice, naming only the husband as plaintiff. Subsequently, husband and wife substituted in new counsel, who informed them of the wife's entitlement to pursue an action for loss of consortium, but by then the right had become time-barred. After the medical malpractice action was settled, the wife sued the original attorney for failure to inform her of her right to pursue a cause of action, or to alert her to the need to consult another attorney about it. The attorney moved for summary judgment, and the motion was granted by the trial court.

The court of appeal reversed, holding that under the facts of the case the attorney had the duty to inform the wife of her potential claim for loss of consortium. The attorney argued that he had no duty to the wife because she was not his client (*34 Cal. App. 4th 1025, 1033)* . The court initially noted that the relationship between spouses with regard to an action for loss of consortium is one of privity, and that the circumstance of privity bears on the duty of an attorney to the spouse of a physically injured client (*34 Cal. App. 4th 1025, 1035)* . The court then stated that professional liability is not dependent upon privity of contract between a professional and an injured party, but rather that the presence or absence of a client's intent that the plaintiff benefit from or relay upon the attorney's services is particularly significant in the determination of duty (*34 Cal. App. 4th 1025, 1041)* . The court then noted that the husband and wife expected the relationship with the attorney to affect the wife, that harm to the wife was foreseeable unless the attorney alerted her to the existence of her rights to pursue an action for loss of consortium, that the wife was injured when her potential action became barred by the running of the statute of limitations, that there was a close connection between the attorney's conduct and the injury, that requiring a duty of an attorney in these circumstances would prevent future harm, and that recognition of liability under the circumstance would not impose an undue burden on the profession (*34 Cal. App. 4th 1025, 1043-1044)* . The court thus concluded that the attorney had a duty to inform the husband and wife of the existence of their rights under the consortium tort (*34 Cal. App. 4th 1025, 1044)* . However, the court emphasized the narrowness of its holding, stating that it pertains only to the loss of consortium, when both spouses consult an attorney with respect to a personal injury suffered by one of them and the attorney knows or could readily ascertain that the other spouse has a potential claim for loss of consortium, and that spouse is unaware of his or her rights (*34 Cal. App. 4th 1025, 1030)* .

[h] Attorney for Insurer May Be Liable for Fraud to Claimant Under Policy

In ***Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone*** *(2003) 107 Cal. App. 4th 54, 131 Cal. Rptr. 2d 777* , the plaintiffs were homeowners who had obtained an arbitration judgment against a home remodeler, then subsequently filed suit against the remodeler's insurer and its attorney. This subsequent lawsuit was based on allegedly

fraudulent statements made by the attorney concerning the extent of coverage, statements that prompted the plaintiffs to accept in satisfaction of the judgment much less than the amount the insurer was legally obligated to pay to indemnify the remodeler. The trial court sustained the demurrer of the attorney and his law firm, dismissing the fraud claim against them on the grounds that the attorney did not owe the plaintiffs a duty of truthful disclosure and that the plaintiffs' reliance on the attorney's statements was not reasonable.

The court of appeal reversed. The court concluded that an attorney, like any party, has a duty to refrain from committing fraud against another, and that an attorney is not relieved of that duty merely by virtue of his or her status as an attorney and the fact that the attorney was at the time negotiating with a party other than his or her client (*107 Cal. App. 4th 54, 69-72)* . In this case, the court concluded that the plaintiffs had adequately alleged facts that, if proven, would support a fraud action against the attorney and his firm. The pleadings alleged that the attorney misled the plaintiffs as to the extent of the insurer's liability to indemnify the remodeler, and that the plaintiffs believed that the attorney's statements about coverage were statements of fact. Moreover, the plaintiffs' reliance on the attorney's statements was justifiable, because the plaintiffs had no reason to doubt the attorney and had no reason to know that the remodeler's insurer had agreed, after the claims procedures had begun, to cover willful acts under the remodeler's policy (*107 Cal. App. 4th 54, 74-76)* . In addition, under these circumstances, the plaintiffs' relationship with the attorney for the insurer was not actually that of attorney and opposing party. As claimants, the plaintiffs were third-party beneficiaries under the insurance policy, and under *Ins. Code § 11580*, the insurer was obligated by virtue of the arbitration judgment to pay the amount of the judgment, subject to the terms and limitations of the policy and any reservation of rights. Furthermore, that statute inures to the benefit of any party injured by the insured as if that party were specifically named in the policy. Therefore, the plaintiffs in this sense were actually standing in the shoes of the insured when the misrepresentations were made (*107 Cal. App. 4th 54, 76)* .

[i] Attorney Agreeing to Serve as Mediator in Dispute Involving Client Owes Duty to Disclose Facts Affecting Impartiality

In ***Furia v. Helm*** *(2003) 111 Cal. App. 4th 945, 4 Cal. Rptr. 3d 357* , the plaintiff was a contractor involved in a dispute with homeowners who had hired the plaintiff to remodel their home. Those homeowners, dissatisfied with the work being performed on the project, consulted their attorney for advice. With the agreement of all parties, the attorney agreed to mediate the dispute and sent a letter to both parties memorializing that agreement. In that letter, the attorney reaffirmed that he represented the homeowners, but agreed to work to mediate the dispute in an effort to resolve the dispute as efficiently as possible. The attorney also sent a separate letter only to the homeowners, reaffirming to them that he represented their interests and would not be truly neutral in the matter. The homeowners eventually replaced the plaintiff on the construction project and filed a complaint against the plaintiff for construction deficiencies, in addition to filing a complaint against the plaintiff with the Contractors' State License Board. The Board suspended the plaintiff's license and required as a condition of reinstatement that he pay restitution to the homeowners, although the Board also concluded that the plaintiff had not abandoned the construction project. The plaintiff then sued the homeowners' attorney for malpractice and fraudulent concealment and misrepresentation, alleging that the plaintiff, unaware of the attorney's true loyalties, abandoned the construction project on the suggestion of the attorney during mediation, only to incur the costs and expenses of defending against the homeowners' subsequent legal actions. The trial court sustained the attorney's demurrer to the plaintiff's second amended complaint on the grounds that the attorney could not be liable to plaintiff because no attorney-client relationship existed between them.

The court of appeal affirmed, but did not follow the reasoning of the trial court. The court of appeal agreed that there was no attorney-client relationship between the attorney and the contractor, but held that the attorney owed a duty to the contractor based on the attorney's accepted role as mediator. Although questioning the propriety of an attorney acting as a mediator in a dispute against a client's adversaries, the court noted that the parties had agreed to the attorney assuming that role, and as such, the attorney owed a duty to both sides in the dispute. Without exploring the full dimensions of the duty owed in this case to his clients' adversary, the court held that the duty extended at least to the duty to disclose fully all facts and circumstances that might reasonably have caused the plaintiff to believe that the attorney would not or

could not be impartial. The court then held that the plaintiff had alleged facts showing a duty and breach of duty sufficient to withstand a demurrer (*111 Cal. App. 4th 945, 953-955)* . However, the court went on to hold that the plaintiff was unable to allege any facts supporting the claim that his reliance on the attorney's misrepresentations or failure to disclose had caused any damages. In the earlier proceedings before the Board, the plaintiff had argued, and the Board had concluded, that the plaintiff had not abandoned the construction project. Given this earlier position, the plaintiff could not now argue that he abandoned the project in reliance on the attorney's suggestions during mediation and subsequently incurred legal costs. Because this was the plaintiff's only argument in support of his claim that he had sustained damages because of the attorney's conduct, the trial court was correct in sustaining the demurrer (*111 Cal. App. 4th 945, 956-959)* .

[j] Lawyer May Be Liable for Fraud Against Third Party

In ***Vega v. Jones, Day, Reavis & Pogue*** *(2004) 121 Cal. App. 4th 282, 291, 17 Cal. Rptr. 26* , the plaintiff was a shareholder in Monsterbook, a company acquired by Transmedia in a merger transaction. The terms of the acquisition included the plaintiff's receipt of restricted stock in Transmedia in exchange for his interest in Monsterbook. Jones, Day, Reavis & Pogue represented Transmedia in the transaction. Before the transaction closed, Transmedia sought and secured $10 million in investment financing from a third party. The terms of the financing transaction included so-called "toxic" stock provisions, under which the investors received convertible preferred stock that seriously diluted the shares of all other Transmedia stockholders. Both Transmedia and Jones Day knew that "toxic" stock financing is a "desperate and last resort of financing for a struggling company" and that 95 percent of companies who engage in such financing end up in bankruptcy. Jones Day prepared a two-page disclosure schedule that clearly described and properly disclosed the toxic provisions of the $10 million investment. However, it did not send the disclosure to Vega. Jones Day knew that disclosing the toxic terms of the financing would have "killed" the acquisition, without which Transmedia would not have obtained the financing and would have gone out of business. Instead, Jones Day told Vega that the $10 million financing was "standard" and "nothing unusual" and that Jones Day and Transmedia would supply additional documents to support these characterizations of the financing. Jones Day supplied Vega with a different sanitized version of the disclosure schedule which did not include the toxic stock provisions.

Vega sued Jones Day for fraud. Jones Day demurred. It contended it made no affirmative misstatements and had no duty to disclose the terms of the third-party investment to an adverse party in the merger transaction. The trial court sustained the demurrer without leave to amend on several grounds, including that Jones Day owed Vega no duty to disclose so that Vega could not state a claim based on omission or nondisclosure. Vega appealed.

The court of appeal reversed. It held that Vega's complaint stated a fraud claim based on nondisclosure. The complaint alleged the law firm, while expressly undertaking to disclose the financing transaction, provided disclosure schedules that did not include material terms of the transaction. The court noted that a fraud claim against a lawyer is no different from a fraud claim against anyone else. If an attorney commits actual fraud in dealings with a third party, the fact the attorney did so in the capacity of attorney for a client does not relieve the attorney of liability. The court of appeal held that a lawyer communicating on behalf of a client with a nonclient may not knowingly make a false statement of material fact or fail to disclose a material fact to the nonclient (*121 Cal. App. 4th 282, 291)* .

[4] Additional Authorities

[a] Duty to Third Party as Intended Beneficiary

In *Assurance Co. of Am. v. Haven (1995) 32 Cal. App. 4th 78, 38 Cal. Rptr. 2d 25* , a liability insurer sued the attorney for the insured for negligence in defending an action brought against the insured by a third party. Although the attorney began the third-party defense as the attorney for both the insured and the insurer, a conflict of interest arose and the attorney became the representative of the insured alone. The attorney was then negligent in failing to assert a statute of limitations defense in a timely manner and in failing to demur to or motion for summary judgment on a cause of action

for peculiar risk. Due to these negligent actions, and because the attorney failed to keep the insurer informed about the third-party action as required by *Civ. Code § 2860*, the insurer was forced to settle with the third party for the full amount of the liability policy. The insurer then sued the insured's attorney for his negligence, but the attorney demurred on the grounds that the attorney owed no duty to the insurer. The demurrer was sustained, and the insurer appealed.

The court of appeal reversed. The court held that the insurer had a cause of action for any violations of duties imposed on the attorney by *Civ. Code § 2860*, the statute that governs the provision of an attorney for an insured in actions by third parties, when violation of those duties prevented the insurer from timely and completely defending the action brought against the insured. These statutory duties included the duties to consult with the insurer in a timely manner, to disclose all known and nonprivileged information to the insurer, and to cooperate in exchanging information with the counsel for the insurer. However, the court also held that the insurer had no cause of action for duties that fell outside those imposed by the statute. Thus, the attorney could not be held liable to the insurer for failing to investigate, prepare, assert, establish, or perform other similar functions regarding the defense (*32 Cal. App. 4th 78, 83)* .

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 24A ATTORNEYS AT LAW: MALPRACTICE
PART II. FORMS

2A-24A California Points & Authorities § 24A.43

§ 24A.43 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--Failure to Segregate Funds Constitutes Professional Negligence

[1] FORM

[*Caption. See § 24A.39.*]

DEFENDANT'S FAILURE TO MAINTAIN PLAINTIFF'S FUNDS IN A TRUST ACCOUNT CONSTITUTED PROFESSIONAL NEGLIGENCE.

Attorney's Failure to Place Client's Funds in Trust Account Is Actionable Legal Malpractice. An attorney's failure to comply with *Rule 4-100 of the Rules of Professional Conduct* of the State Bar of California, requiring that client's funds be deposited in a trust account, is a breach of fiduciary duty and professional negligence (*T & R Foods, Inc. v. Rose (1996) 47 Cal. App. 4th Supp. 1* , Supp. 8, *56 Cal. Rptr. 2d 41*).

[2] Comments

[a] Use of Form

This memorandum may be submitted by a plaintiff in a legal malpractice action, in opposition to a defendant's motion for summary judgment, when the defendant's motion is based on the argument that the failure to maintain plaintiff's funds in a separate trust account does not constitute legal malpractice.

This form may be modified for use in another procedural context in which counsel wishes to raise the substantive issue that an attorney has an obligation to keep clients' funds segregated in a trust account. They may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should include specific facts showing evidence of an attorney-client relationship and of a fee agreement between the

parties, and should argue that funds tendered to the attorney were not intended to pass to the attorney at the time of payment.

[c] Related Memoranda

For memoranda relating to summary judgment generally, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Attorney's Failure to Place Client's Funds in Trust Account Is Actionable Legal Malpractice

In ***T & R Foods, Inc. v. Rose*** *(1996) 47 Cal. App. 4th Supp. 1* , *56 Cal. Rptr. 2d 41* , after the death of the sole shareholder of a professional law corporation, a client of the corporation sued the shareholder's estate for funds which had been given as a retainer but which had not been placed in a client trust account. Plaintiff also filed a claim against the corporation, but the corporation was the subject of a court-supervised dissolution proceeding, and as of the date of trial plaintiff had received no payments from the corporation. In the professional negligence action against the estate, the matter was submitted on stipulated facts, and the trial court entered a judgment that plaintiff take nothing.

The court of appeal first considered the question of whether State Bar *Rules of Prof. Conduct, Rule 4-100*, requires advances for attorney fees to be kept in trust accounts, segregated from money belonging to the attorney. Since the funds in question did not constitute a classic retainer to secure availability over a period of time, but rather were an advance payment retainer so that ownership would not pass until earned, the court concluded that the rule required the funds to be segregated (*47 Cal. App. 4th Supp. 1*). The court then reasoned that an attorney's breach of the ethical duties of good faith and fidelity owed to a client constitutes actionable legal malpractice, and concluded that the failure to segregate plaintiff's funds was professional negligence (*47 Cal. App. 4th Supp. 1*). The court thus reversed the judgment, and ordered the trial court to enter judgment for plaintiff.

California Points & Authorities

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 24A ATTORNEYS AT LAW: MALPRACTICE
PART II. FORMS

2A-24A California Points & Authorities § 24A.44

§ 24A.44 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--Class Action Attorney's Duty to Advise Class of Potential Claims Not Limited to Claims Included in Class Certification Order

[1] FORM

[*Caption. See § 24A.39.*]

SUMMARY JUDGMENT FOR DEFENDANT SHOULD BE DENIED BECAUSE DEFENDANT OWED A DUTY OF CARE TO MEMBERS OF THE PLAINTIFF CLASS IN THE UNDERLYING CLASS ACTION LAWSUIT TO CONSIDER AND ADD AS APPROPRIATE ANY CLAIMS ARISING FROM THE SAME CIRCUMSTANCES THAT UNDERLIE THE CERTIFIED CLAIMS.

A. Rules Governing Summary Judgment Procedure. [*See § 24A.39, Paragraph A.*]

B. Class Attorney Owes Duty to Consider and Advise Class Members on Additional Potential Claims Arising From Same Underlying Facts. If an attorney represents the plaintiff class in a class action lawsuit, the certification of the class does not relieve the attorney from a duty to advise about, and add as appropriate, other potential claims that the plaintiffs may have that arise from the same facts that underlie the certified claims (*Janik v. Rudy, Exelrod & Zieff (2004) 119 Cal. App. 4th 930, 934, 14 Cal. Rptr. 3d 751*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion for summary judgment brought by an attorney who is a defendant in a legal malpractice action, if the basis for the motion for summary judgment is that the attorney owed no duty to the class action plaintiffs represented by the attorney in an underlying class action lawsuit to consider, advise on, and include other legal claims in addition to the claims that were specified in the class certification order.

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law raised. Thus, counsel should include facts detailing the legal claims that the plaintiff believes should have been included in the underlying class action lawsuit, how they relate to the facts underlying the claims that were certified for inclusion, and the failure of the attorney in the underlying action to advise, consider, or include such claims.

This form may be modified for use in other procedural contexts, such as to oppose a demurrer to the plaintiff's complaint.

[3] Discussion of Authorities

[a] Class Attorney Owes Duty to Consider and Advise Class Members on Additional Potential Claims Arising From Same Underlying Facts

In ***Janik v. Rudy, Exelrod & Zieff*** *(2004) 119 Cal. App. 4th 930, 14 Cal. Rptr. 3d 751* , the plaintiff was an insurance claims representative who brought a malpractice lawsuit against the attorneys who represented a class of claims representatives, including the plaintiff, in an earlier class action suit against an insurance company. In the earlier class action lawsuit, the claims certified for the class included claims for unpaid overtime wages brought under a Labor Code provision that allowed recovery of up to three years of unpaid wages. The attorneys were successful in winning $90,000,000 for the class on those claims. In the malpractice action, the plaintiff alleged that the attorneys should have also included claims for unpaid wages under the unfair competition statute, *Bus. & Prof. Code § 17200 et seq.*, because doing so would have allowed recovery of up to four years of unpaid wages, rather than just three years as under the Labor Code. The defendants successfully demurred to the malpractice claim on the grounds that they had no duty to represent the class on claims beyond those included in the class certification order. The plaintiff appealed.

The court of appeal reversed. The court held that if an attorney represents the plaintiff class in a class action lawsuit, the certification of the class does not relieve the attorney from a duty to advise about other potential claims that the plaintiffs may have that arise from the same facts that underlie the certified claims. The court noted that claims under the unfair competition statute would have been based on the same set of facts as the Labor Code claims and would have been subject to essentially the same legal analysis (*119 Cal. App. 4th 930, 934)* . In reaching its decision, the court recognized the general legal principle that an attorney who undertakes one matter on behalf of a client owes a duty of care to at least consider and advise the client if there are related matters that the client is overlooking that should be pursued to avoid prejudicing the client's interests. In the context of a class action, both the representative plaintiffs and the absent class members have the right to assume that the class attorneys will consider and bring to the attention of the plaintiffs any additional or greater claims that may exist arising out of the same set of facts that underlie the certified claims, at least if the failure to do so would result in the loss of any of those claims (*119 Cal. App. 4th 930, 940)* . The court also noted that the existence of a duty of care does not mean that the attorney must include other related claims, because doing so may expand the scope of the lawsuit and create additional grounds for the defendant to challenge the propriety of the class as certified. However, a failure to actually include the additional claims in the lawsuit goes to the issue of whether the attorney has breached the duty of care, and not to the issue of whether a duty of care exists to advise as to the potential claims (*119 Cal. App. 4th 930, 942-943)* . The court also held that because the issue was not addressed in the class action lawsuit, the plaintiff was free to bring a separate action to adjudicate the issue of the

attorneys' negligence in handling the class claims (*119 Cal. App. 4th 930, 946)* .

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 24A ATTORNEYS AT LAW: MALPRACTICE
PART II. FORMS

2A-24A California Points & Authorities § 24A.45

§ 24A.45 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--Defendant Had Duty to Research Unsettled Area of Law

[1] FORM

[*Caption. See § 24A.39.*]

SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE THERE IS A TRIABLE ISSUE OF FACT AS TO WHETHER OR NOT DEFENDANT HAD A DUTY TO CONDUCT REASONABLE RESEARCH INTO THE UNSETTLED AREA OF LAW TO WHICH HIS OR HER MISTAKE PERTAINED.

A. Rules Governing Summary Judgment Procedure. [*See § 24A.39, Paragraph A.*]

B. Duty to Research Unsettled Issue. An attorney has a duty to conduct reasonable research into even an unsettled area of the law, so that he or she can make an informed decision as to a course of conduct on behalf of the client (*Smith v. Lewis (1975) 13 Cal. 3d 349, 359, 118 Cal. Rptr. 621, 530 P.2d 589*).

[*Optional*] **C. Duty to Avoid Involving Client in Doubtful Area of Law.** If research reveals an alternative course of conduct available, the attorney has a duty to avoid involving the client in a debatable or doubtful area of law (*Horne v. Peckham (1979) 97 Cal. App. 3d 404, 416, 158 Cal. Rptr. 714*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted by a plaintiff in opposition to a motion for summary judgment in a legal malpractice action when the motion is based on the contention that defendant is not liable for a mistake on a debatable issue. The basis of opposition is that there is a triable issue of fact as to whether or not the legal matter involved was so esoteric that the attorney could not reasonably have been aware of it, or whether or not the defendant had a duty to conduct reasonable research on the matter.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations which oppose the motion [*see Code Civ. Proc. § 437c*], and which include a showing that the defendant's mistake involved an area of law which was not so esoteric that defendant would not reasonably have been aware of it, and that defendant failed to conduct minimal research into the area of the mistake.

[b] Type of Duty

This form is different from the forms in *§§ 24A.39 -24A.42*, in which the plaintiff argues that a duty of care exists, in opposition to defendant's motion for summary judgment on the grounds that there is no duty of care owed by defendant to plaintiff. In this form, plaintiff opposes defendant's argument that although a duty of care exists, there can be no liability, by asserting that a particular type of duty of care exists under these particular circumstances.

This memorandum may be used in an appropriate case to oppose a motion for summary judgment supported by The points in *§ 24A.25*.

[c] Related Uses

With appropriate modifications, this form may be used to oppose a general demurrer to the complaint, or to oppose a motion for judgment on the pleadings, where it appears on the face of the complaint that defendant failed to research an unsettled area of law.

[d] Related Memoranda

For memoranda relating to summary judgment generally, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Duty to Research Unsettled Issue

In ***Smith v. Lewis*** *(1975) 13 Cal. 3d 349, 118 Cal. Rptr. 621, 530 P.2d 589* , a client sued the attorney who had represented her in a marriage dissolution proceeding for negligence in failing to assert her community interest in her husband's retirement benefits. The retirement benefits were a sizeable portion of the husband's property, but defendant had advised plaintiff that they were not community property, and the court had not considered or apportioned them in the dissolution proceeding. In the malpractice action, the trial court entered judgment for plaintiff. Defendant appealed to the Supreme Court, contending that because the law characterizing retirement benefits was unsettled at the time of his decision relating to the benefits, he should not be liable for his mistake.

The Supreme Court affirmed the judgment. It held that although an attorney will not be liable for failing to anticipate which way an uncertain issue will be resolved, he or she does have a duty to undertake reasonable research into the unsettled area of law in order to make an informed decision as to his or her course of conduct on behalf of the client (

13 Cal. 3d 349, 358-359) . The Court held that, in this case, the attorney had failed to perform even minimal research, which would have revealed a feasible argument in his client's favor (*13 Cal. 3d 349, 360)* . The area of property characterization of retirement benefits is not so esoteric that an attorney could not reasonably be expected to be aware of it, especially since the division of community property is a major issue in dissolution proceedings (*13 Cal. 3d 349, 359)* .

[b] Duty to Avoid Involving Client in Doubtful Area of Law

In ***Horne v. Peckham*** *(1979) 97 Cal. App. 3d 404, 158 Cal. Rptr. 714* , plaintiff hired defendant attorney to prepare a trust for his patent rights, with his sons as beneficiaries. Following his accountant's recommendation, plaintiff sought the tax advantages of a "Clifford Trust" in which the sons rather than plaintiff would be taxed as owners on the patent. Defendant told plaintiff that he had no knowledge of tax matters, and that initially, an expert opinion would be required. Defendant relied chiefly on the accountant's advice, and consulted a newly licensed tax attorney on one question. Defendant alone drafted the required documents. Later, the IRS audited plaintiff's tax returns and assessed plaintiff's taxes on the grounds that the trust had failed to transfer tax liability to plaintiff's sons. After conceding his tax liability, plaintiff sued defendant for malpractice. The trial court entered judgment for plaintiff, and defendant appealed.

The court of appeal affirmed the judgment of defendant's liability. Defendant contended, among other things, that the question of law involved was so doubtful that he should not be liable for his mistake. Defendant relied on *Lucas v. Hamm (1961) 56 Cal. 2d 583, 15 Cal. Rptr. 821, 364 P.2d 685* [*see § 24A.25[3][a]*], which held that an area of law that poses difficult problems for competent attorneys precludes liability for an attorney's mistake relating to it. The court of appeal held that the principle of the *Lucas* case should not control, because in this case, applicable law clearly showed the invalidity of plaintiff's (Clifford) trust for its intended purpose (*97 Cal. App. 3d 404, 409-410, 416)* . The court held that once an attorney has determined that the legal issue involved is doubtful or debatable, he or she then has a duty to the client to research the issue in order to make an informed decision. If this reasonable research by the attorney reveals an alternate course of conduct, the attorney has a duty to avoid that conduct which would involve the client in a doubtful or debatable area of law (*97 Cal. App. 3d 404, 416)* .

[4] Additional Authorities

[a] Duty to Research Unsettled Issue

In *Village Nurseries v. Greenbaum (2002) 101 Cal. App. 4th 26, 123 Cal. Rptr. 2d 555* , the plaintiff was a landscaping and irrigation systems company that performed extensive work for a building contractor. The building contractor filed for Chapter 11 bankruptcy, and the plaintiff recorded several mechanic's liens for amounts that the contractor owed. The plaintiff specifically inquired from its attorneys about whether, to protect its liens, a Notice of Perfection of Security Interest needed to be filed with the Bankruptcy Court under *11 U.S.C.S. § 546(b)*. The attorneys were of the opinion that a Notice was not necessary, but that suit needed to be filed in state court to protect the liens. The following year, both the bankruptcy trustee and the bankruptcy court indicated their opinion that the liens were invalid due to the failure to file a Section 546 notice. The plaintiff eventually filed a malpractice suit against the attorneys after the bankruptcy court ruled that the liens were in fact invalid. The trial court granted summary judgment for the defendants on the grounds of the judgmental immunity doctrine, but the court of appeal ruled that summary judgment should not have been granted on that basis. The court held that regardless of whether the legal question of whether a Notice was required was unsettled or not, the defendants provided no evidence that they performed any legal research on the issue prior to advising the plaintiff. In the absence of evidence that any actual research was performed, the defendants' advice was not based on the exercise of an informed judgment, and the defendants were not entitled to the protection of the judgmental immunity doctrine (*101 Cal. App. 4th 26, 37-39)* .

In *Aloy v. Mash (1985) 38 Cal. 3d 413, 212 Cal. Rptr. 162, 696 P.2d 656* , the Supreme Court reversed the trial court's summary judgment in favor of defendant in an attorney malpractice action based on the attorney's failure to assert a

community property interest in the husband's military pension. The Court noted that characterization of federal military retirement pensions was the subject of legal debate for some time. Defendant asserted that at the time he acted the law was unsettled and that he had exercised informed judgment and was therefore immune from a claim of professional negligence. The Court responded that defendant relied on a single case and did not base his judgment on all available data to make a rational, professional judgment. Defendant acted on an incomplete reading of a single case, without appreciating a vital difference between the facts of the case and the facts of his client's situation (*38 Cal. 3d 413, 417-419)* .

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
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2A-24A California Points & Authorities § 24A.46

§ 24A.46 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--Defendant Had Duty to Refer Client to Specialist

[1] FORM

[*Caption. See § 24A.39.*]

SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE THERE IS A TRIABLE ISSUE OF FACT AS TO WHETHER OR NOT DEFENDANT HAD A DUTY TO REFER TO A SPECIALIST.

A. Rules Governing Summary Judgment Procedure. [*See § 24A.39, Paragraph A.*]

B. Rules of Professional Conduct Authorize Association or Consultation With Other Counsel When Attorney Lacks Sufficient Learning and Skills to Perform Employment. If a member of the State Bar lacks sufficient learning and skills when employment or representation is undertaken, or during the course of the employment or representation, the attorney may nonetheless perform such duties competently by associating, or when appropriate, professionally consulting another State Bar member reasonably believed to be competent (*Cal. Rules Prof. Conduct, Rule 3-110(B)*).

C. Duty to Refer to Specialist. A general practitioner has a duty to refer his or her client to a specialist, or to recommend a specialist if under the circumstances a reasonable attorney would do so (*Horne v. Peckham (1979) 97 Cal. App. 3d 404, 414-415, 158 Cal. Rptr. 714*).

[*Optional*] **D. Duty to Refer to Specialist in Tax Matters.** Although a tax issue does not necessarily require that an attorney refer the client to a tax specialist, the attorney has a duty to so refer if under the circumstances a reasonable attorney would do so (*Horne v. Peckham (1979) 97 Cal. App. 3d 404, 414, 415, 158 Cal. Rptr. 714*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted by a plaintiff in opposition to a motion for summary judgment in a legal malpractice action when the motion is based on the contention that defendant is not liable for a mistake on a debatable issue. The basis of opposition is that there is a triable issue of fact as to whether or not the defendant had a duty under the circumstances to refer the client to a specialist, or to exercise the standard of care of a specialist.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations which oppose the motion [*see Code Civ. Proc. § 437c*], and which include a showing that the defendant's mistake involved an area of specialty, and that circumstances required defendant either to refer the client to a specialist, or to recommend a specialist.

This memorandum may be used in an appropriate case to oppose a motion for summary judgment supported by The points in *§ 24A.25*.

With appropriate modifications, this form may be used to oppose a general demurrer to the complaint, or to oppose a motion for judgment on the pleadings, where it appears on the face of the complaint that defendant failed to exercise his or her duty either to refer plaintiff to a specialist, or to recommend a specialist.

[b] Related Memoranda

For memoranda relating to summary judgment generally, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Duty to Refer to Specialist

Horne v. Peckham *(1979) 97 Cal. App. 3d 404, 158 Cal. Rptr. 714* , is discussed in *§§ 24A.45[3][b]* and *24A.46[3][a]*. The defendant prepared documents to effectuate a trust which would have tax benefits for plaintiff. The trust was invalid for the purposes intended, however, and the court of appeal held that defendant had breached a duty to research the issue prior to preparing the trust (*97 Cal. App. 3d 404, 416)* . The court also held that when a reasonable attorney would do so, an attorney has the duty to refer his or her client to a specialist, or recommend the assistance of a specialist, or in the alternative to exercise a standard of care of the ordinary specialist in the same locality and circumstances (*97 Cal. App. 3d 404, 414-415)* . Under the circumstances of this case, the court held that defendant did have that duty, because tax has traditionally been considered an area of specialty, and the defendant himself acknowledged his need for expert assistance in the matter (*97 Cal. App. 3d 404, 415)* .

[b] Duty to Refer to Specialist in Tax Matters

Horne v. Peckham *(1979) 97 Cal. App. 3d 404, 158 Cal. Rptr. 714* , is discussed in *§§ 24A.45[3][b]* and *24A.46[3][a]*. The defendant prepared a "Clifford Trust" for plaintiff, purportedly to transfer tax liability for plaintiff's patent income to plaintiff's sons. The trust was later held to be invalid. The court of appeal held that an attorney in general practice has the duty to refer his or her client to a tax specialist, if under the circumstances a reasonable attorney

would do so, or to meet the standard of care of a tax specialist (*97 Cal. App. 3d 404, 414-415)* . The court noted the recent phenomenon of increased specialization among attorneys, and the fact that tax is one area most commonly acknowledged as one of specialization (*97 Cal. App. 3d 404, 415)* . The opinion added that the duty to refer to a tax specialist does not exist with every tax case, since many tax matters are generally known and understood by general practitioners (*97 Cal. App. 3d 404, 415)* . But if under the circumstances a reasonable attorney would do so, as was the case here, the defendant will be liable for negligence if he or she fails to make the referral, or to exercise the standard of care of an expert himself or herself (*97 Cal. App. 3d 404, 414-415)* .

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2A-24A California Points & Authorities § 24A.47

§ 24A.47 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--Liability for Malpractice Normally Question of Fact

[1] FORM

[*Caption. See § 24A.39.*]

SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE REASONABLE MINDS COULD DIFFER AS TO WHETHER OR NOT DEFENDANT'S CONDUCT SATISFIED HIS OR HER DUTY OF CARE.

A. Rules Governing Summary Judgment Procedure. [*See § 24A.39, Paragraph A.*]

B. Liability for Malpractice Normally Question of Fact. Except when reasonable minds cannot differ as to whether or not defendant's conduct satisfied his or her standard of care, liability for malpractice is a question of fact (*Wright v. Williams (1975) 47 Cal. App. 3d 802, 809, 121 Cal. Rptr. 194*).

[*Optional*] **C. Malpractice of Legal Specialist as Question of Fact.** When a malpractice action is brought against a specialist, and the claim is related to that area of specialization, expert testimony is required to resolve the defendant's liability as a question of fact (*Wright v. Williams (1975) 47 Cal. App. 3d 802, 810-811, 121 Cal. Rptr. 194*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted by a plaintiff in opposition to a motion for summary judgment in a legal malpractice action when the motion is based on the contention that defendant is not liable for a mistake on a debatable issue or when the motion is based on any contention that there is no liability as a matter of law. The basis of the opposition is that there is a triable issue of fact as to whether or not defendant's conduct satisfied the required standard of care.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations which oppose the motion [*see Code Civ. Proc. § 437c*], and which include a showing that defendant's conduct did not meet the standard of care of either the ordinary prudent attorney or the ordinary prudent specialist attorney.

This memorandum may be used in an appropriate case to oppose a motion for summary judgment supported by The points in *§ 24A.25*. It may also be used to oppose any other motion for summary judgment when the motion contends that there is no liability as a matter of law.

With appropriate modifications, this form may be used to oppose a general demurrer to the complaint, or to oppose a motion for judgment on the pleadings.

[b] Related Memoranda

For memoranda relating to summary judgment generally, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Liability for Malpractice Normally Question of Fact

In ***Wright v. Williams*** *(1975) 47 Cal. App. 3d 802, 121 Cal. Rptr. 194* , plaintiff clients brought a malpractice action against an attorney specializing in maritime law, for negligently failing to advise them of a law precluding the commercial use of a vessel that has been previously owned by an alien. Plaintiffs intended to purchase a boat that had been owned by an alien, and use it for business operations. They hired defendant to advise them regarding the purchase, but told defendant they intended to use the boat for pleasure. Following the purchase, plaintiffs were cited by the Coast Guard for their use of the boat in violation of the Merchant Marine Act of 1920, and plaintiffs brought the suit against defendant. The case was tried to a judge sitting without a jury. The trial court granted defendant's motion for judgment under *Code Civ. Proc. § 631.8*, after plaintiffs had produced their evidence on the ground that plaintiffs had not carried their burden of proof, defendant had fulfilled the obligation for which he was retained, and defendant was not negligent. The trial court entered judgment for defendant, and plaintiffs appealed.

Plaintiffs contended on appeal, that defendant was negligent as a matter of law because a reasonable specialist in maritime law would have informed plaintiffs of the law prohibiting commercial use of their boat, regardless of the intended use disclosed by plaintiffs. The court of appeal affirmed the judgment. It held first that although there are some cases in which reasonable minds cannot differ regarding an attorney's liability, the question of liability for professional negligence is usually one of fact (*47 Cal. App. 3d 802, 808-809)* . Such was true with the case at hand, which involved no special circumstances transforming the issue of liability into a question of law (*47 Cal. App. 3d 802, 809)* . In addition, the court held that although in some situations expert testimony may not be required, when the claim against defendant specialist is related to his or her expertise as a specialist, only an expert can define the standard of care to be applied, and determine whether it was breached (*47 Cal. App. 3d 802, 810-811)* . The case at hand required expert testimony to prove the allegations of liability to the trier of fact, and in its absence judgment for defendant was proper (*47 Cal. App. 3d 802, 811)* .

[b] Malpractice of Legal Specialist as Question of Fact

Wright v. Williams *(1975) 47 Cal. App. 3d 802, 121 Cal. Rptr. 194* , is discussed in *§ 24A.47[3][a]*.

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2A-24A California Points & Authorities § 24A.48

§ 24A.48 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--Issues of Fact Remain as to Possible Damage to Plaintiff as a Result of Defendant's Conduct

[1] FORM

[*Caption. See § 24A.39.*]

SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE THERE IS A TRIABLE ISSUE OF FACT AS TO THE EXISTENCE OF POSSIBLE DAMAGE TO PLAINTIFF AS A RESULT OF DEFENDANT'S CONDUCT.

A. Rules Governing Summary Judgment Procedure. [*See § 24A.39, Paragraph A.*]

B. Summary Judgment Denied When Damages Possible. Whenever there are factual issues remaining which could possibly create a showing of damage, summary judgment should be denied (*Lewis v. Superior Court (1978) 77 Cal. App. 3d 844, 852-853, 144 Cal. Rptr. 1*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted by a plaintiff in opposition to a motion for summary judgment in a legal

malpractice action when the motion is based on the contention that plaintiff cannot show damages as a matter of law. The basis of opposition is that a triable issue of fact remains as to the possible existence of damage to plaintiff.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits and declarations which oppose the motion and a separate statement of disputed and/or undisputed facts [*see Code Civ. Proc. § 437c(b)*].

This form may be used in an appropriate case to oppose a motion for summary judgment supported by The points in *§ 24A.27*.

With appropriate modifications, this form may be used to oppose a general demurrer to the complaint, or to oppose a motion for judgment on the pleadings, when it appears on the face of the complaint that plaintiff has alleged facts from which possible damage can be deduced.

[b] Related Memoranda

For memoranda relating to summary judgment generally, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Summary Judgment Denied When Damages Possible

In ***Lewis v. Superior Court*** *(1978) 77 Cal. App. 3d 844, 144 Cal. Rptr. 1* , defendant, as attorney for plaintiff, failed to assert plaintiff's rights to her husband's military pension as community property in her dissolution proceeding. In the malpractice suit, defendant moved for summary judgment, contending that plaintiff could not as a matter of law show any damage, since she would still be able to assert her rights to the pension as a tenant in common. The motion for summary judgment was denied, and defendant petitioned for a writ of mandate in the court of appeal.

The court of appeal denied the writ, agreeing with the trial court that summary judgment should not be granted. It held that although plaintiff remained a tenant in common to the unadjudicated property, and could later enforce her interest in a separate action, it did not necessarily follow that she could not as a matter of law prove damages in this action (*77 Cal. App. 3d 844, 852)* . Although defendant's omission may not have caused any damage to plaintiff, it could be possible for her to show that she would not be able to collect on a future judgment for some reason, such as her husband's moving out of the jurisdiction, making new elections under the pension affecting plaintiff's interest, or having defenses against her action based on some agreement between them (*77 Cal. App. 3d 844, 852)* . The court concluded that where there are such possible factual issues that might establish damage at trial, a motion for summary judgment should be denied (*77 Cal. App. 3d 844, 852-853)* .

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2A-24A California Points & Authorities § 24A.49

§ 24A.49 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437(c)] in Legal Malpractice Action--Subsequent Litigation Constitutes Damage

[1] FORM

[*Caption. See § 24A.39*].

SUMMARY JUDGMENT ON THE BASIS THAT DAMAGE WILL NOT OCCUR UNLESS PLAINTIFF'S LOSE AN UNRESOLVED LAWSUIT TRIGGERED BY DEFENDANT'S MALPRACTICE SHOULD BE DENIED BECAUSE THE LITIGATION ITSELF CONSTITUTES DAMAGE.

A. Rules Governing Summary Judgement Procedure. [*See § 24A.39, Paragraph A*].

B. Subsequent Litigation Constitutes Damage. The fact that subsequent litigation has not been completed does not render an action for legal malpractice premature where the malpractice was the failure to prevent such a lawsuit (*Sindell v. Gibson, Dunn & Crutcher (1997) 54 Cal. App. 4th 1457, 1460, 63 Cal. Rptr. 2d 594*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted by plaintiff in opposition to a motion for summary judgment in a legal malpractice action when the motion is based on the contention that the action is premature because no damage will occur unless plaintiffs lose an unresolved lawsuit stemming from the malpractice. The ground of opposition is that the malpractice consisted of failing to prevent the litigation, so that the litigation itself constitutes damage.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should provide facts showing that purpose of the employment of defendant was to place plaintiff in a position to be free from subsequent litigation, and should then argue that the fact that subsequent litigation has been filed constitutes damages.

[3] Discussion of Authorities

[a] Subsequent Litigation Constitutes Damage

In ***Sindell v. Gibson, Dunn & Crutcher*** *(1997) 54 Cal. App. 4th 1457, 63 Cal. Rptr. 2d 594* , plaintiffs brought a malpractice action based on defendant's employment by plaintiff's father to complete an estate plan. The action alleged that defendant failed to obtain a consent from the father's spouse regarding which assets were properly to be included in and distributed from his estate. The action further alleged that at the time of the preparation of the estate plan, the spouse had been willing to waive any community interest in assets which were involved in the estate plan. However, after the father's death, the spouse disputed what assets were included in the estate, and initiated litigation on that issue. Defendant attorney contented that the malpractice action was premature, arguing that plaintiffs would suffer actual injury only if their father's spouse's litigation resulted in a judgment adverse to them. The trial court agreed with defendant, and dismissed the action on the ground that until the pending litigation is resolved it cannot be determined whether or not plaintiffs sustained any actual injury.

The court of appeal reversed, concluding that the litigation itself constituted damage. Defendant relied heavily on *ITT Small Business Fin. Corp. v. Niles (1994) 9 Cal. 4th 245, 36 Cal. Rptr. 2d 552, 885 P.2d 965* , arguing that in transactional malpractice cases the action does not accrue until plaintiff suffers an actual injury through entry of an adverse judgment. However, the court noted that the unresolved litigation at issue in this case did not involve the adequacy of defendant's estate plan documentation, but rather negligence in failing to obtain from the spouse written confirmation of the assets encompassed by the plan (*54 Cal. App. 4th 1457, 1467*). The court held that where the purpose of the retention of a lawyer is to place a client or the client's beneficiaries in quiet ownership of assets, and the lawyer fails to obtain a consent which would have precluded subsequent litigation, then the fact of the litigation itself is the event which constitutes damage (*54 Cal. App. 4th 1457, 1470)* .

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 24A ATTORNEYS AT LAW: MALPRACTICE
PART II. FORMS

2A-24A California Points & Authorities § 24A.50

§ 24A.50 Opposing Defendant's Motion For Summary Judgment [Code Civ. Proc. § 437c] In Legal Malpractice Action--Burden Of Proving Causation May Be Shifted To Defendant When Malpractice Is Failure To Preserve Evidence Critical To Underlying Lawsuit

[1] FORM

[*Caption. See § 24A.39.*]

WHEN THE ALLEGED MALPRACTICE INVOLVES THE FAILURE TO PRESERVE EVIDENCE THAT WAS CRITICAL TO THE SUCCESS OF THE UNDERLYING LAWSUIT, THE BURDEN MAY BE SHIFTED TO THE DEFENDANT ATTORNEY TO PROVE THAT THE NEGLIGENCE DID NOT CAUSE THE PLAINTIFF TO LOSE A LAWSUIT THAT WAS OTHERWISE MERITORIOUS.

A. Rules Governing Summary Judgment Procedure. [*See § 24A.37, Paragraph A.*]

B. Burden of Proving Causation May Be Shifted to Defendant. When the alleged malpractice involves the failure to preserve evidence that was critical to the success of the underlying lawsuit, the burden may be shifted to the attorney defendant to prove that the negligence did not cause the malpractice plaintiff to lose a lawsuit that was otherwise meritorious (*Galanek v. Wismar (1999) 68 Cal. App. 4th 1417, 1426-1427, 81 Cal. Rptr. 2d 236*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted by plaintiff in opposition to a motion for summary judgment in a legal malpractice action when the motion is based on the contention that the plaintiff lacks proof that the underlying lawsuit was meritorious. The ground of opposition is that the attorney's own negligence in the underlying action in failing to preserve critical evidence makes it practically impossible for plaintiff to prove causation, justifying a shift in the burden of proof to the attorney to prove that his or her negligence did not damage plaintiff.

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should provide facts showing that the malpractice defendant failed to preserve evidence critical to the underlying lawsuit, as well as facts showing how that evidence, had it been preserved, would have allowed plaintiff to prevail in the underlying action.

This form may be modified for use in other procedural contexts, such as to oppose a motion for nonsuit.

[3] Discussion of Authorities

[a] Burden of Proving Causation May Be Shifted to Defendant

In ***Galanek v. Wismar*** *(1999) 68 Cal. App. 4th 1417, 81 Cal. Rptr. 2d 236* , plaintiff suffered a serious head injury in a car accident when her car was hit from behind by another vehicle. In addition to filing suit against the other driver, plaintiff brought a products liability action against the car manufacturer, alleging that the injuries were caused by a defect in her vehicle that caused the driver's seat to collapse upon impact. While defendant was serving as plaintiff's counsel, plaintiff's automobile, critical to proving the claim of defect against the manufacturer, was sold at auction to a third party and eventually destroyed. The car manufacturer successfully moved for summary judgment on the products liability action, arguing that plaintiff could not prove the vehicle was defective since it had been destroyed before it was properly inspected. Rather than appealing that summary judgment, plaintiff filed a malpractice action against the negligent attorney, alleging the failure to take reasonable steps to prevent the destruction of the vehicle. Following an admission by the plaintiff's attorney in the malpractice suit that he could not prove that plaintiff would have prevailed in the underlying products liability action without the vehicle, defendant attorney successfully moved for nonsuit after plaintiff's opening statement.

The court of appeal reversed, holding that when the alleged malpractice involves the failure to preserve evidence that was critical to the success of the underlying lawsuit, the burden may be shifted to the defendant to prove that the negligence did not cause the malpractice plaintiff to lose a lawsuit that was otherwise meritorious. The court justified shifting the burden of proof on the grounds that it is more appropriate to hold the attorney liable for failing to preserve critical evidence than to deny the malpractice plaintiff's claim, since the underlying malpractice is the very reason the plaintiff has lost the evidence necessary to prove that the underlying claim was meritorious (*68 Cal. App. 4th 1417, 1426)* . The court also noted, however, that a malpractice plaintiff must establish a prima facie case or substantial probability of causation as a condition precedent to shifting the burden of proof. In the case before the court, nonsuit was improper because the malpractice plaintiff's opening statement alleged a prima facie case against the attorney by alleging that the car was defective, the defect caused plaintiff's head injury, the car was unavailable due to defendant's negligence, and that unavailability caused the loss of the underlying lawsuit (*68 Cal. App. 4th 1417, 1427*).

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2A-24A California Points & Authorities § 24A.51

§ 24A.51 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--Fee Award for Attorney Under Fee Arbitration Statute [Bus. & Prof. Code § 6200 et seq.] Does Not Bar Subsequent Malpractice Action

[1] FORM

[*Caption. See § 24A.39.*]

SUMMARY JUDGMENT FOR THE DEFENDANT SHOULD BE DENIED BECAUSE AN ARBITRATION AWARD OF ATTORNEY'S FEES UNDER BUSINESS AND PROFESSIONS CODE SECTION 6200 ET SEQ. DOES NOT BAR A SUBSEQUENT ACTION FOR ATTORNEY MALPRACTICE.

A. Rules Governing Summary Judgment Procedure. [*See § 24A.37, Paragraph A.*]

B. Malpractice Action Not Barred by Arbitrator's Award in Favor of Attorney in Attorney's Fee Dispute. An arbitration award of fees in favor of an attorney under *Business and Professions Code Section 6200 et seq.*, even if binding by prior agreement of the parties, does not preclude an aggrieved client from filing a subsequent malpractice suit against the attorney, so long as the damages or relief sought are something other than the fees that were the subject of the arbitration award (*Liska v. Arns Law Firm (2004) 117 Cal. App. 4th 275, 278, 12 Cal. Rptr. 3d 21*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion for summary judgment brought by an attorney in a legal malpractice claim, if the basis for the motion for summary judgment is that the allegations of misconduct made against the attorney are the same allegations that were made and rejected in the arbitration of a fee dispute pursuant to the mandatory fee arbitration statute, *Bus. & Prof. Code § 6200 et seq.*

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law raised. Thus, counsel should include facts detailing the alleged acts of misconduct by the attorney and explain how the damages caused by that misconduct differ from the fee award that was given to the attorney in the arbitration proceeding.

This form may be modified for use in other procedural contexts, such as to oppose a demurrer to the plaintiff's complaint.

[3] Discussion of Authorities

[a] Malpractice Action Not Barred by Arbitrator's Award in Favor of Attorney in Attorney's Fee Dispute

In ***Liska v. Arns Law Firm*** *(2004) 117 Cal. App. 4th 275, 12 Cal. Rptr. 3d 21* , the plaintiff was the former client of a law firm that had represented the plaintiff in a products liability lawsuit. Under the retainer agreement between the plaintiff and the firm, the firm would get one-third of any recovery if the case settled before a trial date was set, but 40 percent of the recovery if the case settled after a trial date was set. The plaintiff alleged that the firm told him that he could expect a recovery of approximately $1,600,000, and that certain top attorneys at the firm would participate fully in handling the case. After a trial date was set, the case settled during mediation for $600,000. Pursuant to the mandatory fee arbitration statute, *Bus. & Prof. Code § 6200 et seq.*, the plaintiff filed a request for arbitration of a dispute over the amount of fees that the firm was owed, and the parties agreed to be bound by the result of the arbitration. During arbitration, the plaintiff alleged that the case settled for less than it was worth because the attorneys were unprepared for the mediation and did not give enough attention to the case. The arbitration panel found in favor of the law firm, concluding that the settlement amount was reasonable, that the plaintiff had been kept fully informed about the case, and that the contingency fee was fair and reasonable given the difficulty of the case. The plaintiff subsequently filed a lawsuit against the law firm and the attorneys who worked on the case, including causes of action for breach of contract and fraud. In addition to reasserting the facts argued at the arbitration, the plaintiff alleged that the individual attorneys who promised to participate fully in the underlying representation did not do so and that the law firm had made an oral representation that the firm would waive its right to recover its costs and would accept only one-third of the settlement if the plaintiff accepted the $600,000 settlement, a promise that was not honored. The defendants demurred to the complaint, arguing that the lawsuit was an attempt to vacate the arbitration award and was barred by the doctrines of collateral estoppel and res judicata because it addressed the same issues adjudicated in the arbitration. The trial court sustained the demurrer without leave to amend, and the plaintiff appealed.

The court of appeal reversed. The court held that an arbitration award in favor of an attorney, even if binding by prior agreement of the parties, does not preclude an aggrieved client from filing a subsequent malpractice suit against the attorney (*117 Cal. App. 4th 275, 278)* . The court noted that the mandatory fee arbitration statute [*Bus. & Prof. Code §§ 6200(b)(2), 6204(e)*] specifically provides both that the statute does not apply to claims for affirmative relief for damages against the attorney for malpractice and that the award and determinations of the arbitrator are inadmissible in any subsequent action and have no collateral estoppel or res judicata effect (*117 Cal. App. 4th 275, 282-283)* . Therefore, the court concluded that even if an arbitration award of fees is binding, this award will not preclude a malpractice claim or other claim of misconduct that is based on the same factual claims made to the arbitrator in the fee dispute, so long as the damages or relief sought are something other than the fees that were the subject of the arbitration award (*117 Cal. App. 4th 275, 287-288)* . In this particular case, although the plaintiff was barred from seeking

recovery of the fees awarded to the defendants at the arbitration, he was free to seek recovery for misconduct that may have led to his achieving a smaller recovery in the underlying action than he could have received, and in pursuing this claim, the factual findings of the arbitration panel would not be binding (*117 Cal. App. 4th 275, 288)* .

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2A-24A California Points & Authorities § 24A.52

§ 24A.52 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--Statute of Limitations Does Not Commence Until Plaintiff Discovers Wrongful Act or Omission [Code Civ. Proc. § 340.6(a)]

[1] FORM

[*Caption. See § 24A.39.*]

SUMMARY JUDGMENT ON THE BASIS OF THE BAR OF THE STATUTE OF LIMITATIONS SHOULD BE DENIED BECAUSE THERE IS A TRIABLE ISSUE OF FACT REGARDING WHEN PLAINTIFF DISCOVERED DEFENDANT'S WRONGFUL ACT OR OMISSION.

A. Rules Governing Summary Judgment Procedure. [*See § 24A.37, Paragraph A.*]

B. No Summary Judgment If Question of When Discovery Occurred. The one-year statutory limitation applicable to legal malpractice actions does not commence until the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission (*Code Civ. Proc. § 340.6(a)*; *McCann v. Welden (1984) 153 Cal. App. 3d 814, 819-821, 200 Cal. Rptr. 703*). Summary judgment based on the one-year limitation period of *Section 340.6(a) of the Code of Civil Proceduremust* be denied when a triable issue of fact has been presented on the question of whether or not the plaintiff actually discovered, or through the use of reasonable diligence should have discovered, the alleged wrongful act or omission of the defendant within one year before the action was filed (*McCann v. Welden (1984) 153 Cal. App. 3d 814, 824, 200 Cal. Rptr. 703*).

[*Optional*] **C. Statute of Limitations Commences Only for Act or Omission Discovered.** Discovery by the plaintiff of facts constituting a wrongful act or omission starts the running of the one-year limitation period of *Section 340.6(a) of the Code of Civil Procedurefor* the particular wrongful act or omission, but not for other related but separate acts or omissions that have not yet been discovered (*McCann v. Welden (1984) 153 Cal. App. 3d 814, 819-821, 200 Cal. Rptr. 703*).

[*Optional*] **D. Constructive Discovery Depends on Plaintiff's Knowledge and Opportunity.** Whether a plaintiff, through the use of reasonable diligence, should have discovered a wrongful act or omission is generally a question of

fact, the determination of which depends on whether or not the plaintiff possessed knowledge sufficient to put a reasonable person on inquiry or had an opportunity to discover the facts from sources available to him or her (*McCann v. Welden (1984) 153 Cal. App. 3d 814, 822, 824, 200 Cal. Rptr. 703*).

[*Optional*] **E. Confidential Relationship Excuses Failure to Discover Attorney Malpractice.** Because a confidential relationship normally exists between an attorney and client, the client's failure to discover facts constituting fraud or misrepresentation by the attorney may be excused until the attorney-client relationship has been terminated (*Day v. Rosenthal (1985) 170 Cal. App. 3d 1125, 1166, 217 Cal. Rptr. 89* ; *see Code Civ. Proc. § 340.6(a)(2)*).

[*Optional*] **F. Defendant Bears Burden of Proving When Discovery Occurred or Should Have Occurred.** The defendant in an attorney malpractice action who alleges that plaintiff's action is barred under the one-year limitations period of *Code of Civil Procedure Section 340.6(a)* bears the burden of proving when the plaintiff discovered, or through the use of reasonable diligence should have discovered, the facts constituting the alleged malpractice (*Samuels v. Mix (1999) 22 Cal. 4th 1, 5, 7-9, 91 Cal. Rptr. 2d 273, 989 P.2d 701*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted by plaintiff in opposition to a motion for summary judgment in a legal malpractice action when the motion is based on the contention that the one-year limitation period of *Code Civ. Proc. § 340.6(a)* bars the action. The ground of opposition is that there is a triable issue of fact regarding when plaintiff discovered defendant's wrongful act or omission.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach opposing affidavits or declarations and a separate statement of disputed and/or undisputed facts [*see Code Civ. Proc. § 437c(b)(2), (3)*], which include facts showing when plaintiff discovered or reasonably should have discovered defendant's wrongful act or omission.

This form may be used in an appropriate case to oppose a motion for summary judgment supported by The points in *§ 24A.29*.

[b] Related Uses

With appropriate modifications, this form may be used to oppose a general demurrer to the complaint, or to oppose a motion for judgment on the pleadings, when it appears on the face of the complaint that plaintiff discovered the facts constituting the alleged malpractice at such time that the statute of limitations does not bar the action.

[c] Related Memoranda

For memoranda relating to summary judgment generally, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] No Summary Judgment If Question of When Discovery Occurred

In ***McCann v. Welden*** *(1984) 153 Cal. App. 3d 814, 200 Cal. Rptr. 703* , defendant had represented plaintiff in a divorce proceeding during which he had drafted a stipulation that distributed community assets and required plaintiff to pay spousal support. Plaintiff later brought a malpractice action alleging that the stipulation failed to designate and distribute a savings account as community property, and failed, contrary to defendant's representation, to ensure termination of the spousal support obligation within one year. Defendant moved for summary judgment on the ground that the action was barred by *Code Civ. Proc. § 340.6(a)*. Supporting evidence showed that over one year before filing suit, plaintiff had dismissed defendant after becoming generally dissatisfied with the stipulation, and also that plaintiff knew, from consultation with another attorney, that he had a potential cause of action against defendant for certain errors in the stipulation other than those in issue. Plaintiff, in his opposing declarations, alleged that he discovered the alleged instances of malpractice within a year of bringing suit; he was told of the distribution error by an attorney he had retained to terminate his spousal support obligation, and he learned of the misrepresentation regarding his spousal support obligation when the court denied his request for termination. The trial court granted defendant's motion, and plaintiff appealed the ensuing judgment.

The court of appeal reversed on the ground that there were triable issues of fact regarding whether or not the action was barred by the one-year limitation period of *Code Civ. Proc. § 340.6(a)* (*153 Cal. App. 3d 814, 824-825)* . The court first noted that the evidence in support of the motion did not necessarily establish that the action was barred by the statute of limitations (*153 Cal. App. 3d 814, 819-824)* . The court held that, on the contrary, plaintiff's opposing declarations were sufficient to present triable issues on the question whether he discovered, or through the use of reasonable diligence should have discovered, the alleged malpractice within one year of filing his action, and that determination of these issues by way of summary judgment was error (*153 Cal. App. 3d 814, 824)* .

[b] Statute of Limitations Commences Only for Act or Omission Discovered

The facts and procedural background of ***McCann v. Welden*** *(1984) 153 Cal. App. 3d 814, 200 Cal. Rptr. 703* , are discussed in *§ 24A.52[3][a]*. The court of appeal, in reversing the summary judgment for defendant, construed *Code Civ. Proc. § 340.6(a)* to provide a one-year limitation period that runs for a specific wrongful act or omission once it has been actually or constructively discovered by the plaintiff, but does not commence running for any other related but separate wrongful act or omission not yet discovered. Thus, the court rejected defendant's argument that the action was necessarily barred because it was filed over one year after plaintiff became dissatisfied with defendant's work in general, and also after he sought legal advice concerning defendant's work and was told that it contained errors related to but separate from those in issue (*153 Cal. App. 3d 814, 819-821)* .

[c] Constructive Discovery Depends on Plaintiff's Knowledge and Opportunity

The facts and procedural background of ***McCann v. Welden*** *(1984) 153 Cal. App. 3d 814, 200 Cal. Rptr. 703* , are discussed in *§ 24A.52[3][a]*. The court of appeal, in reversing the summary judgment for defendant, stated that whether plaintiff had constructive discovery, i.e., whether he should have discovered the alleged malpractice in the exercise of reasonable diligence, depended on whether he possessed knowledge sufficient to put a reasonable person on inquiry, or whether he had the opportunity to learn of the facts of the alleged errors from sources available to him (*153 Cal. App. 3d 814, 822)* . The court also noted that the question is generally one of fact (*153 Cal. App. 3d 814, 824)* . Accordingly, the court rejected defendant's argument that constructive knowledge of the alleged malpractice was necessarily established from the time that plaintiff admitted that he became generally dissatisfied with defendant's work and had actual knowledge of specific errors in this work that were related to but separate from those in issue (*153 Cal. App. 3d 814, 822-824)* .

[d] Confidential Relationship Excuses Failure to Discover Attorney Malpractice

In ***Day v. Rosenthal*** *(1985) 170 Cal. App. 3d 1125, 217 Cal. Rptr. 89* , the court of appeal affirmed a judgment for plaintiffs for damages for attorney malpractice involving defendant's handling of plaintiffs' tax affairs. The court rejected defendant's argument that plaintiffs' action was barred by the statute of limitations. The court noted that as a general rule, a cause of action for malpractice accrues when the plaintiff is aware of, or with the exercise of reasonable care should have been aware of, the essential facts necessary to establish a cause of action. Defendant argued that plaintiffs should have been on notice of the malpractice for various reasons, including the fact that they received a notice of deficiency from the IRS. However, the court held that because a confidential relationship existed between plaintiffs and defendant, plaintiffs' failure to discover facts constituting fraud or misrepresentation were excused until the attorney-client relationship was terminated (*170 Cal. App. 3d 1125, 1166)* . The court also noted that the date-of-discovery rule, when applied to a fiduciary, is particularly appropriate when defendant maintains control of plaintiff's property or interests. The court also suggested that the continuing relationship between an attorney and client implies a continuing duty to remedy any error and thus extends the period of limitation. For a discussion of the related issue of the tolling of the statute of limitations while an attorney continues to represent a plaintiff in a specific transaction, see *§ 24A.54*.

[e] Defendant Bears Burden of Proving When Discovery Occurred or Should Have Occurred

In ***Samuels v. Mix*** *(1999) 22 Cal. 4th 1, 91 Cal. Rptr. 2d 273, 989 P.2d 701* , the plaintiff filed a malpractice action against an attorney and his law firm, alleging that the attorney had negligently advised her to settle for an inadequate amount her suit against a drug manufacturer for injuries she allegedly suffered after ingesting the drug L-tryptophan. The plaintiff, who filed the malpractice suit in October 1992, alleged that she first learned of the attorney's negligence after November 1991, when she first discovered that the attorney had substantially understated the value of her claim. In the defendants' answer to the complaint, they alleged in part that all causes of action were barred by an applicable statute of limitations, including *Code Civ. Proc. § 340.6(a)*. The plaintiff's suit was bifurcated, with the statute of limitations issue tried separately first. The trial court granted the defendants' motion in limine for an order placing on the plaintiff the burden of establishing by a preponderance of the evidence that the statute of limitations had not run. After taking testimony from the plaintiff and the attorney she had consulted subsequent to the defendant, the trial court instructed the jury that the plaintiff had the burden of proving that her lawsuit was timely filed. The jury found that the plaintiff had failed to bring her action in a timely manner, and the plaintiff appealed. The court of appeal reversed the trial court, concluding that the trial court had erred in placing the burden of proof on the plaintiff. The defendants appealed.

The California Supreme Court agreed with the court of appeal that the trial court erred in placing the burden on the plaintiff to prove when she discovered or should have discovered the facts constituting the defendants' alleged malpractice. The Court first noted that *Evid. Code § 500* places on the party making a claim or asserting a defense the burden of proving each element essential to that claim or defense, except when otherwise provided by law. The Court then concluded that the plain language of *Code Civ. Proc. § 340.6(a)* makes the plaintiff's actual or constructive discovery of the facts constituting a defendant's wrongdoing an element of the affirmative defense that the claim is barred by the one-year limitations period, rather than an element of the plaintiff's claim for malpractice (*22 Cal. 4th 1, 5, 7-9)* .

The Court went on to reject the defendants' arguments for creating an exception to the general rule of *Evid. Code § 500*. First, the Court rejected the argument that the legislature, in enacting *Code Civ. Proc. § 340.6*, intended that the burden of proof be placed on the plaintiff, as it is when applying the common law discovery rule. In the absence of any legislative history to support the defendants' argument, the Court noted that the common law discovery rule is a rule designed to benefit a plaintiff by delaying accrual of a cause of action until such time as the plaintiff discovers or reasonably has cause to discover the facts constituting that cause of action. *Code Civ. Proc. § 340.6(a)*, by contrast, is intended to benefit the defendant by allowing for a shorter one-year limitations period, rather than the alternate four-year-from-occurrence limitations period, if the defendant can prove that the plaintiff failed to bring the action

within one year after actual or constructive discovery of the wrongdoing. The Court concluded that this distinction justified the different burdens of proof (*22 Cal. 4th 1, 9-11)* . The Court also concluded that the legislature's apparent concern with benefiting defendants in attorney malpractice actions by providing a rule that would provide a definite outside limitations period demonstrated that they were concerned with more than merely codifying the common law discovery rule, which in theory was very open-ended (*22 Cal. 4th 1, 12)* .

Second, the Court rejected the defendants' argument that the discovery rule of *Code Civ. Proc. § 338(d)*, applicable to some fraud actions, was analogous to the rule of *Code Civ. Proc. § 340.6(a)*, and therefore the burden should be placed on the plaintiff under the latter, as it is when applying the former. In rejecting this argument, the Court noted that the two provisions were structured differently and that the rule applicable in fraud actions was, like the common law rule, a rule creating an exception to the applicable limitations period by delaying the accrual of the cause of action. Therefore, when applying the rule in a fraud action, the burden is properly placed on the plaintiff (*22 Cal. 4th 1, 14-17)* .

Third, the Court rejected the defendants' argument that the burden of proof should be placed on the plaintiff as a matter of fairness and judicial policy, reiterating its conclusion that a defendant seeking to benefit from a shorter limitations period should bear the burden of proving the elements of that defense (*22 Cal. 4th 1, 17-19)* .

Finally, the Court rejected the defendants' argument that the burden of proof should be placed on the plaintiff because the facts necessary to demonstrate the plaintiff's actual or constructive discovery of the alleged malpractice are peculiarly within the plaintiff's access and control. The Court noted that it did not usually create exceptions to the general rule of *Evid. Code § 500* merely on the basis of relative access to evidence. Moreover, the Court pointed out that to the extent that a defendant argues for a plaintiff's constructive discovery of the facts constituting the alleged malpractice, no reason existed to assume that the facts needed would be peculiarly within the control of the plaintiff. The Court also noted that there was nothing in the record to indicate that the plaintiff in this particular case had any superior or enhanced access to evidence concerning when she discovered or should have discovered the facts constituting the alleged malpractice (*22 Cal. 4th 1, 19-20)* .

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2A-24A California Points & Authorities § 24A.53

§ 24A.53 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--Statute of Limitations Tolled Until Plaintiff Sustains Injury [Code Civ. Proc. § 340.6(a)(1)]

[1] FORM

[*Caption. See § 24A.39.*]

SUMMARY JUDGMENT ON THE BASIS OF THE BAR OF THE STATUTE OF LIMITATIONS SHOULD BE DENIED BECAUSE THERE IS A TRIABLE ISSUE OF FACT AS TO WHEN PLAINTIFF SUSTAINED INJURY FROM DEFENDANT'S NEGLIGENCE.

A. Rules Governing Summary Judgment Procedure. [*See § 24A.37, Paragraph A.*]

B. No Summary Judgment if Question of When Injury Occurred. The statute of limitations does not commence until the plaintiff has sustained actual injury (*Code Civ. Proc. § 340.6(a)(1)*; *Budd v. Nixen (1971) 6 Cal. 3d 195, 200-201, 98 Cal. Rptr. 849, 491 P.2d 433*). [The myriad of circumstances under which statute of limitations issues arise in malpractice cases involving an attorney's failure to comply with the statute of limitations on his or her client's case precludes defining the point of harm for the plaintiff as a fixed point or event.] The issue of when actual harm occurred may be resolved as a matter of law only if the facts are undisputed (*Adams v. Paul (1995) 11 Cal. 4th 583, 588-589, 46 Cal. Rptr. 2d 594, 904 P.2d 1205* ; *Budd v. Nixen (1971) 6 Cal. 3d 195, 202, 98 Cal. Rptr. 849, 491 P.2d 433*).

[*Optional*] **C. Statute Commences on Conclusion of Litigation or Negotiation When Adequacy of Advice Is Subject of Dispute.** In malpractice cases based on inadequate legal advice, in which the existence or effect of the malpractice depends on a litigated or negotiated determination's outcome, actual injury does not occur, and the cause of action does not accrue, until that determination is made (*Baltins v. James (1995) 36 Cal. App. 4th 1193, 1196, 42 Cal. Rptr. 2d 896*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted by plaintiff in opposition to a motion for summary judgment in a legal malpractice action when the motion is based on the contention that the statute of limitations bars the action. The ground of opposition is that there is a triable issue of fact regarding when plaintiff suffered actual harm from defendant's negligence.

The optional bracketed language in Paragraph B may be used in actions involving an attorney's failure to comply with the statute of limitations in the underlying action. Optional Paragraph C may be used in actions involving alleged inadequate legal advice.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations which oppose the motion [*see Code Civ. Proc. § 437c*], and which include a showing of when the harm to plaintiff occurred as a result of defendant's negligence.

This form may be used in an appropriate case to oppose a motion for summary judgment supported by The points in *§ 24A.29*.

[b] Related Uses

With appropriate modifications, The points in this form may be used to oppose a general demurrer to the complaint, or to oppose a motion for judgment on the pleadings, when it appears on the face of the complaint that plaintiff suffered injury at such time that the statute of limitations bars the action.

[c] Related Memoranda

For memoranda relating to summary judgment generally, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] No Summary Judgment if Question of When Injury Occurred

In ***Adams v. Paul*** *(1995) 11 Cal. 4th 583, 46 Cal. Rptr. 2d 594, 904 P.2d 1205* , plaintiff Adams had retained defendant Paul for the purpose of proceeding against her late husband's estate based on the husband's killing of their son. Paul advised Adams that the time for filing claims against the estate would not begin to run until letters of administration were issued, and that an action would need to be filed within 90 days after any claim was rejected. Adams's claim against the estate was not rejected until two years later, at which time Adams instituted a wrongful death action. The estate argued that the statute of limitations barred the action, but the trial court found that material issues of fact existed concerning whether the estate was estopped from asserting the defense because of its representations to Adams. Adams and the estate reached a settlement in the action, and Adams then sued Paul for legal malpractice, alleging that his failure to inform her of the correct statute of limitations was negligent, and caused her to receive less in the settlement than she would have absent the negligent advice. Paul demurred to the complaint on the ground that the malpractice action was barred by the statute of limitations; the trial court sustained the demurrer and dismissed the complaint on the ground that Adams had been damaged, and the malpractice cause of action accrued, at the time the

statute of limitations in the underlying wrongful death action expired. The court of appeal held that the cause of action had accrued at the time of the summary judgment motion in the wrongful death action, but that the malpractice action was still time-barred. The Supreme Court granted review, and reversed.

The Court began by noting that, in the "classic" situation in which an attorney negligently fails to file the underlying lawsuit within the applicable statutory period and does nothing further, the plaintiff suffers actual harm at the time the statutory period lapses because the right or remedy of recovery is substantially impaired at that time (*11 Cal. 4th 583, 589)* . However, there are numerous other circumstances in which the attorney's negligence may have created only the potential for future harm, including situations in which there may be factual issues raised regarding the statute of limitations, such as issues of waiver, estoppel, or even the applicable statute of limitations (*11 Cal. 4th 583, 590-591)* . The Court also pointed out that in cases of contingent or speculative harm, the determination of actual injury does not necessarily depend on or require some form of final adjudication or settlement (*11 Cal. 4th 583, 591)* . In light of this range of issues, the Court held that it is for the trier of fact to determine when the requisite actual harm occurred as a consequence of the attorney's negligence; only if the facts are undisputed can the trial court resolve the question as a matter of law for the purposes of a summary judgment motion (*11 Cal. 4th 583, 591-592)* .

In ***Budd v. Nixen*** *(1971) 6 Cal. 3d 195, 98 Cal. Rptr. 849, 491 P.2d 433* , plaintiff hired an attorney to defend him and the corporation of which he was president, in a civil suit for breach of contract. The attorney filed answers to the complaint in 1963, but failed to make the necessary allegation that his individual client had signed the contract in his representative capacity only, and bore no personal liability on the contract. In 1966, after hiring a new attorney, losing the action, and filing a motion for new trial and an appeal which were unsuccessful, plaintiff filed a legal malpractice action against the first attorney. Defendant's motion for summary judgment was granted by the trial court on the basis that the then two-year statute of limitations barred the action. Plaintiff appealed.

The Supreme Court reversed the summary judgment. The Court noted that the evidence conflicted as to when plaintiff suffered injury from defendant's negligence, because plaintiff alleged injury at the time he was required to pay attorney's fees, and at the time of formal entry of judgment against him in the contract action (*6 Cal. 3d 195, 201-202)* . Because plaintiff's cause of action did not accrue until plaintiff both discovered the cause of action and sustained actual damage, and because the factual issue as to when damage accrued remained unresolved, summary judgment for defendant was improper (*6 Cal. 3d 195, 203-204)* .

[b] Statute Commences on Conclusion of Litigation or Negotiation When Adequacy of Advice Is Subject of Dispute

In ***Baltins v. James*** *(1995) 36 Cal. App. 4th 1193, 42 Cal. Rptr. 2d 896* , plaintiffs, a husband and wife, sued their former attorney for professional negligence in advising them that they could transfer real property that was part of a disputed community property division between the husband and his former wife. When plaintiff husband and his former wife separated, they signed a handwritten marital settlement agreement which became the basis of an interlocutory judgment of dissolution. Subsequently, the former wife filed a motion to set aside those portions of the interlocutory and final judgments that divided the community property and set the amount of spousal and child support. Plaintiffs then retained defendant to oppose the ex-wife's motion and provide related legal advice. The trial court set aside the community property division, and, on defendant's advise, plaintiff's appealed this order. Defendant then advised plaintiffs that the pendency of the appeal allowed them to dispose of and manage property as though the trial court's order setting aside the property division did not exist. Plaintiff husband then transferred real property which had been a community asset of his first marriage to plaintiff wife as her sole and separate property. Furthermore, plaintiff husband continued to pay mortgages on certain investment properties he received under the former property settlement agreement, based on defendant's advice that he would either get title to those properties or would receive reimbursement credits for his expenditures. On appeal, the order setting aside the community property division was affirmed, and matter remanded with the indication that the husband's right to reimbursement credits was uncertain and that the husband might be assessed charges to reimburse the community for his use of community assets. The plaintiffs then

filed suit against defendant, alleging in an amended complaint that as a result of actions taken following defendant's advice plaintiff husband was found to have violated fiduciary duties in managing community assets and was thus denied a substantial portion of the reimbursement credits he claimed. Plaintiffs further asserted that until the dissolution action ruling, he did not discover defendant's negligence and the resulting damage. Defendant demurred on the ground that the plaintiffs claims were time barred by *Code Civ. Proc. § 340.6*, and the trial court sustained the demurrer without leave to amend.

The court of appeal reversed, ruling that any error in defendant's advice was not determinable, and had no effect, until following defendant's advice resulted in an adverse judgment in the dissolution action (*36 Cal. App. 4th 1193, 1208)* . The court noted that the tolling provision of *Code Civ. Proc. § 340.6* provides that the period for commencement of an action for legal malpractice is tolled until the plaintiff sustains actual injury (*36 Cal. App. 4th 1193, 1201)* . The court rejected defendant's argument that the plaintiff's actual injury occurred at the time of the transfer of the community asset from plaintiff husband to plaintiff wife. The plaintiffs sustained no injury immediately upon the property's transfer; rather, the transfer created a potential for adverse consequences if the former wife challenged the transfer and the trial court ruled against the plaintiffs. This threat of future harm which was not yet realized was insufficient to create a cause of action and thereby end the tolling of the limitations period (*36 Cal. App. 4th 1193, 1207-1208)* . Since the alleged actual injury was within the statutory limitations period, the court of appeal reversed the dismissal of the complaint, and remanded the cause to the trial court for further proceedings (*36 Cal. App. 4th 1193, 1208)* .

[4] Additional Authorities

[a] No Summary Judgment if Question of When Injury Occurred

In *Moss v. Stockdale, Peckham & Werner (1996) 47 Cal. App. 4th 494, 54 Cal. Rptr. 2d 805* , plaintiff retained an attorney to represent her in an insurance bad faith action. The attorney failed to prosecute the case and it was dismissed for failure to bring it to trial within five years as required by *Code Civ. Proc. § 583.310*. Plaintiff sued the law firm for legal malpractice. Plaintiff's legal malpractice complaint was filed less than one year after the underlying action was dismissed, but more than one year after the five year deadline imposed by *Code Civ. Proc. § 583.310* passed. The trial court granted summary judgment in favor of defendant on the ground that the action was barred by the *Code Civ. Proc. § 340.6* one year statute of limitations for legal malpractice. The court of appeal reversed, holding that under *Adams v. Paul (1995) 11 Cal. 4th 583, 46 Cal. Rptr. 2d 594, 904 P.2d 1205* [*see § 24A.53[3][a]*], there were triable issues of fact as to when plaintiff suffered actual injury. The court concluded that the trial court erred in finding that plaintiff suffered actual injury as soon as the five year deadline passed (*47 Cal. App. 4th 494, 503)* . *Code of Civ. Proc. § 583.340* provides an exception to the five year deadline would have tolled the statute when bringing the action would have been impossible, impracticable, or futile. According to the court, the record in this case raised a factual issue as to whether the dismissal of the underlying action might have been avoided on the basis that plaintiff could not be penalized for the positive misconduct of her attorney who abandoned her (*47 Cal. App. 4th 494, 503)* .

California Points & Authorities

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 24A ATTORNEYS AT LAW: MALPRACTICE
PART II. FORMS

2A-24A California Points & Authorities § 24A.54

§ 24A.54 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--Statute of Limitations Tolled While Attorney Continues to Represent Plaintiff [Code Civ. Proc. § 340.6(a)(2)]

[1] FORM

[*Caption. See § 24A.39.*]

SUMMARY JUDGMENT ON THE BASIS OF THE BAR OF THE STATUTE OF LIMITATIONS SHOULD BE DENIED BECAUSE THERE IS A TRIABLE ISSUE OF FACT AS TO WHEN DEFENDANT NO LONGER REPRESENTED PLAINTIFF.

A. Rules Governing Summary Judgment Procedure. [*See § 24A.39. Paragraph A.*]

B. No Summary Judgment if Question of When Representation Ended. The statute of limitations does not commence until the attorney no longer continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred (*Code Civ. Proc. § 340.6(a)(2)*; *O'Neill v. Tichy (1993) 19 Cal. App. 4th 114, 119, 25 Cal. Rptr. 2d 162* ; *Gurkewitz v. Haberman (1982) 137 Cal. App. 3d 328, 334-336, 187 Cal. Rptr. 14*). When there is an unresolved question of fact as to when representation ended, summary judgment will be denied (*see O'Neill v. Tichy (1993) 19 Cal. App. 4th 114, 121, 25 Cal. Rptr. 2d 162* ; *Gurkewitz v. Haberman (1982) 137 Cal. App. 3d 328, 334-336, 338, 187 Cal. Rptr. 14*).

[*Optional*] **C. Participation in Fee Arbitration Does Not Preclude Continued Representation.** An allegation that plaintiff and defendant were engaged in fee arbitration during a specified time period does not preclude the possibility that the defendant continued to represent the plaintiff during that period (*Jacoby v. Schenkel (1995) 36 Cal. App. 4th 1701, 1708, 43 Cal. Rptr. 2d 309*).

[*Optional*] **D. Continued Representation Tolling Applies Unconditionally.** The statute of limitations on a legal malpractice action is unconditionally tolled during the time the attorney continues to represent the client regarding the specific subject matter in which the alleged malpractice occurred. The tolling is unaffected by events which might otherwise trigger the commencement of the statutory period (*Kulesa v. Castleberry (1996) 47 Cal. App. 4th 103, 106,*

54 Cal. Rptr. 2d 669).

[*Optional*] **E. Continued Representation Tolling Applicable if Client Returns to Attorney With Problem in Transactional Documents.** In a case involving negligence in the preparation of transactional documents, the statute of limitations is tolled under the continued representation provision if the client comes to the attorney after the potential malpractice manifests itself, and before the limitations period has run, in an attempt to have the attorney rectify the problem or mitigate the damage, even if there is a gap in time between the completion of the documents and the date on which the client returns to the attorney with the problem, during which the attorney was not actually "continuing to represent" the client with respect to that specific subject matter (*Fritz v. Ehrmann (2006) 136 Cal. App. 4th 1374, 1390-1391, 39 Cal. Rptr. 3d 670*).

[*Optional*] **F. Continued Representation Determined Through Client's Reasonable Subjective Belief.** If an attorney unilaterally withdraws or abandons the client, the representation ends for these purposes when the client actually has or reasonably should have no expectation that the attorney will provide further legal services (*Gonzalez v. Kalu (2006) 140 Cal. App. 4th 21, 30-31, 43 Cal. Rptr. 3d 866*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted by plaintiff in opposition to a motion for summary judgment in a legal malpractice action when the motion is based on the contention that the statute of limitations bars the action. The ground of opposition is that there is a triable issue of fact regarding when the defendant no longer continued to represent plaintiff in the matter in which the wrongful act or omission allegedly occurred. The optional paragraph may be used if a fee arbitration between the attorney and the client is the basis for the assertion that the representation was ended.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations that oppose the motion [*see Code Civ. Proc. § 437c*], and that include a showing of when the defendant continued to represent plaintiff in the matter in which the wrongful act or omission allegedly occurred.

This form may be used in an appropriate case to oppose a motion for summary judgment supported by The points in *§ 24A.29*.

[b] Related Uses

With appropriate modifications, this form may be used to oppose a general demurrer to the complaint, or to oppose a motion for judgment on the pleadings, when it appears on the face of the complaint that the statute of limitations does not bar the action.

[c] Related Memoranda

For memoranda relating to summary judgment generally, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] No Summary Judgment if Question of When Representation Ended

In ***O'Neill v. Tichy*** *(1993) 19 Cal. App. 4th 114, 25 Cal. Rptr. 2d 162* , defendants advised plaintiffs regarding the reorganization of their business and how to reduce labor costs. As a result of plaintiffs' actions to close a slaughterhouse in 1977 and replace it with four new, nonunion companies, two unions filed claims with the NLRB alleging that plaintiffs had committed unfair labor practices. Defendants continued to represent plaintiffs in proceedings before the NLRB. In 1982, the administrative law judge found that plaintiffs had committed unfair labor practices. After the ALJ decision, plaintiffs sought second opinions concerning defendants' advice regarding the reorganization of their business. In May 1988, the NLRB affirmed the ALJ's decision, and defendants advised plaintiffs that it was unlikely the decision would be overturned. In July 1988, plaintiffs retained separate counsel regarding defendants' perceived malpractice. In September 1988, plaintiffs notified defendants in writing that although they wanted them to continue to protect their appeal to the Ninth Circuit, they wanted to delay pursuing the appeal in order to pursue a negotiated settlement of the NLRB proceedings. Defendants agreed with plaintiffs that other counsel should be retained to handle the settlement negotiations. Defendants were asked to make their files regarding the NLRB action available for review by the new attorney and to provide him office space and background advice on the matter. On February 17, 1989, plaintiffs formally discharged defendants in writing. On February 16, 1990, plaintiffs filed a legal malpractice action against the defendants for negligently advising them regarding the reorganization of their business. Defendants moved for summary judgment on the grounds, among others, that the action was barred by the statute of limitations. The trial court granted summary judgment after determining the action was barred by the statute of limitations.

The court of appeal reversed the summary judgment. The court held that under *Code Civ. Proc. § 340.6(a)(2)*, the statute of limitations was tolled until the date defendants ceased to represent plaintiffs on the specific matter in which the malpractice allegedly occurred, and that the client's awareness of the attorney's negligence does not interrupt the tolling of the statute of limitations period so long as the client permits the attorney to continue representing the client regarding the specific subject matter in which the alleged negligence occurred (*19 Cal. App. 4th 114, 120-121)* . Here, the record revealed a triable issue of material fact concerning the date in which defendants ceased to represent plaintiffs. It was uncertain what defendants were authorized to do and the extent of their involvement. There was also evidence that another attorney took over the subject matter at issue at an earlier date. In light of the conflicting evidence, summary judgment could not be sustained (*19 Cal. App. 4th 114, 121)* .

In ***Gurkewitz v. Haberman*** *(1982) 137 Cal. App. 3d 328, 187 Cal. Rptr. 14* , defendants represented plaintiffs in an action undertaken in their capacity as trustees against a third party. The action was dismissed in October 1977, for failure to prosecute under former Code Civ. Proc. § 583(a) (*now see Code Civ. Proc. §§ 583.410-583.430*), and the dismissal was affirmed by the court of appeal. This decision was final in December 1978; thereafter, defendants negotiated with the third party's attorney for a reduction in the latter's costs bill. The memorandum of costs on appeal was sent to plaintiffs in March 1979, and the instant malpractice action was filed in November 1979. Defendant's motion for summary judgment was granted on the ground that the action was barred by the statute of limitations of *Code Civ. Proc. § 340.6*; the statute of limitations was held by the trial court to have begun to run in October 1977. Plaintiffs appealed.

The court of appeal reversed the summary judgment. The court held that the negotiations with opposing counsel constituted continuing representation within the meaning of *Code Civ. Proc. § 340.6(a)(2)*, and that this continuing representation tolled the operation of both the one-year and the four-year limitations periods (*137 Cal. App. 3d 328, 333-335)* . The facts as presented by the motion for summary judgment were insufficient to support the granting of the motion (*137 Cal. App. 3d 328, 333)* .

[b] Participation in Fee Arbitration Does Not Preclude Continued Representation

In ***Jacoby v. Schenkel*** *(1995) 36 Cal. App. 4th 1701, 43 Cal. Rptr. 2d 309* , plaintiff filed an original complaint for breach of fiduciary duty, constructive trust, money paid by mistake, and money had and received against his former attorney based on the attorney's withdrawal of substantial sums from the client trust account without permission. The complaint, which was filed in 1992, alleged that plaintiff and defendant were in the process of arbitrating their fee dispute during the period from 1991 to 1992. The defendant filed a demurrer to the original complaint, asserting that the action was time-barred since plaintiff had knowledge of the facts constituting the alleged breach in 1989. Prior to the hearing on the demurrer, plaintiff filed an amended complaint omitting the allegation that plaintiff and defendant were arbitrating their fee dispute from 1991 to 1992, and adding allegations that defendant continued to represent plaintiff into 1992 so that the statute of limitations was tolled. At the hearing, the trial court sustained the demurrer without leave to amend as to both the original complaint and the amended complaint, and dismissed the action.

The court of appeal reversed the dismissal and directed the trial court to reinstate plaintiff's amended complaint (*36 Cal. App. 4th 1701, 1709)* . The court noted that *Code Civ. Proc. § 340.6* provides for a tolling of the statute of limitations during the period that the attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred. The court then noted that although the original complaint stated that the parties were engaged in fee arbitration in 1991 and 1992, it did not indicate the date the representation ceased. The court stated that the allegation regarding fee arbitration is not inconsistent with a continuing representation of plaintiff by defendant, reasoning that merely because an attorney and a client are involved in a fee dispute does not preclude the attorney from continuing to represent the client in the underlying matter (*36 Cal. App. 4th 1701, 1708)* . Then, taking as true the allegation in the amended complaint that the defendant continued to represent the plaintiff regarding the same subject matter into 1992, the court concluded that the original complaint was timely (*36 Cal. App. 4th 1701, 1708)* .

[c] Continued Representation Tolling Applies Unconditionally

In ***Kulesa v. Castleberry*** *(1996) 47 Cal. App. 4th 103, 54 Cal. Rptr. 2d 669* , plaintiffs brought an action for legal malpractice against their former attorneys for failure to pursue a personal injury claim. Defendants moved for summary judgment on the ground that the action was barred by the statute of limitations. The trial court agreed and entered summary judgment.

The court of appeal reversed the judgment for defendants, finding that the running of the statute had been tolled because of the attorneys' continued representation. Defendants argued that pursuant to *Finlayson v. Sanbrook (1992) 10 Cal. App. 4th 1436, 13 Cal. Rptr. 2d 406* , the statute of limitations began to run on the day the plaintiffs lost their rights to pursue their personal injury claims, regardless of the continued representation. The court of appeal disagreed, stating that when undisputed facts showed the attorneys' continued representation until within a year of the filing of the legal malpractice action, the observations in *Finlayson* about actual injury were irrelevant (*47 Cal. App. 4th 103, 109)* . The court concluded that under *Code Civ. Proc. § 340.6(a)(2)* the statute of limitations on a legal malpractice action is unconditionally tolled during the time the attorney continues to represent the client regarding the specific subject matter in which the alleged malpractice occurred. Furthermore, the continued representation tolling is unaffected by events which might otherwise trigger the commencement of the statutory period (*47 Cal. App. 4th 103, 106)* .

[d] Continued Representation Tolling Applicable if Client Returns to Attorney With Problem In Transactional Documents

In ***Fritz v. Ehrmann*** *(2006) 136 Cal. App. 4th 1374, 39 Cal. Rptr. 3d 670* , the plaintiff was the former client of an attorney who prepared two promissory notes for the plaintiff in connection with the plaintiff's sale of a motel. The first note, drafted in 1983, provided generally that the buyers would pay interest at 10 percent on the purchase price for twenty years, at which point the principal would be due and payable. It also contained a provision under which half of

the interest due during the first five years would be deferred and paid at the end of the note's term. The second note, drafted in 1995, replaced the initial note and reduced the interest rate to 8 percent. However, due to the attorney's error, the note did not contain a requested clause that would have prohibited the buyers from making early payments on the principal. Instead, it contained a clause carried over from the first note that allowed the buyers to make early principal payments. In addition, the second note failed to reference the deferred interest due at term's end under the first note. From 2000 to 2002, the buyers made three payments on the principal, each of which the plaintiff agreed to accept at the time they were made. After the third payment, which covered the last of the principal amount, the buyers sought reconveyance of the deed of trust, but the plaintiff alleged that they still owed over $180,000 in deferred interest. The buyers brought suit to clear their title in June 2002, and the plaintiff cross-complained for payment of the missing interest. The same attorney who drafted the notes represented the plaintiff in the controversy from April 2002 until April 2003, at which time he was replaced. In October 2003, the dispute was settled, with the plaintiff agreeing to accept $100,000. The plaintiff then filed a malpractice suit in November 2003 against the attorney who drafted the notes. The trial court granted summary judgment for the attorney on the grounds that the suit was barred by the statute of limitations. The plaintiff appealed.

The court of appeal reversed. The court first concluded that the plaintiff did not sustain actual injury sufficient to begin the running of the statute of limitations in 1995 when the second note was drafted with errors. At the time the note was drafted, any potential harm was merely speculative future harm, because the buyers could have chosen not to make payments on the principal and they could have paid the deferred interest as owed under the first note. Moreover, even if the statute had begun to run in 2000 for the injury of early principal payments, the limitations period would not have begun to run for the separate injury of refusal to pay the deferred interest until early 2002 (*136 Cal. App. 4th 1374, 1383-1387)* .

The court then rejected the attorney's argument that the one-year limitations period, even if triggered as late as mid-2002, had expired before suit was filed in November 2003. The court held that in a case involving negligence in the preparation of transactional documents, the statute of limitations is tolled under the continued representation tolling provision if the client comes to the attorney after the potential malpractice manifests itself, and before the limitations period has run, in an attempt to have the attorney rectify the problem or mitigate the damage. Under these circumstances, it does not matter if there is a gap in time between the completion of the documents and the date on which the client returns to the attorney with the problem during which the attorney was not actually "continuing to represent" the client with respect to that specific subject matter. In this particular case, in early 2002, within a few months after the buyers' refusal to pay the deferred interest, the plaintiff had come to the defendant with the problems in the second note, at which point the defendant agreed to represent the plaintiff. That representation lasted until April 2003, approximately seven months before the malpractice suit was filed. The court tolled the statute of limitations during the time the defendant "continued to represent" plaintiff in trying to solve the dispute over the deferred interest caused by the defendant's earlier error, and held that the malpractice suit was filed within a year after the injury sustained in early 2002 (*136 Cal. App. 4th 1374, 1387-1391)* .

[e] Continued Representation Determined Through Client's Reasonable Subjective Belief

In ***Gonzalez v. Kalu*** *(2006) 140 Cal. App. 4th 21, 43 Cal. Rptr. 3d 866* , plaintiff hired an attorney to represent her in a claim for sexual harassment against her employer. The attorney sent a letter to the employer demanding a settlement. The employer fired the client, after which the attorney filed a sexual harassment complaint with the Department of Fair Employment and Housing. On that same day, according to plaintiff, either the attorney or someone in the attorney's office told plaintiff that the case was going to take a very long time and that they would contact her. Two-and-a-half years later, during which time plaintiff had no communications with the attorney's office, plaintiff discovered that the attorney was not prosecuting the sexual harassment lawsuit and that the time for filing the lawsuit had expired. Plaintiff sued the attorney for malpractice. Although the limitations period for bringing a malpractice action had seemingly expired, plaintiff argued that the limitations period had been tolled during the time that plaintiff believed that the attorney was continuing to represent her with her sexual harassment claim. The trial court rejected this argument,

however, after concluding that no reasonable person would have thought the attorney was still representing the client through such a long time period with no contact between the two. Summary judgment was entered for the attorney. Plaintiff appealed.

The court of appeal reversed and remanded. The court held that if an attorney unilaterally withdraws or abandons the client, the representation ends for purposes of the continued representation exception when the client actually has or reasonably should have no expectation that the attorney will provide further legal services. Thus, the representation may end when the attorney provides express notification to the client that the attorney will perform no further services, or, if the attorney remains silent, the end of the representation may be inferred from the circumstances of the case. The court also noted that the issue of whether the client actually and reasonably believed that the attorney would provide further legal services in the matter is predominantly a question of fact (*140 Cal. App. 4th 21, 30-31)* . In the case before the court, the court held that a triable issue existed as to whether the limitations period was tolled. Plaintiff had presented evidence that the attorney's office had told her the claim would take a very long time and that they would contact her, although they never prosecuted the claim beyond filing an administrative claim and never contacted her. In addition, there was no evidence plaintiff had been advised as to the time frames within which specific actions would need to be taken. Under those circumstances, the court could not say as a matter of law that it was unreasonable for plaintiff not to have known during the long period with no contact that the attorney was no longer representing her (*140 Cal. App. 4th 21, 31-33)* .

[4] Additional Authorities

[a] No Summary Judgment if Question of When Representation Ended

In *Nielsen v. Beck (2007) 157 Cal. App. 4th 1041, 69 Cal. Rptr. 3d 435* , plaintiffs filed an attorney malpractice action against the attorney hired originally to handle their bankruptcy matters. As part of this representation, the attorney advised the plaintiffs to stop making rent payments to their landlord. When a subsequent unlawful detainer action was filed by the landlord, the attorney also provided representation on that matter. The clients were subsequently found liable for a substantial sum in the unlawful detainer action, although efforts to settle the matter continued. Dissatisfied with the representation being provided by the attorney, the clients executed a substitution of attorney form in the unlawful detainer case. Thereafter, one of the clients called the former attorney on three occasions to seek advice regarding strategies for settling the unlawful detainer action, and the attorney responded to these requests and billed the former clients. The clients subsequently brought the malpractice action against the attorney based on his handling of both cases. The trial court granted summary judgment based on the statute of limitations, but the court of appeal reversed. The court of appeal concluded that triable issues of fact remained as to how long the limitations period was tolled by the continued representation tolling rule. The court noted that the execution of a substitution of attorney form does not necessarily dictate a finding that the attorney's representation of the client has ceased, at least if there is contrary evidence from which the trier of fact could conclude that the representation continued beyond that date. In the case before it, the court concluded that the trier of fact could reasonably find that the attorney's representation continued in some capacity through the subsequent phone conversations, even though he had been replaced as litigator in the case, which would mean that the action was timely (*157 Cal. App. 4th 1041, 1051-1052)* .

In *Gold v. Weissman (2004) 114 Cal. App. 4th 1195, 8 Cal. Rptr. 3d 480* , the plaintiff's attorney failed to file the plaintiff's medical malpractice action within the statute of limitations. The attorney admitted to the plaintiff that he failed to meet the statutory time limit, blaming the failure on his attorney service, and offered the plaintiff $10,000 in compensation if she would agree not to sue him. He also said he would try to get further compensation from the attorney service. The plaintiff declined the offer and demanded $25,000 instead. A few months later, the plaintiff's daughter, who practiced law outside California, contacted the plaintiff's attorney about the dispute. He asked for more time to pursue the attorney service and suggested in the meantime that the plaintiff file a complaint about the underlying medical malpractice with the California Board of Medical Quality Assurance (BMQA). In an effort to assist the plaintiff, the attorney drew up a complaint for submission to the BMQA, sent it to the plaintiff's daughter, and also

indicated a willingness to offer further assistance. The plaintiff never filed the BMQA complaint, but instead filed an attorney malpractice action one year minus one day after the date that the attorney sent the drafted complaint to the plaintiff's daughter. The attorney argued that the attorney malpractice action was untimely because it was filed more than a year after the date that the attorney acknowledged that he had missed the time for filing the medical malpractice action. The trial court agreed and granted summary judgment, but the court of appeal reversed. The court of appeal held that the attorney's continued efforts on behalf of the client, both in seeking additional compensation from the attorney service and in preparing the BMQA complaint against the doctor, constituted continued representation stemming from the same underlying medical malpractice claim. The court of appeal rejected the attorney's claim that the continued representation involved a different subject matter because it involved different forums than the medical malpractice claim and sought different remedies from that underlying claim. The court focused instead on the fact that the actions all stemmed from the same underlying conduct, the doctor's malpractice, and sought to help remedy the various injuries caused to plaintiff by that conduct. Therefore, the statute of limitations on the attorney malpractice claim was tolled during that continued representation (*114 Cal. App. 4th 1195, 1200-1201)* .

In *Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort (2001) 91 Cal. App. 4th 875, 110 Cal. Rptr. 2d 877* , the plaintiff, a police officer who had been employed by a city, hired the defendant, a law firm, to represent him in a workers' compensation claim filed against his employer after the employer had terminated him. Shortly after the plaintiff hired the defendant, the plaintiff and his former employer entered into a compromise and release agreement under which the plaintiff gave up his workers' compensation claim and other claims against the former employer in exchange for the former employer's promise to process an application for non-work-related disability for the plaintiff. Although the defendant was apparently not involved in the negotiation of the release agreement, the defendant did advise the plaintiff to sign the agreement. After the plaintiff's former employer subsequently failed to honor its obligations under the release agreement and the defendant took no steps to enforce the agreement on the plaintiff's behalf, the plaintiff sued the defendant for malpractice. The trial court sustained the defendant's demurrer on the grounds that the action was barred by the statute of limitations. The court of appeal reversed. The court ruled that the trial court erred in sustaining the demurrer in light of the plaintiff's allegations that the statute of limitations was tolled due to the defendant's continued representation of the plaintiff in the workers' compensation claim. On its face, the complaint alleged that the defendant continuously represented the plaintiff's legal interests on the same specific matter of the workers' compensation claim from 1988 until March 1999 and that the malpractice action was filed in February 2000. In addition, the defendant conceded that it represented the plaintiff in the workers' compensation claim at the time the release agreement was being negotiated and that it advised the plaintiff to sign the agreement, even though the agreement clearly and adversely affected the plaintiff's claim to all workers' compensation benefits. Therefore, the workers' compensation claim and the release agreement constituted the same specific subject matter, at least under the record that existed at this stage of the proceedings (*91 Cal. App. 4th 875, 889)* .

The facts and procedural background of *Crouse v. Brobeck, Phleger, & Harrison (1998) 67 Cal. App. 4th 1509, 80 Cal. Rptr. 2d 94* , are discussed in *§ 24A.29[3][h]*. The court of appeal reversed the trial court's summary judgment granted for defendant attorney, holding not that a fact question existed as to whether defendant attorney had continued to represent plaintiff on the same specific subject matter for purposes of *Code Civ. Proc. § 340.6(a)(2)*, but that in fact defendant attorney had continued to represent plaintiff for purposes of the statute and thus the tolling provision applied. The court of appeal rejected defendant's argument that the specific subject matter in which the negligence occurred was "representation on the note," finding instead that defendant attorney's representation of plaintiff involved the same specific subject matter: the sale of plaintiff's limited partnership interest and the collection of the proceeds of the sale. The court noted that, although the original note was replaced after restructuring with a new note, this did not transform the attorney's representation in collecting on the new note representation on a different subject matter (*67 Cal. App. 4th 1509, 1528-1529)* .

In *Worthington v. Rusconi (1994) 29 Cal. App. 4th 1488, 35 Cal. Rptr. 2d 169* , defendant attorney had been hired by the plaintiff in May 1988 to probate her mother's estate. In the course of the representation, the defendant advised the plaintiff to disclaim the life estate granted to her by her mother (subject to her not remarrying), but to keep the one-sixth

interest that she had in the remainder of the estate should the life estate be terminated or should she choose to sell the estate prior to termination of the life estate. Approximately two years after disclaiming her life interest, the plaintiff's siblings filed a petition to have her replaced as executrix of the estate upon learning that she had turned down a $300,000 offer on the home that made up the bulk of the estate. The plaintiff, no longer trusting completely the counsel of the defendant, consulted a second attorney. This second attorney contacted the office of the defendant on March 14, 1991, but was unable to speak with the defendant. Thereafter, the defendant unsuccessfully tried to contact the other attorney but did speak with the plaintiff. The defendant claimed that he performed no legal services for the plaintiff and had no further contact with her after this. On May 1, 1991, the plaintiff signed a substitution of attorneys form, which was signed by the defendant the following day and filed with the probate court on May 14. Plaintiff then filed a malpractice suit against the defendant on April 2, 1992, arguing that the advice to disclaim the life estate was self-serving on the part of the defendant in that he stood to make more money in probating the estate and secured a source of funds for payment of his fees. The defendant moved for summary judgment, claiming that the action was barred by the statute of limitations. The defendant argued that, although the statute of limitations in a legal malpractice claim is tolled pursuant to *Code Civ. Proc. § 340.6(a)(2)* while the attorney continues to represent the client, his representation of the plaintiff ended when the second attorney contacted his office. The trial court agreed, and summary judgment for the defendant was entered.

The court of appeal reversed, finding that a material issue of fact existed as to when the defendant ceased his representation of the plaintiff. The court noted that despite his declarations to the contrary, the defendant had contacts with the plaintiff and took actions on her behalf after March 14, 1991, when on April 5, 1991, the defendant sent a letter to the plaintiff that made no mention of the apparent change of counsel and instead offered substantial legal advice as to how they should proceed on the probate matter. The court held that the determination of whether the representation had concluded is to be made from an objective perspective, based on evidence of whether there was an ongoing mutual relationship between the parties and whether activities had been taken in furtherance of the relationship. Thus, the letter sent by the defendant less than a year before the malpractice suit was filed created a question of fact as to whether the attorney/client relationship had ceased, despite evidence that the plaintiff had consulted a second attorney prior to the drafting of the letter (*29 Cal. App. 4th 1488, 1498-1499)* .

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 24A ATTORNEYS AT LAW: MALPRACTICE
PART II. FORMS

2A-24A California Points & Authorities § 24A.55

§ 24A.55 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--Statute of Limitations Tolled While Plaintiff Is Under Legal or Physical Disability [Code Civ. Proc. § 340.6(a)(4)]

[1] FORM

[*Caption. See § 24A.39.*]

SUMMARY JUDGMENT ON THE BASIS OF THE BAR OF THE STATUTE OF LIMITATIONS SHOULD BE DENIED BECAUSE THERE IS A TRIABLE ISSUE OF FACT AS TO WHETHER PLAINTIFF WAS UNDER A _____ [LEGAL *and/or* PHYSICAL] DISABILITY THAT RESTRICTED HIS/HER/ITS ABILITY TO COMMENCE THE ACTION.

A. Rules Governing Summary Judgment Procedure. [*See § 24A.39. Paragraph A.*]

B. Statute of Limitations Tolled During Time When Plaintiff Was Under Legal or Physical Disability. The statute of limitations for a legal malpractice action is tolled during the time that the plaintiff is under a legal or physical disability that restricts the plaintiff's ability to commence legal action (*Code Civ. Proc. § 340.6(a)(4)*; *Bledstein v. Superior Court (1984) 162 Cal. App. 3d 152, 166, 208 Cal. Rptr. 428*).

[*Optional*] **C. Period of Minority or Insanity Is Legal Disability.** If a person entitled to bring an action is, at the time the cause of action accrued, under the age of majority or insane, the time of that disability is not part of the time limit for commencement of the action (*Code Civ. Proc. § 352*).

[*Optional*] **D. Imprisonment Is Legal Disability for Two Years.** If a person entitled to bring an action is, at the time the cause of action accrued, imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than for life, the time of that disability is not part of the time limit for the commencement of the action, not to exceed two years (*Code Civ. Proc. § 352.1*). The plaintiff need not show that the imprisonment actually restricted his or her ability to bring suit (*Bledstein v. Superior Court (1984) 162 Cal. App. 3d 152, 160-166, 208 Cal. Rptr. 428*).

[*Optional*] **E. Defendant's Presence Out of State Tolls Limitations Period in Legal Malpractice Action.** Under

Code of Civil Procedure Section 351, if a defendant is out of state when a cause of action against him or her accrues, or after accrual the defendant leaves the state, the running of any statute of limitations is tolled while the defendant is out of state, and this tolling period applies to a legal malpractice claim (*Jocer Enterprises, Inc. v. Price (2010) 183 Cal. App. 4th 559, 569-570, 107 Cal. Rptr. 3d 539* ; *see Code Civ. Proc. § 351*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted by plaintiff in opposition to a motion for summary judgment in a legal malpractice action when the motion is based on the contention that the statute of limitations bars the action. The ground of opposition is that there is a triable issue of fact regarding whether plaintiff was under a legal or physical disability which tolled the running of the statute of limitations [*see Code Civ. Proc. § 340.6(a)(4)*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a showing of when plaintiff was under a legal disability, as might be indicated by any period of insanity [*see Code Civ. Proc. § 352*]. Counsel should attach affidavits or declarations which oppose the motion, along with the opposing party's separate statement in response to the moving party's statement of undisputed material facts [*see Code Civ. Proc. § 437c(b), (c)*].

This form may be used in an appropriate case to oppose a motion for summary judgment supported by The points in *§ 24A.29*.

[b] Related Uses

With appropriate modifications, this form may be used to oppose a general demurrer to the complaint, or to oppose a motion for judgment on the pleadings, when it appears on the face of the complaint that the statute of limitations does not bar the action.

[c] Related Memoranda

For memoranda relating to summary judgment generally, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Statute of Limitations Tolled During Time When Plaintiff Was Under Legal or Physical Disability

Bledstein v. Superior Court *(1984) 162 Cal. App. 3d 152, 208 Cal. Rptr. 428* , involved a legal malpractice action brought by plaintiff against his criminal defense attorney. Plaintiff, in reliance on the attorney's advice, pleaded guilty to a narcotics charge and was sentenced to four years in federal prison. Plaintiff served his sentence and filed an action for legal malpractice shortly before his term was complete. Defendant claimed that the action was barred by the legal

malpractice statute of limitations. The trial court rejected the defense. Defendant's alternative writ was granted.

The court of appeal discharged the alternative writ and denied defendant's petition for mandate. The court defined the issue as whether the formerly incarcerated plaintiff's legal malpractice case was governed by the tolling provisions of *Code Civ. Proc. § 340.6* or former Code Civ. Proc. § 352 (*now see Code Civ. Proc. § 352.1*). While both statutes applied, any inconsistencies between the ultimate effect of the statutes were to be resolved by interpretation of the statutes in accordance with the general rules of statutory interpretation. After an exhaustive analysis of the rules of statutory interpretation and prior case law, the court ultimately held that by enacting *Code Civ. Proc. § 340.6(a)(4),* which tolls the statute during a legal disability, the legislature intended to refer to the general legal disability tolling provision of former Code Civ. Proc. § 352(a)(3), which included imprisonment on a criminal charge as a legal disability. Interpreting the two statutes together, the court found that plaintiff's imprisonment was sufficient to toll the statute, and plaintiff need not show that the imprisonment actually restricted the ability to bring suit (*162 Cal. App. 3d 152, 160-166)* .

[b] Imprisonment Is Legal Disability for Two Years

Bledstein v. Superior Court *(1984) 162 Cal. App. 3d 152, 208 Cal. Rptr. 428* , is discussed in *§ 24A.55[3][a]*.

[c] Defendant's Presence Out of State Tolls Limitations Period in Legal Malpractice Action

In ***Jocer Enterprises, Inc. v. Price*** *(2010) 183 Cal. App. 4th 559, 107 Cal. Rptr. 3d 539* , plaintiffs filed a legal malpractice action against the attorney and law firm who had represented plaintiffs in both prosecution of an action for trade secret misappropriation and defense of a malicious prosecution claim subsequently filed by the defendant in the trade secret misappropriation action. Defendant attorneys were substituted out of the malicious prosecution action as plaintiffs' counsel on July 3, 2006, but the malpractice action was not filed until July 9, 2007. Defendant attorneys demurred to the malpractice claim on the grounds that the action was barred by the limitations period of *Code Civ. Proc. § 340.6*, and the trial court sustained the demurrer without leave to amend. Plaintiffs appealed.

The court of appeal reversed and remanded to provide plaintiffs an opportunity to amend their complaint. Plaintiffs had agreed that their complaint was untimely unless the limitations period was tolled. However, plaintiffs argued that because the defendant attorney was out of state for the year prior to the filing of the malpractice lawsuit, the limitations period was tolled under *Code Civ. Proc. § 351*, which provides that if a defendant is out of state when a cause of action against him or her accrues, or after accrual the defendant leaves the state, the running of any statute of limitations is tolled while the defendant is out of state. The court of appeal agreed. Although only the tolling provisions of *Code Civ. Proc. § 340.6* are effective to toll the limitations period in an attorney malpractice action, the court held that under the rationale of *Bledstein v. Superior Court*, discussed in [a], *above*, the tolling provision of *Code Civ. Proc. § 351* was incorporated into the tolling provision for legal and physical disabilities provided by *Code Civ. Proc. § 340.6(a)(4)* (*183 Cal. App. 4th 559, 569-570)* . The court found, however, that plaintiffs had failed to allege damages by alleging that they could have achieved a better result in the underlying actions but for the attorney's substandard representation. Because this deficiency was first alleged on appeal, the court remanded to allow plaintiffs to cure the defect (*183 Cal. App. 4th 559, 572)* .

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 24A ATTORNEYS AT LAW: MALPRACTICE
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2A-24A California Points & Authorities § 24A.56

§ 24A.56 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--Defendant Equitably Estopped From Asserting Statute of Limitations Defense

[1] FORM

[*Caption. See § 24A.39.*]

SUMMARY JUDGMENT ON THE BASIS OF THE BAR OF THE STATUTE OF LIMITATIONS SHOULD BE DENIED BECAUSE THE DEFENDANT SHOULD BE EQUITABLY ESTOPPED FROM ASSERTING THE STATUTE OF LIMITATIONS.

A. Rules Governing Summary Judgment Procedure. [*See § 24A.39. Paragraph A.*]

B. Equitable Estoppel May Prevent Defendant From Asserting Statute of Limitations. A defendant in a legal malpractice action may be equitably estopped from asserting the statute of limitations if: (1) the defendant renders legal advice to the client with knowledge of the effect this would have on the statute of limitations; (2) the defendant intends the client to rely on the advice, or the client has the right to believe that the defendant so intended; (3) the client was unaware of the effect the advice would have on the statute of limitations; and (4) the client relies on the advice to the client's detriment (*see Leasequip, Inc. v. Dapeer (2002) 103 Cal. App. 4th 394, 403-404, 126 Cal. Rptr. 2d 782*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion for summary judgment in a legal malpractice action if the plaintiff alleges that the defendant should be equitably estopped from asserting the defense of the statute of limitations because the statute expired only because the plaintiff relied on advice provided by the defendant.

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law stated. Thus, counsel should include facts showing that the defendant provided legal advice to the plaintiff with knowledge of the ramifications of the advice on the applicable statute of limitations, that the defendant intended the plaintiff to rely on the advice, that the plaintiff was unaware of the ramifications of the advice, and that the plaintiff's reliance on the advice caused the malpractice action to be brought only after expiration of the statute of limitations.

[b] Related Uses

With appropriate modifications, this form may be used to oppose a general demurrer to the complaint, or to oppose a motion for judgment on the pleadings.

[3] Discussion of Authorities

[a] Equitable Estoppel May Prevent Defendant From Asserting Statute of Limitations

In ***Leasequip, Inc. v. Dapeer*** *(2002) 103 Cal. App. 4th 394, 126 Cal. Rptr. 2d 782* , the plaintiff was a privately-held corporation that brought suit against its former attorney for multiple claims of legal malpractice. This suit concerned the defendant's representation of the corporation in multiple claims brought by and against the corporation. During the period in which the defendant continued to represent the corporation, the defendant advised the corporation on many occasions that the failure of the corporation to comply with corporate formalities, including the failure to keep corporate minutes or file a statement of information required by *Corp. Code § 1502*, would have no negative effect on the ability of the corporation to pursue its business and legal claims. Eventually, however, the Secretary of State suspended the corporation's corporate status for failure to file the required statement of information, which rendered the corporation legally incapable of pursuing a lawsuit. The corporation's corporate status had not yet been revived when the corporation filed a timely suit against the defendant for mishandling many of the corporation's past claims. However, by the time corporate status had been restored, thereby allowing the corporation to prosecute these claims, the statute of limitations had expired on the legal malpractice claims. The defendant demurred on the grounds that the statute of limitations had expired, and the trial court sustained the demurrer. The corporation appealed.

The court of appeal reversed. The court held that the defendant was equitably estopped from asserting the statute of limitations defense. The court noted that the facts of the case were a classic example of when estoppel was appropriate: (1) an attorney defendant rendered legal advice to a client, allegedly with knowledge that the advice would render the client legally incapable of pursuing a lawsuit against the attorney; (2) the attorney intended the client to rely on the advice; (3) the client was unaware of the effect the advice would have on the statute of limitations; and (4) the client relied on the advice to the client's detriment. Under these circumstances, because the corporation's reliance on the defendant's advice was the cause of both the corporation's suspension and the expiration of the statute of limitations, equitable estoppel was appropriate (*103 Cal. App. 4th 394, 404-405)* . The court noted that although *Code Civ. Proc. § 340.6* may not be tolled for reasons not specified by the statute, estoppel is a distinct concept that does not seek to extend the limitations period, but comes into play only after the limitations period has expired to prevent a defendant from benefitting from the defendant's own wrongdoing (*103 Cal. App. 4th 394, 406-407)* .

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2A-24A California Points & Authorities § 24A.56A

§ 24A.56A Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Legal Malpractice Action--Criminal Defendant Not Required to Prove Actual Innocence of Underlying Criminal Charges

[1] FORM

[*Caption. See § 24A.39.*]

SUMMARY JUDGMENT ON THE BASIS OF PLAINTIFF'S FAILURE TO SHOW THAT _____ [HE *or* SHE] WAS ACTUALLY INNOCENT OF THE CRIMINAL CHARGES BROUGHT AGAINST PLAINTIFF IN THE CRIMINAL PROCEEDING IN WHICH DEFENDANT REPRESENTED PLAINTIFF SHOULD BE DENIED, BECAUSE PLAINTIFF'S MALPRACTICE CLAIM IS NOT OF THE TYPE THAT IMPLICATES THE POLICY CONCERNS THAT UNDERLIE THE REQUIREMENT THAT A CRIMINAL DEFENDANT SHOWED ACTUAL INNOCENCE BEFORE PROSECUTING A LEGAL MALPRACTICE CLAIM.

A. Rules Governing Summary Judgment Procedure. *[See § 24A.39, Paragraph A.]*

[Optional] **B. Fee Dispute Does Not Require Showing of Actual Innocence.** A fee dispute between a convicted criminal and his or her attorney may be litigated without a showing of actual innocence by the client (*Brooks v. Shemaria (2006) 144 Cal. App. 4th 434, 440-441, 50 Cal. Rptr. 3d 430*).

[Optional] **C. Claim Based on Failure to Secure Return of Seized Property Does Not Require Showing of Actual Innocence.** A plaintiff need not prove actual innocence in order to pursue a claim that the attorney committed negligence in failing to secure the return of plaintiff's property that had been seized in connection with a criminal arrest, at least when the relevant law enforcement authorities had concluded that the property should have been returned to plaintiff (*Brooks v. Shemaria (2006) 144 Cal. App. 4th 434, 441-443, 50 Cal. Rptr. 3d 430*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion for summary judgment brought by a defendant attorney in an action brought against the attorney by a former client who was represented by the attorney to defend against criminal charges. The basis for the opposition to the motion for summary judgment is that the claims alleged by the former client are not the type of claims that implicate the policy concerns underlying the requirement that a criminal defendant demonstrate his or her actual innocence of the crimes of which he or she was convicted prior to proceeding with a claim against his or her former attorney.

Counsel should insert argument in this memorandum showing the relationship between the facts of the case and the point of law stated. Thus, counsel should include facts describing the nature of the claim being asserted and argue how successful prosecution of the claim would not implicate the policy concerns underlying the requirement that a criminal defendant demonstrate his or her actual innocence of the crimes of which he or she was convicted prior to proceeding with a claim against his or her former attorney, including concerns about permitting a guilty criminal defendant to profit from his or her wrongdoing or allowing a guilty criminal defendant to shift his or her punishment to a negligent attorney. The policy concerns supporting the requirement are discussed in more detail in *§ 24A.32*.

[b] Related Uses

With appropriate modifications, this memorandum may be used to oppose a general demurrer to the complaint, to oppose a motion for judgment on the pleadings, or in support of a trial or appellate brief.

[c] Opposing Memoranda

For points in opposition to the points raised in this memorandum, see *§ 24A.32*.

[3] Discussion of Authorities

[a] Fee Dispute Does Not Require Showing of Actual Innocence

In ***Brooks v. Shemaria*** *(2006) 144 Cal. App. 4th 434, 50 Cal. Rptr. 3d 430* , plaintiff had been represented by defendant attorney in a prior criminal action in which plaintiff had pleaded no contest and been convicted and sentenced to prison on drug charges. In connection with that criminal proceeding, plaintiff had paid defendant a $50,000 retainer fee, which would pay for both the attorney's representation in defending against the criminal charges and the attorney's actions in seeking the return of plaintiff's property that had been seized in connection with the arrest. According to plaintiff, they had also reached an oral agreement under which the attorney would return the unused balance of the retainer fee at the conclusion of the representation. Following plaintiff's sentencing, the court heard his motion for the return of seized property in a series of hearings occurring over a three-and-a-half-month period. Plaintiff's attorney appeared at the first two hearings, but failed to attend the final two hearings. Some of plaintiff's property was ordered returned and some ordered destroyed. However, because no one ever picked up the property that was ordered returned, steps were taken to dispose of that property as well. Plaintiff subsequently brought suit against his former attorney for negligently failing to secure the return of his property and for breach of contract for not returning the unused portion of the retainer fee that plaintiff had paid. The attorney moved for summary judgment on the grounds that, in order to

prosecute the action, plaintiff was required to prove that his criminal conviction had been reversed or vacated and that he was actually innocent of the criminal charges, and that it was undisputed that plaintiff could not meet either of those requirements. The trial court agreed and granted summary judgment. Plaintiff appealed.

The court of appeal reversed. Addressing plaintiff's claim that the defendant failed to return the unused portion of the retainer fee, the court held that the requirement that plaintiff demonstrate his actual innocence did not apply to this breach of contract claim. The court briefly described the Supreme Court holdings establishing this "actual innocence" requirement, which are described in § 24A.32, and then briefly described the court of appeal opinion in *Bird, Marella, Boxer & Wolpert v. Superior Court (2003) 106 Cal. App. 4th 419, 432, 130 Cal. Rptr. 2d 782* . In the latter case, the court of appeal held that the actual innocence requirement did not apply to a fee dispute between a criminal defendant and his or her attorney, because such a dispute is not a legal malpractice claim and did not implicate the policy considerations underlying the actual innocence requirement. The court of appeal in the instant case agreed with that holding and concluded that the plaintiff's claim for breach of contract stemming from the attorney's failure to return the unused portion of the retainer had nothing to do with the quality of the attorney's representation or with the plaintiff's guilt or innocence. Therefore, the actual innocence requirement did not apply (*144 Cal. App. 4th 434, 439-441)* .

[b] Claim Based on Failure to Secure Return of Seized Property Does Not Require Showing of Actual Innocence

The factual and procedural background of *Brooks v. Shemaria (2006) 144 Cal. App. 4th 434, 50 Cal. Rptr. 3d 430* , is described in [a], *above*. In that case, the court of appeal also held that the actual innocence requirement did not apply to plaintiff's claim that the attorney committed negligence in failing to secure the return of plaintiff's property that had been seized in connection with the criminal arrest. Plaintiff argued that because the property recovery proceedings took place after his conviction and sentencing, they were civil rather than criminal proceedings and the actual innocence requirement did not apply. Conversely, defendant argued that because the property return proceedings concerned property seized pursuant to a valid search warrant and took place in the criminal court that convicted and sentenced plaintiff, the proceedings were criminal in nature and the actual innocence requirement applied.

The court of appeal concluded that the determination hinged on the policy considerations underlying the actual innocence requirement, rather than on whether the proceedings were labeled as "criminal" or "civil," and that none of the relevant policy considerations weighed in favor of applying the actual innocence requirement to plaintiff's claim. The court noted that in seeking damages for his attorney's failure to secure the return of plaintiff's property, plaintiff was not seeking to profit from his own wrong, as the relevant property was in fact plaintiff's property. Similarly, plaintiff was not seeking to shift his criminal responsibility to his attorney or otherwise challenge his conviction or sentence. In addition, while plaintiff's criminal conduct was in some sense the ultimate source of his predicament, even the relevant law enforcement authorities had concluded that the property at issue should have been returned to plaintiff, suggesting that the harm for which plaintiff sought damages was not caused by plaintiff's criminal conduct. The court also recognized that there was no mechanism for postconviction redress for the attorney's alleged misconduct and that other potential practical problems, such as problems in quantifying damages, were not implicated by plaintiff's claim. Finding no policy justification for requiring plaintiff to demonstrate his actual innocence before pursuing his claim against defendant, the court reversed the trial court grant of summary judgment (*144 Cal. App. 4th 434, 443)* .

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2A-24A California Points & Authorities § 24A.57

§ 24A.57 Opposing Cross Defendant's Motion for Summary Judgment in Legal Malpractice Action Based on Contention That Cross Complaint for Indemnity Is Not Allowable--Cross Complaint Allowable Because Subsequent Attorney Was Negligent and His or Her Conduct Did Not Involve Exercise of Professional Judgment

[1] FORM

[*Caption. See § 24A.39.*]

SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE THE CROSS DEFENDANT'S NEGLIGENCE INVOLVED NO EXERCISE OF PROFESSIONAL JUDGMENT TO RESOLVE THE CLIENT'S PROBLEMS.

A. Rules Governing Summary Judgment Procedure. [*See § 24A.39, Paragraph A.*]

B. Cross Complaint for Indemnity Allowed When No Exercise of Professional Judgment by Cross Defendant. In a malpractice action against a client's former attorney, unless the subsequent attorney was forced to exercise professional judgment in resolving the client's problems, or in choosing between alternative courses of conduct, he or she may be liable for negligence, and may be required to indemnify the prior attorney (*Parker v. Morton (1981) 117 Cal. App. 3d 751, 755, 767, 173 Cal. Rptr. 197*).

[*Optional*] **C. No Summary Judgment When Cross Defendant Failed to Mitigate Plaintiff's Damages.** When the subsequent attorney was negligent in failing to assert the client's rights and to mitigate the client's damages caused by the prior attorney's negligence, the subsequent attorney is subject to a cross complaint for indemnity by the prior attorney who is being sued for malpractice, and summary judgment in favor of the subsequent attorney will be denied (*Parker v. Morton (1981) 117 Cal. App. 3d 751, 761, 173 Cal. Rptr. 197*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted by a defendant and cross complainant in opposition to a motion for summary judgment in a legal malpractice action when the motion is based on the contention that a cross complaint against a subsequent attorney for indemnity is not allowed. The ground of opposition is that the cross defendant's negligence did not involve an exercise of professional judgment on the client's behalf.

However, one court of appeal has rejected the main point of law set out in this form--that is, the rule stated in Paragraph B. In *Holland v. Thacher (1988) 199 Cal. App. 3d 924, 934-935, 245 Cal. Rptr. 247* , an appellate panel in the First Appellate District of the court of appeal held that, as a broad rule, predecessor attorneys sued for malpractice are prohibited from cross complaining for equitable indemnity against a successor attorney hired to extricate the client from the condition created by the predecessor attorneys [*see Holland v. Thacher (1988) 199 Cal. App. 3d 924, 926, 245 Cal. Rptr. 247]* . Counsel should therefore take care when using this form, particularly in the First Appellate District, to distinguish the decision in *Holland.*

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations which oppose the motion [*see Code Civ. Proc. § 437c*], and which include a showing that the cross defendant's conduct was negligent, and did not involve an exercise of professional judgment.

This form may be used in an appropriate case to oppose a motion for summary judgment supported by The points in *§ 24A.35*.

[b] Related Uses

With appropriate modifications, this form may be used to oppose a general demurrer to the cross complaint, or to oppose a motion for judgment on the pleadings, when it appears on the face of the cross complaint that cross defendant was negligent, and did not exercise professional judgment in choosing a course of action to extricate the client from the cross complainant's negligence.

[3] Discussion of Authorities

[a] Cross Complaint for Indemnity Allowed When No Exercise of Professional Judgment by Cross Defendant

In ***Parker v. Morton*** *(1981) 117 Cal. App. 3d 751, 173 Cal. Rptr. 197* , plaintiff brought a malpractice action against her former attorney for failing to assert, in a dissolution proceeding, her rights to her husband's pension benefits. Defendant filed a cross complaint for indemnity against plaintiff's subsequent attorney for exacerbating plaintiff's damages by failing to pursue the plaintiff's rights to the benefits, which had not yet been lost. The cross defendant moved for summary judgment on the ground that no such cross complaint was permissible, and the trial court granted the motion. Cross complainant appealed, and the court of appeal reversed.

The court of appeal held that a cross complaint for indemnity against a plaintiff's subsequent attorney is allowable when the subsequent attorney clearly exacerbated the first attorney's negligence (*117 Cal. App. 3d 751, 767)* . The court distinguished the facts of this case from those in which cross complaints against subsequent attorneys were disallowed.

In those cases, the court held, the subsequent attorney was alleged to have negligently exercised professional judgment by making an unreasonable choice of alternative remedies for the client (*117 Cal. App. 3d 751, 760, 763)* . The court held that in such cases it is correct to disallow the cross complaint because the subsequent attorney's professional judgment in the client's best interest should not be inhibited by the possibility of potential liability to indemnify the client's prior attorney (*117 Cal. App. 3d 751, 760, 767)* . But in cases where the alleged negligent conduct involved no exercise of professional choice, but rather involved clear cut negligent conduct, a cross complaint should be allowed (*117 Cal. App. 3d 751, 767)* .

In the case at hand, the subsequent attorney breached his duty to advise the client to pursue her rights, which would have mitigated her damages, and protected her against additional loss (*117 Cal. App. 3d 751, 761)* . Such conduct did not involve the exercise of professional judgment in making a choice between alternatives, and therefore the possibility of indemnification would present no conflicts of interest (*117 Cal. App. 3d 751, 761)* . Under these facts, a cross complaint for indemnification was properly allowed (*117 Cal. App. 3d 751, 767)* .

[b] No Summary Judgment When Cross Defendant Failed to Mitigate Plaintiff's Damages

Parker v. Morton *(1981) 117 Cal. App. 3d 751, 173 Cal. Rptr. 197* , is discussed in *§ 24A.57[3][a]*.

[4] Additional Authorities

[a] Cross Complaint for Indemnity Allowed When No Exercise of Professional Judgment by Cross Defendant

In *Copenbarger v. International Ins. Co. (1996) 46 Cal. App. 4th 961, 54 Cal. Rptr. 2d 1* , an action for malicious prosecution against attorneys who filed an indemnity action against successor attorneys, the court noted that although *Parker v. Morton (1981) 117 Cal. App. 3d 751, 173 Cal. Rptr. 197* , has been subsequently disagreed with, it has not been overturned. The court thus concluded that a reasonable attorney could have thought that filing a claim for indemnity against the defendants was tenable, so that there was probable cause for the institution of the indemnity action (*46 Cal. App. 4th 961, 966)* .

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 24A ATTORNEYS AT LAW: MALPRACTICE
PART II. FORMS

2A-24A California Points & Authorities § 24A.58

§ 24A.58 Opposing Cross Defendant's Contention That Cross Complaint for Indemnity Is Not Allowable--Claim for Indemnity May Be Permitted Against Concurrent Counsel If Policy Considerations Do Not Bar Claim Under Facts of Case

[1] FORM

[*The following may be included in a memorandum, or used in a trial or appellate brief.*]

A CLAIM FOR INDEMNITY MAY BE ALLOWED AGAINST A CONCURRENT COUNSEL OR CO-COUNSEL IN AN ATTORNEY MALPRACTICE CASE IF THE PUBLIC POLICY CONSIDERATIONS THAT GENERALLY PROHIBIT INDEMNIFICATION FROM A SUCCESSOR COUNSEL ARE NOT IMPLICATED UNDER THE FACTS OF THE PARTICULAR CASE.

A. Case-by-Case Analysis Required. The question of whether a claim for indemnity should be allowed in concurrent counsel or co-counsel cases must be decided on a case-by-case basis (*Musser v. Provencher (2002) 28 Cal. 4th 274, 284, 121 Cal. Rptr. 2d 373, 48 P.3d 408*).

B. Claim Allowable If Public Policy Concerns Not Implicated. If the policy reasons justifying the rule preventing indemnification from a successor attorney do not apply under the facts of the particular case, indemnification from concurrent counsel may be allowed. Thus, indemnification may be allowed if the claim creates no conflict of interest between the indemnifying attorney's duty to the client and the attorney's self-interest, and if there is no non-waived attorney-client privilege that will prevent the attorney from whom indemnity is sought from providing a defense (*Musser v. Provencher (2002) 28 Cal. 4th 274, 284-285, 121 Cal. Rptr. 2d 373, 48 P.3d 408*).

[*Optional*] **C. Indemnification of Expert Witness From Hiring Attorney.** An expert witness, sued for negligence by the client on whose behalf the expert was hired, may seek indemnity from the attorney who hired the expert, so long as under the circumstances of the case, the attorney may defend against the indemnification claim without conflicts of interest or the need to reveal confidential communications of the former client (*Forensis Group, Inc. v. Frantz, Townsend & Foldenauer (2005) 130 Cal. App. 4th 14, 34-36, 29 Cal. Rptr. 3d 622*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that in an attorney malpractice action, a claim for indemnity may not be pursued against a concurrent counsel or co-counsel. The grounds for the opposition are that a claim for indemnity may be pursued against a concurrent counsel or co-counsel if the policy considerations that prohibit such a claim against a successor attorney are not implicated under the facts of the particular case. Optional Paragraph C should be used if the indemnification claim against the attorney is being made not by an associated counsel sued for malpractice, but by an expert witness hired to assist in the litigation who has been sued for negligence by the former client.

This form may be combined with points pertaining to the specific procedural context in which these points are raised, such as a motion for summary judgment. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the point of law stated. Thus, for example, counsel should include facts that may support a finding that the concurrent counsel may be liable at least in part to the malpractice defendant for the injuries to the malpractice plaintiff. Counsel should also include facts describing the relationship of the attorneys and the malpractice plaintiff to support the argument that the policy considerations that might caution against indemnification are not implicated.

[3] Discussion of Authorities

[a] Case-by-Case Analysis Required

In ***Musser v. Provencher*** *(2002) 28 Cal. 4th 274, 121 Cal. Rptr. 2d 373, 48 P.3d 408* , a family law attorney was sued for malpractice by her former client, based on the attorney's advice during the client's divorce proceedings to continue to pursue a child support claim despite an automatic stay imposed by the client's spouse's bankruptcy. The decision to continue with the child support hearing was based on the erroneous advice of another attorney, a bankruptcy specialist, who was hired by the client to deal with the legal issues surrounding the spouse's bankruptcy. Because the client faced punitive damages for violation of the stay, she was forced to settle with her former husband for less than the original support order. The client's malpractice action against the family law attorney followed. When the bankruptcy specialist refused to contribute to a settlement offer to the client, the family law attorney filed a cross-complaint for indemnity and settled with the client, as well as with the client's former husband, who had also sued the family law attorney for violating the stay. The trial court eventually granted a nonsuit in favor of the bankruptcy specialist on the indemnification claim, although the court of appeal reversed.

The Supreme Court affirmed the court of appeal's reversal. The Court first reviewed the case law holding that predecessor attorneys may not seek indemnity from successor attorneys, distilling two primary policy considerations: avoiding conflicts between the successor attorney's duty to the client and the attorney's self-interest, and protecting the confidentiality of the communications between the client and the successor attorney. The Court then reviewed court of appeal cases that had addressed indemnification in the context of concurrent counsel or co-counsel. After reviewing these cases, the Court concluded that the question of whether a claim for indemnity should be allowed in concurrent counsel or co-counsel cases should be decided on a case-by-case basis (*28 Cal. 4th 274, 284)* .

[b] Claim Allowable If Public Policy Concerns Not Implicated

The facts and procedural background of ***Musser v. Provencher*** *(2002) 28 Cal. 4th 274, 121 Cal. Rptr. 2d 373, 48 P.3d 408* , are discussed in *§ 24A.58[3][a]*. After concluding that a case-by-case analysis is necessary in the context of indemnity claims against concurrent counsel, the Supreme Court considered the policy reasons justifying the rule preventing indemnification from a successor attorney--the potential for conflicts between the indemnifying attorney's

duty to the client and the attorney's self-interest, and protecting the confidentiality of communications between the client and the indemnifying attorney--and considered whether those concerns should preclude indemnification in this case. The Court noted that no conflict of interest was identified by the bankruptcy specialist, the cross-defendant in this case, and the Court itself could discern no potential conflict in allowing an attorney to seek indemnification from concurrent counsel (*28 Cal. 4th 274, 284)* . As to the need to protect the confidentiality of the client's communications with the attorney, the Court noted that the concern is that the attorney from whom indemnity is sought will not be able to provide a proper defense without revealing privileged client communications. However, the client in this case had expressly waived the attorney-client privilege as to the bankruptcy specialist from whom indemnity was sought by the client's family law attorney. Therefore, there was no compelling reason to prevent the family law attorney from seeking indemnification from the bankruptcy specialist (*28 Cal. 4th 274, 284-285)* .

[c] Indemnification of Expert Witness From Hiring Attorney

In ***Forensis Group, Inc. v. Frantz, Townsend & Foldenauer*** *(2005) 130 Cal. App. 4th 14, 29 Cal. Rptr. 3d 622* , an engineering expert and an expert witness referral firm were sued by plaintiffs, who had been unsuccessful in prosecuting a wrongful death products liability lawsuit, allegedly due to the negligence of the expert in being insufficiently knowledgeable about products liability law. The plaintiffs did not sue the attorneys who represented them in the wrongful death action. The defendants settled with the plaintiffs and sought indemnity from the law firm that represented the plaintiffs in the wrongful death action, arguing that the law firm's negligence contributed to the failure of that underlying lawsuit. The trial court granted summary judgment for the law firm on the indemnification claim, concluding that public policy prohibited indemnification under those circumstances. The expert and the referral firm appealed.

The court of appeal reversed. The court adopted the rationale of the Supreme Court in *Musser v. Provencher* [*see § 24A.58[3*][a], [b]]. The court of appeal concluded that an expert witness, sued for negligence by the clients on whose behalf the expert was hired, could seek indemnity from the clients' former law firm, which had hired the expert. Applying the same case-by-case approach promoted by *Musser* in the context of indemnification between two concurrently serving attorneys, the court of appeal concluded that the law firm, even though not named as a defendant by the former clients, was a potential joint tortfeasor with the expert for negligent handling of the underlying lawsuit. Given that the indemnification issue centered on whether the expert witness was sufficiently knowledgeable to testify and whether the law firm properly guided him on the relevant legal issues, the court concluded that there was no danger under the circumstances that the law firm would be faced with conflicts of interest in defending the indemnity claim or that the law firm would be forced to reveal confidential communications made by the former clients. Thus, the trial court erred in granting summary judgment (*130 Cal. App. 4th 14, 34-40)* .

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2A-24A California Points & Authorities § 24A.59

§ 24A.59 Opposing Cross Defendant's Motion for Summary Judgment in Legal Malpractice Action Based on Contention That Cross Complaint for Indemnity Is Not Allowable--Cross Complaint for Indemnity Allowed Against Predecessor Attorney

[1] FORM

[*Caption. See § 24A.39.*]

SUMMARY JUDGMENT ON CROSS PLAINTIFF'S CROSS COMPLAINT FOR INDEMNITY SHOULD BE DENIED BECAUSE A SUCCESSOR ATTORNEY HELD LIABLE FOR MALPRACTICE IS ALLOWED TO SEEK INDEMNITY FROM A PREDECESSOR ATTORNEY WHO MAY SHARE IN LIABILITY.

A. Rules Governing Summary Judgment. [*See § 24A.39, Paragraph A.*]

B. Cross Complaint for Indemnity May Be Brought by Successor Attorney Against Predecessor Attorney. In a legal malpractice action, a successor attorney may seek equitable indemnity from a predecessor when the predecessor's negligence contributed to the injury for which the successor is liable (*Crouse v. Brobeck, Phleger, & Harrison (1998) 67 Cal. App. 4th 1509, 1545-1548, 80 Cal. Rptr. 2d 94*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted by a defendant and cross complainant in opposition to a motion for summary judgment in a legal malpractice action when the motion is based on the cross defendant's contention that a cross complaint for indemnity may not be filed by a successor attorney against a predecessor attorney.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, for example, counsel should include facts that may support a finding that the predecessor attorney is liable at least in part to the successor attorney for the injuries to the malpractice plaintiff.

[b] Related Uses

With appropriate modifications, this form may be used to oppose a general demurrer to the cross complaint, or to oppose a motion for judgment on the pleadings, when it appears on the face of the pleadings that the cross defendant may be liable to indemnify the cross complainant.

[3] Discussion of Authorities

[a] Cross Complaint for Indemnity May Be Brought by Successor Attorney Against Predecessor Attorney

The facts and procedural background of ***Crouse v. Brobeck, Phleger, & Harrison*** *(1998) 67 Cal. App. 4th 1509, 80 Cal. Rptr. 2d 94* are discussed in *§ 24A.29[3][h]*. The court of appeal reversed the trial court's grant of summary judgment for the defendant attorney's former law firm on the cross complaint for equitable indemnity brought by the defendant attorney's current law firm, and reversed the order granting summary adjudication in favor of the former law firm on the cross complaint for indemnity brought by the defendant attorney. In reaching its decision, the court noted the rule that a defendant may ordinarily seek equitable indemnity from another party when the negligent acts of both have combined to cause a single injury to the plaintiff, regardless of whether the negligent defendants acted jointly, concurrently, or successively. The court noted that in this case, the plaintiff alleged a single injury, the loss of the additional benefits from the aborted note-restructuring agreement, and that the loss was caused by the negligence of the defendant attorney and his former law firm in misplacing and not safeguarding the note, as well as by the attorney and his current law firm in not acting appropriately when informed of the missing note. Thus, under the general rule, defendant attorney and his current firm had a right to seek indemnity from the attorney's former firm (*67 Cal. App. 4th 1509, 1544-1548)* .

However, the court also noted that policy concerns have been used to override principles of equitable indemnity and preclude a defendant who has injured a client from seeking indemnification from the client's subsequent attorney for malpractice committed while that subsequent attorney represents the client in an effort to rectify or recover for the earlier injury caused by the defendant. Those earlier court opinions had expressed concern that the threat of an indemnity suit against the subsequent attorney would create conflicts of interest for the subsequent attorney and difficult problems in protecting privileged communications and attorney work product. The court in the instant case concluded, however, that despite the policy concerns that might caution against allowing a predecessor attorney to seek equitable indemnity from a successor attorney, those concerns seem inapplicable when a successor attorney seeks indemnity from a predecessor attorney. The court concluded that a predecessor attorney was not subject to any conflict of interest and had no continuing privileged communications or work product to protect, and thus, a successor attorney could seek indemnity when the predecessor's negligence contributed to the injury for which the successor was liable. The court distinguished the opinion in *Munoz v. Davis (1983) 141 Cal. App. 3d 420, 190 Cal. Rptr. 400* , which held that a liable attorney could not seek indemnity from the tortfeasor whose conduct caused the personal injury to the attorney's client and created the opportunity for the later malpractice. In the *Munoz* situation, the negligence of the original tortfeasor did not cause or contribute to the subsequent malpractice of the attorney, while in the instant case, plaintiff alleged a single injury caused by the actions of defendant attorney and both his former and current law firms (*67 Cal. App. 4th 1509, 1544-1548)* .

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2A-24A California Points & Authorities § 24A.60

§ 24A.60 Supporting Motion for Lien on Proceeds of Remaining Legal Action

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

DEFENDANT IS ENTITLED TO A LIEN AGAINST THE PROCEEDS OF PLAINTIFF'S REMAINING LEGAL ACTION TO PREVENT A DOUBLE RECOVERY BY PLAINTIFF.

Lien Proper to Avoid Double Recovery. A negligent attorney is entitled to a lien on the proceeds of a remaining legal action to prevent a double recovery (*W.W.S.M. Investors Greve, Clifford, Diepenbrock & Paras (1996) 43 Cal. App. 4th 517, 523, 51 Cal. Rptr. 2d 31*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a defendant's contention in a legal malpractice action that defendant is entitled to a lien on the proceeds of a pending lawsuit by the plaintiff against another party.

This form may be combined with points pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that defendant's liability to plaintiff should be decreased by any recovery in a future or pending related action, for example in a motion for summary judgment. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence of an existing or potential related legal action by plaintiff against a third party, and should argue that any recovery in that action would provide plaintiff with a double recovery unless defendant is granted a lien on the recovery [*see W.W.S.M. Investors v. Greve, Clifford, Diepenbrock & Paras (1996) 43 Cal. App.*

4th 517, 523, 51 Cal. Rptr. 2d 31] .

[3] Discussion of Authorities

[a] Lien Proper to Avoid Double Recovery

In ***W.W.S.M. Investors v. Greve, Clifford, Diepenbrock & Paras*** *(1996) 43 Cal. App. 4th 517, 51 Cal. Rptr. 2d 31* , plaintiff retained defendant to assist in stopping the I.R.S. from wrongfully levying funds and to recover the funds. Defendant successfully convinced the I.R.S. that its levies were wrong, but failed to provide plaintiff with adequate advice as to how to obtain recovery of wrongfully levied amounts. As a result of defendant's negligence, plaintiff filed an invalid claim form. A subsequent action against the I.R.S. was dismissed as untimely, and plaintiff brought a legal malpractice action against defendant. After the trial court granted plaintiff a judgment in the malpractice action, the Ninth Circuit reversed the dismissal of plaintiff's case against the I.R.S. The trial court then amended the judgment to give defendant a lien against any recovery obtained by plaintiff is this action. Plaintiff objected to the lien on the ground that an attorney who commits malpractice has no right to equitable indemnity.

The court of appeal upheld the lien. Plaintiff relied on *Munoz v. Davis (1983) 141 Cal. App. 3d 420, 190 Cal. Rptr. 400* , denying an attorney indemnity on the ground that the attorney and tortfeasor were not jointly and severally liable to the plaintiff for the same injury because the connection between the tortfeasor's act and the attorney's malpractice was too tenuous. The court distinguished *Munoz* on the basis that the trial court had not created a new cause of action allowing defendant to proceed against the I.R.S., but had merely recognized the potential for plaintiff to receive a double recovery (*43 Cal. App. 4th 517, 523)* . The court remanded the action for the trial court to consider whether a lien or an assignment of the action against the I.R.S. was the best method to protect against a double recovery by plaintiff, but otherwise affirmed the judgment.

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2A-24A California Points & Authorities § 24A.61

§ 24A.61 Supporting Motion for New Trial [Code Civ. Proc. § 659] in Legal Malpractice Action--By Defendant--Because Insufficient Showing Plaintiff's Original Case Had Merit [Code Civ. Proc. § 657(6)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF MOTION FOR
Plaintiff,	)	NEW TRIAL
vs.	)	[*Code Civ. Proc. § 659*]
	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THE MOTION FOR A NEW TRIAL SHOULD BE GRANTED BECAUSE PLAINTIFF HAS FAILED TO SHOW DAMAGES IN THAT THERE IS AN INSUFFICIENT SHOWING THAT PLAINTIFF'S ORIGINAL CASE HAD MERIT.

A. Motion for New Trial. On the application of the party aggrieved, the _____ [verdict *or* decision] may be vacated, in whole or in part, and a new trial may be granted, on the ground that the evidence is insufficient to justify the _____ [verdict *or* decision], if substantial rights of the aggrieved party are materially

affected thereby (*Code Civ. Proc. § 657(6)*).

B. Judgment for Plaintiff Requires Proof That Plaintiff's Original Case Had Merit. To recover damages in a legal malpractice suit a plaintiff must show that had defendant not acted negligently, plaintiff would have either won his or her case and collected judgment, or had a successful defense to a judgment against him or her (*Hastings v. Halleck (1859) 13 Cal. 203, 209* ; *Campbell v. Magana (1960) 184 Cal. App. 2d 751, 754, 8 Cal. Rptr. 32*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted by defendant in support of a motion for new trial in a legal malpractice action in which plaintiff was awarded damages. The basis of the motion is that the evidence was insufficient to support the award because plaintiff, alleging damages as resulting from a lost judgment, did not prove that had defendant not been negligent, plaintiff would have won the initial case in which defendant was representing him or her.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, the defendant could bring a motion for judgment notwithstanding the verdict [*see Code Civ. Proc. § 629*] on the issue of damages on the ground that when plaintiff alleged damage as resulting from a lost judgment, there was no substantial evidence in the record sufficient to support the award. With appropriate modifications, the arguments presented in this form could be the basis of an oral argument for a motion for judgment notwithstanding the verdict.

[b] Related Pleading and Practice Forms

For an analysis of motions for nonsuit [*see* Code Civ. Proc. § 581c], and motions for judgment [*see* Code Civ. Proc. § 631.8], which are normally made orally at trial, see California Forms of Pleading and Practice, Ch. 389, *Nonsuit and Motions for Judgment* (Matthew Bender).

[c] Related Memoranda

For memoranda relating to motions for new trial generally, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] Judgment for Plaintiff Requires Proof That Plaintiff's Original Case Had Merit

Hastings v. Halleck *(1859) 13 Cal. 203* , was a legal malpractice case in which a client alleged that his attorneys were negligent in their representation of him in a suit brought against him for money owed. In that suit, judgment was entered

against the client. The attorneys brought an appeal on his behalf, and were successful in reversing judgment because the trial court had erred in awarding certain items of interest. Eventually, they signed a stipulation permitting the original judgment to stand, so long as the interest was deducted from it.

In the malpractice suit, plaintiff alleged that defendants had failed to assert a defense on his behalf, and that he was damaged in the amount of judgment as a result. The trial court entered judgment for defendants, and plaintiff appealed. The Supreme Court affirmed the judgment. It held that in order to establish an attorney's negligence in failing to set up a defense, the plaintiff must prove that the defense could have been successful, had the defendant acted diligently (*13 Cal. 203, 209)* . Because the evidence at trial in this case indicated that no such defense actually existed, or that it could not have been proven at trial, the judgment was properly entered in favor of defendants (*13 Cal. 203, 210-211)* .

In ***Campbell v. Magana*** *(1960) 184 Cal. App. 2d 751, 8 Cal. Rptr. 32* , a client sued her attorneys for their allegedly negligent handling of her personal injury action. That action had been dismissed, and the attorneys had appealed, although they later abandoned the appeal. Plaintiff alleged damages in the amount she would have recovered. The trial court entered judgment for defendants, and plaintiff appealed. The court of appeal affirmed the judgment. It noted that the trial court had found defendant's conduct negligent, but held that there was no showing of damage as a result of that negligence (*184 Cal. App. 2d 751, 753)* . The court held that plaintiff in a malpractice case has a burden of proving damage by showing that careful management of his or her case by the defendant would have resulted in a favorable judgment for him or her (*184 Cal. App. 2d 751, 754)* . Because in this case the plaintiff did not offer evidence sufficient to show that she could have won her personal injury action, judgment for defendants was properly supported by the evidence (*184 Cal. App. 2d 751, 763)* .

[4] Additional Authorities

[a] Judgment for Plaintiff Requires Proof That Plaintiff's Original Case Had Merit

In *Garretson v. Harold I. Miller (2002) 99 Cal. App. 4th 563, 121 Cal. Rptr. 2d 317* , the plaintiff was an employee injured at work who pursued a workers' compensation claim against her employer on the advice of her attorney and then filed a malpractice claim against that attorney for failing to advise about or pursue potential lawsuits against third parties who might have been liable for the injury. After a jury verdict in favor of the plaintiff on the malpractice claim, the trial court granted the defendant's motion for judgment notwithstanding the verdict and motion for a new trial. The court of appeal affirmed the judgment notwithstanding the verdict on the grounds that the plaintiff failed to argue or present any evidence that any judgment on the potential claims against third parties would have been collectible. The plaintiff had the burden of raising and proving the collectibility of any underlying judgment, but the plaintiff failed to raise the issue or present any evidence of insurance, income or net worth, property with equity value, or other assets held by potential third-party defendants. Therefore, the plaintiff failed to prove the success of any underlying lawsuit, and judgment for the defendant was proper (*99 Cal. App. 4th 563, 569-573)* .

Mattco Forge, Inc. v. Arthur Young & Co. (1997) 52 Cal. App. 4th 820, 60 Cal. Rptr. 2d 780 , dealt with the issue of malpractice by an accountant, and involved a discussion of legal malpractice by analogy. Plaintiff contended that the trial-within-a-trial standard, requiring a plaintiff to prove the merits of the original action, was in some dispute, and, in any case, applied only to attorneys. The trial court agreed, and did not require plaintiff to establish that absent defendant's negligence, plaintiff would have prevailed in the underlying case. The court of appeal reversed, stating that, although the trial-within-a-trial burden has been criticized, the burden persists because it is the most effective safeguard against speculative and conjectural claims (*52 Cal. App. 4th 820, 834)* .

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2A-24A California Points & Authorities § 24A.62

§ 24A.62 Supporting Motion for New Trial [Code Civ. Proc. § 659] in Legal Malpractice Action--By Defendant--Absence of Expert Testimony

[1] FORM

[*The following may be included in a memorandum, or adapted for a trial or appellate brief*].

THE MOTION FOR A NEW TRIAL SHOULD BE GRANTED BECAUSE PLAINTIFF HAS FAILED TO SUBMIT EXPERT TESTIMONY REGARDING DEFENDANT'S REQUIRED STANDARD OF CARE AND BREACH OF THAT STANDARD.

A. Motion for New Trial. [*See § 24A.61, Paragraph A.*]

B. Expert Testimony Required to Establish Malpractice. To prove professional negligence, a plaintiff must prove that the attorney breached the standard of care of an attorney under similar circumstances; to show that standard of care requires expert testimony (*Fergus v. Songer (2007) 150 Cal. App. 4th 552, 578, 59 Cal. Rptr. 3d 273* ; *Wilkinson v. Rives (1981) 116 Cal. App. 3d 641, 648, 172 Cal. Rptr. 254* ; *Lipscomb v. Krause (1978) 87 Cal. App. 3d 970, 976, 151 Cal. Rptr. 465*).

[*Optional*] **C. Suit Against Legal Specialist.** When defendant in a legal malpractice suit is a legal specialist, and the claim against him or her relates to that area of specialization, the plaintiff must submit expert testimony to establish liability (*Wright v. Williams (1975) 47 Cal. App. 3d 802, 811, 121 Cal. Rptr. 194*).

[*Optional*] **D. Duty to Investigate Case Further.** When an attorney initially determines that his or her client's case lacks merit, and the client alleges malpractice in failure to investigate the case further, the client is required to produce expert testimony to establish that the attorney had a duty to do so (*Kirsch v. Duryea (1978) 21 Cal. 3d 303, 311, 146 Cal. Rptr. 218, 578 P.2d 935*).

[2] Comments

[a] Use of Form

This form may be submitted by defendant in support of a motion for new trial in a legal malpractice action in which the evidence was insufficient to support a judgment for plaintiff because plaintiff did not offer expert testimony to establish negligence of the defendant under the circumstances of the case.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, the defendant could bring a motion for judgment notwithstanding the verdict [*see Code Civ. Proc. § 629*] on the ground that there was no substantial evidence in the record sufficient to support judgment for plaintiff because there was no expert testimony. With appropriate modifications, the arguments presented in this form could be the basis of an oral argument for a motion for judgment notwithstanding the verdict.

[b] Related Pleading and Practice Forms

For an analysis of motions for nonsuit [*see* Code Civ. Proc. § 581c], and motions for judgment [*see* Code Civ. Proc. § 631.8], which are normally made orally at trial, see California Forms of Pleading and Practice, Ch. 389, *Nonsuit and Motions for Judgment* (Matthew Bender).

[c] Related Memoranda

For points relating to motions for new trial generally, see Ch. 155, *Motions After Trial* .

[d] Opposing Memoranda

In an appropriate case, The points in *§ 24A.67* may be used to oppose the motion for new trial supported by this form.

[3] Discussion of Authorities

[a] Expert Testimony Required to Establish Malpractice

In ***Fergus v. Songer*** *(2007) 150 Cal. App. 4th 552, 578, 59 Cal. Rptr. 3d 273* , an attorney sued a client for failure to pay the amount due under a contingency fee agreement and a partnership agreement. The client filed a cross-complaint for legal malpractice, arguing that the attorney committed malpractice when he failed to provide an accurate legal description to be used at the sheriff's sale of a hotel. The trial court found the contingency fee agreement and the partnership agreement unenforceable. The jury returned a special verdict setting a reasonable attorney's fee. The trial court granted the client a new trial on the issue of damages and denied its motion for a new trial on the malpractice claim.

The court of appeal affirmed that the client failed to establish that the attorney committed malpractice [*150 Cal. App. 4th 552, 578]* . The court held that even if the attorney had made a mistake in the legal description of the hotel, the client failed to refer the court to testimony establishing that the attorney's performance fell below the standard of care and skill of members of his profession [*150 Cal. App. 4th 552, 578]* .

In ***Wilkinson v. Rives*** *(1981) 116 Cal. App. 3d 641, 172 Cal. Rptr. 254* , plaintiffs were sellers of property on which they had recorded a declaration of homestead filed by their attorney. A title company had refused to issue a title insurance policy, and had mistakenly advised plaintiffs that certain claims against the property would have to be satisfied in order to obtain title insurance. Plaintiffs brought a malpractice claim against the attorney for his alleged negligent preparation of the declaration of homestead, and an action against the title company for negligence. After trial by the court, judgment was rendered for defendants, and plaintiffs appealed.

The court of appeal affirmed the judgment on several grounds. One issue discussed by the court was expert testimony at trial. Whether or not the attorney had been negligent under the particular circumstances of the case was not a matter of common knowledge, and therefore plaintiffs were required to offer expert testimony to prove negligence (*116 Cal. App. 3d 641, 648)* . The court held that because the plaintiffs offered no such testimony, there was no evidence on which a finding of negligence could have been made (*116 Cal. App. 3d 641, 648)* .

In ***Lipscomb v. Krause*** *(1978) 87 Cal. App. 3d 970, 151 Cal. Rptr. 465* , plaintiffs brought a malpractice suit against an attorney who had represented them in two lawsuits and had dismissed one of them by stipulation without plaintiffs' consent. At the malpractice trial, the only expert testimony presented by plaintiffs related to scientific technicalities on the merits of the two original suits. At the close of plaintiffs' presentation of evidence, defendants moved for nonsuit on the grounds that there was no evidence to establish either his required standard of care under the circumstances, or a breach of that standard. The trial court found that the attorney's liability was a question of fact not within the common knowledge of laypersons, and granted the nonsuit. Plaintiffs appealed.

The court of appeal affirmed. It stated that the existence of malpractice is generally a question of fact (*87 Cal. App. 3d 970, 975)* . In determining this question of fact, an attorney's standard of care is that of attorneys of ordinary skill and capacity in similar circumstances (*87 Cal. App. 3d 970, 976)* . As a general rule, the court held that a plaintiff's proof as to these issues requires expert testimony, since the standard of care of an attorney under the particular circumstances is usually not a matter of common knowledge (*87 Cal. App. 3d 970, 976)* . The court concluded that, in this case, the lack of expert testimony properly resulted in judgment of nonsuit for defendant (*87 Cal. App. 3d 970, 976)* .

[b] Suit Against Legal Specialist

Wright v. Williams *(1975) 47 Cal. App. 3d 802, 121 Cal. Rptr. 194* , is discussed in *§ 24A.47[3][a]*. The court held that an attorney holding himself or herself out as a specialist in a particular area of law is held to the standard of other specialists in that area (*47 Cal. App. 3d 802, 810)* . The court stated further that when a malpractice action is brought against a legal specialist, and the malpractice claim relates to his or her area of expertise, then expert testimony is required to define the proper standard of care, and determine whether that standard was met (*47 Cal. App. 3d 802, 810-811)* . The court held that because plaintiffs had not produced evidence in the form of expert testimony, judgment for defendant was the proper result (*47 Cal. App. 3d 802, 811)* .

[c] Duty to Investigate Case Further

Kirsch v. Duryea *(1978) 21 Cal. 3d 303, 146 Cal. Rptr. 218, 578 P.2d 935* , is discussed in *§ 24A.24[3][a]*. The Supreme Court reversed judgment for the plaintiff on the ground that the defendant did not owe any duty to the plaintiff to prosecute an action the attorney believed to be without merit. The Court also held that to support plaintiff's contention that the attorney should have investigated plaintiff's case further before refusing to go forward with it, plaintiff was required to produce expert testimony (*21 Cal. 3d 303, 311)* . To establish that an attorney has the duty to hire investigators, depose witnesses, or otherwise further investigate a client's case requires expert testimony, as these things are not matters of common knowledge (*21 Cal. 3d 303, 311)* .

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 24A ATTORNEYS AT LAW: MALPRACTICE
PART II. FORMS

2A-24A California Points & Authorities § 24A.63

§ 24A.63 Supporting Motion for New Trial [Code Civ. Proc. § 659] in Legal Malpractice Action--By Defendant--No Showing of Proximate Cause

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief*].

A MOTION FOR NEW TRIAL SHOULD BE GRANTED BECAUSE PLAINTIFF HAS FAILED TO SHOW BY SUFFICIENT EVIDENCE THE ESSENTIAL ELEMENT OF PROXIMATE CAUSATION.

A. Motion for New Trial. [*See § 24A.61, Paragraph A.*]

B. Judgment for Plaintiff Requires Proof of Causation. In order to obtain judgment in his or her favor, a plaintiff must submit evidence to show the essential element of causation between the defendant's conduct and the plaintiff's injury (*Sprigg v. Garcin (1980) 105 Cal. App. 3d 869, 873, 164 Cal. Rptr. 677*).

[2] Comments

[a] Use of Form

This form may be submitted by defendant in support of a motion for new trial in a legal malpractice action in which the evidence was insufficient to support a judgment for plaintiff because it was insufficient to show proximate cause between defendant's conduct, whether negligent or not, and the injury to plaintiff.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

In an appropriate case, the defendant could bring a motion for judgment notwithstanding the verdict [*see Code Civ. Proc. § 629*] on the ground that there was no substantial evidence in the record sufficient to support the award because

there was no evidence of causation. With appropriate modifications, the arguments presented in this form could be the basis of an oral argument for a motion for judgment notwithstanding the verdict.

[c] Related Pleading and Practice Forms

For an analysis of motions for nonsuit [*see* Code Civ. Proc. § 581c], and motions for judgment [*see* Code Civ. Proc. § 631.8], which are normally made orally at trial, see California Forms of Pleading and Practice, Ch. 389, *Nonsuit and Motions for Judgment* (Matthew Bender).

[3] Discussion of Authorities

[a] Judgment for Plaintiff Requires Proof of Causation

In ***Sprigg v. Garcin*** *(1980) 105 Cal. App. 3d 869, 164 Cal. Rptr. 677* , plaintiffs, husband and wife, were the owners of a warehouse, who hired attorneys to prosecute a case seeking rent from the warehouse lessee. In that case, the trial court had entered partial summary judgment in favor of the lessee, but ordered that the action would proceed as to whether lessee was obligated to restore the building. The attorneys then drafted, but never filed, an amended complaint seeking damages against lessee for failure to restore the warehouse. Several months later, plaintiffs substituted the original attorneys out of the case, and their new attorney filed an amended complaint. Eventually, the parties reached a settlement for a certain sum, although plaintiffs had earlier disclosed to the original attorneys that they would not accept that sum. After settlement, plaintiffs filed the malpractice action against the original attorneys. Defendants also filed an action against plaintiffs for attorney's fees, and the two actions were consolidated for trial.

In the malpractice action, the jury returned a verdict for plaintiffs, and defendants moved for a new trial or for judgment notwithstanding the verdict. The court granted the motion for new trial, but denied the motion for judgment notwithstanding the verdict. Plaintiffs appealed the order granting the motion for new trial, and defendants appealed the order denying their motion for judgment notwithstanding the verdict. The court of appeal disposed of both issues by ordering judgment notwithstanding the verdict.

In the attorney's fees action the jury returned a verdict for the attorneys, but the parties stipulated that if a new trial was ordered in the malpractice action, a new trial would be ordered in the attorney's fees action. The court of appeal reversed this order as part of its ruling on the appeals in the malpractice action, so as to avoid possible inconsistencies.

In ordering the judgment notwithstanding the verdict, the court found that although there was evidence to show both that the defendants had been negligent, and that the plaintiffs had been injured by the lessee, there was no evidence from which a court could infer a causal connection between the negligence and any injury (*105 Cal. App. 3d 869, 874)* . The court held that the absence of evidence to show the essential element of causation precludes a plaintiff's recovery (*105 Cal. App. 3d 869, 873)* .

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PART II. FORMS

2A-24A California Points & Authorities § 24A.64

§ 24A.64 Supporting Motion for New Trial [Code Civ. Proc. § 659] in Legal Malpractice Action--By Defendant--Error to Allow Expert Testimony on Probable Outcome of Underlying Litigation

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief*].

A MOTION FOR NEW TRIAL SHOULD BE GRANTED BECAUSE THE TRIAL COURT ERRED IN ALLOWING PLAINTIFF'S EXPERT TO TESTIFY BEFORE THE JURY ON THE ULTIMATE ISSUE OF THE PROBABLE OUTCOME OF THE UNDERLYING LITIGATION HAD THE DEFENDANT NOT COMMITTED THE ALLEGED MALPRACTICE.

A. Motion for New Trial. [*See § 24A.61, Paragraph A.*]

B. Expert Testimony on Probable Outcome of Underlying Litigation Not Allowed. Because it is the role of the fact finder, usually a jury, to determine what would have happened in the underlying proceeding absent the alleged malpractice, a trial court errs if it allows an expert to testify as to what the probable result would have been (*Piscitelli v. Friedenberg (2001) 87 Cal. App. 4th 953, 973-974, 105 Cal. Rptr. 2d 88*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion for new trial on the grounds that the trial court erred in allowing the plaintiff's expert to testify as to the probable outcome of the underlying litigation had the defendant's alleged malpractice not occurred. The grounds for the claim of error are that the expert should not have been allowed to testify on an ultimate factual issue that is properly for the jury to decide.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the point of law

stated. Thus, counsel should include facts showing that the expert testified on the probable outcome of the underlying litigation, that this was an error, and that the instructions given by the trial court to the jury did not correct the error.

[c] Related Pleading and Practice Forms

For a notice of intention to move for a new trial, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[d] Related Memoranda

For memoranda relating to motions for new trial generally, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] Expert Testimony on Probable Outcome of Underlying Litigation Not Allowed

In ***Piscitelli v. Friedenberg*** *(2001) 87 Cal. App. 4th 953, 105 Cal. Rptr. 2d 88* , the plaintiff hired a law firm to pursue claims against the plaintiff's employer, a securities investment firm, based in part on allegations that the investment firm had misrepresented to its brokers the safety, operation, and returns of certain limited partnership investments, causing the brokers to sell the investments to customers who were not accustomed to the level of risk that actually accompanied the partnerships. While the law firm and the individual attorney assigned to the case were preparing the case against the investment firm, a separate class action suit was proceeding against the investment firm based on similar allegations. Although the attorney handling the case had actual knowledge of the class action suit, he was of the opinion that the plaintiff's claims were not covered by the class action and he failed to advise the plaintiff to opt out of the class action settlement. The attorney was wrong about the scope of the class action settlement, however, which resulted in the release of the plaintiff's claims that would have otherwise been presented to a panel of New York Stock Exchange arbitrators if the plaintiff had opted out of the settlement. The plaintiff brought a legal malpractice action against the law firm, the individual attorney, and others, and settled with all the defendants before trial except the individual attorney. At trial, the jury found that the attorney had been negligent, rendered a verdict in favor of the plaintiff, and awarded the plaintiff over $223,000,000 in damages. The attorney moved for j.n.o.v. and a new trial on various grounds, including excessive damages and legal errors, and the trial court granted the motion for new trial on damages alone unless the plaintiff consented to a remittitur of over $221,000,000. The plaintiff refused to accept the remittitur, and both parties appealed.

The court of appeal reversed, and in the process addressed the defendant's claim that he was entitled to a new trial on both liability and damages because of various legal errors made by the trial court. As an initial matter, the court of appeal held that the trial court did not err in allowing a jury to decide what the result would have been in the underlying action in the absence of the defendant's negligence. The plaintiff had a constitutional right to a jury trial, and the question of what would have happened if a negligent attorney had acted otherwise is a factual question to be decided by the jury. The court rejected the defendant's argument that the issues in the underlying action, which would have been decided by a specialized arbitration panel, were too complex for a lay jury to decide (*87 Cal. App. 4th 953, 969-971)* . The court then held that because it is the role of the fact finder to determine what would have happened in the underlying proceeding absent the malpractice, the trial court erred by allowing the plaintiff's expert to testify as to what the probable result of the underlying arbitration would have been. It was the jury's role to step into the shoes of the arbitrators, consider the facts of the underlying claims, and ultimately determine those claims on their merits, and the trial court abused its discretion in allowing the expert to decide and testify on this ultimate issue entrusted to the jury (*87 Cal. App. 4th 953, 973-974)* . The court also concluded that the error was prejudicial and warranted a new trial, because the trial court refused to give the jury instructions that would have permitted the jury to properly perform its function as the trier of the underlying arbitration. Specifically, partly because an expert told the jury how the arbitration was to proceed and what would have happened, the trial court refused to provide the jury with requested instructions on the rules and regulations that would have governed and been applied by the arbitrators, which prevented the jury from

independently deciding the substantive issues that would have faced the arbitration panel. In the absence of these instructions, and because the plaintiff's counsel relied heavily on the expert's testimony in closing arguments to the jury, a new trial was warranted (*87 Cal. App. 4th 953, 974-977)* .

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PART II. FORMS

2A-24A California Points & Authorities § 24A.65

§ 24A.65 Supporting Contention That Compensatory Damages for Lost Claim for Punitive Damages Are Not Allowed

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

A MALPRACTICE PLAINTIFF CANNOT RECOVER AS COMPENSATORY DAMAGES FROM A NEGLIGENT ATTORNEY THE VALUE OF A CLAIM FOR PUNITIVE DAMAGES THAT WOULD HAVE BEEN RECOVERED AGAINST THE DEFENDANT IN THE UNDERLYING ACTION IN THE ABSENCE OF THE ATTORNEY'S NEGLIGENCE.

No Compensatory Damages for Lost Punitive Damages Claim. A plaintiff in a legal malpractice action may not recover from an attorney, as compensatory damages, the amount of punitive damages the plaintiff alleges he or she would have obtained from the defendant in the underlying litigation giving rise to the malpractice (*Ferguson v. Lieff, Cabraser, Heimann & Bernstein (2003) 30 Cal. 4th 1037, 1041, 135 Cal. Rptr. 2d 46, 69 P.3d 965* ; *Expansion Pointe Properties Limited Partnership v. Procopio, Cory, Hargreaves & Savitch, LLP (2007) 152 Cal. App. 4th 42, 51-52, 61 Cal. Rptr 3d. 166, 2007 Cal. App. LEXIS 993* ; *Piscitelli v. Friedenberg (2001) 87 Cal. App. 4th 953, 979-983, 105 Cal. Rptr. 2d 88*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that the plaintiff in a legal malpractice action, as a matter of public policy, may not recover as compensatory damages from a negligent attorney the value of a punitive damages award the plaintiff could have recovered from the defendant in the underlying action in which the malpractice occurred.

This form can be modified to fit the particular procedural context in which the defendant is making the contention that the plaintiff may not recover for a lost claim for punitive damages, such as a motion for new trial or a motion for judgment notwithstanding the verdict.

The Supreme Court's holding in *Ferguson v. Lieff, Cabraser, Heimann & Bernstein* applies retroactively, even if the negligent attorney was retained prior to the date of the Supreme Court's decision [*see Expansion Pointe Properties Limited Partnership v. Procopio, Cory, Hargreaves & Savitch, LLP (2007) 152 Cal. App. 4th 42, 55-56, 61 Cal. Rptr. 3d 166* (issue waived on appeal, but concluding that retroactive application was proper nonetheless)].

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should include facts showing that the attorney was merely negligent and argue that allowing recovery for a lost claim for punitive damages allegedly caused by such negligence would be against public policy.

[3] Discussion of Authorities

[a] No Compensatory Damages for Lost Punitive Damages Claim

In ***Ferguson v. Lieff, Cabraser, Heimann & Bernstein*** *(2003) 30 Cal. 4th 1037, 135 Cal. Rptr. 2d 46, 69 P.3d 965* , the plaintiffs were two individuals out of approximately 12,000 who had been part of a class action lawsuit against an oil refinery based on a toxic chemical release. The parties in the class action stipulated to the certification of a mandatory, non-opt-out punitive damages class. The class action lawsuit eventually settled for $80,000,000, and as part of the settlement, the plaintiffs' attorneys stipulated to the dismissal of the punitive damages claims with prejudice. After receiving payment in the class action, the two individual plaintiffs then brought a legal malpractice action against the attorneys responsible for the settlement of the class action, alleging that their malpractice resulted in the loss of a much larger damages award, including a large punitive damages award. The trial court sustained demurrers to some causes of action and granted summary judgment for defendants on the others. The court of appeal affirmed, holding that as a matter of law, a malpractice plaintiff may not recover as compensatory damages the value of a lost claim for punitive damages. The California Supreme Court granted review solely to determine that issue, on which court of appeal opinions had disagreed.

The Supreme Court affirmed the court of appeal. The Court held that, for policy reasons, a legal malpractice plaintiff may not recover as compensatory damages the value of a claim for punitive damages that was lost in the underlying lawsuit due to the attorney's negligence (*30 Cal. 4th 1037, 1041)* . The Court first concluded that allowing a recovery for a lost punitive damages claim would not further the purpose of punitive damages, which is to serve a societal interest by punishing the wrongdoer and deterring further similar misconduct. A compensatory award of lost punitive damages would serve no societal interest, because the attorney has no control over the intentional misconduct justifying the underlying punitive damages claim, and therefore the underlying tortfeasor would not be deterred. Moreover, the amount of an award of punitive damages is properly measured by the gravity of the wrongdoer's conduct and the wealth of the wrongdoer. An award "transferred" to the negligent attorney, however, bears no relation to the gravity of the attorney's misconduct, nor does it bear any relation to the attorney's ability to pay (*30 Cal. 4th 1037, 1046-1047)* .

Second, the Court concluded that permitting recovery of a lost punitive damages claim would violate the public policy against speculative damages. Compensatory damages in a legal malpractice action are based on what a reasonable factfinder in the underlying action would have awarded, while punitive damages are based primarily on the moral outrage of the jury. Thus, a jury in a legal malpractice action would be in the position of having to determine what level of moral outrage a reasonable jury would have felt in the underlying action, a standard that the Court concluded was too speculative (*30 Cal. 4th 1037, 1048-1049)* .

Third, the Court similarly concluded that the standard of proof applicable to such claims would be too unwieldy to apply. Compensatory damages are based on proof by a preponderance of the evidence, while punitive damages are awarded only on clear and convincing evidence. Thus, a plaintiff in a malpractice action would have to prove by a

preponderance of the evidence that the jury in the underlying case would have found by clear and convincing evidence that the underlying defendant was guilty of oppression, fraud, or malice (*30 Cal. 4th 1037, 1049)* .

Fourth, the Court concluded that allowing the recovery of lost punitive damages would likely increase the cost of malpractice insurance, and at a minimum, encourage the practice of "defensive law" by attorneys trying to avoid malpractice claims at all cost (*30 Cal. 4th 1037, 1050)* . Because the issue came before the Supreme Court in the context of a class action lawsuit, the Court also noted that allowing the recovery of lost punitive damages in the class action context would hinder the ability of trial courts to manage and resolve mass tort suits. Allowing recovery would discourage the use of mandatory, non-opt-out punitive damages classes, because attorneys using such classes would face the prospect of multiple malpractice lawsuits by dissatisfied class members (*30 Cal. 4th 1037, 1049-1050)* .

In ***Expansion Pointe Properties Limited Partnership v. Procopio, Cory, Hargreaves & Savitch, LLP*** *(2007) 152 Cal. App. 4th 42, 51-52, 61 Cal. Rptr 3d. 166, 2007 Cal. App. LEXIS 993* , the issue was whether *Ferguson v. Lieff, Cabraser, Heimann & Bernstein (2003) 30 Cal. 4th 1037, 135 Cal. Rptr. 2d 46, 69 P.3d 965* , discussed *above*, applied to a retainer agreement signed before *Ferguson* was decided. In 1998, plaintiff hired defendant law firm to represent it in an Arizona lawsuit that had been brought against plaintiff by plaintiff's joint venturer. In that suit, plaintiff filed a counterclaim against its joint venturer for breach of contract, breach of fiduciary duty, and breach of the covenant of good faith and fair dealing, and sought punitive damages. The joint venturer moved for summary judgment on the punitive damages claim, and the trial court granted the motion. Plaintiff then sued the law firm in California for malpractice and breach of fiduciary duties, alleging that the law firm failed to fully understand Arizona law on punitive damages and intentionally failed to present certain evidence in support of plaintiff's punitive damages claim that would have defeated the summary judgment motion in the Arizona action and would have resulted in an award of punitive damages in plaintiff's favor in that action. The law firm moved for summary judgment, arguing that under *Ferguson*, plaintiff could not recover lost punitive damages. The trial court granted the law firm's motion.

On appeal, plaintiff argued that the trial court erred by applying *Ferguson* retrospectively, based on the fact that plaintiff and the law firm entered into their retainer agreement in 1998, five years before *Ferguson* was decided. Plaintiff argued that the change brought on by *Ferguson* unfairly undermined plaintiff's reasonable reliance on the previously existing state of the law, and imposed great hardships on plaintiff. Plaintiff further argued that it believed the law firm would face legal responsibility for the consequences of any negligence, including the loss of punitive damages.

The court of appeal first held that the law firm had no duty to learn about and advise plaintiff of the *Ferguson* opinion [*152 Cal. App. 4th 42, 55]* . While an attorney has a duty to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services [*Bus. & Prof. Code § 6068(m)*], an attorney does not have a duty to discuss the various types of recovery a client may obtain in a potential malpractice action against him or her [*152 Cal. App. 4th 42, 55-56]* .

In addition, the court held that plaintiff's contention that the retroactive application of *Ferguson* impaired its vested contract rights was erroneous. The court held that the retainer agreement was for the firm's representation of plaintiff in the Arizona litigation; it did not include terms pertaining to a potential malpractice action and there was no suggestion that plaintiff entered into it in reliance on pre-*Ferguson* law [*152 Cal. App. 4th 42, 56]* .

The factual and procedural background of ***Piscitelli v. Friedenberg*** *(2001) 87 Cal. App. 4th 953, 105 Cal. Rptr. 2d 88* , is discussed in *§ 24A.64[3][a]*. As part of the compensatory damages award, the jury awarded over $220,000,000 to the plaintiff as the value of an award of punitive damages that the plaintiff could have recovered from an investment firm if the attorney had not been negligent and the plaintiff's case against the firm had gone to arbitration. However, the court of appeal held that as a matter of policy, a malpractice plaintiff may not recover as compensatory damages the value of a lost claim for punitive damages. In *Merenda v. Superior Court (1992) 3 Cal. App. 4th 1, 12, 4 Cal. Rptr. 2d 87* , the court of appeal had allowed such compensatory damages for a lost punitive damages claim on the grounds that the amount of lost punitive damages is properly considered as part of the amount that would have been recovered but for

the malpractice defendant's negligence. However, in criticizing the *Merenda* analysis, the court in *Piscitelli* noted that punitive damages are private fines levied to punish reprehensible conduct and deter its future occurrence, rather than compensation for a plaintiff's loss. The plaintiff in an action is made "whole" through an award of compensatory damages, and punitive damages designed to punish a defendant constitute a windfall for a recovering plaintiff. The court then concluded that a windfall award designed to punish an actor for oppressive, malicious, or fraudulent conduct should not be imposed on a third party who is merely negligent as part of an attempt to make the plaintiff "whole" for the loss of the underlying claim (*87 Cal. App. 4th 953, 981)* . The court also noted that a punitive damages award is uniquely justified by and proportioned to the actor's particular reprehensible conduct and net worth, that transferring the award to a third party was inconsistent with the goal of punishment that underlies the award, and that this conclusion was consistent with California's law prohibiting indemnification of punitive damages by insurers (*87 Cal. App. 4th 953, 981-982)* .

Finally, the court rejected the conclusion that an attorney guilty of malpractice proximately causes the loss of a plaintiff's underlying punitive damages claim. Noting that "proximate cause" is concerned not with the fact of causation, but with "the various considerations of [public] policy that limit an actor's responsibility for the consequences of [his or her] conduct," the court was persuaded that policy considerations justified their decision not to hold a malpractice defendant liable for the value of a lost claim for punitive damages (*87 Cal. App. 4th 953, 982-983)* .

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2A-24A California Points & Authorities § 24A.66

§ 24A.66 Supporting Contention That Civil Code Section 1431.2 Does Not Apply to Damages Obtained in Legal Malpractice Action

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief*].

CIVIL CODE SECTION 1431.2, WHICH LIMITS LIABILITY FOR NONECONOMIC DAMAGES TO SEVERAL LIABILITY ONLY, DOES NOT APPLY IN A LEGAL MALPRACTICE ACTION, BECAUSE A MALPRACTICE ACTION IS NOT AN ACTION FOR "PERSONAL INJURY, PROPERTY DAMAGE, OR WRONGFUL DEATH."

***Civil Code Section 1431.2* Does Not Apply in Attorney Malpractice Action.** The limitation on liability for noneconomic damages to several liability only, found in *Civil Code Section 1431.2*, does not apply to a malpractice claim against an attorney (*Brandon G. v. Gray (2003) 111 Cal. App. 4th 29, 3 Cal. Rptr. 3d 330*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that *Civ. Code § 1431.2*, which limits liability for noneconomic damages to several liability only in actions for "personal injury, property damage, or wrongful death," does not apply in an attorney malpractice action.

This form may be combined with points pertaining to the specific procedural context in which counsel wishes to raise the contention that *Civ. Code § 1431.2* does not apply. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law stated. Thus, counsel should include facts showing the damages sought by the plaintiff, such as monetary damages for the value of a claim lost because the defendant failed to pursue the claim within the requisite limitations period, and

argue that these damages are not damages for personal injury, property damage, or wrongful death.

[3] Discussion of Authorities

[a] Civil Code Section 1431.2 Does Not Apply in Attorney Malpractice Action

In ***Brandon G. v. Gray*** *(2003) 111 Cal. App. 4th 29, 3 Cal. Rptr. 3d 330* , the plaintiffs' two children were sexually assaulted by the owner of a day care center. Prior to enrolling the children in the day care center, the plaintiffs had inquired with the county social services department and been told that no complaints had been lodged against the center and that it was apparently a good center. After their children were molested, the plaintiffs learned that this information was false and that several other complaints had been lodged against the center prior to the plaintiffs' inquiries. The plaintiffs hired an attorney and his law firm to represent the plaintiffs and their children in an action against the county for misrepresenting that no complaints had been filed against the center. Approximately eight months later, the plaintiffs were concerned that no action was being taken on their behalf by the attorneys, and they hired another attorney to take over the case. This second attorney filed a claim with the county, but did not file an application to file a late claim, which was required under the circumstances. The county rejected the claim, and after the plaintiffs filed suit, the court awarded summary judgment to the county on the grounds that no application to file a late claim was ever filed. The plaintiffs then sued both attorneys for malpractice. The first attorney and his firm settled in good faith for $49,000, and trial proceeded against the second attorney. Judgment was entered in favor of the plaintiffs, and damages were awarded for $41,724, which included economic damages and a proportion of the noneconomic damages, minus deductions for the share of the plaintiffs' own negligence and an offset for the settlement amount of the other defendants. Both parties appealed.

The court of appeal reduced the amount of damages owed by the attorney and affirmed. In reducing the amount of damages owed by the attorney, the court held that the trial court erred in applying *Civ. Code § 1431.2* to the action. That statute, which limits liability for noneconomic damages to several liability only, by its own terms applies only to actions for "personal injury, property damage, or wrongful death." The court held that an action for attorney malpractice is not one of those actions, but rather is an action to recover the value of a meritorious claim that was lost because of the attorney's failure to press the claim. Thus, *Civ. Code § 1431.2* was inapplicable (*111 Cal. App. 4th 29, 39)* . Given the inapplicability of *Civ. Code § 1431.2*, the court concluded that the nonsettling defendant was jointly and severally liable for the entire amount of the claim against the county, which was $90,000, minus a $9,000 reduction for the 10 percent contributory negligence attributed to the plaintiffs, and minus a $49,000 offset for the settlement. Therefore, the defendant's total liability should have been $32,000 (*111 Cal. App. 4th 29, 39-40)* .

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§ 24A.66A Opposing Contention That Civil Code Section 1431.2 Does Not Apply to Damages Obtained in Legal Malpractice Action--Primary Damages Sought are Noneconomic

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

CIVIL CODE SECTION 1431.2 REQUIRES APPORTIONMENT OF FAULT IN A LEGAL MALPRACTICE ACTION THAT SEEKS PRIMARILY NONECONOMIC DAMAGES.

Proposition 51 Applicable to Legal Malpractice Action Seeking Primarily Noneconomic Damages. *Civ. Code § 1431.2* can be applied to an attorney malpractice action that seeks primarily noneconomic damages, such as damages for emotional distress caused when a criminal defense attorney's malpractice resulted in his client's criminal conviction (*Ovando v. County of Los Angeles (2008) 159 Cal. App. 4th 42, 73-74, 71 Cal. Rptr. 3d 415*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that Proposition 51, as codified in *Civ. Code § 1431.2*, does not apply to a legal malpractice action because a legal malpractice action is not an action for "personal injury." The basis for the opposition is that the damages sought by plaintiff are primarily noneconomic damages, such as damages for emotional distress, and as such, the cause of action is an action for "personal injury."

This form may be combined with points pertaining to the specific procedural context in which counsel wishes to raise the contention that *Civ. Code § 1431.2* applies. This form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law stated. Thus, counsel should include facts showing the types of damages sought by plaintiff, such as damages for

emotional distress, and argue that the damages sought are primarily damages for "personal injury" under *Civ. Code § 1431.2*.

[c] Opposing Memoranda

This form may be submitted in opposition to The points discussed in *§ 24A.66*.

[3] Discussion of Immunities

[a] Proposition 51 Applicable to Legal Malpractice Action Seeking Primarily Noneconomic Damages

In *Ovando v. County of Los Angeles (2008) 159 Cal. App. 4th 42, 71 Cal. Rptr. 3d 415* , plaintiff was a former criminal defendant who sued his criminal defense attorney and the attorney's employer, the county, for attorney malpractice resulting in his false conviction. A jury verdict was rendered in favor of plaintiff and he was awarded substantial damages, but the trial court granted a new trial because of juror misconduct. The trial court also ruled that Proposition 51, as codified at *Civ. Code § 1431.2*, applied to an attorney malpractice action such as this in which the plaintiff seeks damages primarily for emotional distress, and as such a share of fault should have been apportioned to two police officers who planted false evidence against plaintiff. Both parties appealed.

The court of appeal affirmed the new trial order. While the appeals from the judgment were dismissed as moot, the court discussed the issue of the proper apportionment of fault in a legal malpractice action in which the plaintiff seeks primarily noneconomic damages. The court discussed the earlier holding in *Brandon G. v. Gray (2003) 111 Cal. App. 4th 29, 3 Cal. Rptr. 3d 330* , discussed in *§ 24A.66[3][a]*, that Proposition 51 did not apply in an attorney malpractice action because the damages sought were for a lost legal claim rather than for "personal injury." The court of appeal in the instant case noted, however, that the court in *Brandon* was faced with attorney malpractice that caused the loss of an underlying civil claim. In the instant case, by contrast, plaintiff was seeking primarily damages for emotional distress caused by his wrongful criminal conviction. As such, according to the court, the cause of action was clearly one for "personal injury" within the meaning of *Civ. Code § 1431.2* and apportionment of fault to the police officers who planted false evidence was required in order to apportion liability for noneconomic damages properly (*159 Cal. App. 4th 42, 73-74)* .

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 24A ATTORNEYS AT LAW: MALPRACTICE
PART II. FORMS

2A-24A California Points & Authorities § 24A.67

§ 24A.67 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 659] in Legal Malpractice Action--Expert Testimony Not Necessary

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*]	)	MEMORANDUM IN OPPOSITION TO MOTION
Plaintiff,	)	FOR NEW TRIAL
vs.	)	[Limited Civil Case]
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____

_____

DEFENDANT'S MOTION FOR A NEW TRIAL SHOULD BE DENIED BECAUSE EXPERT TESTIMONY REGARDING MALPRACTICE DEFENDANT'S REQUIRED STANDARD OF CARE AND BREACH OF THAT STANDARD IS UNNECESSARY WHEN DEFENDANT'S PERFORMANCE IS CLEARLY CONTRARY TO ESTABLISHED STANDARDS.

Expert Testimony Unnecessary. When an attorney's performance is so clearly contrary to established standards of professional conduct that a trier of fact may find professional negligence without expert testimony, such testimony is not required (*Day v. Rosenthal (1985) 170 Cal. App. 3d 1125, 1146, 217 Cal. Rptr. 89*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted by plaintiff in opposition to a defendant's motion for a new trial made on the ground that plaintiff failed to submit expert testimony regarding defendant's standard of care and breach of that standard. It generally opposes a motion for new trial that would be supported by The points in *§ 24A.62*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show that defendant's conduct clearly violated particular Rules of Professional Conduct or statutes governing the practice of law, or both [*see, e.g., Bus. & Prof. Code § 6106.5* (fraudulent conduct in connection with insurance claim or worker's compensation claim); *Rules of Professional Conduct, Rule 4-100* (requiring preservation by attorney of identity of client's property and funds)].

[b] Related Pleading and Practice Forms

For a notice of intention to move for a new trial and an order denying the motion, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[c] Related Memoranda

For memoranda relating to motions for new trial generally, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] Expert Testimony Unnecessary

In ***Day v. Rosenthal*** *(1985) 170 Cal. App. 3d 1125, 217 Cal. Rptr. 89* , defendant attorney appealed from a judgment in favor of former clients in which defendant was found liable for legal malpractice, breach of fiduciary duty, fraud, and abuse of process. The trial court had made numerous factual findings as to defendant's misconduct. Among other things, defendant, as business manager and investment counselor to plaintiffs, had misappropriated plaintiffs' funds through a large number of sham investments. In so doing, he concealed information from the clients and, in many instances, intentionally misled the clients. Several of the investments resulted in major losses to the clients. On appeal, defendant challenged the sufficiency of the evidence on several grounds, including the ground that his negligence was not proven at trial through expert testimony.

The court of appeal affirmed the judgment (*170 Cal. App. 3d 1125, 1179)* . The court remarked that it required no expert to tell the trial court that defendant's conduct was attorney negligence. Expert testimony is needed when it will assist the trier of fact. It is not appropriate in all cases. When the attorney's performance is so clearly contrary to established standards that a trier of fact may find professional negligence without expert testimony, such testimony is not required (*170 Cal. App. 3d 1125, 1146)* . The standards governing an attorney's ethical duties are conclusively established by the Rules of Professional Conduct and cannot be changed by expert testimony. In the instant case, the

court of appeal found that defendant's numerous, blatant, and egregious violations of attorney responsibility were not breaches of legal technicalities for which expert testimony is required. Rather, defendant's conduct constituted violations of professional standards of which the trial court was required to take notice (*170 Cal. App. 3d 1125, 1147)* .

[4] Additional Authorities

[a] Expert Testimony Unnecessary

In *Stanley v. Richmond (1995) 35 Cal. App. 4th 1070, 41 Cal. Rptr. 2d 768* , a client brought an action against the attorney who represented her in a marital dissolution proceeding on the ground that the attorney breached the professional standard of care in failing to advise her about the consequences of ceding her interest in her ex-husband's Veterans' Administration pension. At the close of plaintiff's evidence, the trial court granted defendant's motion for nonsuit, ruling that plaintiff was required to present expert testimony on the applicable standard of care for family law attorneys. The appellate court reversed, stating that if an attorney's negligence is readily apparent from the facts of the case, then the testimony of an expert may not be necessary. With regard to the advice about the pension, the court noted that this was not an unsettled question of law, and that the defendant's advice demonstrated a total failure to perform even the most perfunctory research on the legal issue. The court concluded that the testimony of a family law expert was not necessary to establish whether the defendant was negligent by failing to perform a simple research task, and that it was a question of fact within the purview of a jury to decide whether the failure to conduct such research was a violation of the applicable standard of care (*35 Cal. App. 4th 1070, 1092-1095)* .

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 24A ATTORNEYS AT LAW: MALPRACTICE
PART II. FORMS

2A-24A California Points & Authorities § 24A.68

§ 24A.68 Supporting Motion for Dismissal in Legal Malpractice Action--Attorney-Client Privilege Prevents Proper Defense of Suit

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief*].

PLAINTIFF'S LEGAL MALPRACTICE ACTION SHOULD BE DISMISSED BECAUSE DEFENDING THE ACTION WOULD REQUIRE DEFENDANT TO REVEAL CONFIDENTIAL INFORMATION RELATED TO DEFENDANT BY PLAINTIFF CONCERNING PLAIN TIFF'S OWN CLIENTS, AND THOSE CLIENTS HAVE NOT CONSENTED TO WAIVE THE ATTORNEY-CLIENT PRIVILEGE THAT PROTECTS THAT INFORMATION.

Attorney-Client Privilege Prevents Proper Defense of Suit. A legal malpractice action is subject to dismissal if: the malpractice plaintiff is also an attorney; the alleged malpractice consists of negligence in providing faulty legal advice to the plaintiff when the plaintiff was consulting the defendant in connection with the plaintiff's representation of a client; presenting a proper defense of the malpractice claim would require the defendant to reveal confidential information about the plaintiff's client; and that client has not consented to waive the attorney-client privilege (*Solin v. O'Melveny & Myers (2001) 89 Cal. App. 4th 451, 463, 467, 107 Cal. Rptr. 2d 456*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion for dismissal in a legal malpractice action brought by a plaintiff who is also an attorney and who alleges that the defendant provided faulty legal advice when the plaintiff consulted the defendant concerning the plaintiff's representation of a client. The grounds for the motion are that the defendant cannot provide a proper defense to the action without revealing confidential information that the plaintiff revealed to the defendant concerning the plaintiff's client. If the client has not waived the attorney-client privilege protecting that confidential information, fairness requires that the malpractice action be dismissed.

Although the case that provides the basis for this form involved a motion for dismissal brought by the malpractice plaintiff's clients, who had intervened in the malpractice action to protect the confidential information that they had revealed to their attorney (the malpractice plaintiff), the form should be appropriate for use by the malpractice defendant, if the malpractice defendant can provide evidence that the malpractice plaintiff's client has not waived the attorney-client privilege.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should include facts showing that the confidential information about the plaintiff's client played a role in determining the legal advice provided by the defendant to the plaintiff, that the defendant cannot provide a proper defense without revealing that information, and that the client has not waived and is asserting the attorney-client privilege protecting that information.

[3] Discussion of Authorities

[a] Attorney-Client Privilege Prevents Proper Defense of Suit

In ***Solin v. O'Melveny & Myers*** *(2001) 89 Cal. App. 4th 451, 107 Cal. Rptr. 2d 456* , the plaintiff was an attorney who had been serving as outside counsel for clients who were subjects of a federal criminal grand jury investigation. In the course of negotiating the terms under which he would continue to represent the clients, the plaintiff consulted his own counsel because he was concerned that his continued representation might implicate him in any criminal proceedings that might be brought against the clients. Although the attorneys he initially consulted assured him that his conduct was ethical and proper, the plaintiff raised additional concerns about his contractual relationship with his clients and his fees. To protect himself against a future contract dispute, he sought advice on the best way to structure the retainer contract. The attorneys he had been consulting referred him to the defendant, another law firm, for advice on these matters. Consequently, the plaintiff consulted an attorney at this firm seeking additional advice on the criminal implications of his continued representation of his clients, as well as the renewal of his retainer agreement. The eventual malpractice action stemmed from this consultation and the advice given to the plaintiff. The plaintiff alleged that the defendant negligently failed to call attention to a New York line of cases dealing with general retainers that would have benefitted him in structuring his renewal agreement with his clients. The defendant countered that the parties did not discuss the payment terms of the plaintiff's client's renewal retainer agreement, except as those terms affected the criminal law advice rendered by the defendant. After the malpractice action was filed, the plaintiff's clients intervened and, with the defendant, entered into a stipulation and order of confidentiality presented to the trial court to protect the clients' confidential information, which had been revealed by the plaintiff during his consultation with the defendant. The clients moved to dismiss the malpractice action or, in the alternative, for a protective order precluding the disclosure of their privileged and confidential information. The motion to dismiss was based on the defendant's stated intent to disclose the clients' confidential information as part of its defense against the plaintiff's claim that the defendant was negligent in advising him. The trial court ruled that the defendant could not effectively defend itself without revealing the clients' secrets and dismissed the action. The plaintiff appealed.

The court of appeal affirmed. The court agreed that proper resolution of the issues in the malpractice claim would require the defendant to reveal precisely what the plaintiff said to the defendant when the plaintiff sought the defendant's legal advice, in order for the defendant to explain precisely why it gave the particular legal advice to the plaintiff. However, this would require revealing confidential information about the plaintiff's clients, and those clients has asserted the attorney-client privilege. Therefore, if the defendant attempted to introduce evidence of the clients' confidential information, the plaintiff would be under an obligation to object to the introduction of that evidence and, absent an applicable statutory exception to the attorney-client privilege, the trial court would be obligated to sustain the objection. Because the malpractice defendant in this situation is thus precluded from presenting all relevant evidence, dismissal of the plaintiff's malpractice action was proper (*89 Cal. App. 4th 451, 463)* . It was irrelevant that the

plaintiff had stated that he would prove his case without resort to revealing the clients' confidential information. The relevant issue was whether the defendant would need to reveal the confidential disclosures to defend the action (*89 Cal. App. 4th 451, 462-463)* .

NOTE:

Dismissal for inability to present a defense due to client confidences should be reserved for rare cases, and the court must consider at least four factors before deciding to dismiss. First, the relevant evidence must be the client's confidential information and the client must be insisting that the information remain confidential. Second, the confidential information must be highly material to the defense. Third, the court must determine whether it is able to protect the information, and thus allow the action to proceed, through use of such measures as sealing or protective orders, limited admissibility or use orders, or in camera proceedings. Finally, the court should consider whether it would be fundamentally unfair to allow the action to proceed, as might be the case if the plaintiff has brought a suit that, by its very nature, would require the defendant to reveal confidential information to defend, and the plaintiff was the party who provided defendant with the confidential information [*Dietz v. Meisenheimer & Herron (2009) 177 Cal. App. 4th 771, 792-793, 99 Cal. Rptr. 3d 464*].

California Points & Authorities

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 25 ATTORNEY'S FEES

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§ 25.syn Synopsis to Chapter 25: ATTORNEY'S FEES

§ 25.01 Scope of Chapter

§ 25.02 Governing Law

§ 25.03 How to Use Forms in This Chapter

[1] Page Limits on Memoranda

[2] Using the Forms to Build a Draft Memorandum

§ 25.04 Recovery of Attorney's Fees as Costs

§ 25.05 Bad Faith Conduct in Fee Disputes

§ 25.06 Resolution of Fee Disputes

[1] Voluntary Mediation

[2] Mandatory Arbitration

[3] Judicial Action

[4] Cumis Fees

§ 25.07 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

[2] Related Points and Authorities Chapters

§§ 25.08-25.29 [Reserved]

§ 25.30 Supporting Contention That Attorney Has Valid Contractual Claim for Compensation [Code Civ. Proc. § 1021]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Validity of Contract

[b] Full Performance by Attorney

[c] Validity of Oral Contract

[d] Legal Services Performed by Attorney or Firm Not Licensed in California

[4] Additional Authorities

[a] Full Performance by Attorney

§ 25.31 Supporting Contention That Attorney Has Valid Claim for Compensation Based on Contingent Fee Agreement

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Contingent Fee Agreement Is Legal and Valid Contract

[b] Validity of Oral Contingency Fee Contract for Recovery of Workers' Compensation Benefits

[c] Validity of Contingency Fee Contract Not Involving Plaintiff in Damages Action

[4] Additional Authorities

[a] Contingent Fee Agreement Is Legal and Valid Contract

§ 25.32 Supporting Contention That Attorney Has Valid Claim for Compensation Based on Reasonable Value of Services Rendered to Client--When Employment Agreement Makes No Provision for Payment of Specified Fee

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Contract Without Specified Fee Provision

[4] Additional Authorities

[a] Contract Without Specified Fee Provision

§ 25.33 Supporting Contention That Attorney Has Valid Claim for Compensation Based on Reasonable Value of Services Rendered to Client--Attorney Unable to Fully Perform Without Fault of Either Party

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Attorney Unable To Fully Perform Without Fault of Either Party

§ 25.34 Supporting Contention That Attorney Has Valid Claim for Compensation Based on Reasonable Value of Services Rendered to Client--Attorney Discharged by Client

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Attorney Discharged by Client

§ 25.35 Supporting Contention That Attorney Has Valid Claim for Compensation Based on Reasonable Value of Services Rendered to Client--Pro Rata Distribution of Contingent Fee

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Pro Rata Distribution of Contingent Fee.

§ 25.36 Supporting Contention That Attorney Has Valid Claim for Compensation Based on Reasonable Value of Services Rendered to Client--Attorney-Client Contract Cannot Be Enforced

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Invalid Contract

§ 25.37 Supporting Contention That Attorney Has Valid Claim for Compensation Based on Reasonable Value of Services Rendered to Client--Attorney Entitled to Reasonable Fee Even Though Fee Contract Does Not Comply With Writing or Other Requirements of Bus & Prof. Code § 6147 or 6148

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Attorney Is Entitled to Collect Reasonable Fee

[4] Additional Authorities

[a] Attorney Is Entitled to Collect Reasonable Fee

§ 25.38 Supporting Contention That Attorney Has Valid Claim for Compensation Based on Reasonable Value of Services Rendered to Client--Services Performed Out-of-State by Attorney or Firm Not Licensed to Practice in California

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Out-of-State Attorney or Firm Not Licensed to Practice Law in California Is Entitled to Compensation for Services Performed Out-of-State, Not Constituting the Practice of Law in California

§ 25.39 Supporting Contention That Attorney's Fees Sought Are Reasonable

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] General Factors to Be Considered

[b] Customary Fee in Locality

[c] Experience, Reputation, and Ability of Attorney

[d] Contingent Versus Fixed Fee

[e] Discretion of Trial Court

[f] Profit Margin Irrelevant to Determination of Unconscionable Fee

[4] Additional Authorities

[a] General Factors to Be Considered

[b] Contingent Versus Fixed Fee

[c] Discretion of Trial Court

§ 25.40 Supporting Contention That Attorney Has Valid Contractual Lien on Judgment or Recovery

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practices Discussion and Forms

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Lien Created by Express Contract

[b] Attorney's Lien May Be Created by Implication

[c] Lien Survives Discharge

[d] Attorney Lien Survives Client's Later Bankruptcy Absent Its Disallowance or Avoidance During Bankruptcy

[e] Attorney's Contractual Lien on Proceeds of Judgment Has Priority Over Subsequent Judgment Creditor Liens

[f] Debtor With Notice of Attorney's Lien Not Discharged by Payment to Client

[g] Lien On Proceeds of Unrelated Litigation

[h] Notice of Lien Not Required

[i] Lien Exists Without Judgment From Independent Action

[j] Recovery of Fee Is Permitted Even if Lien Is Invalid.

[k] Attorney's Contractual Lien on Proceeds of Judgment Has Priority Over Medical Lien

[l] Contingency Fee Agreement Need Not Comply With Cal. Rules of Prof. Conduct, Rule 3-300 to Create Valid Lien

[4] Additional Authorities

[a] Lien Created by Express Contract

[b] Attorney's Lien May Be Created by Implication

[c] Debtor With Notice of Attorney's Lien Not Discharged by Payment to Client

§ 25.41 Supporting Contention That Attorney Has Valid Claim for Compensation for Costs of Lawsuit and Other Reasonable Expenses

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Reimbursement for Costs of Lawsuit

[b] Reimbursement for Specific Reasonable Expenses Agreed to by Parties

§§ 25.42-25.49 [Reserved]

§ 25.50 Opposing Contention That Contingent Fees for Medical Malpractice Plaintiff's Attorney Are Limited by Bus. & Prof. Code § 6146--Plaintiff Gave Knowing Consent to Alternative Litigation Strategies

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Limitation Exclusive to Actions Based on Professional Negligence

[b] Knowing Consent as Result of Attorney Disclosure

§ 25.51 Opposing Contention That Attorney Has Valid Contractual Claim for Compensation--Attorney Has Not Performed Under Terms of Contract

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Attorney Has Not Performed Under Terms of Contract

§ 25.52 Opposing Contention That Attorney Has Valid Contractual Claim for Compensation--Fees Were Incurred for Work Performed in California by Attorney or Firm Not Licensed to Practice Law in California [Bus. & Prof. Code § 6125]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[d] Related Pleading and Practice Forms

[e] Related Memoranda

[3] Discussion of Authorities

[a] "Practicing Law" in California

§ 25.53 Opposing Contention That Attorney Has Valid Claim for Compensation Based on Contingent Fee Contract--Failure to Comply With Bus. & Prof. Code § 6147(a)

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Contract Voidable for Failure to Comply With Statute

[b] Effect of Disbursements and Costs

[c] Payment for Related Matters Not Covered by Contract

[d] Negotiable Fee

[e] Statement of Errors and Omissions Coverage or Written Guarantee Agreement

[f] Modifications

§ 25.54 Opposing Contention That Attorney Has Valid Claim for Compensation Based on Noncontingent Fee Contract--Failure to Comply With Bus. & Prof. Code § 6148(a), (b)

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Contract Voidable for Failure to Comply With Statute

[b] Contents of Contract

§ 25.55 Opposing Contention That Discharged Attorney Entitled to Reasonable Value of Services Rendered Under Contingent Fee Contract--Stated Contingency Has Not Occurred

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Stated Contingency Has Not Occurred

[4] Additional Authorities

[a] Stated Contingency Has Not Occurred

§ 25.56 Opposing Contention That Attorney Entitled to Reasonable Value of Services Rendered Under Contingent Fee Contract--Attorney Voluntarily Abandoned Case Without Justifiable Cause

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Attorney Voluntarily Abandoned Case Without Justifiable Cause

[4] Additional Authorities

[a] Attorney Voluntarily Abandoned Case Without Justifiable Cause

§ 25.57 Opposing Contention That Attorney's Fees Sought Are Reasonable

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Attorney's Fees Are Excessive

[b] Court May Rely on Own Experience in Determining Value of Services

[4] Additional Authorities

[a] Attorney's Fees Are Excessive

[b] Court May Rely on Own Experience in Determining Value of Services

§ 25.58 Opposing Contention That Attorney Has Lien on Judgment or Recovery

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Attorney's Lien Not Created as Matter of Law

[b] Enforceable Lien Dependent on an Existing Obligation

[c] No Retaining Lien on Property Placed in Trusteeship

[d] Attorney Cannot Unilaterally Determine Fee

[e] Discharged Attorney's Independent Action Barred by Collateral Estoppel

[4] Additional Authorities

[a] Attorney's Lien Not Created as Matter of Law

[b] Enforceable Lien Dependent on an Existing Obligation

[c] No Retaining Lien on Property Placed in Trusteeship

[d] Attorney Cannot Unilaterally Determine Fee

§ 25.59 Opposing Contention That Attorney Entitled to Reimbursement for Expenses Other Than Normal Costs of Lawsuit

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Reimbursement for Costs of Lawsuit

[b] No Reimbursement for Attorney's Personal and Travel Expenses

[c] No Implied Authority to Hire Others on Behalf of Client

[4] Additional Authorities

[a] No Implied Authority to Hire Others on Behalf of Client

§§ 25.60-25.69 [Reserved]

§ 25.70 Supporting Contention That Attorney-Client Employment Contract Construed in Favor of Client

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Construction of Contract in Client's Favor

[4] Additional Authorities

[a] Construction of Contract in Client's Favor

§ 25.71 Supporting Contention That Contingent Fees for Medical Malpractice Plaintiff's Attorney Are Limited by Bus. & Prof. Code § 6146--Excessive Fees Retained by Attorney After Settlement, Arbitration, or Judgment

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Contingency Fee Limitations

[b] Constitutionality of Limitations

[c] Limitations Not Waivable by Client

[4] Additional Authorities

[a] Contingency Fee Limitations

[b] Constitutionality of Limitations

§ 25.72 Supporting Contention That Client May Assert Attorney's Malpractice as Offset to Attorney's Fee Claim

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Attorney Malpractice as Offset to Fee Claim

§ 25.73 Supporting Contention That Action for Recovery of Attorney's Fees Should Be Dismissed--Attorney Failed to Provide Notice of Right to Arbitration [Bus. & Prof. Code § 6201(a); Cal. State B. Rules Proc. Hearing Fee Arb., Rule 4.0]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Attorney's Failure to Provide Notice Does Not Deprive Court of Jurisdiction

[b] Notice of Right to Arbitration Ineffective Where Given Before Actual Fee Dispute Arises

[c] Notice of Right to Arbitration Must be Given to Attorney's Debtor on Account of Services

§ 25.74 Supporting Contention That Fee Dispute Is Not Subject to Mandatory Arbitration [Bus. & Prof. Code §§ 6200-6206]--Statutory Exclusion Applies [Bus. & Prof. Code § 6200(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Evidence Relating to Claims of Malpractice and Professional Conduct

§ 25.75 Supporting Contention That Fee Dispute Is Not Subject to Mandatory Arbitration [Bus. & Prof. Code §§ 6200-6206]--Client Has Waived Right to Mandatory Fee Arbitration [Bus. & Prof. Code § 6201(a), (b), (d); Cal. State B. Rules Proc. for Hearing Fee Arb., Rule 8.0]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Client Sought Judicial Resolution of Fee Dispute or Other Affirmative Relief

§ 25.76 Supporting Contention That Client Cannot Terminate Mandatory Arbitration of Fee Dispute [Bus. & Prof. Code §§ 6200-6206]--Client Has Elected Binding Arbitration

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Arbitrator May Continue Arbitration Proceedings When Client Attempts to File Pleading Seeking Affirmative Relief

[b] Court May Decline to Terminate Arbitration Proceedings When Client Attempts to File Pleading Seeking Affirmative Relief

§ 25.77 Supporting Contention That Relief From Fee Arbitration Award Under Code Civ. Proc. § 473 Is Proper

[1] FORM

[2] Comments

[a] Use of Form

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2A-25 California Points & Authorities § 25.01

§ 25.01 Scope of Chapter

This chapter contains memoranda for use in actions involving disputes between attorneys and clients over the payment of attorney's fees and costs. The chapter does not cover the recovery of attorney's fees from an opposing party in actions or proceedings. For memoranda relating to the recovery of attorney's fees from an opposing party, see Ch. 60, *Costs* . For memoranda relating to recovery of attorney's fees as damages in insurance bad-faith actions, see Ch. 120, *Insurance* , Part III.

This chapter includes memoranda pertaining to an attorney's entitlement to compensation under a fee agreement [*see §§ 25.30*, *25.31*, *25.51 -25.54*, *25.70*], or for the reasonable value of services in the absence of such an agreement [*see §§ 25.32 -25.38*, *25.55 -25.56*]. It also includes memoranda pertaining to the issue of the reasonableness of an attorney's claimed fees [*see §§ 25.39*, *25.57*, *25.72*], the attorney's entitlement to a lien on the client's recovery [*see §§ 25.40*, *25.58*], an attorney's claim for litigation costs or expenses [*see §§ 25.41*, *25.59*], and limitations on attorney's fees in medical malpractice actions [*see §§ 25.50*, *25.71*]. Also contained in this chapter are memoranda relating to arbitration of fee disputes [*see §§ 25.73 -25.77*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewLegal EthicsClient RelationsAttorney FeesExcessive FeesLegal EthicsClient RelationsAttorney FeesFee AgreementsTortsMalpractice & Professional LiabilityHealthcare Providers

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§ 25.02 Governing Law

The provisions of *Code Civ. Proc. § 1021* govern recovery of attorney's fees generally. Limits on contingent fees in medical malpractice actions are governed by *Bus. & Prof. Code § 6146*. Requirements for contingent fee agreements, including the requirement that the agreement be in writing, are set forth in *Bus. & Prof. Code § 6147*. Requirements for certain other fee agreements, also including the requirement that the agreement be in writing, are set forth in *Bus. & Prof. Code § 6148*. Treatment of fee agreements as confidential communications is governed by *Bus. & Prof. Code § 6149*. The fee arbitration program administered by the Board of Governors of the State Bar, which is mandatory for an attorney if commenced by the client, is governed by *Bus. & Prof. Code §§ 6200-6206*.

The State Bar has adopted Rules of Professional Conduct to regulate the professional conduct of California attorneys [*see Bus. & Prof. Code § 6077*; *Cal. Rules Prof. Conduct, Rule 1-100*]. Several of the Rules relate to the payment of attorney's fees. *Cal. Rules Prof. Conduct, Rule 4-200* prohibits attorneys from charging an unconscionable fee. *Cal. Rules Prof. Conduct, Rule 3-310(F)* restricts an attorney from accepting compensation from a nonclient for representing a client. *Cal. Rules Prof. Conduct, Rule 3-700(D)(2)* requires an attorney to repay unearned fees once representation has terminated.

The Rules of Procedure for the Hearings of Fee Arbitrations by the State Bar of California govern the fee arbitration program administered by the Board of Governors of the State Bar. This program is also governed by Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs, Rules I-IV.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesLegal EthicsClient RelationsAttorney FeesExcessive FeesLegal EthicsClient RelationsAttorney FeesFee AgreementsLegal EthicsClient RelationsConfidentiality of Information

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2A-25 California Points & Authorities § 25.03

§ 25.03 How to Use Forms in This Chapter

[1] Page Limits on Memoranda

One of the more significant drafting requirements to keep in mind are page limits: supporting and opposing memoranda filed in discovery motion proceedings may not exceed 15 pages. A reply or closing memorandum may not exceed 10 pages. Exhibits, declarations, attachments, the table of contents, the table of authorities, and the proof of service are excluded from these page limits. Any party must obtain leave of court to file a longer memorandum [*see Cal. Rules of Ct., Rule 3.1113*]. These and other drafting requirements are discussed in further detail in Ch. 1, *Writing Legal Memoranda and Briefs* .

[2] Using the Forms to Build a Draft Memorandum

Forms in this chapter are in the form of contentions based on particular procedural and substantive points of law, and may be combined with each other depending on the facts and issues involved in a particular case. They may also be combined with any appropriate procedural forms, depending on the context in which they are raised. For example, forms supporting a contention that an attorney has a valid claim for compensation may be raised in the context of opposing or supporting a motion for summary judgment and, in that context, might be combined with appropriate procedural forms in Ch. 221, *Summary Judgments* . The contentions may also be adapted for use in a trial or appellate brief or be used to research office memoranda and jury instructions. Whatever procedural context or paper is involved, counsel should add argument that shows the relationship between the facts of the case and the points of law stated.

For a discussion of how to use the forms in this chapter to draft a memorandum or a trial or appellate brief, and for a sample of a complete memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesLegal EthicsClient RelationsAttorney FeesExcessive FeesLegal EthicsClient RelationsAttorney FeesFee

Agreements

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2A-25 California Points & Authorities § 25.04

§ 25.04 Recovery of Attorney's Fees as Costs

If the attorney and client have entered into a written compensation agreement that includes a clause pursuant to *Civ. Code § 1717* that provides for the recovery of attorney's fees and costs in any future litigation concerning the compensation, and the attorney is later the prevailing party in an action for fees under that agreement, he or she may not recover attorney's fees as an item of costs pursuant to *Civ. Code § 1717* if he or she acted proper in the action on the fee agreement. The attorney, by not engaging an attorney to represent himself or herself, does not "incur" any obligation to pay attorney's fees and may not recover to compensate for his or her own time spent on the case or for business opportunities lost by reason of the time spent on the case [*Trope v. Katz (1995) 11 Cal. 4th 274, 282, 292-293, 45 Cal. Rptr. 2d 241, 902 P.2d 259]* . For detailed discussion of the recovery of attorney's fees as an item of Cost, *see* California Forms of Pleading and Practice, Ch. 174, *Costs and Attorney's Fees* . For memoranda relating to the recovery of attorney's fees as an items of costs, *see* California Forms of Pleading and Practice, Ch. 60, *Costs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesAmerican RuleCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewLegal EthicsClient RelationsAttorney FeesFee Agreements

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2A-25 California Points & Authorities § 25.05

§ 25.05 Bad Faith Conduct in Fee Disputes

A client may not recover in a separate lawsuit attorney's fees and costs from a former attorney that the client has incurred defending against that attorney's attempt to collect or retain an unreasonable fee [*Schneider v. Friedman, Collard, Poswall & Virga (1991) 232 Cal. App. 3d 1276, 1281-1285, 283 Cal. Rptr. 882]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewLegal EthicsClient RelationsAttorney FeesExcessive FeesLegal EthicsClient RelationsBilling & Collection

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§ 25.06 Resolution of Fee Disputes

[1] Voluntary Mediation

Mediation is a voluntary consensual process for both an attorney and his or her client, based on direct negotiations between the attorney and the client [*Bus. & Prof. Code § 6200(c)*]. Local bar associations are authorized to sponsor discipline mediation programs to resolve certain complaints against attorneys, and to charge a reasonable administrative fee for the purpose of offsetting the costs of administration [*Bus. & Prof. Code § 6086.14(a)*].

Voluntary mediation is an extension of the negotiated settlement process. All discussions and offers of settlement are confidential, and may not be disclosed in any subsequent arbitration or other proceeding [*Bus. & Prof. Code § 6200(h)*].

[2] Mandatory Arbitration

Unless the client has agreed in writing to arbitration under Chapter 4, Article 13, of the Business and Professions Code, of all disputes concerning fees, costs, or both, mandatory arbitration is a procedure that a client may select, without the consent of the attorney, in order to resolve a fee or cost dispute [*Bus. & Prof. Code § 6200(c), 6201*]. This procedure is designed to alleviate the disparity in bargaining power in attorney fee matters by providing an effective, inexpensive remedy to a client that does not require the hiring of a second attorney [*Manatt, Phelps, Rothenberg & Tunney v. Lawrence (1984) 151 Cal. App. 3d 1165, 1174, 199 Cal. Rptr. 246* ; *see also Law Offices of Dixon R. Howell v. Valley (2005) 129 Cal. App. 4th 1076, 1086-1087, 29 Cal. Rptr. 3d 499* ; *Alternative Systems, Inc. v. Carey (1998) 67 Cal. App. 4th 1034, 1043]* . The public protections established by *Business and Professions Code § 6200 et seq.* cannot be contravened by private agreement between the attorney and the client [*Alternative Systems, Inc. v. Carey (1998) 67 Cal. App. 4th 1034, 1044]* .

Arbitration is formally initiated by the filing of a request for arbitration on the approved State Bar form [Cal. State B. Rules Proc. for Hearing Fee Arb., Rule 15.1]. Any reply must be filed within 20 days of the service of the request [Cal. State B. Rules Proc. for Hearing Fee Arb., Rule 17.1].

When resolving a fee dispute, parties generally cannot pursue both litigation and arbitration simultaneously. For example, if a client elects arbitration, any existing civil action by the attorney to collect fees or cost is automatically

stayed until the arbitration's conclusion [*Bus. & Prof. Code § 6201(c)*; Cal. State B. Rules Proc. for Hearing Fee Arb., Rule 9.0]. The stay can be lifted only if the attorney shows that the issues are not appropriate for arbitration [*Bus. & Prof. Code § 6201(c)*].

Parties may agree to make arbitration binding or nonbinding [*see Bus. & Prof. Code § 6204(a)*; Cal. State B. Rules Proc. for Hearing Fee Arb., Rule 6.0]. If the parties agree to a nonbinding arbitration, each party maintains the right to challenge the arbitration award; for this purpose, the limitations period for filing a civil action is tolled from the arbitration's initiation to 30 days after the receipt of the arbitration award [*Bus. & Prof. Code § 6206*].

Either party may reject a nonbinding arbitration award and request a trial within 30 days after the notice of the award is served [*Bus. & Prof. Code § 6204*]. If neither party requests a trial within this 30-day period, a nonbinding arbitration award becomes binding [*Bus. & Prof. Code § 6203(b)*; *see Loeb v. Record (2008) 162 Cal. App. 4th 431, 444-447, 75 Cal. Rptr. 3d 551*].

The small claims court has jurisdiction to confirm, correct, or vacate a fee arbitration award not exceeding $5,000 between an attorney and client that is binding or has become binding, or to conduct a hearing de novo between an attorney and a client after nonbinding arbitration of a fee dispute involving no more than $5,000 in controversy [*Code Civ. Proc. § 116.220(a)(4)*].

The statutory privileges against disclosure of work product and attorney-client communications generally do not apply in proceedings related to mandatory fee arbitration [*see Bus. & Prof. Code § 6202*]. For memoranda relating to privileges against disclosure, see Ch. 81, *Discovery: Privileges and Other Discovery Limitations* .

[3] Judicial Action

An attorney or a client may bring an action in court to resolve a fee dispute. The attorney can sue for damages for breach of contract [*Berk v. Twentynine Palms Rancheros, Inc. (1962) 201 Cal. App. 2d 625, 637, 20 Cal. Rptr. 144]* or sue in quantum meruit for the reasonable value of legal services rendered [*Elconin v. Yalen (1929) 208 Cal. 546, 549, 282 P. 791]* . An attorney generally may not intervene against his or her client in a pending action in order to recover attorney's fees, but must instead bring an independent action against the client [*Kelly v. Smith (1928) 204 Cal. 496, 500-501, 268 P. 1057]* .

If a client instigates a lawsuit against an attorney to resolve a fee dispute, the client waives the right to request or maintain arbitration [*Bus. & Prof. Code § 6201(d)*; *Law Offices of Dixon R. Howell v. Valley (2005) 129 Cal. App. 4th 1076, 1086-1087, 29 Cal. Rptr. 3d 499* ; *Juodakis v. Wolfrum (1986) 177 Cal. App. 3d 587, 592, 223 Cal. Rptr. 95]* . If the client elects to waive the right to arbitration, the parties may stipulate to set aside the waiver and to proceed with arbitration [*Bus. & Prof. Code § 6201(e)*].

[4] *Cumis* Fees

Pursuant to *Civ. Code § 2860*, *Cumis* fee issues are to be decided in an arbitration forum and not the state's judicial forum. However, this statue does not affect the normal relationship between the federal and state courts when actions have been filed in both of these jurisdictions dealing with the same subject matter. Since *Civ. Code § 2860* does not forbid federal judges or juries from deciding these issues, it is not an abuse of discretion to deny a petition compelling the arbitration of a *Cumis* fee dispute pending the outcome of a federal action involving the same issues [*Caiafa Prof. Law Corp. v. State Farm Fire & Cas. Co. (1993) 15 Cal. App. 4th 800, 803-807, 19 Cal. Rptr. 2d 138]* . For discussion of *Civ. Code § 2860*, see California Forms of Pleading and Practice, Ch. 308, *Insurance* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureAlternative Dispute ResolutionMediationsContracts LawRemediesEquitable ReliefQuantum MeruitInsurance LawClaims & ContractsReservation of RightsIndependent CounselLegal EthicsClient RelationsAttorney FeesGeneral Overview

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2A-25 California Points & Authorities § 25.07

§ 25.07 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

- For discussion and forms relating to actions by attorneys for compensation for professional services, see Ch. 72, *Attorney Practice and Ethics* . For forms dealing with a client's right to recover his or her attorney's fees from an adverse party in litigation, see Ch. 174, *Costs and Attorney's Fees ;* Ch. 177, *Damages ;* and Ch. 318, *Judgments* .

- For a discussion and forms pertaining to the defense of undue influence as negating apparent consent to a contract between attorney and client, see Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake* .

- For a discussion and forms relating to rescission as a remedy for entering a contract under undue influence, see Ch. 107, *Cancellation of Instruments* .

- For a discussion and forms relating to other contractual defenses, see Ch. 140, *Contracts* .

- For a discussion and forms relating to the assertion of breach of contract, see Ch. 140, *Contracts* .

- For a discussion and forms relating to an attorney's bill for fees as an account stated, see Ch. 8, *Accounts Stated and Open Accounts* .

- For a discussion and forms relating to assertion of liens, see Ch. 342, *Liens and Wage Preferences* .

[2] Related Points and Authorities Chapters

- Memoranda for use in obtaining attorney's fees from the opposing party on motion under limited circumstances, such as when provided for by statute, contract, or under certain equitable theories, may be found in Ch. 60, *Costs* .

- Memoranda for use in an action to rescind a contract on the grounds of undue influence of an attorney are contained in Ch. 92, *Duress, Menace, Fraud, Undue Influence, and Mistake*.

- For memoranda relating to other contractual defenses, see Ch. 50, *Contracts* .

- For memoranda relating to intervention generally, see Ch. 124, *Intervention* .

- For a discussion of how to use the forms in this chapter to draft a memorandum of points or authorities or a trial or appellate brief, and for a sample of a complete memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachGeneral OverviewContracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawRemediesCompensatory DamagesGeneral OverviewLegal EthicsClient RelationsAttorney FeesGeneral OverviewLegal EthicsClient RelationsAttorney FeesFee Agreements

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2A-25 California Points & Authorities §§ 25.08-25.29

[Reserved]

§§ 25.08[Reserved]

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PART II. FORMS

2A-25 California Points & Authorities § 25.30

§ 25.30 Supporting Contention That Attorney Has Valid Contractual Claim for Compensation [Code Civ. Proc. § 1021]

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF HAS A VALID CLAIM FOR COMPENSATION BECAUSE PLAINTIFF AND DEFENDANT ENTERED INTO AN _____ [EXPRESS *or* IMPLIED] CONTRACT BY WHICH DEFENDANT AGREED TO PAY PLAINTIFF FOR PROFESSIONAL SERVICES RENDERED BY PLAINTIFF IN HIS/HER PROFESSIONAL CAPACITY AS ATTORNEY ON BEHALF OF DEFENDANT, AND PLAINTIFF HAS PERFORMED UNDER THE TERMS OF SUCH CONTRACT.

A. Validity of Contract. Except as attorney's fees are specifically provided for by statute, the measure and mode of attorneys' compensation is left to the agreement, express or implied, of the parties (*Code Civ. Proc. § 1021*; *see Tracy v. Ringole (1927) 87 Cal. App. 549, 550-551, 262 P. 73*).

B. Requirement of Duplicate Copy. At the time the contract is entered into, the attorney must provide a duplicate copy of the contract, signed by both the attorney and the client (or the client's guardian or representative), to the client (or his or her guardian or representative) [*Bus. & Prof. Code § 6148(a)*].

C. Full Performance by Attorney. An attorney who has fully performed under a contract of employment is entitled to the stipulated fee (*Berk v. Twentynine Palms Ranchos, Inc. (1962) 201 Cal. App. 2d 625, 637, 20 Cal. Rptr. 144* ; *Pinto v. Seely (1913) 22 Cal. App. 318, 326-327, 135 P. 43*).

[*If oral fee contract that was entered into on or after January 1, 1987, EITHER*]

D. Validity of Oral Fee Contract. A contract for attorney services is not required to be in writing if it is not a contingency fee contract that comes within *Section 6147 of the Business and Professions Code*, and it is not reasonably

foreseeable that total expense to a client, including attorney's fees, will exceed $1,000 (*Bus. & Prof. Code § 6148(a)*).

[*OR*]

D. Validity of Oral Fee Contract. A contract for attorney services is not required to be in writing if it is not a contingency fee contract that comes within *Section 6147 of the Business and Professions Code*, and the contract is for services rendered in an emergency to avoid foreseeable prejudice to the rights or interests of the client or when a writing is otherwise impractical (*Bus. & Prof. Code § 6148(a), (d)(1)*).

[*OR*]

D. Validity of Oral Fee Contract. A contract for attorney services is not required to be in writing if it is not a contingency fee contract that comes within *Section 6147 of the Business and Professions Code*, and the arrangement as to the fee is implied by the fact that the attorney's services are of the same general kind as previously rendered to and paid for by the client (*Bus. & Prof. Code § 6148(a), (d)(2)*).

[*OR*]

D. Validity of Oral Fee Contract. A contract for attorney services is not required to be in writing if it is not a contingency fee contract that comes within *Section 6147 of the Business and Professions Code*, and the client knowingly states in writing, after full disclosure of the provisions of *Section 6148 of the Business and Professions Code*, that a writing concerning fees is not required (*Bus. & Prof. Code § 6148(a), (d)(3)*).

[*OR*]

D. Validity of Oral Fee Contract. A contract for attorney services is not required to be in writing if it is not a contingency fee contract that comes within *Section 6147 of the Business and Professions Code*, and the client is a corporation (*Bus. & Prof. Code § 6148(a), (d)(4)*).

[*CONTINUE*]

[*Optional*] **E. Services Performed by Attorney or Firm Not Licensed in California Did Not Constitute Practice of Law in California.** Legal services performed by an unlicensed, out-of-state attorney for a California-based client are compensable to the extent the work is performed out-of-state and does not constitute the practice of law in California (*Birbrower, Montalbano, Condon & Frank v. Superior Court of Santa Clara County (ESQ Business Services, Inc.) (1998) 17 Cal. 4th 119, 70 Cal. Rptr. 2d 304, 949 P.2d 1* ; *Estate of Condon (1998) 65 Cal. App. 4th 1138, 76 Cal. Rptr. 2d 922*).

[2] Comments

[a] Use of Form

This form may be submitted in support of an attorney's contention that he or she has a valid contractual claim for compensation. This form may be used any time an attorney seeks to enforce an employment contract entered into by the attorney and a client that provides for attorney's fees in exchange for legal services rendered on behalf of the client.

When appropriate, this form may be used in conjunction with § 25.31 (supporting contention that attorney has valid contingent fee contract), § 25.39 (supporting contention that attorney's fees are reasonable), § 25.40 (supporting contention that attorney has valid contractual lien on judgment or recovery), and § 25.41 (supporting contention that attorney has valid claim for compensation for costs of lawsuit and other reasonable expenses). Counsel may wish to refer to additional memoranda for use in actions for breach of contract, which are found in Ch. 50, *Contracts* . When the client alleges fraud, duress, or undue influence on the part of the attorney at the time of entering the fee agreement, counsel should refer to additional memoranda found in Ch. 92, *Duress, Menace, Fraud, Undue Influence, and Mistake* .

The argument supported by this memorandum may be raised any time the opposing party contends that an attorney's fee agreement is not valid (Paragraph A and Optional Paragraphs C, D and E) or that the attorney has not fully performed under the contract (Paragraph B). The argument would be most likely to arise in support of an attorney's independent action against a client for breach of contract for nonpayment of the stipulated fee. Counsel for an attorney who has not fully performed under the terms of the contract, but who seeks to recover the reasonable value of his or her services rendered on behalf of a client, should *see §§ 25.32 -25.38*. Counsel for an attorney who may not be entitled to full recovery under the contract because the attorney is an out-of-state attorney not licensed in California, and rendered services to the client some of which were compensable because performed out-of-state, but some of which were noncompensable as constituting the unauthorized practice of law in California under *Bus. & Prof. Code § 6125*, should refer to § 25.38. § 25.37 should be used when the fee contract is an oral contract that was entered into on or after January 1, 1987, that does not come within any of the exceptions to the writing requirement [*see Bus. & Prof. Code § 6148(a), (d)*], because although the contract may be voided by the client, the attorney is nevertheless entitled to recover a reasonable fee [*see Bus. & Prof. Code § 6148(c)*].

Prior to January 1, 1987, the effective date of *Bus. & Prof. Code § 6148*, oral agreements for the payment of attorney's fees, except for contingency fee agreements governed by *Bus. & Prof. Code § 6147*, were held to be valid [*see Sattinger v. Golden State Glass Corp. (1942) 53 Cal. App. 2d 130, 134, 127 P.2d 653* ; *Harvey v. Ballagh (1940) 38 Cal. App. 2d 348, 354, 101 P.2d 147* ; *see also Bus. & Prof. Code § 6148(e)*].

This form may be combined with a form relating to the specific procedural context in which counsel wishes to raise the substantive issue of the existence of a valid contract for the payment of attorney's fees. This form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the terms of the employment contract between the attorney and the client and show the existence of a valid contract, whether express or implied, oral or written. Counsel should also discuss performance (full or partial) under the contract by the attorney, and if applicable, excuse for partial nonperformance, such as discharge by the client. When the attorney has not fully performed under the terms of the contract, or if the client has voided the contract as an oral contract not in compliance with *Bus. & Prof. Code § 6148*, counsel must show that the attorney is entitled to the reasonable value of his or her services [*see §§ 25.32 -25.38*]. Counsel should indicate that a demand for payment of the fee has been made on the client and that the client refuses to pay the stipulated fee.

If the client contends that the fee agreement is unenforceable because the attorney is an out-of-state attorney or law firm not licensed to practice law in California, counsel should show either that the attorney is licensed to practice law in California or that the firm had an attorney licensed to practice law in California at the time services were rendered, or that the services were performed out-of-state and were not activities constituting the practice of law in California. If only some of the activities performed constituted compensable services while others constituted the practice of law in California and thus were not compensable, counsel must show that the attorney is entitled to the reasonable value of his or her services [*see § 25.38*].

If a client contends that the amount of the fee sought by the attorney is excessive and bears no relation to the reasonable value of the services rendered by the attorney [*see § 25.57*], the memoranda set out in *§ 25.39* (supporting contention

that attorney's fees are reasonable) may be used by the attorney in conjunction with the memoranda set forth in this form.

[3] Discussion of Authorities

[a] Validity of Contract

The facts and procedural background of ***Tracy v. Ringole*** *(1927) 87 Cal. App. 549, 262 P. 73* are discussed in *§ 25.40[4][a]*. In discussing the issue of whether an attorney's contingent fee contract could create a valid lien on the proceeds of a judgment, the court stated that it is well settled throughout the United States that an attorney may contract for his or her professional services, that such contract may fix the amount of compensation, and that the right of attorneys to compensation depends in all cases on a contract, either express or implied (*87 Cal. App. 549, 550)* .

[b] Full Performance by Attorney

In ***Berk v. Twentynine Palms Ranchos, Inc.*** *(1962) 201 Cal. App. 2d 625, 20 Cal. Rptr. 144* , plaintiff was employed by a group of investors who wished to form a corporation for the purpose of developing real property. Plaintiff orally agreed to do the legal work required for incorporation and purchase of the real property in exchange for a 25 percent stock interest in the corporation to be formed. The parties later agreed to change plaintiff's compensation to a flat fee of $10,000. Plaintiff then performed all legal work necessary for the creation of the corporation and for the acquisition of the real property on behalf of the corporation. Plaintiff agreed to purchase a discounted trust deed from another corporation in which one of the corporate directors had an interest. It was arranged that $4,000 of the plaintiff's fee would be applied as partial payment toward the purchase price of the trust deed. When the corporation refused to pay the $6,000 balance of his fee, plaintiff brought an action to recover the fee, alleging that payment was conditional on the corporation's lump-sum settlement of the balance due on the purchase price of the property originally acquired by the corporation and that the condition had been met. Defendant alleged that plaintiff was not to receive his fee until such time as the corporation was showing a profit and that in any event, plaintiff had not fully performed because he had not performed any services in connection with obtaining subdivision approval for the corporation's real property. Plaintiff was awarded the balance of his fee by the trial court, and defendant appealed.

The court of appeal affirmed, holding that there was sufficient evidence to support a finding that plaintiff had contracted to do the necessary legal work to acquire the real property and incorporate but that there was no agreement that plaintiff obtain approval for a subdivision of the property. The evidence also supported a finding that the balance of plaintiff's fee was due when the sellers of the real property had been paid, not when the corporation was making a profit (*201 Cal. App. 2d 625, 635)* . The court found that plaintiff's fee had been agreed on by the parties and that plaintiff was suing on a contract that had been fully performed. The court stated that when the attorney and the client each has the capacity to contract and the fee is fixed by the contract, such determination is generally binding on the parties. When an attorney performs fully under the contract, he is entitled to the stipulated fee and is not required to prove the reasonable value of his services (*201 Cal. App. 2d 625, 637)* .

In ***Pinto v. Seely*** *(1913) 22 Cal. App. 318, 135 P. 43* , an attorney agreed to represent a client who was threatened with litigation. There was conflicting evidence as to whether the contingent fee was to be 10 or 50 percent of any recovery. The attorney tried the case, which resulted in a judgment for the client on his cross-complaint. The client was dissatisfied with the amount of the judgment and insisted that the attorney prosecute an appeal. The attorney refused to do any more work on the case unless defendant paid him $100 in cash. The client then decided to employ other counsel to prosecute the appeal, which was agreeable to the attorney. After the attorney's death, the client retained another attorney who prepared and served a notice of appeal but then procured a settlement and satisfaction of the judgment as originally entered. The client refused to pay any attorney's fees to the attorney's estate, alleging that the attorney had repudiated his contract by refusing to prosecute the appeal. The administratrix of the attorney's estate brought an action to recover the fee and obtained a judgment in her favor, from which defendant appealed.

The court of appeal reversed and remanded the case for a new trial on the ground that the evidence did not support a finding that the attorney's contingent fee under the terms of the contract was 50 percent of any recovery. However, the court found no support for defendant's claim that the attorney had repudiated the contract when he refused to prosecute an appeal. The court stated that the general rule that any ambiguity in a contract between an attorney and client in regard to compensation should be construed in favor of the client is not so inflexible that it calls for construction of a contract beyond the express covenants of the parties. The contract between the attorney and defendant did not on its face call for the services of the attorney to continue until the final determination of the controversy on appeal (*22 Cal. App. 318, 326)* . The attorney's compensation was dependent on the satisfaction of the judgment obtained at the initial trial of the action, and therefore his cause of action for his fee accrued when the judgment he had obtained for his client was collected in the settlement negotiated by the substituted attorney. The attorney did what he had contracted to do and was entitled to his compensation under the contract (*22 Cal. App. 318, 327)* .

[c] Validity of Oral Contract

On or after January 1, 1987, in any case not coming under *Bus. & Prof. Code § 6147* (contingency fee contract not for the recovery of workers' compensation benefits) in which it is reasonably foreseeable that total expense to a client, including attorney's fees, will exceed $1,000, the contract for services in the case must be in writing [*Bus. & Prof. Code § 6148(a)*]. Failure to comply with the writing requirement renders the agreement voidable at the option of the client. If the agreement is voided, the attorney is entitled to collect a reasonable fee [*Bus. & Prof. Code § 6148(c)*]. However, the writing requirement does not apply to any of the following [*Bus. & Prof. Code § 6148(d)*]:

- Services rendered in an emergency to avoid foreseeable prejudice to the rights or interests of the client or when a writing is otherwise impractical.

- An arrangement as to the fee implied by the fact that the attorney's services are of the same general kind as previously rendered to and paid for by the client.

- If the client knowingly states in writing, after full disclosure of *Bus. & Prof. Code § 6148*, that a writing concerning fees is not required.

- If the client is a corporation.

[d] Legal Services Performed by Attorney or Firm Not Licensed in California

The facts and procedural background of ***Birbrower, Montalbano, Condon & Frank v. Superior Court of Santa Clara County (ESQ Business Services, Inc.)*** *(1998) 17 Cal. 4th 119, 70 Cal. Rptr. 2d 304, 949 P.2d 1* are discussed in § 25.44[3]. There the California Supreme Court held that a New York law firm, none of whose attorneys were licensed to practice law in California while representing a California client in matters occurring in California, violated *Bus. & Prof. Code § 6125* (unauthorized practice of law by person not licensed in California), and that the fee agreement was unenforceable as to legal services provided in California (*17 Cal. 4th 119, 127-140)* . However, the Court also held that the agreement was enforceable to the extent it was possible to sever the portions of the consideration attributable to services illegally rendered in California from those attributable to New York services, and the firm could recover fees under the agreement for the limited legal services performed in New York to the extent they did not constitute practicing law in California. The fee agreement became illegal when the firm performed legal services in violation of *Bus. & Prof. Code § 6125*, but the law of contract severability [*Civ. Code § 1599*] allows courts to enforce valid parts of contracts that are only partially void when the contract has several distinct objects, of which one at least is lawful. The object of the fee agreement in *Birbrower* may not have been entirely illegal, assuming the client was to pay compensation based in part on work performed in New York that did not amount to the practice of law in California (*17 Cal. 4th 119, 137-140)* .

In ***Estate of Condon*** *(1998) 65 Cal. App. 4th 1138, 76 Cal. Rptr. 2d 922* , a California probate court entered an order denying a Colorado attorney fees for services provided to a coexecutor of a decedent's estate who lived in Colorado. The decedent had lived in California, but had a Colorado law firm at which the Colorado attorney worked prepare her will. One coexecutor, her son, lived in Colorado and hired the Colorado attorney to advise him as coexecutor while also hiring a California attorney to make appearances in the California probate court. The other coexecutor, the decedent's daughter, lived in California and hired separate California counsel to represent her as coexecutor. Upon application for the Colorado attorney's ordinary and extraordinary fees (pursuant to *Prob. Code §§ 10810, 10811*), the probate judge concluded that by serving as counsel for the coexecutor of a will written for a California decedent, which devised California property and was subject to California probate proceedings, the Colorado attorney had practiced law in California in violation of *Bus. & Prof. Code § 6125* and was therefore not entitled to fees.

On the Colorado attorney's appeal, the court of appeal reversed the probate court's order, holding that *Prob. Code § 8570 et seq.* allowed for those fees and that *Bus. & Prof. Code § 6125* did not proscribe them (*65 Cal. App. 4th 1138, 1142)* . Following the appellate court's denial of a petition for rehearing, the Supreme Court granted review and ordered action on the cause deferred until disposition of *Birbrower, Montalbano, Condon & Frank v. Superior Court (1998) 17 Cal. 4th 119, 70 Cal. Rptr. 2d 304, 949 P.2d 1* . Following its decision in *Birbrower*, the Supreme Court transferred review back to the court of appeal with directions to vacate its prior decision and to reconsider *Condon* in light of *Birbrower*.

Following reconsideration, the court of appeal held that the Colorado attorney had not practiced law "in California" and was therefore entitled to fees for his services (*65 Cal. App. 4th 1138, 1148)* . The court distinguished the facts of *Condon* from *Birbrower*, noting that in *Birbrower*, the out-of-state attorney's client was a California resident, while in *Condon*, both the attorney and client were from Colorado (*65 Cal. App. 4th 1138, 1146)* . Adopting the premise articulated in *Birbrower* that the goal of *Bus. & Prof. Code § 6125* is to protect California citizens from incompetent or unscrupulous practitioners of law, the court concluded that Section 6125, while generally applicable to out-of-state lawyers, was not applicable to the matter before it (*65 Cal. App. 4th 1138, 1146)* . The court held that where an out-of-state lawyer, not licensed in California, provides legal services to an out-of-state client regarding California law, the lawyer is not "practicing law" in California for purposes of *Bus. & Prof. Code § 6125* and is entitled to attorney's fees regardless of the lawyer's physical or virtual presence in California relating to the matter (*65 Cal. App. 4th 1138, 1148)* .

[4] Additional Authorities

[a] Full Performance by Attorney

In *Stone v. Carpenter (1963) 211 Cal. App. 2d 491, 27 Cal. Rptr. 203* , an attorney agreed to represent a client in litigation in return for one third of any recovery from the litigation, including a one-third interest in certain real property if and when title to the property had been quieted in the client. The attorney rendered legal services on behalf of the client, which resulted in a judgment awarding the client a one-third interest in the real property. The client refused to pay the contingent fee, alleging that the contingency on which the attorney's right to receive an interest in the real property depended had never occurred because title to the property had not been quieted in the client. The attorney brought an action to recover his fee and obtained a judgment in his favor. The client appealed.

The court of appeal affirmed, finding that the evidence showed that the client had wrongfully refused to execute the necessary documents to quiet title in an attempt to avoid paying the attorney's fee. The court found that the attorney had fully performed under the terms of the contract and that the client was obligated to fulfill his part of the contract (*211 Cal. App. 2d 491, 498)* .

In *Setzer v. Moore (1927) 202 Cal. 333, 260 P. 550* , the client agreed to pay $10,000 to several attorneys as

compensation for representing the client as plaintiff in pending litigation. Five thousand dollars was paid on execution of the agreement and the second $5,000 was to be paid on commencement of trial or on the date the action was settled. The client then entered a dismissal without prejudice and refused to pay the second $5,000 because the case had been neither tried nor settled. Plaintiffs' assignee brought an action to recover the balance of the fee and obtained a favorable judgment from which defendant appealed.

The Supreme Court affirmed, finding that the evidence sustained a showing that the parties intended the term "settled" to mean a termination of the pending litigation either by trial or by dismissal without trial. Defendant's attorneys performed substantial legal services on behalf of defendant in the pending litigation, and defendant obtained important advantages in other litigation by agreeing to dismiss the underlying action. The Court concluded that defendant's decision to terminate the litigation by dismissal amounted to such a settlement in his favor that the attorneys would be entitled to recover the remainder of their fee under the agreement (*202 Cal. 333, 340)* .

In *MacInnis v. Pope (1955) 134 Cal. App. 2d 528, 285 P.2d 688* , the written contract between attorney and client provided that in exchange for representing the client in litigation the attorney would receive 20 percent of any recovery. The client received a settlement of $150,000 but refused to pay anything to the attorney. The attorney brought an action to recover his contingent fee and obtained a verdict in his favor, from which the client appealed. The court of appeal affirmed, stating that the attorney sued on a contract fully performed and was entitled to the fee stipulated in the contract (*134 Cal. App. 2d 528, 530)* .

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 25 ATTORNEY'S FEES
PART II. FORMS

2A-25 California Points & Authorities § 25.31

§ 25.31 Supporting Contention That Attorney Has Valid Claim for Compensation Based on Contingent Fee Agreement

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF HAS A VALID CLAIM FOR COMPENSATION BASED ON THE CONTINGENT FEE CONTRACT BETWEEN PLAINTIFF AND DEFENDANT.

A. Contingent Fee Agreement Is Legal and Valid Contract. A contingent fee agreement between an attorney and client in which the attorney agrees to perform legal services for the client in exchange for a certain amount or percentage of the client's recovery in the action is a valid and legal contract entitled to the protection of the law (*Herron v. State Farm Mutual Ins. Co. (1961) 56 Cal. 2d 202, 205, 14 Cal. Rptr. 294, 363 P.2d 310* ; *Mathewson v. Fitch (1863) 22 Cal. 86, 94* ; *see Bus. & Prof. Code § 6147*).

[*Optional*] **B. Validity of Oral Contingency Fee Contract for Recovery of Workers' Compensation Benefits.** A contingency fee contract for attorney services is not required to be written if it is for the recovery of workers' compensation benefits (*Bus. & Prof. Code § 6147(a), (c)*).

[*Optional*] **C. Validity of Contingency Fee Contract Not Involving Plaintiff in Damages Action.** *Business and Professions Code Section 6147*, the statute setting forth requirements for contingency fee agreements, applies only to contingency fee agreements involving plaintiffs as clients in damages actions, and contingency fee agreements in other cases are not voidable for failure to comply with the statute (*Franklin v. Appel (1992) 8 Cal. App. 4th 875, 891*).

[2] Comments

[a] Use of Form

This form may be submitted in support of an attorney's contention that he or she has a valid claim for compensation based on a contingent fee agreement between the attorney and client. When appropriate, this form may be used by an

attorney seeking to enforce a contingent fee agreement and may be used in conjunction with § 25.40 (supporting contention that attorney has valid contractual lien on judgment or recovery) and with § 25.39 (supporting contention that attorney's fees are reasonable). Counsel may wish to refer to additional memoranda for use in actions for breach of contract, which are found in Ch. 50, *Contracts* . The argument would be most likely to arise in support of an attorney's independent action against a client for breach of contract for nonpayment of the contingent fee.

This form may be combined with a form of memorandum relating to the specific procedural context in which counsel wishes to raise the substantive issue of the enforceability of a contingent fee contract. This form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the terms of the contingent fee agreement between the attorney and his or her client and show the existence of a valid contract. Counsel should also show that the attorney has fully performed under the contract terms, and that the stated contingency has occurred. When the attorney has not fully performed under the terms of the contingent fee contract, counsel must show that the attorney is entitled to the reasonable value of his or her services [*see §§ 25.33 -25.34*]. Counsel should also indicate that there has been recovery obtained in favor of the client and that the client or any other person holding the recovery refuses to pay the fee provided for by the contract.

If a client contends that the amount of the fee sought by the attorney is excessive and bears no relation to the reasonable value of the services rendered by the attorney [*see § 25.57*], the memoranda set out in *§ 25.39* (supporting contention that attorney's fees are reasonable) may be used by the attorney in conjunction with the memoranda set forth in this form.

If the contingency fee contract was entered into orally in contemplation of litigation for the recovery of damages and was not for the recovery of workers' compensation benefits, counsel should not use this form but instead should use § 25.37, to recover a reasonable fee [*see Bus. & Prof. Code § 6147(b)*].

[b] Opposing Memoranda

The memoranda set out in *§ 25.53* may be used in an appropriate case to oppose the contention supported by this memorandum.

[3] Discussion of Authorities

[a] Contingent Fee Agreement Is Legal and Valid Contract

In ***Herron v. State Farm Mutual Ins. Co.*** *(1961) 56 Cal. 2d 202, 14 Cal. Rptr. 294, 363 P.2d 310* , several attorneys entered into a contingent fee contract to represent clients in a personal injury action. The contract terms provided that the attorneys advance court costs and trial preparation costs and receive one third of the amount of recovery after deduction of the costs. No settlement was to be made without the consent of both attorney and client, and if there was no recovery the attorneys would receive nothing for their services or for costs advanced. The insurer of the defendant in the personal injury action then induced the clients to breach the contingent fee agreement by telling them that they did not need an attorney and that a satisfactory settlement would be made. Plaintiff attorneys brought an action against the insurer for intentional interference with contractual relations and against their clients for breach of contract. The clients were not served, and the defendant insurer's demurrer was sustained without leave to amend. Plaintiffs appealed from the judgment. The Supreme Court held that the contingent fee contract was a legal and valid contract and therefore an action would lie for intentional interference with a contractual relationship (*56 Cal. 2d 202, 205)* . There was no evidence to show cause for dismissal of plaintiffs, and no efforts were made to negotiate with them. The Court therefore reversed the judgment.

In ***Mathewson v. Fitch*** *(1863) 22 Cal. 86* , three attorneys made a contract with a client that provided for payment of $500 as attorneys' fees if the attorneys were able to secure final decrees concerning title to certain property. The attorneys procured a decision that the client had valid title to the property and then demanded payment of their fees, which the client refused to pay. The attorneys' assignee on the contract brought an action against the client, and defendant appealed from a judgment in favor of plaintiff.

On appeal, the Supreme Court held that the contract was valid and that obtaining the judgment in favor of defendant was a performance of the condition on which defendant's promise to pay the $500 depended (*22 Cal. 86, 93)* .

[b] Validity of Oral Contingency Fee Contract for Recovery of Workers' Compensation Benefits

A contingency fee contract is required to be made in writing [*Bus. & Prof. Code § 6147(a)*]. If not in writing, the contract is voidable at the option of the client, and the attorney is only entitled to recover a reasonable fee [*Bus. & Prof. Code § 6147(b)*]. However, a contingency fee contract for the recovery of workers' compensation benefits is specifically exempted from this writing requirement [*Bus. & Prof. Code § 6147(c)*].

[c] Validity of Contingency Fee Contract Not Involving Plaintiff in Damages Action

In ***Franklin v. Appel*** *(1992) 8 Cal. App. 4th 875* , an attorney contracted to represent two spouses in connection with the spouses' real estate and video business. Under the terms of the parties' written contingency fee agreement, as compensation for the attorney's legal and financial consulting services, the attorney would receive 25 percent of future profits in the clients' business. As a result of the attorney's efforts under the contract, the clients' equity in certain real property increased substantially. The clients, attempting to obtain a reduction of the attorney's fees, later sought to renegotiate the contingency fee agreement. After the attorney refused to accept a reduction in his fee, the clients brought suit against the attorney for, among other things, rescission of the contingency fee contract. Attorney cross complained for, among other things, breach of contract and quantum meruit. The trial court rejected the clients' theories of recovery. It also rejected the attorney's breach of contract claim, holding that the contract was voidable because it failed to include a statement that "the fee is not set by law but is negotiable" as required by *Bus. & Prof. Code § 6147*. The court held, however, that the attorney was entitled to recover $705,000 in quantum meruit.

The court of appeal affirmed the judgment, but held that the trial court erred in holding that the clients were entitled to void the agreement pursuant to *Bus. & Prof. Code § 6147* and in resorting to a quantum meruit measure of damages (*8 Cal. App. 4th 875, 893, 895)* . The appellate court, after reviewing the legislative history of *Bus. & Prof. Code § 6147*, determined that the statute does not apply to all contingency fee arrangements; rather, it applies only to contingency fee agreements involving plaintiffs in litigation matters (*8 Cal. App. 4th 875, 886-892)* . Because the agreement in this case contemplated transactional matters only, the *Bus. & Prof. Code § 6147* requirements did not apply (*8 Cal. App. 4th 875, 892)* . The appellate court concluded that the trial court's error was nonprejudicial, because the award to the attorney in quantum meruit following trial approximated the attorney's earned fee pursuant to the agreement (*8 Cal. App. 4th 875, 893)* .

The court disregarded the contrary holding in *Alderman v. Hamilton (1988) 205 Cal. App. 3d 1033, 252 Cal. Rptr. 845* . In *Alderman*, an attorney sought to recover 25 percent of the net proceeds as his fee for services rendered in connection with the sale of certain real property. The *Alderman* court held that *Bus. & Prof. Code § 6147(a)* requires all contingency fee agreements to be in writing and that the clients had an absolute right to void the contract for noncompliance with the statute. The *Franklin* court noted that the *Alderman* decision was not helpful, because it simply stated without analysis or discussion that § 6147 requires *all* contingency fee agreements to be in writing. The *Franklin* court, on analysis of the statute's legislative history rejected *Alderman* as reading the statute overbroadly (*8 Cal. App. 4th 875, 886)* .

[4] Additional Authorities

[a] Contingent Fee Agreement Is Legal and Valid Contract

In *Hendricks v. Sefton (1960) 180 Cal. App. 2d 526, 4 Cal. Rptr. 218* , the court of appeal affirmed a judgment upholding a contingent fee contract that provided for a fee of one third of the amount recovered in a personal injury action. The appellant argued that the fact that the agreement provided for a one-third recovery was sufficient to make the contract unfair and unequitable, but the court stated that contingent fee contracts are of a very common variety and not necessarily unfair because they contain such terms (*180 Cal. App. 2d 526, 532)* .

In *Eaton v. Thieme (1936) 15 Cal. App. 2d 458, 59 P.2d 638* , the attorney agreed to prosecute plaintiff's claim against an estate in return for a contingent fee of one third of the net amount of the distribution to plaintiff. The court of appeal found no fault with the agreement, stating that it was one of a very common variety entered into by attorneys or speculators on the one part, and persons claiming some right of action that they are either unable or unwilling to prosecute at their own expense, by which the attorney or speculator undertakes to render legal or other services in exchange for a stated proportion of any amount recovered, and that the attorney frequently agrees to advance necessary expenses that will be reimbursed only in the event of recovery (*15 Cal. App. 2d 458, 463)* .

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CHAPTER 25 ATTORNEY'S FEES
PART II. FORMS

2A-25 California Points & Authorities § 25.32

§ 25.32 Supporting Contention That Attorney Has Valid Claim for Compensation Based on Reasonable Value of Services Rendered to Client--When Employment Agreement Makes No Provision for Payment of Specified Fee

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF HAS A VALID CLAIM FOR COMPENSATION BECAUSE PLAINTIFF AND DEFENDANT ENTERED INTO AN _____ [EXPRESS *or* IMPLIED] CONTRACT BY WHICH PLAINTIFF AGREED TO PERFORM PROFESSIONAL SERVICES ON BEHALF OF DEFENDANT AND DEFENDANT [EXPRESSLY *or* IMPLIEDLY] AGREED TO PAY THE REASONABLE VALUE OF SUCH SERVICES.

Contract Without Specified Fee Provision. In an employment agreement between attorney and client that makes no specific provision for payment of attorney's fees, the consideration for the attorney's services is the client's implied promise to pay the reasonable value of such services (*see Elconin v. Yalen (1929) 208 Cal. 546, 549, 282 P. 791* ; *Stuart v. Preston (1934) 2 Cal. App. 2d 310, 316, 38 P.2d 155*).

[2] Comments

[a] Use of Form

This form may be submitted in support of an attorney's contention that he or she has a valid claim for compensation based on the reasonable value of professional services rendered by the attorney on behalf of a client. Such a situation may arise when the employment agreement has no provision for payment of a specified fee. The argument supported by these memorandum may be raised any time the opposing party alleges that an attorney is not entitled to the reasonable value of services rendered under the contract. The argument would be most likely to arise in support of an attorney's independent action against a client to recover in quantum meruit.

This form may be combined with a form of memorandum relating to the specific procedural context in which counsel wishes to raise the substantive issue of the attorney's right to recover the reasonable value of services rendered under an attorney-client employment contract. This form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the terms of the agreement between the attorney and his or her client and show the existence of a valid contract, either express or implied. Counsel should discuss the nature and extent of the legal services performed by the attorney in order to show that the attorney is entitled to reasonable compensation for such services. If the reasonable value of the legal services performed in a particular situation is at issue, counsel may wish to use this form in conjunction with § 25.39 (supporting the contention that an attorney's fees are reasonable). Counsel should show that the attorney has made demand on the client for payment of the reasonable value of his or her services, and that the client refuses to pay. If the attorney seeks to obtain compensation for the reasonable value of his or her services from any recovery or judgment in the underlying action, counsel must show that there has been a recovery in the client's favor and that the client or any other person holding the recovery obtained refuses to pay the attorney for the reasonable value of services rendered under the attorney-client contract.

If a client contends that the amount of the fee sought by the attorney is excessive and bears no relation to the reasonable value of the services rendered by the attorney [*see § 25.57*], the memoranda set out in *§ 25.39* (supporting contention that attorney's fees are reasonable) may be used by the attorney in conjunction with the memoranda set forth in this form.

[3] Discussion of Authorities

[a] Contract Without Specified Fee Provision

In ***Elconin v. Yalen*** *(1929) 208 Cal. 546, 282 P. 791* , plaintiff attorney orally agreed with defendants to represent them in a personal injury action. The attorney unsuccessfully attempted to settle the case and then filed suit on behalf of defendants and had the case set for trial. Defendants then discharged plaintiff and hired another attorney. Defendants were awarded a judgment in the personal injury action, but refused to pay plaintiff's fee. Plaintiff brought an action claiming that he was entitled to either his contingent fee or to the reasonable value of his services. At trial, the attorney alleged that the agreed compensation was to be one third of any recovery in favor of his clients while the clients alleged that the fee was to be 10 percent of any settlement before trial or 20 percent of any judgment obtained and collected. The trial court found that there was no agreement for a one-third fee and that since plaintiff had refused to accept the defendant's other offer of either 10 or 20 percent, there was no agreement between the parties for any specific sum or compensation to plaintiff. Therefore, plaintiff was entitled only to the reasonable value of his services. Plaintiff appealed the judgment.

The Supreme Court affirmed, finding that the trial court had been correct in its assessment of the agreement between the parties. Although there was a valid oral agreement contract of employment between the parties, it was clear that no agreement was ever reached regarding the compensation to be paid plaintiff. Thus, plaintiff was entitled to the reasonable value of his services up to the time of his discharge (*208 Cal. 546, 549)* .

In ***Stuart v. Preston*** *(1934) 2 Cal. App. 2d 310, 38 P.2d 155* , an attorney was hired by several attorneys to represent them in an action to recover attorneys' fees from a client who they had represented in litigation involving water rights. The attorney was successful in his efforts, and his clients were awarded their fee by the trial court. The clients then began to argue among themselves regarding the division of the judgment and were unable to agree on the compensation to be paid to their attorney. The attorney brought an action to recover the reasonable value of his services and was awarded $50,400. The defendants' motion for a new trial was denied, and they appealed from the judgment.

The court of appeal affirmed, finding that there was an employment contract among the parties but that no specific fee had been fixed. Plaintiff alleged that he had told defendants that he refused to agree to a specific fee because the duties to be performed by him were so indefinite and that the parties agreed that when the action was completed they would calculate a fair and reasonable fee for the work done by plaintiff. Defendants alleged that there was an express

agreement that they would fix the amount of the fee at the termination of litigation and therefore plaintiff could not bring an action in quantum meruit. The court stated that when there has been no meeting of the minds on the subject of compensation but merely a contract of employment, the plaintiff may sue for the reasonable value of his services (*2 Cal. App. 2d 310, 316)* . The court found that there was substantial evidence to support the verdict that plaintiff's fee was reasonable and therefore upheld the trial court's decision (*2 Cal. App. 2d 310, 318)* .

[4] Additional Authorities

[a] Contract Without Specified Fee Provision

In *Cowen v. Calabrese (1964) 230 Cal. App. 2d 870, 41 Cal. Rptr. 441* , plaintiff attorney, an expert in bankruptcy law, was retained to assist a client in bankruptcy proceedings. The initial services were performed at plaintiff's office in Illinois and the parties agreed that $2,500 was a fair fee for such services. The client then asked the attorney to come to California to give further assistance in the pending proceedings. The attorney did so under the promise of payment of his expenses and a fair fee. The client later refused to pay the attorney's fee and the attorney brought an action to recover the reasonable value of his legal services. Judgment was for plaintiff for $5,000 for services rendered in Illinois and California plus $583 for his expenses. Defendant appealed, questioning the finding of the trial court that there was an express agreement to pay the attorney a substantial fee if he was successful in bringing the bankruptcy proceedings to a satisfactory conclusion and an implied contract to pay a smaller fee for the attorney's professional advice even if the proceedings were not concluded favorably to the client. The court of appeal affirmed, finding that testimony at trial supported the conclusion that there was an implied contract for defendant to pay plaintiff for the reasonable value of his services on defendant's behalf (*230 Cal. App. 2d 870, 872)* .

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2A-25 California Points & Authorities § 25.33

§ 25.33 Supporting Contention That Attorney Has Valid Claim for Compensation Based on Reasonable Value of Services Rendered to Client--Attorney Unable to Fully Perform Without Fault of Either Party

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF HAS A VALID CLAIM FOR COMPENSATION BECAUSE PLAINTIFF AND DEFENDANT ENTERED INTO A CONTRACT BY WHICH PLAINTIFF AGREED TO PERFORM PROFESSIONAL SERVICES ON BEHALF OF DEFENDANT AND DEFENDANT AGREED TO PAY PLAINTIFF A FEE OF _____ [PERCENT OF ANY RECOVERY BY DEFENDANT *or* $_____]. WITHOUT FAULT OF EITHER PARTY, PLAINTIFF IS UNABLE TO COMPLETE PERFORMANCE UNDER THE CONTRACT AND IS THEREFORE ENTITLED TO THE REASONABLE VALUE OF SERVICES RENDERED.

Attorney Unable to Fully Perform Without Fault of Either Party. When an attorney is unable to perform under the terms of the contract between the attorney and client without fault of either party, the attorney is entitled to the reasonable value of services rendered up to the time that performance became excused (*Boardman v. Christin (1924) 65 Cal. App. 413, 419, 224 P. 97* ; *see* *Green v. Sherritt (1936) 17 Cal. App. 2d 732, 736, 62 P.2d 769*).

[2] Comments

[a] Use of Form

This form may be submitted in support of an attorney's contention that he or she has a valid claim for compensation based on the reasonable value of professional services rendered by the attorney on behalf of a client when there is a valid employment contract between attorney and client, but the attorney is unable to fully perform under the contract terms without fault of either party. The argument supported by the foregoing memorandum may be raised any time the opposing party alleges that an attorney is not entitled to the reasonable value of services rendered on behalf of the client. The argument would be most likely to arise in support of an attorney's independent action against a client to recover in quantum meruit.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the terms of the fee agreement between the attorney and client and show the existence of a valid contract. Counsel should discuss the nature and extent of the legal services performed by the attorney up to the time that performance was excused, in order to show that the attorney is entitled to reasonable compensation for such services. The reasons why performance ceased should also be discussed. If the reasonable value of the legal services performed in a particular situation is at issue, counsel may wish to use this form in conjunction with § 25.39 (supporting the contention that an attorney's fees are reasonable). Counsel should show that the attorney has made demand on the client for payment of the reasonable value of his or her services, and that the client refuses to pay. If the attorney seeks to obtain compensation for the reasonable value of his or her services from any recovery or judgment in the underlying action, counsel must show that there has been a recovery in the client's favor and that the client or any other person holding the recovery obtained refuses to pay the attorney for the reasonable value of services rendered under the attorney-client contract.

This form may be combined with a form of memorandum relating to the specific procedural context in which counsel wishes to raise the substantive issue of the attorney's right to recover the reasonable value of services rendered up to the time when performance under the contract was excused. This form may also be adapted for use in a trial or appellate brief.

If a client contends that the amount of the fee sought by the attorney is excessive and bears no relation to the reasonable value of the services rendered by the attorney [*see § 25.57*], the memoranda set out in *§ 25.39* (supporting contention that attorney's fees are reasonable) may be used by the attorney in conjunction with the memoranda set forth in this form.

[3] Discussion of Authorities

[a] Attorney Unable To Fully Perform Without Fault of Either Party

In ***Boardman v. Christin*** *(1924) 65 Cal. App. 413, 224 P. 97* , plaintiff attorney was retained by defendant pursuant to a written agreement. Plaintiff, as guardian of the client's minor brother, was about to bring an action to determine the minor's water rights. The client, who owned property adjoining that of her brother, also wanted her water rights determined. The fee agreement stated that, in return for procuring a judgment determining the water rights, the client would pay the attorney a sum of money equivalent to the amount allowed by the court for the attorney's services rendered on behalf of his ward. The attorney made preparations for trial, but prior to the start of trial the minor ward attained his majority and substituted other counsel to maintain the action. The attorney then presented to the court a statement of the services he had performed so far on behalf of the ward, and the court allowed plaintiff $1,000 for his services. Plaintiff then presented a bill for the same amount to his client, which she refused to pay. Plaintiff brought an action to recover his fee and obtained a judgment in his favor. The client appealed, alleging that plaintiff failed to perform his obligation under the contract since no judgment had been procured.

The court of appeal affirmed, finding that the failure of plaintiff to fully perform under his contract of employment was not due to any fault of either his or his client. The ward had the right to discharge plaintiff as his attorney when he reached majority and when he did so, plaintiff's remedy was to sue for the reasonable value of his services up to the time of discharge. Plaintiff could not recover the stipulated compensation in an action on his employment contract, but he was entitled to bring an action in quantum meruit for services actually rendered. The court stated the rule that when complete performance by an attorney of his contract of employment becomes impossible without fault on the part of either party, the attorney may recover in quantum meruit the value of the services actually rendered by him (*65 Cal. App. 413, 419)* .

In ***Green v. Sherritt*** *(1936) 17 Cal. App. 2d 732, 62 P.2d 769* , an attorney was employed to defend the client in a suit

brought by the client's ex-wife to set aside a property settlement and to compel the client to account for $50,000. Injunctions had been issued impounding all the client's assets in that amount. The written fee agreement between attorney and client provided that the attorney receive $10,000 in cash or securities on dissolution of the injunctions, or a reasonable fee to be determined by mutual agreement if the court ordered an accounting and the accounting showed that the client was not indebted in an amount equal to the securities impounded. Plaintiff represented his client at trial, which resulted in the court orally directing the client to account for $74,000 in cash and securities. Plaintiff insisted on findings of fact before the signing of an interlocutory judgment. Due to the difficulty of their preparation, findings were never presented and so no interlocutory judgment was ever granted and the property settlement was not annulled. The parties then began to discuss settlement amount themselves and ultimately agreed that the ex-wife would terminate the litigation in exchange for $5,000. When plaintiff was informed of the settlement and the dismissal of the lawsuit he instituted an action to collect $10,000 either under the contract or as the reasonable amount of his services. The trial court awarded plaintiff $7,500, and both parties appealed.

The court of appeal affirmed, finding that the specified fee of $10,000 was payable upon the happening of one of two contingencies, but that both the attorney's continued performance and the occurrence of either contingency had been prevented by the client's settlement of the action (*17 Cal. App. 2d 732, 735)* . Plaintiff could not recover under the contract for the specified fee of $10,000, but proof of the contingent contract and defendant's compromise supported a recovery in quantum meruit (*17 Cal. App. 2d 732, 736)* .

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 25 ATTORNEY'S FEES
PART II. FORMS

2A-25 California Points & Authorities § 25.34

§ 25.34 Supporting Contention That Attorney Has Valid Claim for Compensation Based on Reasonable Value of Services Rendered to Client--Attorney Discharged by Client

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF HAS A VALID CLAIM FOR COMPENSATION BECAUSE PLAINTIFF IS ENTITLED TO THE REASONABLE VALUE OF PROFESSIONAL SERVICES RENDERED ON BEHALF OF DEFENDANT UP TO THE TIME PLAINTIFF WAS DISCHARGED AS ATTORNEY FOR DEFENDANT.

Attorney Discharged by Client. An attorney discharged by a client is entitled to the reasonable value of any services rendered under the contract of employment (*Fracasse v. Brent (1972) 6 Cal. 3d 784, 792, 100 Cal. Rptr. 385, 494 P.2d 9* ; *Jeffry v. Pounds (1977) 67 Cal. App. 3d 6, 12, 136 Cal. Rptr. 373*).

[2] Comments

[a] Use of Form

This form may be submitted in support of an attorney's contention that he or she has a valid claim for compensation based on the reasonable value of professional services rendered by the attorney on behalf of a client up to the time that the attorney is discharged by the client. The argument supported by the foregoing memorandum may be raised any time the opposing party alleges that an attorney is not entitled to the reasonable value of services performed prior to the attorney's discharge by the client. Counsel should note that if the attorney and client entered into a contingent fee contract, the attorney's cause of action for reasonable compensation accrues only when the contingency stated in the original agreement, the client's recovery by either settlement or judgment, has occurred [*see § 25.55*]. The argument would be most likely to arise in support of an attorney's independent action against a client to recover in quantum meruit.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the terms of the fee agreement between the attorney and client and show the

existence of a valid contract. Counsel should discuss the nature and extent of the legal services performed by the attorney up to the time of discharge in order to show that the attorney is entitled to reasonable compensation for such services. Counsel may wish to discuss the reasons for the attorney's discharge by the client, and should state the date of discharge and the manner in which the attorney was notified of the discharge by the client. If the reasonable value of the legal services rendered in a particular situation is at issue, counsel may wish to use this form in conjunction with § 25.39 (supporting the contention that an attorney's fees are reasonable). Counsel should show that the attorney has made demand on the client for payment of the reasonable value of his or her services and that the client refuses to pay.

If the attorney seeks to obtain compensation for the reasonable value of his or her services from any recovery or judgment in the underlying action, counsel must show that there has been a recovery in the client's favor and that the client or any other person holding the recovery obtained refuses to pay the attorney for the reasonable value of services rendered under the attorney-client contract. In the case of a contingent fee agreement, counsel should show that the stated contingency, that is, a recovery or judgment in the client's favor, has occurred.

If a client contends that the amount of the fee sought by the attorney is excessive and bears no relation to the reasonable value of the services rendered by the attorney [*see § 25.57*], the memoranda set out in *§ 25.39* (supporting contention that attorney's fees are reasonable) may be used by the attorney in conjunction with the memoranda set forth in this form.

This form may be combined with a form of memorandum relating to the specific procedural context in which counsel wishes to raise the substantive issue of the attorney's right to recover the reasonable value of services rendered up to the time of discharge. This form may also be adapted for use in a trial or appellate brief.

[b] Opposing Memoranda

In an appropriate case, the memoranda set out in *§§ 25.55, 25.56* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Attorney Discharged by Client

In ***Fracasse v. Brent*** *(1972) 6 Cal. 3d 784, 100 Cal. Rptr. 385, 494 P.2d 9* , an attorney agreed to represent a client in a personal injury action. The written fee agreement provided for a contingent fee of 33.3 percent of any settlement made at least 30 days prior to the date set for trial and 40 percent of any recovery obtained thereafter, whether by settlement or judgment. Before any recovery was obtained, the client discharged the attorney and retained other counsel. The original attorney then filed a complaint for declaratory relief, alleging that his discharge was without cause, that the client had breached her contract, and that he was entitled to a one-third interest in any monies ultimately recovered in the personal injury action. The trial court held that his complaint did not state a cause of action and sustained the client's general demurrer. The attorney appealed.

The Supreme Court affirmed on the ground that the action was premature, but held that an attorney discharged with or without cause is entitled to the reasonable value of services rendered up to the time of discharge (*6 Cal. 3d 784, 792)* . The Court stated that a client has an absolute right to discharge his or her attorney at any time with or without cause and such a discharge does not constitute a breach of contract (*6 Cal. 3d 784, 790-791)* . By awarding a discharged attorney the reasonable value of the services he or she has rendered up to the time of discharge, the client's right to discharge an attorney without undue restriction is preserved and the attorney's right to fair compensation for work performed is also acknowledged (*6 Cal. 3d 784, 791)* . In the case of a contingent fee contract, an attorney's cause of action for reasonable compensation accrues only when the contingency stated in the original agreement, that is, the client's recovery by either settlement or judgment, has occurred (*6 Cal. 3d 784, 792)* . However, when the discharge occurs

"on the courthouse steps," where the client has executed a settlement obtained after much work by the attorney, the factors involved in a determination of reasonableness may justify a finding that the entire contingent fee was the reasonable value of the attorney's services (*6 Cal. 3d 784, 791)* .

In ***Jeffry v. Pounds*** *(1977) 67 Cal. App. 3d 6, 136 Cal. Rptr. 373* , a law firm agreed to represent a client in a personal injury action. The case was turned over to one of the attorneys in the firm, who began preparations for trial and secured a settlement conference date. Meanwhile, the client consulted another attorney in regard to his marital problems. This attorney prepared a proposed property settlement agreement and submitted it to the client's wife. The wife was dissatisfied with the proposal and consulted an attorney at the law firm representing her husband in the personal injury action. That law firm agreed to represent her in a marital dissolution suit. When the client learned that the law firm handling his personal injury suit was also representing his wife in the dissolution action, he asked the attorney handling his dissolution action to also take over the personal injury action. The client's new attorney effected a settlement of the personal injury action in favor of the client and received a $1,000 fee. The client's original attorneys brought an action against the client and his new attorney for their services rendered on behalf of the client prior to the substitution of attorneys. The trial court found that plaintiffs had not violated any professional canons and awarded them $500 as the reasonable value of their legal services performed up to the time that a conflict of interest might possibly have arisen. Their fee was payable out of the new attorney's fee. Defendants appealed, alleging that plaintiffs should be barred from recovering a fee because the client had discharged them for accepting employment hostile to his interests.

The court of appeal reversed, finding that although their conduct was not deliberately unethical plaintiffs had violated a rule of professional conduct when they agreed to represent a third party in suing their client on an unrelated matter without the knowledge and consent of the client (*67 Cal. App. 3d 6, 10)* . The court held that the client had the absolute right to discharge his attorney, but that plaintiffs were nevertheless entitled to compensation for services supplied preceding the breach of professional conduct and remanded the action to the trial court for determination of the date of the violation (*67 Cal. App. 3d 6, 12)* .

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 25 ATTORNEY'S FEES
PART II. FORMS

2A-25 California Points & Authorities § 25.35

§ 25.35 Supporting Contention That Attorney Has Valid Claim for Compensation Based on Reasonable Value of Services Rendered to Client--Pro Rata Distribution of Contingent Fee

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF HAS A VALID CLAIM FOR A PRO RATA SHARE OF A CONTINGENT FEE BECAUSE BOTH THE DISCHARGED AND EXISTING ATTORNEYS MAKE QUANTUM MERUIT CLAIMS AND THE CONTINGENT FEE IS INSUFFICIENT TO MEET BOTH CLAIMS.

Pro Rata Distribution of Contingent Fee. When the discharged and existing attorneys both make quantum meruit claims and the contingent fee is insufficient to meet both claims, the contingent fee will be distributed among all discharged and existing attorneys in proportion to the time spent on the case by each (*Spires v. American Bus Lines (1984) 158 Cal. App. 3d 211, 216, 204 Cal. Rptr. 531*).

[2] Comments

[a] Use of Form

This form may be submitted in support of an attorney's contention that he or she has a valid claim for compensation based on the reasonable value of professional services rendered by the attorney on behalf of a client when other discharged or existing attorneys have made similar claims and the contingent fee is insufficient to meet all claims.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the amount of time he or she spent in providing services to the client in comparison to the amount of time claimed to have been spent by any other existing or discharged attorneys of the client, and argue what his or her pro rata portion of the contingent fee should be. If the reasonable value of the legal services rendered in a particular situation is at issue, counsel may wish to use this form in conjunction with § 25.39 (supporting the contention that an attorney's fees are reasonable). Counsel should show that the attorney has made demand on the client for payment of the reasonable value of his or her services and that the client refuses to pay.

This form may be combined with a form of memorandum relating to the specific procedural context in which counsel wishes to raise the substantive issue of the attorney's right to recover the reasonable value of services rendered. This form may also be adapted for use in a trial or appellate brief.

[b] Opposing Memoranda

In an appropriate case, the memoranda set out in *§ 25.55* may be used to oppose the contentions supported by this form.

[3] Discussion of Authorities

[a] Pro Rata Distribution of Contingent Fee.

In ***Spires v. American Bus Lines*** *(1984) 158 Cal. App. 3d 211, 204 Cal. Rptr. 531* a personal injury action, the trial court awarded attorney's fees to discharged attorneys but nothing to the attorney who obtained the settlement for the plaintiff. That attorney appealed.

The court of appeal reversed the order adjudicating the fees and remanded the case to the trial court for determination and distribution of attorney's fees on a pro rata basis. The court held that when, as here, the contingent fee is insufficient to meet the quantum meruit claims of both discharged and existing counsel, the proper application of the *Fracasse* rule (attorney employed under contingent fee contract and discharged prior to occurrence of contingency is limited to quantum meruit recovery for reasonable value of services rendered up to time of discharge, rather than full amount of agreed contingent fee) is to use an appropriate pro rata formula that distributes the contingent fee among all discharged and existing attorneys in proportion to the time spent on the case by each (*158 Cal. App. 3d 211, 216)* . *Fracasse v. Brent (1972) 6 Cal. 3d 784, 100 Cal. Rptr. 385, 494 P.2d 9* , is discussed in *§ 25.34[3][a]*.

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2A-25 California Points & Authorities § 25.36

§ 25.36 Supporting Contention That Attorney Has Valid Claim for Compensation Based on Reasonable Value of Services Rendered to Client--Attorney-Client Contract Cannot Be Enforced

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF HAS A VALID CLAIM FOR COMPENSATION BECAUSE PLAINTIFF IS ENTITLED TO THE REASONABLE VALUE OF PROFESSIONAL SERVICES RENDERED ON BEHALF OF CLIENT DESPITE THE PARTIAL INVALIDITY OF THE EMPLOYMENT CONTRACT BETWEEN PLAINTIFF AND DEFENDANT.

Invalid Contract. When the contract terms cannot be fully enforced due to the invalidity of certain provisions, the attorney is entitled to compensation based on the reasonable value of his or her services (*Calvert v. Stoner (1948) 33 Cal. 2d 97, 105, 199 P.2d 297*).

[2] Comments

[a] Use of Form

This form may be submitted in support of an attorney's contention that he or she has a valid claim for compensation based on the reasonable value of professional services rendered by the attorney on behalf of a client even though the employment contract between the parties cannot be fully enforced due to the invalidity of one or more provisions. The argument supported by this memorandum may be raised any time the opposing party alleges that an attorney is not entitled to the reasonable value of services performed because one or more provisions in the employment contract are invalid and unenforceable, thus making the entire contract void. The argument would be most likely to arise in support of an attorney's independent action against a client to recover in quantum meruit.

Counsel should note that a contingent fee contract that does not meet the requirements of *Bus. & Prof. Code § 6147(a)* is voidable at the option of the client and the attorney is then entitled only to a reasonable fee [*Bus. & Prof. Code § 6147(b)*]. Under these circumstances, counsel should use § 25.37 for the appropriate memoranda to recover the reasonable fee.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the terms of the employment contract between the attorney and client to show that even if some provisions of the contract are invalid for any reason, the contract is lawful in other respects and that the attorney is entitled to the reasonable value of his or her services. Counsel should discuss the nature and extent of the legal services performed by the attorney in order to show the value of such services. If the reasonable value of the legal services rendered in a particular situation is at issue, counsel may wish to use this form in conjunction with § 25.39 (supporting contention that an attorney's fees are reasonable). Counsel should show that the attorney has made demand on the client for payment of the reasonable value of his or her services, and that the client refuses to pay. If the attorney seeks to obtain compensation for the reasonable value of his or her services from any recovery or judgment in the underlying action, counsel must show that there has been a recovery in the client's favor and that the client or any other person holding the recovery obtained refuses to pay the attorney for the reasonable value of services rendered under the attorney-client contract.

This form may be combined with a form of memorandum relating to the specific procedural context in which counsel wishes to raise the substantive issue of the attorney's right to recover the reasonable value of services rendered under an employment contract that is partially invalid. They may also be adapted for use in a trial or appellate brief.

[3] Discussion of Authorities

[a] Invalid Contract

In ***Calvert v. Stoner*** *(1948) 33 Cal. 2d 97, 199 P.2d 297* , an attorney was employed to represent a client in a probate proceeding. The contract of employment provided for a contingent fee of one third of the recovery over and above the payment of $25 per month to the date of final distribution or settlement. The parties then negotiated the contract by which the client assigned a one-third interest in the estate to the attorney and the attorney agreed to pay one third of the litigation costs. The estate was settled and the client received a one-half share in real property. The client managed the property, turning over one third of the rentals to the attorney. Subsequently, the client brought an action for declaratory relief to reform the contract, alleging that if the attorney was entitled to anything under the contract, it was no more than one third of the excess over the value of the client's interest under the will. The client contended that the employment contract was against public policy and void because it contained a provision that the client could not make a settlement of her claim without the attorney's consent, and that if she did so she would still be liable for his fee. The trial court found in favor of the attorney, and the client appealed.

The Supreme Court affirmed and stated that, assuming the invalidity of such a provision, the compensation features of the contract were not affected if the contract was lawful in other respects (*33 Cal. 2d 97, 104)* . The Court held that the attorney was entitled to the reasonable value of his services and that there was sufficient evidence to indicate that the services of the attorney were reasonably worth the compensation received by him (*33 Cal. 2d 97, 105)* .

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2A-25 California Points & Authorities § 25.37

§ 25.37 Supporting Contention That Attorney Has Valid Claim for Compensation Based on Reasonable Value of Services Rendered to Client--Attorney Entitled to Reasonable Fee Even Though Fee Contract Does Not Comply With Writing or Other Requirements of Bus & Prof. Code § 6147 or 6148

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF IS ENTITLED TO COLLECT A REASONABLE FEE EVEN IF THE ATTORNEY FEE CONTRACT IS VOIDED AT THE OPTION OF THE CLIENT UNDER SECTION _____ [6147(b) *or* 6148(c)] OF THE BUSINESS AND PROFESSIONS CODE.

[*EITHER, if contingency fee contract*]

Attorney Is Entitled to Collect Reasonable Fee. When an attorney fee agreement is voidable at the option of the client for failure to comply with the requirements of *Section 6147 of the Business and Professions Code*, the attorney is thereupon entitled to collect a reasonable fee (*Bus. & Prof. Code § 6147(b)*).

[*OR, if other than contingency fee contract*]

Attorney Is Entitled to Collect Reasonable Fee. When an attorney fee agreement is voidable at the option of the client for failure to comply with the requirements of *Section 6148 of the Business and Professions Code*, the attorney is thereupon entitled to collect a reasonable fee (*Bus. & Prof. Code § 6148(c)*).

[2] Comments

[a] Use of Form

This form may be submitted in support of an attorney's contention that he or she is entitled to recover a reasonable fee

for professional services rendered by the attorney on behalf of a client when the contract for services was not made in writing or did not meet some other requirement of either *Bus. & Prof. Code § 6147* (contingency fee contracts) or *6148* (certain other contracts). The argument supported by this memorandum may be raised any time the opposing party alleges that the contract for services is void for failure to comply with the statutory requirements. The argument would be most likely to arise in support of an attorney's independent action against a client to recover in quantum meruit.

This form may be combined with a form of memorandum relating to the specific procedural context in which counsel wishes to raise the substantive issue of the attorney's right to recover a reasonable fee for services rendered under an attorney-client employment contract. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the nature and extent of the legal services performed by the attorney to show that the attorney is entitled to a reasonable fee. Counsel should show that the attorney has made demand on the client for payment of a reasonable fee for his or her services, and that the client refuses to pay. If the attorney seeks to obtain a reasonable fee for the reasonable value of his or her services from any recovery or judgment in the underlying action, counsel must show that there has been a recovery in the client's favor and that the client or any other person holding the recovery obtained refuses to pay the attorney for the reasonable value of services rendered under the attorney-client contract.

The memoranda set out in *§§ 25.53* and *25.54* may be used in an appropriate case to oppose the contention that an attorney fee contract is valid and enforceable when the contract does not meet the statutory requirements of *Bus. & Prof. Code § 6147* or *6148*.

[3] Discussion of Authorities

[a] Attorney Is Entitled to Collect Reasonable Fee

When a contract for professional services by an attorney fails to meet the requirements of *Bus. & Prof. Code § 6147* or *6148*, the agreement is voidable at the option of the client. However, the attorney is nevertheless entitled to collect a reasonable fee [*Bus. & Prof. Code §§ 6147(b), 6148(c)*]. The Supreme Court of California supported this contention in *Huskinson & Brown v. Wolf*, which dealt with the failure of a law firm to satisfy the requirement of *Cal. R. Prof. Conduct, Rule 2-200* that a client must consent in writing to a fee-sharing agreement between two law firms. The court stated that even if a particular fee or compensation agreement was not in writing, law firms laboring under such an agreement nonetheless deserved reasonable compensation for their services [*Huskinson & Brown v. Wolf (2004) 32 Cal. 4th 453, 460, 9 Cal. Rptr. 3d 693, 84 P.3d 379]* .

For the specific requirements of *Bus. & Prof. Code §§ 6147, 6148*, see *§§ 25.53* and *25.54*.

[4] Additional Authorities

[a] Attorney Is Entitled to Collect Reasonable Fee

In *Strong v. Beydoun (2008) 166 Cal. App. 4th 1398, 1403-1404, 83 Cal. Rptr. 3d 632* , the court of appeal relied on *Huskinson & Brown v. Wolf (2004) 32 Cal. 4th 453, 460, 9 Cal. Rptr. 3d 693, 84 P.3d 379* , and held further that the attorney's claim for quantum meruit should be against the attorney with which the fee-sharing agreement is entered, not the client.

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2A-25 California Points & Authorities § 25.38

§ 25.38 Supporting Contention That Attorney Has Valid Claim for Compensation Based on Reasonable Value of Services Rendered to Client--Services Performed Out-of-State by Attorney or Firm Not Licensed to Practice in California

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF HAS A VALID CLAIM FOR COMPENSATION BECAUSE PLAINTIFF IS ENTITLED TO THE REASONABLE VALUE OF PROFESSIONAL SERVICES RENDERED ON BEHALF OF DEFENDANT TO THE EXTENT THAT THOSE SERVICES WERE PERFORMED OUT-OF-STATE AND DID NOT AMOUNT TO THE PRACTICE OF LAW IN CALIFORNIA.

Out-of-State Attorney or Firm Not Licensed to Practice Law in California Is Entitled to Compensation for Services Performed Out-of-State, Not Constituting the Practice of Law in California. An out-of-state attorney or firm, not licensed to practice law in California, is entitled to the reasonable value of services rendered to a client when those services were performed out-of-state and did not constitute the unauthorized practice of law in California under *Bus. & Prof. Code § 6125* (*Birbrower, Montalbano, Condon & Frank v. Superior Court of Santa Clara County (ESQ Business Services, Inc.) (1998) 17 Cal. 4th 119, 70 Cal. Rptr. 2d 304, 949 P.2d 1* ; *see also Estate of Condon (1998) 65 Cal. App. 4th 1138, 76 Cal. Rptr. 2d 922*).

[2] Comments

[a] Use of Form

This form may be submitted in support of an attorney's contention that he or she has a valid claim for compensation based on the reasonable value of professional services rendered by the attorney on behalf of a client out-of-state, which did not constitute the unauthorized practice of law in California, even though other services rendered under the same contract may have constituted services performed in California in violation of *Bus. & Prof. Code § 6125*, and thus are noncompensable. The argument supported by this memorandum may be raised any time the opposing party alleges that an attorney is not entitled to the reasonable value of services performed out-of-state by an attorney or firm not licensed

to practice law in California. The argument would be most likely to arise in support of an attorney's independent action against a client to recover in quantum meruit. If counsel for the attorney asserts that all services rendered under the contract are compensable, counsel should refer to § 25.30.

If the attorney and client entered into a contingent fee contract, the attorney's cause of action for reasonable compensation accrues only when the contingency stated in the original agreement, e.g., the client's recovery by either settlement or judgment, has occurred [*see § 25.55*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the terms of the fee agreement between the attorney and client and show the existence of a valid contract. Counsel should discuss the terms of the contract between the attorney and client to show that even if some provisions of the contract are invalid because they pertain to the provision of services in California that constitute the unauthorized practice of law, the contract is lawful in other respects and the attorney is entitled to the reasonable value of his or her services rendered out-of-state that do not constitute the unauthorized practice of law in California. Counsel should discuss the nature and extent of the compensable legal services performed by the attorney to show the value of those services. If the client contends that the amount of the fee sought by the attorney is excessive and bears no relation to the reasonable value of the services rendered by the attorney [*see § 25.57*], the memoranda set out in *§ 25.39* (supporting contention that attorney's fees are reasonable) may be used by the attorney in conjunction with the memoranda set forth in this form. Counsel should show that the attorney has made demand on the client for payment of the reasonable value of his or her services, and that the client refuses to pay. If the attorney seeks to obtain compensation for the reasonable value of his or her services from any recovery or judgment in the underlying action, counsel must show that there has been a recovery in the client's favor and that the client or any other person holding the recovery obtained refuses to pay the attorney for the reasonable value of services rendered under the attorney-client contract. In the case of a contingent fee agreement, counsel should show that the stated contingency, e.g., a recovery or judgment in the client's favor, has occurred.

This form may be combined with a form of memorandum relating to the specific procedural context in which counsel wishes to raise the substantive issue of the attorney's right to recover the reasonable value of services rendered under a contract that is partially invalid. They may also be adapted for use in a trial or appellate brief.

[b] Opposing Memoranda

In an appropriate case, the memoranda set out in *§ 25.52* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Out-of-State Attorney or Firm Not Licensed to Practice Law in California Is Entitled to Compensation for Services Performed Out-of-State, Not Constituting the Practice of Law in California

The facts and procedural background of ***Birbrower, Montalbano, Condon & Frank v. Superior Court of Santa Clara County (ESQ Business Services, Inc.)*** *(1998) 17 Cal. 4th 119, 70 Cal. Rptr. 2d 304, 949 P.2d 1* are discussed in § 25.44[3]. There the California Supreme Court held that a New York law firm, none of whose attorneys were licensed to practice law in California while representing a California client in matters occurring in California, violated *Bus. & Prof. Code § 6125* (unauthorized practice of law by person not licensed in California), and that the fee agreement was unenforceable as to legal services provided in California (*17 Cal. 4th 119, 127-140)* . However, the Court also held that the agreement was enforceable to the extent it was possible to sever the portions of the consideration attributable to services illegally rendered in California from those attributable to New York services, and the firm could recover fees under the agreement for the limited legal services performed in New York to the extent they did not constitute practicing law in California. The fee agreement became illegal when the firm performed legal services in violation of *Bus. & Prof. Code § 6125*, but the law of contract severability [*Civ. Code § 1599*] allows courts to enforce valid parts of

contracts that are only partially void when the contract has several distinct objects, of which one at least is lawful. The object of the fee agreement in *Birbrower* may not have been entirely illegal, assuming the client was to pay compensation based in part on work performed in New York that did not amount to the practice of law in California (*17 Cal. 4th 119, 137-140)* .

The facts and procedural background of *Estate of Condon (1998) 65 Cal. App. 4th 1138, 76 Cal. Rptr. 2d 922* are discussed in *§ 25.30[3][d]*. In that case, after a California probate court denied a Colorado attorney fees for services provided to a coexecutor of a decedent's estate who lived in Colorado, the court of appeal, after reconsideration of its reversal of the probate court's order ordered by the California Supreme Court in light of *Birbrower*, held that the Colorado attorney had not practiced law "in California" and was therefore entitled to fees for his services (*65 Cal. App. 4th 1138, 1148)* . The court distinguished the facts before it from *Birbrower*, noting that in *Birbrower*, the out-of-state attorney's client was a California resident, while in this case, both the attorney and client were from Colorado (*65 Cal. App. 4th 1138, 1146)* . Acknowledging that, as stated in *Birbrower*, the goal of *Bus. & Prof. Code § 6125* is to protect California citizens from incompetent or unscrupulous practitioners of law, the court concluded that Section 6125, while generally applicable to out-of-state lawyers, was not applicable to the matter before it (*65 Cal. App. 4th 1138, 1146)* . Where an out-of-state lawyer, not licensed in California, provides legal services to an out-of-state client regarding California law, the lawyer is not "practicing law" in California for purposes of *Bus. & Prof. Code § 6125* and is entitled to attorney's fees regardless of the lawyer's physical or virtual presence in California relating to the matter (*65 Cal. App. 4th 1138, 1148)* .

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 25 ATTORNEY'S FEES
PART II. FORMS

2A-25 California Points & Authorities § 25.39

§ 25.39 Supporting Contention That Attorney's Fees Sought Are Reasonable

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF IS ENTITLED TO COMPENSATION BECAUSE PLAINTIFF HAS RENDERED PROFESSIONAL SERVICES ON BEHALF OF DEFENDANT AND THE COMPENSATION SOUGHT IS A REASONABLE AMOUNT.

A. General Factors to Be Considered. Factors to be considered in determining the reasonableness of attorney's fees are the time and labor involved, the novelty and difficulty of the legal questions involved and the skill required to properly conduct the case, customary charges for similar services, the amount involved in the controversy and the benefits resulting to the client, and the contingency or certainty of the compensation (*Cline v. Zappettini (1955) 131 Cal. App. 2d 723, 728, 281 P.2d 35*).

[*Optional*] **B. Customary Fee in Locality.** The fee that is customarily charged in the locality for similar legal services can determine the amount of reasonable attorney's fees (*Knight v. Russ (1888) 77 Cal. 410, 415, 19 P. 698* ; *Matthiesen v. Smith (1936) 16 Cal. App. 2d 479, 483*).

[*Optional*] **C. Experience, Reputation, and Ability of Attorney.** Reasonableness of fees can be judged according to the experience, reputation, and ability of the attorney (*Hurst v. Hurst (1964) 227 Cal. App. 2d 859, 871, 39 Cal. Rptr. 162* ; *Boller v. Signal Oil & Gas Co. (1964) 230 Cal. App. 2d 648, 655, 41 Cal. Rptr. 206*).

[*Optional*] **D. Contingent Versus Fixed Fee.** Whether or not attorney's fees are fixed or contingent is a factor used in determining reasonableness of attorney's fees (*Estate of Raphael (1951) 103 Cal. App. 2d 792, 796, 230 P.2d 436* ; *Swanson v. Hempstead (1944) 64 Cal. App. 2d 681, 688, 149 P.2d 404*).

[*Optional*] **E. Discretion of Trial Court.** When the trial court is informed of the nature and extent of the legal services rendered, it may rely on its own experience and knowledge in determining their reasonable value *Elconin v. Yalen*

(1929) 208 Cal. 546, 549-550, 282 P. 791 ; *Clejan v. Reisman (1970) 5 Cal. App. 3d 224, 241, 84 Cal. Rptr. 897*).

[*Optional*] **F. Profit Margin Irrelevant to Determination of Unconscionable Fee.** *California Rules of Professional Conduct, Rule 4-200*, specifically describes how to determine whether an attorney has charged an unconscionable fee, and nothing in that rule suggests that an attorney's profit margin is in any way relevant to that determination (*Shaffer v. Superior Court (1995) 33 Cal. App. 4th 993, 1000, 39 Cal. Rptr. 2d 506*).

[2] Comments

[a] Use of Form

This form may be submitted in support of an attorney's contention that the attorney's fees sought by him or her are reasonable. It may be used when an attorney seeking to obtain the reasonable value of services rendered to a client wants to establish that the compensation sought is a reasonable amount. The argument supported by this form may be raised any time the opposing party alleges that an attorney's fees are not reasonable. The argument would be most likely to arise in support of an attorney's independent action against a client to recover in quantum meruit for the reasonable value of services rendered. Thus, the memoranda in this form may be used when the employment agreement makes no provision for payment of a specified fee (*see § 25.32*), when the attorney is unable to fully perform without fault of either party (*see § 25.33*), when the attorney is discharged by the client (*see § 25.34*), or when the attorney-client contract cannot be enforced (*see § 25.36*).

The argument may also arise in an action for malpractice in which a client is alleging that the attorney defendant violated rules of profession conduct by charging an unconscionable fee [Optional Paragraph F].

This form may be combined with a form of memorandum relating to the specific procedural context in which counsel wishes to raise the substantive issue of the reasonableness of an attorney's fee. This for may also be adapted for use in a trial or appellate brief.

In most cases, if the employment contract is otherwise valid, the attorney is entitled to the stipulated fee, regardless of whether it is reasonable [*see Berk v. Twentynine Palms Ranchos, Inc. (1962) 201 Cal. App. 2d 625, 636-637, 20 Cal. Rptr. 144* ; *see also Setzer v. Robinson (1962) 57 Cal. 2d 213, 218, 18 Cal. Rptr. 524, 368 P.2d 124* ; *Reynolds v. Sorosis Fruit Co. (1901) 133 Cal. 625, 630, 66 P. 21]* . However, the argument that attorney's fees are reasonable may arise in support of an attorney's independent action against a client for breach of contract to recover the set fee provided for in the employment contract when the client refuses to pay the fee on the ground that it is so high as to be unconscionable. In such a case, the memoranda in this form may be used in conjunction with § 25.30 (supporting contention that attorney has valid contractual claim for compensation), § 25.31 (supporting contention that attorney has valid claim for compensation based on contingent fee agreement), or § 25.40 (supporting contention that attorney has valid contractual lien on judgment or recovery). For additional memoranda for use in an action for breach of contract, see Ch. 50, *Contracts* .

Counsel should insert argument with this form, showing the relationship between the facts of the case and the points of law stated. Thus, if the attorney seeks to recover in quantum meruit for the reasonable value of services rendered, counsel should discuss the nature of the performance rendered. Factors that are used by the court in determining the reasonableness of a fee, such as the time, labor, and skill required to satisfactorily handle the case and the difficulty of the legal issues involved (Paragraph A), customary fees in the locality for similar services (optional Paragraph B), the experience, reputation, and ability of the attorney (optional Paragraph C), whether the fee is contingent (optional Paragraph D), and any other pertinent factors should be discussed as they relate to the facts of the case. If the attorney has fully performed under the terms of an employment contract and the client then refuses to pay on the ground that the fee is too high, counsel should discuss the terms of the contract in order to show that the contract is valid and enforceable and that its terms are not unconscionable [*see §§ 25.30, 25.31*; *see also* Ch. 50, *Contracts*].

[b] Opposing Memoranda

In an appropriate case, the memoranda set out in *§ 25.57* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] General Factors to Be Considered

In ***Cline v. Zappettini*** *(1955) 131 Cal. App. 2d 723, 281 P.2d 35* , plaintiff attorney brought an action for declaratory relief seeking a determination of his rights under a contingent fee contract. The client was threatened with a lawsuit by a real estate broker seeking to collect his broker's fee for services rendered in connection with an agreement to exchange real property. The client claimed that he had revoked the exchange agreement. Attorney and client agreed that if the case was settled within one week before trial or if it went to judgment, the attorney would receive one third of the brokerage fee. If the case settled before that time, the attorney would receive one third of the brokerage fee saved. If the client agreed to abide by the exchange agreement, the attorney would charge a reasonable fee not to exceed $500. It was also agreed that if the client was sued for the additional brokerage fee promised by the other party to the exchange agreement, the attorney's fee would be based on the larger amount since the attorney would have to defend the client in two actions.

The attorney filed a complaint in declaratory relief against the broker and against the other party to the exchange agreement. Both defendants answered and crosscomplained. The attorney met again with his client to discuss fees and it was agreed that if the suit was prosecuted to a successful conclusion the client would pay an attorney's fee of $7,000. The trial court decided that the exchange agreement was of no legal force and that neither defendant was entitled to judgment on the crosscomplaints. The client then sent the attorney a check for approximately one half of the agreed fee. The attorney returned the check and brought an action for declaratory relief. The trial court determined that the attorney was entitled to the full fee, and defendant appealed.

The court of appeal affirmed, stating that the evidence supported the attorney's contention that the client was fully informed of all pertinent facts relating to the fee agreement. The agreement was in writing and the parties met several times to discuss its terms. The court stated that in determining whether a contract between attorney and client is fair and equitable, the following factors may considered: the time and labor involved, the novelty and difficulty of the legal questions involved and the skill required to properly conduct the case, customary charges for similar services, the amount involved in the controversy and the benefits resulting to the client, and the contingency or certainty of the compensation. The court held that the contract was fair and equitable because the attorney did many hours of research and spent five days in trial. From defendant's point view the best possible result was obtained since, if the exchange agreement had been carried out, it would have cost the client $75,000. Therefore, considering the services rendered and the results obtained, $7,000 was a reasonable fee (*131 Cal. App. 2d 723, 728)* .

[b] Customary Fee in Locality

In ***Knight v. Russ*** *(1888) 77 Cal. 410, 19 P. 698* , plaintiff attorney was retained by defendant to assist in his defense on an indictment for subornation of perjury. Plaintiff assisted in handling the case, and defendant's demurrer was sustained and the indictment dismissed. Plaintiff presented his client with a bill that the client refused to pay. The attorney brought an action to recover his fee and obtained a jury verdict for the full amount claimed. Defendant appealed.

The Supreme Court held that there was strong evidence to show that plaintiff was employed by defendant to assist in the defense of the criminal prosecution, and that his services were worth as much as the amount allowed by the verdict. Defendant contended that the trial court's instruction, stating that it was proper to consider evidence of the prices usually charged for similar services by other attorneys in the same vicinity and practicing in the same court, was misleading and

erroneous. The Court stated that the instruction was a proper and well-settled rule of law (*77 Cal. 410, 415)* .

In ***Matthiesen v. Smith*** *(1936) 16 Cal. App. 2d 479* , the owner of six promissory notes totaling $171,358 placed the notes with a bank for collection with instructions that if they were not paid they should be turned over to an attorney for collection. Payment on the notes was refused so the bank turned the matter over to one of its attorneys. The attorney brought an action to collect, and prior to the date set for trial, defendants paid the notes in full. The attorney then presented the owner of the notes with a bill for services in the amount of $12,500. The owner refused to pay the fee, claiming that it was exorbitant, and plaintiff attorney brought an action to recover for the reasonable amount of legal services. At the trial, a jury found for plaintiff and awarded him $12,500. Defendants appealed.

The court of appeal affirmed, stating that no evidence had been presented showing that the fee was unreasonable for the services rendered. Defendants had introduced no testimony as to what was a reasonable fee, and plaintiff's expert witnesses all testified that the value of the services was greater than the amount of the verdict (*16 Cal. App. 2d 479, 481-482)* . The court also stated that the amount of compensation must vary with the place in which attorney's services are rendered, for the same services are of more value in a large city than in a small community (*16 Cal. App. 2d 479, 483)* .

[c] Experience, Reputation, and Ability of Attorney

In ***Hurst v. Hurst*** *(1964) 227 Cal. App. 2d 859, 39 Cal. Rptr. 162* , plaintiff brought a paternity action against defendant. Plaintiff was successful in establishing paternity but appealed the trial court's award of $10,000 to her attorney, contending that it was so inadequate as to amount to a clear abuse of discretion.

The court of appeal reversed the judgment as to attorney's fees and remanded the matter to the trial court for redetermination of reasonable attorney's fees. The court said that all parties and the trial court conceded that it was a very difficult case and yet plaintiff's attorney had obtained a successful result. Many hours were spent in preparation for the six-day trial and the numerous court appearances. The court made special note of the experience and reputation of plaintiff's attorney, mentioning his years of experience, the types of litigation he had done during his distinguished career, and the reputation he had as a litigator and legal scholar among his peers (*227 Cal. App. 2d 859, 871)* .

In ***Boller v. Signal Oil & Gas Co.*** *(1964) 230 Cal. App. 2d 648, 41 Cal. Rptr. 206* , plaintiff attorney was retained by defendant to prosecute an appeal. Defendant had been involved in a lengthy dispute with the county in which defendant alleged that it had been illegally taxed on offshore oil and gas leases for the benefit of certain school districts. Defendant had sued in superior court for a writ of mandate to compel the county board of supervisors to take action on defendant's refund claims. The county's demurrer was sustained, and defendant employed plaintiff attorney to handle the appeal. It was agreed that defendant would provide secretarial services, stationery, use of its law library, and any out-of-pocket costs of litigation. The attorney was paid $5,000 on account but the arrangement as to his fee was not definite. Plaintiff was successful in prosecuting the appeal and submitted a final statement, showing that he had worked 6411/2 hours on the case at a rate of $35 per hour. Defendant refused to pay, alleging that no arrangement for an hourly fee had been made that it believed that the attorney had agreed to accept $5,000 as a flat fee for all his services. The attorney brought an action to collect the fee, on the theory that either he had an express oral contract for a fee of $35 per hour or that he should be paid for the reasonable value of his services. The trial court found that there was no express oral contract, but that the attorney was entitled to the reasonable value of his services, which the court fixed at $2,500 after crediting the $5,000 advance. Plaintiff appealed, claiming that the amount was insufficient.

The court of appeal concluded that the trial court had applied erroneous standards when determining a reasonable fee, and the judgment was modified to allow a fee of $17,500. The trial court was of the opinion that the attorney had spent more time than necessary on the case, but the court of appeal stated that plaintiff had been given sole responsibility for the appeal and his judgment and methods of operation in handling the case should be given consideration. The trial court also stated that the case did not call on plaintiff's stipulated expertise as a tax lawyer, since the appeal mainly

involved a question of statutory construction. The court of appeal found that the evidence did not support this conclusion, since the case did involve a complex and difficult property tax matter and plaintiff was an expert in the area of law concerning claims for tax refunds. Plaintiff had to overcome a variety of legal obstacles in successfully prosecuting the appeal, and he brought to the task a background of years of experience with such problems. He was hired by defendant because of such background, and he obtained successful results for defendant (*230 Cal. App. 2d 648, 655-656)* . Thus, a fee of $17,500 was reasonable for the services rendered by plaintiff.

[d] Contingent Versus Fixed Fee

In ***Estate of Raphael*** *(1951) 103 Cal. App. 2d 792, 230 P.2d 436* , two attorneys agreed to represent a widow on a contingent fee basis in proceedings to settle her husband's estate. The contract provided that the contingent fee would be 50 percent of her share of any property not inventoried that they succeeded in having included in the estate and 50 percent of the additional one half of the inventoried property that she would receive if it was established that it was community and not separate property. The attorneys were successful in obtaining an adjudication that all the inventoried property was community property, which was affirmed on appeal. During the pendency of the appeal, the client discharged the attorneys and substituted other counsel and refused to pay any amount under the contingent fee contract, alleging that the contingent fee was unreasonable and that the contract had been obtained by fraud, duress, and undue influence. The attorneys moved the probate court for an order approving the contract and allowing them compensation. The order was granted, and the client appealed.

The court of appeal affirmed, finding that there was no evidence to show that the contract had been obtained under fraud, duress, or undue influence and that the contingent fee was not unreasonable. The court stated that a contingent fee contract, because it involves a gamble on the result, may properly provide for a larger compensation than would otherwise be reasonable. The attorneys made a gamble that they would not collect any fees at all, since the outcome was uncertain, and even the trial judge had stated that the case involved a very "close question" (*103 Cal. App. 2d 792, 796-797)* . The court of appeal found that the attorneys were entitled to 50 percent of the client's recovery.

In ***Swanson v. Hempstead*** *(1944) 64 Cal. App. 2d 681, 149 P.2d 404* , a contingent fee contract provided that an attorney would represent a client in an action to recover certain money and property owed to the client in exchange for a contingent fee of 50 percent of any recovery. The attorney brought an attachment action on the client's behalf to collect on a promissory note. A compromise was reached in which the debtor agreed to execute a new note in the client's favor in consideration of cancellation of the old note and dismissal of the action to collect on the old note. One-half interest in the new note was assigned to the attorney. The client then brought an action against the attorney to cancel the assignment, alleging that the attorney had been paid in full and that the partial assignment of the note was without any consideration. The attorney claimed that he had an interest in the note because of the terms of the contingent fee contract and that he had not been paid in full for his services. The trial court cancelled the attorney-client contract on the grounds that it was an unconscionable contract entered into under fraud and undue influence, and the attorney appealed.

The court of appeal reversed, stating that the evidence produced at the trial level did not support any findings that the contract was unconscionable (*64 Cal. App. 2d 681, 687)* . The court said that the unconscionability of a contingent fee contract must be determined upon the situation as it fairly appears to the parties at the time it is entered into, not as subsequent events reveal it to be, and that speculation on the outcome is implicit in the nature of such contracts. A fee of 50 percent of the client's recovery might be unconscionable if the recovery was sure to be made, but the evidence presented showed that this was not the case (*64 Cal. App. 2d 681, 688-689)* .

[e] Discretion of Trial Court

The facts and procedural background of ***Elconin v. Yalen*** *(1929) 208 Cal. 546, 282 P. 791* are discussed in *§ 25.32[3][a]*. In *Elconin*, the Supreme Court upheld the ruling of the trial court and stated that the trial court had before it detailed evidence regarding the nature and extent of the legal services rendered and could use its own experience and

judgment to determine the reasonable value, with or without the aid of witnesses' testimony (*208 Cal. 546, 549-550)* .

In ***Clejan v. Reisman*** *(1970) 5 Cal. App. 3d 224, 84 Cal. Rptr. 897* , plaintiffs were successful in litigation but appealed from that portion of the judgment awarding them $3,000 in attorney's fees, asserting that the award was inadequate. Counsel for plaintiffs had informed the trial court that 468 hours were spent in preparation for the trial and two members of their law firm were in court during the eight days of trial. The court of appeal reversed the judgment as to the award of attorney's fees, finding that based on a total of 500 hours, the award allowed only the wholly inadequate fee of $6 per hour. The court said that the knowledge and experience of the trial judge was sufficient to determine the reasonable value of attorney's services, but that in this case the trial court had abused its discretion (*5 Cal. App. 3d 224, 241)* .

[f] Profit Margin Irrelevant to Determination of Unconscionable Fee

In ***Shaffer v. Superior Court*** *(1995) 33 Cal. App. 4th 993, 39 Cal. Rptr. 2d 506* , a client brought an action against his attorney alleging malpractice. At a deposition, the client sought disclosure of the hourly rate that a contract attorney charged defendant attorney while she was working on the client's case. The client argued that the information tended to prove that the defendant attorney had charged the client an unconscionable fee in violation of *Cal. Rules of Professional Conduct, Rule 4-200*. The contract attorney refused to disclose the information, and the client filed a motion to compel her to answer. The motion was granted and the contract attorney petitioned the court of appeal for a peremptory writ of mandate.

The court of appeal granted the petition, compelling the trial court to vacate its order. The court stated that *California Rules of Professional Conduct, Rule 4-200* prohibits members of the bar from contracting for, charging, or collecting unconscionable fees and it specifically describes how it is to be determined that an unconscionable fee has been charged. The court concluded that there is nothing in Rule 4-200 to suggest that an attorney's profit margin is in any way relevant to the issue. In support of its conclusion, the court cited several questions and problems that would be opened should a law firm's profit margin be relevant to the analysis of the conscionability of its fees (*33 Cal. App. 4th 993, 1000-1001)* . The court also cited comments made in cases relating to an award of reasonable attorneys fees in public interest cases, which similarly concluded that a determination of a "reasonable" attorney fee based on costs is neither appropriate or practical (*33 Cal. App. 4th 993, 1002-1003)* .

[4] Additional Authorities

[a] General Factors to Be Considered

In *Olson v. Cohen, (2003) 106 Cal. App. 4th 1209, 1218, 131 Cal. Rptr. 2d 620* , the court held that the determination of reasonable attorney fees is at the discretion of the trial court, which is in the best position to judge the value of services rendered in its court. The court stated that factors which may be considered in determining the reasonableness of attorney's fees include the nature of the litigation, the difficulty of the litigation, the amount involved, the skill employed, the attention given, the success of the attorney's efforts, the attorney's learning and experience, the intricacies and importance of the litigation, the labor necessary, and the time consumed.

In *Melnyk v. Robledo (1976) 64 Cal. App. 3d 618, 134 Cal. Rptr. 602* , defendant appealed from that portion of a judgment in her favor awarding her attorney's fees in less than the amount requested. In affirming, the court of appeal stated that a trial court should make its determination after consideration of a number of factors, including the nature of the litigation, its difficulty, the amount involved, the skill required and the skill employed in handling the litigation, the attention given, the results obtained, and other circumstances in the case (*64 Cal. App. 3d 618, 623-624)* .

In *Anthony v. Anthony (1968) 259 Cal. App. 2d 156, 66 Cal. Rptr. 420* , defendant in a dissolution action appealed from an order after judgment awarding plaintiff $53,000 in attorney's fees. The court of appeal upheld the award,

finding that the fees were less than 3 percent of the potential community property that plaintiff's attorneys had obtained for her through their skillful efforts on her behalf (*259 Cal. App. 2d 156, 157-158)* .

In *Berry v. Chaplin (1946) 74 Cal. App. 2d 669, 169 P.2d 453* , plaintiff brought an action against defendant to determine paternity and obtain support. The jury determined that defendant was the father of plaintiff's child, and plaintiff was awarded a monthly sum for support and $5,000 in attorney's fees. Plaintiff appealed from the portions of the judgment awarding support and attorney's fees on the grounds that the amounts were inadequate.

The court of appeal affirmed the amount awarded as monthly support, but reversed the portion of the judgment fixing attorney's fees. The court found that the $5,000 award was insufficient and that the trial court had abused its discretion in granting it. The court stated that among the factors to be considered in determining reasonable compensation for an attorney are the nature of the litigation, its difficulty, the amount involved, the skill required and employed in handling the litigation, the result obtained, the learning, age, and experience of the attorney, and the time consumed in trying the case (*74 Cal. App. 2d 669, 679)* . Attorneys for plaintiff filed several motions and petitions, held conferences with county counsel, and prepared briefs prior to going to trial. The first trial took approximately three weeks and the jury could not reach a verdict, necessitating a second trial of two weeks. The court of appeal found that the attorneys' work was executed with the thoroughness that characterizes skilled attorneys, that important and unusual questions of law were resolved, and that the results of the case were favorable to plaintiff (*74 Cal. App. 2d 669, 681)* . The portion of the judgment fixing fees was reversed with directions to redetermine the amount of attorneys' fees.

[b] Contingent Versus Fixed Fee

The facts and procedural background of *Goldstone v. The State Bar of California (1931) 214 Cal. 490, 6 P.2d 513* are discussed in *§ 25.57[3][a]*. In *Goldstone*, in reviewing disciplinary proceedings of the State Bar, the Supreme Court found that an attorney had charged such a high fee for such trivial service that a temporary suspension from practice was warranted. The attorney had originally agreed to assist in the collection of an award in an industrial accident case in exchange for a contingent fee of 40 percent of any recovery. The attorney later disclaimed the contingent fee contract and said that his fee was the subsequent charge for the services rendered by him. The Supreme Court stated that to charge such a fee after doing so little for the client was attorney misconduct, but that a contingent fee agreement might have been some justification for the size of the fee. An attorney embarking on litigation on a contingent fee basis is well within his or her rights in charging a substantial percentage of the amount recovered because the amount of services to be rendered and the outcome of the litigation are both uncertain (*214 Cal. 490, 498)* .

The facts and procedural background of *Gelfand, Greer, Popko & Miller v. Shivener (1973) 30 Cal. App. 3d 364, 105 Cal. Rptr. 445* are discussed in *§ 25.58[3][a]*. In *Gelfand*, the court of appeal held that an attorney who successfully established a client's 20 percent share of a $100,000 wrongful death settlement was entitled to a 50 percent contingent fee, even though the attorney had not participated in the wrongful death litigation that led up to the settlement, and the major portion of his services to the client consisted of an appearance at a two hour apportionment hearing. The court discussed the various eventualities that could have resulted and stated that the attorney should not be compelled to recover on a quantum meruit basis simply because he was singularly successful on behalf of his client (*30 Cal. App. 3d 364, 377)* . The summary judgment for the attorney was reversed solely on the ground that there was a triable issue of fact as to whether the parties to the fee contract intended to give the attorney a security interest in, or lien on, the recovery.

In *Youngblood v. Higgins (1956) 146 Cal. App. 2d 350, 303 P.2d 637* , the court of appeal held that a contingent fee agreement was not excessive merely because it was for $500 plus one third of the gross recovery (*146 Cal. App. 2d 350, 352)* .

[c] Discretion of Trial Court

In *Glendora Community Development Agency v. Demeter (1984) 155 Cal. App. 3d 465, 202 Cal. Rptr. 389* , the appellate court upheld the trial court's award of attorney's fees based on a contingent fee contract in an action under *Code Civ. Proc. § 1268.610*. Noting that the lower court's holding had substantial evidence to support it, the court said that the amount to be awarded as attorney's fees is left to the sound discretion of the trial court, where the trial judge is in the best position to evaluate the services rendered by an attorney in the courtroom, and the judge's finding will not be disturbed on appeal unless it is clearly wrong (*155 Cal. App.3d 465, 474)* .

California Points & Authorities

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 25 ATTORNEY'S FEES
PART II. FORMS

2A-25 California Points & Authorities § 25.40

§ 25.40 Supporting Contention That Attorney Has Valid Contractual Lien on Judgment or Recovery

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF HAS A VALID CONTRACTUAL LIEN ON _____ [DEFENDANT'S *or* HIS/HER CLIENT'S] RECOVERY IN THE UNDERLYING ACTION BECAUSE PLAINTIFF HAS RENDERED PROFESSIONAL SERVICES IN HIS/HER CAPACITY AS ATTORNEY PURSUANT TO A VALID CONTRACT ENTERED INTO BETWEEN PLAINTIFF AND _____ [DEFENDANT *or* HIS/HER CLIENT] BY WHICH _____ [DEFENDANT *or* THE CLIENT] AGREED TO PAY PLAINTIFF FOR SUCH SERVICES AND WHICH PROVIDED FOR A LIEN IN PLAINTIFF'S FAVOR ON ANY RECOVERY OR JUDGMENT IN FAVOR OF _____ [DEFENDANT *or* THE CLIENT] IN THE UNDERLYING ACTION.

A. Lien Created by Express Contract. A fee agreement between an attorney and client that provides for a lien on the client's recovery creates a valid contractual lien on the proceeds of the judgment (*see* *Fletcher v. Davis (2004) 33 Cal. 4th 61, 69-70, 14 Cal. Rptr. 3d 58, 90 P.3d 1216* (charging lien must comply with *Cal. Rules of Prof. Conduct, Rule 3-300*); *Cetenko v. United California Bank (1982) 30 Cal. 3d 528, 531, 179 Cal. Rptr. 902, 638 P.2d 1299* ; *Haupt v. Charlie's Kosher Market (1941) 17 Cal. 2d 843, 845-846, 112 P.2d 627* ; *Plummer v. Day/Eisenberg, LLP (2010) 184 Cal. App. 4th 38, 45-48, 108 Cal. Rptr. 3d 455* ; *Epstein v. Abrams (1997) 57 Cal. App. 4th 1159, 67 Cal. Rptr. 2d 555* ; *Saltarelli & Steponovich v. Douglas (1995) 40 Cal. App. 4th 1, 6, 46 Cal. Rptr. 2d 683*).

[*Optional*] **B. Attorney's Lien May Be Created by Implication.** An attorney's lien on the proceeds of a judgment may be implied if the retainer agreement between lawyer and client indicates that the attorney is to look to the judgment for payment of professional fees (*Skelly v. Richman (1970) 10 Cal. App. 3d 844, 865, 89 Cal. Rptr. 556* ; *Bartlett v. Pacific Nat. Bank (1952) 110 Cal. App. 2d 683, 689, 244 P.2d 91, 94-95)* .

[*Optional*] **C. Lien Survives Discharge.** A lien for attorney's fees survives the discharge of the attorney by the client, and the amount of the lien is equal to the reasonable value of the attorney's services rendered prior to discharge (*Weiss*

v. Marcus (1975) 51 Cal. App. 3d 590, 598, 124 Cal. Rptr. 297).

[*Optional*] **D. Attorney Lien Survives Client's Later Bankruptcy Absent Its Disallowance or Avoidance During Bankruptcy.** An attorney's lien is perfected at the time of contractual agreement, and a former client's obligation to pay, secured under that lien and incurred before the former client's bankruptcy proceeding, is not automatically discharged. The bankruptcy does not prevent enforcement of the lien unless the lien itself was disallowed or avoided in the bankruptcy proceeding (*Saltarelli & Steponovich v. Douglas (1995) 40 Cal. App. 4th 1, 5, 46 Cal. Rptr. 2d 683*).

[*Optional*] **E. Attorney's Contractual Lien on Proceeds of Judgment Has Priority Over Subsequent Judgment Creditor Liens.** An attorney's lien created by contract is entitled to priority over a subsequent judgment creditors's lien filed pursuant to *Section 708.410 of the Code of Civil Procedure* and over subsequent attachments levied on the judgment (*Cetenko v. United California Bank (1982) 30 Cal. 3d 528, 532-536, 179 Cal. Rptr. 902, 638 P.2d 1299* ; *Haupt v. Charlie's Kosher Market (1941) 17 Cal. 2d 843, 845-846, 112 P.2d 627* ; *Waltrip v. Kimberlin (2008) 164 Cal. App. 4th 517, 524-525, 79 Cal. Rptr. 3d 460*).

[*Optional*] **F. Debtor With Notice of Attorney's Lien Not Discharged by Payment to Client.** A client's debtor who has notice of an attorney's lien on funds due the client will not be discharged from his or her obligation to the attorney by subsequent performance rendered to the client (*Siciliano v. Fireman's Fund Ins. Co. (1976) 62 Cal. App. 3d 745, 757, 133 Cal. Rptr. 376* ; *Skelly v. Richman (1970) 10 Cal. App. 3d 844, 865, 89 Cal. Rptr. 556*).

[*Optional*] **G. Lien on Proceeds of Unrelated Litigation.** A contractual lien may be created to secure attorney fees for services that were rendered unrelated to the litigation and that did not generate the settlement proceeds (*see* *Bluxome Street Associates v. Fireman's Fund Ins. Co. (1988) 206 Cal. App. 3d 1149, 1153-1154, 254 Cal. Rptr. 198*).

[*Optional*] **H. Notice of Lien Not Required.** Providing notice of a lien is not a prerequisite to the creation or enforceability of an attorney's contractual lien on a client's recovery (*see* *Saltarelli & Steponovich v. Douglas (1995) 40 Cal. App. 4th 1, 6, 46 Cal. Rptr. 2d 683* ; *Bluxome Street Associates v. Fireman's Fund Ins. Co. (1988) 206 Cal. App. 3d 1149, 1156-1157, 1158, 254 Cal. Rptr. 198*).

[*Optional*] **I. Lien Exists Without Judgment From Independent Action.** While a discharged attorney must file an independent action to establish the amount of the lien and to enforce it, a judgment on the lien is not a condition precedent to its existence or viability (*Saltarelli & Steponovich v. Douglas (1995) 40 Cal. App. 4th 1, 6, 46 Cal. Rptr. 2d 683*).

[*Optional*] **J. Recovery of Fee Is Permitted Even if Lien Is Invalid**. Even if a lien is invalid or otherwise unenforceable, the underlying obligation remains valid (*Shopoff & Cavallo LLP v. Hyon (2008) 167 Cal. App. 4th 1489, 1522-1524, 85 Cal. Rptr. 3d 268*).

[*Optional*] **K. Attorney's Contractual Lien on Proceeds of Judgment Has Priority Over Medical Lien, Regardless of Which is Filed First.** An attorney's lien created by contract is entitled to priority over a medical lien, regardless of which one is filed first [*Gilman v. Dalby (2009) 176 Cal. App. 4th 606, 616-620, 98 Cal. Rptr. 3d 231*].

[*Optional*] **L. Contingency Fee Agreement Need Not Comply With *Cal. Rules of Prof. Conduct, Rule 3-300* to Create Valid Lien.** Unlike an hourly fee agreement, a contingency fee agreement need not comply with *California Rules of Professional Conduct, Rule 3-300*, to create a valid lien on the recovery (*Plummer v. Day/Eisenberg, LLP (2010) 184 Cal. App. 4th 38, 48-50, 108 Cal. Rptr. 3d 455*).

[2] Comments

[a] Use of Form

This form may be submitted in support of an attorney's contention that he or she has valid contractual lien for attorney's fees on the proceeds of any judgment or recovery in favor of a client who was represented by the attorney in the underlying action. This form may also be used when an attorney seeks to establish priority of the attorney's contractual lien over liens or attachments of subsequent judgment creditors of the client (optional Paragraph E), when an attorney seeks to charge the amount of a lien for attorney's fees against a debtor with notice of the attorney's lien (*e.g.,* the nonprevailing party in the underlying lawsuit) who has made payment directly to the client (optional Paragraph F), or when an attorney seeks to establish a lien for services rendered that are unrelated to the litigation that generated the judgment or recovery (optional Paragraph G). The argument supported by this memorandum may be raised any time the opposing party alleges that there is no lien for attorney's fees on the proceeds of a judgment or recovery. The argument would be most likely to arise in support of an attorney's independent action against the client or the client's debtor to enforce the attorney's lien on the judgment or recovery. The argument could also arise in defense to an action brought by a client's creditor to enforce a subsequent judgment creditor's lien on the client's recovery. An attorney's lien on a client's prospective recovery must be enforced in a separate action; any order or judgment granting the attorney fees in the main action exceeds the court's jurisdiction and is void [*Cal-Western Reconveyance Corp. v. Reed (2007) 152 Cal. App. 4th 1308, 1321-1323, 62 Cal. Rptr. 3d 244]* .

The form may be combined with other memoranda relating to the specific procedural context in which counsel wishes to raise the substantive issue of the existence of a lien for attorney's fees. The form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the terms of the fee agreement between the attorney and his or her client and show the existence of a valid contract and either an express or implied contract provision granting the attorney a lien on any recovery. Counsel should also discuss performance under the contract by the attorney (or excuse for partial performance, such as discharge by the client) and indicate, if applicable, that there has been recovery obtained on the client's claim and that the client or any other person holding the recovery obtained refuses to pay the fee provided for by the contract, or the reasonable value of the attorney's services, in the case of partial performance. If the nonprevailing party paid the client without satisfying the attorney's claim, counsel should show that the party who paid the client had notice of the attorney's lien.

[b] Related Pleading and Practices Discussion and Forms

For detailed discussion of contractual charging liens and their enforcement, including forms of complaint for an action to enforce a lien and a complaint for declaratory relief to establish the existence and validity of a lien, *see* California Forms of Pleading and Practice, Ch. 72, *Attorney Practice and Ethics* (Matthew Bender).

[c] Related Memoranda

For related form pertaining to a judgment creditor's lien on a judgment debtor's cause of action, see *Ch. 131, Judgments , § 131.60* et seq.

[d] Opposing Memoranda

In an appropriate case, the memoranda set out in *§ 25.58* may be used to oppose the contentions supported by the memoranda in this form.

[3] Discussion of Authorities

[a] Lien Created by Express Contract

In ***Fletcher v. Davis*** *(2004) 33 Cal. 4th 61, 14 Cal. Rptr. 3d 58, 90 P.3d 1216* , a client retained plaintiff, attorney Freddie Fletcher, to defend a breach-of-lease action and to institute a conversion action for damages. The client orally agreed to pay all costs plus Fletcher's fee of $200 per hour. In lieu of a cash retainer, the client agreed to grant Fletcher a lien on any judgment or settlement in its litigation. If the judgment or settlement was insufficient, the client agreed to pay the difference from the income it earned once it resumed operations. The client also promised Fletcher an extra unspecified percentage of any judgment obtained if extensive litigation or trial was required and if the recovery in the case was "large." Fletcher also agreed to do additional, personal legal work on behalf of the client's president and his mother. In each matter, the president orally granted Fletcher a lien on the client's prospective recovery in the conversion action.

After the conversion trial resulted in a mistrial, the client fired Fletcher and hired a new attorney. With the new attorney in charge, the client obtained a judgment for $504,000 plus interest. The judgment proceeds were disbursed to various people with claims against the client, not including Fletcher.

Fletcher claimed he did not learn about the disbursement until the day after the funds had been disbursed. Fletcher then filed an action against the client and the others who received part of the judgment proceeds to collect on his lien.

The defendants filed a demurrer against Fletcher, arguing that Fletcher had not perfected his lien against the client. The trial court granted the demurrer, holding that no valid lien existed because, under *Cal. Rules of Prof. Conduct, Rule 3-300*, a client must consent in writing to an attorney's charging lien against the client's future recovery. The court of appeal reversed, holding that Rule 3-300 was inapplicable in that an attorney's charging lien is not "adverse" within the meaning of *Hawk v. State Bar (1988) 45 Cal. 3d 589, 247 Cal. Rptr. 599* . The California Supreme Court granted review.

The Court held that in California a charging lien is created by contract only. Unlike a service lien or a mechanic's lien, an attorney's lien is not created by the mere fact that an attorney has performed services for a client (*33 Cal. 4th 61, 66-67)* . The Court also held that it was reasonably foreseeable the charging lien could become detrimental to the client. Although a charging lien does not grant an attorney the power to extinguish summarily the client's interest in any recovery, a charging lien could significantly impair the client's interest by delaying payment of the recovery or settlement proceeds until any disputes over the lien can be resolved (*33 Cal. 4th 61, 68-69)* . Thus, the Court held that a charging lien is an adverse interest within the meaning of *Cal. Rules of Prof. Conduct, Rule 3-300* and therefore requires the client's informed written consent (*33 Cal. 4th 61, 69)* .

In ***Cetenko v. United California Bank*** *(1982) 30 Cal. 3d 528, 179 Cal. Rptr. 902, 638 P.2d 1299* , an attorney who successfully represented a client in obtaining a judgment filed a motion asking that the entire proceeds of the judgment be released to him as partial satisfaction of his fee. The written contract between the attorney and the client provided for deferred payment of attorney's fees at a stated hourly rate and for a lien on any recovery in the underlying action. Subsequent to the attorney-client contract, a judgment creditor of the client filed a lien on the judgment pursuant to former Code Civ. Proc. § 688.1 (*now see Code Civ. Proc. § 708.410*). The trial court found that the attorney's contractual lien took precedence over the subsequent judgment creditor's lien, and the creditor appealed.

The Supreme Court affirmed, stating that the attorney had a valid lien created by express contract between attorney and client and that it was immaterial whether the contract was for a contingency fee or the payment of hourly fees, as long as the fee arrangement was not so inherently unfair as to be unconscionable. The Court noted that the creditor had not alleged or presented any evidence to show that the fee arrangement was in any way unfair or unreasonable (*30 Cal. 3d 528, 532)* .

The creditor also alleged that the lien was invalid because it was a "secret lien," but the Court found that there is no legal authority that compels an attorney to give notice to a client's creditors of a contractual lien on the judgment, and in any case, the creditor did have actual notice of the attorney's lien. The Court held that the creditor's assertion that a lien

on a judgment could be created only by compliance with former Code Civ. Proc. § 688.1 was completely without merit. By its terms former Code Civ. Proc. § 688.1 relates only to liens of judgment creditors and does not purport to limit liens on a judgment to such creditors to the exclusion of those who have contractual liens (*30 Cal. 3d 528, 533)* . The Court stated that when there is a lien acquired pursuant to statute and a lien created by contract, the text of the statute controls. Since former Code Civ. Proc. § 688.1 contains no language relating to the priority of liens obtained in compliance with its terms, the standard rule of priority applies and thus, other things being equal, the lien first created prevails [*Civ. Code § 2897*]. Since the attorney's contractual lien was created several years before the statutory lien, the attorney's lien prevailed (*30 Cal. 3d 528, 533-534)* .

Former Code Civ. Proc. § 688.1 was superseded in 1983 by *Code Civ. Proc. § 708.410*. In ***Cappa v. F & K Rock & Sand, Inc.*** *(1988) 203 Cal. App. 3d 172, 175, 249 Cal. Rptr. 718* , the court of appeal indicated that the rules set forth in the *Cetenko* case concerning priority of liens will continue to apply under *Code Civ. Proc. § 708.410*. For a discussion of *Cappa*, see *§ 25.40[3][e]*.

In ***Haupt v. Charlie's Kosher Market*** *(1941) 17 Cal. 2d 843, 112 P.2d 627* , an attorney entered into a contingent fee contract with his client, which provided for a fee of one third of any recovery in the action, and a lien in that amount on the judgment. Immediately following a verdict for his client in the personal injury action, the attorney notified the defendants of his lien on the judgment. At the same time, a creditor of the client levied two attachments on the entire amount due under the judgment. Because of the conflicting claims to the proceeds, the defendants asserted the right to withhold payment until the issue of priority was determined. The attorney then brought an action against the defendants in the personal injury action, their insurance carrier, the attaching creditor, and the sheriff. The creditor alone answered, and the attorney then moved for summary judgment. The trial court granted the motion and found that the attorney did have a lien on the proceeds of the judgment, and the creditor appealed.

The Supreme Court found that the attorney had a valid lien on the judgment, created by written contract with his client. The Court stated that an attachment lien reaches only the interest of the debtor in the attached property and is therefore subject to prior equities against the debtor, and that the contractual attorney's lien thus had priority over the subsequent attachment (*17 Cal. 2d 843, 845-846)* .

In ***Plummer v. Day/Eisenberg, LLP*** *(2010) 184 Cal. App. 4th 38, 45-48, 108 Cal. Rptr. 3d 455* , the plaintiff and the defendants agreed to represent a party in an underlying personal injury suit. The contingency fee contract with the client stated that the attorneys would split any attorney's fees and granted the plaintiff an independent lien on the recovery to secure those fees. The parties worked on the case for over a year until the defendants allegedly forced the plaintiff out of the case. The defendants associated with other counsel in the case. After the underlying case settled, the plaintiff notified the underlying defense counsel that he should be included as a payee on the settlement check. The defendants apparently forged the plaintiff's endorsement on the settlement check. The plaintiff sued the defendants for conversion. The defendants filed a summary judgment motion arguing that the conversion cause of action failed as a matter of law because the plaintiff did not perfect an enforceable attorney's lien on the settlement funds; therefore, the plaintiff did not own or have a right to possess the settlement funds. The court granted the summary judgment motion.

The court of appeal reversed. It held that the retention agreement created a contract between the plaintiffs and the clients whereby the plaintiff would perform legal work on their case and the clients expressly granted an attorney's lien on any settlement funds to the plaintiff. The court concluded that triable issues existed on whether the plaintiff acted as the clients' attorney, consistent with a direct contractual relationship [*184 Cal. App. 4th 38, 47-48]* . The lien would satisfy the "right to possess" element of conversion [*184 Cal. App. 4th 38, 48]* .

In ***Epstein v. Abrams*** *(1997) 57 Cal. App. 4th 1159, 67 Cal. Rptr. 2d 555* , an action for breach of a noncompetition agreement, the attorney representing the defendants obtained a summary judgement on behalf of one of the defendants, including an award of attorney's fees in that defendant's favor. Following that defendant's dismissal from the case, the attorney filed and served notice of his contractual attorney's lien. Subsequently, the plaintiffs agreed to settle with the

remaining defendants in exchange for the dismissed defendant's execution of a satisfaction of judgment, in the dismissed defendant's favor, for attorney's fees and costs. The trial court granted the plaintiff's motion for approval of the settlement over the attorney's objection and later denied the attorney's motion for reconsideration. The attorney appealed, contending that the trial court acted in excess of its jurisdiction in approving the settlement.

The court of appeal reversed, agreeing that the trial court had acted in excess of its jurisdiction in approving the settlement pursuant to the judgment lien statutes (*Code Civ. Proc. § 708.410 et seq.*), where the attorney was seeking to enforce a contractual lien (*57 Cal. App. 4th 1159, 1166-1167)* . The court stated that an attorney's lien against prospective recovery of a client upon his or her claim may be created by contract; it is a charging lien and vests in the attorney an equitable interest in the client's recovery (*57 Cal. App. 4th 1159, 1169)* . Although the validity of the attorney's contractual lien was not before the court and would have to proven in an independent action (*57 Cal. App. 4th 1159, 1166)* , the court held that the trial court erred in approving the settlement because it constituted an attempt to defeat an existing attorney's lien (*57 Cal. App. 4th 1159, 1170)* .

In ***Saltarelli & Steponovich v. Douglas*** *(1995) 40 Cal. App. 4th 1, 46 Cal. Rptr. 2d 683* , plaintiff law firm filed an independent action against a former client seeking to enforce its attorney's lien, based on legal services provided under a retainer agreement in another action, before the firm withdrew from representation of the former client in that other action. The former client moved to dismiss the action, claiming that it was barred by a discharge in bankruptcy. The trial court dismissed the action with prejudice, concluding that the former client's personal liability for the unpaid fees had been discharged in bankruptcy and that the law firm had failed to perfect its lien before the bankruptcy proceeding.

The court of appeal reversed and remanded the matter to the trial court with directions. The court observed that California recognizes that parties to an attorney retainer agreement can create a lien in favor of the attorney on the proceeds of the client's prospective recovery in a lawsuit. The court cited *Haupt v. Charlie's Kosher Market (1941) 17 Cal. 2d 843, 845, 112 P.2d 627* , discussed *above,* for the principle that the agreement for an attorney's lien is decisive as to its existence (*40 Cal. App. 4th 1, 6)* .

[b] Attorney's Lien May Be Created by Implication

In ***Skelly v. Richman*** *(1970) 10 Cal. App. 3d 844, 89 Cal. Rptr. 556* , the plaintiff attorney had a contingent fee contract with his client that made no specific reference to the subject of an attorney's lien on the prospective judgment. After the attorney obtained judgment for his client in the action, the defendants in that action settled directly with the attorney's client who lived out of state. The plaintiff attorney had authorized direct negotiations by the defendant attorney and had been told that his contingent fee status would be protected. However, the settlement draft was made payable to plaintiff attorney's client who then refused to pay anything to plaintiff. Plaintiff brought an action against the other attorney and his client for interference with a contingent fee contract and recovered a judgment, which was then appealed.

The court of appeal found that proof of the existence of the contingent fee contract, notice of the contract to the defendants, and defendants' interference with the contract had been sufficiently established by admissible evidence in the trial court. The defendants argued that there must be some specific reference to a lien in the contingent fee contract negotiations for one to eventuate, but the court held that this was not necessary if the parties manifested an intent that the attorney should look to the judgment as security even though the word "lien" had not been used (*10 Cal. App. 3d 844, 865)* .

In ***Bartlett v. Pacific Nat. Bank*** *(1952) 110 Cal. App. 2d 683, 244 P.2d 91* , an attorney who had been retained to enforce bondholder's rights drew up a contingent fee contract that provided for one fourth of the money recovered to be paid as the attorney's fee. Plaintiff attorney performed services under the contract by establishing his client's ownership of certain bonds and obtained a judgment for the value of his services. The client's only source of funds with which to pay attorney's fees was through the sale of the bonds that were being held in an escrow account by defendant bank. The

bank appealed from the judgment in favor of the attorney, arguing that the attorney had no lien on the sale proceeds of the bonds.

The court of appeal affirmed, stating that it was obvious at the time of the making of the contract that the parties contemplated that the plaintiff's compensation could come only from sale of the bonds because the client had no other funds. From the start of the proceedings, plaintiff had claimed an equitable interest in the bonds and had notified all parties that he claimed one fourth of all monies they might receive. All parties to the sale, including the bank, knew of the attorney's claim and never attacked his claim of a lien, and defendant bank actually told the attorney on several occasions that it would withhold for him the amount claimed. The court found that the behavior of the parties showed an intent that the attorney look to the recovery as security for his fee and that a valid attorney's lien had been created (*110 Cal. App. 2d 683, 689-690)* .

[c] Lien Survives Discharge

In ***Weiss v. Marcus*** *(1975) 51 Cal. App. 3d 590, 124 Cal. Rptr. 297* , a client employed an attorney on a contingent fee basis to prosecute a claim against two insurance companies and granted him a written lien on all amounts recovered as security for payment of attorney's fees. The contingent fee contract was oral. The attorney performed legal services on the client's behalf for over two years and was then discharged by the client, who subsequently received $35,000 as settlement of his claim. The attorney alleged that he was entitled to the reasonable value of his services in the amount of $6,750 and notified the client's new attorneys and the defendant insurance companies of his lien. All the settlement money was disbursed to the client, and the attorney brought an action against the client, his new attorneys and the insurance companies to recover the reasonable value of his legal services. The trial court sustained defendant attorneys' demurrer to the complaint, and the plaintiff attorney appealed.

The court of appeal reversed the judgement and held that there was a contractual relationship between attorney and client and that the attorney had a lien for the reasonable value of his services. Defendants contended that the contract of employment between an attorney and a client (including a lien agreement) is terminated on the attorney's discharge, but the court disagreed, stating that a discharged attorney is entitled to enforce his lien to the extent of the reasonable value of his services performed to the date of discharge (*51 Cal. App. 3d 590, 598)* .

[d] Attorney Lien Survives Client's Later Bankruptcy Absent Its Disallowance or Avoidance During Bankruptcy

The facts and procedural background of ***Saltarelli & Steponovich v. Douglas*** *(1995) 40 Cal. App. 4th 1, 46 Cal. Rptr. 2d 683* are discussed in *§ 25.40[4][a]*. In *Saltarelli*, the court of appeal concluded that under California law, a contractual attorney's lien is, in effect, created and perfected at the time of the agreement, if the agreement is otherwise valid. If the former client later files for bankruptcy, any obligation already incurred to pay fees, which is secured by the attorney's lien, is not automatically discharged in the bankruptcy proceeding. The bankruptcy proceeding thus does not prevent enforcement of the lien, unless the lien itself was disallowed or avoided in the bankruptcy proceeding (*40 Cal. App. 4th 1, 5)* .

[e] Attorney's Contractual Lien on Proceeds of Judgment Has Priority Over Subsequent Judgment Creditor Liens

Cetenko v. United California Bank *(1982) 30 Cal. 3d 528, 179 Cal. Rptr. 902, 638 P.2d 1299* is discussed in *§ 25.40[4][a]*.

Haupt v. Charlie's Kosher Market *(1941) 17 Cal. 2d 843, 112 P.2d 627* , is discussed in *§ 25.40[4][a]*.

In ***Waltrip v. Kimberlin*** *(2008) 164 Cal. App. 4th 517, 524-525, 79 Cal. Rptr. 3d 460* , a bank made two loans totaling

$600,000 to the plaintiff. One loan for $500,000 was secured by a commercial security agreement by which the plaintiff granted the bank a security interest in all its inventory, equipment and general intangibles. The bank perfected the security interest by filing a Uniform Commercial Code Financing Statement (UCC-1) form. The plaintiff failed to repay the first loan. The bank filed suit and in August 2001 obtained a money judgment against the plaintiff for $685,909.08.

In August 2001, the plaintiff sued various defendants for breach of contract, breach of fiduciary duty, and fraud and deceit arising from a business dispute (the business litigation). A few days after the lawsuit was filed, the bank filed a judgment lien for $685,909.08 against the plaintiff's personal property pursuant to *Code Civ. Proc. §§ 697.510* and *697.530*. Shortly thereafter, the plaintiff failed to repay the second loan from the bank. The bank obtained a money judgment for $108,727.64 and filed a judgment lien for this amount in September 2002 against the plaintiff's personal property.

In December 2002, the plaintiff entered into a contingency fee agreement with new counsel in the business litigation providing that the plaintiff would assign a lien to its attorney on any recovery from that case to cover the attorney's fees.

In April 2003, the bank filed a notice of lien in the business litigation pursuant to *Code Civ. Proc. § 708.410 et seq.* for its two money judgments.

In August 2005, the plaintiff settled with some of the defendants in the business litigation for $2.5 million. The court approved the settlement, and the bank ultimately agreed to a $1,250,000 distribution from this amount.

The remaining portion of the business litigation proceeded to trial and resulted in a defense verdict. The plaintiff moved, pursuant to *Code Civ. Proc. § 708.440*, for an order authorizing disbursement of the entire remaining settlement proceeds to his counsel. The bank opposed the motion. Asserting it was both a secured creditor and a judgment creditor of the plaintiff, the bank argued it was entitled to recover the full value of its claim from the settlement proceeds.

The trial court held that the bank's lien had priority over the attorney lien. Applying equity principles, the court divided the settlement $1,726,632 to the attorney and $773,368 to the bank. The plaintiff appealed, arguing that the attorney lien had priority over the bank's creditor lien.

The court of appeal agreed. It held that an attorney's contractual lien is created and takes effect when the fee agreement is executed [*164 Cal. App. 4th 517, 525]* . The court held that under *Civ. Code § 2897*, if there are competing liens, the general rule is that, all things being equal, liens have priority according to the time of their creation. An attorney lien on a judgment for services prevails over later encumbrances [*164 Cal. App. 4th 517, 525]* . The court held further that public policy and equitable considerations favor the priority of an attorney lien [*164 Cal. App. 4th 517, 525*].

The bank argued that it had three overlapping liens on the business litigation proceeds, so its lien was prior in time to the attorney lien. It argued that in 1996, it obtained a security interest in the plaintiff's inventory, equipment, and general intangibles. The court held that the 1996 security interest did not cover the settlement proceeds at issue because the proceeds arose from the settlement of commercial tort claims, and thus the bank's lien on the plaintiff's personal property was inapplicable [*164 Cal. App. 4th 517, 530*]. In addition, the court held that the bank's April 2003 judgment lien did not relate back under *Code Civ. Proc. § 697.020(b)* because the earlier lien did not attach to the plaintiff's commercial tort claims [*164 Cal. App. 4th 517, 531*]. Accordingly, the court held that the attorney lien had priority over the bank's lien.

[f] Debtor With Notice of Attorney's Lien Not Discharged by Payment to Client

In ***Siciliano v. Fireman's Fund Ins. Co.*** *(1976) 62 Cal. App. 3d 745, 133 Cal. Rptr. 376* , there was a written retainer agreement between plaintiff attorney and a client that provided for a contingent fee of 40 percent of any recovery in a personal injury action and also expressly created a lien in favor of plaintiff on any recovery. Plaintiff brought suit in the

personal injury action on behalf of the client but was subsequently discharged by the client. The client proceeded in propia persona and eventually obtained a settlement in his favor with the insurer of the defendant in the personal injury action. Prior to the settlement, plaintiff attorney had notified the insurer of his discharge and of the lien he had under the retainer contract. When the settlement funds were paid directly to the client by the insurer, the attorney brought an action against the client and the insurer to enforce his lien on the settlement funds. The trial court sustained the insurer's general demurrer and entered an order of dismissal as to the insurer. Plaintiff appealed.

The court of appeal reversed, holding that the attorney's allegations of performance of services were sufficient as against a general demurrer (*62 Cal. App. 3d 745, 752)* . The court stated that the fact that plaintiff's prayer was for a sum that equalled the percentage agreed to in the contingent contract did not alter the fact that on trial the court would grant the reasonable value of services according to proof (*62 Cal. App. 3d 745, 759)* . The court also found that plaintiff had a valid lien on the judgment proceeds of the settlement and that the insurer had been given notice of the lien. Therefore, neither the client nor an opposing party with knowledge of the attorney's lien could compromise the litigated subject matter so as to defeat the attorney's rights, and the insurer was not discharged from its obligation to the attorney by subsequent performance rendered to the client (*62 Cal. App. 3d 745, 757)* . The court held that the attorney's complaint sufficiently alleged an intentional interference by the insurer with the contract lien, and the order of dismissal was reversed.

The facts and procedural background of ***Skelly v. Richman*** *(1970) 10 Cal. App. 3d 844, 89 Cal. Rptr. 556* are discussed in *§ 25.40[4][b]*. The court found that the defendants had notice of plaintiff attorney's contingent fee arrangement because it had been discussed at the first settlement conference and the defendant attorney had been reminded of it on subsequent occasions. It was not necessary that the defendants have knowledge of the exact percentage figure of plaintiff attorney's fee contract (*10 Cal. App. 3d 844, 859)* . Therefore, the payment of a settlement draft directly to plaintiff's client did not discharge the defendant in the underlying action (*10 Cal. App. 3d 844, 866)* .

[g] Lien On Proceeds of Unrelated Litigation

Bluxome Street Associates v. Fireman's Fund Ins. Co. *(1988) 206 Cal. App. 3d 1149, 254 Cal. Rptr. 198* , was an action to determine the priorities of six groups of lien claimants in the settlement proceeds from a legal malpractice action. The trial court determined the priorities of the claimants. Under the court's order, funds were only to be disbursed to the first- through third-priority claimants, there being no funds remaining from the proceeds for the fourth- through sixth-priority claimants. The fourth- and sixth-priority claimants appealed, asserting that their liens should have been given priority over the third-priority claimant, the law firm of Flynn and Stewart. The settling plaintiff in the legal malpractice action had hired Flynn and Stewart to provide services in an unrelated case; the law firm and the party had executed a security agreement granting the firm a security interest in the plaintiff's recovery from the legal malpractice action. The sixth-priority claimant asserted, inter alia, that this agreement was unenforceable because its purpose was to secure payment of attorney fees for services that were rendered unrelated to the litigation and that did not generate the settlement proceeds. The claimant further argued that the lien was equitable, and that an equitable or implied attorney's lien would arise only to ensure that an attorney whose labors have created a fund for his or her client's benefit will not be deprived of his or her compensation.

The court of appeal affirmed the distribution order (*206 Cal. App. 3d 1149, 1159)* . It remarked that the sixth-priority claimant misconstrued the Flynn & Stewart lien as a purported equitable attorney's lien. The court noted that the Flynn & Stewart lien was based on contract, not equitable grounds. It noted that the status of Flynn & Stewart as a law firm and the purpose of the loan (to secure payment of attorney fees) were both immaterial to the creation and enforceability of the lien under *Civ. Code § 2881(1)*. The lien, said the court, would be enforceable, barring other factors, even if Flynn and Stewart were not a law firm and the obligation secured were not payment of legal fees (*206 Cal. App. 3d 1149, 1154)* .

[h] Notice of Lien Not Required

The facts and procedural background of ***Saltarelli & Steponovich v. Douglas*** *(1995) 40 Cal. App. 4th 1, 46 Cal. Rptr. 2d 683* , are discussed in *§ 25.40[4][a]*. In *Saltarelli,* the trial court dismissed the plaintiff law firm's independent action to enforce an attorney's lien on the ground that the law firm failed to perfect its lien before a bankruptcy proceeding filed by the firm's former client. Citing *Bluxome Street Associates v. Fireman's Fund Ins. Co. (1988) 206 Cal. App. 3d 1149, 1156-1157, 254 Cal. Rptr. 198* , discussed *below,* the court of appeal stated that it was unnecessary for the law firm to file a notice of lien to perfect its lien because the agreement for an attorney's lien is decisive as to the lien's existence. As a consequence, the court reversed the trial court's order dismissing the action (*40 Cal. App. 4th 1, 6-7)* .

The facts and procedural background of ***Bluxome Street Associates v. Fireman's Fund Ins. Co.*** *(1988) 206 Cal. App. 3d 1149, 254 Cal. Rptr. 198* , are discussed in *§ 25.40[3][g]*. In *Bluxome,* the appealing fourth- and sixth-priority claimants asserted that the third-priority (Flynn & Stewart) lien was unenforceable because there was no notice of the lien. The court rejected this argument, noting that there is no authority, statute, or case law requiring notice to create a contractual lien under *Civ. Code § 2881* on a litigant's interest in a tort claim (*206 Cal. App. 3d 1149, 1156-1157)* . The court also found that although the fourth-and sixth-priority claimants did provide written notice (unlike Flynn and Stewart), this fact would not alter the priority of the liens vis-a-vis Flynn & Stewart's earlier unrecorded lien (*206 Cal. App. 3d 1149, 1158-1159)* .

[i] Lien Exists Without Judgment From Independent Action

The facts and procedural background of ***Saltarelli & Steponovich v. Douglas*** *(1995) 40 Cal. App. 4th 1, 46 Cal. Rptr. 2d 683* , are discussed in *§ 25.40[4][a]*. In *Saltarelli,* the court of appeal reviewed California law relating to the nature, extent, and validity of an attorney lien in an action after a bankruptcy court had discharged the client's debt to the law firm. The trial court had dismissed the law firm's independent action with prejudice concluding that the law firm had failed to perfect its lien before the bankruptcy proceeding. The court stated that a retainer agreement providing for an attorney's lien, if otherwise valid, creates the lien. While a discharged attorney must file an independent action to establish the amount of the lien and to enforce it, a judgment on the lien is not a condition precedent to its existence or viability (*40 Cal. App. 4th 1, 6)* .

[j] Recovery of Fee Is Permitted Even if Lien Is Invalid.

In ***Shopoff & Cavallo LLP v. Hyon*** *(2008) 167 Cal. App. 4th 1489, 1522-1524, 85 Cal. Rptr. 3d 268* , an attorney referral provider recruited counsel for clients in exchange for a contingent fee. The clients later retained another attorney who negotiated a global settlement agreement of pending litigation and who sought to resolve disputes regarding the settlement proceeds by interpleader. The trial court awarded percentage shares in the proceeds and awarded attorney's fees against a defendant client and in favor of the plaintiffs, another client, several attorneys, and the attorney referral provider. With respect to the judgment in favor of the attorneys, the defendant argued that the attorneys violated *Cal. Rules of Prof. Conduct, Rule 3-300* by acquiring attorney liens on the recovery proceeds in their retainer agreements without complying with the disclosure and consent requirements specified in the rule.

The Court of Appeal disagreed. It held that the attorneys' recovery did not depend on the validity of their liens under *Cal. Rules of Prof. Conduct, Rule 3-300,* because the contingent fee agreements were valid and severable. It held that granting recovery under a contingent fee agreement although the charging lien may be invalid is consistent with the law of severability of contracts. The court held that the overarching inquiry is whether the interests of justice would be furthered by severance. Thus, the court held, even if the liens were invalid, the attorneys were still permitted to recover their fee [*167 Cal. App. 4th 1489, 1522-1524*].

[k] Attorney's Contractual Lien on Proceeds of Judgment Has Priority Over Medical Lien

In ***Gilman v. Dalby*** *(2009) 176 Cal. App. 4th 606, 616-620, 98 Cal. Rptr. 3d 231* , a motorist was injured in a car accident. The motorist and his health care provider signed a contractual lien to the plaintiff granting him reimbursement for the motorist's medical expenses. The motorist subsequently hired an attorney. The motorist settled his case for less than the litigation costs his attorney incurred. His attorney used the settlement for reimbursement of her litigation expenses and waived her fee. The plaintiff sued the motorist's attorney for conversion for not honoring his lien. The trial court granted the attorney's summary judgment motion dismissing the conversion claim.

On appeal, the court held that attorney lien for the costs of litigation takes priority over a medical lien, against the proceeds of a settlement, regardless of which was first in time [*176 Cal. App. 4th 606, 616-620*]. The court first held that, under *Civ. Code § 2897*, all things being equal, liens have priority among themselves according to the date of their creation. However, the court held, despite the similarity of equities favoring the priority of medical liens and attorney liens, as a matter of public policy, a medical lien against the recovery in a personal injury lawsuit is not equal in equity to an attorney lien for fees and costs created by a retainer agreement to litigate the lawsuit [*176 Cal. App. 4th 606, 618*]. The court based this conclusion on the fact that without an attorney, a patient is not likely to obtain any monetary recovery and the medical lien will remain unpaid [*176 Cal. App. 4th 606, 618-619*]. In addition, giving priority to an attorney's lien provides an incentive to attorneys to take on cases [*176 Cal. App. 4th 606, 619*].

[l] Contingency Fee Agreement Need Not Comply With Cal. Rules of Prof. Conduct, Rule 3-300 to Create Valid Lien

The facts of ***Plummer v. Day/Eisenberg****, LLP (2010) 184 Cal. App. 4th 38, 48-50, 108 Cal. Rptr. 3d 455* , are discussed in *§ 25.40[3][a]*. The defendant argued that the plaintiff's lien was invalid because it did not comply with *Cal. Rules of Prof. Conduct, Rule 3-300*. The court of appeal noted that In *Fletcher v. Davis (2004), 33 Cal.4th 61, 71, 14 Cal. Rptr. 3d 58, 90 P.3d 1216* , the California Supreme Court held that an attorney who secures a charging lien against a client's future judgment or recovery has acquired an interest adverse to the client, and so must comply with *Cal. Rules of Prof. Conduct, Rule 3-300*. Rule 3-300 requires attorneys who acquire interests adverse to their clients to do so on "fair and reasonable" terms and, in writing, disclose those terms and advise the clients they may seek independent counsel.

The court of appeal observed that *Fletcher* applied only to hourly fee agreements and that the California Supreme Court had expressly declined to apply the ruling to contingency fee agreements [*184 Cal. App. 4th 38, 48-49]* . The court further noted that the California State Bar had concluded that a charging lien in a contingency fee agreement does not create an "adverse interest" to the client within the meaning of *Cal. Rules of Prof. Conduct, Rule 3-300* (State Bar Standing Com. on Prof. Responsibility and Conduct, Formal Opn. No. 2006-170, p. 7 (Formal Opinion 2006-170). The court adopted the State Bar's ruling, holding that hourly fee agreements differ from contingency fee agreements in that in contingency fee agreements the attorney and the client have agreed that the attorney's fee will be limited to a percentage of, and derived only from, a successful recovery created by the attorney's work. Further, the attorney and the client share the risk of a recovery, and any fee the attorney receives is delayed until the client obtains a recovery, usually at the end of the representation. In addition, in a contingency fee arrangement, the client's recovery often represents the only source of funds from which the attorney can ever be paid [*184 Cal. App. 4th 38, 49]* .

[4] Additional Authorities

[a] Lien Created by Express Contract

In *Tracy v. Ringole (1927) 87 Cal. App. 549, 262 P. 73* , plaintiff attorney agreed to represent a client in a personal injury action in exchange for a contingent fee of one third of any recovery. The written contract included a clause giving the attorney a lien on any judgement rendered in favor of the client and also provided that no substitution of attorneys could be made without first paying plaintiff, absent any misconduct. After the attorney had performed certain services for the client in the action, the client discharged him and substituted other counsel. The new attorney obtained a

settlement for the client, and the first attorney brought an action against the second attorney to enforce his lien against the judgement. The defendant's demurrer to the complaint was sustained, and the plaintiff appealed.

The court of appeal stated that the sole issue on appeal was whether an attorney may, by contract with a client, provide for a lien on an anticipated judgment for the amount of the attorney's contingent fee. The court said that a lien may be created by contract of the parties and that here the contingent fee contract did provide for a lien, of which the defendant had full knowledge. The court stated that in such a case it has been held that the agreement for a lien is decisive as to its existence and amount and that it constitutes a valid equitable assignment of the judgment pro tanto and creates a lien on the specific fund. Thus, because of the contract, plaintiff became the equitable owner of one third of whatever sum was recovered, and a lien was created in favor of plaintiff. The defendant took the settlement funds subject to the plaintiff's interest and a constructive trustee of any funds recovered in the action (*87 Cal. App. 549, 550-552)* .

[b] Attorney's Lien May Be Created by Implication

In *Wagner v. Sariotti (1943) 56 Cal. App. 2d 693, 133 P.2d 430* , the court held that in order to create a lien for the payment of attorney's fees, the parties are not required to use the word "lien" in their contract. The court said that the real question in each case is whether or not the parties have contracted that the lawyer is to look to the judgment he may secure as security for his fee. If so, an equitable lien is created (*56 Cal. App. 2d 693, 697)* .

[c] Debtor With Notice of Attorney's Lien Not Discharged by Payment to Client

In *Pearlmutter v. Alexander (1979) 97 Cal. App. 3d Supp. 16, 158 Cal. Rptr. 762* , plaintiff attorney was retained to represent a client in the client's claim against a union. The client authorized the attorney to negotiate a $4,000 settlement with the union and then refused to go forward with the settlement when an agreement was reached between his attorney and the union attorney. Plaintiff was authorized by the court to withdraw as attorney for the client after securing a written lien for $1,500 additional attorney's fees from the client. Plaintiff notified the union, the union attorney, and the client's new attorney of his lien. The union attorney and the client's attorney negotiated another settlement for $4,250. The union attorney paid the money to the new attorney, who retained $250 for his services and disbursed the balance to the client. When they refused to honor his lien, plaintiff brought an action against the union, the union attorney, the client, and the client's attorney for interference with prospective economic advantage. The trial court found that plaintiff had waived his lien by withdrawing as attorney and that there was no bad motive, malice, or conspiracy among defendants to deprive plaintiff of his fee. Plaintiff appealed.

The appellate department of the superior court reversed, finding that the attorney's withdrawal did not constitute a waiver of his lien. Although plaintiff was not legally compelled to withdraw from the case, his withdrawal was not improper because the client's conduct made it unreasonably difficult for plaintiff to carry out his employment effectively, and the withdrawal was made on order of the court without opposition from the client. Defendants had paid out settlement funds in disregard of a known lien, thus tortiously interfering with plaintiff's rights (*97 Cal. App. 3d Supp. 16, 19-20*).

The Superior Court Appellate Department's decision in *Pearlmutter* is arguably persuasive in that the court approved the attorney's withdrawal from the prior action with no objection from the former clients. Note, however, that one court of appeal has since held that a client's exercise of the right to reject a settlement does not justify withdrawal by the attorney, expressly rejecting a contrary assertion made in the *Pearlmutter* decision [*Estate of Falco (1987) 188 Cal. App. 3d 1004, 1018, 233 Cal. Rptr. 807]* .

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2A-25 California Points & Authorities § 25.41

§ 25.41 Supporting Contention That Attorney Has Valid Claim for Compensation for Costs of Lawsuit and Other Reasonable Expenses

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF IS ENTITLED TO REIMBURSEMENT FOR COSTS OF THE LAWSUIT ADVANCED BY PLAINTIFF AND FOR OTHER SPECIFIC REASONABLE EXPENSES AGREED TO BY PLAINTIFF AND DEFENDANT.

A. Reimbursement for Costs of Lawsuit. An attorney is entitled to reimbursement for costs of suit such as filing fees and witness fees that the attorney has advanced on behalf of the client (*Cooley v. Miller & Lux (1909) 156 Cal. 510, 525-526, 105 P. 981* ; *Tasker v. Cochrane (1928) 94 Cal. App. 361, 369, 271 P. 503*).

[*Optional*] **B. Reimbursement for Specific Reasonable Expenses Agreed to by Parties.** An attorney is entitled to reimbursement for specific expenses incurred during the course of the attorney's employment by a client when attorney and client have agreed that such expenses will be reimbursed (*Darnell v. Woodruff (1936) 14 Cal. App. 2d 628, 634, 58 P.2d 975* ; *Tasker v. Cochrane (1928) 94 Cal. App. 361, 368-369, 271 P. 503*).

[2] Comments

[a] Use of Form

This form may be submitted in support of an attorney's contention that he or she is entitled to reimbursement for costs of a lawsuit and any other specific and reasonable expenses agreed on by the attorney and client. This form may be used any time an attorney seeks to enforce a fee agreement and may be used in conjunction with § 25.40 (supporting contention that attorney has valid contractual lien on judgment or recovery), § 25.30 (supporting contention that attorney has valid contractual claim for compensation), or *see §§ 25.32 -25.38* (supporting contention that attorney has valid claim for compensation based on reasonable value of services rendered to client). The argument supported by this form may be raised any time the opposing party alleges that the attorney is not entitled to reimbursement for costs of

suit advanced by the attorney, or when the parties enter into a fee agreement that provides that the attorney be reimbursed for specific contemplated expenses but the client then refuses to pay for such expenses. The argument would be most likely to arise in support of an attorney's independent action against a client for breach of contract to pay attorney's fees or in an action in quantum meruit to recover the reasonable value of services rendered.

This form may be combined with a form relating to the specific procedural context in which counsel wishes to raise the substantive issue of the right of an attorney to reimbursement for costs of suit advanced and for other specific and reasonable expenses agreed on by the parties. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the nature and the amount of any costs of suit advanced by the attorney and show that they are normal litigation costs. Counsel should show that the client has been presented with a bill for reimbursement of such costs by the attorney and that the client has refused to pay. If the attorney is claiming reimbursement for specific expenses agreed on by the parties at the onset of the attorney-client relationship, the nature and amount of such expenses and the reason for their incurrence should be shown. Counsel must also show that the attorney and client had an agreement, either express or implied, that such expenses would be reimbursed by the client.

[b] Opposing Memoranda

In an appropriate case, the memoranda set out in *§ 25.59* may be used to oppose the contention supported by the memoranda in this form.

[3] Discussion of Authorities

[a] Reimbursement for Costs of Lawsuit

In ***Cooley v. Miller & Lux*** *(1909) 156 Cal. 510, 105 P. 981* , an attorney agreed to represent a group of absent heirs in settling an estate. The fee agreement stated that in exchange for representing the heirs throughout the administration of the estate, the attorney would receive a certain percentage of whatever the heirs received from the estate. The agreement also provided that any partial advance distributions made to the attorney by the probate court on behalf of the absent heirs should be first applied to reimburse the attorney for costs of suit and the balance retained by the attorney and credited to the heirs on final settlement of the estate, as an advance of the attorney's contingent fee. The attorney was reimbursed for his outlays from the advance distributions, but after the final settlement the absent heirs refused to pay his contingent fee from their share of the estate. The attorney's grantee brought an action to recover the interest in the estate from successors in interest of the heirs. After judgment in favor of defendants, plaintiff appealed from an order denying his motion for a new trial.

The Supreme Court reversed, finding that plaintiff did have an interest in the estate based on the agreement made between the attorney and the heirs. The Court ordered the case remanded for a new trial to determine the exact nature of plaintiff's interest in the estate. In regard to the outlays made by the attorney during his representation of the heirs, the court noted that in the absence of a special agreement to the contrary, a client is bound to repay his attorney for all outlays made by the attorney in the payment of the expenses of conducting the litigation, not including the attorney's personal and travel expenses (*156 Cal. 510, 525-526)* .

In ***Tasker v. Cochrane*** *(1928) 94 Cal. App. 361, 271 P. 503* , the assignee of a law firm brought an action for attorneys' fees and reimbursement of costs of litigation. Defendant refused to pay more than a small portion of the fee and denied responsibility for any of the attorneys' costs. After judgment in favor of plaintiff, defendant's motion for a new trial was granted and plaintiff appealed.

The court of appeal affirmed the order granting a new trial, finding that the trial court's jury instructions were erroneous

in that they failed to make a distinction between the costs of litigation, for which an attorney may be reimbursed, and the personal and travelling expenses of the attorney, which are not reimbursable (*94 Cal. App. 361, 366)* . The court held that the attorneys were entitled to recover all court costs necessarily incurred (*94 Cal. App. 361, 369)* .

[b] Reimbursement for Specific Reasonable Expenses Agreed to by Parties

In ***Darnell v. Woodruff*** *(1936) 14 Cal. App. 2d 628, 58 P.2d 975* , plaintiff attorney, an income tax specialist, was retained by defendant to represent him before the Internal Revenue Service for failure to file income tax returns. Plaintiff had represented defendant in the past on a similar matter, and on that occasion had been reimbursed for his travel, hotel, telephone, and telegram expenses. At the time of the second employment, there was no fee agreement between attorney and client, but the client sent a telegram to the attorney asking him to represent the client in the current matter "as in the past." The attorney made several cross-country trips during the months in which he was putting defendant's financial records in order and negotiating on his behalf with the Internal Revenue Service. During the course of the employment, defendant advanced plaintiff $8,000 to cover his travel and other expenses. Plaintiff was successful in lowering the amount of tax assessed against defendant and in persuading the government not to prosecute defendant for tax fraud or to impose the maximum civil penalties for tax evasion. Defendant then hired another attorney and, utilizing new evidence that had not been available to plaintiff, succeeded in lowering the tax assessment even further. Defendant refused to pay any additional amount to plaintiff, and plaintiff brought an action in quantum meruit for the reasonable value of his services. The trial court found that there was due plaintiff from defendant for services rendered a balance of $24,000, not including the amount already received in advance for hotel and traveling expenses. Defendant appealed the judgment, and in particular complained of the allowance for hotel and travel expenses.

The court of appeal affirmed, finding that the fee awarded plaintiff was reasonable and that the attorney was entitled to be paid for his hotel and travel expenses because plaintiff had been employed to represent defendant as he had done in the past, when hotel and travel expenses had been paid without demur by the client. In the absence of any specific agreement to the contrary, the attorney could reasonably expect to be paid for his expenses in the current matter as he had been in the past (*14 Cal. App. 2d 628, 634)* .

The facts and procedural background of ***Tasker v. Cochrane*** *(1928) 94 Cal. App. 361, 271 P. 503* are discussed in *§ 25.59[3][a]*. There, the court of appeal held that jury instructions were erroneous if they failed to include an instruction stating that an attorney's expenses, outside of the normal costs of litigation, can only be recovered when there is a special or express agreement between attorney and client to that effect. The court also found that the trial court was not in error when it refused to give a jury instruction that contracts or agreements between attorneys and clients relative to reimbursement of costs and expenditures are presumptively void. The court held that the attorneys were entitled to recover all court costs necessarily incurred, as well as the reasonable value of all their expenses that were authorized or ratified by the client (*94 Cal. App. 361, 368-369)* .

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[Reserved]

§§ 25.42[Reserved]

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2A-25 California Points & Authorities § 25.50

§ 25.50 Opposing Contention That Contingent Fees for Medical Malpractice Plaintiff's Attorney Are Limited by Bus. & Prof. Code § 6146--Plaintiff Gave Knowing Consent to Alternative Litigation Strategies

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

DEFENDANT IS ENTITLED TO RETAIN ALL THE FEES THUS FAR OBTAINED BECAUSE PLAINTIFF KNOWINGLY CONSENTED TO A CONTINGENT FEE IN EXCESS OF THE AMOUNT SET FORTH IN SECTION 6146 OF THE BUSINESS AND PROFESSIONS CODE AFTER DEFENDANT SPECIFICALLY ADVISED PLAINTIFF OF THE PROS AND CONS OF ALTERNATIVE LITIGATION STRATEGIES, INCLUDING POTENTIAL ATTORNEY'S FEES.

A. Contingency Fee Limitation on Action for Professional Negligence. An attorney may not contract for or collect a contingency fee in excess of statutory limits in an action based on the professional negligence of a health care provider (*Bus. & Prof. Code § 6146*).

B. Limitation Exclusive to Actions Based on Professional Negligence. *Section 6146 of the Business and Professions Code* does not limit the fee an attorney may earn on a cause of action based on a theory other than professional negligence, nor does it limit the fee in an action involving multiple causes of action, including one not based on professional negligence (*see Waters v. Bourhis (1985) 40 Cal. 3d 424, 436-437, 220 Cal. Rptr. 666, 709 P.2d 469*).

C. Knowing Consent as Result of Attorney Disclosure. An attorney may recover fees in excess of those permitted under *Section 6146 of the Business and Professions Code* after the client knowingly consents to the pursuit of a cause of action based on something other than professional negligence. Knowing consent occurs after the attorney has specifically advised the client of the pros and cons of alternative litigation strategies, including potential attorney's fees, and obtained the client's consent to pursue and settle all causes of action (*Waters v. Bourhis (1985) 40 Cal. 3d 424, 438, 220 Cal. Rptr. 666, 709 P.2d 469*).

[2] Comments

[a] Use of Form

This form may be used by an attorney to oppose the contention by a client that the attorney has recovered fees in excess of the amount allowed by *Bus. & Prof. Code § 6146* in an action for the professional negligence of a health care provider. The argument supported by the foregoing memorandum may be raised when the client brings an independent action against the attorney to recover fees after a settlement, arbitration, or judgment pursuant to which the attorney received funds on behalf of the client, and retained a portion of those funds as attorney's fees [*see, e.g., Waters v. Bourhis (1985) 40 Cal. 3d 424, 220 Cal. Rptr. 666, 709 P.2d 469]* .

This form may be combined with a form of memorandum relating to the specific procedural context in which counsel wishes to raise the substantive issue of the client's knowing consent to the litigation strategy and fee arrangement. This argument may arise in opposing a motion for summary judgment [*see, e.g., Waters v. Bourhis (1985) 40 Cal. 3d 424, 220 Cal. Rptr. 666, 709 P.2d 469]* . This form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated, Thus, counsel should discuss in detail the advice given to the client pertaining to the pros and cons of alternative litigation strategies, the terms of the contingent fee contract, and the client's consent to the strategies and the contingent fee contract.

In an appropriate case, this form may be used to oppose the contention supported by the memoranda contained in § 25.71.

[b] Related Pleading and Practice Forms

For discussion and forms relating to attorney compensation for services, see California Forms of Pleading and Practice, Ch. 72, *Attorney Practice and Ethics* (Matthew Bender).

[3] Discussion of Authorities

[a] Limitation Exclusive to Actions Based on Professional Negligence

In ***Waters v. Bourhis*** *(1985) 40 Cal. 3d 424, 220 Cal. Rptr. 666, 709 P.2d 469* , plaintiff patient alleged that her psychiatrist had entered into a sexual relationship with her and brought an action for damages against him. After the psychiatrist's insurer settled the case without admitting liability, plaintiff brought an action against the attorney who had represented her in that suit, alleging that his contingency fee exceeded the maximum fee permitted by *Bus. & Prof. Code § 6146*. The trial court granted defendant attorney's motion for summary judgment. Plaintiff appealed.

The Supreme Court reversed, based on the uncertainty of plaintiff's consent. The Court explained that *Bus. & Prof. Code § 6146* limitations on attorney's fees do not apply to all types of actions against health care providers. *Bus. & Prof. Code § 6146* is part of the Medical Injury Compensation Reform Act of 1975 (MICRA) and only applies to actions based on the provider's professional negligence. Defendant contended that the recovery was based on the psychiatrist's intentional misconduct engaged in for personal, rather than professional, motives, and that it was not within the scope of MICRA professional negligence. The Court disagreed, saying that the complaint was based on both professional negligence and intentional tortious conduct; it noted that "professional negligence" within the meaning of *Bus. & Prof. Code § 6146* may include conduct that is an intentional departure from professional standards and the same conduct may support an action for professional negligence under MICRA and an action for an intentional tort (*40 Cal. 3d 424, 433-435)* . There is nothing in *Bus. & Prof. Code § 6146* that purports to limit the fee an attorney may earn outside of the MICRA context, and when MICRA and non-MICRA causes of action are properly joined in one proceeding there is no basis for limiting the fee that an attorney may permissibly obtain for successfully litigating the non-MICRA claim. When a plaintiff pursues and recovers on a non-MICRA cause of action, the fee limits should not apply, even if plaintiff

at the same time also succeeds on a separate MICRA cause of action. The Court noted the difficulty of determining the influence of the non-MICRA cause of action when a MICRA action is also involved, and concluded that when a plaintiff knowingly chooses to proceed on both non-MICRA and MICRA causes of action, and obtains a recovery that may be based on a non-MICRA theory, the limitations of *Bus. & Prof. Code § 6146* should not apply (*40 Cal. 3d 424, 436-437)* . However, the ability of the attorney to recover fees in excess of those permitted under *Bus. & Prof. Code § 6146* requires the client to knowingly consent to the pursuit of a non-MICRA cause of action. Because the amount of a client's attorney's fees may be affected by whether an action is pursued on a MICRA or non-MICRA basis and because there may be a potential conflict of interest between the attorney and client on this matter, an attorney who seeks to collect a larger fee than that authorized by *Bus. & Prof. Code § 6146* must specifically advise the client or potential client of the pros and cons of alternative litigation strategies, including potential attorney's fees, and obtain the client's consent to pursue and settle a non-MICRA action as well as a MICRA claim (*40 Cal. 3d 424, 438)* .

[b] Knowing Consent as Result of Attorney Disclosure

Waters v. Bourhis *(1985) 40 Cal. 3d 424, 220 Cal. Rptr. 666, 709 P.2d 469* is discussed in *§ 25.50[3][a]*.

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2A-25 California Points & Authorities § 25.51

§ 25.51 Opposing Contention That Attorney Has Valid Contractual Claim for Compensation--Attorney Has Not Performed Under Terms of Contract

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

DEFENDANT IS NOT REQUIRED TO PAY THE ATTORNEY'S FEE SPECIFIED IN THE CONTRACT ENTERED INTO BY PLAINTIFF AND DEFENDANT BECAUSE PLAINTIFF HAS NOT PERFORMED UNDER THE TERMS OF THE CONTRACT.

Attorney Has Not Performed Under Terms of Contract. An attorney who has not performed under the terms of the employment contract is not entitled to the specified contract fee, but only the reasonable value of any services rendered (*see Abbott v. Hauschild (1952) 113 Cal. App. 2d 383, 388-389, 248 P.2d 41* ; *Brydonjack v. Rieck (1935) 5 Cal. App. 2d 219, 224, 42 P.2d 336*).

[2] Comments

[a] Use of Form

This form may be used by a client to oppose the contention that an attorney has a valid contractual claim for compensation on the ground that the attorney has not performed under the terms of the contract and is therefore entitled only to the reasonable value of any services rendered.

Counsel may wish to refer to additional memoranda for use in actions for breach of contract, which are found in Ch. 50, *Contracts* . If the interpretation of the contract terms is at issue, counsel may use this form in conjunction with § 25.70 (supporting contention that attorney-client employment contract drafted by attorney is construed in favor of client). The argument supported by this memorandum would be most likely to arise in support of a client's defense against an attorney's action to collect a stipulated contractual fee, or in support of a client's independent action brought to prevent an attorney from asserting a lien on any judgement or recovery in favor of the client or on money or property of the client in the attorney's possession that the attorney alleges is due him or her in satisfaction of attorney's fees.

This form may be combined with a form of memorandum relating to the specific procedural context in which counsel wishes to raise the substantive issue of the attorney's failure to perform under the terms of the contract. This form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the terms of the employment contract between attorney and client, in order to show the nature of the fee agreement. Counsel should also discuss the attorney's lack of performance under the contract, in order to show that the attorney is not entitled to the stipulated fee, but only to the reasonable value of any services rendered. If applicable, counsel should indicate that the client has offered to pay a certain amount for the reasonable value of legal services rendered, and that the offer has been refused by the attorney.

[3] Discussion of Authorities

[a] Attorney Has Not Performed Under Terms of Contract

In ***Abbott v. Hauschild*** *(1952) 113 Cal. App. 2d 383, 248 P.2d 41* , an attorney was retained by a client for the purpose of recovering real property that was threatened with foreclosure. The client agreed in writing that if the attorney brought "a proper action" to get the property back he would pay him 50 percent of any money realized from the sale of the property, assign him a one-half interest in the property, and pay him a reasonable fee for getting the property back from the client's wife, who was a joint tenant. The attorney filed an action to quiet title against the mortgagee of the property and the wife, but the complaint was never served on the wife, whose claim against the property was the reason for the litigation. The mortgagee demurred to the complaint, and the attorney failed to appear on the hearing of the demurrer. After being notified that he had 20 days to amend his complaint, the attorney failed to amend and the demurrer was then sustained without leave to amend. The client discharged the attorney and refused to pay his fee. The attorney then brought actions for breach of contract and to quiet title in himself to an asserted one-half interest in the client's real property and to enforce an attorney's lien on one half the proceeds of the sale of the property. The trial court ruled that the attorney was not entitled to any interest in the client's property but could recover $150 as reasonable attorney's fees, and the attorney appealed.

The court of appeal affirmed, finding that the plaintiff had failed to show that he had performed the duties required of him under the purported agreement. The terms of the contract were ambiguous in that it was unclear what would constitute a proper action and whether the client was to pay a 50 percent contingent fee in addition to a reasonable fee. If the client was to pay 50 percent of any money remaining after a foreclosure sale in addition to a reasonable fee, as argued by plaintiff, there would be virtually nothing left for the client. The court stated that any ambiguity in the contract should be construed against the attorney, but that in any event the award of $150 was not inadequate for the very limited services performed by plaintiff (*113 Cal. App. 2d 383, 388)* .

In ***Brydonjack v. Rieck*** *(1935) 5 Cal. App. 2d 219, 42 P.2d 336* , the client signed a letter prepared by an attorney that stated that the attorney was retained as the client's chief counsel for one year in exchange for a retainer fee of $3,500 and $150 monthly salary. The client was incapable of attending to her affairs, and the attorney promised to represent her in her father's estate, get money due the client from her former husband and others, and straighten out a situation relating to some real property owned by the client. The only legal services performed by the attorney for the client were a trip to see the real property and a two-hour conference with the client in his office. Four months later, after paying $2,300 to the attorney, the client sent him a letter cancelling the contract and stating that the amount paid to him was more than sufficient compensation for his services rendered to date. The attorney waited until the end of one year and then filed suit on the contract, alleging that a balance of $3,000 was due. The trial court found for defendant, and plaintiff appealed.

The court of appeal affirmed, finding that the contract was presumptively invalid because the attorney-client

relationship had existed prior to the execution of the formal retainer contract (*5 Cal. App. 2d 219, 223)* . To overcome the presumption, the attorney had the burden of showing that the contract was fair and equitable and that the client was fully informed of all matters relating to the transaction. The court found that he failed to meet his burden since he was able to show only that the contract was executed (*5 Cal. App. 2d 219, 223)* . The client was justified in terminating the contract because there was a complete failure of consideration and utter failure on the part of the attorney to perform any of the terms of the contract (*5 Cal. App. 2d 219, 224)* .

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 25 ATTORNEY'S FEES
PART II. FORMS

2A-25 California Points & Authorities § 25.52

§ 25.52 Opposing Contention That Attorney Has Valid Contractual Claim for Compensation--Fees Were Incurred for Work Performed in California by Attorney or Firm Not Licensed to Practice Law in California [Bus. & Prof. Code § 6125]

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief and may be combined with a general form of memorandum opposing the contention that defendant is liable under a contract for attorney fees (see, e.g., § 25.30*)].

DEFENDANT IS NOT REQUIRED TO PAY THE ATTORNEY'S FEE SPECIFIED IN THE CONTRACT ENTERED INTO BY PLAINTIFF AND DEFENDANT BECAUSE PLAINTIFF PERFORMED WORK IN CALIFORNIA BUT WAS NOT LICENSED TO PRACTICE LAW IN CALIFORNIA WHILE PERFORMING THAT WORK.

An Out-of-State Law Firm or Attorney Not Licensed to Practice Law in California May Not Recover Contractual Attorney's Fees for Performing Legal Services in California. An out-of-state law firm or attorney, who is not licensed to practice law in California, violates *Bus. & Prof. Code § 6125* when performing legal services in California. Thus, to the extent that a fee agreement between the out-of-state law firm or attorney authorizes compensation for legal services performed in California, it is invalid and unenforceable (*Birbrower, Montalbano, Condon & Frank v. Superior Court of Santa Clara County (ESQ Business Services) (1998) 17 Cal. 4th 119, 70 Cal. Rptr. 2d 304, 949 P.2d 1*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to the contention that an out-of-state attorney or law firm has a valid contractual claim for compensation for legal services performed in California under a contract entered into by the attorney or law firm and the client, on the ground that the attorney or law firm was not licensed to practice law in California at the time the legal services were rendered, in violation of *Bus. & Prof. Code § 6125*. This argument may

arise in any of several procedural situations. For example, it may be made in support of a demurrer, or a motion for summary judgment or summary adjudication.

This form may be adapted to oppose the contention that an attorney has a claim for compensation for the reasonable value of services rendered under a contract that is partially invalid when the attorney rendered some services that were not compensable because of the attorney's violation of *Bus. & Prof. Code § 6125*, but some services that were compensable because they were rendered out-of-state and did not constitute unauthorized practice of law in California [*see § 25.38*].

This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should discuss evidence pointing to defendant's failure to be licensed to practice law in California or to associate California counsel at the time of performing legal services in California.

[c] Opposing Memoranda

In an appropriate case, the memoranda set out in *§ 25.30* or *25.38* may be used to oppose the contention supported by this form.

[d] Related Pleading and Practice Forms

For general discussion and forms relating to attorney fee agreements and their enforcement, see California Forms of Pleading and Practice, Ch. 72, *Attorney Practice and Ethics* (Matthew Bender). For discussion and forms relating to the recovery of attorney's fees from an opposing party as an element of an award of costs, see California Forms of Pleading and Practice, Ch. 174, *Costs and Attorney's Fees* (Matthew Bender).

[e] Related Memoranda

For memoranda relating to summary judgment generally, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] "Practicing Law" in California

In ***Birbrower, Montalbano, Condon & Frank v. Superior Court of Santa Clara County (ESQ Business Services, Inc.)*** *(1998) 17 Cal. 4th 119, 70 Cal. Rptr. 2d 304, 949 P.2d 1* , attorneys from a New York law firm performed legal services in California and New York relating to the firm's representation of a California corporation under a contingency fee agreement. None of the attorneys in the firm was licensed to practice law in California during the firm's representation of the California client. The fee agreement covered all matters pertaining to the investigation and prosecution of all claims and causes of action against another corporation related to a software development and marketing contract between the two corporations, which was governed by California law. In the course of the representation, the attorneys traveled to California several times to meet with the client and with representatives of the other corporation. The matter eventually settled. After settlement, the client sued the firm for legal malpractice and related claims, including causes of action seeking declaratory relief as to the validity of the fee agreement. The law firm counterclaimed for attorney's fees for work performed in California and New York under the agreement and, alternatively, for quantum meruit for the reasonable value of legal services provided. The trial court granted the client's motion for summary adjudication on its causes of action based on the fee agreement and on the counterclaim on the ground that by practicing law without a license in California and failing to associate California counsel while doing so,

the law firm violated *Bus. & Prof. Code § 6125*, which rendered the fee agreement unenforceable. The trial court left open the firm's claim for quantum meruit and opined that it believed that the firm was only precluded from collecting in California the fees generated by virtue of work performed in California and not work performed in New York.

The California Supreme Court affirmed the trial court and held that because the firm practiced "substantial law" in California in violation of *Bus. & Prof. Code § 6125*, it could not receive compensation under the fee agreement for any services performed in California. Although previous cases had defined "practice law" within the meaning of *Bus. & Prof. Code § 6125*, *Birbrower* presented a case of first impression on the meaning of "in California." Mere fortuitous or attenuated contacts do not constitute the practice of law in California; however, sufficient contact with a California client by an out-of-state law firm or attorney to render the nature of the legal service a clear legal representation does constitute practicing law in California within the meaning of *Bus. & Prof. Code § 6125*. The primary question is whether the unlicensed attorney engaged in sufficient activities in California or created a continuing relationship with a California client that included legal duties and obligations. Physical presence in California is only one factor to consider in determining a violation of *Bus. & Prof. Code § 6125*; the determination does not necessarily depend on or require physical presence. One may practice law in California without being physically present by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer or other modern technological means. On the other hand, the Court declined to find that a person automatically practices law in California whenever that person practices California law anywhere or "virtually" enters California by technological means. Each case must be decided on its individual facts. Exceptions to *Bus. & Prof. Code § 6125* are narrowly drawn and strictly interpreted and generally limited to allowing out-of-state attorneys to make brief appearances before a state court or tribunal. In this case, the firm's in-state activities clearly constituted unauthorized law practice in California, which fell under none of the exceptions (*17 Cal. 4th 119, 135, 140)* .

However, the Court held that the fee agreement was enforceable to the extent it was possible to sever the portions of the consideration attributable to services illegally rendered in California from those attributable to New York services and that the firm could recover fees under the agreement for the limited legal services performed in New York to the extent they did not constitute practicing law in California, even though the services were performed for a California client. Although the fee agreement became illegal when the firm performed legal services in violation of *Bus. & Prof. Code § 6125*, the law of contract severability [*Civ. Code § 1599*] allows courts to enforce the valid parts of contracts that are only partially void when the contract has several distinct objects, of which one at least is lawful. The object of the fee agreement in this case may not have been entirely illegal, assuming the client was to pay compensation based in part on work the firm performed in New York that did not amount to the practice of law in California (*17 Cal. 4th 119, 140)* .

In citing *Birbrower* as authority, attorneys should be aware of a court of appeal case, decided shortly after *Birbrower*, that applies and further clarifies the holding in *Birbrower*. The facts and procedural background of ***Estate of Condon*** *(1998) 65 Cal. App. 4th 1138, 76 Cal. Rptr. 2d 922* , are discussed in *§ 25.30*, under [3], Legal Services Performed by Attorney or Firm Not Licensed in California. There the court held that, in a probate matter, where a Colorado lawyer, not licensed in California, provided legal services to a Colorado client regarding California law, the lawyer was not "practicing law" in California for purposes of *Bus. & Prof. Code § 6125* and was entitled to attorney's fees regardless of the lawyer's physical or virtual presence in California relating to the matter (*65 Cal. App. 4th 1138, 1148)* .

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 25 ATTORNEY'S FEES
PART II. FORMS

2A-25 California Points & Authorities § 25.53

§ 25.53 Opposing Contention That Attorney Has Valid Claim for Compensation Based on Contingent Fee Contract--Failure to Comply With Bus. & Prof. Code § 6147(a)

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF IS NOT ENTITLED TO THE CONTINGENT FEE STATED IN THE EMPLOYMENT CONTRACT BETWEEN PLAINTIFF AND DEFENDANT BECAUSE OF FAILURE TO COMPLY WITH BUSINESS AND PROFESSIONS CODE SECTION 6147(a) AND IS ENTITLED ONLY TO THE REASONABLE VALUE OF SERVICES RENDERED ON BEHALF OF DEFENDANT.

A. Contract Voidable for Failure to Comply With Statute. A contingent fee contract that does not comply with *Business and Professions Code Section 6147* is voidable at the client's option, and the attorney is entitled to collect only a reasonable fee (*Bus. & Prof. Code § 6147(b)*; *Alderman v. Hamilton (1988) 205 Cal. App. 3d 1033, 1038, 252 Cal. Rptr. 845*).

[*EITHER*]

B. Writing Requirement. A contingent fee contract between an attorney and his or her client shall be in writing (*Bus. & Prof. Code § 6147(a)*).

[*AND/OR*]

C. Copy of Contract. An attorney who contracts to represent a client on a contingency fee basis shall, at the time the contract is entered into, provide a duplicate copy of the contract, signed by both the attorney and the client, or the client's guardian or representative, to the client, or to the client's guardian or representative (*Bus. & Prof. Code § 6147(a)*).

[*AND/OR*]

D. Contingency Fee Rate. A contingent fee contract shall include a statement of the contingency fee rate that the attorney and client have agreed on (*Bus. & Prof. Code § 6147(a)(1)*).

[*AND/OR*]

E. Effect of Disbursements and Costs. A contingent fee contract must include a statement explaining how disbursements and costs incurred in connection with the prosecution or settlement of the claim will affect the contingency fee and the client's recovery (*Bus. & Prof. Code § 6147(a)(2)*; *Alderman v. Hamilton (1988) 205 Cal. App. 3d 1033, 1038, 252 Cal. Rptr. 845*).

[*AND/OR*]

F. Payment for Related Matters Not Covered by Contract. A contingent fee contract must include a statement as to what extent, if any, the client could be required to pay any compensation to the attorney for related matters that arise out of the attorney-client relationship and that are not covered by their contingency fee contract. This may include any amounts collected for the client by the attorney (*Bus. & Prof. Code § 6147(a)(3)*; *Alderman v. Hamilton (1988) 205 Cal. App. 3d 1033, 1038, 252 Cal. Rptr. 845*).

[*AND/OR*]

G. Negotiable Fee. Unless the claim is subject to *Business and Professions Code Section 6146*, a contingent fee contract must include a statement that the fee is not set by law but is negotiable between attorney and client (*Bus. & Prof. Code § 6147(a)(4)*; *Alderman v. Hamilton (1988) 205 Cal. App. 3d 1033, 1038, 252 Cal. Rptr. 845*).

[*AND/OR*]

H. Medical Malpractice Claim. If the claim is subject to *Business and Professions Code Section 6146*, the contingent fee contract must include a statement that the rates set forth in that section are the maximum limits for the contingent fee agreement, and that the attorney and client may negotiate a lower rate (*Bus. & Prof. Code § 6147(a)(5)*).

[*AND/OR*]

I. Statement of Errors and Omissions Coverage or Written Guarantee Agreement. An attorney who (1) does not maintain errors and omissions insurance coverage, (2) has not filed with the State Bar an executed copy of a written agreement guaranteeing payment of all claims established against the attorney by his or her clients for errors or omissions arising out of the practice of law by the attorney in the amount specified in State Bar Law Corp. Rules, Rule IV(B)(1)(c), or (3) if a law corporation, has not filed with the State Bar an executed copy of the written agreement required pursuant to State Bar Law Corp. Rules, Rule IV(B)(1)(a), (b), or (c) must disclose that fact in the contingent fee contract (*Bus. & Prof. Code § 6147(a)(6)*).

[AND/OR]

J. Modifications. Modifications to a contingency fee contract must comply with *Bus. & Prof. Code § 6147* [*Stroud v. Tunzi (2008) 160 Cal. App. 4th 377, 382-383, 72 Cal. Rptr. 3d 756*].

[2] Comments

[a] Use of Form

This form may be used by a client to oppose the contention that an attorney is entitled to the contingent fee stipulated in the attorney-client employment contract on the ground that there is failure to comply with *Bus. & Prof. Code § 6147(a)*, and that the attorney is therefore entitled to only the reasonable value of services rendered. *Bus. & Prof. Code § 6147* does not apply to contingent fee contracts for the recovery of workers' compensation benefits [*Bus. & Prof. Code § 6147(c)*]. The argument supported by this form may be raised any time the contingent fee contract does not comply with the statutory requirements and the client opts to treat the contract as voidable and pay the attorney only the reasonable value of services rendered. The argument would be most likely to arise in defense to an attorney's independent action against the client to recover for breach of a contingent fee contract.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the terms of the contingent fee contract between the client and attorney to show the manner in which the contract does not meet the statutory requirements. If the client alleges that any of the required statements in the contract are misleading or deficient in any way, counsel should discuss the statements and show how they are misleading or deficient. If the client alleges that the attorney failed to explain or fully explain the significance of the required statements, or that the attorney deliberately misled the client regarding the significance or meaning of the required statements, counsel should discuss the manner in which this occurred. Counsel should discuss the nature of the services performed by the attorney and the reasonable value of those services. If the client has offered to pay the attorney a reasonable fee, and the attorney has refused to accept a reasonable fee in lieu of the contingent fee, counsel should so indicate.

This form may be combined with a memorandum relating to the specific procedural context in which counsel wishes to raise the substantive issue of the voidability of a contingent fee contract for failure to comply with *Bus. & Prof. Code § 6147(a)*. This form may also be adapted for use in a trial or appellate brief.

In an appropriate case, the memoranda set out in this may be used to oppose the contentions in §§ 25.30, 25.31, and 25.40.

[3] Discussion of Authorities

[a] Contract Voidable for Failure to Comply With Statute

The contract is required to be in writing, and must contain all of the elements listed in *Bus. & Prof. Code § 6147(a)*. Failure to comply with the statutory provisions renders the contingent fee contract voidable at the option of the client, and the attorney is then entitled to a reasonable fee for services rendered [*Bus. & Prof. Code § 6147(b)*]. The statute does not apply to contingent fee contracts for the recovery of workers' compensation benefits [*Bus. & Prof. Code § 6147(c)*].

In ***Alderman v. Hamilton*** *(1988) 205 Cal. App. 3d 1033, 252 Cal. Rptr. 845* , plaintiff attorney sued client defendants, alleging that the defendants breached a contingent attorney fee agreement. The parties disputed plaintiff's entitlement to compensation for services relating to the sale of certain joint tenancy property. Plaintiff argued that he was entitled under the fee agreement to a percentage of the net proceeds received on the sale of the joint tenancy property. Defendants claimed that the fee agreement was unenforceable, and that it owed plaintiff no moneys from the sale of the

joint tenancy property. The trial court held that the defendants only owed plaintiff a reasonable fee based on the work plaintiff expended on the joint tenancy property, rather than a percentage of the proceeds of the sale. Plaintiff appealed from the judgment.

The court of appeal affirmed. It found that the fee agreement relied on by plaintiff did not meet all the statutory requirements of *Bus. & Prof. Code § 6147*. Even though the agreement contained many of the statutory requirements, it was not complete. The agreement did not include a statement of how disbursements would affect the contingency fee, it did not discuss related matters, and it did not state that the fee was negotiable. Thus, defendants had an absolute right to void the contract provision regarding the joint tenancy property (*205 Cal. App. 3d 1033, 1037-1038)* .

[b] Effect of Disbursements and Costs

The facts and procedural background of ***Alderman v. Hamilton*** *(1988) 205 Cal. App 3d 1033, 252 Cal. Rptr. 845* are discussed in *§ 25.54[3][a]*. In that case, the appellate court upheld a trial court judgment entitling plaintiff attorney to a reasonable fee, rather than a contingent fee, for work expended for his clients, because the purported contingent fee agreement did not include, among other items required by statute, a statement of how disbursements would affect the contingency fee (*205 Cal. App 3d 1033, 1038)* .

[c] Payment for Related Matters Not Covered by Contract

The facts and procedural background of ***Alderman v. Hamilton*** *(1988) 205 Cal. App 3d 1033, 252 Cal. Rptr. 845* are discussed in *§ 25.54[3][a]*. In that case, the appellate court upheld a trial court judgment entitling plaintiff attorney to a reasonable fee, rather than a contingent fee, for work expended for his clients, because the purported contingent fee agreement did not include, among other items required by statute, a statement of the extent to which, if any, the clients could be required to pay any compensation to their attorney for related matters arising out of the attorney-client relationship not covered by the contingent fee contract (*205 Cal. App 3d 1033, 1038)* .

[d] Negotiable Fee

The facts and procedural background of ***Alderman v. Hamilton*** *(1988) 205 Cal. App 3d 1033, 252 Cal. Rptr. 845* are discussed in *§ 25.54[3][a]*. In that case, the appellate court upheld a trial court judgment entitling plaintiff attorney to a reasonable fee, rather than a contingent fee, for work expended for his clients, because the purported contingent fee agreement did not include, among other items required by statute, a statement that the fee was negotiable (*205 Cal. App 3d 1033, 1038)* .

[e] Statement of Errors and Omissions Coverage or Written Guarantee Agreement

Bus. & Prof. Code § 6147(a)(6) is repealed on January 1, 1997, unless the Legislature extends or deletes that date [*Bus. & Prof. Code § 6147(d)*; Stats. 1993, ch. 982, §§ 4, 5].

[f] Modifications

In ***Stroud v. Tunzi*** *(2008) 160 Cal. App. 4th 377, 382-383, 72 Cal. Rptr. 3d 756* , the defendant had sued his former employer and hired the plaintiff attorneys to represent him in his lawsuit. The defendant signed a contingency fee agreement with the plaintiffs, agreeing to pay them a flat fee of $75,000 if the lawsuit settled before trial and 40 percent of any recovery if the matter went to trial. Before going to trial, he settled his lawsuit for $600,000. Prior to the settlement, the defendant had signed a handwritten document that stated: "I, Dominick Tunzi, agree to pay Stroud & Do $300,000 out of my settlement of $600,000 ...". The plaintiffs sued and moved for summary adjudication, arguing that the handwritten document modified the original contingency fee agreement and entitled them to $300,000. The defendant opposed summary adjudication, arguing the handwritten memo did not modify the original contingency fee agreement because it did not comply with the *Bus. & Prof. Code § 6147* governing contingency fee agreements between

an attorney and client. The trial court denied the motion.

The court of appeal agreed and held the modification was invalid. The court held that modifications to a contingency fee agreement must comply with *Bus. & Prof. Code § 6147*. Specifically, the modification must be signed by the attorney, state the contingency rate, discuss costs, and disclose that the attorney's fees were negotiable and not established by law [*160 Cal. App. 4th 377, 382*].

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CHAPTER 25 ATTORNEY'S FEES
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2A-25 California Points & Authorities § 25.54

§ 25.54 Opposing Contention That Attorney Has Valid Claim for Compensation Based on Noncontingent Fee Contract--Failure to Comply With Bus. & Prof. Code § 6148(a), (b)

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF IS NOT ENTITLED TO THE FEE STATED IN THE EMPLOYMENT CONTRACT BETWEEN PLAINTIFF AND DEFENDANT BECAUSE OF FAILURE TO COMPLY WITH THE PROVISIONS OF BUSINESS AND PROFESSIONS CODE SECTION 6148 AND IS ENTITLED TO COLLECT ONLY A REASONABLE FEE FOR SERVICES RENDERED ON BEHALF OF DEFENDANT.

A. Contract Voidable for Failure to Comply With Statute. A fee contract that does not comply with Business and Professions Code Section _____ [6148(a) *or* 6148(b) *or* 6148(c)] is voidable at the option of the client, and the attorney is entitled to collect only a reasonable fee (*Bus. & Prof. Code § 6148(c)*; *Iverson, Yoakum, Papiano & Hatch v. Berwald (1999) 76 Cal. App. 4th 990, 995-997, 90 Cal. Rptr. 2d 665*).

[*EITHER*]

B. Contract Must Be in Writing. In any case not coming under *Business and Professions Code Section 6147* (contingency fee contract) in which it is reasonably foreseeable that the total expense to a client, including attorney's fees, will exceed $1,000, the contract for services in the case must be in writing (*Bus. & Prof. Code § 6148(a)*).

[*AND/OR*]

C. Contents of Contract. In any case not coming under *Business and Professions Code Section 6147* (contingency fee contract) in which it is reasonably foreseeable that the total expense to a client, including attorney's fees, will exceed $1,000, the contract for services in the case must contain (1) any basis of compensation, including, but not limited to,

hourly rates, statutory fees or flat fees, and other standard rates, fees, and charges applicable to the case, (2) the general nature of the legal services to be provided to the client, (3) the respective responsibilities of the attorney and the client as to the performance of the contract, and, if applicable, (4) a statement disclosing that the attorney (a) does not maintain errors and omissions insurance coverage, (b) has not filed with the State Bar an executed copy of a written agreement guaranteeing payment of all claims established against the attorney by his or her clients for errors or omissions arising out of the practice of law by the attorney in the amount specified in State Bar Law Corp. Rules, Rule IV(B)(1)(c), or (c) if a law corporation, has not filed with the State Bar an executed copy of the written agreement required pursuant to State Bar Law Corp. Rules, Rule IV(B)(1)(a), (b), or (c) (*Bus. & Prof. Code § 6148(a)*).

[*AND/OR*]

D. Bills for Services. All bills rendered by an attorney to a client must clearly state the basis thereof. [Bills for the fee portion of the bill must include the amount, rate, basis for calculation, or other method of determination of the attorney's fees and costs]. [Bills for the cost and expense portion of the bill must clearly identify the costs and expenses incurred and the amount of the costs and expenses.] [On request by the client, the attorney must provide a bill to the client no later than 10 days following the request unless the attorney has provided a bill to the client within 31 days following the date the most recent bill was provided.] [The client is entitled to make similar requests at intervals of no less than 30 days following the initial request] (*Bus. & Prof. Code § 6148(b), (e)*).

[2] Comments

[a] Use of Form

This form may be used by a client to oppose the contention that an attorney is entitled to the fee stipulated in a noncontingency fee attorney-client employment contract, on the ground that the contract or attorney failed to comply with *Bus. & Prof. Code § 6148(a)* or *(b)*, and that the attorney is therefore entitled to collect only a reasonable fee for services rendered. However, counsel should note that *Bus. & Prof. Code § 6148* only applies to those contracts entered into on or after January 1, 1987 [*Bus. & Prof. Code § 6148(e)*]. The statutory requirements also do not apply to certain fee contracts, as discussed in *§ 25.30[3][c]*.

The argument supported by this form may be raised any time the fee contract does not comply with the statutory requirements, and the client opts to treat the contract as voidable and pay the attorney only a reasonable fee for services rendered. The argument would be most likely to arise in defense to an attorney's independent action against the client to recover for breach of a fee contract.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the terms of the noncontingency fee contract between the client and attorney to show the manner in which the contract does not meet the statutory requirements. Counsel should discuss the nature of the services performed by the attorney and the reasonable value of those services. If the client has offered to pay the attorney a reasonable fee, and the attorney has refused to accept a reasonable fee in lieu of the stated contract fee, counsel should so indicate.

This form may be combined with a form of memorandum relating to the specific procedural context in which counsel wishes to raise the substantive issue of the voidability of a contingent fee contract for failure to comply with *Bus. & Prof. Code § 6148(a)* or *(b)*. The memoranda may also be adapted for use in a trial or appellate brief.

§ 25.53 should be used instead of this form if the fee contract is a contingent fee contract.

In an appropriate case, the memoranda set out in this form may be used to oppose the contentions in § 25.30.

[3] Discussion of Authorities

[a] Contract Voidable for Failure to Comply With Statute

In ***Iverson, Yoakum, Papiano & Hatch v. Berwald*** *(1999) 76 Cal. App. 4th 990, 995, 90 Cal. Rptr. 2d 665* , plaintiff law firm sued former clients for fees. Plaintiff had represented defendant in suits from July 1988 to May 1992. In May, 1992, plaintiff prepared, and one of the defendants signed, a promissory note for payment of the outstanding fees. However, in all three places on the note where the balance amount was stated, this figure was crossed out and initialed by the defendant signatory, who noted under his signature on the note that the amount was incorrect and did not reflect reductions due to billing errors. Under the terms of the note, defendants agreed to make installment payments on the balance until it was paid in full. Defendants made several installment payments until January 1995. In April 1997 plaintiff notified defendants in writing that they still owed a balance of $45,477, and also sent them a notice of their right to arbitrate the fee dispute. In May 1998, plaintiff filed a verified complaint alleging two common counts: one for damages for services rendered, and the other for an account stated. Both counts alleged a balance owing or an indebtedness of $44,890. Defendants demurred to the complaint on the ground that the plaintiff's failure to allege a valid written fee agreement under *Bus. & Prof. Code § 6148(a)* barred plaintiff from collecting fees under a contract theory. Plaintiff was entitled to recover only under claims for common counts, which claims were barred in turn by lapse of the applicable statutory period of limitation that began to run in 1992. Defendants argued that the promissory note, attached as an exhibit to the complaint, did not constitute a written agreement and could not be the basis of a common count for account stated. The note revealed on its face that there was no definite amount agreed upon in that the stated amount typed by plaintiff were crossed out by the defendant signatory and no other amount appeared on the note in its place. Plaintiff argued that the common counts were based on the promissory note, not a fee agreement, and that by signing the note defendants waived any right to complain about noncompliance with *Bus. & Prof. Code § 6148*. Moreover, a four-year limitation period applicable to the note did not begin to run until the date of the last of the last installment payment made in 1995, and this period therefore had not lapsed before the filing of the complaint. The trial court sustained the demurrer and entered a dismissal, and plaintiff appealed (*76 Cal. App. 4th 990, 992-994)* .

The court of appeal affirmed. The court concluded that the promissory note, as a matter of law, did not comply with *Bus. & Prof. Code § 6148*, were voidable, and had been voided by the client. Plaintiff's only resulting claim, based on quantum meruit for service rendered, was barred the applicable two-year period of limitation (*76 Cal. App. 4th 990, 996-997)* .

[b] Contents of Contract

Bus. & Prof. Code § 6148(a)(4), regarding the statement about the lack of errors and omissions coverage or a filed guarantee agreement, is repealed on January 1, 1997, unless the Legislature extends or deletes that date [*Bus. & Prof. Code § 6148(f)*; Stats. 1993, ch. 982, §§ 5.5, 6].

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 25 ATTORNEY'S FEES
PART II. FORMS

2A-25 California Points & Authorities § 25.55

§ 25.55 Opposing Contention That Discharged Attorney Entitled to Reasonable Value of Services Rendered Under Contingent Fee Contract--Stated Contingency Has Not Occurred

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF IS NOT ENTITLED TO THE REASONABLE VALUE OF ANY SERVICES RENDERED UNDER THE CONTINGENT FEE CONTRACT BETWEEN PLAINTIFF AND DEFENDANT BECAUSE PLAINTIFF HAS BEEN DISCHARGED AND THE CONTINGENCY STATED IN THE CONTRACT HAS NOT OCCURRED.

Stated Contingency Has Not Occurred. When an attorney is discharged under a contingent fee contract, his or her cause of action for reasonable compensation does not accrue until the stated contingency, the client's recovery by either settlement or judgment, has occurred (*Fracasse v. Brent (1972) 6 Cal. 3d 784, 792, 100 Cal. Rptr. 385, 494 P.2d 9* ; *Bandy v. Mt. Diablo Unified Sch. Dist. (1976) 56 Cal. App. 3d 230, 234, 126 Cal. Rptr. 890*).

[2] Comments

[a] Use of Form

This form may be used by a client to oppose the contention that a discharged attorney is entitled to the reasonable value of services rendered under a contingent fee contract on the ground that the stated contingency has not occurred. The argument supported by the form may be raised any time the client has discharged an attorney under a contingent fee contract, the stated contingency has not occurred, and the attorney alleges that he or she has a cause of action for the reasonable value of services performed up to the time of discharge. The argument would be most likely to arise in defense to an attorney's independent action against the client to recover in quantum meruit.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the terms of the contingent fee agreement between the client and attorney and state the nature of the contingencies. Counsel may wish to discuss the reasons for the attorney's discharge by the client and should state the date of discharge and the manner in which the client notified the attorney of the discharge. Counsel

should indicate that the stated contingencies have not yet occurred, through no fault of the client, in order to show that the attorney's cause of action for reasonable compensation has not accrued.

This form may be combined with a form of memorandum relating to the specific procedural context in which counsel wishes to raise the substantive issue of the prematurity of a discharged attorney's cause of action for reasonable compensation under a contingent fee agreement when the stated contingency has not occurred. The memoranda may also be adapted for use in a trial or appellate brief.

[b] Opposing Memoranda

In an appropriate case, the memoranda set out in *§ 25.34* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Stated Contingency Has Not Occurred

The facts and procedural background of ***Fracasse v. Brent*** *(1972) 6 Cal. 3d 784, 100 Cal. Rptr. 385, 494 P.2d 9* are discussed in *§ 25.34[3][a]*. In *Fracasse,* the Supreme Court held that a client has the absolute right to discharge an attorney at any time with or without cause (*6 Cal. 3d 784, 790*), and that the attorney is entitled to recover the reasonable value of services rendered up to the time of discharge (*6 Cal. 3d 784, 792*). However, in the case of a contingent fee contract, the attorney's cause of action for reasonable compensation accrues only when the stated contingency, the client's recovery by either settlement or judgment, has occurred (*6 Cal. 3d 784, 792*). One of the significant factors in determining the reasonableness of an attorney's fee is the amount involved and the result obtained, and thus any determination of the amount involved is highly speculative, and any determination of the result obtained is impossible until the matter has finally been resolved. The Court also stated that it would be improper to burden the client with an absolute obligation to pay a former attorney regardless of the outcome of litigation, especially when the client may no longer have trust and confidence in the discharged attorney, and that the attorney will be denied compensation if the client does not obtain a recovery (*6 Cal. 3d 784, 792*).

In ***Bandy v. Mt. Diablo Unified Sch. Dist.*** *(1976) 56 Cal. App. 3d 230, 126 Cal. Rptr. 890* , an attorney was employed to prosecute three separate personal injury claims on behalf of several clients. The attorney and clients entered into a contingent fee contract providing the attorney with a lien on any recovery for fees and costs advanced. The clients subsequently discharged the attorney, while the cases were still pending. The attorney then filed a motion in each of the actions for a lien for attorney's fees and costs. The trial court granted the attorney a lien for reasonable attorney's fees and costs advanced in stated amounts in each of the actions. The clients' motion to vacate the court's orders was denied and the clients appealed.

The court of appeal found that the attorney did have a valid contractual lien on any recovery, but that the orders granting the liens were premature because the contingency stated in the contract, recovery by the client, had not occurred (*56 Cal. App. 3d 230, 234)* . The court stated that the significant factors in determining the reasonableness of an attorney's fee are the amount involved and the result obtained and that these factors cannot be ascertained until the matter has been finally resolved (*56 Cal. App. 3d 230, 233-234)* .

[4] Additional Authorities

[a] Stated Contingency Has Not Occurred

In *Kroff v. Larson (1985) 167 Cal. App. 3d 857, 213 Cal. Rptr. 526* , defendants retained plaintiff attorney to represent them in a personal injury action. The arrangement provided for a percentage attorney fee and the reimbursement of costs advanced by the attorney, contingent on recovery by the clients. Plaintiff filed a lawsuit, but before any recovery was obtained, was discharged by defendants. Plaintiff wrote defendants seeking reimbursement for costs advanced. After

defendant failed to pay, plaintiff filed a suit to collect attorney fees and costs. The trial court sustained defendants' general demurrer and the court of appeal affirmed. An attorney discharged by a client without cause has a quantum meruit cause of action for the reasonable value of services rendered to the date of discharge. That cause of action does not accrue until recovery by the client either by settlement or judgment. The court refuted plaintiff's attempt to distinguish an action for costs from case law pertaining to attorney fees. The obligation to reimburse the attorney for costs advanced matures, if at all, only on the occurrence of the agreed contingency, recovery by the client. Plaintiff's action was premature (*167 Cal. App. 3d 857, 860-861)* .

The Court of Appeals in *Jalali v. Root (2003) 109 Cal. App. 4th 624, 633-634, 135 Cal. Rptr. 2d 168* held that, regardless of the work done, only in the event of the contingency contemplated would a discharged attorney have a right to quantum meruit recovery. Citing to Justice Sullivan's dissent in *Fracasse v. Brent (1972) 6 Cal. 3d 784, 100 Cal. Rptr. 385, 494 P.2d 9* , the Court interpreted this to mean that a client has the power to "stiff" attorneys working under contingency fee contracts.

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 25 ATTORNEY'S FEES
PART II. FORMS

2A-25 California Points & Authorities § 25.56

§ 25.56 Opposing Contention That Attorney Entitled to Reasonable Value of Services Rendered Under Contingent Fee Contract--Attorney Voluntarily Abandoned Case Without Justifiable Cause

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF IS NOT ENTITLED TO THE REASONABLE VALUE OF ANY SERVICES RENDERED UNDER THE CONTINGENT-FEE CONTRACT BETWEEN PLAINTIFF AND DEFENDANT, BECAUSE PLAINTIFF VOLUNTARILY ABANDONED DEFENDANT'S CASE WITHOUT JUSTIFIABLE CAUSE.

Attorney Voluntarily Abandoned Case Without Justifiable Cause. An attorney who voluntarily abandons employment under a contingent fee contract without justifiable cause cannot thereafter recover the reasonable value of his or her services if the stated contingency occurs (*Hensel v. Cohen (1984) 155 Cal. App. 3d 563, 564, 567-568, 202 Cal. Rptr. 85*).

[2] Comments

[a] Use of Form

This form may be used by a client to oppose the contention that a former attorney is entitled to the reasonable value of services rendered under a contingent fee contract, on the ground that the attorney was not discharged but voluntarily abandoned the client's case without justifiable cause. The argument supported by this memorandum may be raised any time the attorney abandons the client's case without justifiable cause but nonetheless asserts the right to recover the reason able value of services rendered up to the time of abandonment if or when the stated contingency ultimately occurs. The argument would most likely arise in defense to an attorney's independent action against the client to recover in quantum meruit.

Counsel should insert argument in the form showing the relationship between the facts of the case and the point of law stated. Thus, counsel should show that the attorney was not discharged by the client but voluntarily abandoned his or her employment under the contingent fee contract without justifiable cause.

This form may be combined with memoranda pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the attorney's voluntary and unjustifiable abandonment of the client's case. They may also be adapted for use in a trial or appellate brief.

[b] Opposing Memoranda

In an appropriate case, the memoranda set out in *§ 25.34* may be used to support the contention opposed by this form.

[3] Discussion of Authorities

[a] Attorney Voluntarily Abandoned Case Without Justifiable Cause

In ***Hensel v. Cohen*** *(1984) 155 Cal. App. 3d 563, 202 Cal. Rptr. 85* , plaintiff retained defendant attorney to handle a personal injury claim on a contingent-fee basis. After investigation, defendant concluded that the claim was a "dead-blank loser" and notified plaintiff that he would do no further work on it. Defendant later claimed that he had a lien on any eventual recovery for the value of services rendered and costs advanced. Plaintiff filed for declaratory relief, denying the validity of the lien in any amount over costs advanced. The trial court held for plaintiff, and defendant appealed (*155 Cal. App. 3d 563, 564-567)* .

The court of appeal affirmed. The court stated that a client who discharges an attorney retained under a contingent-fee contract becomes liable to the discharged attorney for the reasonable value of services rendered when the stated contingency occurs, regardless of whether the client had good cause to discharge the attorney. The court reasoned that this rule did not apply to permit recovery by an attorney who discharges a client yet cannot point to any action of the client which provided justifiable cause for abandonment of the case (*155 Cal. App. 3d 563, 567)* . The court held that defendant had no right to recover quantum meruit, because, while he employed the proper procedure for withdrawal, his conclusion that the case was a "loser" did not constitute justifiable cause for abandonment of his employment (*155 Cal. App. 3d 563, 567-568)* .

[4] Additional Authorities

[a] Attorney Voluntarily Abandoned Case Without Justifiable Cause

In *Estate of Falco (1987) 188 Cal. App. 3d 1004, 233 Cal. Rptr. 807* , the court of appeal held that a client's exercise of the right to reject a settlement does not justify withdrawal by the attorney and does not constitute cause for the purpose of recovering in quantum meruit (*188 Cal. App. 3d 1004, 1018)* . The court held, however, that an attorney may be compensable in quantum meruit after withdrawal for ethical reasons, if the attorney can prove that the withdrawal was justified (*188 Cal. App. 3d 1004, 1016)* .

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2A-25 California Points & Authorities § 25.57

§ 25.57 Opposing Contention That Attorney's Fees Sought Are Reasonable

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

DEFENDANT IS NOT REQUIRED TO PAY THE ATTORNEY'S FEE SOUGHT BY PLAINTIFF BECAUSE THE FEE IS UNREASONABLE IN RELATION TO THE SERVICES PERFORMED BY PLAINTIFF.

A. Attorney's Fees Are Excessive. Fees that are unreasonable in relation to the services performed will not be upheld (*see Jackson v. Campbell (1932) 215 Cal. 103, 106, 8 P.2d 845* ; *Sayble v. Feinman (1978) 76 Cal. App. 3d 509, 515, 142 Cal. Rptr. 895* ; *Denton v. Smith (1951) 101 Cal. App. 2d 841, 844, 226 P.2d 723*).

[*Optional*] **B. Court May Rely on Own Experience in Determining Value of Services.** When the trial court is informed of the extent and nature of the legal services rendered, it may rely on its own experience and knowledge in determining their reasonable value (*Estate of Straus (1904) 144 Cal. 553, 557-558, 77 P. 1122* ; *In re Marriage of Cueva (1978) 86 Cal. App. 3d 290, 300, 149 Cal. Rptr. 918*).

[2] Comments

[a] Use of Form

This form may be used by a client to oppose the attorney's contention that attorney's fees sought are reasonable on the ground that the fee sought is excessive in relation to the legal services actually performed. This form may be used when the client contends that the attorney is entitled only to the reasonable value of services rendered because the specified fee in the contract is so high as to be unconscionable, or the client did not fully understand the fee agreement and therefore mistakenly consented to unreasonable terms. The form may also be used when an attorney is seeking to recover in quantum meruit for the reasonable value of his or her services and the client contends that the fee sought is excessive. In appropriate circumstances, counsel may wish to include memoranda contending that the trial court may use its discretion in determining the reasonable value of legal services (optional Paragraph B). This form may be used in conjunction with § 25.59 (supporting contention that client is not required to pay for attorney's personal and travel

expenses or of costs other than normal costs of lawsuit).

Counsel may wish to refer to additional memoranda for use in actions for breach of contract, which are found in Ch. 50, *Contracts* . When the client alleges that the fee agreement was obtained by fraud, duress, or undue influence on the part of the attorney, counsel should refer to additional memoranda found in Ch. 92, *Duress, Menace, Fraud, Undue Influence, and Mistake* .

The argument supported by this memorandum would be most likely to arise in support of a client's defense against an attorney's action to collect a stipulated contractual fee, or against an attorney's action in quantum meruit. The argument may also be used in support of a client's independent action brought to prevent an attorney from asserting a lien on any judgment or recovery in favor of the client or on money or property of the client in the attorney's possession that the attorney alleges is due him or her in satisfaction of attorney's fees.

This form may be combined with a form of memorandum relating to the specific procedural context in which counsel wishes to raise the substantive issue of the reasonableness of attorney's fees. The memoranda may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, if the attorney seeks to recover a contractual fee, counsel should discuss the terms of the employment contract between attorney and client to show the excessiveness of the stipulated fee. Regardless of whether the attorney seeks to recover a contractual fee or the reasonable value of services rendered, counsel should discuss the attorney's performance to show that the fee sought is excessive in relation to the legal services rendered. If the client contends that the attorney is entitled only to the reasonable value of his or her services, factors that enter into the determination of a reasonable fee should be discussed. These factors are discussed in *§ 25.39[3][a]*. If applicable, counsel should indicate that the client has offered to pay a certain amount for the reasonable value of legal services rendered, and that the offer has been refused by the attorney.

[b] Opposing Memoranda

In an appropriate case, the memoranda set out in *§ 25.39* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Attorney's Fees Are Excessive

In ***Jackson v. Campbell*** *(1932) 215 Cal. 103, 8 P.2d 845* , an attorney agreed to represent a client in a wrongful death action in exchange for a contingent fee. The written contract provided that if the attorney collected the client's claim for damages without suit, he would receive 20 percent of the total recovery. If the case went to trial, the client would advance all costs of suit and the attorney would receive 35 percent of any recovery. If the claim was settled after bringing suit, the attorney would receive 35 percent of the amount received in settlement. If the action was appealed, the client would advance all costs and the attorney would receive 35 percent of the amount recovered on appeal. The client obtained a judgment in her favor in the wrongful death action that was affirmed on appeal. Thereafter, a dispute arose between the attorney and the client over the attorney's fee. The attorney claimed that he was entitled to a 35 percent fee for his work in the trial court and an additional 35 percent for his services on appeal, while the client contended that he was entitled to only 35 percent for his services at both the trial and the appeal. The attorney waived his right to receive more than 50 percent of the judgment and offered to pay the client one half of the recovery, which she accepted. The client then brought an action to recover an additional 15 percent of the judgment from the attorney. Following a judgment in the client's favor, the attorney appealed.

The Supreme Court affirmed, holding that the attorney was entitled to only 35 percent of the total recovery because the

only reasonable construction of the contract was that the attorney was to receive no more than 35 percent for his work on both the trial and the appeal. The Court stated that the contract terms were rather ambiguous and that any ambiguity would be resolved in favor of the client, but that even if the contract expressly stipulated that the attorney was to receive a total fee of 70 percent for his services in the trial and appellate courts, such a fee would be so grossly excessive and unconscionable as to raise the question of its enforceability (*215 Cal. 103, 106)* .

In ***Sayble v. Feinman*** *(1978) 76 Cal. App. 3d 509, 142 Cal. Rptr. 895* , a law firm brought a declaratory relief action against a client for interpretation of a contingent fee agreement that provided that the law firm would be paid 28.3 percent of any money recovered in a wrongful death action. The attorneys obtained an out-of-court settlement for the client in which she received a cash payment plus a monthly annuity for her lifetime. Neither of the parties had contemplated a form of payment other than a lump sum of cash, but plaintiffs claimed they were entitled immediately to 28.3 percent of the cash payment plus 28.3 percent of the present cash value of the annuity portion of the settlement. The trial court ruled in favor of defendant's interpretation of the contract that plaintiffs were entitled to the stated percentage of the cash payment plus the percentage of the life annuity as and when it was received by defendant.

The court of appeal affirmed, finding that the trial court's interpretation of the phrase "any money recovered" in the contingent fee contract was correct. "Money" was defined as cash proceeds, distinguishable from other forms of personal property, and therefore defendant did not receive any "money" from her annuity until she actually received her monthly check (*76 Cal. App. 3d 509, 514)* . The court stated that to agree with plaintiffs would mean that they were entitled to some 80 percent of the money recovered so far and that this interpretation of a contingent fee contract would be unreasonable and absurd (*76 Cal. App. 3d 509, 515)* .

In ***Denton v. Smith*** *(1951) 101 Cal. App. 2d 841, 226 P.2d 723* , an attorney agreed to provide legal services in the probate of an estate in exchange for a sum equal to one fourth of the appraised value of the part of the estate recovered. The attorney advised the client that the client was entitled to be appointed as administrator of the estate in place of the client's son and provided his legal services in securing such appointment for the client. When the estate was distributed, the probate court found that the attorney was entitled to $310 as statutory attorney's fees and an additional $200 for extraordinary legal services rendered. The attorney filed a petition in probate court to revoke the letters of administration, alleging that the client had refused his demands for payment of the contingent fee. The client then retained another attorney, and the probate court in its final order settling the estate awarded the original attorney $100 as a statutory fee and $50 for further services in the estate matter. The attorney then brought an action against the client to recover the one-fourth interest in the estate that he claimed as his fee. The trial court held that the contract sued on was without consideration, invalid, and unenforceable and that plaintiff should recover nothing under the contract. Plaintiff appealed.

The court of appeal affirmed, finding that the client did not understand the terms of the contract because he was never informed by plaintiff that the fees allowed an attorney in the probate of an estate were much less than the contingent fee asked by plaintiff and that the client would not have agreed to pay such a fee if he had known. Plaintiff knew or should have known that the client's interest in the estate was readily ascertainable and recoverable with a minimum of legal assistance. The fees awarded to plaintiff by the probate court were more than reasonable since his services to the client amounted to no more than what would have been done by the attorney for the previous administrator of the estate (*101 Cal. App. 2d 841, 844)* .

[b] Court May Rely on Own Experience in Determining Value of Services

In ***Estate of Straus*** *(1904) 144 Cal. 553, 77 P. 1122* , the decedent's will left his estate, which consisted mainly of a business, to his widow. The executor of the estate continued to manage and conduct the business for one year and then closed it after realizing a profit for the estate. The executor did not file an accounting of the estate until seven years later, when he revealed that he had over $3,000 belonging to the estate. The decedent's widow had assigned her interest in the estate to her son, who applied for a partial distribution to him of $2,000. The court found that $1,500 could be

paid to the son without damage to the estate, and that more than enough would remain in the hands of the executor to pay his commissions, together with a reasonable attorney's fee and the charges of closing the estate. The executor appealed from the court's order, claiming that the amount remaining was not sufficient to pay his commissions, an attorney's fee, and other administration charges.

The Supreme Court affirmed, finding that the lower court had ample data on which to properly determine the matter. In regard to attorney's fees, the Court stated that all the proceedings in the estate and all matters in which the executor could have required the services of an attorney were before the court, and from these the court of its own knowledge and experience could determine what would be a reasonable fee. It was not necessary that any evidence of a professional nature be introduced (*144 Cal. 553, 557-558)* .

In ***In re Marriage of Cueva*** *(1978) 86 Cal. App. 3d 290, 149 Cal. Rptr. 918* , the court of appeal reversed as to an award of $16,000 in attorney's fees in a dissolution action. The trial court had awarded the wife's attorney the $16,000 in addition to $5,000 previously ordered. The court of appeal found that there was nothing before the trial court disclosing legal services that could reasonably support an award of $21,000 (*86 Cal. App. 3d 290, 297)* . The court reiterated the rule concerning a trial court's discretion to determine the reasonableness of attorney's fees, stating that when the trial court is informed of the extent and nature of services rendered, it may rely on its own experience and knowledge in determining their reasonable value (*86 Cal. App. 3d 290, 300)* .

[4] Additional Authorities

[a] Attorney's Fees Are Excessive

Warner v. State Bar (1983) 34 Cal. 3d 36, 192 Cal. Rptr. 244, 664 P.2d 148 , involved several incidents of misconduct by an attorney. The State Bar recommended disbarment, and the Supreme Court upheld the recommendation. After the attorney represented the client in a litigation, the client invested $25,000 in an unrelated real estate venture formed by the attorney. When the venture failed, a written agreement was executed by the attorney converting the amount of the client's investment into a loan payable over five years at ten percent interest. The agreement provided that interest on the loan accruing before a certain date would be deemed payment in full for any uncompensated legal work previously done by the attorney for the client. The parties also orally agreed that interest accruing after that date could be credited against future fees earned by the attorney. Over the next three years the attorney failed to perform substantial work on the underlying prior litigation and also failed to pay interest on the loan. The attorney refused to respond adequately to the client's requests for accounting for the attorney's time and costs expended, and the prior litigation was ultimately dismissed for lack of prosecution. In the disciplinary hearings before the State Bar, the attorney denied that he had agreed to pay interest on the loan or account annually for his time, and that the fee arrangement was that a fee accommodation was to be reached when the loan matured, at which time all monies would be accounted for and paid. The attorney claimed that he withheld the interest on the loan as security for or as his attorney's fees.

In adopting the State Bar's recommendation of disbarment, the Supreme Court found that the attorney's action in unilaterally withholding interest on the loan as security for or payment of fees constituted the charging of an unconscionable fee under the circumstances in violation of both former Rule 2-107 of the Rules of Professional Conduct [*now see Rule 4-200 of the Rules of Professional Conduct*] and the duties of an attorney under *Bus. & Prof. Code § 6103*. The financial transaction between the attorney and his client was more than a simple loan between creditor and debtor, because of the oral agreement tying interest and attorney's fees. The attorney withheld $2,500 in interest each year, ostensibly as attorney's fees, while refusing to account for his time and failing to provide services justifying fees in the amount withheld. The Supreme Court stated that it is settled that gross overcharge of a fee by an attorney may warrant discipline, and that most cases warranting discipline on this ground involve an element of fraud or overreaching by the attorney, so that the fee charged, under the circumstances, constituted a practical appropriation of the client's funds (*34 Cal. 3d 36, 43)* .

In *Goldstone v. The State Bar of California (1931) 214 Cal. 490, 6 P.2d 513* , the attorney was asked by the client to assist him in obtaining workers' compensation for job-related injuries. The attorney agreed to represent the client in return for 40 percent of any recovery. The client had already been awarded compensation in proceedings before the Industrial Accident Commission, but was ignorant of the fact. The attorney did nothing on behalf of the client until four months later, when the attorney learned of the client's award. The attorney then contacted the client and accompanied him to the office of the insurance carrier, where the client received a check for part of the award. The attorney was paid 40 percent of this sum and then claimed that he should also receive 40 percent of the weekly compensation checks sent to the client. The client refused to pay the additional amount and there was eventually a hearing before the Industrial Accident Commission, which determined that the attorney was entitled to a fee of $20 for services rendered and that the remainder of the fee should be returned to the client. The attorney did not return the money and ultimately the State Bar recommended that he be suspended from practice for three months.

In proceedings to review the State Bar's order, the Supreme Court found that the attorney had charged a fee wholly disproportionate to the services performed and that his suspension was warranted (*214 Cal. 490, 497)* . The attorney had stated that the original contingent fee contract had been destroyed by him, and that he was not charging a contingent fee for his services. The Supreme Court stated that if the attorney did not act in reliance on the contingent fee contract, then payment for his services was not made on a contingent basis, but was paid after the services had been rendered, and in full realization that such service was so slight as scarcely to deserve the name of "service" (*214 Cal. 490, 497)* . The attorney's disclaimer of the contingent fee contract removed the slightest justification for the amount of the fee (*214 Cal. 490, 497)* . The Court stated that the exaction of such a substantial fee for a most trivial service amounted to misconduct on the part of the attorney which would subject him to the disciplinary power of the Court (*214 Cal. 490, 498)* .

In *Werschkull v. United California Bank (1978) 85 Cal. App. 3d 981, 149 Cal. Rptr. 829* , participants in an employees' pension plan brought a class action against their employer bank, who was also trustee of the plan, for wrongful diversion of pension funds. Attorneys for plaintiffs obtained a favorable judgment in the class action and were awarded $400,000 in attorneys' fees. Defendant appealed the judgment on several grounds, including the claim that the award of attorneys' fees was excessive.

The court of appeal reversed the judgment as to the award of attorneys' fees and remanded the matter for redetermination by the trial court. Plaintiffs' attorneys had devoted a total of 1,398 hours to the case and the award of $400,000 compensated them at a rate of $268 per hour. The attorneys had stated that any further legal services performed for plaintiffs would be billed at rates of between $60 and $100 per hour. The court held that the award appeared to bear no relationship to the rate of compensation and number of hours spent by the attorneys (*85 Cal. App. 3d 981, 1007)* .

[b] Court May Rely on Own Experience in Determining Value of Services

The facts and procedural background of *Elconin v. Yalen (1929) 208 Cal. 546, 282 P. 791* are discussed in *§ 25.32[3][a]*. In *Elconin,* the Supreme Court upheld a trial court's finding that the reasonable value of an attorney's services was $300 rather than $1,500. The Court stated that the trial court had before it detailed evidence regarding the nature and extent of the services rendered and could use its own experience and judgment to determine the reasonable value, with or without the aid of witnesses' testimony (*208 Cal. 546, 549-550)* .

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2A-25 California Points & Authorities § 25.58

§ 25.58 Opposing Contention That Attorney Has Lien on Judgment or Recovery

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

_____ [*Specify party seeking to enforce lien, e.g.,* PLAINTIFF] HAS NO LIEN ON THE JUDGMENT OR RECOVERY OBTAINED BY _____ [*specify party resisting lien, e.g.,* DEFENDANT] BECAUSE THE CONTRACT OF EMPLOYMENT BETWEEN PLAINTIFF AND DEFENDANT DOES NOT EXPRESSLY OR IMPLIEDLY PROVIDE FOR ANY LIEN ON, OR SECURITY INTEREST IN, THE JUDGMENT OR RECOVERY AND THERE IS NO SHOWING OF ANY INTENT ON THE PART OF PLAINTIFF AND DEFENDANT TO CREATE A LIEN.

A. Attorney's Lien Not Created as Matter of Law. An attorney's fee contract containing no words as to a lien, security interest, or assignment does not as a matter of law create a lien on the judgment or recovery obtained as a result of his or her services (*Fletcher v. Davis (2004) 33 Cal. 4th 61, 69-70, 14 Cal. Rptr. 3d 58, 90 P.3d 1216* (charging lien must comply with *Cal. Rules of Prof. Conduct, Rule 3-300*); *Gelfand, Greer, Popko & Miller v. Shivener (1973) 30 Cal. App. 3d 364, 370, 105 Cal. Rptr. 445*).

[*Optional*] **B. Enforceable Lien Dependent on an Existing Obligation.** An attorney must show the liability of the client to the attorney for the fee before the attorney's lien can be enforced (*Gostin v. State Farm Ins. Co. (1964) 224 Cal. App. 2d 319, 325-326, 36 Cal. Rptr. 596*).

[*Optional*] **C. No Retaining Lien on Property Placed in Trusteeship.** An attorney cannot claim a retaining lien on property coming into the attorney's hands as trustee (*Hulland v. State Bar (1972) 8 Cal. 3d 440, 447, 105 Cal. Rptr. 152, 503 P.2d 608* ; *Severdia v. Alaimo (1974) 41 Cal. App. 3d 881, 891, 116 Cal. Rptr. 405*).

[*Optional*] **D. Attorney Cannot Unilaterally Determine Fee.** In the absence of an express employment contract providing for compensation, an attorney cannot unilaterally determine his or her own fee (*Silver v. State Bar (1974) 13 Cal. 3d 134, 142, 117 Cal. Rptr. 821, 528 P.2d 1157* ; *Trafton v. Youngblood (1968) 69 Cal. 2d 17, 26, 69 Cal.*

Rptr. 568, 442 P.2d 648).

[*Optional*] **E. Discharged Attorney's Independent Action Barred by Collateral Estoppel.** When the question of the reasonable amount of attorney fees to be awarded a discharged attorney is erroneously determined in the main action, and the discharged attorney fails to attack directly that adverse determination by appeal, the discharged attorney is barred from later reopening the fee dispute by collateral attack in an independent action, by application of the principles of collateral estoppel, disfavor of collateral attack, and res judicata (*see Law Offices of Stanley J. Bell v. Shine, Browne & Diamond (1995) 36 Cal. App. 4th 1011, 1021, 1027*).

[2] Comments

[a] Use of Form

This form may be used to oppose the contention that an attorney who represents a client has a lien on the proceeds of any judgment or recovery in favor of the client. Optional Paragraph C may be used when the client contends that the attorney has no retaining lien on the client's property that is in the possession of the attorney. Optional Paragraph D may be used when the client contends that the attorney has no contractual lien for fees and does not have the right to unilaterally determine a fee and withhold that amount from client's funds held by the attorney.

The argument supported by this form may be raised any time an attorney alleges that he or she has a lien on the proceeds of a client's judgment or recovery, or on property of the client in the attorney's possession. The argument would be most likely to arise in support of a client's defense against an attorney's lien claim or in support of a client's independent action to recover money or property in the possession of, or claimed by, an attorney.

The argument supported by this form may also be used by a client's creditor to oppose the claim of an attorney seeking to establish priority of the attorney's contractual lien over liens or attachments of the client's judgment creditors. The form may also be used by a client's debtor to oppose the claim of an attorney seeking to charge the amount of a lien for attorney's fees against the debtor who has made payment directly to the client.

This form may be combined with other form relating to the specific procedural context in which counsel wishes to raise the substantive issue of the existence of a lien for attorney's fees. This form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the employment contract, if any, between the attorney and client in order to show that there is no express or implied language to indicate the creation of an attorney's lien for fees. Counsel should also show that the parties did not intend that the attorney have a lien on any judgment or recovery in favor of the client. If the attorney seeks to assert a retaining lien, counsel should discuss the manner in which the attorney gained possession of the property that is the subject of the lien in order to show that the property came into the attorney's hands as a trustee and not as security for fees. Counsel may also wish to show that the attorney's continued possession of the property is an act that is against the client's best interests and therefore a violation of the attorney's professional ethics and a violation of public policy [*see Cal. Rules of Professional Conduct, Rules 3-700(A)(2), 4-100(B)(4)*]. If appropriate, counsel should also discuss the attorney's performance or non performance under the contract, in order to show that there is no existing obligation on the part of the client to pay the attorney's fee, and thus no basis for the existence of an attorney's lien for fees.

If an attorney seeks to enforce a lien against a judgment creditor of the client, or against a debtor of the client, see California Forms of Pleading and Practice, Ch. 342, *Liens and Wage Preferences* (Matthew Bender), for a discussion of priority between lien claimants and equitable liens.

[b] Opposing Memoranda

In an appropriate case, the memoranda set out in *§ 25.40* may be used to oppose the contentions supported by this form.

[3] Discussion of Authorities

[a] Attorney's Lien Not Created as Matter of Law

In ***Fletcher v. Davis*** *(2004) 33 Cal. 4th 61, 14 Cal. Rptr. 3d 58, 90 P.3d 1216* , a client retained plaintiff, attorney Freddie Fletcher, to defend a breach-of-lease action and to institute a conversion action for damages. The client orally agreed to pay all costs plus Fletcher's fee of $200 per hour. In lieu of a cash retainer, the client agreed to grant Fletcher a lien on any judgment or settlement in its litigation. If the judgment or settlement was insufficient, the client agreed to pay the difference from the income it earned once it resumed operations. The client also promised Fletcher an extra unspecified percentage of any judgment obtained if extensive litigation or trial was required and if the recovery in the case was "large." Fletcher also agreed to do additional, personal legal work on behalf of the client's president and his mother. In each matter, the president orally granted Fletcher a lien on the client's prospective recovery in the conversion action.

After the conversion trial resulted in a mistrial, the client fired Fletcher and hired a new attorney. With the new attorney in charge, the client obtained a judgment for $504,000 plus interest. The judgment proceeds were disbursed to various people, but not Fletcher, with claims against the client.

Fletcher claimed he did not learn about the disbursement until the day after the funds had been disbursed. Fletcher then filed an action against the client and the others who received part of the judgment proceeds to collect on his lien.

The defendants filed a demurrer against Fletcher, arguing that Fletcher had not perfected his lien against the client. The trial court granted the demurrer, holding that no valid lien existed because, under *Cal. Rules of Prof. Conduct, Rule 3-300*, a client must consent in writing to an attorney's charging lien against the client's future recovery. The court of appeal reversed, holding that Rule 3-300 was inapplicable in that an attorney's charging lien is not "adverse" within the meaning of *Hawk v. State Bar (1988) 45 Cal. 3d 589, 247 Cal. Rptr. 599* . The California Supreme Court granted review.

The Court held that in California a charging lien is created by contract only. Unlike a service lien or a mechanic's lien, an attorney's lien is not created by the mere fact that an attorney has performed services for a client (*33 Cal. 4th 61, 66-67)* . The Court also held that it was reasonably foreseeable the charging lien could become detrimental to the client. Although a charging lien does not grant an attorney the power to summarily extinguish the client's interest in any recovery, a charging lien could significantly impair the client's interest by delaying payment of the recovery or settlement proceeds until any disputes over the lien can be resolved (*33 Cal. 4th 61, 68-69)* . Thus, the Court held that a charging lien is an adverse interest within the meaning of *Cal. Rules of Prof. Conduct, Rule 3-300* and therefore requires the client's informed written consent (*33 Cal. 4th 61, 69)* .

In ***Gelfand, Greer, Popko & Miller v. Shivener*** *(1973) 30 Cal. App. 3d 364, 105 Cal. Rptr. 445* , an attorney was retained by a client to represent him in his action to obtain his share of a wrongful death settlement. The client agreed to pay a contingent fee of 50 percent of all sums awarded to him. The attorney was successful in establishing that the client was entitled to 20 percent of the $100,000 settlement. The client's ex-wife had previously obtained a judgment against him for $26,000 in delinquent support payments and she now served a writ of execution on the law firm that was holding the settlement money pending a court apportionment among the heirs of the decedent. The client's attorney notified the law firm of his contingent fee claim and directed them not to release more than one half of the $20,000 on the ex-wife's claim. The law firm filed an interpleader action against the ex-wife and the client's attorney. The attorney's motion for summary judgment was granted, and the court ordered that the client's share be divided equally between the

attorney and the ex-wife. The ex-wife appealed.

The court of appeal reversed solely on the ground that it was a triable issue of fact whether the parties to the contingent fee contract intended to, and did give, the attorney a lien on the fund. The court stated that an attorney's contingent fee contract containing no words regarding a lien, security, or assignment does not as a matter of law automatically create a lien for attorney's fees. In the absence of express language declaring a lien, giving security, or assigning the proceeds, the question whether the contract creates a lien is one of fact involving a determination of the intention of the parties (*30 Cal. App. 3d 364, 370)* . The court discussed at length the various cases relating to the creation of attorney's liens and concluded that it could not be said as a matter of law that a lien was not created in the instant case, but that the question was one of fact (*30 Cal. App. 3d 364, 375)* .

[b] Enforceable Lien Dependent on an Existing Obligation

In ***Gostin v. State Farm Ins. Co.*** *(1964) 224 Cal. App. 2d 319, 36 Cal. Rptr. 596* , several attorneys were retained to prosecute a client's personal injury claim against an insurance company. The client signed an agreement stating that in consideration of the legal services to be rendered by the attorneys he assigned to them a lien of 33.3 percent on any amounts recovered. The attorneys were subsequently discharged by the client, and the client was paid by the insurance company in settlement of his claim. The attorneys then brought suit against the client and the insurance company to recover an amount equal to one third of the settlement. The client was not served and did not appear in the action. Judgment for one third of the settlement was rendered in favor of the attorneys, and the insurance company appealed.

The court of appeal reversed, finding that although the attorneys had notified the insurance company that they represented the client on his claim and that they had performed legal services on his behalf, there was insufficient evidence presented to show that they actually had rendered such services (*224 Cal. App. 2d 319, 323)* . The court stated that the agreement creating the lien does not necessarily create the act for the performance of which the property subject to the lien is made security. Unless an attorney is entitled to a fee for services that he has rendered, there is no obligation in his favor that can be the subject of an action to enforce performance of the obligation by way of a lien against the client's recovery (*224 Cal. App. 2d 319, 325)* .

[c] No Retaining Lien on Property Placed in Trusteeship

In ***Hulland v. State Bar*** *(1972) 8 Cal. 3d 440, 105 Cal. Rptr. 152, 503 P.2d 608* , a client contacted an attorney to discuss obtaining a divorce and was told that the fee for complete legal representation in a contested divorce was $650 and the fee for an uncontested divorce was $130. The client stated that the divorce would probably be contested. The client signed a confession of judgment in the amount of $650 for "money justly due for legal services" and paid $130 as an initial fee. Subsequently the client informed the attorney that her husband would not contest the divorce, and she asked for a fee reduction. The attorney told her that the charges for the work necessary to complete the divorce would probably equal the $650 fee anyway. The client had received an income tax refund check for $500 and was told by the attorney to leave the check with him for safekeeping. She left the check, unsigned, in his office, and when he later demanded that she endorse the check over to him for his fees she refused to do so and took back the check. The attorney had the default divorce hearing taken off the calendar without notifying the client and then filed the confession of judgment and was awarded a judgment for $650. He later caused a writ of execution to issue and unsuccessfully tried to garnish the client's wages. The client filed a complaint with the State Bar and the Disciplinary Board voted to publicly reprove the attorney.

In its review of the disciplinary proceedings, the Supreme Court concluded that the attorney's willful failure to render legal services to the client and the use of the confession of judgment to collect his fees was improper. The Court did not agree with the attorney's contention that he had a right to treat his duties as at an end because he had an agreement with his client that the tax refund check would be used for his fees and that by regaining possession of the check the client demonstrated a refusal to pay his fees. The attorney claimed that he had a possessory lien on the check, but the Court

stated that even if a possessory lien does exist in California, it does not attach to property coming into the attorney's hands as trustee, and that the attorney acquired possession of the check as a trustee, not as security for his fees (*8 Cal. 3d 440, 447)* .

In ***Severdia v. Alaimo*** *(1974) 41 Cal. App. 3d 881, 116 Cal. Rptr. 405* , an attorney who had represented the wife in a dissolution proceeding retained a percentage of the proceeds from a sale of community property on which he claimed he had a lien for fees. The check for one fourth of the proceeds was made payable to the client and the attorney and was delivered to the attorney. The attorney refused to endorse the check and to turn it over to the client, and the client filed an order to show cause. In the course of the proceedings the check was cashed, and the attorney deducted his alleged fee and costs and paid the remainder to the client. After the hearing of the order to show cause, the attorney was ordered to pay the entire balance of the money retained by him to the client, and he appealed.

The court of appeal affirmed, finding that an attorney has neither a retaining nor a charging lien for compensation in the absence of a contract containing an agreement for a lien, and that in the present case there was no evidence to show that there was such an agreement (*41 Cal. App. 3d 881, 890)* . The court stated that the attorney could not acquire a common law retaining lien even if one existed in California because the funds in question came into the attorney's possession pursuant to a court order regarding the division of his client's community property and were held by him as a trustee, and that if a possessory lien or a common law retaining lien does exist in California it does not attach to property coming into an attorney's hands as trustee (*41 Cal. App. 3d 881, 891)* .

[d] Attorney Cannot Unilaterally Determine Fee

In ***Silver v. State Bar*** *(1974) 13 Cal. 3d 134, 117 Cal. Rptr. 821, 528 P.2d 1157* , an attorney agreed to prosecute an appeal from the property division portion of a client's interlocutory judgment of divorce. The property awarded to the client's former husband included the family residence and a rental duplex. The attorney's law partner procured a court order that the ex-husband pay attorney's fees and costs as they were incurred and the attorney then obtained two writs of execution against the ex-husband's real property. One writ was in the attorney's name for $994 in fees and costs and the other was in the client's name for $1,504, the unpaid balance of the judgment in the dissolution action. The attorney advised the client to have the marshal execute on the attorney's unsatisfied writ rather than the client's unsatisfied writ and a marshal's sale of the duplex was scheduled. The attorney then purchased the property at the sale and arranged to resell the property, receiving $3,121 as the proceeds remaining after escrow. The attorney never notified the client that the property had been sold and that he had received the money. When she learned of the sale and contacted the attorney, he informed her that she was entitled to only $900 of the proceeds. The attorney failed to give the client the $900 and after one year she learned that he had deducted $1,000 for his legal services and a further $1,000 to pay his law partner. Subsequently, disciplinary proceedings were initiated against the attorney by the State Bar for his conduct in this and several other matters. The disciplinary board recommended that the attorney be suspended from the practice of law for two years with one year actual suspension, and the attorney appealed the decision.

On review, the Supreme Court determined that even more severe discipline was warranted and ordered that the attorney be suspended from practice for three years, with one year actual suspension. The Court stated that in regard to the matter of the attorney's method of collecting his fee, the attorney had a legal duty to hold the money received from the sale of the property in trust for his client. Since the attorney had no contractual lien for attorney's fees, he had no right to unilaterally determine that he was entitled to $1,000 for his services and that his partner was entitled to $1,000, and to withhold the money, even if the services were actually worth that amount. The attorney was entitled to withhold only money advanced for the actual costs of litigation and should have paid the client the balance. If she refused to pay his requested fee, his sole remedy consisted of an action for the reasonable value of his services (*13 Cal. 3d 134, 142)* .

In ***Trafton v. Youngblood*** *(1968) 69 Cal. 2d 17, 69 Cal. Rptr. 568, 442 P.2d 648* , an attorney agreed to represent a client in settling disputes arising out of the payment of a fire loss to a building owned by the client. The insurance company made the check payable jointly to the client and two other persons, one of whom refused to endorse the check.

The attorney brought several actions to settle the dispute and eventually obtained an agreement placing the insurance proceeds in escrow. The client authorized the attorney to disburse the escrow funds as needed to satisfy mechanics' liens and other claims and withdrew an amount sufficient to reimburse himself for his payment to a contractor who had worked on the building. The attorney then withdrew the balance of $11,886, paid out $4,672 in satisfaction of various lien claims and kept the remainder as payment for his legal services in the fire loss dispute and several other unrelated matters. He sent the client an itemized bill indicating that he had paid himself $6,800 for his legal services, with a balance due from the client of $609. The client acknowledged receipt of the statement but said he wished to check his files as to the authenticity of the attorney's claims. The client ignored several later bills from the attorney for the outstanding balance and then brought an action against the attorney two years later, alleging that the attorney had improperly diverted that portion of the escrow funds that he had paid to himself without the consent of the client. The trial court held in favor of plaintiff, and defendant appealed.

The Supreme Court affirmed, finding that defendant had wrongfully applied the balance of the escrow funds to his claim for monies due him for legal services and costs advanced on behalf of plaintiff. The Court stated that although an attorney is entitled to recover the reasonable amount of his services if there is no express employment contract providing for his compensation, he may not unilaterally determine his own fee and withdraw funds held in trust for his client in order to satisfy it without the knowledge or consent of the client (*69 Cal. 2d 17, 26)* . Defendant argued that the failure of plaintiff for two years to object to plaintiff's itemized bill created an account stated to which defendant acquiesced, but the Court stated that the rendering of an account, although not objected to, cannot create a liability when no liability existed before. Since there was no agreement between attorney and client either providing for a fixed fee or allowing defendant to withdraw funds to satisfy the fee, the alleged statement of account sent to the client was really a memorandum of the accomplishment of an erroneous, mistaken, and wrongful act, namely the attorney's withdrawal of the escrow funds to satisfy his fee, and did not represent a preexisting liability (*69 Cal. 2d 17, 26)* .

[e] Discharged Attorney's Independent Action Barred by Collateral Estoppel

In ***Law Offices of Stanley J. Bell v. Shine, Browne & Diamond*** *(1995) 36 Cal. App. 4th 1011* , plaintiff attorney filed a complaint in an independent action seeking declaratory relief as to his claim for the reasonable value of his efforts rendered in a prior action seeking damages for personal injuries to a minor. Plaintiff had contracted with the injured party's attorney in the prior action but was later discharged. In the prior action, the injured party's counsel attempted to compromise plaintiff's claim and petitioned the trial court for an order authorizing the proposed compromise; the petition also included a request that the court determine that plaintiff had waived his right to fees by failing to supply information about the alleged fees. Plaintiff made a general appearance in the prior action, objecting to the court's jurisdiction to make an order with respect to his fees, and reasserted his claim for fees under a quantum meruit theory. The trial court denied with prejudice any lien by plaintiff for attorney's fees in the prior action.

Plaintiff did not appeal in the prior action, but filed the independent action for declaratory relief. The injured party's attorneys demurred, and the trial court sustained the demurrer without leave to amend. Plaintiff appealed, and the court of appeal affirmed. The appellate court stated that, while the trial court has in fact exceeded its jurisdiction in making an order or judgment regarding plaintiff's attorney fees, a litigant who has stipulated to procedure in excess of jurisdiction may be estopped to question it, particularly in a collateral attack is involved. After reviewing facts that disclosed the extent to which plaintiff had "embraced" the procedure in the prior action, as well as facts and principles relating to res judicata, the court concluded that the trial court was correct in not permitting the discharged attorney to reopen the fee dispute (*36 Cal. App. 4th 1011, 1023-1027)* .

[4] Additional Authorities

[a] Attorney's Lien Not Created as Matter of Law

In *Echlin v. Superior Court of San Mateo County (1939) 13 Cal. 2d 368* , a client sought to discharge her attorney and

petitioned for a writ of mandate compelling the superior court to make an order substituting attorneys. The Supreme Court granted the writ and in discussing the issue of the discharged attorney's compensation, stated that an attorney has no lien in the absence of an agreement therefore (*13 Cal. 2d 368, 373)* .

In *Norman v. Berney (1965) 235 Cal. App. 2d 424, 45 Cal. Rptr. 467* , the court of appeal stated that a contingent fee contract that provided that the attorney undertake the client's case on a one-third contingent basis, with no fee in the event of no recovery, and 50 percent in event of appeal, was conspicuously lacking in any language indicative of an intent to create a lien on or an equitable assignment of a portion of any recovery. The court held that any interest that the attorney acquired under his contract would attach only to the actual proceeds realized by the client (*235 Cal. App. 2d 424, 433)* .

[b] Enforceable Lien Dependent on an Existing Obligation

In *Trimble v. Steinfeldt (1986) 178 Cal. App. 3d 646, 224 Cal. Rptr. 195* , a former associate of plaintiff's attorney filed a notice of lien claiming a lien on any recovery obtained by plaintiff on the basis of an attorney's agreement between the associate and plaintiff's attorney regarding compensation to the associate for work done in connection with various cases. The associate's name was not included in the retainer agreement between plaintiff and plaintiff's attorney. Moreover, the associate's name never appeared as an attorney of record in any action involving plaintiff. The court of appeal ruled that the trial court had erred in denying plaintiff's motion to expunge the lien. The court noted that there was no agreement between plaintiff and the associate. Accordingly, there was no express or implied basis for impressing a lien against plaintiff in favor of the associate. If the associate was entitled to any compensation at all for work on plaintiff's case, the associate must recover it from plaintiff's attorney and not from plaintiff (*178 Cal. App. 3d 646, 650-651)* .

[c] No Retaining Lien on Property Placed in Trusteeship

In *Academy of Calif. Optometrists v. Superior Court (1975) 51 Cal. App. 3d 999, 124 Cal. Rptr. 668* , an attorney was employed by a client to litigate a case, and the retainer agreement provided for an hourly fee at prevailing rates and a percentage of any recovery. The litigation was lengthy and complex, and the client was billed and paid a total of $27,500 in attorney's fees. Before trial, the client, displeased at what it considered excessive fees, discharged the attorney. The attorney refused to sign a substitution of attorneys or turn over his files until the alleged balance of his fee ($9,300) was paid. The client's new counsel motioned for an order granting substitution, which the court granted. However, the court accorded the first attorney the right to retain the files pending payment of the disputed fee, and the client sought a writ of mandate, claiming that it could not bring the case to trial without the records and that the mandatory dismissal period would soon expire.

The court of appeal granted the writ. The court found that there was a contractual retaining lien because the written retainer agreement executed by the parties stated that the attorney was entitled to all general, possessory, or retaining liens, and all special or charging liens known to the common law. However, the court held that to enforce the consensually created possessory lien would be to condone a violation of an attorney's ethical duties to the client and contrary to the public policy (*51 Cal. App. 3d 999, 1006)* . The court found that the records were of no inherent economic value to the attorney and that by retaining them he would prejudice his former client's ability to go forward with the litigation (*51 Cal. App. 3d 999, 1005)* . The court held that when the subject matter of an attorney's retaining lien is of no economic value to him, but is used only to extort disputed fees from his client, the lien is void (*51 Cal. App. 3d 999, 1006)* . The concurring opinion criticized the distinction made regarding the pecuniary value of the property, and stated that the retaining lien provision should be illegal because it offends important tenets of professional ethics, regardless of the economic value of the withheld material (*51 Cal. App. 3d 999, 1007)* .

In *Spencer v. Spencer (1967) 252 Cal. App. 2d 683, 60 Cal. Rptr. 747* , several attorneys were employed to represent the wife in a dissolution action. Twenty-two thousand dollars, the balance due on a promissory note in favor of the

husband, was deposited in a bank account that had been opened in the names of the attorneys for both parties. When the wife discharged her attorneys, they refused to release the bank account, claiming that they had a common law retaining lien on the account for their legal services. The trial court held that the attorneys were correct in asserting their right of lien, but the court of appeal reversed, finding that the money was received by the attorneys as joint trustees with the husband's attorneys in an obvious effort to place it in an account beyond the control of the litigants until such time as their property rights were settled. The court stated that to allow an attorney to acquire a retaining lien on property held in trusteeship would violate the ethical standards of both attorneys and trustees (*252 Cal. App. 2d 683, 693)* .

[d] Attorney Cannot Unilaterally Determine Fee

The facts and procedural background of *Warner v. State Bar (1983) 34 Cal. 3d 36, 192 Cal. Rptr. 244, 664 P.2d 148* , are discussed in *§ 25.57,* under [4], Attorney's Fees Are Excessive. In *Warner,* a client made a $25,000 loan to his attorney, at ten percent annual interest. The attorney and client orally agreed that interest on the loan accruing after a certain date could be credited against future fees earned by the attorney. The attorney failed to perform substantial legal work for the client and also failed to pay interest on the loan, and claimed that he withheld $2,500 interest on the loan each year as security for or payment of fees. The Supreme Court adopted the State Bar's recommendation for disbarment, stating that the attorney's action in unilaterally withholding interest on the loan constituted the charging of an unconscionable fee under the circumstances (*34 Cal. 3d 36, 43)* .

In *Most v. State Bar (1967) 67 Cal. 2d 589, 63 Cal. Rptr. 265, 432 P.2d 953* , the Supreme Court ordered the suspension from practice for two years of an attorney who had appropriated a client's trust funds for his own personal use. The attorney, who was also a licensed insurance adjuster, had been retained to prosecute the client's fire loss claim against several insurance companies. The written fee agreement provided that the client employed the attorney as a fire adjuster for a fee of 10 percent of the insurance settlement, but the parties were in dispute as to whether the fee included legal services. The attorney brought an action on behalf of his client and eventually settled the claim for $36,000. When the settlement checks were received, the attorney placed them in his trust account and later withdrew most of the funds for his own use. The client demanded that the money be paid out to satisfy the claims of creditors and the remainder released to him. The attorney claimed that he was entitled to $15,000 in attorney's fees and had withdrawn that amount from the trust account.

Disciplinary proceedings were initiated against the attorney, and he sought review of the State Bar's recommendation that he be suspended from practice. The Court held that the attorney had misappropriated the funds and that he was entitled to withdraw no more than $3,600 as his 10 percent fee because no more than 10 percent had been agreed to by the client. The Court stated that an attorney may not unilaterally determine his own fee and withdraw funds held in trust without the consent or knowledge of the client (*67 Cal. 2d 589, 597)* .

California Points & Authorities

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 25 ATTORNEY'S FEES
PART II. FORMS

2A-25 California Points & Authorities § 25.59

§ 25.59 Opposing Contention That Attorney Entitled to Reimbursement for Expenses Other Than Normal Costs of Lawsuit

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

_____ [PLAINTIFF *or* DEFENDANT] IS NOT ENTITLED TO REIMBURSEMENT FOR ANY EXPENSES INCURRED WHILE RENDERING PROFESSIONAL SERVICES ON BEHALF OF _____ [DEFENDANT *or* PLAINTIFF] EXCEPT FOR THE NORMAL COSTS OF SUIT AND ANY OTHER EXPENSES THAT WERE SPECIFICALLY CONTEMPLATED AND AGREED ON BY PLAINTIFF AND DEFENDANT.

A. Reimbursement for Costs of Lawsuit. In the absence of any other agreement, an attorney is entitled only to reimbursement for costs of lawsuit such as filing fees and witness fees that the attorney has advanced on behalf of the client (*Cooley v. Miller & Lux (1909) 156 Cal. 510, 525-526, 105 P. 981* ; *Tasker v. Cochrane (1928) 94 Cal. App. 361, 366, 368, 271 P. 503*).

B. No Reimbursement for Attorney's Personal and Travel Expenses. Unless there is an agreement to that effect, an attorney is not entitled to reimbursement for personal and travelling expenses (*Tasker v. Cochrane (1928) 94 Cal. App. 361, 366, 368, 271 P. 503* ; *Darnell v. Woodruff (1936) 14 Cal. App. 2d 628, 634, 58 P.2d 975*).

[*Optional*] **C. No Implied Authority to Hire Others on Behalf of Client.** An attorney who hires other persons on behalf of the client cannot claim reimbursement for the expense of their services unless the client authorized such employment (*Porter v. Elizalde (1899) 125 Cal. 204, 207-208, 57 P. 899* ; *Davis v. Mackay (1920) 50 Cal. App. 251, 256, 194 P. 738*).

[2] Comments

[a] Use of Form

This form may be used to oppose the contention that an attorney is entitled to reimbursement for expenses other than the normal costs of suit on the ground that the client has not expressly authorized other expenses. This form may be used any time an attorney claims reimbursement for nonauthorized expenses and may be used in conjunction with § 25.55 (opposing contention that attorney's fees are reasonable) or § 25.57 (opposing contention that attorney has lien on client's recovery). The argument supported by this memorandum may be raised any time an attorney claims reimbursement for nonauthorized expenses incurred while rendering professional services to the client. The argument would be most likely to arise in support of a client's defense in an action brought by the attorney to collect attorney's fees and other expenses incurred on behalf of the client, or in support of a client's action brought to recover money or property in the attorney's possession that the client alleges is due the client.

This form may be combined with a form of memorandum relating to the specific procedural context in which counsel wishes to raise the substantive issue of the right of an attorney to be reimbursed only for costs of suit in the absence of an agreement to the contrary. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the nature and amount of any costs and expenses advanced by the attorney that the attorney alleges are reimbursable. If it is alleged that the client authorized the expenses, counsel should discuss the authorization agreement to show that it either does not exist or that by its terms the client did not expressly or impliedly agree to be liable for any expenses other than the usual costs of suit. Counsel should seek to show that the client never assented, in any manner, to other expenses.

In an appropriate case, the memoranda set out in this form may be used to oppose the contention supported by the memoranda set out in *§ 25.41*.

[3] Discussion of Authorities

[a] Reimbursement for Costs of Lawsuit

The facts and procedural background of ***Cooley v. Miller & Lux*** *(1909) 156 Cal. 510, 105 P. 981* are discussed in *§ 25.41[3][a]*. In *Cooley*, the Supreme Court stated that in the absence of a special agreement to the contrary, a client must reimburse the attorney for litigation costs, but the attorney is bound to pay his own personal and travelling expenses (*156 Cal. 510, 525-526)* .

The facts and procedural background of ***Tasker v. Cochrane*** *(1928) 94 Cal. App. 361, 271 P. 503* are discussed in *§ 25.41[3][a]*. The court in *Tasker* reiterated the rule that expenditures of counsel for the costs of litigation, such as clerk's fees, filing fees, witness fees and jury fees, are reimbursable while personal and travelling expenses are not (*94 Cal. App. 361, 366)* . The court stated that the ordinary rule is that the overhead expense of counsel in maintaining their offices, the cost of their travelling expenses, and outlays of that kind are matters to be taken into consideration in determining the value of an attorney's services and in fixing his or her fees for such services. However, counsel are not entitled to have all of those matters taken into consideration in the fixing of fees, and then maintain an action to recover their personal expenses, unless there has been an agreement to that effect, and counsel must prove the existence of such an agreement by a preponderance of the evidence (*94 Cal. App. 361, 368)* .

[b] No Reimbursement for Attorney's Personal and Travel Expenses

Tasker v. Cochrane *(1928) 94 Cal. App. 361, 271 P. 503* is discussed in *§ 25.59[3][a]*.

The facts and procedural background of ***Darnell v. Woodruff*** *(1936) 14 Cal. App. 2d 628, 58 P.2d 975* are discussed in *§ 25.41[3][b]*. The court in *Darnell* referred to the general rule that an attorney is bound to bear his own travelling expenses in the absence of a special agreement to the contrary, but found that there was an agreement that the attorney's

travel expenses be paid by the client (*14 Cal. App. 2d 628, 634)* .

[c] No Implied Authority to Hire Others on Behalf of Client

In ***Porter v. Elizalde*** *(1899) 125 Cal. 204, 57 P. 899* , two attorneys were hired by a client to file a contest against the probate of her husband's will. The attorneys agreed that they would advance and pay all the costs and expenses incurred in the will contest, and their compensation was to be one half of any property recovered by the client. Several months later, one of the attorneys hired another attorney to assist him at the trial. The client did not consent to the employment of additional counsel and did not learn of his involvement with the case until a few days before trial. The new attorney had various conversations with the client during the trial regarding testimony and witnesses, but the subject of his compensation was never discussed. The trial resulted in a favorable verdict for the client, and the original attorneys received their contingent fee. The new attorney did not request compensation from the client until two years after the trial, and she replied by telling him to speak with her original attorneys. The new attorney then brought an action to collect his fee and obtained a verdict in his favor. The client's motion for a new trial was denied, and she appealed.

The Supreme Court reversed the judgment, holding that the evidence did not sustain a finding that she had employed plaintiff. The Court stated that an attorney has no general authority by virtue of his or her retainer to employ counsel or other assistants at the expense of his or her client without previous authority or assent on the part of the client, and the fact that the client knows of the third person and accepts his or her services without objection is not sufficient to establish liability for the expense of such services (*125 Cal. 204, 207-208)* . The Court stated that because the original attorney had no authority to engage additional counsel at the client's expense and because he had agreed to pay all the costs of the litigation, her mere silence could not create an implied promise to pay for the additional services (*125 Cal. 204, 208)* .

In ***Davis v. Mackay*** *(1920) 50 Cal. App. 251, 194 P. 738* , several attorneys were hired by a client to defend a will contest. Without the knowledge and consent of the client, the attorneys hired a private detective to assist in the preparation of the case. The detective's assignee sued the client to recover the amount alleged to be due from defendant for the detective's services. The trial court found for defendant, and plaintiff appealed.

The court of appeal affirmed, holding that there was sufficient evidence to support a finding that defendant never authorized her attorneys to employ a detective (*50 Cal. App. 251, 255)* . The court also stated that an attorney has no implied authority to employ a detective at the expense of the client to assist the attorney in securing evidence and preparing the case for trial, just as an attorney has no implied authority to hire associate counsel at the expense of the client. The detective's fee was over $5,000, and the court stated that the act of the attorneys in making the contract for the payment of such a large sum of money could be deemed within the well-recognized rule that the client is liable for the normal costs of suit (*50 Cal. App. 251, 256)* .

[4] Additional Authorities

[a] No Implied Authority to Hire Others on Behalf of Client

In *Eaton v. Thieme (1936) 15 Cal. App. 2d 458, 59 P.2d 638* , an attorney was hired to prosecute a client's claim to a share in a probate estate. The written contract provided that the attorney would advance money for court costs and other necessary expenses and that his compensation would be a one-third share of the client's recovery. The court of appeal held that the attorney was not entitled to claim the fees of other counsel hired to assist in the case as reimbursable court costs (*15 Cal. App. 2d 458, 463-464)* .

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2A-25 California Points & Authorities §§ 25.60-25.69

[Reserved]

§§ 25.60[Reserved]

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2A-25 California Points & Authorities § 25.70

§ 25.70 Supporting Contention That Attorney-Client Employment Contract Construed in Favor of Client

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

AMBIGUOUS TERMS IN THE EMPLOYMENT CONTRACT BETWEEN PLAINTIFF AND DEFENDANT DRAFTED BY PLAINTIFF ARE CONSTRUED AGAINST PLAINTIFF AND IN FAVOR OF DEFENDANT.

Construction of Contract in Client's Favor. A contract of employment between an attorney and client that is drafted by the attorney will be construed against the attorney and in favor of the client (*see Reynolds v. Sorosis Fruit Co. (1901) 133 Cal. 625, 630, 66 P. 21* ; *Sayble v. Feinman (1978) 76 Cal. App. 3d 509, 515, 142 Cal. Rptr. 895*).

[2] Comments

[a] Use of Form

This form may be submitted in favor of a client's contention that any ambiguous terms in an attorney-client employment contract drafted by the attorney should be construed against the attorney and in favor of the client. This form may be used when a client objects to the attorney's interpretation of an employment contract in relation to the payment of attorney's fees. It may be used in conjunction with § 25.57 (opposing the contention that an attorney's fees are reasonable), § 25.58 (opposing the contention that an attorney has a valid lien on a judgment or recovery), and § 25.59 (opposing the contention that an attorney is entitled to reimbursement for expenses other than the normal costs of a lawsuit).

The argument supported by the foregoing memorandum would be most likely to arise in support of a client's defense against an attorney's action to collect a stipulated contractual fee, or in support of a client's independent action brought to prevent an attorney from asserting a contractual lien on any judgment or recovery in favor of the client, or on money or property of the client in the attorney's possession that the attorney alleges is due him or her in satisfaction of attorney's fees.

This form may be combined with a form of memorandum relating to the specific procedural context in which counsel wishes to raise the substantive issue of construction of the attorney-client contract. This form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the terms of the employment contract between attorney and client in order to show the nature of any ambiguity in the contract. If the client contends that the attorney failed to adequately explain the contract terms to the client, and that therefore the client did not fully understand and agree with the attorney's interpretation of the contract at the time the client signed the contract, counsel should indicate the nature of the misunderstanding. If the client contends that he or she did not understand the contract terms because of fraud, duress, or undue influence on the part of the attorney, counsel should refer to memoranda in Ch. 92, *Duress, Menace, Fraud, Undue Influence, and Mistake* .

[3] Discussion of Authorities

[a] Construction of Contract in Client's Favor

In ***Reynolds v. Sorosis Fruit Co.*** *(1901) 133 Cal. 625, 66 P. 21* , plaintiff attorney entered into a written contract with a client in which the attorney agreed to advise the client on certain matters and to make four trips, if necessary, for the sum of $400, the final payment to be made when the business was successfully completed. The attorney advised the client, made the trips, and also commenced several suits on behalf of the client and defended the client in a lawsuit. The client knew of the attorney's additional services in the various lawsuits, but did not request the attorney to institute or conduct the lawsuits and did not expressly promise to pay for such services. The attorney claimed that the reasonable value of his services was $5,000, but the client refused to pay more than the contracted fee of $400. The attorney brought an action to collect the reasonable value of his services, the trial court found in favor of the client, and the attorney appealed.

The Supreme Court affirmed, holding that the parties must abide by the terms of the written contract. The fact that the services performed by plaintiff were reasonably worth more than the price for which he agreed to perform was irrelevant, and plaintiff would not be relieved for making a bad bargain. The Court found that services performed were fairly included within the terms of the contract since the provision that the fee would be paid when the business was successfully concluded could not reasonably be interpreted to refer to "business" as legal advice only (*133 Cal. 625, 628-629)* . Plaintiff said nothing to the client about any extra charge until the suits had been terminated, and the Court stated that if plaintiff contemplated such charges it would have been only fair to notify the client (*133 Cal. 625, 629)* . The Court stated that when the written contract between an attorney and client is ambiguous, it is the duty of the attorney to see that the client understands and agrees with the attorney's interpretation of the contract. It is also the attorney's duty to have any contract for further professional services clearly and definitely stated and understood, not only in its language, but also in its spirit, legal consequences, and practical results (*133 Cal. 625, 630)* .

The facts and procedural background of ***Sayble v. Feinman*** *(1978) 76 Cal. App. 3d 509, 142 Cal. Rptr. 895* are discussed in *§ 25.57[3][a]*. In that case, the court of appeal held that plaintiff attorneys' interpretation of a contingent fee contract would result in a fee of 80 percent of the client's recovery and that such a construction of the contract would be unfair and unreasonable. Since the attorneys prepared the contract, any ambiguity in it should be construed against them (*76 Cal. App. 3d 509, 515)* .

[4] Additional Authorities

[a] Construction of Contract in Client's Favor

The facts and procedural background of *Jackson v. Campbell (1932) 215 Cal. 103, 8 P.2d 845* are discussed in *§ 25.57[3][a]*. In *Jackson,* the Supreme Court held that if the language of an attorney-client employment contract is

ambiguous, any ambiguity should be resolved in favor of the client and the contract should be given such interpretation as would render it valid, reasonable, conscionable, and enforceable (*215 Cal. 103, 106)* .

In *Bennett v. Potter (1919) 180 Cal. 736, 183 P. 156* , the Supreme Court found that the provisions of an attorney-client employment contract regarding compensation were uncertain and ambiguous. The Court reiterated the rule that an ambiguous contract is interpreted most strongly against the party who caused the uncertainty to exist. Since the attorney had drawn up the contract, any ambiguity would be interpreted against him. The Court stated that this rule of interpretation is accentuated by the fact that the plaintiffs were attorneys at law and presumably familiar with legal terms and proceedings and accustomed to the use of language appropriate to the framing of contracts, while the defendant was a business man with no special knowledge of, or familiarity with, these subjects (*180 Cal. 736, 740)* .

The facts and procedural background of *Abbott v. Hauschild (1952) 113 Cal. App. 2d 383, 248 P.2d 41* are discussed in *§ 25.51[3][a]*. In that case, the court of appeal held that the terms of a written contract were ambiguous in that it was unclear if the client was to pay a 50 percent contingent fee in addition to a reasonable fee, and that any ambiguity in the contract should be construed against the attorney (*113 Cal. App. 2d 383, 388)* .

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2A-25 California Points & Authorities § 25.71

§ 25.71 Supporting Contention That Contingent Fees for Medical Malpractice Plaintiff's Attorney Are Limited by Bus. & Prof. Code § 6146--Excessive Fees Retained by Attorney After Settlement, Arbitration, or Judgment

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF IS ENTITLED TO RECOVER FEES RETAINED BY DEFENDANT IN EXCESS OF THE LIMITATIONS SET FORTH IN SECTION 6146 OF THE BUSINESS AND PROFESSIONS CODE, AND THE LIMITATIONS DO NOT VIOLATE THE CONSTITUTIONAL GUARANTEES OF DUE PROCESS, EQUAL PROTECTION, OR SEPARATION OF POWERS.

A. Contingency Fee Limitations. A medical malpractice plaintiff's attorney cannot contract for or collect a contingency fee in excess of the statutory limits (*see Bus. & Prof. Code § 6146*).

B. Constitutionality of Limitations. The contingency fee limitations set forth in *Section 6146 of the Business and Professions Code* are constitutional on the grounds of due process, equal protection, and separation of powers (*Roa v. Lodi Medical Group, Inc. (1985) 37 Cal. 3d 920, 925-932, 211 Cal. Rptr. 77, 695 P.2d 164*).

[*Optional*] **C. Limitations Not Waivable By Client.** A client who hires an attorney to prosecute a medical malpractice action cannot waive the provisions of *Section 6146 of the Business and Professions Code* and thereby cannot agree to a pay a contingency fee in excess of statutory limits. A client who attempts such a waiver is entitled to recover any contingency fees later collected by the attorney in excess of the statutory limits (*see Fineberg v. Harney & Moore (1989) 207 Cal. App. 3d 1049, 1055, 255 Cal. Rptr. 299*).

[2] Comments

[a] Use of Form

This form may be used by a client to support the contention that the client is entitled to recover fees received by a medical malpractice attorney in excess of the limitations set forth in *Bus. & Prof. Code § 6146*. The argument supported

by the foregoing memorandum may be raised any time the contingent fee contract provides a fee in excess of the limitations. The argument would most likely arise in support of a client's independent action against an attorney to recover fees after a settlement, arbitration, or judgment pursuant to which the attorney received funds on behalf of the client, and retained a portion of those funds as attorney's fees in an excessive amount according to statute. For example, this form could be used in support of plaintiff's motion for summary judgment, asserting that, as a matter of law, the fees were excessive and should be distributed to the client.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should discuss the terms of the contingent fee contract, the amount awarded by settlement, arbitration, or judgment, and the portion thereof retained by the attorney. Counsel should apply the percentages set forth in *Bus. & Prof. Code § 6146* to the amount of plaintiff's recovery, and show that the fees under the contract are in excess of the statutory limitations.

This form may be combined in a memorandum relating to the specific procedural context in which counsel wishes to raise the substantive issue of fee limitations under *Bus. & Prof. Code § 6146*. This form may also be adapted for use in trial or appellate brief.

[b] Related Pleading and Practice Forms

For further discussion of Bus. & Prof. Code § 6146, see California Forms of Pleading and Practice, Ch. 72, *Attorney Practice and Ethics* and Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender).

[3] Discussion of Authorities

[a] Contingency Fee Limitations

Bus. & Prof. Code § 6146 provides that an attorney shall not contract for or collect a contingency fee for representing any persons seeking damages in connection with an action for injury or damage against a health care provider based on that person's alleged professional negligence in excess of the following limits: (1) forty percent of the first $50,000 recovered; (2) thirty-three and one-third percent of the next $50,000; (3) twenty-five percent of the next $500,000; and (4) fifteen percent of any amount on which the recovery exceeds $600,000.

[b] Constitutionality of Limitations

In ***Roa v. Lodi Medical Group, Inc.*** *(1985) 37 Cal. 3d 920, 211 Cal. Rptr. 77, 695 P.2d 164* , plaintiffs brought a medical malpractice action individually and on behalf of their minor child for damages sustained at his birth. The court approved a settlement in the action. Plaintiffs requested that the court approve payment of fees to their attorney from the net proceeds of the settlement in an amount pursuant to a contingency fee arrangement that was in excess of the limitations set forth in *Bus. & Prof. Code § 6146*. Plaintiffs' attorneys filed memoranda asserting that *Bus. & Prof. Code § 6146* was unconstitutional on the grounds that it denies due process and equal protection, and violates the separation of powers doctrine. The trial court rejected the constitutional challenges and awarded fees within the statutory limitations. Plaintiffs appealed.

The Supreme Court affirmed the order. It rejected the challenge on due process grounds by holding that *Bus. & Prof. Code § 6146* does not abrogate the right to retain counsel, but simply limits the compensation that an attorney may obtain in representing an injured party under a contingency fee arrangement (*37 Cal. 3d 920, 926)* . It further held that legislative ceilings on attorney's fees generally are neither constitutionally suspect nor subject to strict judicial scrutiny (*37 Cal. 3d 920, 927)* . With respect to the particular fee schedule of *Bus. & Prof. Code § 6146*, the Court held that the limitations were not unusually low when compared to fees authorized by other statutory fee schemes, and that the sliding scale nature of the schedule did not create a conflict of interest problem by encouraging the attorney to settle cases quickly (*37 Cal. 3d 920, 927-929)* . In rejecting the challenge on the ground of denial of equal protection, the

Court held that the fee limitations are rationally related to the objectives of the legislative scheme to curb medical malpractice premiums, as well as the possible additional objectives to deter institution of frivolous suits or seek unrealistic settlements, and to protect the diminishing compensation of malpractice plaintiffs (*37 Cal. 3d 920, 930-933)* . *Bus. & Prof. Code § 6146* does not violate the separation of powers doctrine because the Legislature has the power to impose limits on attorney's fees, and the determination of fees is not within the sole province of the judicial branch (*37 Cal. 3d 920, 933)* .

[c] Limitations Not Waivable by Client

In ***Fineberg v. Harney & Moore*** *(1989) 207 Cal. App. 3d 1049, 255 Cal. Rptr. 299* , plaintiff agreed to "waive" the provisions of *Bus. & Prof. Code § 6146* if defendant attorneys would represent him in a medical malpractice action. The fee agreement, in contravention of *Bus. & Prof. Code § 6146*, provided that defendants would take a flat 40 percent contingency fee. On the settlement of the malpractice action, the attorneys took 40 percent of the recovery in accordance with the fee agreement. Plaintiff then requested a refund in the amount of the 40 percent fee that exceeded the amount permitted by *Bus. & Prof. Code § 6146*. The defendants refused to refund the excess amount, and plaintiff filed suit against them. The trial court entered judgment in favor of defendants, ruling that there was no public policy factor pertaining to the limitations on contingency fee agreements set forth in *Bus. & Prof. Code § 6146*, and that plaintiff waived the protection of the statute. The plaintiff appealed.

The court of appeal reversed. The court concluded that there is nothing in the statutory scheme or its legislative history indicating that the Legislature intended to permit waiver of the provisions of *Bus. & Prof. Code § 6146* by parties to a contingency agreement in a medical malpractice case. It noted that *Bus. & Prof. Code § 6146* is a part of the Medical Compensation Reform Act of 1975 (MICRA), which was enacted to reduce medical malpractice insurance premium costs and thereby ensure continued delivery of quality health care to California citizens. Because the purpose of MICRA is a public purpose, *Civ. Code § 3315*, providing that "a law established for a public reason cannot be contravened by private agreement," would preclude waiver of the fee limitations in *Bus. & Prof. Code § 6146* (*207 Cal. App. 3d 1049, 1055)* .

[4] Additional Authorities

[a] Contingency Fee Limitations

In *Yates v. Law Offices of Samuel Shore (1991) 229 Cal. App. 3d 583, 280 Cal. Rptr. 316* , an attorney who successfully represented six heirs in a wrongful death action based on medical malpractice divided the recovery amount into six equal shares and applied the *Bus. & Prof. Code § 6146* percentages to each. The attorney also charged the clients for moneys paid to an outside attorney he engaged to handle the wrongful death appeal at an hourly rate. The court of appeal affirmed a trial court judgment providing the clients with reimbursement for a portion of the fees paid, holding that the *Bus. & Prof. Code § 6146* sliding-scale formula should have been applied to the entire recovery in the wrongful death case, not separately to each client (*229 Cal. App. 3d 583, 588-590)* . In addition, the attorney could not charge additional fees for the appeal; the statutory limitations may not be avoided by charging separate fees for segments of the case or by charging both contingent and hourly fees (*229 Cal. App. 3d 583, 591-592)* .

In *Schneider v. Kaiser Foundation Hospitals (1989) 215 Cal. App. 3d 1311, 264 Cal. Rptr. 227* , a medical malpractice case, the court of appeal reversed the judgment of the trial court with directions to correct an arbitration award and to confirm the corrected award. The initial award included periodic payments but neglected to place a total value on the award for purposes of calculating the attorney's contingent fee, as required by *Bus. & Prof. Code § 6146(b)*. Plaintiff's attorney requested the arbitration panel to amend the award to reflect that value; the panel did, albeit erroneously, by basing the value of the award on the arithmetic sum of the periodic payments. The court of appeal held that the appropriate measure of the recovery, for purposes of determining the contingent fee, is the present value of the future periodic payments, not the arithmetic sum of all future payments required by the award (*215 Cal. App. 3d 1311, 1314)*

.

In *Hathaway v. Baldwin Park Community Hospital (1986) 186 Cal. App. 3d 1247, 231 Cal. Rptr. 334* , a medical malpractice case, plaintiffs' attorney hired two other attorneys for consultation and trial purposes. The trial court rejected plaintiffs' petition seeking either to compensate their attorney at a higher rate than that allowed under *Bus. & Prof. Code § 6146*, or to voluntarily pay the attorney hired to conduct the trial. The court of appeal affirmed, holding that a trial court does not have the power to award extraordinary attorney's fees under *Bus. & Prof. Code § 6146*, since the Legislature, in enacting MICRA, intended to preclude that possibility (*186 Cal. App. 3d 1247, 1253)* .

[b] Constitutionality of Limitations

The facts and procedural background of *Fineberg v. Harney & Moore (1989) 207 Cal. App. 3d 1049, 255 Cal. Rptr. 299* are discussed in *§ 25.71[3][c]*. In *Fineberg*, the court of appeal rejected an argument by defendants that the *Bus. & Prof. Code § 6146* fee limitations at the time of its representation of plaintiff would preclude retention by injured persons of adequate counsel. Defendants contended that no lawyer would undertake the representation of medical malpractice plaintiffs under the statutory fee limitation, but the court found this assumption to be purely speculative. Defendants also contended that lawyers engaged in the representation of medical malpractice plaintiffs might lower the standard of representation afforded such clients because of the fee limitation; the court also rejected this assumption, on the ground that it assumed a willingness on the part of medical malpractice lawyers, as a group, to violate their duty to their clients (*207 Cal. App. 3d 1049, 1054-1055)* .

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2A-25 California Points & Authorities § 25.72

§ 25.72 Supporting Contention That Client May Assert Attorney's Malpractice as Offset to Attorney's Fee Claim

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF MAY ASSERT HIS/HER/ITS LEGAL MALPRACTICE CLAIM AS AN OFFSET AGAINST DEFENDANT'S CLAIM FOR ATTORNEY'S FEES[, EVEN THOUGH PLAINTIFF WOULD BE BARRED BY THE STATUTE OF LIMITATIONS FROM BRINGING THE MALPRACTICE CLAIM IN AN INDEPENDENT ACTION AGAINST THE ATTORNEY].

Attorney Malpractice as Offset to Fee Claim. If an attorney's fee claim coexisted with a client's legal malpractice claim against the attorney at a time when neither claim would have been barred by the statute of limitations, the client may assert the attorney's malpractice as a defense in his or her answer to the attorney's complaint for recovery of fees. If the statute of limitations has run on the malpractice claim at the time the answer was filed, the malpractice claim may nevertheless be allowed up to an amount not exceeding the amount of fees found to be owing to the attorney (*see Safine v. Sinnott (1993) 15 Cal. App. 4th 614, 618-619, 19 Cal. Rptr. 2d 52* ; *Code Civ. Proc. § 431.70*).

[2] Comments

[a] Use of Form

This form may be submitted by an attorney's client in support of the contention that the client's legal malpractice claim against the attorney should be permitted as an offset against any fees found to be owing to the attorney. If both the malpractice claim and the fee claim coexisted at a time when neither was barred by the statute of limitations, the malpractice claim may be allowed as an offset against any fees due, even if the malpractice claim was barred by the statute of limitations at the time it was alleged in the client's answer to the fee claim [*see Safine v. Sinnott (1993) 15 Cal. App. 4th 614, 618-619, 19 Cal. Rptr. 2d 52* ; *Code Civ. Proc. § 431.70*].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should refer to facts showing that the client has a valid legal malpractice claim against the attorney

and that this claim coexisted with the attorney's fee claim at a time when neither was barred by the statute of limitations. For memoranda pertaining to legal malpractice, see Ch. 24A, *Attorneys at Law: Malpractice* .

This form may be combined with memoranda pertaining to the specific procedural context in which counsel is raising the issue of the offsetting legal malpractice claim, such as a plaintiff-attorney's demurrer or motion for summary judgment asserting that a defendant-client's cross complaint for legal malpractice is barred by the statute of limitations. This form may also be adapted for use in a trial or appellate brief.

[3] Discussion of Authorities

[a] Attorney Malpractice as Offset to Fee Claim

In ***Safine v. Sinnott*** *(1993) 15 Cal. App. 4th 614, 19 Cal. Rptr. 2d 52* , plaintiff attorney filed an action against his client for legal fees and costs incurred while representing the defendant client in a civil action. The defendant client cross complained for damages resulting from plaintiff's alleged negligence in handling the underlying action. The trial court apparently found for both parties and subtracted the attorney's fee claim from the malpractice claim, entering a net judgment for the defendant client. Plaintiff appealed.

The court of appeal agreed with plaintiff that the malpractice cross claim was barred by the statute of limitations (*15 Cal. App. 4th 614, 617-618)* . The court also ruled, however, that the client was not entirely without recourse. *Code Civ. Proc. § 431.70*, the court observed, provides that when cross-demands for money have existed between persons at any point in time when neither demand was barred by the statute of limitations, and an action is later commenced by one such person, the other person may assert in the answer the defense of payment in that the two demands are compensated so far as they equal each other, even though an independent action would, at the time of filing the answer, be barred by the statute of limitations. Section 431.70 further provides that if the cross-demand would otherwise be barred by the statute of limitations, the relief provided under that section may not exceed the value of the relief granted to the other party (*15 Cal. App. 4th 614, 618)* . The court noted that in this case, the defendant-client's answer included the affirmative defense that the plaintiff-attorney was indebted to defendant. The court noted that plaintiff's fee claim and defendant's malpractice claim coexisted at a time when neither was barred by the statute of limitations and that the trial court had determined that the value of defendant's claim was greater than the value of plaintiff's claim. Therefore, under *Code Civ. Proc. § 431.70*, although defendant could not maintain an independent action against plaintiff to recover money damages from plaintiff (because the malpractice claim was barred by the statute of limitations), defendant was entitled to have plaintiff's claim against him offset by his claim against plaintiff. Thus, the court concluded, defendant was not entitled to recover anything from plaintiff, and plaintiff was not entitled to recover anything from defendant. The court ordered the judgment modified to reflect this conclusion (*15 Cal. App. 4th 614, 618-619)* .

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2A-25 California Points & Authorities § 25.73

§ 25.73 Supporting Contention That Action for Recovery of Attorney's Fees Should Be Dismissed--Attorney Failed to Provide Notice of Right to Arbitration [Bus. & Prof. Code § 6201(a); Cal. State B. Rules Proc. Hearing Fee Arb., Rule 4.0]

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

DISMISSAL OF PLAINTIFF'S ACTION PURSUANT TO SECTION 6201(a) OF THE BUSINESS AND PROFESSIONS CODE IS PROPER BECAUSE PLAINTIFF FAILED TO FORWARD TO DEFENDANT A WRITTEN NOTICE CONCERNING THE RIGHT TO ARBITRATION EITHER BEFORE OR AT THE TIME OF SERVICE OF SUMMONS.

A. Dismissal for Failure to Provide Notice of Right to Arbitration. An attorney must forward a written notice to the client prior to or at the time of service of summons in an action against the client for recovery of fees, costs, or both, covered by *Bus. & Prof. Code §§ 6200-6206*. The written notice must be in such form as prescribed by the State Bar Board of Governors, and must include a statement of the client's right to arbitration under *Bus. & Prof. Code §§ 6200-6206*. Failure to provide this notice is ground for dismissal of the action (Cal. State B. Rules Proc. Hearing Fee Arb., Rule 4.0; *see Bus. & Prof. Code § 6201(a)*). However, the notice shall not be required prior to initiating mediation of the dispute (*Bus. & Prof. Code § 6201(a)*).

[*Optional*] **B. Notice of Right to Arbitration Ineffective Where Given Before Actual Fee Dispute Arises.** A notice of right to arbitration given by an attorney to a client pursuant to *Bus. & Prof. Code § 6201(a)* is effective only if given after an actual fee dispute has arisen between the attorney and client (*Huang v. Cheng (1998) 66 Cal. App. 4th 1230, 1234, 78 Cal. Rptr. 2d 550*).

[*Optional*] **C. Notice of Right to Arbitration Must be Given to Attorney's Debtor on Account of Services.** Where a person other than the client has agreed to pay the client's legal bills, and has become the attorney's debtor on account of legal services, notice under *Bus. & Prof. Code § 6201(a)* must be given by the attorney to that person (*Wager v. Mirzayance (1998) 67 Cal. App. 4th 1187, 1190*).

[2] Comments

[a] Use of Form

This memorandum may be used in support of the contention that dismissal of an attorney's action for recovery of fees, costs, or both, is proper because the attorney failed to serve the client with a written notice of the client's right to arbitrate. The argument supported by this form may be raised in support of a motion to dismiss.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law raised. Thus, counsel should insert facts showing that the attorney failed to forward to the client (or any person responsible for payment of the client's fees) written notice of the right to arbitration before at the time of service of summons.

[3] Discussion of Authorities

[a] Attorney's Failure to Provide Notice Does Not Deprive Court of Jurisdiction

Counsel should note that an attorney's failure to provide a client with notice of the client's right to arbitration (as required by *Bus. & Prof. Code § 6201*) does not deprive the court of jurisdiction over the attorney's action to recover fees or costs. Dismissal for failure to provide the notice required under *Bus. & Prof. C. § 6201(a)* is discretionary rather than mandatory [*Law Offices of Dixon R. Howell v. Valley (2005) 129 Cal. App. 4th 1076, 1086-1091, 29 Cal. Rptr. 3d 499]* . The burden is on the defendant-client to move for dismissal based on the plaintiff-attorney's failure to give the required notice [*Aheroni v. Maxwell (1988) 205 Cal. App. 3d 284, 294-295, 252 Cal. Rptr. 369* (finding that trial court had jurisdiction in fee action to enter default judgment against client, notwithstanding lack of notice)].

[b] Notice of Right to Arbitration Ineffective Where Given Before Actual Fee Dispute Arises

In ***Huang v. Cheng*** *(1998) 66 Cal. App. 4th 1230, 1234, 78 Cal. Rptr. 2d 550* , the trial court dismissed an attorney's action to collect fees, based on the attorney's failure to comply with *Bus. & Prof. Code § 6201(a)*, which requires that an attorney provide notice of a client's right to arbitrate a fee dispute to the client "prior to or at the time" of service of summons or claim in a fee action against the client. Here, the attorney sent his clients a notice of right to arbitrate more than two years prior to filing his fee action against them.

The court of appeal affirmed the dismissal, holding that *Bus. & Prof. Code § 6201(a)* requires attorneys to give notice to clients of their right to arbitrate only after an actual fee dispute has arisen between the attorney and client (*66 Cal. App. 4th 1230, 1234)* . The court determined that this interpretation of the statutory language "prior to or at the time" of service of summons or claim was the only reasonable interpretation given the legislature's apparent purpose to ensure the fair resolution of attorney-client fee disputes (*66 Cal. App. 4th 1230, 1234)* . The attorney's fee action was properly dismissed, because although the attorney had, upon ending representation, sent his clients a notice of the right to arbitrate, the actual fee dispute did not arise until later, at which point the attorney filed his fee action against his clients without providing notice of their right to arbitrate the fee dispute.

[c] Notice of Right to Arbitration Must be Given to Attorney's Debtor on Account of Services

In ***Wager v. Mirzayance*** *(1998) 67 Cal. App. 4th 1187* , the trial court dismissed an attorney's action to collect fees and costs against a husband and wife who signed an agreement with the attorney to be responsible for paying the attorney's fees and costs in defending their son on a murder charge, on the basis that the attorney failed to provide notice to the couple of their right to arbitrate their fee dispute as required by *Bus. & Prof. Code § 6201(a)*. The trial court determined that the attorney's lawsuit was "an action against the client" within the meaning of *Bus. & Prof. Code § 6201(a)* and, as such, the attorney was required to provide the couple with notice of their right to arbitrate under Section 6201 (*67 Cal. App. 4th 1187, 1189)* .

The court of appeal affirmed, holding that where a person other than the client has agreed to pay the client's legal bills, and has become the attorney's debtor on account of legal services, notice of the right to arbitrate must be given by the attorney to that person pursuant to *Bus. & Prof. Code § 6201(a)* (*67 Cal. App. 4th 1187, 1190)* .

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 25 ATTORNEY'S FEES
PART II. FORMS

2A-25 California Points & Authorities § 25.74

§ 25.74 Supporting Contention That Fee Dispute Is Not Subject to Mandatory Arbitration [Bus. & Prof. Code §§ 6200-6206]--Statutory Exclusion Applies [Bus. & Prof. Code § 6200(b)]

[1] FORM Supporting Contention That Fee Dispute Is Not Subject to Mandatory Arbitration [Bus. & Prof. Code §§ 6200-6206]--Statutory Exclusion Applies [Bus. & Prof. Code § 6200(b)]

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

_____ [*Specify client, e.g.*, DEFENDANT] IS NOT ENTITLED TO COMPEL MANDATORY ARBITRATION OF THE FEE DISPUTE BECAUSE _____ [THE CLAIM IS ONE FOR AFFIRMATIVE RELIEF IN THE FORM OF DAMAGES *or* THE CLAIM IS BASED ON ALLEGED MALPRACTICE OR PROFESSIONAL MISCONDUCT *or* _____ (*specify attorney, e.g.,* PLAINTIFF) IS ADMITTED TO PRACTICE OUTSIDE CALIFORNIA, MAINTAINS NO OFFICE IN THE STATE OF CALIFORNIA, AND NO MATERIAL PORTION OF THE SERVICES WAS RENDERED IN THE STATE OF CALIFORNIA *or* THE FEE DISPUTE HAS BEEN DETERMINED PURSUANT TO _____ (STATUTE *or* COURT ORDER)].

No Entitlement to Mandatory Fee Arbitration When Claim or Dispute Is of Type Excluded by Statute. *Sections 6200 to 6206 of the Business and Professions Code*, permitting a client to compel arbitration of a fee or cost dispute with an attorney, do not apply to any of the following: (1) disputes in which a member of the State Bar of California is also admitted to practice in another jurisdiction or in which an attorney is only admitted to practice in another jurisdiction, and he or she maintains no office in California, and no material portion of the services was rendered in California; (2) claims for affirmative relief against the attorney for damages or otherwise based on alleged malpractice or professional misconduct; or (3) disputes in which the fee or cost to be paid by the client or on his or her behalf has been determined pursuant to statute or court order (*Bus. & Prof. Code § 6200(b)*).

[2] Comments

[a] Use of Form

This form of memorandum may be submitted in support of a contention that an attorney-client fee or cost dispute is not

subject to arbitration under *Bus. & Prof. Code §§ 6200-6206*.

The contention may be asserted in support of a motion to vacate a stay of an action, when the action has been automatically stayed pending fee arbitration [*see Bus. & Prof. Code § 6201(c)*], or in support of an attorney's reply to a client's request for arbitration [*see* Cal. State B. Rules Proc. for Hearing Fee Arb., Rule 17.0].

The contention may also be used to oppose a client's motion to dismiss an action for fees or costs, when the motion is made on the ground that the attorney failed to provide notice to the client of the client's right to arbitration [*see Bus. & Prof. Code § 6201(a)* and § 25.73]. No notice of the right to arbitration is required to be provided to the client when the fee action is one of the types of actions excepted from mandatory arbitration under *Bus. & Prof. Code § 6200(b)* [*see Bus. & Prof. Code § 6201(a)* (stating that notice must be provided in action for fees covered by the provisions of *Bus. & Prof. Code §§ 6200-6206*)].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law raised.

[b] Evidence Relating to Claims of Malpractice and Professional Conduct

Claims for malpractice and professional misconduct are generally excluded from mandatory fee arbitration under *Bus. & Prof. Code §§ 6200-6206, except* as provided under *Bus. & Prof. Code § 6203(a)* [*Bus. & Prof. Code § 6200(b)(2)*]. *Bus. & Prof. Code § 6203(a)* provides that evidence relating to claims of malpractice and professional misconduct is admissible only to the extent that those claims bear on the fees, costs, or both, to which the attorney is entitled. The arbitrators may not award affirmative relief in the form of damages or offset or otherwise, for injuries underlying any claim [*Bus. & Prof. Code § 6203(a)*; *see also Bus. & Prof. Code § 6201(d)* (client waives right to arbitrate when he or she seeks affirmative relief based on alleged malpractice or professional misconduct)]. The exclusion of claims for damages does not prevent the award to a client of a refund of unearned fees, costs, or both, previously paid to the attorney [*Bus. & Prof. Code § 6203(a)*].

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2A-25 California Points & Authorities § 25.75

§ 25.75 Supporting Contention That Fee Dispute Is Not Subject to Mandatory Arbitration [Bus. & Prof. Code §§ 6200-6206]--Client Has Waived Right to Mandatory Fee Arbitration [Bus. & Prof. Code § 6201(a), (b), (d); Cal. State B. Rules Proc. for Hearing Fee Arb., Rule 8.0]

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

_____ [*specify client, e.g.,* PLAINTIFF] HAS WAIVED HIS/HER RIGHT TO [REQUEST *or* MAINTAIN] MANDATORY FEE ARBITRATION IN THAT _____ [*specify, e.g.,* HE/SHE IS SEEKING AFFIRMATIVE RELIEF BASED ON THE ALLEGED MALPRACTICE OR PROFESSIONAL MISCONDUCT OF _____ (*specify attorney, e.g.,* DEFENDANT)].

[*EITHER*]

A. Client Answered Complaint Before Filing Request for Arbitration. A client's right to request or maintain arbitration under *Bus. & Prof. Code §§ 6200-6206* is waived when the client answers a complaint in a civil action before filing a request for arbitration, provided notice of the right to arbitrate was provided by the attorney (*Bus. & Prof. Code § 6201(b)*; Cal. State B. Rules Proc. for Hearing Fee Arb., Rule 8.1).

[*AND/OR*]

B. Client Sought Judicial Resolution of Fee Dispute or Other Affirmative Relief. A client's right to request or maintain arbitration under *Bus. & Prof. Code §§ 6200-6206* is waived by the commencement of an action or the filing of any pleading by the client seeking judicial resolution of a fee dispute to which *Bus. & Prof. Code §§ 6200-6206* applies, or by seeking affirmative relief against the attorney for damages or otherwise based on alleged malpractice or professional misconduct (*Bus. & Prof. Code § 6201(d)*; *Juodakis v. Wolfrum (1986) 177 Cal. App. 3d 587, 591-592, 223 Cal. Rptr. 95* ; Cal. State B. Rules Proc. for Hearing Fee Arb., Rule 8.2).

[*AND/OR*]

C. Client Failed to Timely File Request for Arbitration. A client's right to request or maintain arbitration under *Bus. & Prof. Code §§ 6200-6206* is waived if the client fails to request arbitration within 30 days after receipt of the Notice of Client's Right to Arbitrate (*Bus. & Prof. Code § 6201(a)*; Cal. State B. Rules Proc. for Hearing Fee Arb., Rule 8.3).

[*AND/OR*]

D. Client May Waive Arbitration Under Nonstatutory Grounds. A client may waive its arbitration rights even though it did not receive notice of its right to arbitrate under *Bus. & Prof. Code § 6201(a)* [*Law Offices of Dixon R. Howell v. Valley (2005) 129 Cal. App. 4th 1076, 1094-1095, 29 Cal. Rptr. 3d 499]* .

[2] Comments

[a] Use of Form

This form may be used by an attorney to support the contention that a client has waived the right to mandatory fee arbitration. They may be used to oppose a client's motion to confirm an arbitration award, or to support a motion to vacate an arbitration award, when the award was made following a waiver by the client of the right to arbitrate. In addition, they may be used to support a motion to vacate a stay of the attorney's action for fees or costs.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Client Sought Judicial Resolution of Fee Dispute or Other Affirmative Relief

In ***Juodakis v. Wolfrum*** *(1986) 177 Cal. App. 3d 587, 223 Cal. Rptr. 95* , plaintiff-client requested arbitration of a fee that he had paid to defendant attorney some time earlier. Arbitration was commenced pursuant to plaintiff's request. Before any award had been announced in the proceeding, plaintiff filed a complaint against defendant alleging negligence, intentional tort, and breach of contract, all arising out of a relationship based on the sued-on fee agreement. Several months later, the arbitration panel ordered defendant to refund part of the fee to plaintiff. Plaintiff noticed a petition to confirm the arbitration award. Defendant asked that the award be vacated, arguing that, pursuant to *Bus. & Prof. Code §§ 6200(a), 6201(d),* the arbitration panel had no jurisdiction to conduct any proceedings after plaintiff had filed his complaint. After a hearing, the trial court ordered the award vacated as required by *Bus. & Prof. Code § 6201(d)*. Plaintiff appealed.

The court of appeal affirmed. It first noted the applicability of *Bus. & Prof. Code § 6201(d),* which provides that a client waives the right to maintain a State Bar arbitration by commencing or filing a pleading seeking "judicial resolution of a fee dispute," or "affirmative relief against the attorney for damages" (*177 Cal. App. 3d 587, 591)* . The court distinguished *Manatt, Phelps, Rothenberg & Tunney v. Lawrence (1984) 151 Cal. App. 3d 1165, 199 Cal. Rptr. 246* , a case in which the *clients* tried to use *Bus. & Prof. Code § 6201(d)* to relieve them of the fee arbitration that they had requested after their attorneys had filed a judicial action to collect their fees (discussed in *§ 25.76[3][b]*). In the instant case, *Bus. & Prof. Code 6201(d)* was invoked by the *attorney* as a *defense* to an arbitration that he had not requested. There was no attempt by the attorney here, as there was by the clients in *Manatt,* to have "two bites at the same apple at the same time." Thus, the court concluded that the decision in *Manatt* was not relevant to the instant case. Plaintiff also at tempted to rely on *Reisman v. Shahverdian (1984) 153 Cal. App. 3d 1074, 201 Cal. Rptr. 194* , which stated that

State Bar arbitration is a nonjudicial alternative to dispute resolution whether the arbitration occurs before a lawsuit is filed or after a lawsuit is stayed or ceased. The court of appeal stated that such language is consistent with the trial court's finding that plaintiff waived the arbitration by filing his suit. Plaintiff also contended that his filing of the suit against defendant was not inconsistent with his intent to proceed with arbitration, because the proceedings involved different issues and remedies. The court rejected this argument, noting that the quality of defendant's services was involved in both proceedings, in that plaintiff claimed at the arbitration hearing that he was entitled to a refund of the entire fee because he received no benefit from defendant's services. Furthermore, the issue of intent is irrelevant to a waiver under *Bus. & Prof. Code § 6201(d)*, because a waiver occurs when the client files the complaint, irrespective of his or her intention in doing so (*177 Cal. App. 3d 587, 592)* .

In *Law Offices of Dixon R. Howell v. Valley (2005) 129 Cal. App. 4th 1076, 29 Cal. Rptr. 3d 499* , a law firm filed a complaint for fees against a client. The complaint alleged that the client executed a promissory note in favor of the law firm and breached the obligations under the note. The client filed a general denial to the complaint and included an affirmative defense that the law firm was estopped from obtaining any recovery because it failed to comply with *Bus. & Prof. C. § 6201(a)*. The trial court dismissed the law firm's complaint on this ground, holding that it had no discretion and that dismissal was mandatory under this ground.

The court of appeals reversed. It held that dismissal for a law firm's failure to send notice of arbitration rights under *Bus. & Prof. C. § 6201(a)* was discretionary, not mandatory (*129 Cal. App. 4th 1076, 1086-1091)* . The court of appeal held that a client could waive its right to arbitrate an attorney's fees dispute even if the client did not receive the notice. The court held that the following nonstatutory factors may determine whether a client has waived its arbitration rights (*129 Cal. App. 4th 1076, 1097)* :

(1) Whether the party's actions are inconsistent with the right to arbitrate;

(2) Whether the litigation machinery has been substantially invoked and the parties were well into preparation of a lawsuit before the party notified the opposing party of an intent to arbitrate;

(3) Whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay;

(4) Whether important intervening steps, such as taking advantage of judicial discovery procedures not available in arbitration, had taken place; and

(5) Whether the delay affected, misled, or prejudiced the opposing party.

Looking at those factors, the court of appeal held that the client had waived its rights to arbitrate.

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§ 25.76 Supporting Contention That Client Cannot Terminate Mandatory Arbitration of Fee Dispute [Bus. & Prof. Code §§ 6200-6206]--Client Has Elected Binding Arbitration

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

_____ [*Specify client's status, e.g.,* PETITIONER'S] REQUEST TO TERMINATE THE FEE ARBITRATION PROCEEDINGS AND TO HAVE THE FEE DISPUTE DECIDED IN COURT SHOULD NOT BE GRANTED BECAUSE HE/SHE CHOSE BINDING ARBITRATION OF THE FEE DISPUTE.

A. Arbitrator May Continue Arbitration Proceedings When Client Attempts to File Pleading Seeking Affirmative Relief. When a client elects binding arbitration of an attorney's fee dispute pursuant to *Bus. & Prof. Code §§ 6200-6206,* but later attempts to waive the right to arbitration by filing a pleading seeking affirmative relief, the arbitrator has discretion to proceed with the arbitration (*Manatt, Phelps, Rothenberg & Tunney v. Lawrence (1984) 151 Cal. App. 3d 1165, 1171-1172, 199 Cal. Rptr. 246*).

B. Court May Decline to Terminate Arbitration Proceedings When Client Attempts to File Pleading Seeking Affirmative Relief. When a client elects binding arbitration of an attorney's fee dispute pursuant to *Bus. & Prof. Code §§ 6200-6206,* but later attempts to waive the right to arbitration by filing a pleading seeking affirmative relief, the trial court has discretion to strike the pleading and to decline to terminate the arbitration (*Manatt, Phelps, Rothenberg & Tunney v. Lawrence (1984) 151 Cal. App. 3d 1165, 1172-1175, 199 Cal. Rptr. 246*).

[2] Comments

[a] Use of Form

This memorandum may be used in support of the contention that a client, once he or she has opted for binding arbitration of a fee dispute, may not transfer the case to a trial court by filing a pleading seeking affirmative relief.

The argument supported by the form may be used in opposition to a motion to lift a stay on judicial proceedings. It may

also be used in support of a motion to strike a client's pleading seeking affirmative relief. For general memoranda supporting motions to strike, see Ch. 160, *Motions to Strike* .

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Counsel should point out that the client initially sought the arbitration. In addition, the argument may indicate that the client only sought redress in the courts when it appeared that the arbitration would not turn out favorably to him or her.

[3] Discussion of Authorities

[a] Arbitrator May Continue Arbitration Proceedings When Client Attempts to File Pleading Seeking Affirmative Relief

Manatt, Phelps, Rothenberg & Tunney v. Lawrence *(1984) 151 Cal. App. 3d 1165, 199 Cal. Rptr. 246* involved a fee dispute between plaintiff law firm and defendant clients. Initially, plaintiff brought an action for recovery of fees against the defendants. Defendants requested binding arbitration of the dispute, pursuant to *Bus. & Prof. Code §§ 6200-6206*. The court stayed the judicial proceedings pending resolution of the arbitration proceeding. Several months into the arbitration process, following two arbitration hearings, defendants purported to file an answer and cross complaint in the judicial action that had been stayed pending arbitration, seeking damages based on various causes of action in tort. Defendants notified the arbitration panel of this filing, and asserting that they considered the arbitration matter to be terminated. The arbitrators rejected defendant's attempt to stop arbitration, and held two more hearings, finally issuing an award in favor of plaintiff. Meanwhile, the trial court granted plaintiff's motion to strike defendant's purported answer and cross complaint. Plaintiff filed a petition in superior court to confirm the arbitrator's award. Defendants filed a petition to vacate the award and a motion for leave to file a cross complaint. The court granted the petition to confirm the arbitration award and denied defendant's petition and motion. Judgment was entered in favor of plaintiff. Defendants appealed.

The court of appeal affirmed. Reviewing a challenge by defendant to the authority of the arbitration panel to decide that the arbitration was not terminated, the court found that the panel clearly had authority to make a determination concerning its jurisdiction. Furthermore, the court concluded that the arbitrator did not accord an irrational construction to *Bus. & Prof. Code § 6201(d)*. Defendant's interpretation of *Bus. & Prof. Code § 6201(d)* would allow a client to withdraw unilaterally from arbitration proceedings by filing a pleading seeking affirmative relief against the attorney in superior court, even though the client had requested and begun arbitration, had agreed that arbitration of the fee dispute would be binding, and had filed the pleading only after the arbitrators had received evidence in the form of testimony and documents. Such a procedure, the court said, would rob the fee arbitration of any potential for fairness. A client has the statutory right to compel an attorney to arbitrate a fee dispute. If the client also has the power to force the attorney back to court at any time during the arbitration proceeding, a client who is dissatisfied with or uneasy or fearful of an apparent unfavorable outcome of the arbitration simply could file a pleading for affirmative relief and start over in the superior court to try for a better result under a claim that he had "waived" his or her right to arbitrate. The court determined this result to be unreasonable (*151 Cal. App. 3d 1165, 1171)* .

[b] Court May Decline to Terminate Arbitration Proceedings When Client Attempts to File Pleading Seeking Affirmative Relief

The facts and procedural background of *Manatt, Phelps, Rothenberg & Tunney v. Lawrence (1984) 151 Cal. App. 3d 1165, 199 Cal. Rptr. 246* are discussed in *§ 25.76[3][a]*. In *Manatt,* the defendant clients, who had originally requested arbitration, sought termination of arbitration by a motion directed to the superior court to lift the stay on the superior court action and to remove the cause from arbitration. The trial court had refused to terminate the arbitration. The court of appeal found that the trial court had the authority to terminate the arbitration proceedings if it found the matter not amenable to arbitration (*151 Cal. App. 3d 1165, 1172-1173)* . However, the appellate court could find no abuse of

judicial discretion in the trial court's refusal to terminate the arbitration (*151 Cal. App. 3d 1165, 1174)* . The court of appeal noted that claims of waiver are closely scrutinized, arbitration is strongly favored, and every intendment should be indulged to give effect to arbitration proceedings (*151 Cal. App. 3d 1165, 1173)* . It stated that it was appropriate to consider defendants as having waived their right to return to the trial court prior to the end of the arbitration they elected to invoke and sought to make binding on plaintiff (*151 Cal. App. 3d 1165, 1174)* . The court rejected defendants' argument that denial of their motion to terminate the arbitration was contrary to the purposes of the arbitration statutes (*151 Cal. App. 3d 1165, 1174-1175)* .

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 25 ATTORNEY'S FEES
PART II. FORMS

2A-25 California Points & Authorities § 25.77

§ 25.77 Supporting Contention That Relief From Fee Arbitration Award Under Code Civ. Proc. § 473 Is Proper

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

RELIEF SHOULD BE GRANTED BECAUSE THE _____ [AWARD *or* JUDGMENT] WAS TAKEN AGAINST _____ [PLAINTIFF *or* DEFENDANT] THROUGH _____ [PLAINTIFF'S *or* DEFENDANT'S] _____ [*insert ground(s) for relief pursuant to Code Civ. Proc. § 473, e.g.,* MISTAKE].

Relief From Fee Arbitration Award Available. Relief from a fee arbitration award may be granted pursuant to *Section 473 of the Code of Civil Procedure* if the award was taken against the moving party through his or her mistake, inadvertence, surprise, or excusable neglect (*Simpson v. Williams (1987) 192 Cal. App. 3d 285, 290-291, 238 Cal. Rptr. 566*).

[2] Comments

[a] Use of Form

This memorandum may be used to support the contention that a fee arbitration award made pursuant to *Bus. & Prof. Code §§ 6200-6206* may be vacated when it was based on mistake, inadvertence, surprise, or excusable neglect. The argument may be used in support of a motion to vacate a fee arbitration award, or in opposition to a motion to confirm an arbitration award.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

CAUTION:
Rule Has Been Criticized. Counsel should note that at least one later case criticized and rejected the rule stated in this form, that relief from a fee arbitration award may be available under *Code*

***Civ. Proc. § 473*, if the award was taken against the moving party through his or her mistake, inadvertence, surprise, or excusable neglect [*see Shiver, McGrane & Martin v. Littell (1990) 217 Cal. App. 3d 1041, 1047-1049, 266 Cal. Rptr. 298]* . In *Shiver*, the court noted that the California Supreme Court, in *Pressler v. Donald L. Bren Co. (1982) 32 Cal. 3d 831, 834 n.5, 187 Cal. Rptr. 449, 654 P.2d 219* found *Code Civ. Proc. § 473* inapplicable in the context of an appeal from arbitration under the Labor Code. The court in *Shiver* criticized the opinion in *Simpson v. Williams (1987) 192 Cal. App. 3d 285, 290-291, 238 Cal. Rptr. 566* , as being "supported by little analysis" and noted that *Simpson* failed to distinguish or otherwise account for the conflicting *Pressler* opinion [*see Shiver, McGrane & Martin v. Littell (1990) 217 Cal. App. 3d 1041, 1049, 266 Cal. Rptr. 298 (First Appellate District)]* .**

[b] Related Pleading and Practice Forms

For a notice of motion for an order relieving a party from a default or default judgment for mistake, inadvertence, surprise, or excusable neglect, and a declaration in support of such a motion, see California Forms of Pleading and Practice, Ch. 489, *Relief From Judgments and Orders* (Matthew Bender).

[c] Related Memoranda

For memoranda supporting a motion to relieve a party from a default or default judgment for mistake, inadvertence, surprise, or excusable neglect, see Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders* .

[3] Discussion of Authorities

[a] Relief From Fee Arbitration Award Available

Simpson v. Williams *(1987) 192 Cal. App. 3d 285, 238 Cal. Rptr. 566* involved an attorney's attempt to challenge a fee arbitration award that was entered in his client's favor. Thirty-one days after the mailing of the notice of the award, the attorney filed an action for declaratory relief challenging the award. The client petitioned to confirm the arbitrator's award, alleging that the attorney's filing was one day late under *Bus. & Prof. Code § 6204*, which required filing suit "within 30 days after mailing of the award" (*now see Bus. & Prof. Code § 6204(c)*, requiring filing suit within 30 days after "service" of notice of award) The attorney argued that *Code Civ. Proc. § 1013* (extension of time when service is by mail) extended the filing deadline under *Bus. & Prof. Code § 6204* by five days. The trial court disagreed, holding that *Code Civ. Proc. § 1013* does not extend the 30-day limit of *Bus. & Prof. Code § 6204*. The trial court granted the client's motion to confirm the award.

The court of appeal reversed, holding that, although *Code Civ. Proc. § 1013* did not extend the 30-day limit in *Bus. & Prof. Code § 6204*, the court excused the attorney's late filing based on *Code Civ. Proc. § 473* (relief from judgment for mistake, inadvertence, surprise, or excusable neglect) (*192 Cal. App. 3d 285, 288-289, 291)* . The court could find no justification for denying relief under *Code Civ. Proc. § 473* in the general context of mandatory fee arbitration. It further determined that relief was proper in the instant case, due to the attorney's mistaken interpretation of *Code Civ. Proc. § 1013* (*192 Cal. App. 3d 285, 290-291)* .

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CHAPTER 30 BANKRUPTCY

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AUTHOR: Reviewed By John A. Vos

§ 30.syn Synopsis to Chapter 30: BANKRUPTCY

§ 30.01 Scope of Chapter

§ 30.02 Governing Law

[1] Discharge in General

[2] Discharge in Chapter 7 Cases

[3] Discharge in Chapter 11 Cases

[4] Discharge in Chapter 12 Cases

[5] Discharge in Chapter 13 Cases

§ 30.03 Definitions

[1] Claim and Community Claim

[2] Creditor

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§ 30.04 How to Use Forms in This Chapter

[1] Page Limits on Points and Authorities

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§ 30.05 Bankruptcy Reporters

§ 30.06 Related Pleading and Practice Chapters

§§ 30.07-30.19 [Reserved]

§ 30.20 Supporting Contention That Debt Is Nondischargeable and That State Court Has Concurrent Jurisdiction to Determine Dischargeability of Debts [11 U.S.C. § 523]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Concurrent State Court Jurisdiction

[b] Domestic Support

[c] Student Loans

[d] Liability From Drunk Driving or Piloting

[e] Both Compensatory and Punitive Damages Nondischargeable

[4] Additional Authorities

[a] Domestic Support

§ 30.21 Supporting Contention That Debt Is Nondischargeable and That Bankruptcy Court Has Exclusive Jurisdiction to Determine Dischargeability of Debts [11 U.S.C. § 523]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Bankruptcy Court's Exclusive Jurisdiction

[b] Creditor Action Required

[c] Time for Filing Complaint to Determine Dischargeability

[d] Authority to Reopen Case

[e] Preponderance Standard

[f] Collateral Estoppel Effect of [Fraud] Judgment

[4] Additional Authorities

[a] Bankruptcy Court's Exclusive Jurisdiction

[b] Fraud

[c] Authority to Reopen Case

§§ 30.22-30.39 [Reserved]

§ 30.40 Supporting Contention That Creditor Is Enjoined From Attempting to Enforce Debt Against Discharged Debtor or Community Property [11 U.S.C. § 524]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Discharge Operates as Injunction

[b] Injunction of Collection Attempts or State Court Proceeding

[c] Affirmative Defense Not Required

[d] Discharge of Community Claims

[4] Additional Authorities

[a] Discharge Operates as Injunction

[b] Injunction of Collection Attempts or State Court Proceeding

§ 30.41 Supporting Contention That Debtor Is Entitled to Sanctions Against Creditor for Attempt to Collect Discharged Debt [11 U.S.C. § 524]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Violation Is Basis for Sanctions

[4] Additional Authorities

[a] Violation Is Basis for Sanctions

§ 30.42 Opposing Contention That Debtor Is Entitled to Sanctions [11 U.S.C. § 524]--Good-Faith Controversy Exists Concerning Whether Debt Has Been Discharged

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Sanctions Are Not Appropriate

§§ 30.43-30.59 [Reserved]

§ 30.60 Supporting Contention That Debt Has Been Discharged--Debt Was Duly Scheduled or Creditor Had Notice or Actual Knowledge of Bankruptcy Case [11 U.S.C. § 523(a)(3)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Duly Scheduled Debt

[b] Actual Notice of Bankruptcy Case

[c] Receipt of Distribution

[d] Sufficiency of Address

[e] Assignor's Knowledge of Bankruptcy Case

[f] Establishing Discharge

[g] Creditor's Burden of Proof

§ 30.61 Supporting Contention That Debt Has Been Discharged--Punitive Damages Based on Fraud [11 U.S.C. § 523(a)(2)] Are Dischargeable

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Punitive Damages for Fraud Are Dischargeable

§ 30.62 Supporting Contention That Debt Has Been Discharged--Creditor's Reliance Was Not Justifiable so as to Except Loan Obligation From Discharge [11 U.S.C. § 523(a)(2)(A)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Justifiable Reliance

[b] Elements Necessary to Preclude Discharge of Debt

§ 30.63 Supporting Contention That Debt Has Been Discharged--Nonmarital Support Obligation Is Dischargeable [11 U.S.C. § 523(a)(5)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Nonmarital Support Obligation Is Discharged

§ 30.64 Supporting Contention That Debt Has Been Discharged--Damages for Nontortious Breach of Contract as Not "Injury to Property" so as to Except Damage Claim From Discharge [11 U.S.C. § 523(a)(6)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Simple Breach of Contract Claim Is Dischargeable

§ 30.65 Supporting Contention That Debt Has Been Discharged--Reaffirmation Agreement Unenforceable When Rescinded by Debtor or Not Approved by Bankruptcy Court [11 U.S.C. § 524(c)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Bankruptcy Court Must Approve Individual Debtor's Reaffirmation Agreement

§ 30.66 Supporting Contention That Debt Has Been Discharged--Claim Based on Environmental Cleanup Obligation May Be Discharged

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Claim Based on Environmental Cleanup Obligation May Be Discharged

§ 30.67 Opposing Contention That Debt Has Been Discharged--Debt Was Not Duly Scheduled and Creditor Had No Actual Knowledge of Bankruptcy Case [11 U.S.C. § 523(a)(3)]

[1] FORM

[2] Comments

[a] Use of Form

[b] No-Asset Cases

[3] Discussion of Authorities

[a] Incorrect Address Insufficient

[b] No Address

[c] Incorrect Name Insufficient

[d] Unknown Debt

[e] Address Care of Third Person Insufficient

[f] Debtor's Burden of Proof

[g] Actual Knowledge Required

[h] Timeliness of Knowledge

[i] Notice to Assignor After Assignment

[j] Late Claim Not Required

[k] 30 Days Notice Generally Required

[l] Request for Extension Not Required

[4] Additional Authorities

[a] Unscheduled or Improperly Scheduled Debts

[b] Address Insufficient

§ 30.68 Opposing Contention That Debt Has Been Discharged--Damages Based on Fraud [11 U.S.C. § 523(a)(2)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Fraud Other Than in Financial Statement

§ 30.69 Opposing Contention That Debt Has Been Discharged--Debt Arises From Fiduciary Defalcation [11 U.S.C. § 523(a)(4)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Federal Law Determines Nature of Relationship

[b] Federal Definition of Fiduciary

[c] State Law Determines When Trust Exists

[d] No Trust Under Corp. Code § 16404

[e] Partners or Joint Venturers Are Fiduciaries

§ 30.70 Opposing Contention That Debt Has Been Discharged--Debt Is for Spousal or Child Support [11 U.S.C. § 523(a)(5)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Federal Law Determines Nature of Debt

[b] Construction of Agreement

[c] Extrinsic Evidence Required

[d] Inadmissibility of Parol Evidence

[e] Obligation Extending Beyond Remarriage

[f] Nonmodifiable Payments

[g] Attorney's Fees

§ 30.71 Opposing Contention That Debt Has Been Discharged--Debt Was for Willful and Malicious Injury [11 U.S.C. § 523(a)(6)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Intent to Injure is Required

[b] Punitive Damages for Willful and Malicious Injury Are Nondischargeable

§ 30.72 Opposing Contention That Debt Has Been Discharged--Debt Required by Restitution Order in Criminal Case [11 U.S.C. §§ 523(a)(7), 1328(a)(3)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Restitution Order in Criminal Action

[b] Restitution Order in Chapter 13

§ 30.73 Opposing Contention That Debt Has Been Discharged--Order for Conveyance Is Not Debt Within Meaning of Bankruptcy Code

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Nonmonetary Obligation Is Not "Claim"

§ 30.74 Opposing Contention That Debt Has Been Discharged--Preexisting Lien Is Not Discharged by Discharge of Underlying Debt in Bankruptcy

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Discharge of Debt Does Not Discharge Lien That Secured Debt

[4] Additional Authorities

[a] Discharge of Debt Does Not Discharge Lien That Secured Debt

§ 30.75 Opposing Contention That Debt Has Been Discharged--Nondischargeability Was Conclusively Determined

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Nondischargeability Conclusively Determined

§§ 30.76-30.89 [Reserved]

Reviewed By
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FOOTNOTES:
(n6)Footnote *. John A. Vos, B.A. UCLA 1976, J.D. Golden Gate University 1978, admitted to the California bar in 1978. Mr. Vos is a commercial litigator in San Rafael, California. He focuses on bankruptcy and financial workouts for both creditors and debtors, and has been a contributor to Matthew Bender publications on debtor-creditor topics for over 10 years. Mr. Vos is a founding member and past President of the Marin County Bankruptcy Lawyers Association, has passed the specialization exam given by the California State Bar in this practice area, and has appeared frequently as a guest on KGO NewsTalk Radio in San Francisco.

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CHAPTER 30 BANKRUPTCY
PART I. INTRODUCTION

2A-30 California Points & Authorities § 30.01

AUTHOR: Reviewed By John A. Vos

§ 30.01 Scope of Chapter

This chapter contains memoranda of points and authorities governing the discharge of personal liability in bankruptcy. It includes forms for contentions supporting and opposing various issues, both procedural and substantive, relating to dischargeability.

Part A of the forms [*see §§ 30.20, 30.21*], contains points and authorities addressing the jurisdiction of state courts and bankruptcy courts to determine dischargeability and the time within which determinations of dischargeablility of particular types of debts must be sought. These forms also contain the statutory descriptions of each type of dischargeable debt.

Part B of the forms [*see §§ 30.40 -30.42*] addresses the remedies available to a debtor for a creditor's attempt to enforce or collect a discharged debt, including points and authorities supporting and opposing contentions that the order of discharge constitutes a permanent injunction against collection of discharged debts and that monetary sanctions may be awarded to the debtor for a creditor's violation of the discharge order.

Part C of the forms [*see §§ 30.60 -30.74*] addresses the substantive elements necessary to establish dischargeability of specific debts enumerated in *11 U.S.C. § 523(a)*. It includes memoranda of points and authorities supporting and opposing various contentions that dischargeability has been established in a particular situation: e.g., whether debt was timely and properly scheduled; whether debt arose from fiduciary defalcation; whether debt represents property settlement obligations in marital dissolutions, spousal or child support obligations, or nonmarital support obligations; whether debt represents liability for malicious and willful injury, or arises from restitution orders in criminal cases, and whether a particular type of punitive damage award is dischargeable.

For corresponding discussion and forms relating to dischargeability and other bankruptcy issues that may arise in state court actions, see Ch. 94, *Bankruptcy* , in California Forms of Pleading and Practice (Matthew Bender). For detailed discussion and forms covering all aspects of bankruptcy and bankruptcy procedure, *see* Collier on Bankruptcy (15th ed.) (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawDischarge & DischargeabilityLiquidationsEligible DebtsBankruptcy LawDischarge & DischargeabilityNondischarge of Individual DebtsAlimony, Divorce Settlements & SupportBankruptcy LawDischarge & DischargeabilityNondischarge of Individual DebtsMalicious & Reckless BehaviorBankruptcy LawPractice & ProceedingsJurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral Overview

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2A-30 California Points & Authorities § 30.02

AUTHOR: Reviewed By John A. Vos

§ 30.02 Governing Law

[1] Discharge in General

Discharges in Chapter 7, 11, 12, and 13 bankruptcies are governed by *11 U.S.C. §§ 727, 1141(d), 1228*, and *1328*, respectively. The types of debts that remain undischarged differ depending on the chapter, and in a Chapter 12 or 13 case, depending on whether the plan was completed or the debtor obtained a hardship discharge despite failure to complete payments under the plan. The effect of discharge is set forth in *11 U.S.C. § 524*. Nondischargeable debts are enumerated at *11 U.S.C. §§ 523(a)* and *(b), 1141(d)(2)* and *(3), 1228*, and *1328*. Jurisdiction to determine dischargeability is governed by *11 U.S.C. § 523, 28 U.S.C. §§ 157(a)* and *(b)(2)(I), 1334*, and *1452*, and *Fed. R. Bankr. P., Rule 4007*. Bankruptcy does not discharge valid liens [*American Improvement Co. v. Lilienthal (1919) 43 Cal. App. 80, 84, 184 P. 692* ; *see Dewsnup v. Timm (1992) 502 U.S. 410, 417-419, 112 S. Ct. 773, 116 L. Ed. 2d 903* ; *In re Connor (9th Cir. 1994) 27 F.3d 365, 366* ; *see also Mathews Cadillac, Inc. v. Phoenix of Hartford Ins. Co. (1979) 90 Cal. App. 3d 393, 396-397 n.4, 153 Cal. Rptr. 267* ; *but see Johnson v. Home State Bank (1991) 501 U.S. 78, 86-88, 111 S. Ct. 2150, 115 L. Ed. 2d 66* (creditor's right to foreclose that remains after discharge of debtor's personal liability on debt in Chapter 7 case as includable in Chapter 13 plan)]. The scope of discharge is broad and includes contingent and unliquidated claims.

[2] Discharge in Chapter 7 Cases

A discharge under Chapter 7 discharges an individual debtor from all debts that arose before the date of the filing of the petition in bankruptcy, except any debt of the type specified as nondischargeable by *11 U.S.C. § 523(a)* [*11 U.S.C. § 727(b)*].

Only an individual may be discharged from debt in a Chapter 7 case [*11 U.S.C. § 727(a)(1)*; *see N.L.R.B. v. Better Bldg. Supply Corp. (9th Cir. 1988) 837 F.2d 377, 379* (corporate debt not dischargeable in Chapter 7, and survives against corporation or corporation's alter ego that resumes operations)].

[3] Discharge in Chapter 11 Cases

The provisions of a confirmed Chapter 11 plan bind all creditors, whether or not their claims are impaired by the plan and whether or not they accepted the plan [*11 U.S.C. § 1141(a)*; *see 11 U.S.C. § 1141(d)(2), (3)* (exceptions)].

Except as otherwise provided for in the plan, or the order confirming it, the confirmation of a plan in a Chapter 11 case discharges the debtor from all debts that arose before the date of the confirmation and debts of the types specified in *11 U.S.C. § 502(g)* (claim arising from rejection of executory contract or unexpired lease after filing of petition), *11 U.S.C. § 502(h)* (claim arising from recovery of property after filing of petition), and *11 U.S.C. § 502(i)* (claim for taxes arising after filing of petition) [*11 U.S.C. § 1141(d)(1)*]. However, confirmation does not discharge an individual debtor from any debt excepted from discharge by *11 U.S.C. § 523* [*11 U.S.C. § 1141(d)(2)*]. Confirmation does not discharge a debtor if [*11 U.S.C. § 1141(d)(3)*]:

- The plan provides for liquidation of all or substantially all of the property of the estate;
- The debtor does not engage in business after the consummation of the plan; and
- The debtor would be denied a discharge under *11 U.S.C. § 727(a)* if the case were brought under Chapter 7.

The court can approve a written waiver of discharge executed by a debtor in a Chapter 11 case [*11 U.S.C. § 1141(d)(4)*].

In a case in which the debtor is an individual, confirmation of the plan does not discharge any debt provided for in the plan until the court grants a discharge on completion of all payments under the plan, unless after notice and a hearing the court orders otherwise for cause [*11 U.S.C. § 1141(d)(5)(A)*]. However, at any time after the confirmation of the plan, and after notice and a hearing, the court may grant a discharge to a debtor who has not completed payments under the plan if the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on that claim if the estate of the debtor had been liquidated under Chapter 7 on that date, provided modification of the plan under *11 U.S.C. § 1127* is not practicable [*11 U.S.C. § 1141(d)(5)(B)*].

The confirmation of a plan does not discharge a debtor that is a corporation from any debt of a kind specified in *11 U.S.C. § 523(2)(A)* or *(B)* (fraud) that is owed to a domestic governmental unit, or owed to a person as the result of an action filed under *31 U.S.C. § 3721 et seq.* (claims against the federal government) or any similar state statute. The corporation also is not discharged from any debt for a tax or customs duty with respect to which the corporation made a fraudulent return or willfully attempted in any manner to evade or to defeat [*11 U.S.C. § 1141(d)(6)*].

[4] Discharge in Chapter 12 Cases

A Chapter 12 discharge does not discharge debts specified in *11 U.S.C. § 523(a)* [*11 U.S.C. § 1228(a), (c)*]. If the debtor completed all payments under a Chapter 12 plan, other than those provided for under *11 U.S.C. § 1222(b)(5)* (debts on which the last payment is due after the date on which the final payment under the plan is due) or *11 U.S.C. § 1222(b)(9)* (revesting), the order of discharge discharges the debtor from all debts provided for by the plan allowed under *11 U.S.C. § 503* or disallowed under *11 U.S.C. § 502*, except any debt specified nondischargeable by *11 U.S.C. § 523(a)* and those provided for in *11 U.S.C. § 1222(b)(5)* and *(9)*. In the case of a debtor who is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, the debtor must certify that all amounts payable under that order or statute and due on or before the date of the certification (including amounts due before the petition was filed, but only to the extent provided for by the plan) have been paid [*11 U.S.C. § 1228(a)*].

A "hardship discharge" under *11 U.S.C. § 1228(b)* discharges the debtor from all unsecured debts provided for by the plan or disallowed under *11 U.S.C. § 502*, except any debt of a type specified as nondischargeable by *11 U.S.C. §*

523(a) and those provided for under *11 U.S.C. § 1222(b)(5)* and *(9)* [*11 U.S.C. § 1228(c)*].

In any case, on request of a party in interest before one year after a discharge under *11 U.S.C. § 1228* is granted, and after notice and a hearing, the court may revoke the discharge if it was obtained by the debtor through fraud and if the requesting party did not know of the fraud until after the discharge was granted [*11 U.S.C. § 1228(d)*].

The court can approve a written waiver of discharge executed by a debtor in a Chapter 12 case [*see 11 U.S.C. § 1228(a)*].

[5] Discharge in Chapter 13 Cases

If the debtor has completed all payments under a Chapter 13 plan, the order of discharge discharges the debtor from all debts provided for by the plan or disallowed under *11 U.S.C. § 502*, except the following [*11 U.S.C. § 1328(a)*]:

- Debts provided for under *11 U.S.C. § 1322(b)(5)* (debts on which the last payment is due after the date on which the final payment under the plan is due).

- Debts specified nondischargeable by *11 U.S.C. § 507(a)(8)(C)* (a tax required to be collected or withheld and for which the debtor is liable in whatever capacity) and by *11 U.S.C. § 523(a)(1)(B)* and *(C), (2)*-(5), (8) and (9) [*see §§ 30.20, 30.21*].

- Debts for restitution included in a sentence on the debtor's conviction of a crime [*see* H.R. Rep. No. 681(I), 101st Cong., 2d Sess. (1990) (amendment making restitution nondischargeable in Chapter 13 case was intended to abrogate *Pennsylvania Dep't of Public Welfare v. Davenport (1990) 495 U.S. 552, 556-567, 110 S. Ct. 2126, 109 L. Ed. 2d 588* , and thus effectively annuls *People v. Goulart (1990) 224 Cal. App. 3d 71, 85, 273 Cal. Rptr. 477* , which followed *Davenport*)].

- Debts for restitution, or damages, awarded in a civil action against the debtor as a result of willful or malicious injury by the debtor that caused personal injury to an individual or the death of an individual.

A "hardship discharge" under *11 U.S.C. § 1328(b)* discharges the debtor from all unsecured debts provided for by the plan or disallowed under *11 U.S.C. § 502*, except any debt of a type specified as nondischargeable by*11 U.S.C. § 523(a)* and those provided for under *11 U.S.C. § 1322(b)(5)* [*11 U.S.C. § 1328(c)*].

In the case of a debtor who is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, the debtor must certify that all amounts payable under that order or statute and due on or before the date of the certification (including amounts due before the petition was filed, but only to the extent provided for by the plan) have been paid [*11 U.S.C. § 1328(a)*].

Notwithstanding any other provision of *11 U.S.C. § 1328*, a discharge does not discharge the debtor from any debt based on an allowed claim filed under *11 U.S.C. § 1305(a)(2)* if prior approval by the trustee of the debtor's incurring the debt was practicable and was not obtained [*11 U.S.C. § 1328(d)*].

The court can approve a written waiver of discharge executed by a debtor in a Chapter 13 case [*see 11 U.S.C. § 1328(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawDischarge & DischargeabilityFamily Farmers With Regular IncomeBankruptcy LawDischarge &

DischargeabilityIndividuals With Regular IncomeBankruptcy LawDischarge & DischargeabilityLiquidationsEligible DebtsBankruptcy LawDischarge & DischargeabilityNondischarge of Individual DebtsGeneral OverviewBankruptcy LawDischarge & DischargeabilityReorganizations

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2A-30 California Points & Authorities § 30.03

AUTHOR: Reviewed By John A. Vos

§ 30.03 Definitions

[1] Claim and Community Claim

"Claim" is a right to payment or a right to an equitable remedy for breach of performance if the breach gives rise to a right to payment, whether that right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured [*11 U.S.C. § 101(5)*]. A "community claim" is one that arose before the commencement of the case and for which community property of the debtor or the debtor's spouse is liable, even if no community property actually exists at the commencement of the case [*11 U.S.C. §§ 101(7), 541(a)(2)*].

[2] Creditor

"Creditor" means an entity that has a claim of the following type [*11 U.S.C. § 101(10)*]:

- A claim against the debtor that arose at the time of or before the order for relief concerning the debtor, which in a voluntary case, is the same date as that of the filing of the petition [*11 U.S.C. §§ 301(b), 302(a)*];

- A claim against the estate arising under *11 U.S.C. §§ 348(d)* and *502(f)-(i)* (conversion of case; involuntary case; rejection of executory contract or unexpired lease; recovery of property including avoidance of preferential transfers and setoffs; post-petition tax claims); or

- A community claim.

"Claim against the debtor" includes a claim against the property of the debtor [*11 U.S.C. § 102(2)*].

[3] Debt and Consumer Debt

"Debt" means liability on a claim [*11 U.S.C. § 101(12)*]. A "consumer debt" is a debt incurred by an individual primarily for a personal, family, or household purpose [*11 U.S.C. § 101(8)*].

[4] Debtor

A "debtor" is a person or municipality concerning which a case under Title 11 has been commenced [*11 U.S.C. § 101(13)*].

[5] Order for Relief

In a voluntary case, the terms "order for relief" and "entry of an order for relief" are synonymous with the commencement of the case. A voluntary case is commenced by the filing of the petition [*11 U.S.C. §§ 102(6), 301(a), 302(a)*]. An involuntary case is commenced by the filing of a petition by the proposed debtor's creditors. That petition is served on the proposed debtor, who may answer or acquiesce. If the debtor does not answer or after it has been established at trial that the case should proceed, an actual order for relief is entered [*11 U.S.C. § 303(b), (d), (h)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationCommencementInvoluntary CasesEligible DebtorsBankruptcy LawCase AdministrationCommencementVoluntary CasesOrder for ReliefBankruptcy LawClaimsGeneral OverviewBankruptcy LawClaimsTypesDefinitionsBankruptcy LawDebtor Benefits & DutiesGeneral Overview

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2A-30 California Points & Authorities § 30.04

AUTHOR: Reviewed By John A. Vos

§ 30.04 How to Use Forms in This Chapter

[1] Page Limits on Points and Authorities

One of the more significant drafting requirements to keep in mind are page limits: supporting and opposing memoranda may not exceed 15 pages. A reply or closing memorandum may not exceed 10 pages. Exhibits, declarations, attachments, the table of contents, the table of authorities, and the proof of service are excluded from these page limits [*Cal. Rules of Ct., Rule 3.1113(d)*]. Any party must obtain leave of court to file a longer memorandum [*see Cal. Rules of Ct., Rule 3.1113(e)*]. These and other drafting requirements are discussed in further detail in Ch. 1, *Writing Legal Memoranda and Briefs* .

[2] Using the Forms to Build a Draft Memorandum

The forms in this chapter are contentions based on procedural and substantive points of the law of dischargeability in bankruptcy. The contentions may be combined with each other, as appropriate, according to the facts of the case. Substantive contentions may be combined with procedural contentions, depending on the context in which the argument is raised. A contention supporting a particular proposition may also be used to oppose the proposition. For instance, although § 30.60 supports the contention that a certain debt was discharged because it was properly scheduled, the same authorities may be used with factual evidence that the debt was not properly scheduled, to oppose the contention that the debt was discharged.

When appropriate under the circumstances of the particular case, the contentions in this chapter may be used to support or oppose a specific motion or request. For example, in state court, discharge could be asserted by a debtor in a motion to recall and quash execution of a judgment obtained by a creditor on a debt subsequently discharged in bankruptcy, or, in a creditor's action on the debt, by motion for summary judgment. In bankruptcy court, dischargeability is most likely to be raised by a complaint to determine dischargeability or by a motion to reopen a case to allow filing of such a complaint. In addition, the contentions in this chapter may be combined, when appropriate, with points and authorities from other chapters supporting or opposing specific procedures, such as demurrers or motions for summary judgment [*see, e.g.,* Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* , and Ch. 221, *Summary Judgments*]. Finally,

the contentions may be adapted for use in a trial or an appellate brief.

For a discussion of how to use the forms in this chapter to draft a memorandum of points or authorities or a trial or appellate brief, and for a sample of a complete memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawDischarge & DischargeabilityGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting Memoranda

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AUTHOR: Reviewed By John A. Vos

§ 30.05 Bankruptcy Reporters

Decisions of the bankruptcy courts and the Bankruptcy Appellate Panel are reported officially in West's Bankruptcy Reporter, which is cited in this chapter as B.R. If the case has also been published in Collier Bankruptcy Cases, Second Series, that citation will also be given, as Collier Bankr. Cas. 2d. In the case discussions and citations in this chapter, Bankruptcy Appellate Panel is abbreviated B.A.P.

Legal Topics:

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

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AUTHOR: Reviewed By John A. Vos

§ 30.06 Related Pleading and Practice Chapters

For a corresponding discussion and forms relating to dischargeability and other bankruptcy issues that may arise in state court actions, see California Forms of Pleading and Practice, Ch. 94, *Bankruptcy* (Matthew Bender). That chapter includes, for example, a form for an application to reopen a bankruptcy case to determine dischargeability, a form for a complaint to determine dischargeability, and a form for an affirmative defense for use in a state court action.

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawDischarge & DischargeabilityGeneral Overview

California Points & Authorities

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 30 BANKRUPTCY
PART I. INTRODUCTION

2A-30 California Points & Authorities §§ 30.07-30.19

AUTHOR: Reviewed By John A. Vos

[Reserved]

§§ 30.07[Reserved]

California Points & Authorities

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 30 BANKRUPTCY
PART II. FORMS
A. Jurisdiction and Procedure

2A-30 California Points & Authorities § 30.20

AUTHOR: Reviewed By John A. Vos

§ 30.20 Supporting Contention That Debt Is Nondischargeable and That State Court Has Concurrent Jurisdiction to Determine Dischargeability of Debts [11 U.S.C. § 523]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE DEBT IN QUESTION IS ONE FOR _____ [*specify, e.g.,* CHILD SUPPORT], WHICH IS NONDISCHARGEABLE UNDER PARAGRAPH _____ [*specify, e.g.,* (5)] OF *SECTION 523(a) OF TITLE 11 OF THE UNITED STATES CODE*, AND THE STATE COURT HAS JURISDICTION TO DETERMINE DISCHARGEABILITY.

A. Concurrent State Court Jurisdiction. State courts have concurrent jurisdiction with the bankruptcy court to determine the dischargeability of any debt except a debt of the kinds specified in *Section 523(c)(1) of Title 11 of the United States Code*, under which the bankruptcy court has exclusive jurisdiction to determine the dischargeability of a debt for fraud or deception, a debt for fiduciary fraud, embezzlement, or larceny, or a debt for willful and malicious injury to a person or property (*see 11 U.S.C. § 523(a)(2), (4), (6)*). When there is concurrent jurisdiction, contests to dischargeability can be brought in either an appropriate state court or the bankruptcy court [and can be brought before or after discharge has been granted to the debtor] (*In re Aldrich (B.A.P. 9th Cir. 1983) 9 Collier Bankr. Cas. 2d 1073, 1077-1078, 34 B.R. 776, 780)* .

[*Optional*] **B. Taxes and Customs Duties.** The following taxes or customs duties are nondischargeable in bankruptcy (*11 U.S.C. § 523(a)(1)*):

1. Those of the kind and for the periods specified in Paragraphs (3) and (8) of *Section 507(a) of Title 11 of the United States Code* (priority of payment of claims in bankruptcy), whether or not a claim for such tax was filed or allowed.

2. Those with respect to which a return, or equivalent report or notice, if required, either was not filed or given, or was filed or given after its due date (including any extensions) and after two years before the date of the filing of the petition in bankruptcy.

3. Those with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat the tax.

[*Optional*] **C. Unscheduled or Improperly Scheduled Debts.** A debt is excepted from discharge in bankruptcy if it was neither listed nor scheduled under *Section 521(a)(1) of Title 11 of the United States Code*, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit timely filing of a proof of claim _____ [*if debt is one specified at 11 U.S.C. § 523(a)(2), (4), or (6), add:* and, if the debt is of a kind specified in Paragraph (2), (4), or (6) of *Section 523(a) of Title 11 of the United States Code*, timely request for a determination of dischargeability of the debt], unless the creditor had notice or actual knowledge of the case in time for such timely filing [and request] (*11 U.S.C. § 523(a)(3)*).

[*Optional*] **D. Domestic Support.** A debt for domestic support is not dischargeable in bankruptcy (*11 U.S.C. § 523(a)(5)*). Such a debt is one that accrues before, on, or after the date of the order for relief in a bankruptcy case, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of the Bankruptcy Code, and that meets the following four criteria (*11 U.S.C. § 101(14A)*):

1. It is owed to or recoverable by either a governmental unit or a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative.

2. It is in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of that spouse, former spouse, or child of the debtor or that child's parent, without regard to whether the debt is expressly so designated.

3. It is established or subject to establishment before, on, or after the date of the order for relief in a bankruptcy case by reason of applicable provisions of a separation agreement, divorce decree, or property settlement agreement, or of an order of a court of record, or of a determination made in accordance with applicable nonbankruptcy law by a governmental unit.

4. It is not assigned to a nongovernmental entity, unless the obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or that child's parent, legal guardian, or responsible relative for the purpose of collecting the debt. Thus, a domestic support debt is dischargeable to the extent that it was assigned to a nongovernmental entity, except for a voluntary assignment for collection, but is not dischargeable to the extent that it was assigned to a governmental entity (*see In re Marriage of Henderson (1990) 225 Cal. App. 3d 531, 533-534, 275 Cal. Rptr. 226*).

[*Optional*] **E. Fines, Penalties, and Forfeitures.** A debt is nondischargeable in bankruptcy to the extent that it is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss [*if debt is tax penalty, continue as applicable:* other than a tax penalty _____ (relating to a tax of a kind not specified in Paragraph (1) of *Section 523(a) of Title 11 of the United States Code and/or* imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition in bankruptcy)] (*11 U.S.C. § 523(a)(7)*).

[*Optional*] **F. Student Loans.** Unless excepting the debt from discharge would impose an undue hardship on the debtor and the debtor's dependents, a debt is nondischargeable if it is for either (1) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a

governmental unit or nonprofit institution, (2) an obligation to repay funds received as an educational benefit, scholarship, or stipend, or (3) any other educational loan that is a qualified education loan, as defined in *Section 221(d)(1) of the Internal Revenue Code*, incurred by a debtor who is an individual (*11 U.S.C. § 523(a)(8)*; *see In re Nunn (9th Cir. 1986) 788 F.2d 617, 618-619* (payments during applicable pre-petition period do not prohibit discharge)).

[*Optional*] **G. Liability From Drunk Driving or Piloting.** A debt for death or personal injury caused by the debtor's operation of a motor vehicle, vessel, or aircraft is nondischargeable if that operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance (*11 U.S.C. § 523(a)(9)*; *see In re Hudson (9th Cir. 1988) 859 F.2d 1418, 1419* (even under prior law, pre-petition judgment not required in order to have declared nondischargeable a debt arising from damages caused by drunk driving)).

[*Optional*] **H. Debts Not Discharged in Prior Bankruptcy.** A debt that was or could have been listed or scheduled by the debtor in a prior bankruptcy case concerning the debtor is nondischargeable if in the prior case the debtor waived discharge or was denied a discharge under Paragraph (2) through (7) of *Section 727(a) of Title 11 of the United States Code* or under Paragraphs (1)-(4), (6), or (7) of Section 14c of the Bankruptcy Act (*11 U.S.C. § 523(a)(10)*).

[*Optional*] **I. Marital Settlement Debts.** A debt is not dischargeable to the extent that it is owed to a spouse, former spouse, or child of the debtor, and is not a debt for domestic support (*see 11 U.S.C. §§ 101(14A), 523(a)(5)*), provided it was incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit (*11 U.S.C. § 523(a)(15)*).

[*Optional*] **J. Housing Association Fees and Assessments.** A debt for a fee or assessment that becomes due and payable, after the order for relief, to a membership association with respect to the debtor's interest in _____ [a unit that has condominium ownership *or* a share of a cooperative housing corporation *or* a lot in a homeowners association] is nondischargeable for as long as the debtor or the trustee has a legal, equitable, or possessory ownership interest in that _____ [unit *or* corporation *or* lot] (*11 U.S.C. § 523(a)(16)*).

[*Optional*] **K. Court Filing Fees and Costs Imposed on Prisoner.** A debt for a fee imposed on a prisoner by any court for the filing of a case, motion, complaint, or appeal, or for other costs and expenses assessed with respect to such a filing, is nondischargeable, _____ [*add, if appropriate:* regardless of an assertion of poverty by the debtor under Section 1915(b) or (f)(2) of Title 28 of the United States Code or a similar nonfederal law and] regardless of the debtor's status as a prisoner, as defined in *Section 1915(h) of Title 28 of the United States Code* or a similar nonfederal law] (*11 U.S.C. § 523(a)(17)*).

[*Optional*] **L. Loan Repayable to Retirement Plan.** A debt is not dischargeable if it is owed to a pension, profit-sharing, stock bonus, or other plan established under *Section 401, 403, 408, 408A, 414, 457,* or *501(c) of the Internal Revenue Code* under either (1) a loan permitted under Section 408(b)(1) of the Employee Retirement Income Security Act or subject to *Section 72(p) of the Internal Revenue Code* or (2) a loan from a thrift savings plan that satisfies the requirements of *Section 8433(g) of Title 5 of the United States Code* (*11 U.S.C. § 523(a)(18)*).

[*Optional*] **M. Securities Fraud.** A debt is nondischargeable if it is for violation of any of the federal securities laws (as that term is defined in Paragraph (47) of Section 78(a) of Title 15 of the United States Code), any of the state securities laws, or any regulation or order issued under a federal or state securities law, or is for common law fraud, deceit, or manipulation in connection with the purchase or sale of any security, and, in either case, the debt resulted, before, on, or after the date on which the petition was filed, from a judgment, order, consent order, or decree entered in a federal or state judicial or administrative proceeding, or from a settlement agreement entered into by the debtor, or from a court or administrative order for damages, fine, penalty, citation, restitutionary payment, disgorgement payment, attorney's fee, cost, or other payment owed by the debtor [*11 U.S.C. § 523(a)(19)*].

[*Optional*] **N. Both Compensatory and Punitive Damages Nondischargeable.** The statutory exceptions to dischargeability are measured by the nature of the act and apply to all liability resulting from the act. Both compensatory and punitive damages are nondischargeable [under Paragraphs (6) and (9) of *Section 523(a) of Title 11 of the United States Code*] (*In re Adams (9th Cir. 1985) 761 F.2d 1422, 1427-1428)* .

[*Optional*] **O. Debtor's Initial Burden of Proof.** [*See § 30.60, Paragraph E.*]

[*Optional*] **P. Creditor's Burden of Proof.** [*See § 30.60, Paragraph F.*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the state court has jurisdiction to determine dischargeability of debts other than debts described in *11 U.S.C. § 523(a)(2), (4),* and *(6),* that is, other than debts for fraud or deception, debts for fiduciary fraud, embezzlement, or larceny, and debts for willful and malicious injury to a person or property, and that the debt is nondischargeable. Counsel may combine Paragraph A with the optional paragraph setting forth the criteria for nondischargeability of the particular debt in question.

There are additional types of debts with respect to which state courts have concurrent jurisdiction to make determinations of dischargeability:

- Liabilities arising from any act of fraud or defalcation while acting in a fiduciary capacity committed with respect to any depository institution or insured credit union [*11 U.S.C. § 523(a)(11)*];

- Liabilities for malicious or reckless failure to fulfill any commitment to a federal depository institution's regulatory agency to maintain the capital of an insured depository institution [*11 U.S.C. § 523(a)(12)*];

- Liabilities arising from an order of restitution issued under Title 18 of the United States Code [*11 U.S.C. § 523(a)(13)*];

- Liabilities incurred to pay delinquent taxes to the United States that would be nondischargeable [*11 U.S.C. § 523(a)(14)*; *see 11 U.S.C. § 523(a)(1)* (taxes that are nondischargeable)];

- Debts incurred to pay a tax to a governmental unit, other than the United States, that would be nondischargeable [*11 U.S.C. § 523(a)(14A)*; *see 11 U.S.C. § 523(a)(1)* (taxes that are nondischargeable)]; and

- Debts incurred to pay fines or penalties imposed under federal election law [*11 U.S.C. § 523(a)(14B)*].

Counsel should insert argument showing the relationship between the facts of the case and the points of law stated. Thus, counsel should describe the debt in question and any judgment or agreement from which it arises. The factual description should cover each element necessary to establish nondischargeability, or if these points and authorities are being used to support the contention that the debt in question has been discharged, the factual description and argument should emphasize the nondischargeability criteria that have not been satisfied.

The authority in optional Paragraph N applies only to punitive damages based on debts that are nondischargeable under

11 U.S.C. § 523(a)(6) (willful and malicious injury) or *11 U.S.C. § 523(a)(9)* (operating a motor vehicle, vessel, or aircraft while intoxicated). Punitive damages based on fraud (*11 U.S.C. § 523(a)(2)*) are dischargeable; for discussion and authorities, *see § 30.61*. For additional authorities addressing nondischargeability of debts based on willful and malicious injury, *see § 30.71*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the state court has jurisdiction to determine nondischargeability. Counsel should also point out that the dischargeability of the particular debt was not determined in the bankruptcy court because such a determination would be res judicata [*Martin v. Martin (1970) 2 Cal. 3d 752, 759 n.9, 87 Cal. Rptr. 526, 470 P.2d 662]* .

[3] Discussion of Authorities

[a] Concurrent State Court Jurisdiction

The 1974 dissolution agreement of parties to the adversary proceeding in ***In re Aldrich*** *(B.A.P. 9th Cir. 1983) 9 Collier Bankr. Cas. 2d 1073, 34 B.R. 776* , provided that the creditor spouse would receive $1 per month as support from the debtor spouse, that each spouse had a half interest in certain real properties in Maine and New Hampshire, and that the creditor spouse had a 36-percent interest in the debtor spouse's military pension and was to receive 36 percent of each monthly payment of those benefits. The debtor spouse sold the real properties without the consent of the creditor spouse, who commenced an action in state court for damages for breach of the property settlement agreement. Thereafter, the debtor spouse filed a Chapter 7 petition in bankruptcy. The creditor spouse filed an order to show cause in the state dissolution action to require that the military retirement arrearages be brought current. The debtor spouse brought an adversary proceeding in the bankruptcy court to enforce the automatic stay of *11 U.S.C. § 362* to enjoin the state court proceedings. The bankruptcy court stayed the state court damage action and the state court proceeding for arrearages, but granted the creditor spouse relief from the stay in order to determine entitlement to future retirement benefits in state court.

The creditor spouse then filed an adversary proceeding in the bankruptcy court to have the conveyances of the real properties set aside as fraudulent or placed in a resulting trust or to have the proceeds of those conveyances placed in a constructive trust and for orders that the debts for failure to pay the retirement benefits and for wrongful conveyance of the real properties were nondischargeable. After discharge was granted, the debtor spouse moved in the bankruptcy court to enjoin further state proceedings. On the hearing of that motion, the stay was lifted as to any and all state court proceedings in which the creditor spouse was pursuing any action arising out of the dissolution. The debtor appealed the lifting of the stay.

The Bankruptcy Appellate Panel (hereinafter B.A.P.) for the Ninth Circuit reversed the order and remanded for proceedings consistent with its decision. In reversing, the B.A.P. first reviewed the jurisdiction of both the state court and the bankruptcy court to determine dischargeability, saying that *11 U.S.C. § 523(c)(1)* gives the bankruptcy courts exclusive jurisdiction to determine dischargeability of debts enumerated at *11 U.S.C. § 523(a)(2), (4),* and *(6)* (fraud or deception; fiduciary fraud, embezzlement, or larceny; willful and malicious injury to person or property). With respect to all other subsections of *11 U.S.C. § 523(a)*, the bankruptcy court has concurrent rather than exclusive jurisdiction to determine whether a debt is excepted from discharge. When there is concurrent jurisdiction, contests to dischargeability can be brought in either an appropriate state court or in the bankruptcy court and can be brought before or after discharge has been granted to the debtor (*34 B.R. 776, 780)* .

Next, the B.A.P. noted that after discharge had been granted, the bankruptcy court no longer had jurisdiction to lift the stay of *11 U.S.C. § 362*. The stay imposed by that section was no longer applicable, but had been replaced by the stay of *11 U.S.C. § 524* on the date discharge was ordered (*34 B.R. 776, 780)* . If the creditor spouse's claim of nondischargeability were based solely on *11 U.S.C. § 523(a)(5)* (domestic support), the state court had concurrent

jurisdiction with the bankruptcy court and could proceed on that basis even after entry of the discharge (*34 B.R. 776, 781)* . Despite the seeming specificity of the dissolution decree, the retirement benefit payments could in actuality be support and alimony (*34 B.R. 776, 780-781)* . Similarly, entitlement to the benefit payments accruing after bankruptcy was a state court matter (*34 B.R. 776, 781)* .

The B.A.P. said that the basis of the claim to the real property or its proceeds was not clear, but if it was based on *11 U.S.C. § 523(a)(2), (4),* or *(6),* the bankruptcy court would have exclusive jurisdiction to determine dischargeability (*34 B.R. 776, 781)* . The B.A.P. concluded that interests of judicial economy were best served by consideration of all grounds of dischargeability in the bankruptcy court on remand (*34 B.R. 776, 781-782)* .

[b] Domestic Support

The court of appeal in ***In re Marriage of Henderson*** *(1990) 225 Cal. App. 3d 531, 275 Cal. Rptr. 226* , affirmed a judgment renewing a county's judgment against appellant but remanded for recalculation of the amount owing. On dissolution of appellant's marriage, appellant had been ordered to pay $50 per month child support directly to the "Humboldt County Family Trust Fund." By May 1981, the county had a judgment against appellant for $13,250 in arrearages. Appellant filed Chapter 7 bankruptcy in September 1981, and listed the county as an unsecured creditor without priority. Appellant was granted discharge in the Chapter 7 case, and when the county sought to renew its judgment in 1989, appellant sought to vacate the renewal on the ground that the obligation had been discharged. Some of it had been satisfied through payments, but the judgment was renewed. The court of appeal noted that under *11 U.S.C. § 523(a)(5)* even debts for child support that have been assigned to a state or political subdivision are nondischargeable (*225 Cal. App. 3d 531, 533-534)* .

[c] Student Loans

In ***In re Nunn*** *(9th Cir. 1986) 788 F.2d 617* , the bankruptcy court denied discharge of the debtor's student loan under former 11 U.S.C. § 523(a)(8)(A), holding that a five-year period referred to in that statute began when the last payment was actually made. (Under former 11 U.S.C. § 523(a)(8), which applied before May 28, 1991, the first payment could not have come due within five years before the petition was filed.) In this case, the first installment had come due more than five years before the filing of the bankruptcy petition, but the debtor had made installment payments within two years prior to filing bankruptcy. The district court had reversed in part, allowing discharge only of those installments that had come due more than five years before the filing of the bankruptcy case.

The Ninth Circuit reversed, adopting the majority position that the entire unpaid loan balance, not just those installments that came due within five years immediately before filing of bankruptcy petition, is dischargeable if the first installment came due more than five years before date of filing of petition (*788 F.2d 617, 618-619)* .

[d] Liability From Drunk Driving or Piloting

Before November 15, 1990, *11 U.S.C. § 523(a)(9)* specified that in order for liability for driving while intoxicated to be nondischargeable, it had to be based on a judgment or consent decree and on operation of a motor vehicle while legally intoxicated. Nevertheless, in the Ninth Circuit, this requirement was not strictly construed [*see In re Hudson (9th Cir. 1988) 859 F.2d 1418, 1419-1424* (discussed *below*)].

Before the original enactment of *11 U.S.C. § 523(a)(9)* in 1984, liability arising from the operation of a motor vehicle while intoxicated was nondischargeable under *11 U.S.C. § 523(a)(6)* if it could be shown that the injury was willfully and maliciously inflicted. For discussion on *11 U.S.C. § 523(a)(6), see § 30.21*. For authorities describing the standard for determining when an act is willful and malicious, *see § 30.71*.

In ***In re Hudson*** *(9th Cir. 1988) 859 F.2d 1418* , the debtor filed a Chapter 7 bankruptcy petition the day before a

pending drunk driving lawsuit against him was to be tried. The drunk driving lawsuit was stayed. The debtor filed a complaint to determine dischargeability of the drunk driving claim. The bankruptcy court held that the debt arising from the drunk driving claim would be discharged because *11 U.S.C. § 523(a)(9)*, by its literal terms, exempts from discharge only those drunk driving claims that have been reduced to judgment before the filing of bankruptcy. The Bankruptcy Appellate Panel affirmed the bankruptcy court's decision. The plaintiffs in the drunk driving suit appealed the decision in their capacity as creditors of the bankruptcy estate.

The Ninth Circuit reversed. It noted that the instant case was the first time a federal appeals court had been called on to interpret the dischargeability provision of *11 U.S.C. § 523(a)(9)* (*859 F.2d 1418, 1419)* . The court examined the construction that other bankruptcy courts had given to *11 U.S.C. § 523(a)(9)*, and found that these courts uniformly followed the rule that a drunk driving claim need not be reduced to judgment before the debtor files for bankruptcy, in order for the debt to be declared nondischargeable under *11 U.S.C. § 523(a)(9)*. Any other conclusion, noted these courts, would encourage a drunk driver to file preemptively for bankruptcy once it became clear that he or she would be held civilly accountable for his or her actions (*859 F.2d 1418, 1420-1421)* . The court of appeals also examined the legislative history of *11 U.S.C. § 523(a)(9)*, and found that Congress had drafted the statute to deter drunk driving, to ensure that those who caused injury by driving drunk did not escape civil liability through the bankruptcy laws, and to protect the victims of drunk driving. The appellate panel's interpretation of *11 U.S.C. § 523(a)(9)*, noted the court, would advance none of these legislative goals (*859 F.2d 1418, 1423)* . The court remanded the case for further proceedings consistent with its opinion that a pre-petition judgment is not required for having a drunk driving-related debt declared nondischargeable (*859 F.2d 1418, 1424)* .

[e] Both Compensatory and Punitive Damages Nondischargeable

In re Adams *(9th Cir. 1985) 761 F.2d 1422* considered the standard for nondischargeability under *11 U.S.C. § 523(a)(6)* of liability for injuries inflicted by a debtor who was driving while intoxicated, which, before the effective date of the 1984 amendments, was the only basis on which drunk driving liability was nondischargeable. The injuries involved were inflicted in 1979, and the complaint to determine dischargeability was filed in 1983. The district court found the liability to be nondischargeable. The debtor appealed, and the court of appeals affirmed.

Appellant contended that because punitive damages are designed to punish a wrongdoer for conduct that is intentional, willful, and malicious, only punitive damages are nondischargeable. The court quoted from *Coen v. Zick (9th Cir. 1972) 458 F.2d 326, 329-330* , to the effect that the statutory exceptions to dischargeability are measured by the nature of the act and apply to all liability resulting from the act. The court concluded that both compensatory and punitive damages were subject to the findings of nondischargeability, whether pursuant to *11 U.S.C. § 523(a)(6)* or *(9)* (*761 F.2d 1422, 1427-1428)* .

[4] Additional Authorities

[a] Domestic Support

In *Leibowitz v. County of Orange (In re Leibowitz) (9th Cir. 2000) 217 F.3d 799* , the appellant was an absent parent who owed money to the county for child support payments made by the county prior to the entry of a child support order. He filed a Chapter 7 bankruptcy petition, listing the county as a creditor. After the bankruptcy court granted him a discharge of all dischargeable debts, he filed a complaint seeking to determine whether his reimbursement debt to the county was dischargeable. The county moved for summary judgment, arguing that recent amendments to the Bankruptcy Code rendered the debt nondischargeable. Specifically, the county cited former 11 U.S.C. § 523(a)(18), which prohibited the discharge of a debt owed under state law to a municipality, if the debt is "in the nature of support" and "enforceable under Part D of title IV of the Social Security Act." (The nondischargeability of such a debt is now covered, with more-general language, in *11 U.S.C. §§ 101(14A)* and *523(a)(5)*.) The parent opposed the motion, arguing that his debt to the county was neither "in the nature of support" nor enforceable under Title IV-D. The bankruptcy court

granted the county's motion for summary judgment. On appeal to the bankruptcy appellate panel, the parent reasserted his arguments. The panel rejected those arguments, and the parent appealed. The Ninth Circuit affirmed. The court noted that in *Visness v. Contra Costa County (9th Cir. 1995) 57 F.3d 775* and *In re Ramirez (9th Cir. 1986) 795 F.2d 1494* , an absent parent was held entitled to have such a debt discharged. However, in the Welfare Reform Act [Pub. L. No. 105-33 (Aug. 5, 1997)], Congress changed the bankruptcy and welfare laws to provide that a bankrupt debtor may not discharge a debt that is (1) owed under state law; (2) owed to a state or municipality; (3) in the nature of support; and (4) enforceable under Title IV-D of the Social Security Act (*217 F.3d 799, 802-803)* . That subsequent legislation led the court to conclude that now an absent parent who owes money to the county for child support payments is not entitled to discharge any portion of the debt, including the portion that may have accumulated before the entry of a court order (*217 F.3d 799, 800)* . The debt was "in the nature of support" even though it was no longer owed to the former spouse or children, since it derived from AFDC payments made to the former spouse and children (*217 F.3d 799, 803-804)* .

Because Title IV-D established a general framework for the collection and enforcement of child and spousal support debts by the states, it was unclear what Congress meant by the term "enforceable under Part D of Title IV" in former 11 U.S.C. § 523(a)(18). No other circuit had yet addressed the issue, and it was one of first impression before the Ninth Circuit (*217 F.3d 799, 804)* . The parent argued that a debt is enforceable under Title IV-D only if it falls within the parameters of *11 U.S.C. § 656(a)(1)*. The court of appeals held that a debt need not meet the criteria of *11 U.S.C. § 656(a)* in order to be enforceable under Title IV-D. *11 U.S.C. § 656(a)* is one of 21 sections within Title IV-D, and nothing in the language of the Welfare Reform Act or in the legislative history suggests that when Congress said "enforceable under Part D of Title IV," it really meant "enforceable under one small section of Title IV-D." The court said, "Indeed, it is hard to believe that Congress would use such broad language to refer to such a narrow provision. We think the more plausible interpretation is that when Congress used the term 'enforceable under Part D of Title IV,' it was referring to the type of debts the states are instructed to enforce and collect under Title IV-D, namely, debts for child and spousal support. This interpretation is more consistent with the broad language used by Congress and is supported by several structural characteristics of Title IV-D" (*217 F.3d 799, 805)* . Explaining one of those characteristics, the court said, "If Congress had intended this provision to apply only to debts that are enforceable under section 656(a), it seems likely [that Congress] would have used the language 'enforceable under this section.' But instead, Congress referred to debts that are 'enforceable under this part.' This is strong evidence that Congress intended to include all child and spousal support debts that the states are instructed to collect and enforce under Part D of Title IV" (*217 F.3d 799, 806)* .

In *County of Santa Cruz v. Cervantes (In re Cervantes) (9th Cir. 2000) 219 F.3d 955* , the court extended the rationale of Leibowitz v. County of Orange, discussed *above*, to a proceeding under Chapter 13 of the Bankruptcy Code. The debtor sought discharge of a debt owed to the county for pre-judgment AFDC payments, on the ground that governing provisions in Chapter 13 failed to make the debt nondischargeable. The bankruptcy court accepted that argument and granted the debtor's motion for summary judgment on the issue, which a bankruptcy appellate panel upheld on a procedural technicality. The county appealed. The Ninth Circuit reversed on the procedural technicality and reversed on the substantive issue. Although the governing Chapter 13 provisions might be construed as the debtor argued, those provisions do not exclusively control. The Social Security Act, as amended, provides that debts of the kind in question (debts "in the nature of support" and "enforceable under this part [Title IV-D]"), in other words, debts owed to counties for pre-judgment AFDC payments, are "not released by a discharge in bankruptcy under title 11 of the United States Code" (*42 U.S.C. § 656(b)*). Bankruptcy courts may not ignore that provision simply because it is not in the Bankruptcy Code. That provision is an independent basis on which to find a child-support debt nondischargeable in any bankruptcy proceeding (*219 F.3d 955, 962)* .

California Points & Authorities

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§ 30.21 Supporting Contention That Debt Is Nondischargeable and That Bankruptcy Court Has Exclusive Jurisdiction to Determine Dischargeability of Debts [11 U.S.C. § 523]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE DEBT IN QUESTION IS BASED ON _____ [*specify, e.g.,* FIDUCIARY DEFALCATION], WHICH IS NONDISCHARGEABLE UNDER PARAGRAPH _____ [*specify, e.g.,* (4)] OF *SECTION 523(a) OF TITLE 11 OF THE UNITED STATES CODE*, AND THE BANKRUPTCY COURT THEREFORE HAS EXCLUSIVE JURISDICTION TO DETERMINE DISCHARGEABILITY.

A. Bankruptcy Court Jurisdiction. District courts have original but not exclusive jurisdiction of all civil proceedings arising under, in, or related to cases under the Bankruptcy Code. Both bankruptcy cases and proceedings arising under, in, or related to them may be referred by the district court to the bankruptcy court, which has jurisdiction to enter final judgments only in bankruptcy cases and "core proceedings." A proceeding to determine the dischargeability of a particular debt is a core proceeding (*28 U.S.C. §§ 157(b)(1), (2)(I), 1334(a),* (b)).

B. Bankruptcy Court's Exclusive Jurisdiction. The bankruptcy courts have exclusive jurisdiction to determine dischargeability of debts enumerated at Section 523(a)(2), (4), and (6) of Title 11 of the United States Code, that is, debts for fraud or deception, debts for fiduciary fraud, embezzlement, or larceny, and debts for willful and malicious injury to a person or property (*11 U.S.C. § 523(c)(1)*; *In re Houtman (9th Cir. 1978) 568 F.2d 651, 653* ; *In re Aldrich (B.A.P. 9th Cir. 1983) 9 Collier Bankr. Cas. 2d 1073, 34 B.R. 776, 779*).

[*Optional*] **C. Fraud.** A debt for money, property, services, or an extension, renewal, or refinancing of credit is not dischargeable in bankruptcy to the extent obtained by false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or insider's financial condition (*11 U.S.C. § 523(a)(2)(A)*; *see Cohen v. De La Cruz*

(1998) 523 U.S. 213, 217-219, 118 S. Ct. 1212, 140 L. Ed. 2d 341 (phrase "to the extent obtained by" in *11 U.S.C. § 523(a)(2)(A)* modifies "money, property, services, or ...#x2026; credit", not "any debt", so that exception encompasses "any debt ...#x2026; for money, property, [etc.], to the extent [that the money, property, etc., was] obtained by" fraud; phrase thereby makes clear that share of money, property, or whatever that was so obtained gives rise to nondischargeable debt); *Field v. Mans (1995) 516 U.S. 59, 74-75, 116 S. Ct. 437, 133 L. Ed. 2d 351* (test of fraud is debtor's "justifiable reliance")).

[*If debtor engaged in a pre-filing "credit card spree," add:*]

[*EITHER*]

For purposes of Paragraph (2)(A) of *Section 523(a) of Title 11 of the United States Code*, consumer debts owed to a single creditor and aggregating more than $500 for luxury goods or services incurred by an individual debtor on or within 90 days before the order for relief are presumed to be nondischargeable (*11 U.S.C. § 523(a)(2)(C)(i)(I)*). "Luxury goods or services" do not include goods or services reasonably necessary for the support or maintenance of the debtor or a dependent of the debtor (*11 U.S.C. § 523(a)(2)(C)(ii)(II)*).

[*OR*]

For purposes of Paragraph (2)(A) of *Section 523(a) of Title 11 of the United States Code*, cash advances aggregating more than $750 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 70 days before the order for relief are presumed to be nondischargeable (*11 U.S.C. § 523(a)(2)(C)(i)(II)*). An extension of consumer credit under an open-end credit plan is to be defined in this context as it is defined in Section 103 of the Truth in Lending Act (*11 U.S.C. § 523(a)(2)(C)(ii)(I)*).

[*CONTINUE*]

[*Optional*] **D. Fraudulent Representation of Financial Condition.** A debt for money, property, services, or an extension, renewal, or refinancing of credit is not dischargeable in bankruptcy to the extent obtained by use of a statement in writing that is materially false, respecting the debtor's or an insider's financial condition, on which the creditor to whom the debtor is liable for the money, property, services, or credit justifiably relied, and which the debtor made or caused to be published with intent to deceive (*11 U.S.C. § 523(a)(2)(B)*; *see Cohen v. De La Cruz (1998) 523 U.S. 213, 217-219, 118 S. Ct. 1212, 140 L. Ed. 2d 341* (phrase "to the extent obtained by" in *11 U.S.C. § 523(a)(2)(A)* modifies "money, property, services, or ...#x2026; credit", not "any debt", so that exception encompasses "any debt ...#x2026; for money, property, [etc.], to the extent [that the money, property, etc., was] obtained by" fraud; phrase thereby makes clear that share of money, property, or whatever that was so obtained gives rise to nondischargeable debt)).

[*Optional*] **E. Fiduciary Defalcation.** A debt for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny is not dischargeable in bankruptcy (*11 U.S.C. § 523(a)(4)*).

[*Optional*] **F. Willful and Malicious Injury.** A debt for willful and malicious injury by the debtor to another entity or to the property of another entity is not dischargeable in bankruptcy (*11 U.S.C. § 523(a)(6)*).

[*Optional*] **G. Both Compensatory and Punitive Damages Nondischargeable.** [*See § 30.20, Paragraph M.*]

[*Optional*] **H. Creditor Action Required.** Except as provided in *Section 523(a)(3)(B) of Title 11 of the United States*

Code (unscheduled debts), the debtor is discharged from a debt of the kind specified in Paragraph (2), (4), or (6) of *Section 523(a) of Title 11 of the United States Code*, unless, on the request of the creditor to whom that debt is owed, and after notice and a hearing, the bankruptcy court determines the debt to be excepted from discharge under Paragraph (2), (4), or (6), as the case may be (*11 U.S.C. § 523(c)(1)*; *In re Marriage of Williams (1984) 157 Cal. App. 3d 1215, 1222, 203 Cal. Rptr. 909*).

[*Optional*] **I. Time for Filing Complaint to Determine Dischargeability.** A complaint to determine dischargeability of any debt pursuant to *Section 523(c)(1) of Title 11 of the United States Code* must be filed not later than 60 days following the first date set for the meeting of creditors held pursuant to *Section 341(a) of Title 11 of the United States Code* (*Fed. R. Bankr. P., Rule 4007(c)*; *In re Rhodes (B.A.P. 9th Cir. 1987) 71 B.R. 206, 207*).

[*Optional*] **J. Time for Filing Complaint to Determine Dischargeability in Chapter 13 Case.** On motion by a debtor for a discharge under Section 1328(b), the court must enter an order fixing a time for the filing of a complaint to determine the dischargeability of any debt pursuant to *Section 523(a)(6) of Title 11 of the United States Code* and must give not less than 30 days notice of the time fixed to all creditors (*Fed. R. Bankr. P., Rule 4007(d)*).

[*Optional*] **K. Authority to Reopen Case.** A bankruptcy case may be reopened in the court in which it was closed to consider a complaint to determine the dischargeability of a debt (*11 U.S.C. § 350(b)*; *Fed. R. Bankr. P., Rule 4007(a), (b)*; *In re Wright (Bankr. N.D. Ala. 1980) 3 Collier Bankr. Cas. 2d 284, 7 B.R. 197, 200*).

[*Optional*] **L. Debtor's Initial Burden of Proof.** [*See § 30.60, Paragraph E.*]

[*Optional*] **M. Preponderance Standard.** To preserve a debt[, including a debt based on fraud], from discharge, the creditor need only prove its claim by a preponderance of the evidence (*Grogan v. Garner (1991) 498 U.S. 279, 286-287, 111 S. Ct. 654, 112 L. Ed. 2d 755*).

[*Optional*] **N. Collateral Estoppel Effect of** [**Fraud**] **Judgment.** In determining whether a debt that is reduced to judgment [in state court] is nondischargeable, the bankruptcy court can give collateral estoppel effect to those elements of the claim that are identical to the elements required for nondischargeability and that were actually litigated and determined in the prior action [*Grogan v. Garner (1991) 498 U.S. 279, 285, 111 S. Ct. 654, 112 L. Ed. 2d 755* (abrogating cases that barred application of collateral estoppel to debts for which bankruptcy court had exclusive jurisdiction to determine dischargeability, that is, fraud, fiduciary defalcation, embezzlement, larceny, and willful and malicious injury, including *In re Houtman (9th Cir. 1978) 568 F.2d 651, 654-656)* ; *see In re Nourbakhsh (9th Cir. 1995) 67 F.3d 798* (fraud nondischargeability proceeding not excepted from collateral estoppel effect of prior state court fraud default judgment); *but see In re Daley (9th Cir. 1985) 776 F.2d 834, 837-839* (doctrine not applied to state court judgment based on stipulation); *In re Silva (B.A.P. 9th Cir. 1995) 190 B.R. 889* (doctrine not applicable to federal court judgment resulting to unopposed summary judgment motion)].

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that the bankruptcy court has jurisdiction to determine dischargeability of all debts (Paragraph A) and exclusive jurisdiction to determine the dischargeability of debts enumerated in *11 U.S.C. § 523(a)(2), (4),* and *(6)* (fraud or deception; fiduciary fraud, embezzlement, or larceny; willful and malicious injury to person or property) (Paragraph B). Counsel may combine Paragraph A or B with any of the optional Paragraphs C through G in this form or an optional paragraph in § 30.20 setting forth the statutory criteria for nondischargeability of the particular debt in question.

Paragraph C cites the "justifiable reliance" standard established by the United States Supreme Court in *Field v. Mans*

(1995) 516 U.S. 59, 74-75 ; *see § 30.68*, Discussion of Authorities, Fraud Other Than in Financial Statement. Before *Field* was decided, there were Ninth Circuit cases holding that a single "reasonable reliance" standard, as specified in *11 U.S.C. § 523(a)(2)(B)* [*see* Paragraph D], applied for exempting a claim from discharge under *11 U.S.C. § 523(a)(2)(A)* [*see In re Siriani (9th Cir. 1992) 967 F.2d 302, 304]* . There were also Ninth Circuit cases holding that the common-law "justifiable reliance" standard should be applied under *11 U.S.C. § 523(a)(2)(A)* (other than in a written financial statement) because that provision does not specify a standard [*see* Paragraph C; *In re Kirsh (9th Cir. 1992) 973 F.2d 1454, 1458*].

The authority in optional Paragraph G applies only to punitive damages based on debts that are nondischargeable under *11 U.S.C. § 523(a)(6)* (willful and malicious injury) or *11 U.S.C. § 523(a)(9)* (driving while intoxicated). Punitive damages based on fraud (*11 U.S.C. § 523(a)(2)*) are dischargeable; for authorities addressing that issue, *see § 30.61*. For additional authorities addressing nondischargeability of debts based on willful and malicious injury, *see § 30.71*.

Optional Paragraph H is for use when a debt of the type specified at *11 U.S.C. § 523(a)(2), (4)*, or *(6)* has been discharged because of the creditor's inaction. Optional Paragraphs I and J may be used to establish that the time for filing the complaint to determine nondischargeability is past or that a complaint was not timely filed [*but see 11 U.S.C. § 523(c)(2)* (exception for depository institution receiver not appointed in time)]. Although a complaint to determine dischargeability must be filed within the applicable period, no trial will be held until the debtor has been granted a general discharge, because dischargeability of a particular debt will be moot if general discharge is denied [*see* Collier on Bankruptcy (15th ed.) § 523.21 (Matthew Bender)].

Optional Paragraph I may be used in any Chapter 7, 11, 12, or 13 case. Except as noted in the next sentence, in any Chapter 7, 11, 12, or 13 case, a complaint to determine dischargeability under *11 U.S.C. § 523(c)* must be filed within 60 days of the first date set for the meeting of creditors [*Fed. R. Bankr. P., Rule 4007(c)*]. An exception exists when a Chapter 13 debtor moves for a hardship discharge [*see 11 U.S.C. § 1328(b)*] and the dischargeability of a debt arising from willful and malicious injury [*see 11 U.S.C. § 523(a)(6)*] is at issue. In that situation, Optional Paragraph J is appropriate, and the court will enter an order fixing the time to file a complaint to determine the dischargeability of the debt and must give all creditors not less than 30 days notice of the time fixed [*Fed. R. Bankr. P., Rule 4007(d)*].

Optional Paragraph K may be submitted in support of the contention that the bankruptcy court should reopen the case to allow the filing and trial of a complaint to determine dischargeability of a debt. Either the debtor or a creditor may petition to reopen the case to determine dischargeability [*see 11 U.S.C. § 350(b)*; *Fed. R. Bankr. P., Rule 4007(a)*], but the time for filing a complaint to determine dischargeability of debts enumerated at *11 U.S.C. § 523(a)(2), (4)*, and *(6)* will usually have expired by the time the case is closed [*see Fed. R. Bankr. P., Rule 4007(b)-(d)*; *see also In re Daniels (B.A.P. 9th Cir. 1983) 34 B.R. 782, 783-784]* .

Optional Paragraphs L, M and N may be applicable in a particular situation when the burden of proof for the collateral estoppel effect of any earlier judgment is at issue. The collateral estoppel effect of judgments (Paragraph N) is an unsettled area of law. Note that when the judgment against the debtor is based solely on the debtor's "deemed admissions" in a case that the debtor started but then made no further attempt to pursue, the issues embraced by the judgment cannot be treated as "actually litigated" [*United States IRS v. Palmer (In re Palmer) (9th Cir. 2000) 207 F.3d 566, 568]* .

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should describe the debt in question and any judgment or agreement from which it arises. The factual description should cover each element necessary to establish nondischargeability, or, if these points and authorities are used to support the contention that the debt in question is discharged, the factual description and argument should emphasize the nondischargeability criteria that have not been satisfied.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context

in which counsel wishes to raise the substantive issue that the bankruptcy court has jurisdiction to determine nondischargeability.

[3] Discussion of Authorities

[a] Bankruptcy Court's Exclusive Jurisdiction

11 U.S.C. § 523(c)(1) does not apply to a federal depository institution's regulatory agency seeking (in its capacity as conservator, receiver, or liquidating agent for an insured depository institution) to recover a debt described in *11 U.S.C. § 523(a)(2), (4), (6),* or *(11)* owed to the institution by an institution-affiliated party unless the receiver, conservator, or liquidating agent (or the federal depository institution's regulatory agency acting in its capacity as a successor to that receiver, conservator, or liquidating agent) was appointed in time to comply with those requirements reasonably [*11 U.S.C. § 523(c)(2)*].

In re Houtman *(9th Cir. 1978) 568 F.2d 651* , which was decided before the effective date of the Bankruptcy Reform Act of 1978, considered an appeal from a district court order affirming a bankruptcy court decision that a state court judgment was nondischargeable on the ground that it represented liability for money or property obtained by false pretenses or false representations. The issues before the court of appeals were whether the bankruptcy court had given conclusive weight to the documents depicting the state court proceeding and, if it had, did its action amount to failure to exercise its exclusive jurisdiction to determine dischargeability. In considering that contention, the court of appeals reviewed the history of the bankruptcy court's exclusive jurisdiction, noting that the 1970 Amendments to the Bankruptcy Act imposed on the bankruptcy courts exclusive jurisdiction to determine dischargeability of those debts then enumerated at Section 17(a)(2) (fraud or deception), (4) (fiduciary fraud, embezzlement, or larceny), and (8) (willful and malicious injury to person or property) of the Bankruptcy Act (former 11 U.S.C. § 35(a)(1), (2), (8)) (*568 F.2d 651, 653)* .

In re Aldrich *(B.A.P. 9th Cir. 1983) 9 Collier Bankr. Cas. 2d 1073, 34 B.R. 776* is discussed in *§ 30.20[3][a]*.

[b] Creditor Action Required

The facts and procedural background of ***In re Marriage of Williams*** *(1984) 157 Cal. App. 3d 1215, 203 Cal. Rptr. 909* are discussed in *§ 30.21[4][a]*. After noting that the bankruptcy court had exclusive jurisdiction to determine dischargeability of the debts in question since they were based on fraud, the court of appeal noted the further requirement of former 11 U.S.C. § 523(c) [*now see 11 U.S.C. § 523(c)(1)*] that a creditor who is owed a debt that may be excepted from discharge under *11 U.S.C. § 523(a)(2), (4),* or *(6)* initiate proceedings in the bankruptcy court for determination as to whether the debt will be excepted from discharge. The creditor must request that this determination be made. If the creditor fails to request that this determination be made, the debt is discharged (*157 Cal. App. 3d 1215, 1222)* .

[c] Time for Filing Complaint to Determine Dischargeability

In ***In re Rhodes*** *(B.A.P. 9th Cir. 1987) 71 B.R. 206* , the Bankruptcy Appellate Panel affirmed the bankruptcy court's dismissal of a complaint to determine dischargeability of a debt under former 11 U.S.C. § 523(c) [*now see 11 U.S.C. § 523(c)(1)*]. The complaint was filed one day after the deadline for filing complaints. The creditors' attorney sent the complaint by messenger on the last day for filing complaints, but did not instruct the messenger that the complaint had to be filed that day. It was filed the next day. The creditors argued that the court had authority to extend the time for filing the complaint based on excusable neglect. The court disagreed and said that unlike former law, the current Bankruptcy Rules, specifically *Fed. R. Bankr. P., Rule 4007(c),* do not permit an extension for excusable neglect unless the extension itself is sought before the time has expired (*71 B.R. 206, 208)* .

[d] Authority to Reopen Case

The creditor that had made a student loan to the debtor in ***In re Wright*** *(Bankr. N.D. Ala. 1980) 3 Collier Bankr. Cas. 2d 284, 7 B.R. 197* , filed a motion in the bankruptcy court to set aside the discharge. That motion was treated as a petition to reopen the case to seek a determination of the dischargeability of the student loan. The bankruptcy court first considered the debtor's contention that the time allowed for determination of the dischargeability of the loan had passed. The court disagreed and stated that student loans are not within the limitation of *11 U.S.C. § 523(c)(1)* (*7 B.R. 197, 199-200)* . The bankruptcy court stated that its authority under *11 U.S.C. § 350(b)* to "accord relief to the debtor" even after the case was closed also allows it to provide relief to the creditor and required the debtor to answer (*7 B.R. 197, 200)* .

11 U.S.C. § 350(b) provides that a case may be reopened in the court in which it was closed to administer assets, to accord relief to the debtor, or for other cause.

Fed. R. Bankr. P., Rule 4007(a) provides that a debtor or any creditor may file a complaint with the bankruptcy court to obtain a determination of the dischargeability of any debt.

Fed. R. Bankr. P., Rule 4007(b) provides that a complaint to determinate dischargeability other than under *11 U.S.C. § 523(c)(1)* may be filed at any time and that a case may be reopened without payment of an additional filing fee for the purpose of filing a complaint to determine dischargeability.

[e] Preponderance Standard

Plaintiff in ***Grogan v. GarnerGrogan v. Garner*** *(1991) 498 U.S. 279* sued defendant alleging fraud in connection with the sale of securities and was awarded a judgment, including punitive damages, based on jury instructions that authorized recovery based on the preponderance of evidence. The Eighth Circuit Court of Appeals reduced the damages award, but affirmed the judgment. Plaintiff then filed a complaint in the bankruptcy court requesting a determination that the judgment was nondischargeable. In support of the complaint, plaintiff introduced portions of the record in the fraud case. The bankruptcy court found that all of the elements required to establish fraud under *11 U.S.C. § 523(a)(2)* had been proved and that the doctrine of collateral required a holding that the debt was not dischargeable. Defendant appealed to the District Court, contending that collateral estoppel did not apply because the jury instructions in the original trial only required the fraud to be proved by a preponderance of the evidence while *11 U.S.C. § 523(a)* requires proof by clear and convincing evidence. The district court rejected that argument, but the court of appeals reversed.

The Eighth Circuit reasoned that although the Code was silent regarding the burden of proof required to establish discharge, the clear and convincing standard had always been applied in fraud cases and that tougher standard was required in keeping with the policy of bankruptcy to provide the debtor a fresh start. The U.S. Supreme Court granted certiorari to resolve the conflict among the circuits and reversed the court of appeals.

The Supreme Court first noted that there is a distinction between the standard of proof a creditor must satisfy in order to establish its claim and the standard it must satisfy to establish the nondischargeability of its claim (*112 L. Ed. 2d 755, 762-763)* . The validity of the creditor's claim is determined by rules of state law. However, the issue of nondischargeability is a matter of federal law (*112 L. Ed. 2d 755, 763)* . The silence of *11 U.S.C. § 523* regarding the appropriate standard of proof is inconsistent with the view that Congress intended to require a special, heightened standard (*112 L. Ed. 2d 755, 764*). If the preponderance standard governs the question of dischargeability, the bankruptcy court could properly give collateral estoppel effect to the original fraud judgment. If the clear and convincing standard applies, the prior judgment could not be given collateral estoppel effect. Then, creditors from jurisdictions that required fraud to be proved by clear and convincing evidence would be entitled to have prior judgments given collateral estoppel effect, but creditors from jurisdictions that allowed fraud recovery on a preponderance of the evidence would have to establish their claim again in the bankruptcy court. Because the preponderance of the evidence standard results in roughly equal allocation of the risk or error between litigants, the

Court presumed this standard applies in civil actions between private litigants unless particularly important individual interests or rights are at stake. The Court was unpersuaded that the clear and convincing standard was necessary to support the policy of bankruptcy to give debtors a fresh start (*112 L. Ed. 2d 755, 764-765)* . Nor did the Court think it appropriate that the dischargeability of one type of debt be determined by a different standard than the other types of debts enumerated in *11 U.S.C. § 523(a)* (*112 L. Ed. 2d 755, 765)* .

The Court discussed the historical basis for requiring clear and convincing evidence to except a fraud claim from discharge. Before the 1970 amendments, many courts applied a preponderance standard to fraud claims. The 1970 amendments made the question of nondischargeability a question of federal law (*112 L. Ed. 2d 755, 766)* . Following the 1970 amendments but before enactment of *11 U.S.C. § 523* in 1978, courts remained about evenly split over the appropriate standard of proof. The Court said it was not reasonable to conclude that in enacting *11 U.S.C. § 523* Congress silently endorsed a background rule that clear and convincing evidence is required to establish exemption from discharge. Thus, the Court held that the standard of proof for the dischargeability of exceptions in *11 U.S.C. § 523(a)* is the ordinary preponderance of the evidence standard (*112 L. Ed. 2d 755, 767)* .

[f] Collateral Estoppel Effect of [Fraud] Judgment

Grogan v. Garner *(1991) 498 U.S. 279, 111 S. Ct. 654, 112 L. Ed. 2d 755* is discussed in*§ 30.21[3][e]*.

[4] Additional Authorities

[a] Bankruptcy Court's Exclusive Jurisdiction

The court in *In re Marriage of Williams (1984) 157 Cal. App. 3d 1215, 203 Cal. Rptr. 909* reversed the trial court's quashing of a writ of execution and allowance of offset. One spouse (the "debtor spouse") levied on the creditor spouse's savings account to satisfy his obligation to pay her a portion of his retirement benefits. The debtor spouse had obtained discharge in bankruptcy of the community debts assigned to her and of her debt payable to the creditor spouse equalizing the division of community property. The creditor spouse sought to quash the levy and to offset the amount of the discharged debts against the arrearages in retirement income payments. The trial court found that the debtor spouse had committed fraud in the dissolution action by failing to disclose transfers of certain property, allowed the setoff, and quashed execution. The court of appeal reversed, concluding that *11 U.S.C. § 524(a)(2)* prohibits the allowance of an offset against a discharged debt (*157 Cal. App. 3d 1215, 1223-1224)* . Before reaching that conclusion, the court of appeal, citing *Houtman* and noting that the Bankruptcy Reform Act of 1978 renumbered Section 17(a)(2), (4), and (8) of the Bankruptcy Act as *11 U.S.C. § 523(a)(2), (4),* and *(6),* determined that since the only basis for denying dischargeability of the debts in question was fraud, the bankruptcy court had exclusive jurisdiction to determine dischargeability (*157 Cal. App. 3d 1215, 1221-1222)* .

[b] Fraud

The Ninth Circuit Court of Appeals in *In re Franklin (9th Cir. 1991) 922 F.2d 536* affirmed a Bankruptcy Appellate Panel reversing the bankruptcy court's summary judgment in favor of the debtor and remanding for trial to determine dischargeability of a lender's fraud claim [*see 11 U.S.C. § 523(a)(2)*]. The fraud claim was based on misrepresentations relating to the validity of accounts receivable that secured a loan. After an additional advance, the debtor's residence was also pledged as security. The lender foreclosed on the debtor's residence, and the debtor claimed that further action by the creditor was barred by *Code Civ. Proc. § 580a* (antideficiency). The Ninth Circuit disagreed (*922 F.2d 536, 543)* .

The Ninth Circuit in *In re Lansford (9th Cir. 1987) 822 F.2d 902* , reversed the Bankruptcy Appellate Panel's determination of dischargeability of a community claim under *11 U.S.C. § 524* with respect to a debt incurred by submitting a false financial statement. The debt was not discharged as against either the spouse who actually submitted the false financial statement or the other spouse. The other spouse had signed other documents comprising the

transaction that contained misrepresentations, including repetition of one of the more egregious misrepresentations contained in the financial statement (*822 F.2d 902, 904-905)* . The bankruptcy court's original finding of nondischargeability as against both spouses was never challenged on the basis of insufficient evidence against the nonsubmitting spouse, and a challenge on appeal was too late (*822 F.2d 902, 905)* .

The United States Supreme Court has resolved a dispute among the circuits regarding reliance in fraud cases. The standard for excepting a debt from discharge as fraudulent under *11 U.S.C. § 523(a)(2)(A)* is justifiable reliance [*Field v. Mans (1995) 516 U.S. 59, 116 S. Ct. 437, 133 L. Ed. 2d 351, 365* ; *see* discussion in *§ 30.68*].

[c] Authority to Reopen Case

In affirming the dismissal of a complaint to determine dischargeability under *11 U.S.C. § 523(a)(2)*, which had been filed too late, the bankruptcy appellate panel in *In re Daniels (B.A.P. 9th Cir. 1983) 34 B.R. 782* noted its authority under *11 U.S.C. § 350(b)* to reopen the case, but held that reopening the case did not extend the time for filing the complaint to determine dischargeability (*34 B.R. 782, 784)* .

California Points & Authorities

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 30 BANKRUPTCY
PART II. FORMS
A. Jurisdiction and Procedure

2A-30 California Points & Authorities §§ 30.22-30.39

AUTHOR: Reviewed By John A. Vos

[Reserved]

§§ 30.22[Reserved]

California Points & Authorities

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 30 BANKRUPTCY
PART II. FORMS
B. Sanctions for Attempt to Enforce Discharged Debt

2A-30 California Points & Authorities § 30.40

AUTHOR: Reviewed By John A. Vos

§ 30.40 Supporting Contention That Creditor Is Enjoined From Attempting to Enforce Debt Against Discharged Debtor or Community Property [11 U.S.C. § 524]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE JUDGMENT THAT PLAINTIFF SEEKS TO ENFORCE ESTABLISHED DEFENDANT'S PERSONAL LIABILITY WITH RESPECT TO A DEBT THAT WAS DISCHARGED IN BANKRUPTCY, AND THE JUDGMENT IS TO THAT EXTENT VOID. ALL ATTEMPTS TO COLLECT THAT DEBT, INCLUDING BY ENFORCEMENT OF THAT JUDGMENT, ARE PERMANENTLY ENJOINED BY OPERATION OF LAW.

A. Discharge Operates as Injunction. A discharge in a bankruptcy case voids any judgment obtained before, during, or after the bankruptcy, to the extent that the judgment is a determination of the personal liability of the debtor with respect to any discharged debt _____ [*add, if appropriate:*, whether or not discharge of the debt was waived, expressly or by conduct]. The discharge operates as an injunction against the commencement or continuation of an action, the employment of process, or any other act, to collect, recover, or offset any discharged debt as a personal liability of the debtor _____ [*add, if appropriate:*, whether or not discharge of the debt was waived] (*11 U.S.C. § 524(a)(1), (2)*; *Lone Star Security & Video, Inc. v. Gurrola (In re Gurrola) (9th Cir. BAP 2005) 328 B.R. 158, 164* ; *Mathews Cadillac, Inc. v. Phoenix of Hartford Ins. Co. (1979) 90 Cal. App. 3d 393, 396-397, 153 Cal. Rptr. 267*).

B. Injunction of Collection Attempts or State Court Proceeding. If a creditor institutes a state court action, or otherwise attempts to collect a discharged debt, the bankruptcy court can enjoin the _____ [state court _____ (action *or* proceeding) *or* collection attempts] (*In re Whitaker (Bankr. M.D. Tenn. 1982) 5 Collier Bankr. Cas. 2d 1566, 16 B.R. 917, 920-921*).

[*Optional*] **C. Affirmative Defense Not Required.** A debtor who has been discharged is not required to assert the

discharge as an affirmative defense in a state court action (*Mathews Cadillac, Inc. v. Phoenix of Hartford Ins. Co. (1979) 90 Cal. App. 3d 393, 396-397, 153 Cal. Rptr. 267*).

[*Optional*] **D. Discharge of Community Claims.** A discharge granted to a debtor in bankruptcy operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover from, or offset against, community property of the debtor and the debtor's spouse of the kind specified in *Section 541(a)(2) of Title 11 of the United States Code* that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under Section 523, 1228(a)(1), or 1328(a)(1) of Title 11 of the United States Code, or that would be so excepted, determined in accordance with Section 523(c) and (d) of Title 11 of the United States Code, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on the community claim is waived (*11 U.S.C. § 524(a)(3)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that debtor's discharge in bankruptcy renders a judgment on a discharged debt void and constitutes a permanent injunction against any and all attempts to collect discharged debts (Paragraph A), thus allowing the bankruptcy court to enforce that injunction (Paragraph B). Paragraph C may be used to establish that a debtor is no longer required to plead the discharge as an affirmative defense. Paragraph D is for use when the creditor seeks to satisfy the obligation from the community property of the spouse of the bankrupt.

Note that the discharge does not operate as an injunction against an act by a creditor that is the holder of a secured claim. If the creditor retains a security interest in real property that is the principal residence of the debtor, the act by the creditor is in the ordinary course of business between the creditor and the debtor, and that act is limited to seeking or obtaining periodic payments associated witha valid security interest in lieu of pursuit of in rem relief to enforce the lien [*11 U.S.C. § 524(j)*]. If there is a willful failure of a creditor to credit payments received under a plan confirmed under the Bankruptcy Code, unless the order confirming the plan is revoked, the plan is in default. If the creditor has not received payments required to be made under the plan in the manner required by the plan (including crediting the amounts required under the plan), this will constitute a violation of the implicit injunction under *11 U.S.C. § 524(a)(2)* if the act of the creditor to collect and failure to credit payments in the manner required by the plan caused material injury to the debtor [*11 U.S.C. § 524(i)*].

Counsel should insert argument linking these points and authorities with the facts of the case; for example, argument that the debt in question was scheduled in the bankruptcy case, that no proceedings were had or are pending to except the particular debt from discharge, that the order of discharge was granted, attaching a copy, and that notice of discharge was given to the particular creditor pursuant to *Fed. R. Bankr. P., Rule 4004(g)*.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the debtor's discharge in bankruptcy voids any judgment constituting personal liability against the debtor and constitutes a permanent injunction against the collection of discharged debts.

[3] Discussion of Authorities

[a] Discharge Operates as Injunction

In ***Lone Star Security & Video, Inc. v. Gurrola (In re Gurrola)*** *(9th Cir. BAP 2005) 328 B.R. 158* , a homeowner sued a business, charging breach of a contract for installation and monitoring of a home alarm system. While the action was pending, the homeowner filed a Chapter 7 petition. The contract lawsuit was properly listed in a schedule, but the

defendant company inadvertently was omitted from the list of creditors, and consequently the company never received notice of the bankruptcy proceeding. Although the homeowner did not further prosecute the action, in due course the company filed a counterclaim to collect sums allegedly due under the contract, which the homeowner had withheld. The court, being unaware of the bankruptcy proceeding, subsequently entered a default judgment against the homeowner on the counterclaim. After learning about the bankruptcy proceeding, the company took the position that the homeowner had waived his right to rely on the bankruptcy discharge, and the company persisted in efforts to enforce the judgment. Eventually the bankruptcy court was drawn into the controversy through the present adversary proceeding by the company, and that court ruled that the homeowner could not be estopped to assert his discharge. The company appealed.

The bankruptcy appellate panel affirmed and stated that as a matter of plain English, the language of *11 U.S.C. § 524(a)(1)* is both unambiguous and absolute as to questions of effect, time, and waiver. The status of a judgment as void implies that it is a judgment that may be disregarded as a nullity and cannot be enforced. Such a judgment is subject to collateral attack whenever and wherever it might be invoked. The phrase "at any time obtained" plainly means that judgments voided by the discharge include judgments obtained before, during, and after the bankruptcy. The phrase "whether or not discharge of such debt is waived" similarly nullifies all putative waivers of specific debts and appears to encompass both express waivers and waivers by conduct (*328 B.R. 158, 164)* . The court gave a thorough review of cases and legislation, starting in the nineteenth century, to show how the current statutory policy evolved. Before 1970, the bankruptcy discharge was merely an affirmative defense that was waived if not timely asserted in subsequent litigation. Creditors could flout the discharge by suing and hoping that the defense was not timely raised. However, a major purpose of the Bankruptcy Act enacted in 1970 (which created the predecessor of the current statute) was to change the discharge from being an affirmative defense to being an absolute defense (*328 B.R. 158, 165-170)* .

Mathews Cadillac, Inc. v. Phoenix of Hartford Ins. Co. *(1979) 90 Cal. App. 3d 393, 153 Cal. Rptr. 267* is discussed in *§ 30.40[3][c]*.

Counsel should note that there is some authority that the prohibition in *11 U.S.C. § 524(a)(2)* against setoff only applies to post-petition debts and that a mutual pre-petition debt owed by a creditor may be offset against a discharged pre-petition debt [*see In re Conti (Bankr. E.D. Va. 1985) 12 Collier Bankr. Cas. 2d 1472, 50 B.R. 142, 149* ; *see § 30.41[4][a]*].

A bank can place a temporary administrative hold on a debtor's account without creating an impermissible "setoff" that violates the automatic stay provisions of *11 U.S.C. § 362(a)(7)* [*Citizens Bank of Maryland v. Strumpf (1995) 516 U.S. 16, 19-20, 116 S. Ct. 286, 133 L. Ed. 2d 258]* .

[b] Injunction of Collection Attempts or State Court Proceeding

In re Whitaker *(Bankr. M.D. Tenn. 1982) 5 Collier Bankr. Cas. 2d 1566, 16 B.R. 917* , was an adversary proceeding in the bankruptcy court commenced by the debtor after discharge to enjoin a creditor and a district attorney from continuation of a criminal proceeding arising out of a bad check given by the debtor to the creditor. The creditor was scheduled in the debtor's bankruptcy, but did not request a determination of dischargeability of the debt. The creditor argued that the charge was grounded in fraud. The bankruptcy court concluded without discussion that the dischargeability of the claim was determined in the bankruptcy court (*16 B.R. 917, 921 n.4*), and determined that it had authority under *11 U.S.C. § 105(a)*, which provides that it may issue any order necessary or appropriate to carry out the provisions of Title 11, to issue temporary and permanent injunctions (*16 B.R. 917, 920-921)* . Even though this case arose during the transition period (October 1, 1979 through March 31, 1984) during which a bankruptcy court could not enjoin another court, the creditor and the district attorney were the entities enjoined (*16 B.R. 917, 920, 920 n.2, 921-923)* .

The bankruptcy court cited legislative history of *11 U.S.C. § 524(a)(2)* to the effect that the changes made by the 1978

amendments were to ensure that the debtor would not be pressured "in any way" (*16 B.R. 917, 921)* . Because the district attorney had offered to drop the charges if the debtor would make restitution to the creditor, the bankruptcy court concluded that the primary purpose of the criminal prosecution was to recover a dischargeable debt. That being the case, the bankruptcy court found that the issuance of the injunction was necessary to effectuate the judgment of discharge (*16 B.R. 917, 922)* .

Counsel should note that *Whitaker* may represent a minority opinion. One federal court of appeals has held that a criminal prosecution may be enjoined only in extraordinary circumstances when a subversion of the criminal process to collect debt is found [*see Barnette v. Evans (11th Cir. 1982) 673 F.2d 1250, 1252* (prosecution on grand jury indictment for bad checks)]. Other courts have rejected the "primary motivation" test and have refused to enjoin the criminal prosecution unless there is a showing of bad faith or harassment [*In re Davis (3d Cir. 1982) 691 F.2d 176, 179* ; *In re Taylor (Bankr. D. Md. 1984) 11 Collier Bankr. Cas. 2d 1028, 1031, 44 B.R. 548, 549]* .

[c] Affirmative Defense Not Required

Plaintiff in ***Mathews Cadillac, Inc. v. Phoenix of Hartford Ins. Co.*** *(1979) 90 Cal. App. 3d 393, 153 Cal. Rptr. 267* sought to recover damages for construction defects from the construction company and its insurer. The construction company did not answer and its default was taken, although no judgment was entered against it. The construction company had obtained a discharge in bankruptcy, although it had not listed plaintiff as a creditor. More than five years after the complaint was filed, the insurer moved for dismissal under former Code Civ. Proc. § 581a(c). The motion was granted and a judgment of dismissal was entered. Plaintiff appealed.

The court of appeal affirmed. The court of appeal reviewed the legislative history and the effect of the 1970 amendments to the Bankruptcy Act, setting forth the provisions added as former 11 U.S.C. § 32(f), which have been carried forward as *11 U.S.C. § 524(a)(1), (2)*. The court noted that the primary reason for the amendment was so that a discharged debtor would no longer have to plead the discharge as an affirmative defense in a state court action. Any judgment obtained in violation of the discharge order and injunction is void as a determination of personal liability of the bankrupt, though valid liens can still be enforced against the discharged debtor's property (*90 Cal. App. 3d 393, 396-397, 397 n.4*). The court continued by stating that judgment could be entered against the discharged debtor, but that the state court would then be required to enter a perpetual stay of execution in favor of the discharged debtor. Such a judgment would be necessary in order to fix the liability of the insurer (*90 Cal. App. 3d 393, 397-398)* . Regarding the failure to list the plaintiff as a creditor in the bankruptcy, the court said that was further reason to support the dismissal (*90 Cal. App. 3d 393, 399)* . The implication was that dischargeability should have been raised by the plaintiff in the state court action.

[d] Discharge of Community Claims

11 U.S.C. § 524(a)(3) is qualified by *11 U.S.C. § 524(b)*, which provides that *11 U.S.C. § 524(a)(3)* does not apply if the debtor's spouse has commenced a bankruptcy case within six years before the date of the filing of the petition in the debtor's case and the court does not grant the debtor's spouse a discharge in that case [*11 U.S.C. § 524(b)(1)*], or if the debtor's spouse would have been denied a discharge had the spouse commenced a Chapter 7 case at the same time the debtor commenced his or her case, and a determination that the court would not grant such a discharge is made by the bankruptcy court within the time and in the manner provided for a determination under *11 U.S.C. § 727* of whether a debtor is granted a discharge [*11 U.S.C. § 524(b)(2)*].

[4] Additional Authorities

[a] Discharge Operates as Injunction

In re Marriage of Williams (1984) 157 Cal. App. 3d 1215, 203 Cal. Rptr. 909 (*see § 30.21*, Additional Authorities, Bankruptcy Court's Exclusive Jurisdiction) is authority for the contention that *11 U.S.C. § 524(a)(2)* prohibits the

allowance of an offset against a discharged debt (*157 Cal. App. 3d 1215, 1223-1224)* .

[b] Injunction of Collection Attempts or State Court Proceeding

In *Hurley v. Bredehorn (1996) 44 Cal. App. 4th 1700, 52 Cal. Rptr. 2d 615* , creditors had successfully recovered attorney fees from the debtor and filed an appeal in state court from an order granting the debtor's motion to tax costs, before the debtor filed a petition for relief under Chapter 7. The creditors conceded that the discharge order released the debtor from personal liability for the attorney fee award which was the subject of the appeal. However, they argued that because the bankruptcy court had the power to modify the discharge order to allow the state court action to proceed, the state court appeal was not rendered moot. The court of appeal granted the creditors 60 days to obtain a modification of the discharge order in the bankruptcy court and enjoined the appeal pending the bankruptcy court's order (*44 Cal. App. 4th 1700, 1705-1706)* .

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
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PART II. FORMS
B. Sanctions for Attempt to Enforce Discharged Debt

2A-30 California Points & Authorities § 30.41

AUTHOR: Reviewed By John A. Vos

§ 30.41 Supporting Contention That Debtor Is Entitled to Sanctions Against Creditor for Attempt to Collect Discharged Debt [11 U.S.C. § 524]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____'s [*name of creditor*] ATTEMPT TO COLLECT THIS DEBT AMOUNTS TO CIVIL CONTEMPT AND ENTITLES _____ [*name of debtor*] TO MONETARY SANCTIONS.

A. Discharge Operates as Injunction. [*See § 30.40, Paragraph A.*]

B. Violation Is Basis for Sanctions. Civil contempt is an appropriate sanction for a creditor's violation of the implicit injunction resulting from the order of discharge, when the creditor attempts to collect a discharged debt. [Such contempt may arise from the creditor's use of criminal process to aid in or coerce the collection of a discharged debt.] A creditor who is guilty of violating that injunction may be required to pay the debtor an amount equal to the debtor's costs of defending any action on the discharged debt and of seeking relief in the bankruptcy court, as well as reasonable attorney's fees, and in egregious cases, additional monetary sanctions (*In re Myers (Bankr. E.D. Va. 1982) 6 Collier Bankr. Cas. 2d 347, 18 B.R. 362, 363-364* ; *In re Whitaker (Bankr. M.D. Tenn. 1982) 5 Collier Bankr. Cas. 2d 1566, 16 B.R. 917, 923*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the debtor is entitled to costs and sanctions for a creditor's violation of the injunction of the discharge order by attempting to collect a discharged debt. If the creditor has instituted criminal proceedings arguably to coerce collection of a discharged debt, the optional sentence

regarding criminal proceedings should be used [*see In re Whitaker (Bankr. M.D. Tenn. 1982) 5 Collier Bankr. Cas. 2d 1566, 16 B.R. 917]* .

Counsel should insert argument linking these points and authorities with the facts of the case; for example, argument that the debt in question was scheduled in the bankruptcy case, that no proceedings were had or are pending to except the particular debt from discharge, that the order of discharge was granted, attaching a copy, and that notice of discharge was given to the particular creditor pursuant to *Fed. R. Bankr. P., Rule 4004(g)*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the bankruptcy court can assess sanctions for violation of the injunction of the discharge order.

[3] Discussion of Authorities

[a] Violation Is Basis for Sanctions

The debtors in ***In re Myers*** *(Bankr. E.D. Va. 1982) 6 Collier Bankr. Cas. 2d 347, 18 B.R. 362* reopened their case after discharge to seek an injunction and contempt against a finance company, holder of a claim on a debt that had been discharged. Although the debt was secured by a nonpossessory, nonpurchase-money lien on household furniture, which could have been avoided by the debtors under *11 U.S.C. § 522(f)*, the debtors had not sought to avoid the lien during the pendency of the case. The bankruptcy court noted that a case may be reopened after discharge to allow filing of a complaint to avoid a lien (*18 B.R. 362, 362)* . The finance company had commenced a state court action for possession of the property, or, alternatively, its value. Of special concern to the court was the fact that the finance company had checked not the "actual value of the items" blank of the state action but the one marked "amount due under a written contract of sale," and entered there $3,389.10, which the court referred to as a grossly exaggerated figure (representing the value of the property at the time the loan was made) agreed to by the debtors at the time the loan was granted. Even more scandalous, the bankruptcy court noted, was the representation of debtor's counsel that this was a practice the creditor had followed in other cases (*18 B.R. 362, 363)* .

The bankruptcy court found that the finance company had willfully violated the stay and was in contempt. The fact that the state court action was nonsuited did not alter matters. The court said the abuse could not be washed away after the hand had been caught in the proverbial cookie jar (*18 B.R. 362, 363)* . The court noted that the finance company was a sophisticated creditor and knows better. A discharge order is not to be thwarted. The bankruptcy courts mean for their discharge orders to be honored, and they will not be unless the point is emphasized, which the court found it would be by imposition of $10,000 in sanctions and an injunction against pursuing any action for money related to the bankruptcy case (*18 B.R. 362, 363-364)* .

The facts and procedural background of ***In re Whitaker*** *(Bankr. M.D. Tenn. 1982) 5 Collier Bankr. Cas. 2d 1566, 16 B.R. 917* are discussed in *§ 30.40*, Discussion of Authorities, Injunction of Collection Attempts or State Court Proceeding.

After discussing its authority to enjoin the criminal prosecution, the bankruptcy court held that the creditors had failed to comply with the discharge order and that civil contempt was an appropriate sanction for such noncompliance. The bankruptcy court also required the creditor to pay the debtor's cost of defending the criminal action and pursuing the adversary proceeding in bankruptcy court, including reasonable attorney's fees, noting that the $250 limit of former Fed. R. Bankr. P., Rule 920(a)(3) [*see now Fed. R. Bankr. P., Rule 9020* (no limit)] did not apply because that rule governed only punitive sanctions (*16 B.R. 917, 923 n.9*).

[4] Additional Authorities

[a] Violation Is Basis for Sanctions

The bankruptcy court in *In re Rhyne (Bankr. E.D. Pa. 1986) 14 Collier Bankr. Cas. 2d 778, 59 B.R. 276* struck a state court judgment, found the creditor's law firm in contempt, and required it to pay debtor's attorney's fees after the firm obtained a judgment against the debtor based on a wrongful death claim that had been discharged. The court said that not every case is appropriate for contempt or sanctions. The creditor was not found to be in contempt because he lacked the requisite intent (*59 B.R. 276, 278-279)* .

The bankruptcy court in *In re Conti (Bankr. E.D. Va. 1985) 12 Collier Bankr. Cas. 2d 1472, 50 B.R. 142* found the IRS to be in civil contempt for violation of *11 U.S.C. § 524(a)(2)* by sending past due notices to the debtor regarding a discharged tax liability for 1977. The court said that the IRS's claim of sovereign immunity was expressly waived by the provisions of *11 U.S.C. § 106(c)* (*50 B.R. 142, 145-146)* . The court held that the burden of inconvenience for the IRS to segregate discharged accounts from others did not excuse its failure to do so (*50 B.R. 142, 146)* . The court awarded $750 as attorney's fees and damages, but refused to award punitive damages (*50 B.R. 142, 147)* . The court also allowed the IRS to offset against the discharged debt a refund owing to the debtor for a pre-petition year (1982), even though no refund was sought until 1984, a year after discharge. The court reasoned that the *11 U.S.C. § 524(a)(2)* prohibition against offset has to be construed in light of *11 U.S.C. § 553* and refers only to post-petition debts; a pre-petition debt owed by a discharged creditor may be offset against a discharged debt (*50 B.R. 142, 147-150)* .

The bankruptcy court in *In re Olson (Bankr. N.D. Iowa 1984) 10 Collier Bankr. Cas. 2d 864, 38 B.R. 515* , found a medical clinic to be in violation of *11 U.S.C. §§ 362* and *524* for refusing to treat the debtor until the debtor paid a discharged pre-petition account. The fact that a representative of the clinic testified that "nonpays" were refused treatment until outstanding bills were paid whether or not the "nonpay" had filed bankruptcy provided the requisite intent and willfulness for imposition of sanctions. The court stayed imposition of sanctions or damages for 20 days during which time the parties were to present a stipulation regarding sanctions or damages (*38 B.R. 515, 518-519)* .

The credit union creditor in *In re Holland (Bankr. N.D. Ind. 1982) 6 Collier Bankr. Cas. 2d 1307, 21 B.R. 681* received money from the debtor under a pre-petition payroll deduction agreement to be applied in payment of a loan it had made to the debtor. The loan was scheduled; the creditor received notice of the filing of the bankruptcy and of the discharge. After discharge, the debtor executed and forwarded to his employer a request to stop the payroll deductions, but the creditor union refused to return the payments it had received after the date of the filing of the petition. The debtor had not made a "stop deduction request" earlier, he testified, because he had not understood that it was necessary. Contrary to credit union practice, he had not been given the appropriate form when he visited the credit union to inform it of the bankruptcy and to request the cessation of the deduction. The credit union maintained that since the debtor had not initiated a stop deduction request, the post-petition payments were voluntary and it could keep them. The bankruptcy court found the creditor to have violated both the stay of *11 U.S.C. § 362(a)(6)* and the permanent injunction of *11 U.S.C. § 524(a)(2)* and to be in contempt. The creditor was required to return the post-petition payments to the debtor, with interest at the rate those sums would have earned in the debtor's creditor union share account and to pay the debtor's costs and reasonable attorney's fees (*21 B.R. 681, 684, 688-689)* .

The debtor in *In re Goodman (Bankr. Ore. 1983) 34 B.R. 23* had given his landlord two bad checks of $700 each. The rental arrearages covering that period were listed and discharged in bankruptcy. The creditor requested criminal prosecution during the pendency of the bankruptcy case, in violation of the stay order of *11 U.S.C. § 362(a)(6)*, and had the debtor arrested on bad check charges after discharge, although by that time one check had been paid and sufficient funds to cover the other had been tendered. The bankruptcy court was unconvinced by the creditor's testimony that he was confused and had made bookkeeping errors at the time he demanded the debtor's arrest. The court noted its authority to require the creditor to pay the debtor's attorney's fees and out-of-pocket costs as sanctions for civil contempt, and said that those sanctions did not preempt an award of general or punitive damages in a private action arising out of misuse of process. The bankruptcy court imposed sanctions of $3,500 (*34 B.R. 23, 24-25)* .

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B. Sanctions for Attempt to Enforce Discharged Debt

2A-30 California Points & Authorities § 30.42

AUTHOR: Reviewed By John A. Vos

§ 30.42 Opposing Contention That Debtor Is Entitled to Sanctions [11 U.S.C. § 524]--Good-Faith Controversy Exists Concerning Whether Debt Has Been Discharged

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____'s [*name of creditor*] ATTEMPT TO COLLECT THIS DEBT DOES NOT CONSTITUTE CIVIL CONTEMPT BECAUSE THERE HAS BEEN NO PRIOR ADJUDICATION OF THE DISCHARGEABILITY OF THE DEBT, _____ [IT WAS NOT SCHEDULED *and/or* IT IS NOT ONE WHICH IS AUTOMATICALLY DISCHARGED UNDER *SECTION 523(c) OF TITLE 11 OF THE UNITED STATES CODE*], AND A GOOD-FAITH CONTROVERSY EXISTS CONCERNING WHETHER IT HAS BEEN DISCHARGED.

Sanctions Are Not Appropriate. Civil contempt sanctions serve either a coercive or compensatory function, by compelling a person to obey a court's order or compensating a person for the losses sustained due to the violation of a court order. When the debt in question is _____ [arguably excepted from discharge because it is _____ (*specify, e.g.,* for child support) *or* facially excepted from discharge because it was not listed anywhere in the debtor's schedules] and there has been no [previous] determination of dischargeability [until the proceeding for which contempt sanctions are sought], the court is free to assume, in the absence of any evidence to the contrary, that the creditor will not persist in collection efforts _____ [once *or* if] the debt is determined to be discharged, and the coercive function that sanctions normally serve is not applicable. As the debtor will incur the same legal fees whether dischargeability is challenged in the bankruptcy case or in a later action, the compensatory need usually fulfilled by contempt sanctions does not arise from the same proceeding in which dischargeability is determined (*In re Worthing (Bankr. D. Conn. 1982) 24 B.R. 774, 778)* .

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the debtor is entitled to costs and sanctions for a creditor's violation of the injunction of the discharge order by attempting to collect a discharged debt on the ground that the attempt is in fact an effort to determine dischargeability. This form is not appropriate if the debt sought to be collected was scheduled and is one of the kind specified by *11 U.S.C. § 523(a)(2), (4),* or *(6)*.

Counsel should insert argument linking these points and authorities with the facts of the case. For example, argument should include whether the debt in question was scheduled in the bankruptcy case, that no proceedings to except the particular debt from discharge were had or are pending, and the grounds on which the creditor contends the debt is nondischargeable.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that sanctions are not appropriate since the debt in question has never clearly been within the discharge order.

[3] Discussion of Authorities

[a] Sanctions Are Not Appropriate

In re Worthing *(Bankr. D. Conn. 1982) 24 B.R. 774* involved an adversary proceeding in the bankruptcy court brought by a debtor after discharge seeking contempt sanctions against a bank that had levied on the debtor's wages to collect a loan. The parties agreed that the bankruptcy court should also determine whether the debt for the loan was discharged. It had not been scheduled, although a credit card debt owed to the same bank had been scheduled. The credit card debt had been scheduled with the bank's main address. The bank contended that it did not have actual knowledge or notice of the case in time to file timely a proof of claim, as required by *11 U.S.C. § 523(a)(3)(A)*. The bankruptcy court held that the bank was not entitled to notice addressed to its commercial loan department as specified in the note and that an employee's testimony that no notice had been received was insufficient to rebut the presumption of receipt arising from the bankruptcy clerk's certificate of mailing and the fact that the envelope containing the bank's notice was not returned to the clerk's office. Hence, the debt arising from the loan was discharged (*24 B.R. 774, 776-777)* .

Regarding the contempt sanctions, the bankruptcy court first pointed out that willfulness of the offending party need not be shown in order for a finding of contempt (*24 B.R. 774, 777)* . The court then noted that the debt in question was not facially excepted from discharge (because it was not listed), but was only held to be discharged after the court's ruling that the debtor had sustained the burden of proof regarding the bank's notice of the case. Thus, there was no specific and definite order enjoining collection of the subject debt. Civil contempt sanctions serve either a coercive or compensatory function, by compelling a person to obey a court's order or compensating a person for the losses sustained due to the violation of a court order. In this case, no coercive purpose could be served, the court continued, because there is no claim or evidence that the bank will persist in collection efforts in the face of the discharge finding. Nor were attorney's fees appropriate, because the bank could have challenged discharge of the debt, in which event the debtor would have incurred the same legal expense without any basis for reimbursement (*24 B.R. 774, 778)* .

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AUTHOR: Reviewed By John A. Vos

[Reserved]

§§ 30.43[Reserved]

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PART II. FORMS
C. Dischargeability of Specific Debts

2A-30 California Points & Authorities § 30.60

AUTHOR: Reviewed By John A. Vos

§ 30.60 Supporting Contention That Debt Has Been Discharged--Debt Was Duly Scheduled or Creditor Had Notice or Actual Knowledge of Bankruptcy Case [11 U.S.C. § 523(a)(3)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE DEBT AT ISSUE HERE HAS BEEN DISCHARGED IN BANKRUPTCY BECAUSE _____ [IT WAS LISTED OR SCHEDULED *and/or* THE CREDITOR HAD NOTICE OR ACTUAL KNOWLEDGE OF THE BANKRUPTCY CASE] IN TIME TO PERMIT TIMELY FILING OF A PROOF OF CLAIM [AND A TIMELY REQUEST FOR A DETERMINATION OF DISCHARGEABILITY].

[*EITHER*]

A. Duly Scheduled Debt. A debt that is duly scheduled in time to permit the creditor to file a timely proof of claim _____ [*if debt is one specified in 11 U.S.C. § 523(a)(2), (4), or (6) add:* and, if the debt is of a kind specified in Paragraph (2), (4), or (6) of *Section 523(a) of Title 11 of the United States Code*, to make a timely request for a determination of dischargeability of the debt], is discharged[, even though the creditor may never have received notice or actual knowledge of the debtor's bankruptcy case, because the creditor is charged with constructive notice of the case] (*11 U.S.C. § 523(a)(3)*; [*Dill v. Hamilton (1946) 73 Cal. App. 2d 881, 887-888, 167 P.2d 497]*).

[*OR*]

A. Actual Notice of Bankruptcy Case. A debt is dischargeable, although it had not been duly scheduled in time to permit timely filing of a proof of claim _____ [*if debt is one specified in 11 U.S.C. § 523(a)(2), (4), or*

(6) add: and timely request for a determination of dischargeability of the debt], if the creditor had notice or actual knowledge of the case in time for such a timely filing [and request] (*11 U.S.C. § 523(a)(3)*; *In re Price (9th Cir. 1989) 871 F.2d 97, 99)* .

[*CONTINUE*]

[*Optional*] **B. Receipt of Distribution.** A claim that is not [properly] scheduled is nevertheless discharged if the holder of that claim learns of the bankruptcy case in time to file a late claim with leave of the court and receives a distribution of assets from the bankruptcy estate (*Van Denburgh v. Goodfellow (1941) 19 Cal. 2d 217, 224-225, 120 P.2d 20*).

[*Optional*] **C. Sufficiency of Address.** There is no general rule that the designation of the creditor's address by the city of residence, without the street and number, renders a debt not duly scheduled. Thus, in the absence of a showing that the debtor did not use due diligence in attempting to ascertain the street and number of the creditor, a debt scheduled with only the city and state designated in the address is discharged (*Dill v. Hamilton (1946) 73 Cal. App. 2d 881, 884-886, 167 P.2d 497*).

[*Optional*] **D. Assignor's Knowledge of Bankruptcy Case.** If creditor has knowledge of the debtor's bankruptcy case before he or she assigns the debt, that knowledge is sufficient to discharge the debt even though it is not scheduled and the assignee did not know of the bankruptcy case (*Ray v. Schubach (1935) 10 Cal. App. 2d 122, 123, 50 P.2d 1073*).

[*Optional*] **E. Establishing Discharge.** A certified copy of the order of discharge establishes discharge of any debt owed by the debtor at the time the bankruptcy petition was filed (*Kreitlein v. Ferger (1915) 238 U.S. 21, 26-27, 35 S. Ct. 685, 59 L. Ed. 1184*).

[*Optional*] **F. Creditor's Burden of Proof.** Once a certified copy of the order of discharge is in evidence, the creditor must prove that the debt is excepted from discharge (*United States Credit Bureau, Inc. v. Digoras (1959) 169 Cal. App. 2d 673, 680, 337 P.2d 866*).

[*Optional*] **G. Notice to Counsel of Record for Creditor Is Sufficient.** For a debt of a type specified in *Title 11 of the United States Code, Section 523(a)(2), (4),* or *(6),* to be discharged, notice of a scheduled debt provided to the creditor's attorney of record is sufficient to give notice to the creditor (*In re Price (9th Cir. 1989) 871 F.2d 97, 98-99)* .

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a particular debt has been discharged either because it was duly scheduled (first alternative Paragraph A) or because the creditor had notice or actual knowledge of the bankruptcy case in time to file its claim, and if the debt is one of the kind specified at *11 U.S.C. § 523(a)(2), (4),* or *(6),* to make a timely request for determination of dischargeability (second alternative Paragraph A) [*see 11 U.S.C. § 523(a)(3)*]. Descriptions of the types of debts specified at *11 U.S.C. § 523(a)(2), (4),* and *(6)* are in § 30.21 at Paragraphs C, D, E, and F. Generally, a creditor whose claim is one of the kind specified in *11 U.S.C. § 523(a)(2), (4),* or *(6)* must receive at least 30 days' notice of the last date to file complaints to determine dischargeability [*see In re Dewalt (9th Cir. 1992) 961 F.2d 848, 850-851* ; *see § 30.67,* Discussion of Authorities, under 30 Days Notice Generally Required].

Paragraph B is for use when the creditor received notice in time to obtain approval for filing a late claim and received a distribution on that claim [*see 11 U.S.C. § 726(a)(2), (3)* (participation of late claimants in distribution)]. Paragraph C will apply if the debtor could not determine the creditor's street address and so scheduled the claim with only the

creditor's city and state as address. Paragraph D is applicable if the original creditor knew of the bankruptcy case and then assigned the claim to someone who did not know of the case. Paragraph E may be used to show that the introduction of a certified copy of the order of discharge satisfied the debtor's initial burden of proof of the defense of discharge. Paragraph F should be used when arguing that the creditor has not carried its burden of proving the debt to be within an exception to discharge. Paragraph G should be used when arguing that the creditor has received notice of a scheduled debt through its counsel of record.

Counsel should insert argument linking these points and authorities with the facts of the case; for example, either the attachment of a certified copy of the order of discharge (*see* Paragraph E) and of the schedule on which the debt was listed, or, if the debt was not scheduled, argument that the creditor had actual notice of the bankruptcy case before the time for filing claims expired.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the debt has been discharged because it was duly scheduled or because creditor had notice of the bankruptcy case.

This form may also be used, with distinguishing facts, to oppose the contention that a debt has been discharged because it was duly scheduled or because the creditor had notice of the bankruptcy case.

[3] Discussion of Authorities

[a] Duly Scheduled Debt

Plaintiffs in ***Dill v. Hamilton*** *(1946) 73 Cal. App. 2d 881, 167 P.2d 497* sued to enforce a judgment against a debtor who asserted discharge in bankruptcy as a defense. The underlying judgment was in the names of two people as executors and one of them individually. Unbeknownst to the debtor, the individually named creditor had remarried and changed her name. The debt was listed under the names of the judgment creditors (the former name in the case of the remarried creditor), with no mention of their representative capacities with San Francisco, California, as the only address. The street addresses were unknown to defendant, and a San Francisco directory was not available to him. The schedule did not recite that the street addresses were unknown to the debtor [*see* Sufficiency of Address]. Notice of the first meeting of creditors was mailed to both creditors. The bankruptcy file did not disclose that the notices had been returned, but the plaintiff never received them and never had notice of the bankruptcy case. Judgment was for plaintiffs on the ground that the debt had not been duly scheduled and that they had not had actual or constructive notice of the bankruptcy case. The defendant appealed.

The court of appeal reversed, holding that the judgment was duly scheduled and thus was discharged in bankruptcy [*see § 30.60[3][d]*]. With regard to the question of notice, the court of appeal noted that actual knowledge of the bankruptcy case was not necessary and held the trail court's finding that plaintiffs did not have constructive notice to be error. Once a debt is duly scheduled, the creditor is charged with constructive notice of the bankruptcy case, even if the creditor does not receive the written notice mailed to him or her (*73 Cal. App. 2d 881, 887)* . Proper scheduling of the debt imparts constructive notice to the creditor (*73 Cal. App. 2d 881, 888)* .

[b] Actual Notice of Bankruptcy Case

In ***In re Price*** *(9th Cir. 1989) 871 F.2d 97, 99* , a creditor had brought a suit against the debtor in state court in regard to a contract dispute. Before the suit was resolved, debtor filed a petition for Chapter 7 bankruptcy relief. The creditor was not listed on the debtor's schedule of creditors and thus was not notified by the bankruptcy court of the bar date for the filing of dischargeability complaints pursuant to former 11 U.S.C. § 523(c) [*now see 11 U.S.C. § 523(c)(1)*]. However, on May 21, 1986, the creditor's attorney in the state court action against the debtor did receive a Notice of Injunction from the debtor's counsel that stated that a bankruptcy petition had been filed and that the state court suit

would be subject to the automatic stay. The notice did not contain any deadline dates, and the creditor's counsel assumed that further notices would be forthcoming from the bankruptcy court. The creditor's attorney took no action, and the deadline for filing of dischargeability complaints passed on July 22, 1986. After the deadline passed, the creditor's attorney filed a Motion for Leave to File Late Complaint to Determine Dischargeability of Debt, claiming excusable neglect. The bankruptcy court granted the motion, finding that creditor's attorney reasonably assumed that further notice of the bar date would be received from the court. The Bankruptcy Appellate Panel reversed, holding that notice to the creditor's attorney constituted notice to creditor, and that it was sufficient to apprise the creditor of the pendency of the dischargeability deadline date. The creditor appealed.

The Ninth Circuit court of appeals affirmed. It found that the creditor's attorney was given actual notice of the bankruptcy proceedings in time to file a complaint, or at least to file a timely motion for extension of time. At the time of actual notice, the attorney was pursuing the same claim in state court that the creditor sought to have declared nondischargeable. The court held that under the circumstances of the case, notice to the creditor's attorney constituted notice to the creditor. The fact that the debtor failed to list the creditor in the filing did not relieve the creditor of his obligation to take timely action to protect his claim (*871 F.2d 97, 99)* .

The statement in *Price* that notice is timely if the creditor has the opportunity to request an extension of the time to file a complaint to determine dischargeability has been disapproved to the extent provided in *In re Dewalt (9th Cir. 1992) 961 F.2d 848, 850-851* ; *see § 30.67[3][k]*.

[c] Receipt of Distribution

In ***Van Denburgh v. Goodfellow*** *(1941) 19 Cal. 2d 217, 120 P.2d 20* , defendants quashed a writ of execution plaintiff had secured to enforce his judgment against them. Each defendant had filed a separate bankruptcy case. Both had been discharged. Plaintiff's claim had been improperly scheduled and the notice intended for plaintiff was returned to the bankruptcy court. Plaintiff learned of defendants' bankruptcy cases. In one bankruptcy case, plaintiff obtained leave to file a late claim and took a distribution. No claim was filed in the other bankruptcy case. Plaintiff appealed the quashing of the writ.

The Supreme Court affirmed as to the defendant from whose bankruptcy estate the plaintiff had received distribution and reversed as to the other defendant [*see § 30.67[3][a]*]. The Court stated that if the creditor elects to file a late claim with leave of the bankruptcy court, he or she waives any rights arising from defects in the schedule or notice or from any detriment he or she may suffer because of the lack of the opportunity to participate in the administration of the estate and receives in return the right to share in the distribution of assets (*19 Cal. 2d 217, 224-225)* .

[d] Sufficiency of Address

The facts and procedural background of ***Dill v. Hamilton*** *(1946) 73 Cal. App. 2d 881, 167 P.2d 497* , are discussed in *§ 30.60[3][a]*. In support of its holding that the plaintiff's judgment was duly scheduled, the court stated that all authorities, including the leading case of *Kreitlein v. Ferger (1915) 238 U.S. 21, 33-34, 35 S. Ct. 685, 59 L. Ed. 1184* , have adopted the position that the designation of the city of the creditor's residence, without the street and number, is sufficient (*73 Cal. App. 2d 881, 884)* . Although the debtor must use due diligence to ascertain the correct address of the creditor, plaintiffs had failed to show that defendant had not used due diligence in ascertaining the street and number of their residences (*73 Cal. App. 2d 881, 886)* . There is no presumption that debtors in bankruptcy have access to directories containing street addresses of their creditors (*73 Cal. App. 2d 881, 884)* . Quoting from *Kreitlein,* the court noted that the debtor's schedules must not only include claims of recent origin but debts that have accrued many years before that are owed to creditors who may have changed their residences. To lay down a general rule that the schedule must give the name of the creditor and the city and street number of the residence of those living in the largest cities would, in a multitude of cases, destroy the beneficent effect of bankruptcy (*73 Cal. App. 2d 881, 884-885)* .

[e] Assignor's Knowledge of Bankruptcy Case

Ray v. Schubach *(1935) 10 Cal. App. 2d 122, 50 P.2d 1073* , was an action by an assignee on a promissory note in which defendant pleaded as one defense discharge in bankruptcy. The note was not listed in defendant's schedules in bankruptcy, but plaintiff's assignor, while still holder of the note, had discussed with defendant his pending bankruptcy case. Judgment was for plaintiff on the ground that the debt had not been listed. Defendant appealed.

The court of appeal reversed, stating that because the payee, while holder of the note, had actual notice of the bankruptcy case, the debt was discharged (*10 Cal. App. 2d 122, 123)* .

[f] Establishing Discharge

See *§ 30.40*, Paragraphs A--C.

Kreitlein v. Ferger *(1915) 238 U.S. 21, 35 S. Ct. 685, 59 L. Ed. 1184* , was a creditor's action on a judgment in which the defendant pleaded as an affirmative defense his discharge in bankruptcy. The debt arose in 1895 from the defendant's purchase of flour. Plaintiff sued in trover and obtained judgment in 1897, though findings in the case show that defendant made no fraudulent concealment or misrepresentation as to his financial condition. The bankruptcy case was initiated in 1905 and the debt was scheduled as "1895, $271.85 for merchandise, to C. Ferger, Indianapolis, Indiana." The trial court ruled for the plaintiff as did the Appellate Court of the State of Indiana. The United States Supreme Court granted review.

The Supreme Court reversed. The Court set forth the respective burdens of proof of the parties, holding that the initial burden of proof is on the debtor, but that the burden is met, and a *prima facie* defense of discharge is established as to any debt existing against the debtor at the time the petition in bankruptcy was filed, by the introduction of a certified copy of the order of discharge (*238 U.S. 21, 26-27)* .

[g] Creditor's Burden of Proof

In ***United States Credit Bureau, Inc. v. Digoras*** *(1959) 169 Cal. App. 2d 673, 337 P.2d 866* , the defendant moved in the trial court for an order under former Code Civ. Proc. § 675b directing the cancellation and discharge of a judgment obtained by the assignee of a 1946 judgment creditor. The defendant had received a discharge in bankruptcy in 1955. At that time, if the underlying judgment was based on willful and malicious injuries to property, it would not be discharged by the defendant's discharge in bankruptcy. The trial court found that part of the judgment was based on willful withholding of property but that part of it arose from an accounting. The trial court denied the motion and defendant appealed.

The court of appeal reversed. The court stated that, as defendant had filed a certified copy of her discharge in bankruptcy in support of the motion to cancel the judgment, plaintiff had the burden of showing that the judgment, or part of it, was nondischargeable. As it could not be determined from the record how much of the judgment related to willful injury and how much did not, the court concluded that the plaintiff had not sustained its burden of proof (*169 Cal. App. 2d 673, 680)* .

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C. Dischargeability of Specific Debts

2A-30 California Points & Authorities § 30.61

AUTHOR: Reviewed By John A. Vos

§ 30.61 Supporting Contention That Debt Has Been Discharged--Punitive Damages Based on Fraud [11 U.S.C. § 523(a)(2)] Are Dischargeable

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PUNITIVE DAMAGE LIABILITY BASED ON FRAUD IS SUBJECT TO DISCHARGE IN BANKRUPTCY.

Punitive Damages for Fraud Are Dischargeable. Punitive damages for fraud debts are dischargeable in bankruptcy (*In re Levy (9th Cir. 1991) 951 F.2d 196, 199* (construing *11 U.S.C. § 523(a)(2)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that punitive damages based on fraud are dischargeable under *11 U.S.C. § 523(a)(2)*. Note, however, that if the creditor can prove that the punitive damages were based on a malicious and willful injury, the damages will not be dischargeable [*see § 30.71*].

Counsel should insert argument linking these points and authorities with the facts of the case; for example, reference to the record in any underlying action and in the proceeding to determine dischargeability for facts to support the absence of intent to injure, malice, or willfulness.

This form may be combined with points and authorities pertaining to the procedural context in which counsel wishes to raise the substantive issue that the judgment for punitive damages based on fraud has been discharged.

[3] Discussion of Authorities

[a] Punitive Damages for Fraud Are Dischargeable

In re Levy *(9th Cir. 1991) 951 F.2d 196* was an individual's Chapter 7 case. The debtor was one of three principals of a real estate development corporation that reneged on promises to one of its salespersons. A state court judgment was entered in favor of the salesperson for compensatory damages of $53,540, $46,612 of which was based on fraud and misrepresentation, and $250,000 punitive damages. The judgment creditor brought a complaint to determine dischargeability. The bankruptcy court held that the $46,612 was nondischargeable, and that it had discretion to, and did, discharge the punitive damage award. The creditor appealed, and the bankruptcy appellate panel affirmed, holding that *11 U.S.C. § 523(a)(2)* excepted from discharge only actual damages for fraud. The Ninth Circuit Court of Appeals affirmed.

The creditor argued that case law had upheld the nondischarge of punitive damages under *11 U.S.C. § 523(a)(4)* and *(6)* (fiduciary defalcation; willful and malicious injury), and that punitive damages for fraud should not be treated any differently. The court of appeals disagreed, noting that the Ninth Circuit had never addressed the question, although the Ninth Circuit Bankruptcy Appellate Panel had considered the issue and determined that *11 U.S.C. § 523(a)(2)* did not except discharge of punitive damages [*see In re Ellwanger (B.A.P. 9th Cir. 1989) 105 B.R. 551, 555]* (*951 F.2d 196, 197-198)* . The court first considered the language of § 523(a)(2) itself and pointed out that the subsection was amended in 1984 to add the language "to the extent obtained by." That phrase is meant to limit the nondischargeable debt to the amount "obtained by actual fraud," that is, the amount of benefit to the debtor or loss to the creditor created by the the act of fraud itself. Thus, the language of *11 U.S.C. § 523(a)(2)* does not preclude discharge of punitive damages (*951 F.2d 196, 198)* .

Next, the court considered the structure of § 523 as a whole. The court reviewed *Ellwanger's* reasoning, which was based in part on the United States Supreme Court opinion in *Kelly v. Robinson (1986) 479 U.S. 36, 107 S. Ct. 353, 93 L. Ed. 2d 216* (*see § 30.72*, Discussion of Authorities, under Restitution Order in Criminal Action), considering the scope of *11 U.S.C. § 523(a)(7)*, which excepts a debt from discharge "to the extent such debt is a fine, penalty, or forfeiture payable to and for the benefit of a government unit, and is not compensation for actual pecuniary loss." The Supreme Court had said in a footnote that the limitation imposed by the quoted language was likely intended to prevent application of that subsection to wholly private penalties such as punitive damages. While the *Ellwanger* court believed that the footnote compelled the conclusion that non-compensatory damages be excepted from discharge only when they are owed to a government entity, the court of appeals said that conclusion was overly broad. Even if creditors could not avail themselves of *11 U.S.C. § 523(a)(7)*, they can still rely on other subsections of § 523. Moreover, *Ellwanger's* suggestion that no subsection of § 523 bars discharge of punitive damages conflicts with the Ninth Circuit holding in *In re Adams (9th Cir. 1985) 761 F.2d 1422* (*see § 30.20*, Discussion of Authorities, under Both Compensatory and Punitive Damages Nondischargeable), excepting punitive damages from discharge under *11 U.S.C. § 523(a)(6)* (*951 F.2d 196, 199)* .

The court also relied on the Supreme Court's analysis in *Grogan v. Garner (1991) 498 U.S. 279, 111 S. Ct. 654, 112 L. Ed. 2d 755* (*see § 30.21[3][f]*) to reinforce the notion that distinctions should be made among the subsections of § 523. The court concluded that while a creditor should seek non-dischargeability of a debt for fraud alone under *11 U.S.C. § 523(a)(2)*, if the debtor inflicted willful or malicious injury which was the basis of a punitive damage award, the creditor could establish nondischargeability of the punitive damages under *11 U.S.C. § 523(a)(6)* (*951 F.2d 196, 199)* .

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2A-30 California Points & Authorities § 30.62

AUTHOR: Reviewed By John A. Vos

§ 30.62 Supporting Contention That Debt Has Been Discharged--Creditor's Reliance Was Not Justifiable so as to Except Loan Obligation From Discharge [11 U.S.C. § 523(a)(2)(A)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

A DISCHARGE IN BANKRUPTCY DISCHARGES A CREDIT OBLIGATION INDUCED BY THE DEBTOR'S FRAUDULENT MISREPRESENTATIONS IN A LOAN APPLICATION IF THE LENDER'S RELIANCE ON THOSE REPRESENTATIONS WAS NOT JUSTIFIABLE.

A. Fraud. [*See § 30.21, Paragraph C.*]

B. Justifiable Reliance. For a debt to be nondischargeable in bankruptcy, it must have been induced by the creditor's justifiable reliance on fraudulent misrepresentations of the debtor. When the debtor makes fraudulent misrepresentations, but the creditor extends credit without justifiably relying on those misrepresentations, the debt is discharged (*Field v. Mans (1995) 516 U.S. 59, 74-75, 116 S. Ct. 437, 133 L. Ed. 2d 351* ; *In re Kirsh (9th Cir. 1992) 973 F.2d 1454, 1457-1461)* .

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a loan induced by a debtor's misrepresentations is nondischargeable under *11 U.S.C. § 523(a)(2)(A)* only if the creditor's reliance on the misrepresentation was justifiable. Paragraph A sets forth the elements of fraud [*see § 30.21,* Paragraph C]. Paragraph B states that the debt is nondischargeable only if the creditor justifiably relied.

Counsel should insert argument linking these points and authorities with the facts of the case; for example, reference to the record in the underlying action to determine dischargeability for facts to show that the creditor's reliance on the debtor's misrepresentations was not justifiable, and accordingly, that the loan is discharged.

[3] Discussion of Authorities

[a] Justifiable Reliance

The facts and procedural background of ***Field v. Mans*** *(1995) 516 U.S. 59, 116 S. Ct. 437, 133 L. Ed. 2d 351* are discussed in *§ 30.68[3][a]*. Following a dispute among the circuits, the United States Supreme Court confirmed that the "justifiable reliance" standard, rather than the "reasonable reliance" standard, is the standard to be applied in excepting a fraud debt from discharge under *11 U.S.C. § 523(a)(2)(A)* (*133 L. Ed. 2d 351, 365)* .

In re Kirsh *(9th Cir. 1992) 973 F.2d 1454* involved a claim by a pension plan that a loan made to debtors was nondischargeable because of misrepresentations inducing the plan to make the loan. Although the loan agreement contained written representations by the debtors that the deed of trust securing the loan was junior to only one other deed of trust and that the condominium securing the loan had a market value of $240,000, in fact the condominium was encumbered by two senior deeds of trust. The plan ordered no title search, and apparently simply accepted the debtors' representations about the state of the property. The debtors defaulted, and when the condominium was foreclosed upon, the value realized was insufficient to pay off the two senior deeds of trust, much less the plan's third deed of trust. The plan received very little return on its investment before the debtors declared bankruptcy. The plan claimed it had been defrauded, and sought to exempt the debt from discharge (*973 F.2d 1454, 1455-1456)* .

The bankruptcy court found that the pension plan, which was established and managed by the debtors' long-time friend and attorney, did not rely on those representations, but made the $40,000 loan to debtors knowing they were having financial problems and knowing they did not always pay their legal fees on time. The plan sought a determination of nondischargeability in the bankruptcy court, which held for the debtor based on its finding that the attorney, who founded and managed the plan and was probably its main beneficiary, had not relied on those false representations. The bankruptcy court found that the debtors had not defrauded the plan. The district court affirmed, and the plan appealed (*973 F.2d 1454, 1456)* .

The Ninth Circuit first noted that its review, being one of a bankruptcy court's findings of fact, was subject to the clearly erroneous standard, while its review of the bankruptcy court's conclusions of law was de novo. The majority characterized the issue as one of law (the law of dischargeability), which is determined by federal law, in this case the Bankruptcy Code (*973 F.2d 1454, 1456)* . The court then said that the criteria for nondischargeability under *11 U.S.C. § 523(a)(2)(A)* and *(B)* are mutually exclusive, the former referring to representations other than those in financial statements, and the latter referring specifically to written statements of financial condition (*973 F.2d 1454, 1457)* . The court continued its analysis of the distinction, determining that the statements in the loan agreement were not statements "in respect of the debtor's financial condition" and so those were not the type of "misrepresentations in a financial statement" covered by *11 U.S.C. § 523(a)(2)(B)*, so the analysis proceeded under *11 U.S.C. § 523(a)(2)(A)*, which provides that debts for false pretenses, false representations, or actual fraud other than a statement respecting the debtor's or an insider's financial condition, are nondischargeable (*973 F.2d 1454, 1457)* .

The court then had to determine the legal standard of reliance applicable. The court recognized that three possible standards existed ("actual reliance," "reasonable reliance," and "justifiable reliance") and that district courts were split on the application of the standard to these circumstances (*973 F.2d 1454, 1457-1458)* . The court then reviewed the history of the application of the various standards, concluding that a creditor must prove justifiable reliance on the representations of a debtor. In determining that issue, a court must look to all of the circumstances of the transaction, considering in particular the subjective effect of the circumstances on the creditor (*973 F.2d 1454, 1459-1460)* . In applying this standard, the court found that while the bankruptcy court had incorrectly applied the reasonable reliance

standard, its conclusion that the plan had not relied on the debtors' representation in making the loan was correct. Accordingly, the court of appeals affirmed the bankruptcy court's finding that the debt was dischargeable under *11 U.S.C. § 523(a)(2)(A)* (*973 F.2d 1454, 1461)* .

[b] Elements Necessary to Preclude Discharge of Debt

A bankruptcy discharge does not discharge an individual debtor from a debt for money, property, services, or an extension, renewal, or refinancing of credit to the extent it is obtained by false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition [*11 U.S.C. § 523(a)(2)(A)*].

In *Kirsh*, the court stated that to preclude discharge in bankruptcy of a debt under *11 U.S.C. § 523(a)(2)(A)*, a creditor must prove all of the following (*973 F.2d 1454, 1457)* :

- The debtor made the representations.
- The debtor knew the representations were false when made.
- The debtor made the representations with the intention and purpose of deceiving the creditor.
- The creditor relied on the representations.
- The creditor sustained the alleged loss and damage as a proximate result of the representations.

The creditor has the burden of proving each of the elements by a preponderance of the evidence (*973 F.2d 1454, 1457)* . In Kirsh, the creditor could not prove the element of reliance, and accordingly, the creditor's attempted preclusion of discharge failed (*973 F.2d 1454, 1460-1461)* .

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2A-30 California Points & Authorities § 30.63

AUTHOR: Reviewed By John A. Vos

§ 30.63 Supporting Contention That Debt Has Been Discharged--Nonmarital Support Obligation Is Dischargeable [11 U.S.C. § 523(a)(5)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

A DISCHARGE IN BANKRUPTCY DISCHARGES NONMARITAL SUPPORT OBLIGATIONS.

A. Domestic Support. A debt for domestic support is not dischargeable in bankruptcy (*11 U.S.C. § 523(a)(5)*). Such a debt is one that accrues before, on, or after the date of the order for relief in a bankruptcy case, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of the Bankruptcy Code, and that meets four criteria, one of which is the debt is in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of the spouse, former spouse, or child of the debtor or that child's parent, without regard to whether the debt is expressly so designated (*11 U.S.C. § 101(14A)*). Thus, a debt for support is dischargeable to the extent that it is not in the nature of alimony, maintenance, or support, even if it is so designated.

B. Nonmarital Support Obligation Is Discharged. A judgment for nonmarital support is a dischargeable debt that is not "in the nature of alimony" as that term is used in the Bankruptcy Code (*In re Doyle (B.A.P. 9th Cir. 1986) 70 B.R. 106, 107-109, 16 Collier Bankr. Cas. 2d 761*).

[2] Comments

[a] Use of Form

These points and authorities may be used to support the contention that a nonmarital support obligation is dischargeable [*see 11 U.S.C. §§ 101(14A), 523(a)(5)*]. Paragraph A sets forth the statutory criteria for nondischargeability. Paragraph

B sets forth case authority refusing to extend *11 U.S.C. § 523(a)(5)* to nonmarital obligations.

Counsel should insert argument linking these points and authorities with the facts of the case; for example, argument that the debtor and the creditor were not married.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the debt is dischargeable because it is does not rest on a marital relationship.

[3] Discussion of Authorities

[a] Nonmarital Support Obligation Is Discharged

In re Doyle *(B.A.P. 9th Cir. 1986) 16 Collier Bankr. Cas. 2d 761, 70 B.R. 106* arose from a bankruptcy court's dismissal of a creditor's complaint seeking a declaration that a debt was not discharged. The debtor and creditor lived together for five years in a home owned by the creditor, but were never married. The creditor borrowed at least $50,000 for use in the debtor's business. The loan was secured by a second mortgage on the creditor's home. After the relationship ended, the creditor obtained a stipulated judgment for quasi-marital support. The judgment required, in part, that the debtor make payments on the second mortgage. The bankruptcy court dismissed the complaint as a matter of law for failure to state a cause of action. The bankruptcy appellate panel affirmed.

The appellate panel cited *Marvin v. Marvin (1976) 18 Cal. 3d 660, 684 n.24, 134 Cal. Rptr. 815, 557 P.2d 106* , and said that footnote 24 implied that any obligation owing to the nonmarried partner arises from contractual obligations rather than from any inherent right, and expressly provides that the unmarried person does not have rights to support under the Family Law Act. The court concluded that there was no California authority to suggest that the stipulated judgment was a support obligation or one arising from the Family Law Act (*70 B.R. 106, 108)* . *11 U.S.C. § 523(a)(5)* (as now construed in view of the definition of domestic support in *11 U.S.C. § 101(14A)*) is unique in that it specifies the persons to whom an obligation must be payable in order to be nondischargeable. The persons specified do not include nonmarital partners. Although nondischargeability has been extended to include illegitimate children and other child-related expenses, it has never been extended beyond family duties. When there is no obligation arising from parental or marital duties, the debt is dischargeable (*70 B.R. 106, 108-109)* .

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2A-30 California Points & Authorities § 30.64

AUTHOR: Reviewed By John A. Vos

§ 30.64 Supporting Contention That Debt Has Been Discharged--Damages for Nontortious Breach of Contract as Not "Injury to Property" so as to Except Damage Claim From Discharge [11 U.S.C. § 523(a)(6)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

A DISCHARGE IN BANKRUPTCY DISCHARGES ANY OBLIGATION FOR NONTORTIOUS BREACH OF CONTRACT[, SUCH AS FAILURE TO HONOR A RIGHT OF FIRST REFUSAL UNDER A CONTRACT OF SALE].

A. Willful and Malicious Injury. A debt for willful and malicious injury by the debtor to another entity or to the property of another entity is not dischargeable in bankruptcy (*11 U.S.C. § 523(a)(6)*).

B. Simple Breach of Contract Claim Is Dischargeable. A simple breach of contract is not the type of injury addressed by Paragraph (6) of *Section 523(a) of Title 11 of the United States Code*. Only tortious liabilities are excepted from discharge by Paragraph (6), not debts stemming from ordinary breach of contract (*In re Riso (9th Cir. 1992) 978 F.2d 1151, 1154)* .

[*Optional*] **C. Right of First Refusal Is Not Property Interest.** A limited right of first refusal is merely a contract right, not a property interest, and as such, a claim for damages for breach of that contract right is not the type of claim that is excepted from discharge under Paragraph(6) of *Section 523(a) of Title 11 of the United States Code* (*In re Riso (9th Cir. 1992) 978 F.2d 1151, 1154)* .

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that an ordinary breach of contract does not result in the type of claim that is excepted from discharge under *11 U.S.C. § 523(a)(6)*. Optional Paragraph C is for use when the contract breached is a right of first refusal [*see In re Riso (9th Cir. 1992) 978 F.2d 1151, 1154* (right of first refusal not security interest in property)]. The contention is based in part on the distinction between property interests, injury to which amounts to conversion and may result in claims for damages that are excepted from discharge if done intentionally, and contract rights, injury to which ordinarily results only in dischargeable claims (Paragraph B).

Counsel should insert argument linking these points and authorities with the facts of case; for example, argument that incorporates the specific contract language or provision breached, pointing out that it does not grant the creditor any "security interest" or other interest in property.

[b] Related Points and Authorities

The points and authorities in this form generally oppose those in § 30.71.

[3] Discussion of Authorities

[a] Simple Breach of Contract Claim Is Dischargeable

In re Riso *(9th Cir. 1992) 978 F.2d 1151* involved a creditor's adversary proceeding to determine dischargeability of a debt arising from breach of a contract that granted the creditor a right of first refusal on resale of debtors' property. In 1982, S sold an apartment building to W, and took back a note, secured by a deed of trust and a right of first refusal on resale. In 1984, with S's knowledge and consent, W resold the building to the Risos, who sold it again in 1985 to M. The Risos concealed their sale to M from S by prohibiting the escrow agent from ordering a beneficiary statement from S and by having M make payments to the Risos, who made payments to S. S did not learn of the sale until February 1989. After negotiations between the Risos and S broke down in March, 1989, S filed an action against them for foreclosure and damages. The Risos brought payments under the deed of trust current through March 1989. The final payment under the note was due in April 1989, but it was never paid. The Risos filed bankruptcy in June 1989. S claimed that had the Risos given proper notification of the sale, S would have purchased the building in 1985 for $300,000 less than its worth in 1989. Even if S had not purchased the building in 1985, but only accelerated the loan then (apparently for failure to make the last payment), S would have saved approximately $62,000 in income taxes under capital gains treatment that was no longer available when S learned of the sale.

Both the bankruptcy court and the appellate panel held for the Risos, that breach of a right of first refusal is not the sort of willful property damage excepted from discharge under *11 U.S.C. § 523(a)(6)*. The Ninth Circuit Court of Appeal affirmed, agreeing that a limited right of first refusal is merely a contract right, not a property interest, and as such is not a protected interest in property that is excepted from discharge under Paragraph (6) (*978 F.2d 1151, 1153-1154)* . An intentional breach of contract is excepted from discharge under *11 U.S.C. § 523(a)(6)* only when it is accompanied by malicious and willful tortious conduct, which was not indicated in the record before the court (*978 F.2d 1151, 1154)* . The court went on say that it was not bound by a 1967 Washington Supreme Court case, holding a surreptitious sale of a patent interest in violation of a first option to purchase to be a willful and malicious injury to property. It is true that injury to property includes conversion of property subject to a creditor's security interest. However, S's right of first refusal is not a security interest. The restriction on the use of the apartment building imposed by the right of first refusal is not an obligation that is "secured" by the apartment building in the bankruptcy context. The Risos' sale of the property breached their contract with S, but nothing in the record indicated that the sale was a tortious violation of S's property interest in the apartment building, so the debt evidenced by the cause of action is dischargeable (*978 F.2d 1151, 1154)* .

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2A-30 California Points & Authorities § 30.65

AUTHOR: Reviewed By John A. Vos

§ 30.65 Supporting Contention That Debt Has Been Discharged--Reaffirmation Agreement Unenforceable When Rescinded by Debtor or Not Approved by Bankruptcy Court [11 U.S.C. § 524(c)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

ALTHOUGH THE DISCHARGED DEBT SOUGHT TO BE COLLECTED IS THE SUBJECT OF A REAFFIRMATION AGREEMENT, THAT AGREEMENT WAS _____ [NOT APPROVED BY THE BANKRUPTCY COURT *or* RESCINDED BY THE DEBTOR _____ (BEFORE DISCHARGE *or* WITHIN 60 DAYS AFTER IT WAS FILED WITH THE BANKRUPTCY COURT)].

[*EITHER, if individual debtor entered into agreement without attorney*]

Bankruptcy Court Must Approve Individual Debtor's Reaffirmation Agreement. An agreement between an individual debtor in bankruptcy and the holder of a claim against the debtor, the consideration for which, in whole or in part, is based on a dischargeable debt, is not enforceable if all of the following conditions exist (*11 U.S.C. § 524(c)(5), (6)*):

1. The consideration for the agreement is based in whole or in part on a consumer debt that is not secured by real property of the debtor.

2. The individual debtor was not represented by an attorney during the course of negotiating the agreement.

3. The agreement was not approved by the bankruptcy court as not imposing an undue hardship on the

debtor or a dependent of the debtor and as being in the best interest of the debtor.

[*OR, if debtor rescinded agreement*]

Rescission of Reaffirmation Agreement. An agreement between a debtor in bankruptcy and the holder of a claim against the debtor, the consideration for which, in whole or in part, is based on a dischargeable debt, is not enforceable if the debtor rescinded it at any time before discharge or within 60 days after it was filed with the bankruptcy court, whichever occurs later, by giving notice of rescission to the holder of the claim (*11 U.S.C. § 524(c)(4)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a debt remains discharged because a reaffirmation agreement relating to the discharged debt is unenforceable, either because it was not approved by the bankruptcy court as required (in certain cases) [*see 11 U.S.C. § 524(c)(5), (6)*] or because it was rescinded by the debtor [*see 11 U.S.C. § 524(c)(4)*]. (Nothing in *11 U.S.C. § 524(c)(4)-(6)* prevents a debtor from voluntarily repaying any debt [*11 U.S.C. § 524(f)*].)

Counsel should insert argument linking these points and authorities with the facts of the case; for example, argument that specifies the nature of the debt in question (consumer or commercial) and attachment of a copy of the notice of rescission or argument in detail regarding the particular defect that renders the reaffirmation agreement unenforceable.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the reaffirmation agreement is unenforceable.

[3] Discussion of Authorities

[a] Bankruptcy Court Must Approve Individual Debtor's Reaffirmation Agreement

A reaffirmation agreement is not enforceable in any case unless it was made before the granting of the discharge and was filed with the court, and unless the debtor received extensive disclosures [*see 11 U.S.C. § 524(k)*] at or before the time the debtor signed the agreement [*11 U.S.C. § 524(c)(1)-(3)*]. Nevertheless, a creditor may accept payments from a debtor before and after the filing of a reaffirmation agreement with the court, and may accept payments from a debtor under a reaffirmation agreement that the creditor believes in good faith to be effective. The requirements of *11 U.S.C. § 524(c)(2)* and *(k)* are satisfied if disclosures required under those subsections are given in good faith [*11 U.S.C. § 524(l)*].

In a case concerning an individual, if a discharge has been granted and the debtor desires to make a reaffirmation agreement, and the debtor was not represented by an attorney during the course of negotiating the agreement, then the bankruptcy court must hold a hearing at which the debtor must appear in person. At the hearing the court must inform the debtor that such an agreement is not required under the Bankruptcy Code, nonbankruptcy law, or any agreement not made in accordance with the provisions of *11 U.S.C. § 524(c)*. Further, the court must inform the debtor of the legal effect and consequences of a reaffirmation agreement and a default under such an agreement. If the consideration for the agreement is based in whole or in part on a consumer debt that is not secured by real property of the debtor, the court must approve the agreement as not imposing an undue hardship on the debtor or a dependent of the debtor and as being in the best interest of the debtor [*11 U.S.C. § 524(c)(5), (6), (d)*; *see In re Avis (Bankr. S.D. Ohio 1980) 1 Collier Bankr. Cas. 2d 667, 3 B.R. 205, 206* (best interests of debtor is strictly financial or economic); *see also 11 U.S.C. § 524(m)* (presumption, for 60 days after agreement was filed with court, that agreement imposes undue hardship on debtor, in certain cases)].

When an attorney represented the individual debtor during the course of negotiating the reaffirmation agreement, no such hearing is necessary, and the bankruptcy court's approval is not required. Assuming that other requirements for enforceability are met, the agreement is enforceable if it is filed with the court along with the attorney's declaration that (1) the agreement represents a fully informed and voluntary agreement by the debtor, (2) it does not impose an undue hardship on the debtor or a dependent of the debtor, and (3) the attorney has fully advised the debtor of the legal effect and consequences of the agreement and of a default under the agreement [*11 U.S.C. § 524(c)(3)*].

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2A-30 California Points & Authorities § 30.66

AUTHOR: Reviewed By John A. Vos

§ 30.66 Supporting Contention That Debt Has Been Discharged--Claim Based on Environmental Cleanup Obligation May Be Discharged

[1] FORM

[*The following may be included in a memorandum of points and authorities, or a trial or appellate brief.*]

A DISCHARGE IN BANKRUPTCY DISCHARGES A CLAIM BASED ON AN OBLIGATION FOR ENVIRONMENTAL CLEANUP COSTS.

A. Contingent Environmental Cleanup Cost Recovery Is "Claim." A contingent claim for environmental cleanup cost recovery is a "claim" within the meaning of *11 U.S.C. § 101(5)* (*In re Jensen (9th Cir. 1993) 995 F.2d 925, 928, 931)* .

B. Claim for Environmental Cleanup Costs Discharged. A claim for environmental cleanup costs may be discharged in bankruptcy if the responsible creditor government agency had sufficient pre-petition knowledge of the debtor's potential liability to give rise to a contingent claim (*In re Jensen (9th Cir. 1993) 995 F.2d 925, 929-931)* .

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that an environmental cleanup obligation is discharged if the government agency responsible for policing the cleanup had sufficient knowledge of the debtor's potential liability to give rise to a contingent claim before a bankruptcy petition was filed. Paragraph A states that a contingent claim of potential liability is a "claim" within the meaning of the Bankruptcy Act. Paragraph B states the contention that the claim is discharged if the agency had pre-petition knowledge of potential liability.

Counsel should insert argument linking these points and authorities with the facts of the case; for example, argument that refers to findings, or includes the order sought to be enforced, showing that the cleanup claim in question was discharged because the government agency was aware of potential liability before a bankruptcy petition was filed.

[3] Discussion of Authorities

[a] Claim Based on Environmental Cleanup Obligation May Be Discharged

In ***In re Jensen*** *(9th Cir. 1993) 995 F.2d 925* , the obligation at issue was the duty to clean up lumber fungicide at a disused lumberyard site. The lumberyard operator had ceased doing business at the location, filed a Chapter 11 bankruptcy petition, and later converted the bankruptcy case to Chapter 7. A California Water Board inspector discovered a tank of lumber fungicide at the disused site, which contained, among other harmful agents, PCP. Based on the fungicide's threat to fish and downstream water users, the Water Board requested that the Jensens clean up the site. When the Jensens stated they were unable to do so, the California Department of Health Services (DHS) cleaned up the site, at a cost of over $900,000. In the mean time, the Jensens' bankruptcy debts had been discharged. Later, the bankruptcy proceedings were reopened to permit the listing of DHS and other interested parties from the cleanup as creditors. In a following adversarial bankruptcy proceeding, the bankruptcy court determined that DHS's cleanup recovery claim arose post-petition and was not subject to discharge. The BAP reversed, finding that the claim arose pre-petition, and was therefore discharged in the bankruptcy. DHS appealed the decision (*995 F.2d 925, 926-927)* .

The court of appeals focused on the definition of "claim" in the Bankruptcy Act, finding that the broadest possible interpretation of the definition of "claim" set forth in *11 U.S.C. § 101(5)(A)* is designed to ensure that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case (*995 F.2d 925, 929-930)* (*see § 30.03[1]*). Based on this determination, the court found that the two state agencies involved in the cleanup had sufficient knowledge of potential liability in time to give rise to a contingent claim for cleanup costs before the Jensens filed their bankruptcy petition. Accordingly, the court held that the claim was discharged in the bankruptcy, and the BAP's decision was affirmed (*995 F.2d 925, 931)* .

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2A-30 California Points & Authorities § 30.67

AUTHOR: Reviewed By John A. Vos

§ 30.67 Opposing Contention That Debt Has Been Discharged--Debt Was Not Duly Scheduled and Creditor Had No Actual Knowledge of Bankruptcy Case [11 U.S.C. § 523(a)(3)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE DEBT AT ISSUE IN THIS CASE HAS NOT BEEN DISCHARGED IN BANKRUPTCY BECAUSE _____ [IT WAS NOT LISTED OR SCHEDULED *and/or* THE CREDITOR HAD NO NOTICE OR ACTUAL KNOWLEDGE OF THE BANKRUPTCY CASE] IN TIME TO PERMIT TIMELY FILING OF A PROOF OF CLAIM [AND A TIMELY REQUEST FOR A DETERMINATION OF DISCHARGEABILITY].

A. Unscheduled or Improperly Scheduled Debts. [*See § 30.20, Paragraph C.*]

[*Optional*] **B. Incorrect Address Insufficient.** A debt is not duly scheduled if the creditor's address is incorrectly stated. [A debtor is under a duty to use reasonable diligence to ascertain the address of the creditor. If a debtor cannot discover the creditor's address, the schedule should state that the creditor's address is unknown] (*Van Denburgh v. Goodfellow (1941) 19 Cal. 2d 217, 222, 120 P.2d 20*).

[*Optional*] **C. No Address.** A debt scheduled without the creditor's address [or a statement that the debtor does not know the creditor's address] is not discharged (*Marlenee v. Warkentin (1945) 71 Cal. App. 2d 177, 179-180, 162 P.2d 321*).

[*Optional*] **D. Incorrect Name Insufficient.** A debt is not duly scheduled if the creditor's name is incorrectly stated (*United States Credit Bureau, Inc. v. Claus (1947) 79 Cal. App. 2d 85, 88-89, 179 P.2d 36*).

[*Optional*] **E. Unknown Debt.** A debt that is not scheduled because it was not known to the debtor at the time he or she

prepared the bankruptcy schedules is not discharged (*Santa Rosa Bank v. White (1903) 139 Cal. 703, 704-705, 73 P. 577*).

[*Optional*] **F. Address Care of Third Person Insufficient.** A debt that is scheduled in the name of the creditor but addressed to the creditor in care of a third person at the third person's address is not duly scheduled and is therefore not discharged. [When a judgment has been entered, the duties of an attorney come to an end unless the terms of employment require the attorney to collect the judgment. Without a showing that the scope of employment includes authority to receive notice of bankruptcy, receipt by the attorney of notice of the debtor's bankruptcy case does not constitute notice to the (former) client] (*Mizrahi v. Miscione (1967) 252 Cal. App. 2d 673, 676-677, 60 Cal. Rptr. 680* ; *see* *Brown v. Tropp (1930) 106 Cal. App. 605, 607-608, 289 P. 648*).

[*Optional*] **G. Debtor's Burden of Proof.** Once it is established that a debt was not duly scheduled [in time for the creditor to file a timely proof of claim _____ (*if debt is one specified at 11 U.S.C. § 523(a)(2), (4), or (6) add:* and timely request for a determination of dischargeability of the debt)], in order to prove that the debt was discharged, the debtor must prove that the creditor had notice or actual knowledge of the bankruptcy case (*Mizrahi v. Miscione (1967) 252 Cal. App. 2d 673, 676-677, 60 Cal. Rptr. 680*).

[*Optional*] **H. Actual Knowledge Required.** *Title 11 of the United States Code, Section 523(a)(3),* which excepts an _____ [unscheduled *or* improperly scheduled] claim from discharge unless the creditor had notice or actual knowledge of the bankruptcy case, does not contemplate constructive notice to the creditor. The term "actual knowledge" explains the word "notice," and actual knowledge, [obtained in time for the creditor to protect his or her rights in the bankruptcy case], is required in order for the debt to be discharged (*Ismay v. Tyler (1959) 169 Cal. App. 2d Supp. 883, 885, 337 P.2d 257*).

[*Optional*] **I. Timeliness of Knowledge.** When a debt was not duly scheduled [in time for the creditor to file a timely proof of claim _____ (*if debt is one specified in 11 U.S.C. § 523(a)(2), (4), or (6) add:* and to request a determination of dischargeability of the debt timely)], for the debt to be discharged by the creditor's notice or actual knowledge of the bankruptcy case, the creditor must have notice early enough to enable him or her to take advantage of the benefits of the bankruptcy law and to give him or her an equal opportunity with other creditors. However, just a few days' notice may be sufficient to satisfy due process requirements (*In re Green (10th Cir. 1989) 876 F.2d 854, 855-856)* . It may not come so late as to deprive the creditor of participation in the administration of the affairs of the estate, even though such participation would have made no difference (*Van Denburgh v. Goodfellow (1941) 19 Cal. 2d 217, 223, 120 P.2d 20* ; *Brown v. Tropp (1930) 106 Cal. App. 605, 608-609, 289 P. 648*).

[*Optional*] **J. Notice to Assignor After Assignment.** If a debt has been assigned and the debtor knows of the assignment, the debt must be scheduled in the name and at the address of the assignee. If the assigned debt is _____ [listed in the name and at the address of the assignor *or* unscheduled], notice or actual knowledge of the debtor's bankruptcy case, obtained by the assignor after the assignment has been made, is not sufficient to discharge the debt (*Ismay v. Tyler (1959) 169 Cal. App. 2d Supp. 883, 885, 337 P.2d 257*).

[*Optional*] **K. Late Claim Not Required.** A creditor who holds a debt that is _____ [improperly *or* not] scheduled, and who learns of the debtor's bankruptcy case after the time for filing claims has expired, is not required to [seek leave to] file a late claim. If the creditor does not file a claim and takes no distribution from the bankruptcy estate, he or she will retain the debt unimpaired (*Van Denburgh v. Goodfellow (1941) 19 Cal. 2d 217, 224, 120 P.2d 20*).

[*Optional*] **L. 30 Days Notice Generally Required.** For a debt of a type specified in *Title 11 of the United States Code, Section 523(a)(2), (4),* or *(6)* to be discharged, a creditor whose claim was not properly scheduled generally must receive notice or actual knowledge of the case 30 days before the last date to file a complaint to determine dischargeability (*11 U.S.C. § 523(a)(3)(B)*; *In re Dewalt (9th Cir. 1992) 961 F.2d 848, 851)* .

[*Optional*] **M. Request for Extension Not Required.** A creditor whose claim is represented by a debt of a type specified in *Title 11 of the United States Code, Section 523(a)(2), (4),* or *(6),* and was not properly scheduled is not required to file a request for extension of time to file a complaint to determine dischargeability if it receives notice or actual knowledge of the case less than 30 days before the last date to file a complaint to determine dischargeability (*In re Dewalt (9th Cir. 1992) 961 F.2d 848, 850-851)* .

[2] Comments

[a] Use of Form

These points and authorities may be used to oppose the contention that a particular debt has been discharged on the ground that it was not scheduled, or that there was some defect in the scheduling, and the creditor did not have actual knowledge of the bankruptcy case in time to file a claim, seek a determination of dischargeability if one was necessary under *11 U.S.C. § 523(c)(1),* or otherwise participate in the bankruptcy case [*see 11 U.S.C. § 523(a)(3)*]. Paragraph A sets forth the statutory criteria for excepting a debt from discharge on this basis. The other paragraphs are optional and should be used as the particular situation warrants. If the claim is based on a debt of a type specified in *11 U.S.C. § 523(a)(2), (4),* or *(6),* the 30-day standard set forth in Optional Paragraph L will be applicable instead of, or in addition to, the standard set by the earlier authorities in Optional Paragraph I.

Counsel should insert argument linking these points and authorities with the facts of the case; for example, argument that specifies whether the debt in question was scheduled, explains in detail the defects in scheduling, denies actual timely notice on the part of the creditor, or sets forth facts showing the insufficiency of any late notice or knowledge of a third person.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the debt has not been discharged because it was not duly scheduled, and the creditor had no notice of the bankruptcy case.

This form may also be used, with distinguishing facts, to oppose the contention that a debt has been discharged because it was duly scheduled or because creditor had notice of the bankruptcy case.

[b] No-Asset Cases

In the Ninth Circuit, a debtor may not reopen a no-asset, no-bar-date case to amend the debt schedule. After a no-asset, no-bar-date case has been closed, dischargeability is unaffected by scheduling; amendment is therefore pointless. If the omitted debt is of a type covered by *11 U.S.C. § 523(a)(3)(A),* it has already been discharged pursuant to *11 U.S.C. § 727*. If the debt is of a type covered by *11 U.S.C. § 523(a)(3)(B),* it has not been discharged and is nondischargeable [*Beezley v. California Land Title Co. (9th Cir. 1993) 994 F.2d 1433, 1434]* .

[3] Discussion of Authorities

[a] Incorrect Address Insufficient

The facts and procedural background of ***Van Denburgh v. Goodfellow*** *(1941) 19 Cal. 2d 217, 120 P.2d 20* are discussed in *§ 30.60[3][c]*.

The underlying judgment (for deficiency after foreclosure) had been scheduled in both bankruptcies but the address given was the incorrect office number, though the correct building, of the plaintiff's attorney of record in the underlying action. Plaintiff neither resided nor had an office there. Plaintiff's correct address did appear in an available directory. When discussing the improper scheduling of the claim, the California Supreme Court stated that it was well settled that

a debt is not duly scheduled if the bankrupt has listed the creditor's address incorrectly (*19 Cal. 2d 217, 222)* . The Court added that the debtor is under duty to use reasonable diligence to ascertain the residence of the creditor. [Note that the former Bankruptcy Act required the residence address to be given. Now Official Bankruptcy Form No. 6, the schedules of creditors, requires the creditor's full mailing address, including zip code.] If he or she thereby acquires knowledge of the residence, he or she must state it correctly, and if he or she fails to ascertain such residence, he or she must state that the residence is unknown. Furthermore, it is implicit in a schedule that fails to state that the creditor's residence is unknown that the residence *is* known (*19 Cal. 2d 217, 222)* .

[b] No Address

Marlenee v. Warkentin *(1945) 71 Cal. App. 2d 177, 162 P.2d 321* was an action to renew a judgment in which the defendant pleaded his discharge in bankruptcy as a defense. The trial court's findings included that the debt in question was included in the schedule of bankruptcy, but notwithstanding the fact that the plaintiff's place of residence was known to defendant at the time he filed his schedule, no address was included in the schedule, nor was there any statement that the plaintiff's address was unknown to the defendant. The plaintiff did not have actual knowledge of the bankruptcy case. Judgment was for plaintiff, and defendant appealed.

The court of appeal affirmed, quoting from *Van Denburgh* the holding that a debt is not duly scheduled unless the creditor's address is listed correctly (*71 Cal. App. 2d 177, 180)* .

[c] Incorrect Name Insufficient

In ***United States Credit Bureau, Inc. v. Claus*** *(1947) 79 Cal. App. 2d 85, 179 P.2d 36* , the plaintiff's assignor was surety for defendant under a contractor's bond. The assignor, the Indemnity Insurance Company of North America, had made payments on the defendant's default that it was entitled to recover from defendant by the terms of the contract. Defendant raised the defense of his discharge in bankruptcy. Plaintiff introduced defendant's schedule A-3 in bankruptcy, which listed "North American Bonding Co.--Obligation upon a Bond, contracts covering Anderson, Country Club Estate, Fresno, May, 1940." Defendant testified that the foregoing entry on the schedule was intended to identify the plaintiff's assignor's claim. The trial court gave judgment for plaintiff, and the defendant appealed.

The court of appeal affirmed, saying that a claim listed under a wrong name is not duly scheduled (*79 Cal. App. 2d 85, 88-89)* .

[d] Unknown Debt

Santa Rosa Bank v. White *(1903) 139 Cal. 703, 73 P. 577* was an action on a promissory note in which defendant pleaded his discharge in bankruptcy as a defense. Plaintiff's debt had not been listed in defendant's bankruptcy schedules because it was not known to defendant when he prepared the schedules. The court ruled for the plaintiff, and defendant appealed.

The Supreme Court affirmed, stating that the exception from discharge for unscheduled debts applied to all debts not scheduled, whether known or unknown to the bankrupt (*139 Cal. 703, 704-705)* .

[e] Address Care of Third Person Insufficient

Mizrahi v. Miscione *(1967) 252 Cal. App. 2d 673, 60 Cal. Rptr. 680* was an action to establish a claim against an estate in which the decedent's administrator raised the decedent's discharge in bankruptcy as a defense. The underlying debt was a judgment that was scheduled as "Morris I. Mizzachi [sic], $4,500.00, c/o Louis Most, Attorney at Law, 328 S. Beverly Dr., Beverly Hills, Calif. Action for damages filed, etc." The debtor used that address because Most was the first name in the name of the firm that represented plaintiff in the underlying action, although he was from the Los Angeles office of the firm. Most was not plaintiff's attorney when the notice of the first meeting of creditors was sent.

Most testified that he did not remember seeing the notice, did not know plaintiff, had nothing to do with the case in which the underlying judgment was rendered, and that it was his custom to throw into the wastebasket notices of first meetings of creditors of a bankrupt. Judgment was for plaintiff, and defendant appealed.

The court of appeal affirmed. The court stated that mail addressed to a third party that comes to the office of an attorney is mail of the addressee, not of the attorney, and imparts no notice to the attorney (*252 Cal. App. 2d 673, 676)* . At that time the bankruptcy code defined "creditor" to include the duly authorized agent, attorney, or proxy of the holder of a claim. Defendant failed to show that Most had plaintiff's authority to represent him for the purpose of filing a claim in bankruptcy. The court said that when a judgment has been entered, the duties of an attorney come to an end unless the terms of employment require the attorney to collect the judgment. Without a showing that the scope of employment includes authority to receive notice of bankruptcy, receipt by the attorney of notice of the debtor's bankruptcy case does not constitute notice to the (former) client (*252 Cal. App. 2d 673, 677)* . Further, the court of appeal noted that defendant knew plaintiff's business address and that plaintiff's residence address was available to him (*252 Cal. App. 2d 673, 678)* .

Brown v. Tropp *(1930) 106 Cal. App. 605, 289 P. 648* involved a judgment debtor's attempt to quash execution on the basis of an intervening discharge in bankruptcy. The judgment was scheduled but the address given was in care of an attorney in Los Angeles. Defendant's affidavits stated that he did not know plaintiff's address and believed plaintiff to be acquainted with the attorney whose address he used. Plaintiff's affidavits stated that he did not know the third person to whom the notice was addressed, had no actual notice of the bankruptcy until after the election of the trustee, and had no formal notice or notice to file his claim until one day before the expiration of the time for filing claims. The trial court believed the plaintiff and did not quash the writ. Defendant appealed.

The court of appeal affirmed, saying that an incorrect address is insufficient, and that this false address was also insufficient (*106 Cal. App. 605, 607-608)* .

[f] Debtor's Burden of Proof

The facts and procedural background of ***Mizrahi v. Miscione*** *(1967) 252 Cal. App. 2d 673, 60 Cal. Rptr. 680* , are discussed in *§ 30.67[3][e]*. In discussing the defendant debtor's burden of proof, the court of appeal stated that once it is established that a debt was not duly scheduled, in order to prove that the debt was discharged, the burden is on the debtor to prove that the creditor had notice or actual knowledge of the bankruptcy case (*252 Cal. App. 2d 673, 677)* .

[g] Actual Knowledge Required

In ***Ismay v. Tyler*** *(1959) 169 Cal. App. 2d Supp. 883, 337 P.2d 257* , plaintiff (a collection agency) was the assignee of the original creditor and obtained judgment in its own name in 1955. Defendant sought to quash a writ of execution on the ground of a 1957 discharge in bankruptcy. Plaintiff was not listed as a creditor in the bankruptcy case and received no notice of it. The original creditor was listed and received notice. The court denied the application to quash, and defendant appealed.

The court of appeal affirmed. Defendant contended that the assignment to plaintiff created the relationship of principal and agent and that under *Civ. Code § 2332,* which provides that as against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought in good faith and the exercise of ordinary care and diligence to communicate to the other, the assignor's notice of the bankruptcy case constituted constructive notice to plaintiff, its agent. The court of appeal disagreed, stating that the more specific rule governing the relationship among plaintiff, assignor, and defendant was that after defendant had notice of the assignment, he dealt with the assignor at his peril. The underlying action established that defendant knew of the assignment prior to filing bankruptcy (*169 Cal. App. 2d Supp. 883, 885*). The court said that as used in the applicable section of the former Bankruptcy Act [*now see 11 U.S.C. § 523(a)(3)*], the term "actual knowledge" explains the word "notice," and actual knowledge is required to

exclude an unscheduled debt from the exception to discharge. It followed then that *Civ. Code § 2332* should not be applied to meet the requirement of actual knowledge (*169 Cal. App. 2d Supp. 883, 885*). The court distinguished the case of *Ray v. Schubach (1935) 10 Cal. App. 2d 122, 123, 50 P.2d 1073* (*see § 30.60*, Discussion of Authorities, Assignor's Knowledge of Bankruptcy Case), in which the assignor's knowledge of the bankruptcy case was imputed to the assignee. The court noted that in *Ray*, the assignor had actual knowledge of the bankruptcy case before the assignment and the suit on the assigned claim (*169 Cal. App. 2d Supp. 883, 885-886*).

[h] Timeliness of Knowledge

The facts and procedural background of ***Van Denburgh v. Goodfellow*** *(1941) 19 Cal. 2d 217, 120 P.2d 20* are discussed in *§ 30.60[3][c]*. The underlying debt was represented by a deficiency judgment after foreclosure.

Defendants contended that, as plaintiff had sought and obtained leave to file a late claim in one bankruptcy case, he could have done so in the other, and that therefore the late notice was sufficient. The Supreme Court disagreed, saying that in order to be sufficient to discharge a debt that was not duly scheduled, the creditor must have notice early enough to enable him or her to take advantage of the benefits of the bankruptcy law and to give him or her an equal opportunity with other creditors to participate in the administration of the estate. The Supreme Court cited *Brown v. Tropp (1930) 106 Cal. App. 605, 289 P. 648* for the rule that the right to participate, including the right to vote for the trustee, cannot be disregarded on the theory that it would have made no difference in the administration of the affairs of the estate (*19 Cal. 2d 217, 223)* .

The facts and procedural background of ***Brown v. Tropp*** *(1930) 106 Cal. App. 605, 289 P. 648* are discussed in *§ 30.67[3][e]*. The underlying debt was represented by a judgment on a note.

In discussing what notice is sufficient to discharge the unscheduled debt, the court quoted from *Birkett v. Columbia Bank (1904) 195 U.S. 345, 350, 25 S. Ct. 38, 49 L. Ed. 231* , that actual knowledge of the bankruptcy case is a knowledge in time to avail a creditor of the benefits of the law, in time to give him or her an equal opportunity with other creditors, not a knowledge that may come so late as to deprive him or her of participation in the administration of the affairs of the estate, or to deprive the creditor of dividends (*106 Cal. App. 605, 608)* . The trustee in bankruptcy had submitted affidavits saying that no dividends were declared before the last day to file claims and that his election was unanimous, so it would have made no difference even if plaintiff had voted against his election. The court disagreed, stating that the right of plaintiff to the equal opportunity with other creditors to participate in the administration of the affairs of the estate is not to be disregarded on the surmise or conjecture that his or her participation in the proceedings would have made no difference (*106 Cal. App. 605, 609)* .

[i] Notice to Assignor After Assignment

Ismay v. Tyler *(1959) 169 Cal. App. 2d Supp. 883, 337 P.2d 257* is discussed in*§ 30.67[3][g]*.

[j] Late Claim Not Required

The facts and procedural background of ***Van Denburgh v. Goodfellow*** *(1941) 19 Cal. 2d 217, 120 P.2d 20* are discussed in *§ 30.60[3][c]*.

Defendants contended that because plaintiff had sought and obtained leave to file a late claim in one bankruptcy case, he was required to have done so in the other. Leave to file the late claim was granted in the one case on the theory that it was an amendment of the claim shown to exist by the schedules and by the debtor's testimony at the first meeting of creditors. Defendants contended that the schedules and testimony must therefore be considered a claim in the other case. The Supreme Court disagreed with both contentions. The Court said that information supplied by the debtor can be considered a claim only for the purpose of allowing the creditor to file an amended claim when equity and good

conscience require that the creditor be allowed to participate in the case, but that there is nothing in the former Bankruptcy Act that requires a creditor to petition for leave to file such an amended claim (*19 Cal. 2d 217, 225)* .

[k] 30 Days Notice Generally Required

In 1986, debtor in ***In re Dewalt*** *(9th Cir. 1992) 961 F.2d 848* executed an installment note and security agreement in the amount of $4,066 in favor of Finance One of California, Inc. In June 1986, the creditor notified the debtor that it would pursue collection of the note. In July 1987, the debtor filed a Chapter 7 petition but did not list Finance One, which was then known as Manufacturers Hanover, on its schedules. Debtor's Notice of Intent (to surrender or redeem property or reaffirm debt that it secures) listed the creditor as "Finance One Manufacturers Hanover, South Dakota, 92010." That address was incorrect, and the creditor received no initial notice of the bankruptcy filing, or of the creditors' meeting, which was held on September 2, 1987. The last date to file claims to determine dischargeability was set for November 2, 1987. The creditor had commenced a state court action against the debtor in which it requested entry of a default judgment. The debtor was served with the Request to Enter Default on October 21, 1987, and five days later, the secretary for the debtor's attorney telephoned the office of creditor's counsel and left a cryptic message with the secretary of the creditor's counsel that the debtor had previously filed for bankruptcy. The creditor did not file a complaint to challenge dischargeability or a request for extension of time to do so before the bar date. The creditor's counsel examined the bankruptcy file and informed the debtor's counsel that it was not listed on the schedules. The debtor agreed to amend the schedules and did so on November 25, 1987, but again listing the creditor at an incorrect South Dakota address with a California zip code. Consequently, the creditor did not receive any notice of the amended schedules from the court. On March 21, 1988, the creditor filed a complaint to determine dischargeability, alleging that the debtor made material misrepresentations of financial condition in writing [*see 11 U.S.C. § 523(a)(2)(B)*]. The debtor moved to dismiss the complaint as untimely, and the bankruptcy court granted the request, holding that the creditor had actual notice of the case in time to file a request for extension of time before the bar date. A divided Bankruptcy Appellate Panel affirmed. Creditor appealed.

The court of appeals reversed. The court first evaluated the rule enunciated in *In re Price (9th Cir. 1989) 871 F.2d 97, 99* (*see § 30.60[3][b]*), that a creditor has sufficient notice if it learns of the bankruptcy case in time to file a request for extension of time to file a complaint to determine dischargeability. The *Dewalt* court stated that this rule unfairly punishes creditors, holding them to the highest standard of diligence in a situation caused by the debtor's negligence. Further, it appears to be contrary to the statutory language to place a creditor in the position where a motion for extension is its only option. *11 U.S.C. § 523(a)(3)(B)* refers to actual notice in time to file a request for determination of dischargeability. A complaint to determine dischargeability is such a request; a motion for an extension of time is not (*961 F.2d 848, 850)* . If the claim is small, filing a request for extension may consume a good portion of the creditor's litigation budget. In addition, the creditor could be forced to file a request for extension before if had time to determine the merits of the nondischargeability claim. The court found guidance as to the sufficient amount of notice in *Fed. R. Bankr. P., Rule 4007(c)*, which directs the court to give creditors at least 30 days' notice of the bar date. Properly scheduled creditors will receive at least 80 days' notice in most cases (that is, 20 days' notice of creditors' meeting plus 60 days' notice from meeting to bar date). The court acknowledged that under *11 U.S.C. § 523(a)(3)(B)*, actual knowledge of the case is sufficient, but the 30-day notice provision in *Fed. R. Bankr. P., Rule 4007(c)* provides a guide to the minimum time within which it is reasonable to expect a creditor to act (*961 F.2d 848, 851)* . Even 30 days' notice may not be sufficient in truly extraordinary circumstances, for example, if a truly unsophisticated creditor not represented by counsel receives only the sketchiest notice that a bankruptcy case has been filed. On the other hand, a somewhat lesser period may be sufficient if there is clear evidence that the creditor had enough advance knowledge of the bar date to file the complaint or request an extension and has purposefully chosen to lie in wait. Neither of those situations existed in this case. The court concluded that in the great majority of cases, 30 days' advance knowledge of the case is both necessary and sufficient to satisfy *11 U.S.C. § 523(a)(3)(B)* (*961 F.2d 848, 851)* .

[l] Request for Extension Not Required

In re Dewalt *(9th Cir. 1992) 961 F.2d 848* is discussed in*§ 30.67[3][k]*.

[4] Additional Authorities

[a] Unscheduled or Improperly Scheduled Debts

The court of appeal in *Tarakjian v. Krone (1987) 196 Cal. App. 3d 1243, 242 Cal. Rptr. 435* affirmed the trial court's nunc pro tunc amendment of a default judgment entered against defendant during the pendency of defendant's bankruptcy case. The nunc pro tunc amendment was to correct the spelling of defendant's name. The action was filed before defendant filed bankruptcy. Defendant did not list the action or the underlying debt in the bankruptcy schedules, and plaintiffs claimed not to know of the bankruptcy proceeding. The court of appeal said that defendant's failure to list the debt was tacit consent to state court jurisdiction. As the bankruptcy case had since been dismissed, it was also too late for defendant to claim the benefit of an automatic stay (*196 Cal. App. 3d 1243, 1247)* .

[b] Address Insufficient

The debt involved in *Miller v. Guasti (1912) 226 U.S. 170, 33 S. Ct. 49, 57 L. Ed. 173* had been scheduled with the address of the creditor given as "Unknown, California" although the findings of the trial court indicated that the debtor knew the creditor's residence and post office address. On writ of error from the New York Court of Appeals, the United States Supreme Court affirmed that the debt had not been discharged (*226 U.S. 170, 171)* .

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 30 BANKRUPTCY
PART II. FORMS
C. Dischargeability of Specific Debts

2A-30 California Points & Authorities § 30.68

AUTHOR: Reviewed By John A. Vos

§ 30.68 Opposing Contention That Debt Has Been Discharged--Damages Based on Fraud [11 U.S.C. § 523(a)(2)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE DEBT AT ISSUE IN THIS CASE IS BASED ON FRAUD AND THUS IS NOT DISCHARGEABLE IN BANKRUPTCY.

A. Fraud. [*See § 30.21, Paragraph C.*]

[*Optional*] **B. Fraud Other Than in Financial Statement.** To establish nondischargeability of debts for money, property, or services obtained by false pretenses, false representations, or "actual frauds" other than in a financial statement (*see 11 U.S.C. § 523(a)(2)(A)*), the creditor must show all of the following (*Field v. Mans (1995) 516 U.S. 59, 74, 116 S. Ct. 437, 133 L. Ed. 2d 351* ; *In re Apte (9th Cir. 1996) 96 F.3d 1319, 1322-1324* ; *In re Britton (9th Cir. 1991) 950 F.2d 602, 604* ; *In re Rubin (9th Cir. 1989) 875 F.2d 755, 759)* :

(1) The debtor made representations;

(2) At the time, the debtor knew those representations were false;

(3) The debtor made the representations with the intent to deceive the creditor;

(4) The creditor justifiably relied on the representations; and

(5) The creditor sustained loss and damage as a proximate result of the representations having been made.

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose the contention that liability based on fraud has been discharged [*see 11 U.S.C. § 523(a)(2)(A)*].

Paragraph B sets forth the criteria for establishing fraud. If the fraud was based on malicious and willful acts, punitive damages will also be nondischargeable [*In re Britton (9th Cir. 1991) 950 F.2d 602, 605-607* ; *see § 30.71*]. This paragraph contains the "justifiable reliance" standard established by the United States Supreme Court [*see Field v. Mans (1995) 516 U.S. 59, 74, 116 S. Ct. 437, 133 L. Ed. 2d 351]* . Before *Field* was decided, there were Ninth Circuit cases holding that a single "reasonable reliance" standard as specified in *11 U.S.C. § 523(a)(2)(B)* applied, regardless of whether the claim is exempted from discharge under paragraph (A) or paragraph (B) of *11 U.S.C. § 523(a)(2)* [*see In re Siriani (9th Cir. 1992) 967 F.2d 302, 304* and other authorities in *§ 30.20*]. There were also Ninth Circuit cases holding that the common-law "justifiable reliance" standard applied under *11 U.S.C. § 523(a)(2)(A)* (other than in a written financial statement) because that subparagraph does not specify a standard [*see In re Kirsh (9th Cir. 1992) 973 F.2d 1454, 1458]* .

Counsel should insert argument linking these points and authorities with the facts of the case; for example, argument that refers to the record in any underlying action and in the proceeding to determine dischargeability to develop facts relating to the five criteria.

This form may be combined with points and authorities pertaining to the procedural context in which counsel wishes to raise the substantive issue. Paragraphs A, B, and J through O in § 30.21 may be particularly appropriate to establish the procedural and evidentiary requirements for establishing nondischargeability of a debt based on fraud.

[3] Discussion of Authorities

[a] Fraud Other Than in Financial Statement

After the debtor in ***Field v. Mans*** *(1995) 516 U.S. 59, 116 S. Ct. 437, 133 L. Ed. 2d 351* filed for relief under Chapter 11, creditors alleged that debtor had made fraudulent representations in letters on which they relied in extending credit to a corporation controlled by debtor. Creditors contended debtor's obligation to them as guarantor of the corporation's debt should be excepted from discharge under *11 U.S.C. § 523(a)(2)(A)* as a debt resulting from fraud. The bankruptcy court found debtor's letters were false representations, but followed circuit precedent in requiring creditors to show reasonable reliance. The bankruptcy court found their reliance unreasonable, and held the debt dischargeable (*133 L. Ed. 2d 351, 357)* . The district court and court of appeals affirmed. Because there was a conflict on this point among the circuits, the Supreme Court granted certiorari (*133 L. Ed. 2d 351, 358)* .

With no standard of reliance specified in *11 U.S.C. § 523(a)(2)(A)*, the Supreme Court stated that it would look to the generally shared common law for assistance when (as here) common law terms are used without further specification. Accordingly, the court held that *11 U.S.C. § 523(a)(2)(A)* requires justifiable reliance, not reasonable reliance, to except a debt from discharge (*133 L. Ed. 2d 351, 358-365)* .

In re Apte *(9th Cir. 1996) 96 F.3d 1319* involved a Chapter 7 debtor whose debt was held to be nondischargeable under *11 U.S.C. § 523(a)(2)(A)* because it was incurred by fraud. The debtor, Apte, leased office space, fell behind in payments, and was served with an unlawful detainer action. Japra approached Apte about a sublease, without knowledge that Apte was in default. Apte told Japra that the lessor had approved the sublease and Japra's improvement plans, although these representations were false. After Japra's construction was almost complete, Apte's master lease was terminated and Japra was evicted. Apte then filed a chapter 7 petition. Japra filed a proof of claim based on rent

paid and damages incurred, and filed an action to have the debt declared nondischarageable. The bankruptcy court found that Japra's reliance on Apte's misrepresentations was unreasonable and unjustifiable. The bankruptcy appellate panel reversed.

The Ninth Circuit affirmed. It stated that a person is justified in relying on a representation of fact although the falsity of the representation might have been ascertained through investigation. The sublessee's reliance on the debtor/lessee's misrepresentations was justifiable, and thus debt for rent paid and construction costs incurred by the sublessee was nondischargeable under the fraud exception, even though the sublessee could have discovered that the lessee had misrepresented the lessor's approval of the sublease. The sublessee, who was well-educated but not highly experienced in real estate, may have been negligent in continuing construction without the lessor's written approval, but negligence in failing to discover a misrepresentation is not a defense to fraud (*96 F.3d 1319, 1322-1324)* .

The debtor in ***In re Britton*** *(9th Cir. 1991) 950 F.2d 602* (decided before *Field v. Mans,*) was a physician's employee who misrepresented himself to a patient as a physician, examined the patient, and induced the patient to have surgery, which was so negligently performed that infection developed and additional corrective surgery was required. State court judgments were entered against both the debtor and the surgeon, and included an award of $50,000 in punitive damages against the debtor/employee. The proceeding to determine dischargeability of the judgment against the debtor/employee resulted in a finding that the debt, including the liability for punitive damages, was nondischargeable under *11 U.S.C. § 523(a)(2)* (fraud) and *11 U.S.C. § 523(a)(6)* (willful and malicious injury). The bankruptcy appellate panel reversed the bankruptcy court in part, holding that nondischargeability of the punitive damages could not be based on *11 U.S.C. § 523(a)(2)*. The Ninth Circuit affirmed the appellate panel's decision, finding that the debtor's conduct was sufficiently willful and malicious to render the punitive damage judgment nondischargeable under *11 U.S.C. § 523(a)(6)*.

Citing *In re Houtman (9th Cir. 1978) 568 F.2d 651, 655* (*see § 30.21[3][a]*), and *In re Taylor (9th Cir. 1975) 514 F.2d 1370, 1373* , each decided before the effective date of the Bankruptcy Reform Act of 1978, the court said the Ninth Circuit has employed a five-part test for determining whether a debt is nondischargeable under *11 U.S.C. § 523(a)(2)(A)*. The creditor must show that (*950 F.2d 602, 604)* :

(1) The debtor made representations;

(2) At the time, he or she knew those representations were false;

(3) The debtor made the representations with the intent to deceive the creditor;

(4) The creditor reasonably relied on the representations; and

(5) The creditor sustained loss and damage as a proximate result of the representations having been made.

The court acknowledged that there were inconsistencies in the creditor's testimony and conflicts between the creditor's version of events and the debtor's, but concluded that the bankruptcy court's findings with respect to the debtor's conduct were not clearly erroneous (*950 F.2d 602, 604)* .

The court stated that proximate cause is sometimes dependent on whether the conduct has been so significant and important a cause that the defendant should be legally responsible. But both significance and importance turn on conclusions in terms of legal policy, so that they depend on whether the policy of the law will extend the responsibility for the conduct to the consequences which in fact have occurred (*950 F.2d 602, 604)* . Again, the court concluded that the bankruptcy court's findings on the issue of proximate cause were not clearly erroneous. Malpractice can be seen as a foreseeable consequence of any medical procedure, including plastic surgery. The debtor employed fraud to convince the creditor to submit to surgery. Moreover, the court said, on these facts, there appears to be no policy argument for

limiting the extent of the debtor's liability for the creditor's injuries. The debtor cannot escape the consequences of his intentional conduct by arguing that the injuries the creditor suffered were not the proximate result of the fraud the debtor committed (*950 F.2d 602, 605)* .

The portion of the opinion addressing nondischargeability of the punitive damage award is discussed in *§ 30.71[3][b]*.

In re Rubin *(9th Cir. 1989) 875 F.2d 755* , another case before *Field*, was an individual's Chapter 7 proceeding. In 1976, when the creditors' home was in foreclosure, the debtor, a real estate broker, told them there was no time to refinance the house before the foreclosure sale, but that he would buy it from them for $4,000, allowing them to rent it back until they could secure financing to repurchase it from him for $38,000, its then appraised value, pursuant to an option to repurchase. Debtor promised to help them obtain that refinancing, but never did. Instead, the debtor obtained several loans using the home as security, selling it to one of the lenders, and evicted the creditors. The home was eventually transferred back to the debtor, who transferred it to other creditors. In 1977, the creditors sued the debtor for fraud, eventually obtaining a state court verdict for $90,000 in compensatory damages and $500,000 in punitive damages. That verdict was set aside and a new trial granted on the basis of passion and prejudice shown by the jury. In 1982, immediately before the new trial, the matter was settled for $125,000. The creditors brought a complaint to determine dischargeability. Both the bankruptcy court and the Bankruptcy Appellate Panel found the debt nondischargeable, as did the Ninth Circuit.

The Ninth Circuit began its discussion by holding that the bankruptcy court's determinations with respect to debtor's intent to defraud and proximate cause were findings of fact, even though a proximate cause finding may depend to some extent on law. Further, those findings could not be overturned unless they were clearly erroneous (*875 F.2d 755, 758)* .

The court said the elements of a claim for fraudulent misrepresentations under *11 U.S.C. § 523(a)(2)(A)* are (*875 F.2d 755, 759)* :

(1) A representation of fact by the debtor;

(2) That was material;

(3) That the debtor knew at the time to be false;

(4) That the debtor made with the intention of deceiving the creditor;

(5) On which the creditor relied;

(6) That the creditor's reliance was reasonable; and

(7) That damage proximately resulted from the representation.

The court identified two misrepresentations: saying that there was no time to obtain a loan before the foreclosure and saying that he would help them obtain a loan, which he never did. Although the debtor claimed the first was merely an opinion, the court said an opinion about a future even which the declarant does not hold, or which is made with reckless indifference for the truth, may be fraudulent. Further, although debtor could characterize the second misrepresentation as a promise, a promise made with a positive intent not to perform or without a present intent to perform satisfies *11 U.S.C. § 523(a)(2)(A)*. Both representations were material. The court said that the debtor's realization of substantial profits on creditors' home while ignoring their legitimate interests strengthened the finding that the debtor intended to defraud the creditors (*875 F.2d 755, 759)* .

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CHAPTER 30 BANKRUPTCY
PART II. FORMS
C. Dischargeability of Specific Debts

2A-30 California Points & Authorities § 30.69

AUTHOR: Reviewed By John A. Vos

§ 30.69 Opposing Contention That Debt Has Been Discharged--Debt Arises From Fiduciary Defalcation [11 U.S.C. § 523(a)(4)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE DEBT AT ISSUE IN THIS CASE ARISES FROM FIDUCIARY DEFALCATION AND AS SUCH IS NOT DISCHARGEABLE IN BANKRUPTCY.

A. Fiduciary Defalcation. [*See § 30.21, Paragraph E.*]

B. Federal Law Determines Nature of Relationship. Whether a relationship is "fiduciary" within the meaning of *Section 523(a)(4) of Title 11 of the United States Code* is a question of federal law (*Ragsdale v. Haller (9th Cir. 1986) 780 F.2d 794, 795)* .

C. Federal Definition of Fiduciary. The broad, general definition of fiduciary, a relationship involving confidence, trust, and good faith, is inapplicable in the discharge context. The trust giving rise to the fiduciary relationship must be imposed prior to any wrongdoing; the debtor must have been a trustee before the wrong and without reference to it. These requirements eliminate constructive, resulting, or implied trusts (*Ragsdale v. Haller (9th Cir. 1986) 780 F.2d 794, 796)* .

[*Optional*] **D. State Law Determines When Trust Exists.** Although the concept of fiduciary is to be narrowly defined as a matter of federal law, state law is to be consulted to determine when a trust in this strict sense exists (*Ragsdale v. Haller (9th Cir. 1986) 780 F.2d 794, 796)* .

[*Optional*] **E. No Trust Under *Corp. Code § 16404*.** *Corporations Code Section 16404(b)(1)* provides that a partner's

duty of loyalty to the partnership and the other partners includes the duty to account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property or information, including the appropriation of a partnership opportunity. Because the trust arises under this statute only when a partner derives profits without consent of the partnership, it is the sort of trust *ex maleficto* not included in the purview of *Section 523(a)(4) of Title 11 of the United States Code* (*Ragsdale v. Haller (9th Cir. 1986) 780 F.2d 794, 796* (applying former Corp. Code § 15021, substantially identical)).

[*Optional*] **F. Partners or Joint Venturers Are Fiduciaries.** California case law has made all partners trustees over the assets of the partnership. Therefore, California partners are fiduciaries within the meaning of *Section 523(a)(4) of Title 11 of the United States Code* with respect to partnership assets and profits. [The same rule applies to joint ventures and joint venturers] (*Ragsdale v. Haller (9th Cir. 1986) 780 F.2d 794, 796-797 [n.3*]).

[2] Comments

[a] Use of Form

These points and authorities may be used to oppose the contention that a debt arising from fiduciary defalcation is dischargeable [*see 11 U.S.C. § 523(a)(4)*]. Paragraph A sets forth the statutory criteria of nondischargeability for this type of debt. Paragraph B sets forth the requirement that federal law is determinative. Paragraph C sets forth a general federal definition of fiduciary relationship. Optional Paragraph D establishes that state law is used to determine whether a trust exists. Optional Paragraph E is a particular example of one of the trusts imposed by law after wrongdoing that do not fall within the fiduciary definition of *11 U.S.C. § 523(a)(4)*. Optional Paragraph F applies the nondischargeability criteria to debts arising from partnerships or joint ventures. The bracketed text should be used if a joint venture is involved.

Counsel should insert argument linking these points and authorities with the facts of the case; for example, argument that shows the connection between the debt and the fiduciary relationship.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the debt is nondischargeable because it arose from a fiduciary defalcation.

[3] Discussion of Authorities

[a] Federal Law Determines Nature of Relationship

The debtor and the creditor in ***Ragsdale v. Haller*** *(9th Cir. 1986) 780 F.2d 794* cooperated in an Alaskan fishing venture. They owned the boat together, but after the first two years, the fishing permit was taken only in the debtor's name. Therefore, all payments were made to him. The debtor did not pay the creditor all the profits to which the creditor was entitled for the third and fourth seasons. The dispute was not resolved, and the creditor filed a state court action. The debtor filed bankruptcy. The creditor filed a complaint to determine dischargeability of the accrued but unpaid profit distribution. The bankruptcy court found the debt to be nondischargeable. The federal district court affirmed, as did the court of appeals.

The court of appeals first recited that the issue of whether the relationship is "fiduciary" within the meaning of *11 U.S.C. § 523(a)(4)* is determined by federal law (*780 F.2d 794, 795)* . The court then went on to discuss the federal definition of fiduciary in the discharge context, saying that the broad, general definition of fiduciary, a relationship involving confidence, trust, and good faith, is inapplicable. The trust giving rise to the fiduciary relationship must be imposed prior to any wrongdoing; the debtor must have been a trustee before the wrong and without reference to it. These requirements eliminate constructive, resulting, or implied trusts (*780 F.2d 794, 796)* . Nevertheless, the court concluded, even though the concept of fiduciary is to be narrowly defined as a matter of federal law, state law is to be

consulted to determine when a trust in this strict sense exists (*780 F.2d 794, 796)* .

[b] Federal Definition of Fiduciary

Ragsdale v. Haller *(9th Cir. 1986) 780 F.2d 794* is discussed in *§ 30.69[3][a]*.

[c] State Law Determines When Trust Exists

Ragsdale v. Haller *(9th Cir. 1986) 780 F.2d 794* is discussed in *§ 30.69[3][a]*.

[d] No Trust Under Corp. Code § 16404

The facts and procedural background of ***Ragsdale v. Haller*** *(9th Cir. 1986) 780 F.2d 794* and other portions of the opinion are discussed in *§ 30.69[3][a]*. The court considered whether former Corp. Code § 15021 [*see now Corp. Code § 16404(b)(1)*] established the requisite trust relationship. Former Corp. Code § 15021 provided that every partner must account to the partnership for any benefit, and hold as trustee for it any profits he or she derived without the consent of the other partners from any transaction connected with the partnership or from any partnership property. In *Ragsdale*, the profits were not derived without consent, but were retained without consent. Because the trust arose under former Corp. Code § 15021 only when the partner derived profits without consent of the partnership, it was the sort of trust ex maleficio not included within the purview of *11 U.S.C. § 523(a)(4)* (*780 F.2d 794, 796)* .

[e] Partners or Joint Venturers Are Fiduciaries

The facts and procedural background of ***Ragsdale v. Haller*** *(9th Cir. 1986) 780 F.2d 794* and other portions of the opinion are discussed in *§ 30.69[3][a]* and *[d]*. The court continued by citing *Gunter v. Leff (1982) 33 Cal. 3d 508, 514, 189 Cal. Rptr. 377, 381, 658 P.2d 740* and several other cases (*780 F.2d 794, 796 n.2*) [*see generally* Ch. 170, *Partnerships and Joint Ventures* .] and noting that California case law has made all partners trustees over the assets of the partnership. Therefore, California partners are fiduciaries within the meaning of *11 U.S.C. § 523(a)(4)* with respect to partnership assets and profits (*780 F.2d 794, 796-797)* . The court also noted that the bankruptcy court had never determined whether the enterprise in question was a partnership or a joint venture, and said that determination would not effect the outcome because joint venturers have the same responsibilities to one and other as partners (*780 F.2d 794, 797 n.3*).

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California Points & Authorities

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 30 BANKRUPTCY
PART II. FORMS
C. Dischargeability of Specific Debts

2A-30 California Points & Authorities § 30.70

AUTHOR: Reviewed By John A. Vos

§ 30.70 Opposing Contention That Debt Has Been Discharged--Debt Is for Spousal or Child Support [11 U.S.C. § 523(a)(5)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

A DISCHARGE IN BANKRUPTCY DOES NOT DISCHARGE DEBTS PAYABLE TO THE DEBTOR'S [FORMER] SPOUSE OR CHILD FOR SPOUSAL OR CHILD SUPPORT.

A. Domestic Support. [*See § 30.20, Paragraph D.*]

[*Optional*] **B. Federal Law Determines Nature of Debt.** Because of the federal interests reflected in the bankruptcy law, federal rather than state law determines whether an obligation is actually in the nature of alimony, support, or maintenance (*Shaver v. Shaver (9th Cir. 1984) 736 F.2d 1314, 1316* ; *see Stout v. Prussel (9th Cir. 1982) 691 F.2d 859, 860-861)* .

[*Optional*] **C. Construction of Agreement.** In construing an agreement made between [former] spouses, the nature of the obligation created is determined by the intention of the parties, as expressed in the agreement, and by the substance of the obligation (*Stout v. Prussel (9th Cir. 1982) 691 F.2d 859, 860-861* ; *Sloan v. Mitchell (1972) 28 Cal. App. 3d 47, 51, 104 Cal. Rptr. 418*).

[*Optional*] **D. Extrinsic Evidence Required.** In determining whether an obligation is intended for support of a former spouse, the court must look beyond the language of the decree to the intent of the parties and to the substance of the obligation (*Shaver v. Shaver (9th Cir. 1984) 736 F.2d 1314, 1316)* .

[*Optional*] **E. Inadmissibility of Parol Evidence.** When there is no uncertainty or ambiguity in a judgment providing

for a property settlement, extrinsic evidence may not properly be considered by a trial court to vary the terms of the agreement, and the obligations are dischargeable in the debtor spouse's bankruptcy (*Yarus v. Yarus (1960) 178 Cal. App. 2d 190, 196-203, 3 Cal. Rptr. 50*).

[*Optional*] **F. Obligation Extending Beyond Remarriage.** The fact that an obligation continues beyond remarriage of the recipient does not prevent it from being support and thus nondischargeable in bankruptcy (*In re Sternberg (9th Cir. 1996) 85 F.3d 1400, 1406-1407* ; *Sloan v. Mitchell (1972) 28 Cal. App. 3d 47, 51-52, 104 Cal. Rptr. 418*).

[*Optional*] **G. Nonmodifiable Payments.** One spouse's relinquishment of his or her right to a modifiable allowance does not imply that he or she also gave up his or her statutory right to keep the allowance nondischargeable in bankruptcy (*Myhers v. Myhers (1970) 6 Cal. App. 3d 855, 858, 86 Cal. Rptr. 356* ; *see Sloan v. Mitchell (1972) 28 Cal. App. 3d 47, 49, 52, 104 Cal. Rptr. 418*).

[*Optional*] **H. Attorney's Fees.** When the obligation of one [former] spouse to pay the other's attorney's fees is for the purpose of maintaining and supporting the economically disadvantaged spouse and enabling that spouse to secure adequate legal representation and does not arise from the division of the community assets, the debtor spouse's obligation for the other spouse's attorney's fees is not dischargeable in bankruptcy (*Jones v. Tyson (9th Cir. 1975) 518 F.2d 678, 680-681* ; *In re Gwinn (B.A.P. 9th Cir. 1982) 6 Collier Bankr. Cas. 2d 1114, 20 B.R. 233, 235*).

[2] Comments

[a] Use of Form

These points and authorities may be used to oppose the contention that a particular debt payable to a debtor's former spouse or child is dischargeable when the debt is in the nature of support [*see 11 U.S.C. §§ 101(14A), 523(a)(5)*]. Paragraph A sets forth the statutory distinction between obligations for support and those in settlement of property rights. Optional Paragraph B sets forth requirement that federal law is determinative. The other optional paragraphs may be used as the particular situation warrants.

Counsel should insert argument linking these points and authorities with the facts of the case; for example, attachment of a copy of the judgment and any agreement establishing the obligation.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the debt is not dischargeable because it is in the nature of support.

This form may also be used, with distinguishing facts, to support the contention that a debt is dischargeable when it represents a division of property.

[3] Discussion of Authorities

[a] Federal Law Determines Nature of Debt

In ***Shaver v. Shaver*** *(9th Cir. 1984) 736 F.2d 1314* , the obligation at issue arose from the parties' Indiana divorce decree, which provided that three of the couple's four minor children would live with the wife and that the husband would pay her $1,500 per month in child support and $150,000 over a 75-month period at the rate of $2,000 per month in settlement of her property rights. The decree was later amended to increase the $150,000 to $197,300 payable over 10 years. The increase was to provide for the taxes that the wife would have to pay on the original amount. The amended decree referred to the debt as her marital and dower rights. The bankruptcy court and the district court found the obligation to be in the nature of support and therefore nondischargeable. The husband appealed. The court of appeals affirmed.

The court first noted that, although Indiana does not provide for alimony in the circumstances of this case, the bankruptcy court was not bound by treatment of the obligation in the Indiana courts. Citing *Stout v. Prussel (9th Cir. 1982) 691 F.2d 859, 861* , the court held that because of the federal interests reflected in the Bankruptcy Act, federal rather than state law determines whether an obligation is actually in the nature of alimony, support, or maintenance (*736 F.2d 1314, 1316)* .

In ***Stout v. Prussel*** *(9th Cir. 1982) 691 F.2d 859* , the obligation at issue arose from the property settlement agreement of the parties in which the wife took the family residence subject to the existing encumbrances and agreed to hold the husband harmless from any claims related to those encumbrances, while he took the family business and agreed to hold her harmless on the SBA loan that had been obtained jointly to finance the business. The SBA loan was secured in part by the family residence. Under the agreement, the husband was to remove the SBA lien on the residence. He filed bankruptcy and sought to discharge the obligations to remove the lien and to hold the wife harmless. The bankruptcy court found those obligations to be in settlement of property rights and dischargeable. The district court reversed the bankruptcy court, finding the obligations to be in the nature of support and nondischargeable. The husband appealed. The court of appeals reversed, reinstating the determination that the debt was in settlement of property rights and therefore dischargeable.

Although it never decided the issue because it concluded the result would be the same under state or federal law, the court of appeals first discussed former 11 U.S.C. § 523(a)(5)(B), which provided that a debt is nondischargeable only if it is "actually in the nature of alimony, maintenance, or support," and cited a congressional report to the effect that in enacting the Bankruptcy Reform Act of 1978, Congress abrogated prior law and dictated that federal rather than state law should determine whether an obligation is actually in the nature of alimony, support, or maintenance (*736 F.2d 859, 860-861)* .

In a dispute regarding a lien on a homestead granted to a debtor's former spouse to secure the value of a former interest under a divorce decree, the United States Supreme Court held that *11 U.S.C. § 522(f)(1)* requires a debtor to have possessed an interest to which a lien attached, before it attached, to avoid fixing of the lien on that interest. A lien that attached to a former spouse's fee simple interest only after the extinguishment of a couple's joint tenancy in homestead property could not be avoided [*Farrey v. Sanderfoot (1991) 500 U.S. 291, 300-301, 111 S. Ct. 1825, 114 L. Ed. 2d 337]* .

[b] Construction of Agreement

The facts and procedural background of ***Stout v. Prussel*** *(9th Cir. 1982) 691 F.2d 859* , are discussed in *§ 30.70[3][a]*. The court of appeals noted that the bankruptcy judge had relied solely on the agreement in determining the nature of the obligation. Since the paragraph of the agreement that contained the hold harmless provision began "[t]o equalize the division of community property," and the agreement had other provisions designated as support payments, the court of appeals concluded that, viewing the agreement as a whole, the determination that the obligation was in settlement of property rights was not such a gross abuse of discretion that reversal was required (*691 F.2d 859, 861-862)* .

Sloan v. Mitchell *(1972) 28 Cal. App. 3d 47, 104 Cal. Rptr. 418* was an action for declaratory relief in which plaintiff sought a determination that an obligation of a marital settlement agreement was dischargeable in bankruptcy. The agreement provided that in consideration for 18 years of married life, the husband agreed to pay the wife $500 per month for the remainder of their joint lives. The payments were to continue in the case of the wife's remarriage, and could only be modified if certain contingencies occurred reducing the husband's average monthly earnings. In addition, the agreement provided that, in consideration for the support of the wife and division of property, the wife waived all claims to alimony, support, or maintenance that she otherwise might have had over and above the amounts expressly provided for in the agreement. The trial court found the obligation constituted spousal support and was not dischargeable in bankruptcy. Plaintiff appealed the judgment and the court of appeal affirmed.

The court of appeal held that the nature of the obligation is to be determined by the intention of the parties, as expressed in their agreement. Here the court found the agreement to be unambiguous in its recitation that the payments were "in consideration of the years of married life, to-wit: eighteen (18) years" and of the wife's waiver of "any and all claims to alimony, support or maintenance which she otherwise might have over and above the amounts herein expressly provided for" (*28 Cal. App. 3d 47, 51)* .

[c] Extrinsic Evidence Required

The facts and procedural background of ***Shaver v. Shaver*** *(9th Cir. 1984) 736 F.2d 1314* are discussed in *§ 30.70[3][a]*. The court of appeals stated that the court must look beyond the language of the decree to the intent of the parties and to the substance of the debt. If an agreement does not explicitly provide for support, a court may presume that a so-called property settlement is intended for support when the circumstances of the case indicate that the recipient spouse needs support. Factors indicating the need for support include the presence of minor children and the imbalance of the relative income of the parties (*736 F.2d 1314, 1316)* . The court of appeals said that W was unemployed and had no special job-related skills at the time of the divorce, and that the trial judge had so noted. Those considerations would have been irrelevant to a true property settlement but are of primary importance to a settlement intended for support, the court said, concluding that the debt was for support (*736 F.2d 1314, 1317)* .

[d] Inadmissibility of Parol Evidence

Yarus v. Yarus *(1960) 178 Cal. App. 2d 190, 3 Cal. Rptr. 50* was an action for declaratory relief. The interlocutory judgment of the parties provided that the husband was to pay the wife $16,200 according to a prescribed schedule, and that the payment of this sum was solely by way of a property settlement, and not as payment of alimony or support and maintenance. The opinion mentioned no other provision of the agreement that addressed support. Based on extrinsic evidence, the trial court found that despite this provision of the judgment, the parties intended this provision to be in the nature of alimony and support and maintenance of the wife and that, therefore, the obligation was not discharged in defendant's bankruptcy. Defendant appealed and the court of appeal reversed.

The court of appeal stated the same rules of interpretation apply to judgments as apply to any other writing (*178 Cal. App. 2d 190, 197)* . Because there was no uncertainty or ambiguity in the judgment before the court, the trial court had erred in receiving extrinsic evidence (*178 Cal. App. 2d 190, 200-201)* . In the light of the precise terms the parties used in their agreement, the court held that what may have motivated them to include those terms was immaterial, and that the payments were discharged in bankruptcy (*178 Cal. App. 2d 190, 202-203)* .

[e] Obligation Extending Beyond Remarriage

The settlement agreement at issue in ***In re Sternberg*** *(9th Cir. 1996) 85 F.3d 1400* provided that payments made by the husband were not taxable to the wife and were to survive her remarriage. The wife of the Chapter 11 debtor brought an action to determine the dischargeability of the debt owed to her pursuant to the agreement. The bankruptcy court determined that the obligation was nondischargeable as spousal support, and the debtor husband appealed. He argued that the court clearly erred in finding an intent to create spousal support because the payments were to survive the wife's remarriage. The Ninth Circuit disagreed, stating that survival of the debt after remarriage is not viewed as a dispositive factor, and noting that *Fam. Code § 4337* allows divorcing spouses to agree to extend spousal support payments beyond the recipient spouse's remarriage. It found, therefore, that the couple's election to extend the support payments beyond remarriage was not in conflict with an intent to provide spousal support under California law. The court held that the debtor's obligation was nondischargeable as spousal support (*85 F.3d 1400, 1406-1407)* .

The facts and procedural background of ***Sloan v. Mitchell*** *(1972) 28 Cal. App. 3d 47, 104 Cal. Rptr. 418* are discussed in *§ 30.70[3][b]*. The husband contended that the obligation could not be support because it extended beyond remarriage. The court quoted former Civ. Code § 4801(b) [*see now Fam. Code § 4337*], which provides that *except as*

otherwise agreed by the parties in writing, the obligation of any party under any order or judgment for the support and maintenance of the other party shall terminate on the death of either party or the remarriage of the other party, and held that the husband's express undertaking was provided for by the emphasized portion of that section and was nondischargeable (*28 Cal. App. 3d 47, 51-52)* .

[f] Nonmodifiable Payments

The decree at issue in ***Myhers v. Myhers*** *(1970) 6 Cal. App. 3d 855, 86 Cal. Rptr. 356* , incorporated the terms of a separation agreement that provided that defendant agreed to pay plaintiff for her support and maintenance the sum of $300 per week, together with all medical expenses incurred by her, for a period of 121 months, unless plaintiff remarried or died before that time. The weekly payment was to cover all plaintiff's expenses and, in return, she released defendant from all obligations and rights arising from the marital relationship. The trial court found the obligation to be nondischargeable as support. Defendant appealed, and the court of appeal affirmed.

Defendant contended on appeal that, despite the language of the agreement, the payments under the agreement were nonmodifiable because the agreement implicitly so provided, and because plaintiff had waived all marital rights except those under the agreement. Therefore, defendant contended, they were payments under a property settlement agreement and dischargeable in bankruptcy. The court disagreed, stating that the character of the payments is not exclusively determined by modifiability, and that viewing the agreement in its entirely, it was clear that the payments were designed for plaintiff's support and maintenance (*6 Cal. App. 3d 855, 858-859)* .

The facts and procedural background of ***Sloan v. Mitchell*** *(1972) 28 Cal. App. 3d 47, 104 Cal. Rptr. 418* are discussed in *§ 30.70[3][b].*

[g] Attorney's Fees

The judgment of dissolution at issue in ***Jones v. Tyson*** *(9th Cir. 1975) 518 F.2d 678* divided the community property equally, ordered the husband to pay $600 per month spousal support for 72 months, and ordered him to pay $3,500 in legal fees to respondent, the wife's attorney. He listed the obligation for legal fees as an unsecured claim in his bankruptcy case and sought a determination of dischargeability in the bankruptcy court. The bankruptcy court held the debt nondischargeable, a determination that was upheld by the district court. The husband appealed. The court of appeals affirmed. This case was decided under former 11 U.S.C. § 35(a)(7), which, unlike *11 U.S.C. § 523(a)(5)* (as now construed in view of the definition of domestic support in *11 U.S.C. § 101(14A)*), did not include a debt "to a spouse [or] former spouse."

The husband contended that the attorney's fees were on account of legal services that related to the division of the community property. The court held that Civ. Code § 4370 makes no distinction between fees awarded for services related to the dissolution, child custody, and spousal support, and those related to the division of community property (*518 F.2d 678, 680-681)* . Further, the court said the purpose of a fee award is to maintain and support the economically disadvantaged spouse and to enable that spouse to secure adequate legal representation. The award is to be made on a showing of necessity, taking into account the respective incomes of the two spouses. Although the court recognized that in some instances the spouses could agree to consider legal fees as community liabilities and take them into account in dividing the community property, in which case they would be dischargeable, in this case there was no indication that the award was based on anything other than the wife's need (*518 F.2d 678, 681)* .

In re Gwinn *(B.A.P. 9th Cir. 1982) 6 Collier Bankr. Cas. 2d 1114, 20 B.R. 233* involved an appeal of a bankruptcy court's dismissal of an attorney's complaint to determine nondischargeability of a debt owed him by his client's former spouse. The original judgment on which the debt was based characterized it as "additional spousal support." The bankruptcy court required strict construction of the language of *11 U.S.C. § 523(a)(5)* (as now construed in view of the definition of domestic support in *11 U.S.C. § 101(14A)*), excepting from discharge "any debt to a spouse, former spouse,

or child of the debtor," and since the debt was payable to the attorney, concluded that it was discharged. Between the time the bankruptcy court made its decision and the time the bankruptcy appellate panel considered the matter, the Second Circuit Court of Appeals had decided *In re Spong (2d Cir. 1981) 661 F.2d 6* , which held that *11 U.S.C. § 523(a)(5)* did not require discharge of one spouse's obligation to pay the attorney's fees of the other spouse. The *Spong* court found the arrangement to be a third-party beneficiary contract, not an assignment that would render the debt dischargeable. The Ninth Circuit followed *Spong* and held the debt nondischargeable (*20 B.R. 233, 234-235)* .

The foregoing holdings are to be distinguished from those applicable in situations like that involved in ***In re Linn*** *(B.A.P. 9th Cir. 1984) 10 Collier Bankr. Cas. 2d 1049, 38 B.R. 762* . There, fees for an attorney and a psychiatrist appointed by the court during custody litigation were dischargeable. Because the initial court order required their payment by the debtor spouse, the nondebtor spouse was never liable for the fees, so the fees were not in the nature of support (*38 B.R. 762, 763)* .

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CHAPTER 30 BANKRUPTCY
PART II. FORMS
C. Dischargeability of Specific Debts

2A-30 California Points & Authorities § 30.71

AUTHOR: Reviewed By John A. Vos

§ 30.71 Opposing Contention That Debt Has Been Discharged--Debt Was for Willful and Malicious Injury [11 U.S.C. § 523(a)(6)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE DEBT AT ISSUE IN THIS CASE IS NOT DISCHARGEABLE IN BANKRUPTCY BECAUSE IT ARISES FROM WILLFUL AND MALICIOUS INJURY.

A. Willful and Malicious Injury. A debt for willful and malicious injury by the debtor to another entity or to the property of another entity is not dischargeable in bankruptcy (*11 U.S.C. § 523(a)(6)*).

B. Intent to Injure Is Required. *Title 11 of the United States Code, Section 523(a)(6)*, does not extend to acts that are merely done intentionally and cause injury; rather, it is limited to acts done with the actual intent to cause injury. The word "willful" in that paragraph of the statute modifies the word "injury," indicating that nondischargeability requires a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury. The acts covered by that paragraph are in the category of intentional torts. Intentional torts generally require that the actor intend the consequences of an act, not simply the act itself. Debts arising from recklessly or negligently inflicted injuries do not fall within the compass of that paragraph (*Kawaauhau v. Geiger (1998) 523 U.S. 57, 60, 118 S. Ct. 974, 978, 140 L. Ed. 2d 90*).

[*Optional*] **C. Punitive Damages for Willful and Malicious Injury Are Nondischargeable.** Both compensatory and punitive damages for willful and malicious injury are nondischargeable under Paragraph (6) of *Section 523(a) of Title 11 of the United States Code* (*In re Britton (9th Cir. 1991) 950 F.2d 602, 605-607* ; *In re Adams (9th Cir. 1985) 761 F.2d 1422, 1423, 1428)* .

[2] Comments

[a] Use of Form

These points and authorities may be used when a debt arises from malicious and willful injury, to oppose the contention that the debt is dischargeable [*see 11 U.S.C. § 523(a)(6)*]. Paragraph A sets forth the statutory criteria for excepting a debt from discharge on this basis, and Paragraph B states the Supreme Court's construction of the statutory language. Paragraph C is optional and should be used if the particular situation warrants. If the injury giving rise to liability was driving a motor vehicle or operating a vessel or an aircraft while intoxicated, the creditor should rely on *11 U.S.C. § 523(a)(9)* to establish nondischargeability; *see § 30.20*.

Counsel should insert argument linking these points and authorities with the facts of the case; for example, argument detailing the facts giving rise to the debt and demonstrating that the debtor acted intentionally without any justification, in disregard of the creditor's rights, and that the injury followed necessarily from the intentional act.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the debt is not dischargeable because it is within the exception of *11 U.S.C. § 523(a)(6)*. Paragraphs A, B, and J through O in § 30.21 which may be particularly appropriate to establish the procedural and evidentiary requirements for establishing nondischargeability of a debt based on willful and malicious injury.

[3] Discussion of Authorities

[a] Intent to Injure is Required

In ***Kawaauhau v. Geiger*** *(1998) 523 U.S. 57, 118 S. Ct. 974, 140 L. Ed. 2d 90* , the plaintiff obtained a malpractice judgment against defendant physician, who declared bankruptcy after the plaintiff began efforts to collect the judgment amount. The judgment was based on defendant's professional negligence. The Bankruptcy Court, concluding that defendant's treatment of the plaintiff "fell far below the appropriate standard of care" and therefore ranked as "willful and malicious," held the judgment debt to be nondischargeable. The Eighth Circuit reversed. The exemption from discharge under *11 U.S.C. § 523(a)(6)*, the court held, is confined to debts "based on what the law has for generations called an intentional tort." Therefore, a judgment debt for malpractice, being based on conduct that is negligent or reckless rather than intentional, must remain dischargeable.

The United States Supreme Court affirmed, holding that debts arising from recklessly or negligently inflicted injuries do not fall within the scope of *11 U.S.C. § 523(a)(6)* (*523 U.S. 57, 64, 118 S. Ct. 974*). The pivotal question concerning the scope of the "willful and malicious injury" exception was this: Does *11 U.S.C. § 523(a)(6)* cover acts, done intentionally, that cause injury (as the plaintiff urged), or only acts done with the actual intent to cause injury (as the Eighth Circuit ruled)? The words of the statute strongly support the Eighth Circuit's reading. The word "willful" in *11 U.S.C. § 523(a)(6)* modifies the word "injury," indicating that nondischargeability takes a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury. Had Congress meant to exempt debts resulting from unintentionally inflicted injuries, it might have described instead "willful acts that cause injury." Or, Congress might have selected additional words, such as "reckless" or "negligent," to modify "injury." Moreover, as the Eighth Circuit observed, the *11 U.S.C. § 523(a)(6)* formulation triggers in the lawyer's mind the category "intentional torts," as distinguished from negligent or reckless torts. Intentional torts generally require that the actor intend the consequences of an act, not simply the act itself. Furthermore, reading *11 U.S.C. § 523(a)(6)* as the plaintiff urged would obviate the need for *11 U.S.C. § 523(a)(9)*, which specifically exempts debts "for death or personal injury caused by the debtor's operation of a motor vehicle, vessel, or aircraft if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance." In addition, *11 U.S.C. § 523(a)(12)* exempts debts for "malicious or reckless failure" to fulfill certain commitments owed to a federal depository institutions regulatory agency (*523 U.S. 57, 62, 118 S. Ct. 974*).

The Court specifically clarified *Tinker v. Colwell (1904) 193 U.S. 473, 24 S. Ct. 505, 48 L. Ed. 754* as providing no warrant for departure from the current statutory instruction that, to be nondischargeable, the judgment debt must be "for willful and malicious injury" (*523 U.S. 57, 63, 118 S. Ct. 974*).

[b] Punitive Damages for Willful and Malicious Injury Are Nondischargeable

The facts and procedural background of ***In re Britton*** *(9th Cir. 1991) 950 F.2d 602* are discussed in *§ 30.68[3][a]*.

Regarding nondischargeability under *11 U.S.C. § 523(a)(6)*, the debtor argued that *11 U.S.C. § 523(a)(6)* bars discharge of only actual damages for willful and malicious injury, not of punitive damages. The Court first pointed out that *In re Adams (9th Cir. 1985) 761 F.2d 1422* (*see § 30.20[3][e]*) held that the exception to discharge in *11 U.S.C. § 523(a)(6)* is measured by the nature of the act, and that if the act was willful and malicious, all liabilities resulting from it are nondischargeable. Debtor argued that punitive damages are not "a debt for injury caused by a debtor's willful and malicious acts," but the Court found that argument unpersuasive, relying in part on *Coen v. Zick (9th Cir. 1972) 458 F.2d 326, 329-330* .

The debtor also argued that the language in *11 U.S.C. § 523(a)(7)* that a debt will not be discharged "to the extent such debt is a fine, penalty, or forfeiture payable to and for the benefit of a government unit, and is not compensation for actual pecuniary loss" is intended to be applied so that other exceptions to discharge not encompass punitive damages. But, as in *In re Levy (9th Cir. 1991) 951 F.2d 196* (*see § 30.61[3][a]*), the Court rejected that argument, saying that injured private plaintiffs are not precluded from relying on the exceptions set forth in other subsections of *11 U.S.C. § 523* merely because one subsection precludes discharge of certain liabilities owed to governments (*950 F.2d 602, 606)* . The Court also declined to implement debtor's theory that allowing discharge of punitive damages would frustrate the "fresh start" goals of the bankruptcy process, saying that the "fresh start" concept applies to honest but unfortunate debtors and should not be extended to favor giving perpetrators of fraud a fresh start over the interest in protecting victims of fraud. *11 U.S.C. § 523(a)(6)* reflects a similar concern for the victims of willful and malicious injury (*950 F.2d 602, 606)* .

The debtor's last argument was that because states have different standards for imposing liability for punitive damages, holding punitive damages nondischargeable under *11 U.S.C. § 523(a)(6)* would frustrate the policy of uniform bankruptcy law. The Court disagreed, saying that since 1970 the issue of nondischargeability has been a matter of federal law governed by the terms of Bankruptcy Code. Thus, there is no uniformity problem (*950 F.2d 602, 607)* .

In re Adams *(9th Cir. 1985) 761 F.2d 1422* is discussed in *§ 30.20[3][e]*.

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C. Dischargeability of Specific Debts

2A-30 California Points & Authorities § 30.72

AUTHOR: Reviewed By John A. Vos

§ 30.72 Opposing Contention That Debt Has Been Discharged--Debt Required by Restitution Order in Criminal Case [11 U.S.C. §§ 523(a)(7), 1328(a)(3)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE DEBT AT ISSUE IN THIS CASE IS BASED ON A RESTITUTION ORDER IN A CRIMINAL ACTION AND AS SUCH IS NOT DISCHARGEABLE IN BANKRUPTCY.

[*EITHER, in Chapter 7, 11, or 12 case or after hardship discharge in Chapter 13 case*]

A. Fines, Penalties, and Forfeitures. A debt is nondischargeable in bankruptcy to the extent that it is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss [*if debt is tax penalty, continue as applicable:* other than a tax penalty _____ (relating to a tax of a kind not specified in Paragraph (1) of *Section 523(a) of Title 11 of the United States Code and/or* imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition in bankruptcy)] (*11 U.S.C. § 523(a)(7)*).

B. Restitution Order in Criminal Action. The qualifying phrases "to and for the benefit of a governmental unit" and "not compensation for actual pecuniary loss" in Paragraph (7) of *Section 523(a) of Title 11 of the United States Code* do not allow discharge of a criminal judgment that takes the form of restitution, even if the amount of restitution payable is the same amount that would be required to make the victim whole. Because criminal proceedings focus on the state's interests in rehabilitation and punishment, rather than the victim's desire for compensation, restitution orders imposed in criminal proceedings operate "for the benefit of" the state and are not assessed "for compensation" of the victim (*11 U.S.C. § 523(a)(7)*; *Kelly v. Robinson (1986) 479 U.S. 36, 51-53, 107 S. Ct. 353, 93 L. Ed. 2d 216, 230-231)* .

[*OR, after nonhardship discharge in Chapter 13 case*]

Restitution Order in Chapter 13. A debt for restitution included in a sentence in the debtor's conviction of a crime is not dischargeable in a Chapter 13 case (*11 U.S.C. § 1328(a)(3)*).

[2] Comments

[a] Use of Form

These points and authorities may be used when the debt in question is based on a restitution order in a criminal proceeding to oppose the contention that the debt is dischargeable [*see 11 U.S.C. § 523(a)(7)*]. Paragraph A sets forth the general ground of nondischargeability of fines and penalties generally and is applicable in all bankruptcies in which all debts enumerated in *11 U.S.C. § 523(a)* are excepted from discharge. Paragraph B sets forth the Supreme Court's interpretation of the statutory authority as it relates to restitution orders arising from criminal cases. Counsel should note that the debt represented by the restitution order is distinct from any debt the victim may have on the underlying crime [*see In re Heincy (Bankr. S.D. Cal. 1986) 14 Collier Bankr. Cas. 2d 870, 58 B.R. 930, 933-936* (embezzlement)]. The second alternative sets forth the statutory criteria for nondischargeability of restitution orders in nonhardship Chapter 13 cases.

Counsel should insert argument linking these points and authorities with the facts of the case; for example, attachment or a request for judicial notice of any records or transcripts from the criminal action, including the order or a transcript of the hearing at which the restitution order was made.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a debt based on a restitution order is not dischargeable.

[3] Discussion of Authorities

[a] Restitution Order in Criminal Action

Kelly v. Robinson *(1986) 479 U.S. 36, 107 S. Ct. 353, 93 L. Ed. 2d 216* arose out of a Chapter 7 proceeding in which the debtor listed the obligation represented by a restitution order from a criminal proceeding as a debt. The crime involved was wrongful receipt of welfare payments. The Connecticut agencies to which restitution was payable did not file claims or objections to discharge, but took the position that the bankruptcy would not effect the conditions of debtor's probation. Almost three years after discharge, the probation office wrote debtor claiming restitution was still payable. Debtor filed an adversary proceeding in the bankruptcy court seeking an injunction and a declaration that the restitution obligation had been discharged. The bankruptcy court decided that the restitution order was not a debt and had not been discharged. The United States District Court for the District of Connecticut adopted the bankruptcy court's decision.

The Second Circuit reversed (*776 F.2d 30*), holding that the restitution obligation was a debt within the meaning of the Bankruptcy Code and that it was discharged under *11 U.S.C. § 523(a)(7)* because it was actually compensation. The United States Supreme Court accepted Connecticut's petition for writ of certiorari and reversed.

The Supreme Court first noted that its interpretation must reflect the deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings (*93 L. Ed. 2d 216, 227)* . The Court declined to address the issue of whether criminal penalties are debts within the meaning of former 11 U.S.C. § 101(4) [*now see 11 U.S.C. § 101(5), (12)*] (*93 L. Ed. 2d 216, 229)* . Then the Court turned to the interpretation of the phrases "to and for the benefit of a governmental unit" and "not compensation for actual pecuniary loss," and said that the criminal justice system is

not operated for the benefit of victims, but for society as a whole and that one of its goals is to rehabilitate the criminal. The amount of restitution is usually based not only on the victim's injury but on the defendant's situation (*93 L. Ed. 2d 216, 230)* . The Court concluded that because criminal proceedings focus on the state's interests in rehabilitation and punishment, rather than the victim's desire for compensation, restitution orders imposed in criminal proceedings operate "for the benefit of" the state and are not assessed "for compensation" of the victim (*93 L. Ed. 2d 216, 230-231)* .

[b] Restitution Order in Chapter 13

11 U.S.C. § 1328(a)(3) was added to abrogate *Pennsylvania Dep't of Public Welfare v. Davenport (1990) 495 U.S. 552, 564, 110 S. Ct. 2126, 109 L. Ed. 2d 588* [*see* H.R. Rep. No. 681(I), 101st Cong., 2d Sess. (1990)], and thus effectively annuls *People v. Goulart (1990) 224 Cal. App. 3d 71, 85, 273 Cal. Rptr. 477* , which followed *Davenport.*

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 30 BANKRUPTCY
PART II. FORMS
C. Dischargeability of Specific Debts

2A-30 California Points & Authorities § 30.73

AUTHOR: Reviewed By John A. Vos

§ 30.73 Opposing Contention That Debt Has Been Discharged--Order for Conveyance Is Not Debt Within Meaning of Bankruptcy Code

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE ORDER REQUIRING CONVEYANCE OF _____ 'S [*name of party, e.g.,* PLAINTIFF] INTEREST IN _____ [*specify property, e.g.,* THE PROPERTY COMMONLY KNOWN AS _____ (*street address*)] TO _____ [*name of party, e.g.,* DEFENDANT] HAS NOT BEEN DISCHARGED IN BANKRUPTCY, AND COMPLIANCE WITH THE ORDER MAY BE COMPELLED.

Nonmonetary Obligation Is Not "Claim." A "debt" for bankruptcy purposes is liability on a "claim" as defined in *Section 101(5) of Title 11 of the United States Code* (*11 U.S.C. § 101(12)*). Thus, a right to payment is involved in the determination of whether there is a debt that has been discharged in bankruptcy. Because a stipulation or order requiring a conveyance does not involve a right to payment, it is not dischargeable in bankruptcy and compliance with such a stipulation or order may be compelled (*Rayan v. Dykeman (1990) 224 Cal. App. 3d 1629, 1636, 274 Cal. Rptr. 672* ; *see* *Farrey v. Sanderfoot (1991) 500 U.S. 291, 300-301, 111 S. Ct. 1825, 114 L. Ed. 2d 337*).

[2] Comments

[a] Use of Form

These points and authorities may be used when the obligation contended to have been discharged is not a "debt" or "claim" within the meaning of the Bankruptcy Code because it is not a right to payment [*see 11 U.S.C. § 101(5)*].

Counsel should insert argument linking these points and authorities with the facts of the case; for example, argument of facts or reference to findings showing that the obligation is not equivalent to a right to payment.

[3] Discussion of Authorities

[a] Nonmonetary Obligation Is Not "Claim"

Rayan v. Dykeman *(1990) 224 Cal. App. 3d 1629, 274 Cal. Rptr. 672* began as a proceeding under the Domestic Violence Prevention Act (*Code Civ. Proc. § 540 et seq.*) by one joint tenant of residential real property against another. In that proceeding, plaintiff stipulated that she would execute a quitclaim deed to the property transferring title to defendant effective June 1, 1988. The stipulation was entered into on January 9, 1988. On January 22, 1988, plaintiff filed a petition in bankruptcy, listing defendant as an unsecured creditor, with the following notations: "No liability admitted. Listed for information only." and a sum of "0.00" as the amount of defendant's claim. An order of discharge was entered in May, 1988. In March, 1989, elisors were appointed to execute the deed. Plaintiff appealed.

The court of appeal affirmed. Plaintiff contended that the court had no authority to make the order because the obligation had been discharged in bankruptcy, equating the obligation to transfer title under the stipulation and order with a "debt." The court noted that a "debt" for bankruptcy purposes is liability on a claim. Claim is defined as (1) a right to payment, whether or not that right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured [*11 U.S.C. § 101(5)(A)*], or (2) a right to an equitable remedy for breach of performance if the breach gives rise to a right to payment, whether or not that right to an equitable remedy is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured [*11 U.S.C. § 101(5)(B)*]. Thus, a right to payment is involved in the determination of whether there is a debt, or a liability on a claim, which has been discharged in bankruptcy. The court distinguished *Ohio v. Kovacs (1985) 469 U.S. 274, 278-283, 105 S. Ct. 705, 83 L. Ed. 2d 649* , which held that an injunctive order that is reduced to a monetary obligation is a dischargeable debt in bankruptcy. In this case, the court said, the order requiring a conveyance does not involve a right to payment. The trial court did not err in compelling compliance with the stipulation or in refusing to declare its order void (*224 Cal. App. 3d 1629, 1636)* .

In a dispute regarding a lien on a homestead granted to a debtor's former spouse to secure the value of a former interest under a divorce decree, the United States Supreme Court held that *11 U.S.C. § 522(f)(1)* requires a debtor to have possessed an interest to which a lien attached, before it attached, to avoid fixing of the lien on that interest. A lien that attached to a former spouse's fee simple interest only after the extinguishment of a couple's joint tenancy in homestead property could not be avoided (*Farrey v. Sanderfoot (1991) 500 U.S. 291, 300-301, 111 S. Ct. 1825, 114 L. Ed. 2d 337*).

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2A-30 California Points & Authorities § 30.74

AUTHOR: Reviewed By John A. Vos

§ 30.74 Opposing Contention That Debt Has Been Discharged--Preexisting Lien Is Not Discharged by Discharge of Underlying Debt in Bankruptcy

[1] FORM

[*The following may be included in a memorandum of points and authorities, or a trial or appellate brief.*]

A PREEXISTING LIEN IS NOT DISCHARGED BY DISCHARGE IN BANKRUPTCY OF THE UNDERLYING DEBT.

Preexisting Lien Not Discharged. A valid preexisting tax lien remains enforceable against property even after personal liability on the underlying obligation has been discharged in bankruptcy (*In re Connor (9th Cir. 1994) 27 F.3d 365, 366* ; *In re Isom (9th Cir. 1990) 901 F.2d 744, 745*).

[2] Comments

[a] Use of Form

These points and authorities may be used in opposition to the contention that a preexisting lien has been discharged by discharge of the underlying debt in bankruptcy.

Counsel should insert argument linking these points and authorities with the facts of the case; for example, argument of facts, reference to findings, or inclusion of the order sought to be enforced, showing that the lien was valid and preexisting at the time the bankruptcy petition was filed.

[3] Discussion of Authorities

[a] Discharge of Debt Does Not Discharge Lien That Secured Debt

In re Connor *(9th Cir. 1994) 27 F.3d 365* involved the issue of whether a federal tax lien had attached to retirement benefits before a debtor filed a bankruptcy petition. Connor retired from his job as an associate justice of a state supreme court in 1983. On retirement, he began receiving monthly retirement payments to which he was unconditionally entitled. In 1985, the IRS assessed Connor more than $65,000 for unpaid back taxes and filed a federal tax lien. Connor filed a Chapter 7 bankruptcy petition in 1988, when he paid approximately $12,000 of the IRS debt. Connor's personal liability for the remainder of the debt was discharged in bankruptcy. The bankruptcy court ruled that Connor's personal liability for back taxes was discharged in bankruptcy, but that the federal tax lien remained valid as against future payments, which constituted "property" at the time of bankruptcy. The BAP reversed, finding the retirement benefits to be "reduced salary" for continuing future service. The IRS appealed (*27 F.3d 365, 365-366)* .

On appeal, the Ninth Circuit reversed, agreeing with the bankruptcy court that the retirement payments were "property" under *I.R.C. § 6231* to which the federal tax lien applied, because the right to retirement payments was unconditional and fully vested before bankruptcy. Because the discharge in bankruptcy affected only Connor's personal liability, and not the tax lien, the lien remained in effect (*27 F.3d 365, 366-367)* .

Crucial to the outcome of this case is the proposition that a preexisting lien on property remains enforceable against the property even after an individual's personal liability has been discharged (*27 F.3d 365, 366* ; *In re Isom (9th Cir. 1990) 901 F.2d 744, 745* ; *see* *Dewsnup v. Timm (1992) 502 U.S. 410, 417-419, 112 S. Ct. 773, 116 L. Ed. 2d 903*).

[4] Additional Authorities

[a] Discharge of Debt Does Not Discharge Lien That Secured Debt

In *Concannon v. Imperial Capital Bank (In re Concannon) (Bankr. 9th Cir. 2006) 2006 Bankr. LEXIS 214, 338 B.R. 90* , the court addressed a question not expressly settled by the Supreme Court in *Dewsnup v. TimmDewsnup v. Timm (1992) 502 U.S. 410* . That case had involved a consensual lien (under a mortgage), which was important to the Supreme Court's analysis leading to the conclusion that a lien normally would survive in a Chapter 7 bankruptcy (except in a few situations delineated in the Bankruptcy Code). The unaddressed question was whether the rule that emerged from that case should be applied as well in the case of a nonconsensual lien. The mortgagor bank had a pre-existing judgment lien on property at the time the property owners began their Chapter 7 proceeding. Because the bank's lien was junior to several liens securing claims that aggregated to more than the evident value of the property, the bankruptcy court correctly concluded that the bank's claim had a zero value and therefore became an unsecured claim under *11 U.S.C. § 506(a)*. This conclusion raised the question whether the bank's lien therefore was void under *11 U.S.C. § 506(d)*, which provides, "To the extent that a lien secures a claim against the debtor that is not an allowed *secured* claim, such lien is void" (emphasis added), subject to exceptions not applicable in this case. The bankruptcy appellate panel concluded that, because under *Dewsnup* a consensual lien cannot be deemed void--cannot be "stripped off" by the debtor--using that provision in a Chapter 7 case, the bank's nonconsensual lien could not be stripped off but would pass through the bankruptcy case unaffected (*338 B.R. 90, 97*).

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2A-30 California Points & Authorities § 30.75

AUTHOR: Reviewed By John A. Vos

§ 30.75 Opposing Contention That Debt Has Been Discharged--Nondischargeability Was Conclusively Determined

[1] FORM [*The following may be included in a memorandum of points and authorities, or a trial or appellate brief.*]

THE DEBT WAS DULY ADJUDGED AS NONDISCHARGEABLE BY THE _____ [BANKRUPTCY COURT FOR THE _____ DISTRICT OF CALIFORNIA *or* SUPERIOR COURT FOR _____ COUNTY] IN A JUDGMENT ENTERED _____ [*date*], BY WHICH THE ISSUE OF DISCHARGEABILITY WAS CONCLUSIVELY DETERMINED.

Nondischargeability Conclusively Determined. Once a debt has been duly adjudged as nondischargeable, in a valid and final judgment by a court with jurisdiction and from which there was an opportunity to appeal, the debt is always nondischargeable on the basis determined in the judgment (*Moncur v. Agricredit Acceptance Co. (In re Moncur) (9th Cir. BAP 2005) 328 B.R. 183, 186*).

[2] Comments

[a] Use of Form

These points and authorities may be used in opposition to the contention that a debt has been discharged in bankruptcy when the debt in question was previously adjudged to be nondischargeable in another action.

Counsel should insert argument linking these points and authorities with the facts of the case; for example, argument of facts, reference to findings, or inclusion of the judgment sought to be enforced, showing that the debt was duly adjudged as nondischargeable.

[3] Discussion of Authorities

[a] Nondischargeability Conclusively Determined

In ***Moncur v. Agricredit Acceptance Co. (In re Moncur)*** *(9th Cir. BAP 2005) 328 B.R. 183* , a creditor sought to renew a money judgment, which the bankruptcy court had adjudged as nondischargeable under *11 U.S.C. § 523(a)(2)* and *(6)* pursuant to a stipulation by the debtors in their Chapter 12 case, and as to which the creditor, relying on the bankruptcy court's judgment, did not seek an adjudication of nondischargeability in the debtors' subsequent Chapter 7 case. The court's judgment in the Chapter 7 case excepted the debt in question from discharge, on the basis of the prior judgment under which the debt was nondischargeable. The debtors appealed and argued that the creditor was bound to litigate the issue of dischargeability in the Chapter 7 case, notwithstanding the court's prior adjudication of the issue in the earlier Chapter 12 case.

The bankruptcy appellate panel affirmed. A general common law rule, as applied in the bankruptcy context, is that if a particular debt is determined to be nondischargeable in a valid and final judgment by a court with jurisdiction and from which there was an opportunity to appeal, then the debt is always nondischargeable on the basis determined in the judgment. In other words: once nondischargeable, a debt is always nondischargeable (*328 B.R. 183, 186)* . (The Bankruptcy Code creates a few exceptions to the applicability of this rule in the bankruptcy context [*see 11 U.S.C. § 523(b)*], but they were not relevant in this case.) Therefore (unless *11 U.S.C. § 523(b)* requires a different result), once a debt has been duly adjudged to be nondischargeable, the creditor is not obliged to litigate the issue in any subsequent proceeding. In this case, the creditor was not required "to refresh ...#x2026; [its] nondischargeable status with a timely adversary proceeding in the second bankruptcy in order to preserve the claim- and issue-preclusive effects" of the valid and final judgment entered in the first bankruptcy case, "the precise question having been [previously] litigated and decided" (*328 B.R. 183, 187)* .

In addition, if the debt is one described in *11 U.S.C. § 523(a)(2), (4),* or *(6),* the statutory mandate for the bankruptcy court to determine whether it is nondischargeable [*see 11 U.S.C. § 523(c)(1)*] neither requires nor permits the court in a subsequent bankruptcy proceeding to adjudicate the issue again after nondischargeability of the debt was once duly adjudged in a prior bankruptcy proceeding (*328 B.R. 183, 189-191)* .

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AUTHOR: Reviewed By John A. Vos

[Reserved]

§§ 30.76[Reserved]

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CHAPTER 31 BROKERS AND SALESPERSONS

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§ 31.syn Synopsis to Chapter 31: BROKERS AND SALESPERSONS

§ 31.01 Scope of Chapter

§ 31.02 Governing Law

§ 31.03 Real Estate Listing Agreements

§ 31.04 Related Pleading and Practice Chapters

§ 31.05 Related Points and Authorities Chapters

§§ 31.06-31.19 [Reserved]

§ 31.20 Supporting Contention That Recovery of Commission Barred If Real Estate Broker or Salesperson Not Licensed [Bus. & Prof. Code § 10136]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Real Estate Broker Defined

[b] License Required When Services Performed or Underlying Transaction Consummated

[c] Sale of Business Opportunity by Sale of Stock Requires License

§ 31.21 Supporting Contention That Recovery of Compensation Barred If Farm Broker Not Licensed [Food & Agric. Code § 56181]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] No Recovery of Compensation by Unlicensed Farm Broker

[4] Additional Authorities

[a] No Recovery of Compensation by Unlicensed Farm Broker

§ 31.22 Supporting Contention That Recovery of Commission Barred If Securities Broker-Dealer Has No Certificate [Corp. Code § 25210]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] No Recovery of Commission When Agreement in Violation of Licensing Requirement

§ 31.23 Opposing Contention That Recovery of Commission Barred If Real Estate Broker Not Licensed [Bus. & Prof. Code § 10136]--License Not Required at Time Cause of Action Arose If Licensed at Time Services Rendered

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Commission Recoverable When Licensed at Time Services Rendered

[4] Additional Authorities

[a] Commission Recoverable When Licensed at Time Services Rendered

§ 31.24 Opposing Contention That Recovery of Commission Barred If Real Estate Broker Not Licensed [Bus. & Prof. Code § 10136]--License Not Required for Finder or Middleman

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Finder or Middleman Not Barred From Recovering Commission

[4] Additional Authorities

[a] Finder or Middleman Not Barred From Recovering Commission

§ 31.25 Opposing Contention That Recovery of Commission Barred If Real Estate Broker Not Licensed [Bus. & Prof. Code § 10136]--License Not Required When Listing Executed If Licensed at Time of Performance

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Commission Recoverable If Licensed When Services Performed

[4] Additional Authorities

[a] Commission Recoverable If Licensed When Services Performed

§ 31.26 Opposing Contention That Recovery of Commission Barred If Farm Broker Not Licensed [Food & Agric. Code § 56181]--Agreement Not Void When Transaction Completed, No Moral Turpitude Involved, Broker Not Guilty of Greatest Moral Fault, and Unjust Enrichment Would Result

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Unlicensed Broker May Recover Compensation When Certain Conditions Satisfied

§ 31.27 Opposing Contention That Recovery of Commission Barred If Securities Broker-Dealer Has No Certificate [Corp. Code § 25210]--Certificate Not Required for Finder or Middleman

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Commission Recoverable When Acting as Finder or Middleman

[4] Additional Authorities

[a] Commission Recoverable When Acting as Finder or Middleman

§ 31.28 Opposing Contention That Recovery of Commission Barred If Securities Broker-Dealer Has No Certificate [Corp. Code § 25210]--Certificate Not Required When Sale of Securities Incident to Sale of Property or Business

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Commission Recoverable When Sale of Securities Incident to Sale of Property or Business

[4] Additional Authorities

[a] Commission Recoverable When Sale of Securities Incident to Sale of Property or Business

§§ 31.29-31.39 [Reserved]

§ 31.40 Supporting Contention That Statute of Frauds [Civ. Code § 1624(a)(4)] Bars Recovery of Commission--Agreement Required to Be in Writing

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] No Recovery of Commission If Agreement Not in Writing

§ 31.41 Supporting Contention That Statute of Frauds [Civ. Code § 1624(a)(4)] Bars Recovery of Compensation--No Recovery in Quantum Meruit

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Statute of Frauds Bars Recovery in Quantum Meruit

[4] Additional Authorities

[a] Statute of Frauds Bars Recovery in Quantum Meruit

§ 31.42 Supporting Contention That Statute of Frauds [Civ. Code § 1624(a)(4)] Bars Recovery of Commission--Statute Applies to Agreement Employing or Authorizing Broker, Agent, or Any Other Person to Obtain Option to Purchase Real Property

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Commission Not Recoverable When Agreement Not in Writing

§ 31.43 Supporting Contention That Statute of Frauds [Civ. Code § 1624(a)(4)] Bars Recovery of Commission--Statute Applies to Agreement Employing or Authorizing Broker, Agent, or Any Other Person to Procure an Assignment of Contract to Purchase Real Property

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] No Recovery of Commission If Agreement Not in Writing

§ 31.44 Supporting Contention That Statute of Frauds [Civ. Code § 1624(a)(4)] Bars Recovery of Commission--Memorandum Insufficient to Satisfy Statute When Fact of Employment Not Shown

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Commission Not Recoverable If No Written Evidence of Employment Relationship

[4] Additional Authorities

[a] Commission Not Recoverable If No Written Evidence of Employment Relationship

§ 31.45 Supporting Contention That Statute of Frauds [Civ. Code § 1624(a)(4)] Bars Recovery of Commission--Broker Agreeing to Share Commission Under Oral Agreement Must Have Binding Written Contract With Owner

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] No Recovery of Commission By One Broker From Another Broker

§ 31.46 Supporting Contention That Statute of Frauds [Civ. Code § 1624(a)(4)] Bars Recovery of Damages--Broker Cannot Claim Estoppel to Assert Statute of Frauds Based on Oral Promise to Pay Commission

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Oral Promise to Pay Commission Cannot Be Basis of Broker's Claim of Estoppel to Rely on Statute of Frauds

§ 31.47 Opposing Contention That Statute of Frauds [Civ. Code § 1624(a)(4)] Bars Recovery of Commission--Memorandum Sufficient When Fact of Employment Can Be Inferred From Writing Evidencing Agreement to Pay Commission

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Recovery of Commission Not Barred When Fact of Employment Implied

§ 31.48 Opposing Contention That Statute of Frauds [Civ. Code § 1624(a)(4)] Bars Recovery of Commission--Promise to Pay Commission and Amount of Commission Need Not Be Contained in Memorandum

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Promise to Pay and Amount of Commission Not Required

[b] Reasonable Commission Implied

[4] Additional Authorities

[a] Promise to Pay and Amount of Commission Not Required

§ 31.49 Opposing Contention That Statute of Frauds [Civ. Code § 1624(a)(4)] Bars Recovery of Commission--Writing Sufficient to Satisfy Statute May Be More Than One Document

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Recovery of Commission Not Barred When More Than One Document

[4] Additional Authorities

[a] Recovery of Commission Not Barred When More Than One Document

§ 31.50 Opposing Contention That Statute of Frauds [Civ. Code § 1624(a)(4)] Bars Recovery of Commission--Defect in Description of Property Cured by Allegation and Proof of Extrinsic Facts and Circumstances

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Recovery of Commission Not Barred When Defect in Description of Property

[4] Additional Authorities

[a] Recovery of Commission Not Barred When Defect in Description of Property

§ 31.51 Opposing Contention That Statute of Frauds [Civ. Code § 1624(a)(4)] Bars Recovery of Commission--Statute Does Not Bar Recovery Under Portion of Agreement Not Required to Be in Writing When Agreement Severable

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Recovery Not Barred When Agreement Severable

[4] Additional Authorities

[a] Recovery Not Barred When Agreement Severable

§ 31.52 Opposing Contention That Statute of Frauds [Civ. Code § 1624(a)(4)] Bars Recovery of Commission--Oral Agreement Between Brokers to Share Commission Not Within Statute When Written Agreement Between Broker and Owner or When Commission Already Paid

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Recovery Under Agreement to Share Commission Not Barred

[4] Additional Authorities

[a] Recovery Under Agreement to Share Commission Not Barred

§ 31.53 Opposing Contention That Statute of Frauds [Civ. Code § 1624(a)(4)] Bars Recovery of Commission--Finder's Agreement Between Broker and Person Who Is Not Buyer or Seller Not Within Statute

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Recovery Not Barred Under Finder's Agreement

§ 31.54 Opposing Contention That Statute of Frauds [Civ. Code § 1624(a)(4)] Bars Recovery of Commission--Recovery Permitted When Written Promise Executed After Services Performed Pursuant to Oral Agreement

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Recovery Permitted Under Written Promise Executed After Performance

[4] Additional Authorities

[a] Recovery Permitted Under Written Promise Executed After Performance

§ 31.55 Opposing Contention That Statute of Frauds [Civ. Code § 1624(a)(4)] Bars Recovery of Commission--Nonsigning Spouse Liable When He or She Ratifies Actions of Agent Spouse and Accepts Benefits

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Recovery From Nonsigning Spouse Not Barred

[4] Additional Authorities

[a] Recovery From Nonsigning Spouse Not Barred

§ 31.56 Opposing Contention That Statute of Frauds [Civ. Code § 1624(a)(4)] Bars Recovery of Commission--Oral Contract Enforceable When Misrepresentation Regarding Existence of Writing

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Commission Recoverable When Existence of Writing Misrepresented

§ 31.57 Opposing Contention That Statute of Frauds [Civ. Code § 1624(a)(4)] Bars Recovery of Commission--Broker Released Third Party From Binding Obligation to Pay Commission in Reliance on Oral Promise

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Commission Recoverable When Party Released in Reliance on Oral Promise

§ 31.58 Opposing Contention That Statute of Frauds [Civ. Code § 1624(a)(4)] Bars Recovery of Commission--Recovery Permitted When Time Limitation Contained in Employment Agreement Waived

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Recovery Permitted When Time Limitation Waived

§ 31.59 Opposing Contention That Statute of Frauds [Civ. Code § 1624(a)(4)] Bars Recovery of Compensation--Statute Does Not Apply to Personal Services Rendered by Broker

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Compensation Recoverable When Agreement for Personal Services

[4] Additional Authorities

[a] Compensation Recoverable When Agreement for Personal Services

§ 31.60 Opposing Contention That Statute of Frauds [Civ. Code § 1624(a)(4)] Bars Recovery of Damages--Statute Not a Defense to Action for Inducing Breach of Broker's Oral Contract

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Damages Recoverable for Inducing Breach of Oral Contract

[4] Additional Authorities

[a] Damages Recoverable for Inducing Breach of Oral Contract

§ 31.61 Opposing Contention That Statute of Frauds [Civ. Code § 1624(a)(4)] Bars Recovery of Damages--Statute Not a Defense to Action for Intentional Interference With Prospective Economic Advantage

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Recovery for Interference With a Prospective Economic Advantage Not Barred

§§ 31.62-31.79 [Reserved]

§ 31.80 Supporting Contention That Broker May Recover Commission--Broker Procures Ready, Willing, and Able Buyer

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Commission Earned When Ready, Willing, and Able Buyer Procured

[b] Commission Recoverable Although Terms of Sale Different From Listing Agreement

[c] Buyer Conclusively Presumed to Be Ready, Willing, and Able

[d] Right to Commission Not Defeated by Unwilling or Unable Seller

[e] Cooperating Broker Has Standing to Recover Commission From Seller

[4] Additional Authorities

[a] Commission Earned When Ready, Willing, and Able Buyer Procured

[b] Commission Recoverable Although Terms of Sale Different From Listing Agreement

[c] Buyer Conclusively Presumed to Be Ready, Willing, and Able

§ 31.81 Supporting Contention That Broker May Recover Commission--Property Listed Under General Listing Agreement and Broker Was Procuring Cause of Sale Not Made Through Broker

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Commission Recoverable When Broker Procuring Cause Under General Listing

[b] Broker Procuring Cause When Broker Creates Interest That Results in Sale

[4] Additional Authorities

[a] Commission Recoverable When Broker Procuring Cause Under General Listing

§ 31.82 Supporting Contention That Broker May Recover Commission--Property Sold Through Another Broker During Term of Exclusive Agency Agreement

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Commission Recoverable When Property Sold During the Term of Exclusive Agency

[4] Additional Authorities

[a] Commission Recoverable When Property Sold During the Term of Exclusive Agency

§ 31.83 Supporting Contention That Broker May Recover Commission--Property Sold by Owner Personally or Through Another Broker During Term of Exclusive Right-to-Sell Agreement

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Commission Recoverable When Property Sold by Owner or Through Different Broker

[b] Commission Recoverable When Property Sold by Another Following Termination of Agency But During Listing Term

[4] Additional Authorities

[a] Commission Recoverable When Property Sold by Owner or Through Different Broker

§ 31.84 Supporting Contention That Broker May Recover Commission--Recovery Permitted When Exclusive Right-to-Sell Contract Contains Withdraw-From-Sale Clause

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Commission Recoverable Under Withdraw-From-Sale Clause

§ 31.85 Supporting Contention That Broker May Recover Commission--Broker Procures Buyer Within Term of Listing Agreement but Negotiations Concluded Between Buyer and Seller After Expiration of Listing Agreement

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Commission Recoverable Although Negotiations Concluded After Expiration of Agreement

[4] Additional Authorities

[a] Commission Recoverable Although Negotiations Concluded After Expiration of Agreement

§ 31.86 Supporting Contention That Broker May Recover Commission--Broker Procures Ready, Willing, and Able Buyer at Lower Price Than Amount Stated in General Listing but Owner Conducts Final Negotiations Selling Property at Lower Price

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Commission Recoverable Although Broker Procures Buyer at Lower Price

[4] Additional Authorities

[a] Commission Recoverable Although Broker Procures Buyer at Lower Price

§ 31.87 Supporting Contention That Broker May Recover Commission--Commission Not Defeated by Fact That Only One Spouse Signed Listing Agreement or by Refusal of Coowner Spouse to Join in Conveyance

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Listing Agreement Signed by Only One Spouse Enforceable

[b] Right to Commission Not Defeated by Refusal of Spouse to Convey Property

[4] Additional Authorities

[a] Right to Commission Not Defeated by Refusal of Spouse to Convey Property

§ 31.88 Supporting Contention That Broker May Recover Commission--Listing Agreement Revoked in Bad Faith

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Commission Recoverable When Revocation in Bad Faith

[4] Additional Authorities

[a] Commission Recoverable When Revocation in Bad Faith

§ 31.89 Supporting Contention That Broker May Recover Commission--Owner Arbitrarily Refuses to Complete Transaction on Which Commission Depends

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Commission Recoverable When Owner Arbitrarily Refuses to Complete Transaction

[4] Additional Authorities

[a] Commission Recoverable When Owner Arbitrarily Refuses to Complete Transaction

§ 31.90 Supporting Contention That Broker May Recover Commission--Owner Breached Duty of Good Faith Not to Perform Act That Renders Broker's Performance Impossible and Defeats Broker's Right to Commission

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Commission Recoverable When Duty of Good Faith Breached

§ 31.91 Supporting Contention That Broker May Recover Commission--Exclusive Listing With No Definite Termination Date Not Void [Bus. & Prof. Code § 10176(f)] When Transaction Completed, No Moral Turpitude

Involved, Broker Not Guilty of Greatest Moral Fault, and Unjust Enrichment Would Result

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Exclusive Agreement Without Definite Termination Date Not Void Under Certain Circumstances

[4] Additional Authorities

[a] Exclusive Agreement Without Definite Termination Date Not Void Under Certain Circumstances

§ 31.92 Supporting Contention That Broker May Recover Commission--Illegality of Exclusive Listing Agreement With No Definite Termination Date [Bus. & Prof. Code § 10176(f)] Not Defense in Action Between Brokers to Share Commission Already Paid

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Absence of Definite Termination Date Not Defense in Action Between Brokers

§ 31.93 Supporting Contention That Broker May Recover Commission--Purchaser Breached Implied Duty of Good Faith to Broker by Not Consummating Sales Transaction

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Commission Recoverable When Duty of Good Faith Breached

§ 31.94 Supporting Contention That Broker May Recover Commission--Extrinsic Evidence Establishes That Broker Is Entitled to Commission

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Commission Recoverable When Extrinsic Evidence Establishes Broker Is Entitled to Recover

§ 31.95 Commission Agreement Not Defeated When Property Subsequently Sold Pursuant to Separate Agreement on Same Terms Except for Commission Provision

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Commission Recoverable When Owner and Buyer Negotiate Subsequent Separate Agreement That Deprives Broker of Commission

§ 31.96 Opposing Contention That Broker May Recover Commission--Broker Not Procuring Cause of Sale

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Commission Not Recoverable When Broker Not Procuring Cause of Sale

§ 31.97 Opposing Contention That Broker May Recover Commission--Broker Acted in Bad Faith and Withheld From Owner Knowledge of Financial Inability of Buyer

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Commission Not Recoverable When Broker Withholds Knowledge of Buyer's Financial Inability

§ 31.98 Opposing Contention That Broker May Recover Commission--General Listing Agreement Allows Owner to Revoke Agency or to Dispose of Property Prior to Broker's Performance Without Incurring Liability to Broker for Commission

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Commission Not Recoverable Under General Listing When Owner Disposes of Property

§ 31.99 Opposing Contention That Broker May Recover Commission--Agreement Is General Listing Unless Exclusive Agency Provided in Unequivocal Terms or by Necessary Implication

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Exclusive Agency Must Be Unequivocally Stated or Arise by Necessary Implication

§ 31.100 Opposing Contention That Broker May Recover Commission--Exclusive Agency Agreement Allows Owner to Sell Property Through His or Her Own Efforts Without Liability to Broker

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Commission Not Recoverable Under Exclusive Agency When Owner Sells Property

§ 31.101 Opposing Contention That Broker May Recover Commission--Exclusive Agreement Is Exclusive Agency Unless Exclusive Right to Sell Expressly Provided or Arises by Necessary Implication

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Exclusive Right to Sell Must Be Expressly Provided or Arise by Necessary Implication

[4] Additional Authorities

[a] Exclusive Right to Sell Must Be Expressly Provided or Arise by Necessary Implication

§ 31.102 Opposing Contention That Broker May Recover Commission--Contract of Sale Conditional and Condition Not Performed

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Accepted Buyer Not Admitted to Be Ready, Willing, and Able When Contract Conditional

[b] Commission Not Recoverable When Contract Conditional and Condition Not Performed

[4] Additional Authorities

[a] Accepted Buyer Not Admitted to Be Ready, Willing, and Able When Contract Conditional

§ 31.103 Opposing Contention That Broker May Recover Commission--Agreement Between Buyer and Seller Containing Provision for Payment of Commission Not Performed

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Commission Not Recoverable When Provision for Commission Contained in Agreement Not Performed

[4] Additional Authorities

[a] Commission Not Recoverable When Provision for Commission Contained in Agreement Not Performed

§ 31.104 Opposing Contention That Broker May Recover Commission--Broker May Not Recover When Nonsigning Spouse's Consent Is Condition Precedent to Effective Contract of Employment

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Commission Not Recoverable When Consent of Nonsigning Spouse Condition Precedent

§ 31.105 Opposing Contention That Broker May Recover Commission--Broker's Failure to Use Due Diligence Under Exclusive Listing Agreement Justifies Revocation of Agency

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Exclusive Agency Revocable for Failure to Use Due Diligence

§ 31.106 Opposing Contention That Broker May Recover Commission--Exclusive Listing Void When No Definite Termination Date [Bus. & Prof. Code § 10176(f)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Commission Not Recoverable Under Exclusive Agreement With No Termination Date

[b] Termination Date Must Be Definite at Execution of Agreement

[4] Additional Authorities

[a] Termination Date Must Be Definite at Execution of Agreement

§ 31.107 Opposing Contention That Broker May Recover Commission--Cooperating Broker May Not Recover Commission From Listing Broker When Commission Not Paid by Owner

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] No Recovery of Shared Commission When Not Paid by Owner

[b] No Implied Promise to Sue for Commission

§ 31.108 Opposing Contention That Broker May Recover Commission--Broker Failed to Provide Statutory Form of Disclosure of Dual Agency [Civ. Code §§ 2079.14, 2079.16]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Remedy Is No Liability for Commission

§§ 31.109-31.119 [Reserved]

§ 31.120 Supporting Contention That Owner May Recover From Broker Secret Profits Acquired Through Agency--Owner Entitled to All Profits Excluding Broker's Agreed Compensation

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Broker Is Agent of Owner

[b] Secret Profits Prohibited

[c] Owner May Recover Secret Profits From Broker

[d] Secret Profits Recoverable Although Broker Acting Gratuitously

[4] Additional Authorities

[a] Owner May Recover Secret Profits From Broker

§ 31.121 Supporting Contention That Owner May Recover Damages for Fraud [Civ. Code § 1710(3)] From Real Estate Broker When Broker Fails to Disclose Material Facts

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Owner May Recover Damages for Fraud When Broker Fails to Disclose Material Facts

[b] Fact That Broker Is Purchaser Must Be Disclosed

[c] Purchaser Related to Broker Must Be Disclosed

[4] Additional Authorities

[a] Owner May Recover Damages for Fraud When Broker Fails to Disclose Material Facts

[b] Purchaser Related to Broker Must Be Disclosed

§ 31.122 Supporting Contention That Owner May Recover Commission Paid to Broker When Broker Fails to Disclose That Broker Is Purchaser or That Purchaser Is Related to Broker

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Owner May Recover Commission Paid

[4] Additional Authorities

[a] Owner May Recover Commission Paid

§ 31.123 Opposing Contention That Owner May Recover From Broker Secret Profits Acquired Through Agency--Broker Owes No Duty to Disclose That Broker Is Purchasing Property When Listing Is Net Listing

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Net Listing Defined

[b] Owner May Not Recover Broker's Profits Under Net Listing

§§ 31.124-31.139 [Reserved]

§ 31.140 Supporting Contention That Purchaser Under Fraudulently Induced Real Estate Sales Contract May Rescind and Obtain Restitution or Recover Damages for Fraud From Seller--Seller-Owner Responsible for Fraudulent Representations of Broker or Salesperson

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Seller-Owner Responsible for Fraudulent Misrepresentations of Agent

[b] Damages or Restitution Based on Rescission for Fraudulent Inducement

[c] False Statement Without Sufficient Information Is Actionable Fraud

[d] Fact That Broker Agent for Both Parties No Defense to Fraud

[4] Additional Authorities

[a] Seller-Owner Responsible for Fraudulent Misrepresentations of Agent

§ 31.141 Supporting Contention That Purchaser Entitled to Restitution Based on Rescission for Fraudulent Representations of Seller's Broker or Salesperson--Restitution Based on Rescission Permitted Although Contract Contains Exculpatory Clause

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Restitution Based on Rescission Available Despite Exculpatory Clause

[4] Additional Authorities

[a] Restitution Based on Rescission Available Despite Exculpatory Clause

§ 31.142 Supporting Contention That Transferee May Recover Damages for Failure of Transferor to Make Statutory Disclosure on Basis of Information Known to Transferor's Agent [Civ. Code § 1102.4]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Duty to Disclose Specified Conditions

[b] Agent's Knowledge as Basis for Statutory Liability

[c] Actual Damages Available for Violation

§ 31.143 Opposing Contention That Purchaser Under Real Estate Sales Contract May Recover Damages for Fraud From Seller for Fraudulent Representations of Seller's Broker or Salesperson--Seller-Owner Not Responsible for Fraudulent Representations of Broker or Salesperson When Exculpatory Clause in Contract Limits Agent's Authority to Make Representations

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] No Recovery of Damages for Fraud Under Exculpatory Clause

§ 31.144 Opposing Contention That Purchaser May Recover Damages From Seller or Seller's Agent for Nondisclosure--No Obligation to Make Disclosures Regarding Legal Ramifications of Factual Nature of Realty

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] No Duty to Make Disclosures Relating to Factual Nature of Realty

§ 31.145 Opposing Contention That Purchaser May Recover Damages From Seller's Broker for Nondisclosure--No Duty to Inspect Inaccessible Areas, Off-site Areas, Public Records, or Unaffected Units

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] No Duty to Inspect More Than Unit Offered for Sale

§ 31.146 Opposing Contention That Purchaser May Recover Damages From Seller's Broker for Nondisclosure--Broker Has No Duty To Independently Verify or Disclaim Accuracy of Seller's Representations

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Broker Has No Duty to Independently Verify or Disclaim Accuracy of Seller's Representations

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PART I. INTRODUCTION

2A-31 California Points & Authorities § 31.01

§ 31.01 Scope of Chapter

This chapter contains forms of points and authorities relating to brokers and salespersons.

Subpart A of Part II, pertaining to the recovery of a commission or damages by a broker or salesperson, is divided into three sub-subparts that include the following types of forms:

- In Sub-subpart 1, supporting (*see §§ 31.20 -31.22*) and opposing (*see §§ 31.23 -31.28*) the contention that recovery is barred if the broker or salesperson is not licensed or certified.

- In Sub-subpart 2, supporting (*see §§ 31.40 -31.46*) and opposing (*see §§ 31.47 -31.61*) the contention that the statute of frauds (*Civ. Code § 1624(a)(4)*) bars recovery of a commission.

- In Sub-subpart 3, supporting (*see §§ 31.80 -31.94*) and opposing (*see §§ 31.96 -31.108*) the contention that a commission may be recovered under a listing agreement.

Subpart B of Part II, relating to the broker or salesperson's liability to an owner, includes the following forms:

- Supporting (*see § 31.120*) and opposing (*see § 31.123*) the contention that an owner may recover secret profits acquired through the agency.

- Supporting the contention that a property owner may recover damages for fraud (*see § 31.121*).

- Supporting the contention that an owner may recover a commission paid to a broker when the broker has failed to make certain required disclosures (*see § 31.122*).

Subpart C of Part II, covering the seller's liability to a purchaser for the acts of the broker or salesperson, includes the following forms:

- Supporting (*see §§ 31.140, 31.141*) and opposing (*see § 31.143*) the contention that the purchaser has

a right to rescission and restitution based on fraud.

- Supporting (*see § 31.142*) and opposing (*see §§ 31.144 -31.146*) the contention that the purchaser may recover damages for nondisclosure.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral OverviewReal Property LawBrokersDiscipline, Licensing & RegulationReal Property LawBrokersFiduciary ResponsibilitiesReal Property LawBrokersRight to Commissions

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2A-31 California Points & Authorities § 31.02

§ 31.02 Governing Law

The primary provisions relating to the license or certificate requirements applicable to brokers and salespeople are:

- *Bus. & Prof. Code § 10136*, relating to the recovery of a commission by a licensed real estate broker or salesperson.
- *Food & Agric. Code § 56181*, pertaining to the licensing of farm brokers.
- *Corp. Code § 25210(a)*, requiring securities brokers/dealers to have a certificate of authorization.

The basic statute of frauds provision requiring agreements employing real estate brokers and agents to be in writing is set forth in *Civ. Code § 1624(a)(4)*.

A broker is an agent for the person employing him or her [*Rhode v. Bartholomew (1949) 94 Cal. App. 2d 272, 278, 210 P.2d 768]* . The general provisions governing an agency are set forth in *Civ. Code §§ 2079.12-2079.14, 2295 et seq.* The obligations imposed on a real estate broker are the same as those imposed on a trustee [*Smith v. Zak (1971) 20 Cal. App. 3d 785, 792, 98 Cal. Rptr. 242* ; *Buckley v. Savage (1960) 184 Cal. App. 2d 18, 27, 7 Cal. Rptr. 328]* . The obligations of a trustee are set forth in *Prob. Code § 16000 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAgents DistinguishedGeneral AgentsContracts LawStatutes of FraudsGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewReal Property LawBrokersDiscipline, Licensing & RegulationReal Property LawBrokersFiduciary Responsibilities

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2A-31 California Points & Authorities § 31.03

§ 31.03 Real Estate Listing Agreements

Part I, A, 3 of this chapter deals with the recovery of damages or a commission under the various types of real estate listing agreements. The listing agreement creates the agency between the real estate broker and the property owner [*Charles B. Webster Real Estate v. Rickard (1971) 21 Cal. App. 3d 612, 614, 98 Cal. Rptr. 559]* . There are three types of listing agreements. One type is the general listing in which the owner is free to list his or her property with other brokers or to sell it himself or herself without incurring liability to the broker. The other two types of listings, an exclusive agency and an exclusive right to sell, are both exclusive agreements. An exclusive agency allows the owner to sell his or her property personally without incurring liability but prohibits the owner from selling it through another broker. The exclusive right-to-sell agreement prohibits the owner from selling the property either personally or through another broker [*see Tetrick v. Sloan (1959) 170 Cal. App. 2d 540, 546-547, 339 P.2d 613]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawBrokersBrokerage AgreementsReal Property LawBrokersRight to Commissions

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2A-31 California Points & Authorities § 31.04

§ 31.04 Related Pleading and Practice Chapters

For a discussion and forms relating to brokers, see California Forms of Pleading and Practice, Ch. 103, *Brokers* (Matthew Bender).

For a discussion and forms relating to principals and agents, see California Forms of Pleading and Practice, Ch. 427, *Principal and Agent* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAgents DistinguishedGeneral OverviewReal Property LawBrokersGeneral Overview

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2A-31 California Points & Authorities § 31.05

§ 31.05 Related Points and Authorities Chapters

For memoranda of points and authorities relating to the requirements of the statute of frauds, see Ch. 216, *Statute of Frauds* , in this publication. For memoranda of points and authorities relating to agency in general, see Ch. 182, *Principal and Agent* , in this publication.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAgents DistinguishedGeneral OverviewBusiness & Corporate LawAgency RelationshipsAgents DistinguishedGeneral AgentsContracts LawStatutes of FraudsGeneral Overview

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2A-31 California Points & Authorities §§ 31.06-31.19

[Reserved]

§§ 31.06[Reserved]

California Points & Authorities

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PART II. FORMS
A. Broker's Recovery of Commission or Damages
1. Requirement of License or Certificate

2A-31 California Points & Authorities § 31.20

§ 31.20 Supporting Contention That Recovery of Commission Barred If Real Estate Broker or Salesperson Not Licensed [Bus. & Prof. Code § 10136]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF REAL ESTATE _____ [BROKER *or* SALESPERSON] CANNOT RECOVER A COMMISSION BECAUSE HE/SHE WAS NOT LICENSED AT THE TIME THAT _____ [THE CAUSE OF ACTION FOR A COMMISSION ALLEGEDLY AROSE *and/or* THE SERVICES WERE PERFORMED *and/or* THE UNDERLYING TRANSACTION WAS CONSUMMATED].

[*EITHER*]

A. Real Estate Broker Defined. A real estate broker is defined as a person who engages in any of the acts set out in *Business and Professions Code Sections 10131, 10131.1-10131.45*, excluding those persons defined in *Business and Professions Code Section 10131.01* (*Bus. & Prof. Code §§ 10131, 10131.01*).

[*AND/OR*]

B. Real Estate Salesperson Defined. A real estate salesperson is a natural person who, for compensation or in expectation of a compensation, is employed by a licensed real estate broker to do one or more of the acts set forth in *Business and Professions Code Sections 10131, 10131.1, 10131.2, 10131.3, 10131.4,* and *10131.6* (*Bus. & Prof. Code § 10132*).

[*EITHER*]

C. License Required When Cause of Action Arose. A person acting in the capacity of a real state broker or salesperson within the State of California cannot maintain any action in the state of California for the recovery of compensation for the performance of any acts mentioned in *Sections 10130-10148 of the Business and Professions Code* (statutes regulating brokers and salespersons) without alleging and proving that he or she was duly licensed at the time the cause of action arose (*Bus. & Prof. Code § 10136*).

[*AND/OR*]

D. License Required When Services Performed or Underlying Transaction Consummated. Recovery of a commission is barred by *Section 10136 of the Business and Professions Code* if, although the broker or salesperson has a license at the time that the cause of action arose (when the commission is due and payable), he or she did not have a license during the period that the services were performed or the underlying transaction was consummated (*Davis v. Chipman (1930) 210 Cal. 609, 621-623, 293 P 40*).

[*CONTINUE*]

[*Optional*] **E. Sale of Business Opportunity [by Sale of Stock] Requires License.** "Business opportunity" as used in *Section 10030 of the Business and Professions Code* encompasses any transfer of ownership of an entire ongoing business in corporate form, whether accomplished by transfer of all the corporate stock or by transfer of all assets. A person negotiating such a transaction is required to have either a real estate broker's license or a security broker's or dealer's license in order to maintain an action for commission (*Bus. & Prof. Code § 10008.5*; *All Points Traders, Inc. v. Barrington Associates (1989) 211 Cal. App. 3d 723, 731, 734, 737-739, 259 Cal. Rptr. 780*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a party's contention that a real estate broker or salesperson may not recover a commission. The argument may be used when the broker or salesperson was not licensed. Alternative Paragraph C is for use when the broker or salesperson was not licensed at the time that the cause of action for a commission arose. Alternative Paragraph D is for use when the broker or salesperson has a license at the time that the commission is due and payable (time when cause of action arose) but did not have a license during the period that the services were performed or the underlying transaction was consummated. Optional Paragraph E is for use to oppose the recovery of a commission for the sale of a business opportunity by an unlicensed person.

Aside from the fact that there can be no recovery for services rendered, it is unlawful to engage in the business, act in the capacity of, or advertise or assume to act as a real estate broker or salesperson without first obtaining a real estate license [*Bus. & Prof. Code § 10130*].

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the requirement of a license. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing that the services performed were those that required the pleading and proof of a license and that the party seeking recovery did not have a license.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities set out in *§§ 31.23 -31.28* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Real Estate Broker Defined

A real estate broker is defined in *Bus. & Prof. Code § 10131* as a person who, for compensation or in the expectation of a compensation, regardless of the form or time of payment, does or negotiates to do one or more of the following acts for another or others:

(1) Sells or offers to sell, buys or offers to buy, solicits prospective sellers or purchasers of, solicits or obtains listings of, or negotiates the purchase or sale of exchange of real property or a business opportunity [*see Bus. & Prof. Code § 10030* (defining "business opportunity")];

(2) Leases or rents or offers to lease or rent, or places for rent, or solicits listings of places for rent, or solicits for prospective tenants, or negotiates the sale, purchase or exchange of leases on real property, or on a business opportunity, or collects rents from real property, or improvements thereon, or from business opportunities;

(3) Assists or offers to assist in filing an application for the purchase or lease of, or in locating or entering on, lands owned by the state or federal government;

(4) Solicits borrowers or lenders for or negotiates loans or collects payments or performs services for borrowers or lenders or note owners in connection with loans secured directly or collaterally by liens on real property or a business opportunity; and

(5) Sells or offers to sell, buys or offers to buy, or exchanges or offers to exchange a real property sales contract or a promissory note, secured directly or collaterally by a lien on real property or on a business opportunity, and performs services for the holders thereof.

"Business opportunity" includes the sale or lease of a business and goodwill of an existing business enterprise or opportunity [*Bus. & Prof. Code § 10030*].

The provisions of *Bus. & Prof. Code § 10131(b)* do not apply to the manager of a hotel, motel, auto and trailer park, to the resident manager of an apartment building, apartment complex, court, or to the employees of such a manager [*Bus. & Prof. Code § 10131.01*].

The definition of a real estate broker also includes a person who engages as a principal in the business of making loans or buying from, selling to, or exchanging with the public, real property sales contracts, or who makes agreements with the public for the collection of payments or for the performance of services in connection with real property sales contracts or promissory notes secured directly or collaterally by liens on real property [*Bus. & Prof. Code § 10131.1(a)*].

In addition, a real estate broker is a person who engages in the business of claiming, demanding, charging, receiving, collecting, or contracting for the collection of an advance fee in connection with any employment undertaken to promote the sale or lease of real property or of a business opportunity by advance fee listing, advertisement or other offering to sell, lease, exchange, or rent property or a business opportunity, or to obtain a loan or loans thereon [*Bus. & Prof. Code § 10131.2*].

A real estate broker also includes a person who, for another or others, for compensation or in expectation of compensation, issues or sells, solicits prospective sellers or purchasers of, solicits or obtains listings of, or negotiates the purchase, sale, or exchange of securities as specified in *Corp. Code § 25206* (real estate broker transactions exempt from requirement of broker-dealer certificate). This, however, does not apply to a broker-dealer or agent of a broker-dealer licensed by the Commissioner of Corporations under the provisions of the Corporate Securities Law of 1968 (*Corp. Code § 25000 et seq.*) [*Bus. & Prof. Code § 10131.3*].

[b] License Required When Services Performed or Underlying Transaction Consummated

In ***Davis v. Chipman*** *(1930) 210 Cal. 609, 293 P 40* , plaintiff sought recovery of one half of a 10 percent commission on the purchase price of real property sold by defendant. Plaintiff had originally brought defendant together with a third party who executed an option to purchase the property. In connection with the option agreement, plaintiff, defendant, and the holder of the option entered into an agreement whereby a commission of 10 percent of the purchase price would be payable to plaintiff and the option holder even though the option was not exercised if, within the term of the option, plaintiff and the option holder interested someone who purchased the property within one year after expiration of the option. Plaintiff found a party who later purchased the property and an agreement was entered into for the payment of the 10 percent commission on an installment basis because the purchase price was paid. After a few payments defendant stopped paying and plaintiff brought the action. Judgment was rendered for plaintiff and defendant appealed, contending that plaintiff was not licensed at the time of the sale or of the original commission agreement. The Supreme Court, after holding that plaintiff was acting as a broker, held that plaintiff could not recover because he was not licensed at the time he interested the prospective purchaser in the property or at the time the sale was consummated (*210 Cal. 609, 623)* . Plaintiff argued that, although he had no license at the time of the negotiations or sale, he did obtain a license afterward and that because a license was required only at the time the cause of action arose, all payments payable at the time he was licensed were recoverable. The court stated that to interpret the statute this way would be to nullify the purpose of the real estate licensing requirements that were designed to protect the public from unscrupulous operators. The court pointed out that under plaintiff's version, an unlicensed broker could perform all of the acts requiring a license and recover a commission by providing for the payment of the commission at a future date when the broker secured a license (*210 Cal. 609, 621-622)* .

[c] Sale of Business Opportunity by Sale of Stock Requires License

Bus. & Prof. Code § 10008.5 provides that solely with regard to any transaction involving the sale, lease, or exchange of a business opportunity occurring before, on, or after September 30, 1989 (the effective date of *Bus. & Prof. Code § 10008.5*), *Bus. & Prof. Code §§ 10000-11200* do not apply to any person licensed at the time of the transaction as a securities broker or securities dealer under any law of California or of the United States, or to any employee, officer, or agent of that person while acting under the direction of, and within the scope of, his or her employment with that person in connection with the transaction. However, "any transaction involving the sale, lease, or exchange of a business opportunity" does not include any of the acts described in *Bus. & Prof. Code § 10131* or *10131.2* (both set forth in *§ 31.20[3][a]*) if the substance of the transaction is to transfer, sell, lease, or exchange an interest in real property for the purpose of evading the licensing requirements [*see Bus. & Prof. Code §§ 10000-10580*].

Bus. & Prof. Code § 10008.5 was enacted, apparently in response to ***All Points Traders, Inc. v. Barrington Associates*** *(1989) 211 Cal. App. 3d 723, 259 Cal. Rptr. 780* . The statement of legislative intent provides that *Bus. & Prof. Code § 10008.5* was enacted to clarify existing law regarding licensing requirements, and to restore and clarify the basis for practice by which both licensed real estate brokers and licensed securities broker-dealers may participate in transactions involving business opportunities without unnecessary duplicate licensing requirements [Stats. 1989, ch. 1116, § 8]. *Bus. & Prof. Code § 10008.5* does not affect the rights and obligations of the parties determined in *All Points Traders, Inc. v. Barrington Associates (1989) 211 Cal. App. 3d 723, 259 Cal. Rptr. 780* [Stats. 1989, ch. 1116, § 8].

Plaintiff in *All Points Traders, Inc. v. Barrington Associates (1989) 211 Cal. App. 3d 723, 259 Cal. Rptr. 780* , was an investment banking firm organized as a partnership and specializing in mergers and acquisitions. Plaintiff had neither a real estate and business opportunity broker's license nor a security broker's license, believing itself exempt from the security broker's licensing requirements by virtue of *10 Cal. Code Reg. § 260.204.5* (*211 Cal. App. 3d 723, 735, fn. 13*). Plaintiff sued defendant for its commission after defendant found its own purchaser for its entire corporate stock during the term of an exclusive right-to-assist arrangement with plaintiff. The transaction also involved a lease and option to purchase the land on which the business was located and payment of consulting fees to the principals of defendant. The matter was referred to arbitration, and an award entered for plaintiff. Defendant filed a petition to vacate the award on the ground that plaintiff did not have a real estate broker's license, but the motion was denied, as was defendant's later motion for a new trial. Defendant appealed.

The court of appeal reversed. *Bus. & Prof. Code § 10131* defines real estate broker to include anyone who negotiates the sale or exchange of a business opportunity. Business opportunity as defined in *Bus. & Prof. Code § 10030* includes the sale or lease of the business and goodwill or an existing enterprise or opportunity (*211 Cal. App. 3d 723, 729)* . The court said that the term "business opportunity" as used in *Bus. & Prof. Code § 10030* encompasses any transfer of ownership of an entire ongoing business in corporate form, whether accomplished by transfer of all the corporate stock or by transfer of all assets (*211 Cal. App. 3d 723, 731)* .

The court said that most cases that had addressed the issue did not address the issue of the business opportunity licensing requirement, but rather the question of the need for a securities broker's license in *addition* to the real estate broker's license, including (1) *Owen v. Off (1951) 36 Cal. 2d 751, 753, 227 P.2d 457* , which denied recovery of a commission to a licensed real estate broker because the broker did not also have a securities broker's license; (2) *Stoll v. Mallory (1959) 173 Cal. App. 2d 694, 696, 699, 343 P.2d 970* (discussed in *§ 31.28[4][a]*), which allowed a licensed real estate and business opportunity broker to recover a commission without a securities broker's license on the theory that the decision to effect the sale of the business by transfer of the stock was not made until after the broker had brought the parties together; (3) *Weber v. Jorgensen (1971) 16 Cal. App. 3d 74, 77, 82-83, 93 Cal. Rptr. 668* (discussed in *§ 31.28[4][a]*), which also allowed a licensed real estate broker to recover a commission without a securities broker's license on the theory that the transfer of stock was only incidental to the sale of the real and personal property, licenses, and permits comprising the business opportunity, and because the stock transfer agreement was drafted and handled by an attorney, not by the broker; (4) *Lyons v. Stevenson (1977) 65 Cal. App. 3d 595, 603, 135 Cal. Rptr. 457* (*see § 31.28[3][a]*), another case that allowed recovery to a licensed real estate broker to recover who did not hold a securities broker's license on the theory that the broker was engaged to effect the sale of the business and neither party considered how the business would be transferred; and (5) *Nationwide Investment Corp. v. California Funeral Service, Inc. (1974) 40 Cal. App. 3d 494, 499, 114 Cal. Rptr. 77* , which denied recovery of the commission to a plaintiff who held neither a real estate broker's license nor a security broker's license (*211 Cal. App. 3d 723, 730-731)* . In *All Points Traders, Inc.*, the court said that even though this transfer was accomplished through transfer of corporate shares, the person negotiating it was required to have a real estate broker's license (*211 Cal. App. 3d 723, 734)* . The court noted that in this case, only the real estate license requirement was at issue, because defendant did not contest the claim of exemption from the security broker licensing requirement, and said that whether the transaction also fell within the scope of the securities regulations was irrelevant (*211 Cal. App. 3d 723, 734-735)* .

The court then considered whether this was a type of illegality that prohibited recovery by plaintiff. The court acknowledged that there may be special circumstances when the purposes of a legal requirement would not be advanced by denying relief, but this case was not one of them. Enforcement of a contract for a commission would be in direct contravention of the statute, against public policy, and contrary to the explicit mandate of *Bus. & Prof. Code § 10136* (*211 Cal. App. 3d 723, 737-738)* . Further, the equitable principle of unjust enrichment was not applicable here (*211 Cal. App. 3d 723, 739)* .

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§ 31.21 Supporting Contention That Recovery of Compensation Barred If Farm Broker Not Licensed [Food & Agric. Code § 56181]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF FARM BROKER CANNOT RECOVER COMPENSATION UNDER THE AGREEMENT BECAUSE HE/SHE WAS NOT LICENSED.

A. Farm Broker Defined. A farm broker is any person who negotiates the purchase or sale of any farm product (*see Food & Agric. Code § 56103*).

B. License Required. Except for the resale of raw products to prevent waste, pursuant to *Section 55610 of the Food and Agricultural Code*, any person engaged in the business of buying, receiving on consignment, soliciting for sale or commission, or negotiating the sale of farm products from a licensee or producer for resale must be licensed as a broker (*Food & Agric. Code § 56181*).

C. No Recovery of Compensation by Unlicensed Farm Broker. A farm broker cannot recover compensation under an agreement made in violation of the licensing requirement of *Section 56181 of the Food and Agricultural Code* because such an agreement is void (*California Chicks, Inc. v. Viebrock (1967) 254 Cal. App. 2d 638, 641, 62 Cal. Rptr. 269* (construing former Food & Agric. Code § 1263 [*now see Food & Agric. Code § 56181*]).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that a farm broker cannot recover compensation under an agreement made in violation of *Food & Agric. Code § 56181*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that recovery of compensation under an agreement is barred by *Food & Agric. Code § 56181*. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing that the party seeking recovery was acting as a farm broker and was unlicensed.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities set out in *§ 31.26* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] No Recovery of Compensation by Unlicensed Farm Broker

In ***California Chicks, Inc. v. Viebrock*** *(1967) 254 Cal. App. 2d 638, 62 Cal. Rptr. 269* , a produce dealer was denied recovery of money due under a contract on the basis that the dealer was required to be licensed by former Ag C § 1263 (now *Food & Agric. Code § 56181*) and was unlicensed at the time of the transactions under the contract. The court of appeal affirmed and held that although the former Agricultural Code (now Food and Agricultural Code) contained no provision prohibiting an unlicensed dealer from maintaining an action on a contract, such contract was nevertheless void. Quoting from prior case law, the court stated that purported contracts in direct violation of the terms of an express prohibition are void (*254 Cal. App. 2d 638, 640-642)* .

[4] Additional Authorities

[a] No Recovery of Compensation by Unlicensed Farm Broker

The court of appeal in *La Rosa v. Glaze (1936) 18 Cal. App. 2d 354, 63 P.2d 1181* , reversed a judgment in favor of plaintiffs who entered into an agreement with defendant's wife to purchase defendant's grape crop. The court's reversal was based in part on the ground that, at the time of the agreement, plaintiffs were unlicensed in violation of Ag C § 1263 (now *Food & Agric. Code § 56181*). The court stated that the licensing of agents, brokers, and commission merchants pursuant to former Ag C § 1263 is clearly intended for the regulation of traffic in farm commodities for the general protection of the public and that it has been uniformly held that contracts procured in violation of such regulatory licensing provisions are void (*18 Cal. App. 2d 354, 359)* .

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§ 31.22 Supporting Contention That Recovery of Commission Barred If Securities Broker-Dealer Has No Certificate [Corp. Code § 25210]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF BROKER CANNOT RECOVER A COMMISSION BECAUSE RECOVERY IS BARRED WHEN A PERSON ACTS AS A SECURITIES BROKER-DEALER WITHOUT A CERTIFICATE OF AUTHORIZATION.

A. Broker-Dealer Defined. A "broker-dealer" is any person engaged in the business of effecting transactions in securities in California for the account of others or for his or her own account, and the term includes any person engaged in the regular business of issuing or guaranteeing options with regard to securities not of his or her own issue (*Corp. Code § 25004*).

B. Requirement of Certificate. Unless exempted by *Sections 25200-25207 of the Corporations Code*, no broker-dealer shall effect any transaction in, or induce or attempt to induce the purchase or sale of, any security in this state unless such broker-dealer has first applied for and secured from the commissioner a certificate, then in effect, authorizing such person to act in that capacity (*Corp. Code § 25210(a)*).

C. No Recovery of Commission When Agreement in Violation of Licensing Requirement. A contract employing a broker-dealer to perform services in connection with the sale of securities that requires a certificate pursuant to *Section 25210(a) of the Corporations Code* is void if the broker-dealer has no certificate and the agreement will not support an action to recover a commission (*Rhode v. Bartholomew (1949) 94 Cal. App. 2d 272, 272, 282, 210 P.2d 768* (construing former Section 6 of the Corporate Securities Act [*now see Corp. Code § 25210(a)*]).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that recovery of a commission by an unlicensed securities broker-dealer is barred by the certificate requirement of *Corp. Code § 25210(a).*

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that recovery of a commission is barred by *Corp. Code § 25210(a)*. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing that the person seeking recovery of a commission was acting as a broker-dealer within the meaning of *Corp. Code § 25004* and that he or she did not have a certificate required by *Corp. Code § 25210(a)*.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities set out in *§§ 31.27 -31.28* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] No Recovery of Commission When Agreement in Violation of Licensing Requirement

In ***Rhode v. Bartholomew*** *(1949) 94 Cal. App. 2d 272, 210 P.2d 768* , plaintiff brought an action for compensation earned in procuring a purchaser for defendants of the capital stock of a manufacturing company and for assisting in the sale. The jury returned a verdict for plaintiff at the original trial and on retrial. Defendant appealed, contending that the services performed by plaintiff were those of a broker and that plaintiff did not have a broker's license as required by former § 6 of the Corporate Securities Act, now *Corp. Code § 25210(a)*. The court of appeal reversed the judgment and held that plaintiff was acting as a broker and, being unlicensed, was not entitled to recovery. The court stated that the provision of the former Corporate Securities Act (now Corporate Securities Law of 1968, *Corp. Code §§ 25000-25706*), requiring a broker of stock to first secure a license, was designed to protect the public against unscrupulous operators and that the efforts of plaintiff to sell stock were illegal and therefore would not support a promise to pay. Thus, the court stated, a contract employing a broker to sell corporate stock is void when the broker is not licensed to sell the stock, and the broker may not recover a commission (*94 Cal. App. 2d 272, 282)* .

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§ 31.23 Opposing Contention That Recovery of Commission Barred If Real Estate Broker Not Licensed [Bus. & Prof. Code § 10136]--License Not Required at Time Cause of Action Arose If Licensed at Time Services Rendered

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF _____ [BROKER *or* SALESPERSON] MAY RECOVER A COMMISSION, EVEN THOUGH HE/SHE WAS NOT LICENSED AT THE TIME THE CAUSE OF ACTION AROSE, BECAUSE HE/SHE WAS LICENSED AT THE TIME SERVICES WERE RENDERED.

Commission Recoverable When Licensed at Time Services Rendered. Although a broker was unlicensed when the cause of action for a commission arose, a broker can recover a commission if he or she was licensed when the services requiring a license were rendered (*Cline v. Yamaga (1979) 97 Cal. App. 3d 239, 244-246, 158 Cal. Rptr. 598*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that recovery of a commission is barred pursuant to *Bus. & Prof. Code § 10136* because the broker seeking recovery was not licensed at the time the cause of action arose. This form sets out the point that a broker may recover a commission, even though he or she was not licensed when the cause of action arose, if he or she was licensed when the services requiring a license were rendered.

These points and authorities may be combined with a memorandum of points and authorities relating to the specific procedural context in which counsel is responding to the contention that *Bus. & Prof. Code § 10136* bars recovery of a commission. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing that the broker or salesperson was licensed at the time that the services were rendered, even though he or she was not licensed when the cause of action arose.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities set out in *§ 31.20*.

[3] Discussion of Authorities

[a] Commission Recoverable When Licensed at Time Services Rendered

In ***Cline v. Yamaga*** *(1979) 97 Cal. App. 3d 239, 158 Cal. Rptr. 598* , plaintiff, a real estate broker, sought recovery of a commission in connection with the exercise of an option to lease six acres of real property. Plaintiff located for defendants a lessee who was to assist in developing the land owned by them. In 1964, an agreement was entered into for the lease of six of defendants' acres with an option to lease the remaining six. This agreement provided for a commission. The agreement was modified in 1965 and provided for the payment of one half of the commission in consideration for the option and provided that no commission would be payable if the option was not exercised. In 1972 and 1973, leases were entered into but plaintiff was not paid a commission and thus brought an action for recovery of the same. Defendants contended in part that, although plaintiff ceased performing services for defendants in 1965, *Bus. & Prof. Code § 10136* barred recovery of the commission because plaintiff was not licensed at the time the cause of action arose in 1973. The trial court agreed, but the court of appeal reversed and held that *Bus. & Prof. Code § 10136* did not bar recovery (*97 Cal. App. 3d 239, 246)* . The court noted that a broker's cause of action arises when the commission becomes due and payable and that a literal interpretation of the statute would bar recovery by plaintiff because he was not licensed in 1973. However, the court stated, the purpose of the real estate licensing requirement is to protect the public from the perils in dealing with incompetent and untrustworthy practitioners. Accordingly, this purpose would not be served by barring plaintiff's recovery because the protection of the public requires that the broker or salesperson be duly licensed at the time that the services are rendered (*97 Cal. App. 3d 239, 245)* .

[4] Additional Authorities

[a] Commission Recoverable When Licensed at Time Services Rendered

In *Koeberle v. Hotchkiss (1935) 8 Cal. App. 2d 634* , the court of appeal affirmed a judgment for plaintiff who was receiving, as a commission on oil leases obtained for defendants, 10 percent of the royalties as they were received by defendants. Defendants contended in part that plaintiff was barred from recovery of the commission because he did not plead and prove that he was a duly licensed real estate broker at the time that the commissions were to have been received. The court held that the services as a real estate broker were fully performed by plaintiff while he had a license and that a payee under a contract such as plaintiff's need not maintain a license throughout the term of the contract in order to bring an action for recovery of the commission payments (*8 Cal. App. 2d 634, 640-641)* .

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§ 31.24 Opposing Contention That Recovery of Commission Barred If Real Estate Broker Not Licensed [Bus. & Prof. Code § 10136]--License Not Required for Finder or Middleman

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF MAY RECOVER A COMMISSION, EVEN THOUGH HE/SHE WAS NOT LICENSED, BECAUSE A FINDER OR MIDDLEMAN IS NOT REQUIRED TO BE LICENSED AS A REAL ESTATE BROKER.

Finder or Middleman Not Barred From Recovering Commission. One who simply finds and introduces two parties to a real estate transaction, without participating in negotiations, need not be licensed as a real estate broker and under the finder's exception to the real estate licensing laws, such an intermediary or middleman may recover a commission (*Tyrone v. Kelley (1973) 9 Cal. 3d 1, 8-9, 106 Cal. Rptr. 761, 507 P.2d 65*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that recovery of a commission is barred by the license requirement of *Bus. & Prof. Code § 10136* when the services performed by the party seeking recovery were those of a finder or middleman.

These points and authorities may be combined with a memorandum of points and authorities relating to the specific procedural context in which counsel is responding to the contention that recovery of a commission is barred because the party seeking recovery was not licensed. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of

law stated. Thus, counsel should discuss the nature of the services performed and the facts showing that the party seeking recovery was merely acting as a finder.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities set out in *§ 31.20*.

[3] Discussion of Authorities

[a] Finder or Middleman Not Barred From Recovering Commission

In ***Tyrone v. Kelley*** *(1973) 9 Cal. 3d 1, 106 Cal. Rptr. 761, 507 P.2d 65* , plaintiff brought an action to recover a fee earned in connection with finding a lender for a construction project on defendants' property. The trial court rendered judgment for plaintiff and defendants appealed, contending in part that plaintiff had performed services as a real estate broker and was not licensed and was therefore barred from recovering a commission pursuant to *Bus. & Prof. Code § 10136* (*9 Cal. 3d 1, 8)* . The Supreme Court affirmed the judgment and stated that plaintiff was acting as a mere finder and did not participate in the negotiations in any way. Thus, the court held that recovery of the commission was not barred by *Bus. & Prof. Code § 10136*, but on the contrary, plaintiff came within the long-established finder's exception to the real estate licensing requirements (*9 Cal. 3d 1, 8-12)* . The court pointed out that a finder is a person whose employment is limited to bringing the parties together so that they may negotiate their own contract, and that the distinction between a finder and a broker turns on whether or not the intermediary has been invested with authority and duties beyond merely introducing the parties, which is usually the authority to participate in negotiations (*9 Cal. 3d 1, 9)* . Because a finder merely introduces and does not negotiate, the Court noted that there is no reason for the finder to be licensed, since he or she does not need to possess the degree of learning and expertise required of a broker (*9 Cal. 3d 1, 11-12)* .

[4] Additional Authorities

[a] Finder or Middleman Not Barred From Recovering Commission

In *Shaffer v. Beinhorn (1923) 190 Cal. 569, 213 P 960* , the Supreme Court reversed a dismissal of an action for a commission following the sustaining of a demurrer to the complaint. The demurrer was based on the ground that there was no allegation that plaintiffs had licenses. The complaint alleged that plaintiffs entered into an agreement with defendant, a licensed real estate broker, whereby defendant agreed to pay plaintiffs a portion of defendant's commission if they found someone interested in buying a ranch for which defendant had a listing. The Court held that the actions of plaintiffs, as alleged, did not require a license (*190 Cal. 569, 573-574)* .

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2A-31 California Points & Authorities § 31.25

§ 31.25 Opposing Contention That Recovery of Commission Barred If Real Estate Broker Not Licensed [Bus. & Prof. Code § 10136]--License Not Required When Listing Executed If Licensed at Time of Performance

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF BROKER MAY RECOVER A COMMISSION, EVEN THOUGH HE/SHE WAS NOT LICENSED AT THE TIME THE AGREEMENT WAS EXECUTED, BECAUSE HE/SHE WAS LICENSED AT THE TIME SERVICES WERE RENDERED UNDER THE AGREEMENT.

Commission Recoverable If Licensed When Services Performed. A broker need not be licensed at the time of the execution of the listing agreement and the broker is not barred from recovering a commission if he or she is licensed at the time of performance of the services pursuant to the agreement (*Houston v. Williams (1921) 53 Cal. App. 267, 270-272, 200 P 55*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that recovery of a commission is barred by the license requirement of *Bus. & Prof. Code § 10136*. The contention may be used when the broker did not have a license at the time of the execution of the listing agreement but did have a license at the time of the performance of services.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to respond to the contention that recovery of a commission is barred because the broker did not have a license. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing that the broker had a license at the time that the services were performed, even though he or she did not have a license at the time of execution of the agreement under which recovery is sought.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities set out in *§ 31.20*.

[3] Discussion of Authorities

[a] Commission Recoverable If Licensed When Services Performed

In ***Houston v. Williams*** *(1921) 53 Cal. App. 267, 200 P 55* , plaintiff, a real estate broker, obtained a judgment for a commission earned in procuring a purchaser for defendant's property. Defendant appealed, contending in part that the listing agreement was void because at the time of its execution plaintiff did not have a real estate license, although plaintiff was licensed at the time the services were rendered. The court of appeal affirmed the judgment and held that Stats. 1919, ch. 605, § 20 (now contained in *Bus. & Prof. Code § 10136*) only required that a broker, to recover a commission, allege and prove that he or she had a license at the time the cause of action arose and that any earlier time was excluded by implication. Since the cause of action arose at the time a purchaser was procured and it was not disputed that plaintiff had a license at that time, plaintiff was not barred from recovering a commission (*53 Cal. App. 267, 271-272)* .

[4] Additional Authorities

[a] Commission Recoverable If Licensed When Services Performed

The court of appeal in *Radich v. Cernokus (1924) 65 Cal. App. 452, 224 P 124* , relied on *Houston v. Williams (1921) 53 Cal. App. 267, 200 P 55* , discussed in *§ 31.25[3][a]* in affirming a judgment for a real estate broker. In *Radich*, plaintiff and defendant entered into a listing agreement in December, which was dated for the following January due to the fact that defendant had a listing with another agent that expired in January. Plaintiff was not licensed until January, and defendant contended that the listing agreement was void because plaintiff had no license when it was executed. The court held that because plaintiff was licensed when he procured a purchaser, the contention was without merit and plaintiff could recover the commission (*65 Cal. App. 452, 454)* .

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2A-31 California Points & Authorities § 31.26

§ 31.26 Opposing Contention That Recovery of Commission Barred If Farm Broker Not Licensed [Food & Agric. Code § 56181]--Agreement Not Void When Transaction Completed, No Moral Turpitude Involved, Broker Not Guilty of Greatest Moral Fault, and Unjust Enrichment Would Result

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF FARM BROKER, ALTHOUGH UNLICENSED, IS ENTITLED TO RECOVER COMPENSATION BECAUSE AN AGREEMENT MADE IN VIOLATION OF SECTION 56181 OF THE FOOD AND AGRICULTURAL CODE IS NOT VOID WHEN THE TRANSACTION HAS BEEN COMPLETED, THERE WAS NO MORAL TURPITUDE INVOLVED, PLAINTIFF WAS NOT GUILTY OF THE GREATEST MORAL FAULT, AND UNJUST ENRICHMENT WILL RESULT IF THE AGREEMENT IS NOT ENFORCED.

Unlicensed Broker May Recover Compensation When Certain Conditions Satisfied. An unlicensed farm broker may recover compensation under an agreement made in violation of *Section 56181 of the Food and Agricultural Code* when the transaction has been consummated, no serious moral turpitude is involved, the broker is not the one guilty of the greatest moral fault, and the party urging the unenforceability of the agreement will be unjustly enriched at the expense of the broker (*Southfield v. Barrett (1970) 13 Cal. App. 3d 290, 294, 91 Cal. Rptr. 514*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that recovery of compensation under an agreement is barred when a farm broker is unlicensed in violation of *Food & Agric. Code § 56181*. The argument may be made when the agreement has been fully performed, there is no serious moral turpitude, the party contending that it is void is the one guilty of the greatest moral fault, and unjust enrichment would result at the expense of the broker if the agreement were not enforced.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to respond to the contention that a farm broker's recovery of compensation is barred by *Food & Agric. Code § 56181*. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that (1) the transaction in which the services were performed and for which compensation is sought has been completed, (2) there is no serious moral turpitude involved, (3) the party urging the unenforceability of the agreement is the one guilty of the greatest moral fault, and (4) the party urging the unenforceability of the agreement would be unjustly enriched at the expense of the broker.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities set out in *§ 31.21*.

[3] Discussion of Authorities

[a] Unlicensed Broker May Recover Compensation When Certain Conditions Satisfied

In ***Southfield v. Barrett*** *(1970) 13 Cal. App. 3d 290, 91 Cal. Rptr. 514* , the court of appeal reversed a judgment rendered against plaintiff in the trial court. The trial court based its holding on the ground that plaintiff was acting as a commission merchant in violation of Agric. Code § 1263 (now *Food & Agric. Code § 56181*) and that the contract under which plaintiff sought payment was void. The court of appeal held that, although plaintiff was unlicensed, the agreement under which plaintiff sought compensation was not void and plaintiff should not be denied compensation under the contract (*13 Cal. App. 3d 290, 294)* . The court stated that the rule requiring the courts to withhold relief under the terms of an illegal contract is not an inflexible one to be applied in its fullest rigor under any and all circumstances. Thus, when the public cannot be protected because the transaction was completed, no serious moral turpitude was involved, defendant was the one guilty of the greatest moral fault and defendant would be unjustly enriched at the expense of plaintiff if the rule were applied, then the general rule should not be applied (*13 Cal. App. 3d 290, 294)* .

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2A-31 California Points & Authorities § 31.27

§ 31.27 Opposing Contention That Recovery of Commission Barred If Securities Broker-Dealer Has No Certificate [Corp. Code § 25210]--Certificate Not Required for Finder or Middleman

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF SECURITIES BROKER-DEALER IS ENTITLED TO RECOVER A COMMISSION BECAUSE A PERSON ACTING AS A FINDER OR MIDDLEMAN IS NOT REQUIRED TO HAVE A CERTIFICATE OF AUTHORIZATION.

Commission Recoverable When Acting as Finder or Middleman. A finder or middleman who simply finds and introduces a buyer and a seller without participating in negotiations may recover a commission because he or she is not acting as a securities broker-dealer and need not be licensed pursuant to *Section 25210(a) of the Corporations Code* (*Lyons v. Stevenson (1977) 65 Cal. App. 3d 595, 606, 135 Cal. Rptr. 457*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that recovery of a commission is barred by the licensing requirement of *Corp. Code § 25210(a)*. The argument may be used when the party seeking recovery was acting solely as a finder or middleman.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to respond to a party's contention that recovery of a commission is barred pursuant to *Corp. Code § 25210(a)*. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of

law stated. Thus, counsel should discuss facts showing that the party seeking recovery was merely acting as a finder or middleman and did not participate in any of the underlying negotiations.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities set out in *§ 31.22*.

[3] Discussion of Authorities

[a] Commission Recoverable When Acting as Finder or Middleman

In ***Lyons v. Stevenson*** *(1977) 65 Cal. App. 3d 595, 135 Cal. Rptr. 457* , plaintiff, a licensed real estate broker, sought recovery of a commission from defendants, a mortgage company and its controlling stockholder, for procuring a buyer of the mortgage company. The sale of the mortgage company included the sale of all of the stock of the business. Judgment was rendered in favor of plaintiff and defendant stockholder appealed, contending in part that plaintiff was not licensed to act as a broker or agent under the Corporate Securities Law of 1968 (*Corp. Code §§ 25000-25706*). The court of appeal affirmed and held that the sale of stock was incident to the sale of the property and thus, plaintiff was not required to be licensed as a real estate broker. In addition, the court held that plaintiff acted as a mere finder or middleman and was not required to be licensed under the Corporate Securities Law of 1968 (*Corp. Code §§ 25000-25706*) (*65 Cal. App. 3d 595, 604-606)* . The court pointed out that, although there is no statutory definition of a finder or middleman, a finder or middleman is one who merely brings the buyer and seller together so that they may make their own contract and does not participate in the negotiations of the transaction (*65 Cal. App. 3d 595, 605-606)* . The court noted that the evidence clearly disclosed that plaintiff was acting as a finder or middleman because he did not participate in any negotiations but merely acted as a conduit in informing the buyer of the terms of the sale before buyer and seller were introduced and thereafter had no contact with either the buyer or seller (*65 Cal. App. 3d 595, 606)* .

[4] Additional Authorities

[a] Commission Recoverable When Acting as Finder or Middleman

In *Freeman v. Jergins (1954) 125 Cal. App. 2d 536, 271 P.2d 210* , plaintiff sought compensation under an oral agreement allegedly providing that if a sale of stock were effected, defendants would pay plaintiff the reasonable value of plaintiff's services in finding and arranging an introduction. The court of appeal upheld the trial court's finding that plaintiff was acting as a finder and therefore was not required to be licensed under former Corp. Code § 25700 (now *Corp. Code § 25210*). The court agreed that plaintiff had done nothing to bring about the sale other than to introduce the buyer and seller (*125 Cal. App. 2d 536, 546-548)* .

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2A-31 California Points & Authorities § 31.28

§ 31.28 Opposing Contention That Recovery of Commission Barred If Securities Broker-Dealer Has No Certificate [Corp. Code § 25210]--Certificate Not Required When Sale of Securities Incident to Sale of Property or Business

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF SECURITIES BROKER-DEALER IS ENTITLED TO RECOVER A COMMISSION, EVEN THOUGH HE/SHE DOES NOT HAVE A BROKER'S CERTIFICATE, BECAUSE A CERTIFICATE IS NOT REQUIRED WHEN THE SALE OF SECURITIES IS MERELY INCIDENT TO THE SALE OF PROPERTY OR A BUSINESS.

Commission Recoverable When Sale of Securities Incident to Sale of Property or Business. When a person is not retained primarily to sell securities, but to sell property or a business, and the sale of securities is incident to the sale of property or a business, *Section 25210 of the Corporations Code* does not require a certificate in order to recover a commission (*Lyons v. Stevenson (1977) 65 Cal. App. 3d 595, 602-603, 135 Cal. Rptr. 457*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that recovery of a commission is barred by *Corp. Code § 25210*. This argument may be used when the party seeking recovery was retained primarily to sell property or a business and the sale of securities was merely incidental to the sale of the business.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel is responding to the contention that recovery of a commission is barred by *Corp. Code § 25210*. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing that the party seeking recovery of a commission was retained primarily to sell property or a business and that the sale of the securities was merely incidental to this sale.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities set out in *§ 31.22*.

[3] Discussion of Authorities

[a] Commission Recoverable When Sale of Securities Incident to Sale of Property or Business

The facts and procedural background of ***Lyons v. Stevenson*** *(1977) 65 Cal. App. 3d 595, 135 Cal. Rptr. 457* , are discussed in *§ 31.27[3][a]*. In *Lyons*, plaintiff sought recovery of a commission under a contract that employed plaintiff to procure a purchaser for defendant mortgage company. The sale of the mortgage company involved the sale of all the stock of the company, but plaintiff was not told that the agreement involved the sale of stock and it did not occur to defendant, the controlling shareholder of the company, whether or not plaintiff had a license to sell securities. The trial court granted judgment for plaintiff, and the judgment was affirmed by the court of appeal (*65 Cal. App. 3d 595, 607)* . The court of appeal relied on *Stoll v. Mallory (1959) 173 Cal. App. 2d 694, 343 P.2d 970* , and *Weber v. Jorgensen (1971) 16 Cal. App. 3d 74, 93 Cal. Rptr. 668* , both discussed in *§ 31.28[4][a]*. The court stated that these two cases point to the principle that when the party seeking recovery is retained primarily to sell property or a business and the party was not specifically retained to sell securities, there is no public policy objection to recovery of a commission even though the party is not licensed (*65 Cal. App. 3d 595, 603)* . In addition, the court noted that after the decisions in *Stoll* and *Weber*, revisions by the Corporate Securities Law of 1968 (*Corp. Code §§ 25000-25706*), adding the phrase "or induce or attempt to induce the sale of" a security to the prohibition on acting without a license contained in *Corp. Code § 25210*, did not alter the principle contained in these decisions. The court stated that prior to the addition the statute had been defined to include participation in negotiations that involved the transfer of stock, and thus the change did not subsume the finder or middleman exception (*65 Cal. App. 3d 595, 604)* .

[4] Additional Authorities

[a] Commission Recoverable When Sale of Securities Incident to Sale of Property or Business

In *Weber v. Jorgensen (1971) 16 Cal. App. 3d 74, 93 Cal. Rptr. 668* , the court of appeal reversed a judgment of dismissal, entered after a demurrer to plaintiff's complaint for a commission on the sale of defendant's resort and marina business was sustained, and plaintiff did not amend the complaint (*16 Cal. App. 3d 74, 86)* . One of the grounds in support of the demurrer was that plaintiff did not have a securities broker's certificate and therefore the agreement under which plaintiff sought compensation was void. The listing agreement did not mention the transfer of stock, but defendant told plaintiff that transfer of title would be accomplished by transferring the stock of the corporation to the buyer. An offer was presented to defendant, which defendant let expire, and the sale was not consummated. The court of appeal held that the transaction proposed was essentially a real estate transaction and that plaintiff was not entering into a contract to sell stock. Thus, the fact that plaintiff was not licensed was not a bar to recovery of a commission (*16 Cal. App. 3d 74, 84-86)* .

In *Stoll v. Mallory (1959) 173 Cal. App. 2d 694, 343 P.2d 970* , plaintiff, a real estate broker, brought an action for the recovery of a commission in procuring a purchaser of a radio station. The proposed sale involved the transfer of stock. Judgment was rendered for plaintiff and defendants appealed, contending in part that recovery of a commission was barred because plaintiff was not licensed under the Corporate Securities Law of 1968 (*Corp. Code § 25000-25706*). The court of appeal affirmed the judgment and held that plaintiff was not required to be licensed (*173 Cal. App. 2d 694, 700)* . The court stated that plaintiff was retained to secure a purchaser of the business and not to find a buyer for the stock, that plaintiff did not participate in any negotiations for the sale of the stock, and that the memorandum of agreement between the sellers and buyers recited that the sale of stock was incidental to the sale of the radio station (

173 Cal. App. 2d 694, 698-700) .

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[Reserved]

§§ 31.29[Reserved]

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2A-31 California Points & Authorities § 31.40

§ 31.40 Supporting Contention That Statute of Frauds [Civ. Code § 1624(a)(4)] Bars Recovery of Commission--Agreement Required to Be in Writing

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF MAY NOT RECOVER A COMMISSION BECAUSE AN ORAL AGREEMENT EMPLOYING OR AUTHORIZING A BROKER, AGENT, OR ANY OTHER PERSON FOR COMPENSATION TO _____ [*specify nature of services falling within the statute of frauds, e.g.*, PURCHASE REAL ESTATE] IS INVALID UNDER THE STATUTE OF FRAUDS.

A. Agreement Required to Be in Writing to Be Valid. An agreement authorizing or employing an agent, broker, or any other person to purchase or sell real estate, or to lease real estate for a longer period than one year, or to procure, introduce, or find a purchaser or seller of real estate or a lessee or lessor of real estate when such lease is for a longer period than one year, for compensation or a commission, is invalid unless the agreement, or some note or memorandum of it, is in writing and signed by the party to be charged or by his or her agent (*Civ. Code § 1624(a)(4)*).

B. No Recovery of Commission If Agreement Not in Writing. An agreement that falls within the statute of frauds is voidable, and once the defense of the statute is raised against the enforcement of the contract, there can be no recovery of a commission (*Zimmerman v. Bank of America (1961) 191 Cal. App. 2d 55, 57, 12 Cal. Rptr. 319*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that the statute of frauds (*Civ. Code § 1624(a)(4)*) bars recovery of a commission for the purchase or sale of real estate, the procurement, introduction, or finding of a purchaser or seller of real estate, or the lease of real property for more than one year when the agreement on

which recovery is sought is oral.

These points and authorities may be combined with a memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the substantive issue of the statute of frauds. These points and authorities may be adapted for use in a trial or appellate brief.

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should discuss the facts showing that the agreement, pursuant to which a recovery of a commission is sought, is oral and that the commission is sought for the alleged performance of a service under the agreement that is required to be in writing.

In an appropriate case, these points and authorities may be combined with the points and authorities set out in *§ 31.41* relating to quantum meruit recovery.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities set out in *§§ 31.47 -31.59* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] No Recovery of Commission If Agreement Not in Writing

The facts and procedural background of ***Zimmerman v. Bank of America*** *(1961) 191 Cal. App. 2d 55, 12 Cal. Rptr. 319* , are discussed in *§ 31.60[3][a]*. In *Zimmerman*, plaintiff, a real estate broker, brought an action against the owners of property for interference with an oral broker's agreement. The court of appeal held that an agreement for the payment of a commission that was unenforceable, due to the statute of frauds, can properly be the subject of a tort action for interference with a contract. The court observed that an agreement that falls within the statute of frauds is voidable, and once the defense is raised there can be no recovery of a commission under the contract (*191 Cal. App. 2d 55, 57)* .

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2A-31 California Points & Authorities § 31.41

§ 31.41 Supporting Contention That Statute of Frauds [Civ. Code § 1624(a)(4)] Bars Recovery of Compensation--No Recovery in Quantum Meruit

[1] FORM

[*The following should be combined with the contention supported by the points and authorities set forth in § 31.40, and may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF BROKER MAY NOT RECOVER FOR SERVICES RENDERED PURSUANT TO THE ALLEGED AGREEMENT BECAUSE A BROKER MAY NOT RECOVER IN QUANTUM MERUIT WHEN AN AGREEMENT FOR A COMMISSION IS UNENFORCEABLE UNDER THE STATUTE OF FRAUDS.

Statute of Frauds Bars Recovery in Quantum Meruit. When an agreement for a commission is unenforceable due to the statute of frauds, there can be no recovery in quantum meruit for the reasonable value of services performed pursuant to the agreement (*Beazell v. Schrader (1963) 59 Cal. 2d 577, 582, 30 Cal. Rptr. 534, 381 P.2d 390*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that the statute of frauds bars recovery in quantum meruit for the reasonable value of services performed, pursuant to an oral agreement. These points and authorities should be combined with the points and authorities set forth in *§ 31.40* relating to the general statute of frauds provision.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the statute of frauds as a bar to recovery in quantum meruit.

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should

discuss the facts showing that the services for which recovery is sought were rendered pursuant to an alleged agreement that is unenforceable due to the statute of frauds.

[3] Discussion of Authorities

[a] Statute of Frauds Bars Recovery in Quantum Meruit

In ***Beazell v. Schrader*** *(1963) 59 Cal. 2d 577, 30 Cal. Rptr. 534, 381 P.2d 390* , plaintiff real estate broker sought to recover a commission of $10,000 pursuant to written escrow instructions that specified the commission as $2,500 based on the facts that a prior oral agreement was reached regarding the higher commission and that parol evidence should be allowed to show the prior agreement. Plaintiff also sought recovery in quantum meruit for the reasonable value of services rendered. There was no dispute over whether or not plaintiff was entitled to the smaller amount, but the action was brought in superior court, where a demurrer to the complaint was sustained without leave to amend and the action thereafter dismissed on the basis that recovery of anything higher than $2,500 was barred by the statute of frauds and the amount sought was below the jurisdictional level of the court.

The Supreme Court affirmed the judgment (*59 Cal. 2d 577, 582)* . The Court reasoned that because parol evidence could not be introduced to change the terms of the written agreement, both the cause of action for recovery under the agreement and the cause of action for recovery of the reasonable value of services in quantum meruit were barred by the statute of frauds (*59 Cal. 2d 577, 581-582)* . As to the cause of action for quantum meruit, the Court stated that recovery on this theory also required proof of the broker's employment for his services and that such proof can only be made pursuant to the requirements of the statute of frauds (*59 Cal. 2d 577, 582)* .

[4] Additional Authorities

[a] Statute of Frauds Bars Recovery in Quantum Meruit

In *Wm. E. Doud & Co. v. Smith (1967) 256 Cal. App. 2d 552, 64 Cal. Rptr. 222* , plaintiff's real estate brokers sought to recover a commission and also sought recovery in quantum meruit. The written agreement provided for a commission on the sale of defendant's land to one of two specified buyers. The land was eventually sold to two different buyers, although one of the eventual buyers was previously connected with one of the specified buyers. A demurrer to the second amended complaint was sustained without leave to amend on the ground that the action was barred by the statute of frauds. The court of appeal affirmed the judgment of dismissal. The court held that the parol evidence was not admissible to vary the terms of the written agreement and that when an agreement is unenforceable due to the statute of frauds, there can be no recovery in quantum meruit (*256 Cal. App. 2d 552, 558-559)* .

In *Ford v. Palisades Corp. (1950) 101 Cal. App. 2d 491, 225 P.2d 545* , plaintiff, a real estate broker, appealed from a judgment in favor of defendant in an action to recover a real estate commission or, in the alternative, the reasonable value of services rendered. The evidence disclosed that plaintiff had failed to produce a ready, willing, and able buyer within the time set forth in the written agreement of employment and thus the trial court concluded that action was barred by the statute of frauds. The court of appeal affirmed the judgment and in so doing held that when an agreement to pay a broker's commission is unenforceable due to the statute of frauds, the broker cannot recover the reasonable value of his or her services (*101 Cal. App. 2d 491, 498)* .

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2A-31 California Points & Authorities § 31.42

§ 31.42 Supporting Contention That Statute of Frauds [Civ. Code § 1624(a)(4)] Bars Recovery of Commission--Statute Applies to Agreement Employing or Authorizing Broker, Agent, or Any Other Person to Obtain Option to Purchase Real Property

[1] FORM

[*The following should be combined with the contention supported by the points and authorities set forth in § 31.40, and may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF BROKER MAY NOT RECOVER A COMMISSION UNDER THE ALLEGED AGREEMENT BECAUSE AN AGREEMENT EMPLOYING OR AUTHORIZING A BROKER, AGENT, OR ANY OTHER PERSON TO OBTAIN AN OPTION TO PURCHASE REAL PROPERTY IS INVALID UNLESS IN WRITING AS REQUIRED BY THE STATUTE OF FRAUDS.

Commission Not Recoverable When Agreement Not in Writing. A broker may not recover a commission under an oral agreement employing the broker to obtain an option to purchase real property because obtaining an option agreement for the purchase of real property aids or assists in the purchase of real property and thus falls within the provisions of the statute of frauds requiring a writing (*see Pac. etc. Dev. Corp. v. Western Pac. R. R. Co. (1956) 47 Cal. 2d 62, 67-68, 301 P.2d 825*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that the statute of frauds (*Civ. Code § 1624(a)(4)*) bars recovery of a commission. This argument may be made when contending that an agreement employing a person to obtain an option agreement to purchase real property is within the statute of frauds and must be in writing to be valid. These points and authorities should be combined with the points and authorities set forth in *§ 31.40* relating to the general statute of frauds provision.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the substantive issue of the statute of frauds. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should discuss the facts showing that the service allegedly performed and for which recovery is sought was the obtaining of an option agreement to purchase real property and thus comes within the statute of frauds.

In an appropriate case, counsel may wish to combine these points and authorities with the points and authorities set forth in *§ 31.41* relating to quantum meruit recovery.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities set out in *§§ 31.47 -31.51*, *31.54 -31.55*, and *31.57 -31.58* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Commission Not Recoverable When Agreement Not in Writing

In ***Pac. etc. Dev. Corp. v. Western Pac. R. R. Co.*** *(1956) 47 Cal. 2d 62, 301 P.2d 825* , plaintiff sought to recover a commission for services rendered in connection with the procurement of an option to purchase real property by defendant. The trial court rendered judgment for defendant on the ground that the agreement for the recovery of the commission was not in writing as required by the statute of frauds. Plaintiff appealed and contended, among other things, that an agreement employing a broker to obtain an option to purchase real property was not within the provisions of the statute of frauds. Plaintiff argued that an option itself conveys no interest in land but is merely a right to buy the property on the terms and within the time set forth in the option. However, the Supreme Court held that an agreement employing a broker to obtain an option to purchase real property is within the statute of frauds and affirmed the judgment for defendant (*47 Cal. 2d 62, 71)* . The Court quoted earlier cases holding that the phrase "to purchase or sell," within the meaning of the statute of frauds (citing former Civ. Code § 1624(5); *now see Civ. Code § 1624(a)(4)*), included "to aid or assist in the purchase or sale," and that the procurement of an option to purchase real property aids or assists in the purchase of real property (*47 Cal. 2d 62, 67-68)* .

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2A-31 California Points & Authorities § 31.43

§ 31.43 Supporting Contention That Statute of Frauds [Civ. Code § 1624(a)(4)] Bars Recovery of Commission--Statute Applies to Agreement Employing or Authorizing Broker, Agent, or Any Other Person to Procure an Assignment of Contract to Purchase Real Property

[1] FORM

[*The following should be combined with the contention supported by the points and authorities set forth in § 31.40, and may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF BROKER MAY NOT RECOVER A COMMISSION UNDER THE ALLEGED AGREEMENT BECAUSE UNDER THE STATUTE OF FRAUDS AN AGREEMENT EMPLOYING OR AUTHORIZING A BROKER TO PROCURE AN ASSIGNMENT OF A CONTRACT TO PURCHASE REAL PROPERTY IS INVALID UNLESS IN WRITING.

No Recovery of Commission If Agreement Not in Writing. A broker may not recover a commission under an agreement employing a broker to procure an assignment of a contract to purchase real property that is not in writing because such an agreement falls within the statute of frauds (*King v. Tilden Park Estates (1958) 156 Cal. App. 2d 824, 829, 320 P.2d 109*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that a broker may not recover a commission under an agreement employing him or her to procure an assignment of a contract to purchase real property if the agreement is not in writing as required by the statute of frauds. These points and authorities should be combined with the points and authorities set forth in *§ 31.40* relating to the general statute of frauds provision.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the

specific procedural context in which counsel wishes to raise the substantive issue of the statute of frauds. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should discuss the facts showing that the service allegedly performed and for which recovery is sought was the procurement of an assignment of a contract to purchase real property and thus comes within the provision of the statute of frauds.

In an appropriate case, counsel may wish to combine these points and authorities with the points and authorities set forth in *§ 31.48* relating to quantum meruit recovery.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities set out in *§§ 31.47 -31.51*, *31.54 -31.55*, and *31.57 -31.58* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] No Recovery of Commission If Agreement Not in Writing

In ***King v. Tilden Park Estates*** *(1958) 156 Cal. App. 2d 824, 320 P.2d 109* , plaintiff, a real estate broker, sought recovery of a commission for the procurement of an assignment to defendant of a contract to purchase real property. There was never any signed written agreement for the payment of a commission, but plaintiff contended that the assignment of a contract right to purchase real property was not an interest in real property and was not within the statute of frauds. A nonsuit was granted at the close of plaintiff's case and plaintiff appealed.

The court of appeal affirmed the granting of the nonsuit and held that plaintiff could not recover a commission because an agreement employing a broker or agent to procure an assignment of a contract to purchase real property came within the provisions of the statute of frauds. The court quoted from *Pac. etc. Dev. Corp. v. Western Pac. R. R. Co. (1956) 47 Cal. 2d 62, 301 P.2d 825* , discussed in *§ 31.42[3][a]*. The court stated that the terms "to sell or purchase," within the meaning of the statute of frauds (citing former Civ. Code § 1624(5); *now see Civ. Code § 1624(a)(4)*), included "to aid or assist in the purchase or sale" (*156 Cal. App. 2d 824, 829)* .

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2A-31 California Points & Authorities § 31.44

§ 31.44 Supporting Contention That Statute of Frauds [Civ. Code § 1624(a)(4)] Bars Recovery of Commission--Memorandum Insufficient to Satisfy Statute When Fact of Employment Not Shown

[1] FORM

[*The following should be combined with the contention supported by the memorandum set out in § 31.40, and may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF BROKER MAY NOT RECOVER A COMMISSION BECAUSE THE WRITING ON WHICH HE/SHE RELIES DOES NOT SHOW EVIDENCE OF AN EMPLOYMENT RELATIONSHIP AND THUS IS INSUFFICIENT TO SATISFY THE STATUTE OF FRAUDS.

Commission Not Recoverable If No Written Evidence of Employment Relationship. A broker may not recover a commission if the writing on which the broker relies does not show evidence of an employment relationship as required by the statute of frauds (*Franklin v. Hansen (1963) 59 Cal. 2d 570, 576, 30 Cal. Rptr. 530, 381 P.2d 386 , disapproved on other grounds, Sterling v. Taylor (2007) 40 Cal. 4th 757, 770, 55 Cal. Rptr. 3d 116, 152 P.3d 420*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a party's contention that a broker may not recover a commission. This argument may be used when contending that a memorandum is invalid under the statute of frauds because it does not show evidence of an employment relationship. These points and authorities should be combined with the memorandum set out in *§ 31.40* relating to the general statute of frauds provision.

This form may be combined with a form of memorandum relating to the specific procedural context in which counsel wishes to raise the substantive issue of the insufficiency of the writing to satisfy the statute of frauds. This form may also be adapted for use in a trial or appellate brief.

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should discuss the fact that the memorandum does not show an employment relationship.

In an appropriate case, counsel may wish to combine this memorandum with the memorandum set out in *§ 31.41* relating to quantum meruit recovery.

[b] Opposing Memoranda

In an appropriate case, the memorandum set out in *§ 31.47* may be used to oppose the contention supported by this memorandum.

[3] Discussion of Authorities

[a] Commission Not Recoverable If No Written Evidence of Employment Relationship

In ***Franklin v. Hansen*** *(1963) 59 Cal. 2d 570* , the plaintiff, a real estate broker, had acted as a rental agent for defendant in the rental of a piece of property owned by defendant and had approached defendant concerning the sale of the property. A purchase price was agreed on, and plaintiff obtained an offer and telephoned defendant with a request for an authorization to sell. In response, defendant sent a telegram stating in essence that it was confirmation that defendant would sell the property. The telegram also included the address of the property, the cash price, and the date of expiration of the offer. Defendant later refused to go through with the sale and plaintiff sued for breach of the commission agreement. Judgment was rendered in favor of plaintiff.

The Supreme Court reversed and held that the statute of frauds barred plaintiff's recovery because the telegram, the writing on which plaintiff relied, was insufficient to satisfy the statute as it did not contain evidence of an employment relationship (*59 Cal. 2d 570, 577*). The Court pointed out that written evidence of an employment relationship has always been deemed an essential requirement of the statute of frauds (*59 Cal. 2d 570, 576*). The Court reasoned that a writing, to satisfy the statute, must contain the essentials of the agreement sought to be enforced and if it does so, parol evidence can be used to explain the circumstances surrounding the making of the writing. The Court noted that while the telegram in the instant case would be a sufficient memorandum of an agreement to sell the property, it was insufficient to show an agreement to pay a commission because the writing failed to use any words in recognition of a contractual obligation for a commission (*59 Cal. 2d 570, 574*).

In its opinion the Court stated as a basic rule, "The sufficiency of a writing to satisfy the statute of frauds cannot be established by evidence which is extrinsic to the writing itself" (*59 Cal. 2d 570, 573-574)* . In ***Sterling v. Taylor*** *(2007) 40 Cal. 4th 757, 55 Cal. Rptr. 3d 116, 152 P.3d 420* , the Court disapproved of that statement (*40 Cal. 4th 757, 769-770)* and held the basic rule to be "that if a memorandum includes the essential terms of the parties' agreement, but the meaning of those terms is unclear, the memorandum is sufficient under the statute of frauds if extrinsic evidence clarifies the terms with reasonable certainty and the evidence as a whole demonstrates that the parties intended to be bound. Conflicts in the extrinsic evidence are for the trier of fact to resolve, but whether the evidence meets the standard of reasonable certainty is a question of law for the court" (*40 Cal. 4th 757, 771)* .

[4] Additional Authorities

[a] Commission Not Recoverable If No Written Evidence of Employment Relationship

The facts and procedural background of *Pac. etc. Dev. Corp. v. Western Pac. R. R. Co. (1956) 47 Cal. 2d 62, 301 P.2d 825* , are discussed in *§ 31.42[3][a]*. Plaintiff, a real estate broker, sought to recover a commission for obtaining an option to purchase real property for defendant. The evidence disclosed that there were negotiations among plaintiff, defendant, and the owner of a piece of real property, and during these negotiations, defendant sent plaintiff a letter

stating a purchase price that he was willing to pay for the property, the price of an option, and the length of the option. The letter also stated that if plaintiff felt that it was worth the trip he was to let defendant know, and defendant would arrange a meeting in order to "maybe get a deal signed" (*47 Cal. 2d 62, 68)* . However, defendant eventually concluded the deal with the owner without going through plaintiff and refused to pay the commission. Plaintiff sued, and judgment was rendered for defendant on the ground that the action was barred by the statute of frauds. The Supreme Court affirmed the judgment and held that the letter written by defendant was insufficient to satisfy the statute because it failed to mention the fact of employment. The court noted that a writing must unequivocally show the fact of the employment of the broker seeking to recover the commission (*47 Cal. 2d 62, 69)* .

In *Barcelon v. Cortese (1968) 263 Cal. App. 2d 517, 69 Cal. Rptr. 657* , plaintiff real estate broker sought to recover a commission from defendant for locating a seller from whom defendant eventually purchased a piece of real property. Plaintiff was involved in negotiations for the purchase of the property when, in response to a letter sent by plaintiff to defendant, defendant wrote to plaintiff and told him that another agent would represent defendant in the future, because defendant was dissatisfied with plaintiff. Judgment was rendered in favor of defendant on the ground that the letter on which plaintiff relied was insufficient to satisfy the statute of frauds. The court of appeal affirmed and held that plaintiff was not entitled to a commission. The court stated that the crucial fact that must be in writing is the broker's authority to act for the principal. The court noted that the writing on which plaintiff relied not only did not contain this but negated any authority that may have previously been granted orally. Therefore, it did not satisfy the statute of frauds (*263 Cal. App. 2d 517, 525-527)* .

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2A-31 California Points & Authorities § 31.45

§ 31.45 Supporting Contention That Statute of Frauds [Civ. Code § 1624(a)(4)] Bars Recovery of Commission--Broker Agreeing to Share Commission Under Oral Agreement Must Have Binding Written Contract With Owner

[1] FORM

[*The following should be combined with the contention supported by the points and authorities set out in § 31.40, and may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF BROKER MAY NOT RECOVER A COMMISSION BECAUSE THE STATUTE OF FRAUDS BARS RECOVERY UNDER AN ORAL AGREEMENT TO SHARE A COMMISSION WHEN THE COMMISSION HAS NOT BEEN PAID AND THERE IS NO BINDING WRITTEN AGREEMENT BETWEEN THE OWNER AND THE BROKER FROM WHOM RECOVERY IS SOUGHT.

No Recovery of Commission By One Broker From Another Broker. The statute of frauds bars recovery of a commission by one broker from another broker under an oral agreement between brokers to share a commission when the commission has not in fact been paid and there is no binding written contract between the broker from whom recovery is sought and the owner (*Aldis v. Schleicher (1908) 9 Cal. App. 372, 374, 99 P 526* ; *see Iusi v. Chase (1959) 169 Cal. App. 2d 83, 86, 337 P.2d 79*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that the statute of frauds bars recovery of a commission from a broker pursuant to an oral agreement between brokers to share a commission when the commission has not been paid and there is no binding written contract between the broker from whom recovery is sought and the owner. These points and authorities should be combined with the points and authorities set out in *§ 31.40* relating to the general statute of frauds provision.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the statute of frauds. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should discuss the facts showing that the agreement to share a commission is oral, that there is no binding written agreement between the broker from whom recovery is sought and the broker's principal, and that the commission has not been paid.

In an appropriate case, counsel may wish to combine these points and authorities with the points and authorities set out in *§ 31.41* relating to quantum meruit recovery.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities set out in *§ 31.52* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] No Recovery of Commission By One Broker From Another Broker

In ***Aldis v. Schleicher*** *(1908) 9 Cal. App. 372, 99 P 526* , plaintiff sought recovery of compensation for services rendered in effecting a sale. Defendant, a real estate broker, was the owner of an undivided one-third interest in a piece of property, and plaintiff alleged that defendant promised him a commission if he would effect a sale of the property. Plaintiff alleged that defendant was acting as agent for the other two owners and sought recovery solely in connection with the sale of their interests. Judgment was rendered in favor of plaintiff, and defendant appealed. The court of appeal reversed and held that because there was no written binding agreement between defendant broker and his principals for payment of a commission to defendant, there was no commission that could be the subject of an oral agreement between plaintiff and defendant (*9 Cal. App. 372, 374)* .

The facts and procedural background of ***Iusi v. Chase*** *(1959) 169 Cal. App. 2d 83, 337 P.2d 79* , are discussed in *§ 31.52[3][a]*. In *Iusi*, the court held that the statute of frauds did not bar recovery under an oral agreement to share a commission when the commission had in fact been paid. The court of appeal recognized the rule enunciated in *Aldis v. Schleicher (1908) 9 Cal. App. 372, 99 P 526* that there must be a binding written agreement between the broker from whom recovery is sought and the owner in order for the broker to recover a commission pursuant to an oral agreement to share a commission. However, the court held that when the commission has in fact been paid, the commission can be recovered regardless of whether or not the agreement between the broker and his or her principal was in writing (*169 Cal. App. 2d 83, 86*).

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2A-31 California Points & Authorities § 31.46

§ 31.46 Supporting Contention That Statute of Frauds [Civ. Code § 1624(a)(4)] Bars Recovery of Damages--Broker Cannot Claim Estoppel to Assert Statute of Frauds Based on Oral Promise to Pay Commission

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF BROKER MAY NOT CLAIM THAT DEFENDANT IS ESTOPPED FROM ASSERTING THE STATUTE OF FRAUDS BASED ON AN ORAL PROMISE TO PAY COMMISSION.

Oral Promise to Pay Commission Cannot Be Basis of Broker's Claim of Estoppel to Rely on Statute of Frauds. Although a person other than a real estate licensee may use the other party's oral promise to estop that person from relying on the statute of frauds, brokers are presumed to know that contracts for real estate commissions are invalid unless put in writing and cannot rely on oral promises (*Phillippe v. Shapell Industries (1987) 43 Cal. 3d 1247, 1259-1269, 241 Cal. Rptr. 22, 743 P.2d 1279* ; *Tenzer v. Superscope, Inc. (1985) 39 Cal. 3d 18, 27-28, 216 Cal. Rptr. 130, 702 P.2d 212* ; *Pacific Southwest Development Corp. v. Western P. R. Co. (1956) 47 Cal. 2d 62, 70* ; *Keely v. Price (1972) 27 Cal. App. 3d 209, 212, 103 Cal. Rptr. 531*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that a broker may not claim that the other party is estopped to assert the statute of frauds because of an oral promise to pay a commission.

These points and authorities may be combined with a memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue that a real estate broker may not ground its claim that the other party is estopped to rely on the statute of frauds on the other party's oral promise to pay a commission. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Oral Promise to Pay Commission Cannot Be Basis of Broker's Claim of Estoppel to Rely on Statute of Frauds

In ***Phillippe v. Shapell Industries*** *(1987) 43 Cal. 3d 1247, 241 Cal. Rptr. 22, 743 P.2d 1279* , a real estate broker was employed by a developer, who was also a broker. The broker informed the developer of a certain property and wrote a letter stating that he expected a commission. The developer did not respond but purchased the property one and one-half years later. The broker brought an action and obtained a jury verdict, and the developer appealed.

The Supreme Court reversed. It held that a writing was required because the broker was acting as a broker and that a writing referring to a commission on another property was not sufficient. It held that the fact that the principal was a broker did not preclude the writing requirement (*43 Cal. 3d 1247, 1259-1262)* .

The Court then held that a licensed broker cannot rely on equitable estoppel to recover on an oral agreement for a commission. A broker does not suffer an unconscionable injury in performing under an oral agreement. Reliance on an oral contract was not reasonable, because of the broker's knowledge that a writing is required under the statute of frauds. Such reliance was especially unreasonable when the principal was also a licensed broker. Nor was the principal unjustly enriched even when the broker was the procuring cause of the sale. Such a holding would eviscerate the statute of frauds and go counter to the rule that a broker who performs without a writing cannot recover in quantum meruit. Sound policy reasons exist to require a writing to recover a real estate commission. The Legislature has repeatedly required writings as a method of consumer protection. It is fair to require brokers to obtain a writing. Only licensed brokers can recover commissions, and licensed brokers must be aware of the statute of frauds requirement. A disparity of bargaining power or a commercial setting was not a reason for disregarding the statute of frauds, which is clearly set forth by statute (*43 Cal. 3d 1247, 1259-1269)* .

Tenzer v. Superscope, Inc. *(1985) 39 Cal. 3d 18, 216 Cal. Rptr. 130, 702 P.2d 212* , involved a corporate director who had extensive personal and business contacts among investors in the real estate field, but who was not licensed as a broker or salesman. The director brought an action against the corporation for a 10 percent finder's fee on the sale of the corporate headquarters for $1.6 million. The fee had been orally agreed to by defendant's chairman and plaintiff before plaintiff introduced the buyer to the corporation. The sale of the headquarters was approved by the board, with plaintiff abstaining. Discussion was had at that meeting about the payment of the finder's fee, but a final decision was deferred until the next meeting. At the second meeting the proposal was defeated. Plaintiff's interpretation of the discussion and vote at the second meeting was that it concerned payment of finder's fees to directors in future transactions and that his fee had been approved when the sale was approved. Plaintiff stated three causes of action: (1) breach of contract and unjust enrichment; (2) estoppel; and (3) fraud. Defendant's motion for summary judgment was granted, and plaintiff appealed.

The Supreme Court reversed. The Court found that the finder's fee agreement was required by former Civ. Code § 1624(5) (*now see Civ. Code § 1624(a)(4)*) to be in writing (*39 Cal. 3d 18, 25-27)* and that a question of fact existed as to whether plaintiff's activities had gone beyond mere introductions and included matters for which a license would be required (*39 Cal. 3d 18, 31*). The Court considered the holdings of *Pacific Southwest Development Corp. v. Western P. R. Co. (1956) 47 Cal. 2d 62, 70* , and *Keely v. Price (1972) 27 Cal. App. 3d 209, 212, 103 Cal. Rptr. 531* (both discussed *below*), that estoppel to assert the statute of frauds based on an oral agreement to pay a commission is not available to licensed brokers, and declined to expand those cases to cover a claim for a finder's fee by an unlicensed person (*39 Cal. 3d 18, 27-28)* .

Pacific Southwest Development Corp. v. Western P. R. Co. *(1956) 47 Cal. 2d 62* , is discussed in *§ 31.42[3][a]*.

The facts and procedural background of ***Keely v. Price*** *(1972) 27 Cal. App. 3d 209, 103 Cal. Rptr. 531* , are discussed in *§ 31.57[3][a]*. In *Keely,* plaintiff, a real estate broker, brought an action for fraud against the purchasers of real property and their representative, alleging that the purchasers had orally agreed to pay plaintiff's commission and to reduce this agreement to writing. The court in *Keely* cited *Kroger v. Baur (1941) 46 Cal. App. 2d 801, 117 P.2d 50* , and held that if there was no cause of action for a false promise to pay a commission, there was no cause of action for a false promise to reduce an oral commission agreement to writing (*27 Cal. App. 3d 209, 215)* .

It should be noted that much of *Keely* 's reasoning has been overruled by *Tenzer* (discussed *above*), which specifically abrogated *Kroger* and held that a fraud cause of action could be stated when the alleged fraudulent promise was a contract that was unenforceable because of the statute of frauds (*39 Cal. 3d 18, 29-31*). Still, *Tenzer* specifically approved the holdings of *Pacific Southwest Dev. Corp.* and *Keely* for the proposition that a real estate licensee may not base a claim of estoppel to assert the statute of frauds on an oral agreement to pay a commission (*39 Cal. 3d 18, 27-28*).

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2A-31 California Points & Authorities § 31.47

§ 31.47 Opposing Contention That Statute of Frauds [Civ. Code § 1624(a)(4)] Bars Recovery of Commission--Memorandum Sufficient When Fact of Employment Can Be Inferred From Writing Evidencing Agreement to Pay Commission

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF BROKER IS NOT BARRED FROM RECOVERING A COMMISSION BY THE STATUTE OF FRAUDS, BECAUSE THE MEMORANDUM RELIED ON INCLUDES A PROVISION FOR PAYMENT OF A COMMISSION, AND THE FACT OF EMPLOYMENT MAY BE INFERRED FROM THIS PROVISION.

Recovery of Commission Not Barred When Fact of Employment Implied. A memorandum satisfies the requirement of the statute of frauds and recovery of a commission is not barred when the memorandum evidences a provision for payment of a commission, because the fact of employment may be inferred from the commission provision (*Seck v. Foulks (1972) 25 Cal. App. 3d 556, 567-568, 102 Cal. Rptr. 170*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that recovery of a commission is barred by the statute of frauds because the memorandum relied on to establish the right to a commission does not show the fact of employment. The argument set out in this form may be made when the memorandum relied on contains a provision for payment of a commission from which the fact of employment may be inferred.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to respond to the contention that the memorandum is insufficient to satisfy the statute of frauds. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should discuss the facts showing that there is a provision for a commission in the memorandum from which the employment relationship can be inferred.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities set out in *§§ 31.40* and *31.44*.

[b] Related Points and Authorities

For additional points and authorities relating to the sufficiency of a memorandum to satisfy the statute of frauds, see Ch. 216, *Statute of Frauds* .

[3] Discussion of Authorities

[a] Recovery of Commission Not Barred When Fact of Employment Implied

In ***Seck v. Foulks*** *(1972) 25 Cal. App. 3d 556, 102 Cal. Rptr. 170* , plaintiff real estate broker brought an action against defendant sellers for the recovery of a commission. Plaintiff had been approached by one of the defendants, who was representing the other two, about selling defendants' ranch. Plaintiff testified that defendant did not want to sign a formal listing agreement for fear of raising the value of his neighbor's property by virtue of the listing agreement. Plaintiff, however, wrote the terms and condition of the sale down on the back of his business card and included the provision "6% comm." (*25 Cal. App. 3d 556, 562)* . The back of the business card was dated and it was initialed by defendant. After plaintiff found a purchaser and after extensive negotiations, an agreement was reached, but defendants refused to go through with the sale. Defendants later sold the property to another buyer. At the close of plaintiff's case, the trial court on motion entered judgment for defendants on the ground that plaintiff failed to procure a ready, willing, and able buyer on the terms set forth in the listing agreement (business card). Plaintiff appealed.

The court of appeal reversed (*25 Cal. App. 3d 556, 575)* . The court agreed with the trial court's finding that the business card constituted a written listing of the property with plaintiff as broker. One of the grounds on which this finding was attacked by defendants was that the card failed to show on its face the fact of employment and therefore, was insufficient to satisfy the statute of frauds. However, the court held that when the writing relied on evidences a provision for a commission, the broker's authority to act may be inferred and extrinsic evidence may be used to explain the full meaning of the memorandum (*25 Cal. App. 3d 556, 568)* . The court distinguished the case of *Franklin v. Hansen (1963) 59 Cal. 2d 570, 30 Cal. Rptr. 530, 381 P.2d 386* (discussed in *§ 31.44[3][a]*). The court pointed out that in *Franklin* there was no reference to the existence of an employment relationship or to any compensation from which an employment relationship could be inferred (*25 Cal. App. 3d 556, 567)* .

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A. Broker's Recovery of Commission or Damages
2. Writing Requirements For Real Estate Agreements

2A-31 California Points & Authorities § 31.48

§ 31.48 Opposing Contention That Statute of Frauds [Civ. Code § 1624(a)(4)] Bars Recovery of Commission--Promise to Pay Commission and Amount of Commission Need Not Be Contained in Memorandum

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF BROKER IS NOT BARRED BY THE STATUTE OF FRAUDS FROM RECOVERING A COMMISSION BECAUSE A MEMORANDUM IS SUFFICIENT TO SATISFY THE STATUTE WHEN IT SHOWS THE EMPLOYMENT RELATIONSHIP BETWEEN THE PLAINTIFF AND DEFENDANT, EVEN THOUGH IT DOES NOT CONTAIN EITHER THE AMOUNT OF THE COMMISSION OR THE SPECIFIC PROMISE TO PAY THE COMMISSION.

A. Promise to Pay and Amount of Commission Not Required. The statute of frauds does not bar the recovery of a commission when the memorandum relied on shows an employment relationship, although neither the amount of the commission nor the specific promise to pay the commission is in writing (*Barcelon v. Cortese (1968) 263 Cal. App. 2d 517, 529, 69 Cal. Rptr. 657*).

[*Optional*] **B. Reasonable Commission Implied.** In the absence of any agreement regarding compensation, a reasonable commission may properly be inferred if the memorandum otherwise satisfies the statute of frauds (*Bruner v. Van's Markets (1951) 103 Cal. App. 2d 135, 141, 229 P.2d 56* ; *see* *Beazell v. Schrader (1963) 59 Cal. 2d 577, 580-581, 30 Cal. Rptr. 534, 381 P.2d 390*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that recovery of a commission is barred by the statute of frauds. The argument may be used when the memorandum relied on shows an employment

relationship, but the promise to pay a commission or the amount of the commission is not in writing. The optional paragraph may be used when there is no parol agreement regarding the amount of commission, in which case a reasonable amount may be implied.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel is responding to the contention that the statute of frauds bars recovery of a commission. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should discuss facts showing an employment relationship and that there was an agreement, although not written, that a commission would be paid.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities set out in *§ 31.40*.

[b] Related Points and Authorities

For additional points and authorities relating to the sufficiency of a memorandum to satisfy the statute of frauds, see Ch. 216, *Statute of Frauds* .

[3] Discussion of Authorities

[a] Promise to Pay and Amount of Commission Not Required

In ***Barcelon v. Cortese*** *(1968) 263 Cal. App. 2d 517, 69 Cal. Rptr. 657* , two real estate brokers, Barcelon and Merriman, brought suit separately against defendant buyer and the corporation of which defendant was president for the recovery of commissions. Plaintiffs stipulated that each would share in the recovery of any judgment recovered by the other, and both actions were consolidated for trial. The evidence disclosed that defendants employed both brokers to locate a suitable piece of property for a subdivision. Barcelon was employed first and then Merriman was brought in with the knowledge of Barcelon. Barcelon's employment was terminated by defendants, and Merriman thereafter continued to represent defendants. However, when defendant buyer finally purchased the property that both Barcelon and Merriman were involved with, defendant buyer refused to pay the commission. A nonsuit was rendered against plaintiff Barcelon on the basis that the statute of frauds barred recovery and Barcelon appealed. The jury returned a verdict in favor of the plaintiff Merriman and defendants appealed.

The court of appeal affirmed both judgments (*263 Cal. App. 2d 517, 530)* . Defendants contended that the statute of frauds barred recovery of the commission by Merriman because there was no written evidence of an agreement to pay a commission. The court noted, however, that there was ample written evidence of the employment relationship that was sufficient to satisfy the statute of frauds, and stated that a memorandum is deemed sufficient if it shows the fact of employment and the memorandum need not contain a promise to pay a commission or state the amount thereof (*263 Cal. App. 2d 517, 525)* .

[b] Reasonable Commission Implied

In ***Bruner v. Van's Markets*** *(1951) 103 Cal. App. 2d 135, 229 P.2d 56* , plaintiff, a real estate broker, sought recovery of a commission on a renegotiated sale and lease-back of a warehouse from defendant seller. Defendant wanted to build a warehouse and plaintiff, at that time a member of a company, offered to obtain a sale and lease-back as a way of financing the construction of the warehouse. Plaintiff secured a buyer and was paid a commission. However, defendant thereafter realized that because the cost of construction was greater than anticipated, the contract with the buyer would have to be renegotiated. A letter addressed to plaintiff, who was now acting individually and not associated with his former company, and signed by defendant specified the terms to be renegotiated with the buyer. There was no statement

that any commission was to be paid. The transaction between the buyer and seller was consummated and defendant refused to pay plaintiff a commission on the renegotiated sale. At trial, judgment was rendered for plaintiff and defendant appealed, contending that the letter was insufficient to satisfy the statute of frauds.

The court of appeal affirmed the judgment and held that the letter was sufficient, although it did not contain any agreement regarding compensation. The court stated that in the absence of any agreement regarding commission, the agent, if authorized in writing to negotiate a sale, is entitled to reasonable compensation for his or her services (*103 Cal. App. 2d 135, 141)* .

The facts and procedural background of ***Beazell v. Schrader*** *(1963) 59 Cal. 2d 577, 30 Cal. Rptr. 534, 381 P.2d 390* , are discussed in *§ 31.41[3][a]*. In *Beazell*, the Supreme Court held that plaintiff could not recover a commission in excess of the amount provided in the signed escrow instructions. The Court cited *Bruner v. Van's Markets (1951) 103 Cal. App. 2d 135, 229 P.2d 56* , *above*, and stated that in the absence of any agreement regarding compensation, a reasonable commission may properly be inferred (*59 Cal. 2d 577, 581*).

[4] Additional Authorities

[a] Promise to Pay and Amount of Commission Not Required

The facts and procedural background of *Beazell v. Schrader (1963) 59 Cal. 2d 577, 30 Cal. Rptr. 534, 381 P.2d 390* , are discussed in *§ 31.41[3][a]* and in § 31.48[3][b]. In *Beazell*, plaintiff attempted to recover a higher commission than the escrow instructions provided and contended that parol evidence should be allowed to show this. The Supreme Court affirmed the judgment of dismissal and held that parol evidence was not admissible to change the terms of the escrow instructions. The Court noted that a memorandum is deemed sufficient when the fact of employment is shown, although the agreement to pay the commission or the amount of the commission is expressed (*59 Cal. 2d 577, 580)* . The Court cited with approval *Moore v. Borgfeldt (1939) 96 Cal. App. 306, 273 P 1114* , discussed *below.*

In *Moore v. Borgfeldt (1939) 96 Cal. App. 306, 273 P. 1114* , plaintiff, a real estate broker, sought to recover a commission on the exchange of real property. The written memorandum mentioned the terms of the offer of partial exchange and stated that the commission was the amount that exceeded the stated terms of the exchange. The jury returned a verdict in favor of plaintiff and defendant appealed, contending, among other things, that the writing relied on was insufficient to satisfy the statute of frauds. The court of appeal affirmed the judgment and stated that when the memorandum shows authority to act, other terms, including the amount of compensation and the agreement to pay the commission, can be shown by parol evidence (*96 Cal. App. 306, 311)* .

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2A-31 California Points & Authorities § 31.49

§ 31.49 Opposing Contention That Statute of Frauds [Civ. Code § 1624(a)(4)] Bars Recovery of Commission--Writing Sufficient to Satisfy Statute May Be More Than One Document

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF BROKER IS NOT BARRED BY THE STATUTE OF FRAUDS FROM RECOVERING A COMMISSION BECAUSE A WRITING SUFFICIENT TO SATISFY THE STATUTE MAY BE CONTAINED IN MORE THAN ONE DOCUMENT.

Recovery of Commission Not Barred When More Than One Document. Recovery of a commission is not barred by the statute of frauds when the writing requirement is satisfied by reference to more than one document (*Spitler v. Avery (1961) 189 Cal. App. 2d 811, 814-815, 11 Cal. Rptr. 724* ; *see Seck v. Foulks (1972) 25 Cal. App. 3d 556, 568, 102 Cal. Rptr. 170*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that the statute of frauds bars recovery of a commission. This argument may be used when several documents are relied on to satisfy the statute.

These points and authorities may be combined with a memorandum of points and authorities relating to the specific procedural context in which counsel is responding to the contention that the statute of frauds bars recovery of a commission. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should discuss the facts showing that the writings relied on, taken as a whole, contain the terms necessary to satisfy the statute

of frauds.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities set out in *§ 31.40*.

[b] Related Points and Authorities

For additional points and authorities relating to the sufficiency of a memorandum to satisfy the statute of frauds, see Ch. 216, *Statute of Frauds* .

[3] Discussion of Authorities

[a] Recovery of Commission Not Barred When More Than One Document

In ***Spitler v. Avery*** *(1961) 189 Cal. App. 2d 811, 11 Cal. Rptr. 724* , plaintiff, a real estate broker, sought recovery of a commission in connection with the sale of defendant's farm land. Plaintiff relied on a series of six letters attached to the complaint to satisfy the requirement of the statute of frauds. A general demurrer to plaintiff's fourth amended complaint was sustained without leave to amend and the action dismissed. Plaintiff appealed, contending that the letters attached to the complaint were insufficient to comply with the statute of frauds.

The court of appeal reversed the judgment and held that the letters taken as a whole satisfied the statute of frauds. One of the letters told plaintiff to "go ahead with the deal" and the court stated that this letter, in view of the prior letters setting forth the terms of the transaction and amount of the commission, supported an inference of employment so that the complaint stated a cause of action for recovery of the commission (*189 Cal. App. 2d 811, 814-815)* .

The facts and procedural background of ***Seck v. Foulks*** *(1972) 25 Cal. App. 3d 556, 102 Cal. Rptr. 170* , are discussed in *§ 31.47[3][a]*. In *Seck*, the trial court rendered judgment for defendants against plaintiff in an action to recover a commission. The court of appeal reversed and held that there was a writing sufficient to satisfy the statute of frauds because the notations on the back of the business card on which plaintiff relied referred to a commission, and from this the fact of plaintiff's employment could be implied. The court pointed out that its holding was also supported by the surrounding memoranda such as flyers and brochures advertising the property, which not only aided in clarifying the terms on the back of the business card but showed the employment of plaintiff and his authority to act for defendants (*25 Cal. App. 3d 556, 567-568)* .

[4] Additional Authorities

[a] Recovery of Commission Not Barred When More Than One Document

In *Rader Co. v. Stone (1986) 178 Cal. App. 3d 10, 223 Cal. Rptr. 806* , plaintiff real estate broker brought an action for recovery of a commission against a landlord. The broker had brought a prospective tenant to see the premises. Prior to the visit the broker had received a brochure describing the property and offering to pay a commission. The broker filled out a client registration form that was executed by an agent of the landlord. The trial court sustained a demurrer based on failure to satisfy the statute of frauds. The court of appeal reversed. It held that the combination of the brochure and the registration statement was sufficient to show employment to procure a buyer because there was no other reason for the registration statement. The court held that the broker did not have to show employment to negotiate, and that employment to procure a buyer was sufficient (*178 Cal. App. 3d 10, 24-26)* .

In *Herring v. Fisher (1952) 110 Cal. App. 2d 322, 242 P.2d 963* , the court of appeal reversed a judgment awarding plaintiff commissions on seven separate transactions but affirmed the award on one. Plaintiff relied on four letters from the president of defendant corporation to satisfy the statute of frauds, and the court stated that the letters, taken together, evidenced an employment relationship between the parties for the sale of the property referred to (*110 Cal. App. 2d*

322, 328) .

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2A-31 California Points & Authorities § 31.50

§ 31.50 Opposing Contention That Statute of Frauds [Civ. Code § 1624(a)(4)] Bars Recovery of Commission--Defect in Description of Property Cured by Allegation and Proof of Extrinsic Facts and Circumstances

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF BROKER IS NOT BARRED BY THE STATUTE OF FRAUDS FROM RECOVERING A COMMISSION BECAUSE ANY DEFECT, AMBIGUITY, OR UNCERTAINTY IN THE DESCRIPTION OF THE REAL PROPERTY CONTAINED IN THE MEMORANDUM MAY BE CURED BY ALLEGATIONS AND PROOF OF EXTRINSIC FACTS AND CIRCUMSTANCES.

Recovery of Commission Not Barred When Defect in Description of Property. A broker is not barred from recovering a commission by the statute of frauds merely because of a defect, ambiguity, or uncertainty in the description of the property to be sold when the defect, ambiguity, or uncertainty can be cured by the allegation and proof of extrinsic facts (*Russell v. Ramm (1927) 200 Cal. 348, 368-370, 254 P 532* ; *Babcock v. Houston (1973) 33 Cal. App. 3d 858, 864, 109 Cal. Rptr. 454*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that the statute of frauds bars recovery of a commission. This argument may be used when there is a defect in the description of the property that can be cured by the allegation and proof of extrinsic facts and circumstances.

These points and authorities may be combined with a memorandum of points and authorities relating to the specific procedural context in which counsel is responding to the contention that the statute of frauds bars recovery of a

commission. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should discuss the facts showing that the defect in the description of the property can be cured by extrinsic facts and circumstances. For example, if appropriate, counsel should state that the seller owned only one piece of property and that both the buyer and the seller understood what property was referred to by the writing.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities set out in *§ 31.40*.

[b] Related Points and Authorities

For additional points and authorities relating to the sufficiency of a memorandum to satisfy the statute of frauds, see Ch. 216, *Statute of Frauds* .

[3] Discussion of Authorities

[a] Recovery of Commission Not Barred When Defect in Description of Property

In ***Russell v. Ramm*** *(1927) 200 Cal. 348, 254 P 532* , plaintiff, after a jury trial, was awarded a commission earned by procuring a ready, willing, and able buyer for defendant, although defendant refused to go through with the sale assertedly because his wife would not sign the real estate contract. The court of appeal affirmed the judgment and the Supreme Court also affirmed the judgment and adopted the opinion of the court of appeal. One of defendant's contentions on appeal was that the description of the real property contained in the listing agreement was so vague and ambiguous that it rendered uncertain the particular tract of land to which the agreement related. The listing agreement described the land as "60 acres located one mile from Dinuba" (*200 Cal. 348, 354)* . In addition, at trial plaintiff had moved to amend the complaint to provide a specific description of the property by metes and bounds.

The court of appeal cited prior cases in which the descriptions of property were held adequate and were no more definite than the instant description. Furthermore, the court stated that the evidence disclosed that defendant physically pointed out to both plaintiff and the prospective purchaser the property he wanted sold and that it was not shown that defendant owned any other land situated one mile from Dinuba. Thus, it was clear that nobody connected with the transaction was uncertain of the particular property referred to in the listing agreement (*200 Cal. 348, 368-369*). The court, relying on prior case law, stated that because the terms of employment are the central part of a broker's contract as far as the statute of frauds is concerned, the contract will not be declared void merely because of a defect, ambiguity, or uncertainty in the description of the property to be sold or exchanged when such a defect can be cured by allegation or proof of extrinsic facts and circumstances (*200 Cal. 348, 370*).

In ***Babcock v. Houston*** *(1973) 33 Cal. App. 3d 858, 109 Cal. Rptr. 454* , the trial court denied plaintiffs' recovery of a real estate commission, based in part on insufficiency of the memorandum to satisfy the statute of frauds. In *Babcock*, one of the contentions urged by defendants in support of the judgment against plaintiffs was that the description of the property as "Pacific Island Village No. III" was insufficient to satisfy the statute of frauds. The court of appeal held that the description was sufficient and, relying on prior case law, stated that it has been uniformly held that the essential part of a broker's contract, as far as the statute is concerned, is the matter of employment, and that a broker's contract is not to be declared void merely because of a defect, ambiguity, or uncertainty in the description if it can be cured by allegation and proof of extrinsic facts. The court of appeal stated that the trial court expressly found that all parties to the agreement had known the exact location and boundaries of the property described as "Pacific Island Village III" (*33 Cal. App. 3d 858, 864*).

[4] Additional Authorities

[a] Recovery of Commission Not Barred When Defect in Description of Property

In *Herring v. Fisher (1952) 110 Cal. App. 2d 322, 242 P.2d 963* , the court of appeal reversed a judgment awarding plaintiff commissions on seven separate transactions but affirmed the award on one. On appeal, it was contended that the property described in the documents as "Alameda" was insufficient. The court stated that the communications between plaintiff and defendant left no doubt that both parties knew the exact properties intended and that a contract employing a broker is not void for uncertainty when the defect can be cured by pleading and proof of extrinsic facts (*110 Cal. App. 2d 322, 329-330*).

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2A-31 California Points & Authorities § 31.51

§ 31.51 Opposing Contention That Statute of Frauds [Civ. Code § 1624(a)(4)] Bars Recovery of Commission--Statute Does Not Bar Recovery Under Portion of Agreement Not Required to Be in Writing When Agreement Severable

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF BROKER IS NOT BARRED FROM RECOVERING A COMMISSION BECAUSE WHEN AN AGREEMENT IS SEVERABLE THE STATUTE OF FRAUDS DOES NOT BAR RECOVERY OF A COMMISSION FOR SERVICES PERFORMED PURSUANT TO THE PORTION OF THE AGREEMENT THAT IS NOT REQUIRED TO BE IN WRITING.

Recovery Not Barred When Agreement Severable. A broker is not barred by the statute of frauds from recovering that portion of the commission that is for services performed pursuant to a severable part of the agreement that is not required to be in writing (*Marks v. Walter G. McCarty Corp. (1949) 33 Cal. 2d 814, 823-824, 205 P.2d 1025*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that the statute of frauds bars recovery of a commission. This argument may be used when the agreement is severable and part of the services were performed pursuant to a portion of the agreement that was not required to be in writing.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel is responding to the contention that the statute of frauds bars recovery of a commission. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should discuss the facts showing that a portion of the commission is for services rendered pursuant to a part of the agreement not required to be in writing. Counsel should also discuss the fact that the agreement is severable.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities set out in *§ 31.47*.

[b] Related Points and Authorities

For additional points and authorities relating to the sufficiency of a memorandum to satisfy the statute of frauds, see Ch. 216, *Statute of Frauds* .

[3] Discussion of Authorities

[a] Recovery Not Barred When Agreement Severable

In ***Marks v. Walter G. McCarty Corp.*** *(1949) 33 Cal. 2d 814, 205 P.2d 1025* , plaintiff sought recovery of a commission in connection with the sale of a hotel and its furnishings. Defendant seller had listed the property with plaintiff, and plaintiff contacted and negotiated with the eventual buyer concerning the purchase of the property by a syndicate in which the buyer would have an interest. When these negotiations failed, the buyer purchased the property directly from the defendant, and defendant refused to pay the commission. At trial, judgment was rendered for plaintiff and defendant appealed.

The Supreme Court modified the judgment, allowing plaintiff to recover his commission for the sale of the personal property in the hotel (*33 Cal. 2d 814, 824)* . As to the portion of the commission for the sale of the real property, the Court held that recovery was barred by the statute of frauds. The Court stated that the commission could be apportioned, although the sale price was indivisible, because the broker's right to a commission depends not on whether the real property and the personal property could have been separately sold but on whether the sale price of the personal property could be reasonably ascertained. In *Marks*, the sale price of the personal property was allotted separately in the final escrow instructions (*33 Cal. 2d 814, 823-824)* .

[4] Additional Authorities

[a] Recovery Not Barred When Agreement Severable

The facts and procedural background of *Owen v. National Container Corp. of Cal. (1952) 115 Cal. App. 2d 21, 251 P.2d 765* , are discussed in *§ 31.59[3][a]*. In *Owen*, the court of appeal, in holding that the agreement as alleged was not required to be in writing, stated that if it had been determined at trial that a written agreement was required regarding some but not all of the agreed services, the questions of whether or not the contract was severable and whether or not the compensation for those severable portions was ascertainable would arise. The court stated that facts might be found that would render applicable the doctrine, enunciated in *Marks v. Walter G. McCarty Corp. (1949) 33 Cal. 2d 814, 205 P.2d 1025* (discussed in *§ 31.51[3][a]*), that compensation can be recovered for services rendered pursuant to a severable portion of the agreement not required to be in writing (*115 Cal. App. 2d 21, 27-28)* .

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2A-31 California Points & Authorities § 31.52

§ 31.52 Opposing Contention That Statute of Frauds [Civ. Code § 1624(a)(4)] Bars Recovery of Commission--Oral Agreement Between Brokers to Share Commission Not Within Statute When Written Agreement Between Broker and Owner or When Commission Already Paid

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF BROKER IS NOT BARRED BY THE STATUTE OF FRAUDS FROM RECOVERING A COMMISSION BECAUSE THE STATUTE DOES NOT BAR RECOVERY UNDER AN ORAL AGREEMENT BETWEEN BROKERS TO SHARE A COMMISSION WHEN THERE IS A WRITTEN AGREEMENT BETWEEN THE OWNER AND THE LISTING BROKER OR WHEN THE COMMISSION HAS ALREADY BEEN PAID.

Recovery Under Agreement to Share Commission Not Barred. A broker is not barred by the statute of frauds from recovering a commission pursuant to an oral agreement between brokers to share a commission when there is a written agreement between the owner and the listing broker or when the commission has already been paid (*Iusi v. Chase (1959) 169 Cal. App. 2d 83, 86, 337 P.2d 79* ; *see Grant v. Marinell (1980) 112 Cal. App. 3d 617, 619, 169 Cal. Rptr. 414*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that the statute of frauds bars recovery of a commission. This argument should be used when recovery of a portion of an earned commission is sought from a broker, pursuant to an oral agreement between two brokers, to share a commission. Before there can be a recovery of a portion of a commission from a cooperating broker, it must be shown that either (1) there was a binding written contract between the other broker and the owner, or (2) the commission has already been paid by the owner to the broker [*Iusi v. Chase (1959) 169 Cal. App. 2d 83, 86, 337 P.2d 79]* .

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel is responding to the contention that the statute of frauds bars recovery of a commission. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should discuss the facts showing that the commission is sought, pursuant to an oral agreement with the broker to share the commission earned. Counsel should also discuss the fact that the commission has either been received by the broker against whom recovery is sought or that there was a valid agreement between the broker and the owner or purchaser of the property.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities set out in *§§ 31.40* and *31.45*.

[3] Discussion of Authorities

[a] Recovery Under Agreement to Share Commission Not Barred

In ***Iusi v. Chase*** *(1959) 169 Cal. App. 2d 83, 337 P.2d 79* , two real estate brokers, a listing broker and a middleman broker, sought recovery of a portion of a commission earned by defendant, the procuring broker, on the sale of real property in separate actions that were consolidated for trial. Judgment was entered in favor of the listing broker and against the procuring broker for 50 percent of the commission already paid and half of the remaining commission as paid to defendant. Judgment was entered against the middleman on the basis that custom and usage in the trade dictated that he look to the listing broker for his share of the commission. Both judgments were appealed.

The court of appeal affirmed (*169 Cal. App. 2d 83, 88)* . The evidence in *Iusi* disclosed that the property owner orally granted a listing to plaintiff listing broker and that all agreements for the sharing of the commission were oral. Defendant contended that the statute of frauds barred recovery of half of the commissions by the listing broker. The court of appeal stated that the general rule is that the statute of frauds does not bar recovery under agreements between brokers to share commissions earned when there is a valid written agreement between one of the brokers and the principal. In addition, when the commission has in fact been paid by the owner to one broker, even though there was no written contract between them, the second broker can recover on the oral contract with the first broker (*169 Cal. App. 2d 83, 86)* .

In ***Grant v. Marinell*** *(1980) 112 Cal. App. 3d 617, 169 Cal. Rptr. 414* , plaintiff sought from defendant, a licensed real estate broker, compensation for introducing defendant to two prospective customers. Plaintiff contended that there was an oral agreement between plaintiff and defendant, whereby defendant agreed to pay plaintiff a finder's fee of 10 percent of any income earned by defendant as a result of plaintiff introducing to defendant any parties interested in securing the services of a real estate broker. A demurrer to the complaint on the ground that the action was barred by the statute of frauds was sustained without leave to amend. Plaintiff appealed.

The court of appeal reversed, holding that the statute did not bar recovery under oral agreements such as the one alleged (*112 Cal. App. 3d 617, 621*). The court stated that the alleged agreement was analogous to agreements between brokers, and that it is well-settled that the statute does not bar oral contracts between brokers or between brokers and salespersons to cooperate in procuring a sale or purchase of property and to share any commission earned as a result (*112 Cal. App. 3d 617, 619*).

[4] Additional Authorities

[a] Recovery Under Agreement to Share Commission Not Barred

In *Holland v. Morgan & Peacock Properties (1959) 168 Cal. App. 2d 206, 335 P.2d 769* , plaintiffs recovered a portion of a commission from defendants pursuant to an oral agreement to share a commission if plaintiffs found a buyer. Defendants had written contracts with the owner, employing them to sell properties, and had actually received the commissions. The court of appeal affirmed the judgment. One of the contentions on appeal was that recovery under the agreement was barred by the statute of frauds, but the court stated that it was clear that the statute does not apply to a contract between brokers to share commissions (*168 Cal. App. 2d 206, 210)* .

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§ 31.53 Opposing Contention That Statute of Frauds [Civ. Code § 1624(a)(4)] Bars Recovery of Commission--Finder's Agreement Between Broker and Person Who Is Not Buyer or Seller Not Within Statute

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF BROKER IS NOT BARRED BY THE STATUTE OF FRAUDS FROM RECOVERING A COMMISSION BECAUSE THE STATUTE DOES NOT APPLY TO A FINDER'S AGREEMENT BETWEEN A BROKER AND A PERSON WHO IS NEITHER A BUYER NOR A SELLER.

Recovery Not Barred Under Finder's Agreement. The statute of frauds does not bar recovery of a commission under an agreement between a broker and a person who is neither a buyer nor a seller to find a prospective customer for a broker in return for a finder's fee (*Grant v. Marinell (1980) 112 Cal. App. 3d 617, 621, 169 Cal. Rptr. 414*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that the statute of frauds bars recovery of a commission. This argument should be used when the agreement under which recovery is sought is a finder's agreement between a broker and a party who is neither a buyer nor a seller.

These points and authorities may be combined with a memorandum of points and authorities relating to the specific procedural context in which counsel is responding to the contention that the statute of frauds bars recovery. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should discuss the facts showing that the agreement was a finder's agreement and that the party from whom recovery is sought

was neither a buyer nor a seller.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities set out in *§ 31.40*.

[3] Discussion of Authorities

[a] Recovery Not Barred Under Finder's Agreement

The facts and procedural background of ***Grant v. Marinell*** *(1980) 112 Cal. App. 3d 617, 169 Cal. Rptr. 414* , are discussed in *§ 31.52[3][a]*. In *Grant,* the court held that an agreement between a broker and a person who is neither a buyer nor a seller to find prospective customers for a broker in return for a finder's fee is not within the statute of frauds. The court noted that the statute of frauds was designed to protect buyers and sellers of property from unfounded claims of brokers and, like agreements between brokers to share commissions, a finder's agreement between a broker and one who is not a buyer or seller was never meant to be covered by the statute of frauds (*112 Cal. App. 3d 617, 621)* .

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2A-31 California Points & Authorities § 31.54

§ 31.54 Opposing Contention That Statute of Frauds [Civ. Code § 1624(a)(4)] Bars Recovery of Commission--Recovery Permitted When Written Promise Executed After Services Performed Pursuant to Oral Agreement

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF BROKER IS NOT BARRED FROM RECOVERING A COMMISSION BY THE STATUTE OF FRAUDS BECAUSE A WRITTEN PROMISE TO PAY IS ENFORCEABLE, EVEN THOUGH IT WAS EXECUTED AFTER THE SERVICES WERE PERFORMED PURSUANT TO THE ORAL AGREEMENT.

Recovery Permitted Under Written Promise Executed After Performance. A broker is not barred by the statute of frauds from recovering a commission under a written promise to pay a commission that is executed after the services of a broker are performed pursuant to an otherwise unenforceable oral agreement (*Estate of Rule (1944) 25 Cal. 2d 1, 11-12, 152 P.2d 1003* ; *Fellom v. Adams (1969) 274 Cal. App. 2d 855, 866-867, 79 Cal. Rptr. 633*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that the statute of frauds bars recovery of a commission. This argument may be used when there has been a written promise to pay executed after the services were rendered pursuant to an oral agreement.

These points and authorities may be combined with a memorandum of points and authorities relating to the specific procedural context in which counsel is responding to the contention that the statute of frauds bars recovery of a commission. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should discuss the facts showing that the parties executed a written agreement to pay a commission for the services previously performed by the broker pursuant to an oral agreement.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities set out in *§ 31.40*.

[3] Discussion of Authorities

[a] Recovery Permitted Under Written Promise Executed After Performance

In ***Estate of Rule*** *(1944) 25 Cal. 2d 1, 152 P.2d 1003* , the executors of the estate appealed from an order of the probate court awarding a broker's commission. The broker and his salesperson became aware that the estate was attempting to sell a ranch and wrote to the attorney for the estate asking for more information in order to interest purchasers in the property. The attorney responded by sending the broker information on the property. The broker and his salesperson negotiated with the eventual purchaser for the sale of the ranch of the estate, and the purchaser submitted a bid on the property without going through the broker. Thereafter, the executors signed an authorization agreeing to pay the broker's commission out of the proceeds of a sale to any purchaser secured by the broker. One of the contentions on appeal was that the agreement to pay a commission should have been construed as one to pay a commission for future services.

The Supreme Court affirmed the order of the probate court (*25 Cal. 2d 1, 17*). Based on the evidence, the Court stated that the trial court could have properly construed the agreement as one to pay a commission for services performed by the broker prior to the execution of the agreement. The court stated that it has been consistently held that the moral obligation to pay for services rendered as a broker in selling real estate under an oral contract, when the statute requires such a contract to be in writing, will support a new promise to pay executed after the services have been performed. Thus, the court held, the contract executed after the services were performed was legally sufficient to satisfy the requirement, if any, of a written authorization (*25 Cal. 2d 1, 11-12*).

In ***Fellom v. Adams*** *(1969) 274 Cal. App. 2d 855, 79 Cal. Rptr. 633* , plaintiffs sought recovery of the remainder of a commission earned on the sale of real property owned by defendant. There was no written listing agreement or any other agreement employing plaintiffs. A portion of plaintiffs' commission was paid through escrow and defendant signed a promissory note for the balance. Judgment was rendered for plaintiffs and defendant appealed, contending in part that the court improperly failed to make a finding on the issue of whether or not plaintiff rendered services pursuant to an agreement in writing. Defendant contended that these findings should have been made because they would have shown that there was a lack of consideration for the promissory note, because it was given for an obligation unenforceable under the statute of frauds.

The court of appeal affirmed the judgment and held that the promissory note was enforceable and that plaintiffs were not required to prove a prior written agreement (*274 Cal. App. 2d 855, 868*). The court stated that the moral obligation to perform an agreement otherwise unenforceable due to the statute of frauds furnishes sufficient consideration for a subsequently executed promissory note (*274 Cal. App. 2d 855, 867*).

[4] Additional Authorities

[a] Recovery Permitted Under Written Promise Executed After Performance

In *Hillman v. Koch (1949) 92 Cal. App. 2d 163, 206 P.2d 434* , plaintiffs, real estate brokers, sought recovery of a commission on a sale of real property. Plaintiffs, although having no written listing or agreement to act as defendant's brokers, did have an oral authorization to find a purchaser for defendant's property. After the purchaser was found, an agreement of sale, which provided for the payment of a commission, was signed by both the purchaser and defendant.

The trial court rendered judgment for plaintiffs and defendant appealed, contending that the agreement was insufficient to satisfy the statute of frauds because it failed to show the employment of plaintiffs, thus leaving the court powerless to reform it. The court affirmed the award of damages, stating that it is well-settled that if the seller, after services are performed, promises in writing to pay a commission, the agreement meets the requirement of the statute of frauds even though there was no previous employment of the broker. The court reasoned that acceptance of the benefits creates a moral obligation sufficient to furnish consideration for a promise (*92 Cal. App. 2d 163, 166)* .

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2A-31 California Points & Authorities § 31.55

§ 31.55 Opposing Contention That Statute of Frauds [Civ. Code § 1624(a)(4)] Bars Recovery of Commission--Nonsigning Spouse Liable When He or She Ratifies Actions of Agent Spouse and Accepts Benefits

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF BROKER IS NOT BARRED BY THE STATUTE OF FRAUDS FROM RECOVERING A COMMISSION FROM DEFENDANT BECAUSE A BROKER MAY RECOVER A COMMISSION FROM A SPOUSE WHO HAS NOT SIGNED THE LISTING AGREEMENT WHEN THE NONSIGNING SPOUSE RATIFIES THE ACTIONS OF THE SPOUSE WHO SIGNED THE AGREEMENT AND HAS ACCEPTED THE BENEFITS OF THE COMPLETED TRANSACTION.

Recovery From Nonsigning Spouse Not Barred. A broker is not barred by the statute of frauds from recovering a commission against a spouse who did not sign the listing agreement when the nonsigning spouse ratifies the actions of the agent spouse and accepts the benefits of the completed transaction (*Davinroy v. Thompson (1959) 169 Cal. App. 2d 63, 65-66, 336 P.2d 1028*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that the statute of frauds bars recovery of a commission from a nonsigning spouse. This argument may be used when the nonsigning spouse has ratified the actions of the agent spouse and has accepted the benefits of the completed transaction.

These points and authorities may be combined with a memorandum of points and authorities relating to the specific procedural context in which counsel is responding to the contention that the statute of frauds bars recovery of a commission. These points and authorities may also be adapted for use in a trial or appellate brief.

The Supreme Court affirmed the order of the probate court (*25 Cal. 2d 1, 17)* . Thus, counsel should discuss the facts showing that the signing spouse was acting as the agent of the nonsigning spouse and that the nonsigning spouse ratified the actions of the signing spouse and accepted the benefits of the completed transaction.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities set out in *§ 31.40*.

[3] Discussion of Authorities

[a] Recovery From Nonsigning Spouse Not Barred

In ***Davinroy v. Thompson*** *(1959) 169 Cal. App. 2d 63, 336 P.2d 1028* , plaintiff broker brought an action for the recovery of a real estate broker's commission from defendants, husband and wife, in connection with the exchange of real property. Plaintiff relied on the written agreement of exchange and the escrow instructions that were signed only by defendant husband, although the documents were typed out for both the husband and wife to sign. Judgment was rendered for plaintiff and defendants appealed, contending in part that because neither of the documents was signed by the wife there was no evidence to support the finding that the plaintiff performed services for her as a real estate broker and at her written request and authorization.

The court of appeal affirmed the judgment and stated that there was ample evidence to support the finding that the husband was acting as his wife's agent. She knew about the transaction, her signature appeared on the deed and some escrow instructions, and she testified that her husband handled the transaction for her. In addition, the court stated that when a broker spends his or her time and money for the benefit of a spouse, assuming he or she has given proper authority to the other spouse to act as his or her agent, and the spouse signs deeds and accepts the benefits of the completed transaction, the courts will not permit the nonsigning spouse to use the statute of frauds to deprive the broker of his or her commission. In support of its conclusion, the court cited *Laack v. Dimmick (1928) 95 Cal. App. 456, 273 P 50* , discussed in *§ 31.55[4][a]* (*169 Cal. App. 2d 63, 65-66)* .

[4] Additional Authorities

[a] Recovery From Nonsigning Spouse Not Barred

In *Laack v. Dimmick (1928) 95 Cal. App. 456, 273 P 50* , the court of appeal reversed a judgment against plaintiffs and in favor of defendant husband and wife in an action to recover a commission (*95 Cal. App. 456, 475*). One of the questions on appeal was whether or not the exclusive agency agreement was binding on defendant wife whose name was signed on the agreement by her husband. The evidence disclosed that the wife signed the deed, acknowledged the contract in writing by attempting to revoke it, and accepted the deposit of the purchase price. The court discussed the doctrines of ratification and estoppel and concluded that the wife was bound under the exclusive agency agreement. The court noted that even if the wife had not ratified the original action by her husband in signing the exclusive agency agreement, she was certainly estopped to deny the authority of the husband (*95 Cal. App. 456, 466-470, 475)* .

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2A-31 California Points & Authorities § 31.56

§ 31.56 Opposing Contention That Statute of Frauds [Civ. Code § 1624(a)(4)] Bars Recovery of Commission--Oral Contract Enforceable When Misrepresentation Regarding Existence of Writing

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF BROKER IS NOT BARRED BY THE STATUTE OF FRAUDS FROM RECOVERING A COMMISSION BECAUSE AN ORAL AGREEMENT TO PAY A COMMISSION IS ENFORCEABLE WHEN A BROKER IS LED TO BELIEVE THAT A WRITING EXISTS BY THE MISREPRESENTATIONS OF THE OTHER PARTY.

Commission Recoverable When Existence of Writing Misrepresented. A broker is not barred by the statute of frauds from recovering a commission under an oral agreement when the broker is prejudicially led to believe that a writing exists by the misrepresentations of the other party (*Phillippe v. Shapell Industries (1987) 43 Cal. 3d 1247, 1269-1270, 241 Cal. Rptr. 22, 743 P.2d 1279* ; *Owens v. Foundation for Ocean Research (1980) 107 Cal. App. 3d 179, 183, 165 Cal. Rptr. 571* ; *see also Civ. Code § 1623*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the statute of frauds bars recovery of a commission. The argument may be used when a broker has been led to believe, through the misrepresentations of the other party, that a writing exists.

These points and authorities may be combined with a memorandum of points and authorities relating to the specific procedural context in which counsel is responding to the contention that the statute of frauds bars recovery of a commission. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should discuss the facts showing misrepresentation by the opposing party that prejudicially led the party seeking to enforce the agreement to believe that a writing existed.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities set out in *§ 31.40*.

[3] Discussion of Authorities

[a] Commission Recoverable When Existence of Writing Misrepresented

The facts and procedural background of ***Phillippe v. Shapell Industries*** *(1987) 43 Cal. 3d 1247, 241 Cal. Rptr. 22, 743 P.2d 1279* , are discussed in *§ 31.46[3][a]*. In dicta, the Supreme Court stated that the statute of frauds does not preclude an action for actual fraud. To recover for actual fraud, the broker must show that he or she reasonably relied on misrepresentations. A broker cannot reasonably rely on an oral promise to pay a commission or an oral promise to later execute a writing. However, a broker might reasonably rely on a representation that the necessary contract had actually been executed (*43 Cal. 3d 1247, 1269-1270)* .

In ***Owens v. Foundation for Ocean Research*** *(1980) 107 Cal. App. 3d 179, 165 Cal. Rptr. 571* , plaintiff, a real estate broker, sought to recover a commission earned pursuant to an oral agreement with defendant corporation based on a number of different theories, including equitable estoppel and fraud. The action was dismissed on the ground that the complaint did not state a cause of action because the entire action was barred by the statute of frauds. Plaintiff had orally agreed to act as the defendant's broker to sell a tract of land belonging to defendant and was assured by defendant's attorney that the agreement had been reduced to writing and adopted by defendant's board of directors. Plaintiff found a purchaser and the sale went through but defendant refused to pay the commission.

The court of appeal reversed the judgment of dismissal regarding three causes of action, two of them being equitable estoppel and fraud (*107 Cal. App. 3d 179, 185)* . The court held that an oral agreement is enforceable, despite the statute of frauds, under the equitable estoppel exception to the statute when one party is prejudicially led to believe that a writing exists because of a misrepresentation by the other party. In support of this conclusion, the court cited *Civ. Code § 1623*, which provides that a contract otherwise required to be in writing is enforceable against the fraudulent party if it is prevented from being put into writing by fraud. The court distinguished cases in which it was held that an oral promise to pay a commission or put a commission agreement in writing would not support an estoppel action because a broker is presumed to know a writing is required. The court stated that these cases were distinguishable because a broker should be able to trust the other party and thus, the broker's reliance on a misrepresentation that a writing exists may be reasonable even though the broker knows that a writing is required for recovery (*107 Cal. App. 3d 179, 183)* . The court also held that the facts pleaded for equitable estoppel would support a cause of action for fraud because the broker's reliance was reasonable (*107 Cal. App. 3d 179, 184)* .

It should be noted that *Tenzer v. Superscope, Inc. (1985) 39 Cal. 3d 18, 216 Cal. Rptr. 130, 702 P.2d 212* , affects part of the ruling in *Owens. Tenzer*, which is discussed in *§ 31.46*, involved an unlicensed person claiming a finder's fee. The Supreme Court in *Tenzer* overruled *Kroger v. Baur (1941) 46 Cal. App. 2d 801, 803, 117 P.2d 50* , and its progeny, including *Owens*, to the extent that they held a cause of action for fraud could not be based on an alleged fraudulent promise unenforceable as a contract because of the statute of frauds. Nevertheless, the Court affirmed the rule of *Keely v. Price (1972) 27 Cal. App. 3d 209, 212, 103 Cal. Rptr. 531* , that the claim that the other party is estopped to assert the statute of frauds because of an oral agreement for commission is not available to licensed brokers [*Tenzer v. Superscope, Inc. (1985) 39 Cal. 3d 18, 27-31, 216 Cal. Rptr. 130, 702 P.2d 212]* .

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2A-31 California Points & Authorities § 31.57

§ 31.57 Opposing Contention That Statute of Frauds [Civ. Code § 1624(a)(4)] Bars Recovery of Commission--Broker Released Third Party From Binding Obligation to Pay Commission in Reliance on Oral Promise

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF BROKER IS NOT BARRED BY THE STATUTE OF FRAUDS FROM RECOVERING A COMMISSION BECAUSE AN ORAL PROMISE TO PAY A COMMISSION IS ENFORCEABLE WHEN A BROKER, IN RELIANCE THEREON, RELEASES ANOTHER PARTY FROM A BINDING OBLIGATION TO PAY THE COMMISSION.

Commission Recoverable When Party Released in Reliance on Oral Promise. A broker is not barred by the statute of frauds from recovering a commission when, in reliance on an oral agreement to pay a commission, the broker has released another party from a binding obligation to pay the commission (*Le Blond v. Wolfe (1948) 83 Cal. App. 2d 282, 286-287, 188 P.2d 278* ; *see Keely v. Price (1972) 27 Cal. App. 3d 209, 212-213, 103 Cal. Rptr. 531*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that the statute of frauds bars recovery of a commission. This argument may be used when a broker, in reliance on the oral promise to pay the commission, has released another party from a binding obligation to pay.

These points and authorities may be combined with a memorandum of points and authorities relating to the specific procedural context in which counsel is responding to the contention that the statute of frauds bars recovery of a commission. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should discuss the facts showing that there was an oral agreement to pay a commission and, in reliance on this agreement, another party was released from a binding obligation to pay the commission.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities set out in *§ 31.40*.

[3] Discussion of Authorities

[a] Commission Recoverable When Party Released in Reliance on Oral Promise

In ***Le Blond v. Wolfe*** *(1948) 83 Cal. App. 2d 282, 188 P.2d 278* , plaintiff, a real estate broker, sought recovery of a commission from defendant, the prospective purchaser of property who failed to complete the transaction. The evidence disclosed that plaintiff was employed by the owners of the property to obtain a purchaser. Defendant agreed to purchase the property if he could do so at the asking price minus plaintiff's commission of $5,000. Defendant asked plaintiff to release the owners of the property from their obligation to pay the commission and to obtain a net listing price exclusive of plaintiff's commission. Defendant agreed to pay to plaintiff $2,500 as a commission if this was done. Plaintiff released the sellers and an escrow was opened that defendant eventually refused to close. At trial, judgment was rendered for plaintiff and defendant appealed, contending in part that the statute of frauds barred recovery of the commission.

The court of appeal affirmed and held that defendant was estopped from relying on the statute of frauds. The court stated that when a party, in reliance on a parol contract that should have been reduced to writing, has changed his or her position or parted with value so that it would be an injustice to permit the other party to rely on the statute of frauds, the doctrine of equitable estoppel will be invoked and the statute of frauds is not available to perpetrate a fraud (*83 Cal. App. 2d 282, 286)* . The court noted that plaintiff's reliance on the oral promise of defendant, in irremediably changing his position to his detriment by releasing the owners of the property from any obligation to pay a commission, was sufficient to support the court's conclusion that the statute of frauds was not available to defendant as a defense (*83 Cal. App. 2d 282, 287)* .

In ***Keely v. Price*** *(1972) 27 Cal. App. 3d 209, 103 Cal. Rptr. 531* , plaintiff, a real estate broker, brought an action for breach of contract, fraud, and for interference with an advantageous economic relationship against defendant, an attorney representing a group of buyers who purchased some real property located by plaintiff. Plaintiff had made an oral agreement with the seller of the property to find a buyer, and the seller agreed to pay plaintiff's commission. Defendant offered less than the asking price and the seller agreed to the lower price if the buyers would pay plaintiff's commission. Defendant orally agreed on behalf of the buyers to pay the commission and the sale went through at the lower price. However, plaintiff was not paid his commission. The trial court sustained a demurrer without leave to amend on the ground that estoppel does not apply when the only arrangement with the seller is oral.

The court of appeal reversed the dismissal regarding the cause of action for intentional interference with an advantageous economic relationship. It agreed with the trial court, however, regarding the breach of contract and fraud causes of action (*27 Cal. App. 3d 209, 217)* .

Regarding the breach of contract action, the court in *Keely* held that estoppel will not lie when a broker releases a party from an oral promise as opposed to a binding obligation to pay a commission. The court discussed *Le Blond v. Wolfe (1948) 83 Cal. App. 2d 282, 188 P.2d 278* (discussed *above*), and stated that, although the court in *Le Bond* did not expressly state that the contract from which the broker released the sellers was written, the court did focus on the fact that the sellers at one time had an obligation to pay the broker a commission. Thus, the court concluded, in order for plaintiff to successfully allege under the *Le Blond* exception that defendant is estopped from asserting the statute of

frauds, plaintiff broker must be able to allege that he or she gave up an enforceable right to collect his or her commission from the seller in reliance on defendant's oral promise to pay a commission (*27 Cal. App. 3d 209, 214*).

It should be noted that the extent, if any, to which *Le Blond v. Wolfe (1948) 83 Cal. App. 2d 282, 188 P.2d 278* , and *Keely v. Price (1972) 27 Cal. App. 3d 209, 103 Cal. Rptr. 531* , on which § 31.57 is based, are affected by *Tenzer v. Superscope, Inc. (1985) 39 Cal. 3d 18, 216 Cal. Rptr. 130, 702 P.2d 212* , is unclear. *Tenzer*, which is discussed in *§ 31.46*, involved an unlicensed person claiming a finder's fee. While overruling *Kroger v. Baur (1941) 46 Cal. App. 2d 801, 803, 117 P.2d 50* , and its progeny to the extent that they held a cause of action for fraud could not be based on an alleged fraudulent promise unenforceable as a contract because of the statute of frauds, *Tenzer* affirmed the rule of *Keely v. Price (1972) 27 Cal. App. 3d 209, 212, 103 Cal. Rptr. 531* , that the claim that the other party is estopped to assert the statute of frauds based on an oral agreement for commission is not available to licensed brokers [*Tenzer v. Superscope, Inc. (1985) 39 Cal. 3d 18, 27-31, 216 Cal. Rptr. 130, 702 P.2d 212]* .

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2A-31 California Points & Authorities § 31.58

§ 31.58 Opposing Contention That Statute of Frauds [Civ. Code § 1624(a)(4)] Bars Recovery of Commission--Recovery Permitted When Time Limitation Contained in Employment Agreement Waived

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF BROKER IS NOT BARRED BY THE STATUTE OF FRAUDS FROM RECOVERING A COMMISSION, ALTHOUGH THE WRITTEN TERMS OF THE CONTRACT SHOW THAT IT HAS EXPIRED, BECAUSE WHEN AN OWNER ENCOURAGES A BROKER TO CONTINUE TO ACT ON THE CONTRACT AFTER ITS EXPIRATION, THE TIME LIMITATION IN THE CONTRACT IS WAIVED.

Recovery Permitted When Time Limitation Waived. The statute of frauds does not bar a broker's recovery of a commission for producing a purchaser after the expiration of listing agreement because when an owner, after the time limit in the contract has expired, continues to encourage the broker to continue efforts to find a purchaser, and the broker does so with the knowledge, approval, and encouragement of the owner, and as a result of the broker's efforts the property is sold, the time limit in the contract must be considered waived, and the broker is entitled to a commission (*Kraemer v. Smith (1960) 179 Cal. App. 2d 52, 55-56, 3 Cal. Rptr. 471* ; *Baker v. Curtis (1951) 105 Cal. App. 2d 663, 668-670, 234 P.2d 153*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that the statute of frauds bars recovery of a commission. This argument may be used when, although the written terms of the contract evidence that the contract expired prior to the time a purchaser was produced by the broker, it is contended that this time limitation has been waived by the owner's encouragement of continued activities.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel is responding to the contention that the statute of frauds bars recovery of a commission. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should discuss facts showing that a purchaser was produced after expiration of the listing agreement and that the owner has orally waived the time limitation in the contract of employment by encouraging continued activities by the broker.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities set out in *§ 31.40*.

[3] Discussion of Authorities

[a] Recovery Permitted When Time Limitation Waived

In ***Kraemer v. Smith*** *(1960) 179 Cal. App. 2d 52, 3 Cal. Rptr. 471* , plaintiff was given an exclusive agency agreement that terminated on May 23, 1955. During the term of the listing, defendants agreed to sell to a purchaser who was given until August 1, 1955, to meet the conditions of the contract of sale but who failed to meet the conditions on that date. At this time, plaintiff asked defendants to sign another listing and, although defendants refused to sign, defendants told plaintiff to keep working on the property. Plaintiff eventually contacted a party who was interested in the property only if the freeway did not pass through it, but this condition was rejected by defendants. Later, when plaintiff learned that the freeway was not going to pass through defendants' property, plaintiff contacted the same party and a sale was eventually consummated. Defendants refused to pay a commission and plaintiff brought an action for recovery. The trial court found that there had been an oral waiver or extension of time and awarded plaintiff a commission. Defendants appealed, contending that recovery of a commission was barred because the contract had expired, there was no oral waiver or extension of time, and any authorization between the parties after expiration was oral and unenforceable under the statute of frauds.

The court of appeal affirmed, holding that there was sufficient evidence to sustain the trial court's finding that there was an oral waiver or extension of time by defendants sellers (*179 Cal. App. 2d 52, 57*). The court stated that when an owner, after the time limit in the contract has expired, continues to encourage the broker to continue efforts to find a purchaser and the broker does so with the knowledge, approval, and encouragement of the owner, and as a result of the broker's efforts the property is sold, the time limit in the contract must be considered waived, and the broker is entitled to a commission. To hold otherwise, the court continued, would permit the use of the statute of frauds to perpetrate a fraud (*179 Cal. App. 2d 52, 55-56*).

In ***Baker v. Curtis*** *(1951) 105 Cal. App. 2d 663, 234 P.2d 153* , defendant owner gave to plaintiff broker an exclusive right to sell listing that expired within 30 days. Plaintiff was unable to effect a sale of the property during the listing period but plaintiff was told by defendant to keep working on the sale. The property was eventually sold to a purchaser who contacted plaintiff, and defendant refused to pay a commission. At trial, the jury returned a verdict in favor of plaintiff and defendant appealed, contending that because the original agreement had expired, the statute of frauds barred recovery of a commission.

The court of appeal affirmed the judgment and stated that when the owner, after the time limit provided in the contract has expired, urges and encourages the broker to continue efforts to find a purchaser for the property, and the broker does so with the knowledge, approval, and encouragement of the owner, and as a result of the broker's efforts, a purchaser is found, the time limit must be considered waived. To hold otherwise, the court stated, would be to permit the use of the statute of frauds to perpetrate a fraud (*105 Cal. App. 2d 663, 669-670)* .

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2A-31 California Points & Authorities § 31.59

§ 31.59 Opposing Contention That Statute of Frauds [Civ. Code § 1624(a)(4)] Bars Recovery of Compensation--Statute Does Not Apply to Personal Services Rendered by Broker

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF BROKER IS NOT BARRED FROM RECOVERING COMPENSATION BECAUSE THE STATUTE OF FRAUDS DOES NOT APPLY TO AN AGREEMENT EMPLOYING A BROKER TO PERFORM PERSONAL SERVICES THAT DO NOT AID OR ASSIST IN THE PURCHASE OR SALE OF REAL PROPERTY.

Compensation Recoverable When Agreement for Personal Services. The statute of frauds does not bar recovery under an agreement employing a broker to perform personal services that do not aid or assist in the purchase or sale of real property (*Owen v. National Container Corp. of Cal. (1952) 115 Cal. App. 2d 21, 25-26, 251 P.2d 765*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that the statute of frauds bars recovery of compensation by a broker. This argument may be used when the employment agreement calls for the rendition of personal services that do not aid or assist in the sale of real property.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel is responding to the contention that the statute of frauds bars recovery of a commission. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should discuss the facts showing that the agreement calls for the performance of personal services that do not aid or assist in

the purchase or sale of personal property and therefore, is not within the statute of frauds.

In an appropriate case, these points and authorities may be submitted in opposition to the points and authorities set forth in *§ 31.40*.

[3] Discussion of Authorities

[a] Compensation Recoverable When Agreement for Personal Services

In ***Owen v. National Container Corp. of Cal.*** *(1952) 115 Cal. App. 2d 21, 251 P.2d 765* , a demurrer on the ground of the statute of frauds was sustained without leave to amend to plaintiff's third amended complaint for recovery of compensation under an express contract and for recovery of the reasonable value of services rendered. The complaint alleged that plaintiff, a real estate broker, was hired by defendants to locate a suitable industrial site, to develop surveys concerning labor conditions, transportation matters, and financial arrangements, to aid in the engineering plans for a proposed factory, and to aid in the negotiations for the construction of the plant proposed by defendants.

The court of appeal reversed the judgment of dismissal and held that the alleged agreement was not within the statute of frauds (*115 Cal. App. 2d 21, 28*). The court stated that, although an agreement employing a person to negotiate and assist in effecting a purchase of real property for compensation would be within the statute, a valid oral agreement could be made for special services such as those alleged by plaintiff (*115 Cal. App. 2d 21, 25-27*).

[4] Additional Authorities

[a] Compensation Recoverable When Agreement for Personal Services

Carey v. Cusack (1966) 245 Cal. App. 2d 57, 54 Cal. Rptr. 244 , involved a suit brought by two real estate brokers to recover in quantum meruit for services rendered in subdividing property owned by defendants. Plaintiffs recovered, and defendants appealed. In affirming the judgment, the court of appeal pointed out that the trial court properly concluded that the statute of frauds was not applicable for two reasons, one of them being that the agreement was for the subdivision of property and not for the sale of the property (*245 Cal. App. 2d 57, 69)* .

In *Arbuckle v. Clifford F. Reid, Inc. (1931) 118 Cal. App. 272, 4 P.2d 978* , plaintiff sought recovery of compensation earned pursuant to a contract that employed plaintiff to oversee his salesmen in marketing defendant's subdivided property. Judgment was rendered for plaintiff and defendant appealed, contending in part that the statute of frauds barred recovery. The court of appeal affirmed the judgment and held that the contract was not within the statute of frauds because it contained no authorization to either purchase or sell property but simply made plaintiff the business manager for the purpose of aiding and assisting the salesmen in disposing of defendant's land (*118 Cal. App. 272, 277-278)* . It should be noted that *Arbuckle* was distinguished in *Duckworth v. Schumacher (1933) 135 Cal. App. 661, 666, 27 P.2d 919* , which held that a broker assisting in the subdivision and sale of real property was actually aiding and assisting in the sale of real estate and thus, the employment contract was within the statute of frauds.

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2A-31 California Points & Authorities § 31.60

§ 31.60 Opposing Contention That Statute of Frauds [Civ. Code § 1624(a)(4)] Bars Recovery of Damages--Statute Not a Defense to Action for Inducing Breach of Broker's Oral Contract

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF BROKER IS NOT BARRED BY THE STATUTE OF FRAUDS FROM RECOVERING DAMAGES IN THIS ACTION BECAUSE THE FACT THAT A BROKER'S CONTRACT WITH THE OWNER IS ORAL IS NOT A DEFENSE TO A TORT ACTION FOR INDUCING BREACH OF CONTRACT.

Damages Recoverable for Inducing Breach of Oral Contract. A broker is not barred by the statute of frauds from recovering damages for intentional interference with an oral contract because the fact that the contract is oral is not a defense to a tort action for inducing breach of contract (*Zimmerman v. Bank of America (1961) 191 Cal. App. 2d 55, 61, 12 Cal. Rptr. 319*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that the statute of frauds bars recovery of damages by a broker for inducing a breach of contract. This argument may be made when opposing the contention that the statute of frauds bars an action for damages for intentional interference with a contract because the contract is oral.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel is responding to the contention that the statute of frauds bars recovery in the action. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should discuss the facts showing that there was an oral agreement.

[3] Discussion of Authorities

[a] Damages Recoverable for Inducing Breach of Oral Contract

In *Zimmerman v. Bank of America (1961) 191 Cal. App. 2d 55, 12 Cal. Rptr. 319* , plaintiff, a real estate broker, entered into oral contracts with two sets of owners of property, whereby he was employed to procure a purchaser for their property. He arranged an exchange of the two pieces of property but defendant, Bank of America, advised both sets of owners not to pay plaintiff his full commission. The full commission was not paid and plaintiff sued the bank for inducing breach of contract. Plaintiff also sued both sets of owners for conspiring with Bank of America to breach the contract, but this portion of the complaint was not involved in the appeal. A judgment of dismissal was entered after Bank of America's demurrer to the cause of action for inducing breach of contract was sustained without leave to amend.

Plaintiff appealed and the court of appeal reversed. The court held that defendant bank could not use the statute of frauds as a defense to plaintiff's action for inducing breach of contract (*191 Cal. App. 2d 55, 61)* . The court reasoned that the actionable wrong of the tort of interference with an advantageous relationship or with a contract lies in the inducement to break the contract or sever the relationship and not in the kind of contract or relationship disrupted, whether it is written or oral, enforceable or not enforceable (*191 Cal. App. 2d 55, 57)* .

[4] Additional Authorities

[a] Damages Recoverable for Inducing Breach of Oral Contract

In *Friedman v. Jackson (1968) 266 Cal. App. 2d 517, 72 Cal. Rptr. 129* , a real estate broker had an oral listing with a seller to obtain a purchaser. After plaintiff had initially negotiated with defendants buyers, defendants told plaintiff that they were not interested in the property. Thereafter, defendants contacted the seller, told the seller they heard about the property through a party other than plaintiff, and consummated a sale. Plaintiff sued the buyers and the trial court granted judgment on the pleadings in favor of defendants. The trial court apparently relied on prior case law that did not actually reach the issue of whether or not purchasers who induced a seller to breach an oral commission contract were liable to the broker. In reversing, however, the court of appeal pointed out that the buyer was ignorant of defendants' fraudulent conduct and thus, a cause of action for inducing breach of contract would lie (*266 Cal. App. 2d 517, 523)* . The court quoted from *Zimmerman v. Bank of America (1961) 191 Cal. App. 2d 55, 12 Cal. Rptr. 319* (discussed in *§ 31.60[3][a]*), in determining that the oral contract would support a cause of action in tort for interference (*266 Cal. App. 2d 517, 520)* .

In *Golden v. Anderson (1967) 256 Cal. App. 2d 714, 64 Cal. Rptr. 404* , plaintiff real estate broker sued Forest Lawn Company, three connected corporations, and various individual officers and employees of Forest Lawn for interference with a contract. Plaintiff had orally agreed with the seller to list the property and was first approached by defendant Forest Lawn about purchasing the property. Thereafter, defendant Forest Lawn carried out negotiations directly with the seller through third parties and eventually bought the property. Summary judgment was granted regarding some of the defendants and the court of appeal reversed in part. The court observed that a cause of action could be stated, although the listing agreement was oral, and quoted with approval the rule from *Zimmerman v. Bank of America (1961) 191 Cal. App. 2d 55, 12 Cal. Rptr. 319* (discussed in *§ 31.60[3][a]*) (*256 Cal. App. 2d 714, 719)* .

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2A-31 California Points & Authorities § 31.61

§ 31.61 Opposing Contention That Statute of Frauds [Civ. Code § 1624(a)(4)] Bars Recovery of Damages--Statute Not a Defense to Action for Intentional Interference With Prospective Economic Advantage

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF BROKER IS NOT BARRED BY THE STATUTE OF FRAUDS FOR RECOVERING DAMAGES IN THIS ACTION BECAUSE THE STATUTE OF FRAUDS IS NOT A DEFENSE TO AN ACTION FOR INTENTIONAL INTERFERENCE WITH A PROSPECTIVE ECONOMIC ADVANTAGE.

Recovery for Interference With a Prospective Economic Advantage Not Barred. A broker is not barred by the statute of frauds from recovering damages for intentional interference with a prospective economic advantage when there is no written agreement employing the broker (*Buckaloo v. Johnson (1975) 14 Cal. 3d 815, 822-828, 122 Cal. Rptr. 745, 537 P.2d 865*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that the statute of frauds bars recovery of damages for intentional interference with a prospective economic advantage. This argument may be used to oppose the contention that a broker's recovery of damages for interference with prospective economic advantage is barred because the transaction was not in writing.

This memorandum of points and authorities may be combined with a memorandum of points and authorities relating to the specific procedural context in which counsel is responding to the contention that the statute of frauds bars recovery in an action for intentional interference with a prospective economic advantage. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Recovery for Interference With a Prospective Economic Advantage Not Barred

In ***Buckaloo v. Johnson*** *(1975) 14 Cal. 3d 815, 122 Cal. Rptr. 745, 537 P.2d 865* , plaintiff real estate broker brought an action for breach of implied contract and intentional interference with a prospective economic advantage against the buyers of a piece of real property, the buyers' real estate broker, and the seller. Plaintiff had an exclusive listing agreement with defendant owner of the property that expired four years prior to the actions that were the subject of the complaint. However, through this listing plaintiff had become familiar with the property and when plaintiff was approached by a representative of the buyers in response to a sign erected by the owner indicating that the property was for sale and anyone interested should contact his or her local broker, plaintiff discussed the attributes of the property as well as the purchase price. The property was eventually purchased, but not through plaintiff, and plaintiff sued. With the exception of the seller, all defendants demurred, apparently on the ground that there was no agreement complying with the writing requirements of the statute of frauds. The demurrer was sustained and the action dismissed after plaintiff refused to amend (*14 Cal. 3d 815, 819, 822)* . The Supreme Court reversed, regarding the cause of action for intentional interference with a prospective economic advantage, and stated that the action was a tort theory of recovery rather than contract and was based on interference with a relationship between parties irrespective of the enforceability of the underlying agreement (*14 Cal. 3d 815, 822, 830)* . Thus, the Court concluded that plaintiff had stated a cause of action for intentional interference with prospective advantage (*14 Cal. 3d 815, 829-830)* .

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[Reserved]

§§ 31.62[Reserved]

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2A-31 California Points & Authorities § 31.80

§ 31.80 Supporting Contention That Broker May Recover Commission--Broker Procures Ready, Willing, and Able Buyer

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF BROKER MAY RECOVER A COMMISSION BECAUSE A BROKER EARNS A COMMISSION WHEN HE/SHE PROCURES A READY, WILLING, AND ABLE BUYER WITHIN THE LIFE OF THE BROKER'S CONTRACT AND _____ [A BINDING CONTRACT IS EXECUTED *or* THE OPPORTUNITY TO EXECUTE A BINDING CONTRACT IS GIVEN TO THE SELLER *or* THE BUYER VERBALLY ACCEPTS THE SELLER'S TERMS AND OFFERS TO ENTER INTO A BINDING CONTRACT].

A. Commission Earned When Ready, Willing, and Able Buyer Procured. In the absence of any contrary agreement, a broker earns a commission when, within the life of the contract or any extension thereof, the broker has procured a person who is ready, willing, and able to purchase the property on terms satisfactory to the seller and has obtained a binding and valid contract for sale on the terms proposed by the seller, or has brought the seller and buyer together and enabled them to enter into a contract of sale, or has produced a purchaser who has verbally accepted the seller's terms and offered to enter into a written contract that embodies the seller's terms and is binding on both parties (*Twogood v. Monnette (1923) 191 Cal. 103, 107, 215 P 542* ; *Born v. Koop (1962) 200 Cal. App. 2d 519, 530, 19 Cal. Rptr. 379*).

[*Optional*] **B. Commission Recoverable Although Terms of Sale Different From Listing Agreement.** A broker is entitled to a commission although the terms of sale are different from the original listing agreement because a change in the terms of the listing agreement becomes, on ratification by the principal, a part of the original contract of employment (*Seck v. Foulks (1972) 25 Cal. App. 3d 556, 573, 102 Cal. Rptr. 170*).

[*Optional*] **C. Buyer Conclusively Presumed to Be Ready, Willing, and Able.** A buyer is conclusively presumed to

be ready, willing, and able to purchase the property, in a suit by a broker to recover a commission, on proof that the vendor has entered into a valid contract of purchase and sale with the buyer (*Cardoza v. Moorehouse (1961) 197 Cal. App. 2d 76, 79, 17 Cal. Rptr. 28* ; *Chism v. Agazzoni (1961) 195 Cal. App. 2d 189, 191, 15 Cal. Rptr. 700*).

[*Optional*] **D. Right to Commission Not Defeated by Unwilling or Unable Seller.** If a ready, willing, and able buyer has been procured by a broker, a broker's right to a commission accrues when the contract of sale is executed, or when the opportunity to make a contract is given the seller, and the broker is entitled to a commission although the seller is unable or unwilling to complete the sale (*Twogood v. Monnette (1923) 191 Cal. 103, 107, 215 P. 542* ; *Seck v. Foulks (1972) 25 Cal. App. 3d 556, 573, 102 Cal. Rptr. 170*).

[*Optional*] **E. Cooperating Broker Has Standing to Recover Commission From Seller.** A cooperating broker who procured a ready, willing, and able buyer has standing to sue the seller for an unpaid commission, when the listing agreement authorized the listing agent to cooperate with other brokers and to divide any commission due under the agreement with them; the listing agent entered into a written agreement with the cooperating broker providing that the commission would be divided if the cooperating broker procured a buyer for the property; and the language of the listing agreement was sufficient to authorize the listing broker to appoint subagents who could bind the principal, thus making the seller directly responsible for the commission (*Steve Schmidt & Co. v. Berry (1986) 183 Cal. App. 3d 1299, 1311-1313, 228 Cal. Rptr. 689*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that a broker may recover a commission. This argument may be made when the broker has procured a ready, willing, and able buyer and a contract of sale is entered into, or the buyer and seller are given the opportunity to enter into a binding contract, or the buyer has verbally accepted the seller's terms and offered to enter into a binding contract.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the broker's right to a commission. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing that a ready, willing, and able buyer was procured by the broker and that there was a binding contract of sale, the opportunity to enter into a contract of sale, or a verbal acceptance on the seller's terms and offer by the buyer to enter into a binding contract of sale.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities set out in *§ 31.102* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Commission Earned When Ready, Willing, and Able Buyer Procured

In ***Twogood v. Monnette*** *(1923) 191 Cal. 103, 215 P. 542* , defendant owner of a majority of stock in an oil company, together with his family, agreed to pay plaintiff a commission if plaintiff procured a purchaser of the stock. Plaintiff presented a prospective purchaser to defendant and after negotiations concerning the purchase price and terms of payment, defendant and the prospective purchaser came to an agreement. They later met and agreed on all terms of the sale and agreed to have these terms put in writing. A contract of sale was drawn up but defendant refused to sign,

indicating that the minority stockholders had agreed to buy the stock. Plaintiff sued to recover his commission, judgment was rendered for plaintiff, and defendant appealed.

The Supreme Court affirmed the judgment, holding that plaintiff had earned his commission (*191 Cal. 103, 109)* . The Court stated that it is well established that in the absence of any specific agreement to the contrary, a broker employed to sell real or personal property earns a commission when, within the life of the contract or any extension thereof, the broker procures a person who is ready, willing, and able to purchase the property on terms satisfactory to the seller. Additionally, the broker must obtain a binding and valid contract for a sale on the terms proposed by the seller, or bring the seller and buyer together and thus enable them to enter into a contract of sale, or produce such a purchaser who has verbally accepted the seller's terms and offered to enter into a written contract that embodies the seller's terms and is binding on both parties (*191 Cal. 103, 107)* .

In ***Born v. Koop*** *(1962) 200 Cal. App. 2d 519, 19 Cal. Rptr. 379* , defendant gave plaintiff, a real estate broker, a written listing agreement for the sale of defendant's property that specified the terms and conditions of the sale. Plaintiff obtained a proposed purchaser who executed a deposit receipt that contained the proposed buyer's terms. The sale never went through and plaintiff brought an action for a commission. Although the terms of the listing agreement and deposit receipt were different, the trial court held that plaintiff had earned his commission by producing a ready, willing, and able buyer and that defendant had waived any objections to the differences.

The court of appeal reversed the judgment, holding that the terms of the deposit receipt were materially different from the listing agreement and that defendant had not waived these differences. Accordingly, plaintiff had not earned his commission (*200 Cal. App. 2d 519, 533)* . The court quoted *Twogood v. Monnette (1923) 191 Cal. 103, 215 P. 542* (discussed *above*), as setting out the rule governing the right to a commission. The court in *Born* stated that a broker employed to sell real or personal property earns a commission when, within the life of the contract or any extension thereof, the broker produces a person who is ready, willing, and able to purchase the property on terms satisfactory to the seller. Additionally, the broker must obtain a binding and valid contract for a sale on the terms proposed by the seller, bring the seller and buyer together and thus enable them to enter into a contract of sale, or produce such a purchaser who has verbally accepted the seller's terms and offered to enter into a written contract that embodies the seller's terms and is binding on both parties (*200 Cal. App. 2d 519, 530)* .

[b] Commission Recoverable Although Terms of Sale Different From Listing Agreement

The facts and procedural background of ***Seck v. Foulks*** *(1972) 25 Cal. App. 3d 556, 102 Cal. Rptr. 170* , are discussed in *§ 31.80[3][d]*. In *Seck* the court of appeal reversed a judgment against plaintiff real estate broker in an action for a commission earned in procuring a purchaser. The purchase agreement submitted by the purchaser differed from the listing agreement but the parties later met and came to a verbal agreement as to the terms of the sale. In reversing the trial court's holding that plaintiff had not earned his commission, the court of appeal relied on *Levy v. Wolf (1905) 2 Cal. App. 491, 84 P. 313* (discussed in *§ 31.106[4][a]*). The court stated that it is well established that a change in the terms of a listing agreement becomes, on ratification by the seller, a part of the original contract, the compensation fixed in the original contract governs, and the broker is entitled to recover in accordance therewith (*25 Cal. App. 3d 556, 573)* .

[c] Buyer Conclusively Presumed to Be Ready, Willing, and Able

In ***Cardoza v. Moorehouse*** *(1961) 197 Cal. App. 2d 76, 17 Cal. Rptr. 28* , plaintiff, a real estate broker, brought an action to recover a commission for procuring a ready, willing, and able buyer of defendant's property. Plaintiff procured a buyer and the buyer and defendant entered into a deposit receipt agreement for the sale of the property but the buyer subsequently defaulted. The trial court granted judgment for plaintiff and defendant appealed.

The court of appeal affirmed the judgment and stated that a broker earns a commission when the vendee and vendor

execute a binding agreement between them on the terms provided in the broker's contract of employment and the vendee is ready, willing, and able to perform in the prescribed terms. Relying on prior law, including *Malmstedt v. Stillwell (1930) 110 Cal. App. 393, 294 P. 41* (discussed in *§ 31.80[4][c]*), the court further stated that the readiness, willingness, and ability of the buyer is conclusively presumed, in a suit by a broker to recover a commission, on proof that the vendor had entered into a valid contract of purchase and sale with the vendee (*197 Cal. App. 2d 76, 78-79)* .

In ***Chism v. Agazzoni*** *(1961) 195 Cal. App. 2d 189, 15 Cal. Rptr. 700* , the court of appeal affirmed a judgment for plaintiffs in an action to recover a broker's commission earned in procuring a buyer of defendants' property (*195 Cal. App. 2d 189, 194)* . The buyers executed a written offer to buy the property and defendants executed a counter offer that was accepted by the buyers. However, defendants refused to open an escrow. Relying on prior case law, including *Malmstedt v. Stillwell (1930) 110 Cal. App. 393, 294 P. 41* (discussed in *§ 31.80[4][c]*), the court stated that the readiness, willingness, and ability of the vendee is conclusively presumed, in a suit by a broker to recover a commission, on proof that the vendor has entered into a valid contract of purchase and sale with the vendee (*195 Cal. App. 2d 189, 191)* .

[d] Right to Commission Not Defeated by Unwilling or Unable Seller

The facts and procedural background of ***Twogood v. Monnette*** *(1923) 191 Cal. 103, 215 P. 542* , are discussed in *§ 31.80[3][a]*. The Supreme Court affirmed a judgment in favor of plaintiff and stated that when the broker procures a ready, willing, and able buyer, the broker's right to a commission accrues when the contract of sale is executed or when the opportunity to make such a contract is given. The Court noted that the broker becomes entitled to a commission even though the seller is unable or unwilling to complete the sale (*191 Cal. 103, 107)*

In ***Seck v. Foulks*** *(1972) 25 Cal. App. 3d 556, 102 Cal. Rptr. 170* , plaintiff, a real estate broker, brought an action to recover a commission earned in procuring a purchaser for defendant's property. Plaintiff procured a purchaser and submitted a purchase agreement to defendant, who rejected it because the purchase agreement did not conform to the listing agreement. Thereafter, attorneys for both defendant and the proposed purchaser met and came up with a proposed agreement. Later, there was a final meeting at which both parties verbally agreed to the sale. After the meeting, defendant asked that plaintiff and a cobroker take their commission on an installment basis. Plaintiff refused to do so and the deal never went through. The trial court rendered judgment for defendant, holding that the demand that plaintiff take his commission out in installments was a condition to the sale that was never met and that the offer by the purchasers differed from the terms of the listing agreement.

The court of appeal reversed and held that plaintiff had produced a ready, willing, and able purchaser who had verbally accepted the seller's terms and had offered to enter into a written contract embodying those terms, which was binding on the seller. Further, the court held that plaintiff's entitlement to the commission was fixed prior to the time defendant imposed the condition that plaintiff take his commission on an installment basis. The court stated that a broker's right to a commission accrues when the contract of sale is executed, or when the opportunity to make such a contract is given to the seller, and the broker becomes entitled to the commission even though the seller is unwilling or unable to complete the sale (*25 Cal. App. 3d 556, 573-574)* .

[e] Cooperating Broker Has Standing to Recover Commission From Seller

In ***Steve Schmidt & Co. v. Berry*** *(1986) 183 Cal. App. 3d 1299, 228 Cal. Rptr. 689* , plaintiff was the cooperating broker and defendant was the seller of the property. Defendant had entered into an exclusive listing agreement with a broker to sell the property. That listing broker entered into a written agreement with plaintiff stating that plaintiff would be paid a commission if it found a buyer for the property on certain terms and conditions. Plaintiff, acting individually and not on behalf of his company, offered to buy the property on the exact terms of the original listing agreement. Defendant refused to sell the property on those terms. Plaintiff then sued defendant for its commission. The trial court granted summary judgment for plaintiff, and defendant appealed.

The court of appeal affirmed. The court held that plaintiff was entitled to a commission because it had produced a ready, willing, and able buyer (*183 Cal. App. 3d 1299, 1309-1311)* . The court then concluded that plaintiff, as the cooperating broker, had standing to sue defendant for a commission. The listing agreement provided that defendant authorized the listing agent to cooperate with other brokers and to divide any commission due under the agreement (*183 Cal. App. 3d 1299, 1311)* . The listing agent had entered into a written agreement with plaintiff providing for a division of the commission if plaintiff procured a buyer for the property. The court held that the language of the listing agreement was sufficient to authorize the listing broker to appoint subagents who could bind the principal, thus making defendant (the principal) directly responsible for the commission (*183 Cal. App. 3d 1299, 1311)* .

In addition to the direct contract theory, the court also held that defendant could be held liable on a third-party beneficiary theory because plaintiff was a member of a class that was intended to be directly benefitted by defendant's promise to pay a commission (*183 Cal. App. 3d 1299, 1313)* .

Steve Schmidt & Co. v. Berry was distinguished in *Colbough v. Hartline (1994) 29 Cal. App. 4th 1516* . In that case, plaintiffs sued the sellers of real property to recover a commission allegedly due plaintiffs as cooperating brokers who were the procuring cause of the sale of the property. The trial court granted defendants' motion for a nonsuit, and plaintiffs appealed.

The court of appeal affirmed. The court held that plaintiffs could not bring an action against the sellers because the listing broker had only been authorized to cooperate with subagents, not to contract to divide the commission with cooperating brokers; there was no written agreement between the listing broker and the cooperating broker; and the full commission had been paid to the listing agent (*29 Cal. App. 4th 1516, 1523-1524)* .

[4] Additional Authorities

[a] Commission Earned When Ready, Willing, and Able Buyer Procured

In *Richardson v. Walter Land Co. (1953) 118 Cal. App. 2d 459, 258 P.2d 42* , the court of appeal affirmed a judgment in favor of a real estate broker in an action for a commission in connection with a loan transaction. Plaintiff had obtained a loan for defendant on the pledge of defendant's land and some stocks. An escrow agreement was drawn up but defendant refused to go through with the transaction. The court stated that plaintiff's right to a commission in a loan transaction was governed by the rule set forth in *Twogood v. Monnette (1923) 191 Cal. 103, 107, 215 P. 542* (discussed in *§ 31.80[3][a]*) (*118 Cal. App. 2d 459, 463)* .

[b] Commission Recoverable Although Terms of Sale Different From Listing Agreement

In *Johnson v. Rahlves (1931) 114 Cal. App. 319* , the court of appeal affirmed a judgment in favor of plaintiff, a real estate broker, in an action for a commission earned in connection with the sale of defendant's property. Plaintiff and defendant entered into an exclusive listing agreement for the sale of defendant's property for $9,500. Later, defendant and the purchaser agreed on a lower price. Defendant contended on appeal that plaintiff was not entitled to a commission because the selling price was less than the listing price. The court held that plaintiff was entitled to a commission, and stated that the appeal could be disposed of on the authority of prior case law, including *Levy v. Wolf (1905) 2 Cal. App. 491, 84 P 313* (discussed *below*) (*114 Cal. App. 319, 320)* .

In *Levy v. Wolf (1905) 2 Cal. App. 491, 84 P. 313* , the court of appeal affirmed a judgment in favor of plaintiff in an action to recover a commission. Plaintiff was given an exclusive right to sell listing by defendant for five days. Plaintiff found a buyer and communicated the offer to defendant on the fifth day. The offer was less than the price in the listing but defendant agreed to accept. Thereafter, defendant sold the property through another broker to the purchaser procured by plaintiff. In holding that plaintiff was entitled to a commission, the court stated that a departure by a real

estate broker from the terms of his or her authority in effecting a sale becomes, on ratification by the principal, a part of the original contract, the compensation fixed therein governs, and the broker is entitled to a commission (*2 Cal. App. 491, 494)* .

[c] Buyer Conclusively Presumed to Be Ready, Willing, and Able

In *Malmstedt v. Stillwell (1930) 110 Cal. App. 393, 294 P. 41* , plaintiffs, real estate brokers, brought an action for the recovery of a commission in connection with the sale of defendant's cafeteria. Plaintiffs procured a buyer and the property was sold. The trial court rendered judgment for plaintiffs and defendant appealed, contending, in part, that the finding that plaintiffs procured a ready, willing, and able buyer within the life of the employment contract was unsupported by the evidence. The court of appeal affirmed the judgment and stated that the execution by the owner of a contract of sale is conclusive proof that the owner is satisfied with the qualifications of the purchaser and the purchaser's ability to carry out the terms of the contract (*110 Cal. App. 393, 398-399)* .

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2A-31 California Points & Authorities § 31.81

§ 31.81 Supporting Contention That Broker May Recover Commission--Property Listed Under General Listing Agreement and Broker Was Procuring Cause of Sale Not Made Through Broker

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF BROKER MAY RECOVER A COMMISSION UNDER THE GENERAL LISTING AGREEMENT, ALTHOUGH THE SALE WAS NOT MADE THROUGH PLAINTIFF, BECAUSE HE/SHE WAS THE PROCURING CAUSE OF THE SALE.

A. Commission Recoverable When Broker Procuring Cause Under General Listing. A broker under a general listing is entitled to a commission when the broker was the procuring cause of a sale that was made without going through the broker (*Oaks v. Brahs (1955) 132 Cal. App. 2d 182, 184, 281 P.2d 562*).

B. Broker Procuring Cause When Broker Creates Interest That Results in Sale. A broker is a procuring cause when the broker creates an interest in the buyer's mind that becomes a motivating force causing the buyer to act and that continues without cessation until it brings about the consummation of the sale (*Oaks v. Brahs (1955) 132 Cal. App. 2d 182, 184, 281 P.2d 562*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that a broker is entitled to a commission. This argument may be used when the property was listed with the broker under a general listing agreement and the broker was the procuring cause of a sale made by the owner personally or through another broker.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context

in which counsel wishes to raise the substantive issue of the broker's right to a commission. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing that the listing agreement was a general listing, the property was sold by the owner personally or through another broker, and the broker was the procuring cause of the sale.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities set out in *§ 31.96* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Commission Recoverable When Broker Procuring Cause Under General Listing

In ***Oaks v. Brahs*** *(1955) 132 Cal. App. 2d 182, 281 P.2d 562* , plaintiff, a real estate broker, brought an action to recover a commission under a general listing agreement providing that plaintiff was entitled to a commission if plaintiff succeeded in making a sale of defendants' ranch. Plaintiff contacted the eventual purchaser of the property, who plaintiff knew was interested in acquiring a ranch, and told him about the property. After plaintiff contacted the purchaser numerous times and requested that he look at the property, the purchaser looked at the property and a sale was consummated by the purchaser and defendants without going through plaintiff broker. The trial court rendered judgment for plaintiff and defendants appealed. The court of appeal affirmed the judgment and held that the evidence was sufficient to justify the finding that plaintiff was the procuring cause of the sale and thus entitled to a commission (*132 Cal. App. 2d 182, 184)* .

[b] Broker Procuring Cause When Broker Creates Interest That Results in Sale

The facts and procedural background of ***Oaks v. Brahs*** *(1955) 132 Cal. App. 2d 182, 281 P.2d 562* , are discussed in *§ 31.81[3][a]*. In *Oaks,* plaintiff broker, after obtaining a listing from defendant owners, told the eventual purchaser about the property. The purchaser, after being told about the property, looked at the property and talked to defendants. Thereafter, he bought it without going through plaintiff. The trial court granted judgment for plaintiff, holding that plaintiff was the procuring cause of the sale. The court of appeal affirmed (*132 Cal. App. 2d 182, 185)* . The court quoted the trial court's definition of procuring cause as a condition or interest created in another person's mind that becomes a motivating force that causes the person to act, and the motivating force continues without cessation until it brings about the consummation of the act. The court noted that the person who created such interest in the other person's mind that resulted in the act is said to be the procuring cause of the act (*132 Cal. App. 2d 182, 184)* .

[4] Additional Authorities

[a] Commission Recoverable When Broker Procuring Cause Under General Listing

The facts and procedural background of *Nelson v. Mayer (1954) 122 Cal. App. 2d 438, 265 P.2d 52* , are discussed in *§ 31.96[3][a]*. In *Nelson,* the court affirmed a judgment in favor of defendant owner in an action brought by plaintiff under a general listing. The property was sold through another broker and the court stated that plaintiff could recover if the evidence disclosed that plaintiff's efforts were the procuring cause of the sale (*122 Cal. App. 2d 438, 445)* .

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2A-31 California Points & Authorities § 31.82

§ 31.82 Supporting Contention That Broker May Recover Commission--Property Sold Through Another Broker During Term of Exclusive Agency Agreement

[1] FORM

PLAINTIFF BROKER MAY RECOVER A COMMISSION BECAUSE A BROKER IS ENTITLED TO A COMMISSION WHEN THE PROPERTY IS SOLD THROUGH ANOTHER BROKER DURING THE TERM OF AN EXCLUSIVE AGENCY AGREEMENT.

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

Commission Recoverable When Property Sold During the Term of Exclusive Agency. A broker is entitled to a commission under an exclusive agency agreement, whether or not he or she produced a buyer or was the procuring cause of a sale, when the owner of the property sells it through another broker during the term of the agreement (*Lowe v. Loyd (1949) 93 Cal. App. 2d 684, 685-687, 209 P.2d 851*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that a broker may recover a commission. The argument may be used when the property is listed with the broker under an exclusive agency agreement and the owner sells the property through another broker during the term of the agreement. There are two types of exclusive broker's agreements: an exclusive agency agreement and an exclusive right-to-sell agreement. Under an exclusive agency agreement, the owner may not sell the property through another broker during the term of the agreement without becoming liable to the broker for a commission but is free to sell the property personally through his or her own unaided efforts. Under an exclusive right-to-sell agreement, however, the owner may not sell the property either personally or through another broker during the term of the agreement without becoming liable to the broker for a commission [*see E. A. Strout Western Realty v. Gregoire (1950) 101 Cal. App. 2d 512, 517-518, 225 P.2d 585]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the broker's right to a commission. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing that the agreement is an exclusive agency agreement and that the owner sold the property during the term of the agreement through another broker.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities set out in *§ 31.100* may be used to oppose the contention supported by this form of points and authorities.

[3] Discussion of Authorities

[a] Commission Recoverable When Property Sold During the Term of Exclusive Agency

In ***Lowe v. Loyd*** *(1949) 93 Cal. App. 2d 684, 209 P.2d 851* , plaintiff, a real estate broker, brought an action for breach of an exclusive agency agreement when defendants consummated an exchange of the property through another broker during the term of the agreement. The trial court granted judgment for plaintiff and defendants appealed. The court stated that it was immaterial that plaintiff did not procure a ready, willing, and able purchaser of the property or bring about the exchange, because an agent may recover damages for the breach of an exclusive agency contract by the principal when the breach consists of selling the property before the agreement has expired (*93 Cal. App. 2d 684, 686)* .

[4] Additional Authorities

[a] Commission Recoverable When Property Sold During the Term of Exclusive Agency

The facts and procedural background of *Carlsen v. Zane (1968) 261 Cal. App. 2d 399, 67 Cal. Rptr. 747* , are discussed in *§ 31.83[3][a]*. In *Carlsen*, the court of appeal noted the distinction between an exclusive agency agreement and an exclusive right-to-sell agreement. The court stated that there are two types of exclusive listings and that an exclusive agency agreement is interpreted as prohibiting the owner from selling the property through the agency of another broker during the listing period, but the owner may sell the property through his or her own efforts (*261 Cal. App. 2d 399, 401-402)* .

The facts and procedural background of *E. A. Strout Western Realty v. Gregoire (1950) 101 Cal. App. 2d 512, 225 P.2d 585* , are discussed in *§ 31.101[3][a]*. In *Gregoire*, the court of appeal, in discussing the distinction between an exclusive agency agreement and an exclusive right-to-sell agreement, quoted from prior case law and stated that in an exclusive agency agreement the owner has the right to sell the property by his or her own unaided efforts without becoming liable to the broker for a commission, and that the only effect of such a contract is to prevent the owner from placing the property in the hands of another agent (*101 Cal. App. 2d 512, 516)* . The court held that the agency agreement was not an exclusive right to sell because this was not expressly stated in the agreement and such an interpretation was not implied by necessity (*101 Cal. App. 2d 512, 518)* . The court concluded that because the agreement was not an exclusive right to sell and defendant was free to sell the property through his own efforts, defendant was not liable to plaintiff for a commission (*101 Cal. App. 2d 512, 519)* .

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2A-31 California Points & Authorities § 31.83

§ 31.83 Supporting Contention That Broker May Recover Commission--Property Sold by Owner Personally or Through Another Broker During Term of Exclusive Right-to-Sell Agreement

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF BROKER IS ENTITLED TO A COMMISSION BECAUSE, DURING THE TERM OF THE EXCLUSIVE RIGHT-TO-SELL AGREEMENT, THE PROPERTY WAS SOLD BY _____ [THE OWNER PERSONALLY *or* THROUGH ANOTHER BROKER].

A. Commission Recoverable When Property Sold by Another. A broker is entitled to a commission under an exclusive right-to-sell agreement, whether or not the broker produced a ready, willing, and able buyer or was the procuring cause of a sale, when the property is sold during the term of the agreement by the owner personally or through another broker (*Civ. Code § 1086(f)(1)*; *Fleming v. Dolfin (1931) 214 Cal. 269, 271* ; *Carlsen v. Zane (1968) 261 Cal. App. 2d 399, 401-402, 67 Cal. Rptr. 747*).

[*Optional*] **B. Commission Recoverable When Property Sold by Another Following Termination of Agency But During Listing Term.** A broker is entitled to a commission under an exclusive right-to-sell agreement when (1) the seller terminates the agreement prior to its expiration, (2) the property is sold during the listing term by another person, and (3) the agreement provides for compensation to the broker under these circumstances (*Century 21 Butler Realty, Inc. v. Vasquez (1996) 41 Cal. App. 4th 888, 49 Cal. Rptr. 2d 1*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a party's contention that a broker is entitled to a commission because the property was listed with the broker under an exclusive right-to-sell agreement and the property

was sold by the owner personally or through another broker during the term of the agreement. The second (optional) authority paragraph may be used when the seller terminated the agreement prior to its expiration and to the sale of the property during the original listing term.

This form may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the substantive issue that a broker is entitled to a commission under an exclusive right to sell. This form may also be adapted for use in a trial or appellate brief.

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should refer to the allegations in the complaint that establish that the listing agreement was an exclusive right-to-sell agreement and that a sale by another person took place during the original listing term. Counsel can then argue the broker is entitled to a commission based on the authorities set forth above.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities set out in *§ 31.101* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Commission Recoverable When Property Sold by Owner or Through Different Broker

Civ. Code § 1086(f)(1) provides in part that an "exclusive right to sell listing" is a listing under which the owner grants to an agent, for a specified period of time, the exclusive right to sell or to find or obtain a buyer for the property, and the agent is entitled to the agreed compensation if during that period of time the property is sold, no matter who effected the sale.

In ***Fleming v. Dolfin*** *(1931) 214 Cal. 269* , plaintiff real estate brokers were given an exclusive right to sell subject to a 20-day cancellation notice by defendant's agent. Prior to the notice of termination and during the term of the listing, an escrow was opened for the sale of the property and the property was eventually sold through another agent. Plaintiffs sued both the agent and the principal and judgment was rendered against plaintiffs. Plaintiffs appealed and the Supreme Court reversed the judgment, holding that plaintiffs were entitled to a commission because defendant principal had breached the exclusive right-to-sell agreement, thus entitling plaintiffs to the agreed commission (*214 Cal. 269, 271)* .

Defendant in *Fleming* had contended that plaintiffs could not recover a commission in the absence of showing that plaintiffs had produced a ready, willing, and able purchaser, but the Court rejected this contention. The court stated that plaintiffs were entitled to the exclusive right to sell the property during the period specified in the agreement and that the sale through another broker before the conclusion of that period destroyed plaintiffs' right and made performance by them impossible. Thus, the Court added, on defendant's breach, plaintiffs were entitled to sue for the benefits they might have received under the contract, namely, the agreed commission (*214 Cal. 269, 270-271)* .

In ***Carlsen v. Zane*** *(1968) 261 Cal. App. 2d 399, 67 Cal. Rptr. 747* , plaintiff real estate brokers were given an exclusive right to sell defendants' 15-acre parcel of unimproved property for a period of 90 days and defendants agreed to pay a commission of 10 percent of the selling price. Within the term of the listing agreement, defendants sold 10 acres of the property to a friend. Plaintiff filed suit to recover the commission and the trial court awarded judgment to defendants, holding that plaintiffs had not used due diligence in procuring a purchaser. The court of appeal reversed and held that plaintiffs were entitled to a commission under the exclusive right to sell agreement when the owner sold the property, either personally or through another broker, and that plaintiffs were not required to have procured a ready, willing, and able purchaser on terms specified in the listing agreement in order to recover (*261 Cal. App. 2d 399, 401-402)* .

[b] Commission Recoverable When Property Sold by Another Following Termination of Agency But During Listing Term

In ***Century 21 Butler Realty, Inc. v. Vasquez*** *(1996) 41 Cal. App. 4th 888, 49 Cal. Rptr. 2d 1* , plaintiff real estate broker was given an exclusive authorization to sell agreement, which was scheduled to expire on March 10, 1993. In November of 1992, the sellers sent a letter to the broker terminating the listing. In February of 1993, the property was sold through another broker. Plaintiff brought an action for the commission. The trial court entered a summary judgment for defendant sellers.

The court of appeal reversed. The court initially examined the relevant provisions of *Civ. Code § 1086(f)(1)* (discussed in *§ 31.83[3][a]*), and then stated that whether the broker may recover compensation depends on the terms of the particular listing contract. It noted that the listing agreement at issue provided that defendants agreed to compensate plaintiff irrespective of agency relationships if the property was sold during the term of the listing agreement by the broker or through any other person. Defendants had the right to terminate the agency relationship before the agreement expired, but doing so did not eviscerate plaintiff's right to compensation. The agreement provided that plaintiff would earn the commission if the listed property was sold during the listing term, and plaintiff earned its commission because such a sale occurred (*41 Cal. App. 4th 888, 891-892)* .

[4] Additional Authorities

[a] Commission Recoverable When Property Sold by Owner or Through Different Broker

The facts and procedural background of *Walter v. Libby (1945) 72 Cal. App. 2d 138, 164 P.2d 21* , are discussed in *§ 31.88[3][a]*. In *Walter,* plaintiff was given an exclusive right to sell defendant's property but during the term of the agreement defendant revoked the agency and sold the property himself. The court of appeal, in affirming the judgment for plaintiff, stated that when an agent or broker is given an exclusive right to sell, as distinguished from an exclusive agency in which the owner retains the right to sell the property, the broker is entitled to compensation for a sale made by the principal and it is immaterial that the broker is not the procuring cause thereof (*72 Cal. App. 2d 138, 141-142)* .

In *Wright v. Vernon (1947) 81 Cal. App. 2d 346, 183 P.2d 908* , the court of appeal affirmed a judgment for plaintiff for breach of an exclusive right-to-sell agreement when, during the term of the agreement, defendant exchanged the property through another broker. The court stated that the authorities in California follow the rule that an agency contract carries the implication that the owner reserves the right to sell without obligation to pay the stipulated commission to the broker but the rule is contrary when the contract gives the agent the exclusive right to sell and the owner sells through another agent. The court stated that the action of the owner in dealing through another broker was a plain breach of the conditions of the contract and fully supports the judgment for damages (*81 Cal. App. 2d 346, 347)* .

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2A-31 California Points & Authorities § 31.84

§ 31.84 Supporting Contention That Broker May Recover Commission--Recovery Permitted When Exclusive Right-to-Sell Contract Contains Withdraw-From-Sale Clause

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF BROKER MAY RECOVER A COMMISSION UNDER THE WITHDRAW-FROM-SALE CLAUSE CONTAINED IN THE EXCLUSIVE RIGHT-TO-SELL LISTING AGREEMENT BECAUSE THE PROPERTY WAS _____ [*specify act making property unmarketable, e.g.,* WITHDRAWN FROM SALE] BY DEFENDANT OWNER AND BECAUSE SUCH CLAUSE IS ENFORCEABLE AND IS NOT VOID AS AN ILLEGAL PENALTY.

Commission Recoverable Under Withdraw-From-Sale Clause. A broker is entitled to recover a commission under a withdraw-from-sale clause contained in an exclusive right-to-sell listing agreement when the owner withdraws the property from sale prior to expiration of the listing agreement because such a clause is enforceable and is not an unlawful penalty (*Blank v. Borden (1974) 11 Cal. 3d 963, 969-973, 115 Cal. Rptr. 31, 524 P.2d 127*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that a broker is entitled to recover a commission. The argument may be used when recovery is sought under a withdraw-from-sale clause in an exclusive right-to-sell listing agreement. Generally, a withdraw-from-sale clause provides that if the property is withdrawn from sale, transferred, conveyed, or leased without the consent of the listing broker, or is otherwise made unmarketable by the owner's voluntary act, the broker would receive a commission based on the sale price of the property [*see Blank v. Borden (1974) 11 Cal. 3d 963, 966 n.1, 115 Cal. Rptr. 31, 524 P.2d 127]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of a broker's recovery of a commission. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the fact that the agreement contains a withdraw-from-sale clause and that the property was withdrawn from sale or otherwise rendered unmarketable, as defined in the clause, by the owner prior to expiration of the exclusive listing agreement.

[3] Discussion of Authorities

[a] Commission Recoverable Under Withdraw-From-Sale Clause

In ***Blank v. Borden*** *(1974) 11 Cal. 3d 963, 115 Cal. Rptr. 31, 524 P.2d 127* , defendant owner gave plaintiff broker an exclusive right-to-sell listing agreement, which provided that if the property was withdrawn from sale, transferred, conveyed, or leased without the consent of plaintiff, or otherwise made unmarketable by the owner's voluntary act, plaintiff would receive a commission of six percent of the price for the property. The property was withdrawn from sale during the term of the listing agreement and plaintiff sued to recover a commission. Judgment was rendered in favor of plaintiff and defendant appealed. The Supreme Court affirmed the judgment and held that a withdraw-from-sale clause is not an unlawful liquidated damages penalty but is enforceable and that plaintiff was entitled to recover a commission (*11 Cal. 3d 963, 973)* . The court reasoned that a withdraw-from-sale clause is not a liquidated damages provision because a claim for compensation under the clause is not a claim for a breach of contract but a claim for indebtedness under the terms of the contract (*11 Cal. 3d 963, 969-973)* .

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2A-31 California Points & Authorities § 31.85

§ 31.85 Supporting Contention That Broker May Recover Commission--Broker Procures Buyer Within Term of Listing Agreement but Negotiations Concluded Between Buyer and Seller After Expiration of Listing Agreement

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF BROKER MAY RECOVER A COMMISSION BECAUSE RECOVERY IS PERMITTED WHEN A BROKER PROCURES A BUYER DURING THE TERM OF THE LISTING AGREEMENT, EVEN THOUGH THE NEGOTIATIONS BETWEEN THE BUYER AND SELLER CONTINUE AND FINALLY CONCLUDE AFTER EXPIRATION OF THE AGREEMENT.

Commission Recoverable Although Negotiations Concluded After Expiration of Agreement. A broker is entitled to a commission when he or she procures a buyer during the term of the listing agreement although negotiations between the buyer and the seller continue, and finally conclude after expiration of the agreement (*E. A. Strout Western Realty Agency, Inc. v. Lewis (1967) 255 Cal. App. 2d 254, 258, 62 Cal. Rptr. 918* ; *Wilson v. Roppolo (1962) 207 Cal. App. 2d 276, 281, 24 Cal. Rptr. 437*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that a broker may recover a commission. This argument may be used when the broker procures a ready, willing, and able buyer during the term of the listing agreement, but negotiations between the buyer procured by the broker and the seller continue and are finally concluded after expiration of the agreement.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the contention that a real estate broker may recover a commission. These points and

authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing that a buyer was procured who was ready, willing, and able by the broker, that negotiations were ongoing at the time of expiration of the listing agreement, and that the negotiations were concluded between the buyer and the seller after the termination of the agreement.

In an appropriate case, counsel may wish to combine these points and authorities with the points and authorities set out in *§ 31.80*.

[3] Discussion of Authorities

[a] Commission Recoverable Although Negotiations Concluded After Expiration of Agreement

In ***E. A. Strout Western Realty Agency, Inc. v. Lewis*** *(1967) 255 Cal. App. 2d 254, 62 Cal. Rptr. 918* , plaintiff was given a general listing for the sale of defendants' property. The duration of the agreement was three years unless terminated sooner by defendants on 30 days' notice. Plaintiff advertised the property and was contacted by the brother and sister-in-law of the eventual buyers. Plaintiff showed and discussed the property with them and they appeared to be interested, although they were having trouble with financing. Thereafter, defendants gave plaintiff notice of cancellation of the listing and proceeded to offer the property to the same people plaintiff had found. Eventually, the property was sold to the brother and sister-in-law. The trial court found that plaintiff was the procuring cause of the sale and awarded judgment to plaintiff. Defendants appealed and the court of appeal affirmed, holding that plaintiff was the procuring cause of the sale. The court stated that it was immaterial that negotiations between the buyer and seller continued or concluded, without plaintiff's participation, after expiration of the listing agreement (*255 Cal. App. 2d 254, 258-260)* .

In ***Wilson v. Roppolo*** *(1962) 207 Cal. App. 2d 276, 24 Cal. Rptr. 437* , plaintiff real estate broker sought recovery of a commission from the owners of property under a listing agreement that expired on July 9, 1956. During the term of the agreement, plaintiff's salesman received an inquiry from one of the eventual purchasers and discussed the property with him. Plaintiff set up an appointment for defendants to show the property to the purchaser and after it was shown, the purchaser expressed interest. Before expiration of the listing agreement, one of the defendants negotiated the sale of the property himself and told plaintiff that he had sold the property to someone "who just knocked on the door" (*207 Cal. App. 2d 276, 279)* . The negotiations were concluded after expiration of the listing agreement and the property was sold to the purchaser introduced by plaintiff. The trial court rendered judgment for plaintiff and defendants appealed. The court of appeal affirmed the judgment. The court held that plaintiff had procured a ready, willing, and able buyer before expiration of the listing agreement and was entitled to a commission even though negotiations between plaintiff's buyer and the seller continued and finally concluded after expiration of the agreement (*207 Cal. App. 2d 276, 280-282)* .

[4] Additional Authorities

[a] Commission Recoverable Although Negotiations Concluded After Expiration of Agreement

In *De La Questa v. Armstrong Holdings Co. (1920) 48 Cal. App. 487, 192 P 135* , the court of appeal reversed a judgment dismissing plaintiff's action following a demurrer to the complaint for recovery of a commission. Plaintiff was given an exclusive right and option to purchase defendants' property with a stipulation in the agreement that plaintiff would receive a commission if plaintiff procured a purchaser within the time limit of the option. Plaintiff procured a purchaser but defendants delayed closing the transaction until after expiration of the agreement and thereafter consummated the sale with plaintiff's purchaser. The court held that since a ready, willing, and able buyer had been produced, the delay in closing the transaction until after expiration of the time limit in the agreement and the fact that the final negotiations were between the buyer and seller without plaintiff's participation could not defeat plaintiff's right to a commission (*48 Cal. App. 487, 493)* .

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2A-31 California Points & Authorities § 31.86

§ 31.86 Supporting Contention That Broker May Recover Commission--Broker Procures Ready, Willing, and Able Buyer at Lower Price Than Amount Stated in General Listing but Owner Conducts Final Negotiations Selling Property at Lower Price

[1] FORM

[*The following should be combined with the points and authorities set forth in § 31.80 and may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF BROKER MAY RECOVER A COMMISSION BECAUSE HE/SHE PROCURED A READY, WILLING, AND ABLE BUYER UNDER A GENERAL LISTING, EVEN THOUGH THE OWNER CONDUCTED THE FINAL NEGOTIATIONS AND SOLD THE PROPERTY AT A LOWER PRICE THAN THE SALES PRICE STATED IN THE LISTING AGREEMENT.

Commission Recoverable Although Broker Procures Buyer at Lower Price. If a broker procures a ready, willing, and able buyer under a general listing, the broker is entitled to recover a commission even though the purchaser was willing to pay only a lower price than that set forth in the listing agreement, and the owner cannot deprive the broker of a commission by conducting the final negotiations and selling at the lower price to the purchaser procured by the broker (*Palmtag v. Danielson (1947) 30 Cal. 2d 517, 521, 183 P.2d 265*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that a broker is entitled to recover a commission. This argument may be used when the broker has procured a ready, willing, and able buyer under a general listing, but the buyer is willing to pay only a price that is lower than the sales price in the listing agreement and the owner attempts to avoid paying a commission by conducting the final negotiations personally and selling the property to the procured purchaser at a lower price without going through the broker.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the broker's right to recover a commission. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing that the broker procured a ready, willing, and able buyer who was willing to purchase the property only at a price lower than the amount specified in the general listing agreement. Counsel should also discuss facts showing that the owner attempted to avoid paying a commission by personally conducting the final negotiations and selling the property at the lower price to the buyer procured by the broker.

Counsel should combine these points and authorities with the points and authorities set forth in *§§ 31.80* and *31.81*.

[3] Discussion of Authorities

[a] Commission Recoverable Although Broker Procures Buyer at Lower Price

In ***Palmtag v. Danielson*** *(1947) 30 Cal. 2d 517, 183 P.2d 265* , defendant owner gave plaintiff a general listing on real property, which provided that the price was $40,000 and stated that "I will pay you 5% commission or net to me of $38,000" (*30 Cal. 2d 517, 519)* . Plaintiff discussed the property with the ultimate purchaser who was willing to pay $35,000 as his top price. At a meeting between the purchaser and defendant, prices were discussed but no agreement was reached. Shortly after the meeting, defendant terminated plaintiff's agency and the property was eventually sold to the buyer procured by plaintiff for $35,000. Plaintiff sued for a commission and the court found that because plaintiff had procured a buyer that was ready, willing, and able to pay the sale price of $35,000 under the general listing, plaintiff was entitled to recover a five percent commission. Defendant appealed, contending that plaintiff was not entitled to recover a commission because the contract was a net listing instead of a general listing. Under a net listing, plaintiff broker's commission would be limited to any amount that the purchaser's payment exceeded a fixed net amount that the contract specified for the owner. The Supreme Court held that the contract was not a net listing because the words "or net to me" were merely illustrative of the amount that defendant would receive if plaintiff sold the property for $40,000 (*30 Cal. 2d 517, 522)* . Since the contract was not a net listing, the Court held that the owner could not deprive the broker of a commission by selling at a lower price than the asking price when the broker had procured a purchaser who was willing to pay the lower sale price (*30 Cal. 2d 517, 523)* . The Court stated that ordinarily under a general listing, the price at which a broker is authorized to sell the property is merely an asking price to guide the broker and if the broker procures a purchaser willing to pay a lower price, the owner cannot deprive the broker of a commission by conducting the final negotiations and selling at a lower amount to the purchaser procured by the broker (*30 Cal. 2d 517, 521)* .

[4] Additional Authorities

[a] Commission Recoverable Although Broker Procures Buyer at Lower Price

In *Filante v. Kikendall (1955) 134 Cal. App. 2d 695, 286 P.2d 448* , the court of appeal affirmed a judgment for plaintiff in an action for a broker's commission. The asking price in the listing agreement was $110,000 and plaintiff procured a purchaser who was willing to buy for $100,000 but later became worried about a new freeway being constructed near the property. The property was finally sold at $98,000. In addition to holding that there had been a waiver of the time limitation of the contract, the court held that defendant could not deprive the broker of a commission by selling at a lower price to the purchaser who was procured by the broker. The court stated that ordinarily, the price at which a broker is authorized to sell the property is merely an asking price to guide the broker and that if the broker procures a purchaser willing to pay a lower price, the owner cannot deprive the broker of a commission by conducting the final negotiations and selling at a lower figure to the purchaser who was procured by the broker (*134 Cal. App. 2d 695, 701)* .

In *Rutherford v. Berick (1947) 82 Cal. App. 2d 331, 186 P.2d 23* , the court of appeal affirmed a judgment in favor of plaintiff in an action for a commission. The court noted that the listing agreement was not a net listing, that plaintiff was entitled to a commission when he procured a purchaser who was willing to pay a price lower than that specified in the listing agreement, and that the property was eventually sold for this lower price (*82 Cal. App. 2d 331, 336)* .

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2A-31 California Points & Authorities § 31.87

§ 31.87 Supporting Contention That Broker May Recover Commission--Commission Not Defeated by Fact That Only One Spouse Signed Listing Agreement or by Refusal of Coowner Spouse to Join in Conveyance

[1] FORM

[*The following should be combined with the points and authorities set forth in § 31.80 and may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF BROKER MAY RECOVER A COMMISSION BECAUSE HE/SHE PROCURED A READY, WILLING, AND ABLE BUYER AND THIS RIGHT IS NOT DEFEATED BY _____ [THE FACT THAT ONLY ONE SPOUSE SIGNED THE LISTING AGREEMENT *and/or* THE REFUSAL OF A COOWNER SPOUSE TO JOIN IN THE CONVEYANCE].

[*EITHER*]

A. Listing Agreement Signed by Only One Spouse Enforceable. A contract employing a broker to sell property jointly owned by both spouses is enforceable against the signing spouse and will support recovery of a commission although only one spouse signs the contract (*see Tamimi v. Bettencourt (1966) 243 Cal. App. 2d 377, 379, 52 Cal. Rptr. 273*).

[*AND/OR*]

B. Right to Commission Not Defeated by Refusal of Spouse to Convey Property. If a broker is otherwise entitled to a commission for procuring a ready, willing, and able buyer of property under a contract signed by one spouse, this right is not defeated by the failure of the coowner nonsigning spouse to join in the conveyance (*Russell v. Ramm (1927) 200 Cal. 348, 366, 254 P. 532* ; *Dixon v. Malloy (1945) 70 Cal. App. 2d 322, 329, 160 P.2d 896*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that a broker may recover a commission. This argument may be used when the broker has procured a ready, willing, and able buyer but only one spouse has signed the listing agreement and/or a coowner spouse refuses to join in the conveyance of the property.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the broker's right to recover a commission. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing that the broker procured a ready, willing, and able buyer but that the listing agreement was signed by only one spouse and/or that the coowner spouse refused to join in the conveyance.

In an appropriate case counsel may wish to combine these points and authorities with the points and authorities set forth in *§ 31.80*.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities set out in *§ 31.104* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Listing Agreement Signed by Only One Spouse Enforceable

In ***Tamimi v. Bettencourt*** *(1966) 243 Cal. App. 2d 377, 52 Cal. Rptr. 273* , plaintiff brought an action to recover a commission under an exclusive listing, which provided that if the property was sold by the owners or by another agent during the listing period, plaintiff would be entitled to a commission. Defendants, husband and wife, jointly owned the community property but only the wife signed the listing agreement. During the term of the listing, the property was sold by the defendants. The trial court granted judgment for defendants and plaintiff appealed. The court of appeal reversed the judgment as to defendant wife, who had signed the agreement, and held that plaintiff was entitled to recover a commission from her under the listing agreement. The court noted that defendants had not pleaded that the wife's signature on the listing was conditioned on the husband also signing or that the contract was otherwise incomplete or conditional (*243 Cal. App. 2d 377, 379, 380)* .

[b] Right to Commission Not Defeated by Refusal of Spouse to Convey Property

In ***Russell v. Ramm*** *(1927) 200 Cal. 348, 254 P. 532* , plaintiff brought an action to recover a real estate commission for procuring purchasers under an agreement signed by only defendant husband. Defendant refused to go through with the sale of the property on the ground that his wife refused to join in the sale and execution of the contract of sale. The Supreme Court affirmed the judgment of the lower courts and held that the wife's refusal to go through with the sale did not defeat the broker's right to a commission. The Court stated that when the owner of property refuses to sell to the purchaser procured by the broker on any ground other than the inability of the purchaser to purchase, the owner cannot use such ground as a defense to an action for a commission unless this ground is included as a condition in the employment agreement. Thus, the Court stated, it follows that the fact that defendant's wife refuses to join her husband in transferring the properties does not affect or impair plaintiff's right to a commission. The Court also stated that it is the general rule that the refusal of a wife to join in the conveyance of property to the proposed vendee does not, in and

of itself, operate to deprive the broker of the right to compensation (*200 Cal. 348, 366)* .

In ***Dixon v. Malloy*** *(1945) 70 Cal. App. 2d 322, 160 P.2d 896* , the court of appeal affirmed a judgment in favor of a real estate broker in an action to recover a commission. The broker contended that there was insufficient evidence to support the finding of the trial court that the real property was separate property. The court, however, stated that it was unnecessary to determine whether or not it was community property because even if the property was community property, neither the fact that the wife did not sign the agency agreement nor the fact that she refused to join in the sale of the property would avail the defendant as a defense to the action by the broker. The court reasoned that the obligation to pay the commission became fixed when the broker found a ready, willing, and able purchaser on defendant's terms (*70 Cal. App. 2d 322, 329)* .

[4] Additional Authorities

[a] Right to Commission Not Defeated by Refusal of Spouse to Convey Property

In *Kaufman v. Haney (1947) 80 Cal. App. 2d 249, 182 P.2d 250* , the court of appeal affirmed a judgment for plaintiff in an action against defendant husband for a commission in procuring purchasers of property owned in joint tenancy by defendant and his wife. Only defendant signed the agreement of sale and the wife refused to go through with the sale. The court held that defendant was liable for the commission and the fact that the cotenant spouse refused to join in the conveyance did not defeat the broker's right to a commission (*80 Cal. App. 2d 249, 251-254)* .

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2A-31 California Points & Authorities § 31.88

§ 31.88 Supporting Contention That Broker May Recover Commission--Listing Agreement Revoked in Bad Faith

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF BROKER MAY RECOVER A COMMISSION BECAUSE A BROKER IS ENTITLED TO RECOVER A COMMISSION WHEN THE OWNER REVOKES THE EMPLOYMENT AGREEMENT IN BAD FAITH IN ORDER TO DEPRIVE THE BROKER OF A COMMISSION.

Commission Recoverable When Revocation in Bad Faith. A broker is entitled to recover a commission when the agreement employing the broker has been revoked in bad faith for the purpose of depriving the broker of a commission (*see Elms v. Merryman Fruit etc. Co. (1929) 207 Cal. 747, 751, 279 P 781* ; *Walter v. Libby (1945) 72 Cal. App. 2d 138, 144, 164 P.2d 21*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that a broker may recover a commission. This argument may be used when the agreement employing the broker was revoked in bad faith for the purpose of depriving the broker of a commission.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the broker's right to recover a commission. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of

law stated. Thus, counsel should discuss the facts showing that the owner revoked the agency in bad faith in order to deprive the broker of his or her commission.

[3] Discussion of Authorities

[a] Commission Recoverable When Revocation in Bad Faith

In ***Elms v. Merryman Fruit etc. Co.*** *(1929) 207 Cal. 747, 279 P. 781* , plaintiff, a real estate broker, brought an action to recover a commission against defendant, the owner of timber land. Plaintiff was not given an exclusive agency but the terms of the agency contract provided that plaintiff was to receive a commission if he could produce a buyer. Plaintiff's agency was revoked by defendant after defendant became dissatisfied with plaintiff's plans for financing a sale. Thereafter, the land was sold. The trial court granted a directed verdict for defendant and plaintiff appealed, contending in part that the agency was not revoked in good faith. The Supreme Court disagreed and affirmed the judgment. The Court stated the recognized rule that revocation must be made in good faith and not for the purpose of defeating the agent's rights (*207 Cal. 747, 752)* .

In ***Walter v. Libby*** *(1945) 72 Cal. App. 2d 138, 164 P.2d 21* , plaintiff was given an exclusive right to sell defendant's land that was to continue for a minimum period of 30 days and thereafter until cancelled by the principal. The agreement also provided that if defendant sold the land while the agency was in effect, defendant would pay a commission to plaintiff. After the listing agreement had been in effect a little over a month and plaintiff had talked to numerous purchasers, defendant cancelled the contract, stating that he wanted to wait until the trees on the property were in bloom in the hopes of getting more money. However, shortly after the cancellation, defendant sold the property. The trial court found that the termination was induced by fraud and was not effective; thus the contract was in full force and plaintiff was entitled to recover a commission. The court of appeal affirmed the judgment. The court stated that the principal may revoke the agency in accordance with the terms of the agreement, but that he or she may not do so in bad faith merely for the purpose of depriving the agent of rights that he or she would otherwise have under the contract (*72 Cal. App. 2d 138, 144)* .

[4] Additional Authorities

[a] Commission Recoverable When Revocation in Bad Faith

In *Heffernan v. Merrill Estate Co. (1946) 77 Cal. App. 2d 106* , the court of appeal reversed a judgment awarding plaintiff real estate broker a commission for procuring a buyer. The court held that the agency was revoked in good faith prior to performance by plaintiff and stated that in the absence of a provision in the agreement granting a specified time for performance, the owner may revoke in good faith at any time before complete performance by the broker (*77 Cal. App. 2d 106, 113)* .

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2A-31 California Points & Authorities § 31.89

§ 31.89 Supporting Contention That Broker May Recover Commission--Owner Arbitrarily Refuses to Complete Transaction on Which Commission Depends

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF BROKER MAY RECOVER A COMMISSION BECAUSE A BROKER IS ENTITLED TO A COMMISSION WHEN THE OWNER ARBITRARILY REFUSES TO COMPLETE THE TRANSACTION ON WHICH THE BROKER'S COMMISSION DEPENDS.

Commission Recoverable When Owner Arbitrarily Refuses to Complete Transaction. A broker is entitled to recover a commission when the transaction on which the broker's right to a commission depended was not completed due to the arbitrary refusal of the owner to perform (*Collins v. Vickter Manor, Inc. (1957) 47 Cal. 2d 875, 881, 306 P.2d 783* (provision for commission in deposit receipt); *see Coulter v. Howard (1927) 203 Cal. 17, 23, 262 P 751* (provision for commission in escrow instructions)).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that a broker may recover a commission. This argument may be used when the party employing the broker arbitrarily refused to complete the transaction on which the broker's commission depended.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of a broker's right to recover a commission. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing that the transaction failed due to the arbitrary refusal of the broker's employer to complete it.

[3] Discussion of Authorities

[a] Commission Recoverable When Owner Arbitrarily Refuses to Complete Transaction

In ***Collins v. Vickter Manor, Inc.*** *(1957) 47 Cal. 2d 875* , plaintiff real estate brokers sought to recover a commission from defendant corporation seller and damages for wrongful interference with a contract from individual defendants. Plaintiffs' complaint alleged that the provision regarding the payment of the commission was contained in the deposit receipt signed by defendant and the buyers procured by plaintiffs, and that the buyers agreed to the sale subject to the seller furnishing a satisfactory soil compaction report and a contour map subject to the buyers' approval. The complaint further alleged that these documents were never furnished by the seller, that the buyers were at all times ready, willing, and able to perform, and that defendant seller cancelled the escrow. A demurrer to plaintiffs' second amended complaint was sustained without leave to amend and plaintiffs appealed. The Supreme Court reversed the judgment of dismissal. The Court recognized the rule that when the only provision for payment of a commission is contained in an agreement between the buyer and seller, a broker is entitled to the commission only when the underlying transaction is completed. The Court also stated that the issue of whether or not the deposit receipt required consummation of the transaction before the right to a commission arose was unnecessary to decide because the complaint disclosed that the buyers did everything that the agreement required of them and that the consummation of the transaction was prevented solely by the arbitrary refusal of defendant corporation and its officers to proceed. Thus, the court stated that in these circumstances, defendants would not be allowed to take advantage of their own remissness to defeat plaintiffs' recovery (*47 Cal. 2d 875, 881)* .

In ***Coulter v. Howard*** *(1927) 203 Cal. 17, 262 P 751* , plaintiff, a real estate broker, brought an action to recover a commission. The provision for the payment of plaintiff's commission was contained in the escrow instructions and provided that plaintiff was to be paid a commission of five percent at the close of escrow. After a mix-up in the amount of the deposit to be paid into escrow, the purchaser deposited the correct amount. However, on the same day that the check was received in escrow, defendant attempted to cancel the escrow, having already contracted the day before to sell the property to someone else. The trial court rendered judgment for defendant, and plaintiff appealed. The Supreme Court reversed the judgment and stated that if the escrow instructions provided for payment at the close of escrow, the failure of escrow to close would preclude a payment of the commission if defendant were free from fault. The Court noted that in this case, however, defendant repudiated the transaction and the commission was due at the date of repudiation. The Court stated that the law requires of a vendor good faith and the performing of no intentional act to discourage, embarrass, or prevent the completion of the purchase (*203 Cal. 17, 23)* .

[4] Additional Authorities

[a] Commission Recoverable When Owner Arbitrarily Refuses to Complete Transaction

In *Stoll v. Mallory (1959) 173 Cal. App. 2d 694, 343 P.2d 970* , the court of appeal affirmed a judgment in favor of plaintiff, a real estate broker, for services rendered in the sale of a radio station. The court did not agree with defendants' contention that the agreement for the commission depended on completion of the sale, which never occurred. The court stated that even if this were so, plaintiff would be entitled to a commission because of defendants' arbitrary rescission of the agreement. The court stated that when a broker is not to receive a commission until consummation of a final agreement between the seller and the buyer, the agent who has done everything required in bringing them together is entitled to a commission when the failure to consummate the sale is due to the seller's arbitrary refusal to proceed with the sale (*173 Cal. App. 2d 694, 698)* .

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2A-31 California Points & Authorities § 31.90

§ 31.90 Supporting Contention That Broker May Recover Commission--Owner Breached Duty of Good Faith Not to Perform Act That Renders Broker's Performance Impossible and Defeats Broker's Right to Commission

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF BROKER MAY RECOVER A COMMISSION BECAUSE A BROKER IS ENTITLED TO A COMMISSION WHEN THE OWNER BREACHES THE DUTY OF GOOD FAITH NOT TO DO ANYTHING THAT RENDERS PERFORMANCE OF THE EMPLOYMENT AGREEMENT IMPOSSIBLE AND DEFEATS THE BROKER'S RIGHT TO A COMMISSION.

Commission Recoverable When Duty of Good Faith Breached. A broker may recover a commission when the owner breaches the duty of good faith owed to the broker by making performance of the broker's contract, and thus recovery of a commission, impossible (*see Nystrom v. First Nat. Bank of Fresno (1978) 81 Cal. App. 3d 759, 766-767, 146 Cal. Rptr. 711* ; *Colwell Co. v. Hubert (1967) 248 Cal. App. 2d 567, 575-576, 56 Cal. Rptr. 753*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that a broker may recover a commission. The argument may be used when the owner breaches the duty of good faith owed to the broker by making the broker's performance of the contract impossible.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of a broker's right to recover a commission. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing how the owner breached this duty of good faith and prevented performance of the contract by the broker.

[3] Discussion of Authorities

[a] Commission Recoverable When Duty of Good Faith Breached

In ***Nystrom v. First Nat. Bank of Fresno*** *(1978) 81 Cal. App. 3d 759, 146 Cal. Rptr. 711* , plaintiff, a real estate broker, brought an action for breach of contract against defendant bank that was in possession of rental property during foreclosure proceedings after default on a loan made by defendant. Defendant and plaintiff entered into an agreement whereby plaintiff was to collect rents on the property and if defendant obtained a deed to the property through a trustee's sale, plaintiff would have an exclusive listing on the property. An offer of purchase was submitted by plaintiff but rejected by defendant. Thereafter, defendant obtained a deed in lieu of foreclosure and sold the property through another broker. The trial court granted a summary judgment for defendant on the ground that the exclusive listing was illegal and unenforceable under *Bus. & Prof. Code § 10176(f)* because it contained no definite termination date. The court of appeal reversed, holding that the agreement was not illegal and that the promise to give an exclusive listing did not become inoperable because defendant obtained a deed in lieu of foreclosure as opposed to a trustee's deed on foreclosure (*81 Cal. App. 3d 759, 766-768)* . The court stated that defendant could not prevent or make impossible the performance of a condition, as defendant attempted here, and escape liability. The court stated that there is an implied covenant in every contract by each party not to do anything that will deprive the other parties thereto of the benefits of the contract and that this covenant not only imposes on each contracting party the duty to refrain from doing anything that would render performance of the contract impossible by any act of his or her own, but also the duty to do everything that the contract presupposes that he or she will do to accomplish its purpose (*81 Cal. App. 3d 759, 767)* .

In ***Colwell Co. v. Hubert*** *(1967) 248 Cal. App. 2d 567, 56 Cal. Rptr. 753* , plaintiff was employed by defendant to procure a lease from a food market chain for a shopping center that defendant was in the process of developing. Plaintiff procured a prospective tenant and drew up a proposed lease that defendant and his attorney agreed to in whole but in which they wanted to make a few changes. Defendant agreed to supply these changes to plaintiff but never did and terminated the agency. Later, defendant entered into a lease with the same tenant that plaintiff had procured. Plaintiff sued for a commission and the trial court granted judgment for plaintiff in the amount of the commission agreed on, holding that defendant had acted in bad faith and that plaintiff was the procuring cause of the lease. On a motion for a new trial, the judgment was reduced in amount. Defendant appealed from the judgment and plaintiff cross appealed from the reduction. The court of appeal affirmed the judgment, holding that defendant had acted in bad faith and prevented the performance of the agency agreement by failing to submit the proposed objections as promised, thereby making plaintiff's further performance impossible (*248 Cal. App. 2d 567, 575-578)* . The court stated that in every contract there is an implied covenant of good faith that neither party will do anything that will prevent the other party from realizing the fruits of the contract and that the covenant not only imposes on each party the duty to refrain from doing anything that would render performance of the contract impossible but also the duty to do everything that the contract presupposes the party to do (*248 Cal. App. 2d 567, 575)* .

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2A-31 California Points & Authorities § 31.91

§ 31.91 Supporting Contention That Broker May Recover Commission--Exclusive Listing With No Definite Termination Date Not Void [Bus. & Prof. Code § 10176(f)] When Transaction Completed, No Moral Turpitude Involved, Broker Not Guilty of Greatest Moral Fault, and Unjust Enrichment Would Result

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF BROKER MAY RECOVER A COMMISSION BECAUSE AN EXCLUSIVE AGREEMENT WITH NO DEFINITE TERMINATION DATE IS NOT VOID WHEN THE TRANSACTION IS COMPLETED, THERE IS NO MORAL TURPITUDE INVOLVED, PLAINTIFF IS NOT THE ONE GUILTY OF THE GREATEST MORAL FAULT, AND UNJUST ENRICHMENT WOULD RESULT AT PLAINTIFF'S EXPENSE IF RECOVERY OF A COMMISSION IS DENIED.

Exclusive Agreement Without Definite Termination Date Not Void Under Certain Circumstances. The rule under *Section 10176(f) of the Business and Professions Code* that a broker's agreement is void for lack of a definite termination date should not apply to prevent a broker's recovery of a commission when the public cannot be protected because the transaction has been consummated, no serious moral turpitude is involved, the broker is not the one guilty of the greatest moral fault, and the party urging its unenforceability will be unjustly enriched at the expense of the broker (*Babcock v. Houston (1973) 33 Cal. App. 3d 858, 862-863, 109 Cal. Rptr. 454*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that a broker may recover a commission. This argument may be used when recovery is sought pursuant to an exclusive agency agreement or exclusive right-to-sell agreement with no definite termination date when the agreement has been fully performed, there is no serious moral turpitude, the party contending that it is void is the one guilty of the greatest moral fault, and unjust

enrichment would result at the expense of the broker if the agreement were not enforced.

These points and authorities may be combined with a memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the substantive issue of a broker's right to a commission. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing that (1) the transaction in which the services were performed and for which compensation is sought has been completed, (2) there is no serious moral turpitude involved, that is, the broker was unaware that he or she was violating *Bus. & Prof. Code § 10176(f)*, (3) the party urging the unenforceability of the agreement is the one guilty of the greatest moral fault, that is, the broker has in good faith performed the agreement fully and the party urging the unenforceability of the agreement unjustifiedly refuses to perform, and (4) unjust enrichment would result to the party urging the unenforceability of the agreement at the expense of the broker.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities set out in *§ 31.106* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Exclusive Agreement Without Definite Termination Date Not Void Under Certain Circumstances

In ***Babcock v. Houston*** *(1973) 33 Cal. App. 3d 858, 109 Cal. Rptr. 454* , plaintiff real estate brokers entered into an agreement with one of the individual defendants, which gave plaintiffs an exclusive right to sell lots in a tract of real property owned by defendants, husband and wife, but later acquired by a corporation in which the individual defendants were the sole stockholders. The agreement lacked a definite termination date. Defendants terminated the services of plaintiffs at the time that seven lots were in escrow and the escrow instructions contained written authorizations signed by defendant corporation to pay commissions on the sale. An eighth lot was not in escrow but a buyer had been found. Plaintiffs sought commissions on all lots and the trial court awarded judgment for plaintiffs and against the corporation on the seven lots in escrow, relying on the escrow instructions as sufficient to support the actions for commissions. The court denied recovery for plaintiffs against the individual defendants on the ground that the only authorization binding the individual was the exclusive agency agreement with no termination date, which was void. Recovery on the eighth lot was also denied. The court of appeal reversed as to the judgment that the individual husband defendant was not liable and held that the exclusive agreement was enforceable despite *Bus. & Prof. Code § 10176(f)* and that the agreement supported the action for commissions against the individual defendant. The court relied on prior case law, including *Wilson v. Stearns (1954) 123 Cal. App. 2d 472, 267 P.2d 59* , and *Nichols v. Boswell-Alliance Constr. Corp. (1960) 181 Cal. App. 2d 584* (discussed in *§ 31.91[4][a]*). The court stated that the rule that courts will not lend aid in enforcement of an illegal contract is subject to exception when the public cannot be protected because the transaction has been completed, no serious moral turpitude is involved, defendant is the one guilty of the greatest moral fault, and to apply the rule would permit the defendant to be unjustly enriched at the expense of the plaintiff (*33 Cal. App. 3d 858, 862)* .

[4] Additional Authorities

[a] Exclusive Agreement Without Definite Termination Date Not Void Under Certain Circumstances

In *Nichols v. Boswell-Alliance Constr. Corp. (1960) 181 Cal. App. 2d 584* , the court of appeal affirmed a judgment awarding commissions to plaintiff on the sale of houses sold before defendant terminated the broker's agreement, but the court reversed a judgment awarding damages to plaintiff for anticipatory breach measured by the commissions that would have been earned if the agreement had not been terminated (*181 Cal. App. 2d 584, 589)* . Regarding the

commissions earned, the court, relying on prior case law, stated that the rule that courts should not aid in the enforcement of illegal contracts should not be applied when the public cannot be protected because the transaction has been completed, no serious moral turpitude is involved, the defendant is the one guilty of the greatest moral fault, and an application of the rule would result in unjust enrichment to defendant at the expense of plaintiff (*181 Cal. App. 2d 584, 589)* .

In *Wilson v. Stearns (1954) 123 Cal. App. 2d 472, 267 P.2d 59* , the court of appeal refused to apply the rule that an exclusive listing was void and unenforceable unless there was a definite, specified termination date and reversed, in part, a judgment denying recovery to a real estate agent based on this rule. Relying on prior case law, the court stated that the rule that courts will not aid in the enforcement of illegal contracts should not be applied when the public cannot be protected because the transaction has been completed, no serious moral turpitude is involved, the defendant is the one guilty of the greatest moral fault, and an application of the rule would result in unjust enrichment to defendant at the expense of plaintiff (*123 Cal. App. 2d 472, 482)* .

It should be noted that at the time of the decision in *Wilson*, *Bus. & Prof. Code § 10176(f)* provided for disciplinary action when a real estate broker was engaged in "the practice of" claiming, demanding, or receiving compensation under an exclusive agreement with no definite termination date. It was argued in *Babcock v. Houston (1973) 33 Cal. App. 3d 858, 863, 109 Cal. Rptr. 454* (*see § 31.91[4][a]*), that the 1955 amendment to *Bus. & Prof. Code § 10176(f)* eliminating these words nullified the decision in *Wilson v. Stearns (1954) 123 Cal. App. 2d 472, 267 P.2d 59* . The court in *Babcock* however, stated that the rationale of *Wilson* was not changed by the amendment.

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2A-31 California Points & Authorities § 31.92

§ 31.92 Supporting Contention That Broker May Recover Commission--Illegality of Exclusive Listing Agreement With No Definite Termination Date [Bus. & Prof. Code § 10176(f)] Not Defense in Action Between Brokers to Share Commission Already Paid

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF BROKER MAY RECOVER A COMMISSION UNDER THE AGREEMENT WITH DEFENDANT BROKER BECAUSE THE ILLEGALITY OF AN EXCLUSIVE LISTING AGREEMENT WITH NO DEFINITE TERMINATION DATE UNDER SECTION 10176(f) OF THE BUSINESS AND PROFESSIONS CODE MAY NOT BE USED AS A DEFENSE IN AN ACTION BETWEEN BROKERS TO SHARE A COMMISSION THAT HAS ALREADY BEEN PAID TO ONE BROKER BY THE OWNER.

Absence of Definite Termination Date Not Defense in Action Between Brokers. A broker may recover from another broker a portion of a commission that has already been paid, although the agreement between the listing broker and the owner violates the definite termination date requirement of *Section 10176(f) of the Business and Professions Code* because the defense of the illegality of an exclusive agreement with no termination date does not apply to an action between brokers to recover a portion of a commission already paid (*Iusi v. Chase (1959) 169 Cal. App. 2d 83, 87, 337 P.2d 79*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that one broker may recover a commission from another broker. This argument may be used when the commission has already been paid by the owner to the procuring broker under an exclusive agency or exclusive right-to-sell listing agreement that did not contain a definite termination date, as required by *Bus. & Prof. Code § 10176(f)*, and the procuring broker asserts the absence of a

definite termination date as a defense to paying the listing broker his or her portion of the commission.

These points and authorities may be combined with a memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the substantive issue that a broker may recover commission. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing that the procuring broker has already received payment of the commission from the owner.

In an appropriate case, the points and authorities set out in *§ 31.107* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Absence of Definite Termination Date Not Defense in Action Between Brokers

The facts and procedural background of ***Iusi v. Chase*** *(1959) 169 Cal. App. 2d 83, 337 P.2d 79* , are discussed in *§ 31.52[3][a]*. In *Iusi*, the court of appeal affirmed a judgment awarding the listing broker, under an agreement to share a commission, a portion of a commission that had been paid by the owner to the procuring broker. One of the procuring broker's contentions on appeal was that the agreement between the listing broker and the owner was illegal and thus void because it was an exclusive agreement without a definite, specified termination date. The court held, however, that there was no indication that *Bus. & Prof. Code § 10176(f)* was designed to protect brokers. Instead, the court noted, the clients of brokers are the protected class. Thus, the court concluded that because the commissions had already been paid, the modern rule would not strain to establish illegality as a defense that would permit one broker to retain all the fruits of the transaction (*169 Cal. App. 2d 83, 87)* .

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2A-31 California Points & Authorities § 31.93

§ 31.93 Supporting Contention That Broker May Recover Commission--Purchaser Breached Implied Duty of Good Faith to Broker by Not Consummating Sales Transaction

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF _____ [*name of broker*] MAY RECOVER HIS/HER/ITS COMMISSION BECAUSE A BROKER IS ENTITLED TO THE AGREED COMMISSION WHEN THE PURCHASER BREACHES THE IMPLIED DUTY OF GOOD FAITH BY NOT CONSUMMATING AN EXECUTED SALES AGREEMENT.

Commission Recoverable When Duty of Good Faith Breached. A broker who has contracted with a purchaser for the payment of a commission may recover the commission from the purchaser when the purchaser breaches the implied duty of good faith by not consummating an executed sales agreement (*see R. J. Kuhl Corp. v. Sullivan (1993) 13 Cal. App. 4th 1589, 1601-1604, 17 Cal. Rptr. 2d 425*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that a purchaser who contracted with a broker is liable for a commission when the purchaser breaches the implied duty of good faith by not consummating an executed sales agreement.

These points and authorities may be combined with a memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the argument that a broker is liable for a commission to a purchaser who breaches the implied duty of good faith by not consummating an executed sales agreement. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Commission Recoverable When Duty of Good Faith Breached

In ***R. J. Kuhl Corp. v. Sullivan*** *(1993) 13 Cal. App. 4th 1589, 1601-1604, 17 Cal. Rptr. 2d 425* , plaintiff broker entered into a contract with defendant buyer to find a site for a car dealership. Defendant buyer agreed to pay a six percent commission. Defendant buyer also agreed to deposit in escrow or furnish all the necessary documents after execution of a purchase agreement. Plaintiff found a property for defendant and after extensive negotiations, a contract of purchase was executed. During the negotiations, defendant buyer was also negotiating with another defendant to buy the existing car dealership and that other defendant became interested in the property defendant buyer had agreed to purchase. Finally, the other defendant agreed to purchase the property under the same terms as those in the defendant buyer's contract. Defendant buyer consented to the assignment of the contract, and agreed with the other defendant that if plaintiff made a claim for the commission, they would jointly defend and pay the costs. Defendant buyer was also given an option to purchase half of the property in partial consideration of assignment of the rights in the contract. Plaintiff sued defendant buyer and the other defendant for the commission. The trial court entered a judgment for plaintiff, and the defendants appealed.

The court of appeal affirmed. It held that generally a broker for a purchaser earns the commission on the principal's entry into a binding contract regardless of whether the sale is consummated. However, both parties agreed that the brokerage contract at issue made the payment of the commission conditional on consummation of the sales contract. In such a situation, the law requires of the purchaser good faith and the doing of no intentional act to prevent the completion of the purchase. Also, there was a specific clause in the contract that defendant buyer would cooperate by making timely deposits in escrow. The court concluded that defendant buyer's obligation to pay a commission if the transaction was not consummated at his bequest was subject to the covenant of good faith and fair dealing (*13 Cal. App. 4th 1589, 1598-1601)* . The court found that the rule that the principal may not prevent the consummation of the purchase contract would have little meaning if the principal could avoid liability because he reevaluated the wisdom of the contract. If a buyer under an executory contract sold the right to receive title to another for money exceeding the amount of the commission and refused to pay the commission, there would be bad faith. The court found that defendant buyer sold its contract right for a valuable consideration and profited unfairly from plaintiff's services. Defendant buyer could not have evaded the commission by purchasing the property and selling the property to the other defendant, which is effectively what happened. The failure to consummate the transaction was a breach of the implied covenant of good faith and fair dealing (*13 Cal. App. 4th 1589, 1602-1604)* .

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2A-31 California Points & Authorities § 31.94

§ 31.94 Supporting Contention That Broker May Recover Commission--Extrinsic Evidence Establishes That Broker Is Entitled to Commission

[1] FORM

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

PLAINTIFF BROKER MAY RECOVER A COMMISSION UNDER THE AGREEMENT WITH DEFENDANT BECAUSE, EVEN THOUGH THE LISTING CONTRACT WAS AMBIGUOUS, EXTRINSIC EVIDENCE ESTABLISHES THAT THE PARTIES HAD AGREED THAT THE BROKER WAS ENTITLED TO A COMMISSION.

Commission Recoverable When Extrinsic Evidence Establishes Broker Is Entitled to Recover. When the listing agreement is ambiguous, a broker may recover a commission if extrinsic evidence establishes that the broker is entitled to the commission (*John B. Kilroy Co. v. Douglas Furniture of Cal., Inc. (1993) 21 Cal. App. 4th 26, 34, 25 Cal. Rptr. 2d 752*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a broker is entitled to a commission if the listing agreement is ambiguous and extrinsic evidence establishes that a commission is warranted.

These points and authorities may be combined with a memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the argument that a broker is entitled to a commission. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should

discuss the facts showing that the agreement is ambiguous and that parties had agreed to a commission.

[3] Discussion of Authorities

[a] Commission Recoverable When Extrinsic Evidence Establishes Broker Is Entitled to Recover

In ***John B. Kilroy Co. v. Douglas Furniture of Cal., Inc.*** *(1993) 21 Cal. App. 4th 26, 25 Cal. Rptr. 2d 752* , Douglas entered into a listing agreement with Kilroy to lease property. The agreement provided for commissions as a percentage of the yearly rental at successively lower rates for up to 30 years. It also provided that if the lease included an option, the commission would be calculated as though the option was part of the initial lease transaction. Kilroy procured Hughes Aircraft, who entered into a five-year lease with a five-year option. After the lease was executed, Kilroy sent Douglas a letter that stated that it was understood that the commission agreement was applicable to any modifications or extensions of the lease. Douglas accepted the letter by signing in the space provided. The commission was paid on the initial lease and the exercise of the option. Then, Hughes signed separate lease agreements for a further period. Douglas refused to pay commissions on the new leases, and Kilroy brought an action. The trial court entered a judgment for Kilroy, and the Court of Appeal affirmed.

The Court of Appeal held that when the meaning of a contract is ambiguous, extrinsic evidence is admissible to prove the contract's meaning (*21 Cal. App. 4th 26, 33)* . The Court of Appeal also found that the contract was ambiguous in that it contemplated commission payments for up to 30 years and did not limit commissions to the initial lease agreement. It was also ambiguous when it provided that commissions on option periods would be calculated as though the option period was part of the original lease. The court found that the letter sent after the lease's execution reflected the intention of the parties that commissions would be earned on modifications or extensions of the original lease. The parties were free to agree to such a continuing commission contract. The trial court did not err when it held that Kilroy was entitled to continuing commissions for up to 30 years (*21 Cal. App. 4th 26, 34)* .

The court then held that the trial court properly found, based on expert testimony, that the new leases were extensions of the original lease. The leases were with the same parties, for the same property, and for the same use (*21 Cal. App. 4th 26, 35-36)* .

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2A-31 California Points & Authorities § 31.95

§ 31.95 Commission Agreement Not Defeated When Property Subsequently Sold Pursuant to Separate Agreement on Same Terms Except for Commission Provision

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF BROKER MAY RECOVER A COMMISSION BECAUSE, AFTER DEFENDANT OWNER EXECUTED A COUNTEROFFER PROVIDING IN PART FOR A COMMISSION, DEFENDANT REMAINED OBLIGATED TO PAY THE COMMISSION WHEN HE/SHE ENTERED INTO A SUBSEQUENT AGREEMENT WITH THE SAME BUYER AND ON THE SAME TERMS EXCEPT THAT IT OMITTED A COMMISSION PROVISION.

Commission Recoverable When Owner and Buyer Negotiate Subsequent Separate Agreement That Deprives Broker of Commission. If an owner has executed a counteroffer that provides for the payment of a commission to the broker and the counteroffer has expired, the owner cannot thereafter, consistent with the implied covenant of good faith, make a deal with the same buyer on substantially the same terms as it contemplated in the counteroffer without paying the broker the agreed commission (*Torelli v. J. P. Enterprises (1997) 52 Cal. App. 4th 1250, 1256*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a real estate broker is entitled to a commission because the seller (1) signed a counteroffer providing for the payment of a commission, and (2) after expiration of the counteroffer, consummated the sale on the same terms with the same buyer, except for the agreement to pay a commission.

These points and authorities may be combined with points and authorities relating to the specific procedural context in

which counsel wishes to raise the argument that a broker is entitled to a commission. It may also be adapted for use in a trial or appellate brief.

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should discuss the facts showing the execution of a counteroffer and the terms of the subsequent agreement between the same seller and buyer.

[3] Discussion of Authorities

[a] Commission Recoverable When Owner and Buyer Negotiate Subsequent Separate Agreement That Deprives Broker of Commission

In ***Torelli v. J. P. Enterprises*** *(1997) 52 Cal. App. 4th 1250, 1252* , the real estate broker had a listing agreement to sell certain commercial property, but the agreement expired. A month later the broker found a purchaser for the property, and presented to the seller a standard real estate purchase contract signed by the purchaser that called for the broker to receive a 2.5 percent commission. The seller signed a counteroffer, which essentially accepted the terms of the offer set out in the purchase contract, including the commission arrangement with the broker. The counteroffer included an expiration date, and it was not accepted within that time. After the expiration of the counteroffer, the purchaser and seller began negotiating on their own, and came to an agreement that was identical to the counteroffer, except that it did not include a commission for the broker. The trial court granted the seller's motion for summary judgment, agreeing that the expiration of the counteroffer ended any obligation to pay the broker a commission.

The court of appeal reversed, stating that the promise to pay the broker a commission did not expire with the counteroffer. When the seller signed the counteroffer, it became bound by an implied promise not to deprive the broker of the benefits of the bargain to pay the commission. The law does not allow a broker to be cheated out of his or her commission by the simple artifice of entering into direct negotiations and making substantially the same bargain, but without the broker's commission (*52 Cal. App. 4th 1250, 1252)* . As far as the broker's right to a commission is concerned, the broker-seller contract set forth in the counteroffer must be distinguished from the seller-purchaser contract that would be formed if the purchaser signed the counteroffer. Any other rule would lead to a gross inequity if the purchaser did not sign the particular piece of paper setting forth the counteroffer, but nevertheless bought the property on substantially the same terms as the counteroffer (*52 Cal. App. 4th 1250, 1254-1255)* . Because it is established law that a broker may recover when a sale is not consummated due to the seller's fault, it naturally follows that a broker may recover when a sale is consummated because the purchaser and seller, having been brought together by the broker, entered into direct negotiations (*52 Cal. App. 4th 1250, 1256)* .

The court acknowledged that the direct negotiations in this case were instigated by the buyer, so that, strictly speaking, it was not the seller's fault that the counteroffer was not signed by the buyer prior to its expiration date. But just because the seller was not at fault for the nonacceptance of the counteroffer did not mean the seller could, with impunity, breach its existing contact to pay the broker a commission. Every contract has an implied covenant not to do anything that injures the right of the other party to receive the benefits of the agreement. Having made an agreement to pay the broker a commission, the seller could not thereafter, consistent with the implied covenant of good faith, made a deal with the buyer on substantially the same terms as it contemplated in the counteroffer without paying the broker the agreed commission. The omission of a provision for the broker's commission in the final agreement between the purchaser and seller was the functional equivalent of a with-fault repudiation of the entire sale. Although no writing expressly prohibited the seller from entering into direct negotiations with the buyer, the implied covenant of good faith meant that the seller still had no right to use those negotiations to deprive the broker of his commission for having found the buyer in the first place (*52 Cal. App. 4th 1250, 1256-1257)* .

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2A-31 California Points & Authorities § 31.96

§ 31.96 Opposing Contention That Broker May Recover Commission--Broker Not Procuring Cause of Sale

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF BROKER MAY NOT RECOVER A COMMISSION BECAUSE HE/SHE DID NOT SET IN MOTION A CHAIN OF EVENTS THAT, WITHOUT A BREAK IN THEIR CONTINUITY, CAUSED THE BUYER AND SELLER TO COME TO TERMS AS THE PROXIMATE RESULT OF PLAINTIFF BROKER'S PARTICULAR ACTIVITIES, AND THUS, PLAINTIFF BROKER WAS NOT THE PROCURING CAUSE OF THE SALE.

Commission Not Recoverable When Broker Not Procuring Cause of Sale. A broker may not recover a commission for being the procuring cause of the sale unless the broker sets in motion a chain of events that, without a break in their continuity, cause the buyer and seller to come to terms as the proximate result of the broker's particular activities (*Schiro v. Parker (1955) 137 Cal. App. 2d 503, 507, 290 P.2d 634* ; *Nelson v. Mayer (1954) 122 Cal. App. 2d 438, 445, 265 P.2d 52*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that a broker may recover a commission. This argument may be used when opposing the contention that a broker was the procuring cause of the sale. The question of whether or not a broker is a procuring cause of a sale will most likely arise when (1) the owner or another broker sells the property while the broker has a general listing on the property and the broker claims that the sale was due to the broker's efforts, entitling him or her to a commission, (2) the owner sells the property while the broker has an exclusive agency listing and the broker claims that the sale was due to the broker's efforts, entitling him or her to a commission, or (3) the broker attempts to recover a commission under a clause in a contract providing that a commission is earned if the broker procures a buyer.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel is responding to the contention that a broker is entitled to recover a commission. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing that the broker did not set in motion a chain of events that, without a break in their continuity, caused the buyer and seller to come to terms as the proximate result of plaintiff broker's particular activities.

[3] Discussion of Authorities

[a] Commission Not Recoverable When Broker Not Procuring Cause of Sale

In ***Schiro v. Parker*** *(1955) 137 Cal. App. 2d 503, 290 P.2d 634* , plaintiff real estate broker brought an action for a commission against another broker. Defendant was given a listing by the owner of a piece of property and defendant and plaintiff entered into an agreement providing that plaintiff would receive 60 percent of any commission earned by defendant if plaintiff "procured a purchaser" (*137 Cal. App. 2d 503, 505)* . The eventual purchaser of the property responded to plaintiff's ad and plaintiff made two offers to the owner, both of which were refused. The purchaser at that time refused to meet the owner's lowest asking price. Later, defendant broker approached the purchaser and began negotiations again between the owner and the purchaser that resulted in a sale when the purchaser met the owner's lowest asking price. The trial court found that plaintiff broker was not the procuring cause of the sale and granted judgment for defendant. Plaintiff appealed and the court of appeal affirmed, stating that in order for plaintiff to recover, the evidence must show that his efforts were the procuring cause of the sale and not merely one in a chain of causes. The court noted that to constitute the predominating cause, it is not enough that the broker contributes indirectly or incidentally to the sale by imparting information that tends to arouse interest, but the broker must set in motion a chain of events that, without a break in their continuity, cause the buyer and seller to come to terms as the proximate result of the broker's particular efforts. Here, the court stated, that it was through defendant broker's efforts that the final offer of the purchaser was made, and this was evidenced by the fact that at the time the purchaser was initially approached by defendant broker, the purchaser believed that the deal through plaintiff broker was off (*137 Cal. App. 2d 503, 507)* .

In ***Nelson v. Mayer*** *(1954) 122 Cal. App. 2d 438, 265 P.2d 52* , plaintiff, a real estate broker, sought recovery of a commission from the owner of the real property that was sold through another broker. Plaintiff was given a general listing on the property and contacted the attorney for the eventual purchaser who stated that he was not interested in the property. Later, another broker approached the purchaser's attorney and the purchaser, and the property was sold. The trial court directed a verdict in favor of defendant and plaintiff appealed. The court of appeal affirmed the judgment and stated that in order for plaintiff to recover a commission, the evidence must show that plaintiff's efforts were the procuring cause of the sale and not merely one in a chain of causes. The court further stated that to constitute the predominating effective cause, it is not enough that the broker contributes indirectly or incidentally to the sale by imparting information that tends to arouse interest, but the broker must set in motion a chain of events that, without a break in their continuity, cause the buyer and seller to come to terms as the proximate result of the broker's particular activities (*122 Cal. App. 2d 438, 445)* .

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§ 31.97 Opposing Contention That Broker May Recover Commission--Broker Acted in Bad Faith and Withheld From Owner Knowledge of Financial Inability of Buyer

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF BROKER MAY NOT RECOVER A COMMISSION, ALTHOUGH THE BUYER PROCURED BY PLAINTIFF WAS ACCEPTED BY DEFENDANT OWNER, BECAUSE AN OWNER'S ACCEPTANCE DOES NOT ADMIT THE READINESS, WILLINGNESS, AND ABILITY OF A BUYER TO CONSUMMATE THE SALE WHEN A BROKER ACTS IN BAD FAITH AND WITHHOLDS KNOWLEDGE OF THE BUYER'S FINANCIAL INABILITY FROM THE OWNER.

Commission Not Recoverable When Broker Withholds Knowledge of Buyer's Financial Inability. Although the owner accepted the buyer produced by the broker, a broker may not recover a commission because an owner's acceptance does not admit the readiness, willingness, and ability of the buyer to consummate the sale when the broker acts in bad faith and withholds knowledge of the buyer's financial inability from the owner (*Bay Shore Homes, Inc. v. San Diego Trust & Sav. Bk. (1969) 276 Cal. App. 2d 108, 116, 80 Cal. Rptr. 849*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that a broker is entitled to recover a commission. This argument may be used when the buyer produced by the broker was accepted by defendant owner but the broker acted in bad faith and withheld knowledge of the financial inability of the buyer from the owner. The readiness, willingness, and ability of the buyer to complete the sale will be an issue when the sale was never completed and the broker contends that nevertheless, he or she is entitled to recover a commission.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel is responding to the contention that the broker is entitled to recover a commission. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing that the broker was aware of the financial inability of the buyer and withheld this information from the owner in bad faith.

[3] Discussion of Authorities

[a] Commission Not Recoverable When Broker Withholds Knowledge of Buyer's Financial Inability

In ***Bay Shore Homes, Inc. v. San Diego Trust & Sav. Bk.*** *(1969) 276 Cal. App. 2d 108, 80 Cal. Rptr. 849* , the court of appeal affirmed a judgment denying a real estate commission to cross defendant and cross complainant real estate broker. The action began as a suit by a prospective purchaser against the representatives of the sellers for the return of a deposit. The real estate broker had submitted an offer on the property to the sellers' representatives and the offer was accepted. Unbeknownst to the sellers, however, the broker had made a deal with the buyer to return the broker's commission for the buyer's use as part of the purchase price on the property. The sale never went through although the buyer did find another purchaser for the property. The real estate broker appealed the decision of the trial court denying his commission. The court of appeal affirmed and stated that the broker's lack of right to a commission was established by the fact that he withheld information from the sellers that was material to the question of the ability of the buyer to purchase on the offered terms. The court stated that while it was true that the sellers accepted the purchaser and that the general rule is that by doing so the ability of the purchaser to consummate the sale is admitted, this rule is subject to qualifications. One of the qualifications, the court stated, was that in order to be entitled to a commission under the rule, the broker must have acted in good faith and without knowledge of the financial inability of the purchaser (*276 Cal. App. 2d 108, 115-116)* .

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§ 31.98 Opposing Contention That Broker May Recover Commission--General Listing Agreement Allows Owner to Revoke Agency or to Dispose of Property Prior to Broker's Performance Without Incurring Liability to Broker for Commission

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF BROKER MAY NOT RECOVER A COMMISSION BECAUSE WHEN A BROKER IS EMPLOYED UNDER A GENERAL LISTING AGREEMENT, THE OWNER RETAINS THE RIGHT, PRIOR TO THE BROKER'S PERFORMANCE, TO REVOKE THE AGENCY, TO SELL THE PROPERTY PERSONALLY OR THROUGH ANOTHER BROKER, OR TO WITHDRAW THE PROPERTY FROM SALE WITHOUT BECOMING LIABLE FOR A COMMISSION.

Commission Not Recoverable Under General Listing When Owner Disposes of Property. A broker is not entitled to recover a commission under a general listing when, prior to the broker's performance, the agency is revoked, the property is sold by the owner personally or through another broker, or the owner withdraws the property from sale (*see Tetrick v. Sloan (1959) 170 Cal. App. 2d 540, 546, 339 P.2d 613* ; *Nelson v. Mayer (1954) 122 Cal. App. 2d 438, 445, 265 P.2d 52*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that a broker is entitled to recover a commission. This argument may be used when the listing under which the broker was employed was a general listing and, prior to the listing broker's performance, the agency was revoked, the property was sold by the owner personally or through another broker, or the property was withdrawn from sale.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel is responding to the contention that the broker is entitled to recover a commission. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing that the listing agreement was a general listing, as opposed to an exclusive listing, and that prior to performance by the listing broker, the owner revoked the agency, sold the property personally or through another broker, or withdrew the property from the market.

[3] Discussion of Authorities

[a] Commission Not Recoverable Under General Listing When Owner Disposes of Property

The facts and procedural background of ***Tetrick v. Sloan*** *(1959) 170 Cal. App. 2d 540, 339 P.2d 613* , are discussed in *§ 31.99[3][a]*. In *Tetrick*, the court of appeal construed the listing agreement as a general listing and held that because the listing was revocable by defendant in good faith prior to performance by plaintiff, defendant was not liable to plaintiff for a commission (*170 Cal. App. 2d 540, 548)* . The court discussed the types of brokerage listings and noted that a general listing is revocable at the will of the owner in good faith at any time before performance, regardless of the efforts expended by the broker, and leaves the owner free to list the property with other brokers, to sell it himself or herself, or to withdraw it from the market (*170 Cal. App. 2d 540, 546)* .

The facts and procedural background of ***Nelson v. Mayer*** *(1954) 122 Cal. App. 2d 438, 265 P.2d 52* , are discussed in *§ 31.96[3][a]*. In *Nelson*, the court of appeal affirmed a directed verdict in favor of defendant owner in an action brought by plaintiff to recover a broker's commission. The listing agreement was a general listing and the property was sold through another broker. The court noted that under a general listing, defendant reserved the right to sell the property by his own unaided efforts or through another agent or broker without becoming liable for a commission (*122 Cal. App. 2d 438, 446)* .

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3. Recovery Under Real Estate Agreements

2A-31 California Points & Authorities § 31.99

§ 31.99 Opposing Contention That Broker May Recover Commission--Agreement Is General Listing Unless Exclusive Agency Provided in Unequivocal Terms or by Necessary Implication

[1] FORM

[*The following should be combined with the contention supported by the points and authorities set out in § 31.98 and may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF BROKER MAY NOT RECOVER A COMMISSION BECAUSE A BROKER'S AUTHORITY TO SELL REAL PROPERTY IS A GENERAL AGENCY UNLESS THE EMPLOYMENT AGREEMENT PROVIDES FOR AN EXCLUSIVE AGENCY IN UNEQUIVOCAL TERMS OR ARISES BY NECESSARY IMPLICATION.

Exclusive Agency Must Be Unequivocally Stated or Arise by Necessary Implication. A broker's authority to sell real property is a general agency unless the contract of employment provides for an exclusive agency in unequivocal terms or by necessary implication (*Tetrick v. Sloan (1959) 170 Cal. App. 2d 540, 547-548, 339 P.2d 613*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that a broker is entitled to recover a commission and should be combined with the points and authorities set out in *§ 31.98*. This argument may be used when contending that an agreement is a general listing because it fails to provide for an exclusive agency in unequivocal terms or by necessary implication. A general listing agreement allows the owner, prior to performance by the broker, to sell the property personally or through another broker, or to withdraw the property from sale, or revoke the agreement without incurring liability to the broker for a commission [*see* *Tetrick v. Sloan (1959) 170 Cal. App. 2d 540, 547-548, 339 P.2d 613* ; *Nelson v. Mayer (1954) 122 Cal. App. 2d 438, 445, 265 P.2d 52]* .

These points and authorities may be combined with a memorandum of points and authorities relating to the specific

procedural context in which counsel wishes to oppose the contention that the broker is entitled to recover a commission. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing that the listing agreement does not unequivocally provide for an exclusive agency agreement and that this cannot necessarily be implied from the agreement.

[3] Discussion of Authorities

[a] Exclusive Agency Must Be Unequivocally Stated or Arise by Necessary Implication

In ***Tetrick v. Sloan*** *(1959) 170 Cal. App. 2d 540, 339 P.2d 613* , plaintiff broker was employed by defendant to negotiate an oil lease on defendant's property. Plaintiff had introduced defendant to the eventual lessee but when defendant discovered that the eventual lessee would not agree to defendant's price for the lease, defendant refused to discuss the matter further. Defendant terminated plaintiff's employment, a lessee not having been found, and almost a year later entered into an oil lease with the lessee previously introduced by plaintiff. Plaintiff brought an action to recover a commission and the trial court rendered judgment for defendant. Plaintiff contended on appeal that defendant had no right to revoke the agreement once plaintiff had partly performed. The court of appeal affirmed the judgment and held that defendant had the right to cancel the general listing in good faith at any time prior to plaintiff's performance by procuring a ready, willing, and able purchaser (*170 Cal. App. 2d 540, 545-548)* . The court construed the listing agreement as a general listing and because the agreement was a general listing, defendant was free to revoke the authority of plaintiff at any time without becoming liable for a commission. The court stated that a real estate broker's authority to sell real property is not exclusive unless made so by the contract of employment in unequivocal terms or by necessary implication (*170 Cal. App. 2d 540, 548)* .

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2A-31 California Points & Authorities § 31.100

§ 31.100 Opposing Contention That Broker May Recover Commission--Exclusive Agency Agreement Allows Owner to Sell Property Through His or Her Own Efforts Without Liability to Broker

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF BROKER MAY NOT RECOVER A COMMISSION BECAUSE UNDER AN EXCLUSIVE AGENCY AGREEMENT, THE OWNER RETAINS THE RIGHT TO SELL THE PROPERTY THROUGH THE OWNER'S OWN EFFORTS WITHOUT INCURRING LIABILITY TO THE BROKER.

Commission Not Recoverable Under Exclusive Agency When Owner Sells Property. Under an exclusive agency agreement between an owner and broker, the owner retains the right to sell the property, through the owner's own efforts, without becoming liable to the broker for a commission (*E. A. Strout Western Realty v. Gregoire (1950) 101 Cal. App. 2d 512, 515-519, 225 P.2d 585*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that a broker is entitled to recover a commission. This argument may be used when the agreement employing the broker is an exclusive agency and the owner has sold the property through his or her own efforts.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel is responding to the contention that the broker is entitled to recover a commission. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of

law stated. Thus, counsel should discuss the facts showing that the agreement is an exclusive agency and that the property was sold by the owner personally through the owner's own efforts.

[3] Discussion of Authorities

[a] Commission Not Recoverable Under Exclusive Agency When Owner Sells Property

The facts and procedural background of ***E. A. Strout Western Realty v. Gregoire*** *(1950) 101 Cal. App. 2d 512, 225 P.2d 585* , are discussed in *§ 31.101[3][a]*. In *Gregoire*, plaintiff sought damages from defendant owners under an agreement that employed plaintiff to procure a ready, willing, and able buyer in return for a commission. Attached to the agreement was an amendment, which stated that the agreement was amended to give plaintiff "the sole and exclusive right to procure a purchaser" for the property (*101 Cal. App. 2d 512, 513)* . Defendants thereafter sold the property themselves and refused to pay plaintiff's commission. The trial court interpreted the agreement as an exclusive agency agreement and held for defendants. On appeal, plaintiff contended that he was entitled to a commission, although plaintiff did not procure a purchaser, because the agreement was an exclusive right to sell as opposed to an exclusive agency. The court of appeal affirmed and discussed the distinction between an exclusive agency agreement and an exclusive right-to-sell agreement. The court stated that an exclusive agency contract only prevents the owner from placing the property in the hands of another agent, and the owner retains the right to sell the property through his or her own unaided efforts. The court noted, however, that under an exclusive right to sell, the broker is entitled to be compensated when a sale is made by the owner (*101 Cal. App. 2d 512, 515-516)* .

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2A-31 California Points & Authorities § 31.101

§ 31.101 Opposing Contention That Broker May Recover Commission--Exclusive Agreement Is Exclusive Agency Unless Exclusive Right to Sell Expressly Provided or Arises by Necessary Implication

[1] FORM

[*The following should be combined with the contention supported by the points and authorities set out in § 31.100 and may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

PLAINTIFF BROKER MAY NOT RECOVER A COMMISSION BECAUSE A BROKER'S EXCLUSIVE AGREEMENT TO SELL REAL PROPERTY IS AN EXCLUSIVE AGENCY INSTEAD OF AN EXCLUSIVE RIGHT TO SELL UNLESS THE AGREEMENT EXPRESSLY PROVIDES FOR AN EXCLUSIVE RIGHT TO SELL OR SUCH CONSTRUCTION ARISES BY NECESSARY IMPLICATION FROM THE TERMS USED.

Exclusive Right to Sell Must Be Expressly Provided or Arise by Necessary Implication. A broker's exclusive agreement to sell real property is an exclusive agency instead of an exclusive right to sell, unless the agreement expressly provides for an exclusive right to sell or such construction arises by necessary implication from the terms used (*E. A. Strout Western Realty v. Gregoire (1950) 101 Cal. App. 2d 512, 517-518, 225 P.2d 585*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that a broker is entitled to recover a commission and should be combined with the points and authorities set out in *§ 31.100*. This argument may be used when contending that the agreement employing the broker was an exclusive agency instead of an exclusive right to sell because an exclusive right to sell was not stated expressly or did not arise by necessary implication from the terms used. An exclusive agency agreement allows the owner personally to sell the property without liability prior to the broker's performance, but under an exclusive right to sell, the owner of the property becomes liable to the broker for a commission if the property is sold during the term of the agreement either by the owner personally or through another

broker [*see* *E. A. Strout Western Realty v. Gregoire (1950) 101 Cal. App. 2d 512, 517-518, 225 P.2d 585]* .

These points and authorities may be combined with a memorandum of points and authorities relating to the specific procedural context in which counsel wishes to respond to the contention that the broker is entitled to recover a commission. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing that an exclusive right to sell was not stated expressly and does not arise by necessary implication from the terms used in the agreement.

[3] Discussion of Authorities

[a] Exclusive Right to Sell Must Be Expressly Provided or Arise by Necessary Implication

In ***E. A. Strout Western Realty v. Gregoire*** *(1950) 101 Cal. App. 2d 512, 225 P.2d 585* , plaintiff sought damages from defendants who were the owners of real property and with whom plaintiff had a broker's agreement. The agreement employed plaintiff to procure a ready, willing, and able buyer in return for a commission. Attached to the agreement was an amendment, which stated that the agreement was amended to give plaintiff the sole and exclusive right to procure a purchaser for the property (*101 Cal. App. 2d 512, 513)* . Defendants thereafter sold the property themselves and refused to pay plaintiff's commission. The trial court held for defendants and plaintiff appealed, contending in part that plaintiff was entitled to a commission although plaintiff did not procure a purchaser because the agreement was an exclusive right to sell as opposed to an exclusive agency. The court of appeal affirmed the judgment and held that the agreement was an exclusive agency agreement and not an exclusive right to sell, thus entitling defendants to sell the property themselves without incurring liability as long as the property was sold through the unaided efforts of defendants and not to a purchaser procured by plaintiff (*101 Cal. App. 2d 512, 519)* . The court pointed out that California courts recognize the distinction between an exclusive agency in which the owner retains the right to sell the property through the owner's own efforts without incurring liability to the broker, and an exclusive right to sell in which the owner contracts away this right (*101 Cal. App. 2d 512, 517)* . The court stated that because an incident of ownership of property is a right to dispose of the same, the right of the owner to dispose of the property through the owner's own efforts will not be considered to have been contracted away by the grant of an exclusive right to sell unless the language of the agreement expressly so states or such a construction is a necessary implication from the terms used (*101 Cal. App. 2d 512, 518)* .

[4] Additional Authorities

[a] Exclusive Right to Sell Must Be Expressly Provided or Arise by Necessary Implication

In *Snook v. Page (1915) 29 Cal. App. 246, 155 P 107* , plaintiff brokers appealed from a judgment of nonsuit entered in an action for a real estate commission. Plaintiffs entered into an agency agreement and while the agreement was in effect, defendant sold the property without going through plaintiffs. Plaintiffs appealed, contending that they were entitled to recover a commission because the agreement was an exclusive right to sell. The court of appeal affirmed the nonsuit and held that the agreement was an exclusive agency because the contract did not in express terms confer on plaintiffs the exclusive right to sell the property or provide for a commission in case the owner should sell it (*29 Cal. App. 246, 248)* . Under an exclusive agency agreement, the court stated, the owner has the right to sell the property by his or her own unaided efforts without becoming liable to the broker for a commission and the only effect of such a contract is to prevent the owner from placing the property in the hands of another broker (*29 Cal. App. 246, 247)* .

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2A-31 California Points & Authorities § 31.102

§ 31.102 Opposing Contention That Broker May Recover Commission--Contract of Sale Conditional and Condition Not Performed

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF BROKER MAY NOT RECOVER A COMMISSION BECAUSE THE CONTRACT OF SALE ENTERED INTO BETWEEN THE BUYER AND THE SELLER WAS CONDITIONAL AND THE CONDITION WAS NOT PERFORMED.

A. Accepted Buyer Not Admitted to Be Ready, Willing, and Able When Contract Conditional. Although the general rule is that an owner who enters into a contract with a buyer admits the readiness, willingness, and ability of the buyer to complete the contract, this rule does not apply when the contract entered into was conditional (*Kopf v. Milam (1963) 60 Cal. 2d 600, 605, 35 Cal. Rptr. 614, 387 P.2d 390*).

B. Commission Not Recoverable When Contract Conditional and Condition Not Performed. A broker is not entitled to recover a commission if the buyer and seller enter into a conditional contract of sale and the condition is not performed (*see Britschgi v. McCall (1953) 41 Cal. 2d 138, 145, 257 P.2d 977* ; *Keystone Mortgage Co. v. MacDonald (1967) 254 Cal. App. 2d 808, 812, 62 Cal. Rptr. 562*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that a broker is not entitled to recover a commission. This argument may be used when the contract entered into between the buyer and the seller is conditional and the condition was not performed.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel is responding to the contention that a broker is entitled to recover a commission. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing that the contract between the buyer and the seller was conditional and the condition was not performed.

[3] Discussion of Authorities

[a] Accepted Buyer Not Admitted to Be Ready, Willing, and Able When Contract Conditional

In ***Kopf v. Milam*** *(1963) 60 Cal. 2d 600, 35 Cal. Rptr. 614, 387 P.2d 390* , plaintiff brought an action to recover a broker's commission for procuring a buyer for defendants' property. The deposit receipt agreement that was signed by defendants and the prospective purchasers stated that the sale was subject to the buyers' assuming an existing loan on the property. An escrow was opened and a down payment made but the buyers did not complete escrow. The trial court found that the condition regarding the assumption of the loan was for the defendants' benefit, that the buyers never undertook to assume the loan or the other conditions in the deposit receipt agreement, that they were not ready, willing, and able to complete the contract, and that defendants were not estopped to deny that they were ready, willing, and able to complete the contract.

The Supreme Court affirmed and held that because the contract was conditional, no presumption as to the readiness, willingness, and ability of the buyers arose. Thus, the finding of the trial court was conclusive. The court stated that the rule providing that the buyer is conclusively presumed to be ready, willing, and able only applies when the contract entered into between the buyer and seller is unconditional (*60 Cal. 2d 600, 605)* .

[b] Commission Not Recoverable When Contract Conditional and Condition Not Performed

In ***Britschgi v. McCall*** *(1953) 41 Cal. 2d 138, 257 P.2d 977* , three separate actions against defendant sellers were consolidated for trial. The first action was brought by the broker employed by defendants to sell the property. The second an action was brought by the broker employed under the agreement and a second broker for services rendered. The final action was brought by the prospective purchasers for specific performance of the contract of sale. Plaintiff brokers procured an offer on the property that was not accepted by defendants because there was a third party who had a lease with an option to buy on defendants' property. Defendants counteroffered by agreeing to accept the purchasers' offer contingent on the elimination of the third party's interest. The interest was never eliminated and the sale did not go through.

The trial court granted judgments for defendants, and plaintiffs appealed. The court of appeal affirmed and held that the contract of sale was subject to the condition precedent that the sellers would be able to eliminate the interest of the holder of the option on the property and this condition could not be waived by the buyers alone (*41 Cal. 2d 138, 144-145)* . Thus, the court held that plaintiffs brokers were not entitled to a commission because defendant sellers were under no obligation to consummate the sale (*41 Cal. 2d 138, 145)* .

In ***Keystone Mortgage Co. v. MacDonald*** *(1967) 254 Cal. App. 2d 808, 62 Cal. Rptr. 562* , the court of appeal affirmed a judgment denying a real estate broker a commission for obtaining a trust deed loan on defendants' property. A loan commitment was obtained from a life insurance company but it was conditioned on the approval of the terms of the lease on the property. The terms of the lease were never renegotiated to meet the approval of the company and the loan was never made. The trial court granted judgment for defendants and plaintiff appealed. The court of appeal affirmed the judgment (*254 Cal. App. 2d 808, 815)* . The court stated that the loan commitment was not unconditional and thus, defendants were not estopped from asserting that the company making the commitment was ready, willing,

and able to complete the transaction. The court reasoned that when a contract is conditional and the condition is not performed, as in the instant case, there can be no recovery of a commission. However, the court noted, if the contract is conditional and the condition is performed, the broker becomes entitled to a commission only when the condition is met and the buyer becomes ready, willing, and able (*254 Cal. App. 2d 808, 812-813)* . Because the condition was never met, the court held that plaintiff was not entitled to a commission (*254 Cal. App. 2d 808, 815)* .

[4] Additional Authorities

[a] Accepted Buyer Not Admitted to Be Ready, Willing, and Able When Contract Conditional

In *Wiseman v. Ross (1961) 202 Cal. App. 2d 138, 20 Cal. Rptr. 565* , the court of appeal reversed a judgment in favor of plaintiff, a real estate broker, in an action for a commission. Defendant sellers made a counteroffer to the buyers' original offer and the buyers accepted. The counteroffer set forth the amount of cash that defendants required out of the transaction. An escrow was opened but the sale did not go through. The trial court found that the buyers were at all times ready, willing, and able to perform the contract. The court of appeal, however, stated that it was understood by all parties that the buyers' acceptance of defendants' counteroffer was subject to the buyers' ability to finance the purchase along the lines set forth in the counteroffer. Because of this condition, the court stated that it could not apply the rule that a seller who accepts the buyer procured the broker admits the readiness, willingness, and ability of the buyer to complete the transaction. The court noted that while the general rule is that when the owner accepts a buyer procured by the broker the owner admits the readiness, willingness, and ability of the buyer, the rule does not apply when at the time of the execution of the written agreement, it is understood by the parties that the buyers' acceptance of the sellers' offer was subject to the buyers' ability to finance their purchase along the lines required by the agreement (*202 Cal. App. 2d 138, 142)* .

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2A-31 California Points & Authorities § 31.103

§ 31.103 Opposing Contention That Broker May Recover Commission--Agreement Between Buyer and Seller Containing Provision for Payment of Commission Not Performed

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF BROKER MAY NOT RECOVER A COMMISSION BECAUSE THE ONLY PROVISION FOR THE PAYMENT OF A COMMISSION IS CONTAINED IN THE AGREEMENT BETWEEN THE BUYER AND [DEFENDANT] SELLER AND THE AGREEMENT, THROUGH NO FAULT OF THE PARTY EMPLOYING THE BROKER, WAS NOT PERFORMED.

Commission Not Recoverable When Provision for Commission Contained in Agreement Not Performed. A broker is not entitled to recover a commission when the only provision for payment of a commission is contained in an agreement between the buyer and the seller and the contract is not performed through no fault of the party employing the broker (*Paulsen v. Leadbetter (1968) 267 Cal. App. 2d 148, 152-154, 72 Cal. Rptr. 819* (deposit receipt and escrow instructions); *Billings v. Rexford Park Apts. (1966) 244 Cal. App. 2d 317, 321-325, 52 Cal. Rptr. 914* (escrow instructions)).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that a broker is entitled to a commission. The argument may be used when the only provision for payment of a commission is contained in the agreement between the buyer and the seller and the agreement is not performed through no fault of the party employing the broker.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context

in which counsel is responding to the contention that a broker is entitled to a commission. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should discuss the fact that the only provision for the payment of a commission is contained in an agreement between the buyer and seller and that the agreement was not performed. Counsel should also discuss the fact that the nonperformance of the contract was not due to any fault on the part of the party employing the broker.

[3] Discussion of Authorities

[a] Commission Not Recoverable When Provision for Commission Contained in Agreement Not Performed

In ***Paulsen v. Leadbetter*** *(1968) 267 Cal. App. 2d 148, 72 Cal. Rptr. 819* , plaintiff brought an action for a broker's commission for procuring a buyer for defendants' property. The sale never went through but there was no evidence that this was due to any fault of the buyer or seller. A motion for a nonsuit made by defendants was denied and thereafter judgment awarding a commission to plaintiff was entered on a jury verdict. Defendants appealed the denial of the motion but the court of appeal treated the appeal as one from the judgment and reversed. The court found that the only documents providing for a commission that were sufficient to satisfy the statute of frauds were the deposit receipt and the escrow instructions between the buyer and seller and that because the sale was never consummated and the failure to consummate the sale was not due to the fault of defendant sellers, plaintiff could not recover a commission (*267 Cal. App. 2d 148, 153-154)* . The court noted that plaintiff would be able to recover a commission, despite nonperformance of the sales contract, if the transaction had not been completed because of the arbitrary refusal of defendants to perform. The court stated that when the only agreement to pay a commission is contained in a contract between the broker's principal and the customer, the broker's right to compensation depends on performance of that contract (*267 Cal. App. 2d 148, 153-154)* .

In ***Billings v. Rexford Park Apts.*** *(1966) 244 Cal. App. 2d 317, 52 Cal. Rptr. 914* , plaintiff sued both the seller and the buyer for a commission under a provision contained in escrow instructions for the payment of plaintiff's commission. The instructions stated that the escrow officer was authorized and instructed to deduct plaintiff's commission from the funds deposited in escrow. The escrow was never performed. A demurrer to plaintiff's first amended complaint was sustained without leave to amend. Plaintiff appealed but only the prospective purchaser, who was not plaintiff's employer, was a party to the appeal. The court of appeal affirmed the judgment. The court, quoting form prior case law, stated that when the only agreement to pay a broker's commission is contained in the contract between the broker's principal and the customer, the broker's right to compensation is dependent on performance of that contract. The court noted that if the customer refuses to perform, or if the contract is cancelled or rescinded, the broker cannot recover because the broker, not having the ordinary broker's contract of compensation, must stand or fall on the contract actually entered (*244 Cal. App. 2d 317, 322)* .

[4] Additional Authorities

[a] Commission Not Recoverable When Provision for Commission Contained in Agreement Not Performed

In *Lawrence Block Co. v. Palston (1954) 123 Cal. App. 2d 300, 266 P.2d 856* , the court of appeal reversed a judgment for plaintiff in an action for a broker's commission when the provision for the commission was contained in defendant's acceptance of a prospective purchaser's offer. The court held that defendant's acceptance was in fact a counteroffer and that a binding contract of sale, on which plaintiff's commission depended, was never formed (*123 Cal. App. 2d 300, 312)* . The court stated that when the only agreement to pay a broker's commission is contained in the contract between the broker's principal and the customer, the broker's right to compensation depends on performance of that contract and if the customer refuses to perform, or if the contract is cancelled or rescinded, the broker cannot recover (*123 Cal. App. 2d 300, 306-307)* .

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§ 31.104 Opposing Contention That Broker May Recover Commission--Broker May Not Recover When Nonsigning Spouse's Consent Is Condition Precedent to Effective Contract of Employment

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF BROKER MAY NOT RECOVER A COMMISSION BECAUSE THE CONSENT OF _____ [DEFENDANT *or* DEFENDANT'S] SPOUSE TO THE SALE OF THE PROPERTY WAS A CONDITION PRECEDENT TO THE LISTING AGREEMENT AND THE CONSENT WAS NOT OBTAINED.

Commission Not Recoverable When Consent of Nonsigning Spouse Condition Precedent. When a spouse's consent to the sale of property is a condition precedent to the effectiveness of the listing agreement that is signed by only one spouse, and the nonsigning spouse refuses to join in the conveyance, a broker may not recover a commission under the listing agreement (*Tolson v. Griset (1960) 186 Cal. App. 2d 497, 499, 500, 9 Cal. Rptr. 110*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that a broker is entitled to recover a commission. The argument may be used when a spouse refuses to agree to the sale of the property, and the consent of the nonsigning spouse was a condition precedent to the effectiveness of the listing agreement employing the broker.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel is responding to the contention that a broker is entitled to recover a commission although only one coowner spouse has signed the listing agreement. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing that the consent of both coowner spouses to the sale of the property was understood by the parties to be a condition precedent to the effectiveness of the listing agreement.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities set out in *§ 31.87*.

[3] Discussion of Authorities

[a] Commission Not Recoverable When Consent of Nonsigning Spouse Condition Precedent

In ***Tolson v. Griset*** *(1960) 186 Cal. App. 2d 497, 9 Cal. Rptr. 110* , plaintiff broker brought an action against defendants, husband and wife, for a commission earned in procuring a purchaser of defendants' property under a listing agreement that was signed by only the husband. An escrow was opened by the broker and the purchaser, but both the husband and wife refused to go through with the sale. A nonsuit was granted regarding the wife and at the close of all the evidence the trial court rendered a judgment for defendant. The trial court found that the wife's consent to the sale of the property was a condition precedent to the effectiveness of the listing agreement and that because such consent was not given, plaintiff was not entitled to recover a commission. The evidence disclosed that all parties knew that the property was owned in joint tenancy and that defendant husband had signed the listing with the understanding that it would not be effective unless his wife agreed to the sale. On plaintiff's appeal, the court of appeal affirmed the judgment (*186 Cal. App. 2d 497, 501)* . The court stated that the trial court could have properly found that the wife's consent to the sale of the property was a condition precedent to the effectiveness of the listing agreement and denied recovery to plaintiff on this basis (*186 Cal. App. 2d 497, 500)* .

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§ 31.105 Opposing Contention That Broker May Recover Commission--Broker's Failure to Use Due Diligence Under Exclusive Listing Agreement Justifies Revocation of Agency

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF BROKER MAY NOT RECOVER A COMMISSION BECAUSE THE FAILURE OF A BROKER TO USE DUE DILIGENCE WHEN EMPLOYED UNDER AN EXCLUSIVE LISTING AGREEMENT ALLOWS THE OWNER TO REVOKE THE AGENCY WITHOUT INCURRING LIABILITY TO THE BROKER.

Exclusive Agency Revocable for Failure to Use Due Diligence. An owner may revoke an exclusive listing agreement without incurring liability for a commission when the broker fails to use due diligence in the performance of the agreement (*Coleman v. Mora (1968) 263 Cal. App. 2d 137, 148-152, 69 Cal. Rptr. 166*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that a broker may recover a commission. This argument may be used when the broker is employed pursuant to an exclusive listing agreement and the owner revoked the listing because the broker failed to diligently perform.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel is responding to the contention that a broker is entitled to recover a commission. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing that the agreement employing the broker was either an

exclusive agency or an exclusive right to sell and that the broker failed to use due diligence in the performance of the agreement.

[3] Discussion of Authorities

[a] Exclusive Agency Revocable for Failure to Use Due Diligence

In ***Coleman v. Mora*** *(1968) 263 Cal. App. 2d 137, 69 Cal. Rptr. 166* , plaintiff, a real estate broker, brought an action for a commission against defendant, the owner of a business who sold the business through another broker during the term specified in the exclusive listing agreement with plaintiff but after defendant had revoked the agency. The trial court rendered judgment for defendant and plaintiff appealed. The trial court found that plaintiff had not presented any offers to defendant at the listing price or produced any prospective purchasers prior to the termination but had merely listed the property along with other properties. The court of appeal affirmed and held that plaintiff had not used due diligence in the performance of the exclusive listing and that defendant was entitled to revoke the agency without incurring liability to plaintiff (*263 Cal. App. 2d 137, 152, 155)* . Because the property was sold through another broker, the court stated that it was unnecessary to decide if the exclusive listing agreement was an exclusive right to sell or an exclusive agency, but that in either case, the exclusiveness of the agreement implied a promise on the part of plaintiff to use due diligence in the performance of the agreement and the failure to do so was a material breach justifying rescission by the owner (*263 Cal. App. 2d 137, 146-152)* .

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2A-31 California Points & Authorities § 31.106

§ 31.106 Opposing Contention That Broker May Recover Commission--Exclusive Listing Void When No Definite Termination Date [Bus. & Prof. Code § 10176(f)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF BROKER MAY NOT RECOVER A COMMISSION UNDER THE EXCLUSIVE LISTING AGREEMENT BECAUSE AN EXCLUSIVE LISTING AGREEMENT WITH NO DEFINITE DATE OF FINAL TERMINATION IS VOID AND WILL NOT SUPPORT RECOVERY OF A COMMISSION.

A. Disciplinary Action When No Date of Termination. A real estate license may be suspended or revoked when the licensee claims, demands, or receives a fee, compensation, or commission under an exclusive agreement employing the licensee to perform any acts set forth in *Section 10131 of the Business and Professions Code* (acts customarily performed by a real estate broker) and the agreement does not contain a definite, specified date of final and complete termination (*Bus. & Prof. Code § 10176(f)*).

B. Commission Not Recoverable Under Exclusive Agreement With No Termination Date. Because a licensed real estate broker is subject to discipline under *Section 10176(f) of the Business and Professions Code* when the broker claims, demands, or receives compensation under an exclusive broker's agreement that does not contain a definite, specified date of final termination, such an agreement is void and there can be no recovery of a commission (*Dale v. Palmer (1951) 106 Cal. App. 2d 663, 666-668, 235 P.2d 650*).

[*Optional*] **C. Termination Date Must Be Definite at Execution of Agreement.** The date of termination must be definitely provided for in the agreement at the time of its execution and cannot depend on the occurrence of a future event (*Dale v. Palmer (1951) 106 Cal. App. 2d 663, 667, 235 P.2d 650*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that a broker is entitled to recover a commission. This argument may be used when the agreement is an exclusive listing that does not contain a definite termination date. The optional paragraph is for use when contending that the termination date contained in the agreement must be definite at the time of the execution of the agreement and must not depend on the occurrence of a future event.

These points and authorities may be combined with a memorandum of points and authorities relating to the specific procedural context in which counsel is responding to the contention that a broker is entitled to recover a commission. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing that the agreement falls within the prohibition of *Bus. & Prof. Code § 10176(f)* because it employs a broker to perform an act set forth in *Bus. & Prof. Code § 10131* and it does not contain a specific, definite date of final termination.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities set out in *§ 31.91*.

[3] Discussion of Authorities

[a] Commission Not Recoverable Under Exclusive Agreement With No Termination Date

In ***Dale v. Palmer*** *(1951) 106 Cal. App. 2d 663, 235 P.2d 650* , plaintiff entered into an agreement with defendant in which defendant agreed to employ plaintiff to sell homes to be constructed by defendant. The agreement also provided that the listing was to start when construction began and continue exclusively until 30 days after the notice of completion had been filed. After one house was sold defendant discharged plaintiff and employed another broker who sold the rest. Plaintiff sued defendant for damages for anticipatory breach of contract and the trial court rendered judgment for plaintiff. Defendant appealed, contending that the agreement was void because it did not contain a definite, specified date of final termination, in violation of *Bus. & Prof. Code § 10176(f)*. The court of appeal agreed with defendant and reversed the judgment. The court stated that the general rule is that when a statute imposes a penalty for the performing of an act, it implies a prohibition on the act and a contract founded on such act is void (*106 Cal. App. 2d 663, 667)* .

[b] Termination Date Must Be Definite at Execution of Agreement

The facts and procedural background of ***Dale v. Palmer*** *(1951) 106 Cal. App. 2d 663, 235 P.2d 650* , are discussed in *§ 31.106[3][a]*. In *Dale*, the court of appeal, in holding that the contract was void, first addressed the issue of whether or not the provision that the listing was to terminate 30 days after the notice of completion had been filed was a definite, specified termination date. The court held that it was not because the termination date must be set forth in the contract at the time of execution and must not be computed by reference to the occurrence of a future event. The court cited *Castleman v. Scudder (1947) 81 Cal. App. 2d 737, 185 P.2d 35* , discussed in *§ 31.106[4][a]* as interpreting an analogous provision in an agreement as one that did not set forth a definite termination date (*106 Cal. App. 2d 663, 666-667)* .

[4] Additional Authorities

[a] Termination Date Must Be Definite at Execution of Agreement

Castleman v. Scudder (1947) 81 Cal. App. 2d 737, 185 P.2d 35 , involved an appeal from a judgment entered pursuant

to the trial court's order sustaining a demurrer to a petition for a writ of mandate to compel the real estate commissioner to restore petitioners' licenses as business opportunity brokers. The licenses had been revoked pursuant to former Bus. & Prof. Code § 10301(f) for making claims for brokers' commissions under exclusive agreements with no definite, specified termination dates. Petitioners contended that the agreements, which stated that the exclusive agency was for a minimum period of 30 days but was to terminate in no event earlier than three days after receipt of a notice of termination from the owners, contained definite, specified termination dates. The court of appeal disagreed and held that former Bus. & Prof. Code § 10301 required that the termination date be definitely set forth at the time of execution of the agreement and must not depend on the occurrence of a future event (*81 Cal. App. 2d 737, 741)* .

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2A-31 California Points & Authorities § 31.107

§ 31.107 Opposing Contention That Broker May Recover Commission--Cooperating Broker May Not Recover Commission From Listing Broker When Commission Not Paid by Owner

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF BROKER MAY NOT RECOVER A COMMISSION BECAUSE A COOPERATING BROKER MAY NOT RECOVER FROM A LISTING BROKER UNDER AN AGREEMENT TO SHARE A COMMISSION WHEN THE COMMISSION HAS NOT BEEN PAID BY THE OWNER TO THE LISTING BROKER.

A. No Recovery of Shared Commission When Not Paid by Owner. A cooperating broker may not recover a commission from a listing broker under the agreement between the brokers to share a commission when the commission has not been paid by the owner to the listing broker (*Olsen v. Spomer (1961) 192 Cal. App. 2d 99, 102, 13 Cal. Rptr. 392* ; *Smith v. Wright (1961) 188 Cal. App. 2d 790, 792, 10 Cal. Rptr. 675*).

[*Optional*] **B. No Implied Promise to Sue for Commission.** A contract between brokers that provides for sharing a commission does not contain an implied promise on the part of the listing broker to sue for a commission (*Olsen v. Spomer (1961) 192 Cal. App. 2d 99, 103-104, 13 Cal. Rptr. 392*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a cooperating broker's contention that he or she is entitled to recover a portion of a commission from a listing broker. This argument may be used when the cooperating broker seeks recovery under an agreement to share a commission with a listing broker and the commission has not been paid by the owner to the listing broker.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel is responding to the contention that a cooperating broker is entitled to recover a commission. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing that there was an agreement between the brokers to share a commission paid and that the commission has not been paid by the owner.

[3] Discussion of Authorities

[a] No Recovery of Shared Commission When Not Paid by Owner

In ***Olsen v. Spomer*** *(1961) 192 Cal. App. 2d 99, 13 Cal. Rptr. 392* , plaintiffs brought an action against defendants to recover a commission, alleging that defendant listing broker agreed to split a commission with plaintiffs and also had agreed to sue the listing broker's principal for the commission. Defendant had procured a listing from the owner of property, and defendant and plaintiffs agreed that plaintiffs would cooperate with defendant in finding a purchaser and would receive a share of the commission derived from the sale of the property. Plaintiffs procured a purchaser but the seller refused to go through with the sale. The trial court rendered judgment for defendant and plaintiffs appealed. The court of appeal affirmed the judgment, holding that a condition precedent to payment of the commission to plaintiffs was the existence of a commission (*192 Cal. App. 2d 99, 102)* .

In ***Smith v. Wright*** *(1961) 188 Cal. App. 2d 790, 10 Cal. Rptr. 675* , plaintiffs brought an action against the owners of property and against the listing brokers, seeking recovery of one third of a commission against the listing brokers. The complaint alleged that plaintiffs and defendants entered into an agreement whereby defendants agreed to pay plaintiffs one third of the total commission if plaintiffs produced a buyer. Plaintiffs procured a buyer but the owner of the property refused to sell and a commission was never paid. A demurrer to the complaint was sustained and a judgment of dismissal entered. The court of appeal affirmed the judgment of dismissal as to the causes of action against the brokers, holding that since the commission was never paid, plaintiffs could not maintain an action against the brokers under the agreement to share a commission (*188 Cal. App. 2d 790, 792)* .

[b] No Implied Promise to Sue for Commission

The facts and procedural background of ***Olsen v. Spomer*** *(1961) 192 Cal. App. 2d 99, 13 Cal. Rptr. 392* , are discussed in *§ 31.107[3][a]*. In *Olsen,* plaintiffs contended that the agreement between the brokers to share a commission contained an implied-in-law promise that the listing brokers would sue for a commission if it was not paid. The court recognized that every contract contains an implied covenant of good faith and fair dealing but stated that this covenant did not require defendant to sue its principal for a commission (*192 Cal. App. 2d 99, 103-104)* .

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2A-31 California Points & Authorities § 31.108

§ 31.108 Opposing Contention That Broker May Recover Commission--Broker Failed to Provide Statutory Form of Disclosure of Dual Agency [Civ. Code §§ 2079.14, 2079.16]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF _____ [*name of broker*] MAY NOT RECOVER A COMMISSION, BECAUSE HE/SHE/IT DID NOT PROVIDE [DEFENDANT] SELLER WITH THE DISCLOSURE OF DUAL AGENCY REQUIRED BY *CIVIL CODE SECTIONS 2079.14, 2079.16* PRIOR TO EXECUTION OF THE LISTING AGREEMENT.

A. Dual Agency Must Be Disclosed by Statutory Form. A listing broker must provide the seller with a statutory form of disclosure of dual agency prior to entering into a listing agreement (*Civ. Code §§ 2374, 2375*).

B. Remedy Is No Liability for Commission. The remedy for the listing broker's failure to provide the statutory form of disclosure of dual agency to the seller prior to execution of the listing agreement is that the seller is not liable for the commission (*Huijers v. DeMarrais (1992) 11 Cal. App. 4th 676, 684-686*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that a seller is not liable for a commission when the broker failed to provide the seller with the required disclosure of dual agency prior to execution of the listing agreement [*see Civ. Code §§ 2079.14, 2079.16*].

These points and authorities may be combined with a memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the argument that a seller is not liable for a commission when the

broker has failed to provide the seller with the statutorily required disclosure of dual agency prior to execution of the listing agreement. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Remedy Is No Liability for Commission

In ***Huijers v. DeMarrais*** *(1992) 11 Cal. App. 4th 676* , a broker was retained to obtain property for a nursery. The broker contacted a person who owned a nursery property and informed him that she had a client who was interested in purchasing his property. The broker signed a listing agreement with the seller but did not provide the seller with an agency disclosure form as required by former Civ. Code §§ 2374, 2375 (*now see Civ. Code §§ 2079.14, 2079.16*). The required form includes a disclosure of dual agency and describes the duties of a broker with a dual agency. During negotiations, the buyer told the seller that he could not raise the asking price over the price in the listing agreement because, under his understanding of California law, the seller would be liable for a commission on the listing price once the broker had found a ready, willing, and able buyer. The seller agreed to sell at the listing price and was provided with the disclosure form. The next day the seller rescinded the sales contract. The buyer filed a complaint against the seller for specific performance. The seller cross-complained against the buyer and the broker. The trial court awarded specific performance plus damages to the buyer. The seller appealed.

The court of appeal reversed. The court found that there was no dispute that the broker failed to provide the required disclosure form prior to execution of the listing agreement. The court also found that providing the disclosure statement when the purchase agreement was executed did not constitute substantial compliance with the statute (*11 Cal. App. 4th 676, 684)* . The court noted that there were no specific remedies in the disclosure statute but that former Civ. Code § 2382 (*now see Civ. Code § 2079.24*) provided that it did not diminish the duty of disclosure owed by brokers or relieve brokers from liability. Thus, the statute left common-law remedies for failure to disclose intact. The court held that the remedy for failure to disclose dual representation of both buyer and seller is that the principal is not liable to pay the broker's commission and may avoid the transaction. The court held that it is not enough to disclose the fact of dual agency, but that the agent must disclose all facts that would affect the judgment of the parties, and that the Legislature has determined that the information in the statutory disclosure form must be disclosed to alert the parties to the potentially harmful consequences of dual representation so the parties may make an informed judgment (*11 Cal. App. 4th 676, 685-686)* . The court found that the failure to disclose relieved the seller from liability for the commission but did not necessarily relieve the seller from liability to the buyer on the sales contract because the disclosure statement was given to the seller just prior to execution of the sales agreement. However, the seller may be entitled to rescind because the buyer's statement that the seller would be liable for a commission on the listing price was incorrect. Because the trial court had erroneously found that the statement was correct, the court reversed for further findings (*11 Cal. App. 4th 676, 686)* .

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[Reserved]

§§ 31.109[Reserved]

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2A-31 California Points & Authorities § 31.120

§ 31.120 Supporting Contention That Owner May Recover From Broker Secret Profits Acquired Through Agency--Owner Entitled to All Profits Excluding Broker's Agreed Compensation

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF OWNER MAY RECOVER FROM DEFENDANT BROKER THE SECRET PROFITS REALIZED FROM THE RELATIONSHIP BETWEEN PLAINTIFF AND DEFENDANT BECAUSE ALL BENEFITS AND ADVANTAGES ACQUIRED BY AN AGENT AS AN OUTGROWTH OF THE AGENCY, EXCLUSIVE OF THE AGREED COMPENSATION, ARE DEEMED TO HAVE BEEN ACQUIRED FOR THE BENEFIT OF THE PRINCIPAL, WHO IS ENTITLED TO RECOVER THEM.

A. Broker Is Agent of Owner. A real estate broker is an agent for the owner employing the broker (*Charles B. Webster Real Estate v. Rickard (1971) 21 Cal. App. 3d 612, 614-618, 98 Cal. Rptr. 559*).

B. Secret Profits Prohibited. An agent is not permitted to make any secret profit out of the subject of his or her agency (*Crogan v. Metz (1956) 47 Cal. 2d 398, 404, 303 P.2d 1029*).

C. Owner May Recover Secret Profits From Broker. A property owner is entitled to recover from a broker secret profits realized from the agency relationship between the broker and the owner because all benefits and advantages acquired by an agent as an outgrowth of the agency, exclusive of the agent's agreed compensation, are deemed to have been acquired by the broker for the benefit of the principal (*Crogan v. Metz (1956) 47 Cal. 2d 398, 404, 303 P.2d 1029* ; *Roberts v. Lomanto (2003) 112 Cal. App. 4th 1553, 1563-1564, 5 Cal. Rptr. 3d 866* ; *Bate v. Marsteller (1965) 232 Cal. App. 2d 605, 616-617, 43 Cal. Rptr. 149*).

[*Optional*] **D. Secret Profits Recoverable Although Broker Acting Gratuitously.** A broker acting as a gratuitous agent is held to the same standards as an agent for hire and may not make any secret profit from the transaction without being held accountable to the owner (*Ramey v. Myers (1952) 111 Cal. App. 2d 679, 685, 245 P.2d 360*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that a property owner is entitled to recover from a real estate broker secret profits that are an outgrowth of the broker's agency. The word "owner" is used because the majority of cases deal with the relationship between a real estate broker and a property owner who is either attempting to sell his or her property or is attempting to purchase property. Thus, as appropriate, counsel may substitute the term "seller" or "purchaser" for the word "owner" in these points and authorities.

It appears that a party seeking to recover secret profits from a broker may do so in an action for money had and received or in an action for fraud [*see Crogan v. Metz (1956) 47 Cal. 2d 398, 404, 303 P.2d 1029* (money had and received); *Bate v. Marsteller (1965) 232 Cal. App. 2d 605, 616-617, 43 Cal. Rptr. 149* (fraud)].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the owner's right to recover secret profits from a broker. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should discuss the facts showing that the owner seeks to recover secret profits that arose out of the agency of the real estate broker and thus, belong to the owner.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities set out in *§ 31.123* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Broker Is Agent of Owner

In ***Charles B. Webster Real Estate v. Rickard*** *(1971) 21 Cal. App. 3d 612, 98 Cal. Rptr. 559* , plaintiff real estate broker brought an action to recover a commission pursuant to an exclusive right to sell listing agreement. The husband owner died prior to expiration of the term of the agreement and thereafter, defendant, the executor of the will of decedent husband, sold the property without going through plaintiff broker. Plaintiff filed a claim against the estate for the commission, which was rejected by defendant. Plaintiff then sued defendant and judgment was entered in favor of plaintiff. Defendant appealed, contending that the exclusive right to sell listing agreement terminated at the death of the owner.

The court of appeal reversed the judgment, agreeing that the listing agreement terminated on the death of the owner (*21 Cal. App. 3d 612, 620)* . The court stated that the relationship between a real estate broker and an owner is an agency relationship, and as such it terminated on the death of the owner (*21 Cal. App. 3d 612, 614-615)* .

[b] Secret Profits Prohibited

In ***Crogan v. Metz*** *(1956) 47 Cal. 2d 398, 303 P.2d 1029* , plaintiff purchaser of real property brought an action for fraud and for money had and received against her real estate broker, his wife, and two other brokers who shared an office with her broker. To complete an exchange transaction involving three different parties, which would allow all three brokers to recover commissions on all the transactions, plaintiff's broker sold property to plaintiff at a price higher than the amount the broker knew the owner was willing to accept. The trial court granted judgment for plaintiff for the amount of the excess price paid ($15,000) and for interest and punitive damages. Defendants appealed, contending that

there was no evidence to support the award of damages because the proper measure of damages for a purchaser defrauded in the purchase of property pursuant to *Civ. Code § 3343* is the difference between the value of that parted with, and the value of that received, and that the trial court had refused to permit evidence on the value of the property purchased by plaintiff.

The Supreme Court affirmed the judgment for plaintiff regarding the $15,000, but reversed the judgment regarding the punitive damages (*47 Cal. 2d 398, 406)* . The Court noted that an agent is not permitted to make any secret profit out of the subject of his or her agency (*47 Cal. 2d 398, 404)* .

[c] Owner May Recover Secret Profits From Broker

The facts and procedural background of ***Crogan v. Metz*** *(1956) 47 Cal. 2d 398, 303 P.2d 1029* , are discussed in *§ 31.120[3][b]*. In affirming a judgment for plaintiff, the Court held that the award of $15,000 was supported by the cause of action for money had and received because it represented the secret profits that plaintiff's broker received as a result of the agency (*47 Cal. 2d 398, 404)* . The Court stated that the principal may waive the tort of the agent and assert a right to recover any secret profits made by the agent out of the agency, and plaintiff's right to do this is well recognized. Quoting from prior case law, the Court stated that an agent is not permitted to make any secret profit out of his or her agency, and all benefits and advantages acquired by the agent as an outgrowth of the agency, exclusive of the agent's agreed compensation, are deemed to have been acquired for the benefit of the principal, and the principal is entitled to recover such benefits in an appropriate action. The Court further noted that the measure of damages for fraud provided by *Civ. Code § 3343* was not applicable to limit plaintiff's recovery because a principal's right to recover does not depend on any deceit of the agent but is based on the duties incident to the agency relationship and on the fact that all profits resulting from that relationship belong to the principal. Thus, the Court concluded, *Civ. Code § 3343* does not operate to limit a principal's recovery to damages for fraud, even though the profits may have been acquired through the broker's fraudulent representations (*47 Cal. 2d 398, 404-405)* .

In ***Roberts v. Lomanto*** *(2003) 112 Cal. App. 4th 1553, 5 Cal. Rptr. 3d 866* , a broker who entered into a written contract of purchase and sale with her principal, who subsequently assigned her rights to a third party with the principal's consent, did not notify the principal that she would receive an assignment fee until he was signing papers to close escrow, and refused to disclose the amount of the $1.2 million fee, breached her fiduciary duty to the principal by refusing to disclose the details of the assignment transaction (*112 Cal. App. 4th 1553, 1568)* . Execution of the purchase agreement did not complete the purpose of the broker's agency toward the principal and end the broker's duty toward him. The broker's contract of assignment with the third party, under which she in effect substituted the third party for herself as the buyer, became an essential part of the transaction, as did the principal's consent to the assignment. Thus, the broker's duty of disclosure extended to the assignment (*112 Cal. App. 4th 1553, 1566-1567)* . Because the broker's $1.2 million assignment fee was a form of compensation to her that was not disclosed to the principal until after the sale of the property was consummated, it was by definition a secret profit that the broker could not legally retain (*112 Cal. App. 4th 1553, 1570)* . The fact that the transaction yielded the principal his full asking price did not change that result (*112 Cal. App. 4th 1553, 1570)* . Thus, the court of appeal reversed a summary judgment for the broker and remanded the action, but did not direct the trial court to enter summary judgment for the seller, because the seller sought other remedies in addition to recovery of the broker's assignment fee as damages (*112 Cal. App. 4th 1553, 1570-1571)* .

In ***Bate v. Marsteller*** *(1965) 232 Cal. App. 2d 605, 43 Cal. Rptr. 149* , plaintiff sellers brought an action against several defendants for fraud, one of the defendants being plaintiffs' real estate broker. Plaintiffs listed their property with defendant broker for $50,000. Defendant broker told the eventual purchasers that the property was listed for $37,000 and did not try to get a better price for plaintiffs. A purchase agreement was signed and an escrow opened but the eventual purchasers became dissatisfied with the transaction and were willing to lose their deposit rather than complete it. Defendant broker and the remaining defendants helped the purchasers to complete the transaction, with defendant broker obtaining an interest in the property. After the transaction was completed, the property was resold to a

third party for a higher price. The trial court awarded plaintiffs $14,000 and punitive damages. Defendants appealed, contending that the special interrogatory given to the jury concerning the amount of the secret profits realized on the resale was improper because secret profits could not be recovered in the fraud cause of action but only in the equitable cause of action that was barred by the statute of limitations. The court of appeal held that the interrogatory was proper because secret profits are recoverable in a fraud cause of action (*232 Cal. App. 2d 605, 617)* .

The court stated that an agent is not entitled to make any secret profit out of the subject of his or her agency. Quoting prior case law, the court stated that all benefits and advantages acquired by the agent as an outgrowth of the agency, exclusive of the agent's agreed compensation, are deemed to have been acquired for the benefit of the principal, and the principal is entitled to recover such benefits in an appropriate action. The court noted that the principal's right to recover does not depend on any deceit of the agent but is based on the duties incident to the agency relationship and on the fact that all profits resulting from the relationship belong to the principal. The court stated that *Civ. Code § 3343*, which provides the measure of damages for fraud in the sale of property, does not operate to limit a principal's recovery to those damages, even though the profits may have been acquired through fraudulent representations. Thus, the court concluded, there can be a full recovery of any secret profits in an action for damages for fraud (*232 Cal. App. 2d 605, 616-617)* . For a discussion of issues raised on a previous appeal in this case, see *§ 31.121[3][a]*.

[d] Secret Profits Recoverable Although Broker Acting Gratuitously

In ***Ramey v. Myers*** *(1952) 111 Cal. App. 2d 679, 245 P.2d 360* , plaintiffs, husband and wife, brought an action against their real estate broker and his associate for fraud. Plaintiffs had been friends with one of the brokers for many years and asked him for his help in acquiring some income property. A piece of property was shown to plaintiffs and they were told that the asking price on the property was $70,000. Plaintiffs agreed to buy the property by exchanging their property in which they had an equity of $30,000 and assuming two trust deeds in the amount of $40,000. However, unknown to plaintiffs, their broker's associate had an option to buy the property plaintiffs eventually purchased. The broker exercised this option and purchased the property at a much lower price than the price plaintiffs were going to pay and then turned around and sold it to plaintiffs at the price of $70,000.

The trial court instructed the jury on two theories of the case: (1) agency and the plaintiffs' right to recover secret profits; and (2) fraud on the part of the seller. The jury awarded judgment to plaintiffs. Defendants appealed, contending that the complaint was for fraud and the trial court should not have admitted any evidence on the subject of agency and secret profits. The court of appeal affirmed the judgment (*111 Cal. App. 2d 679, 686)* . The complaint essentially alleged that one of the defendants was an old friend of plaintiffs'; plaintiffs were inexperienced in real estate matters; plaintiffs asked for help in locating some property to buy; and plaintiffs, in purchasing the property, were relying on the friendship and confidential relationship between them and the broker who was the old friend. The court held that, although the complaint did not directly plead that defendants were the agents of plaintiffs, it sufficiently alleged the existence of a gratuitous agency between plaintiffs and defendants (*111 Cal. App. 2d 679, 685)* . The court stated that while a gratuitous agent cannot be compelled to perform under an agency nor be held liable in damages for a failure to do so, when the gratuitous agent does enter into such performance he or she is, in common with other agents, bound to exercise the utmost good faith in dealing with his or her principal. The court further stated that a gratuitous agent cannot, while acting for his or her principal, make any secret profit out of the transaction being conducted by the agent without being accountable to the principal (*111 Cal. App. 2d 679, 685)* .

[4] Additional Authorities

[a] Owner May Recover Secret Profits From Broker

In *Menzel v. Salka (1960) 179 Cal. App. 2d 612, 4 Cal. Rptr. 78* , the court of appeal affirmed a judgment in favor of plaintiffs sellers and against defendant broker for secret profits and recovery of a commission paid (*179 Cal. App. 2d 612, 624)* . Plaintiffs entered into an agreement to sell their real property to a buyer procured by defendant. After

depositing $6,200 in escrow, the buyer told defendant that she did not want to complete the transaction and was willing to forfeit $5,000 of the deposit to plaintiffs. Defendant did not disclose this fact to plaintiffs. Instead, defendant purchased the property from the buyer as soon as plaintiffs made the sale to the buyer by paying the buyer the purchase price, less the $5,000 deposit. The court of appeal stated that defendant failed to disclose to plaintiffs the fact that the buyer was willing to, in effect, sell her deposit of $6,200 to plaintiffs for $5,000, and as a result acquired the $5,000 for himself. Thus, the court held that defendant was liable to the owner for the secret profit of $5,000 (*179 Cal. App. 2d 612, 622-623)* .

The facts and procedural background of *Ramey v. Myers (1952) 111 Cal. App. 2d 679, 245 P.2d 360* , are discussed in *§ 31.120[3][d]*. In *Ramey*, the court held defendants real estate brokers liable for secret profits earned on the sale of the property to plaintiffs. The court stated that in the absence of special circumstances, moneys received by a person acting as agent do not belong to the agent but the law implies a promise to pay them to the principal on demand. The court further noted that the principal's right to recover secret profits does not depend on any deceit of the agent but is based on the duties incident to the agency relationship. Thus, *Civ. Code § 3343*, which sets forth the measure of damages recoverable in an action for fraud in the sale of real property, does not limit a principal's recovery of profits, even if the profits were acquired through fraudulent representations (*111 Cal. App. 2d 679, 685)* .

California Points & Authorities

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 31 BROKERS AND SALESPERSONS
PART II. FORMS
B. Real Estate Broker's Liability to Owner

2A-31 California Points & Authorities § 31.121

§ 31.121 Supporting Contention That Owner May Recover Damages for Fraud [Civ. Code § 1710(3)] From Real Estate Broker When Broker Fails to Disclose Material Facts

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF OWNER MAY RECOVER DAMAGES FOR FRAUD FROM DEFENDANT BROKER BECAUSE A BROKER WHO FAILS TO DISCLOSE ALL MATERIAL FACTS, WITHIN THE BROKER'S KNOWLEDGE THAT MIGHT AFFECT THE OWNER'S DECISION TO ENTER INTO THE TRANSACTION, IS LIABLE FOR FRAUD.

A. Owner May Recover Damages for Fraud When Broker Fails to Disclose Material Facts. A real estate broker owes to an owner a duty to disclose all material facts concerning the transaction within the broker's knowledge that might affect the owner's decision, and a failure to do so is fraud for which the owner may recover damages (*see Civ. Code § 1710(3)*; *Jorgensen v. Beach 'N' Bay Realty, Inc. (1981) 125 Cal. App. 3d 155, 159* ; *Bate v. Marsteller (1959) 175 Cal. App. 2d 573, 581-583, 346 P.2d 903*).

[*Optional*] **B. Owner May Recover Damages for Constructive Fraud When Broker Breaches Fiduciary Duty by Not Investigating Material Representations Made By Seller.** A real estate broker is liable for constructive fraud when he or she breaches fiduciary duties by failing (1) to investigate material representations made by the seller or (2) to notify the client of the reliance on the seller's representation (*Salahutdin v. Valley of California, Inc. (1994) 24 Cal. App. 4th 555, 561-563*).

[*Optional*] **C. Owner May Recover Damages for Constructive Fraud When Broker Breaches Fiduciary Duty by Failing to Disclose Defects of Property Listed in Notes Taken by Broker's Colleague.** A real estate broker is liable for constructive fraud when he or she breaches fiduciary duties by failing to disclose material information within its possession (*Michel v. Moore & Associates, Inc. (2007) 156 Cal. App. 4th 756, 763, 67 Cal. Rptr. 3d 797*).

[*Optional*] **D. Fact That Broker Is Purchaser Must Be Disclosed.** The fact that the broker is the purchaser, either directly or indirectly, of the property sold by the owner must be disclosed to the owner (*Batson v. Strehlow (1968) 68 Cal. 2d 662, 675-676*).

[*Optional*] **E. Purchaser Related to Broker Must Be Disclosed.** The fact that the broker is related to the buyer in any way, which would suggest a reasonable possibility that the broker is acquiring an interest in the property, is material and must be disclosed (*Sierra Pacific Industries v. Carter (1980) 104 Cal. App. 3d 579, 582, 163 Cal. Rptr. 764* ; *Loughlin v. Idora Realty Co. (1968) 259 Cal. App. 2d 619, 631, 66 Cal. Rptr. 747*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a party's contention that a property owner may recover damages for fraud from a broker who fails to disclose material facts, concerning the transaction and within the broker's knowledge, that might affect the owner's decision to enter into the transaction [*see Judicial Council of California Civil Jury Instructions, CACI No. 4107*, "Duty of Disclosure by Real Estate Broker" (LexisNexis Matthew Bender, official publisher)].

This memorandum may be combined with memoranda pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the owner's right to recover damages for fraud for the broker's failure to disclose material facts. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that the broker failed to disclose facts within the broker's knowledge that would have been material to the owner's decision to enter into the transaction.

[3] Discussion of Authorities

[a] Owner May Recover Damages for Fraud When Broker Fails to Disclose Material Facts

In ***Jorgensen v. Beach 'N' Bay Realty, Inc.*** *(1981) 125 Cal. App. 3d 155* , plaintiff brought an action for fraud, misrepresentation, breach of fiduciary duty, and negligence against her real estate broker and the agents working in the broker's office. Plaintiff had listed her residential property with defendant broker for $214,500. At about the same time, defendants were looking for investment property for a family from Mexico and showed them plaintiff's property. Defendants obtained an offer of $200,000 from them that plaintiff reluctantly agreed to accept after defendants told her that if plaintiff made any higher counteroffer, she would risk losing the deal. During the time the property was in escrow, one of the defendant agents obtained a listing on the property from the purchasers. After escrow closed, the property was sold to a third party for $27,000 more than plaintiff's sales price.

The trial court granted a nonsuit and plaintiff appealed. The court of appeal reversed the judgment, holding that there was sufficient evidence on all four causes of action to allow the case to go to the jury (*125 Cal. App. 3d 155, 165)* . The trial record showed that defendants had disclosed to plaintiff that they were engaged in a dual agency representing both the purchasers and plaintiff in the transaction. However, the court stated, defendants owed to plaintiff a duty to disclose all material facts within their knowledge that might have affected plaintiff's decision to accept the purchasers' offer. The court stated that the fact that the purchasers intended to use the property for investment purposes and the fact that defendants had a personal stake in striking a good bargain for the purchasers could be considered by a jury to be material facts that could have influenced plaintiff's decision to accept the purchasers' offer (*125 Cal. App. 3d 155, 160-161)* . It also appeared from the trial record that defendants intentionally misled plaintiff to believe that the purchasers intended to reside on the property by telling plaintiff that they would make good neighbors. The court stated that all of these facts could support a jury verdict for fraud, intentional and/or negligent misrepresentation, and/or

breach of fiduciary duty (*125 Cal. App. 3d 155, 160)* .

In ***Bate v. Marsteller*** *(1959) 175 Cal. App. 2d 573, 346 P.2d 903* , plaintiffs sellers of real property brought an action to recover damages for fraud against defendants, a broker, his agents and employees, and the husband and wife purchasers of plaintiffs' real property. Plaintiffs listed their property with defendant broker for $50,000. Defendants found a husband and wife willing to purchase the property and told them that if they made an offer of $37,000, plaintiffs would accept it. Thereafter, plaintiffs entered into a purchase agreement with defendants for $37,000. However, in the middle of the transaction, defendants husband and wife wanted to back out and forfeit their deposit and, to this end, refused to deposit the rest of the requested money in escrow. Defendants, without telling this to plaintiffs, deposited the money into escrow and acquired an interest in the property.

The trial court granted judgment for defendants and plaintiffs appealed. The court of appeal reversed the judgment for defendant broker and his agents and servants but affirmed as to the husband and wife purchasers (*175 Cal. App. 2d 573, 584)* . The court held that defendants failed to disclose to plaintiffs the following material facts: (1) the fact that defendants told the husband and wife to offer the property for $37,000; (2) the fact that the husband and wife wanted to back out of the transaction and forfeit their deposit; (3) the fact that defendants put up the balance of the deposit; and (4) the fact that defendants acquired an interest in the property (*175 Cal. App. 2d 573, 580)* . The court stated that the relationship between a broker and his or her principal is fiduciary in nature and a broker has the duty to act in the highest good faith toward his or her principal. This duty of good faith, the court stated, places a legal obligation on the broker to disclose to his or her principal all facts within the broker's knowledge that are material to the matter in which the broker is employed (*175 Cal. App. 2d 573, 580-581)* . The court held that, although the evidence supported the trial court's finding that the sales price was fair, plaintiffs were still damaged in the amount of the commission paid, to which defendants were not entitled (*175 Cal. App. 2d 573, 583-584)* . For a discussion of issues raised on a later appeal in this case, see *§ 31.120[3][c]*.

In ***Salahutdin v. Valley of California, Inc.*** *(1994) 24 Cal. App. 4th 555, 561-563* , plaintiffs, purchasers of real property, filed a negligent misrepresentation action against their real estate broker. Plaintiffs had told their broker that they wanted to purchase property that could be subdivided into two parcels. The broker told plaintiffs that the property in question could be subdivided if it was more than one acre. The broker found the property listed in the multiple listing sheet as one acre plus. The broker then told plaintiffs he would have no problem subdividing in the future. However, the broker's representations were not true. The property was less than one acre in size. The broker failed to tell plaintiff that he had not independently verified the information on the multiple listing sheet. Plaintiffs filed suit.

The trial court found in the plaintiff's favor and the court of appeals affirmed. The appellate court held that the broker breached his fiduciary duty and committed constructive fraud (*24 Cal. App. 4th 555, 561)* . The court found that a broker who is merely an innocent conduit of the seller's fraud may be innocent of actual fraud, but in this situation the broker may be liable for negligence on a constructive fraud theory if he or she passes on the misstatements as true without personally investigating them (*24 Cal. App. 4th 555, 562)* . The broker in this case thus had a duty to his clients to refrain from advising them that the parcel was more than an acre and that it could therefore be subdivided when he did not know that to be the case and when he knew these facts to be material to plaintiffs' decision to purchase the property. Although the broker was not required to investigate the sellers' representations or the truth of the description contained in the multiple listing service sheet before showing the property to plaintiffs, he was at least required to tell plaintiffs that he had not verified the information he was passing on to them and that he was simply relying on the description provided by the sellers (*24 Cal. App. 4th 555, 563)* .

In ***Michel v. Moore & Associates, Inc.*** *(2007) 156 Cal. App. 4th 756, 67 Cal. Rptr. 3d 797* , Kirkpatrick was a real estate agent working for defendant licensed real estate broker (Moore). Kirkpatrick inspected a home owned by a friend's parents. Kirkpatrick hoped to become the listing agent if the parents decided to sell their house, and took notes of the property's defects, including possible water leaks, cracked interior walls, and damage to the pool. Kirkpatrick planned to use his notes to identify needed repairs and possible disclosure to potential buyers. The house went on the

market. Kirkpatrick, who had not received the sellers' listing, showed the house to plaintiffs, who were represented by an agent (Lagudis) who was also working for Moore. During the home tour, Kirkpatrick did not point out any of the defects from his notes.

Plaintiffs and the sellers agreed on the terms of sale and entered escrow. Plaintiffs' agent visually inspected the property and gave plaintiffs her obligatory transfer disclosure statement (TDS). In accord with Kirkpatrick's notes, the TDS noted that cracks had been patched and painted. The TDS did not, however, disclose other defects listed in Kirkpatrick's notes. One of Kirkpatrick's tasks as Moore's "transaction coordinator" was reviewing the sales files of Moore's agents to ensure that paperwork was in order before escrows closed. Accordingly, Kirkpatrick reviewed Lagudis's TDS to plaintiff. Kirkpatrick did not tell Lagudis about his notes, nor did he augment her TDS with anything from those notes. Plaintiffs thus did not know the contents of Kirkpatrick's notes before escrow closed.

Cracks appeared in the walls of the house after plaintiffs moved in. A soils engineer discovered poor topsoil and fill had caused significant instability and ground movement on the property. He found the movement had tilted the house's foundation about 3.5 inches from level, which in his opinion caused the repeated cracks in the walls. To stabilize the house, he recommended placing caissons under its foundation down to solid bedrock. Plaintiffs subsequently met with Kirkpatrick and told him about the soil instability and cracks in the walls, which would likely cost about $500,000 to repair. Kirkpatrick replied that during his inspection before the house was put on the market he had seen cracks big enough to slip a coin into. Plaintiffs learned about Kirkpatrick's notes at that time, and asked for a copy, which he provided. Thereafter, plaintiffs brought an action against defendants including Moore. The trial court granted Moore's motion for a judgment of nonsuit on plaintiffs' cause of action for negligent nondisclosure. The jury returned a verdict for defendants on plaintiffs' causes of action for violation of *Civ. Code § 2079* (seller's agent has duty to visually inspect property and disclose results of that inspection to buyer) and fraudulent concealment. The court of appeal reversed the judgment of nonsuit and remanded the action (*156 Cal. App. 4th 756, 765)* .

The court of appeal stated that the fiduciary duty owed by a broker to his or her client is greater than the negligence standard of due care under Section 2079 (*Civ. Code § 2079.2* (standard of care is of a "reasonably prudent real estate licensee")). Thus, a broker can be professionally competent under Section 2079 without satisfying the greater duty of a trusted fiduciary (*156 Cal. App. 4th 756, 762)* . The court stated that a fiduciary must tell its principal about all information it possesses that is material to the principal's interests. A fiduciary's failure to share material information with the principal is constructive fraud, a term of art obviating actual fraudulent intent (*Civ. Code § 1573*) (*156 Cal. App. 4th 756, 762-763)* .

The court held that the trial court's dismissal of plaintiffs' cause of action for negligent nondisclosure was error because it involved elements different from their *Civ. Code § 2079* and fraudulent concealment causes of action. For those latter two causes of action, Lagudis might have been competent in her visual inspection of the property in preparing her TDS for plaintiffs and Kirkpatrick might have had no fraudulent intent in not telling plaintiffs about his inspection and notes before escrow closed, thus justifying the jury's verdict. However, that did not mean that Moore did not injure plaintiffs by not telling them about Kirkpatrick's notes before they bought their house (*156 Cal. App. 4th 756, 762)* .

[b] Fact That Broker Is Purchaser Must Be Disclosed

In ***Batson v. Strehlow*** *(1968) 68 Cal. 2d 662* , the executrix of the husband seller's estate brought an action against numerous defendants, including defendant broker, to recover a commission paid to defendant broker. The guardian of the estate of the incompetent husband seller mailed a listing on property owned by the husband and wife to numerous brokers, and defendant responded with a bid on the property made by San Antonio Development Co., Inc., signed by defendant broker as president. Defendant broker and his wife were the only shareholders in the corporation, but this fact was not disclosed to the guardian. The bid was accepted, the sale went through, and a commission was paid to defendant broker. However, the purchase price on the property was not paid by San Antonio Development Co., Inc. but by defendant and two of his business associates in an investment company. Shortly after the sale was completed, the

property was conveyed to the investment company, and on the following day, one third was conveyed to defendant broker, and to each one of his two associates.

The trial court granted judgment for plaintiff against all defendants except the guardian of the husband's estate, and only defendant broker appealed. The Supreme Court affirmed the judgment (*68 Cal. 2d 662, 677)* . The Court stated that defendant broker failed to disclose the facts that defendant and his wife owned all stock in San Antonio Investment Co., Inc. and that defendant and his associates, and not San Antonio Investment Co., Inc., were the actual buyers of the property (*68 Cal. 2d 662, 674)* . Because of this, the Court held that defendant violated his fiduciary duty as a real estate agent by failing to disclose all the material facts of the transaction and becoming an undisclosed purchaser of his principal's property (*68 Cal. 2d 662, 676)* . The Court stated that a real estate agent is charged with a duty of fullest disclosure of all material facts concerning the transaction that might affect the principal's decision (*68 Cal. 2d 662, 674-675)* . The Court noted that the rule that an agent employed to sell the principal's property may not become the purchaser without the principal's full knowledge and consent is aimed at an indirect or collusive sale or transfer, as well as at a direct sale or transfer to the agent, and extends to the agent's spouse; or at an indirect or collusive sale to some other relative of the agent, or to his or her partner or employee. The Court stated that the rule also applies when the transfer is made to a corporation in which the agent has a large concealed interest (*68 Cal. 2d 662, 675-676)* .

[c] Purchaser Related to Broker Must Be Disclosed

In ***Sierra Pacific Industries v. Carter*** *(1980) 104 Cal. App. 3d 579, 163 Cal. Rptr. 764* , plaintiff seller of real property brought an action against a broker for fraud. Defendant broker obtained a listing for $85,000 to sell plaintiff's 10-acre piece of property. Defendant broker sold it to his daughter and son-in-law and received a $5,000 commission. The fact that the purchasers were related to defendant broker was not disclosed to plaintiff. The jury returned a verdict for defendant broker and plaintiff moved for a new trial. The motion was granted on the basis of inadequacy of damages, insufficient evidence, and that the verdict was against the law. Defendant appealed from the order granting the new trial.

The court of appeal affirmed the order granting a new trial with instructions to the court below to direct a verdict against defendant as to duty and breach of duty and to try the issue of damages (*104 Cal. App. 3d 579, 583)* . The court stated that an agent bears a fiduciary relationship to his or her principal, which requires among other things, disclosure of all information in the agent's possession relevant to the subject matter of the agency. The court noted that a real estate agent must refrain from dual representation in a transaction unless he or she obtains the consent of both principals after full disclosure. This means, the court stated, that under most circumstances if the agent is related to the buyer in a way that suggests a reasonable possibility that the agent himself or herself could indirectly be acquiring an interest in the subject of the property, then the relationship is a material fact that must be disclosed (*104 Cal. App. 3d 579, 581-582)* .

In ***Loughlin v. Idora Realty Co.*** *(1968) 259 Cal. App. 2d 619, 66 Cal. Rptr. 747* , plaintiffs, husband and wife sellers, brought an action for fraud against defendant broker, defendant broker's wife and mother-in-law, and defendant broker's real estate agent. Plaintiffs listed their property with defendant for $15,000. Thereafter, defendant presented plaintiffs with an offer of $12,000 from defendant's mother-in-law, which plaintiffs accepted. While the property was in escrow, defendant negotiated a resale of the property to a third party for $14,000. Both sales went through the same escrow at approximately the same time. Defendant received a commission on plaintiffs' sale, which he split with his agent. The proceeds from the resale were deposited in defendant's trust account to be held for his mother-in-law, and defendant charged the account for his commission.

The trial court granted judgment for all defendants and held that defendants did not commit a fraud on plaintiffs or make any secret profits. Plaintiffs appealed, and the court of appeal reversed (*259 Cal. App. 2d 619, 633)* . The court stated that a real estate agent has, among other duties, the duty to make to the principal the fullest disclosure of all material facts concerning the transaction that might affect the principal's decision (*259 Cal. App. 2d 619, 629)* . Defendant broker, the court pointed out, did not disclose the $14,000 resale and the fact that the proposed buyer was defendant broker's mother-in-law. The court held that when the seller's real estate agent is obligated to disclose to his or

her principal the identity of the buyer, and when the buyer is not the agent but occupies with the agent a blood, marital, or other relationship that would suggest a reasonable possibility that the agent could be indirectly acquiring an interest in the property, such relationship is a material fact that the agent must disclose to the principal (*259 Cal. App. 2d 619, 631)* .

[4] Additional Authorities

[a] Owner May Recover Damages for Fraud When Broker Fails to Disclose Material Facts

In *Zikratch v. Stillwell (1961) 196 Cal. App. 2d 535, 16 Cal. Rptr. 660* , plaintiffs' sellers brought an action against their broker for damages. Defendant secured a listing on plaintiffs' property for $1,500 per acre and eventually purchased the property himself with two other businessmen after disclosure to plaintiffs. Defendant did not, however, disclose that he had been negotiating with another group of businessmen to resell the property to them for $3,500 an acre. Defendant eventually sold the property he purchased from plaintiffs for this higher price. The jury returned a verdict for plaintiffs, and defendant appealed. The court of appeal affirmed (*196 Cal. App. 2d 535, 544)* . The court stated that defendant was acting as a fiduciary and was clearly obligated to fully disclose all facts within his knowledge that were cogent to the sale and that might influence plaintiffs' willingness to sell, and thus defendant should have disclosed that there was a higher offer on the property (*196 Cal. App. 2d 535, 541)* . Defendant contended that his liability should not be in damages but in the amount that he personally received on the sale. The court of appeal rejected this contention and pointed out that plaintiffs clearly brought an action for damages, not secret profits. The court stated that in the case of fraud by a fiduciary, the measure of damages is not necessarily limited to the amount defendant was unjustly enriched but may be the amount that will compensate the injured party for all detriment proximately caused (*196 Cal. App. 2d 535, 543)* .

[b] Purchaser Related to Broker Must Be Disclosed

In *Smith v. Zak (1971) 20 Cal. App. 3d 785, 98 Cal. Rptr. 242* , the court of appeal reversed a judgment in favor of defendants in consolidated actions brought by plaintiff seller against defendants broker and his wife. The actions were for fraud, rescission, declaratory relief, and to quiet title to plaintiff's property that was held in the name of defendants. Plaintiff listed the property with defendant, and a purchase and sale agreement was eventually entered into between plaintiff and a real estate salesman by the name of Martin, or his nominee, for less than the listing price. Martin was a close personal friend of defendant broker and in fact was in the process of applying for a real estate license under the sponsorship of defendant broker at the time. It turned out that defendant and his wife were the actual purchasers of the property. The court of appeal, in reversing the judgment of the trial court, stated that defendant failed to disclose to plaintiff the facts of defendants' personal and professional relationship with Martin or the fact that defendant himself was the actual purchaser of the property. Relying on *Loughlin v. Idora Realty Co. (1968) 259 Cal. App. 2d 619, 66 Cal. Rptr. 747* , discussed in *§ 31.121[3][c]*, the court stated that among the material facts that must be disclosed to the owner is the fact that the buyer occupies a close relationship to the broker. The court quoted *Loughlin* and stated that when the buyer is not the agent but occupies a blood, marital, or other relationship with the agent that would suggest the reasonable possibility that the agent could be indirectly acquiring an interest in the property himself or herself, such a relationship is a material fact that must be disclosed (*20 Cal. App. 3d 785, 794)* .

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CHAPTER 31 BROKERS AND SALESPERSONS
PART II. FORMS
B. Real Estate Broker's Liability to Owner

2A-31 California Points & Authorities § 31.122

§ 31.122 Supporting Contention That Owner May Recover Commission Paid to Broker When Broker Fails to Disclose That Broker Is Purchaser or That Purchaser Is Related to Broker

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF OWNER MAY RECOVER FROM DEFENDANT BROKER THE COMMISSION PLAINTIFF PAID TO DEFENDANT BECAUSE DEFENDANT BROKER FORFEITED THE RIGHT TO A COMMISSION BY FAILING TO DISCLOSE THAT _____ [THE BROKER IS PURCHASING THE PROPERTY *or* THE PURCHASER IS RELATED IN SOME WAY TO THE BROKER SO AS TO SUGGEST THE POSSIBILITY THAT THE BROKER IS ACQUIRING AN INTEREST IN THE PROPERTY].

Owner May Recover Commission Paid. An owner may recover the commission paid to a broker when the broker fails to disclose to the owner that the broker is purchasing the property or that the purchaser is in some way related to the broker so as to suggest the possibility that the broker is acquiring an interest in the property (*Batson v. Strehlow (1968) 68 Cal. 2d 662, 675-676* (broker as purchaser); *Sierra Pacific Industries v. Carter (1980) 104 Cal. App. 3d 579, 582-583, 163 Cal. Rptr. 764* (purchaser related to broker)).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that an owner may recover from a broker the commission paid to the broker when the broker either (1) fails to disclose that he or she is the purchaser, or (2) fails to disclose that the purchaser is related to the broker in some way so as to suggest the possibility that the broker is acquiring an interest in the property. It appears that recovery of the commission paid can be an element of damages that are recoverable for fraud for failure to disclose material facts [*see Sierra Pacific Industries v. Carter (1980) 104 Cal. App. 3d 579, 582, 163 Cal. Rptr. 764* ; *Bate v. Marsteller (1959) 175 Cal. App. 2d 573, 584, 346 P.2d 903]* . Therefore, in an appropriate case, these points and authorities may be combined with the points and authorities set out

in *§ 31.121*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the owner's right to recover the commission paid to a broker. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing that the broker either failed to disclose that he or she was the purchaser of the property or that he or she was related in some way to the purchaser so as to suggest a possibility that the broker was acquiring an interest in the property.

[3] Discussion of Authorities

[a] Owner May Recover Commission Paid

The facts and procedural background of ***Batson v. Strehlow*** *(1968) 68 Cal. 2d 662* , are discussed in *§ 31.121[3][b]*. In *Baston*, the executrix of the estate of decedent husband seller brought an action to recover a commission paid to defendant broker. Defendant broker submitted an offer on the husband's and wife's property to the guardian of the incompetent husband's estate. The offer was signed by defendant broker, as president of the company that was supposedly purchasing the property. The company was, however, owned solely by defendant broker and his wife and it turned out that the purchase money was paid solely by defendant and two other associates who were eventually deeded the property. The trial court granted judgment to plaintiff and defendant appealed. The Supreme Court affirmed the judgment (*68 Cal. 2d 662, 677)* . The Court stated that it is clear that defendant violated his fiduciary duty as an agent by failing to fully disclose all material facts of the transaction and by becoming an undisclosed purchaser of his principal's property. Therefore, the court stated, defendant was not entitled to compensation for acting for the estate when he was indeed acting for himself and plaintiff had a right to recover the commission paid (*68 Cal. 2d 662, 676)* .

The facts and procedural background of ***Sierra Pacific Industries v. Carter*** *(1980) 104 Cal. App. 3d 579, 163 Cal. Rptr. 764* , are discussed in *§ 31.121[3][c]*. In *Carter*, plaintiff seller brought an action against defendant broker for fraud. Defendant broker obtained a listing on plaintiff's property and eventually sold it to his daughter and son-in-law without disclosing this to plaintiff. The jury returned a verdict for defendant and plaintiff's motion for a new trial was granted. The court of appeal affirmed the order for a new trial (*104 Cal. App. 3d 579, 583)* . The court held that defendant had breached his duty to disclose because if a broker is related to the purchaser in such a way as to suggest a reasonable possibility that the broker could directly be acquiring an interest in the property, this must be disclosed to the owner (*104 Cal. App. 3d 579, 582)* . The court further stated that plaintiff was entitled to recover a minimum of $5,000 in damages, representing the amount of the commission, because the broker forfeited his right to a commission by breaching the duty of disclosure (*104 Cal. App. 3d 579, 582-583)* .

[4] Additional Authorities

[a] Owner May Recover Commission Paid

The facts and procedural background of *Bate v. Marsteller (1959) 175 Cal. App. 2d 573, 346 P.2d 903* , are discussed in *§ 31.121[3][a]*. In *Bate*, defendant broker and his agents and employees acquired an interest in plaintiffs' property without disclosing this fact to plaintiffs. Plaintiffs brought an action for fraud and the trial court granted judgment for defendants. The court of appeal reversed (*175 Cal. App. 2d 573, 584)* . The court held that defendant breached his duty to disclose material facts to plaintiffs (*175 Cal. App. 2d 573, 580)* . The court stated that, although the trial court found that plaintiffs' property was worth the sale price, the trial court erred in concluding that plaintiffs were not damaged. The court of appeal held that plaintiffs were damaged in the amount of the commission paid, to which defendant and his agents and employees were not entitled (*175 Cal. App. 2d 573, 581-582)* .

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 31 BROKERS AND SALESPERSONS
PART II. FORMS
B. Real Estate Broker's Liability to Owner

2A-31 California Points & Authorities § 31.123

§ 31.123 Opposing Contention That Owner May Recover From Broker Secret Profits Acquired Through Agency--Broker Owes No Duty to Disclose That Broker Is Purchasing Property When Listing Is Net Listing

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF OWNER MAY NOT RECOVER SECRET PROFITS ACQUIRED BY DEFENDANT BROKER AS AN OUTGROWTH OF THE AGENCY BECAUSE A BROKER OWES NO DUTY TO AN OWNER TO DISCLOSE THE FACT THAT THE BROKER IS PURCHASING THE PROPERTY WHEN THE LISTING IS A NET LISTING.

A. Net Listing Defined. A net listing contract is one in which the owner agrees to accept a specified net price of the property to be sold, and the broker's compensation for negotiating the sale is any amount in excess of the specified figure (*Loughlin v. Idora Realty Co. (1968) 259 Cal. App. 2d 619, 626-627, 66 Cal. Rptr. 747*).

B. Owner May Not Recover Broker's Profits Under Net Listing. A broker is not liable to an owner for secret profits when the broker fails to disclose that he or she is purchasing the property because a broker does not owe a duty to disclose this fact when the agreement is a net listing (*Pascal v. Cotton (1962) 205 Cal. App. 2d 597, 600-601, 23 Cal. Rptr. 357*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that a property owner may recover profits acquired by a broker as an outgrowth of the agency. This argument may be used when the broker has purchased the property without disclosure of this fact and the listing was a net listing. Only when the property owner has arrived at the net listing price without influence by the broker and the property was sold for the full net price, however, does the broker owe no duty to disclose the fact that he or she is purchasing the property under a net listing [*see* *Sierra Pacific Industries v. Carter (1980) 104 Cal. App. 3d 579, 582, 163 Cal. Rptr. 764* ; *Loughlin v. Idora Realty Co. (1968) 259*

Cal. App. 2d 619, 627-628, 66 Cal. Rptr. 747] .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel is responding to the contention that a property owner may recover profits from a broker. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that the listing was a net listing, the net price was arrived at without influence by the broker, and the property was sold for the net price.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities set out in *§ 31.120*.

[3] Discussion of Authorities

[a] Net Listing Defined

The facts and procedural background of ***Loughlin v. Idora Realty Co.*** *(1968) 259 Cal. App. 2d 619, 66 Cal. Rptr. 747* , are discussed in *§ 31.121[3][c]*. In *Loughlin*, the court of appeal reversed a judgment in favor of defendant broker in an action brought by plaintiffs owners to recover secret profits (*259 Cal. App. 2d 619, 633)* . The property was sold to defendant's mother-in-law without disclosure of the relationship and then was resold at a much higher price. Defendant contended that the two contracts under which the property was listed were net sale contracts and therefore, that defendant owed to plaintiffs no duty of disclosure. The court of appeal held that defendant owed a duty to disclose because the price specified in the first contract was not realized by plaintiffs and the evidence did not show that plaintiffs independently arrived at the net price set in the second contract (*259 Cal. App. 2d 619, 627-628)* . The court defined a net listing as one in which the owner agrees to accept a specified net price for the property to be sold and the agent's compensation for negotiating a sale is any amount received in excess of the specified figure (*259 Cal. App. 2d 619, 626)* .

[b] Owner May Not Recover Broker's Profits Under Net Listing

In ***Pascal v. Cotton*** *(1962) 205 Cal. App. 2d 597, 23 Cal. Rptr. 357* , plaintiffs, husband and wife sellers, brought an action against defendant broker and his associate to recover secret profits allegedly received on two transactions, one of them being a sale of property under a net listing. Plaintiffs gave defendant a listing on their property and told him that they wanted $37,500 net to them. The evidence disclosed that plaintiffs decided themselves on the selling price without influence by defendant and did not care what kind of commission defendant made as long as plaintiffs received the asking price. Defendant, his associate, and the associate's wife bought the property. This was not disclosed to plaintiffs. The trial court granted judgment for defendants and plaintiffs appealed. The court of appeal affirmed the judgment (*205 Cal. App. 2d 597, 602)* .

The court held that the listing was a net listing and that the net price was arrived at without influence by defendants. Thus, defendants had not breached any fiduciary obligation of disclosure by buying the property themselves without disclosing this fact to plaintiffs (*205 Cal. App. 2d 597, 600-601)* . Relying on prior case law, the court stated that when an owner authorizes an agent to sell his or her property for a fixed price net to the owner, with the understanding that the agent selling the property shall be entitled to any excess thereover as a commission or shall look to the purchaser for the payment of the commission, the agent may, without violating any trust relationship, purchase the property on his or her own account or act as the agent of others in acquiring the same (*205 Cal. App. 2d 597, 600)* .

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2A-31 California Points & Authorities §§ 31.124-31.139

[Reserved]

§§ 31.124[Reserved]

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C. Seller's Liability to Purchaser for Acts of Real Estate Broker or Salesperson

2A-31 California Points & Authorities § 31.140

§ 31.140 Supporting Contention That Purchaser Under Fraudulently Induced Real Estate Sales Contract May Rescind and Obtain Restitution or Recover Damages for Fraud From Seller--Seller-Owner Responsible for Fraudulent Representations of Broker or Salesperson

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF PURCHASER _____ [MAY RECOVER DAMAGES FOR FRAUD FROM DEFENDANT OWNER-SELLER *or* IS ENTITLED TO RESCIND THE REAL ESTATE SALES CONTRACT BETWEEN PLAINTIFF AND DEFENDANT OWNER-SELLER AND TO OBTAIN RESTITUTION AS THE RESULT OF FRAUD] BECAUSE DEFENDANT SELLER-OWNER IS RESPONSIBLE FOR FRAUDULENT MISREPRESENTATIONS MADE BY HIS/HER BROKER OR SALESPERSON ACTING WITHIN THE AUTHORITY OF THE AGENCY.

A. Seller-Owner Responsible for Fraudulent Misrepresentations of Agent. A seller-owner is responsible to the purchaser of the property for the fraudulent misrepresentations of the seller's broker or salesperson that are made while the broker or salesperson is acting within his or her authority (*see Civ. Code §§ 2338, 2339*; *Miller v. Wood (1961) 188 Cal. App. 2d 711, 714, 10 Cal. Rptr. 770* ; *Wilbur v. Wilson (1960) 179 Cal. App. 2d 314, 317, 3 Cal. Rptr. 770*).

B. Damages or Restitution Based on Rescission for Fraudulent Inducement. A purchaser who has been induced by fraud to enter into a contract to purchase property may, on discovery of the fraud, either rescind the contract and sue for the return of the consideration paid or allow it to stand and sue for damages (*see Civ. Code §§ 1689, 1692* (rescission), *3343* (damages); *Richard v. Baker (1956) 141 Cal. App. 2d 857, 861, 297 P.2d 674* ; *Williamson v. Clapper (1948) 88 Cal. App. 2d 645, 653, 199 P.2d 337*).

[*Optional*] **C. False Statement Without Sufficient Information Is Actionable Fraud.** A broker's or salesman's false statement made without sufficient information to warrant it is actionable as a fraudulent misrepresentation (*see Civ. Code § 1572(2)*; *Richard v. Baker (1956) 141 Cal. App. 2d 857, 861, 297 P.2d 674*).

[*Optional*] **D. Fact That Broker Agent for Both Parties No Defense to Fraud.** The fact that the broker is the agent for both parties to the real estate transaction is no defense to an action by one party to hold the other party responsible for the broker's misrepresentations with regard to the other party's property (*Miller v. Wood (1961) 188 Cal. App. 2d 711, 714, 10 Cal. Rptr. 770*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that a purchaser of property may recover damages for fraud from the owner-seller or is entitled to obtain restitution based on rescission of a fraudulently induced sales contract between the owner-seller and the purchaser. This argument may be used when the owner's broker or salesperson has, within his or her authority, made fraudulent misrepresentations that induced the purchaser to enter into the contract.

These points and authorities may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the substantive issue of a purchaser's right to recover damages for fraud from the seller-owner or to obtain restitution based on rescission of the sales contract. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that the broker made fraudulent misrepresentations to the purchaser while acting within his or her authority and that such representations induced the purchaser to enter into a sales contract for the property.

[b] Related Points and Authorities

For additional points and authorities relating to actions for fraud, see Ch. 105, *Fraud and Deceit* in this set. For additional points and authorities relating to the liability of a principal for acts of an agent, see Ch. 182, *Principal and Agent* , in this set.

[3] Discussion of Authorities

[a] Seller-Owner Responsible for Fraudulent Misrepresentations of Agent

In ***Miller v. Wood*** *(1961) 188 Cal. App. 2d 711, 10 Cal. Rptr. 770* , plaintiffs, two separate purchasers of real property from defendants' sellers, sued defendants' sellers and defendants' broker for restitution after rescission and for damages for fraud. The two separate actions were consolidated for trial, and the trial court granted judgment against defendant broker for fraud but judgment in favor of defendants sellers. Plaintiffs appealed, contending that defendants' sellers were vicariously responsible for defendant broker's representations because the broker was acting within his authority in negotiating the sales when he made the fraudulent representations. The court of appeal reversed both judgments so that there could be a complete and orderly disposition of the entire matter in the lower court (*188 Cal. App. 2d 711, 715)* . The court stated that if defendant broker was acting as the agent of defendants' sellers in negotiating the contracts of purchase, defendants' sellers would be vicariously responsible for the broker's representations in the course of negotiation. The court pointed out that the trial court found that defendant broker was employed by defendants' sellers to handle the property dealings for them as their broker. Because one of the primary functions of a broker is to negotiate a sale, the court stated that the implication that the broker had authority to negotiate the terms of the sale was inescapable (*188 Cal. App. 2d 711, 713-714)* .

In ***Wilbur v. Wilson*** *(1960) 179 Cal. App. 2d 314, 317, 3 Cal. Rptr. 770* , plaintiffs purchasers brought an action

against defendants sellers to reform a deed to the property purchased by plaintiffs and to abate the purchase price. The basis for the action was that defendants sellers falsely represented the acreage of the property and/or that there was mutual mistake of fact regarding the number of acres. The trial court granted judgment for plaintiffs and one of the defendants appealed. The court of appeal affirmed (*179 Cal. App. 2d 314, 318)* . One of defendant's contentions on appeal was that the finding of fraud could not stand because the brokers, as opposed to defendants, had actually communicated to plaintiffs the representation regarding the number of acres. The court disagreed and stated that if in fact the brokers were the agents of defendants, as the trial court found, defendants were responsible for their broker's statements (*179 Cal. App. 2d 314, 317)* .

[b] Damages or Restitution Based on Rescission for Fraudulent Inducement

In ***Richard v. Baker*** *(1956) 141 Cal. App. 2d 857, 297 P.2d 674* , plaintiffs purchasers brought an action against defendant owner for damages for fraud and misrepresentation. Plaintiffs alleged that when defendant's agent showed them the unimproved lot that they eventually purchased, he misrepresented the boundary lines. Plaintiffs also alleged that they purchased and improved the property and later found out that the boundary line was not as represented. The trial court refused to admit plaintiffs' evidence of the fraudulent representations concerning the boundary line on the ground that the oral evidence would alter the terms of the written agreement of sale in violation of the parol evidence rule. The trial court granted a nonsuit and plaintiffs appealed. The court of appeal reversed the judgment, holding that plaintiffs' offered evidence should not have been excluded (*141 Cal. App. 2d 857, 865)* . The court stated that a vendee who has been induced to purchase property by fraud or deceit may, on discovery, either rescind the contract or allow it to stand and sue for damages (*141 Cal. App. 2d 857, 861)* .

In ***Williamson v. Clapper*** *(1948) 88 Cal. App. 2d 645, 199 P.2d 337* , plaintiffs purchasers sued defendants sellers for damages for fraud. Plaintiffs alleged that either defendants or a real estate salesman for defendants' broker falsely represented to plaintiffs that the property plaintiffs purchased was zoned for use as a trailer court. As a result, plaintiffs alleged that they purchased the property and started building a trailer court only to discover that the property was restricted against this use. The trial court granted judgment for defendants and plaintiffs appealed. The court of appeal reversed (*88 Cal. App. 2d 645, 649)* . One of the contentions of defendants on appeal was that plaintiffs waived the fraud by completing the purchase after they learned that the property was restricted. The court held that plaintiffs had not done so because they had a right to elect whether to rescind the agreement on the ground of fraud and obtain restitution or to complete their purchase and sue for damages (*88 Cal. App. 2d 645, 653)* .

[c] False Statement Without Sufficient Information Is Actionable Fraud

The facts and procedural background of ***Richard v. Baker*** *(1956) 141 Cal. App. 2d 857, 297 P.2d 674* , are discussed in *§ 31.140[3][b]*. In *Richard*, the court of appeal reversed a nonsuit granted by the trial court after the trial court refused to admit plaintiffs' evidence of oral misrepresentations regarding the boundary of the property (*141 Cal. App. 2d 857, 865)* . Plaintiffs alleged in their complaint, and offered to introduce evidence to show, that defendants' broker falsely represented the boundary lines on the property. The court of appeal held the evidence of fraud admissible and stated that defendants' agent either knew of the true location of the boundaries and knew, therefore, that he was telling an untruth, or should have known the true boundaries; and a representation made with the intent that the recipient thereof shall act in reliance thereon is actionable when falsely made or when made without sufficient information to warrant it (*141 Cal. App. 2d 857, 863)* .

[d] Fact That Broker Agent for Both Parties No Defense to Fraud

The facts and procedural background of ***Miller v. Wood*** *(1961) 188 Cal. App. 2d 711, 10 Cal. Rptr. 770* , are discussed in *§ 31.140[3][a]*. In *Miller*, the court of appeal reversed a judgment in favor of defendants' sellers in an action brought by plaintiff purchasers against defendant sellers and defendants' broker for fraud (*188 Cal. App. 2d 711, 715)* . The trial court found that the broker had induced plaintiffs to purchase defendants' property through a series of fraudulent

representations. One of defendants' sellers' contentions on appeal was that the broker was acting as the agent for plaintiffs as well as for defendants and that therefore, the broker's statements were also chargeable to plaintiffs. The court of appeal disagreed with this contention and stated that the fact that the broker or agent is the agent for both parties is no defense to an action by one party to hold the other party responsible for the broker's or agent's misrepresentations with regard to the other party's property (*188 Cal. App. 2d 711, 714)* .

[4] Additional Authorities

[a] Seller-Owner Responsible for Fraudulent Misrepresentations of Agent

The facts and procedural background of *Williamson v. Clapper (1948) 88 Cal. App. 2d 645, 199 P.2d 337* , are discussed in *§ 31.140[3][b]*. In *Williamson*, the court of appeal reversed a judgment in favor of defendants sellers in an action brought by plaintiffs purchasers for false representations regarding the condition of the title of the property purchased (*88 Cal. App. 2d 645, 653)* . The evidence disclosed that defendants and the real estate agent working for defendants' broker both falsely represented that the property could be used as a trailer court when in fact this use was prohibited. The court held that defendants' sellers were responsible for the representations of their broker's agent because the representations were made within the agent's authority and defendants' sellers knew of the false representations (*88 Cal. App. 2d 645, 650)* . The court stated that the language of the listing was sufficient to authorize the agent to act for defendants in negotiating a sale and to render defendants responsible for any misrepresentations made by the agent regarding the condition of defendants' title (*88 Cal. App. 2d 645, 650)* .

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2A-31 California Points & Authorities § 31.141

§ 31.141 Supporting Contention That Purchaser Entitled to Restitution Based on Rescission for Fraudulent Representations of Seller's Broker or Salesperson--Restitution Based on Rescission Permitted Although Contract Contains Exculpatory Clause

[1] FORM

[*The following should be combined with § 31.140 and may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF PURCHASER MAY RESCIND THE REAL ESTATE SALES CONTRACT WITH DEFENDANT SELLER AND RECOVER THE CONSIDERATION PAID BASED ON FRAUDULENT REPRESENTATIONS BY DEFENDANT'S _____ [BROKER *or* SALESPERSON], ALTHOUGH THE CONTRACT CONTAINS AN EXCULPATORY CLAUSE LIMITING THE AGENT'S AUTHORITY TO MAKE BINDING REPRESENTATIONS, BECAUSE AN EXCULPATORY CLAUSE DOES NOT PREVENT RESCISSION OF A CONTRACT FOR FRAUDULENT REPRESENTATIONS OF A SELLER'S _____ [BROKER *or* SALESPERSON].

Restitution Based on Rescission Available Despite Exculpatory Clause. A seller is entitled to rescind a contract of sale and recover consideration paid under the contract when the contract was entered on the basis of the fraudulent representations of the seller's broker or salesperson, although the contract contains an exculpatory clause limiting the agent's authority to make binding representations, because an exculpatory clause does not prevent rescission for fraudulent representations of a seller's broker or salesperson (*see Greenberg v. Du Bain Realty Corp. (1935) 2 Cal. 2d 628, 629, 42 P.2d 628* ; *Speck v. Wylie (1934) 1 Cal. 2d 625, 627-628, 36 P.2d 618*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that a party may rescind the contract of sale entered into on the basis of the fraudulent representations of the seller's broker. The argument may be used when

the contract contains an exculpatory clause limiting the broker's or salesperson's authority to make binding representations. This should be combined with the points and authorities set out in *§ 31.123*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the purchaser's right to rescind the contract of sale and to the return of the consideration paid. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Restitution Based on Rescission Available Despite Exculpatory Clause

In ***Greenberg v. Du Bain Realty Corp.*** *(1935) 2 Cal. 2d 628, 42 P.2d 628* , plaintiff purchaser sued defendant seller for restitution based on rescission, alleging that the contract of sale was entered due to the fraudulent representations of a salesman for defendant's realty company. The trial court sustained a demurrer to the complaint and the court of appeal affirmed the judgment, holding in part that defendant was not liable for the representations of defendant's agent because of the provision in the contract limiting the authority of the agent to make such representations. The Supreme Court reversed the judgment (*2 Cal. 2d 628, 630)* . Citing earlier Supreme Court decisions, the Court stated that the rule is now firmly established that restitution based on rescission of a contract for an agent's unauthorized misrepresentations may be had even against an innocent principal, even though the rescinding party had notice of the agent's lack of authority. The Court pointed out that the reason for holding the principal responsible in such an instance was equitable rule against unjust enrichment (*2 Cal. 2d 628, 629)* .

In ***Speck v. Wylie*** *(1934) 1 Cal. 2d 625, 36 P.2d 618* , plaintiff purchaser brought an action for restitution based on rescission against defendants sellers for material misrepresentations by defendants' selling agent. The contract between plaintiff and defendants contained an exculpatory clause limiting the agent's authority to alter or change the terms of the contract and providing that neither party was to be bound by representations not in conformity with the contract. The trial court granted judgment for plaintiff and the Supreme Court affirmed (*1 Cal. 2d 625, 628)* . The Court carved out an exception to the rule, announced earlier by the Court in *Gridley v. Tilson (1927) 202 Cal. 748, 262 P. 322* , that parol evidence would not be admitted to show fraudulent representations by an agent to induce the making of a contract when the defrauded party knew that the representations were unauthorized. The exception to this rule, the Court held, allows the purchaser to obtain restitution based on rescission, but not damages for fraud, when the purchaser is induced to enter into the contract of sale by the fraudulent representations of the seller's agent, even though the purchaser knows that the representations are unauthorized because of a provision in the contract (*1 Cal. 2d 625, 627-628*).

[4] Additional Authorities

[a] Restitution Based on Rescission Available Despite Exculpatory Clause

In *Herzog v. Capital Co. (1945) 27 Cal. 2d 349, 164 P.2d 8* , plaintiffs' purchasers sued defendants' sellers for damages for fraud after the house that plaintiffs purchased began to leak badly and an inspection revealed that the leak was due to the use of defective materials and bracing. The evidence disclosed that plaintiffs were taken on a tour of the house by the real estate agent for defendants and told that the house was in perfect repair when, in fact, the agent knew from past experience with the house that it leaked badly. In addition, the agent had caused the house to be refinished and newly painted, concealing the structural defects. The trial court granted judgment for plaintiffs and defendants appealed. The Supreme Court affirmed (*27 Cal. 2d 349, 354)* . One of defendants' contentions on appeal was that the agreement of sale provided that there were no promises, representations, verbal understandings, or agreements except those contained in the contract and that because of this clause, defendants could not be held liable for the broker's statements. The Court held that this clause had no application to a failure to disclose material facts (*27 Cal. 2d 349,*

354) . The Court, in dicta, discussed the effect of the exculpatory clause and stated that the provision will relieve an honest seller from liability for damages for the misrepresentations of his or her agent but it will not prevent a defrauded purchaser from rescinding the contract and pursuing the innocent seller far enough to secure a return of the consideration paid. The Court also stated that the rule does not exempt the principal from liability for his or her own conduct (*27 Cal. 2d 349, 353)* .

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2A-31 California Points & Authorities § 31.142

§ 31.142 Supporting Contention That Transferee May Recover Damages for Failure of Transferor to Make Statutory Disclosure on Basis of Information Known to Transferor's Agent [Civ. Code § 1102.4]

[1] FORM

[*The following should be combined with appropriate portions of* §§ 31.140 and 31.141 and may be included in a memorandum of points and authorities, or in a trial or appellate brief.]

A TRANSFEREE MAY RECOVER DAMAGES FOR FAILURE OF THE TRANSFEROR TO DISCLOSE _____ [*specify condition, e.g.,* PERMITLESS ROOM ADDITIONS] KNOWN TO THE TRANSFEROR'S AGENT.

A. Duty to Disclose Specified Conditions. Except as otherwise provided in *Civil Code Section 1102.2*, a transferor of any real property or residential stock cooperative containing at least one but not more than four residential units, whether the transfer is made by sale, exchange, installment land sale contract, lease with option to purchase, any other option to purchase, or ground lease coupled with improvements, must deliver to the prospective transferee the written disclosure statement set forth in *Civil Code Section 1102.6*, stating at Item _____ [*specify, e.g.,* II. C. 4.] whether or not _____ [*specify, e.g.,* room additions, structural modifications, or other alterations or repairs were made without necessary permits] (*Civ. Code §§ 1102(a), 1102.3, 1102.6*).

B. Agent's Knowledge as Basis for Statutory Liability. For a transferor and the transferor's agent [including any cooperating agent] to escape liability for any error, inaccuracy, or omission in the disclosure required by *Civil Code Section 1102 et seq.*, the error, inaccuracy, or omission must not have been within the personal knowledge of the transferor or the transferor's agent [including any cooperating agent], and must have been based on information timely provided by public agencies or other persons providing information required to be disclosed. Further, ordinary care must have been exercised in obtaining and transmitting the information (*Civ. Code § 1102.4(a)*).

C. Actual Damages for Violation. Any person who willfully or negligently violates or fails to perform any duty prescribed by any provision of *Civil Code Section 1102 et seq.* is liable in the amount of actual damages suffered by a

transferee (*Civ. Code § 1102.13*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a party's contention that a transferee of real property or a residential stock cooperative containing up to four units is entitled to damages from the transferor and the transferor's agent for failure to give, or inaccuracy in giving, the disclosures required by *Civ. Code § 1102 et seq.* Liability under *Civ. Code § 1102.13* attaches for both willful and negligent violations and omissions, but does not include liability for the transferee's attorney's fees (Paragraph C). In the case of a transaction covered by *Civ. Code § 1102.4(a)*, the term "transferor's agent" as used in Paragraph B includes both the listing agent and any other broker cooperating through a multiple listing service who sells, or finds and obtains a buyer for, the property [*Civ. Code §§ 1086(g), (h), 1102.4(a), 1102.14*].

This form should be combined with the appropriate portions of §§ 31.140 and 31.141 relating to (1) the general rule imputing agent's knowledge to the principal [*see § 31.140[1]*, P A], and (2) whichever other remedies are being sought by the transferee.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of transferee's entitlement to damages based on transferor's agent's personal knowledge or lack of care. It may also be adapted for use in a trial or appellate brief.

This form may be modified to apply to a resale transaction entered into on or after January 1, 2000, for a manufactured home [*see Health & Safety Code § 18007*] or mobilehome [*see Health & Safety Code § 18008*] that is classified as personal property and intended for use as a residence. As of the above date, such a resale transaction is subject to the disclosure requirements of *Civ. Code § 1102 et seq.* [*Civ. Code § 1102(b)*; *see Civ. Code §§ 1102.1(b), 1102.3a*; *see also Civ. Code § 1102.6(d)* (statutory disclosure form for these resale transactions)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should refer to the allegations in the complaint that establish that the required disclosure(s) specified in Paragraph A of this form was/were not given by the transferor and the transferor's agent. Counsel can then argue transferee's entitlement to damages based on the authorities set forth above.

[3] Discussion of Authorities

[a] Duty to Disclose Specified Conditions

The disclosure required by *Civ. Code §§ 1102, 1102.3*, and *1102.6* is to be made as soon as is practicable before transfer of title in the case of a sale. In all other cases, disclosure is to be made as soon as is practicable before execution of the contract. For these purposes, "execution" means the making or acceptance of an offer [*Civ. Code § 1102.3*]. Any waiver of these requirements is void as against public policy [*Civ. Code § 1102(c)*].

Part II. A. of the statutory disclosure form provides a checklist of over 40 appliances, appurtenances, and systems (e.g., rain gutter, septic tank, air conditioning) and requires the seller to check those that exist and to describe items that are not in operating condition. Part II. B. asks if the seller is aware of any significant defects or malfunctions in any listed structural components and requires an explanation of any items checked. Item II. C. consists of 16 questions regarding seller's awareness of specific situations, including encroachments, flooding, fill on the property, slide, slippage, noisy neighbors or other nuisances, and noncompliance with building codes.

Part III of the statutory disclosure form requires the seller's agent to disclose the results of his or her reasonably competent and diligent visual inspection of accessible areas of the property and inquiry of the sellers [*see also Easton v. Strassburger (1984) 152 Cal. App. 3d 90, 98-107, 199 Cal. Rptr. 383* (duty of listing broker to inspect and disclose)]. Part IV of the statutory disclosure form requires any other agent who obtained the offer to disclose the results of his or her reasonably competent and diligent visual inspection of accessible areas [*see also Civ. Code §§ 2079-2079.5* (duty of listing and cooperating broker to inspect and disclose)].

Additional disclosure requirements apply to brokers and their clients with regard to real estate transactions. A seller of residential real property who knows that any release of an illegal controlled substance has come to be located on or beneath the real property must give written notice advising of that condition to the buyer before sale of the property. Notice is given by checking "yes" on the appropriate question on the Real Estate Transfer Disclosure Statement [*see Civ. Code § 1102.6*] and attaching a copy of any notice received from law enforcement or any other entity, such as the Department of Toxic Substances Control, the county health department, or the local environmental health officer [*Civ. Code § 1102.18(b)(1)*]. "Illegal controlled substance" means a drug, substance, or immediate precursor listed in specified schedules [*Civ. Code § 1102.18(a)(1), (b)(1)*; *see Health & Safety Code §§ 11054-11058*], or an emission or waste material resulting from the unlawful manufacture or attempt to manufacture of an illegal controlled substance, which does not include marijuana [*Civ. Code § 1102.18(a)(1)*; *see Civ. Code § 1102.18(b)(1)* ("release" defined)].

The seller of any real property subject to the disclosure requirements of *Civ. Code § 1102 et seq.* must make disclosures if the property being transferred is subject to a continuing lien securing the levy of special taxes pursuant to the Mello-Roos Community Facilities Act [*Gov. Code § 53111 et seq.*] or to a fixed lien assessment collected in installments to secure bonds issued under the Improvement Bond Act of 1915 [*Sts. & Hy. Code § 8500 et seq.*] which concerns street improvements [*Civ. Code § 1102.6b(a)*]. The seller must make a good faith effort to obtain and deliver to the transferee a disclosure notice concerning the special Mello-Roos tax provided in *Gov. Code § 53340.2*, and the assessment installment provided in *Gov. Code § 53754* from each local agency that levies the special tax or that collects the assessment installments [*Civ. Code § 1102.6b(b)*]. A seller may satisfy the disclosure notice requirements by delivering a disclosure notice obtained from a nongovernmental source that satisfies the specified requirements [*Civ. Code § 1102.6b(d)(1)*; *see Civ. Code § 1102.6b(d)(3)* (provision does not change ability to make disclosures pursuant to *Civ. Code § 1102.4*)]. With regard to each type of required disclosure, a notice provided by a private entity other than a designated office, department, or bureau of the levying entity may be modified as needed to clearly and accurately describe either of the following [*Civ. Code § 1102.6b(d)(2)*]:

- A special tax pursuant to the Mello-Roos Community Facilities Act levied against the property, or clearly and accurately consolidated information about two or more districts that levy or are authorized to levy a special tax pursuant to the Mello-Roos Community Facilities Act against the property. This notice must include the name of the Mello-Roos levying taxes against the property, the annual tax due for the Mello-Roos for the current tax year, the maximum tax that may be levied against the property in any year, the percentage by which the maximum tax for the Mello-Roos may increase per year, the date until that the tax may be levied against the property for the Mello-Roos, and a contact telephone number, if available, for further information about the Mello-Roos.

- Special assessments and bonds pursuant to the Improvement Bond Act of 1915 levied against the property, or clearly and accurately consolidated information about two or more districts that levy or are authorized to levy special assessments and bonds pursuant to the Improvement Bond Act of 1915 against the property. This notice must include the name of the special assessments and bonds issued pursuant to the Improvement Bond Act of 1915, the current annual tax on the property for the special assessments and bonds issued pursuant to the Improvement Bond Act of 1915, and a contact telephone number, if available, for further information about the special assessments and bonds issued pursuant to the Improvement Bond Act of 1915.

If these required disclosures have been delivered to the transferee, the seller or the seller's agent is not required to provide additional information concerning the special tax or assessment installments, and the disclosure information is deemed to satisfy the responsibility of the seller or the seller's agent to provide this information to the transferee. In any case, these disclosure requirements do not impose a duty agent to discover a special tax or assessment installments, or the existence of any levying district not actually known to the agents [*Civ. Code § 1102.6b(e)*].

In the future, the Toxic Mold Protection Act of 2001 [*Health & Safety Code §§ 26100-26156*] may eventually require a seller to provide written disclosures to potential buyers concerning mold problems in specified types of real property [*see Health & Safety Code §§ 26140-26153*]. However, these disclosure duties and requirements will not apply until the January 1 or July 1 that occurs at least six months after the Department adopts the requisite standards and guidelines [*see Health & Safety Code § 26154*; *see also Health & Safety Code § 26156* (funding contingency)].

[b] Agent's Knowledge as Basis for Statutory Liability

Although the disclosures are to be based on the personal knowledge of the transferor, liability is imposed on any person who willfully or negligently violates or fails to perform any duty prescribed by the applicable provisions [*Civ. Code § 1102.13*]. *Civ. Code §§ 1102.4, 1102.5* state when a transferor or his or her agent will not be liable for errors, inaccuracies, or omissions in the disclosure. However, these sections have not yet been judicially interpreted and it is not clear what liability will be established on the part of the broker or for the failure to seek public agency information.

[c] Actual Damages Available for Violation

In cases of violations, in addition to any other remedies provided by law, the transferee may recover actual damages. However, no transfer may be set aside solely because of the failure to provide the required disclosures [*Civ. Code § 1102.13*]. However, *Civ. Code § 1102.13* is applicable only when the buyer has gone through with the transaction despite the seller's failure to comply with the statutory disclosure requirements. If no transfer has taken place, § 1102.13 does not apply. Prior to transfer, the failure to provide a disclosure statement gives rise to a right to rescission in the buyer [*Realmuto v. Gagnard (2003) 110 Cal. App. 4th 193, 202-205, 1 Cal. Rptr. 3d 569]* .

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2A-31 California Points & Authorities § 31.143

§ 31.143 Opposing Contention That Purchaser Under Real Estate Sales Contract May Recover Damages for Fraud From Seller for Fraudulent Representations of Seller's Broker or Salesperson--Seller-Owner Not Responsible for Fraudulent Representations of Broker or Salesperson When Exculpatory Clause in Contract Limits Agent's Authority to Make Representations

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF PURCHASER MAY NOT RECOVER DAMAGES FROM DEFENDANT SELLER-OWNER FOR FRAUDULENT REPRESENTATIONS ALLEGEDLY MADE BY DEFENDANT'S _____ [BROKER *or* SALESPERSON] BECAUSE THE CONTRACT OF SALE CONTAINS AN EXCULPATORY CLAUSE LIMITING THE AUTHORITY OF THE AGENT TO MAKE BINDING REPRESENTATIONS CONCERNING THE SUBJECT MATTER OF THE CONTRACT, AND THAT CLAUSE PRECLUDES RECOVERY OF DAMAGES AGAINST AN INNOCENT SELLER.

No Recovery of Damages for Fraud Under Exculpatory Clause. When the sales contract between the purchaser and seller contains a provision limiting the authority of the seller's real estate broker or salesperson to make binding representations concerning the subject matter of the contract, the purchaser cannot recover damages from the innocent seller for fraudulent representations of his or her agent (*see Herzog v. Capital Co. (1945) 27 Cal. 2d 349, 353, 164 P.2d 8* ; *Speck v. Wylie (1934) 1 Cal. 2d 625, 627-628, 36 P.2d 618*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that a purchaser may recover damages for fraud from a seller for alleged fraudulent representations of the seller's broker or salesperson. This argument may be used when the sales contract contains a provision limiting the authority of the broker or salesperson to make binding representations concerning the subject matter of the contract.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel is responding to the contention that a purchaser may recover damages from the seller for the fraudulent representations of the seller's broker or salesperson. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing that the contract of sale limited the authority of the broker or salesperson to make binding representations concerning the subject matter of the contract and that the seller was unaware of the fraudulent representations.

[3] Discussion of Authorities

[a] No Recovery of Damages for Fraud Under Exculpatory Clause

The facts and procedural background of ***Herzog v. Capital Co.*** *(1945) 27 Cal. 2d 349, 164 P.2d 8* , are discussed in *§ 31.141[4][a]*. In *Herzog*, the Supreme Court affirmed a judgment for damages for fraud against defendant sellers based on the failure of the sellers' real estate broker to disclose defects in selling defendants' house (*27 Cal. 2d 349, 354)* . Plaintiffs were told by defendants sellers' real estate agent that the house they eventually bought was in perfect condition when, in fact, the agent knew from past experience that it leaked badly. The agent also painted and refinished the house, thereby covering up the defects. The contract of sale contained a provision that there were no promises, representations, verbal understandings, or agreements except those contained in the contract, and defendants contended that they were therefore not liable for the representations of the agent. The Supreme Court stated that such a provision will relieve an honest seller from liability for damages for the fraudulent representations of his or her negotiating agent. The Supreme Court held, however, that this clause did not limit defendants sellers' liability for the agent's failure to disclose known defects. The agent's knowledge was imputed to the seller (*27 Cal. 2d 349, 353)* .

The facts and procedural background of ***Speck v. Wylie*** *(1934) 1 Cal. 2d 625, 36 P.2d 618* , are discussed in *§ 31.141[3][a]*. In *Speck*, the Supreme Court affirmed a judgment for plaintiffs purchasers for the recovery, after rescission, of consideration paid under a contract (*1 Cal. 2d 625, 628)* . The contract of sale contained a provision stating that the agent did not have authority to alter or change the terms of the agreement and that the property was not purchased as the result of representations by the seller or the selling agent. The purchase of the property was induced by a material misrepresentation of defendants' real estate agent. The Court held that, despite the provision limiting the authority of the agent, the defrauded purchaser could rescind the contract and recover from the seller the consideration paid (*1 Cal. 2d 625, 627-628)* . The Court stated that, although rescission is not precluded by the provision, an action for fraud and deceit would not be allowed (*1 Cal. 2d 625, 628)* .

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2A-31 California Points & Authorities § 31.144

§ 31.144 Opposing Contention That Purchaser May Recover Damages From Seller or Seller's Agent for Nondisclosure--No Obligation to Make Disclosures Regarding Legal Ramifications of Factual Nature of Realty

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF PURCHASER MAY NOT RECOVER DAMAGES FROM DEFENDANT FOR ALLEGED NONDISCLOSURES BECAUSE THE MATTERS ALLEGEDLY NOT DISCLOSED RELATE TO THE LEGAL RAMIFICATIONS OF THE FACTUAL NATURE OF REALTY AND A CONCLUSION AS TO HOW THE RAMIFICATIONS MAY ADVERSELY IMPACT VALUE, AND THESE MATTERS ARE NOT "FACTS" SUBJECT TO COMMON LAW OR STATUTORY DISCLOSURE REQUIREMENTS.

No Duty to Make Disclosures Relating to Factual Nature of Realty. Although common law and statutory disclosure requirements require the seller of real estate and his or her broker to reveal to purchasers all factual matters bearing on the quality of the property being sold that might be detrimental to value, the legal ramifications of the factual nature of realty, and a conclusion as to how they may adversely impact value, are not "facts" subject to required disclosure (*Sweat v. Hollister (1995) 37 Cal. App. 4th 603, 608-609, 43 Cal. Rptr. 2d 399*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a seller is liable for nondisclosure under either a theory of common-law fraud or under statutory disclosure requirements, such as those set forth in *§ 31.142*. The form is for use when the "fact" allegedly not disclosed consists of information concerning the legal ramifications of a disclosed fact concerning the property and its effect on the value of the property.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue concerning the extent of the seller or seller's broker to make

disclosures to purchasers relating to the factual nature of realty. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[3] Discussion of Authorities

[a] No Duty to Make Disclosures Relating to Factual Nature of Realty

In ***Sweat v. Hollister*** *(1995) 37 Cal. App. 4th 603, 43 Cal. Rptr. 2d 399* , plaintiffs-purchasers brought suit against the sellers of a house and their brokers. The complaint alleged that the brokers participated in misrepresentations or failures to disclose certain material information in their representations, and particularly in the preparation and delivery of the statutory real estate transfer disclosure statement. The false statement alleged to have been included in the disclosure statement was the statement that there was no "nonconforming use" relative to the property. The disclosure statement did indicate that the property was in a designated flood plain. The plaintiffs asserted that a local ordinance prevented property located in a flood plain from being altered or enlarged in the event of destruction, that this restriction constituted a defect or nonconforming use, and that this "concealed defect" caused the value of the house to be reduced by $215,000. The superior court granted summary judgment in favor of the defendants and awarded them attorney's fees, and the purchasers appealed.

The court of appeal reversed the award of attorney's fees to the sellers' brokers, but affirmed the remainder of the judgment. The court held that the sellers and their brokers, having disclosed that the house was in a flood plain, had no further obligation to disclose that the property, because of its location in the flood plain, was subject to restrictions on improvement or alteration in the event of partial destruction. The court stated that the common law disclosure requirements imposed on the seller of real estate and his or her broker, as well as the more recent statutory disclosure requirements (*Civ. Code § 1102 et seq.*), require revelation of all factual matters bearing on the quality of the property being sold that might be detrimental to value. These factual matters would include, for instance, that the property was constructed on filled land, that the structure was in violation of building codes or zoning ordinances, that the structure had been condemned, or that it was termite-ridden. The legal ramifications of the factual nature of the realty, however, and a conclusion as to how they may adversely impact value, is not a fact subject to required disclosure. If the buyer of property is accurately informed as to the zoning, for instance, it is not necessary for the seller also to advise concerning the detrimental aspects of any specific zoning. The court concluded by stating that this principle applies as well to the disabilities associated with owning a house located in a flood plain; in that situation, the existence of disabilities should be obvious to any buyer. Thus, it is not the obligation of the seller to research local land use ordinances and advise a buyer as to their effect on the realty (*37 Cal. App. 4th 603, 608-609)* .

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2A-31 California Points & Authorities § 31.145

§ 31.145 Opposing Contention That Purchaser May Recover Damages From Seller's Broker for Nondisclosure--No Duty to Inspect Inaccessible Areas, Off-site Areas, Public Records, or Unaffected Units

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF PURCHASER MAY NOT RECOVER DAMAGES FROM DEFENDANT BROKER FOR AN ALLEGED FAILURE TO INSPECT _____ [INACCESSIBLE AREAS *and/or* OFF-SITE AREAS and/or PUBLIC RECORDS and/or UNAFFECTED UNITS] BECAUSE BROKER DID NOT HAVE A DUTY TO INSPECT SUCH _____ [AREAS *and/or* RECORDS].

No Duty to Inspect Inaccessible or Off-site Areas or Public Records. The inspection to be performed by a broker pursuant to *Civil Code Section 2079 et seq.* does not include or involve an inspection of areas that are reasonably and normally inaccessible to such an inspection, nor an affirmative inspection of areas off the site of the subject property or public records or permits concerning the title or use of the property (*Civ. Code § 2079.3*).

No Duty to Inspect More Than Unit Offered for Sale. If property for sale comprises a unit in a planned development, a condominium, or a stock cooperative, the inspection to be performed by a broker pursuant to *Civil Code Section 2079 et seq.* does not include an inspection of more than the unit offered for sale, if the seller or the broker complies with the requirements of *Civil Code Section 1368* (*Civ. Code § 2079.3*; *Padgett v. Phariss (1997) 54 Cal. App. 4th 1270, 1282, 63 Cal. Rptr. 2d 373*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to the contention that a seller's broker is liable for failure to inspect public records or areas that are inaccessible, off-site, or, in the case of a unit in a common-interest development, do not consist of the particular unit offered for sale.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue concerning the extent of the duty of the seller or the seller's broker to make disclosures to the purchasers. They may also be adapted for use in a trial or appellate brief or in jury instructions.

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should discuss the facts showing that the alleged nondisclosure involved areas or records that fall within the scope of *Civ. Code § 2079.3*.

[3] Discussion of Authorities

[a] No Duty to Inspect More Than Unit Offered for Sale

If property for sale comprises a unit in a planned development as defined in *Bus. & Prof. Code § 11003*, a condominium as defined in *Civ. Code § 783*, or a stock cooperative as defined in *Bus. & Prof. Code § 11003.2*, the inspection to be performed by a broker pursuant to *Civ. Code § 2079 et seq.* does not include an inspection of more than the unit offered for sale, if the seller or the broker complies with the requirements of *Civ. Code § 1368* (*Civ. Code § 2079.3*; *see Civ. Code § 1368*) (requiring owner of a separate interest in a common interest development to provide specified documents to a prospective purchaser as soon as practicable before transfer of title).

In ***Padgett v. Phariss*** *(1997) 54 Cal. App. 4th 1270, 1277, 1282, 63 Cal. Rptr. 2d 373* , the plaintiff entered into a contract to purchase a house in a planned unit development. The portion of the statutory real estate transfer disclosure statement completed by the sellers stated that there were no lawsuits against the sellers threatening or affecting the real property. The sellers' agent and the plaintiff's agent filled out their parts of the disclosure statements, noting no evident problems with the property. In fact, the homeowners' association for the development had filed an action for construction defects against the developer approximately one month before the plaintiff signed the contract of sale. The plaintiff brought an action for rescission and damages against the sellers, and for damages against the two real estate agents involved. The trial court granted summary judgment in favor of the defendants on all claims.

The court of appeal affirmed. Three of the causes of action were based on statutes governing an agent's duty to inspect and make related disclosures [*see Civ. Code §§ 1102.6, 1102.13, 2079, 2079.3*], and alleged the agents intentionally or negligently failed to make the required written disclosures about the property and failed to investigate and disclose the condition of the property. The plaintiff claimed that because of the agents' knowledge that construction problems were common in planned unit developments, the agents had the duty to make inquiries of the homeowners' association about lawsuits based on construction defects, which would have disclosed the existence of the lawsuits. The court noted that the home inspection report disclosed no defects in the property, and there was no evidence that the agents knew of any defects or pending litigation. There was no justifiable basis for imposing on them a duty of inquiry of the homeowners' association. Further, the 1994 amendment to Section 2079.3 made it clear that the inspection need not include areas off the site of the property or public records or permits regarding title or use of the property, nor an area greater than the actual unit offered for sale. In conclusion, the plain language of § 2079.3 controlled so that the extended inspection described by the plaintiff was not required (*54 Cal. App. 4th 1270, 1282)* .

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2A-31 California Points & Authorities § 31.146

§ 31.146 Opposing Contention That Purchaser May Recover Damages From Seller's Broker for Nondisclosure--Broker Has No Duty To Independently Verify or Disclaim Accuracy of Seller's Representations

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF PURCHASER MAY NOT RECOVER DAMAGES FOR FAILURE OF DEFENDANT BROKER TO INDEPENDENTLY VERIFY OR DISCLAIM ACCURACY OF SELLER'S REPRESENTATIONS.

Broker Has No Duty to Independently Verify or Disclaim Accuracy of Seller's Representations. A broker's disclosure duty under *Civil Code Section 2079* does not include a duty to independently verify or disclaim the accuracy of the seller's representations; the seller's agent is required only to act in good faith and not convey the seller's representations without a reasonable basis for believing them to be true (*Robinson v. Grossman (1997) 57 Cal. App. 4th 634, 641-642, 67 Cal. Rptr. 2d 380*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to the contention that a seller's agent or broker is liable for nondisclosure of information that would have come to light if the seller's agent had attempted to independently verify or disclaim the accuracy of the seller's representations on the statutory disclosure form.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue concerning the extent of the duty of the seller or the seller's broker to make disclosures to the purchasers. It may also be adapted for use in a trial or appellate brief or in jury instructions.

[3] Discussion of Authorities

[a] Broker Has No Duty to Independently Verify or Disclaim Accuracy of Seller's Representations

In ***Robinson v. Grossman*** *(1997) 57 Cal. App. 4th 634, 637, 67 Cal. Rptr. 2d 380* , the plaintiff-purchasers brought an action against the sellers and the sellers' broker and agent for professional negligence and negligent and intentional misrepresentation based on the agent's failure to disclose defects in the property. On the real estate transfer disclosure statement, the sellers represented that they were unaware of any significant defects in the foundation and exterior walls. The agent inspected the property and noticed hairline stucco cracks, which the sellers said were only cosmetic. The agent did not note them on her portion of the disclosure statement. When the purchasers looked at the home, they saw the stucco cracks. Their agent recommended that they have the home professionally inspected. One of the sellers advised them that the cracks were in the finish of the house. The purchasers made an offer, which was accepted. It was conditioned on inspections by a home inspector and geologist. The home inspector opined that the house was well built, after noting the cracks and some water stains. The Robinsons bought the property. Several weeks later, when they attempted to have a swimming pool installed, the excavation collapsed, requiring backfilling and recompaction. They brought the action mentioned above. In a special verdict, the jury found that the sellers' broker and agent did not breach the professional standard of care. With regard to the claim of negligent misrepresentation, the jury found the seller's broker and agent misrepresented a past or existing material fact, but the misrepresentation was made with a reasonable ground for believing it to be true.

The court of appeal affirmed. Initially it noted that ***Easton v. Strassburger*** *(1984) 152 Cal. App. 3d 90, 199 Cal. Rptr. 383* first pronounced the duty of the seller's broker to potential purchasers to both inspect and disclose. This duty is set forth in *Civ. Code § 2079*, which provides that it is the duty of the broker or salesperson to a prospective purchaser of residential real property to conduct a reasonably competent and diligent visual inspection of the property and to disclose to the prospective purchaser all facts materially affecting the value or desirability of the property that an investigation would reveal. The court then stated that it found no support for the argument that the disclosure duty imposed by Section 2079 includes a duty to independently verify or disclaim the accuracy of the seller's representations. To the contrary, in enacting Section 2079, the Legislature sought to foster availability of professional negligence insurance by eliminating the implication in *Easton v. Strassburger* that a seller's agent could have negligence liability for (1) relying in good faith on the seller's representations, or (2) failing to discharge a vague obligation to obtain professional inspections or reports to confirm the representations. Thus, once the sellers and their agent make the required disclosures, potential purchasers must investigate and make an informed decision based thereon. In making the required disclosures, the seller's agent is required only to act in good faith and not convey the sellers' representations without a reasonable basis for believing them to be true (*57 Cal. App. 4th 634, 643-644*).

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§ 33.syn Synopsis to Chapter 33: CARRIERS

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§ 33.03 Page Limits on Points and Authorities

§ 33.04 Related Pleading and Practice Chapters

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§§ 33.06-33.19 [Reserved]

§ 33.20 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Carrier for Personal Injuries to [Civ. Code §§ 1714, 2100] or Wrongful Death of [Code Civ. Proc. § 377.60] Passenger of Common Carrier of Passengers for Hire--Action Barred by Statute of Limitations [Code Civ. Proc. § 335.1]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Failure to State Cause of Action

[b] Applicable Statute of Limitations

§ 33.21 Supporting Demurrer by Common Carrier to Complaint [Code Civ. Proc. § 430.10(e)] for Loss of or Injury to Freight [Civ. Code § 2194]--Action Barred by Statute of Limitations [Code Civ. Proc. § 338(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Applicable Statute of Limitations

§ 33.22 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Common Carrier or Its Employee for Damages for Negligence for Breach of Duty Codified in Civ. Code § 2100--Duty Extends Only to Passengers and Plaintiff Was Not Passenger

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Applicability of Civil Code Section 2100

[b] Failure to State Cause of Action

[c] No Heightened Duty Once Passenger Has Exited Carrier

[4] Additional Authorities

[a] Applicability of Civil Code Section 2100

§ 33.23 Supporting Defendant's Motion for Change of Venue to Proper Court [Code Civ. Proc. §§ 396b, 397(a)] in County of Defendant's Residence [Code Civ. Proc. § 395(a)]--In Action Against Common Carrier for Personal Injuries to [Civ. Code §§ 1714, 2100] or Wrongful Death of [Code Civ. Proc. § 377.60] Passenger

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Determining Nature of Action

[b] Venue of Action Against Carrier for Personal Injuries

§ 33.24 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] by Defendant Carrier--In Action for Personal Injuries] to [Civ. Code §§ 1714, 2100] or Wrongful Death of [Code Civ. Proc. § 377.60] Passenger--No Duty to Passenger at Time and Place of Accident

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Summary Judgment Proper Where No Duty

[b] Carrier's Duty of Care

[c] No Duty to Maintain

[d] Duty of Carrier by Bus or Streetcar

[e] No Duty to Disembarked Incapacitated Passenger

§ 33.25 Supporting Motion for New Trial [Code Civ. Proc. § 657(7)] in Action Against Common Carrier for Personal Injuries to [Civ. Code §§ 1714, 2100] or Wrongful Death of [Code Civ. Proc. § 377.60 et seq.] Passenger--By

Plaintiff--Instruction That Res Ipsa Loquitur Applicable Should Have Been Given

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Granting Motion for New Trial

[b] When Doctrine of Res Ipsa Loquitur Applies

[c] Refusal of Proper Res Ipsa Loquitur Instructions as Error

§ 33.26 Supporting Contention That Carrier's Liability Is Limited in Action for Loss of or Damage to Baggage or Freight [Civ. Code §§ 2182, 2194, 2195]--Limitation by Special Contract [Civ. Code § 2174]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Limitation of Carrier's Obligations

[b] Agreed Valuation Contract

§ 33.27 Supporting Contention That Carrier's Liability Is Limited in Action for Loss of or Damage to Baggage or Freight [Civ. Code §§ 2182, 2194, 2195]--Limitation by Statute [Civ. Code §§ 2178, 2200, 2205]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

§ 33.28 Opposing Demurrer [Code Civ. Proc. § 430.10(e)] to Complaint in Action Against Common Carrier for Loss of or Injury to Freight [Civ. Code § 2194 or 2195]--Statute of Limitations as Tolled

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Statute of Limitations Tolled

[4] Additional Authorities

[a] Statute of Limitations Tolled

§ 33.29 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action Against Common Carrier for Personal Injury to [Civ. Code §§ 1714, 2100] or Wrongful Death of [Code Civ. Proc. § 377.60] Passenger--Carrier-Passenger Relationship Existing

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Rules Governing Summary Judgment Procedure

[b] Establishment of Carrier-Passenger Relationship

[c] Carrier's Duty During Carrier-Passenger Relationship

[d] Carrier's Duty to Protect Against Assaults by Third Persons

[e] Passenger's Purpose in Purchasing Transportation Does Not Determine Whether Defendant Qualifies as Common Carrier

[4] Additional Authorities

[a] Establishment of Carrier-Passenger Relationship

[b] Carrier's Duty During Carrier-Passenger Relationship

§ 33.30 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action Against Common Carrier for Personal Injury to [Civ. Code §§ 1714, 2100] or Wrongful Death of [Code Civ. Proc. § 377.60]

Passenger--Carrier-Passenger Relationship Not Terminated

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Termination of Carrier-Passenger Relationship

[b] Duty of Highest Degree of Care Until Opportunity to Alight Safely

[c] Application of Rule of Duty of Highest Care

[d] Duty Not to Eject Passenger Prior to Intended Destination

§ 33.31 Opposing Motion for New Trial [Code Civ. Proc. § 657]--In Action Against Common Carrier for Injuries [Civ. Code §§ 1714, 2100] or Wrongful Death [Code Civ. Proc. § 377.60]--Court Correctly Instructed That Res Ipsa Loquitur Inapplicable

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] No Error of Law

[b] Conditions for Applicability of Doctrine of Res Ipsa Loquitur

[c] Doctrine as Inapplicable If Evidence of Specific Acts Shows No Negligence as Matter of Law

[d] Doctrine as Inapplicable When Vehicle at Standstill

§ 33.32 Opposing Contention That Carrier's Liability Is Limited in Action for Loss of or Damage to Baggage or Freight [Civ. Code §§ 2182, 2194, 2195]--Limitation by Special Contract [Civ. Code § 2174]--Loss Caused by Carrier's Gross Negligence [Civ. Code § 2175]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Tariff Limitation Not Applicable to Member of General Public With No Notice

[b] Knowledge of Terms as Question of Fact

§ 33.33 Opposing Contention That Carrier's Liability Is Limited in Action for Loss of or Damage to Baggage or Freight [Civ. Code §§ 2182, 2194, 2195]--Limitation by Statute [Civ. Code § 2205]--Loss Caused by Carrier's Gross Negligence

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Loss to Baggage Caused by Carrier's Gross Negligence

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3-33 California Points & Authorities § 33.01

§ 33.01 Scope of Chapter

This chapter contains memoranda of points and authorities for use in actions arising out of the carriage of passengers or freight.

It contains forms supporting [*see §§ 33.20, 33.21*] and opposing [*see § 33.28*] a demurrer on the ground that the action is barred by the statute of limitations, a form supporting a demurrer on the ground that the defendant owed no duty to the plaintiff [*see § 33.22*], a form supporting a motion for change of venue [*see § 33.23*], forms supporting [*see § 33.24*] and opposing [*see §§ 33.29, 33.30*] a motion for summary judgment on the ground that the defendant owed no duty to the plaintiff, forms supporting [*see § 33.25*] and opposing [*see § 33.31*] a motion for new trial. It also contains forms for use in supporting [*see §§ 33.26, 33.27*] and opposing [*see §§ 33.32, 33.33*] the contention that the defendant's liability is limited by special contract or statute, which may used in various procedural contexts.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsTransportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesDamages

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3-33 California Points & Authorities § 33.02

§ 33.02 Governing Law

Carriers of passengers and freight are governed generally by *Civ. Code §§ 2085-2209*. Various carriers are regulated by the Public Utilities Commission under Cal. Const. art. XII, and under the Public Utilities Code. Bills of lading are governed by *Com. Code § 7101 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsGeneral OverviewTransportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesBills of Lading

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3-33 California Points & Authorities § 33.03

§ 33.03 Page Limits on Points and Authorities

Generally, supporting or opposing a memorandum of points and authorities must not exceed 15 pages, or in the case of a motion for summary judgment or summary adjudication, 20 pages. A reply or closing memorandum may not exceed 10 pages [*see Cal. Rules of Ct., Rule 3.1113(d)*]. Any party desiring to file a longer memorandum must obtain leave of court [*see Cal. Rules of Ct., Rule 3.1113(e)*]. For further discussion of the page limitations under *Cal. Rules of Ct., Rule 3.1113*, and of other basic format requirements of memoranda of points and authorities, see *Ch. 1, Writing Legal Memoranda and Briefs, § 1.05*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPleading & PracticeMotion PracticeSupporting MemorandaCivil ProceduresSummary JudgmentSupporting MaterialsMemoranda of Law

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3-33 California Points & Authorities § 33.04

§ 33.04 Related Pleading and Practice Chapters

For discussion and forms of complaints involving carriage of passengers and freight, see California Forms of Pleading and Practice, Ch. 109, *Carriers* (Matthew Bender).

For discussion and forms for use in actions involving particular types of carriers, see the following chapters in California Forms of Pleading and Practice (Matthew Bender):

- Ch. 16, *Airplanes and Airports*.
- Ch. 106, *Buses and Streetcars*.
- Ch. 244, *Elevators and Escalators*.
- Ch. 485, *Railroads*.
- Ch. 544, *Taxicabs*.
- Ch. 553, *Trucks*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawAir TransportationAirportsGeneral OverviewTransportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesState & Local RegulationTransportation LawCommercial VehiclesGeneral OverviewTransportation LawRail TransportationState & Local Regulation

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3-33 California Points & Authorities § 33.05

§ 33.05 Related Points and Authorities

Related memoranda of points and authorities that may be useful in a case involving a carrier's negligence may be found in Ch. 165, *Negligence* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceGeneral OverviewTortsTransportation TortsGeneral OverviewTransportation LawCarrier Duties & LiabilitiesGeneral Overview

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3-33 California Points & Authorities §§ 33.06-33.19

[Reserved]

§§ 33.06[Reserved]

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3-33 California Points & Authorities § 33.20

§ 33.20 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Carrier for Personal Injuries to [Civ. Code §§ 1714, 2100] or Wrongful Death of [Code Civ. Proc. § 377.60] Passenger of Common Carrier of Passengers for Hire--Action Barred by Statute of Limitations [Code Civ. Proc. § 335.1]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN SUPPORT OF DEMURRER TO COM-
vs.	)	PLAINT
_____ [*name*(*s*)],	)	[*Code Civ. Proc. § 430.10(e)*]
Defendant(s).	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT SHOWS ON ITS FACE THAT IT IS BARRED BY THE STATUTE OF LIMITATIONS.

A. Objection by Demurrer. The party against whom a complaint has been filed may object to the complaint by demurrer on the ground that it does not state facts sufficient to state a cause of action where such ground appears on the face of the complaint [or from any matter of which the court is required to or may take judicial notice] (*Code Civ. Proc. §§ 430.10(e), 430.30(a)*).

B. Failure to State Cause of Action. The objection that an action is barred by a statute of limitations may be set up by demurrer (*Baillargeon v. Department of Water & Power (1977) 69 Cal. App. 3d 670, 675, 138 Cal. Rptr. 338*) and must be deemed to be included in the ground of demurrer that the complaint does not state facts sufficient to constitute a cause of action (*Bell v. Bank of Cal. (1908) 153 Cal. 234, 245, 94 P. 889*).

C. Applicable Statute of Limitations. The time for the commencement of an action for damages caused by personal injuries to a passenger of a carrier is limited by the two-year limitations period of *Code of Civil Procedure Section 335.1* (*see Basler v. Sacramento Elec., Gas & Ry. Co. (1913) 166 Cal. 33, 37* (discussing pre-2003 one-year limitations period of former Code Civ. Proc. § 340(3)).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a general demurrer to a complaint for injuries to or wrongful death of a passenger of a carrier where the demurrer asserts that the complaint fails to state facts sufficient to constitute a cause of action in that it appears on the face thereof, or from a matter of which the court is required to or may take judicial notice, that the action is barred by the statute of limitations in *Code Civ. Proc. § 335*

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, these points and authorities may be used to support a defendant's motion for summary judgment [*see Code Civ. Proc. § 437c*; *Graham v. Bank of Cal. (1961) 197 Cal. App. 2d 438, 439-444, 17 Cal. Rptr. 279]* .

[c] Related Pleading and Practice Forms

For a form of demurrer based on the bar of the statute of limitations, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* (Matthew Bender).

[d] Related Points and Authorities

For general memoranda of points and authorities in support of a demurrer on the ground that the complaint is barred by a statute of limitations, see Ch. 143, *Limitation of Actions* .

[3] Discussion of Authorities

[a] Failure to State Cause of Action

In ***Baillargeon v. Department of Water & Power*** *(1977) 69 Cal. App. 3d 670, 138 Cal. Rptr. 338* , plaintiff brought an action against defendant for breach of contract, infliction of mental distress, and declaratory relief. Defendant's answer included the affirmative defense of the statute of limitations. After discovery, the trial court granted defendant's motion for judgment on the pleadings, apparently on the basis that the action was barred by the statute of limitations. The court of appeal reversed the decision on the cause of action for breach of contract. The court stated that the defense of the statute of limitations may be raised by demurrer and noted that since judgment on the pleadings is similar to a judgment following the sustaining of a demurrer, the standard of appellate review is the same (*69 Cal. App. 3d 670, 675)* .

Bell v. Bank of Cal. *(1908) 153 Cal. 234, 94 P. 889* , was an action for the recovery of shares of stock. The defendant asserted in a general demurrer that the action was barred by a statute of limitations, and the trial court sustained the demurrer and dismissed the action. The method of asserting the defense or bar of a statute of limitations was apparently not at issue in the trial court or on appeal. The Supreme Court, however, noted that the bar of the statute of limitations is not specified in the Code of Civil Procedure as a ground of demurrer. That particular objection to a complaint, while required to be stated in the demurrer, must be deemed to be included within the ground of lack of facts sufficient to constitute a cause of action (*153 Cal. 234, 235)* .

[b] Applicable Statute of Limitations

In ***Basler v. Sacramento Elec., Gas & Ry. Co.*** *(1913) 166 Cal. 33, 37, 134 P. 993* , plaintiff husband sought damages for the loss of his wife's services and for expenses for her medical care as a result of injuries she received while a passenger on a streetcar operated by defendant corporation. The complaint was filed almost two years from the date of the wife's injuries, and contained allegations of negligence of defendant and its agents. The trial court dismissed the action for want of prosecution following its sustaining of a demurrer based on the bar of the one-year statute of limitations of former Code Civ. Proc. § 340(3) [*now see Code Civ. Proc. § 335.1* (two-year statute of limitations beginning in 2003)] for personal injuries. On appeal, plaintiff contended that his causes of action were based on an oral contract and were governed by the two-year limitation period of *Code Civ. Proc. § 339(1)*. However, the Supreme Court affirmed. The Court found that since the breach of duty and consequent injury to the passenger were set forth, the violation of defendant common carrier's obligation was the gravemen of the action, which arose in tort, and that the contract of carriage was only alleged as a matter of inducement (*166 Cal. 33, 37)* .

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3-33 California Points & Authorities § 33.21

§ 33.21 Supporting Demurrer by Common Carrier to Complaint [Code Civ. Proc. § 430.10(e)] for Loss of or Injury to Freight [Civ. Code § 2194]--Action Barred by Statute of Limitations [Code Civ. Proc. § 338(a)]

[1] FORM

[*Caption. See § 33.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT SHOWS ON ITS FACE THAT IT IS BARRED BY THE STATUTE OF LIMITATIONS SET OUT IN SECTION 338(a) OF THE CODE OF CIVIL PROCEDURE.

A. Objection by Demurrer. [*See § 33.20, Paragraph A.*]

B. Failure to State Cause of Action. [*See § 33.20, Paragraph B.*]

C. Applicable Statute of Limitations. The liability of an inland common carrier of freight for loss or injury is created by *Section 2194 of the Civil Code* and is therefore governed by the three-year statute of limitations in *Section 338(a) of the Code of Civil Procedure*, which applies to obligations based on statute (*BBD Transp. Co. v. Buller (1975) 49 Cal. App. 3d 124, 128-129, 122 Cal. Rptr. 357*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a general demurrer to a complaint for injuries to or loss of freight, where the demurrer asserts that the complaint fails to state facts sufficient to constitute a cause of action in that it appears on the face thereof, or from a matter of which the court is required to or may take judicial notice, that the action is barred by the statute of limitations in *Code Civ. Proc. § 338(a)*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, these points and authorities may be used tosupport a defendant's motion for summary judgment [*see Code Civ. Proc. § 437c*; *Graham v. Bank of Cal. (1961) 197 Cal. App. 2d 438, 439-444, 17 Cal. Rptr. 279]* . They also may be used, with appropriate modifications, by a plaintiff to oppose a demurrer brought on the ground that the cause of action is barred by the two-year statute of limitations contained in *Code Civ. Proc. § 339* governing oral contracts [*see BBD Transp. Co. v. Buller (1975) 49 Cal. App. 3d 124, 128-129, 122 Cal. Rptr. 357]* .

[c] Related Pleading and Practice Forms

For a form of demurrer based on the bar of the statute of limitations, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* (Matthew Bender).

[d] Related Points and Authorities

In an appropriate case, the points and authorities in *§ 33.28* may be used in opposition to the motion supported by this memorandum of points and authorities.

For memoranda of points and authorities in support of a demurrer on the ground that the complaint is barred by a statute of limitations, see Ch. 143, *Limitation of Actions* .

[3] Discussion of Authorities

[a] Applicable Statute of Limitations

In ***BBD Transp. Co. v. Buller*** *(1975) 49 Cal. App. 3d 124, 122 Cal. Rptr. 357* , plaintiff, a prime hauler, brought an action against a subhauler for damages incurred when a trailer load of pipe being carried intrastate fell into a ravine. The complaint was filed two years and six weeks after the accident. On appeal from a judgment in favor of the prime hauler, defendant subhauler contended that the action was barred by the two-year statute of limitations of *Code Civ. Proc. § 339*, which governs actions based on oral contracts.

The court of appeal stated that *Civ. Code § 2194*, by its terms, makes an inland common carrier strictly liable for loss or injury of freight from any cause whatever, with certain specified exceptions. The statute therefore goes beyond ordinary tort or contract liability and creates the liability of the carrier. Though defendant's capacity as an inland common carrier which is necessary for the applicability of *Civ. Code § 2194* usually arises out of a contract, the contract only defines the relationship of the parties. This relationship gives rise to the statutory obligation, and the action is governed by the three-year limitation of former Code Civ. Proc. § 338(1) (obligation based on statute) [*now see Code Civ. Proc. §*

338(a)]. The court of appeal therefore held that the trial court had not erred in finding that the complaint was not barred by a statute of limitations (*49 Cal. App. 3d 124, 128-129)* .

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3-33 California Points & Authorities § 33.22

§ 33.22 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Common Carrier or Its Employee for Damages for Negligence for Breach of Duty Codified in Civ. Code § 2100--Duty Extends Only to Passengers and Plaintiff Was Not Passenger

[1] FORM

[*Caption. See § 33.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION FOR DAMAGES UNDER SECTION 2100 OF THE CIVIL CODE BECAUSE _____ [IT SHOWS ON ITS FACE THAT *or* AS APPEARS FROM _____ (*specify matter to be judicially noticed*), OF WHICH THIS COURT IS REQUESTED TO TAKE JUDICIAL NOTICE], PLAINTIFF WAS NOT A PASSENGER AT THE TIME OF THE INCIDENT ALLEGED.

A. Objection by Demurrer. [*See § 33.20, Paragraph A.*]

B. Carrier's Statutory Duty. A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill (*Civ. Code § 2100*).

C. Applicability of *Civil Code Section 2100*. *Section 2100 of the Civil Code* codifies the duty of "utmost care" owed by a commercial carrier to provide "safe carriage" to its passengers and does not apply to nonpassengers (*Coon v. Joseph (1987) 192 Cal. App. 3d 1269, 1277, 237 Cal. Rptr. 873*).

D. Failure to State Cause of Action. A complaint for damages for negligence under *Section 2100 of the Civil Code* fails to state facts sufficient to constitute a cause of action when it shows on its face that plaintiff was not a passenger at the time of the incident alleged (*Coon v. Joseph (1987) 192 Cal. App. 3d 1269, 1277, 237 Cal. Rptr. 873*).

E. No Heightened Duty Once Passenger Has Exited Carrier. Once a passenger has safely exited a common carrier,

the relationship of carrier-passenger terminates and the carrier owes the passenger no affirmative duty to render assistance (*McGettigan v. Bay Area Rapid Transit Dist. (1997) 57 Cal. App. 4th 1011, 1018, 67 Cal. Rptr. 2d 516*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a general demurrer to a complaint under *Civ. Code § 2100* against a carrier or its employee or both for damages for negligence when the complaint shows on its face, or it appears from judicially noticed matter [*see Code Civ. Proc. §§ 430.30(a), 430.70*], that plaintiff was not a passenger at the time of the incident alleged.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, these points and authorities may also be used in support of a demurrer to a cross complaint [*Code Civ. Proc. §§ 430.10, 430.30(a)*] or to a single cause of action (or count) in a complaint or cross complaint [*Code Civ. Proc. § 430.50(a)*], or in support of either a defense motion for judgment on the pleadings or an oral objection by defendant at trial to the introduction of any evidence by plaintiff [*see* Ch. 71, *Demurrers and Motions for Judgment on the Pleadings*].

[c] Related Pleading and Practice Forms

For forms of complaints against common carriers for injury to person, see California Forms of Pleading and Practice, Ch. 109, *Carriers* (Matthew Bender).

[d] Related Points and Authorities

For memoranda of points and authorities in support of demurrers to a complaint for failure to state a cause of action, and in support of the court taking judicial notice of matters, see *Ch. 71, Demurrers and Motions for Judgment on the Pleadings, § 71.20* et seq.

[3] Discussion of Authorities

[a] Applicability of Civil Code Section 2100

Coon v. Joseph *(1987) 192 Cal. App. 3d 1269, 237 Cal. Rptr. 873* , was an action against a city and a city bus driver for damages for emotional distress resulting from witnessing the driver's intentional assault on plaintiff's homosexual

lover. The driver had denied plaintiff entry to the bus, but permitted his lover to enter and then assaulted the lover in plaintiff's immediate presence. The complaint contained four causes of action: (1) intentional infliction of emotional distress; (2) negligent infliction of emotional distress; (3) negligence under *Civ. Code § 2100*; and (4) violation of civil rights under *Civ. Code § 51.7*. Defendants' demurrer to the complaint was sustained with leave to amend and, on plaintiff's election not to amend, a judgment of dismissal was entered. The court of appeal affirmed. With respect to the *Civ. Code § 2100* cause of action, the court said that *Civ. Code § 2100* codifies the duty of "utmost care" owed by a commercial carrier to provide "safe carriage" to its passengers (*192 Cal. App. 3d 1269, 1277)* .

NOTE:

The lead opinion in *Coon* was authored by Justice Scott, who ruled that a significant, stable, and exclusive homosexual relationship between two men, as a matter of law, is not a close relationship within the meaning of *Dillon v. Legg (1968) 68 Cal. 2d 728, 69 Cal. Rptr. 72, 441 P.2d 912* , that warrants recovery of damages for negligent infliction of emotional distress based on one's witnessing an intentional assault on the other. Justice Barry-Deal concurred in this ruling, but invited the legislature to reconsider the matter. Presiding Justice White concurred in the judgment, but dissented from the holding that an intimate homosexual relationship cannot be a significant relationship as a matter of law for stating a cause of action for negligent infliction of emotional distress.

[b] Failure to State Cause of Action

The facts and procedural background of ***Coon v. Joseph*** *(1987) 192 Cal. App. 3d 1269, 237 Cal. Rptr. 873* , are discussed in *§ 33.22[3][a]*. In affirming the judgment of dismissal, the court of appeal, with respect to the *Civ. Code § 2100* issue, pointed out that: (1) the verified complaint stated that the bus driver refused to allow plaintiff to board the bus and, accordingly, plaintiff never became a passenger; and (2) the duty of care codified in *Civ. Code § 2100*, therefore, never arose in plaintiff's favor, and defendants consequently never breached any duty of safe carriage owing to passengers with respect to plaintiff (*192 Cal. App. 3d 1269, 1277)* .

[c] No Heightened Duty Once Passenger Has Exited Carrier

In ***McGettigan v. Bay Area Rapid Transit Dist.*** *(1997) 57 Cal. App. 4th 1011, 67 Cal. Rptr. 2d 516* , plaintiff sued a rapid transit district for negligence based on the following facts: he was asleep on a train and when it reached the end of the line was awakened by a train operator who, knowing that plaintiff was obviously inebriated, ordered him to leave and left him standing on the edge of the station platform, after which plaintiff injured himself by falling off the platform or getting in the way of a moving train. The trial court sustained defendants demurrer, plaintiff filed a motion for reconsideration, and attached an amended complaint to it. Judgment dismissing the complaint was entered and the motion was denied. Plaintiff appealed after his motion to set aside the judgment was also denied.

The court of appeal affirmed on the basis of the rule enunciated in *Marshall v. United Airlines (1973) 35 Cal. App. 3d 84, 86, 110 Cal. Rptr. 416* , that theheightened duty of care owed by a common carrier to a passenger [*see Civ. Code § 2100*] only applies while passengers are in transit and until they have safely departed the carrier's vehicle. According to the court, once plaintiff had safely exited the train, the relationship of carrier-passenger had terminated and plaintiff was in a place of relative safety. Thus, defendant had no duty to remove plaintiff from the train platform based on the existence of the carrier-passenger relationship (*57 Cal. App. 4th 1011, 1017)* . Plaintiff also contended that, because the train operator had advised him that he could catch a return train on another platform, the carrier-passenger relationship had not terminated: he was either a passenger on the first leg of his trip, a passenger who had begun the second leg, or a passenger during the entire journey which included the transfer between trains. In order to hold the rapid transit district liable under this theory plaintiff would have had to allege facts showing that the carrier took some action indicating acceptance of the passenger as a traveler. The court found that plaintiff failed to do this, that merely advising him of the return train did not manifest acceptance of him as a traveler (*57 Cal. App. 4th 1011, 1019)* .

[4] Additional Authorities

[a] Applicability of Civil Code Section 2100

In *Orr v. Pacific Sw. Airlines (1989) 208 Cal. App. 3d 1467, 257 Cal. Rptr. 18* , the plaintiff brought suit against a carrier for failure to exercise the utmost degree of care in failing to prevent her being injured by being knocked down at a security checkpoint and failing to collect and preserve information regarding the event for her use in future civil litigation. The court pointed out that ordinary rules of negligence generally apply to the condition and maintenance of equipment and premises at the carrier's station, but that the doctrine of the highest degree of care applies to the contract of carriage (*208 Cal. App. 3d 1467, 1472)* . The court held that at the time the accident occurred, the relationship between plaintiff and the carrier was no more than carrier and prospective passenger, because plaintiff was not in the custody or control of the carrier, the carrier had not assumed the responsibility of conducting the plaintiff to the point of departure, the carrier had not restricted the plaintiff's mobility, and the carrier had not yet accepted the plaintiff for carriage because such acceptance occurred only when passengers surrendered their tickets at the boarding gate (*208 Cal. App. 3d 1467, 1473-1474)* .

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 33 CARRIERS
PART II. FORMS

3-33 California Points & Authorities § 33.23

§ 33.23 Supporting Defendant's Motion for Change of Venue to Proper Court [Code Civ. Proc. §§ 396b, 397(a)] in County of Defendant's Residence [Code Civ. Proc. § 395(a)]--In Action Against Common Carrier for Personal Injuries to [Civ. Code §§ 1714, 2100] or Wrongful Death of [Code Civ. Proc. § 377.60] Passenger

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN SUPPORT OF MOTION FOR CHANGE OF
vs.	)	VENUE
_____ [*name*(*s*)],	)	[*Code Civ. Proc. §§ 396b, 397(a)*]
Defendant(s).	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT MAY TRANSFER AN ACTION AGAINST A COMMON CARRIER FOR _____ [PERSONAL INJURIES *or* WRONGFUL DEATH] TO THE COUNTY OF DEFENDANT'S RESIDENCE AS A PROPER COUNTY UNDER SECTION 395(a) OF THE CODE OF CIVIL PROCEDURE.

A. Statutory Authority for Motion. The court may, on motion, change the place of trial when the court designated in the complaint is not the proper court (*Code Civ. Proc. § 397(a)*).

B. Transfer Mandatory on Proper Showing. The court must order the action transferred to the proper court when it appears at the hearing of the motion for change of venue that the action was not commenced in the proper court (*Code Civ. Proc. § 396b*).

C. Venue of Tort Actions. A tort action must be tried in the county where the defendant resides or where the injury occurred (*Code Civ. Proc. § 395(a)*).

D. Determining Nature of Action. If the complaint is uncertain as to the nature of the action, on a motion for change of venue the court may construe thecomplaint against the pleader in determining whether the action is founded on a breach of contract or on a tort (*Williamson v. Pacific Greyhound Lines (1944) 67 Cal. App. 2d 250, 254, 153 P.2d 990*).

E. Venue of Action Against Carrier for Personal Injuries. In an action against a carrier by a passenger for personal injuries, where the injuries resulting from the defendant's alleged negligence are the gravamen of the action pleaded, the action is in tort not contract, and the place of trial is determined under *Section 395(a) of the Code of Civil Procedure* (*Williamson v. Pacific Greyhound Lines (1944) 67 Cal. App. 2d 250, 256, 153 P.2d 990* ; *Rushing v. Pickwick Stages Sys. (1931) 113 Cal. App. 240, 242, 298 P. 150*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion made by a defendant carrier for transfer of an action for personal injuries brought by a passenger in a county which is neither the place of the injury nor the defendant's residence.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Counsel should also attach declarations or affidavits in support of the motion.

[b] Related Pleading and Practice Forms

For forms relating to motions for change of venue, see California Forms of Pleading and Practice, Ch. 571, *Venue* (Matthew Bender).

[c] Related Points and Authorities

For related memoranda of points and authorities supporting a defendant's motion for change of venue to the county of his or her residence, see Ch. 238, *Venue* .

[3] Discussion of Authorities

[a] Determining Nature of Action

In ***Williamson v. Pacific Greyhound Lines*** *(1944) 67 Cal. App. 2d 250, 153 P.2d 990* , plaintiff alleged that while riding from Napa to San Francisco as a passenger in defendant's bus, she was injured as a result of the negligence of defendant carrier's employees. The complaint incidentally alleged that plaintiff paid her fare and that defendant agreed to exercise utmost care to safely convey plaintiff to her destination. The injuries were sustained in either Sonoma or Marin County. The trial court granted defendant carrier's motion to transfer the action from Napa County, where the action was filed, to San Francisco, the county where defendant carrier resided. Plaintiff had contended that the action was based on the contract to safely convey plaintiff, and that Napa County, the county where the contract was entered into, was the proper place for trial under *Code Civ. Proc. § 394*. In reviewing the trial court's order, the court of appeal stated that if the complaint is uncertain as to the nature of an action, on a motion for change of venue the court may be justified in construing the complaint against the pleader in determining whether the action is based on breach of contract or tort. Actions for damages to a passenger for negligence of the carrier usually sound in tort and not in contract. In upholding the lower court's transfer of venue to San Francisco, the county of defendant's residence [former Code Civ. Proc. § 395, *now Code Civ. Proc. § 395(a)*] the court of appeal stated that it was convinced that the action was one for damages for personal injury based on the alleged negligence of the carrier's employees. The action sounded in tort, even though the contract was incidentally alleged (*67 Cal. App. 2d 250, 256)* .

[b] Venue of Action Against Carrier for Personal Injuries

Williamson v. Pacific Greyhound Lines *(1944) 67 Cal. App. 2d 250, 153 P.2d 990* , is discussed in *§ 33.23[3][b]*.

In ***Rushing v. Pickwick Stages Sys.*** *(1931) 113 Cal. App. 240, 298 P. 150* , the court of appeal reversed an order of the trial court denying defendant's motion to transfer venue of an action from San Francisco County to defendant's principal place of business, Los Angeles County. Plaintiffs had alleged a contract to carry plaintiff's wife safely from Los Angeles to San Francisco and a breach of that contract in that the defendant so carelessly and negligently operated its bus that the bus ran off the highway injuring plaintiff's wife. Plaintiffs contended that venue was proper since the action was based on the breach of contract of safe carriage. The court of appeal held that former Code Civ. Proc. § 395 [*now Code Civ. Proc. § 395(a)*], which provides that actions for tort be tried in the county where the defendant resides or where the injury occurred, applied since the injuries resulting from defendant's alleged negligence were the gravamen of the action pleaded and the action was therefore in tort. It stated that in an action for damages arising out of the contractual relationship between a carrier and passenger, the tort which is the basis of the claim for damages lies in the breach of the duty imposed by law, and the allegations of the contract relationship between the parties are merely for the purpose of showing that the plaintiff wasnot a trespasser or of showing that the plaintiff was lawfully in the position at the time of the defendant's breach (*113 Cal. App. 240, 242)* .

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Volume 2A Chapters 24-33 ATTORNEYS AT LAW---to---CARRIERS
CHAPTER 33 CARRIERS
PART II. FORMS

3-33 California Points & Authorities § 33.24

§ 33.24 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] by Defendant Carrier--In Action for Personal Injuries] to [Civ. Code §§ 1714, 2100] or Wrongful Death of [Code Civ. Proc. § 377.60] Passenger--No Duty to Passenger at Time and Place of Accident

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN SUPPORT OF MOTION FOR SUMMARY
vs.	)	JUDGMENT
_____ [*name*(*s*)],	)	[*Code Civ. Proc. § 437c*]
Defendant(s).	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

SUMMARY JUDGMENT FOR DEFENDANT CARRIER IS PROPER IF DEFENDANT DOES NOT OWE A DUTY OF CARE TO _____ [PLAINTIFF *or* PLAINTIFF'S DECEDENT].

A. Summary Judgment. A defendant may move for summary judgment in any action or proceeding if it is contended that the action has no merit. Such motion must be granted if all of the papers submitted show that there is no triable issue as to any material fact and that defendant is entitled to a judgment as a matter of law (*Code Civ. Proc. § 437c*).

B. Summary Judgment Proper Where No Duty. It is proper for the court to grant a defendant carrier's motion for summary judgment where defendant did not owe a duty of care to _____ [plaintiff *or* plaintiff's decedent] (*Marshall v. United Airlines (1973) 35 Cal. App. 3d 84, 88, 92, 110 Cal. Rptr. 416*).

C. Carrier's Duty of Care. A common carrier owes its passengers the highest degree of care only while the passengers are in transit and until they have safely departed from the carrier's vehicle. Once the passenger reaches a place outside thesphere of any activity of the carrier which might constitute a mobile hazard, the care required of a carrier for the protection of a passenger on its premises is only reasonable care (*Marshall v. United Airlines (1973) 35 Cal. App. 3d 84, 87, 110 Cal. Rptr. 416*).

D. No Duty to Maintain. In the absence of an agreement or other special circumstances, where the carrier does not own or have a right of control or management of the property, it has no duty to maintain the property and therefore has no liability for its negligent maintenance (*Marshall v. United Airlines (1973) 35 Cal. App. 3d 84, 87-88, 110 Cal. Rptr. 416*).

[*Optional*] **E. Duty Carrier by Bus or Streetcar.** A carrier of passengers by bus or streetcar is not responsible for injuries which occur after the passenger safely alights from the vehicle, such as injuries caused by the condition of the street which the person must cross. The carrier does not have a duty to maintain sidewalks in a safe condition merely because patrons alight from its vehicles on the sidewalk (*Kotronakis v. City & County of San Francisco (1961) 192 Cal. App. 2d 624, 627, 13 Cal. Rptr. 709* ; *MacLean v. City & County of San Francisco (1954) 127 Cal. App. 2d 263, 271, 273 P.2d 698*).

[*Optional*] **F. No Duty to Disembarked Incapacitated Passenger.** Common carriers owe a duty to assist a passenger with special needs only when the passenger is boarding or alighting from its trains or cars. Once the passenger has safely disembarked there is no such duty (*McGettigan v. Bay Area Rapid Transit Dist. (1997) 57 Cal. App. 4th 1011, 1020, 67 Cal. Rptr. 2d 516*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for summary judgment in an action which has been brought for the personal injuries, or wrongful death, of a passenger of a common carrier. The form is for use when defendant carrier is contending that it owed no duty to plaintiff, or plaintiff's decedent, since the injuries occurred at a time when or a place where the carrier-passenger relationship had terminated.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations which support the motion [*Code Civ. Proc. § 437c*].

[b] Related Uses

With appropriate modifications these points and authorities may be used to support a demurrer to a complaint for personal injuries to, or wrongful death of, a passenger where the complaint fails to establish on its face the carrier-passenger relationship [*see Grier v. Ferrant (1944) 62 Cal. App. 2d 306, 309-311, 144 P.2d 631]* , or fails to establish that the carrier owed a duty of care to the passenger at the time or place of the injury.

[c] Related Pleading and Practice Forms

For forms of notices of motions for summary judgment, declarations supporting and opposing motions for summary judgment, and orders granting or denying motions for summary judgment, see California Forms of Pleading and Practice, Ch. 527, *Summary Judgment* (Matthew Bender).

[d] Related Points and Authorities

In an appropriate case, the points and authorities in *§ 33.29* or *§ 33.30* may be used in opposition to the motion supported by this memorandum of points and authorities.

For forms of memoranda supporting motions for summary judgment generally, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Summary Judgment Proper Where No Duty

In ***Marshall v. United Airlines*** *(1973) 35 Cal. App. 3d 84, 110 Cal. Rptr. 416* , plaintiff had purchased an airline ticket from United Airlines for air passage from Berkeley, California to New York and return. After her return to San Francisco Airport, she was to take an SFO Airlines' helicopter to Berkeley. While walking along a corridor in the San Francisco Airport toward the SFO Airlines' facility, plaintiff fell down some stairs and was injured. In support of a motion for summary judgment, United's declaration stated that it did not use, lease, maintain, own, or control the area of the airport where plaintiff was injured at the time of the accident. Plaintiff's declaration in opposition did not state whether the city, United, or SFO, or any or all of them had control of the airport building where she fell. Her declaration also did not indicate that the relationship between United and SFO was any other than that of two independent carriers, where one, for the convenience of the carriers and the passenger, sells a ticket for through passage on both carriers.

In affirming the lower court's summary judgment in favor of United, the courtof appeal found that a common carrier airline company does not have a duty to a passenger to exercise care in the maintenance of an airport building area over which it has no ownership or right of control, but which must be traversed by the passenger when changing planes to an independent connecting airline (*35 Cal. App. 3d 84, 88)* . The court also found that United was under no duty to warn plaintiff of the defect in the stairs, and that United did not expressly or impliedly contract to furnish plaintiff with nonnegligent passage from New York until her departure from the SFO Airlines' helicopter at Berkeley (*35 Cal. App. 3d 84, 92)* .

[b] Carrier's Duty of Care

In ***McGettigan v. Bay Area Rapid Transit Dist.*** *(1997) 57 Cal. App. 4th 1011, 67 Cal. Rptr. 2d 516* , the plaintiff sued a rapid transit district for negligence based on the following facts: he was asleep on a train and when it reached the end of the line was awakened by a train operator who, knowing that plaintiff was obviously inebriated, ordered him to leave and left him standing on the edge of the station platform, after which plaintiff injured himself by falling off the platform or getting in the way of a moving train. The trial court sustained defendants demurrer, plaintiff filed a motion for reconsideration, and attached an amended complaint to it. Judgment dismissing the complaint was entered and the motion was denied. Plaintiff appealed after his motion to set aside the judgment was also denied.

The court of appeal affirmed on the basis of the rule enunciated in *Marshall v. United Airlines (1973) 35 Cal. App. 3d 84, 86, 110 Cal. Rptr. 416* , that the heightened duty of care owed by a common carrier to a passenger, *Civ. Code § 2100*, only applies while passengers are in transit and until they have safely departed the carrier's vehicle. According to the court, once plaintiff had safely exited the train, the relationship of carrier-passenger had terminated and plaintiff was in a place of relative safety. Thus, defendant had no duty to remove plaintiff from the train platform based on the existence of the carrier-passenger relationship (*57 Cal. App. 4th 1011, 1017)* .

The court dismissed plaintiff's argument, under the reasoning in *Marshall* that his special relationship with defendant continued after he left the train because he remained in a hazardous sphere of activity associated with the journey while he was on the train platform. In *Marshall*, the court determined that the carrier owed a plaintiff who was injured while walking in an airport terminal between flights a duty of ordinary or reasonable care because the plaintiff had reached a place outside the sphere of any activity of the carrier which might reasonably constitute a mobile or animated hazard to the passenger. The court concluded that plaintiff was not within a sphere of activity as envisioned by *Marshall*. There are no mobile hazards on a train platform because the train is on a fixed track, and there are no freely moving vehicles that might strike a passenger while on the platform (*57 Cal. App. 4th 1011, 1018)* .

The facts of ***Marshall v. United Airlines*** *(1973) 35 Cal. App. 3d 84, 110 Cal. Rptr. 416* , are discussed in *§ 33.24[3][a]*. In discussing a common carrier's duty of care to its passengers, the court of appeal stated that the general rule is that a carrier owes its passengers the highest degree of care, but that this rule applies while the passengers are in transit and until they have safely departed from the carrier's vehicle. The duty ends when the passenger is discharged into a relatively safe space, but not when the passenger alights safely from the carrier's vehicle if the passenger is discharged into a dangerous area. Once the passenger enters the carrier's station, the carrier is bound to exercise only a reasonable degree of care for the passenger's safety. Thus, in this case the duty of care owed to plaintiff, if any, was no greater than ordinary or reasonable care (*35 Cal. App. 3d 84, 86-87)* .

[c] No Duty to Maintain

The facts of ***Marshall v. United Airlines*** *(1973) 35 Cal. App. 3d 84, 110 Cal. Rptr. 416* , are discussed in *§ 33.24[3][a]*. The court of appeal stated that liability for the negligent maintenance of property arises from the rule that everyone is responsible for injuring another by his want of ordinary care or skill in the management of his property [*see Code Civ. Proc. § 1714*]. In the absence of agreement or other special circumstances, there is no duty to maintain property. Therefore, if there is no ownership or right of control or management of the property, there is no liability for its negligent maintenance. United was under no duty to maintain the stairway which caused plaintiff's injuries since United was not the owner or lessee of the stairway and had no right of control over it (*35 Cal. App. 3d 84, 88)* .

[d] Duty of Carrier by Bus or Streetcar

In ***MacLean v. City & County of San Francisco*** *(1954) 127 Cal. App. 2d 263, 273 P.2d 698* , plaintiff brought an action against the City and County of San Francisco, and others, for injuries she allegedly sustained while alighting from a municipal bus. The court of appeal affirmed the trial court's judgment in favor of defendant city and county after granting its motion for nonsuit. The bus on which plaintiff had been riding had stopped with its front door five to eight feet from the curb. The court of appeal stated that the testimony showed that plaintiff did not step directly from the bus onto the mortar on which she slipped. Since plaintiff was not alighting from the bus when she was injured, the rule that the high degree of care required of a carrier toward a passenger ends when the passenger safely alights from the bus and that the carrier is not responsible for injuries occuring thereafter from the condition of the street which the passenger had to cross to get to the sidewalk applied. This rule was established for streetcars in *Choquette v. Key Sys. Transit Co. (1931) 118 Cal. App. 643, 654-655, 5 P.2d 921* (*127 Cal. App. 2d 263, 271)* . The court also stated that the fact that the bus stopped away from the curb but as near to it as possible under the circumstances did not constitute negligence.

In ***Kotronakis v. City & County of San Francisco*** *(1961) 192 Cal. App. 2d 624, 13 Cal. Rptr. 709* , plaintiff was approaching a bus stop to wait for a city bus which was also approaching the stop. He stepped in a puddle on the sidewalk near the curb and fell. There was no evidence that plaintiff signified his desire to board the bus to the driver, or that the bus driver knew that plaintiff wished to board the bus. The court of appeal held that the evidence was insufficient to sustain the verdict for plaintiff on the theory of the city's liability as a common carrier. Though the court felt that plaintiff had probably not yet become a passenger, it rested its ruling on the ground that the municipal railway as a common carrier did not have any duty to maintain the sidewalks in a safe condition merely because patrons of the line boarded and alighted from its buses on the sidewalk (*192 Cal. App. 2d 624, 627)* . The court approved the holding in *Choquette v. Key Sys. Transit Co. (1931) 118 Cal. App. 643, 653-655, 5 P.2d 921* , that a streetcar company does not have the same duty as a commercial railway to provide a passenger with safe passage to and from a car, since the streetcar company does not have control over the streets or traffic on the streets.

[e] No Duty to Disembarked Incapacitated Passenger

In ***McGettigan v. Bay Area Rapid Transit Dist.*** *(1997) 57 Cal. App. 4th 1011, 67 Cal. Rptr. 2d 516* ; plaintiff sued a rapid transit district for negligence based on the following facts: he was asleep on a train and when it reached the end of the line was awakened by a train operator who, knowing that plaintiff was obviously inebriated, ordered him to leave and left him standing on the edge of the station platform, after which plaintiff injured himself by falling off the platform or getting in the way of a moving train. The trial court sustained defendants demurrer, plaintiff filed a motion for reconsideration, and attached an amended complaint to it. Judgment dismissing the complaint was entered and the motion was denied. Plaintiff appealed after his motion to set aside the judgment was also denied.

The court of appeal affirmed. Plaintiff contended that defendant, as a common carrier, should have assumed responsibility for his care as a passenger because he was obviously incapacitated and unable to care for himself. In support of this argument plaintiff cited *McBride v. Atchison, Topeka & Santa Fe Ry. Co. (1955) 44 Cal. 2d 113, 119, 279 P.2d 966* , which held that a common carrier must render the necessary assistance in boarding or alighting from its trains or cars, to persons with special needs. The court distinguished *McBride* because in this case plaintiff was not injured as he exited the train, but sometime after he had safely exited. Therefore, defendant was not liable for plaintiff's injuries under the reasoning of this case (*57 Cal. App. 4th 1011, 1020)* .

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3-33 California Points & Authorities § 33.25

§ 33.25 Supporting Motion for New Trial [Code Civ. Proc. § 657(7)] in Action Against Common Carrier for Personal Injuries to [Civ. Code §§ 1714, 2100] or Wrongful Death of [Code Civ. Proc. § 377.60 et seq.] Passenger--By Plaintiff--Instruction That Res Ipsa Loquitur Applicable Should Have Been Given

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN SUPPORT OF MOTION FOR NEW TRIAL
vs.	)	[*Code Civ. Proc. § 657(7)*]
_____ [*name*(*s*)],	)	Date: _____
Defendant(s).	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

IT IS PROPER FOR A COURT TO GRANT A MOTION FOR A NEW TRIAL FOR AN ERROR OF LAW CONSISTING OF ITS FAILURE TO INSTRUCT THE JURY ON THE DOCTRINE OF RES IPSA LOQUITUR WHEN THE [AN] INSTRUCTION[S] IS/ARE PROPER.

A. Granting Motion for New Trial. A trial court may grant a new trial for an error of law (*Code Civ. Proc. § 657(7)*) consisting of the failure to give an instruction thereby misleading the jury (*Kimball v. Whetzel (1970) 10 Cal. App. 3d 836, 842, 89 Cal. Rptr. 373*).

B. When Doctrine of Res Ipsa Loquitur Applies. An inference of negligence based on res ipsa loquitur arises when a passenger on a common carrier is injured as a result of the operation of the Vehicle (*Hardin v. San Jose City Lines, Inc. (1953) 41 Cal. 2d 432, 436, 260 P.2d 63*).

C. Refusal of Proper Res Ipsa Loquitur Instructions as Error. When plaintiff has produced evidence sufficient to support findings that the conditions requisite to drawing an inference of res ipsa loquitur exist, it is error for the trialcourt to refuse to allow the inference by refusing a proper instruction (*Keena v. Scales (1964) 61 Cal. 2d 779, 783, 40 Cal. Rptr. 65, 394 P.2d 809*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for a new trial in an action for damages for injuries to or wrongful death of a passenger brought against a common carrier where the court did not give instructions on res ipsa loquitur although plaintiff produced evidence sufficient to support findings that the conditions requisite to drawing an inference of res ipsa loquitur exist.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Counsel should also consider adding points and authorities relating to standards for granting motions for new trial, generally [*see* Ch. 155, *Motions After Trial*].

With appropriate modifications, these points and authorities may be used to oppose a motion for a new trial brought by a defendant on the ground that instructions regarding res ipsa loquitur should not have been given.

[b] Related Pleading and Practice Forms

For a form of notice of intention to move for a new trial, and a form of order granting such a motion, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[3] Discussion of Authorities

[a] Granting Motion for New Trial

In ***Kimball v. Whetzel*** *(1970) 10 Cal. App. 3d 836, 89 Cal. Rptr. 373* , plaintiff brought an action for personal injuries sustained when defendant's vehicle rear-ended her vehicle. After a jury verdict for defendant, the trial court granted a new trial based on its failure to give an instruction concerning the law governing the manner of signaling. Defendant contended that the trial court improperly granted the motion for a new trial because its error in instructing the jury was not prejudicial and because plaintiff had not made an objection. In affirming the order, the court of appeal stated that the trial court's discretion in granting a new trial should be upheld even if the error in instructions was minor or debatable.

There is no requirement that an appellate court determine whether the error was prejudicial. Rather, the issue is whether or not the failure to give the instruction was sufficiently misleading so that the trial court, having seen and heard the witnesses, could find that the instructions were improper. The court affirmed the order, finding that the rules governing waiver have no application to an appellate court's consideration of propriety of an order granting a new trial (*10 Cal. App. 3d 836, 842)* .

[b] When Doctrine of Res Ipsa Loquitur Applies

In ***Hardin v. San Jose City Lines, Inc.*** *(1953) 41 Cal. 2d 432, 260 P.2d 63* , plaintiff brought an action for damages for injuries she sustained while riding in a bus operated by defendant. Plaintiff testified that she was waiting at the front of the bus to get off at her stop when the bus came to a sudden stop about 150 feet from the regular stopping place and that as a result she was thrown forward and injured. The jury returned a verdict for plaintiff, and defendant appealed from the judgment, asserting that the court erred in giving its instruction on the doctrine of res ipsa loquitur. In discussing the propriety of the instruction, the Supreme Court stated that an inference of negligence based on res ipsa loquitur arises in cases in which a passenger on a common carrier is injured as the result of the operation of the vehicle. Therefore, the trial court could properly instruct the jury that if the accident happened as described by plaintiff, an inference arose that her injury was caused by defendant's negligence and that it was incumbent on defendant to rebut the inference by showing that it exercised the utmost care and diligence. Although the Court found that the instruction was improperly worded in that it assumed that the accident occurred in the manner claimed by plaintiff, it affirmed the judgment, because the error was not prejudicial in that other instructions clarified this point (*41 Cal. 2d 432, 436)* .

[c] Refusal of Proper Res Ipsa Loquitur Instructions as Error

In ***Keena v. Scales*** *(1964) 61 Cal. 2d 779, 40 Cal. Rptr. 65, 394 P.2d 809* , the Supreme Court reversed a judgment for defendant in an action for personal injuries suffered by plaintiff in a fall from a chair in defendant's office. The only issue before the court was whether or not the trial court had committed prejudicial error in failing to give plaintiff's requested instruction on the doctrine of res ipsa loquitur. Citing *Di Mare v. Cresci (1962) 58 Cal. 2d 292, 298, 23 Cal. Rptr. 772, 373 P.2d 860* , the Court stated that the doctrine of res ipsa loquitur applies when the accident is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone, and that the defendant is probably the one responsible. The Court found sufficient evidence to warrantfindings supporting the application of the doctrine. Although there was also evidence that would support a finding that plaintiff's negligent use of the chair was the cause of the accident, the Court stated that if a plaintiff has produced evidence sufficient to support findings that the conditions requisite to the drawing of the inference are present, the trial court's refusal to allow the inference by refusing a proper instruction is error, because a proper instruction would have made clear to the jury that the doctrine could not apply unless the plaintiff was free from fault in causing the accident. Since plaintiff's instruction, although lacking in clarity, appeared proper to the Court, the Court reversed the judgment for defendant (*61 Cal. 2d 779, 783)* .

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3-33 California Points & Authorities § 33.26

§ 33.26 Supporting Contention That Carrier's Liability Is Limited in Action for Loss of or Damage to Baggage or Freight [Civ. Code §§ 2182, 2194, 2195]--Limitation by Special Contract [Civ. Code § 2174]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial appellate brief*].

THE AMOUNT OF DAMAGES, IF ANY, RECOVERABLE BY PLAINTIFF IS LIMITED TO $_____ PURSUANT TO AN ENFORCEABLE SPECIAL CONTRACT LIMITING THE OBLIGATIONS OF DEFENDANT AS A COMMON CARRIER.

A. Limitation of Carrier's Obligations. The obligations of a common carrier may be limited by special contract (*Civ. Code § 2174*; *Morville v. United Parcel Serv. (1983) 144 Cal. App. 3d 552, 554, 192 Cal. Rptr. 779*).

[*EITHER*]

B. Agreed Valuation Contract. An agreed valuation contract, whose primary purpose is to set an actual valuation of the property for determination of freight rates, which valuation is agreed by the parties to be the actual value for all purposes, is enforceable as a reasonable contract under which the carrier cannot be held responsible for loss in an amount exceeding the agreed valuation (*Donlon Bros. v. Southern Pac. Co. (1907) 151 Cal. 763, 768-769, 776, 91 P. 603*).

[*OR*]

B. Implied Acceptance of Limitation. A passenger, consignor, or consignee, by accepting a ticket, bill of lading, or written contract for carriage, with knowledge of its terms, assents to the limitation stated regarding the amount of the carrier's liability if property carried in packages, trunks, or boxes is lost or damaged, when the value of the property is

not named, and also to the limitation stated regarding the carrier's liability for loss or injury to live animals carried (*Civ. Code § 2176*).

[*CONTINUE*]

[*Optional*] **C. Limitation of Liability in Bill of Lading.** Damages may be limited by a term in a bill of lading or transportation agreement that the carrier's liability may not exceed a value stated in the bill or transportation agreement, if the carrier's rates are dependent upon value, the consignor is afforded an opportunity to declare a higher value, and the consignor is advised of the opportunity (*Com. Code § 7309(b)*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of the contention that the damages recoverable in an action against a carrier are limited by a special contract between the parties [*see Civ. Code §§ 2174, 2176*]. Optional Paragraph C is for use when damages are limited by a provision in a bill of lading [*see Com. Code § 7309(b)*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the carrier's obligation is limited by virtue of a special contract. For example, if no triable issue of material fact remains, these points and authorities may be combined with points and authorities in support of a motion for summary judgment [*see Code Civ. Proc. § 437c*]. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Therefore, for example, counsel should set forth the existence and terms of the "special contract" within the meaning of *Civ. Code § 2174.*

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities in *§ 33.32* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Limitation of Carrier's Obligations

In ***Morville v. United Parcel Serv.*** *(1983) 144 Cal. App. 3d 552, 192 Cal. Rptr. 779* , a mail order stamp dealer contracted with a company (the consignor) that agreed to convert his mailing lists of customers to a card system for use in an addressing machine. After performing the contracted service, the consignor delivered the cards and the list to United Postal Service (UPS), which lost the package. The contract between UPS and the consignor included a $100 limitationof liability unless excess value was declared. The consignor delivered the packageto UPS without a declaration of added value. The stamp dealer brought an action against UPS and the consignor, seeking damages for breach of contract, negligence, and conversion for loss of unique and irreplaceable goods. Plaintiff did not contest the existence of the contract between UPS and the consignor, but rather asserted that it was void. The trial court granted the motion by UPS for summary judgment, and plaintiff appealed.

The court of appeal affirmed, holding that *Civ. Code § 2174* applied to limit the carrier's liability to the stated amount in the contract (*144 Cal. App. 3d 552, 554-556)* . The court rejected plaintiff's argument that pursuant to *Civ. Code § 2176*, the consent of both the consignor and consignee is required. The court stated that the term "or" as used in that

statute is a disjunctive participle used to express an alternative. Consequently, the consent of the consignor to the terms of the limitation was sufficient to bind plaintiff (*144 Cal. App. 3d 552, 554-555)* . The court further stated that a consignor with authority to deliver goods to a carrier for shipment has the authority to enter into a special contract limiting liability (*144 Cal. App. 3d 552, 555)* . Moreover, the same rule applies when actual authority is absent but the facts do not place the carrier on notice that the consignor is without authority to limit liability (*144 Cal. App. 3d 552, 555)* . In the instant case, UPS had shipped an average of 52 packages per day for the consignor, and had made daily pickups from that company for ten years. The court noted that a rule requiring UPS to inquire into the consignor's authority on each and every package would cause the precise uncertainties and costs that the rate structure is designed to eliminate. Although plaintiff alleged that the contract between him and the consignor provided that the consignor's agent would personally pick up and deliver the lists, UPS had no notice of that contract, and the $100 limitation was therefore binding on plaintiff with regard to UPS (*144 Cal. App. 3d 552, 556)* . The court also noted that its conclusion does not exonerate the consignor from any breach of its agreement with plaintiff (*144 Cal. App. 3d 552, 556 n.7*).

[b] Agreed Valuation Contract

In ***Donlon Bros. v. Southern Pac. Co.*** *(1907) 151 Cal. 763, 91 P. 603* , plaintiffs brought an action for damages against defendant railway common carrier for injury to one racehorse and for the death of another, alleging that while transporting the horses, the defendant committed gross negligence. The contract between plaintiffs and defendant established a special rate for transportation based on an agreed valuation, and stated that the amount claimed for loss or damage for each animal was to be adjusted on the basis of the value at the time and place of shipment, not exceeding the declared valuation set forth in the contract, which was $20 for each horse. The jury found that defendant was grossly negligent, and returned a verdict in favor of plaintiffs for $350 for the horse that was killed and $200 for the horse that was injured. Defendant appealed, asserting that the trial court improperly refused to instruct the jury that if they found for plaintiff, their verdict should not exceed $20 damages for each horse.

The Supreme Court reversed and ordered a new trial, holding that the court erred in refusing to give the proffered instruction (*151 Cal. 763, 776)* . The Court found that because the rates of transportation charged by the carrier were measured by the valuation of the property shipped, the primary purpose of the contract was to fix an agreed valuation of the horses as a basis on which freight rates should be charged and paid, on the condition that in case of loss the responsibility of the carrier would be measured by the agreed valuation. The contract was therefore not one limiting liability for gross negligence within the meaning of *Civ. Code § 2175*, which would be unenforceable under the provisions of that statute (*151 Cal. 763, 774-776)* .

NOTE:

In *Muelder v. Western Greyhound Lines (1970) 8 Cal. App. 3d 319, 330, 87 Cal. Rptr. 297* [*see § 33.32[3][a]*], which did not uphold the limitation provision before it, the court noted in dictum that a contract described in *Donlon* is valid only if the shipper had a choice of rates and a fair opportunity to obtain higher valuation by paying a higher rate.

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3-33 California Points & Authorities § 33.27

§ 33.27 Supporting Contention That Carrier's Liability Is Limited in Action for Loss of or Damage to Baggage or Freight [Civ. Code §§ 2182, 2194, 2195]--Limitation by Statute [Civ. Code §§ 2178, 2200, 2205]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial appellate brief.*]

THE AMOUNT OF DAMAGES, IF ANY, RECOVERABLE BY PLAINTIFF IS LIMITED TO $_____ PURSUANT TO _____ [*specify statute, e.g., CIVIL CODE SECTION 2182*], WHICH LIMITS THE OBLIGATIONS OF DEFENDANT AS A COMMON CARRIER.

[*EITHER*]

Limitation of Railroad's Liability. The liability of a common carrier of property by a railroad for loss or injury of baggage carried as part of or in connection with passenger transportation is limited to _____ [*specify as appropriate, e.g.,* $100 for each trunk and its contents *or* $50 for each suitcase, valise, or traveling bag and its contents *or* $10 for each box, bundle, or package and contents], unless the carrier agreed in writing to assume a greater liability (*Civ. Code § 2178*).

[*OR*]

Limitation of Liability of Common Carrier Over Highway. The liability ofa common carrier operating over the public highways for the loss of or damage to any baggage is limited to _____ [*specify as appropriate, e.g.,* $500 for each trunk and its contents *or* $250 for each valise, suitcase, or traveling bag and its contents *or* $250 for each box, bundle, or package and its contents], unless a higher valuation is declared at the time of delivery of such baggage to the carrier and assented to in writing by the carrier (*Civ. Code § 2205*).

[*OR*]

Limitation of Liability for Valuables. A common carrier of gold, silver, platina, or precious stones, or of imitations of them, of timepieces of any description; of negotiable paper or other valuable writings; of pictures, glass, or chinaware; of statuary, silk, or laces; or of plated ware of any kind, is not liable for more than $50 on the loss or injury of any one package of those articles, unless he or she has notice, on receipt, by mark on the package or otherwise, of the nature of the freight; nor is the carrier liable on any package carried for more than the value of the articles named in the receipt or the bill of lading (*Civ. Code § 2200*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of the contention that a carrier's liability for loss of or injury to baggage or freight is limited by statute [*see Civ. Code §§ 2178, 2200, 2205*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the carrier's obligation is limited by virtue of a special contract. For example, if no triable issue of material fact remains, these points and authorities may be combined with points and authorities in support of a motion for summary judgment [*see Code Civ. Proc. § 437c*]. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should set forth facts showing that the carrier's liability is governed by a particular statute.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities in *§ 33.33* may be used to oppose the contention supported by these points and authorities.

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3-33 California Points & Authorities § 33.28

§ 33.28 Opposing Demurrer [Code Civ. Proc. § 430.10(e)] to Complaint in Action Against Common Carrier for Loss of or Injury to Freight [Civ. Code § 2194 or 2195]--Statute of Limitations as Tolled

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____[*name*(*s*)],	)	IES IN OPPOSITION TO DEMURRER
Defendant(s).	)	[*Code Civ. Proc. § 430.10(e)*]
	)	
	)	

_____

THE COMPLAINT IS NOT BARRED BY THE STATUTE OF LIMITATIONS AS PLAINTIFF'S CAUSE OF ACTION WAS TOLLED UNTIL PLAINTIFF SUSTAINED INJURY AND DISCOVERED OR SHOULD HAVE DISCOVERED A CAUSE OF ACTION.

Statute of Limitations Tolled. In an action for property damage against a defendant which holds itself out as qualified to pack and ship property, the statute of limitations is tolled until plaintiff sustains damage and discovers or should have discovered his/her cause of action (*Allred v. Bekins Wide World Van Serv. (1975) 45 Cal. App. 3d 984, 989-991, 120 Cal. Rptr. 312*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in an action for loss of or injury to freight, in opposition to a demurrer based on the ground that the action is barred by the statute of limitations.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Points and Authorities

For memoranda of points and authorities in opposition to demurrers, see Ch. 71,*Demurrers and Motions for Judgment on the Pleadings*.

In an appropriate case, these points and authorities may be submitted in opposition to the points and authorities in *§ 33.21*.

[3] Discussion of Authorities

[a] Statute of Limitations Tolled

Plaintiffs in ***Allred v. Bekins Wide World Van Serv.*** *(1975) 45 Cal. App. 3d 984, 120 Cal. Rptr. 312* , brought an action for personal injuries and property damages suffered as a result of the existence of microscopic vermin which lived and bred in the packing straw which defendant carrier used to pack plaintiffs' personal belongings which it carried. The trial court sustained defendants' general demurrers on the ground that the action was barred by the statute of limitations. The court of appeal found that the action for personal injury was barred by the statute of limitations, but that the action for property damage was not barred and that the judgment of dismissal entered on the property damage cause of action should be reversed.

In considering the question of the time of commencement of the appropriate periods of limitation (one-year period of former Code Civ. Proc. § 340(3) (*now see Code Civ. Proc. § 335.1* (two-year period beginning in 2003)) for the personal injuries and three-year period of former Code Civ. Proc. § 338(3) (*now see Code Civ. Proc. § 338(a)*) for the property damage), the court of appeal relied on the decisions in *Neel v. Magana, Olney, Levy, Cathcart & Gelfand (1971) 6 Cal. 3d 176, 98 Cal. Rptr. 837, 491 P.2d 421* , and *Budd v. Nixen (1971) 6 Cal. 3d 195, 98 Cal. Rptr. 849, 491 P.2d 433* , which held that the statute of limitations in actions for legal malpractice, as in other actions for professional negligence, does not start running, and the cause of action in tort does not accrue until the client sustains some damage and discovers, or should discover, his or her cause of action. The court of appeal stated that the same duty of care required of a professional is required where one undertakes to render services in the practice of a trade. The court found that defendant held itself out as qualified and equipped to pack and ship articles of personal property around the world, and that the delayed discovery rule of *Neel* and *Budd* applied (*45 Cal. App. 3d 984, 989-991)* .

In *Neel v. Magana, Olney, Levy, Cathcart & Gelfand (1971) 6 Cal. 3d 176, 98 Cal. Rptr. 837, 491 P.2d 421* , the Court discussed several factors leading to the rule postponing the period of limitation until discovery in cases of professional malpractice. The rule is based on the special nature of the relationship between the professional and his or

her client. The Court discussed the special obligation of the professional to use the skill, prudence, and diligence commonly exercised by practitioners of the particular profession. Furthermore, the client may fail to recognize negligence when he or she sees it, and often will lack any opportunity. The final factor the Court discussed is that the dealings between a practitioner and client frame a fiduciary duty which embraces the obligation to render a full and fair disclosure to the beneficiary of all facts which materially affect the beneficiary's rights and interests.

In applying the rule of *Neel*, the court did not consider all of these factors. It discussed the duty of a "professional" and the fact that the court in *Neel* incidentally pointed out that the same duty applies in a trade. The court, however, did not discuss what effect the other considerations in *Neel* such as the existence of a fiduciary relationship, would have on its extension of the Court's holding in *Neel* to a defendant such as Bekins Wide World Van Services.

[4] Additional Authorities

[a] Statute of Limitations Tolled

In *Cain v. State Farm Mut. Auto. Ins. Co. (1976) 62 Cal. App. 3d 310, 132 Cal. Rptr. 860* , the court of appeal cited its decision in *Allred v. Bekins Wide World Van Serv. (1975) 45 Cal. App. 3d 984, 120 Cal. Rptr. 312* [*see § 33.28[3][a]*], as an illustration of the trend applying the discovery rule in respect to the time for accrual of a cause of action for personal injuries. In *Cain,* the court applied the discovery rule to former Code Civ. Proc. § 340(3) [*now see Code Civ. Proc. § 335.1*] in an action for damages for violation of the right of privacy and reversed the lower court's judgment for defendant which was based on the bar of the statute of limitations. In giving examples of cases applying the rule that the statute of limitations does not run until the act causing the personal injuries is discovered, or with reasonable diligence should have been discovered, the court described *Allred* as a case in which the "discovery rule" applied in an action for personal injuries caused by violation of a duty arising under a contract.

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3-33 California Points & Authorities § 33.29

§ 33.29 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action Against Common Carrier for Personal Injury to [Civ. Code §§ 1714, 2100] or Wrongful Death of [Code Civ. Proc. § 377.60] Passenger--Carrier-Passenger Relationship Existing

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN OPPOSITION TO MOTION FOR SUM-
vs.	)	MARY JUDGMENT
_____ [*name*(*s*)],	)	[*Code Civ. Proc. § 437c*]
Defendant(s).	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

IT IS IMPROPER FOR THE COURT TO GRANT A MOTION FOR SUMMARY JUDGMENT WHERE THERE ARE FACTS SHOWING THAT _____ [PLAINTIFF *or* PLAINTIFF'S DECEDENT] MANIFESTED AN INTENTION TO BOARD THE VEHICLE AND THAT DEFENDANT'S AGENT INDICATED AN INTENTION TO ACCEPT _____ [PLAINTIFF *or* PLAINTIFF'S DECEDENT] AS A PASSENGER.

A. Rules Governing Summary Judgment Procedure. Granting a motion for summary judgment is proper only if the affidavits supporting the motion establish every element necessary to sustain a judgment in favor of the moving party

and the opposing party has not presented any facts which give rise to a triable issue. In ruling on the motion, the moving party's affidavits are strictly construed while the opposing party's are liberally construed, and doubts as to the propriety of granting the motion should be resolved in favor of the opposing party (*Corwin v. Los Angeles Newspaper Serv. Bureau, Inc. (1971) 4 Cal. 3d 842, 851 n.6, 851-852, 94 Cal. Rptr. 785, 484 P.2d 953*).

B. Establishment of Carrier-Passenger Relationship. The relationship of passenger to carrier is established when a person intends to board a vehicle, indicates this intention, and the person in charge of the vehicle indicates the intention to receive the person as a passenger (*Hart v. Fresno Traction Co. (1917) 175 Cal. 489, 490-491, 167 P. 885* ; *Lagomarsino v. Market S. R. Co. (1945) 69 Cal. App. 2d 388, 395, 158 P.2d 982*).

C. Carrier's Duty During Carrier-Passenger Relationship. During the carrier-passenger relationship, a carrier is required by law (*Civ. Code § 2100*) to use the utmost care and diligence for the safe carriage of a person, to provide everything necessary for that purpose, and to exercise to that end a reasonable degree of skill (*Lopez v. Southern Cal. Rapid Transit Dist. (1985) 40 Cal. 3d 780, 785, 221 Cal. Rptr. 840, 710 P.2d 907* ; *Lagomarsino v. Market S. R. Co. (1945) 69 Cal. App. 2d 388, 395-396, 158 P.2d 982*).

[*Optional*] **D. Carrier's Duty to Protect Against Assaults by Third Persons.** A common carrier is under a duty to exercise the utmost care to protect its passengers from assaults by third persons (*Lopez v. Southern Cal. Rapid Transit Dist. (1985) 40 Cal. 3d 780, 791, 221 Cal. Rptr. 840, 710 P.2d 907*).

[*Optional*] **E. Passenger's Purpose in Purchasing Transportation Does Not Determine Whether Defendant Qualifies as Common Carrier.** A passenger's purpose in purchasing transportation does not determine whether the provider of the transportation qualifies as a common carrier. Therefore, even if the purpose of the transportation may be the providing of entertainment or thrills, roller coasters and similar amusement park rides qualify as common carriers (*Gomez v. Superior Court (2005) 35 Cal. 4th 1125, 1136, 29 Cal. Rptr. 3d 352, 113 P.3d 41*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for summary judgment made by a carrier in an action for damages for injuries or wrongful death where defendant asserts in its motion that it did not owe a duty of care to plaintiff (or plaintiff's decedent) because a carrier-passenger relationship did not exist at the time of the accident.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discussfacts showing that a carrier-passenger relationship had in fact been established, and that the carrier had breached its duty of care. Counsel should also attach affidavits or declarations supporting the factual contentions set forth in the memorandum, as well as a separate statement setting out the matters that the party contends

are undisputed [*see Code Civ. Proc. § 437c(b)(2),(3)*].

[b] Related Pleading and Practice Forms

For discussion and forms of declarations opposing and orders denying motions for summary judgment, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities in opposition to motions for summary judgment, see Ch. 221, *Summary Judgments* .

In an appropriate case, these points and authorities may be submitted in opposition to the points and authorities in *§ 33.24*.

[3] Discussion of Authorities

[a] Rules Governing Summary Judgment Procedure

Plaintiffs in ***Corwin v. Los Angeles Newspaper Serv. Bureau, Inc.*** *(1971) 4 Cal. 3d 842, 94 Cal. Rptr. 785, 484 P.2d 953* , filed an action against defendants for violations of *Bus. & Prof. Code §§ 16720, 16726* (prohibited restraints of trade under Cartwright Act). The trial court granted defendants' motion for summary judgment and plaintiffs appealed from the judgment entered in favor of defendants. The Supreme Court concluded that the trial court had erroneously granted the summary judgment and reversed the judgment. In reviewing the trial court's action, the Court commented that summary judgment is a drastic procedure which is to be used with caution so that it does not become a substitute for the open trial method of determining facts, and repeated its previous summary of the rules governing summary judgment procedure set out in Paragraph A of this form (*4 Cal. 3d 842, 851 n.6, 851-852)* .

[b] Establishment of Carrier-Passenger Relationship

In ***Hart v. Fresno Traction Co.*** *(1917) 175 Cal. 489, 167 P. 885* , plaintiff brought an action for injuries against an electric railway. Plaintiff and some coworkers had gone to defendant's station with the intention of boarding one of defendant's cars to Fresno. When it began to rain, they took shelter 125 feet from the place where the car usually stopped at the end of the line. When the trolley arrived plaintiff and the others started toward it, but it did not stop at its customary place at the end of the tracks. It started its reverse course but slowed down allowing plaintiff's companions ahead of him to board. The car slowed to the speed at which plaintiff was walking and plaintiff was injured when the car jerked as he was jumping onto the step while being watched by the conductor and the motorman. Defendant appealed from the judgment for plaintiff following a verdict in plaintiff's favor, contending that there was insufficient evidence to show that plaintiff had become a passenger. Defendant asserted that plaintiff did not come under the rule that one, though not inside the carrier's vehicle, may become a passenger if the surrounding circumstances show an intention on the person's part to become a passenger and an acceptance of the person as a passenger by the carrier [*Nilson v. Oakland Traction Co. (1909) 10 Cal. App. 103, 109, 101 P. 413]* because there was no communication of plaintiff's intention and no circumstances showing acceptance of plaintiff as a passenger. In sustaining the judgment for plaintiff, the court of appeal stated that the uncontroverted evidence tended to show that plaintiff intended to board the car to be carried as a passenger, that defendant's employees in charge knew of his intention to do so, and indicated their consent to receive him and his companions by reducing the speed of the car, and that the circumstances thus tended to establish the relationship of carrier and passenger (*175 Cal. 489, 490-491)* .

In ***Lagomarsino v. Market S. R. Co.*** *(1945) 69 Cal. App. 2d 388, 158 P.2d 982* , plaintiff alighted from one of defendant's streetcars to wait to board another of defendant's streetcars. She was waiting for a gate to open so that she could board the streetcar when a passing streetcar struck her, causing her injuries. Plaintiff recovered judgment, and the

trial court denied a motion for new trial after reducing the amount of the judgment. Defendants appealed from the judgment as reduced, contending that there was insufficient evidence to support a finding that a passenger-carrier relationship had been established between plaintiff and defendant. In reviewing the trial court's instructions, the court of appeal stated that if a person intends to board a vehicle and indicates this intention by standing alongside of the vehicle and the person in charge of the vehicle indicates an intention to receive the passenger and, as in this case, stops the car and prepares to immediately receive the person, the relationship of carrier and passenger is established. The court also stated that once the relationship is established the carrier must use the utmost care and diligence, and a reasonable degree of skill must be exercised by its agents or servants on the standing vehicle as well as on a moving vehicle operated by the same carrier. The fact that a fare has not yet been collected is not determinative of the carrier-passenger relationship. The court found that the trial court's use of the words "highest degree of care" in its instructions was correct, and affirmed the judgment on that ground as well as other grounds (*69 Cal. App. 2d 388, 395-396)* .

[c] Carrier's Duty During Carrier-Passenger Relationship

Lagomarsino v. Market S. R. Co. *(1945) 69 Cal. App. 2d 388, 395-396, 158 P.2d 982* , is discussed in *§ 33.29[3][b]*.

[d] Carrier's Duty to Protect Against Assaults by Third Persons

In ***Lopez v. Southern Cal. Rapid Transit Dist.*** *(1985) 40 Cal. 3d 780, 221 Cal. Rptr. 840, 710 P.2d 907* , plaintiff bus passengers sued a public common carrier after they were injured when a fight broke out among other passengers on the bus. The trial court dismissed the action on the grounds that the carrier was a public entity and was immune from liability under the facts of the case. The California Supreme Court reversed.

The Court held that under *Civ. Code § 2100*, a common carrier may be held liable for failing to protect a passenger from assault by a third party. Initially, the Court held that a public entity could be found liable under *Civ. Code § 2100*, which requires carriers of persons for reward to use the utmost care and diligence for their safe carriage. It found that *Civ. Code § 2100* provides the statutory authority necessary to circumvent the general rule of governmental immunity found in *Gov. Code § 815* (*40 Cal. 3d 780, 785)* . The Court then held that the duty of care to protect a passenger from assault by a third person applies when the carrier has, or with the exercise of the utmost care should have, knowledge from which it may reasonably be apprehended that an assault may occur and the carrier, in addition, has the ability, with the exercise of utmost care, to prevent the injury (*40 Cal. 3d 780, 791)* . While noting that the carriers are not insurers of their passengers' safety (*40 Cal. 3d 780, 791)* , and are not necessarily under a duty to provide an armed security guard on each vehicle, the Court noted a number of precautionary measures a carrier might take in order to protect its passengers from assault, including such measures as providing radio communication between the bus driver and the local police and equipping the bus with alarm lights (*40 Cal. 3d 780, 787-788)* .

[e] Passenger's Purpose in Purchasing Transportation Does Not Determine Whether Defendant Qualifies as Common Carrier

In ***Gomez v. Superior Court*** *(2005) 35 Cal. 4th 1125, 29 Cal. Rptr. 3d 352, 113 P.3d 41* , the plaintiffs were the estate and heirs of a woman who was killed after allegedly suffering brain injuries from riding on a roller coaster at an amusement park. The plaintiffs sued the amusement park, including in the complaint causes of action under *Civ. Code §§ 2100* and *2101*, which impose heightened duties of care toward passengers on common carriers. The trial court sustained the defendant's demurrer to those causes of action, concluding that amusement park rides such as roller coasters are not common carriers because the main purpose of the ride is entertainment or thrills and transportation is merely incidental to that purpose. The plaintiffs sought a writ of mandate, which the court of appeal granted, and the defendant appealed.

The California Supreme Court affirmed the decision of the court of appeal. The Court noted the broad statutory definition of common carrier contained in *Civ. Code § 2168*, which encompasses "[e]very one who offers to the public

to carry persons, property, or messages, excepting only telegraphic messages." The Court also noted the expansive application that has been given to this definition by California courts in the past, which have included in the definition of a common carrier such things as elevators, sightseeing airplane rides that begin and end at the same airport, and recreational rides (*35 Cal. 4th 1125, 1130-1133)* . Consistent with these broad interpretations, the Court held that the operator of a roller coaster or similar type of amusement park ride could be a common carrier for purposes of *Civ. Code §§ 2100* and *2101*. The Court held that a passenger's purpose in purchasing transportation, whether that purpose is to get from one place to another or to travel for entertainment or sightseeing, does not determine whether the transportation provider is a common carrier. Therefore, the passenger's purpose does not determine whether the carrier will be required to exercise the highest degree of care for the safety of passengers imposed by *Civ. Code §§ 2100* and *2101* (*35 Cal. 4th 1125, 1136)* .

[4] Additional Authorities

[a] Establishment of Carrier-Passenger Relationship

In *USAir Inc. v. United States Dep't of Navy (9th Cir. 1994) 14 F.3d 1410* , a Navy civilian employee, acting within the scope of his employment, boarded an airplane and stowed his briefcase in an overhead compartment in a precarious, unstable position. Prior to takeoff, a flight attendant, who was looking for space to stow a bag, negligently opened the overhead compartment, using only one hand and without looking at the compartment. The unstable briefcase fell out, hitting a passenger in the head and injuring him. The passenger sued the airline in state court and recovered a verdict. The airline sued the Navy in federal court for indemnity or contribution. The federal district court, ruling for the Navy, found that the Navy employee was not negligent, and that even if he were, the flight attendant's negligence was a superseding cause of the injuries. On appeal, the judgment was reversed, and the case was remanded for an apportionment of damages. The court stated that the airline's status as a common carrier created a duty to its passengers of utmost care and the vigilance of a very cautious person. The airline contended that it was not yet under this duty when the accident occurred because the plane had not yet taken off. The court disagreed, stating that the airline's duty to its passengers was in force when the Navy employee went to the site of departure and the airline accepted him as a passenger. The flight attendant's actions breached the carrier's duty of utmost care, as well as the airline's written policy on the duty to secure overhead luggage. However, the Navy employee also was negligent in stowing his briefcase in a precarious position. The flight attendant's negligence was not a superseding cause of the passenger's injuries; both acts of negligence were concurrent or contributing causes under California law (*14 F.3d 1410, 1414)* .

[b] Carrier's Duty During Carrier-Passenger Relationship

In *Rogoff v. Grabowski (1988) 200 Cal. App. 3d 624, 246 Cal. Rptr. 185* , the court of appeal reversed the judgment entered against the plaintiff after sustaining general and special demurrers. The plaintiff had rented the defendant's limousine to take him and his wife to and from a cocktail and swimming party. Both the plaintiff and the defendant understood that the plaintiff and his wife intended to drink alcoholic beverages at the party and did not want to have to worry about driving home. The plaintiff and his wife left their clothes, credit cards, wallets, keys, money, and the wife's medication in the limousine while they attended the party. The defendant was to wait for them, but instead left them inebriated, clad only in bathing clothes, without personal effects or any way to get home. The defendant later refused to return the plaintiff's personal effects. Although the trial court held that the plaintiffs had not stated a cause of action for tortious breach of the covenant of good faith and fair dealing, the court of appeal reversed, holding that they were able to state causes of action for breach of contract (possibly including damages for emotional distress), for conversion, and for breach of statutory obligations imposed by *Civ. Code § 2100* and *Pub. Util. Code §§ 2106, 2106, 5360, 5382* (*200 Cal. App. 3d 624, 633-634)* .

In *De Vera v. Long Beach Pub. Transp. Co. (1986) 180 Cal. App. 3d 782, 225 Cal. Rptr. 789* , plaintiff, a passenger on a bus owned and operated by defendant, was injured when the bus was involved in an accident with a vehicle owned and operated by a third party. Plaintiff sued defendant, alleging that defendant's driver negligently lost or failed to

obtain the identity of the third party. The court of appeal affirmed the judgment entered after a jury verdict in plaintiff's favor, holding that the liability of a common carrier to its passengers is the same whether the carrier is a public or private entity, and that the *Civ. Code § 2100* "utmost care" standard was properly applied to the public corporation defendant (*180 Cal. App. 3d 782, 792)* . Relying on *Lopez v. Southern Cal. Rapid Transit Dist. (1985) 40 Cal. 3d 780, 788-790, 221 Cal. Rptr. 840, 710 P.2d 907* , the court also held that, following an accident between a common carrier's vehicle and that of a third party, the common carrier has a duty to collect and preserve information concerning the other vehicle and its driver for use by the passengers in future civil litigation (*180 Cal. App. 3d 782, 795)* .

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§ 33.30 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action Against Common Carrier for Personal Injury to [Civ. Code §§ 1714, 2100] or Wrongful Death of [Code Civ. Proc. § 377.60] Passenger--Carrier-Passenger Relationship Not Terminated

[1] FORM

[*Caption. See § 33.29.*]

IT IS IMPROPER FOR THE COURT TO GRANT DEFENDANT'S MOTION FOR SUMMARY JUDGMENT WHERE THERE ARE FACTS SHOWING THAT _____ [PLAINTIFF *or* PLAINTIFF'S DECEDENT] DID NOT HAVE AN OPPORTUNITY TO ALIGHT FROM THE VEHICLE SAFELY.

A. Rules Governing Summary Judgment Procedure. [*See § 33.29, Paragraph A.*]

B. Establishment of Carrier-Passenger Relationship. [*See § 33.29, Paragraph B.*]

C. Carrier's Duty During Carrier-Passenger Relationship. [*See § 33.29, Paragraph C.*]

D. Termination of Carrier-Passenger Relationship. The relationship of carrier and passenger continues until the passenger has alighted from the vehicle, and the carrier must exercise as high a degree of care in giving passengers a reasonable opportunity to alight safely as in carrying them safely (*McBride v. Atchison, Topeka & Santa Fe Ry. Co. (1955) 44 Cal. 2d 113, 116, 279 P.2d 966*).

[*Optional*] **E. Duty of Highest Degree of Care Until Opportunity to Alight Safely.** Though the relationship of passenger and carrier usually ends when a streetcar passenger alights on a public street and clears the car from which the passenger alighted, the rule of utmost care and diligence of *Section 2100 of the Civil Code* applies until the passenger has had a reasonable opportunity to reach a place of safety (*Brandelius v. City & County of San Francisco (1957) 47 Cal. 2d 729, 735, 306 P.2d 432* ; *Parker v. City & County of San Francisco (1958) 158 Cal. App. 2d 597, 603-604, 323 P.2d 108*).

[*Optional*] **F. Application of Rule of Duty of Highest Care.** The rule that the carrier owes a passenger a duty of highest care until the passenger has the opportunity to reach a place of safety applies to passengers in cases involving accidents caused by the negligent use of the carrier's own instrumentalities (*Brandelius v. City & County of San Francisco (1957) 47 Cal. 2d 729, 735-736, 306 P.2d 432*) and also applies even if the injury is not caused by the agency of the common carrier if the passenger is discharged into an area of immediate danger (*Parker v. City & County of San Francisco (1958) 158 Cal. App. 2d 597, 603-604, 323 P.2d 108*).

[*Optional*] **G. Duty Not to Eject Passenger Prior to Intended Destination.** A common carrier that ejects a passenger at a place other than the passenger's designated destination violates the carrier's affirmative duty to prevent harm to its passengers if the ejectment subjects the passenger to reasonably foreseeable injury (*Ingham v. Luxor Cab. Co. (2001) 93 Cal. App. 4th 1045, 1051, 113 Cal. Rptr. 2d 587*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion for summary judgment brought by a carrier in an action for damages for injuries or wrongful death where defendant asserts in its motion that it did not owe a duty of care to plaintiff (or plaintiff's decedent) because the carrier-passenger relationship had terminated at the time of the accident.

Where appropriate, counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations which support the memorandum [*Code Civ. Proc. § 437c*].

[b] Related Pleading and Practice Forms

For discussion and forms of declarations opposing and orders denying motions for summary judgment, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities in opposition to motions for summary judgment, see Ch. 221, *Summary Judgments* .

In an appropriate case, these points and authorities may be submitted in opposition to the points and authorities in *§ 33.24*.

[3] Discussion of Authorities

[a] Termination of Carrier-Passenger Relationship

McBride v. Atchison, Topeka & Santa Fe Ry. Co. *(1955) 44 Cal. 2d 113, 279 P.2d 966* , involved an action to recover damages for personal injuries which resulted when plaintiff, on crutches, fell while alighting from the steps of one of defendant's railroad cars. In reversing the trail court's order granting defendant's motion for nonsuit, the Supreme Court stated that the carriage of a passenger includes the period during which the passenger is disembarking from the common carrier. The relationship between carrier and passenger continues until the passenger has alighted, and the carrier must exercise as high a degree of care in affording passengers a reasonable opportunity to alight in safety as in carrying them safely. The Court held that the question of whether defendant's employee, the porter had breached defendants' duty of utmost care and diligence [*see Civ. Code § 2100*] when the porter failed to clean the steps of the car was a question for the jury and that the court erred in granting defendant's motion for a nonsuit.

[b] Duty of Highest Degree of Care Until Opportunity to Alight Safely

In ***Brandelius v. City & County of San Francisco*** *(1957) 47 Cal. 2d 729, 306 P.2d 432* , decedent was struck by a northbound cable car after he had alighted from a southbound cable car. The trial court granted defendant a new trial on the ground that the jury had not been properly instructed. The Supreme Court upheld the trial court's order on the ground that the court's instruction on last clear chance was incorrect. The Court held that the trial court had properly instructed the jury on the degree of care required on a carrier toward an alighting passenger and had properly left the question of termination of the carrier-passenger relationship to the jury. The Court stated that although the general rule is that the relationship of passenger and carrier terminates when a streetcar passenger alights on a public street and clears the streetcar, there are certain qualifications according to the circumstances of the case. The Court cited *Boa v. San Francisco O. T. Railways (1920) 182 Cal. 93, 100-101* , to the effect that the carrier's responsibility continues until the passenger has had a reasonable opportunity of getting away from the car without injury and thus pass beyond the carrier's care and that this is a jury question. These rules apply to streetcar passengers specifically in the case of accidents caused by the carrier's negligent use of its own instrumentalities.

In ***Parker v. City & County of San Francisco*** *(1958) 158 Cal. App. 2d 597, 323 P.2d 108* , plaintiff was injured when she was struck by a car after alighting from a bus which had stopped approximately 101/2 feet from the curb because a truck was parked in the bus stop. Plaintiff appealed from a judgment for defendant notwithstanding verdict for plaintiff, contending that there was substantial evidence of negligence by defendant proximately contributing to the accident. In reviewing the evidence, the court of appeal stated that a carrier's duty of the highest degree of care for the safety of its passengers generally ends when the passenger safely alights from the bus. However, the duty ends only when thepassenger is discharged into a relatively safe space, not merely when the passenger alights safely from the vehicle if the passenger is discharged into a dangerous area. The court discussed *Brandelius v. City & County of San Francisco (1957) 47 Cal. 2d 729, 306 P.2d 432* , and *Boa v. San Francisco O. T. Railways (1920) 182 Cal. 93* , in support of this rule and stated that although *Brandelius* and *Boa* dealt with injuries received by passengers alighting from a common carrier when the injuries were inflicted by an agency of the common carrier, there is no reason why the exception to the general rule applied in those cases should not also apply in a case such as this one, in which the passenger was discharged into an area of immediate danger.

[c] Application of Rule of Duty of Highest Care

Brandelius v. City & County of San Francisco *(1957) 47 Cal. 2d 729, 306 P.2d 432* and ***Parker v. City & County of San Francisco*** *(1958) 158 Cal. App. 2d 597, 323 P.2d 108* , are discussed in *§ 33.30[3][b]*.

[d] Duty Not to Eject Passenger Prior to Intended Destination

In ***Ingham v. Luxor Cab. Co.*** *(2001) 93 Cal. App. 4th 1045, 113 Cal. Rptr. 2d 587* , the plaintiff was a 57-year-old diabetic woman with a series of health problems who hailed a taxicab to travel to a dental appointment. At the time she

entered the cab, the plaintiff was using a cane and had to use an elaborate maneuver to enter the cab. After giving the driver the address of her destination, the driver drove for several blocks before pulling over and stopping, apparently due to frustration over the fact that a power outage had disabled the traffic signals. The driver told the plaintiff to get out of the cab, even though her destination was still two blocks away and the remaining journey would require scaling a steep hill. The plaintiff pleaded with the driver to finish the trip, explaining that she was on dialysis, walked with a cane, and probably could not walk the remaining blocks. The driver continued to insist that the plaintiff get out, however, and she eventually complied. Seeing no alternative transportation, the plaintiff attempted to walk the remaining way, eventually falling backwards while trying to scale the hill, which resulted in a hip fracture and other injuries. The plaintiff sued the cab company for negligence, but summary judgment was granted for the defendant on the grounds that the defendant owed no duty of care under the facts, because any duty that it may have owed was discharged when the plaintiff left the cab at a safe location. The plaintiff appealed.

The court of appeal reversed. The court noted the established rule that if a common carrier contracts to convey a person, this contract gives rise to a duty actionable in tort to deliver the person to his or her destination. Moreover, a common carrier that ejects a passenger at a place other than the designated destination violates a common carrier's affirmative duty to prevent harm to its passengers, if the ejectment subjects the passenger to reasonably foreseeable injury, and ejectment of a passenger by a common carrier may be wrongful and actionable even if the ejectment occurs at an apparently safe place and even if no physical force is used to remove the passenger from the carrier. Thus, even though there was no imminent danger at the spot where the plaintiff was ejected from the cab, the cab company owed a duty of care not to eject her from the cab two blocks downhill from the intended destination, because it was reasonably foreseeable that the obviously infirm plaintiff might suffer an injury as a result of having to walk uphill to her destination (*93 Cal. App. 4th 1045, 1050-1054)* .

The court noted, however, that the scope of the duty to deliver to the intended destination may vary depending on the nature of the carrier, because cabs contract to deliver to the passenger's ultimate destination, while carriers such as trains carry passengers only to fixed stations that may only be near to the passenger's ultimate destination (*93 Cal. App. 4th 1045, 1053)* . The court also held that there remained a question of fact as to whether the ejectment was the proximate cause of plaintiff's injury, or whether the injury was caused instead by the plaintiff's own subsequent conduct (*93 Cal. App. 4th 1045, 1054-1058)* .

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3-33 California Points & Authorities § 33.31

§ 33.31 Opposing Motion for New Trial [Code Civ. Proc. § 657]--In Action Against Common Carrier for Injuries [Civ. Code §§ 1714, 2100] or Wrongful Death [Code Civ. Proc. § 377.60]--Court Correctly Instructed That Res Ipsa Loquitur Inapplicable

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN OPPOSITION TO MOTION FOR NEW TRI-
vs.	)	AL
_____ [*name*(*s*)],	)	[*Code Civ. Proc. § 657*]
Defendant(s).	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

IT IS NOT PROPER FOR THE COURT TO GRANT A MOTION FOR A NEW TRIAL FOR FAILURE TO INSTRUCT THE JURY ON THE DOCTRINE OF RES IPSA LOQUITUR WHEN THE ACCIDENT OCCURRED WHILE THE VEHICLE WAS AT A STANDSTILL.

A. No Error of Law. When the instructions given by the trial court are correct, there is no basis for the exercise of discretion and a contention of improper instruction of the jury is not legal ground on which a new trial may be granted (*Conner v. Southern Pac. Co. (1952) 38 Cal. 2d 633, 637, 241 P.2d 535*).

B. Conditions for Applicability of Doctrine of Res Ipsa Loquitur. For the doctrine of res ipsa loquitur to apply, the following three conditions must be met: (1) the accident or injury must be of a kind which does not occur unless someone is negligent; (2) it must be caused by an agency or instrumentality in the control of the defendant; and (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff (*Gray v. City & County of San Francisco (1962) 202 Cal. App. 2d 319, 324, 20 Cal. Rptr. 894*).

C. Doctrine as Inapplicable If Evidence of Specific Acts Shows No Negligence as Matter of Law. Plaintiff is deprived of the benefit of the doctrine of res ipsa loquitur where facts regarding the cause of the accident and the care exercised by defendant are shown as a matter of law thus eliminating any justification for resort to the inference of negligence (*Di Mare v. Cresci (1962) 58 Cal. 2d 292, 299, 23 Cal. Rptr. 772, 373 P.2d 860*).

D. Doctrine as Inapplicable When Vehicle at Standstill. The mere fact that the passenger is injured while on a common carrier does not justify the inference of res ipsa loquitur. In an action where the accident has occured while a vehicle is at a standstill and does not arise from any movement or operation of the vehicle, the accident is, as a matter of law, not the kind which ordinarily does not occur unless someone is negligent, and the doctrine of res ipsa loquitur is not applicable (*Gray v. City & County of San Francisco (1962) 202 Cal. App. 2d 319, 328, 20 Cal. Rptr. 894*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for a new trial which was made on the ground that the court should have instructed the jury on the doctrine of res ipsa loquitur.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

Where appropriate, counsel for defendant may modify this form for use in support of a motion for a new trial on the ground that the court should not have instructed the jury on the doctrine of res ipsa loquitur.

In an appropriate case, these points and authorities may be used in opposition to a motion supported by the points and authorities in *§ 33.25*.

[b] Related Points and Authorities

For memoranda of points and authorities opposing motions for a new trial, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] No Error of Law

Conner v. Southern Pac. Co. *(1952) 38 Cal. 2d 633, 241 P.2d 535* , was an action for wrongful death arising out of a collision between a train and an automobile which was being towed by a pickup truck. Defendants appealed from the trial court's order granting plaintiff's motion for a new trial on the ground that there was error in the instructions. In reversing the order of the trial court, the Supreme Court found that the instructions given were not erroneous in law or misleading in fact, and stated that where the instructions are correct, there is no basis for the exercise of discretion and thus no legal ground on which a motion for a new trial may be granted.

[b] Conditions for Applicability of Doctrine of Res Ipsa Loquitur

In ***Gray v. City & County of San Francisco*** *(1962) 202 Cal. App. 2d 319, 20 Cal. Rptr. 894* , plaintiff was injured when she slipped while boarding a streetcar which had come into the loading zone and stopped. The defendant made a motion for nonsuit on the ground that there was no evidence of negligence or lack of common care on the part of defendant common carrier, and that the rule of res ipsa loquitur did not apply. The trial court granted the motion for nonsuit, and the court of appeal affirmed the judgment for defendant. In considering the question of whether it was for the jury to determine whether or not the doctrine of res ipsa loquitur was applicable, the court stated that the trial court had apparently concluded, as a matter of law, that one or more conditions requisite for res ipsa loquitur was not present in the case. It listed the conditions for application of the doctrine set out in Paragraph B of this form.

[c] Doctrine as Inapplicable If Evidence of Specific Acts Shows No Negligence as Matter of Law

Di Mare v. Cresci *(1962) 58 Cal. 2d 292, 23 Cal. Rptr. 772, 373 P.2d 860* , was an action for damages for personal injuries that plaintiff tenant sustained on an outside common stairway of defendant landlord's building. The jury returned a verdict in favor of plaintiff and defendant appealed from the judgment for plaintiff. In affirming the judgment, the Supreme Court found that the trial court properly instructed the jury on the doctrine of res ipsa loquitur. The court relied on *Leet v. Union P. R. Co. (1944) 25 Cal. 2d 605, 620-622, 155 P.2d 42* , for the proposition that the introduction of evidence of specific acts of negligence does not deprive the plaintiff of the benefit of the doctrine of res ipsa loquitur unless the facts regarding the cause of the accident and the care exercised by defendant are shown as a matter of law, thus eliminating any justification for resort to the inference of negligence.

[d] Doctrine as Inapplicable When Vehicle at Standstill

The facts of ***Gray v. City & County of San Francisco*** *(1962) 202 Cal. App. 2d 319, 20 Cal. Rptr. 894* , are discussed in *§ 33.31[3][b]*. In analyzing whether the doctrine of res ipsa loquitur applied to the case before it, the Supreme Court stated that when the evidence is conflicting or subject to conflicting inferences, it is for the jury, under proper instructions, to decide whether the three conditions necessary for applicability of the doctrine exist; but that where reasonable minds cannot differ, the determination of whether the doctrine applies may be a pure question of law. When a passenger falls down and is injured while boarding or alighting from a carrier which is stationary, it cannot be said that negligence is a more probable explanation than any other. Res ipsa loquitur has been applied against carriers in cases in which the facts have shown that the accident or injury arose from the movement or operation of the carrier, and the probability of negligence is therefore present. Since the accident in the case before the court occurred while the carrier was at a standstill and did not arise out of any movement or operation of the defendant's streetcar, the court found that reasonable minds, viewing the facts on the basis of experience, could not draw a conclusion of negligence as a probable explanation. Therefore the first condition required for the applicability of res ipsa loquitur was not present as a matter of law, and the trial court had properly held that the doctrine did not apply.

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3-33 California Points & Authorities § 33.32

§ 33.32 Opposing Contention That Carrier's Liability Is Limited in Action for Loss of or Damage to Baggage or Freight [Civ. Code §§ 2182, 2194, 2195]--Limitation by Special Contract [Civ. Code § 2174]--Loss Caused by Carrier's Gross Negligence [Civ. Code § 2175]

[1] FORM

[*The following may be combined with the point and authorities set forth in § 33.33 and may be included in a memorandum of points and authorities or in a trial appellate brief.*]

DEFENDANT CARRIER'S LIABILITY IS NOT LIMITED BY THE PROVISIONS OF A SPECIAL CONTRACT WITHIN THE MEANING OF *CIVIL CODE SECTION 2174* BECAUSE THE LOSS WAS CAUSED BY DEFENDANT'S GROSS NEGLIGENCE.

A. No Exoneration for Gross Negligence. A common carrier cannot be exonerated, by any agreement made in anticipation thereof, from liability for the gross negligence, fraud, or willful wrong of the common carrier or its employees (*Civ. Code § 2175*).

[*Optional*] **B. Tariff Limitation Not Applicable to Member of General Public With No Notice.** A member of the general public is not bound by alimitation on liability in a tariff regulation or receipt, when the loss occurs through the carrier's gross negligence, and he or she did not contract with knowledge of the limitation and the existence of an opportunity to purchase higher liability (*Muelder v. Western Greyhound Lines (1970) 8 Cal. App. 3d 319, 336-337, 87 Cal. Rptr. 297*).

[*Optional*] **C. Knowledge of Terms Is Question of Fact.** Whether or not a receipt or other document under *Section 2176 of the Civil Code* was accepted with actual knowledge, or under circumstances constituting constructive notice or knowledge, is a question of fact for the jury (*Allred v. Bekins Wide World Van Serv. (1975) 45 Cal. App. 3d 984, 992, 120 Cal. Rptr. 312*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to the contention that a special contract limits the liability of a common carrier, on the ground that the contract is unenforceable because the loss was caused by the carrier's gross negligence [*see Civ. Code § 2175*]. The optional paragraphs are for use if the shipper had no actual or constructive knowledge of the limitation, and had no opportunity to purchase higher liability [*see Muelder v. Western Greyhound Lines (1970) 8 Cal. App. 3d 319, 336-337, 87 Cal. Rptr. 297]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a purported contract limiting a carrier's liability is unenforceable because of lack of knowledge, lack of opportunity to purchase higher liability, and the carrier's gross negligence. For example, they may be combined with points and authorities submitted in opposition to a defendant carrier's motion for summary judgment [*see Code Civ. Proc. § 437c*]. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Therefore, for example, counsel should discuss facts showing that the plaintiff lacked actual or constructive knowledge of any limitation of the carrier's liability, and was not given a choice of rates with an option of purchasing higher liability. Counsel should also show that defendant committed gross negligence.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities in *§ 33.26*.

[3] Discussion of Authorities

[a] Tariff Limitation Not Applicable to Member of General Public With No Notice

The plaintiff in ***Muelder v. Western Greyhound Lines*** *(1970) 8 Cal. App. 3d 319, 87 Cal. Rptr. 297* , brought an action to recover damages for the loss of a briefcase and its contents, which defendant had undertaken to transport from Indio to San Bernardino. After a nonjury trial, the court found that the loss had occurred through defendant's gross negligence and entered judgment in the amount of $7,637.70 in plaintiff's favor. Defendant appealed, contending that under the applicable tariff schedule pursuant to *Civ. Code §§ 2200* (limitation on liability for valuable property) and 2205 (limitation of liability of carrier over public highway), plaintiff's recovery should have been limited to $50. Plaintiff contended that his knowledge of the tariff rules was an essential condition to his valid assent to the "released value" fixed by the tariff as the limit of the carrier's liability, at least when the loss occurred through gross negligence.

The court of appeal affirmed, concluding that the trial court impliedly found that plaintiff had no notice, actual or constructive, of the tariff rules limiting defendant's liability and that recovery for the actual value of the lost items was proper (*8 Cal. App. 3d 319, 337)* . Inasmuch as the state of the law regarding the enforceability of tariff limitations under the facts was unclear, the court discussed the relevant history of authority.

In *Curtis v. United Transfer Co. (1914) 167 Cal. 112, 138 P. 726* , plaintiff brought an action to recover damages for the loss of a trunk and its contents, which defendant common carrier contracted to transport. The complaint included reference to a receipt given to plaintiff that included a clause limiting defendant's liability to plaintiff for loss through negligence to $50 unless otherwise agreed in writing. Plaintiff alleged that she had not read the receipt and did not know what it contained except for her name, until after the loss of the trunk. The trial court sustained the carrier's demurrer to the complaint on the ground that on the facts pleaded, plaintiff was deemed as a matter of law to have had constructive notice of the conditions of limitation of the contract and was bound by them. Judgment was entered against defendant after she declined to amend the complaint following the trial court's sustaining of the demurrer. The Supreme Court in *Curtis* reversed, stating that under the facts pleaded in the complaint, the question was one of law for the court. The court stated that under *Civ. Code § 2176*, a consignor assents to the limitation only by accepting the contract with actual

or constructive knowledge of the terms of the limitation. The consignor's mere taking and keeping of a paper concerning the terms of limitation of liability does not of itself amount to assent to them. The question of knowledge is to be determined not merely from acceptance but from consideration of all the circumstances surrounding the transaction (*8 Cal. App. 3d 319, 330-331)* .

The court noted, however, that in the subsequent decision of *Hischemoeller v. National Ice & Cold Storage Co. (1956) 46 Cal. 2d 318, 294 P.2d 433* , the Supreme Court has thrown the holding of *Curtis* into question. The Court in *Hischemoeller* held that actual knowledge and understanding by plaintiff of the terms of a warehouse receipt and tariff schedule limiting the liability of a public warehouseman were not essential to the effectiveness of the limitation. The Supreme Court held that the tariff automatically became a part of the storage contract and the parties were deemed to have contracted with its provisions in mind (*8 Cal. App. 3d 319, 331-333)* . The court in *Muelder,* however, held that *Hischemoeller* was not determinative of the rights of the parties before it. *Hischemoeller* involved a plaintiff who was a knowledgeable business person, and also involved the liability of a public warehouseman rather than a common carrier, which owes a higher degree of care subject to the provisions of *Civ. Code § 2175* (prohibiting agreements exonerating them from liability for gross negligence) and *Civ. Code § 2176* (requiring knowledge on the part of a consignor of the terms of a ticket, bill of lading, or written contract of carriage limiting the carrier's liability). After considering relevant holdings of various jurisdictions, the court in *Muelder* concluded that a member of the general public is not bound by a "released value" limitation on liability in a tariff regulation or a receipt, at least when loss occurs through the carrier's gross negligence, unless he or she contracted with knowledge of the limitation and of the existence of an opportunity to purchase higher liability (*8 Cal. App. 3d 319, 334-337)* . Thus, *Hischemoeller* did not require the court to hold that plaintiff was, as a matter of law, chargeable with knowledge of the tariff regulations and bound by the released value as a limitation on the carrier's liability (*8 Cal. App. 3d 319, 332-335)* .

[b] Knowledge of Terms as Question of Fact

Allred v. Bekins Wide World Van Serv. *(1975) 45 Cal. App. 3d 984, 120 Cal. Rptr. 312* , is discussed in *§ 33.28[3][a]*. The court also considered the question whether the terms of the bill of lading determined plaintiffs' rights regarding the required notice of a claim and the possible exculpation of defendant carrier from liability. The court relied on *Civ. Code § 2176* and *Curtis v. United Transfer Co. (1914) 167 Cal. 112, 115, 138 P. 726* , in stating that whether plaintiffs had knowledge of the terms of the bill of lading was a question of fact. The court therefore concluded that the bill of lading did not support the trial court's ruling on defendant carrier's bill of lading (*45 Cal. App. 3d 984, 992)* .

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§ 33.33 Opposing Contention That Carrier's Liability Is Limited in Action for Loss of or Damage to Baggage or Freight [Civ. Code §§ 2182, 2194, 2195]--Limitation by Statute [Civ. Code § 2205]--Loss Caused by Carrier's Gross Negligence

[1] FORM

[*The following may be combined with the point and authorities in § 33.32 and may be included in a memorandum of points and authorities or in a trial appellate brief.*]

THE LIABILITY OF DEFENDANT, AS A COMMON CARRIER, IS NOT SUBJECT TO THE LIMITATION ON DAMAGES SET FORTH IN SECTION 2205 OF THE CIVIL CODE BECAUSE THE LOSS TO PLAINTIFF'S BAGGAGE WAS CAUSED BY DEFENDANT'S GROSS NEGLIGENCE.

Loss to Baggage Caused by Carrier's Gross Negligence. The statutory limitation of a common carrier's liability for loss or damage to baggage carried over the public highways, set forth in *Section 2205 of the Civil Code*, does not apply when the loss occurs because of the carrier's gross negligence (*Muelder v. Western Greyhound Lines (1970) 8 Cal. App. 3d 319, 337-338, 87 Cal. Rptr. 297*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to the contention that *Civ. Code § 2205* limits the liability of a common carrier for loss of or damage to baggage transported over public highways. The basis of this memorandum is that the loss was caused by the carrier's gross negligence, and therefore is not subject to the statutory provision [*see Muelder v. Western Greyhound Lines (1970) 8 Cal. App. 3d 319, 337-338, 87 Cal. Rptr. 297]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the carrier's gross negligence causes plaintiff's loss of or damage to baggage transported over public highways. For example, they may be combined with points and authorities submitted in opposition to a defendant carrier's motion for summary judgment [*see Code Civ. Proc. § 437c*]. They may

also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Therefore, for example, counsel should discuss facts showing that plaintiff's conduct constituted gross negligence.

In an appropriate case, these points and authorities may be submitted inopposition to the contention supported by the points and authorities in *§ 33.27*.

[3] Discussion of Authorities

[a] Loss to Baggage Caused by Carrier's Gross Negligence

The facts of ***Muelder v. Western Greyhound Lines*** *(1970) 8 Cal. App. 3d 319, 87 Cal. Rptr. 297* , are discussed in *§ 33.32[3][a]*. In reviewing defendant's contention that apart from the tariff regulations, defendant's liability was limited to the amount specified in *Civ. Code § 2205*, the court stated that it found nothing to indicate that the legislature intended to limit a carrier's liability to the arbitrary nominal amount specified in that statute when a loss occurs through the carrier's gross negligence. The court reasoned that inasmuch as the legislature had expressed a policy against even contractual agreements exonerating a carrier from gross negligence [*Civ. Code § 2175*], it would not be reasonable for the court to assume that the legislature intended *Civ. Code § 2205* to be such a limitation (*8 Cal. App. 3d 319, 337-338)* .

California Points & Authorities

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Volume 3 Chapters 34-39 CHECKS AND BANKS---to---CIVIL SERVICE
CHAPTER 34 CHECKS AND BANKS

3-34 California Points & Authorities 34.syn

§ 34.syn Synopsis to Chapter 34: CHECKS AND BANKS

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[1] In General

[2] Application to Other Financial Institutions

[3] Exclusions From Coverage

§ 34.02 Governing Law

§ 34.03 Definitions

[1] Checks and Status of Banks Generally

[2] Collecting Bank

[3] Customer

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[6] Payor Bank; Drawee Bank

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§ 34.06 How to Use Forms in This Chapter

[1] Page Limits on Points and Authorities

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§ 34.07 Related Pleading and Practice Chapters

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§§ 34.10-34.29 [Reserved]

§ 34.30 Supporting Contention That Drawee Is Liable to Drawer for Unauthorized Payment of Check [Com. Code § 4401]--Check Not Properly Payable

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Implied Contractual Duty

[b] Signature Card Contract

[c] Corporate Principal as Depositor

[4] Additional Authorities

[a] Implied Contractual Duty

§ 34.31 Supporting Contention That Drawee Is Liable to Drawer for Unauthorized Payment of Check [Com. Code § 4401]--Unauthorized Drawer's Signature [Com. Code §§ 3401, 3403]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Signature Required for Liability

[b] Unauthorized Signature Is Inoperative

[c] Check With Unauthorized Signature Is Not Properly Payable

[d] No Ratification

§ 34.32 Supporting Contention That Drawee Is Liable to Drawer for Unauthorized Payment of Check [Com. Code § 4401]--Lacking All Required Drawers' Signatures

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Multiple Signatures Required

[b] Exercise or Nonexercise of Ordinary Care

[c] Geographic Area to Which General Usage Applies

[d] Joint Personal Representatives

[e] No Limitation Period

[f] Drawee's Liability for Drawer's Conversion

§ 34.33 Supporting Contention That Drawee Is Liable to Drawer for Unauthorized Payment of Check [Com. Code § 4401]--Forged Drawer's Signature

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Forged Drawer's Signature

[b] Duty to Know Drawer's Signature

[c] Drawer's Prima Facie Case

[d] Reemployment of Forger Is Not Ratification

§ 34.34 Supporting Contention That Drawee Is Liable to Drawer for Unauthorized Payment of Check [Com. Code § 4401]--Forged, Missing, or Different Endorsement

[1] FORM

[2] Comments

[a] Use of Form

[b] Drawer Has No Action in Conversion

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Drawer's Action Against Drawee for Payment of Check With Defect in Endorsement

[b] Unauthorized Signature Is Inoperative

[c] Endorsement Required

[d] Joint Payees

[4] Additional Authorities

[a] Drawer's Action Against Drawee for Payment of Check With Defect in Endorsement

§ 34.35 Supporting Contention That Drawee Is Liable to Drawer for Unauthorized Payment of Check [Com. Code § 4401]--Only Original Amount of Altered Check Is Properly Chargeable to Drawer's Account [Com. Code § 4401(d)(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Altered Check

[b] No Election of Remedies

§ 34.36 Supporting Contention That Drawee Is Liable to Drawer for Unauthorized Payment of Check [Com. Code § 4401]--Defense That Drawer Failed to Examine Statement and Notify Drawee [Com. Code § 4406(a), (c)] Is

Inapplicable--Drawee Sent Statements to Wrong Address

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Statement Sent to Wrong Address

§ 34.37 Supporting Contention That Drawee Is Liable to Drawer for Unauthorized Payment of Check [Com. Code § 4401]--Defense That Drawer Failed to Examine Statement and Notify Drawee [Com. Code § 4406(a), (c)] Is Inapplicable--Irregularities From Which Losses Derived Were Not Apparent From Statements

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Irregularities Not Apparent From Statements

§ 34.38 Supporting Contention That Drawee Is Liable to Drawer for Unauthorized Payment of Check [Com. Code § 4401]--Defense That Drawer Failed to Examine Statement and Notify Drawee [Com. Code § 4406(a), (c)] Is Inapplicable--Drawee Failed to Pay Item in Good Faith [Com. Code § 4406(e)]

[1] FORM

[2] Comments

[a] Use of Form

[b] "Good Faith" Distinguished From "Ordinary Care"

[c] Related Points and Authorities

§ 34.39 Supporting Contention That Drawee Is Liable to Drawer for Unauthorized Payment of Check [Com. Code § 4401]--Defense That Drawer Failed to Examine Statement and Notify Drawee [Com. Code § 4406(a), (c)] Is Inapplicable--Drawee's Own Negligence and Not Conduct of Drawer Caused Loss [Com. Code § 4406(e)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Comparative Negligence Test

[c] Related Memoranda

[3] Discussion of Authorities

[a] Bank Required to Exercise Ordinary Care

§ 34.40 Supporting Contention That Drawee Is Liable to Drawer for Unauthorized Payment of Check [Com. Code § 4401]--Defense That Drawer Failed to Examine Statement and Notify Drawee [Com. Code § 4406(a), (c)] Is Inapplicable--Drawer Could Not Reasonably Have Discovered Unauthorized Payment [Com. Code § 4406(c)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Safe-Harbor Rule Does Not Preclude Customer From Asserting Unauthorized Signature or Alteration

[c] Related Memoranda

§ 34.41 Supporting Contention That Drawee Is Liable to Drawer for Unauthorized Payment of Check [Com. Code § 4401]--Defense That Drawer Is Entitled to Subrogation to Prevent Unjust Enrichment [Com. Code § 4407] Is Inapplicable

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Drawer Not Unjustly Enriched

[b] Drawee's Loss Not Shown

§ 34.42 Supporting Contention That Drawee Is Liable to Drawer for Unauthorized Payment of Check [Com. Code § 4401]--Defense That Drawer's Negligence Contributed to Alteration or Unauthorized Signature Is Inapplicable--Drawee Comparatively Negligent [Com. Code § 3406(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Comparative Negligence

§ 34.43 Supporting Contention That Drawee Bank Is Liable to Drawer for Wrongful Dishonor [Com. Code §§ 3504(a)(2), 4402]--In General

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Cause of Action for Wrongful Dishonor

[b] Liability for Wrongful Dishonor

[c] Actual Damages

[d] Damages Arising From Arrest and Other Consequential Damages

[e] Value of Repossessed Property

[f] Damages for Emotional Distress

[g] Standing of Principal

[h] Dishonor When Presentment Is Excused

[i] Expectation Regarding Payment of Overdrafts

[4] Additional Authorities

[a] Damages for Emotional Distress

§ 34.44 Supporting Contention That Drawee Is Liable to Drawer for Wrongful Dishonor of Check [Com. Code §§ 4401(a), 4402]--Overdrafts Permitted

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Overdrafts Permitted

§ 34.45 Supporting Contention That Drawee Is Liable to Drawer for Payment of Check in Disregard of Stop Payment Order or Order to Close Account [Com. Code § 4403]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Orders to Stop Payment or Close Account

[b] Drawee's Liability for Disregarding Customer's Order to Stop Payment or Close Account

§ 34.46 Opposing Contention That Drawee Is Liable to Drawer for Unauthorized Payment of Check [Com. Code § 4401]--Payment on Oral Order

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Oral Order Sufficient

§ 34.47 Opposing Contention That Drawee Is Liable to Drawer for Unauthorized Payment of Check [Com. Code § 4401]--Endorsement by One Joint Payee Is Not Totally Inoperative

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Bank's Liability Excludes Amounts Paid Consistent With Drawer's Intentions

[b] Bank Entitled to Determination Regarding Payment

§ 34.48 Opposing Contention That Drawee Is Liable to Drawer for Unauthorized Payment of Check [Com. Code § 4401]--Payee May Authorize Endorsement by Third Party

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Memoranda

[3] Discussion of Authorities

[a] Endorsement by Authorized Third Party

[4] Additional Authorities

[a] Endorsement by Authorized Third Party

§ 34.49 Opposing Contention That Drawee Is Liable to Drawer for Unauthorized Payment of Check [Com. Code § 4401]--Bank May, But Is Not Required to, Pay Stale Check [Com. Code §§ 3409(a), (d), 3414(c), 3415(d), 4404]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Memoranda

[3] Discussion of Authorities

[a] Certified Check

§ 34.50 Opposing Contention That Drawee Is Liable to Drawer for Unauthorized Payment of Check [Com. Code § 4401]--Drawer Failed to Examine Statement and Report Unauthorized Drawer's Signature or Alteration [Com. Code § 4406(a), (c), (d)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Alternative Versions of Commercial Code Section 4406

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Failure to Examine Statements Precludes Bank's Liability

§ 34.51 Opposing Contention That Drawee Is Liable to Drawer for Unauthorized Payment of Check [Com. Code § 4401]--Action Barred by One-Year Limitation [Code Civ. Proc. § 340(c); Com. Code § 4406(f)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Commercial Code Limitation

[b] Limitation of Code of Civil Procedure

[4] Additional Authorities

[a] Commercial Code Limitation

§ 34.52 Opposing Contention That Drawee Is Liable to Drawer for Unauthorized Payment of Check [Com. Code § 4401]--Drawer's Failure to Exercise Ordinary Care Contributed to Alteration or Forgery [Com. Code § 3406]

[1] FORM

[2] Comments

[a] Use of Form

[b] Comparative Negligence

[c] Related Points and Authorities

§ 34.53 Opposing Contention That Drawee Is Liable to Drawer in Negligence for Unauthorized Payment of Check--Com. Code § 4401(a) Displaces Common-Law Negligence

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Negligence Displaced

§ 34.54 Opposing Contention That Drawee Is Liable to Drawer for Wrongful Dishonor of Check [Com. Code § 4402]--Bank May Dishonor Check That Would Create Overdraft

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Drawee Not Required to Pay Overdraft

[b] Officer Had No Authority to Overdraw

[4] Additional Authorities

[a] Drawee Not Required to Pay Overdraft

§ 34.55 Opposing Contention That Drawee Is Liable to Drawer for Wrongful Dishonor of Check [Com. Code § 4402]--Pleading Insufficient

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Description of Check Insufficient

§ 34.56 Opposing Contention That Drawee Is Liable to Drawer for Wrongful Dishonor of Check [Com. Code § 4402]--Conflicting Instructions From Account Signatories [Fin. Code § 953]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Conflicting Instructions

[4] Additional Authorities

[a] Fin. Code §§ 952, 953

§ 34.57 Opposing Contention That Drawee Is Liable to Drawer for Payment of Check in Disregard of Stop Payment Order [Com. Code § 4403]--Stop Payment Order Received Too Late [Com. Code §§ 4105(3), 4108, 4302(a), 4303]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Order Too Late

[4] Additional Authorities

[a] Order Too Late

§ 34.58 Opposing Contention That Drawee Is Liable to Drawer for Payment of Check in Disregard of Stop Payment Order or After Account Has Been Closed [Com. Code § 4403]--Drawee's Subrogation Rights [Com. Code § 4407]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

§§ 34.59-34.69 [Reserved]

§ 34.70 Supporting Contention That Drawee Is Liable to Payee for Amount of Check Paid on Forged Endorsement [Com. Code § 3420]

[1] FORM

[2] Comments

[a] Use of Form

[b] Requirement and Effect of Delivery in Payee Conversion Cases

[c] Measure of Bank's Liability

[d] Drawer Conversion Cases Under Revised Commercial Code

[e] Related Points and Authorities

[3] Discussion of Authorities

[a] Payee's Action Against Drawee for Conversion

[b] Measure of Payee's Damages Against Bank

[c] Defense of Commercial Code Section 3420(c) Inapplicable to Drawee

§ 34.71 Supporting Contention That Drawee or Paying Bank Is Liable to Payee for Retention of Check After Deadline and/or Failure to Give Notice of Nonpayment [Com. Code §§ 4104(a)(10), 4302; 12 C.F.R. §§ 210.9, 229.30, 229.33, 229.38]--In General

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Midnight Deadline (Demand Items)

[b] Federal Reserve Rule (Settlement and Payment)

[c] Federal Reserve Rule (Return)

[d] Three-Year Limitation

[e] Two-Day/Four-Day Test

[f] Forward Collection Test

[g] Extension of Deadline for Expeditious Delivery

[h] Identification of Returned Check

[i] Notice in Lieu of Return

[j] Additional Notice of Nonpayment of Large Item

[k] Bank's Liability Under Regulation CC, Subpart C

[l] Liability for Late Return

[m] Responsibility of Paying Bank or Payable-Through Bank for Check

[n] Expeditious Return of Payable-Through Check

[o] Drawee Is Strictly Liable for Missing Midnight Deadline

§ 34.72 Supporting Contention That Drawee or Paying Bank Is Liable to Payee for Retention of Check After Deadline and/or Failure to Give Notice of Nonpayment [Com. Code §§ 4104(a)(10), 4302; 12 C.F.R. §§ 210.9, 229.30, 229.33, 229.38]--Liability for Undue Retention on Second Presentment of Previously Returned Item

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Duties on Re-Presentment

§ 34.73 Opposing Contention That Drawee Is Liable to Payee for Amount of Check Paid on Forged Endorsement [Com. Code 3420(a)]--Payee's Action Against Collecting Bank Bars Action Against Drawee Bank

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Extinguishment of Payee's Right of Action Against Drawee

§ 34.74 Opposing Contention That Drawee Is Liable to Payee for Amount of Check Paid on Forged Endorsement [Com. Code § 3420(a)]--Payee's Negligence Substantially Contributed to Forged Endorsement [Com. Code § 3406]

[1] FORM

[2] Comments

[a] Use of Form

[b] Payee's Negligence With Regard to Employee

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Contributory Negligence

§ 34.75 Opposing Contention That Drawee Is Liable to Payee for Amount of Check Paid on Forged Endorsement [Com. Code § 3420(a)]--Recredit to Drawer's Account Is Not Payment [Com. Code §§ 4104(a)(11), 4215(a)(1), (2)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Deposit to Account on Which Check Is Drawn Does Not Result in Its Payment

§ 34.76 Opposing Contention That Drawee or Paying Bank Is Liable to Payee for Amount of Check It Failed to Expeditiously Return or With Regard to Which It Failed to Give Timely Notice of Nonpayment [12 C.F.R. §§ 229.30, 229.33, 229.38]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Depositary Bank's Responsibility for Back of Check

[b] Situations Beyond Bank's Control

[c] Exclusion

§ 34.77 Opposing Contention That Drawee or Paying Bank Is Liable for Late Return of Check or Revocation of Provisional Settlement [Com. Code §§ 4107, 4301; 12 C.F.R. §§ 229.30, 229.33]--Revocation or Return Timely

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Revocation of Settlement Under Commercial Code

[b] Federal Reserve Rule (Return)

[c] Revocation of Credit Given

[d] Revocation Timely

[e] Acts Not Amounting to Acceptance or Final Payment

[f] Computer Center Is Separate Branch

[g] Places for Presentment (Regulation CC)

[4] Additional Authorities

[a] Revocation of Settlement Under Commercial Code

[b] Revocation Timely

§ 34.78 Opposing Contention That Drawee or Paying Bank Is Liable for Late Return of Check or Revocation of Provisional Settlement [Com. Code §§ 4107, 4301; 12 C.F.R. §§ 229.30, 229.33]--Stamps on Returned Check Create Presumption of Timely Revocation of Provisional Settlement [Com. Code §§ 3502(b)(1), 3505(a)(2)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Stamps on Check Create Presumption of Timely Revocation of Provisional Settlement

§§ 34.79-34.89 [Reserved]

§ 34.90 Supporting Contention That Collecting Bank That Paid Check on Forged, Different, or Missing Endorsement Is Liable to Drawer--Negligence--When Collecting Bank Is Not Payee

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Negligence of Collecting Bank That Is Not Payee

[b] Drawer Not Required to Negate Validity of Endorsements Under Commercial Code Section 3405

[4] Additional Authorities

[a] Negligence of Collecting Bank That Is Not Payee

§ 34.91 Supporting Contention That Collecting Bank That Paid Check on Forged, Different, or Missing Endorsement Is Liable to Drawer--Negligence--Ambiguous Payee Designation Is Not Contributory Negligence Barring Drawer's Recovery [Com. Code § 3406(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Ambiguous Payee Designation Is Not Contributory Negligence

§ 34.92 Supporting Contention That Collecting Bank That Is Payee of Check Paid on Forged, Different, or Missing Endorsement Is Liable to Drawer--Failure to Discover That Check Was Issued by Mistake

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Payee Bank's Liability for Mistake

[b] No Neglect of Legal Duty by Drawer

§ 34.93 Opposing Contention That Collecting Bank That Paid Check on Forged, Different, or Missing Endorsement Is Liable to Drawer--Endorsement Is Effective When Check is Payable to Fictitious Payee [Com. Code § 3404]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Memoranda

[3] Discussion of Authorities

[a] Fictitious Payee

[b] Divergent Intent of Joint Drawers

[4] Additional Authorities

[a] Fictitious Payee

§ 34.94 Opposing Contention That Collecting Bank That Paid Check on Forged, Different, or Missing Endorsement Is Liable to Drawer--Endorsement Is Effective When Payee's Name Is Misspelled or Wrong [Com. Code § 3204(d)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Payee Designated by Misspelled or Other Name

§ 34.95 Opposing Contention That Collecting Bank That Paid Check on Forged, Different, or Missing Endorsement Is Liable to Drawer--Drawer Cannot Maintain Conversion Action Against Collecting Bank [Com. Code § 3420]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Drawer Has No Conversion Action Against Collecting Bank

[4] Additional Authorities

[a] Drawer Has No Conversion Action Against Collecting Bank

§ 34.96 Opposing Contention That Collecting Bank That Paid Check on Forged, Different, or Missing Endorsement Is Liable to Drawer--Drawer Entrusted Employee With Responsibility [Com. Code § 3405]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Fraudulent Endorsement by Employee

[4] Additional Authorities

[a] Fraudulent Endorsement by Employee

§ 34.97 Opposing Contention That Collecting Bank Is Liable to Drawer for Amount of Check on Which Drawer's Signature Was Forged--Bank's Duties Under Com. Code § 4202 Do Not Include Determination Regarding Validity of Drawer's Signature

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Discovery of Forged Drawer's Signature Is Not Part of Duty of Presentment

[4] Additional Authorities

[a] Duties of Collecting Bank

§ 34.98 Opposing Contention That Collecting Bank Is Liable to Drawer for Amount of Check on Which Drawer's Signature Was Forged--Bank in Good Faith Changed Its Position in Reliance on Final Payment From Drawee [Com. Code § 3418]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Collecting Bank Relied

[b] Collecting Bank's Good Faith

[c] Defense Not Precluded by Failure to Adhere to Procedures

§ 34.99 Opposing Contention That Collecting Bank Is Liable to Drawer for Amount of Check on Which Drawer's Signature Was Forged--Drawer's Negligence Cause of Action Is Displaced by Com. Code § 3418

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Commercial Code Section 3418 Displaces Negligence

[b] Bank Procedures Do Not Create Duty to Noncustomer Drawer

[4] Additional Authorities

[a] Commercial Code Section 3418 Displaces Negligence

§§ 34.100-34.119 [Reserved]

§ 34.120 Supporting Contention That Collecting Bank Is Liable to Payee for Amount of Check Paid on Forged Endorsement [Com. Code § 3420]--Conversion Generally

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Payee's Action Against Collecting Bank for Conversion

§ 34.121 Supporting Contention That Collecting Bank Is Liable to Payee for Amount of Check Paid on Forged Endorsement [Com. Code § 3420(a)]--One Joint Payee Forged Endorsement of Another Joint Payee [Com. Code § 3110(d)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Joint Payee's Action Against Collecting Bank

[b] Delivery to One Joint Payee

§ 34.122 Supporting Contention That Collecting Bank Is Liable to Payee for Amount of Check Paid on Forged Endorsement [Com. Code § 3420(a)]--Bank's Negligence Bars Defense Based on Payee's Contributory Negligence [Com. Code § 3406]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Collecting Bank's Negligence Precludes Defense Based on Payee's Negligence

§ 34.123 Supporting Contention That Depositary Bank Is Liable to Payee for Failure to Make Proceeds of Deposited Item Available for Withdrawal Within Time Required [12 U.S.C. § 4010; 12 C.F.R. § 229.21]

[1] FORM

[2] Comments

[a] Use of Form

[b] Depository and Depositary

[3] Discussion of Authorities

[a] Bank's Liability Under Regulation CC, Subpart B and Federal Expedited Funds Availability Act

[i] Individual Plaintiff

[4] Additional Authorities

[a] Statute of Limitations

§ 34.124 Opposing Contention That Collecting Bank Is Liable to Payee for Amount of Check Paid on Forged Endorsement [Com. Code § 3420(a)]--Action Barred by Three-Year Limitation [Com. Code § 3118(g)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Limitation Applicable to Conversion Action Based on Forged Endorsement

[4] Additional Authorities

[a] Limitation Applicable to Conversion Action Based on Forged Endorsement

§ 34.125 Opposing Contention That Collecting Bank Is Liable to Payee for Amount of Check Paid on Forged Endorsement [Com. Code § 3420(a)]--Payee's Negligence Precludes Assertion of Forged Signature [Com. Code § 3406(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Negligence Preclusion Under Prior Law

[c] Related Points and Authorities

§ 34.126 Opposing Contention That Collecting Bank Is Liable to Payee for Amount of Check Paid on Forged Endorsement [Com. Code § 3420(a)]--Check Was Never Delivered by Drawer

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] No Delivery

[4] Additional Authorities

[a] No Delivery

§ 34.127 Opposing Contention That Depositary Bank Is Liable to Payee for Amount of Check Paid on Missing Endorsement [Com. Code § 3420(a)]--Authority to Deposit

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Authority to Deposit Without Endorsement

[b] Burden of Proof

§ 34.128 Opposing Contention That Collecting or Depositary Bank Is Liable to Payee for Amount of Deposited Check--Provisional Settlement Properly Reversed; Bank's Right of Chargeback [Com. Code §§ 4105, 4107, 4201, 4214 12 C.F.R. § 229.33(d)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Settlement by Collecting Bank Is Provisional

[b] Collecting Bank's Right of Chargeback or Refund

[c] Notification Timely Under Regulation CC

[4] Additional Authorities

[a] Collecting Bank's Right of Chargeback or Refund

§ 34.129 Opposing Contention That Collecting Bank Is Liable to Payee for Amount of Deposited Check [Com. Code § 4202]--Bank's Duties of Presentment and Settlement Were Properly Discharged

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Timing of Collecting Bank's Action

[b] Payee's Burden of Proof of Causation

[4] Additional Authorities

[a] Duties of Collecting Bank

§§ 34.130-34.149 [Reserved]

§ 34.150 Supporting Contention That Collecting Bank Is Liable for Breach of Transfer Warranties [Com. Code § 4207]

[1] FORM

[2] Comments

[a] Use of Form

[b] Notice Requirement

[3] Discussion of Authorities

[a] Warranties on Transfer of Item

§ 34.151 Supporting Contention That Drawee or Other Person Making Payment on Presentment of Check May Recover for Breach of Warranty [Com. Code § 4208]

[1] FORM

[2] Comments

[a] Use of Form

[b] Drawer's Standing for Breach of Warranty

[c] Notice Requirement

[3] Discussion of Authorities

[a] Warranties on Presentment of Unaccepted Draft

[b] Warranties on Presentment of Dishonored Draft or Item for Payment to Party Obligated to Pay

[c] Drawee's Remedy for Breach of Warranty

§ 34.152 Supporting Contention That Encoder of Information or Retainer of Item Is Liable for Breach of Warranty [Com. Code § 4209]

[1] FORM

[2] Comments

[a] Use of Form

[b] Encoding and Retention Warranties

§ 34.153 Opposing Contention That Warrantor Is Liable for Breach of Presentment Warranty Based on Unauthorized Endorsement or Alteration--Endorsement Is Effective or Drawer Precluded From Asserting Unauthorized Endorsement or Alteration [Com. Code § 4208(c)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Warrantor's Defenses

§§ 34.154-34.169 [Reserved]

§ 34.170 Supporting Contention That Bank Is Liable to Payee for Expenses, Loss of Interest, and Consequential Damages for Refusal to Pay Cashier's, Teller's, or Certified Check [Com. Code § 3411]

[1] FORM

[2] Comments

[a] Use of Form

[b] Damages Recoverable for Wrongful Refusal to Pay

[c] Stop Payment Orders on Cashier's, Teller's, and Certified Checks

[d] Related Points and Authorities

§ 34.171 Supporting Contention That Bank Is Liable to Purchaser for Amount of Cashier's Check or Bank Check Paid on Forged Endorsement

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Cashier's Check or Bank Check

[4] Additional Authorities

[a] Cashier's Check or Bank Check

§ 34.172 Opposing Contention That Bank Is Liable to Payee for Expenses or Consequential Damages for Refusal to Pay Cashier's, Teller's, or Certified Check [Com. Code § 3411(c)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

§ 34.173 Opposing Contention That Bank Is Liable to Payee for Breach of Restrictive Endorsement of Cashier's Check Com. Code §§ 3205, 3206]--Blank Endorsement

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] "For Deposit Only," While Restrictive, Is Blank Endorsement

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§ 34.01 Scope of Chapter

[1] In General

This chapter discusses the liability of banks with regard to checks, including the following general topics:

- The liability of drawee banks to drawers.
- The liability of drawee banks to payees of checks.
- The liability of collecting bank to drawers of checks.
- The liability of collecting banks to payees of checks.
- Warranty provisions under Division 4 of the Commercial Code.
- Cashier's, teller's, certified, and bank checks.

For purposes of organization in this chapter, depositary banks are considered collecting banks.

This chapter contains the following forms:

- Points and authorities supporting [*see §§ 34.30 -34.42*] and opposing [*see §§ 34.46 -34.53*] the drawee's liability for improperly charging the drawer's account to pay a check that was not properly payable.
- Points and authorities supporting [*see §§ 34.43 -34.44*] and opposing [*see §§ 34.54 -34.56*] the drawee's liability for wrongful dishonor of a check.
- Points and authorities supporting [*see § 34.45*] and opposing [*see §§ 34.57 -34.58*] the drawee's

liability for paying a check in disregard of a stop payment order or order to close an account.

- Points and authorities supporting [*see § 34.70*] and opposing [*see §§ 34.73 -34.75*] the drawee's liability to the payee for paying a check on a forged endorsement.

- Points and authorities supporting [*see §§ 34.71 -34.72*] and opposing [*see §§ 34.76, 34.77*] the drawee's liability for undue retention of a check presented to it for payment.

- Points and authorities supporting [*see §§ 34.90 -34.91*] and opposing [*see §§ 34.93 -34.96*] the collecting bank's liability to the drawer for paying a check on a forged, different, or missing endorsement.

- Points and authorities supporting liability of a collecting bank that is also payee of a check on grounds for allowing improper distribution of the proceeds [*see § 34.92*].

- Points and authorities opposing imposition of a duty on a collecting bank to determine that the drawer's signature was forged [*see §§ 34.97 -34.99*].

- Points and authorities supporting [*see §§ 34.120 -34.122*] and opposing [*see §§ 34.124 -34.127*] the collecting bank's liability to the payee for paying a check on a forged, missing, or different endorsement.

- A form [*see § 34.123*] setting forth the provisions imposing liability on a depositary bank for failure to make the proceeds of a deposited item available for withdrawal by its customer in the required time. Note that the actual time requirements themselves are not set forth in that form but are discussed in California Forms of Pleading and Practice, Ch. 95, *Banks, Deposits, and Checks* (Matthew Bender).

- Points and authorities opposing liability on a collecting bank for exercising its right of chargeback and revocation of provisional settlement or for late notice of dishonor or return [*see § 34.128*].

- Points and authorities opposing liability on a collecting bank for breach of any of its duties of presentment [*see § 34.129*].

- Points and authorities supporting the contention that a collecting bank is liable for breach of the transfer warranties [*see § 34.150*].

- Points and authorities supporting [*see § 34.151*] and opposing [*see § 34.153*] the drawee's right to recover for breach of the presentment warranties.

- Points and authorities supporting the contention that the encoding or retention warranty has been breached [*see § 34.152*].

- Points and authorities supporting [*see § 34.170*] and opposing [*see § 34.172*] the contention that the bank is liable to the payee for wrongfully refusing to pay a cashier's, teller's, or certified check.

- Points and authorities opposing the contention that a bank is liable to the payee for breaching a restrictive endorsement on a cashier's check [*see § 34.173*].

- Points and authorities supporting the contention that an issuing or selling bank is liable to the purchaser of a cashier's check or a bank check for paying that check on a forged endorsement [*see § 34.171*].

[2] Application to Other Financial Institutions

The federal Expedited Funds Availability Act (*12 U.S.C. § 4001 et seq.*) and Regulation CC (12 C.F.R. Part 229) apply to any organization that accepts transaction or demand deposits. As used in that act and regulation, "bank" includes not only banks but also savings banks, mutual savings banks, credit unions, savings and loan associations, building and loan associations, homestead associations, cooperative banks, insurance companies, trust companies, industrial loan companies, or any other institution in the business of receiving deposits, whether organized under federal or state law [*see 12 U.S.C. § 4001(12)* (defining "depository institution"); *12 C.F.R. § 229.2(e)* (defining "bank")].

Unless a written agreement provides otherwise, the California statutes cited in this chapter with respect to banks and checks also apply to items withdrawn from, transferred to, or otherwise handled by a California credit union [*Fin. Code § 14867(c)*]. In addition, "bank" is defined broadly in the Commercial Code as a person engaged in the business of banking, including a savings bank, savings and loan association, credit union, or trust company [*Com. Code § 4105(1)*]. Thus, although no California or Ninth Circuit case has apparently addressed the issue, it appears likely that a nonbank financial institution, such as a savings and loan association, that functions as a drawee, collecting, or depositary bank would be held to have the same Commercial Code duties and responsibilities as a bank [*see, e.g., La Vista Cemetery Assn. v. American Sav. & Loan Assn. (1970) 12 Cal. App. 3d 365, 368-369, 90 Cal. Rptr. 722* (discussed in *§ 34.124[4][a]*); *see also 12 U.S.C. § 1832* (authority of savings and loan association for accounts subject to negotiable order of withdrawal, referred to as "NOW account"); *12 C.F.R. § 561.29* ("NOW account" defined)].

[3] Exclusions From Coverage

This chapter does not address the Electronic Funds Transfer Act (*15 U.S.C. § 1693 et seq.*), Regulation E of the Federal Reserve (12 C.F.R. Part 205), or the effect of any particular transaction that has been accomplished by electronic means. For discussion of electronic fund transfers, see California Legal Forms, Ch. 56, *Letters of Credit and Electronic Fund Transfers* (Matthew Bender); *see also* Forms and Procedures under the U.C.C., Article 4A, *Funds Transfers*, P 4A.05 (Matthew Bender).

This chapter also does not address the various laws and regulations establishing the maximum checkhold periods (the period of time within which a depositary financial institution must make proceeds of deposited items available for withdrawal) [*see, e.g.*, Federal Expedited Funds Availability Act (*12 U.S.C. § 4001 et seq.*)]. Those requirements are discussed in California Forms of Pleading and Practice, Ch. 95, *Banks, Deposits, and Checks* (Matthew Bender).

Although this chapter does not specifically address interbank issues, cases discussed in this chapter include some cases in which both parties to the litigation were banks. Bank counsel may find cases based on the rights of the bank's customer persuasive [*see also* discussion in *§ 34.06*]. In addition, regulations apply to interbank transactions and liability [*see, e.g., 12 C.F.R. § 229.3*, discussed in *§§ 34.71, 34.76*].

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§ 34.02 Governing Law

Bank deposits and collections are generally governed by Division 4 of the Commercial Code [*Com. Code § 4101 et seq.*], although many concepts from Division 3 are relevant to checks and banks [*see, e.g., Com. Code §§ 3110* (intended payees), 3204 (endorsement and endorser), 3302-3304 (holder in due course), 3401, 3403 (validity of signatures), 3404 (impostors and fictitious payees), 3406 (contributory and comparative negligence), 3418 (payment or acceptance by mistake), 3420 (conversion of instrument)]. Definitions relating to the Uniform Commercial Code are set forth in *Com. Code § 1201*.

Fin. Code § 14867(c) provides that unless the parties agree otherwise, Divisions 3 and 4 of the Commercial Code apply to items withdrawn from, transferred to, or otherwise handled by a California credit union as if the credit union were a bank.

The federal Expedited Funds Availability Act (*12 U.S.C. § 4001 et seq.*) authorized the Board of Governors of the Federal Reserve System to enact regulations to expedite the collection and return of checks by banks. Those regulations (12 C.F.R. Parts 210, 229) supersede the Commercial Code as enacted in any state to the extent of any inconsistency [*see 12 U.S.C. § 4007* (authority for superseding regulation)]. The preemptive scope of the Act and the relevant portions of Regulation CC, however, is quite narrow. Only state laws that establish different timing or disclosure requirements than the Act or otherwise directly conflict with it face preemption. Congress expressed no desire to preempt state laws or causes of action that supplement, rather than contradict, the Act. Therefore, in a case in which a bank deposited a wire transfer to the wrong account, neither the plaintiff's negligence or intentional and negligent misrepresentation claims were preempted, as those claims involved elements that were beyond the scope of the Act [*Mihai Beffa v. Bank of the West (9th Cir. 1998) 152 F.3d 1174, 1177-1178]* .

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§ 34.03 Definitions

[1] Checks and Status of Banks Generally

The definition of "check" in Division 3 of the Commercial Code applies to the provisions governing bank deposits and collections [*Com. Code § 4104(c)*] "Check" is defined in Division 3 as (1) a draft, other than a documentary draft, payable on demand and drawn on a bank, (2) a cashier's check or teller's check, or (3) a demand draft [*Com. Code § 3104(f)*; *see Com. Code § 3104(g), (h), (k)* ("cashier's check," "teller's check," and "demand draft" defined)]. For purposes of Division 4, "draft" means a draft as defined in *Com. Code § 3104* or an item, other than an instrument, that is an order [*Com. Code § 4104(a)(7)*; *see Com. Code §§ 3103(a)(6)* ("order" defined), 4104(a)(9) ("item" defined)]. For a discussion of checks in the context of negotiable instruments, see Ch. 166, *Negotiable Instruments* .

A "bank" means a person engaged in the business of banking, including a savings bank, savings and loan association, credit union, or trust company [*Com. Code § 4105(1)*]. A "clearinghouse" is an association of banks or other payors regularly clearing items [*Com. Code § 4104(a)(4)*; *see Com. Code § 4104(a)(9)* ("item" defined)]. The term "settle" means to pay in cash by clearinghouse settlement, in a charge or credit or by remittance, or otherwise as agreed. A settlement may be either provisional or final [*Com. Code § 4104(a)(11)*].

[2] Collecting Bank

A "collecting bank" is a bank handling an item for collection except the payor bank [*Com. Code § 4105(5)*].

[3] Customer

A "customer" is a person having an account with a bank or for whom a bank has agreed to collect items, including a bank that maintains an account at another bank [*Com. Code § 4104(a)(5)*; *see Com. Code § 4104(a)(1)* ("account" defined)].

[4] Depositary Bank

"Depositary bank" means the first bank to take an item even though it is also the payor bank, unless the item is

presented for immediate payment over the counter [*Com. Code § 4105(2)*]. In this chapter, depositary banks are generally considered collecting banks unless the two are specifically distinguished by statute [*see, e.g., Com. Code § 3420(c)* and Official Comment 3 to U.C.C. § 3-420 (1990) (bank's defense against conversion action limited to collecting banks other than depositary bank)].

[5] Drawee and Drawer

A "drawee" is a person ordered in a draft to make payment [*Com. Code § 4104(a)(8)*] "Drawer" is not defined in Division 4 of the Commercial Code or included in the list of definitions from other divisions that apply to Division 4 [*see Com. Code § 4104*]. However, "drawer" is defined in Division 3 as a person who signs or is identified in a draft as a person ordering payment [*Com. Code § 3103(a)(3)*] *Com. Code § 3414* sets forth a drawer's obligations.

[6] Payor Bank; Drawee Bank

A "payor bank" is a bank that is the drawee of a draft [*Com. Code § 4105(3)*]. Throughout this chapter, the term "drawee bank" or "drawee" is generally used to refer to the bank on which a check is drawn.

[7] Paying Bank

Regulation CC uses the term "paying bank" to mean (1) the bank by which a check is payable unless a check is payable at another bank and is sent to the other bank for payment or collection; (2) the bank at which a check is payable and to which it is sent for payment or collection; (3) the Federal Reserve Bank or Federal Home Loan Bank by which a check is payable; (4) the bank through which a check is payable and to which it is sent for payment or collection, if the check is not payable by a bank; or (5) the state or unit of general local government on which a check is drawn and to which it is sent for payment or collection [*12 C.F.R. § 229.2(z)*]. For purposes of *12 C.F.R. §§ 229.30-229.42* and, in connection therewith, *12 C.F.R. §§ 229.1-229.3*, paying bank includes the bank through which a check is payable and to which it is sent for payment or collection regardless of whether the check is payable by another bank, and the bank whose routing number appears on a check in fractional or magnetic form and to which the check is sent for payment or collection [*12 C.F.R. § 229.2(z)*]. The term "paying bank" will be used in this chapter only when discussing rights and duties under the Expedited Funds Availability Act or Regulation CC [*see, e.g., §§ 34.71, 34.76*].

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§ 34.04 Bank Processing of Checks

The basic steps and procedures customarily undertaken in processing a check are as follows:

(1) The drawer makes and delivers a check to the payee, drawn against a drawee bank.

(2) The payee may directly present the check to the drawee bank for payment or may deposit the check with the depositary bank with which he or she maintains an account.

(3) The depositary bank takes the check for collection and gives provisional credit to the payee's account. Provisional credit is subject to payment by the drawee bank.

(4) The depositary bank then processes the check and sends it through an intermediary bank or clearinghouse for ultimate presentment to the drawee bank. In this process each bank handling the check "settles" with or pays the prior bank. When the drawee bank is local, the depositary bank will sometimes present the check directly for payment instead of going through the clearinghouse.

(5) When presented for payment, the drawee bank reviews the check and either honors the check by payment to the presenting bank, or dishonors the check if, for example, there are insufficient funds to cover it or there is a stop payment order against it. If the check is dishonored, it is returned, either directly to the depositary bank, or through an intermediary, referred to as a "returning bank." It is not necessary that the returning bank have handled the check in the forward collection process. The depositary bank is required to pay the paying bank or a returning bank [*12 C.F.R. § 229.32(b)*], and a returning bank is required to settle for the returned check, either with the paying bank or with another returning bank in the same way it would settle for a similar check in forward collection [*12 C.F.R. § 229.31(c)*; *see 12 C.F.R. § 229.2(cc)* (defining "returning bank" to exclude paying bank and depositary bank; returning bank as collecting bank for purposes of *Com. Code § 4202(b)*)].

(6) When the check is paid the drawee bank posts the check to the drawer's account and files it for subsequent return to the drawer with the bank statement.

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§ 34.05 Statute of Limitations

An action to enforce an obligation, duty, or right arising under Division 4 of the Commercial Code must be commenced within three years after the cause of action accrues [*Com. Code § 4111*; *see Edward Fineman Company v. Superior Court (1998) 66 Cal. App. 4th 1110, 1125-1126, 78 Cal. Rptr. 2d 478* (statute applied retroactively); *see also § 34.51*]. This statute of limitations conforms to the limitations period in *Com. Code § 3118(g)* for actions for breach of warranty and to enforce other obligations, duties, or rights arising under Division 3 of the Commercial Code [Official Comment to U.C.C. § 4-111]. § 34.124 addresses the limitations period in *Com. Code § 3118(g)* as applied to a conversion action under *Com. Code § 3420*. For a discussion of other provisions governing limitation of actions under Division 3, see Ch. 166, *Negotiable Instruments* .

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§ 34.06 How to Use Forms in This Chapter

[1] Page Limits on Points and Authorities

One of the more significant drafting requirements to keep in mind are page limits: supporting and opposing memoranda may not exceed 15 pages. A reply or closing memorandum may not exceed 10 pages. Exhibits, declarations, attachments, the table of contents, the table of authorities, and the proof of service are excluded from these page limits [*Cal. Rules of Ct., Rule 3.1113(d)*]. Any party must obtain leave of court to file a longer memorandum [*see Cal. Rules of Ct., Rule 3.1113(e)*]. These and other drafting requirements are discussed in further detail in Ch. 1, *Writing Legal Memoranda and Briefs* .

[2] Using the Forms to Build a Draft Memorandum

Although the forms in this chapter and the case and statutory authority on which they are based are arranged according to the status of the bank (drawee or collecting) and of the other party to the action (drawer, payee, or purchaser), the contention that a given form or authority supports or opposes may be applicable to someone in a different status. Thus, counsel should look in other parts for authority to explain, interpret, or argue for the applicability of a particular provision. In some instances there is case authority to support the application of a statutory provision phrased in terms of certain status parties to other parties. For instance, although *Com. Code § 4406* is phrased in terms of defenses a drawee bank may assert against the drawer [*see §§ 34.50, 34.51*], case authority has established that the defenses of that section may also be asserted by a collecting bank that is sued by the drawer [*see Sun'n Sand, Inc. v. United California Bank (1978) 21 Cal. 3d 671, 684, 691 n.19, 148 Cal. Rptr. 329, 582 P.2d 920* (construing prior law); *Allied Concord etc. Corp. v. Bank of America (1969) 275 Cal. App. 2d 1, 6, 80 Cal. Rptr. 622* (construing prior law)]. There are also cases and forms applying the contributory negligence defense of *Com. Code § 3406* to all situations [*see §§ 34.52, 34.74*, 192].

If no case or form has supported the application of a particular provision to a particular party, counsel may still wish to argue that its application is appropriate. Some statutes are ambiguous, and their application is still evolving. For instance, the statutory and regulatory authorities cited and discussed in *§ 34.71* [*Com. Code § 4302*; *12 C.F.R. § 210.9(a)*] never specify whether the drawee bank's obligations are owed to the collecting bank or to the payee. The case authorities cited in that form involve banks suing on their own behalf or as assignees of the payee, and even include

dicta that drawers and payees may be bound by Federal Reserve Bank clearinghouse rules [*see Community Bank v. Federal Reserve Bank of San Francisco (9th Cir. 1974) 500 F.2d 282, 286]* .

Use of particular authorities in support of an argument for a finding of liability with regard to transactions other than checks, however, may not be successful as against a defendant bank. For example, in *Software Design and Application v. Hoefer & Arnett (1996) 49 Cal. App. 4th 472, 56 Cal. Rptr. 2d 756* , a defrauded investor of a faithless financial consultant claimed that the bank handling the accounts of the financial consultant/customer owed the investor/noncustomer a duty of care. The investor relied on cases such as *Sun'n Sand v. United California Bank (1978) 21 Cal. 3d 671, 148 Cal. Rptr. 329, 582 P.2d 920* which held that a bank owes a limited duty of inquiry when a check presented for deposit bears some objective signs of fraud [*see § 34.35[3]*]. The court in *Software Design*, however, found that absent extraordinary and specific facts, a bank does not owe a duty of care to a noncustomer. In this case, although the accounts were held under fictitious names, there was no suspicious activity comparable to an altered check that would create such a duty [*Software Design and Application v. Hoefer & Arnett (1996) 49 Cal. App. 4th 472, 479-483, 56 Cal. Rptr. 2d 756* (funds deposited solely by wire transfer)].

Similarly, in *Karen Kane Inc. v. Bank of America NT & SA (1998) 67 Cal. App. 4th 1192, 79 Cal. Rptr. 2d 712* , a clothing manufacturer wrote numerous checks over several years to fictitious vendors for merchandise it never received, based on an employee's submission of fraudulent invoices. The manufacturer brought a negligence action against both the check cashing service that cashed those checks and the bank that deposited the checks into the service's account. Citing *Software Design*, the court of appeal stated that absent extraordinary and specific facts, a bank does not owe a duty of care to a noncustomer. The court found that because the checks were not forged or improperly endorsed, and did not indicate that maker was being defrauded, neither the check cashing service nor the bank had a duty to inquire of the maker if a valid transaction supported the checks before accepting them. The circumstances were not extraordinary enough to give rise to a duty of inquiry by a bank complying with its statutory duties, when in fact they were not even sufficient to constitute notice of fraud to the maker of the checks [*Karen Kane Inc. v. Bank of America NT & SA (1998) 67 Cal. App. 4th 1192, 1201-1203, 79 Cal. Rptr. 2d 712* ; *see also § 34.129*].

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§ 34.07 Related Pleading and Practice Chapters

For discussion and forms relating to banks, see California Forms of Pleading and Practice, Ch. 95, *Banks, Deposits, and Checks* (Matthew Bender).

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§ 34.08 Related Points and Authorities Chapters

For points and authorities applicable to negotiable instruments generally, see Ch. 166, *Negotiable Instruments* . For memoranda of points and authorities regarding contract issues generally, see Ch. 50, *Contracts* . For points and authorities concerning interest on obligations and judgments, see Ch. 121, *Interest* .

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Volume 3 Chapters 34-39 CHECKS AND BANKS---to---CIVIL SERVICE
CHAPTER 34 CHECKS AND BANKS
PART I. INTRODUCTION

3-34 California Points & Authorities § 34.09

§ 34.09 Other Related Publications

For discussion of negotiable instruments generally, see 2 Bender's U.C.C. Service, Commercial Paper (Matthew Bender). For discussion of suretyship and commercial paper, and banks and checks, see Volume 2A of that publication. Checks, drafts, and notes are also discussed in Banking Law (Matthew Bender).

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Volume 3 Chapters 34-39 CHECKS AND BANKS---to---CIVIL SERVICE
CHAPTER 34 CHECKS AND BANKS
PART I. INTRODUCTION

3-34 California Points & Authorities §§ 34.10-34.29

[Reserved]

§§ 34.10[Reserved]

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Volume 3 Chapters 34-39 CHECKS AND BANKS---to---CIVIL SERVICE
CHAPTER 34 CHECKS AND BANKS
PART II. FORMS
A. Drawee Bank's Liability To Drawer

3-34 California Points & Authorities § 34.30

§ 34.30 Supporting Contention That Drawee Is Liable to Drawer for Unauthorized Payment of Check [Com. Code § 4401]--Check Not Properly Payable

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions, and should be combined with points and authorities addressing the particular reason the check is not properly payable (see §§ 34.31 -34.35)*].

DEFENDANT DRAWEE BANK'S CHARGE TO PLAINTIFF'S ACCOUNT FOR CHECK NUMBER _____ IS IMPROPER AND UNAUTHORIZED.

[*EITHER*]

A. General Duty Under Commercial Code for Any Item. A bank may charge against a customer's account an item that is properly payable from that account [even though the charge creates an overdraft]. An item is properly payable if it is authorized by the customer and is in accordance with any agreement between the customer and the bank (*Com. Code § 4401(a)*).

[*OR*]

A. General Duty Under Commercial Code for Postdated Checks. A bank may charge against a customer's account a check that is otherwise properly payable from the account, even though payment was made before the date of the check, unless the customer has given notice to the bank of the postdating, describing the check with reasonable certainty. The notice is effective for the period stated in *Commercial Code Section 4403(b)* for stop payment orders, and must be received at the time and in the manner as to afford the bank a reasonable opportunity to act on it before the bank takes any action with regard to the check described in *Commercial Code Section 4303*. If a bank charges against a customer's

account a check before the date stated in the notice of postdating, the bank is liable for damages for the loss resulting from its act. The loss may include damages for dishonor of subsequent items under *Commercial Code Section 4402* (*Com. Code § 4401(c)*).

[*CONTINUE*]

[*Optional*] **B. Customer Defined.** A "customer" is a person having an account with a bank or for whom a bank has agreed to collect items, including a bank that maintains an account at another bank (*Com. Code § 4104(a)(5)*).

[*Optional*] **C. Customer's Liability.** A customer is not liable for the amount of an overdraft if the customer neither signed the item nor benefited from the proceeds of the item (*Com. Code § 4401(b)*).

[*Optional*] **D. Implied Contractual Duty.** When a bank receives ordinary deposits, it becomes a debtor of the depositor and its contract with that customer is to discharge the indebtedness thus created by honoring checks drawn by the depositor on the bank. The bank is not entitled to debit the depositor's account for payments not made by his or her order or direction (*Glassell Dev. Co. v. Citizens' Nat. Bk. (1923) 191 Cal. 375, 379, 216 P. 1012* ; *Campbell v. Bank of America (1987) 190 Cal. App. 3d 1420, 1427* ; *Joffe v. United California Bank (1983) 141 Cal. App. 3d 541, 554-555, 190 Cal. Rptr. 443*).

[*Optional*] **E. Signature Card Contract.** A bank is authorized to honor withdrawals from an account on the signatures authorized by the signature card, which serves as a contract between the depositor and the bank for the handling of the account. The drawee bank is free from liability for honoring a check [drawn in breach of trust if the check is] signed in conformity with the signature card [when the drawee has no knowledge of a misappropriation] (*Blackmon v. Hale (1970) 1 Cal. 3d 548, 556, 83 Cal. Rptr. 194, 463 P.2d 418* ; *Certified Grocers of California, Ltd. v. San Gabriel Valley Bank (1983) 150 Cal. App. 3d 281, 287, 197 Cal. Rptr. 710*).

[*Optional*] **F. Corporate Principal as Depositor.** When a corporation maintains a deposit account, the bank's duties may also be owed to the individual principals of the corporation. The determination whether the individual principals are the customers is made on a case-by-case basis and usually involves a situation in which the bank is also lending money and looking to the individuals to repay or guarantee the loan (*American Nat. Bank v. Stanfill (1988) 205 Cal. App. 3d 1089, 1098-1101, 252 Cal. Rptr. 861* ; *see Kendall Yacht Corp. v. United California Bank (1975) 50 Cal. App. 3d 949, 956, 123 Cal. Rptr. 848*).

[2] Comments

[a] Use of Form

These points and authorities may be used to support the contention that a drawee bank is liable for charging a customer's account to pay a check that is not properly payable. The alternatives in Paragraph A set forth the Commercial Code duties applicable to an item in general, or in particular, a postdated check [*see Com. Code § 4401(a), (c)*; *see also Com. Code § 4104(a)(9)* ("item" defined)]. Optional Paragraph B sets forth the Commercial Code definition of customer. Optional Paragraph C sets forth the rule established by case authority that if more than one customer can draw on an account, the nonsigning customer is not liable for an overdraft unless he or she benefits from the item's proceeds [*see Com. Code § 4401(b)*; Official Comment 2 to U.C.C. § 4-401]. Optional Paragraph D sets forth the implied contractual obligation established by case law between a depositor and his or her bank. Optional Paragraph E is for use when the drawee bank paid a check not in accordance with the signature card agreement. Optional Paragraph F is for use when one wishes to argue that the drawee bank is liable to a principal for acts or omissions involving a corporate account.

To protect personal privacy and other legitimate interests, parties and their attorneys must not include financial account

numbers, or must redact such numbers when inclusion is necessary, in all pleadings and other papers filed in the court's public file, whether filed in paper or electronic form, unless otherwise provided by law or ordered by the court [*Cal. Rules of Ct., Rule 1.20(b)*].

Counsel should add argument linking the points in this form with the facts of his or her case; for example, facts describing the account and the check in question and establishing whether or not payment of the check violated the signature card agreement. If the check's payment violated the signature card agreement, counsel should include a copy of the agreement or the relevant particulars. If an overdraft is involved, any particulars of the signature card agreement or any separate overdraft agreement should also be set forth.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the drawee's liability.

[b] Related Points and Authorities

§§ 34.31-34.35 address particular defects making a check not properly payable. The points and authorities in *§ 34.53* oppose the contention that the drawee is liable in negligence for improperly charging a check to the drawer's account. §§ 34.36-34.42 support the drawee's liability for improper payment of checks on the grounds that certain defenses are inapplicable. § 34.46-34.52 oppose the contention that the drawee is liable to the drawer for unauthorized payment of checks.

[3] Discussion of Authorities

[a] Implied Contractual Duty

Plaintiff depositor in ***Glassell Dev. Co. v. Citizens' Nat. Bk.*** *(1923) 191 Cal. 375, 216 P. 1012* , sued to recover the increased amount of eight altered and raised checks drawn over an 18-month period. Plaintiff and five other corporations maintained a joint office. *S* was in charge of the joint office and had sole charge of all bookkeeping and auditing for the six companies. All the raised checks were payable to two or more of the other companies in the joint office. The checks were signed by two of plaintiff's officers and were drawn based on vouchers presented them by *S*. After they were drawn, *S* altered them. After one of the forgeries was discovered, *S* admitted to the others. Plaintiff demanded reimbursement from the bank for the amounts embezzled, but the bank refused. Plaintiff then demanded payment of the amount embezzled within the prior year. When that demand was refused, plaintiff commenced suit. Judgment was for defendant. Plaintiff appealed.

The Supreme Court affirmed. However, the Court first stated the settled rule that when a bank receives ordinary deposits, it becomes a debtor of the depositor and its contract with that customer is to discharge the indebtedness thus created by honoring checks drawn by the depositor on the bank. The bank is not entitled to charge the depositor's account for payments not made by his or her order or direction. As between the bank and its depositor, the bank pays forged or altered checks at its peril. The bank cannot charge them against the depositor's account unless (1) some negligent act or conduct of the depositor has contributed to induce payment, the bank itself being free from negligence, or (2) by his or her subsequent conduct in relation to the matter the depositor is estopped by equitable principles from denying the correctness of the payments (*191 Cal. 375, 379)* .

The facts and procedural background of ***Campbell v. Bank of America*** *(1987) 190 Cal. App. 3d 1420* , are discussed in *§ 34.48[3][a]*. Although payment of the check by the drawee bank was ultimately held to have been proper, in considering plaintiff drawer's contention that the drawee bank breached its implied contract, the court of appeal generally discussed the duty of a drawee bank to its customer and the implied contract on which that duty is based. In setting forth the rule, the court quoted from *Joffe v. United California Bank (1983) 141 Cal. App. 3d 541, 554, 190 Cal. Rptr. 443* (discussed *below*) (*190 Cal. App. 3d 1420, 1427)* .

The facts and procedural background of ***Joffe v. United California Bank*** *(1983) 141 Cal. App. 3d 541, 190 Cal. Rptr. 443* , are discussed in *§ 34.53[3][a]*. The court of appeal discussed the duty of a drawee bank to its depositor, saying that it has long been settled that when a bank receives deposits, it has an implied contract with the customer to discharge the indebtedness thus created by honoring checks drawn by the depositor on the bank, but that the bank is not entitled to charge the depositor's account for payments not made by his or her order or direction (*141 Cal. App. 3d 541, 554)* .

[b] Signature Card Contract

The facts and procedural background of ***Blackmon v. Hale*** *(1970) 1 Cal. 3d 548, 83 Cal. Rptr. 194, 463 P.2d 418* , are discussed in *§ 34.94[3][a]*. The payee designation on the check in question was "A and H Trust Account." In discussing the duties of the collecting bank in allowing withdrawals from the trust account, the Supreme Court said that the bank was authorized to honor withdrawals from the account on the signatures authorized by the signature card agreement, which serves as a contract between the depositor and the bank for the handling of the account. If the checks drawn on the account are signed in conformity with the signature card, and absent any knowledge of a misappropriation, the bank is free from liability for honoring a check drawn in breach of trust (*1 Cal. 3d 548, 556)* .

Certified Grocers of California, Ltd. v. San Gabriel Valley Bank *(1983) 150 Cal. App. 3d 281, 197 Cal. Rptr. 710* , was a suit by a corporate drawer's judgment creditor against the drawee bank for conversion and breach of fiduciary duty arising from the bank's allowing unauthorized withdrawals from a corporate payroll account by a corporate officer who converted the funds to his own use. The signature card agreement originally required two officers to sign checks drawn on the account for $500 or more. The original signature card referred to a corporate resolution appointing the officers who were authorized to withdraw. One of those officers had the signature card changed so that he could make withdrawals on only his own signature. The second signature card made no reference to a corporate resolution, but the bank treated it as revoking and superseding the original signature card. The officer drew a series of checks using only his own signature. The trial court entered a judgment of dismissal after sustaining a general demurrer to the second amended complaint without leave to amend. Plaintiff appealed.

The court of appeal affirmed regarding punitive damages, but reversed in all other regards. The court cited *Glassell Dev. Co. v. Citizens' Nat. Bk. (1923) 191 Cal. 375, 379, 216 P. 1012* , *Joffe v. United California Bank (1983) 141 Cal. App. 3d 541, 554, 190 Cal. Rptr. 443* (both discussed *above*), and *Fireman's Fund Ins. Co. v. Security Pacific Nat. Bank (1978) 85 Cal. App. 3d 797, 805 n.7, 149 Cal. Rptr. 883* , for the proposition that when a bank receives deposits, it becomes a debtor of the depositor and its implied contract with that customer is to discharge the indebtedness thus created by honoring checks drawn by the depositor on the bank. The bank is not entitled to charge the depositor's account for payments not made by his or her order or direction (*150 Cal. App. 3d 281, 286)* .

The court cited *Blackmon v. Hale (1970) 1 Cal. 3d 548, 556, 83 Cal. Rptr. 194, 463 P.2d 418* (discussed *above*), and *Bullis v. Security Pac. Nat. Bank (1978) 21 Cal. 3d 801, 811-812, 148 Cal. Rptr. 22, 582 P.2d 109* , for the proposition that a bank is authorized to honor withdrawals from an account on the signatures authorized by the signature card, which serves as a contract between the depositor and the bank for the handling of the account. When the checks drawn on the account are signed in conformity with the signature card, and absent any knowledge of a misappropriation, the bank is free from liability for honoring a check drawn in breach of trust. The complaint alleged that the bank knew that a substantial portion of the funds withdrawn by the officer was used for his personal use unrelated to the payroll obligations of the debtor, and thus stated a cause of action (*150 Cal. App. 3d 281, 287)* .

[c] Corporate Principal as Depositor

The bank in ***American Nat. Bank v. Stanfill*** *(1988) 205 Cal. App. 3d 1089, 252 Cal. Rptr. 861* , loaned money to defendants and cross complainants. The proceeds of the loan were deposited in an account in the name of a nonprofit corporation of which defendants were directors. The note was executed by defendants as individuals and was subject to

a special letter of understanding that the bank did not recognize the nonprofit corporation as a bankable source of repayment. Defendants were authorized signatories on the corporate account. All checks required two signatures, one of which had to be of a defendant. Many checks without the requisite signatures were paid, as were checks with forged endorsements. When the bank sued on the note, defendants asserted the defense of setoff based on the unauthorized withdrawals and cross complained. Summary judgment was entered for the bank on its complaint. Defendants and cross complainants appealed.

The court of appeal reversed. First, the court found that it was error to enter summary judgment on the complaint alone because the matters asserted as a defense were the same as those raised by the cross complaint. It amended the judgment to reflect judgment in the bank's favor on the cross complaint and then reversed that judgment because there was a triable issue of fact whether the defendants were the "customers" or "depositors" within the meaning of former Com. Code §§ 4104(1)(e) and 4401 (*now see Com. Code §§ 4104(a)(5), 4401*) (*205 Cal. App. 3d 1089, 1101)* . The court cited *Kendall Yacht Corp. v. United California Bank (1975) 50 Cal. App. 3d 949, 956, 123 Cal. Rptr. 848* (discussed *below*), for the proposition that the determination whether the individual shareholder or director has standing to assert claims based on mishandling of a corporate account is to be made on a case-by-case basis by evaluating the relationship of the parties (*205 Cal. App. 3d 1089, 1098-1100)* . In this case the following factors were significant: (1) defendants were directors of the corporation; (2) they were required to be personally responsible for the loan that funded the corporation; (3) the loan proceeds were directed by defendants to be deposited in the corporate account and withdrawals from that account were required to have the signature of at least one of them; and (4) one defendant had a long history of commercial dealings with the bank as president of another company. Given all this, the court said it was entirely foreseeable that defendants would suffer adverse consequences if the corporate account was not managed according to their instructions (*205 Cal. App. 3d 1089, 1100)* .

Kendall Yacht Corp. v. United California Bank *(1975) 50 Cal. App. 3d 949, 123 Cal. Rptr. 848* , is discussed in *§ 34.43[3][g]*.

[4] Additional Authorities

[a] Implied Contractual Duty

See *Basch v. Bank of America (1943) 22 Cal. 2d 316, 139 P.2d 1* , discussed in *§ 34.33[3][a]*.

In *LaMonte v. Sanwa Bank, California (1996) 45 Cal. App. 4th 509, 52 Cal. Rptr. 2d 861* , the court cited *Blackmon v. Hale (1970) 1 Cal. 3d 548, 83 Cal. Rptr. 194, 463 P.2d 418* , in concluding that a depositary bank was under no duty to inquire as to the disposition of funds withdrawn by appellant's agent and joint account holder, her husband. Therefore, it could not posit any such duty on the part of a drawee bank, which paid royalty checks when presented with a "PEG" warranty and had no knowledge of the disposition of the proceeds from those checks. Accordingly, the court concluded that a drawee bank handling collection and disbursement of royalties did not breach its fiduciary duty by paying checks naming the owner as payee but endorsed by her husband alone, as the bank had not expressly or by implication agreed to supervise or monitor the owner's finances and accounts (*45 Cal. App. 4th 509, 522-523)* .

The facts and procedural background of *Danning v. Bank of America (1984) 151 Cal. App. 3d 961, 199 Cal. Rptr. 163* , are discussed in *§ 34.31[3][c]*. In discussing a drawee's duty to its customer, the court of appeal said that their relationship is one of debtor and creditor, being founded on contract, and that the bank is under a duty to pay checks only in strict accordance with the customer's order. The court cited *Basch v. Bank of America (1943) 22 Cal. 2d 316, 321, 139 P.2d 1* (discussed in *§ 34.33[3][a]*), for the proposition that the bank is without authority to charge a customer's account with an unauthorized order, and payment of such is made out of the bank's own funds (*151 Cal. App. 3d 961, 969)* .

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PART II. FORMS
A. Drawee Bank's Liability To Drawer

3-34 California Points & Authorities § 34.31

§ 34.31 Supporting Contention That Drawee Is Liable to Drawer for Unauthorized Payment of Check [Com. Code § 4401]--Unauthorized Drawer's Signature [Com. Code §§ 3401, 3403]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT DRAWEE BANK'S CHARGE TO PLAINTIFF'S ACCOUNT FOR CHECK NUMBER _____ IS IMPROPER AND UNAUTHORIZED BECAUSE THAT CHECK HAD AN UNAUTHORIZED DRAWER'S SIGNATURE.

A. General Duty Under Commercial Code for Any Item. [*See § 34.30[1], Paragraph A.*]

[*Optional*] **B. Implied Contractual Duty.** [*See § 34.30[1], Paragraph D.*]

C. Signature Card Contract. [*See § 34.30[1], Paragraph E.*]

D. Signature Required for Liability. A person is not liable on an instrument unless (1) the person signed the instrument, or (2) the person is represented by an agent or representative who signed the instrument and the signature is binding on the represented person under *Commercial Code Section 3402* [*Com. Code § 3401(a)*; *see Danning v. Bank of America (1984) 151 Cal. App. 3d 961, 969, 199 Cal. Rptr. 163]* (disapproved on other grounds in *In re Marriage of Arceneaux (1990) 51 Cal. 3d 1130, 1137-1138)* .

[*Optional*] **E. Unauthorized Signature Is Inoperative.** An unauthorized signature, which under *Commercial Code Section 1201(b)(41)* includes one made without actual, implied, or apparent authority, is ineffective [except as the signature of the unauthorized signer in favor of a person who in good faith pays the instrument or takes it for value] [*Com. Code § 3403(a)*; *see Danning v. Bank of America (1984) 151 Cal. App. 3d 961, 969, 199 Cal. Rptr. 163]* (disapproved on other grounds in *In re Marriage of Arceneaux (1990) 51 Cal. 3d 1130, 1137-1138)* .

F. Check With Unauthorized Signature Is Not Properly Payable. A check with an unauthorized signature is not properly payable, and a drawee bank breaches its agreement with its customer, the drawer, in paying such an item [*Danning v. Bank of America (1984) 151 Cal. App. 3d 961, 969, 199 Cal. Rptr. 163* ; *see Com. Code § 4401(a)*] (disapproved on other grounds in *In re Marriage of Arceneaux (1990) 51 Cal. 3d 1130, 1137-1138)* .

[*Optional*] **G. No Ratification.** Although an unauthorized signature may generally be ratified, one whose signature is not sufficient to make a check effective in the first place cannot ratify the validity of that check [*see Com. Code § 3403(a)*; *Danning v. Bank of America (1984) 151 Cal. App. 3d 961, 974, 199 Cal. Rptr. 163]* (disapproved on other grounds in *In re Marriage of Arceneaux (1990) 51 Cal. 3d 1130, 1137-1138)* .

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a drawee bank is liable for charging a customer's account to pay a check that had an unauthorized drawer's signature. Paragraph D sets forth the Commercial Code requirement of signature [*see Com. Code § 3401(a)*]. Optional Paragraph E sets forth the statutory provision regarding the ineffectiveness of an unauthorized signature. The bracketed portion need only be used if a party contends it is a holder in due course [*see Com. Code § 3403(a)*; *Danning v. Bank of America (1984) 151 Cal. App. 3d 961, 977-979, 199 Cal. Rptr. 163]* . Paragraph F states the rule that a check with an unauthorized signature is not properly payable. Optional Paragraph G states that one who is not authorized to sign a check cannot ratify his or her own or another unauthorized signature.

To protect personal privacy and other legitimate interests, parties and their attorneys must not include financial account numbers, or must redact such numbers when inclusion is necessary, in all pleadings and other papers filed in the court's public file, whether filed in paper or electronic form, unless otherwise provided by law or ordered by the court [*Cal. Rules of Ct., Rule 1.20(b)*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Thus, counsel should set forth facts describing the account, the check, and the signature card agreement in question, possibly attaching a copy of the signature card agreement or the relevant particulars.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the drawee's liability.

[b] Related Points and Authorities

The points and *authorities in §§ 34.32 -34.35* address other defects making a check not properly payable. The points and authorities in *§ 34.53* oppose the contention that the drawee is liable in negligence for improperly charging a check to the drawer's account. The points and *authorities in §§ 34.36 -34.42* support the drawee's liability for improper payment of checks on the grounds that certain defenses are inapplicable. The points and *authorities in §§ 34.46 -34.52* oppose the contention that the drawee is liable to the drawer for unauthorized payment of checks.

For additional points and authorities applicable to the signature requirements under Division 3 of the Commercial Code, see Ch. 166, *Negotiable Instruments* .

[3] Discussion of Authorities

[a] Signature Required for Liability

The facts, procedural background, and portion of the opinion in ***Danning v. Bank of America*** *(1984) 151 Cal. App. 3d 961, 199 Cal. Rptr. 163* (disapproved on other grounds in *In re Marriage of Arceneaux (1990) 51 Cal. 3d 1130, 1137-1138)* , that addresses *Com. Code § 3401(a)* are discussed in *§ 34.31[3][c]*.

[b] Unauthorized Signature Is Inoperative

The facts, procedural background, and portion of the opinion in ***Danning v. Bank of America*** *(1984) 151 Cal. App. 3d 961, 199 Cal. Rptr. 163* (disapproved on other grounds in *In re Marriage of Arceneaux (1990) 51 Cal. 3d 1130, 1137-1138)* , that addresses *Com. Code § 3403(a)* are discussed in *§ 34.31[3][c]*.

[c] Check With Unauthorized Signature Is Not Properly Payable

In ***Danning v. Bank of America*** *(1984) 151 Cal. App. 3d 961, 199 Cal. Rptr. 163* (disapproved on other grounds in *In re Marriage of Arceneaux (1990) 51 Cal. 3d 1130, 1137-1138)* , the trustee in bankruptcy of a bankrupt corporation sued the corporation's bank for negligence and breach of contract for charging the corporate account after paying a $250,000 check drawn on the corporate account without the authorized signatures. The signature card agreement noted that all checks over $10,000 drawn on the account required the signatures of either *H* or *M* and one other authorized officer. The check in question was signed by *G* and *R*. The bank refused to cash the check when it was presented, so the payee endorsed it and deposited it to its account at Camino-California Bank (hereinafter "Camino"). When the check arrived at defendant bank (February 22), the corporate account was charged for it. Later, the irregularity was noted. *R* informed a bank officer that the check was authorized. On February 26, *H* refused to authorize the check because he had resigned from the corporation. The bank officer could not reach *M*, so he credited the corporate account with the amount of the check and returned it to Camino. On February 27, defendant received a federal district court order telling it not to pay any items against the corporate account because a receiver had been appointed for the corporation. Camino, which had already paid the payee, received the check on February 28, refused to accept it because it was a "late return," and returned it to defendant. On March 5, defendant reversed the credit made on February 26. The trial court entered judgment for plaintiff on the complaint and for defendant on its cross complaint against the payee and certain officers of both corporations. Defendant appealed.

The court of appeal affirmed. The court first discussed a drawee's general duty to its customer. This part of the opinion is discussed in *§ 34.30[4][a]*. The court noted that under former Com. Code § 3401(1) (*now see Com. Code § 3401(a)*), a person is not liable on an instrument unless his or her signature appears on it. Under former Com. Code § 3401(1), an unauthorized signature, which under former Com. Code § 1201(43) (*now see Com. Code § 1201(b)(41)*) includes one made without actual, implied, or apparent authority, is wholly inoperative as the signature of the person whose name is signed. By negative implication and pursuant to former Com. Code § 4401(1) (*now see Com. Code § 4401(a)*), a check with an unauthorized signature is not properly payable, and the bank breaches its agreement with its customer in paying such an item. Because the check was not signed by either *H* or *M*, defendant breached the terms of its deposit agreement (*151 Cal. App. 3d 961, 969)* . This result appears consistent with the 1992 amendment of *Com. Code § 4401*, which added a definition of "properly payable" as an item that is authorized by the customer and is in accordance with any agreement between the customer and bank [*see Com. Code § 4401(a)*].

[d] No Ratification

The facts and procedural background of ***Danning v. Bank of America*** *(1984) 151 Cal. App. 3d 961, 199 Cal. Rptr. 163* (disapproved on other grounds in *In re Marriage of Arceneaux (1990) 51 Cal. 3d 1130, 1137-1138)* , are discussed in *§ 34.31[3][c]*. Defendant drawee contended that payment of the check was orally ratified by *R*. The court of appeal quickly disposed of that contention, saying it defies logic to assert that one whose signature is not sufficient to make a check effective in the first place could ratify the validity of a check exceeding $10,000 (*151 Cal. App. 3d 961, 974)* .

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3-34 California Points & Authorities § 34.32

§ 34.32 Supporting Contention That Drawee Is Liable to Drawer for Unauthorized Payment of Check [Com. Code § 4401]--Lacking All Required Drawers' Signatures

[1] FORM

[*The following may be included in a memorandum or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT DRAWEE BANK'S CHARGE TO PLAINTIFF'S ACCOUNT FOR CHECK NUMBER _____ IS IMPROPER AND UNAUTHORIZED BECAUSE THAT CHECK DID NOT HAVE ALL THE REQUIRED DRAWERS' SIGNATURES.

A. Signature Card Contract. [*See § 34.30[1], Paragraph E.*]

B. Multiple Signatures Required. When more than one signature is required on checks by law, by the signature card agreement, or by any applicable banking custom or practice [incorporated into the contract] to make authorized withdrawals from an account, the drawee is liable for charging the account to pay checks drawn with less than all required signatures (*Bullis v. Security Pac. Nat. Bank (1978) 21 Cal. 3d 801, 809-812, 148 Cal. Rptr. 22, 582 P.2d 109* ; *see Com. Code § 3403(b)*; *Certified Grocers of California, Ltd. v. San Gabriel Valley Bank (1983) 150 Cal. App. 3d 281, 287, 197 Cal. Rptr. 710*).

[*Optional*] **C. Exercise or Nonexercise of Ordinary Care.** Action or nonaction approved by Division 4 of the Commercial Code, or pursuant to Federal Reserve regulations or operating circulars, is the exercise of ordinary care. In the absence of special instructions, action or nonaction consistent with clearinghouse rules and the like, or with a general banking usage not disapproved of by Division 4, is prima facie the exercise of ordinary care. Conversely, the failure [of a bank] to act in accordance with an accepted banking practice suggests the absence of care (*Com. Code § 4103(c)*; *Bullis v. Security Pac. Nat. Bank (1978) 21 Cal. 3d 801, 809 n.9, 148 Cal. Rptr. 22, 582 P.2d 109*).

[*Optional*] **D. Geographic Area to Which General Usage Applies.** "General banking usage" should be taken to mean

a general usage common to banks in the area concerned. A metropolitan area is sufficient (*Bullis v. Security Pac. Nat. Bank (1978) 21 Cal. 3d 801, 809 n.9, 148 Cal. Rptr. 22, 582 P.2d 109*).

[*Optional*] **E. Joint Personal Representatives.** When there are two personal representatives, the signatures of both are necessary to make withdrawals from an estate account (*Prob. Code § 9630*; *Bullis v. Security Pac. Nat. Bank (1978) 21 Cal. 3d 801, 810, 148 Cal. Rptr. 22, 582 P.2d 109* (construing former Prob. Code § 570; *now see Prob. Code § 9630*).

[*Optional*] **F. No Limitation Period.** An action for recovery of amounts charged a checking account in payment of checks without all required drawers' signatures is governed by *Code of Civil Procedure Section 348*, which provides that there is no limitation on the time for initiating an action to recover money deposited with a bank. [That section applies even when the action is not based on breach of the signature card contract] (*Code Civ. Proc. § 348*; *Bullis v. Security Pac. Nat. Bank (1978) 21 Cal. 3d 801, 813, 148 Cal. Rptr. 22, 582 P.2d 109*).

[*Optional*] **G. Drawee's Liability for Drawer's Conversion.** A drawee bank that not only pays checks drawn with only one of two required signatures of cofiduciaries, but also knows that the funds are being converted by the disloyal fiduciary in the breach of his or her fiduciary duty, is jointly liable to the depositor for conversion whether or not it participates in the wrongful acts (*Certified Grocers of California, Ltd. v. San Gabriel Valley Bank (1983) 150 Cal. App. 3d 281, 289, 197 Cal. Rptr. 710*).

[2] Comments

[a] Use of Form

These points and authorities are for use in supporting the contention that a drawee bank is liable for charging a customer's account to pay a check that did not have all required drawers' signatures. Optional Paragraphs C and D may be applicable if the issue hinges on the bank's exercise of ordinary care or a practice of general usage. Optional Paragraph E applies when the account is that of a decedent's estate with joint personal representatives. Optional Paragraph F addresses the limitation period. The limitation period for recovery under *Com. Code § 4401(a)* for other types of unauthorized payments is set forth in *§ 34.51*. If the drawee's conduct in allowing the withdrawal goes as far as complicity in conversion, Optional Paragraph G may be used.

To protect personal privacy and other legitimate interests, parties and their attorneys must not include financial account numbers, or must redact such numbers when inclusion is necessary, in all pleadings and other papers filed in the court's public file, whether filed in paper or electronic form, unless otherwise provided by law or ordered by the court [*Cal. Rules of Ct., Rule 1.20(b)*].

Counsel should insert argument in the form, showing the relationship between the facts of the case and points of law stated. Therefore, counsel should set forth facts describing the account, the check, and the signature card agreement in question, possibly attaching a copy of the signature card agreement or the relevant particulars.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the drawee's liability.

[b] Related Points and Authorities

For points and authorities opposing the contention that the drawee may also be liable under a negligence theory for improperly charging a check to its customer's account, see *§ 34.53*. For related points and authorities opposing the contention that the drawee is liable to the drawer for unauthorized payment of checks, see *§§ 34.46 -34.52*.

[3] Discussion of Authorities

[a] Multiple Signatures Required

In ***Bullis v. Security Pac. Nat. Bank*** *(1978) 21 Cal. 3d 801, 148 Cal. Rptr. 22, 582 P.2d 109* , one coexecutor sued the drawee bank for charging the estate account approximately $280,000 for checks drawn with only the signature of the other coexecutor. One coexecutor opened the checking account for the estate. There was no discussion at that time regarding the number of signatures required to make withdrawals, but the letters testamentary, which showed coexecutors, were presented to the bank. The bank sent a signature card to plaintiff coexecutor, who signed it and returned it. Both signature cards provided that the account would be governed by applicable banking laws, customs, and clearinghouse regulations. The bank's operations manual said that if there were two executors for an estate, the signatures of both were ordinarily necessary for any withdrawal. The signature cards for such accounts were to be flagged with a stamp to indicate that more than one signature was needed. If two signatures were not to be required, the bank's legal department was to be consulted. The account card was not flagged, and the legal department was not consulted. After four years, plaintiff coexecutor discovered the withdrawals and commenced the action. During the course of the action, the estate's assets were distributed and the heirs and testamentary trustees substituted as plaintiffs. The trial court found the bank liable on three separate grounds for the loss represented by each withdrawal: (1) failure to require the signatures of both executors was a breach of the bank's common-law duty to use reasonable care in its conduct with its depositor; (2) violation of former Prob. Code § 570 (*now see Prob. Code § 9630*), which was held to have required both signatures to effect withdrawals; and (3) breach of the deposit contract that incorporated all applicable banking customs, which were found to require he signatures of both coexecutors for withdrawals. Judgment was for the amount of the checks plus interest from the date of each withdrawal. Defendant appealed.

In an opinion that never mentioned former Com. Code § 4401(1) (*now see Com. Code § 4401(a)*) regarding what a bank may charge against a customer's account, the Supreme Court affirmed. The Court first considered whether the evidence supported the finding that the drawee had breached its common-law duty to act with reasonable care when it permitted withdrawals on only one signature. The standard of care in a particular circumstance may be based on a statute or on the custom and practice in the relevant community (*21 Cal. 3d 801, 809)* . The evidence supported the finding that the bank deviated from the practice and custom in the banking industry in the Los Angeles area of requiring both signatures for coexecutors to withdraw funds from an estate account, and that the bank deviated from its own written procedures and accepted practice by not flagging the signature cards or consulting its legal department (*21 Cal. 3d 801, 809-810*). Based on the evidence of the banking industry's custom and defendant's own procedures and practices, the evidence supported the finding that the failure to require the signatures of both coexecutors on withdrawals fell below the standard of care owed to the estate (*21 Cal. 3d 801, 811)* . Defendant argued that the withdrawals were in accordance with the signature card. The Court stated defendant was negligent in failing to indicate in some effective manner that withdrawals were not to be honored unless signed by both coexecutors and therefore was not insulated from liability (*21 Cal. 3d 801, 812)* .

Note that the decision in *Bullis* is consistent with current *Com. Code § 3403*. That section was amended in 1992 to add *Com. Code § 3403(b)*, which provides that if the signature of more than one person is required to constitute the authorized signature of an organization (which is defined broadly and includes two or more persons with a common interest [*see Com. Code § 1201(b)(25)*]), the signature of the organization is unauthorized if one of the required signatures is lacking. In *Edward Fineman Company v. Superior Court (1998) 66 Cal. App. 4th 1110, 1119-1125, 78 Cal. Rptr. 2d 478* , the court examined the history of *Com. Code § 3403(b)* and concluded that the 1992 amendment was a clarification of existing law with respect to the meaning of "unauthorized" in cases when checks lack all of the required signatures and that it implicitly abrogated the holding in *Far West Citrus Inc. v. Bank of America (1979) 91 Cal. App. 3d 913, 917, 154 Cal. Rptr. 464* (in which the same court had previously held that a check signed by only one of the two required signatures was not an item bearing an "unauthorized" signature, the relevant provisions of *Com. Code § 4406* were not triggered, and the customer's action against the bank was not precluded by his failure to discover and, within one year, report a check bearing an unauthorized signature) with respect to the inapplicability of the one-year notice period of *Com. Code § 4406*. For further discussion, see *§§ 34.36* and *34.51* [*see also* Official Comment 4 to U.C.C. § 3-403 (1990)].

Certified Grocers of California, Ltd. v. San Gabriel Valley Bank *(1983) 150 Cal. App. 3d 281, 197 Cal. Rptr. 710* , is discussed in *§ 34.30[3][b]*.

[b] Exercise or Nonexercise of Ordinary Care

The facts and procedural background of ***Bullis v. Security Pac. Nat. Bank*** *(1978) 21 Cal. 3d 801, 148 Cal. Rptr. 22, 582 P.2d 109* , are discussed in *§ 34.32[3][a]*. In considering what was required of the bank in exercising ordinary care, the Supreme Court noted that former Com. Code § 4103(3) (*now see Com. Code § 4103(c)*) provides that action or nonaction by a bank consistent with a general banking usage not disapproved of by Division 4 of the Commercial Code prima facie constitutes the exercise of ordinary care. Conversely, the bank's failure to act in accordance with an accepted banking practice suggests the absence of due care. "General banking usage" should be taken to mean a general usage common to banks in the area concerned. A metropolitan area is sufficient (*21 Cal. 3d 801, 809 n.9*).

[c] Geographic Area to Which General Usage Applies

Bullis v. Security Pac. Nat. Bank *(1978) 21 Cal. 3d 801, 148 Cal. Rptr. 22, 582 P.2d 109* , is discussed in § 34.342[3][a].

[d] Joint Personal Representatives

Former Prob. Code § 570, repealed effective July 1, 1988, provided that one of two coexecutors could act alone only in certain situations. The Supreme Court in ***Bullis v. Security Pac. Nat. Bank*** *(1978) 21 Cal. 3d 801, 148 Cal. Rptr. 22, 582 P.2d 109* (discussed in *§ 34.32[3][a]*), said that by implication, action under any circumstance other than as set forth in Prob. Code § 570 (*now see Prob. Code § 9630*) must be taken jointly (*21 Cal. 3d 801, 810)* .

Prob. Code § 9630(a)(1) (operative July 1, 1988) provides that when there are two personal representatives, both must concur to exercise a power. *Prob. Code § 9630(a)(2)* provides that when there are more than two personal representatives, a majority must concur to exercise a power [*see also Prob. Code § 9645* (transition provision)].

[e] No Limitation Period

Code Civ. Proc. § 348 provides that there is no limitation to actions brought to recover money or other property deposited with any bank, banker, trust company, building and loan association, or savings and loan society, or evidenced by a certificate issued by an industrial loan company or credit union, except when those entities have become insolvent and are in the process of liquidation.

The facts and procedural background of ***Bullis v. Security Pac. Nat. Bank*** *(1978) 21 Cal. 3d 801, 148 Cal. Rptr. 22, 582 P.2d 109* , are discussed in *§ 34.32[3][a]*. In discussing the applicable limitation period, the Supreme Court said that an action for recovery of amounts charged a checking account in payment of checks without all required drawers' signatures must be distinguished from one on which the check contained a forged or unauthorized signature. When required signatures are missing, the action is one for recovery of money deposited with a bank and is governed by *Code Civ. Proc. § 348*. That section applies even when the action is not based on a breach of contract theory (*21 Cal. 3d 801, 813)* .

[f] Drawee's Liability for Drawer's Conversion

The facts and procedural background of ***Certified Grocers of California, Ltd. v. San Gabriel Valley Bank*** *(1983) 150 Cal. App. 3d 281, 197 Cal. Rptr. 710* , are discussed in *§ 34.30[3][b]*. In considering defendant drawee bank's liability for conversion, the court of appeal noted that the complaint alleged that the bank knowingly and actively participated with the disloyal officer in the breach of his fiduciary duty by wrongfully permitting him to obtain access to the payroll

account and to convert to his own use and benefit the money on deposit in that account. When there is a common plan or design to commit a tort, all who participate are jointly liable whether or not they participate in the wrongful acts. Further, a person who is not a fiduciary may be liable for breach of fiduciary duty as a result of colluding with a disloyal fiduciary. Thus, the complaint stated a cause of action against the bank for breach of fiduciary duty (*150 Cal. App. 3d 281, 289)* .

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Volume 3 Chapters 34-39 CHECKS AND BANKS---to---CIVIL SERVICE
CHAPTER 34 CHECKS AND BANKS
PART II. FORMS
A. Drawee Bank's Liability To Drawer

3-34 California Points & Authorities § 34.33

§ 34.33 Supporting Contention That Drawee Is Liable to Drawer for Unauthorized Payment of Check [Com. Code § 4401]--Forged Drawer's Signature

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT DRAWEE BANK'S CHARGE TO PLAINTIFF'S ACCOUNT FOR CHECK NUMBER _____ IS IMPROPER AND UNAUTHORIZED BECAUSE THE PURPORTED SIGNATURE OF DRAWER ON THAT CHECK WAS FORGED.

A. General Duty Under Commercial Code for Any Item. [*See § 34.30[1], Paragraph A.*]

[*Optional*] **B. Implied Contractual Duty.** [*See § 34.30[1], Paragraph D.*]

C. Signature Card Contract. [*See § 34.30[1], Paragraph E.*]

D. Unauthorized Signature Is Inoperative. [*See § 34.31[1], Paragraph E.*]

E. Forged Drawer's Signature. Disregarding certain exceptions, ultimate liability for paying a check bearing a forged drawer's signature rests with the drawee bank. Absent its ratification or negligence, the drawer may demand that the drawee recredit its account on the ground that a check bearing a forged drawer's signature is not properly payable within the meaning of *Commercial Code Section 4401(a)*. Paying such a check is a breach of the drawee's primary contractual obligation and a violation of its duty under Section 4401(a), and no degree of care on the bank's part will excuse it from liability (*Basch v. Bank of America (1943) 22 Cal. 2d 316, 321, 139 P.2d 1* ; *Fireman's Fund Ins. Co. v. Security Pacific Nat. Bank (1978) 85 Cal. App. 3d 797, 804-805, 149 Cal. Rptr. 883* (construing prior law)).

F. Duty to Know Drawer's Signature. A drawee bank has a duty to know its depositor's signature. Absent negligence

on the drawer's part, a drawee is liable for paying a check with a forged drawer's signature even if payment was made in good faith and in accordance with reasonable commercial standards. No degree of care on the bank's part will excuse it from liability (*Basch v. Bank of America (1943) 22 Cal. 2d 316, 321, 139 P.2d 1* ; *Fireman's Fund Ins. Co. v. Security Pacific Nat. Bank (1978) 85 Cal. App. 3d 797, 805, 149 Cal. Rptr. 883* (construing prior law)).

[*Optional*] **G. Drawer's Prima Facie Case.** Drawer's prima facie case against the drawee bank is established by showing that forged checks have been paid from his or her account and that the bank has refused demand for reimbursement (*Basch v. Bank of America (1943) 22 Cal. 2d 316, 333, 139 P.2d 1* ; *Sommer v. Bank of Italy etc. Assn. (1930) 109 Cal. App. 370, 376, 293 P. 98*).

[*Optional*] **H. Reemployment of Forger Is Not Ratification.** The drawer's reemployment of the employee who forged [the drawer's signature on the] checks does not amount to ratification of prior forgeries by that employee (*Sommer v. Bank of Italy etc. Assn. (1930) 109 Cal. App. 370, 373, 376-377, 293 P. 98*).

[2] Comments

[a] Use of Form

These points and authorities are for use in supporting the contention that a drawee bank is liable for charging a customer's account to pay a check on which the drawer's signature was forged. Paragraph E sets forth the basic authority that payment of a check with a forged drawer's signature is a violation of both the drawee's statutory and contractual duties. Paragraph F describes the scope of the duty. Optional Paragraph G addresses what is sufficient to establish the drawer's prima facie case. Optional Paragraph H is applicable only if the drawer has reemployed or continues to employ the forger and the drawee contends this amounts to ratification of the forgeries.

To protect personal privacy and other legitimate interests, parties and their attorneys must not include financial account numbers, or must redact such numbers when inclusion is necessary, in all pleadings and other papers filed in the court's public file, whether filed in paper or electronic form, unless otherwise provided by law or ordered by the court [*Cal. Rules of Ct., Rule 1.20(b)*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Therefore, counsel should set forth facts describing the account, the check, and the signature card agreement in question, possibly attaching a copy of the signature card agreement and the forged checks.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the drawee's liability.

[b] Related Points and Authorities

For points and authorities opposing the contention that the drawee may also be liable under a negligence theory for improperly charging a check to its customer's account, see *§ 34.53*. For related points and authorities opposing the contention that the drawee is liable to the drawer for unauthorized payment of checks, see *§§ 34.46 -34.52*.

[3] Discussion of Authorities

[a] Forged Drawer's Signature

Plaintiff in ***Basch v. Bank of America*** *(1943) 22 Cal. 2d 316, 139 P.2d 1* , sued the drawee to recover the amount of 127 checks on which plaintiff's signature as drawer was forged by an employee of plaintiff. The checks were payable to the employee and were made over a 10-month period during which plaintiff never examined his bank statements. When the employee absconded and plaintiff discovered the forgeries, he made demand on defendant for reimbursement.

Defendant refused, and plaintiff sued. Defendant claimed that plaintiff was negligent in failing to examine the statements and report the forgeries and in delegating management of his banking affairs to the employee without having inquired first about the employee's reputation for honesty and integrity. Judgment was entered for plaintiff. Defendant appealed.

The Supreme Court affirmed. The Court repeated the well-settled rule that when a bank receives ordinary deposits it becomes a debtor of the depositor. Its contract with that customer is to discharge this indebtedness by honoring checks drawn by the depositor on the bank. In so doing, the bank is charged with knowledge of its depositor's signature. Consequently, a bank pays a forged check at its peril, and payment of a forged check will be considered to have been made from the bank's own funds. It has no right to charge the depositor's account with amounts disbursed contrary to his or her genuine order, and it will be liable to the depositor for doing so. Although no degree of care on the drawee bank's part will excuse it from liability for paying a forged check, it may justify payment on principles of estoppel, or on the basis of the depositor's negligent or misleading conduct that directly or proximately caused the bank to pay (*22 Cal. 2d 316, 321)* . The depositor's prima facie case is established by showing that forged checks have been paid from the account and that the bank has refused demand for reimbursement (*22 Cal. 2d 316, 333)* . The portion of the opinion considering the bank's defenses is discussed in *§ 34.39[2][b]*.

Plaintiff in ***Fireman's Fund Ins. Co. v. Security Pacific Nat. Bank*** *(1978) 85 Cal. App. 3d 797, 149 Cal. Rptr. 883* , was the drawer's insurer. Plaintiff brought the action in its capacity as subrogee after it paid the drawer the amount of a check on which one of the drawer's employees had forged one of the two required drawers' signatures. The check was drawn on the insured's account at another bank (hereinafter "Banco") and was payable to "Security Pacific National Bank A/C No. 260 049 569 GC Associates." The employee opened account number 260 049 569 at defendant bank in the name of G. C. Associates and deposited the check there with the typewritten endorsement "Deposit Only AC 049 569 G. C. Associates." Then the employee withdrew the funds from the account at defendant. Banco paid defendant and charged the drawer's account. The drawer demanded that Banco recredit its account, but Banco refused. Plaintiff sued only defendant for negligence and breach of warranty. A judgment of dismissal was entered, and plaintiff appealed.

The court of appeal affirmed. In explaining why plaintiff had chosen the wrong defendant, the court said that disregarding certain exceptions, ultimate liability for payment of a check bearing a forged drawer's signature rests with the drawee bank, which in this case was Banco. Former Com. Code § 4401(1) (*now see Com. Code § 4401(a)*) provides that as between drawee and drawer, losses from a forged or unauthorized signature are borne by the bank since payment not made pursuant to direction of a properly payable order cannot be charged to the depositor's account (*85 Cal. App. 3d 797, 804)* . Absent its ratification or negligence, the drawer may demand that the drawee recredit its account on the ground that a check bearing a forged drawer's signature is not properly payable within the meaning of former Com. Code § 4401(1). The 1992 amendment of *Com. Code § 4401* [Stats. 1992, ch. 914, § 40] should not alter this holding. The amendment not only maintains the "properly payable" language but also defines "properly payable" as that which is authorized by the customer and is in accordance with any agreement between the customer and bank [*see Com. Code § 4401(a)*].

The court further stated that under former Com. Code § 3404(1) (*now see Com. Code § 3403(a)*), the forgery was not operative as the ostensible drawer's signature (*85 Cal. App. 3d 797, 804-805 n.5*). Payment of such a check is a breach of the drawee's primary contractual obligation and a violation of its duty under former Com. Code § 4401(1). The court cited *Basch* for the propositions that as drawee, Banco had the duty to know the drawer's signature and that absent the drawer's negligence, Banco is liable even if it paid in good faith and in accordance with commercially reasonable standards (*85 Cal. App. 3d 797, 805)* .

[b] Duty to Know Drawer's Signature

Basch v. Bank of America *(1943) 22 Cal. 2d 316, 139 P.2d 1* , and ***Fireman's Fund Ins. Co. v. Security Pacific Nat. Bank*** *(1978) 85 Cal. App. 3d 797, 149 Cal. Rptr. 883* , are discussed in *§ 34.33[3][a]*.

[c] Drawer's Prima Facie Case

Basch v. Bank of America *(1943) 22 Cal. 2d 316, 139 P.2d 1* , is discussed in *§ 34.33[3][a]*.

Plaintiffs in ***Sommer v. Bank of Italy etc. Assn.*** *(1930) 109 Cal. App. 370, 293 P. 98* , were partners who maintained their partnership account with defendant. An employee of plaintiffs forged their signatures to a series of checks during July, August, and September of 1928. The forgeries were discovered and the employee was arrested on September 17. The bank made reimbursement for the checks forged before August, but refused plaintiffs' demand in regard to the August and September checks on the ground that plaintiffs were negligent in failing to inspect the statements and cancelled checks and that they ratified the forgeries by reemploying the employee. After being reemployed by plaintiffs the employee made partial reimbursement. Plaintiffs sued defendant for the unreimbursed balance. Judgment of nonsuit was entered in favor of defendant at the close of plaintiffs' case. Plaintiffs appealed.

The court of appeal reversed. It was not questioned on appeal that plaintiffs established that the bank paid a number of forged checks from plaintiffs' account and refused their demand for reimbursement (*109 Cal. App. 370, 372)* . The court said that the depositor makes out a prima facie case by showing that the bank has made payment from his or her account on forged checks and refused on demand to pay the sum represented by the forged checks. The burden is not on the depositor to show that he or she is free from negligence. After the prima facie case is shown, the burden is on the bank to show by way of defense that it was free from negligence and that the depositor was negligent (*109 Cal. App. 370, 376)* . Because plaintiffs had made a prima facie case and no defense had been established as a matter of law at the close of plaintiffs' case, nonsuit was error (*109 Cal. App. 370, 377)* .

[d] Reemployment of Forger Is Not Ratification

The facts and procedural background of ***Sommer v. Bank of Italy etc. Assn.*** *(1930) 109 Cal. App. 370, 293 P. 98* , are discussed in *§ 34.33[3][c]*. Defendant contended that plaintiffs ratified the forgeries by reemploying the forger after he was placed on probation and by accepting partial restitution from the forger through the probation office. The court stated there was no authority to sustain the proposition that reemployment or acceptance of partial restitution constitutes ratification precluding a depositor's claim against the bank. In the absence of any authority, the court refused to hold that reemployment or acceptance of partial restitution constituted ratification (*109 Cal. App. 370, 376-377)* .

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CHAPTER 34 CHECKS AND BANKS
PART II. FORMS
A. Drawee Bank's Liability To Drawer

3-34 California Points & Authorities § 34.34

§ 34.34 Supporting Contention That Drawee Is Liable to Drawer for Unauthorized Payment of Check [Com. Code § 4401]--Forged, Missing, or Different Endorsement

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT DRAWEE BANK's CHARGE TO PLAINTIFF'S ACCOUNT FOR CHECK NUMBER _____ IS IMPROPER AND UNAUTHORIZED BECAUSE THE _____ [PURPORTED ENDORSEMENT OF _____ (*name of payee*) WAS FORGED *or* CHECK WAS NOT ENDORSED *or* ENDORSEMENT WAS NOT THE SAME AS THE DESIGNATED PAYEE].

A. General Duty Under Commercial Code for Any Item. [*See § 34.30[1], Paragraph A.*]

B. Drawer's Action Against Drawee for Payment of Check With Defect in Endorsement. A check with a forged or missing endorsement or an endorsement that is ineffective because it is different from the designated payee is not properly payable by the drawee bank. Thus, the drawee is liable to the drawer for the amount of any charge made to its account in paying the check (*Joffe v. United California Bank (1983) 141 Cal. App. 3d 541, 554-555, 190 Cal. Rptr. 443* ; *see Com. Code § 4401(a)*).

[*Optional*] **C. Unauthorized Signature Is Inoperative.** [*See § 34.31[1], Paragraph E.*]

[*Optional*] **D. Endorsement Required.** Some endorsement is required on a check payable to order, [even if the check is payable to a fictitious payee] (*see Com. Code § 3201(b)*; *Wright v. Bank of California (1969) 276 Cal. App. 2d 485, 489-491, 81 Cal. Rptr. 11*).

[*Optional*] **E. Joint Payees.** If a check is payable to two or more persons alternatively, it is payable to any of them. Payment of the check's entire amount to the payee in possession discharges a bank's obligation on the check. If a check

is payable to two or more persons but not alternatively, it is payable to all of them and endorsements of all of them are required for negotiation. If a check payable to two or more persons is ambiguous as to whether it is payable to the persons alternatively, the check is payable to the persons alternatively (*Com. Code § 3110(d)*; *Southern Cal. Permanente Medical Group v. Bozinovski (1983) 148 Cal. App. 3d 503, 507-508, 196 Cal. Rptr. 150* ; *Feldman Constr. Co. v. Union Bank (1972) 28 Cal. App. 3d 731, 734-735, 104 Cal. Rptr. 912* (both construing prior law)).

[2] Comments

CAUTION:

The drawer's cause of action against the drawee for charging his or her account to pay a check on a forged or defective endorsement appears to be extinguished if the designated payee or a person to whom the check was negotiated brings a conversion action against any collecting or depositary bank involved. The rationale is that the payee's action ratifies the collection of the proceeds from the drawee bank [*see Cooper v. Union Bank (1973) 9 Cal. 3d 371, 377, 107 Cal. Rptr. 1, 507 P.2d 609* (discussed in *§ 34.73*); *see also § 34.34[2][b]*].

[a] Use of Form

These points and authorities are for use in supporting the contention that a drawee bank is liable for charging a customer's account to pay a check on which the endorsement was forged or missing or not that of the designated payee. Paragraph B sets forth the drawee's general liability to the drawer for paying a check with an improper endorsement. Optional Paragraph D is for use when there was no endorsement, and Optional Paragraph E is for use when there are joint payees, but less than all of them endorsed the check. It should be noted that if the case involves a fraudulent endorsement by an employee (either one made in the employer's name to instruments payable to the employer or one made in the payee's name of instruments issued by the employer), *Com. Code § 3405* controls and the points and authorities in this form are generally inapplicable. For forms addressing the case of a fraudulent endorsement by an employee, see *§§ 34.90* and *34.96*.

To protect personal privacy and other legitimate interests, parties and their attorneys must not include financial account numbers, or must redact such numbers when inclusion is necessary, in all pleadings and other papers filed in the court's public file, whether filed in paper or electronic form, unless otherwise provided by law or ordered by the court [*Cal. Rules of Ct., Rule 1.20(b)*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Therefore, counsel should set forth facts describing the payee designation on the check and the particular defect in the endorsement.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the drawee's liability for paying a check with a defective endorsement.

[b] Drawer Has No Action in Conversion

Com. Code § 3420(a) provides that an action for an instrument's conversion may not be brought by the instrument's issuer. This appears to resolve the split in authority on the issue of whether the drawer of a check with a forged endorsement may assert rights against a depositary bank that took the check. The code takes the position that there is no reason why a drawer should have an action in conversion. The check represents the drawer's obligation rather than the drawer's property. The drawer has an adequate remedy against the payor bank for recredit of the drawer's account for unauthorized payment of the check [Official Comment 1 to U.C.C. § 3-420 (1990)].

[c] Related Points and Authorities

For points and authorities opposing the contention that the drawee may also be liable under a negligence theory for improperly charging a check to its customer's account, see *§ 34.53*. The points and authorities set out in *§§ 34.93* and *34.94* address particular payee designations. In addition, Ch. 166, *Negotiable Instruments* includes forms addressing particular payee designations [*see, e.g.*, forms applying *Com. Code § 3109* (instruments payable to bearer or order)]. §§ 34.47-34.48 and 34.50-34.52 oppose the contention that the drawee is liable to the drawer for paying a check with a forged endorsement. Other aspects of the validity and requirements of endorsements, and of liability for payment on an improper endorsement, are addressed in §§ 34.70, 34.73-34.75, 34.90-34.92, 34.95, 34.120-34.122, 34.124-34.126, and 34.171.

[3] Discussion of Authorities

[a] Drawer's Action Against Drawee for Payment of Check With Defect in Endorsement

The facts and procedural background of ***Joffe v. United California Bank*** *(1983) 141 Cal. App. 3d 541, 190 Cal. Rptr. 443* , are discussed in *§ 34.53[3][a]*. The court of appeal discussed the general duty of a drawee to its drawer, which permits the bank to charge its depositor's account only for checks that are otherwise properly payable from that account. Pursuant to both former Com. Code § 4401(1) (*now see Com. Code § 4401(a)*) and the common law on which it is based, checks with a forged or missing endorsement are not properly payable and that a bank may not charge a customer's account for such items (*141 Cal. App. 3d 541, 554)* . The Commercial Code provides that as between the drawee bank and the depositor, losses from forged or unauthorized signatures are borne by the bank. Defendant contended that the endorsement was effective. There was a question of fact as to whether it had been authorized and effective, but a cause of action for payment on improper endorsement was stated and the sustaining of the demurrer was reversed (*141 Cal. App. 3d 541, 555)* .

[b] Unauthorized Signature Is Inoperative

Com. Code § 3403(a), which provides that an unauthorized signature is ineffective, is applicable to endorsements because *Com. Code § 3204(a)* provides that a signature and its accompanying words is an endorsement unless the accompanying words, terms of the instrument, place of the signature, or other circumstances unambiguously indicate that the signature was made for a purpose other than endorsement.

[c] Endorsement Required

Com. Code § 3201(b) provides that an instrument payable to an identified person (that is, payable to order) requires both transfer of possession and endorsement by the holder for its negotiation. "Payable to order" and "payable to bearer" are defined in *Com. Code § 3109*.

Wright v. Bank of California *(1969) 276 Cal. App. 2d 485, 81 Cal. Rptr. 11* , involved a joint checking account maintained by two depositors for certain commercial purposes. Both signatures were required on the checks. One depositor fraudulently induced the other to sign a check payable to a creditor, and in collusion with another person, forged the signature of the creditor's agent on the check and exchanged it for a cashier's check of the drawee bank. An agent of the creditor endorsed the cashier's check (purportedly for redeposit in the makers' account), which the defrauding comaker presented to a different bank. That bank issued its own cashier's check, which the defrauding comaker negotiated, later diverting the funds to his own use. The defrauded comaker of the original check brought an action against the other comaker, the colluding forger, the drawee bank, and the bank that issued the ultimate cashier's check for negligence, conversion, and related causes of action. The drawee bank filed a demurrer to the complaint, which the trial court sustained, without leave to amend. Plaintiff appealed.

In discussing whether or not an endorsement was necessary, the court of appeal considered two main factors: applicability of the fictitious payee exception [*see Com. Code § 3404*] and the difference between instruments payable

to bearer and those payable to order. The portion of the opinion considering the applicability of the fictitious payee exception is discussed in *§ 34.93[3][b]*. When that exception applies, any endorsement in the name of the named payee is effective. The court said that a drawee is not liable to the drawer for paying a bearer instrument without an endorsement but cited former Com. Code § 3202 (*now see Com. Code § 3201*) for the proposition that endorsement is generally required on all negotiable instruments except those payable to bearer (*276 Cal. App. 2d 485, 489)* . After concluding that the check was within the fictitious payee exception, the court said that some endorsement was still required (*276 Cal. App. 2d 485, 490-491)* .

These authorities do not address the effect of *Com. Code § 3205(b)*, which provides that an instrument endorsed in blank, which usually means the instrument contains only a signature without other words, becomes payable to bearer and may be negotiated by transfer of possession alone until it is specially endorsed.

[d] Joint Payees

Southern Cal. Permanente Medical Group v. Bozinovski *(1983) 148 Cal. App. 3d 503, 196 Cal. Rptr. 150* , is discussed in *§ 34.47[3][a]*.

Plaintiff-drawer in ***Feldman Constr. Co. v. Union Bank*** *(1972) 28 Cal. App. 3d 731, 104 Cal. Rptr. 912* , sued the drawee, which in turn cross complained for indemnity against the collecting bank, for payment of a check with joint payees that had been endorsed by only one of them. The check was payable to a corporate subcontractor and to another company that was the supplier. The two names were on separate lines, one above the other. No additional words such as "and" or "or" appeared on the check's face. The back of the check carried the notation "Endorsement of this check acknowledges payment as of this date all material and labor at ... [specific building site and location]." The subcontractor endorsed the check with its name and the name of its president. Plaintiff reported the missing endorsement to defendant as soon as the check was returned to it. Judgment was for plaintiff and cross plaintiff. Cross defendant (collecting bank) appealed.

The court of appeal affirmed. Cross defendant contended that the check was payable to either payee in the alternative. The court disagreed, saying the absence of "and" or "or" was not controlling and that the placement of the names on separate lines and the notation on the back made it clear what type of transaction was in progress, namely the payment of a subcontractor and a materialman. The court set forth the provisions of former Com. Code § 3116(b) (*now see Com. Code § 3110(d)*) and concluded that the evidence supported the finding that the check was payable jointly and required the endorsements of both payees (*28 Cal. App. 3d 731, 734-735)* . However, the court may have reached a different result had it been interpreting the current provisions governing joint payees. Former Com. Code § 3116 did not provide guidance when an ambiguity exists regarding whether an instrument is payable alternatively. However, the 1992 repeal and reenactment of Division 3 of the Commercial Code provides that if an instrument payable to two or more persons is ambiguous as to whether it is payable to the persons alternatively, the instrument is payable to the persons alternatively (*Com. Code § 3110(d)*). Thus, in the case of ambiguity, persons dealing with the instrument should be able to rely on the endorsement of a single payee [Official Comment 4 to U.C.C. § 3-110 (1990)].

[4] Additional Authorities

[a] Drawer's Action Against Drawee for Payment of Check With Defect in Endorsement

Allied Concord etc. Corp. v. Bank of America (1969) 275 Cal. App. 2d 1, 80 Cal. Rptr. 622 , was an action by the check's drawer against the depository and collecting banks for paying the check on a forged endorsement by the payee's brother. Judgment for defendants after sustaining of demurrers without leave to amend was affirmed, mainly on the basis of the statute of limitations. In the course of deciding whether a drawer could bring an action directly against the collecting bank for payment on a forged endorsement, the court said that a drawer is not injured when the drawee pays a check with a forged endorsement, because at that point, the money paid out is the drawee bank's money (*275 Cal. App.*

2d 1, 7) . Only when the drawee bank charges the drawer's account is the drawer injured. At that point, the drawer has a cause of action against the drawee for conversion (*275 Cal. App. 2d 1, 8)* . However, this portion of the opinion appears to have been abrogated by *Com. Code § 3420(a)(1)*, which provides that an action for conversion may not be brought by the instrument's issuer. For further discussion regarding the drawer's action for conversion, see *§ 34.34[2][b]*.

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CHAPTER 34 CHECKS AND BANKS
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A. Drawee Bank's Liability To Drawer

3-34 California Points & Authorities § 34.35

§ 34.35 Supporting Contention That Drawee Is Liable to Drawer for Unauthorized Payment of Check [Com. Code § 4401]--Only Original Amount of Altered Check Is Properly Chargeable to Drawer's Account [Com. Code § 4401(d)(1)]

[1] FORM

[*The following may be included in a memorandum, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT DRAWEE BANK'S CHARGE TO PLAINTIFF'S ACCOUNT FOR CHECK NUMBER _____ IS IMPROPER AND EXCESSIVE BECAUSE THE CHECK WAS _____ [ALTERED *and/or* RAISED]. ONLY THE ORIGINAL AMOUNT OF THE CHECK IS PROPERLY PAYABLE.

A. General Duty Under Commercial Code for Any Item. [*See § 34.30[1], Paragraph A.*]

B. Altered Check. A drawee bank pays an altered check at its peril and cannot charge its customer's account for more than the original amount of the check (*see Com. Code § 4401(d)(1)*; *Pac. Coast Cheese, Inc. v. Sec.-First Nat. Bk. (1955) 45 Cal. 2d 75, 78, 286 P.2d 353* ; *Glassell Dev. Co. v. Citizens' Nat. Bk. (1923) 191 Cal. 375, 379, 216 P. 1012* ; *see also Sun'n Sand, Inc. v. United California Bank (1978) 21 Cal. 3d 671, 690-691, 691 n.18, 148 Cal. Rptr. 329, 582 P.2d 920* (construing prior law)).

[*Optional*] **C. No Election of Remedies.** A drawer's action against a drawee that has charged its account for raised checks is not barred because it obtains a civil judgment against the employee who raised the checks (*Pac. Coast Cheese, Inc. v. Sec.-First Nat. Bk. (1955) 45 Cal. 2d 75, 80, 286 P.2d 353*).

[2] Comments

[a] Use of Form

These points and authorities are for use in supporting the contention that a drawee bank is liable for charging a

customer's account to pay an altered check. The drawee is liable for the amount of the charge over the original amount of the check [*see Com. Code § 4401(d)(1)*]. Optional Paragraph C is for use when the drawer has obtained judgment against someone else relating to the same check.

To protect personal privacy and other legitimate interests, parties and their attorneys must not include financial account numbers, or must redact such numbers when inclusion is necessary, in all pleadings and other papers filed in the court's public file, whether filed in paper or electronic form, unless otherwise provided by law or ordered by the court [*Cal. Rules of Ct., Rule 1.20(b)*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Therefore, counsel should set forth facts describing the account and the check as originally drawn and as altered.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the drawee's liability.

[b] Related Points and Authorities

For points and authorities opposing the contention that the drawee may also be liable under a negligence theory for improperly charging a check to its customer's account, see *§ 34.53*. For related points and authorities opposing the contention that the drawee is liable to the drawer for unauthorized payment of checks, see *§§ 34.46 -34.52*.

[3] Discussion of Authorities

[a] Altered Check

Com. Code § 4401(d) provides that a bank that in good faith makes payment to a holder may charge the indicated account of its customer according to either (1) the original terms of the altered item or (2) the terms of the completed item, even though the bank knows the item has been completed unless the bank has notice that the completion was improper. "Holder," with regard to a negotiable instrument, means the person in possession if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, if the identified person is in possession. "Holder," with regard to a document of title, means the person in possession if the goods are deliverable to bearer or to the order of the person in possession [*Com. Code § 1201(b)(21)*].

Pac. Coast Cheese, Inc. v. Sec.-First Nat. Bk. *(1955) 45 Cal. 2d 75, 286 P.2d 353* , involved a drawee's liability to a drawer for paying raised checks, some or all of which were intercepted and destroyed by the culpable employee of the drawer. The Supreme Court reversed the judgment for defendant drawee. In discussing the general relationship between the drawer and the drawee in relation to the payment of forged or altered checks, the Court said that a drawee bank may not charge a depositor's account with payments made on forged or altered checks unless some conduct of the depositor falling under the principles of negligence or estoppel contributed to the loss and the bank was free from negligence. This rule is applied even when the alteration or forgery is committed by an employee of the depositor (*45 Cal. 2d 75, 78)* .

Glassell Dev. Co. v. Citizens' Nat. Bk. *(1923) 191 Cal. 375, 216 P. 1012* , is discussed in *§ 34.30[3][a]*.

In ***Sun'n Sand, Inc. v. United California Bank*** *(1978) 21 Cal. 3d 671, 148 Cal. Rptr. 329, 582 P.2d 920* , the drawer sued the drawee and collecting banks to recover funds embezzled by plaintiff's employee over the course of a three-year period. The named defendant was the collecting bank, and only collecting bank issues were considered on appeal. One of the employee's duties was to prepare checks for signature by a corporate officer. Each of the nine checks at issue was payable to defendant. The employee raised the amount of each check by several thousand dollars after the corporate officer had signed as drawer, believing each check represented a small sum owed to defendant. In fact, plaintiff did not

owe defendant anything. The employee opened an account at defendant into which the checks were deposited. Six causes of action were alleged by plaintiff: mistake, fraudulent misrepresentation, negligence, breach of warranty against material alteration, and breach of warranty of good title under former Com. Code §§ 3417 (defendant as payee) and 4207 (defendant as collecting bank). Demurrers were sustained to all causes of action and judgment entered for defendant. Plaintiff appealed.

The Supreme Court reversed as to the material alteration warranty cause of action for the last (most recent) check and the negligence and mistake causes of action for the last six checks. Although the drawer's complaint named both the drawee and collecting banks, only plaintiff drawer's rights against the collecting bank were considered on appeal. In discussing the measure of damages on the cause of action for breach of warranty against material alteration, the Court said that the wrong for which plaintiff sought recovery was the negotiation of each check in an excessive amount. The proper measure of damages is the difference between the raised amount and the amount for which the checks were originally drawn (*21 Cal. 3d 671, 690-691)* . The Court, citing former Com. Code § 4401(2)(a) (*now see Com. Code § 4401(d)(1)*), noted that a drawee bank that has acted in good faith may charge the account of its customer-drawer according to the original tenor of the altered item (*21 Cal. 3d 671, 691 n.18*).

Because *Sun'n Sand* was decided under former provisions of the Commercial Code, caution should be used when citing all or portions of the opinion. For example, of primary importance in the *Sun'n Sand* opinion was the holding that a drawer had standing under former Com. Code §§ 3417 and 4207 to bring an action for breach of warranty (*21 Cal. 3d 671, 680-684)* . This result has clearly been rejected by the 1992 amendments of these sections [*see Com. Code §§ 3417, 4208*; Official Comment 2 to U.C.C. § 3-417 (1990) (warranties now made to drawee, not drawer)]. What is not as clear, however, is the continued validity of the Court's decisions with regard to other causes of action raised by the plaintiff. Although the Court's decisions regarding these causes of action may still be applicable, caution should be used when relying on a particular holding or holdings.

[b] No Election of Remedies

Pac. Coast Cheese, Inc. v. Sec.-First Nat. Bk. *(1955) 45 Cal. 2d 75, 286 P.2d 353* , is discussed in *§ 34.35[3][a]*. Defendant drawee contended that plaintiff drawer's recovery against it was barred because plaintiff had obtained a civil judgment against its bookkeeper, who raised the checks for the same damages. Nothing had been collected on that judgment, but defendant claimed it amounted to an election of remedies. The Supreme Court disagreed. The Court said that the doctrine of election of remedies is based on estoppel and operates only when the party asserting it has been injured. Defendant was not injured by plaintiff's action against the bookkeeper (*45 Cal. 2d 75, 80)* .

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3-34 California Points & Authorities § 34.36

§ 34.36 Supporting Contention That Drawee Is Liable to Drawer for Unauthorized Payment of Check [Com. Code § 4401]--Defense That Drawer Failed to Examine Statement and Notify Drawee [Com. Code § 4406(a), (c)] Is Inapplicable--Drawee Sent Statements to Wrong Address

[1] FORM

[*The following may be included in a memorandum, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT DRAWEE BANK CANNOT DEFEND ON THE GROUND THAT PLAINTIFF DRAWER FAILED TO EXAMINE ITS BANK STATEMENTS AND RETURNED CHECKS AND REPORT THE _____ [UNAUTHORIZED SIGNATURE *or* ALTERATION] BECAUSE DEFENDANT DID NOT SEND THE STATEMENTS TO THE ADDRESS DESIGNATED BY PLAINTIFF.

A. Customer's Duty to Examine Statements. [*See § 34.50[1], Paragraph B.*]

B. Failure to Examine Statements Precludes Bank's Liability. [*See § 34.50[1], Paragraph C.*]

C. Statement Sent to Wrong Address. A drawee bank that has sent statements of account and supporting paid items to an address other than the one designated by the drawer cannot rely on the defense that the drawer failed to examine bank statements and returned checks and report unauthorized signatures or alterations (*Far West Citrus, Inc. v. Bank of America (1979) 91 Cal. App. 3d 913, 917, 154 Cal. Rptr. 464*).

[2] Comments

[a] Use of Form

These points and authorities are for use in supporting the contention that a drawee bank may not assert the defense that the drawer failed to examine its bank statements and report irregularities when the bank has sent the statements to the wrong address [*see Com. Code § 4406(a), (c)*].

Counsel should insert argument in the form, showing the relationship between the facts of the case and points of law stated. Thus, counsel should describe the signature card agreement or other notice designating the address for receipt of bank statements and the other address to which they were sent. Counsel may wish to include a copy of the signature card agreement or the relevant particulars.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that this defense is not available to the drawee.

[3] Discussion of Authorities

[a] Statement Sent to Wrong Address

In ***Far West Citrus, Inc. v. Bank of America*** *(1979) 91 Cal. App. 3d 913, 154 Cal. Rptr. 464* , plaintiff corporate drawer sued the drawee bank to recover amounts paid from its checking account for checks with only the corporate secretary's signature when two drawers' signatures were required by the signature card. Defendant had been sending the statements and canceled checks to an address other than that designated by plaintiff. Defendant demurred on the ground that the action was barred by plaintiff's failure to examine the statements and make its claim within the one-year period described in former Com. Code § 4406(4) (*now see Com. Code § 4406(f)*, discussed in *§ 34.51*). The demurrer was sustained and judgment was entered for defendant. Plaintiff appealed and the court of appeal reversed.

Commenting that the bank's reliance on plaintiff's failure to discover the missing signatures was a matter of defense and not a ground of demurrer, the court of appeal said that even as a defense it was without merit because the bank had not sent the statements to the address designated by plaintiff. The fact plaintiff may have been doing business at the address to which the statements were sent was irrelevant; the bank is not free to disregard the depositor's designation and send the statement to another address (*91 Cal. App. 3d 913, 917)* . The court also said that the defense is not available to a bank that sends the statements to the defaulting employee (*91 Cal. App. 3d 913, 917 n.2*).

Note that the court's holding in *Far West Citrus* regarding the inapplicability of *Com. Code § 4406* was abrogated by the amendment of *Com. Code § 3403(b)* in 1992. In *Edward Fineman Company v. Superior Court (1998) 66 Cal. App. 4th 1110, 78 Cal. Rptr. 2d 478* , the court held that as a result of that amendment, if the signature of more than one person is required to constitute the authorized signature of an organization, the signature of the organization is unauthorized if one of the required signatures is lacking. The court stated that this amendment is directly contrary to the holding of *Far West Citrus* and unequivocally imposes the obligations of *Com. Code § 4406(f)* on customers with checking accounts that require more than one signature (*66 Cal. App. 4th 1110, 1119-1125)* . For further discussion, see *§ 34.51*.

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§ 34.37 Supporting Contention That Drawee Is Liable to Drawer for Unauthorized Payment of Check [Com. Code § 4401]--Defense That Drawer Failed to Examine Statement and Notify Drawee [Com. Code § 4406(a), (c)] Is Inapplicable--Irregularities From Which Losses Derived Were Not Apparent From Statements

[1] FORM

[*The following may be included in a memorandum, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT DRAWEE BANK CANNOT DEFEND ON THE GROUND THAT PLAINTIFF DRAWER FAILED TO EXAMINE ITS BANK STATEMENTS AND RETURNED CHECKS AND REPORT THE _____ [*specify, e.g.,* EMBEZZLEMENT] BECAUSE THE IRREGULARITY IN THE _____ [*specify transactions from which losses arose, e.g.,* PROCESSING OF DEPOSITS] WAS NOT APPARENT FROM THE FACE OF THE STATEMENT.

A. Customer's Duty to Examine Statements. [*See § 34.50[1], Paragraph B.*]

B. Failure to Examine Statements Precludes Bank's Liability. [*See § 34.50[1], Paragraph C.*]

C. Irregularities Not Apparent From Statements. The requirement that a depositor examine its statements and returned items and notify the bank of errors does not apply when the error or irregularity could not be ascertained from the face of the statement (*Barclay Kitchen, Inc. v. California Bank (1962) 208 Cal. App. 2d 347, 356, 25 Cal. Rptr. 383* ; *see Com. Code § 4406(c)*).

[2] Comments

[a] Use of Form

These points and authorities are for use in supporting the contention that a drawee bank may not assert the defense that the drawer failed to examine its bank statements and report irregularities when the loss in question derived from errors

or irregularities that were not apparent from the face of the statement [*see Com. Code § 4406(c)*]. The case cited in the form arose from irregular booking of deposits, and its holding probably cannot be extended to a situation in which the irregularity is apparent on the face or back of a check included with the statement.

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Thus, counsel should describe or attach the statements in question and should describe the loss and how it arose from some error or irregularity not shown on the statement.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that this defense is not available to the drawee.

[3] Discussion of Authorities

[a] Irregularities Not Apparent From Statements

Although the following case was decided before the initial adoption of *Com. Code § 4406*, it appears that it is still persuasive for the point discussed. Plaintiff depositor in ***Barclay Kitchen, Inc. v. California Bank*** *(1962) 208 Cal. App. 2d 347, 25 Cal. Rptr. 383* , sued the bank at which it maintained its commercial account for losses arising from plaintiff's bookkeeper's embezzlement. The bookkeeper was authorized to make deposits to the account and to make cash withdrawals of up to $1,000, and was expected to make cash withdrawals on Fridays to provide the business with weekend cash. The Friday withdrawals were usually in the amount of $900. The cash was supposed to be redeposited on Mondays, but over the course of about a year, the bookkeeper converted some $11,468. To cover these defalcations, on four occasions the bookkeeper combined or divided regular deposit items. For instance, on one occasion a deposit consisting of a $4,261 check payable to plaintiff and $795 in cash was accepted by defendant on four separate deposit tickets of $900 each and one of $1,456. On the bank statement, the bank would show a posting for each deposit ticket. Plaintiff sued the bank for negligent breach of contract on the theory that the bank's processing of deposits facilitated the bookkeeper's scheme and prevented its discovery. Judgment was entered against the bank for the full amount of the loss. Defendant appealed.

There was no finding on the amount of losses that occurred before the bank accepted combined or split deposits, so the court of appeal reversed and remanded to establish the amount embezzled before the first statement showing a split or combined deposit with instructions to reduce the judgment by that amount. In all other regards, the judgment was affirmed (*208 Cal. App. 2d 347, 356-357)* . The bank contended that plaintiff's delay in failing to discover errors in the statements should bar its action on the ground of laches. The court said that the contract between plaintiff and defendant required defendant to render to plaintiff a true and accurate statement and account of all transactions in connection with the account (*208 Cal. App. 2d 347, 353)* . That duty included the implied promise to keep accounts and to render statements according to usual customs and procedures (*208 Cal. App. 2d 347, 353-354)* . The effect of the irregular deposit procedure was to render inaccurate statements of deposits (*208 Cal. App. 2d 347, 354)* . The provision requiring the depositor to notify the bank of errors did not apply because the error or irregularity could not be ascertained from the face of the statement. The statement carried no intimation of the irregular procedure by the bank (*208 Cal. App. 2d 347, 356)* .

Com. Code § 4406(c) provides that the customer's duty to notify the bank of the relevant facts concerning a particular error or irregularity depends on whether the customer should "reasonably" have discovered an unauthorized payment "based on the statement or items provided" by the bank. Thus, the statute alone provides a reasonable basis for arguing that the drawer's failure to examine the statement and to notify the drawee is inapplicable if the error or irregularity was not apparent from the material provided by the bank. For further discussion of *Com. Code § 4406(c)* and for a more specific form applying the drawer's inability to discover unauthorized payments under that section, see *§ 34.40*.

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3-34 California Points & Authorities § 34.38

§ 34.38 Supporting Contention That Drawee Is Liable to Drawer for Unauthorized Payment of Check [Com. Code § 4401]--Defense That Drawer Failed to Examine Statement and Notify Drawee [Com. Code § 4406(a), (c)] Is Inapplicable--Drawee Failed to Pay Item in Good Faith [Com. Code § 4406(e)]

[1] FORM

[*The following may be included in a memorandum, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT DRAWEE BANK CANNOT DEFEND ON THE GROUND THAT PLAINTIFF FAILED TO EXAMINE ITS BANK STATEMENTS AND RETURNED CHECKS AND REPORT THE _____ [UNAUTHORIZED SIGNATURE *or* ALTERATION] BECAUSE DEFENDANT DID NOT PAY THE ITEM IN GOOD FAITH.

A. Failure to Examine Statements Precludes Bank's Liability. [*See § 34.50[1], Paragraph C.*]

B. Failure to Pay in Good Faith Precludes Defense. If the customer proves that the bank did not pay the item in good faith, the preclusion under *Commercial Code Section 4406(d)* does not apply (*Com. Code § 4406(e)*).

C. "Good Faith" Defined. "Good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing (*Com. Code § 1201(b)(20)*).

[2] Comments

[a] Use of Form

These points and authorities are for use in supporting the contention that a drawee bank may not assert the defense that the drawer failed to examine its bank statements and report irregularities when the bank failed to pay the item in good faith [*see Com. Code § 4406(e)*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Thus, counsel should describe the checks and signature card agreement, and set forth facts establishing that the bank did not pay the item in good faith as that term is defined by statute.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that this defense is not available to the drawee.

[b] "Good Faith" Distinguished From "Ordinary Care"

The definition of "good faith" requires both honesty in fact and observance of reasonable commercial standards of fair dealing [*Com. Code § 1201(b)(20)*]. Although fair dealing is a broad term that must be defined in context, the term is concerned with the fairness of conduct rather than the care with which an act is performed. Failure to exercise ordinary care in conducting a transaction is an entirely different concept than failure to deal fairly in conducting the transactions. Both fair dealing and ordinary care (which is defined in *Com. Code § 3103(a)(7)*) are to be judged in light of reasonable commercial standards, but those standards in each case are directed to different aspects of commercial conduct [Official Comment 4 to U.C.C. § 3-103 (1990); *see* Revised California Code Comment 4 to *Com. Code § 4406*].

[c] Related Points and Authorities

For points and authorities supporting the contention that the drawee is liable to the drawer for unauthorized payment of a check on the ground that the drawee's negligence, and not the conduct of the drawer, caused the loss, see *§ 34.39*. For points and authorities opposing the drawee's liability on the ground that the drawer failed to examine the statement and report unauthorized signatures or alterations, see *§ 34.50*.

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§ 34.39 Supporting Contention That Drawee Is Liable to Drawer for Unauthorized Payment of Check [Com. Code § 4401]--Defense That Drawer Failed to Examine Statement and Notify Drawee [Com. Code § 4406(a), (c)] Is Inapplicable--Drawee's Own Negligence and Not Conduct of Drawer Caused Loss [Com. Code § 4406(e)]

[1] FORM

[*The following may be included in a memorandum, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT DRAWEE IS LIABLE FOR THE UNAUTHORIZED PAYMENT OF CHECK NO. _____ BECAUSE DEFENDANT DID NOT EXERCISE ORDINARY CARE IN PAYING THE CHECK AND THE LOSS WAS NOT CAUSED BY PLAINTIFF's FAILURE TO REPORT THE _____ [UNAUTHORIZED SIGNATURE *or* ALTERATION] BUT BY DEFENDANT's NEGLIGENCE.

A. Failure to Examine Statements Precludes Bank's Liability. [*See § 34.50[1], Paragraph C.*]

B. Bank Required to Exercise Ordinary Care. If the preclusion under *Commercial Code Section 4406(d)* applies and the customer proves that the bank failed to exercise ordinary care in paying the item and the failure contributed to loss, the loss is allocated between the customer precluded and the bank asserting the preclusion according to the extent to which the customer's failure to comply with *Commercial Code Section 4406(c)* and the bank's failure to exercise ordinary care contributed to the loss (*Com. Code § 4406(e)*; *see Commercial Cotton Co. v. United California Bank (1985) 163 Cal. App. 3d 511, 513-516, 209 Cal. Rptr. 551*).

C. Ordinary Care. "Ordinary care" in the case of a person engaged in business means observance of reasonable commercial standards, prevailing in the area in which the person is located, with regard to the business in which the person is engaged. In the case of a bank that takes an instrument for processing for collection or payment by automated means, reasonable commercial standards do not require the bank to examine the instrument if the failure to examine does not violate the bank's prescribed procedures and the bank's procedures do not vary unreasonably from general

banking usage not disapproved by either Division 3 or 4 of the Commercial Code (*Com. Code § 3103(a)(7)*). The definition of "ordinary care" in *Commercial Code Section 3103* applies to transactions under Division 4 of the Commercial Code (*Com. Code § 4104(c)*). The definition of "ordinary care" in *Com. Code § 3103* is declaratory of the meaning of "ordinary care" in former Com. Code § 4406 (*see Story Road Flea Market, Inc. v. Wells Fargo Bank (1996) 42 Cal. App. 4th 1733, 1741-1742*).

[2] Comments

[a] Use of Form

These points and authorities may be used to support the contention that a drawee bank is liable for the unauthorized payment of a check when the drawer can prove that the bank failed to exercise ordinary care in paying the checks and there is no causal connection between the bank's payment of the check and the drawer's failure to report the unauthorized signature or alteration [*see Com. Code § 4406(c), (e)*].

Counsel should add argument linking the points in this form with the facts of his or her case; for example, describe the checks and signature card agreement and set forth facts establishing the drawee's negligence in paying the checks and that the drawee's own negligence was in fact the cause of the loss. Because *Com. Code § 4406(e)* poses a modified comparative negligence test for determining liability [*see* discussion in *§ 34.39[2][b]*], the drawer must prove that the bank's failure to exercise ordinary care was the major (or sole) factor contributing to the loss and that the drawer's own failure to examine the statement of account did not contribute to the loss.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that this defense is not available to the drawee.

[b] Comparative Negligence Test

Com. Code § 4406, as amended in 1992 [Stats. 1992, ch. 914, § 45], poses a modified comparative negligence test for determining liability when a loss results from the payment of an unauthorized or altered check and both the customer and the bank have failed in some regard to fulfill their statutory duties. The loss is to be allocated between the customer and the bank according to the extent to which the customer's failure to examine statements and notify the bank [*see Com. Code § 4406(c)*] and the bank's failure to exercise ordinary care contributed to the loss [*see Com. Code § 4406(e)*].

The comparative negligence standard may call into question decisions that the drawee's negligence precludes using the defense of the drawer's failure to examine statements and notify the drawee [*see, e.g., Basch v. Bank of America (1943) 22 Cal. 2d 316, 330-334, 139 P.2d 1* ; *Sommer v. Bank of Italy etc. Assn. (1930) 109 Cal. App. 370, 374-376, 293 P. 98]* . In *Basch* (discussed in *§ 34.33[3][a]*), drawee defended on the ground that plaintiff was negligent in entrusting his banking business to a forger without checking the forger's reputation for honesty and in failing to examine the statements and report the forgeries. The Supreme Court held that the drawer's conduct is available as a defense only when the drawee itself is free from negligence in the first instance in paying forged checks. If in the exercise of due care the drawee would have detected the forgeries without the depositor's aid, the drawee cannot escape its contractual liability merely because the drawer is also at fault. When the drawee is negligent in paying the check, it does not pay because previous forgeries were not reported to it, but it pays because on its own negligent inspection it supposed the checks were genuine [*Basch v. Bank of America (1943) 22 Cal. 2d 316, 330, 139 P.2d 1]* . Thus, the Court found that although plaintiff was negligent [*Basch v. Bank of America (1943) 22 Cal. 2d 316, 323-329, 139 P.2d 1]* , the evidence, including the testimony of the teller in charge of plaintiff's account that certain of the checks were obvious forgeries and should not have been passed, supported the judgment in plaintiff's favor [*Basch v. Bank of America (1943) 22 Cal. 2d 316, 330-334, 139 P.2d 1]* . Although the court's reasoning may still be persuasive in arguing under a comparative negligence theory, the holding that a drawee's negligence precludes using the drawer's conduct as a defense

appears suspect in light of Co. Code § 4406(e).

[c] Related Memoranda

For memoranda opposing the drawee's liability on the ground that the drawer failed to examine the statement and to report unauthorized signatures or alterations, see *§ 34.50*.

[3] Discussion of Authorities

[a] Bank Required to Exercise Ordinary Care

The facts and procedural background of ***Commercial Cotton Co. v. United California Bank*** *(1985) 163 Cal. App. 3d 511, 209 Cal. Rptr. 551* , are discussed in *§ 34.53[3][a]*. In *Commercial Cotton*, the court of appeal held that the drawer's failure to examine his or her bank statement and notify the drawee of an unauthorized payment is after-the-fact conduct that is irrelevant to the issue of comparative negligence. In considering defendant's assertion of comparative negligence, the court further stated that plaintiff's delay in reporting the loss was irrelevant, had nothing to do with the bank's negligent payment of the check, and did not contribute to the transaction (*163 Cal. App. 3d 511, 515-516)* .

For further discussion of *Commercial Cotton* and its apparent conflict with other appellate decisions on other matters, see *§ 34.53*. In addition, the holding in *Commercial Cotton* with regard to the availability of tort damages for bad faith breach of the implied covenant of good faith and fair dealing is no longer viable [*Copesky v. Superior Court (1991) 229 Cal. App. 3d 678, 681, 694, 280 Cal. Rptr. 338]* .

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3-34 California Points & Authorities § 34.40

§ 34.40 Supporting Contention That Drawee Is Liable to Drawer for Unauthorized Payment of Check [Com. Code § 4401]--Defense That Drawer Failed to Examine Statement and Notify Drawee [Com. Code § 4406(a), (c)] Is Inapplicable--Drawer Could Not Reasonably Have Discovered Unauthorized Payment [Com. Code § 4406(c)]

[1] FORM

[*The following may be included in a memorandum, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT DRAWEE BANK CANNOT DEFEND ON THE GROUND THAT PLAINTIFF FAILED TO EXAMINE ITS BANK STATEMENTS AND RETURNED CHECKS AND REPORT THE _____ [UNAUTHORIZED SIGNATURE *or* ALTERATION] BECAUSE PLAINTIFF DID NOT HAVE A REASONABLE OPPORTUNITY TO DISCOVER THE UNAUTHORIZED PAYMENT.

Customer's Duty to Examine Statements. If a bank sends or makes available a statement of account or items pursuant to *Commercial Code Section 4406(a)*, the customer must exercise reasonable promptness in examining the statement or the items to determine whether any payment was not authorized because of an alteration of an item or because a purported signature by or on behalf of the customer was not authorized. If, based on the statement or items provided, the customer should reasonably have discovered the unauthorized payment, the customer must promptly notify the bank of the relevant facts (*Com. Code § 4406(c)*).

[2] Comments

[a] Use of Form

This memorandum are for use in supporting the contention that a drawee bank may not assert the defense that the drawer failed to examine its bank statements and report irregularities because the drawer did not have a reasonable opportunity to discover the unauthorized payment [*see Com. Code § 4406(c)*]. This contention will arise when the bank uses the truncation provisions of *Com. Code § 4406* by not returning the paid items and by supplying only a statement of account with limited information [*see Com. Code § 4406(a)*]. It is based on the ground that with check truncation the

customer does not receive the actual paid items back, and thus it is not possible to discover certain types of fraud. For example, if a check is altered by a change in the payee's name, the customer could not normally detect the fraud unless the customer is given the paid check or the statement of account discloses the name of the payee of the altered check [Revised Official Comment 2 to *Com. Code § 4406*]. Thus, the effect of *Com. Code § 4406(c)* is to limit the customer's duty to discover and report alterations and unauthorized payments to those that can only be discovered by examining the cancelled checks themselves.

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Thus, counsel should describe the check, establish that the bank did not return the item, and set forth additional facts showing that the customer could not reasonably have discovered the unauthorized payment.

This memorandum may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that this defense is not available to the drawee.

[b] Safe-Harbor Rule Does Not Preclude Customer From Asserting Unauthorized Signature or Alteration

If the bank sends or makes available a statement of account showing payment of items for the account, the statement must provide information "sufficient to allow the customer reasonably to identify the items paid" [*Com. Code § 4406(a)*; *but see Com. Code § 4406(h)* (requirement that customer must be able to "reasonably" identify items paid is superseded January 1, 2015, by requirement that customer must be able merely to identify items paid)]. Until January 1, 2015, the bank complies with this standard if the "item is described by item number, amount, and date of payment" [*see Com. Code § 4406(a), (h)*]. This "safe harbor" rule serves to permit a bank, based on the state of existing technology, to trigger the customer's duties under *Com. Code § 4406(c)*. However, the safe harbor does not necessarily preclude a customer under *Com. Code § 4406(d)* from asserting its unauthorized signature or an alteration against a bank in those circumstances under *Com. Code § 4406(c)* in which the customer should not "reasonably have discovered the unauthorized payment." Whether the customer has failed to comply with its duties under *Com. Code § 4406(c)* is determined on a case-by-case basis [Revised Official Comment 2 to *Com. Code § 4406*].

[c] Related Memoranda

For additional memoranda supporting the contention that the drawer's failure to examine the account statement and to notify the drawee is inapplicable, see *§§ 34.36 -34.39*. For memoranda opposing the drawee's liability on the ground that the drawer failed to examine the statement and to report unauthorized signatures or alterations, see *§ 34.50*.

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3-34 California Points & Authorities § 34.41

§ 34.41 Supporting Contention That Drawee Is Liable to Drawer for Unauthorized Payment of Check [Com. Code § 4401]--Defense That Drawer Is Entitled to Subrogation to Prevent Unjust Enrichment [Com. Code § 4407] Is Inapplicable

[1] FORM

[*The following may be included in a memorandum, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT DRAWEE BANK CANNOT DEFEND ON THE GROUND THAT IT IS ENTITLED TO BE SUBROGATED TO THE RIGHTS OF PLAINTIFF [OR OF THE PAYEE OR OF THE COLLECTING BANK] BECAUSE THAT DEFENSE IS NOT AVAILABLE IN SITUATIONS LIKE THIS ONE, IN WHICH THERE IS NO DANGER OF UNJUST ENRICHMENT.

A. Drawee's Right of Subrogation. [*See § 34.58[1], Paragraph B.*]

B. Drawer Not Unjustly Enriched. The drawer is not unjustly enriched by a payment that is a nullity, for instance when the payment is fraudulent, or illegal, or in violation of the priorities for paying its creditors established by the bankruptcy court in the drawer's bankruptcy. A payment that is a nullity does not provide the basis for the drawee's right of subrogation under *Commercial Code Section 4407* (*Danning v. Bank of America (1984) 151 Cal. App. 3d 961, 976-979, 199 Cal. Rptr. 163*).

C. Drawee's Loss Not Shown. A drawee that recovers the amount of an improperly paid check from the payee [on its cross complaint] may not argue, in the drawer's action against it, that it is entitled to be subrogated to the payee's rights, because in that situation the drawee is unable to establish that it will suffer any loss (*Danning v. Bank of America (1984) 151 Cal. App. 3d 961, 976-977, 199 Cal. Rptr. 163*).

[2] Comments

[a] Use of Form

These points and authorities are for use in supporting the contention that a drawee bank may not assert the defense that it is entitled to be subrogated to the rights of the drawer or the payee or a holder in due course or either of them when there is no threat of unjust enrichment [*see Com. Code § 4407*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Thus, counsel should describe the check, the transaction out of which it arose, any other cross actions or litigation between the parties on the check or underlying obligation, and should set forth facts negating the drawee's claim of unjust enrichment.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that this defense is not available to the drawee.

[b] Related Points and Authorities

The points and authorities in *§ 34.58* support the contention that subrogation is appropriate although the drawee failed to honor a timely stop payment order. The points and authorities in *§§ 34.30 -34.40* support, and those in §§ 34.46-34.53 oppose, the contention that the drawee is liable to the drawer for improperly charging the drawer's account to pay a check that was not properly payable. For points and authorities supporting and opposing the contention that particular parties are holders in due course, see Ch. 166, *Negotiable Instruments* .

[3] Discussion of Authorities

[a] Drawer Not Unjustly Enriched

The facts and procedural background of ***Danning v. Bank of America*** *(1984) 151 Cal. App. 3d 961, 199 Cal. Rptr. 163* , are set forth in *§ 34.31[3][c]*. Defendant drawee contended that under *Com. Code § 4407* it was entitled to be subrogated to rights of the payee and the collecting bank. The court of appeal denied this contention for several reasons. First, the payment to the payee was fraudulent (as found by the bankruptcy court) and violated priorities of the drawer's creditors established by the bankruptcy court. Thus, payment to the payee was a nullity, and the drawer corporation's bankruptcy estate would not be unjustly enriched. Second, defendant made no showing that it would sustain any loss. To the contrary, the drawee bank prevailed on its cross complaint (*151 Cal. App. 3d 961, 976-977)* .

[b] Drawee's Loss Not Shown

Danning v. Bank of America *(1984) 151 Cal. App. 3d 961, 199 Cal. Rptr. 163* , is discussed in *§ 34.41[3][a]*.

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3-34 California Points & Authorities § 34.42

§ 34.42 Supporting Contention That Drawee Is Liable to Drawer for Unauthorized Payment of Check [Com. Code § 4401]--Defense That Drawer's Negligence Contributed to Alteration or Unauthorized Signature Is Inapplicable--Drawee Comparatively Negligent [Com. Code § 3406(b)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT DRAWEE BANK CANNOT DEFEND ON THE GROUND THAT PLAINTIFF IS PRECLUDED FROM ASSERTING THE _____ [ALTERATION *or* FORGERY] DUE TO PLAINTIFF's FAILURE TO EXERCISE ORDINARY CARE, BECAUSE DEFENDANT FAILED TO EXERCISE ORDINARY CARE IN PAYING THE INSTRUMENT AND THAT FAILURE ALSO CONTRIBUTED TO THE LOSS.

A. Contributory Negligence. A person whose failure to exercise ordinary care contributes to an alteration of an instrument or to the making of a forged signature on an instrument is precluded from asserting the alteration or the forgery against a person who, in good faith, pays the instrument or takes it for value or for collection (*Com. Code § 3406(a)*).

B. Comparative Negligence. Under *Commercial Code Section 3406(a)*, if the person asserting the preclusion fails to exercise ordinary care in paying or taking the instrument and that failure contributes to loss, the loss is allocated between the person precluded and the person asserting the preclusion according to the extent to which the failure of each to exercise ordinary care contributed to the loss (*Com. Code § 3406(b)*).

C. Burden of Proof. Under *Commercial Code Section 3406(b)*, the burden of proving failure to exercise ordinary care is on the person precluded (*Com. Code § 3406(c)*).

D. Ordinary Care. "Ordinary care" in the case of a person engaged in business means observance of reasonable commercial standards, prevailing in the area in which the person is located, with regard to the business in which the

person is engaged (*Com. Code § 3103(a)(7)*).

[2] Comments

[a] Use of Form

These points and authorities are for use in supporting the contention that a drawee bank may not assert the defense that the drawer was contributorily negligent and is therefore precluded from asserting an alteration or forgery because the drawee was also negligent in paying the instrument, and thus the loss should be allocated between the two parties according to the extent to which the failure of each to exercise ordinary care contributed to the loss [*see Com. Code § 3406(b)*]. The form should be used when both parties to the transaction failed, in some regard, to exercise ordinary care.

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Thus, counsel should describe the check and the transaction out of which it arose and set forth facts establishing a failure by the bank to exercise ordinary care in paying the check and how that failure contributed to the loss. The extent to which the bank's failure contributed to the loss should also be set forth.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the defense of the drawer's contributory negligence is not applicable.

[b] Related Points and Authorities

The points and authorities in *§ 34.52* oppose the contention that the drawee is liable to the drawer for the unauthorized payment of a check on the ground that the drawer's negligence contributed to the alteration or unauthorized signature.

[3] Discussion of Authorities

[a] Comparative Negligence

If the person precluded under *Com. Code § 3406(a)* proves that the person asserting the preclusion failed to exercise ordinary care and that failure substantially contributed to the loss, the loss may be allocated between the two parties on a comparative negligence basis [Official Comment 4 to U.C.C. § 3-406 (1990)].

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3-34 California Points & Authorities § 34.43

§ 34.43 Supporting Contention That Drawee Bank Is Liable to Drawer for Wrongful Dishonor [Com. Code §§ 3504(a)(2), 4402]--In General

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT DRAWEE BANK IS LIABLE TO PLAINTIFF DRAWER FOR WRONGFULLY REFUSING TO PAY PLAINTIFF's CHECK NUMBER _____.

A. Cause of Action for Wrongful Dishonor. When a genuine check is presented to a drawee by a person entitled to receive the amount of that check, the drawee is obligated to honor the check if funds sufficient to pay it are on deposit in the drawer's account. Except as otherwise provided in Division 4 of the Commercial Code, a drawee bank wrongfully dishonors an item if it dishonors a check that is properly payable (*Com. Code § 4402(a)*; *Allen v. Bank of America (1943) 58 Cal. App. 2d 124, 127, 136 P.2d 345*).

B. Liability for Wrongful Dishonor. A drawee bank is liable to its customer for damages proximately caused by the wrongful dishonor of a check. Liability is limited to actual damages proved (*Com. Code § 4402(b)*; *see Com. Code § 4105(3)* (payor bank means bank that is drawee of a draft)).

C. Actual Damages. An action for damages sustained because of wrongful dishonor of a check sounds both in tort and in contract. Damages that the parties contemplated and those that may not have been contemplated but were reasonably foreseeable and proximately caused by the wrongful dishonor are recoverable. Actual damage is a term synonymous with compensatory damage and covers all loss recoverable as a matter of right (*Weaver v. Bank of America (1963) 59 Cal. 2d 428, 431-435, 437, 30 Cal. Rptr. 4, 380 P.2d 644* ; *Allen v. Bank of America (1943) 58 Cal. App. 2d 124, 127, 136 P.2d 345*).

[*Optional*] **D. Damages Arising From Arrest and Other Consequential Damages.** Damages in a wrongful dishonor

cause of action may include damages for an arrest or prosecution of the customer or other consequential damages. The risk that the payee of a wrongfully dishonored check will cause the drawer's arrest is not a remote contingency or a special circumstance unknown to the drawee. It appears to be an obvious risk against which the drawee undertakes to protect the drawer. The loss of reputation and impairment of health caused by the drawer's arrest are included in the recoverable damages. Whether any consequential damages are proximately caused by the wrongful dishonor is a question of fact to be determined in each case (*Com. Code § 4402(b)*; *Weaver v. Bank of America (1963) 59 Cal. 2d 428, 434-435, 437-438, 30 Cal. Rptr. 4, 380 P.2d 644*).

[*Optional*] **E. Value of Repossessed Property.** When the wrongfully dishonored check is an installment payment under a contract that gives its holder the right to repossess and sell the property in the event of a default under the contract and the property is repossessed and sold, the loss of that property is proximately caused by the wrongful dishonor. The drawer is entitled to recover the market value of the property repossessed as damages for the check's wrongful dishonor (*Abramowitz v. Bank of America (1955) 131 Cal. App. 2d Supp. 892, 897-898, 281 P.2d 380*).

[*Optional*] **F. Damages for Emotional Distress.** Damages for emotional distress caused by a check's wrongful dishonor are recoverable [when events that follow the dishonoring of the check, for example, acts of harassment and vandalism by creditors, would have induced mental suffering in any reasonable person] (*Kendall Yacht Corp. v. United California Bank (1975) 50 Cal. App. 3d 949, 957-958, 123 Cal. Rptr. 848*).

[*Optional*] **G. Standing of Principal.** The principal of an undercapitalized shell corporation that has issued no stock has standing to maintain an action for damages for wrongful dishonor when the drawee has looked to that principal as the financially responsible party (*Karsh v. American City Bank (1980) 113 Cal. App. 3d 419, 421-422, 169 Cal. Rptr. 851* ; *Kendall Yacht Corp. v. United California Bank (1975) 50 Cal. App. 3d 949, 956, 123 Cal. Rptr. 848*).

[*Optional*] **H. Dishonor When Presentment Is Excused.** Presentment is excused if the maker or acceptor has repudiated an obligation to pay. Assuming that a check is regular as to signature, name of drawee bank, and is correctly drawn on the proper account, when presentment is excused by the drawee, the drawee's nonacceptance or refusal to pay may be treated as dishonor (*Com. Code § 3504(a)(2)*; *see Allen v. Bank of America (1943) 58 Cal. App. 2d 124, 128-129* (construing prior law)).

[*Optional*] **I. Expectation Regarding Payment of Overdrafts.** A drawee bank may be liable for wrongful dishonor of checks whose payment would create or increase overdrafts if the drawee has led the drawer to expect that it would pay overdrafts (*see Kendall Yacht Corp. v. United California Bank (1975) 50 Cal. App. 3d 949, 954-955, 123 Cal. Rptr. 848*).

[2] Comments

[a] Use of Form

These points and authorities are for use in supporting the contention that a drawee bank is liable to its drawer for damages proximately caused by its wrongful dishonor of a check [*see Com. Code § 4402*].

Paragraph A describes what constitutes wrongful dishonor, and Paragraph B sets forth the statutory authority for recovery of damages by the drawer. Paragraph C describes in general terms the theory of damages, while Optional Paragraphs D-F address particular types of damages that are recoverable. Optional Paragraph G is for use only when the drawee has looked to the individual plaintiff as the party responsible for the drawer's obligations to it. Optional Paragraph H is for use only when the drawee has waived presentment and dishonored the check without its being presented. As a general rule, absent an agreement between the parties to the contrary, the drawee is not required to pay a check that would cause an overdraft [*see Com. Code § 4402(a)*; *Torrance N. Bank v. Enesco F. Credit Union (1955) 134 Cal. App. 2d 316, 320-321, 285 P.2d 737* ; *Bachtel v. Bank of America (1954) 127 Cal. App. 2d 728, 731-732, 274*

P.2d 421 (discussed in *§ 34.54[3*][a])]. However, there is dicta that encouragement, promises, and representations by the drawee that lead the drawer to expect that a large number of its overdrafts will be paid is sufficient to require payment by the drawee bank. That dicta is the basis of Optional Paragraph I [*see Kendall Yacht Corp. v. United California Bank (1975) 50 Cal. App. 3d 949, 954, 958-959, 123 Cal. Rptr. 848]* .

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Thus, counsel should describe the check, the account on which it was drawn, and the balance in the account at the time the check was presented. Counsel might also set forth facts negating any reason the drawee claimed, or may be expected to claim, that the check was not properly payable.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the drawee's liability for wrongful dishonor.

[b] Related Points and Authorities

The points and authorities set out in *§§ 34.54 -34.56* oppose the contention that the drawee is liable for wrongful dishonor. The points and authorities in *§ 34.57* may also be used to oppose the contention that the drawee is liable for wrongful dishonor if the drawer had filed a timely stop payment notice affecting the check in question.

[3] Discussion of Authorities

[a] Cause of Action for Wrongful Dishonor

Plaintiff-drawer in ***Allen v. Bank of America*** *(1943) 58 Cal. App. 2d 124, 136 P.2d 345* , sued the drawee for wrongful dishonor of a $25 check, claiming as damages lost profits from certain business transactions that were not consummated because of the harm done to plaintiff's reputation and good name. The check was never presented. The alleged wrongful dishonor consisted of the drawee's "no account" response to the payee's telegram to it inquiring "Advise if (initials) Allen check $25 good." General and special demurrers were sustained without leave to amend, and judgment was entered for defendant. Plaintiff appealed.

The court of appeal reversed. The court first discussed the general relationship of the drawer and drawee, saying that the drawee is obligated by presentation of a genuine check in the hands of a person entitled to receive the amount of that check to honor the check if sufficient funds to cover the amount for which it is drawn are on deposit. A cause of action for wrongful dishonor arises whenever the drawee fails to discharge its agreement by dishonoring a duly presented check. The cause of action arises from a contract but, in another sense, it is independent of the contract and sounds in tort, involving an element of wrong or a violation of duty (*58 Cal. App. 2d 124, 127)* . The portion of the court's opinion relating to waiver of presentment is discussed in *§ 34.43[3][h]*. The portion of the court's opinion relating to the insufficiency of the pleading is discussed in *§ 34.55[3][a]*.

[b] Liability for Wrongful Dishonor

Com. Code § 4402 is worded in terms of a payor bank's liability to its customer. *Com. Code § 4105(3)* defines "payor bank" as a bank that is the drawee of a draft. "Customer" is a person having an account with a bank or for whom a bank has agreed to collect items, including a bank that maintains an account at another bank [*Com. Code § 4104(a)(5)*].

[c] Actual Damages

Plaintiff-drawer in ***Weaver v. Bank of America*** *(1963) 59 Cal. 2d 428, 30 Cal. Rptr. 4, 380 P.2d 644* , sued the drawee for $50,000 under former Civ. Code § 3320 (*now see Com. Code § 4402*) for wrongful dishonor of a $32.68 check. The check was returned to the payee marked "account closed." The payee had plaintiff arrested for petty theft. Defendant demurred on the ground that the only damages sought flowed from the arrest that was the act of a third party and

therefore not proximately caused by defendant. The demurrer was sustained without leave to amend, and judgment was entered for defendant. Plaintiff appealed.

The Supreme Court reversed. The demurrer was sustained based on *Hartford v. All Night & Day Bank (1915) 170 Cal. 538, 150 P. 356* , and *Bearden v. Bank of Italy (1922) 57 Cal. App. 377, 207 P. 270* , which held that an arrest is a supervening act of the payee. Thus, the chain of causation is severed and the arrest is not proximately caused by the drawee's dishonor. The Court said that *Hartford-Bearden* theory of proximate cause had been repudiated (*59 Cal. 2d 428, 432-433)* . The Court first cited *Allen v. Bank of America (1943) 58 Cal. App. 2d 124, 127, 136 P.2d 345* (discussed in *§ 34.43[3][a]*), for the proposition that the cause of action arising from dishonor of a duly presented check sounds in both contract and tort (*59 Cal. 2d 428, 431)* . The payee's procuring of the drawer's arrest does not constitute a superseding cause that severs the chain of causation (*59 Cal. 2d 428, 433-434)* . Whether the complaint is viewed as sounding in contract or in tort, the breach of duty and consequential damages were sufficiently alleged to state a cause of action (*59 Cal. 2d 428, 435)* .

The Court reviewed the history of former Civ. Code § 3320 (*now see Com. Code § 4402*), noting the common-law presumption that traders or merchants, but not others, suffered substantial damages from wrongful dishonor was abrogated by the adoption of former Civ. Code § 3320 (*59 Cal. 2d 428, 435-437)* . The Court cited an Ohio case for the interpretations of the uniform law (former Civ. Code § 3320 was part of the Uniform Negotiable Instruments Law) that actual damages is a term synonymous with compensatory damages and covers all losses recoverable as a matter of right (*59 Cal. 2d 428, 437)* , and that damages for loss of reputation and impairment of health caused by the arrest of the drawer are recoverable (*59 Cal. 2d 428, 437-438)* . The Court adopted this interpretation (*59 Cal. 2d 428, 438)* , which is consistent with the 1992 amendment of *Com. Code § 4402* [Stats. 1992, ch. 914, § 41], which expressly provides that liability is limited to "actual damages proved and may include damages for an arrest or prosecution of the customer or other consequential damages" [*Com. Code § 4402(b)*].

Allen v. Bank of America *(1943) 58 Cal. App. 2d 124, 136 P.2d 345* , is discussed in *§ 34.43[3][a]*.

[d] Damages Arising From Arrest and Other Consequential Damages

Weaver v. Bank of America *(1963) 59 Cal. 2d 428, 30 Cal. Rptr. 4, 380 P.2d 644* , is discussed in *§ 34.43[3][c]*.

[e] Value of Repossessed Property

Plaintiff-drawer in ***Abramowitz v. Bank of America*** *(1955) 131 Cal. App. 2d Supp. 892, 281 P.2d 380* , sued the drawee for wrongful dishonor of a check. The payee was the holder of the conditional sales contract on plaintiff's car. As a result of the wrongful dishonor, the car was repossessed and sold in accordance with the contract. The payee sold the car for $1,600. Plaintiff had paid $935 under the contract at the time of the repossession. The deficiency still owing under the contract after the car was sold by the payee was $597. From the sum of those amounts ($935 + $597 = $1532), the trial court subtracted $800, representing the reasonable value of the car's use during the time it was in plaintiff's possession, and awarded plaintiff $732 plus interest. Defendant appealed. The only question on appeal was the propriety of the damage award.

The court of appeal affirmed, although it determined that, under the proper measure of damages, plaintiff was entitled to recover $1,600, which was the market value of the car (*131 Cal. App. 2d Supp. 892, 898*). The loss of the automobile, the court said, was the proximate result of the check's dishonor (*131 Cal. App. 2d Supp. 892, 897*).

[f] Damages for Emotional Distress

Plaintiffs in ***Kendall Yacht Corp. v. United California Bank*** *(1975) 50 Cal. App. 3d 949, 123 Cal. Rptr. 848* , were the corporate drawer and a husband and wife who were officers and prospective shareholders of the corporation. The

corporation was only a shell, had never issued stock, and was undercapitalized. It built yachts on progress payments. The drawer was in serious financial trouble in September 1970 when defendant-drawee made a $14,000 90-day loan to it to cover operating expenses. All parties expected that the necessary capital would be raised elsewhere within the 90 days. The individual plaintiffs personally guaranteed the loan, only $3,000 of which had been paid at the time the action was commenced.

A customer of the drawer wanted to get out of its contract with the drawer when the price of the yacht rose substantially over the contract price. The drawer agreed to purchase the completed yacht for $25,000 in hopes of reselling it at a profit. Defendant promised to loan $25,000 to the drawer, which loan would be secured by a lien on the completed yacht. To complete that yacht, the drawer stopped or slowed work on its other contracts, exacerbating its cash flow problems.

There was a vague agreement that defendant would honor certain overdrafts. By the end of October 1970, the drawer was $6,000 overdrawn. The drawer executed a new note to the drawee for that amount, clearing the overdraft, and the personal guaranties were increased to $20,000. On November 20, defendant told plaintiffs it would not make the promised loan on the soon-to-be-completed yacht. Later, defendant dishonored the $25,000 check drawn to repurchase that yacht from drawer's customer.

During December, the drawee honored some checks drawn against the corporate accounts and dishonored others. Among those dishonored were payroll checks, checks to suppliers, and a check issued to pay the drawer's workers' compensation policy premium. Over $15,000 of overdraft checks were paid by defendant during October, November, and December. On December 30, the drawee informed the drawer that it would no longer honor its checks. Soon thereafter, the corporation's assets were seized and sold by the IRS for nonpayment of taxes. The corporation's suppliers and employees accused the individual plaintiffs of having milked the corporation, threatened legal action and physical harm, and threatened the husband's subsequent employer. Eggs and oil were thrown at the individual plaintiffs' cars. Administrative proceedings were brought against plaintiffs for dishonored payroll checks and for failure to maintain workers' compensation insurance. Criminal charges for writing checks against insufficient funds were brought against the wife but dropped before trial. The individual plaintiffs suffered marital problems as a result of the stress of the failure of the business.

Plaintiffs sued the bank for compensatory and punitive damages for breach of agreements to loan money to the corporation. Defendant cross complained for the unpaid balances. The trial court found that defendant had wrongfully dishonored checks of the corporation and awarded each individual plaintiff $26,000 as compensatory damages and $10,000 as punitive damages. Defendant was awarded $26,691 plus interest on its cross complaint. Defendant appealed.

The court of appeal reversed as to punitive damages and affirmed in all other regards. Defendant contended that damages for emotional suffering were not recoverable, citing the rule that damages for mental suffering or injury to reputation resulting from breach of contract are not recoverable. The court cited *Weaver v. Bank of America (1963) 59 Cal. 2d 428, 431, 30 Cal. Rptr. 4, 380 P.2d 644* (discussed in *§ 34.43[3][c]*), for the proposition that a cause of action for wrongful dishonor sounds in tort as well as in contract (*50 Cal. App. 3d 949, 957)* . The court maintained that if damages for suffering incident to arrest are recoverable, as held in *Weaver*, there is no reason to bar recovery for the mental distress attending the types of consequences experienced here, which included criminal and administrative investigation and charges, as well as acts of harassment and vandalism (*50 Cal. App. 3d 949, 957-958)* . The individual plaintiffs did not merely allege a subjective state of discomfort at having their checks dishonored. They gave proof of objectively verifiable events that followed the dishonoring of the checks and would have induced mental suffering in any reasonable person (*50 Cal. App. 3d 949, 958)* .

[g] Standing of Principal

In ***Karsh v. American City Bank*** *(1980) 113 Cal. App. 3d 419, 169 Cal. Rptr. 851* , plaintiff, president and sole owner

of a corporation, brought four causes of action against drawee bank and its employees for damages sustained because of the wrongful dishonor of corporate checks. Defendant's demurrer was sustained on the theory that only the corporate depositor had standing to maintain the action. Judgment of dismissal was entered. Plaintiff appealed.

The court of appeal reversed. Both parties agreed that under *Kendall Yacht Corp. v. United California Bank (1975) 50 Cal. App. 3d 949, 956, 123 Cal. Rptr. 848* (discussed *below*), there were some circumstances in which an individual, not the nominal depositor, may recover damages under *Com. Code § 4402*. The parties disagreed concerning whether plaintiff's pleading brought him within the *Kendall* rule for recovery. Plaintiff alleged that the nominal depositor corporation "had not issued any stock, ... was undercapitalized and was a transparent shell, having no viability as a separate and distinct legal entity, ... all to the knowledge of defendants, and each of them. Plaintiff, alone, controlled the corporation's financial affairs and personally vouched for its fiscal responsibility both to defendant bank, through its employees," including the individual defendants, and to the public at large. Plaintiff also alleged that "[d]efendant [b]ank dealt directly with plaintiff, looked personally to plaintiff and required plaintiff to personally guarantee and satisfy all obligations [of the corporation] to defendant [b]ank as they would arise. Plaintiff did, in fact, personally guarantee and did in fact satisfy said obligations. Plaintiff personally, and not in the capacity of a corporate officer, satisfied corporate debts to defendant [b]ank through the use of plaintiff's own personal monies as defendant [b]ank required and plaintiff guaranteed to do" (*113 Cal. App. 3d 419, 421-422)* . Defendant attempted to distinguish *Kendall* on the basis that there was a written guaranty in *Kendall*. The court of appeal disagreed (*113 Cal. App. 3d 419, 422)* .

The facts and procedural background of ***Kendall Yacht Corp. v. United California Bank*** *(1975) 50 Cal. App. 3d 949, 123 Cal. Rptr. 848* , are discussed in *§ 34.43[3][f]*. The court of appeal noted that *Com. Code § 4402* speaks in terms of the drawee's liability to its customer and that former Com. Code § 4104(1)(e) (*now see Com. Code § 4104(a)(5)*) defines "customer" as any person having an account with a bank, including a bank that maintains an account at another bank. *Com. Code § 1201(b)(27)* defines "person" to include individuals and organizations (*50 Cal. App. 3d 949, 955)* .

In deciding that the individual plaintiffs could recover for wrongful dishonor of checks drawn by the corporation, the court of appeal said it was certainly not holding as a general proposition that shareholders and officers of a corporation can recover under *Com. Code § 4402* for the wrongful dishonor of a corporate check. Here, however, it is difficult to avoid the conclusion that the individual plaintiffs were as much customers of defendant within the contemplation of the statute as the corporation. Defendant looked to them directly to satisfy the corporate obligations and required their guaranties to be increased to cover credit it was extending in the form of honoring overdrafts. The corporation was a shell. The individual plaintiffs were controlling its financial affairs and vouching for its fiscal responsibility. It was entirely foreseeable that dishonoring the corporation's checks would reflect directly on the personal credit and reputation of the individual plaintiffs and that they would suffer the adverse personal consequences that resulted when defendant reneged on its commitment. Under these circumstances, the court concluded, it would elevate form over substance to hold that the wrong defined in *Com. Code § 4402* was done only to the corporation and that the individual plaintiffs could not recover (*50 Cal. App. 3d 949, 956)* .

[h] Dishonor When Presentment Is Excused

Com. Code § 3504(a)(2) provides that presentment for payment or acceptance is excused when the maker or acceptor has repudiated an obligation to pay.

The facts and procedural background of ***Allen v. Bank of America*** *(1943) 58 Cal. App. 2d 124, 136 P.2d 345* , are discussed in *§ 34.43[3][a]*. Defendant contended that no cause of action was stated because there was no allegation that the check was ever presented. The court of appeal disagreed, concluding that presentment had been waived (*58 Cal. App. 2d 124, 128-129)* . In construing prior law, the court said that defendant was entitled to have the check presented, but under former Civ. Code § 3229 (*now see Com. Code §§ 3502* (dishonor), 3503 (notice of dishonor), 3504(a)(2) (presentment excused by reputing obligation to pay)) a check may be treated as dishonored when presentment is waived and acceptance has been refused on some ground other than irregular presentment (*58 Cal. App. 2d 124, 128)* .

Assuming that in all other regards the check was regular as to signature, name of drawee bank, and was correctly drawn on the proper account, defendant's telegram was tantamount to an absolute refusal to pay the check described in the telegram for the reason stated, which was a reason other than irregular presentment, and amounted to a waiver of presentment. The payee was entitled to treat the check as dishonored (*58 Cal. App. 2d 124, 129)* . However, these assumptions were not borne out by the pleadings. The demurrer should have been sustained, albeit with leave to amend, because plaintiff neglected to allege where and at which branch of defendant the check was payable and that plaintiff's account was in the same name as that used in the telegram (*58 Cal. App. 2d 124, 130)* .

[i] Expectation Regarding Payment of Overdrafts

The facts and procedural background of ***Kendall Yacht Corp. v. United California Bank*** *(1975) 50 Cal. App. 3d 949, 123 Cal. Rptr. 848* are discussed in *§ 34.43[3][f]*. Defendant did not contest the trial court's conclusion that its acts constituted wrongful dishonor (*50 Cal. App. 3d 949, 955)* . The findings in support of that conclusion were that defendant encouraged, promised, and represented to plaintiffs that defendant would pay a large number of Kendall Yacht Club checks written by plaintiffs without regard to whether there would be sufficient funds on deposit to cover the checks when they were presented for payment; that plaintiffs wrote numerous checks in reliance on defendant's promises and with the expectation that they would be honored as overdrafts; that some checks, including checks to suppliers, employee payroll checks, and the check for the worker's compensation coverage, were not honored by defendant; and that the individual plaintiffs were induced to incur obligations that would not otherwise have been incurred, to violate criminal law, and to suffer personal distress of varying kinds and damage to their reputations (*50 Cal. App. 3d 949, 954)* . However, defendant's failure to honor all plaintiff's checks did not represent sufficient malice to warrant punitive damages, in part because the agreement to honor them was so vague and did not require it to honor all overdraft checks (*50 Cal. App. 3d 949, 958-959)* .

It is unclear whether the above dicta in *Kendall* is still valid in light of the 1992 amendment of *Com. Code § 4402* [Stats. 1992, ch. 914, § 41], which added the provision that "a bank may dishonor an item that would create an overdraft unless it has agreed to pay the overdraft" [*Com. Code § 4402(a)*]. For example, it could be argued that the statutory language requires an agreement to pay each overdraft item and that a vague agreement such as the one that existed in *Kendall* to pay a large number of overdrafts, but not all, is not sufficient.

[4] Additional Authorities

[a] Damages for Emotional Distress

The court of appeal in *Teitel v. First Los Angeles Bank (1991) 231 Cal. App. 3d 1593, 282 Cal. Rptr. 916* , affirmed a judgment for $9,000 in general damages and remanded for determination whether $500,000 in punitive damages was excessive. The issues on appeal were mainly procedural, having to do with the propriety of the trial court's method of reducing the punitive damage award. Plaintiff had signed her employer's name, as drawer, to three checks payable to herself totalling approximately $2,800. The employer signed an affidavit of forgery. Both the employer and plaintiff maintained accounts at defendant. Defendant relied on the affidavit to withdraw the amount of the allegedly forged checks from plaintiff's account and to dishonor checks drawn by plaintiff against the "reversed" deposit. Plaintiff was arrested and charged with forgery, although never prosecuted. The complaint included causes of action for wrongful dishonor, intentional infliction of emotional distress, negligence, conversion, and violations of *Fin. Code §§ 857, 952*. The court stated that an award of punitive damages was proper, based on evidence, although conflicting, that reversal and dishonor was not standard banking practice (*231 Cal. App. 3d 1593, 1599, 1604-1605)* .

NOTE:

The holding in *Teitel* appears to be unaffected by the 1995 repeal and re-enactment of *Fin. Code § 857* (prohibiting banks from giving preference to one depositor or creditor over another).

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Volume 3 Chapters 34-39 CHECKS AND BANKS---to---CIVIL SERVICE
CHAPTER 34 CHECKS AND BANKS
PART II. FORMS
A. Drawee Bank's Liability To Drawer

3-34 California Points & Authorities § 34.44

§ 34.44 Supporting Contention That Drawee Is Liable to Drawer for Wrongful Dishonor of Check [Com. Code §§ 4401(a), 4402]--Overdrafts Permitted

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT DRAWEE BANK IS LIABLE TO PLAINTIFF FOR WRONGFULLY REFUSING TO PAY PLAINTIFF'S CHECK NUMBER _____.

A. Overdrafts Permitted. Ordinarily, a drawee is not required to honor a check for an amount in excess of the deposit against which it is drawn, but a drawee is permitted to do so. *Commercial Code Section 4401(a)* specifically authorizes a drawee to pay overdrafts and to charge the customer's account to recover the amount paid, even when payments result in overdrafts on the account. [Ordinarily, the contract between the drawer and drawee does not include a promise by the drawer to refrain from writing checks against an account that does not have sufficient funds to pay them] (*Perdue v. Crocker National Bank (1985) 38 Cal. 3d 913, 931-932, 216 Cal. Rptr. 345, 702 P.2d 503* ; *Shapiro v. United California Bank (1982) 133 Cal. App. 3d 256, 263, 184 Cal. Rptr. 34* ; *Hoffman v. Security Pacific Nat. Bank (1981) 121 Cal. App. 3d 964, 969, 176 Cal. Rptr. 14* ; *see Com. Code § 4402(a)*).

[*Optional*] **B. General Duty Under Commercial Code for Any Item.** [*See § 34.30[1], Paragraph A*].

[*Optional*] **C. Expectation Regarding Payment of Overdrafts.** [*See § 34.43[1], Paragraph I*].

[2] Comments

CAUTION:
The particular signature card or overdraft agreement between the drawer and drawee may render these authorities inapplicable.

[a] Use of Form

These points and authorities are for use in supporting the contention that a drawee bank is liable for wrongful dishonor even when the check's payment would create an overdraft. The authorities themselves only establish that the ordinary signature card and custom do not prohibit either writing of overdraft checks (hereinafter sometimes referred to as "NSF checks") by the depositor or payment of overdraft checks by the drawee bank (Paragraphs A, B) [*see Com. Code §§ 4401(a), 4402(a)*; *Shapiro v. United California Bank (1982) 133 Cal. App. 3d 256, 263, 184 Cal. Rptr. 34* ; *Hoffman v. Security Pacific Nat. Bank (1981) 121 Cal. App. 3d 964, 969, 176 Cal. Rptr. 14]* . The particular agreement of the parties or other facts giving rise to a reasonable expectation on the drawer's part that the NSF check would be paid will ultimately determine whether the drawee was required to honor the overdraft check (Paragraph C) [*see Com. Code § 4402(a)*; *Kendall Yacht Corp. v. United California Bank (1975) 50 Cal. App. 3d 949, 954-955, 123 Cal. Rptr. 848* (discussed in *§ 34.43[3*][i])].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Therefore, counsel should set forth facts describing the account and the check in question and establishing the understanding, prior conduct, or particular agreement of the parties with regard to paying overdraft checks.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the drawee's liability.

[b] Related Points and Authorities

The points and authorities set out in *§ 34.43* support, and points and authorities set out in *§§ 34.54 -34.56* oppose, the contention that the drawee is liable for wrongful dishonor.

[3] Discussion of Authorities

[a] Overdrafts Permitted

Com. Code § 4402(a) provides that a payor bank wrongfully dishonors an item if it dishonors an item that is properly payable, but a bank may dishonor an item that would create an overdraft unless it has agreed to pay the overdraft.

Perdue v. Crocker National Bank *(1985) 38 Cal. 3d 913, 216 Cal. Rptr. 345, 702 P.2d 503* , was a class action by depositors seeking to establish that the service charges imposed for writing NSF checks were illegal on several grounds, including that they constituted unlawful penalties under former Civ. Code §§ 1670 and 1671 (*now see Civ. Code § 1671*) as those sections existed at the time the action was commenced. Those statutes apply to penalties charged as liquidated damages for breach of contract. In order for those statutes to apply, plaintiffs had to establish that either the signature card agreements governing their accounts or banking custom contained an actual or implied promise by the depositor not to write NSF checks. Plaintiffs could not establish any promise on their part to refrain from writing NSF checks. The trial court sustained demurrers and judgment was entered for defendant. Plaintiffs appealed.

The Supreme Court affirmed as to the cause of action alleging that the charges were unlawful penalties. The Court noted that two court of appeal cases had addressed plaintiffs' contention and quoted at length from *Hoffman v. Security Pacific Nat. Bank (1981) 121 Cal. App. 3d 964, 968-969, 176 Cal. Rptr. 14* , and *Shapiro v. United California Bank (1982) 133 Cal. App. 3d 256, 263, 184 Cal. Rptr. 34* (both discussed *below*): "[The] statutes governing the obligations of banks and their depositors, which are incorporated into and become part of the contract between a bank and its depositors [citations], treat an overdraft as an application for advance credit rather than as a breach of an express or implied covenant. *California Uniform Commercial Code section 4401* specifically authorizes a bank to pay overdrafts and to charge customers' accounts to recover amounts paid, even when payments result in overdrafts on the account. While a bank has a statutory obligation to honor any check drawn by a depositor for an amount not exceeding the

balance in his account, and while the depositor has a contractual obligation to pay a service charge when he presents a NSF check, the depositor has no statutory or contractual obligation to refrain from drawing checks for amounts in excess of the balance in his account" (*38 Cal. 3d 913, 931-932)* .

The Court did not agree that an overdraft is an application for credit, noting that the contract was silent on the characterization of an overdraft check, but did agree that there was no promise on the part of the depositors to refrain from writing overdraft checks (*38 Cal. 3d 913, 932)* .

Shapiro v. United California Bank *(1982) 133 Cal. App. 3d 256, 184 Cal. Rptr. 34* , and ***Hoffman v. Security Pacific Nat. Bank*** *(1981) 121 Cal. App. 3d 964, 176 Cal. Rptr. 14* were class actions by depositors challenging service charges imposed for writing NSF checks on the ground that they constituted unlawful penalties under former Civ. Code §§ 1670 and 1671 (*now see Civ. Code § 1671*) as those sections existed at the time the actions were commenced. In order for those statutes to apply, plaintiffs had to establish that either the signature card agreements governing their accounts or applicable banking custom contained an actual or implied promise by the depositor not to write NSF checks. Plaintiffs could not establish any promise on their part to refrain from writing NSF checks. The trial court judgments for defendants were affirmed on appeal. The relevant portions of the opinions are quoted above in the discussion of *Perdue v. Crocker National Bank (1985) 38 Cal. 3d 913, 931-932, 216 Cal. Rptr. 345, 702 P.2d 503* .

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CHAPTER 34 CHECKS AND BANKS
PART II. FORMS
A. Drawee Bank's Liability To Drawer

3-34 California Points & Authorities § 34.45

§ 34.45 Supporting Contention That Drawee Is Liable to Drawer for Payment of Check in Disregard of Stop Payment Order or Order to Close Account [Com. Code § 4403]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT DRAWEE BANK IS LIABLE TO PLAINTIFF FOR PAYING PLAINTIFF'S CHECK NUMBER _____ AND CHARGING PLAINTIFF'S ACCOUNT FOR THAT PAYMENT AFTER HAVING RECEIVED A TIMELY, WRITTEN ORDER TO _____ [STOP PAYMENT *or* CLOSE THE ACCOUNT].

A. Orders to Stop Payment or Close Account. A customer or any person authorized to draw on the account if there is more than one person may stop payment of any item drawn on the customer's account or close the account by an order to the bank describing the item or account with reasonable certainty received at a time and in a manner that affords the bank a reasonable opportunity to act on it before any action by the bank with regard to the item described in *Commercial Code Section 4303*. If the signature of more than one person is required to draw on an account, any of these persons may stop payment or close the account (*Com. Code § 4403(a)*; *see Grisinger v. Golden State Bank (1928) 92 Cal. App. 443, 445, 268 P. 425* ; *Hiroshima v. Bank of Italy (1926) 78 Cal. App. 362, 374, 248 P. 947*).

B. Drawee's Liability for Disregarding Customer's Order to Stop Payment or Close Account. A bank that pays an item over a stop payment order or order to close an account is prima facie liable. The burden of establishing the fact and amount of loss resulting from paying an item contrary to a stop payment order or order to close an account is on the customer (*Com. Code § 4403(c)*; Official Comment 1 to U.C.C. § 4-407; *Grisinger v. Golden State Bank (1928) 92 Cal. App. 443, 445, 268 P. 425*).

[*ADD if payment for item was contrary to stop payment order*]

C. Damages Available. The loss from paying an item contrary to a stop payment order may include damages for dishonor of subsequent items under *Commercial Code Section 4402* (*Com. Code § 4403(c)*).

[*Optional*] **D. Mistake or Inadvertence Irrelevant/Effect of Failure to Exercise Ordinary Care.** A payment violating an effective direction to stop payment is an improper payment, even though it is made by mistake or inadvertence. Any agreement to the contrary is invalid under *Commercial Code Section 4103(a)* if in paying the item over the stop payment order the bank failed to exercise ordinary care (Official Comment 7 to U.C.C. § 4-403).

[*Optional*] **E. Expiration of Stop Payment Order.** A stop payment order is effective for six months, but it lapses after 14 calendar days if the original order was oral and was not confirmed in writing within that period. A stop payment order may be renewed for additional six-month periods by a writing given to the bank within a period during which the stop payment order is effective (*Com. Code § 4403(b)*).

[2] Comments

[a] Use of Form

These points and authorities are for use in supporting the contention that a drawee bank is liable for paying a check after receiving a stop payment order or order to close an account [*see Com. Code § 4403*]. Paragraphs C-E are applicable only if the payment was contrary to a stop payment order.

A cashier's check or teller's check purchased by a customer whose account is debited in payment for the check is not a check drawn on the customer's account within the meaning of *Com. Code § 4403(a)*. Thus, a customer purchasing a cashier's check or a teller's check has no right to stop the check's payment [Official Comment 4 to U.C.C. § 4-403]. In addition, under *Com. Code § 4303(a)(1)* (*set forth in § 34.57*), payment cannot be stopped on a certified check or a cashier's check that has been properly issued and delivered to the payee [*see Kaufman v. Chase Manhattan Bank, National Ass'n (S.D.N.Y. 1973) 370 F. Supp. 276, 278* (under *Com. Code § 3409(a)* (*set forth in § 34.49*), cashier's check is considered accepted when issued); *see also* Official Comment 4 to U.C.C. § 4-403].

Even if the check involved is an ordinary check, as a practical matter it may be difficult for the drawer to establish liability on the drawee's part if the drawer would have remained liable to the payee on the underlying debt had the stop payment order been honored [*see Com. Code § 4407* (*set forth in § 34.58*); Official Comment 1 to U.C.C. § 4-407; *Swiss Credit Bank v. Balink (10th Cir. 1980) 614 F.2d 1269, 1271-1272* (drawee recredited drawer's account and recovered from payee under subrogation theory; underlying claim had been compromised/settled); *Universal C.I.T. Credit Corp. v. Guaranty Bank & Tr. Co. (D. Mass. 1958) 161 F. Supp. 790, 792, 794-795* (drawer denied recovery from drawee, which was denied recovery from collecting bank on theory drawee was subrogated to collecting bank's right to recover, as holder in due course, from drawer)]. California cases decided before the adoption of *Com. Code §§ 4403* and *4407*, holding that the drawer may recover notwithstanding his or her remaining liability to the payee on the underlying debt, are discussed in *§ 34.45[3][b]*.

To protect personal privacy and other legitimate interests, parties and their attorneys must not include financial account numbers, or must redact such numbers when inclusion is necessary, in all pleadings and other papers filed in the court's public file, whether filed in paper or electronic form, unless otherwise provided by law or ordered by the court [*Cal. Rules of Ct., Rule 1.20(b)*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Thus, if damages are sought for paying an item contrary to a written stop payment order, counsel should attach a copy of the stop payment order showing that it has not expired and that it describes the check with sufficient particularity. Counsel should also establish that the order was received in time for the drawee to act on it. Counsel may also wish to avoid the problem mentioned above by setting forth facts to show that the underlying debt was void or

unenforceable.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the drawee's liability.

[b] Related Points and Authorities

The points and authorities set out in *§ 34.57* oppose the contention that the drawee is liable for failing to honor a stop payment order on the ground that the order came too late. The points and authorities set out in *§ 34.58* may be used to oppose the contention that the drawee is liable for failing to honor a stop payment order on the ground that the drawee is entitled to be subrogated to the rights of the payee. The authority in *§ 34.56* also establishes that the drawee is not liable for stopping payment when one of two authorized signatories on the account orders it to do so.

[3] Discussion of Authorities

[a] Orders to Stop Payment or Close Account

The check in ***Grisinger v. Golden State Bank*** *(1928) 92 Cal. App. 443, 268 P. 425* , was postdated and was a commission payment to the payee for arranging a loan for plaintiff before a specified date. Several days before that date arrived, it became clear to plaintiff that the loan was not going to be forthcoming, so plaintiff, first orally and then in writing, gave stop payment instructions to defendant-drawee. The written instructions were on defendant's form, which recited that the stopping of payment would be a courtesy only and that plaintiff released defendant from any liability in the case of payment or nonpayment. Defendant negligently paid the check after receiving the stop payment order. Plaintiff sued to recover the amount of the check. Judgment was for defendant. Plaintiff appealed.

The court of appeal reversed. The court relied on *Hiroshima v. Bank of Italy (1926) 78 Cal. App. 362, 248 P. 947* (discussed *below*), in invalidating the release clause (*92 Cal. App. 443, 445)* .

The facts and procedural background of ***Hiroshima v. Bank of Italy*** *(1926) 78 Cal. App. 362, 248 P. 947* are discussed in *§ 34.45[3][b]*. In discussing the drawee's duty, the court of appeal said that it is the bank's duty when notified to stop payment to use all reasonable efforts to comply with the directions given by its depositor (*78 Cal. App. 362, 374)* . The stop payment order was on defendant's form, which recited that the stopping of payment was a courtesy only and that plaintiff released defendant from any liability in the case of payment or nonpayment. The court of appeal affirmed the trial court's findings that plaintiff could not read English and did not understand the form, other than to believe it would cause payment to be stopped (*78 Cal. App. 362, 372-373)* . The court found that the attempted release was invalid as against public policy in general and *Civ. Code § 1668* (exculpatory clauses) in particular (*78 Cal. App. 362, 373-378)* .

[b] Drawee's Liability for Disregarding Customer's Order to Stop Payment or Close Account

Grisinger v. Golden State Bank *(1928) 92 Cal. App. 443, 268 P. 425* , is discussed in *§ 34.45[3][a]*.

The status of the holding in cases such as *Hiroshima v. Bank of Italy (1926) 78 Cal. App. 362, 248 P. 947* that the drawee is liable for payment in disregard of a stop payment order even if the underlying obligation to the payee remains valid or if payee is a holder in due course, appears to have been abrogated by subsequent amendments to *Com. Code § 4403(c)* (set forth in Paragraph B) and *Com. Code § 4407* (*set forth in § 34.58*).

In *Hiroshima v. Bank of Italy (1926) 78 Cal. App. 362, 248 P. 947* , defendant-drawee's demurrer on the ground of the absence of any allegation that plaintiff was damaged was overruled. No evidence was allowed on the issue of any consideration given by the payee to the drawer or of the payee's status as a holder in due course. Judgment for plaintiff-drawer was affirmed.

The court of appeal said that when payment of a sum certain of money is alleged to have been wrongfully made, the amount of damages suffered necessarily appears from the statement of facts thus set forth. Whether or not there was consideration moving between plaintiff and the payee for the issuance of the check is entirely collateral to the issues presented here (*78 Cal. App. 362, 368)* . The court did acknowledge that the payee would still have the right to sue the drawer on any underlying debt (*78 Cal. App. 362, 370)* , but concluded that the bank had no interest in the contract between plaintiff and the payee. Its duty is simply to follow the order given by the check's drawer. The doctrine that payment cannot be stopped against a holder in due course is only true in those jurisdictions that hold that a check works an assignment of the funds (*78 Cal. App. 362, 371)* . However, under *Com. Code §§ 4403* and *4407* payment can be stopped against a holder in due course, but the drawer remains liable to the holder in due course and the drawee, if it pays, is subrogated to the rights of the holder in due course against the drawer [Official Comment 7 to U.C.C. § 4-403; Official Comment 1 to U.C.C. § 4-407].

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3-34 California Points & Authorities § 34.46

§ 34.46 Opposing Contention That Drawee Is Liable to Drawer for Unauthorized Payment of Check [Com. Code § 4401]--Payment on Oral Order

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT DRAWEE BANK'S CHARGE TO PLAINTIFF'S ACCOUNT FOR CHECK NUMBER _____ WAS PROPER AND AUTHORIZED IN ACCORDANCE WITH PLAINTIFF's ORAL INSTRUCTION.

A. General Duty Under Commercial Code for Any Item. [*See § 34.30[1], Paragraph A.*]

[*Optional*] **B. Implied Contractual Duty.** [*See § 34.30[1], Paragraph D*].

[*Optional*] **C. Signature Card Contract.** [*See § 34.30[1], Paragraph E*].

D. Oral Order Sufficient. Although a bank is entitled to demand written evidence of an order from a depositor to pay out or transfer a deposit, it may pay out on oral instructions. A verbal direction from the depositor to honor checks signed by another, or to pay a sum or transfer a credit, will fully justify the bank in doing so. In complying with the verbal order, the bank is relieved from further liability to the depositor[, especially when the payment was made to a creditor of the depositor and was received by the creditor in payment of a specific debt] (*V of I Productions v. California Bank (1961) 194 Cal. App. 2d 897, 904-905, 15 Cal. Rptr. 562*).

[2] Comments

[a] Use of Form

These points and authorities are for use in opposing the contention that a drawee bank is liable for unauthorized payment of a check without all required drawers' signatures when payment was made in accordance with the

drawer-depositor's oral instructions.

To protect personal privacy and other legitimate interests, parties and their attorneys must not include financial account numbers, or must redact such numbers when inclusion is necessary, in all pleadings and other papers filed in the court's public file, whether filed in paper or electronic form, unless otherwise provided by law or ordered by the court [*Cal. Rules of Ct., Rule 1.20(b)*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Thus, counsel should attach a copy of the check or otherwise describe its particulars and should set forth facts establishing sufficient oral instructions regarding any apparent defect on the check's face. The drawee's liability is more emphatically negated if counsel can also set forth facts establishing that the check was payment for and discharged a debt of the drawer to the payee or holder.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to establish that the drawee is not liable for paying a check in accordance with the drawer-depositor's oral instructions.

[b] Related Points and Authorities

For additional points and authorities opposing the contention that the drawee is liable for unauthorized payment of a check, see *§§ 34.47 -34.53*. For points and authorities supporting the contention that the drawee is liable for unauthorized payment of a check, see *§§ 34.30 -34.42*.

[3] Discussion of Authorities

[a] Oral Order Sufficient

Plaintiff-drawer in ***V of I Productions v. California Bank*** *(1961) 194 Cal. App. 2d 897, 15 Cal. Rptr. 562* , sued the drawee to recover $35,100, the amount of three checks paid from plaintiff's account allegedly without authority. Plaintiff was in the business of selling airplane transportation for tours. The signatures of *R* and *D* were required to withdraw money from the account. When *R* was in New York for two weeks, an airline demanded payment for three flights and refused to make the flights unless prepayment was received. The money then in plaintiff's account consisted mostly of payments made by the passengers booked on those flights. The office manager tried for several days to reach *R* by phone, but was unable to do so. Before *R* left, he had told the bookkeeper to do whatever was necessary to see that those flights went. The bookkeeper prepared three checks, one for each flight; *D* signed them. The airline's representative and the bookkeeper went to the bank and told the manager they needed the checks to be certified, and why, and that *R* would sign them when he returned from New York. The bank manager charged the three checks to plaintiff's account and issued three cashier's checks to the airline. The trial court judgment was for defendant on the grounds that plaintiff had suffered no damage because the checks were used to discharge an obligation of plaintiff and that plaintiff was estopped to assert that payment without the second signature was improper. Plaintiff appealed.

The court of appeal affirmed. The court said that although a bank is entitled to demand written evidence of an order from a depositor to pay out or transfer a deposit, it may pay out on oral instructions. The court cited a Kansas case for the proposition that a verbal direction from the depositor to honor checks signed by another, or to pay a sum or transfer a credit, will justify the bank in doing so, and in complying with the verbal order the bank is relieved from further liability to the depositor (*194 Cal. App. 2d 897, 904)* . The court stressed that plaintiff was indebted to the airline and that the checks were received by the airline in payment of that debt (*194 Cal. App. 2d 897, 904-905)* . Also, the bookkeeper was acting in accordance with *R*'s instructions (*194 Cal. App. 2d 897, 905-906)* .

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3-34 California Points & Authorities § 34.47

§ 34.47 Opposing Contention That Drawee Is Liable to Drawer for Unauthorized Payment of Check [Com. Code § 4401]--Endorsement by One Joint Payee Is Not Totally Inoperative

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT DRAWEE BANK'S CHARGE TO PLAINTIFF'S ACCOUNT FOR CHECK NUMBER _____ WAS PROPER AND AUTHORIZED TO THE EXTENT OF THE AMOUNT PLAINTIFF OWED TO _____ [*name of joint payee who endorsed the check and received the proceeds*].

A. General Duty Under Commercial Code for Any Item. [*See § 34.30[1], Paragraph A.*]

B. Joint Payees. [*See § 34.34[1], Paragraph E.*]

C. Bank's Liability Excludes Amounts Paid Consistent With Drawer's Intentions. A _____ [drawee *or* collecting] bank's liability for paying a joint-payee check with at least one forged endorsement does not require it to duplicate its original payment to any joint payee who received payment in accordance with the drawer's intention (*Southern Cal. Permanente Medical Group v. Bozinovski (1983) 148 Cal. App. 3d 503, 507, 196 Cal. Rptr. 150* (construing prior law)).

[*Optional*] **D. Bank Entitled to Determination Regarding Payment.** To preclude the banks' duplicate liability and to prevent the payee's unjust enrichment, the court should determine what portion of the check has been received by each payee and whether any amount received exceeded the intent of the drawer (*Southern Cal. Permanente Medical Group v. Bozinovski (1983) 148 Cal. App. 3d 503, 511, 196 Cal. Rptr. 150* (construing prior law)).

[2] Comments

[a] Use of Form

These points and authorities are for use in opposing the contention that a drawee bank is liable for the face amount of a joint-payee check that it paid over a forged endorsement when at least one payee received proceeds in accordance with the drawer's intent. Optional Paragraph D is for use when the court has erred by failing to determine, or allow evidence on the issue of, the actual receipt of the check's proceeds as compared to the allocation of proceeds intended by the drawer.

To protect personal privacy and other legitimate interests, parties and their attorneys must not include financial account numbers, or must redact such numbers when inclusion is necessary, in all pleadings and other papers filed in the court's public file, whether filed in paper or electronic form, unless otherwise provided by law or ordered by the court [*Cal. Rules of Ct., Rule 1.20(b)*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Thus, counsel should attach a copy of the check and endorsements, or otherwise set forth the payee designation and the forged and valid endorsements. Counsel should also describe the actual distribution of the proceeds and the allocation of the proceeds intended by the drawer.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to establish that the drawee's liability should be diminished by the amount of the proceeds that were received by a payee in accordance with the drawer's intention.

[b] Related Points and Authorities

For additional points and authorities opposing the contention that the drawee is liable for unauthorized payment of a check, see *§§ 34.46* and *34.48 -34.53*. For points and authorities supporting the contention that the drawee is liable for unauthorized payment of a check, see *§§ 34.30 -34.42*. §§ 34.34 and 34.93-34.94 address particular payee designations. Ch. 166, *Negotiable Instruments*, also includes forms addressing particular payee designations [*see e.g.*, forms applying *Com. Code § 3109* (instruments payable to bearer or order)]. Other aspects of the validity and requirements of endorsements, and of liability for payment on an improper endorsement, are addressed in §§ 34.34, 34.48, 34.70, 34.73-34.75, 34.90-34.92, 34.95, 34.120-34.122, 34.124-34.126, 34.171.

[3] Discussion of Authorities

[a] Bank's Liability Excludes Amounts Paid Consistent With Drawer's Intentions

Southern Cal. Permanente Medical Group v. Bozinovski *(1983) 148 Cal. App. 3d 503, 196 Cal. Rptr. 150* , arose from a drawer's interpleader to determine entitlement to proceeds of a $50,000 check payable to three joint payees. The check was in payment of a settlement in a malpractice case and was payable to defendant and his attorney and an attorney who commenced the malpractice action on defendant's behalf but had since been discharged. The attorney forged the signatures of the other two payees, deposited the check in his trust account, and had his bank transfer $25,000 from his trust account to his office account. When plaintiff learned of the forgeries, it demanded that its account be recredited. The drawee recredited plaintiff's account for the full $50,000. Plaintiff then commenced the interpleader, naming all three payees and the drawee bank as defendants. The drawee bank cross complained against the collecting bank. The forger stipulated that he claimed no part of the interpleaded fund and waived any claim against plaintiff. All parties stipulated that the discharged attorney was entitled to $5,410. The banks claimed that the attorney had the right to endorse the check on behalf of his client under the terms of their retainer agreement. The trial court found that the check was wholly inoperative because at least one of the endorsements was forged, that the former attorney was entitled to $5,410, and that the client was entitled to the remainder ($44,590). Both banks appealed on the ground that the trial court erred in failing to decide what portion of the funds, if any, they were entitled to receive.

The court of appeal reversed and remanded for further proceedings in accordance with its opinion after concluding that a bank's liability for paying a check with a forged endorsement does not require it to duplicate its original payment to a joint payee to the extent the joint payee received payment in accordance with the drawer's intention. The court said the case was one of first impression in California (*148 Cal. App. 3d 503, 507)* . There was no question that both banks improperly paid the check, as at least one endorsement was forged and proper negotiation of a joint-payee check is precluded under former Com. Code § 3116(b) (*now see Com. Code § 3110(d)*) by the presence of an unauthorized endorsement (*148 Cal. App. 3d 503, 507-508)* .

Nevertheless, the court said, this conclusion did not mean that the check was wholly inoperative. The liability of drawee and collecting banks in this situation should be measured by the damage standards applicable under former Com. Code § 3419 (*now see Com. Code § 3420, set forth in § 34.70*) to the payee's action for conversion when a bank has paid a joint-payee check on a forged endorsement (*148 Cal. App. 3d 503, 508)* . Although under former Com. Code § 3419(2), damages are presumed to be the face amount of the check, the California code comments to former Com. Code § 3419(2) shed further light on the presumption by acknowledging that the measure of damages is obscure. The court also cited *Hensley-Johnson v. Citizens National Bank (1953) 122 Cal. App. 2d 22, 25, 264 P.2d 973* , for the rule that the bank is liable to the payee for the amount that the payee should have received. Thus, there is no indication that the bank's liability is the face amount of the check. The former code comment said that the proposed amendment allows for the possibility that in some circumstances it would be unjust to hold the drawee liable for the face amount of the check, and that under former Com. Code § 3417 (*now see Com. Code §§ 3416, 3417*, regarding warranties on presentment and transfer) the bank could recover any duplicate payment from the one who received it (*148 Cal. App. 3d 503, 509)* . The court concluded that the presumption of former Com. Code § 3419(2) may be rebutted by a showing that a payee has received the sum intended by the drawer. This conclusion is supported by *Harry H. White Lbr. Co. v. Crocker-Citizens Nat. Bk. (1967) 253 Cal. App. 2d 368, 374-375, 61 Cal. Rptr. 381* , and *Indiana Plumbing Supply Co. v. Bank of America (1967) 255 Cal. App. 2d 910, 918, 63 Cal. Rptr. 658* (*148 Cal. App. 3d 503, 509-510)* . The court considered cases from other states that were more directly on point, and noted that the evidence in this case established that the attorney had received at least 25,000 of the proceeds and that defendant-client may have received something (*148 Cal. App. 3d 503, 510-511)* . To preclude the banks' duplicate liability and to prevent the payee's unjust enrichment, the court of appeal found that the trial court erred in failing to determine what portion of the check had been received by the payees and whether any amount received exceeded the drawer's intent (*148 Cal. App. 3d 503, 511)* .

Although the court in *Southern Cal. Permanente Medical Group* was construing the former measure of liability in conversion actions, the current liability provision appears to be consistent with the court's decision. *Com. Code § 3420(b)* attempts to clarify the obscurity of former Com. Code § 3419(2) ("measure of liability is presumed to be the face amount of the instrument") by providing that the "measure of liability is presumed to be the amount payable on the instrument," thus allowing recovery for the full amount due under the instrument [*see* Official Comment 2 to U.C.C. § 3-420 (1990)]. The current liability provision also provides that recovery may not exceed the amount of the plaintiff's interest in the instrument [*Com. Code § 3420(b)*]. This provision addresses the problem of conversion actions in multiple-payee checks. *Com. Code § 3110(d)* provides that an instrument cannot be enforced unless all payees join in the action. However, *Com. Code § 3420(b)* recognizes that an action for conversion might be brought by a payee having no interest or a limited interest in the check's proceeds, and thus prevents this type of plaintiff from receiving a windfall by limiting his or her recovery [Official Comment 2 to U.C.C. § 3-420 (1990)].

[b] Bank Entitled to Determination Regarding Payment

Southern Cal. Permanente Medical Group v. Bozinovski *(1983) 148 Cal. App. 3d 503, 196 Cal. Rptr. 150* , is discussed in *§ 34.47[3][a]*.

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3-34 California Points & Authorities § 34.48

§ 34.48 Opposing Contention That Drawee Is Liable to Drawer for Unauthorized Payment of Check [Com. Code § 4401]--Payee May Authorize Endorsement by Third Party

[1] FORM

[*The following may be included in a memorandum, or may be adapted for use in a trial or appellate brief or in jury instructions*].

DEFENDANT DRAWEE BANK's CHARGE TO PLAINTIFF'S ACCOUNT FOR CHECK NUMBER _____ WAS PROPER AND AUTHORIZED IN THAT THE NAMED PAYEE [TRANSFERRED THE CHECK TO AND] AUTHORIZED THE ENDORSEMENT BY _____ [*name in which check was endorsed*].

A. General Duty Under Commercial Code for Any Item. [*See § 34.30[1], Paragraph A.*]

B. Endorsement by Authorized Third Party. A drawee bank is not liable to its drawer for paying a check that was endorsed by one other than the named payee if the evidence establishes that the designated payee transferred the check to the endorser or otherwise authorized or instructed the proceeds to be paid to or deposited to the endorser's credit (*Campbell v. Bank of America (1987) 190 Cal. App. 3d 1420, 1427-1428* (construing prior law)).

[2] Comments

[a] Use of Form

This memorandum are for use in opposing the contention that a drawee bank is liable for paying a check endorsed by one other than the named payee when the endorsement by and/or payment to the third party was authorized by the named payee.

To protect personal privacy and other legitimate interests, parties and their attorneys must not include financial account numbers, or must redact such numbers when inclusion is necessary, in all pleadings and other papers filed in the court's public file, whether filed in paper or electronic form, unless otherwise provided by law or ordered by the court [*Cal.*

Rules of Ct., Rule 1.20(b)].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Thus, counsel should attach a copy of the check or otherwise describe the payee line and the endorsement and should set forth facts establishing the named payee's authorization or transfer of the check.

This memorandum may be combined with memoranda pertaining to the specific procedural context in which counsel wishes to establish that the drawee is not liable for paying a check in accordance with the payee's instructions.

[b] Related Memoranda

For additional memoranda opposing the contention that the drawee is liable for unauthorized payment of a check, see *§§ 34.46, 34.47,* and 53- 70. For memoranda supporting the contention that the drawee is liable for unauthorized payment of a check, see *§§ 34.30 -34.42*. §§ 34.34 and 34.93-34.95 address particular payee designations. Ch. 166, *Negotiable Instruments*, also includes forms addressing particular payee designations [*see e.g.,* forms applying *Com. Code § 3109* (instruments payable to bearer or order)]. Other aspects of the validity and requirements of endorsements, and of liability for payment on an improper endorsement, are addressed in §§ 34.34, 34.47, 34.70, 34.73-34.75, 34.90-34.92, 34.95, 34.120-34.122, 34.124-34.126, 34.171.

[3] Discussion of Authorities

[a] Endorsement by Authorized Third Party

Plaintiff-drawer in ***Campbell v. Bank of America*** *(1987) 190 Cal. App. 3d 1420, 235 Cal. Rptr. 905* , sued the drawee bank, which was also the collecting bank of the checks involved, for breach of the endorsement warranties of former Com. Code §§ 3417(1)(a) and 4207(1)(a) (*now see Com. Code §§ 3417, 4207*) and for negligence in accepting improperly endorsed checks. The checks were payable to MVTL, a consumer loan company in which plaintiff made repeated investments, or thought he did, over a seven-year period, receiving a series of promissory notes in return. Although his checks were payable to MVTL, over the seven-year course of investments from 1975 until 1982, all but the first note plaintiff received to evidence his investment were made by MVTL-North, another real estate investment company controlled by the same principal as MVTL. Plaintiff's checks were endorsed with a stamp "MVTL-North." Plaintiff never noticed that the notes were those of MVTL-North or that the checks were endorsed by MVTL-North. When plaintiff learned that MVTL and MVTL-North were filing for bankruptcy and might not be able to repay all their loans, he discovered that his checks had been endorsed by MVTL-North and that he held MVTL-North notes. After the drawee bank refused his demand for reimbursement, plaintiff sued the bank, also seeking punitive damages. The trial court awarded plaintiff the amounts of the checks plus interest and costs but denied punitive damages. Both parties appealed.

The court of appeal affirmed the denial of punitive damages and reversed in all other regards because the endorsements by MVTL-North and deposit of the proceeds into MVTL-North's account were authorized by the principal of the named payee. The court set forth the substance of former Com. Code § 4207(1)(a), and quoted *Sun'n Sand, Inc. v. United California Bank (1978) 21 Cal. 3d 671, 687, 148 Cal. Rptr. 329, 582 P.2d 920* (discussed in *§ 34.35[3][a]*), that the initial inquiry regarding the warranty of good title of former Com. Code § 4207(1)(a) is whether the check presented contained all necessary endorsements and whether those endorsements were genuine or otherwise deemed effective (*190 Cal. App. 3d 1420, 1425)* . Plaintiff established his prima facie case of breach of the warranty of good title by proving that the endorsement was missing or not identical to the named payee, but MVTL, as payee, had title to the checks and the right to transfer title or to instruct the bank how the checks were to be deposited. Whether one looks at the case in terms of the bank, as collecting bank, obtaining title or of the bank's obtaining payment on authorization of one who had good title, when the principal of MVTL had the checks transmitted to defendant with instructions to deposit the funds into MVTL-North's account, defendant had the right to charge plaintiff's account for the face value of

the checks (*190 Cal. App. 3d 1420, 1426-1427)* .

In considering the negligence cause of action, the court of appeal did not discuss *Joffe v. United California Bank (1983) 141 Cal. App. 3d 541, 557-558, 190 Cal. Rptr. 443* , or *Commercial Cotton Co. v. United California Bank (1985) 163 Cal. App. 3d 511, 514-515, 209 Cal. Rptr. 551* (both discussed in *§ 34.53[3][a]*), or the possible preemption of common-law negligence in regard to drawee's duties to drawers by *Com. Code § 4401(a)*. The court in *Campbell* only cited *E. F. Hutton & Co. v. City National Bank (1983) 149 Cal. App. 3d 60, 66, 196 Cal. Rptr. 614* (discussed in *§ 34.90[3][a]*), a collecting bank case, and concluded that plaintiff had established a prima facie case of negligence against defendant as payor bank because it paid the check to one other than the named payee. The court held, however, as with the other causes of action, that payment was authorized by the named payee, and therefore proper (*190 Cal. App. 3d 1420, 1428)* .

[4] Additional Authorities

[a] Endorsement by Authorized Third Party

Although *Joffe v. United California Bank (1983) 141 Cal. App. 3d 541, 190 Cal. Rptr. 443* , reversed the sustaining of the drawee's demurrer to the drawer's cause of action for breach of the implied agreement by paying a check that was endorsed other than by the named payee, the court of appeal did acknowledge that there was a question of fact regarding whether the endorsement was authorized and effective (*141 Cal. App. 3d 541, 555)* .

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3-34 California Points & Authorities § 34.49

§ 34.49 Opposing Contention That Drawee Is Liable to Drawer for Unauthorized Payment of Check [Com. Code § 4401]--Bank May, But Is Not Required to, Pay Stale Check [Com. Code §§ 3409(a), (d), 3414(c), 3415(d), 4404]

[1] FORM

[*The following may be included in a memorandum, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT DRAWEE BANK IS NOT LIABLE TO PLAINTIFF FOR _____ [CHARGING HIS/HER/ITS ACCOUNT IN PAYMENT OF *or* DISHONORING] PLAINTIFF's CHECK _____ [EVEN THOUGH *or* BECAUSE] THAT CHECK WAS NOT CERTIFIED AND WAS PRESENTED MORE THAN SIX MONTHS AFTER ITS DATE.

A. Stale Checks. A bank is under no obligation to a customer having a checking account to pay a check, other than a certified check, that is presented more than six months after its date, but it may charge its customer's account for payment of such a check in good faith (*Com. Code § 4404*).

[*Optional*] **B. Certified Check.** "Certified check" means a check accepted by the bank on which it is drawn. Acceptance may be made as stated in *Commercial Code Section 3409(a)* or by a writing on the check that indicates that the check is certified (*Com. Code § 3409(d)*). [If a draft is accepted by a bank, the drawer is discharged and if acceptance occurs after an endorsement the endorser's liability is discharged (*Com. Code §§ 3414(c), 3415(d)*)]. The effect of certification is to transfer the drawer's claim against the drawee to the payee or holder of the check. This transfer occurs at the time of certification if the check is certified at the request of the payee or holder of the check. If certification is procured at the drawer's instance, the transfer does not occur until the check is delivered to the payee (*Umbsen v. Crocker First Nat. Bank (1949) 33 Cal. 2d 599, 601-602, 203 P.2d 752*).

[*Optional*] **C. Acceptance.** Acceptance means the drawee's signed agreement to pay a draft as presented. It must be written on the draft and may consist of the drawee's signature alone. Acceptance may be made at any time and becomes effective when notification pursuant to instructions is given or the accepted draft is delivered for the purpose of giving

rights on the acceptance to any person (*Com. Code § 3409(a)*).

[2] Comments

[a] Use of Form

This memorandum are for use in opposing the contention that a drawee bank is liable for unauthorized payment of a check that was not certified and was presented more than six months after its date [*see Com. Code § 4404*]. These points and authorities may also be used to oppose the contention that a drawee bank is liable for wrongful dishonor if it refused to pay such a check [*see Com. Code § 4404*]. Optional Paragraphs B and C are for use when there is some issue as to whether or not the check in question was certified.

To protect personal privacy and other legitimate interests, parties and their attorneys must not include financial account numbers, or must redact such numbers when inclusion is necessary, in all pleadings and other papers filed in the court's public file, whether filed in paper or electronic form, unless otherwise provided by law or ordered by the court [*Cal. Rules of Ct., Rule 1.20(b)*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Thus, counsel should attach a copy of the check or otherwise describe its particulars and note the date on which it was presented.

This memorandum may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to establish that the drawee is not liable for either paying or not paying the stale check.

[b] Related Memoranda

For additional memoranda opposing the contention that the drawee is liable for unauthorized payment of a check, see *§§ 34.46 -34.48* and *§§ 34.50 -34.58*. For memoranda supporting the contention that the drawee is liable for unauthorized payment of a check, see *§§ 34.30 -34.42*. For memoranda supporting or opposing the contention that the drawee is liable for wrongful dishonor, see *§§ 34.43, 34.44* and *§§ 34.70 -34.72*.

[3] Discussion of Authorities

[a] Certified Check

The definition of certified check in *Com. Code § 3409* applies in Division 4 of the Commercial Code [*Com. Code § 4104(c)*]. In the absence of an agreement, the drawee of a check has no obligation to certify the check, and refusal to certify is not dishonor of the check [*Com. Code § 3409(d)*; *see* Official Comment 4 to U.C.C. § 3-409 (1990)]. Whenever a bank certifies a check, it must immediately charge the amount of the check against the drawer's account [*Fin. Code § 970*]. It is unlawful to certify a check unless the drawer has on deposit at the time of certification an amount not less than the amount of the check [*Fin. Code § 971*].

Plaintiff in ***Umbsen v. Crocker First Nat. Bank*** *(1949) 33 Cal. 2d 599, 203 P.2d 752* , was the successor in interest of the drawer's assets. The state treasurer was intervening in this action to determine ownership of an unclaimed deposit in drawer's name. The amount in the account was equal to the amount of a check to an unknown payee that had been certified approximately 40 years earlier. The trial court awarded the account to the intervener. Plaintiff appealed.

The Supreme Court first discussed the effect of certification, saying that certification constitutes an acceptance by the bank, and its effect is to impose primary liability on the acceptor to pay the check's amount on demand to the payee or holder. It transfers the drawer's claim against the drawee to the payee or holder of the check (*33 Cal. 2d 599, 601)* . This transfer occurs at the time of certification if the check is certified at the request of the payee or holder of the check.

If certification is procured at the drawer's instance, the transfer does not occur until the check is delivered to the payee, so that any time before delivery, the drawer may have the check cancelled and his or her account recredited with the amount of the check (*33 Cal. 2d 599, 601-602)* . The Court said that because there was no evidence about who requested certification or of delivery or nondelivery, the case had to be decided on the basis of inferences that could be drawn from the evidence. Checks are customarily presented. Because this check was never presented, the Court concluded that it was never delivered, so the plaintiff was entitled to the amount remaining on deposit (*33 Cal. 2d 599, 602-603)* .

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Volume 3 Chapters 34-39 CHECKS AND BANKS---to---CIVIL SERVICE
CHAPTER 34 CHECKS AND BANKS
PART II. FORMS
A. Drawee Bank's Liability To Drawer

3-34 California Points & Authorities § 34.50

§ 34.50 Opposing Contention That Drawee Is Liable to Drawer for Unauthorized Payment of Check [Com. Code § 4401]--Drawer Failed to Examine Statement and Report Unauthorized Drawer's Signature or Alteration [Com. Code § 4406(a), (c), (d)]

[1] FORM

[*The following may be included in a memorandum, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

PLAINTIFF's ACTION AGAINST DEFENDANT DRAWEE BANK FOR CHARGING HIS/HER/ITS ACCOUNT TO PAY PLAINTIFF's CHECK NUMBER _____ IS BARRED BY PLAINTIFF's FAILURE TO EXAMINE HIS/HER/ITS STATEMENTS AND RETURNED ITEMS AND REPORT THE _____ [UNAUTHORIZED SIGNATURE *or* ALTERATION] TO DEFENDANT.

A. Bank's Duty to Provide Statement of Account. A bank that sends or makes available to a customer a statement of account showing payment of items for the account must either return or make available to the customer the items paid or provide information in the statement of account sufficient to allow the customer [reasonably] to identify the items paid. [The statement of account provides sufficient information if the item is described by item number, amount, and date of payment.] If the bank does not return the items, it must provide in the statement of account the telephone number that the customer may call to request an item, a substitute check, or a legible copy of the item pursuant to *Commercial Code Section 4406(b)* (*Com. Code § 4406(a)*).

B. Customer's Duty to Examine Statements. If a bank sends or makes available a statement of account or items pursuant to *Commercial Code Section 4406(a)*, the customer must exercise reasonable promptness in examining the statement or the items to determine whether any payment was not authorized because of an alteration of an item or because a purported signature by or on behalf of the customer was not authorized. If, based on the statement or items provided, the customer should reasonably have discovered the unauthorized payment, the customer must promptly notify the bank of the relevant facts (*Com. Code § 4406(c)*).

C. Failure to Examine Statements Precludes Bank's Liability. If the bank proves that the customer failed with regard to a check, to comply with the duties imposed on the customer by *Commercial Code Section 4406(c)*, the customer is precluded from asserting against the bank (1) the customer's unauthorized signature or any alteration on the check if the bank also proves that it suffered a loss by reason of the failure, and (2) the customer's unauthorized signature or alteration by the same wrongdoer on any other check paid in good faith by the bank if the payment was made before the bank received notice from the customer of the unauthorized signature or alteration and after the customer has been afforded a reasonable period of time, not exceeding 30 days, in which to examine the item or statement of account and notify the bank (*Com. Code § 4406(d)*; *Espresso Roma Corporation v. Bank of America, N.A. (2002) 100 Cal. App. 4th 525, 535, 124 Cal. Rptr. 2d 549*).

[*Optional*] **D. Bank Required to Exercise Ordinary Care.** [*See § 34.39[1], Paragraph B.*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to the contention that a drawee bank is liable for charging the drawer's account to pay an altered check or a check with a forged drawer's signature when the drawee itself used ordinary care and the drawer's failure to report the forgery or alteration in fact caused the loss [*see Com. Code § 4406(d), (e)*]. With regard to the burden of proof to assert this defense, the pre-Code cases required the drawee bank to establish its freedom from negligence and that the loss was caused by the drawer's failure to examine the statement and report the unauthorized signature or alteration [*see Basch v. Bank of America (1943) 22 Cal. 2d 316, 330-334, 139 P.2d 1* ; *Sommer v. Bank of Italy etc. Assn. (1930) 109 Cal. App. 370, 376, 293 P. 98* ; *see also § 34.39[2]*]. Although *Com. Code § 4406(d)* explicitly places the burden of proof as to causation on the bank, *Com. Code § 4406(e)* poses a modified comparative negligence standard and explicitly places the burden of proof as to the bank's lack of ordinary care in paying the check on the drawer-customer in order to preclude the availability of the defense.

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Thus, counsel should attach a copy of the check and statements and set forth facts establishing that the loss, or at least some portion of it, could have been prevented if the drawer had reported the forgery or alteration in a timely manner. In addition, the customer's duty to examine a statement or returned items and report unauthorized signatures or alterations becomes operative only if the bank sends or makes available a statement of account. Thus, counsel should also set forth facts showing that the bank has sent a statement of account or the paid items to the customer [*see* Revised California Code Comment 1 to *Com. Code § 4406*]. Moreover, because *Com. Code § 4406* poses a modified comparative negligence test, counsel may also wish to include facts showing that (1) the drawee exercised ordinary care in paying the item or (2) if the bank failed to exercise ordinary care, that failure did not contribute to the loss [*see Com. Code § 4406(e)*].

This memorandum may be combined with memoranda pertaining to the specific procedural context in which counsel wishes to establish that the drawer's failure to report the forgery or alteration bars its recovery.

[b] Alternative Versions of Commercial Code Section 4406

Paragraph A of this memorandum is based on a version of *Com. Code § 4406(a)* in effect until January 1, 2015. On that date it is superseded by a verison that is identical, with the following exceptions [*see Com. Code § 4406(h)*]:

- The requirement that a statement of account must be sufficient to allow the customer "reasonably" to identify the items paid is superseded as of January 1, 2015, by a requirement that the information must be sufficient merely to allow the customer to identify the items paid (that is, the qualifier "reasonably" is deleted).

- The rule that a statement of account provides sufficient information if an item is described by item number, amount, and date of payment is deleted as of January 1, 2015; therefore, compliance with that rule would no longer be deemed sufficient under the statute to allow the customer to identify the items paid.

[c] Related Points and Authorities

For additional memoranda opposing the contention that the drawee is liable for unauthorized payment of a check, see *§§ 34.46 -34.49, 34.51 -34.53*. §§ 34.36-34.40 set forth memoranda that the defense established by *Com. Code § 4406(a), (c),* and *(d)* is inapplicable.

[3] Discussion of Authorities

[a] Failure to Examine Statements Precludes Bank's Liability

In ***Espresso Roma Corporation v. Bank of America, N.A.*** *(2002) 100 Cal. App. 4th 525, 124 Cal. Rptr. 2d 549* , a corporation brought several causes of action against a bank based on its payment of forged checks drawn on plaintiff's account by a former employee. The trial court entered judgment in favor of the bank after it granted the bank's motion for summary judgment on the ground that plaintiff was precluded by *Com. Code § 4406(d)* and *(e)* from asserting any claims against the bank for unauthorized payment of checks drawn on the corporation's account. The court of appeal affirmed. It first noted that the forged checks were presented for payment between October 1997 and May 1999, but plaintiff did not discover or report them until May 15, 1999. To establish its prima facie case that *Com. Code § 4406(d)* applied to preclude the customer's claims, the bank presented testimony that it made monthly account statements and canceled checks available to plaintiff shortly after the closing period of each statement. The first forgery, however, was not reported until long after the statutory 30-day period had expired (*100 Cal. App. 4th 525, 529-530)* . The court of appeal next noted that once a prima facie case is established that the bank had made monthly statements available and that plaintiff failed to notify the bank within 30 days, *Com. Code § 4406(d)* applies to preclude the claim unless the customer can establish that the bank failed to exercise ordinary care in paying the item and that the failure contributed to the loss. It found that the declaration of the bank's expert, that the bank's practices and procedures were consistent with those of all other large "bulk file bookkeeping" banks in California, was sufficient to establish a prima facie case that the bank exercised ordinary care, thereby shifting the burden to plaintiff to create a triable issue of fact (*100 Cal. App. 4th 525, 530-532)* . The court of appeal concluded that the court properly granted the bank's motion for summary judgment on the ground that *Com. Code § 4406(d)* and *(e)* precluded plaintiff from asserting claims against the bank for unauthorized payment of checks drawn on its checking account, and that plaintiff failed to created a triable issue of fact as to whether the bank failed to exercise ordinary care in paying the items and that the failure contributed to the loss (*100 Cal. App. 4th 525, 535)* .

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3-34 California Points & Authorities § 34.51

§ 34.51 Opposing Contention That Drawee Is Liable to Drawer for Unauthorized Payment of Check [Com. Code § 4401]--Action Barred by One-Year Limitation [Code Civ. Proc. § 340(c); Com. Code § 4406(f)]

[1] FORM

[*The following may be included in a memorandum, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

PLAINTIFF's ACTION AGAINST DEFENDANT DRAWEE BANK FOR CHARGING HIS/HER/ITS ACCOUNT TO PAY PLAINTIFF's CHECK NUMBER _____ IS BARRED BY THE APPLICABLE ONE-YEAR STATUTE OF LIMITATION.

A. Commercial Code Limitation. Without regard to care or lack of care of either the customer or the bank, a customer who does not discover and report the customer's unauthorized signature on or any alteration on a check within one year after the statement or the checks are made available to the customer is precluded from asserting the unauthorized signature or alteration against the bank. [This one-year period begins to run with each successive check] (*Com. Code § 4406(f)*; *Edward Fineman Company v. Superior Court (1998) 66 Cal. App. 4th 1110, 1124-1125, 78 Cal. Rptr. 2d 478* ; *see Sun'n Sand, Inc. v. United California Bank (1978) 21 Cal. 3d 671, 692, 148 Cal. Rptr. 329, 582 P.2d 920* (construing prior law); *Kiernan v. Union Bank (1976) 55 Cal. App. 3d 111, 114-116, 127 Cal. Rptr. 441* (construing prior law)).

B. Limitation of Code of Civil Procedure. An action by a depositor against a bank for paying a forged or raised check, or a check that bears a forged or unauthorized endorsement, must be commenced within one year (*Code Civ. Proc. § 340(c)*; *Chatsky and Associates et al. v. Superior Court (2004) 117 Cal. App. 4th 873, 877, 880, 12 Cal. Rptr. 3d 154* (*Code Civ. Proc § 340(c)* was not repealed by *Com. Code § 4111*, which provides three-year limitation period for actions under Division 4 of Commercial Code); *Roy Supply Inc. v. Wells Fargo Bank (1995) 39 Cal. App. 4th 1051, 1074, 46 Cal. Rptr. 2d 309*).

[*Optional*] **C. When Statement Is Made Available.** The statement is made available so that the limitation period

begins to run when the bank sends the statement to the customer accompanied by items paid in good faith. A statement is sent when it is deposited in the mails with appropriate postage. [A finding that the statement was received by the customer is not necessary to support a judgment for the bank based on the running of the limitation period] (*Com. Code § 1201(b)(36)*; *Kiernan v. Union Bank (1976) 55 Cal. App. 3d 111, 114-116, 127 Cal. Rptr. 441* (construing prior law)).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a drawee bank is liable for charging the drawer's account to pay a raised or forged check, a check with an unauthorized endorsement, or a check with a forged drawer's signature when the action was commenced more than a year after the check or statement was returned to the drawer or otherwise made available to the drawer [*see Code Civ. Proc. § 340(c)*; *Com. Code § 4406(f)*; *Chatsky and Associates et al. v. Superior Court (2004) 117 Cal. App. 4th 873, 875, 880, 12 Cal. Rptr. 3d 154]* . Case authority has held that this limitation period is not applicable to actions for negligence, but is limited to actions based on breach of an implied contractual or statutory warranty [*Sun'n Sand, Inc. v. United California Bank (1978) 21 Cal. 3d 671, 698-700, 148 Cal. Rptr. 329, 582 P.2d 920* (discussed in *§ 34.51[3*][a]); *Commercial Cotton Co. v. United California Bank (1985) 163 Cal. App. 3d 511, 515, 209 Cal. Rptr. 551* (discussed in *§ 34.53[3][a]*)]. However, these holdings appear suspect in light of the 1992 revisions to the Commercial Code, which rejected a drawer's cause of action for breach of warranty [*see Com. Code §§ 3417, 4208*; Official Comment 2 to U.C.C. § 3-417 (1990); *see also § 34.151*]. One court has held that the limitation period does apply when the plaintiff alleges negligence. The court rejected the decision in *Sun'n Sand, Inc., above,* as controlling authority on that issue [*Roy Supply, Inc. v. Wells Fargo (1996) 39 Cal. App. 4th 1051, 1069-1070, 46 Cal. Rptr. 2d 309* (*see § 34.51[4*][a])]. Another court appears to have erased this distinction [*Chatsky and Associates et al. v. Superior Court (2004) 117 Cal. App. 4th 873, 875, 880, 12 Cal. Rptr. 3d 154* (claims for conversion, breach of contract, violation of Commercial Code, and unfair business practices are governed by one-year limitation period)].

Note that if the customer fails to examine his or her bank statement and notify the bank of a forged signature or alteration within a reasonable period of time, not exceeding 30 days, the bank is not liable for any unauthorized signature or alteration by the same wrongdoer on any other item paid by the bank in good faith [*Com. Code § 4406(d)(2)*]. When this rule applies, the customer may be barred from bringing an action even though it is within the one-year period noted above.

An action based on the lack of a required drawer's signature is not subject to any limitation [*Code Civ. Proc. § 348*; *see Bullis v. Security Pac. Nat. Bank (1978) 21 Cal. 3d 801, 813, 148 Cal. Rptr. 22, 582 P.2d 109* (discussed in *§ 34.32[3*][e])].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Thus, counsel should attach a copy of the check or statement and set forth facts establishing the date on which it wassent to the customer. Counsel should also establish, if applicable, plaintiff's failure to discover and report his or her unauthorized signature or any alteration on the check within one year after the above date.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to establish that the drawer's action is barred by the one-year limitation.

[b] Related Points and Authorities

For additional points and authorities opposing the contention that the drawee is liable for unauthorized payment of a check, see *§§ 34.46 -34.50, 34.52 -34.53*. For points and authorities supporting the contention that the drawee is liable

for unauthorized payment of a check, see *§§ 34.30 -34.42*.

[3] Discussion of Authorities

[a] Commercial Code Limitation

The 30-day and one-year issue-preclusion periods set forth in *Com. Code § 4406(d)(2)* and *Com. Code § 4406(f)* do not apply to a customer's failure to report unauthorized endorsements, as opposed to the customer's unauthorized signature or any alteration of the check. The current version of *Com. Code § 4406* imposes no duty on the drawer to look for unauthorized endorsements [*Com. Code § 4406*, 1990 Official UCC Comment 5]. However, the one-year limitation period of *Code Civ. Proc. § 340(c)* does apply to actions on forged or unauthorized endorsements (in addition to actions on forged signatures) [*Chatsky and Associates et al. v. Superior Court (2004) 117 Cal. App. 4th 873, 875, 877, 880, 12 Cal. Rptr. 3d 154]* .

In ***Edward Fineman Company v. Superior Court*** *(1998) 66 Cal. App. 4th 1110, 78 Cal. Rptr. 2d 478* , the owner of a payroll checking account sued a bank for breach of contract, negligence, and damages under *Com. Code § 4103*. Between 1991 and 1996, the bank paid 83 checks drawn on plaintiff's account, signed only by plaintiff's accounting manager. Under the terms of the account, withdrawals were authorized only by two signatures when one signature was the accounting manager's. The bank moved for summary adjudication with respect to the 23 checks drawn between 1991 and 1993 on the ground that the claims were barred by *Com. Code §§ 4406(f)* and *4111*. Plaintiff opposed the motion, arguing that those sections were inapplicable because they only became effective in 1993. The trial court granted the summary judgment motion and held that plaintiff's claim for the 23 1991-1993 checks were barred by *Com. Code §§ 4406(f)* and *4111*.

The court of appeal first cited *Sun'n Sand*, discussed *below*, for the proposition that each check constitutes a separate cause of action susceptible to a complete disposition if barred by affirmative defenses asserted by the bank. It held that under *Code Civ. Proc. § 437c(f)*, a party may present a motion for summary adjudication challenging a separate and distinct wrongful act even though combined with other wrongful acts alleged in the same cause of action (*66 Cal. App. 4th 1110, 1118)* . The court next addressed *Com. Code § 4406(f)* and its predecessor, former Com. Code § 4406(4), concluding that during all relevant times the substance of *Com. Code § 4406* imposed an obligation on the customer to examine monthly statements and canceled checks to discover and report any payment by the bank of any items bearing unauthorized signatures. The court stated that whether that section was applicable, let alone retroactive, depends on whether the manager's sole signature was an "unauthorized signature" pursuant to *Com. Code § 3403(b)*. The court examined the 1993 amendment to that section which added language stating that a signature is unauthorized if one of the required signatures is lacking, and reviewed its legislative history, concluding that the amendment "clarified" existing law and thus operated retroactively. The amendment implicitly abrogated the holding of *Far West Citrus Inc. v. Bank of America (1979) 91 Cal. App. 3d 913, 917, 154 Cal. Rptr. 464* , discussed in *§ 34.36*, with respect to the inapplicability of the one-year notice period of *Com. Code § 4406*. The court held that because the 23 1991-1996 checks lacked a second required signature, they fell within the classification of items that must be discovered and reported pursuant to *Com. Code § 4406(f)*, and thus plaintiff was precluded from pursuing recovery for them from the bank (*66 Cal. App. 4th 1110, 1119-1125)* . Similarly, with respect to *Com. Code § 4111*, which also became effective in 1993, the court held that the three-year statute of limitation applied retroactively to the unauthorized checks drawn on plaintiff's account during the two-year period at issue (*66 Cal. App. 4th 1110, 1125-1126)* .

Sun'n Sand, Inc. v. United California Bank *(1978) 21 Cal. 3d 671, 148 Cal. Rptr. 329, 582 P.2d 920* , was a drawer's action against the collecting bank. The facts and procedural background of *Sun'n Sand, Inc.* are set forth in *§ 34.35[3][a]*. Defendant collecting bank contended that the cause of action for breach of warranty against material alteration was barred by former Com. Code § 4406(4) (*now see Com. Code § 4406(f)*) (*21 Cal. 3d 671, 691)* . The Supreme Court held that the limitation of former Com. Code § 4406(4) barred recovery for the first eight checks because each of them was alleged to have been issued sufficiently in advance of the filing of the action to compel the

inference that it was negotiated and made available to plaintiff with an accompanying monthly statement more than one year before the commencement of the action (*21 Cal. 3d 671, 691-692)* . In reaching that conclusion, the Court first had to determine whether in a series of altered checks, a new one-year period begins to run with each successive check, or whether the preclusion extends to all checks, so that once the time bar precludes action on the first altered check, action is barred on the entire series, even those negotiated less than one year before the action is commenced. The Court noted that the preclusions of former Com. Code § 4406(2) are set forth in separate clauses: former Com. Code § 4406(2)(a) refers to unauthorized signatures and alterations on single items, and former Com. Code § 4406(2)(b) sets forth a different rule specifically applicable to repetitive forgeries or alterations. Former Com. Code § 4406(4), however, declares one rule using terms that suggest a series is to be treated no differently from the first item or single items. Because former Com. Code § 4406(4) fails to explicitly differentiate between one-time an repetitive forgeries and alterations, the Court concluded that a new one-year period begins to run with each successive check and that the cause of action for breach of warranty of material alteration based on the ninth (last) check was not barred (*21 Cal. 3d 671, 692)* .

Because *Sun'n Sand* was decided under former provisions of the Commercial Code, caution should be used when citing all or portions of the opinion. For example, the Court's holding that a drawer has standing under former Com. Code §§ 3417 and 4207 to bring an action for breach of warranty has been rejected by the 1992 amendments to those sections [*see Com. Code §§ 3417, 4208*; Official Comment 2 to U.C.C. § 3-417 (1990) (warranties are made to drawee and not to drawer)]. Thus, the Court's ruling that the one-year limitation period of *Com. Code § 4406* is limited to actions based on breach of an implied contractual or statutory warranty (*21 Cal. 3d 671, 698-700)* also appears to have been abrogated. However, the Court's reasoning with regard to its decision that the one-year period of former Com. Code § 4406(4) (*now see Com. Code § 4406(f)*) begins to run with each successive check appears to remain persuasive. Like its predecessor, the current version of *Com. Code § 4406* provides for preclusions in two separate clauses; one for unauthorized signatures or alterations on a single item [*compare* former Com. Code § 4406(2)(a) *with Com. Code § 4406(d)(1)*], and another rule for repetitive forgeries or alterations [*compare* former Com. Code § 4406(2)(b) *with Com. Code § 4406(d)(2)*]. In addition, *Com. Code 4406(f)*, like former Com. Code § 4406(4), appears to set forth one rule applicable to both one-time and repetitive forgeries or alterations.

Plaintiff drawers in ***Kiernan v. Union Bank*** *(1976) 55 Cal. App. 3d 111, 127 Cal. Rptr. 441* , sued the drawee to recover the amount of forged checks paid and charged against their account. The checks had been forged by their bookkeeper, who intercepted the statements on their return. Summary judgment was granted for defendant as to all checks paid and returned more than one year before the filing of the action. Plaintiffs appealed.

The court of appeal affirmed. The court quoted portions of former Com. Code § 4406(4) (*now see Com. Code § 4406(f)*), and said the statement is made available so that the limitation period begins to run when the bank sends it to the customer accompanied by items paid in good faith. The court cited former Com. Code § 1201(38) (*now see Com. Code § 1201(b)(36)*) for the proposition that a statement is sent when it is deposited in the mails with appropriate postage. Lack of care, or negligence, on the part of either the customer or the bank does not affect the running of the one-year limitation; it is an absolute time limit. However, for the limitation period to run, there remains the requirement that the items were paid in good faith (*55 Cal. App. 3d 111, 114)* . Here, there was no allegation or any evidence that the bank acted other than in good faith, so the grant of summary judgment was proper (*55 Cal. App. 3d 111, 114-115)* .

Plaintiffs contended, citing *Pac. Coast Cheese, Inc. v. Sec.-First Nat. Bk. (1955) 45 Cal. 2d 75, 78-79, 286 P.2d 353* (discussed in *§ 34.35[3][a]*), that defendant should have been required to prove its freedom from negligence and that plaintiffs were negligent or estopped to deny the correctness of the charges to their account (*55 Cal. App. 3d 111, 115)* . The court stated that the cited decision predated the adoption of former Com. Code § 4406(4) (*now see Com. Code § 4406(f)*) and was superseded by it. It appears that it would have been more appropriate for the court to note that there was no statute of limitation issue in *Pac. Coast Cheese*, but rather the issue of the depositor's negligence as compared with the bank's negligence in circumstances now addressed by *Com. Code § 4406(a)-(e)*.

Plaintiffs argued that the limitation period does not begin to run until the depositor actually receives the statement. The court disagreed, saying the statute runs when the statement is made available to the customer. Former Com. Code § 4406(4) (like the current version of *Com. Code § 4406(f)*) places the burden on the customer to examine the statements and that responsibility is not obviated by the fact that an employee of the customer has concealed the forgery (*55 Cal. App. 3d 111, 115)* . The bookkeeper was entrusted with reconciling the bank statements, and thus, notice of the bookkeeper's fraud was imputed to plaintiffs (*55 Cal. App. 3d 111, 116-117)* .

Plaintiffs also contended that the trial court was not justified in inferring that the May 1, 1970, statement was received by plaintiffs before May 11, 1970. The court of appeal said that inference was not necessary. It was sufficient that defendant's uncontradicted evidence established that the statement was mailed on or before May 6, 1970 (*55 Cal. App. 3d 111, 115-116)* .

[b] Limitation of Code of Civil Procedure

Chatsky and Associates et al. v. Superior Court *(2004) 117 Cal. App. 4th 873, 12 Cal. Rptr. 3d 154* clarified the relationship between the general three-year limitation period of *Com. Code § 4111* (actions to enforce an obligation, duty, or right arising under Division 4 of the Commercial Code) and the one-year limitations period of *Code Civ. Proc. § 340(c)* for an action by a depositor against a bank for the payment of a check with a forged signature or endorsement. Plaintiffs argued that because *Com. Code § 4111* was enacted later, it supplanted or implicitly repealed *Code Civ. Proc. § 340(c)*. The court held that as the more specific statute, and consistent with the one-year issue-preclusion period of *Com. Code § 4406(f)*, the one-year limitation period established by *Code Civ. Proc. § 340(c)* continues to apply to actions on forged checks.

[4] Additional Authorities

[a] Commercial Code Limitation

In *Roy Supply, Inc. v. Wells Fargo (1996) 39 Cal. App. 4th 1051, 46 Cal. Rptr. 2d 309* , bank customers filed a complaint alleging that the bank negligently maintained its records and negligently operated, managed, and controlled its check processing operations to allow checks drawn with a forged signature to be charged against the plantiffs' accounts. The bank successfully demurred on the ground that the plaintiffs' common law negligence remedy was supplanted by the remedies available in the Commercial Code. The trial court dismissed the complaint, effectively terminating the action, and the plaintiffs appealed. Because the action was filed in 1992 with respect to checks paid in 1991 or earlier, the court of appeal examined former Com. Code § 4406(4), the predecessor to *Com. Code § 4406(f)*, which had imposed a duty on a customer to act promptly in discovering and reporting forgeries and alterations. The court found that the Code provision was unambiguous, covered the allegations in the complaint, and displaced common law negligence principles with respect to payment of forged checks by a bank. The court rejected the plaintiffs' assertions that the decision in *Sun'n Sand, Inc. v. United California Bank (1978) 21 Cal. 3d 671, 148 Cal. Rptr. 329, 582 P.2d 920* (discussed in *§ 34.51[3][a]*.) established that the former section had no application when a plaintiff alleged negligence. The court stated that the lead opinion was not even precedential authority; moreover, it did not involve a dispute between a paying bank and its customer (*39 Cal. App. 4th 1051, 1067-1068)* . The court declined to disregard the clear and unambiguous language of the former section (*39 Cal. App. 4th 1051, 1069-1070)* .

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3-34 California Points & Authorities § 34.52

§ 34.52 Opposing Contention That Drawee Is Liable to Drawer for Unauthorized Payment of Check [Com. Code § 4401]--Drawer's Failure to Exercise Ordinary Care Contributed to Alteration or Forgery [Com. Code § 3406]

[1] FORM

[*The following may be included in a memorandum, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

PLAINTIFF's OWN FAILURE TO EXERCISE ORDINARY CARE CONTRIBUTED TO THE _____ [ALTERATION *or* FORGED SIGNATURE] AND PRECLUDES THE IMPOSITION OF LIABILITY ON DEFENDANT DRAWEE BANK FOR CHARGING PLAINTIFF's ACCOUNT TO PAY HIS/HER/ITS CHECK NUMBER _____.

A. Contributory Negligence. A person whose failure to exercise ordinary care contributes to an alteration of an instrument or to the making of a forged signature on an instrument is precluded from asserting the alteration or the forgery against a person who, in good faith, pays the instrument or takes it for value or for collection. The burden of proving failure to exercise ordinary care is on the person asserting the preclusion (*Com. Code § 3406(a), (c)*).

B. Ordinary Care. [*See § 34.39[1], Paragraph C.*]

[2] Comments

[a] Use of Form

These points and authorities are for use in opposing the contention that a drawee bank is liable for charging the drawer's account to pay an altered check or a check with a forged drawer's signature when the drawee paid in good faith and the drawer's own negligence contributed to the loss. This defense may also be used by a person who takes the instrument for value or collection [*see Com. Code § 3406(a)*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law

stated. Thus, counsel should describe the checks and the manner in which the drawer's negligence contributed to the loss. Counsel should also set forth reasonable commercial standards in paying checks as this is relevant to whether there has been a failure to exercise ordinary care [*see* Official Comment 1 to U.C.C. § 3-406 (1990)]. In addition, because *Com. Code § 3406(b)* adopts a comparative negligence test [*see § 34.52[2*][b]; *see also § 34.42*], counsel should set forth facts showing that the drawee was not negligent in paying the check.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to establish that the drawer's negligence contributed to the alteration or unauthorized signature.

This form may be used with distinguishing facts to support the contention that the drawee is liable for paying the forged or altered check [*see, e.g., Joffe v. United California Bank (1983) 141 Cal. App. 3d 541, 557, 190 Cal. Rptr. 443* (discussed in *§ 34.91[3*][a])].

[b] Comparative Negligence

Com. Code § 3406 differs from prior law in that it adopts a concept of comparative negligence. If the person precluded under *Com. Code § 3406(a)* proves that the person asserting the preclusion failed to exercise ordinary care in paying or taking the instrument and that failure contributed to the loss, the loss is allocated between the two parties according to the extent to which the failure of each to exercise ordinary care contributed to the loss [*Com. Code § 3406(b)*; *see Com. Code § 3406(c)* (burden of proof on person precluded)].

[c] Related Points and Authorities

For additional points and authorities opposing the contention that the drawee is liable for unauthorized payment of a check, see *§§ 34.46 -34.51, 34.53*. For points and authorities supporting the contention that the drawee is liable for unauthorized payment of a check, see *§§ 34.30 -34.42*. The points and *authorities in § 34.42* support the contention that the drawer's contributory negligence is inapplicable because the drawee was also negligent and thus the loss should be allocated based on the comparative negligence of both parties.

For authorities holding related defenses inapplicable either because of the drawee's negligence or because of the lack of causal connection between the drawer's negligence and the loss, see *§ 34.39*.

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3-34 California Points & Authorities § 34.53

§ 34.53 Opposing Contention That Drawee Is Liable to Drawer in Negligence for Unauthorized Payment of Check--Com. Code § 4401(a) Displaces Common-Law Negligence

[1] FORM

[*The following may be included in a memorandum, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT DRAWEE BANK IS NOT LIABLE TO PLAINTIFF FOR NEGLIGENCE FOR CHARGING PLAINTIFF's ACCOUNT TO PAY A CHECK THAT WAS NOT PROPERLY PAYABLE BECAUSE THE STANDARD OF CARE REQUIRED BY COMMERCIAL CODE *SECTION 4401(a) HAS* DISPLACED COMMON-LAW NEGLIGENCE WITH REGARD TO A DRAWEE's LIABILITY FOR IMPROPER OR UNAUTHORIZED CHARGES TO A DRAWER's ACCOUNT.

Negligence Displaced. A drawer may not maintain a negligence cause of action against the drawee based on an improper charge to the account on which the item was drawn because *Commercial Code Section 4401(a)* has displaced tort principles with regard to a drawee bank's liability to its customer for improper charges to the customer's account (*Joffe v. United California Bank (1983) 141 Cal. App. 3d 541, 557-558, 190 Cal. Rptr. 443* ; *but see Commercial Cotton Co. v. United California Bank (1985) 163 Cal. App. 3d 511, 514-515, 209 Cal. Rptr. 551*).

[2] Comments

CAUTION:

The authority used in this form is directly opposed by *Commercial Cotton Co. v. United California Bank (1985) 163 Cal. App. 3d 511, 209 Cal. Rptr. 551* , which actually only considered the statute of limitations applicable to a drawer's negligence cause of action after the drawee admitted its negligence in paying an unauthorized check.

[a] Use of Form

These points and authorities are for use in opposing the contention that a drawee bank is liable in negligence to the drawer for charging the account to pay a check that was not properly payable.

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Thus, counsel should describe the defect in the check that renders it not properly payable and thus within the purview of *Com. Code § 4401(a)*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that *Com. Code § 4401(a)* has replaced common law negligence in the drawer-drawee relationship with regard to charges that may properly be made against the drawer's account.

[b] Related Points and Authorities

For additional points and authorities opposing the contention that the drawee is liable for unauthorized payment of a check, see *§§ 34.46 -34.52*. For additional points and authorities generally supporting the contention that the drawee is liable for unauthorized payment of a check, see *§§ 34.30 -34.42*.

[3] Discussion of Authorities

[a] Negligence Displaced

Plaintiffs in ***Joffe v. United California Bank*** *(1983) 141 Cal. App. 3d 541, 190 Cal. Rptr. 443* , took a check from their savings and loan association, evidencing a withdrawal from their savings account, drawn on the savings association's account at UCB and payable to "Continental Finance Systems--Wells Fargo Escrow Trust Account." The check was deposited at Continental's account at Bank of America with the stamped endorsement "Pay to the order of Bank of America NT and SA For Deposit Only Continental Financial Systems 02137-07857." The savings association-drawer assigned its rights and causes of action to plaintiffs. Plaintiffs sued both banks for negligence, Bank of America for breach of warranty of good title under former Com. Code § 4207(1)(a), and UCB for payment on improper endorsement in breach of its agreement with the savings association to honor only properly endorsed checks. The trial court sustained demurrers to all causes of action against both banks and ordered the actions to be dismissed. Plaintiffs appealed.

The court of appeal reversed the dismissal order for all causes of action except the negligence action against UCB. In regard to that cause of action, the court said that while UCB clearly must abide by the obligations imposed under the common law and under the Commercial Code, the provisions of former Com. Code § 4401(1) (*now see Com. Code § 4401(a)*) preclude recovery under a negligence theory in this situation. Former Com. Code § 4401(1) (as does the current version in *Com. Code § 4401(a)*) permits a drawee to charge a depositor's account for "properly payable" items drawn from the account. Thus, if the endorsement was authorized and the check was properly payable, UCB comes within the protection of the statutes. Similarly, if the endorsement was not authorized and the check was not properly payable, plaintiffs may recover under former Com. Code § 4401(1) (*now see Com. Code § 4401(a)*, which also added a definition of "properly payable"). The court observed that the principles of law and equity supplement the Commercial Code unless displaced by the particular provisions of the Code, and concluded that the principles of tort law are displaced by the particular provisions of the Commercial Code in this instance (*141 Cal. App. 3d 541, 557-558)* .

It should be noted that the holding in *Joffe* concerning the displacement of negligence is in apparent conflict with the holding in ***Commercial Cotton Co. v. United California Bank*** *(1985) 163 Cal. App. 3d 511, 209 Cal. Rptr. 551* . Plaintiff-drawer in *Commercial Cotton Co.* maintained a commercial checking account at defendant bank. Its principal was the only authorized signatory on the account. In 1972, the principal's wife reported a series of checks missing and received replacement checks of a different style and color. In 1976, one of the missing checks was presented to and paid by defendant. It was for $4,000 and had two unauthorized signatures. The principal never looked at the statement and did not discover the improper payment until 1978, when he reported it to defendant. Defendant refused reimbursement

on the ground that the claim was barred by the one-year limitation of former Code Civ. Proc. § 340(3) (*now see Code Civ. Proc. § 335.1*, allowing two years) and former Com. Code § 4406(4) (*now see Com. Code § 4406(f)*). Plaintiff sued for negligence, intentional infliction of emotional distress, and breach of the covenant of good faith and fair dealing inherent in the contractual relationship of the parties. The trial court awarded plaintiff $4,000 for negligence, $20,000 for intentional infliction of emotional distress, and $100,000 for breach of the covenant of good faith and fair dealing. Defendant appealed.

The court of appeal reversed the award for intentional infliction of emotional distress and affirmed the remainder of the judgment. Petitions for rehearing and for hearing in the Supreme Court were denied (*163 Cal. App. 3d 511, 518)* . Defendant admitted its negligence (*163 Cal. App. 3d 511, 514, 515 n.1*). The opinion did not discuss the standard imposed by *Com. Code § 4401* or by *Joffe v. United California Bank (1983) 141 Cal. App. 3d 541, 557-558, 190 Cal. Rptr. 443* (discussed *above*), which held that former Com. Code § 4401(1) (*now see Com. Code § 4401(a)*) has displaced negligence in regard to the drawee's duty only to charge the drawer's account for checks that are properly payable. The court in *Commercial Cotton Co.* characterized the action as one for negligence because the customer alleged a breach of duty (*163 Cal. App. 3d 511, 515)* .

Commenting on an internal memorandum of defendant's staff counsel that suggested that defendant might be able to diminish its liability by proving comparative negligence on the part of plaintiff, the court said that the doctrine was factually inapplicable here. Although the claim that plaintiff was negligent in failing to notify the bank of the defective check was not presented at trial, the court of appeal said any delay was irrelevant to the issue of comparative negligence. The delay in reporting the loss had nothing to do with the bank's negligent payment of the check and did not contribute to the transaction (*163 Cal. App. 3d 511, 515)* . Plaintiff's after-the-fact conduct did not contribute to defendant's negligence in making the unauthorized payment (*163 Cal. App. 3d 511, 516)* .

Note that the same court that issued *Commercial Cotton Co.* has reevaluated its analysis of the bank-depositor relationship and the cause of action for tort damages for bad-faith breach of the implied covenant of good faith and fair dealing. In *Copesky v. Superior Court (1991) 229 Cal. App. 3d 678, 688-694, 280 Cal. Rptr. 338* , the court determined that the cause of action for bad faith is no longer viable after *Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 254 Cal. Rptr. 211, 765 P.2d 373* .

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3-34 California Points & Authorities § 34.54

§ 34.54 Opposing Contention That Drawee Is Liable to Drawer for Wrongful Dishonor of Check [Com. Code § 4402]--Bank May Dishonor Check That Would Create Overdraft

[1] FORM

[*The following may be included in a memorandum, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT DRAWEE BANK IS NOT LIABLE TO PLAINTIFF FOR WRONGFULLY REFUSING TO PAY PLAINTIFF's CHECK NUMBER _____ BECAUSE PAYMENT OF THAT CHECK WOULD HAVE CREATED AN OVERDRAFT.

A. Drawee Not Required to Pay Overdraft. A bank may dishonor a check that would create an overdraft unless it has agreed to pay the overdraft (Com. Code § 4402(a); *see Torrance N. Bank v. Enesco F. Credit Union (1955) 134 Cal. App. 2d 316, 320-321, 285 P.2d 737* ; *Bachtel v. Bank of America (1954) 127 Cal. App. 2d 728, 731-732, 274 P.2d 421*).

[*Optional*] **B. Officer Had No Authority to Overdraw.** A drawee bank is not required to honor overdraft checks of a corporate drawer unless the particular corporate officer signing the checks has authority to overdraw the corporate account or to borrow from the bank (*Torrance N. Bank v. Enesco F. Credit Union (1955) 134 Cal. App. 2d 316, 321-328, 285 P.2d 737*).

[2] Comments

CAUTION:

The conduct of the parties, any oral agreement, or the particular signature card or overdraft agreement between the drawer and drawee may render the authorities mentioned in this form inapplicable [*see Com. Code § 4402(a)* and §§ 34.43, 34.44]

[a] Use of Form

These points and authorities are for use in opposing the contention that a drawee bank is liable for wrongful dishonor when the check's payment would create an overdraft.

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Therefore, counsel should set forth facts describing the account, the balance in the account, and the check in question and establishing that no understanding, prior conduct, or particular agreement of the parties required payment of overdraft checks or reasonably could have lead the drawer to believe the overdraft check would be paid.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to address the substantive issue of the drawee's liability.

[b] Related Points and Authorities

The points and authorities in *§§ 34.55* and *34.56* oppose the contention that a drawee is liable for wrongful dishonor for reasons other that the fact that the check would create an overdraft. The points and authorities in *§ 34.49* may be used to oppose the contention that failure to pay a check amounted to wrongful dishonor when the check involved was more than six months old.

The points and authorities in *§§ 34.43* and *34.44* support the contention that a drawee is liable for wrongful dishonor for failure to pay a check, even one that would create an overdraft.

[3] Discussion of Authorities

[a] Drawee Not Required to Pay Overdraft

In ***Torrance N. Bank v. Enesco F. Credit Union*** *(1955) 134 Cal. App. 2d 316, 285 P.2d 737* , the court of appeal reversed the judgment for the drawee bank awarding it the amount of overdrafts paid by it on the ground that the depositor's officer who wrote the overdraft checks was authorized to sign corporate checks, but not to create overdrafts. The court said that ordinarily, a drawee is not required to honor a check for an amount in excess of the deposit against which it is drawn (*134 Cal. App. 2d 316, 320-321)* . The court reviewed the signature card and corporate resolution that had been provided to the bank and said they were at once an authorization and a limitation (*134 Cal. App. 2d 316, 321)* . The proceeds of the overdraft checks were used in the signatory officer's own business, but the decision was based on the fact that that officer had no actual or ostensible authority to borrow from the bank or to create overdrafts, although the officer was authorized to draw checks for any amounts less than or up to the amount of the deposit (*134 Cal. App. 2d 316, 321-328)* .

Plaintiff in ***Bachtel v. Bank of America*** *(1954) 127 Cal. App. 2d 728, 274 P.2d 421* , sole owner of an automobile dealership, wrote checks for $2,253 and $2,045 against his account on May 10, 1951. They were both payable to the creditor that extended all plaintiff's inventory financing. The checks did not arrive for processing at defendant until 8:30 a.m. on Tuesday, May 15. Around noon that day, plaintiff went to defendant bank and inquired about his account balance. He was told it was slightly in excess of $5,000. He did not inquire whether the two checks in question had been processed, but withdrew $4,300. When the checks were processed that afternoon, defendant called plaintiff and told him the $4,300 would have to be returned if it was going to pay the checks. Plaintiff said he would return the money, but never did. The checks were returned unpaid. The creditor instituted an action against plaintiff in which judgment was entered against plaintiff. In plaintiff's action against the bank based on failure to pay the checks, plaintiff sought damages for loss of the business on the ground that the creditor's suit was a result of the dishonor of the two checks and that the creditor's suit caused him to lose his entire business. The jury returned a $20,000 verdict in plaintiff's favor, but judgment notwithstanding the verdict was entered for defendant. Plaintiff appealed.

The court of appeal affirmed. The only issue on appeal was whether there was sufficient evidence to sustain the jury's verdict. The court said there was not, adding that a depositor's own records are supposed to show the status of his or her account and that it was plaintiff's fault that the checks were returned (*127 Cal. App. 2d 728, 732)* .

[b] Officer Had No Authority to Overdraw

Torrance N. Bank v. Enesco F. Credit Union *(1955) 134 Cal. App. 2d 316, 285 P.2d 737* , is discussed in *§ 34.54[3][a]*.

[4] Additional Authorities

[a] Drawee Not Required to Pay Overdraft

Perdue v. Crocker National Bank (1985) 38 Cal. 3d 913, 216 Cal. Rptr. 345, 702 P.2d 503 , *Shapiro v. United California Bank (1982) 133 Cal. App. 3d 256, 184 Cal. Rptr. 34* , and *Hoffman v. Security Pacific Nat. Bank (1981) 121 Cal. App. 3d 964, 176 Cal. Rptr. 14* (discussed in *§ 34.44[3][a]*), are also authorities for the contention that ordinarily the drawee is not required to pay checks that would create overdrafts.

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3-34 California Points & Authorities § 34.55

§ 34.55 Opposing Contention That Drawee Is Liable to Drawer for Wrongful Dishonor of Check [Com. Code § 4402]--Pleading Insufficient

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

PLAINTIFF HAS NOT STATED A CAUSE OF ACTION AGAINST DEFENDANT DRAWEE BANK FOR WRONGFULLY REFUSING TO PAY PLAINTIFF's CHECK NUMBER _____.

A. Cause of Action for Wrongful Dishonor. [*See § 34.43[1], Paragraph A.*]

B. Description of Check Insufficient. In a complaint for damages for wrongful dishonor of a check, when the check is not pleaded verbatim, the complaint must show (1) that the check was drawn in the depositor's name as his or her name appears of record at the drawee bank, (2) the branch on which the check was drawn, and (3) that presentment, or any inquiry that provided the basis for waiver of presentment, was made to the branch at which the plaintiff's account was maintained (*Allen v. Bank of America (1943) 58 Cal. App. 2d 124, 130, 136 P.2d 345*).

[2] Comments

[a] Use of Form

These points and authorities are for use in opposing the contention that a drawee bank is liable for wrongful dishonor when the pleading has not established all necessary elements of the cause of action or characteristics of the check in question.

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Thus, counsel should point out the elements or characteristics that were not pleaded.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to address the failure to establish the cause of action against the drawee.

[b] Related Points and Authorities

§ 34.54 opposes the contention that a drawee is liable for wrongful dishonor when the check's payment would create an overdraft. § 34.56 opposes the contention that a drawee is liable for wrongful dishonor when the drawee has conflicting instructions from joint signatories. § 34.78 and Ch. 166, *Negotiable Instruments* set forth parts of *Com. Code § 3502* relating to dishonor.

The points and authorities set out in *§§ 34.43* and *34.44* support the contention that a drawee is liable for wrongful dishonor for failure to pay a check, including an overdraft check.

[3] Discussion of Authorities

[a] Description of Check Insufficient

The facts and procedural background of ***Allen v. Bank of America*** *(1943) 58 Cal. App. 2d 124, 136 P.2d 345* , and the portions of the opinion relating to the elements of the cause of action and when presentment may be waived, are discussed in *§ 34.43[3][a]*. After deciding that the failure to allege presentment was not fatal because facts establishing the drawee's waiver of presentment and dishonor were pleaded, the court of appeal held the demurrer should have been sustained, albeit with leave to amend, because plaintiff had neglected to allege where and at which branch of defendant the check was payable and that plaintiff's account was in the same name as that used in the telegram. When the check is not pleaded verbatim, the complaint must show (1) that the check was drawn in the depositor's name as his or her name appears of record at the drawee bank; (2) the branch on which the check was drawn; and (3) that presentment, or any inquiry that provided the basis for waiver of presentment, was made to the branch at which the plaintiff's account was maintained. The court was satisfied that the hotel's status as holder was sufficiently pleaded (*58 Cal. App. 2d 124, 130)* .

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3-34 California Points & Authorities § 34.56

§ 34.56 Opposing Contention That Drawee Is Liable to Drawer for Wrongful Dishonor of Check [Com. Code § 4402]--Conflicting Instructions From Account Signatories [Fin. Code § 953]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT DRAWEE BANK IS NOT LIABLE FOR REFUSING TO PAY PLAINTIFF's CHECK NUMBER _____ BECAUSE, AT THE TIME THAT CHECK WAS PRESENTED FOR PAYMENT, DEFENDANT HAD RECEIVED CONFLICTING INSTRUCTIONS FROM THOSE AUTHORIZED TO MAKE WITHDRAWALS FROM THE ACCOUNT ON WHICH IT WAS DRAWN.

A. Signature Card Contract. [*See § 34.30[1], Paragraph E.*]

B. Cause of Action for Wrongful Dishonor. [*See § 34.43[1], Paragraph A.*]

[*Optional*] **C. Drawee's Right to Assume Signatory's Authority.** When the depositor of a commercial or savings account has authorized any person to make withdrawals from the account, the bank, in the absence of written notice otherwise, may assume that any check, receipt, or order of withdrawal drawn by that person in the authorized form or manner, including checks drawn to his or her personal order and withdrawal orders payable to him or her personally, was drawn for a purpose authorized by the depositor and within the scope of the authority conferred on that person (*Fin. Code § 953*).

D. Conflicting Instructions. A signature card provision that allows the drawee, if given conflicting demands by the authorized signators on an account, to withhold payment from the account pending joint order or receipt of all parties insulates the drawee from liability for wrongful dishonor at a time when it receives conflicting demands [and the signatories refuse the drawee's offer to release all funds in the account to all signers if they would receive them together] (*AARTS Productions, Inc. v. Crocker National Bank (1986) 179 Cal. App. 3d 1061, 1067-1069, 225 Cal. Rptr. 203*).

[2] Comments

CAUTION:
The particular signature card agreement between the drawer and drawee may render this authorities inapplicable.

[a] Use of Form

These points and authorities are for use in opposing the contention that a drawee bank is liable for wrongful dishonor when the drawee refused to honor the check in reliance on a signature card provision that allowed it to withhold payment when it had received conflicting instructions from authorized signatories on the account.

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Thus, counsel should set forth the relevant signature card provisions and the conflicting demands.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to establish that the drawee is not liable for wrongful dishonor.

[b] Related Points and Authorities

The points and authorities set out in *§§ 34.43* and *34.44* support the contention that a drawee is liable for wrongful dishonor for failure to pay a check, including an overdraft check. § 34.54 opposes the contention that a drawee is liable for wrongful dishonor when the check's payment would create an overdraft. § 34.55 opposes the contention that a drawee is liable for wrongful dishonor when all elements necessary to establish liability have not been pleaded.

[3] Discussion of Authorities

[a] Conflicting Instructions

Plaintiff in ***AARTS Productions, Inc. v. Crocker National Bank*** *(1986) 179 Cal. App. 3d 1061, 225 Cal. Rptr. 203* , was an unincorporated association. When the checks were dishonored, there were four authorized signatories on the account. The signature card agreement provided in relevant part that defendant "may ..... (c) if given conflicting certifications or demands, either deposit the balance in court or withhold payment from the account pending the joint order or receipt of all parties or an appropriate court order determining those authorized to sign ..... " (*179 Cal. App. 3d 1061, 1066)* . One of the signatories, plaintiff's treasurer, wrote defendant requesting that no checks be honored because the checkbook had been stolen. The three other signatories told defendant the checkbook had not been stolen and demanded that defendant honor checks drawn on the account. A letter to defendant from the treasurer's attorney repeated the instruction not to honor checks and mentioned pending litigation involving the account. Defendant offered to release all funds to all signers if they would receive them together. All but the treasurer refused this offer. Defendant filed an action in interpleader and deposited the funds with the court. Plaintiff sued for wrongful dishonor, conversion, and breach of the covenant of good faith and fair dealing. The trial court entered summary judgment for defendant. Plaintiff appealed.

The court of appeal affirmed. The only issue on appeal was whether the dishonor was wrongful. Defendant contended that the signature card agreement authorized it to withhold payment pending a court order or joint order of the signatories. Plaintiff contended that the signature card agreement had to be read in the light of relevant Financial Code provisions, particularly *Fin. Code §§ 952* and *953*. Plaintiff contended that *Fin. Code § 953* (set forth in Paragraph C) allowed it to assume that the checks would be paid and that defendant should have assumed the signatures of the other three were valid. The court agreed with defendant, that the letters defendant had received were "written notice otherwise" and allowed it to question the ostensible authority of the presenter of a check or withdrawal demand (*179 Cal. App. 3d 1061, 1067)* .

Plaintiff also contended that *Fin. Code § 952* required defendant to ignore the letters from the treasurer and the treasurer's attorney. *Fin. Code § 952* provides that a bank is required to honor checks notwithstanding its receipt of an adverse claim to a deposit, unless the notice of adverse claim is in the form of an affidavit as provided in *Fin. Code § 952(a)* or a restraining order procured and served in accordance with *Fin. Code § 952(b)* (*179 Cal. App. 3d 1061, 1067-1068)* . The court found no California case, but noted authorities from states with similar statutes that were unanimous in holding that an account holder is not an adverse claimant as to the other signatories (*179 Cal. App. 3d 1061, 1068-1069)* . The purpose of *Fin. Code § 952* is to protect banks from getting caught in a crossfire between its depositors and strangers claiming entitlement to accounts. The court held *Fin. Code § 952* was inapplicable because there was no comparable need for a statute to regulate situations of conflicting demands between joint account holders because those could be provided for by the account agreement (*179 Cal. App. 3d 1061, 1069)* .

The application of *Fin. Code § 952* is not limited by any provisions in the Multiple Party Accounts Law [*Fin. Code § 952(d)*; *see Prob. Code § 5100 et seq.*].

[4] Additional Authorities

[a] Fin. Code §§ 952, 953

In *Chazen v. Centennial Bank (1998) 61 Cal. App. 4th 532, 71 Cal. Rptr. 2d 462* , mortgage purchasers sought to hold a bank liable for the actions of a mortgage loan broker who withdrew funds from trust accounts he opened with the bank for deposit of funds collected on behalf of the purchasers. The court of appeal found that *Fin. Code §§ 952, 953* codify the well-established principle that a bank has no duty to monitor trust accounts for breaches of fiduciary duty. Specifically, a bank has no duty to prevent commingling of assets in fiduciary accounts, monitor fiduciary accounts for irregular transactions, prevent improper disbursements from accounts, or conduct investigation of possible misappropriation of funds (*61 Cal. App. 4th 532, 541)* .

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3-34 California Points & Authorities § 34.57

§ 34.57 Opposing Contention That Drawee Is Liable to Drawer for Payment of Check in Disregard of Stop Payment Order [Com. Code § 4403]--Stop Payment Order Received Too Late [Com. Code §§ 4105(3), 4108, 4302(a), 4303]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT DRAWEE BANK IS NOT LIABLE TO PLAINTIFF FOR PAYING PLAINTIFF's CHECK NUMBER _____ AND CHARGING PLAINTIFF's ACCOUNT FOR THAT PAYMENT AFTER HAVING RECEIVED A STOP PAYMENT ORDER BECAUSE THE STOP PAYMENT NOTICE ARRIVED TOO LATE.

A. Stop Payment Order. A customer or any person authorized to draw on the account if there is more than one person may stop payment of any item drawn on the customer's account by an order to the bank describing the item or account with reasonable certainty received at a time and in a manner that affords the bank a reasonable opportunity to act on it before any action by the bank with regard to the item described in *Commercial Code Section 4303* (*Com. Code § 4403(a)*).

B. Order Too Late. Any _____ [knowledge received by *or* notice received by *or* stop payment order received by *or* legal process served on *or* setoff exercised by] a payor bank comes too late to terminate, suspend, or modify the bank's right or duty to pay an item or to charge its customer's account for the item if the _____ [knowledge *or* notice *or* stop payment order *or* legal process] is received or served and a reasonable time for the bank to act on it expires [or the setoff is exercised] after the earliest of the following:

(1) The bank accepts or certifies the item (*Com. Code § 4303(a)(1)*; *see Umbsen v. Crocker First Nat. Bank (1949) 33 Cal. 2d 599, 601-602, 203 P.2d 752* (certified check)).

(2) The bank pays the item in cash (*Com. Code § 4303(a)(2)*).

(3) The bank settles for the item without having a right to revoke the settlement under statute, clearinghouse rule, or agreement (*Com. Code § 4303(a)(3)*).

(4) The bank becomes accountable for the amount of the item under *Commercial Code Section 4302* dealing with the payor bank's responsibility for late return of items (*Com. Code § 4303(a)(4)*).

(5) With regard to checks, a cutoff hour no earlier than one hour after the opening of the next banking day after the banking day on which the bank received the check and no later than the close of that next banking day or, if no cutoff hour is fixed, the close of the next banking day after the banking day on which the bank received the check (*Com. Code § 4303(a)(5)*).

[*Optional*] **C. Payor Defined.** A "payor bank" is a bank that is the drawee of a draft (*Com. Code § 4105(3)*).

[*Optional*] **D. Cutoff Hour.** For the purpose of allowing time to process items, prove balances, and make the necessary entries on its books to determine its position for the day, a bank may fix an afternoon hour of 2 P.M. or later as a cutoff hour for the handling of money and items and the making of entries on its books. An item or deposit of money received on any day after a cutoff hour or after the close of the banking day may be treated as being received at the opening of the next banking day (*Com. Code § 4108*).

[*Optional*] **E. Payor Bank's Responsibility for Late Return of Item.** If an item is presented to and received by a payor bank, the bank is accountable for the amount of either (*Com. Code § 4302(a)*):

(1) A demand item, other than a documentary draft, whether properly payable or not, if the bank, in any case in which it is not also the depositary bank, retains the item beyond midnight of the banking day of receipt without settling for it or, whether or not it is also the depositary bank, does not pay or return the item or send notice of dishonor until after its midnight deadline.

(2) Any other properly payable item unless, within the time allowed for acceptance or payment of that item, the bank either accepts or pays the item or returns it and accompanying documents.

[*Optional*] **F. Drawee's Order of Processing.** Subject to *Commercial Code Section 4303(a)*, items may be accepted, paid, certified, or charged to the indicated account of its customer in any order (*Com. Code § 4303(b)*).

[2] Comments

[a] Use of Form

These points and authorities are for use in opposing the contention that a drawee bank is liable for failing to honor a stop payment order when the order was received too late [*see Com. Code §§ 4303, 4403*] *Com. Code § 4403*, the basic provision setting forth the drawer's right to stop payment (Paragraph A), provides that the stop payment order must be received in time for the drawee to have a reasonable opportunity to act on it before any action by the bank with regard to the item described in *Com. Code § 4303* (Paragraph B). Optional Paragraphs C-F set forth other code sections that may be applicable when applying the rules set forth in *Com. Code § 4303* and need only be used when that aspect of settlement is at issue.

To protect personal privacy and other legitimate interests, parties and their attorneys must not include financial account numbers, or must redact such numbers when inclusion is necessary, in all pleadings and other papers filed in the court's public file, whether filed in paper or electronic form, unless otherwise provided by law or ordered by the court [*Cal. Rules of Ct., Rule 1.20(b)*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Thus, counsel should set forth the facts establishing the drawee's reasonable efforts and the intervening notice, stop payment order, process, knowledge, or settlement.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to establish that the drawee is not liable for failing to honor the stop payment order.

[b] Related Points and Authorities

Although generally the points and authorities in *§ 34.45* support the contention that the drawee is liable for failing to honor a stop payment order, Optional Paragraph E in § 34.45 may be used to oppose the contention that the drawee is liable for failing to honor a written stop payment order if the check was paid more than six months after receiving the order and the order was not renewed [*see Com. Code § 4403(b)*]. The points and authorities in *§ 34.58* may be used to oppose the contention that the drawee is liable for failure to honor a stop payment order on the ground that the drawee is entitled to be subrogated to the rights of another party to the check.

[3] Discussion of Authorities

[a] Order Too Late

Both certified checks and cashier's checks that have been properly issued and delivered to the payee fall within the purview of *Com. Code § 4303(a)(1)*. Certified checks are specifically mentioned. Cashier's checks are considered accepted at the time they are issued [*see Kaufman v. Chase Manhattan Bank, National Ass'n (S.D.N.Y. 1973) 370 F. Supp. 276, 278* (applying former Com. Code § 3410(1); *now see Com. Code § 3409*, which is *set forth in § 34.49*)].

Umbsen v. Crocker First Nat. Bank *(1949) 33 Cal. 2d 599, 203 P.2d 752* , is discussed in *§ 34.49[3][a]*.

[4] Additional Authorities

[a] Order Too Late

In *Wright v. Bank of America (1959) 176 Cal. App. 2d 176, 1 Cal. Rptr. 202* , drawers sued the drawee bank for wrongfully paying a postdated check. The court of appeal ultimately held that drawers were estopped to assert the drawee's liability because they were negligent in signing blank checks for their officer manager (*176 Cal. App. 2d 176, 179-180)* . The parties also addressed the validity and effect of an oral stop payment order given on May 9. The court noted that the account statement in evidence showed that the check was paid on May 6, and said further discussion of the validity and consequences of the order was inappropriate (*176 Cal. App. 2d 176, 182)* .

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Volume 3 Chapters 34-39 CHECKS AND BANKS---to---CIVIL SERVICE
CHAPTER 34 CHECKS AND BANKS
PART II. FORMS
A. Drawee Bank's Liability To Drawer

3-34 California Points & Authorities § 34.58

§ 34.58 Opposing Contention That Drawee Is Liable to Drawer for Payment of Check in Disregard of Stop Payment Order or After Account Has Been Closed [Com. Code § 4403]--Drawee's Subrogation Rights [Com. Code § 4407]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT DRAWEE BANK IS NOT LIABLE TO PLAINTIFF FOR PAYING PLAINTIFF's CHECK NUMBER _____ AND CHARGING PLAINTIFF's ACCOUNT FOR THAT PAYMENT AFTER _____ [HAVING RECEIVED A STOP PAYMENT ORDER *or* THE ACCOUNT WAS CLOSED] BECAUSE DEFENDANT IS ENTITLED TO BE SUBROGATED TO THE RIGHTS OF _____ [*name and status of party to whom defendant claims right to be subrogated*].

A. Drawee's Liability for Disregarding Customer's Order to Stop Payment or Close Account. [*See § 34.45[1], Paragraph B.*]

B. Drawee's Right of Subrogation. If a payor bank has paid a check _____ [over the order of the drawer or maker to stop payment *or* after an account has been closed] or otherwise under circumstances giving a basis for objection by the drawer or maker, to prevent unjust enrichment and only to the extent necessary to prevent loss to the bank by reason of its payment of the check, the payor bank is subrogated to the rights of all of the following: (1) any holder in due course of the check against the drawer or maker; (2) the payee or any other holder of the item against the drawer or maker either on the check or under the transaction out of which the check arose; and (3) the drawer or maker against the payee or any other holder of the check with regard to the transaction out of which the check arose (*Com. Code § 4407*).

[2] Comments

[a] Use of Form

These points and authorities are for use in opposing the contention that a drawee bank is liable for failing to honor a stop payment order or paying an item after an account has been closed on the ground that the drawee is entitled to be subrogated to the rights of another party to the check, most likely the payee or the collecting bank [*see Com. Code § 4407*; *see also Bank of Costa Mesa v. Losack (1977) 74 Cal. App. 3d 287, 293-294, 141 Cal. Rptr. 550* (construing prior law)].

Com. Code § 4403(c) (*set forth in § 34.45*, Paragraph B) requires the drawer to establish the fact and amount of loss as a result of the drawee's failure to honor an order to stop payment or close the account. The difficulty of doing this when the drawer remains liable to some other party on the check has not been the subject of any California cases, but is discussed in Bender's U.C.C. Service, Commercial Paper, § 14.10[4] (Matthew Bender) [*see also Swiss Credit Bank v. Balink (10th Cir. 1980) 614 F.2d 1269, 1271-1272* (drawee recredited drawer's account and recovered from payee under subrogation theory; underlying claim had been compromised and settled); *Universal C.I.T. Credit Corp. v. Guaranty Bank & Tr. Co. (D. Mass. 1958) 161 F. Supp. 790, 792, 794-795* (drawer denied recovery from drawee, which was denied recovery from collecting bank on theory drawee was subrogated to collecting bank's right to recover, as holder in due course, from drawer)].

In addition, the Official Comments to the U.C.C. provide that in actions against the bank for wrongfully paying over a stop payment order, the bank will often defend on the ground that the drawer suffered no loss because it would have been liable to a holder in due course in any event. Although some cases have held that payment cannot be stopped against a holder in due course, the U.C.C. takes the position that the payment may be stopped but if it is, the drawer is liable and the bank is subrogated to the rights of the holder in due course [*see* Official Comment 7 to U.C.C. § 4-403; Official Comment 1 to U.C.C. § 4-407].

To protect personal privacy and other legitimate interests, parties and their attorneys must not include financial account numbers, or must redact such numbers when inclusion is necessary, in all pleadings and other papers filed in the court's public file, whether filed in paper or electronic form, unless otherwise provided by law or ordered by the court [*Cal. Rules of Ct., Rule 1.20(b)*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Thus, counsel should set forth the facts establishing the drawer's remaining liability to the other party, the equities in the bank's favor, and that the drawer would be unjustly enriched if the drawee were held liable.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to establish that the drawee is not liable for failing to honor the stop payment order or for paying an item after the account has been closed.

[b] Related Points and Authorities

Although generally the points and authorities in *§ 34.45* support the contention that the drawee is liable for failing to honor an order to stop payment or to close the account, Optional Paragraph E in § 34.45 may be used to oppose the contention that the drawee is liable for failing to honor a written stop payment order if the check was paid more than six months after receiving the order and the order was not renewed [*see Com. Code § 4403(b)*]. The points and authorities in *§ 34.57* may be used to oppose the contention that the drawee is liable for failure to honor a stop payment order on the ground that the notice or order came too late.

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[Reserved]

§§ 34.59[Reserved]

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B. Drawee Bank's Liability To Payee

3-34 California Points & Authorities § 34.70

§ 34.70 Supporting Contention That Drawee Is Liable to Payee for Amount of Check Paid on Forged Endorsement [Com. Code § 3420]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT DRAWEE BANK IS LIABLE TO PLAINTIFF FOR THE AMOUNT OF THE CHECK DATED _____, DRAWN BY _____ [*name of drawer*] AND PAYABLE TO PLAINTIFF IN THE AMOUNT OF $_____, BECAUSE AFTER PLAINTIFF RECEIVED DELIVERY OF THAT CHECK, PLAINTIFF's ENDORSEMENT ON THAT CHECK WAS FORGED AND DEFENDANT PAID THE PROCEEDS OF THE CHECK OTHER THAN TO PLAINTIFF.

A. Conversion. The law applicable to conversion of personal property applies to instruments. An instrument is also converted if it is taken by transfer, other than a negotiation, from a person not entitled to enforce the instrument or a bank makes or obtains payment with regard to the instrument for a person not entitled to enforce the instrument or to receive payment (*Com. Code § 3420(a)*).

B. Payee's Action Against Drawee for Conversion. *Commercial Code Section 3420(a)* covers cases in which a depositary or payor bank takes an instrument bearing a forged endorsement. Thus, if the amount of a check is paid on a forged endorsement to any person other than the designated payee [or a person to whom the check was negotiated], the drawee is liable to the designated payee [or other true owner] for converting the amount of the check [unless and until the payee or other true owner ratifies the collection of the check's proceeds by suing the collecting or depositary bank for conversion]. An action for conversion of an instrument may be brought by a payee who received delivery of the instrument either directly or through delivery to an agent or a copayee (*see Com. Code § 3420(a)(2)*; Official Comment 1 to U.C.C. § 3-420 (1990); *Cooper v. Union Bank (1973) 9 Cal. 3d 371, 376-377, 381, 107 Cal. Rptr. 1, 507 P.2d 609* (construing prior law)).

C. Presumed Damages for Conversion. In an action under *Commercial Code Section 3420(a)* for conversion, the measure of damages is presumed to be the amount payable on the instrument not exceeding the amount of plaintiff's interest in the instrument (*Com. Code § 3420(b)*; *Stenseth v. Wells Fargo (1995) 41 Cal. App. 4th 457, 465-466, 48 Cal. Rptr. 2d 192*).

[*Optional*] **D. Defense of *Commercial Code Section 3420(c)*.** A representative, other than a depositary bank, who has in good faith dealt with an instrument or its proceeds on behalf of one who was not the person entitled to enforce the instrument is not liable in conversion to that person beyond the amount of any proceeds that it has not paid out (*Com. Code § 3420(c)*).

[*Optional*] **E. Defense of *Commercial Code Section 3420(c)* Inapplicable to Drawee.** *Commercial Code Section 3420(c)* is limited to collecting banks other than the depositary bank. If the defense of Section 3420(c) applies to drawee banks, it would not protect them from liability for paying a check on a forged endorsement because the amounts a drawee bank forwards to a collecting bank on a forged endorsement do not constitute the proceeds of the instrument. Thus, the drawee is liable for the full amount of the check notwithstanding *Commercial Code Section 3420(c)* (*see* Official Comment 3 to U.C.C. § 3-420 (1990); *Cooper v. Union Bank (1973) 9 Cal. 3d 371, 376-377, 384-385, 107 Cal. Rptr. 1, 507 P.2d 609* (construing prior law)).

[2] Comments

CAUTION:

These points and authorities include citations to *Cooper v. Union Bank (1973) 9 Cal. 3d 371, 376-377, 384-385, 107 Cal. Rptr. 1, 507 P.2d 609* . This case was decided before the 1992 repeal and reenactment of Division 3 of the Commercial Code [Stats. 1992, ch. 914], and thus should be used with caution. Portions of the opinion appear to have been effectively abrogated. For example, *Com. Code § 3420(a)* clearly eliminates a drawer's cause of action for conversion and takes the position of other authority on this point [*see § 34.70[2][d]*; *see also* discussion in *§ 34.95*]. In addition, *Cooper* may be suspect in that it does not make a distinction in plaintiff/payee conversion cases as to whether the payee took delivery of the check or whether the thief/forger obtained it first. This distinction is now crucial [*see § 34.70[2][b]*]. The decision, however, appears to remain persuasive in certain other areas and thus has been included in this form [*see § 34.120[3][a]*].

[a] Use of Form

This form of points and authorities may be used to support the contention that a drawee bank is liable in conversion to the payee or other true owner of a check paid on a forged endorsement [*see Com. Code § 3420(a)*]. Under *Com. Code § 3420*, the payee may sue any bank in the collection chain but is of course limited to one recovery [*see* Official Comment 3 to U.C.C. § 3-420 (1990); *see also* discussion in *§ 34.70[2][b]*]. Under former Com. Code § 3419, the payee also had causes of action against both the collecting bank and the drawee bank but could only pursue one of them because the payee's commencement of an action against the collecting bank extinguished the drawee's liability. The rationale was that the payee's action against the depositary or collecting bank ratified the collection of the proceeds from the drawee bank [*see Cooper v. Union Bank (1973) 9 Cal. 3d 371, 377, 384, 107 Cal. Rptr. 1, 507 P.2d 609* ; *see also § 34.73*].

If there are joint payees, the drawee's liability to any one of them will be limited to the amount the drawer intended to be paid to that particular payee [*see §§ 34.47, 34.121*]. Paragraph E is for use to rebut any claim of defense under *Com. Code § 3420(c)*, which is set forth in Paragraph D.

Counsel should add argument linking the points in this form with the facts of his or her case; for example, facts describing the payee designation on the check, whether the check had been negotiated to any third person, the particular defect in the endorsement, and that the payee received delivery of the check but did not receive a replacement check or

other duplicate payment from the drawer [*see Com. Code § 4407* (*set forth in § 34.58*, regarding drawee's rights of subrogation)], nor commenced an action against the collecting or depositary bank that processed the check.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the drawee's liability to the payee for paying a check with a forged or defective endorsement.

[b] Requirement and Effect of Delivery in Payee Conversion Cases

Under *Com. Code § 3420* the loss for paying a check on a forged endorsement falls on the one who gave value to the thief/forger. That is usually the depositary bank [*see* Official Comment 1 to U.C.C. § 3-420 (1990)]. However, if the forger stole the check before it was delivered to the payee, the payee never became the check's owner or holder, so the payee has no cause of action for conversion [*Com. Code § 3420(a)(2)*]. The payee may still enforce the underlying obligation [*see* Official Comment 1 to U.C.C. § 3-420 (1990)].

Once the payee has taken delivery of the check, however, the payee no longer can enforce the underlying obligation [*see Com. Code § 3310(b)(4)*], so the payee needs a cause of action for conversion. Thus, if the forger steals a check after it is delivered to the payee and forges the payee's endorsement, the payee has causes of action for conversion against all the banks in the collection chain, including the payor bank. Although the payee may sue any bank in the collection chain, *Com. Code § 3420(c)* makes it far more efficacious for the payee to sue the depositary bank. Each of the other banks in the collection chain is apt to defend on the ground of having paid the proceeds in good faith to one not entitled to enforce the instrument. However, a payee who sues both depositary and payor banks is entitled to only one recovery [*see* Official Comment 3 to U.C.C. § 3-420 (1990)].

[c] Measure of Bank's Liability

Under *Com. Code § 3420(b)*, the measure of liability is the amount payable on the instrument and may not exceed the amount of the plaintiff's interest in the instrument. *Com. Code § 3420(b)*, rather than *Civ. Code § 3336* (allowing damages for the time and effort spent attempting to recover the converted property), applies to conversion actions involving negotiable instruments [*see Stenseth v. Wells Fargo (1995) 41 Cal. App. 4th 457, 465-466, 48 Cal. Rptr. 2d 192]* .

[d] Drawer Conversion Cases Under Revised Commercial Code

Under former Division 3 of the U.C.C. the cases were divided on the issue of whether the drawer of a check with a forged endorsement could assert rights against a depositary bank that took the check. *Com. Code § 3420(a)(1)* resolves the conflict by providing that a drawer has no cause of action in conversion. The reasoning is that the check represents the drawer's obligation rather than his or her property. Thus, the drawer's remedy is under *Com. Code § 4401(a)*, for recredit of any unauthorized charge to his or her account for paying a check on a forged endorsement [Official Comment 1 to U.C.C. § 3-420 (1990)].

[e] Related Points and Authorities

The points and authorities set out in *§§ 34.34* and *34.93 -34.94* address particular payee designations. See Ch. 166, *Negotiable Instruments* , for forms addressing particular payee designations [*see, e.g.*, forms applying *Com. Code § 3109* (instruments payable to bearer or order)]. The points and authorities set out in *§§ 34.73 -34.75* oppose the contention that the drawee bank is liable to the payee for conversion for paying a check on a forged endorsement on various grounds. The points and authorities set out in *§§ 34.120 -34.122* support, and those in §§ 34.124-34.126 oppose, the contention that the collecting bank is also liable to the payee for conversion for paying a check on a forged endorsement. Other aspects of the validity and requirements of endorsements, and of liability for payment on an improper endorsement, are addressed in §§ 34.34, 34.47-34.48, 34.90-34.92, 34.95, 34.171.

[3] Discussion of Authorities

[a] Payee's Action Against Drawee for Conversion

One plaintiff in ***Cooper v. Union Bank*** *(1973) 9 Cal. 3d 371, 107 Cal. Rptr. 1, 507 P.2d 609* , was an attorney whose secretary and bookkeeper, over a period of approximately a year and one-half, forged endorsements on 29 checks. The attorney, a joint venture of which the attorney was a member, clients of the attorney, and a company for which the attorney was receiver were payees on the checks. The company and the clients assigned their rights to the attorney. The joint venture partners were also plaintiffs. The secretary cashed some of the checks at defendants Union Bank and Crocker Citizens National Bank (hereinafter "Crocker") and deposited all but one of the remainder to her personal account at Crocker. The entire amount of those deposits was withdrawn before the forgeries were discovered. Plaintiffs sued the collecting and drawee banks for conversion under former Com. Code § 3419 (*now see Com. Code § 3420*). The trial court entered judgment for defendants in the belief that under former Com. Code § 3419(3) (*now see Com. Code § 3420(c)*, set forth in Paragraph D) a bank that has dealt with an instrument in good faith and in accordance with reasonable commercial standards is not liable to the true owner beyond the amount of any proceeds remaining in its hands. The trial court also found that plaintiffs were negligent in failing to discover the forgeries before April 1, 1966, approximately six months after the first forgery, and that their negligence substantially contributed to the making of the subsequent forgeries. Under former Com. Code § 3406 (*now see Com. Code § 3406* as amended by Stats. 1992, ch. 914, § 6), the negligence was another basis for denying recovery of the checks presented after April 1, 1966. Plaintiffs appealed.

The Supreme Court reversed the judgment as to the collecting bank's liability on the seven checks presented before April 1, 1966, and in all other regards affirmed. Although the Court affirmed the judgment with regard to the checks cashed at defendant because they were presented after April 1, 1966, the cause of action was otherwise sound, and is discussed below. For a discussion of *Cooper* with regard to its opinion concerning the collecting bank's liability, see *§ 34.120*.

All but three of the checks were paid by the drawee banks after being transferred for collection to defendant collecting banks. As indicated in the portion of the opinion discussed in *§ 34.73[3][a]*, the commencement of the action against the collecting banks ratified the drawees' payment of the proceeds to the collecting banks and provided those drawees with complete defenses. The remaining three checks were all drawn on Crocker; one was presented by a collecting bank that was not sued; and two were cashed at Crocker. First, the Court said that former Com. Code § 3419(3) (*now see Com. Code § 3420(c)*) was not intended to apply to a nondepositary drawee. The fact that former Com. Code § 3419(3) expressly included depositary and collecting banks but did not mention drawee banks created a strong negative inference in this regard. The Court cited numerous experts in the law of commercial paper and noted that none suggested that the defense of former Com. Code § 3419(3) was available to nondepositary drawee banks (*9 Cal. 3d 371, 384-385, 385 n.18*). Whether this conclusion is still valid in light of *Com. Code § 3420(c)*, which provides that a representative "other than a depositary bank ..... is not liable in conversion ..... beyond the amount of any proceeds that it has not paid out" is questionable. It is clear that the *Com. Code § 3420(c)* defense is limited to collecting banks other than the depositary bank [Official Comment 3 to U.C.C. § 3-420 (1990)]. However, the Court's additional conclusion as discussed below, that even if the defense did apply to drawee banks it would not protect them, may remain persuasive.

Specifically, the Court said even assuming for argument that former Com. Code § 3419(3) was intended to apply to drawee banks, it would not afford them any protection in a case such as this. The amount a drawee bank transfers to a collecting bank on a forged endorsement does not constitute proceeds of the instrument unless and until the true owner ratifies the collection (*9 Cal. 3d 371, 376-377, 384-385)* . The amounts forwarded are not proceeds because the debtor-creditor relationship between the drawer and drawee allows the drawee to charge the drawer's account only at the drawer's direction. If the drawee pays any person other than the designated payee or a person to whom the check was negotiated, the drawee's indebtedness to the drawer is not diminished and the full amount of the check remains in the drawer's account. If the drawee does charge the drawer's account for payment on a forged endorsement, the drawer can

compel the drawee to recredit the amount of the check. When the drawee pays on a forged endorsement, it does not part with the proceeds of the instrument but merely remits other funds of its own. When the true owner of the check brings an action against the collecting bank for conversion of a check collected on a forged endorsement, he or she is deemed to have ratified the collection of the proceeds from the drawee bank (*9 Cal. 3d 371, 377)* . It follows that absent such ratification, the proceeds remain in the drawee bank's hands and the drawee is consequently liable for the full amount of the instrument (*9 Cal. 3d 371, 385)* . In discussing the collecting banks' liability under various theories, the Court stated that a drawee bank is in effect strictly liable to the true owner if it pays an instrument on a forged endorsement (*9 Cal. 3d 371, 381)* . Nevertheless, the three checks considered were cashed after April 1, 1966, so plaintiffs' negligence barred recovery (*9 Cal. 3d 371, 386)* . The portion of the opinion considering the negligence defense of the drawee is discussed in *§ 34.74[2][b]*.

[b] Measure of Payee's Damages Against Bank

In ***Stenseth v. Wells Fargo*** *(1995) 41 Cal. App. 4th 457, 48 Cal. Rptr. 2d 192* , the plaintiff's employee wrongfully took checks made payable to the plaintiff, forged his endorsement on them, and presented them to the bank, which paid them. The jury found for the plaintiff, the bank appealed, and the plaintiff cross-appealed on the ground that the trial court erred by excluding evidence of damages attributable to his efforts to determine his losses. He relied on *Civ. Code § 3336*, which provides that damages for conversion of personal property may include fair compensation for time and money properly expended in pursuit of the money. The court of appeal concluded that *Com. Code § 3420(b)*, which provides that the measure of liability is the amount payable on the instrument and may not exceed the amount of the owner's interest in the instrument, applies to conversion actions involving negotiable instruments. Because no Commercial Code provision allows for the recovery of damages for time and effort spent attempting to recover the converted property, the trial court did not err in excluding that evidence (*41 Cal. App. 4th 457, 465-466)* .

[c] Defense of Commercial Code Section 3420(c) Inapplicable to Drawee

The facts, procedural background, and portion of the opinion in ***Cooper v. Union Bank*** *(1973) 9 Cal. 3d 371, 107 Cal. Rptr. 1, 507 P.2d 609* , considering the application of this defense to the drawee, are discussed in *§ 34.70[3][a]*.

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3-34 California Points & Authorities § 34.71

§ 34.71 Supporting Contention That Drawee or Paying Bank Is Liable to Payee for Retention of Check After Deadline and/or Failure to Give Notice of Nonpayment [Com. Code §§ 4104(a)(10), 4302; 12 C.F.R. §§ 210.9, 229.30, 229.33, 229.38]--In General

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT _____ [DRAWEE *or* PAYING] BANK IS LIABLE TO PLAINTIFF FOR THE AMOUNT OF THE CHECK DATED _____, DRAWN BY _____ [*name of drawer*] AND PAYABLE TO PLAINTIFF IN THE AMOUNT OF $_____, BECAUSE DEFENDANT _____ [FAILED TO EXPEDITIOUSLY RETURN THAT CHECK AS REQUIRED BY FEDERAL RESERVE REGULATIONS *and/or* FAILED TO GIVE NOTICE OF NONPAYMENT AS REQUIRED BY FEDERAL RESERVE REGULATIONS *and/or* RETAINED THAT CHECK BEYOND _____ (THE CLOSE *or* MIDNIGHT) OF THE BANKING DAY ON WHICH DEFENDANT RECEIVED THAT CHECK WITHOUT _____ (*one or more as applicable:* SETTLING FOR (OR RETURNING) THE CHECK *or* GIVING NOTICE OF DISHONOR)].

A. Midnight Deadline (Demand Items). If an item is presented to and received by a payor bank, the bank is accountable for the amount of a demand item other than a documentary draft, whether properly payable or not, if the bank, in any case in which it is not also the depositary bank, retains the item beyond midnight of the banking day of receipt without settling for it or, whether or not it is also the depositary bank, does not pay or return the item or send notice of dishonor until after its midnight deadline (*Com. Code § 4302(a)(1)*; *see Bank of America v. Security Pacific Nat. Bank (1972) 23 Cal. App. 3d 638, 642-643, 100 Cal. Rptr. 438*).

[*EITHER*]

[*Optional*] **B. Federal Reserve Rule (Settlement and Payment).** On the day a paying bank receives a cash item directly or indirectly from a Reserve Bank, it must settle for the item such that the proceeds of the settlement are available to its Administrative Reserve Bank by the close of Fedwire on that day, or it must return the item by the later of the close of the paying bank's banking day or the close of Fedwire. If the paying bank fails to settle for or return a cash item in accordance with the above rules, it is accountable for the amount of the item as of the close of its banking day or the close of Fedwire on the day it receives the item, whichever is earlier. [A paying bank is deemed to receive a cash item on its next banking day if it receives the item on a day other than a banking day for it; or on a banking day for it, but after a "cut-off hour" established by it in accordance with state law] (*12 C.F.R. § 210.9(b)(1)*; *see Community Bank v. Federal Reserve Bank of San Francisco (9th Cir. 1974) 500 F.2d 282, 285-287, 286 n.11 , cert. denied, 419 U.S. 1089*).

[*OR*]

[*Optional*] **B. Federal Reserve Rule (Return).** If a paying bank determines not to pay a check, it must return the check in an expeditious manner as provided in Title 12 of the Code of Federal Regulations Section 229.30(a)(1) or (a)(2). Subject to the requirement for expeditious return, a paying bank may send a returned check to the depositary bank or to any other bank agreeing to handle the returned check expeditiously under Title 12 of the Code of Federal Regulations Section 229.31(a). [A paying bank may convert a check to a qualified returned check by encoding the returned check to conform to the requirements of this paragraph.] [This paragraph does not affect a paying bank's responsibility to return a check within the deadline required by the Uniform Commercial Code, Title 12 of the Code of Federal Regulations Part 210 or Title 12 of the Code of Federal Regulations Section 229.30(c)] (*12 C.F.R. § 229.30(a)*).

[*CONTINUE*]

[*Optional*] **C. Deadline for Items Other Than Demand Items.** If an item is presented to and received by a payor bank, the bank is accountable for the amount of any properly payable item other than a demand item that is not a documentary draft, unless, within the time allowed for acceptance or payment of that item, the bank either accepts or pays the item or returns it and the accompanying documents (*Com. Code § 4302(a)(2)*).

[*Optional*] **D. Midnight Deadline Defined.** "Midnight deadline" with regard to a bank is midnight on its next banking day following the banking day on which it receives the relevant item or notice or from which the time for taking action commences to run, whichever is later (*Com. Code § 4104(a)(10)*).

[*Optional*] **E. Three-Year Limitation.** An action against a drawee bank based on its failure to return an item within the time required by *Commercial Code Section 4302* is subject to a three-year limitation period (*Bank of America v. Security Pacific Nat. Bank (1972) 23 Cal. App. 3d 638, 644-646, 100 Cal. Rptr. 438*).

[*Optional*] **F. Two-Day/Four-Day Test.** A paying bank returns a check in an expeditious manner if it sends the returned check in such a manner that the check would normally be received by the depositary bank not later than 4:00 P.M. (local time of the depositary bank) of the _____ [second business day following the banking day on which the check was presented to the paying bank if the paying bank is *or* fourth business day following the banking day on which the check was presented to the paying bank if the paying bank is not] located in the same check-processing region as the depositary bank. [If the last business day on which the paying bank may deliver a returned check to the depositary bank is not a banking day for the depositary bank, the paying bank meets the two-day/four-day test if the returned check is received by the depositary bank on or before the depositary bank's next banking day] (*12 C.F.R. § 229.30(a)(1)*).

[*Optional*] **G. Forward Collection Test.** A paying bank returns a check in an expeditious manner if it sends the

returned check in a manner that a similarly situated bank would normally handle a check (1) of similar amount as the returned check, (2) drawn on the depositary bank, and (3) deposited for forward collection in the similarly situated bank by noon on the banking day following the banking day on which the check was presented to the paying bank (*12 C.F.R. § 229.30(a)(2)*).

[*Optional*] **H. Extension of Deadline for Expeditious Delivery.** The deadline for return or notice of nonpayment under the Uniform Commercial Code or Regulation J (12 C.F.R. Part 210) or Title 12 of the Code of Federal Regulations Section 229.36(f)(2) is extended if a paying bank, in an effort to expedite delivery of a returned check to a bank, uses a means of delivery that ordinarily would result in the returned check being received by the bank to which it is sent on or before the receiving bank's next banking day following the otherwise applicable deadline by the earlier of the close of that banking day or a cutoff hour of 2 p.m. or later set by the receiving bank under *Commercial Code Section 4108*. The deadline is extended further if a paying bank uses a highly expeditious means of transportation, even if this means of transportation would ordinarily result in delivery after the receiving bank's next banking day (*12 C.F.R. § 229.30(c)*).

[*Optional*] **I. Identification of Returned Check.** A paying bank returning a check must clearly indicate on the check's face that it is a returned check and the reason for return. If the check is a substitute check, the paying bank must place this information within the image of the original check that appears on the front of the substitute check (*12 C.F.R. § 229.30(d)*).

[*Optional*] **J. Notice in Lieu of Return.** If a check is unavailable for return, the paying bank may send in its place a copy of the front and back of the returned check or, if no such copy is available, a written notice of nonpayment containing the information specified in Title 12 of the Code of Federal Regulations Section 229.33(b). The copy or notice must clearly state that it constitutes notice in lieu of return. A notice in lieu of return is considered a returned check subject to the expeditious return requirements of this section and to the other requirements of Title 12 of the Code of Federal Regulations Part 229, Subpart C (*12 C.F.R. § 229.30 et seq.*) (*12 C.F.R. § 229.30(f)*).

[*Optional*] **K. Additional Notice of Nonpayment of Large Item.** If a paying bank determines not to pay a check in the amount of $2,500 or more, it must provide notice of nonpayment so that the notice is received by the depositary bank by 4:00 P.M. (local time) on the second business day following the banking day on which the check was presented to the paying bank. [If the day the paying bank is required to provide notice is not a banking day for the depositary bank, receipt of notice on the depositary bank's next banking day constitutes timely notice.] [Notice may be provided by any reasonable means, including the returned check, a writing (including a copy of the check), telephone, Fedwire, telex, or other form of telegraph.] The notice must include the name and routing number of the paying bank, the name of the payee(s), the check's amount, the date of the endorsement of the depositary bank, the account number of the depositary bank's customer(s), the branch name or number from the depositary bank's endorsement, the trace number associated with the depositary bank's endorsement, and the reason for nonpayment (*12 C.F.R. § 229.33(a), (b)*).

[*Optional*] **L. Bank's Liability Under Regulation CC, Subpart C.** A bank must exercise ordinary care and act in good faith in complying with Title 12 of the Code of Federal Regulations Part 229, Subpart C (*12 C.F.R. § 229.30 et seq.*). A bank that fails to exercise ordinary care or to act in good faith under Subpart C may be liable to the depositary bank, the depositary bank's customer, the owner of the check, or another party to the check. The measure of damages for failure to exercise ordinary care is the amount of the loss incurred up to the check's amount, reduced by the amount of the loss that the party would have incurred even if the bank had exercised ordinary care. A bank that fails to act in good faith may be liable for other damages, if any, suffered by the party as a proximate consequence. This section does not affect a paying bank's liability to its customer under the Commercial Code or other law (*12 C.F.R. § 229.38(a)*).

[*Optional*] **M. Liability for Late Return.** If a paying bank fails both to comply with Title 12 of the Code of Federal Regulations Section 229.30(a) and to comply with the deadline for return under the Uniform Commercial Code (*see Com. Code §§ 4301, 4302*), Regulation J (12 C.F.R. Part 210) or Title 12 of the Code of Federal Regulations Section

229.30(c) in connection with a single nonpayment of a check, the paying bank is liable under either Title 12 of the Code of Federal Regulations Section 229.30(a) or such other provision, but not both (*12 C.F.R. § 229.38(b)*).

[*Optional*] **N. Responsibility of Paying Bank or Payable-Through Bank for Check.** A paying bank or, in the case of a check payable through the paying bank and payable by another bank, the bank by which the check is payable, is responsible for damages under Title 12 of the Code of Federal Regulations Section 229.38(a) to the extent that the condition of the check when issued by it or its customer adversely affects the bank's ability to endorse the check legibly in accordance with Title 12 of the Code of Federal Regulations Section 229.35. Responsibility under this paragraph is treated as negligence of the paying bank for purposes of Title 12 of the Code of Federal Regulations Section 229.38(c) (*12 C.F.R. § 229.38(d)(1)*).

[*Optional*] **O. Expeditious Return of Payable-Through Check.** In the case of a check that is payable by a bank and payable through a paying bank located in a different check-processing region than the bank by which the check is payable, the bank by which the check is payable is responsible for damages under Title 12 of the Code of Federal Regulations Section 229.38(a) to the extent that the check is not returned to the depositary bank through the payable-through bank as quickly as the check would have been required to be returned under Title 12 of the Code of Federal Regulations Section 229.30(a) had the bank by which the check is payable (1) received the check as paying bank on the day the payable-through bank received the check and (2) returned the check as paying bank in accordance with Title 12 of the Code of Federal Regulations Section 229.30(a)(1) (*12 C.F.R. § 229.38(d)(2)*).

[*Optional*] **P. One-Year Limitation Under Regulation CC.** An action under Title 12 of the Code of Federal Regulations Section 229.38 must be brought within one year after the date of the occurrence of the violation involved (*12 C.F.R. § 229.38(g)*).

[*Optional*] **Q. Drawee Is Strictly Liable for Missing Midnight Deadline.** A drawee is strictly liable for late return because the Uniform Commercial Code is designed to bar such fact-based theories of defense as negligence, fault, estoppel, intentional tort, or illegality of the underlying transaction in the overriding public interest of promulgating integrity, certainty, and finality of commercial transactions (*Los Angeles Nat. Bank v. Bank of Canton (1995) 31 Cal. App. 4th 726, 37 Cal. Rptr. 2d 389* ; *Chicago Title Ins. Co. v. California Canadian Bank (1991) 1 Cal. App. 4th 798, 809-812, 2 Cal. Rptr. 2d 422* ; *Los Angeles Nat. Bank v. Bank of Canton (1991) 229 Cal. App. 3d 1267, 1276-1280, 280 Cal. Rptr. 831*).

[2] Comments

CAUTION:

The authorities that are the basis of Optional Paragraph Q arose from transactions that occurred before *12 C.F.R. § 229.38(c)* (regarding comparative negligence) was applicable [*see § 34.76*, Paragraph B].

[a] Use of Form

These points and authorities may be used to support the contention that a drawee bank is liable to the payee (or a holder in due course or a collecting bank) for undue retention of a check that was presented to it [*see Com. Code § 4302*; *12 C.F.R. §§ 210.9(b), 229.30, 229.33*]. Although the term "drawee bank" has been used in the title of this form, Regulation CC (12 C.F.R. Part 229) applies to paying banks, which includes not only the drawee, but any bank at which a check is payable and to which it is sent for payment or collection. When the check is not payable by a bank, for instance when the check is drawn on a credit union, the bank through which the check is payable and to which it is sent for payment or collection is considered the paying bank [*see 12 C.F.R. § 229.2(z)* (discussed in the § 34.03[7]].

Drawee or paying financial institutions are subject to deadlines in the forward collection process established by *Com. Code §§ 4301* and *4302*, by Regulation J (12 C.F.R. Part 210), and by Regulation CC (12 C.F.R. Part 229). This form

addresses *Com. Code § 4302* and Regulations CC and J (12 C.F.R. Parts 210 and 229). *Com. Code § 4301* is discussed in *§ 34.77*. Except for the extension permitted by *12 C.F.R. § 229.30(c)*, *12 C.F.R. § 229.30* (Paragraphs B, F-H, I, and J) does not relieve a paying bank from the obligation to comply with the timely return requirements of *Com. Code §§ 4301* and *4302*, but *12 C.F.R. § 229.38(b)* (Paragraph M) provides that a paying bank is not subject to liability under both the Commercial Code and Regulation CC. Thus, the payee or other bank can only recover under one provision [*see* 12 C.F.R. pt. 229, app. E, commentary to §§ 229.30(a) and 229.36(a) (*Com. Code § 4301* not applicable to payable-through or payable-at bank)]. It is noteworthy that there is only a one-year limitation period for an action under Regulation CC, compared to a three-year limitation period for an action based on a violation of *Com. Code § 4302* (Paragraphs E, P). Still, at many stages of the litigation, counsel may be concerned to establish liability both for failure to comply with *Com. Code § 4302* and for failure to comply with *12 C.F.R. §§ 229.30* and*/or 229.33*. *Com. Code § 4302(a)* (Paragraph A) has been superseded by *12 C.F.R. §§ 229.30(d), (f)*, and 229.33(b) (Paragraphs I-K) with regard to the form of notice of dishonor [*see* 12 C.F.R. pt. 229, app. E, commentary to §§ 229.30(d), (f), 229.33].

Paragraphs A and C-E set forth the Commercial Code rules and definitions. First alternative Paragraph B sets forth the Regulation J rule regarding interbank settlements. The second alternative Paragraph B and Paragraphs F-P address the requirements and definitions of Regulation CC. Paragraph A states the Commercial Code rule for checks and demand items other than documentary drafts [*see Valenzuela v. Bank of America (1969) 272 Cal. App. 2d 673, 677, 77 Cal. Rptr. 609* (deadline for documentary drafts)]. Paragraph C sets forth the Commercial Code rule for other items. Paragraph D sets forth the Commercial Code definition of midnight deadline, and Paragraph E sets forth the applicable limitation period for an action against the drawee based on undue retention of an item presented for payment.

Optional Paragraphs B set forth the settlement, or payment, rule under Regulation J and the basic return rule for paying banks under Regulation CC. If the paying bank did neither, counsel for a payee may prefer to assert liability under Regulation CC (second alternative Paragraph B) rather than under Regulation J (first alternative Paragraph B), because there is only dicta that Regulation J (12 C.F.R. § 210) applies to payees and nonmember banks, while Regulation CC specifies that payees (and other parties to the check) can recover for unexpeditious return [*see 12 C.F.R. § 229.38*]. The second alternative Paragraph B can be used with one or more of optional Paragraphs F-K, N, or O, depending on the particular ways in which the bank's performance failed to conform to the regulatory requirements. Paragraphs L and M are for use when the extent of the bank's liability is at issue. Paragraph P is for use to establish that an action under Regulation CC is timely. Optional Paragraph Q is for use to foreclose relevancy of any fact-based defenses, although it is not clear whether *12 C.F.R. § 229.38(c)* [*see § 34.76*, Paragraph B] dilutes this strict liability rule.

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should describe the check, the time and channels through which it was presented, whether, and if so, when and how it was returned. Counsel may wish to attach a copy of any notice of return or of the face and back of the check because stamps on the back or face of the check may indicate dates on which various processing steps were taken [*see Com. Code § 3505(a)(2)*; *Security Pac. Nat. Bank v. Associated Motor Sales (1980) 106 Cal. App. 3d 171, 177, 165 Cal. Rptr. 38* (presumption created by stamps; construing prior law); *see also § 34.78*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the drawee's liability for undue retention of a check.

[b] Related Points and Authorities

A drawee bank's duties regarding a check's return on the second and successive presentments are addressed in § 34.72.

The points and authorities in *§ 34.76* may be used to oppose those in this form.

[3] Discussion of Authorities

[a] Midnight Deadline (Demand Items)

Although *Com. Code § 4302(a)* is phrased in terms of a payor bank's duties, a payor bank is a drawee bank [*see Com. Code § 4105(3)* (discussed in *§ 34.03[6*])]. The term "banking day" used in *Com. Code § 4302(a)(1)* is defined by *Com. Code § 4104(a)(3)* as the part of a day on which a bank is open to the public for carrying on substantially all of its banking functions.

A payor bank's liability to pay an item under the midnight deadline rule of *Com. Code § 4302(a)* is subject to defenses based on breach of a presentment warranty (*Com. Code § 4208*) or proof that the person seeking enforcement of the liability presented or transferred the item for the purpose of defrauding the payor bank [*Com. Code § 4302(b)*].

Plaintiff in ***Bank of America v. Security Pacific Nat. Bank*** *(1972) 23 Cal. App. 3d 638, 100 Cal. Rptr. 438* , was assignee of the payees of seven sight drafts. Plaintiff took the seven sight drafts, which were drawn on defendant, in due course of business without notice of infirmities. The opinion set forth the relevant times of presentment of only one draft, saying it was illustrative. The draft was dated December 12, 1965, was endorsed by the payee and deposited in plaintiff on December 28. On January 3, 1966, plaintiff presented it to defendant for payment as a cash item. Although the drawers had sufficient money in their account to pay the draft, defendant returned it on January 4 without a separate notice of dishonor or any reason for the return. This type of return constitutes sufficient dishonor under former Com. Code § 4301(3) (*now see Com. Code § 4301(c)*) (*23 Cal. App. 3d 638, 642)* . Plaintiff re-presented the draft on January 4. It was returned unpaid on March 23, 1966. All the drafts involved in the action had been re-presented more than three years and less than four years before the action's commencement. Judgment was entered for defendant after a demurrer was sustained without leave to amend. Plaintiff appealed.

The court of appeal affirmed. The only issue on appeal was the statute of limitations. Defendant contended that the applicable limitation period was the three-year limitation of former Code Civ. Proc. § 338(1) (*now see Code Civ. Proc. § 338(a)*) for liability created by statute or the three-year limitation of former Code Civ. Proc. § 338(3) (*now see Code Civ. Proc. § 338(c)*) for conversion. Plaintiff contended that the action was governed by the four-year limitation of *Code Civ. Proc. § 337(1)* as an action on a contract or a liability founded on an instrument in writing (*23 Cal. App. 3d 638, 640)* . The court of appeal set forth *Com. Code § 4302(a)* and said *Com. Code § 4301* (*set forth in § 34.77*) makes clear that the drawee bank has until its midnight deadline to act. The court then set forth the definition of midnight deadline and said that former Com. Code § 3104(2)(a) (*now see Com. Code § 3104(e)*) brings sight drafts within the definition of demand items for the purpose of *Com. Code § 4302(a)* (*23 Cal. App. 3d 638, 642)* . The court noted that there were no California cases on point, but cited cases from other states that construed language identical to *Com. Code § 4302* to provide a basis for a statutory cause of action for the amount of the demand item involved (*23 Cal. App. 3d 638, 642-643)* . Those courts have construed the word "accountable" in *Com. Code § 4302* to be synonymous with "liable," and have imposed liability on the payor (drawee) bank for the amount of an item if it delays return of the item beyond its midnight deadline. The court of appeal also cited California code comments to the effect that *Com. Code § 4302* imposes liability on a bank that fails to act by its midnight deadline. The court, saying that it was mindful of the need for uniformity in interpreting the Commercial Code's provision, agreed with the authorities from other states that *Com. Code § 4302* creates a liability independent of negligence or conversion for the amount of the item involved. The returns on the first presentment of each item were timely, so they did not give rise to any cause of action (*23 Cal. App. 3d 638, 643)* .

The court then said it did not need to address the issue of whether liability created under *Com. Code § 4302* is equally applicable to a second presentment of a previously returned draft [*see § 34.72*], because even if *Com. Code § 4302* was applicable to the second presentment, the cause of action created on the second presentment would be governed by the three-year limitation of former Code Civ. Proc. § 338(1) (*now see Code Civ. Proc. § 338(a)*) as a liability created by statute (*23 Cal. App. 3d 638, 643-644)* . A drawee is not liable on a draft until it accepts it, and under former Com. Code § 3410 (*now see Com. Code § 3409*), the drawee's acceptance must be in writing. The court would not allow plaintiff to bootstrap itself around the specific code provisions by using custom to create an oral acceptance and then

using that acceptance to convert the cause of action to one on the written instrument, which would be governed by the four-year limitation (*23 Cal. App. 3d 638, 645-646)* . The court concluded that the sustaining of the demurrer was proper on the basis of the three-year statute of limitations (*23 Cal. App. 3d 638, 646)* .

See also cases discussed in *§ 34.71[3][o]*.

[b] Federal Reserve Rule (Settlement and Payment)

For purposes of Regulation J, a cash item is a check, other than one classified as a noncash item, or any other item payable on demand and collectible at par that the Reserve Bank in the District in which the item is payable is willing to accept as a cash item [*12 C.F.R. § 210.2(g)*]. A noncash item is one that the receiving Reserve Bank classifies in its operating circulars as requiring special handling [*12 C.F.R. § 210.2(k)*] "Banking day" for purposes of Regulation J is a day during which a bank is open to the public for carrying on substantially all its banking functions [*12 C.F.R. § 210.2(f)*].

Regulation J deadlines are applicable even to banks that are not members of the Federal Reserve system if they process items through Federal Reserve clearinghouse exchanges [*Community Bank v. Federal Reserve Bk. of San Francisco (9th Cir. 1974) 500 F.2d 282, 286-287 , cert. denied, 419 U.S. 1089]* .

Community Bank v. Federal Reserve Bk. of San Francisco *(9th Cir. 1974) 500 F.2d 282* , was an action for injunctive relief by state banks that were not members of the Federal Reserve System, but used checks imprinted with Federal Reserve routing numbers and forwarded checks for collection through the Federal Reserve Clearinghouse. Plaintiffs protested the June 1972 amendments to Regulation J, which required them to process items faster than required by *Com. Code §§ 4301* and *4302*. The Ninth Circuit held that former Com. Code § 4103(1) (*now see Com. Code § 4103(a)*) allows Commercial Code provisions to be modified by agreement, that Federal Reserve regulations and operating circulars have the status of agreements, even if not specifically assented to by all parties interested in the items handled [*Com. Code § 4103(b)*], and that by forwarding items to Federal Reserve banks for collection, nonmember banks are bound by the regulations and circulars (*500 F.2d 282, 286-287)* . In dicta, the court cited California Commercial Code comments to the effect that under prior law, clearinghouse rules did not govern the rights of a drawer and a payee who were not members of the clearinghouse and who did not contract with express reference to those rules, and opined that the comment's reference to the rights of drawers and payees under prior law suggests that the adoption of the Commercial Code has changed that result (*500 F.2d 282, 286)* .

[c] Federal Reserve Rule (Return)

As used in the federal Expedited Funds Availability Act (*12 U.S.C. § 4001 et seq.*) and Regulation CC (*12 C.F.R. § 229.1 et seq.*), "bank" means just about every conceivable type of organization that accepts deposits: banks, savings banks, mutual savings banks, credit unions, savings and loan associations, building and loan associations, homestead associations, cooperative banks, insurance companies, trust companies, industrial loan companies, or any other institution in the business of receiving deposits, whether organized under federal or state law [*see 12 C.F.R. §§ 229.2(e)* (defining "bank"), 4001(12) (defining "depository institution")].

For a drawee bank, the requirement of expeditious return under *12 C.F.R. § 229.30* is in addition to the requirement of timely return under *Com. Code § 4302* and in addition to the requirements of Regulation J [*see 12 C.F.R. § 229.30(a)*; 12 C.F.R. pt. 229, app. E, commentary to § 229.30(a)].

The expeditious return requirement of *12 C.F.R. § 229.30(a)* does not apply if the paying bank is unable to identify the depositary bank. Then, the paying bank may send the returned check to any bank that handled the check in the forward collection process, as long as the paying bank advises that bank that it is unable to identify the depositary bank [*12 C.F.R. § 229.30(b)*] *12 C.F.R. § 229.30(b)* does not relieve a paying bank from liability for the lack of expeditious

return if the paying bank itself is responsible for the inability to identify the depositary bank, for instance when the paying bank's customer has used a check with printing or other material on the back in the areas reserved for the depositary bank's endorsement, making the endorsement unreadable [12 C.F.R. pt. 229, app. E, commentary to § 229.30(b)]. *12 C.F.R. § 229.30(b)* does not relieve a paying bank of the obligations of *Com. Code § 4301*[12 C.F.R. pt. 229 app. E, commentary to § 229.30(b)].

Under *Com. Code §§ 3418(c)* and *4215(a)*, late return constitutes payment and would be final in favor of a holder in due course or a person who has in good faith changed his or her position in reliance on the payment. This requirement is retained to give a paying bank an additional incentive to make a prompt return [12 C.F.R. pt. 229, app. E, commentary to § 229.30(a)].

[d] Three-Year Limitation

Bank of America v. Security Pacific Nat. Bank *(1972) 23 Cal. App. 3d 638, 100 Cal. Rptr. 438* , is discussed in *§ 34.71[3][a]*.

[e] Two-Day/Four-Day Test

"Banking day" under Regulation CC means that part of any business day on which an office of a bank is open to the public for carrying on substantially all of its banking functions [*12 C.F.R. § 229.2(f)*].

"Business day" under Regulation CC means a calendar day other than a Saturday, Sunday, or legal holiday [*12 U.S.C. § 4001(3)*; *12 C.F.R. § 229.2(g)*]. The Federal Reserve holidays, and thus holidays for purposes of the Expedited Funds Availability Act and Regulation CC, are January 1, the third Monday in January, the third Monday in February, the last Monday in May, July 4, the first Monday in September, the second Monday in October, November 11, the fourth Thursday in November, and December 25. If January 1, July 4, November 11, or December 25 fall on a Sunday, the next Monday is not a business day [*12 C.F.R. § 229.2(g)*].

The two-day/four-day test does not necessarily require actual receipt of the check by the depositary bank within these times. Rather, the paying bank must send the check so that the check would normally be received by the depositary bank within the specified time. Thus, the paying bank is not responsible for unforeseeable delays in the check's return, such as transportation delays [12 C.F.R. pt. 229, app. E, commentary to § 229.30(a)(1)].

[f] Forward Collection Test

The definition of banking day is set forth in *§ 34.71[3][e]*.

A "similarly situated bank" means a bank of similar size, located in the same community, and with similar check-handling activities as the paying bank or returning bank [*12 C.F.R. § 229.2(ee)*].

[g] Extension of Deadline for Expeditious Delivery

12 C.F.R. § 229.30(c) extends the paying bank's midnight deadline under *Com. Code §§ 4301* and *4302* and Regulation J (*12 C.F.R. § 210.12*). The extension is designed to speed up the overall return of checks; no modification or extension of the expeditious return requirement of *12 C.F.R. § 229.30(a)* is required [12 C.F.R. pt. 229, app. E, commentary to § 229.30(c)]. For instance, a paying bank that uses a courier that leaves after midnight to deliver its forward collection checks may send its return checks by the same courier. The extension removes the constraint of the midnight deadline if the returned check reaches the receiving bank on or before the receiving bank's next banking day following the otherwise applicable deadline by the earlier of the close of that banking day or a cutoff hour of 2 p.m. or later set by the receiving bank under *Com. Code § 4108*. The extension also applies if the check reaches the bank to which it is sent later than the time described in the preceding sentence, if highly expeditious means of transportation are used. For

example, a west coast bank may use this further extension to ship a returned check by air directly to an east coast returning bank even if the check arrives after the returning bank's cutoff hour [12 C.F.R. pt. 229, app. E, commentary to § 229.30(c)].

[h] Identification of Returned Check

The reason for the return must be clearly indicated [*12 C.F.R. § 229.30(d)*]. A check is identified as a returned check if the front of that check indicates the reason for return, even if it does not specifically state that the check is a returned check. A reason such as "Refer to Maker" is permissible in appropriate cases. If the returned check is a substitute check, the reason for return must be placed within the image of the original check that appears on the front of the substitute check so that the information is retained on any subsequent substitute check. If the paying bank places the returned check in a carrier envelope, the carrier envelope should indicate that it is a returned check but need not repeat the reason for return stated on the check if it in fact appears on the check [12 C.F.R. pt. 229, app. E, commentary to § 229.30(d)].

[i] Notice in Lieu of Return

The requirements of *12 C.F.R. § 229.30(f)* supersede the requirement of *Com. Code § 4301(a)* as to the form of and information required of a notice of dishonor or nonpayment [12 C.F.R. pt. 229, app. E, commentary to § 229.30(f)].

12 C.F.R. § 229.30(f) applies when a check is lost or otherwise unavailable for return. If no copy of the check is available, the written notice must contain the information specified in *12 C.F.R. § 229.33(b)* (set forth in Paragraph J). The copy or written notice must clearly indicate that it is a substitute for the returned check. Notice by telephone, telegraph, or other electronic transmission other than a legible facsimile or similar image transmission of both sides of the check does not satisfy the requirements of *12 C.F.R. § 229.30(f)* [12 C.F.R. pt. 229, app. E, commentary to § 229.30(f)].

12 C.F.R. § 229.34(a)(4) includes a warranty that the original check has not been and will not be returned if a notice in lieu has been returned [12 C.F.R. pt. 229, app. E, commentary to § 229.30(f)].

The notice in lieu of return is subject to the provisions of *12 C.F.R. § 229.30* and is treated like a returned check for settlement purposes. If the original check is over $2,500, the notice of nonpayment required by *12 C.F.R. § 229.33* (Paragraph J) is still required, but may be satisfied by the notice in lieu of return if the notice meets the time and information requirements of *12 C.F.R. § 229.33* [12 C.F.R. pt. 229, app. E, commentary to § 229.30(f)].

[j] Additional Notice of Nonpayment of Large Item

The Regulation CC definitions of banking day and business day are set forth in *§ 34.71[3][e]*.

The notice of nonpayment required by *12 C.F.R. § 229.33* and written notice in lieu of return as provided in *12 C.F.R. § 229.30(f)* serve different functions; however, the two kinds of notice must meet the content requirements of *12 C.F.R. § 229.33* [12 C.F.R. pt. 229, app. E, commentary to § 229.33(a)].

Because the return of the check itself may serve as the required notice of nonpayment, in many cases no notice other than the check's return will be necessary; however, if the returned check would not normally be received within the time limits for the notice, return of the check will not be sufficient [12 C.F.R. pt. 229, app. E, Commentary to § 229.33(a)]. Unless the returned check is used to satisfy the notice requirement, the requirement for notice is independent of and does not affect the requirements for timely and expeditious return of the check under *Com. Code § 4302* and 12 C.F.R. § 229.30. If a paying bank fails both to comply with *12 C.F.R. § 229.33* and to comply with the requirements for timely and expeditious return of the check under *Com. Code § 4302*, Regulation J, and *12 C.F.R. § 229.30*, it is liable under either *12 C.F.R. § 229.33* or the other requirements, but not both [12 C.F.R. pt. 229, app. E, commentary to §

229.33(a)].

A paying bank is not responsible for failure to give notice of nonpayment to a party that has breached a presentment warranty under *Com. Code § 4208*, notwithstanding that the paying bank may have returned the check [12 C.F.R. pt. 229, app. E, commentary to § 229.33(a)].

If the paying bank cannot identify the depositary bank from the check itself, it may send the notice of nonpayment to the earliest collecting bank it can identify and indicate that the notice is not being sent to the depositary bank. The collecting bank may be able to identify the depositary bank and forward the notice, but it is under no obligation to do so [12 C.F.R. pt. 229, app. E, commentary to § 229.33(b)].

A bank must identify an item of information if the bank is uncertain as to that item's accuracy. A bank may make this identification by setting the item off with question marks, asterisks, or other symbols designated for this purpose by generally applicable industry standards [12 C.F.R. pt. 229, app. E, commentary to § 229.33(b)].

[k] Bank's Liability Under Regulation CC, Subpart C

The standard of care set forth in *12 C.F.R. § 229.38(a)* applies to a paying bank under *12 C.F.R. §§ 229.30* and *229.33*. The standard is similar to the standard imposed by *Com. Code § 1304* (good faith) and *Com. Code § 4103(a)*. The measure of damages stated derives from *Com. Code §§ 4103(e)* and *4202(c)* [12 C.F.R. pt. 229, app. E, commentary to § 229.38(a)].

However, *12 C.F.R. § 229.38(a)* does not affect a paying bank's liability to its customer for wrongful dishonor, which is different from failure to exercise ordinary care and has a different measure of damages [12 C.F.R. pt. 229, app. E, commentary to § 229.38(a); for discussion of wrongful dishonor liability, *see § 34.43*].

Limitations on liability provided in *12 C.F.R. § 229.38(a)*, *(c)*-(f), (h) are set forth in *§ 34.76*.

[l] Liability for Late Return

12 C.F.R. § 229.38(b) clarifies that a bank could be liable for failure to meet either the Commercial Code standard or the *12 C.F.R. § 229.30* standard, but not for failure to meet both. The regulation intends to preserve the paying bank's "accountability" for missing its midnight deadline or other deadlines under the Commercial Code provisions, such as *Com. Code § 4215*, that are not incorporated in this regulation, but may be useful in establishing the time of final payment by the paying bank [12 C.F.R. pt. 229, app. E, commentary to § 229.38(b)].

[m] Responsibility of Paying Bank or Payable-Through Bank for Check

A paying bank, or in the case of a check payable through the paying bank and payable by another bank, the bank by which the check is payable, is responsible for the check's condition when it is issued by it or its customer. Thus, the paying bank would be responsible for the adverse effect, if any, of a carbon band or other material placed on the back of the check before issuance [12 C.F.R. pt. 229, app. E, commentary to § 229.38(d)(1)].

[n] Expeditious Return of Payable-Through Check

Under *12 C.F.R. § 229.38(d)(2)*, a payable-through check must be returned by the payable-through bank within the time necessary to meet the requirements of the two-day/four-day test, as if the bank by which it is payable received the check as paying bank on the day the payable-through bank received it [12 C.F.R. pt. 229, app. E, commentary to § 229.38(d)(2)]. Responsibility under *12 C.F.R. § 229.38(d)(2)* does not include responsibility for the time required for the forward collection of a check to the payable-through bank. Generally, liability under *12 C.F.R. § 229.38(d)(2)* will be limited in amount. Under *12 C.F.R. § 229.33(a)*, if a paying bank returns a check in the amount of $2,500 or more

and it is not returned through the payable-through bank as quickly as would have been required had the check been received by the bank by which it is payable, the depositary bank would not suffer damages unless it had not received timely notice of nonpayment. Thus, ordinarily the bank by which a payable-through check is payable would be liable under *12 C.F.R. § 229.38(a)* only for checks in amounts up to $2,500; and the paying bank would be responsible for notice of nonpayment for checks in the amount of $2,500 or more [12 C.F.R. pt. 229, app. E, commentary to § 229.38(d)(2)].

[o] Drawee Is Strictly Liable for Missing Midnight Deadline

Los Angeles Nat. Bank v. Bank of Canton *(1995) 31 Cal. App. 4th 726, 37 Cal. Rptr. 2d 389* , was an action by a depository bank against the drawee of 28 checks, deposited in three batches over a period of several days, for failure to return the checks or give notice before the midnight deadline. The court of appeal reversed the summary judgment in defendant's favor, and the matter was remanded to the trial court in a published opinion [*see Los Angeles Nat. Bank v. Bank of Canton (1991) 229 Cal. App. 3d 1267, 280 Cal. Rptr. 831* , discussed *below*]. On remand, the trial court entered judgment in favor of the depository bank and defendant again appealed.

The court of appeal affirmed the judgment in favor of the depository bank (*31 Cal. App. 4th 726, 729)* . Reiterating its reasoning in *Los Angeles Nat. Bank v. Bank of Canton (1991) 229 Cal. App. 3d 1267, 280 Cal. Rptr. 831* (discussed *below*), the court held that the payor bank was strictly liable to the depository bank for the amount of the checks (despite the alleged fraud of the depository bank in cashing the checks without first verifying that there were adequate funds in the payor bank's account from which the checks were drawn) because the payor bank missed the statutory deadline (*31 Cal. App. 4th 726, 742-744)* . Although the Legislature apparently subsequently decided that fraud should not be exempted as a defense and adopted an amendment to that effect [*see Com. Code § 4302*; Stats. 1992, ch. 914, § 38], since the acts in question occurred in 1986 the court held that fraud and the other defenses raised by the payor bank were irrelevant (*31 Cal. App. 4th 726, 744)* .

The court also held that the statutory midnight deadline begins to run when the Federal Reserve makes the checks available for pickup, rather than when the payor bank actually receives the checks from its courier (*31 Cal. App. 4th 726, 739-740)* . Quoting from its earlier decision, discussed *below*, the court reasoned that since the purpose of the midnight deadline rule is to ensure prompt notification, if the deadline did not begin to run until the bank or its agent actually decided to pick up the checks from the Federal Reserve, the bank could "defeat the protection sought to be afforded by imposing strict deadlines for final payment or 'dishonor' " (*31 Cal. App. 4th 726, 739)* .

Finally, the court held that the statutory midnight deadline was not met when the payor bank's tellers orally informed the teller at the depository bank that the account from which the checks were drawn did not have any funds. For the reasons enunciated in *Los Angeles Nat. Bank v. Bank of Canton (1991) 229 Cal. App. 3d 1267, 1280, 280 Cal. Rptr. 831* , discussed *below*, the court concluded that the statute required written notice of dishonor (*31 Cal. App. 4th 726, 740-741)* .

Plaintiff in ***Chicago Title Ins. Co. v. California Canadian Bank*** *(1991) 1 Cal. App. 4th 798, 2 Cal. Rptr. 2d 422* , was escrow agent for numerous transactions originated by a mortgage broker for a condominium conversion project. The mortgage broker and the developer engaged in massive check fraud, involving about $300 million over the course of two years. This litigation involved 28 checks, totalling $17 million that were issued to plaintiff as payee and drawn on defendant. Defendant did not pay the checks, but failed to return them before the midnight deadline. Judgment was for plaintiff and defendant appealed.

The court of appeal affirmed. Defendant drawee relied on an ambiguous former rule of the California Bankers Clearing House Association to claim that the returns were timely because the items left the branches where the drawer maintained its accounts before the midnight deadline. The court noted that the actual cause of the late returns was the bank's clearing procedure. Furthermore, any interpretation other than one requiring arrival at the clearinghouse or

collecting bank before the midnight deadline would have been inconsistent with prior law and banking practice (*1 Cal. App. 4th 798, 804-808, 810)* .

The checks were apparently part of a "kite," in which one of plaintiff's lower level operatives was allegedly involved. Nevertheless, the court noted that the defendant-drawee knew for months that the checks were apparently not backed by sufficient funds, and did nothing in time to stop the defrauders (*1 Cal. App. 4th 798, 812-813)* . Defendant drawee raised several defenses, including estoppel, waiver, unclean hands, and restitution. The court relied on *Los Angeles Nat. Bank v. Bank of Canton (1991) 229 Cal. App. 3d 1267, 1278-1280, 280 Cal. Rptr. 831* (discussed *below*), and *SOS Oil v. Norstar Bank of Long Island (1990) 76 N.Y.2d 561, 561 N.Y.S. 2d 887, 890, 563 N.E.2d 258* , in holding that a drawee is strictly liable for late return (*1 Cal. App. 4th 798, 809-810)* . *Com. Code § 4302* places a heavy burden on paying banks, but that burden serves important commercial purposes: it expedites the collection process by motivating banks to process instruments quickly and firms up the provisional credits received by each bank in the collection chain, thereby supplying a key element of certainty in commercial paper transactions (*1 Cal. App. 4th 798, 810)* . The court said it was important to bear in mind in this context that the Uniform Commercial Code is designed to banish from the law governing timely return of dishonored checks such fact-based theories of liability and defense as negligence, fault, estoppel, intentional tort, or illegality of the underlying transaction in the overriding public interest of promulgating integrity, certainty, and finality of commercial transactions (*1 Cal. App. 4th 798, 811)* . The Uniform Commercial Code establishes a more mechanical system based only on facts unlikely to be disputed in litigation, such as the date stamped on a check on its receipt, the date it was returned or dishonored, or whether the check was not readable by a computer or was presented posthumously for payment (*1 Cal. App. 4th 798, 811-812)* . Mindful of the importance of securing uniformity, the court was loath to disturb the carefully circumscribed, determinate, and articulated system with its own interpretation, especially because the system apparently results from the deliberate intention of its drafters (*1 Cal. App. 4th 798, 812)* .

Los Angeles Nat. Bank v. Bank of Canton *(1991) 229 Cal. App. 3d 1267, 280 Cal. Rptr. 831* , was an action by a depositary bank against the drawee of 28 checks, deposited in three batches over a period of several days, for failure to return the checks or give notice of dishonor before the midnight deadline. The court of appeal reversed the judgment in defendant's favor, holding as a matter of first impression in California that a drawee may be held strictly liable under *Com. Code § 4302(a)* for its failure to return checks by the applicable deadline, regardless of whether any actual damages suffered by the other party were solely a result of the drawee's failure to comply with *Com. Code § 4302* (*229 Cal. App. 3d 1267, 1277-1278)* . *Com. Code § 1103(b)* does not serve to incorporate general principles of law, such as the defense that a party's loss was caused by its own negligence, because *Com. Code § 1103(b)* applies "unless displaced by the particular provisions of this code," and the strict liability rule of *Com. Code § 4302* does displace the defense that a party's loss was caused by its own negligence. Here the depositary's employee gave cash exceeding her authorized limit against uncollected deposited items (*229 Cal. App. 3d 1267, 1278)* . For purposes of calculating the midnight deadline, the processor to which the drawee had the Federal Reserve clearinghouse deliver its checks was its agent, and defendant "received" the checks for purposes of its compliance with *Com. Code § 4302* when they were delivered to the processor (*229 Cal. App. 3d 1267, 1280)* .

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Volume 3 Chapters 34-39 CHECKS AND BANKS---to---CIVIL SERVICE
CHAPTER 34 CHECKS AND BANKS
PART II. FORMS
B. Drawee Bank's Liability To Payee

3-34 California Points & Authorities § 34.72

§ 34.72 Supporting Contention That Drawee or Paying Bank Is Liable to Payee for Retention of Check After Deadline and/or Failure to Give Notice of Nonpayment [Com. Code §§ 4104(a)(10), 4302; 12 C.F.R. §§ 210.9, 229.30, 229.33, 229.38]--Liability for Undue Retention on Second Presentment of Previously Returned Item

[1] FORM

[*The following may be included in a memorandum, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT _____ [DRAWEE *or* PAYING] BANK IS LIABLE TO PLAINTIFF FOR THE AMOUNT OF THE CHECK DATED _____, DRAWN BY _____ [*name of drawer*] AND PAYABLE TO PLAINTIFF IN THE AMOUNT OF $_____, BECAUSE, WHEN THAT CHECK WAS PRESENTED TO DEFENDANT FOR THE _____ [*specify, e.g.*, SECOND] TIME ON _____ [*date*], DEFENDANT _____ [FAILED TO EXPEDITIOUSLY RETURN THAT CHECK AS REQUIRED BY TITLE 12 OF THE CODE OF FEDERAL REGULATIONS SECTION 229.30 *and/or* FAILED TO GIVE NOTICE OF NONPAYMENT AS REQUIRED BY TITLE 12 OF THE CODE OF FEDERAL REGULATIONS SECTION 229.33 *and/or* RETAINED THAT CHECK BEYOND _____ (THE CLOSE *or* MIDNIGHT) OF THE BANKING DAY ON WHICH DEFENDANT RECEIVED THAT CHECK WITHOUT _____ (*one or more as applicable:* SETTLING FOR (OR RETURNING) THE CHECK *or* GIVING NOTICE OF DISHONOR)].

Duties on Re-Presentment. California has adopted the majority and better-reasoned rule that duties and liabilities of a drawee bank the first time a check is presented to it for payment are equally applicable to second and successive presentments of previously returned items. Thus, a _____ [drawee *and/or* paying] bank that does not pay, expeditiously return, or give notice of dishonor or nonpayment of a re-presented check within the applicable time period is liable for the amount of the check (*see Com. Code § 4302*; *12 C.F.R. §§ 210.9(b), 229.30, 229.33*; *Huntmix, Inc. v. Bank of America (1982) 134 Cal. App. 3d 347, 349, 359, 361, 184 Cal. Rptr. 551*).

[2] Comments

[a] Use of Form

These points and authorities are for use in supporting the contention that a drawee or paying bank is liable to the payee, holder in due course, or collecting bank for undue retention of a previously presented check that, on a second or successive presentment, was retained beyond the applicable deadline without the drawee or paying bank's settling for it, expeditiously returning it, or sending timely notice of dishonor or nonpayment [*see Com. Code § 4302*; *12 C.F.R. §§ 210.9(b), 229.30, 229.33* (*set forth in § 34.71*)]. Although the term "drawee bank" has been used in the title of this form, Regulation CC (12 C.F.R. Part 229) applies to paying banks, which includes not only the drawee, but any bank at which a check is payable and to which it is sent for payment or collection. When the check is not payable by a bank, for instance when the check is drawn on a credit union, the bank through which the check is payable and to which it is sent for payment or collection is considered the paying bank [*see 12 C.F.R. § 229.2(z)(4)* (discussed in *§ 34.03[7]*)].

The case on which this form is based discussed the issue only in terms of *Com. Code § 4302(a)*, because the court of appeal concluded that Regulation J imposed no additional duties on the defendant in that case, and Regulation CC had not yet been promulgated [*see Huntmix, Inc. v. Bank of America (1982) 134 Cal. App. 3d 347, 355 n.11, 184 Cal. Rptr. 551]* . Regulation CC became effective on September 1, 1988. Still, it appears that the reasoning of the case would apply not only to the Commercial Code obligations, but also to those imposed by Regulations CC and J. The drawee or paying bank's liability to the payee may be more easily established under Regulation CC than under Regulation J because there is only dicta that Regulation J (12 C.F.R. § 210) applies to payees and nonmember banks [*see Community Bank v. Federal Reserve Bank of San Francisco (9th Cir. 1974) 500 F.2d 282, 285-287, 286 n.11 , cert. denied, 419 U.S. 1089* , discussed in *§ 34.71[3][b]*], while Regulation CC specifies that payees (and other parties to the check) can recover for unexpeditious return or failure to provide timely notice of nonpayment of a large item [*see 12 C.F.R. § 229.38(a)*]. Furthermore, the drawee would be liable in conversion if it refused on demand to return an item delivered to it for acceptance [*see Com. Code §§ 3409(a)* ("acceptance" defined, set forth in *§ 34.49*), 3420 (set forth in *§ 34.70*)].

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should describe the check, the time and channels through which it was presented and represented, and as to the presentment on which liability is premised, whether, and if so, when and how it was returned. Counsel may wish to attach copies of the face and back of the check because stamps on the back or face of the check may indicate dates on which various processing steps were taken. Counsel may need to rebut the presumption arising from those stamps [*see Com. Code § 3505(a)(2)*; *Security Pac. Nat. Bank v. Associated Motor Sales (1980) 106 Cal. App. 3d 171, 177, 165 Cal. Rptr. 38* (discussed in *§ 34.78[3*][a])].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the drawee's liability for undue retention of a previously returned check.

[b] Related Points and Authorities

The statute of limitations applicable to an action based on undue retention is addressed in § 34.71. The points and authorities set out in *§ 34.71* support, and those in §§ 34.77-34.78 oppose, the contention that the drawee bank is liable for late return.

[3] Discussion of Authorities

[a] Duties on Re-Presentment

Plaintiff in ***Huntmix, Inc. v. Bank of America*** *(1982) 134 Cal. App. 3d 347, 184 Cal. Rptr. 551* , was payee of a check drawn on defendant. The first time the check was presented to defendant, it was dishonored for lack of sufficient funds.

The second time the check was presented, it was not paid or returned, and no notice of dishonor was given within the time specified by *Com. Code § 4302* (*set forth in § 34.71*). The trial court sustained defendant's demurrer, without leave to amend, on the basis of dicta in *Bank of America v. Security Pacific Nat. Bank (1972) 23 Cal. App. 3d 638, 643-644, 100 Cal. Rptr. 438* (discussed in *§ 34.71[3][a]*), and authorities from Kansas that there is no requirement of dishonor on the second presentment. Plaintiff appealed.

The court of appeal reversed, saying that there was no dispositive California decision, that there was a split of authority in the jurisdictions that had considered the issue, and that the weight of such authority and the better rationale favors treating re-presented checks in the same fashion as checks presented for the first time (*134 Cal. App. 3d 347, 349, 359)* . The court set forth the provisions of *Com. Code § 4302(a)* and former Com. Code § 4104(1)(h) (*now see Com. Code § 4104(a)(10)*) (*134 Cal. App. 3d 347, 349-350)* , and noted that the applicability of *Com. Code § 4302* to re-presentment of checks previously returned for insufficient funds has been considered by several cases that were decided after *Bank of America v. Security Pacific Nat. Bank (1972) 23 Cal. App. 3d 638, 100 Cal. Rptr. 438* (*134 Cal. App. 3d 347, 351)* .

The rationale for not requiring timely notice of dishonor on the second presentment is that under former Com. Code § 3511(4) (*now see Com. Code § 3502(f)*), when a draft is dishonored by nonacceptance, later presentment and notice of dishonor are excused. Under that rationale, the reason for the imposition of sanctions under *Com. Code § 4302* dissipates once the drawee has timely discharged its duties on the first presentment (*134 Cal. App. 3d 347, 350-351)* . In the case of checks once dishonored for insufficient funds, the rationale only applies to a second presentment while the (drawer's) account remains insufficient. Additionally, this rationale has also been limited to checks dishonored by nonacceptance (i.e., returned unpaid, but without notice of dishonor) (*134 Cal. App. 3d 347, 353)* .

Cases cited by the court of appeal for the rationale that timely notice of dishonor is required on the re-presentment considered the fact that former Com. Code § 3511(4) (*now see Com. Code § 3502(f)*) does not apply to demand items, but only to time drafts (*134 Cal. App. 3d 347, 354)* ; that a significant number of previously dishonored checks are paid on re-presentment (*134 Cal. App. 3d 347, 355)* ; and that it is necessary for the drawee to be subject to the same duties on re-presentment as on the original presentment in order not to put an undue burden on the depositary and other banks in the collection chain that need to know when their time has expired to revoke provisional settlements (*134 Cal. App. 3d 347, 356)* [*see Com. Code § 4301* (*set forth in § 34.77*, regarding provisional settlement)]. The court found an additional reason to require notice of dishonor or return on the second presentment in the fact that former Com. Code § 4108(1) (*now see Com. Code § 4109(a)*), which allows good faith extension of time limits imposed or permitted by the Commercial Code, does not apply to drawee banks (*134 Cal. App. 3d 347, 359)* . The court also noted that the limitation of the minority rule to checks that were dishonored by nonacceptance meant that checks dishonored for insufficient funds would not fall within its purview and would require timely notice of dishonor on the second presentment. The court found the most persuasive argument to be the one regarding the practicalities of the situation (*134 Cal. App. 3d 347, 360)* . The court considered other arguments and adopted the majority rule (*134 Cal. App. 3d 347, 361)* .

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3-34 California Points & Authorities § 34.73

§ 34.73 Opposing Contention That Drawee Is Liable to Payee for Amount of Check Paid on Forged Endorsement [Com. Code 3420(a)]--Payee's Action Against Collecting Bank Bars Action Against Drawee Bank

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

THE LIABILITY OF DEFENDANT DRAWEE BANK TO PLAINTIFF FOR PAYING THE AMOUNT OF THE CHECK DATED _____, DRAWN BY _____ [*name of drawer*] AND PAYABLE TO PLAINTIFF TO ANOTHER PERSON ON A FORGED ENDORSEMENT, HAS BEEN EXTINGUISHED BY PLAINTIFF's COMMENCEMENT OF AN ACTION AGAINST THE COLLECTING BANK FOR CONVERSION RELATED TO THE SAME CHECK.

Extinguishment of Payee's Right of Action Against Drawee. The payee's [or other true owner's] commencement of an action against the collecting bank for conversion based on the bank's payment of a check on a forged endorsement ratifies the collection of the proceeds of the check by the collecting bank and transmutes the remittance of funds by the drawee bank into an authorized act [for which it may debit the drawer's account]. This ratification retroactively validates the drawee bank's remission of proceeds and provides it with a defense to an action for conversion (*Cooper v. Union Bank (1973) 9 Cal. 3d 371, 377, 384-385, 107 Cal. Rptr. 1, 507 P.2d 609* (construing prior law); *see Resh v. Connecticut National Bank (9th Cir. 1996) 89 F.3d 598, 601* (payee ratifies payment made by drawee to depositary when payee sues both depositary and drawee in single suit in state court, precluding conversion, payment by mistake, or negligence)).

[2] Comments

CAUTION:

These points and authorities are based on *Cooper v. Union Bank (1973) 9 Cal. 3d 371, 107 Cal. Rptr. 1, 507 P.2d 609* . This case was decided before the 1992 repeal and reenactment of Division 3 of the Commercial Code [Stats. 1992, ch. 914] and thus should be used with caution. Portions of the opinion

appear to have been effectively abrogated. For example, *Com. Code § 3420(a)* clearly eliminates a drawer's cause of action for conversion and takes the position of other authority on this point [*see § 34.95*]. In addition, *Cooper* may be suspect in that it does not make a distinction in plaintiff/payee conversion cases as to whether the payee took delivery of the check or whether the thief/forger obtained it first. This distinction is now crucial [*see Com. Code § 3420(a)(2)*].

It is unclear whether the portion of *Cooper* that is the basis of this form is still applicable. Under *Com. Code § 3420* it appears that the payee may sue any of the banks in the collection chain, but that the payee is entitled to but one recovery [*see* Official Comment 3 to U.C.C. § 3-420 (1990)]. How this affects the court's decision in *Cooper* that the payee's action against the drawee is extinguished once the payee commences suit against the collecting or depositary bank is unclear.

[a] Use of Form

This form of points and authorities may be used to oppose the contention that a drawee bank is liable in conversion to the payee or other true owner of a check paid on a forged endorsement when the payee or true owner has commenced an action for conversion against the collecting bank based on payment of the same check [*see Com. Code § 3420(a)*].

Counsel should add argument linking the points in this form with the facts of his or her case; for example, a copy of the pleadings in, or request that judicial notice be taken of [*Evid. Code §§ 452(d), 453*], the payee's action against the collecting bank. Counsel should also describe the check and payment involved with enough particularity so that it is clear that the same payment is the subject of both actions.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issueof the extinguishment of the drawee's liability to the payee for paying a check with a defective endorsement.

[b] Related Points and Authorities

The points and authorities set out in *§§ 34.34* and *34.93 -34.94* address particular payee designations. See Ch. 166, *Negotiable Instruments* , for forms addressing particular payee designations [*see, e.g.*, forms applying *Com. Code § 3109* (instruments payable to bearer or order)]. The points and authorities in *§ 34.70* support the contention that the drawee bank is liable to the payee for conversion for paying a check on a forged endorsement. The points and authorities in *§§ 34.74* and *34.75* oppose the contention that the drawee bank is liable for conversion for paying a check on a forged endorsement on the grounds that the payee's negligence substantially contributed to the forgery [*§ 34.74*] and that the drawee's actions did not constitute payment of the check [*§ 34.75*]. The points and authorities set out in *§§ 34.120 -34.122* support, and those in §§ 34.124-34.126 oppose, the contention that the collecting bank is also liable to the payee for conversion for paying a check on a forged endorsement. Other aspects of the validity and requirements of endorsements, and of liability for payment on an improper endorsement, are addressed in §§ 34.34, 34.47, 34.90-34.95, and 34.171.

[3] Discussion of Authorities

[a] Extinguishment of Payee's Right of Action Against Drawee

The facts and procedural background of ***Cooper v. Union Bank*** *(1973) 9 Cal. 3d 371, 107 Cal. Rptr. 1, 507 P.2d 609* , and the part of the opinion considering the rationale for extinguishing the payee's right of action against the drawee, are discussed in *§ 34.70[3][a]*. The Supreme Court also said that a payee or other true owner, in bringing an action against the collecting bank for conversion of a check collected on a forged endorsement, is deemed to have ratified the collection of the proceeds from the drawee bank. This ratification transmutes the remittance of funds by the drawee bank into an authorized act for which it may debit the drawer's account (*9 Cal. 3d 371, 377)* . The ratification

retroactively validates the drawee bank's remission of proceeds and provides it with a defense to an action for conversion. Therefore, as to all the checks involved that had been transferred for collection through collecting banks that were also parties to the action, no liability existed as to any drawee bank (*9 Cal. 3d 371, 384)* .

In ***Resh v. Connecticut National Bank*** *(9th Cir. 1996) 89 F.3d 598* , the payee of a check sued the drawee in federal court for negligence in failing to discover forged endorsements, payment of the checks by mistake, conversion of checks to its own use, and wrongful retention of the proceeds of the checks, which were therefore subject to a constructive trust. The payee had previously also sued the depositary in state court, and the parties had settled. The drawee moved for summary judgment, relying on ratification by the payee. The district court granted summary judgment and the payee appealed, claiming that only its cause of action for conversion was barred by *Cooper, above.* The Ninth Circuit cited *Cooper* as established California law that suit by the payee of a check against the depositary or collecting bank ratifies payment made by the drawee or payor bank to the depositary bank. The action for conversion ratified payment by the drawee; therefore, the drawee did not pay by mistake and was not negligent in making payment (*89 F.3d 598, 601)* .

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3-34 California Points & Authorities § 34.74

§ 34.74 Opposing Contention That Drawee Is Liable to Payee for Amount of Check Paid on Forged Endorsement [Com. Code § 3420(a)]--Payee's Negligence Substantially Contributed to Forged Endorsement [Com. Code § 3406]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT DRAWEE BANK IS NOT LIABLE TO PLAINTIFF FOR PAYING THE AMOUNT OF THE CHECK DATED _____, DRAWN BY _____ [*name of drawer*] AND PAYABLE TO PLAINTIFF, TO ANOTHER PERSON ON A FORGED ENDORSEMENT BECAUSE PLAINTIFF's NEGLIGENCE SUBSTANTIALLY CONTRIBUTED TO THE MAKING OF THE FORGERY.

A. Contributory Negligence. A person whose failure to exercise ordinary care contributes to the making of a forged signature on an instrument is precluded from asserting the forgery against a person who, in good faith, pays the instrument or takes it for value or for collection (*Com. Code § 3406(a)*).

B. Ordinary Care. [*See § 34.39[1], Paragraph C.*]

C. Burden of Proof. The burden of proving failure to exercise ordinary care is on the person asserting the preclusion (*Com. Code § 3406(c)*).

[2] Comments

[a] Use of Form

The points and authorities in [1], *above*, may be used to oppose the contention that a drawee bank is liable in conversion to the payee or other true owner of a check paid on a forged endorsement. For this defense to apply, the drawee must have paid the check in good faith [*see Com. Code § 3406*].

Counsel should add argument linking the points in this form with the facts of his or her case; for example, facts establishing the drawee's good faith in paying the check and the payee's or true owner's negligence. In addition, because *Com. Code § 3406(b)* adopts a comparative negligence test [*see* discussion in *§ 34.52[2*][b]; *see also § 34.39*], counsel should set forth facts showing that the drawee was not negligent in paying the check.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the drawee's freedom from liability because of the payee's negligence.

[b] Payee's Negligence With Regard to Employee

Com. Code § 3405 governs fraudulent endorsements made by an employee with regard to instruments to which the employer has given "responsibility" to the employee [*see Com. Code § 3405(a)(3), (b)*; Official Comment 1 to U.C.C. § 3-405 (1990)]. Before the 1992 repeal and reenactment of Division 3 of the Commercial Code [Stats. 1992, ch. 914], former Com. Code § 3406 was used in cases in which an employee fraudulently endorsed the employer's name on a check payable to the employer [*see, e.g., Cooper v. Union Bank (1973) 9 Cal. 3d 371, 107 Cal. Rptr. 1, 507 P.2d 609* , discussed in *§ 34.96[4][a]*]. Under former Com. Code § 3406, the employer took the loss only if his or her negligence could be proved. However, under revised Division 3, *Com. Code § 3406* need not be used with regard to forgeries of the employer's endorsement. *Com. Code § 3405* imposes the loss on the employer without proof of negligence [Official Comment 1 to U.C.C. § 3-405 (1990)]. However, if in the employee fraud case the employer did not give "responsibility" to the employee as that term is defined by *Com. Code § 3405(a)(3)*, then the general contributory negligence provisions of *Com. Code § 3406* could presumably be used as a defense [*see* Official Comment 1 to U.C.C. § 3-405 (1990); Case 1 of Official Comment 3 to U.C.C. § 3-405 (1990); Case 1 of Official Comment 3 to U.C.C. § 3-406 (1990) (drawer's negligence)]. For points and authorities addressing the employer's responsibilities under *Com. Code § 3405*, see *§ 34.96*.

[c] Related Points and Authorities

The points and authorities in *§ 34.70* support the contention that the drawee bank is liable to the payee for conversion for paying a check on a forged endorsement. The points and authorities in *§§ 34.73* and *34.75* oppose the contention that the drawee bank is liable for conversion for paying a check on a forged endorsement on the grounds that the payee commenced action against the collecting bank [§ 34.73] and that the drawee's actions did not constitute payment of the check [§ 34.75]. The points and authorities set out in *§§ 34.34* and *34.93* -39.94 address particular payee designations. Ch. 166, *Negotiable Instruments* also includes forms addressing particular payee designations [*see, e.g.*, forms applying *Com. Code § 3109* (instruments payable to bearer or order)]. The points and *authorities in §§ 34.120 -34.122* support, and those in *§§ 34.124 -34.126* oppose, the contention that the collecting bank is also liable to the payee for conversion for paying a check on a forged endorsement. Other aspects of the validity and requirements of endorsements, and of liability for payment on an improper endorsement, are addressed in §§ 34.34, 34.47-34.48, 34.90-34.95, and 34.171.

[3] Discussion of Authorities

[a] Contributory Negligence

Good faith is defined by *Com. Code § 1201(b)(20)* as honesty in fact and the observance of reasonable commercial standards of fair dealing.

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3-34 California Points & Authorities § 34.75

§ 34.75 Opposing Contention That Drawee Is Liable to Payee for Amount of Check Paid on Forged Endorsement [Com. Code § 3420(a)]--Recredit to Drawer's Account Is Not Payment [Com. Code §§ 4104(a)(11), 4215(a)(1), (2)]

[1] FORM

[*The following may be included in a memorandum, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT DRAWEE BANK IS NOT LIABLE TO PLAINTIFF FOR THE AMOUNT OF THE CHECK DATED _____, DRAWN BY _____ [*name of drawer*] AND PAYABLE TO PLAINTIFF, BECAUSE THE DRAWER's FORGERY OF PLAINTIFF's ENDORSEMENT AND DEPOSIT OF THE CHECK TO THE ACCOUNT ON WHICH IT WAS DRAWN DID NOT RESULT IN ITS PAYMENT.

A. Final Payment by Payor Bank. An item is finally paid by a payor bank when the bank has first done any of the following:

(1) Paid the item in cash.

(2) Settled for the item without having a right to revoke the settlement under statute, clearinghouse rule, or agreement.

(3) Made a provisional settlement for the item and failed to revoke the settlement in the time and manner permitted by statute, clearinghouse rule, or agreement.

If provisional settlement for an item does not become final, the item is not finally paid (*Com. Code § 4215(a), (b)*).

B. Settle Defined. To "settle" is to pay in cash, by clearinghouse settlement, in a charge or credit or by remittance, or otherwise as agreed. A settlement may be either provisional or final (*Com. Code § 4104(a)(11)*).

C. Deposit to Account on Which Check Is Drawn Does Not Result in Its Payment. When a drawer steals a check back from the payee, forges the payee's endorsement over his or her own endorsement, and deposits the check to the account on which it is drawn, and the drawee debits and credits that account, the check has not been paid within the meaning of *Commercial Code Section 4215(a)(1)* or *(2)* even if the drawee stamped it "Paid." Thus, the payee has no cause of action against the drawee for conversion (*see Com. Code § 3420(a)*; *Pupko v. Bank of America (1981) 114 Cal. App. 3d 495, 499-502, 170 Cal. Rptr. 615* (construing prior law)).

[2] Comments

[a] Use of Form

These points and authorities are for use in opposing the contention that a drawee bank is liable in conversion to the payee of a check on which the drawer forged the payee's endorsement [*see Com. Code § 3420(a)*]. The drawee's defense is based on the fact that the deposit, debiting, and crediting of the check to the drawer's account do not constitute payment [*see Com. Code § 4215(a)(1), (2)*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Thus, counsel should set forth the processing steps taken by the drawee so that they are distinguishable from the definition of payment contained in *Com. Code § 4215(a)*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the drawee's actions do not constitute payment.

[b] Related Points and Authorities

The points and authorities set out in *§ 34.70* supports the contention that the drawee bank is liable to the payee for conversion for paying a check on a forged endorsement. The points and authorities set out in *§§ 34.73* and *34.74* oppose the contention that the drawee bank is liable for conversion for paying a check on a forged endorsement on the grounds of the payee's commencement of action against the collecting bank § 34.73 and of the payee's negligence § 34.74.

[3] Discussion of Authorities

[a] Deposit to Account on Which Check Is Drawn Does Not Result in Its Payment

Plaintiff in ***Pupko v. Bank of America*** *(1981) 114 Cal. App. 3d 495, 170 Cal. Rptr. 615* , was payee of three checks drawn on defendant and sued defendant for conversion after they were allegedly paid on forged endorsements. The drawer originally delivered the checks to plaintiff for value. Plaintiff tried to cash them, but payment was refused for insufficient funds. Then, the drawer stole the checks from plaintiff's briefcase, forged plaintiff's endorsement on each check, endorsed its company name under the forged endorsement, and deposited the checks to the account at defendant on which they were drawn. Defendant debited and credited the drawer's account for each check and marked each check paid. Drawer's principal departed the area abruptly, abandoning the underlying obligation to plaintiff. Plaintiff and defendant both moved for summary judgment. It was granted, and judgment was entered, for defendant bank. Plaintiff appealed.

The court of appeal affirmed. Plaintiff contended that the checks had been paid on forged endorsements within the meaning of former Com. Code § 3419(1)(c) (*now see Com. Code § 3420(a)*). Defendant contended that the checks were never paid as that term is defined in former Com. Code § 4213(1)(a) and (b) (*now see Com. Code § 4215(a)(1), (2)*), and that drawer's actions amounted to no more than the exercise of its right to stop payment (*114 Cal. App. 3d 495, 497)* . The court said that a check is paid when the drawee does some act defined by former Com. Code § 4213 (*now see Com. Code § 4215*) as payment, and quoted portions of former Com. Code § 4213(1)(a) and *(b)* (*now see Com. Code § 4215(a)(1), (2)*) to the effect that an item is finally paid when it is paid in cash or settled for without having a right to

revoke the settlement under any statute, clearinghouse rule, or agreement. The court set forth the definition of settlement found in former Com. Code § 4104(1)(j) (*now see Com. Code § 4104(a)(11)*), and said comments to that section establish that the very essence of settlement is the payor bank's parting with value. The transaction in this case did not indicate either a cash or noncash settlement, but represented no more than a completed "wash," only a bookkeeping transaction--simultaneous entries of debit and credit. No cash was paid, no charge or credit or remittance of any sort was involved (*114 Cal. App. 3d 495, 499)* . Payment as defined in former Com. Code § 4213 (*now see Com. Code § 4215*) was not accomplished by this bookkeeping transaction (*114 Cal. App. 3d 495, 499-500)* . The court cited *Ocean Park Bank v. Rogers (1907) 6 Cal. App. 678, 681* , a case in which the payee challenged the reversal of a check's provisional payment drawn on insufficient funds, for the proposition that stamping a check "Paid" does not constitute final payment (*114 Cal. App. 3d 495, 500)* . The court noted comments regarding the failure of California to adopt former Com. Code § 4213(1)(c) (also not adopted in current *Com. Code § 4215*) because the common practice is for California banks to post items at a centralized bookkeeping location and then to send them to the branches on which they are drawn to check signatures, to search for stop payment orders, and the like. Banks did not want any ambiguity as to the rule that payment is not final until it is not revoked within the time allotted by statute. The court concluded that the rejection of former Com. Code § 4213(1)(c) makes it clear that the California legislative intent was that mere recording or posting activities would not constitute payment (*114 Cal. App. 3d 495, 501)* . This is consistent with the current final payment provisions in which a similar provision was not adopted [*see Com. Code § 4215(a)*].

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3-34 California Points & Authorities § 34.76

§ 34.76 Opposing Contention That Drawee or Paying Bank Is Liable to Payee for Amount of Check It Failed to Expeditiously Return or With Regard to Which It Failed to Give Timely Notice of Nonpayment [12 C.F.R. §§ 229.30, 229.33, 229.38]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT PAYING BANK IS NOT LIABLE TO PLAINTIFF FOR THE AMOUNT OF THE CHECK DATED _____, DRAWN BY _____, AND PAYABLE TO PLAINTIFF IN THE AMOUNT OF $_____, EVEN THOUGH THE CHECK WAS NOT RETURNED TO THE DEPOSITARY BANK WITHIN THE TIME REQUIRED BY TITLE 12 OF THE CODE OF FEDERAL REGULATIONS SECTION 220.30, BECAUSE _____ [*specify reason for limitation of bank's liability, e.g.,* PLAINTIFF's ENDORSEMENT EXTENDED INTO THE SPACE RESERVED FOR THE ENDORSEMENT OF THE DEPOSITARY BANK AND THE RESULTING ILLEGIBILITY OF THE DEPOSITARY BANK's ENDORSEMENT MADE IT IMPOSSIBLE FOR DEFENDANT TO RETURN THE CHECK TO THE DEPOSITARY BANK WITHIN THE REQUIRED TIME].

A. Bank Is Not Liable for Acts of Others. Subject to a bank's duty to exercise ordinary care or to act in good faith in choosing the means of return or notice of nonpayment, the bank is not liable for the insolvency, neglect, misconduct, mistake, or default of another bank or person, or for loss or destruction of a check or notice of nonpayment in transit or in the possession of others (*12 C.F.R. § 229.38(a)*).

B. Comparative Negligence. If a person, including a bank, fails to exercise ordinary care or to act in good faith under Title 12 of the Code of Federal Regulations Part 229, Subpart C (*12 C.F.R. § 229.30 et seq.*) in endorsing a check (*see 12 C.F.R. § 229.35*), accepting a returned check or notice of nonpayment (*see 12 C.F.R. §§ 229.32(a), 229.33(c)*), or otherwise, the damages incurred by that person must be diminished in proportion to the amount of negligence or bad faith attributable to that person (*12 C.F.R. § 229.38(c)*).

[*Optional*] **C. Depositary Bank's Responsibility for Back of Check.** A depositary bank is responsible for damages under Title 12 of the Code of Federal Regulations Section 229.38(a) to the extent that the condition of the back of the check arising after the issuance of the check and before acceptance of the check by it adversely affects the ability of a bank to endorse the check legibly in accordance with Title 12 of the Code of Federal Regulations Section 229.35. Responsibility under Title 12 of the Code of Federal Regulations Section 229.38(d)(1) must be treated as negligence of the depositary bank for purposes of Title 12 of the Code of Federal Regulations Section 229.38(c) (*12 C.F.R. § 229.38(d)(1)*).

[*Optional*] **D. Situations Beyond Bank's Control.** If a bank is delayed in acting beyond the time limits set forth in Title 12 of the Code of Federal Regulations Part 229, Subpart C (*12 C.F.R. § 229.30 et seq.*) because of the interruption of communication or computer facilities, suspension of payments by a bank, war, emergency conditions, failure of equipment, or other circumstances beyond its control, its time for acting is extended for the time necessary to complete the action, if it exercises as much diligence as the circumstances require (*12 C.F.R. § 229.38(e)*).

[*Optional*] **E. Exclusion.** Title *12 of the United States Code Section 4010(a), (b),* and *(c)* and Title 12 of the Code of Federal Regulations Section 229.21 do not apply to actions that arise under Title 12 of the Code of Federal Regulations Part 229, Subpart C (*12 C.F.R. § 229.30 et seq.*) (*12 C.F.R. § 229.38(f)*).

[*Optional*] **F. Reliance on Board Ruling.** No provision of Title 12 of the Code of Federal Regulations Part 229, Subpart C (*12 C.F.R. § 229.30 et seq.*) imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation of a rule or regulation by the Board of Governors of the Federal Reserve, regardless of whether the rule, regulation, or interpretation is amended, rescinded, or determined by judicial or other authority to be invalid for any reason after the act or omission has occurred (*12 C.F.R. § 229.38(h)*).

[2] Comments

[a] Use of Form

These points and authorities are for use in opposing the contention that a drawee or paying bank is liable under Subpart C of Regulation CC (*12 C.F.R. § 229.30 et seq.*) to the payee, holder in due course, or collecting bank for the amount of a check, return of which was untimely under *12 C.F.R. § 229.30* (set forth in *§ 34.71*), or with regard to which it failed to provide timely notice of nonpayment under *12 C.F.R. § 229.33* (set forth in *§ 34.71*). The opposition may be based on one or more of the grounds set forth in *12 C.F.R. § 229.38(a), (c)*-(f), and (h). The ground used in the example relates to Appendix D of Regulation CC, which reserves the first one and one-half inches from the trailing edge of the reverse of a check for the payee's endorsement [*see 12 C.F.R. § 229.35(a)* (requiring banks to place their endorsements in accordance with Appendix D); *see also* 12 C.F.R. § 229, Appendix E, Commentary to § 229.35(a)]. The space between three inches from the leading edge to one and one-half inches from the trailing edge is reserved for the depositary bank's endorsement [12 C.F.R. § 229, Appendix D].

Although the title and certain other aspects of this form are phrased in terms of a drawee or a paying bank, *12 C.F.R. § 229.38* is equally applicable to banks of any status. Thus, these authorities may be used by a depositary, collecting, or returning bank to oppose the imposition of liability under Subpart C of Regulation CC (*12 C.F.R. § 229.30 et seq.*).

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should describe the check, defendant's status, and the particular facts exonerating the bank.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the exclusion or limitation on a bank's liability under Subpart C of Regulation CC (*12 C.F.R. § 229.30 et seq.*).

[b] Related Points and Authorities

The points and authorities set out in *§ 34.71* support the contention that the drawee or paying bank is liable for late return or failure to provide timely notice of nonpayment. § 34.78 addresses the presumption of timely return created by certain processing stamps on a check.

[3] Discussion of Authorities

[a] Depositary Bank's Responsibility for Back of Check

A paying bank is responsible for the check's condition when it is issued by it or its customer. Thus, the paying bank would be responsible for the adverse effect, if any, of a carbon band or other material placed on the back of the check before issuance. The paying bank may contract with its customer with regard to this responsibility [12 C.F.R. § 229, Appendix E, Commentary to § 229.38(d)(1)].

The depositary bank is responsible for the check's condition arising after it is issued and before it is accepted by the depositary bank, as well as any condition of the check arising during its handling of the check. The depositary bank would be responsible for the adverse effect, if any, of a stamp placed on the check by its customer or a prior endorser. The depositary bank may refuse to accept a check whose back is unreasonably obscured or contract with its customers with regard to this responsibility [12 C.F.R. § 229, Appendix E, Commentary to § 229.38(d)(1)].

[b] Situations Beyond Bank's Control

12 C.F.R. § 229.38(e) excuses certain delays. It adopts the standard of *Com. Code § 4109(b)* [12 C.F.R. § 229, Appendix E, Commentary to § 229.38(e)]

[c] Exclusion

Any depository institution that fails to comply with any requirement imposed by the federal Expedited Funds Availability Act (*12 U.S.C. § 4001 et seq.*) and regulations promulgated under it (12 C.F.R. Parts 210 and 229), or with any provision of state law that supersedes any provision of Subpart B (*12 C.F.R. § 229.10 et seq.*), with regard to any person other than another depository institution, is liable to that person in an amount equal to the actual damage sustained by that person as a result of the failure to comply, plus an additional amount between $100 and $1,000 as allowed by the court [*12 U.S.C. § 4010(a)(1), (2)(A)*; *12 C.F.R. § 229.21(a)(1), (2)(i)*] *12 C.F.R. § 229.38(f)* provides that the civil liability and class action provisions, particularly the punitive damage provisions and the bona fide error provisions [*see 12 U.S.C. § 4010(a)-(c)*], do not apply to regulatory provisions adopted to improve the efficiency of the payments mechanism (i.e., *12 C.F.R. § 229.30 et seq.*). Allowing punitive damages for delays in the return of checks when no actual damages are incurred would only encourage litigation and provide little or no benefit to the check-collection system. In view of the provisions of *12 C.F.R. § 229.38(a)*, which incorporate traditional bank collection standards based on negligence, the provision on bona fide errors is not included in Subpart C (*12 C.F.R. § 229.30 et seq.*) [12 C.F.R. § 229, Appendix E, Commentary to § 229.38(f)].

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3-34 California Points & Authorities § 34.77

§ 34.77 Opposing Contention That Drawee or Paying Bank Is Liable for Late Return of Check or Revocation of Provisional Settlement [Com. Code §§ 4107, 4301; 12 C.F.R. §§ 229.30, 229.33]--Revocation or Return Timely

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT DRAWEE BANK IS NOT LIABLE TO PLAINTIFF FOR THE AMOUNT OF THE CHECK DATED _____, DRAWN BY _____ [*name of drawer*] AND PAYABLE TO PLAINTIFF IN THE AMOUNT OF $_____, BECAUSE DEFENDANT's _____ [RETURN *and/or* NOTICE OF DISHONOR *and/or* NOTICE OF NONPAYMENT *and/or* REVOCATION OF PROVISIONAL SETTLEMENT] WAS TIMELY.

A. Revocation of Settlement Under Commercial Code. If a payor bank settles for a demand item other than a documentary draft presented otherwise than for immediate payment over the counter before midnight of the banking day of receipt, the payor bank may revoke the settlement and recover the settlement if, before it has made final payment and before its midnight deadline, it either (a) returns the item, or (b) sends written notice of dishonor or nonpayment if the item is unavailable for return (*Com. Code § 4301(a)*; *see Farmers & Merchants Bank v. Bank of America (1971) 20 Cal. App. 3d 939, 944, 98 Cal. Rptr. 381*).

[*Optional*] **B. Federal Reserve Rule (Return).** [*See § 34.71[1], second alternative Paragraph B, plus Paragraphs F-H, J, and K, as appropriate (reletter following paragraphs accordingly).*]

[*Optional*] **C. Revocation of Credit Given.** If a demand item is received by a payor bank for credit on its books, it may return the item or send notice of dishonor and may revoke any credit given or recover the amount thereof withdrawn by its customer, if it acts within the time limit and in the manner specified in *Commercial Code Section 4301(a)* (*Com. Code § 4301(b)*).

D. Revocation Timely. A drawee bank's [notice of dishonor and] reversal of provisional credit is timely when done on the [next banking] day after the [banking] day on which the check was _____ [received *or* deposited] at the drawee for collection and provisional credit was given (*Nautilus Leasing Services, Inc. v. Crocker National Bank (1983) 147 Cal. App. 3d 1023, 1031-1032, 195 Cal. Rptr. 478*).

[*Optional*] **E. Acts Not Amounting to Acceptance or Final Payment.** The drawee's charging or posting of a check to the drawer's account and stamping the check "Paid" constitute neither acceptance within the meaning of Commercial Code Section _____ [3409 *and/or* 4303(a)(1)], nor final payment within the meaning of Commercial Code Section _____ [4215(a)(1) or (2) *and/or* 4303(a)(2) or (3)] (*Nautilus Leasing Services, Inc. v. Crocker National Bank (1983) 147 Cal. App. 3d 1023, 1029-1030, 195 Cal. Rptr. 478* ; *Pupko v. Bank of America (1981) 114 Cal. App. 3d 495, 499-501, 170 Cal. Rptr. 615*).

[*Optional*] **F. Computer Center Is Separate Branch.** If the drawee's _____ [computer *or* processing *or* operations] center, at which checks are actually first received for payment, does not perform functions usually considered branch functions, such as verifying signatures, verifying the sufficiency of the balance in the account on which the check is drawn, or verifying the lack of any stop payment orders or legal notices, the _____ [computer *or* processing *or* operations] center is a separate branch within the meaning of *Commercial Code Section 4107*, and the time within which the check must be settled for, or returned, or notice of dishonor sent, begins on the [banking] day on which the check is received at the branch where the drawer's account is maintained (*Nautilus Leasing Services, Inc. v. Crocker National Bank (1983) 147 Cal. App. 3d 1023, 1031, 195 Cal. Rptr. 478*).

[*Optional*] **G. Separate Office or Branch.** For purposes of computing the time within which, and determining the place at or to which, action may be taken or notice or orders shall be given under Divisions 3 and 4 of the Commercial Code, a branch or separate office of a bank is a separate bank (*Com. Code § 4107*).

[*Optional*] **H. Places for Presentment (Regulation CC).** A check is considered received by the paying bank when it is received (1) at a location to which delivery is requested by the paying bank; (2) at an address of the bank associated with the routing number on the check, whether in magnetic ink or in fractional form; (3) at any branch or head office, if the bank is identified on the check by name without address; or (4) at a branch, head office, or other location consistent with the name and address on the check if the bank is identified on the check by name and address (*12 C.F.R. § 229.36(b)*).

[2] Comments

[a] Use of Form

These points and authorities are for use in opposing the contention that a drawee or paying bank is liable to the payee, holder in due course, or collecting bank for the amount of a check with regard to which the drawee or paying bank made timely return, or sent timely notice of dishonor or notice of nonpayment or notice in lieu of return [*see Com. Code § 4301*; *12 C.F.R. §§ 229.30, 229.33* (set forth in *§ 34.71*)] *Com. Code § 4301* (Paragraphs A and C) have been superseded by the requirements of *12 C.F.R. §§ 229.30* and *229.33* (set forth in *§ 34.71*, Paragraphs B, F-K; *see also* related discussions in *§ 34.71[3][a]*) [12 C.F.R. § 229, Appendix E, Commentary to § 229.30(a)] in that the time limits set forth in *Com. Code § 4301* may be affected by the additional requirements of expeditious return under *12 C.F.R. § 229.30* and notice of nonpayment of large items under *12 C.F.R. § 229.33* [12 C.F.R. § 229, Appendix E, Commentary to §§ 229.30(a), 229.33; *see 12 U.S.C. § 4007(b)* (authority for regulations that supersede Commercial Code)] Note, however, that although a bank may miss both deadlines, it can only be held liable for missing one [*see 12 C.F.R. § 229.38(b)* (set forth in *§ 34.71*, Paragraph L)]. Also, the concept of revocation of provisional credit has been superseded by Regulation CC (12 C.F.R. § 229) effective September 1, 1988. Under Regulation CC, interbank settlements are final when made, but the paying bank still has the right to recover settlement from a returning bank or depositary bank to which it returns a check [*see § 34.77[3][a]*]. Thus, in some situations, for instance for purposes of *Com. Code §*

4215(a)(2) or *(3)*, settlement by a paying bank or drawee is not considered final [12 C.F.R. s. 229, Appendix E, Commentary to § 229.36(d)].

Paragraphs D-G reflect application of *Com. Code § 4301* before the promulgation of Regulation CC, and will be superseded by that regulation to the extent they are inconsistent with it [*see 12 U.S.C. § 4007(b)* (authority for regulations that supersede the Uniform Commercial Code as enacted in any state)]. For instance, the proposition set forth in Paragraph F would not be applicable if the drawee had requested that checks being presented for payment be delivered to its processing center or if the address of the processing center was associated with the routing number on the check [*see 12 C.F.R. § 229.36(b)* (set forth in Paragraph H)]. Paragraph B incorporates many provisions of *12 C.F.R. §§ 229.30* and *229.33*. Counsel should use those paragraphs that relate to the defects claimed by the payee or collecting bank.

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should describe the check, the time and channels through which it was presented, when and if the drawee or paying bank settled for the check, and when and how it attempted to recover that settlement.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the drawee's timely return.

[b] Related Points and Authorities

The points and authorities set out in *§ 34.71* support the contention that the drawee bank is liable for late return. § 34.78 addresses the presumption of timely return created by certain processing stamps on a check.

[3] Discussion of Authorities

[a] Revocation of Settlement Under Commercial Code

Under the Commercial Code, a collecting bank receives settlement for a check when it presents the check to the drawee; this is referred to as provisional settlement. The drawee bank may recover this settlement when it returns the check to the presenting bank. Under Regulations J and CC, the drawee or paying bank must still settle for checks presented to it [*see 12 C.F.R. §§ 210.9(b)* (set forth in *§ 34.71*, Paragraph B), 229.36(d) (settlement in forward collection process)]. Under Regulation CC, however, the drawee or paying bank may return the check directly to the depositary bank or through returning banks that did not handle the check for forward collection. On these more efficient paths, the paying bank does not recover the settlement made to the presenting bank. Instead the depositary bank is required to pay the drawee or a returning bank [*12 C.F.R. § 229.32(b)*], and a bank through which the drawee or paying bank returned a check (returning bank) is required to settle for the returned check, either with the paying bank or with another returning bank in the same way it would settle for a similar check in forward collection [*12 C.F.R. § 229.31(c)*; *see 12 C.F.R. § 229.2(cc)* (defining returning bank to exclude paying bank and depositary bank; returning bank is collecting bank for purposes of *Com. Code § 4202(b)*)]. To achieve uniformity, *12 C.F.R. § 229.31(c)* applies even if the returning bank handled the check for forward collection [12 C.F.R. § 229, Appendix E, Commentary to § 229.31(c)].

[b] Federal Reserve Rule (Return)

See *§ 34.71[3][c], [e] -[j]*.

[c] Revocation of Credit Given

Note that the time requirement in *Com. Code § 4301(a)*, referred to in *Com. Code § 4301(b)*, and the concept of revocation of interbank credits have been superseded, as discussed in *§ 34.77[2][a]* and *§ 34.77[3][a]*.

[d] Revocation Timely

Note that the authorities used in this paragraph consider only the midnight deadline under *Com. Code § 4301*. As discussed in *§ 34.77[2][a]*, the drawee or paying bank must also meet the deadlines imposed by *12 C.F.R. §§ 229.30* and *229.33* (set forth in *§ 34.71*).

Plaintiff in ***Nautilus Leasing Services, Inc. v. Crocker National Bank*** *(1983) 147 Cal. App. 3d 1023, 195 Cal. Rptr. 478* , was the payee of a $35,000 check drawn on defendant. The check was dated November 28, 1978, was deposited by plaintiff, was forwarded by plaintiff's bank through the San Francisco Clearinghouse Exchange, and arrived at defendant's operations center at 8:00 A.M. on Friday, December 1, 1978. The operations center sorted the check according to the branch on which it was drawn, stamped it "Paid," and posted the check to the drawer's account, all without checking to see if there were actually sufficient funds in the account to cover the check. Defendant refers to this process as provisional settlement, and it was completed by 2:00 A.M. Saturday morning, December 2. On Monday, December 4, the check arrived at the branch on which it was drawn. Drawer had a demand loan owing to defendant, which both knew could only be paid if certain merger negotiations were successfully concluded. On December 4, the drawer informed defendant that the merger would not occur, and defendant demanded full payment of the loan. Drawer told defendant it could not meet the demand, so defendant exercised its right of setoff against the account on which plaintiff's check was drawn, leaving a negative balance in the account. Plaintiff's check and others like it were returned unpaid. On the afternoon of December 4, the drawer filed a Chapter 11 bankruptcy petition, and on December 12, drawer and defendant filed a stipulation in the bankruptcy court, which that court approved, that the setoff was valid. Plaintiff and defendant each moved for summary judgment on the basis of agreed facts. Judgment was for plaintiff. Defendant appealed.

The court of appeal reversed. The only issue involved was the construction and application of *Com. Code § 4303* (*set forth in § 34.57*, Paragraph B.). The court said a bank has a right to return a check unpaid provided none of the events listed in *Com. Code § 4303* has occurred (*147 Cal. App. 3d 1023, 1027-1028)* . Plaintiff contended that defendant had accepted the check [*see Com. Code § 4303(a)(1)*] and retained it beyond the permissible deadline (*147 Cal. App. 3d 1023, 1028)* . The portion of the opinion considering the acceptance contention is discussed in *§ 34.77[3][e]*. In order to determine if defendant had retained the check too long, the court first had to determine when the check was deemed received, which hinged on whether defendant's computer center was a separate branch [*see Com. Code § 4107*]. Although that portion of the opinion is likely to have been superseded by *12 C.F.R. § 229.36(b)* [set forth in Paragraph H], the discussion of that portion of the opinion has been retained under Computer Center Is Separate Branch, *infra*. If defendant had requested that checks being presented for payment be delivered to its processing center, or if the address of the processing center was given on the check, the result under *12 C.F.R. § 229.36(b)(1)* would be different than in the case, and the check would have been considered received on Friday. Still, defendant's return would have been timely under *12 C.F.R. § 229.30(a)* and notice of nonpayment under *12 C.F.R. § 229.33* would have been unnecessary [*see* discussion in *§ 34.71[3][j]*] if the depositary bank received the returned check by 4:00 P.M. on Tuesday [*see 12 C.F.R. § 229.30(a)*]. Lastly, the court considered whether defendant had exercised its right of setoff too late under former Com. Code § 4303(1)(c) (*no see Com. Code § 4303(a)(3)*), which permits a drawee to exercise setoff until it has settled for the item without having a right to revoke the settlement under a statute, clearinghouse rule, or agreement, specifically *Com. Code § 4301* [set forth in Paragraph A], *Com. Code § 4302* [time for settlement or return, set forth in *§ 34.71*, Paragraphs A, C], and *Com. Code § 4104(a)(11)* [defining midnight deadline, set forth in *§ 34.71*, Paragraph D]. The court said that defendant's deadline for revocation of provisional settlement or exercise of setoff, whether it received the check on Friday or Saturday, was midnight of the next banking day, or Monday. Exercise of its right of setoff during the day on Monday was therefore proper (*147 Cal. App. 3d 1023, 1031-1032)* .

[e] Acts Not Amounting to Acceptance or Final Payment

The facts and procedural background of ***Nautilus Leasing Services, Inc. v. Crocker National Bank*** *(1983) 147 Cal. App. 3d 1023, 195 Cal. Rptr. 478* , are set forth in *§ 34.77[3][d]*. Plaintiff contended that defendant had accepted the

check and retained it beyond the permissible deadline (*147 Cal. App. 3d 1023, 1028)* . Plaintiff's acceptance argument relied on *Rosen v. Rosen (1936) 17 Cal. App. 2d 601, 603, 62 P.2d 384* , which the court distinguished as being superseded by the adoption of the Commercial Code (*147 Cal. App. 3d 1023, 1028-1029)* . The court said that acceptance within the meaning of former Com. Code § 4303(1)(a) (*now see Com. Code § 4303(a)(1)*) means formal acceptance as defined in former Com. Code § 3410 (*now see Com. Code § 3409*, set forth in *§ 34.49*, Paragraph C), which requires the drawee to sign the check, and requires the signing to be done intentionally by an authorized bank official. This does not mean that bank officers must sign every check, but acceptance does require a certain degree of formality that was lacking in this case. Plaintiff argued that the signature requirement was satisfied by the affixing of the "Paid" stamp (*147 Cal. App. 3d 1023, 1029)* , and that defendant must accept the liabilities of machines (*147 Cal. App. 3d 1023, 1030)* . The court cited ***Pupko v. Bank of America*** *(1981) 114 Cal. App. 3d 495, 500, 170 Cal. Rptr. 615* (discussed in *§ 34.75[3][a]*), and *Ocean Park Bank v. Rogers (1907) 6 Cal. App. 678, 681* , for the proposition that such stamps and other internal processing constitute mere memoranda adopted in aid of convenient dispatch of business, not payment. Nor is the fact that the check was posted to the drawer's account determinative, especially in view of California's refusal to adopt the rule that an item is finally paid when the bank has completed the process of posting the item to the indicated account [*see* former Com. Code § 4213(1)(c) and *Com. Code § 4215(a)*] (*147 Cal. App. 3d 1023, 1030)* .

[f] Computer Center Is Separate Branch

Note that the authorities used in this paragraph will be superseded in many cases by *12 C.F.R. § 229.36(b)*, set forth in Paragraph H.

The facts and procedural background of ***Nautilus Leasing Services, Inc. v. Crocker National Bank*** *(1983) 147 Cal. App. 3d 1023, 195 Cal. Rptr. 478* , are set forth in *§ 34.77[3][d]*. Plaintiff contended that defendant, even though it had not accepted the check, was liable because it retained it too long under former Com. Code § 4303(1)(d) (*now see Com. Code § 4303(a)(5)*). Plaintiff argued that defendant received the check on Friday and was obligated to return it by the end of that day or become liable for payment. Defendant contended it did not receive that check until Saturday, the day the check arrived at the drawer's branch and that because Saturday was not an official banking day, it had until the end of the next banking day (Monday) to exercise setoff and return the check. Plaintiff relied on *Farmers & Merchants Bank v. Bank of America (1971) 20 Cal. App. 3d 939, 944, 98 Cal. Rptr. 381* , which was decided under former Fin. Code § 1013 (*now see Com. Code § 4301*) for the proposition that a drawee's computer center and the branch on which the check is drawn are one and the same for purposes of determining when a check is received. *Farmers and Merchants Bank* turned on the fact that the bookkeeping functions ordinarily performed at a branch were performed at the computer center and distinguished the functions performed only by the bank's computer, which were essentially the same functions that Crocker's operation's center performed. Applying *Farmers and Merchants Bank*, the court stated that the check was not received until Saturday, and the setoff and return on Monday were both timely (*147 Cal. App. 3d 1023, 1030-1031)* .

[g] Places for Presentment (Regulation CC)

Physical presentment of the check is not necessary if the paying bank and the depositary or collecting bank have an "electronic presentment agreement." Then, the bank presenting the check to the paying bank may do so by transmission of information describing the check in accordance with their agreement. An electronic presentment agreement may not extend the return times or otherwise vary the requirements of Title 12 of the Code of Federal Regulations Part 229, Subpart C (*12 C.F.R. § 229.30 et seq.*) with regard to the parties interested in the check who are not parties to the electronic presentment agreement (*12 C.F.R. § 229.36(c)*).

A bank that arranges for checks that are payable by it to be payable through another bank must have imprinted on the front of the check its own name, location, and first four digits of its own routing number, followed by the words "payable through" and the name and location of the payable-through bank [*12 C.F.R. § 229.36(e)*]. *12 C.F.R. §*

229.36(e) does not affect *12 C.F.R. § 229.36(b)* [12 C.F.R. § 229, Appendix E, Commentary to § 229.36(e)]. If a payable-through check does not meet the requirements of *12 C.F.R. § 229.36(e)*, the bank by which the check is payable may be liable to the depositary bank or others as provided in *12 C.F.R. § 229.38* [12 C.F.R. § 229, Appendix E, Commentary to § 229.36(e)]

[4] Additional Authorities

[a] Revocation of Settlement Under Commercial Code

The court of appeal in *Lincoln Nat. Bank v. Dworsky (1990) 218 Cal. App. 3d 852, 267 Cal. Rptr. 361* , affirmed a judgment for the drawee bank on a cross complaint by the payees claiming that the bank's return of a photocopy of the check and notice of dishonor, although timely, did not constitute compliance with the midnight deadline. The question presented was whether the check was "otherwise unavailable for return" within the meaning of former Com. Code § 4301(1)(b) (*now see Com. Code § 4301(a)(2)*). Although there was some evidence that the check was later returned to its maker in a monthly statement, it was clear that the check was unavailable on the day the midnight deadline had to be met. The court said that a check is "otherwise unavailable for return" if it is not "immediately utilizable." The check does not have to be permanently lost or stolen, only unavailable for return at the time the bank must act to meet its midnight deadline. It does not matter if the check subsequently becomes available (*218 Cal. App. 3d 852, 857)* . This conclusion should not be altered by the 1992 amendment of *Com. Code § 4301*, which deleted the word "otherwise" [*see Com. Code § 4301(a)(2)*].

[b] Revocation Timely

City of Long Beach v. Crocker National Bank (1986) 179 Cal. App. 3d 1114, 225 Cal. Rptr. 227 , was a class action by 80 payees of other checks on which provisional settlement was revoked after exercise of the same setoff considered in *Nautilus Leasing Services, Inc. v. Crocker National Bank (1983) 147 Cal. App. 3d 1023, 195 Cal. Rptr. 478* (discussed in *§ 34.77[3][d]*). Summary judgment was entered for defendant on the basis that the matter was finally determined in *Nautilus Leasing* (*179 Cal. App. 3d 1114, 1116)* . That judgment was affirmed because plaintiffs' notice of appeal was not timely.

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B. Drawee Bank's Liability To Payee

3-34 California Points & Authorities § 34.78

§ 34.78 Opposing Contention That Drawee or Paying Bank Is Liable for Late Return of Check or Revocation of Provisional Settlement [Com. Code §§ 4107, 4301; 12 C.F.R. §§ 229.30, 229.33]--Stamps on Returned Check Create Presumption of Timely Revocation of Provisional Settlement [Com. Code §§ 3502(b)(1), 3505(a)(2)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT DRAWEE BANK IS NOT LIABLE TO PLAINTIFF FOR THE AMOUNT OF THE CHECK DATED _____, DRAWN BY _____ [*name of drawer*] AND PAYABLE TO PLAINTIFF IN THE AMOUNT OF $_____, BECAUSE PLAINTIFF HAS NOT INTRODUCED ANY EVIDENCE TO REBUT THE PRESUMPTION ARISING FROM THE STAMPS ON THE CHECK THAT _____ [RETURN *and/or* NOTICE OF DISHONOR *and/or* NOTICE OF NONPAYMENT *and/or* REVOCATION OF PROVISIONAL SETTLEMENT] WAS TIMELY.

A. Presumption of Dishonor. A purported stamp or writing of the drawee, payor bank, or presenting bank on or accompanying the instrument stating that acceptance or payment has been refused unless reasons for the refusal are stated and the reasons are not consistent with dishonor are admissible as evidence and create a presumption of dishonor and of any notice of dishonor stated (*Com. Code § 3505(a)(2)*).

B. Meaning of Dishonor. If a check is duly presented for payment to the payor bank otherwise than for immediate payment over the counter, the check is dishonored if the payor bank makes timely return of the check or sends timely notice of dishonor or nonpayment under *Commercial Code Section 4301* or *4302*, or becomes accountable for the amount of the check under *Commercial Code Section 4302* (*Com. Code § 3502(b)(1)*).

C. Stamps on Check Create Presumption of Timely Revocation of Provisional Settlement. The presumption of *Commercial Code Section 3505(a)(2)* is that the instrument has been timely returned by the _____ [drawee *or* payor] bank in accordance with the provisions of *Commercial Code Section 4301*, which allows a

_____ [drawee *or* payor] bank to revoke provisional settlements by midnight of the day following the day of receipt. This is a

presumption affecting the burden of producing evidence. [In a motion for summary judgment, when no evidence is offered to contradict the proposition that the checks were seasonably returned by the midnight deadline, it operates to eliminate the existence of a triable issue of fact] (*Com. Code § 1206*; *Security Pac. Nat. Bank v. Associated Motor Sales (1980) 106 Cal. App. 3d 171, 177-178, 179-180, 165 Cal. Rptr. 38*).

[*Optional*] **D. Midnight Deadline Defined.** [*See § 34.71[1], Paragraph D.*]

[2] Comments

CAUTION:
The extent to which *12 C.F.R. §§ 229.30-229.42*, effective September 1, 1988, may have superseded the authorities in this form is not clear. See the discussion in *§ 34.78[2][a]*.

[a] Use of Form

These points and authorities are for use in opposing the contention that a drawee bank is liable to the payee, holder in due course, or collecting bank for the amount of a check with regard to which the drawee or paying bank made timely return, or sent timely notice of dishonor or notice of nonpayment or notice in lieu of return [*see Com. Code § 4301*; *12 C.F.R. §§ 229.30, 229.33* (set forth in Form 110)] when the payee has not introduced any evidence to rebut the presumption of timely revocation arising from the stamps on the check.

Note that the terms "provisional settlement" and "revocation of provisional settlement" are no longer applicable between banks [*see 12 C.F.R. §§ 229.31(c), 229.32(b), 229.36(d)*, and discussion in *§ 34.77[3][a]*]. In addition to the deadlines imposed by *Com. Code §§ 4301* and *4302*, Regulation CC (specifically, *12 C.F.R. §§ 229.30* and *229.33*) [*see § 34.71*] imposes additional requirements for timely return and for notice of nonpayment of checks in amounts in excess of $2,500 [*see 12 U.S.C. § 4007(b)* (authority for regulation that supersedes Commercial Code as enacted in any state)]. The Commentary to Regulation CC, which constitutes an official Federal Reserve Board interpretation of the regulation, specifies that *12 C.F.R. §§ 229.30* and *229.33* affect *Com. Code §§ 4301, 4302*, and states that they may affect other Commercial Code provisions. The Commentary does not specifically address *Com. Code § 3502* or *3505* [12 C.F.R. § 229, Appendix E, Commentary to §§ 229.30, 229.33]. In addition, *12 C.F.R. § 229.30(d)* [*see § 34.71*] requires a degree of specificity in the placement and content of return stamps used by the drawee. It is not clear whether any presumption would arise from a return stamp that did not satisfy the requirements of *12 C.F.R. § 229.30(d)*.

Counsel should insert argument in this form showing the relationship between the facts of the case and points of law stated. Thus, counsel should describe the check, the time and channels through which it was presented, when and if the drawee or paying bank settled for the check, and when and how it attempted to recover that settlement.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the drawee's right to rely on this presumption of timely return.

[b] Related Points and Authorities

The points and authorities set out in *§ 34.71* support, and those in § 34.77 oppose, the contention that the drawee bank is liable for late return or revocation of provisional settlement. Ch. 166, *Negotiable Instruments*, includes points and authorities regarding dishonor, and in particular, dishonor in the context of an endorser's liability on a promissory note.

[3] Discussion of Authorities

[a] Stamps on Check Create Presumption of Timely Revocation of Provisional Settlement

In ***Security Pac. Nat. Bank v. Associated Motor Sales*** *(1980) 106 Cal. App. 3d 171, 165 Cal. Rptr. 38* , the depositary bank sued the payee of 26 dishonored deposit items to recover a $188,000 overdraft created by the dishonor and to impose endorser's liability of $311,925 in regard to the same checks. Defendant admitted endorsement, deposit, and negotiation of the checks, and pleaded as an affirmative defense that the checks were not timely dishonored. Copies of the checks and plaintiff's written notices to defendant of the dishonors were admitted into evidence. Summary judgment was entered for plaintiff. Defendant appealed.

The court of appeal affirmed as to the endorser's liability cause of action and said it was therefore unnecessary to address the overdraft cause of action (*106 Cal. App. 3d 171, 175-176)* . Defendant contended there were triable issues of fact as to whether the checks were timely dishonored by the drawee banks and as to whether plaintiff had given it timely notice of dishonor. Noting the checks were returned for insufficient funds, uncollected funds, or should be referred to maker, plaintiff contended the stamps on the checks were sufficient evidence to support the finding of timely notice of dishonor by the drawee banks because defendant's answer failed to controvert the allegation of dishonor (*106 Cal. App. 3d 171, 176-177)* , and no evidence was introduced to contradict the proposition that the returns were timely (*106 Cal. App. 3d 171, 180)* . The court first set forth the provisions of former Com. Code § 3507(1)(a) (*now see Com. Code § 3502*) and former Com. Code § 3510(b) (*now see Com. Code § 3505(a)(2)*). Former Com. Code § 3510(b) (*now see Com. Code § 3505(a)(2)*) creates a presumption that the instrument has been timely returned by the payor bank in accordance with the provisions of *Com. Code § 4301*, which allows a payor bank to revoke provisional settlements by midnight of the day following the day of receipt (*106 Cal. App. 3d 171, 177)* . As provided in *Com. Code § 1206*, the presumption is a presumption affecting the burden of producing evidence (*106 Cal. App. 3d 171, 178)* . Since defendant had not offered any evidence to contradict the presumption that the checks were seasonably returned by the midnight deadline, the presumption operated to eliminate the existence of a triable issue of fact (*106 Cal. App. 3d 171, 179-180)* .

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[Reserved]

§§ 34.79[Reserved]

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C. Collecting Bank's Liability To Drawer

3-34 California Points & Authorities § 34.90

§ 34.90 Supporting Contention That Collecting Bank That Paid Check on Forged, Different, or Missing Endorsement Is Liable to Drawer--Negligence--When Collecting Bank Is Not Payee

[1] FORM

[*The following may be included in a memorandum, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

IN ALLOWING PLAINTIFF's CHECK NUMBER _____ TO BE NEGOTIATED BY AN UNAUTHORIZED PERSON, DEFENDANT COLLECTING BANK BREACHED ITS DUTY OF CARE TO PLAINTIFF AND IS LIABLE TO PLAINTIFF-DRAWER IN NEGLIGENCE FOR THE AMOUNT OF THE CHECK.

A. Negligence of Collecting Bank That Is Not Payee. When a collecting bank is presented with one or more checks of significant amounts by a person [it knows or should know is an employee of the drawer], other than the named payee, who is seeking to negotiate the check for his or her own benefit in circumstances with insufficient indicia of that person's authority to negotiate the check, there is enough inherent danger to give rise to a duty on the collecting bank's part to investigate the authority of the person attempting to negotiate the check (*E. F. Hutton & Co. v. City National Bank (1983) 149 Cal. App. 3d 60, 67-68, 196 Cal. Rptr. 614* (construing prior law); *Joffe v. United California Bank (1983) 141 Cal. App. 3d 541, 555-557, 190 Cal. Rptr. 443* (construing prior law); *Newman v. Wells Fargo Bank (2001) 87 Cal. App. 4th 73, 83-85, 104 Cal. Rptr. 2d 310* ; *see Com. Code § 3405(b)*).

[*Optional*] **B. Drawer Not Required to Negate Validity of Endorsements Under *Commercial Code Section 3405*.** A drawer does not have to plead facts sufficient to negate the validity of an endorsement under *Commercial Code Section 3405* to state a cause of action in negligence against a collecting bank that was not also payee of a check, but which negotiated the check at the request of a person other than the named payee in obviously suspicious circumstances (*E. F. Hutton & Co. v. City National Bank (1983) 149 Cal. App. 3d 60, 68-70, 196 Cal. Rptr. 614* (construing prior law)).

[2] Comments

[a] Use of Form

These points and authorities are for use in supporting the contention that a collecting bank is liable to a drawer in negligence for having allowed someone other than the named payee to negotiate the check for his or her own benefit in suspicious circumstances. Paragraph A sets forth the situation giving rise to the duty. Optional Paragraph B establishes that the drawer does not have to allege facts negating the validity of the endorsement under *Com. Code § 3405* to state a cause of action in negligence.

Counsel should insert argument in the form, showing the relationship between the facts of the case and points of law stated. Counsel should set forth facts describing the payee designation and the manner in which the check was negotiated.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the collecting bank's liability.

[b] Related Points and Authorities

The points and authorities in *§ 34.96* oppose the contention that the bank is liable to the drawer for paying a check on a forged endorsement when the fraud was committed by an employee of the drawer and the drawer entrusted the employee with responsibility with regard to the check.

[3] Discussion of Authorities

[a] Negligence of Collecting Bank That Is Not Payee

Under *Com. Code § 3405*, the risk of loss for fraudulent endorsements by employees (who are entrusted with responsibility with regard to checks) generally falls on the employer rather than on the bank on the theory that the employer is in a better position to avoid the loss by taking steps to prevent fraud. However, when the bank fails to exercise ordinary care in paying or taking the check and that failure contributes to the loss resulting from the fraud, the employer may shift the loss to the bank to the extent the bank's failure to exercise ordinary care contributed to the loss [*see Com. Code § 3405(b)*; Official Comment 1 to U.C.C. § 3-405 (1990); *see also Com. Code § 3103(a)(7)* ("ordinary care" defined)]. Under *Com. Code § 3405(b)*, the failure to exercise ordinary care is to be determined in the context of all the facts relating to the bank's conduct with regard to the bank's collection of the check [Official Comment 4 to U.C.C. § 3-405 (1990)].

In ***Newman v. Wells Fargo Bank*** *(2001) 87 Cal. App. 4th 73, 104 Cal. Rptr. 2d 310* , a medical corporation hired a bookkeeper and assistant office manager, who subsequently misappropriated funds from the business by two different methods. Checks and drafts made payable to the medical practice were fraudulently indorsed and cashed or deposited into their personal bank accounts, and checks and drafts drawn by the medical practice were fraudulently indorsed with the name of the payee and then cashed or deposited into their personal bank accounts. The fraudulently indorsed checks were delivered to defendant bank for collection. Although each of the checks submitted contained irregularities suggestive of fraud, the bank permitted the bookkeeper and accomplices to deposit the funds into their personal accounts. The medical office sued the bank under theories of common law negligence and conversion under *Com. Code § 3420* based on the bank's role as a depositary and collecting bank. The bank filed a demurrer and motion to strike, and the medical corporation filed an opposition. The trial court sustained the demurrer without leave to amend and dismissed the action.

The court of appeal reversed. It first held that the Commercial Code precludes a common law negligence action against banks taking checks fraudulently indorsed by dishonest employees. It noted that *Com. Code § 3405* adopts the fundamental principle that the risk of loss for fraudulent indorsements by employees entrusted with responsibility for

checks should fall on the employer rather than on the bank that takes the check or pays it. That loss allocation principle, however, is tempered by the doctrine of comparative negligence on the part of the party paying the instrument or taking it for collection. Under *Com. Code § 3405(b)*, an employer can recover from a depositary or collecting bank to the extent the bank's failure to exercise ordinary care contributes to the loss. The court then held that the first amended complaint stated a cause of action under *Com. Code § 3405(b)*. It alleged that the bank breached its obligation to exercise ordinary care when it allowed plaintiff's employees to cash or deposit checks in their personal accounts notwithstanding suspicious circumstances indicative of fraud, and gave specific examples of those circumstances (*87 Cal. App. 4th 73, 83-85)* .

Plaintiff drawer in ***E. F. Hutton & Co. v. City National Bank*** *(1983) 149 Cal. App. 3d 60, 196 Cal. Rptr. 614* , sued the collecting bank for approximately $650,000, representing 18 checks on which one of its employees had forged endorsements and deposited to the employee's personal account at defendant. The checks ranged in amount from $10,000 to $81,598. Causes of action for negligence, breach of warranty of good title, and a common count were alleged. After demurrers were sustained as to all causes of action, judgment was entered for defendant. Plaintiff appealed.

The court of appeal reversed as to the negligence cause of action and the common count. The complaint alleged that each of the checks was properly payable to the named payee, that defendant knew or should have known that the forger was an employee and a fiduciary of plaintiff, that it was foreseeable that plaintiff would be injured, that defendant had a duty to use due care in handling the checks, that defendant and its employees knew or should have known that the negotiation of the checks was irregular, and that further inquiry was required, but that defendant was grossly negligent in failing to follow reasonable commercial banking standards and in failing to make reasonable attempts to verify the endorsements or the forger's authority to deposit the proceeds into his personal account (*149 Cal. App. 3d 60, 66)* . The court set forth the elements of negligence and quoted at length from *Sun'n Sand, Inc. v. United California Bank (1978) 21 Cal. 3d 671, 692-696, 148 Cal. Rptr. 329, 582 P.2d 920* , regarding a collecting bank's duty when presented with one or more checks of significant amounts by a person it knows or should know is an employee of the drawer who is seeking to negotiate the check for his or her own benefit. The court acknowledged that *Sun'n Sand* limited the collecting bank's duty of inquiry to situations in which the checks of significant amounts were payable to the bank itself, but said that narrowing was merely an application of the *Sun'n Sand* facts to the general rule that a collecting bank has a general duty based on the foreseeability of the risk to the drawer (*149 Cal. App. 3d 60, 67)* . The court noted that *Joffe v. United California Bank (1983) 141 Cal. App. 3d 541, 556, 190 Cal. Rptr. 443* (discussed *below*), did not limit the duty as *Sun'n Sand* did, and chose to follow *Joffe* (*149 Cal. App. 3d 60, 67-68)* . The pleadings alleged circumstances with insufficient indicia of the forger's authority to negotiate the checks and with sufficient inherent danger signals to give rise to the collecting bank's duty to investigate. In proceeding without investigation, the collecting bank acted at its peril (*149 Cal. App. 3d 60, 68)* .

The facts and procedural background of ***Joffe v. United California Bank*** *(1983) 141 Cal. App. 3d 541, 190 Cal. Rptr. 443* , are discussed in *§ 34.53[3][a]*. The payee designation on the check was "Continental Finance Systems--Wells Fargo Escrow Trust Account." Continental used the stamped endorsement "Pay to the order of Bank of America N T and S A For Deposit Only Continental Financial Systems 02137-07857" and deposited the check into that account at defendant collecting bank. Plaintiffs contended that under the rationale of *Sun'n Sand*, defendant collecting bank committed actionable negligence by accepting the check for deposit to an account other than that named in the payee designation (*141 Cal. App. 3d 541, 555)* . The court said the most important factor in the *Sun'n Sand* Court's decision to impose a duty was the foreseeability of harm to plaintiff-drawer (*141 Cal. App. 3d 541, 555-556)* . The duty is activated only when the collecting bank is also the payee. The circumstances alleged in the *Joffe* complaint were sufficiently suspicious to come within a rule similar to *Sun'n Sand*'s (*141 Cal. App. 3d 541, 556)* . Although Continental may have been an appropriate endorser, the payee was the escrow trust account at another bank, and Continental was not the payee and was not identified as an authorized representative of the payee. Even though Continental may have been an appropriate endorser, the check's face did not provide sufficient objective indicia from which defendant could reasonably conclude that the party presenting the check was authorized to transact in the manner

proposed. The facts that the check was for a substantial amount ($25,000), payable to an escrow at another bank, with inadequate indicia on the face of the check regarding the representative authorized to negotiate it amounted to circumstances in which the risk to the drawer was sufficiently foreseeable to impose a duty to the depositary-collecting bank not to ignore the danger signals inherent in an attempted negotiation by a third party (*141 Cal. App. 3d 541, 556)* .

The court of appeal disagreed with defendant's contention that *Com. Code § 1103(b)* (displacement of principles of law and equity by particular Commercial Code provisions) or former Com. Code §§ 3116 (joint payees; *now see Com. Code § 3110(d)*) and 3117 (who may negotiate check; *now see Com. Code § 3110(c)(2)*) created a loss-distributive scheme that precluded plaintiff's action in negligence (*141 Cal. App. 3d 541, 557)* .

[b] Drawer Not Required to Negate Validity of Endorsements Under Commercial Code Section 3405

The facts and procedural background of ***E. F. Hutton & Co. v. City National Bank*** *(1983) 149 Cal. App. 3d 60, 196 Cal. Rptr. 614* , and the portion of the opinion considering the circumstances giving rise to the duty of inquiry are discussed in *§ 34.90[3][a]*. Defendant contended that former Com. Code § 3405(1)(c) (*now see Com. Code § 3405*) was a necessary element of the negligence action in that if, under that section, the endorsements were deemed effective, no cause of action would be stated. The court discussed the rationale of former Com. Code § 3405(1)(c), that losses resulting from fraudulent employee behavior should be placed on the employer-drawer that is generally in a better position than the bank to detect or prevent these types of fraud or to insure against them (*149 Cal. App. 3d 60, 68-69)* . The court concluded that this rationale was not applicable when a collecting bank is confronted with obviously suspicious circumstances and could have reasonably foreseen the drawer's loss. No provision of the Commercial Code, not even former Com. Code § 3405, has displaced common law negligence recovery (*149 Cal. App. 3d 60, 69)* . Thus a cause of action for negligence had been stated, and former Com. Code § 3405 was not part of that cause of action (*149 Cal. App. 3d 60, 70)* . The situation addressed by the loss-distributive scheme of former Com. Code § 3405 could be raised by defendant as a comparative negligence defense (*149 Cal. App. 3d 60, 70 n.6*).

It is unclear whether the above conclusion and the reasoning on which it is based is consistent with the 1992 enactment of *Com. Code § 3405*. Under former Com. Code § 3405(1)(c), the bank's negligence did not shift the loss to the bank as long as the bank acted in good faith. Under *Com. Code § 3405* as revised, the loss may be recovered from the bank to the extent the bank's failure to exercise ordinary care contributed to the loss [*see Com. Code § 3405(b)*; Official Comment 1 and 2 to U.C.C. § 3-405 (1990)].

[4] Additional Authorities

[a] Negligence of Collecting Bank That Is Not Payee

In *Sehremelis v. Farmers & Merchants Bank (1992) 6 Cal. App. 4th 767, 7 Cal. Rptr. 2d 903* , plaintiff was a commercial loan borrower. As part of the construction loan agreement, the construction lender, a bank other than defendant, would draw checks on the construction loan disbursement account. The construction loan agreement provided that all checks were to be made payable to the general contractor and the particular subcontractor as copayees. Many checks were made out payable only to the general contractor, who had an account with defendant and for whom defendant negotiated the checks. The court of appeal reversed that portion of the judgment based on the sustaining of a demurrer with regard to a cause of action for negligence. The court said that relevant legal and practical considerations militate in favor of a rather expansive duty of care by collecting banks in dealing with endorsements of checks they negotiate. Although plaintiff was not technically the drawer of the checks, plaintiff occupied a very similar position and were directly within the "danger zone" of loss (*6 Cal. App. 4th 767, 775)* . Thus, the court held that sufficient facts were pleaded to justify a duty of care between plaintiff and defendant and the demurrer should not have been sustained (*6 Cal. App. 4th 767, 776)* .

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3-34 California Points & Authorities § 34.91

§ 34.91 Supporting Contention That Collecting Bank That Paid Check on Forged, Different, or Missing Endorsement Is Liable to Drawer--Negligence--Ambiguous Payee Designation Is Not Contributory Negligence Barring Drawer's Recovery [Com. Code § 3406(a)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

AN AMBIGUOUS PAYEE DESIGNATION IS NOT CONTRIBUTORY NEGLIGENCE WITHIN THE MEANING OF COMMERCIAL CODE SECTION 3406 SUFFICIENT TO BAR RECOVERY BY THE DRAWER FOR DEFENDANT COLLECTING BANK's NEGLIGENCE RELATING TO _____ [*specify, e.g.,* NEGOTIATION OF THE CHECK IN SUSPICIOUS CIRCUMSTANCES].

A. Contributory Negligence. [*See § 34.52[1], Paragraph A.*]

B. Ambiguous Payee Designation Is Not Contributory Negligence. The drawer's use of an ambiguous or confusing payee designation does not constitute contributory negligence within the meaning of *Commercial Code Section 3406* sufficient to bar recovery by the drawer based on a [collecting] bank's allowing negotiation of the check by someone other than the intended payee (*Joffe v. United California Bank (1983) 141 Cal. App. 3d 541, 557, 190 Cal. Rptr. 443* (construing prior law)).

[2] Comments

CAUTION:

Joffe v. United California Bank (1983) 141 Cal. App. 3d 541, 557, 190 Cal. Rptr. 443 , was decided under the former statutory provision that set forth only a contributory negligence standard [*see* former Com. Code § 3406]. However, the current statutory scheme as enacted in 1992 also adopts a concept of comparative negligence [*see Com. Code § 3406(a), (b)*; *see also* Official Comment 1, 3, and 4 to U.C.C. § 3-406 (1990)]. It is not clear whether the court's decision in *Joffe* that an ambiguous payee designation

is not contributory negligence sufficient to bar recovery would still be valid with the addition of a comparative negligence standard.

[a] Use of Form

These points and authorities are for use in supporting the contention that a bank cannot invoke the contributory negligence defense of *Com. Code § 3406* against a drawer merely because the payee designation was ambiguous or unclear.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts describing the payee designation and the manner in which the check was negotiated.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the collecting bank's liability.

[b] Related Points and Authorities

Particular payee designations are *considered at §§ 34.34* and *34.93 -34.94*. Ch. 166, *Negotiable Instruments* also includes forms addressing particular payee designations [*see, e.g.,* forms applying *Com. Code § 3109* (instruments payable to bearer or order)].

[3] Discussion of Authorities

[a] Ambiguous Payee Designation Is Not Contributory Negligence

The facts and procedural background of ***Joffe v. United California Bank*** *(1983) 141 Cal. App. 3d 541, 190 Cal. Rptr. 443* , are discussed in *§ 34.53[3][a]*. The portion of the opinion considering plaintiff-drawer's negligence cause of action against the collecting bank is discussed in *§ 34.90[3][a]*. Defendant collecting bank contended that plaintiff was precluded by former Com. Code § 3406 (*now see Com. Code § 3406(a)*) from asserting defendant's negligence in allowing the check to be negotiated other than as intended by the drawer in suspicious circumstances because plaintiff was negligent in drawing the check. The court said that although the payee line was not a model of clarity, it was not sufficiently ambiguous to preclude recovery at the demurrer stage. Further, plaintiff's actions as alleged in the complaint did not arise as a matter of law to the standard set forth in former Com. Code § 3406 (*141 Cal. App. 3d 541, 557)* .

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§ 34.92 Supporting Contention That Collecting Bank That Is Payee of Check Paid on Forged, Different, or Missing Endorsement Is Liable to Drawer--Failure to Discover That Check Was Issued by Mistake

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

IN ALLOWING PLAINTIFF's CHECK NUMBER _____ TO BE NEGOTIATED BY AN UNAUTHORIZED PERSON AT A TIME WHEN PLAINTIFF WAS NOT INDEBTED TO DEFENDANT, DEFENDANT AS BOTH PAYEE AND COLLECTING BANK IS LIABLE UNDER A THEORY OF MISTAKE TO REFUND THE AMOUNT OF THE CHECK TO PLAINTIFF-DRAWER IN NEGLIGENCE FOR THE AMOUNT OF THE CHECK.

A. Payee Bank's Liability for Mistake. A collecting bank that is also the payee of a check is liable to the drawer on a theory of mistake for allowing a mistakenly issued check to be negotiated[, and its proceeds paid to a third person], at a time when the drawer was not indebted to the payee bank (*see Sun'n Sand, Inc. v. United California Bank (1978) 21 Cal. 3d 671, 700-701, 148 Cal. Rptr. 329, 582 P.2d 920* (construing prior law)).

B. No Neglect of Legal Duty by Drawer. A drawer's failure to examine its bank statements and returned items and to thereby discover checks issued by mistake does not constitute a neglect of legal duty sufficient to bar recovery of the amount of the checks on a theory of mistake (*Sun'n Sand, Inc. v. United California Bank (1978) 21 Cal. 3d 671, 700-701, 148 Cal. Rptr. 329, 582 P.2d 920* (construing prior law)).

[2] Comments

CAUTION:

Sun'n Sand, Inc. v. United California Bank (1978) 21 Cal. 3d 671, 148 Cal. Rptr. 329, 582 P.2d 920 , was decided under former provisions of Divisions 3 and 4 of the Commercial Code, and thus caution should be used when citing all or portions of the opinion. Those divisions of the Commercial Code were

significantly revised in 1992, and some portions of the decision have been abrogated. For example, the Court in *Sun'n Sand* held that a drawer had standing under former Com. Code §§ 3417 and 4207 to bring an action for breach of warranty (*see 21 Cal. 3d 671, 680-684)* . This result has been rejected by the 1992 amendments of these sections [*see Com. Code §§ 3417, 4208*; Official Comment 2 to U.C.C. § 3-417 (1990) (warranties now made to drawee not drawer)]. However, the continued validity of the Court's decision regarding other causes of action raised by the plaintiff, such as negligence [discussed in *§ 34.90*] and mistake [discussed *below*], is not clear. Caution should be used when relying on these portions of the opinion until courts provide further clarification.

[a] Use of Form

These points and authorities are for use in supporting the contention that a payee bank is liable to a drawer under a theory of mistake for allowing a check payable to it to be paid to some third person at a time when the drawer was not indebted to it. Paragraph A sets forth the general theory and Paragraph B applies the rule that ordinary negligence does not bar recovery under the theory of mistake.

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Thus, counsel should describe the payee designation, the fact that plaintiff was not indebted to defendant at the time the check was negotiated, and the manner in which the check was negotiated.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the payee's liability. These points and authorities are perhaps best used at the demurrer stage, because they do not address what may prove to be the drawer's most difficult hurdle, namely the payee bank's change of position in reliance on the payment and the equities of requiring refund [*see Com. Code § 3418*; *Sun'n Sand, Inc. v. United California Bank (1978) 21 Cal. 3d 671, 701, 148 Cal. Rptr. 329, 582 P.2d 920]* .

[b] Related Points and Authorities

For points and authorities relating to mistake as a ground for rescission, see Ch. 92, *Duress, Menace, Fraud, Undue Influence, and Mistake* .

[3] Discussion of Authorities

[a] Payee Bank's Liability for Mistake

Sun'n Sand, Inc. v. United California Bank *(1978) 21 Cal. 3d 671, 148 Cal. Rptr. 329, 582 P.2d 920* , is discussed in *§ 34.92[3][b]*.

[b] No Neglect of Legal Duty by Drawer

The facts and procedural background of ***Sun'n Sand, Inc. v. United California Bank*** *(1978) 21 Cal. 3d 671, 148 Cal. Rptr. 329, 582 P.2d 920* , are discussed in *§ 34.35[3][a]*. The cause of action for mistake alleged that plaintiff issued the checks in the mistaken belief that it owed defendant-payee collecting bank the amounts for which the checks were drawn. Defendant contended that recovery on a theory of mistake was barred by plaintiff's failure to examine its bank statements and returned items as required by former Com. Code § 4406(1) (*now see Com. Code § 4406(a), (c)*), and by its failure to carry out its duty allegedly imposed by former Com. Code § 3405 (*now see Com. Code § 3405* as enacted by Stats. 1992, ch. 914, § 6) to supervise employees in the preparation of checks (*21 Cal. 3d 671, 700-701)* . Concerning the causes of action for mistake, the Court discussed only defendant collecting bank's contention that the failure to examine the bank statements constituted a neglect of legal duty sufficient to bar recovery. The Court cited the proposition that money paid by mistake may be recovered, however negligent the party paying may have been in

making the mistake, unless the payment has caused such a change in the position of the other party that it would be unjust to require a refund (*21 Cal. 3d 671, 700)* . Ordinary negligence does not constitute neglect of legal duty sufficient to bar recovery for mistake (*21 Cal. 3d 671, 700-701)* . The Court said it did not need to discuss defendant's contention that former Com. Code § 3405 created a duty on plaintiff's part to supervise employees in the preparation of checks, because even if it did, plaintiff's failure to discharge that duty would not bar its recovery. Defendant was sufficiently protected by the requirement of the change of position. Although a cause of action for mistake was stated, defendant would have the opportunity in further proceedings to defeat recovery by proving that it changed its position to such an extent that requiring it to refund the money would be unjust (*21 Cal. 3d 671, 701)* .

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3-34 California Points & Authorities § 34.93

§ 34.93 Opposing Contention That Collecting Bank That Paid Check on Forged, Different, or Missing Endorsement Is Liable to Drawer--Endorsement Is Effective When Check is Payable to Fictitious Payee [Com. Code § 3404]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT COLLECTING BANK IS NOT LIABLE TO PLAINTIFF FOR PAYING PLAINTIFF's CHECK NUMBER _____ ON A FORGED ENDORSEMENT BECAUSE THE ENDORSEMENT IS EFFECTIVE UNDER COMMERCIAL CODE SECTION 3404.

A. Fictitious Payee. An endorsement by any person in the payee's name is effective as the payee's endorsement in favor of a person who, in good faith, pays the instrument or takes it for value or for collection if

[*EITHER*]

an impostor, by use of the mails or otherwise, induces an instrument's issuer to issue the instrument to the impostor, or to a person acting in concert with the impostor, by impersonating the instrument's payee or a person authorized to act for the payee (*Com. Code § 3404(a)*).

[*AND/OR*]

a person whose intent determines to whom an instrument is payable (*Com. Code § 3110(a)* or *(b)*), does not intend the person identified as payee to have any interest in the instrument, or the person identified as an instrument's payee is a fictitious person. This rule applies until the instrument is negotiated by special endorsement (*Com. Code § 3404(b)*).

[*CONTINUE*]

B. When Endorsement Made in Payee's Name. Under *Commercial Code Section 3404(a)* or *(b)*, an endorsement is made in the payee's name if (1) it is made in a name substantially similar to that of the payee or (2) the instrument, whether or not endorsed, is deposited in a depositary bank to an account in a name substantially similar to that of the payee (*Com. Code § 3404(c)*).

[*Optional*] **C. Divergent Intent of Joint Drawers.** *Commercial Code Section 3404* applies [to place the loss on the drawer and make an endorsement in the name of the named payee effective] when there are two drawers' signatures on a check and only one of them intends that the named payee have no interest in the check (*see Com. Code § 3404*; *Wright v. Bank of California (1969) 276 Cal. App. 2d 485, 489, 81 Cal. Rptr. 11* (construing prior law); *Tire & R. Co. v. Wells Fargo Bank, etc. (1934) 1 Cal. App. 2d 694, 708-713, 37 P.2d 483* (construing prior law)).

[2] Comments

[a] Use of Form

These points and authorities are for use in opposing the contention that a collecting bank is liable to the drawer of a check for paying the check on a forged endorsement. The opposition is based on the ground that an endorsement is effective if the situation is within the fictitious payee exception [*see Com. Code § 3404*]. Paragraph A sets forth the Commercial Code statement of the impostor and fictitious payee doctrines and is applicable to a collecting bank's duties as well as to a drawee bank's. Paragraph B is for use when one of two drawers intended the check to be payable to the fictitious payee, and may be most appropriate in cases involving fraudulent endorsements by employees [*see Com. Code § 3404*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Thus, counsel should set forth facts bringing the situation actually or presumptively within the fictitious payee exception. In addition, because *Com. Code § 3404* adopts a loss-distributive scheme in that the person who suffers the loss may recover from a bank that failed to exercise ordinary care, counsel should set forth facts establishing that the collecting bank was not negligent in paying the instrument or taking it for value or collection [*see Com. Code § 3404(d)*; Official Comment 3 to U.C.C. § 3-404 (1990); Official Comment 4 to U.C.C. § 3-405 (1990)].

This memorandum may be combined with memoranda pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the fictitious payee exception or the special pleading requirements applicable to it.

[b] Related Memoranda

The memoranda set out in *§§ 34.34* and *34.94* address particular payee designations. Ch. 92, *Duress, Menace, Fraud, Undue Influence, and Mistake*, also includes forms addressing particular payee designations [*see, e.g,* forms applying *Com. Code § 3109* (instruments payable to bearer or order)]. Other aspects of the validity and requirements of endorsements, and of liability for payment on an improper endorsement, are addressed in §§ 34.34, 34.47-34.48, 34.70, 34.73-34.75, 34.90-34.92, 34.94, 34.120-34.122, 34.124-34.126, 34.171.

[3] Discussion of Authorities

[a] Fictitious Payee

If a check payable to an impostor, fictitious payee, or payee not intended to have an interest in the check is paid, the

effect of *Com. Code § 3404(a)* and *(b)* is to place the loss on the check's drawer rather than on the drawee or depositary bank that took the check for collection [Official Comment 3 to U.C.C. § 3-404 (1990)]. The Official U.C.C. Comment sets forth several examples illustrating the application of the fictitious payee rule under *Com. Code § 3404(b)* [*see* Official Comment 2 to U.C.C. § 3-404 (1990); *see also Unlimited Adjusting Group, Inc. v. Wells Fargo Bank (2009) 174 Cal. App. 4th 883, 894-895, 94 Cal. Rptr. 3d 672* (phrase "person identified as payee" in *Com. Code § 3404(b)* refers to named payee, not intended payee)].

[b] Divergent Intent of Joint Drawers

The facts and procedural background of ***Wright v. Bank of California*** *(1969) 276 Cal. App. 2d 485, 81 Cal. Rptr. 11* , are discussed in *§ 34.34[3][c]*. In *Wright*, one drawer intended the payee to have an interest in the check and the other did not. Defendant contended that the issuance of the cashier's check in exchange for the original check should not result in any liability to it because the situation was governed by the fictitious payee exception of former Com. Code § 3405(1)(c) (*now see Com. Code § 3404*). The court of appeal agreed, saying that former Com. Code § 3405 continued in effect the rule of *Tire & R. Co. v. Wells Fargo Bank, etc. (1934) 1 Cal. App. 2d 694, 37 P.2d 483* (discussed *below*), regarding divergent intent of joint drawers. That rule places the loss on the drawer by making any endorsement in the name of the named payee effective in all cases in which one joint drawer signs the check on the recommendation of the other. In this case, however, there was no endorsement (*276 Cal. App. 2d 485, 488-489)* . The portion of the opinion discussing the effect of that lack of endorsement is set forth in *§ 34.34[3][c]*.

Tire & R. Co. v. Wells Fargo Bank, etc. *(1934) 1 Cal. App. 2d 694, 37 P.2d 483* , decided under former Civ. Code § 3090, was an action by a drawer against the drawee for wrongfully charging its account to pay over $100,000 of checks on forged endorsements. The checks were payable to fictitious (nonexistent) payees and were issued by plaintiff's employee. The employee was authorized to sign checks as drawer, but another signature was also required. The other person who signed as drawer did not know of the culpable employee's scheme. After both signatures were on the checks, the culpable employee stole the checks, endorsed the names of the fictitious payees, and deposited or cashed them. Judgment was for plaintiff, and defendant appealed.

The court of appeal reversed. The court held that for purposes of the fictitious payee exception the intent of one authorized cosigner is sufficient to bring the payee designation within the scope of the exception (*276 Cal. App. 2d 485)* .

[4] Additional Authorities

[a] Fictitious Payee

The Ninth Circuit Court of Appeals in *United States v. Johnson (9th Cir. 1979) 596 F.2d 842* , affirmed a conviction for embezzlement of federal funds and embezzlement of union funds. Redevelopment agency funds were disbursed on fraudulent vouchers submitted by defendant, a union official. The union had to submit vouchers for work done and payroll checks would be issued in reliance on the vouchers. Appellant contended that the conviction could not be upheld because, in paying checks on forged endorsements, the bank paid only its own funds, not government funds or the union's funds. The court of appeals disagreed, noting that the fictitious payee exception of former Com. Code § 3405 (*now see Com. Code § 3404*) applied to make any endorsement effective (*596 F.2d 842, 846)* .

Plaintiff in *Pacific Indemnity Co. v. Security First Nat. Bank (1967) 248 Cal. App. 2d 75, 56 Cal. Rptr. 142* , was the drawer's insurer. Plaintiff sued defendant payee bank in negligence and conversion for the amount of checks payable to defendant that were deposited in the personal account of the insured's employee. In reversing a judgment for defendant payee bank, the court of appeal said the trial court's primary error was in considering the checks to be bearer paper by misapplication of former Com. Code § 3405 (*248 Cal. App. 2d 75, 79-93)* . The basis of the holding was the fact that the bank was payee of the check and had improperly let it be negotiated by a third party (*248 Cal. App. 2d 75, 94)* .

Before concluding that the fictitious payee exception had no application, the court described situations in which the exception did apply. It applies when the drawer causes the check to be made payable to a nonexistent person or a real person to whom the check is never to be delivered (*248 Cal. App. 2d 75, 88)* .

The facts and procedural background of *Jerman v. Bank of America (1970) 7 Cal. App. 3d 882, 87 Cal. Rptr. 88* , are set forth in *§ 34.171[3][a]*. Although the borrower and possible forger had supplied plaintiff with the names of the payees, the trial court found that the endorsement on each check purporting to be that of the named payee was not effective under former Com. Code § 3405(1)(c) (*now see Com. Code § 3404*) (*7 Cal. App. 3d 882, 887 n.2*). The court of appeal agreed. The court referred to specific findings, for example, that the designated payees were real people who had actual interests in the property and that plaintiff, although she had never met them, intended the proceeds to be paid to the named payees to purchase or clear their interests in the land (*7 Cal. App. 3d 882, 888, 888 n.3*). A dissenting opinion disagreed, citing *Union B. & T. Co. v. Security-First Nat. Bk. (1937) 8 Cal. 2d 303, 307, 65 P.2d 355* , *Tire & R. Co. v. Wells Fargo Bank, etc. (1934) 1 Cal. App. 2d 694, 701-702, 37 P.2d 483* (discussed in *§ 34.93[3][b]*), and *Pacific Indemnity Co. v. Security First Nat. Bank (1967) 248 Cal. App. 2d 75, 88, 56 Cal. Rptr. 142* (discussed in *§ 34.93[3][a]*), for the proposition that the fictitious payee exception is not made inapplicable merely by reason of the fact that the named payees are real people (*7 Cal. App. 3d 882, 893)* .

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3-34 California Points & Authorities § 34.94

§ 34.94 Opposing Contention That Collecting Bank That Paid Check on Forged, Different, or Missing Endorsement Is Liable to Drawer--Endorsement Is Effective When Payee's Name Is Misspelled or Wrong [Com. Code § 3204(d)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

THE ENDORSEMENT ON CHECK NUMBER _____ IS PROPER UNDER COMMERCIAL CODE SECTION 3204(d) EVEN THOUGH THE CHECK WAS MADE PAYABLE TO THE PAYEE UNDER A _____ [MISSPELLED *or* WRONG] NAME.

Payee Designated by Misspelled or Other Name. If a check is payable to a holder under a name that is not the holder's name, the holder may endorse in the name stated in the check or in the holder's name or both; [but signature in both names may be required by a person paying or taking the instrument for value or collection] (*Com. Code § 3204(d)*; *Blackmon v. Hale (1970) 1 Cal. 3d 548, 555-556, 83 Cal. Rptr. 194, 463 P.2d 418*).

[2] Comments

[a] Use of Form

These points and authorities are for use in opposing the contention that a bank paid a check on an ineffective or improper endorsement when the payee was designated under a misspelled or other name and the endorsement was by the actual payee. In such a situation, the endorsement is valid in either the misspelled or correctly spelled form or in the payee's name or the name by which the payee was designated [*see Com. Code § 3204(d)*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Thus, counsel should set forth facts describing the payee designation and establishing the adequacy of the endorsement.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the propriety of the endorsement.

[b] Related Points and Authorities

The points and authorities set out in *§§ 34.34* and *34.93* address particular payee designations. Ch. 166, *Negotiable Instruments* also includes forms addressing particular payee designations [*see, e.g.,* forms applying *Com. Code § 3109* (instruments payable to bearer or order)]. Other aspects of the validity and requirements of endorsements, and of liability for payment on an improper endorsement, are addressed in § 34.34, § 34.47-48, § 34.70, § 34.73-75, § 34.90-92, § 34.93, § 34.120-§ 34.122, § 34.124-126, and § 34.171.

[3] Discussion of Authorities

[a] Payee Designated by Misspelled or Other Name

Plaintiff in ***Blackmon v. Hale*** *(1970) 1 Cal. 3d 548, 83 Cal. Rptr. 194, 463 P.2d 418* , purchased a cashier's check payable to the trust account of his attorney's law partnership. The payee designation on the cashier's check was "A and H Trust Account." In fact, a third attorney had recently left the firm, and the remaining two partners were still using an account entitled the "A, H, and L Trust Account." Plaintiff's attorney, *A*, endorsed the cashier's check "A and H Trust Account by A." Below that endorsement was rubber stamped "Pay to the order of California Bank, A, H, and L Trust Account." After the proceeds were deposited in the A, H, and L Trust Account, *A* and *H* dissolved their partnership. To settle accounts between them, *H* signed a check drawn on the A, H, and L Trust Account payable to the "JCA Trust Account." Attorney *A* used the proceeds of that check to open his solo practice trust account and later diverted the funds from that account for his personal use. Plaintiff sued both the bank on which the cashier's check was drawn and the collecting bank at which it was deposited to recover all but $1,000 of the check's face amount. The trial court ruled in the bank's favor. Plaintiff appealed.

The Supreme Court affirmed. The Court first considered the propriety of the endorsement. Plaintiff argued that under former Civ. Code § 3117 (*now see Com. Code §§ 3205, 3206*) the endorsement was restrictive so that the endorsee could not negotiate the check contrary to the endorsement. The Court disagreed, saying that the check was deposited to precisely the account for which it was intended at the time it was drawn. Despite the designation given, the check's payee was intended by both plaintiff and *A* to be the trust account used by *A*. The incompleteness and irregularity of the payee's name was inconsequential (*1 Cal. 3d 548, 555)* .

Plaintiff also argued that the endorsement by *A* alone was ineffective and that both *A* and *H* had to endorse it. The Court disagreed, saying the bank's reliance on the stamped endorsement was proper. Although withdrawals from that account could be made by *H* alone or by *A* and *L* together, there was no evidence that a stamped endorsement was not authorized to effect a deposit to the account (*1 Cal. 3d 548, 555-556)* . The Court did not discuss plaintiff's objection to the trial court's finding that since the cashier's check was a bearer instrument, no endorsement was needed.

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3-34 California Points & Authorities § 34.95

§ 34.95 Opposing Contention That Collecting Bank That Paid Check on Forged, Different, or Missing Endorsement Is Liable to Drawer--Drawer Cannot Maintain Conversion Action Against Collecting Bank [Com. Code § 3420]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

PLAINTIFF-DRAWER HAS NO CAUSE OF ACTION AGAINST DEFENDANT COLLECTING BANK FOR CONVERSION ARISING FROM DEFENDANT's PAYMENT OF PLAINTIFF's CHECK DATED _____, PAYABLE TO _____ [*name of payee*] ON A FORGED ENDORSEMENT.

A. Conversion. The law applicable to conversion of personal property applies to instruments. An instrument is also converted if it is taken by transfer, other than a negotiation, from a person not entitled to enforce the instrument or a bank makes or obtains payment with regard to the instrument for a person not entitled to enforce the instrument or receive payment (*Com. Code § 3420(a)*).

B. Drawer Has No Conversion Action Against Collecting Bank. An action for conversion of an instrument may not be brought by the instrument's issuer. The drawer's actions are restricted to one against the drawee bank for improperly charging his or her account to pay a check on a forged endorsement (*Com. Code § 3420(a)(1)*; *Allied Concord etc. Corp. v. Bank of America (1969) 275 Cal. App. 2d 1, 7-8, 80 Cal. Rptr. 622*).

[2] Comments

[a] Use of Form

These points and authorities are for use in opposing the contention that a collecting bank is liable to a drawer in conversion for paying the proceeds of a check to someone other than the named payee on a forged endorsement [*see Com. Code § 3420(a)*]. Paragraph A sets forth the statutory definition of conversion. Paragraph B sets forth the rule

establishing the drawer's lack of standing to sue the collecting bank for conversion and that the drawer's adequate remedy is to require the drawee to recredit the account on which the check was drawn.

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Thus, counsel should set forth facts describing the payee designation and the manner in which the check was negotiated. Counsel may wish to add facts negating any ownership interest in the check on the drawer's part.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the collecting bank's freedom from liability in a conversion action.

[b] Related Points and Authorities

The points and authorities set out in *§ 34.70* support and those in §§ 34.73-34.75 oppose the contention that the drawee is liable in conversion to the payee of a check paid on a forged endorsement. The points and authorities set out in *§§ 34.120 -34.122* support and those in §§ 34.124-34.126 oppose the contention that a collecting bank is liable in conversion to the payee of check paid on a forged endorsement. The points and authorities in *§§ 34.47* and *34.121* address drawee or collecting bank liability for forged endorsement of a joint payee check.

The drawer's action against the drawee for charging the drawer's account to pay a check with a forged endorsement is the subject of §§ 34.34 and 34.48.

[3] Discussion of Authorities

[a] Drawer Has No Conversion Action Against Collecting Bank

Allied Concord etc. Corp. v. Bank of America *(1969) 275 Cal. App. 2d 1, 80 Cal. Rptr. 622* , was an action by the drawer of a check against the depositary and collecting banks for damages arising from their payment of a check on an endorsement forged by the payee's brother. Plaintiff did not discover the forgery until more than a year after the check had been paid. Plaintiff relied on theories of conversion and breach of warranties. Judgment entered for defendants after sustaining of demurrers without leave to amend was affirmed on the basis that a drawer cannot maintain a conversion action against the collecting bank based on a forged endorsement, and that the breach of warranty causes of action were barred by the one-year statute of limitations.

The court first decided that the drawer could bring an action for breach of warranty directly against the collecting bank for payment on a forged endorsement (*275 Cal. App. 2d 1, 3-4)* , although this portion of the opinion appears suspect in light of the 1992 amendments to the warranty provisions [*see Com. Code §§ 3417, 4208*; Official Comment 2 to U.C.C. § 3-417 (1990) (no warranties made to drawer)]. Plaintiff also contended that the drawer, equally with the payee, should be entitled to sue depositary and collecting banks in conversion. The court said plaintiff's argument did not take into account the different ways in which the drawer and the payee are damaged by payment of a check on a forged endorsement. When a depositary bank honors a forged endorsement, it has foreclosed the true payee from presenting and collecting the check and thereby directly and immediately damages the payee. The drawer, however, suffers no loss. Even if the drawee accepts and pays the check, the drawer has not been injured, because at that point, the money paid out is the drawee's money, not the drawer's (*275 Cal. App. 2d 1, 7-8)* . Only when the drawee charges the drawer's account has the drawer been injured based on the forged endorsement. Even then, the drawer's damage is minimal until the statute of limitations has run on the drawer's right to demand that the drawee reverse the charge. It is true that the collecting bank is liable to the true owner, normally the payee, for the amount of the check. If a drawer can establish a claim to the proceeds as true owner of the check, then the drawer will be able to recover the amount of the check. However, citing *Com. Code § 1103* (general principles of law apply unless specifically displaced by code), the court stated that the drawer's claim will be in assumpsit, not in conversion (*275 Cal. App. 2d 1, 8)* .

It is apparent that when a depositary or collecting bank pays out money on a forged endorsement, it has converted nothing of the drawer's and done no more than part with its own money. The only conversion that adversely affects the drawer occurs when the drawee bank charges his or her account, and the drawer's cause of action runs only against the drawee bank. Thus, while the payee is entitled to sue a depositary bank in conversion for money paid to a third person on a forged endorsement that should have been paid to him or her, a drawer has no such right to sue a depositary or collecting bank for conversion (*275 Cal. App. 2d 1, 8)* .

The court's decision in *Allied* with regard to the conversion cause of action appears consistent with the 1992 repeal and reenactment of Division 3 of the Commercial Code. Under former Division 3, the cases were divided on the issue of whether the drawer of a check with a forged instrument was entitled to assert rights against a depositary or collecting bank that took the check. *Com. Code § 3420(a)(1)*, by specifically stating that an action for conversion of an instrument may not be brought by the issuer or acceptor of the instrument, takes the court's position in *Allied* and rejects other authority that allowed a drawer to state a cause of action for conversion [*see Tedesco v. Crocker National Bank (1983) 148 Cal. App. 3d 1211, 1215-1216, 196 Cal. Rptr. 534* ; *see also Cooper v. Union Bank (1973) 9 Cal. 3d 371, 378, 107 Cal. Rptr. 1, 507 P.2d 609]* . As discussed in *Allied*, the check represents an obligation of the drawer rather than the drawer's property. The drawer has an adequate remedy against the drawee bank for recredit of the drawer's account for unauthorized payment of the check [Official Comment 1 to U.C.C. § 3-420 (1990)].

[4] Additional Authorities

[a] Drawer Has No Conversion Action Against Collecting Bank

The facts and procedural background of *Sehremelis v. Farmers & Merchants Bank (1992) 6 Cal. App. 4th 767, 7 Cal. Rptr. 2d 903* , are discussed in *§ 34.90[4][a]*. The court of appeal affirmed that portion of the judgment based on the sustaining of a demurrer with regard to a cause of action for conversion [*see Com. Code § 3420(a)*], agreeing with *Allied* (discussed *above*) that a drawer cannot sue the collecting bank for conversion on account of the collecting bank's payment of a check with invalid or missing endorsements. The court declined to follow *Tedesco v. Crocker National Bank (1983) 148 Cal. App. 3d 1211, 1215-1216, 196 Cal. Rptr. 534* , relied on by plaintiff, saying the *Tedesco* opinion failed to distinguish the rules and relationships respectively applicable to payees and drawers (*6 Cal. App. 4th 767, 777)* .

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3-34 California Points & Authorities § 34.96

§ 34.96 Opposing Contention That Collecting Bank That Paid Check on Forged, Different, or Missing Endorsement Is Liable to Drawer--Drawer Entrusted Employee With Responsibility [Com. Code § 3405]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT COLLECTING BANK IS NOT LIABLE TO PLAINTIFF FOR PAYING PLAINTIFF's CHECK NUMBER _____ ON A FORGED ENDORSEMENT BECAUSE THE ENDORSEMENT IS EFFECTIVE UNDER COMMERCIAL CODE SECTION 3405.

A. Fraudulent Endorsement by Employee. For the purpose of determining the rights and liabilities of a person who, in good faith, pays an instrument or takes it for value or for collection, if an employer entrusted an employee with responsibility with regard to the instrument and the employee or a person acting in concert with the employee makes a fraudulent endorsement of the instrument, the endorsement is effective as the endorsement of the person to whom the instrument is payable if it is made in the name of that person (*Com. Code § 3405(b)*).

B. Fraudulent Endorsement Defined. "Fraudulent endorsement" means (A) in the case of an instrument payable to the employer, a forged endorsement purporting to be that of the employer, or (B) in the case of an instrument with regard to which the employer is the drawer, a forged endorsement purporting to be that of the person identified as payee (*Com. Code § 3405(a)(2)*).

C. Responsibility Defined. "Responsibility" with regard to instruments means authority (A) to sign or endorse instruments on the employer's behalf, (B) to process instruments received by the employer for bookkeeping purposes, for deposit to an account, or for other disposition, (C) to prepare or process instruments for issue in the employer's name, (D) to supply information determining the names or addresses of payees of instruments to be issued in the employer's name, (E) to control the disposition of instruments to be issued in the employer's name, or (F) to act otherwise with regard to instruments in a responsible capacity. "Responsibility" does not include authority that merely

allows an employee to have access to instruments or blank or incomplete instrument forms that are being stored or transported or are part of incoming or outgoing mail, or similar access (*Com. Code § 3405(a)(3)*).

D. When Endorsement Made in Name of Person to Whom Check Is Payable. Under *Commercial Code Section 3405(b)*, an endorsement is made in the name of the person to whom an instrument is payable if (1) it is made in a name substantially similar to the name of that person or (2) the instrument, whether or not endorsed, is deposited in a depositary bank to an account in a name substantially similar to the name of that person (*Com. Code § 3405(c)*).

[2] Comments

[a] Use of Form

These points and authorities are for use in opposing the contention that a collecting bank is liable to the drawer of a check for paying the check on a forged endorsement. The opposition is based on the ground that an endorsement is effective if the situation is within the rule governing fraudulent endorsements by an employee. Thus, for the defense to apply (1) the bank must have paid or taken the check for value or collection in good faith, (2) the employer must have entrusted an employee with responsibility as that term is defined by statute, and (3) the (fraudulent) endorsement must have been made in the name of the person to whom the instrument is payable [*see Com. Code § 3405*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Thus, counsel should set forth facts bringing the situation within the rule. In addition, because *Com. Code § 3405* adopts a loss-distributive scheme in that the employer may shift the loss to the bank to the extent the bank's failure to exercise ordinary care contributed to the loss, counsel should set forth facts establishing that the collecting bank was not negligent in paying the instrument or taking it for value or collection [*see Com. Code § 3405(b)*; Official Comment 1 and 4 to U.C.C. § 3-405 (1990)].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the collecting bank's freedom from liability when the case falls within the fraudulent-endorsement-by-an-employee rule.

[b] Related Points and Authorities

The points and authorities set out in *§§ 34.93 -34.95* address other grounds on which the collecting bank may oppose liability to the drawer based on a forged endorsement. § 34.90 supports the contention that the collecting bank is liable to the drawer for paying a check on a forged endorsement on the ground that the bank failed to exercise ordinary care in paying the check.

[3] Discussion of Authorities

[a] Fraudulent Endorsement by Employee

Com. Code § 3405 governs fraudulent endorsements made by employees with regard to instruments to which the employer has given responsibility to the employee. It covers two categories of fraudulent endorsements: endorsements made in the employer's name to instruments payable to the employer, and endorsements made in the payee's name of instruments issued by the employer. Under former Division 3, the first category of cases, fraudulent endorsements of the employer's name to instruments payable to the employer, were governed by former Com. Code § 3406. Under that section, the employer took the loss only if the employer's negligence could be proved. Under Division 3 as revised in 1992, *Com. Code § 3406* need not be used with regard to forgeries of the employer's endorsement. *Com. Code § 3405* imposes the loss on the employer without proof of negligence [Official Comment 1 to U.C.C. § 3-405 (1990); *see Cooper v. Union Bank (1973) 9 Cal. 3d 371, 386 . 107 Cal. Rptr. 1, 507 P.2d 609* (discussed in *§ 34.96[4][a]*)]. However, if the case does not fall within the rule of *Com. Code § 3405* (for example, the forger was never given

"responsibility" with regard to the instrument), then the provisions of *Com. Code § 3406* regarding contributory negligence might apply [*see* Case 1 to Official Comment 3 to U.C.C. § 3-405 (1990); Case 1 to Official Comment 3 to U.C.C. § 3-406 (1990); *see also § 34.74*].

[4] Additional Authorities

[a] Fraudulent Endorsement by Employee

The facts and procedural background of *Cooper v. Union Bank (1973) 9 Cal. 3d 371, 107 Cal. Rptr. 1, 507 P.2d 609* , and the portion of the opinion considering the payee's right of action against the drawee, are discussed in *§ 34.70[3][a]*. The Supreme Court reviewed the facts that were the basis of the holding that, under former version of Com. Code § 3406 (prior to its 1992 amendment), plaintiff's negligence barred recovery on checks presented after April 1, 1966, approximately six months after the bookkeeper forged the first endorsement. The Court noted that the bookkeeper had retained plaintiff as an attorney in 1963 because of the bookkeeper's insolvency and the creditors' suits against her. She told plaintiff at that time that the financial difficulties were due to gambling losses. A short time later, plaintiff hired her as a bookkeeper. Plaintiff exercised practically no supervision, never reviewed the books, and never checked the bank reconciliation of deposits on the accounts that the bookkeeper handled, even after a suspicious absence of an entry was noted during an annual examination made in the course of preparing tax returns (*9 Cal. 3d 371 383)* . In support of the finding that the drawee (Crocker) had acted in good faith and in accordance with reasonable commercial standards, the Court noted that at the time the bookkeeper's account was opened at Crocker, she had been introduced to that bank by one of its established customers. There was nothing on the face of the checks that would have led the bank to suspect they were irregular in any way (*9 Cal. 3d 371 385)* . A single branch of a large bank may handle several thousand instruments bearing third-party endorsements in a single day (*9 Cal. 3d 371 385-386)* . Considering this burden, the Court said it would be commercially unreasonable to expect drawee banks to undertake foolproof efforts to verify ostensibly valid endorsements. With regard to the checks that were received through bank collection channels, all prior endorsements were guaranteed by the collecting banks. Having acted in good faith and in accordance with reasonable commercial standards, Crocker was entitled to invoke the defense of former Com. Code § 3406 (*9 Cal. 3d 371 386)* .

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3-34 California Points & Authorities § 34.97

§ 34.97 Opposing Contention That Collecting Bank Is Liable to Drawer for Amount of Check on Which Drawer's Signature Was Forged--Bank's Duties Under Com. Code § 4202 Do Not Include Determination Regarding Validity of Drawer's Signature

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT _____ [DEPOSITARY *and/or* COLLECTING] BANK IS NOT LIABLE TO PLAINTIFF FOR THE AMOUNT OF THE CHECK DATED _____, PAYABLE TO _____ [*name of payee*], AND ON WHICH PLAINTIFF's SIGNATURE AS DRAWER WAS FORGED BECAUSE DEFENDANT IS NOT RESPONSIBLE FOR DISCOVERING A FORGED DRAWER's SIGNATURE.

A. Duties of Collecting Bank. [*See § 34.129[1], Paragraph A.*]

B. Discovery of Forged Drawer's Signature Is Not Part of Duty of Presentment. A collecting bank's duty of proper presentment under *Commercial Code Section 4202(a)(1)* does not include the duty to discover a forged drawer's signature on a deposited item (*Fireman's Fund Ins. Co. v. Security Pacific Nat. Bank (1978) 85 Cal. App. 3d 797, 820-821, 149 Cal. Rptr. 883*).

[2] Comments

[a] Use of Form

These points and authorities are for use in opposing the contention that a collecting bank is liable to the drawer of a check for paying the proceeds of that check when the purported drawer's signature was forged. The opposition is based on the ground that discovery of a forged drawer's signature is not part of a collecting bank's presentment duties [*see Com. Code § 4202*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Thus, counsel should show how, when, and by whom the check was received for collection, that it was not also the drawee, and that it did not know the drawer's signature was forged [*see Com. Code § 4207(a)(2)* (warranty against knowledge of unauthorized drawer's signature, set forth in *§ 34.150*)].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the collecting bank's lack of responsibility for discovery of a forged drawer's signature.

[b] Related Points and Authorities

The points and authorities set out in *§§ 34.98* and *34.99* address other aspects of a collecting bank's responsibility, or the lack of it, for a forged drawer's signature. §§ 34.31-34.33 address a drawee bank's liability for charging the drawer's account to pay a check with a forged drawer's signature or one lacking all required drawers' signatures.

[3] Discussion of Authorities

[a] Discovery of Forged Drawer's Signature Is Not Part of Duty of Presentment

Plaintiff in ***Fireman's Fund Ins. Co. v. Security Pacific Nat. Bank*** *(1978) 85 Cal. App. 3d 797, 149 Cal. Rptr. 883* , was the drawer's insurer and brought the action in its capacity as subrogee after it paid the drawer the amount of a check on which one of the drawer's employees had forged one of the two required drawers' signatures. The check was drawn on the insured's account at another bank (hereinafter "Banco") and was payable to "Security Pacific National Bank A/C No. 260 049 569 GC Associates." The employee opened account number 260 049 569 at defendant in the name of GC Associates and deposited the check there with the typewritten endorsement "Deposit Only AC 049 569 GC Associates." Banco paid defendant and charged the drawer's account. Then the employee withdrew the funds from the account at defendant. The drawer demanded that Banco recredit its account, but Banco refused to do so. Plaintiff sued only defendant collecting bank for negligence and breach of warranty. A judgment of dismissal was entered, and plaintiff appealed.

The court of appeal affirmed. The court considered plaintiff's contention that former Com. Code § 4202(1) (*now see Com. Code § 4202(a)*) imposes a duty of due care on collecting banks in accepting checks for deposit, and that this duty runs to a noncustomer drawer (*85 Cal. App. 3d 797, 818, 820)* . The court agreed that former Com. Code § 4202(1) imposes a duty on collecting banks; however, that duty relates to presentment, which was not the issue in this case. Presentment is made by a presenting bank at the place where the drawee bank has requested presentment be made [former Com. Code § 4204(2); *now see Com. Code § 4204(c)*] (*85 Cal. App. 3d 797, 820)* . The court concluded that former Com. Code § 4202(1)(a) (*now see Com. Code § 4202(a)(1)*) does not impose on a collecting bank the duty of determining whether a check bears a forged drawer's signature (*85 Cal. App. 3d 797, 820-821)* . Even if the receiving and initial processing of a check were viewed as part of the presentment process, the duties imposed on a collecting bank by that section should only be imposed by the owner of the instrument who initiates collection or by a prior collecting bank (*85 Cal. App. 3d 797, 821)* .

[4] Additional Authorities

[a] Duties of Collecting Bank

In *Karen Kane Inc. v. Bank of America NT&SA (1998) 67 Cal. App. 4th 1192, 79 Cal. Rptr. 2d 712* , the court of appeal held that absent extraordinary circumstances, a collecting bank does not owe a duty of care to a non-customer, particularly when the bank has met its statutory duties as set forth in *Com. Code § 4202(a)*. In that case, a clothing manufacturer wrote numerous checks over several years to fictitious vendors for merchandise it never received, based

on an employee's submission of fraudulent invoices. The manufacturer brought a negligence action against both the check cashing service that cashed those checks and the bank that deposited the checks into the service's account. It claimed that the checks bore indicia of wrongdoing, such as unconventional endorsements, which gave respondents notice that it was probable that the manufacturer had unwittingly issued the checks as the result of an unlawful scheme, made harm to the manufacturer foreseeable, and created a duty to inquire as to the validity of the obligation supporting the checks. The court found that because the checks were not forged or improperly endorsed, and did not indicate that maker was being defrauded, neither the check cashing service nor the bank had a duty to inquire of the maker if a valid transaction supported the checks before accepting them. The circumstances were not extraordinary enough to give rise to a duty of inquiry by a bank complying with its statutory duties, when in fact they were not even sufficient to constitute notice of fraud to the maker of the checks (*67 Cal. App. 4th 1192, 1202-1203)* .

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§ 34.98 Opposing Contention That Collecting Bank Is Liable to Drawer for Amount of Check on Which Drawer's Signature Was Forged--Bank in Good Faith Changed Its Position in Reliance on Final Payment From Drawee [Com. Code § 3418]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT _____ [DEPOSITARY *and/or* COLLECTING] BANK IS NOT LIABLE TO PLAINTIFF FOR THE AMOUNT OF THE CHECK DATED _____, PAYABLE TO _____ [*name of payee*], AND ON WHICH PLAINTIFF's SIGNATURE AS DRAWER WAS FORGED BECAUSE DEFENDANT IN GOOD FAITH DID NOT ALLOW THE PROCEEDS OF THAT CHECK TO BE WITHDRAWN UNTIL PAYMENT FROM THE DRAWEE WAS FINAL.

A. Restitution/Payment Final. When an instrument is paid by mistake the payor is generally entitled to restitution of the amount paid. However, restitution

is not available when payment becomes final. Payment on a forged check is final in favor of a person who (1) received the proceeds in good faith and for value or (2) in good faith changed his or her position in reliance on the payment (*see Com. Code § 3418(a)-(c)*; Official Comment 1 to § 3-418 (1990)).

B. Collecting Bank Relied. A depositary or collecting bank that allows its customer to withdraw the proceeds of a deposited check after payment from the drawee bank has become final has changed its position in reliance on the payment within the meaning of *Commercial Code Section 3418* (*Fireman's Fund Ins. Co. v. Security Pacific Nat. Bank (1978) 85 Cal. App. 3d 797, 822-823, 149 Cal. Rptr. 883* (construing prior law)).

C. Collecting Bank's Good Faith. A depositary or collecting bank's change of position in reliance on a payment is made in good faith within the meaning of *Commercial Code Section 3418* if, from all the facts and circumstances

known to it at the time in question, it has no reason to know or suspect that any forgery, alteration, or irregularity exists or that any breach of trust was occurring (*Fireman's Fund Ins. Co. v. Security Pacific Nat. Bank (1978) 85 Cal. App. 3d 797, 823-825, 149 Cal. Rptr. 883* (construing prior law)).

[*Optional*] **D. Defense Not Precluded by Failure to Adhere to Procedures.** A collecting bank's failure to comply with its internal procedures in cashing or allowing withdrawal of proceeds of a deposit item does not amount to negligence or bad faith so as to preclude its defense under *Commercial Code Section 3418* (*Fireman's Fund Ins. Co. v. Security Pacific Nat. Bank (1978) 85 Cal. App. 3d 797, 825-827, 149 Cal. Rptr. 883* (construing prior law)).

[2] Comments

[a] Use of Form

These points and authorities are for use in opposing the contention that a collecting bank is liable to the drawer of a check for paying the proceeds of that check when the purported drawer's signature was forged. The opposition is based on the collecting bank's bringing itself within the final payment defense of *Com. Code § 3418*, which is set forth in Paragraph A. Paragraph B provides that reliance is established if the bank did not allow withdrawal of the proceeds until payment from the drawee was final. Paragraph C sets forth the criteria for establishing good faith. This element of the defense will probably be negated if there is actual ambiguity in the payee designation, or if the bank is the payee [*see Sun'n Sand, Inc. v. United California Bank (1978) 21 Cal. 3d 671, 688-692, 148 Cal. Rptr. 329, 582 P.2d 920]* . Paragraph D is for use if there is an issue regarding the bank's nonadherence to its internal procedures.

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Thus, counsel should show how, when, and by whom the check was received for collection, that nothing in these circumstances was out of the ordinary, and that it did not allow the proceeds to be withdrawn until final payment was received from the drawee [*see Com. Code §§ 4215(a), 4301* (regarding final payment, set forth in *§§ 34.75* and *34.77*, respectively)].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the collecting bank's final payment defense.

[b] Related Points and Authorities

The points and authorities set out in *§§ 34.97* and *34.99* address a collecting bank's liability for paying a check with a forged drawer's signature. §§ 34.31-34.33 and 34.46-34.53 address a drawee bank's liability for charging the drawer's account to pay a check with a forged drawer's signature or one lacking all required drawers' signatures.

[3] Discussion of Authorities

[a] Collecting Bank Relied

The facts and procedural background of ***Fireman's Fund Ins. Co. v. Security Pacific Nat. Bank*** *(1978) 85 Cal. App. 3d 797, 149 Cal. Rptr. 883* , and the portion of the opinion holding that defendant collecting bank had no duty under *Com. Code § 4202(a)(1)* to discover that plaintiff-drawer's signature was forged, are discussed in *§ 34.97[3][a]*. The court of appeal then considered defendant's claim of defense under the former version of Com. Code § 3418 (since amended in 1992). Even plaintiff's allegations conceded that defendant did not allow the forger to withdraw the proceeds until defendant had received final payment from the drawee (*85 Cal. App. 3d 797, 822)* . Concerning the reliance element of the defense, the court said the determinative fact is not that defendant gave value, but that it changed its position only after knowledge of the payment from the drawee. Thus, defendant relied on the payment before changing its position (*85 Cal. App. 3d 797, 822-823)* .

[b] Collecting Bank's Good Faith

Fireman's Fund Ins. Co. v. Security Pacific Nat. Bank *(1978) 85 Cal. App. 3d 797, 149 Cal. Rptr. 883* , is discussed in *§ 34.98[3][a]*. Concerning whether defendant's reliance was in good faith, the court (citing California Uniform Commercial Code Comment 2 to former Com. Code § 3302) noted that good faith as applied to holder in due course status refers to the definition in *Com. Code § 1201* of honesty in fact in the conduct or transaction concerned [*see Com. Code § 1201(b)(20)*; *see also* Official Comment 4 to U.C.C. § 3-103 (1990)]). The former Comment provides that the presence of suspicious circumstances sufficient to put a reasonably prudent person on inquiry does not negate the existence of good faith (*85 Cal. App. 3d 797, 823)* . The holder's negligence does not affect the finality of payment or acceptance unless the negligence amounts to lack of good faith or to notice under former Com. Code § 3304 (notice to purchaser) (*85 Cal. App. 3d 797, 823-824)* . Notice as used in former Com. Code § 3304 is defined in *Com. Code § 1202(a)*, which provides that one has notice of a fact when, from all the facts and circumstances known to him or her at the time in question, he or she has reason to know that it exists. The court cited *Sun'n Sand, Inc. v. United California Bank (1978) 21 Cal. 3d 671, 697 n.21, 148 Cal. Rptr. 329, 582 P.2d 920* , for the proposition that "reason to know" suggests an objective notion of notice. Plaintiff contended that the ambiguity in the payee designation and the fact that the check was negotiated by a fiduciary put defendant on notice [*see* former Com. Code § 3304(1)(a) and current *Com. Code § 3302(a)(1)*; former Com. Code § 3304(4)(e) and current *Com. Code § 3307*]. The court disagreed, saying the payee designation was not that irregular (*85 Cal. App. 3d 797, 824)* . Plaintiff misconstrued former Com. Code § 3304(4)(e) (*now see Com. Code § 3307*) (*85 Cal. App. 3d 797, 824-825)* . Even under the most restrictive view of notice, and even if defendant had been aware that the check was being negotiated by a fiduciary, that fact alone would not give it notice unless it took the item with knowledge of a breach of trust or without objective criteria from which it could reasonably conclude that the party presenting the check was authorized to act as it did (*85 Cal. App. 3d 797, 825)* . This argument was made even stronger by the presence of two drawers' signatures on the check. Defendant was entitled to rely on the second signature as an assurance that no misappropriation or fraud was being conducted (*85 Cal. App. 3d 797, 827)* . Thus, defendant had no notice and was both a person who in good faith changed its position in reliance on the payment and a holder in due course (*85 Cal. App. 3d 797, 825)* .

The lack of a comparable section to former Com. Code § 3304 in Division 3 as revised in 1992 should not significantly alter the above decision. Most of the rules in former Com. Code § 3304 are repeated in various other places in Division 3 [*see Com. Code §§ 3302, 3304, 3307*]. In addition, the basic definition of notice remains [*see Com. Code § 1202(a)*].

[c] Defense Not Precluded by Failure to Adhere to Procedures

Fireman's Fund Ins. Co. v. Security Pacific Nat. Bank *(1978) 85 Cal. App. 3d 797, 149 Cal. Rptr. 883* , is discussed in *§ 34.98[3][a]*. Plaintiff contended that defendant's failure to adhere to its internal procedures (in the ways set forth in the portion of the opinion discussed in *§ 34.99[3][b]*) barred its reliance on the defense of *Com. Code § 3418*. The court of appeal considered cases from other jurisdictions that allowed the defense even in the face of failure to adhere to internal procedures (manager approval before cashing corporate checks drawn on another bank) and to prevailing banking practice (requiring corporate resolution of corporate account holder) (*85 Cal. App. 3d 797, 825-826)* . The circumstances here, particularly the facts that there were two drawers' signatures on the check and the payee designation gave a specific account name and number, negated any implication of suspicious circumstances (*85 Cal. App. 3d 797, 826-827)* .

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3-34 California Points & Authorities § 34.99

§ 34.99 Opposing Contention That Collecting Bank Is Liable to Drawer for Amount of Check on Which Drawer's Signature Was Forged--Drawer's Negligence Cause of Action Is Displaced by Com. Code § 3418

[1] FORM

[*The following may be included in a memorandum, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT _____ [DEPOSITARY *and/or* COLLECTING] BANK IS NOT LIABLE TO PLAINTIFF IN NEGLIGENCE FOR THE AMOUNT OF THE CHECK DATED _____, PAYABLE TO _____ [*name of payee*] AND ON WHICH PLAINTIFF's SIGNATURE AS DRAWER WAS FORGED, BECAUSE COMMERCIAL CODE SECTION 3418 DISPLACES A NEGLIGENCE ACTION IN THIS SITUATION.

A. ***Commercial Code Section 3418*** **Displaces Negligence.** *Commercial Code Section 3418* articulates a loss-distribution scheme applicable to a collecting bank's failure to notice the forgery of a noncustomer-drawer's signature on a deposited check that displaces and precludes the drawer's negligence action against the collecting bank (*Fireman's Fund Ins. Co. v. Security Pacific Nat. Bank (1978) 85 Cal. App. 3d 797, 827-830, 149 Cal. Rptr. 883* (construing prior law)).

B. Bank Procedures Do Not Create Duty to Noncustomer Drawer. Although a violation of a company rule may be used as evidence of breach of a duty, it cannot be used to establish the existence of such a duty when contrary to both statutory and common law (*Fireman's Fund Ins. Co. v. Security Pacific Nat. Bank (1978) 85 Cal. App. 3d 797, 829, 149 Cal. Rptr. 883* (construing prior law)).

[2] Comments

[a] Use of Form

These points and authorities are for use in opposing the contention that a collecting bank is liable to the drawer of a

check for paying the proceeds of that check when the purported drawer's signature was forged on the ground that *Com. Code § 3418* has displaced negligence.

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Thus, to bring the situation within the ambit of this rule, counsel should show that the only defect in the check is the forgery of the drawer's signature, that the drawer is not its customer, and that the circumstances of presentment were not so suspicious as to impart notice that would negate the availability of the defense of *Com. Code § 3418*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a collecting bank is not liable in negligence to a noncustomer-drawer whose signature is forged.

[b] Related Points and Authorities

The points and authorities set out in *§§ 34.97* and *34.98* oppose a collecting bank's liability for payment of a check with a forged drawer's signature. §§ 34.31-34.33 and 34.46-34.53 address a drawee bank's liability for charging the drawer's account to pay a check with a forged drawer's signature or one lacking all required drawers' signatures.

[3] Discussion of Authorities

[a] Commercial Code Section 3418 Displaces Negligence

The facts and procedural background of ***Fireman's Fund Ins. Co. v. Security Pacific Nat. Bank*** *(1978) 85 Cal. App. 3d 797, 149 Cal. Rptr. 883* , and the portion of the opinion holding that defendant collecting bank had no duty under *Com. Code § 4202(a)(1)* to discover that the drawer's signature was forged, are discussed in *§ 34.97[3][a]*. Plaintiff, the drawer's insurer, alleged that defendant was negligent in not discovering that one of the two required drawers' signatures was forged. Plaintiff argued that defendant failed to adhere to reasonable commercial standards in the banking business, and failed to follow procedures set forth in its own operations manual by failing (1) to check the depositor's prior banking connections or employment by its principal, (2) to determine ownership of the partnership that was its account holder, (3) to obtain a credit check on the account holder prior to opening the account, (4) to obtain a certified copy of the account holder's fictitious business name statement, (5) to contact plaintiff regarding disposition of the proceeds when defendant could reasonably be construed to be the payee, or a joint payee, of the check (note that defendant was determined not to be the payee of the check), (6) to have a staff member review the deposit because of its size ($25,000), (7) to contact the drawer although one of the purported drawer's signatures was the same as a signator in the account into which the check was deposited, (8) to inspect the endorsement even though it did not contain the signature of any person signing on behalf of the partnership (endorsement was typewritten), and (9) to ascertain whether defendant was required to endorse the check as joint payee (*85 Cal. App. 3d 797, 811 ns.29, 30*).

The court of appeal discussed the elements of negligence and the fact that *Sun'n Sand, Inc. v. United California Bank (1978) 21 Cal. 3d 671, 148 Cal. Rptr. 329, 582 P.2d 920* , had not held all negligence theories under which a drawer might recover from a collecting bank for losses occasioned by the fraudulent action of the drawer's employee to be displaced by the Commercial Code (*85 Cal. App. 3d 797, 811-813)* . The court in *Fireman's Fund* noted two distinguishing factors between *Sun'n Sand* and this case: (1) in *Sun'n Sand,* the collecting bank was the payee, and (2) *Sun'n Sand* involved material alterations while this case involved a forged drawer's signature (*85 Cal. App. 3d 797, 813-814)* . The court determined that defendant in this case was not the payee (*85 Cal. App. 3d 797, 814-818)* , that defendant's presentment duties under former Com. Code § 4202(1)(a) (*now see Com. Code § 4202(a)(1)*) did not include the duty to verify the signature as that of the drawer (*85 Cal. App. 3d 797, 818-821)* , and that defendant met the requirements for invoking the defense of former Com. Code § 3418 (*85 Cal. App. 3d 797, 821-827)* . The court noted that the former version of Com. Code § 3418 (since amended in 1992) articulates a loss-distributive scheme that was applicable to the fact pattern as alleged (forged drawer's signature), and found that *Com. Code § 3418* displaces an

action for common law negligence (*85 Cal. App. 3d 797, 827)* .

Plaintiff contended the defense of *Com. Code § 3418* was only available to a collecting bank in an action by the drawee bank, not in an action by the drawer. The court found that contention violated the plain meaning of *Com. Code § 3418* (*85 Cal. App. 3d 797, 827-829)* . Plaintiff also contended that violation of defendant's own procedures gave rise to a duty, breach of which was negligence. The court responded by stating that while a violation of a company rule may be used as evidence of breach of a duty, it cannot be used to establish the existence of such a duty when contrary to both statutory and common law (*85 Cal. App. 3d 797, 829)* . The court distinguished between imposing liability on a collecting bank, in the drawer's favor, for paying a check with a forged endorsement and for paying one with a forged drawer's signature, especially in terms of vitiating the final payment policy of *Com. Code § 3418* (*85 Cal. App. 3d 797, 830)* .

[b] Bank Procedures Do Not Create Duty to Noncustomer Drawer

Fireman's Fund Ins Co v. Security Pacific Nat. Bank *(1978) 85 Cal. App. 3d 797, 149 Cal. Rptr. 883* , is discussed in *§ 34.99[3][a]*.

[4] Additional Authorities

[a] Commercial Code Section 3418 Displaces Negligence

In *Gentner v. Wells Fargo Bank (1999) 76 Cal. App. 4th 1165, 90 Cal. Rptr. 2d 904* , a Wells Fargo customer paid a consulting firm for services by check, on which it later stopped payment. When the firm presented the check to Wells Fargo, however, the bank paid it by issuing a cashier's check to the firm. Later, Wells Fargo issued a stop payment on the cashier's check and when the firm tried to deposit it at another bank, the cashier's check was not honored. The firm brought suit against Wells Fargo for wrongful dishonor of the cashier's check. The trial court found that the firm was a holder in due course of the cashier's check and entered judgment in the amount of the check plus interest (*76 Cal. App. 4th 1165, 1166-1167)* .

The court of appeal affirmed, concluding that as between a bank and a payee who acts in good faith, the Commercial Code clearly requires the bank to suffer the loss occasioned by its error in accepting or paying a check covered by a stop payment order, and the result is the same whether the check is paid in cash or exchanged for a cashier's check. The court first stated that the firm was entitled to holder-in-due-course status under *Com. Code § 3302* (*76 Cal. App. 4th 1165, 1168-1170)* . It then held that the provisions of *Com. Code § 3418* precluded the bank from recovering its mistaken payment as long as the payee took the instrument in good faith (*76 Cal. App. 4th 1165, 1175-1176)* . The court found that when a payee presents a check to the drawee bank, it is entitled to a prompt and accurate answer to the question of whether or not the check is good (*76 Cal. App. 4th 1165, 1179-1180)* .

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[Reserved]

§§ 34.100[Reserved]

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3-34 California Points & Authorities § 34.120

§ 34.120 Supporting Contention That Collecting Bank Is Liable to Payee for Amount of Check Paid on Forged Endorsement [Com. Code § 3420]--Conversion Generally

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT COLLECTING BANK IS LIABLE TO PLAINTIFF FOR THE AMOUNT OF THE CHECK DATED _____, DRAWN BY _____ [*name of drawer*] AND PAYABLE TO PLAINTIFF IN THE AMOUNT OF $_____, BECAUSE PLAINTIFF's ENDORSEMENT ON THAT CHECK WAS FORGED AND DEFENDANT PAID THE PROCEEDS OF THAT CHECK OTHER THAN TO PLAINTIFF.

A. Conversion. [*See § 34.70[1], Paragraph A.*]

B. Presumed Damages for Conversion. [*See § 34.70[1], Paragraph C.*]

C. Payee's Action Against Collecting Bank for Conversion. If the amount of a check is paid on a forged endorsement to any person other than the designated payee or a person to whom the check was negotiated, the collecting bank is liable to the designated payee or other true owner for converting the amount of the check (*see Com. Code § 3420(a)*; *Cooper v. Union Bank (1973) 9 Cal. 3d 371, 376-377, 381-383, 107 Cal. Rptr. 1, 507 P.2d 609* (construing prior law); *Fabricon Products v. United Cal. Bank (1968) 264 Cal. App. 2d 113, 116-117, 70 Cal. Rptr. 50*).

D. Defense of *Commercial Code Section 3420(c)*. [*See § 34.70[1], Paragraph D.*]

E. Defense of *Commercial Code Section 3420(c)* Unavailable to Collecting Bank That Is Also Depositary Bank. The defense provided by *Commercial Code Section 3420(c)* is limited to collecting banks other than the depositary bank (Official Comment 3 to U.C.C. § 3-420 (1990)).

[2] Comments

CAUTION:

These points and authorities include a citation to *Cooper v. Union Bank (1973) 9 Cal. 3d 371, 384-385, 107 Cal. Rptr. 1, 507 P.2d 609* . This case was decided before the 1992 repeal and reenactment of Division 3, and thus should be used with caution. Portions of the opinion appear to have been effectively abrogated. For example, *Com. Code § 3420(a)* clearly eliminates a drawer's cause of action for conversion [*see § 34.70[2]*; *see also* discussion in *§ 34.95*]. In addition, *Cooper* may be suspect in that it does not make a distinction in plaintiff/payee conversion cases as to whether the payee took delivery of the check or whether the thief/forger obtained it first. This distinction is now crucial [*see Com. Code § 3420(a)(2)*].

[a] Use of Form

These points and authorities are for use in supporting the contention that a collecting bank is liable in conversion to the payee or other true owner of a check paid on a forged endorsement [*see Com. Code § 3420*]. Although the payee may sue any bank in the collection chain after he or she has taken delivery of the check [*see Com. Code § 3420(a)*], *Com. Code § 3420(c)* makes it far more efficacious for the payee to sue the depositary bank. Each of the other banks in the collection chain is apt to defend on the ground of having paid the proceeds in good faith to one not entitled to enforce the instrument [*see* Official Comment 3 to U.C.C. § 3-420 (1990)]. Thus, this form should be used only if the payee can establish that the defense of *Com. Code § 3420* is inapplicable because either the collecting bank is also the depositary bank or the collecting bank did not deal with the check in good faith [*see Com. Code § 3420(c)*].

Although the payee may sue any bank in the collection chain he or she is entitled to but one recovery [Official Comment 3 to U.C.C. § 3-420 (1990)]. Under former Com. Code § 3419, the payee had causes of action against both the collecting bank and the drawee bank but could only pursue one of them because the payee's commencement of an action against the collecting bank extinguished the drawee's liability on the theory that the payee's action ratified the collection of the proceeds from the drawee bank [*see Cooper v. Union Bank (1973) 9 Cal. 3d 371, 377-378, 107 Cal. Rptr. 1, 507 P.2d 609* ; *see also § 34.73*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Thus, counsel should set forth facts describing the payee designation on the check, whether the check had been negotiated to any third person, the particular defect in the endorsement, and that the payee or true owner has not received any part of the proceeds or any replacement check or other duplicate payment from the drawer. Counsel must also establish that the defense provided by *Com. Code § 3420(c)* is unavailable to the collecting bank by showing, for example, that the collecting bank is also the depositary bank.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the collecting bank's liability to the payee for paying a check with a defective endorsement.

[b] Related Points and Authorities

The points and authorities set out in *§§ 34.34* and *34.93 -34.94* address particular payee designations. Ch. 166, *Negotiable Instruments*, also includes forms addressing particular payee designations [*see, e.g.,* forms applying *Com. Code § 3109* (instruments payable to bearer or order)]. §§ 34.121-34.122 support, and §§ 34.124-34.126 oppose the contention that the collecting bank is liable to the payee for conversion for paying a check on a forged endorsement. § 34.70 supports, and §§ 34.73-34.75 oppose the contention that the drawee bank is also liable to the payee for conversion for paying a check on a forged endorsement. Other aspects of the validity and requirements of endorsements, and of liability for payment on an improper endorsement, are addressed in §§ 34.34, 34.47-34.48, 34.90-34.96, 34.171.

[3] Discussion of Authorities

[a] Payee's Action Against Collecting Bank for Conversion

The facts and procedural background of ***Cooper v. Union Bank*** *(1973) 9 Cal. 3d 371, 107 Cal. Rptr. 1, 507 P.2d 609* , are discussed in *§ 34.70[3][a]*. In considering the claims against the collecting banks that had paid the checks after they were deposited to the personal accounts of the forger, plaintiff's employee, the Supreme Court said it was clear, excluding for the moment the issue of plaintiff's negligence, that defendant collecting banks are liable for conversion unless they can establish a defense under former Com. Code § 3419(3) (*now see Com. Code § 3420(c)*) (*9 Cal. 3d 371, 376)* . The Court concluded that the defense was not available to the collecting banks (*9 Cal. 3d 371, 377-378)* , although this portion of the opinion appears to have been abrogated by 1992 legislation that makes the defense applicable to collecting banks other than the depositary bank [*see Com. Code § 3420(c)*; Official Comment 3 to U.C.C. § 3-420 (1990)].

Plaintiff in ***Fabricon Products v. United Cal. Bank*** *(1968) 264 Cal. App. 2d 113, 70 Cal. Rptr. 50* , was payee of 20 checks deposited to its employee's personal account at defendant between September 25, 1962, and December 3, 1962. The checks were endorsed by the employee in his name preceded by the words "Fabricon Products Commission Agent." On July 16, 1965, plaintiff filed suit against defendant, setting forth causes of action for conversion and for money had and received. Defendant conceded that a collecting bank is liable to a payee whose endorsement is forged, but contended that the liability could only be asserted by a cause of action for money had and received that was governed by the two-year limitation of *Code Civ. Proc. § 339(1)*. Defendant's demurrer on the ground of the statute of limitations was sustained. Judgment was entered for defendant. Plaintiff appealed.

The court of appeal reversed. California courts have long recognized that the payee has an action for conversion, as well as for money had and received, against a collecting bank that has paid out on a check bearing the payee's forged endorsement. The principle behind the conversion theory is that because a forged endorsement is inoperative, the collecting bank acquires no right to retain the check or to enforce payment from the drawee. The collecting bank's retention of the check and use of it to obtain payment from the drawee is an exercise of dominion over the check inconsistent with and an interference with plaintiff's right to control and use of its own property (*264 Cal. App. 2d 113, 116)* . The court cited authorities from banking texts and other states for the proposition that a payee may base recovery on the theory of conversion or on money had and received (*264 Cal. App. 2d 113, 117)* . The portion of the opinion considering the applicable statute of limitations is discussed in *§ 34.124[3][a]*.

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3-34 California Points & Authorities § 34.121

§ 34.121 Supporting Contention That Collecting Bank Is Liable to Payee for Amount of Check Paid on Forged Endorsement [Com. Code § 3420(a)]--One Joint Payee Forged Endorsement of Another Joint Payee [Com. Code § 3110(d)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT COLLECTING BANK IS LIABLE TO PLAINTIFF FOR THE AMOUNT OF THE CHECK DATED _____, DRAWN BY _____ [*name of drawer*] AND PAYABLE TO _____ [*name of other payee*] AND TO PLAINTIFF AS JOINT PAYEES, BECAUSE PLAINTIFF's ENDORSEMENT ON THAT CHECK WAS FORGED AND DEFENDANT PAID THE ENTIRE PROCEEDS OF THAT CHECK TO THE OTHER PAYEE(S).

A. Conversion. [*See § 34.70[1], Paragraph A.*]

B. Presumed Damages for Conversion. [*See § 34.70[1], Paragraph C.*]

C. Joint Payees. [*See § 34.34[1], Paragraph E.*]

D. Joint Payee's Action Against Collecting Bank. A collecting bank is liable in conversion to a joint payee whose endorsement was forged by another joint payee when that bank paid a check payable to joint payees to the joint payee who made his or her own endorsement and forged the endorsement of the other joint payee (*Indiana Plumbing Supply Co. v. Bank of America (1967) 255 Cal. App. 2d 910, 913-916, 63 Cal. Rptr. 658* ; *Harry H. White Lbr. Co. v. Crocker-Citizens Nat. Bk. (1967) 253 Cal. App. 2d 368, 373-374, 61 Cal. Rptr. 381* ; *see Com. Code § 3420(a)*).

[*Optional*] **E. Delivery to One Joint Payee.** The drawer's delivery of a joint payee check to one joint payee is sufficient delivery to permit the other joint payee to bring its action against the collecting bank for payment of the check

on his or her forged endorsement (*Indiana Plumbing Supply Co. v. Bank of America (1967) 255 Cal. App. 2d 910, 917-918, 63 Cal. Rptr. 658*).

[2] Comments

CAUTION:

See *§ 34.47* for discussion of authorities establishing that the bank is liable to the joint payee whose endorsement was forged only to the extent that the payee did not receive the amount of the proceeds intended by the drawer [*Southern Cal. Permanente Medical Group v. Bozinovski (1983) 148 Cal. App. 3d 503, 507, 196 Cal. Rptr. 150]* .

[a] Use of Form

These points and authorities are for use in supporting the contention that a collecting bank is liable in conversion to one joint payee when the entire amount of the check was paid on his or her forged endorsement to the other joint payee [*see Com. Code §§ 3110(d), 3420(a)*]. For discussion of who the payee may sue in the collection chain and the availability of but one recovery, see the Comments to § 34.120.

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Thus, counsel should set forth facts describing the payee designation on the check, whether the check had been negotiated to any third person, the forgery, and that plaintiff joint payee has not received any part of the proceeds or any replacement check or other duplicate payment from the drawer.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the collecting bank's liability to the joint payee for payment of a check with a defective endorsement.

[b] Related Points and Authorities

The points and authorities set out in *§§ 34.34* and *34.93 -34.94* address particular payee designations. Ch. 166, *Negotiable Instruments* also includes forms addressing particular payee designations [*see. e.g.,* forms applying *Com. Code § 3109* (instruments payable to bearer or order)]. §§ 34.120 and 34.122 support, and §§ 34.124-34.126 oppose the contention that the collecting bank is liable to the payee for conversion for paying a check on a forged endorsement. § 34.70 supports, and § 34.73-34.75 oppose the contention that the drawee bank is also liable to the payee for conversion for paying a check on a forged endorsement. Other aspects of the validity and requirements of endorsements, and of liability for payment on an improper endorsement, are addressed in § 34.34, § 34.47-34.48, § 34.90-34.92, § 34.93-34.96, and § 34.171.

[3] Discussion of Authorities

[a] Joint Payee's Action Against Collecting Bank

Com. Code § 3420(a) provides that an instrument is converted if it is taken by transfer, other than a negotiation, from a person not entitled to enforce the instrument or a bank makes or obtains payment with regard to the instrument for a person not entitled to enforce the instrument or receive payment. This covers cases in which an instrument is payable to two persons who are not alternative payees. Under *Com. Code § 3110(d)* the check may be negotiated or enforced only by both persons acting jointly. Thus, neither payee acting without the other's consent is a person entitled to enforce the instrument. If one payee endorses the check but the other does not, and the bank takes the check for deposit to the endorser's account, the bank is liable to the nonendorsing payee for conversion if the nonendorsing payee did not consent to the transaction [Official Comment 1 to U.C.C § 3-420 (1990)].

Plaintiff in ***Indiana Plumbing Supply Co. v. Bank of America*** *(1967) 255 Cal. App. 2d 910, 63 Cal. Rptr. 658* , was joint payee, with another plumbing company, of three checks totalling $6,060. All of that sum was owed by the other plumbing company to plaintiff, but the drawer delivered the checks to the other joint payee. The president of the other joint payee forged plaintiff's signature and presented the checks to defendant, which paid him the entire amount of the checks. Defendant collected the amount of the checks from the drawee banks. Plaintiff sued defendant collecting bank, and moved for summary judgment. Defendant did not submit any counter declarations. Summary judgment was granted and judgment entered in plaintiff's favor. Defendant appealed.

The court of appeal affirmed. The court reviewed the facts established by plaintiff's declarations and copies of the checks: the checks were payable to the payees jointly; the other joint payee's endorsement was genuine and that of plaintiff was forged; the other joint payee had no authority to make plaintiff's endorsement; the checks were presented to defendant by the other joint payee; defendant paid the amount of the checks to the other joint payee and collected that sum from the drawee banks; all of the money represented by the checks was owing from the other joint payee to plaintiff; and plaintiff received none of the money represented by the three checks from any source (*255 Cal. App. 2d 910, 913-914)* . The court said there was no merit to defendant's attack on the sufficiency of the evidence. It has long been held that a collecting bank is liable to a payee when it pays on a forged endorsement. *Harry H. White Lbr. Co. v. Crocker-Citizens Nat. Bk. (1967) 253 Cal. App. 2d 368, 373-374, 61 Cal. Rptr. 381* (discussed *below*), extended this rule to a joint payee on facts almost identical to those involved here (*255 Cal. App. 2d 910, 914-915)* .

Defendant also contended that there was a triable issue of fact as to what interest, if any, plaintiff had in the checks, and that there was nonjoinder of an indispensable party because the issue of plaintiff's interest could not be determined without joinder of the other joint payee. The court said that, as no opposing declarations were submitted, it was never disputed that the other payee had no interest in the checks. Thus, there was no necessity for joinder (*255 Cal. App. 2d 910, 918)* .

Plaintiff in ***Harry H. White Lbr. Co. v. Crocker-Citizens Nat. Bk.*** *(1967) 253 Cal. App. 2d 368, 61 Cal. Rptr. 381* , was joint payee of four checks payable to it and another company. The drawer delivered the checks to the other payee, who forged plaintiff's endorsement, presented them to, and received payment from, defendant as collecting bank. The checks totalled $5,760, and plaintiff claimed an interest of $2,472 on them. The claim represented the amount owing by the other joint payee to plaintiff for lumber sold to it by plaintiff. Three of the checks were dated in 1964 and were governed by the former Negotiable Instruments Law (former Civ. Code §§ 3104, 3122). The last check was drawn in 1965 and was governed by former Com. Code §§ 3116 and 3404 (*now see Com. Code §§ 3110(d), 3403*). Defendant demurred on the ground that under former Civ. Code § 3200(4) (*now see Civ. Code § 1475*; *Com. Code § 3601(a)*), payment to the other joint payee had discharged its obligation. Judgment was entered for defendant, and plaintiff appealed.

The court of appeal reversed. Former Civ. Code § 3104 (*now see Com. Code § 3403*) provided that a forged signature was wholly inoperative and no discharge or other right may be acquired under a forged signature. Former Civ. Code § 3122 (*now see Com. Code § 3110(d)*) provided that the endorsement of all joint payees was required to negotiate a check. The court said that *Civ. Code § 1475* and former Civ. Code § 3200(4) did not apply because the collecting bank was not a party to the underlying obligation. Any rights of defendant came only through the check's negotiation, which required endorsements of both payees (*253 Cal. App. 2d 368, 372-373)* . The court said that construing former Civ. Code §§ 3104 and 3122 together, a collecting bank is liable to a joint payee whose signature has been forged when that bank has paid a negotiable instrument payable to joint payees without the authorized endorsement of both or all of the joint payees (*253 Cal. App. 2d 368, 373)* . The theory of recovery is conversion (*253 Cal. App. 2d 368, 374)* . Concerning the last check, the court said that former Com. Code § 3116 (*now see Com. Code § 3110(d)*) was clear that the requirement that all joint payees must join in endorsing a check made out to them other than in the alternative applies not only to negotiation, but also to discharge (*253 Cal. App. 2d 368, 374-375)* .

[b] Delivery to One Joint Payee

The facts and procedural background of ***Indiana Plumbing Supply Co. v. Bank of America*** *(1967) 255 Cal. App. 2d 910, 63 Cal. Rptr. 658* , are discussed in *§ 34.121[3][a]*. Defendant contended that the motion for summary judgment should have been denied under *Jones v. Bank of America (1942) 49 Cal. App. 2d 115, 121 P.2d 94* (discussed in *§ 34.126[3][a]*), because there had been no delivery of the checks to plaintiff. In *Jones*, the checks were delivered to the manager of one of the drawer's offices who was supposed to deliver the checks to the payees, but who forged their endorsements instead. The court distinguished *Jones* on the basis that there, the checks never left the custody, possession, and control of the drawers (*255 Cal. App. 2d 910, 916)* . The case of *George v. Security Trust & Savings Bank (1928) 91 Cal. App. 708, 267 P. 560* , had been discussed in and distinguished from *Jones* on the basis that in *George* the checks were delivered by the drawer to a third person who was not the payee. The court in *Indiana Plumbing* concluded that, as in *George*, delivery was sufficient because it had been made by the drawer with the intent and purpose of giving effect to it (*255 Cal. App. 2d 910, 916-917)* . Delivery also was to the other joint payee as it was in *Harry H. White Lbr.* The court said that implicit in *Harry H. White Lbr.* is the ruling that delivery to one joint payee is sufficient to permit the other joint payee to bring its action against the collecting bank (*255 Cal. App. 2d 910, 917-918)* .

This conclusion appears consistent with the 1992 repeal and reenactment of Division 3 of the Commercial Code. Under the revised Code, an action for conversion may not be brought by a payee who did not receive delivery of the instrument [*Com. Code § 3420(a)(2)*]. However, if a check is payable to more than one payee, delivery to one of the payees is deemed to be delivery to all of the payees [Official Comment 1 to U.C.C § 3-420, 5th paragraph (1990)].

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3-34 California Points & Authorities § 34.122

§ 34.122 Supporting Contention That Collecting Bank Is Liable to Payee for Amount of Check Paid on Forged Endorsement [Com. Code § 3420(a)]--Bank's Negligence Bars Defense Based on Payee's Contributory Negligence [Com. Code § 3406]

[1] FORM

[*The following may be included in a memorandum, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT COLLECTING BANK IS LIABLE TO PLAINTIFF FOR THE AMOUNT OF THE CHECK DATED _____, DRAWN BY _____ [*name of drawer*] AND PAYABLE TO PLAINTIFF IN THE AMOUNT OF $_____, BECAUSE PLAINTIFF's ENDORSEMENT ON THAT CHECK WAS FORGED AND DEFENDANT WAS NEGLIGENT IN FAILING TO COMPLY WITH REASONABLE COMMERCIAL STANDARDS IN PAYING THE CHECK TO A THIRD PERSON.

A. Contributory Negligence. [*See § 34.52[1], Paragraph A.*]

B. Collecting Bank's Negligence Precludes Defense Based on Payee's Negligence. A [collecting] bank cannot assert the defense of contributory negligence established by *Commercial Code Section 3406*, unless it acted in accordance with the reasonable commercial standards of the banking business (*Hermetic Refrig. Co., Inc. v. Central Valley Nat. Bank Inc. (9th Cir. 1974) 493 F.2d 476, 477-478* (construing prior law)).

[2] Comments

CAUTION:

Hermetic Refrig. Co. was decided under the former provision of the Commercial Code applicable to contributory negligence. *Com. Code § 3406*, as enacted by Stats. 1992, ch. 914, § 6, adopts a concept of comparative negligence. If the person precluded under *Com. Code § 3406(a)* proves that the person asserting the preclusion failed to exercise ordinary care and that failure substantially contributed to the loss, the loss may be allocated between the two parties on a comparative negligence basis [Official

Comment 4 to U.C.C. § 3-406 (1990)]. Although the defense of the payee's negligence is still only available to a person who, in good faith, pays the instrument or takes it for value or for collection [*see Com. Code § 3406(a)*; *see also Com. Code § 1201(b)(20)* ("good faith" defined)], the adoption of a comparative negligence standard may be construed as effectively abrogating the court's decision in *Hermetic Refrig. Co.* that the bank's negligence precludes a defense based on the payee's negligence.

[a] Use of Form

These points and authorities are for use in supporting the contention that a collecting bank is liable in conversion to the payee of a check paid on a forged endorsement and cannot rely on the defense of the payee's contributory negligence under *Com. Code § 3406* when the bank did not act in accordance with reasonable commercial standards in paying the check [*see Com. Code § 3406*]. For discussion of who the payee may sue in the collection chain and the availability of but one recovery, see *§ 34.120[2]*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Thus, counsel should set forth facts describing the payee designation on the check, whether the check had been negotiated to any third person, the forgery, that the plaintiff payee has not received any part of the proceeds or any replacement check or other duplicate payment from the drawer, the reasonable commercial standards applicable, and the collecting bank's deviation from those standards.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the collecting bank's liability based on the unavailability of this defense.

[b] Related Points and Authorities

The points and authorities set out in *§§ 34.34* and *34.93 -34.94* address particular payee designations. Ch. 166, *Negotiable Instruments* also includes forms addressing particular payee designations [*see, e.g.,* forms applying *Com. Code § 3109* (instruments payable to bearer or order)]. The points and *authorities in § 34.120 -34.121* support, and those in § 34.124-34.126 oppose, the contention that the collecting bank is liable to the payee for conversion for paying a check on a forged endorsement. The points and *authorities in § 34.70* support, and those in § 34.73-34.75 oppose, the contention that the drawee bank is liable for conversion for paying a check on a forged endorsement on various grounds, including the availability of the defense of the payee's contributory negligence under *Com. Code § 3406* [§ 34.74].

[3] Discussion of Authorities

[a] Collecting Bank's Negligence Precludes Defense Based on Payee's Negligence

Plaintiff in ***Hermetic Refrig. Co., Inc. v. Central Valley Nat. Bank Inc.*** *(9th Cir. 1974) 493 F.2d 476* , was payee of certain checks. An employee of plaintiff who was in charge of its Oakland office and was authorized to deposit large checks to plaintiff's account at another bank used a stamp with plaintiff's name and address to endorse the checks in question, and then endorsed his own name below the stamp. The employee deposited the checks in his personal checking account at defendant bank. The employee's defalcations were not discovered for six years. The district court refused to accept the collecting bank's defense of the payee's contributory negligence, and entered judgment for plaintiff. Defendant appealed.

The court of appeals affirmed. The court set forth the provisions of the former version of Com. Code § 3406 (since amended in 1992), and said that section does not establish liability, but creates a conditional estoppel. However, citing *Cooper v. Union Bank (1973) 9 Cal. 3d 371, 383, 385-386, 107 Cal. Rptr. 1, 507 P.2d 609* , the court stated that before a bank can take advantage of the estoppel, it must first show that it acted in accordance with reasonable commercial standards of the banking business. Even assuming that the payee in this case was contributorily negligent,

uncontradicted testimony showed that defendant failed to comply with the reasonable commercial standards of the banking business (*493 F.2d 476, 477)* . Without discussing the evidence or how defendant's actions fell short of reasonable commercial standards of the banking business, the court upheld the district court's ruling that the defense of contributory negligence was unavailable (*493 F.2d 476, 477-478)* .

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3-34 California Points & Authorities § 34.123

§ 34.123 Supporting Contention That Depositary Bank Is Liable to Payee for Failure to Make Proceeds of Deposited Item Available for Withdrawal Within Time Required [12 U.S.C. § 4010; 12 C.F.R. § 229.21]

[1] FORM

[*The following may be included in a memorandum, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT DEPOSITARY BANK IS LIABLE TO PLAINTIFF FOR THE AMOUNT OF THE CHECK DATED _____, DRAWN BY _____, PAYABLE TO PLAINTIFF IN THE AMOUNT OF $_____, AND DEPOSITED TO PLAINTIFF's ACCOUNT AT DEFENDANT BANK ON _____ [*date*], BECAUSE DEFENDANT FAILED TO MAKE THE PROCEEDS OF THAT CHECK AVAILABLE TO PLAINTIFF BY THE TIME REQUIRED UNDER _____ [*specify relevant statute and/or regulation, e.g.,* TITLE *12 OF THE UNITED STATES CODE SECTION 4002(a)(2)(D), (c)(1)(B)(iii)* AND TITLE 12 OF THE CODE OF FEDERAL REGULATIONS SECTION 229.10(c)(1)(vii)].

A. Bank's Liability Under Regulation CC, Subpart B, and Federal Expedited Funds Availability Act--Individual Plaintiff. Any depository institution that fails to comply with any requirement imposed by the federal Expedited Funds Availability Act (*12 U.S.C. § 4001 et seq.*) and Title 12 of the Code of Federal Regulations Part 229, Subpart B (*12 C.F.R. § 229.10 et seq.*), or with any provision of state law that supersedes any provision of Title 12 of the Code of Federal Regulations Sections 229.10-229.21, with regard to any person other than another depository institution, is liable to that person in an amount equal to the actual damage sustained by that person as a result of the failure to comply, plus an additional amount between $100 and $1,000 as allowed by the court [except that this section does not apply to actions for wrongful dishonor] (*12 U.S.C. § 4010(a)(1), (2)(A); 12 C.F.R. § 229.21(a)(1), (2)(i)*[, (f)]).

B. Attorney's Fees. In the case of a successful action to enforce liability under Title *12 of the United States Code Section 4010* and Title 12 of the Code of Federal Regulations Section 229.21, the prevailing party is entitled to costs and reasonable attorney's fees as determined by the court (*12 U.S.C. § 4010(a)(3)*; *12 C.F.R. § 229.21(a)(3)*).

[*Optional*] **C. Class Action.** In a class action under Title *12 of the United States Code Section 4010* and Title 12 of the Code of Federal Regulations Section 229.21, actual damages, costs, and attorney's fees are recoverable as they would be in an individual action, except that with regard to the additional amount allowed by the court, there is no minimum recovery on the amount awarded to each member of the class. [However, the total recovery in any class action or series of class actions arising out of the same failure to comply by the same institution must not exceed the lesser of $500,000 or one percent of the net worth of the depository institution] (*12 U.S.C. § 4010(a)(2)(B)*; *12 C.F.R. § 229.21(a)(2)(ii)*).

[*Optional*] **D. Considerations Regarding Award in Class Action.** In a class action under Title *12 of the United States Code Section 4010* and Title 12 of the Code of Federal Regulations Section 229.21, the court, in determining the amount of any award, must consider, along with other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance, the depository institution's resources, the number of persons adversely affected, and the extent to which the failure of compliance was intentional (*12 U.S.C. § 4010(b)*; *12 C.F.R. § 229.21(b)*).

[*Optional*] **E. Statute of Limitation.** An action under Title *12 of the United States Code Section 4010* and Title 12 of the Code of Federal Regulations Section 229.21 may be brought within one year after the date of the occurrence of the violation involved (*12 U.S.C. § 4010(d)*; *12 C.F.R. § 229.21(d)*).

[2] Comments

[a] Use of Form

These points and authorities are for use in supporting the contention that a depositary bank or other financial institution governed by the federal Expedited Funds Availability Act is liable to its depositor for failure to make the proceeds of a check [*see 12 U.S.C. § 4001(7)*; *12 C.F.R. § 229.2(k)*] deposited in that customer's account [*see 12 U.S.C. § 4001(1)*; *12 C.F.R. § 229.2(a)*] available for withdrawal or for writing checks within the time required by *12 U.S.C. §§ 4002* and *4003*, *12 C.F.R. §§ 229.10-229.14*, or any California regulation that provides a shorter availability requirement than the federal law [*see 12 U.S.C. § 4007*; *12 C.F.R. § 229.20*; *see also Fin. Code § 866.5*; *10 Cal. Code Reg. §§ 10.190400-10.190402* (banks), 30.101 (credit unions), 40.101 (industrial loan companies), 106.200-106.202 (savings and loan associations)]. Those actual availability deadlines are beyond the scope of this chapter but are discussed in California Forms of Pleading and Practice, Ch. 95, *Banks, Deposits, and Checks* (Matthew Bender), as are the terms "account" and "check."

Counsel should add argument linking the points in this form with the facts of his or her case; for example, facts describing the type of check, the date of deposit, and the circumstances regarding the failure or refusal of the depositary to allow withdrawal or use of the proceeds.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the depositary bank's liability to the payee for failure to make the proceeds available within the time required.

[b] Depository and Depositary

The federal Expedited Funds Availability Act uses the term "depository institution" to describe all financial institutions subject to the act. As defined by that act, "depository institution" means just about every conceivable type of organization that accepts deposits [*see 12 U.S.C. § 4001(12)*]. Thus, the points and authorities in this form apply to deposits made to demand deposit or transaction accounts in any bank, savings bank, mutual savings bank, credit union, savings and loan association, building and loan association, homestead association, cooperative bank, insurance company, trust company, industrial loan company, or any other institution in the business of receiving deposits, whether organized under federal law or state law [*see 12 U.S.C. § 4001(12)*; *12 C.F.R. § 229.2(e)*].

The term "depositary bank" is used in this form in its Commercial Code sense to mean the first depository institution to take the check [*see Com. Code § 4105(2)*].

Federal court subject matter jurisdiction under *12 U.S.C. § 4010(a), (d)*, and *(f)*, is not confined to suits by bank customers against banks. The Act also provides for federal court jurisdiction in a suit by one bank against another bank [*Bank One Chicago v. Midwest B & T (1996) 516 U.S. 264, 116 S. Ct. 637, 641-643, 133 L. Ed. 2d 635]* .

[3] Discussion of Authorities

[a] Bank's Liability Under Regulation CC, Subpart B and Federal Expedited Funds Availability Act

[i] Individual Plaintiff

Title ***12 U.S.C. § 4010(a)*** and ***12 C.F.R. § 229.21*** do not apply to actions that arise under *12 C.F.R. § 229.30 et seq.* (interbank responsibilities regarding collection of checks) [*see 12 C.F.R. § 229.21(f)*]. For points and authorities regarding liability under *12 C.F.R. § 229.30 et seq.*, see *§§ 34.71* and *34.76*.

Title *12 C.F.R. § 229.21(f)*, but not *12 U.S.C. § 4010(a)*, excludes liability for wrongful dishonor [*12 C.F.R. § 229.21(f)*].

A depository institution is not liable for failing to comply with any requirement imposed by the federal Expedited Funds Availability Act or regulations promulgated thereunder if that institution demonstrates by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error [*12 U.S.C. § 4010(c)(1)*; *12 C.F.R. § 229.21(c)(1)*]. Examples of bona fide errors include clerical errors, calculation errors, computer malfunction and programming errors, and printing errors. However, an error of legal judgment with regard to a depository institution's obligation under *12 U.S.C. § 4001 et seq.* is not a bona fide error [*12 U.S.C. § 4010(c)(2)*; *12 C.F.R. § 229.21(c)(2)*].

As with liability under *12 C.F.R. § 229.30 et seq.*, an act or omission done in good faith in conformity with any rule, regulation, or interpretation of a rule or regulation by the Board of Governors of the Federal Reserve System is a complete defense [*12 C.F.R. § 229.21(e)* (which is the same as *12 C.F.R. § 229.38(h)*, set forth in *§ 34.76*)].

An action under *12 U.S.C. § 4010* and *12 C.F.R. § 229.21* may be brought in United States district court or in any other court of competent jurisdiction [*12 U.S.C. § 4010(d)*; *12 C.F.R. § 229.21(d)*].

[4] Additional Authorities

[a] Statute of Limitations

In *Mihai Beffa v. Bank of the West (1998) 152 F.3d 1174* , a bank deposited a foreign wire transfer to the wrong account on December 9, 1993. As a result of his inquiries at the bank and his review of his bank statements, the customer knew by January 1994 that the funds had not been deposited into his account. Using this date, under EFAA, the statute of limitations would have expired in mid-December 1994, but the customer did not file his complaint until November 1995. The bank moved for summary judgment, asserting that the customer's EFAA claim was untimely under *12 U.S.C. § 4010(d)*. In response, the customer argued that the statute of limitations should be tolled until March 1995, the time at which he allegedly learned that the bank was at fault for the breakdown in the transfer. The district court noted that EFAA does not contain an express notice provision and declined to recognize any implied notice requirement. The court also held that even if notice were required under EFAA, the customer had the requisite notice by January 1994. It granted summary judgment for the bank on the EFAA claim. The Ninth Circuit affirmed, finding that even if the statute of limitations was tolled until plaintiff received notice of the violation, his complaint was untimely

because once he knew the foreign wire transfer was not credited to his account, he chose to blame the foreign bank rather than using due diligence to track it through his own bank (*152 F.3d 1174, 1176-1177)* .

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3-34 California Points & Authorities § 34.124

§ 34.124 Opposing Contention That Collecting Bank Is Liable to Payee for Amount of Check Paid on Forged Endorsement [Com. Code § 3420(a)]--Action Barred by Three-Year Limitation [Com. Code § 3118(g)]

[1] FORM

[*The following may be included in a memorandum, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

PLAINTIFF-PAYEE's ACTION AGAINST DEFENDANT COLLECTING BANK FOR CONVERSION ARISING FROM DEFENDANT's PAYMENT OF THE CHECKS DATED _____, DRAWN BY _____ [*name of drawers*] AND PAYABLE TO PLAINTIFF IN THE TOTAL AMOUNT OF $_____, IS BARRED BY THE THREE-YEAR LIMITATION OF COMMERCIAL CODE SECTION 3118(g).

Limitation Applicable to Conversion Action Based on Forged Endorsement. An action for an instrument's conversion, for money had and received, or like action based on conversion, must be commenced within three years after the cause of action accrues (*Com. Code § 3118(g)*).

[2] Comments

[a] Use of Form

These points and authorities are for use in opposing the contention that a collecting or depositary bank is liable in conversion to the payee or other true owner of a check paid on a forged endorsement when the action is commenced more than three years after the checks were negotiated [*see Com. Code § 3118(g)*].

Counsel should insert argument in this form showing the relationship between the facts of the case and points of law stated. Thus, counsel should set forth the dates on which the checks were paid.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context

in which counsel wishes to raise the substantive issue of the statute of limitations.

[b] Related Points and Authorities

The points and authorities set out in *§§ 34.34* and *34.93 -34.94* address particular payee designations. Ch. 166, *Negotiable Instruments* also includes forms addressing particular payee designations [*see, e.g.*, forms applying *Com. Code § 3109* (instruments payable to bearer or order)]. The points and *authorities in §§ 34.120 -34.122* support, and those in §§ 34.125-34.126 oppose, the contention that the collecting bank is liable to the payee for conversion for paying a check on a forged endorsement. The points and *authorities in §§ 34.70* and *34.73 -34.75* address drawees' conversion liability to payees for paying checks on forged endorsements. Other aspects of the validity and requirements of endorsements, and of liability for payment on an improper endorsement, are addressed in §§ 34.34, 34.47-34.48, 34.90-34.92, 34.93-34.96, and 34.171.

[3] Discussion of Authorities

[a] Limitation Applicable to Conversion Action Based on Forged Endorsement

The three-year limitation period runs from the time the cause of action accrues [*Com. Code § 3118(g)*]. Accrual of a cause of action is stated in other sections of Division 3, such as those that state the various obligations of the parties to the instrument. The only purpose of *Com. Code § 3118* is to define the time within which an action to enforce an obligation, duty, or right arising under Division 3 must be commenced [Official Comment 1 to U.C.C. § 3-118 (1990)].

In addition to the statute of limitations set forth in *Com. Code § 3118(g)*, Division 4 provides a limitations period that conforms to the Division 3 period of limitations; that is, an action to enforce an obligation, duty, or right arising under Division 4 must also be commenced within three years after the cause of action accrues [*Com. Code § 4111*]. Moreover, the period of limitations set forth in the Code of Civil Procedure for similar actions, which applied before the adoption of the Commercial Code provisions [*see § 34.124[4][a]*] is consistent with the statutory periods of the Commercial Code [*see Code Civ. Proc. § 338(c)* (three year limitation for actions for taking, detaining, or injuring any goods or chattels, including actions for specific recovery of personal property)].

[4] Additional Authorities

[a] Limitation Applicable to Conversion Action Based on Forged Endorsement

Plaintiff-payee in *La Vista Cemetery Assn. v. American Sav. & Loan Assn. (1970) 12 Cal. App. 3d 365, 90 Cal. Rptr. 722* , was the payee of three checks totalling $30,000. In August 1964, plaintiff's endorsements were forged by employees who deposited the checks to an account at defendant savings and loan association. That account was in the name of an entity controlled by the employees. Defendant collected the amount of the checks from the drawee banks, and the employees withdrew all funds in the account and absconded. In February 1969, plaintiff sued defendant for recovery of money on deposit and for actual and constructive fraud. In affirming the judgment for defendant, the court of appeal said that a payee's remedies against a collecting bank that collects from the drawee and gives the money to a person who forged the payee's endorsement are conversion or money had and received. The limitation for the cause of action for conversion is three years. Undaunted by these realities, plaintiff found two other theories not barred by the statute of limitations (*12 Cal. App. 3d 365, 368)* . However, no cause of action was stated under those theories (*12 Cal. App. 3d 365, 368-369)* .

The facts and procedural background of *Fabricon Products v. United Cal. Bank (1968) 264 Cal. App. 2d 113, 70 Cal. Rptr. 50* , are discussed in *§ 34.120[3][a]*. Decided before the enactment of a Commercial Code period of limitations [Stats. 1992, ch. 914, § 6], the court of appeal said that the payee's action predicated on a theory of a check's conversion by the collecting bank is governed by the three-year statute of limitations of former Code Civ. Proc. § 338(3) (*now see Code Civ. Proc. § 338(c)*) (*264 Cal. App. 2d 113, 117)* . Citing *Ponti v. Farrell (1961) 194 Cal. App. 2d 676,*

682-683, 15 Cal. Rptr. 500 , the court stated that when a cause of action is pleaded as money had and received, the applicable statute of limitations is the one governing the underlying tort. The three-year limitation period might also apply to the cause of action for money had and received, but the court did not decide that issue. The survival of the conversion causes of action was enough to require reversal (*264 Cal. App. 2d 113, 118)* . However, *Com. Code § 3118(g)* now clearly applies a three-year limitation period to a cause of action for money had and received.

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3-34 California Points & Authorities § 34.125

§ 34.125 Opposing Contention That Collecting Bank Is Liable to Payee for Amount of Check Paid on Forged Endorsement [Com. Code § 3420(a)]--Payee's Negligence Precludes Assertion of Forged Signature [Com. Code § 3406(a)]

[1] FORM

[*The following may be included in a memorandum, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT COLLECTING BANK IS NOT LIABLE TO PLAINTIFF FOR THE AMOUNT OF THE CHECKS DATED _____, PAYABLE TO PLAINTIFF IN THE TOTAL AMOUNT OF $_____, BECAUSE PLAINTIFF's NEGLIGENCE IN FAILING TO DISCOVER AND PREVENT THE FORGERIES PRECLUDES HIM/HER FROM ASSERTING THE FORGED SIGNATURES.

A. Unauthorized Signature Is Inoperative. An unauthorized signature, which under *Commercial Code Section 1201(b)(41)* includes a forgery or one made without actual, implied, or apparent authority, is ineffective except as the signature of the unauthorized signer in favor of a person who in good faith pays the instrument or takes it for value (*Com. Code § 3403(a)*).

B. Payee's Negligence Precludes Assertion of Forged Signatures. A person whose failure to exercise ordinary care contributes to an alteration of an instrument or to the making of a forged signature on an instrument is precluded from asserting the alteration or the forgery against a person who, in good faith, pays the instrument or takes it for value or for collection (*Com. Code § 3406(a)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a collecting or depositary bank is liable in conversion to the payee or other true owner of a check paid on a forged endorsement when the forgeries were

made under circumstances that indicate that the payee's negligence was a substantial factor in the forgeries. For this defense to apply, the bank must have paid the checks in good faith [*see Com. Code § 3406(a)*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Thus, counsel should set forth the facts establishing the payee's or true owner's negligence and the bank's good faith. In addition, because of the adoption of a comparative negligence standard, counsel may also wish to set forth facts establishing that the bank was not negligent in paying the checks or taking them for collection [*see Com. Code § 3406(b)*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the collecting bank's freedom from liability because of the payee's negligence.

[b] Negligence Preclusion Under Prior Law

Former Com. Code Section 3404(1) stated that an unauthorized signature was inoperative as the signature of the person whose name was signed unless that person was "precluded from denying it." Under former Com. Code § 3406 if negligence by the person whose name was signed contributed to an unauthorized signature, that person was "precluded from asserting the ..... lack of authority." Both of these sections were applied to cases in which a forged signature appeared on an instrument and the person asserting rights on the instrument alleged that the purported signer's negligence contributed to the forgery. Since the standards for liability between the two sections differed, the overlap caused confusion. *Com. Code § 3403(a)* deals with the problem by removing the preclusion language that appeared in former Com. Code § 3404 [Official Comment 1 to U.C.C. § 3-403 (1990); *see, e.g., Cooper v. Union Bank (1973) 9 Cal. 3d 371, 383-384, 107 Cal. Rptr. 1, 507 P.2d 609* (under former Com. Code § 3404, payee's negligence in failing to discover patent defalcations of employee, which was directly responsible for bank's detrimental change of position in paying employee amount of checks, precluded payee from denying validity of forged endorsements to extent necessary to avoid unconscionable result)]. Thus, the preclusion should now be asserted under *Com. Code § 3406*.

Com. Code § 3406 refers to a "forged instrument" rather than "unauthorized signature" [*compare Com. Code § 3406(a) with* former Com. Code § 3406]. Unauthorized signature is a broader concept that includes not only forgery but also the signature of an agent that does not bind the principal under the law of agency. The agency cases are resolved independently under agency law, and *Com. Code § 3406* is not necessary in those cases [Official Comment 2 to U.C.C. § 3-406 (1990)].

[c] Related Points and Authorities

The points and authorities set out in *§ 34.42* support the contention that a drawee is liable to the drawer for unauthorized payment of a check because the drawee was comparatively negligent. § 34.52 opposes the contention that a drawee is liable to the drawer for unauthorized payment of a check because the drawer's failure to exercise ordinary care contributed to an alteration or forgery of the check. § 34.74 opposes the contention that a drawee is liable to the payee for the amount of a check paid on a forged endorsement because the payee's negligence substantially contributed to the forged endorsement. The points and authorities set out in *§§ 34.34* and *34.93 -34.94* address particular payee designations. Ch. 166, *Negotiable Instruments* also includes forms addressing particular payee designations [*see, e.g.,* forms applying *Com. Code § 3109* (instruments payable to bearer or order)]. §§ 34.120-34.122 support, and §§ 34.124 and 34.126 oppose, the contention that the collecting bank is liable to the payee for conversion for paying a check on a forged endorsement. §§ 34.70 and 34.73-34.75 address drawees' conversion liability to payees for paying checks on forged endorsements. Other aspects of the validity and requirements of endorsements, and of liability for payment on an improper endorsement, are addressed in §§ 34.34, 34.47-34.48, 34.90-34.96, and 34.171.

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3-34 California Points & Authorities § 34.126

§ 34.126 Opposing Contention That Collecting Bank Is Liable to Payee for Amount of Check Paid on Forged Endorsement [Com. Code § 3420(a)]--Check Was Never Delivered by Drawer

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT COLLECTING BANK IS NOT LIABLE TO PLAINTIFF FOR THE AMOUNT OF THE CHECK DATED _____, DRAWN BY _____ [*name of drawer*] AND PAYABLE TO PLAINTIFF IN THE AMOUNT OF $_____, BECAUSE THAT CHECK WAS NEVER DELIVERED BY ITS DRAWER.

No Delivery. When a check is stolen and the payee's endorsement forged before the drawer has parted with custody, possession, or control of the check, or otherwise delivered it to the payee, the payee never acquires any interest in the check and has no cause of action [against the collecting bank] based on payment of the check on a forged endorsement (*Jones v. Bank of America (1942) 49 Cal. App. 2d 115, 119-122, 121 P.2d 94* ; *see Com. Code § 3420(a)(2)*; Official Comment 1 to U.C.C. § 3-420 (1990)).

[2] Comments

[a] Use of Form

These points and authorities are for use in opposing the contention that a bank is liable in conversion to the payee of a check paid on a forged endorsement when the check was never delivered by the drawer. In such a case, the payee never acquires any interest in the check [*see Com. Code § 3420(a)(2)*; *Jones v. Bank of America (1942) 49 Cal. App. 2d 115, 119-122, 121 P.2d 94]* .

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Thus, counsel should set forth the facts establishing the lack of delivery.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the payee's lack of interest in an undelivered check.

[b] Related Points and Authorities

The points and authorities set out in *§§ 34.121* and *34.171* support findings of delivery when the drawer delivered the check to one joint payee or to a third party. §§ 34.120 and 34.122 support, and §§ 34.124-34.125 oppose, the contention that the collecting bank is liable to the payee for conversion for paying a check on a forged endorsement. § 34.70 supports, and §§ 34.73-34.75 oppose, the contention that the drawee bank is also liable to the payee for conversion for paying a check on a forged endorsement. Liability of drawee banks for payment on an improper endorsement are addressed in §§ 34.34, 34.47-34.48, 34.90-34.92, 34.93-34.96, and 34.171.

[3] Discussion of Authorities

[a] No Delivery

Com. Code § 3420(a)(2) provides that an action for an instrument's conversion may not be brought by a payee who did not receive delivery of the instrument either directly or through delivery to an agent or a copayee. Until delivery, the payee does not have any interest in the check. The payee never became the check's holder nor a person entitled to enforce the check [*see Com. Code § 3301*]. Nor is the payee injured by fraud. Normally the check's drawer intends to pay an obligation owed to the payee. If the check is never delivered to the payee, however, the obligation is unaffected and continues after the thief/forger obtains payment. Thus, the payee may still enforce the underlying obligation and there is no reason to give him or her an additional remedy [Official Comment 1 to U.C.C. § 3-420 (1990)].

Plaintiff in ***Jones v. Bank of America*** *(1942) 49 Cal. App. 2d 115, 121 P.2d 94* , was the claims manager of drawer's surety, and based his standing on assignments by the payees of their causes of action against defendant collecting bank. The payees were customers of the Long Beach office of the brokerage firm-drawer, and the checks were settlement of securities sales. The checks that are relevant to the issue considered here were drawn by the appropriate officers of the drawer at its main office in Los Angeles and forwarded to its Long Beach office. The manager of the Long Beach office forged the payees' endorsements and deposited the checks in his personal account at defendant. Defendant collected the amount of the checks from the drawee banks and paid that amount in due course to the forger. The drawer paid the payees the amounts owed to each of them for their respective securities sales, and claimed that amount from its surety under an agreement relating to losses occasioned by employee fraud or embezzlement. Defendant answered, denying that the checks were ever issued, and argued that by reason of the nondelivery to the payees, the payees never had any interest in the checks, and therefore were not damaged by defendant collecting bank's payment to the forger. Judgment was for plaintiff, and defendant appealed.

The court of appeal reversed. The court agreed with defendant, that the checks were never in fact issued because they were stolen while still undelivered and in the drawer's hands. The intended payees never became owners of the checks and never had any interest in them (*49 Cal. App. 2d 115, 119)* . The court relied on former Civ. Code § 3097 (*now see Com. Code §§ 3105(b), 3303(b), 3305(a)(2)*), which specified that every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect to it, and on a criminal case for what constituted felonious taking of an undelivered note. If there was no delivery of the checks to the payees, the checks remained the drawer's property (*49 Cal. App. 2d 115, 120)* . The court distinguished *George v. Security Trust & Savings Bank (1928) 91 Cal. App. 708, 267 P. 560* , relied on by plaintiff and in which the checks were delivered by the drawer to a third person who was not the payee. *George* and the other cases cited by the court were distinguished on the basis of the drawer's release or delivery of the check with the intent to give effect to it (*49 Cal. App. 2d 115, 121)* . Here, the checks never left the drawer's custody, control, or possession. The forger was the firm's employee and agent; he was not the payee's agent (*49 Cal. App. 2d 115, 122)* .

[4] Additional Authorities

[a] No Delivery

The California Supreme Court in *Garthwaite v. Bank of Tulare (1901) 134 Cal. 237, 66 P. 326* (discussed in *§ 34.171[3][a]*), held that the payee never acquired any interest in a check that was lost in the mail before it reached the payee (*134 Cal. 237, 241)* .

The court of appeal in *Burke v. Mission Bay Yacht Sales (1963) 214 Cal. App. 2d 723, 29 Cal. Rptr. 685* , affirmed a judgment for a purchaser of a cashier's check and against the payee on the ground that plaintiff had been fraudulently induced to part with the check. But for the fraud, the check never would have been delivered. It would have remained the plaintiff's property, and the payee would not have acquired any interest in it (*214 Cal. App. 2d 723, 732)* .

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3-34 California Points & Authorities § 34.127

§ 34.127 Opposing Contention That Depositary Bank Is Liable to Payee for Amount of Check Paid on Missing Endorsement [Com. Code § 3420(a)]--Authority to Deposit

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT DEPOSITARY BANK IS NOT LIABLE TO PLAINTIFF FOR THE AMOUNT OF THE CHECK DATED _____, DRAWN BY _____ [*name of drawer*] AND PAYABLE TO PLAINTIFF IN THE AMOUNT OF $_____, BECAUSE THE PERSON WHO DEPOSITED THE CHECK HAD THE AUTHORITY TO DO SO.

Authority to Deposit. A depositary bank's liability for statutory conversion for depositing a check without the payee's endorsement turns on the authority of the person depositing the check (In *In re Bartoni-Corsi Produce, Inc. (9th Cir. [Cal.] 1997) 130 F.3d 857, 861-863*).

[2] Comments

[a] Use of Form

These points and authorities are for use in opposing the contention that a depositary bank is liable in conversion to the payee of a check paid on a missing endorsement.

Counsel should insert argument in this form showing the relationship between the facts of the case and points of law stated. Thus, for example, counsel should set forth the dates on which the check was paid.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the depositary bank's liability to the payee for making payment on a check with a missing endorsement.

[b] Related Pleading and Practice Forms

For a complaint for use by a payee whose endorsement was missing, to recover the amount of the check from the depositary bank that paid on the check, see *California Forms of Pleading and Practice, Ch. 95, Banks, Deposits, and Checks, § 34.53* (Matthew Bender). For an affirmative defense by a bank asserting that the person who made a deposit had the authority to do so, see *California Forms of Pleading and Practice, Ch. 95, Banks, Deposits, and Checks, § 95.462* (Matthew Bender).

[3] Discussion of Authorities

[a] Authority to Deposit Without Endorsement

Under *Com. Code § 3420(a)*, an instrument is converted if a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment. Although there is no California case law directly on point regarding the conversion liability of the depositary bank under that section when the payee has not endorsed the check, a Ninth Circuit case has held that a depositary bank's liability for statutory conversion for depositing a check without the payee's endorsement turns on the question of whether the person who deposited the check had the authority to do so.

In ***In re Bartoni-Corsi Produce, Inc.*** *(9th Cir. [Cal.] 1997) 130 F.3d 857* , a corporation's sole director and shareholder approved the sale of all corporate assets to a corporation formed to purchase its assets, and authorized its agents to deposit checks payable to the selling corporation into a bank account of the purchasing corporation. The president and vice-president of the new corporation deposited a number of checks payable to the first corporation into the new corporation's account, without endorsement of the first corporation. The first corporation's bankruptcy trustee brought a conversion action against the bank which had accepted those checks for deposit, alleging that it improperly accepted for deposit checks payable to the debtor without the debtor's endorsement. The Bankruptcy Court found the bank liable for statutory conversion under California law, and the federal district court affirmed (*130 F.3d 857, 860)* .

The federal court of appeals held that the bankruptcy court erred in concluding that conversion liability arises without regard to whether the person who deposited the check had the authority to do so when the payee has not endorsed the check. The precise question presented in this matter had not been resolved by a California court in a published opinion. The federal court of appeals, therefore, was required to predict how the highest California court would decide the issue (*130 F.3d 857, 861)* . It held that the depositary bank's liability for statutory conversion for depositing the check without the payee's endorsement turned on the authority of the person depositing the check, that the persons making the deposits had implied actual authority to deposit the checks payable to the debtor into an account belonging to the business formed to purchase debtor's assets, and that the agents were acting within the scope of implied actual authority as to the bank when they deposited the checks, even though their conduct was detrimental to the debtor (*130 F.3d 857, 861-863)* .

[b] Burden of Proof

The facts and procedural background of ***In re Bartoni-Corsi Produce, Inc.*** *(9th Cir. [Cal.] 1997) 130 F.3d 857* , are discussed in *§ 34.127[3][a]*. The federal court of appeals, resolving the parties' disagreement over who has the burden to prove or disprove the existence of corporate authority, stated that once the plaintiff has shown that the necessary endorsement is missing, the burden to prove authority shifts to the defendant (*130 F.3d 857, 862 n.8*).

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3-34 California Points & Authorities § 34.128

§ 34.128 Opposing Contention That Collecting or Depositary Bank Is Liable to Payee for Amount of Deposited Check--Provisional Settlement Properly Reversed; Bank's Right of Chargeback [Com. Code §§ 4105, 4107, 4201, 4214 12 C.F.R. § 229.33(d)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT _____ [DEPOSITARY *and/or* COLLECTING] BANK IS NOT LIABLE TO PLAINTIFF FOR THE AMOUNT OF THE CHECK DATED _____, DRAWN BY _____ [*name of drawer*] AND PAYABLE TO PLAINTIFF IN THE AMOUNT OF $_____, BECAUSE DEFENDANT's REVOCATION OF PROVISIONAL SETTLEMENT WAS [TIMELY AND] PROPER.

A. Settlement by Collecting Bank Is Provisional. Unless a contrary intent clearly appears, and before the time that a settlement given by a collecting bank for an item is, or becomes, final, the bank, with regard to the item, is an agent or subagent of the owner of the item and any settlement given for the item is provisional. This provision applies regardless of the form of endorsement or lack of endorsement and even though credit given for the item is subject to immediate withdrawal as of right or is in fact withdrawn; but the continuance of ownership of an item by its owner, and any rights of the owner to proceeds of the item, are subject to rights of a collecting bank such as those resulting from outstanding advances on the item and rights of recoupment or setoff. [If an item is handled by banks for purposes of presentment, payment, collection, or return, the relevant provisions of Division 4 of the Commercial Code apply even though action of the parties clearly establishes that a particular bank has purchased the item and is the owner of it] (*Com. Code § 4201(a)*; *see Lawrence v. Bank of America (1985) 163 Cal. App. 3d 431, 435, 209 Cal. Rptr. 541*).

B. Collecting Bank's Right of Chargeback or Refund. If a collecting bank has made provisional settlement with its customer for an item and fails by reason of dishonor, suspension of payments by a bank, or otherwise to receive settlement for the item that is or becomes final, the bank may revoke the settlement given by it, charge back the amount

of any credit given for the item to its customer's account, or obtain refund from its customer, whether or not it is able to return the item, if by its midnight deadline or within a longer reasonable time after it learns the facts it returns the item or sends notification of the facts. If the return or notice is delayed beyond the bank's midnight deadline or a longer reasonable time after it learns the facts, the bank may revoke the settlement, charge back the credit, or obtain refund from its customer, but it is liable for any loss resulting from the delay. These rights to revoke, charge back, and obtain refund terminate if and when a settlement for the item received by the bank is or becomes final (*Com. Code § 4214(a)*; *Lawrence v. Bank of America (1985) 163 Cal. App. 3d 431, 435-436, 209 Cal. Rptr. 541*).

C. When Item Returned. A collecting bank returns an item when it is sent or directed to the bank's customer or transferor or pursuant to its instructions (*Com. Code § 4214(b)*).

[*Optional*] **D. Midnight Deadline Defined.** [*See § 34.71[1], Paragraph D.*]

[*Optional*] **E. Depositary-Drawee Bank's Right of Chargeback or Refund.** A depositary bank that is also the payor may charge back the amount of an item to its customer's account or obtain refund in accordance with *Commercial Code Section 4301*, governing the return of an item received by a payor bank for credit on its books (*Com. Code § 4214(c)*).

[*Optional*] **F. Separate Office or Branch.** [*See § 34.77[1], Paragraph G.*]

[*Optional*] **G. Notification Timely Under Regulation CC.** If the depositary bank receives a returned check or notice of nonpayment, it must send notice to its customer of the facts by midnight of the banking day following the banking day on which it received the returned check or notice, or within a longer reasonable time (*12 C.F.R. § 229.33(d)*).

[*Optional*] **H. Payee's Burden of Proof of Causation.** [*See § 34.129[1], Paragraph E.*]

[2] Comments

[a] Use of Form

These points and authorities are for use in opposing the contention that a collecting or depositary bank is liable to the payee of a check when the bank properly reversed provisional settlement [*see Com. Code §§ 4201, 4214*] after giving timely notice of return, nonpayment, or dishonor [*see Com. Code § 4214*; *12 C.F.R. § 229.33(d)*]. Optional Paragraphs E and F are only necessary when the check is drawn on the same bank, though not necessarily the same branch, at which it is deposited or cashed. Optional Paragraph G sets forth the requirement under *12 C.F.R. § 229.33(d)*, which establishes the same deadline derived by applying the definition of midnight deadline in *Com. Code § 4104(a)(10)* to *Com. Code § 4214(a)* [*see Com. Code § 4104(a)(10)*]

Counsel should insert argument in this form showing the relationship between the facts of the case and points of law stated. Thus, counsel should set forth the date and manner of giving provisional credit, whether or not it was given on a banking day, and if not, when the next banking day would be [*see* Paragraphs B, D; *see also Com. Code § 4104(a)(3)* (banking day is part of day on which bank is open to public for carrying on substantially all of its banking functions)], when and why the drawee returned or dishonored the check, when the collecting or depositary bank received notice of dishonor or return, when the collecting or depositary bank revoked provisional settlement, and that timely notice of revocation was given to the depositor-payee.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the collecting bank's revocation of provisional settlement was proper.

[b] Related Points and Authorities

The points and authorities in *§§ 34.71* and *34.72* support, and those in §§ 34.76, 34.77, and 34.78 oppose, the contention that the drawee or paying bank is liable for failure to make timely settlement or return or to provide timely notice of nonpayment of a check presented to it for collection. § 34.123 sets forth the provisions of the federal Expedited Funds Availability Act and Regulation CC under which a depositary bank is liable to its customer, the payee, for failure to make the proceeds of a deposited item available within the prescribed time.

[3] Discussion of Authorities

[a] Settlement by Collecting Bank Is Provisional

Com. Code § 4201(b) has been superseded by *12 C.F.R. § 229.35(c)*, in such a way that the results in *Com. Code § 4201(b)* apply to every form of endorsement by a bank. Thus, after a bank has endorsed a check, only a bank may acquire the rights of a holder until the check has been (1) returned to the person initiating collection or (2) specially endorsed by a bank to a person who is not a bank [*12 C.F.R. § 229.35(c)*; *see 12 U.S.C. § 4007(b)* (authority for regulations that supersede Commercial Code)].

Lawrence v. Bank of America *(1985) 163 Cal. App. 3d 431, 209 Cal. Rptr. 541* , is discussed in *§ 34.128[3][b]*. The court of appeal in *Lawrence* stated that any settlement given by a collecting bank before the drawee bank has finally settled with it is provisional (*163 Cal. App. 3d 431, 435)* .

[b] Collecting Bank's Right of Chargeback or Refund

Plaintiff in ***Lawrence v. Bank of America*** *(1985) 163 Cal. App. 3d 431, 209 Cal. Rptr. 541* , maintained an account at defendant's Shattuck-Vine branch and was payee of two checks drawn on defendant's Watsonville branch. On February 22, 1980, plaintiff cashed the two checks at the Shattuck-Vine branch. Plaintiff alleged that before paying plaintiff the face amount of the checks, defendant verified the balance in the drawer's account and charged the drawer's account for the amount of the two checks. On February 26, defendant informed plaintiff that the checks had been retroactively dishonored because of a subsequently filed stop payment order and demanded that plaintiff reimburse it for the amount of the checks. When plaintiff failed to do so, defendant charged plaintiff's account for the amount of the checks. Plaintiff sued defendant for the amount of the checks, claiming that cashing the checks on February 22 constituted final payment and settlement under former Com. Code § 4213 (*now see Com. Code § 4215*), which could not be reversed. Defendant's demurrer was sustained without leave to amend. Plaintiff appealed from the judgment entered in defendant's favor.

The court of appeal affirmed. The court first set forth the provisions of former Com. Code §§ 4105 and 4106 (*now see Com. Code §§ 4105* (as amended by Stats. 1992, ch. 914, § 11), 4107). Under those provisions, each branch was a separate bank. The Watsonville branch was the drawee bank [*see Com. Code § 4105(3)*] and the Shattuck-Vine branch was both the depositary and the collecting bank [*see Com. Code § 4105(2), (5)*]. The court acknowledged that under former Com. Code § 4213(1)(a) (*now see Com. Code § 4215(a)(1)*), payment in cash by the drawee bank is a form of final settlement, but noted that under former Com. Code § 4201(1) (*now see Com. Code § 4201(a)*), any settlement made by the collecting bank is only provisional until it receives final payment (*163 Cal. App. 3d 431, 434-435)* . If the collecting bank never receives final settlement, it has the right of chargeback or refund (*163 Cal. App. 3d 431, 435-436)* . Under former Com. Code § 3414 (*now see Com. Code § 3415*), plaintiff could be liable as endorser to defendant as holder. On the other hand, the Watsonville branch had a legal obligation to its customer under *Com. Code §§ 4303* and *4403* to honor the stop payment order. While the complaint acknowledged the clear statutory authority, it interpreted the authority as if the two branches were one bank by reason of their computer linkage. The single-bank theory flies in the face of California law and is completely without merit (*163 Cal. App. 3d 431, 436)* .

The opinion never mentioned when the check was received by the Watsonville branch and never discussed *Com. Code §*

4214(c), which would have required the Watsonville branch to revoke provisional settlement by midnight of the day following the day it received the check [*see Com. Code §§ 4104(a)(10), 4301(a), (b)*].

[c] Notification Timely Under Regulation CC

The measure of damages for violating *12 C.F.R. § 229.33(d)* is set forth in *12 C.F.R. § 229.38(a)* [*see § 34.71*], subject to the exceptions and exclusion set forth in *§ 34.76*. In addition, a depositary bank may be liable for damages incurred by its customer for its failure to give its customer timely notice of nonpayment. This requirement is similar to the requirement under the Commercial Code as interpreted in *Appliance Buyers Credit Corp. v. Prospect Nat. Bank (7th Cir. 1983) 708 F.2d 290* [12 C.F.R. § 229, Appendix E, Commentary to § 229.33(d)].

The court in *Appliance Buyers* rendered judgment for the depositary bank, under former Com. Code §§ 4202 and 4212 (*now see Com. Code §§ 4202* (as amended by Stats. 1992, ch. 914, § 19), 4214), because there was no showing that the payee could have recovered any more from the maker than it would have recovered in the maker's bankruptcy even if it had been notified of the return and dishonor in a timely manner (*708 F. 2d 290, 291-292, 295)* . Former Com. Code § 4212(1) (*now see Com. Code § 4214(a)*) does not establish a strict liability standard, but states that the payee must prove its loss (*708 F. 2d 290, 293-295)* . *Alioto v. United States (N.D. Cal. 1984) 593 F. Supp. 1402* , discussed in *§ 34.129[3][b]*, discussed *Appliance Buyers* and came to the same conclusion (*593 F. Supp. 1402, 1416)* .

[4] Additional Authorities

[a] Collecting Bank's Right of Chargeback or Refund

Security Pac. Nat. Bank v. Associated Motor Sales (1980) 106 Cal. App. 3d 171, 165 Cal. Rptr. 38 (discussed in *§ 34.78[3][a]*), stated in dicta that it is arguable that former Com. Code § 4212(1) (*now see Com. Code § 4214(a)*) requires written notice of dishonor in order for a collecting bank to properly exercise its right of chargeback. Former Com. Code § 4212(1) requires the bank to send notification of the facts, and the Commercial Code comments to that section refer to the definition of "send" in former Com. Code § 1201(38) (*now see Com. Code § 1201(b)(36)*): "send" in connection with any writing or notice means to deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed (*106 Cal. App. 3d 171, 181, n.7*). However, the court was only concerned with the issue of the payee-depositor's endorser's liability to the collecting bank. Thus, the court's decision that insufficiency of the notice required under former Com. Code § 4212(1) would not adversely affect the bank's right to impose endorser's liability was based on former Com. Code § 4212(5) (*now see Com. Code § 4214(e)*). That section provides that a failure to charge back or claim a refund does not affect the other rights of the bank against the customer or any other party (*106 Cal. App. 3d 171, 181)* .

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3-34 California Points & Authorities § 34.129

§ 34.129 Opposing Contention That Collecting Bank Is Liable to Payee for Amount of Deposited Check [Com. Code § 4202]--Bank's Duties of Presentment and Settlement Were Properly Discharged

[1] FORM

[*The following may be included in a memorandum, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT _____ [DEPOSITARY *and/or* COLLECTING] BANK IS NOT LIABLE TO PLAINTIFF FOR THE AMOUNT OF THE CHECK DATED _____, DRAWN BY _____ [*name of drawer*] AND PAYABLE TO PLAINTIFF, BECAUSE DEFENDANT _____ [*specify, e.g.,* PRESENTED THE CHECK IN A TIMELY MANNER].

A. Duties of Collecting Bank. A collecting bank must exercise ordinary care in all of the following (*Com. Code § 4202(a)*):

(1) Presenting an item or sending it for presentment.

(2) Sending notice of dishonor or nonpayment or returning an item other than a documentary draft to the bank's transferor after learning that the item has not been paid or accepted.

(3) Settling for an item when the bank receives final settlement.

(4) Notifying its transferor of any loss or delay in transit within a reasonable time after discovery thereof.

B. Timing of Collecting Bank's Action. A collecting bank exercises ordinary care under *Commercial Code Section 4202(a)* by taking proper action before its midnight deadline following receipt of an item, notice, or settlement. Taking proper action within a reasonably longer time may constitute the exercise of ordinary care, but the bank has the burden of establishing timeliness (*Com. Code § 4202(b)*; *see Com. Code § 4104(a)(10)* ("midnight deadline" defined); *Alioto v.*

United States (N.D. Cal. 1984) 593 F. Supp. 1402, 1414) .

[*Optional*] **C. Conditions or Acts of Others.** Subject to *Commercial Code Section 4202(a)(1)*, a bank is not liable for the insolvency, neglect, misconduct, mistake, or default of another bank or person or for loss or destruction of an item in the possession of others or in transit (*Com. Code § 4202(c)*).

[*Optional*] **D. Midnight Deadline Defined.** [*See § 34.71[1], Paragraph D.*]

[*Optional*] **E. Payee's Burden of Proof of Causation.** In order for a payee to recover damages against a depositary or collecting bank for mishandling of a deposited check, the payee must prove both that the check was mishandled and that he/she/it would have had a reasonable chance of collecting the check's amount if it were not for the bank's mishandling (*Alioto v. United States (N.D. Cal. 1984) 593 F. Supp. 1402, 1417)* .

[2] Comments

[a] Use of Form

These points and authorities are for use in opposing the contention that a collecting bank is liable to the payee of a check for failure to timely perform its duties of presentment or settlement [*see Com. Code § 4202*]. Optional Paragraph C is for use only when the collecting bank contends it is not liable for the default of a third party. Optional Paragraph D defines midnight deadline for use with Paragraph B if appropriate.

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Thus, counsel should set forth the date and manner of negotiation and presentment, whether that occurred on a banking day, and if not, when the next banking day would be [*see* Paragraphs B, D; *see also Com. Code § 4104(a)(3)* (banking day as part of day on which bank is open to public for carrying on substantially all of its banking functions)], and any other relevant actions by the drawee or the collecting bank (for example, dishonor, return, loss, delay).

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the collecting bank's presentment was proper.

[b] Related Points and Authorities

The points and *authorities in § 34.128* addresses a collecting bank's right of chargeback. The points and *authorities in §§ 34.71 -34.72* address a drawee bank's liability for failure to timely make provisional settlement or return a check presented for collection. The points and *authorities in §§ 34.77* and *34.78* oppose the contention that the drawee bank is liable for improper or untimely revocation of provisional settlement.

[3] Discussion of Authorities

[a] Timing of Collecting Bank's Action

Three cases relating to nonpayment by a bankrupt company of its payroll tax withholdings were consolidated under the title of ***Alioto v. United States*** *(N.D. Cal. 1984) 593 F. Supp. 1402* . One of those cases was the United States' action against the bank at which a check for withholdings was deposited. The United States, as payee, alleged that the bank failed to make timely presentment of the check to the drawee bank, and that the late presentment resulted in the check's being dishonored for insufficient funds. Both parties moved for summary judgment. Both motions were denied.

With respect to the payee's motion for summary judgment, the district court said that former Com. Code § 4202(1)(a) (*now see Com. Code § 4202(a)(1)*) requires a collecting bank to use ordinary care in presenting or sending for presentment a check deposited for collection. Under former Com. Code § 4202(2) (*now see Com. Code § 4202(b)*), the

collecting bank exercises ordinary care if it takes proper action on the check before midnight of the day following receipt of the check. If the collecting bank fails to take proper action before that midnight deadline, the collecting bank has the burden of establishing that it exercised ordinary care. There was a triable issue of fact as to when the check was received. It was presented to the drawee on January 30 (Monday). The company officer who signed the check (as drawer) remembered that it was signed on January 25, but the payee only submitted evidence of the drawer's custom to prove that the check was deposited at its tax depository account at defendant bank on January 25. Defendant bank only submitted evidence of its customary practices to prove its contention that the check was not received until January 27, a Friday. If deposited on Friday, action taken before midnight Monday would have been within the midnight deadline (*593 F. Supp. 1402, 1414-1415)* . Because only inferences could be used to establish either party's case, and inferences could be drawn that the check was received on January 25 and on January 27, summary judgment was not proper. When evidence supports an inference favoring the nonmoving party, summary judgment cannot be granted (*593 F. Supp. 1402, 1415)* .

[b] Payee's Burden of Proof of Causation

The facts and procedural background of ***Alioto v. United States*** *(N.D. Cal. 1984) 593 F. Supp. 1402* , are discussed in *§ 34.129[3][a]*. The same inferences relied on to deny the payee's motion for summary judgment required denial of the bank's motion for summary judgment (*593 F. Supp. 1402, 1417)* . The bank contended that it was entitled to summary judgment because the payee had not presented any evidence to establish that it was damaged by the bank's alleged mishandling of the check. The court agreed that to recover from a collecting bank for the mishandling of a check the payee has to prove both the mishandling of the check and that it would have had a reasonable chance of collecting the amount of the check if it were not for the collecting bank's mishandling. The evidence showed that if the check was presented to the drawee on January 26 or 27, it might or might not have been honored. This was enough to invoke the rule regarding inferences in favor of the nonmoving party, because if the check was deposited on the 25th, there was a reasonable chance it would have been honored (*593 F. Supp. 1402, 1416-1417)* .

[4] Additional Authorities

[a] Duties of Collecting Bank

In *Karen Kane Inc. v. Bank of America NT&SA (1998) 67 Cal. App. 4th 1192, 79 Cal. Rptr. 2d 712* , the court of appeal held that absent extraordinary circumstances, a collecting bank does not owe a duty of care to a non-customer, particularly when the bank has met its statutory duties as set forth in *Com. Code § 4202(a)*. In that case, a clothing manufacturer wrote numerous checks over several years to fictitious vendors for merchandise it never received, based on an employee's submission of fraudulent invoices. The manufacturer brought a negligence action against both the check cashing service that cashed those checks and the bank that deposited the checks into the service's account. The court found that because the checks were not forged or improperly endorsed, and did not indicate that maker was being defrauded, neither the check cashing service nor the bank had a duty to inquire of the maker if a valid transaction supported the checks before accepting them. The circumstances were not extraordinary enough to give rise to a duty of inquiry by a bank complying with its statutory duties, when in fact they were not even sufficient to constitute notice of fraud to the maker of the checks (*67 Cal. App. 4th 1192, 1202-1203)* .

Frontier Refining Co. v. Home Bank (1969) 272 Cal. App. 2d 630, 77 Cal. Rptr. 641 , involved a drawer's action against a bank that was alleged to be a collecting bank but that was found to be only an ordinary payee of a check taken in its capacity as collection agent for a lessor. Dicta in *Frontier* states that the duty of care imposed on a collecting bank by *Com. Code § 4202(a)(1)* does not include the duty to determine whether a particular check was issued by mistake (*272 Cal. App. 2d 630, 636)* . This dicta was cited with approval in *Fireman's Fund Ins. Co. v. Security Pacific Nat. Bank (1978) 85 Cal. App. 3d 797, 820-821, 149 Cal. Rptr. 883* (discussed in *§ 34.97[3][a]*), which held that a collecting bank's duty of presentment under *Com. Code § 4202(a)(1)* does not include the duty to discover a forged drawer's signature. Those situations must be distinguished from the situation considered in *Sun'n Sand, Inc. v. United*

California Bank (1978) 21 Cal. 3d 671, 148 Cal. Rptr. 329, 582 P.2d 920 (discussed in *§ 34.92[3][a]*), in which a cause of action for mistake was stated by a drawer against a collecting bank that was also payee (*21 Cal. 3d 671, 700-701)* .

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[Reserved]

§§ 34.130[Reserved]

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3-34 California Points & Authorities § 34.150

§ 34.150 Supporting Contention That Collecting Bank Is Liable for Breach of Transfer Warranties [Com. Code § 4207]

[1] FORM

[*The following may be included in a memorandum, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT COLLECTING BANK IS LIABLE TO PLAINTIFF FOR THE AMOUNT OF THE CHECK DATED _____, PAYABLE TO PLAINTIFF IN THE AMOUNT OF $_____, BECAUSE DEFENDANT BREACHED THE WARRANTY _____ [*specify warranty breached, e.g.,* THAT THE CHECK HAS NOT BEEN ALTERED].

A. Warranties on Transfer of Item. A customer or collecting bank that transfers an item and receives a settlement or other consideration warrants to the transferee and to any subsequent collecting bank that

[*Specify applicable warranty, EITHER*]

(1) The warrantor is a person entitled to enforce the item (*Com. Code § 4207(a)(1)*).

[*AND/OR*]

(2) All signatures on the item are authentic and authorized (*Com. Code § 4207(a)(2)*).

[*AND/OR*]

(3) The item has not been altered (*Com. Code § 4207(a)(3)*).

[*AND/OR*]

(4) The item is not subject to a defense or claim in recoupment (*Com. Code § 3305(a)*) of any party that can be asserted against the warrantor (*Com. Code § 4207(a)(4)*).

[*AND/OR*]

(5) The warrantor has no knowledge of any insolvency proceeding commenced with regard to the maker or acceptor or, in the case of an unaccepted draft, the drawer (*Com. Code § 4207(a)(5)*).

[*AND/OR*]

(6) If the draft is a demand draft, creation of the item according to the terms on its face was authorized by the person identified as the drawer (*Com. Code § 4207(a)(6)*).

[*CONTINUE*]

B. Damages for Breach of Warranty. A person to whom the warranties under *Commercial Code Section 4207(a)* are made and who took the item in good faith may recover from the warrantor as damages for breach of warranty an amount equal to the loss suffered as a result of the breach, but not more than the amount of the item plus expenses and loss of interest incurred as a result of the breach (*Com. Code § 4207(c)*).

[*Optional*] **C. Disclaimer Not Permitted.** The warranties stated in *Commercial Code Section 4207(a)* cannot be disclaimed with regard to checks (*Com. Code § 4207(d)*).

[*Optional*] **D. Accrual of Cause of Action.** A cause of action for breach of warranty accrues when the claimant has reason to know of the breach (*Com. Code § 4207(e)*).

[*Optional*] **E. Conflict of Law Rules.** If the warranty in *Commercial Code Section 4207(a)(6)* is not given by a transferor or collecting bank under applicable conflict of law rules, then the warranty is not given to that transferor when that transferor is a transferee nor to any prior collecting bank of that transferee (*Com. Code § 4207(f)*).

[*Optional*] **F. Duty to Pay Dishonored Check.** If an item is dishonored, a customer or collecting bank transferring the item and receiving settlement or other consideration must pay the amount due on the item (1) according to the terms of the item at the time it was transferred, or (2) if the transfer was of an incomplete item, according to its terms when completed as stated in *Commercial Code Sections 3115* and *3407*. The transferor's obligation is owed to the transferee and to any subsequent collecting bank that takes the item in good faith. A transferor cannot disclaim its obligation to pay a dishonored check by an endorsement stating that it is made "without recourse" or otherwise disclaiming liability (*Com. Code § 4207(b)*).

[2] Comments

[a] Use of Form

The points and authorities in [1], *above*, may be used to support the contention that a collecting bank is liable for breach of one or more warranties once the bank transfers a check and receives a settlement or other consideration for it [*see Com. Code § 4207*]. Paragraphs C-E are for use only when specific issues are raised such as the item's dishonor [*see* Paragraph E] or an asserted disclaimer [*see* Paragraph C].

Counsel should add argument linking the points in this form with the facts of his or her case; for example, facts establishing the basis for breach of a particular warranty. In addition, because damages for breach of warranty may be recovered only by a person who took the item in good faith, counsel should set forth the transferee's good faith as that term is defined by statute [*see Com. Code § 4207(c)*; *see also Com. Code § 1201(b)(20)*].

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the collecting bank's liability for breach of warranty.

[b] Notice Requirement

Unless notice of a claim for breach of warranty is given to the warrantor within 30 days after the claimant has reason to know of the breach and the identity of the warrantor, the warrantor is discharged to the extent of any loss caused by the delay in giving notice of the claim [*Com. Code § 4207(d)*; *see 12 C.F.R. § 229.34(g)* (same limitation applies under federal law)].

[3] Discussion of Authorities

[a] Warranties on Transfer of Item

The warranties under ***Com. Code § 4207(a)*** in favor of the immediate transferee apply to all persons who transfer a check for consideration whether or not the transfer is accompanied by endorsement [*see* Official Comment 1 to U.C.C. § 3-416 (1990); Official Comment to U.C.C. § 4-207 (*Com. Code § 4207* conforms to warranty provisions regarding instruments and extends coverage to checks)]. Since the purpose of transfer is to give the transferee the right to enforce the check, *Com. Code § 4207(a)* is a warranty that the transferor is a person entitled to enforce the check [*see Com. Code § 3203(a), (b)*] *Com. Code § 4207(a)(1)* is in effect a warranty that there are no unauthorized or missing endorsements that prevent the transferor from making the transferee a person entitled to enforce the check [Official Comment 2 to U.C.C. § 3-416 (1990)].

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3-34 California Points & Authorities § 34.151

§ 34.151 Supporting Contention That Drawee or Other Person Making Payment on Presentment of Check May Recover for Breach of Warranty [Com. Code § 4208]

[1] FORM

[*The following may be included in a memorandum, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

PLAINTIFF, _____ [*specify, e.g.,* THE DRAWEE OF AN UNACCEPTED DRAFT WHO _____ (PAID *or* ACCEPTED)] THE DRAFT, IS ENTITLED TO RECOVER DAMAGES FROM DEFENDANT BECAUSE DEFENDANT BREACHED THE WARRANTY _____ [*specify, e.g.,* THAT THE DRAFT HAD NOT BEEN ALTERED] ON PRESENTING THE DRAFT TO PLAINTIFF.

[*EITHER, if cause of action is based on warranties under Com. Code § 4208(a) on presentment of unaccepted draft*]

A. Warranties on Presentment of Unaccepted Draft. If an unaccepted draft is presented to the drawee for payment or acceptance and the drawee pays or accepts the draft, (i) the person obtaining payment or acceptance, at the time of presentment, and (ii) a previous transferor of the draft, at the time of transfer, warrant to the drawee that pays or accepts the draft in good faith that all of the following apply:

(1) The warrantor is, or was, at the time the warrantor transferred the draft, a person entitled to enforce the draft or authorized to obtain payment or acceptance of the draft on behalf of a person entitled to enforce the draft (*Com. Code § 4208(a)(1)*).

(2) The draft has not been altered (*Com. Code § 4208(a)(2)*).

(3) The warrantor has no knowledge that the signature of the purported drawer of the draft is unauthorized (*Com. Code § 4208(a)(3)*).

(4) If the draft is a demand draft, creation of the demand draft according to the terms on its face was authorized by the person identified as the drawer (*Com. Code § 4208(a)(4)*).

[*OR, if cause of action is based on presentment warranties under Com. Code § 4208(d)*]

A. Warranties on Presentment of Dishonored Draft or Item for Payment to Party Obligated to Pay. If (1) a dishonored draft is presented for payment to the drawer or an endorser or (2) any other item is presented for payment to a party obliged to pay the item, and the item is paid, the person obtaining payment and a prior transferor of the item warrant to the person making payment in good faith that the warrantor is, or was, at the time the warrantor transferred the item, a person entitled to enforce the item or authorized to obtain payment on behalf of a person entitled to enforce the item (*Com. Code § 4208(d)*).

[*CONTINUE*]

B. Drawee's Remedy for Breach of Warranty.

[*EITHER, if drawee of unaccepted draft pays draft*]

A drawee making payment may recover from a warrantor damages for breach of warranty equal to the amount paid by the drawee less the amount the drawee received or is entitled to receive from the drawer because of the payment. The drawee is also entitled to compensation for expenses and loss of interest resulting from the breach. The drawee's right to recover damages under this subdivision is not affected by any failure of the drawee to exercise ordinary care in making payment (*Com. Code § 4208(b)*).

[*OR, if drawee of unaccepted draft accepts draft without making payment*]

If the drawee accepts the draft, breach of warranty is a defense to the acceptor's obligation (*Com. Code § 4208(b)(1)*).

[*OR, if drawee of unaccepted draft accepts draft and makes payment*]

If the drawee accepts the draft and makes payment with regard to the draft, the acceptor is entitled to recover from a warrantor for breach of warranty the amounts stated in *Commercial Code Section 4208(b)* (*Com. Code § 4208(b)(2)*).

[*OR, if breach of warranty is based on Com. Code § 4208(d)*]

The person making payment may recover from any warrantor for breach of warranty an amount equal to the amount paid plus expenses and loss of interest resulting from the breach (*Com. Code § 4208(d)*).

[*CONTINUE*]

[*Optional*] **C. Disclaimer Not Permitted.** The warranties stated in *Commercial Code Section 4208(a)* and *(d)* cannot be disclaimed with regard to checks (*Com. Code § 4208(e)*).

[*Optional*] **D. Accrual of Cause of Action.** A cause of action for breach of warranty accrues when the claimant has reason to know of the breach (*Com. Code § 4208(f)*).

[*Optional*] **E. Conflict of Law Rules.** If the warranty in *Commercial Code Section 4208(a)(4)* is not given by a transferor or collecting bank under applicable conflict of law rules, then the warranty is not given to that transferor when that transferor is a transferee (*Com. Code § 4208(h)*).

[2] Comments

[a] Use of Form

These points and authorities may be used to support the contention that a person obtaining payment for an unaccepted draft, dishonored draft, or other item presented for payment to a party obligated to pay is liable to the drawee or other person making payment for breach of warranty [*see Com. Code § 4208(a), (d)*]. Paragraph A sets forth the statutory warranties on presentment of a draft or other item. The first alternative establishes the warranties applicable when the drawee of an unaccepted draft pays or accepts the draft under *Com. Code § 4208(a)*. The second alternative applies to presentment for payment in all cases not covered by *Com. Code § 4208(a)* [*see Com. Code § 4208(d)*]. Paragraphs C and D are for use only when specific issues are raised such as an asserted disclaimer [*see* Paragraph C].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Thus, counsel should set forth facts establishing the basis for breach of a particular warranty. In addition, because damages for breach of warranty may be recovered only by a person accepting or paying an item in good faith, counsel should set forth the transferee's good faith as that term is defined by statute [*see Com. Code § 4208(a), (d)*; *see also Com. Code § 1201(b)(20)*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of a warrantor's liability for breach of a presentment warranty.

[b] Drawer's Standing for Breach of Warranty

Com. Code §§ 3417(a) and *4208(a)* do not provide a warranty to the drawer when presentment is made to the drawee. Warranty to the drawer is governed by *Com. Code §§ 3417(d)* and *4208(d)*; this warranty applies only when presentment for payment is made to the drawer with regard to a dishonored draft. In *Sun'n Sand, Inc. v. United California Bank (1978) 21 Cal. 3d 671, 680-683, 148 Cal. Rptr. 329, 582 P.2d 920* , the Supreme Court held that under former Com. Code § 3417(1) a warranty was made to the check's drawer when the check was presented to the drawee for payment. That result is rejected [Official Comment 2 to U.C.C. § 3-417 (1990)].

Despite the rejection of *Sun'n Sand* under the revised Commercial Code, a drawer is given standing under another warranty provision. The depositary bank warrants to collecting banks, the payor bank or other payor, and the drawer that the amount of the item was paid to the customer or deposited to the customer's account [*Com. Code § 4205(b)*]. This provision satisfies the need for a receipt of funds by the depositary bank by imposing on that bank a warranty that it paid the customer or deposited the item to the customer's account. This warranty runs not only to collecting banks and to the payor bank or nonbank drawee but also to the drawer, affording protection to these parties that the depositary bank received the item and applied it to the holder's benefit [Official Comment to U.C.C § 4-205].

[c] Notice Requirement

Unless notice of a claim for breach of warranty is given to the warrantor within 30 days after the claimant has reason to know of the breach and the identity of the warrantor, the warrantor is discharged to the extent of any loss caused by the delay in giving notice of the claim [*Com. Code § 4208(e)*; *see 12 C.F.R. § 229.34(g)* (same limitation applies under

federal law)].

[3] Discussion of Authorities

[a] Warranties on Presentment of Unaccepted Draft

Presentment warranties made to drawees of uncertified checks and other unaccepted drafts are stated in *Com. Code §§ 3417(a)* and *4208(a)*. All other presentment warranties are stated in *Com. Code §§ 3417(d)* and *4208(d)* [*see* Official Comment 1 to U.C.C. § 3-417 (1990); Official Comment to U.C.C. § 4-208 (*Com. Code § 4208* conforms to warranty provisions regarding instruments and extends coverage to checks)].

[b] Warranties on Presentment of Dishonored Draft or Item for Payment to Party Obligated to Pay

Com. Code §§ 3417(d) and *4208(d)* apply to presentment for payment in all cases not covered by *Com. Code §§ 3417(a)* and *4208(a)*. They apply to presentment of notes and accepted drafts if made to the drawer or an endorser. In cases covered by *Com. Code §§ 3417(d)* and *4208(d)*, the warranty is the same as that stated in *Com. Code §§ 3417(a)(1)* and *4208(a)(1)*, that there are no unauthorized or missing endorsements [Official Comment 4 to U.C.C. § 3-417 (1990)].

[c] Drawee's Remedy for Breach of Warranty

There is no express provision for attorney's fees included in the measure of damages for breach of warranty under *Com. Code § 3417(a)* or *4208(a)*. However, they could be granted because they fit within the language "expenses ... resulting from the breach" [Official Comment 5 to U.C.C. § 3-417 (1990)].

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3-34 California Points & Authorities § 34.152

§ 34.152 Supporting Contention That Encoder of Information or Retainer of Item Is Liable for Breach of Warranty [Com. Code § 4209]

[1] FORM

[*The following may be included in a memorandum, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT _____ [*specify, e.g.,* DEPOSITARY BANK] IS LIABLE TO PLAINTIFF FOR DAMAGES BECAUSE DEFENDANT BREACHED THE WARRANTY CONTAINED IN COMMERCIAL CODE SECTION 4209 THAT _____ [*specify, e.g.,* INFORMATION MUST BE CORRECTLY ENCODED].

[*EITHER*]

A. Encoding Warranty. A person who encodes information on or with regard to an item after issue warrants to any subsequent collecting bank and to the payor bank or other payor that the information is correctly encoded. If the customer of a depositary bank encodes, that bank also makes the warranty (*Com. Code § 4209(a)*).

[*OR*]

A. Retention Warranty. A person who undertakes to retain an item under an agreement for electronic presentment warrants to any subsequent collecting bank and to the payor bank or other payor that retention and presentment of the item comply with the agreement. If the customer of a depositary bank undertakes to retain an item, that bank also makes this warranty (*Com. Code § 4209(b)*; *see Com. Code § 4110* ("agreement for electronic presentment" defined)].

[*CONTINUE*]

B. Damages for Breach of Warranty. A person to whom warranties are made under *Commercial Code Section 4209(a)* or *(b)* and who took the item in good faith may recover from the warrantor as damages for breach of warranty an amount equal to the loss suffered as a result of the breach, plus expenses and loss of interest incurred as a result of the breach (*Com. Code § 4209(c)*).

[2] Comments

[a] Use of Form

These points and authorities are for use in supporting the contention that a person who encodes information or undertakes to retain an item under an agreement for electronic presentment is liable for breach of the warranty that the information was correctly encoded or that retention and presentment complied with an agreement for electronic presentment [*see Com. Code § 4209*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Thus, counsel should set forth facts establishing that the defendant was the person doing the encoding or retaining the item and that the information encoded was incorrect or that the item's retention and presentment did not comply the agreement for electronic presentment. In addition, because damages for breach of warranty may be recovered only by a person who took the item in good faith, counsel should set forth plaintiff's good faith as that term is defined by statute [*see Com. Code § 4209(c)*; *see also Com. Code § 1201(b)(20)*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the liability of an encoder or retainer for breach of warranty.

[b] Encoding and Retention Warranties

The measure of damages is the same for breach of the encoding or retention warranty [*see Com. Code § 4209(c)*]. Encoding and retention warranties are included in Division 4 because they are unique to the bank collection process. These warranties are breached only by the person doing the encoding or retaining the item and not by subsequent banks handling the item. Encoding and check retention may be done by customers who are payees of a large volume of check; hence, warranties are imposed on customers as well as banks. If a customer encodes or retains, the depositary bank is also liable for any breach of this warranty [Official Comment 1 to U.C.C. § 4-209]. Official Comment 2 to U.C.C. § 4-209 provides illustrations of the liability attaching to the depositary and payor banks if the depositary bank misencodes the amount of a drawer's check.

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3-34 California Points & Authorities § 34.153

§ 34.153 Opposing Contention That Warrantor Is Liable for Breach of Presentment Warranty Based on Unauthorized Endorsement or Alteration--Endorsement Is Effective or Drawer Precluded From Asserting Unauthorized Endorsement or Alteration [Com. Code § 4208(c)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT IS NOT LIABLE TO PLAINTIFF FOR BREACH OF THE WARRANTY UNDER COMMERCIAL SECTION 4208(a) THAT _____ [*specify, e.g.,* THE DRAFT CONTAINED AN UNAUTHORIZED ENDORSEMENT] BECAUSE _____ [*specify warrantor's defense, e.g.,* THE ENDORSEMENT IS EFFECTIVE UNDER COMMERCIAL CODE SECTION 3404].

Warrantor's Defenses. If a drawee asserts a claim for breach of warranty under *Commercial Code Section 4208(a)* based on an unauthorized endorsement of the draft or an alteration of the draft, the warrantor may defend by proving that the endorsement is effective under *Commercial Code Section 3404* or *3405* or the drawer is precluded under *Commercial Code Section 3406* or *4406* from asserting against the drawee the unauthorized endorsement or alteration (*Com. Code § 4208(c)*).

[2] Comments

[a] Use of Form

These points and authorities are for use in opposing the contention that a warrantor is liable for breach of one or more of the presentment warranties based on an unauthorized endorsement or alteration because either (1) the endorsement is effective under another provision of the Commercial Code or (2) the drawer is precluded from asserting the unauthorized endorsement or alteration because of his or her own negligence [*see Com. Code § 4208(c)*]. Depending on the particular defense being asserted, the points and authorities should also set forth the applicable statutory provision referred to in *Com. Code § 4208(c)*. For example, if the warrantor is defending on the ground that the endorsement is

effective under the fictitious payee rule, the provisions of *Com. Code § 3404(a)* should be set forth.

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Thus, counsel should set forth facts supporting the warrantor's defense. For example, if applicable, counsel should show by referring to specific aspects of the transactions that plaintiff's own negligence contributed to the making of a forged signature [*see Com. Code § 3406(a)*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the warrantor's defense for breach of warranty.

[3] Discussion of Authorities

[a] Warrantor's Defenses

Com. Code §§ 3417(c) and *4208(c)* apply to checks and other unaccepted drafts. It gives the warrantor the benefit of rights that the drawee has against the drawer under *Com. Code § 3404, 3405, 3406*, or *4406*. If the drawer's conduct contributed to the loss from forgery or alteration, the drawee should not be allowed to shift the loss from the drawer to the warrantor [Official Comment 6 to U.C.C. § 3-417 (1990)].

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3-34 California Points & Authorities §§ 34.154-34.169

[Reserved]

§§ 34.154[Reserved]

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3-34 California Points & Authorities § 34.170

§ 34.170 Supporting Contention That Bank Is Liable to Payee for Expenses, Loss of Interest, and Consequential Damages for Refusal to Pay Cashier's, Teller's, or Certified Check [Com. Code § 3411]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT BANK IS LIABLE TO PLAINTIFF FOR DAMAGES RESULTING FROM ITS NONPAYMENT OF THE _____ [CASHIER's *or* TELLER's *or* CERTIFIED] CHECK DATED _____, _____ [ISSUED *or* ACCEPTED] BY DEFENDANT, AND PAYABLE TO PLAINTIFF BECAUSE DEFENDANT IS OBLIGATED AND ABLE TO PAY.

A. Liability for Refusal to Pay. If an obligated bank wrongfully (1) refuses to pay a cashier's check or certified check, (2) stops payment of a teller's check, or (3) refuses to pay a dishonored teller's check, the person asserting the right to enforce the check is entitled to compensation for expenses and loss of interest resulting from the nonpayment and may recover consequential damages if the obligated bank refuses to pay after receiving notice of particular circumstances giving rise to the damages (*Com. Code § 3411(b)*).

B. "Obligated Bank" Defined. "Obligated bank" means the acceptor of a certified check or the issuer of a cashier's check or teller's check bought from the issuer (*Com. Code § 3411(a)*).

[2] Comments

[a] Use of Form

These points and authorities are for use in supporting the contention that a bank that accepted a certified check or issued a cashier's or teller's check is liable to the payee for wrongfully refusing to pay the check [*see Com. Code § 3411*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law

stated. Thus, counsel should set forth the date and manner in which the check was issued or accepted, that the bank is both obligated and able to pay, and that the bank has refused to pay. If consequential damages are sought, counsel should establish that the bank has received notice of the particular circumstances giving rise to the damages [*see Com. Code § 3411(b)*]. In addition, because expenses and consequential damages are not recoverable in certain stated circumstances, counsel should show that these circumstances do not apply. For example, counsel should establish that the bank does not have any claim or defense against plaintiff [*see Com. Code § 3411(c)(2)*; *see also § 34.172*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a bank is liable for refusing to pay a cashier's, teller's, or certified check.

[b] Damages Recoverable for Wrongful Refusal to Pay

If the obligated bank wrongfully refuses to pay, it is liable to pay for expenses and loss of interest resulting from the refusal to pay. There is no express provision for attorney's fees, but attorney's fees are not meant to be necessarily excluded and could be granted because they fit within the statutory language for recoverable damages. The bank may also be liable to pay consequential damages if it has notice of the particular circumstances giving rise to the damages [Official Comment 2 to U.C.C. § 3-411 (1990)].

[c] Stop Payment Orders on Cashier's, Teller's, and Certified Checks

A customer using a cashier's, teller's, or certified check as a means of payment has no right to stop payment on the item. Nevertheless, some banks will stop payment on these items as an accommodation to their customers. *Com. Code § 3411* is designed to discourage this practice by imposing liability that goes beyond the check's face amount and makes the bank liable for loss of interest from nonpayment, expenses of enforcement, and consequential damages [*see* Official Comment 1 to U.C.C. § 3-411 (1990)].

[d] Related Points and Authorities

§ 34.171 addresses a bank's liability for paying a cashier's check on a forged endorsement. § 34.172 opposes the contention that an obligated bank is liable for refusing to pay a cashier's, teller's, or certified check on the ground that the bank's refusal to pay is permitted by statute.

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3-34 California Points & Authorities § 34.171

§ 34.171 Supporting Contention That Bank Is Liable to Purchaser for Amount of Cashier's Check or Bank Check Paid on Forged Endorsement

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT _____ [DRAWER *or* DRAWEE] BANK IS LIABLE TO PLAINTIFF FOR THE AMOUNT OF THE [CASHIER's] CHECK DATED _____, _____ [DRAWN *or* ISSUED] BY DEFENDANT, PAYABLE TO _____ [*name of payee*], AND PURCHASED BY PLAINTIFF IN THE AMOUNT OF $_____, BECAUSE THAT CHECK WAS PAID ON A FORGED ENDORSEMENT.

Cashier's Check or Bank Check. A bank that sells a _____ [bank *or* cashier's] check impliedly promises the purchaser that the check will be paid to the named payee. If the _____ [bank *or* cashier's] check is paid on a forged endorsement, the [drawee *or* issuing] bank is liable to either the purchaser or the payee for the amount of the check (*Garthwaite v. Bank of Tulare (1901) 134 Cal. 237, 241-242, 66 P. 326* (bank check); *Jerman v. Bank of America (1970) 7 Cal. App. 3d 882, 887, 87 Cal. Rptr. 88* (cashier's checks)).

[2] Comments

[a] Use of Form

These points and authorities are for use in supporting the contention that a bank that issues a cashier's check or sells a bank check is liable to the purchaser or to the payee if the check is paid on a forged endorsement.

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Thus, counsel should describe whether the check is a cashier's check or whether the bank is only a drawer, the payee designation on the check, whether the check was delivered to the payee, the particular defect in the endorsement,

and that the payee or true owner has not received any part of the proceeds.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the bank's liability to the payee or the purchaser for the amount of a check paid on a forged endorsement.

[b] Related Points and Authorities

The points and authorities in *§§ 34.45* and *34.57* may be used to support or oppose the contention that a bank is liable for disregarding a stop payment order on a cashier's check.

[3] Discussion of Authorities

[a] Cashier's Check or Bank Check

Plaintiff in ***Garthwaite v. Bank of Tulare*** *(1901) 134 Cal. 237, 66 P. 326* , was the executor of the payee, who was also the assignee of the purchaser, of a check purchased from defendant. The check was not a cashier's check in that it was drawn on another bank, but defendant was the check's drawer. The check was lost in the mail between the purchaser and the payee. The drawee cashed the check on an endorsement forged by an unknown person. The payee was shown the endorsement, told the drawee it was forged, and demanded that the drawee either pay him the check's amount or surrender it to him. The drawee refused to do either. Defendant was notified of the demand and refusal. When the drawee finally surrendered the check to plaintiff, plaintiff presented it to the drawee for payment, which was refused. Then plaintiff demanded payment from defendant, and that demand was refused. Plaintiff sued defendant (drawer). Judgment was for plaintiff. Defendant appealed.

The Supreme Court affirmed. The Court said that the check remained the property of the purchaser because it was never received by the payee. Payment of the check on the forged endorsement did not give the drawee any right to retain the check or to demand reimbursement for the amount paid. The drawee's refusal of the payee's first demand for payment amounted to dishonor (*134 Cal. 237, 241)* . When defendant was notified of this dishonor, it became obligated either to cause the drawee to pay the proceeds to the payee or to refund the amount of the check to the purchaser (*134 Cal. 237, 241-242)* . Failure to do either constituted breach of its agreement with the purchaser (*134 Cal. 237, 242)* .

Plaintiff in ***Jerman v. Bank of America*** *(1970) 7 Cal. App. 3d 882, 87 Cal. Rptr. 88* , purchased five cashier's checks from defendant over a two-month period in 1965. Plaintiff, as lender, had a loan agreement with *C*. *C* told plaintiff that the loan proceeds would be used to acquire or clear title to real property that *C* would then sell, sharing the profits with plaintiff. The cashier's checks ranged in amount from $5,000 to $12,500. *C* informed plaintiff who should be named as payees. Plaintiff believed the payees had some interest in or lien on the land. Plaintiff, after purchasing the cashier's checks from defendant, delivered them to *C* for delivery to the payees. The payees' endorsements were forged, apparently by *C* 's attorney, and the checks were cashed at another bank that was not involved in the action. Plaintiff sued defendant for the amount of the checks. The trial court entered judgment for defendant, on the ground that plaintiff had suffered no damages at the time of trial. Plaintiff appealed.

The court of appeal reversed. The payees assigned their interests in the checks to plaintiff, but the court considered the assignment immaterial to its decision, possibly because the checks were never delivered to the named payees (*7 Cal. App. 3d 882, 887, 887 n.2*). Part of a drawee bank's contract with the purchaser of a cashier's check is the promise that the check will be paid to the named payee. If the cashier's check is paid on a forged endorsement, the drawee is liable to either the purchaser or the payee. Here, unless the checks were payable to fictitious payees [*see Com. Code § 3404*] or unless plaintiff was negligent in delivering the checks to *C* [*see Com. Code § 3406*], defendant was liable (*7 Cal. App. 3d 882, 887-888)* . The trial court found plaintiff was not negligent, and that finding was not contested on appeal (*7 Cal. App. 3d 882, 889)* .

The trial court based its finding that plaintiff had suffered no damage on the theory that plaintiff's loan agreement was with *C* and that no breach of the loan agreement was shown by payment of the checks on forged endorsements. The court of appeal agreed that because *C* had signed receipts for the checks, the proceeds would be considered advances under the loan agreement. However, the court said that did not bar plaintiff's recovery from defendant on its contract with plaintiff that it would not pay the checks on forged endorsements (*7 Cal. App. 3d 882, 890)* .

[4] Additional Authorities

[a] Cashier's Check or Bank Check

The court of appeal in *Burke v. Mission Bay Yacht Sales (1963) 214 Cal. App. 2d 723, 29 Cal. Rptr. 685* , affirmed a judgment for a purchaser of a cashier's check and against the payee on the ground that plaintiff had been fraudulently induced to part with the check. The court disagreed with defendant's contention that plaintiff-purchaser had no interest in the check. Even though plaintiff was not actually the drawer of the cashier's check, the rights of a purchaser of a cashier's check simulate those of a drawer of an ordinary check (*214 Cal. App. 2d 723, 732)* .

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3-34 California Points & Authorities § 34.172

§ 34.172 Opposing Contention That Bank Is Liable to Payee for Expenses or Consequential Damages for Refusal to Pay Cashier's, Teller's, or Certified Check [Com. Code § 3411(c)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT BANK IS NOT LIABLE TO PLAINTIFF FOR EXPENSES AND CONSEQUENTIAL DAMAGES RESULTING FROM ITS NONPAYMENT OF THE _____ [CASHIER's *or* TELLER's *or* CERTIFIED] CHECK DATED _____, _____ [ISSUED *or* ACCEPTED] BY DEFENDANT, AND PAYABLE TO PLAINTIFF BECAUSE DEFENDANT _____ [*specify, e.g.*, HAS A REASONABLE DOUBT AS TO WHETHER PLAINTIFF IS THE PERSON ENTITLED TO ENFORCE THE INSTRUMENT AND HAS NEVER BEEN GIVEN ADEQUATE PROOF OF PLAINTIFF's RIGHT TO ENFORCE].

A. Liability For Refusal to Pay. [*See § 34.170[1], Paragraph A.*]

B. "Obligated Bank" Defined. [*See § 34.170[1], Paragraph B.*]

C. Expenses or Consequential Damages Not Recoverable. Expenses or consequential damages under *Commercial Code Section 3411(b)* are not recoverable if the obligated bank's refusal to pay occurs because (1) the bank suspends payments, (2) the obligated bank asserts a claim or defense of the bank that it has reasonable grounds to believe is available against the person entitled to enforce the instrument, (3) the obligated bank has a reasonable doubt whether the person demanding payment is the person entitled to enforce the instrument, or (4) payment is prohibited by law (*Com. Code § 3411(c)*).

[2] Comments

[a] Use of Form

These points and authorities are for use in opposing the contention that a bank that accepted a certified check or issued a cashier's or teller's check is liable to the payee for wrongfully refusing to pay the check [*see Com. Code § 3411(c)*]. Paragraph C sets forth the circumstances under which the bank may refuse to pay without being held liable for expenses and consequential damages that result from the nonpayment.

Counsel should insert argument in the form, showing the relationship between the facts of the case and points of law stated. Thus, counsel should set forth the date and manner in which the check was issued or accepted and the particular circumstances under which nonpayment is permitted even though the bank is obligated to pay. For example, if the bank's reason for nonpayment is because it doubts the identity of the person demanding payment, counsel should set forth facts as to why it has reason to doubt plaintiff's identity, that such doubts are reasonable, and that plaintiff has not offered adequate proof that he or she is in fact the person entitled to enforce the instrument.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a bank is not liable for refusing to pay a cashier's, teller's, or certified check.

[b] Related Points and Authorities

§ 34.170 addresses a bank's liability for refusing to pay a cashier's, teller's, or certified check.

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3-34 California Points & Authorities § 34.173

§ 34.173 Opposing Contention That Bank Is Liable to Payee for Breach of Restrictive Endorsement of Cashier's Check Com. Code §§ 3205, 3206]--Blank Endorsement

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT BANK IS NOT LIABLE TO PLAINTIFF FOR THE AMOUNT OF THE CASHIER's CHECK DATED _____ BECAUSE THE ENDORSEMENT "FOR DEPOSIT ONLY," WHILE RESTRICTIVE, WAS A BLANK ENDORSEMENT AND THE BANK's ACCEPTANCE FOR COLLECTION OF THE CASHIER's CHECK WAS NOT A VIOLATION OF A RESTRICTIVE ENDORSEMENT.

"For Deposit Only," While Restrictive, Is Blank Endorsement. An endorsement "for deposit only," while restrictive, is also a blank endorsement which permits deposit to any account at any bank. *Spencer v. Sterling Bank (1998) 63 Cal. App. 4th 1055, 1059-1060, 74 Cal. Rptr. 2d 576* .

[2] Comments

[a] Use of Form

These points and authorities are for use in opposing the contention that a bank is liable for breach of the restrictive endorsement "for deposit only" without further limitation.

Counsel should insert argument in this form showing the relationship between the facts of the case and points of law stated.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the bank's liability for breach of a restrictive endorsement.

[3] Discussion of Authorities

[a] "For Deposit Only," While Restrictive, Is Blank Endorsement

In ***Spencer v. Sterling Bank*** *(1998) 63 Cal. App. 4th 1055, 74 Cal. Rptr. 2d 576* , three cashier's checks purportedly endorsed by decedent "for deposit only" without further limitation were deposited by the lawyer handling the decedent's estate into her client trust account. The executor of the estate sued the lawyer's bank, seeking damages for breach of a restrictive endorsement. The trial court sustained the bank's demurrers without leave to amend and the executor appealed. The court of appeal affirmed the order of dismissal. The court noted that pursuant to *Com. Code § 3205(a)*, an endorsement identifying the person to whom the instrument is payable is a special endorsement which may be negotiated only by the endorsement of that person. Under *Com. Code § 3205(b)*, an endorsement that is not a special endorsement is a blank endorsement which is payable to the bearer and may be negotiated by transfer of possession alone. The court held that under the plain language of this statutory scheme, an endorsement "for deposit only," while restrictive, is also a blank endorsement because it does not specify where or for whose benefit the checks are to be deposited. The court also rejected the executor's argument that under *Com. Code § 3206* governing restrictive endorsements, the bank's acceptance of the cashier's checks was inconsistent with the endorsement. The blank endorsement did not use any words indicating that the instrument was to be collected by a bank for a particular account, and thus permitted a deposit to any account at any bank (*63 Cal. App. 4th 1055, 1059-1060)* .

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CHAPTER 35 CIVIL RIGHTS: UNRUH CIVIL RIGHTS ACT

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§ 35.syn Synopsis to Chapter 35: CIVIL RIGHTS: UNRUH CIVIL RIGHTS ACT

§ 35.01 Scope of Chapter

§ 35.02 Governing Law

§ 35.03 Defendants Under the Unruh Civil Rights Act

§ 35.04 Related Pleading and Practice Chapters

§ 35.05 Related Points and Authorities Chapters

§§ 35.06-35.19 [Reserved]

§ 35.20 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Business Establishment for Violation of Unruh Civil Rights Act [Civ. Code § 51]--Failure to Show Denial or Discrimination

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[3] Discussion of Authorities

[a] Denial or Discrimination as Actionable

[b] Failure to Show Denial or Discrimination

[c] Failure to Prove Intentional Discrimination

[d] Failure to Allege Proper Standing

[e] Failure to Act Affirmatively

[f] Failure to Complete Real Estate Transaction

[4] Additional Authorities

[a] Denial or Discrimination as Actionable

[b] Failure to Prove Intentional Discrimination

§ 35.21 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Business Establishment for Violation of Unruh Civil Rights Act [Civ. Code § 51]--Failure to Show Prohibited Reason for Denial or Discrimination

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[3] Discussion of Authorities

[a] Failure to Show Prohibited Reason for Denial or Discrimination

[b] Arbitrary Reason Defined

[c] Openness to Public as Criteria

[d] Distinction Made on Basis of Financial Criterion Is Not Violation of Unruh Act

[e] Specialized Institution Designed to Meet Social Need

[f] Restriction of Children in Housing Is Not Violation of Unruh Act

[g] Age-Based Discounts Are Not Violation of Unruh Act

[h] Distinction Made on Basis of Marital Status Is Violation of Unruh Act

[i] Discrimination in Office Leasing Based on Profession Not Violation of Unruh Act

[j] Discrimination Against Nonsmokers Not Violation of Unruh Act

[k] Discrimination Against Motorcyclists Wearing Indicia of Membership in Motorcycle Club Not Violation of Unruh Act

[4] Additional Authorities

[a] Failure to Show Prohibited Reason for Denial or Discrimination

§ 35.22 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Business Establishment for Violation of Unruh Civil Rights Act [Civ. Code § 51]--Failure to Show Prohibited Reason for Denial or Discrimination--Denial or Discrimination Applicable to All Persons Alike

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[3] Discussion of Authorities

[a] Limitation on Unruh Civil Rights Act

[b] Law Applicable to All Persons Alike

[4] Additional Authorities

§ 35.23 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Business Establishment for Violation of Unruh Civil Rights Act [Civ. Code § 51]--Failure to Show Arbitrary Reason for Denial or Discrimination--Protection of Public Safety

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[3] Discussion of Authorities

[a] Protection of Public Safety

§ 35.24 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Business Establishment for Violation of Unruh Civil Rights Act [Civ. Code § 51]--Failure to Show Plaintiff as Victim

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[b] Related Pleading and Practice Forms

[c] Related Memoranda

[3] Discussion of Authorities

[a] Failure to Show Plaintiff as Victim

[4] Additional Authorities

[a] Failure to Show Plaintiff as Victim

§ 35.25 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Business Establishment for Violation of Unruh Civil Rights Act [Civ. Code § 51]--Failure to Show That Defendant Is Business Establishment

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Failure to Show That Defendant Is Business Establishment

[b] Permanency and Purpose of Livelihood or Gain Is Required

[c] Rental of Single Unit

[d] Private Social Club Is Not Necessarily a Business Establishment

[e] Private Social Organization May Not Be Business Establishment for Purposes of Membership Decisions

[f] Private Religious School Is Not Necessarily Business Establishment

[g] Organization Is Not Deemed Business Establishment When to Do So Would Infringe on Members' First Amendment Rights

[h] Unruh Act Does Not Apply to Legislative Action by Governmental Entities

[4] Additional Authorities

[a] Rental of Single Unit

§ 35.26 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Business Establishment for Violation of Unruh Civil Rights Act [Civ. Code § 51]--Denial or Discrimination Outside State

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Denial or Discrimination Outside State

§ 35.27 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Business Establishment for Violation of Unruh Civil Rights Act [Civ. Code § 51]--Limitations Period Has Run

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Limitations Period for Claim Under Unruh Act Is Two Years

§ 35.28 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Business Establishment for

Violation of Unruh Civil Rights Act [Civ. Code § 51]--Plaintiff Did Not Tender the Purchase Price for Defendant's Services or Products

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

§§ 35.29-35.39 [Reserved]

§ 35.40 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Business Establishment for Violation of the Unruh Civil Rights Act [Civ. Code § 51]--Defendant Is Business Establishment

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[3] Discussion of Authorities

[a] Liberal Construction as Necessary

[b] Permanent Activities Carried Out for Livelihood or Gain as Business Establishment

[c] Business Conducted at Specified Location as Business Establishment

[d] Professional Services as Business Establishment

[e] Developing, Building, or Selling Housing Accommodations as Business Establishment

[f] Physician as Business Establishment

[g] Real Estate Broker as Business Establishment

[h] Rental of Two Housing Accommodations as Business Establishment

[i] Condominium Association as Business Establishment

[j] Public, Nonexclusive Club or Organization as Business Establishment

[k] Effect of Private Club's Regular Business Transactions With Nonmembers

[l] Nonprofit and Noncommercial Entity as Business Establishment

[m] Insurance Company Is Business Establishment

[4] Additional Authorities

[a] Liberal Construction as Necessary

§ 35.41 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Business Establishment for Violation of the Unruh Civil Rights Act--Complaint Satisfies Requirements for Pleading Arbitrary Denial or Discrimination--Additional Facts Necessary to Determine Whether Denial or Discrimination Reasonable

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Deportment Regulations as Lacking Rational Relationship

[b] Additional Facts Necessary to Determine Whether Denial or Discrimination Reasonable

§ 35.42 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Business Establishment for Violation of the Unruh Civil Rights Act [Civ. Code § 51]--Complaint Satisfies Requirements for Pleading Arbitrary Denial or Discrimination--Single Instance of Discrimination Actionable

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Single Instance of Discrimination Actionable

§ 35.43 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Business Establishment for Violation of Unruh Civil Rights Act [Civ. Code § 51]--Complaint Satisfies Pleading Requirements--Facially Neutral Policy Applied in Discriminatory Manner

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Facially Neutral Policy Applied in Discriminatory Manner Can Be Proven by Statistics

§ 35.44 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Business Establishment for Violation of the Unruh Civil Rights Act [Civ. Code § 51]--Complaint Satisfies Requirements for Pleading Arbitrary Denial or Discrimination--Denial or Discriminatory Treatment Based on Exclusion or Differential Treatment of Entire Class by Business Establishment

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Exclusion of Entire Class

[b] Differentiation of Men and Women

[c] Sexual Harassment

[d] Immoral Character

[e] Sexual Orientation

[f] Unconventional Dress

[g] Organizations or Associations

[h] Children or Families With Children

[i] Age

[j] Religious Belief

[4] Additional Authorities

[a] Exclusion of Entire Class

[b] Sexual Orientation

§ 35.45 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Business Establishment for Violation of the Unruh Civil Rights Act--Complaint Satisfies Requirements for Pleading Arbitrary Denial or Discrimination--Denial or Discrimination Based on Exercise of Legal Rights of Tenant

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[3] Discussion of Authorities

[a] Denial or Discrimination Based on Exercise of Legal Rights of Tenant

[b] Eviction

§ 35.46 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Business Establishment for Violation of the Unruh Civil Rights Act [Civ. Code § 51]--Complaint Satisfies Requirements for Pleading Arbitrary Denial or Discrimination--Denial or Discrimination as Act of Retaliation for Exercise of Legal Rights

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Denial or Discrimination Done in Retaliation for Exercise of Legal Right

§ 35.47 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Business Establishment for Violation of the Unruh Civil Rights Act--Complaint Satisfies Requirements for Pleading Arbitrary Denial or Discrimination--Denial or Discrimination Because of Associates

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Denial or Discrimination Because of Associates

[4] Additional Authorities

[a] Denial or Discrimination Because of Associates

§ 35.48 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Business Establishment for Violation of the Unruh Civil Rights Act--Complaint Satisfies Requirements for Pleading Arbitrary Denial or Discrimination--Cause of Action for Sexual Harassment [Civ. Code § 51.9(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Cause of Action for Sexual Harassment

[b] Business, Service, or Professional Relationships

[c] No Claim Under Civil Code § 51.9 for Acts Occurring Before January 1, 1995

[4] Additional Authorities

§ 35.49 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Participant in Violation of Unruh Civil Rights Act [Civ. Code § 51]--Complaint Satisfies Requirements for Pleading Liability of Defendant for Denial or Discrimination--Participation Through Agreement

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Participation Through Agreement

§ 35.50 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Real Estate Broker in Violation of Unruh Civil Rights Act [Civ. Code § 51]--Complaint Satisfies Requirements for Pleading Liability of Defendant for Denial or Discrimination--Liability of Real Estate Broker

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Liability of Real Estate Broker

§ 35.51 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Business Establishment in Violation of Unruh Civil Rights Act [Civ. Code § 51]--Complaint Satisfies Requirements for Pleading Plaintiff as Victim--Denial or Discrimination Against Third Party

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Denial or Discrimination Against Third Party

[b] Plaintiff's Agreement With Physician

§ 35.52 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Business Establishment in Violation of Unruh Civil Rights Act [Civ. Code § 51]--Complaint Satisfies Requirements for Pleading Plaintiff as Victim--Plaintiff Need Not Be Customer of Defendant

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Plaintiff Need Not Be Customer of Defendant

§ 35.53 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Business Establishment in Violation of Unruh Civil Rights Act [Civ. Code § 51]--Complaint Satisfies Pleading Requirements for Disability Discrimination--Plaintiff Need Not Show Present Substantial Limitation

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Unruh Civil Rights Act Protects Against Discrimination on Basis of Disability

[b] Plaintiff Need Not Allege Present Limitation of Major Life Activity

§ 35.54 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Business Establishment in Violation of Unruh Civil Rights Act [Civ. Code § 51]--Complaint Satisfies Requirements for Pleading Arbitrary Denial or Discrimination--Denial or Discrimination Based on Marital Status Discrimination

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Marital Status Discrimination Is Actionable

§ 35.55 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Business Establishment in Violation of Unruh Civil Rights Act [Civ. Code § 51]--Complaint Satisfies Requirements for Pleadings Arbitrary Denial or Discrimination--Demand for Equal Treatment and Refusal Not Required

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Demand for Equal Treatment and Refusal Not Required

§ 35.56 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Business Establishment in Violation of Unruh Civil Rights Act [Civ. Code § 51]--Constitutional Protections for Religion and Speech Do Not Exempt Business Establishments From Complying With Unruh Act's Prohibition of Discrimination Based on Sexual Orientation

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Constitutional Protections for Religion and Speech Do Not Exempt Business Establishment From Unruh Act's Prohibition of Discrimination Based on Sexual Orientation

California Points & Authorities

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CHAPTER 35 CIVIL RIGHTS: UNRUH CIVIL RIGHTS ACT
PART I. INTRODUCTION

3-35 California Points & Authorities § 35.01

§ 35.01 Scope of Chapter

This chapter contains memoranda of points and authorities for use in supporting [*see §§ 35.20 -35.27*] and opposing [*see §§ 35.40 -35.53*] a demurrer to a complaint for violation of the Unruh Civil Rights Act [*Civ. Code § 51*]. It does not provide points and authorities for use in litigation under the California Disabled Persons Act [*Civ. Code § 54 et seq.*] or California Fair Employment and Housing Act [*Gov. Code § 12900 et seq.*]. For related jury instructions, see *Judicial Council of California Civil Jury Instructions, CACI No. 3020* et seq. (LexisNexis Matthew Bender, Official Publisher), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For a jury instruction related to the essential factual elements of a claim under *Civ. Code § 52.1*, see *CACI No. 3025*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawGeneral OverviewCivil Rights LawCivil Rights ActsGeneral Overview

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3-35 California Points & Authorities § 35.02

§ 35.02 Governing Law

The principal state civil rights laws are the Unruh Civil Rights Act [*Civ. Code § 51*] and the California Fair Employment and Housing Act [*Gov. Code § 12900 et seq.*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawGeneral OverviewCivil Rights LawCivil Rights ActsGeneral Overview

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3-35 California Points & Authorities § 35.03

§ 35.03 Defendants Under the Unruh Civil Rights Act

The points and authorities in this chapter are constructed on the assumption that plaintiff is proceeding against a defendant that either is a business establishment or acts in concert with a business establishment. There is nothing in the Unruh Civil Rights Act, however, that prevents its application to any individual, acting independently, who deprives someone of the services of a business establishment. The law permits an action against anyone who discriminates in regard to rights of accommodation established by the Act, denies these rights, or aids or incites their denial [*Civ. Code § 52(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawGeneral OverviewCivil Rights LawCivil Rights ActsGeneral Overview

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PART I. INTRODUCTION

3-35 California Points & Authorities § 35.04

§ 35.04 Related Pleading and Practice Chapters

For discussion, procedures, and forms for use in regard to complaints for violation of the Unruh Civil Rights Act [Civ. Code § 51], see California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawCivil Rights ActsGeneral OverviewCivil Rights LawPractice & ProcedureGeneral Overview

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3-35 California Points & Authorities § 35.05

§ 35.05 Related Points and Authorities Chapters

For discussion on violation of equal protection, see Ch. 35A, *Civil Rights: Equal Protection* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawGeneral OverviewCivil Rights LawCivil Rights ActsGeneral Overview

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3-35 California Points & Authorities §§ 35.06-35.19

[Reserved]

§§ 35.06[Reserved]

California Points & Authorities

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CHAPTER 35 CIVIL RIGHTS: UNRUH CIVIL RIGHTS ACT
PART II. FORMS
A. Supporting Demurrer to Complaint

3-35 California Points & Authorities § 35.20

§ 35.20 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Business Establishment for Violation of Unruh Civil Rights Act [Civ. Code § 51]--Failure to Show Denial or Discrimination

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER TO COMPLAINT
vs.	)	
_____ [*name(s)*],	)	Date: _____
Defendant(s).	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION UNDER THE UNRUH CIVIL RIGHTS ACT IN THAT IT SHOWS ON ITS FACE THAT DEFENDANT DID NOT COMMIT ANY FORM OF DENIAL OR DISCRIMINATION AS THOSE TERMS ARE USED IN THE ACT.

A. Objection by Demurrer. The party against whom a complaint has been filed may object to the complaint by demurrer on the ground that it does not state facts sufficient to state a cause of action when that ground appears on the face of the complaint [or from any matter of which the court is required to or may take judicial notice] (*Code Civ. Proc. §§ 430.10(e), 430.30(a)*).

B. Rights of Accommodation. Under the Unruh Civil Rights Act, all persons within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever (*Civ. Code § 51*).

C. Denial or Discrimination as Actionable. Under the Unruh Civil Rights Act, an individual only has a cause of action against a business establishment or anyone who denies or aids or incites the denial of the individual's rights of accommodation established by the Act or who makes any discrimination or distinction in these rights on account of sex, color, race, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation, or for any arbitrary reason (*Civ. Code § 52(a)*; *see In re Cox (1970) 3 Cal. 3d 205, 216, 90 Cal. Rptr. 24, 474 P.2d 992*).

D. Failure to Show Denial or Discrimination. A complaint for violation of the Unruh Civil Rights Act is subject to demurrer for failure to state a cause of action if it fails to allege facts that show the occurrence of a denial or discrimination as those terms are used in the Act (*Crowell v. Isaacs (1965) 235 Cal. App. 2d 755, 757, 45 Cal. Rptr. 566*).

[*Optional*] **E. Failure to Prove Intentional Discrimination.** A plaintiff seeking to establish a case under the Unruh Civil Rights Act must plead and prove intentional discrimination in public accommodations in violation of the terms of the Act (*Harris v. Capital Growth Investors XIV (1991) 52 Cal. 3d 1142, 1175, 278 Cal. Rptr. 614, 805 P.2d 873* ; *Hankins v. El Torito Restaurants, Inc. (1998) 63 Cal. App. 4th 510, 74 Cal. Rptr. 2d 684*). A disparate-impact test does not apply to claims under the Act (*Harris v. Capital Growth Investors XIV (1991) 52 Cal. 3d 1142, 1175, 278 Cal. Rptr. 614, 805 P.2d 873*).

[*Optional*] **F. Failure to Allege Proper Standing.** Unless the plaintiff comes within the meaning of "aggrieved person" as used in *Civil Code Section 52*, that plaintiff lacks standing to bring an action for violation of the Unruh Civil Rights Act (*see Midpeninsula Citizens for Fair Housing v. Westwood Investors (1990) 221 Cal. App. 3d 1377, 1382-1386, 271 Cal. Rptr. 99*).

[*Optional*] **G. Failure to Act Affirmatively.** The failure to seek out individuals of a particular race or to advertise that buyers or customers of all races are invited does not constitute a denial or discrimination under the Unruh Civil Rights Act (*Crowell v. Isaacs (1965) 235 Cal. App. 2d 755, 757, 45 Cal. Rptr. 566*).

[*Optional*] **H. Failure to Complete Real Estate Transaction.** The failure to complete a real estate transaction does not constitute unlawful denial or discrimination on the part of a real estate broker when the broker provided those services that are within the power of a broker to provide and the failure to complete the transaction was the result of decisions solely within the power of the principal (*Vargas v. Hampson (1962) 57 Cal. 2d 479, 481-482, 20 Cal. Rptr. 618, 370 P.2d 322*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a general demurrer to a complaint for

violation of the Unruh Civil Rights Act when the demurrer asserts that the complaint fails to state a cause of action in that it appears on the face of the complaint, or from a matter of which the court is required to or may take judicial notice, that regardless of the actual effect of the defendant's action on the plaintiff's rights of accommodation, a discrimination or denial as those terms are used in the Act did not occur [*see Civ. Code § 51*].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, this memorandum may be used to support a motion for summary judgment [*see Code Civ. Proc. § 437c*] or a petition for writ of mandate to review a decision by the Fair Employment and Housing Commission [*see Code Civ. Proc. § 1094.5*; *Gov. Code § 12930(f)(2)*] based on the contention that a form of denial or discrimination as those terms are used in the Unruh Civil Rights Act did not occur.

If the complaint alleges a violation of the Unruh Act based on an alleged violation of the right of an individual under the Americans with Disabilities Act of 1990, these points and authorities may also be appropriately modified to support a motion for summary judgment [*Civ. Code § 51*; *see* California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments* (Matthew Bender)].

[c] Related Pleading and Practice Forms

For a general form of complaint against a business establishment alleging denial or discrimination in violation of the Unruh Civil Rights Act, see California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments* (Matthew Bender).

[d] Related Memoranda

The points and authorities set out in *§ 35.50* may be used in an appropriate case to oppose a demurrer supported by this memorandum.

[3] Discussion of Authorities

[a] Denial or Discrimination as Actionable

In re Cox *(1970) 3 Cal. 3d 205, 90 Cal. Rptr. 24, 474 P.2d 992* , involved the enforcement of a local trespassing ordinance that prohibited trespassing on private property or business premises except in situations in which ejecting an individual would violate the Unruh Civil Rights Act. Cox and his associate, a young man who wore long hair and dressed in an unconventional manner, were arrested under this ordinance at a shopping center after refusing to leave the premises. A complaint was filed against Cox and, after he was released on bail, he petitioned for a writ of habeas corpus to test the restraint imposed on him in the form of constructive custody prior to trial. Although the Supreme Court denied the petition because the trial court failed to make any findings of facts, it set out the law to be followed by the trial court in applying the Unruh Act.

At the time of this incident, the Act provided that denial of services by business establishments on account of an individual's race, color, religion, ancestry, or national origin was specifically prohibited. The Court held that these enumerated characteristics were illustrative, rather than restrictive, indicia of the types of exclusions that the statute prohibited. The Court felt that both the history and the language of the statute disclosed a clear legislative design to interdict all arbitrary discrimination by a business enterprise. The Court noted that the first statutory predecessor of the Unruh Act, enacted in 1897, codified the common law rule that requires certain enterprises to serve all customers reasonably without discrimination. Although the Unruh Act, enacted in 1959, replaced the narrow term of "public

accommodation and amusement" with "business establishments of every kind whatsoever" and added the enumerated categories of prohibited discrimination, it did not explicitly suggest a legislative intention to modify the prior law's prohibition on all arbitrary discrimination (*3 Cal. 3d 205, 212-217)* .

Counsel should note, however, that in ***Harris v. Capital Growth Investors XIV*** *(1991) 52 Cal. 3d 1142, 278 Cal. Rptr. 614, 805 P.2d 873* , which is discussed in *§ 35.20[3][c]*, the Court included language that could be construed to indicate the Court's preference to limit the scope of the Act to the groups specified in *Civ. Code § 51* (*52 Cal. 3d 1142, 1159-1161, 1175)* . In ***King v. Hofer*** *(1996) 42 Cal. App. 4th 678, 49 Cal. Rptr. 2d 719* , discussed in *§ 35.21[3][j]*, the court of appeal cited the cautionary language in *Harris*, to say that future expansion of prohibited categories should be carefully weighed to ensure a result consistent with legislative intent (*42 Cal. App. 4th 678, 681-684)* . In ***Brown v. Smith*** *(1997) 55 Cal. App. 4th 767, 64 Cal. Rptr. 2d 301* , discussed in *§ 35.44[3][c]*, the court found that courts have been reluctant to extend the scope of protection under the Unruh Act since the decision in *Harris*, and that the Unruh Act itself does not protect against sexual harassment (*55 Cal. App. 4th 767, 786-788)* .

In ***Hessians Motorcycle Club v. J.C. Flanagans*** *(2001) 86 Cal. App. 4th 833, 103 Cal. Rptr. 2d 552* , discussed in *§ 35.21[3][k]*, the court of appeal held that although the California Supreme Court concluded in *Harris* that the Legislature intended to confine the scope of the Act to the types of discrimination specifically identified in *Civ. Code § 51*, the Court did not overrule the prior cases extending the Unruh Act to certain nonenumerated classifications, but made clear that future expansion of prohibited categories should be carefully weighed to ensure a result consistent with legislative intent. In *Hessians*, the court found that exclusion from a sports bar of anyone wearing "colors" or a patch indicating membership in a particular motorcycle club was not discrimination based on unconventional appearance, a nonenumerated classification recognized in *Cox*. Motorcyclists wearing full regalia were welcomed, as well as those with long hair, leather, or tattoos. Since the patch alone kept the plaintiffs out of the bar, it was not discrimination based on unconventional appearance (*86 Cal. App. 4th 833, 837)* .

Although the Unruh Act prohibits discrimination on the basis of disability, it does not require any construction, alteration, or any other modification to any new or existing establishment, facility, building, or any other structure, beyond construction, alteration, repair, or modification otherwise required by other provisions of law [*Civ. Code §§ 51, 52(g)*].

[b] Failure to Show Denial or Discrimination

In ***Crowell v. Isaacs*** *(1965) 235 Cal. App. 2d 755, 45 Cal. Rptr. 566* , plaintiffs, two whites who wished to sell their house to any qualified buyer, sought recovery under the Unruh Civil Rights Act against their real estate agent on the grounds that the agent did not intend to offer the property to any member of the general public regardless of race, did not permit advertising that invited buyers of all races to purchase the property, and did not seek out qualified black buyers. The trial court sustained defendant's general demurrer without leave to amend, and plaintiffs appealed. Although the court of appeal reversed the trial court's action insofar as the complaint stated a cause of action based on breach of contract, it upheld the trial court's interpretation of the Unruh Civil Rights Act. It explained that plaintiffs' allegations, standing alone, did not show any denial or discrimination as those terms are used in *Civ. Code § 52*, which is used to enforce the Act. Although the court conceded that mere quiescence could amount to discrimination in some circumstances, it held that failure to act affirmatively to encourage minority purchasers did not amount to discrimination (*235 Cal. App. 2d 755, 757)* .

[c] Failure to Prove Intentional Discrimination

In ***Harris v. Capital Growth Investors XIV*** *(1991) 52 Cal. 3d 1142, 278 Cal. Rptr. 614, 805 P.2d 873* , plaintiffs, female heads of low-income families whose income consisted solely of public-assistance benefits, filed a representative action under the Unruh Act against defendants, real property owners and management of rental properties, based on defendants' policy of requiring that prospective tenants have gross monthly incomes of at least three times the rent to be

charged. Although plaintiffs could afford to pay the rent charged, they did not have incomes equal to three times the rent. Plaintiffs alleged the minimum-income policy was both arbitrary economic discrimination and sex discrimination based on its adverse statistical impact on women. The trial court dismissed the action. The court of appeal reversed the economic discrimination claim and affirmed the sex discrimination claim.

The California Supreme Court reversed the court of appeal holding on the economic discrimination claim and affirmed its holding on the sex discrimination on the basis of the disparate-impact claim. Plaintiffs alleged that defendants' minimum-income policy constitutes sex discrimination because it has a disparate impact on women. They explained that a disproportionate number of families receiving public assistance are headed by women, and women generally have lower average incomes than men. Thus, they claimed that defendants' minimum-income policy excludes a disproportionate number of female-headed households from the pool of applicants to whom defendants will rent units, since a statistically greater number of families headed by women are adversely affected by defendants' policies than families headed by men. The Court explained that the disparate-impact test allows a plaintiff in certain contexts to establish a prima facie case of discrimination by showing that a defendant's policies or practices have an adverse impact on a statutorily protected class of persons such as women. It allows a plaintiff to prove that a facially neutral employment practice nonetheless actually discriminates because of its disproportionate negative impact on the particular protected class to which plaintiff belongs (*52 Cal. 3d 1142, 1170-1171)* .

Plaintiffs urged that extension of a disparate-impact test to claims under the Unruh Act is necessary to further the purpose of the Act to combat arbitrary discrimination in public accommodations. The Court disagreed, explaining that the language of the Act suggests that intentional acts of discrimination, not disparate impact, was the object of the legislation. It cited language from *Civ. Code §§ 51* and *52*, its enforcement provision. The Court found the references to "aiding" and "inciting" denial of access, to making discriminations and restrictions, and to the commission of an "offense" to imply willful, affirmative misconduct on the part of those who violate the Act. Moreover, the damages provision reveals a desire to punish intentional and morally offensive conduct. In contrast, the law under which the disparate-impact test was developed does not allow recovery of compensatory or punitive damages, but confines relief to specified forms of equitable relief. Additionally, the Act explicitly exempts standards that are "applicable alike to persons of every" enumerated characteristic. The Court concluded that if the Legislature had intended to include adverse-impact claims, it would have omitted or at least qualified this language, because, by its nature, an adverse-impact claim challenges a standard that is applicable alike to all persons, on the basis of the premise that, notwithstanding its universal applicability, its actual impact demands scrutiny (*52 Cal. 3d 1142, 1172-1173)* .

Further, the Court observed that the disparate-impact test has not been applied in cases decided under Title II (*42 U.S.C. § 2000a(a)*), the federal antidiscrimination law most closely analogous to the Unruh Act (*52 Cal. 3d 1142, 1173-1174)* . The general antidiscriminatory objectives of the Unruh Act are much broader than the specific antidiscriminatory principles underlying the federal laws prohibiting employment and housing discrimination, which employ a disparate-impact test. The Unruh Act aims to eliminate arbitrary discrimination in the provision of all business services to all persons. Adoption of the disparate-impact theory to cases under the Unruh Act would expose businesses to new liability and potential court regulation of their day-to-day practices in a manner never intended by the Legislature (*52 Cal. 3d 1142, 1174)* .

Accordingly, the Court held that a plaintiff seeking to establish a case under the Unruh Act must plead and prove intentional discrimination in public accommodations in violation of the terms of the Act. A disparate-impact test does not apply to Unruh Act claims. In so holding, the Court said it did not preclude the admission of relevant evidence of disparate impact in Unruh Act cases on proper foundation and subject to the general rules of evidence. Because the evidence may be probative of intentional discrimination in some cases, a blanket rule of exclusion cannot be justified (*52 Cal. 3d 1142, 1175)* .

In ***Hankins v. El Torito Restaurants, Inc.*** *(1998) 63 Cal. App. 4th 510, 74 Cal. Rptr. 2d 684* , a disabled restaurant patron sued the restaurant for violations of the Unruh Act after he was forced to relieve himself in the restaurant parking

lot because restaurant employees refused to let him use an otherwise accessible employee restroom, even though restrooms for patrons were on the second floor of the restaurant, which had no elevator. The trial court found that, although the defendant restaurant was not in violation of applicable disability laws, it breached its duty to plaintiff as a disabled person and discriminated against plaintiff by refusing to permit him to use the only available restroom facilities on the ground floor of the building.

On appeal, the defendant restaurant contended, among other things, that the plaintiff had failed to plead intentional discrimination by the restaurant, that the trial court did not find intentional discrimination, and that there was insufficient evidence of intentional discrimination (*63 Cal. App. 4th 510, 517-518)* . The court of appeal found that plaintiff did plead intentional discrimination by alleging a violation of *Civ. Code § 51* in one of his causes of action by expressly alleging the defendant had wrongfully and unlawfully denied accessible restroom facilities to physically handicapped persons, that it acted with knowledge of the effect its conduct was having on physically disabled persons, and that plaintiff was discriminated against on the sole basis that he was physically disabled. Thus, the court held the issue of intentional discrimination was before the lower court. Further, although the court agreed that the trial court's statement of decision could have been clearer, it found the trial court's decision included a finding of intentional discrimination in the express statement that it was awarding plaintiff damages for defendant's "discriminatory conduct" and imposing liability under *Civ. Code § 51 et seq.* (*63 Cal. App. 4th 510, 518)* .

[d] Failure to Allege Proper Standing

In ***Midpeninsula Citizens for Fair Housing v. Westwood Investors*** *(1990) 221 Cal. App. 3d 1377, 271 Cal. Rptr. 99* , a nonprofit corporation organized for the purpose of securing equal housing opportunities for all persons, sued the owner and manager of an apartment complex because of their policy of limiting occupancy to one person per bedroom, claiming that policy was discrimination prohibited by the Unruh Act. The trial court found the organization had no standing to sue under the Act and entered judgment for defendants. Plaintiff appealed.

The court of appeal reversed and remanded with directions to dismiss the action as moot. Although the court agreed that the organization had no standing under the Unruh Act, it noted that the organization did have standing under the unfair business practices statute (*Bus. & Prof. Code § 17204*). Moreover, although *Bus. & Prof. Code § 17204* provides only for injunctive relief, and the complex had changed its policy, rendering the case moot, the court proceeded to address the issue of standing, noting that it is an issue of continuing public interest (*221 Cal. App. 3d 1377, 1380)* . (*Bus. & Prof. Code § 17204* has since been amended, and its relief provisions are no longer restricted to injunctive relief.) The court said that *Civ. Code § 52* sets forth the remedies available for violations of the Unruh Act. It explained that *Civ. Code § 52(a)* enables the person denied those rights to sue for damages, while *Civ. Code § 52(c)* permits actions for injunctions by various public attorneys and any person aggrieved. The organization claimed it was an aggrieved party because the complex's policy caused a drain on its limited resources, thereby diverting needed funds from important educational and counseling services (*221 Cal. App. 3d 1377, 1382)* . The court was not persuaded, and said that the legislative history indicated that *Civ. Code § 52(c)* was not intended to be given such an expansive interpretation (*221 Cal. App. 3d 1377, 1383)* . It said that the class of plaintiffs affected by the occupancy policy consisted of prospective tenants with large families who would be disqualified from renting apartments. Assuming that the policy operated in a discriminatory manner in violation of the Unruh Act, the court concluded that the organization was not one of those suffering from the unfair treatment. The court also rejected the organization's attempt to apply federal precedent, saying that the analysis applicable to a provision of the federal Fair Housing Act does not determine the scope of standing under the California statutory scheme (*221 Cal. App. 3d 1377, 1385)* .

[e] Failure to Act Affirmatively

The factual background of ***Crowell v. Isaacs*** *(1965) 235 Cal. App. 2d 755, 45 Cal. Rptr. 566* , is *discussed under § 35.20[3][b]*. In upholding the trial court's decision to sustain a general demurrer without leave to amend for failure to state a cause of action under the Unruh Civil Rights Act, the court of appeal determined that plaintiffs' allegations of

defendant's failure affirmatively to seek out buyers who were black and to advertise that buyers of all races were invited to purchase the house did not constitute a denial of equal rights or a discrimination, distinction, or restriction. Further, an offer or attempt to sell did not become discriminatory merely because it omitted a disclaimer of discrimination (*235 Cal. App. 2d 755, 757)* .

[f] Failure to Complete Real Estate Transaction

In ***Vargas v. Hampson*** *(1962) 57 Cal. 2d 479, 20 Cal. Rptr. 618, 370 P.2d 322* , plaintiffs, a husband and wife of Mexican ancestry, brought an action under the Unruh Civil Rights Act for injunctive relief against defendant real estate broker who had refused to sell them a home. The trial court sustained general and special demurrers to the complaint with leave to amend. Plaintiffs failed to amend and appealed to the Supreme Court, which affirmed the judgment of the trial court. Plaintiffs' complaint alleged that they had made a cash deposit with defendant broker for purchase of a house and, at defendant's request, signed a purchase and sale agreement. Subsequently, defendant returned the deposit and refused to sell the property to plaintiffs allegedly because they were of Mexican ancestry, and defendant had a policy not to sell real property to persons of Mexican ancestry.

The Court commented that plaintiffs' complaint stated a cause of action against defendant for violation of the Unruh Act and it would have been error to sustain a demurrer without leave to amend. However, under the theory that defendant acted as the agent of a third party in refusing to sell the property, the Court stated that it was proper to sustain the motions for demurrer. The complaint showed that defendant did provide some services to plaintiffs; it did not specify any failure by defendant to render any services within his power as a broker. The allegation that defendant refused to sell the property can be interpreted to charge him with a failure to complete the transaction, but the Court pointed out that it did not allege that he had authority to do so. It may have been the owner who refused to consummate the sale. Further, the allegation that defendant's refusal to sell was in accordance with his policy of discrimination did not necessarily show that the refusal was caused by that policy. Thus, the Court concluded, the decision of the trial court could be upheld under the rule that although in some circumstances both a broker and an owner may be guilty of discrimination, a broker who in good faith does all within his or her power to serve a member of a racial minority is not liable if the broker's failure to complete the transaction is due solely to the owner's refusal to sell (*57 Cal. 2d 479, 481-482)* .

It does not appear that the principle enunciated in *Vargas* can be expanded to a general rule that all agents are exonerated for violation of the Unruh Civil Rights Act when they act solely at the direction of a principal. The Court did not cite any precedent for its rule in *Vargas* and the general rule in California is that one who assumes to act as an agent is responsible to third persons as a principal for wrongful acts committed in the course of an agency and that an agent is always liable for his or her torts regardless of whether the agent was acting according to the principal's directions [*Civ. Code § 2343(3)*; *Holman v. California (1975) 53 Cal. App. 3d 317, 336, 124 Cal. Rptr. 773]* . *Vargas* thus appears to be an exception to the general rule of agency liability and may be limited to its own facts.

[4] Additional Authorities

[a] Denial or Discrimination as Actionable

In *Black v. Department of Mental Health (2000) 83 Cal. App. 4th 739, 100 Cal. Rptr. 2d 39* , the administrator of the estate of a long-term mental patient sued the state Department of Mental Health and its director, two state hospitals, and a private facility and its operator, for, *inter alia*, violating the Unruh Civil Rights Act, *Civ. Code § 51*, based on the incorporation into the Unruh Act of the Americans with Disabilities Act of 1990 ("ADA"), *42 U.S.C. § 12101 et seq.* The decedent had been a long-term mental patient at a state hospital that closed in 1997. Decedent's brother and conservator agreed to have decedent transferred to a privately-owned facility operating on the grounds of another state hospital; after the transfer, decedent died. The complaint alleged that decedent's conservator was duped into believing his brother was transferred to the other state hospital, not the private facility, where he received a lower level of care,

violating the "integration mandate" of the ADA. The trial court sustained demurrers without leave to amend and entered judgment for defendants. The court of appeal affirmed, holding that while it may have been medically inappropriate to transfer decedent to the private facility, it did not violate the integration mandate of the ADA (*83 Cal. App. 4th 739, 754-755)* .

[b] Failure to Prove Intentional Discrimination

In *Gunther v. Lin (2006) 144 Cal. App. 4th 223, 50 Cal. Rptr. 3d 317* , plaintiff, who uses a wheelchair, discovered two violations of the Americans With Disabilities Act Architectural Guidelines (ADAAGs) in a restaurant restroom he used just before the completion of remodeling. He sued under *Civ. Code § 52* based on an alleged violation of the Unruh Act provision that violations of the ADA constitute violations of the Unruh Act [*Civ. Code § 51(f)*], based on the two alleged ADAAG violations. The plaintiff could have sued under *Civ. Code § 54.3*, which does not require intentional discrimination, but he would have received a smaller statutory penalty. There was no question that the defendant never intended to violate the ADA. The trial court granted defendant summary judgment, on the ground that plaintiff failed to show intentional discrimination under § 52. The Court of Appeal affirmed. The court held that *Civ. Code § 52* requires proof of intentional discrimination, and that the adoption of the 1992 legislation which added *Civ. Code § 51(f)* did not change the *Harris* rule requiring an intentional discrimination to trigger the automatic penalty provisions of § 52. The plaintiff elected to go for the relatively higher minimum penalty provided by § 52 rather than the lower penalty of § 54.3, but his election required a showing of intentional discrimination, which he could not make, so the trial court was correct to grant the summary judgment motion (*144 Cal. App. 4th 223, 226-256)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil Rights LawCivil Rights ActsGeneral OverviewCivil Rights LawPractice & ProcedureGeneral Overview

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Volume 3 Chapters 34-39 CHECKS AND BANKS---to---CIVIL SERVICE
CHAPTER 35 CIVIL RIGHTS: UNRUH CIVIL RIGHTS ACT
PART II. FORMS
A. Supporting Demurrer to Complaint

3-35 California Points & Authorities § 35.21

§ 35.21 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Business Establishment for Violation of Unruh Civil Rights Act [Civ. Code § 51]--Failure to Show Prohibited Reason for Denial or Discrimination

[1] FORM

[*Caption. See § 35.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION UNDER THE UNRUH CIVIL RIGHTS ACT IN THAT IT SHOWS ON ITS FACE THAT DEFENDANT'S ACTION DID NOT DISCRIMINATE IN REGARD TO OR DENY RIGHTS OF ACCOMMODATION ON ACCOUNT OF AN INDIVIDUAL CHARACTERISTIC ENUMERATED IN THE ACT OR FOR ANY ARBITRARY REASON.

A. Objection by Demurrer. [*See § 35.20, Paragraph A.*]

B. Rights of Accommodation. [*See § 35.20, Paragraph B.*]

C. Denial or Discrimination as Actionable. [*See § 35.20, Paragraph C.*]

D. Failure to Show Prohibited Reason for Denial or Discrimination. A complaint for violation of the Unruh Civil Rights Act is subject to a demurrer for failure to state a cause of action if it fails to allege facts that show that defendant discriminated in regard to or denied rights of accommodation established by the Act on account of an individual characteristic enumerated in the Act or for some arbitrary reason (*Archibald v. Cinerama Hawaiian Hotels, Inc. (1977) 73 Cal. App. 3d 152, 159, 140 Cal. Rptr. 599* ; *Newby v. Alto Riviera Apartments (1976) 60 Cal. App. 3d 288, 302, 131 Cal. Rptr. 547*).

E. Arbitrary Reason Defined. An action that discriminates in regard to or denies rights of accommodation established by the Unruh Civil Rights Act is not arbitrary if it is based on a reason that is rationally related to the services performed and the facilities provided (*In re Cox (1970) 3 Cal. 3d 205, 217, 90 Cal. Rptr. 24, 474 P.2d 992* ; *Howe v. Bank of America, N.A. (2009) 179 Cal. App. 4th 1443, 102 Cal. Rptr. 3d 506* ; *Wynn v. Monterey Club (1980) 111 Cal.*

App. 3d 789, 796, 168 Cal. Rptr. 878).

[*Optional*] **F. Openness to Public as Criteria.** A business establishment that is less open to the public may impose more stringent standards in regard to recommendations than establishments that are more open to the public (*Newby v. Alto Riviera Apartments (1976) 60 Cal. App. 3d 288, 300-301, 131 Cal. Rptr. 547*).

[*Optional*] **G. Distinction Made on Basis of Financial Criterion Is Not Violation of Unruh Act.** A financial criterion of customer selection that applies uniformly and neutrally to all persons regardless of personal characteristics is not a violation of the Unruh Civil Rights Act. For example, a landlord's policy requiring prospective tenants to have a gross monthly income of at least three times the rent to be charged is not unlawful discrimination (*Harris v. Capital Growth Investors XIV (1991) 52 Cal. 3d 1142, 1169, 278 Cal. Rptr. 614, 805 P.2d 873*).

[*Optional*] **H. Specialized Institution Designed to Meet Social Need.** A specialized institution designed to meet a social need may properly exclude a certain class of persons if its exclusionary policy serves a compelling societal interest (*Marina Point, Ltd. v. Wolfson (1982) 30 Cal. 3d 721, 742-743, 180 Cal. Rptr. 496, 640 P.2d 115* (dictum)).

[*Optional*] **I. Housing Open Only to Senior Citizens Is Not Violation of Unruh Act.** When accommodations are designed to meet the physical and social needs of senior citizens, a business establishment may establish and preserve that housing for senior citizens, pursuant to *Civil Code Section 51.3* (*Civ. Code § 51.2*).

[*Optional*] **J. Restriction of Children in Housing Is Not Violation of Unruh Act.** Differential treatment towards families with young children may be permissible. For example, a condominium complex that did not totally exclude children, but merely restricted them to one-half the complex, did not arbitrarily discriminate in violation of the Unruh Civil Rights Act (*Sunrise Country Club Assn. v. Proud (1987) 190 Cal. App. 3d 377, 381-382, 235 Cal. Rptr. 404*).

[*Optional*] **K. Age-Based Discounts Are Not Violation of Unruh Act.** Price discounts given to children and senior citizens do not constitute a violation of the Unruh Civil Rights Act, because of public policy considerations as exemplified by the differential treatment of these groups by various statutes, the limited earning capacities of these groups, the fact that such a policy does not perpetuate irrational stereotypes, and the fact that all members of society will be members of both groups (*Starkman v. Mann Theatres Corp. (1991) 227 Cal. App. 3d 1491, 1495-1501, 278 Cal. Rptr. 543*).

[*Optional*] **L. Distinction Made on Basis of Marital Status Is Violation of Unruh Act.** The Unruh Civil Rights Act specifically prohibits discrimination on the basis of marital status (*Civ. Code § 51(b), (e)*). However, not all forms of discrimination on the basis of marital status constitute violations of the Unruh Civil Rights Act, and the type of marital status discrimination alleged by plaintiff is not cognizable under the Act (*see* *Koebke v. Bernardo Heights Country Club (2005) 36 Cal. 4th 824, 836-855, 31 Cal. Rptr. 3d 565, 115 P.3d 1212*).

[*Optional*] **M. Discrimination in Office Leasing Based on Profession Not Violation of Unruh Act.** Discrimination in leasing office space based on profession, so long as it is not a strategem designed to disguise prohibited discrimination based on personal characteristics, is not prohibited under the Unruh Civil Rights Act (*Roth v. Rhodes (1994) 25 Cal. App. 4th 530, 539, 30 Cal. Rptr. 2d 706*).

[*Optional*] **N. Discrimination Against Nonsmokers Not Violation of Unruh Act.** Discrimination in public accommodations based on characteristic of being a nonsmoker does not constitute a violation of the Unruh Civil Rights Act (*King v. Hofer (1996) 42 Cal. App. 4th 678, 683-684, 49 Cal. Rptr. 2d 719*).

[*Optional*] **O. Discrimination Against Motorcyclists Wearing Indicia of Membership in Motorcycle Club Not Violation of Unruh Act.** Discrimination in public accommodations against motorcyclists based on their wearing indicia of club membership, such as "colors" or patches, does not constitute a violation of the Unruh Civil Rights Act (*Gatto*

v. County of Sonoma (2002) 98 Cal. App. 4th 744, 765-769, 120 Cal. Rptr. 2d 550 ; *Hessians Motorcycle Club v. J.C. Flanagans (2001) 86 Cal. App. 4th 833, 837-839, 103 Cal. Rptr. 2d 552*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a general demurrer to a complaint for violation of the Unruh Civil Rights Act when the demurrer asserts that the complaint fails to state a cause of action in that it appears on the face of the complaint, or from a matter of which the court is required to or may take judicial notice, that the complaint fails to allege facts showing that defendant's action discriminated in regard to or denied a right of accommodation established by the Act on account of sex, color, race, religion, ancestry, national origin, disability, or for any arbitrary reason.

Counsel should note that *Civ. Code §§ 51.2-51.4*, relating to housing specifically set aside for senior citizens, do not apply to the County of Riverside, and are supplanted, with respect to that county only, by *Civ. Code §§ 51.10-51.12*.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, this memorandum may be used to support a motion for summary judgment [*see Code Civ. Proc. § 437c*] or a petition for writ of mandate to review a decision by the Fair Employment and Housing Commission [*see Code Civ. Proc. § 1094.5*; *Gov. Code § 12930(f)(2)*] based on the contention that an arbitrary restriction did not occur.

[c] Related Pleading and Practice Forms

For a general form of complaint against a business establishment alleging denial or discrimination in violation of the Unruh Civil Rights Act, see California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments* (Matthew Bender).

[d] Related Memoranda

Memoranda of points and authorities describing specific situations in which restriction in services or facilities does not violate the Act are set out in *§§ 35.22* and *35.23*. The points and authorities set out in *§§ 35.41 -35.47* may be used in an appropriate case to oppose a demurrer supported by this memorandum.

[3] Discussion of Authorities

[a] Failure to Show Prohibited Reason for Denial or Discrimination

In ***Archibald v. Cinerama Hawaiian Hotels, Inc.*** *(1977) 73 Cal. App. 3d 152, 140 Cal. Rptr. 599* , plaintiff, a

California resident, was charged a rate by a hotel in Hawaii that was higher than the rate that is offered to residents of Hawaii. She brought a class action on behalf of California residents and citizens who had been charged a similarly higher rate by hotels in Hawaii. One of her three causes of action was based on the common-law duty of innkeepers not to discriminate, and another was for violation of some unspecified California law. The trial court sustained a demurrer without leave to amend to all of plaintiff's causes of action, and plaintiff appealed.

The court of appeal affirmed. It held that the common-law duty of innkeepers not to discriminate requires an innkeeper to receive and accommodate all persons at a reasonable rate, but does not prevent an innkeeper from charging rates that are lower than reasonable or from offering discounts to induce patronage from certain groups or classes. The court also responded to plaintiff's claim that the Unruh Civil Rights Act extended the common-law rules applied to innkeepers. It held that the Act was inapplicable in many cases because by its express language it only applies within California. Finally it held that even if it were otherwise, plaintiff could not claim a violation of the Act because she was not arbitrarily excluded from any business establishment nor arbitrarily discriminated against in any way. The court appeared to determine that defendants' action was not arbitrary under the Act because it was not discriminatory under the common-law duty of innkeepers. Since plaintiff did not show an actionable wrong under the statute, the trial court did not err in sustaining defendants' demurrers (*73 Cal. App. 3d 152, 159)* .

The Supreme Court in *Koire v. Metro Car Wash (1985) 40 Cal. 3d 24, 32 n.10, 219 Cal. Rptr. 133, 707 P.2d 195* , disapproved, as conclusional dictum, the finding in *Archibald* that even if the Unruh Civil Rights Act were to be applied, it did not proscribe the practices about which plaintiff complained.

Archibald states that a plaintiff must always show that discrimination or denial was arbitrary. However, it did not determine if an allegation showing that the basis of an act of discrimination was a characteristic enumerated in the Unruh Act, such as race or sex, sufficiently alleges that the act was arbitrary to state a cause of action. The Supreme Court has not explicitly resolved this issue. Paragraph D of the foregoing memorandum, however, is based on the theory, supported by dictum in *Newby v. Alto Riviera Apartments (1976) 60 Cal. App. 3d 288, 131 Cal. Rptr. 547* (discussed *below*), that any form of discrimination on the basis of race, sex, or other enumerated characteristic is arbitrary per se, at least for the purpose of resisting a general demurrer.

In ***Newby v. Alto Riviera Apartments*** *(1976) 60 Cal. App. 3d 288, 131 Cal. Rptr. 547* , plaintiff sought declaratory relief, an injunction, and damages in connection with alleged threats by defendant owners and managers of her apartment house to evict her from her apartment. At the close of plaintiff's evidence, the trial court granted defendants a judgment of nonsuit on the jury cause of action and judgment under *Code Civ. Proc. § 631.8* on the other causes of action, and plaintiff appealed. One of the issues on appeal was whether or not the threatened eviction represented arbitrary discrimination under the Unruh Civil Rights Act. The facts disclosed that plaintiff had participated in a tenants' meeting called to discuss proposed rent increases and had obtained signatures on a petition requesting defendant owner to attend another meeting to discuss the rent increases. Further, the managers of the building were worried about the possibility of a rent strike. Although the court of appeal reversed the judgment of the trial court as to the cause of action for intentional infliction of emotional distress, it upheld the trial court's interpretation of the Unruh Civil Rights Act. Plaintiff's case failed in the court's view because an action by a landlord that does not restrict the right of a tenant to habitable living premises and does not discriminate on the basis of an enumerated characteristic is not actionable if it proceeds from a motive of rational self-interest. Thus, the court, assumed that discrimination on the basis of an enumerated characteristic is, by itself, a sufficient showing of arbitrary discrimination (*60 Cal. App. 3d 288, 302)* .

Although the Legislature subsequently determined in *Civ. Code § 1942.5* to protect tenants from retaliatory eviction for advocating tenants' rights and thus, under the rationale adopted by *Newby,* conferred an Unruh Civil Rights Act action, this change does not affect the validity of the court's analysis of the effect of failure to allege facts sufficient to show a cause of action under the Act.

[b] Arbitrary Reason Defined

The factual background of ***In re Cox*** *(1970) 3 Cal. 3d 205, 90 Cal. Rptr. 24, 474 P.2d 992* , is discussed in *§ 35.20[3][a]*. Although the Supreme Court determined in that case that the Unruh Civil Rights Act prohibits arbitrary discrimination by business establishments, the Court emphasized that the Act does not deprive business establishments of the ability to establish reasonable patronage regulations that are rationally related to the services performed and the facilities provided (*3 Cal. 3d 205, 217)* .

In ***Howe v. Bank of America, N.A.*** *(2009) 179 Cal. App. 4th 1443, 102 Cal. Rptr. 3d 506* , plaintiffs, acting on behalf of a putative class of "individuals of U.S. national origin and/or ancestry, as well as naturalized individuals," sued credit card companies, alleging that, to increase their profits, defendants arbitrarily discriminated against the class and discriminated against the class based on national origin and/or ancestry in violation of the Unruh Civil Rights Act (*Civ. Code § 51 et seq.*) by requiring that United States citizens provide a Social Security number to open a particular type of credit card account, while allowing foreign nationals to open such accounts with only alternative forms of identification. The complaint alleged that the plaintiff class was harmed in two ways: (1) By not requiring Social Security numbers of foreign nationals, defendants could be jeopardizing the safety of every person in the U.S. because the lack of a Social Security number aided terrorists, provided a gateway to money laundering, encouraged illegal immigration and identity theft, and defied or hinders federal laws, including immigration laws, the Patriot Act, and tax laws. (2) Defendants improperly favored foreign nationals over the plaintiff class, because by not having to provide Social Security numbers, foreign nationals were not as vulnerable to identity theft, did not have a damaging inquiry added to their credit report, and did not have to report to the Internal Revenue Service interest from the accounts, unlike U.S. nationals. The complaint sought monetary damages and an injunction prohibiting further discriminatory practices, but did not specify whether the requested injunction should preclude defendants from allowing foreign nationals to apply for credit cards without providing a Social Security number, or preclude defendants from requiring United States citizens and permanent residents to provide Social Security numbers in applying for credit cards. Defendants demurred to the complaint, arguing that they were required by federal law to obtain Social Security numbers from United States citizens seeking to establish credit card accounts; federal law did not require credit card companies to obtain Social Security numbers from foreign nationals; and requiring Social Security numbers from foreign nationals would effectively preclude those who were not eligible to obtain Social Security numbers from opening accounts. Thus, the policy of allowing foreign nationals, but not United States citizens, to obtain accounts without providing a Social Security number was reasonable and nondiscriminatory. Defendants also argued that plaintiffs had not alleged any cognizable harm to the putative class caused by either its requirement that they produce Social Security numbers to open a credit account, or its failure to require that foreign nationals provide Social Security numbers to open a credit account; and to the extent a cause of action had been stated, the court should decline to consider it under the doctrine of equitable abstention, since adjudicating the credit practices of a federally regulated bank would delve too deeply into issues of economic policy, which is traditionally a legislative function. The trial court sustained the demurrer without leave to amend, reasoning that to the extent feasible, defendants sought seeking viable useful identification from every credit card applicant, and that having identical standards of identification would leave out vast numbers of people from the credit card program (*179 Cal. App. 4th 1443, 1445-1449)* .

The Court of Appeal affirmed. The court found first that the Unruh Act generally prohibits discrimination based upon "personal characteristics," and assumed, without deciding that citizenship status would qualify as the type of "personal characteristic" falling within the protection of the Act (*179 Cal. App. 4th 1443, 1450* & n.2). However, the Act does not entirely prohibit businesses from drawing distinctions on the basis of the protected classifications or personal characteristics; rather, the objective of the Act is to prohibit businesses from engaging in unreasonable, arbitrary or invidious discrimination. A public policy expressed by statute generally constitutes a reasonable basis for drawing distinctions on the basis of classifications otherwise protected by the Act (*179 Cal. App. 4th 1443, 1450-1451)* . Moreover, legitimate business interests may justify limitations on consumer access to public accommodations (*179 Cal. App. 4th 1443, 1451)* . The court then agreed with the trial court's conclusion that defendants did not act "arbitrarily" when requiring United States citizens to provide a Social Security number to open a credit card account, while allowing foreign nationals to open one using an alternative form of identification. Federal regulations, enacted

pursuant to "The USA Patriot Act," specifically required defendants to obtain a Social Security number from a United States citizen opening an account but allowed them to obtain either a Social Security number or an alternative identification number from a customer who was not a U.S. citizen [*see 31 C.F.R. § 103.121(b)*], and defendants had no choice but to do so. Thus, as a matter of law, defendants did not act arbitrarily in requiring Social Security numbers from United States citizen account holders. The distinction between the types of identification numbers required for United States citizens and foreign nationals was created by federal law, not by defendants, and presumably reflected a determination that the alternative identification numbers that could be used by foreign nationals effectively served the same purposes as a Social Security number. For defendant to depart from the required minimums by imposing stricter requirements on foreign nationals, but not on United States citizens, could itself appear discriminatory in the context of the regulatory scheme, and might subject defendants to litigation. Even if that litigation were not successful, defendants had a strong incentive to avoid the expense and controversy associated with defending such a claim. Thus, defendants did not act "arbitrarily" when they simply applied the minimum identification standards imposed by federal law to both foreign nationals and United States citizens seeking to obtain a credit account. Defendants' practice bore a reasonable relationship to their commercial objectives and was consequently valid on its face (*179 Cal. App. 4th 1443, 1451-1454)* .

In ***Wynn v. Monterey Club*** *(1980) 111 Cal. App. 3d 789, 168 Cal. Rptr. 878* , plaintiff contracted with two gambling establishments to bar his wife, a compulsive gambler, from entering the premises and cashing checks. Plaintiff agreed to satisfy the debts his wife incurred when she cashed checks with insufficient funds at defendants' clubs. Plaintiff paid the obligation in full during the ensuing year. However, approximately one year later, plaintiff learned that his wife was again gambling and cashing checks at defendants' clubs. Plaintiff brought an action against defendants for breach of contract. The trial court granted defendants' motion for summary judgment on the ground that the contract was illegal and, therefore, unenforceable. The court of appeal reversed and remanded. Defendants claimed that although they could legally justify barring plaintiff's wife based on her past conduct in cashing insufficiently funded checks, they could no longer bar her from access once the debt was satisfied because the Unruh Civil Rights Act prohibits a business establishment from arbitrarily excluding any prospective customer.

However, the court noted that *In re Cox (1970) 3 Cal. 3d 205, 90 Cal. Rptr. 24, 474 P.2d 992* (discussed *above*), recognized the right of a business establishment to adopt reasonable restrictions when those restrictions are rationally related to business conducted or the facilities and services provided (*111 Cal. App. 3d 789, 796)* . It stated that there was nothing in *Civ. Code § 51* that indicated that its application turned on the narrow question of indebtedness. Furthermore, the reason for excluding plaintiff's wife transcended the satisfaction of the debt, since she would continue to write insufficiently funded checks to fund her gambling, thereby harming herself and her husband. The court felt that these factors were sufficient to justify an ongoing exclusion of plaintiff's wife from the facilities (*111 Cal. App. 3d 789, 797)* . It analogized the situation to the liquor establishment's justification in refusing access to a habitually intoxicated person who, in the past, had become intoxicated on the premises and had disturbed or harmed other persons. Both cases, the court reasoned, involved recognized mental disorders. Therefore, the court held that the barring of plaintiff's wife would not be arbitrary, but would be rationally related to good business and social practice (*111 Cal. App. 3d 789, 798)* . It reversed and remanded with directions to the trial court to vacate its order and to enter an order denying the motion for summary judgment.

[c] Openness to Public as Criteria

The factual background of ***Newby v. Alto Riviera Apartments*** *(1976) 60 Cal. App. 3d 288, 131 Cal. Rptr. 547* , is discussed in *§ 35.21[3][a]*. In that case, the trial court determined that plaintiff had not shown a case of arbitrary discrimination under the Unruh Civil Rights Act. The court of appeal affirmed and, in its analysis of what types of restrictions on patrons were permitted by the act, noted that a landlord in exercising controls rationally related to the facilities provided might reasonably impose more stringent standards than an owner of a business establishment more open to the public (*60 Cal. App. 3d 288, 302-303)* .

The Supreme Court appears to have cast doubt on this decision as it pertains to apartment complexes [*see Marina Point, Ltd. v. Wolfson (1982) 30 Cal. 3d 721, 743, 180 Cal. Rptr. 496, 640 P.2d 115 , cert. denied, 459 U.S. 858* ; *see also* the *discussion under § 35.21[3][e]*]. *Newby* seems to recognize that apartment complexes are businesses that are not open to the general public. Thus, under *Newby*, a landlord is allowed to impose more stringent standards than the owner of a business establishment open to the general public [*see Newby v. Alto Riviera Apts. (1976) 60 Cal. App. 3d 288, 300-301, 131 Cal. Rptr. 547]* . The Court, in *Marina Point*, however, rejected "adult only" apartment complexes, recognizing that apartment complexes are businesses open to the general public [*see Marina Point, Ltd. v. Wolfson (1982) 30 Cal. 3d 721, 742-743, 180 Cal. Rptr. 496, 640 P.2d 115 , cert. denied, 459 U.S. 858]* .

Although the *Newby* principle cannot be applied to apartment complexes, it still appears to be viable with regard to other types of businesses. It has been alluded to in the leading case of ***In re Cox*** *(1970) 3 Cal. 3d 205, 217, 90 Cal. Rptr. 24, 474 P.2d 992* (set out in *§ 35.20[3][a]*), in which the Supreme Court explicitly characterized the Unruh Civil Rights Act as forbidding arbitrary exclusion by a business establishment generally open to the public. *Cox* quoted a statement from *Marsh v. Alabama (1946) 326 U.S. 501, 506, 66 S. Ct. 276, 90 L. Ed. 265* , that the more that owners, for their own advantage, open up property for use by the public in general, the more their rights become circumscribed by the statutory and constitutional rights of those who use it.

However, California courts have not decided whether the Unruh Civil Rights Act applies to a business establishment that is not generally open to the public. ***Gardner v. Vic Tanny Compton, Inc.*** *(1960) 182 Cal. App. 2d 506, 513-514, 6 Cal. Rptr. 490* , was a case involving alleged racial discrimination by a gymnasium under *Civ. Code § 51*, which required that defendant be a public accommodation or amusement, unlike the Unruh Civil Rights Act, which requires that defendant be a business establishment. At the trial, defendant presented evidence that showed that the facility was open to people on a membership basis and membership requires an application, interview, and evaluation by the manager as to whether the applicants were sincere in their desire to improve themselves physically and would not be detrimental to the business welfare. The trial court found that the premises were open to some but not all members of the general public and rendered judgment for the defendant. On appeal, the court of appeal affirmed. According to the court, the issue turned on whether defendant was a place of public accommodation or amusement. The court decided that the term "public" meant open to common or general use and, thus, did not apply to defendant's operation.

It is doubtful that an enterprise like defendant in *Gardner* could claim today that it was not subject to the Unruh Civil Rights Act because it screened their customers on the basis of the sincerity of their desire and their contribution to business welfare. Those reasons would only underline the fact that it is a business establishment, thus subjecting it to the standards of the Unruh Civil Rights Act [*see § 35.25*]. Nevertheless, *Gardner* should not be ignored. Coupled with the *Newby* decision permitting more stringent standards for business establishments less open to the public, business establishments such as places of entertainment operated on a membership basis or sales outlets open to a specialized clientele may perhaps even claim exemption from the act. Liability may still exist, however, under Title II of the Civil Rights Act of 1964 which prohibits certain forms of discrimination by places of public accommodation or under *42 U.S.C. § 1981* [*see, e.g., Runyon v. McCrary (1976) 427 U.S. 160, 167, 96 S. Ct. 2586, 49 L. Ed. 2d 415* (racial discrimination by private school is violation of *42 U.S.C. § 1981*); *Tillman v. Wheaton-Haven Recreation Ass'n (1973) 410 U.S. 431, 438, 93 S. Ct. 1090, 35 L. Ed. 2d 403* (organization that makes membership more or less automatically available to any defined group is not private club under Title II)].

In a pair of cases involving challenges to the Boy Scouts under the *Unruh Act*, ***Curran v. Mount Diablo Council of the Boy Scouts*** *(1998) 17 Cal. 4th 670, 72 Cal. Rptr. 2d 410, 952 P.2d 218* ; ***Randall v. Orange County Council, Boy Scouts of America*** *(1998) 17 Cal. 4th 736, 72 Cal. Rptr. 2d 453, 952 P.2d 261* , the California Supreme Court discussed the application of the Unruh Act to an organization that makes membership decisions and in that sense is not open generally to the public. The Court held that the Boy Scouts is not subject to the Unruh Act for membership decisions and may exclude homosexuals and atheists without violating the Act, because the Boy Scouts is not a "business establishment" under the Unruh Act for purposes of its membership decisions. The Court held, however, that the Boy Scouts are subject to the Act for business transactions with nonmembers (*17 Cal. 4th 670, 696-700* ; *17 Cal. 4th 736,*

744) . The factual background of *Curran* and *Randall* is discussed in *§ 35.25[3][e]*.

[d] Distinction Made on Basis of Financial Criterion Is Not Violation of Unruh Act

The facts and procedural background of ***Harris v. Capital Growth Investors XIV*** *(1991) 52 Cal. 3d 1142, 278 Cal. Rptr. 614, 805 P.2d 873* , is discussed in *§ 35.20[3][c]*. In *Harris,* plaintiffs filed a representative action under the Unruh Act against defendants, based on their policy of requiring that prospective tenants have gross monthly incomes of at least three times the rent. Plaintiffs alleged the minimum-income policy was arbitrary economic discrimination. The Supreme Court held there was no cause of action under the Unruh Act on that basis.

Plaintiffs argued that under prior case law, the Unruh Act applies to any distinction among persons judicially determined to be "arbitrary" or "unreasonable." They argued that defendants' policy was arbitrary because it excludes persons who are in fact able to pay rent. The Court observed that plaintiffs' argument was based on the presumption that the Legislature has effectively endorsed the broad language in prior cases by amending the statute without amending the specific language on which those cases were based. The Court was unpersuaded, saying that any presumption of legislative acquiescence in the broad concept of "arbitrary discrimination" is weakened by two factors: (1) the specific facts of the prior cases, which unlike their broad language, were confined to discrimination based on personal characteristics similar to the statutory classifications of race, sex, and religion, and (2) evidence of subsequent legislative action emphasizing the continued importance of those classifications (*52 Cal. 3d 1142, 1156)* . The Court stressed the fact that each category enumerated in *Civ. Code §§ 51* and *52* is a personal characteristic as opposed to an economic characteristic, even though the Legislature was aware throughout the history of the Unruh Act that businesses make charges for goods and services and impose financial conditions on access to their establishments (*52 Cal. 3d 1142, 1160)* . The Legislature's decision to enumerate personal characteristics, while omitting financial or economic ones, strongly suggests a limitation on the scope of the Act. Further, when courts have applied the Act to arbitrary discrimination beyond the categories listed in *Civ. Code § 51,* personal characteristics, not financial status or capability, provided the basis of decision. The Court concluded that there is no support for the contention that economic distinctions are criteria within the scope of the Unruh Act. The Court buttressed its position by noting that case law recognizes that legitimate business interests may justify limitations on consumer access to public accommodations. In each case, the particular business interests of the purveyor in maintaining order, complying with legal requirements, and protecting a business reputation or investment were sufficient to justify distinctions among its customers (*52 Cal. 3d 1142, 1161-1162)* .

Business establishments have an essential interest in obtaining full and timely payment for the goods and services they provide. There is no question that a business may, without violating the Act, charge a stated price for goods or services and demand payment in advance. *Civ. Code § 51* expressly provides that the equality called for is subject to the conditions and limitations established by law, and applicable alike to all citizens. Payment for goods and services by all citizens, equally and without discrimination, is one such condition. Businesses are not prohibited from making economic distinctions among customers so long as the criteria used were not based on personal characteristics and could conceivably be met by any customer. Discounts based on quantity, advance reservations, time of purchase, or other conditions that any patron can satisfy are clearly permissible (*52 Cal. 3d 1142, 1162-1163)* . The Court elaborated that a minimum-income policy is no different in its purpose or effect from stated price or payment terms. In pursuit of the objective of securing payment, a landlord has a legitimate and direct economic interest in the income level of prospective tenants, as opposed to their personal characteristics. For nearly all tenants, current income is the source of the monthly rental payment. When a tenant ceases paying rent during the term of the tenancy, the landlord must resort to legal process to obtain possession of the premises and to collect any back rent that may be due (*52 Cal. 3d 1142, 1163)* . An eviction may take several months, during which the tenant remains in possession, enjoying the benefits of the leasehold without paying rent. Thus, the landlord bears the economic burden resulting from (1) loss of income from default to eviction, (2) administrative time and legal and other expenses incurred in the eviction process, and (3) delays and expense of collection of back rent from the tenant, as well as the risk of noncollection (*52 Cal. 3d 1142, 1163-1164)* . To minimize the transaction costs of default, a landlord might adopt one or more approaches such as a

minimum-income policy, which assumes that at some ratio of rent to income, the burden of paying rent, along with other living expenses, will impose a hardship on a tenant, increasing the likelihood of default. Although there may be a myriad of individual factors operating in cases of particular prospective tenants that might affect the predictive value of the ratio, it does not thereby become "arbitrary" in the same way that race and sex discrimination are arbitrary. Plaintiffs argued that the concepts of "arbitrary discrimination" and "reasonable" regulations inevitably involve fact-bound determinations requiring trial as opposed to legal issues cognizable on demurrer. The Court said that argument is not supported by the cases decided under the Unruh Act, which have in fact often decided issues as questions of law on demurrer or summary judgment when the policy or practice of a business establishment is valid on its face because it bears a reasonable relation to commercial objectives appropriate to an enterprise serving the public (*52 Cal. 3d 1142, 1164-1165)* .

Plaintiffs maintained that the use of a minimum-income policy is arbitrary because it does not treat them as individuals and "stereotypes" them as being low-income and unable to pay rent. They argued that the act requires landlords to make individualized determinations of each prospective tenant's ability to pay rent without the use of a minimum-income policy that screens out a particular group of persons on the basis of income (*52 Cal. 3d 1142, 1165)* . Once again, the Court was not persuaded and found two significant adverse consequences that would likely follow from such an interpretation. First, it would involve the courts in a multitude of microeconomic decisions they are ill equipped to make; the trial would develop into a battle of economic studies, the outcome of which would be subject to constant change and would not serve as a future predictor. Moreover, plaintiffs' argument is not confined to landlords and tenants, but would extend to the many other businesses, including lending institutions and retail sellers, that are in the position of extending money, goods, or services in exchange for promises to pay or repay in the future. Second, requiring individualized determinations of the kind proposed may have pernicious effects on the antidiscrimination policy of the Act itself. The Act guarantees access to public accommodations on the part of all persons regardless of race, sex, religion, or other characteristics that have no bearing on a person's status as a responsible consumer. A minimum-income policy is neutral with respect to these characteristics. Instead of encouraging landlords and other businesses to rely on criteria that are race and sex neutral in making business decisions, plaintiffs seek to challenge such criteria in court on a case-by-case basis, thereby inducing landlords to abandon such criteria in favor of subjective, individualized decisions. And yet, those evaluations, unguided by neutral criteria announced in advance and applied consistently, may serve to disguise and thereby promote the very kinds of invidious discrimination based on traits that the act prohibits (*52 Cal. 3d 1142, 1166-1169)* .

[e] Specialized Institution Designed to Meet Social Need

In ***Marina Point, Ltd. v. Wolfson*** *(1982) 30 Cal. 3d 721, 180 Cal. Rptr. 496, 640 P.2d 115 , cert. denied, 459 U.S. 858* , plaintiff, the landlord of a large apartment complex, instituted an unlawful detainer action against tenants who failed to vacate the premises after the expiration of a lease extension. The nonrenewal of defendants' lease rested solely on the landlord's general policy of refusing to rent any apartments to families with children. Defendants contended that the no-children policy violated the Unruh Civil Rights Act, the California Fair Housing Rights Act (*Gov. Code § 12955 et seq.*) (now known as the California Fair Employment and Housing Act [FEHA], set forth in *Gov. Code § 12900 et seq.*), and their state and federal constitutional rights of familial privacy and equal protection of the law. The trial court held that the provisions of the Unruh Act were confined to a limited category of protected classes and that the ban on children was outside the scope of the Act. Therefore, the court upheld the exclusionary practice and granted judgment for the landlord.

The Supreme Court reversed the judgment, stating that the blanket exclusion of families with children from an apartment complex violated the Unruh Act (*30 Cal. 3d 721, 744-745)* . The Court stated that contrary to the lower court's conclusion, the antidiscrimination provisions of the Unruh Act are not confined to a limited category of protected classes, but protect all persons from any arbitrary discrimination by a business establishment (*30 Cal. 3d 721, 730-733)* . The landlord's ban on children was not permissible even if children as a class were noisier, rowdier, more mischievous, and more boisterous than adults (*30 Cal. 3d 721, 736-740)* . The Act does not permit a business

enterprise to exclude an entire class of individuals on the basis of a generalized prediction that the class as a whole was more likely to commit misconduct than some other class of the public (*30 Cal. 3d 721, 739)* . Although the Court recognized that entrepreneurs unquestionably possess broad authority to protect their enterprises from improper and disruptive behavior, the Court held that entrepreneurs must generally exercise this legitimate interest directly by excluding those persons who are in fact disruptive (*30 Cal. 3d 721, 740)* .

In dictum, the Court added that *Marina Point* was distinguishable from cases involving age-limited policies in retirement communities or housing complexes for older citizens (*30 Cal. 3d 721, 742)* . In light of public policy reflected by legislative enactments, age qualifications as to a housing facility reserved for older citizens can operate as a reasonable and permissible means under the Unruh Act of establishing and preserving specialized facilities for those particularly in need of those services or environment. A specialized institution designed to meet a social need differs fundamentally from the wholesale exclusion of children from an apartment complex otherwise open to the general public (*30 Cal. 3d 721, 742-743)* . The Court concluded that the landlord's ban on children did not serve any similarly compelling social interest. Unlike the case of special housing for the elderly, the landlord's exclusion of children exacerbates, rather than alleviates, the state's specialized housing needs (*30 Cal. 3d 721, 743)* .

After the *Marina Point* decision, the Legislature enacted *Civ. Code § 51.2,* which states that housing specifically set aside for senior citizens does not violate the Unruh Civil Rights Act [*see Civ. Code § 51.3* (specification of allowed age restrictions on housing for senior citizens)].

[f] Restriction of Children in Housing Is Not Violation of Unruh Act

In ***Sunrise Country Club Assn. v. Proud*** *(1987) 190 Cal. App. 3d 377, 235 Cal. Rptr. 404* , plaintiff was the condominium homeowners' association of a complex that promulgated rules dividing the complex into separate "adult" or "family" areas. Condominiums in "adult" areas were not allowed to be sold or rented to persons with children under 16 years of age, and children under 16 years of age were not allowed to use "adult" swimming pools. Defendants purchased a condominium in the "adult" area, although there were units available in the "family" area. Shortly thereafter defendant's daughter and her husband adopted two young children and began living in the unit. Plaintiff brought an action against defendants for violation of the rules. The trial court found defendants' use of the condominium unit was a breach of contract and a nuisance, and issued an injunction restraining defendants and their privies from permitting minors under age 16 to reside in the unit and swim in adult swimming pools. Defendants appealed.

The court of appeal affirmed the trial court judgment regarding the exclusion of children. Defendants contended that the rules establishing the separate areas were a violation of the Unruh Act. The court disagreed, and said that the act prohibits only unreasonable, arbitrary, or invidious discrimination, not differential treatment based on actual characteristic differences or differences in need of users (*190 Cal. App. 3d 377, 381)* . Although the Act proscribes any form of arbitrary discrimination, certain types of discrimination have been denominated reasonable and, therefore, not arbitrary.

In certain situations, the Act has been held inapplicable to discrimination between patrons based on the nature of the business enterprise and of the facilities provided. The division of the complex into adult and family areas with over one-half the living units and swimming pools designated for family use did not constitute an unreasonable or arbitrary age discrimination, since there was no blanket exclusion of children under the age of 16. The court found that the absence of a total exclusion and the reasonable provisions for families with children made the case fundamentally distinguishable from *O'Connor v. Village Green Owners Ass'n (1983) 33 Cal. 3d 790, 191 Cal. Rptr. 320, 662 P.2d 427* (discussed in *§ 35.40[3][i]*), and *Marina Point, Ltd. v. Wolfson (1982) 30 Cal. 3d 721, 180 Cal. Rptr. 496, 640 P.2d 115 , cert. denied, 459 U.S. 858* (discussed in *§ 35.21[3][e]*) (*190 Cal. App. 3d 377, 381-382)* .

The court specifically refused to apply *Civ. Code § 51.2,* which prohibits discrimination in housing on the basis of age, because it was enacted after defendants had purchased the unit and was not necessary to resolve the case (*190 Cal.*

App. 3d 377, 381) .

[g] Age-Based Discounts Are Not Violation of Unruh Act

In ***Starkman v. Mann Theatres Corp.*** *(1991) 227 Cal. App. 3d 1491, 278 Cal. Rptr. 543* , plaintiff, who paid full price for himself, his wife, and his two teenage children at a movie theater, brought suit against defendant theater, alleging that its policy of offering discount admission prices to children and senior citizens violated the Unruh Act. The trial court granted defendant's motion for summary judgment. Plaintiff appealed the subsequent judgment.

The court of appeal affirmed. The court cited *Koire v. Metro Car Wash (1985) 40 Cal. 3d 24, 219 Cal. Rptr. 133, 707 P.2d 195* (discussed in *§ 35.44[3][b]*), in which the Supreme Court found that discounts offered only to female customers on "Ladies Day" violated the Unruh Act, and quoted extensively from its discussion distinguishing between sex-based and age-based discounts. Charging different prices to children and senior citizens is sometimes permissible and socially desirable. The Court said that the public policy considerations applicable to price discounts for children or senior citizens are very different from those applicable to sex-based discounts. Some of the important and distinguishing features of aged-based discounts include the differential treatment of children by numerous state statutes, the state and federal legislation that has been enacted to address the special needs of elderly citizens, and the limited earning capacities of children and elderly persons. The court acknowledged that although women generally earn less than men, the societal remedy for that inequity has been equal employment opportunities, and ameliorative legislation. By contrast, the vast majority of children are incapable of earning as much as adults and are, in fact, prohibited from working except under strict limitations. Similarly, many elderly persons have limited incomes, and are unable to work because of health problems or forced retirement (*227 Cal. App. 3d 1491, 1497-1499)* . The court agreed with defendant's contentions that the pricing scheme is designed to promote the family-oriented nature of its business and that the promotional scheme benefits disadvantaged groups because seniors and children have less disposable income. Establishing different price rates for seniors and children in an amusement business does not perpetuate irrational stereotypes. Instead, the pricing classification is a recognition that without such incentives these populations may be totally excluded from enjoying some of the pleasures of our society. Moreover, unlike other classifications, all persons benefit from these discounts during their lifetimes, first as children and then as senior citizens (*227 Cal. App. 3d 1491, 1499)* . The court concluded that all members of society will, in the normal course of events, be members of each class entitled to the discount. This is neither arbitrary, discriminatory, nor unfair (*227 Cal. App. 3d 1491, 1501)* .

In ***Sargoy v. Resolution Trust Corp.*** *(1992) 8 Cal. App. 4th 1039, 10 Cal. Rptr. 2d 889* , defendant savings and loan offered a PrimePlus program to persons 55 years and older, which earned a higher interest rate on deposits. When plaintiff, who was under the age of 55, was told she was not qualified for an account, she brought an action alleging violation of the Unruh Act. The court of appeal affirmed the trial court's dismissal of the action.

The Unruh Act prohibits only arbitrary, invidious, or unreasonable discrimination. Discriminatory treatment is reasonable, and nonarbitrary, when a strong public policy exists in favor of the treatment (*8 Cal. App. 4th 1039, 1043)* . Age-based practices that favor the elderly do not violate civil rights laws. Those practices promote the public policy of assisting the elderly (*8 Cal. App. 4th 1039, 1048-1049)* . The court concluded that the same policy considerations recognized in justifying senior price discounts apply to defendant's PrimePlus interest rates. No rational distinction can be drawn between senior citizen price discounts and the preferential interest rates offered to seniors. Offering higher interest rates to senior citizens does not constitute the type of arbitrary and invidious discrimination falling within the ambit of the Unruh Act (*8 Cal. App. 4th 1039, 1045-1046)* .

The court also recognized that should it make any other decision, every discount or preference offered senior citizens would be placed in jeopardy by eliminating the many price discounts and benefits presently given to senior citizens. That result would have a profound impact on the quality of life enjoyed by senior citizens. The fundamental purpose of the Unruh Act is the elimination of antisocial discriminatory practice--not the elimination of socially beneficial ones (*8 Cal. App. 4th 1039, 1049)* .

[h] Distinction Made on Basis of Marital Status Is Violation of Unruh Act

Under the Civil Rights Act of 2005, the Unruh Act was amended to specifically prohibit discrimination on the basis of marital status [*Civ. Code § 51(b), (e)*], as a clarification of existing law [*see* 2005 Stats., ch. 420, § 2(c)]. Earlier case law had held that discrimination on the basis of marital status was not a violation of the Unruh Act. For example, in *Beaty v. Truck Ins. Exchange (1992) 6 Cal. App. 4th 1455, 8 Cal. Rptr. 2d 593* , plaintiffs, a homosexual couple who had lived together and shared the common necessities of life for 18 years, applied to defendant insurance company for a joint umbrella liability insurance policy. Defendant refused to issue such a policy because it was issued only to married couples, but offered them separate umbrella policies. After plaintiffs' requested ruling from the Department of Insurance was denied, plaintiffs sued for damages, and injunctive and declaratory relief under the Unruh Act. Defendant's demurrer was sustained without leave to amend, and the action was dismissed. Plaintiffs appealed.

The court of appeal affirmed. The court found that there was no discrimination on the basis of sexual orientation because defendant's refusal to issue joint umbrella policies applied to all unmarried couples, not just unmarried homosexual couples (*6 Cal. App. 4th 1455, 1460-1461)* . Plaintiffs argued that defendant's conduct was arbitrary discrimination based on marital status in violation of the Unruh Act. The court explained that the Act makes no mention of discrimination on the basis of marital status. Although the Act has been extended to include categories not expressly enumerated in *Civ. Code § 51*, no court has extended it to include marital status. Citing *Harris v. Capital Growth Investors XIV* [*see § 35.20[3][c]*], and its refusal to expand prohibited discrimination beyond the enumerated categories, the court declined to expand the Act to include marital status as an additional category of prohibited discrimination. There is a strong state policy favoring marriage, and that policy would not be furthered, and would actually be thwarted, by including marital status among the prohibited categories. The court concluded that it is for the Legislature, not the courts, to determine whether nonmarital relationships deserve the statutory protections afforded marriage, noting that there are scores of other statutes in which the Legislature has included marital status in anti-discrimination legislation (*6 Cal. App. 4th 1455, 1462-1463)* .

In ***Koebke v. Bernardo Heights Country Club*** *(2005) 36 Cal. 4th 824, 31 Cal. Rptr. 3d 565, 115 P.3d 1212* , the California Supreme Court held that marital status claims are cognizable under the Unruh Act, but, for purposes of those claims, there is a distinction between domestic partners registered under the California Domestic Partner Rights and Responsibilities Act of 2003 [*Fam. Code § 297 et seq.*] and other unmarried couples and individuals. Registered domestic partners are the equivalent of spouses for the purposes of the Unruh Act. A business that extends benefits to spouses it denies to registered domestic partners engages in impermissible marital status discrimination. On the other hand, while the Unruh Act may protect the rights of other unmarried couples and unmarried individuals to equal access to public accommodations under some circumstances, distinctions drawn by businesses between married couples and those unmarried couples and individuals that are supported by legitimate business reasons do not constitute impermissible marital status discrimination under the Act (*36 Cal. 4th 824, 836-855)* .

In *Koebke*, the Supreme Court also extensively discussed *Beaty v. Truck Ins. Exchange* as the only appellate decision that had considered whether marital status discrimination was cognizable under the Unruh Act. The Court found that, unquestionably, there is a strong public policy favoring marriage and there are practical interests served by the policy favoring marriage, but concluded that the policy favoring marriage is not served by denying registered domestic partners protection from discrimination under the Unruh Act. To the contrary, permitting a business to discriminate against registered domestic partners by denying them benefits or services it extends to spouses violates the comparable public policy favoring domestic partnership. The Court in *Koebke* then found that in *Beaty* an insurer could reasonably conclude that the relationship of an unmarried couple lacked the assurance of permanence necessary to assess with confidence the risks insured against in a joint umbrella policy. However, these concerns do not apply to registered domestic partners, because registered domestic partners occupy a legal status that, like marital status, is formalized, public, and verifiable. The Court further distinguished *Beaty* by finding that *Beaty* concluded that the consequence of allowing plaintiffs to proceed with their marital status discrimination claim would be that all de facto couples would be treated as a married unit in derogation of the strong policy favoring marriage. However, allowing plaintiffs to proceed

with their claim in *Koebke* would not have the same adverse consequence, because the ruling affected only registered domestic partners, not all unmarried couples, and the consequence of interpreting the Unruh Act to prohibit discrimination against domestic partners would have the positive effect of effectuating the Legislature's intent expressed in the Domestic Partner Act to create substantial legal equality between registered domestic partners and spouses (*36 Cal. 4th 824, 843-848)* .

[i] Discrimination in Office Leasing Based on Profession Not Violation of Unruh Act

In ***Roth v. Rhodes*** *(1994) 25 Cal. App. 4th 530, 30 Cal. Rptr. 2d 706* , defendant refused to lease office space in its medical office building to plaintiff, a podiatrist, based on defendant's policy to lease only to medical doctors. Plaintiff sued, alleging inter alia that the refusal to rent to non-M.D.'s was arbitrary discrimination prohibited by the Unruh Act. The trial court granted summary judgment to defendant, and plaintiff appealed.

The court of appeal affirmed the judgment. The court discussed the cases that have held that the Unruh Act prohibits "all arbitrary discrimination by business establishments," and concluded that in fact those cases prohibit only arbitrary discrimination based on personal, as opposed to economic, characteristics (*25 Cal. App. 4th 530, 539)* . The court found that the Unruh Act was not intended to prohibit legitimate business decisions, such as those of an operator of a commercial building who wishes to limit tenants to specific categories. As long as discrimination based on profession is not a stratagem designed to disguise discrimination based on personal characteristics, it is not prohibited under the Unruh Act (*25 Cal. App. 4th 530, 539)* .

[j] Discrimination Against Nonsmokers Not Violation of Unruh Act

In ***King v. Hofer*** *(1996) 42 Cal. App. 4th 678, 49 Cal. Rptr. 2d 719* , following plaintiff's complaint that defendant restaurant was allowing smoking in the bar area during restaurant hours, defendant told plaintiff that if he did not like smoke, he was not welcome in the restaurant and defendant would not serve him. In a motion for summary judgment defendant urged that plaintiff was not a member of any protected class under the Unruh Act. In opposition, plaintiff argued that he had been discriminated against based on the personal characteristic of being a nonsmoker, and sought leave to amend his complaint to clarify that he had been discriminated against as a nonsmoker. The trial court granted summary judgment and denied leave to amend (*42 Cal. App. 4th 678, 683-684*).

The court of appeal affirmed, finding that nonsmoking is not the type of immutable characteristic traditionally protected by the Unruh Act, and there is no authority or history which suggests that the Act was intended to address health and safety in public accommodations (*42 Cal. App. 4th 678, 682)* . Moreover, there could be legitimate business needs to discriminate against nonsmokers. For example, if a nonsmoking patron is in the smoking area of a restaurant and refuses to leave that area but insists on having smoke-free air, the business may have no choice but to ask the nonsmoking patron to leave (*42 Cal. App. 4th 678, 682-683)* .

[k] Discrimination Against Motorcyclists Wearing Indicia of Membership in Motorcycle Club Not Violation of Unruh Act

In ***Gatto v. County of Sonoma*** *(2002) 98 Cal. App. 4th 744, 120 Cal. Rptr. 2d 550* , the plaintiff, who was attending a county fair wearing a vest carrying the insignia of the Hell's Angels Motorcycle Club, was asked to either remove the vest or leave the fair because he was violating the fair's dress code. The dress code states that no apparel or accessories intended to provoke, offend, or intimidate others would be tolerated, including offensive slogans, insignia, or "gang colors." After leaving, he filed suit for denial of full and free access to accommodations in violation of the Unruh Act, *Civ. Code § 51*. The trial court did not explicitly determine whether enforcement of the dress code deprived him of full and free access to accommodations in violation of the Unruh Act, but awarded him the minimum amount of damages then specified for violations of the statutes he invoked (*98 Cal. App. 4th 744, 750-752)* .

The court of appeal reversed. Relying on *Hessians Motor Club v. J.C. Flanagans*, described *below*, and finding it as applicable to a county fair as to a private drinking establishment, the court held that the county fair's enforcement of the dress code to require plaintiff to remove his vest did not violate plaintiff's right to full and equal accommodations under the Unruh Act (*98 Cal. App. 4th 744, 765-769)* .

In ***Hessians Motorcycle Club v. J.C. Flanagans*** *(2001) 86 Cal. App. 4th 833, 103 Cal. Rptr. 2d 552* , it was stipulated that defendant sports bar, while admitting entry to patrons wearing casual attire including "motorcycle attire," denied admittance to members of two motorcycle clubs when they refused to comply with the bar's policy requiring them to remove their "colors," i.e., the patch on a motorcycle jacket signifying membership in a particular motorcycle club, before entering. In response to plaintiffs' complaint asserting that the bar violated their rights under the Unruh Act, the bar offered the security rationale for the policy, that its management believes allowing colors to be worn would lead to fights between rival motorcycle gangs in the bar. After trial on the stipulated facts, the trial court found no Unruh Act violation.

The court of appeal affirmed. The court found that the bar's policy was not discrimination based on unconventional appearance, a classification recognized in *In re Cox (1970) 3 Cal. 3d 205, 217-218, 90 Cal. Rptr. 24, 474 P.2d 992* . Plaintiffs had conceded that motorcyclists wearing full motorcycle regalia are welcomed in the bar and management does not blink at long hair, leather, or tattoos. Since the patch signifying allegiance to a particular club was the only part of plaintiffs' outfit considered objectionable, it was not discrimination based on unconventional appearance (*86 Cal. App. 4th 833, 837)* . The court also refused to recognize a new classification to cover discrimination against motorcycle club members wearing colors. The court found that the "no colors" rule was a policy applicable alike to all persons regardless of race, color, sex, religion, etc., and plaintiffs were not singled out for arbitrary treatment. The court found further that the security concern represented by the policy to prevent barroom brawls is a legitimate business concern, the policy is not irrational, and the bar's perception of the wearing of colors as provocative is not unfounded. Finally, the court found that allowing a discrimination claim of this nature would lead to endless, increasingly frivolous challenges to dress codes and other neutral admission policies common in many restaurants and retail establishments (*86 Cal. App. 4th 833, 837-839)* .

[4] Additional Authorities

[a] Failure to Show Prohibited Reason for Denial or Discrimination

In *Pizarro v. Lamb's Players Theatre (2006) 135 Cal. App. 4th 1171, 37 Cal. Rptr. 3d 859* , a local theater company produced a musical called "Boomers." The company held a "Boomer Night" promotion on Wednesday nights, providing individuals born between 1946 and 1964 with admission at one-half the price they would otherwise pay. Plaintiffs attended the Boomers production on a Wednesday night. Two plaintiffs were minors and received the children's discount. Two plaintiffs were adults not born between 1946 and 1964 who were not given the half-price discount from the regular price admission even though it was requested. Plaintiffs sued the company, alleging violations of the Unruh Act for age discrimination. The trial court sustained the company's demurrer without leave to amend and dismissed the complaint. The Court of Appeal concluded that offering discount admission prices to "baby-boomers" to attend a musical about that generation did not involve an arbitrary class-based generalization protected by the Unruh Act. The court found that the Unruh Act applies not only when businesses exclude individuals altogether, but when treatment is unequal, and unequal treatment includes offering price discounts on an arbitrary basis to certain classes of individuals. Further, age discrimination may violate the Act if used as an arbitrary class-based generalization. However, the courts treat age classification differently from categories enumerated in the Act, and there is no general prohibition against all age-based discrimination or preferential treatment. California courts have allowed private parties to extend or withhold benefits based on age. The court then concluded that the company's offer of a theater ticket discount to a generation to attend a musical about them was permissible as reasonable and not arbitrary. The company provided the discount admission to "baby-boomers" to encourage attendance at a family-based entertainment event. Further, as a result of an age-based lack of job security and a corresponding lack of disposable income, the "baby-boomer" generation would

benefit from price discounts on family-oriented pastimes, as do children and seniors. Also, providing discounted theater admissions to "baby-boomers" to attend a musical about that generation does not perpetuate any irrational stereotypes, but, instead, acts to honor a generation of individuals who contributed to the economy and participated in and contributed to meaningful civic, cultural, educational, business, and recreational activities. Finally, the discount was applicable alike to persons of every sex, color, race, etc., instead of being contingent on an arbitrary, class-based generalization (*135 Cal. App. 4th 1171, 1174-1176)* .

In *Frantz v. Blackwell (1987) 189 Cal. App. 3d 91, 234 Cal. Rptr. 178* , a business deal between plaintiff real estate broker and defendant developer resulted in a lawsuit that was dismissed after defendant paid a settlement to plaintiff. After plaintiff's attempts to purchase a lot in defendant's subdivision were rebuffed by defendant, plaintiff sued defendant alleging discrimination violating the Unruh Act because plaintiff was a member of the class of persons who had filed suits against defendant. The trial court sustained defendant's demurrer and dismissed the action. The court of appeal affirmed, concluding that defendant's refusal to do business with plaintiff was not arbitrary discrimination. The list of prohibited discrimination in *Civ. Code § 51* is illustrative rather than exhaustive, so the basis of discrimination alleged by plaintiff was not beyond the scope of the Act simply because it was not included within the Act's terms or court precedent (*189 Cal. App. 3d 91, 94-95)* . However, defendant's belief that plaintiff was a speculator who had previously tried to profit at his expense was not the singling out of an undefined group or making generalizations about a defined group. Defendant's exclusion was personal, directed toward a particular individual based on that individual's conduct. Reasonable regulations rationally related to the services performed are not prohibited. The Unruh Act seeks to remedy arbitrary discrimination and does not apply when the person's conduct, as opposed to his or her status, produced the discrimination (*189 Cal. App. 3d 91, 95-96)* .

In *Cohn v. Corinthian Colleges, Inc. (2008) 169 Cal. App. 4th 523, 86 Cal. Rptr. 3d 401* , a man who attended a professional baseball game alleged that the Unruh Civil Rights Act's prohibition of gender discrimination was violated by the home team's Mother's Day celebration to honor all mothers in attendance by a tote bag giveaway for all mothers in attendance. Due to the difficult logistics of discerning which women were mothers in the heavy traffic of entry to the game, the team generalized "mothers" as females 18 years old and over. The man and two friends went to the game, requested tote bags, and were refused twice, but after his counsel sent a complaint to the team bemoaning the fact he did not receive a tote bag, the team responded by sending four tote bags, one each for the man, his counsel, and his friends. The trial court granted summary judgment in favor of the team (*169 Cal. App. 4th 523, 526-527*). The Court of Appeal affirmed, the man's allegations against the Mother's Day tote bag giveaway were not supported by the interpretation of, or policy behind, the Act. The intended discrimination was not female versus male, but rather mothers versus the rest of the population, and the Act does require the treatment of mothers to be exactly the same as that of nonmothers. The giveaway was based on motherhood, with gender only a secondary consideration, and honored mothers as a group of individuals without promoting any irrational stereotypes, which did not violate the Act. Further, the giveaway was not a gender-based price differential in violation of the Act. Women were charged the same amount for entry as men were on the date in question. The tote bag represented a gift and did not discount the admission price. If the intent is for the item to be a gift, rather than an attempt to circumvent the ban on gender based discounts, the gift is permissible. Intent is not to be determined by the value of the gift, because even a small discount is enough to violate the Act. The tote bag was a gift to be used, and could not be converted nor considered compensatory (*169 Cal. App. 4th 523, 527-530)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil Rights LawCivil Rights ActsGeneral OverviewCivil Rights LawPractice & ProcedureGeneral Overview

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Volume 3 Chapters 34-39 CHECKS AND BANKS---to---CIVIL SERVICE
CHAPTER 35 CIVIL RIGHTS: UNRUH CIVIL RIGHTS ACT
PART II. FORMS
A. Supporting Demurrer to Complaint

3-35 California Points & Authorities § 35.22

§ 35.22 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Business Establishment for Violation of Unruh Civil Rights Act [Civ. Code § 51]--Failure to Show Prohibited Reason for Denial or Discrimination--Denial or Discrimination Applicable to All Persons Alike

[1] FORM

[*Caption. See § 35.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION UNDER THE UNRUH CIVIL RIGHTS ACT IN THAT IT SHOWS ON ITS FACE THAT DEFENDANT'S ACTION DID NOT DISCRIMINATE IN REGARD TO OR DENY RIGHTS OF ACCOMMODATION ON ACCOUNT OF AN INDIVIDUAL CHARACTERISTIC ENUMERATED IN THE ACT OR FOR ANY ARBITRARY REASON BECAUSE DEFENDANT'S ACTION WAS _____ [CONDITIONED OR LIMITED BY LAW *or* APPLICABLE ALIKE TO PERSONS OF EVERY SEX, COLOR, RACE, RELIGION, ANCESTRY, NATIONAL ORIGIN, DISABILITY, OR MEDICAL CONDITION].

A-D. Authorities Establishing Basis for Demurrer on Ground of Failure to Show Prohibited Reason for Denial or Discrimination. [*See § 35.21, Paragraphs A-D.*]

E. Limitation on Unruh Civil Rights Act. The Unruh Civil Rights Act may not be construed to confer any right or privilege on a person which is conditioned or limited by law or which is applicable alike to persons of every sex, color, race, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation (*Civ. Code § 51*; *Beaty v. Truck Ins. Exchange (1992) 6 Cal. App. 4th 1455, 1463, 8 Cal. Rptr. 2d 593*).

[*Optional*] **F. Limitation on Modification of Structure.** The Unruh Civil Rights Act may not be construed to require any construction, alteration, repair, structural or otherwise, or modification of any sort whatsoever to any new or existing establishment, facility, building, improvement, or any other structure, beyond construction, alteration, repair, or modification otherwise required by other provisions of law (*Civ. Code § 51*).

G. Law Applicable to All Persons Alike. An action which discriminates in regard to or denies rights of

accommodation established by the Unruh Civil Rights Act does not violate the Act if it is based on laws or regulations applicable to all persons (*Marsh v. Edwards Theatres Circuit, Inc. (1976) 64 Cal. App. 3d 881, 889-891, 134 Cal. Rptr. 844*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a general demurrer to a complaint for violation of the Unruh Civil Rights Act when the demurrer asserts that the complaint fails to state a cause of action in that it appears on the face of the complaint, or from a matter of which the court is required to or may take judicial notice, that the alleged denial or discrimination was based on enforcement of laws or regulations applicable to all persons.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, this memorandum may be used to support a motion for summary judgment [*see Code Civ. Proc. § 437c*] or a petition for writ of mandate to review a decision by the Fair Employment and Housing Commission [*see Code Civ. Proc. § 1094.5*; *Gov. Code § 12930(f)(2)*] based on the contention that an arbitrary restriction did not occur.

[c] Related Pleading and Practice Forms

For a general form of complaint against a business establishment alleging denial or discrimination in violation of the Unruh Civil Rights Act, see California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments* (Matthew Bender).

[d] Related Memoranda

The points and authorities set out in *§§ 35.41 -35.47* may be used in an appropriate case to oppose a demurrer supported by this memorandum.

[3] Discussion of Authorities

[a] Limitation on Unruh Civil Rights Act

The facts and procedural background of ***Beaty v. Truck Ins. Exchange*** *(1992) 6 Cal. App. 4th 1455, 8 Cal. Rptr. 2d 593* , are discussed in *§ 35.21[3][h]*. In *Beaty*, plaintiffs, a homosexual couple, unsuccessfully argued that defendant insurance company's refusal to issue them a joint umbrella liability insurance policy was a violation of the Unruh Act. Defendant only issued those policies to married couples. Citing the language of the Act regarding its construction to confer a right applicable alike to all persons, the court said that the Unruh Act was not intended to create a right of

insurance access so long as the insurer's policy was applicable to all persons alike regardless of their status in one of the categories listed in *Civ. Code § 51*. There was no question that defendant's issuance of umbrella policies was uniform and without regard to any of those categories. Plaintiffs were not in a position to claim they had been singled out for arbitrary treatment with regard to their application for a joint umbrella policy (*6 Cal. App. 4th 1455, 1463)* .

[b] Law Applicable to All Persons Alike

In ***Marsh v. Edwards Theatres Circuit, Inc.*** *(1976) 64 Cal. App. 3d 881, 134 Cal. Rptr. 844* , one of the issues on appeal was whether plaintiff could obtain relief under the Unruh Civil Rights Act. The court of appeal discussed the third paragraph of the Act, which provides that the Act does not confer any right or privilege on a person which is conditioned or limited by law or which is applicable alike to all persons and comparable language in *Civ. Code § 54.1*, which protects a disabled person's right of access to places of public accommodation. Although the court stated that plaintiff's case was governed solely by *Civ. Code § 54.1* on the theory that a special statute takes precedence over a more general statute, it fully discussed the application of both laws. It determined that enforcement of fire regulations did not constitute actionable discrimination under either law. In particular, the court interpreted the third paragraph of the Unruh Civil Rights Act to create an exception where access is conditioned or limited by law applicable to all persons alike. One of the limitations to which all persons are subject is the requirement that they be able to avail themselves of public accommodations without violating fire regulations.

The phrase "blindness or other physical disability" was added to *Civ. Code § 51* in 1987. That phrase was changed to "disability" in 1992 and "disability" was changed to "disability or medical condition" in 2000. Thus, to the extent *Marsh* holds that *Civ. Code § 51* does not apply to an action brought by a person who is disabled or suffers from a medical condition as defined in *Gov. Code § 12926(h)* [*see Civ. Code § 51(e)(2)*], it is no longer correct. It is still valid, however, for its discussion of the point that the Unruh Act does not confer rights or privileges that are limited by law or applicable alike to all persons.

[4] Additional Authorities

In *Hessians Motorcycle Club v. J.C. Flanagans (2001) 86 Cal. App. 4th 833, 103 Cal. Rptr. 2d 552* , discussed in *§ 35.21[3][k]*, the court held that the policy of a sports bar to refuse entry to those wearing "colors" or other indicia of membership in a particular motorcycle club was a policy applicable alike to all persons regardless of race, color, sex, religion, etc. The court held that the policy did not violate the Unruh Act because it was not discrimination based on unconventional appearance since the bar admitted patrons in full motorcycle regalia and only refused entry to those wearing "colors," the policy was applicable alike to all persons, the bar possessed a legitimate interest in excluding those wearing "colors," i.e., preventing rival motorcycle gangs in the bar, and because allowing a discrimination claim of this nature would lead to endless, increasingly frivolous challenges to dress codes and other neutral admission policies common in many restaurants and retail establishments (*86 Cal. App. 4th 833, 837-839)* .

In *Turner v. Association of American Medical Colleges (2008) 167 Cal. App. 4th 1401, 85 Cal. Rptr. 3d 94* , California residents with reading-related learning disabilities or attention deficit hyperactivity disorder sued the organization responsible for administering the Medical College Admission Test (MCAT) after it denied their requests for more time or a private room in which to take the MCAT, alleging violation of the Unruh Civil Rights Act. The Court of Appeal held that the standards for the administration of the MCAT, including a time limit for each section of the test, were neutral and extended to all applicants regardless of their membership in a particular group. The claim that the policies were discriminatory because they had a disparate impact on those with learning and reading-related disabilities, who have a more difficult time taking tests under standard conditions, could not be the basis for an Unruh Civil Rights Act claim, as disparate impact claims are not cognizable under the Unruh Act. Although under the Unruh Civil Rights Act, in addressing a claim that a facially neutral testing policy has a disparate impact on persons with learning and reading-related disabilities, accommodations are required to the extent they are required under the Americans With Disabilities Act (*see Civ. Code § 51(f)*), there was no allegation defendant failed to comply with the ADA in

considering requests for accommodations on the MCAT, so that plaintiffs failed to establish their entitlement to relief under the Unruh Civil Rights Act. Finally, there was no allegation or evidence defendant applied its facially neutral policy in an intentionally discriminatory manner (*167 Cal. App. 4th 1401, 1407-1411)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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CHAPTER 35 CIVIL RIGHTS: UNRUH CIVIL RIGHTS ACT
PART II. FORMS
A. Supporting Demurrer to Complaint

3-35 California Points & Authorities § 35.23

§ 35.23 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Business Establishment for Violation of Unruh Civil Rights Act [Civ. Code § 51]--Failure to Show Arbitrary Reason for Denial or Discrimination--Protection of Public Safety

[1] FORM

[*Caption. See § 35.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION UNDER THE UNRUH CIVIL RIGHTS ACT ON THE THEORY THAT DEFENDANT ARBITRARILY DISCRIMINATED IN REGARD TO OR ARBITRARILY DENIED RIGHTS OF ACCOMMODATION IN THAT IT SHOWS ON ITS FACE THAT DEFENDANT'S ACTION WAS TAKEN TO PROTECT PUBLIC SAFETY AND WELFARE.

A-E. Authorities Establishing Basis for Demurrer on Ground of Failure to Show Arbitrary Reason for Denial or Discrimination. [*See § 35.21, Paragraphs A-E.*]

F. Protection of Public Safety. An action that discriminates in regard to or denies rights of accommodation established by the Unruh Civil Rights Act is not arbitrary if it is taken to protect public safety or welfare (*In re Cox (1970) 3 Cal. 3d 205, 217, 90 Cal. Rptr. 24, 474 P.2d 992* ; *Orloff v. Los Angeles Turf Club (1951) 36 Cal. 2d 734, 740-741, 227 P.2d 449*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a general demurrer to a complaint for violation of the Unruh Civil Rights Act when the demurrer asserts that the complaint fails to state a cause of action in that it appears on the face of the complaint, or from a matter of which the court is required to or may take judicial notice, that plaintiff's theory is that defendant discriminated in regard to or denied a right of accommodation for an arbitrary reason, as opposed to denial or discrimination based on an individual characteristic enumerated in the act, and the complaint fails to allege facts showing that defendant's action was arbitrary because defendant's action was taken to protect public safety and welfare, including the prevention of crime on its premises.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, this memorandum may be used to support a motion for summary judgment [*see Code Civ. Proc. § 437c*] or a petition for writ of mandate to review a decision by the Fair Employment and Housing Commission [*see Gov. Code § 12930(f)(2)*; *Code Civ. Proc. § 1094.5*] based on the contention that an arbitrary denial or discrimination did not occur.

[c] Related Pleading and Practice Forms

For a general form of complaint against a business establishment alleging denial or discrimination in violation of the Unruh Civil Rights Act, see California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments* (Matthew Bender).

[d] Related Memoranda

The points and authorities set out in *§§ 35.41 -35.47* may be used in an appropriate case to oppose a demurrer supported by this memorandum.

[3] Discussion of Authorities

[a] Protection of Public Safety

The factual background of ***In re Cox*** *(1970) 3 Cal. 3d 205, 90 Cal. Rptr. 24, 474 P.2d 992* , is discussed in *§ 35.20[3][a]*. Although the Supreme Court determined in *Cox* that the Unruh Civil Rights Act prohibits arbitrary discrimination by business establishments, the Court emphasized that this principle does not wholly prevent restrictions on patrons. It cited *Orloff v. Los Angeles Turf Club (1951) 36 Cal. 2d 734, 227 P.2d 449* for the rule that a business enterprise need not tolerate customers who damage property, injure others, or otherwise disrupt the business.

In ***Orloff v. Los Angeles Turf Club*** *(1951) 36 Cal. 2d 734, 227 P.2d 449* , the Supreme Court was required to determine whether an individual who had a reputation as a person of immoral character could be excluded from a race track under the predecessor of *Civ. Code § 51*, which provided that all citizens were entitled to the full accommodation of places of public accommodation and amusement subject only to limitation applicable alike to all citizens, and former *Civ. Code § 53*, which permitted the proprietor of a place of public amusement or entertainment including a race-course to deny admittance to a person of lewd or immoral character. Plaintiff, who had been ejected twice from Santa Anita Race Track and thereafter refused admittance, filed an action for injunctive relief to restrain defendant from refusing to admit him. The trial court denied his request, finding that he had a reputation as a man of immoral character, was a known undesirable, and a person guilty of conduct detrimental to racing and to the public welfare. On appeal, the Supreme Court reversed. Although the Court held that, on the facts of the instant case, plaintiff was wrongfully

excluded, the Court stated explicitly that it would be reasonable to exclude an individual for committing lewd, immoral, or other acts inimical to the public safety or welfare when applying for or after admittance to the place of accommodation. Moreover, it would be justified to take reasonable precautions to prevent opportunities for the commission of criminal activities at the race course (*36 Cal. 2d 734, 740-741)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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3-35 California Points & Authorities § 35.24

§ 35.24 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Business Establishment for Violation of Unruh Civil Rights Act [Civ. Code § 51]--Failure to Show Plaintiff as Victim

[1] FORM

[*Caption. See § 35.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION UNDER THE UNRUH CIVIL RIGHTS ACT IN THAT IT SHOWS ON ITS FACE THAT PLAINTIFF WAS NOT AN INDIVIDUAL WHO WAS DISCRIMINATED AGAINST IN REGARD TO OR DENIED RIGHTS OF ACCOMMODATION ESTABLISHED BY THE ACT.

A. Objection by Demurrer. [*See § 35.20, Paragraph A.*]

B. Rights of Accommodation. [*See § 35.20, Paragraph B.*]

C. Denial or Discrimination as Actionable. [*See § 35.20, Paragraph C.*]

D. Failure to Show Plaintiff as Victim. A complaint for violation of the Unruh Civil Rights Act is subject to demurrer for failure to state a cause of action if it fails to allege facts which show that plaintiff was discriminated against in regard to or denied rights of accommodation established by the act (*Crowell v. Isaacs (1965) 235 Cal. App. 2d 755, 757, 45 Cal. Rptr. 566*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a general demurrer to a complaint for violation of the Unruh Civil Rights Act when the demurrer asserts that the complaint fails to state a cause of action in that it appears on the face of the complaint, or from a matter of which the court is required to or may take judicial notice, that plaintiff was not personally discriminated against in regard to or denied any services protected by the Unruh Civil Rights Act.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

With appropriate modifications, this memorandum may be used to support a motion for summary judgment [*see Code Civ. Proc. § 437c*] or a petition for writ of mandate to review a decision by the Fair Employment and Housing Commission [*see Gov. Code § 12930(f)(2)*; *Code Civ. Proc. § 1094.5*] based on the contention that a denial or discrimination, if one occurred, was not directed against the plaintiff.

[b] Related Pleading and Practice Forms

For a general form of complaint against a business establishment alleging denial or discrimination in violation of the Unruh Civil Rights Act, see California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments* (Matthew Bender).

[c] Related Memoranda

The points and authorities set out in *§ 35.51* may be used in an appropriate case to oppose a demurrer supported by this memorandum.

[3] Discussion of Authorities

[a] Failure to Show Plaintiff as Victim

The factual background of ***Crowell v. Isaacs*** *(1965) 235 Cal. App. 2d 755, 45 Cal. Rptr. 566* , is discussed in *§ 35.20[3][b]*. In that case, plaintiffs, who were white and had listed their home for sale with defendant broker, tried to base their claim for violation of the Unruh Civil Rights Act on defendant's alleged discrimination against persons who were black. The court of appeal held that the version of *Civ. Code § 52* then in effect, which is substantially the same as the current *Civ. Code § 52(a)* and granted a cause of action for damages "suffered by any person denied the rights" established by former *Civ. Code § 52*, required actual discrimination against the claimant on one of the grounds prohibited by the Act. Plaintiff's complaint, the court noted, was subject to demurrer because it alleged nothing to show discrimination against them and, thus, they were not persons to whom the Act extended a remedy (*235 Cal. App. 2d 755, 757)* .

[4] Additional Authorities

[a] Failure to Show Plaintiff as Victim

In *Long v. Mountain View Cemetery Ass'n (1955) 130 Cal. App. 2d 328, 278 P.2d 945* , plaintiff, a black woman, brought an action for damages under the predecessor of the Unruh Civil Rights Act against defendant, a cemetery

association, because it refused to bury her husband in a mausoleum which was set aside for the exclusive use of members of the "Caucasian race." The trial court entered judgment for the defendant, and on appeal, the court of appeal affirmed. In affirming the decision, the three judges of the court wrote three separate opinions. The presiding judge held that a cemetery was not a place of public accommodation, a view apparently repudiated by the Legislature when it enacted the Unruh Civil Rights Act [*see Burks v. Poppy Constr. Co. (1962) 57 Cal. 2d 463, 468, 20 Cal. Rptr. 609, 370 P.2d 313* , discussed in *§ 35.25[3][b]*]. One of the concurring opinions also held that plaintiff failed to establish a course of action because she was not denied the right to enter the cemetery which was the only service owed her. The denial of burial services was discrimination against the deceased and only living persons could claim the rights protected by former *Civ. Code § 51*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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3-35 California Points & Authorities § 35.25

§ 35.25 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Business Establishment for Violation of Unruh Civil Rights Act [Civ. Code § 51]--Failure to Show That Defendant Is Business Establishment

[1] FORM

[*Caption. See § 35.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION AGAINST A BUSINESS ESTABLISHMENT UNDER THE UNRUH CIVIL RIGHTS ACT IN THAT IT SHOWS ON ITS FACE THAT DEFENDANT IS NOT A BUSINESS ESTABLISHMENT.

A. Objection by Demurrer. [*See § 35.20, Paragraph A.*]

B. Rights of Accommodation. [*See § 35.20, Paragraph B.*]

C. Denial or Discrimination as Actionable. [*See § 35.20, Paragraph C.*]

D. Failure to Show That Defendant Is Business Establishment. A complaint for violation of the Unruh Civil Rights Act by a business establishment is subject to a demurrer if it fails to allege facts which show that the defendant is a business establishment (*Hill v. Miller (1966) 64 Cal. 2d 757, 759, 51 Cal. Rptr. 689, 415 P.2d 33*).

[*Optional*] **E. Permanency and Purpose of Livelihood or Gain Is Required.** The term "business establishment" in the Unruh Civil Rights Act requires a commercial force, organization, settled position, or location which is permanent and which involves activities carried on for the purpose of livelihood or gain (*Burks v. Poppy Construction Co. (1962) 57 Cal. 2d 463, 468, 20 Cal. Rptr. 609, 370 P.2d 313* ; *Abstract Inv. Co. v. Hutchinson (1962) 204 Cal. App. 2d 242, 254, 22 Cal. Rptr. 309*).

[*Optional*] **F. Rental of Single Unit.** The rental of a single family unit is not a "business establishment" as that term is used in the Unruh Civil Rights Act (*see* *Hill v. Miller (1966) 64 Cal. 2d 757, 759, 51 Cal. Rptr. 689, 415 P.2d 33*).

[*Optional*] **G. Private Social Club Is Not Necessarily a Business Establishment.** Truly private social clubs generally do not constitute business establishments within the meaning of the Unruh Civil Rights Act. Thus, such a club does not fall within the reach of the Act simply because of its status as a private social club (*Warfield v. Peninsula Golf & Country Club (1995) 10 Cal. 4th 594, 618, 42 Cal. Rptr. 2d 50, 896 P.2d 776*).

[*Optional*] **H. A Private Social Organization Is Not a Business Establishment Under the Unruh Act for Purposes of Membership Decisions.** An expressive social organization whose primary function is the inculcation of a specific set of values in its youth members and whose recreational facilities and activities are complementary to the organization's primary purpose is not a business establishment whose membership policies or decisions fall within the reach of the Unruh Civil Rights Act (*Curran v. Mount Diablo Council of the Boy Scouts (1998) 17 Cal. 4th 670, 696-700, 72 Cal. Rptr. 2d 410, 952 P.2d 218*).

[*Optional*] **I. A Private Religious School Is Not Necessarily a Business Establishment Under the Unruh Act.** A private religious school which is an expressive social organization whose primary function is the inculcation of its religious values in its youth members is not a business enterprise under the Unruh Act with regard to decisions regarding whether to suspend or expel students for violations of those values (*Doe v. California Lutheran High School Assn. (2009) 170 Cal. App. 4th 828, 835-841, 88 Cal. Rptr. 3d 475*).

[*Optional*] **J. Organization Is Not Deemed Business Establishment When to Do So Would Infringe on Members' *First Amendment* Rights.** The term "business establishment" is construed in the broadest sense *reasonably* possible, but any interpretation must consider the duty to avoid constitutional infirmity. Accordingly, an organization limited in its membership and its purpose is not a business establishment within the meaning of the Unruh Civil Rights Act when such a construction would constitute an infringement on the members' *First Amendment* rights (*Hart v. Cult Awareness Network (1993) 13 Cal. App. 4th 777, 786-787, 792-793, 16 Cal. Rptr. 2d 705*).

[*Optional*] **K. Unruh Act Does Not Apply to Legislative Action by Governmental Entities.** Because the Unruh Civil Rights Act, by its terms, bars discrimination only by business establishments, it does not apply to legislative enactments by governmental bodies (*Burnett v. San Francisco Police Department (1995) 36 Cal. App. 4th 1177, 1191-1192, 42 Cal. Rptr. 2d 879*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a general demurrer to a complaint for violation of the Unruh Act by a business establishment when the demurrer asserts that the complaint fails to state a cause of action in that it appears on the face of the complaint, or from a matter of which the court is required to or may take judicial notice, that defendant is not a business establishment.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, this memorandum may be used to support a motion for summary judgment [*see Code Civ. Proc. § 437c*] based on the contention that defendant is not a business establishment.

[c] Related Pleading and Practice Forms

For a general form of complaint against a business establishment alleging denial or discrimination in violation of the Unruh Act, see California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments* (Matthew Bender).

[d] Opposing Memoranda

The points and authorities set out in *§§ 35.40* and *35.49* may be used in an appropriate case to oppose a demurrer supported by this memorandum.

[3] Discussion of Authorities

[a] Failure to Show That Defendant Is Business Establishment

In ***Hill v. Miller*** *(1966) 64 Cal. 2d 757, 51 Cal. Rptr. 689, 415 P.2d 33* , plaintiff, an African-American, was the tenant of residential property owned by defendant. When defendant attempted to evict plaintiff because of his race, plaintiff filed an action for injunctive relief. Defendant demurred on the ground that plaintiff had failed to state sufficient facts to constitute a cause of action, and the trial court sustained defendant's demurrer without leave to amend. On appeal, the Supreme Court affirmed holding that plaintiff failed to state a cause of action under the *Fourteenth Amendment*, the Rumford Fair Housing Act [*Health & Safety Code § 35700 et seq.*] which was a predecessor of the current Fair Employment and Housing Act [*Gov. Code § 12900 et seq.*], and the Unruh Act. The Court pointed out that the Unruh Act prohibits discrimination only when it occurs in business establishments and in this regard, plaintiff failed to allege any facts which would bring him within the provisions of the Act (*64 Cal. 2d 757, 759)* .

[b] Permanency and Purpose of Livelihood or Gain Is Required

In ***Burks v. Poppy Construction Co.*** *(1962) 57 Cal. 2d 463, 20 Cal. Rptr. 609, 370 P.2d 313* , plaintiffs, who were black, brought an action for damages and injunctive relief under the Unruh Act against a company which developed, built, and sold tract homes based on the company's discrimination with respect to the sale of a house. The trial court sustained a general demurrer without leave to amend, and plaintiffs appealed. The Supreme Court reversed. In determining whether or not defendant was a "business establishment" as the phrase is used in the Act, the Court stated that the term "business" embraced everything about which one can be employed and was often synonymous with a calling, occupation, or trade engaged in for the purpose of making a livelihood or gain. The Court defined "establishment" as the place where one is permanently fixed for residence or business, or a permanent force, organization, or settled position, thus emphasizing the necessity of an on-going business purpose or plan (*57 Cal. 2d 463, 468)* . Applying these definitions to the activities of defendant construction company, the Court concluded that it was clear that defendant operated a business establishment within the meaning of the Act.

In ***Abstract Inv. Co. v. Hutchinson*** *(1962) 204 Cal. App. 2d 242, 22 Cal. Rptr. 309* , plaintiff attempted to evict defendant from his month-to-month tenancy. Defendant attempted to raise the affirmative defense that the real reason for eviction was defendant's race. The trial court refused to admit any evidence in regard to the affirmative defense and rendered judgment in favor of plaintiff. The court of appeal reversed. One of the issues considered by the court was whether plaintiff's actions, if the facts alleged in the affirmative defense were true, violated the Unruh Act. The only facts reported about defendant's business activities in the decision were that it was a corporation named Abstract Investment Company and it had leased an apartment to defendant. Applying the definitions of "business establishment" contained in *Burks v. Poppy Construction Co. (1962) 57 Cal. 2d 463, 468, 20 Cal. Rptr. 609, 370 P.2d 313* , the court concluded from the record that plaintiff's activity in renting housing accommodations was a business (*204 Cal. App. 2d*

242, 254) . However, it was impossible to determine without more facts whether or not plaintiff's business activities constituted a business establishment. According to the court, not all persons who rent their property to others can be held to operate business establishments and, plainly, many do not.

[c] Rental of Single Unit

The factual background of ***Hill v. Miller*** *(1966) 64 Cal. 2d 757, 51 Cal. Rptr. 689, 415 P.2d 33* , is discussed in *§ 35.25[3][a]*. In that case, the facts showed that defendant owned residential property which plaintiff occupied as tenant. The Supreme Court, in upholding the trial court's action sustaining defendant's demurrer, stated that plaintiff failed to allege facts that would bring him within the provisions of the Unruh Act for discrimination by a business establishment. In the Court's analysis, there was nothing in the record to suggest that plaintiff could successfully amend his complaint to state a cause of action under the Act (*64 Cal. 2d 757, 759)* .

The decision in *Hill* thus stands for the proposition that the rental of one residential unit does not constitute a business enterprise. Counsel should note that there is no case law specifically determining whether the sale of a single property, the rental of two units, or the acceptance of boarders in a home constitutes a business establishment, although *Swann v. Burkett (1962) 209 Cal. App. 2d 685, 695, 26 Cal. Rptr. 286* (set out in *§ 35.25[4][a]*) concluded that the rental of units in a triplex was a business establishment. It is true that under the California Fair Employment and Housing Act [*Gov. Code § 12900 et seq.*] (successor to the Fair Housing Law enacted in 1977), discrimination in all forms of sale or rental except renting to a single boarder in an owner-occupied house is prohibited if it is based on a protected characteristic enumerated in that law; however, the Fair Employment and Housing Act does not prohibit as many bases for discrimination as the Unruh Act does.

[d] Private Social Club Is Not Necessarily a Business Establishment

Warfield v. Peninsula Golf & Country Club *(1995) 10 Cal. 4th 594, 42 Cal. Rptr. 2d 50, 896 P.2d 776* , involved a country club that had a policy of excluding women from proprietary membership. Plaintiff's husband had a proprietary family membership in the defendant club, under which plaintiff was permitted to use the club's facilities. When plaintiff and her husband dissolved their marriage, the family law court awarded the family membership to plaintiff. The defendant then terminated the membership, tendering plaintiff the "redemption value" of the family membership. Plaintiff sued defendant for violation of the Unruh Civil Rights Act (*Civ. Code § 51*). The trial court granted defendant a directed verdict, in part on the ground that the club was not a "business establishment" within the meaning of the Act. The court of appeal affirmed.

On review, the California Supreme Court noted that in initial drafts of the bill that ultimately added the "business establishment" language to the Unruh Civil Rights Act, the bill had contained language referring specifically to "membership ... in all public or private groups, organizations [and] associations" (*10 Cal. 4th 594, 608)* . Plaintiff contended that the final version of the bill referring to "all business establishments of every kind whatsoever" was intended to incorporate all the entities (including private groups and associations) contained in the earlier drafts of the bill and that, therefore, private social clubs necessarily constitute business establishments within the meaning of the Act (*10 Cal. 4th 594, 614)* . The Court rejected this contention as unsupported by the Court's prior opinions (*10 Cal. 4th 594, 614-616)* and concluded that the Act does not apply to "truly private social clubs" (*10 Cal. 4th 594, 618)* . However, as further discussed in *§ 35.40[3][k]*, the Court held that the defendant club was a "business establishment" under the facts of this case and therefore reversed the judgment (*10 Cal. 4th 594, 621-623)* .

[e] Private Social Organization May Not Be Business Establishment for Purposes of Membership Decisions

In ***Curran v. Mount Diablo Council of the Boy Scouts*** *(1998) 17 Cal. 4th 670, 696-700, 72 Cal. Rptr. 2d 410, 952 P.2d 218* , plaintiff was a former Eagle Scout who applied to become an assistant scoutmaster and then publicly stated that he is a homosexual and expressed his commitment to communicating to others his view as to the acceptability and

morality of homosexuality. Defendant maintained that plaintiff's views conflict with its official position that homosexuality is immoral and rejected the application. Plaintiff sued under the Unruh Act for an injunction prohibiting defendant from rejecting the application. The trial court held that defendant's membership decisions are covered by the Unruh Act, but that application of the Act to prohibit defendant from rejecting plaintiff would violate defendant's members' federal constitutional right of expressive association, and entered judgment for defendant. The court of appeal affirmed the trial court. The California Supreme Court reversed on the issue of the application of the Unruh Act to the Boy Scouts' membership decisions, holding that for the purposes of its membership decisions, the Boy Scouts does not fall within the category of "business establishments" as that language is used in the Unruh Civil Rights Act (*17 Cal. 4th 670, 673)* . In a related case, *Randall v. Orange County Council, Boy Scouts of America (1998) 17 Cal. 4th 736, 744, 72 Cal. Rptr. 2d 453, 952 P.2d 261* , plaintiffs were twin brothers who joined the Cub Scouts and were later told that they could not participate or advance in scouting activities or be active members of the Boy Scouts because they refused to take part in religious requirements or activities, use the word "God" in the Boy Scout Pledge, worship God in song, prayer, or study, or earn religious medals or emblems. They sued under the Unruh Act for injunctive relief and damages. The trial court granted a permanent injunction against the Boy Scots, preventing it from excluding plaintiffs from membership or advancement in the organization. The court of appeal affirmed. The Supreme Court reversed based on its holding in *Curran* that the Boy Scouts' attributes and activities render the Unruh Act inapplicable to its membership decisions (*17 Cal. 4th 736, 744)* .

The Court in *Curran* held that the circumstance that the Boy Scouts is generally nonselective in its admission policies and affords membership to a large segment of the public is not itself sufficient to demonstrate that it reasonably could be characterized as the functional equivalent of a traditional place of public accommodation or amusement. The Court found that the Boy Scouts is an organization whose primary function is the inculcation of a specific set of values in its youth members, and its recreational facilities and activities are complementary to the organization's primary purpose (*17 Cal. 4th 670, 697)* . In *Isbister v. Boys' Club of Santa Cruz, Inc. (1985) 40 Cal. 3d 72, 219 Cal. Rptr. 150, 707 P.2d 212* , whose procedural and background facts are discussed in *§ 35.40[3][j]*, the Court found that the Boys' Club of Santa Cruz violated the Act by refusing to admit girls. The Court found that the Boys' Club possessed the attributes of a traditional place of public amusement so that membership was equivalent to admission to a place of public amusement. The Boy Scouts, however, meet in small groups intended to foster close friendship, trust and loyalty, and scouts are required to participate in a variety of activities, ceremonies, and rituals designed to teach the moral principles to which the organization subscribes (*17 Cal. 4th 670, 697-698)* .

In ***Warfield v. Peninsula Golf & Country Club*** *(1995) 10 Cal. 4th 594, 42 Cal. Rptr. 2d 50, 896 P.2d 776* , discussed in *§§ 35.25[3][d], 35.40[3][k]*, the Court had found that a private golf and country club, whose primary functions providing recreational facilities and food and drink to its members in return for dues and fees, subjected it to the Unruh Act because of the business transactions regularly conducted on the club's premises with nonmembers. The Court in *Curran* distinguished *Warfield*, on the basis that the Boy Scouts is an expressive social organization whose primary function is the inculcation of values in its youth members, whose small social group structure and activities are not comparable to those of a traditional place of public accommodation or amusement, and whose business transactions with nonmembers do not involve the sale of access to the basic activities or services offered by the organization. The Court had no doubt that the Act would apply to prohibit discrimination by the Boy Scouts in business transactions with nonmembers, but its membership policies or decisions are not within the reach of the Act (*17 Cal. 4th 670, 699-700)* .

[f] Private Religious School Is Not Necessarily Business Establishment

In ***Doe v. California Lutheran High School Assn.*** *(2009) 170 Cal. App. 4th 828, 88 Cal. Rptr. 3d 475* , two female high school students sued the private, nonprofit, religious high school they attended under the Unruh Civil Rights Act for expelling them based on their sexual orientation. The school was accredited by a secular accreditation authority and offered a college preparatory curriculum designed to meet University of California entrance requirements, including some classes mandated by the state Education Code. The school required students to pay tuition fees, and failure to pay tuition could result in suspension. The School allowed members of the public to buy tickets to its football games and

other sporting events, and, at football games, sold food, beverages, T-shirts, and "spirit items." It sold advertising space in its yearbook to members of its religion and non-members alike. It held fundraising auctions and golf tournaments that were open to the public. It also rented portions of its campus, such as the gymnasium or the football field, to outside organizations for their events. The school had a policy of refusing admission to homosexual students based on its religious values. It had a "Christian Conduct" rule providing that a student could be expelled for engaging in immoral or scandalous conduct on or off campus, including homosexual conduct. The enrollment application, which was supposed to be signed by both the student and a parent, provided that by signing the application, student and parent acknowledged their understanding that admission to the school placed the student under the policies and regulations of the school and obliged student and parent to accept and to cooperate with those policies and regulations." A student at the school reported to a teacher that one unnamed female student said that she loved another unnamed female student. The teacher discovered the identities of the students. The principal of the school called a meeting of the School's disciplinary committee, and the committee agreed that the principal should talk to the students immediately and if the report was true, they should be suspended. According to the principal, both girls admitted they loved each other, they had hugged and kissed each other, and they had told other students that they were lesbians. He therefore suspended them and had their parents come pick them up. Throughout this time, the students were not free to leave, but while they were waiting for their parents to pick them up, they were allowed to go to the restroom and to their lockers. The principal then sent the students' parents letters stating that they had been suspended because they had a bond of intimacy characteristic of a lesbian relationship, in violation of the "Christian Conduct" rule, and, by a unanimous vote of the school's board of directors, the school expelled them for engaging in a homosexual relationship. Because of religious beliefs, only men served on the board of directors, which was responsible for expulsions. The students alleged that, as a result, female students were disciplined more harshly than male students, and their evidence showed that some male students had been involved in incidents of drug or alcohol possession or use that had resulted in, at most, temporary suspensions (*170 Cal. App. 4th 828, 831-833)* .

The Court of Appeal held that the school was not a business establishment under the Unruh Act for these purposes. As a private nonprofit religious school, the school had as its overall purpose and function the education of children in keeping with its religious beliefs. The inculcation of a specific set of values, with programs designed to teach the moral principles to which the school subscribed, prevented the school from being considered a business establishment whose student admission practices would be subject to the Act. According to its mission statement, as set forth in its student handbook, the school existed "to glorify God by using his inerrant Word to nurture discipleship in Christ, ... equipping them for a lifetime of service to their Savior, their homes, churches, vocations and communities." Further, admission to the School, unlike membership in the Boy Scouts (*see Curran v. Mount Diablo Council of the Boy Scouts*, discussed at [e], *above*), was effectively selective and based on those values. The fact that the school was nonprofit was not controlling, but that did mean that it could not be deemed a business unless it had some significant resemblance to an ordinary for-profit business. The school's non-member transactions with the public did not involve the sale of access to the basic activities or services offered by the school. The allegations of the complaint that the students were expelled because of their sexual orientation went to the very heart of the reason for the existence of the school. Thus, the school could be a business and prohibited from discriminating with respect to its nonmember transactions, yet not be a business and not be prohibited from discriminating, with respect to decisions regarding the suspension or expulsion of students based on violations of the "Christian Conduct" rule. Further, the fact that the school charged students for its educational services did not bring those decisions within the purview of the Unruh Act, because an otherwise private organization can engage in some business transactions with members without the risk of becoming a business enterprise for purposes of the Unruh Civil Rights Act. Merely selling a service to like-minded persons for money is not enough to make a nonprofit organization a "business establishment." The fact that the school taught not only religious subjects, but also such garden-variety secular subjects as English, history, mathematics, and physical education also did not bring it within the Act, since the school's religious message was inextricably intertwined with its secular functions. Thus, the school established, beyond a triable issue of fact, that it was not a business establishment within the meaning of the Unruh Civil Rights Act (*170 Cal. App. 4th 828, 835-841)* .

[g] Organization Is Not Deemed Business Establishment When to Do So Would Infringe on Members' First

Amendment Rights

In ***Hart v. Cult Awareness Network*** *(1993) 13 Cal. App. 4th 777, 16 Cal. Rptr. 2d 705* , after plaintiff, a member of the Church of Scientology, was denied membership in defendant, an organization devoted to informing the public about the harmful effects of mind control and the unethical practices employed by cults, he filed an action for damages and preliminary and permanent injunctive relief alleging that defendant's actions constituted religious discrimination in violation of the Unruh Civil Rights Act. When the trial court denied the application for preliminary injunction, plaintiff appealed.

The court of appeal affirmed. The court explained that although the term "business establishment" is construed in the broadest sense reasonably possible, and an organization is not excluded from the scope of the Unruh Civil Rights Act simply because it is nonprofit, *Civ. Code § 51* does not govern organizations that are truly private (*13 Cal. App. 4th 777, 786)* . Defendant claimed that it was a private organization, and that defining it as a business establishment would constitute an infringement of its members' rights of freedom of association. It said that admitting members of a group like Scientology, which fits the category of a cult would lead to defendant's destruction. The court examined the effect of applying the Unruh Act to defendant and its members' constitutionally protected freedom of association, concluding that such an application would constitute an infringement (*13 Cal. App. 4th 777, 787-792)* . (A thorough discussion of this analysis is contained in Ch. 22, *Associations and Clubs.*) The court then explained that its duty to construe the term "business establishment" in the broadest sense *reasonably* possible includes the duty to avoid constitutional infirmity. Accordingly, the court held that defendant is not a business establishment within the meaning of the Unruh Act (*13 Cal. App. 4th 777, 792-793)* .

[h] Unruh Act Does Not Apply to Legislative Action by Governmental Entities

In ***Burnett v. San Francisco Police Department*** *(1995) 36 Cal. App. 4th 1177, 42 Cal. Rptr. 2d 879* , plaintiffs, who consisted of a group of adults over the age of 18 and under the age of 21 as well as several cabaret owners, brought an action against a city and its police department, challenging their power to enforce a city ordinance that precluded persons under the age of 21 from entering a cabaret. A "cabaret" was defined under the ordinance as an establishment open between the hours of 2 a.m. and 6 a.m. that either serves food or beverages for consumption on the premises or provides entertainment on the premises. The trial court entered judgment for the defendants, and the court of appeal affirmed.

Plaintiffs argued, among other things, that the ordinance violated the Unruh Civil Rights Act because it unlawfully discriminated on the basis of age and that it caused businesses to unlawfully discriminate on the basis of age. In rejecting this argument, the court of appeal noted that, by its plain language, the Act bars discrimination on various bases by *business establishments.* The court held that there was nothing in the Act that precludes *legislative bodies* from enacting ordinances that make age distinctions among adults (*36 Cal. App. 4th 1177, 1191-1192)* . The court further noted that the ordinance did not force the plaintiff cabaret owners to violate the Unruh Act because the Act did not "confer any right or privilege ... which is conditioned or limited by law." Thus, the Act did not hold the plaintiff cabaret owners accountable for following the dictates of the ordinance (*36 Cal. App. 4th 1177, 1192)* .

[4] Additional Authorities

[a] Rental of Single Unit

In *Swann v. Burkett (1962) 209 Cal. App. 2d 685, 26 Cal. Rptr. 286* , plaintiffs brought suit under the Unruh Civil Rights Act to recover damages for defendant's failure to rent to plaintiffs units in a triplex, which they owned, but in which they did not reside. The trial court granted defendants' motion for a nonsuit on the ground that the activities of defendants in connection with the triplex did not constitute a "business establishment." On appeal, the court of appeal limited the issue to consideration of whether rental of a triplex is a business establishment. The court pointed out that

the rental by an owner of small rental units was not regulated by the predecessor of the Unruh Act and did not appear to constitute operation of a business establishment. If the Legislature had intended such a radical change in the law, it should have shown its intention clearly. Nevertheless, noting that the Supreme Court defined "business establishment" in *Burks v. Poppy Construction Co. (1962) 57 Cal. 2d 463, 20 Cal. Rptr. 609, 370 P.2d 313* , to include engaging in a permanent settled position for gain, the court found that defendants' behavior came within the terms of this definition, particularly since defendants also rented two other properties (*209 Cal. App. 2d 685, 695)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil Rights LawCivil Rights ActsGeneral OverviewCivil Rights LawPractice & ProcedureGeneral Overview

California Points & Authorities

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Volume 3 Chapters 34-39 CHECKS AND BANKS---to---CIVIL SERVICE
CHAPTER 35 CIVIL RIGHTS: UNRUH CIVIL RIGHTS ACT
PART II. FORMS
A. Supporting Demurrer to Complaint

3-35 California Points & Authorities § 35.26

§ 35.26 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Business Establishment for Violation of Unruh Civil Rights Act [Civ. Code § 51]--Denial or Discrimination Outside State

[1] FORM

[*Caption. See § 35.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION UNDER THE UNRUH CIVIL RIGHTS ACT IN THAT IT SHOWS ON ITS FACE THAT DEFENDANT'S ACTION WHICH ALLEGEDLY DISCRIMINATED IN REGARD TO OR DENIED RIGHTS OF ACCOMMODATION ESTABLISHED BY THE ACT OCCURRED OUTSIDE OF CALIFORNIA.

A. Objection by Demurrer. [*See § 35.20, Paragraph A.*]

B. Rights of Accommodation. [*See § 35.20, Paragraph B.*]

C. Denial or Discrimination as Actionable. [*See § 35.20, Paragraph C.*]

D. Denial or Discrimination Outside State. A complaint for violation of the Unruh Civil Rights Act is subject to demurrer for failure to state a cause of action if it shows on its face that the alleged discrimination in regard to or denial of rights of accommodation established by the Act occurred outside of California (*Archibald v. Cinerama Hawaiian Hotels, Inc. (1977) 73 Cal. App. 3d 152, 159, 140 Cal. Rptr. 599*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a general demurrer to a complaint for violation of the Unruh Civil Rights Act when the demurrer asserts that the complaint fails to state a cause of action in that it appears on the face thereof, or from a matter of which the court is required to or may take judicial notice, that the denial or discrimination complained of occurred outside California.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, this memorandum may be used to support a motion for summary judgment [*see Code Civ. Proc. § 437c*] based on the contention that a denial or discrimination prohibited by the Unruh Civil Rights Act did not occur.

[c] Related Pleading and Practice Forms

For a general form of complaint against a business establishment alleging denial or discrimination in violation of the Unruh Civil Rights Act, see California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments* (Matthew Bender).

[3] Discussion of Authorities

[a] Denial or Discrimination Outside State

The facts of ***Archibald v. Cinerama Hawaiian Hotels, Inc.*** *(1977) 73 Cal. App. 3d 152, 140 Cal. Rptr. 599* , are discussed in *§ 35.21[3][a]*. In holding that plaintiff could not show a violation of the Unruh Civil Rights Act, the court stated that by its express language, the Act applies only within California whereas the discriminatory act that was the basis of plaintiff's complaint occurred in Hawaii (*73 Cal. App. 3d 152, 159)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil Rights LawCivil Rights ActsGeneral OverviewCivil Rights LawPractice & ProcedureGeneral Overview

California Points & Authorities

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Volume 3 Chapters 34-39 CHECKS AND BANKS---to---CIVIL SERVICE
CHAPTER 35 CIVIL RIGHTS: UNRUH CIVIL RIGHTS ACT
PART II. FORMS
A. Supporting Demurrer to Complaint

3-35 California Points & Authorities § 35.27

§ 35.27 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Business Establishment for Violation of Unruh Civil Rights Act [Civ. Code § 51]--Limitations Period Has Run

[1] FORM

[*Caption. See § 35.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION UNDER THE UNRUH CIVIL RIGHTS ACT IN THAT IT SHOWS ON ITS FACE THAT IT IS BARRED BY THE TWO YEAR STATUTE OF LIMITATIONS FOR A CLAIM UNDER THE UNRUH CIVIL RIGHTS ACT.

A. Objection by Demurrer. [*See § 35.20, Paragraph A.*]

B. Limitations Period for Claim Under Unruh Act Is Two Years. The limitations period for an action brought under the Unruh Civil Rights Act is the two-year limitations period specified in *Code Civ. Proc. § 335.1* for personal injury actions (*see Gatto v. County of Sonoma (2002) 98 Cal. App. 4th 744, 754-760, 120 Cal. Rptr. 2d 550* (decided under former *Code Civ. Proc. § 340(3)* when statute of limitations for personal injury actions was one year); *West Shield Investigations & Sec. Consultants v. Superior Court (2000) 82 Cal. App. 4th 935, 953, 98 Cal. Rptr. 2d 612* (decided under former *Code Civ. Proc. § 340(3)* when statute of limitations for personal injury actions was one year)).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a general demurrer to a complaint for violation of the Unruh Civil Rights Act when the demurrer asserts that the complaint fails to state a cause of action in that it appears on the face of the complaint, or from a matter of which the court is required to or may take judicial notice, that the statute of limitations for the claim has run.

Counsel should insert argument in this form showing the relationship between the facts of the case, such as when the alleged act constituting the violation of the Unruh Act occurred and when the complaint was filed, and the points of law stated.

[b] Related Uses

With appropriate modifications, this memorandum may be used to support a motion for summary judgment [*see Code Civ. Proc. § 437c*] based on the contention that the limitations period for a claim under the Unruh Civil Rights Act has run. This memorandum of points and authorities may also be submitted in support of a general demurrer to a complaint for violation of *Civ. Code § 52.1* or *51.9* when the demurrer asserts that the complaint fails to state a cause of action in that it appears on the face of the complaint, or from a matter of which the court is required to or may take judicial notice, that the statute of limitations for the claim has run.

[c] Related Pleading and Practice Forms

For a general form of complaint against a business establishment alleging denial or discrimination in violation of the Unruh Civil Rights Act, see California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments* (Matthew Bender).

[3] Discussion of Authorities

[a] Limitations Period for Claim Under Unruh Act Is Two Years

In ***Gatto v. County of Sonoma*** *(2002) 98 Cal. App. 4th 744, 120 Cal. Rptr. 2d 550* , discussed in *§ 35.21[3][k]*, the court of appeal agreed with the court in *West Shield*, discussed *below*, that the limitations period for claims under *Civ. Code §§ 51, 52.1* was one year (now two years under *Code Civ. Proc. § 335.1*, effective January 1, 2003). However, the court found that there is a problem created by a lack of clarity as to which provisions of the Civil Code actually comprise the Unruh Act and the Legislature's failure to specify the statute or statutes of limitations applicable to the provisions of the Civil Code commonly thought to be components of the Unruh Act (*98 Cal. App. 4th 744, 754-760)* .

In ***West Shield Investigations & Sec. Consultants v. Superior Court*** *(2000) 82 Cal. App. 4th 935, 953, 98 Cal. Rptr. 2d 612* , a minor sued a wilderness program company in New Mexico with whom her parents contracted for a six-week wilderness expedition for her, a security company retained by her parents to transport her to the wilderness program, and several individual defendants, including the owner and employees of the wilderness program, the president, and employees of the security company. After attending the expedition and returning to California, the minor, who was then 17 years old, was emancipated from her parents by court order on May 8, 1995. She turned 18 on September 8, 1995. She filed her complaint on September 9, 1996, and a first amended complaint on September 4, 1997. She alleged 11 causes of action against all defendants, including, inter alia, interference with civil rights under *Civ. Code § 52.1* and sexual harassment under *Civ. Code § 51.9*. The defendants filed motions for summary adjudication on the civil rights claims on the ground that they were barred by the affirmative defense of the one-year statute of limitations for personal injury claims set forth in former *Code Civ. Proc. § 340(3)* and the one-year statute of limitations was not tolled until plaintiff's majority in accordance with *Code Civ. Proc. § 352*, but instead began to run when plaintiff was emancipated by court order on May 8, 1995. The trial court denied the motion. The defendants filed writ petitions seeking extraordinary relief.

The court of appeal issued a writ of mandate directing the trial court to vacate its denial of summary adjudication for defendants on the minor's civil rights causes of action and to enter a new order granting summary adjudication. The court held that the applicable limitations period was the former *Code Civ. Proc. § 340(3)* one-year statute of limitations for personal injury actions, citing *Mitchell v. Sung (N.D. Cal. 1993) 816 F. Supp. 597* . The court noted that three federal courts have held that the statute of limitations for Unruh Act claims is the three year period for actions based on statutory liability provided by *Code Civ. Proc. § 338(a)*, citing *Olympic Club v. Underwriters at Lloyd's London (9th Cir. 1993) 991 F.2d 497, 501* (dicta), *Kramer v. Regents of the University of California (N.D. Cal. 1999) 81 F. Supp. 2d 972, 977* (district court without analysis followed *Olympic Club* and *Independent Housing Services* in stating applicable statute of limitations for Unruh Act claims is three-year limitations period for state statutory claims), and *Independent Housing Services v. Fillmore Center Associates (N.D. Cal. 1993) 840 F. Supp. 1328, 1359* . However, the court agreed with the district court in *Mitchell v. Sung*, that the one-year statute of limitations was applicable because the Unruh Act did not create a new form of liability, but rather, liability for violation of civil rights is derived from common law [*Warfield v. Peninsula Golf & Country Club (1995) 10 Cal. 4th 594, 607, 42 Cal. Rptr. 2d 50, 896 P.2d 776* (indicating that common law contains the roots of the Unruh Act)]. Because the Unruh Act as set forth at *Civ. Code § 51 et seq.* constitutes a refinement and codification of existing common law liability for violation of civil rights, the applicable statute of limitations for Unruh Act claims was former *Code Civ. Proc. § 340(3)*, the one-year limitations period for personal injury actions, rather than *Code Civ. Proc. § 338(a)*, the three-year limitations period for liability created on a statute. The court found its conclusion consistent with the statutory language of former *Code Civ. Proc. § 340(3)*, which provided that the one-year limitations period applies to actions for injury caused by the wrongful act or neglect of another, and with rulings in the context of analogous federal civil rights law as set forth in *42 U.S.C. § 1983* (*82 Cal. App. 4th 935, 953)* . The court then held that application of the one-year statute of limitations to the civil rights causes of action resulted in both causes of action being time-barred as a matter of law, since the complaint was not filed within the one year period following her emancipation (*82 Cal. App. 4th 935, 953-954)* .

NOTE:

Effective January 1, 2003, the Legislature amended *Code Civ. Proc. § 340* and added *Code Civ. Proc. § 335.1* to make the statute of limitations in a personal injury action two years.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil Rights LawCivil Rights ActsGeneral OverviewCivil Rights LawPractice & ProcedureGeneral Overview

California Points & Authorities

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Volume 3 Chapters 34-39 CHECKS AND BANKS---to---CIVIL SERVICE
CHAPTER 35 CIVIL RIGHTS: UNRUH CIVIL RIGHTS ACT
PART II. FORMS
A. Supporting Demurrer to Complaint

3-35 California Points & Authorities § 35.28

§ 35.28 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Business Establishment for Violation of Unruh Civil Rights Act [Civ. Code § 51]--Plaintiff Did Not Tender the Purchase Price for Defendant's Services or Products

[1] FORM

[*Caption. See § 35.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION UNDER THE UNRUH CIVIL RIGHTS ACT IN THAT IT SHOWS ON ITS FACE THAT PLAINTIFF DID NOT TENDER THE PURCHASE PRICE FOR DEFENDANT'S SERVICES OR PRODUCTS.

A. Objection by Demurrer. [*See § 35.20, Paragraph A.*]

B. Plaintiff Did Not Tender the Purchase Price for Defendant's Services or Products. In order to have standing to sue for alleged discriminatory practices in violation of the Unruh Civil Rights Act, a person must tender the purchase price for a business's services or products (*Surrey v. TrueBeginnings, LLC (2008) 168 Cal. App. 4th 414, 418-420, 85 Cal. Rptr. 3d 443*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a general demurrer to a complaint for violation of the Unruh Civil Rights Act when the demurrer asserts that the complaint fails to state a cause of action in that it appears on the face of the complaint, or from a matter of which the court is required to or may take judicial notice, that plaintiff lacks standing to sue for alleged violations of the Unruh Civil Rights Act because plaintiff did not tender to defendant the purchase price of defendant's services or products.

Counsel should insert argument in this form showing the relationship between the facts of the case, such as the plaintiff's failure to tender to defendant the purchase price of defendant's services or products, and the points of law stated.

[b] Related Uses

With appropriate modifications, this memorandum may be used to support a motion for summary judgment [*see Code Civ. Proc. § 437c*] based on the contention that plaintiff lacks standing to sue for alleged violations of the Unruh Civil Rights Act. This memorandum also may be submitted in support of a general demurrer to a complaint for violation of *Civ. Code § 52.1* or *51.9* when the demurrer asserts that the complaint fails to state a cause of action in that it appears on the face of the complaint, or from a matter of which the court is required to or may take judicial notice, that plaintiff lacks standing to sue for alleged violations of the Unruh Civil Rights Act.

[c] Related Pleading and Practice Forms

For a general form of complaint against a business establishment alleging denial or discrimination in violation of the Unruh Civil Rights Act, see California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments* (Matthew Bender).

[3] Discussion of Authorities

In ***Surrey v. TrueBeginnings, LLC*** *(2008) 168 Cal. App. 4th 414, 85 Cal. Rptr. 3d 443* , defendant operated an online matchmaking service, which had a disproportionately high percentage of male patrons, which defendant sought to rectify by offering free services to women who joined. Plaintiff, a male, visited the Web site with the intent of utilizing its services, but after discovering the discrepancy in its charges, he did not subscribe to or pay for its services. He then filed an action alleging that defendant's differential pricing for its services violated the Unruh Civil Rights Act. Defendant moved for summary judgment on various grounds, including that plaintiff was not entitled to sue because he was never "denied" the rights protected under the Act. The trial court granted defendant's summary judgment motion on the ground that plaintiff lacked standing to sue under the Unruh Civil Rights Act because he had never requested or paid for defendant's services (*168 Cal. App. 4th 414, 416-417)* .

The Court of Appeal affirmed. The language of *Civil Code § 52(a)* bestows standing to sue only on those persons whose rights under the Unruh Civil Rights Act have been "denied." The mere fact that plaintiff became aware defendant was offering a discount policy for women subscribers at the time he accessed its Web site did not constitute a denial of his antidiscrimination rights under the Act. Since he did not attempt to subscribe to defendant's services, his interest in preventing discrimination was arguably no greater than the interest of the public at large (*168 Cal. App. 4th 414, 417-420)* .

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3-35 California Points & Authorities §§ 35.29-35.39

[Reserved]

§§ 35.29[Reserved]

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Volume 3 Chapters 34-39 CHECKS AND BANKS---to---CIVIL SERVICE
CHAPTER 35 CIVIL RIGHTS: UNRUH CIVIL RIGHTS ACT
PART II. FORMS
B. Opposing Demurrer to Complaint

3-35 California Points & Authorities § 35.40

§ 35.40 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Business Establishment for Violation of the Unruh Civil Rights Act [Civ. Code § 51]--Defendant Is Business Establishment

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEMURRER TO COMPLAINT
vs.	)	
_____ [*name*(*s*)]	)	Date: _____
Defendant(s).	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE DEMURRER SHOULD BE OVERRULED BECAUSE PLAINTIFF'S COMPLAINT FOR VIOLATION OF THE UNRUH CIVIL RIGHTS ACT SATISFIES THE REQUIREMENTS FOR PLEADING THAT DEFENDANT IS A BUSINESS ESTABLISHMENT IN THAT IT ALLEGES FACTS SHOWING THAT DEFENDANT IS A PERMANENT _____ [COMMERCIAL FORCE *or* ORGANIZATION *or* SETTLED POSITION] THAT CARRIES ON ACTIVITIES FOR THE PURPOSE OF LIVELIHOOD OR GAIN.

A. Liberal Construction as Necessary. The Unruh Civil Rights Act is entitled to a liberal construction that will effect its purposes and promote justice (*Winchell v. English (1976) 62 Cal. App. 3d 125, 128, 133 Cal. Rptr. 20*).

B. Permanent Activities Carried Out for Livelihood or Gain as Business Establishment. A complaint for violation of the Unruh Civil Rights Act sufficiently pleads that defendant is a business establishment if it alleges facts which show that defendant is a permanent commercial force, organization, or settled position that carries on activities for the purpose of livelihood or gain (*Burks v. Poppy Construction Co. (1962) 57 Cal. 2d 463, 468-469, 20 Cal. Rptr. 609, 370 P.2d 313* ; *Rotary Club of Duarte v. Board of Directors (1986) 178 Cal. App. 3d 1035, 1047-1048, 224 Cal. Rptr. 213*).

[*Optional*] **C. Business Conducted at Specified Location as Business Establishment.** The transaction of business activities at a specified location is a business establishment within the meaning of the Unruh Civil Rights Act (*Lee v. O'Hara (1962) 57 Cal. 2d 476, 478, 20 Cal. Rptr. 617, 370 P.2d 321*).

[*Optional*] **D. Professional Services as Business Establishment.** The provision of professional services for the purpose of livelihood or gain is a business establishment within the meaning of the Unruh Civil Rights Act (*Washington v. Blampin (1964) 226 Cal. App. 2d 604, 606-608, 38 Cal. Rptr. 235*).

[*Optional*] **E. Developing, Building, or Selling Housing Accommodations as Business Establishment.** The activity of developing, building, or selling housing accommodations is a business establishment within the meaning of the Unruh Civil Rights Act (*Burks v. Poppy Construction Co. (1962) 57 Cal. 2d 463, 469, 20 Cal. Rptr. 609, 370 P.2d 313*).

[*Optional*] **F. Physician as Business Establishment.** The practice of the profession of a physician for purposes of livelihood or gain is a business establishment within the meaning of the Unruh Civil Rights Act (*Washington v. Blampin (1964) 226 Cal. App. 2d 604, 608, 38 Cal. Rptr. 235*).

[*Optional*] **G. Real Estate Broker as Business Establishment.** The activity of real estate brokers is a business establishment within the meaning of the Unruh Civil Rights Act (*Lee v. O'Hara (1962) 57 Cal. 2d 476, 478, 20 Cal. Rptr. 617, 370 P.2d 321*).

[*Optional*] **H. Rental of Two Housing Accommodations as Business Establishment.** The rental of at least two housing accommodations by their owner is a business establishment within the meaning of the Unruh Civil Rights Act (*Swann v. Burkett (1962) 209 Cal. App. 2d 685, 695, 26 Cal. Rptr. 286*).

[*Optional*] **I. Condominium Association as Business Establishment.** A condominium association has sufficient businesslike attributes to fall within the scope of a business establishment, within the meaning of the Unruh Civil Rights Act (*O'Connor v. Village Green Owners Ass'n (1983) 33 Cal. 3d 790, 795-796, 191 Cal. Rptr. 320, 662 P.2d 427*).

[*Optional*] **J. Public, Nonexclusive Club or Organization as Business Establishment.** All commercial and noncommercial entities open to and serving the general public in a nonexclusive manner are business establishments within the meaning of the Unruh Civil Rights Act (*Ibister v. Boys' Club of Santa Cruz, Inc. (1985) 40 Cal. 3d 72, 78-81, 219 Cal. Rptr. 150, 707 P.2d 212*).

[*Optional*] **K. Effect of Private Club's Regular Business Transactions With Nonmembers.** A private social club that might otherwise be outside the reach of the Unruh Civil Rights Act will be treated as a business establishment for purposes of the Act if it regularly conducts business transactions on its premises with persons who are not members of the club (*Warfield v. Peninsula Golf & Country Club (1995) 10 Cal. 4th 594, 621, 42 Cal. Rptr. 2d 50, 896 P.2d 776*).

[*Optional*] **L. Nonprofit and Noncommercial Entity as Business Establishment.** Nonprofit and noncommercial organizations may be business establishments within the meaning of the Unruh Civil Rights Act (*Pines v. Tomson*

(1984) 160 Cal. App. 3d 370, 383-386, 206 Cal. Rptr. 866).

[*Optional*] **M. Insurance Company Is Business Establishment.** the Unruh Civil Rights Act applies to insurance companies (*Goldman v. Standard Ins. Co. (9th Cir. 2003) 341 F.3d 1023, 1027)* .
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a demurrer to a complaint for violation of the Unruh Civil Rights Act by a business establishment when the demurrer asserts that the complaint fails to state a cause of action because it fails to allege facts showing that defendant is a business establishment. The grounds for opposing the demurrer are that sufficient facts are alleged to show that defendant carries on an enterprise with some degree of permanence or continuity for the purposes of livelihood or gain. The Optional Paragraphs may be used as appropriate, depending on the facts of the case.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

Related points and authorities for use in opposing a demurrer on the ground that the complaint fails to allege facts showing that defendant is a business establishment are set out in *§ 35.49*.

In an appropriate case, this memorandum may be submitted in opposition to a demurrer supported by the points set out in *§ 35.25*.

[b] Related Uses

With appropriate modifications, this memorandum may be used to oppose a motion for summary judgment [*see Code Civ. Proc. § 437c*] based on the contention that defendant is not a business establishment.

[c] Related Pleading and Practice Forms

For a general form of complaint against a business establishment alleging denial or discrimination in violation of the Unruh Civil Rights Act, see California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments* (Matthew Bender).

[d] Related Memoranda

For points and authorities relating to actions of an organization that are not protected by the constitutional right of freedom of association, see Ch. 22, *Associations and Clubs* .

[3] Discussion of Authorities

[a] Liberal Construction as Necessary

In ***Winchell v. English*** *(1976) 62 Cal. App. 3d 125, 133 Cal. Rptr. 20* , plaintiff brought an action under the Unruh Act against defendants who operated a mobile home court on the theory that defendants gave permission to plaintiffs to sublet to others and then discriminated against them because plaintiffs let space to, and associated with, persons of the black race. The trial court sustained a demurrer to the complaint with leave to amend and, after plaintiffs failed to amend, dismissed the complaint. On appeal, the court of appeal reversed. The court determined that the only issue in the case was whether or not discrimination by a business establishment against persons on account of their association with others of the black race was actionable under the Act. The court treated the issue as one of statutory interpretation, which in the case of the Unruh Civil Rights Act requires a liberal, and not a strict, construction with a view to effect the object of the Act and to promote justice (*62 Cal. App. 3d 125, 128)* .

[b] Permanent Activities Carried Out for Livelihood or Gain as Business Establishment

The factual background of ***Burks v. Poppy Construction Co.*** *(1962) 57 Cal. 2d 463, 20 Cal. Rptr. 609, 370 P.2d 313* , is discussed in *§ 35.25[3][b]*. In that decision, the Supreme Court was required to determine whether or not a company engaged in the business of developing, building, and selling a tract of housing accommodations was a business establishment as that term is used in the Unruh Civil Rights Act. The Court noted that because the Legislature added the words "all" and "of every kind whatsoever" to describe business establishments in the Act without any exception and without specification of particular kinds of enterprises, there was no doubt that the term was used in the broadest sense reasonably possible (*57 Cal. 2d 463, 468)* . This conclusion was buttressed in the Court's view by the fact that the original version of the bill presented to the Legislature referred to specific types of enterprises but that these specific references were deleted in the final version, suggesting that the Legislature conceived these specific references to be mere surplusage which were unnecessary in view of the broad language of the Act as finally passed (*57 Cal. 2d 463, 469)* . The Court pointed out that the word "business" embraces everything about which one can be employed and is often synonymous with activities engaged in for the purpose of making a livelihood or gain (*57 Cal. 2d 463, 468)* . The word "establishment," when used broadly, includes such meanings as a fixed location, permanent commercial force or organization, or permanent settled position as in life or business (*57 Cal. 2d 463, 468-469)* . Counsel will note that other than the decision in *Abstract Inv. Co. v. Hutchinson (1962) 204 Cal. App. 2d 242, 255, 22 Cal. Rptr. 309* (set out in *§ 35.25[3][b]*), which ruled that a mere showing of some economic activity is not sufficient to establish a business enterprise, there are no explicit limitations on the types of economic endeavors to which the term may be applied. In particular, *Burks* does not purport to limit the definition of the term "enterprise"; the decision only provides examples of what the term, when broadly defined, includes.

In ***Rotary Club of Duarte v. Board of Directors*** *(1986) 178 Cal. App. 3d 1035, 224 Cal. Rptr. 213* , defendant, board of directors of an international organization, revoked the charter of plaintiff, a local chapter, because plaintiff had admitted women as members. Plaintiff and two of the women admitted as members brought an action for injunctive and declaratory relief. The trial court granted judgment for defendant, finding that neither defendant nor plaintiff organization was a "business establishment" that provided "goods, services, and facilities" to members within the meaning of the Unruh Act. Plaintiff appealed.

The court of appeal reversed after a thorough analysis of the Unruh Act and the many reasons why defendant was within its scope. The court noted that the Unruh Act is liberally construed with a view to effectuating the purposes for which it was enacted and to promote justice; it is a declaration of the state's public policy mandate and objective that men and women be treated equally (*178 Cal. App. 3d 1035, 1046-1047)* . Citing *O'Connor v. Village Green Owners Ass'n (1983) 33 Cal. 3d 790, 191 Cal. Rptr. 320, 662 P.2d 427* , and its discussion of earlier cases, the court said that the words "all" and "of every kind whatsoever" indicate without doubt that the phrase "business establishments" was used in the broadest sense reasonably possible. "Business" embraces everything about which one can be employed and is synonymous with calling, occupation, or trade, engaged in for the purpose of making a livelihood or gain. "Establishment" includes not only a fixed location, such as the place where one is permanently fixed for residence or business, but also a permanent commercial force or organization of a permanent settled position (*178 Cal. App. 3d*

1035, 1048) . The court concluded that defendant was covered by the Unruh Act, even though it is a nonprofit organization, due to the business-like attributes of its organizational structure, financial concerns, commercial interest in form of organizational emblem royalties, probable commercial and business benefits as motivation for membership, and the limitation of membership to business and professional leaders (*178 Cal. App. 3d 1035, 1051-1058)* .

[c] Business Conducted at Specified Location as Business Establishment

In ***Lee v. O'Hara*** *(1962) 57 Cal. 2d 476, 20 Cal. Rptr. 617, 370 P.2d 321* , plaintiff, a black man, filed a complaint for violation of the Unruh Civil Rights Act against defendants who were licensed real estate brokers. The complaint alleged that defendants had been retained to rent certain described premises to any member of the public ready, willing, and able to rent the premises on the terms offered, but that defendants refused to rent to plaintiff solely because of his race. The trial court sustained a general demurrer without leave to amend, and plaintiff appealed to the Supreme Court, which reversed. On appeal, defendant real estate brokers contended that even though the Unruh Civil Rights Act applies to real estate transactions, it does not apply to real estate brokers acting as such. To rebut this contention, the Court noted that *Bus. & Prof. Code § 10162* required licensed real estate brokers to maintain a definite location as an office for the transaction of business. The Court held that the office which a real estate broker is required to maintain at a specified location and from which business must be transacted is a business establishment within the meaning of the Unruh Civil Rights Act (*57 Cal. 2d 476, 478)* .

[d] Professional Services as Business Establishment

In ***Washington v. Blampin*** *(1964) 226 Cal. App. 2d 604, 38 Cal. Rptr. 235* , plaintiffs brought an action under the Unruh Civil Rights Act to recover damages from defendant physician who allegedly refused to furnish them with medical services solely because of their race. The municipal court granted defendant's motion for judgment on the pleadings on the ground that the Unruh Civil Rights Act does not apply to the services of physicians. Plaintiffs appealed to the appellate department of the superior court which reversed and certified the case to the court of appeal. The court of appeal reversed the Action of the municipal court. The court noted that prior cases in different areas of law had referred to the practice of medicine as a business, that the *Supreme Court in Burks v. Poppy Construction Co. (1962) 57 Cal. 2d 463, 468-469, 20 Cal. Rptr. 609, 370 P.2d 313* , had defined "business" for Unruh Civil Rights Act purposes as an activity engaged in for the purpose of making a livelihood, and that although the Legislature deleted the term "professional services" from the original version of the Unruh Civil Rights Act bill, this deletion indicates that the Legislature considered the specific reference to be mere surplusage. The court concluded that these factors point inevitably to the conclusion that the phrase "business establishments of every kind whatsoever" was intended to embrace professional services (*226 Cal. App. 2d 604, 606-608)* .

[e] Developing, Building, or Selling Housing Accommodations as Business Establishment

The factual background of ***Burks v. Poppy Construction Co.*** *(1962) 57 Cal. 2d 463, 20 Cal. Rptr. 609, 370 P.2d 313* , is discussed in *§ 35.25[3][b]*. In that case, the Supreme Court held that it was clear that defendants who were in the business of developing, building, and selling a tract of homes operated a "business establishment" as that term is used in the Unruh Civil Rights Act, even though the Legislature, at the time that it passed the Unruh Civil Rights Act, also enacted the Hawkins Act, which was a predecessor of the California Fair Employment and Housing Act [*Gov. Code § 12900 et seq.*] and which also prohibited discrimination in housing (*57 Cal. 2d 463, 469)* .

[f] Physician as Business Establishment

Washington v. Blampin *(1964) 226 Cal. App. 2d 604, 38 Cal. Rptr. 235* , is discussed in *§ 35.40[3][d]*.

[g] Real Estate Broker as Business Establishment

Lee v. O'Hara *(1962) 57 Cal. 2d 476, 20 Cal. Rptr. 617, 370 P.2d 321* , is discussed in *§ 35.40[3][c]*.

[h] Rental of Two Housing Accommodations as Business Establishment

The factual background of ***Swann v. Burkett*** *(1962) 209 Cal. App. 2d 685, 26 Cal. Rptr. 286* , is discussed in *§ 35.25[4][a]*. In that case, the court of appeal had to decide whether the rental of a triplex by its owner is a "business establishment" as that term is used in the Unruh Civil Rights Act. The court defined the rental of a triplex as the rental of three, or if the building is owner-occupied, two units in a structure consisting of three units or flats, complete in themselves, and rented separately. It pointed out that the rental of these units by their owner did not obviously constitute the operation of a "business establishment" and that such activity was clearly distinguishable from the Activities of developing, building, and selling a tract of houses or acting as a real estate broker who sells real property, which had been held to be business establishments in earlier cases. Nevertheless, as the court pointed out, *Burks v. Poppy Construction Co. (1962) 57 Cal. 2d 463, 468-469, 20 Cal. Rptr. 609, 370 P.2d 313* , clearly defined a business establishment as engaging in a permanent, settled position for gain and this definition definitely applied to the owner of the triplex (*209 Cal. App. 2d 685, 695)* .

[i] Condominium Association as Business Establishment

In ***O'Connor v. Village Green Owners Ass'n*** *(1983) 33 Cal. 3d 790, 191 Cal. Rptr. 320, 662 P.2d 427* , plaintiffs lived in a condominium development that excluded children by means of an age restriction in the covenants, conditions, and restrictions of the owners' association. After the birth of their son, the association notified plaintiffs that their child's presence violated that restriction. Plaintiffs sought to have the age restriction declared invalid and enjoined from enforcement because it violated the Unruh Civil Rights Act [*Civ. Code § 51*]. The association filed a general demurrer, which the trial court granted without leave to amend. The action was dismissed, and plaintiffs appealed. The association then sought and obtained a preliminary injunction against plaintiffs, from which plaintiffs appealed.

The Supreme Court reversed the consolidated appeals. The Court cited *Marina Point, Ltd. v. Wolfson (1982) 30 Cal. 3d 721, 736-740, 180 Cal. Rptr. 496, 640 P.2d 115 , cert. denied, 459 U.S. 858* (discussed in *§ 35.21[3][e]*), in holding that arbitrary discrimination against children violates the Unruh Civil Rights Act (*33 Cal. 3d 790, 793-794)* . The only question left for the Court to decide was whether or not that discriminatory policy was being invoked by a "business establishment," as required by the Act. The Court found that the legislative intent and statutory language of the Unruh Civil Rights Act indicated that the scope of what constitutes a business establishment is broad. The condominium association had sufficient businesslike attributes to fall within the scope of the Act's reference to "business establishments of every kind whatsoever" (*33 Cal. 3d 790, 795-796)* . The fact that the association was nonprofit did not take it out of the coverage of the Act because nothing in the language or history of the Act calls for excluding nonprofit organizations (*33 Cal. 3d 790, 795-796)* .

[j] Public, Nonexclusive Club or Organization as Business Establishment

In ***Isbister v. Boys' Club of Santa Cruz, Inc.*** *(1985) 40 Cal. 3d 72, 219 Cal. Rptr. 150, 707 P.2d 212* , defendant was a private nonprofit corporation that owned and operated a facility offering a variety of recreational activities to its members. Membership was open to all male children in the area on payment of a small annual membership fee. After plaintiff girls were denied membership in defendant and access to its facilities solely on the basis of their sex, they brought an action for injunctive and declaratory relief under the Unruh Civil Rights Act (*Civ. Code § 51*). The trial court permanently enjoined defendant from denying membership or access to its facilities to girls. Defendant appealed.

The Supreme Court affirmed. In response to defendant's contention that it was not a "business establishment" covered by the Unruh Act, the Court thoroughly analyzed the history and legislative intent of the Act. The Court cited use of the emphatic words "all" and "of every kind whatsoever," as indicative of the Legislature's intent that the phrase "business establishment" be interpreted in the broadest sense reasonably possible (*40 Cal. 3d 72, 78)* . It went on to note that "business establishment" included private and public groups or organizations as well as places of public accommodation or amusement (*40 Cal. 3d 72, 78-79)* . The Court found that defendant was a place of public accommodation or

amusement. Defendant was classically public in its operation by opening its doors to the entire young male population in the area without any attempt to select or restrict membership or access on the basis of personal, cultural, or religious affinity, as a private club might. Relations with and among its members were of a kind that take place more or less in public view (*40 Cal. 3d 72, 81)* . Because defendant was a place of public accommodation or amusement the fact that its purposes and operations were not strictly commercial do not bar a conclusion that it was a "business establishment" to which the Act applies (*40 Cal. 3d 72, 83)* . The Court also responded to defendant's contention that forcing female participation in its activities would interfere with its current members' rights of association guaranteed by both the federal and state constitutions. Noting that defendant professed to focus on the particular needs of male youth, the Court said that defendant never suggested that it substantially engaged in protected "intimate" or "expressive" views, and that in light of California's special constitutional sensitivity to sexual discrimination, there was no basis to hold that a statutory requirement of equal access to the recreational facilities of a public, nonselective, nonexpressive community service organization offends defendant's rights (*40 Cal. 3d 72, 84-86)* . In its conclusion the Court included a caveat that its finding was based on the particular circumstances surrounding defendant and that nothing necessarily requires a similar result in case of other single-sex youth organizations (*40 Cal. 3d 72, 91)* .

However, in *Curran v. Mount Diablo Council of the Boy Scouts (1998) 17 Cal. 4th 670, 72 Cal. Rptr. 2d 410, 952 P.2d 218* , and in *Randall v. Orange County Council, Boy Scouts of America (1998) 17 Cal. 4th 736, 72 Cal. Rptr. 2d 453, 952 P.2d 261* , whose facts and procedural background are discussed in *§ 35.25[3][e]*, the California Supreme Court held that the Unruh Act does not apply to membership decisions of the Boy Scouts of America (*17 Cal. 4th 670, 696-700)* . The Court distinguished these cases from *Isbister* on the ground that while the Boys' Club possessed the attributes of a traditional place of public amusement so that membership was equivalent to admission to a place of public amusement, the Boy Scouts meet in small groups intended to foster close friendship, trust and loyalty, and scouts are required to participate in a variety of activities, ceremonies, and rituals designed to teach the moral principles to which the organization subscribes (*17 Cal. 4th 670, 697-698)* .

[k] Effect of Private Club's Regular Business Transactions With Nonmembers

The facts and procedural background of ***Warfield v. Peninsula Golf & Country Club*** *(1995) 10 Cal. 4th 594, 42 Cal. Rptr. 2d 50, 896 P.2d 776* , are discussed in *§ 35.25[3][d]*. The plaintiff in that case was challenging the defendant country club's practice of excluding all females from proprietary membership in the club. Although rejecting plaintiff's contention that all private social clubs necessarily constitute business establishments within the meaning of the Unruh Civil Rights Act (*10 Cal. 4th 594, 614-618)* , the Supreme Court held that the defendant country club was a "business establishment" under the facts of this case and therefore reversed the judgment against plaintiff.

The Court observed that although a major part of the club's operations were financed by fees, dues, and charges paid by club members, the club also obtained direct and indirect financial benefits from regular business transactions with nonmembers. First, the club regularly permitted (on the average of once a week) nonmembers to use its facilities for a fee in connection with sponsored events. In carrying on such activities for a fee, the club operated as the functional equivalent of a commercial caterer or recreational resort and thus competed with those types of business entities (*10 Cal. 4th 594, 621)* . Second, the club obtained income on a regular basis from fees charged for the use of its facilities, and the purchase of food and beverages on its premises, by nonmember "invited guests" (*10 Cal. 4th 594, 621-622)* . Finally, the record showed that the club received a significant, albeit indirect, financial benefit from the regular business transactions with nonmembers conducted at the club's golf and tennis pro shops located on the premises. Although the club did not receive a share of the income obtained from the pros' sale of goods and services to members or nonmembers, the existence of these "satellite" public commercial enterprises on the club's premises enabled the club to place golf and tennis professionals on the premises, identified as the club's own professionals and readily available to club members, at a monthly retainer that was much lower than the club would have to pay in the absence of such public commercial enterprises. The court stated that under the circumstances, the golf and tennis pro shops, and the related services they provided, realistically must be viewed as an integral part of the club's overall operations (*10 Cal. 4th 594, 622)* . The Court held that the business transactions that were regularly conducted on the club's premises with persons

who were not members were sufficient in themselves to bring the club within the reah of *Civ. Code § 51*'s broad reference to "all business establishments of every kind whatsoever" (*10 Cal. 4th 594, 621, 622-623)* .

However, in *Curran v. Mount Diablo Council of the Boy Scouts (1998) 17 Cal. 4th 670, 72 Cal. Rptr. 2d 410, 952 P.2d 218* , and in *Randall v. Orange County Council, Boy Scouts of America (1998) 17 Cal. 4th 736, 72 Cal. Rptr. 2d 453, 952 P.2d 261* , whose facts and procedural background are discussed in *§ 35.25[3][e]*, in holding that the Unruh Act does not apply to membership decisions of the Boy Scouts of America, the California Supreme Court distinguished *Warfield*, on the basis that the Boy Scouts is an expressive social organization whose primary function is the inculcation of values in its youth members, whose small social group structure and activities are not comparable to those of a traditional place of public accommodation or amusement, and whose business transactions with nonmembers do not involve the sale of access to the basic activities or services offered by the organization. The Court had no doubt (and the Boy Scouts' counsel conceded) that the Act would apply to prohibit discrimination by the Boy Scouts in business transactions with nonmembers (*17 Cal. 4th 670, 699-700)* .

[l] Nonprofit and Noncommercial Entity as Business Establishment

In ***Pines v. Tomson*** *(1984) 160 Cal. App. 3d 370, 206 Cal. Rptr. 866* , defendant published a business telephone directory containing advertisements for commercial goods and services, with religious adages and symbols on the pages. It only accepted advertisements placed by a person who affirmed orally and in writing that he or she was a born-again Christian. Included in each directory was an explanation of the purpose of the directory, which was to strengthen and unify the Christian community. Plaintiffs, owners of a ceramic tile business, were Jewish and could not and would not sign or recite the required oath. After they were not allowed to place their advertisements in the directory, plaintiffs brought an action charging religious discrimination. The trial court judgment was for plaintiff and granted them injunctive and monetary relief. Defendant appealed.

The court of appeal affirmed, but reversed a portion of the injunction that restrained statements of editorial opinion prior to publication as a violation of the free speech guarantee. The court found that the publication and distribution of the directory were acts of discriminatory business conduct on the basis of religion and were acts that aid or incite discriminatory business conduct on the basis of religion. Defendants argued that because they did not operate a business establishment their activities were not proscribed by the Unruh Act. They claimed that the directory was published under the formal aegis of a nonprofit religious corporation and their belief that their work was a ministry. The court disagreed, explaining that the term "business establishment" was used in the broadest sense reasonably possible. Business embraces everything about which one can be employed and is synonymous with a calling, occupation, or trade engaged in for the purpose of making a livelihood or gain. Establishment includes not only a fixed location such as the place where one is permanently fixed for residence or business, but also a permanent commercial force or organization or a permanent settled position. The court concluded that the Unruh Act covers even nonprofit organizations, and noncommercial as well as commercial entities. It includes all commercial and noncommercial entities open to and serving the general public. Defendants argued that they were a nonprofit organization and that their activities in connection with the directory were noncommercial. The court disagreed, explaining that the directory fit both the commercial and noncommercial aspects of the meaning of business establishment (*160 Cal. App. 3d 370, 383-386)* .

[m] Insurance Company Is Business Establishment

The facts and procedural background of ***Goldman v. Standard Ins. Co.*** *(9th Cir. 2003) 341 F.3d 1023* , are discussed in *§ 35.53[3][b]*. In *Goldman*, the plaintiff challenged an insurance company's refusal to issue her a disability income policy based on her diagnosis of and treatment for adjustment disorder with anxiety and depressed mood and the company's underwriting policy to deny coverage for applicants with adjustment disorder until at least one year after the cessation of treatment (*341 F.3d 1023, 1025)* . The Ninth Circuit Court of Appeals held that the Unruh Act applies to insurance companies (citing *Ins. Code § 1861.03(a)*), and an insurance company's refusal to provide coverage on the basis of disability may constitute a denial of full and equal services under the Unruh Act if the discrimination is not

reasonable (*341 F.3d 1023, 1027)* .

[4] Additional Authorities

[a] Liberal Construction as Necessary

The facts and procedural background of *Jackson v. Superior Court (1994) 30 Cal. App. 4th 936, 36 Cal. Rptr. 2d 207* , are discussed in *§ 35.42[3][a]*. In holding that plaintiff had stated a cause of action for violation of the Unruh Act, the court noted that the Act is to be given a liberal construction with a view to effectuating its purposes (*30 Cal. App. 4th 936, 940)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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3-35 California Points & Authorities § 35.41

§ 35.41 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Business Establishment for Violation of the Unruh Civil Rights Act--Complaint Satisfies Requirements for Pleading Arbitrary Denial or Discrimination--Additional Facts Necessary to Determine Whether Denial or Discrimination Reasonable

[1] FORM

[*Caption. See § 35.40.*]

THE DEMURRER SHOULD BE OVERRULED BECAUSE PLAINTIFF'S COMPLAINT FOR VIOLATION OF THE UNRUH CIVIL RIGHTS ACT SATISFIES THE REQUIREMENTS FOR PLEADING THAT DEFENDANT ARBITRARILY DISCRIMINATED IN REGARD TO OR ARBITRARILY DENIED RIGHTS OF ACCOMMODATION ESTABLISHED BY THE ACT BY ALLEGING FACTS THAT SHOW A DENIAL OR DISCRIMINATION THAT IS ARBITRARY IN THE SENSE THAT ITS RATIONAL RELATIONSHIP TO THE SERVICES PERFORMED AND FACILITIES PROVIDED CANNOT BE JUDGED AS A MATTER OF LAW WITHOUT ADDITIONAL FACTS.

A. Liberal Construction as Necessary. [*See § 35.40, Paragraph A.*]

B. Deportment Regulations as Lacking Rational Relationship. Although a business establishment may promulgate reasonable deportment regulations to protect the premises from improper and disruptive conduct, the regulations may constitute arbitrary discrimination against potential customers if the regulations are not rationally related to the services performed or the facilities provided (*In re Cox (1970) 3 Cal. 3d 205, 217, 90 Cal. Rptr. 24, 474 P.2d 992*).

C. Additional Facts Necessary to Determine Whether Denial or Discrimination Reasonable. A complaint for violation of the Unruh Civil Rights Act sufficiently pleads that defendant arbitrarily discriminated in regard to or arbitrarily denied rights of accommodation if it alleges facts that show a denial or discrimination that is arbitrary in the sense that its rational relationship to the services performed and the facilities provided cannot be judged as a matter of law without additional facts, which cannot be determined on demurrer (*Hales v. Ojai Valley Inn & Country Club (1977) 73 Cal. App. 3d 25, 28-29, 140 Cal. Rptr. 555*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a demurrer to a complaint for violation of the Unruh Civil Rights Act [*Civ. Code § 51*]. It opposes a demurrer that asserts that the complaint fails to state a cause of action because it does not allege facts to show that defendant's denial or discrimination was arbitrary. It may be used when plaintiff has alleged sufficient facts to establish a basis for a finding of arbitrary discrimination so that the issue of reasonableness of defendant's action cannot be resolved without further determination of the facts.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

Related memoranda of points and authorities for use in opposing a demurrer on the ground that the complaint fails to allege facts showing that the restriction was arbitrary are set out in *§§ 35.44 -35.47*.

In an appropriate case, this memorandum may be submitted in opposition to a demurrer supported by the points set out in *§§ 35.21 -35.23*.

[b] Related Uses

With appropriate modifications, this memorandum may be used to oppose a motion for summary judgment [*see Code Civ. Proc. § 437c*] based on the contention that an arbitrary denial or discrimination did not occur.

[c] Related Pleading and Practice Forms

For a general form of complaint against a business establishment alleging denial or discrimination in violation of the Unruh Civil Rights Act, see California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments* (Matthew Bender).

[3] Discussion of Authorities

[a] Deportment Regulations as Lacking Rational Relationship

The factual background of ***In re Cox*** *(1970) 3 Cal. 3d 205, 90 Cal. Rptr. 24, 474 P.2d 992* , is discussed in *§ 35.20[3][a]*. In that case, the Supreme Court held that a business establishment could not arbitrarily exclude a prospective customer, but was permitted to promulgate reasonable deportment regulations if they were rationally related to the services performed and the facilities provided (*3 Cal. 3d 205, 217)* .

[b] Additional Facts Necessary to Determine Whether Denial or Discrimination Reasonable

In ***Hales v. Ojai Valley Inn & Country Club*** *(1977) 73 Cal. App. 3d 25, 140 Cal. Rptr. 555* , plaintiff, a male, sued defendant restaurant for violation of the Unruh Civil Rights Act. Plaintiff alleged that when he entered defendant's establishment, he was attired in a "leisure suit," and that even though women who were similarly attired in leisure suits were served with food and drink, defendant refused to serve plaintiff unless he wore a tie. Because of this restriction,

plaintiff alleged that he was the victim of sex discrimination. The trial court sustained without leave to amend a general demurrer to the complaint, and plaintiff appealed to the court of appeal which reversed. The court did not determine whether or not plaintiff was the victim of discrimination on the basis of sex. Instead, it pointed out that under the rule of *In re Cox (1970) 3 Cal. 3d 205, 217, 90 Cal. Rptr. 24, 474 P.2d 992* , the Unruh Civil Rights Act does not prohibit all discrimination, but it does prohibit arbitrary discrimination (*73 Cal. App. 3d 25, 28)* . It then determined that the pleading was sufficient to withstand a general demurrer because it was sufficient to indicate the nature of plaintiff's contention and given the nature of plaintiff's contention, a determination of whether the reason for the discrimination was arbitrary or reasonable turned, not on the bare facts pleaded, but on other facts that could only be determined on trial and not on demurrer. In that the allegations stated that defendant restaurant differentiated between men and women on the basis of attire, other facts necessary for the determination included the definition of the garment in contention which was a "leisure suit," the nature of defendant's establishment, and local community standards of dress (*73 Cal. App. 3d 25, 28-29)* .

Significantly, the court did not say that the allegations, if proven, would establish a prima facie case of discrimination. It pointed out that additional facts would have to be shown, but did not say which party had the burden of establishing such factual determinations. Further, it added that although the general demurrer should not have been sustained, plaintiff could well be required in the discretion of the trial court to allege some facts in more detail in response to a special demurrer (*73 Cal. App. 3d 25, 29)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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3-35 California Points & Authorities § 35.42

§ 35.42 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Business Establishment for Violation of the Unruh Civil Rights Act [Civ. Code § 51]--Complaint Satisfies Requirements for Pleading Arbitrary Denial or Discrimination--Single Instance of Discrimination Actionable

[1] FORM

[*Caption. See § 35.40.*]

THE DEMURRER TO PLAINTIFF'S COMPLAINT SHOULD BE OVERRULED BECAUSE THE COMPLAINT SUFFICIENTLY ALLEGES THAT DEFENDANT(S) COMMITTED [AT LEAST] ONE ACT OF DISCRIMINATION IN VIOLATION OF THE UNRUH CIVIL RIGHTS ACT.

A. Liberal Construction as Necessary. [*See § 35.40, Paragraph A.*]

B. Single Instance of Discrimination Actionable. The Unruh Civil Rights Act prohibitions are not limited to discriminatory acts that are routinely committed or are a matter of policy. Although plaintiff's burden of persuasion may be easier if he or she can provide evidence that the defendant routinely discriminates against the class to which plaintiff belongs, plaintiff need only plead and prove a single violation to establish liability under the Unruh Act (*see Jackson v. Superior Court (1994) 30 Cal. App. 4th 936, 942, 36 Cal. Rptr. 2d 207*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a demurrer to a complaint for violation of the Unruh Civil Rights Act [Civ. Code § 51] when the defendant contends that the complaint fails to state a cause of action because it does not allege facts sufficient to show that the alleged act of discrimination was part of a policy or routine practice of discrimination. The ground of opposition set forth in this form is that such allegations are unnecessary to state a cause of action under the Unruh Act and that a single discriminatory act will support liability under the Act.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, the points and authorities in this form may be modified for use in other procedural contexts in which the substantive points may arise. For example, in an appropriate case, this memorandum may be submitted in opposition to a defense motion for summary judgment [*see Code Civ. Proc. § 437c*].

[c] Related Pleading and Practice Forms

For a general form of complaint against a business establishment for violation of the Unruh Civil Rights Act, see California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments* (Matthew Bender).

[3] Discussion of Authorities

[a] Single Instance of Discrimination Actionable

In ***Jackson v. Superior Court*** *(1994) 30 Cal. App. 4th 936, 36 Cal. Rptr. 2d 207* , plaintiff, an African-American investment advisor, had recommended that two of his clients (who were elderly sisters) invest in a particular mutual fund. To facilitate this transaction, plaintiff accompanied his clients to the defendant bank to assist them in obtaining a cashier's check made payable to the fund. An employee of the bank, allegedly because of her prejudice against African Americans, told plaintiff's clients that plaintiff was trying to "pull a scam" on them and urged them not to undertake the transaction. As a result of the employee's statements, the clients left the bank and did not go through with the transaction. Plaintiff sued the defendant bank and its employee, alleging a violation of the Unruh Civil Rights Act (*Civ. Code § 51*) and various tort causes of action. The trial court sustained defendant's demurrer to the Unruh Act cause of action with leave to amend to allege a common law cause of action. Plaintiff sought a writ of mandate directing the trial court to overrule the demurrer.

The court of appeal granted the writ. In holding that plaintiff had stated a cause of action for violation of the Unruh Act, the court rejected defendant's suggestion that plaintiff's complaint was inadequate because it did not contain allegations that defendant's discriminated as a matter of policy and practice. The court noted that the plain language of *Civ. Code § 51* does not prohibit only those acts of discrimination that are routinely committed or are a matter of policy. The court observed that a plaintiff will obviously have an easier burden of persuasion if he or she can provide evidence that the defendant routinely discriminates against the class to which plaintiff belongs. The court concluded, however, that such an allegation is not necessary to plead a violation of *Civ. Code § 51*. Whether the defendants in this case did discriminate was a factual issue that could not be determined as a question of law from the facts pleaded (*30 Cal. App. 4th 936, 942)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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3-35 California Points & Authorities § 35.43

§ 35.43 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Business Establishment for Violation of Unruh Civil Rights Act [Civ. Code § 51]--Complaint Satisfies Pleading Requirements--Facially Neutral Policy Applied in Discriminatory Manner

[1] FORM

[*Caption. See § 35.40.*]

THE DEMURRER TO PLAINTIFF'S COMPLAINT SHOULD BE OVERRULED BECAUSE THE COMPLAINT SUFFICIENTLY ALLEGES A FACIALLY NEUTRAL POLICY APPLIED IN A DISCRIMINATORY MANNER.

A. Liberal Construction as Necessary. [*See § 35.40, Paragraph A.*]

B. Facially Neutral Policy Applied in Discriminatory Manner Can Be Proven by Statistics. Introduction of statistics to prove a claim that a facially neutral policy was applied in a discriminatory manner under the Unruh Civil Rights Act is appropriate when based on the proper foundation and subject to the general rules of evidence. Statistical evidence may be probative of intentional discrimination in some cases, and a blanket rule of exclusion cannot be justified (*Everett v. Superior Court (2003) 104 Cal. App. 4th 388, 392-393, 128 Cal. Rptr. 2d 418*).

Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a demurrer to a complaint for violation of the Unruh Civil Rights Act [*Civ. Code § 51*] when the defendant contends that the complaint fails to state a cause of action because it does not sufficiently allege a disparate impact claim. The ground of opposition set forth in this form is that statistical evidence can sufficiently plead a disparate impact case when based on the proper foundation and subject to the general rules of evidence.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, the points and authorities in this form may be modified for use in other procedural contexts in which the substantive points may arise. For example, in an appropriate case, this memorandum may be submitted in opposition to a defense motion for summary judgment [*see Code Civ. Proc. § 437c*].

[c] Related Pleading and Practice Forms

For a general form of complaint against a business establishment for violation of the Unruh Civil Rights Act, see California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments* (Matthew Bender).

[3] Discussion of Authorities

[a] Facially Neutral Policy Applied in Discriminatory Manner Can Be Proven by Statistics

In ***Everett v. Superior Court*** *(2003) 104 Cal. App. 4th 388, 128 Cal. Rptr. 2d 418* , an African-American man, his wife, and his sister-in-law sued an amusement park and several of its employees for violation of the Unruh Act after the man was detained by security employees for allegedly violating the park's rule against cutting in line while waiting to board a ride, assaulted, placed under citizen's arrest, chained to a bench, and then ejected from the park. In opposition to defendants' motion for summary adjudication, plaintiff relied on statistical information showing that African-Americans were more than eight times as likely to be held and removed from the park for line cutting than members of other ethnic groups. This statistical information showed that in 1998, 7.5 percent of the park's guests were African-American, but 55.7 percent of the individuals removed from the park for line cutting were African-Americans, while in 1997, African-Americans made up 7.2 percent of the guests and 41.3 percent of the people removed from the park for line cutting. Plaintiff also presented evidence that during the same years, African-Americans were arrested by the park security force at seven times the combined rate for all other racial groups; of all the individuals arrested in the park in 1997 and 1998, 35.4 and 49.3 percent, respectively, were African-Americans. The trial court granted summary adjudication, calling the plaintiffs' evidence "speculative" (*104 Cal. App. 4th 388, 390-392)* .

The court of appeal reversed. Citing *Harris v. Capital Growth Investors XIV (1991) 52 Cal. 3d 1142, 1175, 278 Cal. Rptr. 614, 805 P.2d 873* , the court found that the introduction of statistics to prove a disparate impact claim is appropriate when based on the proper foundation and subject to the general rules of evidence, and that statistical evidence may be probative of intentional discrimination in some cases, so that a blanket rule of exclusion cannot be justified (*104 Cal. App. 4th 388, 392-393)* . Citing United States Supreme Court cases, the court found that courts regularly have employed statistics to support an inference of intentional discrimination [*see Yick Wo v. Hopkins (1886) 118 U.S. 356, 373-374, 6 S. Ct. 1064, 30 L. Ed. 220* (200 Chinese individuals denied permits to operate laundry business, but permits granted to 80 of 81 non-Chinese applicants); *Castaneda v. Partida (1977) 430 U.S. 482, 495, 97 S. Ct. 1272, 51 L. Ed. 2d 498* (county population of Mexican-Americans (79.1 percent) twice as large as percentage of Mexican-Americans summoned for grand jury service (39 percent)); *Turner v. Fouche (1970) 396 U.S. 346, 359, 90 S. Ct. 532, 24 L. Ed. 2d 567* (county population of black citizens (60 percent) far exceeded percentage on grand jury

lists (37 percent)); *Whitus v. Georgia (1967) 385 U.S. 545, 552, 87 S. Ct. 643, 17 L. Ed. 2d 599* (number of black citizens on tax digest (27.1 percent) at least three times number of blacks on grand jury venire (9.1 percent) and petit jury venire (7.8 percent))]. The court found that although statistical analysis in some cases requires an expert, expert testimony is required only for opinions related to a subject sufficiently beyond common experience that the opinion of an expert would assist the trier of fact [*Evid. Code § 801(b)*], and a simple comparison of percentages did not exceed the common experience of the trier of fact, and did not mandate use of an expert (*104 Cal. App. 4th 388, 393-394)* . Thus, the trial court's grant of summary adjudication was improper, because the plaintiff presented evidence sufficient to support an inference that the park's facially neutral line cutting policy is applied in a discriminatory manner (*104 Cal. App. 4th 388, 394)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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3-35 California Points & Authorities § 35.44

§ 35.44 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Business Establishment for Violation of the Unruh Civil Rights Act [Civ. Code § 51]--Complaint Satisfies Requirements for Pleading Arbitrary Denial or Discrimination--Denial or Discriminatory Treatment Based on Exclusion or Differential Treatment of Entire Class by Business Establishment

[1] FORM

[*Caption. See § 35.40.*]

THE COURT SHOULD OVERRULE DEFENDANT'S DEMURRER TO PLAINTIFF'S COMPLAINT FOR VIOLATION OF THE UNRUH CIVIL RIGHTS ACT, SINCE IT SATISFIES THE REQUIREMENTS FOR PLEADING THAT DEFENDANT ARBITRARILY DISCRIMINATED AGAINST PLAINTIFF BECAUSE IT ALLEGES FACTS TO SHOW THAT DEFENDANT _____ [EXCLUDED *or* DIFFERENTIALLY TREATED] AN ENTIRE CLASS OF THE PUBLIC BECAUSE HE/SHE/IT _____ [BELIEVED THAT THE CLASS MIGHT PRESENT GREATER PROBLEMS THAN SOME OTHER CLASS OF THE PUBLIC *or* BELIEVED THAT DIFFERENTIAL TREATMENT OF AN ENTIRE CLASS SERVED A PUBLIC INTEREST *or set forth other alleged justification*].

A. Liberal Construction as Necessary. [*See § 35.40, Paragraph A.*]

B. Deportment Regulations as Lacking Rational Relationship. [*See § 35.41, Paragraph B.*]

C. Exclusion of Entire Class. Although entrepreneurs unquestionably possess broad authority to protect their enterprises from improper and disruptive behavior, under the Unruh Civil Rights Act, entrepreneurs must generally exercise this legitimate interest directly by excluding those persons who are in fact disruptive; the Unruh Act does not permit a business enterprise to exclude or discriminate against an entire class of individuals on the prediction that the class as a whole is more likely to commit misconduct than some other class of the public (*Marina Point, Ltd. v. Wolfson (1982) 30 Cal. 3d 721, 738-741, 180 Cal. Rptr. 496, 640 P.2d 115 , cert. denied, 459 U.S. 858, 103 S. Ct. 129, 74 L. Ed. 2d 111* ; *see also O'Connor v. Village Green Owners Ass'n (1983) 33 Cal. 3d 790, 793-794, 191 Cal. Rptr. 320, 662 P.2d 427*).

[*Optional*] **D. Differentiation of Men and Women.** A business establishment's denial of services or discrimination based on differential treatment of similarly situated men and women may constitute arbitrary discrimination, thus violating the Unruh Civil Rights Act (*Koire v. Metro Car Wash (1985) 40 Cal. 3d 24, 38, 219 Cal. Rptr. 133, 707 P.2d 195* ; *see Hales v. Ojai Valley Inn & Country Club (1977) 73 Cal. App. 3d 25, 28-29, 140 Cal. Rptr. 555* ; *see also Civ. Code § 51.6(b)* (prohibiting business establishment from discriminating in price charged for similar service based on person's gender)).

[*Optional*] **E. Immoral Character.** A business establishment's denial of services or discrimination against a class of persons with reputations of immoral character may constitute arbitrary discrimination, thus violating the *Unruh Civil Rights Act (Orloff v. Los Angeles Turf Club (1951) 36 Cal. 2d 734, 741, 227 P.2d 449* ; *see also Marina Point, Ltd. v. Wolfson (1982) 30 Cal. 3d 721, 739, 180 Cal. Rptr. 496, 640 P.2d 115 , cert. denied, 459 U.S. 858, 103 S. Ct. 129, 74 L. Ed. 2d 111*).

[*Optional*] **F. Sexual Orientation.** A business establishment's denial of services or discrimination against a prospective customer based on a policy of excluding gays or lesbians as a class may constitute arbitrary discrimination, thus violating the Unruh Civil Rights Act (*Civ. Code § 51(b), (e)*; *Stoumen v. Reilly (1951) 37 Cal. 2d 713, 716-717, 234 P.2d 969* ; *Curran v. Mount Diablo Council of the Boy Scouts (1983) 147 Cal. App. 3d 712, 733, 195 Cal. Rptr. 325 , appeal dismissed, 468 U.S. 1205 (1984) , on review after remand, 17 Cal. 4th 670, 72 Cal. Rptr. 2d 410, 952 P.2d 218 (1998)* ; *see also Marina Point, Ltd. v. Wolfson (1982) 30 Cal. 3d 721, 739, 180 Cal. Rptr. 496, 640 P.2d 115 , cert. denied, 459 U.S. 858, 103 S. Ct. 129, 74 L. Ed. 2d 111*).

[*Optional*] **G. Unconventional Dress.** A business establishment's denial of services or discrimination against a prospective customer based on his or her long hair or unconventional dress may constitute arbitrary discrimination, thus violating the *Unruh Civil Rights Act (In re Cox (1970) 3 Cal. 3d 205, 217-218, 90 Cal. Rptr. 24, 474 P.2d 992*).

[*Optional*] **H. Organizations or Associations.** A business establishment's exclusion of an entire class of the public on the basis of the class's membership in an organization or association may be arbitrary discrimination, thus violating the *Unruh Civil Rights Act (In re Cox (1970) 3 Cal. 3d 205, 217-218, 90 Cal. Rptr. 24, 474 P.2d 992*).

[*Optional*] **I. Children or Families With Children.** The blanket of exclusion of all children or families with children from a business establishment may constitute arbitrary discrimination, thus violating the Unruh Civil Rights Act (*O'Connor v. Village Green Owners Ass'n (1983) 33 Cal. 3d 790, 793-794, 191 Cal. Rptr. 320, 662 P.2d 427* (condominiums); *Marina Point, Ltd. v. Wolfson (1982) 30 Cal. 3d 721, 741-742, 180 Cal. Rptr. 496, 640 P.2d 115 , cert. denied, 459 U.S. 858, 103 S. Ct. 129, 74 L. Ed. 2d 111* (rental units)).

[*Optional*] **J. Age.** A business establishment's exclusion of persons on the basis of age may constitute arbitrary discrimination, thus violating the Unruh Civil Rights Act (*see Park Redlands Covenant Control Committee v. Simon (1986) 181 Cal. App. 3d 87, 93-94*).

[*Optional*] **K. Religious Belief.** Acts that aid or incite discriminatory business conduct on the basis of religion may constitute arbitrary discrimination, thus violating the Unruh Civil Right Act (*Pines v. Tomson (1984) 160 Cal. App. 3d 370, 377, 206 Cal. Rptr. 866*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a demurrer to a complaint for violation of the Unruh Civil Rights Act [*Civ. Code § 51*]. It opposes a demurrer that asserts that the complaint fails to state a cause of action because it does not allege facts to show that defendant's denial or discriminatory treatment was arbitrary. It may be used when plaintiff has alleged sufficient facts to show that defendant's action was based on an arbitrary exclusion or differential treatment of an entire class by the business establishment.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In particular, counsel should show how the complaint has sufficiently stated facts to allege that defendant exercised an unreasonable or arbitrary discriminatory policy when he or she excluded or differentially treated plaintiff because plaintiff fell within a particular class of persons.

The California Supreme Court has held that the statutorily enumerated bases of discrimination--sex, color, race, religion, ancestry, national origin, disability, medical condition, marital status, and sexual orientation--are illustrative rather than restrictive [*Civ. Code § 51*; *Marina Point, Ltd. v. Wolfson (1982) 30 Cal. 3d 721, 725, 180 Cal. Rptr. 496, 640 P.2d 115 , cert. denied, 459 U.S. 858, 103 S. Ct. 129, 74 L. Ed. 2d 111* ; *In re Cox (1970) 3 Cal. 3d 205, 216, 90 Cal. Rptr. 24, 474 P.2d 992* ; *see also Curran v. Mount Diablo Council of the Boy Scouts (1983) 147 Cal. App. 3d 712, 733, 195 Cal. Rptr. 325 , appeal dismissed, 468 U.S. 1205 (1984) , on review after remand, 17 Cal. 4th 670, 72 Cal. Rptr. 2d 410, 952 P.2d 218 (1998)* ; *but see Harris v. Capital Growth Investors XIV (1991) 52 Cal. 3d 1142, 1159-1161, 1175, 278 Cal. Rptr. 614, 805 P.2d 873* (language that could be construed to indicate Court's preference to limit scope of Act to groups specified in *Civ. Code § 51*), discussed in *§ 35.20[3*][c])].

The Court has emphasized that the Unruh Act protects all classes from arbitrary discrimination and not simply those classes set forth in the statute or that come under the statute by judicial determination [*Marina Point, Ltd. v. Wolfson (1982) 30 Cal. 3d 721, 732, 180 Cal. Rptr. 496, 640 P.2d 115 , cert. denied, 459 U.S. 858, 103 S. Ct. 129, 74 L. Ed. 2d 111]* . Hence, the optional paragraphs in this form are intended to illustrate possible bases of discrimination and not to limit the scope of the Unruh Act in a manner incompatible with these Supreme Court decisions.

In an appropriate case, this memorandum may be submitted in opposition to a demurrer supported by the points set out in *§§ 35.21 -35.23*.

[b] Related Uses

With appropriate modifications, this memorandum may be used to oppose a motion for summary judgment [*see Code Civ. Proc. § 437c*] based on the contention that an arbitrary denial or discrimination did not occur.

[c] Related Pleading and Practice Forms

For a general form of complaint against a business establishment alleging denial or discrimination in violation of the Unruh Civil Rights Act, see California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments* (Matthew Bender).

[3] Discussion of Authorities

[a] Exclusion of Entire Class

The factual and procedural background of ***Marina Point, Ltd. v. Wolfson*** *(1982) 30 Cal. 3d 721, 180 Cal. Rptr. 496, 640 P.2d 115 , cert. denied, 459 U.S. 858, 103 S. Ct. 129, 74 L. Ed. 2d 111* is discussed in *§ 35.21[3][e]*. The

Supreme Court reversed judgment for the landlord in an unlawful detainer action, stating that the blanket exclusion of families with children from an apartment complex violated the Unruh Civil Rights Act (*30 Cal. 3d 721, 744-745)* . The Court said that, contrary to the municipal court's conclusion, the anti-discriminatory provisions of the Unruh Act were not confined to a limited category of protected classes, but protected all persons from arbitrary discrimination by a business establishment (*30 Cal. 3d 721, 730-733)* . It added that the landlord's ban on children was not permissible even if children as a class were noisier, rowdier, more mischievous, and more boisterous than adults (*30 Cal. 3d 721, 736-740)* . The Unruh Act, the Court explained, does not permit a business enterprise to exclude an entire class of individuals on the basis of a generalized prediction that the class as a whole was more likely to commit misconduct than some other class of the public (*30 Cal. 3d 721, 739)* . Although the Court recognized that entrepreneurs unquestionably possess broad authority to protect their enterprises from improper and disruptive behavior, the Court held that entrepreneurs must generally exercise this legitimate interest directly by excluding those persons who are in fact disruptive (*30 Cal. 3d 721, 740)* .

The factual and procedural background of ***O'Connor v. Village Green Owners Ass'n*** *(1983) 33 Cal. 3d 790, 191 Cal. Rptr. 320, 662 P.2d 427* , is discussed in *§ 35.40[3][i]*. Citing the holding in *Marina Point,* the Supreme Court in *O'Connor* held that a condominium association's exclusion of children was a violation of the Unruh Civil Rights Act and could not be justified by any claim about generalized characteristics of children (*33 Cal. 3d 790, 793-794)* . The Court held that the Act protects all persons from arbitrary discrimination in "all business establishments of every kind whatsoever" and concluded that a nonprofit condominium owners' association fell within that category (*33 Cal. 3d 790, 795-796)* .

[b] Differentiation of Men and Women

In ***Koire v. Metro Car Wash*** *(1985) 40 Cal. 3d 24, 219 Cal. Rptr. 133, 707 P.2d 195* , after plaintiff's requests for the same discount prices given to women on "Ladies' Day" were turned down by several car washes and bars, he brought an action against those establishments alleging violations of the Unruh Civil Rights Act. The trial court found that the sex-based price discounts did not violate the Unruh Act and granted judgment for all defendants. Plaintiff appealed.

The Supreme Court reversed and remanded, finding that the plain language of the Unruh Act mandates equal provision of advantages, privileges, and services in business establishments and that absent a compelling social policy supporting sex-based price differentials, the discounts violate the Unruh Act (*40 Cal. 3d 24, 38)* . Defendants contended that the Unruh Act prohibits only the exclusion of a member of a protected class from a business establishment and that discrimination based on admission prices and services are allowed. The Court disagreed, noting that the Unruh Act guarantees full and equal accommodations, advantages, facilities, privileges and services; its scope is clearly not limited to exclusionary practices, but is broad enough to include discrimination in the form of sex-based price discounts (*40 Cal. 3d 24, 29-30)* . In also rejecting defendants' contention that the discounts fell within recognized exceptions to the Act, the Court said that discriminatory practices may be upheld only when there is a strong public policy in favor of the discriminatory treatment based on a compelling societal interest, and that neither substantial business purposes in the form of profits nor social purposes in the form of more interaction between the sexes was a compelling societal interest (*40 Cal. 3d 24, 31-33)* . It cited sex-segregated restroom facilities as one instance when public policy warrants differential treatment for men and women, based on the constitutional right to personal privacy. The Court ended its decision with a thorough discussion of the public policy reasons mandating equal treatment of men and women as well as those supporting preferential prices for children and the elderly (*40 Cal. 3d 24, 37-38)* .

The factual and procedural background of ***Hales v. Ojai Valley Inn & Country Club*** *(1977) 73 Cal. App. 3d 25, 140 Cal. Rptr. 555* , is discussed in *§ 35.41[3][b]*. In that case, the complaint alleged that defendant restaurant differentiated between men and women on the basis of attire because it refused to serve men wearing leisure suits but not ties, while it served women who wore leisure suits. The court of appeal held that whether or not such differentiation was reasonable or arbitrary required the determination of other facts such as local community standards of dress for both sexes (*73 Cal. App. 3d 25, 28-29)* . Thus, the case appears to support the proposition that any differentiation between two people

who happen to be of the opposite sex is arbitrary on its face and allegations describing such differentiation are therefore adequate to withstand attack by general demurrer, even though, as the court pointed out, the allegations in this particular case might not have been adequate to withstand a special demurrer seeking clarification.

In addition to the Unruh Act, the Gender Tax Repeal Act of 1995 [*see Civ. Code § 51.6(a)*] specifically provides that no business establishment of any kind may discriminate against a person with respect to the price charged for services of a similar kind because of the person's gender [Civ. Code § 51.6(b)]. Like the Unruh Act, the remedies for a violation of *Civ. Code § 51.6* are those provided in *Civ. Code § 52(a)* [*Civ. Code § 51.6(d)*]. For related jury instructions, see *Judicial Council of California Civil Jury Instructions, CACI Nos. 3022, 3026* (LexisNexis Matthew Bender, Official Publisher), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions.

Civ. Code § 51.6(b) does not prohibit price differences that are based specifically on the amount of time, difficulty, or cost of providing the services [*Civ. Code § 51.6(c)*]. Furthermore, *Civ. Code § 51.6* does not alter or affect the provisions of the Health and Safety Code, the Insurance Code, or other laws that govern health care service plan or insurer underwriting or rating practices [*Civ. Code § 51.6(e)*].

[c] Sexual Harassment

The factual and procedural background of ***Brown v. Smith*** *(1997) 55 Cal. App. 4th 767, 64 Cal. Rptr. 2d 301* , is discussed in *§ 35.48[3][c]*. In *Brown*, the court of appeal found that sexual harassment is not included in the scope of protected categories listed in the Unruh Act (*Civ. Code §§ 51, 52*), citing *Harris v. Capital Growth Investors XIV (1991) 52 Cal. 3d 1142, 278 Cal. Rptr. 614, 805 P.2d 873* (*55 Cal. App. 4th 767, 787)* . The court found that a person is now liable in a cause of action for sexual harassment under *Civ. Code § 51.9* where the plaintiff proves the statutory elements of the cause of action; however, the Legislature's intent in enacting *Civ. Code § 51.9* was to create a cause of action where none had existed before (*55 Cal. App. 4th 767, 787)* .

[d] Immoral Character

The factual background of ***Orloff v. Los Angeles Turf Club*** *(1951) 36 Cal. 2d 734, 227 P.2d 449* , is discussed in *§ 35.23[3][a]*. In that case, the Supreme Court held that under the predecessors of *Civ. Code §§ 51-53* it would not be reasonable to deny an individual's right to accommodation in a public place to which the statutes apply. The Court reached this conclusion by reasoning that all laws that govern fundamental rights and duties must be definite and their meaning ascertainable by those whose rights and duties are affected; an uncertain law is repugnant to the due process clause. The use of an unspecific basis like immoral character for denying fundamental rights could thus be constitutionally fatal. Such vagueness can be avoided however by interpreting the statutes with the "governing criteria" of reasonableness. Noting that their general objective is the protection of others on the premises, the Court said that the commission of lewd, immoral, or other acts inimical to the public safety when applying for or after admittance is a reasonable ground for exclusion. But it concluded that mere suspicion based on past conduct and alleged reputed activities outside the race track or on conversations held at the race track with persons considered questionable without disclosure of their substance did not justify ejection or exclusion (*36 Cal. 2d 734, 741)* . This was true in the case of plaintiff since even though the facts showed that he had several convictions for offenses related to horse racing, there was no evidence that any of his offenses had been committed at a race track. Underlying the Court's reasoning in *Orloff* is the view that use of the statute to enforce an unreasonable ground for exclusion would violate the guarantees of equal protection and due process. Although the Court was specifically applying *Civ. Code § 53*, the opinion implies that an unreasonable exclusion under the predecessor of *Civ. Code § 51* is also prohibited.

Counsel should also note that the Legislature subsequently amended the Business and Professions Code to permit exclusion from race tracks of known bookmakers or touts or persons convicted of an offense of wagering on horse races [former *Bus. & Prof. Code § 19561.5* (*now see Bus. & Prof. Code §§ 19572, 19573*), upheld in *Flores v. Los Angeles Turf Club (1961) 55 Cal. 2d 736, 742-745, 13 Cal. Rptr. 201, 361 P.2d 921]* . The decision in *Flores*, however, does not

repudiate *Orloff*, since it describes a ground for exclusion which is a statutory exception to the Unruh Civil Rights Act created for a particular type of business establishment and which is protected from abuse by the availability of an administrative remedy.

The factual and procedural background of ***Marina Point, Ltd. v. Wolfson*** *(1982) 30 Cal. 3d 721, 180 Cal. Rptr. 496, 640 P.2d 115 , cert. denied, 459 U.S. 858* , is discussed in *§§ 35.21[3][e]* and *35.44[3][a]*. The Supreme Court stated that an individual may forfeit his or her statutory right of access to the services of a business enterprise if he or she conducts himself or herself improperly or disrupts the operations of the enterprise. However, the Unruh Act does not permit a business enterprise to exclude an entire class of individuals on the basis of a generalized prediction that the class as a whole is more likely to commit misconduct than some other class of the public (*30 Cal. 3d 721, 738-739)* . The Court added that this proposition is clearly demonstrated by *Orloff v. Los Angeles Turf Club (1951) 36 Cal. 2d 734, 227 P.2d 449* . Undoubtedly, the Court said, the class of persons with "reputations as to immoral character" was more likely than the general population to engage in illegal activities that a public racetrack legitimately would seek to prevent. However, the case clearly held that an individual could not be excluded from the racetrack on the basis of such classification, but rather had a right to be judged on the basis of his or her own conduct (*30 Cal. 3d 721, 739)* .

[e] Sexual Orientation

Stoumen v. Reilly *(1951) 37 Cal. 2d 713, 234 P.2d 969* , was an appeal from the judgment of a superior court denying a petition for writ of mandate to compel the State Board of Equalization to reinstate petitioner's license to sell alcoholic beverages. The Supreme Court reversed and ordered the lower court to grant a peremptory writ of mandate. The Court noted that the decision of the State Board of Equalization was based on a finding that the licensee permitted the premises to be used as a disorderly house in that persons of "known homosexual tendencies" patronized the premises and used them as a meeting place (*37 Cal. 2d 713, 715)* . The Court further noted that there was no evidence of any illegal or immoral conduct on the premises or that the patrons resorted to the restaurant for purposes injurious to public morals (*37 Cal. 2d 713, 715-717)* . Although police officers testified that many of the patrons were homosexuals and that there were a number of arrests, some for vagrancy and some for "homosexual actions," there was no showing that any of those arrested were convicted (*37 Cal. 2d 713, 715)* .

In the Court's analysis, although former section 58 of the Alcoholic Beverage Control Act penalized licensees if they permitted licensed premises to be used as disorderly houses or places to which people resorted for purposes injurious to public morals, the statute did not attempt to regulate mere patronage by any class of persons without regard to their conduct on the premises. Indeed, the Court pointed out, under the predecessors of *Civ. Code §§ 51* and *52*, which were applicable at that time, all members of the public of lawful age had a right to patronize a public restaurant and bar as long as they acted properly and did not commit illegal and immoral acts since a proprietor could not exclude or eject a patron except for good cause (*37 Cal. 2d 713, 716-717)* .

The factual and procedural background of ***Curran v. Mount Diablo Council of the Boy Scouts*** *(1983) 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 , appeal dismissed, 468 U.S. 1205 (1984) , on review after remand, 17 Cal. 4th 670, 72 Cal. Rptr. 2d 410, 952 P.2d 218 (1998)* , is discussed in *§ 35.25[3][e]*. The court of appeal stated that, as held in *In re Cox (1970) 3 Cal. 3d 205, 216, 90 Cal. Rptr. 24, 474 P.2d 992* (discussed in *§ 35.20[3][a]*), the Unruh Act bars all types of arbitrary discrimination, and the Act's reference to particular bases of discrimination (sex, color, race, religion, ancestry, national origin, or disability) is illustrative rather than restrictive. The court also stated that the Act's focus is on the individual and precludes the exclusion of persons based on a generalization about the class to which they belong (*147 Cal. App. 3d 712, 733)* . The court cited *Stoumen v. Reilly (1951) 37 Cal. 2d 713, 234 P.2d 969* , discussed *above*, which held that the Act prohibits the exclusion of a person on the basis of homosexual status, and *Gay Law Students Assn. v. Pacific Tel. & Tel. Co. (1979) 24 Cal. 3d 458, 475, 156 Cal. Rptr. 14, 595 P.2d 592* , which held that although homosexuals were not specified in the statutory language, former *Pub. Util. Code § 453(a)* prohibited arbitrary employment discrimination against homosexuals. The court concluded that the Unruh Act prohibits arbitrary discrimination against homosexuals (*147 Cal. App. 3d 712, 734)* . *Pub. Util Code § 453* has been amended to prohibit

a public utility from prejudicing or disadvantaging a person because of ancestry, medical condition, marital status or change in marital status, occupation, or any characteristic listed or defined in *Gov. Code § 11135*, which includes sexual orientation [*Pub. Util Code § 453(b)*].

The factual and procedural background of ***Marina Point, Ltd. v. Wolfson*** *(1982) 30 Cal. 3d 721, 180 Cal. Rptr. 496, 640 P.2d 115 , cert. denied, 459 U.S. 858, 103 S. Ct. 129, 74 L. Ed. 2d 111* , is discussed in *§§ 35.21[3][e], 35.44[3][a]* and *[d]*. The Supreme Court stated that the Unruh Act does not permit a business enterprise to exclude an entire class of individuals on the basis that the class as a whole is more likely to commit misconduct than some other class of the public (*30 Cal. 3d 721, 738-739)* . The Court said that this proposition is clearly demonstrated by *Stoumen v. Reilly (1951) 37 Cal. 2d 713, 234 P.2d 969* , discussed *above.* The Court explained that although it may have been thought true--at least under the mores of that time--that homosexuals as a class were more likely than heterosexuals to engage in the kind of "immoral conduct" that would justify expulsion from a public restaurant or bar, any such class generalization did not afford a proper basis for exclusion of all gays or lesbians. The Court emphasized that members of the public have a right to patronize a public restaurant and bar so long as they are acting properly and are not committing illegal or immoral acts (*30 Cal. 3d 721, 739)* .

Note:

The Unruh Civil Rights Act, *Civ. Code § 51*, was amended by the Civil Rights Act of 2005 [*see* 2005 Stats., ch. 420 (AB1400)] to include sexual orientation as a prohibited basis of discrimination [*see Civ. Code § 51(b), (e)*]. The Legislature specifically noted that the amendment was clarifying of existing law and reemphasized that the list of prohibited bases in § 51 is illustrative rather than exclusive [2005 Stats., ch. 420, § 2(c)].

[f] Unconventional Dress

The factual and procedural background of ***In re Cox*** *(1970) 3 Cal. 3d 205, 90 Cal. Rptr. 24, 474 P.2d 992* , is discussed in *§ 35.20[3][a]*. In that case, petitioner Cox sought a writ of habeas corpus after he was arrested for violating a municipal trespass ordinance. The ordinance provided that no person may remain on any business premises after being asked to leave, but excluded from its application those situations in which an ejection would violate the Unruh Civil Rights Act [*Civ. Code § 51*]. Petitioner alleged that he and a friend, who wore long hair and dressed unconventionally, were conversing in a shopping center when a security guard asked them to leave the premises. Although the Court denied the petition, it stated that under the Unruh Civil Rights Act, a shopping center may not exclude individuals who wear long hair and unconventional dress, who are black, or who are members of the John Birch society, merely because of these characteristics or associations (*3 Cal. 3d 205, 217-218)* .

[g] Organizations or Associations

In re Cox *(1970) 3 Cal. 3d 205, 90 Cal. Rptr. 24, 474 P.2d 992* , is discussed in *§§ 35.20[3][a]* and *35.44[3][f]*.

[h] Children or Families With Children

The factual and procedural background of ***O'Connor v. Village Green Owners Ass'n*** *(1983) 33 Cal. 3d 790, 191 Cal. Rptr. 320, 662 P.2d 427* , is discussed in *§§ 35.40[3][i]*, and *35.44[3][a]*. The Supreme Court held that a rule in a condominium association's covenants, conditions, and restrictions excluding children from living in the condominiums violated the Unruh Civil Rights Act (*33 Cal. 3d 790, 793-794)* . The Act applies to business establishments, and the condominium association was held to be a business establishment within the meaning of the Act (*33 Cal. 3d 790, 795-796)* . The Court cited the holding in *Marina Point, below*, that a blanket exclusion of children could not be justified by generalized characteristics of children (*33 Cal. 3d 790, 794)* .

The factual and procedural background of ***Marina Point, Ltd. v. Wolfson*** *(1982) 30 Cal. 3d 721, 180 Cal. Rptr. 496, 640 P.2d 115 , cert. denied, 459 U.S. 858* , is discussed in *§§ 35.21[3][e]*, and *35.44[3][a]*. The Supreme Court

reversed judgment for the landlord in an unlawful detainer action, stating that the blanket exclusion of families with children from an apartment complex violated the Unruh Civil Rights Act (*30 Cal. 3d 721, 744-745)* . The Court noted that the landlord's ban on children was not permissible even if children as a class were noisier, rowdier, more mischievous, and more boisterous than adults (*30 Cal. 3d 721, 730-733)* . The Unruh Act, the Court explained, does not permit a business enterprise to exclude an entire class of individuals on the basis of a generalized prediction that the class as a whole was more likely to commit misconduct than some other class of the public (*30 Cal. 3d 721, 739)* .

It should be noted that, after *Marina Point,* the Legislature enacted legislation allowing housing that meets certain criteria to be reserved for senior citizens, notwithstanding the Unruh Act [*see Civ. Code §§ 51.2-51.4*]. For discussion of these provisions, see California Forms of Pleading and Practice, Ch. 117, *Civil Rights: Housing Discrimination* (Matthew Bender).

[i] Age

In ***Park Redlands Covenant Control Committee v. Simon*** *(1986) 181 Cal. App. 3d 87* , plaintiff homeowners' association brought an action against defendants as homeowners to enforce two restrictive covenants applicable to all homeowners in the subdivision. One of the covenants restricted residency to those 45 years of age and older. Defendants violated this covenant by having their two adult children and a grandchild live with them periodically. Defendants cross-complained for declaratory relief, seeking an interpretation of several covenants in the homeowner agreement. The trial court granted an injunction enjoining defendants' children and grandchild from residing with defendants until they were 45 years old and declared the other restrictive covenants valid. Defendants appealed.

The court of appeal reversed the injunction and otherwise affirmed the judgment. The court agreed with defendants' argument that the age-related restrictive covenant violated *Civ. Code § 53* in the Unruh Civil Rights Act. Initially the court found that as a tract housing homeowners' association, plaintiff was a business establishment and therefore subject to the Act (*181 Cal. App. 3d 87, 93)* . Plaintiff attempted to justify the covenant as one in favor of a minority class, individuals over 45 years, and one socially necessary to meet the needs of senior citizens. Citing *Marina Point, Ltd. v. Wolfson (1982) 30 Cal. 3d 721, 180 Cal. Rptr. 496, 640 P.2d 115* (discussed in *§ 35.21[3][e]*), the court said that to bring age discrimination within the exception for a specialized institution designed to meet a social need, the discrimination must occur (1) to meet the special needs of senior citizens and (2) it must take place in the context of housing designed especially for the elderly. It found neither factor present and remarked that 45 appeared to be chosen not to facilitate the special needs of the elderly, but solely to engage in impermissible discrimination against children and families with children because 45 is beyond the age that people have children. Moreover, the homes in the subdivision were not designed as specialized facilities for the elderly (*181 Cal. App. 3d 87, 93-94)* .

For discussion of statutory requirements for the senior housing exemption from the Unruh Act (*Civ. Code §§ 51.2-51.4* and §§ 51.10-51.12 (applicable only to County of Riverside)), see California Forms of Pleading and Practice, Ch. 117, *Civil Rights: Housing Discrimination* (Matthew Bender).

[j] Religious Belief

The facts and procedural background of ***Pines v. Tomson*** *(1984) 160 Cal. App. 3d 370, 206 Cal. Rptr. 866* , are discussed in *§ 35.40[3][l]*. The court of appeal affirmed the trial court judgment in favor of plaintiffs in an action alleging violation of the Unruh Civil Rights Act for religious discrimination. It specifically upheld the finding that the publication and distribution of the directory were acts of discriminatory business conduct on the basis of religion and were acts which aided or incited discriminatory business conduct on the basis of religion. Defendant's refusal to accept advertisements from one refusing to affirm a born-again Christian status was arbitrary and discriminatory business conduct on the basis of religion (*160 Cal. App. 3d 370, 377)* .

[4] Additional Authorities

[a] Exclusion of Entire Class

In *Isbister v. Boys' Club of Santa Cruz, Inc. (1985) 40 Cal. 3d 72, 219 Cal. Rptr. 150, 707 P.2d 212* , the trial court permanently enjoined defendant, a private nonprofit corporation that operated a recreational facility only for boys, from denying membership or access to its facilities to girls. The Supreme Court affirmed. After finding that defendant was a "business establishment" covered by the Unruh Act, the Court addressed the issue of arbitrary discrimination, saying that although a person may be excluded from a business establishment on an individual basis if that individual does not conform to proper standards of conduct, the discrimination is arbitrary, and therefore prohibited by the Unruh Act, if it excludes an entire class on the basis of stereotyped notions (*40 Cal. 3d 72, 87)* . Defendant was a public accommodation and did not come within the special social need exception to the Unruh Act because it was not a specialized facility established to serve those particularly in need of a service. In addition to its public nature, the facts surrounding defendant's operations that highlighted the arbitrary nature of the female exclusion were: defendant's programs, facilities, and services were suitable for both sexes, the inclusion of both sexes in the programs would not diminish their value or effectiveness, and there was no proof that female membership would cause serious permanent damage to defendant's funding or its relationship with the parent national organization (*40 Cal. 3d 72, 88-90)* . The Court included a caveat that its finding was based on the particular circumstances surrounding defendant and that nothing necessarily requires a similar result in case of other single-sex youth organizations (*40 Cal. 3d 72, 91)* .

In *Curran v. Mount Diablo Council of the Boy Scouts (1983) 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 , appeal dismissed, 468 U.S. 1205 (1984) , on review after remand, 17 Cal. 4th 670, 72 Cal. Rptr. 2d 410, 952 P.2d 218 (1998)* , plaintiff brought suit against the Boy Scouts for unfair procedure and violation of the Unruh Civil Rights Act [*Civ. Code § 51*] after he was expelled from the Boy Scouts, and rejected as a "Scouter," on the basis of his status as a homosexual. The court of appeal held that plaintiff had stated a cause of action against the organization under both theories. With regard to plaintiff's cause of action under the Unruh Act, the court stated that the focus of *Civ. Code § 51* on the individual precludes the exclusion of persons based on a generalization about the class to which they belong (*147 Cal. App. 3d 712, 733)* . Thus, the court concluded that the Unruh Act prohibits arbitrary discrimination against homosexuals (*147 Cal. App. 3d 712, 734)* . Counsel should note, however, that on review after remand, the California Supreme Court held that the Unruh Act does not apply to membership decisions by the Boy Scouts (*17 Cal. 4th 670, 696-700* ; *see § 35.25[3][e]*).

[b] Sexual Orientation

Hubert v. Williams (1982) 133 Cal. App. 3d Supp. 1 , was an Unruh Civil Rights Act action in which the trial court erroneously sustained a demurrer to plaintiffs' complaint for failure to state a cause of action. Plaintiffs, a quadriplegic and his attendant, alleged that they had been evicted from their apartment because the attendant was a lesbian and the quadriplegic tenant associated with persons of "homosexual orientation." In reversing the lower court's order, the appellate department of the superior court stated that gays and lesbians are a class protected by the Unruh Act, and that the right to associate with members of a protected class is likewise protected (*133 Cal. App. 3d Supp. 1, 15*).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil Rights LawCivil Rights ActsGeneral OverviewCivil Rights LawPractice & ProcedureGeneral Overview

California Points & Authorities

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3-35 California Points & Authorities § 35.45

§ 35.45 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Business Establishment for Violation of the Unruh Civil Rights Act--Complaint Satisfies Requirements for Pleading Arbitrary Denial or Discrimination--Denial or Discrimination Based on Exercise of Legal Rights of Tenant

[1] FORM

[*Caption. See § 35.40.*]

A COMPLAINT FOR VIOLATION OF THE UNRUH CIVIL RIGHTS ACT SATISFIES THE REQUIREMENTS FOR PLEADING THAT DEFENDANT ARBITRARILY DISCRIMINATED IN REGARD TO OR ARBITRARILY DENIED RIGHTS OF ACCOMMODATION ESTABLISHED BY THE ACT IF IT ALLEGES FACTS WHICH SHOW A DENIAL OR DISCRIMINATION BASED ON PLAINTIFF'S EXERCISE OF LEGAL RIGHTS AS A TENANT.

A. Liberal Construction as Necessary. [*See § 35.40, Paragraph A.*]

B. Deportment Regulations as Lacking Rational Relationship. [*See § 35.41, Paragraph B.*]

C. Exclusion of Entire Class. [*See § 35.44, Paragraph C.*]

D. Denial or Discrimination Based on Exercise of Legal Rights of Tenant. A complaint for violation of the Unruh Civil Rights Act sufficiently pleads that defendant arbitrarily discriminated in regard to or arbitrarily denied rights of accommodation established by the Act if it alleges facts which show a denial or discrimination because of plaintiff tenant's exercise of legal rights to insure tenantability of the premises (*Newby v. Alto Riviera Apt. (1976) 60 Cal. App. 3d 288, 301-302, 131 Cal. Rptr. 547* (dictum)).

[*Optional*] **E. Eviction.** Eviction or threatened eviction because of plaintiff tenant's exercise of legal rights to insure tenantability of the premises is arbitrary (*Newby v. Alto Riviera Apartments (1976) 60 Cal. App. 3d 288, 301-302, 131 Cal. Rptr. 547* (dictum)).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a demurrer to a complaint for violation of the Unruh Civil Rights Act when the demurrer asserts that the complaint fails to state a cause of action in that it fails to allege facts showing that the denial or discrimination was arbitrary but when sufficient facts are alleged to show that defendant's action was based on plaintiff tenant's exercise of legal rights concerning the business establishment.

Counsel should insert argument in this showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, this memorandum may be submitted in opposition to a demurrer supported by the points set out in *§§ 35.21 -35.23*.

[b] Related Uses

With appropriate modifications, this memorandum may be used to oppose a motion for summary judgment [*see Code Civ. Proc. § 437c*] or a petition for writ of mandate to review a decision by the Fair Employment and Housing Practices Commission [*see Gov. Code § 12930(f)(2)*; *Code Civ. Proc. § 1094.5*] based on the contention that an arbitrary denial or discrimination did not occur.

[c] Related Pleading and Practice Forms

For a general form of complaint and forms of allegation for use in a complaint against a business establishment alleging denial or discrimination in violation of the Unruh Civil Rights Act in regard to services and in particular for refusal to rent housing accommodations, see California Forms of Pleading and Practice, Chs. 116 and 117, *Civil Rights* (Matthew Bender).

[d] Related Memoranda

For points and authorities pertaining to retaliatory eviction, see Ch. 236, *Unlawful Detainer* , in this set.

[3] Discussion of Authorities

[a] Denial or Discrimination Based on Exercise of Legal Rights of Tenant

The factual background of ***Newby v. Alto Riviera Apartments*** *(1976) 60 Cal. App. 3d 288, 131 Cal. Rptr. 547* , is discussed in *§ 35.21[3][a]*. One of the issues on appeal in that case was whether a threatened eviction represented arbitrary discrimination under the Unruh Civil Rights Act. To determine what grounds for eviction might be considered unreasonable, the court of appeal examined prior case and statutory law. It noted that *Civ. Code § 1942.5* protects a tenant from retaliation by a landlord because of the exercise of rights granted by *Civ. Code §§ 1940-1954* related to tenantability of the premises. Thus, it would be unreasonable for a landlord to retaliate against a tenant for having exercised statutory rights insuring tenantability. The court concluded that an eviction notice is not "rationally related to the facilities provided" if it expels a tenant who demands premises which do not endanger the health and welfare of its

occupant and do not violate the housing codes but failed to find a violation of the Act because the case did not involve an eviction for this reason.

It is important to note that *Newby* does not consider the issue of whether or not the Unruh Civil Rights Act may be used in lieu of or in addition to *Civ. Code § 1942.5* as a basis for injunctive relief against retaliatory eviction or damages [*see Aweeka v. Bonds (1971) 20 Cal. App. 3d 278, 281-282, 97 Cal. Rptr. 650* (retaliatory eviction was basis for affirmative cause of action for damages or preliminary injunction) and California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions* (Matthew Bender)]. Subsequently, however, the Legislature amended *Civ. Code § 1942.5* to provide that its remedies are in addition to any other remedies provided by statutory or decisional law [*Civ. Code § 1942.5(h)*].

In ***Marina Point, Ltd. v. Wolfson*** *(1982) 30 Cal. 3d 721, 180 Cal. Rptr. 496, 640 P.2d 115 , cert. denied, 459 U.S. 858* , the Supreme Court disapproved some language in *Newby v. Alto Riviera Apartments (1976) 60 Cal. App. 3d 288, 131 Cal. Rptr. 547* . In ruling on the propriety of a landlord's blanket exclusion of families with children from an apartment complex under the Unruh Civil Rights Act [*Civ. Code § 51*], the Court stated that *Newby* involved the threatened eviction of a tenant on the basis of the tenant's own conduct and was clearly distinguishable from the case at bar. The Court disapproved the language in *Newby* that stated that "action by a landlord which does not restrict the right of a tenant to insure habitable living premises, and does not discriminate on the basis of race, sex, color, religion, ancestry, or national origin, is not actionable under the [Unruh Act] if it proceeds from a motive of rational self interest, i.e., if it is 'rationally related to the facilities provided' " [*see Newby v. Alto Riviera Apartments (1976) 60 Cal. App. 3d 288, 302, 131 Cal. Rptr. 547* ; *Marina Point, Ltd. v. Wolfson (1982) 30 Cal. 3d 721, 740-741 n.9, 180 Cal. Rptr. 496, 640 P.2d 115 , cert. denied, 459 U.S. 858]* .

[b] Eviction

The factual background of ***Newby v. Alto Riviera Apartments*** *(1976) 60 Cal. App. 3d 288, 131 Cal. Rptr. 547* , is discussed in *§ 35.21[3][a]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil Rights LawCivil Rights ActsGeneral OverviewCivil Rights LawPractice & ProcedureGeneral Overview

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3-35 California Points & Authorities § 35.46

§ 35.46 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Business Establishment for Violation of the Unruh Civil Rights Act [Civ. Code § 51]--Complaint Satisfies Requirements for Pleading Arbitrary Denial or Discrimination--Denial or Discrimination as Act of Retaliation for Exercise of Legal Rights

[1] FORM

[*Caption. See § 35.40.*]

A COMPLAINT FOR VIOLATION OF THE UNRUH CIVIL RIGHTS ACT SATISFIES THE REQUIREMENTS FOR PLEADING THAT DEFENDANT ARBITRARILY DISCRIMINATED IN REGARD TO, OR ARBITRARILY DENIED, RIGHTS OF ACCOMMODATION ESTABLISHED BY THE ACT IF IT ALLEGES FACTS THAT SHOW A DENIAL OR DISCRIMINATION DONE IN RETALIATION FOR PLAINTIFF'S EXERCISE OF A LEGAL RIGHT.

A. Liberal Construction as Necessary. [*See § 35.40, Paragraph A.*]

B. Deportment Regulations as Lacking Rational Relationship. [*See § 35.41, Paragraph B.*]

C. Denial or Discrimination Done in Retaliation for Exercise of Legal Right. A complaint for violation of the Unruh Civil Rights Act sufficiently pleads that defendant arbitrarily and unreasonably discriminated against the plaintiff when it alleges facts that show a denial or discrimination done in retaliation for the plaintiff's having previously exercised his or her legal rights (*Vaughn v. Hugo Neu Proler International (1990) 223 Cal. App. 3d 1612, 1617-1620, 273 Cal. Rptr. 426* ; *contra Gayer v. Polk Gulch, Inc. (1991) 231 Cal. App. 3d 515, 519, 282 Cal. Rptr. 556*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a demurrer to a complaint for violation of the Unruh Civil Rights Act [*Civ. Code § 51*]. It opposes a demurrer that asserts that the complaint fails to state a cause of action because it does not allege facts to show that the defendant's denial or discriminatory treatment was arbitrary. It may be used when the plaintiff has alleged sufficient facts to show that the defendant's action was based on the plaintiff's having previously exercised his or her legal rights with regard to the defendant.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, this memorandum may be submitted in opposition to a demurrer supported by the points set out in *§§ 35.21 -35.26*.

[b] Related Uses

With appropriate modifications, this memorandum may be used to oppose a motion for summary judgment [*see Code Civ. Proc. § 437c*] or a petition for writ of mandate to review a decision by the Fair Employment and Housing Commission [*see Code Civ. Proc. § 1094.5*; *Gov. Code § 12930(f)(2)*] based on the contention that an arbitrary denial or discrimination did not occur.

[c] Related Pleading and Practice Forms

For a general form of complaint against a business establishment alleging denial or discrimination in violation of the Unruh Civil Rights Act, see California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments* (Matthew Bender).

[3] Discussion of Authorities

[a] Denial or Discrimination Done in Retaliation for Exercise of Legal Right

In ***Vaughn v. Hugo Neu Proler International*** *(1990) 223 Cal. App. 3d 1612, 273 Cal. Rptr. 426* , plaintiff, a woman in the business of procuring and selling scrap metal to scrap-metal processing and distribution centers, brought a sex discrimination action against defendants, owners and operators of a scrap-metal processing and distribution facility, alleging that she and other females were not permitted entry onto defendants' business premises, although no men were denied that access. After that action was settled, defendants again denied only plaintiff and her employees access to their facility, and refused to purchase scrap metal from her. Defendants also prohibited her from entering adjoining property to pick up discarded scrap metal, and when plaintiff was on the adjoining property, called the police and requested that she be arrested for trespassing. Later, one of plaintiff's employees was injured by one defendant as he was procuring unwanted scrap metal from the adjoining property. Plaintiff filed a complaint alleging violation of the Unruh Act, claiming that defendants' actions were taken in retaliation for the earlier sex-discrimination action. Defendants filed special demurrers, and the trial court sustained them. Plaintiff chose not to amend the complaint, stipulated to a dismissal, and appealed.

Division Five of the Second District Court of Appeal reversed the dismissal of the cause of action under the Unruh Act. The court refuted defendants' contention that since plaintiff was not a member of a class when she filed the lawsuit, she had no claim under the Unruh Act. It explained that the Act protects all persons from arbitrary discrimination; it is not limited to a category of "protected classes." The rights afforded by the Act are enjoyed by all persons, as individuals. The Act is to be liberally construed with a view to effecting its object and to promoting justice. The court said allowing

defendants to discriminate against plaintiff because she had previously filed a sex-discrimination lawsuit would be contrary to the primary purpose of the Act, which is to compel recognition of the equality of all persons in the right to the particular service offered by an organization or entity covered by the Act (*223 Cal. App. 3d 1612, 1617-1618)* . Once it concluded that the terms and primary purpose of the Unruh Act were violated by defendant's alleged conduct, the court went on to distinguish the case from those in which the Act was held inapplicable to discriminatory conduct by business enterprises. Those cases involved situations in which the practice was not arbitrary, and was based on the defendant's right to exclude a person because of the plaintiff's conduct, or because a regulation was adopted for a rational reason that was related to services performed or services provided by the defendant, or the Act excluded a particular business from its coverage. A business establishment may place reasonable restrictions on its customers as long as the restrictions are rationally related to the services performed and the facilities provided. In the instant case there was no evidence to establish that defendants were discriminating against plaintiff for any reason other than the fact that she had previously filed a lawsuit against them for sex discrimination. Thus, the court concluded that the exclusion of plaintiff from the premises was not rationally related to the services performed or services provided by defendants. More importantly, exclusion solely on the basis of the previously filed lawsuit was arbitrary and unreasonable pursuant to *Civ. Code § 51* (*223 Cal. App. 3d 1612, 1618-1619)* . Defendants claimed that the Act does not specifically provide for a cause of action for retaliation, and therefore they can exclude plaintiff from the same privileges as the general public. The court responded that courts have not hesitated to prohibit retaliatory exercises of broad private powers when they interfere with public policy, notwithstanding the absence of a statutory cause of action (*223 Cal. App. 3d 1612, 1619)* . Permitting defendants to discriminate against plaintiff in retaliation for exercising a statutory right would be contrary to public policy. Because plaintiff chose to challenge unlawful discrimination by filing a lawsuit to correct that illegal practice, defendants engaged in discriminatory practices for arbitrary reasons. When a person challenges such practices in a suit filed pursuant to the Unruh Act, the public has an interest in protecting that person from retaliatory conduct by the offending party (*223 Cal. App. 3d 1612, 1620)* .

In ***Gayer v. Polk Gulch, Inc.*** *(1991) 231 Cal. App. 3d 515, 282 Cal. Rptr. 556* , plaintiff brought an Unruh Act action against defendant bar in which he alleged that defendant had discriminated against him by refusing to serve him in retaliation for his previously having brought an Unruh Act action against defendant. The trial court sustained defendant's demurrer without leave to amend and dismissed the Action. Plaintiff appealed.

Division Four of the First District Court of Appeal affirmed. The court emphasized that when a demurrer is sustained, the reviewing court must determine whether the complaint states facts sufficient to state a cause of action. Accordingly, the court said the only question before it was whether defendant violated the Act when its employees excluded plaintiff from the bar in retaliation for his having previously filed a discrimination suit against the owner. Plaintiff asserted that he was protected from that retaliation under the Act either as an individual or as a member of a class of civil rights litigants. The court concluded that the Act does not encompass discrimination based on retaliation and, therefore, that plaintiff failed to state a cause of action (*231 Cal. App. 3d 515, 519)* . The court acknowledged that the case was similar to *Vaughn* in that both dealt with retaliation, but said it was factually different from *Vaughn.* Defendant claimed that it refused to serve and then excluded plaintiff from the bar because of his prior rowdy conduct and because the prior discrimination suit between them was pending, and was set for hearing within days of the incident. In *Vaughn* the previous discrimination suit between the parties had been settled several years before the alleged retaliatory exclusion took place, and defendant could not argue that plaintiff was excluded because tensions between the parties were running high as the result of the pending lawsuit (*231 Cal. App. 3d 515, 523)* .

However, the dissent pointed out that there was no real difference between this case and *Vaughn,* and its holding should control. Moreover, the court was ruling on a demurrer, and should look only to the face of the pleading and must assume the truth of the facts therein (*231 Cal. App. 3d 515, 526)* .

Legal Topics:

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

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil Rights LawCivil Rights ActsGeneral OverviewCivil Rights LawPractice & ProcedureGeneral Overview

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3-35 California Points & Authorities § 35.47

§ 35.47 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Business Establishment for Violation of the Unruh Civil Rights Act--Complaint Satisfies Requirements for Pleading Arbitrary Denial or Discrimination--Denial or Discrimination Because of Associates

[1] FORM

[*Caption. See § 35.40.*]

A COMPLAINT FOR VIOLATION OF THE UNRUH CIVIL RIGHTS ACT SATISFIES THE REQUIREMENTS FOR PLEADING THAT DEFENDANT ARBITRARILY DISCRIMINATED IN REGARD TO OR ARBITRARILY DENIED RIGHTS OF ACCOMMODATION ESTABLISHED BY THE ACT IF IT ALLEGES FACTS WHICH SHOW A DENIAL OR DISCRIMINATION BASED ON THE CHARACTERISTICS OF PLAINTIFF'S ASSOCIATES AT THE BUSINESS ESTABLISHMENT IN VIOLATION OF THE ACT.

A. Liberal Construction as Necessary. [*See § 35.40, Paragraph A.*]

B. Deportment Regulations as Lacking Rational Relationship. [*See § 35.41, Paragraph B.*]

C. Exclusion of Entire Class. [*See § 35.44, Paragraph C.*]

D. Denial or Discrimination Because of Associates. A complaint for violation of the Unruh Civil Rights Act sufficiently pleads that defendant arbitrarily discriminated in regard to or arbitrarily denied rights of accommodation established by the Act if it alleges facts which show a denial or discrimination based on the characteristics of plaintiff's associates at the business establishment in violation of the Act (*Winchell v. English (1976) 62 Cal. App. 3d 125, 129, 133 Cal. Rptr. 20*).

[*Optional*] **E. Race.** Denial or discrimination because of the race of plaintiff's associates is arbitrary (*Winchell v. English (1976) 62 Cal. App. 3d 125, 129-130, 133 Cal. Rptr. 20*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a demurrer to a complaint for violation of the Unruh Civil Rights Act when the demurrer asserts that the complaint fails to state a cause of action in that it fails to allege facts showing that the denial or discrimination was arbitrary, but where sufficient facts are alleged to show that defendant's action was based, in violation of the Act, on the characteristics of plaintiff's associates at the business establishment.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, this memorandum may be submitted in opposition to a demurrer supported by the points set out in *§§ 35.21 -35.23*.

[b] Related Uses

With appropriate modifications, this memorandum may be used to oppose a motion for summary judgment [*see Code Civ. Proc. § 437c*] or a petition for writ of mandate to review a decision by the Fair Employment and Housing Commission [*see Gov. Code § 12930(f)(2)*; *Code Civ. Proc. § 1094.5*] based on the contention that an arbitrary denial or discrimination did not occur.

[c] Related Pleading and Practice Forms

For a general form of complaint against a business establishment alleging denial or discrimination in violation of the Unruh Civil Rights Act, see California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments* (Matthew Bender).

[3] Discussion of Authorities

[a] Denial or Discrimination Because of Associates

The factual background of ***Winchell v. English*** *(1976) 62 Cal. App. 3d 125, 133 Cal. Rptr. 20* , is discussed in *§ 35.40[3][a]*. In that case, the trial court sustained a demurrer against the complaint apparently on the theory that the Unruh Civil Rights Act did not protect individuals from discrimination directed against them because of the characteristics of their companions at the time of the incident. The court of appeal, in reversing the Action of the trial court, held specifically that discrimination against persons on account of their associations with persons of the black race was actionable under the Unruh Civil Rights Act. The court pointed out that *Civ. Code § 52* refers not only to discrimination on account of the color of the person discriminated against, but also to any discrimination on account of color. In this way, *Civ. Code § 52* indicates that discrimination by a business establishment against one's right of association on account of the associates' color is a violation of the Unruh Civil Rights Act.

Further, the court's reasoning and language make it clear that any arbitrary discrimination based on characteristics of one's associates is actionable. The court emphasized the rule of *In re Cox (1970) 3 Cal. 3d 205, 216, 90 Cal. Rptr. 24,*

474 P.2d 992 , set out in *§ 35.20[3][a]*, that the Act prohibits all arbitrary discrimination and the factual circumstances of that case in which Cox was apparently a victim of discrimination because he associated with another of unusual dress and appearance. The court noted that in other states, statutes comparable to *Civ. Code § 52*, which defines liability for violation of the Unruh Civil Rights Act, are not limited in their operation to the color or other feature of the person who was the immediate object of discrimination.

However, one limitation on this decision is the fact that the *Winchell* court expressly decided not to determine if discrimination because of one's associates is arbitrary where the behavior of the associates creates a reasonable basis for their eviction or other action.

[4] Additional Authorities

[a] Denial or Discrimination Because of Associates

In *Rotary Club of Duarte v. Board of Directors (1986) 178 Cal. App. 3d 1035, 224 Cal. Rptr. 213* , defendant, the board of directors of an international organization, revoked the charter of plaintiff, a local chapter, because plaintiff had admitted women as members. In reversing the trial court's judgment for defendant, the court of appeal thoroughly examined the history and meaning of the terms used in the Unruh Act. After finding that defendant was a business establishment and was within the parameters of the Unruh Act, the court said that the Act proscribes not only direct discrimination against women, but also discrimination against a club because of its association with women (*178 Cal. App. 3d 1035, 1061)* .

The factual and procedural background of *Hubert v. Williams (1982) 133 Cal. App. 3d Supp. 1* , *184 Cal. Rptr. 161* , is discussed in *§ 35.44[4][b]*. In reversing the trial court's order sustaining defendant's demurrer to plaintiffs' complaint and dismissing the Action, the appellate department of the superior court stated that because gays and lesbians are protected from arbitrary discrimination in rental housing by the Unruh Act, the right to associate with members of the protected class, as a class, is likewise protected under the Act (*133 Cal. App. 3d Supp. 1, 5)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil Rights LawCivil Rights ActsGeneral OverviewCivil Rights LawPractice & ProcedureGeneral Overview

California Points & Authorities

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3-35 California Points & Authorities § 35.48

§ 35.48 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Business Establishment for Violation of the Unruh Civil Rights Act--Complaint Satisfies Requirements for Pleading Arbitrary Denial or Discrimination--Cause of Action for Sexual Harassment [Civ. Code § 51.9(a)]

[1] FORM

[*Caption. See § 35.40.*]

A COMPLAINT FOR VIOLATION OF THE UNRUH CIVIL RIGHTS ACT SATISFIES THE REQUIREMENTS FOR PLEADING A CAUSE OF ACTION FOR SEXUAL HARASSMENT IF IT ALLEGES FACTS WHICH SHOW THAT DEFENDANT WAS IN A BUSINESS, SERVICE, OR PROFESSIONAL RELATIONSHIP WITH PLAINTIFF; DEFENDANT MADE AND CONTINUED TO MAKE UNWELCOME AND PERSISTENT OR SEVERE SEXUAL ADVANCES, SOLICITATIONS, SEXUAL REQUESTS, DEMANDS FOR SEXUAL COMPLIANCE BY PLAINTIFF, OR OTHER VERBAL, VISUAL, OR PHYSICAL CONDUCT OF A SEXUAL OR HOSTILE NATURE BASED ON GENDER; THAT PLAINTIFF COULD NOT EASILY TERMINATE THE RELATIONSHIP; AND THAT PLAINTIFF HAS SUFFERED OR WILL SUFFER ECONOMIC LOSS OR DISADVANTAGE OR PERSONAL INJURY AS A RESULT OF DEFENDANT'S CONDUCT.

A. Liberal Construction as Necessary. [*See § 35.40, Paragraph A.*]

B. Sexual Harassment. A person in a business, service, or professional relationship with the plaintiff may be held liable for unwelcome and persistent or severe sexual advances, solicitations, sexual requests, demands for sexual compliance by the plaintiff, or other verbal, visual, or physical conduct of a sexual nature or of a hostile nature based on gender, provided (1) the plaintiff is unable to easily terminate the relationship, and (2) the plaintiff has suffered or will suffer economic loss or disadvantage, or personal injury, including, but not limited to, emotional distress or the violation of a statutory or constitutional right, as a result of the conduct (*Civ. Code § 51.9(a)*; *see Brown v. Smith (1997) 55 Cal. App. 4th 767, 787-788, 64 Cal. Rptr. 2d 301* (*Civ. Code § 51.9(a)* provides cause of action for sexual harassment occurring after effective date of statute, January 1, 1995, as part of professional relationship)).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a demurrer to a complaint for violation of *Civ. Code § 51.9* for sexual harassment when the demurrer asserts that the complaint fails to state a cause of action in that it fails to allege facts showing conduct by the defendant that constitutes a cause of action for sexual harassment as prescribed in *Civ. Code § 51.9(a)*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include facts showing that the complaint pleads the elements of a cause of action for sexual harassment as set forth in *Civ. Code § 51.9(a)* (*see § 35.48[3][a]*), and that the alleged acts on which the cause of action is based took place after December 31, 1994 (*see § 35.48[3][c]*).

[b] Related Pleading and Practice Forms

For a general form of complaint against a business establishment alleging discrimination in violation of the Unruh Civil Rights Act, see Ch. 116, *Civil Rights: Discrimination in Business Establishments* , in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Cause of Action for Sexual Harassment

A person is liable in a cause of action for sexual harassment when the plaintiff proves all of the following elements [*Civ. Code § 51.9(a)*; *see also Brown v. Smith (1997) 55 Cal. App. 4th 767, 787, 64 Cal. Rptr. 2d 301]* :

- A business, service, or professional relationship exists between the plaintiff and defendant.
- The defendant has made sexual advances, solicitations, sexual requests, demands for sexual compliance by the plaintiff, or engaged in other verbal, visual, or physical conduct of a sexual nature or of a hostile nature based on gender, that were unwelcome and persistent or severe.
- The plaintiff is unable to easily terminate the relationship.
- The plaintiff has suffered or will suffer economic loss or disadvantage or personal injury, including, but not limited to, emotional distress or the violation of a statutory or constitutional right, as a result of the defendant's conduct.

In an action pursuant to *Civ. Code § 51.9*, damages will be awarded as provided by *Civ. Code § 52* [*Civ. Code § 51.9(b)*]. Nothing in *Civ. Code § 51.9* may be construed to limit application of any other remedy for sexual harassment provided under law [*Civ. Code § 51.9(c)*]. The definition of sexual harassment and the standards for determining liability set forth in *Civ. Code § 51.9* are limited to determining liability only with regard to a cause of action brought under *Civ. Code § 51.9* [*Civ. Code § 51.9(d)*].

For related jury instructions, see *Judicial Council of California Civil Jury Instructions, CACI Nos. 3024, 3027* (LexisNexis Matthew Bender, Official Publisher), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions.

[b] Business, Service, or Professional Relationships

Civ. Code § 51.9(a)(1) gives as examples of business, service, or professional relationships that may exist between plaintiff and another person as including, but not limited to, relationships with:

- Physicians, psychotherapists (as defined in *Bus. & Prof. Code § 728(c)(1)*), or dentists [*Civ. Code § 51.9(a)(1)(A)*];

- Attorneys, holders of master's degrees in social work, real estate agents, real estate appraisers, accountants, bankers, trust officers, financial planners, loan officers, collection services, building contractors, or escrow loan officers [*Civ. Code § 51.9(a)(1)(B)*];

- Executors, trustees, or administrators [*Civ. Code § 51.9(a)(1)(C)*];

- Landlords or property managers [*Civ. Code § 51.9(a)(1)(D)*; *see also* *Brown v. Smith (1997) 55 Cal. App. 4th 767, 786-788, 64 Cal. Rptr. 2d 301* (landlord)];

- Teachers [*Civ. Code § 51.9(a)(1)(E)*]; or

- Relationships similar to any of the ones delineated in *Civil Code § 51.9(a)(1)(A)-(E)* [*Civ. Code § 51.9(a)(1)(F)*].

[c] No Claim Under Civil Code § 51.9 for Acts Occurring Before January 1, 1995

In **Brown v. Smith** (1997) 55 Cal. 4th App. 4th 767, *64 Cal. Rptr. 2d 301* , a tenant and her husband brought an action against her landlord and his wife for sexual harassment based on repeated comments and advances toward her of a sexual nature made in 1991. The complaint claimed violations of the Fair Employment & Housing Act (FEHA; *Gov. Code § 12900 et seq.*), and the Unruh Act (*Civ. Code §§ 51, 52*). After a jury trial, the plaintiffs were awarded damages under FEHA and the Act. The defendants appealed.

The court of appeal reversed the FEHA verdict on the basis of infirm jury instructions (*55 Cal. App. 4th 767, 782-786)* , and reversed the verdict under the Unruh Act. The court found that conduct constituting sexual harassment was not within the scope of the Unruh Act (*Civ. Code §§ 51, 52*) as it existed at the time of the Acts pleaded in the complaint, citing *Harris v. Capital Growth Investors XIV (1991) 52 Cal. 3d 1142, 278 Cal. Rptr. 614, 805 P.2d 873* (*55 Cal. App. 4th 767, 787)* . The court found that the legislative intent in enacting *Civ. Code § 51.9*, which was effective January 1, 1995, was to plug the hole in the Unruh Act and create a cause of action for sexual harassment where none had exited before (*55 Cal. App. 4th 767, 787)* . While recognizing that a female tenant can assert a cognizable cause of action for sexual harassment against her landlord under *Civ. Code § 51.9*, the court of appeal construed the statute to provide prospective relief only. Because the tenant in *Brown* complained of conduct occurring prior to January 1, 1995, the effective date of the statute, the court concluded that the tenant could not state a cause of action for sexual harassment remedies under the Unruh Act portion of the plaintiff's sexual harassment complaint (*55 Cal. App. 4th 767, 787-788)* .

[4] Additional Authorities

In *C.R. v. Tenet Healthcare Corp. (2009) 169 Cal. App. 4th 1094, 87 Cal. Rptr. 3d 424* , a patient at a medical center

sued the center after she was allegedly molested by one of the center's employees, alleging violation of *Civ. Code § 51.9*. The center demurred, and the trial court granted the demurrer on the ground that the section 51.9 claim was deficient because there was no allegation that defendant committed the acts of sexual abuse, the sexual assaults were alleged to have been committed by an individual, the statute does not impose liability on a business establishment such as a hospital, and a corporate entity cannot be held vicariously liable for sexual torts (*169 Cal. App. 4th 1094, 1097-1101*). The Court of Appeal reversed. The court held first that defendant, as a hospital, although not expressly listed in section 51.9(a), fell within the statute's scope. The alleged molester was alleged to be a certified nursing assistant and allegedly had responsibilities substantially similar to those provided by a physician. Moreover, defendant, as an entity providing health care services who hired and supervised a certified nursing assistant to care for patients as alleged in the first amended complaint, was either a service or fell within the ambit of a profession. Further, section 51.9 did not require the defendant have a fiduciary relationship with the plaintiff. The court also held that defendant, as a corporation, could be liable for the sexual abuse of plaintiff, and there were sufficient allegations of ratification to withstand a challenge at the demurrer stage, *i.e.*, that defendant, with knowledge of the alleged molester's misconduct, continued to employ him and destroyed documents (*169 Cal. App. 4th 1094, 1105-1112)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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3-35 California Points & Authorities § 35.49

§ 35.49 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Participant in Violation of Unruh Civil Rights Act [Civ. Code § 51]--Complaint Satisfies Requirements for Pleading Liability of Defendant for Denial or Discrimination--Participation Through Agreement

[1] FORM

[*Caption. See § 35.40.*]

A COMPLAINT FOR VIOLATION OF THE UNRUH CIVIL RIGHTS ACT SATISFIES THE REQUIREMENTS FOR PLEADING THE LIABILITY OF A DEFENDANT WHO DID NOT ACTIVELY DISCRIMINATE IN REGARD TO OR DENY RIGHTS OF ACCOMMODATION ESTABLISHED BY THE ACT IF IT ALLEGES FACTS WHICH SHOW THAT DEFENDANT WAS PARTY TO A PLAN, AGREEMENT, UNDERSTANDING, CONCERTED ACTION, OR CONSPIRACY AMONG OTHER DEFENDANTS TO VIOLATE THE ACT AND WHICH RESULTED IN VIOLATION OF THE ACT.

A. Liberal Construction as Necessary. [*See § 35.40, Paragraph A.*]

B. Denial or Discrimination as Actionable. [*See § 35.20, Paragraph C.*]

C. Participation Through Agreement. A complaint for violation of the Unruh Civil Rights Act sufficiently pleads the liability of a defendant who did not discriminate in regard to or deny rights of accommodation established by the Act if it alleges facts which show that defendant was party to a plan, agreement, understanding, concerted action, or conspiracy among other defendants to violate the Act and which resulted in violation of the Act, whether or not defendant is a business establishment (*Wagner v. O'Bannon (1969) 274 Cal. App. 2d 121, 131-132, 79 Cal. Rptr. 44* ; *Holmes v. Bank of America (1963) 216 Cal. App. 2d 529, 535-536, 30 Cal. Rptr. 917*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a demurrer to a complaint for violation of the Unruh Civil Rights Act when the demurrer asserts that the complaint fails to state a cause of action against a defendant in that it fails to allege facts showing that defendant is a business establishment or that defendant committed a discrimination in regard to or denial of rights of accommodation but where the allegations show that defendant was party to some form of agreement or concerted action which resulted in a violation of the Act by some other party.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

Related memoranda of points and authorities for use in opposing a demurrer on the ground that the complaint fails to allege facts showing that defendant is a business establishment are set out in *§ 35.40*.

In an appropriate case, this memorandum may be submitted in opposition to a demurrer supported by the points set out in *§ 35.25*.

[b] Related Uses

With appropriate modifications, this memorandum may be used to oppose a motion for summary judgment [*see Code Civ. Proc. § 437c*] or a petition for writ of mandate to review a decision by the Fair Employment and Housing Commission [*see Gov. Code § 12930(f)(2)*; *Code Civ. Proc. § 1094.5*] based on the contention that even if a violation occurred, defendant did not commit it.

[c] Related Pleading and Practice Forms

For a general form of complaint against a business establishment alleging denial or discrimination in violation of the Unruh Civil Rights Act, see California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments* (Matthew Bender).

[3] Discussion of Authorities

[a] Participation Through Agreement

In ***Wagner v. O'Bannon*** *(1969) 274 Cal. App. 2d 121, 79 Cal. Rptr. 44* , plaintiffs, a black married couple, sued the owner of a house, the county realty board, and various realtors under the Unruh Civil Rights Act for discrimination on the basis of race in a real estate transaction. The trial court found in favor of all the defendants and entered a judgment denying relief to plaintiffs. Part of the trial court's conclusions were that defendant county realty board was not a business establishment under the Act. In reversing the Action of the trial court, the court of appeal noted that the defendant realty board exercised some supervisory authority over its members' conduct; that blacks were not shown or encouraged to buy homes in nonblack neighborhoods; that one defendant realtor did not follow customary procedures in discussing plaintiffs' offer with the president of the realty board before submitting it to the listing broker; and that two defendant real estate brokers tried to avoid the sale, even though avoidance was contrary to their economic interest. The court concluded that if this evidence justified, on retrial, a conclusion that the realty board was the instrumentality through which discrimination in housing was promoted and maintained, then the board could be held liable under *Civ. Code § 52* for aiding or inciting a denial of privileges, whether or not it was a business establishment. Further, if retrial

established that the board was a party to an agreement, concerted action, or civil conspiracy to inflict the wrong complained of, the board might be liable under common law rules applicable to joint tortfeasors.

In ***Holmes v. Bank of America*** *(1963) 216 Cal. App. 2d 529, 30 Cal. Rptr. 917* , plaintiff, a black man, sued two corporations engaged in the business of developing, building, and selling a tract of housing accommodations in San Diego County and a bank that had agreed to finance the sale of the housing accommodations for violation of the Unruh Civil Rights Act. Plaintiff complained that defendants had conspired and agreed to deprive plaintiff and all other Negroes of a home in the tract and that the bank as agent and coconspirator maintained and carried out a policy of refusing to finance homes in the tract to persons solely because they were Negroes. The trial court sustained the demurrer to the complaint by defendant bank, and plaintiff appealed. The principal argument of the bank before the court of appeal was that it did not come under the terms of the Unruh Civil Rights Act. It claimed that (1) obtaining a bank loan is not an accommodation, advantage, facility, privilege, or service of a business establishment within the meaning of *Civ. Code § 51*; (2) *Civ. Code § 51* may apply to business establishments but not to every business transaction of a business establishment; and (3) since no person may compel another to enter into a contract without the other's consent, loan contracts were exempted from the Act.

The court of appeal, in reversing the Action of the trial court, stated that it did not have to decide the correctness of the bank's arguments. Even if they were correct, the allegations of conspiracy and oral agreement to discriminate on the basis of race raised factual questions, which could not be determined as a question of law from the facts pleaded, as to whether or not the bank aided or incited a denial or discrimination, thus creating a basis for liability under *Civ. Code § 52*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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3-35 California Points & Authorities § 35.50

§ 35.50 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Real Estate Broker in Violation of Unruh Civil Rights Act [Civ. Code § 51]--Complaint Satisfies Requirements for Pleading Liability of Defendant for Denial or Discrimination--Liability of Real Estate Broker

[1] FORM

[*Caption. See § 35.40.*]

A COMPLAINT FOR VIOLATION OF THE UNRUH CIVIL RIGHTS ACT SATISFIES THE REQUIREMENTS FOR PLEADING THE LIABILITY OF A REAL ESTATE BROKER IF IT ALLEGES FACTS WHICH SHOW THAT THE BROKER DISCRIMINATED IN REGARD TO OR DENIED RIGHTS OF ACCOMMODATION ESTABLISHED BY THE ACT BY ACTIONS WITHIN HIS/HER OWN POWER, EVEN THOUGH FAILURE TO COMPLETE THE REAL ESTATE TRANSACTION WAS THE RESULT OF DISCRIMINATION OR DENIAL BY THE BROKER'S PRINCIPAL.

A. Liberal Construction as Necessary. [*See § 35.40, Paragraph A.*]

B. Denial or Discrimination as Actionable. [*See § 35.20, Paragraph C.*]

C. Liability of Real Estate Broker. A complaint for violation of the Unruh Civil Rights Act sufficiently pleads the liability of a real estate broker it it alleges facts which show that the broker discriminated in regard to or denied rights of accommodation established by acts within the broker's own power, even though the failure to complete the real estate transaction was the result of a discrimination or denial in violation of the Act by the broker's principal (*Wagner v. O'Bannon (1969) 274 Cal. App. 2d 121, 130-131, 79 Cal. Rptr. 44*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a demurrer to a complaint for violation of the Unruh Civil Rights Act when the demurrer asserts that the complaint fails to state a cause of action against a real estate broker in that it shows that defendant acted as agent of a discriminatory principal but when the allegations show that defendant committed acts of denial or discrimination in areas which were under defendant's own control.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

Related memoranda of points and authorities for use in opposing a demurrer on the ground that the complaint fails to allege facts showing that defendant restricted plaintiff are set out in *§§ 35.49* and *35.51*.

In an appropriate case, this memorandum may be submitted in opposition to a demurrer supported by the points set out in *§ 35.20*.

[b] Related Uses

With appropriate modifications, this memorandum may be used to oppose a motion for summary judgment [*see Code Civ. Proc. § 437c*] or a petition for writ of mandate to review a decision by the Fair Employment Practices Commission [*see Gov. Code § 12930(f)(2)*; *Code Civ. Proc. § 1094.5*] based on the contention that even if an arbitrary restriction occurred, defendant is not liable.

[c] Related Pleading and Practice Forms

For a general form of complaint against a business establishment and agents of a business establishment alleging denial or discrimination in violation of the Unruh Civil Rights Act, see Californai Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments* (Matthew Bender).

[3] Discussion of Authorities

[a] Liability of Real Estate Broker

The factual background of ***Wagner v. O'Bannon*** *(1969) 274 Cal. App. 2d 121, 79 Cal. Rptr. 44* , is discussed in *§ 35.49[3][a]*. In that case, the trial court determined that the home owner's refusal to sell to the black couple was a complete defense for the real estate brokers. After a court trial, judgment was entered denying plaintiffs' relief, and they appealed. The court of appeal reversed, holding that the facts supported a finding that defendant real estate brokers had failed to give plaintiffs the full benefits of their services as brokers irrespective of their inability to complete the transaction due to the owner's refusal to sell. In this case, the brokers did not merely transmit the plaintiffs' offer to purchase to the owner; instead, they met with the owner, discussed some of the problems of selling to blacks, and then arranged, within 24 hours, a sale of the home on more favorable terms to a white couple.

Legal Topics:

For related research and practice materials, see the following legal topics:
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3-35 California Points & Authorities § 35.51

§ 35.51 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Business Establishment in Violation of Unruh Civil Rights Act [Civ. Code § 51]--Complaint Satisfies Requirements for Pleading Plaintiff as Victim--Denial or Discrimination Against Third Party

[1] FORM

[*Caption. See § 35.40.*]

A COMPLAINT FOR VIOLATION OF THE UNRUH CIVIL RIGHTS ACT SATISFIES THE REQUIREMENTS FOR PLEADING THAT DEFENDANT'S ACTION DISCRIMINATED IN REGARD TO OR DENIED PLAINTIFF'S RIGHTS OF ACCOMMODATION ESTABLISHED BY THE ACT IF IT ALLEGES FACTS WHICH SHOW THAT DEFENDANT'S ACTION VIOLATED A THIRD PARTY'S RIGHTS OF ACCOMMODATION UNDER THE ACT FOR WHICH PLAINTIFF HAD CONTRACTED AS PART OF A LEGAL OBLIGATION TO THE THIRD PARTY.

A. Liberal Construction as Necessary. [*See § 35.40, Paragraph A.*]

B. Denial or Discrimination as Actionable. [*See § 35.20, Paragraph C.*]

C. Denial or Discrimination Against Third Party. A complaint for violation of the Unruh Civil Rights Act sufficiently pleads that plaintiff was discriminated against in regard to or denied rights of accommodation established by the Act if it alleges facts which show that defendant's action discriminated in regard to or denied the rights of a third party in violation of the Act, when defendant had agreed with plaintiff to provide this accommodation which was part of plaintiff's legal obligation to the third party (*Washington v. Blampin (1964) 226 Cal. App. 2d 604, 608, 38 Cal. Rptr. 235*).

[*Optional*] **D. Plaintiff's Agreement With Physician.** A complaint sufficiently pleads a denial or discrimination against a plaintiff by a physician if it alleges facts which show that defendant's action discriminated in regard to or denied medical services to plaintiff's minor child in violation of the Unruh Civil Rights Act and defendant had agreed with plaintiff to provide medical services to the child (*Washington v. Blampin (1964) 226 Cal. App. 2d 604, 608, 38 Cal. Rptr. 235*).

Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a demurrer to a complaint for violation of the Unruh Civil Rights Act when the demurrer asserts that the complaint fails to state a cause of action in that it fails to allege facts showing that plaintiff was personally restricted by defendant business establishment but where the allegations show a denial or discrimination against a third party, one to whom plaintiff owed a legal obligation to arrange the service which was denied, in violation of an agreement between plaintiff and defendant.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. The facts should describe (1) defendant's agreement with plaintiff to provide a third party with a form of accommodation established by the Act, (2) defendant's violation of the rights of the third party by a discrimination in regard to or denial of this form of accommodation, and (3) the nature of plaintiff's legal obligation to the third party to arrange for this form of accommodation.

In an appropriate case, this memorandum may be submitted in opposition to a demurrer supported by the points set out in *§ 35.24*.

[b] Related Uses

With appropriate modifications, this memorandum may be used to support a motion for summary judgment [*see Code Civ. Proc. § 437c*] or a petition for writ of mandate to review a decision by the Fair Employment and Housing Commission [*see Gov. Code § 12930(f)(2)*; *Code Civ. Proc. § 1094.5*] based on the contention that a denial or discrimination which occurred did not affect the plaintiff.

[c] Related Pleading and Practice Forms

For forms of allegation for use in a complaint against a physician alleging denial or discrimination in violation of the Unruh Civil Rights Act for refusal to treat the plaintiff's child, see *California Forms of Pleading and Practice, Ch. 116, Civil Rights: Discrimination in Business Establishments, § 116.81* (Matthew Bender).

[3] Discussion of Authorities

[a] Denial or Discrimination Against Third Party

The factual background of ***Washington v. Blampin*** *(1964) 226 Cal. App. 2d 604, 38 Cal. Rptr. 235* , is discussed in *§ 35.40[3][d]*. In that case, the complaint alleged two causes of action, one on behalf of a minor who was denied service, and the second on behalf of the minor's father which alleged that defendant had agreed to render service to plaintiff's child and had then refused to render the service.

The municipal court granted defendant's motion for judgment on the pleadings and entered judgment against plaintiffs who appealed to the appellate department of the superior court which reversed and certified the case to the court of

appeal. The court of appeal reversed the Action of the municipal court, sustaining both causes of action. The court stated that it is the legal duty of the father to provide necessary medical care for his child and that the complaint alleged in the father's cause of action that he had entered into an agreement with the defendant whereby the defendant was to render services to plaintiff's minor child. Under these allegations, the services were to be rendered to and for the father although the patient was the child. Thus, the court concluded, the defendant's alleged denial of service was a violation of the father's rights under *Civ. Code §§ 51, 52*.

Significantly, the factual situation in *Washington* contained two elements which, together or separately, could have been the basis for a cause of action under *Civ. Code § 51*. First, defendant had denied plaintiff a form of business accommodation by refusing to perform a third-party beneficiary contract in favor of plaintiff's child which defendant had made with plaintiff. Second, defendant, by refusing a direct service to the child, indirectly refused to provide plaintiff with the additional service of fulfilling his legal obligation to arrange medical care for the child. Although, as the court noted, the presence of both elements was adequate to support a cause of action, the court did not rule out the possibility that either element by itself would have been sufficient.

[b] Plaintiff's Agreement With Physician

The factual background of ***Washington v. Blampin*** *(1964) 226 Cal. App. 2d 604, 38 Cal. Rptr. 235* , is discussed in *§ 35.40[3][d]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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3-35 California Points & Authorities § 35.52

§ 35.52 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Business Establishment in Violation of Unruh Civil Rights Act [Civ. Code § 51]--Complaint Satisfies Requirements for Pleading Plaintiff as Victim--Plaintiff Need Not Be Customer of Defendant

[1] FORM

[*Caption. See § 35.40.*]

THE DEMURRER TO PLAINTIFF'S COMPLAINT SHOULD BE OVERRULED BECAUSE THE COMPLAINT SUFFICIENTLY ALLEGES THAT DEFENDANT(S) DISCRIMINATORILY DENIED PLAINTIFF FULL AND EQUAL ACCOMMODATIONS, ADVANTAGES, PRIVILEGES, OR SERVICES IN VIOLATION OF THE UNRUH CIVIL RIGHTS ACT, NOTWITHSTANDING THE FACT THAT PLAINTIFF WAS NOT A "CUSTOMER" OF DEFENDANT(S) AT THE TIME OF THE DISCRIMINATORY ACTS.

A. Liberal Construction as Necessary. [*See § 35.40, Paragraph A.*]

B. Plaintiff Need Not Be Customer of Defendant. A plaintiff who has been discriminated against by a business establishment in violation of the Unruh Civil Rights Act need not necessarily have been a "customer" of that establishment to bring an action for violation of the Act (*see Jackson v. Superior Court (1994) 30 Cal. App. 4th 936, 940-942, 36 Cal. Rptr. 2d 207*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a demurrer to a complaint for violation of the Unruh Civil Rights Act [*Civ. Code § 51*] when the defendant contends that the complaint fails to state a cause of action because it does not allege facts sufficient to show that plaintiff was a customer of the defendant at the time of the alleged discriminatory acts. The ground of opposition supported by this form is that plaintiff need not allege such facts if he or she otherwise sufficiently alleges that defendant denied plaintiff full and equal accommodations, advantages, privileges, or services in violation of the Act.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, the points and authorities in this form may be modified for use in other procedural contexts in which the substantive points may arise. For example, in an appropriate case, this memorandum may be submitted in opposition to a defense motion for summary judgment [*see Code Civ. Proc. § 437c*].

[c] Related Pleading and Practice Forms

For a general form of complaint against a business establishment for violation of the Unruh Civil Rights Act, see California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments* (Matthew Bender).

[3] Discussion of Authorities

[a] Plaintiff Need Not Be Customer of Defendant

The facts and procedural background of ***Jackson v. Superior Court*** *(1994) 30 Cal. App. 4th 936, 36 Cal. Rptr. 2d 207* , are discussed in *§ 35.42[3][a]*. In holding that plaintiff had stated a cause of action for violation of the Unruh Act, the court rejected defendant's contention that plaintiff could not sue under the Act because he himself was not seeking the defendant bank's services as a customer of the bank at the time of the Acts alleged in the complaint. The court noted that the bank accommodated the public in may ways peripheral to its main functions of providing banking services, including allowing persons to accompany its customers and help them pursue their banking business. The court held that when the bank refuses an African American this courtesy because of his or her race, the bank is denying that person the full and equal accommodations, privileges, or services of the bank, in violation of the Unruh Act (*30 Cal. App. 4th 936, 940-941)* . The court therefore concluded that plaintiff had sufficiently alleged race discrimination in violation of the Act and that the trial court erred in sustaining defendants' demurrer to this cause of action (*30 Cal. App. 4th 936, 942)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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3-35 California Points & Authorities § 35.53

§ 35.53 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Business Establishment in Violation of Unruh Civil Rights Act [Civ. Code § 51]--Complaint Satisfies Pleading Requirements for Disability Discrimination--Plaintiff Need Not Show Present Substantial Limitation

[1] FORM

[*Caption. See § 35.40.*]

THE DEMURRER TO PLAINTIFF'S COMPLAINT SHOULD BE OVERRULED BECAUSE THE COMPLAINT SUFFICIENTLY ALLEGES THAT DEFENDANT(S) DISCRIMINATORILY DENIED PLAINTIFF FULL AND EQUAL ACCOMMODATIONS, ADVANTAGES, PRIVILEGES, OR SERVICES IN VIOLATION OF THE UNRUH CIVIL RIGHTS ACT, NOTWITHSTANDING THE FACT THAT PLAINTIFF WAS NOT A "CUSTOMER" OF DEFENDANT(S) AT THE TIME OF THE DISCRIMINATORY ACTS.

A. Liberal Construction Is Necessary. [*See § 35.40, Paragraph A.*]

B. Unruh Civil Rights Act Protects Against Discrimination on Basis of Disability. All persons within California, no matter what their disability, are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever (*Civ. Code § 51(b)*).

C. Plaintiff Need Not Allege Present Limitation of Major Life Activity. The definition of disability under the Unruh Civil Rights Act does not require a plaintiff to show that he or she is regarded as having a present limitation of a major life activity. An allegation that plaintiff may someday be limited in a major life activity as the basis for the alleged discrimination is sufficient to bring the claim within the Unruh Act (*Goldman v. Standard Ins. Co. (9th Cir. 2003) 341 F.3d 1023, 1027-1034)* .

Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]

By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a demurrer to a complaint for violation of the Unruh Civil Rights Act [*Civ. Code § 51*] when the defendant contends that the complaint fails to state a cause of action because it does not allege facts sufficient to show that plaintiff comes within the definition of disability in the Act because plaintiff fails to allege facts sufficient to show that plaintiff was limited in a major life activity at the time acts evidencing discrimination based on disability took place. The ground of opposition supported by this form is that plaintiff need not allege such facts if he or she otherwise sufficiently alleges discrimination based on future limitation of a major life activity in violation of the Act.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, the points and authorities in this form may be modified for use in other procedural contexts in which the substantive points may arise. For example, in an appropriate case, this memorandum may be submitted in opposition to a defense motion for summary judgment [*see Code Civ. Proc. § 437c*].

[c] Related Pleading and Practice Forms

For a general form of complaint against a business establishment for violation of the Unruh Civil Rights Act, see California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments* (Matthew Bender).

[3] Discussion of Authorities

[a] Unruh Civil Rights Act Protects Against Discrimination on Basis of Disability

The Unruh Act provides that all persons within California are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever, no matter what their disability (*Civ. Code § 51(b)*).

[b] Plaintiff Need Not Allege Present Limitation of Major Life Activity

In ***Goldman v. Standard Ins. Co.*** *(9th Cir. 2003) 341 F.3d 1023* , an attorney applied for a disability income insurance policy through a program approved by the State Bar of California and available only to its members. The insurance company declined to issue the policy because the attorney had been diagnosed as having an "Adjustment Disorder with mixed anxiety and depressed mood, DSM IV (Diagnostic and Statistical Manual of Mental Disorders) 309.28," and was participating in weekly therapy sessions with a licensed clinical social worker. The company's underwriting policy was to deny coverage for applicants with adjustment disorder until at least one year after the cessation of treatment. The attorney initially filed suit in federal district court seeking damages and declaratory and injunctive relief for violation of the Americans With Disabilities Act ("ADA") (*42 U.S.C. § 12101 et seq.*), the Unruh Civil Rights Act ("the Act") (*Civ. Code § 51*), and *Bus. & Prof. Code § 17200 et seq.* Shortly thereafter she dismissed the federal complaint and filed the same claims in California state court. The company removed the case to federal court and the federal district court

exercised its jurisdiction under *28 U.S.C. § 1331* based on the ADA claim, and supplemental jurisdiction over the state law claims. The district court then granted summary judgment against the attorney on the grounds that she could not qualify as a disabled person under the ADA, because the company did not regard her as presently substantially limited by her adjustment disorder, but only as a person who may be substantially limited in the future. The court relied on the United States Supreme Court's interpretation of the ADA in *Sutton v. United Air Lines (1999) 527 U.S. 471, 482, 119 S. Ct. 2139, 144 L. Ed. 2d 450* , requiring a plaintiff to show she is presently not potentially or hypothetically substantially limited. The district court concluded that the Unruh Act incorporated the ADA definition of disability and thus she also was not covered by the Unruh Act. The court also rejected the claim under *Bus. & Prof. Code § 17200*. The attorney appealed the entry of summary judgment on her claims under the Unruh Act and § 17200, but did not pursue her ADA claim (*341 F.3d 1023, 1025-1026)* .

The Ninth Circuit Court of Appeals concluded that, unlike the ADA as interpreted by *Sutton*, the definition of disability under the Unruh Act does not require a plaintiff to show that he or she is regarded as having a present limitation of a major life activity. As an initial matter, the court was not concerned with whether the Unruh Act requires the limitation to be substantial, because the insurance company regarded her as having a condition that could completely prohibit her from performing her job and thus a condition that could substantially limit her ability to work, which the court assumed was a major life activity under California law (*341 F.3d 1023, 1026)* . The court then held that the Unruh Act applies to insurance companies, citing *Ins. Code § 1861.03(a)*, and that an insurance company's refusal to provide coverage on the basis of disability may constitute a denial of full and equal services if the discrimination is not reasonable (*341 F.3d 1023, 1027)* . The court then found that at the time the company refused to issue the policy, the Act did not define "disability," but the California Legislature subsequently amended the Act (*see Civ. Code § 51(e)(1)*) to define the disability as any mental or physical disability covered by the Fair Employment and Housing Act ("FEHA"), *Gov. Code § 12920 et seq.* FEHA includes within the definition of "mental disability," *inter alia*, having a mental or psychological disorder or condition that limits a major life activity or being regarded or treated by the covered entity as having or having had a mental or psychological disorder or condition that has no present disabling effect but may become a mental disability (*see Gov. Code § 12926(i)(1), (5)*). Because the company believed the attorney might someday be entirely prohibited from working given her diagnosis, which was the basis of its refusal to issue the policy, she was regarded as disabled. The Ninth Circuit did not resolve whether the amendment applied retroactively, but, rather, held that California's disability antidiscrimination law has never required that a plaintiff be regarded as presently limited by her disability. The amendment merely clarified that the definition does not include such a limitation and has never done so (*341 F.3d 1023, 1028-1034)* . The court then found that the attorney presented a genuine issue of material fact as to the reasonableness of the company to deny her coverage. Viewing the facts most favorably to the attorney as the nonmoving party, the court concluded that the company failed to establish as a matter of law that its decision to refuse coverage was based on sound actuarial principles or related to actual and reasonably anticipated experience (*341 F.3d 1023, 1034-1036)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil Rights LawCivil Rights ActsGeneral OverviewCivil Rights LawPractice & ProcedureGeneral Overview

California Points & Authorities

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Volume 3 Chapters 34-39 CHECKS AND BANKS---to---CIVIL SERVICE
CHAPTER 35 CIVIL RIGHTS: UNRUH CIVIL RIGHTS ACT
PART II. FORMS
B. Opposing Demurrer to Complaint

3-35 California Points & Authorities § 35.54

§ 35.54 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Business Establishment in Violation of Unruh Civil Rights Act [Civ. Code § 51]--Complaint Satisfies Requirements for Pleading Arbitrary Denial or Discrimination--Denial or Discrimination Based on Marital Status Discrimination

[1] FORM

[*Caption. See § 35.40.*]

A COMPLAINT FOR VIOLATION OF THE UNRUH CIVIL RIGHTS ACT SATISFIES THE REQUIREMENTS FOR PLEADING THAT DEFENDANT ARBITRARILY DISCRIMINATED IN REGARD TO OR ARBITRARILY DENIED RIGHTS OF ACCOMMODATION ESTABLISHED BY THE ACT IF IT ALLEGES FACTS WHICH SHOW A DENIAL OR DISCRIMINATION BASED ON MARITAL STATUS DISCRIMINATION.

A. Liberal Construction as Necessary. [*See § 35.40, Paragraph A.*]

B. Marital Status Discrimination Is Actionable. Marital status claims are cognizable under the Unruh Act (*Koebke v. Bernardo Heights Country Club (2005) 36 Cal. 4th 824, 31 Cal. Rptr. 3d 565, 115 P.3d 1212*).

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Comments

[A] Use of Form

This form may be submitted in opposition to a demurrer to a complaint for violation of the Unruh Civil Rights Act when the demurrer asserts that the complaint fails to state a cause of action in that it fails to allege facts showing that the

denial or discrimination was arbitrary but when sufficient facts are alleged to show that defendant's action was based on marital status discrimination.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, this memorandum may be submitted in opposition to a demurrer supported by the points set out in *§§ 35.21 -35.25*.

[b] Related Uses

With appropriate modifications, this memorandum may be used to oppose a motion for summary judgment [*see Code Civ. Proc. § 437c*] or a petition for writ of mandate to review a decision by the Fair Employment and Housing Practices Commission [*see Gov. Code § 12930(f)(2)*; *Code Civ. Proc. § 1094.5*] based on the contention that an arbitrary denial or discrimination did not occur.

[c] Related Pleading and Practice Forms

For a general form of complaint and forms of allegation for use in a complaint against a business establishment alleging denial or discrimination in violation of the Unruh Act in regard to services, see California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments* (Matthew Bender).

[3] Discussion of Authorities

[a] Marital Status Discrimination Is Actionable

In ***Koebke v. Bernardo Heights Country Club*** *(2005) 36 Cal. 4th 824, 31 Cal. Rptr. 3d 565, 115 P.3d 1212* , plaintiffs, a lesbian couple, sued defendant country club alleging violation of the Unruh Act based on the defendant's refusal to extend to them the same benefits granted to married couples. For at least some of the period in which plaintiffs allege the violation occurred, they were registered with the state as domestic partners. Defendant answered and filed a motion for summary judgment or, alternatively, summary adjudication. The trial court granted defendant's motion without specifically addressing plaintiffs' claims of discrimination, finding that defendant did not provide different privileges to plaintiffs than to other unmarried couples. The court of appeal found that plaintiffs had failed to establish an Unruh Act violation on the basis of marital status discrimination, gender discrimination, or sexual orientation discrimination. However, the court of appeal also concluded that there was a triable issue of material fact as to whether defendant had discriminatorily enforced its spousal benefit policy. Therefore, the court of appeal reversed the summary judgment to the extent that it rejected plaintiffs' claim that defendant's bylaws were applied in a discriminatory manner but, in all other respects, affirmed the judgment (*36 Cal. 4th 824, 832-836)* .

The California Supreme Court reversed summary judgment in the country club's favor to the extent the marital status discrimination claim implicated the California Domestic Partner Rights and Responsibilities Act of 2003 [*Fam. Code § 297 et seq.*], but otherwise affirmed and remanded for further proceedings. The Court held that in light of the current version of the domestic partnership law, the Unruh Act requires businesses to treat registered domestic partners the same as spouses (*36 Cal. 4th 824, 837-850)* . The Court went on to hold that before the enactment of the Domestic Partners Act, denial of the spousal benefit to plaintiffs did not constitute impermissible marital status discrimination under the Unruh Act, because defendant's policy did not, on its face, constitute either impermissible marital discrimination or sexual orientation discrimination under the Unruh Act (*36 Cal. 4th 824, 851-854)* . However, the Court agreed with the lower court that plaintiffs presented sufficient evidence of discriminatory application of that policy to proceed to trial on that theory (*36 Cal. 4th 824, 854-856)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil Rights LawCivil Rights ActsGeneral OverviewCivil Rights LawPractice & ProcedureGeneral Overview

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CHAPTER 35 CIVIL RIGHTS: UNRUH CIVIL RIGHTS ACT
PART II. FORMS
B. Opposing Demurrer to Complaint

3-35 California Points & Authorities § 35.55

§ 35.55 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Business Establishment in Violation of Unruh Civil Rights Act [Civ. Code § 51]--Complaint Satisfies Requirements for Pleadings Arbitrary Denial or Discrimination--Demand for Equal Treatment and Refusal Not Required

[1] FORM

[*Caption. See § 35.40.*]

A COMPLAINT FOR VIOLATION OF THE UNRUH CIVIL RIGHTS ACT SATISFIES THE REQUIREMENTS FOR PLEADING THAT DEFENDANT ARBITRARILY DISCRIMINATED IN REGARD TO OR ARBITRARILY DENIED RIGHTS OF ACCOMMODATION ESTABLISHED BY THE ACT EVEN IF DOES NOT ALLEGE FACTS WHICH SHOW THAT PLAINTIFF DEMANDED EQUAL TREATMENT FROM DEFENDANT AND WAS REFUSED.

A. Liberal Construction as Necessary. [*See § 35.40, Paragraph A.*]

B. To State A Claim Under the Unruh Civil Rights Act, Plaintiff Is Not Required to Show that Plaintiff Demanded Equal Treatment From Defendant and Was Refused. In order to state a claim under the Unruh Civil Rights Act, a plaintiff who sufficiently alleges discrimination or denial of rights of accommodation is not required to show that he or she demanded equal treatment from the defendant business establishment and was refused (*Angelucci v. Century Supper Club (2007) 41 Cal. 4th 160, 166-180, 59 Cal. Rptr. 3d 142, 158 P.3d 718*).

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a demurrer to a complaint for violation of the Unruh Civil Rights Act when the demurrer asserts that the complaint fails to state a cause of action in that it fails to allege facts showing that the plaintiff demanded equal treatment and the defendant refused.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, this memorandum may be submitted in opposition to a demurrer supported by the points *set out in §§ 35.21 -35.25*.

[b] Related Uses

With appropriate modifications, this memorandum may be used to oppose a motion for summary judgment [*see Code Civ. Proc. § 437c*] or a petition for writ of mandate to review a decision by the Fair Employment and Housing Practices Commission [*see Gov. Code § 12930(f)(2)*; *Code Civ. Proc. § 1094.5*] based on the contention that an arbitrary denial or discrimination did not occur.

[c] Related Pleading and Practice Forms

For a general form of complaint and forms of allegation for use in a complaint against a business establishment alleging denial or discrimination in violation of the Unruh Act in regard to services, see California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments* (Matthew Bender).

[3] Discussion of Authorities

[a] Demand for Equal Treatment and Refusal Not Required

In ***Angelucci v. Century Supper Club*** *(2007) 41 Cal. 4th 160, 59 Cal. Rptr. 3d 142, 158 P.3d 718* , male plaintiffs filed a complaint against defendant club for violation of the Unruh Civil Rights Act and the Gender Tax Repeal Act of 1995 (*Civ. Code § 51.6*), alleging that plaintiffs patronized the club and were charged an admission fee higher than that charged to women because they are men. The club moved for judgment on the pleadings, arguing that plaintiffs could not recover under for violations of the Unruh Civil Rights Act or the Gender Tax Repeal Act, because they had not alleged they had asked the club to be charged at the same rate as female patrons. The trial court agreed with defendant and entered judgment in its favor. Plaintiffs appealed and the Court of Appeal affirmed, holding that *Civ. Code § 52(a)* provides a remedy only to plaintiffs who request nondiscriminatory treatment and are refused, which applied equally to plaintiffs' claims under the Unruh Civil Rights Act and the Gender Tax Repeal Act *(41 Cal. 4th 160, 164-166)* .

The California Supreme Court held that to state a claim under the Unruh Act, plaintiffs are not required to show that they demanded equal treatment and refused. The Court found first that the Unruh Act does not contain express language requiring that before a legal action may be filed, the victim of the asserted discrimination must have demanded equal treatment and have been refused. Unlike some other remedy statutes, the Act, and specifically section 52(a), does not establish as a condition of instituting a lawsuit that the defendant have been given notice and an opportunity to correct the asserted violation (*41 Cal. 4th 160, 168-173)* . The Court then held that plaintiffs were injured within the meaning of the Unruh Act when they presented themselves for admission and were charged a higher admission price than women because gender-based price discounts constitute arbitrary discrimination within the meaning of the Act *(41 Cal. 4th 160, 173-177)* . Finally, the Court found that the trial court's and the Court of Appeal's interpretation of § 52(a) reflected in part defendant's assertion that the plaintiffs were professional plaintiffs who "shake down" business entities on the basis of assertedly technical violations of civil rights laws and similar enactments, and that they and their attorneys engage in this practice simply to make a living-unmotivated by any desire to eliminate discrimination or to redress any

actual injury, and the Court shared to some degree these concerns. However, those concerns did not supply a justification for inserting additional elements of proof into the cause of action defined by the Unruh Act. With regard to the extent of the damages that could accrue for repeated unannounced visits to an establishment offering discounts to women, although the question was not before the Court, the Court stated in dictum that equitable principles could apply, and there are constitutional constraints on the accrual of statutory penalties (*41 Cal. 4th 160, 178-180)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil Rights LawCivil Rights ActsGeneral OverviewCivil Rights LawPractice & ProcedureGeneral Overview

California Points & Authorities

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CHAPTER 35 CIVIL RIGHTS: UNRUH CIVIL RIGHTS ACT
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B. Opposing Demurrer to Complaint

3-35 California Points & Authorities § 35.56

§ 35.56 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Against Business Establishment in Violation of Unruh Civil Rights Act [Civ. Code § 51]--Constitutional Protections for Religion and Speech Do Not Exempt Business Establishments From Complying With Unruh Act's Prohibition of Discrimination Based on Sexual Orientation

[1] FORM

[*Caption. See § 35.40.*]

CONSTITUTIONAL PROTECTIONS FOR RELIGION AND SPEECH DO NOT EXEMPT A BUSINESS ESTABLISHMENT FROM COMPLYING WITH THE UNRUH ACT'S PROHIBITION OF DISCRIMINATION BASED ON SEXUAL ORIENTATION.

A. Liberal Construction as Necessary. [*See § 35.40, Paragraph A.*]

B. Constitutional Protections for the Freedom of Exercise of Religion and of Speech Do Not Exempt a Business Establishment From Complying the Unruh Act's Prohibition of Discrimination Based on Sexual Orientation. A business establishment is not exempt for the Unruh Act's prohibition of discrimination based on sexual orientation (*North Coast Women's Care Medical Group, Inc. v. Superior Court (2008) 44 Cal. 4th 1145, 1153-1161, 81 Cal. Rptr. 3d 708*).

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a demurrer to a complaint for violation of the Unruh Civil Rights Act when the demurrer asserts that the complaint fails to state a cause of action because defendants' actions were protected by the constitutional protections for freedom of exercise of religion and speech.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, this memorandum may be submitted in opposition to a demurrer supported by the points *set out in §§ 35.21 -35.25*.

[b] Related Uses

With appropriate modifications, this memorandum may be used to oppose a motion for summary judgment [*see Code Civ. Proc. § 437c*] based on the contention that an arbitrary denial or discrimination did not occur.

[c] Related Pleading and Practice Forms

For a general form of complaint and forms of allegation for use in a complaint against a business establishment alleging denial or discrimination in violation of the Unruh Act in regard to services, see California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments* (Matthew Bender).

[3] Discussion of Authorities

[a] Constitutional Protections for Religion and Speech Do Not Exempt Business Establishment From Unruh Act's Prohibition of Discrimination Based on Sexual Orientation

In ***North Coast Women's Care Medical Group, Inc. v. Superior Court*** *(2008) 44 Cal. 4th 1145, 81 Cal. Rptr. 3d 708* , plaintiff, a lesbian, and her partner, wanted plaintiff to become pregnant, and they decided on intravaginal self-insemination, a nonmedical process in which a woman inserts sperm into her own vagina. They used sperm from a sperm bank, but after several unsuccessful efforts at pregnancy through this method, plaintiff was diagnosed with polycystic ovarian syndrome, a disorder characterized by irregular ovulation, and she was referred to defendant medical group for fertility treatment. Plaintiff and her partner first met one defendant, an obstetrician and gynecologist employed by the medical group, and plaintiff mentioned that she was a lesbian. The doctor explained that at some point intrauterine insemination (IUI) might have to be considered, in which a physician threads a catheter through the patient's cervix and inserts semen through the catheter into the patient's uterus. The doctor said that if IUI became necessary, her religious beliefs would preclude her from performing the procedure for plaintiff. The doctor testified that she told plaintiff another doctor at the medical group, also a defendant, shared her religious objection to performing IUI for an unmarried woman, but either of two other physicians at the medical group could do the procedure for plaintiff. According to plaintiff, however, the doctor said that she was the only medical group physician with a religious objection to performing IUI for plaintiff, and all other members of her practice, whom she believed lacked her bias, would be available to do the procedure. The doctor proceeded to treat plaintiff for infertility primarily through an ovulation-inducing medication, followed by plaintiff's use of intravaginal self-insemination with sperm obtained from a sperm bank, as well as other tests and procedures to determine the cause of plaintiff's infertility. Plaintiff then decided, "with the advice and consent" the doctor, to try IUI, but to use a friend's fresh sperm rather than sperm from a sperm bank. When plaintiff told the doctor she wanted to use her friend's donated fresh sperm, the doctor responded that it would pose a problem for the medical group, because its physicians performed IUI either with fresh sperm provided by a patient's husband or sperm from a sperm bank, but never with fresh sperm donated by a patient's friend. To do so might delay the procedure as the medical group would first have to confirm that its protocols pertaining to donated fresh sperm would satisfy the requirements of its state tissue bank license and the federal Clinical Laboratory Improvement Amendments of 1988 (*42 U.S.C. § 263*). Plaintiff then opted to have the IUI with sperm from a sperm bank. The doctor

so noted in plaintiff's medical records and left for an out-of-state vacation. During her absence, her colleague took over plaintiff's medical care. He was unaware of the first doctor's notation of plaintiff's decision not to use her friend's fresh sperm for the IUI, because the secretary who typed that notation in plaintiff's file left it in the first doctor's in-box awaiting her return from vacation. Thus, he mistakenly believed that plaintiff intended to have IUI with fresh sperm donated by a friend, which (even when provided by a patient's husband) requires preparation before it can be used for IUI, and licensure is necessary to do the requisite sperm preparation. Only this doctor was licensed to perform these tasks, but he refused to prepare donated fresh sperm for plaintiff because of his religious objection. He referred plaintiff to a physician outside the medical group's medical practice, who performed an IUI, but plaintiff was unable to conceive until that doctor performed in vitro fertilization. Plaintiff sued the medical group and the two physicians seeking damages and injunctive relief on several theories, including sexual orientation discrimination in violation of the Unruh Civil Rights Act. Defendants' answer asserted a variety of affirmative defenses, including that defendants' alleged misconduct, if any, was protected by the rights of free speech and freedom of religion set forth in the federal and state Constitutions. Plaintiff moved for summary adjudication of the defense. The trial court granted the motion, ruling that neither the federal nor the state Constitution provided a religious defense to a claim of sexual orientation discrimination under the Unruh Civil Rights Act. Defendants challenged that ruling through a petition for writ of mandate in the Court of Appeal, which court granted the petition with respect to the two physician defendants only, thereby allowing them to later assert at trial that their constitutional rights of free speech and religious freedom exempted them from complying with the Unruh Civil Rights Act's prohibition against sexual orientation discrimination (*44 Cal. 4th 1145, 1150-1153)* .

The California Supreme Court granted plaintiff's petition for review, and set aside the Court of Appeal's decision. The Court found first that a medical group providing medical services to the public is a business establishment for purposes of the Unruh Act. Further, although during the relevant period, the Unruh Act did not list sexual orientation as a prohibited basis for discrimination, California's reviewing courts had, in a variety of contexts, described the Act as prohibiting sexual orientation discrimination (*see* *Harris v. Capital Growth Investors XIV (1991) 52 Cal.3d 1142, 1155, 278 Cal. Rptr. 614, 805 P.2d 873* ; *see also* *Curran v. Mount Diablo Council of the Boy Scouts (1998) 17 Cal.4th 670, 703, 72 Cal. Rptr. 2d 410, 952 P.2d 218* (conc. opn. of Mosk, J.); *Stoumen v. Reilly (1951) 37 Cal.2d 713, 716, 234 P.2d 969* ; *Rolon v. Kulwitzky (1984) 153 Cal. App.3d 289, 292, 200 Cal. Rptr. 217* ; *Hubert v. Williams (1982) 133 Cal. App. 3d Supp. 1, 5, 184 Cal. Rptr. 161*). The Court then held that the *First Amendment's* right to the free exercise of religion does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes or prescribes conduct that the individual's religion prescribes or proscribes (*see* *Church of Lukumi Babalu Aye, Inc. v. Hialeah (1993) 508 U.S. 520, 531, 113 S. Ct. 2217, 124 L. Ed. 2d 472* ; *Employment Div., Ore. Dept. of Human Res. v. Smith (1990) 494 U.S. 872, 879, 110 S. Ct. 1595, 108 L. Ed. 2d 876* ; *Catholic Charities of Sacramento, Inc. v. Superior Court (2004) 32 Cal.4th 527, 549, 10 Cal. Rptr. 3d 283, 85 P.3d 67*), and that the Unruh Act is a valid and neutral law of general applicability because it requires business establishments to provide full and equal accommodations, advantages, facilities, privileges, or services to all persons notwithstanding their sexual orientation, so that the *First Amendment's* right to the free exercise of religion did not exempt defendant physicians from conforming their conduct to the Act's antidiscrimination requirements even if compliance posed an incidental conflict with their religious beliefs (*44 Cal. 4th 1145, 1154-1157)* . Defendants did not have a hybrid claim based on their allegation of interference with a combination of their *First Amendment* rights to free speech and to freely exercise their religion, because the Unruh Act imposes on business establishments certain antidiscrimination obligations, precluding any such establishment or its agents from telling patrons that it will not comply with the Act, and notwithstanding these statutory obligations, defendant physicians remained free to voice their objections, religious or otherwise, to the Act's prohibition against sexual orientation discrimination (*44 Cal. 4th 1145, 1157)* . Any conduct by plaintiff that impinged on the defendant physicians' *First Amendment* rights did not fall within the ambit of the *First Amendment* because plaintiff is a private citizen (*44 Cal. 4th 1145, 1157)* . Defendants' claim also failed under the California Constitution's protection of religion, because the substantial burden imposed on their religious beliefs by the Unruh Act's prohibition against sexual orientation discrimination was insufficient to allow them to engage in such discrimination. To avoid any conflict between their religious beliefs and the Unruh Act's antidiscrimination provisions, defendant physicians could simply refuse to perform the IUI medical procedure for any patient of the medical group. Or, because they would incur liability under the Act if they infringed upon the right to the

full and equal services of the medical practice, they could avoid a conflict by ensuring that every patient requiring IUI received full and equal access to the procedure through a physician employed by the medical group lacking their religious objections (*44 Cal. 4th 1145, 1158-1160)* .

The Court of Appeal had concluded that summary adjudication of the affirmative defense was improper as to the defendant physicians because it effectively precluded them from presenting any evidence at trial that their refusal to perform IUI for plaintiff was based on their religious beliefs regarding the propriety of performing the procedure for unmarried women, which the Court of Appeal further concluded was not prohibited by the Act at the time of their refusal. However, in granting plaintiff's motion for summary adjudication of the affirmative defense, the trial court did not at all preclude defendant physicians from later offering evidence at trial of their religious grounds for refusing to perform the medical procedure for plaintiff because of her marital status as an unmarried woman rather than her sexual orientation as a lesbian. Thus, the trial court's ruling left defendant physicians free to later offer evidence at trial that their religious objections were to participating in the medical insemination of an unmarried woman and were not based on plaintiff's sexual orientation. The trial court's ruling simply narrowed the issues by disposing of defendants' contention that their constitutional rights to free speech and the free exercise of religion exempt them from complying with the Unruh Act's prohibition against sexual orientation discrimination. In concluding to the contrary, the Court of Appeal erred (*44 Cal. 4th 1145, 1160-1161)* .

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Volume 3 Chapters 34-39 CHECKS AND BANKS---to---CIVIL SERVICE
CHAPTER 35A CIVIL RIGHTS: EQUAL PROTECTION

3-35A California Points & Authorities 35A.syn

§ 35A.syn Synopsis to Chapter 35A: CIVIL RIGHTS: EQUAL PROTECTION

§ 35A.01 Scope of Chapter

§ 35A.02 Governing Law

§ 35A.03 Equal Protection Analysis

§ 35A.04 Meaning of Rational Basis

[1] Introduction to "Rational Relationship" Test

[2] Effect on Fundamental Interest

[3] Based on Suspect Category

[4] Criticism of Two-Tier Model

§ 35A.05 Raising Constitutional Issues by Writ of Mandate

§ 35A.06 Related Uses

§ 35A.07 Related Pleading and Practice Chapters

§ 35A.08 Related Points and Authorities Chapters

§§ 35A.09-35A.19 [Reserved]

§ 35A.20 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Challenging Constitutionality of State Action by Writ of Mandate

[b] Scope of State Action

[c] Challenging Constitutionality of State Action on Equal Protection Grounds

[d] State Action Based on Arbitrary Classification as Violation of Equal Protection

[e] State Action Based on Suspect Category or Burdening Fundamental Interest as Subject to Strict Scrutiny

[f] Nature of Suspect Category

[g] Nature of Fundamental Interest

[h] State Action Subject to Strict Scrutiny as Violation of Equal Protection Unless Justified

[4] Additional Authorities

[a] Scope of State Action

[b] State Action Based on Arbitrary Classification as Violation of Equal Protection

[c] Nature of Fundamental Interest

[d] State Action Based on Arbitrary Classification as Violation of Equal Protection

§ 35A.21 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--Scope of State Action--Private Action Under Monopoly Authority Conferred by State Action

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] State Action Under California Constitution

[b] Private Action Under Monopoly Authority Conferred by State Action

§ 35A.22 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action by Mandate--Beneficial Interest as Required--Violation of Petitioner's Rights

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Violation of Petitioner's Rights

[b] Having Burdens Not Faced by Even Potential Competitors as Violation of Rights

[c] Pecuniary Interest as Unnecessary

§ 35A.23 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action by Mandate--Beneficial Interest as Required--Violation of Petitioner's Rights With Broad Effects

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Violation of Petitioner's Rights With Broad Effects

[b] Nature of Interest Protected

[c] Petitioner as Representative

§ 35A.24 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action by Mandate--Beneficial Interest as Required--Violation of Third Party's Rights

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapter

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Violation of Third Party's Rights

[b] Being Required or Encouraged to Discriminate Against Others

[4] Additional Authorities

[a] Violation of Third Party's Rights

[b] Subsequent Developments

§ 35A.25 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action by Mandate--Beneficial Interest as Required--Violation Involving Public Duty

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Violation Involving Public Duty

[4] Additional Authorities

[a] Violation Involving Public Duty

§ 35A.26 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--Intentional Classification by Application or Administration of Facially Neutral State Action as Sufficient

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Intentional Classification by Application or Administration of Facially Neutral State Action as Sufficient

§ 35A.27 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--Classification by Differential Impact of Facially Neutral State Action as Sufficient

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Classification by Differential Impact of Facially Neutral State Action as Sufficient

[b] Scope of Authority

§ 35A.28 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--State Action Based on Arbitrary Classification as Violation of Equal Protection--Hostility and Prejudice as Not Legitimate Public Purpose

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Hostility and Prejudice as Not Legitimate Public Purpose

§ 35A.29 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--Suspect Categories or Burdens on Fundamental Interests as Subject to Strict Scrutiny--Classification Based on Race as Suspect

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Classifications Based on Race as Suspect

[b] Racial Classifications as Suspect Even Though Benign

[4] Additional Authorities

[a] Race Subject to Strict Scrutiny

§ 35A.30 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--Suspect Categories or Burdens on Fundamental Interests as Subject to Strict Scrutiny--Classifications Based on National Origin as Suspect

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Classification Based on National Origin as Suspect

[b] Relation to Racial Discrimination

§ 35A.31 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--Suspect Categories or Burdens on Fundamental Interests as Subject to Strict Scrutiny--Classifications Based on Alienage as Suspect

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Classifications Based on Alienage as Suspect

[b] Subsequent Developments

§ 35A.32 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--Suspect Categories or Burdens on Fundamental Interests as Subject to Strict Scrutiny--Classifications Based on Gender as Suspect

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Classifications Based on Gender Are Suspect

[i] Related United States Supreme Court Decisions

[b] Gender Discrimination Is Not Justified by Alleged Rehabilitative and Compensatory Purpose

[i] Analysis of Ameliorative Purpose

[c] Gender Discrimination as Not Justified by Overly Broad Stereotypical Assumptions

[4] Additional Authorities

[a] Gender Discrimination Is Not Justified by Overly Broad Stereotypical Assumptions

[b] Gender Subject to Strict Scrutiny

§ 35A.32A Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--Suspect Categories or Burdens on Fundamental Interests as Subject to Strict Scrutiny--Classifications Based on Sexual Orientation as Suspect; Burdens on Family Relationships as Suspect

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Classifications Based on Sexual Orientation and Burdens Placed on Fundamental Right to Marry Are Suspect

§ 35A.33 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--Suspect Categories or Burdens on Fundamental Interests as Subject to Strict Scrutiny--Classifications Based on Illegitimacy as Subject to Scrutiny

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Classifications Based on Illegitimacy as Subject to Scrutiny

[b] State Action Subject to Scrutiny as Violation of Equal Protection Unless Justified

§ 35A.34 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--Suspect Categories or Burdens on Fundamental Interests as Subject to Strict Scrutiny--Classifications Based on Wealth and Affecting Fundamental Interest as Suspect

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Classifications Based on Wealth and Burdening Fundamental Interest as Suspect

[i] Absence of Fundamental Interest

[b] Wealth as Basis for Benefit

§ 35A.35 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--Suspect Categories or Burdens on Fundamental Interests as Subject to Strict Scrutiny--Exercise of Franchise as Fundamental Interest

[1] FORM

[2] Comments

[a] Use of Form

[b] Restriction of Franchise Justified in Municipal Annexation

[3] Discussion of Authorities

[a] Exercise of Franchise as Fundamental Interest

[b] Restrictions on Eligibility to Vote

[c] Barriers on Candidacy

[i] Expansion of Principle

[d] Restrictions on Ballot Initiatives and Referenda

[4] Additional Authorities

[a] Exercise of Franchise as Fundamental Interest

[b] Restrictions on Eligibility to Vote

[c] Barriers on Candidacy

§ 35A.36 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--Suspect Categories or Burdens on Fundamental Interests as Subject to Strict Scrutiny--Marriage and Procreation as Fundamental Interests

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Marriage and Procreation Are Fundamental Interests

[4] Additional Authorities

[a] Marriage and Procreation as Fundamental Interests

§ 35A.37 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--Suspect Categories or Burdens on Fundamental Interests as Subject to Strict Scrutiny--Right to Travel as Fundamental Interest

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Right to Travel Is Fundamental Interest

[b] Scope of Right to Travel

[c] Durational Residence Requirement Is Burden on Right to Travel

[4] Additional Authorities

[a] Right to Travel Is Fundamental Interest

§ 35A.38 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--Suspect Categories or Burdens on Fundamental Interests as Subject to Strict Scrutiny--Education as Fundamental Interest

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Education Is Fundamental Interest

§ 35A.39 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--Suspect Categories or Burdens on Fundamental Interests as Subject to Strict Scrutiny--Employment as Fundamental Interest

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Employment as Fundamental Interest

[b] Expansion of Principle

§ 35A.40 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--Suspect Categories or Burdens on Fundamental Interests as Subject to Strict Scrutiny--First Amendment Guarantees as Fundamental Interests

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] First Amendment Guarantees as Fundamental Interests

§ 35A.41 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--Suspect Categories or Burdens on Fundamental Interests as Subject to Strict Scrutiny--Privacy as Fundamental Interest

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Privacy as Fundamental Interest

[b] Elements of Privacy

§ 35A.42 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--Suspect Categories or Burdens on Fundamental Interests as Subject to Strict Scrutiny--Personal Liberty as Fundamental Interest

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Personal Liberty as Fundamental Interest

[i] Unanimous Jury Verdict

[b] Considerable Restraint as Sufficient

[4] Additional Authorities

[a] Personal Liberty as Fundamental Interest

§ 35A.43 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--Suspect Categories or Burdens on Fundamental Interests as Subject to Strict Scrutiny--Access to Courts as Fundamental Interest

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Access to Courts as Fundamental Interest

[b] Denial of Indigent's Ability to Obtain Divorce

[c] Denial of Prisoners' Access to Legal Resources

[d] Denial of Prisoner's Ability to Defend Civil Suit

§ 35A.44 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality

of State Action on Equal Protection Grounds--Suspect Categories or Burdens on Fundamental Interests as Subject to Strict Scrutiny--Right to Acquire Property as Fundamental Interest

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Right to Acquire Property as Fundamental Interest

[4] Additional Authorities

[a] Right to Acquire Property as Fundamental Interest

§ 35A.45 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--State Action Subject to Strict Scrutiny as Violation of Equal Protection Unless Justified--Chilling Exercise of Fundamental Interest

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Chilling Exercise of Constitutional Rights

§ 35A.46 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--State Action Subject to Strict Scrutiny as Violation of Equal Protection Unless Justified--Unsupported Justifications as Insufficient

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Unsupported Justifications as Insufficient

[b] Established Practices as Not Insulated

[c] When Scrutiny Enhanced

[4] Additional Authorities

[a] Unsupported Justifications as Insufficient

§ 35A.47 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--State Action Subject to Strict Scrutiny as Violation of Equal Protection Unless Justified--Mere Recitation of Proper Purpose as Insufficient

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Mere Recitation of Proper State Purpose as Insufficient

§ 35A.48 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--State Action Subject to Strict Scrutiny as Violation of Equal Protection Unless Justified--Administrative Cost Saving as Insufficient

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Administrative Cost Saving as Insufficient

[4] Additional Authorities

[a] Administrative Cost Saving as Insufficient

§ 35A.49 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--State Action Subject to Strict Scrutiny as Violation of Equal Protection Unless Justified--Effect of Unnecessary Classifications

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Effect of Unnecessary Classifications

[b] Lack of Substantial Relationship

[c] Lack of Precision and Tailoring

[d] Availability of Less Drastic Means

[4] Additional Authorities

[a] Effect of Unnecessary Classification

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CHAPTER 35A CIVIL RIGHTS: EQUAL PROTECTION
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3-35A California Points & Authorities § 35A.01

§ 35A.01 Scope of Chapter

This chapter contains memoranda of points and authorities for use in supporting a petition for a writ of mandate [*see §§ 35A.20 -35A.49*] to challenge state action in a state court when that action violates the equal protection guarantees of the United States and California Constitutions.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsMandamusConstitutional LawEqual ProtectionScope of Protection

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3-35A California Points & Authorities § 35A.02

§ 35A.02 Governing Law

The right to equal protection of the law is protected by the *Fourteenth Amendment of the United States Constitution* [*U.S. Const., amend. XIV, § 1*] and the California Constitution [*Cal. Const., art. I, § 7(a)*] from abuse by state action. The guarantee of equal protection in regard to action of the federal government is provided by the due process clause in the *Fifth Amendment* [*U.S. Const., amend. V*].

A petition for a writ of mandate is governed by *Code Civ. Proc. § 1084 et seq.* Causes of action in state or federal court for damages or other forms of relief for certain deprivations of the right to equal protection protected by the United States Constitution are provided in *42 U.S.C. §§ 1983, 1985(3)*.

Before being amended in 1974 to provide specifically that a person may not be denied equal protection of the laws [*Cal. Const., art. I, § 7(a)*], the California Constitution did not provide a specific guarantee of equal protection under the laws. Instead, equal protection arguments were framed under former Cal. Const., art. I, § 11 (*now Cal. Const., art. IV, § 16(a)*), providing that all laws of a general nature shall have a uniform operation, and under former Cal. Const., art. I, § 21 (*now Cal. Const., art. I, § 7(b)*), providing that no citizen or class of citizens shall be granted privileges or immunities which on the same terms are not granted to all citizens.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsMandamusCivil Rights LawConspiracyElementsConstitutional LawEqual ProtectionGeneral OverviewConstitutional LawEqual ProtectionScope of Protection

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3-35A California Points & Authorities § 35A.03

§ 35A.03 Equal Protection Analysis

The United States Supreme Court and the California Supreme Court follow a so-called "two-tier" approach to equal protection challenges. At a minimum, a statutory classification or other form of state action must bear some rational relationship to a legitimate state purpose [*In re King (1970) 3 Cal. 3d 226, 232, 90 Cal. Rptr. 15, 474 P.2d 983 , cert. denied, 403 U.S. 931 (1971)]* . Statutes that classify and impose differing procedural requirements on litigants are generally valid if the classification is supported by a rational basis [*Fitzgerald v. Racing Ass'n of Central Iowa (2003) 539 U.S. 103, 123 S. Ct. 2156, 2159-2161, 156 L. Ed. 2d 97* (difference in state tax rates between slot machines at race tracks and slot machines on riverboats is subject to rational basis review); *People v. Health Laboratories of North America, Inc. (2001) 87 Cal. App. 4th 442, 449, 104 Cal. Rptr. 2d 618* (exemption in *Code Civ. Proc. § 425.16(d)* of public prosecutors' enforcement actions from anti-SLAPP motions bears directly on furthering state's legitimate interest of allowing prosecutors to pursue actions to enforce laws unencumbered by delay, intimidation, or distraction)].

Equal protection claims may be brought by a "class of one" when the plaintiffalleges that he or she was intentionally treated differently from others similarly situated and there is no rational basis for the difference in treatment [*Village of Willowbrook v. Olech (2000) 528 U.S. 562, 564, 120 S. Ct. 1073, 145 L. Ed. 2d 1060* (per curiam); *see Genesis Environmental Services v. San Joaquin Valley Unified Air Pollution Control Dist. (2003) 113 Cal. App. 4th 597, 604-608, 6 Cal. Rptr. 3d 574* (plaintiff sufficiently alleged equal protection claim for class of one by alleging plaintiff was treated differently from similarly situated persons, difference in treatment was intentional, and there was no rational basis for difference in treatment)]. Although the latitude given state economic and social regulation is necessarily broad, when the classifications employed in state action approach sensitive and fundamental personal rights, the courts exercise a stricter scrutiny [*Trimble v. Gordon (1977) 430 U.S. 762, 766-767, 97 S. Ct. 1459, 52 L. Ed. 2d 31]* . As stated in several cases, if state action classifies individuals on the basis of a suspect category, such as race or ancestry, or infringes a fundamental interest, such as the right to liberty, it is subject to strict judicial scrutiny [*see, e.g., Graham v. Richardson (1971) 403 U.S. 365, 371-372, 375-376, 91 S. Ct. 1848, 29 L. Ed. 2d 534* ; Parents Involved in Community Schools v. Seattle School Dist., No. 1 *(9th Cir. 2004) 377 F.3d 949, 960* ; *Hunter v. Regents of the University of California (9th Cir. 1999) 190 F.3d 1061, 1063* (race); *In re Marriage Cases (2008) 43 Cal. 4th 757, 783-784, 76 Cal. Rptr. 3d 683* (sexual orientation as suspect class and interest in family relationship as fundamental); *People v. Olivas (1976) 17 Cal. 3d 236, 243, 131 Cal. Rptr. 55, 551 P.2d 375]* . If a classification is subject to strict scrutiny, the presumption of constitutionality is abandoned and the defenders of state action have the burden of

justification. They must show that the state action serves a compelling state interest and that there are no other reasonable, less intrusive means by which the interest can be served [*Examining Bd. v. Flores de Otero (1976) 426 U.S. 572, 602, 605, 96 S. Ct. 2264, 49 L. Ed. 2d 65* ; Parents Involved in Community Schools v. Seattle School Dist., No. 1 *(9th Cir. 2004) 377 F.3d 949, 960* ; *Choudhry v. Free (1976) 17 Cal. 3d 660, 664, 131 Cal. Rptr. 654, 552 P.2d 438]* .

No matter which tier or test is used, the same test must be applied to similarly situated persons [*see* *Cleburne v. Cleburne Living Center (1985) 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313* (indicating that *Equal Protection Clause* requires same treatment of "similarly situated" persons); *Fajardo v. City of Los Angeles (9th Cir. 1999) 179 F.3d 698, 700* (in determining whether city policy of treating domestic violence 911 calls differently from non-domestic violence calls, critical issue is not whether domestic violence rarely results in death or severe injury, but whether domestic-violence crimes result in severe injury or death less frequently than non-domestic-violence crimes that are considered 911 emergencies)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawEqual ProtectionGeneral OverviewConstitutional LawEqual ProtectionLevel of Review

California Points & Authorities

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3-35A California Points & Authorities § 35A.04

§ 35A.04 Meaning of Rational Basis

[1] Introduction to "Rational Relationship" Test

Every classification contained in state action must bear some rational relationship to a legitimate state purpose. The "rational relationship" standard generally defers to state action and is usually employed to justify state action [*Fitzgerald v. Racing Ass'n of Central Iowa (2003) 539 U.S. 103, 123 S. Ct. 2156, 2159, 156 L. Ed. 2d 97* (rational basis review especially deferential in context of complex tax laws); *Nordlinger v. Hahn (1992) 505 U.S. 1, 11, 112 S. Ct. 2326, 120 L. Ed. 2d 1]* . Thus, a classification subjected to the rational relationship test does not deny equal protection if any set of facts may reasonably be conceived in its justification [*McGowan v. Maryland (1961) 366 U.S. 420, 426, 81 S. Ct. 1101, 6 L. Ed. 2d 393* ; *Choudhry v. Free (1976) 17 Cal. 3d 660, 131 Cal. Rptr. 654, 552 P.2d 438]* . A classification is constitutionally infirm only if so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational [*Conservatorship of Edde (2009) 173 Cal. App. 4th 883, 890-898, 93 Cal. Rptr. 3d 266* (*Welf. & Inst. Code § 7275* did not violate equal protection when applied to allow state to seek reimbursement for cost of commitment to state hospital from conservatorship estate of pretrial detainee found not competent to stand trial, even though state could not seek reimbursement for commitment after criminal adjudication, where there was rational basis for distinguishing between them); *see also Vance v. Bradley (1979) 440 U.S. 93, 97, 99 S. Ct. 939, 59 L. Ed. 2d 171]* .

Even improvident decisions of a political branch will eventually be rectified by the democratic process so that judicial intervention is generally unwarranted, no matter how unwisely the court may think the political branch has acted [*Nordlinger v. Hahn (1992) 505 U.S. 1, 17-18, 112 S. Ct. 2326, 120 L. Ed. 2d 1* ; *County of San Diego v. Brown (1993) 19 Cal. App. 4th 1054, 1081 n.36, 23 Cal. Rptr. 2d 819]* . The courts may not properly strike down a statute simply because they disagree with the wisdom of the law or because they believe there is a fairer method for dealing with the problem [*Fein v. Permanente Medical Group (1985) 38 Cal. 3d 137, 163, 211 Cal. Rptr. 368, 695 P.2d 665 , appeal dismissed, 474 U.S. 892, 106 S. Ct. 214, 88 L. Ed. 2d 215* ; *County of San Diego v. Brown (1993) 19 Cal. App. 4th 1054, 1081 n.36, 23 Cal. Rptr. 2d 819* ; *see also Schweiker v. Wilson (1981) 450 U.S. 221, 235, 101 S. Ct. 1074, 67 L. Ed. 2d 186* (as long as classificatory scheme chosen by legislative body rationally advances reasonable and identifiable governmental objective, court must disregard existence of other methods of allocation that judges, as individuals, would have preferred)].

On the other hand, both the United States and the California Supreme Courts have stated the rational relationship test in what would appear to be more vigorous ways. Several decisions refer to the language of *Royster Guano Co. v. Virginia (1920) 253 U.S. 412, 415, 40 S. Ct. 560, 64 L. Ed. 989* , which held that a classification must be reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced are treated alike [*see, e.g., Eisenstadt v. Baird (1972) 405 U.S. 438, 448, 92 S. Ct. 1029, 31 L. Ed. 2d 349* ; *Brown v. Merlo (1973) 8 Cal. 3d 855, 106 Cal. Rptr. 388, 506 P.2d 212]* .

While acknowledging that neither California cases nor those of the United States Supreme Court have settled on a particular verbal formula to describe the "restrained" equal protection standard of review, the California Supreme Court has stated that all of the various linguistic formulations of the test require the court to conduct a serious and genuine judicial inquiry into the correspondence between the classification and the legislative goals [*Cooper v. Bray (1978) 21 Cal. 3d 841, 848, 148 Cal. Rptr. 148, 582 P.2d 604* , citing *Newland v. Board of Governors of Cal. Community Colleges (1977) 19 Cal. 3d 705, 711, 139 Cal. Rptr. 620, 566 P.2d 254* ; *Fein v. Permanente Medical Group (1985) 38 Cal. 3d 137, 163, 211 Cal. Rptr. 368, 695 P.2d 665 , appeal dismissed, 474 U.S. 892, 106 S. Ct. 214, 88 L. Ed. 2d 215]* .

The United States Supreme Court has also developed a more assertive interpretation of the rational relationship test in cases involving illegitimacy and gender, categories which are similar to a suspect category in terms of immutability and stigma of inferiority; indeed, gender is a suspect category under the California Constitution [*see Sail'er Inn, Inc. v. Kirby (1971) 5 Cal. 3d 1, 18-20, 95 Cal. Rptr. 329, 485 P.2d 529]* . When a classification involves illegitimacy, the Court will give equal consideration to both the legitimate interests promoted by the classification and the fundamental personal rights which it endangers, and analyze the state's objectives to see how well they justify the classification under challenge [*Trimble v. Gordon (1977) 430 U.S. 762, 773-774, 97 S. Ct. 1459, 52 L. Ed. 2d 31* ; *Weber v. Aetna Cas. & Sur. Co. (1972) 406 U.S. 164, 172-173, 92 S. Ct. 1400, 31 L. Ed. 2d 768]* . When a classification involves gender, it will not withstand a constitutional challenge unless it serves important governmental objectives and is substantially related to achievement of those objectives [*Craig v. Boren (1976) 429 U.S. 190, 197, 97 S. Ct. 451, 50 L. Ed. 2d 397]* . It is unclear if the U.S. Supreme Court will expand the cases to which this more assertive standard has been applied. Specifically, the Court has declined to treat age as either a suspect category or one subject to its more assertive interpretation of the rational relationship test [*see Massachusetts Bd. of Retirement v. Murgia (1976) 427 U.S. 307, 312-315, 96 S. Ct. 2562, 49 L. Ed. 2d 520]* . Similarly, courts have declined to treat homosexuals as a suspect or quasi-suspect class [*see Romer v. Evans (1996) 517 U.S. 620, 116 S. Ct. 1620, 1626-1627, 134 L. Ed. 2d 855* (applying rational basis review, without specifically determining which standard was applicable, in upholding challenge to Colorado's *Amendment 2*, which prohibited state or local legislative, executive, or judicial action designed to protect homosexuals); *Holmes v. California Army Nat. Guard (9th Cir. 1997) 124 F.3d 1126, 1132* (applying rational basis review in rejecting challenge under *U.S. Const., Amend. V* to military's statutory "don't ask/don't tell" policy)].

Existence of these various levels of application of the rational relationship test has led to criticism of the Court's two-tier approach [*see § 35A.04[4]*].

[2] Effect on Fundamental Interest

In *San Antonio School Dist. v. Rodriguez (1973) 411 U.S. 1, 17, 93 S. Ct. 1278, 36 L. Ed. 2d 16* , the U.S. Supreme Court stated that when a classification impinges upon a fundamental interest, it is subject to strict judicial scrutiny. This language makes it clear that strict scrutiny does not require a total deprival of a fundamental right, but does not explain how great the burden must be before strict scrutiny will be invoked. Some decisions show awareness of the question. For example, in *Bullock v. Carter (1972) 405 U.S. 134, 144, 92 S. Ct. 849, 31 L. Ed. 2d 92* , the Court noted that not every limitation or incidental burden on the exercise of voting rights would require the more stringent standard of review; a classification must have a real and appreciable impact on the exercise of the franchise. In many decisions, however, the extent of the burden required is not clear from the language used. It is arguable that almost any

interference is sufficient since courts have stated that strict scrutiny is appropriate if the classification touches on or affects a fundamental interest or has an impact on the ability to exercise it [*see McDonald v. Bd. of Election Com. of Chicago (1969) 394 U.S. 802, 807, 89 S. Ct. 1404, 22 L. Ed. 2d 739* ; *People v. Olivas (1976) 17 Cal. 3d 236, 243, 251, 131 Cal. Rptr. 55, 551 P.2d 375]* . However, other decisions would appear to require a greater impact and characterize the classification as one that invades, restricts, infringes on, or intrudes on a fundamental interest [*see McDonald v. Bd. of Election Com. of Chicago (1969) 394 U.S. 802, 807, 89 S. Ct. 1404, 22 L. Ed. 2d 739* ; *In re Antazo (1970) 3 Cal. 3d 100, 114, 89 Cal. Rptr. 255, 473 P.2d 999]* .

The forms of points and authorities in this chapter generally use the word "burden" to describe a significant impact on a fundamental interest which is sufficient to require use of the strict scrutiny test unless the decision clearly suggests more specific language. But to fully determine the degree of interference that is required for strict scrutiny, counsel must examine both the language of the decisions and the factual context in which it is applied.

[3] Based on Suspect Category

For a classification to merit some form of heightened scrutiny because of the way it affects individuals with particular personal characteristics, it must in some sense classify them on the "basis" of such characteristics. Thus, in *Califano v. Boles (1979) 443 U.S. 282, 293-295, 99 S. Ct. 2767, 61 L. Ed. 2d 541* , the majority, noting that proper classification for purposes of equal protection analysis is not an exact science, concluded that the challenged legislation did not discriminate against illegitimate children as a class because the legislation's effect was too speculative and incidental to establish that the class would suffer significant deprivation of a benefit or imposition of a substantial burden [*Califano v. Boles (1979) 443 U.S. 282, 293-295, 99 S. Ct. 2767, 61 L. Ed. 2d 541]* . In contrast, the minority concluded that the classification in question was "based" on illegitimacy because the statute was designed to aid children, yet totally excluded illegitimate children from its benefits [*Califano v. Boles (1979) 443 U.S. 282, 303-304, 99 S. Ct. 2767, 61 L. Ed. 2d 541* (Marshall, J., dissenting)].

[4] Criticism of Two-Tier Model

The two-tier model which appears to place equal protection cases into one of two distinct categories that dictate the appropriate standard of review has been criticized as too rigid an approach to equal protection analysis [*see San Antonio School Dist. v. Rodriguez (1973) 411 U.S. 1, 98, 93 S. Ct. 1278, 36 L. Ed. 2d 16 , reh'g denied, 411 U.S. 959, 93 S. Ct. 1919, 36 L. Ed. 2d 418* (Marshall, J., dissenting)]. The basic criticism is that use of the two-tier test inhibits the growth of the equal protection doctrine and obscures what the United States Supreme Court really does in many equal protection cases. In this view, because the Court by creating a new suspect category or fundamental interest greatly expands the types of state action that are vulnerable to constitutional attack, since strict scrutiny generally leads to invalidation [*see Massachusetts Bd. of Retirement v. Murgia (1976) 427 U.S. 307, 319, 96 S. Ct. 2562, 49 L. Ed. 2d 520* (Marshall, J., dissenting)], it has shown a marked inhibition to expand the number of protected categories and interests [*see, e.g., San Antonio School Dist. v. Rodriguez (1973) 411 U.S. 1, 34-35, 93 S. Ct. 1278, 36 L. Ed. 2d 16 , reh'g denied, 411 U.S. 959, 93 S. Ct. 1919, 36 L. Ed. 2d 418* (education not fundamental interest); *Massachusetts Bd. of Retirement v. Murgia (1976) 427 U.S. 307, 324-325, 96 S. Ct. 2562, 49 L. Ed. 2d 520* (state employment not fundamental interest; age not suspect category)]. On the other hand, it has subjected certain classifications to a level of scrutiny that goes beyond the rational relationship test. Thus, illegitimacy is not a suspect category but the analysis given to classifications affecting illegitimate persons more strictly scrutinizes the classifications than would be true under the rational relationship test [*Trimble v. Gordon (1977) 430 U.S. 762, 767, 97 S. Ct. 1459, 52 L. Ed. 2d 31* ; *see § 35A.04[1]*]. Justice Marshall in dissent claimed that the Court focuses its real analysis not on the two-tier test but on the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interestsin support of the classification [*see San Antonio School Dist. v. Rodriguez (1973) 411 U.S. 1, 99, 93 S. Ct. 1278, 36 L. Ed. 2d 16 , reh'g denied, 411 U.S. 959, 93 S. Ct. 1919, 36 L. Ed. 2d 418* (Marshall, J., dissenting); *Massachusetts Bd. of Retirement v. Murgia (1976) 427 U.S. 307, 320, 96 S. Ct. 2562, 49 L. Ed. 2d 520* (Marshall, J., dissenting)].

Although the California Supreme Court has not commented on this critical view of the two-tier test, it does not appear to have inhibited the expansion of equal protection analysis in holding state action unconstitutional, because unlike the United States Supreme Court, the state Supreme Court has indicated a willingness to expand the number of protected interests under the two-tier test [*see, e.g., Sail'er Inn, Inc. v. Kirby (1971) 5 Cal. 3d 1, 21, 95 Cal. Rptr. 329, 485 P.2d 529* (gender is suspect category); *Serrano v. Priest (1976) 18 Cal. 3d 728, 766, 135 Cal. Rptr. 345, 557 P.2d 929 , cert. denied, 432 U.S. 907 (1977)* (education is fundamental interest); *Woods v. Horton (2008) 167 Cal. App. 4th 658, 673-679, 84 Cal. Rptr. 3d 332* (gender is suspect class, holding domestic violence programs that provided services to women but not to men violated men's equal protection rights, but men were not similarly situated to women for the purpose of statutorily-based alternative-sentencing and community treatment programs for inmate mothers)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawEqual ProtectionGeneral OverviewConstitutional LawEqual ProtectionLevel of ReviewConstitutional LawEqual ProtectionScope of Protection

California Points & Authorities

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CHAPTER 35A CIVIL RIGHTS: EQUAL PROTECTION
PART I. INTRODUCTION

3-35A California Points & Authorities § 35A.05

§ 35A.05 Raising Constitutional Issues by Writ of Mandate

In a proceeding for writ of mandate, the petitioner must be a party beneficially interested in issuance of the writ [*Code Civ. Proc. § 1086*]. The general rule is that a beneficial interest exists where the writ is necessary to prevent substantial damage to an interest or right of petitioner which is independent of those interests or rights held in common with the public at large [*Fuller v. San Bernardino Valley Mun. Wat. Dist. (1966) 242 Cal. App. 2d 52, 56-57, 51 Cal. Rptr. 120]* . A separate set of legal principles exists for determining when an individual has standing to challenge the constitutionality of state action for a violation of equal protection. The general rule is that the party attacking the constitutionality of a statute or official action must show an actual or threatened injury, and where a statute discriminates against a class, only a member of the class discriminated against may attack it [*Burns v. State Compensation Ins. Fund (1968) 265 Cal. App. 2d 98, 104, 71 Cal. Rptr. 326]* . Both these rules have been relaxed in recent years in cases involving public duties and important social consequences [*Residents of Beverly Glen, Inc. v. Los Angeles (1973) 34 Cal. App. 3d 117, 121, 109 Cal. Rptr. 724* ; *American Friends Serv. Comm. v. Procunier (1973) 33 Cal. App. 3d 252, 256, 109 Cal. Rptr. 22]* . Moreover, California courts are not bound by stricter federal standards of justiciability [*see, e.g.,* *White v. Davis (1975) 13 Cal. 3d 757, 764, 120 Cal. Rptr. 94, 533 P.2d 222* ; *McDonald v. Stockton Metropolitan Transit Dist. (1973) 36 Cal. App. 3d 436, 440 n.4, 111 Cal. Rptr. 637]* .

The decisions, however, do not explain the relationship between a beneficial interest sufficient to allow a petition for writ of mandate and an interest sufficient to support standing to raise a constitutional issue. Some decisions have applied the rule governing standing in nonmandate cases to determine both the existence of a beneficial interest and ability to raise a constitutional issue in a petition for mandate [*see, e.g.,* *Bozung v. Local Agency Formation Comm'n (1975) 13 Cal. 3d 263, 272, 118 Cal. Rptr. 249, 529 P.2d 1017* (rule of standing under federal Administrative Procedure Act applied in petition for mandate not involving constitutional issue); *Sail'er Inn, Inc. v. Kirby (1971) 5 Cal. 3d 1, 6 n.1, 95 Cal. Rptr. 329, 485 P.2d 529* (rule of standing under federal Constitution applied in petition for writ of mandate involving constitutional issue)]. It would thus appear that if a beneficial interest is sufficient to support a petition for writ of mandate, it is sufficient to permit raising the constitutional issue. Mandate is proper to challenge the constitutionality or validity of statutes or official acts [*Jolicoeur v. Mihaly (1971) 5 Cal. 3d 565, 570 n.2, 96 Cal. Rptr. 697, 488 P.2d 1]* , and it is unlikely that constitutionality can be questioned in some situations where an individual has a beneficial interest entitling him or her to sue for a writ but not in others. On the other hand, in *Rubio v. Superior Court (1979) 24 Cal. 3d 93, 101-103, 154 Cal. Rptr. 734, 593 P.2d 595* , the Supreme Court found that a petitioner who

was a person beneficially interested in the issuance of a writ of prohibition [*see Code Civ. Proc. § 1103*] had standing to raise some constitutional issues but not others under the applicable rules of standing to raise constitutional challenges. The import of *Rubio* is that the Court did not foreclose treating the beneficial interest and standing questions as legally distinct if the petitioner's relationship to the constitutional issue is too remote to warrant a challenge.

The memoranda of points and authorities in this chapter that describe when a petitioner has a beneficial interest to petition for a writ of mandate raising an equal protection issue rely, where possible, on authorities that adjudicate the beneficial interest question and involve a constitutional challenge. If there are none, the memoranda rely on either authorities defining when a beneficial interest exists or authorities that do not involve writs of mandate but define when standing to raise a constitutional issue exists.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusConstitutional LawEqual ProtectionScope of Protection

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3-35A California Points & Authorities § 35A.06

§ 35A.06 Related Uses

The forms of points and authorities in this chapter may be used with appropriate modification to support claims that equal protection has been denied one who has been restrained or imprisoned in a petition for writ of habeas corpus challenging the constitutionality of the restraint or imprisonment [*Penal Code § 1473(a)*; *see, e.g., In re Antazo (1970) 3 Cal. 3d 100, 107-108, 89 Cal. Rptr. 255, 473 P.2d 999* ; *In re Young (1973) 32 Cal. App. 3d 68, 70-71, 107 Cal. Rptr. 915]* . Although neither the Code of Civil Procedure nor the California Rules of Court expressly authorize or require that points and authorities be filed in support of a petition for awrit of habeas corpus, it is advisable to file the memoranda when time and circumstances permit.

Moreover, the forms of points and authorities in this chapter may be used with appropriate modifications to support a petition for writ of mandate to review an administrative decision [*Code Civ. Proc. § 1094.5*]. A constitutional challenge on equal protection grounds to the validity of an agency's enabling act or its application could be the basis for a claim that an agency has proceeded without, or in excess of, jurisdiction, has committed a prejudicial abuse of discretion by not proceeding in the manner required by law, or has unlawfully precluded the petitioner from the use and enjoyment of a right or office to which the petitioner is entitled [*see Code Civ. Proc. §§ 1085, 1094.5*; *see also Walker v. Munro (1960) 178 Cal. App. 2d 67, 74-75, 2 Cal. Rptr. 737* (raising issue of constitutionality of statute enforced by agency to challenge jurisdiction)].

Equal protection claims may also be relevant to actions in state court for declaratory relief [*Code Civ. Proc. § 1060*] challenging the validity of a statute or ordinance on the ground that it violates the guarantee of equal protection. The points and authorities provided in this chapter could be used with appropriate modifications in such an action to oppose a demurrer or a motion for summary judgment (or comparable motion) arguing that a violation of equal protection has not been shown.

Equal protection may be raised in state court by actions for damages or other forms of relief for deprivation of constitutional rights under two of the post-Civil War civil rights statutes [*42 U.S.C. §§ 1983, 1985(3)*; *see Williams v. Horvath (1976) 16 Cal. 3d 834, 837, 129 Cal. Rptr. 453, 548 P.2d 1125]* . The points and authorities provided in this chapter which interpret the federal Constitution could be used with appropriate modifications in such proceedings to oppose a demurrer or a motion for summary judgment (or comparable motion), arguing that a violation of equal

protection has not been shown.

In federal court, an application for a writ of habeas corpus based on the claim that the applicant is in custody in violation of the United States Constitution may raise an equal protection issue. Support of the application by a memorandum of points and authorities, while not required, would be appropriate [*see 28 U.S.C. § 2241(c)(3)*]. Furthermore, whenever any civil claim based on a denial of equal protection under the federal Constitution is contested by motions for dismissal for failure to state a claim on which relief can be granted, for judgment on the pleadings, or for summary judgment [*Fed. R. Civ. P., Rules 12(b)(6), (c), 56*], points and authorities in some form opposing such motions are recommended in federal district courts in California [*see* U.S. Dist. Ct., East Dist. of Cal., Rule 113(e); U.S. Dist. Ct., No. Dist. of Cal., Rule 220-2; U.S. Dist. Ct., Cen. Dist. of Cal., Rule 3(e)(2); U.S. Dist. Ct., So. Dist. of Cal., Rule 3(e)(1)(b) (requiring that such motions be supported by points and authorities)]. The points and authorities provided in this chapter which interpret the federal Constitution could be used with appropriate modifications to oppose any motion which states that a violation of equal protection has not been shown or to support a writ of habeas corpus.

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawEqual ProtectionGeneral OverviewConstitutional LawEqual ProtectionScope of Protection

California Points & Authorities

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3-35A California Points & Authorities § 35A.07

§ 35A.07 Related Pleading and Practice Chapters

For a general discussion of the right to equal protection, see California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post -Civil War Civil Rights Statutes*, and Ch. 114, *Civil Rights: Prisoners' Rights* (Matthew Bender). For a discussion, procedural guide, and forms for use in mandate proceedings, see California Forms of Pleading and Practice, Ch. 358, *Mandate and Prohibition* (Matthew Bender). For a discussion, procedural guide, and forms of petition for judicial review of a final administrative order under administrative mandate, see California Forms of Pleading and Practice, Ch. 470, *Overview of Public Administrative Law* (Matthew Bender). For forms of petitions for writs of habeas corpus based on unconstitutional statutes or ordinances, see California Forms of Pleading and Practice, Ch. 59, *Assemblies, Meetings, and Demonstrations* , and Ch. 292, *Habeas Corpus* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsMandamusConstitutional LawEqual ProtectionGeneral Overview

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3-35A California Points & Authorities § 35A.08

§ 35A.08 Related Points and Authorities Chapters

For a discussion of equal rights under the Unruh Act, see Ch. 35, *Civil Rights: Unruh Civil Rights Act* .

A discussion of the legal basis for requiring points and authorities to be filed in support of a petition for writ of mandate may be found in Ch. 150, *Mandate and Prohibition* . For related memoranda of points and authorities useful in cases involving equal protection claims, see Ch. 14, *Advertising* , and Ch. 195, *Public Administrative Law* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsMandamusConstitutional LawEqual ProtectionGeneral Overview

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3-35A California Points & Authorities §§ 35A.09-35A.19

[Reserved]

§§ 35A.09[Reserved]

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PART II. FORMS

3-35A California Points & Authorities § 35A.20

§ 35A.20 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--General Form

[1] FORM

	)	
	)	NO. _____
SUPERIOR COURT OF CALIFORNIA,	)	MEMORANDUM OF POINTS AND AUTHORIT-
COUNTY OF _____	)	IES IN SUPPORT OF PETITION FOR WRIT OF
_____ [*name*],	)	MANDATE
Petitioner,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Respondent.	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD GRANT THE WRIT OF MANDATE BECAUSE THE STATE'S CLASSIFICATION VIOLATES THE PETITIONER'S RIGHT TO EQUAL PROTECTION IN THAT IT IS _____ [ARBITRARY *or, if classification is based on suspect category or infringes a fundamental interest,* NOT JUSTIFIED BY A COMPELLING GOVERNMENTAL INTEREST].

A. Availability of Writ of Mandate. A writ of mandate may issue from any court to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law specifically enjoins as a duty from an office, trust, or station or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled and from which the party is unlawfully precluded. The writ must be issued in all cases where there is no plain, speedy, and adequate remedy in the ordinary course of law (*Code Civ. Proc. §§ 1085, 1086*).

B. Challenging Constitutionality of State Action by Writ of Mandate. State action may be challenged on constitutional grounds in a petition for writ of mandate, and if the state action is found to be unconstitutional, a writ of mandate will issue to compel action in conformity with constitutional requirements (*Jolicoeur v. Mihaly (1971) 5 Cal. 3d 565, 570 n.2, 96 Cal. Rptr. 697, 488 P.2d 1* ; *Sail'er Inn, Inc. v. Kirby (1971) 5 Cal. 3d 1, 7, 95 Cal. Rptr. 329, 485 P.2d 529* ; *Floresta, Inc. v. City Council of San Leandro (1961) 190 Cal. App. 2d 599, 612, 12 Cal. Rptr. 182*).

[*Memoranda of points and authorities which describe standing to raise constitutional issues by writ of mandate are set out in §§ 35A.22 -35A.25.*]

C. Scope of State Action. State action occurs when there is any action by an agency or instrumentality of the state and its political subdivisions including action which is legislative, judicial, executive, or administrative as well as private conduct which is entwined with government involvement, support, or encouragement (*Avery v. Midland County (1968) 390 U.S. 474, 479-480, 88 S. Ct. 1114, 20 L. Ed. 2d 45* ; *Cooper v. Aaron (1958) 358 U.S. 1, 16-17, 78 S. Ct. 1401, 3 L. Ed. 2d 5* ; *Crawford v. Board of Educ. (1976) 17 Cal. 3d 280, 289-292, 130 Cal. Rptr. 724, 551 P.2d 28* ; *Murguia v. Municipal Court (1975) 15 Cal. 3d 286, 294, 124 Cal. Rptr. 204, 540 P.2d 44* ; *Adams v. Department of Motor Vehicles (1974) 11 Cal. 3d 146, 153-154, 113 Cal. Rptr. 145, 520 P.2d 961*).

D. Challenging Constitutionality of State Action on Equal Protection Grounds. State action that classifies individuals is limited by the guarantee of equal protection in the federal Constitution, which provides that no state may deny to any persons within its jurisdiction the equal protection of the laws (*U.S. Const., Amend. XIV, § 1*), and as an independent ground which may provide additional guarantees, the state Constitution, which provides that no person may be denied equal protection of the laws (*Cal. Const., art. I, § 7(a)*; *Serrano v. Priest (1976) 18 Cal. 3d 728, 764-765, 135 Cal. Rptr. 345, 557 P.2d 929 , cert. denied, 432 U.S. 907, 97 S. Ct. 2951, 53 L. Ed. 2d 1079 (1977))* .

[*Memoranda of points and authorities describing types of classifications are set out in §§ 35A.26, 35A.27.*]

[*EITHER, to emphasize test as basis for judicial analysis*]

E. State Action Based on Arbitrary Classification as Violation of Equal Protection. Any state action that classifies individualsviolates the guarantee of equal protection unless the classification is reasonable, not arbitrary, and the differentiation created by the classification has a fair and substantial relation to the purpose of the state action (*Eisenstadt v. Baird (1972) 405 U.S. 438, 448, 92 S. Ct. 1029, 31 L. Ed. 2d 349* ; *Brown v. Merlo (1973) 8 Cal. 3d 855, 861, 106 Cal. Rptr. 388, 506 P.2d 212*).

[*OR, to state traditional deferential test*]

E. State Action Based on Arbitrary Classification as Violation of Equal Protection. Any state action that classifies individuals violates the guarantee of equal protection unless the classification bears a rational relationship to a legitimate public purpose (*D'Amico v. Board of Medical Examiners (1974) 11 Cal. 3d 1, 16, 22-23, 112 Cal. Rptr. 786, 520 P.2d 10* ; *In re King (1970) 3 Cal. 3d 226, 232, 90 Cal. Rptr. 15, 474 P.2d 983 , cert. denied, 403 U.S. 931, 91 S. Ct. 2249, 29 L. Ed. 2d 709 (1971))* .

[*A memoranda of points and authorities describing a legitimate public purpose is set out in § 35A.28.*]

F. State Action Based on Suspect Category or Burdening Fundamental Interest as Subject to Strict Scrutiny. If state action classifies individuals on the basis of a suspect category or burdens a fundamental interest, it is subject to strict judicial scrutiny even though it is not arbitrary (*Graham v. Richardson (1971) 403 U.S. 365, 371-372, 375-376, 91 S. Ct. 1848, 29 L. Ed. 2d 534* ; *People v. Olivas (1976) 17 Cal. 3d 236, 243, 131 Cal. Rptr. 55, 551 P.2d 375*).

[*Memoranda of points and authorities describing suspect categories are set out in §§ 35A.29 -35A.34; memoranda of points and authorities describing fundamental interests are set out in §§ 35A.35 -35A.44.*]

G. Nature of Suspect Category. A category is suspect when it is based on a characteristic of individuals which is immutable and bears no relationship to ability to perform or contribute to society, or has been historically identified as subject to the stigma of inferiority and second class citizenship (*Sail'er Inn, Inc. v. Kirby (1971) 5 Cal. 3d 1, 19-21, 95 Cal. Rptr. 329, 485 P.2d 529*).

H. Nature of Fundamental Interest. A fundamental interest is a personal right or liberty which is basic to the concept of a free and representative form of government or essential to the individual in economic or human terms (*Serrano v. Priest (1976) 18 Cal. 3d 728, 767-768, 135 Cal. Rptr. 345, 557 P.2d 929 , cert. denied, 432 U.S. 907, 97 S. Ct. 2951, 53 L. Ed. 2d 1079 (1977)* (interpretation of California Constitution); *Bixby v. Pierno (1971) 4 Cal. 3d 130, 144-145, 93 Cal. Rptr. 234, 481 P.2d 242*).

I. State Action Subject to Strict Scrutiny as Violation of Equal Protection Unless Justified. If state action is subject to strict judicial scrutiny, it will be held to violate the guarantee of equal protection unless its defenders can establish that the state action serves a compelling state interest and that there are no reasonable, less intrusive means by which its purpose can be achieved (*San Antonio School Dist. v. Rodriguez (1973) 411 U.S. 1, 16-17, 93 S. Ct. 1278, 36 L. Ed. 2d 16 , reh'g denied, 411 U.S. 959* ; *Choudhry v. Free (1976) 17 Cal. 3d 660, 664, 131 Cal. Rptr. 654, 552 P.2d 438*).

[*Memoranda of points and authorities describing justification are set out in §§ 35A.45 -35A.49.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a petition for a writ of mandate to challenge the constitutionality of state action on equal protection grounds.

The form presents an outline of an equal protection argument in terms of five general steps as follows:

- State action is present;
- The state action classifies individuals;
- The classification is arbitrary and therefore violates equal protection;
- Even if the classification is not arbitrary, it is based on a suspect category such as race or infringes a fundamental interest and therefore is subject to strict judicial scrutiny; and
- Because the classification is subject to strict judicial scrutiny, it violates equal protection unless it

can be justified by those who defend it.

These steps are intended to be primarily a foundation for the development of equal protection arguments. In any particular instance, there will be some general principles that can be used as they are stated in this form and others that will require augmentation. Thus, the case may clearly involve discrimination because of race or alienage and the main question is whether it can be justified [*see, e.g., University of Cal. Regents v. Bakke (1978) 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 796* ; *Foley v. Connelie (1978) 435 U.S. 291, 295-297, 98 S. Ct. 1067, 55 L. Ed. 2d 287]* . Or, the case might present state action that is restrictive and difficult to justify, but the question is whether a suspect category or fundamental interest is present [*see, e.g., Sail'er Inn, Inc. v. Kirby (1971) 5 Cal. 3d 1, 18-20, 95 Cal. Rptr. 329, 485 P.2d 529* ; *San Antonio School Dist. v. Rodriguez (1973) 411 U.S. 1, 28-29, 93 S. Ct. 1278, 36 L. Ed. 2d 16 , reh'g denied, 411 U.S. 959]* .

Although the form is intended to be primarily a foundation for the development of more complex equal protection arguments, it may be sufficient by itself in a particular case. Thus, if the main contention is that the classification contained in the state action is arbitrary, Paragraphs A-E may be a sufficient statement of the relevant legal principles since arbitrariness is usually shown by analysis of the facts rather than the law [*see, e.g., Eisenstadt v. Baird (1972) 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349* , discussed in *§ 35A.20[3*][d]; *In re King (1970) 3 Cal. 3d 226, 232-233, 90 Cal. Rptr. 15, 474 P.2d 983 , cert. denied, 403 U.S. 931 (1971)* , discussed in *§ 35A.20[3][d]*]. Similarly, if the main contention is that the classification contained in state action is based on a suspect category or infringes a fundamental interest that has not yet been defined by case law, Paragraphs A-D and F-I set out the relevant legal principles necessary to hold the classification unconstitutional.

The remaining forms in the chapter permit augmentation of the general principles stated in § 35A.20 on the following issues:

- Does the state action classify individuals [*see §§ 35A.26, 35A.27*]?
- Is the classification arbitrary [*see § 35A.28*]?
- Is a category used in a classification a suspect category [*see §§ 35A.29 -35A.34*]?
- Is an interest affected by a classification a fundamental interest and does the classification infringe it [*see §§ 35A.35 -35A.44*]?
- Is adequate justification offered for the classification [*see §§ 35A.45 -35A.49*]?

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms of complaint and allegation for use in actions based on deprivation of the right to equal protection, see Ch. 59, *Assemblies, Meetings, and Demonstrations* , Ch. 112, *Civil Rights* , and Ch. 265, *Federal Courts: Jurisdiction and Removal* , in California Forms of Pleading and Practice (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities in support and in opposition to a motion for preliminary injunction to restrain the enforcement of an ordinance because it denies equal protection, see Ch. 14, *Advertising* , in this set.

[3] Discussion of Authorities

[a] Challenging Constitutionality of State Action by Writ of Mandate

In ***Jolicoeur v. Mihaly*** *(1971) 5 Cal. 3d 565, 96 Cal. Rptr. 697, 488 P.2d 1* , petitioners invoked the original jurisdiction of the California Supreme Court to seek writs of mandate ordering respondent registrars of voters to register petitioners to vote. The Court granted the writ and held that both the *U.S. Const., Amend. XXVI* and California law required registrars of voters to treat all citizens 18 years of age or older alike for all purposes related to voting. The Court discussed the use of the remedy of mandate and cited several cases for the rule that mandamus is an appropriate method for challenging the constitutionality or validity of statutes or official acts.

In ***Sail'er Inn, Inc. v. Kirby*** *(1971) 5 Cal. 3d 1, 95 Cal. Rptr. 329, 485 P.2d 529* , when the Department of Alcoholic Beverage Control attempted to revoke the liquor licenses of bars that employed women bartenders in violation of former Bus. & Prof. Code § 25656, the licensees petitioned the California Supreme Court for a writ of mandate to prevent revocation of their licenses. They contended that former Bus. & Prof. Code § 25656, which prohibited women from tending bar unless they or their husbands held the liquor license but did not place a comparable limitation on male bartenders, violated the *equal protection clauses* of the federal and state Constitutions. In granting their request for a writ, the Court held in part that mandamus, like certiorari, was an appropriate writ for review, on constitutional grounds, of the exercise of quasi-judicial power by constitutionally authorized statewide agencies.

In ***Floresta, Inc. v. City Council of San Leandro*** *(1961) 190 Cal. App. 2d 599, 12 Cal. Rptr. 182* , petitioner sought a writ of mandate and declaratory relief after the zoning board denied petitioner's application fora use permit to place a cocktail lounge in a shopping center. Although the court of appeal affirmed the trial court's decision to deny relief, it specifically approved petitioner's use of the remedy of mandamus. While mandamus is traditionally a procedure for reviewing the discretionary action of an administrative agency, it may also be invoked to challenge the constitutionality of ordinances and regulations.

[b] Scope of State Action

Avery v. Midland County *(1968) 390 U.S. 474, 88 S. Ct. 1114, 20 L. Ed. 2d 45* , involved a constitutional challenge on equal protection grounds to the method of selecting members of the Commissioner's Court, a general governing body at the county level in Texas. The United States Supreme Court upheld the challenge and held that the Commissioner's Court was subject to the "one man-one vote" rule. The Court analyzed the basic issue as whether the *Fourteenth Amendment*, which the Court had previously held forbade the election of state legislators from districts of disproportionate population, also applies to the election of local government officials. It concluded that the *equal protection clause* reached the exercise of state power whether exercised directly or through subdivisions of the state. Although the forms and functions of local government and the relationship among the various units are matters of state concern, the Court held that these political subdivisions must comply with the *Fourteenth Amendment*.

In ***Cooper v. Aaron*** *(1958) 358 U.S. 1, 78 S. Ct. 1401, 3 L. Ed. 2d 5, 79 Ohio Law Abs. 452* , a school board attempted to postpone implementation of a school desgregation plan. Although the federal district court granted the board's request, the court of appeals reversed, and the United States Supreme Court affirmed the decision of the court of appeals. One of the school board's arguments for postponement was that the legislative, executive, and judicial departments of the state government had increased the risk of violence and disorder by their opposition to desegregation. In response, the Court explained that opposition to desegregation also violated *U.S. Const., amend. XIV*. A state, the Court pointed out, must act through its legislative, executive, and judicial authorities for it can act in no other way. Whoever acts by virtue of a public position under a state government acts in the name of the state and for the state and is clothed with the state's power; thus, their action is that of the state.

In ***Crawford v. Board of Educ.*** *(1976) 17 Cal. 3d 280, 130 Cal. Rptr. 724, 551 P.2d 28* , plaintiff brought a school

desegregation action against defendant board of education. The trial court ordered defendant to prepare and implement a reasonably feasible plan for the desegregation of its schools, and defendant appealed. On appeal, defendant maintained that since the segregation in its schools was de facto in origin, it had no obligation under the *equal protection clause* to alleviate the racial and ethnic segregation which it conceded to exist. The state Supreme Court rejected this argument, holding that whatever the rule of law under the federal Constitution, the *equal protection clause* of the California Constitution [*Cal. Const., art. I, § 7(a)*] requires a school board to take reasonably feasible steps to alleviate school segregation whether the segregation is de jure or de facto in nature and even where the segregation is the result of the application of facially neutral policies.

The first step in the Court's analysis was to determine that even if the origin or causes of school segregation could not be attributed to the school board, it was so "significantly involved" in the control, maintenance, and ongoing supervision of the system that the school segregation could be described as state action under the state's *equal protection clause*. In California, school boards possess plenary authority to determine school assignment policies, establish geographic attendance zones, determine the location, size, and neighborhood served by new schools, create or eliminate transfer options, and establish specialized programs that may attract particular students to particular schools. Given this pervasive control and continuing responsibility over the factors which determine the racial and ethnic school attendance pattern, the school could not claim that the resultant segregation was not the result of state action.

The subsequent amendment of the *equal protection clause* of the California Constitution in 1979 by Proposition 1 to prohibit school desegregation only where it is prohibited by the United States Constitution affects neither the definition of state action in *Crawford* nor the general availability of the state constitution as an independent ground for equal protection challenges [*see Serrano v. Priest (1976) 18 Cal. 3d 728, 764-765, 135 Cal. Rptr. 345, 557 P.2d 929 , cert. denied, 432 U.S. 907 (1977)* , discussed in *§ 35A.20[3][c]*].

Murguia v. Municipal Court *(1975) 15 Cal. 3d 286, 124 Cal. Rptr. 204, 540 P.2d 44* , involved a criminal prosecution in which defendant union members requested a discovery order to obtain information which would support their claim that various provisions of the Penal Code were being discriminatorily enforced against them. The trial court denied defendants's request, and they sought a writ of mandate directing the trial court to vacate its order. The California Supreme Court held that defendants were entitled to a discovery order because discriminatory enforcement of a criminal law by the executive branch of government in violation of the *equal protection clause* can provide a defense in a criminal prosecution, and traditional principles of criminal discovery require that defendants be permitted to discover information relevant to that defense. At the outset of its analysis, the Court emphasized that the *equal protection clause of the Fourteenth Amendment of the United States Constitution* did more than place limitations on the legislative branch of government. From the very inception of the *Fourteenth Amendment*, courts have recognized that the *equal protection clause* safeguards individuals from all branches ofgovernment, including the executive. The Court cited *Ex parte Virginia (1880) 100 U.S. 339, 347, 25 L. Ed. 676* for the same principle adopted in *Cooper v. Aaron (1958) 358 U.S. 1, 16-17, 78 S. Ct. 1401, 3 L. Ed. 2d 5* , discussed *above*, that a state acts by its legislative, executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the state, or of the officers or agents by whom it powers are exerted, can deny to any person within its jurisdiction the equal protection of the laws.

In ***Adams v. Department of Motor Vehicles*** *(1974) 11 Cal. 3d 146, 113 Cal. Rptr. 145, 520 P.2d 961* , petitioners sought a writ of mandamus ordering the Department of Motor Vehicles not to participate in a garageman's sale or to transfer the interest in any vehicle sold pursuant to a garageman's lien. One petitioner was an automobile owner whose vehicle, after a dispute over the repair bill, was retained and sold pursuant to the garagemen's labor and materials lien provided in former Civ. Code §§ 3068, 3071 [*now see Civ. Code §§ 3068, 3071*]. Petitioners maintained that the state's failure to provide the owner of such a vehicle with a hearing either when the vehicle was seized or prior to the sale violated the guarantee of due process in the *Fourteenth Amendment* and former Cal. Const., art. I, § 13 [*now see Cal. Const., art. I, § 7(b)*]. The Supreme Court agreed, holding in part that the action of automobile repairers in retaining and selling vehicles was notpurely private conduct but state action subject to the due process guarantees. Although many

attachment cases found state action in the actual acts of government officials or courts in effectuating seizure, direct government involvement is not essential. Private conduct may become so entwined with government action that it becomes subject to the *Fourteenth Amendment* and former Cal. Const., art. I, § 13 [*now see Cal. Const., art. I, § 7(b)*]. In the case before the Court there was significant government involvement. The lien and procedures for its enforcement were created and governed by statute; an agency of the state oversaw the sale and transferred the title; and the statutory plan delegated to a private person the traditional government function of lien enforcement.

Although at issue in *Adams* was the level of government involvement necessary for state action under the due process clause, its analysis applies equally to the *equal protection clause*. In fact, the Supreme Court cited leading equal protection cases as its authority in *Adams.*

[c] Challenging Constitutionality of State Action on Equal Protection Grounds

Serrano v. Priest *(1976) 18 Cal. 3d 728, 135 Cal. Rptr. 345, 557 P.2d 929 , cert. denied, 432 U.S. 907 (1977)* , was the second appeal of a challenge to a system of public school financing under which money available for schools varied according to the wealth of each school district. In *Serrano v. Priest (1971) 5 Cal. 3d 584, 596, 614-615, 96 Cal. Rptr. 601, 487 P.2d 1241* , the Court held the system unconstitutional as alleged by plaintiffs as an infringement on state and federal guarantees of equal protection and remanded the case for trial to determine if plaintiffs could sustain their allegations. During the course of that trial, the Legislature amended the school financing law, and the United States Supreme Court held that a comparable system in Texas did not violate the *equal protection clause of the Fourteenth Amendment* [*San Antonio School Dist. v. Rodriguez (1973) 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 , reh'g denied, 411 U.S. 1, 6]* . Nevertheless, the California trial court found that the revised system of school financing violated the *equal protection clause* of the California Constitution, and defendants appealed. The Supreme Court affirmed the decision of the trial court, emphasizing that the system in question required the Court's strict scrutiny and justification by a compelling state interest. In particular the Court held that discrimination in educational opportunity on the basis of district wealth involves a suspect classification which affects the fundamental interest of education. The Court made it clear that the state equal protection provisions, while substantially equivalent to the guarantees contained in the *Fourteenth Amendment*, possess an independent vitality which in a given case may demand an analysis different from that which would apply if only the federal standard were applicable. Although, in the Court's view, the decisions of the United States Supreme Court defining fundamental rights are persuasive authority and entitled to respectful consideration, they may be followed by courts in California only if they provide no less individual protection than that which is guaranteed by California law and are part of the full panoply of rights which Californians have come to expect as their due.

[d] State Action Based on Arbitrary Classification as Violation of Equal Protection

Eisenstadt v. Baird *(1972) 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349* , was a habeas corpus proceeding in which petitioner challenged his conviction under a Massachusetts law for giving away a contraceptive device. The federal court of appeals instructed the district court to grant the writ, and the county sheriff appealed to the United States Supreme Court which affirmed. The Court noted that the statute in question permitted married persons to obtain contraceptive devices, although only from doctors or druggists on prescription, whereas single persons could not obtain contraceptives to prevent pregnancy from anyone. Thus, the issue was whether or not the statute viewed as a prohibition on contraception per se violated the rights of single persons under the *equal protection clause*. The Court held that the statute violated the *equal protection clause* because the differential treatment between married and unmarried persons could not be rationally explained. It stated that although the *Fourteenth Amendment* does not deny to states the power to treat differentclasses of persons in different ways, it does deny to states the power to legislate differential treatment of persons who are placed into different statutory classes on the basis of criteria wholly unrelated to the objectives of the statute. The Court adopted the standard of *Royster Guano Co. v. Virginia (1920) 253 U.S. 412, 415, 40 S. Ct. 560, 64 L. Ed. 989* , that classification must be reasonable, not arbitrary, and must rest upon some ground of difference which has a fair and substantial relation to the objectives of the legislation so that all persons similarly circumstanced are

treated alike. Since the statute could not be justified on a rational basis, further inquiry into whether it was justified by a compelling state interest was unnecessary.

In ***Brown v. Merlo*** *(1973) 8 Cal. 3d 855, 106 Cal. Rptr. 388, 506 P.2d 212* , plaintiff brought an action for damages suffered while riding as a nonpaying guest in a vehicle driven by defendant. The trial court granted defendant's motion for summary judgment on plaintiff's cause of action on the ground that former Veh. Code § 17158 prevented recovery by a nonpaying guest in the absence of intoxication or willful misconduct on the driver's part. On appeal, the California Supreme Court held that the statute was unconstitutional as a denial of equal protection under the federal and state Constitutions because there was no rational basis for the classifications made by the statute. In its analysis of the rational basis standard, the Court pointed out that a statute may single out a class for distinctive treatment only if the classification bears a rational relation to the purpose of the legislation. At a minimum, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. The Court adopted the standard used by the United States Supreme Court in *Eisenstadt*, discussed *above*, that a classification must be reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced are treated alike. Thus, the Court concluded, when a statute provides that one class shall receive different treatment from another, constitutional provisions demand more than nondiscriminatory application within the class established, they impose a requirement of some rationality in the nature of the class singled out.

In ***D'Amico v. Board of Medical Examiners*** *(1974) 11 Cal. 3d 1, 112 Cal. Rptr. 786, 520 P.2d 10* , petitioners petitioned for a writ of mandate to order the state Board of Osteopathic Examiners to license them as physicians and surgeons in order to challenge on equal protection grounds a state law that prohibited osteopathy graduates from practicing as physicians and surgeons in California. The trial court sustained the board's demurrer without leave to amend, but the court of appeals reversed and remanded. On remand, the trial court granted a summary judgment for petitioners, and the board appealed to the Supreme Court which affirmed, holding that the statutory distinction between the allopathic approach to medicine and osteopathy violated the *equal protection clause* of the federal and state Constitutions because it bore no rational relationship to any conceivable state interest. The Court stated that so long as classification does not permit one to exercise a privilege while refusing it to another of like qualifications, under like conditions and circumstances, it is unobjectionable upon this ground. But, in this case, the state's only legitimate interest was to protect the public from poorly trained and incompetent medical practitioners and the board, by its own admissions, established that there was no rational relationship between an exclusion of all osteopathic graduates and this goal.

In re King *(1970) 3 Cal. 3d 226, 90 Cal. Rptr. 15, 474 P.2d 983 , cert. denied, 403 U.S. 931 (1971)* , was a habeas corpus proceeding in which petitioner successfully challenged former Penal Code § 270, which made it a misdemeanor for a father to willfully fail to provide his minor children with necessities, but raised the offense to a felony if, during the period of nonsupport, the father remained outside the state for 30 days. The California Supreme Court held that basic guarantees of equal protection embodied in *U.S. Const., amend. XIV, § 1* and former Cal. Const., art. I, §§ 11, 21 [*now see Cal. Const., art. I, § 7*] protect persons from arbitrary discrimination by the state. Although the state was permitted to draw distinctions between different groups of individuals, equal protection principles require, at a minimum, classifications which bear a rational relationship to a legitimate public purpose. The Court concluded that since the crime of nonsupport does not vary with the place of its commission, an incremental penalty based on location was arbitrary and irrational.

[e] State Action Based on Suspect Category or Burdening Fundamental Interest as Subject to Strict Scrutiny

In ***Graham v. Richardson*** *(1971) 403 U.S. 365, 91 S. Ct. 1848, 29 L. Ed. 2d 534* , plaintiffs filed class actions in a federal district court challenging the constitutionality of state laws which restricted the ability of aliens to obtain welfare benefits. Plaintiffs prevailed in the trial court, and on appeal the United States Supreme Court affirmed. The Court held

that state statutes which either deny welfare benefits to resident aliens or condition such benefits on a specified residence period in the United States violate the *equal protection clause*. As part of its analysis, the Court pointed out that classifications based on alienage, like those based on nationality and race, are inherently suspect and subject to close judicial scrutiny. Moreover, the fact that the statutes in question also infringe on the right to travel provided an additional reason for a strict scrutiny of the legislation, not because travel is a suspect criterion such as race, nationality, or alienage, but because it is a fundamental right.

In ***People v. Olivas*** *(1976) 17 Cal. 3d 236, 131 Cal. Rptr. 55, 551 P.2d 375* , defendant challenged his commitment to the California YouthAuthority following conviction for misdemeanor assault on equal protection grounds. The crux of defendant's argument was that as an individual between the ages of 16 and 21, he could be committed to the Youth Authority under former Welf. & Inst. Code § 1731.5 for a misdemeanor conviction and serve a potentially longer term than the maximum jail sentence which could be imposed for the same offense if committed by an individual 21 years of age or older. The California Supreme Court agreed with defendant's contention and declared the statute unconstitutional. It explained that in cases which involve suspect categories or touch on fundamental interests, the courts adopt an attitude of active and critical analysis subjecting the classification to strict scrutiny.

[f] Nature of Suspect Category

The factual background of ***Sail'er Inn, Inc. v. Kirby*** *(1971) 5 Cal. 3d 1, 95 Cal. Rptr. 329, 485 P.2d 529* , is discussed in *§ 35A.20[3][a]*. In that case, the California Supreme Court was required to determine whether or not classifications based on gender were subject to strict scrutiny. The Court applied two tests common to all suspect classifications:

- Whether the characteristic on which the classification is based is an immutable trait that bears no relationship to ability to perform or contribute to society. Under this test the Court distinguished race and lineage from intelligence or physical disability and pointed out that if classifications are permitted that ignore this test, then the whole class of individuals with this characteristic are relegated to an inferior legal status without regard to the capabilities or characteristics of its individual members.

- Identification of all suspect classifications and the stigma of inferiority and second class citizenship associated with them. The Court identified women, blacks, aliens, and the poor as groups that have historically labored under severe legal and social disabilities.

[g] Nature of Fundamental Interest

The factual background of ***Serrano v. Priest*** *(1976) 18 Cal. 3d 728, 135 Cal. Rptr. 345, 557 P.2d 929 , cert. denied, 432 U.S. 907 (1977)* , is discussed in *§ 35A.20[3][c]*. In that case, the California Supreme Court held that a system of public school financing under which money available for schools varied according to the wealth of each school district violated the right to equal protection under the California Constitution because it discriminated on the basis of wealth, a suspect classification, in regard to education, a fundamental interest, and was not justified by a compelling state interest.

The trial court, in its analysis of the issues, had applied the test for determining a fundamental interest established by five members of the Supreme Court in *San Antonio School Dist. v. Rodriguez (1973) 411 U.S. 1, 33, 93 S. Ct. 1278, 36 L. Ed. 2d 16 , reh'g denied, 411 U.S. 1* , who adopted the conservative rule that fundamental rights are only those rights that are explicitly or implicitly guaranteed by the Constitution. It concluded that even though education was not a fundamental interest under the federal Constitution, it did meet the *Rodriguez* definition of fundamental interest under the California Constitution. The California Supreme Court affirmed the conclusion of the trial court, but not its reasoning. The Court stated quite strongly that it was not required by either inclination or authority to determine the importance of rights and interests affected by legislative classifications according to the extent to which they are "explicitly or implicitly guaranteed" by the compendious, comprehensive, and distinctly mutable state Constitution. Although the treatment afforded particular rights and interests by the state Constitution is to be accorded significant

consideration in determining what rights are fundamental, the proper test under the state *equal protection clause* is whether an individual right or liberty lies at the core of our free and representative form of government.

Although the Court did not so state, its view is closer to a minority of justices on the United States Supreme Court who believe that fundamental interests do not require a constitutional basis if they have a close nexus with constitutional interest [*see San Antonio School Dist. v. Rodriguez (1973) 411 U.S. 1, 102-103, 93 S. Ct. 1278, 36 L. Ed. 2d 16 , reh'g denied, 411 U.S. 1* (Marshall, J., dissenting)]. Further, the language used by the Court directly opposes its earlier statement in *D'Amico v. Board of Medical Examiners (1974) 11 Cal. 3d 1, 18, 112 Cal. Rptr. 786, 520 P.2d 10* , that fundamental interests for the purpose of equal protection analysis are limited to rights which are explicitly or implicitly guaranteed by the Constitution.

In ***Bixby v. Pierno*** *(1971) 4 Cal. 3d 130, 93 Cal. Rptr. 234, 481 P.2d 242* , two individuals petitioned in superior court for a writ of mandamus to compel the Commissioner of Corporations to set aside a certain decision. The trial court denied the petition, and plaintiffs appealed to the California Supreme Court, contending that the trial court should have exercised its independent judgment in reviewing the commissioner's decision. The Court affirmed and held that the case did not call for the exercise of independent judgment on the evidence since it did not involve a vested, fundamental right. The Court gave considerable attention to explaining the nature of fundamental rights. It stated that in determining whether or not a right is fundamental, the courts do not alone weight the economic aspect of it but the effect of it in human terms and the importance of it to the individual in the life situation.

Although *Bixby* dealt with the issue of whether a right is fundamental for the purpose of the scope of review of an administrative decision which interferes with it, the Court recognized that it had traditionally utilized asimilar form of analysis in applying the *equal protection clause* to the area of economic regulations, on the one hand, and to cases involving fundamental interests on the other. Further, for its examples of fundamental interests the Court relied on *Meyer v. Nebraska (1923) 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042* , which described as fundamental interests protected by the due process clause a number of interests, such as the right to engage in a common occupation, marry, establish a home, and bring up children, which were subsequently recognized as safeguarded by the *equal protection clause*.

[h] State Action Subject to Strict Scrutiny as Violation of Equal Protection Unless Justified

San Antonio Independent Sch. Dist. v. Rodriguez *(1973) 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 , reh'g denied, 411 U.S. 959* , was a class action on behalf of certain Texas school children challenging the constitutionality of the state's system for financing public schools. Plaintiffs contended that the system, which was financed by the property tax income within each school district supplemented by state funds, violated the *equal protection clause* in so far as it resulted in substantial disparities in the amount of money spent per pupil. The federal district court held that since wealth was a suspect classification and education was a fundamental interest, the system would be subject to strict scrutiny. The state failed to show a compelling state interest, and the system was ruled unconstitutional. On direct appeal, the United States Supreme Court reversed on the grounds that the system did not discriminate on the basis of wealth and education was not a fundamental interest. Therefore, it was not an appropriate case for strict scrutiny. The Court duly noted, however, that if strict scrutiny had been applied to the system, it would have been found unconstitutional, for it could not satisfy the three elements of strict scrutiny indicated by previous decisions which require the following:

- That the state action is not entitled to the usual presumption of validity.

- That the defenders of state action must carry a heavy burden of justification.

- That the defenders of state actions must demonstrate that the state action has been structured with precision and is tailored narrowly to serve legitimate objectives and that it uses the less drastic means for

effectuating its objectives.

The decision cites, as its principle authority for the strict scrutiny test, *Dunn v. Blumstein (1972) 405 U.S. 330, 343, 92 S. Ct. 995, 31 L. Ed. 2d 274* , in which the Court held that statutes affecting constitutional rights must be drawn with precision and must be tailored to serve their legitimate objectives. If there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a state may not choose the way of greater interference; for if it acts at all, it must choose less drastic means.

Counsel should be aware that the Court in some decisions has formulated the strict scrutiny test in ways that appear to permit justification by a government interest that is less than compelling and implementation by a method that is not the least restrictive. Thus, in *Examining Bd. v. Flores de Otero (1976) 426 U.S. 572, 602, 96 S. Ct. 2264, 49 L. Ed. 2d 65* , the Court stated that state action could only be upheld if the government which imposed it could demonstrate that its purpose or interest was both constitutionally permissible and substantial and that its use of the classification was necessary to the accomplishment of its purpose or the safeguarding of its interest. However a classification is not considered "necessary" where it is not tailored to the purpose in question and based on the least drastic means of accomplishing it [*see § 35A.49*].

In ***Choudhry v. Free*** *(1976) 17 Cal. 3d 660, 131 Cal. Rptr. 654, 552 P.2d 438* , petitioners, none of whom owned real property, sought an original writ of mandate in the Supreme Court to compel defendant county clerk to accept nominating papers filed by one of the petitioners who wished to be a candidate for director of the Imperial Irrigation District. The basis for the clerk's refusal to accept the papers was *Water Code § 21100*, which provided that directors of an irrigation district formed under the Irrigation District Law [*Water Code §§ 20500 et seq.*] must be freeholders of the district they represent. Petitioners challenged Section 21100 on equal protection grounds. The California Supreme Court held *Water Code § 21100* unconstitutional as it applied to the Imperial Irrigation District. In reaching its conclusion, the Court determined that the statute in question was subject to the strict scrutiny test. Under it, the state must demonstrate that the statutory classification serves a compelling governmental interest and that there are no reasonable, less intrusive means by which the goals of the state can be achieved.

[4] Additional Authorities

[a] Scope of State Action

Burton v. Wilmington Parking Auth. (1961) 365 U.S. 715, 81 S. Ct. 856, 6 L. Ed. 2d 45 , is a leading case on the issue of what decree of nexus between private conduct and governmental activity is sufficient to establish the private conduct as state action. In that case, plaintiff was a black man denied service in a restaurant operated by defendant private corporation in space leased from a state owned and operated automobile parking facility. Plaintiff brought an action for declaratory and injunctive relief, claiming that his rights under the *equal protection clause* of the *Fourteenth Amendment* had been violated. The trial court's grant of a summaryjudgment for plaintiff was reversed by the Supreme Court of Delaware which found no state action because defendant was operating in a purely private capacity. The United States Supreme Court reversed. In its opinion, the Court admitted that the *Fourteenth Amendment* erects no shield against purely private conduct, however discriminatory or wrongful. The amendment only inhibits such action as may fairly be said to be that of the state. Nevertheless, the amendment applies to state action of every kind including state participation through any arrangement, management, funds, or property and reaches private conduct in which the state in any of its manifestations has become to some significant extent involved. The Court added that creation of a precise formula is not possible; only by sifting facts and weighing circumstances can the nonobvious involvement of the state in private conduct be attributed its true significance. In the instant case, the land and building were publicly owned, and the building was dedicated to public use in performance of defendant parking authority's essential governmental functions. Maintenance of commercially leased areas in the facility was a financially integral and indispensable part of the state's plan to operate the facility as a self-sustaining unit. Operation of the restaurant in the parking facility created mutual advantages for both landlord and tenant. Additionally, certain of the state's responsibilities as lessor, like

building maintenance, would be paid for from public funds. The Court concluded that the state had so far insinuated itself into a position of interdependence with the private corporation that it must be recognized as a joint participant in the challenged activity; it had thus achieved that degree of participation and involvement in discriminatory behavior which it was the intent of the *Fourteenth Amendment* to condemn.

Curtis v. Board of Supervisors of Los Angeles County (1972) 7 Cal. 3d 942, 104 Cal. Rptr. 297, 501 P.2d 537 , was a constitutional challenge by original writ of mandate in the California Supreme Court to former Gov. Code § 34311, under which landowners owning at least 51 percent of the land in an area proposed for incorporation had the power to prevent the county board of supervisors from calling an incorporation election. The Supreme Court determined that the statute in question was an unconstitutional violation of the right to equal protection. In reaching this conclusion, the Court was required to decide whether the refusal of the county board of supervisors to proceed with the incorporation election demanded by petitioners was state action. The Court held that former Gov. Code § 34311 and the acts of the board of supervisors pursuant to its mandate unquestionably constituted state action (*7 Cal. 3d 942, 951)* .

In *Reitman v. Mulkey (1967) 387 U.S. 369, 87 S. Ct. 1627, 18 L. Ed. 2d 830* , plaintiffs, a black couple, brought an action for violation of the Unruh Civil Rights Act [*Civ. Code § 51*] on account of discrimination in housing. The trial court granted defendants' motion for summary judgment on the ground that former Cal. Const., art. I, § 26 (incorporated into the Constitution as a result of the voter's approval of Proposition 14 in 1964) nullified the application of the Act to housing discrimination by prohibiting the state from limiting the right of individuals to dispose of real property in any way they chose. Plaintiffs appealed to the California Supreme Court, which held that Proposition 14 violated the *Fourteenth Amendment* [*Mulkey v. Reitman (1966) 64 Cal. 2d 529, 534-543, 50 Cal. Rptr. 881, 413 P.2d 825]* . Defendants appealed to the United States Supreme Court which affirmed on the ground that Proposition 14 unconstitutionally involved the state in racial discrimination and was therefore invalid under the *Fourteenth Amendment*. The Court first pointed out that significant state involvement in private discrimination could amount to unconstitutional state action under the *Fourteenth Amendment*. Such prohibited state involvement may be found even when the state only encouraged, but did not command, discrimination. The California Supreme Court found that enactment of Proposition 14 significantly encouraged and involved the state in private racial discrimination, and the U.S. Supreme Court deferred to the California court's knowledge of the facts and circumstances concerning the passage and potential impact of Proposition 14 and familiarity with the milieu in which it would operate (*387 U.S. 369, 375-379)* .

It was significant to the United States Supreme Court that the California court did not base its findings on the view that the mere repeal of laws forbidding racial discrimination constituted forbidden state encouragement. Rather, its finding could be supported by the reasonable theory that the proposition encouraged racial discrimination because the constitutional authorization to discriminate which it created was free from legislative, executive, or judicial regulation. It alleviated individuals from the need to rely on their personal beliefs to justify discrimination and provided an express constitutional authority which was free from censure or interference of any kind from official sources (*387 U.S. 369, 376-377)* .

[b] State Action Based on Arbitrary Classification as Violation of Equal Protection

In *People v. McKee (2010) 47 Cal. 4th 1172, 104 Cal. Rptr. 3d 427, 223 P.3d 566* , the California Supreme Court examined Proposition 83, passed by the voters in November of 2006, which modified the terms by which sexually violent predators (SVP's) could be released from civil commitment under the Sexually Violent Predators Act (*Welf. & Inst. Code, § 6600 et seq.*), to an indefinite commitment from which the individual could be released if the individual proved by a preponderance of the evidence that the individual no longer was an SVP, in light of a challenge that Proposition 83 violated the *equal protection clause of the Fourteenth Amendment of the United States Constitution*, because it treated SVP's significantly less favorably than those similarly situated individuals civilly committed under other statutes. The Court concluded that the state had not yet carried its burden of demonstrating why SVP's, but not any other ex-felons subject to civil commitment, such as mentally disordered offenders, were subject to indefinite

commitment. The Court held first that mentally disordered offenders (MDO's) and SVP's were similarly situated, and imposing on SVP's an indefinite commitment and the burden of proving they should not be committed, when the MDO's was subject to short-term commitment renewable only if the People proved periodically that continuing commitment was justified beyond a reasonable doubt, raised a substantial equal protection question that calling for justification by the *People (47 Cal. 4th 1172, 1203)* . Standards and burdens of proof represent societal determinations of who should bear the risk that a court's or jury's judgment will be in error and balance the individual's fundamental liberty interest in not being incarcerated or involuntarily confined with the state's compelling interest in protecting society from dangerous persons, in punishing criminal behavior in the case of criminal defendants, and in treating mental illness in the case of civil committees (*47 Cal. 4th 1172, 1203-1204)* . The Legislature may make reasonable distinctions between civil commitment statutes based on a showing that those reasonably determined to represent a greater danger may be treated differently from the general population (*47 Cal. 4th 1172, 1204)* . The differential treatment may result at least initially in imposing a greater burden of proof in order to be released from involuntary commitment. However, both SVP's and MDO's had suffered prior felony convictions and had been determined by mental health experts to suffer from mental disorders that making them a continuing danger, and the reasons for differential treatment were not immediately obvious from the face of the two statutory schemes (*47 Cal. 4th 1172, 1204-1205)* . Further, individuals found not guilty by reason of insanity (NGI's) and SVP's were also similarly situated, and a comparison of the two commitment regimes raised similar equal protection problems as those related to MDO's, and, as with MDO's, the People had not yet carried their burden of justifying the differences between the SVP and NGI commitment statutes (47 Cal. 4th 1172, 1207). The Court thus remanded to afford the People the opportunity to make the appropriate showing that, notwithstanding the similarities between SVP's and MDO's and NGI's, SVP's as a class bore a substantially greater risk to society, and therefore imposing on them a greater burden before they could be released from commitment was needed to protect society (*47 Cal. 4th 1172, 1207-1209*). In remanding the case, the Court made clear that different classes of individuals civilly committed need not be treated identically, but the government had not yet shown that special treatment of SVP's was validly based on the degree of danger reasonably perceived as to that group, or whether it arose from any medical or scientific evidence (47 Cal. 4th 1172, 1210).

In *People v. Wilkinson (2004) 33 Cal. 4th 821, 16 Cal. Rptr. 3d 420, 94 P.3d 551* , a criminal defendant challenged the statutory provisions relating to battery on a custodial officer as "irrational" and violating the federal and state guarantees of equal protection because one who commits the "lesser" offense of battery on a custodial officer without injury can receive felony punishment under *Penal Code § 243.1*, while a person committing the "greater" offense of battery on a custodial officer with injury can be convicted of a wobbler offense under *Penal Code § 243(c)(1)* and can receive a misdemeanor sentence. The California Supreme Court found the rational basis test applicable, because a criminal defendant does not have a fundamental interest in a specific term of imprisonment or in the designation a particular crime receives (*33 Cal. 4th 821, 838* , citing *People v. Flores(1986)178 Cal. App. 3d 74, 88, 223 Cal. Rptr. 465* ; *see People v. Alvarez (2001) 88 Cal. App. 4th 1110, 1116, 106 Cal. Rptr. 2d 447* (finding rational basis test applicable to equal protection challenge involving alleged sentencing disparity)). Application of the strict scrutiny standard would have been incompatible with the broad discretion the Legislature traditionally has been understood to exercise in defining crimes and specifying punishment. The Court then held that the statutory scheme was not irrational because neither the existence of two identical criminal statutes prescribing different levels of punishments nor the exercise of a prosecutor's discretion in charging under one such statute and not the other, violates equal protection principles (*33 Cal. 4th 821, 838-839* , citing *United States v. Batchelder (1979) 442 U.S. 114, 124-125, 99 S. Ct. 2198, 60 L. Ed. 2d 755*). Without a showing that a criminal defendant was singled out deliberately for prosecution on the basis of some invidious criterion which is arbitrary and unjustified because it bears no rational relationship to legitimate law enforcement interests, which the defendant here did not allege, the defendant cannot make out an equal protection violation (*33 Cal. 4th 821, 839* , citing *Manduley v. Superior Court (2002) 27 Cal. 4th 537, 568-569, 117 Cal. Rptr. 2d 168, 41 P.3d 3*).

In *Raffaelli v. Committee of Bar Examiners (1972) 7 Cal. 3d 288, 101 Cal. Rptr. 896, 496 P.2d 1264* , petitioner challenged the constitutionality of former Bus. & Prof. Code § 6060, which excluded aliens from the practice of law in California, by applying for an original writ of mandate compelling the respondent Committee of Bar Examiners to

certify him for admission to the practice of law. Petitioner was a permanent resident alien who was educated at law school in California and passed the California Bar Examination. The California Supreme Court held that the restriction against aliens expressed in Section 6060 violated both *U.S. Const., amend. XIV, § 1* and former Cal. Const., art. I, §§ 11, 21 [*now see Cal. Const., art. I, § 7*]. The Court determined that classifications based on alienage were subject to strict judicial scrutiny. After evaluating the various arguments put forth by the state to explain why the statute was a necessary means of promoting a compelling state interest, the Court concluded that the state could not even show that the challenged classification had a rational connection with the applicant's fitness or capacity to practice law. Therefore, the state could not sustain its burden of showing that the classification was necessary to promote a compelling interest (*7 Cal. 3d 288, 292-301)* .

[c] Nature of Fundamental Interest

Harlow v. Carleson (1976) 16 Cal. 3d 731, 129 Cal. Rptr. 298, 548 P.2d 698 , was an administrative mandamus action by a welfare recipient challenging the decision of the State Department of Social Welfare to terminate her benefits. The trial court determined that the administrative decision was not supported by substantial evidence, and defendant appealed. The California Supreme Court held that since the administrative decision affected a vested, fundamental interest, it required evaluation by the more rigorous independent judgment test (*16 Cal. 3d 731, 733)* . However, it affirmed the decision of the trial court on the theory that if the court had properly applied the independent judgment test, instead of the substantial evidence test, it would have nevertheless reached the same result (*16 Cal. 3d 731, 738-739)* .

In deciding that petitioner's right to continued welfare benefits was a fundamental interest, the Court cited the leading case of *Bixby v. Pierno (1971) 4 Cal. 3d 130, 144-145, 93 Cal. Rptr. 234, 481 P.2d 242* , for the rule that to determine whether or not a right is fundamental, the courts should weigh not just its economic aspect but its effect in human terms and its importance to the individual's life (*16 Cal. 3d 731, 736)* .

[d] State Action Based on Arbitrary Classification as Violation of Equal Protection

In *Village of Willowbrook v. Olech (2000) 528 U.S. 562, 120 S. Ct. 1073, 145 L. Ed. 2d 1060* , a homeowner asked the Village to connect her property to the municipal water supply. The Village initially demanded the grant of a 33-foot easement as a condition. On the homeowner's objection that the Village only required a 15-foot easement from other property owners seeking access to the water supply, after a 3-month delay the Village agreed to provide the connection with only a 15-foot easement. The homeowner sued on the ground that the Village's initial demand violated her equal protection rights as wholly irrational and arbitrary, and alleged that the demand was motivated by ill will resulting from a previous unrelated successful lawsuit against the Village, and the Village acted with the intent to deprive the homeowner of her rights or in reckless disregard of those rights. The District Court dismissed the complaint for failure to state a claim. The Seventh Circuit Court of Appeals reversed.

The United States Supreme Court affirmed the Seventh Circuit's reversal. The Court held per curiam that the homeowner stated a claim for violation of the *Equal Protection clause of the 14th Amendment* since the complaint could be construed as alleging that she was intentionally treated differently than others similarly situated and there was no rational basis for the difference in treatment (*528 U.S. 562, 564-565*).

In *Holguin v. Flores (2004) 122 Cal. App. 4th 428, 18 Cal. Rptr. 3d 749* , the surviving partner of an unmarried cohabiting heterosexual couple challenged *Fam. Code § 297*, a California law affording unmarried cohabiting couples who qualify as domestic partners rights and benefits not afforded to other unmarried couples, including the right of the surviving partner to sue for the wrongful death of the other partner, and Code Civ.Proc. § 377.60, which granted the right to sue for wrongful death to surviving spouses, surviving putative spouses, and surviving domestic partners, but not to surviving members of unmarried couples of opposite sex. Under *Fam. Code § 297*, an adult couple living together could qualify as a domestic partnership if they were of the same sex or one of them was at least 62 years of age and

eligible for benefits under the federal Social Security Act based on age. After his partner was killed in an automobile accident, the surviving partner filed a wrongful death action against the other driver. The trial court dismissed the action on the ground he lacked standing to sue for wrongful death because he and his partner were not married and were not domestic partners as defined by *Fam. Code § 297*. The court of appeal affirmed, holding that it is not a violation of the right to equal protection to bar the surviving member of an unmarried cohabiting couple of opposite sex from asserting a cause of action for the wrongful death of the other member (*122 Cal. App. 4th 428, 438-443*). The court held first that a heightened level of scrutiny was not required because the wrongful death statute did not discriminate against the surviving partner on the basis of his gender or age, but on the basis of his marital status, that is, unmarried with the right to wed (*122 Cal. App. 4th 428, 439*). The court then held that the Legislature rationally could have concluded the survivors of same sex couples and couples with an aged member eligible for Social Security benefits were deserving of solicitude because they were as likely to suffer economic loss from the death of their partners as were spouses but, because of other statutory schemes, they were legally or practically prevented from marrying, but opposite sex younger couples were not entitled to the same solicitude because the law did not prevent them from marrying, and that the failure of opposite sex couples to adopt the responsibility of the marital vows and the legal obligation resulting from a formal marriage ceremony evidenced a lack of permanent commitment which made compensation for loss of monetary support too speculative to calculate (*122 Cal. App. 4th 428, 442-443*).

In *Genesis Environmental Services v. San Joaquin Valley Unified Air Pollution Control Dist. (2003) 113 Cal. App. 4th 597, 6 Cal. Rptr. 3d 574* , a participant in an independent contractor program to test pollutant levels in emissions from stationary sources for an air pollution control district alleged that the negligence of the district prevented it from remaining eligible to pursue testing emissions for companies and other sources subject to mandatory emissions testing and was a violation of the contractor's constitutional right to equal protection as a class of one. The court of appeal held that an equal protection claim based on a class of one contains the following essential elements: (1) Plaintiff was treated differently from other similarly situated persons; (2) the difference in treatment was intentional; and (3) there was no rational basis for the difference in treatment, and that the contractor's allegations and the reasonable inferences drawn from the allegations and documents subject to judicial notice were sufficient to state a cause of action under *42 U.S.C. § 1983* based on a denial of equal protection (*113 Cal. App. 4th 597, 604-608*).

In *Citizens for Responsible Behavior v. Superior Court (1991) 1 Cal. App. 4th 1013, 2 Cal. Rptr. 2d 648* , a citizens' group sought to place on the ballot an initiative enacting a city ordinance that would have repealed existing ordinances relating to homosexual rights, required voter approval for any future ordinances on the subject, and prohibited funding for AIDS or for the advocacy of homosexual rights. After the city refused to place the initiative on the ballot, the trial court would not force it to do so, ruling that the proposed initiative was constitutionally defective. The court of appeal denied the group's petition for a writ of mandate. The court said the proposed ordinance raised obstacles in the path of persons seeking to have ordinances prohibiting discrimination on the basis of sexual orientation or AIDS enacted, but did not raise any such obstacles for other ordinances. There was no rational reason why the city should be permitted to enact an ordinance barring discrimination against persons with any other disease, no matter how serious or communicable, but not one dealing with persons suffering from AIDS. Nor was there any rational basis for the distinctions drawn by the proposed ordinance with respect to the limitations placed on the city's legislative power to enact protective or corrective legislation regarding homosexuals, bisexuals, or those suffering from AIDS. The proposed ordinance thereby failed the rational basis test. The classification would result in a real, substantial, and invidious denial of the equal protection of the laws (*1 Cal. App. 4th 1013, 1025-1027*).

Torres v. County of Los Angeles (1989) 209 Cal. App. 3d 325, 257 Cal. Rptr. 211 , involved alleged medical malpractice in the delivery and treatment of plaintiff's son at birth. Plaintiff's claim against defendant public hospital was filed when her son was almost five years old. Defendant denied the claim, as well as a petition for relief from late filing. After the trial court denied plaintiff's petition for an order for relief from compliance with the claim filing requirement, plaintiff filed a medical malpractice action. Defendant filed a motion for summary judgment, asserting that the Tort Claims Act barred plaintiff's suit because she failed to file a claim within the time limits of *Gov. Code § 911.2*, and because she failed to obtain judicial relief from that requirement. The trial court granted defendant's motion.

Although the court of appeal affirmed the judgment based on its finding that plaintiff had at least presumptive notice and knowledge of medical malpractice, rendering her noncompliance with the claim filing requirement fatal, it found that *Code Civ. Proc. § 340.5*, which sets forth the limitations period in malpractice actions, violated minors' right to the law's equal protection. The court explained that *Code Civ. Proc. § 340.5* defines the accrual of a cause of action differently for adults and minors. It perceived no rational basis for placing persons into different classes on the basis of criteria wholly unrelated to the statutory objective. Such a classificationmust be reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced will be treated alike. By defining the actions of adults and minors to accrue differently, the court said that *Code Civ. Proc. § 340.5* violated minors' right to the law's equal protection. *Code Civ. Proc. § 340.5* provides that an adult's cause of action may accrue either from the date of injury or from the time the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first. The minor's cause of action, by contrast, accrues from the date of the wrongful act rather than the injury, and the statute contains no comparable provision permitting accrual when the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury. The court found that dating the accrual of a minor's medical malpractice action from the wrongful act penalizes minors insofar as *Gov. Code § 901* computes *Gov. Code § 911.2* time limits from the *Code Civ. Proc. § 340.5* accrual. For example, when harm occurs prenatally or in childbirth, the wrongful act may only be revealed to have caused an injury to the minor months or even years later, as the child grows and develops (*209 Cal. App. 3d 325, 334*).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusConstitutional LawEqual ProtectionGeneral OverviewConstitutional LawEqual ProtectionRaceConstitutional LawEqual ProtectionScope of Protection

California Points & Authorities

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Volume 3 Chapters 34-39 CHECKS AND BANKS---to---CIVIL SERVICE
CHAPTER 35A CIVIL RIGHTS: EQUAL PROTECTION
PART II. FORMS

3-35A California Points & Authorities § 35A.21

§ 35A.21 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--Scope of State Action--Private Action Under Monopoly Authority Conferred by State Action

[1] FORM

[*Caption. See § 35A.20.*]

A WRIT OF MANDATE IS PROPER TO CHALLENGE PRIVATE ACTION WHICH VIOLATES THE RIGHT TO EQUAL PROTECTION WHEN THE ACTOR HAS BEEN GRANTED MONOPOLY CONTROL BY STATE ACTION.

A-B. Authorities Establishing Property of Writ of Mandate to Challenge Constitutionality of State Action. [*See § 35A.20, Paragraphs A, B.*]

C. Scope of State Action. [*See § 35A.20, Paragraph C.*]

D. State Action Under California Constitution. The concept of state action in the California Constitution is not limited by the definition of state action under the United States Constitution (*Gay Law Students Ass'n v. Pacific Tel. & Tel. Co. (1979) 24 Cal. 3d 458, 469, 156 Cal. Rptr. 14, 595 P.2d 592*).

E. Private Action Under Monopoly Authority Conferred by State Action. Private action is subject to the *equal protection clause* of the California Constitution when it utilizes monopoly authority which has been conferred by state action (*Gay Law Students Ass'n v. Pacific Tel. & Tel. Co. (1979) 24 Cal. 3d 458, 469, 156 Cal. Rptr. 14, 595 P.2d 592*).

F-K. Authorities Establishing Equal Protection Challenge to Classification Which Is Arbitrary, Based on a Suspect Category, or Burdens a Fundamental Interest. [*See § 35A.20, Paragraphs D-I.*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a petition for writ of mandate to challenge the constitutionality of private action on equal protection grounds when the basis of the challenge is that the action contains a classification which is arbitrary, based on a suspect category, or burdens a fundamental interest and the applicability of equal protection requirements to the action is an issue. It may be used when the challenged private action was undertaken by a private party utilizing monopoly authority conferred by state action.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] State Action Under California Constitution

Gay Law Students Ass'n v. Pacific Tel. & Tel. Co. *(1979) 24 Cal. 3d 458, 156 Cal. Rptr. 14, 595 P.2d 592* , is discussed in *§ 35A.21[3][b]*.

[b] Private Action Under Monopoly Authority Conferred by State Action

In ***Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*** *(1979) 24 Cal. 3d 458, 156 Cal. Rptr. 14, 595 P.2d 592* , plaintiffs filed a class action against defendant seeking declaratory and injunctive relief and damages on account of defendant's employment discrimination against homosexuals. The trial court sustained defendant's demurrer but on appeal, the Supreme Court reversed, holding that the defendant's action was subject to the *equal protection clause* of the California Constitution, and employment discrimination against homosexuals, if proven, would constitute a violation of that clause. The Court noted that although the state Constitution does not contain an explicit state action requirement, it does not apply broadly to all purely private conduct. On the other hand, the state clause need not be interpreted identically with the federal *equal protection clause*, and the state action requirement is satisfied when a privately owned public utility, which enjoys a state-protected monopoly or quasi-monopoly, utilizes its authority arbitrarily to exclude a class of individuals from employment opportunities. Not only does the state give the monopolist its power over employment, but due to monopolistic control, rejected employees have no comparable employment opportunities and the general public lacks the power to show disapproval for discriminatory practices by changing to a competitor. Moreover, relevant United States Supreme Court decisions are consistent with the principle that a private entity which, by virtue of state action, is afforded monopolistic control over employment opportunities, is not free to exercise its power without regard to constitutional restraints.

Counsel will note that although the Court limited its discussion to public utilities with monopolistic control over employment, the principle stated in this form apparently applies to discrimination by any private entity in an area where it has a monopoly created by government.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsMandamusConstitutional LawEqual ProtectionGeneral

OverviewConstitutional LawEqual ProtectionScope of Protection

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Volume 3 Chapters 34-39 CHECKS AND BANKS---to---CIVIL SERVICE
CHAPTER 35A CIVIL RIGHTS: EQUAL PROTECTION
PART II. FORMS

3-35A California Points & Authorities § 35A.22

§ 35A.22 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action by Mandate--Beneficial Interest as Required--Violation of Petitioner's Rights

[1] FORM

[*Caption. See § 35A.20.*]

A WRIT OF MANDATE IS PROPER TO CHALLENGE STATE ACTION WHICH VIOLATES PETITIONER'S RIGHT TO EQUAL PROTECTION IF THE PETITIONER POSSESSES A SPECIAL INTEREST, DISTINGUISHABLE FROM THE INTERESTS OF THE PUBLIC AT LARGE, WHICH HAS SUFFERED OR WILL SUFFER SUBSTANTIAL DAMAGE BY A CLASSIFICATION WHICH IS EITHER ARBITRARY OR, IF THE CLASSIFICATION IS BASED ON A SUSPECT CATEGORY OR BURDENS A FUNDAMENTAL INTEREST, NOT JUSTIFIED BY A COMPELLING GOVERNMENTAL INTEREST.

A-B. Authorities Establishing Propriety of Writ of Mandate to Challenge Constitutionality of State Action. [*See § 35A.20, Paragraphs A, B.*]

C. Beneficial Interest as Required. A writ of mandate must be issued on the verified petition of the party beneficially interested (*Code Civ. Proc. § 1086*).

D. Violation of Petitioner's Rights. A petitioner has a beneficial interest in the issuance of a writ of mandate which challenges state action violating petitioner's constitional rights if the petitioner possesses a special interest, distinguishable from the interests of the public at large, which as suffered or will suffer substantial damage (*Fuller v. San Bernardino Valley Mun. Wat. Dist. (1966) 242 Cal. App. 2d 52, 56-57, 51 Cal. Rptr. 120* ; *Tustin Heights Ass'n v. Board of Supervisors (1959) 170 Cal. App. 2d 619, 636-637, 339 P.2d 914*).

[*Optional*] **E. Having Burdens Not Faced by Even Potential Competitors as Violation of Rights.** One need not have actually lost a benefit to another classified differently; a person has standing to challenge state action which burdens it in a way in which others would not be if they had chosen to participate in the challenged program (*Monterey Mechanical Co. v. Wilson (9th Cir. 1997) 125 F.3d 702*).

[*Optional*] **F. Pecuniary Interest as Unnecessary.** The special interest of a petitioner need not be a pecuniary interest (*Fuller v. San Bernardino Valley Mun. Wat. Dist. (1966) 242 Cal. App. 2d 52, 59, 51 Cal. Rptr. 120*).

G-M. Authorities Establishing Equal Protection Challenge to Classification Which Is Arbitrary, Based on a Suspect Category, or Burdens a Fundamental Interest. [*See § 35A.20, Paragraphs C-I.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a petition for writ of mandate to challenge the constitutionality of state action on equal protection grounds because the state action uses a classification which is arbitrary, based on a suspect category, or burdens a fundamental interest, and the sufficiency of petitioner's interest in raising such a challenge is an issue. The memorandum establishes that petitioner has sufficient beneficial interest in issuance of the writ because petitioner possesses a special interest, distinguishable from the interests of the public at large, which has suffered or will suffer substantial damage. Counsel will note that this rule is the most conservative view of standing to petition for mandate and is comparable to the rule in nonmandate cases that a party attacking the constitutionality of a statute must show some actual or threatened injury and where the statute discriminates against a class, only a member of the class discriminated against may attack it [*see Burns v. State Compensation Ins. Fund (1968) 265 Cal. App. 2d 98, 104, 71 Cal. Rptr. 326 , set out in § 35A.24[3][a]*].

Use Optional Paragraph E if the classification scheme did not disadvantage the plaintiff vis-a-vis others who were actually involved in the state action only because no members of the favored classes chose to participate. Use Optional Paragraph F if the petitioner's special interest is not pecuniary.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Counsel would demonstrate how petitioner has a special interest, distinguishable from those of the public at large, in the issuance of a writ. If the discriminatory governmental action did not treat the petitioner differently from others actually involved (e.g., petitioner was one of several bidders on a contract, all of whom were non-minorities required to show compliance with a minority set-aside program), counsel should show how the petitioner was placed on an unequal footing with other potential competitors (e.g., that at the point it prepared its bid, it had to shoulder the expense of recruiting minority business participation and not work with subcontractors with whom it had an established relationship, unlike any minority-owned contracting firm that could have bid).

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of petition for writs of mandate, with orders issuing the writ, see California Forms of Pleading and Practice, Ch. 358, *Mandate and Prohibition* (Matthew Bender).

[d] Related Points and Authorities

Related memoranda of points and authorities for use in supporting a petition for writ of mandate where the sufficiency

of petitioner's beneficial interest is an issue are *set out in §§ 35A.23 -35A.25*.

[3] Discussion of Authorities

[a] Violation of Petitioner's Rights

In ***Fuller v. San Bernardino Valley Mun. Wat. Dist.*** *(1966) 242 Cal. App. 2d 52, 51 Cal. Rptr. 120* , petitioners, who were proponents of a new water district, sought a peremptory writ of mandate ordering defendant water district to terminate annexation proceedings. The trial court granted the writ and defendants appealed to the court of appeal, which affirmed on the ground that since plaintiffs had filed a valid petition with the board of supervisors for formation of a new district, these formation proceedings had precedence over subsequently initiated annexation proceedings. One of defendants' contentions was that plaintiffs, as proponents of the new district, did not have a sufficient beneficial interest to maintain the action. The court responded by first reviewing the law of beneficial interest. It stated that private individuals may apply for a writ of mandate only if they have some special interest to be subserved or some particular right to be preserved or protected independent of those held in common with the public at large. The writ will be granted only where necessary to protect a substantial right and it is shown that some substantial damage will be suffered if the writ is denied. The court added that the beneficial interest need not be pecuniary. In this case, plaintiffs showed a sufficient beneficial interest in several ways. They were property owners in the proposed new district which would have been affected by the annexation. They were also the moving force in attempting to create the district and because of their efforts, they also had an interest in an early determination of the validity and relative priority of the competing water district actions. Finally, they had a pecuniary interest in that they could only be reimbursed for their formation expenditures if the new district was formed.

Although neither *Fuller* nor *Tustin Heights Ass'n,* discussed *below,* involved a writ of mandate containing a constitutional challenge, the basic test of beneficial interest sufficient to provide standing to petition for a writ of mandate appears to be substantially similar to the basic test of standingto raise a constitutional question. The general rule is that a party attacking the constitutionality of a statute must show some actual or threatened injury and where the statute discriminates against a class, only a member of the class discriminated against may attack it [*Burns v. State Compensation Ins. Fund (1968) 265 Cal. App. 2d 98, 104, 71 Cal. Rptr. 326]* .

In ***Tustin Heights Ass'n v. Board of Supervisors*** *(1959) 170 Cal. App. 2d 619, 339 P.2d 914* , petitioners were residents and property owners and an association representing residents and property owners and individual residents and property owners who resided in the immediate vicinity of an area for which defendant board of supervisors had approved establishment of a church and parochial school. They sought a writ of mandate requiring the board of supervisors to vacate and set aside its approval. The trial court sustained defendants' demurrer to the petition without leave to amend and plaintiffs appealed to the court of appeal, which reversed on the ground that the board of supervisors failed to follow the provisions of the zoning ordinance. One of defendants' contentions on appeal was that petitioners had now shown any special interest or damage which would entitle them to petition for a writ of mandate. The court disagreed. It held that since petitioners were owners of real property within the zoned area and thus restricted in their use of their property by the zoning ordinance, they each had individual interests in enforcement of the ordinance and if the ordinance were violated, each would suffer special damages that would be distinguishable from those suffered by the public at large.

[b] Having Burdens Not Faced by Even Potential Competitors as Violation of Rights

Monterey Mechanical Co. v. Wilson *(9th Cir. 1997) 125 F.3d 702* , concerned *Pub. Contract Code § 10115 et seq.,* which require state agencies to award contracts to the lowest bidder either meeting, or documenting good-faith efforts to meet, specified percentage goals for the degree of participation of business enterprises operated by minorities, women, and disabled veterans. Two construction contractors, neither of which was itself an enterprise of the types assisted by the statute, submitted bids on a project at a state university, and the contract went to the higher bidder because only it

documented good-faith efforts as required by the statute. The losing contractor sued in federal district court, challenging the statute as violating the *Equal Protection Clause of the United States Constitution*, lost a motion for a preliminary injunction, and appealed.

The court of appeal reversed. First it rejected a contention that the plaintiff lacked standing to make an equal-protection claim because it was situated the same and treated the same as the contractor which had won the bidding. The court found the issue controlled by *Northeastern Florida Contractors v. Jacksonville (1993) 508 U.S. 656, 113 S. Ct. 2297* , which it read as establishing that standing exists in a set-aside case when plaintiff is unable to compete on an equal footing with someone else, whether or not it loses a contract to a favored party. Applying that principle to the instant case, the court concluded that plaintiff faced burdens and costs that would not face a minority- or women-owned enterprise, which would not have to subcontract out as much of the work. This injury took place at the point the plaintiff submitted its bid, when it had no way of knowing who else was bidding. The court added that requiring a private party to discriminate is also a form of injury in itself.

The court also found, on the same basis, that the statute did treat different contractors differently on the basis of race and sex. It rejected the possibility that, since the statute only requires outreach in a good-faith effort to meet its goals, there was no discriminatory classification, since a minority or woman-owned firm would not have to do the same outreach.

Approaching the question of whether the classification is justified, the court noted the applicability of the strict-scrutiny standard to both race and sex classifications. Citing *City of Richmond v. J.A. Croson Co. (1989) 488 U.S. 469, 109 S. Ct. 706* for the proposition that racial classifications can survive strict scrutiny only if the governmental entity involved demonstrates that the current program is a remedy for its own active or passive past discrimination, the court found that neither the university nor the state had made any attempt to meet that burden. The court also noted that the statute was overbroad, including ethnic groups that could not possibly have been discriminated against in California in the past. Finding the statute unconstitutional, it remanded for the district court to consider whether preliminary injunctive relief was appropriate.

Note that the analysis pertinent to the contention in the form (summarized above) relates to the effect of the state action on the petitioner in the context of standing, the question considered in the "beneficial-interest" context is virtually the same.

[c] Pecuniary Interest as Unnecessary

Fuller v. San Bernardino Valley Mun. Wat. Dist. *(1966) 242 Cal. App. 2d 52, 51 Cal. Rptr. 120* , is discussed in *§ 35A.22[3][a]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusConstitutional LawEqual ProtectionGeneral OverviewConstitutional LawEqual ProtectionScope of Protection

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California Points & Authorities

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Volume 3 Chapters 34-39 CHECKS AND BANKS---to---CIVIL SERVICE
CHAPTER 35A CIVIL RIGHTS: EQUAL PROTECTION
PART II. FORMS

3-35A California Points & Authorities § 35A.23

§ 35A.23 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action by Mandate--Beneficial Interest as Required--Violation of Petitioner's Rights With Broad Effects

[1] FORM

[*Caption. See § 35A.20.*]

A WRIT OF MANDATE IS PROPER TO CHALLENGE STATE ACTION WHICH VIOLATES PETITIONER'S RIGHT TO EQUAL PROTECTION IF THE PETITIONER POSSESSES AN INTEREST, INCLUDING AN INTEREST SHARED WITH MANY INDIVIDUALS, WHICH HAS SUFFERED OR WILL SUFFER HARM BY A CLASSIFICATION WHICH IS EITHER ARBITRARY OR, IF THE CLASSIFICATION IS BASED ON A SUSPECT CATEGORY OR BURDENS A FUNDAMENTAL INTEREST, NOT JUSTIFIED BY A COMPELLING GOVERNMENTAL INTEREST AND THE STATE ACTION INVOLVES BROAD SOCIAL AND ECONOMIC EFFECTS.

A, B. Authorities Establishing Propriety of Writ of Mandate to Challenge Constitutionality of State Action. [*See § 35A.20, Paragraphs A, B.*]

C. Beneficial Interest as Required. [*See § 35A.22, Paragraph C.*]

D. Violation of Petitioner's Rights With Broad Effects. A petitioner has a beneficial interest in the issuance of a writ of mandate which challenges the constitutionality of state action for violating petitioner's constitutional rights when the petitioner possesses an interest, even if that interest is shared by many, which has suffered or will suffer harm and the state action involves broad and long-term effects relating to the social and economic realities of the present-day organization of society (*Bozung v. Local Agency Formation Comm'n (1975) 13 Cal. 3d 263, 272, 118 Cal. Rptr. 249, 529 P.2d 1017* ; *Residents of Beverly Glen, Inc. v. Los Angeles (1973) 34 Cal. App. 3d 117, 121, 109 Cal. Rptr. 724*).

[*Optional*] **E. Nature of Interest Protected.** An interest which may be protected from harm when state action involves broad social and economic effects is not limited to economic interest but includes environmental, recreational, and aesthetic interests, even though injury to these interests may be suffered by many who are not petitioners (*United*

States v. SCRAP (1973) 412 U.S. 669, 683-685, 93 S. Ct. 2405, 37 L. Ed. 2d 254 ; *Bozung v. Local Agency Formation Comm'n (1975) 13 Cal. 3d 263, 272, 118 Cal. Rptr. 249, 529 P.2d 1017*).

[*Optional*] **F. Petitioner as Representative.** A petitioner has a beneficial interest in the issuance of a writ of mandate that challenges the constitutionality of state action for violating the rights of petitioner's members when the members possess a beneficial interest in issuance of a writ of mandate and petitioner is authorized to represent its members in the lawsuit (*Residents of Beverly Glen, Inc. v. Los Angeles (1973) 34 Cal. App. 3d 117, 124 n.5, 109 Cal. Rptr. 724*).

G-M. Authorities Establishing Equal Protection Challenge to Classification Which Is Arbitrary, Based on a Suspect Category, or Burdens a Fundamental Interest. [*See § 35A.20, Paragraphs C-I.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a petition for writ of mandate to challenge the constitutionality of state action on equal protection grounds when the basis of the challenge is that the state action contains a classification which is arbitrary, based on a suspect category, or burdens a fundamental interest, and the sufficiency of petitioner's interest in raising such a challenge is an issue. The memorandum establishes that petitioner has sufficient beneficial interest in issuance of the writ because petitioner possesses an interest which has suffered or will suffer harm and the state action involves broad social and economic effects.

Use Optional Paragraph E if the classification scheme involves broad social and economic effects. Use Optional Paragraph F if the petitioner is an authorized representative of the affected group.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Counsel would demonstrate how petitioner hasa special interest, distinguishable from those of the public at large, in the issuance of a writ.

[c] Related Pleading and Practice Chapters

For related legal background, research and procedural guides, and forms of petition for writs of mandate, with orders issuing the writ, see California Forms of Pleading and Practice, Ch. 358, *Mandate and Prohibition* (Matthew Bender).

[d] Related Points and Authorities

Related memoranda of points and authorities for use in supporting a petition for writ of mandate where the sufficiency of petitioner's beneficial interest is an issue are *set out in §§ 35A.22, 35A.24, 35A.25*.

[3] Discussion of Authorities

[a] Violation of Petitioner's Rights With Broad Effects

Bozung v. Local Agency Formation Comm'n *(1975) 13 Cal. 3d 263, 118 Cal. Rptr. 249, 529 P.2d 1017* , involved a challenge by writ of mandate to the validity of an annexation by the City of Camarillo by an individual county resident and taxpayer and the Ventura County Environmental Coalition which was composed of county residents and taxpayers, many of whom lived in Camarillo or in the area of annexation. Plaintiffs contended that the annexation was illegal because the Local Agency Formation Commission did not prepare and certify an environmental impact report prior to approving the annexation. The trial court sustained defendants' demurrers to the complaint without leave to amend, but, on appeal, the Supreme Court affirmed, adopting the opinion of the court of appeal as its own. One of defendants' contentions was that none of the plaintiffs had standing because each lacked the "beneficial interest" required for a writ of mandamus. The Court disagreed. It found that because plaintiffs alleged that they would be harmed by the environmental effects of the challenged annexation, under the rule of *United States v. SCRAP (1973) 412 U.S. 669, 683-685, 93 S. Ct. 2405, 37 L. Ed. 2d 254* , discussed in *§ 35A.23[3][b]*, that allegation was sufficient. Furthermore, it did not matter whether plaintiffs lived within or without the annexing city; strict rules of standing that might be appropriate in other contexts have no application where broad and long-term effects are involved.

In ***Residents of Beverly Glen, Inc. v. Los Angeles*** *(1973) 34 Cal. App. 3d 117, 109 Cal. Rptr. 724* , a civic corporation representing residents of a geographical area sought both a writ of mandate to set aside a conditional use permit granted by the city for a building development and a declaration that a section of the municipal code was unconstitutional. The trial court granted defendant city's motion for summary judgment in part on the ground that plaintiff civic corporation lacked standing to bring the action. On appeal, the Court of Appeal reversed. It stated that the corporation had standing to maintain this action because it was a corporation whose members lived in the affected area and would suffer injury if the challenged project, to be constructed under a permit pursuant to an allegedly unconstitutional ordinance, was allowed to proceed. Significantly, although the interest possessed by plaintiff's members was a special interest--protection of their homes from destruction caused by the necessary widening of a major boulevard--which would have qualified as a beneficial interest under the test of *Fuller v. San Bernardino Valley Mun. Wat. Dist. (1966) 242 Cal. App. 2d 52, 56-57, 51 Cal. Rptr. 120 , set out in § 35A.22[3][a]*, the court made it clear that such a specific injury was not required. Using language comparable to the principle subsequently stated in *Bozung*, discussed *above*--that strict rules of standing have no application where broad and long-term effects are involved--the court explained that the sharing of particular environmental interests by the many rather than the few did not make them less deserving of legal protection and noted a trend toward marked accommodation of formerly strict procedural requirements of standing to sue where matters relating to the social and economic realities of the present-day society were concerned. Moreover, although the case involved both a petition or writ of mandate and a request for declaratory relief, the court did not distinguish between these causes of action in reaching its decision on standing. Therefore, the decision is good authority on the specific issue of what interest must be shown to raise a constitutional issue.

[b] Nature of Interest Protected

In ***United States v. SCRAP*** *(1973) 412 U.S. 669, 93 S. Ct. 2405, 37 L. Ed. 2d 254* , environmental protection groups challenged a railroad freight increase approved by the Interstate Commerce Commission. A three-judge district court granted a preliminary injunction forbidding the commission from permitting the railroads to collect the rate increase. On direct appeal, the Supreme Court reversed, holding that although the plaintiffs had standing under the Administrative Procedure Act, the district court lacked jurisdiction to enter a preliminary injunction since only the Interstate Commerce Commission could suspend rates pending its final decision of their lawfulness. In regard to the standing issue, plaintiff SCRAP alleged that each of its members would suffer economic, recreational, and aesthetic harm as a result of the rate increase. Specifically, SCRAP alleged that the increased freight rates would cause higher prices for finished products, adversely affecting the use of natural resources surrounding the Washington Metropolitan area for recreational and aesthetic purposes, increase air pollution, and increase taxes. Defendants claimed that these allegations as they related to standing were vague, unsubstantiated, andinsufficient, but the Court rejected this view. Under the Administrative Procedure Act, standing was available to those who could show, in allegations capable of proof at trial, injury in fact to an interest arguably within the zone of interests to be protected or regulated by the statute which the agencies were

claimed to have violated. Injury in fact is not confined to economic harm. Aesthetic and environmental harms could also be the basis for standing and the fact that many other persons also suffer the same injury does not prevent standing.

SCRAP was cited in *Bozung,* discussed in *§ 35A.23[3][a],* for the proposition that strict rules of standing that might be appropriate in other contexts have no application where broad and long-term effects are involved.

Bozung v. Local Agency Formation Comm'n *(1975) 13 Cal. 3d 263, 118 Cal. Rptr. 249, 529 P.2d 1017* , is discussed in *§ 35A.23[3][a]*.

[c] Petitioner as Representative

Residents of Beverly Glen, Inc. v. Los Angeles *(1973) 34 Cal. App. 3d 117, 109 Cal. Rptr. 724* , is *discussed under § 35A.23[3][a]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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CHAPTER 35A CIVIL RIGHTS: EQUAL PROTECTION
PART II. FORMS

3-35A California Points & Authorities § 35A.24

§ 35A.24 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action by Mandate--Beneficial Interest as Required--Violation of Third Party's Rights

[1] FORM

[*Caption. See § 35A.20.*]

A WRIT OF MANDATE IS PROPER TO CHALLENGE STATE ACTION WHICH VIOLATES A THIRD PARTY'S RIGHT TO EQUAL PROTECTION IF THE PETITIONER POSSESSES A PROFESSIONAL, BUSINESS, OR ECONOMIC INTEREST WHICH HAS SUFFERED OR WILL SUFFER INJURY BY A CLASSIFICATION WHICH IS EITHER ARBITRARY OR, IF THE CLASSIFICATION IS BASED ON A SUSPECT CATEGORY OR BURDENS A FUNDAMENTAL INTEREST, NOT JUSTIFIED BY A COMPELLING GOVERNMENTAL INTEREST.

A, B. Authorities Establishing Propriety of Writ of Mandate to Challenge Constitutionality of State Action. [*See § 35A.20, Paragraphs A, B.*]

C. Beneficial Interest as Required. [*See § 35A.22, Paragraph C.*]

D. Violation of Third Party's Rights. A petitioner has a beneficial interest in issuance of a writ of mandate which challenges the constitutionality of state action violating the rights of a third party where the petitioner possesses a professional, business, or economic interest that has suffered or will suffer injury (*Sail'er Inn, Inc. v. Kirby (1971) 5 Cal. 3d 1, 6 n.1, 95 Cal. Rptr. 329, 485 P.2d 529* ; *People v. Belous (1969) 71 Cal. 2d 954, 963 n.5, 80 Cal. Rptr. 354, 458 P.2d 194 , cert. denied, 397 U.S. 915, 90 S. Ct. 920, 25 L. Ed. 2d 96 (1970)* ; *Burns v. State Compensation Ins. Fund (1968) 265 Cal. App. 2d 98, 104, 71 Cal. Rptr. 326*).

[*Optional*] **E. Being Required or Encouraged to Discriminate Against Others.** A person has standing to challenge state action which forces it to discriminate against others (*Monterey Mechanical Co. v. Wilson (9th Cir. 1997) 125 F.3d 702, 714-715)* .

F-L. Authorities Establishing Equal Protection Challenge to Classification Which Is Arbitrary, Based on a

Suspect Category, or Burdens a Fundamental Interest. [*See § 35A.20, Paragraphs C-I.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a petition for writ of mandate to challenge the constitutionality of state action on equal protection grounds because the state action contains a classification which is arbitrary, based on a suspect category, or burdens a fundamental interest, and the sufficiency of petitioner's interest in raising such a challenge is an issue. The memorandum establishes that petitioner has sufficient beneficial interest in issuance of a writ because petitioner possesses a professional, business, or economic interest which has suffered or will suffer injury as the result of state action which violates the constitutional rights of a third party. Use the optional paragraph if the challenged state action requires or encourages the petitioner to discriminate against others.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Counsel would demonstrate how petitioner has a special interest, distinguishable from those of the public at large, in the issuance of a writ, and in particular how petitioner has such a professional or economic connection with those subject to discrimination that petitioner may challenge the discriminatory action on their behalf (e.g., a doctor would be subject to penalties if he or she treated patients in a non-discriminatory fashion).

[c] Related Pleading and Practice Chapter

For related legal background, research and procedural guides, and forms of petition for writs of mandate, with orders issuing the writ, see California Forms of Pleading and Practice, Ch. 358, *Mandate and Prohibition* (Matthew Bender).

[d] Related Points and Authorities

Related memoranda of points and authorities for use in supporting a petition for writ of mandate where the sufficiency of petitioner's beneficial interest is an issue are *set out in §§ 35A.22, 35A.23, 35A.25*.

[3] Discussion of Authorities

[a] Violation of Third Party's Rights

The factual and procedural background of ***Sail'er Inn, Inc. v. Kirby*** *(1971) 5 Cal. 3d 1, 95 Cal. Rptr. 329, 485 P.2d 529* , is discussed in *§ 35A.20[3][a]*. In that case, petitioners who were holders of on-sale liquor licenses sought to challenge, in a writ of mandate proceeding, a section of the Business and Professions Code which prohibited women, except in limited circumstances, from tending bar on the grounds that it violated the rights of women to equal protection of the law under the federal and state Constitutions. The Court noted that petitioners, who were not women, had standing to raise the constitutional rights of those women excluded from bartending because petitioners were also criminally liable under the statute for hiring women and faced possible license revocations. The Court cited as its authority *Griswold v. Connecticut (1965) 381 U.S. 479, 481, 85 S. Ct. 1678, 14 L. Ed. 2d 510* , which held that

individuals convicted of a crime could raise the constitutional rights of those with whom they had a close professional relationship in challenging their convictions (*5 Cal. 3d 1, 6 n.1*).

Counsel will note that neither *Sail'er Inn* nor the other authorities discussed below explicitly limit standing to raise a third party's rights to situations where the petitioner has suffered an injury which is pecuniary in nature. Nevertheless, cases applying this principle generally involve an injury to one's professional practice or business operations, including a criminal conviction for business-related activities, or a monetary expenditure.

In ***People v. Belous*** *(1969) 71 Cal. 2d 954, 80 Cal. Rptr. 354, 458 P.2d 194 , cert. denied, 397 U.S. 915 (1970)* , a physician was convicted for violation of former Pen. Code § 274, which had penalized the procurement of abortions unless they were necessary to save the woman's life. On appeal, he contended that the statute was unconstitutional in its infringement of a woman's fundamental rights under the federal and state Constitutions. One issue concerned whether the physician could raise this issue. The Court responded that his standing to raise this constitutional question was unchallenged. To support this conclusion, the Court cited *Griswold v. Connecticut (1965) 381 U.S. 479, 481, 85 S. Ct. 1678, 14 L. Ed. 2d 510* , and *Barrows v. Jackson (1952) 346 U.S. 249, 257, 73 S. Ct. 1031* . *Griswold* held that individuals convicted of a crime could raise the constitutional rights of those with whom they have a close professional relationship in challenging their conviction. In *Barrows*, the Court held that where an individual is injured by the operation of a statute, the individual may raise the constitutional rights of those affected by the statute, particularly if it would be difficult, if not impossible, for those persons whose rights are asserted to present their grievances to a court. The Court pointed out that this principle is an exception to the rules that ordinarily one may not claim standing in the United States Supreme Court to vindicate the constitutional rights of some third party, even though one will suffer a direct substantial injury from application of the statute which infringes those rights.

In ***Burns v. State Compensation Ins. Fund*** *(1968) 265 Cal. App. 2d 98, 71 Cal. Rptr. 326* , plaintiff, who suffered a serious industrial injury at his place of employment, brought an action for damages against his company's workers' compensation insurer and a nonprofit, unincorporated association comprised of all workers' compensation insurers licensed to do business in California. The basis for his complaint was that defendants failed to perform carefully their safety inspections at his employer's mill. The trial court sustained the insurance company's demurrer without leave to amend and granted the association's motion for summary judgment because of statutes disallowing both lawsuits. On appeal, plaintiff contended that the California statutes which denied him a cause of action violated the right to equal protection of independent safety engineers because it held them liable for their negligent safety inspections while exonerating entities such as the defendants. The court of appeal determined that plaintiff had the requisite standing to raise this constitutional issue. Generally, a party attacking the constitutionality of a statute must show some actual orthreatened injury, and it is usually stated that only a member of a class discriminated against by a statute can attack it. However, when the complaining party is injured by the legislation, although not a member of the class discriminated against, he or she may raise the question. In this case, plaintiff was injured by the statutes in question because they narrow the group against which he can recover for a negligent inspection of his employer's facility. However, the court failed to find an actual denial of equal protection and affirmed the decision of the trial court (*265 Cal. App. 2d 98, 104-105)* .

[b] Being Required or Encouraged to Discriminate Against Others

In ***Monterey Mechanical Co. v. Wilson*** *(9th Cir. 1997) 125 F.3d 702, 714-715* , the court invalidated a statute requiring California agencies to award contracts to the lowest bidder which met or demonstrated a good-faith effort to meet certain goals for participation by minority-, women-, and disabled-veteran-owned business. The facts and procedural background of this case are discussed in *§ 35A.22[3][b]*. As one of the grounds for its decision that a contractor who failed to meet the requirements of the statute had standing to challenge it, the court stated that a person suffers injury if the government requires or encourages as a condition of granting a benefit that he or she discriminate against others on the basis of their race or sex.

[4] Additional Authorities

[a] Violation of Third Party's Rights

In *Quong Ham Wah Co. v. Industrial Acc. Comm'n (1920) 184 Cal. 26, 192 P. 1021* , an employer contested an award pursuant to Section 58 of the Workmen's Compensation, Insurance, and Safety Act on the ground that the section was unconstitutional because it violated the privileges and immunities clause of U.S. *Const., art. IV, § 2* . Section 58 extended the jurisdiction of the Industrial Accident Commission to the injuries of California residents working for California employers when the injury occurred outside California but denied relief to non-California residents who were injured while working for California residents outside the state. The Supreme Court held that the statute was unconstitutional as applied to nonresidents, but could be saved by interpreting the statute to extend its protection to nonresidents as well as residents.

The Court allocated much of its decision to analyzing whether or not the employer had standing to question the constitutionality of Section 58. It noted that generally a statute which denies equal rights and privileges by discriminating against persons and classes of persons may not be raised by one not belonging to the class discriminated against. However, the general rule is not a hard-and-fast rule which must be arbitrarily and inflexibly applied in every situation involving the constitutionality of the statute; it must necessarily be subject to certain well-defined exceptions (*184 Cal. 26, 29-30),* . In this case, the Act did not give the commission jurisdiction over controversies arising out of injuries sustained outside of California by nonresidents. The Court reasoned that, therefore, a nonresident would have no standing before the commission or any court to make a claim under the Act, and thus neither the commission nor the court could adjudicate the constitutional question involved. In this situation, where no member of a class alleged to be unlawfully discriminated against by a statute is in a position to raise the constitutional question, then any person having a claim to which the constitutional issue is fairly relevant can raise the question. The Court commented that a contrary rule would prevent a court from exercising its function of constitutional review and require it to enforce for all time a statute which might be obviously void (*184 Cal. 31-32)* . Thus, the Court held that the employer may raise the constitutional question because, although it is not a victim of discrimination, it is injured by reason of the legislation which imposes on it the liability of an insurer for certain classes of its employees and thus deprives it of property. If, for any reason, the legislation is unconstitutional, such deprivation would be without due process of law (*184 Cal. 34*).

[b] Subsequent Developments

Counsel will note that *Quong Ham Wah* could have been decided on the narrower rule that standing exists to challenge the violation of a third party's constitutional rights where the challenger has suffered an injury which is pecuniary in nature but the Court chose to render a broader rule which states that where the third party cannot challenge a constitutional violation, then any party injured in some way by the statute may raise the third party's rights. In *Barrows v. Jackson (1952) 346 U.S. 249, 257, 73 S. Ct. 1031, 97 L. Ed. 1586* , the United States Supreme Court held, similarly, that a party injured by state action has standing to vindicate the constitutional rights of a third party where the action of a state court might result in a denial of these rights and it would be difficult, if not impossible, for the persons whose rights are asserted to present their grievance before any court. The Supreme Court cited *Quong Ham Wah* as authority for a principle of law which was different from its own ruling but sufficiently analogous to lend it support.

Legal Topics:

For related research and practice materials, see the following legal topics:
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3-35A California Points & Authorities § 35A.25

§ 35A.25 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action by Mandate--Beneficial Interest as Required--Violation Involving Public Duty

[1] FORM

[*Caption. See § 35A.20.*]

A WRIT OF MANDATE IS PROPER TO CHALLENGE STATE ACTION WHICH VIOLATES PETITIONER'S OR A THIRD PARTY'S RIGHT TO EQUAL PROTECTION IF THE PETITIONER POSSESSES ANY INTEREST IN A CLASSIFICATION WHICH IS EITHER ARBITRARY OR, IF THE CLASSIFICATION IS BASED ON A SUSPECT CATEGORY OR BURDENS A FUNDAMENTAL INTEREST, NOT JUSTIFIED BY A COMPELLING GOVERNMENTAL INTEREST AND THE STATE ACTION INVOLVES THE PERFORMANCE OF A PUBLIC DUTY IN COMPLIANCE WITH LAW.

A, B. Authorities Establishing Propriety of Writ of Mandate to Challenge Constitutionality of State Action. [*See § 35A.20, Paragraphs A, B.*]

C. Beneficial Interest as Required. [*See § 35A.22, Paragraph C.*]

D. Violation Involving Public Duty. A petitioner has a beneficial interest in the issuance of a writ of mandate in which the constitutionality of state action is challenged for violation of petitioner's or a third party's constitutional rights if the petitioner possesses an interest in enforcement of the law and the state action involves performance of a public duty in compliance with law (*Board of Social Welfare v. Los Angeles County (1945) 27 Cal. 2d 98, 100-101, 162 P.2d 627* ; *American Friends Serv. Comm. v. Procunier (1973) 33 Cal. App. 3d 252, 256, 109 Cal. Rptr. 22*).

E-K. Authorities Establishing Equal Protection Challenge to Classification Which Is Arbitrary, Based on a Suspect Category, or Burdens a Fundamental Interest. [*See § 35A.20, Paragraphs C-I.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]

By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a petition for writ of mandate to challenge the constitutionality of state action on equal protection grounds when the basis of the challenge is that the state action contains a classification which is arbitrary, based on a suspect category, or burdens a fundamental interest, and the sufficiency of petitioner's interest in raising such a challenge is an issue. The memorandum establishes that petitioner has sufficient beneficial interest in issuance of the writ because the petitioner possesses, at a minimum, an interest in enforcement of the law and the state action involves performance of a public duty in compliance with law.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

Related memoranda of points and authorities for use in supporting a petition for writ of mandate where the sufficiency of petitioner's beneficial interest is an issue are *set out in §§ 35A.22 -35A.24*.

[3] Discussion of Authorities

[a] Violation Involving Public Duty

In ***Board of Social Welfare v. Los Angeles County*** *(1945) 27 Cal. 2d 98, 162 P.2d 627* , the Board of Social Welfare petitioned for an original writ of mandamus to compel the county to comply with its order that it issue duplicate warrants to three recipients of aid for the aged to replace three warrants which had been cancelled. The first issue the court addressed was if the board was a "party beneficially interested" in the issuance of the warrants as those terms are used in *Code Civ. Proc. § 1086*. The Court concluded that it was, citing the general rule that if a question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the petitioner need not show any legal or special interest in the result, since it is sufficient if the petitioner is interested as a citizen in having the laws executed and the duty in question enforced. In this case, the court viewed the provision of public aid to the needy aged as a matter of state-wide concern. However, the court denied the petition because the aid recipients had not applied for duplicate warrants as required by statute.

Counsel should note that, despite the broad language of the rule relied on in *Board of Social Welfare*, it has generally been applied when thecitizens seeking the writ showed some interest in the result beyond their interest as citizens. Thus, in *Board of Social Welfare* itself the court pointed out that persons who were aged and needy may be financially and physically unable to maintain a law suit on their own behalf and to deny them the assistance of the welfare board would tend to defeat the purposes of the welfare legislation. Further, the board was the only state agency with full power to supervise every phase of the administration of the public assistance plans. In *American Friends Serv. Comm.*, discussed *below*, plaintiffs had "important, valid, helpful, and legitimate" interests in the welfare of prison inmates which was the subject of the writ. And in *Bozung v. Local Agency Formation Comm'n*, discussed in *§ 35A.25[4][a]*, plaintiffs had alleged that they would be harmed by the environmental effects of the annexation challenged in the petition for a writ.

In ***American Friends Serv. Comm. v. Procunier*** *(1973) 33 Cal. App. 3d 252, 109 Cal. Rptr. 22* , four nonprofit corporations which were active in the areas of prison reform and prison inmate welfare sought a writ of mandate directing the Department of Corrections and the Adult Authority, in formulating their rules and regulations, to comply with the state Administrative Procedure Act. The trial court granted the writ and defendants appealed. On appeal, defendants argued that plaintiffs lacked standing to sue. The court of appeal disagreed. It relied on *Board of Social*

Welfare, discussed *above,* for the rule that if the question is one of public, as opposed to private, interest, and the petitioner seeks performance of a public duty, the ordinary requirement that a petitioner must demonstrate the necessity of a writ to enforce or protect a specific legal right that is clear, present, certain, and substantial is relaxed. It concluded that if the petition for mandate alleges that a government department is not complying with the law and seeks a court order compelling such compliance, the object of the mandate sought constitutes enforcement of a public duty under the *Board of Social Welfare* rule. However, the court reversed the action of the trial court on the ground that the Administrative Procedure Act was not applicable to defendants.

[4] Additional Authorities

[a] Violation Involving Public Duty

The factual background of *Bozung v. Local Agency Formation Comm'n (1975) 13 Cal. 3d 263, 118 Cal. Rptr. 249, 529 P.2d 1017* , is discussed in *§ 35A.23[3][a]*. In that case, the Supreme Court held that a county resident and taxpayer and a coalition of county taxpayers and residents had standing to challenge an annexation by a city, whether or not they resided in the city or the property to be annexed, for the dual reasons that they had alleged harm from the environmental effects of the challenged annexation and because they sought to procure enforcement of a public duty, the preparation of an environmental impact report. On the issue of standing to enforce a public duty, the Court cited *Kappadahl v. Alcan Pac. Co. (1963) 222 Cal. App. 2d 626, 643, 35 Cal. Rptr. 354* , which relied on the same principle stated in *Board of Social Welfare v. Los Angeles County,* discussed *above.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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3-35A California Points & Authorities § 35A.26

§ 35A.26 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--Intentional Classification by Application or Administration of Facially Neutral State Action as Sufficient

[1] FORM

[*Caption. See § 35A.20.*]

A WRIT OF MANDATE IS PROPER TO CHALLENGE STATE ACTION WHICH IS FACIALLY NEUTRAL BUT VIOLATES THE RIGHT TO EQUAL PROTECTION WHEN IT IS INTENTIONALLY OR PURPOSEFULLY APPLIED, ADMINISTERED, OR ENFORCED ACCORDING TO A CLASSIFICATION WHICH IS ARBITRARY OR, IF BASED ON A SUSPECT CATEGORY, NOT JUSTIFIED BY A COMPELLING GOVERNMENTAL INTEREST.

A-D. Authorities Establishing Basis for Equal Protection Challenge. [*See § 35A.20, Paragraphs A-D.*]

E. Intentional Classification by Application or Administration of Facially Neutral State Action as Sufficient. State action which is facially neutral nevertheless may be challenged on equal protection grounds where it is intentionally or purposefully applied, administered, or enforced according to classifications that are arbitrary or based on a suspect category (*Williams v. Illinois (1970) 399 U.S. 235, 242, 90 S. Ct. 2018, 26 L. Ed. 2d 586* ; *Murguia v. Municipal Court (1975) 15 Cal. 3d 286, 295, 124 Cal. Rptr. 204, 540 P.2d 44*).

F-I. Authorities Establishing Grounds for Equal Protection Challenge. [*See § 35A.20, Paragraphs E-G, I.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a petition for a writ of mandate to challenge the constitutionality of state action on equal protection grounds when the basis of the challenge is that the state action in question, while facially neutral, was intentionally administered, applied, or enforced in a way which created classifications that are arbitrary or based on a suspect category. The principle would presumably apply also to the creation of classifications which infringe a fundamental interest, but the authorities relied on in this form do not discuss this issue.

When appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

A related memorandum of points and authorities for use in supporting a petition for writ of mandate which describes how state action classifies individuals is *set out in § 35A.27*.

[3] Discussion of Authorities

[a] Intentional Classification by Application or Administration of Facially Neutral State Action as Sufficient

In ***Williams v. Illinois*** *(1970) 399 U.S. 235, 90 S. Ct. 2018, 26 L. Ed. 2d 586* , an indigent defendant in a criminal case attempted to void that part of his sentence which required him to "work off" the unpaid part of his fine at the rate of $5 per day. The trial court denied the petition and the Supreme Court of Illinois affirmed. On appeal, the United States Supreme Court vacated the judgment and remanded the case because permitting the aggregate imprisonment of an indigent criminal defendant to exceed the maximum period fixed by statute as the result of involuntary nonpayment of a fine or court cost created an impermissible discrimination which violated the *Fourteenth Amendment*. In reaching this result, the Court had to address the fact that the Illinois statute did not explicitly distinguish between defendants on the basis of ability to pay fines. On its face, the statute extended to all defendants an apparently equal opportunity for limiting confinement to the statutory maximum simply by satisfying a money judgment. But in fact this was an illusory choice for any indigent. As applied to an indigent defendant, the statute worked an invidious discrimination solely on the basis of inability to pay. A law nondiscriminatory on its face may be grossly discriminatory in its operation.

The factual background of ***Murguia v. Municipal Court*** *(1975) 15 Cal. 3d 286, 124 Cal. Rptr. 204, 540 P.2d 44* , is discussed in *§ 35A.20[3][b]*. In that case, the Supreme Court was required to determine whether discriminatory enforcement of a statute fair on its face could constitute a violation of equal protection. The Supreme Court held that the purposeful and intentional administration or application of a state law, although fair on its face, so that it discriminates between persons in similar circumstances constitutes a violation of equal protection. The Court referred to the landmark decision of *Yick Wo v. Hopkins (1866) 118 U.S. 356, 373-374, 6 S. Ct. 1064, 30 L. Ed. 220* , which stated that when a law which is fair on its face and impartial in its appearance is applied and administered with an evil eye and unequal hand so as to make unjust and illegal discriminations between people in similar circumstances which are material to their rights, the Constitution has been violated. The Court added that this principle is applicable to both penal and nonpenal statutes. In the instant case, if defendants were prosecuted because of their union activities, such a prosecution was as invidious as a prosecution based on racial, religious, ethnic, or any other arbitrary grounds.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsMandamusConstitutional LawEqual ProtectionGeneral OverviewConstitutional LawEqual ProtectionScope of Protection

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Volume 3 Chapters 34-39 CHECKS AND BANKS---to---CIVIL SERVICE
CHAPTER 35A CIVIL RIGHTS: EQUAL PROTECTION
PART II. FORMS

3-35A California Points & Authorities § 35A.27

§ 35A.27 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--Classification by Differential Impact of Facially Neutral State Action as Sufficient

[1] FORM

[*Caption. See § 35A.20.*]

A WRIT OF MANDATE IS PROPER TO CHALLENGE STATE ACTION WHICH IS FACIALLY NEUTRAL BUT VIOLATES THE RIGHT TO EQUAL PROTECTION UNDER THE STATE CONSTITUTION WHEN ITS DIFFERENTIAL IMPACT [ON SELECTION OF GRAND JURY MEMBERS OR ASSIGNMENT OF STUDENTS TO PUBLIC SCHOOLS] IS TO CREATE OR PERMIT CLASSIFICATIONS BASED ON SUSPECT CATEGORIES AND BURDENING FUNDAMENTAL INTERESTS, EVEN THOUGH THIS EFFECT IS NOT INTENTIONAL OR PURPOSEFUL.

A-D. Authorities Establishing Basis for Equal Protection Challenge. [*See § 35A.20, Paragraphs A-D.*]

E. Classification by Differential Impact of Facially Neutral State Action as Sufficient. State action which is facially neutral nevertheless may be challenged on equal protection grounds under the state Constitution, where its differential impact [on selection of grand jury members or assignment of students to public schools] creates or permits classifications based on suspect categories and burdening fundamental interests, even though this effect is not intentional or purposeful (*Crawford v. Board of Educ. (1976) 17 Cal. 3d 280, 297-298, 130 Cal. Rptr. 724, 551 P.2d 28* (interpretation of California Constitution)).

F-J. Authorities Establishing Grounds for Equal Protection Challenge. [*See § 35A.20, Paragraphs E-I.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a petition for a writ of mandate to challenge the constitutionality of state action on equal protection grounds when the basis of the challenge is that the state action in question, while facially neutral or unmotivated by discriminatory bias, has a differential impact on members of a protected group and burdens their fundamental interests. In that the scope of this principle has not been determined, counsel may add the material in brackets to limit the principle to situations expressly discussed in the authority provided [*see § 35A.27[3][b]*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

A related memorandum of points and authorities for use in supporting a petition for writ of mandate which describes how state action classifies individuals is *set out in § 35A.26*.

[3] Discussion of Authorities

[a] Classification by Differential Impact of Facially Neutral State Action as Sufficient

The factual background of ***Crawford v. Board of Educ.*** *(1976) 17 Cal. 3d 280, 130 Cal. Rptr. 724, 551 P.2d 28* , is discussed in *§ 35A.20[3][b]*. In that case, the Court held that under the *equal protection clause* of the California Constitution, a school board must take reasonably feasible steps to alleviate school segregation whether such segregation is de jure or de facto in nature and even where it is the result of facially neutral policies. The Court gave substantial attention to the school board's defense that it had not caused the segregation and, therefore, should not be responsible for alleviating it. It emphasized that, under certain circumstances, a government body or official is not free to adopt any facially neutral policy of its choosing oblivious of the policy's actual discriminatory impact (*3 Cal. 3d. 861, 864-868)* .

The decision in *Crawford* appears to conflict with the decision of the United States Supreme Court in *Washington v. Davis (1976) 426 U.S. 229, 238-239, 96 S. Ct. 2040, 48 L. Ed. 2d 597* , which held that to establish a prima facie case alleging a form of discrimination which is forbidden by the United States Constitution, there must be evidence of discriminatory intent, purpose, or motive. The conflict between *Crawford* and *Washington* is expressed explicitly in the context of school segregation. *Crawford* holds that school boards must take steps to alleviate school segregation, regardless of whether the cause of the segregation was de factor or de jure [*Crawford v. Board of Educ. (1976) 17 Cal. 3d 280, 284-285, 130 Cal. Rptr. 724, 551 P.2d 28]* . *Washington* rejected de facto segregation as a constitutional violation. It stated that the essential element of de jure segregation is a current condition of segregation resulting from intentional school action; the differentiating factor between de jure segregation and so-called de facto segregation is purpose or intent to segregate [*Washington v. Davis (1976) 426 U.S. 229, 240, 96 S. Ct. 2040, 48 L. Ed. 2d 597]* .

[b] Scope of Authority

Whether the California Supreme Court will extend the reasoning in *Crawford* to other situations of possible unconstitutional discrimination is not clear. It stated that those who compile jury lists and select jury panels have a duty to make sure that their actions do not have discriminatory results. Otherwise, the Court merely added that the obligation to design programs or frame policies so as to avoid discriminatory results exists in some circumstances. It seems important, however, that, as the Court pointed out, school segregation on a racial basis not only classifies individuals on an impermissible basis but it infringes the fundamentalinterest of education. Likewise, the Court might have said that

discriminatory jury lists are based on suspect categories and infringe the fundamental interest of liberty [*see People v. Olivas (1976) 17 Cal. 3d 236, 251-252, 131 Cal. Rptr. 55, 551 P.2d 375 , set out in § 35A.42[3][a]*]. In this regard, the Court subsequently rejected, without mentioning *Crawford,* application of the differential impact test to a discriminatory employment examination where it failed to find any infringement of a fundamental right under the California Constitution [*Hardy v. Stumph (1978) 21 Cal. 3d 1, 7, 145 Cal. Rptr. 176, 576 P.2d 1342 , set out in § 35A.39[3][a]*]. Thus, a broad reading of *Crawford* would be that any classification which is based on a suspect category and infringes a fundamental interest would violate *Cal. Const., art. I, § 7(a),* even though it is the unintended result of the differential impact of a facially neutral policy. A narrow reading of *Crawford* would limit its governing principle to the two situations of jury and school segregation which it discusses.

Legal Topics:

For related research and practice materials, see the following legal topics:
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CHAPTER 35A CIVIL RIGHTS: EQUAL PROTECTION
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3-35A California Points & Authorities § 35A.28

§ 35A.28 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--State Action Based on Arbitrary Classification as Violation of Equal Protection--Hostility and Prejudice as Not Legitimate Public Purpose

[1] FORM

[*Caption. See § 35A.20.*]

A WRIT OF MANDATE IS PROPER TO CHALLENGE STATE ACTION WHICH VIOLATES THE RIGHT TO EQUAL PROTECTION WHEN IT CONTAINS A CLASSIFICATION BASED ON HOSTILITY AND PREJUDICE TOWARD A PARTICULAR CLASS WHICH IS NOT A LEGITIMATE PUBLIC PURPOSE.

A-E. Authorities Establishing Equal Protection Challenge to Arbitrary Classification. [*See § 35A.20, Paragraphs A-E.*]

F. Hostility and Prejudice as Not Legitimate Public Purpose. State action violates the right to equal protection when its purpose is hostility and prejudice toward a particular class which is not a legitimate public purpose, even though the classification contained in the state action bears a rational relationship to its purpose and the actual impact of the state action may not be discriminatory against the class in question (*Parr v. Municipal Court (1971) 3 Cal. 3d 861, 864, 868, 92 Cal. Rptr. 153, 479 P.2d 353*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a petition for a writ of mandate to challenge the constitutionality of state action on equal protection grounds when the basis of the challenge is that the classification is based on an improper purpose of hostility and prejudice toward a particular class.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Hostility and Prejudice as Not Legitimate Public Purpose

In ***Parr v. Municipal Court*** *(1971) 3 Cal. 3d 861, 92 Cal. Rptr. 153, 479 P.2d 353* , the defendant in a criminal proceeding sought a writ of mandate to restrain the trial court from proceeding with the trial. The Supreme Court granted the writ, holding that the municipal ordinance which was the basis for criminal prosecution violated the *equal protection clause of the Fourteenth Amendment* because of its discriminatory purpose. The Court noted that a law which expresses hostility, antagonism, or prejudice toward a particular group violates the *Fourteenth Amendment*. Not only must a statutory classification bear a rational relationship to the purpose of the statute, but the purpose must be a permissible one. The Court referred to legislation with an impermissible purpose as class legislation designed to punish or treat with severity persons of any unpopular class, sect, creed, or nation. Even if the statute was written in facially neutral language, the public statements of its sponsors and the impact it will have on the community may be examined to determine whether the purpose is impermissible. In the instant case, the purpose of the ordinance, to discourage persons known as "hippies" from congregating in the city, was clear both from the language of the urgency clause which stated that the city was in danger of ruin due to an extraordinary influx of undesirable and unsanitary visitors to the city, sometimes known as hippies, as well as from the failure of the ordinance to confine its language to persons whoengaged in illegal conduct. This discriminatory purpose alone would invalidate the ordinance, even if it did not have a predictable discriminatory impact (*3 Cal. 3d 861, 864-868)* .

It should be noted that several of the cases cited by the Court for its conclusion that a discriminatory purpose will invalidate a statute concerned discrimination based on race, alienage, or national origin which are established suspect categories. *Parr* explicitly goes beyond the traditional list of characteristics provided by the *Fourteenth Amendment* and provides protection to any class that is the victim of hostility and prejudice. The Court stated that it had been consistently vigilant to protect racial groups from the effects of official prejudice and it could be no less concerned when the human beings currently in disfavor were identifiable by dress and attitudes rather than by color (*3 Cal. 3d 861, 870)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsMandamusConstitutional LawEqual ProtectionGeneral OverviewConstitutional LawEqual ProtectionRaceConstitutional LawEqual ProtectionScope of Protection

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3-35A California Points & Authorities § 35A.29

§ 35A.29 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--Suspect Categories or Burdens on Fundamental Interests as Subject to Strict Scrutiny--Classification Based on Race as Suspect

[1] FORM

[*Caption. See § 35A.20.*]

THE WRIT OF MANDATE SHOULD BE GRANTED BECAUSE _____ [*identify legislation, regulation, or other challenged governmental action*] VIOLATES PETITIONER'S CONSTITUTIONAL RIGHT TO EQUAL PROTECTION IN THAT IT CONTAINS A CLASSIFICATION THAT DISCRIMINATES AGAINST PETITIONER BASED ON HIS/HER RACE AND IS NOT NARROWLY TAILORED TO FURTHER A COMPELLING GOVERNMENTAL INTEREST.

A-F. Authorities Establishing Equal Protection Challenge to Suspect Category. [*See § 35A.20, Paragraphs A-D, F, G.*]

G. Classifications Based on Race as Suspect. A classification based on race is suspect and subject to strict judicial scrutiny (*Grutter v. Bollinger (2003) 539 U.S. 306, 123 S. Ct. 2325, 2337-2338, 156 L. Ed. 2d 304* ; *Gratz v. Bollinger (2003) 539 U.S. 244, 123 S. Ct. 2411, 2427, 156 L. Ed. 2d 257* ; *Adarand Constructors, Inc. v. Pena (1995) 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158, 182-183* ; *Palmore v. Sidoti (1984) 466 U.S. 429, 432-433, 104 S. Ct. 1879, 80 L. Ed. 2d 421* ; *McLaughlin v. Florida (1964) 379 U.S. 184, 191-192, 85 S. Ct. 283, 13 L. Ed. 2d 222*).

[*Optional*] **H. Racial Classifications as Suspect Even Though Benign.** A classification based on race is suspect even though it has the benign purpose of remedying the effects of past societal discrimination against racial minorities (*Adarand Constructors, Inc. v. Pena (1995) 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158, 182* ; *see Regents of University of California v. Bakke (1978) 438 U.S. 265, 287-291, 355-362, 98 S. Ct. 2733, 57 L. Ed. 2d 750* ; *Monterey Mechanical Co. v. Wilson (9th Cir. 1997) 125 F.3d 702, 710-711* (statute requiring general contractors to subcontract percentages of work to minority-owned subcontractors by imposing system of goals rather than quotas treated as classification under *equal protection clause*).

I. State Action Subject to Strict Scrutiny as Violation of Equal Protection Unless Justified. [*See § 35A.20, Paragraph I.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a petition for a writ of mandate to challenge the constitutionality of state action on equal protection grounds when the basis of the challenge is that the state action in question contains a classification based on race that is not justified by a compelling governmental interest.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

Related memoranda of points and authorities for use in supporting a petition for writ of mandate on the ground that the classification is based on a suspect category are *set out in §§ 35A.30 -35A.34*.

[b] Related Pleading and Practice Forms

For forms of complaint for use in actions based on violation of state or federal civil rights laws because of discrimination on the basis of race orcolor, see California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post -Civil War Civil Rights Statutes* (Matthew Bender).

[3] Discussion of Authorities

[a] Classifications Based on Race as Suspect

In ***Gratz v. Bollinger*** *(2003) 539 U.S. 244, 123 S. Ct. 2411, 156 L. Ed. 2d 257* , two Caucasian applicants to the University of Michigan who were denied admission filed a class action challenging the undergraduate admissions policy, which utilized race as a consideration, as violating the Equal Protection guarantee of the *Fourteenth Amendment*. The District Court for the Eastern District of Michigan first concluded that the University and amici curiae presented solid evidence that a racially and ethnically diverse student body produces significant educational benefits such that achieving such a student body constitutes a compelling governmental interest. The district court then determined that the admissions program the University began using in 1999, awarding 20 points, or one-fifth of the points needed to guarantee admission, to every single underrepresented minority applicant solely because of race, was a narrowly tailored means of achieving the University's interest in the educational benefits that flow from a racially and ethnically diverse student body, but that the University's prior practice of "protecting" or "reserving" seats for underrepresented minority applicants effectively kept nonprotected applicants from competing for those slots and operated as the functional equivalent of a constitutionally infirm quota. The district court granted the applicants' motion for summary judgment with respect to the admissions programs in existence from 1995 through 1998, and the University's motion with respect to the admissions programs for 1999 and 2000, and denied the applicants' request for injunctive relief. The district court certified two questions for interlocutory appeal to the Sixth Circuit Court of Appeals. Both parties appealed aspects of the district court's rulings, and the Court of Appeals heard the case en banc on the same day as *Grutter v. Bollinger,* in which the University of Michigan's law school's admissions program was challenged as

violating equal protection as well. The Sixth Circuit issued an opinion in *Grutter*, upholding the law school admissions program, and the petitioner in that case sought a writ of certiorari from the United States Supreme Court. The applicants in this case asked the Supreme Court to grant certiorari in this case as well, despite the fact that the Court of Appeals had not yet rendered a judgment, so that the Supreme Court could address the constitutionality of the consideration of race in university admissions in a wider range of circumstances. The Supreme Court granted certiorari in both cases.

The Supreme Court in this case held that the University's policy, automatically distributing points to every single underrepresented minority applicant solely because of race, was not narrowly tailored to achieve the interest in educational diversity that the University claimed justifies the program (*123 S. Ct. 2411, 2427-2428*). The Court found that the automatic distribution of points has the effect of making the factor of race decisive for virtually every minimally qualified underrepresented minority applicant, instead of considering how the differing backgrounds, experiences, and characteristics of students might benefit the University. The fact that the review committee could look at the applications individually and ignore the points once an application was flagged was of little comfort under the strict scrutiny analysis. Because the University's use of race in its freshman admissions policy was not narrowly tailored to achieve the asserted compelling interest in diversity, the admissions policy violated the *Equal Protection Clause of the Fourteenth Amendment*, as well as Title VI and *42 U.S.C. § 1981* (*123 S. Ct. 2411, 2428-2431*).

On the other hand, in ***Grutter v. Bollinger*** *(2003) 539 U.S. 306, 123 S. Ct. 2325, 156 L. Ed. 2d 304* , the University of Michigan Law School admissions policy required admissions officials to evaluate each applicant based on all the information available in the applicant's file, including a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School. The policy aspired to achieve a diversity with the potential to enrich everyone's education and make a law school class stronger than the sum of its parts, but did not restrict the types of diversity contributions eligible for "substantial weight" in the admissions process. The policy did, however, reaffirm the Law School's longstanding commitment to racial and ethnic diversity with special reference to the inclusion of students from groups historically discriminated against, like African-Americans, Hispanics, and Native Americans, and referred to enrolling a "critical mass" of underrepresented minorities. The District Court conducted a bench trial on the extent to which race was a factor in the Law School's admissions decisions and whether the consideration of race constituted a race-based double standard. Applying strict scrutiny, the District Court concluded that the Law School's use of race as a factor in admissions decisions was unlawful. The District Court determined that the Law School's asserted interest in assembling a diverse student body was not compelling, and that even if diversity were compelling, the Law School had not narrowly tailored its use of race to further that interest. Sitting en banc, the Sixth Circuit Court of Appeals reversed. The Court of Appeals held that Justice Powell's opinion in *Regents of University of California v. Bakke (1978) 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750* (*see § 35A.29[3][b]*) was binding precedent establishing diversity as a compelling state interest and that the use of race was narrowly tailored because race was merely a "potential plus factor" and because the program was virtually identical to the Harvard admissions program described approvingly by Justice Powell in *Bakke.* The United States Supreme Court granted certiorari to resolve disagreement amongthe Courts of Appeals on the question of whether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities.

The Supreme Court affirmed. The Court first examined *Bakke* and its aftermath. The Court endorsed Justice Powell's view in *Bakke* that student body diversity is a compelling state interest that can justify the use of race in university admissions. The Court held that the Law School's use of race is justified by a compelling state interest in student body diversity, deferring to the Law School's educational judgment that diversity is essential to its educational mission (*123 S. Ct. 2325, 2337-2338)* . The Court then found that the Law School's admissions program was narrowly tailored because the Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. The Law School gives substantial weight to diversity factors besides race and accepts nonminority applicants with grades and test scores lower than underrepresented minority applicants and other nonminority applicants who are rejected. Finally, the Court held that the Law School adequately considered race-neutral alternatives capable of producing a critical mass without forcing

the Law School to abandon the academic selectivity that is the cornerstone of its educational mission, and concluded that the admissions policy does not unduly burden individuals who are not members of the favored racial and ethnic groups. The Court concluded that the *Equal Protection Clause* does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body and that the statutory claims based on Title VI and *42 U.S.C. § 1981* also fail (*123 S. Ct. 2325, 2343-2347)* .

Adarand Constructors, Inc. v. Pena *(1995) 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158* , involved a constitutional challenge to a federal government policy of providing general contractors on governmental projects a financial incentive to hire subcontractors controlled by "socially and economically disadvantaged individuals" and in particular the government's use of a presumption that certain racial minorities were socially and economically disadvantaged, thereby qualifying for the incentives. Plaintiff submitted the lowest bid on the guardrail portion of a federally financed highway project, but was not awarded the subcontract. Instead the subcontract went to a company controlled by a racial minority. Plaintiff filed suit against various federal officials in federal district court, claiming that the policy violated its right to equal protection. The district court granted the government's motion for summary judgment, and the Tenth Circuit Court of Appeals affirmed. The U.S. Supreme Court granted certiorari and reversed.

The Court reviewed its previous decisions and noted that some earlier cases had suggested that racial discrimination by the federal government was subject to a less strict level of scrutiny under the *Fifth Amendment* than that which applied to state and local governments under the *Fourteenth Amendment* (*132 L. Ed. 2d 158, 173)* . However, the Court observed that its later decisions, through *Richmond v. J.A. Croson Co. (1989) 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854* , had established three general propositions about governmental racial classifications. First, any prefererence based on racial or ethnic criteria must necessarily receive a most searching examination. Second, the standard of review under the *Equal Protection Clause* does not depend on the race of the persons burdened or benefited by a particular classification, i.e., all racial classifications reviewable under the *Equal Protection Clause* must be strictly scrutinized. Third, equal protection analysis under the *Fifth Amendment* is the same as under the *Fourteenth Amendment* (*132 L. Ed. 2d 158, 179-180)* . The Court noted that a subsequent case, *Metro Broadcasting v. FCC (1990) 497 U.S. 547, 110 S. Ct. 2997, 111 L. Ed. 2d 445* , had taken a "surprising turn" by holding that "benign" racial classifications by the federal government (as distinguished from the states) need only satisfy "intermediate" scrutiny and that such classifications were constitutional to the extent that they served important governmental objectives within the power of Congress and were substantially related to the achievement of those objectives (*132 L. Ed. 2d 158, 180)* . The Court in *Adarand Contractors* concluded, however, that *Metro Broadcasting* was a significant departure from its previous holdings and that the lesser scrutiny of "benign" classifications did not accord wth the Court's understanding of equal protection. The Court therefore held that all racial classifications, whether imposed by federal, state, or local government actors, must be analyzed by a reviewing court under strict scrutiny--i.e., such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests (*132 L. Ed. 2d 158, 182-183)* . The Court therefore overruled *Metro Broadcasting* to the extent that it was inconsistent with the Court's holding (*132 L. Ed. 2d 158, 182)* .

Palmore v. Sidoti *(1984) 466 U.S. 429, 104 S. Ct. 1879, 80 L. Ed. 2d 421* , involved a divorced mother whose custody of her daughter was taken away and given to the child's father when the mother, who was white, remarried a black man. The trial court had made findings that both of the child's parents were fit and devoted, as were the new spouses of each of them. However, based on a report by the court counselor, stating that the child would be subject to societal prejudice and pressure because of her mother's intermarriage, the court awarded custody to the father. The Second District Court of Appeal affirmed. The United States Supreme Court granted certiorari and reversed.

The Supreme Court stated that a core purpose of the *Fourteenth Amendment* was to do away with all governmentally imposed discrimination based on race. The Court, citing *McLaughlin v. Florida (1964) 379 U.S. 184, 85 S. Ct. 283, 13 L. Ed. 2d 222* , discussed *below,* stated that classifications of people according to their race are subject to the most exacting scrutiny, and to pass constitutional muster they must be justified by a compelling governmental interest and

must be necessary to the accomplishment of its legitimate purpose (*466 U.S. 429, 432-433)* . The Court agreed that the best interests of the child is of substantial governmental interest, but the Court stated that it had little difficulty concluding that the risk of racial prejudice against the child is not a sufficient reason to remove a child from the custody of a fit parent. The Court stated that acknowledged racial prejudice cannot justify a racial classification in which constitutionally protected rights are denied (*466 U.S. 429, 433-434)* .

McLaughlin v. Florida *(1964) 379 U.S. 184, 85 S. Ct. 283, 13 L. Ed. 2d 222* , involved a criminal conviction under a Florida statute which made it an offense for a white person and a Negro of opposite sexes who were not married to each other to habitually live in and occupy in the nighttime the same room. Defendants appealed their conviction first to the Florida Supreme Court, which affirmed, and then to the United States Supreme Court, which reversed on the ground that the statute violated the *equal protection clause of the Fourteenth Amendment*. In its decision, the Court first determined that the statute presented a classification based on race because no couple other than an interracial couple could be convicted under this statute, and no other statute proscribed the same conduct when committed by couples of the same race. Second, the Court established that classifications based on race must be viewed in light of the historical fact that the central purpose of the *Fourteenth Amendment* was to eliminate racial discrimination emanating from official sources in the states. This strong policy renders racial classifications constitutionally suspect and subject to the most rigid scrutiny. They are, in most circumstances, irrelevant to any constitutionally acceptable legislative purpose. Third, the Court then focused its inquiry on whether or not there clearly appeared some overriding statutory purpose requiring the proscription of the specified conduct when engaged in by a white person and a black person but not otherwise. Without such justification, the racial classification would be reduced to an invidious discrimination forbidden by the *equal protection clause* (*379 U.S. 184, 191-192)* .

[b] Racial Classifications as Suspect Even Though Benign

Adarand Constructors, Inc. v. Pena *(1995) 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158* , is discussed in *§ 35A.29[3][a]*.

In ***Regents of University of California v. Bakke*** *(1978) 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750* , plaintiff, a white male who had been denied admission to a state medical school in California, brought an action in state court for declaratory and injunctive relief against defendant university regents claiming, in part, that the medical school's special admissions program for disadvantaged members of minority races violated his right to equal protection. The trial court ruled that the program violated the *equal protection clauses* of the federal and state constitutions but refused to order plaintiff's admission to medical school because he did not show that he would have been admitted but for existence of the special program favoring minorities. On appeal, the California Supreme Court reversed the part of the trial court's decision that failed to require the medical school to accept plaintiff. The United States Supreme Court granted certiorari and affirmed and reversed in part. Justice Powell, who delivered the opinion of the Court, decided that the special admissions program violated equal protection guarantees. On this point, he was not joined by any other justices, but four members of the Court were willing to hold the program invalid as a violation of Title VI of the Civil Rights Act of 1964 [*42 U.S.C. §§ 2000d-2000d-6*], which prohibits racial discrimination in any program receiving federal financial assistance (*438 U.S. 265, 408-421)* . Thus, a majority of justices affirmed the decision of the California Supreme Court in so far as it invalidated the special admissions program and required the admission of plaintiff.

However, a separate majority of justices made up of Justice Powell and four other justices writing their own opinion was willing to examine other equal protection issues in the case. This majority agreed that race was a factor which was permissible to take into consideration under the *equal protection clause* and reversed the state Supreme Court in so far as it prohibited defendant regents from according any consideration to race in its future admissions process (*438 U.S. 265, 320, 379)* .

This same majority also supported the view that a classification based on race was subject to strict scrutiny regardless of its purpose. On this point, the university regents argued that the racial classifications should be sustained because they

were reasonably related to the university's benign purpose of remedying the effects of past societal discrimination; it contended that strict scrutiny was not appropriate because white males are not a discrete and insular minority such as black persons and do not require extraordinary protection from the majoritarian political process. In response, Justice Powell found that racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination (*438 U.S. 265, 291)* . Although discreteness and insularity may be relevant in deciding whether to add new types of classifications to the list of "suspect" categories, these qualities are neither necessary nor sufficient to establish that a particular classification is invidious (*438 U.S. 265, 290-291)* . The justice admitted that school and employment discrimination cases had approved on a rational basis standard the use of remedies which had granted racial preferences, but he distinguished these situations since they had involved proven constitutional or statutory violationsand the remedies had been tailored specifically to address those violations and to compensate identifiable victims (*438 U.S. 265, 300-302)* . He then tested the medical school's admission program by the strict scrutiny standard--existence of a substantial state interest and a classification necessary to its accomplishment. He concluded that attainment of a diverse student body was a compelling state interest in light of the *First Amendment*, but that the program in question was not necessary to promote this interest (*438 U.S. 265, 314-320)* . Instead, the justice endorsed an admissions program at Harvard which takes race into account, along with several other factors, but does not assign a fixed number of places to a minority group (*438 U.S. 265, 316-318, 320-324)* .

Four other justices also concluded that a racial classification, even if its purpose was benign, should be subject to some form of strict scrutiny (*438 U.S. 265, 361-362)* . The justices, in their joint opinion, admitted that the school's admissions program did not present an obvious case for application of strict scrutiny since it did not involve a fundamental interest. Furthermore, whites as a class have none of the "traditional indicia" of suspectness, the school's racial purposes were not irrelevant, and it was not promoting racial hatred or inferiority (*438 U.S. 265, 357)* . Nevertheless, even racial classifications that serve a benign purpose can be misused since they often serve to stereotype and stigmatize those who are politically powerless and represent an immutable characteristic which its possessors are powerless to escape or set aside (*438 U.S. 265, 360)* . The four parted company with Justice Powell however by concluding that, on the facts of the case, the medical school's articulated purpose of remedying the effects of past societal discrimination was sufficiently important to justify the adoption of its admissions program, since there was a sound basis for concluding that minority underrepresentation was substantial and chronic and that the handicap of past discrimination was impeding access of minorities to the medical school (*438 U.S. 265, 362)* .

In ***Monterey Mechanical Co. v. Wilson*** *(9th Cir. 1997) 125 F.3d 702, 710-711* , an unsuccessful bidder for a construction project at a California university brought a federal action against university trustees and the successful bidder asserting that a state statute requiring general contractors to subcontract percentages of work to women-or minority-owned subcontractors, or demonstrate a good faith effort to do so (*Pub. Contract Code § 10115 et seq.*), violated the *equal protection clause*. In ruling on the racial portion of the statutory challenge, the Ninth Circuit Court of Appeals concluded that statutes requiring general contractors to subcontract percentages of work to minority-owned subcontractors by imposing a non-rigid system of goals and good-faith efforts, while expressly abjuring quotas, is nevertheless treated as a classification under the *equal protection clause*. Such provisions are not immunized from scrutiny because they purport to establish goals rather than quotas (*125 F.3d 702, 710-711)* . The court reiterated that the relevant question is not whether a statute requires the use of such measures, but whether it authorizes or encourages them (*125 F.3d 702, 711)* . The court went on to hold the statute violated the *equal protection clause* because there was no evidence the state had engaged in past discrimination against the groups benefitting from the set-asides, and the statute was not narrowly tailored to serve a compelling governmental interest (*125 F.3d 702, 712-715)* .

[4] Additional Authorities

[a] Race Subject to Strict Scrutiny

In *Richardson v. Runnels (9th Cir. 2010) 594 F.3d 666* , an African-American prison inmate housed in a facility that contained high risk prisoners, a number of whom were African-American, sued prison officials pro se for violation of

his equal protection rights based on racial classification as a result of the lockdown of all African-American prisoners in the facility based on incidents involving African-American prisoners, even though all Hispanic or white inmates were not locked down based on incidents involving Hispanic or white prisoners. The district court granted defendants' motion for summary judgment, based on the findings and recommendations of a magistrate. The Ninth Circuit Court of Appeals reversed. The court found that facts presented by the defendants showed that, in several instances, assaults believed to be perpetrated or planned by prisoners who were African-American led to the lockdown of all African-American inmates in a particular unit of the prison, including plaintiff, and that the defendants apparently believed that without showing any linkage between the perpetrators and the prisoners subjected to the lockdown, it was enough to assume that race alone tied together the perpetrators and the larger group, which was an assumption grounded on race. However, the United States Supreme Court has applied a strict-scrutiny standard for racial classifications in prisons, requiring the government to prove that such measures be narrowly tailored to further a compelling governmental interest (*594 F.3d 666, 671* ; *see Johnson v. California (2005) 543 U.S. 499, 505-507, 125 S. Ct. 1141, 160 L. Ed. 2d 949*). Even under the weaker reasonableness standard, the assertion that it was sufficient for prison officials simply to believe there to be a link between an individual incident perpetrated by one or two inmates, and the risk of violence from all the African-American prisoners in the facility, with no evidentiary basis whatever indicated for that belief, fell short (*594 F.3d 666, 671)* . Moving for summary judgment, the defendants had the burden of showing that on undisputed facts, they were entitled to prevail (*594 F.3d 666, 671* ; *see Fed. R. Civ. P. 56*). In this case, the defendants had to show that reasonable men and women could not differ regarding the necessity of a racial classification in response to prison disturbances and that the racial classification was the least restrictive alternative (*i.e.*, that any race-based policies are narrowly tailored to legitimate prison goals). They failed to carry this burden on plaintiff's equal protection claim, as they made no evidentiary showing at all concerning the basis for regarding all African-Americans as a security risk when one or a few African-American inmates were responsible for an assault (*594 F.3d 666, 671-672)* .

In *Smith v. University of Washington (9th Cir. 2004) 392 F.3d 367* , the white applicants to law school whose applications were rejected sued the University of Washington on the grounds that the law school's admissions policy impermissibly discriminated on the basis of race. The district court entered judgment in favor of the law school after a bench trial, and the plaintiffs appealed. External events overtook the litigation: The United States Supreme Court ratified the Ninth Circuit's earlier holding in this case that educational diversity constitutes a compelling state interest (*392 F.3d 367, 369)* [*see Smith v. Univ. of Wash. Law School (9th Cir. 2000) 233 F.3d 1188, 1200-1201* ; *see also Grutter v. Bollinger (2003) 539 U.S. 306, 325, 123 S. Ct. 2325, 156 L. Ed. 2d 304* ; *Gratz v. Bollinger (2003) 539 U.S. 244, 268, 123 S. Ct. 2411, 156 L. Ed. 2d 257]* . In 1998, after plaintiffs filed the action, Washington residents approved a voter initiative prohibiting the kind of race-based affirmative action plan at issue, mooting the plaintiffs' injunctive and declaratory claims, which the district court dismissed (*392 F.3d 367, 369)* [*see Smith v. Univ. of Wash. Law School (9th Cir. 2000) 233 F.3d 1188, 1201]* . The Ninth Circuit then held that the law school's admissions program was narrowly tailored to meet the compelling interest of educational diversity during the three years in which the plaintiffs applied and that plaintiffs were not entitled to damages under *42 U.S.C. §§ 1981, 1983, 2000d* (*392 F.3d 367, 371-382)* . None of the three aspects cited by plaintiffs in support of their claim that the law school's admissions program was not narrowly tailored undermined the district court's finding that the law school narrowly tailored its consideration of race and ethnicity to meet the compelling interest of obtaining the educational benefits of diversity. These three aspects were: (1) an ethnicity substantiation letter the law school sent only to some minority applicants; (2) the giving of a plus to Asian Americans; and (3) the referral of a large number of white applicants to the Admissions Committee rather than being directly admitted by an administrator (*392 F.3d 367, 376-382)* .

In *Artichoke Joe's Cal. Grand Casino v. Norton (9th Cir. 2003) 353 F.3d 712* , California card clubs and charities prohibited under California state law from offering casino-style gaming challenged the validity of compactsentered into under the federal Indian Gaming Regulatory Act (*25 U.S.C. § 2701 et seq.*) between the State of California and certain Indian tribes as violating their right to equal protection under the federal Constitution (*353 F.3d 712, 714)* . The Ninth Circuit Court of Appeals held that the distinction between Indian and non-Indian gaming interests was a political not a racial classification, so that the proper level of review was whether the distinction had a rational basis and that legitimate state interests--the regulation of vice activity which lies at the heart of a state's police powers by permitting

certain forms of gambling only on the lands of sovereign tribal entities entering into government-to-government compacts with the state and to promote cooperative relationships between the tribes and the state by fostering tribal sovereignty and self-sufficiency--justified the grant to Indian tribes of a monopoly on class III gaming (*353 F.3d 712, 731-742)* .

In *Connerly v. State Personnel Board (2001) 92 Cal. App. 4th 16, 112 Cal. Rptr. 2d 5* , a private citizen continued litigation commenced by a governor challenging five statutory programs falling within the general rubric of "affirmative action," on the ground they impermissibly establish classifications and preferences based on race, ethnicity, and gender. The trial court found invalid a portion of one scheme and all of another, but otherwise rejected the plaintiff's contentions (*92 Cal. App. 4th 16, 27)* . The Court of Appeal reversed and remanded, holding that all of four of the schemes were invalid and as to the fifth, a portion could be severed from the remaining invalid portions and upheld (*92 Cal. App. 4th 16, 28)* . The court found that (1) under the federal and California Constitutions, strict scrutiny applies to racial classifications, (2) under the state Constitution, strict scrutiny applies to gender classifications, and (3) Proposition 209 (*Cal. Const., art. I, § 31*) imposes additional restrictions against racial and gender preferences and discriminatory actions (*92 Cal. App. 4th 16, 19-41)* . The court found further that insofar as the challenged statutory schemes utilize race and gender classifications, they are invalid (*92 Cal. App. 4th 16, 28)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsMandamusConstitutional LawBill of RightsFundamental FreedomsGeneral OverviewConstitutional LawEqual ProtectionScope of Protection

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Volume 3 Chapters 34-39 CHECKS AND BANKS---to---CIVIL SERVICE
CHAPTER 35A CIVIL RIGHTS: EQUAL PROTECTION
PART II. FORMS

3-35A California Points & Authorities § 35A.30

§ 35A.30 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--Suspect Categories or Burdens on Fundamental Interests as Subject to Strict Scrutiny--Classifications Based on National Origin as Suspect

[1] FORM

[*Caption. See § 35A.20.*]

THE COURT SHOULD GRANT THE WRIT OF MANDATE BECAUSE _____ [*identify legislation, regulation, or other challenged governmental action*] VIOLATES PETITIONER'S CONSTITUTIONAL RIGHT TO EQUAL PROTECTION IN THAT IT CONTAINS A CLASSIFICATION THAT DISCRIMINATES AGAINST PETITIONER ON THE BASIS OF NATIONAL ORIGIN AND IS NOT NARROWLY TAILORED TO FURTHER A COMPELLING GOVERNMENTAL INTEREST.

A-F. Authorities Establishing Equal Protection Challenge to Suspect Category. [*See § 35A.20, Paragraphs A-D, F, G.*]

G. Classifications Based on National Origin as Suspect. A classification based on national origin is suspect and subject to strict judicial scrutiny (*Oyama v. California (1947) 332 U.S. 633, 646, 68 S. Ct. 269, 92 L. Ed. 249* ; *Fujii v. California (1952) 38 Cal. 2d 718, 728-730, 242 P.2d 617*).

H. State Action Subject to Strict Scrutiny as Violation of Equal Protection Unless Justified. [*See § 35A.20, Paragraph I.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a petition for a writ of mandate to challenge the constitutionality of state action on equal protection grounds when the basis of the challengeis that the state action in question contains a classification based on ancestry which is not justified by a compelling governmental interest.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

Related memoranda of points and authorities for use in supporting a petition for writ of mandate on the ground that the classification is based on a suspect category are *set out in §§ 35A.29, 35A.31 -35A.34*.

[b] Related Pleading and Practice Forms

For forms of complaint for use in actions based on violation of state or federal civil rights laws because of discrimination on the basis of ancestry or national origin, see California Forms of Pleading and Practice, Ch. 112, *Civil Rights: Government-Funded Programs and Activities* , and Ch. 547, *Theaters, Shows, and Amusement Places* (Matthew Bender).

[3] Discussion of Authorities

[a] Classification Based on National Origin as Suspect

In ***Oyama v. California*** *(1947) 332 U.S. 633, 68 S. Ct. 269, 92 L. Ed. 249* , appellants, an alien of Japanese descent and his minor son, who was an American citizen, challenged the constitutionality of part of Section 9 of California's Alien Land Law [former Stats. 1921, p. lxxxiii, as amended]. This law provided that whenever aliens ineligible for citizenship acquired agricultural property it would escheat to the state and any transfer made to avoid escheat would have the same effect. The statute also created a presumption of intent to avoid escheat whenever an ineligible alien paid the consideration for a transfer of property to another citizen or eligible alien. On two occasions, appellant father had paid for land transferred to his son, and it was this land that the state attempted to escheat. The United States Supreme Court, in reversing the California Supreme Court which upheld the provision, did not reach the question of whether or not the law violated any equal protection guarantees for the father because it discriminated against aliens. Instead, the Court found discrimination against the son on the basis of national origin.

Although the two-tier test for equal protection analysis was not explicitly formulated when *Oyama* was decided, the Court employed a comparable analysis. It stated that the relevant issue was whether discrimination between citizens on the basis of their racial descent was justifiable and affirmed that only the most exceptional circumstances could excuse discrimination on that basis in the face of the *equal protection clause*. The state advanced only one justification for the law and the Court found it inadequate.

[b] Relation to Racial Discrimination

It should also be also noted that cases which involve discrimination on the basis of ancestry may involve a national group which is a racial minority. Indeed, the Court in *Oyama* used the term "racial descent" as if it were synonymous with ancestry or country of origin and the California Supreme Court has commented that the United States Supreme Court has applied the *Fourteenth Amendment* in several cases to bar state-imposed discrimination based upon ancestry, whether racial or national [*see Castro v. California (1970) 2 Cal. 3d 223, 229 n.9, 85 Cal. Rptr. 20, 466 P.2d 244 , set out in § 35A.48[3][a]*]. Nevertheless, both *Oyama* and *Fujii v. California (1952) 38 Cal. 2d 718, 242 P.2d 617* , discussed *below*, are decisions which clearly address discrimination based on national origin although showing an

awareness of the related racial discrimination. As its guiding principle, the Court cited *Hirabayashi v. United States (1943) 320 U.S. 81, 100, 63 S. Ct. 1375, 87 L. Ed. 1774* , for the rule that distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded on the doctrine of equality. This case creates such distinctions. Whenever the parent of a citizen or eligible alien paid for a conveyance to his or her child, the law presumed that the parent intended a gift. But if the parent was an ineligible alien, the Alien Land Law in effect created a presumption that the conveyance was not a gift. The minor's burden of establishing ownership was far greater than that placed on other minor donees, and the sole basis for this distinction was the fact that the father was Japanese and not, for example, American, Russian, Chinese, or English.

In *Fujii v. California (1952) 38 Cal. 2d 718, 242 P.2d 617* , appellant, a Japanese alien who was ineligible for citizenship under federal naturalization law, appealed from a judgment declaring that certain land which he had purchased had escheated to the state under California's former Alien Land Law [former Stats. 1921, p. 1xxxiii, as amended]. The Supreme Court held that the law violated the *equal protection clause of the Fourteenth Amendment*. Although the state law classified persons on the basis of eligibility for citizenship, the underlying federal naturalization law restricted only the Japanese and a few small racial groups from the right to citizenship. Thus, the California law in fact classified on the basis of race or nationality. Although a legislative classification will generally be sustained if it is reasonable and bears a substantial relation to a legitimate objective, classifications on the basis of race are immediately suspect and subjected to the most rigid scrutiny. In the Court's view, discrimination because of nationality was comparable to racial discrimination; it stated that the presumption of constitutional validity was greatly narrowed in scope, if not dispelled entirely, whenever it was shown that legislation actually discriminates against certain persons because of their race or nationality. In response to the argument that a statute might be justified indenying property rights to aliens who could become citizens but chose not to, the Court pointed out that the classification in this case does not withhold property from aliens because of anything they have done or any beliefs they hold, but solely because they are Japanese and not French or Italian. Because the Court found that none of the other reasons proposed to justify the classification were adequate, it declared the law invalid.

Legal Topics:

For related research and practice materials, see the following legal topics:
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CHAPTER 35A CIVIL RIGHTS: EQUAL PROTECTION
PART II. FORMS

3-35A California Points & Authorities § 35A.31

§ 35A.31 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--Suspect Categories or Burdens on Fundamental Interests as Subject to Strict Scrutiny--Classifications Based on Alienage as Suspect

[1] FORM

[*Caption. See § 35A.20.*]

A WRIT OF MANDATE IS PROPER TO CHALLENGE STATE ACTION WHICH VIOLATES THE RIGHT TO EQUAL PROTECTION WHEN IT CONTAINS A CLASSIFICATION BASED ON ALIENAGE WHICH IS NOT JUSTIFIED BY A COMPELLING GOVERNMENTAL INTEREST.

A-F. Authorities Establishing Equal Protection Challenge to Suspect Category. [*See § 35A.20, Paragraphs A-D, F, G.*]

G. Classifications Based on Alienage as Suspect. A classification based on alienage is suspect and subject to strict judicial scrutiny (*Examining Bd. v. Flores de Otero (1976) 426 U.S. 572, 601-604, 96 S. Ct. 2264, 49 L. Ed. 2d 65* ; *Raffaelli v. Committee of Bar Examiners (1972) 7 Cal. 3d 288, 293, 101 Cal. Rptr. 896, 496 P.2d 1264*).

H. State Action Subject to Strict Scrutiny as Violation of Equal Protection Unless Justified. [*See § 35A.20, Paragraph I.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a petition for a writ of mandate to challenge the constitutionality of state action on equal protection grounds when the basis of the challenge is that the state action in question contains a classification based on alienage that is not justified by a compelling governmental interest.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should insert facts showing how the state action violates equal protection by containing a classification based on alienage not justified by a compelling governmental interest.

Related memoranda of points and authorities for use in supporting a petition for writ of mandate on the ground that the classification is based on a suspect category are *set out in §§ 35A.29, 35A.30, 35A.32 -35A.34*.

[b] Related Pleading and Practice Forms

For forms of complaint for use in actions based on violation of state or federal civil rights laws because of discrimination on the basis of ancestry or national origin, see Ch. 112, *Civil Rights: Government-Funded Programs and Activities* , and Ch. 547, *Theaters, Shows, and Amusement Places* , in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Classifications Based on Alienage as Suspect

Examining Bd v. Flores de Otero *(1976) 426 U.S. 572, 96 S. Ct. 2264, 49 L. Ed. 2d 65* , was a constitutional challenge to a statute of Puerto Rico that required applicants for registration as licensed engineers or architects to be citizens of the United States. The challengers, who were alien legal residents of Puerto Rico, brought actions in a federal district court for declaratory and injunctive relief for violation of their rights under two post-Civil War civil rights statutes [*42 U.S.C. §§ 1981, 1983*]. They prevailed, and Puerto Rico appealed. The United States Supreme Court first inquired if Puerto Rico's statute restricting aliens in the private practice of engineering deprived them of any rights, privileges, or immunities secured by the Constitution and laws within the meaning of *42 U.S.C. § 1983*. The Court noted that it was not clear whether the *due process clause of the Fifth Amendment* or the equal protection and *due process clauses of the Fourteenth Amendment* applied to residents of Puerto Rico, but that it need not resolve that precise question because statutory restriction on theability of aliens to engage in the otherwise lawful practice of civil engineering was plainly unconstitutional under either the *equal protection clause of the Fourteenth Amendment* or the *due process clause of the Fifth Amendment*. Applying relevant principles, the Court confirmed that state classifications based on alienage were subject to strict judicial scrutiny for two reasons:

- Aliens as a class are a prime example of a discrete and insular minority for whom heightened judicial solicitude is appropriate.

- The regulation of aliens is a field of primary federal responsibility because of the federal government's duties in regard to immigration and naturalization.

The Court then cited several cases in which official discrimination against lawfully admitted aliens was struck down and concluded that the statute in question could be nullified as eiher a violation of equal protection or due process.

The factual background of ***Raffaelli v. Committee of Bar Examiners*** *(1972) 7 Cal. 3d 288, 101 Cal. Rptr. 896, 496 P.2d 1264* , is discussed in *§ 35A.20[3][d]*. The California Supreme Court held that a statute that prevented aliens from practicing law in California violated both *U.S. Const., amend. XIV, § 1* and former Cal. Const., art. I, §§ 11, 21 [*now see*

Cal. Const., art. I, § 7(a)]. The Court reasoned that both citizens and aliens are entitled to equal protection of the law and that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Judicial protection of aliens is particularly important because they are frequently the victims of prejudice, they lack the means of self-protection through exercise of the right to vote, and frequently the discrimination practiced against them would deny them employment. In the instant case, the state failed to justify the statute by showing how it promoted a compelling state interest. The Court found that, in fact, the state's argument even failed to show that the challenged classification had a rational connection with the applicant's fitness or capacity to practice law.

[b] Subsequent Developments

Subsequent to *Otero,* the United States Supreme Court has vacillated on the question of whether or not classifications based on alienage are subject to strict judicial scrutiny when a fundamental interest was not also at stake. In *Nyquist v. Mauclet (1977) 432 U.S. 1, 12, 97 S. Ct. 2120, 53 L. Ed. 2d 63* , the Court invalidated a New York statute that prevented resident aliens from obtaining state financial assistance for higher education unless they indicated an intent to become American citizens. In a dissent, Chief Justice Burger pointed out that prior cases applied the strict scrutiny standard to alienage only in situations of employment or welfare where the essential means of economic survival were threatened (*432 U.S. 1, 13-14)* . The majority responded that classifications based on alienage are inherently suspect and therefore subject to strict scrutiny whether or not a fundamental right is impaired. However, in *Foley v. Connelie (1978) 435 U.S. 291, 295-297, 98 S. Ct. 1067, 55 L. Ed. 2d 287* , the Court stated that not all limitations on aliens were inherently invalid and upheld a New York statute that prohibited aliens from joining the state police. The rule that emerges from *Foley* is that restrictions that prevent aliens from participating in functions closely related to democratic political institutions, such as the right to vote or serve on a jury or to participate directly in the formulation, execution, or review of broad public policy, are not subject to strict scrutiny and may be justified by showing some rational relationship between the interest sought to be protected and the limiting classification. Restrictions on those who may exercise the police function come within this principle because, although police officers in the ranks do not formulate policy per se, they are clothed with authority to exercise an almost infinite variety of discretionary powers which can affect members of the public significantly and often in the most sensitive areas of daily life. *See also Ambach v. Norwick (1979) 441 U.S. 68, 99 S. Ct. 1589, 60 L. Ed. 2d 49, 59* (applied the *Foley* rule to uphold a statute excluding aliens from teaching in public schools).

Moreover, restrictions placed on aliens by the federal government in the exercise of its constitutional power over immigration and naturalization are not subject to the strict scrutiny test. Thus, provisions that deny Medicare benefits to certain groups of aliens are valid under the *due process clause of the Fifth Amendment* if they are reasonable [*Mathews v. Diaz (1976) 426 U.S. 67, 84-87, 96 S. Ct. 1883, 48 L. Ed. 2d 478]* . Similarly, the strict-scrutiny test was not applied by a California appellate court that found that *Educ. Code § 68062(h)* (determination of student residence) precludes undocumented alien students from qualifying as residents of California for tuition purposes [*Regents of University of California v. Superior Court (1990) 225 Cal. App. 3d 972, 978-982, 276 Cal. Rptr. 197]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsMandamusConstitutional LawEqual ProtectionGeneral OverviewConstitutional LawEqual ProtectionScope of Protection

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CHAPTER 35A CIVIL RIGHTS: EQUAL PROTECTION
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3-35A California Points & Authorities § 35A.32

§ 35A.32 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--Suspect Categories or Burdens on Fundamental Interests as Subject to Strict Scrutiny--Classifications Based on Gender as Suspect

[1] FORM

[*Caption. See § 35A.20.*]

A WRIT OF MANDATE IS PROPER TO CHALLENGE STATE ACTION WHICH VIOLATES THE RIGHT TO EQUAL PROTECTION UNDER THE STATE CONSTITUTION WHEN IT CONTAINS A CLASSIFICATION BASED ON GENDER WHICH IS NOT JUSTIFIED BY A COMPELLING GOVERNMENTAL INTEREST.

A-F. Authorities Establishing Equal Protection Challenge to Suspect Category. [*See § 35A.20, Paragraphs A-D, F, G.*]

G. Classifications Based on Gender Are Suspect. A classification based on gender is suspect under the California Constitution and subject to strict judicial scrutiny (*Sail'er Inn, Inc. v. Kirby (1971) 5 Cal. 3d 1, 1820, 95 Cal. Rptr. 329, 485 P.2d 529* ; *Woods v. Horton (2008) 167 Cal. App. 4th 658, 673-679, 84 Cal. Rptr. 3d 332*).

[*Optional*] **H. Gender Discrimination Not Justified by Alleged Rehabilitative and Compensatory Purpose.** Where state action is subject to strict judicial scrutiny because it contains a classification based on gender, an allegation of rehabilitative and compensatory purpose in the choice of a particular gender classification is not sufficient to establish a compelling state interest justifying the state action unless the purpose is self-evident or clearly indicated and the method of implementation represents the least restrictive means by which the purpose can be achieved (*Arp v. Workers' Compensation Appeals Bd. (1977) 19 Cal. 3d 395, 403-407, 138 Cal. Rptr. 293, 563 P.2d 849*).

[*Optional*] **I. Gender Discrimination Not Justified by Overly Broad Stereotypical Assumptions.** When state action contains a classification based on gender, overly broad or stereotypical assumptions underlying the choice of a particular gender classification are not sufficient to justify the state action under the *Fourteenth Amendment*, even though the standard of scrutiny is less than strict judicial scrutiny (*Craig v. Boren (1976) 429 U.S. 190, 198-199, 97 S. Ct. 451, 50 L. Ed. 2d 397 , reh'g denied, 429 U.S. 1124 (1977))* .

J. State Action Subject to Strict Scrutiny Is Violation of Equal Protection Unless Justified. [*See § 35A.20, Paragraph I.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a petition for a writ of mandate to challenge the constitutionality of state action on equal protection grounds when the basis of the challenge is that the state action in question contains a classification based on gender, a suspect category under the state Constitution, which is not justified by a compelling governmental interest.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should insert facts showing the classification based on gender and the lack of justification by a compelling governmental interest.

Related memoranda of points and authorities for use in supporting a petition for writ of mandate on the ground that the classification is based on a suspect category are *set out in §§ 35A.29 -35A.31, 35A.33, 35A.34*.

[b] Related Pleading and Practice Forms

For forms of complaint for use in actions based on violation of state or federal civil rights laws because of discrimination on the basis of gender, see Ch. 112, *Civil Rights* , and Ch. 547, *Theaters, Shows, and Amusement Places* , in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Classifications Based on Gender Are Suspect

The factual background of ***Sail'er Inn, Inc. v. Kirby*** *(1971) 5 Cal. 3d 1, 95 Cal. Rptr. 329, 485 P.2d 529* , is discussed in *§ 35A.20[3][a]*. Petitioners sought a writ of mandate challenging former Bus. & Prof. Code § 25656 on equal protection grounds because it restricted female bartenders but not male bartenders. In granting the petition, the California Supreme Court noted that cases involving suspect classifications or touching on fundamental interests require application of the strict scrutiny test. The Court then explained why gender classifications are properly treated as suspect. It pointed out that gender, like race and lineage, is an immutable trait that bears no relation to ability to perform or contribute to society. Courts must closely examine classifications based on immutable traits lest outdated social stereotypes result in invidious laws or practices. A second characteristic underlying all suspect classifications is the stigma of inferiority and second class citizenship associated with them, and women, like blacks, aliens, and the poor have historically labored under severe legal and social disabilities.

In ***Woods v. Horton*** *(2008) 167 Cal. App. 4th 658, 84 Cal. Rptr. 3d 332* , four men and the daughter of one filed a complaint for injunctive and declaratory relief and a petition for writ of mandate to challenge, on equal protection grounds, statutes relating to domestic violence programs and programs for inmate mothers. They contended the

gender-based classifications in the statutes did not withstand a strict scrutiny analysis under the California Constitution because the classifications were not necessary and gender-neutral alternatives were available. The trial court denied their petition for a writ of mandate, finding they failed to show men were similarly situated to women for purposes of the statutory schemes (*167 Cal. App. 4th 658, 662-670)* .

The Court of Appeal reversed in part, finding the gender-based classifications in the challenged statutes that provided programs for victims of domestic violence violated equal protection. The court found that male victims of domestic violence were similarly situated to female victims for purposes of the statutory programs and no compelling state interest justified the gender classification. The trial court's reasoning that since more women were victims of domestic violence, and since they suffered more severe injuries, men were not similarly situated for purposes of domestic violence services and improperly viewed equal protection rights as group rights, rather than individual rights, and permitted discrimination simply because fewer men than women were affected. The trial court recognized that plaintiffs established, through declarations and journal articles, that men experienced significant levels of domestic violence as victims, so that these men were similarly situated to women as to the need for domestic violence services (*167 Cal. App. 4th 658, 671)* . The challenged programs did not survive strict scrutiny analysis because the gender classifications were unnecessary and there were gender-neutral alternatives available. The greater need for services by female victims of domestic violence did not provide a compelling state interest in a gender classification. Even if there were a compelling state interest, defendants did not show the classification was necessary, rather than convenient, and no gender-neutral alternative was available. Most of the government-funded domestic violence programs offered services on a gender-neutral basis, showing the classification was not necessary. There was an alternative; most statutory definitions of domestic violence were gender neutral (*167 Cal. App. 4th 658, 674-676)* .

However, plaintiffs failed to show men were similarly situated to women for purposes of the prison programs for inmate mothers, which were an alternative sentencing program designed to reduce drug use and recidivism for women prisoners who were pregnant or parents of one or more children under the age of six, and a program providing for a community treatment program for women inmates sentenced to state prison who had one or more children under the age of six. The trial court found the purposes of the alternative sentencing program and the community treatment program were to foster the mother-child bond, the healthy development of children, and the rehabilitation of inmate mothers. Enactment of these programs coincided with a dramatic increase in the number of female inmates, many of whom were imprisoned for nonviolent drug and property offenses, used drugs before incarceration, and were victims of abuse. These characteristics made them suitable for low-security, community-based treatment programs. Government data showed these women prisoners were likely to have been the primary or single caretaker of their young children, who were likely to be displaced to other relatives or foster care. By contrast, children of incarcerated men were likely to continue living with their mothers. Given the absence of a showing of any inmate father who qualified for a program and was denied its benefits, the deference accorded prison officials in developing such programs, the separation of powers concerns in encroaching on executive and legislative determinations, and the differences between male and female inmates, the trial court did not err in finding male and female inmates are not similarly situated for the purposes of the programs for inmate mothers (*167 Cal. App. 4th 658, 671-674)* .

[i] Related United States Supreme Court Decisions

Only the California Supreme Court has adopted the strict scrutiny test with respect to gender classification. The United States Supreme Court subjected classifications based on gender to considerable scrutiny but refrained from describing sex as a suspect category warranting the application of a compelling interest test. In ***Reed v. Reed*** *(1971) 404 U.S. 71, 75-76, 92 S. Ct. 251, 30 L. Ed. 2d 225* , the Court indicated that classifications based on sex were definitely subject to scrutiny; they must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced are treated alike. In essence, the test proposed was the "rational relationship" test but stated in a rigorous fashion [*see §§ 35A.03, 35A.04*]. Then, in ***Frontiero v. Richardson*** *(1973) 411 U.S. 677, 682, 93 S. Ct. 1764, 36 L. Ed. 2d 583 , set out in § 35A.48[3][a],* four justices speaking for the Court announced that classifications based on gender are inherently suspect

and must be subject to close judicial scrutiny, finding that the decision in *Reed* provides at least "implicit support" for this approach. However, this view was not sustained in subsequent cases. ***Craig v. Boren*** *(1976) 429 U.S. 190, 197-198, 97 S. Ct. 451, 50 L. Ed. 2d 397 , reh'g denied, 429 U.S. 1124 (1977)* , set out under § 35A.32[3][c], and ***Orr v. Orr*** *(1979) 440 U.S. 268, 99 S. Ct. 1102, 59 L. Ed. 2d 306, 319* (statute providing for payment of alimony by husbands, but not wives, is violation of equal protection) interpreted with the support of six justices the previous decisions to establish that classifications by gender, to withstand constitutional challenge, must serve important governmental objectives and be substantially related to achievement of those objectives. This test appears to take a middle ground between the "rational relationship" test and the "strict scrutiny" test. As the California Supreme Court commented, the standard for judging gender discrimination cases under the *Fourteenth Amendment*, as it has evolved in the federal courts, appears to be a hybrid which can be characterized as "strict rationality" or "rational scrutiny" [*Arp v. Workers' Compensation Appeals Bd. (1977) 19 Cal. 3d 395, 400, 138 Cal. Rptr. 293, 563 P.2d 849]* .

Moreover, the United States Supreme Court may choose to avoid even heightened scrutiny by concluding that a classification is not gender-based for purposes of equal protection analysis on the ground that the men and women differentially classified are not similarly situated and the statutory classification is realistically based upon the differences in their situation [*Parham v. Hughes (1979) 441 U.S. 347, 99 S. Ct. 1742, 60 L. Ed. 2d 269, 276-277* (statute precluding fathers, but not mothers, who have not legitimated their children from suing for their wrongful death is not violative of equal protection)].

[b] Gender Discrimination Is Not Justified by Alleged Rehabilitative and Compensatory Purpose

In ***Arp v. Workers' Compensation Appeals Bd.*** *(1977) 19 Cal. 3d 395, 138 Cal. Rptr. 293, 563 P.2d 849* , a widower sought payment of a death benefit under the Workers' Compensation Law after his wife died. The workers' compensation judge found that a provision of the Workers' Compensation Law that in effect created a conclusive presumption that widows were wholly dependent on their deceased spouses, but did not extend the same presumption in favor of widowers. Rather than attempt to prove actual dependency, the widower petitioned the Workers' Compensation Appeals Board for reconsideration and when the board denied this request, he petitioned the California Supreme Court for review. In essence, he argued that former Lab. Code § 3501(a) violated his right to equal protection because of gender-based discrimination. He proposed that the Court remedy the constitutional defect by extending the statutory benefit to widowers and widows alike. The Court held that, indeed, Section 3501(a) was unconstitutional under both the state and the federal *equal protection clauses*, but it chose to invalidate the statute rather than remedy the constitutional defect.

[i] Analysis of Ameliorative Purpose

In its decision in *Arp*, the Court was confronted with a strong argument that a statute using a presumption of dependency to help widows collect death benefits but not extending the same presumption in favor of widowers was not unconstitutional because it was both ameliorative and rehabilitative. This argument was based on cases such as *Schlesinger v. Ballard (1975) 419 U.S. 498, 508-509, 95 S. Ct. 572, 42 L. Ed. 2d 610* , in which the United States Supreme Court upheld legislation providing women with benefits not provided to men on the theory that men and women were not similarly situated with respect to matters governed by the challenged statutes and that practices designed to compensate for real disabilities imposed on one gender were constitutionally permissible. However, theCalifornia Supreme Court indicated that it would strongly resist similar attempts to validate statutes that are sexually discriminatory on their face. It admitted that the provision could be upheld on the theory that after centuries of economic discrimination against females, men and women were simply not similarly situated with respect to economic factors. Under these circumstances, a provision designed to mitigate the continuing consequences of past economic abuse might properly be characterized as a compelling state interest, particularly if the act of conferring a benefit on widows does not, per se, deprive widowers of any substantial benefits to which they are otherwise entitled. Nevertheless, the Court decided that it should not accept without historical inquiry the mere recitation of a benign, compensatory purpose; it would examine the legislation to determine if it were based, in fact, on archaic and overbroad

role stereotypes. Even if the statute did have an ameliorative purpose, it would reject such a justification if it restricted women or discriminated against some while benefiting others. Applying this reasoning, the Court found *Lab. Code § 3501(a)* discriminated unjustifiably against employed females. While it gave males the security of knowing their spouses will definitely receive death benefits, it denied working wives the same security. Moreover, while *Lab. Code § 3501(a)* eliminated red tape and so accelerated benefits to the truly needy widow, it reinforced a role stereotype by treating the employed female as if her contribution to the family income was always insignificant. The Court concluded that when a statute is sexually discriminatory on its face, is unsupported by any clear indication of ameliorative purpose, disadvantages large numbers of the very gender it purports to aid, and accomplishes this by perpetuation of paternalistic notions about the sexes, the statute cannot be said to be necessary to the realization of a compelling state goal.

Counsel will note that the statute in *Arp* distinguished between genders on its face. In another situation, in which the state action was facially neutral because it concerned the equal application of a physical agility test to men and women, the Court held that the fact that the test disqualified a disproportionate number of women did not, by itself, create a classification based on gender which would be subjected to strict scrutiny [*Hardy v. Stumph (1978) 21 Cal. 3d 1, 7, 145 Cal. Rptr. 176, 576 P.2d 1342 , set out in § 35A.39[3][a]*].

[c] Gender Discrimination as Not Justified by Overly Broad Stereotypical Assumptions

Craig v. Boren *(1976) 429 U.S. 190, 97 S. Ct. 451, 50 L. Ed. 2d 397 , reh'g denied, 429 U.S. 1124 (1977)* , was a constitutional attack on the validity of Oklahoma statutes that prohibited the sale of 3.2 percent beer to males under the age of 21 but permitted sale to females over the age of 17. The United States Supreme Court held that the statutory gender-based differential constituted a denial of equal protection in violation of the *Fourteenth Amendment* to males aged 18-20. Its opinion did not describe gender as a suspect category requiring strict scrutiny. Instead, the Court stated that classifications based on gender may survive scrutiny under the federal Constitution only if they serve important governmental objectives and are substantially related to achievement of those objectives. The Court cited several cases in which a sex-based classification was invalidated because gender had been employed as an "inaccurate proxy" for more germane classifications. In these situations, the classification of women on the basis of overbroad generalizations or loose fitting, stereotypical characterizations of their roles or situations resulted in a weak congruence between gender and the characteristic or trait that gender purported to represent to achieve the goal of the legislation. The Court held that the Oklahoma statutes represented such an inaccurate classification. Although protection of public health and safety represents an important function of state and local government, the statistics introduced by the state of Oklahoma on the driving habits of drunken male youth were too general and violated the requirement that a gender-based difference be substantially related to achievement of the statutory objective.

Counsel will note that in *Arp v. Workers' Compensation Appeals Bd.*, discussed *above*, the California Supreme Court also rejected overly broad, stereotypical assumptions related to gender as a basis for justification under its strict scrutiny approach. In that case, the Court was confronted with attempts to justify a statute which created a conclusive presumption for the purpose of collecting death benefits that widows were wholly dependent on their deceased spouses but did not extend the same presumption in favor of widowers. The Court's analysis made it clear that benefits given to members of one gender cannot be easily justified by overly broad, stereotypical assumptions. The Court reasoned that the purpose of the statute was not ameliorative but simply reflected an archaic and overbroad role stereotype which treated wives as dependent by nature and custom. It described the statute as founded on unexamined role stereotypes and a social and psychological reflex.

[4] Additional Authorities

[a] Gender Discrimination Is Not Justified by Overly Broad Stereotypical Assumptions

Stanton v. Stanton (1975) 421 U.S. 7, 95 S. Ct. 1373, 43 L. Ed. 2d 688 , involved a Utah statute providing that females attain the age of majority on their 18th birthday but males must wait until they are 21. The trial court and the

Utah Supreme Court concluded that a divorced father was not obligated to support a daughter who had reached the age of 18. The mother of the girl appealed to the United States Supreme Court, which reversed. The Court observed that the main justifications offered in supportof the statute were what the Utah Supreme Court referred to as "old notions," such as the idea that since men are primarily responsible for providing a home and its essentials, it is beneficial for them to receive support for education or training whereas women tend to mature and marry earlier so that their period of legal minority need not be extended. The United States Supreme Court concluded that these old notions, based on role stereotypes rather than current reality, could not justify drawing a distinction between children for the purpose of child support. The Court stated that whatever form of equal protection analysis is used--the compelling state interest test, rational basis test, or something in between--the statute denies females who had reached 18 the equal protection of the laws, as guaranteed by the *Fourteenth Amendment*.

[b] Gender Subject to Strict Scrutiny

In *Connerly v. State Personnel Board (2001) 92 Cal. App. 4th 16, 112 Cal. Rptr. 2d 5* , a private citizen continued litigation commenced by a governor challenging five statutory programs falling within the general rubric of "affirmative action," on the ground they impermissibly establish classifications and preferences based on race, ethnicity, and gender. The trial court found invalid a portion of one scheme and all of another, but otherwise rejected the plaintiff's contentions (*92 Cal. App. 4th 16, 27)* . The Court of Appeal reversed and remanded, holding that all of four of the schemes were invalid and as to the fifth, a portion could be severed from the remaining invalid portions and upheld (*92 Cal. App. 4th 16, 28)* . The court found that (1) under the federal and California Constitutions, strict scrutiny applies to racial classifications, (2) under the state constitution, strict scrutiny applies to gender classifications, and (3) Proposition 209 (*Cal. Const., art. I, § 31*) imposes additional restrictions against racial and gender preferences and discriminatory actions (*92 Cal. App. 4th 16, 19-41)* . The court found further that insofar as the challenged statutory schemes utilize race and gender classifications, they are invalid (*92 Cal. App. 4th 16, 28)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsMandamusConstitutional LawEqual ProtectionScope of Protection

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Volume 3 Chapters 34-39 CHECKS AND BANKS---to---CIVIL SERVICE
CHAPTER 35A CIVIL RIGHTS: EQUAL PROTECTION
PART II. FORMS

3-35A California Points & Authorities § 35A.32A

§ 35A.32A Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--Suspect Categories or Burdens on Fundamental Interests as Subject to Strict Scrutiny--Classifications Based on Sexual Orientation as Suspect; Burdens on Family Relationships as Suspect

[1] FORM

[*Caption. See § 35A.20.*]

A WRIT OF MANDATE IS PROPER TO CHALLENGE STATE ACTION WHICH VIOLATES THE RIGHT TO EQUAL PROTECTION UNDER THE STATE CONSTITUTION WHEN IT CONTAINS A [CLASSIFICATION BASED ON SEXUAL ORIENTATION] _____ [AND *or* OR] BURDEN ON FAMILY RELATIONSHIPS] WHICH _____ [IS *or* ARE] NOT JUSTIFIED BY A COMPELLING GOVERNMENTAL INTEREST.

A-F. Authorities Establishing Equal Protection Challenge to Suspect Category. [*See § 35A.20, Paragraphs A-D, F, G.*]

G. Classifications Based on Sexual Orientation Are Suspect. A classification based on sexual orientation is suspect under the California Constitution and subject to strict judicial scrutiny (*In re Marriage Cases (2008) 43 Cal. 4th 757, 783, 76 Cal. Rptr. 3d 683, 183 P.3d 384*).

[*and/or*]

[**G.** *or* **H.**] **Burdens on Family Relationships Are Suspect.** A burden on family relationships is suspect under the California Constitution and subject to strict judicial scrutiny (*In re Marriage Cases (2008) 43 Cal. 4th 757, 783, 76 Cal. Rptr. 3d 683*).

[**H.** *or* **I.**] **State Action Subject to Strict Scrutiny Is Violation of Equal Protection Unless Justified.** [*See § 35A.20, Paragraph I.*]

Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This form of memorandum may be submitted in support of a petition for a writ of mandate to challenge the constitutionality of state action on equal protection grounds when the basis of the challenge is that the state action in question contains a classification based on sexual orientation and/or based on family relationships, both of which are suspect categories under the state Constitution, which is not justified by a compelling governmental interest.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should insert facts showing the classification based on sexual orientation and/or family relationship and the lack of justification by a compelling governmental interest.

Related memoranda for use in supporting a petition for writ of mandate on the ground that the classification is based on a suspect category are *set out in §§ 35A.29-35A.31, 35A.33, 35A.34*.

[3] Discussion of Authorities

[a] Classifications Based on Sexual Orientation and Burdens Placed on Fundamental Right to Marry Are Suspect

In ***In re Marriage Cases*** *(2008) 43 Cal. 4th 757, 76 Cal. Rptr. 3d 683, 183 P.3d 384* , the Mayor of the City and County of San Francisco (City) sent a letter to the county clerk, directing the clerk to determine what changes should be made to the forms and documents used to apply for and issue marriage licenses, so that licenses could be provided to couples without regard to their gender or sexual orientation. The county clerk designed revised forms for the marriage license application and for the licenseand certificate of marriage, and the City began issuing marriage licenses to same-sex couples. The following day, two separate actions were filed seeking an immediate stay as well as writ relief, to prohibit the city's issuance of marriage licenses to same-sex couples. After the superior court declined to grant an immediate stay and the City continued to issue marriage licenses to and solemnize and register marriages of numerous same-sex couples, the California Attorney General and a number of taxpayers filed two separate petitions seeking to have the California Supreme Court issue an original writ of mandate, asserting that the City's actions were unlawful and warranted immediate intervention. The Court issued an order to show cause in those proceedings, and, pending determination of both matters, directed City officials to enforce the existing marriage statutes and refrain from issuing marriage licenses not authorized by those provisions (*Fam. Code §§ 300, 308.5*). In addition, the Court stayed all proceedings in the two cases then pending in San Francisco Superior Court, but indicated that the stay did not preclude the filing of a separate action in superior court raising a direct challenge to the constitutionality of California's current marriage statutes. The City filed a writ petition and complaint for declaratory relief in superior court, seeking a declaration that *Fam. Code § 308.5*, which was an initiative statute proposed by Proposition 22 and enacted by the voters, did not apply to marriages solemnized in California, and that in any event, all California statutory provisions limiting marriage to unions between a man and a woman violated the California Constitution. Thereafter, two similar actions challenging the constitutionality of California's current marriage statutes were filed by a number of same-sex couples who maintained either that they were involved in committed relationships but were not permitted to marry in California, or that their out-of-state marriages were not recognized under California law. Several statewide

organizations representing many thousands of same-sex couples joined as plaintiffs in these actions. The cases were coordinated by order of a judge appointed by the Chair of the Judicial Council, into a single proceeding entitled *In re Marriage Cases*. A sixth action filed by a separate group of same-sex couples who similarly challenged the constitutionality of the current marriage statutes was later added to the coordination proceeding. While the coordination proceeding was pending in the superior court, the California Supreme Court rendered its decision concluding that City officials had exceeded their authority in issuing marriage licenses to same-sex couples in the absence of a judicial determination that the statutory provisions limiting marriage to the union of a man and a woman were unconstitutional, and further concluding that the approximately 4,000 same-sex marriages performed in San Francisco prior to the earlier Court order staying proceedings were void and of no legal effect. In light of these conclusions, the Court issued a writ of mandate compelling City officials to comply with the requirements and limitations of the current marriage statutes in performing their duties under those statutes, and directing the officials to notify all same-sex couples to whom the officials had issued marriage licenses or registered marriage certificates that those same-sex marriages were void from their inception and a legal nullity. Although the Court concluded that City officials had acted unlawfully and the same-sex marriages they had authorized were void, the opinion made clear that the substantive question of the constitutionality of California's statutory provisions limiting marriage to a man and a woman was not before the Court and that the Court expressed no opinion on that issue. The superior court in the coordination matter proceeded expeditiously to conduct a hearing on the validity, under the California Constitution, of California's statutes limiting marriage to a man and a woman and issued its decision, confining its decision to the challenge based on the state constitutional *equal protection clause*. The superior court determined that the statutes limiting marriage in California to opposite-sex couples properly had to be evaluated under the strict scrutiny equal protection standard, because they rested on a suspect classification (sex) and impinged upon a fundamental constitutional right (the right to marry). The court considered the various state interests and justifications proffered in support of the enactments, ultimately concluding that the statutory limitation of marriage to the union of a man and a woman not only did not satisfy the strict scrutiny standard, but also did not meet the more deferential rational basis test because the differential treatment mandated by the statute did not further any legitimate state interest. Thus, the court held that California's current marriage statutes were unconstitutional under the state Constitution insofar as they limited marriage to opposite-sex couples and entered judgment in favor of plaintiffs in each of the coordinated cases. On appeal, the Court of Appeal reversed the superior court on the substantive constitutional issue. The Court of Appeal concluded the superior court erred in finding that the statutory provisions at issue impinged on the fundamental constitutional right to marry, determining that this right properly should have been interpreted to encompass only the right to marry a person of the opposite sex and the constitutional right the plaintiffs actually sought to enforce was a right to same-sex marriage, which the Court of Appeal found lacking in any historical or precedential support. The Court of Appeal rejected the superior court's conclusion that the California marriage statutes discriminated on the suspect basis of sex and were subject to strict scrutiny review, relying on the circumstance that the statutes did not discriminate against either men or women or treat either of the genders differently from the other, but rather permitted members of either gender to marry only a person of the opposite gender. Although the Court of Appeal found that California's marriage statutes realistically had to be viewed as providing differential treatment on the basis of sexual orientation, it held that sexual orientation did not constitute a suspect classification for purposes of the state *equal protection clause*. The Court of Appeal concluded that the marriage statutes were not subject to strict scrutiny review, but, rather had to be evaluated only under the deferential rational basis standard, and that the marriage statutes' limitation of marriage to opposite-sex couples survived rational basis review, because the state had a legitimate interest in preserving the traditional definition of marriage and the statute's classifications were rationally related to that interest (*43 Cal. 4th 757, 785-789)* .

The California Supreme Court granted review and reversed the Court of Appeal. The Court began by examining the relevant California statutory provisions relating to marriage and domestic partnership that lay at the heart of the controversy, finding that although the statutes governing marriage and family relations have undergone very significant changes in a host of areas since the late 19th century, the statutory designation of marriage as a relationship between a man and a woman remaineduncharged. The Court found that *Fam. Code § 300* limited marriages that lawfully may be performed in California to marriages of opposite-sex couples, that *Fam. Code § 308.5* had to be interpreted to apply both to marriages performed in California and those performed in other jurisdictions, and that *Fam. Code § 308.5,*

which stated both that only a marriage between a man and a woman is "recognized" in California and also that only a marriage between a man and a woman is "valid" in California, was intended to ensure that California would not legitimize or recognize same-sex marriages from other jurisdictions or permit same-sex partners to validly marry within California (*43 Cal. 4th 757, 792-801)* . The Court then reviewed the history of domestic partnership legislation in California, noting differences between the domestic partnership legislation and marriage characteristics, and holding that the provisions of both the current marriage statutes and the current domestic partnership statutes had to be considered in determining whether the challenged provisions of the marriage statutes violated the constitutional rights of same-sex couples guaranteed by the California Constitution (*43 Cal. 4th 757, 801-808)* . The Court then held that by limiting marriage to opposite-sex couples, California's marriage statutes violated a same-sex couple's fundamental right to marry as guaranteed by the privacy, free speech, and due process clauses of the California Constitution (*Cal. Const., art. I, §§ 1, 2, 7*), and violated the *equal protection clause* of the California Constitution (*Cal. Const., art. I, § 7*). Although the state Constitution does not contain an explicit reference to a right to marry, the Court found that the right to marry embodied in *Cal. Const., art. I, §§ 1* and *7* guaranteed same-sex couples the same substantive constitutional rights as opposite-sex couples to choose one's life partner and enter with that person into a committed, officially recognized, and protected family relationship that enjoys all of the constitutionally based incidents of marriage (*43 Cal. 4th 757, 809-829)* . The Court then held that despite the rights afforded to same-sex couples by the Domestic Partner Act, the current California statutes violated the right of same-sex couples to marry, because the statutes reserve exclusively to opposite-sex couples the traditional designation of marriage and assign a different designation, *i.e.*, domestic partnership, to the only official family relationship available to same-sex couples. Whether the name "marriage," in the abstract, is considered a core element of the state constitutional right to marry, one of the core elements is the right of same-sex couples to have their official family relationship accorded the same dignity, respect, and stature as that accorded to all other officially recognized family relationships. By drawing a distinction between the name assigned to the family relationship available to opposite-sex couples and the name assigned to the family relationship available to same-sex couples, and by reserving the historic and highly respected designation of marriage exclusively to opposite-sex couples while offering same-sex couples only the new and unfamiliar designation of domestic partnership, the statutes posed a serious risk of denying the official family relationship of same-sex couples the equal dignity and respect that is a core element of the constitutional right to marry (*43 Cal. 4th 757, 830-831)* .

The Court then held that the statutory assignment of different names for the official family relationships of opposite-sex couples and same-sex couples violated the state constitutional *equal protection clause*. The Court found first that the standard of review to be applied was strict scrutiny, because the basis for discrimination was sexual orientation, which the Court found to be a suspect class, and the statutes impinged on the fundamental right to marry. The Court rejected gender as the basis for discrimination, because in drawing a distinction between opposite-sex couples and same-sex couples, the challenged marriage statutes did not treat men and women differently, but rather were more properly viewed as instances of differential treatment on the basis of sexual orientation and accordingly should be evaluated on that ground (*43 Cal. 4th 757, 833-838)* . The Court held first that the statutory provisions restricting marriage to a man and a woman did not merely have a disparate impact on gay persons, but directly classified and prescribed distinct treatment on the basis of sexual orientation by limiting marriage to opposite-sex couples, which operated clearly and directly to impose different treatment on gay individuals because of their sexual orientation (*43 Cal. 4th 757, 839-840)* . The Court then held that sexual orientation is a suspect classification under the California equal protection clause, so that statutes drawing a distinction on this basis are subject to strict scrutiny (*43 Cal. 4th 757, 840-843)* . The Court rejected an intermediate scrutiny standard of review comparable to the standard applied by the United States Supreme Court to discriminatory classifications based on sex or illegitimacy, because in enforcing the California Constitution's equal protection clause, however, California cases have not applied an intermediate scrutiny standard of review to classifications involving any suspect (or quasi-suspect) characteristic, and there was no persuasive basis for applying to statutes that classified persons on the basis of the suspect classification of sexual orientation a standard less rigorous than that applied to statutes that classify on the basis of the suspect classifications of gender, race, or religion (*43 Cal. 4th 757, 843-844)* . The Court also found that the strict scrutiny standard applied because affording same-sex couples access only to the separate institution of domestic partnership and denying them access to the established institution of marriage, impinged on the right of those couples to have their family relationship accorded respect and dignity equal to

that accorded the family relationship of opposite-sex couples (*43 Cal. 4th 757, 844-847)* . The Court first rejected the contention that the separation-of-powers doctrine rendered judicial scrutiny improper because the statutory provisions embodied an integral aspect of the definition of marriage, and that the circumstance that the limitation of marriage to a union between a man and a woman embodied in *Fam. Code § 308.5* was enacted as an initiative measure by a vote of the electorate similarly neither exempted it from constitutional scrutiny nor justified a more deferential standard of review (*43 Cal. 4th 757, 847-853)* . The Court then concluded that the state interest in limiting the designation of marriage exclusively to opposite-sex couples and in excluding same-sex couples from access to that designation could not properly be considered a compelling state interest for equal protection purposes. While retention of the limitation of marriage to opposite-sex couples is not needed to preserve the rights and benefits of opposite-sex couples, the exclusion of same-sex couples from the designation of marriage works a real and appreciable harm upon same-sex couples and their children. Further, because of the historic disparagement of gay persons, the retention of a distinction in nomenclature by which the term "marriage" was withheld only from the family relationship ofsame-sex couples was all the more likely to cause the new parallel institution established for same-sex couples to be considered a mark of second-class citizenship. Finally, in addition to the potential harm flowing from the lesser stature likely to be afforded to the family relationships of same-sex couples by designating them domestic partnerships, there was a substantial risk that a judicial decision upholding the differential treatment of opposite-sex and same-sex couples would be understood as validating a more general proposition that California has repudiated, *i.e.,* that it is permissible, under the law, for society to treat gay individuals and same-sex couples differently from, and less favorably than, heterosexual individuals and opposite-sex couples. Thus, insofar as the provisions of *Fam. Code §§ 300* and *308.5* draw a distinction between opposite-sex couples and same-sex couples and excluded the latter from access to the designation of marriage, they are unconstitutional (*43 Cal. 4th 757, 853-856)* . Finally, the Court held that the proper remedy for the state's differential treatment of separate categories of individuals in violation of equal protection principles to be extend the designation of marriage to same-sex couples rather than withhold that designation from both opposite-sex couples and same-sex couples in favor of some other, uniform designation. Thus, the Court found that the language of *Fam. Code § 300* limiting the designation of marriage to a union "between a man and a woman" was unconstitutional and had to be stricken from the statute, and that the remaining statutory language had to be understood as making the designation of marriage available both to opposite-sex and same-sex couples. Because the limitation of marriage to opposite-sex couples imposed by *Fam. Code § 308.5* could have no constitutionally permissible effect, that provision could not stand (*43 Cal. 4th 757, 856-857)* .

In ***Strauss v. Horton*** *(2009) 46 Cal. 4th 364, 93 Cal. Rptr. 3d 591, 207 P.3d 48* , the California Supreme Court addressed Proposition 8, an initiative measure approved by a majority of voters in 2008, which added a new section to the California Constitution providing that only marriage between a man and a woman is valid or recognized in California (*Cal. Const., art. I, § 7.5*), and concluded that, under the governing provisions of the California Constitution, Proposition 8 constituted a permissible change to the California Constitution, but that it did not invalidate the estimated 18,000 marriages of same-sex couples that were performed before it was adopted (*46 Cal. 4th 364, 385-391, 406-412)* . Against the backdrop of *In re Marriage Cases*, the Court found that Proposition 8 had to be understood as carving out an exception to the preexisting scope of the privacy and due process clauses of the California Constitution with respect to the particular subject matter encompassed by Prop 8 (*46 Cal. 4th 364, 411-412)* . Although Proposition 8 eliminated the ability of same-sex couples to enter into an official relationship designated "marriage," in all other respects same-sex couples continue to possess, under the state constitutional privacy and due process clauses, the core set of basic substantive legal rights and attributes traditionally associated with marriage, including the opportunity of an individual to establish, with the person with whom the individual has chosen to share his or her life, an officially recognized and protected family possessing mutual rights and responsibilities and entitled to the same respect and dignity accorded a union traditionally designated as marriage (*46 Cal. 4th 364, 412* , quoting *In re Marriage Cases (2008) 43 Cal. 4th 757, 781, 76 Cal. Rptr. 3d 683, 183 P.3d 384*). The Court found that, like opposite-sex couples, same-sex couples enjoy this protection not as a matter of legislative grace, but of constitutional right.

The Court also found that Proposition 8 had a similarly limited effect on the holdings of the majority opinion in *In re Marriage Cases* relating to the state constitutional *equal protection clause*. The equal protection principles established

in that case, *i.e.*, that sexual orientation constitutes a suspect classification for purposes of analysis under the state *equal protection clause*, and that statutes according differential treatment on the basis of sexual orientation are subject to the strict scrutiny standard of review, were unaffected by the new section added to the California Constitution by Proposition 8. With respect to the specific subject of the designation of the word "marriage," Proposition 8 did change the rule set forth in *In re Marriage Cases* that limiting access to this designation to opposite-sex couples constituted an impermissible violation of the state *equal protection clause* by incorporating into the California Constitution a specific provision that expressly restricts the designation of "marriage" to the union of a man and a woman, creating a limited exception to the state *equal protection clause* as interpreted in *In re Marriage Cases* (*46 Cal. 4th 364, 411)* . Although constituting the governing state constitutional rule with regard to the specific matter it addressed, this exception did not alter the general equal protection principles set forth in *In re Marriage Cases* and in other California decisions interpreting and applying the state constitutional *equal protection clause*, and those principles continue to apply in all other contexts (*46 Cal. 4th 364, 411-412)* .

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Volume 3 Chapters 34-39 CHECKS AND BANKS---to---CIVIL SERVICE
CHAPTER 35A CIVIL RIGHTS: EQUAL PROTECTION
PART II. FORMS

3-35A California Points & Authorities § 35A.33

§ 35A.33 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--Suspect Categories or Burdens on Fundamental Interests as Subject to Strict Scrutiny--Classifications Based on Illegitimacy as Subject to Scrutiny

[1] FORM

[*Caption. See § 35A.20.*]

A WRIT OF MANDATE IS PROPER TO CHALLENGE STATE ACTION WHICH VIOLATES THE RIGHT TO EQUAL PROTECTION WHEN IT CONTAINS A CLASSIFICATION BASED ON ILLEGITIMACY IF THE LEGITIMATE STATE INTERESTS WHICH THE CLASSIFICATION PROMOTES DO NOT OUTWEIGH THE FUNDAMENTAL PERSONAL RIGHTS WHICH IT ENDANGERS.

A-F. Authorities Establishing Equal Protection Challenge to Suspect Category. [*See § 35A.20, Paragraphs A-D, F, G.*]

G. Classifications Based on Illegitimacy as Subject to Scrutiny. A classification based on illegitimacy, while not suspect under the *Fourteenth Amendment*, is analogous to many personal characteristics which are suspect and subject to judicial scrutiny beyond the reasonableness test (*Trimble v. Gordon (1977) 430 U.S. 762, 767, 97 S. Ct. 1459, 52 L. Ed. 2d 31*).

H. State Action Subject to Scrutiny as Violation of Equal Protection Unless Justified. State action which contains classifications based on illegitimacy violates the *equal protection clause of the Fourteenth Amendment* unless the legitimate interests promoted by the classification justify the danger to fundamental personal rights which the state action creates (*Trimble v. Gordon (1977) 430 U.S. 762, 766-767, 773-774, 97 S. Ct. 1459, 52 L. Ed. 2d 31*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a petition for a writ of mandate to challenge the constitutionality of state action on equal protection grounds when the basis of the challenge is that the state action in question contains a classification based on illegitimacy which cannot survive judicial scrutiny beyond the rational relationship standard.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

Related memoranda of points and authorities for use in supporting a petition for writ of mandate on the ground that the classification is based on a suspect category are *set out in §§ 35A.29 -35A.32, 35A.34*.

[3] Discussion of Authorities

[a] Classifications Based on Illegitimacy as Subject to Scrutiny

Trimble v. Gordon *(1977) 430 U.S. 762, 97 S. Ct. 1459, 52 L. Ed. 2d 31* , was a challenge to the constitutionality of an Illinois statute which permitted legitimate children to inherit by intestate succession from either parent but allowed illegitimate children to inherit only from their mothers. The Supreme Court held that the statute violated the *equal protection clause of the Fourteenth Amendment*. In reaching this conclusion, the Court applied a standard of scrutiny that was less than that of strict scrutiny but more than a standard requiring merely a rational link with a legitimate state goal. The Court first rejected the contention that illegitimacy was a suspect category, even though it is analogous in many respects to the personal characteristics, like race or alienage, which are viewed as suspect. However, although the Court declined to adopt a strict scrutiny analysis, the analysis which it used bore a striking resemblance to the compelling state interest approach. Weighing the proposed justifications for the statute against the effect of the statutory differentiation, the Court found that the law could not be justified as an attempt to promote legitimate family relationships because it penalized innocent children for the failures of their parents, contrary to the basic principle that legal burdens should bear some relationship to individual responsibility or wrongdoing. Similarly, the statute could not be justified by the state's interest in establishing a method of disposing of property because its policy of total exclusion discriminated too broadly between legitimate and illegitimate when it should have been carefully tuned to alternative considerations.

[b] State Action Subject to Scrutiny as Violation of Equal Protection Unless Justified

The factual background of ***Trimble v. Gordon*** *(1977) 430 U.S. 762, 97 S. Ct. 1459, 52 L. Ed. 2d 31* , is discussed in *§ 35A.33[3][a]*. In holding that a statutory classification that regulated the ability of illegitimate children to inherit from their fathers violated the guarantee of equal protection, the Court rejected the concept that illegitimacy was a suspect category but did not declare the statute unconstitutional on the ground that it was arbitrary. Instead, the Court said essentially that the legitimate interests the statute promoted would have to justify the dangers created by the statute to fundamental personal rights. Although the Court did not adopt a specific formulation of the new test, it quoted from *Weber v. Aetna Cas. & Sur. Co. (1972) 406 U.S. 164, 172, 92 S. Ct. 1400, 31 L. Ed. 2d 768* , which held that in illegitimacy cases the court must make a dual inquiry into both the legitimate state interest which the classification promotes and the fundamental personal rights the classification endangers, framing the issue as to whether the differentiation created by the statute could be justified by the promotion of recognized state objectives.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsMandamusConstitutional LawEqual ProtectionGeneral OverviewConstitutional LawEqual ProtectionScope of Protection

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3-35A California Points & Authorities § 35A.34

§ 35A.34 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--Suspect Categories or Burdens on Fundamental Interests as Subject to Strict Scrutiny--Classifications Based on Wealth and Affecting Fundamental Interest as Suspect

[1] FORM

[*Caption. See § 35A.20.*]

A WRIT OF MANDATE IS PROPER TO CHALLENGE STATE ACTION WHICH VIOLATES THE RIGHT TO EQUAL PROTECTION WHEN IT CONTAINS A CLASSIFICATION BASED ON WEALTH AND BURDENING A FUNDAMENTAL INTEREST WHICH IS NOT JUSTIFIED BY A COMPELLING GOVERNMENTAL INTEREST.

A-F. Authorities Establishing Equal Protection Challenge to Suspect Category. [*See § 35A.20, Paragraphs A-D, F, G.*]

G. Classifications Based on Wealth and Burdening Fundamental Interest as Suspect. A classification based on wealth is suspect only under the following circumstances (*San Antonio Independent School Dist. v. Rodriguez (1973) 411 U.S. 1, 20, 93 S. Ct. 1278, 36 L. Ed. 2d 16*):

(1) When individuals are completely unable to pay for some desired benefit because of their impecunity.

(2) As a consequence, they sustain an absolute deprivation of a meaningful opportunity to enjoy that benefit.

[*Optional*] **H. Wealth as Basis for Benefit.** A classification is based on wealth if, on the basis of personal resources, it totally deprives an individual of the benefits resulting from exercise of a fundamental interest or reduces the quality of such benefits (*San Antonio Independent School Dist. v. Rodriguez (1973) 411 U.S. 1, 23-24, 93 S. Ct. 1278, 36 L. Ed. 2d 16* ; *Serrano v. Priest (1976) 18 Cal. 3d 728, 755-756, 135 Cal. Rptr. 345, 557 P.2d 929 , cert. denied sub nom. Clowes v. Serrano, 432 U.S. 907 (1977))* .

I. State Action Subject to Strict Scrutiny Is Violation of Equal Protection Unless Justified. [*See § 35A.20, Paragraph I.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a petition for a writ of mandate to challenge the constitutionality of state action on equal protection grounds when the basis of the challenge is that the state action in question contains a classification not justified by a compelling governmental interest, which is based on wealth and burdens a fundamental interest of the individual.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

Related memoranda of points and authorities for use in supporting a petition for writ of mandate on the ground that the classification is based on a suspect category are *set out in §§ 35A.29 -35A.33*.

[3] Discussion of Authorities

[a] Classifications Based on Wealth and Burdening Fundamental Interest as Suspect

The factual background of ***Serrano v. Priest*** *(1976) 18 Cal. 3d 728, 135 Cal. Rptr. 345, 557 P.2d 929 , cert. denied, 432 U.S. 907 (1977)* , is discussed in *§ 35A.20[3][c]*. In that case, the Supreme Court held that a system of school financing under which money available for schools varied according to school district wealth constituted a violation of equal protection under the California Constitution. The analysis of the Court makes it clear that classifications based on wealth which affect fundamental interests are highly vulnerable to challenges based on equal protection. The Court stated that because the school financing system has been shown to involve a suspect classification insofar as it draws distinctions on the basis of school district wealth and because that classification affects the fundamental interest of students' education, it would have no difficulty in concluding that the system must be examined with a strict and searching scrutiny.

[i] Absence of Fundamental Interest

Counsel will also note that the earlier decision of *In re Antazo (1970) 3 Cal. 3d 100, 112, 89 Cal. Rptr. 255, 473 P.2d 999* [*set out in § 35A.46[3][b]*] contained language which suggested that wealth was a suspect category, even where it was not the basis for infringing on a fundamental interest. In that decision, the Court characterized a classification which discriminated on the basis of poverty as a suspect classification which must be reviewed and evaluated under the strict scrutiny test. However, the authority of *Antazo* must be doubted for two reasons. First, the decision relied on *Williams v. Illinois (1970) 399 U.S. 235, 239-240, 90 S. Ct. 2018, 26 L. Ed. 2d 586* [*set out in § 35A.46[3][b]*] for its interpretation of the character of wealth under the *Fourteenth Amendment* and, as discussed below, the Supreme Court subsequently declined to hold that classifications based solely on wealth were subject to strict scrutiny under the *Fourteenth Amendment*. Second, as an interpretation of *Cal. Const., art. I, § 7(a)*, this language in *Antazo* appears to have been repudiated in *Serrano* by the California Supreme Court's statement that whether there should be strict

scrutiny review of all governmental classifications based on wealth, thus elevating such classifications to a level of "suspectedness" equivalent to those based on race, was still an open question in California. Moreover, *Antazo,* in fact, involved the fundamental interest of personal liberty [*see § 35A.42*] although the Court did not discuss this interest and clearly did not require that wealth be considered a suspect category only in the presence of a fundamental interest.

In the subsequent decision of ***San Antonio School Dist. v. Rodriguez*** *(1973) 411 U.S. 1, 25 n.60, 29, 93 S. Ct. 1278, 36 L. Ed. 2d 16 , reh'g denied, 411 U.S. 959, 93 S. Ct. 1919, 36 L. Ed. 2d 418* , the United States Supreme Court noted that it had never held that discrimination on the basis of wealth alone, without interference with a fundamental right, provides an adequate basis for invoking strict scrutiny. Nevertheless, the language of some decisions does support the view that wealth, by itself, is a suspectcategory. In *San Antonio,* the Court commented that a system of education made available only to those who could pay tuition would present a far more compelling set of circumstances for judicial assistance. This comment is supported by the dictum in *Shapiro v. Thompson (1969) 394 U.S. 618, 633, 89 S. Ct. 1322, 22 L. Ed. 2d 600* , where the Court said that to reduce expenditures for education by barring indigent children from the schools would be an invalid, invidious distinction. Neither of these comments ties the analysis of wealth to the presence of a fundamental interest; indeed, in *San Antonio,* the Court concluded that education was not a fundamental interest protected by the *equal protection clause*.

[b] Wealth as Basis for Benefit

The factual background of ***San Antonio School Dist. v. Rodriguez*** *(1973) 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 , reh'g denied, 411 U.S. 959, 93 S. Ct. 1919, 36 L. Ed. 2d 418* , is discussed in *§ 35A.20[3][h]*. In that case, the Supreme Court determined that a school financing law did not discriminate on the basis of wealth. The Court pointed out that even if children from districts having less assessable wealth were receiving a poorer quality education, they were not absolutely deprived of the benefits of education. Individuals or groups of individuals who constituted the class discriminated against on the basis of wealth in prior cases were, because of their impecunity, completely unable to pay for some desired benefit and as a consequence sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit. The Court cited, for example, *Griffin v. Illinois (1956) 351 U.S. 12, 19-20, 76 S. Ct. 585, 100 L. Ed. 891* (indigent defendant as denied transcript or adequate substitute for transcript) and *Williams v. Illinois (1970) 399 U.S. 235, 239-240, 90 S. Ct. 2018, 26 L. Ed. 2d 586* (incarceration of indigent defendants solely because of their inability to pay fine is unconstitutional). A relative deprivation is not sufficient to constitute discrimination on the basis of wealth since the *equal protection clause* does not require absolute equality or precisely equal advantages.

The factual background of ***Serrano v. Priest*** *(1976) 18 Cal. 3d 728, 135 Cal. Rptr. 345, 557 P.2d 929 , cert. denied, 432 U.S. 907 (1977)* , is discussed in *§ 35A.20[3][c]*. In that case, the Court concluded that both the previous system of school financing and the one subsequently enacted in response to the first *Serrano* decision discriminated on the basis of wealth. This discrimination, in the opinion of the Court, possessed two elements--it conditioned the availability of government resources (that is, school revenue) on the wealth of districts, which was disparate, and it resulted in a disparate quality of the service which was sought, namely education.

Counsel will note that the United States Supreme Court appears to have adopted a more restrictive definition of discrimination on the basis of wealth under the *Fourteenth Amendment* in *San Antonio School Dist. v. Rodriguez (1973) 411 U.S. 1, 20, 25, 93 S. Ct. 1278, 36 L. Ed. 2d 16* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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3-35A California Points & Authorities § 35A.35

§ 35A.35 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--Suspect Categories or Burdens on Fundamental Interests as Subject to Strict Scrutiny--Exercise of Franchise as Fundamental Interest

[1] FORM

[*Caption. See § 35A.20.*]

A WRIT OF MANDATE IS PROPER TO CHALLENGE STATE ACTION WHICH VIOLATES THE RIGHT TO EQUAL PROTECTION WHEN IT CONTAINS A CLASSIFICATION BURDENING EXERCISE OF THE FRANCHISE WHICH IS NOT JUSTIFIED BY A COMPELLING GOVERNMENTAL INTEREST.

A-F. Authorities Establishing Equal Protection Challenge to Burden on Fundamental Interest. [*See § 35A.20, Paragraphs A-D, F, H.*]

G. Exercise of Franchise as Fundamental Interest. A classification which has a real and appreciable impact on the equality, fairness, and integrity of the electoral process and exercise of the franchise is subject to strict judicial scrutiny (*Bullock v. Carter (1972) 405 U.S. 134, 144, 92 S. Ct. 849, 31 L. Ed. 2d 92* ; *Fullerton Joint High School Dist. v. State Bd. of Education (1982) 32 Cal. 3d 779, 799, 187 Cal. Rptr. 398, 654 P.2d 168*).

[*Optional*] **H. Restrictions on Eligibility to Vote.** In an election of general interest, any restriction on eligibility to vote on grounds other than residence, age, and citizenship is subject to strict judicial scrutiny (*Hill v. Stone (1975) 421 U.S. 289, 297, 95 S. Ct. 1637, 44 L. Ed. 2d 172 , reh'g denied, 422 U.S. 1029*).

[*Optional*] **I. Barriers on Candidacy.** Barriers on candidacy which have a real and appreciable impact on the equality and fairness of exercise of the franchise are subject to strict scrutiny (*Bullock v. Carter (1972) 405 U.S. 134, 144, 92 S. Ct. 849, 31 L. Ed. 2d 92* ; *Choudhry v. Free (1976) 17 Cal. 3d 660, 664-665, 131 Cal. Rptr. 654, 552 P.2d 438*).

[*Optional*] **J. Restrictions on Ballot Initiatives and Referenda.** Regulations on a state's referendum process may implicate the fundamental right to vote (*Lemons v. Bradbury (9th Cir. 2008) 538 F.3d 1098, 1102-1107)* .

J. State Action Subject to Strict Scrutiny as Violation of Equal Protection Unless Justified. [*See § 35A.20, Paragraph I.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a petition for a writ of mandate to challenge the constitutionality of state action on equal protection grounds when the basis of the challenge is that the state action in question that burdens exercise of the franchise, a fundamental interest of the individual, is not justified by a compelling governmental interest.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should present facts that show that the state action has a real and appreciable impact on the right to vote, and that no compelling state interest exists for the restriction.

Related memoranda of points and authorities for use in supporting a petition for writ of mandate on the ground that the classification infringes a fundamental interest are *set out in §§ 35A.34, 35A.36 -35A.45*.

[b] Restriction of Franchise Justified in Municipal Annexation

The legislative scheme for the annexation of unincorporated territories into neighboring cities is set out in *Gov. Code § 56000 et seq.* (Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000). It provides that elections on a proposed annexation approved by the Local Agency Formation Commission will be held only in the affected territory, leaving the affected city with no say as to whether the territory will be annexed to it, when both of the following are true:

- The total assessed value of the land within the affected territory equals less than one half of the total assessed value of land in the affected city; and

- The number of registered voters residing in the affected territory equals less than one half of the number of registered voters residing in the affected city [*see Gov. Code § 57075* (former Gov. Code § 35228(b); election in affected territory if conditions met)].

Despite this restriction, the Supreme Court has upheld the legislative scheme. The Court acknowledged that the relevant geographic area for an annexation election includes both the territory to be annexed and the affected city, and that therefore the restriction of the franchise in an annexation election to residents of the territory to be annexed invokes the strict scrutiny standard of review [*Citizens Against Forced Annexation v. Local Agency Formation Com. (1982) 32 Cal. 3d 816, 822-824, 187 Cal. Rptr. 423, 654 P.2d 193]* . However, the Court held that when the conditions of former Gov. Code § 35231 are met, the probable impact of the annexation on the residents of the city will be smaller than its impact on the residents of the affected territory. In that case, the state has the following two compelling interests which under the strict scrutiny standard justify the state in restricting the franchise [*Citizens Against Forced Annexation v. Local Agency Formation Com. (1982) 32 Cal. 3d 816, 825-829, 187 Cal. Rptr. 423, 654 P.2d 193]* :

- A compelling interest limiting the election to persons with a substantial interest in the outcome of the election, coupled with an interest in avoiding the cost and burden of an election encompassing the affected city; and

- A compelling interest in promoting logical community development and providing municipal services to newly urbanized areas, and preventing the development of "orphan" islands of unincorporated territory rejected by neighboring cities but lacking the financial resources for self incorporation.

[3] Discussion of Authorities

[a] Exercise of Franchise as Fundamental Interest

In ***Bullock v. Carter*** *(1972) 405 U.S. 134, 92 S. Ct. 849, 31 L. Ed. 2d 92* , individuals who met all the qualifications to be candidates in the Texas Democratic primary for county offices but were unable to pay the large filing fees required by Texas statutes as a condition to having one's name placed on the primary ballot, challenged the validity of the Texas filing-fee system. A three-judge district court held the filing-fee scheme unconstitutional, and on direct appeal, the United States Supreme Court affirmed on the ground that the statutory filing fee denied equal protection of the laws because, without providing a reasonable alternative means of access to the ballot, it utilized the criterion of ability to pay as a condition of being on the ballot and thus excluded some otherwise qualified candidates and denied an undetermined number of voters the opportunity to vote for candidates of their choice. The Court identified the threshold question as whether the filing-fee system could be sustained if it is shown to have somerational basis or whether it must withstand a more rigid standard of review. The Court noted that not every limitation or incidental burden on the exercise of voting rights was subject to a stringent standard of review. In this case, however, close scrutiny is appropriate because the system has a real and appreciable impact on the exercise of the franchise and because this impact is related to the financial resources of the voters supporting a particular candidate.

Bullock should be distinguished from cases in which the United States Supreme Court avoided applying the strict scrutiny test to classifications related to voting by finding the classifications note to be infringements on the right to vote [*see, e.g.,* *Holt Civic Club v. Tuscaloosa (1978) 439 U.S. 60, 68-69, 99 S. Ct. 383, 58 L. Ed. 2d 292* (extraterritorial extension of franchise not required by extraterritorial extension of municipal powers); *Lockport v. Citizens for Community Action (1977) 430 U.S. 259, 272-273, 97 S. Ct. 1047, 51 L. Ed. 2d 313* (provisions establishing that reallocation of power between city and county governments must be approved separately by county and city voters are constitutional since they reflect substantially differing interests of two groups); *Gordon v. Lance (1971) 403 U.S. 1, 7-8, 91 S. Ct. 1889, 29 L. Ed. 2d 273* (referendum voting scheme giving disproportionate power to minority is constitutional when minority is not identifiable class)]. In ***Choudhry v. Free*** *(1976) 17 Cal. 3d 660, 131 Cal. Rptr. 654, 552 P.2d 438* , discussed in *§ 35A.35[3][c]*, the California Supreme Court was asked to rule that limitations on the electoral process in an irrigation district did not constitute an infringement on the right to vote. The Court rejected this view for the irrigation district in question and held that a denial of the right to vote was an infringement on the electoral process unless the excluded class was substantially less affected by the results of the election than those who were entitled to vote.

Fullerton Joint High School Dist. v. State Bd. of Education *(1982) 32 Cal. 3d 779, 187 Cal. Rptr. 398, 654 P.2d 168* , involved a proposed plan approved by the State Board of Education calling for severing a portion of a high school district, which was geographically separated from the main portion of the district, and integrating the severed portion into an independent school district. The plan called for an election on the question of severance to be held only in the portion of the district that was to be severed. The high school district petitioned the superior court for a writ of mandate barring the election, arguing inter alia that the restriction of the election franchise to residents of the portion of the district to be severed denied equal protection to the residents of the remaining portions of the district. The trial court found the plan permissible in part and defective in part, and issued a writ of mandate barring the election. Both parties appealed.

The California Supreme Court reversed the trial court's order that the election be barred completely, but held that the election must include all voters residing in the district. Addressing the issue of the restricted election, the Court restated the traditional rule that the strict standard of review applicable to classifications impinging on a fundamental right applies to legislation that excludes certain potential voters from participation (*32 Cal. 3d 779, 799)* . The Court further stated that although a classification that has only a minimal, if any, effect on the fundamental right to vote may escape strict scrutiny, the requirement that the state have a compelling interest that makes the classification necessary applies to classifications that have a real and appreciable impact on the equality, fairness, and integrity of the electoral process. The Court held that the classification before it clearly did not involve a mere incidental or marginal effect on the right to vote since it excluded all residents of the high school district outside of the portion to be severed from voting, an exclusion that may affect the outcome of the election (*32 Cal. 3d 779, 799)* .

The Court rejected two arguments by the board urging that exceptions to the strict scrutiny standard be applied. Regarding the first argument, the Court held that the cases of *Lockport v. Citizens for Community Action (1977) 430 U.S. 259, 272-273, 97 S. Ct. 1047, 51 L. Ed. 2d 313* , and *Holt Civic Club v. Tuscaloosa (1978) 439 U.S. 60, 68-69, 99 S. Ct. 383, 58 L. Ed. 2d 292* (*see above*), had not created a general exception permitting a geographical classification of voters that did not serve an impermissible purpose, such as racial discrimination, from escaping strict scrutiny. In particular, the Court held that no exception applied when the geographical classification excluded persons physically residing within the boundaries of the relevant geographical area from voting (*32 Cal. 3d 779, 800-803)* . The Court held that since the high school district is the existing legal entity with authority over the portion to be severed, and not merely a neighboring district incidentally affected by the secession of the affected portion, the relevant geographical area was the entire district, and not merely the portion to be severed (*32 Cal. 3d 779, 803)* .

Regarding the second argument, the Court acknowledged the existence of an exception to the strict scrutiny requirement for elections involving special districts of limited powers whose activities disproportionately affect members of a particular group. However, the Court held that a school district does not come under the category of district to which the exception applies (*32 Cal. 3d 779, 803-805)* .

Applying the standard of strict scrutiny, the Court acknowledged that a classification may permissibly exclude voters who have no interest in the election in order to protect the interest of voters who are vitally concerned with the issue to be voted on. However, the Court concluded that the classification in the case before it was not justified by the fact that the residents of the portion of the district to be severed had interests in the election that were not shared by the residents of the remaining portion of the district, when the residents of the remaining portion had their own separate, substantial interests in the election (*32 Cal. 3d 779, 805)* .

[b] Restrictions on Eligibility to Vote

In ***Hill v. Stone*** *(1975) 421 U.S. 289, 95 S. Ct. 1637, 44 L. Ed. 2d 172 , reh'g denied, 422 U.S. 1029* , certain voters in a tax bond election challenged the constitutionality of provisions of the Texas Constitution, state statutes, and a city charter, all of which limited the right to vote in city bond elections to persons who had listed property with local tax authorities. The federal district court held that this restriction violated the *equal protection clause of the Fourteenth Amendment*, and the state attorney general appealed directly to the United States Supreme Court, which affirmed on the ground that disfranchising persons in bond elections solely because they had not rendered property was impermissible unless justified and the proposed state interests were not compelling. The Court interpreted its prior voting rights decisions to stand for the basic principle that as long as the election in question is not one of special interest, any classification restricting the franchise on grounds other than residence, age, and citizenship cannot stand unless it is demonstrated that the classification serves a compelling state interest.

[c] Barriers on Candidacy

The factual background of ***Bullock v. Carter*** *(1972) 405 U.S. 134, 92 S. Ct. 849, 31 L. Ed. 2d 92* , is discussed in *§ 35A.35[3][a]*. *Bullock* required the Court to decide whether barriers on a candidate's access to the primary ballot would compel strict scrutiny as a restriction on the right to vote. It stated that since the existence of barriers, by itself, did not compel close scrutiny, it was essential to examine in a realistic light the extent and nature of their impact on voters. It noted that the Texas system that imposed large filing fees favored those who had personal wealth and affluent backers and thus was patently exclusionary. The effect of this exclusionary mechanism on voters was neither incidental nor remote. Voters were substantially limited in their choice of candidates and denied the opportunity to vote for a candidate of their choosing; further, the impact fell more heavily on the less affluent segment of the community. Because of this real and appreciable impact on the exercise of the franchise and because this impact was related to the resources of voters supporting particular candidates, the barriers on candidacy required strict scrutiny.

The factual background of ***Choudhry v. Free*** *(1976) 17 Cal. 3d 660, 131 Cal. Rptr. 654, 552 P.2d 438* , is discussed in *§ 35A.20[3][h]*. In that case, the California Supreme Court was required to determine whether a statute conditioning the right to be a candidate for director of the Imperial Irrigation District on owning land within the district should be subject to strict scrutiny. The Court reasoned that the right to be a candidate is subject to strict scrutiny for equal protection purposes when it is affected by a classification with a real and appreciable impact on the right of franchise. The Court reviewed cases in which the strict scrutiny test was applied to laws requiring candidate filing fees, durational residence requirements for candidacy, and placement of incumbents first on the ballot. These laws not only restricted the individual's ability to be a candidate, but restricted the right to vote by denying voters the opportunity to vote for certain candidates. The Court noted that the restriction on nonfreeholders was even more pervasive because it excluded an individual from the ballot entirely, whereas in previous cases, individuals could have obtained the ballot by payment of a fee, fulfillment of a durational residence requirement, or willingness to allow the placement of one's name below that of the incumbent. The Court concluded that the provision challenged had an appreciable impact on the equality and fairness of the electoral process.

[i] Expansion of Principle

Counsel will note that there is language in at least two California Supreme Court cases that goes beyond *Choudhry* in suggesting that candidacy is an independent fundamental right that has an interlocking relationship with the right to vote but is important enough in its own right that every intrusion, subtle or direct, which impairs or affects the right of candidates to seek the public's suffrage will be subjected to strict scrutiny. These cases appear to reject the conclusion in *Bullock v. Carter (1972) 405 U.S. 134, 143, 92 S. Ct. 849, 31 L. Ed. 2d 92* , that a barrier on the right to be a candidate, by itself, may not require strict scrutiny [*see* *Johnson v. Hamilton (1975) 15 Cal. 3d 461, 466-468, 125 Cal. Rptr. 129, 541 P.2d 881* ; *Zeilenga v. Nelson (1971) 4 Cal. 3d 716, 719-720, 94 Cal. Rptr. 602, 484 P.2d 578]* .

[d] Restrictions on Ballot Initiatives and Referenda

In ***Lemons v. Bradbury*** *(9th Cir. 2008) 538 F.3d 1098* , Oregon voters who signed a state referendum appealed the district court's denial of permanent injunctive relief against the Oregon Secretary of State. The Secretary had determined that the referendum, which sought a statewide vote on a legislative act establishing same-sex domestic partnerships, did not have enough valid signatures to qualify for the ballot. The district court held that the Secretary's sampling procedures did not violate the plaintiffs' equal protection rights, and the Ninth Circuit affirmed. Oregon statutes required the Secretary to use a statistical sampling method for verifying referendum petition signatures using an elector's voter registration record or other database. The Secretary sampled approximately five percent of the submitted signatures for each referendum, and submitted the sampled signatures to county elections officials. A publication entitled *Directive for Signature Verification*, issued by the Secretary, specified that county elections officials should compare the signature on the petition and the signature on the voter registration card to identify whether the signature was genuine and must be counted. The Secretary extrapolated the overall number of valid petition signatures using the sampled signature results. Oregon law did not provide procedures by which a voter could introduce extrinsic evidence to rehabilitate a referendum signature after its rejection. In contrast, for non-matching ballot signatures returned during Oregon's vote-by-mail

elections, the Secretary's *Vote by Mail Procedures Manual* required county elections officials to give the voter ten-days' notice and an opportunity to submit an updated voter registration card (*538 F.3d 1098, 1100-1101)* . The Ninth Circuit held that, although regulations on the referendum process implicated the fundamental right to vote, the state's important interests justified the minimal burden on plaintiffs' rights and that Oregon's signature verification standards were uniform and specific enough to ensure equal treatment of voters (*538 F.3d 1098, 1102-1107)* .

[4] Additional Authorities

[a] Exercise of Franchise as Fundamental Interest

The factual background of *Choudhry v. Free (1976) 17 Cal. 3d 660, 131 Cal. Rptr. 654, 552 P.2d 438* , is discussed in *§ 35A.20[3][h]*. In that case, petitioners challenged on equal protection grounds a statute providing that a candidate for director of a water district must be a freeholder in the district. The California Supreme Court declared the law unconstitutional as it applied to the Imperial Irrigation District under the *equal protection clauses* of both the United States and the California Constitutions. The Court first inquired whether petitioners' claim was to be judged by the compelling interest test or the rational relation test. It noted that because the right of franchise is fundamental in character, the stricter of these standards has often been applied. Although not every classification created by an election law is subject to strict scrutiny, the compelling interest test must be applied if a classification has a real and appreciable impact on the equality, fairness, and integrity of the electoral process.

[b] Restrictions on Eligibility to Vote

In *Westbrook v. Mihaly (1970) 2 Cal. 3d 765, 87 Cal. Rptr. 839, 471 P.2d 487 , vacated, 403 U.S. 915 (1971)* , petitioners, who were residents and registered voters of a municipality, filed suit for a writ of mandamus to compel municipal authorities to certify that local bond issues were approved by a majority of the voters even though they did not receive the two-thirds vote required by former Cal. Const., art. XIII, § 40 [*see now* Cal. Const., art. XIV, § 18]. Petitioners claimed that this provision of the California Constitution violated the *equal protection clause of the Fourteenth Amendment* because it substantially diminished the effect of the votes of all persons favoring passage of the bond issue. The California Supreme Court agreed. It first determined that the right to vote belongs in the category of rights that are deemed fundamental and then applied strict judicial scrutiny to hold that the state constitutional provision violated the *equal protection clause*.

Although respondents argued that a requirement of two-thirds voter approval in a local bond election did not abridge the fundamental right to vote because it did not apply to elections for public office and did not absolutely deny the voting franchise, the Supreme Court rejected both these arguments, holding that the type of election does not determine the parameters of the right and any invasion or restraint on the right is sufficient to invoke the strict scrutiny standard of review.

Westbrook, however, was vacated by the United States Supreme Court on the basis of the holding in *Gordon v. Lance (1971) 403 U.S. 1, 7-8, 91 S. Ct. 1889, 29 L. Ed. 2d 273* , that the *Fourteenth Amendment* does not prevent a state from requiring more than a simple majority on tax and revenue measures.

In *Ramirez v. Brown (1973) 9 Cal. 3d 199, 107 Cal. Rptr. 137, 507 P.2d 1345 , rev'd, 418 U.S. 24 (1974)* , three ex-felons, all of whom had successfully completed parole, challenged the constitutionality of former Cal. Const., arts. II, XX, § 11 [*now see Cal. Const., art. II, § 11*], which denied the right to vote to persons convicted of an infamous crime. The California Supreme Court held that these provisions and the statutes implementing them violated the *equal protection clause of the Fourteenth Amendment*. The Court first noted that since its last major pronouncement on the fundamental right to vote in *Otsuka v. Hite (1966) 64 Cal. 2d 596, 601, 51 Cal. Rptr. 284, 414 P.2d 412* , the test for judging the constitutionality of a state-imposed limitation on the right to vote had become substantially more strict. A restriction on voting must be necessary to promote a compelling state interest, and to be necessary, it must constitute the

"least burdensome" alternative possible. That is, if there are other, reasonable ways to achieve its goals with a lesser burden on constitutionally protected activity, a state may not choose the way of greater interference. For the Court, this principle requiring the least burdensome means available to achieve the goal became the crux of the case. The purpose of disfranchisement of ex-felons was to deter election fraud. However, the state's modern electoral system had undergone repeated reforms which diminished the possibility of election fraud. Further, a broad range of penal sanctions had been enacted to prevent such fraud. Enforcement of the laws governing the voting process and penalizing its misuse--rather than the outright disfranchisement of persons convicted of crime--is the method of preventing election fraud which is least burdensome on the right of suffrage.

Ramirez was reversed by the United States Supreme Court for its interpretation of the scope of the *Fourteenth Amendment*, but the case is still significant for indicating the highly protective approach of the California Supreme Court in addressing statutes and other forms of regulation that affect the right to vote.

[c] Barriers on Candidacy

In *Elections Bd. v. Socialist Workers Party (1979) 440 U.S. 173, 99 S. Ct. 983, 59 L. Ed. 2d 230, 241-243* , a barrier on candidacy was created by an Illinois statute that required a candidate to gather 25,000 voters' signatures for a statewide election but a greater number of signatures to run in a Chicago election; the statute was challenged by prospective candidates for the Chicago mayorality position. The United States Supreme Court, in holding that the statute violated the *equal protection clause*, pointed out that restrictions on access to the ballot burden two distinct and fundamental rights--the right to associate for the advancement of political beliefs and the right of voters to cast their ballots effectively. Even though the states have a legitimate interest in regulating the number of candidates on a ballot, the signature requirements for Chicago candidates are clearly not the least restrictive means of protecting that interest since a lower requirement is provided for statewide elections.

Gould v. Grubb (1975) 14 Cal. 3d 661, 122 Cal. Rptr. 377, 536 P.2d 1337 , was a mandate proceeding in which two candidates for public office challenged the validity of a city charter provision which effectively required that incumbents' names be placed on the top of the election ballot. The California Supreme Court ruled that the city charter provision constituted a denial of equal protection under the federal and state Constitutions because it imposed a real and appreciable impact on the quality, fairness, and integrity of the electoral process. First, the Court cited the rule that any classification scheme which imposes a real and appreciable impact on the equality, fairness, and integrity of the electoral process would be subjected to strict scrutiny. Second, the Court determined that the city charter provision in question would be subjected to strict scrutiny because of the trial court's determination that the candidate in the top ballot position has a substantial advantage over lower-placed candidates. The charter thus inevitably dilutes the weight of the vote of those electors who cast their ballots for a candidate not included within the advantaged class. The Court distinguished the incumbent-first provision from election provisions detailing the mechanisms of the election process which, because of their minimal effect on the fundamental right to vote, are judged on the "rational basis" standard.

Gould is significant because it probably represents the least restrictive candidacy related provision to which the Court applied the strict scrutiny test; other decisions on the right of candidacy examined laws which, in effect, prevented one from becoming a candidate [*see, e.g.,* *Choudhry v. Free (1976) 17 Cal. 3d 660, 664, 131 Cal. Rptr. 654, 552 P.2d 438* (restriction of candidates to property owners is unconstitutional; *see § 35A.35[3*][c]); *Johnson v. Hamilton (1975) 15 Cal. 3d 461, 472, 125 Cal. Rptr. 129, 541 P.2d 881* (prefiling residence requirement greater than 30 days is unconstitutional); *Knoll v. Davidson (1974) 12 Cal. 3d 335, 350, 116 Cal. Rptr. 97, 525 P.2d 1273* (filing fee is unconstitutional unless alternative means of access to ballot provided for indigent and nonindigent candidates)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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Volume 3 Chapters 34-39 CHECKS AND BANKS---to---CIVIL SERVICE
CHAPTER 35A CIVIL RIGHTS: EQUAL PROTECTION
PART II. FORMS

3-35A California Points & Authorities § 35A.36

§ 35A.36 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--Suspect Categories or Burdens on Fundamental Interests as Subject to Strict Scrutiny--Marriage and Procreation as Fundamental Interests

[1] FORM

[*Caption. See § 35A.20.*]

A WRIT OF MANDATE IS PROPER TO CHALLENGE STATE ACTION WHICH VIOLATES THE RIGHT TO EQUAL PROTECTION WHEN IT CONTAINS A CLASSIFICATION BURDENING THE RIGHT TO MARRY OR HAVE OFFSPRING WHICH IS NOT JUSTIFIED BY A COMPELLING GOVERNMENTAL INTEREST.

A-F. Authorities Establishing Equal Protection Challenge to Burden on Fundamental Interest. [*See § 35A.20, Paragraphs A-D, F, H.*]

G. Marriage and Procreation Are Fundamental Interests. A classification which significantly interferes with exercise of the right to marry or to have offspring is subject to strict judicial scrutiny (*Zablocki v. Redhail (1978) 434 U.S. 374, 383-387, 98 S. Ct. 673, 54 L. Ed. 2d 618* ; *Perez v. Sharp (1948) 32 Cal. 2d 711, 715, 198 P.2d 17*).

H. State Action Subject to Strict Scrutiny as Violation of Equal Protection Unless Justified. [*See § 35A.20, Paragraph I.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a petition for a writ of mandate to challenge the constitutionality of state action on equal protection grounds when the basis of the challenge is that the state action in question that burdens the right to marry or to have offspring, which are fundamental interests of the individual, is not justified by a compelling governmental interest.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should insert facts showing that state action burdens the right to marry or have offspring, not justified by a compelling governmental interest.

Related memoranda of points and authorities for use in supporting a petition for writ of mandate on the ground that the classification infringes a fundamental interest are *set out in §§ 35A.34, 35A.35, 35A.37 -35A.45*.

[3] Discussion of Authorities

[a] Marriage and Procreation Are Fundamental Interests

In ***Zablocki v. Redhail*** *(1978) 434 U.S. 374, 98 S. Ct. 673, 54 L. Ed. 2d 618* , a father who was obligated to support children not in his custody was denied the right to marry under a Wisconsin statute that provided that a Wisconsin resident in his situation could not marry without proof of compliance with the support obligation and that the children were not at present, or likely to become in the future, public charges. He filed a claim in federal district court challenging the statute on several grounds including the denial of equal protection. A three-judge panel held that strict scrutiny of the statute was required because the classification created by the statute infringed on a fundamental right, the right to marry. Under the strict scrutiny test, the panel declared the statute invalid, and the United States Supreme Court affirmed. Although the Court did not use the term "strict scrutiny," it employed comparable language. The Court stated that since the classification at issue significantly interfered with the exercise of that right, critical examination of the state interests advanced in support of the classification was required. The Court then reviewed prior decisions recognizing the fundamental nature of marriage and its importance as the foundation of the family and society [*see, e.g., Loving v. Virginia (1967) 388 U.S. 1, 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010* ; *Meyer v. Nebraska (1923) 262 U.S. 390, 399, 43 S. Ct. 625, 67 L. Ed. 1042]* . Further, the decision to marry, like decisions relating to procreation, childbirth, childrearing, and family relationships, is one of the personal decisions protected by the right of privacy.

Counsel should be aware that *Zablocki* does not stand for the proposition that any state infringement on marriage will be subjected to strict scrutiny. Although the Court suggested that any classification which significantly interferes with the exercise of the right to marry is constitutionally suspect, the Court distinguished *Califano v. Jobst (1978) 434 U.S. 47, 53-54, 98 S. Ct. 95, 54 L. Ed. 2d 228* , in which regulations providing for loss of certain disability benefits on marriage were upheld as reasonable regulations that did not significantly interfere with decisions to enter into the marriage relationship even though, on the facts of that case, a disabled person would lose benefits if he or she married a person who was also disabled.

In ***Perez v. Sharp*** *(1948) 32 Cal. 2d 711, 198 P.2d 17* , a proceeding in mandamus, petitioners challenged the constitutionality of former Civ. Code §§ 60, 69, 69a, which prevented marriage between white persons and Negroes, mulattos, Mongolians, or members of the Malay race. The California Supreme Court held that a statute restricting an individual's right to marry on the basis of race alone was a violation of the *Fourteenth Amendment*. The Court described marriage as a fundamental right that could not be prohibited by law except for an important social objective and by reasonable means. It further referred to marriage and the right to have offspring as fundamental rights that are protected from legislative infringement based on prejudice or oppressive discrimination by the constitutional requirements of due process and equal protection of the laws.

[4] Additional Authorities

[a] Marriage and Procreation as Fundamental Interests

Skinner v. Oklahoma (1942) 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 , is a leading case for describing marriage and procreation as fundamental interests, defining a fundamental interest, and using the term "strict scrutiny." Skinner was scheduled for a vasectomy under the Oklahoma Habitual Criminal Sterilization Act, which provided that an individual convicted three times for felonies involving moral turpitude could be subjected to a trial on the issue of whether he or she should be rendered sexually sterile. The United States Supreme Court held that the law violated the *equal protection clause of the Fourteenth Amendment*. The Court reasoned that the statute dealt with one of the basic civil rights of people. Marriage and procreation are fundamental to the existence and survival of the race, and the power to sterilize may have subtle, far-reaching, and devastating effects, particularly in evil or reckless hands. Therefore, strict scrutiny of the classification contained in a sterilization law is essential. In this case, for example, the law encompassed those who committed larceny by trespass, trick, or fraud, but excluded embezzlers without the slightest indication that the distinction had any significance in the inheritability of criminal traits. The Court stated that the *equal protection clause* would be a formula of empty words indeed if such conspicuously artificial laws could be drawn.

In *In re Marriage Cases (2008) 43 Cal. 4th 757, 76 Cal. Rptr. 3d 683, 183 P.3d 384* , the trial court determined that the statutes limiting marriage in California to opposite-sex couples [*see Fam. Code §§ 300, 308.5*] had to be evaluated under the strict scrutiny equal protection standard, because they rested upon a suspect classification (sex) and impinged upon a fundamental constitutional right (the right to marry), and concluded that the statutory limitation of marriage to the union of a man and a woman not only did not satisfy the strict scrutiny standard, but also did not meet the more deferential rational basis test because the differential treatment mandated by the statute did not further any legitimate state interest. The court held that California's marriage statutes were unconstitutional under the state Constitution insofar as they limited marriage to opposite-sex couples (*43 Cal. 4th 757, 785-788)* .

The Court of Appeal reversed on the ground that the superior court erred in finding that the statutory provisions at issue impinge upon the fundamental constitutional right to marry, which properly should have been interpreted to encompass only the right to marry a person of the opposite sex and the constitutional right plaintiffs actually sought to enforce was a right to same-sex marriage, which the Court of Appeal majority found lacking in any historical or precedential support. The Court of Appeal also rejected the superior court's conclusion that the California marriage statutes discriminated on the suspect basis of sex and for this reason were subject to strict scrutiny review, relying upon the circumstance that the statutes did not discriminate against either men or women or treat either of the genders differently from the other, but rather permitted members of either gender to marry only a person of the opposite gender. Although the Court of Appeal found that the marriage statutes realistically had to be viewed as providing differential treatment on the basis of sexual orientation, the court held that sexual orientation did not constitute a suspect classification for purposes of the state *equal protection clause*. Thus, the marriage statutes were not subject to strict scrutiny review, and applying the deferential rational basis standard, and found that the limitation of marriage to opposite-sex couples survived rational basis review, reasoning that the state had a legitimate interest in preserving the traditional definition of marriage and the statute's classifications were rationally related to that interest (*43 Cal. 4th 757, 788)* .

The California Supreme Court granted review and held that the California Constitution prohibited a statutory distinction between marriage and registered domestic partnerships [*see Fam. Code § 297 et seq.*], *i.e.,* that the failure to designate the official relationship of same-sex couples as marriage violated the California Constitution based on the constitutionally-based right to marry, and that in view of the substance and significance of the fundamental constitutional right to form a family relationship, the California Constitution properly had to be interpreted to guarantee the basic civil right to marry to all Californians, whether homosexual or heterosexual, and to same-sex couples as well as to opposite-sex couples. The right to marry is a fundamental right under the California Constitution (*43 Cal. 4th 757, 809-810)* . With regard to equal protection specifically, the Court held that the circumstance that the statutes assigned a different name for the official family relationship of same-sex couples as contrasted with the name for the

official family relationship of opposite-sex couples, *i.e.*, marriage, raised constitutional concerns under the state constitutional *equal protection clause*. In analyzing the validity of this differential treatment, the Court first determined that the strict scrutiny standard of review applied to the statutory classification because the statutes were properly understood as classifying or discriminating on the basis of sexual orientation, which the Court concluded was a constitutionally suspect basis upon which to impose differential treatment, and that the differential treatment at issue impinged upon a same-sex couple's fundamental interest in having their family relationship accorded the same respect and dignity enjoyed by an opposite-sex couple (*43 Cal. 4th 757, 782-785* ,). Under the strict scrutiny standard, the Court concluded that the purpose underlying differential treatment of opposite-sex and same-sex couples embodied in California's marriage statutes, *i.e.*, the interest in retaining the traditional and well-established definition of marriage, could not properly be viewed as a compelling state interest for purposes of the *equal protection clause* or as necessary to serve such an interest. The Court gave the following reasons for that conclusion: The exclusion of same-sex couples from the designation of marriage was not necessary to afford full protection to all of the rights and benefits enjoyed by married opposite-sex couples; permitting same-sex couples access to the designation of marriage would not deprive opposite-sex couples of any rights and would not alter the legal framework of the institution of marriage, because same-sex couples who chose to marry would be subject to the same obligations and duties imposed on married opposite-sex couples. Retaining the traditional definition of marriage and affording same-sex couples only a separate and differently-named family relationship would impose appreciable harm on same-sex couples and their children, because denying such couples access to the familiar and highly favored designation of marriage was likely to cast doubt on whether the official family relationship of same-sex couples enjoyed dignity equal to that of opposite-sex couples. Because of the widespread disparagement gay individuals historically faced, it was more probable that excluding same-sex couples from the legal institution of marriage was likely to be viewed as reflecting an official view that their committed relationships were of lesser stature than the comparable relationships of opposite-sex couples. Finally, retaining the designation of marriage exclusively for opposite-sex couples and providing only a separate and distinct designation for same-sex couples could have the effect of perpetuating a more general premise emphatically rejected by California that gay individuals and same-sex couples were in some respects second-class citizens who could legally be treated differently from, and less favorably than, heterosexual individuals or opposite-sex couples (*43 Cal. 4th 757, 782-785, 831-856)* . As a remedy, the Court concluded that in light of its conclusions, the language of *Fam. Code § 300* limiting the designation of marriage to a union "between a man and a woman" was unconstitutional and had to be stricken from the statute, and that the remaining statutory language had to be understood as making the designation of marriage available both to opposite-sex and same-sex couples. In addition, because the limitation of marriage to opposite-sex couples imposed by *Fam. Code § 308.5* could have no constitutionally permissible effect, it could not stand. The Court held further that plaintiffs were entitled to the issuance of a writ of mandate directing the appropriate state officials to take all actions necessary to effectuate its ruling so as to ensure that county clerks and other local officials throughout the state, in performing their duty to enforce the marriage statutes in their jurisdictions, applied those provisions in a manner consistent with its decision (*43 Cal. 4th 757, 856-857)* .

Legal Topics:

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CHAPTER 35A CIVIL RIGHTS: EQUAL PROTECTION
PART II. FORMS

3-35A California Points & Authorities § 35A.37

§ 35A.37 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--Suspect Categories or Burdens on Fundamental Interests as Subject to Strict Scrutiny--Right to Travel as Fundamental Interest

[1] FORM

[*Caption. See § 35A.20.*]

A WRIT OF MANDATE IS PROPER TO CHALLENGE STATE ACTION WHICH VIOLATES THE RIGHT TO EQUAL PROTECTION WHEN IT CONTAINS A CLASSIFICATION BURDENING THE RIGHT TO TRAVEL WHICH IS NOT JUSTIFIED BY A COMPELLING GOVERNMENTAL INTEREST.

A-F. Authorities Establishing Equal Protection Challenge to Burden on Fundamental Interest. [*See § 35A.20, Paragraphs A-D, F, H.*]

G. Right to Travel Is Fundamental Interest. A classification which burdens the right to travel is subject to strict judicial scrutiny (*Memorial Hosp. v. Maricopa County (1974) 415 U.S. 250, 259-260, 94 S. Ct. 1076, 39 L. Ed. 2d 306* ; *In re King (1970) 3 Cal. 3d 226, 233-236, 90 Cal. Rptr. 15, 474 P.2d 983 , cert. denied, 403 U.S. 931 (1971)* (*Fourteenth Amendment* violated)).

[*Optional*] **H. Scope of Right to Travel.** A classification infringes on the right to travel if it burdens the right to cross state lines and the right freely to choose a state of residence (*In re King (1970) 3 Cal. 3d 226, 234, 90 Cal. Rptr. 15, 474 P.2d 983 , cert. denied, 403 U.S. 931 (1971)*).

[*Optional*] **I. Durational Residence Requirement Is Burden on Right to Travel.** A classification created in a durational residence requirement which burdens the right to travel by restricting the ability to obtain the necessities of life is subject to strict judicial scrutiny (*Memorial Hosp. v. Maricopa County (1974) 415 U.S. 250, 259-260, 94 S. Ct. 1076, 39 L. Ed. 2d 306* ; *Somers v. Superior Court (2009) 172 Cal. App. 4th 1407, 1414-1416, 92 Cal. Rptr. 3d 116*).

J. State Action Subject to Strict Scrutiny Is Violation of Equal Protection Unless Justified. [*See § 35A.20, Paragraph I.*]

Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a petition for a writ of mandate to challenge the constitutionality of state action on equal protection grounds when the basis of the challenge is that the state action in question which burdens the right to travel, a fundamental interest of the individual, is not justified by a compelling governmental interest. The principles stated in the memorandum apply only to interstate travel; restrictions on international travel need only satisfy the rational relationship standard [*Califano v. Aznavorian (1978) 439 U.S. 170, 99 S. Ct. 471, 58 L. Ed. 2d 435, 441]* .

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should insert facts showing state action burdening the right to travel, not justified by a compelling governmental interest.

Related memoranda of points and authorities for use in supporting a petition for writ of mandate on the ground that the classification infringes a fundamental interest are *set out in §§ 35A.34 -35A.36, 35A.38 -35A.45*.

[3] Discussion of Authorities

[a] Right to Travel Is Fundamental Interest

In ***Memorial Hosp. v. Maricopa County*** *(1974) 415 U.S. 250, 94 S. Ct. 1076, 39 L. Ed. 2d 306* , a county refused to pay for nonemergency hospitalization of or medical care for an indigent who did not meet the one-year county residence requirement created by an Arizona statute. The United States Supreme Court held that this durational residence requirement was an infringement on the right to travel. As such, it could only be justified by a compelling state interest, and in this case, the state could not provide a justification.

The factual background of ***In re King*** *(1970) 3 Cal. 3d 226, 90 Cal. Rptr. 15, 474 P.2d 983 , cert. denied, 403 U.S. 931 (1971)* , is discussed in *§ 35A.20[3][d]*. Petitioner sought to invalidate a child support statute that placed a higher penalty on nonsupporting fathers who lived outside California. The state argued that the enhanced penalty facilitated its legitimate interest in enforcing child support obligations because it "encouraged" absent fathers to move to and remain in California. The Court responded that even if the statute was rationally related to the state's interest, it violated the individual's constitutional right to travel. The Court noted that even though the right to travel from one state to another is not explicitly mentioned in the United States Constitution, it was firmly established and repeatedly recognized. The Court noted further that it was not necessary to determine whether former Penal Code § 270 as an infringement of the fundamental constitutional right to travel could be justified by a compelling government interest, since the basic objective of the law--to induce nonsupporting fathers to come to California--was not constitutionally legitimate.

[b] Scope of Right to Travel

The factual background of ***In re King*** *(1970) 3 Cal. 3d 226, 90 Cal. Rptr. 15, 474 P.2d 983 , cert. denied, 403 U.S. 931 (1971)* , is discussed in *§ 35A.20[3][d]*. Petitioner sought to invalidate a child support statute that placed a higher

penalty on nonsupporting fathers who lived outside California. The California Supreme Court, in declaring the statute unconstitutional as a violation of equal protection under the federal Constitution, held that the constitutional right to travel embodies more than merely the right to cross state lines and move about the country; it includes as well the right of the individual freely to choose a state of residence. It thus encompasses a statutory provision which penalizes the decision to reside in a state other than California.

[c] Durational Residence Requirement Is Burden on Right to Travel

The factual background of ***Memorial Hosp. v. Maricopa County*** *(1974) 415 U.S. 250, 94 S. Ct. 1076, 39 L. Ed. 2d 306* , is discussed in *§ 35A.37[3][a]*. The United States Supreme Court held that durational residence requirements were not, per se, unconstitutional as an infringement on the right to travel, but that a requirement that penalized the exercise of the right to travel by restricting the ability to obtain such necessities of life as medical care, food, or shelter must be justified by a compelling state interest. The Court held that the state could not provide such a justification.

Counsel will note that the Supreme Court has declined to view durational residence requirements in suits for dissolution of marriage as an unconstitutional infringement on the right to travel. The Court stated that a state's interest in the regulation of domestic relations provided a much stronger justification for those requirements than administrative convenience proposed as a justification in *Memorial Hosp.* [*see Sosna v. Iowa (1975) 419 U.S. 393, 416-417, 95 S. Ct. 553, 42 L. Ed. 2d 532]* .

In ***Somers v. Superior Court*** *(2009) 172 Cal. App. 4th 1407, 1414-1416, 92 Cal. Rptr. 3d 116* , an individual who was born in California in 1941, was issued a California birth certificate, which identified her sex as male. In 2005, she underwent gender reassignment surgery. She subsequently obtained an order from a court in Kansas, where she resided, legally changing her name, and then a Kansas driver's license, reflecting her new name, and indicating her sex as female. She also obtained a Medicare card reflecting her new name and gender. She was advised by two Kansas attorneys regarding changing her birth certificate that Kansas law did not permit issuance of a new birth certificate to reflect a change of gender. She filed a petition under *Health & Safety Code § 103425* in a California Superior Court for change of gender and issuance of new California birth certificate. She included a declaration from her physician indicating that she had undergone gender reassignment surgery, and a copy of the Kansas order for name change. She also filed her declaration and the declaration of one of her Kansas attorneys, indicating that she could not obtain the relief sought in Kansas. The trial court denied the petition on the basis that she was not a resident of California (*172 Cal. App. 4th 1407, 1410-1411)* . The Court of Appeal held that the statutory requirement that she file her petition for new California birth certificate under Section 103425 in her county of residence, when she resided outside California, violated her equal protection rights under the *Fourteenth Amendment* and the California Constitution. The court found first that a birth certificate is a vital, primary source of personal identification, necessary to obtain other forms of identification such as a Social Security card or passport (*172 Cal. App. 4th 1407, 1411*). The court then found that the trial court had jurisdiction to grant the petition. The court had subject matter jurisdiction to order issuance of a new California birth certificate to reflect the gender reassignment of an individual born in California pursuant to the statutory scheme, and it had personal jurisdiction over the individual, who consented to the court's jurisdiction by voluntarily filing the petition and personally appearing at the hearing (*172 Cal. App. 4th 1407, 1411-1412)* . The court then held that the statutory requirement that an individual filing a petition under *Health & Saf. Code § 103425* for issuance of a new California birth certificate file in the county of his or her residence was a violation of the equal protection and clause as applied to nonresident transgender individuals who were born in California. The court first determined that strict scrutiny was the appropriate standard to apply, given that the classification implicated the constitutionally guaranteed right of interstate travel because it penalizes California-born transgender individuals for moving to a state outside of California (*172 Cal. App. 4th 1407, 1413-1415)* . Further, on review of the legislative history of Section 103425, the court found no reason for the requirement that individuals seeking issuance of a new California birth certificate file the petition in their county of residence. Thus, the court could discern no compelling state interest in treating California-born transgender individuals who reside out of state differently from California-born transgender individuals who reside in California when either class seeks issuance of a new California birth certificate under §

103425 (*172 Cal. App. 4th 1407, 1415)* . The court also found that even if constitutional rights were not implicated by the classification, there was no rational basis for the disparate treatment. Accordingly, the requirement that a petitioner under *Health & Safety Code § 103425* file the petition in the county of his or her residence denied California-born transgender individuals residing outside California the same rights that California-born transgender individuals residing in California had under Section 103425 (*172 Cal. App. 4th 1407, 1415-1416)* .

[4] Additional Authorities

[a] Right to Travel Is Fundamental Interest

Shapiro v. Thompson (1969) 394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 , is the seminal decision describing the fundamental right of travel. In *Shapiro*, the United States Supreme Court held that state statutes requiring one year of residence as a condition precedent for receipt of state welfare funds violated the *equal protection clause of the Fourteenth Amendment* by impinging on the constitutional right to travel freely from state to state. The Court reasoned that the nature of the federal union and the constitutional concepts of personal liberty both require that all citizens be free to travel throughout the nation uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement. Even though the right to travel is not explicitly mentioned in the federal Constitution, the Court found no need to locate a particular constitutional provision granting it. It is sustained, instead, as a constitutional right by its obvious necessity to creation of a strong union and its long recognition as a basic right under the federal Constitution. The statutes may not be justified on the ground that they discourage the poor from travel to a state; that kind of discouragement directly chills the assertion of a constitutional right by penalizing those who choose to exercise it.

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CHAPTER 35A CIVIL RIGHTS: EQUAL PROTECTION
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3-35A California Points & Authorities § 35A.38

§ 35A.38 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--Suspect Categories or Burdens on Fundamental Interests as Subject to Strict Scrutiny--Education as Fundamental Interest

[1] FORM

[*Caption. See § 35A.20.*]

A WRIT OF MANDATE IS PROPER TO CHALLENGE STATE ACTION WHICH VIOLATES THE RIGHT TO EQUAL PROTECTION WHEN IT CONTAINS A CLASSIFICATION BURDENING THE RIGHT TO EDUCATION WHICH IS NOT JUSTIFIED BY A COMPELLING GOVERNMENTAL INTEREST.

A-F. Authorities Establishing Equal Protection Challenge to Burden on Fundamental Interest. [*See § 35A.20, Paragraphs A-D, F, H.*]

G. Education Is Fundamental Interest. A classification which burdens the right to education under the California Constitution is subject to strict judicial scrutiny (*Serrano v. Priest (1976) 18 Cal. 3d 728, 766, 135 Cal. Rptr. 345, 557 P.2d 929 , cert. denied, 432 U.S. 907 (1977)* .

H. State Action Subject to Strict Scrutiny as Violation of Equal Protection Unless Justified. [*See § 35A.20, Paragraph I.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a petition for a writ of mandate to challenge the constitutionality of state action on equal protection grounds when the basis of the challenge is that the state action in question which burdens the right to education,a fundamental interest of the individual, is not justified by a compelling governmental interest.

Counsel should insert facts and argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should insert facts showing state action burdening the right to education, not justified by a compelling governmental interest.

Related memoranda of points and authorities for use in supporting a petition for writ of mandate on the ground that the classification infringes a fundamental interest are *set out in §§ 35A.34 -35A.37, 35A.39 -35A.45*.

[3] Discussion of Authorities

[a] Education Is Fundamental Interest

The factual background of ***Serrano v. Priest*** *(1976) 18 Cal. 3d 728, 135 Cal. Rptr. 345, 557 P.2d 929 , cert. denied, 432 U.S. 907 (1977)* , is discussed in *§ 35A.20[3][c]*. The California Supreme Court concluded that to determine if the existing state public school financing system complied with the equal protection requirements of the state constitution, its provisions must be subjected to strict judicial scrutiny because the system established and perpetuated a classification based on school district wealth which affected plaintiffs' fundamental interest in education. The Court held unequivocally that education is a fundamental interest. In *Butt v. State of California (1992) 4 Cal. 4th 668, 692, 15 Cal. Rptr. 2d 480, 842 P.2d 1240* , the California Supreme Court again held that education is a fundamental interest, and stated that the denial of basic educational equality on the basis of district residence is subject to strict scrutiny analysis.

Serrano's holding that education is a fundamental interest is limited only to an interpretation of the state Constitution. The United States Supreme Court specifically held that education is not a fundamental interest under the federal Constitution in *San Antonio School Dist. v. Rodriguez (1973) 411 U.S. 1, 35-38, 93 S. Ct. 1278, 36 L. Ed. 2d 16 , reh'g denied, 411 U.S. 959* , *set out in § 35A.20[3][h]*. Moreover, even under the California Constitution, some related aspects of public education might not be considered to be a fundamental right [*see, e.g., Steffes v. California Interscholastic Federation (1986) 176 Cal. App. 3d 739, 748, 222 Cal. Rptr. 355* (while public education is fundamental right, right to participate in interscholastic athletics is not fundamental right entitled to strict scrutiny review, but is tested by rational basis standard)].

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3-35A California Points & Authorities § 35A.39

§ 35A.39 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--Suspect Categories or Burdens on Fundamental Interests as Subject to Strict Scrutiny--Employment as Fundamental Interest

[1] FORM

[*Caption. See § 35A.20.*]

A WRIT OF MANDATE IS PROPER TO CHALLENGE STATE ACTION WHICH VIOLATES THE RIGHT TO EQUAL PROTECTION WHEN IT CONTAINS A CLASSIFICATION BURDENING THE RIGHT TO PURSUE EMPLOYMENT IN A COMMON OCCUPATION WHICH IS NOT JUSTIFIED BY A COMPELLING STATE INTEREST.

A-F. Authorities Establishing Equal Protection Challenge to Burden on Fundamental Interest. [*See § 35A.20, Paragraphs A-D, F, H.*]

G. Employment as Fundamental Interest. A classification which burdens the right to pursue any employment other than those involving technical complexity and an intimate relationship to the public interest and welfare is subject to strict judicial scrutiny (*Hardy v. Stumph (1978) 21 Cal. 3d 1, 8, 145 Cal. Rptr. 176, 576 P.2d 1342* ; *Sail'er Inn, Inc. v. Kirby (1971) 5 Cal. 3d 1, 18, 95 Cal. Rptr. 329, 485 P.2d 529*).

H. State Action Subject to Strict Scrutiny as Violation of Equal Protection Unless Justified. [*See § 35A.20, Paragraph I.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a petition for a writ of mandate to challenge the constitutionality of state action on equal protection grounds when the basis of the challengeis that the state action in question which burdens the right to pursue employment in a common occupation, a fundamental interest of the individual, is not justified by a compelling governmental interest. Counsel should note that the principle stated in this memorandum is limited to common occupations, those which do not involve technical complexity and an intimate relationship to the public interest and welfare. There is additional, but limited, authority to support the contention that employment in any occupation--common or not--is a fundamental interest [*see § 35A.39[3]*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

Related memoranda of points and authorities for use in supporting a petition for writ of mandate on the ground that the classification infringes a fundamental interest are *set out in §§ 35A.34 -35A.38, 35A.40 -35A.45*.

[3] Discussion of Authorities

[a] Employment as Fundamental Interest

In ***Hardy v. Stumph*** *(1978) 21 Cal. 3d 1, 145 Cal. Rptr. 176, 576 P.2d 1342* , plaintiff petitioned for a writ of mandate to challenge the City of Oakland's physical agility test for female police officers which she had failed. The trial court denied the petition and plaintiff appealed to the California Supreme Court which affirmed on the ground that use of the test did not constitute a denial of equal protection or a violation of the Civil Rights Act of 1964. One of plaintiff's arguments was that the test, which disqualified a disproportionate number of female applicants, abridged the fundamental right of women to pursue employment. The Court rejected this contention because the right to pursue a lawful occupation is fundamental only if the employment sought is a common occupation within the community. It cited a dictim in *D'Amico v. Board of Medical Examiners (1974) 11 Cal. 3d 1, 18, 112 Cal. Rptr. 786, 520 P.2d 10* [*set out in § 35A.20[3][d]*], for the rule that an individual does not possess a fundamental right to pursue an occupation wherein technical complexity and intimate relationship to the public interest and welfare counsel deference to legislative judgment. On these criteria, law enforcement is hardly a common occupation.

The factual background of ***Sail'er Inn, Inc. v. Kirby*** *(1971) 5 Cal. 3d 1, 95 Cal. Rptr. 329, 485 P.2d 529* , is discussed in *§ 35A.20[3][a]*. In that case, petitioners challenged on equal protection grounds a statute which restricted the employment of women bartenders. The Supreme Court in declaring the statute unconstitutional held that application of the strict standard of review was necessary, not only because the statutory classification was based on sex but because the statute limited the fundamental right of one class of persons to pursue the lawful profession of bartending. The Court relied for this conclusion principally on the rule in both *Purdy & Fitzpatrick v. California (1969) 71 Cal. 2d 566, 578, 79 Cal. Rptr. 77, 456 P.2d 645* , which held that any limitation on the opportunity for employment impedes the achievement of economic security which is essential for the pursuit of life, liberty, and happiness and can only be sustained after careful scrutiny, and *Truax v. Raich (1915) 239 U.S. 33, 41, 36 S. Ct. 7, 60 L. Ed. 131* , in which the United States Supreme Court stated that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the *Fourteenth Amendment* to secure.

[b] Expansion of Principle

Although there is language in *Sail'er Inn* which suggests that an individual has a fundamental right to pursue any lawful occupation, the Court disavowed such broad language in *Hardy v. Stumph*, discussed *above*. It is not possible to

determine whether the decisions of the United States Supreme Court would support the reasoning in *Hardy* because the Court has not ruled explicitly on employment as a fundamental interest for the purposes of equal protection analysis. In *Examining Bd. v. Flores de Otero (1976) 426 U.S. 572, 603-604, 96 S. Ct. 2264, 49 L. Ed. 2d 65* [*set out in § 35A.31[3][a]*], the Court quoted the rule of *Truax* that the right to pursue a common occupation of the community was fundamental; but referred repeatedly throughout the opinion to employment in a "lawful occupation" and struck down, as a violation of equal protection, restrictions on the practice of engineering and architecture which conceivably are not common occupations under the standard of *Hardy.* Nevertheless, the primary reason for the result in *Examining Bd.* was discrimination against aliens in these occupations. It is also true, however, that one of the cases relied on by *Truax* describes the right of citizens to earn a livelihood by any lawful calling and to pursue any livelihood or avocation as a liberty interest protected by the *due process clause of the Fourteenth Amendment* [*Allgeyer v. Louisiana (1896) 165 U.S. 578, 589, 591, 17 S. Ct. 427, 41 L. Ed. 832* , questioned on another point in Lincoln Fed. Labor Union No. 19129, *American Fed. of Labor v. Northwestern Iron & Metal Co. (1948) 335 U.S. 525, 535, 69 S. Ct. 251, 93 L. Ed. 212]* . But this case also refers to the privilege of pursuing an ordinary calling or trade. Arguably, *Sail'er Inn* is authority for the additional proposition that a classification which burdens the right to pursue any employment--common or not--is subject to strict scrutiny where the basis for the burden is a suspect category such as sex or race.

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3-35A California Points & Authorities § 35A.40

§ 35A.40 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--Suspect Categories or Burdens on Fundamental Interests as Subject to Strict Scrutiny--First Amendment Guarantees as Fundamental Interests

[1] FORM

[*Caption. See § 35A.20.*]

A WRIT OF MANDATE IS PROPER TO CHALLENGE STATE ACTION WHICH VIOLATES THE RIGHT TO EQUAL PROTECTION WHEN IT CONTAINS A CLASSIFICATION OF ACTIVITY PROTECTED BY THE *FIRST AMENDMENT* WHICH BURDENS ITS EXPRESSION IN SOME INSTANCES ON THE BASIS OF ITS CONTENT AND IS NOT JUSTIFIED BY A COMPELLING GOVERNMENTAL INTEREST.

A-F. Authorities Establishing Equal Protection Challenge to Burden on Fundamental Interest. [*See § 35A.20, Paragraphs A-D, F, H.*]

G. *First Amendment* Guarantees as Fundamental Interests. A classification of activity protected by the *First Amendment* which burdens its expression in some instances on the basis of its content is subject to strict judicial scrutiny (*Police Dep't v. Mosley (1972) 408 U.S. 92, 98-102, 92 S. Ct. 2286, 33 L. Ed. 2d 212*).

H. State Action Subject to Strict Scrutiny as Violation of Equal Protection Unless Justified. [*See § 35A.20, Paragraph I.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a petition for a writ of mandate to challenge the constitutionality of state action on equal protection grounds when the basis of the challenge is that the state action in question which contains classifications which burden activities protected by the *First Amendment* that constitute fundamental interests of the individual is not justified by a compelling governmental interest.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

Related memoranda of points and authorities for use in supporting a petition for writ of mandate on the ground that the classification infringes a fundamental interest are *set out in §§ 35A.34 -35A.39, 35A.41 -35A.45*.

[3] Discussion of Authorities

[a] First Amendment Guarantees as Fundamental Interests

In ***Police Dep't v. Mosley*** *(1972) 408 U.S. 92, 92 S. Ct. 2286, 33 L. Ed. 2d 212* , the United States Supreme Court examined the validity of a Chicago ordinance that made it a criminal offense to picket within 150 feet of a school building while school was in session but exempted peaceful picketing of a school involved in a labor dispute. Because the ordinance divided picketing into two classes, the Court analyzed the ordinance in terms of the *equal protection clause* and held the ordinance unconstitutional because it made an impermissible distinction between labor picketing and other peaceful picketing. The Court's analysis in effect treats *First Amendment* guarantees like other fundamental interests that are subject to strict judicial scrutiny. It first noted that the equal protection claim was closely intertwined with *First Amendment* interests. Under the *equal protection clause*, as well as the *First Amendment* itself, the government may not grant the use of a forum to people whose views it finds acceptable but deny use to those wishing to express less favored or more controversial views. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone. The Court cited *Niemotko v. Maryland (1951) 340 U.S. 268, 273, 71 S. Ct. 325, 95 L. Ed. 267* , which held that the completely arbitrary and discriminatory refusal to grant a permit for use of a public park was a denial of equal protection, as its principle authority.

Second, the Court pointed out that it is not the case that all picketing must always be allowed. Under an equal protection analysis, there may be sufficient regulatory interests justifying selective exclusions or distinctions among pickets. And the state may have a legitimate interest in prohibiting some picketing to protect public order. But these justifications for selective exclusions from a public forum must be carefully scrutinized. Because picketing plainly involves expressive conduct within the protection of the *First Amendment*, discrimination among pickets must be tailored to serve a substantial governmental interest.

Mosley was followed by a California court of appeal in *Ghafari v. Municipal Court (1978) 87 Cal. App. 3d 255, 265-266, 150 Cal. Rptr. 813* (statute prohibiting appearance in public with face concealed violated equal protection).

Thereafter, four justices of the United States Supreme Court applied the principles of *Mosley* in ***Young v. American Mini Theatres*** *(1976) 427 U.S. 50, 63-73, 96 S. Ct. 2440, 49 L. Ed. 2d 310* . Although the issue was whether a statutory classification in a city zoning ordinance which differentiates between motion picture theaters which exhibited sexually explicit adult movies and those which did not was constitutional, the basis for the opinion's equal protection analysis is not clear. The opinion asserts that even though *Mosley* said that selective exclusion from a public forum may not be based on content alone, material with an erotic content may be placed in a different classification from nonerotic forms of expression. It then proceeded to determine whether the classification which regulated the geographic localities in which such movies could be exhibited but did not suppress or greatly restrict access to the movies was justified by the city's interest in preserving the character of its neighborhoods, and concluded that because the city's interest in the

present and future character of its neighborhoods adequately supports its classification of motion pictures, the ordinance did not violate the *equal protection clause*.

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3-35A California Points & Authorities § 35A.41

§ 35A.41 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--Suspect Categories or Burdens on Fundamental Interests as Subject to Strict Scrutiny--Privacy as Fundamental Interest

[1] FORM

[*Caption. See § 35A.20.*]

A WRIT OF MANDATE IS PROPER TO CHALLENGE STATE ACTION WHICH VIOLATES THE RIGHT TO EQUAL PROTECTION WHEN IT CONTAINS A CLASSIFICATION BURDENING THE RIGHT OF PRIVACY WHICH IS NOT JUSTIFIED BY A COMPELLING GOVERNMENTAL INTEREST.

A-F. Authorities Establishing Equal Protection Challenge to Infringement of Fundamental Interest. [*See § 35A.20, Paragraphs A-D, F, H.*]

G. Privacy as Fundamental Interest. A classification which burdens the right of privacy is subject to strict judicial scrutiny (*Roe v. Wade (1973) 410 U.S. 113, 152-155, 164, 93 S. Ct. 705, 35 L. Ed. 2d 147 , reh'g denied, 410 U.S. 959, 93 S. Ct. 1409, 35 L. Ed. 2d 694* ; *see Long Beach City Employees Assn. v. City of Long Beach (1986) 41 Cal. 3d 937, 943-944, 227 Cal. Rptr. 90, 719 P.2d 660* (based on California Constitution)).

[*Optional*] **H. Elements of Privacy.** A classification which burdens personal decisions relating to _____ [marriage *or* procreation *or* contraception *or* family relationships *or* child rearing *or* education] is subject to strict judicial scrutiny (*Carey v. Population Serv. Int'l (1977) 431 U.S. 678, 684-686, 97 S. Ct. 2010, 52 L. Ed. 2d 675* ; *Roe v. Wade (1973) 410 U.S. 113, 152-153, 93 S. Ct. 705, 35 L. Ed. 2d 147 , reh'g denied, 410 U.S. 959, 93 S. Ct. 1409, 35 L. Ed. 2d 694* ; *American Academy of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 66 Cal. Rptr. 2d 210, 940 P.2d 797*).

I. State Action Subject to Strict Scrutiny as Violation of Equal Protection Unless Justified. [*See § 35A.20, Paragraph I.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a petition for a writ of mandate to challenge the constitutionality of state action on equal protection grounds when the basis of the challenge is that the state action in question which burdens some aspect of the right of privacy, a fundamental interest of the individual, is not justified by a compelling governmental interest. Counsel should be aware that in addition to equal protection arguments under both the federal and state Constitutions, privacy is a guarantee explicitly provided for in the state Constitution [*Cal. Const., art. I, § 1*; *see also California Forms of Pleading and Practice, Ch. 429, Privacy, § 429.10 et seq.* (Matthew Bender)].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

Related memoranda of points and authorities for use in supporting a petition for writ of mandate on the ground that the classification infringes a fundamental interest are set out §§ 35A.34-35A.40, 35A.42-35A.45.

[3] Discussion of Authorities

[a] Privacy as Fundamental Interest

In ***Roe v. Wade*** *(1973) 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 , reh'g denied, 410 U.S. 959, 93 S. Ct. 1409, 35 L. Ed. 2d 694* , the Supreme Court examined the constitutionality of a Texas statute that prohibited abortions unless they were undertaken on medical advice for the purpose of saving the mother's life. The Court held that the statute violated the *due process clause of the Fourteenth Amendment*. The basis for its holding was its view that a right of personal privacy or guarantee of certain zones of privacy exists under the federal Constitution, particularly as part of the concept of liberty guaranteed by the first section of the *Fourteenth Amendment*, which provides that no state may deprive any person of life, liberty, or property without due process of law. This right of privacy, as the Court pointed out, is applicable to activities relating to marriage, procreation, contraception, family relationships, child rearing, and education; but it applies only to personal rights which can be deemed fundamental or "implicit in the concept of ordered liberty." The Court concluded that the right of privacy is broad enough to encompass a woman's decision to terminate her pregnancy. Thus, the statute in question could be justified only if it served a compelling state interest and was narrowly drawn to express only the legitimate state interests at stake; and the statute could not satisfy these criteria.

Roe treated privacy as a fundamental interest for purposes of due process analysis rather than equal protection analysis. However, in a subsequent decision, the Court cited *Roe* without further discussion as an example of classifications subject to strict scrutiny under the *equal protection clause* because they impermissibly interfered with the exercise of a fundamental right [*Massachusetts Bd. of Retirement v. Murgia (1976) 427 U.S. 307, 312, 96 S. Ct. 2562, 49 L. Ed. 2d 520* ; *see Skinner v. Oklahoma (1942) 316 U.S. 535, 541-542, 62 S. Ct. 1110, 86 L. Ed. 1655* (*set out in § 35A.36[4*][a], decided before the right of privacy cases but dealing with one aspect of that right--procreation--as an equal protection issue)].

In ***Long Beach City Employees Assn. v. City of Long Beach*** *(1986) 41 Cal. 3d 937, 227 Cal. Rptr. 90, 719 P.2d 660* , a subdivision of defendant city began requiring its employees to undergo polygraph examinations after money was stolen from the bureau operations. Plaintiff filed a complaint for a temporary restraining order and injunctive relief to

prevent administration of the examinations, claiming that the compulsory polygraph examinations were unconstitutional. The trial court denied the relief. Plaintiff appealed.

The California Supreme Court reversed, based on its finding that the examinations were a violation of the employees' privacy rights. *Cal. Const., art. I, § 1,* specifies privacy as an inalienable right. The Court observed that if there is a quintessential zone of human privacy it is the mind (*41 Cal. 3d 937, 943-944)* . Although the Court did not characterize the test as one of "strict scrutiny," its opinion made it clear that strict scrutiny was the appropriate test before interfering with the fundamental right of privacy. Because the Court found that polygraph examinations impinged on the fundamental right of privacy, a rational relationship was not enough. Defendant had the burden of demonstrating that its classifications of which employees were required to take the examination were justified by a compelling governmental interest and that the distinctions drawn were necessary to further that purpose (*41 Cal. 3d 937, 948)* . The Court noted that public employees are trustees of the public interest and thus owe a special duty of integrity. Nevertheless, the Court found that this duty alone, without more, did not provide a compelling justification for such an inherent intrusion on an ordinary public employee's fundamental right of privacy, particularly when less intrusive means to investigate alleged wrongdoing are available (*41 Cal. 3d 937, 952)* . The Court found that defendant had failed to meet its burden (*41 Cal. 3d 937, 956)* .

[b] Elements of Privacy

In ***Carey v. Population Serv. Int'l*** *(1977) 431 U.S. 678, 97 S. Ct. 2010, 52 L. Ed. 2d 675* , the Supreme Court held that a New York statute which controlled the sale and distribution of contraceptives violated the constitutional right to privacy. The Court affirmed its conclusion in *Roe v. Wade (1973) 410 U.S. 113, 152, 93 S. Ct. 705, 35 L. Ed. 2d 147 , reh'g denied, 410 U.S. 959, 93 S. Ct. 1409, 35 L. Ed. 2d 694* [set out under § 35A.41[3][a]], that the right of personal privacy is one aspect of the "liberty" protected by the *due process clause of the Fourteenth Amendment* and it protects personal decisions relating to marriage, procreation, contraception, child rearing, and education from unjustified governmental interference. The Court noted that the outer limits of this right of privacy had not yet been determined.

The factual background of ***Roe v. Wade*** *(1973) 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 , reh'g denied, 410 U.S. 959, 93 S. Ct. 1409, 35 L. Ed. 2d 694* , is discussed in *§ 35A.41[3][a]*.

In ***American Academy of Pediatrics v. Lungren*** *(1997) 16 Cal. 4th 307, 66 Cal. Rptr. 2d 210, 940 P.2d 797* , after concluding that a statute impinging on the fundamental autonomy privacy right of a minor or an adult must be evaluated under the compelling interest test, the California Supreme Court declared unconstitutional a statute requiring pregnant minors to secure either parental consent or judicial authorization before obtaining an abortion. The Court made clear that statutory intrusion on an autonomy privacy interest of a fundamental nature may not be justified simply by showing that the statute serves a legitimate competing interest sufficient to justify an impingement on a less central privacy interest.Though a statute's relationship to minors is properly employed in the constitutional calculus in determining whether an asserted state purpose or interest is compelling, because the statute's impact on minors is taken into account in assessing the importance of the state interest ostensibly served by the infringement, it is inappropriate additionally to lower the applicable constitutional standard under which the statute is evaluated simply because the privacy interests at stake are those of minors (*16 Cal. 4th 307, 341-342)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsMandamusConstitutional LawEqual ProtectionGeneral OverviewConstitutional LawEqual ProtectionScope of Protection

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Volume 3 Chapters 34-39 CHECKS AND BANKS---to---CIVIL SERVICE
CHAPTER 35A CIVIL RIGHTS: EQUAL PROTECTION
PART II. FORMS

3-35A California Points & Authorities § 35A.42

§ 35A.42 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--Suspect Categories or Burdens on Fundamental Interests as Subject to Strict Scrutiny--Personal Liberty as Fundamental Interest

[1] FORM

[*Caption. See § 35A.20.*]

A WRIT OF MANDATE IS PROPER TO CHALLENGE STATE ACTION WHICH VIOLATES THE RIGHT TO EQUAL PROTECTION WHEN IT CONTAINS A CLASSIFICATION BURDENING THE RIGHT OF PERSONAL LIBERTY WHICH IS NOT JUSTIFIED BY A COMPELLING GOVERNMENTAL INTEREST.

A-F. Authorities Establishing Equal Protection Challenge to Burden on Fundamental Interest. [*See § 35A.20, Paragraphs A-D, F, H.*]

G. Personal Liberty as Fundamental Interest. A classification which burdens the right of personal liberty is subject to strict judicial scrutiny (*People v. Olivas (1976) 17 Cal. 3d 236, 251-252, 131 Cal. Rptr. 55, 551 P.2d 375*).

[*Optional*] **H. Considerable Restraint as Sufficient.** A classification which subjects an individual to any considerable governmental constraint is subject to strict judicial scrutiny, even though it does not involve institutionalization (*People v. Olivas (1976) 17 Cal. 3d 236, 245-246, 131 Cal. Rptr. 55, 551 P.2d 375*).

I. State Action Subject to Strict Scrutiny as Violation of Equal Protection Unless Justified. [*See § 35A.20, Paragraph I.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a petition for a writ of mandate to challenge the constitutionality of state action on equal protection grounds when the basis of the challenge is that the state action in question which burdens personal liberty, a fundamental interest of the individual, is not justified by a compelling governmental interest. In that the individual's interest in a unanimous jury verdict has been described as an interest closely related to personal liberty, this memorandum may also be adapted to support the principle that a unanimous jury verdict is a fundamental interest [*see § 35A.42[3*][a][i]].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

Related memoranda of points and authorities for use in supporting a petition for writ of mandate on the ground that the classification infringes a fundamental interest are set out §§ 35A.34-35A.41, 35A.43-35A.45.

[b] Related Pleading and Practice Forms

For a form of petition for writ of habeas corpus based on restraint pursuant to an unconstitutional local ordinance, see California Forms of Pleading and Practice, Ch. 59, *Assemblies, Meetings, and Demonstrations* (Matthew Bender).

[3] Discussion of Authorities

[a] Personal Liberty as Fundamental Interest

The factual background of ***People v. Olivas*** *(1976) 17 Cal. 3d 236, 131 Cal. Rptr. 55, 551 P.2d 375* , is discussed in *§ 35A.20[3][e]*. The defendant in that case argued that former Welf. & Inst. Code § 1731.5 violated his guarantee of equal protection under the laws because under its provisions an individual between the ages of 16 and 21 could be committed to the youth authority and serve a potentially longer term than the maximum jail sentence imposed for the same offense on persons who were 21 or older. The Supreme Court agreed with defendant's contention and declared the law unconstitutional. The Court determined that the interest involved was personal liberty, an interest which has origins in Anglo-American legalhistory and is reflected in the constitutional guarantee of the right to a fair trial for those accused of a crime. It concluded that personal liberty is a fundamental interest which, in the words of the Court, is second only to life itself as an interest protected under both the state and federal Constitutions.

Olivas is an interesting decision because of the approach taken to determine, for the first time in California, whether personal liberty represented an interest which was fundamental for purposes of equal protection analysis. The Court noted that courts in other states and lower federal courts had reached conflicting conclusions. It then reviewed the legal precedents for the personal liberty concept beginning with the Magna Carta. It examined in particular the various guarantees of due process which exist largely because of a great concern in our system of justice for procedures which may result in deprivations of personal liberty. The fact that the California Constitution requires a unanimous jury verdict manifests an even stronger concern for unwarranted deprivations of personal liberty by the state than can be found in the *due process clause of the Fourteenth Amendment*. The Court concluded that if the United States and California Constitutions were vigilant through their due process clauses in protecting against the initial deprivation of personal liberty, they could be no less vigilant in protecting through their *equal protection clauses* against continuing deprivations of liberty.

Counsel will note, however, that the interest in personal liberty is not necessarily infringed by all classifications which affect the possible loss of freedom. Thus, the California Supreme Court declined to apply strict scrutiny in *In re Mitchell P. (1978) 22 Cal. 3d 946, 950 n.3, 151 Cal. Rptr. 330, 587 P.2d 1144* , on the ground that disparity in

evidentiary rules governing juvenile and criminal proceedings is not a classification directly affecting the liberty interest.

[i] Unanimous Jury Verdict

Counsel will note that in regard to the individual's interest in a unanimous jury verdict, an interest closely related to personal liberty, the California Supreme Court has commented that the individual's right to a unanimous verdict in a criminal case is a fundamental interest for the purposes of equal protection analysis [*People v. Olivas (1976) 17 Cal. 3d 236, 246, 131 Cal. Rptr. 55, 551 P.2d 375* ; *People v. Superior Court (1967) 67 Cal. 2d 929, 932, 64 Cal. Rptr. 327, 434 P.2d 623* ; *see Cal. Const., art. I, § 16*]. Further, the Court has held that the individual's right to a unanimous verdict is also a fundamental interest in civil commitment proceedings [*People v. Feagley (1975) 14 Cal. 3d 338, 356, 121 Cal. Rptr. 509, 535 P.2d 373* (denial of unanimous jury verdict requirement to persons committed under the mentally disordered sex offender law while it is provided to persons committed as mentally disordered persons not justified by compelling state interest)]. Nevertheless, the practical necessity for this latter principle is questionable in view of the rulings which interpret *Cal. Const., art. I, § 16* to guarantee a unanimous jury verdict not only in criminal cases but also in the civil commitment proceedings for alleged mentally disordered sex offenders and narcotics addicts even though the constitutional provision does not by its terms apply to "civil" actions [*see People v. Thomas (1977) 19 Cal. 3d 630, 641-644 fn. 12, 139 Cal. Rptr. 594, 566 P.2d 228]* .

[b] Considerable Restraint as Sufficient

The factual background of ***People v. Olivas*** *(1976) 17 Cal. 3d 236, 131 Cal. Rptr. 55, 551 P.2d 375* , is discussed in *§ 35A.20[3][e]*. In that case, the Supreme Court was required to determine whether commitment to a youth authority institution could be viewed as a restraint on personal freedom. The Court admitted that youth authority wards may experience greater freedom than individuals confined in state prisons or mental hospitals but concluded that any institutional process which involved physical restraint of the person was an infringement of personal liberty. In fact, in the Court's view, the types of limitations and controls which accompany an individual's release on parole also exert a comparable restraint on personal liberty because they amount to a considerable limitation on the freedom of action which all other citizens possess.

[4] Additional Authorities

[a] Personal Liberty as Fundamental Interest

In *Humphrey v. Cady (1972) 405 U.S. 504, 92 S. Ct. 1048, 31 L. Ed. 2d 394* , the Supreme Court held that a statute which permitted the "massive curtailment of liberty" involved in compulsory confinement for psychiatric treatment violated the *equal protection clause* because it denied a jury trial on the issue of whether or not commitment standards had been met even though a different state law permitted a jury trial in essentially equivalent situations. The Court did not discuss the nature of personal liberty as a constitutionally protected interest and had no occasion to invoke the strict scrutiny test since it believed that the differential statutory treatment was arbitrary.

In *O'Connor v. Donaldson (1975) 422 U.S. 563, 95 S. Ct. 2486, 45 L. Ed. 2d 396* , the Supreme Court held that a state which confines an individual who is not dangerous and is capable of surviving freely and safely either by himself or with the help of family or friends violates the individual's constitutional right to "freedom." This case was an action for damages under *42 U.S.C. § 1983* for deprival of constitutional rights under color of state law, and the Court did not discuss the right to personal freedom in terms of equal protection analysis.

Legal Topics:

For related research and practice materials, see the following legal topics:
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Volume 3 Chapters 34-39 CHECKS AND BANKS---to---CIVIL SERVICE
CHAPTER 35A CIVIL RIGHTS: EQUAL PROTECTION
PART II. FORMS

3-35A California Points & Authorities § 35A.43

§ 35A.43 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--Suspect Categories or Burdens on Fundamental Interests as Subject to Strict Scrutiny--Access to Courts as Fundamental Interest

[1] FORM

[*Caption. See § 35A.20.*]

A WRIT OF MANDATE IS PROPER TO CHALLENGE STATE ACTION WHICH VIOLATES THE RIGHT TO EQUAL PROTECTION WHEN IT CONTAINS A CLASSIFICATION BURDENING THE RIGHT TO ACCESS TO THE COURTS WHICH IS NOT JUSTIFIED BY A COMPELLING GOVERNMENTAL INTEREST.

A-F. Authorities Establishing Equal Protection Challenge to Burden on Fundamental Interest. [*See § 35A.20, Paragraphs A-D, F, H.*]

G. Access to Courts as Fundamental Interest. A classification which burdens the right of access to the courts is subject to strict judicial scrutiny (*Boddie v. Connecticut (1971) 401 U.S. 371, 377-379, 91 S. Ct. 780, 28 L. Ed. 2d 113* ; *Payne v. Superior Court (1976) 17 Cal. 3d 908, 919-923, 132 Cal. Rptr. 405, 553 P.2d 565*).

[*Optional*] **H. Denial of Indigent's Ability to Obtain Divorce.** Any system of fees and court costs which denies the ability of an indigent person to initiate a divorce action is subject to strict judicial scrutiny (*Boddie v. Connecticut (1971) 401 U.S. 371, 380-382, 91 S. Ct. 780, 28 L. Ed. 2d 113*).

[*Optional*] **I. Denial of Prisoner's Access to Legal Resources.** Failure to assist prisoners in preparing and filing meaningful legal papers by providing adequate law libraries or adequate assistance from legally trained persons is subject to strict judicial scrutiny (*Bounds v. Smith (1977) 430 U.S. 817, 828, 97 S. Ct. 1491, 52 L. Ed. 2d 72*).

[*Optional*] **J. Denial of Prisoner's Ability to Defend Civil Suit.** Failure to either provide an indigent prisoner with counsel or to permit the prisoner's appearance in court is subject to strict judicial scrutiny (*Payne v. Superior Court (1976) 17 Cal. 3d 908, 919-923, 132 Cal. Rptr. 405, 553 P.2d 565*).

K. State Action Subject to Strict Scrutiny as Violation of Equal Protection Unless Justified. [*See § 35A.20, Paragraph I.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a petition for a writ of mandate to challenge the constitutionality of state action on equal protection grounds when the basis of the challenge is that the state action which burdens an individual's right of access to the courts, a fundamental interest of the individual, is not justified by a compelling governmental interest.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

Related memoranda of points and authorities for use in supporting a petition for writ of mandate on the ground that the classification infringes a fundamental interest are *set out in §§ 35A.34 -35A.42, 35A.44, 35A.45*.

[3] Discussion of Authorities

[a] Access to Courts as Fundamental Interest

In ***Boddie v. Connecticut*** *(1971) 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113* , a group of welfare recipients challenged the constitutionality of certain state procedures for the commencement of divorce proceedings, as the procedures had been applied to them, including the requirement of payment of court fees and costs for service of process. The Supreme Court held that withholding access to the courts on the basis of indigency when the purpose was to obtain a divorce violated the *due process clause of the Fourteenth Amendment*. Although the Court framed its views in terms of the due process clause, the test of constitutionality which it used is comparable to the strict scrutiny test in equal protection analysis. The Court stated first that due process requires, at a minimum, that absent a courtervailing state interest of overriding significance, persons forced to settle their claims through the judicial process must be given a meaningful opportunity to be heard. Second, a statute or rule may be constitutionally invalid as applied when it operates to deprive an individual of a protectedright although its general validity is beyond question. The Court added that although it cannot be said that access to the courts for all individuals under all circumstances is guaranteed by the *Fourteenth Amendment*, such access was required in this case.

In ***Payne v. Superior Court*** *(1976) 17 Cal. 3d 908, 132 Cal. Rptr. 405, 553 P.2d 565* , an indigent prisoner's request to attend the trial of a civil case in which damages were sought against him was denied by state prison authorities. The Supreme Court held that the dual deprivation of appointed counsel and the right to personal presence is an unconstitutional violation of the prisoner's rights under the due process and *equal protection clauses* of both the state and federal Constitutions. The Court first noted that none of the constitutionally guaranteed freedoms would be secure if a person could be deprived of possessions without an opportunity to defend them at a meaningful time and in a meaningful manner, and that the right of access to the courts included access to all courts, both state and federal, without regard to the type of petition or relief sought. When indigent prisoners are denied access to a court to defend a civil suit while free citizens and prisoners possessing the means to hire counsel possess such a right, the Court found

that an equal protection question is raised in addition to that of due process. The Court concluded that since the right of access is one of fundamental constitutional dimension, its denial by the state must be supported by a compelling state interest. In this case, the state could not provide such a justification.

[b] Denial of Indigent's Ability to Obtain Divorce

The factual background of ***Boddie v. Connecticut*** *(1971) 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113* , is discussed in *§ 35A.43[3][a]*. Prior to rebutting the arguments put forth by the state to support its fee and cost requirements, the Supreme Court pointed out that since access to courts was the only way to obtain a divorce, refusal to admit indigents unless they pay the required costs was equivalent to denying them an opportunity to be heard on their claimed right to dissolution of their marriages, which in the absence of sufficient countervailing justification would be a denial of due process.

Subsequently, in *Ortwein v. Schwab (1973) 410 U.S. 656, 658-659, 93 S. Ct. 1172, 35 L. Ed. 2d 572* and *United States v. Kras (1973) 409 U.S. 434, 443-444, 93 S. Ct. 631, 34 L. Ed. 2d 626* , the Supreme Court declined to extend the principle of *Boddie* to attempts by indigents to challenge administrative decisions affecting welfare benefits and to file a petition for bankruptcy, respectively, without payment of filing fees on the ground that the individual's interest in a bankruptcy discharge or increased welfare benefits is not of the same constitutional significance as the individual interest in the marital relationship. In California, however, the courts have an inherent power to waive filing fees for indigents and the California Supreme Court has ruled that whenever a motion to proceed in forma pauperis is supported by an affidavit sufficient on its face to show indigency, the court must grant the motion unless it has good reason to doubt the truthfulness of the factual allegations in the affidavit, or in unusual circumstances, order a hearing for the purpose of inquiring into the matter [*Earls v. Superior Court (1971) 6 Cal. 3d 109, 114, 98 Cal. Rptr. 302, 490 P.2d 814]* . Although the Court has commented that the rule assists indigents in securing their fundamental rights, the legal basis for the judicial power is common law usage [*see* *Earls v. Superior Court (1971) 6 Cal. 3d 109, 117, 98 Cal. Rptr. 302, 490 P.2d 814* ; *Ferguson v. Keays (1971) 4 Cal. 3d 649, 653, 656 fn. 6, 94 Cal. Rptr. 398, 484 P.2d 70]* .

[c] Denial of Prisoners' Access to Legal Resources

In ***Bounds v. Smith*** *(1977) 430 U.S. 817, 97 S. Ct. 1491, 52 L. Ed. 2d 72* , a group of prison inmates filed a law suit alleging that they were denied their rights under the *Fourteenth Amendment* when the state failed to provide legal research facilities. The district court held that this failure constituted a violation of the prisoners' rights both to access to the courts and to equal protection of the laws. The Supreme Court affirmed. In the course of its opinion, the Court emphasized that the constitutional right of access to the courts for prisoners has been established beyond doubt. The states must insure that such access is adequate, effective, and meaningful. Since prisoners are entitled to a reasonably adequate opportunity to present claims that their fundamental constitutional rights have been violated, the Court reasoned that states may even have to shoulder affirmative obligations to assure all prisoners meaningful access to the courts. It concluded that the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.

[d] Denial of Prisoner's Ability to Defend Civil Suit

The factual background of ***Payne v. Superior Court*** *(1976) 17 Cal. 3d 908, 132 Cal. Rptr. 405, 553 P.2d 565* , is discussed in *§ 35A.43[3][a]*.

Legal Topics:

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CHAPTER 35A CIVIL RIGHTS: EQUAL PROTECTION
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3-35A California Points & Authorities § 35A.44

§ 35A.44 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--Suspect Categories or Burdens on Fundamental Interests as Subject to Strict Scrutiny--Right to Acquire Property as Fundamental Interest

[1] FORM

[*Caption. See § 35A.20.*]

A WRIT OF MANDATE IS PROPER TO CHALLENGE STATE ACTION WHICH VIOLATES THE RIGHT TO EQUAL PROTECTION WHEN IT CONTAINS A CLASSIFICATION BURDENING THE RIGHT TO _____ [ACQUIRE *or* ENJOY *or* OWN *or* DISPOSE OF] PROPERTY WHICH IS NOT JUSTIFIED BY A COMPELLING GOVERNMENTAL INTEREST.

A-F. Authorities Establishing Equal Protection Challenge to Burden on Fundamental Interest. [*See § 35A.20, Paragraphs A-D, F, H.*]

G. Right to Acquire Property as Fundamental Interest. A classification which burdens the individual's ability to _____ [acquire *or* enjoy *or* own *or* dispose of] property is subject to strict judicial scrutiny (*Shelley v. Kraemer (1947) 334 U.S. 1, 10-11, 68 S. Ct. 836, 92 L. Ed. 1161* (dicta); *Fujii v. California (1952) 38 Cal. 2d 718, 728, 242 P.2d 617* (dicta)).

H. State Action Subject to Strict Scrutiny as Violation of Equal Protection Unless Justified. [*See § 35A.20, Paragraph I.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a petition for a writ of mandate to challenge the constitutionality of state action on equal protection grounds when the basis of the challenge is that the state action in question which burdens the fundamental interest of the petitioner's ability to acquire, enjoy, own, or dispose of property is not justified by a compelling governmental interest. Counsel will note that the authorities provided in this memorandum are described as dicta because, even though they both clearly described rights related to property as essential civil rights, neither authority was required to determine whether they were fundamental interests for the purpose of equal protection analysis under the two-tier test.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

Related memoranda of points and authorities for use in supporting a petition for writ of mandate on the ground that the classification infringes a fundamental interest are set out in *§§ 35A.34 -35A.43, 35A.45*.

[3] Discussion of Authorities

[a] Right to Acquire Property as Fundamental Interest

In ***Shelley v. Kraemer*** *(1947) 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161* , the petitioners were individuals who had bought a house in Missouri which was subject to a restrictive agreement that no part of the property be occupied by a person not of the "Caucasian race." Other parties to the agreement, who were owners of property in the area, sued to restrain petitioners, who were black, from taking possession. The trial court denied relief, but the Missouri Supreme Court reversed. The United States Supreme Court then granted certiorari and reversed the Missouri Supreme Court on the ground that judicial action enforcing the restrictive agreements was state action for purposes of the *Fourteenth Amendment* and discriminated on the basis of color in the enjoyment of property rights. Although the Court was not required to determine whether property rights were fundamental interests for purposes of analysis under the two-tier standard, it stated that, without doubt, the rights to acquire, enjoy, own, and dispose of property were among the civil rights intended to be protected from discriminatory state action by the *Fourteenth Amendment*. Equality in the enjoyment of property rights was regarded by the framers of the amendment as an essential precondition to the realization of other basic civil rights and liberties which the amendment was intended to guarantee.

The factual background of ***Fujii v. California*** *(1952) 38 Cal. 2d 718, 242 P.2d 617* , is discussed in *§ 35A.30[3][a]*. In that case, the California Supreme Court held that the state's former Alien Land Law [Stats. 1921, p. 1xxxiii, as amended] violated the *equal protection clause of the Fourteenth Amendment* because it discriminated on the basis of nationality in regard to the right of owning property. The Court pointed out that, unquestionably, the rights to acquire, enjoy, own, and dispose of property are among the civil rights intended to be protected from discriminatory stateaction by the *Fourteenth Amendment* and that the power of a state to regulate the use and ownership of land must be exercised subject to the controls and limitations of that amendment.

[4] Additional Authorities

[a] Right to Acquire Property as Fundamental Interest

In *Mulkey v. Reitman (1966) 64 Cal. 2d 529, 50 Cal. Rptr. 881, 413 P.2d 825 , aff'd, 387 U.S. 369, 87 S. Ct. 1627, 18 L. Ed. 2d 830 (1967)* , plaintiffs, a black couple, brought an action for violation of the Unruh Civil Rights Act [*Civ. Code § 51*] on account of discrimination in housing. The trial court granted defendants' motion for summary judgment on the ground that former Cal. Const., art. I, § 26, incorporated into the Constitution as a result of the voter's approval of

Proposition 14 in 1964, nullified the application of the Act to housing discrimination by prohibiting the state from limiting the right of individuals to dispose of real property in any way they chose. Plaintiffs appealed to the California Supreme Court. The Supreme Court reversed, finding that Proposition 14 violated the *equal protection clause of the Fourteenth Amendment*. The Court held the role of the state in encouraging private discrimination was state action which denied the guarantee of equal protection because it failed to protect the individual's right to acquire, enjoy, own, and dispose of property which is essential to the realization of other basic rights and liberties which the *Fourteenth Amendment* was intended to guarantee.

Legal Topics:

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PART II. FORMS

3-35A California Points & Authorities § 35A.45

§ 35A.45 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--State Action Subject to Strict Scrutiny as Violation of Equal Protection Unless Justified--Chilling Exercise of Fundamental Interest

[1] FORM

[*Caption. See § 35A.20.*]

A WRIT OF MANDATE IS PROPER TO CHALLENGE STATE ACTION WHICH VIOLATES THE RIGHT TO EQUAL PROTECTION WHEN IT CONTAINS A CLASSIFICATION WHICH AS ITS ONLY EFFECT OR PURPOSE CHILLS THE EXERCISE OF A FUNDAMENTAL INTEREST BY PENALIZING ITS EXERCISE.

A-G. Authorities Establishing Grounds for Equal Protection Challenge to Burden on Fundamental Interest. [*See § 35A.20, Paragraphs A-D, F, H, I.*]

H. Chilling Exercise of Constitutional Rights. If the only effect or purpose of state action is to chill the exercise of a fundamental interest by penalizing its exercise, the state action will be held to violate the guarantee of equal protection without further consideration of whether it is justified by a compelling state interest (*Shapiro v. Thompson (1969) 394 U.S. 618, 631, 89 S. Ct. 1322, 22 L. Ed. 2d 600* ; *In re King (1970) 3 Cal. 3d 226, 235-236 n.7, 90 Cal. Rptr. 15, 474 P.2d 983 , cert. denied, 403 U.S. 931, 91 S. Ct. 2249, 29 L. Ed. 2d 709 (1971)* .
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a petition for a writ of mandate to challenge the constitutionality of state action on equal protection grounds when the basis of the challengeis that the state action in question, as its only effect or purpose, burdens the exercise of a fundamental interest by penalizing those who exercise it.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

Related memoranda of points and authorities for use in supporting a petition for writ of mandate on the ground that a classification cannot be justified are set out in *§§ 35A.46 -35A.49*.

[3] Discussion of Authorities

[a] Chilling Exercise of Constitutional Rights

The factual background of ***Shapiro v. Thompson*** *(1969) 394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600* , is discussed in *§ 35A.37[4][a]*. In that case, the Supreme Court held that state statutes which required one year of residence as a condition precedent for receipt of state welfare funds impinged on the constitutional right to travel in violation on the *equal protection clause*. The Court found that the only purpose of the law was to discourage the poor from travel to a state and held that if a law has no other purpose than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it is patently unconstitutional. The Court cited *United States v. Jackson (1968) 390 U.S. 570, 581, 88 S. Ct. 1209, 20 L. Ed. 2d 138* , which applied the principle to a provision which had no other purpose or effect than to discourage assertion of the *Fifth Amendment*.

The factual background of ***In re King*** *(1970) 3 Cal. 3d 226, 90 Cal. Rptr. 15, 474 P.2d 983 , cert. denied, 403 U.S. 931, 91 S. Ct. 2249, 29 L. Ed. 2d 709 (1971)* , is discussed in *§ 35A.20[3][d]*. In that case, the California Supreme Court declared unconstitutional, as a violation of the *Fourteenth Amendment*, a criminal statute which placed a higher penalty on fathers who failed to pay child support while they were living outside California. The state attempted to justify the statute by arguing that it facilitated the enforcement of support obligations. The Court responded that if the purpose was to require individuals to move to or remain in California, it violated the right to travel and, quoting from *Shapiro* (discussed *above*), if a law has no other purpose than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it is patently unconstitutional. The Court noted further that since the basic objective of the statute was not a constitutionally legitimate one, it would have no occasion to apply the compelling governmental interest test to determine whether the statute could be otherwise justified.

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Volume 3 Chapters 34-39 CHECKS AND BANKS---to---CIVIL SERVICE
CHAPTER 35A CIVIL RIGHTS: EQUAL PROTECTION
PART II. FORMS

3-35A California Points & Authorities § 35A.46

§ 35A.46 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--State Action Subject to Strict Scrutiny as Violation of Equal Protection Unless Justified--Unsupported Justifications as Insufficient

[1] FORM

[*Caption. See § 35A.20.*]

A WRIT OF MANDATE IS PROPER TO CHALLENGE STATE ACTION WHICH VIOLATES THE RIGHT TO EQUAL PROTECTION WHEN IT CONTAINS A CLASSIFICATION WHICH IS BASED ON A SUSPECT CATEGORY OR BURDENS A FUNDAMENTAL INTEREST AND THE ONLY JUSTIFICATIONS OFFERED ARE GENERALIZATIONS AND RATIONALES UNSUPPORTED BY LOGIC, EXPERIENCE, OR AN ASCERTAINABLE PROBLEM.

A-H. Authorities Establishing Grounds for Equal Protection Challenge to Suspect Category or Burden on Fundamental Interest. [*See § 35A.20, Paragraphs A-D, F-I.*]

I. Unsupported Justifications as Insufficient. When state action is subject to strict judicial scrutiny, generalizations and rationales unsupported by logic, experience, or an ascertainable problem are not sufficient to establish a compelling state interest which can justify such state action (*Sail'er Inn, Inc. v. Kirby (1971) 5 Cal. 3d 1, 21-22, 95 Cal. Rptr. 329, 485 P.2d 529*).

[*Optional*] **J. Established Practices as Not Insulated.** State action that is based on a suspect category or burdens a fundamental interest may be held to violate the *equal protection clause* even though it represents a long recognized and well established practice (*Williams v. Illinois (1970) 399 U.S. 235, 239-240, 90 S. Ct. 2018, 26 L. Ed. 2d 586* ; *In re Antazo (1970) 3 Cal. 3d 100, 108-109, 89 Cal. Rptr. 255, 473 P.2d 999*).

[*Optional*] **K. When Scrutiny Enhanced.** A classification that is based both on a suspect category and burdens a fundamental interest is subject to more exacting and especially sensitive judicial scrutiny (*McDonald v. Bd. of Election Com. of Chicago (1969) 394 U.S. 802, 807, 89 S. Ct. 1404, 22 L. Ed. 2d 739* (dictum); *McLaughlin v. Florida (1964) 379 U.S. 184, 192, 85 S. Ct. 283, 13 L. Ed. 2d 222* ; *Crawford v. Board of Educ. (1976) 17 Cal. 3d*

280, 297, 130 Cal. Rptr. 724, 551 P.2d 28).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a petition for a writ of mandate to challenge the constitutionality of state action on equal protection grounds when the basis of the challenge is that the state action in question is based on a suspect category or burdens a fundamental interest and cannot be justified solely by resort to unsupported generalizations.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

Related memoranda of points and authorities for use in supporting a petition for writ of mandate on the ground that a classification cannot be justified are *set out in §§ 35A.45, 35A.47 -35A.49*.

[3] Discussion of Authorities

[a] Unsupported Justifications as Insufficient

The factual background of ***Sail'er Inn, Inc. v. Kirby*** *(1971) 5 Cal. 3d 1, 95 Cal. Rptr. 329, 485 P.2d 529* , is discussed in *§ 35A.20[3][a]*. In that case, the Supreme Court determined that a statute which limited the ability of women to work as bartenders was subject to strict scrutiny and required the state to justify it by showing a compelling state interest. The state argued first that the class of women restricted by the statute--women who were not bar owners or spouses of owners--would not be sufficiently restrained from committing "improprieties." The Court responded that this unacceptable generalization was arbitrary and unsupported by logic or experience.

Second, the state argued that women bartenders would be an unwholesome influence on the public. The Court answered that this rationale should be rejected because it was based on notions of what is a proper pursuit for a woman in this society rather than any ascertainable evil effects of permitting women to be bartenders.

[b] Established Practices as Not Insulated

In ***Williams v. Illinois*** *(1970) 399 U.S. 235, 90 S. Ct. 2018, 26 L. Ed. 2d 586* , an indigent who had been convicted of petty theft and who received the maximum sentence plus a fine which, if unpaid, would be worked off at the rate of $5 per day, challenged that part of his sentence which permitted incarceration for nonpayment of the fine. The trial court denied his petition and the Illinois Supreme Court affirmed. On appeal, the United States Supreme Court vacated the judgment and remanded the case, holding that when the aggregate imprisonment exceeds the maximum period fixed by statute because of an involuntary nonpayment of a fine or court costs, imprisonment violates the *equal protection clause* because it is the result of an impermissible discrimination based on ability to pay. The Court admitted that the custom of imprisoning a convicted defendant for nonpayment of fines dated back to medieval England, has long been practiced in the United States, and was authorized by statute in most states. Nevertheless, the Court must be open to reassessment of ancient practices other than those explicitly mandated by the Constitution. Although such factors should be weighed,

neither the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries can insulate it from constitutional attack.

In re Antazo *(1970) 3 Cal. 3d 100, 89 Cal. Rptr. 255, 473 P.2d 999* , was a habeas corpus proceeding which raised the issue of whether an invidious discrimination on the basis of wealth had occurred. In the trial court, petitioner and his codefendant were both released on probation on the condition, among others, that they pay a fine and penalty assessment or, in lieu of payment, serve time in the county jail at the rate of one day for each $10 unpaid. Petitioner's codefendant paid the fine and penalty assessment and was set free, but petitioner, who was indigent, went to jail. Before the Supreme Court, petitioner argued that his confinement violated the *Fourteenth Amendment of the United States Constitution* and former Cal. Const., art. I, §§ 6, 13 [*now see Cal. Const., art. I, §§ 15, 17*]. The Supreme Court agreed and granted the writ. In its decision, the Court observed that the practice of ordering imprisonment for nonpayment of fines was well established in Anglo-American law and had prevailed for some time in the courts of most states; but although the long-standing existence of a practice was a factor to be considered, it could not foreclose reassessment in the light of the continued evolution of fundamental precepts of the constitutional system. The court found an abiding concern for equality in all areas of today's society which did not spare established practices from exposure under the spotlight of equal protection principles.

[c] When Scrutiny Enhanced

McDonald v. Bd. of Election Com. of Chicago *(1969) 394 U.S. 802, 89 S. Ct. 1404, 22 L. Ed. 2d 739* , was a challenge on equal protection groundsby a group of jail inmates awaiting trial to an Illinois statute which denied them the ability to obtain an absentee ballot because it limited absentee voting to persons absent from the county or physically incapacitated. The district court granted summary judgment to the board of election commissioners and, on direct appeal, the Supreme Court affirmed because the statutory scheme was not arbitrary. The Court did not apply strict scrutiny to the Illinois statute because the statute was not drawn on the basis of wealth or race and did not impact the prisoner's ability to exercise the fundamental right to vote, since it only affected their right to receive an absentee ballot. Nevertheless, the Court discussed thoroughly the proper rules to be applied if the inmate's assertion that the case involved a basic fundamental right had been sustained. The Court stated that classifications which might invade or restrain voting rights must be closely scrutinized and carefully confined. Moreover, a careful examination by the Court is especially warranted where lines restricting voting rights are drawn on the basis of wealth or race, two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny. One of the sources relied on by the Court for this principle was *McLaughlin v. Florida (1964) 379 U.S. 184, 192, 85 S. Ct. 283, 13 L. Ed. 2d 222* , discussed *below.*

Counsel will note that to obtain this more careful scrutiny by showing both a suspect category and a fundamental interest, it is not necessary that the suspect category be a traditionally recognized one such as race or alienage. The Supreme Court has described these well established suspect categories as inherently suspect while recognizing that other categories may become suspect by virtue of their use in burdening a fundamental interest [*see Nyquist v. Mauclet (1977) 432 U.S. 1, 8 n.9, 97 S. Ct. 2120, 53 L. Ed. 2d 63]* . Wealth, for example, is treated as a suspect category when a fundamental interest is present and illegitimacy is arguably qualified for such treatment [*see §§ 35A.33, 35A.34*].

The factual background of ***McLaughlin v. Florida*** *(1964) 379 U.S. 184, 85 S. Ct. 283, 13 L. Ed. 2d 222* , is *set out in § 35A.29[3][a]*. In that case, two persons were convicted for violating a Florida statute which made it an offense for a white person and a black person of opposite sexes, not married to each other, to habitually live in and occupy the same room at night. On appeal, the Supreme Court held that the statute was invalid as a denial of the constitutional guarantee of equal protection. The Court pointed out that a classification based on race was "constitutionally suspect" and subject to the "most rigid scrutiny." Furthermore, the Court emphasized that since the racial classification was embodied in a criminal statute, it would be especially sensitive to the policies of the *equal protection clause*.

Although the Court did not specifically point it out, *McLaughlin* involved two protected interests because criminal statutes effect the fundamental interest of personal liberty [*see People v. Olivas (1976) 17 Cal. 3d 236, 251-252, 131 Cal. Rptr. 55, 551 P.2d 375* , discussed in *§ 35A.20[3][e]*].

The factual background of ***Crawford v. Board of Educ.*** *(1976) 17 Cal. 3d 280, 130 Cal. Rptr. 724, 551 P.2d 28* , is discussed in *§ 35A.20[3][b]*. This decision did not call for application of the strict scrutiny doctrine in the ordinary sense, but it did require the Court to determine how far school districts must go to alleviate school segregation. The Court held that the analysis of policies to avoid the racial discrimination in this instance took on "special constitutional significance" because education had been explicitly recognized for equal protection purposes as a fundamental interest.

Counsel will note that other combinations of suspect categories and fundamental interests may receive this specially significant scrutiny, even though the suspect category in question is not a traditional one like race or alienage. Thus, the California Supreme Court had recognized that it may treat wealth as a suspect category without raising it to a level of "suspectedness" equivalent to race when wealth was used to affect the fundamental interest of education [*see Serrano v. Priest (1976) 18 Cal. 3d 728, 766 n.45, 135 Cal. Rptr. 345, 557 P.2d 929 , cert. denied, 432 U.S. 907, 97 S. Ct. 2951, 53 L. Ed. 2d 1079 (1977) , set out in § 35A.20[3*][c]; *see also Sail'er Inn, Inc. v. Kirby (1971) 5 Cal. 3d 1, 21, 95 Cal. Rptr. 329, 485 P.2d 529* (treating sexual classification as suspect is particularly proper when classification infringes fundamental interest), *set out in §§ 35A.20[3][a]* and *35A.32[3][a]*].

[4] Additional Authorities

[a] Unsupported Justifications as Insufficient

The factual background of *Westbrook v. Mihaly (1970) 2 Cal. 3d 765, 87 Cal. Rptr. 839, 471 P.2d 487 , vacated, 403 U.S. 915, 91 S. Ct. 2224, 29 L. Ed. 2d 692 (1971)* , is discussed in *§ 35A.35[4][b]*. In that case, the respondents in an action for writ of mandamus attempted to justify a requirement to two-thirds voter approval in a local bond election by arguing that it served as a protective device to prevent bonded indebtedness from reaching levels that would necessitate either foreclosure or repudiation. The Supreme Court rejected this argument as unsupported. The Court cited several studies which showed that the special voting requirement did not create fiscal responsibility and could indeed encourage more costly alternative financing measures. It also pointed out that respondents failed to provide data indicating more frequent bond defaults, lower credit ratings, or extravagant public projects in states which do not follow the two-thirds vote rule.

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3-35A California Points & Authorities § 35A.47

§ 35A.47 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--State Action Subject to Strict Scrutiny as Violation of Equal Protection Unless Justified--Mere Recitation of Proper Purpose as Insufficient

[1] FORM

[*Caption. See § 35A.20.*]

A WRIT OF MANDATE IS PROPER TO CHALLENGE STATE ACTION WHICH VIOLATES THE RIGHT TO EQUAL PROTECTION WHEN IT CONTAINS A CLASSIFICATION WHICH IS BASED ON A SUSPECT CATEGORY OR BURDENS A FUNDAMENTAL INTEREST AND THE ONLY JUSTIFICATIONS OFFERED MERELY RECITE A PROPER STATE PURPOSE.

A-H. Authorities Establishing Grounds for Equal Protection Challenge to Suspect Category or Burden on Fundamental Interest. [*See § 35A.20, Paragraphs A-D, F-I.*]

I. Mere Recitation of Proper State Purpose as Insufficient. When state action is subject to strict judicial scrutiny, mere recitation of a proper state purpose is not sufficient to establish a compelling state interest that can justify such state action (*Trimble v. Gordon (1977) 430 U.S. 762, 767, 97 S. Ct. 1459, 52 L. Ed. 2d 31* ; *Arp v. Workers' Compensation Appeals Bd. (1977) 19 Cal. 3d 395, 404, 138 Cal. Rptr. 293, 563 P.2d 849*).

[*Optional*] **J. Established Practices as Not Insulated.** [*See § 35A.46, Paragraph J.*]

[*Optional*] **K. When Scrutiny Enhanced.** [*See § 35A.46, Paragraph K.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a petition for a writ of mandate to challenge the constitutionality of state action on equal protection grounds when the basis of the challenge is that the state action in question is based on a suspect category or burdens a fundamental interest and cannot be justified merely by the recitation of a proper state purpose.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

Related memoranda of points and authorities for use in supporting a petition for writ of mandate on the ground that a classification cannot be justified are *set out in §§ 35A.45, 35A.46, 35A.48, 35A.49*.

[3] Discussion of Authorities

[a] Mere Recitation of Proper State Purpose as Insufficient

The factual background of ***Trimble v. Gordon*** *(1977) 430 U.S. 762, 97 S. Ct. 1459, 52 L. Ed. 2d 31* , is discussed in *§ 35A.33[3][a]*. In that case, the Court was confronted with a contention that a state statute which permitted legitimate children to inherit by intestate succession from either parent but allowed illegitimate children to inherit only from their mothers could be justified as an attempt to promote legitimate family relationships. The Court rejected this contention because not only did the law penalize innocent children for their parents' failure, contrary to the principle that legal burdens should bear some relationship to individual responsibility or wrongdoing, but the mere incantation of a proper state purpose is insufficient under the *equal protection clause*.

The factual background of ***Arp v. Workers' Compensation Appeals Bd.*** *(1977) 19 Cal. 3d 395, 138 Cal. Rptr. 293, 563 P.2d 849* , is discussed in *§ 35A.32[3][b]*. In that case, the state attempted to justify a statute which created a conclusive presumption for the purposes of collecting death benefits that widows were wholly dependent on their deceased spouses but did not extend the same presumption in favor of widowers because it was designed to mitigate the continuing consequences of past economic abuse against women. The Supreme Court responded that it would not accept, without historical inquiry, the mere recitation of a benign, compensatory purpose; instead, it would examine the legislation to determine if, in fact, it was based on a different purpose.

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3-35A California Points & Authorities § 35A.48

§ 35A.48 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--State Action Subject to Strict Scrutiny as Violation of Equal Protection Unless Justified--Administrative Cost Saving as Insufficient

[1] FORM

[*Caption. See § 35A.20.*]

A WRIT OF MANDATE IS PROPER TO CHALLENGE STATE ACTION WHICH VIOLATES THE RIGHT TO EQUAL PROTECTION WHEN IT CONTAINS A CLASSIFICATION WHICH IS BASED ON A SUSPECT CATEGORY OR BURDENS A FUNDAMENTAL INTEREST AND THE ONLY JUSTIFICATION OFFERED IS ADMINISTRATIVE COST SAVING TO THE GOVERNMENT.

A-H. Authorities Establishing Grounds for Equal Protection Challenge to Suspect Category or Burden on Fundamental Interest. [*See § 35A.20, Paragraphs A-D, F-I.*]

I. Administrative Cost Saving as Insufficient. When state action is subject to strict judicial scrutiny, administrative cost saving to the government is not sufficient to establish a compelling state interest that can justify such state action (*Memorial Hosp. v. Maricopa County (1974) 415 U.S. 250, 262-263, 94 S. Ct. 1076, 39 L. Ed. 2d 306* ; *Castro v. California (1970) 2 Cal. 3d 223, 242, 85 Cal. Rptr. 20, 466 P.2d 244*).

[*Optional*] **J. Established Practices as Not Insulated.** [*See § 35A.46, Paragraph J.*]

[*Optional*] **K. When Scrutiny Enhanced.** [*See § 35A.46, Paragraph K.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a petition for a writ of mandate to challenge the constitutionality of state action on equal protection grounds when the basis of the challenge is that the state action in question is based on a suspect category or burdens a fundamental interest and cannot be justified solely because it creates administrative cost savings for the government.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

Related memoranda of points and authorities for use in supporting a petition for writ of mandate on the ground that a classification cannot be justified are *set out in §§ 35A.45 -35A.47, 35A.49*.

[3] Discussion of Authorities

[a] Administrative Cost Saving as Insufficient

The factual background of ***Memorial Hosp. v. Maricopa County*** *(1974) 415 U.S. 250, 94 S. Ct. 1076, 39 L. Ed. 2d 306* , is discussed in *§ 35A.37[3][a]*. In that case, the Court rejected several attempts by county authorities to justify a durational residence requirement for county-provided medical services. First, the Court flatly rejected the county's claim that the requirement was necessary to insure the fiscal integrity of its free medical care program by discouraging an influx of indigents. The Court held that a state may not protect the fiscal integrity of a program by drawing an invidious distinction between classes of its citizens. Second, the Court indicated that it would be extremely unlikely to uphold justifications based on other forms of administrative benefit. It rejected the residence requirement as too drastic a means for determining bona fide residence, ill-suited as a means of preventing fraud, and irrelevant for purposes of budget planning.

In ***Castro v. California*** *(1970) 2 Cal. 3d 223, 85 Cal. Rptr. 20, 466 P.2d 244* , petitioners challenged the constitutionality of former Cal. Const., art. II, § 1 [*now see Cal. Const., art. II, § 1*], which conditioned the right to vote on the ability to read the English language in an action for declaratory and mandatory relief against the secretary of state and a registrar of voters. The trial court rejected petitioners' argument that individuals who were literate only in Spanish would be able adequately to identify and familiarize themselves with political candidates and issues and rendered judgment for defendants. Petitioners appealed to the Supreme Court which reversed. The Court analyzed the history of equal protection challenges to voting statutes and concluded that the issue was whether the state's restriction of the right to vote to those literate in English was necessary to achievea compelling state interest. One potentially justifying source of state interest was the state's desire to avoid the cost and administrative complexity entailed in providing a bilingual electoral system. The Court avoided concluding that extension of the right to vote to those literate in any language would require such a system; but it emphasized that avoidance or recoupment of administrative costs, while a valid state concern, cannot justify imposition of an otherwise improper classification, especially one which touches on matters close to the core of the constitutional system. It is clear, the Court concluded, that the goal of efficient and inexpensive administration, while praiseworthy, cannot justify depriving citizens of fundamental rights.

[4] Additional Authorities

[a] Administrative Cost Saving as Insufficient

In *Frontiero v. Richardson (1973) 411 U.S. 677, 93 S. Ct. 1764, 36 L. Ed. 2d 583* , several federal statutes were attacked on equal protection grounds because they permitted a military serviceman to claim his wife as a dependent, entitled to certain government benefits, without regard to whether she was in fact financially dependent on him, but

refused comparable benefits to spouses of servicewomen unless they could show they were in fact dependent on their wives for over one half of their support. The Court held that the statutes violated the equal protection requirement imposed on the federal government by the *due process clause of the Fifth Amendment*. One of the arguments the government employed to justify the classification was administrative convenience. The government contended that as an empirical matter wives frequently are dependent on their husbands while husbands are rarely dependent on their wives. Thus, Congress could have reasonably concluded that it would be both cheaper and easier simply to create a conclusive presumption of dependency in favor of wives. On this point, four justices writing for the Court found little merit in this argument, stating that although efficacious administration of governmental programs is not without importance, the constitution recognizes higher values than speed and efficiency. Certainly, where strict judicial scrutiny is concerned, the recitation of administrative convenience cannot dictate constitutionality.

The factual background of *In re King (1970) 3 Cal. 3d 226, 90 Cal. Rptr. 15, 474 P.2d 983 , cert. denied, 403 U.S. 931, 91 S. Ct. 2249, 29 L. Ed. 2d 709 (1971)* , is discussed in *§ 35A.20[3][d]*. In that case, the petitioner in a habeas corpus proceeding successfully challenged on equal protection grounds a criminal statute which more heavily penalized fathers who failed to provide child support if they left California during the period of violation than if they stayed within the state. One of the arguments the state made in its attempt to justify the law was that it facilitated the administration of support obligations since it encouraged obligors to live in California. The Supreme Court apparently did not consider the argument important enough to warrant more than a footnote where it dealt with the claim succinctly. The Court commented that a generalized fiscal purpose like administrative benefit or protecting the public treasury cannot justify an invidious distinction between classes of citizens.

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§ 35A.49 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Challenging Constitutionality of State Action on Equal Protection Grounds--State Action Subject to Strict Scrutiny as Violation of Equal Protection Unless Justified--Effect of Unnecessary Classifications

[1] FORM

[*Caption. See § 35A.20.*]

A WRIT OF MANDATE IS PROPER TO CHALLENGE STATE ACTION WHICH VIOLATES THE RIGHT TO EQUAL PROTECTION WHEN IT CONTAINS A CLASSIFICATION WHICH IS BASED ON A SUSPECT CATEGORY OR BURDENS A FUNDAMENTAL INTEREST AND IS NOT NECESSARY TO SUPPORT A COMPELLING STATE INTEREST BECAUSE IT IS NOT DRAWN WITH PRECISION, TAILORED TO SERVE ITS OBJECTIVE, AND BASED ON THE LEAST DRASTIC MEANS OF ACCOMPLISHING ITS OBJECTIVE.

A-H. Authorities Establishing Grounds for Equal Protection Challenge to Suspect Category or Burden on Fundamental Interest. [*See § 35A.20, Paragraphs A-D, F-I.*]

I. Effect of Unnecessary Classifications. When state action is subject to strict judicial scrutiny, a classification which it imposes cannot be justified when the classification is not necessary to support a state interest because it is not drawn with precision, tailored to serve the objective of state action, and based on the least drastic means of accomplishing the objective of state action (*Dunn v. Blumstein (1972) 405 U.S. 330, 342-343, 92 S. Ct. 995, 31 L. Ed. 2d 274*).

[*Optional*] **J. Lack of Substantial Relationship.** A classification is not necessary to support a state interest when it is not substantially related to such interest or designed to serve it (*Carey v. Population Serv. Int'l (1977) 431 U.S. 678, 690-691, 97 S. Ct. 2010, 52 L. Ed. 2d 675*).

[*Optional*] **K. Lack of Precision and Tailoring.** A classification is not necessary to support a state interest where it is not drawn with precision or tailored to serve the objective of state action in that the individuals excluded by the classification are not in fact substantially less interested or affected than those who are included in the classification (*Kramer v. Union Free School Dist. (1969) 395 U.S. 621, 630-633, 89 S. Ct. 1886, 23 L. Ed. 2d 583*).

[*Optional*] **L. Availability of Less Drastic Means.** A classification is not necessary to support a state interest where alternative means are available which are less drastic in their impact on constitutionally protected interests (*Dunn v. Blumstein (1972) 405 U.S. 330, 345-346, 92 S. Ct. 995, 31 L. Ed. 2d 274* ; *In re Antazo (1970) 3 Cal. 3d 100, 113-115, 89 Cal. Rptr. 255, 473 P.2d 999*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a petition for a writ of mandate to challenge the constitutionality of state action on equal protection grounds when the basis of the challenge is that the state action in question burdens a suspect category or is based on a fundamental interest and is not necessary to support a compelling state interest because it is not narrowly drawn to support only that interest and fails to provide the least burdensome alternative.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

Related memoranda of points and authorities for use in supporting a petition for writ of mandate on the ground that a classification cannot be justified are *set out in §§ 35A.45 -35A.48*

[3] Discussion of Authorities

[a] Effect of Unnecessary Classifications

In ***Dunn v. Blumstein*** *(1972) 405 U.S. 330, 92 S. Ct. 995, 31 L. Ed. 2d 274* , a state resident challenged a state statute which excluded him from voting in state elections because of durational residence requirements on equal protection grounds. A federal district court declared that the requirements were unconstitutional and on direct appeal, the Supreme Court affirmed. The Court held that the requirements violated the *equal protection clause* because they were unnecessary to promote a compelling interest. In the course of its opinion, the Court elaborated on the equal protection test. It stated that laws subject to the strict equal protection text are unconstitutional unless the state can demonstrate that such laws are *necessary* to promote a compelling governmental interest (emphasis added by the Court). It is not sufficient for state action to further a very substantial state interest. Statutes affecting constitutional rights must be drawn with precision and must be tailored to serve their legitimate objectives. And if there are other reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a state may not choose the way of greater interference. If it acts at all, it must choose less drastic means.

[b] Lack of Substantial Relationship

The factual background of ***Carey v. Population Serv. Int'l*** *(1977) 431 U.S. 678, 97 S. Ct. 2010, 52 L. Ed. 2d 675* , is discussed in *§ 35A.41[3][b]*. In that case, the Court held that a New York statute which regulated the sale of contraceptives constituted an unjustified invasion of the constitutional right of privacy since the state failed to establish that the law served compelling state interests and was narrowly drawn to express only those interests. Two of the goals suggested by the state were rejeted by the Court because they were not compelling. The analysis suggests that while the

interests themselves may have been significant, they did not serve to justify this particular statute because the statute, in the Court's opinion, was neither substantially related to such interests nor was it designed to serve them. For example, the statute limited certain contraceptive sales to pharmacists and the state sought to show that this limitation was justified by the state's interest in preventing people from tampering with the contraceptives prior to sale. The Court pointed out that while other restrictions may well be reasonably related to the objective of quality control, there was no explanation of why pharmacists were better able than others to prevent tampering.

[c] Lack of Precision and Tailoring

In ***Kramer v. Union Free School Dist.*** *(1969) 395 U.S. 621, 89 S. Ct. 1886, 23 L. Ed. 2d 583* , a bachelor challenged the constitutionality of one section of the New York Education Law which disqualified him from voting in a school district election because he did not either own property or parent children enrolled in a local public school. The federal district court dismissed his complaint, but on appeal the court of appeals remanded onthe basis that a three-judge district court be convened. The three-judge panel then dismissed the complaint, but on direct appeal, the Supreme Court reversed. The Court held that the law violated the *equal protection clause* because it permitted inclusion of many persons having only a remote and indirect interest in school affairs while excluding others having a distinct and direct interest. The Court stated that the issue was whether the exclusion of certain voters was necessary to promote a compelling state interest. It found after examination of the classification that it did not accomplish the purposes put forth by the district with sufficient precision to justify denying the franchise to plaintiff. Whether a classification which limits a particular benefit to some individuals denies equal protection to those excluded depends, inter alia, on whether all those excluded are in fact substantially less interested or affected than those who are included. The classification must be tailored so that the exclusion is necessary to achieve the state's goals, In fact, the classification challenged was overinclusive because it permitted inclusion of many persons who had, at best, a remote and indirect interest in school affairs, and on the other hand, underinclusive because it excluded others who have a distinct and direct interest in school decisions. The Court also noted that since it found that the classification was not necessary to promote the articulated state interest, it was not required to determine whether that interest was a compelling one.

Counsel will note that in *Dunn v. Blumstein*, discussed in *§ 35A.49[3][a]*, the Court employed the same analysis to conclude that Tennessee's durational residence requirement for voting was not necessary to promote the state's goal of having knowledgeable voters. The requirement was insufficiently tailored to achieve this goal because it crudely excluded large numbers of fully qualified voters who could not meet the requirement while providing no assurance that those who had lived in Tennessee longer had an adequate knowledge of the issues.

[d] Availability of Less Drastic Means

The factual background of ***Dunn v. Blumstein*** *(1972) 405 U.S. 330, 92 S. Ct. 995, 31 L. Ed. 2d 274* , is discussed in *§ 35A.29[3][a]*. In that case, the Court held that Tennessee's durational residence requirement for voting was not necessary to promote the state's goal of preventing voter fraud. There were other means, particularly involving reliance on the state's system of voter registration, which were less restrictive, less burdensome, and far less drastic in their impact on constitutionally protected interests.

The factual background of ***In re Antazo*** *(1970) 3 Cal. 3d 100, 89 Cal. Rptr. 255, 473 P.2d 999* , is discussed in *§ 35A.46[3][b]*. In that case, petitioner successfully challenged the constitutionality on equal protection grounds of statutes which permitted his incarceration for failure to pay a fine imposed in a criminal case at the rate of one day for each $10 unpaid. In its analysis, the Court asked whether the practice of incarceration in this instance was necessary to promote the state's interest in collection of fines. It concluded that the practice was not necessary in the constitutional sense because there existed alternative and less obtrusive means by which the state could further its interest. Similarly, incarceration for failure to pay fines was not necessary to further the state's interest in rehabilitation and reformation. The suggested alternatives to incarceration for failure to pay fines can simultaneously promote the state's interest in rehabilitating the offenders and by requiring the offender's compliance with onerous conditions, create awareness that

one is responsible for criminal conduct, and encourage offenders to become law abiding.

A variation on the rule stated in *Antazo* may be found in *Sail'er Inn, Inc. v. Kirby (1971) 5 Cal. 3d 1, 20-21, 95 Cal. Rptr. 329, 485 P.2d 529 , set out in § 35A.20[3][c],* where the Court determined that the state's interest in preventing improprieties in the sale of alcoholic beverages was not justified by a law preventing most women from becoming bartenders. The Court held that where the evil which the Legislature seeks to prevent can be directly prevented through legislation which is nondiscriminatory, and where the class singled out by the Legislature has no necessary connection with the evil to be prevented, the statute must be struck down as an invidious discrimination against the class.

[4] Additional Authorities

[a] Effect of Unnecessary Classification

The factual background of *Ramirez v. Brown (1973) 9 Cal. 3d 199, 107 Cal. Rptr. 137, 507 P.2d 1345 , rev'd, 418 U.S. 24, 94 S. Ct. 2655, 41 L. Ed. 2d 551 (1974)* , is discussed in *§ 35A.35[4][b]*. In that case, the Supreme Court strongly reaffirmed the importance of limiting state action to that which is least intrusive. In dealing with the fundamental right to vote, it said that where there is a restriction on such a fundamental interest, the restriction is constitutionally permissible only if it is necessary to promote that interest. To be necessary, it must constitute, among other things, the "least burdensome" alternative possible. The Court cited several cases where both it and the United States Supreme Court had invalidated classifications which were not necessary to promote a governmental interest. The Court found the cases as a group to represent applications of both the United States and the California Constitutions to classifications which infringe fundamental interests or use suspect categories. They document the several ways in which a classification may fail to provide the least burdensome alternative possible. In its analysis the Court found as examples that the classification may be (1) overinclusive (permit inclusion of persons who should not be affected); (2) underinclusive (exclude others who should be restricted); (3) replaced by more reasonable alternatives;(4) neither drawn with precision nor tailored to serve the legitimate objectives; or (5) an indirect way of reaching a result which can be obtained directly.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsMandamusConstitutional LawEqual ProtectionGeneral OverviewConstitutional LawEqual ProtectionScope of Protection

California Points & Authorities

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[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

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[b] Mandate to Review Discipline of Employee

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[a] Mandate to Review Discipline of Employee

[b] Strict Compliance With Discipline Procedure

§ 36.21 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5 (state); Code Civ. Proc. §§ 1094.5, 1094.6 (local)]--Discipline of Civil Service Employee--Due Process Requirements

[1] FORM

[2] Comments

[a] Use of Form

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[3] Discussion of Authorities

[a] Due Process Requirements for Permanent Civil Service Employee

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[a] Due Process Requirements for Permanent Civil Service Employees

[b] Due Process Requirements for Short-Term Suspensions

[c] Right to Respond to Authority Imposing Discipline

[d] Posthearing Determination Must Be Based on Review of Evidence

§ 36.22 Opposing Petition for Writ of Mandate to Review Administrative Decision--Discipline of Civil Service Employee--Due Process Requirements--No Property Right to Be Protected When Employment Is at Will

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memorandum

[3] Discussion of Authorities

[a] No Protected Property Interest When Employment Is at Will

§ 36.22A Opposing Petition for Writ of Mandate to Nullify Administrative Decision--Discipline of Civil Service Employee--Official Initiating Disciplinary Action May Serve as Skelly Hearing Officer

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Same Official May Initiate Disciplinary Proceedings and Conduct Skelly Hearing

§ 36.23 Opposing Petition for Writ of Mandate to Nullify Administrative Decision--Discipline of Civil Service Employee--Open Session of Civil Service Commission or Board Not Required [Gov. Code § 54957]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[3] Discussion of Authorities

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Predeprivation Hearing Not Required for Public Employee Who Accepts Demotion in Lieu of Layoff

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[3] Discussion of Authorities

[a] Administrative Appeal Procedures Must be Tailored to Due-Process Need in Particular Case

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[3] Discussion of Authorities

[a] Public Safety Officers Procedural Bill of Rights Act Does Not Apply to Criminal Investigations

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[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Withdrawal of Adverse Action and Appeal Pursuant to Settlement Deprives Board of Jurisdiction

§ 36.27 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5 (state); Code Civ. Proc. §§ 1094.5, 1094.6 (local)]--Discipline of Civil Service Employee--Exercise of First Amendment Rights

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Protection From Discipline for Exercise of First Amendment Rights

[b] What Constitutes Matter of Public Concern

[c] Even Recklessly False Statements May Be Protected

[d] Mere Disruption Insufficient to Defeat First Amendment Rights

[4] Additional Authorities

[a] Protection From Discipline for Exercise of First Amendment Rights

[b] What Constitutes Matter of Public Concern

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

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[3] Discussion of Authorities

[a] No Free-Speech Protection When Employee Is Expressing Views As an Employee, Not As a Concerned Citizen.

§ 36.29 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5 (state); Code Civ. Proc. §§ 1094.5, 1094.6 (local)]--Discipline of Civil Service Employee--Statutory Cause for Discipline--General Form

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Cause for Discipline

[b] Substantial Evidence

[c] Findings Based Solely on Hearsay to Which Objection Timely Made

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[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] When Inefficiency Based on Statistical Comparison Cause for Discipline

[4] Additional Authorities

[a] When Inefficiency Based on Statistical Comparison Cause for Discipline

§ 36.31 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5 (state); Code Civ. Proc. §§ 1094.5, 1094.6 (local)]--Discipline of Civil Service Employee--Professional Philosophy of Employee as Insufficient Evidence to Discipline on Ground of Inefficiency

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] When Inefficiency Based on Professional Philosophy Cause for Discipline

§ 36.32 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5 (state); Code Civ. Proc. §§ 1094.5, 1094.6 (local)]--Discipline of Civil Service Employee--Neglect of Duty as Not Basis for Discipline When Based on Mere Failure to Perform Certain Act

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] When Neglect of Duty Cause for Discipline

[b] Incomplete Hospital Rounds

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[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] When Insubordination Cause for Discipline

[b] Physical Beating of Hospital Patient

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[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] When Dishonesty Cause for Discipline

[4] Additional Authorities

[a] When Dishonesty Cause for Discipline

§ 36.35 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5 (state); Code Civ. Proc. §§ 1094.5, 1094.6 (local)]--Discipline of Civil Service Employee--Immorality Not Cause for Discipline Unless It Indicates Unfitness to Perform Job

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

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[b] Homosexual Status

[c] Homosexual Conduct

[4] Additional Authorities

[a] When Immorality Cause for Discipline

§ 36.36 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5 (state); Code Civ. Proc. §§ 1094.5, 1094.6 (local)]--Discipline ofCivil Service Employee--Discourteous Treatment of Public or Other Employees as Cause for Discipline

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] When Discourteous Treatment of Public and Other Employees Cause for Discipline

[4] Additional Authorities

[a] When Discourteous Treatment of Public and Other Employees Cause for Discipline

§ 36.37 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5 (state); Code Civ. Proc. §§ 1094.5, 1094.6 (local)]--Discipline of Civil Service Employee--Willful Disobedience as Cause for Discipline

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] When Willful Disobedience Cause for Discipline

§ 36.38 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5 (state); Code Civ. Proc. §§ 1094.5, 1094.6 (local)]--Discipline of Civil Service Employee--Other Failure of Good Behavior as Cause for Discipline

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

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[b] Possession of Marijuana

[4] Additional Authorities

[a] When Other Failure of Good Behavior Cause for Discipline

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[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] When Conduct Unbecoming a Civil Service Employee Is Cause for Discipline

§ 36.40 Supporting Petition for Writ of Mandate [Code Civ. Proc. § 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5 (state); Code Civ. Proc. §§ 1094.5, 1094.6 (local)]--Discipline of Civil Service Employee--Retaliation Against Whistle-blower Not Cause for Discipline if Petitioner Reasonably Believed Personnel Action Was Independently Justified [Gov. Code § 8547.8]

[1] FORM

[2] Comments

[a] Use of Form

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[3] Discussion of Authorities

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§ 36.41 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5 (state); Code Civ. Proc. §§ 1094.5, 1094.6 (local)]--Discipline of Civil Service Employee--Excessive Penalty

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Excessive Penalty

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[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Inadequacy of One of Several Grounds

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[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Statutory Bar on Use of Nolo Contendere Plea Extends to Administrative Actions

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[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Reviewing Weight of Evidence

[b] Authority to Exercise Independent Judgment

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[4] Additional Authorities

[a] Authority to Exercise Independent Judgment

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[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

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[4] Additional Authorities

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[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Mandate to Compel Payment of Prevailing Wage

[b] Mandate to Compel Arbitration of Wage Dispute

[c] Liberal Construction of Prevailing Wage Statute

[d] Reasonable Correspondence With Wages Elsewhere

[e] Wage Determination an Abuse of Discretion

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] The Fair Labor Standards Act Does Not Prohibit Public Employer From Compelling Employees to Use Accrued Compensatory Time

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[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Mandate to Compel Civil Service Commission to Permit Applicant to Take Examination

[b] Limited Powers of Commission

[c] Examination Requirements

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[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

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[a] Denial of Equal Protection

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[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Mandate to Review Performance of Discretionary Duty

[b] Mandate to Compel Civil Service Commission to Certify Petitioner

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[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Mandatory Duty

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[4] Additional Authorities

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[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Withdrawal of Resignation Before Effective Date

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[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Due Process Not Violated if Hearing Officer Not Perfectly Impartial

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[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Peace Officer Bill of Rights Provides Limited Protection to Probationary Employees

[b] Peace Officer Bill of Rights Does Not Affect City's Right to Terminate Employment At-Will

[c] Probationary Peace Officers Are Terminable At-Will

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[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Court Not Free to Review Degree of Punishment Imposed by Agency in Absence of Abuse of Discretion

[b] Employer Permitted to Impose More Severe Penalty Than That Proposed by Hearing Officer

[c] Similar Charges Need Not Result In Identical Penalties

§ 36.56 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Discipline of Civil Service Employee--Writ Barred by Laches

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Laches Bars Administrative Mandate if Employee's Unreasonable Delay in Seeking Writ of Mandate has Prejudiced Employer

§ 36.57 Opposing Petition for Writ of Mandate to Review Discipline of Public Safety Officer--Statute of Limitations for Imposition of Discipline Was Tolled or Extended

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Statute of Limitations for Imposition of Discipline on Public Safety Officers Is Subject to Tolling

§ 36.58 Opposing Petition for Writ of Mandate to Review Discipline of Public Safety Officer--Statute of Limitations Defense Forfeited

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[3] Discussion of Authorities

[a] Statute of Limitations Defense Under Public Safety Officers Procedural Bill of Rights Act Must Be Raised in Administrative Hearing Before Mandamus Relief Can Be Sought

§ 36.59 Opposing Petition for Writ of Mandate to Review Discipline of Public Safety Officer--Notice of Disciplinary Action Timely and Sufficient

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[3] Discussion of Authorities

[a] Agency Must Provide Written Notice of Disciplinary Action Within One Year of Discovery of Violation

[b] Officer's False Statement During Investigation Constitutes Separate Misconduct That Triggers New One-Year Period

[c] Notice of Disciplinary Action Need Not Identify Person Who Decided to Impose Discipline

§ 36.60 Opposing Petition for Writ of Mandate to Review Discipline of Civil Service Employee--Employee's Constitutional Right Against Self-Incrimination Does Not Bar Disciplinary Action for Refusal to Answer Employer's Job-Related Questions

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Privilege Against Self-Incrimination Does Not Prevent Employer From Requiring Public Employee To Answer Job-Related Questions

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3-36 California Points & Authorities § 36.01

§ 36.01 Scope of Chapter

This chapter contains memoranda for use in supporting petitions for writs of mandate for review of final administrative adjudicatory orders or decisions of state or local civil service commissions disciplining a civil service employee [*see §§ 36.20 -36.43*], including a memorandum for use in urging a court to use an independent judgment test in reviewing a local agency decision [*see § 36.44*], and a memorandum supporting review by traditional writ of mandate of an agency's disciplinary decision when that decision is not based on an evidentiary hearing and constitutes an abuse of discretion [*see § 36.45*]. It also contains a memorandum for use in compelling a civil service commission to adopt an ordinance or regulation providing for payment of the prevailing wage [*see § 36.46*], to permit an applicant to take an examination [*see §§ 36.48, 36.49*], to certify a petitioner to appointment to an available civil service position [*see § 36.50*], to fill a vacant position through promotion of a civil service employee [*see § 36.51*], and to accept withdrawal of an employee's resignation before its effective date [*see § 36.52*].

This chapter also provides memoranda of a memorandum for use on behalf of a public employer to establish the employer's right to require an employee to use accrued compensatory time [*see § 36.47*] and to oppose employee petitions seeking to set aside or review disciplinary actions [*see §§ 36.22 -36.26*, 36.53-36.60].

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3-36 California Points & Authorities § 36.02

§ 36.02 Governing Law

The civil service system of California is authorized by *Cal. Const., art. VII, § 1*, and implemented by the State Civil Service Act, *Gov. Code § 18500 et seq.* Other provisions governing state officers and employees are found in *Gov. Code § 19815 et seq.* (personnel administration). State civil service regulations are contained in *2 Cal. Code Reg. § 1 et seq.* County civil service systems are authorized by *Cal. Const., art. XI, §§ 1, 3, 4*, and by the County Civil Service Enabling Law, *Gov. Code § 31100 et seq.* City civil service is authorized by *Cal. Const., art. XI, §§ 2, 3, 5*, and by the City Civil Service Enabling Law, *Gov. Code § 45000 et seq.* Local civil service regulations are contained in local charters and ordinances.

The Fair Labor Standards Act (FLSA) [*see 29 U.S.C. §§ 201-219*], as limited by the Portal-to-Portal Act [*see 29 U.S.C. §§ 251-262*], is the primary federal statute governing wages and hours of employment. For an overview of the FLSA, see California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes* (Matthew Bender). For a detailed discussion of the coverage of the FLSA, see Wilcox, California Employment Law, Ch. 1 (Matthew Bender).

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3-36 California Points & Authorities § 36.03

§ 36.03 How to Use Forms in This Chapter

[1] Page Limits on Memoranda

Among the more significant drafting requirements to keep in mind are page limits: supporting and opposing memoranda filed in discovery motion proceedings may not exceed 15 pages. A reply or closing memorandum may not exceed 10 pages. Exhibits, declarations, attachments, the table of contents, the table of authorities, and the proof of service are excluded from these page limits. Any party must obtain leave of court to file a longer memorandum [*see Cal. Rules of Ct., Rule 3.1113(d), (e)*]. These and other drafting requirements are discussed in further detail in Ch. 1, *Writing Legal Memoranda and Briefs* .

[2] Using the Forms to Build a Draft Memorandum

Counsel should use the memoranda in this chapter with caution and knowledge that many of the supporting authorities are cases which, in fact, uphold a civil service commission's disciplining of an employee. The cases are useful in that the courts have discussed the general rules governing such actions, but in applying those rules, the courts have often decided in favor of the commission.

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3-36 California Points & Authorities § 36.04

§ 36.04 Related Pleading and Practice Chapters

For a discussion, procedural checklist, and forms for use in state and local civil service proceedings, see California Forms of Pleading and Practice, Ch. 118, *Civil Service* (Matthew Bender).

For discussion and forms for use in particular cases involving civil service actions, see the following chapters in California Forms of Pleading and Practice (Mathew Bender):

- Ch. 182, *Declaratory Relief*
- Ch. 292, *Habeas Corpus*
- Ch. 303, *Injunctions*
- Ch. 358, *Mandate and Prohibition*
- Ch. 464, *Public Entities and Officers: California Tort Claims Act*
- Ch. 465, *Public Entities and Officers: Civil Claims Arising from Criminal Acts*
- Ch. 466, *Public Entities and Officers: Taxpayer's Actions*
- Ch. 467, *Public Entities and Officers: Enforcement of Judgments Against Public Entities*
- Ch. 468, *Public Entities and Officers: False Claims Actions*
- Ch. 469, *Public Entities and Officers: Conflicts of Interest*
- Ch. 473, *Public Agency Adjudication* , et seq.

- Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq.
- Ch. 492, *Review (Certiorari), Writ of*

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3-36 California Points & Authorities § 36.05

§ 36.05 Related Points and Authorities Chapters

Related memoranda that may be useful when a writ of mandate is being sought by a civil service employee may be found in Ch. 195, *Public Administrative Law* .

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3-36 California Points & Authorities §§ 36.06-36.19

[Reserved]

§§ 36.06[Reserved]

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PART II. FORMS

3-36 California Points & Authorities § 36.20

§ 36.20 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5 (state); Code Civ. Proc. §§ 1094.5, 1094.6 (local)]--Discipline of Civil Service Employee--Discipline Procedure Not Strictly Followed

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	MEMORANDUM IN SUPPORT OF PETITION
_____ [*name*],	)	FOR WRIT OF MANDATE
Respondent.	)	[Code Civ. Proc. _____ (§ 1094.5
	)	*or* §§ 1094.5, 1094.6)]
	)	

_____

A MANDATE PROCEEDING IS THE PROPER MEANS BY WHICH TO JUDICIALLY REVIEW THE ADMINISTRATIVE DISCIPLINE OF A CIVIL SERVICE EMPLOYEE WHEN THE PROCEDURE REQUIRED TO BE FOLLOWED WITH REGARD TO THE IMPOSITION OF DISCIPLINE WAS NOT STRICTLY COMPLIED WITH.

A. Decisions Reviewable in Mandate Proceeding. A final administrative order or decision is reviewable in a mandate proceeding if it was the result of an administrative proceeding in which by law a hearing was required for the purpose of taking evidence on the basis of which the agency had discretion to determine relevant facts (*Code Civ. Proc. § 1094.5(a)*) *or* (*Code Civ. Proc. §§ 1094.5(a), 1094.6(a)*).

B. Mandate to Review Discipline of Employee. A final administrative adjudicatory order or decision disciplining a civil service employee is reviewable in a mandate proceeding (*Topanga Ass'n for a Scenic Community v. Los Angeles*

County (1974) 11 Cal. 3d 506, 514, 113 Cal. Rptr. 836, 522 P.2d 12 ; *Boren v. State Personnel Bd. (1951) 37 Cal. 2d 634, 637, 234 P.2d 981* ; *La Prade v. Department of Water & Power (1945) 27 Cal. 2d 47, 53, 162 P.2d 13*).

C. Form and Content of Pleadings. When an application is made for issuance of a writ of mandate to review the validity of a final administrative order or decision upholding the discharge of a civil service employee, the pleading of petitioner need only state facts entitling him or her to some kind of relief, that is, facts stating a cause of action for mandate or certiorari (*Boren v. State Personnel Bd. (1951) 37 Cal. 2d 634, 637, 234 P.2d 981*).

D. Inquiry in Mandate Proceeding. The inquiry in a mandate proceeding to review a final administrative adjudicatory order or decision extends to the questions of whether the agency has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion established by the agency not proceeding in the manner required by law, the order or decision not being supported by the findings, or the findings not being supported by the evidence (*Code Civ. Proc. § 1094.5(b)*).

E. Strict Compliance With Discipline Procedure. Any charter provision, statute, or regulation setting out the procedure to be followed with regard to disciplining a civil service employee must be strictly complied with in order for the discipline to be effective (*Shannon v. Los Angeles (1928) 205 Cal. 366, 370-371, 270 P. 682* ; *Zeron v. City of Los Angeles (1998) 67 Cal. App. 4th 639, 643, 79 Cal. Rptr. 2d 130* ; *Frates v. Burnett (1970) 9 Cal. App. 3d 63, 71, 87 Cal. Rptr. 731*).

[*Optional*] **F. Requirements of Ralph M. Brown Act.** The Ralph M. Brown Act, California's open meeting law (*Gov. Code § 54950 et seq.*), prescribes agenda and notice requirements for a local agency to conduct a meeting at which it considers complaints against, and imposes discipline on, a public employee (*see* Gov. Code §§ 54945.2, *54956, 54957*). In particular, an agency's failure to provide an employee advance notice that it will consider complaints or charges against the employee renders any discipline imposed on the employee null and void (*Gov. Code § 54957(b)*; *Moreno v. City of King (2005) 127 Cal. App. 4th 17, 24-29, 25 Cal. Rptr. 3d 29*).

[*EITHER*]

[*Optional*] **G. Reinstatement of Employee.** Reinstatement of an employee in his or her former position, with payment of back salary, is the proper procedure following a finding that the employee was dismissed without (1) a required prior hearing, (2) a subsequent hearing at which dismissal was upheld on good grounds, or (3) following a hearing in which the civil service board or commission reached an incorrect decision as a matter of law (*Kirkpatrick v. Civil Serv. Comm'n (1978) 77 Cal. App. 3d 940, 945, 144 Cal. Rptr. 51* ; *Frates v. Burnett (1970) 9 Cal. App. 3d 63, 72, 87 Cal. Rptr. 731* ; *Peters v. Mitchell (1963) 222 Cal. App. 2d 852, 862, 35 Cal. Rptr. 535* ; *see Gov. Code § 19143*).

[*OR*]

[*Optional*] **G. Payment of Back Salary.** A civil service employee denied pretermination due process is entitled to payment of back salary for the period between termination and institution of due process safeguards (*Chang v. Palos Verdes Estates (1979) 98 Cal. App. 3d 557, 564, 159 Cal. Rptr. 630* ; *West v. Berkeley (1979) 96 Cal. App. 3d 143, 147-148, 157 Cal. Rptr. 764*).

H. Action Remanded to Civil Service Board or Commission. If a hearing has been denied a civil service employee or the evidence is insufficient to sustain the action of the civil service board of commission, but it is still possible for the board or commission to hold a hearing or exercise its discretion, then the matter should be remanded to the board or commission for further consideration (*Skelly v. State Personnel Bd. (1975) 15 Cal. 3d 194, 219-220, 124 Cal. Rptr. 14, 539 P.2d 774* ; *La Prade v. Department of Water & Power (1945) 27 Cal. 2d 47, 53, 162 P.2d 13*).

I. Punitive Action Generally May Not Be Taken Against Peace Officer More Than One Year After Discovery of Misconduct. Under the Public Safety Officers Procedural Bill of Rights Act (*Gov. Code § 3300 et seq.*), any punitive action or denial of a promotion on grounds other than merit generally may not be taken for any act, omission, or other allegation of misconduct if the investigation of the allegation is not completed within one year of the public agency's discovery (by a person authorized to initiate an investigation) of the allegation of the act, omission, or other misconduct (*Gov. Code § 3304(d)*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a petition for a writ of mandate for review of a final administrative adjudicatory order or decision of a state or local civil service commission disciplining a civil service employee when the procedure required by law to be followed was not strictly complied with.

Counsel should choose appropriate citations from the alternatives available, depending on whether the State Personnel Board or a local civil service commission is involved. For the form to be complete, counsel should also include a discussion of the administrative regulations involved in reviewing the employee's discipline.

Counsel should add argument linking the points in this form with the facts of his or her case.

[3] Discussion of Authorities

[a] Decisions Reviewable in Mandate Proceeding

Code Civ. Proc. § 1094.5(a) provides that when the writ of mandate is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer, the case shall be heard by the court sitting without a jury. The California Constitution provides that the State Personnel Board "shall ... review disciplinary actions" against state civil service employees [*Cal. Const., art. VII, § 3(a)*]. Judicial review by administrative mandate, therefore, would ordinarily occur after the State Personnel Board issues its final decision [*see Code Civ. Proc. § 1094.5(a)*]. Former statutory provisions authorizing administrative review by any entity other than the Board (such as a "board of adjustment" created as part of a grievance procedure specified in a memorandum of understanding for a state-employee bargaining unit) were declared unconstitutional [*State Personnel Bd. v. Dep't of Personnel Admin. (2005) 37 Cal. 4th 512, 522-527, 36 Cal. Rptr. 3d 142, 149-153, 123 P.3d 169* (holding *former* Code Civ. Proc. § 1094.5(k), *former* Gov. Code §§ 19175(f), (g), 18670(c)-(e) unconstitutional)].

Code Civ. Proc. § 1094.6(a) provides that a writ of mandate may be issued in review of any decision of a local agency,

other than a school district, or of any commission, board, officer, or agent thereof. A petition for writ of mandate to review the decision of a local agency must comply with the time limits set forth in *Code Civ. Proc. § 1094.6* [*Code Civ. Proc. § 1094.6(a)*]. A "decision" of a local agency for purposes of *Code Civ. Proc. § 1094.6* means a decision subject to review under *Code Civ. Proc. § 1094.5* that (1) suspends, demotes, or dismisses an officer or employee; (2) revokes or denies an application for a permit, license, or other entitlement; (3) imposes a civil or administrative penalty, fine, charge, or cost; or (4) denies an application for any retirement benefit or allowance [*Code Civ. Proc. § 1094.6(e)*].

A petition for administrative mandate must be filed no later than 90 days after the decision becomes final [*Code Civ. Proc. § 1094.6(b)* (§ 36.20[3][a])]. The decision becomes final when it is announced, if no applicable statute, charter, or rule provides for the possibility of reconsideration or requires a written decision or written findings. If there is a possibility of reconsideration, the decision becomes final when the time for reconsideration expires or when a request for reconsideration is denied. If there is a provision for a written decision or written findings, the decision becomes final when it is mailed to the party seeking the writ [*Code Civ. Proc. § 1094.6(b)*; *see Donnellan v. City of Novato (2001) 86 Cal. App. 4th 1097, 1102-1107, 103 Cal. Rptr. 2d 882* (employee's 90-day period to petition for writ of mandate will not begin to run until agency mails its decision to employee, together with copy of affidavit or certificate of mailing; omission of affidavit or certificate of mailing means 90-day period will not begin to run); *Herman v. Los Angeles County Metro. Transp. Auth. (1999) 71 Cal. App. 4th 819, 824-830, 84 Cal. Rptr. 2d 144* (written decision must be mailed to employee; mailing decision to employee's attorney will not trigger running of time to file petition for writ of mandate)]. If the petition for administrative mandate is filed in federal court along with a federal civil rights claim and ultimately is dismissed without prejudice, the 90-day period to seek administrative mandate in state court under *Code Civ. Proc. § 1094.6(b)* is tolled pursuant to *28 U.S.C. § 1367(d)* during the pendency of the federal proceedings and for 30 days after dismissal of those proceedings [*Guevara v. Ventura County Cmty. Coll. Dist. (2008) 169 Cal. App. 4th 167, 170-173, 87 Cal. Rptr. 3d 50]* .

In cases in which administrative mandate is not available to review the disciplinary decision because a hearing was not required by law [*see, e.g., Gov. Code § 19576* (suspension of state civil service employee for five days or less)], ordinary mandate may be available under *Code Civ. Proc. § 1085(a)* if the agency's decision constituted an abuse of discretion [*see Coelho v. State Personnel Bd. (1989) 209 Cal. App. 3d 968, 971, 257 Cal. Rptr. 557*]. For points and authorities supporting a petition for writ of mandate in such cases, see *§ 36.44*.5.

[b] Mandate to Review Discipline of Employee

Topanga Ass'n for a Scenic Community v. Los Angeles County *(1974) 11 Cal. 3d 506, 113 Cal. Rptr. 836, 522 P.2d 12* , was an appeal from a judgment of a trial court denying a writ of mandate in a proceeding for review of an administrative decision. Despite petitioner's protest, the Los Angeles County Board of Supervisors upheld the planning commission's grant of a variance on certain acreage, and petitioner then sought relief by means of administrative mandate. The Supreme Court reversed the lower court judgment and remanded the cause to the superior court with directions to issue a writ of mandate requiring the Los Angeles Board of Supervisors to vacate its order awarding a variance. The Supreme Court discussed the propriety of using administrative mandate under *Code Civ. Proc. § 1094.5*, noting that the California Judicial Council desired that the section apply to all agencies, regardless of whether they are subject to the Administrative Procedure Act and regardless of their state or local character, and that in the absence of compelling language to the contrary, a statute will be assumed to have been adopted with the intent and meaning expressed by the council in its report (*11 Cal. 3d 506, 514 n. 12, 113 Cal. Rptr. 836, 522 P.2d 12*). The Court then ruled that under *Code Civ. Proc. § 1094.5* the reviewing court must determine whether substantial evidence supports the agency's findings and whether the findings support the agency's decision (*11 Cal. 3d 506, 514-515, 113 Cal. Rptr. 836, 522 P.2d 12*). The Court then held that the planning commission's summary of factual data did not include facts sufficient to satisfy the requirements governing the granting of a variance (*11 Cal. 3d 506, 520, 113 Cal. Rptr. 836, 522 P.2d 12*).

Boren v. State Personnel Bd. *(1951) 37 Cal. 2d 634, 234 P.2d 981* , was an appeal by a civil service employee from a

judgment of the trial court in a proceeding for review of an order of the State Personnel Board upholding the dismissal of the employee. The superior court had sustained a demurrer to the complaint (which the trial court and Supreme Court treated as a petition for mandate and certiorari) and had dismissed the suit. The Supreme Court, hearing the appeal, affirmed the superior court judgment. After pointing out that mandate and certiorari were available to review a decision of the State Personnel Board, the Supreme Court ruled that plaintiff had not stated any facts establishing a lack or excess of jurisdiction, a denial of a fair trial, or an abuse of discretion, and that a cause of action for mandate or certiorari had therefore not been stated (*37 Cal. 2d 634, 637, 644, 234 P.2d 981*).

La Prade v. Department of Water & Power *(1945) 27 Cal. 2d 47, 162 P.2d 13* , was an appeal by the Board of Civil Service Commissioners from a judgment of the trial court in a mandate proceeding brought by a discharged civil service employee to compel his reinstatement. The trial court had issued the writ of mandate directing the reinstatement of the employee. The Supreme Court, hearing the appeal, acknowledged that the employee had been denied a hearing, but it modified the judgment by remanding the matter to the Board of Civil Service Commissioners since it was still possible for the board to hold a hearing and exercise its discretion (*27 Cal. 2d 47, 53, 162 P.2d 13*).

[c] Form and Content of Pleadings

The factual background of ***Boren v. State Personnel Bd.*** *(1951) 37 Cal. 2d 634, 234 P.2d 981* , is discussed in *§ 36.20[3][b]*. Although the Supreme Court sustained the demurrer to the complaint because it failed to allege any facts that would justify granting relief, the Court stated that it was unimportant that plaintiff's pleading was not in the form of a petition for mandate or certiorari, since all that was required was that plaintiff state facts entitling him to some type of relief, and that if a cause of action for mandate or certiorari had been stated, a general demurrer would have been overruled (*37 Cal. 2d. 634, 638, 234 P.2d 981*).

[d] Strict Compliance With Discipline Procedure

Shannon v. Los Angeles *(1928) 205 Cal. 366, 270 P. 682* , was an appeal by a discharged civil service employee from a judgment of the trial court in a mandate proceeding brought by the employee to compel his reinstatement and payment of back pay. The superior court had sustained a general demurrer to the mandate petition on the ground that the petition did not state facts sufficient to entitle the petitioner to the relief prayed for, and it directed judgment to be given, made, and entered in the respondents' favor. On appeal, the Supreme Court determined that the employee had not been properly served with notice of discharge and was, therefore, not lawfully discharged (*205 Cal. 366, 370-371, 270 P. 682*). The Court acknowledged an employee's right to invoke a writ of mandate to compel his or her reinstatement to a position until such time as the law relating to the procedure for his or her removal has been strictly obeyed, and the Court directed the trial court to set aside its order sustaining the demurrer and to overrule the demurrer with leave to answer (*205 Cal. 366, 372-373, 270 P. 682*).

In ***Zeron v. City of Los Angeles*** *(1998) 67 Cal. App. 4th 639, 79 Cal. Rptr. 2d 130* , a city police officer who had been discharged without a full hearing petitioned for a writ of mandate to compel his reinstatement. The trial court denied the petition on the ground that the officer was a probationary employee who could be terminated without a full hearing. The court of appeal reversed, however, finding that the city had failed to comply with a city charter provision that automatically granted the officer tenure unless a termination notice was delivered to the civil service commission prior to the expiration of the officer's probationary period. The city had sent a termination notice to the officer, but not to the civil service commission, as required by the charter provision. The court of appeal held that the city's failure to strictly comply with the termination procedure resulted in the officer becoming a permanent employee. Accordingly, the subsequent termination of the officer without a full hearing was improper (*67 Cal. App. 4th 639, 643-646, 79 Cal. Rptr. 2d 130*).

Frates v. Burnett *(1970) 9 Cal. App. 3d 63, 87 Cal. Rptr. 731* , was an appeal by a board of education from a judgment of the trial court in a mandate proceeding brought by an employee of the board to review his dismissal. The

trial court had found that the employee was improperly discharged and had issued a peremptory writ of mandate commanding that petitioner be restored to his former position. The court of appeal stated that failure to strictly follow civil service procedures would result in an invalid discharge, and it held that in light of the unlawful discharge of petitioner resulting from failure to provide him with a pretermination hearing, the judgment granting the writ would be affirmed and petitioner would be reinstated to his former position (*9 Cal. App. 3d 63, 71-73, 87 Cal. Rptr. 731*).

[e] Requirements of Ralph M. Brown Act

In ***Moreno v. City of King*** *(2005) 127 Cal. App. 4th 17, 25 Cal. Rptr. 3d 29* , the plaintiff sought a writ of mandate after the termination of his employment as finance director for the defendant city. The plaintiff claimed his termination was null and void because the city council had not complied with the requirements of the Ralph M. Brown Act, California's open meeting law (*Gov. Code § 54950 et seq.*). The trial court granted the writ, and the court of appeal affirmed, finding that the city council had indeed violated the Brown Act (*127 Cal. App. 4th 17, 24-29*).

The court of appeal first held that the city had violated the applicable agenda requirements. The Brown Act provides that the presiding officer of a local legislative body (such as the city council in this case), or a majority of the members of the body, may call a special meeting by delivering a written notice to each member of the body and to each local newspaper of general circulation and radio or television station requesting notice in writing. The notice must be received at least 24 hours before the time of the meeting, and the notice must "specify the time and place of the special meeting and the business to be transacted or discussed." No other business may be considered at the meeting (*Gov. Code § 54956*). The court of appeal in this case held that the provision requiring that the notice of a special meeting "specify ... the business to be transacted" imposed substantially the same requirement as the provision governing the posting of an agenda for a *regular* meeting of a local legislative body. That provision requires that the posted agenda "contain a brief general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed session" (*Gov. Code § 54954.2(a)*). The court of appeal went on to hold that the special meeting notice in this case, which simply stated that the business for the meeting included "Public Employee (employment contract)," was not sufficient to constitute the requisite specification of the business to be conducted, because it gave no clue that the termination of the plaintiff or of any public employee would be considered at the meeting (*127 Cal. App. 4th 17, 26-27*).

The court of appeal also found that the city council had failed to comply with the Brown Act's requirement that, before the local body holds a closed session on "specific complaints or charges" brought against a public employee, the employee must be given at least 24 hours' written notice of his or her right to have the complaint or charge heard in an open session rather than a closed session. If this notice is not given, any disciplinary or other action taken by the local body against the employee based on the specific complaint or charge in the closed session is null and void (*Gov. Code § 54957(b)*). The plaintiff in this case was given no advance notice of the meeting at which he was terminated. Therefore, whether the plaintiff's termination violated the notice requirement depended on whether the city council considered "specific complaints or charges" against him, or whether the council simply considered the plaintiff's performance evaluation, a matter that does not trigger a duty to provide advance notice to the employee. The court of appeal concluded that the council had indeed considered "complaints or charges" against the plaintiff, because at the meeting the council reviewed a written report from the city manager that contained the details of five specific accusations of alleged misconduct by the plaintiff. Pointing out that the lack of advance notice had deprived the plaintiff of an opportunity to respond to the accusations, the court of appeal held that the council's action in terminating the plaintiff's employment was null and void under the express provisions of the Brown Act (*127 Cal. App. 4th 17, 27-29*).

[f] Reinstatement of Employee

Kirkpatrick v. Civil Serv. Comm'n *(1978) 77 Cal. App. 3d 940, 144 Cal. Rptr. 51* , was an appeal from a judgment of the trial court granting a writ of mandate and ordering defendant commission to reverse its order sustaining plaintiff's discharge and to reinstate him in his position. Plaintiff, chief probation officer, had been discharged for failure to

effectively manage his department. The trial court held that plaintiff had been denied due process, and it therefore ordered his reinstatement. The court of appeal ruled that the procedural errors relied on by the trial court did not justify the order reinstating petitioner in his position, and it therefore reversed the lower court judgment and remanded the cause for examination of the evidence supporting the commission's discharge of plaintiff. The court held that an employee is not entitled to reinstatement if, although denied the preremoval safeguards outlined in *Skelly v. State Personnel Bd.,* he had an opportunity to exercise his due process rights at a subsequent hearing which showed that there were good grounds for dismissal [*see Skelly v. State Personnel Bd. (1975) 15 Cal. 3d 194, 124 Cal. Rptr. 14, 539 P.2d 774* , discussed in *§ 36.20[3][h]*]. Under such circumstances, the employee is entitled only to damages for the limited time period in which the discipline was wrongfully imposed, that is, the period from the time discipline was actually imposed to the date the commission filed its decision validating the dismissal (*77 Cal. App. 3d 940, 945*).

Frates v. Burnett *(1970) 9 Cal. App. 3d 63, 87 Cal. Rptr. 731* , is discussed in *§ 36.20[3][d]*.

Peters v. Mitchell *(1963) 222 Cal. App. 2d 852, 35 Cal. Rptr. 535* , was an appeal by a civil service employee from a judgment of the trial court. The State Personnel Board had upheld the discharge of the employee from her position as a psychiatric technician in a state hospital because of her restraint of several patients. The superior court denied the employee's petition for a writ of mandate and affirmed the action of the board. The court of appeal held that the employee was not guilty of willful disobedience nor inexcusable neglect of duty when the restraint she instituted did not violate a specific command or prohibition of her employer and was not done intentionally, designedly, or without lawful excuse. Based on the fact that the employee restrained the patients under the supervision and direct examination of her superiors, the court of appeal reversed the judgment of the trial court. Based on the fact that the State Personnel Board had reached an incorrect decision as a matter of law, the court instructed the trial court to issue a writ of mandate directing the State Personnel Board to annul the employee's dismissal and to reinstate her to her position with payment of such back salary as was authorized by law (*222 Cal. App. 2d 852, 862-863*).

Gov. Code § 19143 provides that at the termination of any temporary separation, except termination of a permanent or probationary employee by layoff and termination by displacement (as defined in State Personnel Board regulations), the employee must be reinstated to his or her former position, as defined in *Gov. Code § 18522*, unless some other reinstatement right is specified in the Civil Service Act or State Personnel Board regulation.

[g] Payment of Back Salary

Chang v. Palos Verdes Estates *(1979) 98 Cal. App. 3d 557, 159 Cal. Rptr. 630* , were cross appeals from a judgment which, among other things, directed the issuance of a writ of mandate commanding the city to pay petitioner full back pay from December 11, 1974 to November 11, 1975, the date the city council first sustained his discharge. Petitioner was a tenured civil service employee employed as a fire engineer. On December 11, 1974, following his arrest and a preliminary hearing for possession of marijuana, amphetamine sulfate, and amobarbital, petitioner was discharged by the fire chief. Petitioner had received neither prior notice of the proposed discharge, a copy of the materials on which the discharge was based, nor an opportunity to respond thereto, either orally or in writing. Petitioner appealed his discharge, a hearing was held, and on November 11, 1975, the city council sustained the discharge. The court of appeal found that petitioner was not afforded procedural due process, and it held that because petitioner was not given the opportunity to respond to the grounds for the contemplated discharge, the city was liable to him for the back pay award made by the trial court (*98 Cal. App. 3d 557, 563-564*). However, the court held that petitioner had no other rights, and it accordingly affirmed the trial court judgment (*98 Cal. App. 3d 557, 565-566*).

West v. Berkeley *(1979) 96 Cal. App. 3d 143, 157 Cal. Rptr. 764* , was an appeal by a discharged police officer from a trial court judgment denying his petition for a writ of mandate. The police officer had been discharged by the city following a notice of termination which set forth various charges against him. This notice was sent out on December 2, 1975; the officer filed a timely notice of appeal with the city's personnel board, and hearings were held on January 24, 1976. The court of appeal upheld the city manager's actions in terminating the officer and the trial court's review of the

action. The court then noted the time lapse between the termination notice sent to the officer and the institution of personnel board hearings, and it stated the pretermination procedural safeguards guaranteeing due process of law as outlined in *Skelly v. State Personnel Bd. (1975) 15 Cal. 3d 194, 215, 124 Cal. Rptr. 14, 539 P.2d 774* . The court noted that the city conceded that the officer had not been given the safeguards required by *Skelly* and that he should therefore receive back pay for the period in question. It then remanded to the trial court for the sole purpose of determining the amount of back pay due the officer for the above period (*96 Cal. App. 3d 143, 147-148*).

[h] Action Remanded to Civil Service Board or Commission

Skelly v. State Personnel Bd. *(1975) 15 Cal. 3d 194, 124 Cal. Rptr. 14, 539 P.2d 774* , was an appeal by a civil service employee from a judgment of the superior court denying his petition for writ of mandate to compel the State Personnel Board to set aside his dismissal from his position as a medical consultant. Based on the employee's unexcused absences, apparent drinking during these absences, and failure to comply with work-hour requirements, the State Personnel Board had upheld his dismissal under *Gov. Code § 19572(j)* for inexcusable absence without leave. The Supreme Court reversed the judgment of the trial court, which refused to issue the writ of mandate, and remanded the cause to the trial court and ordered that court to issue a writ directing the board to set aside its decision and to reconsider petitioner's appeal. The Court stated that the provisions of the State Civil Service Act concerning the taking of punitive action against a permanent civil service employee did not fulfill minimum constitutional demands. The Court ruled that due process mandated that an employee be accorded certain preremoval safeguards including notice of the proposed action, the reasons therefor, a copy of the charges and materials on which the action is based, and the right to respond verbally or in writing to the authority imposing the discipline (*15 Cal. 3d 194, 215*). In response to the *Skelly* decision, the State Personnel Board has amended its regulations to establish a disciplinary procedure in compliance with these safeguards [*see 2 Cal. Code Reg. § 52.3*].

La Prade v. Department of Water & Power *(1945) 27 Cal. 2d 47, 162 P.2d 13* , is discussed in *§ 36.20[3][b]*.

[4] Additional Authorities

[a] Mandate to Review Discipline of Employee

Drummey v. State Bd. of Funeral Directors (1939) 13 Cal. 2d 75, 87 P.2d 848 , was an appeal from the judgment of the trial court in a proceeding for review of an administrative decision. The petitioner sought review alternatively by means of writs of review (certiorari), prohibition, and mandate. A demurrer to the petition was sustained as to the alleged cause of action for writs of review and prohibition (on the basis of then recent Supreme Court decisions holding such writs to be unavailable for review of an administrative decision) but was overruled as to the alleged cause of action for writ of mandate. The eventual judgment was in favor of the petitioner and ordered issuance of a peremptory writ of mandate. The Supreme Court, hearing the appeal, affirmed the superior court judgment and established the rule stated in Paragraph A. After pointing out that it had recently (in 1936 and 1937) held the writs of review (i.e., certiorari) and prohibition unavailable in such circumstances, and that there was no statutory procedure for review, the Supreme Court stated that mandate was the only possible remedy available to those aggrieved by administrative adjudicatory decisions. Historically, the writ of mandate was invented to provide a remedy when no other remedy existed. From an early date it has been held that when no other remedy is available, mandamus is the proper remedy for one improperly deprived of a professional license by an administrative board to secure the restoration of such license (*13 Cal. 2d 75, 82*). Statement of the rule in regard to deprivation of a license merely describes the case that was before the Court and does not limit the application of the general rule. After stating the rule the Court set out principles for guiding the superior court's inquiry on review (*13 Cal. 2d 75, 83-86*). These principles were later (in 1945) incorporated in *Code Civ. Proc. § 1094.5*.

[b] Strict Compliance With Discipline Procedure

In *Cilderman v. City of Los Angeles (1998) 67 Cal. App. 4th 1466, 80 Cal. Rptr. 2d 20* , a police officer began serving

his 18-month probationary period as required by the city charter. The charter provided that the police department could terminate any officer's employment during the probationary period simply by delivering a termination notice to the civil service commission. At the expiration of the probationary period, however, the officer would have tenure and could not be terminated without a full hearing. The police officer in this case had his probationary period extended by 19 days, pursuant to the county's civil service rules, to compensate for sick time and a period of restricted duty because of an injury. More than 18 months after the officer began service, but before the expiration of the additional 19 days, the officer was terminated without a hearing. The officer petitioned for a writ of mandate, claiming that he should have been treated as a tenured officer and therefore should have received a hearing prior to termination. The basis for the officer's contention was that the police department had inconsistently applied the rules governing extensions of probationary periods. The officer presented a statistical record showing that of 125 officers eligible to have their probation extended under the applicable rules, probation was actually extended for only 34 of them. On the basis of this unequal enforcement of the rules, the trial court held that the 19-day extension of probation in this case had been improper. Therefore, the court reasoned, the officer was a tenured employee when the termination occurred. The trial court concluded that the termination was ineffective, because it had not been accomplished in accordance with the rules requiring a hearing for the termination of a tenured officer (*67 Cal. App. 4th 1466, 1468-1470*).

The court of appeal reversed the trial court's judgment. The court held that the unequal application of a statute or rule does not constitute a denial of equal protection or constitutionally prohibited discriminatory enforcement unless there is an element of intentional or purposeful discrimination. The court found that the record in this case demonstrated no intentional or purposeful discrimination, but merely a laxity of enforcement. Therefore, since the extension of the officer's probation and his termination had been accomplished in accordance with the applicable rules, the trial court had erred in granting the petition for writ of mandate (*67 Cal. App. 4th 1466, 1470-1471*).

Plaintiff in *Shoemaker v. County of Los Angeles (1995) 37 Cal. App. 4th 618, 43 Cal. Rptr. 2d 774* , was a physician employed at a medical center jointly operated by the University of Southern California (a private institution) and the County of Los Angeles. Plaintiff sued both the university and the county after he was removed from his position as chief of emergency services at the medical center and chairman of emergency medicine department at the university. Plaintiff retained his employment as a physician at the hospital and as a faculty member of the university. Plaintiff argued that his removal from his administrative position was unlawful because he was not afforded any predisciplinary due process hearing as required by county civil service rules. In reversing a trial court judgment granting plaintiff a preliminary injunction, the court of appeal noted that when, as here, a county has adopted a civil service ordinance, it must strictly follow established procedures to dismiss or demote a permanent employee (*37 Cal. App. 4th 618, 626*). However, the court noted that plaintiff had not been discharged from employment but had only been removed as chief of the department and concluded that the applicable civil service rules did not require the county to follow any predisciplinary procedures before he was removed from his administrative post (*37 Cal. App. 4th 618, 627-628*).

Jackson v. Pomona (1979) 100 Cal. App. 3d 438, 160 Cal. Rptr. 890 , arose out of a disciplinary action against a police sergeant for failure to exercise adequate supervision and control over subordinate police officers. Pursuant to a city ordinance, a hearing officer had reviewed complaints against the sergeant, and had then recommended that the sergeant not be dismissed, but instead be suspended for a month without compensation. The city council reviewed the hearing officer's findings, and then went beyond them by ordering that the sergeant be demoted. The sergeant filed a petition for a writ of mandate which the trial court denied.

The court of appeal reversed and remanded, holding that a civil service employee is entitled to strict compliance with prescribed disciplinary procedures (*100 Cal. App. 3d 438, 449*). The absence of strict compliance in *Jackson* arose from the fact that the city council had failed to follow the procedures set forth in the city ordinance, by failing to make a determination that the decision of the hearing officer was unsupported by substantial evidence.

Lotts v. Board of Park Comm'rs (1936) 13 Cal. App. 2d 625, 57 P.2d 215 , was an appeal by respondent board from a judgment of the superior court declaring that petitioners were entitled to a peremptory writ of mandate ordering their

reinstatement to full-time positions in the department of parks at full pay and the payment of back salary to them at the rate applicable for full-time positions. The Los Angeles City Council had passed an ordinance providing for the creation of half-time positions, giving the appointing power in each city department the power to order the employment of persons on a half-time basis and to reduce the compensation of such persons accordingly. The trial court found that placing petitioners on half-time work constituted a removal, suspension, and lay-off and that such action, not having been taken in accordance with civil service regulations, was illegal and void, entitling petitioners to a writ of mandate directing their reinstatement. The court of appeal affirmed this judgment. It ruled that petitioners were, in effect, removed from their positions, and that such removal could be accomplished only in conformity with the charter provisions governing the removal of civil service employees (*13 Cal. App. 2d 625, 631*).

California Points & Authorities

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Volume 3 Chapters 34-39 CHECKS AND BANKS---to---CIVIL SERVICE
CHAPTER 36 CIVIL SERVICE
PART II. FORMS

3-36 California Points & Authorities § 36.21

§ 36.21 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5 (state); Code Civ. Proc. §§ 1094.5, 1094.6 (local)]--Discipline of Civil Service Employee--Due Process Requirements

[1] FORM

[*Caption. See § 36.20.*]

THE PETITION FOR WRIT OF MANDATE SHOULD BE GRANTED ON THE GROUND THAT RESPONDENT'S ACTION IN _____ [*specify nature of disciplinary action, e.g.,* DISMISSING PLAINTIFF] IS UNLAWFUL BECAUSE RESPONDENT DID NOT COMPLY WITH THE REQUIREMENTS OF DUE PROCESS IN THAT _____ [*specify nature of failure to comply with due process*].

A-E. Propriety of Mandate to Review Discipline of Employee. [*See § 36.20, Paragraphs A-E.*]

[*EITHER*]

F. Due Process Requirements for Permanent Civil Service Employee. A permanent civil service employee has been improperly dismissed when he or she has not been given prior notice of the punitive action, the reasons therefor, and a copy of the charges and the materials on which the action is based; a right to respond, orally or in writing, to the authority imposing the discipline before the discipline is imposed; and a full evidentiary hearing before the punitive action becomes final (*Skelly v. State Personnel Bd. (1975) 15 Cal. 3d 194, 212, 215, 124 Cal. Rptr. 14, 539 P.2d 774* ; *Bostean v. Los Angeles Unified School Dist. (1998) 63 Cal. App. 4th 95, 113-118, 73 Cal. Rptr. 2d 523* ; *Kirkpatrick v. Civil Service Com. (1978) 77 Cal. App. 3d 940, 945, 144 Cal. Rptr. 51*).

[*OR*]

F. Due Process Requirements for Short-Term Suspensions. Minimal concepts of fair play and justice embodied in the concept of due process require that an employee suspended for five days or less be notified of the action and the reasons thereof, be given a copy of the charges filed against him or her, including materials on which the action is based, and be given a right to respond, orally or in writing, to the authority imposing the discipline, either during the suspension or within a reasonable time thereafter (*Civil Serv. Ass'n v. City & County of San Francisco (1978) 22 Cal. 3d 552, 564, 150 Cal. Rptr. 129, 586 P.2d 162*).

[*OR*]

F. Due Process Requirements for Probationary and At-Will Employees. A probationary or at-will employee has been deprived of the liberty guaranteed all persons under the *Fourteenth Amendment* and under *Article I, Section 7(a), of the California Constitution* if his or her dismissal is based on charges of misconduct that stigmatize his or her reputation, seriously impair his or her opportunity to earn a living, or seriously damage his or her standing or associations in the community, and the employee is not afforded notice and opportunity for hearing appropriate to the nature of the case before the termination becomes effective (*Katzberg v. Regents of Univ. of Cal. (2002) 29 Cal. 4th 300, 127 Cal. Rptr. 2d 482, 58 P.3d 339* ; *Holmes v. Hallinan (1998) 68 Cal. App. 4th 1523, 1530-1534, 81 Cal. Rptr. 2d 174* ; *Lubey v. City & County of San Francisco (1979) 98 Cal. App. 3d 340, 346, 159 Cal. Rptr. 440*).

[*OR*]

F. Due Process Requirements for Public Employee Not in Civil Service System. Due process requirements apply to any public employee who can be terminated only for cause. Such an employee has a constitutionally protected property interest in continued employment, even if he or she is not in the civil service system (*Townsel v. San Diego Metro. Transit Dev. Board (1998) 65 Cal. App. 4th 940, 949-950, 77 Cal. Rptr. 2d 231*).

[*OR*]

F. No Punitive Action Against Peace Officer Without Opportunity for Administrative Appeal. Under *Gov. Code §§ 3303, 3304(b)*, "punitive action"--any action that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment--may not be taken against a peace officer without affording the officer a right to an administrative appeal, allowing the officer opportunity to establish a formal record of circumstances surrounding discipline and to attempt to convince the agency to reverse its decision (*Brown v. City of Los Angeles (2002) 102 Cal. App. 4th 155, 172-178, 125 Cal. Rptr. 2d 474* ; Hunter v. Los Angeles County Civil Serv. *Comm'n (2002) 102 Cal. App. 4th 191, 194-198, 124 Cal. Rptr. 2d 924* ; *Otto v. Los Angeles Unified Sch. Dist. (2001) 89 Cal. App. 4th 985, 998-999, 107 Cal. Rptr. 2d 664* ; *Caloca v. County of San Diego (1999) 72 Cal. App. 4th 1209, 1220-1223, 85 Cal. Rptr. 2d 660* ; *Runyan v. Ellis (1995) 40 Cal. App. 4th 961, 964-967, 47 Cal. Rptr. 2d 356*).

[*CONTINUE*]

[*Optional*] **G. Right to Respond to Authority Imposing Discipline.** The mere opportunity to review an unfavorable rating with a person who has signed the rating report or assisted in its making is not the right to respond to charges before a reasonably impartial, noninvolved reviewer, a right which is implied in the due process requirement that an employee be given the right to respond, orally or in writing, to the authority imposing the discipline (*Williams v. Los Angeles County (1978) 22 Cal. 3d 731, 735, 150 Cal. Rptr. 475, 586 P.2d 956*).

[*Optional*] **H. Posthearing Determination Must Be Based on Review of Evidence.** The due process principle of "one

who decides must hear" requires that once an administrative body holds a *Skelly* hearing and recommends an action, the ultimate decisionmaker cannot take a contrary action based on evidence that was not introduced at the hearing or without reviewing the record to a sufficient extent to enable him or her to make an informed judgment (*Vollstedt v. City of Stockton (1990) 220 Cal. App. 3d 265, 275-276, 269 Cal. Rptr. 404*).

[*Optional*] **I. Seasonal Civil Service Employees.** A seasonal civil service employee with justifiable expectations as to reemployment is entitled to the same due process protection as a tenured civil service employee (*Williams v. Los Angeles County (1978) 22 Cal. 3d 731, 736-737, 150 Cal. Rptr. 475, 586 P.2d 956*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a petition for writ of mandate for review of a final administrative adjudicatory order or decision of a state or local civil service commission disciplining a civil service employee if the procedure used to discipline the employee did not meet the constitutional requirements of due process. This form may be used to protest an employee's discipline effected without proper notice of a prior hearing or a right to respond to the authority imposing the discipline. However, because the State Personnel Board amended its regulations to conform to the due process requirements noted in this form [*see 2 Cal. Code Reg. § 52.3*], this form is for use primarily in a proceeding brought by a local civil service employee for wrongful discipline.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Limitations on Use of Form

Note that courts have indicated that public employees need not be afforded *Skelly* procedural safeguards before some types of discipline. For example, in one case, a court of appeal held that a county medical center was not required by due process to afford physician predisciplinary procedures before removing him from his position as chief of the emergency medical services department (but retaining him as a physician with the same salary) because the physician had no property interest in his administrative position [*see Shoemaker v. County of Los Angeles (1995) 37 Cal. App. 4th 618, 630-633, 43 Cal. Rptr. 2d 774*]. For full discussion of extent and limits of due process rights under *Skelly*, see California Forms of Pleading and Practice, Ch. 118, *Civil Service* (Matthew Bender).

[3] Discussion of Authorities

[a] Due Process Requirements for Permanent Civil Service Employee

Skelly v. State Personnel Bd. *(1975) 15 Cal. 3d 194, 124 Cal. Rptr. 14, 539 P.2d 774* , is discussed in *§ 36.20[3][h]*. In *Skelly*, the state statutory scheme regulating civil service employment entitled a permanent employee to an

evidentiary hearing after discipline was imposed, but provided for no hearing or other procedural safeguards before the punitive action took effect (*15 Cal. 3d 194, 205*). The California Supreme Court noted that federal due process requires that a full evidentiary hearing be held at some time before a competitive civil service employee may be finally terminated for misconduct (*15 Cal. 3d 194, 212*). The Court went on to hold that although due process does not require the state to provide the employee with a full trial-type evidentiary hearing prior to the initial punitive action, the employee has the right, before the discipline becomes effective, to receive notice of the proposed action, the reasons for the action, a copy of the charges and material on which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline (*15 Cal. 3d 194, 217*).

Bostean v. Los Angeles Unified School Dist. *(1998) 63 Cal. App. 4th 95, 73 Cal. Rptr. 2d 523* , concerned a plaintiff who was a permanent, classified employee of a school district. Mr. Bostean had complained to the school district that, while driving the district's van, he had been exposed to hazardous fumes and materials caused by safety violations. The district denied the plaintiff's grievance on this issue as untimely, but the district did conduct an unofficial investigation of the plaintiff's allegations. After requesting and receiving a letter from the plaintiff's physician concerning restrictions on the plaintiff's ability to perform his duties, the district placed the plaintiff on involuntary, unpaid illness leave. The plaintiff never received prior notice that he would be placed on leave, nor was he afforded a hearing on the matter. The plaintiff then initiated a union grievance, claiming that the district's action of placing him on involuntary unpaid leave constituted a disciplinary action in violation of his due process rights. The district then sought additional information and evaluation of the plaintiff's condition from the plaintiff's doctor, who informed the district that he was not qualified to answer the additional matters. Seven months after the leave was imposed, the district reinstated the plaintiff, based on a report from a second physician. The plaintiff's union representative requested back pay for the seven-month period, but the district denied it (*63 Cal. App. 4th 95, 100-102*).

The plaintiff then filed a complaint for declaratory and injunctive relief against the district and other defendants. His complaint alleged that the district's failure to provide him with written notice of its intended action and an opportunity to respond before the imposition of the involuntary leave violated the due process clause of the United States Constitution. The plaintiff also filed a petition for a writ of mandate making him whole for the wages and benefits he lost during the involuntary leave. The trial court denied the plaintiff's petition and entered judgment for the defendants (*63 Cal. App. 4th 95, 103-107*).

The court of appeal reversed. Because a permanent, classified employee of a school district cannot be suspended without reasonable cause (*see Educ. Code §§ 45302, 45304(a)*), the district must comply with procedural due process before imposing a suspension on the employee (*63 Cal. App. 4th 95, 112-118*). In this case, the seven-month involuntary, unpaid illness leave was effectively a suspension, because of its effect on the plaintiff's receipt of salary and benefits (*63 Cal. App. 4th 95, 110*). Therefore, procedural due process requirements were applicable. Generally, procedural due process requires that the employee be given a presuspension hearing, although a balancing of the employee's interest, the district's interest, and the risk of an erroneous suspension and probable value of the hearing may justify proceeding without a presuspension hearing in some cases (*63 Cal. App. 4th 95, 113*).

In this case, the fact that an employee would lose wages during a suspension weighed heavily in favor of a predeprivation hearing. Also, the risk of an erroneous deprivation in the absence of a hearing was great, as demonstrated by the fact that the first doctor, whose letter had been the basis for the suspension, ultimately was not qualified to render an opinion on the matters involved. A hearing probably would have clarified the medical information sooner than seven months. Further, the district had no other procedural safeguards in place to remedy the deprivation of the plaintiff's wages and benefits. Balancing all of these factors, the court found that the district was indeed required to afford a hearing before suspending the plaintiff (*63 Cal. App. 4th 95, 113-118*).

Kirkpatrick v. Civil Service Com. *(1978) 77 Cal. App. 3d 940, 144 Cal. Rptr. 51* , was an appeal by a county civil service commission from the issuance of a writ of mandate ordering the reinstatment of a county employee. The trial court issued the writ on the ground that the employee was not given, prior to his dismissal, notice of the charges against

him and an opportunity to respond as required by *Skelly v. State Personnel Bd. (1975) 15 Cal. 3d 194, 124 Cal. Rptr. 14, 539 P.2d 774* (discussed *above*). He did receive a posttermination hearing before the civil service commission, which sustained the dismissal. The court of appeal reversed and remanded to the superior court, holding that the violation of the *Skelly* pretermination safeguards alone did not justify an order of reinstatement. If, on remand, the trial court were to find that the dismissal was justified, the employee's remedy was limited to backpay from the time the discipline was imposed to the date the commission filed its decision validating the dismissal. The appellate court reasoned that the minimal due process rights required by *Skelly before* discharge merely anticipate the full rights that are accorded to the employee *after* discharge, including the right to an evidentiary hearing (*77 Cal. App. 3d 940, 945-946, 950*).

[b] Due Process Requirements for Short-Term Suspensions

Civil Serv. Ass'n v. City & County of San Francisco *(1978) 22 Cal. 3d 552, 150 Cal. Rptr. 129, 586 P.2d 162* , was an appeal by eight permanent civil service employees and two labor unions from a judgment of the trial court denying their petition for a writ of mandate challenging the legality of short-term suspensions of five days or less imposed on the employees for disciplinary reasons. The Supreme Court affirmed the judgment as to a police department employee and reversed it as to all others, and it remanded the cause to the trial court for further proceedings. The Court ruled that although the shortness of the suspensions demonstrated that the required *Skelly* pretermination procedures would not be required here, minimal concepts of fair play and justice embodied in the concept of due process required that an employee suspended for five days or less be notified of the action and the reasons thereof, be given a copy of the charges filed against him or her, including materials on which the action is based, and be given a right to respond orally or in writing to the authority imposing the discipline, either during the suspension or within a reasonable time thereafter [*see Skelly v. State Personnel Bd. (1975) 15 Cal. 3d 194, 124 Cal. Rptr. 14, 539 P.2d 774* , discussed in *§ 36.20[3][h]*]. Since the police department employee had an opportunity for a postdisciplinary hearing and complaint alleged neither a demand for a hearing nor a denial of such demand, the Court found that she had not exhausted her administrative remedies and affirmed the judgment against her. Since the other employees did not have an opportunity for any hearing, the Court reversed the judgments against them (*Civil Serv. Ass'n v. City & County of San Francisco (1978) 22 Cal. 3d 552, 564, 150 Cal. Rptr. 129, 586 P.2d 162*).

[c] Due Process Requirements for Probationary and At-Will Employees

In ***Katzberg v. Regents of Univ. of Cal.*** *(2002) 29 Cal. 4th 300, 127 Cal. Rptr. 2d 482, 58 P.3d 339* , the plaintiff was a public employee who sued to recover damages from his employer, the University of California. The complaint alleged that the employer's agents had violated the plaintiff's due-process liberty interest, protected under *Cal. Const., art. I, § 7(a)*, by making stigmatizing statements about the plaintiff in the course of removing him from his position as department chairperson. The Supreme Court observed that it is well-established that an at-will public employee is deprived of due-process liberty interests when his or her termination occurs amidst charges that might seriously damage the employee's standing and associations in the community or impose a stigma or other disability that would foreclose the freedom to take advantage of other employment opportunities. When such a liberty deprivation occurs, the employee has a right to a so-called "name-clearing hearing" (*29 Cal. 4th 300, 326*). The Court went on to point out that if the employer does not provide a name-clearing hearing, the employee's appropriate course of action is to seek a writ of mandate under *Code Civ. Proc. § 1085* to compel the public employer to provide the hearing (*29 Cal. 4th 300, 326*). In addition, the plaintiff may pursue a defamation action to obtain damages for reputational injury caused by an actionable delay in providing the hearing (*29 Cal. 4th 300, 327*). In part because of the availability of these adequate remedies, the Supreme Court declined to find an implied constitutional tort action seeking damages to remedy the asserted violation of due-process liberty interests (*29 Cal. 4th 300, 323-324*).

In ***Holmes v. Hallinan*** *(1998) 68 Cal. App. 4th 1523, 81 Cal. Rptr. 2d 174* , a city had terminated the at-will employment of a district attorney's investigator for falsifying workers' compensation forms and for dishonesty. Before terminating the investigator, the city afforded him a hearing at which he and his attorney could present his side of the

story. However, the city did not provide a full evidentiary hearing, at which the investigator could present live witnesses and cross-examine adverse witnesses under oath. Further, the city had denied the investigator's request for discovery prior to the hearing. The trial court granted the investigator's petition for mandamus and ordered his reinstatement, because the investigator had not received a full hearing. The court of appeal reversed. The court acknowledged that, although the investigator was an at-will employee, he did have a right to a hearing because his discharge was accompanied by charges of dishonesty that would affect his liberty interests by damaging his reputation and limiting his ability to obtain future employment. However, an at-will employee whose liberty interests are at stake is entitled only to a hearing at which he or she can personally present his or her side of the story (*68 Cal. App. 4th 1523, 1530-1532*). There is no requirement that such a hearing include live witnesses or the ability to cross-examine adverse witnesses (*68 Cal. App. 4th 1523, 1532-1533*). Moreover, the mere fact that the hearing was before a representative of the employer was insufficient to establish the existence of bias that would constitute a denial of due process (*68 Cal. App. 4th 1523, 1533*). Finally, there is no authority for the proposition that an employee is entitled to conduct discovery prior to the hearing or prior to his or her discharge (*68 Cal. App. 4th 1523, 1534*).

Lubey v. City & County of San Francisco *(1979) 98 Cal. App. 3d 340, 159 Cal. Rptr. 440* , was an appeal by the city of San Francisco from a judgment of the trial court ordering the police chief to reinstate two discharged probationary police officers and award them back wages and benefits. The dismissal of the officers occurred after a citizen made unsworn charges of misconduct against both officers, the police department conducted an investigation, the officers were interrogated and furnished with a statement of charges, and a memorandum reciting those and other charges not made known to the officers was sent to the police chief with a recommendation that the officers be tried for misconduct. Approximately two and a half months after the start of the investigation and on a few hours notice, the officers were summoned to the police chief's office for the opportunity of refuting the charges against them, and they were given written notices of termination of employment at the close of the meeting. Two months after this termination, the officers were advised by the city's civil service commission that they were entitled to no future employment with the City and County of San Francisco. In an action brought by the officers for reinstatement and payment of back wages, the trial court found that the officers (1) were not permitted to call or examine witnesses, (2) did not have an opportunity to perform an independent investigation or to present evidence, (3) were not given prior notice of all the charges or of the purpose of the meeting, and (4) by virtue of the charges and consequent job terminations found it difficult or impossible for the officers to be employed as police officers anywhere.

On appeal, the court of appeal noted that probationary employees may usually be dismissed without a hearing or judicially cognizable good cause, but it went on to discuss the exceptions to the rule. Included among the exceptions was the situation where the probationary employee's job termination was based on charges of misconduct which stigmatize his reputation, seriously impair his opportunity to earn a living, or seriously damage his standing or associations in the community. The court stated that in such circumstances there is a deprivation of the liberty guaranteed all persons by the *Fourteenth Amendment*. The court found here that the officers' reputations were stigmatized, their chances of future employment in their chosen field and elsewhere seriously impaired, and their standing in the community seriously damaged; and that the termination of the officers did not comport with *Fourteenth Amendment* requirements. The court of appeal modified the lower court judgment to remove an inconsistency and then affirmed the reinstatement order (*98 Cal. App. 3d 340, 346*).

[d] Due Process Requirements for Public Employee Not in Civil Service System

Townsel v. San Diego Metro. Transit Dev. Board *(1998) 65 Cal. App. 4th 940, 77 Cal. Rptr. 2d 231* , involved a petition by a public employee (an inspector for a metropolitan transit board) for a writ of mandate to vacate his termination, after the employer's board of directors had denied the employee's request for a posttermination evidentiary hearing concerning the alleged rules violation that was the basis for termination. The employee's job was not within the civil service system, but it was undisputed that his employment could be terminated only for cause. The court held that the due-process requirement of an evidentiary hearing applies to any public employee who has a constitutionally protected property interest in continued employment, even if the employee is not in the civil service system or subject to

a statutory scheme that specifically provides the required evidentiary hearing. The employee in this case had a property interest in his continued employment, because his job as an inspector for the metropolitan transit board could be terminated only for cause. Therefore, the employee was entitled to a posttermination evidentiary hearing (*65 Cal. App. 4th 940, 949-950*).

[e] No Punitive Action Against Peace Officer Without Opportunity for Administrative Appeal

In ***Brown v. City of Los Angeles*** *(2002) 102 Cal. App. 4th 155, 125 Cal. Rptr. 2d 474* , the court of appeal considered whether procedures provided by a city for administrative appeals by police officers under *Gov. Code § 3304(b)* satisfied the requirements of due process. The court noted that at a minimum, due process requires that an officer be accorded written notice of the grounds for the disciplinary measures, disclosure of the evidence supporting the disciplinary grounds, the right to present witnesses and to confront adverse witnesses, the right to be represented by counsel, a fair and impartial decision-maker, and a written statement from the fact-finder listing the evidence relied upon and the reasons for the determination made. Also, if the administrative appeal hearing is the first evidentiary inquiry into the facts giving rise to the punitive action, the burden of proving the charges must be placed on the employing agency that is making the charges (*102 Cal. App. 4th 155, 174-175*).

In this case, the court found the city's administrative appeal procedure to be constitutionally inadequate, because (1) it placed no burden of proof on the police department, leaving the presentation of evidence to the discretion of department; (2) it did not require the chief of police, the final decision-maker, to apply any substantive guidelines or principles in making the decision, and the chief was not required to uphold the decision of the hearing officer; and (3) it failed to afford a neutral and impartial decision-maker because the police chief was the person who initially authorized the punitive action that gave rise to this case (*102 Cal. App. 4th 155, 176-178*).

In ***Hunter v. Los Angeles County Civil Serv. Comm'n*** *(2002) 102 Cal. App. 4th 191, 124 Cal. Rptr. 2d 924* , a public safety officer sought an administrative appeal under *Gov. Code § 3304(b)*, claiming that he had been denied a promotion on grounds other than merit. Because the county had not established a specific procedure for such appeals, the officer filed an appeal with the county civil service commission. After a hearing officer dismissed the appeal for lack of jurisdiction, the trial court issued a writ of mandate requiring the civil service commission to hear the administrative appeal. The court of appeal, however, reversed the trial court's judgment.

The court of appeal acknowledged that the county clearly had a duty under *Gov. Code § 3304(b)* to provide the officer with an administrative appeal. However, a civil service commission created by charter has only the special and limited jurisdiction expressly authorized by the charter, and in this case that jurisdiction did not include the power to hear appeals under *Gov. Code § 3304(b)*. Therefore, the trial court erred in issuing a writ to compel the civil service commission to hear the officer's appeal (*102 Cal. App. 4th 191, 194-197*).

The court of appeal concluded by indicating that the officer was not without a remedy for the county's failure to provide an administrative appeal. Under *Code Civ. Proc. § 1095*, writ relief is available to compel a public agency to perform an act prescribed by law. Thus, if a county has not performed its duty to establish a forum for administrative appeals under *Gov. Code § 3304(b)* (*see Gov. Code §§ 3304.5, 3309.5*), writ relief may be available to compel the county to do so. However, since that was not the relief sought or ordered in the trial court in this case, the court of appeal reversed the trial court's judgment (*102 Cal. App. 4th 191, 197-198*).

Otto v. Los Angeles Unified Sch. Dist. *(2001) 89 Cal. App. 4th 985, 107 Cal. Rptr. 2d 664* , involved two police officers who were employed by a school district. After "summary of conference" memoranda (memorializing meetings between the officers and their supervisors) were placed in their personnel files, the officers sought mandamus to compel their employer to provide administrative appeals under the Public Safety Officers Procedural Bill of Rights Act (*see Gov. Code §§ 3303, 3304*). The trial court denied the petitions for mandamus, finding that the "summary of conference" memoranda were not formal reprimands and thus did not trigger the officers' administrative appeal rights.

The court of appeal held that whether a "summary of conference" memorandum constitutes a punitive action that triggers administrative appeal rights depends on the contents of the memorandum. In this particular case, the court of appeal concluded that the memorandum concerning one officer did constitute a sufficiently punitive action, because it stated that "continued failure [to follow a particular departmental policy] could lead to future disciplinary action." Thus, the memorandum contained adverse comments that could lead to punitive action in the future. Therefore, the officer was entitled to an administrative appeal, and the trial court should have granted the officer's petition for mandamus. The other officer's memorandum, however, was not sufficiently punitive to trigger the officer's administrative appeal rights.

The court of appeal found that the tenor and contents of the memorandum indicated that its mention of shortcomings in the officer's performance was not a criticism for fault, but rather an educational reminder. Therefore, the trial court had correctly denied the second officer's petition for mandamus (*89 Cal. App. 4th 985, 995-999*).

In ***Caloca v. County of San Diego*** *(1999) 72 Cal. App. 4th 1209, 85 Cal. Rptr. 2d 660* , a county citizens' law enforcement review board issued a report containing findings of serious misconduct on the part of certain deputy sheriffs; the report made no recommendation concerning discipline of the deputies. The sheriff's department made its own investigation of the incidents involved, finding that no misconduct had occurred. The citizens' law enforcement review board had been established by the county charter as an advisory body, with no power to establish policy or impose any disciplinary measures. After the civil service commission denied the deputies' request for an administrative appeal of the board report, they petitioned for mandamus. The trial court denied the petition, ruling that the deputies were not entitled to an administrative appeal because they had suffered no injury.

The court of appeal reversed, holding that the report of the citizens' law enforcement review board itself constituted punitive action within the meaning of *Gov. Code §§ 3303* and *3304(b)*, entitling the deputies to an administrative appeal. Although the deputies had been subjected to no disciplinary measures as a result of the board report or the incidents involved, the testimony of sheriff's department's head of human resources established that the existence of the negative report could have an adverse effect on the deputies' career advancement. *Government Code § 3303* defines "punitive action" that triggers a right to an administrative appeal as any action that *may* lead to dismissal, demotion, or other adverse employment consequences. Therefore, even though the deputies had suffered no immediate punishment from the report, the court of appeal concluded that they were entitled to an administrative appeal because the report could lead to adverse employment consequences in the future (*72 Cal. App. 4th 1209, 1220-1223*).

Runyan v. Ellis *(1995) 40 Cal. App. 4th 961, 47 Cal. Rptr. 2d 356* , involved a police officer, Runyan, who was given a temporary transfer and corresponding pay reduction for alleged deficiencies in performance. Runyan requested an administrative appeal before the Civil Service Commission, which was denied. He filed a petition for writ of mandate to force the Civil Service Commission to provide him with an administrative appeal as the result of his punitive transfer to a lower paying position. The trial court granted the writ; the court of appeal affirmed. The City argued that a meeting with the city manager or his designee, provided for under the provisions of a memorandum of understanding between the city and the Police Officers Association, satisfied the administrative appeal requirement under *Gov. Code § 3304*; however, the court held this insufficient and that Runyan had a right to an administrative appeal before the *Civil Service Commission (Runyan v. Ellis (1995) 40 Cal. App. 4th 961, 964-967, 47 Cal. Rptr. 2d 356*).

[f] Right to Respond to Authority Imposing Discipline

Williams v. Los Angeles County *(1978) 22 Cal. 3d 731, 150 Cal. Rptr. 475, 586 P.2d 956* , was an appeal from a judgment of the trial court sustaining a demurrer to a complaint alleging discharge of a seasonal civil service employee without just cause and a hearing. Plaintiff, a seasonal employee with justifiable expectations as to reemployment, accepted the county's offer to manage a pool in the summer, and relying on that contract, he rejected alternative employment opportunities. The opening of the pool was delayed, but plaintiff, contrary to instructions, reported for duty to the unopened pool and submitted a time card for such "work." After numerous discussions and counseling with his

supervisors regarding this matter, plaintiff received an unsatisfactory performance rating and was released from the recurrent service. The Supreme Court held that the demurrer should not have been sustained as to the causes of action, and it remanded the cause to the trial court for further proceedings. The Court ruled that a recurrent employee with justifiable expectations as to reemployment, when faced with discharge for alleged unsatisfactory service, must be accorded more than a mere opportunity to review his rating with one of the persons who signed the rating report or assisted in making the rating. The Court found that the skimpy review provided plaintiff was not the right to respond before a reasonably impartial, noninvolved reviewer, a right implied in the due process requirement that an employee be given the right to respond, orally or in writing, to the authority imposing the discipline (*22 Cal. 3d 731, 735*).

[g] Posthearing Determination Must Be Based on Review of Evidence

In ***Vollstedt v. City of Stockton*** *(1990) 220 Cal. App. 3d 265, 269 Cal. Rptr. 404* , a city employee was demoted for poor performance. Following a hearing, the city's civil service commission found that the evidence was insufficient to support the demotion and recommended to the city manager that the employee be reinstated. Contrary to the procedures set forth in a city ordinance, the commission failed to forward a written statement of facts to the city manager. The city manager rejected the commission's recommendation and upheld the employee's demotion based on a private discussion with the city's personnel director and without reviewing the evidence presented at the hearing. The employee petitioned the superior court for a writ of mandate to compel reinstatement and for damages. When the petition was denied, the employee appealed.

The court of appeal reversed, holding that the employee had not been given a fair hearing. The court reasoned that the city manager's decision to proceed without a statement of facts or a review of the tapes or transcripts of the commission's hearing, coupled with the decision to reject the commission's recommendation based on evidence supplied by the city's personnel director, denied the employee due process and violated the fundamental principle that "one who decides must hear" (*220 Cal. App. 3d 265, 269*). Under this principle, there has been no "hearing" unless the one who decides considers the evidence, is guided by that alone, and reaches a conclusion uninfluenced by extraneous considerations (*220 Cal. App. 3d 265, 275*). The ultimate decisionmaker is not required to peruse every exhibit or read every witness' entire testimony but he or she must review the record to a sufficient extent to enable him or her to make an informed judgment (*220 Cal. App. 3d 265, 276*). Review of a written statement of facts from the commission would have satisfied this requirement, the court explained. The total absence of independent review, the court concluded, coupled with the city manager's rejection of the commission's recommendation based on information supplied by the personnel director, denied petitioner due process (*220 Cal. App. 3d 265, 276*).

[h] Seasonal Civil Service Employees

Williams v. Los Angeles County *(1978) 22 Cal. 3d 731, 150 Cal. Rptr. 475, 586 P.2d 956* , is discussed in *§ 36.21[3][f]*.

[4] Additional Authorities

[a] Due Process Requirements for Permanent Civil Service Employees

Coburn v. State Personnel Bd. (1978) 83 Cal. App. 3d 801, 148 Cal. Rptr. 134 , concerned a psychiatric technician who was charged with committing a sex offense with a male patient, but was not informed of his impending dismissal until just two and one-half hours before it became effective. The dismissal was upheld by the State Personnel Board, and the employee's petition for a writ of mandate was denied in the trial court. The court of appeal reversed the denial of the writ, holding that the *Skelly* due process requirements were not met in this case, in that the notice given two and one-half hours prior to the imposition of the punitive action did not give the employee an effective opportunity to rebut the charges (*83 Cal. App. 3d 801, 806*).

[b] Due Process Requirements for Short-Term Suspensions

The United States Supreme Court in Gilbert v. Homar (1997) 520 U.S. 924, 933-935, 117 S. Ct. 1807, 138 L. Ed. 2d 120, 129-130 , reached the same conclusion as the California Supreme Court reached in *Civil Service Assn. v. City and County of San Francisco (1978) 22 Cal. 3d 552, 564, 150 Cal. Rptr. 129, 586 P.2d 162* : that is, a public employee's due-process rights require notice and an opportunity to be heard within a reasonable time after a temporary suspension, but not necessarily before it.

A police officer was suspended without pay immediately upon being arrested and charged with a felony in another jurisdiction. He was not given an opportunity to contest the action beforehand, and his only opportunity to do so following notification of the evidence against him took place four weeks later. The district court found no due process violation, but the court of appeal held that a governmental employer may not suspend an employee without pay unless the suspension is preceded by some kind of pre-suspension hearing, providing the employee with notice and an opportunity to be heard.

In reversing, the Supreme Court strongly disapproved of the lower court's categorical reasoning, emphasizing both the flexibility of the Due-Process Clause and the existence of situations where a state agency must act more quickly than a requirement of pre-deprivation notice and hearing would allow (*138 L. Ed. 2d 120, 127*). The court balanced the employee's interest (relatively minor because of the temporary deprivation), the state's interest (a strong need to protect the perceived and actual integrity of law enforcement agencies), and the risks and benefits of not requiring the safeguard in question. On this last factor, the Court was satisfied that suspensions triggered by felony arrests are already preceded by an independent investigation (that leading to the arrest) which protects against totally arbitrary action by the employer. It also noted that a post-suspension hearing was more likely to give an opportunity for reliable fact-finding, because of the additional time for more information to be gained (*138 L. Ed. 2d 120, 128-130*).

The Court noted that criminal charges against the suspended employee were dropped 17 days before he was given a meaningful opportunity to be heard and remanded for the lower courts to consider whether this fact amounted to a lack of promptness in providing a post-suspension hearing, in violation of the employee's due--process rights (*138 L. Ed. 2d 120, 130*).

The court of appeal in *Sienkiewicz v. County of Santa Cruz (1987) 195 Cal. App. 3d 134, 240 Cal. Rptr. 451* , affirmed a trial court's denial of a petition for extraordinary relief and dismissal of a complaint for damages by a detention officer against a county. The petitioner had suffered facial and jaw injuries in a motorcycle accident unrelated to work, but feared becoming involved in an altercation at work that could result in his being struck in the face. A psychiatrist diagnosed petitioner as suffering from posttraumatic stress disorder. The sheriff felt that petitioner's mental state rendered him unfit for normal service and presented a danger to petitioner and to other detention officers. Petitioner's suspension was indefinite in that it provided that he should remain away from work until he could demonstrate that his presence in his normal work assignment would not endanger himself or the safety of other employees.

While the court of appeal agreed that a public employee subject to a short-term suspension must be afforded the right to respond either during the suspension or within a reasonable time thereafter, the court said that the administrative appeal to the county civil service commission after suspension by the sheriff was sufficient opportunity for response. The court acknowledged that the suspension was indefinite, but considered it short-term because petitioner had the power to end the suspension quickly by showing that he had overcome his fear (*195 Cal. App. 3d 134, 141*).

[c] Right to Respond to Authority Imposing Discipline

In *Kempland v. Regents of University of California (1984) 155 Cal. App. 3d 644, 202 Cal. Rptr. 275* , a discharged employee petitioned for a writ of mandate for reinstatement with back pay, alleging that he had been discharged without sufficient procedural due process. His employer held the predismissal hearing one day after the employee had received notice of intention to dismiss. The employee did not feel sufficiently prepared for this hearing, and later submitted a

written response within five days of his notice, as permitted under established procedure. However, his employer dismissed him immediately without considering this response (*155 Cal. App. 3d 644, 647-648*). The trial court denied relief, and the court of appeal reversed, holding that the dismissal was void for lack of procedural due process and that the employee was therefore entitled to reinstatement. The court reasoned that the employer had not given the employee a meaningful opportunity to respond to the charges raised in its notice of intention to dismiss (*155 Cal. App. 3d 644, 648-650*). The employee was entitled to back pay from his dismissal until such time as he was afforded a meaningful opportunity to respond, less any interim wages earned (*155 Cal. App. 3d 644, 650-651*).

[d] Posthearing Determination Must Be Based on Review of Evidence

In *Parker v. City of Fountain Valley (1981) 127 Cal. App. 3d 99, 179 Cal. Rptr. 351* , a tenured city police officer appealed the denial of his petition for a writ of mandate, by which he sought reinstatement to his position in the city police department. The court of appeal reversed the trial court's denial of the writ, stating that the city denied the officer his constitutional right to procedural due process (*127 Cal. App. 3d 99, 118*). Although the officer was given notice of the charges, a copy of the materials on which the action was based, and the right to respond to the charges in a hearing, the police chief considered new witness statements and written materials that had not been provided to the officer and to which the officer had had no opportunity to respond, thus denying him the minimum safeguards required by due process (*127 Cal. App. 3d 99, 107*).

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Volume 3 Chapters 34-39 CHECKS AND BANKS---to---CIVIL SERVICE
CHAPTER 36 CIVIL SERVICE
PART II. FORMS

3-36 California Points & Authorities § 36.22

§ 36.22 Opposing Petition for Writ of Mandate to Review Administrative Decision--Discipline of Civil Service Employee--Due Process Requirements--No Property Right to Be Protected When Employment Is at Will

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PETITIONER IS NOT ENTITLED TO DUE-PROCESS PROTECTION OF HIS/HER POSITION.

A. No Protected Property Interest When Employment Is at Will. When the statutory scheme creating a public employee's position gives the employee no guarantee of retaining it, there is no property interest implicated when the position is taken away. Therefore the employee is not entitled to due process in the manner of the taking (*Campbell v. State Personnel Bd. (1997) 57 Cal. App. 4th 281, 293-295, 66 Cal. Rptr. 2d 722*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to a contention that the procedures used to demote or discharge a public employee violated the employee's due process rights, where the position in question was at will or otherwise not one the employee had a legal entitlement to retain. It should be combined with any of the other forms in this chapter that are applicable to the particular case.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Counsel should, for example, explain how the petitioner's position was exempt from normal civil service protections or explicitly made not a permanent position.

[c] Related Pleading and Practice Chapters

For related legal background and research guides for defending mandamus cases involving discipline of public employees, see California Forms of Pleading and Practice, Ch. 118, *Civil Service* (Matthew Bender).

[d] Related Memoranda

Any of the other memoranda for opposing mandamus that are *set out in § 36.22A* et seq. may be combined with this form.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memorandum

In an appropriate case this form may be adapted and submitted in opposition to the memorandum *set out in § 36.21*.

[3] Discussion of Authorities

[a] No Protected Property Interest When Employment Is at Will

The facts and procedural background of ***Campbell v. State Personnel Bd.*** *(1997) 57 Cal. App. 4th 281, 288-290, 66 Cal. Rptr. 2d 722* are discussed in *§ 36.28[3][a]*.

In *Campbell* the state's chief structural engineer was demoted within the Office of the State Architect, losing his "career executive assignment," a special category of state civil service reserved for high-level administrative and policy--influencing positions under *Gov. Code § 18547* (*57 Cal. App. 4th 281, 284*). He argued that procedures for terminating a career executive assignment violated due process because they fail to include a pretermination hearing, citing *Skelly v. State Personnel Bd. (1975) 15 Cal. 3d 194, 124 Cal. Rptr. 14, 539 P.2d 774* .

The court observed that before *Skelly* applies, a property interest must be implicated. Reviewing the statutory scheme regarding career executive assignments, the court showed that the category is one providing the employee very little protection from reassignment. From this it concluded that there is no property right in such an assignment (*57 Cal. App. 4th 281, 293-294*).

As the court made clear that the issue in *Campbell* was not whether the petitioner had a property interest in a state job, but whether his property interest extended to the career executive assignment (*57 Cal. App. 4th 281, 293*), the case would be of limited precedential value in defending against discharge of a permanent employee. On the other hand, a close analogy could be made in termination cases involving probationary or other at--will employees. *Cf. § 36.54*.

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3-36 California Points & Authorities § 36.22A

§ 36.22A Opposing Petition for Writ of Mandate to Nullify Administrative Decision--Discipline of Civil Service Employee--Official Initiating Disciplinary Action May Serve as *Skelly* Hearing Officer

[1] FORM

[*The following may be included in a memorandum opposing a petition for mandate, or in a trial or appellate brief.*]

THAT THE OFFICIAL WHO INITIALLY RECOMMENDED DISCIPLINARY ACTION ALSO SERVED AS THE *SKELLY* HEARING OFFICER DID NOT VIOLATE PETITIONER'S DUE-PROCESS RIGHTS.

Same Official May Initiate Disciplinary Proceedings and Conduct *Skelly* Hearing. An official who initiates disciplinary proceedings against a public employee may also serve as the hearing officer at the employee's *Skelly* hearing, at which the employee has the opportunity to respond to the charges on which the proposed discipline is based (*Flippin v. Los Angeles City Bd. of Civil Serv. Comm'rs (2007) 148 Cal. App. 4th 272, 281-283, 55 Cal. Rptr. 3d 458*).

[2] Comments

[a] Use of Form

This form may be used to oppose a contention that a public employee's due-process rights were violated by having the same official initiate disciplinary action and conduct the employee's *Skelly* hearing.

[b] Opposing Memoranda

In an appropriate case, the memoranda *set out in §§ 36.20* and *36.21* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Same Official May Initiate Disciplinary Proceedings and Conduct *Skelly* Hearing

In ***Flippin v. Los Angeles City Bd. of Civil Serv. Comm'rs*** *(2007) 148 Cal. App. 4th 272, 55 Cal. Rptr. 3d 458* , the Los Angeles Department of Power and Water (DPW) discharged an employee after he was found sleeping in a hammock beneath a DPW truck on a public street during working hours. After the city's Board of Civil Service Commissioners sustained the penalty, the employee petitioned for administrative mandamus to compel the Board to reinstate his employment. The employee claimed, among other things, that the DPW had denied him due process by not providing an impartial *Skelly* hearing officer before discharging him. Specifically, the employee contended that, because the hearing officer was the same DPW manager who had initially investigated and recommended discharge, the hearing officer could not serve as a neutral *Skelly* hearing officer. The trial court found no *Skelly* violation, but it did find that the penalty was excessive. The court of appeal reversed, finding that the trial court had erred in setting aside the penalty of discharge. The court of appeal agreed with the trial court and the Board, however, that no *Skelly* violation had occurred.

In examining the employee's claim that he had been denied a proper *Skelly* hearing, the court of appeal began with a brief historical review. In *Skelly v. State Personnel Bd. (1975) 15 Cal. 3d 194, 124 Cal. Rptr. 14, 539 P.2d 774* , discussed in *§ 36.20[3][h]*, the California Supreme Court held that in order to satisfy due process, an agency considering disciplinary action against a public employee must accord the employee certain "preremoval safeguards," including notice of the proposed action, the reasons therefor, a copy of the charges and materials on which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline (*Skelly v. State Personnel Bd. (1975) 15 Cal. 3d 194, 215, 124 Cal. Rptr. 14, 539 P.2d 774*). The Supreme Court's directive gave rise to an administrative procedure known as a *Skelly* hearing, in which an employee has the opportunity to respond to the charges on which the proposed discipline is based (*148 Cal. App. 4th 272, 280)* .

In this case, the employee's alleged misconduct was investigated by a DWP manager, who concluded that discharge was called for. The manager notified the employee in a written memorandum of the proposed dismissal and the charges on which the dismissal was based. The memorandum also advised the employee of his right to a *Skelly* hearing and that the manager would serve as the *Skelly* hearing officer. The court of appeal found that this procedure did not violate the employee's due-process rights. The court observed that there is no authority precluding an officer from recommending discipline and acting as hearing officer in the same case. The court also found it significant that after the *Skelly* hearing, two more stages of administrative review occurred: (1) a full evidentiary hearing before a neutral hearing examiner appointed by the Board, and (2) a review of the hearing examiner's decision by the Board itself. The court concluded that, at least when these additional levels of administrative review are present, the conduct of the *Skelly* hearing by the manager who initially recommended discharge does not violate the employee's due-process rights (*148 Cal. App. 4th 272, 281-283)* .

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3-36 California Points & Authorities § 36.23

§ 36.23 Opposing Petition for Writ of Mandate to Nullify Administrative Decision--Discipline of Civil Service Employee--Open Session of Civil Service Commission or Board Not Required [Gov. Code § 54957]

[1] FORM

[*The following may be included in a memorandum opposing a petition for mandate, or in a trial or appellate brief.*]

THE _____ [CIVIL SERVICE COMMISSION *or identify board or agency*] MAY CONSIDER WHETHER TO DISCIPLINE AN EMPLOYEE IN A CLOSED EXECUTIVE SESSION, AND THE EMPLOYEE'S RIGHT TO REQUEST AN OPEN SESSION DOES NOT APPLY UNLESS THE _____ [COMMISSION *or identify board or agency*] IS CONDUCTING AN EVIDENTIARY HEARING ON A SPECIFIC COMPLAINT OR CHARGE AGAINST THE EMPLOYEE.

A. Civil Service Commission or Board May Meet in Closed Session to Make Decisions About Employee Discipline and Other Personnel Matters. Although the California Constitution (*Cal. Const., art. I, § 3(b)(1)*) and the Ralph M. Brown Act (*Gov. Code § 54950 et seq.*) generally require local legislative bodies (including civil service commissions) to conduct open sessions, that requirement is subject to a "personnel exception" (*Gov. Code § 54957*; *see Cal. Const., art. I, § 3(b)(5)*). Under the personnel exception, a commission may hold a closed session to consider or deliberate whether specific complaints or charges against the employee warrant dismissal or discipline. The employee's right to request an open session applies only if the commission conducts an *evidentiary* hearing on specific complaints or charges against the employee (*Bollinger v. San Diego Civil Serv. Comm'n (1999) 71 Cal. App. 4th 568, 574-575, 84 Cal. Rptr. 2d 27*).

B. Evidentiary Hearing Before Single Hearing Officer Satisfies Requirements of Due Process. The employee's due-process right to be heard prior to the imposition of discipline is satisfied by the use of a single hearing officer whose findings and proposed decision are adopted by the civil service commission (*see Gov. Code §§ 11517, 19582*); the employee does not have a further right to respond to the hearing officer's report or to be heard by the full commission prior to the commission's adoption of the hearing officer's recommendation (*Bollinger v. San Diego Civil Serv. Comm'n (1999) 71 Cal. App. 4th 568, 575-578, 84 Cal. Rptr. 2d 27*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a public employee's contention that a dismissal or disciplinary action against the employee is void because it was imposed by the local civil service commission or relevant governing board without an open hearing before the full commission or board under the Ralph M. Brown Act (*see Gov. Code § 54957*). Paragraph A sets forth the proposition that the commission or board may meet in closed sessions to consider and deliberate on personnel matters, including discipline and dismissal, unless it conducts an evidentiary hearing about specific charges. Paragraph B sets forth the proposition that the use of a single hearing officer to conduct evidentiary hearings complies with due process.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. The argument should, therefore, establish that the commission or board did not conduct an evidentiary hearing, but merely considered and adopted the recommendations of a hearing officer or panel that conducted an evidentiary hearing.

[c] Related Pleading and Practice Chapters

For related legal background and research guides for defending mandamus cases involving discipline of public employees, see California Forms of Pleading and Practice, Ch. 118, *Civil Service* (Matthew Bender).

[3] Discussion of Authorities

[a] Civil Service Commission or Board May Meet in Closed Session to Make Decisions About Employee Discipline and Other Personnel Matters

In ***Bollinger v. San Diego Civil Serv. Comm'n*** *(1999) 71 Cal. App. 4th 568, 575-578, 84 Cal. Rptr. 2d 27* , a demoted police officer petitioned for a writ of mandate to set aside the civil service commission's ratification of a hearing officer's findings of fact and recommendation that the demotion be upheld. The hearing officer's report was submitted after a three-day noticed public hearing, but the commission ratified the report in a closed session without giving the officer a chance to respond to the report. The trial court declared the commission's action void, holding that the Ralph M. Brown Act (*Gov. Code § 54950 et seq.*) required the commission to notify the officer of his right to request a public hearing. *Gov. Code § 54957* provides that when a local legislative body (such as a civil service commission) meets to hear specific complaints or charges against a public employee, it must give the employee 24-hour written notice of the right to request that the complaints or charges be heard in an open session.

The court of appeal reversed, holding that the employee's right to request an open session applies only when the commission is conducting an *evidentiary* hearing on specific complaints or charges. In contrast, the right to an open session does not apply when the commission meets solely to consider or deliberate whether the complaints or charges warrant disciplinary action. In support of its reading of the statute, the court pointed to the distinction between the words "consider" and "hear" as used in the statute: the right to an open hearing applies only when the commission "hears" charges, but not when it "considers" discipline or dismissal (*71 Cal. App. 4th 568, 574-575*).

[b] Evidentiary Hearing Before Single Hearing Officer Satisfies Requirements of Due Process

The facts and procedural background of ***Bollinger v. San Diego Civil Serv. Comm'n*** *(1999) 71 Cal. App. 4th 568, 575-578, 84 Cal. Rptr. 2d 27* , are discussed in *§ 36.23[3][a]*. The court of appeal acknowledged that the officer, a tenured public employee, was entitled to due process in the disciplinary proceedings. The minimum standards of due process require that, prior to the imposition of discipline, a public employee receive (1) notice of the disciplinary action proposed, (2) the grounds for the discipline, (3) the charges and materials on which the disciplinary action is based, an

(4) the opportunity to respond in opposition to the proposed disciplinary action. The opportunity to respond, however, need not be before the full civil service commission; the use of a single hearing officer, whose findings and recommendation are adopted by the commission, complies with due process (*71 Cal. App. 4th 568, 575-576*). It is only when the full commission reviews the evidence itself that the employee has a right to an open hearing before the commission. The court pointed out that the Administrative Procedure Act and the Civil Service Act provide for such procedures on the state level, requiring a hearing before the full agency only if the agency does not adopt the hearing officer's recommendation and reviews the evidence itself (*71 Cal. App. 4th 568, 576-577* ; *see Gov. Code §§ 11517, 19582*). Finally, the court noted that, although not required by minimal due-process standards, the better practice would be for the commission to give the employee an opportunity to respond orally or in writing to the hearing officer's report before the commission makes its final decision (*71 Cal. App. 4th 568, 577*).

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3-36 California Points & Authorities § 36.24

§ 36.24 Opposing Petition for Writ of Mandate to Review Administrative Decision--Layoff of Public Employees--Due Process Requirements--No Predeprivation Hearing Required for Employee Who Accepts Demotion in Lieu of Layoff

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DUE PROCESS DOES NOT REQUIRE A PREDEPRIVATION HEARING FOR A PUBLIC EMPLOYEE WHO ACCEPTS A DEMOTION IN LIEU OF A LAYOFF.

Predeprivation Hearing Not Required for Public Employee Who Accepts Demotion in Lieu of Layoff. When a public agency determines that it must lay off employees because of a fiscal crisis and the layoffs based on seniority, a permanent employee who accepts a demotion in lieu of being laid off does not have a due-process right to a predemotion hearing. A postdemotion right to appeal the layoff decision is sufficient to meet the requirements of due process (*Duncan v. Department of Personnel Admin. (2000) 77 Cal. App. 4th 1166, 1175-1183, 92 Cal. Rptr. 2d 257*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that an employee who has accepted a demotion in lieu of a layoff should have been given a predemotion hearing. In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities set forth in *§ 36.21*.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. The argument should, therefore, establish that the employer's layoff/demotion decision was based on the employer's financial crisis, rather than the actions of the employee, and that the layoffs were based on objective criteria

such as seniority (*see Duncan v. Department of Personnel Admin. (2000) 77 Cal. App. 4th 1166, 1180-1182, 92 Cal. Rptr. 2d 257*).

[c] Related Points and Authorities

Any of the other points and authorities for opposing mandamus that are set out in this chapter may be combined with this form.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Predeprivation Hearing Not Required for Public Employee Who Accepts Demotion in Lieu of Layoff

In ***Duncan v. Department of Personnel Admin.*** *(2000) 92 Cal. Rptr. 2d 257* , the plaintiff was an employee of the California Department of Insurance, working for six years as an associate life actuary. In 1996, the Department informed its employees that a budgetary crisis would necessitate layoffs. The Department also obtained the approval from the Department of Personnel Administration for the layoffs, which would be based on seniority.

Subsequently, the Department of Insurance notified the plaintiff that he would be laid off, but that his seniority score gave him the option of accepting a demotion instead of the layoff. The notice also informed the plaintiff of his right to appeal the layoff decision to the Department of Personnel Administration (*see Gov. Code § 19997.14*).

The plaintiff decided to accept a demotion to the position of senior actuarial statistician, which involved a reduction of his monthly salary by $1,508. He also exercised his right to appeal the layoff/demotion. The Department of Personnel Administration ultimately sustained the demotion, and the plaintiff filed a petition for a writ of mandate, alleging that his layoff was procedurally deficient and substantively wrong. The trial court denied the petition, and the plaintiff appealed.

On appeal, the plaintiff contended that the state had violated his right to due process by not providing a pre-layoff hearing at which he could challenge the layoff decision. The plaintiff also contended that the layoff decision was substantively wrong.

The court of appeal dealt first with the due process issue, noting that it rested on two premises. The first premise was that, as a permanent civil service employee, the plaintiff had a constitutionally protected property interest in his continuing employment as an associate life actuary. The second premise was that the plaintiff had been forced to accept a demotion because the state improperly denied him an opportunity to challenge the layoff decision before it became effective. The court of appeal agreed with the plaintiff's first contention, noting the well-established rule that permanent civil servant has a protectible property interest that the state cannot take away without satisfying due process (*77 Cal. App. 4th 1166, 1175-1178*).

However, the court of appeal rejected the plaintiff's contention that due process required a predeprivation hearing in this case. In making its determination of what kind of hearing was required by due process, the court of appeal applied the three-factor balancing test enunciated by the *United States Supreme Court in Gilbert v. Homar (1997) 520 U.S. 924, 117 S. Ct. 1807, 138 L. Ed. 2d 120* . Those three factors are (1) the private interest that will be affected by the official action (in this case, the layoff); (2) the risk of an erroneous deprivation of the plaintiff's property interest through the procedure used, and the probable value, if any, of additional or substitute safeguards such as a predeprivation hearing; and (3) the government's interest (*77 Cal. App. 4th 1166, 1179-1180*).

On the first factor--the nature of the plaintiff's interest--the court of appeal opined that the plaintiff's interest in *retaining* employment was of little significance in this case, since the plaintiff remained employed (albeit in a lower-paid position) by virtue of his decision to accept the demotion. The court also noted that a layoff, like a resignation, carries no stigma that would impair a dismissed employee's future job prospects. A layoff, unlike a punitive termination for misconduct, is the result of financial exigency, not the actions of the employee. The court concluded, therefore, that in this case the plaintiff's interests were less of a concern than those of an employee who faces punitive discipline (*77 Cal. App. 4th 1166, 1180-1181*).

On the second factor--the risk of an erroneous deprivation through the procedure used, and the probable value of additional safeguards--the court of appeal found that the scale tipped in favor of the state. In contrast to disciplinary matters, which usually focus on the actions of a single employee, a layoff is based on the "big picture," that is, an extensive, time-consuming examination of the department or agency involved. Further, layoffs are generally based on seniority; the use of such objective criteria lessens the chance of an erroneous prehearing decision regarding a particular employee. In this case, given that the layoffs were based on objective criteria (seniority), that the Department of Insurance had expended significant resources in furtherance of the layoff plan, and that a second government entity (the Department of Personnel Administration) had reviewed and approved the layoff plan, it was unlikely that a pre-layoff hearing would have reduced the risk, if any, of error (*77 Cal. App. 4th 1166, 1181-1182*).

The court of appeal also found that the third factor--the government's interest--favored the state. The court observed that in a time of financial crisis, the state has a significant interest in taking quick steps to resolve its economic problems. It is one thing to require a predeprivation hearing for a single employee who faces demotion because of misconduct; it is quite another thing to require pre-layoff hearings for a multitude of employees in the midst of a financial crisis. Group hearings would probably not be adequate, since each employee would want to explain why his or her particular position should not be eliminated or why he or she is more deserving of retention than others. The court remarked that the expense of such hearings could worsen the financial crisis and, ironically, increase the number of layoffs (*77 Cal. App. 4th 1166, 1182-1183*).

Accordingly, the court of appeal concluded that due process did not require a predeprivation hearing in this case, and the trial court had properly denied the plaintiff's petition for a writ of administrative mandate (*77 Cal. App. 4th 1166, 1183*). In an unpublished portion of its opinion, the court went on to reject the plaintiff's contention that the layoff decision was substantively wrong (*77 Cal. App. 4th 1166, 1184*).

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3-36 California Points & Authorities § 36.25

§ 36.25 Opposing Petition for Writ of Mandate to Review Administrative Decision--Placement of Negative Memorandum in Officer's Personnel File--Due Process Requirements--No Right to Full Evidentiary Hearing

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DUE PROCESS DOES NOT REQUIRE THAT THE RESPONDENT PROVIDE THE PETITIONER WITH A FULL EVIDENTIARY HEARING UNDER THE CIRCUMSTANCES OF THIS CASE, IN WHICH THE RESPONDENT'S ACTION HAS NOT RESULTED IN ANY DEMOTION, TRANSFER, PAY REDUCTION, OR OTHER ADVERSE CONSEQUENCE FOR THE PETITIONER.

Administrative Appeal Procedures Must be Tailored to Due-Process Need in Particular Case. The placement of a written memorandum in a peace officer's personnel file to be considered in a future performance review is the lowest level of discipline an employer can impose, and it triggers only minimal due-process requirements. Thus, a peace officer need not be afforded the right to confront and cross-examine witnesses during a hearing on a challenge to a memorandum that has not resulted in any demotion, transfer, pay reduction, or other adverse consequence (*James v. City of Coronado (2003) 106 Cal. App. 4th 905, 910-913, 131 Cal. Rptr. 2d 85*).

[2] Comments

[a] Use of Form

This form of points and authorities may be used to oppose a contention that a peace officer is entitled to a full evidentiary hearing challenging a negative memorandum that has been placed in the officer's personnel file. In an appropriate case, this form of points and authorities may be used in opposition to the points and authorities set forth in *§ 36.21*.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should establish that the placement of the memorandum in the officer's personnel file has not resulted in any demotion, transfer, pay reduction, or other adverse consequence to the officer.

[c] Related Pleading and Practice Chapters

For related legal background and research guides for defending mandamus cases involving discipline of public employees, see California Forms of Pleading and Practice, Ch. 118, *Civil Service* (Matthew Bender).

[3] Discussion of Authorities

[a] Administrative Appeal Procedures Must be Tailored to Due-Process Need in Particular Case

In ***James v. City of Coronado*** *(2003) 106 Cal. App. 4th 905, 131 Cal. Rptr. 2d 85* , a police department investigated unrelated complaints against two of its permanent police officers. One officer was determined to have opened a parcel not addressed to him and to have entered and removed property from the locked office of a fellow employee. Based on this information, the police chief issued a memorandum stating that the incidents were "a matter for formal counseling rather than discipline," and that "[a]ny recurrence of this or similar conduct would require severe disciplinary action that could include termination. Therefore, a copy of this memorandum shall be included with the [officer's] counseling documentation and should become a part of the next evaluation of this officer."

The other officer was determined to have submitted a request for overtime pay without the necessary prior authorization for that work. Regarding this officer, the police chief issued a memorandum stating that "[t]here is strong evidence to support making this a matter for discipline. However, ... I will allow it to be handled as a matter for evaluation provided this memorandum is included as a part of the [officer's] next evaluation."

The police department denied the officers' requests for administrative appeals to challenge the memoranda. The officers then filed a petition for a writ of mandamus (*see Code Civ. Proc. § 1085*) to compel the department to provide an administrative appeal. The superior court granted the petition and ordered the department to provide an evidentiary hearing before a neutral fact finder with the burden of proof on the department. The court ruled, however, that at the hearing the officers would be entitled to introduce evidence (mainly, their own testimony) but not to confront and cross-examine witnesses. The officers appealed, contending that under the Public Safety Officers Procedural Bill of Rights Act (*Gov. Code § 3300 et seq.*) their administrative appeals necessarily included the right to confront and cross-examine witnesses (*Gov. Code § 3304(b)*).

The court of appeal affirmed the trial court's judgment. The court acknowledged that the Bill of Rights Act provides that no punitive action or denial of promotion on grounds other than merit may be undertaken by any public agency without providing the officer with an opportunity for administrative appeal (*Gov. Code § 3304(b)*). To trigger an officer's right to an administrative appeal, it is not necessary that an adverse employment consequence have already occurred or even be likely to occur; a possibility of future adverse consequences is sufficient. Thus, written criticisms of an officer's performance trigger administrative appeal rights if they may hinder advancement or cause other adverse consequences in the future (*106 Cal. App. 4th 905, 909*).

The court of appeal went on to note that in general, the local employing agency should formulate the procedural details for implementing officers' administrative appeal rights. However, when, as in this case, the scope of the administrative appeal hearing is not prescribed by personnel rules, agency regulations, memoranda of understanding, or customary agency practices, the adequacy of the appeal procedure afforded is measured according to constitutional due-process principles. The court observed that due process--the opportunity to be heard at a meaningful time and in a meaningful manner--does not require a trial-like hearing in every instance. Rather, the requirements of due process vary according to the specific context. Thus, in considering the due-process protections owed under the Public Safety Officers

Procedural Bill of Rights Act, courts make distinctions based on the officers' status and the type of punitive action imposed. For example, in a general fact-finding investigation (as opposed to an adjudicative proceeding that will make a binding determination affecting the rights of individuals), due process does not require that the full panoply of judicial procedures be used (*106 Cal. App. 4th 905, 909-911*).

Applying these due-process principles in this case, the court of appeal rejected the notion that as a matter of law every administrative appeal under the Public Safety Officers Procedural Bill of Rights Act requires a formal hearing accompanied by the full rights of confrontation and cross-examination. The court concluded that the officers were not entitled to confront and cross-examine witnesses during the hearings on their administrative appeals. Although the officers were permanent employees, they had suffered no demotion, transfer, pay reduction, or other adverse consequence. Indeed, the placement of written memoranda in the officers' personnel files for consideration in future performance reviews was the lowest level of discipline that could be imposed, and the department had made no binding determination affecting the legal rights of the officers. Therefore, the full panoply of judicial procedures was not required (*106 Cal. App. 4th 905, 912-913*).

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2-36 California Points & Authorities § 36.25A

§ 36.25A Opposing Petition for Writ of Mandate to Review Discipline of Public Safety Officer--Public Safety Officers Procedural Bill of Rights Act Inapplicable to Criminal Investigation

[1] FORM

[*The following may be included in a memorandum opposing a petition for mandate or in an appellate brief.*]

DUE PROCESS DOES NOT REQUIRE THAT THE RESPONDENT AFFORD THE PETITIONER THE FULL RANGE OF RIGHTS PROVIDED UNDER THE PUBLIC SAFETY OFFICERS PROCEDURAL BILL OF RIGHTS ACT, BECAUSE THE DISCIPLINE IMPOSED ON THE PETITIONER IS BASED ON INFORMATION GAINED IN THE COURSE OF A BONA FIDE CRIMINAL INVESTIGATION OF THE PETITIONER.

Public Safety Officers Procedural Bill of Rights Act Does Not Apply to Criminal Investigations. The Public Safety Officers Procedural Bill of Rights Act (*Gov. Code § 3300 et seq.*) provides procedural protections when a peace officer is interrogated in the course of an administrative investigation that might subject the officer to punitive action (*Gov. Code § 3303*). However, the Act does not apply to cover an investigation concerned solely and directly with alleged criminal activities (*Gov. Code § 3303(i)*). Thus, the Act's protections do not apply to officers subject to criminal investigations conducted by their employers (*Van Winkle v. County of Ventura (2007) 158 Cal. App. 4th 492, 497-498, 69 Cal. Rptr. 3d 809*).

[2] Comments

[a] Use of Form

This form may be used to oppose a contention that a peace officer is entitled to the protections of the Public Safety Officers Procedural Bill of Rights Act (*Gov. Code § 3300 et seq.*). In an appropriate case, this form may be used in opposition to the form *set forth in § 36.21*.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law

stated. Thus, counsel should establish that the discipline imposed on the officer is the result of information gained through an independent, bona fide criminal investigation of the officer's activity rather than an administrative investigation.

[c] Related Pleading and Practice Chapters

For related legal background and research guides for defending mandamus cases involving discipline of public employees, as well as detailed coverage of the Public Safety Officers Procedural Bill of Rights Act (*Gov. Code § 3300 et seq.*), see California Forms of Pleading and Practice, Ch. 118, *Civil Service* (Matthew Bender).

[3] Discussion of Authorities

[a] Public Safety Officers Procedural Bill of Rights Act Does Not Apply to Criminal Investigations

In ***Van Winkle v. County of Ventura*** *(2007) 158 Cal. App. 4th 492, 69 Cal. Rptr. 3d 809* , the county sheriff's department's internal affairs unit began investigating a citizen complaint that an officer was conducting an extramarital affair while on duty. When the internal affairs unit uncovered evidence that the officer had committed a criminal offense, embezzlement of firearms, the matter was referred to the department's major crimes bureau. The ensuing criminal investigation led to the arrest of the officer, who then waived his *Miranda* rights and admitted taking home a firearm that had been brought to the sheriff's department for destruction. The district attorney declined to prosecute, but the sheriff's department terminated the officer's employment.

The officer filed a superior court petition for injunctive relief under the Public Safety Officers Procedural Bill of Rights Act, alleging that the county had violated the Act by (1) obtaining statements from him during the criminal investigation without first giving him the advisements required by that Act (*see Gov. Code § 3303*), and (2) attempting to use statements he made during the criminal investigation to support the decision to fire him. He sought to enjoin the county from taking any disciplinary action against him or from using statements he made during the criminal investigation in his civil service hearing (*see Gov. Code § 3309.5*).

The trial court enjoined the county from using the officer's statements made in the custodial interrogation in any administrative proceeding, except for impeachment purposes.

The court of appeal reversed, holding that the protections of the Public Safety Officers Procedural Bill of Rights Act were inapplicable to the criminal investigation. The court explained that the Act is a labor relations statute that provides procedural protections for police officers during administrative and disciplinary actions initiated by their employers. The Act does not apply, however, to an investigation concerned solely and directly with alleged criminal activities (*Gov. Code § 3303(i)*) (*158 Cal. App. 4th 492, 497)* .

The court of appeal emphasized that the criminal investigation in this case was entirely separate from the administrative investigation of the citizen complaint. Further, the officer made no claim that the criminal investigation was conducted as a sham conducted to further a disciplinary investigation. Also, the sheriff's department's major crimes bureau, which conducted the criminal investigation, had no authority to conduct administrative investigations or to make recommendations regarding discipline (*158 Cal. App. 4th 492, 498)* .

The court of appeal rejected a contention that the Public Safety Officers Procedural Bill of Rights Act's exclusion for criminal investigations applies only to criminal investigations conducted by outside agencies. The language of the exclusion does not support such an interpretation: it simply excludes "an investigation concerned solely and directly with alleged criminal activities" (*Gov. Code § 3303(i)*) (*158 Cal. App. 4th 492, 498-501)* .

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3-36 California Points & Authorities § 36.26

§ 36.26 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5] by State Personnel Board--Discipline of Civil Service Employee--Board Has No Jurisdiction to Impose Discipline When State Agency Has Withdrawn Adverse Action by Settlement With Employee

[1] FORM

[*Caption. See § 36.20.*]

THE COURT SHOULD GRANT A WRIT OF MANDATE DIRECTING THE STATE PERSONNEL BOARD TO SET ASIDE ITS DECISION IMPOSING DISCIPLINE ON THE PETITIONER BECAUSE THE _____ [*specify state agency*] HAS AGREED TO WITHDRAW ITS ADVERSE ACTION AGAINST PETITIONER AS PART OF A WRITTEN SETTLEMENT AGREEMENT UNDER WHICH PETITIONER HAS AGREED TO WITHDRAW HIS/HER APPEAL. THEREFORE, THE BOARD IS WITHOUT JURISDICTION TO TAKE ACTION AGAINST PETITIONER, NOTWITHSTANDING THE BOARD'S FAILURE OR REFUSAL TO APPROVE THE WITHDRAWAL.

A-E. Propriety of Mandate to Review Discipline of Employee. [*See § 36.20, Paragraphs A-E.*]

F. Withdrawal of Adverse Action and Appeal Pursuant to Settlement Deprives Board of Jurisdiction. When the appointing state agency and a civil service employee enter into a settlement agreement under which the state agency agrees to withdraw its adverse action against the employee and the employee agrees to withdraw his or her appeal, the State Personnel Board is without jurisdiction to take further action in the matter. The validity of such a withdrawal is not conditioned on Board approval (*Larson v. State Personnel Board (1994) 28 Cal. App. 4th 265, 279-281, 33 Cal. Rptr. 2d 412* ; *see Gov. Code §§ 18681, 19579*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a petition for writ of mandate for review of a State Personnel Board decision imposing discipline on a state civil service employee. This form is for use if the Board imposes discipline on an employee, but the employee and the relevant state agency have entered into a settlement agreement under which the agency agrees to withdraw its disciplinary action against the employee and the employee agrees to withdraw his or her appeal.

Counsel should add argument linking the points in this form with the facts of his or her case.

[3] Discussion of Authorities

[a] Withdrawal of Adverse Action and Appeal Pursuant to Settlement Deprives Board of Jurisdiction

The petitioner in ***Larson v. State Personnel Board*** *(1994) 28 Cal. App. 4th 265, 33 Cal. Rptr. 2d 412* , was employed by the Department of Developmental Services (DDS) as a teacher at a state facility for the developmentally disabled. The DDS terminated petitioner's employment based on his alleged sexual molestation of clients at the facility, and petitioner appealed to the State Personnel Board (Board). On the day that the appeal was to be heard by an administrative law judge (ALJ), petitioner and the DDS entered into a written settlement agreement under which the DDS agreed to withdraw its termination of petitioner's employment and reinstate petitioner's employment under certain conditions. In return, petitioner agreed to withdraw his appeal. The parties informed the ALJ of the settlement, but the ALJ took the position that it was up to the Board to determine whether or not to permit the withdrawal. The ALJ then submitted a proposed decision to the Board (1) disapproving the DDS's attempted withdrawal of its adverse action against petitioner and disapproving petitioner's attempted withdrawal of his appeal; (2) referring the matter to the Board's hearing office for a new hearing on the merits of the appeal, or in the alternative, submission of a settlement agreement to the Board for approval; and (3) maintaining petitioner's status as a dismissed employee pending final disposition of the appeal. The Board adopted the ALJ's decision as its own. Petitioner sought a writ of mandate to compel the Board to set aside its decision. The superior court granted the writ, and the Board appealed.

The court of appeal affirmed the judgment granting the writ. The Board contended that the parties could not withdraw from the proceeding without the Board's approval. The Board relied on *Gov. Code § 18681*, which provides: "Whenever any matter is pending before the Personnel Board involving a dispute between one or more employees and an appointing power and the parties to such dispute agree upon a settlement or adjustment thereof, the terms of such settlement or adjustment *may* be submitted to the board, and if approved by the board, the disposition of the matter in accordance with the terms of such adjustment or settlement shall become final and binding upon the parties" (emphasis added). The Board argued that while the word "may" usually implies permissiveness (*28 Cal. App. 4th 265, 276*), in this case it should be construed to be mandatory because otherwise parties could have a "final and binding agreement" regardless of whether or not they submitted the agreement for approval. No party would ever submit a settlement for approval and risk rejection. The Board argued that this result would undermine the purpose of § 18681, which the Board claimed was to provide Board supervision over settlement agreements to ensure consistency with merit principles (*28 Cal. App. 4th 265, 277*). The court rejected the Board's contention, noting that it could find no authority conditioning

withdrawal of a state agency's adverse action or an appeal on Board approval. The court observed that *Gov. Code § 18681* governs the presentation of settlement agreements to the Board and that it is couched in permissive language. Furthermore, *Gov. Code § 19579* permits employees, employers, or their representatives to withdraw actions or appeals (simply by failing to proceed at the hearing) and that the statute does not expressly condition such withdrawals on Board approval. Thus, the court concluded, a logical reading and construction of these statutes posed no bar to the procedure proposed by the DDS and the petitioner in this case (*28 Cal. App. 4th 265, 279*). The court could see no reason why, if both parties reach an agreement or resolution and wish to withdraw from further proceedings before the Board, they should be precluded from doing so (*28 Cal. App. 4th 265, 280-281*). Thus, the court concluded that the lower court had properly held that the parties could withdraw from the Board hearing and that the Board acted officiously and in excess of its jurisdiction when it rendered its decision in this matter (*28 Cal. App. 4th 265, 280*).

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3-36 California Points & Authorities § 36.27

§ 36.27 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5 (state); Code Civ. Proc. §§ 1094.5, 1094.6 (local)]--Discipline of Civil Service Employee--Exercise of First Amendment Rights

[1] FORM

[*Caption. See § 36.20.*]

THE COURT SHOULD GRANT A WRIT OF MANDATE DIRECTING _____ [*specify relevant public employer or agency*] TO SET ASIDE ITS DECISION IMPOSING DISCIPLINE ON PETITIONER BECAUSE (1) THE DISCIPLINE WAS BASED ON PETITIONER'S EXERCISE OF HIS/HER CONSTITUTIONALLY PROTECTED INTEREST, AS A CITIZEN, IN COMMENTING ON MATTERS OF PUBLIC CONCERN, NAMELY _____ [*specify matter(s) of public concern*]; AND (2) PETITIONER'S INTEREST IS NOT OUTWEIGHED IN THIS CASE BY ANY INTEREST OF _____ [*specify relevant public employer or agency*], AS PETITIONER'S EMPLOYER, IN PROMOTING THE EFFICIENCY OF THE PUBLIC SERVICES IT PERFORMS THROUGH ITS EMPLOYEES.

A-E. Propriety of Mandate to Review Discipline of Employee. [*See § 36.20, Paragraphs A-E.*]

F. Protection From Discipline for Exercise of *First Amendment* Rights. The *First Amendment* prohibits a public employer from disciplining an employee for commenting on matters of public concern unless the employer establishes that the employee's interest in commenting on matters of public concern is outweighed by the public employer's interest in promoting the efficiency of the services it performs through its employees (*see Connick v. Myers (1983) 461 U.S. 138, 142, 103 S. Ct. 1684, 75 L. Ed. 2d 708* ; *Johnson v. Multnomah County, Or. (9th Cir. 1995) 48 F.3d 420, 422, 426*).

G. What Constitutes Matter of Public Concern. Speech involves a matter of public concern when it can be fairly considered to relate to any matter of political, social, or other concern to the community. Misuse of public funds, wastefulness, and inefficiency in managing and operating government entities are examples of matters of inherent

public concern (*Johnson v. Multnomah County, Or. (9th Cir. 1995) 48 F.3d 420, 422, 425*).

[*Optional*] **H. Even Recklessly False Statements May Be Protected.** Recklessly false statements are not per se unprotected by the *First Amendment* when they substantially relate to matters of public concern. Instead, the recklessness of the employee and the falseness of the statements should be considered in light of the public employer's showing of actual injury to its legitimate interests, as part of the balancing required to determine if the employer's interests outweigh the employee's (*Johnson v. Multnomah County, Or. (9th Cir. 1995) 48 F.3d 420, 424*).

[*Optional*] **I. Mere Disruption Insufficient to Defeat *First Amendment* Rights.** A public employee's interest in commenting on matters of public concern is not outweighed by the mere fact that his or her statements may cause disruption to the workplace (*Johnson v. Multnomah County, Or. (9th Cir. 1995) 48 F.3d 420, 427*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a petition for writ of mandate for review of a final administrative adjudicatory order or decision of a state or local civil service commission discharging a civil service employee if the conduct of the employee involves the exercise of his or her *First Amendment* interest in commenting on matters of public concern and there is no countervailing legitimate interest of the public employer that outweighs the employee's interest.

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should refer to facts in the record establishing that petitioner's conduct consisted of statements about matters of public concern. Counsel should identify the particular public concerns to which the petitioner's statements relate. Furthermore, counsel should set forth argument showing that the public employer has not established any legitimate interest that outweighs the petitioner's interest in commenting on matters of public concern.

[b] Opposing Points and Authorities

In an appropriate case these points and authorities may be adapted and submitted in opposition to the points and authorities *set out in § 36.28*.

[3] Discussion of Authorities

[a] Protection From Discipline for Exercise of First Amendment Rights

In ***Connick v. Myers*** *(1983) 461 U.S. 138, 142, 103 S. Ct. 1684, 75 L. Ed. 2d 708* , plaintiff, an assistant district attorney, was fired for allegedly refusing to accept a transfer. Plaintiff filed suit against the district attorney's office under federal civil rights laws, claiming that the real reason for the termination of her employment was because she had

exercised her constitutional right of free speech by distributing a questionnaire to fellow staff members about various matters pertaining to the district attorney's office (e.g., office transfer policy, employee morale, employee confidence in supervisors, the need for a grievance committee). The district court entered judgment for the plaintiff, finding that the distribution of the questionnaire was the real reason for plaintiff's dismissal, that the questionnaire involved matters of public concern, and that the district attorney had not clearly demonstrated that plaintiff's survey "substantially interfered" with the operation of the district attorney's office. The Fifth Circuit Court of Appeals affirmed the district court's judgment, and the United States Supreme Court granted certiorari to review the Fifth Circuit's decision.

Although it reversed the judgment for plaintiff, the Supreme Court observed the settled rule that a state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression. Citing *Pickering v. Board of Education (1968) 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811* , the Court in *Connick* stated that its task in such cases is to seek a balance between the interests of the employee, as a citizen, in commenting on matters of public concern, and the interest of the state, as employer, in promoting the efficiency of the public services it performs through its employees (*461 U.S. 138, 142*). After reviewing previous Supreme Court decisions concerning the *First Amendment* rights of public employees, the Court emphasized that when employee expression cannot fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the *First Amendment* (*461 U.S. 138, 146*). Examining the questionnaire involved in *Connick,* the Court concluded that one of the questions (whether employees ever felt pressured to work on behalf of office-supported candidates) touched on a matter of public concern (*461 U.S. 138, 149*). However, after balancing the plaintiff's interest in commenting on this matter of public concern against her employer's legitimate interests, the Court concluded that the *First Amendment* interest involved in this case did not require that the district attorney tolerate action that he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships. The Court therefore held that plaintiff's discharge did not offend the *First Amendment* (*461 U.S. 138, 154*). In so holding, the Court rejected the test applied by the district court, which required the public employer to clearly demonstrate that the speech involved substantially interfered with official responsibilities. The Court instead held that the government's burden varies depending on the nature of the employee's expression, and that a particularized balancing of competing interests is required (*461 U.S. 138, 149-150*).

Plaintiff in ***Johnson v. Multnomah County, Or.*** *(9th Cir. 1995) 48 F.3d 420* , was an administrative assistant to the manager of a county fair. Plaintiff was fired from her position after making various statements to her coworkers and others accusing her supervisor of mismanagement and possible criminal conduct in connection with the fair. Plaintiff then sued the county and others for civil rights violations, alleging she had been terminated in retaliation for her exercise of *First Amendment* rights. The district court ruled that plaintiff's statements were not protected by the *First Amendment* and entered summary judgment for defendants.

On appeal, the Ninth Circuit Court of Appeals vacated the summary judgment and remanded the case. The court initially noted that, to prevail in her *First Amendment* claim, plaintiff must initially prove that her statements were constitutionally protected. The court observed that plaintiff's speech cannot be constitutionally protected unless it substantially involved matters of public concern. If plaintiff is able to show that the statements were of public concern, then the burden is shifted to the county to show that its legitimate administrative interests outweigh the *First Amendment* interests in plaintiff's freedom of speech (*48 F.3d 420, 422*). The court concluded that there were material issues of fact regarding both (1) whether plaintiff's speech involved matters of public concern (*48 F.3d 420, 425-426*); and (2) whether plaintiff's free speech interests were outweighed by the county's legitimate administrative interests (*48 F.3d 420, 426-427*). Therefore, the appellate court held that the district court had erred in entering a summary judgment against plaintiff.

[b] What Constitutes Matter of Public Concern

The facts and procedural background of ***Johnson v. Multnomah County, Or.*** *(9th Cir. 1995) 48 F.3d 420* , are

discussed in *§ 36.27[3][a]*. In granting summary judgment for defendants, the district court had held that plaintiff's statements were not protected by the *First Amendment* because they did not involve matters of public concern. The Ninth Circuit noted that speech involves a matter of public concern when it can fairly be considered to relate to any matter of political, social, or other concern to the community. Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record (*48 F.3d 420, 422*). The court further observed that its previous decisions have stated that misuse of public funds, wastefulness, and inefficiency in managing and operating government entities are matters of inherent public concern and that the plaintiff's statements were precisely of this type (*48 F.3d 420, 425*). The appellate court disagreed with the district court's finding that plaintiff's statements were merely about personnel disputes and grievances and therefore were not entitled to *First Amendment* protection (*48 F.3d 420, 425*). The court also rejected the county's argument that plaintiff's statements were not protected because they were motivated by plaintiff's private grudge against her boss and not by an intent to protect the public or bring wrongdoing to light. While the court conceded that a plaintiff's motivation may be relevant to whether or not the statements were a matter of public concern, the court noted that the relevant facts concerning plaintiff's motivation in this case were in dispute and therefore held that the district court erred in granting summary judgment on the ground that plaintiff's statements were not of public concern (*48 F.3d 420, 425-426*).

[c] Even Recklessly False Statements May Be Protected

The facts and procedural background of ***Johnson v. Multnomah County, Or.*** *(9th Cir. 1995) 48 F.3d 420* , are discussed in *§ 36.27[3][a]*. In reversing a summary judgment for defendants, the Ninth Circuit rejected defendants' contention that plaintiff's statements were per se unprotected by the *First Amendment* because they were false and made with reckless disregard for the truth and therefore did not qualify as statements relating to matters of public concern (*48 F.3d 420, 422*). The Ninth Circuit observed that the U.S. Supreme Court had expressly declined to decide what *First Amendment* protection was to be afforded to recklessly false statements and that the other circuits were split as to whether recklessly false statements are per se unprotected or whether the recklessness is simply one of the factors to be considered in the balancing of interests (*48 F.3d 420, 423*). The court found the latter cases were more persuasive because of the danger that stripping all *First Amendment* protection from recklessly false statements would inhibit the flow of accurate information from public employees who are uncertain about whether they have accumulated a legally sufficient factual basis for their statements. The court therefore concluded that recklessly false statements are not per se unprotected by the *First Amendment* when they substantially relate to matters of public concern. Instead, the recklessness of the employee and the falseness of the statements should be considered in light of the public employer's showing of actual injury to its legitimate interests, as part of the balancing test for determining whether the statements are protected (*48 F.3d 420, 424*).

[d] Mere Disruption Insufficient to Defeat First Amendment Rights

The facts and procedural background of ***Johnson v. Multnomah County, Or.*** *(9th Cir. 1995) 48 F.3d 420* , are discussed in *§ 36.27[3][a]*. After holding that the district court had erred in granting summary judgment for defendant county on the ground that plaintiff's statements did not involve matters of public concern, the Ninth Circuit noted that the county could nevertheless be entitled to summary judgment if it showed that the speech so severely damaged office harmony and working relationships that the government's interest in promoting an effective workplace outweighs the employee's *First Amendment* rights. The court first rejected the county's contention that its interests outweighed plaintiff's because plaintiff's statements were recklessly false and therefore entitled to very little *First Amendment* protection. The court concluded that summary judgment on this ground was precluded because the record did not establish as a matter of law that plaintiff's statements were either false or reckless (*48 F.3d 420, 426-427*). The county further argued that even if the statements were of public concern and that plaintiff possessed proof of wrongdoing, her free speech interest would still be outweighed by the county's interest in avoiding disruption in the workplace. The court rejected this argument, holding that the county must do more than show mere disruption; it must show actual injury to its legitimate interests. The court observed that the county does not have a legitimate interest in covering up

mismanagement or corruption and cannot justify retaliation against whistleblowers as a legitimate means of avoiding the disruption that necessarily accompanies such exposure. Nor, stated the court, are the county's legitimate interests injured if plaintiff's supervisor was undermined by truthful statements exposing his own wrongdoing. Because the court was required to presume that plaintiff's allegations were true for purposes of summary judgment, the court held that the county's showing of disruption was insufficient to entitle it to summary judgment on the ground that its legitimate administrative interests outweigh the *First Amendment* interests in plaintiff's freedom of speech (*48 F.3d 420, 427*).

[4] Additional Authorities

[a] Protection From Discipline for Exercise of First Amendment Rights

The petitioner in *Gray v. County of Tulare (1995) 32 Cal. App. 4th 1079, 38 Cal. Rptr. 2d 317* , was a captain in the county sheriff's department who was fired after making critical comments about the sheriff in local newspapers. Petitioner sought a writ of mandate from the superior court directing the county to set aside the dismissal. The superior court granted the writ, finding petitioner's comments were protected by the *First Amendment*, and the county appealed. On appeal, the court of appeal noted the well-established rule that the *First Amendment* protects speech by public employees that involves matters of public concern. However, the court observed, the government as employer has far broader powers to regulate the speech of its employees than it has as sovereign to regulate the speech of citizens in general (*32 Cal. App. 4th 1079, 1089*). The court stated that in determining whether a dismissal impermissibly infringed on a public employee's *First Amendment* rights, the threshold question is whether the employee's speech related to a matter of public concern (*32 Cal. App. 4th 1079, 1089-1090*). If so, the court must then balance the interests of the employee, as citizen, in commenting on matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services that it performs through its employees. The court stated that the ultimate issue of whether the employee's speech is protected is a question of law and that both steps in the two-pronged analysis are subject to the court's independent review on appeal (*32 Cal. App. 4th 1079, 1090*). The court then held that the petitioner's statements did address issues of public concern, namely misuse of public resources to punish public entities (*32 Cal. App. 4th 1079, 1090-1091*), but that, on balance, the sheriff's interest in maintaining order and discipline within the department outweighed the petitioner's free speech interests. Therefore, the court reversed the judgment in favor of petitioner (*32 Cal. App. 4th 1079, 1091-1096*).

In *Young v. County of Marin (1987) 195 Cal. App. 3d 863, 241 Cal. Rptr. 169* , an appointed county public defender sued the county for wrongful termination and libel, alleging, inter alia, that she was fired for exercising her *First Amendment* rights of free speech. The court of appeal reversed the trial court's sustaining of the county's demurrer to the complaint with respect to the wrongful termination cause of action. The court held that *First Amendment* rights protect a public officer, as well as a public employee, pursuant to certain balancing factors, and also protects an at-will officer or employee (*195 Cal. App. 3d 863, 868-869*). (The court sustained the demurrer with respect to the libel cause of action on grounds of privilege.)

[b] What Constitutes Matter of Public Concern

The plaintiff in *Lambert v. Richard (9th Cir. 1995) 59 F.3d 134* , sued a city, its city manager, and the head of its library department (Richard) for federal civil rights violations after plaintiff was fired from her position as a library employee. Plaintiff was fired because of remarks she made at a city council meeting, appearing on behalf of the city employees association, in which she questioned Richard's job performance. In affirming a district court judgment in favor of plaintiff, the Ninth Circuit panel noted that to receive *First Amendment* protection, a public employee's speech must be on a matter of public concern, and the employee's interest in expressing himself or herself on the matter must not be outweighed by any injury that the speech could cause to the state, as his or her employer, in promoting the efficiency of the public services it performs through its employees. The court further noted that whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record. Speech that focuses solely on internal policy and personnel grievances does not

implicate the *First Amendment* (*59 F.3d 134, 136*).

Examining the remarks made by plaintiff, the court noted that there was no question that Richard's management style had become an issue of public concern even before plaintiff spoke to the city council. Given that the library is among the most visible of functions performed by city governments, the court observed that plaintiff had a constitutional right--and perhaps a civic duty--to inform the council if library service was jeopardized by poor management at the top. The court concluded that plaintiff's remarks were clearly protected and that the city officials who fired her were therefore not entitled to qualified immunity from liability under *42 U.S.C. § 1983* (*59 F.3d 134, 136-137*).

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CHAPTER 36 CIVIL SERVICE
PART II. FORMS

3-36 California Points & Authorities § 36.28

§ 36.28 Opposing Petition for Writ of Mandate to Review Administrative Decision--Discipline of Civil Service Employee--First Amendment Rights Do Not Protect Speech in Intragovernmental Dispute

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PETITIONER'S EXPRESSION INVOLVING AN INTRAGOVERNMENTAL DISPUTE WAS NOT PROTECTED SPEECH.

A. No Free-Speech Protection When Employee Is Expressing Views As an Employee, Not As a Concerned Citizen. A balancing of governmental interest in effective working relationships and an employee's interest in expression on matters of public concern requires allowing termination of employees who speak principally in their official role, not as concerned citizens, when the manner and content of their speech threatens to disrupt an agency's effectiveness (*Garcetti v. Ceballos (2006) 547 U.S. 410, 418-423, 126 S. Ct. 1951, 164 L. Ed. 2d 689* ; *Kaye v. Board of Trs. of San Diego County Pub. Law Library (2009) 179 Cal. App. 4th 48, 56-59, 101 Cal. Rptr. 3d 456* ; *Campbell v. State Personnel Bd. (1997) 57 Cal. App. 4th 281, 288-290, 66 Cal. Rptr. 2d 722*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a contention that a public employee's termination was in violation of the employee's *First Amendment* freedom of speech, when the employee was speaking less as a concerned citizen and more in his or her professional role. It should be combined with any of the other forms in this chapter that are applicable to the particular case.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Counsel should, for example, cite evidence or petitioner's allegations showing that the petitioner's expression concerned an

intragovernmental dispute, when petitioner was taking his or her own or his or her agency's side, rather than speaking about public policy as a citizen.

[c] Related Pleading and Practice Chapters

For related legal background and research guides for defending mandamus cases involving discipline of public employees, see California Forms of Pleading and Practice, Ch. 118, *Civil Service* (Matthew Bender).

[d] Related Points and Authorities

Any of the other forms for opposing mandamus that are set out in *§ 36.53* et seq. of this chapter may be combined with this form.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

In an appropriate case, this form may be adapted and submitted in opposition to the form set out in *§ 36.27*.

[3] Discussion of Authorities

[a] No Free-Speech Protection When Employee Is Expressing Views As an Employee, Not As a Concerned Citizen.

Garcetti v. Ceballos *(2006) 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689* , was a civil-rights action in which a deputy district attorney alleged that his employer had imposed disciplinary measures on him after he had questioned the legality of an affidavit used to obtain a warrant in one of his cases. The plaintiff claimed that the imposition of the disciplinary measures was a violation of his First-Amendment right to speak on matters of public concern (i.e., possible misconduct by the government). The United States Supreme Court acknowledged that the *First Amendment* protects a public employee's right to speak as a citizen addressing matters of public concern. So long as public employees are speaking as citizens on matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively (*547 U.S. 410, 418-419)* .

In this case, however, the Supreme Court found that the plaintiff's expressions about the affidavit and search warrant were not made as a citizen. Rather, they were made pursuant to the plaintiff's duties as a deputy district attorney. The Court squarely held that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for *First Amendment* purposes, and the Constitution does not insulate their communications from employer discipline (*547 U.S. 410, 421-423)* .

The plaintiff in ***Kaye v. Board of Trs. of San Diego County Pub. Law Library*** *(2009) 179 Cal. App. 4th 48, 101 Cal. Rptr. 3d 456* , was a law librarian who was discharged from his employment with a public law library after sending an email criticizing his superiors. The plaintiff sued for wrongful termination, asserting several claims, including a claim that his termination violated the free-speech clause of the California Constitution (*see Cal. Const. art. I, § 2(a)*). The court of appeal affirmed the trial court's summary adjudication in favor of the employer. The appellate court found the plaintiff's claim under the California Constitution to be analogous to the federal First-Amendment claim rejected by the *United States Supreme Court in Garcetti v. Ceballos (2006) 547 U.S. 410, 418-423, 126 S. Ct. 1951, 164 L. Ed. 2d 689* , discussed above. The court of appeal explained that, although the California Constitution's free-speech clause is worded more expansively and has in some circumstances been interpreted to be more protective than the *First Amendment*, there was no cogent reason to depart from *Garcetti's* holding under the circumstances of this case. The court noted that

as to public-employee free-speech matters, California courts have routinely followed U.S. Supreme Court precedents and have not afforded public employees greater protection than is available under the *First Amendment* (*179 Cal. App. 4th 48, 57-59)* .

In ***Campbell v. State Personnel Bd.*** *(1997) 57 Cal. App. 4th 281, 288-290, 66 Cal. Rptr. 2d 722* , the state's chief structural engineer was demoted within the Office of the State Architect after sending a lengthy letter to a regulatory commission which had some interlocking responsibilities with the Architect's office, as well as oversight over that office in certain functions. The letter excoriated a commissioner for his manner of questioning one of the engineer's subordinates at a public meeting and the other commissioners for allowing the behavior. The letter raised a considerable uproar, leading to several expressions of concern directed to the architect's superiors from commissioners and an influential businessman involved in the affairs of both agencies. The termination followed (*57 Cal. App. 4th 281, 284-287*). The engineer lost an appeal to the State Personnel Board and was denied administrative mandamus in the superior court.

In reviewing the petitioner's claim that his demotion violated his *First Amendment* rights, the court of appeal cited *Pickering v. Board of Education (1968) 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811* for the proposition that the determination whether discipline of a public employee for speech--related activities is unconstitutional requires a balance between the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees (*57 Cal. App. 4th 281, 288*). In striking the balance on the facts of this case, the court found that the petitioner was not expressing himself as a citizen, but as a representative of one agency opposed to how another agency was dealing with his. The manner in which he did so threatened his agency's legitimate interest in maintaining a good working relationship with the commission, and his superiors were justified in preventing further damage by removing him from the arena (*57 Cal. App. 4th 281, 288-290*).

After rejecting a contention that the demotion procedures violated due process, the court affirmed the lower-court denial of mandamus (*57 Cal. App. 4th 281, 291-295*).

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3-36 California Points & Authorities § 36.29

§ 36.29 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5 (state); Code Civ. Proc. §§ 1094.5, 1094.6 (local)]--Discipline of Civil Service Employee--Statutory Cause for Discipline--General Form

[1] FORM

[*Caption. See § 36.20.*]

DISCIPLINING OF A CIVIL SERVICE EMPLOYEE IS UNLAWFUL IF THE CONDUCT ON WHICH THE DISCIPLINE IS BASED DOES NOT CONSTITUTE SUBSTANTIAL EVIDENCE IN SUPPORT OF A STATUTORY CAUSE FOR DISCIPLINE [WITHIN THE MEANING OF SECTION 19572 OF THE GOVERNMENT CODE].

A-E. Propriety of Mandate to Review Discipline of Employee. [*See § 36.20, Paragraphs A-E.*]

F. Cause for Discipline. The discipline of a civil service employee is unlawful unless the conduct on which the discipline is based constitutes substantial evidence in support of a statutory cause for discipline (*see Shepherd v. State Personnel Bd. (1957) 48 Cal. 2d 41, 46-51, 307 P.2d 4* ; *Neely v. California State Personnel Bd. (1965) 237 Cal. App. 2d 487, 489, 47 Cal. Rptr. 64*).

G. Substantial Evidence. Substantial evidence is that evidence which is reasonable in nature, credible, and of solid value, that is, evidence which is of ponderable legal significance (*Pennel v. Pond Union School Dist. (1973) 29 Cal. App. 3d 832, 837 fn. 2, 105 Cal. Rptr. 817*).

[*Optional*] **H. Findings Based Solely on Hearsay to Which Objection Timely Made.** Hearsay evidence offered over timely objection is insufficient by itself to support an administrative finding (*Gov. Code § 11513(d)*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a petition for writ of mandate for review of a final administrative adjudicatory order or decision of a state or local civil service commission disciplining a civil service employee when the conduct of the employee does not constitute substantial evidence in support of a statutory cause for discipline. Although none of the cases reviewed actually uses the language of Paragraph F, this rule of law forms the basis for court review of the administrative decisions and is implied in the court holdings.

For a form of memorandum of points and authorities supporting a petition for writ of mandate to review an administrative decision where the question of substantial evidence arises, see Ch. 195, *Public Administrative Law* in this set.

Counsel should add argument linking the points in this form with the facts of his or her case.

[3] Discussion of Authorities

[a] Cause for Discipline

Shepherd v. State Personnel Bd. *(1957) 48 Cal. 2d 41, 307 P.2d 4* , was an appeal by both a civil service employee and the State Personnel Board from a judgment of the superior court in a mandate proceeding reviewing the discharge of the employee. The board had made detailed findings and had found that certain causes for discipline existed under *Gov. Code § 19572*. The superior court determined that there was substantial evidence to support only some of the board's findings and conclusions. The Supreme Court stated on appeal that the findings of the board were not to be disturbed if supported by substantial evidence, but it disapproved the trial court's holdings and ruled that two of the findings of the board which the superior court had upheld were, in fact, fatally defective. The Supreme Court therefore reversed the lower court judgment, but, because several of the grounds on which the board had based its discharge of the employee were not supported by substantial evidence, it also remanded the cause to the board for reconsideration of the penalty imposed (*48 Cal. 2d 41, 46-51*).

The facts of ***Neely v. California State Personnel Bd.*** *(1965) 237 Cal. App. 2d 487, 47 Cal. Rptr. 64* , are discussed in *§ 36.36[4][a]*. In reviewing the case, the court of appeal stated that factual determinations of the State Personnel Board are to be upheld by a reviewing court if they are supported by substantial evidence (*237 Cal. App. 2d 487, 489*).

[b] Substantial Evidence

Pennel v. Pond Union School Dist. *(1973) 29 Cal. App. 3d 832, 105 Cal. Rptr. 817* , was an appeal from a judgment of the trial court denying a peremptory writ of mandate to compel plaintiff's reinstatement to a teaching position, and denying payment of salary. Plaintiff had been a first grade probationary teacher for 10 years. For the 11th year, she signed, under protest, a contract to teach the fourth grade. Following the signing of the contract, plaintiff wrote a letter to the district superintendent, stating that she signed the contract unwillingly and under pressure. Plaintiff called in sick at the opening of the school year, and the school board held a meeting the next night, decided that plaintiff had

abandoned her position, and hired a replacement. The superior court denied plaintiff's petition for a writ of mandate, and it also denied her claim for back salary. The court of appeal reversed the judgment and directed respondent board to pay plaintiff her salary for that school year. The court found, among other things, that there was no substantial evidence to support the findings of the trial court. Defining substantial evidence as evidence of ponderable legal significance, that is, evidence which is reasonable in nature, credible, and of solid value, the court concluded that there was no substantial evidence showing that plaintiff intended to abandon her contract for the school year. Although her actions were equivocal, the court stated that plaintiff did, in fact, sign a contract, and did, in fact, assert an excuse for her nonperformance at the opening of the school year, and that she at no time expressly repudiated her contract or refused to comply with its terms (*29 Cal. App. 3d 832, 837-838*).

[c] Findings Based Solely on Hearsay to Which Objection Timely Made

Gov. Code § 11513(d) provides that hearsay evidence offered "over timely objection" is not sufficient in itself to support a finding unless it would be admissible over objection in a civil action [*Gov. Code § 11513(d)*]. The statute further provides that an objection is "timely" if made "before submission of the case or on reconsideration" [*Gov. Code § 11513(d)*].

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§ 36.30 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5 (state); Code Civ. Proc. §§ 1094.5, 1094.6 (local)]--Discipline of Civil Service Employee--Insufficient Evidence to Discipline Employee on Ground of Inefficiency Based on Statistical Compilations

[1] FORM

[*Caption. See § 36.20.*]

A CIVIL SERVICE EMPLOYEE MAY BE DISCIPLINED FOR A SMALL WORK OUTPUT OR A LOW LEVEL OF ACTIVITY CONSTITUTING INEFFICIENCY, [WITHIN THE MEANING OF SECTION 19572(c) OF THE GOVERNMENT CODE], ON THE BASIS OF STATISTICAL COMPILATIONS IF THE STATISTICAL EVIDENCE IS A REASONABLY RELIABLE INDICATOR OF THE EMPLOYEE'S LEVEL OF EFFICIENCY AS COMPARED WITH THAT OF OTHERS PERFORMING LIKE DUTIES UNDER LIKE CIRCUMSTANCES.

A-E. Propriety of Mandate to Review Discipline of Employee. [*See § 36.20, Paragraphs A-E.*]

F. When Inefficiency Based on Statistical Comparison Cause for Discipline. A civil service employee may be disciplined for a small work output or a low level of activity found [to be a cause for discipline under *Section 19572(c) of the Government Code*] on the basis of statistical compilations if (1) the statistical comparisons were made over a sufficiently extended period of time so as to eliminate the effect of any fluctuations due to transitory conditions; (2) the employee and members of the group were performing comparable activities under comparable conditions; (3) the criteria used for comparison reflected the range of activities in which the employee and members of the group were engaged; and (4) the group with whom the employee was compared was sufficiently large and its members were selected on such a basis so as to assure a fair representation of those performing like duties as the employee (*Bodenschatz v. State Personnel Bd. (1971) 15 Cal. App. 3d 775, 781-782, 93 Cal. Rptr. 471*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a petition for writ of mandate for review of a final administrative adjudicatory order or decision of a state or local civil service commission disciplining a civil service employee when the conduct of the employee allegedly constituting inefficiency within the meaning of *Gov. Code § 19572(c)* or an applicable local rule was based on a small work output or low level of activity established on the basis of statistical compilations that were not a reasonably reliable indicator of the employee's level of efficiency as compared with that of others performing like duties under like circumstances. Counsel should be aware in using this form that courts have, at times, excluded evidence of what others with comparable duties were doing when such evidence was, in effect, offered as an excuse to inefficient conduct [*see Wilson v. State Personnel Bd. (1976) 58 Cal. App. 3d 865, 880-881, 130 Cal. Rptr. 292* , discussed in *§ 36.30[4][a]*]. The courts have also found inefficiency on the basis of comparisons with only two other employees when large scale sampling was impossible because of the specialized nature of the work [*see Sweeney v. State Personnel Bd. (1966) 245 Cal. App. 2d 246, 248-252, 53 Cal. Rptr. 766* , discussed in *§ 36.30[4][a]*].

For a general form of memorandum of points and authorities supporting a petition for writ of mandate to review the disciplining of a civil service employee, see *§ 36.29*.

Counsel should add argument linking the points in this form with the facts of his or her case.

[3] Discussion of Authorities

[a] When Inefficiency Based on Statistical Comparison Cause for Discipline

Bodenschatz v. State Personnel Bd. *(1971) 15 Cal. App. 3d 775, 93 Cal. Rptr. 471* , was an appeal by a civil service employee from a judgment of the superior court denying a peremptory writ of mandate to compel the State Personnel Board to set aside its decision sustaining his dismissal from employment as a traffic officer. The State Personnel Board had found that the employee was inefficient within the meaning of *Gov. Code § 19572(c)* in failing to meet departmental standards of enforcement activity. The court of appeal ruled that a low level of activity determined on the basis of statistical compilations based on comparisons made over an extended period of time among law enforcement officers performing comparable duties under comparable conditions was a reasonably reliable indicator of employee inefficiency. The court, therefore, affirmed the judgment of the trial court denying the peremptory writ of mandate (*15 Cal. App. 3d 775, 781-784*).

[4] Additional Authorities

[a] When Inefficiency Based on Statistical Comparison Cause for Discipline

Wilson v. State Personnel Bd. (1976) 58 Cal. App. 3d 865, 130 Cal. Rptr. 292 , was an appeal by the State Personnel Board from a judgment of the superior court in a mandate proceeding ordering the issuance of a peremptory writ of mandate commanding the board to set aside and reconsider its decision affirming petitioner's dismissal from employment as a fish and game warden. Petitioner's dismissal had been based on inefficiency, inexcusable neglect of

duty, dishonesty, and misuse of state property under *Gov. Code § 19572*. The superior court found, inter alia, that five of the board's findings could not be sustained and that the remaining findings were not sufficient to satisfy the penalty of dismissal. The court of appeal reviewed the many charges against the petitioner, reinstated all the findings of the board, reversed the superior court judgment, and directed the trial court to deny the writ. Among other things, the court found that the petitioner's late filing of citations was conduct constituting inefficiency, within the meaning of *Gov. Code § 19572(c)*, even though no specific regulation or rule proscribed late citation filings and other officers may have also been making late citation filings. Because petitioner's conduct was clearly inefficient, the court upheld exclusion of the latter evidence as irrelevant (*58 Cal. App. 3d 865, 880-881*).

Sweeney v. State Personnel Bd. (1966) 245 Cal. App. 2d 246, 53 Cal. Rptr. 766 , was an appeal by the State Personnel Board from a judgment of the superior court in a mandate proceeding. The board had found that the employee, an assistant counsel, should have had a substantially greater output of work and that his review of an average of only four articles of incorporation per hour constituted inefficiency within the meaning of *Gov. Code § 19572(c)*. The trial court ordered the issuance of a writ of mandate directing the employee's return to his position. The court of appeal reversed the trial court. It ruled that when the work output of an attorney within the state civil service system is substantially smaller than that of other attorneys in the office performing similar duties, the employee is inefficient within the meaning of *Gov. Code § 19572(c)*, and that a comparison with two other workers was sufficient when the legal staff of the office was small, the work was specialized, and large scale sampling was thus not possible (*245 Cal. App. 2d 246, 248-252*).

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3-36 California Points & Authorities § 36.31

§ 36.31 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5 (state); Code Civ. Proc. §§ 1094.5, 1094.6 (local)]--Discipline of Civil Service Employee--Professional Philosophy of Employee as Insufficient Evidence to Discipline on Ground of Inefficiency

[1] FORM

[*Caption. See § 36.20.*]

THERE IS INSUFFICIENT EVIDENCE TO DISCIPLINE A CIVIL SERVICE EMPLOYEE ON THE GROUND OF INEFFICIENCY, [WITHIN THE MEANING OF SECTION 19572(c) OF THE GOVERNMENT CODE], WHERE THE DISCIPLINE WAS BASED ON THE FACT THAT THE PROFESSIONAL EMPLOYEE HAD NOT GIVEN REASONABLE ATTENTION TO THE APPROPRIATE FACTORS OF HIS/HER JOB, BUT THE EVIDENCE SHOWED THAT THE EMPLOYEE HAS FULLY CONSIDERED ALL RELEVANT FACTORS AND WAS MERELY PROFESSIONALLY INTERESTED IN OTHER FACTORS IN ADDITION TO THOSE STRESSED BY HIS/HER EMPLOYER.

A-E. Propriety of Mandate to Review Discipline of Employee. [*See § 36.20, Paragraphs A-E.*]

F. When Inefficiency Based on Professional Philosophy Cause for Discipline. A civil service employee may not be disciplined on the ground of inefficiency, [a cause for discipline under *Section 19572(c) of the Government Code*], on the basis of his or her professional philosophy where the employee has given reasonable attention to the factors of his or her job stressed by the employer, and has merely given additional interest to other factors within the area of his or her professional competence (*Walker v. State Personnel Bd. (1971) 16 Cal. App. 3d 550, 555-556, 94 Cal. Rptr. 132*).

[*Optional*] **G. Medical Philosophy of Physician.** A physician employed by the civil service as a psychiatric resident may not be disciplined for inefficiency, [a cause for discipline under *Section 19572(c) of the Government Code*], on the basis of his or her belief in organic and structural brain changes as causes for psychological distress where (1) the physician fully considered all relevant factors in treating his or her patients, including the dynamic psychological factors stressed by the employer; (2) no patient suffered because of treatment received by the doctor; and (3) he or she merely

was interested in aspects of his or her patients' illnesses in addition to their psychological dynamics (*Walker v. State Personnel Bd. (1971) 16 Cal. App. 3d 550, 555-556, 94 Cal. Rptr. 132*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a petition for writ of mandate for review of a final administrative adjudicatory order or decision of a state or local civil service commission disciplining a professional civil service employee where the conduct of the employee allegedly constituting inefficiency within the meaning of *Gov. Code § 19572(c)* or an applicable local rule was based on the employee's professional philosophy of examining relevant factors in addition to those stressed by the employer, and the employee had, in fact, given reasonable attention to the factors considered appropriate by the employer.

For a general form of memorandum of points and authorities supporting a petition for writ of mandate to review the disciplining of a civil service employee, see *§ 36.29*.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] When Inefficiency Based on Professional Philosophy Cause for Discipline

Walker v. State Personnel Bd. (1971) 16 Cal. App. 3d 550, 94 Cal. Rptr. 132 , was an appeal by the State Personnel Board from a judgment of the trial court setting aside the dismissal of a physician from his position as a psychiatric resident. The board had found that the physician had been discourteous to fellow employees and inefficient, within the meanings of *Gov. Code § 19572(m), (c)*. The trial court found insufficient evidence to support these findings, and it set aside the dismissal. The court of appeal reversed the judgment of the trial court, vacated the decision of the board, and remanded the cause to the board with instructions to enter findings and conclusions in accordance with its opinion and to determine the penalty to be imposed. The court found sufficient evidence to support the board's finding that the physician had been discourteous to fellow employees, but it ruled that the record contained no substantial evidence to support the board's finding that the physician was inefficient. The court stated that the employee's dismissal could not be upheld because his views failed to conform to current dogma on the causes of mental illness. Since the record contained nothing to support the conclusion that the physician did not fully consider all relevant factors in treating his patients, or that any patient suffered because of treatment received, the physician could not be found inefficient merely because he was interested in organic aspects of his patients' illnesses in addition to their psychological dynamics.

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3-36 California Points & Authorities § 36.32

§ 36.32 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5 (state); Code Civ. Proc. §§ 1094.5, 1094.6 (local)]--Discipline of Civil Service Employee--Neglect of Duty as Not Basis for Discipline When Based on Mere Failure to Perform Certain Act

[1] FORM

[*Caption. See § 36.20.*]

DISCIPLINE OF A CIVIL SERVICE EMPLOYEE IS UNLAWFUL WHERE THE CONDUCT ALLEGED TO CONSTITUTE NEGLECT OF DUTY, [WITHIN THE MEANING OF SECTION 19572(d) OF THE GOVERNMENT CODE], WAS A MERE FAILURE TO PERFORM A CERTAIN ACT.

A-E. Propriety of Mandate to Review Discipline of Employee. [*See § 36.20, Paragraphs A-E.*]

F. When Neglect of Duty Cause for Discipline. Conduct does not constitute neglect of duty, [a cause for discipline under *Section 19572(d) of the Government* Code], unless it involves willfulness, intention, design, or inexcusableness. The mere failure to perform a certain act, without more, is not sufficient (*Peters v. Mitchell (1963) 222 Cal. App. 2d 852, 862, 35 Cal. Rptr. 535* ; *Rapaport v. Civil Serv. Comm'n (1933) 134 Cal. App. 319, 323, 25 P.2d 265*).

[*Optional*] **G. Incomplete Hospital Rounds.** A physician's failure to visit certain hospital wards is an insufficient basis for a charge of neglect of duty, where the evidence did not show that the physician's failure was willful, intentional, or inexcusable (*Rapaport v. Civil Serv. Comm'n (1933) 134 Cal. App. 319, 323-324, 25 P.2d 265*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a petition for writ of mandate for review of a final administrative adjudicatory order or decision of a state or local civil service commission disciplining a civil service employee where the conduct of the employee allegedly constitutes neglect of duty [within the meaning of *Gov. Code § 19572(d)*] but does not involve willfulness, intention, design, or inexcusableness, but rather, the mere failure to perform a certain act.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] When Neglect of Duty Cause for Discipline

Peters v. Mitchell (1963) 222 Cal. App. 2d 852, 35 Cal. Rptr. 535 , is discussed in *§ 36.20[3][f]*.

Rapaport v. Civil Serv. Comm'n (1933) 134 Cal. App. 319, 25 P.2d 265 , was an appeal by a civil service employee from a judgment of the superior court. The Civil Service Commission had upheld the discharge of petitioner from his position as an assistant physician at a state hospital, which was based on unprofessional conduct, inefficiency, and neglect of duty. The superior court refused petitioner's petition for a writ of certiorari, and he appealed to the court of appeal. The court reversed the order of the superior court, annulled the commission's order, and remanded the cause to the superior court accordingly. It held that the physician's conduct in accepting payment for services did not amount to unprofessional conduct, that inefficiency was not shown, and that the physician's failure to visit a ward, without an allegation that the public service was impaired and without a showing that the failure was willful, intentional, or inexcusable, did not constitute neglect of duty.

[b] Incomplete Hospital Rounds

Rapaport v. Civil Serv. Comm'n (1933) 134 Cal. App. 319, 25 P.2d 265 , is discussed in *§ 36.32[3][a]*.

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3-36 California Points & Authorities § 36.33

§ 36.33 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5 (state); Code Civ. Proc. §§ 1094.5, 1094.6 (local)]--Discipline of Civil Service Employee--Insubordination Not Cause to Discipline Unless It Involves Mutinous, Disrespectful, or Contumacious Conduct

[1] FORM

[*Caption. See § 36.20.*]

DISCIPLINE OF A CIVIL SERVICE EMPLOYEE IS UNLAWFUL WHERE THE CONDUCT ALLEGED TO CONSTITUTE INSUBORDINATION, [WITHIN THE MEANING OF SECTION 19572(e) OF THE GOVERNMENT CODE], DOES NOT INVOLVE A GENERAL COURSE OF MUTINOUS, DISRESPECTFUL, OR CONTUMACIOUS CONDUCT.

A-E. Propriety of Mandate to Review Discipline of Employee. [*See § 36.20, Paragraphs A-E.*]

F. When Insubordination Cause for Discipline. Conduct does not constitute insubordination, [a cause for discipline under *Section 19572(e) of the Government Code*], unless it is a general course of mutinous, disrespectful, or contumacious conduct. Insubordination requires proof of intent or willfulness, that is, proof that the person knows what he is doing and intends to do what he or she is doing (*Coomes v. State Personnel Bd. (1963) 215 Cal. App. 2d 770, 775, 30 Cal. Rptr. 639*).

[*Optional*] **G. Physical Beating of Hospital Patient.** A civil service psychiatric technician's holding of a disturbed patient while companion attendants applied excessive and improper force on the patient did not amount to insubordination where there was no evidence of a preconceived plan to subject this particular patient to blows or kicks, no evidence of any habitual or expected course of improper controls, and no evidence that the employee continued to hold the patient after he became aware of the blows inflicted by the others (*Coomes v. State Personnel Bd. (1963) 215 Cal. App. 2d 770, 777, 30 Cal. Rptr. 639*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a petition for a writ of mandate for review of a final administrative adjudicatory order or decision of a state or local civil service commission disciplining a civil service employee where the conduct of the employee allegedly constitutes insubordination within the meaning of *Gov. Code § 19572(e)* or an applicable local rule but does not involve a general course of mutinous, disrespectful, or contumacious conduct.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] When Insubordination Cause for Discipline

Coomes v. State Personnel Bd. (1963) 215 Cal. App. 2d 770, 30 Cal. Rptr. 639 , was an appeal by a civil service employee from a judgment of the superior court denying a writ of mandate. Petitioner, a psychiatric technician in a state hospital, and two other employees, had become involved in a struggle with a patient, and all three employees were discharged. The State Personnel Board found that petitioner had violated a departmental rule concerning treatment of patients and that his conduct constituted insubordination and willful disobedience within the meaning of *Gov. Code § 19572(e)*. Parallel decisions were made as to the other employees, and all three dismissals were confirmed on rehearing by the board. The court of appeal found that the evidence in the case completely failed to establish knowing insubordination or willful misconduct on petitioner's part. The court stated, among other things, that insubordination implies a general course of mutinous, disrespectful, or contumacious conduct, and excludes the notion of accidental or negligent conduct. The court then found that petitioner had acted as he should have in holding the patient and that petitioner was not liable for the excessive force applied by the other employees unless he knowingly held the patient as their target. In light of the lack of evidence showing that petitioner had so acted, that there was an habitual or expected course of improper controls, or that there was a preconceived plan to subject this patient to blows, the court found no support for the findings and reversed the judgment and directed the trial court to issue a writ of mandate directing the board to annul petitioner's dismissal and to reinstate him in his position.

[b] Physical Beating of Hospital Patient

Coomes v. State Personnel Bd. (1963) 215 Cal. App. 2d 770, 30 Cal. Rptr. 639 , is discussed in *§ 36.33[3][a]*.

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3-36 California Points & Authorities § 36.34

§ 36.34 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5 (state); Code Civ. Proc. §§ 1094.5, 1094.6 (local)]--Discipline of Civil Service Employee--Dishonesty Not Cause for Discipline Unless It Involves Bad Faith

[1] FORM

[*Caption. See § 36.20.*]

DISCIPLINE OF A CIVIL SERVICE EMPLOYEE IS UNLAWFUL IF THE CONDUCT ALLEGED TO CONSTITUTE DISHONESTY, [WITHIN THE MEANING OF SECTION 19572(f) OF THE GOVERNMENT CODE], DOES NOT INVOLVE THE ELEMENT OF BAD FAITH.

A-D. Propriety of Mandate to Review Discipline of Employee. [*See § 36.20, Paragraphs A-D.*]

E. When Dishonesty Cause for Discipline. Conduct does not constitute dishonesty, [within the meaning of *Section 19572(f) of the Government Code*], unless it includes an element of bad faith and involves fraud, deception, betrayal, and faithlessness (*Gee v. California State Personnel Bd. (1970) 5 Cal. App. 3d 713, 718-720, 85 Cal. Rptr. 762* ; *Hogg v. Real Estate Comm'r (1942) 54 Cal. App. 2d 712, 717, 129 P.2d 709*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a petition for writ of mandate for review of a final administrative adjudicatory order or decision of a state or local civil service commission disciplining a civil service employee where the conduct of the employee allegedly constitutes dishonesty within the meaning of *Gov. Code § 19572(f)* or an applicable local rule, but does not involve bad faith. Counsel should note that *Hogg v. Real Estate Comm'r (1942) 54 Cal. App. 2d 712, 129 P.2d 709* , one of the cases cited in support of the point of law set out in Paragraph E, is not a civil service case, but rather an action involving the Real Estate Commissioner and a real estate broker. The court's discussion is made in general terms, however, and the definitions of dishonesty which the case puts forth should apply in a civil service setting.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] When Dishonesty Cause for Discipline

Gee v. California State Personnel Bd. (1970) 5 Cal. App. 3d 713, 85 Cal. Rptr. 762 , was an appeal by a civil service employee from a judgment of the superior court in a mandate proceeding. The State Personnel Board had sustained the dismissal of the employee for dishonesty and other behavior discrediting the agency or employment. This action occurred following findings by the board that the employee, an auditor in the State Department of Justice, had obtained three on-sale liquor licenses with himself named as the owner of the business when, in fact, others owned the business. The superior court refused his mandate petition, and petitioner appealed. The court of appeal noted that dishonesty denotes a disposition to cheat, deceive, or defraud, and an absence of integrity and ruled that appellant's false statements under oath as to the ownership and operation of two bars and the source of their purchase money constituted dishonesty within the meaning of *Gov. Code § 19572(f)*. The court affirmed the judgment of dismissal.

Hogg v. Real Estate Comm'r (1942) 54 Cal. App. 2d 712, 129 P.2d 709 , was an appeal by a real estate broker from a judgment of the superior court upholding the respondent commissioner's revocation of his license and dismissing the proceeding. Petitioner's real estate broker's license had been revoked following a complaint by potential home buyers that he had refused to return their down payment. Petitioner filed in superior court a petition for a writ of review, which, by stipulation, was treated as one in mandamus. In reviewing the superior court's dismissal of the proceeding, the court of appeal defined dishonesty, the charge laid against appellant, as fraud, deception, betrayal, and faithlessness. It noted that dishonesty includes the element of bad faith, denotes an absence of integrity, and denotes a disposition to cheat, deceive, defraud, or betray. The court held that appellant could not be found guilty of dishonesty for refusing to pay back a sum of money which in good faith he claimed that he was entitled to retain. The court reversed the judgment of the superior court, holding that petitioner's license was improperly revoked.

[4] Additional Authorities

[a] When Dishonesty Cause for Discipline

Wilson v. State Personnel Bd. (1976) 58 Cal. App. 3d 865, 130 Cal. Rptr. 292 , is discussed in *§ 36.30[4][a]*.

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3-36 California Points & Authorities § 36.35

§ 36.35 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5 (state); Code Civ. Proc. §§ 1094.5, 1094.6 (local)]--Discipline of Civil Service Employee--Immorality Not Cause for Discipline Unless It Indicates Unfitness to Perform Job

[1] FORM

[*Caption. See § 36.20.*]

THE PETITION FOR WRIT OF MANDATE SHOULD BE GRANTED BECAUSE RESPONDENT'S ACTION IN DISCIPLINING PETITIONER ON THE GROUND OF IMMORALITY [UNDER GOVERNMENT CODE SECTION 19572(l)] IS UNLAWFUL IN THAT THE CONDUCT FOR WHICH PETITIONER WAS DISCIPLINED DOES NOT INDICATE THAT HE/SHE IS UNFIT TO PERFORM HIS/HER JOB.

A-E. Propriety of Mandate to Review Discipline of Employee. [*See § 36.20, Paragraphs A-E.*]

F. When Immorality Cause for Discipline. An employee's conduct with regard to immorality does not constitute a proper basis for discipline, [a cause or discipline under *Government Code Section 19572(l)*], unless it indicates the employee is unfit to perform his or her job (*Morrison v. State Bd. of Educ. (1969) 1 Cal. 3d 214, 224-228, 82 Cal. Rptr. 175, 461 P.2d 375*).

[*Optional*] **G. Homosexual Status.** Discipline of an employee on the basis of homosexuality alone violates the employee's right to equal protection under the California Constitution and the employee's right to engage in protected political activity under *Labor Code Sections 1101* and *1102* (*Cal. Const., Art. I § 7(a)*; *Gay Law Students Assn. v. Pacific Tel. & Tel. Co. (1979) 24 Cal. 3d 458, 467, 486-489, 156 Cal. Rptr. 14, 595 P.2d 592*).

[*Optional*] **H. Homosexual Conduct.** Homosexual conduct does not constitute a proper basis for disciplining an employee unless there is a rational nexus between the employee's conduct and harm to the employer (*see* *Curran v. Mount Diablo Council of the Boy Scouts (1983) 147 Cal. App. 3d 712, 723-725, 195 Cal. Rptr. 325*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a petition for writ of mandate for review of a final administrative adjudicatory order or decision of a state or local civil service commission disciplining a civil service employee for conduct allegedly constituting immorality within the meaning of *Gov. Code § 19572(l)* or an applicable local rule when the conduct does not indicate unfitness to perform the job. *Morrison v. State Bd. of Educ. (1969) 1 Cal. 3d 214, 82 Cal. Rptr. 175, 461 P.2d 375* , the case cited in support of the point of law in Paragraph F, involved the dismissal of a teacher for immorality under the Education Code, rather than dismissal of a civil service employee under the Government Code. Nevertheless, *Morrison* is the leading case for the requirement that a person cannot be removed from or denied government employment because of factors totally unconnected with the responsibilities of the job (*see Hetherington v. State Personnel Bd. (1978) 82 Cal. App. 3d 582, 592, 147 Cal. Rptr. 300*). In reaching its conclusion that the Legislature intended the term "immoral" to depend on and relate to the occupation involved, the *Morrison* Court noted that the term is used in a wide variety of professional contexts, including state civil service employment pursuant to *Gov. Code § 19572(l)* (*1 Cal. 3d 214, 227)* .

Optional Paragraphs G and H may be used when the employee asserts that the disciplinary action was based on his or her status as a homosexual, or on homosexual conduct unrelated to his or her fitness for the job, and therefore was arbitrary within the meaning of the state *equal protection clause*.

When appropriate, counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] When Immorality Cause for Discipline

Morrison v. State Bd. of Educ. (1969) 1 Cal. 3d 214, 82 Cal. Rptr. 175, 461 P.2d 375 , was an appeal from a judgment of the superior court denying a petition for a writ of mandate. Respondent board had revoked petitioner's life diplomas for teaching in the public secondary schools of California because of immoral and unprofessional conduct and acts involving moral turpitude as authorized by Educ. Code § 13202. The revocation was based on a one-week long, limited, noncriminal physical relationship which petitioner described as being of a homosexual nature and which occurred during a time of severe emotional stress. The Supreme Court reviewed the superior court's denial of the writ of mandate and reversed its judgment. The Supreme Court stated that in using broad terms such as "immoral and unprofessional conduct" or "moral turpitude" the Legislature did not mean to endow the employing agency with the power to dismiss any employee whose personal, private conduct incurred its disapproval. Conduct cannot be characterized as "immoral," "unprofessional," or "involving moral turpitude" unless that conduct effects a person's performance of his or her job, that is, as in this case, unless that conduct indicates that the person is unfit to teach. The Court held that, in determining whether the teacher's conduct indicated unfitness to teach, the board could consider the

following factors: (1) the likelihood that the conduct may have adversely affected students or fellow teachers, (2) the proximity or remoteness in time of the conduct, (3) the extenuating or aggravating circumstances, if any, surrounding the conduct, (5) the praiseworthiness or blameworthiness of the motives resulting in the conduct, and (6) the extent to which disciplinary action may inflict an adverse impact on the constitutional rights of the teacher involved or on those of other teachers. The Court concluded that the record contained no evidence as to the significance and implications of petitioner's single, isolated, and limited homosexual contact, and that the board had failed to show that the incident in any manner affected petitioner's performance as a teacher. The Supreme Court therefore reversed the superior court judgment and remanded the cause to the superior court for further proceedings.

Blake v. State Personnel Bd. (1972) 25 Cal. App. 3d 541, 102 Cal. Rptr. 50 , was an appeal by a civil service employee from a judgment of the superior court denying him a peremptory writ of mandate to compel his reinstatement to his former position as supervising deputy labor commissioner. The petitioner had been dismissed from his position following, among other things, a gun-pointing incident during off-duty hours with two male state-employed attorneys escorting female state-employed attorney in whom petitioner was interested. The court of appeal ruled that the dismissal must stand or fall on the sufficiency of the gun-pointing incident to constitute cause for discipline as discourteous treatment of other employees under *Gov. Code § 19572(m)*. It found the evidence sufficient to support the board's finding that petitioner's gun pointing resulted in harm to the public service by causing the two attorneys to be apprehensive of their safety during future contacts with the female attorney while in the performance of their official duties, and it ruled that the fact that the incident occurred during off-duty hours was irrelevant. The court noted that although a public employee may not be disciplined for what he or she does in his or her private life, unless such conduct impairs the public service or causes discredit to the employing agency, such inquiry was not required here where the petitioner was being disciplined not for his private romance, but for his threats to other employees. The court further held, however, that in light of petitioner's age, length of government service, and position, the imposition of the maximum penalty of dismissal was clearly excessive, and it reversed the judgment of the trial court and directed that court to enter judgment commanding the State Personnel Board to set aside its decision of dismissal and to redetermine the proper penalty to be imposed.

[b] Homosexual Status

Gay Law Students Assn. v. Pacific Tel. & Tel. Co. (1979) 24 Cal. 3d 458, 467, 156 Cal. Rptr. 14, 595 P.2d 592 , was an appeal from a judgment in favor of defendant in a class action brought against a public utility that allegedly discriminated in hiring, firing, and promoting homosexual employees. The Supreme Court reversed the judgment, holding that the trial court improperly sustained defendants' demurrer. The court held that the complaint stated three causes of action against the public utility: (1) under the *equal protection clause* of the California Constitution (*Cal. Const., Art. I § 7(a)*), which prohibits the state, or a privately-owned utility with quasi-monopoly status, from excluding homosexuals as a class from employment opportunities without a showing that an individual's homosexuality renders him or her unfit for the job (*24 Cal. 3d 458, 467-475)* ; (2) under *Pub. Util. Code § 453(a)*, which bans arbitrary discrimination by public utilities (*24 Cal. 3d 458, 477-486)* ; (3) and under *Lab. Code §§ 1101* and *1102*, which protects the rights of employees in general to engage in political activity without interference by employers, and extends to homosexual persons who are open about their sexual preferences and who associate with others in working for equal rights (*24 Cal. 3d 458, 486-488)* .

[c] Homosexual Conduct

Curran v. Mount Diablo Council of the Boy Scouts (1983) 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 , was an appeal from dismissal of an action brought by a former member of the Boy Scouts who was expelled, without notice or opportunity to respond, on the ground he was a homosexual and so not a good moral example for younger scouts. Plaintiff contended that the expulsion violated the common law right of fair procedure, as well as the Unruh Civil Rights Act (*Civ. Code § 51*).

The court of appeal agreed and reversed the judgment, holding that the trial court improperly sustained defendants' demurrer. In its discussion of the common-law ground for the decision, the court found that plaintiff's membership in the organization, with its associated privileges, was a valuable interest which could not be arbitrarily withdrawn (*147 Cal. App. 3d 712, 721)* . The court held that using the status of homosexuality as a basis of expulsion from a private association is both capricious and offensive to public policy because the mere status of homosexuality, by itself, does not connote immorality (*147 Cal. App. 3d 712, 723)* . In addition, the allegations of the complaint could reasonably be construed as charging that defendant's action to expel rested on plaintiff's political decision to "come out of the closet" and acknowledge his sexual preference; if so, the expulsion inhibited protected political activity and violated public policy under *Gay Law Students Assn. v. Pacific Tel. & Tel. Co. (1979) 24 Cal. 3d 458, 487-488, 156 Cal. Rptr. 14, 595 P.2d 592* (discussed *above*) (*147 Cal. App. 3d 712, 723-724)* . On the other hand, the court held, if the expulsion was based on homosexual conduct, the plaintiff's right of freedom of expression was qualified by the association's right of self-preservation. Because the plaintiff's role in the Boy Scouts was analogous to that of a school teacher, the court stated that the factors set out in *Morrison* (discussed *above*) should be applied to determine if there was a rational nexus between plaintiff's homosexual conduct, if any, and harm to the Boy Scouts resulting from his continued membership. Before homosexual conduct, whether private or public, criminal or noncriminal, could lawfully be used as a basis to expel plaintiff from the Boy Scouts, the court held, a connection must be demonstrated between his homosexual conduct and any significant danger of harm to the association resulting from his continued membership (*147 Cal. App. 3d 712, 724-725)* .

[4] Additional Authorities

[a] When Immorality Cause for Discipline

Fout v. State Personnel Bd. (1982) 136 Cal. App. 3d 817, 186 Cal. Rptr. 452 , was an appeal by a public employer from a judgment of the trial court ordering a peremptory writ to issue and remanding the case back to the State Personnel Board for reconsideration of the penalty of dismissal imposed on a police officer. The police officer had been dismissed for immorality, based on child molestation activities, and for insubordination, based on his refusal to cooperate in the investigation of the molestation charges. The court of appeals found that child molestation was immorality within the meaning of *Gov. Code § 19572(l)* (*136 Cal. App. 3d 817, 821)* . The court held that the grounds for dismissal were not an abuse of discretion, and that the trial court had erred by substituting its discretion for that of the employer and the State Personnel Board (*136 Cal. App. 3d 817, 821-822)* . Therefore, the judgment of the trial court was reversed and the decision of the State Personnel Board was reinstated (*136 Cal. App. 3d 817, 822)* .

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3-36 California Points & Authorities § 36.36

§ 36.36 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5 (state); Code Civ. Proc. §§ 1094.5, 1094.6 (local)]--Discipline ofCivil Service Employee--Discourteous Treatment of Public or Other Employees as Cause for Discipline

[1] FORM

[*Caption. See § 36.20.*]

DISCIPLINE OF A CIVIL SERVICE EMPLOYEE IS UNLAWFUL IF THE CONDUCT ALLEGED TO CONSTITUTE DISCOURTEOUS TREATMENT OF THE PUBLIC OR A FELLOW EMPLOYEE, [WITHIN THE MEANING OF SECTION 19572(m) OF THE GOVERNMENT CODE], BEARS NO RATIONAL RELATIONSHIP TO THE EMPLOYMENT AND IS OF SUCH A CHARACTER THAT IT CANNOT REASONABLY RESULT IN THE IMPAIRMENT OR DISRUPTION OF PUBLIC SERVICE.

A-E. Propriety of Mandate to Review Discipline of Employee. [*See § 36.20, Paragraphs A-E.*]

F. When Discourteous Treatment of Public and Other Employees Cause for Discipline. Conduct does not constitute discourteous treatment of the public or other employees, [a cause for discipline under *Section 19572(m) of the Government Code*], unless it bears some rational relationship to the employment and is of such a character that it can reasonably result in the impairment of disruption of public service. The nature of the misbehavior and its effect on the public service, rather than the time or place of its occurrence, are the determinative factors (*Blake v. State Personnel Bd. (1972) 25 Cal. App. 3d 541, 550, 102 Cal. Rptr. 50*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a petition for writ of mandate for review of a final administrative adjudicatory order or decision of a state or local civil service commission disciplining a civil service employee based on conduct allegedly constituting discourteous treatment of the public or other employees within the meaning of *Gov. Code § 19572(m)* or an applicable local rule where the conduct does not bear a rational relationship to the employment and was not of such a character as to reasonably result in the impairment or disruption of public service.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] When Discourteous Treatment of Public and Other Employees Cause for Discipline

Blake v. State Personnel Bd. (1972) 25 Cal. App. 3d 541, 102 Cal. Rptr. 50 , is discussed in *§ 36.35[3][a]*.

[4] Additional Authorities

[a] When Discourteous Treatment of Public and Other Employees Cause for Discipline

Neely v. California State Personnel Bd. (1965) 237 Cal. App. 2d 487, 47 Cal. Rptr. 64 , was an appeal by the State Personnel Board from a superior court judgment setting aside the punitive action taken by the board against a civil service employee. The board had found that a referee of the Industrial Accident Commission had treated a member of the public discourteously, had been inefficient in reassigning case hearings, and had been discourteous and insubordinate to his appointing power, and it therefore ordered the referee suspended for almost three months and his salary reduced one step. The superior court reversed as to the first two causes and that portion of the third relating to insubordination, and it ordered the matter remanded to the board for further hearings and reconsideration of the penalty with respect to the discourteous treatment of the appointing power. The court of appeal reversed the judgment since it did not find substantial evidence to support a finding of insubordination and directed the board to redetermine the penalty to be imposed. The court did hold that there was substantial evidence to support the board's findings of discourteous treatment of the public, of inefficiency, and of discourteous treatment of another employee. In so holding, the court stated that the word "public" used in *Gov. Code § 19572(m)* includes everyone with whom a civil service employee comes in contact by reason of his or her employment, and that an attorney interested in and rightfully present at a hearing presided over by a state referee was included in the term.

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3-36 California Points & Authorities § 36.37

§ 36.37 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5 (state); Code Civ. Proc. §§ 1094.5, 1094.6 (local)]--Discipline of Civil Service Employee--Willful Disobedience as Cause for Discipline

[1] FORM

[*Caption. See § 36.20.*]

DISCIPLINE OF A CIVIL SERVICE EMPLOYEE FOR WILLFUL DISOBEDIENCE IS UNLAWFUL WHERE THE CONDUCT ALLEGED TO CONSTITUTE WILLFUL DISOBEDIENCE, [WITHIN THE MEANING OF SECTION 19572(o) OF THE GOVERNMENT CODE], DOES NOT INVOLVE A SPECIFIC VIOLATION OF A COMMAND OR PROHIBITION.

A-E. Propriety of Mandate to Review Discipline of Employee. [*See § 36.20, Paragraphs A-E.*]

F. When Willful Disobedience Cause for Discipline. Conduct does not constitute willful disobedience, [a cause for discipline under *Section 19572(o) of the Government Code*], unless it involves a specific violation of a command or prohibition (*Peters v. Mitchell (1963) 222 Cal. App. 2d 852, 862, 35 Cal. Rptr. 535*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a petition for writ of mandate for review of a final administrative adjudicatory order or decision of a state or local civil service commission disciplining a civil service employee for the conduct allegedly constituting willful disobedience within the meaning of *Gov. Code § 19572(o)* or an applicable local rule when the conduct does not involve a specific violation of a command or prohibition.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] When Willful Disobedience Cause for Discipline

Peters v. Mitchell (1963) 222 Cal. App. 2d 852, 35 Cal. Rptr. 535 , is discussed in *§ 36.20[3][f]*.

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3-36 California Points & Authorities § 36.38

§ 36.38 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5 (state); Code Civ. Proc. §§ 1094.5, 1094.6 (local)]--Discipline of Civil Service Employee--Other Failure of Good Behavior as Cause for Discipline

[1] FORM

[*Caption. See § 36.20.*]

DISCIPLINE OF A CIVIL SERVICE EMPLOYEE IS UNLAWFUL WHERE THE CONDUCT ALLEGED TO CONSTITUTE OTHER FAILURE OF GOOD BEHAVIOR, [WITHIN THE MEANING OF SECTION 19572(t) OF THE GOVERNMENT CODE], WOULD NOT CAUSE DISCREDIT TO THE PUBLIC SERVICE.

A-E. Propriety of Mandate to Review Discipline of Employee. [*See § 36.20, Paragraphs A-E.*]

F. When Other Failure of Good Behavior Cause for Discipline. Conduct does not constitute other failure of good behavior, [a cause for discipline under *Section 19572(t) of the Government Code*], unless it is of such a nature that, in light of the type of employment involved, it would reflect discredit on the employing agency or the position held by the person engaging in such conduct if it were known to the public (*Vielehr v. State Personnel Bd. (1973) 32 Cal. App. 3d 187, 194, 107 Cal. Rptr. 852*).

[*Optional*] **G. Possession of Marijuana.** Conviction of possession of marijuana off the job does not, without more, establish a sufficient probative nexus between the failure of good behavior and a finding of discredit to the agency or employment to justify disciplinary action [under *Section 19572(t) of the Government Code*] (*Vielehr v. State Personnel Bd. (1973) 32 Cal. App. 3d 187, 194, 107 Cal. Rptr. 852*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a petition for writ of mandate for review of a final administrative adjudicatory order or decision of a state or local civil service commission disciplining a civil service employee where the conduct of the employee allegedly constituting other failure of good behavior within the meaning of *Gov. Code § 19572(t)* or an applicable local rule would not cause discredit to the public service if known to the public.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

However, counsel should be aware of *Parker v. State Personnel Bd. (1981) 120 Cal. App. 3d 84, 174 Cal. Rptr. 333* . In *Parker,* a mandate proceeding for review of a final administrative adjudicatory decision [*Code Civ. Proc. § 1094.5*], the court upheld the discharge of an employee for possession of a large amount of marijuana when the worker was a group supervisor at a vocational training institution for the rehabilitation of youthful offenders. The petitioner was terminated under *Gov. Code § 19572* after discovery of approximately 450 grams of marijuana both growing and in loose form at his residence. At a hearing before the State Personnel Board, petitioner offered no testimony on the discovery of the marijuana, because criminal proceedings were still pending. The hearing officer proposed sustaining the dismissal, finding that petitioner's status as a peace officer and his job functions of guidance and supervision of Youth Authority wards provided a relationship between the possession of marijuana and petitioner's employment. The board adopted the decision and it was upheld by the superior court. In affirming the trial court, the court of appeal noted that in order for the dismissal to be valid, the failure of good behavior must reflect on the employee's job. The court found substantial evidence supporting the board's decision, however, in testimony by petitioner's supervisor that the arrest had a significant adverse effect on petitioner's credibility and on the community to which the wards return. The State Personnel Board and trial court were entitled to rely on the supervisor's opinion in upholding the dismissal.

[3] Discussion of Authorities

[a] When Other Failure of Good Behavior Cause for Discipline

Vielehr v. State Personnel Bd. *(1973) 32 Cal. App. 3d 187, 107 Cal. Rptr. 852* , was an appeal by a discharged civil service employee from a judgment of the superior court denying a petition for a writ of mandate. Petitioner, a tax representative trainee, was convicted on his plea of guilty of possession of marijuana and sentenced to two years probation with 90 days suspended jail sentence. On the basis of this marijuana conviction, petitioner was dismissed from his job, and respondent board sustained the dismissal under *Gov. Code § 19572(t)*. The superior court denied a petition for mandate without opinion, and the court of appeal reversed its decision and remanded the cause to the superior court for further proceedings. The court ruled that *Gov. Code § 19572(t)*, establishing as a cause for discipline other failure of good behavior either during or outside duty hours which is of such a nature that it causes discredit to the employee's agency or employment, must be applied to petitioner in light of the type of employment he was engaged in (enforcing the tax laws) to determine whether or not his alleged failure of good behavior (possession of marijuana) was of such a nature that it caused discredit to his agency or to his employment, and that there must be a rational relationship between the goal which *Gov. Code § 19572(t)* seeks to achieve and the failure of good behavior. The court then held that conviction of possession of marijuana, standing alone, did not constitute substantial evidence of a failure of good

behavior outside duty hours which was of such a nature that it caused discredit to the agency or to petitioner's employment. The court found no obvious relationship between possessing marijuana off the job and the duties of a tax representative trainee, and it concluded that conviction of possession of marijuana off the job did nt, without more, establish a sufficient probative nexus between the failure of good behavior and a finding of discredit to the agency or employment to justify disciplinary action. Since the record contained no findings of specific harms or impairments resulting to the public service, the court noted that further proceedings might be necessary.

[b] Possession of Marijuana

Vielehr v. State Personnel Bd. *(1973) 32 Cal. App. 3d 187, 107 Cal. Rptr. 852* , is discussed in *§ 36.38[2][a]*.

[4] Additional Authorities

[a] When Other Failure of Good Behavior Cause for Discipline

In *Ramirez v. State Personnel Bd. (1988) 204 Cal. App. 3d 288, 251 Cal. Rptr. 9* , a Department of Youth Authority counselor appealed from a denial of his petition seeking a writ of mandate to overturn a decision by the State Personnel Board to dismiss him from employment after his arrest for masturbating in a place open to public view. The court of appeal affirmed, holding that there was a sufficient nexus between the counselor's misconduct and his employment as a peace officer to justify termination under *Gov. Code § 19572(t)*. In so holding, the court reached a result opposite to that reached in *Yancey* [*see* discussion *below*]. The court reasoned that when a youth counselor, by disobeying the law, does the very thing he or she is supposed to counsel against, the counselor cannot be said to be acting in the best interest of the Youth Authority or its wards. The court also held that the board did not abuse its discretion under the circumstances of the case by awarding termination, notwithstanding the petitioner's prior discipline-free record of service (*204 Cal. App. 3d 288, 293-294)* .

Yancey v. State Personnel Bd. (1985) 167 Cal. App. 3d 478, 213 Cal. Rptr. 634 , was an appeal by a civil service employee from a denial of his petition for a writ of mandate to compel the State Personnel Board to vacate its decision terminating appellant's employment as an officer at a correctional facility, after he was found off-duty wearing female underclothing. The court of appeal reversed, holding that the evidence was insufficient to support the decision to dismiss under *Gov. Code § 19572(t)*, noting also that if any discipline were warranted the penalty imposed was grossly excessive (*167 Cal. App. 3d 478, 487-488)* . The court stated that there must be more than a failure of good behavior before the board may discipline an employee under *Gov. Code § 19572(t)*; the misconduct must bear some rational relationship to the employee's job and be of such character that it can easily result in impairment or disruption of the public service (*167 Cal. App. 3d 478, 483)* . The court then concluded that the evidence was insufficient to justify dismissal under this standard, because appellant did not commit a criminal act, was not willfully disobedient, did not violate any departmental rule, and had an exemplary prior work record. Moreover, the incident appeared to be transitory in nature (*167 Cal. App. 3d 478, 487)* .

Nightingale v. State Personnel Bd. (1972) 7 Cal. 3d 507, 102 Cal. Rptr. 758, 498 P.2d 1006 , was an appeal by a civil service employee from a judgment of the superior court denying a petition for a writ of mandate. Petitioner, a referee with the Division of Industrial Accidents, had privately contacted the referee in charge of a friend's worker's compensation case and the deputy attorney general representing the injuries fund in an attempt to expedite her friend's case and obtain special treatment for her. On the basis of these actions, petitioner was suspended for 20 days under *Gov. Code § 19572(t)* for a failure of good behavior during working hours which was of such a nature that it caused discredit to the state agencies involved in worker's injury claims. The State Personnel Board upheld the suspension. The Supreme Court affirmed the trial court's judgment on appeal and denied the petition for writ of mandate. The Court ruled that it was immaterial that petitioner neither intended to nor did affect the fairness of the proceedings in her friend's case. Since her efforts on behalf of her friend amounted to an unwarranted interference with proceedings scheduled to be held before another officer, the Court held that petitioner violated *Gov. Code § 19572(t)*. The Court stated that a "failure of

good behavior" need not be known to some portion of the public before it may be said to have caused discredit to the public service, and that to have a referee working from inside an agency on behalf of a party to a pending action is obviously improper and can reasonably be expected to raise doubts among litigants as to the impartial exercise of discretion by the agency (*7 Cal. 3d 507, 513-515)* .

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§ 36.39 Supporting Petition for Writ of Mandate [Code Civ. Proc. § 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5 (state); Code Civ. Proc. §§ 1094.5, 1094.6 (local)]--Discipline of Civil Service Employee--Conduct Unbecoming Civil Service Employee Not Cause for Discipline Unless It Refers to Lack of Fitness for Specific Occupation

[1] FORM

[*Caption. See § 36.20.*]

DISCIPLINE OF A CIVIL SERVICE EMPLOYEE ON THE BASIS OF CONDUCT UNBECOMING AN EMPLOYEE OF THE CIVIL SERVICE IS LAWFUL ONLY IF THE STANDARD REFERS TO CONDUCT INDICATING A LACK OF FITNESS TO PERFORM THE FUNCTIONS OF THE EMPLOYEE'S OCCUPATION.

A-E. Propriety of Mandate to Review Discipline of Employee. [*See § 36.20, Paragraphs A-E.*]

F. When Conduct Unbecoming Civil Service Employee Is Cause for Discipline. Conduct unbecoming an employee of the civil service is cause for discipline only when it refers to conduct that indicates a lack of fitness to perform the functions of the specific occupation in which the employee is engaged (*Cranston v. City of Richmond (1985) 40 Cal. 3d 755, 769, 221 Cal. Rptr. 779, 710 P.2d 845* (conduct unbecoming a city police officer)).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a petition for writ of mandate for review of a final administrative adjudicatory order or decision of a state or local civil service commission disciplining a civil service employee for "conduct unbecoming an employee of the civil service."

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] When Conduct Unbecoming a Civil Service Employee Is Cause for Discipline

In ***Cranston v. City of Richmond*** *(1985) 40 Cal. 3d 755, 221 Cal. Rptr. 779, 710 P.2d 845* , petitioner, a Richmond City Police Officer, drove his car while it was mechanically and structurally unsound, in the middle of the night, and led other police and Highway Patrol officers on a wild chase over wet and slippery streets at speeds up to 95 miles per hour. Petitioner was not on duty at the time of the chase, and the chase did not involve duty-related matters. Additionally, petitioner previously had been warned about his driving habits and notified that his conduct was being closely observed. As a result of the chase incident, coupled with prior instances of misconduct, petitioner was discharged from his position under a city personnel rule providing that an employee may be discharged for conduct unbecoming an employee of the city service. The city personnel board sustained the discharge, and the trial court denied petitioner's petition for a writ of administrative mandamus to compel his reinstatement. Petitioner then sought review of the denial in the Supreme Court.

The Supreme Court affirmed the trial court's judgment denying the petition (*40 Cal. 3d 755, 759)* . Among other things, petitioner contended that his discharge denied him due process of law because the city personnel rule under which he was discharged was unconstitutionally vague in that it provided no standard at all under which his conduct could be judged (*40 Cal. 3d 755, 765)* . The Court held the rule, viewed in the context of other rules and practices pertaining to police service, was not so vague as to preclude discipline for conduct that was so obviously improper for a police officer and so clearly outside the scope of any substantive legal protection as the reckless and unlawful conduct in which petitioner engaged (*40 Cal. 3d 755, 759)* . The Court reasoned that it was unlikely that the City of Richmond, in enacting the rule, intended to impose on all city employees an identical standard of "unbecoming" conduct. Relying on *Morrison v. State Bd. of Educ. (1969) 1 Cal. 3d 214, 227, 82 Cal. Rptr. 175, 461 P.2d 375* (discussed in *§ 36.35[3][a]*), the Court held that the city intended the meaning of "conduct unbecoming an employee of the city service" to depend on, and thus relate to, the occupation involved in a particular case (*40 Cal. 3d 755, 768-769)* . Thus, in applying the rule to petitioner, the Court construed the rule as if it read "conduct unbecoming a city police officer" (*40 Cal. 3d 755, 769)* . In finding that petitioner's conduct so clearly fell within the proscription of the rule that the rule's application to him was constitutionally valid, the Court emphasized that its holding was a narrow one. There might well be situations in which the admittedly uncertain language of the rule would fail to provide sufficiently definite notice to a police officer or other city employee that his or her conduct may be cause for discipline (*40 Cal. 3d 755, 771)* . The Court held only that the rule was not unconstitutionally vague as applied to a police officer who had engaged in the sort of patently unlawful and reckless conduct engaged in by petitioner (*40 Cal. 3d 755, 772)* .

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3-36 California Points & Authorities § 36.40

§ 36.40 Supporting Petition for Writ of Mandate [Code Civ. Proc. § 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5 (state); Code Civ. Proc. §§ 1094.5, 1094.6 (local)]--Discipline of Civil Service Employee--Retaliation Against Whistle-blower Not Cause for Discipline if Petitioner Reasonably Believed Personnel Action Was Independently Justified [Gov. Code § 8547.8]

[1] FORM

[*Caption. See § 36.20.*]

[*EITHER*]

PETITIONER'S CONDUCT CONCERNING _____ [*name of employee or applicant filing complaint concerning improper governmental activity*] WAS NOT GROUNDS FOR DISCIPLINARY ACTION UNDER GOVERNMENT CODE SECTIONS 8547.8(b) AND 19572 BECAUSE PETITIONER REASONABLY BELIEVED THAT THE PERSONNEL ACTION HE/SHE _____ [TOOK *and/or* DIRECTED *and/or* RECOMMENDED *and/or* APPROVED] CONCERNING _____ [*name of employee or applicant filing complaint concerning improper governmental activity*] WAS JUSTIFIED, ON THE BASIS OF EVIDENCE SEPARATE AND APART FROM THE FACT THAT _____ [*name of employee or applicant filing complaint concerning improper governmental activity*] DISCLOSED [ALLEGED] IMPROPER GOVERNMENTAL ACTIVITIES.

[*OR*]

PETITIONER'S FAILURE TO _____ [*specify personnel action, e.g.,* RECOMMEND THE PROMOTION OF _____ (*name of employee or applicant filing complaint concerning improper governmental activity*)] WAS NOT GROUNDS FOR DISCIPLINARY ACTION UNDER GOVERNMENT CODE SECTIONS 8547.8(b) AND 19572 BECAUSE PETITIONER REASONABLY BELIEVED THAT HE/SHE WAS

JUSTIFIED IN FAILING TO TAKE THAT PERSONNEL ACTION, ON THE BASIS OF EVIDENCE SEPARATE AND APART FROM THE FACT THAT _____ [*name of employee filing complaint concerning improper governmental activity*] DISCLOSED [ALLEGED] IMPROPER GOVERNMENTAL ACTIVITIES.

A-E. Propriety of Mandate to Review Discipline of Employee. [*See § 36.20, Paragraphs A-E.*]

F. When Personnel Action or Inaction Not Cause for Discipline. *Government Code Section 8547.8* is not intended to prevent a manager or supervisor from taking, directing others to take, recommending, or approving any personnel action or from failing to take a personnel action with respect to any state employee or applicant for state employment if the manager or supervisor reasonably believes any action or inaction is justified on the basis of evidence separate and apart from the fact that the employee or applicant has disclosed improper governmental activities as defined in *Government Code Section 8547.2(b)* (*Gov. Code § 8547.8(d)*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for writ of mandate for review of a final administrative adjudicatory order or decision of a state civil service commission disciplining civil service employee when (1) the employee is a manager or a supervisor, (2) the employee allegedly retaliated against a state applicant or employee for the applicant's or employee's disclosure of improper governmental activities, and (3) the employee reasonably believes his or her action or inaction is justified by evidence separate and apart from the fact that the employee or applicant has disclosed improper governmental activities [*see* Gov. Code § 8457.8(d)].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Retaliation Against State Applicant or Employee as Grounds for Discipline

Gov. Code § 8547.8(b) provides that any state civil service employee who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a state employee or applicant for state employment for having disclosed any "improper governmental activity" shall be disciplined by adverse action as provided by *Gov. Code § 19572* (causes for discipline). If the particular agency does not take adverse action against the employee, the State Personnel Board may do so [*Gov. Code §§ 8547.8(a), (b), 19683(e)*; *see Gov. Code § 19583.5* (procedure for filing charges)]. Similar provisions protect University of California and California State University employees [*Gov. Code §§ 8547.10(a), (b), 8547.12(a), (b)*].

In addition, *Gov. Code § 19572(x)* provides that adverse action may be taken against any employee or person whose name appears on any employment list for unlawful retaliation against any other state officer or employee or member of

the public who, in good faith, reports, discloses, divulges, or otherwise brings to the attention of the Attorney General, or any other appropriate authority, any facts or information relative to actual or suspected violation of any state or federal law occurring on the job or directly related thereto.

[c] Improper Governmental Activities

"Improper governmental activity" means any activity by a state agency or an employee that is undertaken in the performance of the employee's duties, undertaken inside a state office, or, if undertaken outside a state office by the employee, directly relates to state government, whether or not that activity is within the scope of his or her employment, and that (1) is in violation of any state or federal law or regulation, including, but not limited to, corruption, malfeasance, bribery, theft of government property, fraudulent claims, fraud, coercion, conversion, malicious prosecution, misuse of government property, or willful omission to perform duty, or (2) is economically wasteful, or involves gross misconduct, incompetency, or inefficiency [*Gov. Code § 8547.2(b)*].

[d] Related Civil Actions

[i] State Civil Service System

Any person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a state employee or applicant for state employment for disclosing improper governmental activities may be held liable in an action for damages brought against him or her by the injured party [*Gov. Code § 8547.8(c)*]. However, a damages action is not available unless the injured party first files a complaint with the State Personnel Board within the specified time pursuant to *Gov. Code § 8547.8(a)* and thereafter the board has issued, or failed to issue, findings [*Gov. Code § 8547.8(c)*; *see Gov. Code § 19683*]. The injured employee's failure to pursue this administrative procedure is a jurisdictional defect that may be raised in the damages action by a party or the court at any time [*Hood v. Hacienda La Puente Unified Sch. Dist. (1998) 65 Cal. App. 4th 435, 439-441, 76 Cal. Rptr. 2d 448]* . However, as long as the board has issued findings (or the deadline for issuing findings has passed), the injured employee may proceed with a damages action whether the board's findings are favorable or unfavorable to the employee. Moreover, once the board has issued findings, the employee need not pursue additional administrative remedies and need not challenge the findings by way of a petition for a writ of administrative mandate [*State Bd. of Chiropractic Examiners v. Superior Court (2009) 45 Cal. 4th 963, 971-978, 89 Cal. Rptr. 3d 576, 201 P.3d 457]* .

If the plaintiff is a California State University employee, an action for damages may not be brought unless the state university has failed to reach a decision on the employee's administrative complaint within the time limits established for that purpose by the trustees or has failed to address the complaint to the employee's satisfaction within 18 months [*Gov. Code § 8547.12(c)* ("Nothing in this section is intended to prohibit the injured party from seeking a remedy if the university has not satisfactorily addressed the complaint within 18 months"); *Runyon v. Board of Trs. of Cal. State Univ. (2010) 48 Cal. 4th 760, 767-773, 108 Cal. Rptr. 3d 557, 229 P.3d 985* ("satisfactorily addressed" in *Gov. Code § 8547.12(c)* refers to satisfaction of complaining employee, rather than satisfaction of good-faith standard for investigation of complaint)]. If the employee has complied with the university's internal complaint and investigation requirements and received an adverse decision from the university, the employee need not seek to overturn the university's decision through a petition for a writ of administrative mandate before filing a civil action [*Runyon v. Board of Trs. of Cal. State Univ. (2010) 48 Cal. 4th 760, 773-775, 108 Cal. Rptr. 3d 557, 229 P.3d 985]* .

If the injured party is an employee of the University of California, an action for damages may be brought only if the university's administrative remedy failed to result in a timely decision; if the university reached a timely decision, even one in its own favor, the employee has no cause of action for damages [*Gov. Code § 8547.10(c)*; *Miklosy v. Regents of Univ. of Cal. (2008) 44 Cal. 4th 876, 888-898, 80 Cal. Rptr. 3d 690, 188 P.3d 629*].

In addition, *Gov. Code § 8547.3(a)* provides that a state employee may not, directly or indirectly, use, or attempt to use,

his or her official authority or influence to, or to attempt to, intimidate, threaten, coerce, command any person for the purpose of interfering with that person's right to disclose to the State Auditor the existence of improper governmental activities. A state employee who violates *Gov. Code § 8547.3(a)* may be held liable in an action for civil damages brought against the employee by the offended party [*Gov. Code § 8547.3(c)*].

[ii] Local Civil Service Systems

Any local officer, manager, or supervisor who has been found by a court to have taken a reprisal action, with malicious intent, against any local agency employee or applicant for employment who discloses improper local governmental activities will be individually liable for damages in an action brought against him or her by the injured employee [*Gov. Code § 53298.5*; *see also Gov. Code §§ 53296* (definitions), 53297 (right to file administrative complaint alleging improper local government activities), 53298 (prohibiting reprisal actions for disclosure of improper local governmental activities)].

[e] Related Pleading and Practice Forms

For a form of complaint by a state employee or applicant for state employment for use in an action under Gov. Code § 8547.8(c) for damages based on the commission of retaliatory acts against the employee or applicant for his or her disclosure of improper governmental activities, see California Forms of Pleading and Practice, Ch. 118, *Civil Service* (Matthew Bender).

[3] Discussion of Authorities

[a] When Personnel Action or Inaction Not Cause for Discipline

Gov. Code § 8547.8(d) provides that *Gov. Code § 8547.8* (discipline of manager or supervisor for retaliation against state applicant or employee who discloses improper governmental activities) is not intended to prevent a manager or supervisor from taking, directing others to take, recommending, or approving any personnel action or from failing to take a personnel action with respect to any state employee or applicant for state employment if the manager or supervisor reasonably believes any action or inaction is justified on the basis of evidence separate and apart from the fact that the employee or applicant has disclosed improper governmental activities, as defined in *Gov. Code § 8547.2(b)*.

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Volume 3 Chapters 34-39 CHECKS AND BANKS---to---CIVIL SERVICE
CHAPTER 36 CIVIL SERVICE
PART II. FORMS

3-36 California Points & Authorities § 36.41

§ 36.41 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5 (state); Code Civ. Proc. §§ 1094.5, 1094.6 (local)]--Discipline of Civil Service Employee--Excessive Penalty

[1] FORM

[*Caption. See § 36.20.*]

DISMISSAL OF PETITIONER WAS AN EXCESSIVE PENALTY THAT WAS DISPROPROTIONATE TO PETITIONER'S [ALLEGED] MISCONDUCT AND CONSTITUTES AN ABUSE OF DISCRETION ON THE PART OF THE STATE BECAUSE, UNDER THE CIRCUMSTANCES OF THIS CASE, DISMISSAL WAS NOT NEEDED TO AVERT HARM TO THE PUBLIC SERVICE.

A-E. Propriety of Mandate to Review Discipline of Employee. [*See § 36.20, Paragraphs A-E.*]

F. Excessive Penalty. The penalty imposed in discharging a civil service employee is excessive and constitutes an abuse of discretion of the administrative body imposing the discipline unless, in light of the circumstances surrounding the misconduct and the likelihood of its recurrence, the action taken was required to avert harm to the public service (*Skelly v. State Personnel Bd. (1975) 15 Cal. 3d 194, 217-219, 124 Cal. Rptr. 14, 539 P.2d 774* ; *Blake v. State Personnel Bd. (1972) 25 Cal. App. 3d 541, 554, 102 Cal. Rptr. 50*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a petition for writ of mandate for review of a final administrative adjudicatory order or decision of a state or local civil service commission disciplining a civil service employee when the penalty of discharge imposed on the employee is excessive.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Excessive Penalty

The factual background of *Skelly v. State Personnel Bd. (1975) 15 Cal. 3d 194, 124 Cal. Rptr. 14, 539 P.2d 774* , is discussed in *§ 36.20[3][h]*. In discussing petitioner's contention that the penalty of dismissal was excessive and disproportionate to his alleged wrong, the Supreme Court stated that the overriding concern in disciplining an employee is the extent to which the employee's conduct resulted in, or if repeated is likely to result in, harm to the public service (*15 Cal. 3d 194, 217)* . Considering the circumstances surrounding petitioner's minor deviations from the prescribed time schedule, the likelihood of petitioner repeating his misconduct, and the lack of proof that the public service was adversely affected, the Court concluded that petitioner's dismissal was improper (*15 Cal. 3d 194, 218-219)* .

Blake v. State Personnel Bd. (1972) 25 Cal. App. 3d 541, 102 Cal. Rptr. 50 , is discussed in *§ 36.35[3][a]*. In discussing petitioner's contention that the penalty of dismissal was excessive as a matter of law, the court of appeal stated that in determining whether misconduct warrants dismissal, consideration should be given to the circumstances surrounding the misbehavior, the degree to which it affected the public service, and the likelihood of its recurrence (*25 Cal. App. 3d 541, 554)* . The court then held that the penalty of dismissal was an excessive punishment for petitioner's threatening of two fellow employees with a gun where there was no direct testimony from the employees that their work was affected, the incident occurred after an evening of drinking and petitioner apologized the next morning and gave assurances that the incident would not recur, petitioner had been in the state service since 1949 and had an exemplary employment record replete with commendations for meritorious service, petitioner had been promoted to the position of supervising deputy labor commissioner, and the State Personnel Guide to Employee Discipline suggested the penalty of a warning or letter of reprimand for a first offense under *Gov. Code § 19572(m)*.

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3-36 California Points & Authorities § 36.42

§ 36.42 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5 (state); Code Civ. Proc. §§ 1094.5, 1094.6 (local)]--Discipline of Civil Service Employee--Inadequacy of One of Several Grounds

[1] FORM

[*Caption. See § 36.20.*]

REMAND FOR RECONSIDERATION IS THE PROPER PROCEDURE WHERE THE DISCIPLINE OF AN EMPLOYEE IN THE CIVIL SERVICE WAS UPHELD BY AN ADMINISTRATIVE TRIBUNAL ON SEVERAL GROUNDS AND ONE OF THESE IS INADEQUATE.

A-E. Propriety of Mandate to Review Discipline of Employee. [*See § 36.20, Paragraphs A-E.*]

F. Inadequacy of One of Several Grounds. A case involving the discipline of a civil service employee should be remanded to the administrative tribunal which upheld the discipline if the administrative tribunal based its decision on several grounds and one of these is inadequate (*Shepherd v. State Personnel Bd. (1957) 48 Cal. 2d 41, 51, 307 P.2d 4* ; *Neely v. California State Personnel Bd. (1965) 237 Cal. App. 2d 487, 494, 47 Cal. Rptr. 64*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a petition for writ of mandate for review of a final administrative adjudicatory order or decision of a state or local civil service commission disciplining a civil service employee where one of the grounds on which the punitive action was based is inadequate.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Inadequacy of One of Several Grounds

The factual background of ***Shepherd v. State Personnel Bd.*** *(1957) 48 Cal. 2d 41, 307 P.2d 4* , is discussed in *§ 36.29[3][a]*. After determining that only one of the several grounds on which the State Personnel Board based its discipline of petitioner was valid, the Supreme Court stated that it was settled in such a situation that orderly procedure would best be preserved by remanding the case to the board so that it may reconsider the penalty to be imposed.

Neely v. California State Personnel Bd. *(1965) 237 Cal. App. 2d 487, 47 Cal. Rptr. 64* , was an appeal by respondent board from a judgment of the superior court in a mandate proceeding. The board had upheld the suspension of a civil service employee and had reduced his salary. The superior court set aside punitive action, and the board appealed. The court of appeal held that there was substantial evidence to support three of the board's four findings on which the suspension was based. It therefore reversed the judgment of the superior court and directed that court to enter judgment instructing the board to set aside its decision and to determine the penalty to be imposed in light of the opinion of the court of appeal.

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3-36 California Points & Authorities § 36.43

§ 36.43 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision--Discipline of Civil Service Employee--Improper Use of Misdemeanor Plea in Disciplinary Hearing

[1] FORM

[*Caption. See § 36.20.*]

USE OF NOLO CONTENDERE PLEA TO MISDEMEANOR IS BARRED IN SUBSEQUENT ADMINISTRATIVE DISCIPLINARY HEARING AGAINST CIVIL SERVICE EMPLOYEE.

A-E. Propriety of Mandate to Review Discipline of Employee. [*See § 36.20, Paragraphs A-E.*]

B. Statutory Bar on Use of Nolo Contendere Plea Extends to Administrative Actions. *Penal Code § 1016*, which prevents use of a nolo contendere plea to misdemeanor charge in any subsequent civil suit, extends to administrative actions and thus cannot be used against civil service employee in subsequent disciplinary hearing (*County of Los Angeles v. Civil Service Commission (1995) 39 Cal. App. 4th 620, 632, 46 Cal. Rptr. 2d 256*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Respondent _____ [*name*]

[2] Comments

[a] Use of Form

This form of memorandum of points and authorities may be submitted in support of a petition for a writ of mandate seeking review of an administrative decision to discipline or dismiss a civil service employee based upon employee's prior nolo contendere plea in a misdemeanor action. Admission of such evidence in an administrative action is barred under *Penal Code § 1016*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Statutory Bar on Use of Nolo Contendere Plea Extends to Administrative Actions

County of Los Angeles v. Civil Service Commission *(1995) 39 Cal. App. 4th 620, 46 Cal. Rptr. 2d 256* , involved a disciplinary action against a deputy sheriff who pleaded nolo contendere to the misdemeanor charge of receiving stolen property. This was based upon his purchase of electronic equipment from an associate of his brother in law. Based upon this, the Los Angeles County Sheriff's Department fired the deputy. Pursuant to the deputy's request, an administrative hearing was conducted. The hearing officer excluded evidence of the nolo contendere plea and found that the deputy did not know the items in question were stolen. Nonetheless, he recommended a 30 day suspension. That recommendation was adopted by the Civil Service Commission; however, the county initiated the mandamus proceeding to have its original decision to fire the deputy upheld. The trial court denied the petition. The court of appeal affirmed the denial, finding that the evidence of the nolo contendere plea was properly excluded under *Penal Code § 1016*, which prevents use of a nolo contendere plea in any civil action. The court held that this prohibition extended to administrative actions and that the civil service rule permitting admission of any relevant evidence at an administrative hearing despite common law or statutory rules to the contrary did not override public policy against use of nolo contendere plea or conviction in administrative proceedings (*39 Cal. App. 4th 620, 632)* .

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3-36 California Points & Authorities § 36.44

§ 36.44 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Local Administrative Decision [Code Civ. Proc. §§ 1094.5, 1094.6]--Discipline of Employee--Scope of Evidentiary Review--Use of Independent Judgment Test

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	MEMORANDUM OF POINTS
_____ [*name*],	)	AND AUTHORITIES IN SUPPORT OF PETITION
Respondent.	)	FOR WRIT OF MANDATE
	)	[*Code Civ. Proc. §§ 1094.5, 1094.6*)]
	)	

_____

ON REVIEWING A FINAL ADJUDICATORY ORDER OR DECISION OF A LOCAL ADMINISTRATIVE AGENCY, THE COURT IS AUTHORIZED TO EXERCISE ITS INDEPENDENT JUDGMENT ON THE EVIDENCE AND TO DETERMINE WHETHER THE FINDINGS ARE SUPPORTED BY THE WEIGHT OF THE EVIDENCE, WHERE IT IS ALLEGED THAT THE EVIDENCE DOES NOT SUPPORT THE FINDINGS AND THE ORDER OR DECISION SUBSTANTIALLY AFFECTS THE FUNDAMENTAL VESTED RIGHT OF THE PETITIONER'S CONTINUING PUBLIC EMPLOYMENT.

A. Reviewing Weight of Evidence. Where it is claimed that the findings are not supported by the evidence, in cases where the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence (*Code Civ. Proc. §*

1094.5(c)).

B. Authority to Exercise Independent Judgment. A court is authorized to exercise its independent judgment on the evidence where the administrative order or decision attacked substantially affects a fundamental vested right of the petitioner and the respondent agency is not directly authorized by the Constitution to exercise judicial functions (*Strumsky v. San Diego County Employees' Retirement Ass'n (1974) 11 Cal. 3d 28, 32, 35, 112 Cal. Rptr. 805, 520 P.2d 29* ; *Wences v. City of Los Angeles (2009) 177 Cal. App. 4th 305, 313-318, 99 Cal. Rptr. 3d 199*).

C. Fundamental Vested Rights. The right to continue in permanent public employment is a fundamental vested right (*Los Angeles County Employees' Assn. v. Sanitation Dist. No. 2 (1979) 89 Cal. App. 3d 294, 299, 152 Cal. Rptr. 415*).

D. Duty to Exercise Independent Judgment. Where findings and conclusions of an administrative agency rely on disputed evidence or conflicting witness testimony, a court ruling on a petition for writ of mandate has a duty to make an independent determination regarding the credibility of witnesses and evidence (*Barber v. Long Beach Civil Service Commission (1996) 45 Cal. App. 4th 652, 658-659, 53 Cal. Rptr. 2d 4*).

E. Constitutional Authority to Exercise Judicial Functions. Local agencies have no authority to exercise judicial functions; their factual determinations are not due the deference and respect usually accorded judicial decisions, and, therefore, a court reviewing such an agency's decisions may exercise its independent judgment on the evidence (*see Strumsky v. San Diego County Employees' Retirement Ass'n (1974) 11 Cal. 3d 28, 32, 35-37, 42-44, 112 Cal. Rptr. 805, 520 P.2d 29*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a petition for a writ of mandate for review of a local civil service commission's final administrative adjudicatory order or decision where the order or decision affected an employee's right to continue in public employment and the employee contended that the commission findings were not supported by the evidence.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

The form's use is limited to review of the proceedings of a local service commission since such an agency is not vested by the Constitution with limited judicial powers [*see* discussion in *§ 36.44[3][b]*]. By contrast, findings of the State Personnel Board are subject to judicial review under the substantial evidence test even when fundamental vested rights are involved, since the Board has constitutional authority to act as an adjudicatory body [*see* *Coleman v. Department of Personnel Administration (1991) 52 Cal. 3d 1102, 1125, 278 Cal. Rptr. 346, 805 P.2d 300* ; *Gonzalez v. State*

Personnel Bd. (1995) 33 Cal. App. 4th 422, 428, 39 Cal. Rptr. 2d 282].

[3] Discussion of Authorities

[a] Reviewing Weight of Evidence

Code Civ. Proc. § 1094.5(c) provides that in cases where the court is authorized by law to exercise its independent judgment on the evidence and where it is claimed that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence.

[b] Authority to Exercise Independent Judgment

Strumsky v. San Diego County Employees' Retirement Ass'n *(1974) 11 Cal. 3d 28, 112 Cal. Rptr. 805, 520 P.2d 29* , involved an appeal from a judgment denying the petitioner a writ of mandate to set aside the decision of the respondent board which denied her certain death benefits. The Supreme Court reversed and remanded to the trial court on the basis that the trial court had erroneously applied the substantial judgment test in reviewing the decision of the board, instead of the independent judgment test. The Court noted that formerly the independent judgment test had been held inapplicable in the case of agencies of constitutional origin which were granted judicial power by the Constitution and local agencies. While this rule is still valid as to the constitutional agencies, the Court held that there is no longer any valid reason to apply the substantial evidence rule to decisions of local agencies. The Court reasoned that the trial court formerly had not been permitted to independently judge the evidence of a state agency of constitutional origin which had been granted limited judicial powers by the Constitution because of the separation of power doctrine. That doctrine contained in *Cal. Const., Art. III, § 3*, provides that persons charged with the exercise of legislative, executive, or judicial power may not exercise either of the other powers except as the Constitution permits. Because this provision applies only to the state, local agencies are not prevented from exercising judicial power. Turning to the question of whether such power could be exercised, the Court found Article VI of the California Constitution disposes of all judicial power not expressly disposed of elsewhere in the Constitution, and that following its amendment in 1950, it no longer authorized the Legislature, in its granting of power to various local bodies pursuant to Article XI, to grant such agencies judicial powers. Therefore, the factual findings of local agencies are entitled to no greater deference tan those of other agencies lacking judicial powers under the Constitution. The Court then confirmed the holding in *Bixby v. Pierno (1971) 4 Cal. 3d 130, 143, 93 Cal. Rptr. 234, 481 P.2d 242* , that when an administrative decision affects a right which has been legitimately acquired or is otherwise vested, and when that right is of a fundamental nature from the standpoint of its economic aspect or its effect in human terms and the importance to the individual, then a full and independent judicial review of the decision is indicated, with the sole exception of agencies of constitutional origin with limited judicial power.

In ***Wences v. City of Los Angeles*** *(2009) 177 Cal. App. 4th 305, 99 Cal. Rptr. 3d 199* , a police department issued an official reprimand against an officer for using unauthorized tactics and inappropriately drawing his weapon during the course of an off-duty, officer-involved shooting. The trial court denied the officer's writ petition on the ground that there was substantial evidence to support the administrative decision. The officer appealed, contending that the trial court should have exercised its independent judgment to determine whether the weight of the evidence supported the administrative findings, rather than applying the deferential substantial-evidence standard of review.

The court of appeal agreed with the officer and reversed the trial court's judgment. The appellate court explained that if the administrative decision substantially affects a fundamental vested right, the trial court must exercise its independent judgment on the evidence (citing *Strumsky v. San Diego County Employees Retirement Assn (1974) 11 Cal. 3d 28, 32, 112 Cal. Rptr. 805, 520 P.2d 29* (discussed above)). Whether an administrative decision substantially affects a fundamental vested right must be determined on a case-by-case basis. A right may be deemed fundamental either because of (1) the character and quality of its economic aspect, or (2) the character and quality of its human aspect (*177 Cal. App. 4th 305, 313)* .

It is settled that termination of employment sufficiently affects a public employee's vested right in employment to require a trial court to exercise its independent judgment in reviewing the evidence. But this case presented an issue of first impression: whether the independent judgment standard of judicial review should apply in an administrative mandamus proceeding when the challenged discipline is solely a reprimand as opposed to a more severe penalty (*177 Cal. App. 4th 305, 314)* .

The court of appeal found that, in this case, the reprimand substantially affected a fundamental right, so that the trial court should have exercised its independent judgment. The court of appeal noted that the right at issue in this case was the officer's right to employment as a non-probationary peace officer, a right that is both vested and fundamental. The police department's official reprimand was a part of the officer's employment record as a police officer. The reprimand may be considered by the department in future personnel and disciplinary decisions, and based on its content, it could adversely affect the officer's future opportunities for career advancement. It therefore implicated a right that was important to the officer in his life situation, even in the absence of an immediate economic impact. That the officer had received a promotion after the issuance of the reprimand did not eliminate the possibility that the presence of reprimand could hinder the officer's future career advancement (*177 Cal. App. 4th 305, 316-318)* .

[c] Fundamental Vested Rights

The factual background of ***Los Angeles County Employees' Assn. v. Sanitation Dist. No. 2*** *(1979) 89 Cal. App. 3d 294, 152 Cal. Rptr. 415* , was discussed in *§ 36.21[3][a]*. In discussing the proper application of the independent judgment test by the trial court in determining whether the findings of the commission were supported by the evidence, the court of appeal quoted from *Strumsky v. San Diego County Employees' Retirement Ass'n (1974) 11 Cal. 3d 28, 32, 112 Cal. Rptr. 805, 520 P.2d 29* , where the Supreme Court said that if the order or decision of the agency substantially affects a fundamental vested right, the trial court, in determining under *Code Civ. Proc. § 1094.5* whether there has been an abuse of discretion because the findings are not supported by the evidence, must exercise its independent judgment on the evidence and find an abuse of discretion if the findings are not supported by the weight of the evidence. The court of appeal then ruled that it could not be doubted that this employee's right to continue in his permanent public employment was a vested right within the meaning of that rule.

[d] Duty to Exercise Independent Judgment

In ***Barber v. Long Beach Civil Service Commission*** *(1996) 45 Cal. App. 4th 652, 53 Cal. Rptr. 2d 4* , a discharged police officer filed a petition for writ of administrative mandate against the Long Beach Civil Service Commission, which was denied by the superior court. The officer's discharge had been based upon allegations of mishandling of criminal evidence, filing false information in an arrest report and providing false testimony under oath. The findings and conclusions of the Civil Service Commission were substantially based upon witness testimony, which was disputed by witnesses on behalf of the officer. In ruling on the petition, the superior court declined to exercise its independent judgment and review witness credibility. The court of appeal reversed, holding that the superior court had a duty to make an independent determination regarding the credibility of witnesses and therefore remanded for a new trial (*45 Cal. App. 4th 652, 658-659)* .

[e] Constitutional Authority to Exercise Judicial Functions

Strumsky v. San Diego County Employees' Retirement Ass'n *(1974) 11 Cal. 3d 28, 112 Cal. Rptr. 805, 520 P.2d 29* , was discussed in *§ 36.44[3][b]*.

[4] Additional Authorities

[a] Authority to Exercise Independent Judgment

The court of appeal in *Sienkiewicz v. County of Santa Cruz (1987) 240 Cal. Rptr. 451* , affirmed a trial court's denial of a petition for extraordinary relief and dismissal of a complaint for damages by a detention officer against a county. In discussing the respective standards of review, the court said that a trial court reviewing a decision of a local civil service commission to dismiss an employee must exercise independent judgment because a fundamental right is involved. The court of appeal, however, reviews the trial court's decision for substantial evidence to support the trial court's decision (*195 Cal. App. 3d 134, 137)* .

Parker v. City of Fountain Valley (1981) 127 Cal. App. 3d 99, 179 Cal. Rptr. 351 , was an action in which a tenured city police officer appealed the denial of his petition for a writ of mandate, by which he sought reinstatement to his position in the city police department. The court of appeal reversed the trial court's denial of the writ, stating that it was unclear which standard of review the trial court actually employed. However, the court of appeal noted that the proper standard of review was the independent-judgment test because the case involved a fundamental vested right (*127 Cal. App. 3d 99, 118)* .

[b] Fundamental Vested Rights

See the cases discussed in *§ 36.44[4][a]*.

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Volume 3 Chapters 34-39 CHECKS AND BANKS---to---CIVIL SERVICE
CHAPTER 36 CIVIL SERVICE
PART II. FORMS

3-36 California Points & Authorities § 36.45

§ 36.45 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Discipline of Civil Service Employee--Ordinary Mandate Available to Review Abuse of Discretion in Disciplinary Decision Not Requiring Evidentiary Hearing

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Petitioner,	)	IES IN SUPPORT OF PETITION FOR WRIT OF
vs.	)	MANDATE
_____ [*name*],	)	[*Code Civ. Proc. §§ 1085, 1086*]
Respondent.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT MAY REVIEW THE DECISION OF RESPONDENT _____ [*specify agency, e.g.,* STATE PERSONNEL BOARD] TO _____ [*specify disciplinary decision, e.g.,* SUSPEND PETITIONER WITHOUT PAY FOR FOUR DAYS] BY ORDINARY MANDATE BECAUSE THE RESPONDENT'S DECISION IN THIS CASE WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND THEREFORE CONSTITUTED AN ABUSE OF ITS DISCRETION.

A. Mandate to Compel Performance of Mandatory Duty. A mandate proceeding is the proper means by which a

court may compel an inferior tribunal or board to perform an act that the law specially enjoins as a duty arising from an office, trust, or station (*Code Civ. Proc. § 1085(a)*).

B. Ordinary Mandate Available to Review Agency's Abuse of Discretion. In cases in which administrative mandate under *Code of Civil Procedure Section 1094.5* is unavailable because an evidentiary hearing is not required by law, ordinary mandate under *Code of Civil Procedure Section 1085(a)* is available to correct an agency's abuse of discretion if the petitioner clearly establishes his or her right to have discretion exercised in a particular manner (Coelho v. State *Personnel Bd. (1989) 209 Cal. App. 3d 968, 971, 257 Cal. Rptr. 557*).

[*Optional*] **C. Ordinary Mandate Available to Review State Agency Decision When State Personnel Board Fails to Render Timely Decision.** The State Personnel Board's failure to render a decision within the time periods specified in *Government Code Section 18671.1* constitutes an exhaustion of all administrative remedies for the state employee, unless he or she has waived the time limits (*Gov. Code § 18671.1*). If the employee has not waived those time limits, he or she may bring an ordinary mandate proceeding under *Code of Civil Procedure Section 1085* directly against the appointing agency to set aside the adverse action (*California Correctional Peace Officers Assn. v. State Personnel Bd. (1995) 10 Cal. 4th 1133, 1151, 43 Cal. Rptr. 2d 693, 899 P.2d 79*).

D. Disciplinary Action Not Supported by Substantial Evidence Constitutes Abuse of Discretion. An administrative decision imposing discipline on a civil service employee that is not supported by substantial evidence constitutes an abuse of discretion that may be corrected by ordinary mandate (*Coelho v. State Personnel Bd. (1989) 209 Cal. App. 3d 968, 971, 971 n.2, 257 Cal. Rptr. 557*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a petition for writ of ordinary mandate [*Code Civ. Proc. §§ 1085(a), 1086*] for review of a decision by the State Personnel Board or a local public entity imposing discipline on a civil service employee in those cases in which an evidentiary hearing is not required by law. An example of such a case would be a suspension of a state civil service employee for five days or less [*see Gov. Code § 19576*]. The basis for seeking the writ is that the agency's decision constituted an abuse of discretion.

In addition, by using Optional Paragraph C, this form may be used in circumstances in which the State Personnel Board has failed to render a timely decision, as required by *Gov. Code § 18671.1*, in proceedings to review the state agency's adverse personnel decision, in which case the employee may elect to bring an ordinary mandate proceeding directly against the employing agency to challenge the adverse action. Alternatively, the employee may bring a mandate proceeding against the Board to compel the Board to render a decision within a time period to be set by the court [*see California Correctional Peace Officers Assn. v. State Personnel Bd. (1995) 10 Cal. 4th 1133, 1151, 43 Cal. Rptr. 2d 693, 899 P.2d 79* , discussed in *§ 36.45*[3][b]]. Administrative mandate is not available in such a case because there will

have been no final administrative adjudicatory decision by the Board [*California Correctional Peace Officers Assn. v. State Personnel Bd. (1995) 10 Cal. 4th 1133, 1150, 43 Cal. Rptr. 2d 693, 899 P.2d 79*].

In cases in which discipline was imposed after an administrative hearing that was required by law, the employee should seek review by administrative mandate under *Code Civ. Proc. §§ 1094.5* or *1094.6*. For points and authorities for use in support of a petition for administrative mandate, see *§§ 36.20 -36.44*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In particular, counsel should insert argument showing that the agency abused its discretion in imposing discipline because it lacked substantial evidence to support its decision.

[3] Discussion of Authorities

[a] Ordinary Mandate Available to Review Agency's Abuse of Discretion

In ***Coelho v. State Personnel Bd.*** *(1989) 209 Cal. App. 3d 968, 257 Cal. Rptr. 557* , petitioner, a state civil service employee, sought a writ of administrative mandate to review a decision of the State Personnel Board suspending him for four days without pay on grounds of inefficiency, inexcusable neglect of duty, dishonesty, and other misbehavior. Among other things, petitioner alleged that the Board's findings were based on insufficient evidence and that the Board had therefore abused its discretion in suspending petitioner. The trial court sustained a demurrer to the petition on the ground that it lacked jurisdiction, and petitioner appealed.

The court of appeal reversed. The court noted, as petitioner conceded, that administrative mandate under *Code Civ. Proc. § 1094.5* was unavailable in this case because administrative mandate is limited to review of decisions in which an evidentiary hearing is required by law, and the Board was not required to hold a hearing to impose a suspension of five days or less under *Gov. Code § 19576* (*209 Cal. App. 3d 968, 970-971)* . However, the court noted that "ordinary" or "traditional" mandamus under *Code Civ. Proc. § 1085* is available to correct an abuse of discretion when a petitioner clearly establishes his or her right to have discretion exercised in a particular way. The court stated that a demurrer to a petition for extraordinary relief should be overruled if the petition alleges facts entitling the petitioner to ordinary mandamus, even if the petition erroneously requests administrative mandamus. Examining the petition in this case, the court noted that the petition alleged that the Board had abused its discretion in imposing discipline because its decision was not supported by substantial evidence. The court held that if the allegations were true, the Board had a legal duty to revoke the adverse action. Therefore, the court concluded that the trial court erred in sustaining the demurrer and should have considered the merits of the petition (*209 Cal. App. 3d 968, 971)* .

[b] Ordinary Mandate Available to Review State Agency Decision When State Personnel Board Fails to Render Timely Decision

In ***California Correctional Peace Officers Assn. v. State Personnel Bd.*** *(1995) 10 Cal. 4th 1133, 43 Cal. Rptr. 2d 693, 899 P.2d 79* , the plaintiff, a public employee union, brought an action on behalf of a number of its members who were subject to disciplinary action by the Department of Corrections and Department of Youth Authority against the State Personnel Board seeking to have the disciplinary actions against the members dismissed and the members restored to their positions for backpay, based on the Board's failure to render decisions in their cases within the statutory time limits provided in *Gov. Code § 18671.1*. The superior court denied the relief sought by the plaintiff and instead merely ordered the Board to hold hearings in the cases in which no hearings had yet been held and to render decisions in those cases in which hearings had been held. Plaintiff appealed.

At the time the court of appeal heard the case, the Board had complied with the superior court's order and rendered decisions in all of the cases. The court of appeal reversed the superior court judgment and remanded for proceedings to determine which employees had waived the statutory time limits. The court of appeal held that those employees could

seek review of the Board's decision by administrative mandate under *Code Civ. Proc. § 1094.5*; however, for employees who had not waived the time limits, the court held that the Board's action was "ineffective" and that those employees could bring a mandate proceeding under *Code Civ. Proc. § 1085* (*now see Code Civ. Proc. § 1085(a)*) to compel the department that employed them to set aside its adverse action and that the employer would have the burden of proof in such proceedings. The California Supreme Court granted review on petitions by both the plaintiff and the Board.

Although not agreeing with the court of appeal's reasoning, the Supreme Court affirmed the judgment remanding the case to the superior court. The Court first held that the time limits within which the Board must render a decision under *Gov. Code § 18671.1* are directory, rather than mandatory, and that the Board's failure to render a decision within those limits did not deprive the Board of jurisdiction to continue investigating and hearing the case (*10 Cal. 4th 1133, 1145-1148, 43 Cal. Rptr. 2d 693, 899 P.2d 79*). The Court observed that the time limits may be enforced by bringing a mandate proceeding against the Board to compel the Board to hear and decide the case, but the Court rejected the Board's argument that this was the employee's sole remedy in such a case (*10 Cal. 4th 1133, 1148, 43 Cal. Rptr. 2d 693, 899 P.2d 79*). The Court noted that the statute provided that the Board's failure to render a timely decision constitutes an exhaustion of administrative remedies and impliedly authorizes the plaintiff to bring a mandate proceeding under *Code Civ. Proc. § 1085* (*now see Code Civ. Proc. § 1085(a)*) against the appointing power to seek judicial relief from the adverse action (*10 Cal. 4th 1133, 1148-1150, 43 Cal. Rptr. 2d 693, 899 P.2d 79*). The Court also rejected the plaintiff's contention that failure to comply with the time limit requires dismissal of both the appeal and the adverse action, reasoning that the Legislature's intent was not to penalize the state agencies and the people of the state by requiring reinstatement of an incompetent or untrustworthy employee merely because the Board failed to render a timely decision in the employee's appeal (*10 Cal. 4th 1133, 1150, 43 Cal. Rptr. 2d 693, 899 P.2d 79*). The Court therefore concluded that if the Board fails to render a decision within the time allowed, the employee may seek a writ of mandate either against the Board to enforce compliance by a date certain or directly against the employing power to compel reversal of the adverse action. The Court further held that if the Board renders a favorable decision while the mandate proceeding is pending, the employee may dismiss that proceeding. If the decision is not favorable, the employee may either proceed with the mandate proceeding, the ruling on which would displace the Board's ruling, or dismiss the mandate proceeding against the employing power and seek review of the board's decision by administrative mandate under *Code Civ. Proc. § 1094.5* (*10 Cal. 4th 1133, 1151, 43 Cal. Rptr. 2d 693, 899 P.2d 79*).

NOTE:

Although the Court's decision allows a state civil service employee to proceed directly against the employing department in an ordinary mandate proceeding if the Board fails to render a timely decision regarding his or her administrative appeal, the Court also ruled that the employee, rather than the employing power, has the burden of proof in such a mandate proceeding [*California Correctional Peace Officers Assn. v. State Personnel Bd. (1995) 10 Cal. 4th 1133, 1153-1155, 43 Cal. Rptr. 2d 693, 899 P.2d 79*]. By contrast, in proceedings before the Board, the employing power has the burden of proving that the employee engaged in the conduct on which the charge is based and that the conduct is cause for discipline under *Gov. Code § 19572* [*see California Correctional Peace Officers Assn. v. State Personnel Bd. (1995) 10 Cal. 4th 1133, 1153, 43 Cal. Rptr. 2d 693, 899 P.2d 79* ; *Parker v. City of Fountain Valley (1981) 127 Cal. App. 3d 99, 113, 179 Cal. Rptr. 351*]. Thus, although the employee may proceed directly against the appointing power, the employee may be better advised in many instances to waive the time limits and to continue with proceedings before the Board, in which the burden of proof will be on the employer.

[c] Disciplinary Action Not Supported by Substantial Evidence Constitutes Abuse of Discretion

Coelho v. State Personnel Bd. *(1989) 209 Cal. App. 3d 968, 257 Cal. Rptr. 557* , is discussed in *§ 36.45[3][a]*.

[4] Additional Authorities

[a] Mandate to Compel Payment of Prevailing Wage

In *Union of American Physicians v. Civil Service Com. (1982) 129 Cal. App. 3d 392, 181 Cal. Rptr. 93* , the court of appeal held that a local civil service commission violated a city charter provision requiring the development of salary ranges from midpoints of comparable pay ranges for public employees elsewhere. The commission, instead of selecting the midpoint in a salary range, chose the fourth step in a salary ladder with 18 steps from a comparable job classification in another county. The court of appeal remanded the case, directing the trial court to issue a writ of mandate commanding the civil service commission to recompute the prevailing basic pay rates (*129 Cal. App. 3d 392, 397, 181 Cal. Rptr. 93*).

[b] Wage Determination an Abuse of Discretion

In *California State Police Ass'n v. California (1981) 120 Cal. App. 3d 674, 175 Cal. Rptr. 34* , the State Police Association and others sought relief from the state and the State Personnel Board regarding the board's determination of police salaries. Plaintiffs contended that pursuant to *Gov. Code § 18850*, the board had a duty to consider the salary rates of, and duties performed by, other state police organizations, in setting plaintiffs' salary rates. The board allegedly violated its duty by refusing to consider these factors, resulting in plaintiffs being paid substantially less than the comparable groups. After their application for relief was denied by the board, plaintiffs filed a complaint for declaratory relief, and petition for writ of mandate in the superior court. The court sustained defendants' demurrer to the complaint on the ground that no cause of action could be stated, and plaintiffs appealed from the resulting judgment of dismissal.

The court of appeal reversed. It held that, because *Gov. Code § 18850(a)* imposes a mandatory duty on the board to consider prevailing salary rates in other public and private employment, the plaintiffs successfully stated a cause of action by alleging failure to fulfill that duty (*120 Cal. App. 3d 674, 680, 175 Cal. Rptr. 34*). While the board does have broad discretion in setting salaries, its discretion may be abused by a refusal to consider the applicable comparable rates of other private or public employees (*120 Cal. App. 3d 674, 681, 175 Cal. Rptr. 34*).

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§ 36.46 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Compel Payment of Prevailing Wage Rate and Retroactive Salary Increase

[1] FORM

[*Caption. See § 36.20.*]

THIS MANDATE PROCEEDING IS THE PROPER MEANS TO COMPEL RESPONDENT CIVIL SERVICE COMMISSION TO PERFORM ITS MANDATORY DUTY TO ASCERTAIN THE PREVAILING WAGE, TO ADOPT AN ORDINANCE OR REGULATION PROVIDING FOR PAYMENT OF SUCH PREVAILING WAGE, AND TO PROVIDE FOR A RETROACTIVE SALARY INCREASE.

A. Mandate to Compel Performance of Mandatory Duty. A mandate proceeding is the proper means by which to compel a tribunal, corporation, board, or person to perform an act which the law specially enjoins as a duty resulting from an office, trust, or station (*Code Civ. Proc. § 1085(a)*).

[*Optional*] **B. Mandatory Duty to Ascertain Prevailing Wage.** The State Department of Personnel Administration (*Gov. Code § 19815(a)*) is required to establish and adjust salary ranges for each class of position in the state civil service after giving consideration to the prevailing rates for comparable service in other public employment and in private business (*Gov. Code § 19826(a)*).

C. Mandate to Compel Payment of Prevailing Wage. A mandate proceeding is the proper means by which to compel a civil service commission to perform its mandatory duty to ascertain the prevailing wage and to adopt an ordinance or regulation providing for the payment of such prevailing rate when the rates of compensation adopted by the commission are so palpably unreasonable and arbitrary as to indicate an abuse of discretion as a matter of law (*Walker v. County of Los Angeles (1961) 55 Cal. 2d 626, 639, 12 Cal. Rptr. 671, 361 P.2d 247* ; *City & County of San Francisco v. Boyd (1943) 22 Cal. 2d 685, 690, 140 P.2d 666*).

D. Mandate to Compel Arbitration of Wage Dispute. Where an agreement between a governmental agency and a

union provides for arbitration of disputes over departmental rules, personnel policies, and working conditions, any doubts as to the arbitrability of particular disputes are to be resolved in favor of coverage (SEIU, Local 347 v. *City of Los Angeles (1996) 42 Cal. App. 4th 1546, 1551-1553, 50 Cal. Rptr. 2d 216*).

E. Liberal Construction of Prevailing Wage Statute. A prevailing wage statute or provision must be liberally construed in favor of the worker, and the civil service commission has no right to pay workers less than the prevailing wage (*Walker v. County of Los Angeles (1961) 55 Cal. 2d 626, 635, 12 Cal. Rptr. 671, 361 P.2d 247* ; *Goodrich v. Fresno (1946) 74 Cal. App. 2d 31, 36, 167 P.2d 784*).

F. Reasonable Correspondence With Wages Elsewhere. Wages are not in accord with the generally prevailing rates of wages for like service and working conditions in private employment or in other comparable governmental organizations in the state, as required by ordinance, unless there is a reasonable or just correspondence or harmony between the rates established and those prevailing elsewhere (*City & County of San Francisco v. Boyd (1943) 22 Cal. 2d 685, 690, 140 P.2d 666*).

G. Wage Determination an Abuse of Discretion. The Civil Service Board's determination of rates of compensation was an abuse of discretion when the board failed to ascertain the prevailing wage and adopted a salary ordinance without regard to wages paid elsewhere (*Walker v. Los Angeles County (1961) 55 Cal. 2d 626, 637, 12 Cal. Rptr. 671, 361 P.2d 247*).

H. Mandate to Compel Retroactive Salary Increase. A mandate proceeding is also the proper means by which to compel payment of a retroactive salary increase to civil service employees in line with a prevailing wage doctrine (*Walker v. County of Los Angeles (1961) 55 Cal. 2d 626, 640, 12 Cal. Rptr. 671, 361 P.2d 247*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a petition for writ of mandate to compel a civil service commission to ascertain the prevailing wage, adopt an ordinance or regulation providing for payment of such prevailing wage, and to provide for a retroactive salary increase. Counsel should include in the form either optional Paragraph B or a paragraph citing appropriate local authority for a mandatory prevailing wage rule.

Counsel should add argument linking the points in this form with the facts of his or her case.

[3] Discussion of Authorities

[a] Mandate to Compel Payment of Prevailing Wage

Walker v. County of Los Angeles *(1961) 55 Cal. 2d 626, 12 Cal. Rptr. 671, 361 P.2d 247* , was an appeal by

defendant county from a judgment of the superior court in an action for declaratory relief and a proceeding in mandate to compel the county board of supervisors to ascertain the prevailing wage rate and provide for such salary for civil service employees. In 1958, the annual survey of wage, employment, and other economic conditions was conducted, but the board refused to apply it in fixing salaries for the year, and it continued the wage scale of the preceding year. The board at no time made a formal finding of prevailing wages before adopting this salary ordinance. Later in the year the matter was reconsidered by the chief administrative officer and the board, and an across-the-board wage increase of five and one-half percent was passed. The trial court rendered a declaratory judgment setting forth the rights and duties of the parties, and it ordered the issuance of a peremptory writ of mandate requiring the board to ascertain and declare the prevailing rate.

The Supreme Court upheld the trial court's findings and judgment, although it altered the court's interpretation of the charter provision as not including fringe benefits within the definition of salary. Citing case authority, the Court stated that the prevailing wage statute should be liberally construed in favor of the worker, that there must be a reasonable correspondence between the salary rates established and those prevailing elsewhere, and that courts may interfere with a board's determinations when its actions are fraudulent or so palpably unreasonable and arbitrary as to indicate an abuse of discretion as a matter of law (*55 Cal. 2d 626, 635-639)* . Because the board had not ascertained prevailing wages before adopting the first ordinance, as required by county charter, the Supreme Court upheld the trial court's determination that the salary ordinance was arbitrary, capricious, and an abuse of discretion (*55 Cal. 2d 626, 639)* . It upheld the order for a writ of mandate, stating that mandate is a proper remedy to compel a city council or city civil service board to perform a mandatory duty when its actions indicate an abuse of discretion, and stating that a writ of mandate properly issued for payment of a retroactive salary increase when the increase resulted from having salaries legally fixed in the manner required by the charter (*55 Cal. 2d 626, 639-641)* .

City & County of San Francisco v. Boyd *(1943) 22 Cal. 2d 685, 140 P.2d 666* , was a proceeding in mandate brought by the petitioner city and county and its Public Utilities Commission to compel its controller to audit and approve wage claims of certain employees at the rates of compensation fixed by ordinance. Respondent controller contended that such claims would constitute an illegal expenditure of public funds since the ordinance was void and contravening the city charter which provided that the civil service commission was to prepare, and the board of supervisors was to adopt, a schedule of compensations in accord with the generally prevailing rates of wages for like service and working conditions in private employment or in other comparable governmental organizations in the state.

The Supreme Court held that the charter provisions did not require that the wage rates be identical with or not higher than the generally prevailing rates, but only that there be a reasonable or just correspondence between the rates. Therefore, even though the rates of wages for certain employees ranged from $.85 to $.971/2 per hour, where the prevailing wage was $.70 to $.931/2 per hour, the Court found the proposed rates to be within the discretion of the rate-making authority. The Court supported its decision by stating the rule that the determination of whether proposed rates of compensation are in accord with generally prevailing rates is within the discretion of the rate-making authority, and the courts will not interfere with that determination unless the rate-setting action was fraudulent or so palpably unreasonable and arbitrary as to indicate an abuse of discretion as a matter of law (*22 Cal. 2d 685, 690)* . The Supreme Court, therefore, issued a peremptory writ of mandate and ordered that the writ issue on the filing of the decision (*22 Cal. 2d 685, 695)* .

[b] Mandate to Compel Arbitration of Wage Dispute

In **SEIU, Local 347 v.** ***City of Los Angeles*** *(1996) 42 Cal. App. 4th 1546, 50 Cal. Rptr. 2d 216* , a union representing employees from the Department of Public Works of the City of Los Angeles filed a petition to compel arbitration of employee grievances with the department, claiming entitlement to "premium pay" under the Los Angeles City Administrative Code for city employees working in high-noise areas. The court held the issue was arbitrable under an agreement between the city and the union which provided for arbitration of disputes over departmental rules, personnel policies, and working conditions. The court also held that any doubts as to whether the subject arbitration clause applied

were to be resolved in favor of coverage (*42 Cal. App. 4th 1546, 1551-1553)* .

[c] Liberal Construction of Prevailing Wage Statute

Walker v. County of Los Angeles *(1961) 55 Cal. 2d 626, 12 Cal. Rptr. 671, 361 P.2d 247* , is discussed in *§ 36.46[3][a]*.

Goodrich v. Fresno *(1946) 74 Cal. App. 2d 31, 167 P.2d 784* , was an appeal by civil service employees from a judgment of the superior court in a mandate proceeding brought to compel the city to reclassify employees and pay their demands for additional wages. The petitioners contend that they were wrongfully classified, as a result of which they have been receiving less than the prevailing wage paid in private employment in the city in the trades in which they are working. The superior court found that the employees had not been wrongfully or arbitrarily classified, nor had they been paid less than the prevailing wage in private employment, as referred to in the charter. Each petitioner was found to be entitled to receive a certain amount per hour not anything more than what had already been paid. The court thus denied the petitions for writs of mandate, and the petitioners appealed. The court of appeal stated that although a prevailing wage statute should be liberally construed in favor of the worker, city officials have a certain discretion in the matter of classifying employees and assigning duties to them (*74 Cal. App. 2d 31, 36)* . The court thoroughly reviewed the wages of the petitioners and those of private employees and concluded that the evidence, with respect to the amounts actually paid, supported the findings and judgment. The court of appeal therefore affirmed the judgment of the lower court (*74 Cal. App. 2d 31, 40)* .

[d] Reasonable Correspondence With Wages Elsewhere

City & County of San Francisco v. Boyd *(1943) 22 Cal. 2d 685, 140 P.2d 666* , is discussed in *§ 36.46[3][a]*.

[e] Wage Determination an Abuse of Discretion

Walker v. County of Los Angeles *(1961) 55 Cal. 2d 626, 12 Cal. Rptr. 671, 361 P.2d 247* , is discussed in *§ 36.46[3][a]*.

[f] Mandate to Compel Retroactive Salary Increase

Walker v. County of Los Angeles *(1961) 55 Cal. 2d 626, 12 Cal. Rptr. 671, 361 P.2d 247* , is discussed in *§ 36.46[3][a]*.

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§ 36.47 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Prevent Public Employer From Requiring Employee to Use Accrued Compensatory Time

[1] FORM

[*Caption. See § 36.20.*]

A WRIT OF MANDATE SHOULD NOT ISSUE TO PREVENT THE RESPONDENT FROM REQUIRING THE PETITIONER TO USE ACCRUED COMPENSATORY TIME, BECAUSE THE RESPONDENT IS AUTHORIZED TO DO SO UNDER THE FAIR LABOR STANDARDS ACT.

The Fair Labor Standards Act Does Not Prohibit Public Employer From Compelling Employees to Use Accrued Compensatory Time. Although the Act restricts an employer's efforts to prohibit the use of compensatory time (*see 29 U.S.C. § 207(o)(5)*), it says nothing about restricting an employer's efforts to require employees to use compensatory time (*Christensen v. Harris County (2000) 529 U.S. 576, 120 S. Ct. 1655, 1660-1662, 146 L. Ed. 2d 621*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a petition for administrative mandate to prevent a public employer from implementing a policy requiring its employees to use their accrued compensatory time (i.e., time granted by a public employer in lieu of cash payment for overtime work, pursuant to an agreement or understanding with the employees).

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. The argument should, therefore, establish that the agreement between the employer and employees authorizing compensatory time does not contain any restrictions on the employer's power to compel the use of accrued

compensatory time.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] The Fair Labor Standards Act Does Not Prohibit Public Employer From Compelling Employees to Use Accrued Compensatory Time

In ***Christensen v. Harris County*** *(2000) 529 U.S. 576, 120 S. Ct. 1655, 146 L. Ed. 2d 621* , a county adopted a policy of requiring its employees to schedule time off in order to reduce the amount of accrued compensatory time. The county adopted this policy to minimize its potential obligation to pay cash to employees who had reached the statutory cap on accrued compensatory time and to employees who had any unused compensatory time on the termination of their employment (*see 29 U.S.C. § 207(o)(3)(A), (4)*). The plaintiffs, who were deputy sheriffs employed by the county, sued for a declaration that the policy violated the Fair Labor Standards Act (FLSA; *see 29 U.S.C. § 201 et seq.*).

The FLSA provides that, if agreed to by its employees, a public employer may compensate the employees for overtime work by granting them compensatory time at a rate of 1.5 hours for every overtime hour worked (*29 U.S.C. § 207(o)(1)*). The employer must honor an employee's request to use compensatory time within a reasonable period after the request, so long as the use of compensatory time would not unduly disrupt the employer's operations (*29 U.S.C. § 207(o)(5)*; *29 C.F.R. § 553.25*). If an employee accumulates the maximum amount of compensatory time allowed under the FLSA, the employer must pay cash compensation for additional overtime work (*29 U.S.C. § 207(o)(3)(A)*). Also, the employer must pay an employee cash for any unused compensatory time remaining at the termination of employment (*29 U.S.C. § 207(o)(4)*).

The plaintiffs conceded that the FLSA did not expressly prohibit a public employer from compelling its employees to use their accrued compensatory time. However, they contended that the compelled use of compensatory time was implicitly prohibited by the FLSA provision requiring an employer to honor employees' reasonable requests to use compensatory time (*see 29 U.S.C. § 207(o)(5)*). Their argument was based on the canon of statutory interpretation *expressio unius est exclusio alterius*. That is, the plaintiffs argued that the FLSA's express grant of control to the employee to use compensatory time (subject to the limitation regarding undue disruption of the employer's operations) implies that all other methods of spending compensatory time are excluded. After the district court entered a declaratory judgment that the county's policy violated the FLSA, the Fifth Circuit reversed. The Supreme Court granted certiorari to resolve a conflict among the circuits (*120 S. Ct. 1655, 1659-1660)* .

The Supreme Court rejected the plaintiffs' argument. The Court did accept the proposition that when a statute limits a thing to be done in a particular mode, it includes a negative of any other mode. However, the Court explained that the "thing to be done" under the FLSA provision pertaining to employees' requests to use compensatory time was not the expenditure of compensatory time, but rather the grounds on which an employer may deny an employee's request to use compensatory time. Thus, the Court read the statute not as setting forth the exclusive method for using compensatory time, but as setting up a safeguard to ensure that an employee will receive timely compensation for overtime work. Put another way, the statute (*29 U.S.C. § 207(o)(5)*) restricts an employer's efforts to prohibit the use of compensatory time, but it says nothing about restricting an employer's efforts to require employees to use compensatory time (*120 S. Ct. 1655, 1660-1661)* .

In support of this interpretation, the Court cited other FLSA provisions that reflected a concern for ensuring that

employees receive timely compensation for overtime work. For example, the FLSA limits the amount of compensatory time an employee may accrue; additional overtime work must be compensated with cash (*29 U.S.C. § 207(o)(3)(A)*) (*120 S. Ct. 1655, 1661)* .

The Court found further support for its interpretation in the fact that under the FLSA an employer is free to decrease the hours that employees work (*see Barrentine v. Arkansas-Best Freight Sys., Inc. (1981) 450 U.S. 728, 739, 101 S. Ct. 1437, 67 L. Ed. 2d 641*) and to cash out an employee's accumulated compensatory time by paying the employee's regular hourly wage for each hour accrued (*29 U.S.C. § 207(o)(3)(B)*). The compelled use of compensatory time amounts to doing both of these things at once. Therefore, the Court reasoned, it would make little sense to interpret the FLSA as prohibiting the combination of these steps when each independently is lawful (*120 S. Ct. 1655, 1662)* .

The Supreme Court then rejected the plaintiffs' contention that the Court should defer to an interpretation of the relevant FLSA provisions that was set forth in an opinion letter issued by the United States Department of Labor. Before adopting its policy that required employees to use their accrued compensatory time, the defendant county had requested advice from the Department of Labor's Wage and Hour Division. In response, the Acting Administrator of the Division issued an opinion letter stating that in the absence of an agreement with the employees, "neither the statute nor the regulations permit an employer to require an employee to use accrued compensatory time." The Supreme Court acknowledged that a court must give effect to an agency's regulation containing a reasonable interpretation of an ambiguous statute. However, such deference is warranted for an interpretation contained in an opinion letter that was not issued after, for example, a formal adjudication or notice-and-comment rulemaking. Instead, interpretations contained in formats such as opinion letters, policy statements, agency manuals, and enforcement guidelines are entitled to "respect," but only to the extent that those interpretations are persuasive. In this case, the Supreme Court found the Division's opinion letter unpersuasive for the reasons discussed above. Moreover, the agency regulation dealing with compensatory time (*29 C.F.R. § 553.23(a)(2)*) was not owed deference in this case because the regulation did not address the issue of the compelled use of compensatory time; it simply permitted an agreement between employer and employees to specify methods of using compensatory time. Finally, the Division's opinion letter was not owed deference as a interpretation of the regulation, since the regulation had no ambiguity that needed interpretation (*120 S. Ct. 1655, 1662-1663)* .

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3-36 California Points & Authorities § 36.48

§ 36.48 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Compel Civil Service Commission to Permit Applicant to Take Examination--Limited Powers of Commission--Examination Requirements

[1] FORM

[*Caption. See § 36.20.*]

A MANDATE PROCEEDING IS THE PROPER MEANS BY WHICH TO COMPEL A CIVIL SERVICE COMMISSION TO PERMIT AN APPLICANT TO TAKE AN EXAMINATION WHEN THE COMMISSION HAS EXCEEDED ITS AUTHORITY IN ESTABLISHING EXAMINATION RULES WHICH INCLUDE SUCH APPLICANT.

A. Mandate to Compel Performance of Mandatory Duty. [*See § 36.46, Paragraph A.*]

[*Optional*] **B. Examination Qualifications Established by State Personnel Board.** The State Personnel Board may establish minimum qualifications for determining the fitness of applicants for examinations and may refuse to examine anyone who lacks any of the requirements established (*Gov. Code §§ 18931, 18935(a)*).

C. Mandate to Compel Civil Service Commission to Permit Applicant to Take Examination. A mandate proceeding is the proper means by which to compel a civil service commission to permit an applicant to take an examination when the commission has exceeded its jurisdiction in refusing to permit the applicant to take the exam (*see Terry v. Civil Serv. Comm'n (1952) 108 Cal. App. 2d 861, 872, 240 P.2d 691*).

D. Limited Powers of Commission. A civil service commission derives its power from _____ [the charter *or* statute] creating it and may not exercise any power not directly given or necessarily implied from the prerogatives so conferred (*Haub v. Tuttle (1926) 80 Cal. App. 561, 567, 251 P. 925*).

E. Examination Requirements. The courts may interfere with any rule adopted by a civil service commission

establishing examination requirements where the rule is beyond the power of the commission as authorized by _____ [charter provision *or* statute] (*Bruce v. Civil Serv. Bd. (1935) 6 Cal. App. 2d 633, 637-639, 45 P.2d 419*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a petition for writ of mandate to compel a civil service commission to permit an applicant to take an examination where the requirements set for the examination are beyond the powers of the commission as authorized by statute or charter provision. Counsel should include in the form either optional Paragraph B or a paragraph citing appropriate local authority for examination qualifications.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Mandate to Compel Civil Service Commission to Permit Applicant to Take Examination

Terry v. Civil Serv. Comm'n (1952) 108 Cal. App. 2d 861, 240 P.2d 691 , is discussed in *§ 36.49[3][a]*. Although the court did not directly discuss the appropriateness of the writ of mandate as a remedy for the civil service commission's enactment of a rule which arbitrarily discriminated among applicants for a civil service examination, it affirmed the lower court judgment granting the writ.

[b] Limited Powers of Commission

Haub v. Tuttle (1926) 80 Cal. App. 561, 251 P. 925 , was an appeal by the members and secretary of a city civil service commission from a judgment of the superior court in a mandate proceeding brought by a civil service employee. The commission held a competitive, promotional examination for the position of fire department lieutenant and graded the examination so that merit, efficiency, character, and conduct, as ascertained by a written examination, accounted for 60 points; a physical examination accounted for 10 points; merit, efficiency, character, and conduct, as ascertained by records of the department, accounted for 20 points; and seniority accounted for a maximum of 10 points. The trial court commanded the commission to certify all the applicants for promotion in the fire department on the basis of their records of merit, efficiency, character, conduct, and seniority, and to refrain from compelling applicants to undergo mental or physical tests. The court of appeal reviewed the charter provisions which govern the examination and appointment of employees and determined that the provisions did not authorize the commission to base its determinations of eligibility for promotions on competitive examinations. The court stated that since the charter was entirely void of any language which even inferentially justified the requirement of competitive examinations and the commission derived its power from the charter creating it, the commission has no power to hold competitive

examinations. The court ruled, however, that the commission could require applicants for promotion to undergo tests to determine their physical and mental fitness to occupy the position, since physical fitness and mental health are prime requisites for a fireman, whatever his work in the service. The court therefore reversed the judgment of the trial court.

[c] Examination Requirements

Bruce v. Civil Serv. Bd. (1935) 6 Cal. App. 2d 633, 45 P.2d 419 , was an appeal by a city civil service board from a judgment of the superior court in injunction and mandate proceedings brought by a civil service applicant. The applicant had been denied leave to take an examination for the position of patrolman because he had not completed the 12th grade as required. The superior court had issued a writ of mandate ordering the board to permit him to compete and it had enjoined the city from conducting examinations for patrolman until appeals were concluded. The court of appeal reviewed the relevant charter provisions and civil service rules and held that the charter provisions requiring that every civil service applicant be able to read and write the English language and directing that examinations be for the purpose of determining qualifications for a particular position and be practical and fair tests of the applicant's fitness to discharge the duties of the position sought, did not authorize the board to limit the patrolman examination to those who had completed the 12th grade. The court held that a civil service commission derives its powers from the charter creating it and may not exercise any power not directly given or necessarily implied from those conferred. The court found that the board had transgressed its authority by denying an applicant the right to take an examination which would practically and fairly test his fitness to become a police officer, that is, by adopting the standard that he could not compete unless he presented a 12th grade certificate or evidence that his education demonstrates such ability as the certificate would indicate. The court affirmed the judgment of the trial court.

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3-36 California Points & Authorities § 36.49

§ 36.49 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Compel Civil Service Commission to Permit Applicant to Take Examination--Denial of Equal Protection

[1] FORM

[*Caption. See § 36.20.*]

A MANDATE PROCEEDING IS THE PROPER MEANS BY WHICH TO COMPEL A CIVIL SERVICE COMMISSION TO PERMIT AN APPLICANT TO TAKE AN EXAMINATON IF THE REQUIREMENTS SET FOR THE EXAMINATION ARE ARBITRARY AND UNREASONABLE.

A. Mandate to Compel Performance of Mandatory Duty. [*See § 36.46, Paragraph A.*]

[*Optional*] **B. Examination Qualifications Established by State Personnel Board.** [*See § 36.48, Paragraph B.*]

C. Mandate to Compel Civil Service Commission to Permit Applicant to Take Examination. [*See § 36.48, Paragraph C.*]

D. Limited Powers of Commission. [*See § 36.48, Paragraph D.*]

E. Denial of Equal Protection. The courts may interfere with any rule which arbitrarily and unreasonably discriminates between those who are qualified to take a civil service examination and thus infringes the rejected applicant's right to work and denies him or her the equal protection guaranteed by the state and federal Constitutions (*Terry v. Civil Serv. Comm'n (1952) 108 Cal. App. 2d 861, 868, 870, 240 P.2d 691*).

[*Optional*] **F. Arbitrary Education Accreditation Requirement.** The civil service commission's restriction of the right to take an examination for playground director to graduates of schools accredited by only two of five regional associations is arbitrary and discriminatory where there is little or no difference in the standards used by the five associations (*Terry v. Civil Serv. Comm'n (1952) 108 Cal. App. 2d 861, 869, 240 P.2d 691*).

[*Optional*] **G. Arbitrary 12th-Grade Education Requirement.** The civil service board transgressed its charter-given authority to limit employment to those able to read and write English when it limited the right to take the police officer's examination to those with a 12th-grade certificate or evidence that their education was equivalent to that represented by such certificate (*Bruce v. Civil Serv. Bd (1935) 6 Cal. App. 2d 633, 639, 45 P.2d 419*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a petition for writ of mandate to compel a civil service commission to permit an applicant to take an examination where the requirements set for the examination are arbitrary and unreasonable and deny the applicant the equal protection guaranteed by the state and federal Constitutions.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Points and Authorities

For memoranda of points and authorities for use in supporting a petition for writ of mandate where state action is being challenged on equal protection grounds under the state and federal Constitutions, see Ch. 35A, *Civil Rights: Equal Protection* .

[3] Discussion of Authorities

[a] Denial of Equal Protection

Terry v. Civil Serv. Comm'n (1952) 108 Cal. App. 2d 861, 240 P.2d 691 , was an appeal by a local civil service commission from a judgment of the superior court in a mandate proceeding brought to compel the commission to permit five applicants to take an examination for playground director. The day before the examination was to be given the trial court issued an alternative writ of mandate, and the commission was ordered to permit the applicants to take the examination. Several months later, there was a hearing on the writ, and a judgment was entered granting the writ, even though all five applicants had received failing grades on the examination. The commission had attempted to limit applicants to those who were graduates of a university or college accredited by the Association of American Universities or the Northwest Association of Secondary and Higher Schools. The superior court found that this was arbitrary, unreasonable, discriminatory, and a violation of the equal protection guarantees of the state and federal Constitutions, and that its adoption by the civil service commission was an abuse of discretion. The court of appeal held that the commission had no legal power to limit public employment to graduates of colleges accredited by either of only two associations where the evidence established that there was little or no difference in the standards used by the five regional associations, one of which accredited the colleges from which the applicants graduated. The court therefore

declared the commission rule arbitrary, discriminatory, an unconstitutional limitation on the right to work, and void. Since the question involved was the applicants' right to take the examination, the court held the point not moot, even though all applicants eventually failed the examination and were thus disqualified from holding the position. Although the court of appeal did not directly discuss the appropriateness of the writ of mandate in such circumstances, it affirmed the lower court judgment granting the writ.

[b] Arbitrary Education Accreditation Requirements

Terry v. Civil Serv. Comm'n (1952) 108 Cal. App. 2d 861, 240 P.2d 691 , is discussed in *§ 36.49[4][a]*.

[c] Arbitrary 12th-Grade Education Requirement

Bruce v. Civil Serv. Bd. (1935) 6 Cal. App. 2d 633, 45 P.2d 419 , is discussed in *§ 36.48[3][c]*.

[4] Additional Authorities

[a] Denial of Equal Protection

Waters v. Civil Serv. Bd. (1955) 133 Cal. App. 2d 733, 284 P.2d 919 , was an appeal by a city civil service board from a judgment of the superior court in a mandate proceeding brought to compel the board to accept the petitioner's application for examination for promotion from lieutenant to captain of police. The board had restricted the examination to those applicants who had served in the rank of lieutenant for two years. The trial court found that the requirement of two years' experience in the grade of lieutenant as a prerequisite to eligibility for the examination was arbitrary and without authority in the city charter. The court of appeal reviewed the various charter provisions and the civil service rule promulgated by the board, and it held that although the charter established a complete system of civil service, under its rule-making authority the board was possessed of broad discretionary powers. The court found the two-year rule to be reasonable and within the authority of the board, and it reversed the lower court judgment granting the peremptory writ of mandate.

Amerio v. City & County of San Francisco (1954) 126 Cal. App. 2d 359, 271 P.2d 996 , was an appeal by the city and county and members of its civil service commission from a judgment of the superior court entered in a proceeding for an injunction and a writ of mandate. The commission had set up an open examination for the position of Maintenance Chief at the San Francisco airport, and as a minimum requirement necessary to take the examination it had included a substantial amount of paid experience in construction work. Petitioners, civil service employees assigned to positions as Crew Chief or Airport Attendant at the airport, could not qualify for the examination under these minimum qualifications. The superior court ordered the commission to abandon its intention of holding an open examination for which petitioners were not qualified and instead to hold a promotional examination. The court of appeal held that the commission had not abused its discretion in fixing the minimum qualifications that must be met to be eligible for the examination and that absent a showing of arbitrary, fraudulent, or capricious conduct, or a clear abuse of discretion, the commission's determination was conclusive. The court therefore reversed the judgment of the lower court.

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3-36 California Points & Authorities § 36.50

§ 36.50 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Compel Civil Service Commission to Certify Petitioner for Appointment From Eligible List to Civil Service Position

[1] FORM

[*Caption. See § 36.20.*]

A MANDATE PROCEEDING IS THE PROPER MEANS BY WHICH TO COMPEL A CIVIL SERVICE COMMISSION TO CERTIFY PETITIONER FOR APPOINTMENT FROM AN ELIGIBLE LIST TO A CIVIL SERVICE POSITION.

A. Mandate to Compel Performance of Mandatory Duty. [*See § 36.46, Paragraph A.*]

B. Mandate to Review Performance of Discretionary Duty. The fact that a civil service commission is not required to give a disappointed job applicant a hearing does not make the mandate procedure inapplicable; it merely affects the form of mandate that must be invoked. Thus, the commission's discretionary denial of a hearing is reviewable on a petition for a writ of ordinary mandate under *Code Civ. Proc. § 1085*, which is used to review agency decisions when the agency is not required to hold a hearing (*DeCuir v. Los Angeles County (1998) 64 Cal. App. 4th 75, 80-83, 75 Cal. Rptr. 2d 102*).

C. Mandate to Compel Civil Service Commission to Certify Petitioner. A mandate proceeding is the proper means by which to compel a civil service commission to certify for appointment the name of the person ranking highest on the current list of eligibles for the position to be filled (*Ballf v. Civil Serv. Comm'n (1941) 43 Cal. App. 2d 211, 213, 110 P.2d 478*).

[*Optional*] **D. Certification of Eligibility.** When a vacancy occurs for a civil service position, the State Personnel Board must certify to the appointing power the names of the three persons standing highest on the promotional employment list for the class in which the position belongs (*Gov. Code § 19057*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a petition for writ of mandate to compel a civil service commission to certify petitioner for appointment to an available civil service position. Counsel should include in the form either optional Paragraph D or a paragraph citing appropriate local authority for civil service appointments.

Counsel should insert argument in this from showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Mandate to Review Performance of Discretionary Duty

DeCuir v. Los Angeles County *(1998) 64 Cal. App. 4th 75* , arose from the plaintiff's unsuccessful application for a civil service position with the county. The plaintiff protested to the civil service commission that he had been treated unfairly in the application and interview process. Following the civil service commission's refusal of plaintiff's request for a hearing, the plaintiff filed a damages suit against the county. After the plaintiff obtained a jury verdict for damages, the county appealed, contending that the plaintiff's failure to seek a writ of mandate precluded a civil damages suit. The court of appeal agreed with the county and reversed the judgment. The court held that the *only* judicial remedy available to an unsuccessful applicant for a civil service position is a petition for a writ of mandate. In such a case, a civil suit challenging the civil service decision is not an available remedy, unless the employee or job applicant is making a claim of unlawful discrimination (for example, under Title VII of the Federal Civil Rights Act or the California Fair Employment and Housing Act). The fact that in this case the civil service commission had not given the plaintiff a hearing did not make mandate inapplicable; the commission's discretionary denial of a hearing would have been reviewable on a petition for a writ of ordinary mandate under *Code Civ. Proc. § 1085* (*64 Cal. App. 4th 75, 80-83*).

[b] Mandate to Compel Civil Service Commission to Certify Petitioner

Ballf v. Civil Serv. Comm'n (1941) 43 Cal. App. 2d 211, 110 P.2d 478 , was an appeal by respondent commission and its members from a judgment of the superior court in a mandate proceeding brought to compel the commission to certify plaintiff's name to the board of supervisors as appointee for the position of "General Clerk-Stenographer" in the office of the board. When a position had become available in the clerk-stenographer classification, an employee who had stood ninth on the list of eligibles for such classification was transferred to the position. Plaintiff, who had stood eighth on the list of eligibles for the position, desired the position and had not waived his rights to the position as had the other seven people ranking above him and the transferred employee. The trial court held that the commission had violated the governing charter when it refused to certify the name of the person ranking highest on the current list of

eligibles for the position to be filled. The court of appeal agreed with the superior court. Although it agreed that a plaintiff's seniority should date from the time he was entitled to certification, the court modified the lower court judgment by striking the provisions which eliminated the necessity of plaintiff's serving a probationary period. Thus modified, the court affirmed the judgment and ordered that a peremptory writ issue and that plaintiff recover his costs of appeal.

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3-36 California Points & Authorities § 36.51

§ 36.51 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Compel Civil Service Commission to Fill Vacant Position Through Holding of Promotional Examination

[1] FORM

[*Caption. See § 36.20.*]

A MANDATE PROCEEDING IS THE PROPER MEANS BY WHICH TO COMPEL A CIVIL SERVICE COMMISSION TO FILL A VACANT POSITION THROUGH THE HOLDING OF A PROMOTIONAL EXAMINATION AND THE PROMOTION OF A CIVIL SERVICE EMPLOYEE.

A. Mandate to Compel Performance of Mandatory Duty. [*See § 36.46, Paragraph A.*]

[*Optional*] **B. Duty to Fill Vacancy Through Promotion.** Vacancies in positions should be filled, insofar as it is consistent with the best interests of the state, from among employees holding positions in appropriate classes, and open, nonpromotional examinations must be held only when, in the judgment of the board, open competition will produce eligible lists with more highly skilled qualified candidates and is consistent with the best interests of the state (*Gov. Code § 18950*).

C. Mandatory Duty. Provisions requiring a civil service board to provide for promotion in the system on the basis of ascertained merit, seniority in service, and standing on competitive exams, and to provide, in all cases when practicable, that vacancies be filled by promotion from among members of the next lower rank are mandatory provisions, and a board acts in excess of its jurisdiction if it fails to give a promotional exam when there are employees who, by reason of their position, possess the prerequisite qualifications and are thus qualified to take the exam (*Rhodehamel v. Civil Serv. Bd. (1941) 18 Cal. 2d 709, 711, 712, 117 P.2d 349*).

D. Mandate to Compel Civil Service Commission to Fill Vacant Position Through Holding of Promotional Exam. A proceeding in mandate is the proper means by which to compel a civil service commission to fill a vacant position through the holding of a promotional exam and the promotion of a civil service employee (*Rhodehamel v.*

Civil Serv. Bd. (1941) 18 Cal. 2d 709, 717, 117 P.2d 349 ; *Allen v. McKinley (1941) 18 Cal. 2d 697, 705, 117 P.2d 342*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a petition for writ of mandate to compel a civil service commission to fill a vacant position through the holding of a promotional examination and the promotion of a civil service employee. Counsel should include in the form either optional Paragraph B or a paragraph citing appropriate local authority for a mandatory duty to fill vacant positions through promotion.

Counsel should add argument linking the points in this form with the facts of his or her case.

[3] Discussion of Authorities

[a] Mandatory Duty

Rhodehamel v. Civil Serv. Bd. *(1941) 18 Cal. 2d 709, 117 P.2d 349* , was an appeal by a civil service employee from a judgment of the superior court in a mandate proceeding brought to compel respondent city board to hold a promotional examination rather than an open examination for the position of Senior Account Clerk. When a vacancy had occurred in that position and there was no existing eligible list from which the position could have been filled, the board had decided to hold an open examination. The superior court upheld the board's decision.

The Supreme Court reversed, adopting the opinion of the court of appeal. The Court held that the city charter provisions requiring the holding of promotional examinations were mandatory and that the board must give a promotional examination whenever there were employees in the service who, by reason of their position, possessed the qualifications established by the board as prerequisites for the position (*18 Cal. 2d 709, 712*). The Court followed *Allen v. McKinley (1941) 18 Cal. 2d 697, 117 P.2d 342* , and ruled that, regardless of the board's opinion as to the relative merits of an open or promotional examination, the board abused its discretion by holding an open examination when the duties of Intermediate Account Clerk were so related to those of Senior Account Clerk as to prepare employees in the former for promotion into the latter position (*18 Cal. 2d 709, 712-713, 717*) [*see* *Allen v. McKinley (1941) 18 Cal. 2d 697, 117 P.2d 342* , discussed in *§ 36.51*[3][b]].

[b] Mandate to Compel Civil Service Commission to Fill Vacant Position Through Promotion

The facts of ***Rhodehamel v. Civil Serv. Bd.*** *(1941) 18 Cal. 2d 709, 117 P.2d 349* , are discussed in *§ 36.51[3][a]*. Although the Court did not directly discuss the appropriateness of the writ of mandate as a remedy for the civil service board's holding of an open rather than a promotional examination for a position, the Court heard the case on that basis and reversed the lower court judgment denying the writ (*18 Cal. 2d 709, 711, 717*).

Allen v. McKinley *(1941) 18 Cal. 2d 697, 117 P.2d 342* , was an appeal by a local civil service commission from a judgment of the superior court in a mandate proceeding brought to compel the commission to hold a promotional examination rather than an open one for the purpose of creating an eligible list for positions in the tax collector's office designated as Adjuster, Class G153. The proceeding was instituted by civil service employees in that office after the office gave notice of an open examination. In granting petitioners' motion for judgment on the pleadings, the superior court held that the employees were legally entitled to take a promotional examination for the available position and that the commission had abused its discretion in ordering an open examination.

The Supreme Court held that it was the duty of the commission to hold promotional examinations when practicable. Furthermore, whether a promotional examination was practicable was confided to the commission's limited discretion, and the courts may interfere when that discretion has been abused (*18 Cal. 2d 697, 700*). The court then found that an abuse of discretion had occurred (*18 Cal. 2d 697, 703*). The court stated that it was not impracticable to hold a promotional examination when a large group of civil service employees had the qualifications set for an open examination (*18 Cal. 2d 697, 704*). The court therefore affirmed the judgment of the superior court (*18 Cal. 2d 697, 708*).

[4] Additional Authorities

[a] Mandate to Compel Civil Service Commission to Fill Vacant Position Through Holding of Promotional Exam

In *Santa Monica Mun. Employees Assn. v. City of Santa Monica (1987) 191 Cal. App. 3d 1538, 237 Cal. Rptr. 185* , the court of appeal upheld a trial court ruling granting a petition for writ of mandate to compel a city to comply with provisions of the city charter by filling all vacancies by promotion on competitive examinations unless there was approval by the personnel board of exceptional circumstances. The court stated that while there have been many changes in employment law since *Rhodehamel* and *Allen* (see discussion of cases in *§ 36.51[3]*) were decided, until the Legislature decides otherwise or the Supreme Court rejects the determination that city employees can be given preference for vacancies, the court was bound by those decisions (*191 Cal. App. 3d 1538, 1546*).

Paule v. State Personnel Bd. (1974) 38 Cal. App. 3d 32, 113 Cal. Rptr. 38 , was an appeal by a civil service employee from a judgment of the superior court denying him a peremptory writ of mandate to compel the respondent board to include all state employees in a promotional examination being given for the position of Staff Counsel III in the Department of Water Resources (DWR). Petitioner, an attorney holding the position of Staff Counsel I with the Department of Real Estate, had fulfilled the qualifications for the vacancy and properly applied to take the examination, but he had not been permitted to compete because he had not been employed by the DWR. The court of appeal held that the respondent had the authority to establish classes in state government and to hold examinations either on an open promotional basis or on a restricted promotional basis. In light of the board's determination that department morale could be best maintained and the most qualified candidates secured by promoting those who are already employed by a particular department, the board had properly exercised its discretion in providing for departmental promotional examinations. The court of appeal therefore affirmed the judgment of the lower court (*38 Cal. App. 3d 32, 36-37*).

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3-36 California Points & Authorities § 36.52

§ 36.52 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Compel Appointing Power to Accept Withdrawal of Civil Service Employee's Resignation

[1] FORM

[*Caption. See § 36.20.*]

A MANDATE PROCEEDING IS THE PROPER MEANS BY WHICH TO COMPEL AN APPOINTING POWER TO PERFORM ITS MANDATORY DUTY TO ACCEPT THE WITHDRAWAL OF A CIVIL SERVICE EMPLOYEE'S RESIGNATION BEFORE ITS EFFECTIVE DATE.

A. Mandate to Compel Performance of Mandatory Duty. [*See § 36.46, Paragraph A.*]

B. Withdrawal of Resignation Before Effective Date. Unless valid enactments provide otherwise, an appointing power must accept the withdrawal of a civil service employee's resignation if the employee withdraws the resignation before its effective date, before it has been accepted, and before the appointing power acts in reliance on the resignation (*Armistead v. State Personnel Bd. (1978) 22 Cal. 3d 198, 206, 149 Cal. Rptr. 1, 583 P.2d 744*).

[*Optional*] **C. Invalid Resignation Rule.** The State Personnel Board's Personal Transaction Manual § 525.11, governing resignations of employees, is invalid and of no effect since it was not duly promulgated or published under the California Administrative Procedure Act (*Armistead v. State Personnel Bd. (1978) 22 Cal. 3d 198, 201, 149 Cal. Rptr. 1, 583 P.2d 744*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a petition for writ of mandate to compel an appointing power to accept the withdrawal of a civil service employee's resignation where there are no valid rules governing the withdrawal of resignations and the employee attempts to withdraw his or her resignation before its effective date, before it has been accepted, and before the appointing power has acted in reliance on the resignation.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Withdrawal of Resignation Before Effective Date

Armistead v. State Personnel Bd. *(1978) 22 Cal. 3d 198, 149 Cal. Rptr. 1, 583 P.2d 744* , was an appeal from a judgment dismissing a petition for a writ of mandate. Petitioner, a civil service employee, had submitted a written resignation and then, six days later, had attempted to withdraw it. With knowledge of the attempted withdrawal, his resignation was accepted, and respondent board refused to set aside the acceptance. Petitioner sought a writ of mandate, the trial court sustained respondent's demurrer without leave to amend, and petitioner appealed. The Supreme Court reversed the trial court judgment. The Court discussed the rules governing the withdrawal of a resignation and found that the state rule, Personnel Transactions Manual § 525.11, was invalid, since it had not been promulgated or published according to the procedure established by the California Administrative Procedure Act. The Court then held that absent a valid enactment, a civil service employee is entitled to withdraw a resignation if he or she does so before its effective date, before it has been accepted, and before the appointing power acts in reliance on the resignation.

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Volume 3 Chapters 34-39 CHECKS AND BANKS---to---CIVIL SERVICE
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3-36 California Points & Authorities § 36.53

§ 36.53 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Set Aside Discipline--Due Process Violated by Alleged Hearing Officer Bias

[1] FORM

[*Insert appropriate opposition caption.*]

A WRIT OF MANDATE SHOULD NOT ISSUE TO SET ASIDE DISCIPLINE IMPOSED BY AGENCY DUE TO ALLEGED HEARING OFFICER BIAS IN ABSENCE OF INDEPENDENT EVIDENCE OF BIAS.

A. Due Process Not Violated if Hearing Officer Not Perfectly Impartial. Without sufficient independent evidence of bias, the mere fact that an officer who presides over a dismissal or discipline hearing is selected and paid by employer, does not constitute a deprivation of due process (*Linney v. Turpen (1996) 42 Cal. App. 4th 763, 775-776, 49 Cal. Rptr. 2d 813*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Respondent _____ [*name*]

[2] Comments

[a] Use of Form

This form of memorandum of points and authorities may be submitted in opposition to a petition for a writ of mandate by an employee seeking to set aside disciplinary action taken by an agency after an administrative hearing based upon a claim of bias, where the hearing officer is selected and paid by the employer.

[b] Related Points and Authorities

For memoranda of points and authorities opposing petitions for writs of mandate generally, see Ch. 150, *Mandate and Prohibition* .

[3] Discussion of Authorities

[a] Due Process Not Violated if Hearing Officer Not Perfectly Impartial

In ***Linney v. Turpen*** *(1996) 42 Cal. App. 4th 763, 49 Cal. Rptr. 2d 813* , a San Francisco Airport police officer filed a petition for a writ of mandate to set aside discipline, after he was suspended for lying to a superior in the course of an investigation involving lost passenger property. The suspended officer had been charged with violating several rules in the airport police manual, which entitled him to a dismissal hearing under the San Francisco Charter. After a hearing, the officer was suspended for six months without pay. The superior court upheld the decision. On appeal, the suspended officer claimed, *inter alia*, that because the officer who presided over his dismissal hearing was selected and paid by the employer, he was deprived of due process. The court of appeal held that due process did not require a perfectly impartial hearing officer and that without independent evidence of bias, these facts alone did not constitute a deprivation of due process (*42 Cal. App. 4th 763, 775-776*).

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3-36 California Points & Authorities § 36.54

§ 36.54 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Set Aside Discharge of Probationary Peace Officer--No Due Process Requirements

[1] FORM

[*Caption. See § 36.53.*]

A WRIT OF MANDATE SHOULD NOT ISSUE TO PERMIT REINSTATEMENT OF TERMINATED PROBATIONARY PEACE OFFICER FOR ALLEGED FAILURE TO COMPLY WITH DUE PROCESS REQUIREMENTS UNDER PEACE OFFICER BILL OF RIGHTS BECAUSE PROBATIONARY PEACE OFFICERS ARE TERMINABLE AT WILL.

A. Peace Officer Bill of Rights Provides Limited Protection to Probationary Employees. The Peace Officer Bill of Rights provides only limited procedural rights to probationary police officers who, unlike tenured police officers, are not entitled to a full and fair pre-termination hearing or to be fired only upon a showing of good cause (*Gov. Code § 3300 et seq.*; *Riveros v. City of Los Angeles (1996) 41 Cal. App. 4th 1342, 1357-1360*).

B. Peace Officer Bill of Rights Does Not Affect City's Right to Terminate Employment At Will. *Gov. Code § 3300 et seq.* does not interfere with *California Constitution, article XI, § 5*, and charter cities' right to regulate either peace officers' qualifications for employment or the causes for which they may be removed (*Binkley v. City of Long Beach (1993) 16 Cal. App. 4th 1795, 1809, 20 Cal. Rptr. 2d 903*).

C. Probationary Peace Officers Are Terminable Without Cause. Probationary police officers have no protected property interest in their employment. They are terminable at will and can be fired for any reason, without cause, and only entitled to limited, post-termination "administrative appeal" (*Riveros v. City of Los Angeles (1996) 41 Cal. App. 4th 1342, 1357-1360*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Respondent _____ [*name*]

[2] Comments

[a] Use of Form

This form of memorandum of points and authorities may be submitted in opposition to a petition to the superior court for a writ of mandate seeking reinstatement of a terminated probationary police officer, claiming his or her termination failed to comply with procedural requirements in *Gov. Code § 3300 et seq.*, the "Police Officers'Bill of RightsAct." The basis of the opposition is that probationary employees do not have protected property interest in their employment, may be terminated at-will without cause, and have limited rights to post-termination administrative hearings.

[b] Related Points and Authorities

For memoranda of points and authorities opposing petitions for writs of mandate generally, see Ch. 150, *Mandate and Prohibition* .

[3] Discussion of Authorities

[a] Peace Officer Bill of Rights Provides Limited Protection to Probationary Employees

In ***Riveros v. City of Los Angeles*** *(1996) 41 Cal. App. 4th 1342* , probationary police officer Riveros was discharged for misconduct for becoming sexually involved with an arrestee, although his record was otherwise free of any discipline or rule violations of any kind. Once the relationship was discovered by the department, Riveros was suspended. Thereafter, the Los Angeles police chief decided to terminate Riveros. Riveros was officially terminated but informed of rights of administrative appeal. The police hearing officer recommended against termination and in favor of suspension of Riveros. However, the chief of police signed the order terminating Riveros notwithstanding the recommendation. Riveros appealed to the Civil Service Commission, which declined to hear the appeal because of Riveros's status as a probationary officer. He then filed a petition for writ of mandate alleging that the department had failed to comply with its own rules and the Police Officers'Bill of Rights. Riveros argued that the department had failed to cite specific reasons for his termination and that he was entitled to an evidentiary hearing at which the department had the burden of proof, was required to produce evidence and to make findings supported by substantial evidence. The trial court declined to issue the writ. The court of appeal affirmed, holding that probationary officers had no protected property interest in their employment and were not entitled to the same pre-termination hearing and other procedural protections given to tenured officers and, further, that probationary officers could be terminated at-will and without cause (*41 Cal. App. 4th 1342, 1357-1360*).

[b] Peace Officer Bill of Rights Does Not Affect City's Right to Terminate Employment At-Will

In ***Binkley v. City of Long Beach*** *(1993) 16 Cal. App. 4th 1795, 20 Cal. Rptr. 2d 903* , former Long Beach Police Chief Binkley was removed from office by the city manager. He was granted an administrative appeal, which Binkley argued was biased and unfair. He petitioned for a writ of mandate, which was granted by the superior court on the ground that the city had failed to comply with *Gov. Code § 3300 et seq.* The city appealed. The court of appeal reversed the trial court's decision, finding that *Gov. Code § 3304* only requires that terminated employees be given an "administrative appeal," and that the particulars of the appeal process are left to the local agency. The court also found that § 3300 et seq. did not interfere with a city's right to regulate either peace officers' qualifications for employment or

the causes for which they may be removed. The court held that any appeal process afforded by the city had to be measured against constitutional due process principles. At a minimum, this required that Binkley be given an opportunity to refute the charges against him and clear his name. The court found that due process was satisfied by Binkley's administrative appeal and let his termination stand (*16 Cal. App. 4th 1795, 1809, 20 Cal. Rptr. 2d 903*).

[c] Probationary Peace Officers Are Terminable At-Will

Riveros v. City of Los Angeles *(1996) 41 Cal. App. 4th 1342* , is discussed in *§ 36.54[3][a]*.

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3-36 California Points & Authorities § 36.55

§ 36.55 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Discipline of Civil Service Employee--Degree of Punishment Not Subject to Review

[1] FORM

[*Caption. See § 36.53.*]

A WRIT OF MANDATE SHOULD NOT ISSUE TO OVERTURN DISCIPLINARY DECISION OR DISCHARGE OF CIVIL SERVICE EMPLOYEE BY ADMINISTRATIVE AGENCY IN THE ABSENCE OF AN ABUSE OF DISCRETION.

A. Court Not Free to Review Degree of Punishment Imposed by Agency in Absence of Abuse of Discretion. Although appellate courts conduct a de novo review of possible abuse of discretion by administrative agency, in the absence of such a showing, the court cannot substitute its judgment for that of the agency concerning the degree of punishment imposed in a disciplinary action (*Deegan v. City of Mountain View (1999) 72 Cal. App. 4th 37, 45-47, 84 Cal. Rptr. 2d 690* ; *Cummings v. Civil Service Commission (1995) 40 Cal. App. 4th 1643, 1652, 47 Cal. Rptr. 2d 775*).

B. Employer Permitted to Impose More Severe Penalty Than That Proposed by Hearing Officer. A public employer can impose a more severe penalty than that recommended by the hearing officer and the employer's decision cannot be disturbed unless a manifest abuse of discretion is shown (*Boctor v. Los Angeles County Metropolitan Transit Authority (1996) 48 Cal. App. 4th 560, 574-575, 55 Cal. Rptr. 2d 861*).

C. Similar Charges Need Not Result In Identical Penalties. There is no requirement that a public agency impose identical penalties for similar charges; therefore, the mere fact that the agency imposes different punishments in similar cases does not establish an abuse of discretion (*Pegues v. Civil Service Comm'n (1998) 67 Cal. App. 4th 95, 106, 78 Cal. Rptr. 2d 705*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Respondent _____ [*name*]

[2] Comments

[a] Use of Form

This form of memorandum of points and authorities may be submitted in opposition to a petition to the superior court for a writ of mandate seeking review of discipline or discharge of a civil service employee. The basis of the opposition is that, in the absence of a showing of abuse of discretion, a court cannot substitute its judgment or review the degree of punishment imposed by the administrative agency.

[b] Related Points and Authorities

For memoranda of points and authorities opposing petitions for writs of mandate generally, see Ch. 150, *Mandate and Prohibition* .

[3] Discussion of Authorities

[a] Court Not Free to Review Degree of Punishment Imposed by Agency in Absence of Abuse of Discretion

In ***Deegan v. City of Mountain View*** *(1999) 72 Cal. App. 4th 37, 84 Cal. Rptr. 2d 690* , a city appeals board discharged an employee after a reckless driving incident. The trial court granted the employee's petition for a writ of mandate, after finding that the penalty was excessive. The court of appeal reversed, reinstating the penalty imposed by the city. The court of appeal explained that the standards of review by the trial court differ greatly depending on the issues involved. With respect to culpability (that is, whether the employee in fact committed the misconduct alleged), a trial court has extensive powers to review an administrative agency's determination and may exercise its independent judgment on the evidence (*72 Cal. App. 4th 37, 45*). With respect to the penalty, however, the trial court's powers of review are limited and are exercised only with great deference to the agency's findings. Thus, the court is required to uphold the penalty imposed by the agency if there is any reasonable basis for it; the penalty will not be disturbed unless a manifest abuse of discretion is shown. An abuse of discretion exists only if reasonable minds cannot disagree that the penalty is excessive (*72 Cal. App. 4th 37, 46-47*).

In ***Cummings v. Civil Service Commission*** *(1995) 40 Cal. App. 4th 1643, 47 Cal. Rptr. 2d 775* , the Los Angeles County Probation Department discharged a deputy probation officer for misuse of authority, violating confidential records and lying to his superiors and other government officials. The county Civil Service Commission sustained the discharge. Cummings petitioned for a writ of mandate, which the trial court denied. The court of appeal reviewed the issue of abuse of discretion de novo, holding that in the absence of such a finding on the part of the administrative agency, neither the appellate court nor the trial court is permitted to substitute its discretion for that of administrative agency concerning the degree of punishment imposed on the employee (*40 Cal. App. 4th 1643, 1652*).

[b] Employer Permitted to Impose More Severe Penalty Than That Proposed by Hearing Officer

Boctor v. Los Angeles County Metropolitan Transit Authority *(1996) 48 Cal. App. 4th 560, 55 Cal. Rptr. 2d 861* , involved a vehicle operations manager for the Los Angeles County Metropolitan Transit Authority who engaged in a pattern of sexual harassment. An internal investigation confirmed all the charges against Boctor. Boctor appealed the findings internally before a hearing officer. The hearing officer recommended that Boctor not be demoted but rather

suspended for 30 days and made to attend appropriate workplace training courses. The employer rejected the hearing officer's findings and recommendations and demoted Boctor to the position of bus operator. Boctor then appealed for a writ of mandate, contending that his employer lacked authority to reject the hearing officer's recommendations. The trial court denied the petition and the court of appeal affirmed. The court of appeal found that Boctor's employer acted within its proper authority in rejecting the hearing officer's findings and held that a public employer can impose a more severe penalty than that recommended by hearing officer. Furthermore, absent a manifest abuse of discretion, the employer's decision cannot be disturbed by the court (*48 Cal. App. 4th 560, 574-575*).

[c] Similar Charges Need Not Result In Identical Penalties

In ***Pegues v. Civil Service Comm'n*** *(1998) 67 Cal. App. 4th 95, 78 Cal. Rptr. 2d 705* , a county civil service commission upheld the discharge of a department of social services employee who had provided false information on her application for food stamps. The employee petitioned for a writ of mandate compelling her reinstatement. The employee contended, among other things, that she had been subjected to disparate treatment because other employees who committed similar offenses had not been discharged. The trial court granted the writ, but the court of appeal reversed, observing that the allegedly similar cases adduced by the employee were in fact substantially different from the employee's case (*67 Cal. App. 4th 95, 105-106*). The court went on to hold that in any event, when it comes to a public agency's imposition of punishment, there is no requirement that charges similar in nature must result in identical penalties. The mere fact that the agency imposed different punishments in similar cases was not a ground for reinstating the employee in this case (*67 Cal. App. 4th 95, 106*). Thus, since the decision to discharge the employee was within the discretion of the civil service commission, the trial court erred in substituting its own judgment for that of the commission concerning the appropriate penalty for the employee's misconduct (*67 Cal. App. 4th 95, 106-108*).

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3-36 California Points & Authorities § 36.56

§ 36.56 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Discipline of Civil Service Employee--Writ Barred by Laches

[1] FORM

[*Caption. See § 36.53.*]

A WRIT OF MANDATE SHOULD NOT ISSUE BECAUSE THE PETITION IS BARRED BY LACHES.

Laches Bars Administrative Mandate if Employee's Unreasonable Delay in Seeking Writ of Mandate Has Prejudiced Employer. Judicial review of a personnel decision of a public agency must be sought promptly. If the employee has unreasonably delayed seeking that review, either before or after filing a petition for a writ of administrative mandate, and if that delay prejudices the employer, then the petition is barred by laches (*Johnson v. City of Loma Linda (2000) 24 Cal. 4th 61, 68-69, 99 Cal. Rptr. 2d 316, 5 P.3d 874*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a petition for administrative mandate that has not been filed promptly after the decision that the employee seeks to have reviewed.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. The argument should, therefore, establish that the employee has waited a substantial period of time before filing the petition, or that the employee failed to pursue the petition for a substantial period of time after filing. The argument should also establish that the employer has been prejudiced by the delay. For example, if a replacement employee has been hired, the employer might suffer prejudice if reinstatement of the original employee would require the discharge of the replacement, or if the employer might incur a double payment consisting of back pay for the reinstated employee

plus the salary of the replacement employee (*see Johnson v. City of Loma Linda (2000) 24 Cal. 4th 61, 68-69, 99 Cal. Rptr. 2d 316, 5 P.3d 874*).

[c] Related Points and Authorities

Any of the other points and authorities for opposing mandamus that are set out in this chapter may be combined with this form.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Laches Bars Administrative Mandate if Employee's Unreasonable Delay in Seeking Writ of Mandate has Prejudiced Employer

In ***Johnson v. City of Loma Linda*** *(2000) 24 Cal. 4th 61, 99 Cal. Rptr. 2d 316, 5 P.3d 874* , the plaintiff was a terminated city employee who had filed a grievance with the city; the grievance was rejected by the city's personnel board in September 1993 and upheld by the city council in December 1993. The plaintiff then filed an administrative charge with the Department of Fair Employment and Housing, and a year later he was issued a right-to-sue letter. In July 1995, the plaintiff brought suit against the city for violation of the Fair Employment and Housing Act (*Gov. Code § 12900 et seq.*) and Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000 et seq.). At the same time, the plaintiff petitioned for a writ of administrative mandate, challenging the actions of the city's personnel board and the city council. The trial court granted the city's motion for summary judgment and found that laches barred the plaintiff from pursuing the writ of administrative mandate. The court also found that the plaintiff was bound by the administrative findings against him because he had failed to judicially challenge them. The court of appeal reversed the judgment with respect to the Title VII claim and affirmed the rest of the judgment.

The Supreme Court held that the employee's petition for mandate was indeed barred by laches. The review of a personnel decision of a public agency must be sought promptly. In this case, the employee had delayed both before and after filing the petition for administrative mandate. The plaintiff had waited 18 months after the city council's action to file the petition for mandate; then, after filing the petition, he failed to pursue it for another 18 months. The Court also found that this unreasonable delay would prejudice the employer, since in the interim the employer had divided the plaintiff's former duties among several other employees. Granting the plaintiff's requested relief (reinstatement and back pay) would require the city to significantly alter its new structure and incur double payments: back wages to the plaintiff and salaries to the employees. Accordingly, since the delay was unreasonable and would prejudice the employer, the petition for mandate was barred (*24 Cal. 4th 61, 68-69*).

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3-36 California Points & Authorities § 36.57

§ 36.57 Opposing Petition for Writ of Mandate to Review Discipline of Public Safety Officer--Statute of Limitations for Imposition of Discipline Was Tolled or Extended

[1] FORM

[*Insert appropriate opposition caption.*]

A WRIT OF MANDATE SHOULD NOT ISSUE TO SET ASIDE THE DISCIPLINE IMPOSED ON THE PETITIONER BECAUSE THE LIMITATIONS PERIOD ESTABLISHED BY THE PUBLIC SAFETY OFFICERS PROCEDURAL BILL OF RIGHTS ACT WAS _____ [TOLLED or REASONABLY EXTENDED] AND HAD NOT EXPIRED AT THE RELEVANT TIME.

Statute of Limitations for Imposition of Discipline on Public Safety Officers Is Subject to Tolling and Extension. The one-year limitations period for the imposition of discipline on public safety officers under the Public Safety Officers Procedural Bill of Rights Act is subject to tolling or reasonable extension under the circumstances specified in the Act, including _____ [*specify, e.g.,* when criminal prosecution is pending *or* when the investigation of the underlying incident involves more than one employee and requires a reasonable extension] (*Gov. Code § 3304(d)(1)*; *see Parra v. City & County of S.F. (2006) 144 Cal. App. 4th 977, 993-998, 50 Cal. Rptr. 3d 822*).

[2] Comments

[a] Use of Form

This form may be used to oppose a petition to the superior court for a writ of mandate asserting that discipline imposed on a peace officer is barred by the one-year statute of limitations established by the Public Safety Officers Procedural Bill of Rights Act (*Gov. Code § 3304(d)*). That statute provides that, with specified exceptions, no punitive action or denial of promotion on grounds other than merit may be undertaken for any act, omission, or other allegation of misconduct if the investigation of the allegation is not completed within one year of the public agency's discovery (by a person authorized to initiate an investigation of the allegation) of an act, omission, or other misconduct (*Gov. Code § 3304(d)(1)*). The exceptions to the one-year period are as follows (*Gov. Code § 3304(d)(2)(A)-(H)*):

- If the act, omission, or other allegation of misconduct is also the subject of a criminal investigation

or criminal prosecution, the one-year time period is tolled while the criminal investigation or criminal prosecution is pending.

- If the public safety officer waives the one-year time period in writing, the time period is tolled for the period of time specified in the written waiver.

- If the investigation is a multijurisdictional investigation that requires a reasonable extension for coordination of the involved agencies (*see Breslin v. City & County of San Francisco (2007) 146 Cal. App. 4th 1064, 1083-1085, 55 Cal. Rptr. 3d 14* (that two city agencies--police department and office of citizen complaints--were investigating incident did not make investigation "multijurisdictional," since city's police commission had power to control and coordinate both agencies' investigative activities)).

- If the investigation involves more than one employee and requires a reasonable extension.

- If the investigation involves an employee who is incapacitated or otherwise unavailable.

- If the investigation involves a matter in civil litigation in which the public safety officer is named as a party defendant, the one-year time period is tolled while that civil action is pending (*see Bettencourt v. City & County of San Francisco (2007) 146 Cal. App. 4th 1090, 1098-1101, 53 Cal. Rptr. 3d 402* (civil action against peace officer has tolling effect even if it does not impede public agency's investigation, so long as investigation and civil action involve same incident); *Breslin v. City & County of San Francisco (2007) 146 Cal. App. 4th 1064, 1081, 55 Cal. Rptr. 3d 14* (civil action has no tolling effect as to officer who is not named as defendant)).

- If the investigation involves a matter in criminal litigation in which the complainant is a criminal defendant, the one-year time period is tolled during the period of that defendant's criminal investigation and prosecution.

- If the investigation involves an allegation of workers' compensation fraud on the part of the public safety officer.

The one-year period is also tolled during any time that the officer is discharged from service as a public safety officer (*Melkonians v. Los Angeles County Civil Serv. Comm'n (2009) 174 Cal. App. 4th 1159, 1174, 95 Cal. Rptr. 3d 415* (officer who had been discharged for previous violation and then reinstated was not entitled to protections of Public Safety Officers Bill or Rights Act while he was not public safety officer, so one-year period under *Gov. Code § 3304(d)* was tolled during period of his discharge)).

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. For example, counsel should identify and document the beginning and ending dates of any criminal investigation and prosecution of the act, omission, or other allegation of misconduct that is the basis of the disciplinary charge (*see Gov. Code § 3304(d)(2)(A)*).

[b] Opposing Memoranda

In an appropriate case, the memorandum *set out in § 36.20* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Statute of Limitations for Imposition of Discipline on Public Safety Officers Is Subject to Tolling

Parra v. City & County of S.F. *(2006) 144 Cal. App. 4th 977, 50 Cal. Rptr. 3d 822* , arose from an investigation of an incident that initially involved three off-duty San Francisco police officers and eventually included several other offers who alleged failed to conduct or cooperate with proper investigation. Ultimately, the fallout from the incident included criminal indictments against 10 officers, a federal civil case, a state civil case, and extensive criminal and administrative investigations by the local police department that employed the officers. The underlying incident occurred on November 20, 2002. Disciplinary charges were eventually filed with the San Francisco Police Commission and served against seven officers on July 26, 2004. Before the commission, the officers moved to dismiss the charges as untimely under the Public Safety Officers Procedural Bill of Rights Act (*Gov. Code § 3300 et seq.*). The Act provides that, with specified exceptions, "no punitive action, nor denial of promotion on grounds other than merit, shall be undertaken for any act, omission, or other allegation of misconduct if the investigation of the allegation is not completed within one year of the public agency's discovery by a person authorized to initiate an investigation of the allegation of an act, omission, or other misconduct" (*now see Gov. Code § 3304(d)(1)*).

The police commission denied the officers' motion to dismiss, finding that the one-year limitations period was subject to four of the statutory exceptions. First, the commission concluded that the one-year limitations period had been tolled during the pendency of a criminal investigation of the conduct that was involved in the disciplinary charges (*now see Gov. Code § 3304(d)(2)(A)*). The commission also held that the limitations period was tolled by the pendency of a federal civil suit that had been filed as a result of the underlying incident (*now see Gov. Code § 3304(d)(2)(F)*). Finally, the commission concluded alternatively that the disciplinary charges were timely, because the multi-jurisdictional nature of the investigation and the fact that multiple officers were under investigation both required reasonable extension of the investigative period (*now see Gov. Code § 3304(d)(2)(C),(D)*).

The officers then petitioned for administrative mandamus, which the trial court denied. The court of appeal affirmed, holding that the one-year period was tolled during the criminal investigation and prosecution. The court held that this tolling applied even as to officers who were not prosecuted. The relevant statutory provision provides for tolling "[i]f the act, omission, or other allegation of misconduct is also the subject of a criminal investigation or criminal prosecution, the time during which the criminal investigation or criminal prosecution is pending shall toll the one-year time period" (*now see Gov. Code § 3304(d)(2)(A*)). The court of appeal read this language as tolling the one-year period for all of the officers involved, since the criminal investigation included all of the conduct at issue in the disciplinary charges, even though not all of the officers were prosecuted in the criminal proceedings (*144 Cal. App. 4th 977, 993-994)* .

Because the criminal prosecution concluded in April 2003, and the disciplinary charges were filed more than a year later--in July 2004--the question remained whether another exception to the limitations period was also applicable. Turning to that question, the court of appeal agreed with the police commission that the provision allowing a reasonable extension of the limitations period when multiple officers are investigated was applicable (*now see Gov. Code § 3304(d)(2)(D)*). Further, the court concluded that a three-month extension was reasonable under the complex circumstances of this case, which involved numerous officers, including at one point or another the chief of police, the chief's assistant, various deputy chiefs, and many other ranking officers. Also involved were captains, lieutenants, lieutenants supervising sergeants, sergeants supervising line officers, and line officers themselves. The court of appeal found it significant that "[t]he integrity of the San Francisco Police Department, top to bottom, was in focus here, providing abundant evidence supporting an extension of the limitation provision" (*144 Cal. App. 4th 977, 997)* . Accordingly, the court concluded that the disciplinary charges, which were filed one year and three months after the conclusion of the criminal proceedings, were timely (*144 Cal. App. 4th 977, 995-998)* .

Because the criminal investigation and multiple officer exceptions (*now see Gov. Code § 3304(d)(2)(A),(D)*) were clearly applicable and sufficient to make the disciplinary charges timely in this case, the court of appeal found it unnecessary to consider the applicability of the other exceptions relied on by the police commission (*144 Cal. App. 4th 977, 995-998* ; *now see Gov. Code § 3304(d)(2)(C),(F)*).

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2-36 California Points & Authorities § 36.58

§ 36.58 Opposing Petition for Writ of Mandate to Review Discipline of Public Safety Officer--Statute of Limitations Defense Forfeited

[1] FORM

[*The following may be included in a memorandum or in a trial or appellate brief.*]

THE PETITIONER'S FAILURE TO RAISE THE STATUTE OF LIMITATIONS IN THE ADMINISTRATIVE PROCEEDINGS BELOW PRECLUDES MANDATE REVIEW OF THAT ISSUE BY THIS COURT.

Statute of Limitations Defense Under Public Safety Officers Procedural Bill of Rights Act Must Be Raised in Administrative Hearing Before Mandamus Relief Can Be Sought. The one-year limitations period for imposing discipline on public safety officers under the Public Safety Officers Procedural Bill of Rights Act (*Gov. Code § 3300 et seq.*) must be asserted by an officer during administrative proceedings. A failure to do so forfeits the statute of limitations defense in subsequent proceedings for a writ of mandate (*Moore v. City of Los Angeles (2007) 156 Cal. App. 4th 373, 382-383, 386, 67 Cal. Rptr. 3d 218*).

[2] Comments

[a] Use of Form

This form may be used to oppose a contention that a discipline imposed on a peace officer is barred by the one-year statute of limitations established by the Public Safety Officers Procedural Bill of Rights Act (*Gov. Code § 3304(d)*). In an appropriate case, this form may be used in opposition to the form *set forth in § 36.20.*

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should establish that the officer failed to assert the statute of limitations in the administrative proceedings.

[c] Related Pleading and Practice Chapters

For related legal background and research guides for defending mandamus cases involving discipline of public employees, as well as detailed coverage of the Public Safety Officers Procedural Bill of Rights Act (*Gov. Code § 3300 et seq.*), see California Forms of Pleading and Practice, Ch. 118, *Civil Service* (Matthew Bender).

[3] Discussion of Authorities

[a] Statute of Limitations Defense Under Public Safety Officers Procedural Bill of Rights Act Must Be Raised in Administrative Hearing Before Mandamus Relief Can Be Sought

In ***Moore v. City of Los Angeles*** *(2007) 156 Cal. App. 4th 373, 67 Cal. Rptr. 3d 218* , a Los Angeles police officer was terminated after five charges of misconduct were sustained. The officer then sought a writ of mandate under *Code Civ. Proc. § 1094.5*, arguing that the termination was barred by the one-year statute of limitations under the Public Safety Officers Procedural Bill of Rights (*see Gov. Code § 3304(d)*). The superior court denied the writ, ruling that the officer had forfeited the statute of limitations defense by failing to raise it in his hearing before the city's board of review.

The court of appeal affirmed, noting that California law has long provided that a statute of limitations defense must be raised at an administrative hearing before relief may be sought on that ground in a mandate proceeding. The reason for the rule is that the review of administrative proceedings provided under *Code Civ. Proc. § 1094.5* ordinarily is confined to the issues appearing in the record of the administrative body as made out by the parties to the proceedings (*156 Cal. App. 4th 373, 382-383)* . Thus, even if it would have been "futile" to assert the statute of limitations in the administrative board hearing, a failure to assert it will result in forfeiture of the issue, because any matter not appearing in the administrative record will not be before the trial court in a subsequent mandate proceeding (*156 Cal. App. 4th 373, 386)* .

In affirming the superior court's denial of mandate, the court of appeal noted that the officer could have asserted the statute of limitations in an alternative proceeding seeking injunctive relief under *Gov. Code § 3309.5(a)*, which makes it which makes it "unlawful for any public safety department to deny or refuse to any public safety officer the rights and protections guaranteed to him or her by this chapter." Because the superior court would have had initial jurisdiction over a proceeding for injunctive relief under *Gov. Code § 3309.5*, the court could have granted such relief despite the officer's failure to assert the statute of limitations before the administrative board (*Gov. Code § 3309.5(c)*). However, the officer in this case had not proceeded under *Gov. Code § 3309.5* and never invoked the superior court's initial jurisdiction (*156 Cal. App. 4th 373, 383-386)* .

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2-36 California Points & Authorities § 36.59

§ 36.59 Opposing Petition for Writ of Mandate to Review Discipline of Public Safety Officer--Notice of Disciplinary Action Timely and Sufficient

[1] FORM

[*The following may be included in a memorandum or in a trial or appellate brief.*]

A. Agency Must Provide Written Notice of Disciplinary Action Within One Year of Discovery of Violation. Under the Public Safety Officers Procedural Bill of Rights Act, a public agency intending to take disciplinary action against an officer must provide the officer written notice of disciplinary action within one year of the discovery, by a person authorized to initiate an investigation, of the allegation of the act, omission, or misconduct that is the cause of discipline (*Gov. Code § 3304(d)(1)*; *Benefield v. Department of Corrections & Rehabilitation (2009) 171 Cal. App. 4th 469, 476-477, 89 Cal. Rptr. 3d 608*). Notification of the proposed discipline is given in a Letter of Intent or Notice of Adverse Action articulating the proposed discipline (*Gov. Code § 3304(d)(1)*). The agency is not required to impose the discipline within the one-year period (*Gov. Code § 3304(d)(1)*).

[*Optional*] **B. Officer's False Statement During Investigation Constitutes Separate Misconduct That Triggers New One-Year Period.** If an officer under investigation for misconduct makes a false statement about that matter during the one-year period for investigating the alleged misconduct, the false statement constitutes a separate offense with its own one-year period for investigation and notification of proposed discipline (*Crawford v. City of Los Angeles (2009) 175 Cal. App. 4th 249, 256-258, 95 Cal. Rptr. 3d 550*).

[*Optional*] **C. Notice of Disciplinary Action Need Not Identify Person Who Decided to Impose Discipline.** The Public Safety Officers Procedural Bill of Rights Act does not require that a public agency's notice of proposed discipline identify the decisionmaker (*Benefield v. Department of Corrections & Rehabilitation (2009) 171 Cal. App. 4th 469, 477, 89 Cal. Rptr. 3d 608* ; *see Gov. Code § 3304(d)*).

[2] Comments

[a] Use of Form

This form may be used to oppose a contention that a discipline imposed on a peace officer is barred by the one-year statute of limitations established by the Public Safety Officers Procedural Bill of Rights Act (*Gov. Code § 3304(d)*). In an appropriate case, this form may be used in opposition to the form *set forth in § 36.20*.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show that the notice of disciplinary action was provided to the officer within the statutory period (*see Gov. Code § 3304(d)*), that it specified the alleged misconduct, and that it stated the matter would be adjudicated by an administrative tribunal.

[c] Related Pleading and Practice Chapters

For related legal background and research guides for defending mandamus cases involving discipline of public employees, as well as detailed coverage of the Public Safety Officers Procedural Bill of Rights Act [*Gov. Code § 3300 et seq.*], see California Forms of Pleading and Practice, Ch. 118, *Civil Service* (Matthew Bender).

[3] Discussion of Authorities

[a] Agency Must Provide Written Notice of Disciplinary Action Within One Year of Discovery of Violation

Benefield v. Department of Corrections & Rehabilitation (2009) 171 Cal. App. 4th 469, 89 Cal. Rptr. 3d 608 , involved discipline imposed by the California Department of Corrections and Rehabilitation (CDCR) for misconduct by two correctional officers employed by the CDCR. One issue was whether the CDCR had provided the officers with notice of disciplinary action within the one-year limitation provided by the Public Safety Officers Procedural Bill of Rights Act (*now see Gov. Code § 3304(d)(1)*). Specifically, the question was whether the one-year period began to run when the incident of misconduct occurred and was observed by a fellow correctional officer, or when that fellow officer reported the misconduct to the CDCR. The officer who observed the incident was not herself authorized by the CDRC manual to initiate an investigation of the misconduct, but she testified that she had not immediately reported the misconduct because she believed that a correctional lieutenant also knew about the misconduct and would initiate an investigation. When it became apparent that the lieutenant had not initiated an investigation, the officer who observed the misconduct reported the incident to the CDCR, which then initiated an investigation. The CDCR sent the notice of disciplinary action within one year of the report of the incident to the CDCR, but more than a year after the incident itself. The court of appeal held that the notice was timely, because the Public Safety Officers Procedural Bill of Rights Act specifies that the one-year period begins to run on the "agency's discovery *by a person authorized to initiate an investigation* of the allegation of an act, omission, or other misconduct" (*now see Gov. Code § 3304(d)(1)* (emphasis added)). Since the officer who observed the alleged misconduct had not been authorized to initiate an investigation, her knowledge of the incident did not constitute "discovery" by the agency so as to trigger the running of the one-year period. Further, even if that officer was correct that the lieutenant knew of the incident, his knowledge did not constitute "discovery" by the agency, because there was no evidence that he held a position with authority under the CDRC manual to initiate an investigation. Therefore, the one-year period did not begin to run until the report of the incident to the CDCR (*171 Cal. App. 4th 469, 476-477)* .

[b] Officer's False Statement During Investigation Constitutes Separate Misconduct That Triggers New One-Year Period

One issue in ***Crawford v. City of Los Angeles*** *(2009) 175 Cal. App. 4th 249, 95 Cal. Rptr. 3d 550* , was how one-year statute of limitations for a police department to investigate and notify an officer of proposed discipline (*see Gov. Code § 3304(d)*) should be applied to a charge of making a false statement during the official investigation of other alleged misconduct. In this case, the officer's allegedly false statement was made before the limitations period expired on the underlying charge. The department's notice of proposed discipline, which included the charge of making of a false

statement, was issued after the limitations period had expired on the underlying charge. However, the notice was well within one year of the allegedly false statement (*175 Cal. App. 4th 249, 257)* .

The court of appeal held that the false-statement charge was not time-barred. The court acknowledged that at least one other court has held that an officer's dishonesty in denying an underlying charge *after* the expiration of the one-year limitations period on the underlying charge does not constitute separately chargeable misconduct (*see Alameida v. State Pers. Bd. (2004) 120 Cal. App. 4th 46, 62-63, 15 Cal. Rptr. 3d 383*). In such circumstances, to allow the dishonesty charge to survive would effectively resuscitate the underlying charge, which would need to be proven in order to demonstrate that the officer's denial was dishonest. That would defeat the purpose of the limitations period, which is to ensure a speedy adjudication of conduct that could result in discipline (*175 Cal. App. 4th 249, 256-257)* .

In this case, however, the court of appeal found it significant that the one-year period had not expired when the officer made the allegedly false statement. Under this scenario, there was no danger that the police department would be using the allegedly false statement to resuscitate a charge that had been time-barred. As a result, the policy concern about impermissibly reviving an already-expired charge by questioning the officer about was not present in this case (*175 Cal. App. 4th 249, 257)* .

[c] Notice of Disciplinary Action Need Not Identify Person Who Decided to Impose Discipline

The factual background of *Benefield v. Department of Corrections & Rehabilitation (2009) 171 Cal. App. 4th 469, 89 Cal. Rptr. 3d 608* , is discussed in [a], above. The disciplined officers claimed that they were entitled to relief under the Public Safety Officers Procedural Bill of Rights Act (*see Gov. Code § 3309.5*) because the notice of disciplinary action was "misleading" in that it did not specify the person who decided to impose discipline on the officers. The court of appeal rejected this contention, explaining that "[n]owhere in the [Public Safety Officers Procedural Bill of Rights Act] is there any requirement that a notice of proposed discipline or a notice of adverse action identify the decisionmaker" (*171 Cal. App. 4th 469, 477)* .

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2-36 California Points & Authorities § 36.60

§ 36.60 Opposing Petition for Writ of Mandate to Review Discipline of Civil Service Employee--Employee's Constitutional Right Against Self-Incrimination Does Not Bar Disciplinary Action for Refusal to Answer Employer's Job-Related Questions

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

A WRIT OF MANDATE SHOULD NOT ISSUE TO SET ASIDE THE DISCIPLINE IMPOSED ON THE PETITIONER, BECAUSE THE PETITIONER'S CONSTITUTIONAL RIGHT AGAINST SELF-INCRIMINATION DOES NOT PREVENT THE RESPONDENT FROM DISCIPLINING THE PETITIONER FOR A REFUSAL TO ANSWER JOB-RELATED QUESTIONS.

Privilege Against Self-Incrimination Does Not Prevent Employer From Requiring Public Employee To Answer Job-Related Questions. A public employer may discipline, and even dismiss, a public employee for refusing, on grounds of the constitutional privilege against self-incrimination, to answer the employer's job-related questions, as long as the employee is not required, as a condition of remaining in the job, to waive or surrender his or her constitutional protection against criminal use of the statements thus obtained, at least when the employee is specifically advised that he or she retains that protection (*Spielbauer v. County of Santa Clara (2009) 45 Cal. 4th 704, 725-730, 88 Cal. Rptr. 3d 590, 199 P.3d 1125*).

[2] Comments

[a] Use of Form

This form may be used to oppose a contention that a public employer violated an employee's constitutional protection against self-incrimination by compelling the employee to answer job-related questions under threat of disciplinary action. In an appropriate case, this form may be used in opposition to the form *set forth in § 36.37*.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. For example, counsel should show that, although the public employer threatened disciplinary action if the employee refused to answer questions, the employee was not required to waive his or her constitutional right not to have the compelled answers used against him or her in a criminal prosecution.

[3] Discussion of Authorities

[a] Privilege Against Self-Incrimination Does Not Prevent Employer From Requiring Public Employee To Answer Job-Related Questions

In ***Spielbauer v. County of Santa Clara*** *(2009) 45 Cal. 4th 704, 88 Cal. Rptr. 3d 590, 199 P.3d 1125* , the plaintiff had been a deputy public defender employed by the defendant county. During an investigation of allegations that the plaintiff had made deceptive statements to the court while representing a criminal defendant, a supervising attorney directed the plaintiff to answer questions about the incident and told the plaintiff that a refusal to cooperate would be deemed insubordination warranting discipline up to and including dismissal. The supervisor also accurately advised the plaintiff that his constitutional right against the use of compelled self-incrimination (*see U.S. Const. amend. V*, cl. 3; *Cal. Const. art. I, § 15*) meant that his answers could not be used in any criminal proceeding. Nevertheless, the plaintiff refused to answer, and the county terminated the plaintiff's employment, in part for insubordination in refusing to answer questions about his job performance.

The plaintiff sought mandamus relief. Among other things, he insisted he could not be dismissed for refusing, on grounds of his constitutional right against self-incrimination, to answer the county's potentially incriminating questions unless he received, in advance, a formal grant of immunity from criminal use of his answers. The trial court denied the petition, ruling that the plaintiff was not entitled to formal immunity before being compelled to answer his employer's questions. After the court of appeal reversed the trial court's judgment, the California Supreme Court granted review.

The Supreme Court agreed with the trial court and reversed the court of appeal's judgment on the question whether a formal grant of criminal-use immunity is required before a public employee can be compelled, under threat of dismissal, to answer job-related questions. The Supreme Court began with the settled proposition that under the relevant federal and state constitutional provisions, incriminating answers coerced from a public employee under threat of dismissal cannot be used against the employee in a criminal proceeding (*45 Cal. 4th 704, 715)* . On the other hand, the constitutional privilege against compelled self-incrimination in a *criminal* case does not protect against the *nonpenal* adverse use of officially compelled answers. Thus, incriminating answers given by a public employee under threat of job discipline for refusal to answer may themselves form the basis for job discipline, including termination, as long as the employee is protected against the use of such statements in criminal proceedings (*45 Cal. 4th 704, 715)* .

The Supreme Court also noted that lower federal courts and most California courts have concluded that the federal and state Constitutions do not require a public employer to obtain and provide an affirmative grant of criminal-use immunity before using the threat of job discipline to compel answers from its employee in the course of an investigation of job performance. Rather, the employee may be punished for a refusal to answer such questions, provided that he or she is not required to waive or surrender the constitutional privilege against criminal use of the answers (*45 Cal. 4th 704, 718-719)* .

The Supreme Court agreed with these courts, explaining that the state and federal *self-incrimination clauses* say one cannot be made an involuntary witness against himself, or herself, in a criminal proceeding. Thus, they do not prohibit officially compelled admissions of wrongdoing as such; they only forbid the use of such statements in a criminal proceeding against the declarant. Thus, the constitutional provisions afford a public employee no right to refuse to account for his or her job performance, or to avoid dismissal as punishment for such a refusal. They simply forbid the use of the compelled statements, or the fruits thereof, in a criminal prosecution against the employee (*45 Cal. 4th 704, 727)* .

The Supreme Court concluded that a public employer need not provide a formal grant of criminal-use immunity before it can discipline and even dismiss a public employee for refusing to answer the employer's job-related questions, so long as the employee is not required to waive or surrender his or her privilege against self-incrimination, at least where, as in this case, the employee is specifically advised that he or she retains that right (*45 Cal. 4th 704, 725, 730*). Accordingly, the Court reversed the court of appeal's judgment to the extent that that judgment had required the plaintiff to receive a formal grant of criminal-use immunity before he could be dismissed for refusing to answer the county's job-related questions (*45 Cal. 4th 704, 730)* .

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4-40 California Points & Authorities 40.syn

§ 40.syn Synopsis to Chapter 40: CLAIM AND DELIVERY

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§ 40.02 Governing Statutes

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§ 40.04 Related Pleading and Practice Chapters

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§§ 40.06-40.19 [Reserved]

§ 40.20 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] for Possession of Personal Property [Civ. Code §§ 3379, 3380]--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Failure to Allege Plaintiff's Right to Possession of Property Sought to Be Recovered

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Plaintiff as Required to Have Right to Immediate Possession of Property Claimed

[b] Complaint Fatally Insufficient Where Right to Possession Not Alleged

§ 40.21 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] for Possession of Personal Property [Civ. Code §§ 3379, 3380]--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Failure to Allege Demand for Property Where Defendant Lawfully Obtained Possession

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] When Demand Necessary

[b] Failure to Allege Demand

§ 40.22 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] for Possession of Personal Property [Civ. Code §§ 3379, 3380]--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Intangible Property as Not Recoverable

[1] FORM

[2] Comments

[a] Use of Form

[b] Recovery of Corporate Stock

[c] Opposing Points and Authorities

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Intangible Property as Not Recoverable

[b] Corporate Stock Not Identified by Certificate as Not Recoverable

§ 40.23 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] for Possession of Personal Property [Civ. Code §§ 3379, 3380]--Complaint Uncertain [Code Civ. Proc. § 430.10(f)]--Insufficient Description of Property Sought to Be Recovered

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Insufficient Description of Personal Property as Raised by Demurrer

§ 40.24 Supporting Motion for New Trial [Code Civ. Proc. § 657(5), (6)] by Defendant in Action for Possession of Personal Property [Civ. Code §§ 3379, 3380]--Failure to Show Defendant's Possession of or Power to Deliver Property When Action Commenced

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Use

[c] Opposing Points and Authorities

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Possession by Defendant Required

§ 40.25 Supporting Motion for New Trial [Code Civ. Proc. § 657(5), (6)] by Defendant in Action for Possession of Personal Property [Civ. Code §§ 3379, 3380]--Award of Damages for Detention Is Excessive [Code Civ. Proc. § 667]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Damages for Detention Authorized

[b] Formula for Damages Based on Rental Value

[c] Damages Calculated by Application of Flat Rental Rate Over Time Is Error

[d] Failure to Take Expenditures Into Account Is Error

[e] Damages for Detention That Grossly Exceed Value of Property Is Error

[4] Additional Authorities

[a] Formula for Damages Based on Rental Value

[b] Damages for Detention That Grossly Exceed Value of Property Is Error

§ 40.26 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] for Possession of Personal Property [Civ. Code §§ 3379, 3380]--Plaintiff Need Not Allege Source of Right to Possession

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Plaintiff Need Not Allege Source of Right to Possession

§ 40.27 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] for Possession of Personal Property [Civ. Code §§ 3379, 3380]--Plaintiff May Recover Certificates Representing Shares of Corporate Stock

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Plaintiff May Recover Certificates Representing Shares of Corporate Stock

§ 40.28 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 657(5), (6)] in Action for Possession of Personal Property [Civ. Code §§ 3379, 3380]--Plaintiff Need Not Be Absolute Owner of Property

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[3] Discussion of Authorities

[a] Absolute Ownership of Property Not Necessary

[b] Qualified Interest as Sufficient

[c] Possessory Lien Interest as Sufficient

[d] Mortgagee's Interest as Sufficient

§ 40.29 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action for Possession of Personal Property [Civ. Code §§ 3379, 3380]--Showing of Plaintiff's Demand for Return of Property Not Required If Demand Useless

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[3] Discussion of Authorities

[a] Showing of Demand Not Required If Demand Useless

[b] Showing of Demand Not Required When Defendant Asserts Ownership

§ 40.30 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action for Possession of Personal Property [Civ. Code §§ 3379, 3380]--Showing of Actual Physical Possession by Defendant Unnecessary

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Actual Physical Possession by Defendant Unnecessary

§ 40.31 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action for Possession of Personal Property [Civ. Code §§ 3379, 3380]--Possession by Defendant Unnecessary If Defendant Has Wrongfully Disposed of Property Prior to Commencement of Action

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Possession by Defendant Unnecessary if Defendant Has Wrongfully Disposed of Property Prior to Commencement of Action

§ 40.32 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 657(5), (6)] in Action for Possession of Personal Property [Civ. Code §§ 3379, 3380]--Award of Damages for Detention Is Not Excessive [Code Civ. Proc. § 667]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Interest Recoverable as Damages for Detention

[b] Rental Value Recoverable as Damages for Detention

[c] Damages for Detention May Include Lost Profits

[d] Depreciation During Period of Detention

[e] Damages for Detention May Exceed Value of Property

[f] Punitive Damages May Be Awarded

[4] Additional Authorities

[a] Rental Value Recoverable as Damages for Detention

[b] Depreciation During Period of Detention

[c] Punitive Damages May Be Awarded

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4-40 California Points & Authorities § 40.01

§ 40.01 Scope of Chapter

This chapter contains forms of memoranda for use in an action for the possession of personal property (sometimes called an action for claim and delivery or replevin). It includes memoranda supporting [*see §§ 40.20 -40.23*] and opposing [*see §§ 40.26, 40.27*] a demurrer to a complaint in an action for possession of personal property, and supporting [*see §§ 40.24, 40.25*] and opposing [*see §§ 40.28 -40.32*] a motion for a new trial in such an action.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPleading & PracticeMotion PracticeSupporting MemorandaCivil ProceduresJudgmentsRelief From JudgmentMotions for New TrialsCivil ProceduresRemediesProvisional RemediesReplevins

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§ 40.02 Governing Statutes

Actions for the possession of personal property are governed by *Civ. Code §§ 3379* and *3380*. The law governing the provisional remedy of claim and delivery is contained in *Code Civ. Proc. §§ 511.010-516.050*. *Code Civ. Proc. § 667* authorizes an award of damages for detention in favor of the successful party in a claim and deliver action.

Legal Topics:

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

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4-40 California Points & Authorities § 40.03

§ 40.03 Page Limits on Memoranda

Generally, a supporting or opposing memorandum may not exceed 15 pages, or 20 pages in the case of a memorandum supporting or opposing a motion for summary judgment or summary adjudication. A reply or closing memorandum may not exceed 10 pages [*Cal. Rules of Ct., Rule 3.1113(d)*]. A party desiring to file a longer memorandum must obtain leave of court [*Cal. Rules of Ct., Rule 3.1113(e)*]. For further discussion of these page limitations, and of other basic format requirements governing memoranda, see *Ch. 1, Writing Legal Memoranda and Briefs, § 1.05*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureRemediesProvisional RemediesReplevins

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4-40 California Points & Authorities § 40.04

§ 40.04 Related Pleading and Practice Chapters

For discussion, procedures, and forms relating to actions for the possession of personal property and the provisional remedy of claim and delivery, see California Forms of Pleading and Practice, Ch. 119, *Claim and Delivery* (Matthew Bender). For discussion, procedures, and forms for use in conjunction with the provisional remedy of claim and delivery, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* and Ch. 538, *Suretyship, Bonds, and Undertakings* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesProvisional RemediesReplevins

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4-40 California Points & Authorities § 40.05

§ 40.05 Related Points and Authorities Chapters

Related memoranda that may be used in actions for the possession of personal property may be found in Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* and Ch. 155, *Motions After Trial* .

Related memoranda that may be useful in conjunction with the provisional remedy of claim and delivery may be found in Ch. 116, *Injunctions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePretrial JudgmentsJudgment on the PleadingsCivil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesProvisional RemediesReplevins

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4-40 California Points & Authorities §§ 40.06-40.19

[Reserved]

§§ 40.06[Reserved]

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CHAPTER 40 CLAIM AND DELIVERY
PART II. FORMS

4-40 California Points & Authorities § 40.20

§ 40.20 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] for Possession of Personal Property [Civ. Code §§ 3379, 3380]--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Failure to Allege Plaintiff's Right to Possession of Property Sought to Be Recovered

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN SUPPORT OF DEMURRER TO COM-
vs.	)	PLAINT
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

A DEMURRER TO PLAINTIFF'S COMPLAINT FOR POSSESSION OF PERSONAL PROPERTY SHOULD BE SUSTAINED ON THE GROUND THAT THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT DOES NOT ALLEGE THE PLAINTIFF'S RIGHT TO IMMEDIATE POSSESSION AT THE TIME OF THE COMMENCEMENT OF THE ACTION.

A. Objection by Demurrer. The party against whom a complaint has been filed may object to the complaint by demurrer on the ground that it fails to state facts sufficient to constitute a cause of action when such ground appears on the face of the complaint [or from any matter of which the court is required to or may take judicial notice] (*Code Civ.*

Proc. §§ 430.10(e), 430.30(a)).

B. Plaintiff as Required to Have Right to Immediate Possession of Property Claimed. To sustain an action for the recovery of specific personal property, the plaintiff must have the right to immediate and exclusive possession of the property at the time of the commencement of the action (*Commercial Discount Co. v. Cowen (1941) 18 Cal. 2d 610, 613, 116 P.2d 599*).

C. Complaint Fatally Insufficient Where Right to Possession Not Alleged. A complaint in an action for possession of personal property is fatally insufficient if it fails to allege the plaintiff's right to possession of the property at the time the action is commenced (*see* *Vanalstine v. Whelan (1901) 135 Cal. 232, 233, 67 P. 125* ; *Truman v. Young (1898) 121 Cal. 490, 491, 53 P. 1073*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted in support of a demurrer to a complaint for possession of personal property when the complaint fails to allege that the plaintiff is entitled to immediate possession of the property at the time the action for its recovery is commenced.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

With appropriate modifications, the foregoing points and authorities may be used to support a motion for summary judgment or new trial.

[b] Related Points and Authorities

For memoranda of points and authorities supporting demurrers to complaints, generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Plaintiff as Required to Have Right to Immediate Possession of Property Claimed

Commercial Discount Co. v. Cowen *(1941) 18 Cal. 2d 610, 116 P.2d 599* , was an action in claim and delivery to recover certain personal property located at defendant's place of business. Plaintiff alleged that he was entitled to immediate possession of this property and demanded possession thereof from defendant, which was refused. Plaintiff's

alleged right to possession stemmed from a contract for the liquidation of a debt owing from defendant to plaintiff. The contract provided that in the event defendant breached the agreement, any and all of theassets located at defendant's place of business were to be assigned and transferred to plaintiff and liquidated, and the proceeds thereof would be credited toward defendant's indebtedness. The trial court found that the agreement did not give plaintiff the right to immediate possession and entered judgment for defendant.

On appeal, the Supreme Court affirmed. The Court noted the well-established rule that in order to maintain an action for recovery of specific personal property, the plaintiff must have the right to immediate and exclusive possession of the property at the time of the commencement of the action, although it is not essential that he or she show that he or she ever had actual possession of it. The plaintiff need not show absolute ownership of the property; a special property interest therein entitling plaintiff to immediate and exclusive possession of the property is sufficient (*18 Cal. 2d 610, 613)* . The Court held, however, that the contract in this case did not give plaintiff the right to immediate possession of the property (*18 Cal. 2d 610, 615-616)* .

[b] Complaint Fatally Insufficient Where Right to Possession Not Alleged

In ***Vanalstine v. Whelan*** *(1901) 135 Cal. 232, 67 P. 125* , plaintiff brought an action to recover personal property seized by one defendant, a sheriff, for the benefit of other defendants who had maintained successful attachment suits. Defendants answered, and at the conclusion of the trial, judgment was entered in favor of plaintiff. Defendants appealed on the ground that the complaint was insufficient for failure to allege that plaintiff was the owner and entitled to possession of the property when the action was commenced. Plaintiff argued that this defect in the complaint was cured by the allegation in defendants' answer that plaintiff was not the owner and was not entitled to possession of the goods at the time alleged in the complaint or at any other time. The Supreme Court reversed the judgment for insufficiency of the complaint. It stated that a complaint in an action for possession of personal property was fatally insufficient if it failed to allege plaintiff's ownership and right to possession of the property at the time the action was commenced (*135 Cal. 232, 233)* . It also stated that when a complaint fails to state material facts, those facts may be supplied by the answer. However, the answer before the Court did not supply the omitted facts because it alleged the converse of the allegation that plaintiff ought to have made in the complaint (*135 Cal. 232, 234)* .

In ***Truman v. Young*** *(1898) 121 Cal. 490, 53 P. 1073* , plaintiff brought an action for possession of a diamond. Defendant demurred on the ground that the complaint did not state sufficient facts to constitute a cause of action. The demurrer was overruled. Following trial, the trial court found for plaintiff. Defendant appealed from the trial court's adverse judgment and its denial of defendant's motion for a new trial. The Supreme Court found that the demurrer should have been sustained and reversed the judgment, granting plaintiff leave to amend the complaint (*121 Cal. 490, 490)* . It held that the allegation that the plaintiff was the owner of the personal property and entitled to its possession on a specified date prior to the commencement of the action was insufficient in that it did not imply plaintiff's continued ownership at the time of commencement of the action, which is a necessary element giving plaintiff the right to bring the action. Therefore, a complaint in an action for possession of personal property is fatally insufficient if it fails to allege plaintiff's ownership and right to possession of the property at the time the action is commenced (*121 Cal. 490, 491)* .

Counsel should note that although both the *Truman* and *Vanalstine* cases imply that plaintiff must allege both ownership and right to possession of the property at the time the action is commenced, the Supreme Court subsequently held that it is not essential to an action for possession of personal property that plaintiff be the absolute owner of the property, provided that he or she is entitled to its immediate possession at the time the action is commenced [*see Commercial & Sav. Bank v. Foster (1930) 210 Cal. 76, 79, 290 P. 583]* . Thus it appears that while plaintiff must allege his or her right to immediate possession of the property at the commencement of the action, plaintiff need not allege ownership of the property.

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4-40 California Points & Authorities § 40.21

§ 40.21 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] for Possession of Personal Property [Civ. Code §§ 3379, 3380]--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Failure to Allege Demand for Property Where Defendant Lawfully Obtained Possession

[1] FORM

[*Caption. See § 40.20.*]

A DEMURRER TO PLAINTIFF'S COMPLAINT FOR POSSESSION OF PERSONAL PROPERTY SHOULD BE SUSTAINED ON THE GROUND THAT THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT APPEARS FROM THE COMPLAINT THAT DEFENDANT OBTAINED POSSESSION OF THE PROPERTY LAWFULLY, BUT THE COMPLAINT FAILS TO ALLEGE THAT PLAINTIFF DEMANDED RETURN OF THE PROPERTY AT A TIME WHEN DEFENDANT HAD POSSESSION OF THE PROPERTY.

A. Objection by Demurrer. [*See § 40.20[1], P A*].

B. When Demand Necessary. If defendant has lawfully obtained possession of personal property, plaintiff must make a demand on him or her for return of the property before bringing an action in claim and delivery for its possession (*Commercial & Sav. Bank v. Foster (1930) 210 Cal. 76, 82, 290 P. 583* ; *Home Payment Jewelry Co. v. Smith (1914) 24 Cal. App. 486, 488, 141 P. 933*).

C. Failure to Allege Demand. If it appears from the complaint that defendantobtained possession of the property rightfully, then the complaint must allege the making of a demand on defendant for return of the property during the time when defendant had possession thereof, and if the complaint does not contain such an allegation, a demurrer to the complaint may properly be sustained (*Home Payment Jewelry Co. v. Smith (1914) 24 Cal. App. 486, 488, 141 P. 933*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted in support of a demurrer to a complaint for possession of personal property when it appears from the complaint that defendant obtained possession of the property lawfully, but the complaint fails to allege that plaintiff made a demand on defendant for return of the property.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

With appropriate modifications, the foregoing points and authorities may be used in support of a motion for new trial on the ground that the evidence is insufficient to support a verdict or decision for plaintiff because plaintiff failed to prove that a demand was made on defendant at a time when defendant had possession of the property [*see Code Civ. Proc. § 657(6)*; *Commercial & Sav. Bank v. Foster (1930) 210 Cal. 76, 82, 290 P. 583]* .

[b] Related Points and Authorities

For memoranda of points and authorities supporting demurrers to complaints, generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] When Demand Necessary

Commercial & Sav. Bank v. Foster *(1930) 210 Cal. 76, 290 P. 583* , was an action in claim and delivery brought by plaintiff to recover possession of certain dairy stock or its value. Plaintiff claimed right to possession of the cattle by virtue of a chattel mortgage executed by defendant to secure a promissory note payable to plaintiff. The mortgage gave plaintiff the right to take possession of the cattle if defendant defaulted. The trial court entered a judgment for the plaintiff. On appeal, defendant contended, inter alia, that plaintiff could not maintain the action for possession of the cattle because it had failed to make demand on her for the cattle before bringing the action. The Supreme Court affirmed the judgment. The Court stated that where property has lawfully come into possession of a party, he or she cannot be sued for possession unless a demand has been made on him or her. The Court observed, however, that in this case, the uncontradicted evidence showed that when levying officers came to defendant's property to hold the foreclosure sale, defendant absolutely refused to admit them and thereby refused to deliver the cattle, indicating that a formal demand would be useless. The Court held that where, under the circumstances, a demand would be useless, the necessity for making a demand is dispensed with (*210 Cal. 76, 82)* . The Court also noted that the case was tried on behalf of defendant on the theory that she had title and was entitled to possession, that plaintiff's claim was based on a void mortgage, and that a demand was also unnecessary for that reason (*210 Cal. 76, 82-83)* .

In ***Home Payment Jewelry Co. v. Smith*** *(1914) 24 Cal. App. 486, 141 P. 933* , plaintiff sued to recover possession of personal property consisting of certain articles of jewelry and to recover damages. The complaint alleged that plaintiff

lessor had delivered the property to Ames under a lease contract, which provided that the lessee could not transfer possession of the property without plaintiff's written consent, and that plaintiff had the right to retake possession of the property in the event of any failure to make a payment under the lease. The complaint further alleged that after obtaining possession of the property, Ames defaulted on her payments under the lease and that she had transferred the property to other persons without plaintiff's consent. Plaintiff alleged that, prior to commencement of the action, defendants had obtained possession of the property from Ames, either directly or indirectly, and that they were still in possession of the property without plaintiff's consent. Plaintiff also alleged that it had demanded possession of the property from defendants prior to commencement of the action, but the defendants refused to deliver possession of the property to plaintiff. The trial court sustained a demurrer to the complaint and entered a judgment of dismissal.

The court of appeal affirmed. The court held that if defendants obtained possession rightfully, then it was necessary that demand be made on them requiring that the property be returned to the lessor before an action for claim and delivery could be brought. The court stated that since a demand was necessary, it was essential that plaintiff should have alleged the making of such a demand during the time that defendants held possession of the property. The court concluded that plaintiff had not done so because although the complaint alleged that a demand was made prior to the commencement of the action, the complaintdid not allege at what date defendants obtained possession of the property. The demurrer was therefore properly sustained (*24 Cal. App. 486, 488)* .

[b] Failure to Allege Demand

Home Payment Jewelry Co. v. Smith *(1914) 24 Cal. App. 486, 141 P. 933* , is discussed in *§ 40.21[3][a]*.

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4-40 California Points & Authorities § 40.22

§ 40.22 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] for Possession of Personal Property [Civ. Code §§ 3379, 3380]--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Intangible Property as Not Recoverable

[1] FORM

[*Caption. See § 40.20.*]

A DEMURRER TO PLAINTIFF'S COMPLAINT FOR POSSESSION OF PERSONAL PROPERTY SHOULD BE SUSTAINED ON THE GROUND THAT THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION BECAUSE IT APPEARS FROM THE COMPLAINT THAT THE PROPERTY WHICH PLAINTIFF SEEKS TO RECOVER IS INTANGIBLE.

A. Objection by Demurrer. [*See § 40.20[1], P A.*]

B. Intangible Property as Not Recoverable. In an action for recovery of specific personal property, the property sought to be recovered must exist in some concrete or tangible form capable of identification and seizure (*Lamus v. Engwicht (1919) 39 Cal. App. 523, 528-529, 179 P 435*).

[*Optional*] **C. Corporate Stock Not Identified by Certificate as Not Recoverable.** Because stock in a corporation is an incorporeal, intangible thing which is incapable of identification and seizure, a complaint for recovery of personal property which identifies the property to be seized as corporate stock, but which does not identify any particular certificate which represents the stock, does not state a cause of action (*Ashton v. Heydenfeldt (1899) 124 Cal. 14, 16, 56 P 624* ; *Lamus v. Engwicht (1919) 39 Cal. App. 523, 528-529, 179 P 435*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted in support of a demurrer to a complaint for possession of personal property when the complaint seeks to recover possession of intangible property.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated.

[b] Recovery of Corporate Stock

Optional Paragraph C should be included when plaintiff's complaint seeks to recover possession of corporate stock without identifying any particular certificates representing the stock. Corporate stock itself is intangible property which cannot be recovered in an action for possession of personal property [*see Ashton v. Heydenfeldt (1899) 124 Cal. 14, 16, 56 P. 624* (discussed in *§ 40.22[3]* [b])]. A possessory action may be brought, however, to recover the certificates which represent the stock [*see Englert v. Ivac Corp. (1979) 92 Cal. App. 3d 178, 184, 154 Cal. Rptr. 804]* .

[c] Opposing Points and Authorities

The points and authorities set out in *§ 40.27* may be used in an appropriate case to oppose a demurrer supported by the foregoing memorandum.

[d] Related Points and Authorities

For memoranda of points and authorities supporting demurrers to complaints, generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* in this set.

[3] Discussion of Authorities

[a] Intangible Property as Not Recoverable

Lamus v. Engwicht *(1919) 39 Cal. App. 523, 179 P. 435* , was an action by plaintiff, on behalf of a minor, to recover possession of shares of stock in a bank. The shares were allegedly given to the minor by his uncle shortly before the uncle's death and kept in a safe deposit box to which the uncle gave the minor the key. The complaint alleged that the minor was owner and entitled to possession of the stock but that the bank had refused to deliver possession of the stock to the minor on demand. The trial court overruled demurrers to the complaint and, after a trial, entered a judgment for plaintiff awarding him possession of the stock.

On appeal, the court of appeal reversed. The court noted that the complaint did not refer to, describe, or identify the certificate evidencing the stock referred to in the complaint. The court stated the rule that the mere reference in the complaintin an action to recover possession of corporate stock to the stock, without describing or referring to the certificate representing the stock, does not state a cause of action in claim and delivery (*39 Cal. App. 523, 528)* . The rationale of the rule, held the court, is that because an action in replevin or claim and delivery is adapted to the recovery of specific personal property, the property sought to be recovered must exist in some concrete or tangible form which is capable of identification and seizure (*39 Cal. App. 523, 528-529)* . Since stock in a corporation is an incorporeal,

intangible thing which is incapable of identification and seizure, the proceeding must be aimed at the certificate representing the shares, if there is one (*39 Cal. App. 523, 529)* .

[b] Corporate Stock Not Identified by Certificate as Not Recoverable

Ashton v. Heydenfeldt *(1899) 124 Cal. 14, 56 P 624* , involved an appeal from a judgment of dismissal entered after the trial court sustained a demurrer to the complaint in an action for possession of personal property. The complaint described the property sought to be recovered as 4,674 shares of the capital stock of a certain corporation. The Supreme Court held that the complaint did not state a cause of action in claim and delivery because stock in a corporation is an incorporeal, intangible thing which is incapable of identification and seizure. The Court noted that this proceeding was not aimed at the certificate representing the shares, nor was the certificate mentioned or described in the complaint (*124 Cal. 14, 16)* . The Court also held that the complaint did not state a cause of action for conversion, but reversed the judgment on other grounds.

Lamus v. Engwicht *(1919) 39 Cal. App. 523, 179 P. 435* , is discussed in *§ 40.22[3][a]*.

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4-40 California Points & Authorities § 40.23

§ 40.23 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] for Possession of Personal Property [Civ. Code §§ 3379, 3380]--Complaint Uncertain [Code Civ. Proc. § 430.10(f)]--Insufficient Description of Property Sought to Be Recovered

[1] FORM

[*Caption. See § 40.20.*]

THE DEMURRER TO PLAINTIFF'S COMPLAINT FOR POSSESSION OF PERSONAL PROPERTY SHOULD BE SUSTAINED BECAUSE THE COMPLAINT IS UNCERTAIN IN THAT IT FAILS TO SUFFICIENTLY DESCRIBE THE PROPERTY SOUGHT TO BE RECOVERED.

A. Objection by Demurrer. The party against whom a complaint has been filed may object to the complaint by demurrer on the ground that the pleading is uncertain where such ground appears on the face of the complaint [or from any matter of which the court is required to or may take judicial notice] (*Code Civ. Proc. §§ 430.10(f), 430.30(a)*).

B. Insufficient Description of Personal Property as Raised by Demurrer. A demurrer to a complaint for possession of personal property is proper when the complaint fails to describe the property sought to be recovered with a reasonable degree of certainty (*Hawley v. Kocher (1898) 123 Cal. 77, 82, 55 P. 696* ; *Orchardson v. Christie (1916) 30 Cal. App. 8, 9, 157 P. 547*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted in support of a demurrer to a complaint for possession of personal property when the complaint fails to sufficiently describe the property sought to be recovered.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For a form of demurrer to a complaint for possession of personal property on the ground of uncertainty for failing to sufficiently describe the property sought to be recovered, see California Forms of Pleading and Practice, Ch. 119, *Claim and Delivery* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities supporting demurrers for uncertainty, generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Insufficient Description of Personal Property as Raised by Demurrer

In ***Hawley v. Kocher*** *(1898) 123 Cal. 77, 55 P. 696* , plaintiff, the assignee of an insolvent debtor, brought an action for possession of personal propertytransferred by the insolvent debtor to defendant. The defendant filed a demurrer on the ground of uncertainty, in that the complaint did not contain a sufficient description of the property sought to be recovered. The trial court sustained the demurrer and rendered judgment for defendant after plaintiff failed to file a timely amended complaint. Plaintiff appealed, and the Supreme Court affirmed the judgment of the trial court, holding that the demurrer to the complaint was properly sustained. The Court stated the rule that, in any suit involving personal property, the property should be described with a reasonable degree of certainty. It noted that this rule was especially applicable in actions for possession of personal property because the property must be specifically returned to a prevailing plaintiff on execution if a return can be made, and a defendant has the right to make a return of the property in the event of an adverse judgment (*123 Cal. 77, 82)* . The Court found that the complaint contained lists of articles, that each item on the list contained several different kinds of property with an aggregate value attached, and that no quality, quantity, value, or price was given to any particular kind of property named. In addition, the complaint failed to allege where the property was located at the commencement of the action in order to identify it. A demurrer on the ground of uncertainty was thus proper in light of the insufficient description of the property sought to be recovered (*123 Cal. 77, 83)* .

In ***Orchardson v. Christie*** *(1916) 30 Cal. App. 8, 157 P. 547* , plaintiff brought an action to recover possession of 110 paintings and other pictures from defendant. Some of the pictures were not named in the complaint. The defendant did not demur to the complaint but met the issues raised by the complaint in an answer. Subsequently, the trial court entered judgment in favor of plaintiff for 105 pictures. These pictures were named in the judgment. In addition, the judgment referred to those pictures not named in the complaint as pictures made by plaintiff and held by defendant. It alleged that the subjects of the pictures were not named or described in the judgment because the subjects of the pictures could not be recalled by plaintiff, and because defendant denied plaintiff access to the pictures. Defendant appealed from the adverse judgment, in part, on the ground that some of the pictures were not named in the complaint. The court of appeal

affirmed the judgment and held, inter alia, that a demurrer to a complaint for possession of personal property is proper when the complaint insufficiently describes the property sought to be recovered. Thus, defendant's objection based on defects in the description of the property sought to be recovered should have been raised in a demurrer for uncertainty (*30 Cal. App. 8, 9)* .

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4-40 California Points & Authorities § 40.24

§ 40.24 Supporting Motion for New Trial [Code Civ. Proc. § 657(5), (6)] by Defendant in Action for Possession of Personal Property [Civ. Code §§ 3379, 3380]--Failure to Show Defendant's Possession of or Power to Deliver Property When Action Commenced

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____ _____

	)	
_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORIT-
vs.	)	IES IN SUPPORT OF MOTION FOR NEW TRIAL
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Trial Date: NONE

_____

A MOTION FOR NEW TRIAL SHOULD BE GRANTED BECAUSE THE EVIDENCE IS INSUFFICIENT TO SHOW THAT DEFENDANT HAD POSSESSION OF OR THE POWER TO DELIVER THE PROPERTY AT THE TIME THE ACTION WAS COMMENCED.

A. Motion for New Trial. On the application of the party aggrieved, the verdict or decision may be vacated, in whole or in part, and a new trial may be granted, on all or some of the issues, on the ground that the evidence is insufficient to justify the decision or verdict, the verdict or decision is against the law, or the damages are excessive, if substantial rights of the aggrieved party are materially affected thereby (*Code Civ. Proc. § 657(5), (6)*).

B. Possession by Defendant Required. An action to recover possession of personal property will not lie unless at the time the action is commenced, defendant has possession of the property or the power to deliver it in satisfaction of a judgment for its possession. If the evidence shows that defendant did not have possession, such nonpossession is a complete defense to the action (*Stockton M.P. Co. v. Mariposa County (1950) 99 Cal. App. 2d 210, 214, 215, 221 P.2d 232* ; *Ramacciotti v. Galiano (1943) 59 Cal. App. 2d 8, 12, 137 P.2d 722* ; *see Simonian v. Patterson (1994) 27 Cal. App. 4th 773, 783, 32 Cal. Rptr. 2d 722*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for a new trial in an action for possession of personal property when the evidence is insufficient to show that defendant had possession of or the power to deliver the property at the time the action was commenced [*Code Civ. Proc. § 657(6)*].

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Use

With appropriate modifications, these points and authorities may be used to support a demurrer to a complaint for possession of personal property when the complaint fails to allege defendant's possession of or power to deliver the property at the time the action was commenced [*see, e.g., Simonian v. Patterson (1994) 27 Cal. App. 4th 773, 783-784, 32 Cal. Rptr. 2d 722* (demurrer upheld)].

[c] Opposing Points and Authorities

The points and authorities set out in *§§ 40.30* and *40.31* may be used in an appropriate case to oppose a motion for new trial supported by this form.

[d] Related Points and Authorities

For forms of memoranda of points and authorities relating to motions for new trials, generally, see Ch. 155, *Motions After Trial* , in this set.

[3] Discussion of Authorities

[a] Possession by Defendant Required

Stockton M.P. Co. v. Mariposa County *(1950) 99 Cal. App. 2d 210, 221 P.2d 232* , was an action for possession of a

piece of road equipment brought against an individual defendant and the county. Plaintiff's complaint alleged that plaintiff's assignor had sold the property to the individual defendant under a conditional sales contract on which a balance remained unpaid. The contract provided that if defendant failed to pay the required installments, plaintiff, as seller's assignee, could take immediate possession of the property. The complaint further alleged that the individual defendant had made no payments, that the county now had possession of the equipment, that plaintiff had right to immediate possession of the property, and that the county had refused to deliver it to plaintiff after written demand. The trial court granted the county's motion for judgment on the pleadings as to the county and, after making findings of fact and conclusions of law, entered judgment on the merits for the individual defendant. Plaintiff appealed from both judgments.

The court of appeal affirmed as to the individual defendant. The court noted that the only relief which plaintiff had sought against that defendant was recovery of the chattel, of which the county had possession at all times. The trial court had found, as a matter of fact, that the county had possession of the property and that the individual defendant did not have possession; the court noted that these findings were supported by substantial evidence. In an action for recovery of personal property, held the court, defendant's nonpossession is a complete defense (*99 Cal. App. 2d 210, 215)* .

In ***Ramacciotti v. Galiano*** *(1943) 59 Cal. App. 2d 8, 137 P.2d 722* , plaintiffs, who were engaged in farming operations on a ranch, executed a mortgage to one of defendants to secure certain money advances made from that defendant to plaintiffs. The mortgage covered certain personal property located on the ranch and contained a provision that prohibited plaintiffs from moving the property without defendant mortgagee's consent. On one occasion, one of the plaintiffs attempted to remove certain items of personal property from the ranch in violation of the terms of the mortgage but was prevented from doing so by defendant mortgagee's watchman. Plaintiffs were in possession of the ranch and the property thereon at the time the incident occurred. Thereafter, plaintiffs brought an action against defendants to recover possession of the property. The trial court entered judgment for plaintiffs.

The court of appeal reversed the judgment. The court held that an action to recover possession of personal property will not lie unless at the time the action is commenced, defendant has possession of the property or the power to deliver it in satisfaction of a judgment for its possession. Because of this rule, a person who himself or herself is in possession cannot, while such possession continues, bring an action of this kind. The court noted that in this case, it appeared that none of the property was in the possession of defendants at the time of the commencement of the action; it remained at all times in the possession of plaintiffs on the ranch. Thus, concluded the court, there was no factual basis for an action in claim and delivery against defendants (*59 Cal. App. 2d 8, 12)* .

In ***Simonian v. Patterson*** *(1994) 27 Cal. App. 4th 773, 32 Cal. Rptr. 2d 722* , plaintiff brought an action against his ex-fiancee's father for claim and delivery and various other causes of action, arising out of his efforts to retrieve various items of personal property from his fiancee after their relationship had ended. Thedefendant father had helped his daughter move various items of personal property from the apartment that plaintiff and the daughter had shared to the daughter's new apartment. Plaintiff alleged that certain of these items (record albums and Christmas decorations) were moved without his permission and against his wishes, and that defendant had failed to return them on demand or to assist plaintiff in securing their return from defendant's daughter. The trial court sustained defendant's demurrer to all causes of action and dismissed the action, and the court of appeal affirmed.

The court of appeal held that the trial court had not abused its discretion in granting defendant's demurrer to the claim and delivery cause of action without leave to amend. Plaintiff contended that under California law, a cause of action to recover possession of personal property may be maintained if, at the time the action is commenced, the defendant has the power to deliver the property in satisfaction of the judgment. Plaintiff argued that a father's power to persuade or coerce his adult daughter to return property was a question of fact that the trial court could not resolve by taking judicial notice of facts outside the pleading. The court of appeal, as a matter of law, rejected plaintiff's argument that the defendant had the power to deliver possession of the property. The court observed that plaintiff's theory was "premised

on the antiquated notion that adult women are legally inferior beings who can be ordered around by men as though they were servants." The court held that there was "no point in permitting a trial based on an archaic legal theory that should remain dead and buried" (*27 Cal. App. 4th 773, 783)* .

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4-40 California Points & Authorities § 40.25

§ 40.25 Supporting Motion for New Trial [Code Civ. Proc. § 657(5), (6)] by Defendant in Action for Possession of Personal Property [Civ. Code §§ 3379, 3380]--Award of Damages for Detention Is Excessive [Code Civ. Proc. § 667]

[1] FORM

[*Caption. See § 40.24.*]

THE MOTION FOR NEW TRIAL SHOULD BE GRANTED ON THE GROUND THAT DAMAGES FOR DETENTION ARE _____ [*specify, e.g.,* EXCESSIVE AS A MATTER OF LAW], BECAUSE _____ [*specify, e.g.,* THE COURT REFUSED TO ADMIT DEFENDANT'S EVIDENCE REGARDING ITS EXPENDITURES FOR UPKEEP AND MAINTENANCE OF THE PROPERTY, AND DEDUCTION FOR THOSE ITEMS IS PART OF THE PROPER CALCULATION OF DAMAGES FOR LOSS OF USE OF THE PROPERTY].

A. Motion for New Trial. [*See § 40.24[1], P A.*]

B. Damages for Detention Authorized. In an action to recover the possession of personal property, judgment for plaintiff may be for the possession or the value of the property, in case delivery cannot be had, and damages for its detention (*Code Civ. Proc. § 667*).

C. Formula for Damages Based on Rental Value. Damages for wrongful detention of personal property are to be calculated on the basis of the net usable value of the property, less the expense of maintaining it (*Guerin v. Kirst (1949) 33 Cal. 2d 402, 414-415, 202 P.2d 10* ; *Mutch v. Long Beach Imp. Co. (1920) 47 Cal. App. 267, 269, 190 P. 638*).

[*Optional*] **D. Damages Calculated by Application of Flat Rental Rate Over Time Is Error.** Because the net rental value of personal property usually decreases over time, reflecting normal deterioration[, especially in the case of machinery or similar property], damages for detention should not be calculated by applying a flat rental rate over the

entire period of detention, without some reduction over time in recognition of depreciation. When calculation of damages for detention based on a flat rental rate results in an award that is disproportionate compared to the value of the property, the award is excessive (*Guerin v. Kirst (1949) 33 Cal. 2d 402, 415, 202 P.2d 10* ; *Fran-Well Heater Co. v. Robinson (1960) 182 Cal. App. 2d 125, 131-133, 5 Cal. Rptr. 900*).

[*Optional*] **E. Failure to Take Expenditures Into Account Is Error.** It is error to refuse admission of evidence of the expenditures for upkeep and maintenance of the property during the period of detention, or to fail to take those expenditures into consideration in calculating damages for detention or loss of use (*Guerin v. Kirst (1949) 33 Cal. 2d 402, 415, 202 P.2d 10* ; *Fran-Well Heater Co. v. Robinson (1960) 182 Cal. App. 2d 125, 133, 5 Cal. Rptr. 900*).

[*Optional*] **F. Damages for Detention That Grossly Exceed Value of Property Is Error.** Damages for detention that are disproportionately large compared to the value of the property itself are excessive (*Guerin v. Kirst (1949) 33 Cal. 2d 402, 415, 202 P.2d 10* ; *Fran-Well Heater Co. v. Robinson (1960) 182 Cal. App. 2d 125, 133, 5 Cal. Rptr. 900*).

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted in support of a motion for a new trial in an action for claim and delivery when the moving party contends that damages awarded for detention of the personal property are not supported by sufficient evidence or are against the law [*Code Civ. Proc. § 657(6)*], or are excessive [*Code Civ. Proc. § 657(5)*]. The foregoing form may also be adapted for use in a trial or appellate brief.

Counsel should insert agrument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities set out in *§ 40.32* may be used to oppose the motion supported by the foregoing form.

[3] Discussion of Authorities

[a] Damages for Detention Authorized

Code Civ. Proc. § 667 also provides that if the property has been delivered to the plaintiff, and the defendant claims a return of it, judgment for defendant may be for a return of the property or its value, in case a return cannot be had, and damages for taking and withholding the property [*Code Civ. Proc. § 667*].

[b] Formula for Damages Based on Rental Value

Plaintiff in ***Guerin v. Kirst*** *(1949) 33 Cal. 2d 402, 202 P.2d 10* , sought recovery of a Caterpillar tractor or its value, and damages for its detention. Defendant had purchased the tractor from a third party to whom plaintiff had delivered possession under a lease and financing arrangement. Judgment was for defendant, and plaintiff appealed.

The Supreme Court reversed because the evidence established that plaintiff was entitled to a judgment for possession. The Court also discussed the evidence and law regarding damages. The evidence established the value of the tractor at $6,000 to $7,000, and defendant stipulated that its reasonable rental value was $825 per month. The Court said that in an action for claim and delivery, the owner may recover the value of the use of his or her property when that amount exceeds the interest on the value of the property, because then interest alone would not furnish adequate compensation for the wrongful detention. However, in computing those damages, it is only the net usable value less the expense of

keeping the property up that can be recovered by the aggrieved party. Under this rule, defendant should have been allowed to introduce evidence of a $2,170 overhaul made to the tractor when defendant purchased it and before defendant learned of plaintiff's claim (*33 Cal. 2d 402, 414)* . Similarly, defendant should be permitted to show whatever expenditures he made with regard to the tractor after he knew of plaintiff's claim (*33 Cal. 2d 402, 414-415)* . In addition, appropriate allowance should be made for the decline in the rental value of the tractor over the years, perhaps to the vanishing point, consistent with the normal deterioration of a piece of machinery that reduces its capacity to perform effective work. All this is necessary, the Court said, citing *Civ. Code § 3359*, to compensate plaintiff fully without subjecting defendant to unconscionable and grossly oppressive damages (*33 Cal. 2d 402, 415)* . Thus, application of the stipulated rental value at a flat rate over the entire period of detention would amount to damages for detention of $9,900 per year, an obviously grossly excessive and disproportionate amount of damages when correlated to the value of the tractor (*33 Cal. 2d 402, 415)* .

The court of appeal in ***Mutch v. Long Beach Imp. Co.*** *(1920) 47 Cal. App. 267, 190 P. 638* , reversed judgment for plaintiff on the ground that damages were excessive. There was undisputed evidence that the value of the car was $400 at the time of the taking. The automobile was returned to plaintiff before trial. Judgment confirmed plaintiff's ownership and awarded damages of the $1,298 as rental value over the 86-week period of detention, plus another $203 for loss of tools and appliances, the cost of cleaning after recovery, and depreciation during the period of detention. The court said that one deprived of the use of an automobile cannot recover the gross rental value of a fully maintained car, free from all expense of maintenance, repairs, and natural wear and tear to which a rented car would naturally be subject (*47 Cal. App. 267, 268)* . Damages for detention of property equal to three times its value are grossly excessive, unconscionable, and contrary to *Civ. Code § 3359* (*47 Cal. App. 267, 268-269)* . While damages for detention are allowed according to the market value of the use of the property, it is the net usable value less the expense of keeping up the property that may be recovered (*47 Cal. App. 267, 269)* . In applying the foregoing rule, care should be taken not to permit the fixing of an amount out of all proportion to the value of the thing itself (*47 Cal. App. 267, 269)* .

The decision in *Mutch* has been criticized by the court of appeal in *Harris v. Dixon Cadillac Co. (1982) 132 Cal. App. 3d 485, 183 Cal. Rptr. 299* , discussed in *§ 40.32[3][b]*.

[c] Damages Calculated by Application of Flat Rental Rate Over Time Is Error

Guerin v. Kirst *(1949) 33 Cal. 2d 402, 202 P.2d 10* , is discussed in *§ 40.25[3][b]*.

Fran-Well Heater Co. v. Robinson *(1960) 182 Cal. App. 2d 125, 5 Cal. Rptr. 900* , was an action for recovery of subsurface drilling equipment, or its value, and damages for its detention. Both surface and subsurface equipment for two wells were leased to defendant by plaintiff. After plaintiff removed the surface equipment, the monthly rental rate for the subsurface equipment was $100 per month per well. Judgment was for plaintiff, for the return of the equipment, or $1,679 as its value, plus $5,160 as damages for detention for approximately two years and seven months. Defendant appealed on the grounds that the court applied an erroneous measure of damages and that they were excessive as a matter of law.

The court of appeal agreed and reversed. The $5,160 was calculated at the rate of $200 per month for the entire period of detention. The court said that assessment of damages for detention at a flat rate based solely on the gross rental value of chattel is erroneous as a matter of law (*182 Cal. App. 2d 125, 132)* . The correct measure of damages is the net usable value less the expense of keeping the property up, and must be determined by appropriate allowance for the decline inrental value over the years (*182 Cal. App. 2d 125, 133)* . No pleading or proof of these elements was made or offered by plaintiff. Because no attempt was made to fix the net usable value, there was no proper evidence to support the judgment for damages for wrongful detention. Furthermore, the damage award was excessive as a matter of law because it resulted in a total award of more than three times the value of the equipment (*182 Cal. App. 2d 125, 133)* .

[d] Failure to Take Expenditures Into Account Is Error

Guerin v. Kirst *(1949) 33 Cal. 2d 402, 202 P.2d 10* , is discussed in *§ 40.25[3][b]*.

Fran-Well Heater Co. v. Robinson *(1960) 182 Cal. App. 2d 125, 5 Cal. Rptr. 900* , is discussed in *§ 40.25[3][c]*.

[e] Damages for Detention That Grossly Exceed Value of Property Is Error

Guerin v. Kirst *(1949) 33 Cal. 2d 402, 202 P.2d 10* , is discussed in *§ 40.25[3][b]*.

Fran-Well Heater Co. v. Robinson *(1960) 182 Cal. App. 2d 125, 5 Cal. Rptr. 900* , is discussed in *§ 40.25[3][c]*.

[4] Additional Authorities

[a] Formula for Damages Based on Rental Value

Judgment in *Bonestell v. Automotive F. Corp. (1924) 69 Cal. App. 719, 232 P. 734* , was for plaintiff, for return of a car valued at $2,500 plus $600 for damages for detention during a period of over 48 days. The court of appeal reversed the damage award and remanded for retrial on that issue. According to plaintiff's witness, the value of the use of the car was $25 per day. That was the gross value, the court of appeal said (*69 Cal. App. 719, 728)* . In order for damages for detention to be reasonable, as required by *Civ. Code § 3359*, damages for detention must be limited to the net usable value of the property detained less the expense of keeping up the property. In determining the value of use under this rule, care should be taken not to permit the fixing of an amount out of all proportion to the value of the thing itself (*69 Cal. App. 719, 727)* . The only evidence of net usable value was that of defendant's witness who testified that the gross value of the car was $10 per day, which would yield a thirty percent net profit. That thirty percent would yield $3 per day or $145.50 as damages for detention (*69 Cal. App. 719, 728)* .

[b] Damages for Detention That Grossly Exceed Value of Property Is Error

The trial court in *Booth v. People's Finance Etc. Co. (1932) 124 Cal. App. 131, 12 P.2d 50* , gave judgment for plaintiff against defendant and its agent for return of a car or $650 as its value, $1,350 as damages for nine months loss of use, and $1,500 punitive damages after allegedly wrongful repossession. The court of appeal affirmed the judgment for possession or $650, but unless plaintiff accepted remittitur to $607 detention damages and $500 punitive damages, the portion of the judgment relating to those issues would be reversed and remanded for a new trial (*124 Cal. App. 131, 145-146)* . Although there was testimony that the rental value of the car was $10 to $15 per day, the court did not find that the witness was experienced enough to be credible. Further, damages calculated at that rate would result in a total detention award of $4,050, which, compared to the value of the car, would be grossly excessive (*124 Cal. App. 131, 137-138, 143)* . The only testimony the court found credible was that of the defense witness who said a car like plaintiff's could be rented for $1.75 to $2.25 per day, which would result in a total award for damages for detention of $607 (*124 Cal. App. 131, 138-140)* . The court also seemed to take into consideration the fact that the car was not used during the period of detention (*124 Cal. App. 131, 138)* . The court discussed and compared other cases and concluded that it was error to award damages for detention equal to more than two times the value of the car (*124 Cal. App. 131, 140-143)* . The court also noted that here, no attempt was made to ascertain net usable value (*124 Cal. App. 131, 140)* . That was not error, however, because defendant itself failed to request correction of the jury instruction to refer to net usable value (*124 Cal. App. 131, 143)* . The punitive damage award was based on conflicting evidence of whether plaintiff had tendered the payment that defendant alleged to be in default. There was also evidence that defendant, knowing there was no default, intentionally took possession of the automobile to teach plaintiff a lesson, but the court of appeal felt that the jury had abused its discretion in awarding $1,500 (*124 Cal. App. 131, 143-146)* .

Bonestell v. Automotive F. Corp. (1924) 69 Cal. App. 719, 232 P. 734 , discussed in *§ 40.25[4][a]* and *Mutch v. Long Beach Imp. Co. (1920) 47 Cal. App. 267, 268-269, 190 P. 638* , discussed in *§ 40.25[3][b]*, are also authority for the rule that damages for detention that far exceed the value of the property detained are excessive.

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4-40 California Points & Authorities § 40.26

§ 40.26 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] for Possession of Personal Property [Civ. Code §§ 3379, 3380]--Plaintiff Need Not Allege Source of Right to Possession

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____ _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORIT-
vs.	)	IES IN OPPOSITION TO DEMURRER
_____ [*name*],	)	[*Code Civ. Proc. § 430.10(e)*]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Trial Date: _____]

_____

THE DEMURRER TO PLAINTIFF'S COMPLAINT FOR POSSESSION OF PERSONAL PROPERTY SHOULD BE OVERRULED BECAUSE THE COMPLAINT ALLEGES THE ULTIMATE FACT OF HIS/HER/ITS RIGHT TO POSSESSION AT THE TIME THE ACTION WAS COMMENCED; PLAINTIFF NEED NOT ALLEGE THE SOURCE OF HIS/HER/ITS RIGHT.

A. Absolute Ownership of Property Not Necessary. [*See § 40.28[1], P A.*]

B. Plaintiff Need Not Allege Source of Right to Possession. In an action for possession of personal property, plaintiff is not required to plead the source of his or her or its asserted right to possession of the property in question; it is

sufficient to plead the ultimate fact of right to possession at the time of the commencement of the action (*see Commercial Credit Co. v. Peak (1924) 195 Cal. 27, 32-33, 231 P. 340*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted in opposition to a demurrer to a complaint for possession of personal property based on plaintiff's failure to sufficiently allege right to possession of the property at the commencement of the action. The ground of opposition is that the complaint alleges the ultimate fact of such right of possession; the source of plaintiff's asserted rights need not be alleged.

In an appropriate case, this form may be used in opposition to a demurrer supported by the points and authorities set out in *§ 40.20*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Points and Authorities

For memoranda of points and authorities opposing demurrers, generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* , in this set.

[3] Discussion of Authorities

[a] Plaintiff Need Not Allege Source of Right to Possession

Commercial Credit Co. v. Peak *(1924) 195 Cal. 27, 231 P. 340* , was an action for recovery of possession of personal property. The trial court entered judgment for plaintiff, and defendant appealed. In affirming, the Supreme Court rejected defendant's contention that plaintiff should not be permitted to recover on an assigned claim without pleading the assignment. The Court held, inter alia, that plaintiff was not required to plead the source of its asserted ownership of the property in question; it was sufficient to plead the ultimate fact of its ownership of the property at the time of the commencement of the action. The Court stated that if ownership rested on an assignment, that was a probative fact to be shown at the trial, and that plaintiff had shown that fact (*195 Cal. 27, 32-33)* .

Counsel should note that although the language in the *Peak* case implies that ownership of the property must be alleged, the Supreme Court subsequently held that a party need not be the absolute owner of personal property in order to bring an action for its possession, provided that he or she is entitled to immediate possession of the property at the time the action is commenced [*see Commercial & Sav. Bank v. Foster (1930) 210 Cal. 76, 79, 290 P. 583]* . However, the point made in the *Peak* case appears applicable to plaintiff's right to possession of the property as well as his or her ownership

of the property, that is, it is sufficient for plaintiff to plead the ultimate fact of his or her right to immediate possession of the property at the time the action was commenced, without pleading the sourceof his or her asserted right to possession.

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4-40 California Points & Authorities § 40.27

§ 40.27 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] for Possession of Personal Property [Civ. Code §§ 3379, 3380]--Plaintiff May Recover Certificates Representing Shares of Corporate Stock

[1] FORM

[*Caption. See § 40.26.*]

THE DEMURRER TO PLAINTIFF'S COMPLAINT FOR POSSESSION OF PERSONAL PROPERTY ON THE GROUND THAT THE PROPERTY SOUGHT TO BE RECOVERED IS INTANGIBLE SHOULD BE OVERRULED BECAUSE IT APPEARS FROM THE COMPLAINT THAT PLAINTIFF SEEKS TO RECOVER THE CERTIFICATES REPRESENTING SHARES OF CORPORATE STOCK.

Plaintiff May Recover Certificates Representing Shares of Corporate Stock. Although corporate stock is intangible property which may not be recovered in an action for possession of personal property, the certificates which represent the stock may properly be recovered in such an action (*Englert v. Ivac Corp. (1979) 92 Cal. App. 3d 178, 184, 154 Cal. Rptr. 804*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted in opposition to a demurrer to a complaint for possession of personal property on the ground that the property sought to be recovered is intangible. The ground of opposition is that the complaint seeks to recover possession of certificates of stock rather than the intangible interest which they represent. In an appropriate case, this form may be submitted in opposition to a demurrer supported by the points and authorities set out in *§ 40.23*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Plaintiff May Recover Certificates Representing Shares of Corporate Stock

Englert v. Ivac Corp. *(1979) 92 Cal. App. 3d 178, 154 Cal. Rptr. 804* , was an action by plaintiff to recover certain stock certificates which he alleged that defendant had wrongfully retained. The trial court found that plaintiff was entitled to recover the certificates on payment of a certain sum of money, and the trial court entered judgment accordingly. On appeal, defendant contended, inter alia, that the judgment for plaintiff was erroneous as a matter of law because shares of stock are considered intangible personal property and cannot be replevied. In affirming, the court of appeal held that shares of stock, a person's intangible ownership interest in a company which cannot be replevied, must be distinguished from the certificates of stock which represent those shares and which can be replevied. Since plaintiff prayed for redelivery of the pledged collateral, that is, the share certificates, the action for possession of personal property was proper (*92 Cal. App. 3d 178, 184)* .

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4-40 California Points & Authorities § 40.28

§ 40.28 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 657(5), (6)] in Action for Possession of Personal Property [Civ. Code §§ 3379, 3380]--Plaintiff Need Not Be Absolute Owner of Property

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*],	)	IES IN OPPOSITION TO MOTION FOR NEW TRI-
Defendant.	)	AL
	)	[*Code Civ. Proc. § 657(5), (6)*]
	)	

_____

THE MOTION FOR NEW TRIAL, ON THE GROUND THAT THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH PLAINTIFF'S OWNERSHIP OF THE PROPERTY AT THE COMMENCEMENT OF THE ACTION, SHOULD BE DENIED BECAUSE THE EVIDENCE WAS SUFFICIENT TO ESTABLISH PLAINTIFF'S RIGHT TO IMMEDIATE POSSESSION OF THE PROPERTY AT THAT TIME.

A. New Trial Precluded Unless Court Convinced That Court or Jury Clearly Should Have Reached Different Result. A new trial must not be granted on the ground of insufficiency of the evidence to justify the _____ [verdict *or* decision][, or on the ground of excessive or inadequate damages], unless, after weighing the evidence, the court is convinced from the entire record, including reasonable inferences therefrom, that the _____ [jury *or* court] clearly should have reached a different _____ [verdict *or* decision] (*Code Civ. Proc. § 657*).

B. Absolute Ownership of Property Not Necessary. To maintain an action for possession of personal property, it is not essential that plaintiff be the absolute owner of the property, provided that he or she is entitled to its immediate possession at the time the action is commenced (*Commercial & Sav. Bank v. Foster (1930) 210 Cal. 76, 79, 290 P. 583*).

[*Optional*] **C. Qualified Interest as Sufficient.** An action for possession of personal property may be maintained by one who has a qualified interest in the property, providing that he or she has a right to its immediate possession (*International Airports, Inc. v. Finn (1955) 132 Cal. App. 2d 293, 297, 282 P.2d 102*).

[*Optional*] **D. Possessory Lien Interest as Sufficient.** One who holds property by virtue of a lien may maintain an action to recover it if it is wrongfully taken from him or her (*International Airports, Inc. v. Finn (1955) 132 Cal. App. 2d 293, 297, 282 P.2d 102*).

[*Optional*] **E. Mortgagee's Interest as Sufficient.** A chattel mortgagee under a mortgage conferring a right of possession on default may, after default, recover possession of the mortgaged chattel in a replevin action (*Commercial & Sav. Bank v. Foster (1930) 210 Cal. 76, 80, 290 P. 583*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted in opposition to a motion for new trial brought by an unsuccessful defendant in an action for possession of personal property when the defendant's objection is insufficiency of the evidence to show that plaintiff was owner of the property at the time the action was commenced. The ground of opposition presented is that plaintiff need not show that he or she was the absolute owner of the property, provided that he or she was entitled to immediate possession of the property at the time the action was commenced.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

With appropriate modifications, the foregoing form may be submitted in opposition to a demurrer to a complaint, such as one supported by the points and authorities set out in *§ 40.20*.

[3] Discussion of Authorities

[a] Absolute Ownership of Property Not Necessary

The procedural and factual background of ***Commercial & Sav. Bank v. Foster*** *(1930) 210 Cal. 76, 290 P. 583* , is discussed in *§ 40.21[3][a]*. In affirming the judgment for plaintiff, the Supreme Court rejected defendant's contention that plaintiff could not recover unless it pleaded and proved a conversion by defendant.The Court stated that an action for replevin is strictly distinguishable from an action for conversion in that the former has as its purpose recovery of the property itself, while the latter has as its purpose the recovery of damages for conversion of the property. To maintain an action for recovery of personal property, the plaintiff must have the right to immediate and exclusive possession of the property at the commencement of the action. However, the Court held, the plaintiff need not be the absolute owner of the property, provided that he or she is entitled to its immediate possession (*210 Cal. 76, 79)* . The Court observed that a chattel mortgagee under a mortgage conferring a right of possession on default may, after default, recover possession of the mortgaged chattel in a replevin action such as this. Hence, plaintiff, a mortgagee, had pleaded and proved all the facts necessary to sustain the action (*210 Cal. 76, 80)* .

[b] Qualified Interest as Sufficient

In ***International Airports, Inc. v. Finn*** *(1955) 132 Cal. App. 2d 293, 282 P.2d 102* , defendants owned an airplane which they wanted to operate commercially. They entered into an agreement with plaintiff, by which plaintiff agreed to perform the work necessary to license the plane for this purpose and defendants agreed to pay for that work. As part of the agreement, plaintiff also lent defendants a sum of money which was secured by a chattel mortgage on the plane. In addition, plaintiff agreed to lease the plane from defendants for the period the work was in progress, with the payments on the lease to be offset against the amounts which defendants owed to plaintiff. Pursuant to this agreement, possession of the aircraft was delivered to plaintiff. Thereafter, after defendants had defaulted, defendants entered plaintiff's hangar and removed the plane. Plaintiff brought an action for claim and delivery and for foreclosure of the chattel mortgage. The trial court entered judgment for plaintiff, and defendants appealed.

The court of appeal affirmed, holding that plaintiff had a possessory lien on the aircraft for labor performed and materials furnished in improving it at the time it was taken by defendants. The court noted that an action for claim and delivery may be maintained by one who has a qualified interest in the property which is the subject of the litigation, providing he or she has a right to its possession. Accordingly, one who holds property by virtue of a lien may maintain an action to recover it if it is wrongfully taken from him or her (*132 Cal. App. 2d 293, 297)* .

[c] Possessory Lien Interest as Sufficient

International Airports, Inc. v. Finn *(1955) 132 Cal. App. 2d 293, 282 P.2d 102* , is discussed in *§ 40.28[3][b]*.

[d] Mortgagee's Interest as Sufficient

Commercial & Sav. Bank v. Foster *(1930) 210 Cal. 76, 290 P. 583* , is discussed in *§ 40.28[3][a]*.

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4-40 California Points & Authorities § 40.29

§ 40.29 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action for Possession of Personal Property [Civ. Code §§ 3379, 3380]--Showing of Plaintiff's Demand for Return of Property Not Required If Demand Useless

[1] FORM

[*Caption. See § 40.28.*]

DEFENDANT'S MOTION FOR A NEW TRIAL ON THE GROUND OF INSUFFICIENCY OF THE EVIDENCE TO SHOW THAT PLAINTIFF MADE A DEMAND FOR RETURN OF THE PROPERTY PRIOR TO COMMENCING THE ACTION SHOULD BE DENIED BECAUSE A SHOWING OF A DEMAND ON DEFENDANT FOR THE RETURN OF PERSONAL PROPERTY IS NOT REQUIRED IF SUCH A DEMAND WOULD BE USELESS UNDER THE CIRCUMSTANCES.

A. New Trial Precluded Unless Court Convinced That Court or Jury Clearly Should Have Reached Different Result. [*See § 40.28[1], P A.*]

B. Showing of Demand Not Required If Demand Useless. In an action for possession of personal property, plaintiff need not make a formal demand on defendant for return of the property before commencing the action if, under the circumstances, a demand would be useless (*Commercial & Sav. Bank v. Foster (1930) 210 Cal. 76, 82, 290 P. 583*).

[*Optional*] **C. Showing of Demand Not Required When Defendant Asserts Ownership.** Proof of demand on a defendant for the return of personal property is not required when the defendant asserts his or her ownership and right to possession of the property, so that a demand for its return would be useless and unavailing (*Godfrey v. Godfrey (1927) 85 Cal. App. 204, 207, 259 P. 71*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted by a plaintiff in opposition to a motion for a new trial brought by an unsuccessful defendant in an action for possession of personal property when the objectionurged by the defendant is the insufficiency of the plaintiff's evidence to show a demand on the defendant for a return of the property before commencing the action. The ground of opposition is that such a demand is not necessary when, under the circumstances, the making of such a demand would be useless, such as when defendant has asserted his or her right to possession of the property [*see* optional Paragraph C].

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

With appropriate modifications, the foregoing points and authorities may be used to oppose a demurrer to a complaint for possession of personal property when it is argued in the demurrer that the complaint is insufficient in that it fails to allege a demand on the defendant for the return of the property which he or she obtained lawfully [*see § 40.22*].

[3] Discussion of Authorities

[a] Showing of Demand Not Required If Demand Useless

Commercial & Sav. Bank v. Foster *(1930) 210 Cal. 76, 290 P. 583* , is discussed in *§ 40.21[3][a]*. In that case, the Supreme Court rejected defendant's contention that plaintiff could not maintain an action to recover possession of personal property because it had failed to make demand on defendant for recovery of the property before bringing the action, noting that in this case, the uncontradicted evidence showed that a formal demand for return of the property would have been useless. The Court held that when, under the circumstances, a demand would be useless, the necessity for making a demand is dispensed with (*210 Cal. 76, 82)* .

[b] Showing of Demand Not Required When Defendant Asserts Ownership

Godfrey v. Godfrey *(1927) 85 Cal. App. 204, 259 P. 71* , was an action by plaintiff to recover furniture which defendant allegedly removed from plaintiff's home and which allegedly belonged to plaintiff. Defendant had denied plaintiff's title and insisted throughout her testimony that she was the owner of the property. The trial court entered judgment awarding possession of this furniture to plaintiff. On appeal, defendant contended, inter alia, that the judgment should be reversed because there was no evidence that plaintiff had made any demand on defendant for return of the property prior to commencing the action. The court of appeal held that when, as here, property is in the possession of one claiming to be the owner, a demand would be unavailing and, hence, need not be pleaded or proved by plaintiff (*85 Cal. App. 204, 207)* .

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4-40 California Points & Authorities § 40.30

§ 40.30 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action for Possession of Personal Property [Civ. Code §§ 3379, 3380]--Showing of Actual Physical Possession by Defendant Unnecessary

[1] FORM

[*Caption. See § 40.28.*]

A MOTION FOR NEW TRIAL ON THE GROUND THAT THE EVIDENCE IS INSUFFICIENT TO SHOW THAT DEFENDANT HAD POSSESSION OF THE PROPERTY AT THE TIME THE ACTION WAS COMMENCED SHOULD BE DENIED BECAUSE THE EVIDENCE WAS SUFFICIENT TO SHOW THAT DEFENDANT, ALTHOUGH NOT IN ACTUAL PHYSICAL POSSESSION OF THE PROPERTY, HAD THE POWER TO DELIVER THE PROPERTY TO PLAINTIFF.

A. New Trial Precluded Unless Court Convinced That Court or Jury Clearly Should Have Reached Different Result. [*See § 40.28[1], P A.*]

B. Actual Physical Possession by Defendant Unnecessary. In an action for possession of personal property, if plaintiff shows that the property sought to be recovered is under the control of defendant and that it is within defendant's power to deliver the property, then defendant is liable, although the property is not in his or her actual physical possession (*Taylor v. Bernheim (1922) 58 Cal. App. 404, 408, 209 P. 55*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted in opposition to a motion for a new trial brought by an unsuccessful defendant in an action for possession of personal property when the defendant's objection is insufficiency of the evidence to show that the property sought to be recovered was in defendant's possession at the time the action was commenced. The ground of opposition is that plaintiff need not show that defendant had actual physical possession of the property if defendant had control over the property and thepower to deliver it to plaintiff. In an appropriate case, the foregoing form may be submitted in opposition to a motion for new trial supported by the points and authorities set out in *§ 40.24*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Actual Physical Possession by Defendant Unnecessary

In ***Taylor v. Bernheim*** *(1922) 58 Cal. App. 404, 209 P. 55* , defendant, after commencing an action against plaintiff's son to collect an indebtedness, procured a writ of attachment which was given to the sheriff for service. The sheriff levied the writ on an automobile stored in a public garage under the name of plaintiff's son. Thereafter, plaintiff, claiming to be the true owner of the car, filed a verified third-party claim on the sheriff, who retained possession of the automobile, and plaintiff commenced an action to recover possession of the automobile. The trial court rendered a judgment for plaintiff.

On appeal, defendant contended, inter alia, that there was no evidence to sustain the judgment because it was the sheriff and not defendant who seized the car and detained it from the possession of plaintiff. In affirming the judgment, the court of appeal rejected this contention. The court noted that although the general rule is that an action for claim and delivery will lie only against the persons who have possession of the property in dispute at the time of the commencement of the action, the term "possession" as used in these cases has been construed to mean either actual or constructive possession. Thus, the court held, if it is shown that the property sought to be recovered is under the control of a person, or if it is shown that the person has the power to deliver the property, then the person is liable, although the property is not in his or her actual physical possession. The court concluded that the evidence in this case showed that the sheriff was acting merely as the agent of defendant and that defendant had the power to release the property if he cared to do so by giving the sheriff instructions to that effect. Thus, defendant was in ostensible and actual control of the property and was consequently liable for any damages resulting from its unlawful detention (*58 Cal. App. 404, 408)* .

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4-40 California Points & Authorities § 40.31

§ 40.31 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action for Possession of Personal Property [Civ. Code §§ 3379, 3380]--Possession by Defendant Unnecessary If Defendant Has Wrongfully Disposed of Property Prior to Commencement of Action

[1] FORM

[*Caption. See § 40.28.*]

A MOTION FOR NEW TRIAL ON THE GROUND THAT THE EVIDENCE IS INSUFFICIENT TO SHOW THAT DEFENDANT HAD POSSESSION OF THE PROPERTY AT THE TIME THE ACTION WAS COMMENCED SHOULD BE DENIED BECAUSE THE EVIDENCE WAS SUFFICIENT TO SHOW THAT DEFENDANT WRONGFULLY DISPOSED OF THE PROPERTY BEFORE THE COMMENCEMENT OF THE ACTION.

A. New Trial Precluded Unless Court Convinced That Court or Jury Clearly Should Have Reached Different Result. [*See § 40.28[1], P A.*]

B. Possession by Defendant Unnecessary If Defendant Has Wrongfully Disposed of Property Prior to Commencement of Action. In an action for possession of personal property, it is no defense that the defendant wrongfully disposed of the property before the commencement of the action and was therefore not in possession of it (*Faulkner v. First Nat'l Bank (1900) 130 Cal. 258, 263-265, 62 P. 463*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted in opposition to a motion for a new trial brought by an unsuccessful defendant in an action for possession of personal property when the defendant's objection is the insufficiency of the evidence to show that the property sought to be recovered was in defendant's possession at the time the action was commenced. The ground of opposition is that plaintiff need not show that defendant had possession at the time the action was commenced if defendant wrongfully disposed of the property prior to the commencement of the action.

In an appropriate case, the foregoing form may be submitted in opposition to a motion for new trial supported by the points and authorities set out in *§ 40.24*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Possession by Defendant Unnecessary if Defendant Has Wrongfully Disposed of Property Prior to Commencement of Action

In ***Faulkner v. First Nat'l Bank*** *(1900) 130 Cal. 258, 62 P. 463* , plaintiff brought an action to recover possession of promissory notes deposited with defendant as collateral security for a promissory note made to plaintiff by a third person. The trial court found that prior to commencement of the action defendant had delivered these notes to the third person and that it had no right to do so. The trial court entered judgment for plaintiff for the value of the notes.

On appeal, defendant contended that the judgment was erroneous because an action of claim and delivery cannot be maintained where the defendant is not in possession of the property sued for at the time of the commencement of the action. The Supreme Court rejected this contention and affirmed the judgment. The court stated that the cause of action in this case was based on a bailment contract; the original taking was not unlawful but the detention of the property was. At common law, the Court noted, an action of detinue was an appropriate remedy for such a wrong, and the complaint in this case contained the allegations necessary in such an action. The Court held that, in such a case, it was no defense that the defendant had wrongfully disposed of the property before the commencement of the action and was therefore not in possession of it (*130 Cal. 258, 263-265)* .

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4-40 California Points & Authorities § 40.32

§ 40.32 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 657(5), (6)] in Action for Possession of Personal Property [Civ. Code §§ 3379, 3380]--Award of Damages for Detention Is Not Excessive [Code Civ. Proc. § 667]

[1] FORM

[*Caption. See § 40.28.*]

THE MOTION FOR NEW TRIAL, ON THE GROUND THAT DAMAGES ARE _____ [*specify, e.g.,* EXCESSIVE AS A MATTER OF LAW], SHOULD NOT BE GRANTED, BECAUSE _____ [THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE AMOUNT OF DAMAGES AWARDED FOR DETENTION OF PLAINTIFF'S PROPERTY *and/or* DAMAGES FOR DETENTION MAY EXCEED THE VALUE OF THE THING DETAINED].

A. New Trial Precluded Unless Court Convinced That Court or Jury Clearly Should Have Reached Different Result. [*See § 40.28[1], P A.*]

B. Damages for Detention Authorized. [*See § 40.25[1], P B.*]

[*EITHER*]

C. Interest Recoverable as Damages for Detention. The ordinary measure of damages for loss of use and other injuries resulting from the taking and withholding of personal property is interest at the legal rate on the value of the property from the time of the taking, or when demand for its return is made, to the date of the verdict. This measure applies unless the property detained has a usable value in excess of that amount of interest (*Drinkhouse v. Van Ness (1927) 202 Cal. 359, 379, 260 P. 869* ; *Brandenburger v. Hanner (1929) 96 Cal. App. 396, 399, 274 P. 390*).

[*OR*]

C. Rental Value Recoverable as Damages for Detention. When the property detained has a usable value, damages for detention under *Section 667 of the Code of Civil Procedure* means the reasonable value of the use of the property during the period of the wrongful detention up until the rendition of judgment. The owner is entitled to recover damages on the basis of rental value, whether or not he or she hired other property to take the place of the property that was wrongfully withheld (*Drinkhouse v. Van Ness (1927) 202 Cal. 359, 379, 260 P. 869* ; *Harris v. Dixon Cadillac Co. (1982) 132 Cal. App. 3d 485, 491, 183 Cal. Rptr. 299* ; *Tucker v. Hagerty (1918) 37 Cal. App. 789, 791-792, 174 P. 908*).

[*CONTINUE*]

[*Optional*] **D. Damages for Detention May Include Lost Profits.** Damages for the detention of property under *Section 667 of the Code of Civil Procedure* may be awarded for all the detriment proximately caused by the detention. Thus, damages may include business losses such as employee salaries that had to be paid while the business was closed until replacement property could be obtained, and profits lost during and after the replacment period (*McFaddin v. H. S. Crocker Co. (1963) 219 Cal. App. 2d 585, 588-589* ; *Ruzanoff v. Retailers Credit Asso. (1929) 97 Cal. App. 682, 686-687*).

[*Optional*] **E. Depreciation During Period of Detention.** Depreciation, or loss of value, of the property during the period of its wrongful detention is an element of general damages for detention, and may be recovered without having been specifically pleaded (*Spencer Kennelly, Ltd. v. Bk. of Amer. (1942) 19 Cal. 2d 586, 589, 122 P.2d 552* ; *Berry v. Bank of Bakersfield (1918) 177 Cal. 206, 210-211, 170 P. 415*).

[*Optional*] **F. Damages for Detention May Exceed Value of Property.** Damages for the detention of property under *Section 667 of the Code of Civil Procedure* may exceed the value of the property withheld as long as they are provable and reasonable (*Harris v. Dixon Cadillac Co. (1982) 132 Cal. App. 3d 485, 491-493, 183 Cal. Rptr. 299* ; *Tucker v. Hagerty (1918) 37 Cal. App. 789, 793, 174 P. 908*).

[*Optional*] **G. Punitive Damages May Be Awarded.** Punitive damages may be awarded under *Section 3294 of the Civil Code* to a successful plaintiff in a claim and delivery action when malice, fraud, and oppression on the part of defendant are established by clear and convincing evidence (*Livestock G.P. Co. v. Union Etc. Co. (1896) 114 Cal. 447, 450, 46 P. 286* ; *Harris v. Dixon Cadillac Co. (1982) 132 Cal. App. 3d 485, 493-494, 183 Cal. Rptr. 299*).

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted in opposition to a motion for a new trial in an action for claim and delivery when the moving party contends that damages awarded for detention of the personal property are not supported by sufficient evidence or are against the law [*Code Civ. Proc. § 657(6)*], or are excessive [*Code Civ. Proc. § 657(5)*]. The foregoing form may also be adapted for use in a trial or appellate brief.

In an appropriate case, the foregoing form of points and authorities may be submitted in opposition to a motion for new trial supported by the points and authorities set out in *§ 40.25*.

Counsel should insert agrument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Interest Recoverable as Damages for Detention

Drinkhouse v. Van Ness *(1927) 202 Cal. 359, 260 P. 869* , was an action for claim and delivery of a horse alleged to be worth $10,000. Defendant also claimed ownership, and obtained redelivery of the horse after posting bond. Before trial, defendant became insolvent, and the horse died. Judgment was for plaintiff for $15,000: $7,500 as the value of the horse, and $7,500 as damages for its detention. Intervener, defendant's surety, appealed.

The Supreme Court reduced the damages for detention to $7,000, but otherwise affirmed the judgment. Ordinarily, the Court said, loss of use and other injuries resulting from the taking and withholding of personal property may be compensated by allowing the successful party to recover interest on the value of the property from the time of the taking to the date of the verdict. However, if the property has a usable value and the value of the use of the property exceeds that interest, the successful party may recover as damages for detention the reasonable value of the property's use during the period of detention up to the time of the rendition of judgment (*202 Cal. 359, 379)* . Evidence of the horse's value as a stud for breeding purposes was sufficient to support the award in this case (*202 Cal. 359, 379-380)* . Although damages are recoverable for the time and money expended in pursuit of the horse, attorney's fees were not properly includable as incurred in pursuit of the property. For this error, the award was reduced by $500 (*202 Cal. 359, 380)* .

Judgment in ***Brandenburger v. Hanner*** *(1929) 96 Cal. App. 396, 274 P. 390* , was for plaintiff for return of part of a herd of cattle plus $345 as damages for their detention. Defendant, who was awarded possession of the remainder of the herd, appealed.

The court of appeal modified language in the judgment describing the appropriate division of the herd, and affirmed the judgment as so modified. One of defendant's contentions on appeal was that there was no evidence to support the finding that plaintiff had been damaged in that amount by the detention. The $345 was equivalent to the legal rate of interest on the value of plaintiff's portion of the herd for the period that possession was withheld from plaintiff (*96 Cal. App. 396, 398-399*). The court said that the law is well settled that unless greater damages are shown, *Code Civ. Proc. § 667* entitles a successful plaintiff to compensation for detention in an amount equal to interest on the value of the property from the time of the taking, or of the demand for return, until the date of the verdict (*96 Cal. App. 396, 399*).

[b] Rental Value Recoverable as Damages for Detention

Drinkhouse v. Van Ness *(1927) 202 Cal. 359, 260 P. 869* , is discussed in *§ 40.32[3][a]*.

Plaintiff in ***Harris v. Dixon Cadillac Co.*** *(1982) 132 Cal. App. 3d 485, 183 Cal. Rptr. 299* , sought return of her car and general and punitive damages from defendant. Defendant had performed repair work on plaintiff's car without giving the written estimate required by *Bus. & Prof. Code § 9884.9* and without obtaining plaintiff's prior authorization for the repairs. Plaintiff was a nursing student and part-time waitress. Without the car, plaintiff had to quit her job and school and move in with her brother. Eventually she moved back to Kansas to live with her parents. Defendant cross complained for repair and storage costs. Judgment was for plaintiff, for $10,000 general and $45,000 punitive damages. Defendant appealed.

The judgment was modified to provide for return of the car, which the parties stipulated had a value of $2,500, and reduction of general damages to $7,500. In all other respects the judgment was affirmed. Defendant contended that thecompensatory damage award was unsupported by sufficient evidence, and was excessive and erroneous, relying on *Mutch v. Long Beach Imp. Co. (1920) 47 Cal. App. 267, 190 P. 638* (discussed in *§ 40.25[3][b]*), for the proposition that compensatory damages far in excess of the value of the property withheld are invalid (*132 Cal. App. 3d 485, 490)* . The court of appeal said the better rule was enunciated in *Tucker v. Hagerty (1918) 37 Cal. App. 789, 174 P. 908* (discussed *below*), and *Stanley W. Smith, Inc. v. Pilgrim (1931) 117 Cal. App. 244, 3 P.2d 573* (discussed in *§*

40.32[4][a]). Under that rule, damages for detention under *Code Civ. Proc. § 667* means the reasonable value of the use of the property detained during the period of the wrongful detention up until the rendition of judgment (*132 Cal. App. 3d 485, 491)* . The reason for this rule in replevin is that the interest or value of the property does not furnish adequate compensation for the wrongful detention. Under *Code Civ. Proc. § 667*, when the property detained has a usable value, the owner is entitled to recover damages on the basis of rental value, whether or not he or she hired other property to take the place of the property that was wrongfully withheld. Reversal is not required by the fact that the rental value allowed amounts to more than the value of the property withheld (*132 Cal. App. 3d 485, 491)* .

The court of appeal compared the damages that could be awarded under *Civ. Code § 3333* if the property had been negligently destroyed. Then, the owner could recover the value of the property at the time of destruction and for the loss sustained by being deprived of its use during the time reasonably required for replacement or repairs. The analogy is clear, the court said. It is not the value of the property that controls the amount of compensatory damages for wrongful detention. Damages are allowable for the detriment proximately caused by a wrongful detention as long as they are provable and reasonable (*132 Cal. App. 3d 485, 492)* .

Defendant also claimed that *Civ. Code § 3359*, which provides that damages must be reasonable in all cases, prevented the $7,500 award. The court disagreed, noting that the only evidence of value of use was plaintiff's testimony that the reasonable use-value of the car was $10 to $15 dollars per day, and that the $7,500 award represented less than $5 per day (*132 Cal. App. 3d 485, 492-493)* .

Plaintiff in ***Tucker v. Hagerty*** *(1918) 37 Cal. App. 789, 174 P. 908* , sought return of a car wrongfully retained by defendant sheriff after release of the writ of attachment under which the car was seized. Plaintiff alleged the value of the car to be $650 and the value of its use to be $10 per day. Judgment was for plaintiff for the return of the car, or $450 as its value, plus $5 per day during the period of detention, which amounted to $585 by the time judgment was entered. Defendant appealed.

The court of appeal affirmed. Defendant contended that because there was no showing of aggravation or malice, plaintiff's damages were limited to interest at the legal rate. The court of appeal said that the ordinary measure of damages for wrongful detention of property is interest (*37 Cal. App. 789, 791)* . However, when the property has a usable value that exceeds interest at the legal rate, the successful party is entitled to recover as damages for the detention the value of the use of the property during the period of the wrongful detention. This value may be estimated by the ordinary market price of the use of the property (*37 Cal. App. 789, 792)* . The reason for this rule is that interest or the value of the property does not furnish adequate compensation for the wrongful detention. In some cases the wrongdoer may even make a profit from the use of the property during the wrongful detention. This the law will not tolerate, and it would deny plaintiff damages that naturally and certainly follow a wrongful invasion of his or her rights (*37 Cal. App. 789, 792)* . In some cases, the court conceded, damages may be speculative, but that was not the case here. There was nothing so startling in the fact that the rental value allowed by the court amounts to more than the value of the machine as to compel a reversal of the judgment (*37 Cal. App. 789, 793)* .

[c] Damages for Detention May Include Lost Profits

McFaddin v. H. S. Crocker Co. *(1963) 219 Cal. App. 2d 585* , was the second action between the parties. In the former action, *H. S. Crocker Co. v. McFaddin (1957) 148 Cal. App. 2d 639* , defendant H. S. Crocker Co. had obtained possession of plaintiff's inventory of Christmas cards for over two years during the pendency of the action. That action was resolved in plaintiff's favor (as defendant in the former action), who was awarded return of the inventory or its value, but not damages for its detention. In this action, plaintiff sought recovery of damages for loss of profits for three Christmas seasons and damage to the cards by exposure, dirt, and poor handling while in defendant's possession. Judgment of dismissal was entered in favor of defendant in this second action on the grounds that it was barred by res judicata and the statute of limitations.

The court of appeal affirmed. The court discussed the extent of the relief that was available to plaintiff in the first action. Under *Code Civ. Proc. § 667*, the court said, a defendant who is successful in establishing his or her right to return of the property is entitled to damages for its taking and withholding (*219 Cal. App. 2d 585, 588-589)* . Deterioration is a proper element of damages for detention. Moreover, under appropriate circumstances, recovery of damages may be had for business losses arising out of the wrongful detention. Attorney's fees, however, are not a proper element of damages (*219 Cal. App. 2d 585, 589)* .

Ruzanoff v. Retailers Credit Asso. *(1929) 97 Cal. App. 682* , was an action for claim and delivery in which plaintiffs sought damages for business losses. The property involved was used in plaintiffs' grocery business. Because of the wrongful taking and detention, plaintiffs had to close the store for a week while replacement property was found and delivered. During this time plaintiffshad to continue to pay an employee's salary. Also, not all plaintiffs' customers returned when they reopened, and monthly gross sales dropped about $1,000 per month. Plaintiffs quit the business about two and one-half months after the taking. Judgment was for plaintiffs. Defendant appealed.

The court of appeal affirmed the judgment. The court of appeal said that ordinarily, loss of use and other injuries resulting from the taking and withholding of personal property are adequately compensated for by allowing the successful party to recover interest at the legal rate on the value of the property from the time of the taking to the date of the verdict, or the value of the use of the property if it exceeds the interest. This does not mean that recovery for wrongful detention is limited to interest or usable value. The plaintiff is entitled to all damages necessary to compensate him or her for all the detriment proximately caused by the detention (*97 Cal. App. 682, 686)* . Plaintiffs were entitled to compensation for the usable value of the property taken even if they did not hire replacement property. They were entitled to recover the amount paid to the employee during the week their business was closed and loss of profits during and after that week (*97 Cal. App. 682, 687)* . Lost profits during and after that week could not be measured with mathematical accuracy, but that did not bar recovery (*97 Cal. App. 682, 687)* .

[d] Depreciation During Period of Detention

Plaintiff automobile dealer in ***Spencer Kennelly, Ltd. v. Bk. of Amer.*** *(1942) 19 Cal. 2d 586, 122 P.2d 552* , was awarded possession of a certificate of ownership of an automobile. Defendant was awarded the balance owing under a conditional sale contract. There had been a dispute about the amount of the last payment due under the financing contract. During the time the certificate was held by defendant, plaintiff was unable to sell the automobile because it could not supply evidence of title. There was uncontradicted evidence that the vehicle depreciated $155 in value during the time the certificate was wrongfully withheld. Plaintiff appealed, contending it was error for the court not to have awarded it compensatory damages. The Supreme Court modified the judgment to include an award of compensatory damages for plaintiff in the amount established by the evidence, and affirmed the judgment as modified. The Court cited *Drinkhouse v. Van Ness (1927) 202 Cal. 359, 374, 260 P. 869* (discussed in *§ 40.32[3][a]*), for the general rule that when a party who is found to have been entitled to possession of the property both before and after the bringing of an action for claim and delivery proves compensatory damages, those damages should be awarded as a matter of course (*19 Cal. 2d 586, 589)* . Moreover, the Court said, when plaintiff prevails and the personal property involved has diminished in value, depreciation is a proper element of damages (*19 Cal. 2d 586, 589)* . After considering defendant's contention that plaintiff had waived its right to those damages by certain statements its attorney made in argument, the Court concluded that the judgment should be modified to provide for award of those damages to plaintiff (*19 Cal. 2d 586, 593-594)* .

Berry v. Bank of Bakersfield *(1918) 177 Cal. 206, 170 P. 415* , was an action for claim and delivery of a certificate for 82,144 shares of stock originally deposited with defendant allegedly as security for payment of a note. There was a dispute regarding whether anything was still owing on the note, and defendant refused to return the stock certificate. The shares were held by the named plaintiff as trustee for himself and others. The court found that the named plaintiff was owner of 27,381 shares; that there was a balance owing on the note; that the shares were never pledged as security by plaintiff; that the stock was worth fifty cents per share at the commencement of the case and ten cents per share at the

time of trial. Judgment was for plaintiff, for the return of the certificate or the value of his shares, plus $10,952.40 as damages for the decrease in the value of the shares, less the amount owed in the note. Defendant appealed.

The Supreme Court affirmed. One of defendant's contentions on appeal was that the damages for decrease in the value of the stock were special damages and could not be recovered, because they had not been specially pleaded. The Court disagreed, saying that depreciation in value of unlawfully detained property is an element of damage that is naturally to be anticipated and therefore is covered by an averment of general damage (*177 Cal. 206, 210)* . Further, no supplemental pleading was required to warrant recovery of damages resulting after the commencement of the action (*177 Cal. 206, 211)* .

[e] Damages for Detention May Exceed Value of Property

Both ***Harris v. Dixon Cadillac Co.*** *(1982) 132 Cal. App. 3d 485, 183 Cal. Rptr. 299* , and ***Tucker v. Hagerty*** *(1918) 37 Cal. App. 789, 174 P. 908* , are discussed in *§ 40.32[3][a]*.

[f] Punitive Damages May Be Awarded

Plaintiff in ***Livestock G.P. Co. v. Union Etc. Co.*** *(1896) 114 Cal. 447, 46 P. 286* , was awarded the right to possession of the property, or its value, but the trial court found that plaintiff was not damaged by its detention, and that defendant was not guilty of oppression, fraud, or malice. Contending that there was uncontradicted evidence of substantial damage, plaintiff moved for a new trial. The motion was granted, and defendant appealed. The Supreme Court affirmed the grant of the motion for new trial. If plaintiff proved oppression, fraud, and malice, it could be awarded exemplary damages (*114 Cal. 447, 450)* . But even if it did not, the Court said, citing *Civ. Code § 3333*, plaintiff was entitled to sufficient damages to compensate it for all the detriment caused by the wrong complained of (*114 Cal. 447, 450-451)* .

The facts and portion of the opinion in ***Harris v. Dixon Cadillac Co.*** *(1982) 132 Cal. App. 3d 485, 183 Cal. Rptr. 299* , addressing compensatory damages is discussed in *§ 40.32[3][a]*. The court also affirmed the award of $45,000 of punitive damages to plaintiff. The court noted that the requisite state of mind may be proved by direct evidence or by implication (*132 Cal. App. 3d 485, 493-494)* . The court said this case was quite similar to *Zhadan v. Downtown Los Angeles Motor Distributors Inc. (1979) 100 Cal. App. 3d 821, 831-833, 161 Cal. Rptr. 225* , an action for conversion based on detention of the vehicle for repairs made without compliance with *Bus. & Prof. Code § 9884.9* and in which a $90,000 punitive damage award was upheld (*132 Cal. App. 3d 485, 494)* . Both cases involved serious violations of a policy designed to protect consumers. In this case, the violation was characterized as flagrant. Defendant had also apparently falsified authorization signatures, including plaintiff's, on copies of the invoices it sent to the California Bureau of Automotive Repairs in response to the Bureau's investigation of a complaint plaintiff filed with it. As a result of this action, the Bureau dropped the complaint. The most salient indication of defendant's misconduct, the court said, was the lien sale notice it sent to plaintiff in Kansas after it knew of the pendency of the action, in which defendant stated that it had no knowledge of any valid defense to the claim that gave rise to its lien (*132 Cal. App. 3d 485, 494)* .

[4] Additional Authorities

[a] Rental Value Recoverable as Damages for Detention

Both parties in *Stanley W. Smith, Inc. v. Pilgrim (1931) 117 Cal. App. 244, 3 P.2d 573* , claimed the right to possession of a car. Plaintiff had deprived defendant of the car for more than three years, and disposed of it. Judgment for defendant, for the value of the automobile at the time of trial and for its usable value, based on a reasonable rental until that time, was affirmed. Expert testimony placed the market rental value of the car at $200 per month during the first year of the detention declining to $125 per month during the third year and $20 to $25 per week during the remaining period of detention, with proper upkeep and allowing for usual depreciation. The jury were instructed that the reasonable rental value, if any, was the net usable value less the expense of upkeep and maintenance. The court of appeal said that in an action for claim and delivery of personal property, the aggrieved party is entitled to the usable

value regardless of whether or not he or she hired other property to take the place of the property that was wrongfully withheld (*117 Cal. App. 244, 246, 247)* . Compensation based on reasonable value of the use of the property need not be limited by the value of the property. If the property detained has a usable value, its owner is entitled to recover damages equivalent to the reasonable value of its use during the period of detention up until the rendition of judgment (*117 Cal. App. 244, 246)* .

[b] Depreciation During Period of Detention

Plaintiff in *Anglo-California Trust Co. v. Collins (1923) 192 Cal. 315, 219 P. 982* , was awarded return of a farm tractor, or $350 as its value, but was denied damages for detention, and appealed. The Supreme Court reversed the judgment. The trial court found that the tractor, which remained in defendant's possession under a redelivery bond during the pendency of the action, was worth $1,700 on the day action was commenced and $350 when judgment was rendered. On the basis of those findings, it was error not to award $1,350 as damages for detention (*192 Cal. 315, 317-318)* . Plaintiff was entitled to damages for deterioration or depreciation, which are proper elements of damages for the detention of property. A finding of a specific amount of deterioration is equivalent to a finding of damages in that amount (*192 Cal. 315, 317)* .

The court of appeal in *Morris v. Allen (1911) 17 Cal. App. 684, 121 P. 690* , affirmed judgment for plaintiff for return of a vehicle, or $600 as its value, and $250 damages for its detention over an 18-month period. Defendant's primary contentions on appeal were that evidence of the car's decrease in value should not have been admitted and that that evidence established special damages, which plaintiff was barred from recovering because only general damages were pleaded. The evidence objected to established without conflict that the car was worth $600 at the time of the taking, but decreased in value to $400 during the pendency of the action. The court of appeal noted that *Code Civ. Proc. § 667* specifically authorizes damages for detention, which may be either general or special (*17 Cal. App. 684, 688)* . The court said that the manufacture of cars was still in its infancy and that by reason of the many changes and improvements from year to year, an automobile manufactured and marketed in any one year necessarily decreases in value as a salable commodity with each succeeding year of its existence (*17 Cal. App. 684, 688-689)* . Thus, damage from depreciation by reason of lapse of time was the direct and necessary result of the wrongful detention, rightfully proven and assessed under a general damage allegation (*17 Cal. App. 684, 689)* .

[c] Punitive Damages May Be Awarded

Booth v. People's Finance Etc. Co. (1932) 124 Cal. App. 131, 12 P.2d 50 (discussed in *§ 40.25[4][b]*), upheld a punitive damage award in an action for claim and delivery, albeit in a reduced amount (*124 Cal. App. 131, 143-146)* .

California Points & Authorities

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[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Memorandum

[3] Discussion of Authorities

[a] Propriety of Class Action Should Be Determined at Early Stage

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[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Memorandum

[3] Discussion of Authorities

[a] Defendant May Move for Order Determining Propriety of Class Action

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§ 41.32 Supporting Motion to Decertify Class in Class Action [Code Civ. Proc. § 382]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Memorandum

[3] Discussion of Authorities

[a] Certification Order May Be Altered

[b] Decertification Proper After Decision on Merits When Changed Circumstances

§ 41.33 Opposing Motion to Decertify Class in Class Action [Code Civ. Proc. § 382]--Decertification May Not Occur After Decision on Merits Unless Changed Circumstances Make Continued Class Action Treatment Improper

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Procedural Class Issues Resolved Before Merits

[b] Defendant Must Show Changed Circumstances

[c] Waiver of Right to Seek Decertification

[4] Additional Authorities

[a] Procedural Class Issues Resolved Before Merits

§ 41.34 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] on Ground of Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Insufficient Allegations of Fact to Establish Class Action [Code Civ. Proc. § 382]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Challenging Class Action by Demurrer

[b] Insufficient Allegations of Class Interest

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[4] Additional Authorities

[a] Insufficient Allegations of Class Interest

§ 41.34A Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] on Ground of Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Class Action Is Barred by Prior Judgment Denying Class Certification

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Judgment Denying Class Certification May Have Issue-Preclusive Effect on Subsequent Putative Class Action

§ 41.35 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] on Ground of Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Allegations Sufficient to Establish Reasonable Possibility That Class Action Treatment Appropriate [Code Civ. Proc. § 382]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Class Action Should Survive Pleading Stages If Possible

[b] Decision on Propriety Deferred Until Evidentiary Hearing

§ 41.35A Opposing Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] on Ground of Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Class Action Is Not Barred by Prior Judgment Denying Class Certification

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Judgment or Order Denying Certification of Class Does Not Have Issue-Preclusive Effect in Subsequent Action Involving Narrower Class

§ 41.36 Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Class Is Ascertainable

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Class Action Requirements

[b] Determination of Ascertainability

§ 41.37 Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Class Is Ascertainable--Members Readily Identified or Their Claims Substantiated by Defendant's Records

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Class Identified by Defendant's Records

§ 41.38 Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Class Is Ascertainable--Individual Members Need Not Be Identified

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Individual Class Members Need Not Be Identified

§ 41.39 Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Community of Interest Among Class Members--Common Questions Sufficiently Important to Permit Class Adjudication

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Sufficiently Important Common Questions

[b] Common Questions of Liability Generally Justify Class Adjudication

§ 41.40 Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Community of Interest Among Class Members in Questions of Fact--Class Members Have Single Fact in Common

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Common Questions of Fact

[4] Additional Authorities

[a] Common Questions of Fact

§ 41.41 Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Community of Interest Among Class Members in Action Alleging Fraud or Misrepresentation--Inference of Reliance Arises as to Entire Class When Material Representations Made to Class Members Who Thereafter Act Consistently With Reliance

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Community of Interest Sufficient in Action Alleging Fraud

[4] Additional Authorities

[a] Community of Interest Sufficient in Action Alleging Fraud

§ 41.42 Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Community of Interest Among Class Members Who Are Parties to Separate Versions of Standardized Contract That Violates Statute

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Certification of Class of Parties to Separate Versions of Standardized Contract Violating Statute Is Not Barred by Individual Members' Knowledge or Interpretation of Contract

[b] Individual Member's Understanding or Knowledge Does Not Bar Sufficient Commonality

§ 41.43 Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Community of Interest Among Class Members in Action Alleging Price-Fixing Conspiracy

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Existence of Conspiracy Is Common Issue

[b] Injury to Class Members Is Common Issue

[c] Injury to Indirect Purchasers

[d] Individual Damages Issues Do Not Overshadow Common Issues

§ 41.44 Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Community of Interest Among Class Members--Neither Common Fund Nor Request for Common Relief Is Essential to Establish Community of Interest

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Common Fund or Common Relief Not Required

§ 41.45 Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Community of Interest Among Class Members--Mere Separate Transactions Do Not Preclude Finding Requisite Community of Interest When Class Members Not Required to Litigate Numerous and Substantial Individual Questions

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Absence of Numerous and Substantial Individual Questions

[b] Separate Proof of Damages or Other Remedy

[4] Additional Authorities

[a] Absence of Numerous and Substantial Individual Questions

[b] Proof of Separate Damages

§ 41.46 Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Community of Interest Among Class Members--Plaintiff's Nonmembership in Class Not Ground for Dismissal When Error Can Be Corrected by Amendment to Complaint

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Plaintiff's Nonmembership in Class

§ 41.47 Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Community of Interest Among Class Members--No Strict Requirement That Named Plaintiff Have Interest in Each Subject Partnership

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Community-of-Interest Requirement as Predominant

§ 41.48 Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Community of Interest Among Class Members--Damages With Respect to Real Property May Be Determined on Class Basis When Calculation

Possible According to Standard Formula

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Damages to Real Property Determined on Class Basis

§ 41.49 Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Named Plaintiffs Adequately Represent Interests of Absent Class Members--Representation Adequate Unless Conflict of Interest or Overwhelming Disapproval Within Class

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Named Plaintiff Must Adequately Represent Class

[b] Factors in Determining Adequacy of Representation

[c] Representation Adequate Unless Conflict or Overwhelming Disapproval

[d] Potential Conflict Does Not Warrant Denial of Certification

[4] Additional Authorities

[a] Named Plaintiff Must Adequately Represent Class

§ 41.50 Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Potential Recovery Larger Than Nominal Sum Does Not Render Class Action Inappropriate

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Potential Recovery Larger Than Nominal Sum

§ 41.51 Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Class Treated as Claimant for Purposes of Satisfying Claims Statutes in Actions Against Government Entities

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Satisfying Claims Statutes as a Class

[4] Additional Authorities

[a] Satisfying Claims Statutes as a Class

§ 41.52 Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Merit of Underlying Claim Generally Not Factor in Certification Proceeding

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Merit Assessment Generally Not Appropriate in Certification Proceeding

[b] Inability to Reach Merits Does Not Prevent Class Certification

§ 41.52A Opposing Contention That Class Action [Code Civ. Proc. § 382] Proper--In Appropriate Case, Merit of Underlying Claim May be Considered at Certification Stage

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Under Appropriate Circumstances, Court May Deny Class Certification Based on Finding That Class Claims Lack Merit

§ 41.52B Opposing Contention That Class Action [Code Civ. Proc. § 382] Proper--Class Is Not Ascertainable

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Proposed Class Definition That Rests on Determination of Liability Is Not Objective

§ 41.53 Opposing Contention That Class Action [Code Civ. Proc. § 382] Proper--No Community of Interest Among Class Members--Numerous and Substantial Individual Questions

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Class Action Must Be Advantageous

[b] Numerous and Substantial Individual Questions

[c] Real Property Damage Action Not Proper

[d] National Class Action Subject to Different States' Laws

[e] Class Action Must be Superior to Individual Litigation

[4] Additional Authorities

[a] Numerous and Substantial Individual Questions

§ 41.54 Opposing Contention That Class Action [Code Civ. Proc. § 382] Proper--No Community of Interest Among Class Members--No Special Obligation to Adjudicate Nationwide Class Action

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Need for Diverse Legal Rulings Constitute Individual Questions

[b] Court Has No Special Obligation to Adjudicate Nationwide Class Action

[c] Special Obligation Determination Made at Pleading Stage

§ 41.55 Opposing Contention That Class Action [Code Civ. Proc. § 382] Proper--No Community of Interest Among Class Members--Multiplicity of Actions Unlikely When Injury to Sole Aggrieved Party Is Self-Generated

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Multiplicity of Actions Unlikely When Injury to Sole Aggrieved Party Is Self-Generated

§ 41.56 Opposing Contention That Class Action [Code Civ. Proc. § 382] Proper--No Community of Interest Among Class Members--Class Representative Does Not Have Cause of Action Against All Defendants

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Community of Interest Requirements

[b] Class Representative Must Have Cause of Action Against All Defendants

§ 41.57 Opposing Contention That Class Action [Code Civ. Proc. § 382] Proper--Named Plaintiffs Do Not Adequately Represent Interests of Absent Class Members--Named Plaintiffs Failed to Raise Claims Reasonably Expected by Class Members

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Proof of Adequacy of Representation

[b] Plaintiffs' Representation Inadequate

[4] Additional Authorities

[a] Plaintiff's Representation Inadequate

§ 41.58 Opposing Contention That Class Action [Code Civ. Proc. § 382] Proper--Named Plaintiffs Do Not Adequately Represent Interests of Absent Class Members--Conflict of Interest or Widespread Antagonism Among Potential Class Members

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Representation Inadequate When Conflict or Overwhelming Disapproval

§ 41.58A Supporting Contention That Class Counsel Should Be Disqualified for Conflict of Interest--Named Plaintiff Is Member of Law Firm

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Named Plaintiff's Position As Attorney for Class Presents Conflict of Interest

§ 41.59 Opposing Contention That Class Action [Code Civ. Proc. § 382] Proper--Action Improper and Without Substantial Benefit When Potential Individual Recovery Small and Distribution Would Require Substantial Time and Expense

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Substantial Benefit to Litigants and Court

[b] Class Action Without Substantial Benefit

[4] Additional Authorities

[a] Class Action Without Substantial Benefit

§ 41.60 Opposing Contention That Class Action [Code Civ. Proc. § 382] Proper--Defendant Class Improper When Inadequate Notice and Representation

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Inadequate Notice Requires Reversal of Judgment Against Class

[b] Adequate Representation of Class Is Necessary for Class Action

§ 41.61 Opposing Contention That Class Action [Code Civ. Proc. § 382] Is Proper--Defendant Class Action Improper When No Affirmative Relief Against Defendant Class Is Sought or Possible

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Memoranda

[3] Discussion of Authorities

[a] Defendant Class Action Improper When No Affirmative Relief Against Defendant Class Is Sought or Possible

§ 41.62 Opposing Contention That Class Action [Code Civ. Proc. § 382] Proper--No Provable Harm to Class Members

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Class Action Improper When Individual Damages Not Provable

§ 41.63 Supporting Contention That Trial Court May Impose Costs of Notice to Class Members on Adverse Party in Class Action [Code Civ. Proc. § 382]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Trial Court May Order Either Party to Provide or Bear Cost of Class Notice

§ 41.64 Supporting Contention That Trial Court May Not Adjudicate Substantive Merits of Class Action [Code Civ. Proc. § 382] Without Prior Determination of Procedural Class Issues

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Class Determinations Must Precede Substantive Adjudication

[4] Additional Authorities

[a] Class Determinations Must Precede Substantive Adjudication

§ 41.65 Supporting Contention That Trial Court May Not Determine Procedural Class Issues in Class Action [Code Civ. Proc. § 382] Following an Adjudication on the Substantive Merits

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Court Should Try Class Issues Before Substantive Merits

[b] Procedural Class Issues May Not Be Decided After Merits

§ 41.66 Opposing Contention That Trial Court May Not Adjudicate Substantive Merits of Class Action [Code Civ. Proc. § 382] Without Prior Determination of Procedural Class Issues--Defendant's Waiver of Due Process Rights to Prior Procedural Determination

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[3] Discussion of Authorities

[a] Defendant's Waiver of Due Process Rights

[b] Defendant's Waiver by Failure to Object

[c] Defendant's Waiver by Obtaining Substantive Ruling

[d] Defendant's Waiver by Requesting Bifurcated Trial

[4] Additional Authorities

[a] Defendant's Waiver of Due Process Rights

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[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[3] Discussion of Authorities

[a] Prior Adjudication for Declaratory or Injunctive Relief

[4] Additional Authorities

[a] Prior Adjudication for Declaratory or Injunctive Relief

§ 41.68 Opposing Contention That Trial Court May Not Adjudicate Substantive Merits of Class Action [Code Civ. Proc. § 382] Without Prior Determination of Procedural Class Issues--Temporary Restraining Order or Preliminary Injunction, or Both, May Be Granted Whether or Not the Class Has Been Certified [Code Civ. Proc. § 527(b)]

[1] FORM

[2] Comments

[a] Use of Form

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§ 41.69 Supporting Contention That Representative Action [Code Civ. Proc. § 382] by Association on Behalf of Members Proper

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Association May Sue in Representative Action

[4] Additional Authorities

[a] Association May Sue in Representative Action

§ 41.70 Opposing Contention That Representative Action [Code Civ. Proc. § 382] by Association on Behalf of Members Is Proper

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Association Cannot Sue for Inherently Personal Injuries

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California Points & Authorities

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Volume 4 Chapters 40-49 CLAIM & DELIVERY---to---CONTINUANCE
CHAPTER 41 CLASS AND REPRESENTATIVE ACTIONS
PART I. INTRODUCTION

4-41 California Points & Authorities § 41.01

§ 41.01 Scope of Chapter

This chapter contains memoranda for use in class actions and representative actions. The chapter includes memoranda supporting a motion to certify an action as a proper class action [*see § 41.30*], supporting a motion for an order declaring an action inappropriate as a class action [*see § 41.31*], supporting a motion to decertify the class in a class action [*see § 41.32*], opposing a motion to decertify the class in a class action [*see § 41.33*], and supporting [*see §§ 41.34*, *41.34A*] and opposing [*see § 41.35*] defendant's demurrer to a class-action complaint on the ground of failure to state a cause of action.

The chapter contains additional memoranda supporting [*see §§ 41.36 -41.52*] and opposing [*see §§ 41.52A -41.62*] the existence of the requirements for maintaining a proper class or representative action. The chapter also contains a memorandum supporting [*see § 41.63*] the contention that the trial court may impose costs of notice to class members on the adverse party in a class action. In addition, the chapter includes memoranda supporting [*see §§ 41.64 -41.65*] and opposing [*see §§ 41.66 -41.68*] the contention that the trial court may not adjudicate the substantive merits of an action without prior determination of procedural class-action issues. Also included are a memorandum supporting [*see § 41.69*] and opposing [*see § 41.70*] the contention that a representative action by an association on behalf of its members is proper, and a memorandum supporting the contention that a fluid class recovery is proper [*see § 41.71*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsDecertificationCivil ProcedureClass ActionsNoticesCivil ProcedureClass ActionsPrerequisitesGeneral Overview

California Points & Authorities

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Volume 4 Chapters 40-49 CLAIM & DELIVERY---to---CONTINUANCE
CHAPTER 41 CLASS AND REPRESENTATIVE ACTIONS
PART I. INTRODUCTION

4-41 California Points & Authorities § 41.02

§ 41.02 Governing Law

[1] Applicable State and Federal Law

Class actions and representative actions are governed in general by *Code Civ. Proc. § 382*, which provides that when the question is one of common or general interest, of many persons, or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.

Procedural rules for the management of class actions in California trial courts are set forth in *Cal. Rules of Ct., Rule 3.760 et seq.* The rules apply in class actions brought under *Code Civ. Proc. § 382* (authorizing class actions generally) and in class actions brought under the Consumers Legal Remedies Act (*Civ. Code § 1750 et seq.*) [*Cal. Rules of Ct., Rule 3.760(a)*]. As to matters not covered by the rules, the statutory procedures for class actions under the Consumers Legal Remedies Act [*see Civ. Code § 1781*] and the rule governing class actions in federal courts, Federal Rule of *Civil Procedure 23*, may be used as procedural guidelines to ensure fairness in class action suits generally [*see Richmond v. Dart Industries, Inc. (1981) 29 Cal. 3d 462, 469-470 n.7, 174 Cal. Rptr. 515, 629 P.2d 23* ; *see also B.W.I. Custom Kitchen v. Owens-Illinois, Inc. (1987) 191 Cal. App. 3d 1341, 1347, 235 Cal. Rptr. 228* ; for discussion of procedure under the Consumers Legal Remedies Act, *see* California Forms of Pleading and Practice, Ch. 504, *Sales: Consumers Legal Remedies Act* (Matthew Bender)]. Absent controlling California authority, federal cases construing *Fed. R. Civ. P., Rule 23*, are particularly persuasive authority when the California rule involved is identical to the rule construed in the federal case [*Danzig v. Superior Court (1978) 87 Cal. App. 3d 604, 610, 151 Cal. Rptr. 185 , cert. denied, 474 U.S. 819, 106 S. Ct. 67, 88 L. Ed. 2d 55 (1985)]* .

The Judicial Council has preempted local rules relating to pleadings, demurrers, ex parte applications, motions, discovery, provisional remedies, and the form and format of papers. Thus, all local rules regulating these matters in class actions are null and void unless otherwise permitted or required by statute or Judicial Council rule [*Cal. Rules of Ct., Rule 3.20(a)*]. There are some exceptions to the general preemption of local rules, most significantly for local rules enacted under the Trial Court Delay Reduction Act [*Cal. Rules of Ct., Rule 3.20(b)*; *see Gov. Code § 68600 et seq.*].

The federal Class Action Fairness Act of 2005 [Pub. L. No. 109-2, 119 Stat. 4], which took effect February 18, 2005, enacted new provisions to facilitate the removal of certain class actions from state court to federal court. Under these

provisions, a class action filed in a California superior court may be removed to, and ultimately adjudicated in, federal district court, even if the complaint asserts only state-law claims and complete diversity of citizenship among the parties is lacking [*see 28 U.S.C. §§ 1332(d), 1453*]. For discussion of removal of class actions under these provisions, see *§ 41.03[2]*. For coverage of the general procedures for the removal of actions to federal court, see 16 Moore's Federal Practice--Civil, Ch. 107, *Removal* (Matthew Bender). For coverage of class-action procedures applicable in federal court, see 5 Moore's Federal Practice--Civil, Ch. 23, *Class Actions* (Matthew Bender).

Federal law may prevent California courts from adjudicating certain class claims, even if asserted solely on the basis of state law. For example, the Securities Litigation Uniform Standards Act of 1998 (SLUSA) provides that no "covered class action" based on the statutory or common law of any state may be maintained in state or federal court by any private party alleging fraud in connection with the purchase, sale, or holding of a "covered security" [*15 U.S.C. § 78bb(f)(1)*; *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit (2006) 547 U.S. 71, 126 S. Ct. 1503, 164 L. Ed. 2d 179, 190-194* (SLUSA's preemption of state-law class actions alleging fraud "in connection with the purchase or sale" of securities bars state-law claims not just by purchasers and sellers of securities, but also by holders of securities, even though holders lack standing to pursue privatesecurities-fraud claims under federal law)]. A "covered class action" for SLUSA purposes is a lawsuit in which damages are sought on behalf of more than 50 people [*15 U.S.C. § 78bb(f)(5)(B)*]. A "covered security" is a security traded nationally and listed on a regulated national exchange [*15 U.S.C. § 78bb(f)(5)(E)*]. SLUSA exempts from its operation certain class actions based on the law of the state in which the issuer of the covered security is incorporated, actions brought by a state agency or state pension plan, actions under contracts between issuers and indenture trustees, and derivative actions brought by shareholders on behalf of a corporation [*15 U.S.C. § 78bb(f)(3)(A)-(C), (5)(C)*]. SLUSA also expressly preserves state jurisdiction over state agency enforcement proceedings [*15 U.S.C. § 78bb(f)(4)*]. After SLUSA is found applicable, the court may allow the plaintiffs to amend the complaint to assert state-law claims for a group of fewer than 50 plaintiffs or to exclude allegations that trigger SLUSA preclusion [*Wells Fargo Bank, N.A. v. Superior Court (2008) 159 Cal. App. 4th 381, 394, 71 Cal. Rptr. 3d 506*].

[1A] Procedure for Determining Propriety of Class Action

A motion for class certification should be filed when practicable [*Cal. Rules of Ct., Rule 3.764(b)*; *see Cal. Rules of Ct., Rule 3.764(c)* (notice and format requirements for motion to certify class)], and the propriety of permitting the action to proceed as a class action should be decided at an early stage of the proceedings [*Danzig v. Jack Grynberg & Associates (1984) 161 Cal. App. 3d 1128, 1136, 208 Cal. Rptr. 336]* . In its discretion, the court may establish a deadline for the filing of the motion as part of a case conference or as part of other case management proceedings [*Cal. Rules of Ct., Rule 3.764(b)*; *see Cal. Rules of Ct., Rules 3.762, 3.763* (case conference)]. Any such deadline must take into account discovery proceedings that may be necessary to the filing of the motion [*Cal. Rules of Ct., Rule 3.764(b)*; *see Stern v. Superior Court (2003) 105 Cal. App. 4th 223, 232-233, 129 Cal. Rptr. 2d 275* (each party must have opportunity to conduct discovery on class action issues before filing documents to support or oppose class action certification motion)]. The court rules also authorize the filing of motions to determine the existence of and certify subclasses, to amend or modify an order certifying a class, and to decertify a class [*Cal. Rules of Ct., Rule 3.764(a)(2)-(4)*].

Another method by which a defendant may test the propriety of a class action is by filing a demurrer to a class-action complaint on the ground that it fails to state facts sufficient to constitute a cause of action [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*]. When the complaint on its face fails to contain sufficient allegations of fact to establish a class interest, the class issue may be properly disposed of by demurrer [*Rose v. Medtronics, Inc. (1980) 107 Cal. App. 3d 150, 154, 166 Cal. Rptr. 16* ; *see Pinnacle Holdings, Inc. v. Simon (1995) 31 Cal. App. 4th 1430, 1435, 37 Cal. Rptr. 2d 778* ; *see also TJX Cos., Inc. v. Superior Court (2001) 87 Cal. App. 4th 747, 749-754, 104 Cal. Rptr. 2d 810* (if there is real and genuine dispute over whether complaint alleges facts sufficient for class action, trial court may not summarily dispose of demurrer without conducting oral hearing)]. When there is a reasonable possibility that the plaintiff can establish a community of interest among potential claimants, however, the preferred course is to defer

decision on the propriety of the class action until an evidentiary hearing has been held on the appropriateness of class litigation [*Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 813, 94 Cal. Rptr. 796, 484 P.2d 964* ; *Arce v. Kaiser Found. Health Plan, Inc. (2010) 181 Cal. App. 4th 471, 487, 496, 104 Cal. Rptr. 3d 545* (because there was reasonable possibility that plaintiff could demonstrate predominance of common issues, trial court erred in sustaining demurrer).]

If the court certifies a class, at that time or as soon thereafter as practicable, the court must make an order determining whether notice to the class is necessary, and if so, the time, manner, and content of the notice, and the parties responsible for the cost of notice [*Cal. Rules of Ct., Rule 3.766(c)*; *see Hernandez v. Vitamin Shoppe Indus. Inc. (2009) 174 Cal. App. 4th 1441, 1454-1461, 95 Cal. Rptr. 3d 734* (trial court did not abuse its discretion by enjoining class member's attorney from unilaterally contacting other class members, after attorney sent argumentative letters to class members urging them to opt out of class, after court had reviewed proposed settlement and counsel's arguments, preliminarily approved settlement and conditionally certified class, and ordered claims administrator to send notice to class)]. The court may require either party to notify the class of the action in the manner specified by the court [*Cal. Rules of Ct., Rule 3.766(a)*; *see Civ. Code § 1781(d), (e)* (notice requirements under Consumers Legal Remedies Act)]. The difficulty of notifying individual class members does not authorize the court to require that class members--even those with a substantial stake in the case--acknowledge personal notification by affirmatively requesting inclusion in the class. Such an "opt-in" procedure is permitted only after liability has been determined, as a means of apportioning the class's recovery [*Hypertouch, Inc. v. Superior Court (2005) 128 Cal. App. 4th 1527, 1542 n.5, 1546-1547* (after liability is determined, court may require class members to establish their entitlement to portions of recovery by filing proofs of claim)].

Before the determination of liability, an "opt-in" procedure is not required by constitutional due-process principles [*Hypertouch, Inc. v. Superior Court (2005) 128 Cal. App. 4th 1527, 1537-1543, 27 Cal. Rptr. 3d 839* (difficulty of providing notice may be reason to deny class certification, but once class is certified, due process does not require use of opt-in procedure to limit class to those who have received actual notice)], and it is not permitted by the applicable federal or California court rules, which require only the best notice practicable under the circumstances [*Hypertouch, Inc. v. Superior Court (2005) 128 Cal. App. 4th 1527, 1544-1550, 27 Cal. Rptr. 3d 839* ; *see Fed. R. Civ. P. 23(c)(2)*; *Cal. Rules of Ct., Rule 3.766(f)*].

There is no general authorization for, or requirement of, pre-certification notice to prospective class members. However, if prospective class members' identifying information is disclosed in precertification discovery, it may be appropriate for the court to order that notice be provided to prospective class members so that they may take steps to protect their privacy [*see, e.g.,* *Pioneer Elecs. (USA) Inc. v. Superior Court (2007) 40 Cal. 4th 360, 373-375, 53 Cal. Rptr. 3d 513, 150 P.3d 198* (approving trial court's order to notify defendant's customers and giving them opportunity to object to transmission of their identifying information in discovery)].

When a court has denied certification, the proper remedy is appeal, and successive certification motions are not available [*Stephen v. Enterprise Rent-A-Car (1991) 235 Cal. App. 3d 806, 813, 1 Cal. Rptr. 2d 130]* . Thus, after time for direct appeal has expired, a plaintiff may not "renew" a certification motion under *Code Civ. Proc. § 1008(b)* (renewal of motion on different state of facts) [*Stephen v. Enterprise Rent-A-Car (1991) 235 Cal. App. 3d 806, 811-812, 1 Cal. Rptr. 2d 130]* . For a form of memorandum opposing a renewed motion after an order denying class certification, see Ch. 158, *Motions to Reconsider and Renewed Motions* .

[2] Determination of Procedural Issues Prior to Substantive Issues

California court decisions have focused on the timing of motions seeking determination of procedural class action issues. Ordinarily, the trial court may not adjudicate any substantive issues, such as motions for summary judgment, prior to determination of the procedural class action issues, such as suitability of the action as a class action, determination of the composition of the class, and appropriate notification of members of the class. Similarly, the trial court ordinarily may not resolve procedural class-action issues after an adjudication on the substantive merits [*Green*

v. Obledo (1981) 29 Cal. 3d 126, 146, 172 Cal. Rptr. 206, 624 P.2d 256 ; *see §§ 41.64, 41.65*]. The purpose of resolving procedural issues first is to protect the defendant from "one-way intervention," under which potential class members could elect to stay in the class after a favorable merits ruling but opt out after an unfavorable merits ruling [*see Fireside Bank v. Superior Court (2007) 40 Cal. 4th 1069, 1074, 1081, 56 Cal. Rptr. 3d 861, 155 P.3d 268]* . It has even been said that the defendant has a due-process right to avoid one-way intervention [*Fireside Bank v. Superior Court (2007) 40 Cal. 4th 1069, 1083, 56 Cal. Rptr. 3d 861, 155 P.3d 268* ; *Home Sav. & Loan Assn. v. Superior Court (1976) 54 Cal. App. 3d 208, 214, 126 Cal. Rptr. 511]* . The general requirement that procedural issues be resolved first is not rigid, however, and is subject to the following rules [*Fireside Bank v. Superior Court (2007) 40 Cal. 4th 1069, 1083, 56 Cal. Rptr. 3d 861, 155 P.3d 268]* :

- First, a defendant must actively preserve its protection against one-way intervention by objecting to any adjudication of the merits before class certification. If the defendant fails to timely object, or affirmatively seeks resolution of the merits before certification, it will be deemed to have waived its rights [*see, e.g.,* *Employment Development Dept. v. Superior Court (1981) 30 Cal. 3d 256, 262, 262-265, 178 Cal. Rptr. 612, 636 P.2d 575* ; *Civil Service Employees Ins. Co. v. Superior Court (1978) 22 Cal. 3d 362, 373-374, 149 Cal. Rptr. 360, 584 P.2d 497* ; *see also § 41.66*].

- Second, plaintiffs should seek certification before moving for any resolution of the merits [*see Cal. Rules of Ct., Rule 3.764(b)* ("A motion for class certification should be filed when practicable")]. If the plaintiffs seek certification after seeking resolution of the merits, in the absence of a waiver by the defendant, they must demonstrate changed circumstances or other good cause justifying the belated motion before the trial court may consider it.

- Third, in the absence of a waiver by the defendant, the trial court should not resolve the merits in a putative class action before resolving class certification and notice issues, absent a compelling justification for doing so.

[3] Consumer Class Actions

The Consumers Legal Remedies Act (CLRA) [*Civ. Code §§ 1750-1784*] provides for class actions by consumers against unethical sellers of goods or services for unfair methods of competition and unfair or deceptive acts or practices [*Civ. Code §§ 1770, 1780(a)*; *see* *Fairbanks v. Superior Court (2009) 46 Cal. 4th 56, 61, 92 Cal. Rptr. 3d 279, 205 P.3d 201* (life insurance is not "good" or "service" within scope of remedial provisions of CLRA)]. The court must permit an action if all of the following conditions exist [*Civ. Code § 1781(b)(1)-(4)*]:

(1) It is impracticable to bring all members of the class before the court;

(2) The questions of law or fact common to the class are substantially similar and predominate over the questions affecting the individual members;

(3) The claims or defenses of the representative plaintiffs are typical of the claims or defenses of the class; and

(4) The representative plaintiffs will fairly and adequately protect the interests of the class.

Class actions brought under the CLRA are subject to the procedural rules generally applicable to class actions [*Cal. Rules of Ct., Rule 3.760(a)*]. In addition, the Act provides that the court must, on any party's motion that is supported by an affidavit (or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]) of a person or persons having knowledge of the facts, hold a hearing after 10 days' notice of the hearing has been served on the other parties to the action. At the hearing the court will determine [*Civ. Code § 1781(c)*]:

(1) Whether or not the four conditions necessary for maintenance of a class action exist;

(2) Whether or not the action is without merit or there is no defense to the action; and

(3) Whether or not published notice of the action should be given to each member of the alleged class.

To have standing to bring a class action under the CLRA, a representative plaintiff must be a consumer and must have suffered "any damage" as a result of the defendant's violation of the Act [*Civ. Code § 1780(a)*]. The statutory reference to "any damage" in this context indicates a category that includes, but is greater than, actual pecuniary damages. Thus, a representative plaintiff who has not suffered pecuniary damages may nevertheless have standing to sue if he or she has incurred transaction costs or opportunity costs as a result of an alleged violation of the Act [*Meyer v. Sprint Spectrum L.P. (2009) 45 Cal. 4th 634, 640* & n.1, *88 Cal. Rptr. 3d 859, 200 P.3d 295* (transaction costs are costs associated with forming, maintaining, and enforcing contracts; opportunity costs are benefits forgone by entering contract, such as forgone opportunity to contract with third party)]. However, the existence of a violation of the Act (e.g., inclusion of unconscionable term in consumer contract [*see, e.g., Civ. Code § 1770(a)(14), (19)*]) does not by itself constitute a form of damage. Therefore, the existence of a violation, without more, will not confer standing on a consumer exposed to the violation (e.g., consumer who enters into contract that includes unconscionable term), unless some kind of damage has resulted [*Meyer v. Sprint Spectrum L.P. (2009) 45 Cal. 4th 634, 641-643, 88 Cal. Rptr. 3d 859, 200 P.3d 295* (plaintiff suffered no damage because defendant had not attempted to enforce allegedly unconscionable contract term); *see Steroid Hormone Prod. Cases (2010) 181 Cal. App. 4th 145, 156-157, 104 Cal. Rptr. 3d 329* (named plaintiff had standing to proceed under CLRA based on claim that, in reliance on defendant's deceptive conduct, he bought illegal product he would not have bought had he known it was illegal)]. A class action under the CLRA requires a showing of actual injury as to each class member [*Steroid Hormone Prod. Cases (2010) 181 Cal. App. 4th 145, 155-156, 104 Cal. Rptr. 3d 329]* .

Like the CLRA, California's statutory unfair competition and false advertising law also broadly proscribes unlawful, unfair, or fraudulent business practices and unfair, deceptive, untrue, or misleading advertising [*Bus. & Prof. Code §§ 17200 et seq., 17500 et seq.*; *see Civ. Code § 1752* (remedies under CLRA are not exclusive)].

Formerly, a class action for relief under the unfair competition and false advertising law could be brought by a private plaintiff, even if that representative plaintiff had not suffered any injury or damage [*see former* Bus. & Prof. Code § 17204]. However, with the enactment of Proposition 64 on November 2, 2004, a private representative plaintiff lacks standing to maintain a class action unless he or she suffered injury in fact and lost money or property as a result of the alleged unfair competition or false advertising [*Bus. & Prof. Code §§ 17203, 17204, 17535*; *see Californians for Disability Rights v. Mervyn's, LLC (2006) 39 Cal. 4th 223, 227, 46 Cal. Rptr. 3d 57, 138 P.3d 207* (standing requirements of *Bus. & Prof. Code §§ 17203, 17204*, and *17535*, which took effect with passage of Proposition 64 on November 2, 2004, apply to cases pending on that date)]. For example, a labor union that has not suffered actual injury under the Unfair Competition Law lacks standing to bring a representative action as the assignee of employees who suffered injuries or as an association whose members have suffered injuries [*Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court (2009) 46 Cal. 4th 993, 1002, 95 Cal. Rptr. 3d 605, 209 P.3d 937]* .

Proposition 64's requirement that the class representative have suffered injury in fact and have lost money or property "as a result of" alleged unfair competition [*see Bus. & Prof. Code § 17204*] means, in the context of an alleged fraudulent business practice, that the class representative must demonstrate actual reliance on the allegedly deceptive or misleading statements of the defendant, in accordance with settled principles regarding the element of reliance in ordinary fraud actions. Thus, the representative plaintiff need not plead or prove with an unrealistic degree of specificity that the plaintiff relied on particular misrepresentations or false statements when the alleged unfair practice is an extensive and long-term advertising campaign [*In re Tobacco II Cases (2009) 46 Cal. 4th 298, 306, 324-328, 93 Cal. Rptr. 3d 559, 207 P.3d 20* ; *but see Pfizer Inc. v. Superior Court (2010) 182 Cal. App. 4th 622, 633-634, 105 Cal. Rptr.*

3d 795 (named plaintiff who had limited experience with only one label used in defendant's advertising campaign, and who had not seen other labels and television commercials that were part of campaign, was inadequate class representative)].

The standing requirements imposed by Proposition 64 apply only to the class representative, and unnamed class members need not show injury in fact or actual loss of money or property [*In re Tobacco II Cases (2009) 46 Cal. 4th 298, 306, 314-324, 93 Cal. Rptr. 3d 559, 207 P.3d 20* ; *see also Arias v. Superior Court (2009) 46 Cal. 4th 969, 975, 977-980, 95 Cal. Rptr. 3d 588, 209 P.3d 923* (employee who sues employer on behalf of self and other employees under Unfair Competition Law, *Bus. & Prof. Code § 17200 et seq.*, must satisfy class-action requirements)]. However, in such a case the class definition must not include persons who were not exposed to the alleged fraudulent business practice and could not possibly have lost money or property as a result of the alleged unfair competition [*Pfizer Inc. v. Superior Court (2010) 182 Cal. App. 4th 622, 631-633, 105 Cal. Rptr. 3d 795]* .

The named plaintiff's lack of standing in a class action brought under the unfair competition law does not necessarily require dismissal of the action. In this case, the court has discretion to allow precertification discovery designed to ascertain a suitable class representative, after identifying any potential abuses of the class-action procedure that may be created if discovery is allowed, and weighing those potential abuses against the rights of the parties under the circumstances of the case [*Parris v. Superior Court (2003) 109 Cal.App. 4th 285, 300-301, 135 Cal. Rptr. 2d 90* ; *see In re Tobacco II Cases (2009) 46 Cal. 4th 298, 328, 93 Cal. Rptr. 3d 559, 207 P.3d 20* (if named plaintiff lacks standing, proper procedure is not to decertify class but to grant leave to amend to redefine class or add new class representative); *see, e.g., CashCall, Inc. v. Superior Court (2008) 159 Cal. App. 4th 273, 284-296, 71 Cal. Rptr. 3d 441* (trial court properly authorized precertification discovery to find suitable class representative even though named plaintiff lacked standing to bring suit); *First Am. Title Ins. Co. v. Superior Court (2007) 146 Cal. App. 4th 1564, 1573-1578, 53 Cal. Rptr. 3d 734* (trial court abused its discretion in allowing precertification discovery to find appropriate class representative, when named plaintiff who initiated unfair-business-practices action on behalf of class was not member of class); *see also Branick v. Downey Savings & Loan Assn. (2006) 39 Cal. 4th 235, 239, 46 Cal. Rptr. 3d 66, 138 P.3d 214* (amendment of class-action complaint to add representative plaintiff who meets standing requirements of *Bus. & Prof. Code §§ 17203, 17204*, and 17535 is subject to ordinary rules governing pleading amendments and their relation back)].

[4] Review of Certification Order

The procedure available to review an order of a trial court regarding the propriety of a class action depends on the particular result of the order. If the certification order permits the class action to proceed, the order is reviewable by mandate and prohibition proceedings [*see Chance v. Superior Court (1962) 58 Cal. 2d 275, 277, 23 Cal. Rptr. 761, 373 P.2d 849]* .

When the legal effect of the certification order is to virtually demolish the class action, the order is appealable as a "final judgment" [*Daar v. Yellow Cab Co. (1967) 67 Cal. 2d 695, 698-699, 63 Cal. Rptr. 724, 433 P.2d 732* ; *see Code Civ. Proc. §§ 904.1, 904.2* (appealable orders)]. This principle is sometimes called the "death knell" doctrine, because the denial of class certification is "tantamount to a dismissal of the action as to all members of the class other than plaintiff," effectively sounding the "death knell" of the action as to the putative class members [*Farwell v. Sunset Mesa Property Owners Assn., Inc. (2008) 163 Cal. App. 4th 1545, 1547, 78 Cal. Rptr. 3d 666*]. Under the "death knell" doctrine, for example, a decision by a trial court denying certification to an entire class is an appealable order [*Richmond v. Dart Industries, Inc. (1981) 29 Cal. 3d 462, 466, 470, 479, 174 Cal. Rptr. 515, 629 P.2d 23* ; *see also Stephen v. Enterprise Rent-A-Car (1991) 235 Cal. App. 3d 806, 811-812, 1 Cal. Rptr. 2d 130* (because order denying certification is final, it may not be renewed after it is final)]. However, an order sustaining a demurrer but granting leave to amend is not appealable under the "death knell" doctrine, because it does not have the effect of terminating the class action, since the complaint can be amended in a way that would permit class certification [*Farwell v. Sunset Mesa Property Owners Assn., Inc. (2008) 163 Cal. App. 4th 1545, 1551-1552, 78 Cal. Rptr. 3d 666]* .

One court has held that a denial of class certification cannot be appealed if dismissal of the class action is operative only against the class and not against the named plaintiff [*Rosack v. Volvo of America Corp. (1982) 131 Cal. App. 3d 741, 745, 749, 182 Cal. Rptr. 800]* . Another has held that an order certifying a statewide, rather than a national, class was not appealable, reasoning that the order did not have a "death knell" effect of making further proceedings in the action impractical because of denial of class action status [*General Motors Corp. v. Superior Court (1988) 199 Cal. App. 3d 247, 249, 250-252, 244 Cal. Rptr. 776* ; *contra Clothesrigger, Inc. v. GTE Corp. (1987) 191 Cal. App. 3d 605, 609-611, 619, 236 Cal. Rptr. 605]* .

[5] Procedure for Settlement

A settlement or compromise of an entire class action, or of a cause of action in a class action, or as to a party, requires the approval of the court after a hearing [*Cal. Rules of Ct., Rule 3.769(a)*; *see Civ. Code § 1781(f)* (consumer class actions); *Marcarelli v. Cabell (1976) 58 Cal. App. 3d 51, 53, 129 Cal. Rptr. 509* (named plaintiff in class action is not permitted to settle action without court approval)]. Before final approval, the court must conduct an inquiry into the fairness of the proposed settlement [*Cal. Rules of Ct., Rule 3.769(a)*]. If the court has certified the action as a class action, notice of the final approval hearing must be given to the class members in the manner specified by the court. The notice must contain an explanation of the proposed settlement and procedures for class members to follow in filing written objections to it and in arranging to appear at the settlement hearing to state any objections to the proposed settlement [*Cal. Rules of Ct., Rule 3.769(f)*; *see Civ. Code § 1781(f)*; *see also Martorana v. Marlin & Saltzman (2009) 175 Cal. App. 4th 685, 694-698, 96 Cal. Rptr. 3d 172* (once court's order approving settlement notice procedure becomes final, class member may not maintain malpractice action against class counsel for failure to negotiate different settlement notice procedure or failure to give class member more notice than that required by judicially approved notice procedure)]. The notice must include an unambiguous class definition, so that persons receiving the notice will be able to determine whether they are members of the class [*Cho v. Seagate Tech. Holdings, Inc. (2009) 177 Cal. App. 4th 734, 745-748, 99 Cal. Rptr. 3d 436* (vacating order approving settlement so that trial court could provide unambiguous definition of class and re-notice settlement)].

[6] Fluid Class Recovery

Ordinarily, once a class action is resolved, the members of the class will be notified to file individual claims to establish their shares of the recovery. However, this may be impractical when there is a large class of consumers with relatively small individual claims. In such cases, it is likely that only a fraction of the class will have the desire and documentation to file individual claims and, as a result, there will be a substantial amount of remaining damages. Therefore, the court may order that damages be distributed according to one of several methods known collectively as "fluid class recovery" or "cy pres remedy." This type of distribution, which may, for example, take the form of a future price rollback, benefits as many of the class members as possible, but most probably, some injured class members will receive no compensation and some people not in the class will benefit from the distribution [*Bruno v. Superior Court (1981) 127 Cal. App. 3d 120, 123-124, 179 Cal. Rptr. 342]* .

Fluid recovery is ordinarily implemented in three steps [*State of California v. Levi Strauss & Co. (1986) 41 Cal. 3d 460, 472-473, 224 Cal. Rptr. 605, 715 P.2d 564]* :

(1) The defendant's total damage liability is paid over to a class fund;

(2) Individual class members are given an opportunity to collect their individual shares by proving their particular damages, usually according to a lowered standard of proof; and

(3) Any residue remaining after individual claims have been paid is distributed by one of several practical procedures that have been developed by the courts.

When fluid class recovery is implemented by a price rollback, under some circumstances the rollback may be more accurately characterized as an alternative to creation of the residue [*see State of California v. Levi Strauss & Co. (1986) 41 Cal. 3d 460, 488 n.1, 224 Cal. Rptr. 605, 715 P.2d 564* (concurring opn. of Grodin, J.)].

Under appropriate circumstances, fluid class recovery may result in the entire recovery being distributed to charitable, governmental, and nonprofit organizations, with no direct payments to any class members. Distribution of the recovery in this manner may be appropriate, for example, if the distribution and administration costs for class members' claims will exceed the recovery [*In re Vitamin Cases (2003) 107 Cal. App. 4th 820, 826-832, 132 Cal. Rptr. 2d 425]* .

However, fluid class recovery cannot be used simply to surmount problems in certifying a class action and does not give a cause of action to anyone without a right to recover damages [*Bruno v. Superior Court (1981) 127 Cal. App. 3d 120, 135, 179 Cal. Rptr. 342]* . If a class is not ascertainable because no individual member can prove the harm he or she is alleged to have suffered, the possibility of fluid recovery does not salvage the class action [*see, e.g.,* *Collins v. Safeway Stores, Inc. (1986) 187 Cal. App. 3d 62, 74, 231 Cal. Rptr. 638]* .

[7] Page Limits on Supporting and Opposing Memoranda

An opening or responding memorandum supporting or opposing a motion for class certification must not exceed 20 pages. A reply memorandum must not exceed 15 pages. Otherwise, memoranda submitted on motions in class actions are subject to the requirements that generally apply to supporting and opposing memoranda [*Cal. Rules of Ct., Rule 3.764(c)(2)*; *see Cal. Rules of Ct., Rule 3.1113* (general requirements)].

For further discussion of basic format requirements of supporting and opposing memoranda, see *Ch. 1, Writing Legal Memoranda and Briefs, § 1.05*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalBasisGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsCompromisesCivil ProcedureClass ActionsOpt-Out ProvisionsCivil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionFinal Judgment Rule

California Points & Authorities

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Volume 4 Chapters 40-49 CLAIM & DELIVERY---to---CONTINUANCE
CHAPTER 41 CLASS AND REPRESENTATIVE ACTIONS
PART I. INTRODUCTION

4-41 California Points & Authorities § 41.03

§ 41.03 Removal of Class Action to Federal Court

[1] Overview of Class Action Fairness Act of 2005

The federal Class Action Fairness Act of 2005 (CAFA), which took effect February 18, 2005, added new provisions to facilitate the removal of class actions from state court to federal court [Pub. L. No. 109-2, 119 Stat. 4; *see 28 U.S.C. §§ 1332(d), 1453*].

CAFA applies to all class actions commenced in any court on or after February 18, 2005 [Pub L. No. 109-2, § 9]. Thus, CAFA does not apply to a case commenced in state court before February 18, 2005 [*see Pritchett v. Office Depot, Inc. (10th Cir. 2005) 404 F.3d 1232, 1235-1238* (class action is "commenced" for CAFA purposes when it is filed in state court, not when it is removed to federal court); *see also McAtee v. Capital One, F.S.B. (2007) 479 F.3d 1143, 1145-1148* (action filed in California state court is commenced for purposes of CAFA when complaint is filed, irrespective of any later amendment to add new causes of action or to add or replace plaintiffs or defendants, including substitution of named defendant for fictitiously sued defendant)].

[2] Authority for Removal of Class Action

CAFA authorizes removal of a class action by any defendant, without regard to whether any defendant is a citizen of the state in which the action was filed, and without the consent of other defendants [*28 U.S.C. § 1453(b)*; *see United Steel, Paper & Forestry, Rubber Mfg. Energy, Allied Indus. & Serv. Workers Int'l Union v. Shell Oil Co. (9th Cir. 2008) 549 F.3d 1204, 1208-1209* (one defendant's timely notice of removal pursuant to CAFA accomplishes removal of entire case and is not vitiated by another defendant's untimely notice of removal)]. The new provision also makes the usual one-year limit on removal inapplicable to the removal of a class action [*28 U.S.C. § 1453(b)*]. Before the enactment of this provision, removal of a class action was subject to the general rules governing removal, which ordinarily require the defendants to act unanimously to effect removal, and which prohibit removal more than one year after commencement of the action [*see 28 U.S.C. §§ 1441(a), 1446(a), (b)*].

CAFA does not change the long-standing rule that a removing defendant has the burden of establishing federal jurisdiction [*Abrego v. Dow Chem. Co. (9th Cir. 2006) 443 F.3d 676, 685-686* (per curiam) (plaintiff not required to establish lack of federal jurisdiction)]. However, once the removing defendant has met its initial burden of establishing

federal jurisdiction under CAFA's minimal-diversity provision [*see 28 U.S.C. § 1332(d)(2)*; *see* [3], *below*], a plaintiff seeking remand has the burden of showing that a statutory exception to minimal-diversity jurisdiction applies [*Serrano v. 180 Connect, Inc. (9th Cir. 2007) 478 F.3d 1018, 1021-1024* (party seeking remand has burden of proving applicability of "local controversy" and "home-state controversy" exceptions to minimal-diversity jurisdiction under *28 U.S.C. § 1332(d)(4)*; *see also* [6], *below*].

The new removal provision does not apply to any class action that solely involves a claim [*28 U.S.C. § 1453(d)*]:

> (1) Concerning a "covered security" as defined under Section 16(f)(3) of the Securities Act of 1933 [*15 U.S.C. § 78p(f)(3)*] and Section 28(f)(5)(E) of the Securities Exchange Act of 1934 [*15 U.S.C. § 78bb(f)(5)(E)*];
>
> (2) That relates to the internal affairs or governance of a corporation orother form of business enterprise and that arises under or by virtue of the laws of the state in which the corporation or business enterprise is incorporated or organized; or
>
> (3) That relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security, as defined under Section 2(a)(1) of the Securities Act of 1933 [*15 U.S.C. § 77b(a)(1)*] and the regulations issued under that provision.

[3] Minimal-Diversity Jurisdiction of Federal Court

Facilitated removal under CAFA is available only if the federal court would have original subject-matter jurisdiction of the action [*see 28 U.S.C. §§ 1441(a), 1446(a), (b), 1453(b)*]. The federal court's jurisdiction generally may be based either on the presence of a federal question or on the diversity of citizenship of the parties [*see 28 U.S.C. §§ 1331, 1332*]. If the claims asserted in a case are all based on state law, therefore, the case can be removed to federal court only if the case satisfies the requirements of diversity jurisdiction.

In most cases, a federal court may exercise subject-matter jurisdiction based on diversity of citizenship only if there is complete diversity (that is, only if no plaintiff and defendant are citizens of the same state) and if the amount in controversy exceeds $75,000, exclusive of costs [*28 U.S.C. § 1332(a), (c)*; *Ruhrgas AG v. Marathon Oil Co. (1999) 526 U.S. 574, 580 n.2, 119 S. Ct. 1563, 143 L. Ed. 2d 760]* . Before the enactment of CAFA, therefore, diversity jurisdiction over a class action did not exist unless there was complete diversity of citizenship between all named representatives of the plaintiff class and all defendants [*see State Farm Fire & Casualty Co. v. Tashire (1967) 386 U.S. 523, 530-531, 87 S. Ct. 1199, 18 L. Ed. 2d 270]* .

CAFA added a new subsection to the federal diversity jurisdiction statute, allowing federal courts to exercise jurisdiction over certain class actions based on minimal diversity [*see 28 U.S.C. § 1332(d)*]. Under the new provision, federal district courts generally have original jurisdiction over any class action in which [*28 U.S.C. § 1332(d)(2)*]:

> (1) The matter in controversy exceeds $5 million, exclusive of interest and costs; and
>
> (2) Either:
>
> > (a) Any member of a plaintiff class and any defendant are citizens of different states;
> >
> > (b) Any member of a plaintiff class is a foreign state, or a citizen or subject of a foreign state, and any defendant is a citizen of a state; or
> >
> > (c) Any member of a plaintiff class is a citizen of a state and any defendant is a foreign

state or a citizen or subject of a foreign state.

For purposes of minimal-diversity jurisdiction, citizenship of the members of the proposed plaintiff classes is determined as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to federal jurisdiction, as of the date of service by the plaintiffs of an amended pleading, motion, or other paper that indicates the existence of federal jurisdiction [*28 U.S.C. § 1332(d)(7)*]. CAFA does not specify a time for determining the citizenship of defendants.

For purposes of minimal-diversity jurisdiction, an unincorporated association is deemed a citizen of the state where it has its principal place of business and the state under whose laws it is organized [*28 U.S.C. § 1332(d)(10)*].

If otherwise applicable, minimal-diversity jurisdiction can be exercised before or after the entry of a class-certification order [*28 U.S.C. § 1332(d)(8)*].

Class members' claims may be aggregated for purposes of determining whether the $5 million threshold is met [*28 U.S.C. § 1332(d)(6)*]. Before the enactment of CAFA, in cases other than those in which in the class members' rights were joint in nature, the federal courts were split over whether plaintiff class members could aggregate their claims to meet the generally applicable $75,000 amount-in-controversy threshold [*see Del Vecchio v. Conseco, Inc. (7th Cir. 2000) 230 F.3d 974, 977-978* (noting circuit split and holding that court could exercise supplemental jurisdiction over class members whose claims fell below jurisdictional minimum); *Trimble v. Asarco, Inc. (8th Cir. 2000) 232 F.3d 946, 960-962* (district courts could not exercise supplemental jurisdiction over claims of class members who did not themselves satisfy jurisdictional minimum); *Mehlenbacher v. Akzo Nobel Salt, Inc. (2d Cir. 2000) 216 F.3d 291, 296-297* & n.10 (in property owners' class action, members could not aggregate claims based on property damage and economic losses to meet jurisdictional minimum); *Tortola Restaurants, L.P. v. Kimberly-Clark Corp. (N.D. Cal. 1997) 987 F. Supp. 1186, 1189-1190, 1190 n.2* (claims of plaintiffs suing as class cannot be aggregated for purpose of satisfying amount-in-controversy requirement)].

[4] Diversity Jurisdiction Over "Mass Actions"

Special rules apply to a "mass action," which is any civil action, other than a class action [*see 28 U.S.C. § 1711(2)*], in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact [*28 U.S.C. § 1332(d)(11)(B)(i)*]. For purposes of minimal-diversity jurisdiction and removal to federal court, a mass action is treated as a class action, except that in a mass action minimal-diversity jurisdiction does not exist over any plaintiff whose individual claim does not satisfy the generally applicable $75,000 jurisdictional minimum for diversityjurisdiction [*28 U.S.C. § 1332(d)(11)(A), (B)(i)*]. A "mass action" for this purpose does not include any civil action in which (1) all of the claims arise from an alleged event or occurrence in the state in which the action was filed, with the allegedly resulting injuries in that state or in states contiguous to that state; (2) the claims are joined on motion of a defendant; (3) all claims in the action are asserted on behalf of the general public, and not on behalf of individual claimants or members of a purported class, pursuant to a state statute specifically authorizing such an action; or (4) the claims have been consolidated or coordinated solely for pretrial proceedings [*28 U.S.C. § 1332(d)(11)(B)(ii)*].

A mass action may be removed to federal court based on minimal diversity [*28 U.S.C. § 1332(d)(11)(A)*], but thereafter it may not ordinarily be transferred to any other court for consolidated or coordinated pretrial proceedings [*see 28 U.S.C. § 1407*] unless a majority of the plaintiffs in the action request transfer for that purpose [*28 U.S.C. § 1332(d)(11)(C)(i)*].

This apparently would prevent the Judicial Panel on Multidistrict Litigation from transferring such a mass action for consolidated treatment with other similar cases. However, this restriction on transfer does not apply if the mass action has been certified as a class action under Federal Rule of *Civil Procedure 23*, or if the plaintiffs propose that the action

proceed as a class action under Rule 23 [*28 U.S.C. § 1332(d)(11)(C)*]. The limitations periods on any claims asserted in a mass action that is removed to federal court based on minimal diversity are tolled during the period that the action is pending in federal court [*28 U.S.C. § 1332(d)(11)(D)*].

A mass action is not necessarily the same thing as a mass tort.

[5] Exceptions to Minimal Diversity

Minimal-diversity jurisdiction is inapplicable under several circumstances. For example, minimal-diversity jurisdiction is not available in any class action in which [*28 U.S.C. § 1332(d)(5)*]:

> (1) The primary defendants are states, state officials, or other governmental entities against which the federal district court may be foreclosed from ordering relief (i.e., because of *Eleventh Amendment* immunity); or
>
> (2) There are fewer than 100 members of all proposed plaintiff classes in the aggregate.

Minimal-diversity jurisdiction is also inapplicable to any class action that solely involves a claim [*28 U.S.C. § 1332(d)(9)*]:

> (1) Concerning a "covered security" as defined under Section 16(f)(3) of the Securities Act of 1933 [*15 U.S.C. § 78p(f)(3)*] and Section 28(f)(5)(E) of the Securities Exchange Act of 1934 [*15 U.S.C. § 78bb(f)(5)(E)*];
>
> (2) That relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the state in which the corporation or business enterprise is incorporated or organized; or
>
> (3) That relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security, as defined under Section 2(a)(1) of the Securities Act of 1933 [*15 U.S.C. § 77b(a)(1)*] and the regulations issued under that provision.

[6] When Federal Court Must or May Decline to Exercise Minimal-Diversity Jurisdiction

A federal district court must decline to exercise minimal-diversity jurisdiction if two thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the state in which the action was originally filed [*28 U.S.C. § 1332(d)(4)(B)*; *see Serrano v. 180 Connect, Inc. (9th Cir. 2007) 478 F.3d 1018, 1021-1024* (party seeking remand to state court has burden of proving applicability of "home-state controversy" exception to minimal-diversity jurisdiction under *28 U.S.C. § 1332(d)(4)(B)*)]. The court must also decline to exercise minimal-diversity jurisdiction if [*28 U.S.C. § 1332(d)(4)(A)*; *see Serrano v. 180 Connect, Inc. (9th Cir. 2007) 478 F.3d 1018, 1021-1024* (party seeking remand to state court has burden of proving applicability of "local controversy" exception to minimal-diversity jurisdiction under *28 U.S.C. § 1332(d)(4)(A)*)]:

> (1) More than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the state in which the action was originally filed;
>
> (2) At least one defendant from whom significant relief is sought and whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class is a citizen of the state in which the action was originally filed;

(3) Principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the state in which the action was originally filed; and

(4) During the three years preceding the filing of the class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons.

In this context, it is not clear from the text of CAFA whether a "primary" defendant [*see 28 U.S.C. § 1332(d)(4)(B)*] is the same as a defendant "fromwhom significant relief is sought" and "whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class" [*see 28 U.S.C. § 1332(d)(4)(A)*].

A federal district court has discretion, in the interests of justice and looking at the totality of the circumstances, to decline to exercise minimal-diversity jurisdiction if more than a third but less than two thirds of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the state in which the action was originally filed [*28 U.S.C. § 1332(d)(3)*]. In deciding whether to decline to exercise jurisdiction, the court must consider whether [*28 U.S.C. § 1332(d)(3)*]:

(1) The claims asserted involve matters of national or interstate interest;

(2) The claims asserted will be governed by the laws of the state in which the action was originally filed or by the laws of other states;

(3) The class action has been pleaded in a manner that seeks to avoid federal jurisdiction;

(4) The action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

(5) The number of citizens of the state in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other state, and the citizenship of the other members of the proposed class is dispersed among a substantial number of states; and

(6) During the three years preceding the filing of the class action, one or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

In ascertaining whether the one-third or two-thirds threshold is met, the court will count the number of class members, without regard to the amount of damages claimed by each class member [*see 28 U.S.C. § 1332(d)(3), (4)*].

[7] Federal Appellate Review of Remand Orders

If a removed class action is remanded to state court, the general prohibition against appellate review of remand orders [*see 28 U.S.C. § 1447(d)*] does not apply. Thus, the federal court of appeals has discretion to hear an appeal from the grant or denial of a remand order if an application is made to the court of appeals not more than seven days after the entry of the order [*28 U.S.C. § 1453(c)(1)*; *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc. (9th Cir. 2006) 435 F.3d 1140, 1145-1146* (although *28 U.S.C. § 1453(c)(1)* literally requires application for permission to appeal "not less than 7 days after entry" of remand order, only reasonable interpretation of statute is that it requires that application be filed "not more than" 7 court days after entry of remand order); *but see Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc. (9th Cir. 2006) 448 F.3d 1092, 1094-1100* (Bybee, J., dissenting from denial of rehearing en banc) (although illogical, "not less than 7 days" language of *28U.S.C. § 1453(c)(1)* is not absurd and should be applied as written)].

If the court accepts the appeal, it is ordinarily required to complete its review and enter judgment within 60 days after the date of the order granting leave to appeal [*28 U.S.C. § 1453(c)(2)* (requiring court of appeals to render judgment no later than 60 days after the "appeal was filed"); *see Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc. (9th Cir. 2006) 435 F.3d 1140, 1144-1145* (petition for permission to appeal under *28 U.S.C. § 1453(c)* is subject to *Fed. R. App. P. 5(d)(2)*, which provides that entry of order granting permission to appeal serves as filing of appeal for all timing issues)]. The court may extend the 60-day period for an additional 10 days if good cause is shown and the extension is in the interests of justice, or for any additional period if all parties agree to the extension [*28 U.S.C. § 1453(c)(3)*]. If the court of appeals fails to enter a final judgment on the appeal within the 60 days, plus any extensions, the appeal will be deemed denied [*28 U.S.C. § 1453(c)(4)*].

[8] Consumer Protection in Federal Court

CAFA includes the Consumer Class Action *Bill of Rights* and Improved Procedures for Interstate Class Actions [*see 28 U.S.C. §§ 1711-1715*]. This part of CAFA, which applies to class actions filed in or removed to federal district court [*see 28 U.S.C. § 1711(2)*], contains special requirements for attorney's fees and court approval of "coupon settlements," in which the class recovery consists of an award of coupons to class members [*28 U.S.C. § 1712*], as well as other provisions designed to protect individual class members when a class action is settled. For example, if a proposed settlement would obligate any class member to pay sums to class counsel that would result in a net loss to the class member, the federal court may approve the settlement only if the court makes a written finding that nonmonetary benefits to the class member substantially outweigh the monetary loss [*28 U.S.C. § 1713*]. Also, the federal court lacks authority to approve any proposed settlement that provides for the payment of greater sums to some class members than to others solely on the basis that the class members to whom the greater sums are to be paid are located in closer geographic proximity to the court [*28 U.S.C. § 1714*]. CAFA imposes special notice requirements for the settlement of class actions. Not later than 10 days after a proposed settlement of a class action is filed in federal district court, each defendant that is participating in the proposed settlement must serve notice of the proposed settlement on the attorney general or other appropriate state official of each state in which a class member resides, and on the Attorney General of the United States or other appropriate federal official [*28 U.S.C. § 1715(b), (c)*; *see 28 U.S.C. § 1715(a)* ("appropriate officials" defined)].

The foregoing provisions of the Consumer Class Action *Bill of Rights* and Improved Procedures for Interstate Class Actions apply to any "proposed settlement," which is defined as an agreement regarding a class action that is subject to federal-court approval and that, if approved, would be binding on some or all class members [*28 U.S.C. § 1711(6)*]. Therefore, because court approval of a settlement is required only after class certification [*Fed. R. Civ. P. 23(e)*], these requirements are inapplicable to pre-certification settlements.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalBasisGeneral OverviewCivil ProcedureRemovalBasisDiversity of CitizenshipCivil ProcedureRemovalElementsProper TransferorsCivil ProcedureRemovalPostremoval RemandsAppellate ReviewCivil ProcedureRemovalProceedingsGeneral OverviewCivil ProcedureClass ActionsGeneral Overview

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4-41 California Points & Authorities § 41.04

§ 41.04 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

For a discussion and forms for use in class and representative actions, see California Forms of Pleading and Practice, Ch. 120, *Class Actions* (Matthew Bender). See also the following chapters in that publication:

- Ch. 41, *Appeal: Review Standards and Appellate Rules of Law*.
- Ch. 160, *Corporations*, Pt. VIII, "Derivative Actions."
- Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*.
- Ch. 358, *Mandate and Prohibition*.
- Ch. 375, *Motions to Strike*.
- Ch. 389, *Nonsuit and Motions for Judgment*.
- Ch. 504, *Sales: Consumers Legal Remedies Act*.
- Ch. 537, *Summary Judgment*.

[2] Related Points and Authorities Chapters

Related memoranda that may be useful in particular cases involving class actions may be found in Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* , Ch.158, *Motions to Reconsider and Renewed Motions* , and Ch. 221, *Summary Judgments* . For memoranda relating to shareholder derivative actions, see Ch. 52, *Corporations* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsShareholdersActions Against CorporationsDerivative ActionsGeneral OverviewCivil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsDerivative ActionsGeneral OverviewCivil ProcedurePretrial JudgmentsJudgment on the PleadingsCivil ProcedurePretrial JudgmentsNonsuitsGeneral OverviewCivil ProcedureSummary JudgmentStandardsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsGeneral OverviewCivil ProcedureAppealsStandards of ReviewGeneral Overview

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[Reserved]

§§ 41.05[Reserved]

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PART II. FORMS

4-41 California Points & Authorities § 41.30

§ 41.30 Supporting Motion to Certify Action as Proper Class Action [Code Civ. Proc. § 382]--General Form

[1] FORM Supporting Motion to Certify Action as Proper Class Action [Code Civ. Proc. § 382]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF MOTION TO
Plaintiff,	)	CERTIFY CLASS
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

A MOTION TO CERTIFY THE CLASS IS PROPER BECAUSE SUCH A MOTION MAY BE MADE AS SOON AS PRACTICABLE AFTER THE COMMENCEMENT OF AN ACTION BROUGHT AS A CLASS ACTION.

A. Class Actions Authorized. When the question is one of common or general interest, of many persons, or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all (*Code Civ. Proc. § 382*).

B. Propriety of Class Action Should Be Determined at Early Stage. A motion for class certification should be filed when practicable (*Cal. Rules of Ct., Rule 3.764(b)*), and the propriety of permitting the action to proceed as a class action should be decided at an early stage of the proceedings (*Danzig v. Jack Grynberg & Associates (1984) 161 Cal. App. 3d 1128, 1136, 208 Cal. Rptr. 336 , cert. denied, 474 U.S. 819, 106 S. Ct. 67, 88 L. Ed. 2d 55 (1985))* . In its

discretion, the court may establish a deadline for the filing of the motion, as part of a case conference or as part of other case management proceedings (*Cal. Rules of Ct., Rule 3.764(b)*; *see Cal. Rules of Ct., Rules 3.762, 3.763*). Any such deadline must take into account discovery proceedings that may be necessary to the filing of the motion (*Cal. Rules of Ct., Rule 3.764(b)*; *see Stern v. Superior Court (2003) 105 Cal. App. 4th 223, 232-233, 129 Cal. Rptr. 2d 275* (each party must have opportunity to conduct discovery on class action issues before filing documents to support or oppose class action certification motion)).

[*Where appropriate, add points and authorities supporting existence of requisites for maintaining a proper class action (see §§ 41.36 -41.51).*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to certify an action as a proper class action or to determine the class issues in a class action. The form is a general one that sets out the authority supporting the procedure for determining class issues. The motion to certify is sometimes referred to as a motion for an order determining class issues.

Counsel should attach to this general form points and authorities supporting the existence of the requirements for maintaining a proper class action [*see §§ 41.36 -41.51*]. Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For a form of motion for an order determining class issues, see California Forms of Pleading and Practice, Ch. 120, *Class Actions* (Matthew Bender).

[c] Opposing Memorandum

The memorandum *set out in § 41.31* may in an appropriate case be modified for use in opposing a motion to certify the class action supported by this memorandum.

[3] Discussion of Authorities

[a] Propriety of Class Action Should Be Determined at Early Stage

In ***Danzig v. Jack Grynberg & Associates*** *(1984) 161 Cal. App. 3d 1128, 208 Cal. Rptr. 336 , cert. denied, 474 U.S. 819, 106 S. Ct. 67, 88 L. Ed. 2d 55 (1985)* , the defendant made a public offering of limited partnership interests in a business in which he was the sole general partner. The purpose was to explore for oil and gas drilling prospects on oil and gas leases held either by the defendant or his wife. After an active solicitation program, consisting of an often-amended writtenprospectus, 55 persons became limited partner investors. The plaintiffs, limited partners, brought

an action based on alleged violations of the partnership agreement. The action was certified as a class action. At the pretrial conference the plaintiffs were permitted to amend their complaint to seek rescission and restitution on an alternative theory. The defendant's demurrer was overruled, and a trial was held on the issues as framed in the amended complaint. The trial court found that fraudulent misrepresentations and nondisclosures were intentionally and willfully made to induce the plaintiff class to subscribe and contribute to partnership interests. The trial court entered judgment for the plaintiff class, and the defendant appealed.

The court of appeal affirmed. The defendant argued that once the complaint was amended, changing its focus from enforcement of the partnership agreement to avoidance based on allegations of fraud, the original class certification was vitiated and a class judgment was improper. The court disagreed and found that the defendant's failure to move timely to decertify the class after the complaint had been amended constituted a waiver of any objections to the certification. The proper time to challenge the procedural propriety of a class action is before proceedings have been undertaken on the merits; the propriety of a class action must be decided at the earliest possible stage (*161 Cal. App. 3d 1128, 1136)* .

In ***Stern v. Superior Court*** *(2003) 105 Cal. App. 4th 223, 129 Cal. Rptr. 2d 275* , the plaintiffs sued an accounting firm and its members, alleging that one of the defendants, an employee of the firm, performed accounting services for the plaintiffs and other consumers while he was unlicensed. The complaint contained causes of action for violation of the California Consumers Legal Remedies Act (*see Civ. Code § 1750 et seq.*), unlawful and fraudulent business practices (*see Bus. & Prof. Code § 17200 et seq.*), and misrepresentation. These claims were asserted on behalf of the class of consumers who had used the unlicensed accountant's services during the three-plus years that he was unlicensed. At the initial status conference, the trial court observed that the action had not been certified as a class action. The plaintiffs' attorney conceded it was not certified. Then, without giving the plaintiffs notice or an opportunity to present evidence, the trial court found that the matter was not a class action and ordered the matter reclassified as a limited civil case because the plaintiffs had not shown that on their individual claims they could recover more than the $25,000 limit for limited civil cases (*see Code Civ. Proc. §§ 85, 403.040(a)*).

The court of appeal held that the trial court abused its discretion in deciding the case was not a class action without giving the parties notice, discovery, or an opportunity to brief issues and present evidence (*105 Cal. App. 4th 223, 232-233)* . The court explained that whether an action may proceed as a class action is customarily decided after a noticed hearing. This is true whether the issue arises on a motion by plaintiff, on a motion to dismiss class action allegations by a party opposing the class, or on the court's own motion. Due process requires that an order concerning class certification not be made without a full opportunity for the parties to brief issues and present evidence. In this case, one of the causes of action was asserted under the Consumers Legal Remedies Act (*Civ. Code § 1750 et seq.*), which requires at least 10 days' notice before a hearing on a class-certification motion (*Civ. Code § 1781(c)*) (*105 Cal. App. 4th 223, 232)* .

The appellate court also emphasized that each party must have an opportunity to conduct discovery on class-action issues before filing documents to support or oppose a class-certification motion, so the trial court can realistically determine if common questions are sufficiently pervasive to permit adjudication in a class action. In this case, the trial court had ruled that the action was not a class action just nine days after the second amended complaint was filed, a period that was not adequate for discovery on class-certification issues (*105 Cal. App. 4th 223, 232-233)* .

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4-41 California Points & Authorities § 41.31

§ 41.31 Supporting Motion for Order Declaring Action Inappropriate as Class Action [Code Civ. Proc. § 382]--General Form

[1] FORM Supporting Motion for Order Declaring Action Inappropriate as Class Action [Code Civ. Proc. § 382]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION FOR ORDER DECLARING ACTION INAPPROPRIATE AS CLASS ACTION
vs.	)	[*Code Civ. Proc. § 382*]
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THE MOTION IS PROPER BECAUSE THE PROPRIETY OF A CLASS ACTION SHOULD BE DETERMINED AS SOON AS PRACTICABLE, AND ANY PARTY MAY BRING A MOTION TO DETERMINE CLASS ISSUES.

A. Propriety of Class Action Should Be Determined at Early Stage. [*See § 41.30, Paragraph B.*]

B. Defendant May Move for Order Determining Propriety of Class Action. Although the California Rules of Court do not expressly authorize motions to declare class actions inappropriate, any party, including the defendant, may file a motion to certify or decertify a class, to determine the existence of subclasses, or to amend or modify a class certification order (*Cal. Rules of Ct., Rule 3.764(a)*; *Stern v. Superior Court (2003) 105 Cal. App. 4th 223, 232, 129 Cal. Rptr. 2d 275*). Further, a determination of whether a class action is appropriate may be made on the court's own motion (*San Jose v. Superior Court (1974) 12 Cal. 3d 447, 453, 115 Cal. Rptr. 797, 525 P.2d 701*).

C. Plaintiff's Required Showing on Motion to Certify. On a motion to certify class status of an action, it is the plaintiff's burden to establish that the requisites for continuation of the litigation in that format are in fact present. Satisfaction of this burden requires that the plaintiff establish more than a reasonable possibility that class action treatment is appropriate (*Hamwi v. Citinational-Buckeye Inv. Co. (1977) 72 Cal. App. 3d 462, 471, 140 Cal. Rptr. 215*).

D. Plaintiff's Burden on Demurrer Distinguished. When a class action complaint is tested on demurrer, plaintiff must establish only a reasonable possibility that class action treatment is appropriate. When the court determines the issue of class propriety at a hearing on an appropriate motion at which evidence is presented, however, the issue of community of interest is determined on the merits, and the plaintiff must establish the community as a matter of fact (*Hamwi v. Citinational-Buckeye Inv. Co. (1977) 72 Cal. App. 3d 462, 471-472, 140 Cal. Rptr. 215*).

[*Where appropriate, add points and authorities opposing existence of requisites for maintaining a proper class action (see §§ 41.53 -41.59).*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be used in support of a motion for an order declaring an action inappropriate as a class action. The form is a general one that sets out the authority supporting the procedure for determining class issues on the motion of the defendant in a class action.

With appropriate modification, This form may be submitted in opposition to a motion to certify an action as a proper class action supported by the points and authorities *set out in § 41.30*. Counsel should attach to this general form points and authorities opposing the existence of requisites for maintaining a proper class action [*see §§ 41.53 -41.59*]. Counsel should also insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For a form of motion for an order determining class issues, see California Forms of Pleading and Practice, Ch. 120, *Class Actions* (Matthew Bender).

[c] Opposing Memorandum

The memorandum *set out in § 41.30* may in an appropriate case be modified for use in opposing a motion for an order declaring an action inappropriate as a class action supported by this memorandum.

[3] Discussion of Authorities

[a] Defendant May Move for Order Determining Propriety of Class Action

The facts and procedural background of ***Stern v. Superior Court*** *(2003) 105 Cal. App. 4th 223, 129 Cal. Rptr. 2d 275* , are discussed in *§ 41.30[3][a]*. In making the point that class certification is customarily decided after a noticed hearing, the court of appeal recognized that a motion to consider the appropriateness of a class action may be made by a defendant (*105 Cal. App. 4th 223, 232)* .

San Jose v. Superior Court *(1974) 12 Cal. 3d 447, 115 Cal. Rptr. 797, 525 P.2d 701* , involved an action for nuisance and inverse condemnation on behalf of all real property owners situated in the flight pattern of San Jose Municipal Airport. Following discovery, defendant moved the trial court for an order declaring the action inappropriate as a class action. After affidavits were filed and a hearing held, the court found the action appropriate and ordered notification of class members. Defendant then filed for a writ of mandate, contending that the court had no jurisdiction to certify the class on a motion to declare the action inappropriate as a class action. Defendant also contended that the plaintiffs did not adequately represent the class and had failed to show a sufficient community of interest among the purported class members. The Supreme Court ruled that the trial court had jurisdiction to certify the class but had abused its discretion in doing so because plaintiff had failed to prove the necessary requirements. The Court also noted that the trial court had jurisdiction to determine the propriety of a class action on the motion of the plaintiff or defendant, or on the court's own motion (*12 Cal. 3d 447, 453)* .

[b] Plaintiff's Required Showing on Motion to Certify

Hamwi v. Citinational-Buckeye Inv. Co. *(1977) 72 Cal. App. 3d 462, 140 Cal. Rptr. 215* , was a class action on behalf of past and present tenants of defendant for breaches of a lease and fiduciary duty. After discovery, plaintiffs filed a notice of motion for determination of class issues pursuant to the Class Action Manual of the Los Angeles Superior Court. The trial court denied plaintiffs' motion and dismissed the action without prejudice as to the unnamed members of the class. Plaintiffs then appealed to the court of appeal.

The court of appeal affirmed the judgment of dismissal, holding that the trial court had properly determined that plaintiffs had failed to sustain their burden of establishing the community of interest necessary to maintain the litigation as a class action. Relying on *San Jose v. Superior Court (1974) 12 Cal. 3d 447, 460, 115 Cal. Rptr. 797, 525 P.2d 701* (discussed in *§ 41.31[3][a]*), and *Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 813, 94 Cal. Rptr. 796, 484 P.2d 964* , the court noted that on a motion to certify class status of an action, it is the plaintiff's burden to establish that the requisites for continuation of the litigation in that format are in fact present. Furthermore, to satisfy this burden, the plaintiff must establish more than a reasonable possibility that class-action treatment is appropriate (*72 Cal. App. 3d 462, 471)* .

[c] Plaintiff's Burden on Demurrer Distinguished

The facts and procedural background of ***Hamwi v. Citinational-Buckeye Inv. Co.*** *(1977) 72 Cal. App. 3d 462, 140 Cal. Rptr. 215* , are discussed in *§ 41.31[3][b]*. The court in *Hamwi*, citing *Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 813, 94 Cal. Rptr. 796, 484 P.2d 964* , distinguished the plaintiff's burden on a motion to certify from the required showing on defendant's demurrer. The court stated that when a class action complaint is tested on demurrer, plaintiff must establish only a reasonable possibility that class action treatment is appropriate. When the court determines the issue of class propriety at a hearing on an appropriate motion at which evidence is presented, however,

the issue of community of interest is determined on the merits, and the plaintiff must establish the community as a matter of fact (*72 Cal. App. 3d 462, 471-472)* .

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4-41 California Points & Authorities § 41.32

§ 41.32 Supporting Motion to Decertify Class in Class Action [Code Civ. Proc. § 382]--General Form

[1] FORM Supporting Motion to Decertify Class in Class Action [Code Civ. Proc. § 382]--General Form
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF MOTION TO
Plaintiff,	)	DECERTIFY CLASS
vs.	)	[*Code Civ. Proc. § 382*]
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

A MOTION TO DECERTIFY THIS ACTION AS A CLASS ACTION IS PROPER BECAUSE THE TRIAL COURT MAY _____ [ALTER OR AMEND A PRIOR CERTIFICATION ORDER BEFORE REACHING A DECISION ON THE MERITS *or* DECERTIFY THE CLASS AFTER A DECISION ON THE MERITS WHEN THERE HAS BEEN A SHOWING OF CHANGED CIRCUMSTANCES OR NEWLY AVAILABLE EVIDENCE MAKING CONTINUED CLASS ACTION TREATMENT IMPROPER].

A. Any Party May File Motion to Decertify Class. Any party may file a motion to decertify a class or to amend or modify an order certifying a class (*Cal. Rules of Ct., Rule 3.764(a)(3), (4)*).

B. Certification Order May Be Altered. A motion to decertify an action as a class action is proper because the trial court may alter or amend a prior certification order before reaching a decision on the merits (*see Occidental Land, Inc. v. Superior Court (1976) 18 Cal. 3d 355, 360, 134 Cal. Rptr. 388, 556 P.2d 750*).

[*Optional*] **C. Decertification Proper After Decision on Merits When Changed Circumstances.** The trial court retains jurisdiction to decertify a class even after a decision on the merits when there has been a showing of changed circumstances or newly available evidence making continued class action treatment improper (*Grogan-Beall v. Ferdinand Roten Galleries, Inc. (1982) 133 Cal. App. 3d 969, 977, 184 Cal. Rptr. 411*).

[*When appropriate, add points and authorities opposing existence of requisites for maintaining a proper class action (see §§ 41.53 -41.59).*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be used in support of a motion for an order decertifying a class action. The form is a general one that sets out the authority supporting the procedure for obtaining decertification of the class on the motion of the defendant in a class action.

Counsel should attach to this general form points and authorities opposing the existence of requisites for maintaining a proper class action [*see §§ 41.53 -41.59*]. Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For a form of motion for an order determining class issues, see California Forms of Pleading and Practice, Ch. 120, *Class Actions* (Matthew Bender).

[c] Opposing Memorandum

The memorandum *set out in § 41.30* may in an appropriate case be modified for use in opposing a motion to decertify the class supported by this memorandum. The memorandum *set out in § 41.33* may be used in an appropriate case to oppose a motion to decertify the class supported by Optional Paragraph C. of this memorandum.

[3] Discussion of Authorities

[a] Certification Order May Be Altered

Occidental Land, Inc. v. Superior Court *(1976) 18 Cal. 3d 355, 134 Cal. Rptr. 388, 556 P.2d 750* , was a class

action by a group of subdivision homeowners against the developer for fraudulently misrepresenting the cost and extent of maintenance of the project. Subsequent to discovery following the court's certification of the class, defendant moved for an order decertifying the class. The motion was denied and defendant then sought a writ of mandate to overturn the order refusing to decertify the class.

Based on the facts of the case, the Supreme Court ruled that the trial court did not abuse its discretion in refusing to decertify the action as a class action (*18 Cal. 3d 355, 364)* . The Court recognized, however, that the procedure followed by the defendant seeking decertification was authorized by the decision in *Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 821, 94 Cal. Rptr. 796, 484 P.2d 964* . Relying on *Vasquez* and *Fed. R. Civ. P., Rule 23(c)(1)*, the Court reasoned that its decisions clearly contemplated the possibility of successive motions concerning certification. The court noted with its approval that the defendant had conducted discovery proceedings in order to support a motion to decertify the action and then filed its motion based on evidence not before the court in the prior proceeding (*18 Cal. 3d 355, 360)* .

[b] Decertification Proper After Decision on Merits When Changed Circumstances

Grogan-Beall v. Ferdinand Roten Galleries, Inc. *(1982) 133 Cal. App. 3d 969, 184 Cal. Rptr. 411* , was a class action seeking damages for defendants' failure to comply with the disclosure-disclaimer provisions of the California Sale of Fine Prints Act (*Civ. Code §§ 1740-1745*). The class was conditionally certified over defendants' objections. After the jury returned a special verdict finding that defendants had nonwillfully violated the Act, the court granted defendants' motion to decertify the class, which had been made prior to submission of the case to the jury. The individual plaintiff then filed an appeal from the order decertifying the class.

The court of appeal affirmed the trial court's order decertifying the conditional class of plaintiffs (*133 Cal. App. 3d 969, 979)* . Before addressing the question of the timing of the decertification order, the court concluded that it was not reasonably possible to establish the necessary community of interest among the class members because each claimant would be required to litigate a number of substantial fact questions peculiar to his or her right of recovery (*133 Cal. App. 3d 969, 976)* . Second, distinguishing the decision in *Green v. Obledo (1981) 29 Cal. 3d 126, 146, 172 Cal. Rptr. 206, 624 P.2d 256* (discussed in *§ 41.33[3][a]*), the court ruled that the trial court's decertification order was proper. The court noted that while the Supreme Court in *Green* held that generally a motion to decertify must be determined before the decision on the merits, it also declined to make this an absolute rule. The court of appeal then stated that the trial court retains jurisdiction to decertify a class even after a decision on the merits, providing that there has been a showing of changed circumstances or newly available evidence making continued class action treatment improper (*133 Cal. App. 3d 969, 977)* .

Green was also distinguished factually. The court in *Grogan-Beall* noted that defendants in *Green* failed to contest plaintiffs' original motion for class certification and did not move for decertification until after a determination against them on the merits. The court pointed out that, in sharp contrast, defendants in *Grogan-Beall* both objected to the original certification and moved to decertify prior to submission of the case to the jury. In addition, the court stated that the trial court's original certification order was only conditional. Finally, the court noted that defendants had renewed their opposition to certification prior to submission of the case to the jury, arguing that the evidence at trial showed that uncommon questions of fact were central to a determination of defendants' liability (*133 Cal. App. 3d 969, 977)* .

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4-41 California Points & Authorities § 41.33

§ 41.33 Opposing Motion to Decertify Class in Class Action [Code Civ. Proc. § 382]--Decertification May Not Occur After Decision on Merits Unless Changed Circumstances Make Continued Class Action Treatment Improper

[1] FORM Opposing Motion to Decertify Class in Class Action [Code Civ. Proc. § 382]--Decertification May Not Occur After Decision on Merits Unless Changed Circumstances Make Continued Class Action Treatment Improper

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN OPPOSITION TO MOTION TO DECERTI-
vs.	)	FY CLASS
_____ [*name*],	)	[*Code Civ. Proc. § 382*]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE MOTION TO DECERTIFY THIS ACTION AS A CLASS ACTION SHOULD NOT BE GRANTED BECAUSE THE COURT MAY NOT ORDER DECERTIFICATION OF THE CLASS AFTER ITS DECISION ON THE MERITS UNLESS CHANGED CIRCUMSTANCES MAKE CONTINUED CLASS ACTION TREATMENT IMPROPER.

A. Procedural Class Issues Resolved Before Merits. California appellate courts have held that procedural class action issues, including the composition of the class, must ordinarily be resolved before a decision on the merits is reached (*Green v. Obledo (1981) 29 Cal. 3d 126, 146, 172 Cal. Rptr. 206, 624 P.2d 256*).

B. Defendant Must Show Changed Circumstances. After a decision on the merits, a class should be decertified only when it is clear that there are changed circumstances making continued class action treatment improper (*Green v. Obledo (1981) 29 Cal. 3d 126, 148, 172 Cal. Rptr. 206, 624 P.2d 256*).

[*Optional*] **C. Waiver of Right to Seek Decertification.** A defendant who fails to contest plaintiff's motion for class certificationwhen it is filed and waits until after a determination on the merits before acting to challenge the class in effect waives any right to move for decertification (*Green v. Obledo (1981) 29 Cal. 3d 126, 148, 172 Cal. Rptr. 206, 624 P.2d 256*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion for an order decertifying a class action when the decertification motion has been filed after the court has determined the substantive merits or a substantive issue of an action. For example, this memorandum may be filed in opposition to a motion to decertify that is filed after the court has denied or granted a motion for summary adjudication of an issue.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Procedural Class Issues Resolved Before Merits

Green v. Obledo *(1981) 29 Cal. 3d 126, 172 Cal. Rptr. 206, 624 P.2d 256* , was an action by recipients of benefits under the program for aid to families with dependent children (AFDC), seeking to invalidate a state regulation because of conflict with federal and state law. On plaintiff's motions for class certification and summary judgment, the court ordered the class certified and declared the regulation invalid. On defendant's subsequent motion to decertify the class, the court altered its original certification order and limited the class to present and future AFDC recipients, thereby denying retroactive relief. Plaintiffs then filed an appeal.

The Supreme Court held that the trial court had erred in partially decertifying the class after the court had granted plaintiffs' motion for summary judgment (*29 Cal. 3d 126, 148-149)* . The Court noted that the California class action statute (*Code Civ. Proc. § 382*) is silent on the question of when a court may order a class to be certified or decertified. *Fed. R. Civ. P., Rule 23(c)(1)*, provides, however, that class issues shouldbe determined as soon as practicable after commencement of an action and, further, that a court's order determining the issues may be altered or amended before

the decision on the merits. Citing *Home Sav. & Loan Assn. v. Superior Court (1976) 54 Cal. App. 3d 208, 214, 126 Cal. Rptr. 511* and *Home Sav. & Loan Assn. v. Superior Court (1974) 42 Cal. App. 3d 1006, 1015, 117 Cal. Rptr. 485* (discussed in *§ 41.64[3][a]*), the Court stated that California courts have given effect to the phrase "before the decision on the merits" by holding that class action issues, including the composition of the class, must ordinarily be resolved before a decision on the merits is reached. The Court noted that although this rule had previously been applied only for the benefit of defendants, there appeared to be no reason prohibiting application at the request of plaintiffs (*29 Cal. 3d 126, 146)* .

[b] Defendant Must Show Changed Circumstances

The facts and procedural background of ***Green v. Obledo*** *(1981) 29 Cal. 3d 126, 172 Cal. Rptr. 206, 624 P.2d 256* , are discussed in *§ 41.33[3][a]*. In *Green*, the Supreme Court ruled that, based on the facts of the case, the defendants could not escape application of the general rule that decertification must occur, if at all, prior to a decision on the merits (*29 Cal. 3d 126, 148)* . The Court refused, however, to fashion an iron-clad standard removing all jurisdiction from a trial court to decertify a class or part thereof after a decision on the merits. Citing *Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 821, 94 Cal. Rptr. 796, 484 P.2d 964* , the Court in *Green* noted that trial courts should retain some measure of flexibility in handling a class action. Relying on federal court decisions, the Court concluded that after a decision on the merits, a class should be decertified only when it is clear that there are changed circumstances making continued class action treatment improper (*29 Cal. 3d 126, 148)* .

[c] Waiver of Right to Seek Decertification

The facts and procedural background of ***Green v. Obledo*** *(1981) 29 Cal. 3d 126, 172 Cal. Rptr. 206, 624 P.2d 256* , are discussed in *§ 41.33[3][a]*. In *Green*, the Supreme Court ruled that the trial court had erred in partially decertifying the class after it had granted plaintiffs' motion for summary judgment, a decision on the merits. The Court noted that by failing to contest plaintiffs' motion for class certification when it was filed and by waiting until after a determination on the merits before acting, the defendants had in effect waived any right to move for decertification. The court reasoned that defendants' arguments in support of their motion for decertification had not been based on changed circumstances. Furthermore, defendants had not produced new evidence that became available to them only after the merits had been decided (*29 Cal. 3d 126, 148)* .

[4] Additional Authorities

[a] Procedural Class Issues Resolved Before Merits

In *Danzig v. Jack Grynberg & Associates (1984) 161 Cal. App. 3d 1128, 208 Cal. Rptr. 336* , defendant made a public offering of limited partnership interests in a business in which he was the sole general partner. The purpose was to explore for oil and gas drilling prospects on oil and gas leases held either by defendant or his wife. After an active solicitation program, consisting of an often amended written prospectus, 55 persons became limited partner investors. Plaintiffs, limited partners, brought an action based on alleged violations of the partnership agreement. The action was certified as a class action. At the pretrial conference plaintiffs were permitted to amend their complaint to seek rescission and restitution on an alternative theory. Defendant's demurrer was overruled, and the trial was held on the issues as framed in the amended complaint. The trial court found that fraudulent misrepresentations and nondisclosures were intentionally and willfully made to induce plaintiff class to subscribe and contribute to partnership interests. The trial court judgment was for plaintiff class, and defendant appealed.

The court of appeal affirmed. Defendant argued that once the complaint was amended changing its focus from enforcement of the partnership agreement to avoidance based on allegation of fraud, the original class certification was vitiated and a class judgment was improper. The court disagreed and found that defendant's failure to move timely to decertify the class certification after the complaint had been amended constituted a waiver of any objections to that certification. The proper time to challenge the procedural propriety of a class action is before proceedings have been

undertaken on the merits; judicial review, if necessary, is available by extraordinary writ. The propriety of a class action must be decided at the earliest possible stages. Once the initial determination has been made, a motion to decertify the class action may be used whenever changed circumstances render class status no longer appropriate. As to the issue of waiver, the court stated that defendant neither registered a formal objection to the initial class certification nor moved to decertify the class after the amendment to the complaint. Defendant challenged the certification in his objections to the proposed findings of fact, claiming that it was timely since formal judgment had not been entered. The court disagreed, explaining that the purpose of pretrial determination of class issues is to avoid passive acquiescence to class certification awaiting results of the trial, and if unfavorable, then belatedly attacking the class certification order as improper. The failure to move timely to decertify or recertify the class effectively waived any objections to the class certification based on a claim of changed circumstances (*161 Cal. App. 3d 1128, 1136-1137)* .

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4-41 California Points & Authorities § 41.34

§ 41.34 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] on Ground of Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Insufficient Allegations of Fact to Establish Class Action [Code Civ. Proc. § 382]

[1] FORM Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] on Ground of Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Insufficient Allegations of Fact to Establish Class Action [Code Civ. Proc. § 382]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER TO COMPLAINT
vs.	)	
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THIS DEMURRER TO THE COMPLAINT SHOULD BE SUSTAINED BECAUSE PLAINTIFF HAS FAILED TO ALLEGE FACTS SUFFICIENT TO ESTABLISH A REASONABLE POSSIBILITY THAT CLASS ACTION TREATMENT IS APPROPRIATE.

A. Objection by Demurrer. The party against whom a complaint has been filed may object to it by demurrer on the ground that it fails to state facts sufficient to constitute a cause of action when the ground for objection appears on the

face of the complaint or from any matter of which the court must or may take judicial notice (*Code Civ. Proc. §§ 430.10(e), 430.30(a)*).

B. Challenging Class Action by Demurrer. The complaint must contain sufficient allegations of class interest before a hearing may be held to offer proof of the propriety of a class action. When sufficient allegations are absent, the pleading is vulnerable to a general demurrer (*Bartlett v. Hawaiian Village, Inc. (1978) 87 Cal. App. 3d 435, 437-438, 151 Cal. Rptr. 392*).

C. Insufficient Allegations of Class Interest. When the complaint on its face fails to contain sufficient allegations of fact toestablish a class interest, the class issue may be properly disposed of by demurrer (*Rose v. Medtronics, Inc. (1980) 107 Cal. App. 3d 150, 154, 166 Cal. Rptr. 16*).

D. Standard for Evaluating Class Action on Demurrer. When the class action complaint is tested on demurrer, the plaintiff must establish a reasonable possibility that class action treatment is appropriate (*Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 813, 94 Cal. Rptr. 796, 484 P.2d 964* ; *Newell v. State Farm Gen. Inc. Co. (2004) 118 Cal. App. 4th 1094, 1101-1106, 13 Cal. Rptr. 3d 343* ; *Hamwi v. Citinational-Buckeye Inv. Co. (1977) 72 Cal. App. 3d 462, 471, 140 Cal. Rptr. 215*).

[*When appropriate, add points and authorities opposing existence of requisites for maintaining a proper class action (see §§ 41.53 -41.59).*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be used in support of a defendant's demurrer on the ground that no cause of action is stated because plaintiff's allegations are insufficient to establish the requisites for a class action. The form is a general one that sets out the authority supporting the use of a demurrer to challenge the propriety of a purported class action. Counsel should attach additional points and authorities opposing the existence of the requisites for maintaining a proper class action [*see §§ 41.53 -41.59*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms of general demurrers, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender).

[c] Opposing Points and Authorities

The points and authorities *set out in § 41.35* may be used in an appropriate case to oppose a demurrer supported by this memorandum.

[3] Discussion of Authorities

[a] Challenging Class Action by Demurrer

Bartlett v. Hawaiian Village, Inc. *(1978) 87 Cal. App. 3d 435, 151 Cal. Rptr. 392* , was an action for damages and injunctive relief by a group of homosexual men on behalf of themselves and all others similarly situated for unlawful exclusion from public baths in violation of the Unruh Civil Rights Act (*Civ. Code §§ 51-52*). The trial court sustained a general demurrer without further leave to amend for failure to sufficiently plead an ascertainable class or community of interest and entered a judgment of dismissal as to the class allegations. Plaintiffs then filed their appeal.

The court of appeal affirmed the judgment of dismissal and dismissed the appeal. The court ruled that the complaint must contain sufficient allegations of class interest before a hearing may be held to offer proof of the propriety of a class action. When the sufficient allegations are absent, the pleading is vulnerable to a general demurrer (*87 Cal. App. 3d 435, 437-438)* . The court rejected the plaintiffs' contention that it was error to determine the propriety of the class action during the pleading stage, thus denying them the chance to develop facts at a later evidentiary hearing (*87 Cal. App. 3d 435, 437)* .

[b] Insufficient Allegations of Class Interest

Rose v. Medtronics, Inc. *(1980) 107 Cal. App. 3d 150, 166 Cal. Rptr. 16* , was a class action for damages from personal injuries allegedly caused by the defective manufacture of a cardiac pacemaker. The trial court sustained a demurrer to the amended complaint without leave to amend, concluding that individual issues would predominate over the common issues. Plaintiff then filed his appeal, contending that the trial court erred procedurally in making its determination at the pleading stage, thereby denying an opportunity to establish the propriety of the class action at an evidentiary hearing.

The court of appeal affirmed the trial court's dismissal of the class action, holding that the factual questions and legal issues were preponderantly diverse rather than common (*107 Cal. App. 3d 150, 157)* . The court noted that when there is a reasonable possibility that the plaintiff can establish a community of interest among potential claimants, the preferred procedural course is to defer decision on the propriety of the class action until an evidentiary hearing has been held on the appropriateness of class litigation. Citing *Bartlett v. Hawaiian Village, Inc. (1978) 87 Cal. App. 3d 435, 437-438, 151 Cal. Rptr. 392* (discussed in *§ 41.34[3][a]*), the court stated, however, that when the complaint on its face fails to contain sufficient allegations of fact to establish a class interest, the class issue may be properly disposed of by demurrer (*107 Cal. App. 3d 150, 154)* .

[c] Standard for Evaluating Class Action on Demurrer

Vasquez v. Superior Court *(1971) 4 Cal. 3d 800, 94 Cal. Rptr. 796, 484 P.2d 964* , was an action by a group of consumers who had purchased frozen food and freezers under installment contracts. The consumers sought rescission of the contracts, for fraudulent misrepresentation on behalf of themselves and others similarly situated, against both the seller and the finance company to which the installment contracts had been assigned. Defendants demurred to the complaint on the ground that it did not state a cause of action, and the demurrers were sustained without leave to amend insofar as the complaint alleged a class action for fraud. Plaintiffs then sought a writ of mandate to compel the trial court to vacate its order sustaining the demurrers and to allow plaintiffs to try the cause of action for fraud as a class action. In granting the writ, the Supreme Court noted that under *Daar v. Yellow Cab Co. (1967) 67 Cal. 2d 695, 63 Cal. Rptr. 724, 433 P.2d 732* (discussed in *§ 41.36[3][a]*), plaintiff must establish an ascertainable class and a well-defined community of interest in the questions of law and fact in order to sustain a class action. The Court ruled that for purposes of determining whether demurrers should be overruled, it is sufficient that there is a reasonable

possibility that plaintiffs can establish a prima facie community of interest among the class members (*4 Cal. 3d 800, 813)* .

The plaintiffs in ***Newell v. State Farm Gen. Inc. Co.*** *(2004) 118 Cal. App. 4th 1094, 13 Cal. Rptr. 3d 343* , were homeowners who were insured by the defendant insurance companies at the time of an earthquake. The complaint alleged that the named plaintiffs and members of the class they proposed to represent were wrongfully denied policy benefits for damage caused to their homes by the earthquake. Asserting causes of action for declaratory relief, breach of contract, breach of the implied covenant of good faith and fair dealing, and unfair competition, the plaintiffs sought compensatory and punitive damages, injunctive relief, attorney's fees, and prejudgment interest and costs. The defendants filed a demurrer to the class-action allegations, and the trial court sustained the demurrer without leave to amend.

The court of appeal affirmed, finding that the plaintiffs could not possibly satisfy the commonality or superiority requirements for class certification, because the ability of each member of the putative class to recover clearly depended on separate set of unique facts (*118 Cal. App. 4th 1094, 1102-1106)* . Moreover, the trial court had not abused its discretion in denying leave to amend, because the plaintiffs had suggested no additional facts they could allege to satisfy the commonality and superiority requirements for class certification (*118 Cal. App. 4th 1094, 1106)* .

In affirming the trial court's decision, the court of appeal noted that class-certification issues properly and routinely are decided on demurrer.The court explained that if class certification is challenged by demurrer, the trial court must determine whether there is a reasonable possibility that the plaintiffs can plead a prima facie community of interest among class members. The ultimate question is whether, given an ascertainable class, the issues that may be jointly tried, compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants. If the ability of each member of the class to recover clearly depends on individualized proof, then all of the policy considerations that justify class actions equally compel the dismissal of such an inappropriate action at the pleading stage (*118 Cal. App. 4th 1094, 1101, 1106)* .

The facts and procedural background of ***Hamwi v. Citinational-Buckeye Inv. Co.*** *(1977) 72 Cal. App. 3d 462, 140 Cal. Rptr. 215* , are discussed in *§ 41.31[3][b]*. The court stated that when a class action complaint is tested on demurrer, plaintiff must establish only a reasonable possibility that class action treatment is appropriate. When the court determines the issue of class propriety at a hearing on an appropriate motion at which evidence is presented, however, the issue of community of interest is determined on the merits, and the plaintiff must establish the community as a matter of fact (*72 Cal. App. 3d 462, 471-472)* .

[4] Additional Authorities

[a] Insufficient Allegations of Class Interest

In *Brown v. Regents of University of California (1984) 151 Cal. App. 3d 982, 198 Cal. Rptr. 916* , an order sustaining a demurrer to class-action allegations in a complaint for negligent and intentional factual concealment and misrepresentation, and for failure to provide adequate coronary care, was upheld by the court of appeal. Beyond the questions common to all the allegations, the court found that there were many difficult factual questions which could only be resolved by individual proof. Problems in common proof of reliance, complexity of damages, and the differing extent of duty owed to each individual all combined to indicate that individual issues would substantially predominate over common questions. The court found that it was not reasonably possible that plaintiffs would be able to establish a sufficient community of interest to warrant a class action (*151 Cal. App. 3d 982, 989-991)* .

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4-41 California Points & Authorities § 41.34A

§ 41.34A Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] on Ground of Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Class Action Is Barred by Prior Judgment Denying Class Certification

[1] FORM Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] on Ground of Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Class Action Is Barred by Prior Judgment Denying Class Certification

[*The following may be combined with a general form of memorandum supporting defendant's demurrer on the ground that class action treatment is not appropriate (see § 41.34). It may also be submitted in opposition to a motion to certify a, action for class treatment or in support of a motion for an order declaring the action inappropriate for class treatment (see § 41.31)*].

THIS ACTION MAY NOT PROCEED AS A CLASS ACTION BECAUSE THE PLAINTIFFS ARE BOUND BY A PREVIOUS JUDGMENT DENYING CLASS CERTIFICATION.

Judgment Denying Class Certification May Have Issue-Preclusive Effect on Subsequent Putative Class Action. A judgment denying class certification in one action will preclude relitigation of the class-certification issue in a subsequent action brought by a different plaintiff, if (1) the issue is identical to the one decided in the earlier case, (2) the issue was actually litigated in the earlier case, (3) the issue was necessarily decided in the earlier case, (4) the earlier decision is final and was rendered on the merits, and (5) the plaintiff in the current was in privity with or virtually represented by the plaintiff in the earlier case (*Alvarez v. May Dept. Stores Co. (2006) 143 Cal. App. 4th 1223, 1233-1239, 49 Cal. Rptr. 3d 892*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a contention that class certification should be denied because the question of class certification was already decided in another case and that relitigation of that question is barred by issue preclusion (also known as collateral estoppel).

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law

stated. Counsel should, for example, identify the previous case so that the present court can take judicial notice of the earlier decision [*see Evid. Code § 451(a)*], and should show how the circumstances of the previous case establish that the present plaintiff is in privity with, or was virtually represented by, a party in the previous case concerning the class-certification issue [*see Alvarez v. May Dept. Stores Co. (2006) 143 Cal. App. 4th 1223, 1237-1238, 49 Cal. Rptr. 3d 892]* .

[3] Discussion of Authorities

[a] Judgment Denying Class Certification May Have Issue-Preclusive Effect on Subsequent Putative Class Action

Alvarez v. May Dept. Stores Co. *(2006) 143 Cal. App. 4th 1223, 49 Cal. Rptr. 3d 892* , was a putative class action filed by 56 current and former "Area Sales Managers" employed by the defendant. The plaintiffs alleged individual and class claims for failure to pay overtime compensation (*see Lab. Code §§ 1194, 1198*),conversion, violation of the unfair practices law (Bus. § Prof. Code § 17200 et seq.), and violation of the Labor Code Private Attorneys General Act of 2004 (*Lab. Code § 2698 et seq.*). Based on the doctrine of issue preclusion (also called collateral estoppel), the trial court sustained, without leave to amend, the defendant's demurrer to the complaint's class action allegations. Specifically, the trial court held that because class certification had been denied for the same class on the same claims in a prior case, the plaintiffs in the present case were precluded from relitigating the question of class certification, even though the prior case had been brought by different named plaintiffs.

The plaintiffs appealed (an order that has the effect of denying class certification is appealable; *see Morrissey v. City and County of San Francisco (1977) 75 Cal. App. 3d 903, 907, 142 Cal. Rptr. 527*). The plaintiffs contended on appeal that, because class certification had been denied in the prior case, the denial of certification in that case was not binding on putative class members who were not named parties to the prior case.

The court of appeal affirmed the trial court's application of issue preclusion. The court of appeal first noted that the trial court had appropriately resolved the class-certification question on demurrer. It is generally proper at the pleading stage to strike class allegations if the face of the complaint and other matters subject to judicial notice (such as a prior judgment supporting the application of issue preclusion) reveal the invalidity of the class allegations (*143 Cal. App. 4th 1223, 1231)* .

The appellate court next observed that the definitions of the putative class in the prior case and of the putative class in the present case were substantially identical, as were the class claims in the two cases (*143 Cal. App. 4th 1223, 1232)* . The court then reviewed the elements of issue preclusion, the doctrine that prevents relitigation of issues previously argued and resolved in a prior proceeding. In order to apply the doctrine, (1) the issue must be identical to that decided in the prior proceeding; (2) the issue must have been actually litigated in the prior proceeding; (3) the issue must have been necessarily decided in the prior proceeding; (4) the decision must have been final and on the merits; and (5) preclusion must be sought against a person who was a party or in privity with a party to the prior proceeding (*143 Cal. App. 4th 1223, 1233)* .

The court pointed to a Seventh Circuit decision that had applied issue preclusion to bar absent class members from seeking certification of a national class in successive state-court actions, after the certification question had been fully litigated and resolved in federal court. In that case, the Seventh Circuit explained that the earlier federal suit was commenced as a class action, and one vital issue was litigated and resolved on a class-wide basis: whether a national class was tenable. Absent class members were therefore bound by the federal court's decision on that issue, provided that the named representatives and their lawyers furnished adequate representation, which they did in that case (*Bridgestone/Firestone, Inc. v. Tires Prods. (7th Cir. 2003) 333 F.3d 763, 769)* .

The court of appeal in the present case found the Seventh Circuit's reasoning persuasive. When a prevailing party seeks

to enforce a ruling denying class certification against an absent putative class member, the general principles of issue preclusion apply. Those principles ensure that the absent party's interest was adequately represented in the prior proceeding. In other words, if the elements of issue preclusion are satisfied, the fact that the prior judgment did not result in certification of a class does not prevent the judgment from binding absent class members on the issue actually litigated and decided in that prior action (*143 Cal. App. 4th 1223, 1236)* .

Turning to the specifics of the present case, the court of appeal found that the elements of issue preclusion were satisfied. The court emphasized that the plaintiffs in the prior action were the "virtual representatives" of the plaintiffs in the present case. The interested parties, their claims, and their counsel were the same in both cases. Also, the plaintiffs in the prior action had the same interest as the plaintiffs in the present case and the motive to present the same claim. The plaintiffs in the prior case had a full opportunity to present their case for class certification. Under the circumstances, the present plaintiffs should reasonably have expected to be bound by the prior decision (*143 Cal. App. 4th 1223, 1236-1238)* .

The court of appeal noted that the application of issue preclusion in this case would not eliminate the plaintiffs' substantive right to pursue their lawsuit; it would only deny them the ability to serve as representatives of other potential claimants (*143 Cal. App. 4th 1223, 1233, 1238)* .

The court of appeals specifically rejected the plaintiffs' claim that they could not be bound by the prior judgment because a class has not yet been certified, or that notice to potential class members of the prior litigation was necessary before any absent potential class member could be bound by the prior judgment. The court pointed out that there is no statutory mandate or equitable principle that demands that notice of an unsuccessful attempt to certify a class be sent to all putative class members prior to binding a litigant who seeks to certify the same class. Rather, the court concluded that due process is satisfied when an absent class member's interest is adequately represented (*143 Cal. App. 4th 1223, 1238-1239)* .

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4-41 California Points & Authorities § 41.35

§ 41.35 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] on Ground of Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Allegations Sufficient to Establish Reasonable Possibility That Class Action Treatment Appropriate [Code Civ. Proc. § 382]

[1] FORM Opposing Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] on Ground of Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Allegations Sufficient to Establish Reasonable Possibility That Class Action Treatment Appropriate [Code Civ. Proc. § 382]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN OPPOSITION TO DEMUR-
Plaintiff,	)	RER TO COMPLAINT
vs.	)	[*Code Civ. Proc. §§ 382, 430.10(e), 430.30(a)*]
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

A GENERAL DEMURRER TO THIS COMPLAINT ON THE GROUND THAT IT CONTAINS INSUFFICIENT ALLEGATIONS TO ESTABLISH THE REQUISITES OF A CLASS ACTION SHOULD BE OVERRULED BECAUSE THE ALLEGATIONS SHOW A REASONABLE POSSIBILITY THAT CLASS ACTION TREATMENT IS APPROPRIATE.

A. Class Action Should Survive Pleading Stages If Possible. California's judicial policy favors allowing potential class action plaintiffs to have their action measured on its merits. In order to effect this policy, the California Supreme Court has mandated that a class action complaint be allowed to survive the pleading stages of litigation if at all possible (*Prince v. CLS Transp., Inc. (2004) 118 Cal. App. 4th 1320, 1325-1326, 13 Cal. Rptr. 3d 725* ; *Becksteadv. Superior Court (1971) 21 Cal. App. 3d 780, 783, 98 Cal. Rptr. 779*).

B. Decision on Propriety Deferred Until Evidentiary Hearing. When there is a reasonable possibility that the plaintiff can establish a community of interest among potential claimants, the preferred course is to defer decision on the propriety of the class action until an evidentiary hearing has been held on the appropriateness of class litigation (*Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 813, 94 Cal. Rptr. 796, 484 P.2d 964* ; *Rose v. Medtronics, Inc. (1980) 107 Cal. App. 3d 150, 154, 166 Cal. Rptr. 16*

[*Where appropriate, add points and authorities supporting existence of requisites for maintaining a proper class action (see §§ 41.36 -41.51).*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be used in opposition to a defendant's demurrer for failure to state a cause of action. The ground of opposition presented is that plaintiff's allegations show a reasonable possibility of establishing the requisites for a class action. The form is a general one that sets out the authority favoring the survival of class action allegations beyond the pleading stage until a hearing on the merits. Counsel should attach additional points and authorities supporting the existence of the requisites for maintaining a proper class action (*see §§ 41.36 -41.51*). Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, this memorandum may be submitted in opposition to a demurrer supported by the points and authorities *set out in § 41.34*.

[3] Discussion of Authorities

[a] Class Action Should Survive Pleading Stages If Possible

Prince v. CLS Transp., Inc. *(2004) 118 Cal. App. 4th 1320, 13 Cal. Rptr. 3d 725* , was a wage-and-hour class action brought by a truck driver on behalf of himself and more than 500 drivers employed by the defendant. The complaint alleged a variety of wage law violations, including the defendant's alleged failure to pay overtime compensation, to pay compensation for all hours worked, to reimburse the drivers for certain expenses, to provide required meal and rest periods, to provide itemized wage statements, and to pay its former employees all wages due at the time of discharge. The defendant demurred, contending that the plaintiff could not establish a well-defined community of interest among

the potential class members. It also claimed that class treatment was not a superior method of adjudicating the case because each class member's recovery would depend on highly individualized determinations of actual work performed, waiting time, standby time, overtime compensation, meal and rest periods, gratuities, and expenses incurred in the course and scope of employment. The trial court sustained the defendant's demurrer without leave to amend the class allegations.

The court of appeal reversed, holding that class suitability in this case should not have been determined by demurrer. Citing *Beckstead v. Superior Court (1971), 21 Cal. App. 3d 780, 98 Cal. Rptr. 779* (discussed *below*), the court explained that because the sustaining of a demurrer without leave to amend represents the earliest possible determination of the propriety of class action litigation, it should be looked upon with disfavor. Absent a strong factual showing that negates the possibility of satisfying the requirements for class treatment, all that is normally required for a complaint to survive a demurrer to the propriety of class litigation is that the complaint allege facts that tend to show (1) an ascertainable class of plaintiffs, and (2) questions of law and fact that are common to the class. If the complaint is allowed to survive the demurrer, then the judge may proceed with the suit, deferring the determination of the propriety of class action until a time more appropriate to making the decision. Ordinarily, therefore, only in mass tort actions, or other actions that are equally unsuited to class treatment, should class suitability be determined at the pleading stage. In other cases, including wage-and-hour claims, class suitability should be determined at a later stage (*118 Cal. App. 4th 1320, 1325-1326)* . Finally, the court of appeal noted that in this case, the plaintiff alleged institutional practices by the defendant that affected all class members in the same manner, so that it appeared that all liability issues could be determined on a class-wide basis. At the pleading stage, no more is required (*118 Cal. App. 4th 1320, 1329)* .

Beckstead v. Superior Court *(1971) 21 Cal. App. 3d 780, 98 Cal. Rptr. 779* , involved a class action seeking declaratory relief and enforcement of contracts. The trial court sustained demurrers to the original complaint without leave to amend and entered a judgment dismissing the class action. Plaintiffs then filed for a writ of mandate in the court of appeal.

The court of appeal granted the writ, holding that plaintiffs had pleaded facts which tend to show both an ascertainable class and questions of law and fact common to the class (*21 Cal. App. 3d 780, 784)* . Relying on prior appellate court decisions, the court stated that California's judicial policy favors allowing potential class action plaintiffs to have their action measured on its merits. The court noted that in order to effect this policy, the California Supreme Court has mandated that a class action complaint be allowed to survive the pleading stages of litigation if at all possible (*21 Cal. App. 3d 780, 783)* .

[b] Decision on Propriety Deferred Until Evidentiary Hearing

The facts and procedural background of ***Vasquez v. Superior Court*** *(1971) 4 Cal. 3d 800, 94 Cal. Rptr. 796, 484 P.2d 964* , are discussed in *§ 41.34[3][c]*. The Supreme Court ruled that for purposes of determining whether or not demurrers should be overruled, it is sufficient that there is a reasonable possibility that plaintiffs can establish a prima facie community of interest among the class members (*4 Cal. 3d 800, 813)* .

The facts and procedural background of ***Rose v. Medtronics, Inc.*** *(1980) 107 Cal. App. 3d 150, 166 Cal. Rptr. 16* , are discussed in *§ 41.34[3][b]*. Although the court of appeal held on the facts in *Rose* that the demurrers had been properly sustained, it noted that when there is a reasonable possibility that the plaintiff in a class action can establish a community of interest among potential claimants, the preferred procedural course is to defer decision on the propriety of the class action until an evidentiary hearing has been held on the appropriateness of class litigation (*107 Cal. App. 3d 150, 154)* .

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§ 41.35A Opposing Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] on Ground of Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Class Action Is Not Barred by Prior Judgment Denying Class Certification

[1] FORM Opposing Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] on Ground of Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Class Action Is Not Barred by Prior Judgment Denying Class Certification

[*The following may be combined with a general form of memorandum opposing defendant's demurrer on the ground that class action treatment is not appropriate (see § 41.35). It may also be submitted in support of a motion to certify an action for class treatment (see § 41.30).*]

THIS ACTION MAY PROCEED AS A CLASS ACTION BECAUSE THE PLAINTIFFS ARE NOT BOUND BY ANY PREVIOUS JUDGMENT DENYING CLASS CERTIFICATION.

Judgment or Order Denying Class Certification Does Not Have Issue-Preclusive Effect in Subsequent Action That Does Not Present Identical Class-Certification Issues. A judgment denying class certification in one action will not preclude litigation of the class-certification issue in a subsequent action in which the class-certification issues are not identical to those presented in the earlier action (*Johnson v. GlaxoSmithKline, Inc. (2008) 166 Cal. App. 4th 1497, 1512-1517, 83 Cal. Rptr. 3d 607*). For example, a denial of class certification will not preclude certification in a later action that involves a narrower class, if the narrowed class definition attempts to correct flaws identified in the earlier action, with the result that the issues presented on class certification are different (*Bufil v. Dollar Fin. Group, Inc. (2008) 162 Cal. App. 4th 1193, 1202-1204, 76 Cal. Rptr. 3d 804*).

[2] Comments

[a] Use of Form

This form may be used in a memorandum opposing a contention that the question of class certification was already decided in another case and that relitigation of that question is barred by issue preclusion (also known as collateral estoppel).

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law

stated. Counsel should, for example, explain how the class definition in the present case is narrower than that of the class for which certification was sought in the previous case.

In an appropriate case, this form may be used to oppose the contention made in the form *set out in § 41.34A*.

[3] Discussion of Authorities

[a] Judgment or Order Denying Certification of Class Does Not Have Issue-Preclusive Effect in Subsequent Action Involving Narrower Class

Johnson v. GlaxoSmithKline, Inc. *(2008) 166 Cal. App. 4th 1497, 83 Cal. Rptr. 3d 607* , was a putative class action brought against a drug manufacturer, alleging that the defendant had violated California's Unfair Competition Law (UCL) (*Bus. & Prof. Code § 17200 et seq.*). The defendant moved to preclude class certification, claiming that certification was collaterally estopped because a federal district court had twice denied class certification in a separate action raising similar UCL claims (*see In re Paxil Litig. (C.D. Cal. 2003) 218 F.R.D. 242* ; *In re Paxil Litig. (C.D. Cal. 2003) 212 F.R.D. 539*). The trial court granted the defendant's motion.

The court of appeal reversed, finding that not all the elements of issue preclusion (collateral estoppel) were met. Those elements are as follows: (1) the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding; (2) the issue must have been actually litigated in the former proceeding; (3) the issue must have been necessarily decided in the former proceeding; (4) the decision in the former proceeding must be final and on the merits; and (5) the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding (*166 Cal. App. 4th 1497, 1508)* . In this case, the court of appeal found that although the last four elements might have been met, the first element had not been met: the issue decided by the federal court in denying class certification had not been identical to the class-certification issue presented in this case (*166 Cal. App. 4th 1497, 1512-1513)* .

The court of appeal explained that the federal court's denials of class certification occurred before the voters approved Proposition 64, which significantly restricted the previously broad standing requirements for pursuing a private cause of action under the UCL. Before the amendment by Proposition 64, the UCL permitted any person acting for the general public to sue for relief from unfair competition and did not predicate standing on a showing of injury or damage. As amended by Proposition 64, *Bus. & Prof. Code § 17204* limits standing in a UCL action to certain specified public officials and to "any person who has suffered injury in fact and has lost money or property as a result of ... unfair competition." In the federal litigation, the district court had denied class certification, finding that persons who had never seen or heard the defendant's allegedly deceptive advertisements would not be adequate representatives of the putative class (even though the pre-Proposition 64 version of the UCL apparently allowed such persons to sue) (*166 Cal. App. 4th 1497, 1513-1514)* .

Unlike the named plaintiffs in the federal litigation, the plaintiff in the present case asserted a post-Proposition 64 UCL claim, based on his own injury and loss of money or property as a result of the defendant's allegedly deceptive advertising. In contrast to the federal plaintiffs, the plaintiff in the present case alleged that he had seen and heard the defendant's advertisements. Thus, because of the significant change in the legal landscape in which UCL claims may be asserted as a result of Proposition 64, the single issue on which the district court denied class certification was materially different from the issue of adequacy of representation in the present case. Therefore, the court of appeal concluded that the federal court's denial of class certification did not have issue-preclusive effect in the present case (*166 Cal. App. 4th 1497, 1514-1515)* .

Bufil v. Dollar Fin. Group, Inc. *(2008) 162 Cal. App. 4th 1193, 76 Cal. Rptr. 3d 804* , was an action against an employer, alleging that the defendant had denied its employees meal periods and rest breaks required by California law. In an earlier action, one employee had sought to represent a class comprising all hourly employees employed by the

defendant in California during a specified period "who were denied meal periods and rest breaks in compliance with California law." The trial court denied class certification, and the court of appeal affirmed, on the ground that common questions of fact and law did not predominate over individualized issues, since there was no evidence that the defendant had a uniform policy regarding meals and breaks, and each employee would have had to testify regarding the circumstances in which he or she had been denied the meal periods and rest breaks (*162 Cal. App. 4th 1193, 1199-1201)* .

Less than four months later, a different employee brought the present action, seeking to represent two subclasses of employees for whom the defendant's records depicted a meal period or rest break not taken because the class member either (1) was the sole employee on a work shift, or (2) was giving in-store training to other employees. The defendant contended that the judgment in the earlier case barred class certification in the present case, under the doctrine of collateral estoppel. The trial court agreed and dismissed the plaintiff's class allegations (*162 Cal. App. 4th 1193, 1201)* .

The court of appeal reversed, finding collateral estoppel inapplicable because the classes in the two cases were different and thus the issues were different (unlike the situation presented in *Alvarez v. May Dept. Stores Co. (2006) 143 Cal. App. 4th 1223, 49 Cal. Rptr. 3d 892* , which is discussed in *§ 41.34A[3][a]*). For example, in the earlier action it was significant that each class member would have had to testify as to his or her understanding of the meal-period waiver. But that was not an issue in the present case, which proceeded on the theory that the two circumstances--single employee on duty or providing training--did not come within the "nature of the work" exception to the meal-period and rest-break requirements under the relevant Industrial Wage Order. The court of appeal explained that this was a legal question concerning the liability of the defendant to each putative class member; the plaintiff did not contend that any class member had signed a meal-period waiver, and was not litigating the intent and understanding of the parties regarding any waiver or agreement regarding meal periods and rest breaks. Thus, in the present case the court could identify the class from the defendant's records and determine liability as a matter of law. In essence, the plaintiff was defining the class more narrowly, in a way that corrected the flaws that resulted in the denial of class certification in the earlier action. Accordingly, because the present case did not implicate any of the problems involving liability that resulted in the denial of class certification in the earlier action, the trial court erred in concluding that issue preclusion (collateral estoppel) should bar class certification in this case (*162 Cal. App. 4th 1193, 1202-1204)* .

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4-41 California Points & Authorities § 41.36

§ 41.36 Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Class Is Ascertainable

[1] FORM Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Class Is Ascertainable

[*The following may be combined with a general form of memorandum in support of a motion to certify an action as a class action (see, e.g., § 41.30). The following may also be combined with a general form of memorandumopposing a demurrer to a complaint on the ground that class action treatment is not appropriate (see, e.g., § 41.35).*]

THE CLASS IN THIS ACTION IS ASCERTAINABLE BECAUSE POTENTIAL CLASS MEMBERS MAY BE EASILY LOCATED AND IDENTIFIED AND BECAUSE JOINDER WOULD NOT BE PRACTICABLE DUE TO THE SIZE OF THE CLASS.

A. Class-Action Requirements. Although *Section 382 of the Code of Civil Procedure* appears to speak in the alternative, it has uniformly been held that two requirements must be met in order to sustain a class action. There must be both an ascertainable class and a well-defined community of interest in the questions of law and fact involved affecting the parties to be represented (*Daar v. Yellow Cab Co. (1967) 67 Cal. 2d 695, 704, 63 Cal. Rptr. 724, 433 P.2d 732*).

B. Determination of Ascertainability. The class is readily ascertainable when potential class members are easily located and identified and the size of the class makes joinder impracticable (*see* *Richmond v. Dart Industries, Inc. (1981) 29 Cal. 3d 462, 478, 174 Cal. Rptr. 515, 629 P.2d 23*). The need for individualized analysis to ascertain each class member's damages does not mean that the class is not ascertainable, so long as the class can be defined in terms of objective characteristics and common transactional facts (*Hicks v. Kaufman & Broad Home Corp. (2001) 89 Cal. App. 4th 908, 913-916, 107 Cal. Rptr. 2d 761* ; *see* *Lee v. Dynamex, Inc. (2008) 166 Cal. App. 4th 1325, 1334-1336, 83 Cal. Rptr. 3d 241*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a plaintiff's contention that the potential class is ascertainable because

potential members may be easily located and identified and because joinder would not be practicable due to the size of the class. The plaintiff must prove both an ascertainable class and a well-defined community of interest in questions of law and fact in order to establish a proper class action.

This memorandum may be combined, where appropriate, with points and authorities relating to specific procedural context in which counsel wishes to invoke the contention. A plaintiff might make an argument supported by this memorandum under the following circumstances: (1) when supporting a motion to certify an action as a proper class action (*see, e.g., § 41.30*); (2) when opposing a motion by the defendant to declare an action inappropriate as a class action; (3) when opposinga motion by the defendant to decertify the class (*see, e.g., § 41.33*); and (4) when opposing a demurrer to the complaint made on the ground that class action treatment is not appropriate (*see, e.g., § 41.35*). This form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel should refer to facts showing that persons falling within the definition of the class can easily be located and identified. Counsel should also note that joinder would not be practicable because the potential class is too large.

[3] Discussion of Authorities

[a] Class Action Requirements

Daar v. Yellow Cab Co. *(1967) 67 Cal. 2d 695, 63 Cal. Rptr. 724, 433 P.2d 732* , was a class action for damages due to excessive charges for defendant's taxicab services during the four years preceding commencement of the action. Defendant demurred, contending in part that the complaint did not contain the elements of a proper class action and thus failed to state a cause of action. The superior court sustained the demurrer without leave to amend on the basis of lack of jurisdiction, but gave no reason for its action. The court ordered the case transferred to municipal court because plaintiff's individual action did not state a cause of action for damages in excess of the jurisdictional amount for superior courts under former Code Civ. Proc. § 89. Plaintiff then filed an appeal.

In reversing, the Supreme Court held that the complaint set forth sufficient facts to establish a proper class action (*67 Cal. 2d 695, 717)* . The Court stated the general rule that although *Code Civ. Proc. § 382* appears to speak in the alternative, courts have uniformly held that two requirements must be met to sustain any class action. There must be both an ascertainable class and a well-defined community of interest in the questions of law and fact affecting the parties to be represented (*67 Cal. 2d 695, 704)* .

[b] Determination of Ascertainability

Richmond v. Dart Industries, Inc. *(1981) 29 Cal. 3d 462, 174 Cal. Rptr. 515, 629 P.2d 23* , was an action on behalf of all past and present lot owners in a subdivision for compensatory and punitive damages, rescission, declaratory relief, and creation of a constructive trust to ensure that sufficient funds would be available to provide adequate water and sewage facilities. Plaintiffs filed a motion for class certification, claiming that theclass action was proper because they had established an ascertainable class and a well-defined community of interest among the class members. The trial court denied certification, stating that plaintiffs had not carried the burden of proving that the representative party had interests which were compatible with, and not antagonistic to, the interests of the class members to be represented. Plaintiffs then filed an appeal.

The Supreme Court reversed the order denying certification, holding that plaintiffs had met the legal tests for class certification (*29 Cal. 3d 462, 479)* . The Court noted that the issue of ascertainability of the class was a relatively simple matter because the record owners of the subdivision lots could easily be identified and located. Furthermore, joinder of all the potential plaintiffs would not be practicable in a case involving over 2,600 sales of lots (*29 Cal. 3d*

462, 478) .

In ***Hicks v. Kaufman & Broad Home Corp.*** *(2001) 89 Cal. App. 4th 908, 107 Cal. Rptr. 2d 761* , the plaintiffs were homeowners who alleged that the defendant developers had used inferior materials in constructing the concrete-slab foundations under the plaintiffs' homes. On behalf of themselves and all other similarly situated homeowners, the plaintiffs alleged causes of action for strict liability, negligence, and breach of express and implied warranties. The complaint sought damages for the repair or replacement of the foundations. After the defendants filed an answer, the plaintiffs moved for certification of a class identified as the owners of homes in specified developments that had been constructed by the defendants using the specified defective product. The trial court denied certification and dismissed the class allegations of the complaint, holding that the members of the class were not reasonably ascertainable and that the causes of action lacked common issues of fact. The court of appeal reversed in part, holding that the class was indeed ascertainable and that, on the breach-of-warranty causes of action, common questions of law and fact predominated over individual questions, justifying class treatment of those causes of action (*89 Cal. App. 4th 908, 911-913)* .

On the question of ascertainability of the class, the court of appeal held that the trial court had applied an improper criterion in determining ascertainability of the class. The trial court had concluded that the class was not reasonably ascertainable because class membership depended on the existence of foundation damage to each putative class member's home, which would require individualized analysis. The court of appeal pointed out that, by linking class membership to the extent of damage, the trial court's analysis improperly made class membership dependent on a determination of the merits of the case. The court of appeal explained that the existence of damage to a foundation was not a precondition to classmembership. Rather, if anything, it was an element in the proof of the defendants' liability and related to the existence of common questions of law and fact, not ascertainability of the class (*89 Cal. App. 4th 908, 913-915)* .

The court of appeal noted that ascertainability of the class and identification of its members can be better achieved by defining the class in terms of objective characteristics and common transactional facts. The class certification order and notice to class members are the proper places to explain the relationship between the defined class and the legal claims made in the case. Accordingly, the court of appeal found that homeowners in the specified developments constructed and marketed by the defendants and in whose homes the specified defective product was used constituted an ascertainable class. This class was precise and objective, and it could be determined from public records and the defendants' own records (*89 Cal. App. 4th 908, 915-916)* .

Lee v. Dynamex, Inc. *(2008) 166 Cal. App. 4th 1325, 83 Cal. Rptr. 3d 241* , was a putative class action alleging that the defendant, a parcel-delivery company, had improperly reclassified its drivers from employees to independent contractors. The plaintiff sought to certify a class consisting of all persons classified as independent contractors who, during a specified time span, personally picked up and delivered parcels and other items for the defendant using their personal vehicles. In response to the defendant's objection, the plaintiff refined the class definition to exclude individuals who (1) were not affiliated with a third-party administrator for the purpose of providing services to the defendant, (2) provided services to the defendant through their own employees or subcontractors more than half the time, (3) concurrently picked up or delivered shipments for the defendant and another package delivery service that did not have a business relationship with the defendant, or (4) concurrently picked up or delivered shipments for the defendant and their own customers. The trial court denied the motion for class certification, determining that the putative class was not sufficiently ascertainable. In making this finding, the court focused on the four exclusions offered by the plaintiff as a means of refining the categories of drivers to be included. Stating "it is unclear how to deal with hybrid drivers [those who perform services for their own customers or an independent package delivery service] or how to determine whether ... someone is excluded altogether ... by the language of the exclusions," the court concluded the plaintiff had failed to define the class in terms of "objective characteristics and common transactional facts" (*166 Cal. App. 4th 1325, 1334)* .

The court of appeal reversed, holding that because the basic parameters of the class proposed by the plaintiff could be readily ascertained through the defendant's records, the trial court's rejection of the proposed class on this ground was unjustified. The appellate court explained that a class is not inappropriate merely because each member at some point may be required to make an individual showing as to eligibility for recovery. Quoting Hicks v. Kaufman & Broad Home Corp. (*discussed immediately above*), the court observed that rather than focusing the ascertainability question on the ultimate fact class members would have to prove to establish liability, this element is "better achieved by defining the class in terms of objective characteristics and common transactional facts making the ultimate identification of class members possible when that identification becomes necessary" (*166 Cal. App. 4th 1325, 1334-1335)* . The court of appeal concluded that the trial court's analysis unnecessarily confused issues of ascertainability with the merits of the underlying claims. The defendant's records were adequate to identify those persons classified as independent contractors who qualified for membership in the proposed class. At the class-certification stage of the proceeding, nothing more is required; appropriate exclusions can be implemented at a later stage (*166 Cal. App. 4th 1325, 1336)* .

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4-41 California Points & Authorities § 41.37

§ 41.37 Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Class Is Ascertainable--Members Readily Identified or Their Claims Substantiated by Defendant's Records

[1] FORM Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Class Is Ascertainable--Members Readily Identified or Their Claims Substantiated by Defendant's Records

[*The following may be combined with a general form of memorandum of points and authorities in support of a motion to certify an action as a class action (see, e.g., § 41.30). The following may also be combined with a general form of memorandum of points and authorities opposing a demurrer to a complaint on the ground that class action treatment is not appropriate (see, e.g., § 41.35).*]

THE CLASS IN THIS ACTION IS ASCERTAINABLE BECAUSE POTENTIAL MEMBERS MAY BE READILY IDENTIFIED OR THEIR CLAIMS SUBSTANTIATED BY REFERENCE TO DEFENDANT'S EXISTING RECORDS.

A. Ascertainable Class and Community of Interest in Questions of Law and Fact Essential for Proper Class Action. [*See § 41.36, Paragraph A.*]

B. Class Identified by Defendant's Records. When the members of the designated class may be readily identified or their claims substantiated (or both) by reference to defendant's existing records, and when performance of the two functions will not involveunreasonable time or expense, the class is ascertainable (*Hypolite v. Carleson (1975) 52 Cal. App. 3d 566, 578-579, 125 Cal. Rptr. 221*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a plaintiff's contention that the potential class is ascertainable because the members of the designated class may be readily identified by reference to defendant's existing records.

This form may be combined, where appropriate, with points and authorities relating to the specific procedural context in

which counsel wishes to invoke the contention. A plaintiff might make an argument supported by this memorandum under the following circumstances: (1) when supporting a motion to certify an action as a proper class action (*see, e.g., § 41.30*); (2) when opposing a motion by the defendant to declare an action inappropriate as a class action; (3) when opposing a motion by the defendant to decertify the class (*see, e.g., § 41.33*); and (4) when opposing a demurrer to the complaint on the ground that class action treatment is not appropriate (*see, e.g., § 41.35*). This form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel should refer to facts showing that members of the class could be identified by reference to defendant's existing records. Counsel should also note that the identification of potential class members from defendant's records would not involve unreasonable time or expense.

[3] Discussion of Authorities

[a] Class Identified by Defendant's Records

Hypolite v. Carleson *(1975) 52 Cal. App. 3d 566, 125 Cal. Rptr. 221* , was a class action challenging the validity of an aid to families with dependent children (AFDC) program regulation under which minor plaintiffs had been denied benefits. Defendant did not challenge the propriety of the action as a class action by demurrer or motion, nor was the issue raised in his answer. The trial court originally ruled in favor of defendant on the merits, but the judgment was reversed on appeal. After defendant's unsuccessful attempts to obtain a hearing before the California Supreme Court and a writ of certiorari for review by the United States Supreme Court, the case proceeded on remand to the trial court, which entered a judgment granting plaintiffs' writ of mandate. Subsequently, the courtgranted plaintiffs' motions to amend the judgment on substantive grounds and for certification of the class. Defendant then filed an appeal, contending that plaintiffs had failed to establish the requisites for a class action and that plaintiffs were precluded from obtaining the order certifying the class because they had not moved for it until after the substantive issues had been litigated to finality.

The court of appeal affirmed the judgment, holding that a class of persons wrongfully denied benefits under the aid to families with dependent children (AFDC) program was ascertainable (*52 Cal. App. 3d 566, 579)* . Adopting the trial court's reasoning, the court of appeal noted that members of the designated class could readily be identified, or their claims substantiated (or both), by reference to the defendant's existing records and, further, that the two functions would not involve unreasonable time or expense (*52 Cal. App. 3d 566, 578-579)* . The trial court's decision had noted that fair-hearing decisions at which individuals were wrongfully denied benefits had been coded so that persons denied benefits pursuant to a specific regulation were readily ascertainable (*52 Cal. App. 3d 566, 578)* .

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4-41 California Points & Authorities § 41.38

§ 41.38 Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Class Is Ascertainable--Individual Members Need Not Be Identified

[1] FORM Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Class Is Ascertainable--Individual Members Need Not Be Identified

[*The following may be combined with a general form of memorandum in support of a motion to certify an action as a class action (see, e.g., § 41.30). The following may also be combined with a general form of memorandum opposing a demurrer to a complaint on the ground that class action treatment is not appropriate (see, e.g., § 41.35).*]

THIS ACTION IS A PROPER CLASS ACTION BECAUSE EACH INDIVIDUAL CLASS MEMBER DOES NOT HAVE TO BE IDENTIFIED IN ORDER TO ESTABLISH THE EXISTENCE OF AN ASCERTAINABLE CLASS.

A. Ascertainable Class and Community of Interest in Questions of Law and Fact Essential for Proper Class Action. [*See § 41.36, Paragraph A.*]

B. Individual Class Members Need Not Be Identified. If the existence of an ascertainable class has been shown, there is no need to identify its individual members in order to bind all members by the judgment. The fact that the class members are unidentified at this point will not preclude a complete determination of the issues affecting the class (*Daar v. Yellow Cab Co. (1967) 67 Cal. 2d 695, 706, 63 Cal. Rptr. 724, 433 P.2d 732* ; *Estrada v. FedEx Ground Package Sys., Inc. (2007) 154 Cal. App. 4th 1, 14, 64 Cal. Rptr. 3d 327*).

[2] Comments

[a] Use of Form

The foregoing form may be submitted in support of plaintiff's contention that an action is properly maintained as a class action. This argument may be made in response to defendant's contention that class action treatment is not proper because each individual member of the potential class has not been identified. The argument may also be made in anticipation of such a contention by defendant.

This form may be combined, as appropriate, with forms relating to the specific procedural context in which counsel wishes to invoke the contention. A plaintiff might make an argument supported by this memorandum under the following circumstances: (1) when supporting a motion to certify an action as a proper class action (*see, e.g., § 41.30*); (2) when opposing a motion by the defendant to declare an action inappropriate as a class action; (3) when opposing a motion by the defendant to decertify the class (*see, e.g., § 41.33*); and (4) when opposing a demurrer to the complaint on the ground that class action treatment is not appropriate (*see, e.g., § 41.35*). The foregoing form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel should refer to facts showing that members of the class can be located and identified. Counsel should also note that each individual member need not be identified in order to find that the class is ascertainable.

[3] Discussion of Authorities

[a] Individual Class Members Need Not Be Identified

The facts and procedural background of ***Daar v. Yellow Cab Co.*** *(1967) 67 Cal. 2d 695, 63 Cal. Rptr. 724, 433 P.2d 732* , are discussed in *§ 41.36[3][a]*. The Court in *Daar* held that a class of taxicab users was ascertainable in an action for overcharges (*67 Cal. 2d 695, 717)* . The Court noted that the defendant had apparently failed to distinguish between the necessity of establishing the existence of an ascertainable class and the necessity of identifying the individual members as a prerequisite to a class suit. If the existence of an ascertainable class has been shown, the Court reasoned, there is no need to identify its individual members in order to bind all members by the judgment. The fact that class members are not identified at that point will not preclude a complete determination of the issues affecting the class (*67 Cal. 2d 695, 706)* .

In ***Estrada v. FedEx Ground Package Sys., Inc.*** *(2007) 154 Cal. App. 4th 1, 64 Cal. Rptr. 3d 327* , the plaintiffs sued on behalf of a class of drivers who worked for the defendant delivery service. The plaintiffs sought to recover reimbursement of work-related expenses under *Lab. Code § 2802*, which makes an employer liable for business expenses incurred by employees. In opposing class certification, the defendant contended, among other things, that the class was not ascertainable. The court of appeal affirmed the trial court's certification order, which limited the class to drivers who worked full-time for the defendant in single work areas and who did not subcontract their service areas out to others for reasons other than vacation, sick leave, or other commonly excused employment absences. The trial court found, and the court of appeal agreed, that the members of that class could reasonably be ascertained from the defendant's records and through discovery. Although the defendant suggested that the members of the class shifted "in and out, sometimes on a day-to-day basis," the court of appeal rejected any claim that all members of the class had to be identified at the outset (*154 Cal. App. 4th 1, 14* (citing *Daar v. Yellow Cab Co. (1976) 67 Cal. 2d 695, 706*) (discussed above)). Rather, a class isascertainable if it identifies a group of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify himself or herself as having a right to recover based on the description (*154 Cal. App. 4th 1, 14)* .

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4-41 California Points & Authorities § 41.39

§ 41.39 Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Community of Interest Among Class Members--Common Questions Sufficiently Important to Permit Class Adjudication

[1] FORM Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Community of Interest Among Class Members--Common Questions Sufficiently Important to Permit Class Adjudication

[*The following may be combined with a general form of memorandum in support of a motion to certify an action as a class action (see, e.g., § 41.30). The following may also be combined with a general form of memorandum opposing a demurrer to a complaint on the ground that class action treatment is not appropriate (see, e.g., § 41.35).*]

A COMMUNITY OF INTEREST EXISTS AMONG THE CLASS MEMBERS IN THIS ACTION BECAUSE THE COMMON QUESTIONS ARE SUFFICIENTLY IMPORTANT TO PERMIT ADJUDICATION IN A CLASS ACTION RATHER THAN IN A MULTIPLICITY OF SEPARATE SUITS.

A. Ascertainable Class and Community of Interest in Questions of Law and Fact Essential for Proper Class Action. [*See § 41.36, Paragraph A.*]

B. Sufficiently Important Common Questions. A community of interest exists among the class members when the common questions are sufficiently important to permit adjudication in a class action rather than in a multiplicity of separate suits (*Daar v. Yellow Cab Co. (1967) 67 Cal. 2d 695, 713, 63 Cal. Rptr. 724, 433 P.2d 732*).

C. Common Questions of Liability Generally Justify Class Adjudication. As a general rule, if the defendant's liability can be determined by facts common to all members of a class, class certification is proper, even if the members must individually prove their damages (*Hicks v. Kaufman & Broad Home Corp. (2001) 89 Cal. App. 4th 908, 916-923, 107 Cal. Rptr. 2d 761*).

[2] Comments

[a] Use of Form

The foregoing form may be submitted in support of a plaintiff's contention that there is a community of interest among

the class members in the questions of law and facts because the common questions are sufficiently important to permit adjudication in a class action rather than in a multiplicity of separate suits.

This form may be combined, as appropriate, with forms relating to the specific procedural context in which counsel wishes to invoke the contention. A plaintiff might make an argument supported by this memorandum under the following circumstances: (1) when supporting a motion to certify an action as a proper class action (*see, e.g., § 41.30*); (2) when opposing a motion by the defendant to declare an action inappropriate as a class action; (3) when opposing a motion by the defendant to decertify the class (*see, e.g., § 41.33*); and (4) when opposing a demurrer to the complaint on the ground that class action treatment is not appropriate (*see, e.g., § 41.35*). The foregoing form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel should refer to facts showing the existence of common questions of law and facts, the substantial benefits of class litigation to both the litigants and the court, and the advantages of litigating the issues in a class suit as opposed to a multiplicity of separate actions.

[3] Discussion of Authorities

[a] Sufficiently Important Common Questions

The facts and procedural background of ***Daar v. Yellow Cab Co.*** *(1967) 67 Cal. 2d 695, 63 Cal. Rptr. 724, 433 P.2d 732* , are discussed in *§ 41.36[3][a]*. In *Daar*, the Supreme Court held that a class of taxicab users seeking damages for overcharges had a well-defined community of interest in the questions of law and fact (*67 Cal. 2d 695, 717)* . The Court stated that substantial benefits resulting from class litigation, both to the litigants and the court, should be found before the imposition of a judgment binding on absent parties can be justified. The Court noted that the community of interest determination depends on whether or not the common questions are sufficiently important to permit adjudication in a class action rather than in a multiplicity of separate suits (*67 Cal. 2d 695, 713)* . The Court reasoned that if a class suit was not permitted, a multiplicity of legal actions dealingwith identical basic issues would be required (*67 Cal. 2d 695, 714-715)* . In addition, the Court noted that absent a class suit, recovery by any of the individual taxicab users would be unlikely due to the relatively small loss to each individual class member (*67 Cal. 2d 695, 715)* .

[b] Common Questions of Liability Generally Justify Class Adjudication

The facts and procedural background of ***Hicks v. Kaufman & Broad Home Corp.*** *(2001) 89 Cal. App. 4th 908, 107 Cal. Rptr. 2d 761* , are discussed in *§ 41.36[3][b]*. On the question of whether common issues predominated, the court of appeal applied the general rule that if a defendant's liability can be determined by facts common to all members of a class, the class will be certified even if the members must individually prove their damages. As to the contractual breach-of-warranty claims, the court noted that the failure or malfunctioning of the allegedly defective product was not an element of the cause of action; whether the product had malfunctioned was relevant to the remedy for a breach of warranty, not to the existence of the breach itself. Therefore, even though each class member would have to provide individualized proof of the extent of damages, such individualized proof was not necessary to establish the defendants' liability. Instead, liability (that is, breach of warranties) would be established by showing that the foundations of plaintiffs' homes contained an inherent defect that was substantially certain to result in malfunction during the useful life of the foundations. Such a showing would involve predominantly common questions of law and fact, since individualized showings of actual malfunction would be unnecessary. Accordingly, the court of appeal held that the trial court had erred in refusing to certify the class on the breach-of-warranty claims (*89 Cal. App. 4th 908, 916-923)* .

The court of appeal went on to affirm the trial court's holding that the plaintiffs' tort claims for negligence and strict liability were not appropriate for class treatment. Under these tort causes of action, no remedy is available in the absence of actual damage. Thus, to establish the liability of the defendants, each class member would have to establish

that damage had resulted from the malfunction of his or her foundation. Given this need for individualized proof, commonality of facts was lost, and the case could not be adjudicated as a class action (*89 Cal. App. 4th 908, 923-924)* .

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4-41 California Points & Authorities § 41.40

§ 41.40 Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Community of Interest Among Class Members in Questions of Fact--Class Members Have Single Fact in Common

[1] FORM Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Community of Interest Among Class Members in Questions of Fact--Class Members Have Single Fact in Common

[*The following may be combined with a general form of memorandum in support of a motion to certify an action as a class action (see, e.g., § 41.30). The following may also be combined with a general form of memorandum opposing a demurrer to a complaint on the ground that class action treatment is not appropriate (see, e.g., § 41.35).*]

THE REQUISITE OF A WELL-DEFINED COMMUNITY OF INTEREST IN QUESTIONS OF FACT IS SATISFIED IN THIS ACTION BECAUSE EACH INDIVIDUAL'S ENTITLEMENT DEPENDS ON THE EXISTENCE OF A SINGLE COMMON FACT.

A. Ascertainable Class and Community of Interest in Questions of Law and Fact Essential for Proper Class Action. [*See § 41.36, Paragraph A.*]

B. Common Questions of Fact. When each individual's entitlement depends on the existence of a single fact common to all class members, and not on a separate set of facts applicable only to him or her, the requisite of a well-defined community of interest in the questions of fact has been satisfied (*Hypolite v. Carleson (1975) 52 Cal. App. 3d 566, 580, 125 Cal. Rptr. 221*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a plaintiff's contention that there is a community of interest among the class members in the questions of fact because each individual's entitlement depends on the existence of a single fact common to all class members.

This form may be combined, where appropriate, with points and authorities relating to the specific procedural context in

which counsel wishes to invoke the contention. A plaintiff might make an argument supported by this memorandum under the following circumstances: (1) when supporting a motion to certify an action as a proper class action (*see, e.g., § 41.30*); (2) when opposing a motion by the defendant to declare an action inappropriate as a class action; (3) when opposing a motion by the defendant to decertify the class (*see, e.g., § 41.33*); and(4) when opposing a demurrer to the complaint on the ground that class action treatment is not appropriate (*see, e.g., § 41.35*). This form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel should refer to the issues of fact that are common among the class members. Counsel should also note that the representative plaintiffs must show common questions of law as well as facts.

[3] Discussion of Authorities

[a] Common Questions of Fact

The facts and procedural background of ***Hypolite v. Carleson*** *(1975) 52 Cal. App. 3d 566, 125 Cal. Rptr. 221* , are discussed in *§ 41.37[3][a]*. In *Hypolite*, the court held that a class of plaintiffs seeking to invalidate a regulation under the program for aid to families with dependent children had established the requisite community of interest in questions of fact. The defendants conceded that class members shared common questions of law but contended that common questions of fact were absent because of the many factors which influenced an individual's eligibility for benefits. The court rejected this argument, noting that the designated class consisted only of the persons who had been rendered ineligible under the regulation for a single reason. Thus, the court noted, each claimant's entitlement to benefits depended on the existence of a single fact, not on a separate set of facts applicable only to him or her. Because all members of the class had the single fact in common, the court concluded, they shared the requisite element of a well-defined community of interest in the questions of fact involved affecting the parties to be represented (*52 Cal. App. 3d 566, 579-580)* .

[4] Additional Authorities

[a] Common Questions of Fact

In *Rose v. City of Hayward (1981) 126 Cal. App. 3d 926, 179 Cal. Rptr. 287* , a class action seeking a writ of mandate to compel the state retirement system to include fringe benefits in its calculation of pension benefits, the court of appeal held that the action was suitable for class action disposition. Relying on *Hypolite v. Carleson (1975) 52 Cal. App. 3d 566, 580, 125 Cal. Rptr. 221* (discussed in *§ 41.40[3][a]*), the court noted that resolution of each applicant's claim requires no inquiry into any peripheral issues. The court stated that the single, decisive issue for all class members is whether the pertinent allowances should be included in the computation of retirement benefits (*126 Cal. App. 3d 926, 932-934)* .

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4-41 California Points & Authorities § 41.41

§ 41.41 Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Community of Interest Among Class Members in Action Alleging Fraud or Misrepresentation--Inference of Reliance Arises as to Entire Class When Material Representations Made to Class Members Who Thereafter Act Consistently With Reliance

[1] FORM Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Community of Interest Among Class Members in Action Alleging Fraud or Misrepresentation--Inference of Reliance Arises as to Entire Class When Material Representations Made to Class Members Who Thereafter Act Consistently With Reliance

[*The following may be combined with a general form of memorandum in support of a motion to certify an action as a class action (see, e.g., § 41.30). The following may also be combined with a general form of memorandum opposing a demurrer to a complaint on the ground that class action treatment is not appropriate (see, e.g., § 41.35).*]

A COMMUNITY OF INTEREST SUFFICIENT TO PERMIT DETERMINATION OF THE ISSUE OF LIABILITY ON A CLASS BASIS EXISTS AMONG THE CLASS MEMBERS IN THIS ACTION ALLEGING _____ [*specify, e.g.,* FRAUD] BECAUSE MATERIAL MISREPRESENTATIONS WERE MADE TO CLASS MEMBERS WHO THEREAFTER ACTED CONSISTENTLY WITH RELIANCE, SO AS TO RAISE AN INFERENCE OF RELIANCE AS TO THE ENTIRE CLASS.

Community of Interest Sufficient in Action Alleging Fraud. In a class action alleging fraud or misrepresentation, a community of interest sufficient to permit determination of the issue of liability on a class basis exists when material misrepresentations have been made to class members who thereafter act consistently with reliance, so as to raise an inference of reliance as to the entire class (*Occidental Land, Inc. v. Superior Court (1976) 18 Cal. 3d 355, 363, 134 Cal. Rptr. 388, 556 P.2d 750* ; *Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 814, 94 Cal. Rptr. 796, 484 P.2d 964* ; *see Steroid Hormone Prod. Cases (2010) 181 Cal. App. 4th 145, 156-157, 104 Cal. Rptr. 3d 329*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the plaintiff's contention that a class action alleging fraud or

misrepresentation is proper because a community of interest sufficient to permit determination of the issue of liability on a class basis exists when material misrepresentations have been made to class members who thereafter actconsistently with reliance, so as to raise an inference of reliance as to the entire class.

This form may be combined, as appropriate, with forms relating to the specific procedural context in which counsel wishes to invoke the contention. A plaintiff might make an argument supported by this memorandum under the following circumstances: (1) when supporting a motion to certify an action as a proper class action (*see, e.g., § 41.30*); (2) when opposing a motion by the defendant to declare an action inappropriate as a class action; (3) when opposing a motion by the defendant to decertify the class (*see, e.g., § 41.33*); and (4) when opposing a demurrer to the complaint on the ground that class action treatment is not appropriate (*see, e.g., § 41.35*). This form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel should refer to facts showing that material representations were made to class members in the form of a standard contract or other common basis. If appropriate, counsel should point out that oral representations were made to class members at the same time and place [*see Collins v. Rocha (1972) 7 Cal. 3d 232, 237, 102 Cal. Rptr. 1, 497 P.2d 225]* . In addition, counsel should refer to facts showing that plaintiffs acted consistently with reliance after the representations were made.

[3] Discussion of Authorities

[a] Community of Interest Sufficient in Action Alleging Fraud

The facts and procedural background of ***Occidental Land, Inc. v. Superior Court*** *(1976) 18 Cal. 3d 355, 134 Cal. Rptr. 388, 556 P.2d 750* , are discussed in *§ 41.32[3][a]*. In *Occidental*, a class action by subdivision homeowners seeking damages for the developer's allegedly fraudulent misrepresentation of the costs for maintaining the project, the Supreme Court held that the trial court had not abused its discretion in refusing to decertify the action as a class action (*18 Cal. 3d 355, 364)* . The Court rejected defendant's contention that even if alleged written misrepresentations were made to each homeowner, a class suit was not appropriate because at trial each plaintiff would be required to separately prove justifiable reliance. Citing *Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 814, 94 Cal. Rptr. 796, 484 P.2d 964* (discussed *below*), the Court stated that an inference of reliance arises if a material false representation was made to persons whose acts thereafter were consistent with reliance on the representation. The Court concluded that because plaintiffs' purchases of homes were acts consistent with their reliance on the subdivision report that set out maintenance fees, the trial court had not erred in inferringthat justifiable reliance may be established on a common basis (*18 Cal. 3d 355, 363)* .

The facts and procedural background of ***Vasquez v. Superior Court*** *(1971) 4 Cal. 3d 800, 94 Cal. Rptr. 796, 484 P.2d 964* , are discussed in *§ 41.34[3][c]*. In *Vasquez*, a class action seeking rescission because of fraudulent misrepresentation by consumers who had purchased frozen food and freezers under installment contracts, the Supreme Court held that the trial court had erred in sustaining demurrers on the ground that plaintiffs had not alleged a proper class action (*4 Cal. 3d 800, 815)* . The Court noted that if material representations were made to the class members, at least an inference of reliance would arise as to the entire class (*4 Cal. 3d 800, 814)* . Thus, the Court stated, if plaintiffs could establish without individual testimony that the representations were made to each plaintiff and that they were false, it should not be unduly complicated to sustain their burden of proving reliance thereon as a common element (*4 Cal. 3d 800, 814)* .

The named plaintiff in ***Steroid Hormone Prod. Cases*** *(2010) 181 Cal. App. 4th 145, 104 Cal. Rptr. 3d 329* , claimed that the defendant had violated the unfair competition law (UCL) (*Bus. & Prof. Code § 17200 et seq.*) and the Consumers Legal Remedies Act (CLRA) (*Civ. Code § 1750 et seq.*) by selling products that contained a controlled substance illegal to possess without a prescription (*see Health & Safety Code §§ 11377, 11379*). The complaint sought

restitution and injunctive relief, and the plaintiff moved to certify a class of all persons who had purchased the products during a particular period of time. The trial court denied the motion, finding that common issues did not predominate, because class members would be required to individually litigate issues of causation and injury.

The court of appeal reversed. On the UCL claim, the court observed that although a named plaintiff in a UCL class action must show that he or she suffered injury in fact and lost money or property as a result of the unfair competition, once the named plaintiff meets that burden, no further individualized proof of injury or causation is required to impose restitution liability against the defendant in favor of absent class members (*181 Cal. App. 4th 145, 154* (citing *In re Tobacco II Cases (2009) 46 Cal. 4th 298, 321, 93 Cal. Rptr. 3d 559, 207 P.3d 20*)).

On the CLRA claim, the court of appeal acknowledged that the CLRA requires a showing of actual injury as to each class member (*see Civ. Code §§ 1780(a), 1781(a)*). Under the circumstances of this case, however, the need for each class member to show actual injury did not mean that individual issues would predominate. The court explained that the "damage" the plaintiff alleged in this case was that, in reliance on the defendant's deceptive conduct, he bought an illegal product he would not have bought had he known it was illegal. He did not seek actual damages, but instead sought restitution. Thus, he was entitled to show that the defendant's alleged deceptive conduct caused the same damage to the class by showing that the alleged misrepresentation was material, even if the defendant might be able to show that some class members would have bought the products even if they had known they were unlawful to sell or possess without a prescription. In other words, if the plaintiff could show that material misrepresentations were made to the class members, at least an inference of reliance--i.e., causation and injury--would arise as to the entire class (*181 Cal. App. 4th 145, 156-157)* . In this kind of case, a misrepresentation is deemed material if a reasonable person would attach importance to its existence or nonexistence in determining whether to purchase the product. The court of appeal noted that "[i]t requires no stretch to conclude that the proper answer is 'yes'--we assume that a reasonable person would not knowingly commit a criminal act of purchasing a controlled substance without the requisite prescription" (*181 Cal. App. 4th 145, 157)* .

The court of appeal distinguished this case from *In re Vioxx Class Cases (2009) 180 Cal. App. 4th 116, 103 Cal. Rptr. 3d 83* (discussed in *§ 41.53[3][b]*). *Vioxx* involved claims of actual damages suffered by class members who had purchased the medication *Vioxx* believing it to be safe and more effective than a less-expensive generic medication, based on misleading information provided by the manufacturer of Vioxx. Common issues did not predominate in *Vioxx* because each class member's claim was dependent on a showing of the individual's specific medical needs and history. The present case was significantly different, however, because in this case the relief sought was not actual damages, but rather restitution of the purchase price paid by class members, and as explained above, materiality and reliance could be established on a class-wide basis (*181 Cal. App. 4th 145, 159-160)* .

[4] Additional Authorities

[a] Community of Interest Sufficient in Action Alleging Fraud

In *Richmond v. Dart Industries, Inc. (1981) 29 Cal. 3d 462, 174 Cal. Rptr. 515, 629 P.2d 23* (discussed in *§ 41.36[3][b]*), a class action by subdivision lot owners for compensatory and punitive damages, rescission, declaratory relief, and creation of a constructive trust to ensure that sufficient funds would be available to provide adequate water and sewage facilities, the Supreme Court reversed a trial court order denying certification of the class (*29 Cal. 3d 462, 479)* . With respect to the issue of community of interest, the Court noted that written misrepresentation claims provide an adequate basis for a finding of common questions within the class (*29 Cal. 3d 462, 478)* .

In *Collins v. Rocha (1972) 7 Cal. 3d 232, 102 Cal. Rptr. 1, 497 P.2d 225* (discussed in *§ 41.50[3][a]*), a class action on behalf of farm laborers for compensatory and punitive damages based on fraud and breach of an oral employment contract, the Supreme Court held that if representations were made at one time and place to all class members, and if they thereon simultaneously accepted employment, a persuasive inference that each of them relied on the

representations arises without separate proof of reliance by each plaintiff (*7 Cal. 3d 232, 237)* . The Court noted that plaintiffs were allegedly gathered together to learn the details of the job with defendant and that the representations were made at that time (*7 Cal. 3d 232, 237)* .

In *Danzig v. Jack Grynberg & Associates (1984) 161 Cal. App. 3d 1128, 208 Cal. Rptr. 336* , the court of appeal affirmed the trial court's judgment in favor of plaintiff class in an action for rescission based on fraudulentmisrepresentations and nondisclosures willfully and intentionally made by defendant to induce plaintiff class to subscribe to limited partnership interests. Defendant challenged the findings related to justifiable reliance on the grounds that there was insufficient evidence to support them and that independent proof of individual reliance of all class members was required. The court of appeal found that there was substantial evidence to support the trial court's findings. Regarding the need for independent proof of individual reliance, the court cited *Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 94 Cal. Rptr. 796, 484 P.2d 964* , for the rule that if the trial court finds, as it did here, that material misrepresentations were made to class members, at least an inference of reliance would arise concerning the entire class (*161 Cal. App. 3d 1128, 1137-1138)* .

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§ 41.42 Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Community of Interest Among Class Members Who Are Parties to Separate Versions of Standardized Contract That Violates Statute

[1] FORM Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Community of Interest Among Class Members Who Are Parties to Separate Versions of Standardized Contract That Violates Statute

[*The following may be combined with a general form of memorandum of points and authorities in support of a motion to certify an action as a class action (see, e.g., § 41.30). The following may also be combined with a general form of memorandum of points and authorities opposing a demurrer to a complaint on the ground that class action treatment is not appropriate (see, e.g., § 41.35).*]

IN THIS ACTION, ALLEGING THAT DEFENDANT'S STANDARDIZED CONTRACT VIOLATES _____ [*specify statute, e.g.,* SECTION 17200 OF THE BUSINESS AND PROFESSIONS CODE], THERE EXISTS AMONG THE CLASS MEMBERS, WHO CONTRACTED SEPARATELY WITH DEFENDANT USING THIS CONTRACT, A COMMUNITY OF INTEREST THAT IS SUFFICIENT TO PERMIT DETERMINATION OF THE ISSUE OF LIABILITY NOTWITHSTANDING POSSIBLY VARYING UNDERSTANDINGS OR INTERPRETATIONS OF THE CONTRACT BY THE INDIVIDUAL CLASS MEMBERS.

Certification of Class of Parties to Separate Versions of Standardized Contract Violating Statute Is Not Barred by Individual Members' Knowledge or Interpretation of Contract. Certification of a class, in an action alleging that standardized provisions in defendant's contracts violate a statute, is not barred by the differingunderstanding, knowledge, or interpretation of the offending provision by individual plaintiffs. Allowing a class action to proceed is an effective method of accomplishing the disgorgement of property obtained by illegal means so long as neither numerous nor substantial individual issues have to be litigated after a class judgment has determined questions common to the class (*McConnell v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1983) 33 Cal. 3d 816, 823, 191 Cal. Rptr. 458, 662 P.2d 916* ; *Fletcher v. Security Pacific National Bank (1979) 23 Cal. 3d 442, 449-451, 454, 153 Cal. Rptr. 28, 591 P.2d 51* ; *MacManus v. A. E. Realty Partners (1987) 195 Cal. App. 3d 1106, 1115-1117, 241 Cal. Rptr. 315*).

[2] Comments

[a] Use of Form

This form may be submitted in support of plaintiff's contention that a class action is proper, based on a standardized contract provision or practice in violation of a statute, regardless of the individual class members' understanding or interpretation of the provision or practice or its effect [*see Fletcher v. Security Pacific National Bank (1979) 23 Cal. 3d 442, 449-451, 454, 153 Cal. Rptr. 28, 591 P.2d 51]* .

This form may be combined with points and authorities relating to the specific procedural context in which counsel wishes to invoke the contention [*see § 41.30* (supporting a motion to certify), § 41.33 (opposing a motion to decertify), § 41.35 (opposing a demurrer claiming that class action treatment is not appropriate)].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the particular statute that is alleged to have been violated, including any provision for restitution or imposition of penalties that does not require findings based on plaintiff's understanding or interpretation of the offending provision, and should stress the common issues that establish the violation.

[3] Discussion of Authorities

[a] Certification of Class of Parties to Separate Versions of Standardized Contract Violating Statute Is Not Barred by Individual Members' Knowledge or Interpretation of Contract

McConnell v. Merrill Lynch, Pierce, Fenner & Smith, Inc. *(1983) 33 Cal. 3d 816, 191 Cal. Rptr. 458, 662 P.2d 916* , was a class action bycustomers of defendant broker seeking redress for violation of § 2 of the Usury Law (Deering's Ann Uncod measures 1919-1, § 2; 10 West's Ann Civ. Code foll § 1916), which prohibits compounding of interest unless an express agreement allowing compounding is signed by the party to be charged. Compound interest was charged on customers' debit-balance accounts. The written agreements only provided that interest would be charged in accordance with defendant's usual custom. After receiving evidence regarding the monthly statements provided to customers, the industry practice regarding such charges, and four customers' expectations, the trial judge decertified the class because individual issues predominate over class issues, and dismissed the action as a class action. Plaintiffs appealed.

The Supreme Court reversed. The Court discussed ***Fletcher v. Security Pacific National Bank*** *(1979) 23 Cal. 3d 442, 449-451, 454, 153 Cal. Rptr. 28, 591 P.2d 51* , at length. The Court concluded that no evidence at all could be admitted to explain the customers' understanding of the meaning of the agreement because the agreement was clearly in violation of the usury statute in that it did not expressly provide for compounding. Further, the Court said that its conclusion not only safeguards the interests of the borrower, which is an important objective of the usury law, but it also furthers the remedial purposes of that law. If evidence of borrowers' understanding of the contract language was admissible, not only would a cause of action for violation of the statute often be rendered inappropriate for prosecution as a class action, but lenders who had violated the law would be shielded from liability (*33 Cal. 3d 816, 821-823)* .

Fletcher v. Security Pacific National Bank *(1979) 23 Cal. 3d 442, 153 Cal. Rptr. 28, 591 P.2d 51* , was an opinion in consolidated actions by loan customers of defendant for breach of contract and violation of *Bus. & Prof. Code § 17200*, which prohibits use of misleading statements to induce a person to enter into a contract. The loan papers merely stated that a specified interest rate was changed per annum. Defendant's practice was to calculate interest using a 360-day year rather than a 365-day year, a practice which, though common in the industry, was held to be an unfair trade practice under *Bus. & Prof. Code § 17200* in *Chern v. Bank of America (1976) 15 Cal. 3d 866, 127 Cal. Rptr. 110, 544 P.2d 1310* . After the decision in *Chern*, defendant moved for dismissal of this action as a class action, claiming that the practice was only unfair to borrowers who did not know what industry custom was and that knowledge of each borrower would have to be determined individually. The motion was granted, and plaintiff appealed.

The Supreme Court affirmed the breach of contract cause of action but reversed on the unfair trade practice cause of

action. The Court agreed that each borrower would have to be examined about his or her prior knowledge of the meaning of "per annum" in order to sustain recovery on the breachof contract claim (*23 Cal. 3d 442, 446)* . The same issues are not relevant to the unfair practices claim. Noting that *Bus. & Prof. Code § 17535* authorizes a court to order restitution in the absence of proof of lack of individual knowledge in order to deter future violations of the unfair trade practice statute and to foreclose retention by the violator of its ill-gotten gains, the Court concluded that the unfair practice cause of action should be allowed to go forward as a class action without individualized proof of lack of knowledge on the ground that that would be an effective means to accomplish disgorgement (*23 Cal. 3d 442, 449-451)* . The fact that some members of the class may have known that a 360-day denominator was used does not preclude the trial court from affording a remedy for recovery by those who had no such knowledge (*23 Cal. 3d 442, 454)* .

MacManus v. A. E. Realty Partners *(1987) 195 Cal. App. 3d 1106, 241 Cal. Rptr. 315* , was a class action against a real estate developer and an affiliated escrow company for violation of California's antitrust statute (*Bus. & Prof. Code § 16720*) and for violation of *Civ. Code § 2995*, which prohibits a developer from requiring as a condition of a single family residential real property transfer that the buyer use an escrow entity in which the developer has a financial interest. The issue involved the construction and coercive effect of standardized provisions in defendant-developer's sales contracts relating to the use of the defendant-escrow. Summary judgment was granted on the antitrust cause of action on the ground that the defendants were not separate entities and thus could form a conspiracy, contract, or combination as referred to in the statute. The trial court denied certification as a class on the remaining cause of action. Plaintiffs appealed.

The court of appeal reversed the summary judgment and the order denying certification. Defendants argued that individual questions predominated because there were many individual transactions and each plaintiff may have had a different understanding of the contract provision. The court of appeal discussed *McConnell v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1983) 33 Cal. 3d 816, 823, 191 Cal. Rptr. 458, 662 P.2d 916* , and *Fletcher v. Security Pacific National Bank (1979) 23 Cal. 3d 442, 449-451, 454, 153 Cal. Rptr. 28, 591 P.2d 51* , and concluded that here, when a violation of statute was alleged, knowledge of the individual class members is no obstacle to certification. Citing *Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 809, 94 Cal. Rptr. 796, 484 P.2d 964* (discussed in *§ 41.45[3][a]*), the court stated that separate transactions are no bar to certification, so long as every member of the alleged class would not be required to litigate numerous and substantial questions to determine his or her individual right to recover following a class judgment determining the questions common to the class. Nor did the variation in the prices charged for escrow services present an insurmountable obstacle to certification, the court said, citing *Occidental Land, Inc. v. Superior Court (1976) 18 Cal. 3d 355, 360, n.3, 134 Cal. Rptr. 388, 556 P.2d 750* (discussed in *§ 41.32[3][a]*) (*195 Cal. App. 3d 1106, 1116-1117)* .

[b] Individual Member's Understanding or Knowledge Does Not Bar Sufficient Commonality

Rosack v. Volvo of America Corp. *(1982) 131 Cal. App. 3d 741, 182 Cal. Rptr. 800* , involved an alleged price fixing conspiracy by one manufacturer and its United States distributors. The dealers were not named as defendants. The court of appeal reversed the trial court's denial of certification as a class and dismissed the action as a class action. In antitrust terminology, price fixing is a per se violation; thus, everyone who purchased the item whose price was fixed is presumed to have suffered some impact or injury. The fact that certain class members may not have been injured does not defeat class certification (*131 Cal. App. 3d 741, 752-754)* . The complexity of the pricing scheme and the number of variables, although they may prove fatally unmanageable for damage calculation, will rarely inhibit generalized proof of impact (*131 Cal. App. 3d 741, 754)* . Nevertheless, the trial court had denied certification in part on the ground that the presumption of injury could not be maintained in the retail automobile market, which it described as notorious for haggling and bargaining. The court of appeal said that the effectiveness of any purchaser's negotiations had to be seen as relative, depending on whether the negotiation commenced from a price that was set by a competitive market or from an artificially inflated price. If base prices are raised, generalized injury results regardless of the purchaser's individual negotiating abilities. As the price fixing conspiracy could be proved on a class-wide basis, class certification should not have been denied because of the possibility that some plaintiffs might have been injured to a lesser extent or not at all (

131 Cal. App. 3d 741, 759-760) .

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§ 41.43 Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Community of Interest Among Class Members in Action Alleging Price-Fixing Conspiracy

[1] FORM Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Community of Interest Among Class Members in Action Alleging Price-Fixing Conspiracy

[*The following may be combined with a general form of memorandum of points and authorities in support of a motion to certify an action as a class action (see, e.g., § 41.30). The following may also be combined with a general form of memorandum of points and authorities opposing a demurrer to a complaint on the ground that class action treatment is not appropriate (see, e.g., § 41.35).*]

A COMMUNITY OF INTEREST EXISTS AMONG THE CLASS MEMBERS VICTIMIZED IN A CONSPIRACY ACTION BROUGHT UNDER _____ [THE CARTWRIGHT ACT (SECTIONS 16700-16770 OF THE BUSINESS AND PROFESSIONS CODE) *and/or* SECTIONS 17200-17208 OF THE BUSINESS AND PROFESSIONS CODE] BECAUSE THE COMMON, PREDOMINANT ISSUE CENTRAL TO THE ACTION IS THE EXISTENCE, IMPLEMENTATION, AND EFFECT OF THE ALLEGED CONSPIRACY.

A. Existence of Conspiracy Is Common Issue. In a class action alleging a price-fixing conspiracy, the existence of the conspiracy is an issue common to the class when the complaint credibly pleads allegations of anticompetitive behavior embracing all of the various products purchased by class members and distribution patterns involving class members (*B.W.I. Custom Kitchen v. Owens-Illinois, Inc. (1987) 191 Cal. App. 3d 1341, 1349-1350, 235 Cal. Rptr. 228*).

B. Injury to Class Members Is Common Issue. In a class action alleging a price-fixing conspiracy, injury to class members is an issue common to the class because, if the conspiracy is proven and plaintiffs establish they purchased the price-fixed goods, a jury can infer damage to the plaintiffs, even when prices for the goods were individually negotiated (*B.W.I. Custom Kitchen v. Owens-Illinois, Inc. (1987) 191 Cal. App. 3d 1341, 1350, 1352-1353, 235 Cal. Rptr. 228*).

[*Optional*] **C. Injury to Indirect Purchasers.** Injury to a class of indirect purchasers of price-fixed goods can be proven on a class-wide basis when the product ultimately sold to the consumer was largely unchanged in form from the

price-fixing manufacturer to the indirect purchaser, and therefore, in the vast majority of cases, at least a portion of the illegal overcharge was "passed on" to class members in the form of higher prices (*B.W.I. Custom Kitchen v. Owens-Illinois, Inc. (1987) 191 Cal. App. 3d 1341, 1352-1353, 235 Cal. Rptr. 228*).

D. Individual Damages Issues Do Not Overshadow Common Issues. In a class action alleging a price-fixing conspiracy, the mere presence of separate individual damages issues does not overshadow issues common to the class when the class members were likely to have kept records of purchases, the size of the class is manageable, and a bifurcated trial or division into subclasses or other methods can be employed to simplify the proceedings (*B.W.I. Custom Kitchen v. Owens-Illinois, Inc. (1987) 191 Cal. App. 3d 1341, 1354, 235 Cal. Rptr. 228*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the plaintiff's contention that a class action is proper, in that it alleges a price-fixing conspiracy under either the Cartwright Act (*Bus. & Prof. Code §§ 16700-16770*) or California's unfair competition statutes (*Bus. & Prof. Code §§ 17200-17208*), or both, and a community of interest exists sufficient to permit determination of the issues of the existence, implementation, and effect of the alleged conspiracy.

This form may be combined, when appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to invoke the contention [*see § 41.30* (supporting a motion to certify), § 41.33 (opposing a motion to decertify), § 41.35 (opposing a demurrer that claims that class action treatment is not appropriate)].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should refer to facts showing that all of the various products purchased by class members and distribution patterns involving class members are embraced by the allegations pleaded in the complaint. In addition, counsel should refer to facts showing that class members were likely to have kept records and that the size of the class is manageable.

[3] Discussion of Authorities

[a] Existence of Conspiracy Is Common Issue

In ***B.W.I. Custom Kitchen v. Owens-Illinois, Inc.*** *(1987) 191 Cal. App. 3d 1341, 235 Cal. Rptr. 228* , a business that bought its food jars from an independent distributor brought a class action against a group of glass container manufacturers, alleging they engaged in a conspiracy to set noncompetitive prices for glass containers in violation of the Cartwright Act (*Bus. & Prof. Code §§ 16700-16770*) and state unfair competition statutes (*Bus. & Prof. Code §§ 17200-17208*). Plaintiff sought certification of a class of several thousand California businesses that indirectly purchased glass containers from defendant manufacturers and paid inflated prices because of defendants' alleged price-fixing conspiracy. Like plaintiff, members of the proposed class had purchased the containers from independent distributors, who purchased them from defendants and other glass container manufacturers. The trial court refused to certify the class, holding that common questions of law and fact did not predominate over questions affecting only individual class members. The trial court determined that the alleged conspiracy was not susceptible of class-wide proof, because defendants manufactured different kinds of glass containerseventually purchased by many different kinds of businesses; the alleged price increase paid by indirect purchasers was too remote from the source of the overcharge and too individualized to be susceptible of class-wide proof; and, even if liability were shown, individual questions predominated with respect to factual determination of damages. Plaintiff appealed.

The court of appeal reversed, holding that action could proceed on a class-wide basis because the common, predominant issue central to the action was the existence, implementation, and effect of the alleged conspiracy. The court recognized that individual issues existed: the different type of glass containers involved in the alleged conspiracy, the different

pricing policies of the independent distributors, and the difficulties in proving the precise amount of overcharge that was "passed on" to each class member. Nevertheless, the court held that they did not present a predominant core of individual questions (*191 Cal. App. 3d 1341, 1355)* . Addressing the question of the existence of the conspiracy, the court reasoned that the proof required to demonstrate defendants' conspiratorial agreements was the same regardless of whether plaintiff purchased food jars or wine bottles. The court held that the trial court should look past surface distinctions among the products purchased by class members or the marketing mechanisms involved when allegations of anticompetitive behavior embracing all of the various products and distribution patterns have been credibly pleaded (*191 Cal. App. 3d 1341, 1349-1350)* .

[b] Injury to Class Members Is Common Issue

The factual and procedural background of ***B.W.I. Custom Kitchen v. Owens-Illinois, Inc.*** *(1987) 191 Cal. App. 3d 1341, 235 Cal. Rptr. 228* , is discussed in *§ 41.43[3][a]*. Rejecting the trial court's determination that injury could only be proved on a highly individualized basis, the court of appeal held that when a conspiracy to fix prices is proven and plaintiffs establish they purchased the price-fixed goods, injury to the plaintiffs can be inferred by a jury, even when prices for the goods are individually negotiated. Therefore, the issue of injury usually can be proven on a class-wide basis (*191 Cal. App. 3d, 1341, 1350-1353)* .

[c] Injury to Indirect Purchasers

The factual and procedural background of ***B.W.I. Custom Kitchen v. Owens-Illinois, Inc.*** *(1987) 191 Cal. App. 3d 1341, 235 Cal. Rptr. 228* , is discussed in *§ 41.43[3][a]*. Defendants contended that the necessity of tracing the allegedly price-fixed product through the chain of distribution to indirect purchasers presented such complex individual issues that injury could not be proven on a class-wide basis (*191 Cal. App. 3d 1341, 1346-1347)* . The court of appeal acknowledged that to prove injury, class members would have to establish that the independent distributors "passed on" defendant's illegal overcharges to them in the form of higherprices for glass containers (*191 Cal. App. 3d 1341, 1351)* . However, the court found that the class could show on a generalized basis that its members absorbed at least some portion of the alleged overcharges because the product ultimately sold to the consumer was largely unchanged in form from the price-fixing manufacturer to the indirect purchaser (*191 Cal. App. 3d 1341, 1352)* . The court further held that even if it were shown that certain class members escaped having to pay any of the overcharge because of their superior market positions, if in the vast majority of cases at least a portion of the illegal overcharge was passed on by the independent distributors to class members in the form of higher prices, the issue of injury could be proven on a class-wide basis (*191 Cal. App. 3d 1341, 1353)* . In the instant case, plaintiff showed that each distributor whose deposition had been taken testified that price increases by the defendant manufacturers were completely passed on to plaintiff and the members of the class (*191 Cal. App. 3d 1341, 1352 n.8*).

[d] Individual Damages Issues Do Not Overshadow Common Issues

The factual and procedural background of ***B.W.I. Custom Kitchen v. Owens-Illinois, Inc.*** *(1987) 191 Cal. App. 3d 1341, 235 Cal. Rptr. 228* , is discussed in *§ 41.43[3][a]*. The court of appeal held that the problem of ascertaining individual damages does not preclude class action when the parties are business entities that presumably kept records, the size of the class (several thousand members) is manageable, and bifurcated trial or division into subclasses or other methods could be employed to simplify the proceedings (*191 Cal. App. 3d 1341, 1354)* .

California Points & Authorities

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PART II. FORMS

4-41 California Points & Authorities § 41.44

§ 41.44 Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Community of Interest Among Class Members--Neither Common Fund Nor Request for Common Relief Is Essential to Establish Community of Interest

[1] FORM Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Community of Interest Among Class Members--Neither Common Fund Nor Request for Common Relief Is Essential to Establish Community of Interest

[*The following may be combined with a general form of memorandum of points and authorities in support of a motion to certify an action as a class action (see, e.g., § 41.30). The following may also be combined with a general form of memorandum of points and authorities opposing a demurrer to a complaint on the ground that class action treatment is not appropriate (see, e.g., § 41.35).*]

THIS ACTION IS A PROPER CLASS ACTION BECAUSE PLAINTIFF NEED NOT SHOW THE EXISTENCE OF A COMMON FUNDOR REQUEST COMMON RELIEF IN ORDER TO SATISFY THE COMMUNITY OF INTEREST REQUIREMENT.

A. Ascertainable Class and Community of Interest in Questions of Law and Fact Essential for Proper Class Action. [*See § 41.36, Paragraph A.*]

B. Common Fund or Common Relief Not Required. It is not essential to the establishment of a class action that a common fund exist (*Daar v. Yellow Cab Co. (1967) 67 Cal. 2d 695, 707, 63 Cal. Rptr. 724, 433 P.2d 732*). Nor is the seeking of common relief required in order to establish a community of interest (*see Richmond v. Dart Industries, Inc. (1981) 29 Cal. 3d 462, 477, 174 Cal. Rptr. 515, 629 P.2d 23* ; *Daar v. Yellow Cab Co. (1967) 67 Cal. 2d 695, 707, 63 Cal. Rptr. 724, 433 P.2d 732*).

[2] Comments

[a] Use of Form

This form may be submitted in support of plaintiff's contention that an action is properly maintained as a class action.

This argument may be made in response to defendant's contention that class action treatment is not proper because plaintiff has failed to show the existence of a common fund or to request common relief on behalf of the class, and thus, has not satisfied the community of interest requirement. The argument may also be made in anticipation of such a contention by defendant.

This form may be combined, where appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to invoke the contention. A plaintiff might make an argument supported by this memorandum under the following circumstances: (1) when supporting a motion to certify an action as a proper class action (*see, e.g., § 41.30*); (2) when opposing a motion by the defendant to declare an action inappropriate as a class action; (3) when opposing a motion by the defendant to decertify the class (*see, e.g., § 41.33*); and (4) when opposing a demurrer to the complaint on the ground that class action treatment is not appropriate (*see, e.g., § 41.35*). This form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Common Fund or Common Relief Not Required

The facts and procedural background of ***Daar v. Yellow Cab Co.*** *(1967) 67 Cal. 2d 695, 63 Cal. Rptr. 724, 433 P.2d 732* , are discussed in *§ 41.36[3][a]*. The Court in *Daar* held that the representative plaintiffs must show an ascertainable class and a well-defined community of interest in the questions of law and fact affecting the parties to be represented in order to sustain a class action (*67 Cal. 2d 695, 704)* .

In discussing the community of interest requirement, the Court rejected defendant's contention that class members must request a common remedy (*67 Cal. 2d 695, 707)* . The Court noted that as a practical matter, a requirement of common relief has no compelling importance and its absence presents no insuperable difficulties. In addition, the Court stated that a determination of the interest of each class member in any damages recovered does not seem dissimilar to a determination of each member's interest in a common trust fund, which is sometimes required after the common issues have been resolved in a class action. Only at the final stages of litigation, the Court continued, do the individual interests become critical and does the community of interest requirement lose significance. Thus, the court concluded, it is not unusual for class actions to involve subsidiary questions wherein individuals contest issues among themselves after common questions as to basic liability have been settled (*67 Cal. 2d 695, 709)* .

The Court in *Daar*, relying on prior appellate court decisions, also noted that a common fund is not essential to the establishment of a class action. The Court stated that under proper circumstances, the existence of a common fund is merely one way to satisfy the community of interest requirement (*67 Cal. 2d 695, 707)* .

The facts and procedural background of ***Richmond v. Dart Industries, Inc.*** *(1981) 29 Cal. 3d 462, 174 Cal. Rptr. 515, 629 P.2d 23* , are discussed in *§ 41.36[3][b]*. In *Richmond*, the Court held that a class of subdivision lot owners was ascertainable and had established the requisite community of interest for maintaining an action against the developer for compensatory and punitive damages, rescission, declaratory relief, and the creation of a constructive trust (*29 Cal. 3d 462, 479)* . Relying on *Daar v. Yellow Cab Co. (1967) 67 Cal. 2d 695, 707, 63 Cal. Rptr. 724, 433 P.2d 732* (discussed in *§ 41.36[3][a]*), the Court noted that because the seeking of common relief is no longer a prerequisite to a class suit, a prayer for relief that included rescission and a request for punitive damages should not bar certification of the action as a proper class action (*29 Cal. 3d 462, 477)* .

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4-41 California Points & Authorities § 41.45

§ 41.45 Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Community of Interest Among Class Members--Mere Separate Transactions Do Not Preclude Finding Requisite Community of Interest When Class Members Not Required to Litigate Numerous and Substantial Individual Questions

[1] FORM Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Community of Interest Among Class Members--Mere Separate Transactions Do Not Preclude Finding Requisite Community of Interest When Class Members Not Required to Litigate Numerous and Substantial Individual Questions

[*The following may be combined with a general form of memorandum in support of a motion to certify an action as a class action (see, e.g., § 41.30). The following may also be combined with a general form of memorandum opposing a demurrer to a complaint on the ground that class action treatment is not appropriate (see, e.g., § 41.35).*]

THIS ACTION IS A PROPER CLASS ACTION BECAUSE MERE SEPARATE TRANSACTIONS DO NOT PRECLUDE A FINDING OF THE REQUISITE COMMUNITY OF INTEREST SO LONG AS CLASS MEMBERS WOULD NOT BE REQUIRED TO LITIGATE NUMEROUS AND SUBSTANTIAL QUESTIONS TO DETERMINE THEIR INDIVIDUAL RIGHTS TO RECOVER FOLLOWING A JUDGMENT DETERMINING THE COMMON CLASS ISSUES.

A. Ascertainable Class and Community of Interest in Questions of Law and Fact Essential for Proper Class Action. [*See § 41.36, Paragraph A.*]

B. Absence of Numerous and Substantial Individual Questions. The mere fact that a class action involves separate transactions does not of itself preclude a finding of the requisite community of interest so long as every member of the alleged class would not be required to litigate numerous and substantial questions to determine his or her individual right to recover, subsequent to the rendering of any class judgment which determined in plaintiffs' favor whatever questions were common to the class (*Sav-on Drug Stores, Inc. v. Superior Court (2004) 34 Cal. 4th 319, 332-340, 17 Cal. Rptr. 3d 906, 96 P.3d 194* ; *Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 809, 94 Cal. Rptr. 796, 484 P.2d 964* ; *see Gattuso v. Harte-Hanks Shoppers, Inc. (2007) 42 Cal. 4th 554, 576, 67 Cal. Rptr. 3d 468, 169 P.3d 889* ; *see also Capitol People First v. Department of Developmental Servs. (2007) 155 Cal. App. 4th 676, 694-696, 66 Cal. Rptr. 3d 300* ; *Estrada v. FedEx Ground Package Sys., Inc. (2007) 154 Cal. App. 4th 1, 13-14, 64 Cal. Rptr. 3d 327*).

[*Optional*] **C. Separate Proof of Damages or Other Remedy.** That each class member must ultimately prove his or her separate claim to a portion of any recovery by the class, or that the court may fashion different remedies for individual class members based on the applicability of equitable defenses, does not necessarily preclude the maintenance of a class action (*Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 815, 94 Cal. Rptr. 796, 484 P.2d 964* ; *Daar v. Yellow Cab Co. (1967) 67 Cal. 2d 695, 713, 63 Cal. Rptr. 724, 433 P.2d 732* ; *Ticconi v. Blue Shield of Cal. Life & Health Ins. Co. (2008) 160 Cal. App. 4th 528, 543-546, 72 Cal. Rptr. 3d 888*).

[2] Comments

[a] Use of Form

The foregoing form may be submitted in support of plaintiff's contention that an action is properly maintained as a class action. This argument may be made in response to defendant's contention that class action treatment is not appropriate because the class members' claims involve separate transactions. The argument may also be made in anticipation of such a contention by defendant.

This form may be combined, as appropriate, with forms relating to the specific procedural context in which counsel wishes to invoke the contention. A plaintiff mightmake an argument supported by this memorandum under the following circumstances: (1) when supporting a motion to certify an action as a proper class action (*see, e.g., § 41.30*); (2) when opposing a motion by the defendant to declare an action inappropriate as a class action; (3) when opposing a motion by the defendant to decertify the class (*see, e.g., § 41.33*); and (4) when opposing a demurrer to the complaint on the ground that class action treatment is not appropriate (*see, e.g., § 41.35*). The foregoing form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel should refer to facts showing that although separate transactions are involved, each class member would not be required to litigate numerous and substantial questions subsequent to a class judgment determining class issues.

[b] Opposing Memoranda

The form set out in *§ 41.53* may be used in an appropriate case to oppose a contention supported by this memorandum.

[3] Discussion of Authorities

[a] Absence of Numerous and Substantial Individual Questions

In ***Sav-on Drug Stores, Inc. v. Superior Court*** *(2004) 34 Cal. 4th 319, 17 Cal. Rptr. 3d 906, 96 P.3d 194* , the plaintiffs sued their employer, for themselves and a class of fellow employees, alleging a violation of overtime-wage requirements. The trial court granted the plaintiffs' motion for class certification. The court of appeal then issued a writ of mandate commanding the trial court to deny class certification, and the Supreme Court granted review.

The Supreme Court reversed the judgment of the court of appeal and held that class certification was appropriate. The specific issue before the Supreme Court was whether the trial court erred in concluding that common issues predominated. The defendant argued that individual issues predominated because whether any individual member of the class was exempt or nonexempt from the overtime requirements depended on which tasks that person actually performed and the amount of time actually spent on given tasks. The Supreme Court rejected this argument, explaining that the "predominant common questions" factor does not require that all class members have uniform or identical claims (*34 Cal. 4th 319, 338)* , and a class action is not inappropriate simply because each class member may at some point be required to make an individual showing of eligibility for recovery or amount of damages. Rather, to determine

whether common questions predominate, a court must compare the costs and benefits of adjudicating the plaintiffs' claims in a class action with the costs and benefits of proceeding by numerous separate actions (*34 Cal. 4th 319, 332-334, 339 n.10*). In this case, the theory of recovery advanced by the plaintiffs was based largely on the defendant's class-wide policies and practices. Therefore, many of the issues likely to be most vigorously contested in this case were common ones. Absent class treatment, each individual plaintiff would be required to present in separate, duplicative proceedings the same, or essentially the same, arguments and evidence, including expert testimony. The result would be a multiplicity of trials conducted at enormous expense to both the judicial system and the litigants. Accordingly, the Supreme Court concluded that the trial court had not abused its discretion in finding that common issues predominated (*34 Cal. 4th 319, 340)* .

The facts and procedural background of ***Vasquez v. Superior Court*** *(1971) 4 Cal. 3d 800, 94 Cal. Rptr. 796, 484 P.2d 964* , are discussed in *§ 41.34[3][c]*. In *Vasquez*, the Supreme Court held that the representative plaintiffs had stated facts sufficient to show an ascertainable class and a community of interest in an action seeking rescission of installment contracts because of fraudulent misrepresentation (*4 Cal. 3d 800, 815)* . Relying on *Daar v. Yellow Cab Co. (1967) 67 Cal. 2d 695, 63 Cal. Rptr. 724, 433 P.2d 732* (discussed in *§ 41.36[3][a]*), the Court stated that the mere fact that separate transactions are involved does not of itself preclude a finding of the requisite community of interest so long as every member of the alleged class would not be required to litigate numerous and substantial questions to determine his or her individual right to recover, subsequent to the rendering of any class judgment which determined in plaintiffs' favor whatever questions were common to the class (*4 Cal. 3d 800, 809)* .

In ***Gattuso v. Harte-Hanks Shoppers, Inc.*** *(2007) 42 Cal. 4th 554, 67 Cal. Rptr. 3d 468, 169 P.3d 889* , the plaintiffs sued their employer on behalf of a class of outside sales representatives, claiming that the defendant's payment of increased wages or commissions did not satisfy the employer's obligation to reimburse its employees for automobile expenses incurred in carrying out employment duties (*see Lab. Code § 2802(a)*). The trial court denied class certification, finding that the plaintiffs' claims would turn on individualized determinations of (1) whether each sales representative had an agreement about the manner in which he or she would be compensated for automobile expenses, and (2) whether the compensation paid to each sales representative was reasonable.

The Supreme Court reversed and remanded for reconsideration of the class-certification issue. The Court emphasized that the defendant claimed that it had fulfilled its reimbursement obligation by paying the outside sales representatives higher commission rates and higher base salaries than it paid to other sales representatives. The Court therefore instructed the trial court to consider whether the following questions were appropriate for resolution on a class-wide basis: (1) whether the defendant had adopted a practice or policy of reimbursing outside sales representatives for automobile expenses by paying them higher commission rates and base salaries than it paid to inside sales representatives; if so, (2) whether the defendant established a method to apportion the enhanced compensation payments between compensation for labor performed and expense reimbursement, and (3) whether the amount paid for expense reimbursement was sufficient to fully reimburse the employees for the automobile expenses they reasonably and necessarily incurred (*42 Cal. 4th 554, 576)* .

In ***Capitol People First v. Department of Developmental Servs.*** *(2007) 155 Cal. App. 4th 676, 66 Cal. Rptr. 3d 300* , the plaintiffs sought certification of a class consisting of all California residents who had developmental disabilities and who were institutionalized or at risk of being institutionalized in congregate residential facilitieswith a capacity of 16 or more individuals. The action sought to enforce class members' rights, under the Lanterman Developmental Disabilities Services Act, to live in least restrictive community settings (*see Welf. & Inst. Code § 4500 et seq.*). Specifically, the action focused on the systemic failure of state agencies and regional centers to provide proper oversight of the placement of class members. Only injunctive and declaratory relief were sought. The trial court denied class certification, holding that the plaintiffs had failed to demonstrate commonality, adequacy of class representation, and the superiority of proceeding as a class action.

The court of appeal reversed. Regarding commonality, the appellate court cited *Sav-on Drug Stores, Inc. v. Superior*

Court (2004) 34 Cal. 4th 319, 17 Cal. Rptr. 3d 906, 96 P.3d 194 , discussed *above*, for the principle that the community-of-interest requirement does not require that all class members have uniform or identical claims. In this case, the plaintiffs were not seeking individual relief for each class member; rather, they sought systemic relief by compelling state and local entities to implement policies and procedures that would allow class members to receive the least restrictive, most integrated residential placements consistent with their needs and choices. In support of certification and the underlying assertion that proof of systemic deficits in the defendants' policies and practices was amenable to class treatment, the plaintiffs submitted pattern-and-practice evidence including testimony from the defendants about their policies and practices, admissions by the defendants, documents, statistics, expert testimony, and sampling. For example, challenging the legal sufficiency of the process of assessing class members' needs, the plaintiffs identified as a common factual issue whether the defendants used proper standards and criteria for conducting the assessments. They presented expert testimony and deposition testimony from the ranks of defendants' professionals on that point (*155 Cal. App. 4th 676, 694)* .

The court of appeal held that the plaintiffs' approach--to focus initially on evidence of the defendants' patterns and practices--was proper, and that the plaintiffs' pattern-and-practice evidence had indeed demonstrated sufficient commonality of legal and factual issues. Thus, the trial court erred in assuming that significant individual inquiries would be necessary to provide class relief. Citing *Sav-on* and other precedents, the court of appeal noted that courts have approved the use of statistics, sampling, policies, administrative practices, anecdotal evidence, deposition testimony, and the like to prove classwide behavior on the part of defendants (*155 Cal. App. 4th 676, 695-696)* . Moreover, at the class-certification stage, it was not the trial court's role to determine whether the plaintiffs' experts and evidence will ultimately be more persuasive than the defendants' experts and evidence. Rather, the focus at the class-certification stage is whether the evidence the plaintiffs will offer is sufficiently generalized in nature to make class treatment suitable (*155 Cal. App. 4th 676, 696)* .

In ***Estrada v. FedEx Ground Package Sys., Inc.*** *(2007) 154 Cal. App. 4th 1, 64 Cal. Rptr. 3d 327* , the plaintiffs sued on behalf of a class of drivers who worked for the defendant delivery service. The plaintiffs sought to recover reimbursement of work-related expenses under *Lab. Code § 2802(a)*, which makes an employer liable for business expenses incurred by employees. A major issue in the case was whether the defendant treated the drivers as employees even though the parties' "Operating Agreement" characterized the drivers as independent contractors. On appeal, the defendant contended, among other things, that class certification was inappropriate because individual facts predominated over common issues. Specifically, the defendant argued that the drivers had presented "anecdotal evidence"--i.e., individual facts--about the defendant's treatment of individual drivers to establish that those individuals were treated as employees. The court of appeal rejected this argument and affirmed the trial court's certification order (*154 Cal. App. 4th 1, 13-14)* .

The court of appeal explained that it was clear that common issues--whether the drivers were employees and, if so, which expenses would be reimbursable--predominated. The anecdotal evidence was admitted to show the defendant's power to apply the Operating Agreement so as to treat the drivers as employees, and thus it was relevant to the class as a whole, not just to the individual who happened to be the subject of a particular anecdote. Under these circumstances, therefore, the use of anecdotal evidence did not establish that individual issues predominated (*154 Cal. App. 4th 1, 14)* .

[b] Separate Proof of Damages or Other Remedy

The facts and procedural background of ***Vasquez v. Superior Court*** *(1971) 4 Cal. 3d 800, 94 Cal. Rptr. 796, 484 P.2d 964* , are discussed in *§ 41.34[3][c]*. In *Vasquez*, the Supreme Court held that the representative plaintiffs had stated facts sufficient to show an ascertainable class and a community of interest in an action seeking rescission of installment contracts because of fraudulent misrepresentation (*4 Cal. 3d 800, 815)* . Relying on *Daar v. Yellow Cab Co. (1967) 67 Cal. 2d 695, 63 Cal. Rptr. 724, 433 P.2d 732* (discussed in *§ 41.36[3][a]*), in discussing the community of interest requirement, the Court noted that although ultimately each class member will be required in some manner to establish

his or her individual damages, this circumstance does not preclude the maintenance of the suit as a class action (*4 Cal. 3d 800, 809, 815)* .

The facts and procedural background of ***Daar v. Yellow Cab Co.*** *(1967) 67 Cal. 2d 695, 63 Cal. Rptr. 724, 433 P.2d 732* , are discussed in *§ 41.36[3][a]*. In *Daar*, the Supreme Court held that the representative plaintiffs must show an ascertainable class and well-defined community of interest in the questions of law and fact affecting the parties to be represented in order to sustain a class action (*67 Cal. 2d 695, 704)* . In discussing the community of interest requirement, the Court noted that the fact that each individual must ultimately prove his or her separate claim to a portion of any recovery by the class is only one factor to be considered in determining whether a class action is proper (*67 Cal. 2d 695, 713)* .

In ***Ticconi v. Blue Shield of Cal. Life & Health Ins. Co.*** *(2008) 160 Cal. App. 4th 528, 72 Cal. Rptr. 3d 888* , the plaintiff sued a health-insurance provider under the Unfair Competition Law (UCL) (*Bus. & Prof. Code § 17200 et seq.*), alleging that the defendant had unlawfully engaged in postclaims underwriting by rescinding the plaintiff's and other disability insurance policies based on alleged misrepresentations in the applications for insurance (*see Ins. Code § 10384* ("postclaims underwriting" means the rescinding, canceling, or limiting of policy due to insurer's failure to complete medical underwriting and resolve all reasonable questions arising from written information submitted on or with application before issuing the policy)). Thetrial court denied the plaintiff's motion for class certification on the ground that the defendant's defenses of fraud and unclean hands raised individual issues that predominated over the common issues related to liability. The plaintiff appealed, and the court of appeal reversed.

The court of appeal noted that the defendant had issued class members' insurance policies without attaching to them, or endorsing on them, the applications for insurance. The court found this significant because the Insurance Code prohibits incorporating an application into a disability insurance policy by reference unless it is endorsed upon or attached to the policy when issued (*Ins. Code § 10113*). If a copy of an application for a policy is not attached to or endorsed on the policy when the policy is issued, then the insured is not bound by statements made in that application (*Ins. Code § 10381.5*). Thus, an insurer may not invoke the defense of misrepresentations or omissions in an application that was not attached to or endorsed on the policy (*160 Cal. App. 4th 528, 540-541)* .

The court of appeal found that the liability issues in this case--whether the defendant had rescinded policies after claims were filed based on statements made in insurance applications that were not attached to or endorsed on the policies--were universal to all class members, with the result that common issues of law and fact would predominate on the question of liability (*160 Cal. App. 4th 528, 543)* . The appellate court rejected the trial court's rationale for denying class certification, that issues concerning the defenses of fraud and unclean hands outweighed those related to liability. The appellate court explained that the equitable defense of unclean hands is not a defense to an unfair trade or business practices claim based on a statutory violation such as the violations of the Insurance Code alleged in this case. Accordingly, the defendant could not raise the unclean-hands defense to defeat the motion for class certification. Similarly, because class members were not bound by statements made in applications that were not attached to or endorsed on the policies, fraud was not available as a defense to defeat class certification. Thus, although the trial court could fashion different equitable *remedies* for individual class members based on the defenses of unclean hands or fraud (see *Bus. & Prof. Code § 17203*), those defenses did not prevent class certification on the question of the defendant's liability (*160 Cal. App. 4th 528, 543-546)* .

[4] Additional Authorities

[a] Absence of Numerous and Substantial Individual Questions

In *La Sala v. American Sav. & Loan Ass'n (1971) 5 Cal. 3d 864, 97 Cal. Rptr. 849, 489 P.2d 1113* (discussed in *§ 41.46[3][a]*), a class action seeking to declare an acceleration clause in defendant's form of trust deed invalid as a restraint on alienation, the Supreme Court reversed the trial court's dismissal in favor of the defendant. The Court held

that plaintiffs' claim that the trust deeds were adhesive contracts did not per se negate a finding of community of interest and make the suit unfit for class litigation (*5 Cal. 3d 864, 876-877)* . The Court noted that controversies involving contracts of adhesion present ideal cases for class adjudication because the contracts are uniform, the same principles of interpretation apply to each contract, and all members of the class will share a common interest in the interpretation. The Court rejected the defendant's assumption that proof of the adhesive character of the trust deed would necessarily require the individual testimony of each borrower. The Court noted, however, that the trial court would need to determine whether or not the facts presented individualized issues and evidence (*5 Cal. 3d 864, 877)* .

In *Mendoza v. Tulare County (1982) 128 Cal. App. 3d 403, 180 Cal. Rptr. 347* , a class action by a group of prisoners seeking injunctive and declaratory relief with respect to adverse jail conditions, the court of appeal reversed the trial court's decision dismissing the class action allegations on defendant's demurrer to the complaint (*128 Cal. App. 3d 403, 419)* . The trial court had ruled that the community of interest necessary for a class action was lacking because each prisoner would be required to litigate factual and legal issues peculiar to his own case (*128 Cal. App. 3d 403, 416)* . In reversing the trial court, the court of appeal noted that although the complaint revealed some questions of fact and law that were inapplicable to the class as a whole, common questions substantially outweighed the individual issues. In addition, the court concluded that each member of the class would not be required to litigate numerous and substantial questions in order to establish a right to the remedy sought. The court reasoned that if the trial court ultimately found statutory and/or constitutional violations, declaratory and injunctive relief would lie to redress violations common to the class even though some violations applied only to individuals. Individual damages to class members did not present a problem, the court noted, because the complaint sought only declaratory and injunctive relief (*128 Cal. App. 3d 403, 418)* .

In *Cavanaugh v. California (1978) 85 Cal. App. 3d 354, 149 Cal. Rptr. 453* , a class action by tenants within a redevelopment area seeking relocation benefits, the court of appeal reversed the trial court's dismissal of the class action allegations. The court held that the plaintiffs' complaint had stated the essential elements to support a class suit. The court stated that the class was limited, easily ascertainable, and revealed a readily identifiable community of interest (*85 Cal. App. 3d 354, 360)* . The court noted that proof of expenses in at least some of the plaintiff groups could easily be computed after liability was established, and that the class proceeding under the circumstances would foster and accomplish substantial judicial economy (*85 Cal. App. 3d 354, 360-361)* .

[b] Proof of Separate Damages

See also *MacManus v. A. E. Realty Partners (1987) 195 Cal. App. 3d 1106, 1117, 241 Cal. Rptr. 315* , discussed in *§ 41.42[3][a]*.

In *B.W.I. Custom Kitchen v. Owens-Illinois, Inc. (1987) 191 Cal. App. 3d 1341, 235 Cal. Rptr. 228* , the court of appeal reversed an order refusing certification of a class of indirect purchasers of glass containers. The complaint against numerous defendants alleged a price-fixing conspiracy. The trial court found that common questions did not predominate. The court of appeal said that most courts hold that when a conspiracy to fixprices has been alleged, common questions predominate over any questions affecting individual members only (*191 Cal. App. 3d 1341, 1348-1354)* . Evidence proving the conspiracy will concentrate on the relationship among the alleged conspirators (*191 Cal. App. 3d 1341, 1348-1354)* . Because price fixing is a per se violation of both California and federal anti-trust laws, once a conspiracy to fix prices is proved, injury to plaintiffs who purchased the price-fixed goods or services is inferred. Accordingly, impact or injury can be treated as a common question for certification purposes (*191 Cal. App. 3d 1341, 1348-1354)* . The presence of individual damage issues cannot bar certification (*191 Cal. App. 3d 1341, 1348-1354)* .

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4-41 California Points & Authorities § 41.46

§ 41.46 Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Community of Interest Among Class Members--Plaintiff's Nonmembership in Class Not Ground for Dismissal When Error Can Be Corrected by Amendment to Complaint

[1] FORM Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Community of Interest Among Class Members--Plaintiff's Nonmembership in Class Not Ground for Dismissal When Error Can Be Corrected by Amendment to Complaint

[*The following may be combined with memoranda relating to the specific procedural context in which counsel wishes to invoke the contention. For example, the following may be combined with a general form of memorandum opposing a demurrer to a complaint on the ground that class action treatment is not appropriate (see, e.g., § 41.35).*]

THIS ACTION IS PROPERLY MAINTAINED AS A CLASS ACTION BECAUSE PLAINTIFF'S NONMEMBERSHIP IN THE CLASS DUE TO AN ARBITRARY AND INADVERTENT MISDEFINITION DOES NOT CONSTITUTE GROUNDS FOR DISMISSAL WHEN AN ORDER OF DISMISSAL WOULD IN EFFECT DENY THE OPPORTUNITY TO CORRECT THE DEFECT BY AMENDING THE COMPLAINT.

Plaintiff's Nonmembership in Class. The plaintiff's nonmembership in the class because of an arbitrary and inadvertent misdefinition does not constitute grounds for dismissal if the error can readily be corrected by amending the complaint (*La Sala v. American Sav. & Loan Ass'n (1971) 5 Cal. 3d 864, 875-876, 97 Cal. Rptr. 849, 489 P.2d 1113* ; *LaLiberte v. Pacific Mercantile Bank (2007) 147 Cal. App. 4th 1, 6-8, 53 Cal. Rptr. 3d 745*).

[2] Comments

[a] Use of Form

This form may be submitted in support of plaintiff's contention that an action is properly maintained as a class action. This argument may be made in response to defendant's contention that class action treatment is not proper because the class has been defined to exclude the named plaintiff as a member. The argument may also be made in anticipation of such a contention by defendant.

This form may be combined, when appropriate, with memoranda relating to the specific procedural context in which counsel wishes to invoke the contention. A plaintiff might make an argument supported by this memorandum under the following circumstances: (1) when opposing a motion by the defendant to declare an action inappropriate as a class action; (2) when opposing a motion by the defendant to decertify the class (*see, e.g., § 41.33*); and (3) when opposing a demurrer to the complaint on the ground that class action treatment is not appropriate (*see, e.g., § 41.35*). This form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel should refer to facts showing that the class was inadvertently misdefined to exclude plaintiff as a member. Counsel should also include facts showing that the error can be corrected by an amendment to the complaint.

[3] Discussion of Authorities

[a] Plaintiff's Nonmembership in Class

La Sala v. American Sav. & Loan Ass'n *(1971) 5 Cal. 3d 864, 97 Cal. Rptr. 849, 489 P.2d 1113* , was a class action seeking to declare an acceleration clause in defendant's form of trust deed invalid as a restraint on alienation. Defendant demurred to the complaint, but prior to a hearing on the demurrer, defendant's counsel offered to waive the acceleration clause as to the named plaintiffs. The trial court then ordered the matter placed off its calendar for lack of a justiciable issue. Subsequently, the court granted defendant's motion to dismiss for lack of a representative party. Plaintiffs had opposed the dismissal without prior notice to the class. After the dismissal, plaintiffs filed their appeal.

The Supreme Court reversed the order dismissing the class action, holding that a waiver of the acceleration clause as to the named plaintiffs did not mechanically render them unfit per se to represent the class (*5 Cal. 3d 864, 871)* . The Court rejected defendant's argument that the action failed because plaintiffs had never been members of the class defined in the complaint (*5 Cal. 3d 864, 874)* . Plaintiffs did not fall within the confines of the class as defined in their complaint due to an error by their counsel (*5 Cal. 3d 864, 875, 875 n.9*).

In rejecting defendant's argument, the Court noted that prior appellate cases uniformly hold that a plaintiff seeking to maintain a class action must be a member of the class he or she claims to represent. This requirement derives from the principle that joinder of plaintiffs in a class action should consist of those sharing a well-defined community of interest in the questions of law and fact involved (*5Cal. 3d 864, 875)* . In the present case, plaintiffs' nonmembership in the class stemmed not from the lack of a community of interest between the plaintiffs, but from arbitrary and inadvertent limitation of the class (*5 Cal. 3d 864, 875)* . The Court concluded that the action should not be dismissed because the error could readily be corrected by an amendment to the complaint (*5 Cal. 3d 864, 875-876)* .

In ***LaLiberte v. Pacific Mercantile Bank*** *(2007) 147 Cal. App. 4th 1, 53 Cal. Rptr. 3d 745* , the plaintiffs initially asserted only individual claims, alleging that the defendant bank had violated the Truth in Lending Act (TILA) (*15 U.S.C. § 1601 et seq.*). The plaintiffs' suit was filed in May 2003, based on alleged TILA violations in connection with the plaintiffs' refinancing of their home loans in April 2002. On November 21, 2003, the plaintiffs amended their complaint to include class allegations; after further amendment, the complaint defined the class as including persons who had obtained certain loans from the defendant "from November 21, 2002, to the present." (The November 21, 2002, date was determined by applying the one-year statute of limitations period for seeking statutory damages under TILA, *15 U.S.C. § 1640(e)*, to the date on which the complaint first included class allegations.) The trial court sustained the defendant's demurrer to the class allegations, and refused to grant the plaintiffs leave to amend, on the sole ground that the plaintiffs were not members of the class they purported to represent, since their refinancing transaction had occurred before the November 21, 2002, date specified in the class definition. The trial court's ruling did not affect the plaintiffs' individual claims.

The court of appeal reversed. The court acknowledged that the plaintiffs alleged that they obtained their loans in April

2002 and defined the class members as those obtaining loans after November 21, 2002. However, the complaint alleged the same TILA violations as to both the named plaintiffs and the class members. Because the loan dates did not in any way affect the community of interest alleged between the named plaintiffs and class members, the court of appeal concluded that they were of no significance. For example, the plaintiffs could amend their complaint to define the class as including the named plaintiffs plus all persons who had obtained the relevant loans from the defendant "from November 21, 2002, to the present." The court emphasized that in this case the named plaintiffs' adequacy as class representatives derived from the community of interest in the law and facts involved in the case, not merely because of the addition of their names to the class definition. Accordingly, the court of appeal concluded that the trial court had abused its discretion in denying the plaintiffs leave to amend the class definition (*147 Cal. App. 4th 1, 6-8)* .

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4-41 California Points & Authorities § 41.47

§ 41.47 Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Community of Interest Among Class Members--No Strict Requirement That Named Plaintiff Have Interest in Each Subject Partnership

[1] FORM Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Community of Interest Among Class Members--No Strict Requirement That Named Plaintiff Have Interest in Each Subject Partnership

[*The following may be combined with memoranda relating to the specific procedural context in which counsel wishes to invoke the contention. For example, the following may be combined with a general form of memorandum opposing a demurrer to a complaint on the ground that class action treatment is not appropriate (see, e.g., § 41.35).*]

THIS ACTION IS PROPERLY MAINTAINED AS A CLASS ACTION BECAUSE THERE IS A SUFFICIENT COMMUNITY OF INTEREST TO DEFINE A CLASS, AND THUS THERE IS NO STRICT REQUIREMENT TO HAVE A NAMED PLAINTIFF WITH AN INTEREST IN _____ [*describe entities that are subjects of plaintiffs' action, e.g.,* EACH INDIVIDUAL REAL ESTATE LIMITED PARTNERSHIP] THAT IS ALLEGED TO HAVE RECEIVED FALSE OR MISLEADING SOLICITATION MATERIALS.

Community-of-Interest Requirement as Predominant. The community of interest defines the class, not whether each individual partnership has a former investor named as a plaintiff. When the representatives allege that a single prospectus was mailed to all the partnerships, and therefore the defendant's alleged misconduct is the single, common issue, then there is no strict requirement to have a named plaintiff with an interest in each individual partnership (*Daniels v. Centennial Group, Inc. (1993) 16 Cal. App. 4th 467, 472-473, 21 Cal. Rptr. 2d 1*).

[2] Comments

[a] Use of Form

This form may be submitted in support of plaintiff's contention that an action is properly maintained as a class action. This argument may be made in response to defendant's contention that class action treatment is not proper because a named plaintiff does not have an interest in each individual partnership that is alleged to have received false or misleading solicitation material.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of the law stated.

[3] Discussion of Authorities

[a] Community-of-Interest Requirement as Predominant

In ***Daniels v. Centennial Group, Inc.*** *(1993) 16 Cal. App. 4th 467, 21 Cal.Rptr. 2d 1* , six real estate limited partnerships and other private companies were consolidated into a single corporate entity. Plaintiff representatives were former limited partners. Plaintiffs sued the former general partners and the new corporate entity on behalf of themselves and approximately 28,000 partnership investors for money damages or rescission of the consolidation. Plaintiffs alleged that the former general partners fraudulently induced approval of the consolidation by disseminating false and misleading solicitation materials, and issued to themselves a disproportionate share of stock in connection with the consolidation. The trial court denied plaintiffs' motions for class certification because (1) a possible conflict of interest was created when the representatives agreed to waive individual claims for rescission but those allegations remained in the complaint, and presumably applied to unnamed putative class members, and (2) none of the representatives had invested in one of the six partnerships. Plaintiffs appealed from the order denying class certification.

The appellate court ordered the certification to be granted, but also left the trial court the discretion to reexamine the propriety of certification, including the creation of subclasses or exclusion of certain class members if discovery warranted a reappraisal (*16 Cal. App. 4th 467, 474)* . In discussing the trial court's second ground for denial of certification, the appellate court referred to the well-known rule as state in *La Sala v. American Sav. & Loan Assn. (1971) 5 Cal. 3d 864, 879, 97 Cal. Rptr. 849, 489 P.2d 1113* (discussed in *§ 41.46[3][a]*), that a plaintiff seeking to maintain a class action must be a member of the class he or she claims to represent. But the requirement that the representative be a member of the class derives from the principle that joinder of plaintiffs in a class action should consist of those sharing a well-defined interest in the questions of law and factinvolved. Thus, it is the community of interest that defines the class, not whether each individual partnership has a former investor as a named plaintiff (*16 Cal. App. 4th 467, 472-473)* . The focus should be on the typicality rather than the number of partnerships. The representatives alleged that a single prospectus was mailed to all six partnerships, and therefore defendants' alleged misconduct was the single, pivotal, and common issue. There was a sufficient community of interest to define the class, and thus there was not strict requirement to have a named plaintiff with an interest in each individual partnership (*16 Cal. App. 4th 467, 473)* .

For discussion regarding whether a conflict of interest was created by waiver of the rescission claims, see *§ 41.49[3][d]*.

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4-41 California Points & Authorities § 41.48

§ 41.48 Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Community of Interest Among Class Members--Damages With Respect to Real Property May Be Determined on Class Basis When Calculation Possible According to Standard Formula

[1] FORM Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Community of Interest Among Class Members--Damages With Respect to Real Property May Be Determined on Class Basis When Calculation Possible According to Standard Formula

[*The following may be combined with a general form of memorandum of points and authorities in support of a motion to certify an action as a class action (see, e.g., § 41.30). The following may also be combined with a general form of memorandum of points and authorities opposing a demurrer to a complaint on the ground that class action treatment is not appropriate (see, e.g., § 41.35).*]

THIS REAL PROPERTY DAMAGE ACTION IS A PROPER CLASS ACTION BECAUSE A SUFFICIENT COMMUNITY OF INTEREST IS PRESENT AND DAMAGES MAY BE DETERMINED ON A CLASS BASIS WHEN THE DIMINISHED VALUE OF EACH PARCEL CAN BE CALCULATED ACCORDING TO A STANDARD FORMULA.

Damages to Real Property Determined on Class Basis. The mere fact that a dispute involves damages to real property presents no obstacle to finding a sufficient community of interest and determining damages on a class basis when the diminished value of each parcel can be calculated according to a standard formula (*Occidental Land, Inc. v. Superior Court (1976) 18 Cal. 3d 355, 363-364, 134 Cal. Rptr. 388, 556 P.2d 750*).

[2] Comments

[a] Use of Form

This form may be submitted in support of plaintiff's contention that an action is properly maintained as a class action. This argument may be made in response to defendant's contention that class action treatment is not proper because damages with respect to real property may not be determined on a class basis due to factors unique with respect to each parcel. The argument may also be made in anticipation of such contention by defendant.

This form may be combined with points and authorities relating to the specific procedural context in which counsel wishes to invoke the contention. A plaintiff might make an argument supported by this memorandum under the following circumstances: (1) when supporting a motion to certify an action as a proper class action (*see, e.g., § 41.30*); (2) when opposing a motion by the defendant to declare an action inappropriate as a class action; (3) when opposing a motion by the defendant to decertify the class (*see, e.g., § 41.33*); and (4) when opposing a demurrer to the complaint on the ground that class action treatment is not appropriate (*see, e.g., § 41.35*). This form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel should refer to facts showing that damages can be calculated based on a standard formula applicable to all class members' parcels of land. Counsel should also point out that the questions of liability and damage would not vary with respect to each parcel of land.

[b] Opposing Points and Authorities

The points and authorities *set out in § 41.53* may be used in an appropriate case to oppose a contention supported by this memorandum.

[3] Discussion of Authorities

[a] Damages to Real Property Determined on Class Basis

The facts and procedural background of ***Occidental Land, Inc. v. Superior Court*** *(1976) 18 Cal. 3d 355, 134 Cal. Rptr. 388, 556 P.2d 750* , are discussed in *§ 41.32[3][a]*. The Court in *Occidental* held that the trial court had not abused its discretion in refusing to decertify the action as a class action (*18 Cal. 3d 355, 364)* . The class of subdivision homeowners sought damages for the developer's allegedly fraudulent misrepresentation of the costs for maintaining the project. Relying on *San Jose v. Superior Court (1974) 12 Cal. 3d 447, 115 Cal. Rptr. 797, 525 P.2d 701* , (discussed in *§ 41.49[3][a]* and *§ 41.53[3][b]*), defendant contended that damages could not be established on a common basis because each parcel of land was unique and the diminution in value attributable to each class member's property would depend on specific factors unique to each parcel (*18 Cal. 3d 355, 363)* .

In upholding the class action in *Occidental*, the Supreme Court distinguished the decision in *San Jose.* The Court noted that in *San Jose*, the plaintiffs had sought damages for diminution in the market value of real property located in the flight pattern of an airport. The questions of liability and damages varied with respect to each parcel according to its location relative to flight paths, the topography of the land, and the physical condition of each structure (*18 Cal. 3d 355, 363)* .

The Court noted that in contrast to *San Jose*, the problems of liability and the calculation of the diminished value of each parcel in *Occidental* did not depend on such variables because plaintiffs had not alleged damage to the land itself. Thus, the uniqueness of each parcel presented no obstacle to class treatment (*18 Cal. 3d 355, 363)* . The Court stated that plaintiffs had alleged a standard claim of fraudulent misrepresentations, the terms of which were common to the class, and further, that damages could be calculated according to a standard formula based on the difference between the promised maintenance costs and the actual costs subsequently required (*18 Cal. 3d 355, 363-364, 134 Cal. Rptr. 388, 556 P.2d 750*). Therefore, the Court concluded, the mere fact that the dispute involved the cost of maintaining real property presented no obstacle to a determination of damages on a class basis (*18 Cal. 3d 355, 364)* .

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§ 41.49 Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Named Plaintiffs Adequately Represent Interests of Absent Class Members--Representation Adequate Unless Conflict of Interest or Overwhelming Disapproval Within Class

[1] FORM Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Named Plaintiffs Adequately Represent Interests of Absent Class Members--Representation Adequate Unless Conflict of Interest or Overwhelming Disapproval Within Class

[*The following may be combined with a general form of memorandum of points and authorities in support of a motion to certify an action as a class action (see, e.g., § 41.30). The following may also be combined with a general form of memorandum of points and authorities opposing a demurrer to a complaint on the ground that class action treatment is not appropriate (see, e.g., § 41.35).*]

REPRESENTATION OF THE CLASS BY THE NAMED PLAINTIFFS IN THIS ACTION IS ADEQUATE BECAUSE THERE IS NOCONFLICT OF INTEREST OR OVERWHELMING DISAPPROVAL OF THE LAWSUIT WITHIN THE CLASS THAT WOULD DEFEAT THE PURPOSE OF CLASS ADJUDICATION.

A. Named Plaintiff Must Adequately Represent Class. To maintain a class action, the representative plaintiff must adequately represent and protect the interests of other members of the class (*San Jose v. Superior Court (1974) 12 Cal. 3d 447, 463, 115 Cal. Rptr. 797, 525 P.2d 701* ; *Classen v. Weller (1983) 145 Cal. App. 3d 27, 46-47, 192 Cal. Rptr. 914*).

B. Factors in Determining Adequacy of Representation. Adequacy of representation depends on whether or not the plaintiff's attorney is qualified to conduct the proposed litigation and whether or not plaintiff's interests are antagonistic to the interests of the class (*McGhee v. Bank of America (1976) 60 Cal. App. 3d 442, 450, 131 Cal. Rptr. 482*).

C. Representation Adequate Unless Conflict or Overwhelming Disapproval. The named plaintiffs' representation is adequate unless the defendants establish either a conflict of interest or overwhelming disapproval of the lawsuit within the class which would defeat the purpose of class adjudication (*see Richmond v. Dart Industries, Inc. (1981) 29 Cal. 3d 462, 474-475, 174 Cal. Rptr. 515, 629 P.2d 23*).

[*Optional*] **D. Potential Conflict Does Not Warrant Denial of Certification.** A potential, but not irreconcilable, conflict between the representatives and the class does not warrant denial of class certification for a whole action. If a conflict does arise, the trial court can create subclasses or exclude any members with conflicting claims (*see Daniels v. Centennial Group, Inc. (1993) 16 Cal. App. 4th 467, 472, 21 Cal. Rptr. 2d 1*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the named plaintiffs' contention that they adequately represent the interests of absent class members because there is neither a conflict of interest nor overwhelming disapproval of the lawsuit within the class which would defeat the purpose of class adjudication. This argument may also be made in response to defendant's contention, or in anticipation of the contention, that plaintiffs' representation is inadequate.

This form may be combined with points and authorities relating to the specific procedural context in which counsel wishes to invoke the contention. A plaintiff might make an argument supported by this memorandum under the following circumstances: (1) when supporting a motion to certify an action as a proper class action (*see, e.g., § 41.30*); (2) when opposing a motion by the defendant to declare an action inappropriate as a class action; (3) when opposing a motion by the defendant to decertify the class (*see, e.g., § 41.33*); and (4) when opposing a demurrer to the complaint on the ground that class action treatment is not appropriate (*see, e.g., § 41.35*). This form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel should refer to facts showing his or her qualifications to conduct the litigation. Counsel should also point out that any antagonism against the lawsuit by potential class members is insignificant compared to support for the action. In addition, counsel should state facts showing that there is no conflict of interest between the representative plaintiffs and members of the class. Finally, if appropriate, counsel should show that the court can accommodate dissident class members by permitting them to intervene on the defendant's side of the action, or by establishing well-defined subclasses [*see Richmond v. Dart Industries, Inc. (1981) 29 Cal. 3d 462, 474, 174 Cal. Rptr. 515, 629 P.2d 23]* .

[b] Opposing Points and Authorities

The points and authorities *set out in § 41.58* may be used in an appropriate case to oppose a contention supported by this memorandum.

[3] Discussion of Authorities

[a] Named Plaintiff Must Adequately Represent Class

San Jose v. Superior Court *(1974) 12 Cal. 3d 447, 115 Cal. Rptr. 797, 525 P.2d 701* , involved an action for nuisance and inverse condemnation on behalf of all real property owners situated in the flight pattern of San Jose Municipal Airport. Following discovery, defendant moved the trial court for an order declaring the action inappropriate as a class action. After affidavits were filed and a hearing held, the court found the action appropriate and ordered notification of class members. Defendant then filed for a writ of mandate, contending that the court had no jurisdiction to certify the class on a motion to declare the action inappropriate as a class action. Defendant also contended that the plaintiffs did not adequately represent the class and had failed to show a sufficient community of interest among the purported class members. The Supreme Court ruled that the trial courthad jurisdiction to certify the class but had abused its discretion in doing so because plaintiff had failed to prove the necessary requirements. The Court also held that plaintiffs inadequately represented a class of landowners seeking damages for nuisance and inverse condemnation

resulting from airport flight patterns. The representation was inadequate, the Court reasoned, because the named plaintiffs had failed to raise claims reasonably expected of the class members and thus, had pursued a course which would deprive class members of many elements of damage (*12 Cal. 3d 447, 464)* .

Relying on *La Sala v. American Sav. & Loan Ass'n (1971) 5 Cal. 3d 864, 871-872, 97 Cal. Rptr. 849, 489 P.2d 1113* (discussed in *§ 41.46[3][a]*), the Court stated that to maintain a class action, the representative plaintiff must adequately represent and protect the interests of other members of the class (*12 Cal. 3d 447, 463)* . The Court noted that the representative party bore a fiduciary duty to protect the interests of the absent class members. To fulfill this duty, the Court concluded, the representative plaintiff must raise those claims reasonably expected to be raised by the members of the class (*12 Cal. 3d 447, 464)* .

In ***Classen v. Weller*** *(1983) 145 Cal. App. 3d 27, 192 Cal. Rptr. 914* , a real estate broker brought an action to recover a commission from a home builder to whom he had sold a lot in an exclusive development. Defendant cross complained on behalf of himself and all other builders who had purchased property in the development. The class action was brought for alleged antitrust violations pertaining to the requirement that all builders who purchased lots in the development were required as a condition of the purchase to use the services of the broker on the sale of the houses constructed. The trial court granted the broker's motion for summary judgment, and defendant appealed from the judgment.

The court of appeal reversed. Among other issues, the appellate court reviewed the propriety of the builder's representation of the purported class and found it proper. In an antitrust action, the basic considerations are the illegality of the alleged actions and their impact on plaintiffs. The court held that the builder had stated claims of illegality and impact that could be proved predominantly with facts applicable to the class as a whole and had met the requirements of showing predominant, common questions of law or fact, claims typical of the class, and adequate representation of the class (*145 Cal. App. 3d 27, 46-47)* .

[b] Factors in Determining Adequacy of Representation

McGhee v. Bank of America *(1976) 60 Cal. App. 3d 442, 131 Cal. Rptr. 482* , involved several consolidated class actions against lending institutions by holders of deeds of trust. Plaintiffs sought payment of interest on funds set aside by defendants for payment of taxes and insurance onplaintiffs' residences. In two of the actions, the trial court granted defendants' motions to vacate prior certification of the classes. In the remaining action, the trial court denied plaintiffs' motion to certify the class. Plaintiffs then filed an appeal.

The court of appeal reversed the orders vacating and denying certification of the classes, holding that there was no showing that the plaintiffs would not adequately and fairly represent the interests of the class (*60 Cal. App. 3d 442, 451)* . The court noted that adequacy of representation depends on whether or not the plaintiffs' attorney is qualified to conduct the proposed litigation and whether or not the plaintiffs' interests are antagonistic to the interests of the class. The court found that neither of these factors applied to prevent plaintiffs from being adequate representatives (*60 Cal. App. 3d 442, 450)* .

In upholding the adequacy of plaintiffs' representation, the court rejected several arguments by the defendants. First, the court stated that alleged financial inability to represent the class, due to insufficient funds for notification costs, would not necessarily defeat the action because the trial court has discretionary power to set the proper form of notice. There was no showing that an effective requirement of notice, with which plaintiffs could comply, could not be devised (*60 Cal. App. 3d 442, 450-451)* .

Second, the court rejected two arguments of potential conflicts of interest between the named plaintiffs and their class. The court noted that dual representation by plaintiffs' attorneys, the concept that the attorneys become the true representatives of the class because of the named plaintiffs' inexperience, lack of knowledge, and lack of financial

resources, has been implicitly sanctioned in California subject to the court's authority to prevent overreaching (*60 Cal. App. 3d 442, 451)* . Finally, the court dismissed defendants' argument that plaintiffs' financial difficulties could force them to settle the action on terms unfavorable to other class members. The court noted that a class action may not be dismissed without court approval, and thus the trial court could protect the other class members' interests should the named plaintiffs request dismissal. Thus, there was no showing that plaintiffs would not adequately and fairly represent the interests of the class (*60 Cal. App. 3d 442, 451)* .

[c] Representation Adequate Unless Conflict or Overwhelming Disapproval

The facts and procedural background of ***Richmond v. Dart Industries, Inc.*** *(1981) 29 Cal. 3d 462, 174 Cal. Rptr. 515, 629 P.2d 23* , are discussed in *§ 41.36[3][b]*. In *Richmond*, the Supreme Court held that because defendants had not established in the trial court that there was either a conflict of interest or overwhelming disapproval of the lawsuit within the class which would defeat the purpose of class adjudication, the trial courthad erred when it refused certification (*29 Cal. 3d 462, 474-475)* . The Court noted that the results of a survey presented by defendants showed that no more than six percent of the potential class members were antagonistic to the suit, while a sizable number of persons had chosen to join the action as named plaintiffs (*29 Cal. 3d 462, 475)* .

The Supreme Court relied on two prior appellate court decisions to support its conclusion. The Court noted that in *Fanucchi v. Coberly-West Co. (1957) 151 Cal. App. 2d 72, 311 P.2d 33* , the court of appeal held that a class action suit could not be barred even though one third of the potential class members had signed affidavits stating that they did not wish to participate (*29 Cal. 3d 462, 471)* . In addition, the Court cited *Hebbard v. Colgrove (1972) 28 Cal. App. 3d 1017, 105 Cal. Rptr. 172* , in which the court of appeal held that several antagonistic class members out of a total of 50 could not defeat class certification (*29 Cal. 3d 462, 472)* . The *Richmond* Court noted that in both of these cases, the court of appeal stated that the antagonistic members' desire to forego any share of the recovery could not defeat an action on behalf of the remaining class members (*29 Cal. 3d 462, 471-472)* .

Relying on procedural provisions of *Fed. R. Civ. P., Rule 23(c)(2)*, the Court in *Richmond* noted that when a class contains various viewpoints, the court may ensure that these viewpoints are represented by allowing persons to join as interveners or as additional representatives of subclasses within the full class (*29 Cal. 3d 462, 473-474)* . Additional protection is afforded to absent class members, the Court stated, by the provisions of *Fed. R. Civ. P., Rule 23(c)(2)*, that allow a class member to opt out of the class if he or she does not wish to be bound by the result of the suit. The Court reasoned that a rule holding that any antagonism is sufficient to defeat class treatment would bar a large number of class suits and encourage defendants to seek out or to improperly sow dissension within a class. The Court repeated that divergent viewpoints can be brought into the litigation when the trial court allows intervention and/or well-defined subclasses within the class (*29 Cal. 3d 462, 474)* . Therefore, the Court concluded, when plaintiffs meet the legal tests set forth for class certification, a motion for certification should not be denied by a trial court because some members of the potential class are antagonistic to the lawsuit (*29 Cal. 3d 462, 479)* .

Counsel should note that in some decisions, including *Richmond*, California appellate courts have discussed the necessity of adequate representation as being part of the community of interest requirement (*29 Cal. 3d 462, 470)* . These decisions rely on the Consumers Legal Remedies Act [*Civ. Code § 1750 et seq.*], which states that the community of interest requirement embodies three factors [*Civ. Code § 1781(b)(2)-(4)*]:

(1) Predominant common question of law or fact;

(2) Class representatives with claims or defenses typical of the class; and

(3) Class representatives who can adequately represent the class.

In some cases, however, the adequacy of representation has been discussed independently of the community of interest

requirement [*see, e.g.,* *San Jose v. Superior Court (1974) 12 Cal. 3d 447, 464, 115 Cal. Rptr. 797, 525 P.2d 701* (discussed in *§ 41.57[3][b]*)]. Because the authorities discussing this requirement are not uniform, counsel should discuss adequacy of representation as an independent requirement for maintaining a class action.

[d] Potential Conflict Does Not Warrant Denial of Certification

The facts and procedural background of ***Daniels v. Centennial Group, Inc.*** *(1993) 16 Cal. App. 4th 467, 21 Cal. Rptr. 2d 1* , are discussed in *§ 41.47[3][a]*. The appellate court observed that at the time of the last motion for certification, many, if not most, putative class members could no longer seek rescission because they had sold their stock in the new corporation. Money damages were more likely to be favored because the new corporation was doing well. As a result, the putative class representatives agreed to waive any rescission claims. Nonetheless, the trial court was concerned that the representatives had not amended their complaint to delete the rescission claim. The appellate court described the denial of certification for the entire action on that basis to be "much like using a nuclear weapon to kill a fly." If the presence of the rescission claim created a conflict between the class representatives and the class (of which the reviewing court was not convinced), the remedy was to certify a damages class, not dismiss the whole action. A potential conflict existed, not an irreconcilable one. Defendants failed to present any evidence contradicting the assessment that the rescission claim was likely to go away on its own because damages was a more lucrative remedy. Even if a conflict did arise, the trial court could create subclasses or exclude any members seeking rescission (*16 Cal. App. 4th 467, 471-472)* .

[4] Additional Authorities

[a] Named Plaintiff Must Adequately Represent Class

In *La Sala v. American Sav. & Loan Ass'n (1971) 5 Cal. 3d 864, 97 Cal. Rptr. 849, 489 P.2d 1113* (discussed in *§ 41.46[3][a]*), a class action seeking to declare an acceleration clause in defendant's form of trust deed invalid as a restraint on alienation, the Supreme Court reversed the trial court's judgment of dismissal in favor of defendant. The Court held that a waiver of acceleration as to the named plaintiffs did not mechanically render them unfit per se to continue to represent the class. A plaintiff whosues on behalf of a class assumes a fiduciary obligation to the class members, surrendering any right to compromise the group action in return for an individual gain (*5 Cal. 3d 864, 871)* . The issue of whether or not the named plaintiffs will fairly and adequately protect the class rests in the discretion of the trial court, which may consider the fact that the named plaintiffs have already obtained their individual benefits from the action (*5 Cal. 3d 864, 871-872)* . The Court concluded that if the trial court finds that named plaintiffs can no longer suitably represent the class, the plaintiffs should be allowed to amend their complaint to redefine the class or to add new individual plaintiffs, or both, in order to establish a suitable representative (*5 Cal. 3d 864, 872)* .

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4-41 California Points & Authorities § 41.50

§ 41.50 Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Potential Recovery Larger Than Nominal Sum Does Not Render Class Action Inappropriate

[1] FORM Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Potential Recovery Larger Than Nominal Sum Does Not Render Class Action Inappropriate

[*The following may be combined with a general form of memorandum of points and authorities in support of a motion to certify an action as a class action (see, e.g., § 41.30). The following may also be combined with a general form of memorandum of points and authorities opposing a demurrer to a complaint on the ground that class action treatment is not appropriate (see, e.g., § 41.35).*]

THIS ACTION MAY BE PROPERLY MAINTAINED AS A CLASS ACTION BECAUSE THE POSSIBILITY OF A POTENTIAL RECOVERY FOR EACH CLASS MEMBER LARGER THAN A NOMINAL SUM DOES NOT MILITATE AGAINST THE MAINTENANCE OF A CLASS ACTION.

Potential Recovery Larger Than Nominal Sum. The possibility of a potential recovery for each class member larger than a nominal sum does not militate against the maintenance of a class action (*Collins v. Rocha (1972) 7 Cal. 3d 232, 238, 102 Cal. Rptr. 1, 497 P.2d 225* ; *Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 816, 94 Cal. Rptr. 796, 484 P.2d 964*).

[2] Comments

[a] Use of Form

This form may be submitted in support of plaintiff's contention that an action is properly maintained as a classaction. This argument may be made in response to defendant's contention that class action treatment is not proper because the potential recovery for each class member is an amount larger than a nominal sum. The argument may also be made in anticipation of such a contention by defendant.

This form may be combined with points and authorities relating to the specific procedural context in which counsel wishes to invoke the contention. A plaintiff might make an argument supported by this memorandum under the

following circumstances: (1) when supporting a motion to certify an action as a proper class action (*see, e.g., § 41.30*); (2) when opposing a motion by the defendant to declare an action inappropriate as a class action; (3) when opposing a motion by the defendant to decertify the class (*see, e.g., § 41.33*); and (4) when opposing a demurrer to the complaint on the ground that class action treatment is not appropriate (*see, e.g., § 41.35*). This form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Potential Recovery Larger Than Nominal Sum

Collins v. Rocha *(1972) 7 Cal. 3d 232, 102 Cal. Rptr. 1, 497 P.2d 225* , was an action on behalf of a group of farm laborers for compensatory and punitive damages based on fraud and breach of an oral employment contract. Defendant demurred on the ground that the causes of action did not constitute a proper class action. The trial court sustained the demurrer on the ground that there was no ascertainable class with the same community of interest. The trial court reasoned that each member of the alleged class would be required to show that he or she relied on the representations made and that separate bases might exist for the discharge of each class member from employment. The court transferred the action to municipal court, apparently because the damages sought were below the amount required for the jurisdiction of the superior court if the action could not proceed as a class suit. Plaintiffs then filed their appeal.

The Supreme Court reversed the trial court's order. Relying on *Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 814, 94 Cal. Rptr. 796, 484 P.2d 964* (discussed *below*), the Court held that if representations were made at one time and place to all class members, and if they thereon simultaneously accepted employment, a persuasive inference that each of them relied on the representations arises without separate proof of reliance by each plaintiff (*7 Cal. 3d 232, 237)* . The Court rejected defendant's argument that a class action was inappropriate because each class member's alleged damages were sufficient to make individual suits practical (*7 Cal.3d 232, 237-238)* . Again relying on *Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 816, 94 Cal. Rptr. 796, 484 P.2d 964* (discussed *below*), the Court noted that while the impracticability of bringing an individual action for comparatively small potential recovery was a consideration in favor of permitting a class action, the converse was not necessarily controlling. In other words, the Court stated, the possibility of a potential recovery for each class member of an amount larger than a nominal sum does not militate against the maintenance of a class action. Thus, the amount requested by plaintiffs did not per se render a class action inappropriate (*7 Cal. 3d 232, 238)* .

The facts and procedural background of ***Vasquez v. Superior Court*** *(1971) 4 Cal. 3d 800, 94 Cal. Rptr. 796, 484 P.2d 964* , are discussed in *§ 41.34[3][c]*. In *Vasquez*, the Supreme Court held that the trial court had erred in sustaining demurrers to the complaint for fraud on the ground that it did not allege a proper class action (*4 Cal. 3d 800, 815)* . The Court rejected defendant's argument that a class action was inappropriate because each plaintiff's claim was sufficiently large to justify separate actions. The Court noted that while the impracticability of bringing an individual action for comparatively small potential recovery is a consideration in favor of allowing a class action, it cannot be said that a potential recovery for each class member larger than a nominal sum necessarily militates against maintenance of such a suit. The Court cited its decision in *Jones v. H. F. Ahmanson & Co. (1969) 1 Cal. 3d 93, 121, 81 Cal. Rptr. 592, 460 P.2d 464* , as an example of its approval of a class action in which the relief requested was substantially more than the amount sought in *Vasquez* (*4 Cal. 3d 800, 816)* .

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4-41 California Points & Authorities § 41.51

§ 41.51 Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Class Treated as Claimant for Purposes of Satisfying Claims Statutes in Actions Against Government Entities

[1] FORM Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Class Treated as Claimant for Purposes of Satisfying Claims Statutes in Actions Against Government Entities

[*The following may be combined with a general form of memorandum of points and authorities in support of a motion to certify an action as a class action (see, e.g., § 41.30). The following may also be combined with a general form of memorandum of points and authorities opposing a demurrer to a complaint on the ground that class action treatment is not appropriate (see, e.g., § 41.35).*]

THIS ACTION IS PROPERLY MAINTAINED AS A CLASS ACTION BECAUSE, FOR PURPOSES OF SATISFYING CLAIMS STATUTES IN ACTIONS AGAINST GOVERNMENT ENTITIES, EACH MEMBEROF THE PURPORTED CLASS NEED NOT FILE AN INDIVIDUAL CLAIM AS LONG AS THE NAMED PLAINTIFFS HAVE SUBSTANTIALLY COMPLIED WITH THE CLAIMS STATUTES.

Satisfying Claims Statutes as a Class. For purposes of satisfying claims statutes requirements in actions against government entities, the term "claimant" is equated with the class, and therefore each member of the purported class need not file an individual claim (*San Jose v. Superior Court (1974) 12 Cal. 3d 447, 457, 115 Cal. Rptr. 797, 525 P.2d 701*).

[2] Comments

[a] Use of Form

This form may be submitted in support of plaintiff's contention that an action is properly maintained as a class action. This argument may be made in response to defendant's contention that class action treatment is not proper because class members have not filed claims with the appropriate government entity under applicable claims statutes. The argument may also be made in anticipation of such a contention by defendant.

This form may be combined, where appropriate, with points and authorities relating to the specific procedural context in

which counsel wishes to invoke the contention. A plaintiff might make an argument supported by this memorandum under the following circumstances: (1) when supporting a motion to certify an action as a proper class action (*see, e.g., § 41.30*); (2) when opposing a motion by the defendant to declare an action inappropriate as a class action; (3) when opposing a motion by the defendant to decertify the class (*see, e.g., § 41.33*); and (4) when opposing a demurrer to the complaint on the ground that class action treatment is not appropriate (*see, e.g., § 41.35*). This form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel should refer to facts showing that the representative plaintiffs filed claims under applicable claims statutes which contain the name, address, and other specified information concerning the representative plaintiffs, as well as sufficient information to identify and make ascertainable the class itself. Counsel should also refer to facts showing that plaintiffs' claims meet the test for substantial compliance with the applicable claims statutes [*see San Jose v. Superior Court (1974) 12 Cal. 3d 447, 456-457, 115 Cal. Rptr. 797, 525 P.2d 701]* .

[3] Discussion of Authorities

[a] Satisfying Claims Statutes as a Class

The facts and procedural background of ***San Jose v. Superior Court*** *(1974) 12 Cal. 3d 447, 115 Cal. Rptr. 797, 525 P.2d 701* , are discussed in *§ 41.49[3][a]*. In *San Jose*, a class action by property owners against the city for nuisance and inverse condemnation resulting from airport flight patterns, the Supreme Court held that a sufficient community of interest had not been shown because the action depended on facts peculiar to each prospective plaintiff (*12 Cal. 3d 447, 460-461)* . The Court rejected defendant's contention that a class claim could never fulfill the requirements of claims statutes, because the claims statutes prohibit maintenance of class actions against government entities for inverse condemnation and nuisance (*12 Cal. 3d 447, 457)* . The Court stated that in actions for damages against local public entities, the claims statutes (in this case, *Gov. Code § 910*) require timely filing of a proper claim as a condition precedent to the maintenance of the action (*12 Cal. 3d 447, 454)* . The Court noted that in determining the quantity of information required to satisfy the statutes, the trial court must inquire whether or not there is some compliance with all of the statutory requirements, and if so, whether or not the compliance is sufficient to constitute substantial compliance (*12 Cal. 3d 447, 456-457)* .

The Court concluded that the term "claimant" in the applicable claims statute (*Gov. Code § 910*) must be equated with the class itself, and the Court rejected the suggested necessity for filing an individual claim for each member of the purported class (*12 Cal. 3d 447, 457)* . The Court reasoned that to require such detailed information in advance of the complaint would severely restrict the maintenance of appropriate class actions contrary to recognized policy favoring them and that the claims statutes were not intended to thwart class relief (*12 Cal. 3d 447, 457)* .

Thus, to satisfy the claims statutes, the Court noted, the class claim must provide the name, address, and other specified information concerning the representative plaintiff, as well as sufficient information to identify and make ascertainable the class itself (*12 Cal. 3d 447, 457)* . The Court refused, however, to decide whether the claim in *San Jose* was sufficient to meet the tests of compliance, noting that extraordinary relief is not available to remedy defective compliance with claims statutes (*12 Cal. 3d 447, 458)* .

[4] Additional Authorities

[a] Satisfying Claims Statutes as a Class

In *Schoderbek v. Carlson (1980) 113 Cal. App. 3d 1029, 170 Cal. Rptr. 400* , a class action challenging property tax assessments, the court heldthat plaintiffs' failure to file a claim for refund with the appropriate administrative body under *Rev. & Tax. Code §§ 5096* and *5097* barred their court action (*113 Cal. App. 3d 1029, 1037)* . Relying on *San Jose v. Superior Court (1974) 12 Cal. 3d 447, 457, 115 Cal. Rptr. 797, 525 P.2d 701* (*see § 41.71[3]*), the court noted

that plaintiffs could have filed a claim for a refund with the county on behalf of themselves and on behalf of the members of the class they represent (*113 Cal. App. 3d 1029, 1033)* . Citing prior appellate court authority approving application of the *San Jose* tests in cases seeking refunds with respect to income and sales and use taxes, the court concluded that there was no reason not to apply the *San Jose* substantial compliance test to class claims for refunds of ad valorem property taxes (*113 Cal. App. 3d 1029, 1036)* .

In *Lattin v. Franchise Tax Board (1977) 75 Cal. App. 3d 377, 142 Cal. Rptr. 130* , a class action for recovery of personal income tax paid under protest, the court of appeal affirmed the trial court's dismissal of class action allegations (*75 Cal. App. 3d 377, 383)* . The court noted that as a mandatory condition precedent to the commencement of a class action against the state, there must be the filing of an appropriate claim by, or on behalf of, the class (*75 Cal. App. 3d 377, 381)* . The representative plaintiffs had filed a claim for refund on behalf of themselves, but no claim was made on behalf of the class which they sought to represent under former Rev. & Tax. Code § 19055 [*see now Rev. & Tax. Code § 19322*] (*75 Cal. App. 3d 377, 380)* .

In *Santa Barbara Optical Co. v. State Bd. of Equalization (1975) 47 Cal. App. 3d 244, 120 Cal. Rptr. 609* , a class action for refund of sales tax, the court of appeal reversed the trial court's dismissal of the action (*47 Cal. App. 3d 244, 251, 120 Cal. Rptr. 609*). Relying on *San Jose v. Superior Court (1974) 12 Cal. 3d 447, 457, 115 Cal. Rptr. 797, 525 P.2d 701* (discussed in *§ 41.51[3][a]*), the court noted that plaintiffs had filed a claim for refund on behalf of themselves and the absent class members (*47 Cal. App. 3d 244, 246, 247, 120 Cal. Rptr. 609*). The court rejected defendant's argument that a claim that did not contain the claimant's correct name, account, and specific amount of refund requested failed to meet requirements for a proper claim under *Rev. & Tax. Code §§ 6902* and *6905* (*47 Cal. App. 3d 244, 247-248, 120 Cal. Rptr. 609*).

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§ 41.52 Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Merit of Underlying Claim Generally Not Factor in Certification Proceeding

[1] FORM Supporting Contention That Class Action [Code Civ. Proc. § 382] Proper--Merit of Underlying Claim Generally Not Factor in Certification Proceeding

[*This form may be combined with a general form of memorandum in support of a motion to certify an action as a class action (see, e.g., § 41.30). This form may alsobe combined with a general form of memorandum opposing a demurrer to a complaint on the ground that class action treatment is not appropriate (see, e.g., § 41.35).*]

A CHALLENGE BASED ON THE MERITS OF THE UNDERLYING CLAIM IS GENERALLY NOT A PROPER CONSIDERATION WHEN DETERMINING WHETHER THE CLASS IS CERTIFIABLE.

A. Merit Assessment Generally Not Appropriate in Certification Proceeding. Certification of a class should not be conditioned on a showing that the class claims for relief are likely to prevail. The trial court may deviate from this rule only in exceptional cases when there is no other reasonable pretrial means to challenge the merits, after giving the parties notice and an opportunity to brief the merits (*Linder v. Thrifty Oil Co. (2000) 23 Cal. 4th 429, 443, 97 Cal. Rptr. 2d 179, 2 P.3d 27*).

B. Inability to Reach Merits Does Not Prevent Class Certification. The general rule against evaluating the merits of the plaintiff's claims in deciding whether class treatment is appropriate does not mean that the court must deny certification because it cannot reach the merits. Rather, the court must evaluate whether the theory of recovery advanced by the plaintiff is likely to prove amenable to class treatment (*Ghazaryan v. Diva Limousine, Ltd. (2008) 169 Cal. App. 4th 1524, 1531, 87 Cal. Rptr. 3d 518*).

[2] Comments

[a] Use of Form

This form may be submitted in support of plaintiff's contention that an action is properly maintained as a class action. The argument in this form may be made in response to a defendant's contention that class action treatment is not proper

because the claim to be asserted by the proposed class lacks merit.

This form may be combined with points and authorities relating to the specific procedural context in which counsel wishes to invoke the contention. For example, a plaintiff might argue the contention in reply to a defendant's opposition to a motion to certify a class [*see, e.g., § 41.30*], or in opposition to a defendant's motion to declare the claim inappropriate as a class action, or to decertify the class [*see, e.g., § 41.33*]. This form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Merit Assessment Generally Not Appropriate in Certification Proceeding

In ***Linder v. Thrifty Oil Co.*** *(2000) 23 Cal. 4th 429, 97 Cal. Rptr. 2d 179, 2 P.3d 27* , the plaintiff filed an action on behalf of herself and all others similarly situated, alleging that the defendant oil company violated provisions of the Song-Beverly Credit Card Act of 1971 (*Civ. Code § 1747* et seq.), by charging cash-paying customers an illegal surcharge (the "surcharge" class action) and by using forms with a preprinted space for cardholder's telephone numbers in violation of the law (the "penalty" class action). Following a proceeding to certify the class, the trial court issued an order denying certification. The court's minute order addressed only the issue of the "surcharge" class, concluding that plaintiff could not establish a class community interest as a matter of law. On appeal by plaintiff from the order of denial, the court of appeal affirmed the trial court's order, holding in addition that certification of the "penalty" class was properly denied because the aggregate amount of penalties were either too small to justify the burdens of class treatment or too onerous in relation to the alleged wrongdoing. The Supreme Court granted plaintiff's petition for review.

The Supreme Court reversed the judgment of the court of appeal. With respect to certification of the "surcharge" class, the Court initially noted that the trial court had denied certification based on its rejection of the merits of plaintiff's claim, which hinged on giving a particular construction to the applicable statute. The court of appeal, in turn, affirmed, finding that its own interpretation of the statute suggested that plaintiff could not prevail on the surcharge claim as a matter of law (*23 Cal. 4th 429, 436-437)* .

The Court held that a denial of certification may not stand when it is based upon improper criteria and incorrect legal assumptions (*23 Cal. 4th 429, 448)* . The Court viewed the question of certification as essentially a procedural one that does not ask whether an action is legally or factually meritorious (*23 Cal. 4th 429, 439-440)* . The defendant argued that a court's decision whether to certify a class should be informed by an evaluation of the merits of the proposed class claims. The Court agreed that the important interests of fairness and efficiency sometimes may be served better when class causes of action are screened for legal sufficiency before the matter of certification is decided, but nothing prevents a court from weeding out legally meritless suits prior to certification by, for example, a defendant's demurrer or pretrial motion (*23 Cal. 4th 429, 440)* . Were it to condone merit-based challenges as part and parcel of the certification process, stated the Court, similar procedural protections would be necessary to ensure that an otherwise certifiable class is not unfairly denied the opportunity to proceed on legitimate claims. Substantial discovery also may be required if plaintiffs are expected to make meaningful presentations on the merits. All of that is likely to render the certification process more protracted and cumbersome (*23 Cal. 4th 429, 440-441)* .

The Court concluded that certification should not be conditioned on a showing that class claims for relief are likely to prevail. Nonetheless, in keeping with the principle that trial courts should be afforded flexibility in dealing with class actions, this does not foreclose the possibility that, in an exceptional case, when the defense has no other reasonable pretrial means to challenge the merits of a claim to be asserted by a proposed class, the trial court may, after giving the parties notice and an opportunity to brief the merits question, refuse class certification because the claim lacks merit as a

matter of law. Furthermore, nothing prevents the trial court from considering the legal sufficiency of claims during a certification proceeding when both sides have jointly requested that it do so (*23 Cal. 4th 429, 443)* .

The Court stated that nothing in its opinion was intended to preclude a court from scrutinizing a proposed class cause of action to determine whether, assuming its merit, it is suitable for resolution on a class-wide basis. Indeed, issues affecting the merits of a case may be enmeshed with class action requirements, such as whether substantially similar questions are common to the class and predominate over individual questions or whether the claims or defenses of the representative plaintiffs are typical of class claims or defenses. Moreover, although the Court recognized that defendants may mount precertification challenges on the merits, the Court did not suggest they necessarily are entitled to a merit determination before a ruling on certification. As before, trial courts retain broad discretion to conduct the proceedings in an orderly and just manner (*23 Cal. 4th 429, 443)* .

In this case, reversal of the order denying certification was necessary because it was based on improper criteria. The lower courts improperly considered and prejudged the legal merit of the "surcharge" claim (*23 Cal. 4th 429, 448)* .

The Court went on to consider two additional issues, and with respect to these held that the trial court and court of appeal had improperly evaluated the benefits and burdens of the class action under incorrect legal standards (*23 Cal. 4th 429, 444-446)* , and the court of appeal had engaged in a flawed analysis of the applicable statute in determining that the "penalty" class should not be certified (*23 Cal. 4th 429, 446-448)* .

Although these errors required reversal of the court of appeal's judgment, the Court emphasized that this did not necessarily mean that certification was in fact justified in this particular case. The trial court, to which the cause was remanded, might conclude certification was proper after eliminating improper criteria, or it might find valid reasons for denying certification (*23 Cal. 4th 429, 448-449)* .

[b] Inability to Reach Merits Does Not Prevent Class Certification

Ghazaryan v. Diva Limousine, Ltd. *(2008) 169 Cal. App. 4th 1524, 87 Cal. Rptr. 3d 518* , was a compensation action brought on behalf of limousine drivers against their employer. In particular, the complaint alleged that the defendant's practice of not paying its drivers for time spent on call between assignments during the workday constituted a violation of California's wage and hour laws. The trial court denied the plaintiff's motion for class certification, finding that there were too many individualized issues.

The court of appeal reversed, holding that the trial court had applied improper criteria in deciding the motion for class certification. For example, the trial court had suggested that, if the plaintiff's claims were valid, class treatment of those claims would be appropriate. On the question of numerosity, the trial court stated that "[i]f all the employees were on-the-clock [during their on-call time] and not paid, then the proposed class would be ascertainable and then probably numerous. However, here it would be necessary to first determine an ultimate issue in the case, which this Court cannot do to determine the class." Similarly, as to ascertainability the trial court asserted that it "first must ... determine if [the defendant's] practices are improper and, if so, which drivers fit into an appropriate class" (*169 Cal. App. 4th 1524, 1530-1531)* .

The court of appeal acknowledged that the trial court was correct that the certification question is essentially a procedural one that does not ask whether an action is legally or factually meritorious. But the trial court fundamentally misconceived the import of the rule against evaluating the merits of the plaintiff's claims in deciding whether class treatment is appropriate. Rather than denying certification because it cannot reach the merits, the trial court should have (1) focused on the kind of questions--common or individual--that were likely to arise in the case, and (2) evaluated whether the theory of recovery advanced by the plaintiff was, as an analytical matter, likely to prove amenable to class treatment (*169 Cal. App. 4th 1524, 1531)* .

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§ 41.52A Opposing Contention That Class Action [Code Civ. Proc. § 382] Proper--In Appropriate Case, Merit of Underlying Claim May be Considered at Certification Stage

[1] FORM Opposing Contention That Class Action [Code Civ. Proc. § 382] Proper--In Appropriate Case, Merit of Underlying Claim May be Considered at Certification Stage

[*This form may be submitted in opposition to a motion to certify a class action. It may also be combined with a general form of memorandum supporting defendant's demurrer on the ground that the complaintfails to state a cause of action (see, e.g., § 41.34).*]

CLASS CERTIFICATION IS INAPPROPRIATE IN THIS ACTION BECAUSE THE COMPLAINT DOES NOT PRESENT A VIABLE CAUSE OF ACTION ON BEHALF OF THE PROPOSED CLASS.

Under Appropriate Circumstances, Court May Deny Class Certification Based on Finding That Class Claims Lack Merit. Although class certification generally should not be conditioned on a showing that the class claims for relief are likely to prevail, in appropriate circumstances the court may consider the legal sufficiency of claims when ruling on certification. For example, the court may consider the merits if requested to do so by both sides, if the issue raised is one of continuing importance, or if the defense has no other reasonable pretrial means to challenge the merits of the class claims (*Linder v. Thrifty Oil Co. (2000) 23 Cal. 4th 429, 443, 97 Cal. Rptr. 2d 179, 2 P.3d 27* ; *Conley v. Pacific Gas & Electric Co. (2005) 131 Cal. App. 4th 260, 268, 31 Cal. Rptr. 3d 719*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a contention that class certification should be denied because the claims asserted on behalf of the proposed class lack merit.

This form may be combined, when appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to raise the contention. For example, a defendant might make an argument supported by the foregoing memorandum (1) in support of a motion for an order declaring an action inappropriate as a class action (*see,*

e.g., § 41.31); (2) in support of a motion to decertify the class (*see, e.g., § 41.32*); (3) in opposing a motion to certify an action as a proper class action; or (4) in support of a demurrer on the ground that class action treatment is not appropriate (*see, e.g., § 41.34*). In an appropriate case, this memorandum may be submitted in opposition to the contention supported by the points and authorities *set out in § 41.52*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law stated. Counsel should, for example, show that the plaintiff has also asked the court to address the merits, that the substantive issues raised by the complaint are of continuing importance, or that the defense has no other reasonable pretrial means to challenge the merits of the class claims [*Linder v. Thrifty Oil Co. (2000) 23 Cal. 4th 429, 443, 97 Cal. Rptr. 2d 179, 2 P.3d 27* ; *Conley v. Pacific Gas & Electric Co. (2005) 131 Cal. App. 4th 260, 268, 31 Cal. Rptr. 3d 719]* .

[3] Discussion of Authorities

[a] Under Appropriate Circumstances, Court May Deny Class Certification Based on Finding That Class Claims Lack Merit

In ***Linder v. Thrifty Oil Co.*** *(2000) 23 Cal. 4th 429, 97 Cal. Rptr. 2d 179, 2 P.3d 27* , the background of which is discussed in *§ 41.52[3][a]*, the Supreme Court held that class certification generally should not be conditioned on a showing that the class claims for relief are likely to prevail (*23 Cal. 4th 429, 443)* . However, the Court also observed that there is nothing to prevent a court from considering the legal sufficiency of claims when ruling on certification where both sides jointly request such action. In addition, the Supreme Court declined to "foreclose the possibility that, in the exceptional case where the defense has no other reasonable pretrial means to challenge the merits of a claim to be asserted by a proposed class, the trial court may, after giving the parties notice and an opportunity to brief the merits question, refuse class certification because the claim lacks merit as a matter of law" (*23 Cal. 4th 429, 443)* .

In ***Conley v. Pacific Gas & Electric Co.*** *(2005) 131 Cal. App. 4th 260, 268, 31 Cal. Rptr. 3d 719* , the plaintiffs sought to pursue claims against their employer for unpaid overtime compensation on behalf of several classes of employees. One of the proposed classes (the "salary-basis" class) consisted of employees classified by the defendant as exempt from overtime-pay requirements. As to this class, the plaintiffs claimed that the defendant's practice of making deductions from the employees' vacation-leave banks for partial-day absences constituted a reduction in compensation based on the quantity of work performed. The plaintiffs contended that this practice prevented the employees from qualifying as exempt employees under applicable statutes and regulations.

The trial court denied the plaintiffs' motion for class certification in its entirety. As to the salary-basis class, the trial court ruled that the case presented common factual and legal questions that were common to all members of the proposed class. However, the court denied certification, solely on the ground that the class members did not have a plausible cause of action. At the same time, the court denied the defendants' motion for summary adjudication, on the ground that such a motion can be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty (*see Code Civ. Proc. § 437c(f)*).

The court of appeal affirmed the denial of certification as to this class. The court of appeals acknowledged that in **Linder v. Thrifty Oil Co.** (*see above* and *§ 41.52[3][a]*), the California Supreme Court had held that class certification generally should not be conditioned on a showing that class claims for relief are likely to prevail. However, the **Linder** Court also observed that there is nothing to prevent a court from considering the legal sufficiency ofclaims when ruling on certification if both sides jointly request such action. In this case, the court of appeal found it appropriate to consider the merits both because the parties had requested that the court do so for their further guidance, and because the issue raised was one of continuing importance in wage and hour litigation in California (*131 Cal. App. 4th 260, 268)* .

In addition, the **Linder** Court had expressly declined to foreclose the possibility that, in an exceptional case in which

the defense has no other reasonable pretrial means to challenge the merits of a claim to be asserted by a proposed class, the trial court may, after giving the parties notice and an opportunity to brief the merits question, refuse class certification because the claim lacks merit as a matter of law. The court of appeal found that this case appeared to be an "exceptional case" of the type referred to in **Linder**. The defendant had attempted to use a summary adjudication motion to raise its defense to the proposed class's claim, but had been unable, for purely procedural reasons, to secure an adjudication of that issue before the class certification ruling. Also, as required by **Linder**, the trial court had permitted discovery and ample briefing on the merits of the issue prior to adjudicating it in connection with the class certification motion (*131 Cal. App. 4th 260, 268)* . Accordingly, the court of appeal concluded that in this case it was appropriate for the merits of the case to be considered in deciding the certification motion (*131 Cal. App. 4th 260, 269)* .

California Points & Authorities

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4-41 California Points & Authorities § 41.52B

§ 41.52B Opposing Contention That Class Action [Code Civ. Proc. § 382] Proper--Class Is Not Ascertainable

[1] FORM Opposing Contention That Class Action [Code Civ. Proc. § 382] Proper--Class Is Not Ascertainable

[*This form may be submitted in opposition to a motion to certify a class action. It may also be combined with a general form of memorandum supporting defendant's demurrer on the ground that class action treatment is not appropriate (see, e.g., § 41.34).*]

CLASS CERTIFICATION IS INAPPROPRIATE IN THIS ACTION BECAUSE THE PROPOSED CLASS IS NOT ASCERTAINABLE, SINCE THE CLASS DEFINITION IS BASED NOT ON OBJECTIVE CRITERIA, BUT RATHER ON THE ULTIMATE ISSUE OF LIABILITY.

Proposed Class Definition That Rests on Determination of Liability Is Not Objective. Class certification is not appropriate when the proposed class definition is not based on objective criteria, but instead requires a merits-based determination in order to establish whether a particular person is a member of the class. The members of such a class are not readily identifiable so as to permit appropriate notice to be given (*Sony Elecs. Inc. v. Superior Court (2006) 145 Cal. App. 4th 1086, 1094-1097, 52 Cal. Rptr. 3d 139*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a contention that class certification should be denied because the class is not ascertainable by objective factors that do not involve merits determinations for each potential class member.

This form may be combined, when appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to raise the contention. For example, a defendant might make an argument supported by the foregoing memorandum (1) in support of a motion for an order declaring an action inappropriate as a class action (*see, e.g., § 41.31*); (2) in support of a motion to decertify the class (*see, e.g., § 41.32*); (3) in opposing a motion to certify an action as a proper class action; or (4) in support of a demurrer on the ground that class action treatment is not appropriate (*see, e.g., § 41.34*). In an appropriate case, this memorandum may be submitted in opposition to the

contentions supported by the points and authorities *set out in §§ 41.36, 41.37, 41.38*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law stated. Counsel should, for example, show that under the proposed class definition, a determination of some liability issue would be necessary to decide whether any particular person is a member of the class [*see, e.g., Sony Elecs. Inc. v. Superior Court (2006) 145 Cal. App. 4th 1086, 1096-1097, 52 Cal. Rptr. 3d 139* (proposed class consisted not of all purchasers of defendant's product, but only of those purchasers who received defective products)].

[3] Discussion of Authorities

[a] Proposed Class Definition That Rests on Determination of Liability Is Not Objective

In ***Sony Elecs. Inc. v. Superior Court*** *(2006) 145 Cal. App. 4th 1086, 52 Cal. Rptr. 3d 139* , the plaintiff had purchased a laptop computer manufactured by the defendant. After experiencing repeated problems with the computer, the plaintiff filed suit, asserting claims for false advertising and breach of express warranty, and for violations of the Unfair Competition Law (*Bus. & Prof. Code § 17200 et seq.*), the Consumer Legal Remedies Act (*Civ. Code § 1750 et seq.*), and the Song-Beverly Consumer Warranty Act (*Civ. Code § 1790 et seq.*). Specifically, the complaint alleged that the defendant had marketed and distributed a series of laptop computers knowing that the computers had defective memory chip sockets (specifically, inadequate soldering of the memory slot connector pins), but without disclosing such defects to consumers.

Ruling on the plaintiff's motion for class certification, the trial court certified a class consisting of all persons in the United States who had purchased computers with inadequate soldering of the memory slot connector pins (excepting persons who were associated with the defendant or whose computers had already been repaired by the defendant).

The court of appeal granted the defendant's petition for a writ of mandate to vacate to trial court's certification order. The court of appeal began its analysis by noting that the party seeking certification has the burden to establish the existence of both an ascertainable class and a well-defined community of interest among class members. Ascertainability is required to ensure that all putative class members receive notice of the action and that the resulting judgment will have claim-preclusive (res judicata) effect as to those class members. Thus, ascertainability requires a class definition that is precise, objective and currently ascertainable. Although a proposed class plaintiff need not establish the existence and identity of class members at the certification stage of the proceedings, the plaintiff must show that there are objective criteria by which class members can later be identified and given notice of the proceedings (*145 Cal. App. 4th 1086, 1094)* .

The defendant in this case contended that the class certified by the trial court was not ascertainable because the class definition was not based on objective criteria, but instead on the issue of ultimate liability: whether a particular person's laptop computer had the defect that the plaintiff complained of. The court of appeal agreed. The court explained that a proposed class definition that rests on a liability question cannot be objective, nor can the class members be currently ascertained. When the class definition is framed as a legal conclusion, the trial court has no way of ascertaining whether a given person is a member of the class until after a determination of ultimate liability as to that person is made (*145 Cal. App. 4th 1086, 1095-1096)* .

The court of appeal concluded that the class certified by the trial court was flawed: the class consisted of purchasers of the particular series of laptop computers that had inadequate soldering of the memory slot connector pins. However, because there was no evidence showing that this alleged manufacturing defect was universal to all computers of that series, the class definition required a merits-based determination in order to establish whether a purchaser was a member of the class. The members of such a class were thus not readily identifiable so as to permit appropriate notice to be given, and the definition would not permit persons who receive notice of this action to determine whether they were part of the class (*145 Cal. App. 4th 1086, 1096-1097)* .

The court of appeal went on to reject a suggestion that it could salvage the class definition by excising the liability-based component, a change that would effectively define the class as all purchasers of the relevant series of laptop computers. The trial court had already specifically declined to certify that class. Noting the complete lack of evidence that all such computers contained the complained-of defect, the court of appeal found that the trial court had acted within its discretion in refusing to certify the broad class of all purchasers. Thus, since class certification is a matter within the trial court's discretion, the court of appeal had no basis to approve the broad class definition that the trial court had properly refused to adopt (*145 Cal. App. 4th 1086, 1097)* .

Accordingly, the court of appeal granted the defendant's petition and issued a writ directing the trial court to vacate its order certifying the class as defined, and to conduct further proceedings to determine whether certification of a different class would be appropriate (*145 Cal. App. 4th 1086, 1098)* .

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4-41 California Points & Authorities § 41.53

§ 41.53 Opposing Contention That Class Action [Code Civ. Proc. § 382] Proper--No Community of Interest Among Class Members--Numerous and Substantial Individual Questions

[1] FORM Opposing Contention That Class Action [Code Civ. Proc. § 382] Proper--No Community of Interest Among Class Members--Numerous and Substantial Individual Questions

[*This form may be combined with a general form of memorandum in support of a motion for an order declaring an action inappropriate as a class action (see, e.g., § 41.31) or a motion to decertify the class (see, e.g., § 41.32). It may also be combined with a general form of memorandum supporting defendant's demurrer on the ground that class action treatment is not appropriate (see, e.g., § 41.34).*]

THE COMMUNITY OF INTEREST REQUIREMENT IS NOT SATISFIED IN THIS ACTION BECAUSE EVERY MEMBER OF THE ALLEGED CLASS WOULD BE REQUIRED TO LITIGATE NUMEROUS AND SUBSTANTIAL QUESTIONS DETERMINING HIS OR HER INDIVIDUAL RIGHT TO RECOVER FOLLOWING THE CLASS JUDGMENT DETERMINING COMMON CLASS ISSUES.

A. Ascertainable Class and Community of Interest in Questions of Law and Fact Essential for Proper Class Action. [*See § 41.36, Paragraph A.*]

B. Class Action Must Be Advantageous. The issues which may be jointly tried, when compared with those requiring separate adjudication, must be sufficiently numerous and substantial to make the class action advantageous to the judicial process and to the litigants (*San Jose v. Superior Court (1974) 12 Cal. 3d 447, 460, 115 Cal. Rptr. 797, 525 P.2d 701* ; *Collins v. Rocha (1972) 7 Cal. 3d 232, 238, 102 Cal. Rptr. 1, 497 P.2d 225*).

C. Numerous and Substantial Individual Questions. A class action cannot be maintained when each member's right to recover depends on facts peculiar to his or her case, because the community of interest requirement is not satisfied if every member of the alleged class would be required to litigate numerous andsubstantial questions determining his or her individual right to recover following the class judgment determining issues common to the purported class (*Lockheed Martin Corp. v. Superior Court (2003) 29 Cal. 4th 1096, 1108-1111, 131 Cal. Rptr. 2d 1, 63 P.3d 913* ; *San Jose v. Superior Court (1974) 12 Cal. 3d 447, 459, 115 Cal. Rptr. 797, 525 P.2d 701* ; *Gerhard v. Stephens (1968) 68*

Cal. 2d 864, 913, 69 Cal. Rptr. 612, 442 P.2d 692 ; *In re Vioxx Class Cases (2009) 180 Cal. App. 4th 116, 133-134, 136, 103 Cal. Rptr. 3d 83* ; *Dunbar v. Albertson's, Inc. (2006) 141 Cal. App. 4th 1422, 1431-1432, 47 Cal. Rptr. 3d 83*).

[*Optional*] **D. Real Property Damage Action Not Proper.** A class action for damages to real property is not proper when the determination of each plaintiff's recovery would depend on the characteristics of his or her particular parcel of land (*San Jose v. Superior Court (1974) 12 Cal. 3d 447, 460-461, 115 Cal. Rptr. 797, 525 P.2d 701* ; *Knox v. Streatfield (1978) 79 Cal. App. 3d 565, 574, 145 Cal. Rptr. 39*).

[*Optional*] **E. National Class Action Subject to Different States' Laws.** The court should not grant certification of a nationwide class without first determining the effect of choice-of-law agreements under which the claims of class members would be governed by different states' laws. The party seeking nationwide class certification bears the burden of identifying variations in state law and demonstrating how a trial on the class causes of action can be conducted fairly and efficiently in light of those variations (*Washington Mutual Bank v. Superior Court (2001) 24 Cal. 4th 906, 915-928, 103 Cal. Rptr. 2d 320, 15 P.3d 1071*).

[*Optional*] **F. Class Action Must be Superior to Individual Litigation.** Even if questions of law or fact predominate, a class should not be certified unless a class action would be superior to individual lawsuits. In determining whether a class action is superior, the court should consider (1) the interest of each member in personally controlling his or her own case, (2) any difficulties that are likely to be encountered in managing a class action, (3) the nature and extent of any individual class members' litigation already in progress involving the same controversy, and (4) the desirability of consolidating all claims in a single action before a single court (*Basurco v. 21st Century Ins. Co. (2003) 108 Cal. App. 4th 110, 122, 133 Cal. Rptr. 2d 367*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that class action treatment is proper. Defendant may use this form when arguing that the community of interest requirement is not satisfied because every member of the alleged class would be required to litigate numerous and substantial questions determining his or her individual right to recover following the class judgment determining common issues.

This form may also be combined with a form contending that the trial court would be required to adjudicate issues involving different rules of law from the various states, and there is no special obligation for the court to do so [*see § 41.54*].

This form may be combined, as appropriate, with forms relating to the specific procedural context in which counsel wishes to oppose class action treatment. A defendant might make an argument supported by this memorandum under the following circumstances: (1) when supporting a motion for an order declaring an action inappropriate as a class action (*see, e.g., § 41.31*); (2) when supporting a motion to decertify the class (*see, e.g., § 41.32*); (3) when opposing a motion to certify an action as a proper class action; and (4) when supporting a demurrer on the ground that class action treatment is not appropriate (*see, e.g., § 41.34*). This form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Counsel should refer to facts showing that each class member would be required to present evidentiary facts to support his or her claim of liability. If appropriate, counsel should also point out that the use of subclassifications would not be practicable because of the large number of subclasses that would be required.

In an appropriate case, this form may be submitted in opposition to the contention supported by the forms *set out in §§*

41.41[1] and *41.45[1]*. Optional Paragraph D of this form may, in an appropriate case, be submitted in opposition to the contention supported by the form *set out in § 41.48[1]*.

[3] Discussion of Authorities

[a] Class Action Must Be Advantageous

The facts and procedural background of ***San Jose v. Superior Court*** *(1974) 12 Cal. 3d 447, 115 Cal. Rptr. 797, 525 P.2d 701* , are discussed in *§ 41.49[3][a]*. In *San Jose*, a class action by property owners for nuisance and inverse condemnation resulting from noise caused by airport flight patterns, the Supreme Court held that a community of interest was not present because the action depended on facts peculiar to each prospective plaintiff (*12 Cal. 3d 447, 460-461)* . The Court stated that before the imposition of a judgment binding on absent class members can be justified, plaintiff must show that there will be substantial benefits both to the litigants and to the court. The Court noted that each class member must not be required to individually litigate numerous and substantial questions to determine his or her right to recover following the class judgment. Relying on *Collins v. Rocha (1972) 7 Cal. 3d 232, 238, 102 Cal. Rptr. 1, 497 P.2d 225* (discussed *below*), the Court stated that the issues that may be jointly tried, when compared with those requiring separate adjudication, must be sufficiently numerous andsubstantial to make the class action advantageous to the judicial process and to the litigants (*12 Cal. 3d 447, 460)* .

The facts and procedural background of ***Collins v. Rocha*** *(1972) 7 Cal. 3d 232, 102 Cal. Rptr. 1, 497 P.2d 225* , are discussed in *§ 41.50[3][a]*. In *Collins*, the Supreme Court held that the trial court had erred in sustaining defendant's demurrer on the ground that plaintiffs had not stated a proper class action (*7 Cal. 3d 232, 238)* . The Court noted that, assuming the existence of an ascertainable class, the ultimate question is whether or not the issues that may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants. In reversing the trial court's decision, the Court stated that there was a substantial likelihood that only the issue of damages would require separate proof for each class member (*7 Cal. 3d 232, 238)* .

[b] Numerous and Substantial Individual Questions

Lockheed Martin Corp. v. Superior Court *(2003) 29 Cal. 4th 1096, 131 Cal. Rptr. 2d 1, 63 P.3d 913* , was an action seeking medical monitoring of the residents of a geographic area affected by the defendants' discharge of toxic chemicals that allegedly contaminated drinking water. The plaintiffs moved for certification of a class of people who were exposed to water contaminated by any of a lengthy list of chemicals. The trial court certified the class, finding that the plaintiffs had met the criteria for class treatment. Specifically, the court found that the plaintiffs had established a realistic chance of success on the merits, that the class was ascertainable, that members of the class had a well-defined community of interest, and that common questions of law and fact predominated in the action. However, the court of appeal issued a writ of mandate directing the trial court to vacate its class-certification order because individual issues raised by plaintiffs' claims predominated, making class certification inappropriate.

The Supreme Court granted review and affirmed the judgment of the court of appeal. The Court began its analysis by noting that the plaintiffs' claims sounded generally in negligence and would therefore require proof of duty, breach of duty, proximate cause, and damages. Determination of whether questions common to the class predominated over questions affecting class members individually, therefore, required consideration of those elements (*29 Cal. 4th 1096, 1106)* .

The first element of the negligence cause of action--the existence of duty--is a question of law for the trial court. Therefore, the Supreme Court concluded that the trial court rationally could conclude that the duty element of the plaintiffs' claims would be based on common proof (*29 Cal. 4th 1096, 1106)* . Also, the second element--breach of duty--would involve proof of how and when the defendants disposed of toxic chemicals and whether the defendants'

conduct was negligent. Therefore, that element also involved significant common issues (*29 Cal. 4th 1096, 1107)* .

Turning to the final two elements of the negligence cause of action--causation and damage--the Supreme Court acknowledged that the plaintiffs clearly were in a position to address some aspects of causation and damages on a class basis. For example, the toxicity of the chemicals allegedly discharged and the seriousness of any disease for which a plaintiff was at risk could be established by common proof. Also, the amount of contaminants that entered the groundwater and, when, where, and at what levels contaminants entered the domestic water system were significant common issues of fact in this case (*29 Cal. 4th 1096, 1107)* .

The Supreme Court pointed out, however, that the plaintiffs' burden on moving for class certification is not merely to show that some common issues exist, but, rather, to place substantial evidence in the record that common issues *predominate.* Thus, the Court found that each class member's actual toxic dosage would be relevant, even if the plaintiffs could establish that medical monitoring (the relief sought in the case) was required for all potential class members who received a certain "minimum dosage." Furthermore, each plaintiff would have to demonstrate that the need for future monitoring for that plaintiff was a reasonably certain consequence of the toxic exposure, as opposed to some other cause. The Court found it significant that the plaintiffs' experts could not categorically state that mere membership in the class would demonstrate a need for medical monitoring irrespective of actual chemical dosages received (*29 Cal. 4th 1096, 1108-1111)* .

The Supreme Court found, therefore, that the causation and damages issues raised by the plaintiffs' claims would have to be litigated individually, even if the case were to proceed on a class basis. Especially when considered in light of the trial court's finding that the class would consist of an estimated 50,000 to 100,000 people, the Court opined that the individual issues fatally undermined the trial court's finding that common issues predominated (*29 Cal. 4th 1096, 1111)* . The Supreme Court concluded that the questions regarding each individual class member's right to recover that would remain following any class judgment appeared so numerous and substantial as to render any efficiencies attainable through joint trial of common issues insufficient, as a matter of law, to make a class action advantageous to the judicial process and the litigants. Accordingly, the Court affirmed the court of appeal's judgment requiring vacatur of the class certification order (*29 Cal. 4th 1096, 1111)* .

The facts and procedural background of ***San Jose v. Superior Court*** *(1974) 12 Cal. 3d 447, 115 Cal. Rptr. 797, 525 P.2d 701* , are discussed in *§ 41.49[3][a]*. In *San Jose*, a class action by property owners for nuisance and inverse condemnation resulting from airport flight patterns, the Court held that a community of interest was not present because the action depended on facts peculiar to each prospective plaintiff (*12 Cal. 3d 447, 460-461)* . Relying on *Weaver v. Pasadena Tournament of Roses (1948) 32 Cal. 2d 833, 841, 198 P.2d 514* , the Court reaffirmed the rule that a class action cannot be maintained when each member's right to recover depends on facts peculiar to his or her case. The Court stated that the rule exists because the community of interest requirement is not satisfied if every member of the alleged class would be required to litigate numerous and substantial questions determining his or her individual right to recover following the class judgment determining issues common to the purported class (*12 Cal. 3d 447, 459)* .

The Court reasoned that a sufficient community of interest was not present because an approaching or departing aircraft may or may not give rise to actionable nuisance or inverse condemnation depending on a myriad of individualized evidentiary factors. The Court also noted that the development, character, and uses of the geographic region of the proposed class were diverse (*12 Cal. 3d 447, 461)* .

Finally, the Court in *San Jose* rejected the plaintiffs' efforts to avoid the rule in *Weaver* by dividing the parcels of land into subclassifications and determining as a group the diminution in value for all members in each subclass. First, the Court stated that the purported scheme would require plaintiffs to disregard liability for some forms of damage, such as actual physical injury to property, resulting in a breach of fiduciary duty by the representative plaintiffs. Second, the Court noted that the scheme was incompatible with the fundamental maxim that each parcel of land is unique (*12 Cal. 3d 447, 461)* . The Court reasoned that the number of subclasses would be substantial given the numerous unique

factors with respect to each parcel. Under such circumstances, the class action would become unmanageable. In addition, the uniqueness factors weighed heavily in favor of requiring independent litigation of the liability with respect to each parcel and its owner (*12 Cal. 3d 447, 462)* . Thus, the Court concluded, the class action could not proceed because the proposed subclassification system had failed (*12 Cal. 3d 447, 463)* .

Gerhard v. Stephens *(1968) 68 Cal. 2d 864, 69 Cal. Rptr. 612, 442 P.2d 692* , involved four consolidated actions to quiet title to undivided mineral interests underlying a certain portion of land. Plaintiffs claimed their interests as successors of stockholders in two defunct corporations which had previously obtained the mineral rights. Plaintiffs in one of the cases brought their action on behalf of a class consisting of the owners of the remaining undivided fractional interest in the mineral rights. The trial court held that claims of purported class members presented many individual problems, and further, that potential class members were not so numerous as to require a class action instead of intervention. Plaintiffs then filed an appeal.

The Supreme Court affirmed the trial court's ruling, holding that the questions raised in the cases were not appropriate for a class action (*68 Cal. 2d 864, 912)* . The Court noted that although many common questions of law and fact had to be resolved before a court could determine the ownership issues, every member of the class would have to litigate numerous and substantial questions determining his or her individual right to recover against the named defendants following the rendering of a class judgment determining the common class questions (*68 Cal. 2d 864, 912-913)* .

The Court reasoned that each alleged class member would be required to establish his or her proof of title from the shareholders, which would be a difficult task because the plaintiffs had not used the recording system. In addition, the Court noted that defendants' defense of abandonment of the mineral interests would create a factual issue as to each class member's intent (*68 Cal. 2d 864, 913)* . Finally, the Court could find no substantial advantage which would result from maintaining the action as a class action (*68 Cal. 2d 864, 913-914)* . In support of this conclusion, the Court noted that the representative plaintiffs had been unable to locate most of the remaining shareholders or potential class members (*68 Cal. 2d 864, 914)* .

In ***In re Vioxx Class Cases*** *(2009) 180 Cal. App. 4th 116, 103 Cal. Rptr. 3d 83* , the plaintiffs asserted claims under the unfair competition law (UCL) (*Bus. & Prof. Code § 17200 et seq.*) and the Consumers Legal Remedies Act (CLRA) (*Civ. Code § 1750 et seq.*) based on allegations that the manufacturer of the medication Vioxx knew about cardiovascular risks associated with the medication but engaged in a campaign to hide or explain away those risks. The plaintiffs asserted that Vioxx was no more effective and less safe than a less-expensive generic medication. The complaint sought to recover the difference between the cost of Vioxx and the cost of the generic medication. The trial court denied class certification, finding that common issues did not predominate. The court found that whether Vioxx was no more effective and less safe than the generic medication was dependent on each individual's specific medical needs and history (*180 Cal. App. 4th 116, 126-127)* .

The court of appeal affirmed. On the CLRA claim, the court of appeal reasoned that, in light of the individualized issues regarding Vioxx's effectiveness and safety, the trial court was correct that the plaintiffs could not establish materiality and reliance on a classwide basis (*180 Cal. App. 4th 116, 133-134)* . On the UCL claim, the appellate court noted that the plaintiffs needed to be able to show the existence of a "measurable amount" of restitution supported by the evidence. The plaintiffs' assertion that that amount was the difference between the cost of Vioxx and the cost of the generic medication failed, because the generic medication was not a valid comparator due to the differences among patients who take those kinds of medications (*180 Cal. App. 4th 116, 136)* .

Dunbar v. Albertson's, Inc. *(2006) 141 Cal. App. 4th 1422, 47 Cal. Rptr. 3d 83* , was an action seeking overtime compensation based on a claim that a putative class of grocery managers had been misclassified as executive employees exempt from the overtime wage laws. The trial court denied class certification, concluding that, although many prerequisites for class certification were met, common issues did not predominate over individual issues, and that a class action was not the superior means of resolving the litigation.

The court of appeal affirmed, noting that the trial court's decision was based not on the mere presence of individual liability issues (i.e., the need to establish that each grocery manager had been misclassified as an executive), but on the nature of those issues. Specifically, the record established that there was a significant variation in the grocery managers' work from store to store, and from week to week. This variation required very particularized individual liability determinations that predominated over common issues (*141 Cal. App. 4th 1422, 1431-1432)* .

The court of appeal went on to reject the plaintiff's contention that the trial court had failed to take into account a variety of procedural tools--such as the use of exemplar plaintiffs, survey results, subclassing, mini-trials, or special masters--that the plaintiff had suggested might enable the court to manage the individual issues while proceeding with the class litigation. The court of appeal found that the record did not establish that the trial court had failed to consider those procedural tools. Further, the court of appeal remarked that it is not sufficient for a plaintiff simply to mention a procedural tool that might facilitate the management of individual issues. Rather, the party seeking class certification must explain *how* the procedure will effectively manage the issues in question, and the plaintiff in this case had failed to do so (*141 Cal. App. 4th 1422, 1432-1433)* .

[c] Real Property Damage Action Not Proper

San Jose v. Superior Court *(1974) 12 Cal. 3d 447, 115 Cal. Rptr. 797, 525 P.2d 701* , is discussed in *§ 41.53[3][b]*.

Knox v. Streatfield *(1978) 79 Cal. App. 3d 565, 145 Cal. Rptr. 39* , was a class action for damages and injunctive relief by a group of subdivision property owners against other owners allegedly in violation of a declaration of restrictions. Defendants' demurrers to the complaint were sustained by the trial court, which entered a judgment dismissing the action. Plaintiffs then filed their appeal.

The court of appeal affirmed the dismissal as to the class action allegations, but reversed the dismissal of the named plaintiffs' individual actions (*79 Cal. App. 3d 565, 574, 576)* . The court noted that although plaintiffs in this case did not allege damage to the land itself, as did the plaintiffs in *San Jose v. Superior Court (1974) 12 Cal. 3d 447, 115 Cal. Rptr. 797, 525 P.2d 701* (discussed *§ 41.53[3][b]*), the uniqueness of each parcel presented an obstacle to class treatment in this case. Each plaintiff's recovery, the court stated, would depend on the characteristics of his or her particular parcel of land, such as the distance from lots where alleged violations had occurred and the condition of the property. The court noted that all of these factors would have to be determined individually (*79 Cal. App. 3d 565, 574)* . The court stated that not only the issue of damages, but also the issue of liability on the part of each defendant would have to be individually litigated because plaintiffs had alleged that different defendants had violated the declaration of restrictions in different ways and some of the alleged violations may not have caused damage to some of the class members by virtue of location (*79 Cal. App. 3d 565, 572)* .

[d] National Class Action Subject to Different States' Laws

In ***Washington Mutual Bank v. Superior Court*** *(2001) 24 Cal. 4th 906, 103 Cal. Rptr. 2d 320, 15 P.3d 1071* , the trial court certified a nationwide class without determining the force and effect of contractual agreements that would have made the laws of different states applicable in the case. The court of appeal found that certification was proper because the defendant had failed to show that the contractually selected laws were conflicting. The Supreme Court reversed, finding that the lower courts had applied an incomplete and erroneous analysis.

The Supreme Court held that a court should not grant certification of a nationwide class without first determining the effect of choice-of-law agreements under which the claims of different class members would be governed by different states' laws. The court should deny certification if it determines that the degree of complexity arising from the application of different states' laws results in common legal questions not predominating, or makes nationwide class litigation unmanageable (*24 Cal. 4th 906, 915)* .

The trial court's analysis should proceed as follows when the parties have a contractual choice-of-law clause. The trial court should first examine the choice-of-law clause and ascertain whether the advocate of the clause has met the burden of establishing that the various claims of putative class members fall within its scope (*24 Cal. 4th 906, 916)* . If the trial court finds that the class claims fall within the scope of a choice-of-law clause, it must next evaluate the clause's enforceability according to the approach reflected in Restatement (Second) of Conflict of Laws, § 187(2). The court must determine whether the chosen state has a substantial relationship to the parties or their transaction, or whether there is any other reasonable basis for the parties' choice of law. If neither of these tests is met, that is the end of the inquiry, and the court need not enforce the parties' choice of law (*24 Cal. 4th 906, 916)* .

If, however, either test is met, the court must next determine whether the chosen state's law is contrary to a fundamental policy of California. If there is no such conflict, the court must enforce the parties' choice of law. If, however, there is a fundamental conflict with California law, the court must then determine whether California has a materially greater interest than the chosen state in the determination of the particular issue. If California has a materially greater interest than the chosen state, the choice-of-law clause should not be enforced (*24 Cal. 4th 906, 916-917)* . If the choice-of-law clause is inapplicable or not enforceable, the court mayapply California law on a class-wide basis so long as its application is not arbitrary or unfair with respect to nonresident class members, and so long as the interests of other states are not found to outweigh California's interest in having its law applied (*24 Cal. 4th 906, 919-921)* .

If the trial court finds that the laws of multiple states are applicable in the action, the party seeking nationwide class certification then bears the burden of identifying any variations in the states' laws and meaningfully demonstrating how a trial can be conducted in light of those variations. To meet this burden, the class action proponent must credibly demonstrate, through a thorough analysis of the applicable state laws, that state law variations will not swamp common issues and defeat predominance. Additionally, the proponent's presentation must be sufficient to permit the trial court, at the time of certification, to make a detailed assessment of how any state law differences could be managed fairly and efficiently at trial, for example, through the creation of a manageable number of subclasses (*24 Cal. 4th 906, 922-928)* .

[e] Class Action Must be Superior to Individual Litigation

In **Basurco v. 21st *Century Ins. Co.*** *(2003) 108 Cal. App. 4th 110, 133 Cal. Rptr. 2d 367* , the plaintiffs sought to certify a class consisting of homeowners who were allegedly denied insurance benefits by the defendant insurance companies after the January 1994 Northridge earthquake. The trial court denied the plaintiffs' class certification motion, finding that common questions of law and fact did not predominate over individual issues, and that a class action would not be superior to individual lawsuits.

The court of appeal affirmed. The court began its analysis with a brief review of the requirements for class certification. To obtain certification, a party must establish the existence of both an ascertainable class and a well-defined community of interest among the class members. The community of interest requirement involves three factors: (1) predominant common questions of law or fact, (2) class representatives with claims or defenses typical of the class, and (3) class representatives who can adequately represent the class. The court found that common questions of law did not predominate because the existence of damage, the cause of damage, and the extent of damage would have to be determined on a case-by-case basis for each homeowner (*108 Cal. App. 4th 110, 117-120)* .

The court of appeal then turned to the question of superiority of class treatment. The court observed that because a class should not be certified unless substantial benefits accrue both to litigants and the courts, it was necessary to consider whether a class action would be superior to individual lawsuits. Even if questions of law or fact predominate, if class treatment would not be superior to individual lawsuits, the lack of advantage providesan alternative ground to deny class certification. In determining whether a class action is superior, the court should consider (1) the interest of each member in controlling his or her own case personally, (2) any difficulties that are likely to be encountered in managing

a class action, (3) the nature and extent of any litigation by individual class members already in progress involving same controversy, and (4) the desirability of consolidating all claims in a single action before a single court (*108 Cal. App. 4th 110, 120-121)* .

Applying the first factor, the court found that putative class members had a strong interest in controlling their own cases, given the nature of the relief sought--the repair of substantial damage to their homes and the payment of expenses for having to live elsewhere during repairs. Considering the second factor, the court concluded that a class action would be extremely difficult to manage because individual issues predominated over common questions of law and fact, because the existence, type, and extent of damage varied from case to case. As to the third factor, there were at least 287 separate actions against these defendants, with over 1,500 plaintiffs. Regarding the fourth factor, the court opined that the complexity of the issues in the pending cases made it impractical and thus undesirable to consolidate all 287 actions into a single proceeding. In this connection, the court of appeal noted with approval that the trial court had already adopted special procedures to manage all of the individual insurance lawsuits arising out of the 1994 earthquake, including those brought against other defendants not involved in the present action. Accordingly, the court of appeal concluded that class treatment would not be superior to individual lawsuits, and the court affirmed the trial court's denial of class certification (*108 Cal. App. 4th 110, 121-122)* .

[4] Additional Authorities

[a] Numerous and Substantial Individual Questions

In *Caro v. Procter & Gamble Co. (1993) 18 Cal. App. 4th 644, 22 Cal. Rptr. 2d 419* , the court of appeal affirmed a trial court decision denying class certification in a case in which a plaintiff was suing a company for misleading consumers into believing its product was pure orange juice. The denial was proper because (1) damages would have been insignificant; (2) the defendant's practices had ceased; (3) persons with claims would have been too numerous and too difficult to find; (4) individual remedies for statutory violations were available; (5) class treatment would have clogged courts; (6) the plaintiff failed to demonstrate that his claims were typical of class members' claims, because he had only read the top portion of the label on the product and not the conflicting bottom; thus he was not misled in the manner the class was allegedly deceived; and (7) individual issues involving the existence and nature of any material misrepresentationwould have predominated over common issues (*18 Cal. App. 4th 644, 657-669)* .

In *Osborne v. Subaru of America, Inc. (1988) 198 Cal. App. 3d 646, 243 Cal. Rptr. 815* , the trial court refused to certify a nationwide class of plaintiffs who were current or former owners of 1973, 1974, and 1976 Subaru automobiles and who sought damages for the alleged defective design of the vehicles. The damages sought included compensation for repair costs, costs for additional service, maintenance, and replacement transportation, diminution in value due to the defects, and punitive damages of not less than $5,000 per vehicle. The court of appeal affirmed the trial court's decision, finding no abuse of discretion. It agreed with the trial court's holding that certification of a nationwide class would require the adjudication of issues by applying numerous rules of law from different states (*198 Cal. App. 3d 646, 659)* , and would result in numerous individual adjudications of fact (*198 Cal. App. 3d 646, 662)* . Finally, the court found that California had no special obligation to adjudicate the issues, since the only connection between the automobiles and California was that some vehicles arrived through a California port of entry (*198 Cal. App. 3d 646, 663)* .

In *Brown v. Regents of University of California (1984) 151 Cal. App. 3d 982, 198 Cal. Rptr. 916* (discussed in *§ 41.34[4][a]*), an order sustaining a demurrer to class-action allegations in a complaint for negligent and intentional factual concealment and misrepresentation, and for failure to provide adequate coronary care, was upheld by the court of appeal. The court noted that class actions will not be permitted when there are diverse factual issues to be resolved, even though there may be many common questions of law. If the ability of each member of the class to recover clearly depends on a separate set of facts applicable only to him or her, then all of the policy considerations that justify class actions equally compel the dismissal of such inappropriate actions (*151 Cal. App. 3d 982, 989)* .

In *Grogan-Beall v. Ferdinand Roten Galleries, Inc. (1982) 133 Cal. App. 3d 969, 184 Cal. Rptr. 411* , a class action seeking damages for defendant's failure to comply with the disclosure-disclaimer provisions of the California Sale of Fine Prints Act (*Civ. Code §§ 1740-1745*), the court of appeal affirmed the trial court's order decertifying the conditional class of plaintiffs (*133 Cal. App. 3d 969, 976-979)* . The court noted that determining violations of the act's disclosure or disclaimer requirements would involve substantial individual factual issues. In concluding that decertification of the class was proper, the court stated that since each claimant must litigate a number of substantial fact questions peculiar to his or her right of recovery, it is not reasonably possible to establish the necessary community of interest among the class members (*133 Cal. App. 3d 969, 976-979)* .

In *D'Amico v. Sitmar Cruises, Inc. (1980) 109 Cal. App. 3d 323, 167 Cal. Rptr. 254* , an action for damages on behalf of a class of passengers whobecame ill during a pleasure cruise, the court of appeal affirmed a trial court decision striking class action allegations (*109 Cal. App. 3d 323, 327)* . The court apparently found validity in respondents' argument that liability could be established only through the individual testimony of each class member, because after discussion of the general rule stated in Paragraph B of this form, the court affirmed the trial court's decision without additional comments (*109 Cal. App. 3d 323, 325-327)* .

In *Rose v. Medtronics, Inc. (1980) 107 Cal. App. 3d 150, 166 Cal. Rptr. 16* (discussed in *§ 41.34[4][a]*), an action for medical negligence by a class of persons allegedly implanted with defective pacemakers, the court of appeal held that the trial court had properly dismissed the class action allegations because the factual questions and legal issues were preponderantly diverse rather than common (*107 Cal. App. 3d 150, 157)* . The court noted that defendant's liability could vary from claim to claim, claimants' damages could vary from nonexistent to damages for wrongful death, and further, that the activities and skills of intermediaries (physicians and surgeons) could have different degrees of relevancy for each claim (*107 Cal. App. 3d 150, 156-157)* . In addition, the questions of law would be more individual than common (*107 Cal. App. 3d 150, 157)* .

In *Bartlett v. Hawaiian Village, Inc. (1978) 87 Cal. App. 3d 435, 151 Cal. Rptr. 392* (discussed in *§ 41.34[3][a]*), the court of appeal upheld the trial court's dismissal of a class action by a group of homosexual men for unlawful exclusion from public baths (*87 Cal. App. 3d 435, 440)* . The court noted that the class members possessed only the common legal issue of whether or not defendants were liable for the wrongful exclusion of any person with certain personal characteristics. Each claimant, the court concluded, would still be required to litigate a number of substantial fact questions peculiar to his right of recovery. Thus, the community of interest requirement was not fulfilled (*87 Cal. App. 3d 435, 440)* .

In *Altman v. Manhattan Savings Bank (1978) 83 Cal. App. 3d 761, 148 Cal. Rptr. 100* , a class action for breach of fiduciary duty and damages based on negligence, the court of appeal upheld the trial court's dismissal of the class action allegations (*83 Cal. App. 3d 761, 769)* . The court noted that the testimony of each class member would be required to demonstrate substantial damage to either property or person as a condition precedent to recovery on plaintiffs' additional claim for emotional distress. Also, complex proof would be required to establish individual damages (*83 Cal. App. 3d 761, 767)* . Thus, the court found the requisite community of interest lacking because damages could not be easily calculated and each member would be required to litigate numerous and substantial questions to determine his or her right to recovery (*83 Cal. App. 3d 761, 769)* .

In *Hamwi v. Citinational-Buckeye Inv. Co. (1977) 72 Cal. App. 3d 462, 140 Cal. Rptr. 215* (discussed in *§ 41.31[3][b]*), a class action by past and present tenants for breaches of a lease and fiduciary duties, the court of appeal held that thetrial court had properly determined that plaintiff had failed to establish the requisite community of interest (*72 Cal. App. 3d 462, 473)* . The court noted that the community of interest is not present when each class member would be required to individually litigate numerous and substantial questions to determine his or her right to recover. Thus, the court concluded, if a class action will splinter into individual trials, common questions do not predominate, and litigation of the action in the class format is inappropriate (*72 Cal. App. 3d 462, 471)* . In *Hamwi*, the interpretation of ambiguous portions of the lease would have involved separate trials as to the meaning of extrinsic evidence of

discussions with the individual class members (*72 Cal. App. 3d 462, 473)* .

In *Stilson v. Reader's Digest Ass'n, Inc. (1972) 28 Cal. App. 3d 270, 104 Cal. Rptr. 581 , cert. denied, 411 U.S. 952, 93 S. Ct. 1928, 36 L. Ed. 2d 414 (1973)* , a class action for unauthorized use of plaintiffs' names for commercial exploitation, the court of appeal sustained the trial court's order striking class action allegations (*28 Cal. App. 3d 270, 275)* . The court noted that a showing of plaintiffs' mental anguish from the unauthorized use would involve evidence of the mental and subjective state of each plaintiff who sought more than nominal damages (*28 Cal. App. 3d 270, 274)* . These requirements, the court concluded, when combined with the large size of the potential class, would impose an unjustified and intolerable burden on the court and the parties (*28 Cal. App. 3d 270, 274-275)* .

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CHAPTER 41 CLASS AND REPRESENTATIVE ACTIONS
PART II. FORMS

4-41 California Points & Authorities § 41.54

§ 41.54 Opposing Contention That Class Action [Code Civ. Proc. § 382] Proper--No Community of Interest Among Class Members--No Special Obligation to Adjudicate Nationwide Class Action

[1] FORM Opposing Contention That Class Action [Code Civ. Proc. § 382] Proper--No Community of Interest Among Class Members--No Special Obligation to Adjudicate Nationwide Class Action

[*The following may be combined with a general form of memorandum of points and authorities in support of a motion for an order declaring an action inappropriate as a class action (see, e.g., § 41.31) or a motion to decertify the class (see, e.g., § 41.32). The following may also be combined with a general form of memorandum of points and authorities supporting defendant's demurrer on the ground that class action treatment is not appropriate (see, e.g., § 41.34).*]

THE COMMUNITY OF INTEREST REQUIREMENT IS NOT SATISFIED IN THIS ACTION BECAUSE THE TRIAL COURT WOULD BE REQUIRED TO ADJUDICATE ISSUES BY APPLICATION OF NUMEROUS DIFFERENT RULES OF LAW FROM THE VARIOUS STATES, AND THERE IS NO SPECIAL OBLIGATION IMPOSING A BURDEN ON THE COURT TO DO SO.

A. Need for Diverse Legal Rulings Constitute Individual Questions. When legal questions vary from state to state and hence require the trial court to make diverse legal rulings on an emerging theory of recovery in a multitude of jurisdictions, the questions of law necessarily would be more individual than common to all (*Osborne v. Subaru of America, Inc. (1988) 198 Cal. App. 3d 646, 655, 243 Cal. Rptr. 815*).

B. Court Has No Special Obligation to Adjudicate Nationwide Class Action. California courts should not, absent a "special obligation" to do so, undertake the massive burden of adjudicating nationwide class action lawsuits when to do so would require the trial court to adjudicate issues by application of numerous different rules of law from the various states (*Osborne v. Subaru of America, Inc. (1988) 198 Cal. App. 3d 646, 664, 243 Cal. Rptr. 815*).

[*Optional*] **C. Special Obligation Determination Made at Pleading Stage.** The trial court should, at the pleading stage, consider factors set forth in *Osborne v. Subaru of America, Inc. (1988) 198 Cal. App. 3d 646, 663-664, 243 Cal. Rptr. 815* , whether certification of nationwide class would require trial court to adjudicate issues by application of numerous different rules of law from various states, and whether California has "special obligation" to undertake

litigation (*Canon U.S.A., Inc. v. Superior Court (1998) 68 Cal. App. 4th 1, 8, 79 Cal. Rptr. 2d 897*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that class action treatment is proper. Defendant may use these points and authorities when arguing that the community of interest requirement is not satisfied because the trial court would be required to adjudicate issues by application of numerous different rules of law from the various states, and there is no special obligation imposing a burden on the court to do so.

This form may be combined, when appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to invoke the contention. This form may also be adapted for use in a trial or appellate brief.

This form may also be combined with a form contending that there are numerous and substantial individual questions [*see § 41.53*].

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Counsel shouldrefer to facts showing that the trial court would be required to adjudicate issues by application of numerous different rules of law from various states, and that the facts of the case do not indicate a "special obligation" on the part of the court to undertake a massive burden of adjudicating a nationwide class action lawsuit, requiring the court to adjudicate issues by application of numerous different rules of law from the various states [*see Osborne v. Subaru of America, Inc. (1988) 198 Cal. App. 3d 646, 664, 243 Cal. Rptr. 815]* .

[3] Discussion of Authorities

[a] Need for Diverse Legal Rulings Constitute Individual Questions

In ***Osborne v. Subaru of America, Inc.*** *(1988) 198 Cal. App. 3d 646, 243 Cal. Rptr. 815* , the trial court refused to certify a nationwide class of plaintiffs who were current or former owners of 1973, 1974, and 1976 Subaru automobiles and who sought damages premised on the asserted defective design of their automobiles. The owners all experienced various engine breakdowns in their Subarus which they attributed to a defect in the design of the head gasket and valve system. Although plaintiffs themselves own Subarus in only three model years, they sought to certify a nationwide class on behalf of owners of new or used Subarus of model years 1969 through 1976, claiming all those models use the same defective engine design. Approximately 180,000 of these automobiles were sold by Subaru.

Plaintiffs sought damages to compensate for repair costs, costs for additional maintenance and service, costs for replacement transportation during repairs, and diminution in value due to the defects. Plaintiffs also sought punitive damages of not less than $5,000 per vehicle. After a hearing, the trial court denied certification of the class. The court ruled that while plaintiffs had framed an ascertainable class, separate questions of law and fact outweighed the common issues. The court noted that the action undeniably raises certain issues which would appear to underlie all of the individual claims, but they are far outweighed by the peculiarities of each case alone. The allegation that the head gaskets were inherently defective in all the model years and the use of national advertising may be common themes. But beyond these starting points the individual cases branched off in their own separate directions with a multitude of varying legal and factual issues. On the law to be applied, the national scope of the purported class immediately raised choice of law issues concerning the statute of limitations, liability, and recovery of damages. The trial court stated that the rules on these issues throughout the states were not only inharmonious but were flatly contradictory in many respects. The trial court concluded that the case had so many difficult and peculiarlyindividual issues that treating it as a class action would be disadvantageous to the judicial process and, ultimately, to the litigants themselves.

The court of appeal affirmed the trial court's decision, finding no abuse of discretion. It agreed with the trial court's

holding that certification of a nationwide class would require the adjudication of issues by applying numerous rules of law from different states (*198 Cal. App. 3d 646, 659)* , and would result in numerous individual adjudications of fact (*198 Cal. App. 3d 646, 662)* . The court cited its prior decision in *Baltimore Football Club, Inc. v. Superior Court (1985) 171 Cal. App. 3d 352, 363, 215 Cal. Rptr. 323* that when legal questions vary from state to state and hence require the trial court to make diverse legal rulings on an emerging theory of recovery in a multitude of jurisdictions, the questions of law necessarily would be more individual than common to all (*198 Cal. App. 3d 646, 655)* .

[b] Court Has No Special Obligation to Adjudicate Nationwide Class Action

The facts and procedural background of ***Osborne v. Subaru of America, Inc.*** *(1988) 198 Cal. App. 3d 646, 243 Cal. Rptr. 815* , are discussed in *§ 41.54[3][a]*. The court of appeal concluded that California courts should not, absent a "special obligation" to do so, undertake the massive burden of adjudicating nationwide class action lawsuits when to do so would require the trial court to adjudicate issues by application of numerous different rules of law from the various states. The court found that California had no special obligation to adjudicate the issues, since the only connection between the automobiles and California was that some vehicles arrived through a California port of entry (*198 Cal. App. 3d 646, 663)* .

[c] Special Obligation Determination Made at Pleading Stage

In ***Canon U.S.A., Inc. v. Superior Court*** *(1998) 68 Cal. App. 4th 1, 79 Cal. Rptr. 2d 897* , the trial court denied a motion to strike from the complaint all references to a purported nationwide class of purchasers and lessees of certain models of color laser copiers. The copier manufacturer and other parties sought a writ of mandate directing the trial court to set aside its order.

The court of appeal issued a writ of mandate directing the trial court to vacate its order denying the motion to strike. The parties seeking certification of the class who opposed the petition read *Osborne v. Subaru of America, Inc. (1988) 198 Cal. App. 3d 646, 664, 243 Cal. Rptr. 815* to stand for the proposition that if there is a reasonable possibility that plaintiffs can plead a prima facie community of interest and ascertainable class, the trial court should first allow class-related discovery to be conducted, and then set a class-certification hearing in order to determine whether theevidence garnered during the discovery process is sufficient to meet the plaintiffs' burden of proof. The court stated that while in *Osborne* the decision not to certify the class was made following an evidentiary hearing during which the plaintiffs were given an opportunity to present evidence garnered during discovery, an *Osborne* analysis does not turn on matters subject to discovery. Even if the parties seeking certification of the class had been given an opportunity after conducting discovery to present evidence conclusively demonstrating that there exists in this class action lawsuit common questions of fact which outweigh the separate questions of fact, the trial court would still have been required to determine whether the variations of applicable law among the various states would render the purported nationwide class unmanageable, and whether California has a "special obligation" to undertake the burden of a nationwide class action. Such determinations can and should be made at the pleading stage. The only information outside the pleadings needed to resolve the variation-of-law issue is an analysis of the conflicting laws of the 50 states. This is a matter properly considered in an attack on the pleadings (*68 Cal. App. 4th 1, 8)* .

In deciding whether California has a "special obligation" to undertake the nationwide class action, certain factors must be considered, including whether the nationwide class would promote judicial economy in California courts, whether California claimants would be aided in their recovery by class litigation, and the extent of the connection the parties have with California. These facts are often ascertainable by reference to the allegations contained within the complaint, or by reference to matters subject to judicial notice. Thus, consideration of this issue is proper in connection with a motion to strike (*68 Cal. App. 4th 1, 8, 9)* .

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§ 41.55 Opposing Contention That Class Action [Code Civ. Proc. § 382] Proper--No Community of Interest Among Class Members--Multiplicity of Actions Unlikely When Injury to Sole Aggrieved Party Is Self-Generated

[1] FORM Opposing Contention That Class Action [Code Civ. Proc. § 382] Proper--No Community of Interest Among Class Members--Multiplicity of Actions Unlikely When Injury to Sole Aggrieved Party Is Self-Generated

[*The following may be combined with a general form of memorandum of points and authorities in support of a motion for an order declaring an action inappropriate as a class action (see, e.g., § 41.31) or a motion to decertify the class (see, e.g., § 41.32). The following may also be combined with a general form of memorandum of points and authorities supporting defendant's demurrer on the ground that class action treatment is not appropriate (see, e.g., § 41.34).*]

THE COMMUNITY OF INTEREST REQUIREMENT IS NOT SATISFIED IN THIS ACTION BECAUSE MULTIPLE LAWSUITS ARE UNLIKELY IN LIGHT OF THE FACT THAT THE ONLY AGGRIEVED PARTY WHO HAD BROUGHT SUIT HAD DELIBERATELY GENERATED HIS/HER OWN INJURY.

Multiplicity of Actions Unlikely When Injury to Sole Aggrieved Party Is Self-Generated. When the only lawsuit on file is based on a self-generated injury, the trial court could reasonably conclude that it would likely not have to adjudicate a multiplicity of actions if the class is not certified (*Reese v. Wal-Mart Stores, Inc. (1999) 73 Cal. App. 4th 1225, 1236, 87 Cal. Rptr. 2d 346*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that class action treatment is proper. The community of interest determination depends on whether or not the common questions are sufficiently important to permit adjudication in a class action rather than in a multiplicity of separate suits [*Daar v. Yellow Cab Co. (1967) 67 Cal. 2d 695, 713, 63 Cal. Rptr. 724, 433 P.2d 732* ; *see § 41.39[3][a]*]. Thus, Defendant may use these points and authorities when arguing that the community of interest requirement is not satisfied because multiple lawsuits are unlikely in light of the fact that the only aggrieved party who had brought suit had deliberately generated his or her own injury.

This form may be combined, when appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to invoke the contention. This form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel should refer to facts showing that:

- The only lawsuit on file is that filed by the aggrieved party, and
- The plaintiff had deliberately generated his or her own injury.

[3] Discussion of Authorities

[a] Multiplicity of Actions Unlikely When Injury to Sole Aggrieved Party Is Self-Generated

In ***Reese v. Wal-Mart Stores, Inc.*** *(1999) 73 Cal. App. 4th 1225, 87 Cal. Rptr. 2d 346* , the complaint was directed at a "Ladies Day" promotionaldiscount at which the defendant store purportedly offered female customers a lower price for a "lube express" oil change at various automotive repair facilities. The plaintiff customer brought suit on behalf of himself, a nationwide class of males who paid for an oil change at the store, and the general public. The trial court denied the customer's motion for class certification. The customer moved for reconsider, and the motion was denied. The customer appealed.

The court of appeal affirmed. The court found that the trial court did not abuse its discretion in finding that the plaintiff failed to demonstrate that substantial benefits would accrue from class treatment in this case. The court stated that there are at least three different benefits from class treatment: redress for numerous aggrieved parties who could not otherwise maintain individual actions; the avoidance of the possibility of multiple actions; and the disgorging of the wrongdoer's unjust enrichment. In this case, the trial court did not abuse its discretion in determining that substantial benefits would not accrue from class treatment when (1) individual claims were viable without class treatment; (2) multiple lawsuits were unlikely in light of the fact that the only aggrieved party who had brought suit the plaintiff had deliberately generated his own injury; (3) class treatment would consume more time and expense than adjudicating the pending case or a limited number of individual suits; (4) some form of effective class-wide relief was available without class certification through the unfair competition claim alleged by plaintiff; and (5) the statutory penalties sought by plaintiff and others could disgorge any unjust enrichment without resort to class certification (*73 Cal. App. 4th 1225, 1229)* .

Although the complaint alleged that the store's Ladies Day special had been an ongoing promotion over a three year period, at the time the plaintiff moved for class certification, no one other than the plaintiff had filed suit based on these business practices. And the record before the trial court disclosed that plaintiff--the one person who did file suit--had deliberately gone to the store, rather than his normal automotive service, on the day in question for purposes of being denied the Ladies Day discount. And he had done so only after he was introduced to his counsel. The court observed that "Whereas most litigants consult with a lawyer after an injury to seek judicial redress, this client went to his lawyer to seek an injury for which he could claim judicial redress." The court did not express a view here on the propriety of such a practice. But on the record, when the only lawsuit on file was based on a self-generated injury, the court concluded that the trial court could reasonably conclude that it would likely not have to adjudicate a multiplicity of actions if the class was not certified (*73 Cal. App. 4th 1225, 1236)* .

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§ 41.56 Opposing Contention That Class Action [Code Civ. Proc. § 382] Proper--No Community of Interest Among Class Members--Class Representative Does Not Have Cause of Action Against All Defendants

[1] FORM Opposing Contention That Class Action [Code Civ. Proc. § 382] Proper--No Community of Interest Among Class Members--Class Representative Does Not Have Cause of Action Against All Defendants

[*The following may be combined with a general form of memorandum of points and authorities in support of a motion for an order declaring an action inappropriate as a class action (see, e.g., § 41.31) or a motion to decertify the class (see, e.g., § 41.32). The following may also be combined with a general form of memorandum of points and authorities supporting defendant's demurrer on the ground that class action treatment is not appropriate (see, e.g., § 41.34).*]

THE CLASS REPRESENTATIVE DOES NOT SHARE A COMMUNITY OF INTEREST WITH THE MEMBERS OF THE CLASS BECAUSE HE/SHE DOES NOT HAVE A CAUSE OF ACTION AGAINST ALL THE DEFENDANTS.

A. Ascertainable Class and Community of Interest in Questions of Law and Fact Essential for Proper class Action. [*See § 41.36, Paragraph A.*]

B. Community of Interest Requirements. The community of interest requirement embodies three factors: (1) predominant common questions of law of fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class (*Baltimore Football Club, Inc. v. Superior Court (1985) 171 Cal. App. 3d 352, 358-359, 215 Cal. Rptr. 323*).

C. Class Representative Must Have Cause of Action Against All Defendants. In the absence of a conspiracy between all defendants, a class action may only be maintained against defendants concerning whom the class representative has a cause of action (*Hart v. County of Alameda (1999) 76 Cal. App. 4th 766, 775-776, 90 Cal. Rptr. 2d 386* ; *Baltimore Football Club, Inc. v. Superior Court (1985) 171 Cal. App. 3d 352, 359, 215 Cal. Rptr. 323*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a contention that a class action may be properly maintained. Defendant mayuse these in a case in which there are multiple defendants, and the class representative has not alleged a cause of action against all defendants [*see Code Civ. Proc. § 382*; *see also Baltimore Football Club, Inc. v. Superior Court (1985) 171 Cal. App. 3d 352, 358-359, 215 Cal. Rptr. 323]* .

This memorandum may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a class action may not be properly maintained. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should discuss facts showing that the class representative has not alleged a cause of action against all defendants.

[b] Related Pleading and Practice Forms

For discussion and forms of class action complaints and notices of motion relating to class actions, see California Forms of Pleading and Practice, Ch. 120, *Class Actions* , (Matthew Bender).

[3] Discussion of Authorities

[a] Community of Interest Requirements

Baltimore Football Club, Inc. v. Superior Court *(1985) 171 Cal. App. 3d 352, 215 Cal. Rptr. 323* , was an action brought by a season ticket holder against all teams in a professional sports league, to recover damages from profits earned by defendants' retention of ticket purchase money during a players' strike. Plaintiffs sought certification as a class action on behalf of all of each league team's season ticket holders. Defendants opposed certification, declaring that each team establishes its own policies regarding season tickets. The league's teams do not pool and divide season ticket purchase money, and after the strike ended, each team responded to its season ticket holders independently. The trial court granted the motion to certify the case as a class action, and defined the class as all persons who purchased a season ticket from one or more defendants for all home games during the affected season, and who paid a valuable consideration therefor. Defendants sought a peremptory writ of mandate directing respondent superior court to vacate its order granting plaintiffs' motion and to enter a new order denying the motion for class certification.

The court of appeal reversed, noting that *Code Civ. Proc. § 382* requires a class action to include an ascertainable class, and a well defined community of interest in the questions of law and fact that affect the parties to be represented. The community of interest requirement embodies: (1) predominant common questions of law or fact; (2) class representatives with claimsor defenses typical of the class; and (3) class representatives who can adequately represent the class (*171 Cal. App. 3d 352, 358)* . The class was therefore improperly certified (*171 Cal. App. 3d 352, 361)* . Moreover, the class action did not meet the fundamental requirement of predominate common questions of law or fact because each team was responsible for its own policies regarding season tickets, and legal questions varied among the foreign states (*171 Cal. App. 3d 352, 363)* .

[b] Class Representative Must Have Cause of Action Against All Defendants

In ***Hart v. County of Alameda*** *(1999) 76 Cal. App. 4th 766, 775-776, 90 Cal. Rptr. 2d 386* , a plaintiff brought an action on behalf of himself and others similarly situated against 25 California counties, seeking the return of unused jury fee deposits. The central thrust of the plaintiff's second amended complaint was that he and the class members were entitled to a return of their jury deposits because the counties breached a duty to make reasonable efforts to notify the depositors before the jury fees reverted to the counties' general funds. The counties denied they owed a duty to provide such notice. The trial court sustained the counties' demurrer without leave to amend, concluding that the plaintiff was

barred from recovery under any theory. The plaintiff appealed.

The court of appeal affirmed the judgment of the trial court. The 22 counties in which the plaintiff did not make jury deposits contended that the plaintiff lacked standing to sue because he did not allege that he made a deposit in those counties and therefore he was not the real party in interest. According to the court, the contention had merit, whether characterized as a "standing" defect or a failure to satisfy the class action "typicality" requirement. The court, citing *Baltimore Football Club, Inc. v. Superior Court (1985) 171 Cal. App. 3d 352, 359, 215 Cal. Rptr. 323* , and other cases, stated that under California's class action statute, when a class action is brought against multiple defendants, the action may only be maintained against defendants against whom the class representative has a cause of action. Without such a personal cause of action, the prerequisite that the claims of the representative party be typical of the class cannot be met. If the plaintiff class representative only has a personal cause of action against one defendant and never had any claim of any kind against the remaining defendants, his or her claim is not typical of the class. This requirement is not fulfilled merely because the plaintiffs allege that they suffered injuries similar to those of other parties at the hands of other defendants (*76 Cal. App. 4th 766, 775-776)* . Because the plaintiff did not allege that he or his assignors deposited jury fees in 22 of the 25 counties, and did not allege any facts to fit within an exception to the rule requiring a personal cause of action, the court concluded that the plaintiff had no standing to sue those 22 counties, and was not a proper class representative in claims against those counties (*76 Cal. App. 4th 766, 776)* .

The facts and procedural background of ***Baltimore Football Club, Inc. v. Superior Court*** *(1985) 171 Cal. App. 3d 352, 215 Cal. Rptr. 323* , is discussed in *§ 41.56[3][a]*. The court of appeal held that because the class representatives had not shown that they had purchased season tickets from all defendants, and therefore had not stated causes of action against all defendants, the class action was improperly certified (*171 Cal. App. 3d 352, 359)* . The fact that plaintiffs allege that they suffered injuries similar to those of other parties at the hands of other defendants does not satisfy the typicality requirement (*171 Cal. App. 3d 352, 359)* .

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4-41 California Points & Authorities § 41.57

§ 41.57 Opposing Contention That Class Action [Code Civ. Proc. § 382] Proper--Named Plaintiffs Do Not Adequately Represent Interests of Absent Class Members--Named Plaintiffs Failed to Raise Claims Reasonably Expected by Class Members

[1] FORM Opposing Contention That Class Action [Code Civ. Proc. § 382] Proper--Named Plaintiffs Do Not Adequately Represent Interests of Absent Class Members--Named Plaintiffs Failed to Raise Claims Reasonably Expected by Class Members

[*The following may be combined with a general form of memorandum of points and authorities in support of a motion for an order declaring an action inappropriate as a class action (see, e.g., § 41.31) or a motion to decertify the class (see, e.g., § 41.32). The following may also be combined with a general form of memorandum of points and authorities supporting defendant's demurrer on the ground that class action treatment is not appropriate (see, e.g., § 41.34).*]

THE NAMED PLAINTIFFS IN THIS ACTION INADEQUATELY REPRESENT THE ALLEGED CLASS BECAUSE THEY FAIL TO RAISE CLAIMS REASONABLY EXPECTED TO BE RAISED BY THE ABSENT CLASS MEMBERS.

A. Proof of Adequacy of Representation. The party seeking class certification has the burden of proving the adequacy of its representation (*Richmond v. Dart Industries, Inc. (1981) 29 Cal. 3d 462, 470, 174 Cal. Rptr. 515, 629 P.2d 23*).

B. Plaintiffs' Representation Inadequate. The named plaintiffs inadequately represent the alleged class when they fail to raise claims reasonably expected to be raised by the members of the class and thus pursue a course which, even should the litigation be resolved in favor of the class, would deprive class members of many elements of damage (*San Jose v. Superior Court (1974) 12 Cal. 3d 447, 464, 115 Cal. Rptr. 797, 525 P.2d 701*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that the named plaintiffs adequately represent the interests

of absent class members. Defendant may use these points and authorities when arguing that representation is inadequate because the named plaintiffs failed to raise claims reasonably expected to be raised by the absent class members.

This form may be combined, when appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to invoke the contention. A defendant might make an argument supported by this memorandum under the following circumstances: (1) when supporting a motion for an order declaring an action inappropriate as a class action (*see, e.g., § 41.31*); (2) when supporting a motion to decertify the class (*see, e.g., § 41.32*); (3) when opposing a motion to certify an action as a proper class action; and (4) when supporting a demurrer on the ground that class action treatment is not appropriate (*see, e.g., § 41.34*). This form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel should refer to facts showing that the named plaintiffs have failed to raise claims that could reasonably be expected from absent members of the class.

[3] Discussion of Authorities

[a] Proof of Adequacy of Representation

The facts and procedural background of ***Richmond v. Dart Industries, Inc.*** *(1981) 29 Cal. 3d 462, 174 Cal. Rptr. 515, 629 P.2d 23* , are discussed in *§ 41.36[3][b]*. In *Richmond*, the Supreme Court held that because defendants had not established in the trial court that there was either a conflict of interest or overwhelming disapproval of the lawsuit within the class which would defeat the purpose of class adjudication, the trial court erred when it refused certification (*29 Cal. 3d 462, 474-475)* .

Despite its holding that representation was adequate because the defendants had failed to show otherwise, the Court in *Richmond* also stated that the party seeking class certification has the burden of proving the adequacy of its representation. In addition, the Court noted that when the party opposing certification presents evidence that indicates widespread antagonism to the class suit, the adequacy of representation is called into question (*29 Cal. 3d 462, 470)* . Although the first statement appears torequire affirmative proof of adequate representation, possibly as an element of plaintiff's action, the second comment infers that the issue arises only when the defendant presents evidence of widespread antagonism to the class suit. In addition, the Court's holding that representation was adequate because defendant had failed to show a conflict or overwhelming disapproval among class members seems to place the burden on defendant to show that representation is inadequate. Thus, although the Court in *Richmond* stated that the party seeking class certification has the burden of proving the adequacy of its representation, the Court's additional comments and its holding leave this issue unclear.

[b] Plaintiffs' Representation Inadequate

The facts and procedural background of ***San Jose v. Superior Court*** *(1974) 12 Cal. 3d 447, 115 Cal. Rptr. 797, 525 P.2d 701* , are discussed in *§ 41.49[3][a]*. In *San Jose*, the Supreme Court held that the named plaintiffs inadequately represented a class of landowners seeking damages for nuisance and inverse condemnation resulting from airport flight patterns. The representation was inadequate, the Court ruled, because the named plaintiffs had failed to raise claims reasonably expected of the class members and thus had pursued a course which would deprive class members of many elements of damage (*12 Cal. 3d 447, 464)* . The Court reasoned that damages recoverable in a nuisance action for injuries to real property include not only diminution in market value but also damages for annoyance, inconvenience, discomfort, actual injuries to the land, and costs of minimizing future damages. The named plaintiffs, however, sought only recovery for diminution in market value, which effectually waived any possible recovery of potentially substantial present or future damages on behalf of hundreds of class members (*12 Cal. 3d 447, 464)* .

Relying on *La Sala v. American Sav. & Loan Ass'n (1971) 5 Cal. 3d 864, 871-872, 97 Cal. Rptr. 849, 489 P.2d 1113* (discussed in *§ 41.46[3][a]*), the Court stated that it had long been concerned with requiring the representative party to protect the interests of the absent class members, and had even imposed a fiduciary duty to do so on the representative class member. To fulfill this fiduciary duty, the Court stated, the representative plaintiff must raise those claims reasonably expected to be raised by the members of the class. The Court concluded that clearly under the alleged facts in *San Jose*, the class members would reasonably be expected to seek recovery of damages beyond mere diminution in market values and thus, by certifying the class, the trial court had sanctioned a clear violation of plaintiffs' fiduciary duty (*12 Cal. 3d 447, 464)* .

[4] Additional Authorities

[a] Plaintiff's Representation Inadequate

In *Caro v. Procter & Gamble Co. (1993) 18 Cal. App. 4th 644, 22 Cal. Rptr. 2d 419* , the court of appeal affirmed a trial court decision denying class certification in a case in which a plaintiff was suing a company for misleading consumers into believing its product was pure orange juice. The denial was proper because (1) damages would have been insignificant; (2) the defendant's practices had ceased; (3) persons with claims would have been too numerous and too difficult to find; (4) individual remedies for statutory violations were available; (5) class treatment would have clogged the courts; (6) the plaintiff failed to demonstrate that his claims were typical of class members' claims, because he had only read the top portion of the label on the product and not the conflicting bottom; thus he was not misled in the manner the class was allegedly deceived; and (7) individual issues involving the existence and nature of any material misrepresentation would have predominated over common issues (*18 Cal. App. 4th 644, 657-669)* .

In *Trotsky v. Los Angeles Fed. Sav. & Loan Ass'n (1975) 48 Cal. App. 3d 134, 121 Cal. Rptr. 637* , a class action seeking damages and a declaration that provisions of a form of trust deed were invalid, the court of appeal held that the named plaintiffs were not adequate representatives of a portion of the class (*48 Cal. App. 3d 134, 146)* . The court noted that the plaintiff must be a person who will fairly and adequately protect the interests of the class and whose claims or defenses are typical of the claims or defenses of the class. The named plaintiffs in *Trotsky* failed to define the class to include borrowers who would have had claims under a certain clause of the trust deeds. In addition, the named plaintiffs had not suffered any monetary damage as a result of the disputed clause because it had never been exercised with respect to their deed (*48 Cal. App. 3d 134, 146-147)* .

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4-41 California Points & Authorities § 41.58

§ 41.58 Opposing Contention That Class Action [Code Civ. Proc. § 382] Proper--Named Plaintiffs Do Not Adequately Represent Interests of Absent Class Members--Conflict of Interest or Widespread Antagonism Among Potential Class Members

[1] FORM Opposing Contention That Class Action [Code Civ. Proc. § 382] Proper--Named Plaintiffs Do Not Adequately Represent Interests of Absent Class Members--Conflict of Interest or Widespread Antagonism Among Potential Class Members

[*The following may be combined with a general form of memorandum of points and authorities in support of a motion for an order declaring an action inappropriate as a class action (see, e.g., § 41.31)or a motion to decertify the class (see, e.g., § 41.32). The following may also be combined with a general form of memorandum supporting defendant's demurrer on the ground that class action treatment is not appropriate (see, e.g., § 41.34).*]

REPRESENTATION OF THE CLASS BY THE NAMED PLAINTIFFS IN THIS ACTION IS INADEQUATE BECAUSE THERE IS _____ [A CONFLICT OF INTEREST *and/or* WIDESPREAD ANTAGONISM] AMONG POTENTIAL CLASS MEMBERS.

Representation Inadequate When Conflict or Overwhelming Disapproval. The named plaintiffs do not adequately represent the absent members of the class when there is either a conflict of interest or overwhelming disapproval of the lawsuit within the class that would defeat the purpose of class adjudication (*see Richmond v. Dart Industries, Inc. (1981) 29 Cal. 3d 462, 474-475, 174 Cal. Rptr. 515, 629 P.2d 23* ; *Seastrom v. Neways, Inc. (2007) 149 Cal. App. 4th 1496, 1502, 57 Cal. Rptr. 3d 903*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that the named plaintiffs adequately represent the interests of absent class members. Defendant may use this form when arguing that representation is inadequate because there is either a conflict of interest or widespread antagonism among potential class members.

This form may be combined, as appropriate, with forms relating to the specific procedural context in which counsel wishes to invoke the contention. A defendant might make an argument supported by this memorandum under the following circumstances: (1) when supporting a motion for an order declaring an action inappropriate as a class action (*see, e.g., § 41.31*); (2) when supporting a motion to decertify the class (*see, e.g., § 41.32*); (3) when opposing a motion to certify an action as a proper class action; and (4) when supporting a demurrer on the ground that class action treatment is not appropriate (*see, e.g., § 41.34*). This form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the point of law stated. Counsel should refer to facts showing either a conflict of interest or widespread antagonism to the action among potential class members.

In an appropriate case, this memorandum may be submitted in opposition to the contention supported by the form set out in *§ 41.49*.

[3] Discussion of Authorities

[a] Representation Inadequate When Conflict or Overwhelming Disapproval

The facts and procedural background of ***Richmond v. Dart Industries, Inc.*** *(1981) 29 Cal. 3d 462, 174 Cal. Rptr. 515, 629 P.2d 23* , are discussed in *§ 41.36[3][b]*. In *Richmond*, the Supreme Court held that because defendants had not established in the trial court that there was either a conflict of interest or overwhelming disapproval of the lawsuit within the class that would defeat the purpose of class adjudication, the trial court erred when it refused certification (*29 Cal. 3d 462, 474-475)* . The Court noted that when the party opposing certification presents evidence that indicates widespread antagonism to the class suit, the adequacy of representation is called into question. Quoting from federal secondary authority, the Court reasoned that a putative representative cannot adequately protect the class if his or her interests are antagonistic to or in conflict with the objectives of the persons to be represented (*29 Cal. 3d 462, 470)* . The Court stated, however, that only a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status, and further, that if the trial court can use *Fed. R. Civ. P., Rule 23(c)(4)*, to divide the class into subclasses or to separate those issues that merit class action treatment so as to remove any antagonism, then the action need not be dismissed (*29 Cal. 3d 462, 470-471)* .

The Court in *Richmond* did not specify the amount of antagonism or the degree of conflict necessary to preclude a class action. In rejecting defendant's argument that only a small amount of antagonism would defeat a class action, however, the Court cited several federal appellate cases in which courts disapproved class actions in the face of opposition by a substantial majority of the potential class members (*29 Cal. 3d 462, 472-473)* . Thus, although *Richmond* supports the general rule that a conflict of interest or widespread antagonism among the class members will render the named plaintiffs' representation inadequate, counsel may wish to consult federal authorities to determine the degree of conflict or antagonism that is necessary to support an argument of inadequate representation in his or her case.

Seastrom v. Neways, Inc. *(2007) 149 Cal. App. 4th 1496, 57 Cal. Rptr. 3d 903* , was an action against the manufacturer of a product allegedly sold illegally without a prescription. Distribution of the product involved a pyramid sales scheme. The named plaintiffs were upper-level distributors who sought to represent a class consisting of all persons who purchased the product. The trial court denied the plaintiffs' motion for class certification, finding that their claims were not typical of those of other class members and that they would not adequately represent the class.

The court of appeal affirmed, finding that the named plaintiffs had an insurmountable conflict of interest. Specifically, the named plaintiffs, because of their position in the upper level of the distribution scheme, were potential defendants in the case. The plaintiffs' complaint sought forfeiture and restitution of the purchase price of the product, but the plaintiffs themselves had made commissions on the sale of the product. Because the named plaintiffs sought to retain those profits, which their complaint described as illegal, the conflict between their interests and those of other class members

went to the very heart of the litigation. Accordingly, the court of appeal concluded that the trial court had properly exercised its discretion in denying class certification (*149 Cal. App. 4th 1496, 1502)* .

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4-41 California Points & Authorities § 41.58A

§ 41.58A Supporting Contention That Class Counsel Should Be Disqualified for Conflict of Interest--Named Plaintiff Is Member of Law Firm

[1] FORM Supporting Contention That Class Counsel Should Be Disqualified for Conflict of Interest--Named Plaintiff Is Member of Law Firm

[*This form may be submitted in support of a motion for an order disqualifyingclass counsel. It may also be combined with a general form of memorandum in support of a motion for an order declaring an action inappropriate as a class action (see, e.g., § 41.31) or a motion to decertify the class (see, e.g., § 41.32).*]

REPRESENTATION OF THE CLASS BY THE LAW FIRM OF _____ [*name of law firm*] IS IMPROPER BECAUSE THERE IS A CONFLICT OF INTEREST BETWEEN THE FIRM AND UNNAMED MEMBERS OF THE CLASS.

Named Plaintiff's Position as Attorney for Class Presents Conflict of Interest. An insurmountable conflict of interests usually exists when a named plaintiff acts in the dual roles of class representative and attorney for the class. The conflict arises from the temptation for the attorney for the class to recommend settlement on terms less favorable to class members when a large fee is part of the bargain, particularly when the potential recovery for each class member (including the named plaintiff) is small (*Apple Computer, Inc. v. Superior Court (2005) 126 Cal. App. 4th 1253, 1264-1279, 24 Cal. Rptr. 3d 818*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a contention that the law firm acting as class counsel should be disqualified because one of the named plaintiffs is an attorney in the firm, creating a conflict of interest between class counsel and the unnamed class members.

This form may be combined, as appropriate, with forms relating to the specific procedural context in which counsel wishes to raise the contention. For example, a defendant might make an argument supported by this memorandum (1) in

support of a motion for an order declaring an action inappropriate as a class action (*see, e.g., § 41.31*); (2) in support of a motion to decertify the class (*see, e.g., § 41.32*); (3) in opposing a motion to certify an action as a proper class action; or (4) in support of a demurrer on the ground that class action treatment is not appropriate (*see, e.g., § 41.34*). In an appropriate case, this memorandum may be submitted in opposition to the contention supported by the form set out in *§ 41.49*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the point of law stated. Counsel should, for example, cite evidence or allegations showing that the named plaintiff is a member of the law firm that is seeking to act as class counsel.

[3] Discussion of Authorities

[a] Named Plaintiff's Position As Attorney for Class Presents Conflict of Interest

In ***Apple Computer, Inc. v. Superior Court*** *(2005) 126 Cal. App. 4th 1253, 24 Cal. Rptr. 3d 818* , the named plaintiff, an attorney, was represented by the law firm where he worked and by a second firm that served as co-counsel with his firm in other cases. The defendant moved to disqualify both firms based on a conflict of interest. The defendant argued that the conflict arose from the circumstance that as the class representative, the named plaintiff was obligated to seek the maximum recovery for the putative class, but the plaintiff and the firms may have had an interest in maximizing their recovery of attorney's fees. The court of appeal held that the trial court abused its discretion in denying the motion to disqualify the firms, because an insurmountable conflict of interest existed between the class representative and class counsel on one hand, and the putative class on the other hand (*126 Cal. App. 4th 1253, 1264-1279)* .

The court of appeal explained that for the same individual to attempt representation of the class as named plaintiff and as counsel presents an inherent conflict of interests. The temptation always exists for class counsel to recommend settlement on terms less favorable to the class members because a large fee is part of the bargain. The potential conflict is increased when the attorney is also the named plaintiff who brought the action, and when the potential recoveries by individual class members, including the named plaintiff, are likely to be very small in proportion to the total amount of recovery by the class as a whole (in this case, each class member stood to recover $8 if the defendant was found liable). In such a situation, the named plaintiff may stand to gain little as class representative but may gain very much as attorney for the class (*126 Cal. App. 4th 1253, 1264-1267)* .

The court of appeal pointed out that, in the context of a potential settlement, fairness to the class members is safeguarded not just by the oversight provided by the court at the time of settlement, but also by the participation and supervision that an independent class representative should provide from start to finish. Both levels of scrutiny are necessary to protect the interests of the putative class (*126 Cal. App. 4th 1253, 1268-1271)* .

The court of appeal also held that the prohibition against dual roles--serving as class counsel and as class representative--is equally applicable whether the potential attorney's fees would be paid out of a common fund generated by the litigation, or by the defendant under a fee-shifting statute such as *Code Civ. Proc. § 1021.5* (*126 Cal. App. 4th 1253, 1272)* .

Finally, the court of appeal found that the same insurmountable conflict existed not just for the law firm that the named plaintiff worked for, but also for the other law firm, because of the close business connection between the firms, which had served as co-counsel in several other cases. Accordingly, the trial court's refusal to disqualify both firms was an abuse of discretion (*126 Cal. App. 4th 1253, 1274-1279)* .

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4-41 California Points & Authorities § 41.59

§ 41.59 Opposing Contention That Class Action [Code Civ. Proc. § 382] Proper--Action Improper and Without Substantial Benefit When Potential Individual Recovery Small and Distribution Would Require Substantial Time and Expense

[1] FORM Opposing Contention That Class Action [Code Civ. Proc. § 382] Proper--Action Improper and Without Substantial Benefit When Potential Individual Recovery Small and Distribution Would Require Substantial Time and Expense

[*The following may be combined with a general form of memorandum of points and authorities in support of a motion for an order declaring an action inappropriate as a class action (see, e.g., § 41.31) or a motion to decertify the class (see, e.g., § 41.32). The following may also be combined with a general form of memorandum of points and authorities supporting defendant's demurrer on the ground that class action treatment is not appropriate (see, e.g., § 41.34).*]

THIS CLASS ACTION SHOULD BE DISMISSED AS UNMANAGEABLE AND WITHOUT SUBSTANTIAL BENEFIT TO CLASS MEMBERS BECAUSE THE POTENTIAL INDIVIDUAL RECOVERY IS SMALL AND BECAUSE SUBSTANTIAL TIME AND EXPENSE WOULD BE CONSUMED IN DISTRIBUTION OF THE RECOVERY.

A. Substantial Benefit to Litigants and Court. Because a group action is capable of injustice, the representative plaintiff must show that substantial benefit from the class action will result both to the litigants and the court (*Blue Chip Stamps v. Superior Court (1976) 18 Cal. 3d 381, 385, 134 Cal. Rptr. 393, 556 P.2d 755* ; *San Jose v. Superior Court (1974) 12 Cal. 3d 447, 459, 115 Cal. Rptr. 797, 525 P.2d 701*).

B. Class Action Without Substantial Benefit. A class action is unmanageable and without substantial benefit to class members when the potential recovery to the individual is small and when substantial time and expense would be consumed in distribution of the recovery (*Blue Chip Stamps v. Superior Court (1976) 18 Cal. 3d 381, 386, 134 Cal. Rptr. 393, 556 P.2d 755*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that class action treatment is proper. Defendant may use these points and authorities when arguing that a class action should be dismissed as unmanageable and without substantial benefit to class membersbecause the potential individual recovery is small and because substantial time and expense would be consumed in distribution of the recovery.

This form may be combined, when appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to invoke the contention. A defendant might make an argument supported by this memorandum under the following circumstances: (1) when supporting a motion for an order declaring an action inappropriate as a class action (*see, e.g., § 41.31*); (2) when supporting a motion to decertify the class (*see, e.g., § 41.32*); (3) when opposing a motion to certify an action as a proper class action; and (4) when supporting a demurrer on the ground that class action treatment is not appropriate (*see, e.g., § 41.34*). This form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel should refer to facts showing that the potential recovery for individual class members is small. Counsel should also show that substantial time and expense would be required in distribution of the class recovery. If appropriate, counsel should refer to other facts showing that the class action is unmanageable and that there are no substantial benefits to the parties and the court from proceeding in the form of a class action.

[3] Discussion of Authorities

[a] Substantial Benefit to Litigants and Court

Blue Chip Stamps v. Superior Court *(1976) 18 Cal. 3d 381, 134 Cal. Rptr. 393, 556 P.2d 755* , was a class action seeking recovery of sales tax paid on redemptions of trading stamps. The plaintiffs also requested injunctive relief, punitive damages, and attorney's fees. Following an amendment to correct a defect in the complaint, the trial court certified the class. Defendant then filed for a writ of mandate to compel the trial court to vacate its certification order.

The Supreme Court granted the writ and held that the trial court had abused its discretion in certifying the action as a proper class action (*18 Cal. 3d 381, 387)* . Relying on *San Jose, below*, and other prior appellate court decisions, the Court stated that, resting on considerations of necessity and convenience, the class action attempts to further justice. The Court noted, however, that because group action is also capable of injustice, the representative plaintiff must show substantial benefit will result both to the litigants and to the court (*18 Cal. 3d 381, 385)* .

The facts and procedural background of ***San Jose v. Superior Court*** *(1974) 12 Cal. 3d 447, 115 Cal. Rptr. 797, 525 P.2d 701* , are discussed in *§ 41.49[3][a]*. In *San Jose*, a class action by property owners for nuisance and inverse condemnation resulting from airport flight patterns, theSupreme Court held that a sufficient community of interest had not been shown because the action depended on facts peculiar to each prospective plaintiff (*12 Cal. 3d 447, 460-461)* . The Court stated that despite its general support of class actions, it has not been unmindful of the accompanying dangers of injustice or of the limited scope within which these suits serve beneficial purposes. Instead, the Court noted, trial courts have been consistently admonished to carefully weigh respective benefits and burdens and to allow maintenance of the class action only when substantial benefits accrue both to litigants and the courts (*12 Cal. 3d 447, 459)* .

[b] Class Action Without Substantial Benefit

The facts and procedural background of ***Blue Chip Stamps v. Superior Court*** *(1976) 18 Cal. 3d 381, 134 Cal. Rptr. 393, 556 P.2d 755* , are discussed in *§ 41.59[3][a]*. In *Blue Chip*, the Supreme Court held that the trial court had abused its discretion in certifying the action as a proper class action (*18 Cal. 3d 381, 387)* . The Court reasoned that a class action should be dismissed as unmanageable and without substantial benefit to class members when the potential

recovery to the individual is small and when substantial time and expense would be consumed in distribution of the recovery (*18 Cal. 3d 381, 386)* . The trial court had noted, in dispensing with the requirement of pretrial notice of the action to class members, that most of the class members had overpaid only very small sums, some as little as 18 cents (*18 Cal. 3d 381, 384)* . The Supreme Court, in declaring the action improper, stated that while termination of a defendant's alleged wrongdoing is a factor to be considered, it does not warrant group action for damage when the members will not recover damage, and when a simpler remedy, such as mandate, is available. The Court also noted that the assertedly wrongful practice had ended long before the action was filed, rendering its requested termination a rather empty prayer (*18 Cal. 3d 381, 386)* .

Finally, the Court rejected plaintiffs' request for so-called "fluid recovery" by reducing defendant's future charges in order to obtain repayment of excess tax collections. The Court noted that fluid recovery in this case provides no correlation between those who paid excess tax and those who might benefit from a future reduction in redemption price (*18 Cal. 3d 381, 386)* .

In *Bruno v. Superior Court (1981) 127 Cal. App. 3d 120, 130, 179 Cal. Rptr. 342* , an antitrust class action under the Cartwright Act (*Bus. & Prof. Code § 16700 et seq.*), the court of appeal approved a fluid class recovery. Distinguishing *Blue Chip Stamps*, the court noted that the propriety of fluid class recovery depends on the purposes of the law under which a class action is brought and the facts of each case (*127 Cal. App. 3d 120, 129-130)* .

[4] Additional Authorities

[a] Class Action Without Substantial Benefit

In *Caro v. Procter & Gamble Co. (1993) 18 Cal. App. 4th 644, 22 Cal. Rptr. 2d 419* , the court of appeal affirmed a trial court decision denying class certification in a case in which a plaintiff was suing a company for misleading consumers into believing its product was pure orange juice. The denial was proper because (1) damages would have been insignificant; (2) the defendant's practices had ceased; (3) persons with claims would have been too numerous and too difficult to find; (4) individual remedies for statutory violations were available; (5) class treatment would have clogged the courts; (6) the plaintiff failed to demonstrate that his claims were typical of class members' claims, because he had only read the top portion of the label on the product and not the conflicting bottom; thus he was not misled in the manner the class was allegedly deceived; and (7) individual issues involving the existence and nature of any material misrepresentation would have predominated over common issues (*18 Cal. App. 4th 644, 657-669)* .

In *Bacom v. Merced County (1977) 66 Cal. App. 3d 45, 136 Cal. Rptr. 14* , a class action on behalf of all persons similarly situated in California to recover fines paid for misdemeanor convictions that had subsequently been set aside on constitutional grounds, the court of appeal held that to permit a class action encompassing the entire state and involving every justice and municipal court and many superior courts would so unduly burden the entire judicial system that any benefits of such action would be far outweighed by its burdens (*66 Cal. App. 3d 45, 50)* . The court also ruled that such an action limited to only Merced County would have a serious detrimental effect on the administration of justice which far outweighs the benefits to be gained (*66 Cal. App. 3d 45, 50)* .

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4-41 California Points & Authorities § 41.60

§ 41.60 Opposing Contention That Class Action [Code Civ. Proc. § 382] Proper--Defendant Class Improper When Inadequate Notice and Representation

[1] FORM Opposing Contention That Class Action [Code Civ. Proc. § 382] Proper--Defendant Class Improper When Inadequate Notice and Representation

[*The following may be combined with a general form of memorandum of points and authorities in support of a motion for an order declaring an action inappropriate as a class action (see, e.g., § 41.31) or a motion to decertify the class (see, e.g., § 41.32).*]

THIS CLASS ACTION SHOULD BE DISMISSED AS IMPROPER BECAUSE INADEQUATE NOTICE WAS GIVEN TO THOSEPURPORTED TO BE MEMBERS OF THE DEFENDANT CLASS, RESULTING IN THEIR INADEQUATE REPRESENTATION.

A. Notice Must Be Given to Class Members in Accordance With Court's Order. On certification of the class, or as soon thereafter as practicable, the court must make an order determining whether notice is necessary, and if so, the time, manner, and content of the notice, and the parties responsible for the cost of notice (*Cal. Rules of Ct., Rule 3.766(c)*; *see Cal. Rules of Ct., Rule 3.766(d), (e)*).

B. Inadequate Notice Requires Reversal of Judgment Against Class. When adequate notice is not given to the defendant class, the defects in service and notification are jurisdictional and require reversal of a judgment against the alleged class of defendants (*Simons v. Horowitz (1984) 151 Cal. App. 3d 834, 846, 199 Cal. Rptr. 134*).

C. Adequate Representation of Class Is Necessary for Class Action. Adequacy of representation of a class, whether plaintiff or defendant, is a prerequisite for the maintenance of a class action (*Simons v. Horowitz (1984) 151 Cal. App. 3d 834, 847, 199 Cal. Rptr. 134*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that class action treatment is proper. Defendant may use these points and authorities when arguing that a class action should be dismissed because there was inadequate notice and representation of the defendant class.

This form may be combined, when appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to invoke the contention. A defendant might make an argument supported by this memorandum under the following circumstances: (1) when supporting a motion for an order declaring an action inappropriate as a class action (*see, e.g., § 41.31*); and (2) when supporting a motion to decertify the class (*see, e.g., § 41.32*). This form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Inadequate Notice Requires Reversal of Judgment Against Class

Simons v. Horowitz *(1984) 151 Cal. App. 3d 834, 199 Cal. Rptr. 134* , involved a judgment against the defendant class in which each defendant class member was ordered to account for and pay each member of the plaintiff class commissions due on sales of fine art occurring within a specified time period.

In reversing the judgment against the class of defendants, the court of appeal focused on the notice to the defendant class and the adequacy of its representation. The trial court had issued an order specifying requirements for notice to the plaintiff and defendant classes. The record indicated that this order was not complied with. There was no evidence that any members of the defendant class were actually served, either with process or class notification. The defects in service and notification were jurisdictional and required the reversal of the judgment against the defendant class (*151 Cal. App. 3d 834, 846)* .

[b] Adequate Representation of Class Is Necessary for Class Action

The facts and procedural background of ***Simons v. Horowitz*** *(1984) 151 Cal. App. 3d 834, 199 Cal. Rptr. 134* , are discussed in *§ 41.60[3][a]*. In *Simons*, the appellate court said that the primary criterion for determining whether a class representative has adequately represented a class is whether the representative, through qualified counsel, vigorously and tenaciously protected the interests of the class. Although two attorneys attended a hearing on behalf of one named defendant, they expressly disclaimed any intention or attempt to represent the defendant class. Adequacy of representation of a class, whether plaintiff or defendant, is a prerequisite for the maintenance of a class action; without it a judgment against a class must be reversed (*151 Cal. App. 3d 834, 846-847)* .

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4-41 California Points & Authorities § 41.61

§ 41.61 Opposing Contention That Class Action [Code Civ. Proc. § 382] Is Proper--Defendant Class Action Improper When No Affirmative Relief Against Defendant Class Is Sought or Possible

[1] FORM Opposing Contention That Class Action [Code Civ. Proc. § 382] Is Proper--Defendant Class Action Improper When No Affirmative Relief Against Defendant Class Is Sought or Possible

[*The following may be combined with a general form of memorandum in support of a motion for an order declaring an action inappropriate as a class action (see, e.g., § 41.31) or a motion to decertify the class (see, e.g., § 41.32). The following may also be combined with a general form of memorandum supporting defendant's demurrer on the ground that class action treatment is not appropriate (see, e.g., § 41.34).*]

THIS CLASS ACTION SHOULD BE DISMISSED AS IMPROPER BECAUSE THE COMPLAINT SEEKS NO AFFIRMATIVE RELIEF AGAINST THE DEFENDANT CLASS [OR THEIR NAMED REPRESENTATIVES], AND THE MEMBERS OF THE DEFENDANT CLASS [AND THEIR NAMED REPRESENTATIVES] CANNOT GRANT PLAINTIFF ANY AFFIRMATIVE RELIEF.

Defendant Class Action Improper When No Affirmative Relief Against Defendant Class Is Sought or Possible. A class action against a class of defendants for declaratory relief is improper when no affirmative relief is sought against the class members, and the class members have no power to grant anyaffirmative relief (*see Pinnacle Holdings, Inc. v. Simon (1995) 31 Cal. App. 4th 1430, 1436-1437, 37 Cal. Rptr. 2d 778*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that class action treatment is proper. Defendant may submit these points and authorities when plaintiff attempts to bring a class action for declaratory relief against a class of defendants against whom no affirmative relief is sought and who have no power to grant plaintiff any affirmative relief.

This form may be combined, as appropriate, with points and authorities pertaining to the specific procedural context in which counsel seeks to raise the issue. A defendant might make an argument supported by these points and authorities

in the following procedural situations: (1) when supporting a motion for an order declaring an action inappropriate as a class action [*see, e.g., § 41.31*]; (2) when supporting a motion to decertify the class [*see, e.g., § 41.32*]; when opposing a motion to certify an action as a proper class action [*see, e.g., § 41.30*]; and (4) when supporting a demurrer on the ground that class action treatment is not appropriate [*see, e.g., § 41.34*]. This form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should insert argument demonstrating that the complaint seeks no affirmative relief against the defendant class and that the defendant class has no power to grant any affirmative relief to the plaintiff.

[b] Related Memoranda

For memoranda pertaining to the availability of declaratory relief, see Ch. 67, *Declaratory Relief* .

[3] Discussion of Authorities

[a] Defendant Class Action Improper When No Affirmative Relief Against Defendant Class Is Sought or Possible

In ***Pinnacle Holdings, Inc. v. Simon*** *(1995) 31 Cal. App. 4th 1430, 37 Cal. Rptr. 2d 778* , a landlord that had unsuccessfully sought authority for a rent increase from a county rent control board brought a proceeding for mandate and for declaratory relief against the rent control board. In the declaratory relief action, the plaintiff landlord also sought to join as defendants four tenants who had spoken in opposition to the proposed rent increase during a hearing before the board. The four tenants were named both as individual defendants and as representatives of a class consisting of all of the plaintiff's tenants. The trial court dismissed the declaratory relief action against the four tenants after sustaining their demurrers without leave to amend and denying plaintiff's motion for certification of the defendant class.

The court of appeal affirmed. The plaintiff had conceded that the tenants were not indispensable parties, but argued including the tenants in the litigation was proper because the determination regarding the propriety of the rent control board's decision would affect the tenants. However, the court disagreed that subjecting the tenants to a lawsuit against their will was necessary to protect their due process rights (*31 Cal. App. 4th 1430, 1435)* . The court noted that the tenants did not need plaintiff's help to protect their rights since the tenants had their own right to file an action under the rent control ordinance to challenge any unlawful rent increase and could also intervene in any ensuing appeal of the rent board's decision (*31 Cal. App. 4th 1430, 1436)* . The court also held that the tenants could not be made parties to the action because the action sought no relief against them and because they had no power to grant plaintiff the relief it sought (i.e., approval for the rent increase) (*31 Cal. App. 4th 1430, 1436-1437)* . The court reasoned to permit the plaintiff to make the tenants unwilling parties to litigation in which no affirmative relief was sought against them and to require them to represent the interests of all similarly situated tenants would have a chilling effect on the provision of the rent control ordinance that permitted interested parties to participate in rent increase hearings (*31 Cal. App. 4th 1430, 1437)* .

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4-41 California Points & Authorities § 41.62

§ 41.62 Opposing Contention That Class Action [Code Civ. Proc. § 382] Proper--No Provable Harm to Class Members

[1] FORM Opposing Contention That Class Action [Code Civ. Proc. § 382] Proper--No Provable Harm to Class Members

[*The following may be combined with a general form of memorandum in support of a motion for an order declaring an action inappropriate as a class action (see, e.g., § 41.31) or a motion to decertify the class (see, e.g., § 41.32). The following may also be combined with a general form of memorandum supporting defendant's demurrer on the ground that class action treatment is not appropriate (see, e.g., § 41.34).*]

THIS CLASS ACTION SHOULD BE DISMISSED AS IMPROPER BECAUSE THERE IS NO PROBABILITY THAT INDIVIDUAL CLASS MEMBERS CAN PROVE THEIR PARTICULAR DAMAGES AND THEREFORE THE CLASS IS NOT ASCERTAINABLE.

A. Class Action Requirements. [*See § 41.36, Paragraph A.*]

B. Class Action Improper When Individual Damages Not Provable. Proof of damage is a necessary element of the cause of action and, without some probability that class members will come forward and prove their separate claims,class certification is improper (*Collins v. Safeway Stores, Inc. (1986) 187 Cal. App. 3d 62, 68, 72, 231 Cal. Rptr. 638*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that class action treatment is proper. Defendant may use these points and authorities when arguing that a class action should be dismissed on the ground that members of the proposed class will not be able to prove their particular damages and therefore no ascertainable class exists.

This form may be combined, when appropriate, with points and authorities relating to the specific procedural context in

which counsel wishes to raise the issue. A defendant might make an argument supported by this memorandum under the following circumstances: (1) when supporting a motion for an order declaring an action inappropriate as a class action (*see, e.g., § 41.31*); (2) when supporting a motion to decertify the class (*see, e.g., § 41.32*); (3) when opposing a motion to certify an action as a proper class action (*see, e.g., § 41.30*); and (4) when supporting a demurrer on the ground that class action treatment is not appropriate (*see, e.g., § 41.34*). This form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel should refer to facts showing that, although representatives of the proposed class have alleged damages for purposes of pleading, individual class members will be unable to prove they actually sustained any injury.

[3] Discussion of Authorities

[a] Class Action Improper When Individual Damages Not Provable

Collins v. Safeway Stores, Inc. *(1986) 187 Cal. App. 3d 62, 231 Cal. Rptr. 638* , was an action on behalf of an economic damage class defined as all state residents who, during a specified period, purchased from a grocery store chain and/or consumed, or whose families consumed, eggs supplied by a certain producer. Approximately 20 percent of the eggs sold by the producer to the chain during that period were contaminated with a pesticide. During packaging, the contaminated eggs had been commingled with safe eggs. The grocery chain sold the producer's egg cartons until the producer, unable to ascertain which eggs had been contaminated, instituted a recall of all those cartons it had supplied the chain during the specified time period. The trial court, stating that plaintiffs would be unable to prove that class members suffered any economic harm, denied certification of the class.

The court of appeal upheld the denial on the ground that the economic damage was unprovable, finding that plaintiffs represented no ascertainable class. The court reasoned that since contaminated eggs were commingled with safe eggs, no single member of the economic class would be able to prove he or she purchased a carton of eggs with one or more contaminated eggs in it. The court refused to speculate that all cartons sold to consumers contained one or more contaminated eggs or that 80 percent of the cartons contained no contaminated eggs (*187 Cal. App. 3d 62, 71)* . The trial court's consideration of whether the proposed class could prevail on the merits was not an improper criterion for denying certification. Proof of damage is a necessary element of the cause of action and a prerequisite to certification, since without it no ascertainable class exists (*187 Cal. App. 3d 62, 72)* . Relying on *Blue Chip Stamps v. Superior Court (1976) 18 Cal. 3d 381, 134 Cal. Rptr. 393, 556 P.2d 755* , the court reiterated that the trial judge properly could weigh the probability that each member of the proposed class would come forward ultimately and prove his or her separate claim to a portion of the total recovery. When not all the products purchased by the class were defective and when class members themselves did not know, and never would know, whether they purchased a defective product, there was no probability of any individual class members ever coming forward and proving their particular damages. Therefore, the trial court had substantial evidence on which to deny certification of the proposed class (*187 Cal. App. 3d 62, 71)* .

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4-41 California Points & Authorities § 41.63

§ 41.63 Supporting Contention That Trial Court May Impose Costs of Notice to Class Members on Adverse Party in Class Action [Code Civ. Proc. § 382]

[1] FORM Supporting Contention That Trial Court May Impose Costs of Notice to Class Members on Adverse Party in Class Action [Code Civ. Proc. § 382]

[*The following may be combined with a general form of memorandum relating to the specific procedural context in which counsel wishes to raise the issue.*]

THE TRIAL COURT MAY IMPOSE THE COSTS OF NOTICE IN THIS CLASS ACTION ON _____ [PLAINTIFF *or* DEFENDANT].

Trial Court May Order Either Party to Provide or Bear Cost of Class Notice. If a class is certified, the trial court may order either party to notify the class in the manner specified by the court (*Cal. Rules of Ct., Rule 3.766(a)*). The court's order concerning notice must specify the party or parties responsible for the cost of the notice (*Cal. Rules of Ct., Rule 3.766(c)(5)*; *Hypertouch, Inc. v. Superior Court (2005) 128 Cal. App. 4th 1527, 1551-1555, 27 Cal. Rptr. 3d 839*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a party'scontention that the adverse party in a class action should be required to bear the costs of notice to class members.

This form may be combined, as appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to invoke the contention. For example, plaintiff might make an argument supported by these points and authorities in connection with a motion for an order notifying class members of the pending action.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel should refer to facts showing that the opposing party should be required to bear notice costs because

of actions by the opposing party making notice difficult or because of that party's more favorable financial position. Counsel should also refer to facts showing that a public policy in favor of class actions would be promoted by requiring the opposing party to bear notice costs, or that this policy would be thwarted unless the opposing party, because of its more favorable position financially or otherwise, is required to pay the cost of notice [*see Civil Service Employees Ins. Co. v. Superior Court (1978) 22 Cal. 3d 362, 377, 149 Cal. Rptr. 360, 584 P.2d 497* (decided before adoption of predecessor of *Cal. Rules of Ct., Rule 3.766(a), (c)(5),* which expressly authorizes court to impose cost of notice on any party)].

[3] Discussion of Authorities

[a] Trial Court May Order Either Party to Provide or Bear Cost of Class Notice

Hypertouch, Inc. v. Superior Court *(2005) 128 Cal. App. 4th 1527, 27 Cal. Rptr. 3d 839* , was a class action against a consulting company that allegedly sent unsolicited advertisements by telephone facsimile, in violation of the Telephone Consumer Protection Act of 1991 (*47 U.S.C. § 227(b)(1)(C), (3)*). After certifying the class, the trial court issued an order approving publication of notice to the class and providing that individual members of the certified class must affirmatively respond to the published notice and "opt" into the litigation, and that the judgment would bind only those class members that opt in.

The trial court's order requiring that class members opt into the litigation was based in part on the fact that notifying class members had been made more difficult by the defendant's assertion that its database of telephone numbers to which it had sent facsimile advertisements was confidential and privileged as a trade secret (*see Civ. Code § 3426.1(d)*), and also by the defendant's destruction of its database containing the telephone numbers of persons who had called and asked the defendant to stop sending facsimiles (*128 Cal. App. 4th 1527, 1534-1536)* .

The named plaintiff sought writ relief from the trial court's notice order, contending that the opt-in requirement was not constitutionally required and not permitted by applicable court rules. The court of appeal held that the difficulty of notifying individual class members does not authorize a trial court to require that class members--even those with a substantial stake in the case--acknowledge personal notification by affirmatively requesting inclusion in the class. An opt-in procedure generally is permitted only after liability has been determined, as a means of apportioning the class's recovery (*128 Cal. App. 4th 1527, 1542 n.5, 1546-1547* & nn.9, 10). Before the determination of liability, an opt-in procedure is not required by constitutional due-process principles. The court explained that although the difficulty of providing notice may be a reason to deny class certification, once a class is certified, due process does not require the use of an opt-in procedure to limit the class to those who have received actual notice (*128 Cal. App. 4th 1527, 1537-1543)* . Moreover, the use of an opt-in requirement is not permitted by the applicable federal or California court rules, which require only the best notice practicable under the circumstances (*128 Cal. App. 4th 1527, 1544-1550* ; *see Fed. R. Civ. P. 23(c)(2)*; *Cal. Rules of Ct., Rule 3.766(f).*

Accordingly, the court of appeal vacated the notice order and remanded the case so that the trial court could determine in the first instance the appropriate means of giving notice. In remanding, the court of appeal observed that the forms of notice mentioned in the Rules of Court as alternatives to personal notification--publication in a newspaper or magazine; broadcasting on television, radio or the Internet; or posting or distribution through a trade or professional association, union, or public interest group--are offered simply as examples; the list is not exclusive (*see Cal. Rules of Ct., Rule 3.766(f).* Thus, a trial court has substantial room for creativity in designing an effective means of notifying class members. The court of appeal pointed out that one aspect over which the trial court may exercise discretion is the allocation of the cost of giving notice. Ordinarily the plaintiff has the responsibility of providing the notice and bearing the expense of doing so. However, the trial court has discretion to require the defendant to provide or pay for notice if the defendant's conduct has unnecessarily complicated the problems of identifying and notifying the class, or if the defendant possesses the ability to provide class notice easily and at little cost (*128 Cal. App. 4th 1527, 1551-1555)* .

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4-41 California Points & Authorities § 41.64

§ 41.64 Supporting Contention That Trial Court May Not Adjudicate Substantive Merits of Class Action [Code Civ. Proc. § 382] Without Prior Determination of Procedural Class Issues

[1] FORM Supporting Contention That Trial Court May Not Adjudicate Substantive Merits of Class Action [Code Civ. Proc. § 382] Without Prior Determination of Procedural Class Issues

[*The following may be combined with a general form of memorandum in opposition to a motion seeking determination of a substantive issue, e.g., motion for summary judgment, prior to adjudication of procedural class issues (see, e.g.,Ch. 116, Injunctions, and Ch. 221, Summary Judgments). The following may also be combined with a general form of memorandum in opposition to a motion seeking a determination with respect to class issues (see, e.g., § 41.30) when the motion follows a substantive ruling.*]

THE COURT SHOULD NOT GRANT _____ [*specify substantive ruling sought, e.g.,* A SUMMARY JUDGMENT] IN THIS ACTION BECAUSE THE COURT GENERALLY MAY NOT ADJUDICATE THE SUBSTANTIVE MERITS OF AN ACTION WITHOUT PRIOR DETERMINATION OF THE PROCEDURAL CLASS ACTION ISSUES, SUCH AS _____ [SUITABILITY OF THE ACTION AS A CLASS ACTION *and/or* DETERMINATION OF THE COMPOSITION OF THE CLASS *and/or* APPROPRIATE NOTIFICATION OF THE CLASS MEMBERS], AND THERE ARE NO SPECIAL CIRCUMSTANCES IN THIS CASE JUSTIFYING A DEPARTURE FROM THE GENERAL RULE.

Class Determinations Must Precede Substantive Adjudication. The trial court may not adjudicate the substantive merits of an action without prior determination of procedural class action issues, such as suitability of the action as a class action, determination of the composition of the class, and appropriate notification of the class members, unless the defendant has waived the right to have the procedural issues determined first, or unless there is a compelling justification for resolving the merits issues first (*Fireside Bank v. Superior Court (2007) 40 Cal. 4th 1069, 1083, 56 Cal. Rptr. 3d 861, 155 P.3d 268* ; (*Home Sav. & Loan Assn. v. Superior Court (1976) 54 Cal. App. 3d 208, 214, 126 Cal. Rptr. 511* ; *Home Sav. & Loan Assn. v. Superior Court (1974) 42 Cal. App. 3d 1006, 1015, 117 Cal. Rptr. 485*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a party's contention that the trial court may not adjudicate the substantive merits of an action without prior determination of procedural class action issues. For example, the argument supported by this memorandum might be raised by the defendant when, before certification of the action as a class action, plaintiff seeks a preliminary injunction, summary adjudication of an issue, or other substantive relief.

A corollary to the contention supported by this memorandum is the argument that procedural class action issues may not be determined after an adjudication of substantive issues [*see § 41.65*]. A plaintiff might argue, for example, that defendant's motion for decertification must be denied when it is made after the substantive issues of the case have been decided [*see § 41.33*].

These authorities may be combined, where appropriate, with memoranda relating to the specific procedural context in which counsel wishes to raise the issue of requiring prior determination of procedural class action issues. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the point of law stated.

[b] Opposing Memoranda

The memoranda *set out in §§ 41.66 -41.68* may be used in an appropriate case to oppose the contention supported by this memorandum.

[3] Discussion of Authorities

[a] Class Determinations Must Precede Substantive Adjudication

In ***Fireside Bank v. Superior Court*** *(2007) 40 Cal. 4th 1069, 56 Cal. Rptr. 3d 861, 155 P.3d 268* , a bank sued a borrower, claiming sums owed under a conditional sales contract that the borrower had used to finance the purchase of an automobile. The borrower filed an answer asserting the affirmative defense that recovery was barred by the bank's failure to comply with the Rees-Levering Motor Vehicle Sales and Finance Act (*Civ. Code §§ 2981-2984.4*). The borrower also filed a cross-complaint asserting claims of conversion, as well as claims under the Rees-Levering Act and other statutory provisions. The borrower then moved for judgment on the pleadings on the bank's complaint, but the trial court continued the hearing on that motion to allow the borrower time to decide whether to seek class treatment for the claims asserted in the cross-complaint. Eventually, the borrower filed an amended cross-complaint that included class claims based on alleged violations of the Rees-Levering Act and the unfair-competition law (UCL) (*Bus. & Prof. Code § 17200 et seq.*). The borrower then moved for class certification.

The hearing on class certification occurred on the same date set for the continued hearing on the borrower's motion for judgment on the pleadings. At the hearing, the bank opposed any ruling on the motion for judgment until notice had been given to the class, if any, and the time for class members to opt out had expired. The trial court declined argument on the motion for judgment on the pleadings, indicating that the motion was going to go off calendar pending a ruling on certification, but that a further hearing would be set if the court denied certification.

Despite the trial court's assurances, however, about a month after the hearing the court issued formal orders granting class certification and granting the borrower's motion for judgment on the pleadings as to the bank's complaint.

The bank sought writ relief, arguing that by ruling on the motion for judgmenton the pleadings before notice had been given to the class, the court had impermissibly provided class members with an opportunity for "one-way intervention." After the court of appeal denied writ relief, the California Supreme Court granted review and, in a unanimous decision,

reversed the court of appeal's judgment.

The Supreme Court began its analysis with a review of the history and policy considerations underlying the rule against one-way intervention. "One-way intervention," in this context, refers to the following consequence of ruling on the merits before determining whether the case should proceed as a class action. If the merits ruling is favorable to the plaintiff, other members of the class would be able to intervene and "share the spoils"; but if the merits ruling is unfavorable to the plaintiff, other potential class members would opt out and wait for another plaintiff to be victorious. As a result, the defendant could win only against the named plaintiff and might face additional suits by other class members, but any loss to a named plaintiff would result in a loss to all remaining members of the class (*40 Cal. 4th 1069, 1078)* .

The Supreme Court observed that in the federal system, defendants are protected against one-way intervention by the provisions of Federal Rule of *Civil Procedure 23(c)(1)(A)*, which requires that class issues be resolved at an early practicable time (*40 Cal. 4th 1069, 1078-1079)* . In California, the problem has been dealt with judicially, beginning with the court of appeal decisions in *Home Sav. & Loan Assn. v. Superior Court (1974) 42 Cal. App. 3d 1006, 1015, 117 Cal. Rptr. 485* and *Home Sav. & Loan Assn. v. Superior Court (1976) 54 Cal. App. 3d 208, 214, 126 Cal. Rptr. 511* , both discussed below, which required that the trial court resolve procedural class issues before deciding the merits. The Supreme Court adopted the *Home Savings* rule in *Green v. Obledo (1981) 29 Cal. 3d 126, 146, 172 Cal. Rptr. 206, 624 P.2d 256* , discussed in *§ 41.33[3][a]*. The *Green* opinion went on to extend the *Home Savings* rule, holding that it should apply not only to protect defendants from a belated motion for certification, but also to protect plaintiffs from a belated motion for decertification. Thus, a defendant should not be allowed to withhold its best case against certification and then seeking decertification if it suffered an unfavorable merits ruling (*40 Cal. 4th 1069, 1079-1081)* .

The Court in this case then pointed out that the general *Home Savings* rule, as adopted in *Green* and applied in subsequent cases, is not an ironclad standard (*40 Cal. 4th 1069, 1081-1083)* . Rather, the general requirement that procedural issues be resolved first is subject to the following rules (*40 Cal. 4th 1069, 1083)* :

- First, a class defendant must actively preserve its protection against one-way intervention by objecting to any adjudication of the merits before class certification. If the defendant fails to timely object, or affirmatively seeks resolution of the merits before certification, it will be deemed to have waived its rights [*see, e.g.,* *Employment Development Dept. v. Superior Court (1981) 30 Cal. 3d 256, 262, 262-265, 178 Cal. Rptr. 612, 636 P.2d 575* ; *Civil Service Employees Ins. Co. v. Superior Court (1978) 22 Cal. 3d 362, 373-374, 149 Cal. Rptr. 360, 584 P.2d 497* ; *see also § 41.66*].

- Second, plaintiffs seeking to represent a class should move for certification before moving for any resolution of the merits [*see Cal. Rules of Ct., Rule 3.764(b)* ("A motion for class certification should be filed when practicable")]. If the plaintiffs seek certification after seeking resolution of the merits, in the absence of a waiver by the defendant, they must demonstrate changed circumstances or other good cause justifying the belated motion before the trial court may consider it.

- Third, in the absence of a waiver by the defendant, the trial court should not resolve the merits in a putative class action before resolving class certification and notice issues, absent a compelling justification for doing so.

The Court next considered the range of substantive motions that implicate the foregoing rules governing one-way intervention. The Court noted that the interest in postponing a substantive ruling in a case until after resolution of class issues depends on the extent to which the ruling gives rise to concerns about one-way intervention. Thus, the relevant question is whether a given ruling affects the merits of the class claims in a way that would create a risk of one-way intervention. In the present case, for example, the fact that the borrower moved for judgment on the merits of the bank's claim--not on the class claims raised in the cross-complaint--did not necessarily immunize the motion from the rules

governing one-way intervention. Rather, whenever a class defendant assets its right not to be subject to one-way intervention, the court should consider (1) the degree to which the given motion poses one-way intervention problems, balanced against (2) the compelling justifications proffered by the moving party for nevertheless deciding the given motion in advance of resolving class issues. The greater the concerns, the more compelling the countervailing justification must be. The Court emphasized that the form of a given motion or whether it may leave some issues unresolved do not matter for this purpose; what matters is the extent to which the motion impacts the principal legal issue or issues in a case and thereby poses for the defendant the risk of one-way intervention depending on its outcome (*40 Cal. 4th 1069, 1085-1086)* .

Applying the foregoing principles to the borrower's motion for judgment on the pleadings in the present case, the Court concluded that although the ruling on the motion left unresolved the bank's affirmative defenses against the class claims raised in the borrower's cross-complaint, it squarely resolved the central issue in the class claims--whether the bank's conduct had violated the Rees-Levering Actand thus whether the bank's conduct was unlawful for purposes of the UCL. The Court found it immaterial that the substantive motion was brought by the borrower as a defendant, while the motion for class certification was brought by her as plaintiff in her cross-action. As a practical matter, because the motion for judgment on the pleadings involved the determination of substantive issues common to both actions, it presented the same one-way intervention concerns that would have been presented by a ruling on the affirmative class claims. Accordingly, the motion for judgment on the pleadings was subject to the rules governing one-way intervention. Therefore, the trial court would have been warranted in deciding the substantive issue before a class had been notified only if it found a compelling justification for doing so. Because there was no compelling justification in this case, the Supreme Court concluded that the trial court had abused its discretion in ruling on the motion for judgment in the pleadings before notice had gone out to the class (*40 Cal. 4th 1069, 1086-1087)* .

The Supreme Court next turned to the question of the appropriate remedy. The Court observed that the order in which the borrower filed her motions--first seeking judgment on the pleadings, and then moving for class certification--was justified by changed circumstances (the possibility of class treatment did not arise until the bank's belated discovery responses, after the substantive motion had already been filed). Also, the borrower had agreed to have all class issues resolved before any ruling on the merits. The Supreme Court concluded that under the circumstances, to bar the class action would have been inequitable. Instead, the Court decided that vacating the trial court's premature merits ruling, and ordering that any future motion on the merits be decided de novo, would reduce the risk of one-way intervention without unduly punishing the class (*40 Cal. 4th 1069, 1087-1089)* .

Accordingly, after finding that the trial court's class-certification order was correct (*40 Cal. 4th 1069, 1089-1092)* , the Supreme Court left that order in place, directed that the trial court's entry of judgment on the pleadings be vacated, and remanded the case for further proceedings (*40 Cal. 4th 1069, 1075, 1093)* .

Home Sav. & Loan Assn. v. Superior Court *(1976) 54 Cal. App. 3d 208, 126 Cal. Rptr. 511* (*Home II*), involved the combined efforts of plaintiffs in several of the six class actions against defendant (see discussion of *Home I, below*) to obtain summary judgment and other substantive relief prior to determination of procedural class action issues. Defendant filed opposing motions to stay adjudication of plaintiffs' motions until the suitability of each action as a class action and the composition of its class had been determined and until members of the class had been appropriately notified. After defendant's motions were denied, it sought a writ of prohibition from the court of appeals.

The court of appeal granted the writ, prohibiting the trial court from adjudicating any issues on application for summary judgment, partial summary judgment, specification of issues without substantial controversy, or preliminary injunction prior to adjudication of the procedural class action issues, including determination and notification of the classes involved (*54 Cal. App. 3d 208, 214)* . The court rejected plaintiffs' contention that this case differed from *Home I* because the motions did not involve a trial but merely sought an adjudication of matters of law in light of established court precedent. The court noted that the key words in *Home I* were "substantive merits," not trial, and further, that the controlling factor is not the way that the superior court determines the substantive merits of the case, but whether or not

it does so prior to adjudication of procedural class issues and notification of the class (*54 Cal. App. 3d 208, 211)* .

After supporting its decision by essentially the same reasoning set forth in *Home I* (discussed *below*), the court in *Home II* noted that with respect to consumer class actions under the Consumers Legal Remedies Act, the Legislature had concluded in *Civ. Code § 1781(c)* that summary judgment is inappropriate prior to determination and notification of the class (*54 Cal. App. 3d 208, 213)* .

Home Sav. & Loan Assn. v. Superior Court *(1974) 42 Cal. App. 3d 1006, 117 Cal. Rptr. 485* (*Home I*), was one of six class actions filed in state court seeking damages and declaratory relief arising from loan agreement late charges imposed by defendant. On the motion of plaintiffs in this action, the trial court entered an order bifurcating the trial and providing for adjudication of defendant's liability prior to determination of procedural class issues. Defendant then sought a writ of prohibition to prevent the court from conducting its intended procedure.

The court of appeal granted the writ and prohibited the trial court from proceeding to trial on the substantive merits of the case without prior adjudication of the procedural class action issues, including suitability of the action as a class action, determination of the composition of the class, and appropriate notification of members of the class, all pursuant to guidelines set out in *Fed. R. Civ. P., Rule 23,* and *Civ. Code § 1781* (*42 Cal. App. 3d 1006, 1015)* . The court reasoned that absent notification, no member of the class need be bound by the result of the litigation. In addition, the court stated that under the doctrine of collateral estoppel, a defendant who litigates and loses issues tendered in a class action filed by an individual member of the class may be estopped in subsequent litigation with other members of the class to deny the validity and binding effect of the adverse judgment in the first action. By the same token, if the defendant prevails in the first action involving individual members of the class, the other class members are not bound by the outcome because they were not parties to the lawsuit and received no notification about it (*42 Cal. App. 3d 1006, 1011)* .

The court also criticized the trial court's procedure as allowing one-way intervention. When the merits are determined first, the potential members of the class can reserve their decision to become part of the class until the validity of the action asserted by the named plaintiffs on behalf of the class has been determined.The court stated that for a defendant, this presents the terrors of an open-ended lawsuit that cannot be defeated, settled, and adjudicated (*42 Cal. App. 3d 1006, 1011)* .

Finally, the court cited analogous federal and state authority to support its holding. The court noted that federal decisional authority interpreting procedural provisions of *Fed. R. Civ. P., Rule 23,* has forbidden inquiry into the merits of an action prior to notice to the class (*42 Cal. App 3d 1006, 1013)* . In addition, the court stated that the class actions provision of the Consumers Legal Remedies Act [*Civ. Code § 1781(c)*] requires plaintiffs in a class action to prove their status as representatives of a defined class prior to determination of the substantive merits of their claim (*42 Cal. App. 3d 1006, 1014)* .

[4] Additional Authorities

[a] Class Determinations Must Precede Substantive Adjudication

In *People v. Pacific Land Research Co. (1977) 20 Cal. 3d 10, 141 Cal. Rptr. 20, 569 P.2d 125* , an action by the Attorney General and a county district attorney alleging unlawful misrepresentations in the sale of land and seeking injunctive relief, civil penalties, and restitution on behalf of the vendees, the Supreme Court held that consumer protection actions by the People under *Bus. & Prof. Code § 17535* are not the equivalent of class actions brought by private parties, requiring the same safeguards to protect a defendant from multiple suits and other harmful consequences (*20 Cal. 3d 10, 17)* . The Court noted that while a defendant in a class action brought by a private individual may prevent adjudication of the merits prior to a determination of the composition of the class under the rule announced in *Home Sav. & Loan Assn. v. Superior Court (1974) 42 Cal. App. 3d 1006, 1015, 117 Cal. Rptr. 485* (discussed in *§*

41.64[3][a]), the defendant does not have similar rights in an enforcement action under *Bus. & Prof. Code § 17535* (*20 Cal. 3d 10, 18)* .

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4-41 California Points & Authorities § 41.65

§ 41.65 Supporting Contention That Trial Court May Not Determine Procedural Class Issues in Class Action [Code Civ. Proc. § 382] Following an Adjudication on the Substantive Merits

[1] FORM Supporting Contention That Trial Court May Not Determine Procedural Class Issues in Class Action [Code Civ. Proc. § 382] Following an Adjudication on the Substantive Merits

[*The following may be combined with a general form of memorandum relating to the specific procedural context in which counsel wishes to raise the issue. For example, the following may be combined with a general form of memorandum opposing a motion seeking a determination of class action issues when the motion follows a ruling on the substantive merits.*]

_____ [PLAINTIFF'S *or* DEFENDANT'S] MOTION FOR _____ [*specify procedural ruling sought, e.g.,* CLASS CERTIFICATION] IS NOT PROPER BECAUSE THE COURT GENERALLY MAY NOT DETERMINE PROCEDURAL CLASS-ACTION ISSUES FOLLOWING AN ADJUDICATION ON THE SUBSTANTIVE MERITS OF AN ACTION, AND THERE ARE NO SPECIAL CIRCUMSTANCES IN THIS CASE JUSTIFYING A DEPARTURE FROM THE GENERAL RULE.

A. Court Should Try Class Issues Before Substantive Merits. The law is now firmly established that the trial court in a class action should first try the issue of identity of the class and designate the appropriate form and manner of notice before trying the issue of the defendant's liability, unless the defendant waives the right to such prior determination, or unless there is a compelling justification for resolving the merits issues first (*Fireside Bank v. Superior Court (2007) 40 Cal. 4th 1069, 1083, 56 Cal. Rptr. 3d 861, 155 P.3d 268* ; *Travelers Insurance Co. v. Superior Court (1977) 65 Cal. App. 3d 751, 756-757, 135 Cal. Rptr. 579*).

B. Procedural Class Issues May Not Be Decided After Merits. The trial court may not ordinarily resolve procedural class action issues after an adjudication on the substantive merits (*see* *Green v. Obledo (1981) 29 Cal. 3d 126, 146, 172 Cal. Rptr. 206, 624 P.2d 256* ; *Travelers Insurance Co. v. Superior Court (1977) 65 Cal. App. 3d 751, 756-758, 135 Cal. Rptr. 579*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a party's contention that the trial court may not determine procedural class issues following an adjudication on the substantive merits of an action. This argument is a corollary of the rule that the trial court may not adjudicate the substantive merits of an action without prior determination of procedural class action issues [*see § 41.64*].

These authorities may be combined, where appropriate, with memoranda relating to the specific procedural context in which counsel wishes to raise the issue of prohibiting subsequent determination of procedural class action issues. For example, the argument supported by this memorandum might be raised by the defendant when, after obtaining a substantive ruling over the defendant's objection, the plaintiff seeks certification of the class. Alternatively, a plaintiff might raise the argument supported by this memorandum when the defendant seeks decertification of the class after the court has rendered a decision on the merits [*see § 41.33*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Opposing Memoranda

With appropriate modification, the memoranda *set out in §§ 41.66 -41.68* maybe used in an argument opposing the contention that procedural class issues may not be decided after adjudication of the substantive merits.

[3] Discussion of Authorities

[a] Court Should Try Class Issues Before Substantive Merits

The facts and procedural background of ***Fireside Bank v. Superior Court*** *(2007) 40 Cal. 4th 1069, 56 Cal. Rptr. 3d 861, 155 P.3d 268* , are discussed in *§ 41.64*[3][a]. The Supreme Court held that the general requirement that procedural issues be resolved first is subject to the following rules (*40 Cal. 4th 1069, 1083)* :

- First, a class defendant must actively preserve its protection against one-way intervention by objecting to any adjudication of the merits before class certification. If the defendant fails to timely object, or affirmatively seeks resolution of the merits before certification, it will be deemed to have waived its rights [*see, e.g.,* *Employment Development Dept. v. Superior Court (1981) 30 Cal. 3d 256, 262, 262-265, 178 Cal. Rptr. 612, 636 P.2d 575* ; *Civil Service Employees Ins. Co. v. Superior Court (1978) 22 Cal. 3d 362, 373-374, 149 Cal. Rptr. 360, 584 P.2d 497* ; *see also § 41.66*].

- Second, plaintiffs seeking to represent a class should move for certification before moving for any resolution of the merits [*see Cal. Rules of Ct., Rule 3.764(b)* ("A motion for class certification should be filed when practicable")]. If the plaintiffs seek certification after seeking resolution of the merits, then in the absence of a waiver by the defendant, they must demonstrate changed circumstances or other good cause justifying the belated motion before the trial court may consider it.

- Third, in the absence of a waiver by the defendant, the trial court should not resolve the merits in a putative class action before resolving class certification and notice issues, absent a compelling justification for doing so.

Travelers Insurance Co. v. Superior Court *(1977) 65 Cal. App. 3d 751, 135 Cal. Rptr. 579* , was a class action to recover disability benefits allegedly wrongfully withheld by defendant. On plaintiff's motion, the trial court severed the issue of liability from the issue of the identity of the class and proceeded to trial on the issue of liability first.

Defendant's attempt to appeal the liability decision was dismissed because the decision was not final. Defendant then moved to dismiss the class action elements in the trial court because the court had erroneously determined the issue of liability before resolving procedural class action issues. After the trial court overruled the motion, defendant filed for writs of mandate and prohibition.

The court of appeal granted the writ of mandate and ordered the trial court to vacate its order determining the substantive issue (*65 Cal. App. 3d 751, 763)* . Relying on *Home Savings & Loan Ass'n v. Superior Court (1974) 42 Cal. App. 3d 1006, 117 Cal. Rptr. 485* (*Home I*) and *Home Savings & Loan Ass'n v. Superior Court (1976) 54 Cal. App. 3d 208, 126 Cal. Rptr. 511* (*Home II*) (discussed in *§ 41.64[3][a]*), the court stated that the law is now firmly established that the trial court in a class action should first try the issue of identity of the class and designate the appropriate form and manner of notice before trying the issue of the defendant's liability, unless the defendant waives the right to such prior determination (*65 Cal. App. 3d 751, 756-757)* .

[b] Procedural Class Issues May Not Be Decided After Merits

The facts and procedural background of ***Green v. Obledo*** *(1981) 29 Cal. 3d 126, 172 Cal. Rptr. 206, 624 P.2d 256* , are discussed in *§ 41.33[3][a]*. The Supreme Court in *Green* upheld plaintiffs' objections to decertification of the class following the adjudication of substantive issues. The Court noted that California appellate courts, relying on *Fed. R. Civ. P., Rule 23(c)(1)*, have held that procedural class issues must ordinarily be resolved before a decision on the merits is reached. Furthermore, the Court stated that although this rule had previously been applied only for the benefit of defendants, there appeared to be no reason prohibiting application at the request of plaintiffs (*29 Cal. 3d 126, 146)* .

The Court in *Green* did not establish a hard-and-fast rule prohibiting decertification after a decision on the merits. Instead, relying on federal court decisions, the Court concluded that after a decision on the merits, a class should be decertified only when it is clear that there are changed circumstances making continued class action treatment improper. Based on the facts of the case, the Court concluded that defendant could not escape application of the general rule that decertification must occur, if at all, prior to a decision on the merits (*29 Cal. 3d 126, 148)* .

A reasonable inference from the decision in *Green* is that procedural class issues may not ordinarily be determined after a decision on the substantive merits of the case. This conclusion is a corollary of the general rule that the trial court may not adjudicate the substantive merits of an action without prior determination of procedural class action issues [*see § 41.64[1]*]. The Court in *Green* relied on this rule, first announced in *Home Sav. & Loan Assn. v. Superior Court (1974) 42 Cal. App. 3d 1006, 1015, 117 Cal. Rptr. 485* (discussed in *§ 41.64[3][a]*), in refusing to allow the procedural determination of decertification after the substantive merits had been decided. The rule stems from *Fed. R. Civ. P., Rule 23(c)(1)*, which provides that an order determining class issues may be altered or amended before the decision on the merits.

The facts and procedural background of ***Travelers Insurance Co. v. SuperiorCourt*** *(1977) 65 Cal. App. 3d 751, 135 Cal. Rptr. 579* , are discussed in *§ 41.65[3][a]*. The court of appeal in *Travelers* relied on the general rule forbidding adjudication of the substantive merits prior to a determination of procedural class issues in ordering the trial court to vacate its order determining the substantive issues of the case (*65 Cal. Ap. 3d 751, 756-757, 761)* . In effect, the court ruled that procedural class issues could not be decided until the trial court's improper procedure was corrected. However, the court refused to use dismissal of the class action allegations as the method of correcting the court's error, choosing instead to order that the substantive order, which was not a final judgment, be vacated. In dictum, the court noted that if the problem had been presented on appeal from a final judgment in a class action, it would have reversed the entire judgment, including the premature provisional determination of the issue of liability (*65 Cal. App. 3d 751, 761)* . Thus, the decision in *Travelers* also appears to support the corollary rule that procedural class determinations may not be made after a determination of the substantive merits. If the trial court follows improper procedure, its decision should be overturned so that procedural class issues may be determined first.

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§ 41.66 Opposing Contention That Trial Court May Not Adjudicate Substantive Merits of Class Action [Code Civ. Proc. § 382] Without Prior Determination of Procedural Class Issues--Defendant's Waiver of Due Process Rights to Prior Procedural Determination

[1] FORM Opposing Contention That Trial Court May Not Adjudicate Substantive Merits of Class Action [Code Civ. Proc. § 382] Without Prior Determination of Procedural Class Issues--Defendant's Waiver of Due Process Rights to Prior Procedural Determination

[*The following may be combined with a general form of memorandum in support of a motion seeking determination of a substantive issue, e.g., motion for summary judgment, prior to adjudication of procedural class issues (see, e.g., Ch. 116, Injunctions, and Ch. 221, Summary Judgments). The following may also be combined with a general form of memorandum in support of a motion seeking a determination with respect to class issues (see, e.g., § 41.30) when the motion follows a substantive ruling on the merits.*]

THE COURT SHOULD GRANT _____ [*specify substantive or procedural ruling sought, e.g.,* A SUMMARY JUDGMENT] IN THIS ACTION BECAUSE THE COURT MAY PROPERLY ADJUDICATE THE SUBSTANTIVE MERITS OF AN ACTION WITHOUT PRIOR DETERMINATION OF PROCEDURAL CLASS ACTION ISSUES WHEN DEFENDANT WAIVES THE RIGHT TO A PRIOR PROCEDURAL DETERMINATION.

A. Defendant's Waiver of Due Process Rights. The trial court may properly adjudicate the substantive merits of an action without prior determination of procedural class action issues when defendant waives the right to a prior procedural determination (*see Civil Service Employees Ins. Co. v. Superior Court (1978) 22 Cal. 3d 362, 373, 149 Cal. Rptr. 360, 584 P.2d 497* ; *see also Fireside Bank v. Superior Court (2007) 40 Cal. 4th 1069, 1083, 56 Cal. Rptr. 3d 861, 155 P.3d 268*).

[*Optional*] **B. Defendant's Waiver by Failure to Object.** The defendant waives its due process rights to object to resolution of a substantive issue prior to notification of the class when it simply contests the substantive motion on the merits and fails to object to the timing of the court's ruling (*Civil Service Employees Ins. Co. v. Superior Court (1978) 22 Cal. 3d 362, 373, 149 Cal. Rptr. 360, 584 P.2d 497*).

[*Optional*] **C. Defendant's Waiver by Obtaining Substantive Ruling.** The defendant waives its due process rights to object to resolution of procedural class issues following a ruling on the substantive merits when the defendant has precipitated a precertification ruling on the merits by its own demurrer (*Employment Development Dept. v. Superior Court (1981) 30 Cal. 3d 256, 262, 264, 178 Cal. Rptr. 612, 636 P.2d 575*).

[*Optional*] **D. Defendant's Waiver by Requesting Bifurcated Trial.** Proceeding in a bifurcated trial and considering the liability issue first is proper when the defendant requests such a procedure (*Colwell Co. v. Superior Court (1975) 50 Cal. App. 3d 32, 36, 123 Cal. Rptr. 228*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a party's contention that the trial court may not adjudicate the substantive merits of an action without prior determination of procedural class action issues. The foregoing may also be submitted in opposition to the contention that the trial court may not determine procedural class action issues after adjudication of the substantive merits of an action. The argument may be made when defendant waives the right to a prior procedural determination.

This form may be combined, where appropriate, with memoranda relating to the specific procedural context in which counsel wishes to invoke the contention. For example, defendant might raise the argument supported by this memorandum when seeking a substantive ruling prior to certification of the class in connection with a general demurrer or other motions that are typically used for obtaining relief on the merits, such as a request for summary judgment or summary adjudication of an issue. Plaintiff might make an argument supported by this memorandum when opposing defendant's attempt to prevent determination of class issues after defendant has failed to object to or has procured the court's ruling on a substantive issue. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship betweenthe facts of the case and the points of law stated.

In an appropriate case, this memorandum may be submitted in opposition to the contention supported by the memorandum *set out in § 41.64*.

[b] Related Uses

A corollary to the general rule prohibiting adjudication of the substantive merits of an action without prior determination of procedural class action issues [*see § 41.64*] is the rule that a court may not determine procedural class issues following an adjudication on the substantive merits of an action [*see § 41.65*]. With appropriate modification, these points of law may be used to oppose the contention that procedural class issues may not be decided after adjudication of the substantive merits.

[3] Discussion of Authorities

[a] Defendant's Waiver of Due Process Rights

Civil Service Employees Ins. Co. v. Superior Court *(1978) 22 Cal. 3d 362, 149 Cal. Rptr. 360, 584 P.2d 497* , was a class action for damages resulting from defendant's refusal to pay benefits under an insurance policy for medical expenses allegedly covered by other policies. Plaintiffs filed motions for certification of the class and for summary adjudication of an issue. Defendant responded to the motions but did not claim that the request for summary adjudication of an issue was premature or that its consideration should be postponed until absent class members had

been notified of the action. Defendant simply contested the motion on its merits. The court granted both of plaintiffs' motions, certified the case as a class action, and ordered defendant to bear the initial costs of notice to the class. Defendant subsequently moved to limit the partial summary judgment order to the individual plaintiffs because the class had not been notified prior to this substantive determination. After this motion was rejected, defendant filed for a writ of mandate or prohibition to compel the trial court to vacate its orders granting partial summary judgment and directing defendant to pay initial notification costs.

The Supreme Court held that by failing to object to the trial court's determination of plaintiff's motion for partial summary judgment prior to class notification, defendant had waived any right it may have had to postpone such a ruling until after notice had been provided to the class (*22 Cal. 3d 362, 371)* . In contending that it was entitled to a prior determination of procedural class issues such as notice, defendant had cited *Home Sav. & Loan Assn. v. Superior Court (1974) 42 Cal. App. 3d 1006, 1015, 117 Cal. Rptr. 485* (*Home I) and Home Sav. & Loan Assn. v. Superior Court (1976) 54 Cal. App. 3d 208, 214, 126 Cal. Rptr. 511* (*Home II*) (discussed in *§ 41.64[3][a]*) (*22 Cal. 3d 362, 372)* . The court in *Home I* and *Home II* held that a defendant in a class action has a due process right to secure a determination of procedural class issues prior to determination of the merits of the action. The Court in *Civil Service* noted that it was not necessary to pass on the soundness of the *Home* decisions' due process analysis because, regardless of the correctness of the analysis, the partial summary judgment had to be upheld due to defendant's waiver of whatever rights may have been afforded by *Home* (*22 Cal. 3d 362, 373)* .

The Court noted that previous class action authorities, including the *Home II* decision, uniformly supported its conclusion that a defendant waives whatever due process rights it may possess when it voluntarily accedes to a trial court's decision on the merits of an issue before notice is provided to absent class members (*22 Cal. 3d 362, 373)* . The Court stated that a defendant may be willing to forgo class notification prior to adjudication of the merits for several reasons, such as fear of detriment from the notice itself or the desire to avoid discovery or other litigation expenses entailed in notification (*22 Cal. 3d 362, 373-374)* . The Court reasoned that having chosen to submit the issue to the trial court on the merits, defendant can hardly claim that it is fundamentally unfair in a due process sense to accord binding effect to the trial court's decision. The court noted that the defendant assumed the risk that its motion would not be legally binding on unnotified class members by not raising a timely objection to the court's resolution of the motion before class notification (*22 Cal. 3d 362, 374)* .

Counsel should note that subsequent to the decision in *Civil Service, the Supreme Court in Green v. Obledo (1981) 29 Cal. 3d 126, 146, 148, 172 Cal. Rptr. 206, 624 P.2d 256* (discussed in *§ 41.33[3][a]*), cited with approval the rule announced in the *Home* decisions. The Court in *Green* held that the trial court had erred in partially decertifying the class after plaintiff's motion for summary judgment, a decision on the merits, had been granted. However, in *Employment Development Dept. v. Superior Court (1981) 30 Cal. 3d 256, 262, 178 Cal. Rptr. 612, 636 P.2d 575* (discussed *below*), decided after *Green*, the Court upheld the trial court's finding that the defendant had waived its right to determination of procedural class issues prior to a ruling on the merits. The Court based its decision on the ruling in *Civil Service.* Thus, it appears that the general rule announced in the *Home* decisions retains validity, but is subject to exceptions, such as defendant's waiver.

The facts and procedural background of ***Fireside Bank v. Superior Court*** *(2007) 40 Cal. 4th 1069, 56 Cal. Rptr. 3d 861, 155 P.3d 268* , are discussed in *§ 41.64*[3][a]. The Supreme Court held that the general requirement that procedural issues be resolved first is subject to the following rules (*40 Cal. 4th 1069, 1083)* :

- First, a class defendant must actively preserve its protection against one-way intervention by objecting to any adjudication of the merits before class certification. If the defendant fails to timely object, or affirmativelyseeks resolution of the merits before certification, it will be deemed to have waived its rights [*see, e.g.,* *Employment Development Dept. v. Superior Court (1981) 30 Cal. 3d 256, 262, 262-265, 178 Cal. Rptr. 612, 636 P.2d 575* ; *Civil Service Employees Ins. Co. v. Superior Court (1978) 22 Cal. 3d 362, 373-374, 149 Cal. Rptr. 360, 584 P.2d 497* ; *see also § 41.66*].

- Second, plaintiffs seeking to represent a class should move for certification before moving for any resolution of the merits [*see Cal. Rules of Ct., Rule 3.764(b)* ("A motion for class certification should be filed when practicable")]. If the plaintiffs seek certification after seeking resolution of the merits, then in the absence of a waiver by the defendant, they must demonstrate changed circumstances or other good cause justifying the belated motion before the trial court may consider it.

- Third, in the absence of a waiver by the defendant, the trial court should not resolve the merits in a putative class action before resolving class certification and notice issues, absent a compelling justification for doing so.

[b] Defendant's Waiver by Failure to Object

Civil Service Employees Ins. Co. v. Superior Court *(1978) 22 Cal. 3d 362, 149 Cal. Rptr. 360, 584 P.2d 497* , is discussed in *§ 41.66[3][a]*.

[c] Defendant's Waiver by Obtaining Substantive Ruling

Employment Development Dept. v. Superior Court *(1981) 30 Cal. 3d 256, 178 Cal. Rptr. 612, 636 P.2d 575* , was a class action challenging thevalidity of former Unemp. Ins. Code § 1264, which had denied unemployment benefits to any employee who did not provide the sole or major support of his or her family and who left his or her job because of marital or domestic duties. Defendants demurred to the complaint, challenging both the adequacy of the class action allegations and the request for substantive relief. Prior to argument on the demurrer, defendants submitted supplemental points and authorities which asserted that the challenged statute was not unconstitutional. Without passing on the adequacy of the class action allegations, the court sustained the demurrer with leave to amend on the basis of defendant's substantive contention. Plaintiff elected to stand on the complaint and the trial court dismissed the action. On plaintiff's appeal, the court of appeal concluded that the statute was unconstitutional and reversed the judgment sustaining the demurrer. On remand to the trial court, defendants opposed plaintiff's motion to certify the class on the ground, in part, that certification could not properly be ordered after a decision on the merits. The trial court granted plaintiff's motion, finding that defendants had waived the right to prior determination of class issues by proceeding to litigate the merits on the demurrer without objection. Defendants filed for a writ of mandate, which was granted by the court of appeal. Plaintiff then filed an appeal.

The Supreme Court, relying on *Civil Service Employees Ins. Co. v. Superior Court (1978) 22 Cal. 3d 362, 149 Cal. Rptr. 360, 584 P.2d 497* (discussed in *§ 41.66[3][b]*), held that the trial court had properly concluded that defendant had waived the right to prior determination of procedural class issues (*30 Cal. 3d 256, 262, 178 Cal. Rptr. 612, 636 P.2d 575*). The Court rejected the defendants' contention that because they had expressly objected to maintenance of the suit as a class action in the demurrer before any decision on the merits, the trial court could not properly find that they had waived any rights with respect to the class action issue (*30 Cal. 3d 256, 262, 178 Cal. Rptr. 612, 636 P.2d 575*). The Court explained that defendants had not waived their basic right to oppose class certification on remand from the court of appeal, but they could not complain about the timing of the ruling on class certification because they had not objected to the court's consideration of the merits before class certification when the court initially sustained their demurrer (*30 Cal. 3d 256, 263, 178 Cal. Rptr. 612, 636 P.2d 575*).

The Court noted that the case against defendants' contention was even stronger than in *Civil Service* because defendants' demurrer had precipitated a precertification ruling on the merits, while in *Civil Service*, the plaintiff had sought the prenotice summary adjudication of an issue. The Court concluded that since defendants themselves had triggered the early determination, there could be no suggestion that plaintiff was attempting to manipulate the sequence of rulings to bring about the asserted inequities of one-way intervention (*30 Cal. 3d 256, 264, 178 Cal. Rptr. 612, 636 P.2d 575*).

[d] Defendant's Waiver by Requesting Bifurcated Trial

Colwell Co. v. Superior Court *(1975) 50 Cal. App. 3d 32, 123 Cal. Rptr. 228* , was an action by a group of plaintiffs on behalf of themselves and other persons similarly situated who, in payment for the construction of mountain cabins, executed lien contracts and deeds of trust that were assigned by the builders to defendant. Defendant moved to bifurcate the issues of class determination and liability in order to obtain an early trial on the issues of liability because it feared damage to its business if notification of the class preceded resolution of the merits. Subsequently, the parties entered into a stipulation, approved by the trial court, to bifurcate the trial and try the issue of liability prior to determining the class action issues. After the decision in *Home Sav. & Loan Assn. v. Superior Court (1974) 42 Cal. App. 3d 1006, 117 Cal. Rptr. 485* (*Home I*) (discussed in *§ 41.64[3][a]*), the trial court, on its own motion, vacated the original order approving the stipulation. Defendant then filed for a writ of mandate in the court of appeal.

In granting the writ, the court of appeal held that the decision in *Home Sav. & Loan Assn. v. Superior Court (1974) 42 Cal. App. 3d 1006, 117 Cal. Rptr. 485* , did not preclude bifurcated trials when the defendant was willing to forgo the protections against one-way intervention. The court reasoned that in *Home I*, the defendant had insisted on the protection and objected to a determination of liability prior to resolving the class action issues, whereas in the present case, the defendant had chosen to waive the protection of a judgment binding on all members of the class (*50 Cal. App. 3d 32, 34, 123 Cal. Rptr. 228*). Relying on federal decisional authority, the court noted that no legal detriment accrues to the class by permitting a determination of the liability issues first. Thus, the court concluded, proceeding in a bifurcated trial and considering the liability issue first are proper when the defendant requests such a procedure (*50 Cal. App. 3d 32, 36, 123 Cal. Rptr. 228*).

[4] Additional Authorities

[a] Defendant's Waiver of Due Process Rights

In *Rose v. City of Hayward (1981) 126 Cal. App. 3d 926, 179 Cal. Rptr. 287* , a class action seeking a writ of mandate to compel the state retirement system to include fringe benefits in its calculation of pension benefits, the court of appeal held that the defendant waived its due process right to a pretrial determination of class maintainability when the parties stipulated to the trial court's determination of liability prior to deciding whether or not the action could be maintained as a class action (*126 Cal. App. 3d 926, 937, 179 Cal. Rptr. 287*). The court stated the rule that when a defendant voluntarily accedes to a trial court hearing on the merits prior to determination of the class issues, he or she thereby waives his or her right to class certification prior to hearings on the substantive merits (*126 Cal. App. 3d 926, 937, 179 Cal. Rptr. 287*).

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4-41 California Points & Authorities § 41.67

§ 41.67 Opposing Contention That Trial Court May Not Adjudicate Substantive Merits of Class Action [Code Civ. Proc. § 382] Without Prior Notice to Absent Class Members--When Action Primarily Seeks Declaratory or Injunctive Relief

[1] FORM Opposing Contention That Trial Court May Not Adjudicate Substantive Merits of Class Action [Code Civ. Proc. § 382] Without Prior Notice to Absent Class Members--When Action Primarily Seeks Declaratory or Injunctive Relief

[*The following may be combined with a general form of memorandum in support of a motion seeking determination of a substantive issue, e.g., motion for summary judgment, prior to adjudication of procedural class issues (see, e.g., Ch. 116, Injunctions and Ch. 221, Summary Judgments). The following may also be combined with a general form of memorandum in support of a motion seeking a determination with respect to class issues (see, e.g., § 41.30) when the motion follows a substantive ruling on the merits.*]

THE COURT SHOULD GRANT _____ [*specify substantive ruling sought, e.g.,* A SUMMARY JUDGMENT] IN THIS ACTION BECAUSE THE COURT MAY ADJUDICATE THE SUBSTANTIVE MERITS PRIOR TO NOTIFYING CLASS MEMBERS WHEN A CLASS ACTION PRIMARILY SEEKS DECLARATORY OR INJUNCTIVE RELIEF.

A. Trial Court Has Discretion to Determine That Notice to Class Members Is Not Necessary. On certification of the class, or as soon thereafter as practicable, the court must make an order determining whether notice to class members is necessary (*Cal. Rules of Ct., Rule 3.766(c)(1)*). Therefore, it is within the court's power to forgo class notice in an appropriate case.

B. Prior Adjudication for Declaratory or Injunctive Relief. The trial court may follow federal procedure with respect to class actions seeking declaratory or injunctive relief and allow a decision on the merits without requiring prior notice to absent class members (*Lowry v. Obledo (1980) 111 Cal. App. 3d 14, 23, 169 Cal. Rptr. 732*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a party's contention that the trial court may not adjudicate the substantive merits of an action without prior notice to absent class members. The argument may be used when a class action primarily seeks declaratory or injunctive relief.

This form may be combined, where appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to invoke the contention. For example, a plaintiff might make an argument supported by this memorandum when the defendant seeks to compel determination of a procedural class issue, such as notice, prior to a substantive ruling requested by the plaintiff.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, this memorandum may be submitted in opposition to the contention supported by the points and authorities *set out in § 41.64*.

[b] Related Uses

A corollary to the general rule prohibiting adjudication of the substantive merits of an action without prior determination of procedural class action issues [*see § 41.64*] is the argument that a court may not determine procedural class issues following an adjudication on the substantive merits of an action [*see § 41.65*]. With appropriate modification, these points of law may be used in an argument opposing the contention that procedural class issues may not be decided after adjudication of the substantive merits.

[3] Discussion of Authorities

[a] Prior Adjudication for Declaratory or Injunctive Relief

Lowry v. Obledo *(1980) 111 Cal. App. 3d 14, 169 Cal. Rptr. 732* , was a class action seeking to invalidate a state regulation concerning the aid to families with dependent children (AFDC) program and requesting recalculation of class members' benefits. Plaintiffs simultaneously moved for summary judgment on the declaratory relief and for certification of the class. Defendants objected to consideration of the merits of the case prior to certification of the class and notice to its members, but notwithstanding defendant's objection, the trial court simultaneously certified the class and ruled on the merits. The court certified the class for purposes of declaratory relief only and refused to grant a writ of mandate compelling defendants to recalculate class members' past grants. On appeal, defendants contended that their due process rights were infringed by the trial court's failure to certify the class and require notice to its members prior to reaching the merits of the case.

The court of appeal held that the trial court had appropriately followed the federal procedure of allowing a decision on the merits without prior notice to members of the class (*111 Cal. App. 3d 14, 23)* . The court relied on federal decisional authority dispensing with the requirement of notice in class actions that primarily seek declaratory or injunctive relief under *Fed. R. Civ. P., Rule 23(b)(2)* [*see Elliott v. Weinberger (9th Cir. 1977) 564 F.2d 1219, 1229 , reversed in part on other grounds sub nom. Califano v. Yamasaki (1979) 442 U.S. 682, 99 S. Ct. 2545, 61 L. Ed. 2d 176]* . The court noted that although federal courts have ordered notice to absent class members in actions for declaratory or injunctive relief under *Fed. R. Civ. P., Rule 23(b)(2)*, notice serves no purpose when there are no factual disputes and the plaintiff class is adequately represented by counsel (*111 Cal. App. 3d 14, 23)* .

In rejecting defendants' contention, the court noted the rule of prior California appellate court decisions, relied on by defendants, that a defendant against whom a class action is brought has a due process right to obtain class certification and notice to class members before determination of the merits of the action (*see § 41.64*). The court concluded,

however, that the reasoning behind the rule did not apply to the case under consideration (*111 Cal. App. 3d 14, 22)* . The court noted that there was no danger of one-way intervention because if plaintiffs had lost on the merits, the doctrine of stare decisis would have made the likelihood of new litigation by AFDC recipients not bound by notice of the action a remote theoretical possibility (*111 Cal. App. 3d 14, 23-24)* . In addition, the court stated that the only danger of multiple litigation in the case resulted from the trial court's failure to grant a writ of mandate requiring recalculation of benefits for members of the class (*111 Cal. App. 3d 14, 24)* .

[4] Additional Authorities

[a] Prior Adjudication for Declaratory or Injunctive Relief

In *Frazier v. City of Richmond (1986) 184 Cal. App. 3d 1491, 228 Cal. Rptr. 376* , city employees brought a class action seeking a declaration of their rights under the city charter, and also petitioned for a writ of mandate to compel the payment of proper retirement allowances pursuant to the charter. Defendant moved for summary judgment, contending that a decision in a prior class action involving the parties barred plaintiffs' class action under the doctrine of res judicata. The trial court denied defendant's motion, holding that absent class members in the prior action had not been provided with notice that they were members of the class represented by plaintiffs and that therefore the prior action could not be asserted as res judicata to the instant claim.

The court of appeal reversed, characterizing the prior action as a declaratory action that came within the scope of *Fed. R. Civ. P., Rule 23(b)(2)*,notwithstanding plaintiff's request for monetary relief (*184 Cal. App. 3d 1491, 1501)* . The court noted that under federal law, notice in actions classified under *Fed. R. Civ. P., Rule 23(b)(2)* is only discretionary (*184 Cal. App. 3d 1491, 1499)* . Applying the federal rule, the court found that notice was within the trial court's discretion in the prior class action. Thus, res judicata barred plaintiffs from relitigating the issues resolved in the prior action (*184 Cal. App. 3d 1491, 1503)* .

In *Gonzales v. Jones (1981) 116 Cal. App. 3d 978, 171 Cal. Rptr. 567* , a class action seeking injunctive and declaratory relief on behalf of general assistance (GA) recipients challenging the validity of a county's requirement of an ineligibility period, the court of appeal reversed the trial court's order denying class certification and directed the trial court to certify the class and enter a decision on the merits without prior individual notice to class members (*116 Cal. App. 3d 978, 986)* . As authority for its conclusion, the court cited *Lowry v. Obledo (1980) 111 Cal. App. 3d 14, 23, 169 Cal. Rptr. 732* (discussed in *§ 41.67[3][a]*), and noted that the reasoning applied equally in *Gonzales* (*116 Cal. App. 3d 978, 986)* . Counsel should note, however, that the court in *Gonzales* did not explicitly state that notice was not required because the action requested injunctive or declaratory relief.

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4-41 California Points & Authorities § 41.68

§ 41.68 Opposing Contention That Trial Court May Not Adjudicate Substantive Merits of Class Action [Code Civ. Proc. § 382] Without Prior Determination of Procedural Class Issues--Temporary Restraining Order or Preliminary Injunction, or Both, May Be Granted Whether or Not the Class Has Been Certified [Code Civ. Proc. § 527(b)]

[1] FORM Opposing Contention That Trial Court May Not Adjudicate Substantive Merits of Class Action [Code Civ. Proc. § 382] Without Prior Determination of Procedural Class Issues--Temporary Restraining Order or Preliminary Injunction, or Both, May Be Granted Whether or Not the Class Has Been Certified [Code Civ. Proc. § 527(b)]

[*The following may be combined with a general form of memorandum of points and authorities in support of an application for a temporary restraining order or preliminary injunction when the injunctive relief is sought prior to certification of the class (see Ch. 116, Injunctions). The following may also be combined with a general form of memorandum of points and authorities in support of a motion seeking a determination with respect to class issues (see, e.g., § 41.30) when the motion follows a substantive ruling on the merits.*]

THE COURT SHOULD GRANT A _____ [TEMPORARY RESTRAINING ORDER *or* PRELIMINARY INJUNCTION] IN THIS ACTION BECAUSE THE COURT MAY GRANT A TEMPORARY RESTRAINING ORDER OR A PRELIMINARY INJUNCTION, OR BOTH,IN A CLASS ACTION IN WHICH ONE OR MORE OF THE PARTIES SUES OR DEFENDS FOR THE BENEFIT OF NUMEROUS PARTIES ON THE SAME GROUNDS AS IN OTHER ACTIONS, WHETHER OR NOT THE CLASS HAS BEEN CERTIFIED.

Preliminary Injunctive Relief Prior to Class Certification. The trial court may properly grant a temporary restraining order or a preliminary injunction, or both, in a class action in which one or more of the parties sues or defends for the benefit of numerous parties on the same grounds as in other actions, whether or not the class has been certified (*Code Civ. Proc. § 527(b)*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a party's contention that the trial court may not adjudicate the substantive

merits of an action, by granting preliminary injunctive relief, prior to certification of the class. The foregoing may also be submitted in opposition to the contention that the trial court may not determine procedural class action issues, such as certification, after adjudication of the substantive merits of an action. The argument may be used when either party in a class action seeks a temporary restraining order or preliminary injunction, or both, prior to certification of the class.

This form may be combined, when appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to invoke the contention. For example, either party might make an argument supported by this memorandum when applying for a temporary restraining order or preliminary injunction prior to a certification of the class. In addition, either party might make an argument supported by this memorandum when the opposing party seeks to compel determination of class certification issues prior to adjudication of plaintiff's application for preliminary injunctive relief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the point of law stated.

In an appropriate case, this memorandum may be submitted in opposition to the contention supported by the points and authorities *set out in § 41.64*.

[b] Related Uses

A corollary to the general rule prohibiting adjudication of the substantive merits of an action without prior determination of procedural class action issues [*see § 41.64[1]*] is the rule that a court may not determine procedural class issues following an adjudication on the substantive merits ofan action [*see § 41.65[1]*]. With appropriate modification, these points of law may be used to oppose the contention that procedural class issues may not be decided after adjudication of the substantive merits.

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4-41 California Points & Authorities § 41.69

§ 41.69 Supporting Contention That Representative Action [Code Civ. Proc. § 382] by Association on Behalf of Members Proper

[1] FORM Supporting Contention That Representative Action [Code Civ. Proc. § 382] by Association on Behalf of Members Proper

[*The following may be combined with points and authorities relating to the specific procedural context in which counsel wishes to invoke the contention.*]

THIS ACTION IS PROPERLY MAINTAINED AS A REPRESENTATIVE ACTION BECAUSE AN ASSOCIATION MAY SUE IN A REPRESENTATIVE CAPACITY ON BEHALF OF ITS MEMBERS FOR DAMAGES OR OTHER RELIEF UNDER SECTION 382 OF THE CODE OF CIVIL PROCEDURE.

A. Class and Representative Actions Authorized. [*See § 41.30, Paragraph A.*]

B. Association May Sue in Representative Action. An association may sue in a representative capacity for damages or other relief on behalf of its members under *Section 382 of the Code of Civil Procedure* (*Professional Fire Fighters, Inc. v. City of Los Angeles (1963) 60 Cal. 2d 276, 284, 32 Cal. Rptr. 830, 384 P.2d 158* ; *Raven's Cove Townhomes, Inc. v. Knuppe Development Co. (1981) 114 Cal. App. 3d 783, 796, 171 Cal. Rptr. 334*).

[*Where appropriate, add points and authorities supporting existence of requisites for maintaining a proper representative action (see §§ 41.36 -41.51).*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that a representative action by an association on behalf of its members is proper. These points and authorities should be combined, where appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to invoke the contention. A plaintiff might make an argument supported by this memorandum, for example, when opposing a demurrer to the complaint on the ground that a representative action is not appropriate.

A representative action under *Code Civ. Proc. § 382* is very similar to a class action in that plaintiffs must show an ascertainable class and a well-defined community of interest in the questions of law and fact involved affecting the parties to be represented [*see Raven's Cove Townhomes, Inc. v. Knuppe Development Co. (1981) 114 Cal. App. 3d 783, 795, 171 Cal. Rptr. 334]* . The issue of an association's capacity to sue as a representative usually arises, however, in the procedural context of defendant's demurrer or motion to strike allegations of representative capacity, as opposed to a motion for certification of the class, which is the standard method of proceeding in class actions [*see* Los Angeles County Class Actions Manual § 404 (association suing as representative will usually be excused from compliance with class action procedures)].

Because of the similarities between class and representative actions, counsel may find §§ 41.36-41.51 useful with respect to establishing the requisites for maintaining a proper representative action. With appropriate modification, counsel should combine these forms, where appropriate, with this form to support the contention that a representative action is proper.

Counsel should also insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Association May Sue in Representative Action

Professional Fire Fighters, Inc. v. City of Los Angeles *(1963) 60 Cal. 2d 276, 32 Cal. Rptr. 830, 384 P.2d 158* , was an action for injunctive and declaratory relief based on discrimination brought by a labor union in its representative capacity on behalf of its members. Defendant filed a general demurrer together with an answer denying the charges of discrimination and affirmatively alleging that plaintiff did not have capacity to sue. Before decision on the demurrer, each party moved for summary judgment. The trial court held that plaintiff had no capacity to sue and sustained defendant's motion for summary judgment. Plaintiff then filed an appeal.

The Supreme Court reversed the trial court and held that the union's representative action was proper under *Code Civ. Proc. § 382* (*60 Cal. 2d 276, 284)* . The Court reasoned that unions are organized for the purpose of representing their members and that an action at law on behalf of such members is one form of such representation. Thus, the Court concluded, the plaintiff had a clear beneficial interest in pursuing the action (*60 Cal. 2d 276, 284)* .

The Court distinguished its decision in *Parker v. Bowron (1953) 40 Cal. 2d 344, 254 P.2d 6* , by pointing out that the plaintiff in that case had no beneficial interest in the subject matter and his right of representation was alleged by virtue of his position as secretary-treasurer of an unincorporated association. The labor union in *Professional Fire Fighters* was an incorporated association (*60 Cal. 2d 276, 284)* .

Raven's Cove Townhomes, Inc. v. Knuppe Development Co. *(1981) 114 Cal. App. 3d 783, 171 Cal. Rptr. 334* , was

an action by a homeowner's association against the project developer for strict liability and breach of warranty based on defects in common-area landscaping and in the exterior walls of individual units. The trial court granted defendant's motion for nonsuit, holding, with respect to the actions involving individual units, that the association lacked standing. Plaintiffs then filed an appeal.

The court of appeal reversed the trial court, holding that the association had standing to sue in a representative capacity under *Code Civ. Proc. § 382* for the damage to individual units (*114 Cal. App. 3d 783, 796)* . The court did not deem it necessary to deal with defendant's contention that the association did not have standing to maintain a class action, because the court found that the association had the requisite standing in a representative capacity (*114 Cal. App. 3d 783, 793)* . Relying on *Residents of Beverly Glen, Inc. v. Los Angeles (1973) 34 Cal. App. 3d 117, 109 Cal. Rptr. 724* (discussed in *§ 41.69[4][a]*), the court noted that whether or not a representative plaintiff does and can in fact represent others is a question of fact for the trial court. The court also stated that while all class suits are representative in nature, all representative suits are not necessarily class actions (*114 Cal. App. 3d 783, 794)* . The court noted that in either instance, justification for the procedural device whereby one may sue for the benefit of many rests on considerations of necessity, convenience, and justice (*114 Cal. App. 3d 783, 795)* .

Relying on *Daar v. Yellow Cab Co. (1967) 67 Cal. 2d 695, 704, 63 Cal. Rptr. 724, 433 P.2d 732* (discussed in *§ 41.36[3][a]*), the court stated that the two requirements for a representative action are an ascertainable class and a well-defined community of interest in the questions of law and fact involved affecting the parties to be represented (*114 Cal. App. 3d 783, 795)* . The court noted that use of the representative procedural device was justified because the association had filed the action on behalf of itshomeowner members who all had a beneficial interest in the result of the case (*114 Cal. App. 3d 783, 795)* .

[4] Additional Authorities

[a] Association May Sue in Representative Action

In *Del Mar Beach Club Owners Ass'n v. Imperial Contracting Co. (1981) 123 Cal. App. 3d 898, 176 Cal. Rptr. 886* , an action by an association that was the managing entity and owner of a planned development for strict liability against the developer-builder, the court of appeal held that the association could maintain an action in a representative capacity on behalf of its members (*123 Cal. App. 3d 898, 906)* . The court noted that when the association's obligations under a declaration of restrictions are well defined and when it has sustained actual damages as owner, there is no question that it has and does intend to fairly and adequately represent the interests of the individual unit owners who are members of the association (*123 Cal. App. 3d 898, 907)* . The court also stated that because damage to the common areas, such as walkways and stairs, affects all the unit owners, it is not only logical that the common questions of law and fact be resolved in one proceeding, but it is judicially economical and cost beneficial to do so (*123 Cal. App. 3d 898, 907)* .

In *Salton City etc. Owners Ass'n v. M. Penn Phillips Co. (1977) 75 Cal. App. 3d 184, 141 Cal. Rptr. 895* , an action by an association as representative of its members for damages or rescission and restitution of land sale contracts against a number of defendants, the court of appeal held that the association had stated a proper class action on behalf of a self-defined class, despite the association's claim of representative status and disclaimer of interest in class action status (*75 Cal. App. 3d 184, 188)* . The court noted that in either a representative or class action, there must be an ascertainable class and a well-defined community of interest in the questions of law and fact involved affecting the parties to be represented (*75 Cal. App. 3d 184, 189)* . The court found both of these requisites satisfied (*75 Cal. App. 3d 184, 189-190)* . Although it labeled the action as a class action, the court noted that the trial court was vested with ample authority to decide to what extent, if any, ordinary class action requirements should be modified to suit the case (*75 Cal. App. 3d 184, 191)* .

In *Residents of Beverly Glen, Inc. v. Los Angeles (1973) 34 Cal. App. 3d 117, 109 Cal. Rptr. 724* , a representative action to set aside a conditional land use permit and to declare unconstitutional the ordinance under which it was

granted, the court of appeal held that the association had standing to maintain a representative action (*34 Cal. App. 3d 117*). The court noted that it was clearly inferable from the complaint that plaintiff sought to represent its members in the action, although there was not an express allegation that the action was brought in a representative capacity or onbehalf of a certain class of people (*34 Cal. App. 3d 117, 128)* . The court did not clearly state whether it was upholding the action as a class or a representative suit. It noted only that despite the association's disclaimer of a class action and argument that it had standing to represent its members, the nature of an action is to be judged by what it really is, not by how the parties characterize or label it (*34 Cal. App. 3d 117, 128)* .

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§ 41.70 Opposing Contention That Representative Action [Code Civ. Proc. § 382] by Association on Behalf of Members Is Proper

[1] FORM Opposing Contention That Representative Action [Code Civ. Proc. § 382] by Association on Behalf of Members Is Proper

[*The following may be combined with points and authorities relating to the specific procedural context in which counsel wishes to invoke the contention.*]

THIS ACTION IS NOT PROPERLY MAINTAINED AS A REPRESENTATIVE ACTION BECAUSE PLAINTIFF SEEKS TO RECOVER DAMAGES FOR INTANGIBLE OR INHERENTLY PERSONAL INJURIES TO ITS INDIVIDUAL MEMBERS.

Association Cannot Sue for Inherently Personal Injuries. An association does not have standing to sue for damages for personal injuries because such injuries are too intangible and too inherently personal to the individual to reasonably constitute a community of interest among the members (*Tenants Assn. of Park Santa Anita v. Southers (1990) 222 Cal. App. 3d 1293, 1304, 272 Cal. Rptr. 361*).

[*When appropriate, add points and authorities opposing existence of requisites for maintaining a proper representative action (see §§ 41.53 -41.62).*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that a representative action by an association on behalf ofits members is proper. These points and authorities should be combined, where appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to invoke the contention. A defendant might make an argument supported by this memorandum, for example, when demurring to the complaint on the ground that a representative action is inappropriate.

A representative action under *Code Civ. Proc. § 382* is very similar to a class action in that plaintiffs must show an ascertainable class and a well-defined community of interest in the questions of law and fact involved affecting the parties to be represented [*see Raven's Cove Townhomes, Inc. v. Knuppe Development Co. (1981) 114 Cal. App. 3d 783, 795, 171 Cal. Rptr. 334]* . Because of the similarities between class and representative actions, counsel may combine this form with one or more of the *forms in §§ 41.53 -41.62* when the complaint fails to establish one of the basic requisites for maintaining a proper representative action.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the point of law stated.

[3] Discussion of Authorities

[a] Association Cannot Sue for Inherently Personal Injuries

In ***Tenants Assn. of Park Santa Anita v. Southers*** *(1990) 222 Cal. App. 3d 1293, 272 Cal. Rptr. 361* , an unincorporated association of mobilehome tenants brought an action on behalf of its members against the owners and managers of their mobilehome park for allegedly attempting to force the tenants out in order to close and sell the park. The complaint alleged causes of action for fraud and breach of statutory duties and sought an injunction, fines, and damages, including personal injury damages for mental suffering, physical distress, and anxiety. The trial court sustained the defendants' demure on the ground that the association had no standing to sue in a representative capacity and plaintiff appealed the order of dismissal.

The court of appeal reversed in part only, holding that the demurrer was properly sustained on the cause of action for damages for personal injuries to the individual members of the association (*222 Cal. App. 3d 1293, 1304-1305)* . The court held that the association did not have standing to sue for damages for anxiety, emotional distress, or personal injuries because such injuries were too intangible and too inherently personal to the individual to reasonably constitute a community of interest. What may have caused emotional distress to one tenant, the court explained, may have caused a different degree of distress or no distress at all to another tenant. The court ordered that the association be granted leave to amend the complaint to add the individual members as plaintiffs for recovery ofdamages that were intangible or inherently personal to the individual (*222 Cal. App. 3d 1293, 1304)* .

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Volume 4 Chapters 40-49 CLAIM & DELIVERY---to---CONTINUANCE
CHAPTER 41 CLASS AND REPRESENTATIVE ACTIONS
PART II. FORMS

4-41 California Points & Authorities § 41.71

§ 41.71 Supporting Contention That Fluid Class Recovery Is Proper Device for Distribution of Damages

[1] FORM Supporting Contention That Fluid Class-Recovery Is Proper Device for Distribution of Damages

[*The following may be combined with points and authorities relating to the specific procedural context in which counsel wishes to invoke the contention.*]

FLUID CLASS-RECOVERY IS PROPER BECAUSE IT FULFILLS THE GOALS OF COMPENSATION, DISGORGEMENT, AND DETERRENCE, WHICH ARE THE PURPOSES OF THE UNDERLYING CAUSE OF ACTION.

A. When Fluid Class-Recovery Is Proper. The propriety of fluid class-recovery in a particular case depends on its usefulness in fulfilling the purpose of the underlying cause of action (*State of California v. Levi Strauss & Co. (1986) 41 Cal. 3d 460, 472, 224 Cal. Rptr. 605, 715 P.2d 564*).

[*EITHER*]

B. Common-Law Class Actions. Fluid class-recovery fulfills the purpose underlying the common-law development of class actions when the class has many members with relatively small individual claims and when requiring proof of individual claims will neither compensate injured persons nor deter defendant's unlawful practices (*Bruno v. Superior Court (1981) 127 Cal. App. 3d 120, 123, 127, 179 Cal. Rptr. 342*).

[*AND/OR*]

C. Class Actions Under Cartwright Act. Fluid class-recovery fulfills the purpose of the private damages action for violations of the Cartwright Act (*Sections 16700-16770 of the Business and Professions Code*) if damages are distributed so as to compensate substantially those injured class members who recover damages, especially if that distribution serves to deter violations and disgorge illegal profits, and when most of the injured class members would

otherwise get nothing because of the unlikelihood that they could prove their individual claims (*Bruno v. Superior Court (1981) 127 Cal. App. 3d 120, 132-133, 179 Cal. Rptr. 342*).

[*CONTINUE*]

D. Distribution of Residue. In choosing the appropriate method of distributing the residue after individual claims have been filed, the trial court should consider the amount of compensation provided to class members, the proportion of class members sharing in the recovery, the size and effect of the "spillover" to nonclass members, and the costs of administration (*State of California v. Levi Strauss & Co. (1986) 41 Cal. 3d 460, 479, 224 Cal. Rptr. 605, 715 P.2d 564*).

[*Optional*] **E. Price Rollback.** Lowering the price of the defendant's product for a specified period is an appropriate form of fluid recovery for remedying overcharges on items that are repeatedly purchased by the same individuals, at least in a monopoly market where the price of the items is set by defendant manufacturer rather than retailers, because the individuals who were overcharged are likely to benefit from the reduced prices (*State of California v. Levi Strauss & Co. (1986) 41 Cal. 3d 460, 473-474, 224 Cal. Rptr. 605, 715 P.2d 564*).

[*Optional*] **F. Earmarked Escheat.** After individual claims have been filed, disbursement of the residue to a responsible governmental organization for use on projects that benefit noncollecting class members and promote the purposes of the underlying cause of action is an appropriate form of fluid recovery because it minimizes administrative costs, provides indirect compensation to "silent" class members, and reduces the risk of future harm (*State of California v. Levi Strauss & Co. (1986) 41 Cal. 3d 460, 474, 479-480, 224 Cal. Rptr. 605, 715 P.2d 564*).

[*Optional*] **G. Consumer Trust Fund.** Administration of the recovery in the interests of the class by a court-appointed board of directors, or by a responsible private organization, is an appropriate form of fluid recovery because it provides indirect compensation to "silent" class members and ensures the residue is used on projects designed to effectuate the aims of the underlying substantive law (*State of California v. Levi Strauss & Co. (1986) 41 Cal. 3d 460, 475, 479-480, 224 Cal. Rptr. 605, 715 P.2d 564*).

[*Optional*] **H. Claimant Fund Sharing.** Division of the residue, or of the fund itself, among the individual claimants is an appropriate form of fluid recovery when a large proportion of class members participate and submit accurate claims (*State of California v. Levi Strauss & Co. (1986) 41 Cal. 3d 460, 476, 224 Cal. Rptr. 605, 715 P.2d 564*).

[*Optional*] **I. General Escheat.** Payment of the residue to a general fund of a governmental body, which spreads the benefits of the recovery among all taxpayers, is an appropriate form of fluid recovery when a more precise remedy cannot be found (*State of California v. Levi Strauss & Co. (1986) 41 Cal. 3d 460, 475, 224 Cal. Rptr. 605, 715 P.2d 564*).

[*Optional*] **J. Distribution of Entire Fund to Nonclass Members.** Under appropriate circumstances, such as when distribution and administration costs for class members' claims will exceed the recovery, the court may order that the entire recovery be distributed to charitable, governmental, and nonprofit organizations, with no direct payments to any class members (*In re Vitamin Cases (2003) 107 Cal. App. 4th 820, 826-832, 132 Cal. Rptr. 2d 425*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that a fluid class-recovery is a proper method for disbursing the award of damages. These points and authorities should be combined with others relating to the specific procedural

context in which counsel wishes to invoke the contention. For example, they may be combined with points and authorities opposing defendant's motion to strike from the complaint plaintiffs' request that damages be distributed by fluid class-recovery [*see Bruno v. Superior Court (1981) 127 Cal. App. 3d 120, 123, 179 Cal. Rptr. 342]* . They may be combined with points and authorities supporting an application for approval of a class action settlement [*see State of California v. Levi Strauss & Co. (1986) 41 Cal. 3d 460, 470, 224 Cal. Rptr. 605, 715 P.2d 564* ; for discussion of settlement procedures, *see § 41.02[5*]. They may also be included in an appellate brief on appeal from a judgment entered pursuant to a class action settlement [*see State of California v. Levi Strauss & Co. (1986) 41 Cal. 3d 460, 464, 224 Cal. Rptr. 605, 715 P.2d 564* ; *see also Trotsky v. Los Angeles Fed. Sav. & Loan Assn. (1975) 48 Cal. App. 3d 134, 139-140, 121 Cal. Rptr. 637* (class member who appears at hearing on proposed settlement and whose objections are overruled has standing to appeal subsequent judgment)].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Counsel should refer to facts showing that each individual's recovery is too small to make traditional methods of proof worthwhile because, for example, class members were not likely to retain records of small purchases for long periods of time. In addition, counsel should demonstrate how, without fluid recovery, the defendant will be able to keep ill-gottengains simply because their conduct harmed large numbers of people in small amounts [*see State of California v. Levi Strauss & Co. (1986) 41 Cal. 3d 460, 471-472, 224 Cal. Rptr. 605, 715 P.2d 564]* .

[3] Discussion of Authorities

[a] When Fluid Class-Recovery Is Proper

In ***State of California v. Levi Strauss & Co.*** *(1986) 41 Cal. 3d 460, 224 Cal. Rptr. 605, 715 P.2d 564* , the state attorney general brought a class action, both as a representative of consumers under *Code Civ. Proc. § 382*, and under *Bus. & Prof. Code § 16760* in *parens patriae* on behalf of the state's residents, against a clothing manufacturer who allegedly maintained artificially high prices in violation of the Cartwright Act (*Bus. & Prof. Code §§ 16700-16770*). The court certified a class consisting of all current California residents who made retail purchases of defendant's denim jeans during the period from 1972 to 1975, estimated at three to seven million households. The parties negotiated a settlement, which was to be distributed to individuals on a pro rata basis according to the number of pairs of jeans purchased during the relevant period. There was no requirement that claimants prove their purchases; the average individual recovery was projected to be three dollars or less.

Several organizations and individuals, whom the court allowed to intervene, opposed the individual distribution plan. In addition to making other objections, they argued that the plan would produce only small individual returns, and without expensive measures to verify purchases, a large percentage of the fund would be paid out for fraudulent claims. As an alternative, the intervenors proposed that the settlement money be used to establish a nonprofit corporation which would administer a "consumer trust fund" for consumer protection projects, including research and litigation.

Over intervenors' objections, the court approved the distribution plan, and in 1981, the public was notified of the proposed settlement. By the deadline for response, almost one and one-half million claim forms had been received. At the fairness hearing, an individual intervenor renewed the objections to the settlement, arguing that only a minority of class members had bothered to file claims and a large percentage of the recovery went to pay inflated or baseless claims. The court nevertheless approved the settlement and ruled that the top five percent of claims, or those alleging more than 21 purchases per individual from 1972 to 1975, were to be treated as suspect. These individuals were required to resubmit their claims with a sworn and notarized confirmation that their claims were accurate. By the time the court prepared its findings of facts and conclusions of law, 80 percent of the suspect claims had not been resubmitted. A sizeable residue of the recovery remained unallocated, because of theeliminated claims, claimants who could no longer be located, and interest on the settlement money. The trial court entered its final judgment and the intervenor appealed.

The Supreme Court affirmed the judgment but remanded to the trial court for a determination of how the residue should

be distributed, suggesting that the intervenor's plan for a consumer trust fund had "considerable merit" (*41 Cal. 3d 460, 479)* . Holding that a settlement had to be approved or rejected as a whole, the Court affirmed the judgment so as to honor the more than one million household claims that were already received and processed (*41 Cal. 3d 460, 470-471)* . However, the Court went on to discuss, for the guidance of the trial court and other courts, the area of fluid recovery in consumer class actions (*41 Cal. 3d 460, 472-479)* . The equitable doctrine of fluid recovery, the Court summarized, applies when each individual's recovery is too small to make traditional methods of proof worthwhile and when consumers are not likely to retain records of small purchases for long periods of time (*41 Cal. 3d 460, 471-472)* . The Court approved the holding in *Bruno v. Superior Court (1981) 127 Cal. App. 3d 120, 179 Cal. Rptr. 342* (discussed in *§ 41.70[3][b]*), that the propriety of fluid recovery in a particular case depends on its usefulness in fulfilling the purpose of the underlying cause of action. Fluid class-recovery, the Court observed, can be essential to ensure that the policies of disgorgement or deterrence are realized, when defendants otherwise would be permitted to retain ill-gotten gains because their conduct harmed large numbers of people in small amounts instead of small numbers of people in large amounts (*41 Cal. 3d 460, 472)* . Implementation of fluid recovery, the Court summarized, involves three steps: (1) the defendant's total damage liability is paid over to a class fund; (2) individual class members are given an opportunity to collect their individual shares by proving their particular damages, usually according to a lowered standard of proof; and (3) any residue remaining after individual claims have been paid is distributed by one of several practical procedures that have been developed by the courts (*41 Cal. 3d 460, 472-473)* .

The Court also rejected the contention that fluid class-recovery was prohibited in a private antitrust action brought under the Cartwright Act. The *parens patriae* statute (*Bus. & Prof. Code § 16760*) empowers the Attorney General to sue for violations of the act and provides that the residue must escheat to the state's general fund. However, the Court held, the statute was not intended to impose any restrictions on the conduct of *private* consumer class actions, such as the one brought and settled by the attorney general in conjunction with a "backup" *parens patriae* suit (*41 Cal. 3d 460, 477-478, 478 n.14*).

[b] Common-Law Class Actions

In ***Bruno v. Superior Court*** *(1981) 127 Cal. App. 3d 120, 179 Cal. Rptr. 342* , plaintiffs brought a class action against three supermarketcorporations on behalf of an estimated one to one and one-half million milk purchasers for price-fixing practices in violation of the Cartwright Act (*Bus. & Prof. Code §§ 16700-16770*). The average claim of each class member was projected to be $125 or less. Plaintiffs' amended complaint requested that damages be paid on the basis of individual claims presented and, to the extent class members did not present claims, by either (1) lowering of milk prices (price rollback), or (2) depositing the damages with the state for the limited purpose of applying it to charitable purposes benefitting the consuming public in the affected locale (earmarked escheat). Defendants moved to strike from the complaint the proposed methods of distributing the residue of damages, and the trial court granted the motion, finding that the distribution methods were prohibited by case law. Plaintiffs petitioned for a writ of mandate.

The court of appeal granted the writ, holding that the trial court abused its discretion in striking the request for fluid class-recovery, because such methods of distributing damages are not *per se* improper in state antitrust class actions (*127 Cal. App. 3d 120, 122)* . The court refused to read *Blue Chip Stamps v. Superior Court (1976) 18 Cal. 3d 381, 134 Cal. Rptr. 393, 556 P.2d 755* (discussed in *§ 41.59*) as establishing a broad rule that fluid class-recovery is improper for any class action lawsuit (*127 Cal. App. 3d 120, 124)* . Fluid class-recovery was rejected in that case, the court reasoned, only because it would not have achieved either (1) disgorgement of illegal profit still held by defendant, or (2) compensation of injured class members, defined as enough of an overlap between the class of individuals injured by defendant's conduct and the class of individuals who would benefit from a future price reduction as to make the distribution method a rational means of compensating class members (*127 Cal. App. 3d 120, 125-126)* . Under the philosophy of *Daar v. Yellow Cab Co. (1967) 67 Cal. 2d 695, 63 Cal. Rptr. 724, 433 P.2d 732* (discussed in *§ 41.36*), and *Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 94 Cal. Rptr. 796, 484 P.2d 964* (discussed in *§ 41.34*), the court observed, class actions serve the primary purpose of compensating injured persons, as well as the important purpose, when individual lawsuits are not feasible, of removing ill-gotten gains from the hands of those engaged in unlawful

practices. In the absence of fluid class-recovery, class actions in which proof of individual claims is impractical would neither compensate plaintiffs nor deter defendants (*127 Cal. App. 3d 120, 127)* . The court held that the propriety of using fluid class-recovery largely depends on the purposes of the law under which the class action is brought. The issue is whether a fluid class-recovery will sufficiently further those purposes given the facts of the particular case under consideration (*127 Cal. App. 3d 120, 129-130)* .

[c] Class Actions Under Cartwright Act

The factual and procedural background of ***Bruno v. Superior Court*** *(1981) 127 Cal. App. 3d 120, 179 Cal. Rptr. 342* , is discussed in *§ 41.71[3][b]*.In its analysis of the Cartwright Act, the court of appeal held that the provisions authorizing private antitrust actions do not prohibit fluid class recovery if damages are distributed so as to compensate substantially the injured class members who have recovered the damages, especially if that distribution serves to deter violations and disgorge illegal profits (*127 Cal. App. 3d 120, 132-133)* . In addition, the court held, the fact that the act empowers the state to bring *parens patriae* antirust lawsuits, and specifies the methods for distributing the damages recovered, does not evidence a legislative intent to prohibit fluid class-recovery in *private* antitrust class actions (*127 Cal. App. 3d 120, 133)* . However, the court noted, if defendants could show that the "correlation" or "overlap" between those injured and those to be benefitted by a fluid class-recovery would be minimal, that argument could be raised when the trial court considered damages distribution as one of the several factors that it must balance to determine whether or not the suit can be maintained as a class action (*127 Cal. App. 3d 120, 135 n.10*)

[d] Distribution of Residue

The factual and procedural background of ***State of California v. Levi Strauss & Co.*** *(1986) 41 Cal. 3d 460, 224 Cal. Rptr. 605, 715 P.2d 564* , is discussed in *§ 41.71[3][a]*. The Court observed that the intervenor who sought review of the settlement in that case was principally concerned not with reversing the settlement but with how to use the sizeable residue that remained unallocated after only a portion of the class submitted individual claims (*41 Cal. 3d 460, 471)* . Therefore, the Court went on to discuss, for the trial court's guidance on remand and for other courts, the area of fluid recovery in consumer class actions (*41 Cal. 3d 460, 472-479)* . The disposition of the residue on remand, the court held, is a matter within the discretion of the trial court (*41 Cal. 3d 460, 479)* . In determining which method to employ, the courts should consider (1) the amount of compensation provided to class members, including nonclaiming or "silent" members; (2) the proportion of class members sharing in the recovery; (3) the extent to which benefits will "spill over" to nonclass members and the degree to which the spillover benefits will effectuate the purposes of the underlying substantive law; and (4) the costs of administration (*41 Cal. 3d 460, 473)* . The Court then discussed the merits of each of the common types of distribution (*41 Cal. 3d 460, 473-476)* . It is the correlation or overlap between the injured class of persons and the class to be benefitted, not the absolute number of persons recovering, that provides the principal criterion for assessing the compensatory effectiveness of a distribution plan (*41 Cal. 3d 460, 479)* . The settlement did not reasonably compensate class members when only 1.2 million of an estimated three to seven million people made claims and when there was a likely high incidence of erroneous or fraudulent claims. The court suggested that the consumer trust fund had considerable merit in this case because (1) up to one half of theoriginal group of claimants might have moved since 1981 and be difficult to locate, and therefore, further attempts to distribute the entire fund to individual claimants would result in an even lower rate of participation than did the original plan, and (2) the consumer trust fund plan, or a plan employing earmarked escheat in place of the fund, would provide some indirect compensation for silent class members, while ensuring that the residue of the recovery is used on projects designed to effectuate the aims of the Cartwright Act (*41 Cal. 3d 460, 479-480)* .

[e] Price Rollback

The factual and procedural background of ***State of California v. Levi Strauss & Co.*** *(1986) 41 Cal. 3d 460, 224 Cal. Rptr. 605, 715 P.2d 564* , is discussed in *§ 41.71[3][a]*. The Court stated that lowering the price of the defendant's product for a specified period is an appropriate form of fluid recovery for remedying overcharges on items that are

repeatedly purchased by the same individuals, at least in a monopoly market where the price of the items is set by defendant manufacturer rather than retailers, because the individuals who were overcharged are likely to benefit from the reduced prices (*41 Cal. 3d 460, 473-474)* .

[f] Earmarked Escheat

The factual and procedural background of ***State of California v. Levi Strauss & Co.*** *(1986) 41 Cal. 3d 460, 224 Cal. Rptr. 605, 715 P.2d 564* , is discussed in *§ 41.71[3][a]*. The Court stated that after individual claims have been filed, disbursement of the residue to a responsible governmental organization for use on projects that benefit noncollecting class members and promote the purposes of the underlying cause of action is an appropriate form of fluid recovery because it minimizes administrative costs, provides indirect compensation to "silent" class members, and reduces the risk of future harm (*41 Cal. 3d 460, 474, 479-480)* .

[g] Consumer Trust Fund

The factual and procedural background of ***State of California v. Levi Strauss & Co.*** *(1986) 41 Cal. 3d 460, 224 Cal. Rptr. 605, 715 P.2d 564* , is discussed in *§ 41.71[3][a]*. The Court stated that administration of the recovery in the interests of the class by a court-appointed board of directors, or by a responsible private organization, is an appropriate form of fluid recovery because it provides indirect compensation to "silent" class members and ensures the residue is used on projects designed to effectuate the aims of the underlying substantive law (*41 Cal. 3d 460, 475, 479-480)* .

[h] Claimant Fund Sharing

The factual and procedural background of ***State of California v. Levi Strauss & Co.*** *(1986) 41 Cal. 3d 460, 224 Cal. Rptr. 605, 715 P.2d 564* ,is discussed in *§ 41.71[3][a]*. The Court stated that division of the residue, or of the fund itself, among the individual claimants is an appropriate form of fluid recovery when a large proportion of class members participate and submit accurate claims (*41 Cal. 3d 460, 476)* .

[i] General Escheat

The factual and procedural background of ***State of California v. Levi Strauss & Co.*** *(1986) 41 Cal. 3d 460, 224 Cal. Rptr. 605, 715 P.2d 564* , is discussed in *§ 41.71[3][a]*. The Court stated that payment of the residue to a general fund of a governmental body, which spreads the benefits of the recovery among all taxpayers, is an appropriate form of fluid recovery when a more precise remedy cannot be found (*41 Cal. 3d 460, 475)* .

[j] Distribution of Entire Fund to Nonclass Members

In re Vitamin Cases *(2003) 107 Cal. App. 4th 820, 132 Cal. Rptr. 2d 425* , was a coordinated proceeding that included claims brought on behalf of a class of California consumers who had indirectly purchased vitamin and vitamin products from the defendants during a 10-year period. The coordinated class complaint alleged that the defendants, manufacturers of raw vitamins and related products, had committed price fixing in violation of both the Cartwright Act (*Bus. & Prof. Code § 16700 et seq.*) and the Unfair Competition Act (*Bus. & Prof. Code § 17200 et seq.*). The trial court approved a settlement that included certification of a class of consumers who had purchased the relevant products during the relevant period. The settlement agreement provided for the distribution of the entire $38 million consumer settlement fund to charitable, governmental, and nonprofit organizations that promoted the health and nutrition of consumer class members or that otherwise furthered the purposes underlying the lawsuit. The settlement agreement did not provide for the payment of any part of the settlement fund to individual consumers. The trial court approved this fluid recovery for the following reasons: (1) it was impracticable or impossible to compensate direct victims of the alleged wrongdoing because of the disproportionate administrative expenses resulting from the number of potential claimants in relation to the size of the consumer settlement fund, (2) there was a strong correlation between the proposed use of the funds and the consumer class, and (3) the proposed distribution of the settlement fund furthered the

purpose of the relevant statutes. Several members of the consumer class appealed, contending that the settlement was barred because it did not allow class members to make individual claims to settlement proceeds.

The court of appeal affirmed. The court observed that because the theory underlying fluid class recovery (or cy pres remedy) is that each class member cannot be compensated exactly for the damage he or she suffered, the best alternative is to pay damages that benefit as many of the classmembers as possible (in the approximate proportion that each member has been damaged), even though some injured class members probably will receive no compensation and some people not in the class will benefit from the distribution (*107 Cal. App. 4th 820, 826)* .

This case presented the issue of whether *Code Civ. Proc. § 384(b)* precludes fluid recovery if the class members have not first been given an opportunity to obtain their appropriate share of the settlement. Specifically, Section 384(b) provides that prior to the entry of judgment in a class action, the court must determine the total amount that will be payable to all class members, if all class members are paid the amount to which they are entitled pursuant to the judgment. Then, after the parties report to the court the total amount that was actually paid to the class members, the court must amend the judgment to require distribution of the unpaid residue to nonprofit organizations or foundations for the purposes specified in the statute (*107 Cal. App. 4th 820, 826-827)* .

The court of appeal found that Section 384 was inapplicable in this case because by its own terms, the statute addresses only a situation in which a "residue" of a class settlement fund remains after the distribution to class members is completed. By requiring that the trial court ensure distribution of the residue to an appropriate nonprofit organization or foundation, Section 384 provides important information needed by class members in deciding whether to accept the benefits of a proposed settlement, opt out and pursue their individual remedies, or object to the settlement. In contrast, Section 384 has no application to the kind of situation presented in this case, in which the settlement agreement provided for the distribution of the entire settlement fund and there would be no residue whose distribution was not disclosed in advance to the class (*107 Cal. App. 4th 820, 827-829)* .

The court of appeal declined to interpret Section 384 as requiring individual payments to class members in every case. The court explained that such an interpretation would be unreasonable, because in some cases distribution and administration costs will exceed the recovery. In this case, for example, nearly every consumer in California was a class member, given that the defendants' products had been used not only in vitamin supplements but in many food products. In the motion for preliminary approval of the class settlement, the number of potential claimants was estimated to be 30,000,000. Given the size of the class compared to the size of the award (approximately $38 million), the amount of each individual's recovery would be quite small and could well be less than distribution and administration costs (*107 Cal. App. 4th 820, 830-832)* .

The court of appeal also held that class members were not deprived of due process even though none would receive any of the settlement fund because the terms of the proposed settlement had been fully disclosed to class members. The requirements of due process were met in this case,because the notice provided to class members explained that the proposed settlement provided solely for the distribution of funds to nonprofit organizations and foundations, stated that there would be no payments to individual consumers, and informed the class members of their opportunities of opting out or objecting (*107 Cal. App. 4th 820, 829)* .

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Chapter 42 RESERVED

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RESERVED

Commercial Paper See Ch. 34, *Checks and Banks* ,
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CHAPTER 43 COMMON COUNTS AND BILLS OF PARTICULARS

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§ 43.syn Synopsis to Chapter 43: COMMON COUNTS AND BILLS OF PARTICULARS

§ 43.01 Scope of Chapter

§ 43.02 Page Limits on Points and Authorities

§ 43.03 Related Pleading and Practice Chapters

§ 43.04 Related Points and Authorities Chapters

§§ 43.05-43.19 [Reserved]

§ 43.20 Supporting General Demurrer to Complaint--Common Count Based on Same Facts as Defectively Pleaded Specific Count

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Common Count Pleaded on Same Facts as Special Count as Alternative Method of Recovery

[b] Demurrer to Common Count Proper When Count Is Based on Same Facts as Defective Special Count

[c] Amended Common Count Defective if Insufficiencies of Specific Count Are Not Corrected

[4] Additional Authorities

[a] Demurrer to Common Count Proper When Count Is Based on Same Facts as Defective Special Count

[b] Amended Common Count Defective if Insufficiencies of Specific Count Are Not Corrected

§ 43.21 Supporting General Demurrer to Complaint--Common Count Based on Express Contract

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Common Count Improper if Based on Unexecuted, Express Contract

[4] Additional Authorities

[a] Common Count Improper if Based on Unexecuted, Express Contract

§ 43.22 Supporting General Demurrer to Complaint--Common Count Does Not State Cause of Action--Count Based on Special Count Barred by Statute of Frauds

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Common Count in Quantum Meruit Must Be for Reasonable Value of Services

[b] Common Count Based on Oral Real Estate Broker's Commission Contract

[4] Additional Authorities

[a] Common Count in Quantum Meruit Must Be For Reasonable Value of Services

§ 43.23 Supporting General Demurrer to Complaint--Common Count Does Not State Cause of Action--Failure to Allege Essential Element of Indebtedness, Consideration, or Nonpayment

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Failure to Allege Essential Elements of Common Count

[b] Demurrer to Common Count

[c] Common Count Based on Unjust Enrichment Must Show Something Moving to Defendant

[4] Additional Authorities

[a] Common Count Based on Unjust Enrichment Must Show Something Moving to Defendant

§ 43.24 Supporting General Demurrer to Complaint--Common Count Does Not State Cause of Action--Failure to Allege Facts Showing Express or Implied Promise to Pay

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Common Count Must Allege Express or Implied Promise

[4] Additional Authorities

[a] Common Count Must Allege Express or Implied Promise

§ 43.25 Supporting General Demurrer to Complaint--Common Count Seeks Relief Other Than Money

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Demurrer to Common Count as Proper Where Count Seeks Relief Other Than Money

[4] Additional Authorities

[a] Demurrer to Common Count as Proper Where Count Seeks Relief Other Than Money

§ 43.26 Supporting Special Demurrer to Complaint--Complaint Setting Forth Common Count Ambiguous and Uncertain as to Dates Alleged

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Special Demurrer Appropriate When Count Is Ambiguous or Uncertain

§ 43.27 Supporting Special Demurrer to Complaint--Common Counts Cannot Be United in One Count as One Cause of Action

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Demurrer Proper if Diverse Common Counts United in One Count

[4] Additional Authorities

[a] Demurrer as Proper if Diverse Common Counts United in One Count

§ 43.28 Supporting Motion for Change of Venue [Code Civ. Proc. §§ 396b, 397(a)]--In Action on Account Stated--Count Fails to Allege It Was Stated in County of Forum

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Failure to Allege That Account Stated Was Stated in County of Forum

[4] Additional Authorities

[a] Failure to Allege That Account Stated Was Stated in County of Forum

§ 43.29 Supporting Motion for Order [Code Civ. Proc. § 1003] to Exclude Evidence--Failure to Meet Demand for

Bill of Particulars [Code Civ. Proc. § 454]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Motion to Exclude as Proper on Failure to Satisfy Timely Demand for Bill of Particulars

§ 43.30 Supporting Motion for Summary Judgment by Defendant--In Action on Account Stated--Does Not Create Independent Obligation

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Account Stated Does Not Create Liability

[b] Underlying Indebtedness Barred by Staute of Frauds

[4] Additional Authorities

[a] Underlying Indebtedness Barred by Statute of Frauds

§ 43.31 Supporting Motion for Summary Judgment by Defendant--In Action on Account Stated--Failure to Object to Statement Does Not Create Account

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Failure to Object Does Not Create Account Stated

[4] Additional Authorities

[a] Failure to Object Does Not Create Account Stated

§ 43.32 Supporting Motion for Summary Judgment by Defendant--Common Count Barred When Based on Illegal Contract or Contract That Is Unenforceable by Plaintiff

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] General Rule Prohibits Recovery Under Common Count

[b] Failure to Give Automotive Repair Estimate

[c] No Recovery of Amount Paid Under Illegal Contract

[d] Test for Severability of Illegal Consideration

[4] Additional Authorities

[a] General Rule Prohibits Recovery Under Common Count

§ 43.33 Supporting Motion for Summary Judgment by Defendant-- In Action for Quantum Meruit--Failure to Establish Both Request for Services and Benefit of Services

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Failure to Establish Both Request for Services and Benefit of Services

§ 43.34 Opposing Demurrer to Complaint--Common Count Based on Same Facts as Defectively Pleaded Special Count Sufficient Against Demurrer

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Common Count Sufficient if Plaintiff Entitled to Different Theory of Recovery

[b] Common Count Defective Only if Clearly Based on Defective Count

[c] Common Count Sufficient if Pleadings Show Valid Theory of Recovery

§ 43.35 Opposing Demurrer to Complaint--Common Count Generally Sufficient Against Demurrer on Ground That Count Is Barred by Statute of Frauds

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Party Who Conferred Benefit on Contract That Is Invalid Under Statute of Frauds May Still Recover Reasonable Value of Benefit Conferred

[b] Common Count Is Permissible Basis for Unjust Enrichment

[c] Statute of Frauds Does Not Bar Recovery on Common Count

[d] Reasonable Value of Services May Be Recovered

[4] Additional Authorities

[a] Statute of Frauds Does Not Bar Recovery on Common Count

§ 43.36 Opposing Demurrer to Complaint--Common Count Sufficient Against Demurrer on Ground That Count Is Based on Express Contract--Contract Executed and Nothing Remains but Payment of Money

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Common Count Based on Express Contract Proper if Only Money Payment Remains

[b] Measure of Damages for "Extras"

§ 43.37 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Common Count Sufficient Against Demurrer on Ground That Count Is Based on Express Contract--Contract Has Been Deviated From or Modified by Consent of Parties

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Common Count as Properly Pleaded on Express Contract

§ 43.38 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Common Count Sufficient Against Demurrer on Ground That Count Is Based on Express Contract--Defendant Repudiated Contract or Prevented Plaintiff From Performing

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Common Count as Properly Pleaded on Express Contract

§ 43.39 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Common Count Sufficient Against Demurrer on Ground That Count for Goods Sold and Delivered Failed to Allege Defendant's Promise to Pay

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Failure to Allege Promise to Pay

[4] Additional Authorities

[a] Failure to Allege Promise to Pay

§ 43.40 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Common Count Sufficient Against Demurrer on Ground That Count for Goods Sold and Delivered Failed to Allege the Particular Value of Goods Delivered

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Failure to Allege Value of Goods Delivered

§ 43.41 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Common Count Sufficient Against Demurrer on Ground That Count for Money Had and Received Failed to Set Forth Time When Indebtedness Occurred

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Failure to State When Indebtedness Arose

§ 43.42 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Common Count Sufficient Against Demurrer on Ground That Count for Work and Labor Failed to Allege That Defendant Requested Services or Promised to Pay Therefor Where Services Personally Rendered to Defendant

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Failure to Allege Request for Services or Promise to Pay

[4] Additional Authorities

[a] Failure to Allege Request for Services or Promise to Pay

§ 43.43 Opposing Demurrer to Complaint--Common Count Sufficient Against Demurrer on Grounds of Uncertainty

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Common Count as Sufficient Against General or Special Demurrer

[b] Special Demurrer for Ambiguity as Lying Only When Dates Ambiguously Alleged

[c] Bill of Particulars as Appropriate Remedy

[d] Common Count Not Required to Specify Whether Contract Oral or Written

[4] Additional Authorities

[a] Common Count as Sufficient Against General or Special Demurrer

[b] Bill of Particulars as Appropriate Remedy

§ 43.44 Opposing Demurrer to Complaint--Common Count Sufficient Against Demurrer for Uncertainty on Ground That Count for Work and Materials Failed to Specify Which Claims Were for Work and Which for Materials

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Failure to Distinguish Work From Materials

§ 43.45 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(f)]--Common Count Sufficient Against Demurrer on Ground That Count for Goods Sold and Delivered Failed to Allege Delivery of Goods

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Failure to Allege Delivery of Goods

§ 43.46 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(f)]--Common Count Sufficient Against Demurrer for Uncertainty on Ground That Common Count Failed to Specify Whether Action Was on Contract or for

Reasonable Value of Goods

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Failure to Specify Nature of Contract

§ 43.47 Opposing Motion for Order [Code Civ. Proc. § 1003] to Exclude Evidence for Failure to Meet Demand for Bill of Particulars [Code Civ. Proc. § 454]--Untimely Delivery Nonprejudicial to Defendant

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Nonprejudicial Delivery Beyond Statutory Deadline

§ 43.48 Opposing Motion for Order [Code Civ. Proc. § 1003] to Exclude Evidence for Failure to Meet Demand for Bill of Particulars [Code Civ. Proc. § 454]--Failure to Demand Further Bill

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Further Bill of Particulars as Remedy to Inadequate Bill

§ 43.49 Opposing Motion for Order [Code Civ. Proc. § 1003] to Exclude Evidence for Failure to Meet Demand for Bill of Particulars [Code Civ. Proc. § 454]--Demand Failed to Contain Clear Indication of Entitlement

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Necessity That Demand Show Entitlement to Account

§ 43.50 Opposing Motion for Order [Code Civ. Proc. § 1003] to Exclude Evidence for Failure to Meet Demand for Bill of Particulars [Code Civ. Proc. § 454]--Failure to Make Motion Prior to Trial

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Motion to Exclude as Required Before Trial,

[4] Additional Authorities

[a] Motion to Exclude as Required Before Trial

§ 43.51 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c] by Defendant--In Action for Account Stated--Circumstances Implying Account Stated Present Triable Issue of Fact

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Implication of Account Stated Presents Issues of Triable Fact

§ 43.52 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c] by Defendant--Recovery on Common Count Permitted Even Though Based on Void or Illegal Contract

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] One Party's Consideration Is Not Intrinsically Illegal

[b] Parties Not in Pari Delicto

[4] Additional Authorities

[a] One Party's Consideration Is Not Intrinsically Illegal

§ 43.53 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] by Plaintiff--Agreed Price in Unenforceable Contract as Evidence of Reasonable Value of Services Rendered

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Agreed Price Is Evidence of Reasonable Value

[b] Oral Stipulation as Admission

[4] Additional Authorities

[a] Agreed Price Is Evidence of Reasonable Value

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4-43 California Points & Authorities § 43.01

§ 43.01 Scope of Chapter

This chapter contains memoranda of points and authorities for use in supporting [*see §§ 43.20 -43.27*] and opposing [*see §§ 43.34 -43.46*] demurrers to complaints pleaded on common counts as well as memoranda for use in supporting [*see §§ 43.30 -43.32, 43.53*] and opposing [*see §§ 43.51, 43.52*] motions for summary judgment. It also contains memoranda of points and authorities for use in supporting § 43.29 and opposing [*see §§ 43.47 -43.50*] a motion to exclude evidence for failure to provide an adequate bill of particulars and a memorandum of points and authorities for use in supporting a change of venue in an action on account stated [*see § 43.28*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureSummary JudgmentOppositionMemoranda in OppositionCivil ProcedureSummary JudgmentSupporting MaterialsMemoranda of LawCriminal Law & ProcedureDiscovery & InspectionBills of ParticularsGeneral OverviewCriminal Law & ProcedurePretrial Motions & ProceduresSuppression of Evidence

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4-43 California Points & Authorities § 43.02

§ 43.02 Page Limits on Points and Authorities

Generally, a supporting or opposing memorandum must not exceed 15 pages in length, or, in the case of a motion for summary judgment or summary adjudication, 20 pages in length. A reply or closing memorandum may not exceed 10 pages in length [*see Cal. Rules of Ct., Rule 3.1113(d)*]. Any party desiring to file a longer memorandum must obtain leave of court [*see Cal. Rules of Ct., Rule 3.1113(e)*]. For further discussion of the page limitations under *Cal. Rules of Ct., Rule 3.1113*, and of other basic format requirements of memoranda of points and authorities, see *Ch. 1, Writing Legal Memoranda and Briefs, § 1.05*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureSummary JudgmentOppositionMemoranda in OppositionCivil ProcedureSummary JudgmentSupporting MaterialsMemoranda of Law

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4-43 California Points & Authorities § 43.03

§ 43.03 Related Pleading and Practice Chapters

For discussion and complaints for pleading on the common counts as well as motions and orders for bills of particulars, see California Forms of Pleading and Practice, Ch. 121, *Common Counts* (Matthew Bender).

For discussion and forms for use in particular cases involving the common counts, see the following chapters in California Forms of Pleading and Practice:

- Ch. 7, *Accounting, Action for*.
- Ch. 8, *Accounts Stated and Open Accounts*.
- Ch. 104, *Building Contracts*.
- Ch. 140, *Contracts*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeGeneral OverviewCivil ProceduresPleading & PracticePleadingsComplaintsRequirementsCivil ProceduresRemediesEquitable AccountingsGeneral OverviewContracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContracts

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4-43 California Points & Authorities § 43.04

§ 43.04 Related Points and Authorities Chapters

For related memoranda that may be useful in cases pleaded on the common counts, see the following chapters in California Points And Authorities:

- Ch. 12, *Accounting*.
- Ch. 50, *Contracts*.
- Ch. 71, *Demurrers and Motions for Judgment on the Pleadings*.
- Ch. 121, *Interest*.

For memoranda regarding the use of common counts for recovery of attorney's fees, see Ch. 25, *Attorney's Fees* .

For a discussion of how to use the forms in this chapter to draft a memorandum or a trial or appellate brief, and for a sample of a complete memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPretrial JudgmentsJudgment on the PleadingsCivil ProceduresRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProceduresRemediesEquitable AccountingsGeneral OverviewCivil ProceduresRemediesJudgment InterestGeneral OverviewCivil ProceduresAppealsBriefs

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4-43 California Points & Authorities §§ 43.05-43.19

[Reserved]

§§ 43.05[Reserved]

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4-43 California Points & Authorities § 43.20

§ 43.20 Supporting General Demurrer to Complaint--Common Count Based on Same Facts as Defectively Pleaded Specific Count

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*],	)	IES IN SUPPORT OF GENERAL DEMURRER TO
Defendant.	)	COMPLAINT FOR FAILURE TO STATE CAUSE
	)	OF ACTION
	)	Date: _____
		Time: _____
		Location: _____

_____

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT THE COMMON COUNT ALLEGED IS BASED ON THE SAME FACTS AS THE SPECIALLY ALLEGED DEFECTIVE COUNT.

A. Objection by Demurrer. The party against whom a complaint has been filed may object by demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action (*Code Civ. Proc. § 430.10(e)*) when the ground for that objection appears on the face of the complaint [or from any matter of which the court is required to take judicial note] (*Code Civ. Proc. § 430.30(a)*).

B. Common Count Pleaded on Same Facts as Special Count as Alternative Method of Recovery. When a common count follows a specially pleaded count and is based on the same facts, the common count is construed as an alternative method of pleading a right to recover and does not constitute a different cause of action (*Oakland v. Oakland Unified*

School Dist. (1956) 138 Cal. App. 2d 406, 411, 291 P.2d 1001).

C. Demurrer to Common Count Proper When Count Is Based on Same Facts as Defective Special Count. It is proper to sustain a demurrer to a common count when it is based on the same facts which are insufficient to entitle plaintiff to recover on a specifically pleaded count (*Zumbrun v. University of So. Cal. (1972) 25 Cal. App. 3d 1, 14, 101 Cal. Rptr. 499*).

[*Optional*] **D. Amended Common Count Defective if Insufficiencies of Specific Count Are Not Corrected.** A plaintiff who has filed a verified specific allegation and common count based on the same facts may not merely amend the complaint to state a cause of action solely as a common count without correcting the prior inconsistencies between the specific allegation and the common count (*Neal v. Bank of America National Trust & Savings Assn. (1949) 93 Cal. App. 2d 678, 681-682*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a demurrer to a complaint pleaded on a common count when the demurrer asserts that the complaint is defective because it is based on the same facts as an insufficient special count.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Points and Authorities

In an appropriate case, the points and authorities set out in *§§ 43.34* through *43.38* may be used in opposition to the demurrer supported by this memorandum of points and authorities.

[3] Discussion of Authorities

[a] Common Count Pleaded on Same Facts as Special Count as Alternative Method of Recovery

In ***Oakland v. Oakland Unified School Dist.*** *(1956) 138 Cal. App. 2d 406, 291 P.2d 1001* , the City of Oakland attempted to recover from defendant school district its proportional share of costs of a city election in which certain school-director vacancies were filled. Although the school district had paid its proportional share of election costs in past elections, it refused on the ground that the statute on which its prior liability was predicated no longer applied due to a boundary change in the school district. The applicable statute required school districts whose boundaries were not coterminous with the boundaries of the city to contribute to the city for elections, whereas the school district boundaries had been changed and were now coterminous. The trial court, however, ordered defendant school district to pay its pro

rata share of election costs. Defendant appealed and the court of appeal determined on the basis of the relevant statutory language that the school district had no liability to the city. On appeal the city argued that it had a right to recover from the school district under its second cause of action which was pleaded as a common count for money paid. Such a right to relief was denied by the court, however, since the common count was pleaded on the same facts as the defective special count and therefore was not a different cause of action, but merely an alternative method of alleging plaintiff's right to recover (*138 Cal. App. 2d 406, 411)* .

[b] Demurrer to Common Count Proper When Count Is Based on Same Facts as Defective Special Count

In ***Zumbrun v. University of So. Cal.*** *(1972) 25 Cal. App. 3d 1, 101 Cal. Rptr. 499* , plaintiff, a 63-year-old woman, sought to recover damages allegedly suffered when the professor of a class that the plaintiff was taking refused to finish teaching the course and offer a final examination because of a faculty strike to register disapproval of certain United States policies in Cambodia. The students, however, did receive grades, plaintiff receiving a "B." Plaintiff's complaint attempted to allege breach of fiduciary duty, unjust enrichment, fraud, constructive fraud, breach of warranty, misrepresentation, negligence, breach of trust, and conspiracy. The trial court upheld defendant's demurrer to plaintiff's specially pleaded first count on the ground that plaintiff failed to state a cause of action. The second cause of action was for money had and received and was based on the same facts as the first. Since the special count was defective, the trial court sustained the demurrer to the common count on the ground that if the plaintiff is not entitled to recover on a count which is specifically pleaded, recovery under a common count based on the same factual situation is also improper. The court of appeal affirmed (*25 Cal. App. 3d 1, 14)* .

[c] Amended Common Count Defective if Insufficiencies of Specific Count Are Not Corrected

In ***Neal v. Bank of America National Trust & Savings Assn.*** *(1949) 93 Cal. App. 2d 678* , plaintiff sought to recover money from defendant bank allegedly due him for certain contracting work. Plaintiff constructed two houses for persons who had obtained building loans from defendant, and defendant allegedly accepted plaintiff as the contractor and authorized construction of the houses. Plaintiff's first two counts attempted to set forth defendant's obligation to plaintiff, and the third consisted of a common count based on the same facts as the first two. Subsequently, the trial court sustained defendant's demurrer to the original complaint on the grounds that it failed to state a cause of action and that it was uncertain since if failed to allege any promise on the part of the defendant to recognize plaintiff as contractor. Plaintiff then filed an amended complaint which attempted to state a cause of action exclusively in the form of a common count for money had and received. The court found that since no new defendants were added and none of the deficiencies of the original complaint had been corrected, the amended complaint pleaded as a common count was also inadequate. The court stated that facts once alleged cannot be withdrawn from consideration by the mere filing of an amended pleading omitting them without any explanation (*93 Cal. App. 2d 678, 681-682)* .

[4] Additional Authorities

[a] Demurrer to Common Count Proper When Count Is Based on Same Facts as Defective Special Count

In *Building Permit Consultants, Inc. v. Mazur (2004) 122 Cal. App. 4th 1400, 1414, 19 Cal. Rptr. 3d 562* , an unlicensed public adjusting firm sued the insured with whom it had contracted to provide funding for pursuit of a claim against an insurance company. When the insurance company settled with the insured but the insured did not pay the adjusting firm the fee called for in the contract, the adjusting firm sued. The court held that because the adjusting firm was not licensed when the contract was signed, not only was its contract voidable by the insured pursuant to *Ins. Code § 15006(b)*, but under the court's interpretation of that section the adjusting firm's common counts claim for recovery was also barred.

In *Hays v. Temple (1937) 23 Cal. App. 2d 690, 73 P.2d 1248* , an action was brought against the child actress, Shirley Temple, for breach of an exclusive services contract. The right to recovery was set forth specifically on the contract as well as in a common count for money had and received. The trial court found the specific counts ambiguous, uncertain,

and unintelligible and held that they failed to state a cause of action. Likewise, it held that the common count, which obviously sought recovery on the same facts as the insufficient special counts, must also fail. The court of appeal affirmed the judgment sustaining defendant's demurrer without leave to amend.

[b] Amended Common Count Defective if Insufficiencies of Specific Count Are Not Corrected

The court of appeal in *Filmservice Laboratories, Inc. v. Harvey Bernhard Enterprises, Inc. (1989) 208 Cal. App. 3d 1297, 256 Cal. Rptr. 735* , affirmed the trial court's judgment of dismissal, based on sustaining of a demurrer to a third amended complaint without leave to amend. The first complaint alleged an express oral contract that was barred by a two-year limitation period (*208 Cal. App. 3d 1297, 1304-1306*). The first, second, and third amended complaints omitted a count on the express contract but contained counts for account stated and open book account. The court gave two reasons why the common counts were fatally defective. In the absence of any allegation that the debtor agreed to forego the oral contract and proceed on the basis of an account, invoices from the creditor were not evidence of an account but only memorialized the oral contract (*208 Cal. App. 3d 1297, 1307-1308)* . In addition, the action could not be resurrected by the device of pleading common counts when the common count and the count on the express contract were factually identical in all material aspects and no facts were alleged explaining the omission of the oral contract allegations in the amended complaints (*208 Cal. App. 3d 1297, 1308)* .

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4-43 California Points & Authorities § 43.21

§ 43.21 Supporting General Demurrer to Complaint--Common Count Based on Express Contract

[1] FORM

[*Caption. See § 43.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT THE COMMON COUNT ALLEGED IS BASED ON AN UNEXECUTED, EXPRESS CONTRACT WHICH HAS NOT BEEN MUTUALLY RESCINDED.

A. Objection by Demurrer. [*See § 43.20[1], Paragraph A.*]

B. Common Count Improper if Based on Unexecuted, Express Contract. A common count which is based on an express contract is improper where the contract is open and unexecuted and not rescinded by mutual consent (*Barrere v. Somps (1896) 113 Cal. 97, 101, 45 P. 177*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of demurrer to a complaint pleaded on a common count when the demurrer asserts that the complaint is defective because the common count is based on an express contract. Although the general rule is that a common count will not lie on an express contract, because of the many exceptions to that rule [*see §§ 43.34 -43.38*], this form is for use only when the complaint shows that the express contract is unexecuted and was never mutually rescinded.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Points and Authorities

In an appropriate case, the points and authorities set out in *§§ 43.36* and *43.37* may be used in opposition to the demurrer supported by this memorandum of points and authorities.

[3] Discussion of Authorities

[a] Common Count Improper if Based on Unexecuted, Express Contract

In ***Barrere v. Somps*** *(1896) 113 Cal. 97, 45 P. 177* , plaintiff and defendant entered into a contract pursuant to which plaintiff was to purchase soda water exclusively from defendant for resale. Defendant provided the necessary horses, wagon, and syphon bottles to plaintiff who deposited the sum of $500 with defendant as security against damages to the wagon or animals. In a subsequent action pleaded as a common count, plaintiff sought return of the $500 deposit. The trial court overruled defendant's demurrer to the complaint and denied defendant's motion for nonsuit. The Supreme Court reversed, finding that a common count was not appropriate where there existed a special contract which was still open, unexecuted in part and not rescinded by mutual consent. It stated that allegations and proof must agree under both code and common law pleading. Thus, where the respective liabilities of the parties as to the deposit remained unsettled and disputed, the common count alleged by plaintiff was not supported by the evidence presented and it was necessary for plaintiff to prove defendant's liability pursuant to the applicable provisions of the contract (*113 Cal. 97, 101)* .

[4] Additional Authorities

[a] Common Count Improper if Based on Unexecuted, Express Contract

In *Castagnino v. Balletta (1889) 82 Cal. 250, 23 P. 127* , plaintiff brought an action against defendants to foreclose a mechanic's lien on buildings plaintiff constructed for defendants pursuant to a written contract. At the second trial, plaintiff stated his cause of action against defendants in three counts: work and labor done in constructing the buildings, extra work done and materials furnished, and special indebtedness for a door and sidewalk furnished at defendants' special request. After a jury trial, the trial court entered judgment in favor of plaintiff. Defendants moved for a new trial and the motion was denied. Defendants then appealed the judgment and order. On appeal, the Supreme Court affirmed the trial court's decision. In so doing, the Court set forth the general rules regarding the appropriateness of pleading on the common counts. It stated that the election to plead on the common counts, where a special agreement exists, applies only if the contract has been fully performed by the plaintiff, abandoned by mutual consent, or rescinded by the defendant. Otherwise, if the contract is executory, the plaintiff's only remedy is to seek relief pursuant to the express contract. The Court found that plaintiff had fully performed his part of the contract and could appropriately plead his cause of action on the common counts.

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CHAPTER 43 COMMON COUNTS AND BILLS OF PARTICULARS
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4-43 California Points & Authorities § 43.22

§ 43.22 Supporting General Demurrer to Complaint--Common Count Does Not State Cause of Action--Count Based on Special Count Barred by Statute of Frauds

[1] FORM

[*Caption. See § 43.20.*]

PLAINTIFF'S COMPLAINT PLEADED ON A COMMON COUNT DOES NOT ALLEGE FACTS SUFFICIENT TO STATE A CAUSE OF ACTION IN THAT IT SHOWS ON ITS FACE THAT IT IS BARRED BY THE STATUTE OF FRAUDS.

A. Common Count in Quantum Meruit Must Be for Reasonable Value of Services. Although a general demurrer will not lie to a common count in which plaintiff seeks recovery of the reasonable value of the services rendered under a contract valid except for the statute of frauds, the count in quantum meruit must bear some reasonable relationship to the reasonable value of the goods and services rendered by the plaintiff, that is, the plaintiff must make some genuine attempt to show the propriety of an action based on quantum meruit (*Parker v. Solomon (1959) 171 Cal. App. 2d 125, 134-137, 340 P.2d 353*).

[*Optional*] **B. Common Count Based on Oral Real Estate Broker's Commission Contract.** A plaintiff cannot avoid the statute of frauds in a suit to recover his or her real estate broker's commission pleaded both in a special and common count if the contract is not in writing and the plaintiff has failed to allege any facts which would estop the defendant from pleading the statute of frauds (*Allen v. Powell (1967) 248 Cal. App. 2d 502, 511-512, 56 Cal. Rptr. 715*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a demurrer to a complaint pleaded in a special count for breach of contract and in a common count when the special count is barred by the statute of frauds and the common count is based on the same facts and the same theory of recovery as the special count. This memorandum sets forth a specific application of the general rule set out in *§ 43.20* that a demurrer will lie to a common count which is based on the same facts as a specific count alleging an express contract if the specific count does not state a cause of action. Although it has been generally stated that the rule does not apply if the demurrer to the specific count is based on the statute of frauds [*see § 43.35*], this exception does not apply if the count does not make some reasonable attempt to show the propriety of an action in quantum meruit for the value of the services rendered in reliance on a promise to compensate which is made unenforceable by the statute of frauds [*see* discussion in *§ 43.22[3][a]*].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Common Count in Quantum Meruit Must Be for Reasonable Value of Services

In ***Parker v. Solomon*** *(1959) 171 Cal. App. 2d 125, 340 P.2d 353* , plaintiff attempted to recover one half of her father's estate based on an alleged oral agreement. Plaintiff, the legitimate daughter of the decedent, was abandoned by her father at an early age. As an adult, plaintiff met with her father and expressed an interest in moving to Los Angeles, where he lived, and further demanded that he compensate her for past neglect. Decedent orally agreed that plaintiff would receive one half of his estate on his death if plaintiff agreed not to move to Los Angeles. Although his estate was worth an estimated $1,500,000, decedent left plaintiff a specific bequest for $1,000. Plaintiff's action was in two counts, one based on the oral contract, and the second was in the form of a common count in quantum meruit for services rendered. The trial court sustained defendant's demurrer to the complaint and dismissed the action. The court of appeal affirmed. It held that the first count came within the statute of frauds and did not allege any equitable considerations which would remove it from the purview of the statute, noting in part that the decedent's estate would not be unjustly enriched if the oral contraction which plaintiff relied were not enforced. With respect to the second count, although the court noted that the statute of frauds would not bar plaintiff from recovering the reasonable value of the services rendered to decedent, plaintiff had not alleged a cause of action in which she sought such a value. Rather, because (1) the only consideration for decedent's alleged promise consisted of plaintiff's forbearing to assert a claim against decedent for her support and for her refraining from intruding herself into his life, (2) the counts prayed for the same recovery, and (3) the amount claimed in the common count thus bore no relationship to the reasonable value of any alleged services, the court held that the common count was subject to a general demurrer (*171 Cal. App. 2d 125, 134-137)* .

[b] Common Count Based on Oral Real Estate Broker's Commission Contract

In ***Allen v. Powell*** *(1967) 248 Cal. App. 2d 502, 56 Cal. Rptr. 715* , the trial court sustained a demurrer to a common count on the ground that the plaintiff had failed to allege any facts which would estop defendant from asserting the statute of frauds. Plaintiff sought to recover the reasonable value of services rendered as real estate broker for defendant. The court of appeal affirmed, finding that plaintiff had pleaded the necessary elements to constitute a valid common count, but held that a real estate broker's commission contract must be in writing. Since plaintiff had failed to plead facts

which would estop defendant from asserting the bar of the statute of frauds, judgment was rendered for defendant.

The court in *Allen* did not clearly consider the issue of the relationship of the statute of frauds to a common count in quantum meruit when the underlying contract cannot be enforced because it is not in writing. Unlike *Parker* (discussed in *§ 43.22[3][a]*), in which the court of appeal carefully considered the underlying rationale for the rule that a common count in quantum meruit is not subject to a general demurrer based on the statute of frauds, *Allen* did not consider a plaintiff's right to recover the reasonable value of services rendered to a defendant when those services are performed pursuant to an unenforceable contract. Nevertheless, there appear to be two bases for supporting the court's holding in *Allen*. First, as in *Parker*, the facts show that plaintiff brokers prayed for the same amount as the reasonable value of services rendered that they would have earned had their contract been enforceable. Thus, it was not clear that plaintiffs had made a reasonable attempt to allege the propriety of an action in quantum meruit. Second, and more importantly, *Allen* has been cited as authority for the proposition that a licensed real estate broker is presumed to know that real estate commission contracts are invalid and unenforceable unless in writing and subscribed by the person to be charged [*Rosenbaum v. Rosenbaum (1967) 257 Cal. App. 2d 193, 198, 64 Cal. Rptr. 632]* . In other words, a plaintiff broker cannot complain in such a case that a defendant has been unjustly enriched and thus, there is no basis for a recovery in quantum meruit (*248 Cal. App. 2d 502, 512)* .

[4] Additional Authorities

[a] Common Count in Quantum Meruit Must Be For Reasonable Value of Services

In *Maglica v. Maglica (1998) 66 Cal. App. 4th 442, 449-452* , an unmarried cohabitant sought to recover the reasonable value of services rendered to a business solely owned by the other cohabitant. The jury awarded the plaintiff $84 million on her quantum meruit claim. The court of appeal reversed, holding that the trial court erred in allowing the jury to measure quantum meruit recovery on the basis of the impact of plaintiff's services on the business. The trial judge had instructed the jury that the reasonable value of plaintiff's services was either the value of what it would have cost the defendant to obtain those services from someone else, or the value by which defendant had benefitted as a result of those services. The court appeal stated that the legal test for recovery in quantum meruit is not the value of the benefit, but value of the services (*66 Cal. App. 4th 442, 449-452)* .

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CHAPTER 43 COMMON COUNTS AND BILLS OF PARTICULARS
PART II. FORMS

4-43 California Points & Authorities § 43.23

§ 43.23 Supporting General Demurrer to Complaint--Common Count Does Not State Cause of Action--Failure to Allege Essential Element of Indebtedness, Consideration, or Nonpayment

[1] FORM

[*Caption. See § 43.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT FAILS TO ALLEGE _____ [DEFENDANT'S INDEBTEDNESS TO PLAINTIFF *OR* THE CONSIDERATION GIVEN BY PLAINTIFF *OR* NONPAYMENT BY DEFENDANT], AN ESSENTIAL ELEMENT IN PLEADING ON THE COMMON COUNTS.

A. Objection by Demurrer. [*See § 43.20[1], Paragraph A.*]

B. Failure to Allege Essential Elements of Common Count. The essential allegations which must be present to constitute an adequate common count are allegations of indebtedness by the defendant to the plaintiff, consideration given by the plaintiff, and nonpayment by the defendant (*Allen v. Powell (1967) 248 Cal. App. 2d 502, 510, 56 Cal. Rptr. 715*).

C. Demurrer to Common Count. Demurrer to a common count is appropriate when any of the essential allegations is absent (*Vaughn v. Certified Life Ins. Co. (1965) 238 Cal. App. 2d 177, 181-182, 47 Cal. Rptr. 619*).

[*Optional*] **D. Common Count Based on Unjust Enrichment Must Show Something Moving to Defendant.** Although in a suit on a common count based on unjust enrichment whereby the plaintiffs waive the tort and sue in assumpsit the consideration is a fiction since there is not intent on the plaintiff's part to give anything as an agreed exchange, the plaintiff, nevertheless, must allege something moving to the defendant to support the implied promise to pay (*Allen v. Powell (1967) 248 Cal. App. 2d 502, 510, 56 Cal. Rptr. 715*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a demurrer to a complaint pleaded on a common count when the demurrer asserts that the complaint fails to allege the essential element of indebtedness in pleading on a common count. Counsel should note that demand was considered a necessary allegation in pleading on the common counts in older California decisions, but that it is no longer stated to be essential in more recent cases [*see Pike v. Zadig (1915) 171 Cal. 273, 152 P. 923* ; *see also Division of Labor Law Enforcement v. Barnes (1962) 205 Cal. App. 2d 337]* .

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For a discussion of the necessity of alleging venue and jurisdiction generally, see *California Forms of Pleading and Practice, Ch. 121, Common Counts, § 43.20[2]* (Matthew Bender).

[3] Discussion of Authorities

[a] Failure to Allege Essential Elements of Common Count

In ***Allen v. Powell*** *(1967) 248 Cal. App. 2d 502, 56 Cal. Rptr. 715* , plaintiffs, licensed real estate brokers, brought an action against certain lessors and the lessee for the recovery of a commission the lessors had promised to pay plaintiffs from rents to be received from the lessee after plaintiffs had negotiated a long-term lease with the lessee. The lessee was also named as a defendant on the alternative bases that it had tortiously interfered with the contract between plaintiffs and defendant lessors and that the lessors and the lessee had conspired to prevent plaintiffs from recovering their commission. In addition, plaintiffs sought recovery for the lessee's unjust enrichment because of the acts alleged as part of these two alternative theories. The trial court rendered judgment in favor of plaintiffs and against the lessors but sustained the lessee's demurrer to the complaint without leave to amend, and that part of the action was dismissed. Plaintiffs appealed, and the court of appeal reversed, holding that plaintiffs had stated a cause of action against the lessors and lessee on the alternative theories of interference with contract or civil conspiracy. However, the court held that plaintiffs were not entitled to recover anything based on a theory of unjust enrichment. It stated that such a recovery could be upheld neither on the ground that plaintiffs were entitled to the remedy of a constructive trust, since plaintiffs had not alleged and could not show there was an inadequate remedy at law, nor on the ground that plaintiffs had successfully alleged a common count. Although plaintiffs were entitled to waive the tort (interference with contract) and sue in assumpsit, they nevertheless had failed to allege an essential element of a common count, the consideration. Quoting from Witkin, California Procedure, (2d ed) Vol. 3 *Pleading*, § 431, the court stated that the essential allegations of a common count are (1) the statement of indebtedness in a certain sum; (2) the consideration, that is, goods sold, work done, etc.; and (3) nonpayment. It found that not only was the consideration not pleaded, it could not be pleaded. The court reasoned that the consideration is a fiction when the tort is waived, since there is no intent to give anything as

an agreed exchange. But, in order to employ the fiction, there must be something moving to the defendant to support the implied promise to pay therefor. In plaintiffs' case, there was nothing so moving for the plaintiffs to waive the tort (*248 Cal. App. 2d 502, 510*).

[b] Demurrer to Common Count

In ***Vaughn v. Certified Life Ins. Co.*** *(1965) 238 Cal. App. 2d 177, 47 Cal. Rptr.619* , plaintiff brought an action against defendant to recover an alleged debt for fraud. After defendant's two demurrers were sustained, plaintiff filed a second amended complaint in two counts, one attempting to plead a common count and the second sounding in fraud. Defendant generally and specially demurred to the second amended complaint. The trial court sustained this demurrer, and, on plaintiff's failure to amend, judgment was entered for defendant. Plaintiff appealed, and the court of appeal affirmed. With respect to the cause of action stated as a common count, the court determined that plaintiff had failed to plead sufficiently the count. Noting the liberality of pleading requirements with common counts, the court still held that plaintiff had failed to state directly or impliedly the relationship between plaintiff and defendant or the express or implied legal principle on which a promise to pay plaintiff was predicated. The court found that plaintiff's mere allegations that he paid $128.25 to defendant as a premium on a policy and that no part of it was repaid to plaintiff were insufficient to establish any legal theory on which there was an obligation on the part of defendant to repay (*238 Cal. App. 2d 177, 181-182)* .

[c] Common Count Based on Unjust Enrichment Must Show Something Moving to Defendant

Allen v. Powell *(1967) 248 Cal. App. 2d 502, 56 Cal. Rptr. 715* , is discussed in *§ 43.23[3][a]*.

[4] Additional Authorities

[a] Common Count Based on Unjust Enrichment Must Show Something Moving to Defendant

The court of appeal in *Enterprise Leasing Corp. v. Shugart Corp. (1991) 231 Cal. App. 3d 737, 282 Cal. Rptr. 620* reversed a judgment for defendant as to plaintiff's cause of action for unjust enrichment. Plaintiff leased computer equipment to a third entity, which sold all its electronics division assets to defendant. The lease prohibited assignment without plaintiff's consent, which was never obtained. Defendant took possession of the computer equipment and made monthly payments to plaintiff for a time. Although the court eventually ruled for plaintiff, it stated the theory of the case as follows: one who has been unjustly enriched at the expense of another is required to make restitution. A critical limitation on this rule is that one who confers a benefit officiously is not entitled to restitution. It must ordinarily appear that the benefits were conferred by mistake, fraud, coercion or request; otherwise, although there is enrichment, it is not unjust (*231 Cal. App. 3d 737, 748*). At the time defendant took possession of the equipment, the rental payments for the remaining term of the lease totaled $146,243, and the monthly payments required by the lease were based on the lease remaining in effect for its full term of 60 months. Although defendant made monthly payments at the lease rate ($3,179) for a while, in order for defendant to pay the $146,243, it would have had to make monthly payments of $8,006 during the period it used the equipment. Therefore, the court concluded that the facts established that defendant was enriched, that is, benefitted financially, by making only the rental payments specified in the lease during the period it used the equipment, and that such enrichment was unjust because the benefit conferred was the result of plaintiff's lack of knowledge that defendant had the equipment and was making the payments and that the payments would not continue throughout the term of the lease (*231 Cal. App. 3d 737, 749)* .

In *Nibbi Brothers, Inc. v. Home Federal Savings & Loan Assn. (1988) 205 Cal. App. 3d 1415* , a contractor that supplied materials and labor for tenant improvements at the construction lender's request sued the construction lender on theories of unjust enrichment and negligent misrepresentation when the contractor remained unpaid after the construction lender had acquired the property through foreclosure. The court of appeal affirmed judgment for the lender on those causes of action entered after sustaining of demurrers and granting of motions to strike. The court first noted that restitution to avoid unjust enrichment is appropriate when the benefits were conferred by mistake, fraud, coercion,

or request, saying that without a showing of mistake, fraud, coercion, or request, though there may be enrichment, it is not unjust (*205 Cal. App. 3d 1415, 1422)* . Here, the allegations relating to defendant's alleged fraud were fatally defective because they did not allege that defendant promised it would pay for the work. Without a specific promise to pay for the work itself, defendant's promise of payment had to be construed as an optimistic and nonactionable opinion about the original owner-borrower's payment (*205 Cal. App. 3d 1415, 1422-1423)* .

In *Otworth v. Southern Pac. Transportation Co. (1985) 166 Cal. App. 3d 452, 212 Cal. Rptr. 743* , the court of appeal held that a complaint alleging numerous causes of action, including unjust enrichment, failed to allege sufficient facts to support that cause of action. Plaintiff, who challenged withholding of a portion of his wages for income tax purposes by his employer, did not allege how withholding taxes and turning them over to the I.R.S. unjustly enriched defendant. Therefore, the trial court properly sustained a demurrer to this cause of action (*166 Cal. App. 3d 452, 460)* .

In *Gold v. Los Angeles Democratic League (1975) 49 Cal. App. 3d 365, 122 Cal. Rptr. 732* , plaintiff in part sought the recovery of $4,400 under a common count alleging that defendants became indebted to plaintiff for this sum on an open book account. In the fourth count of the complaint, plaintiff had alleged a cause of action based on intentional interference with plaintiff's prospective employment. The cause of action was based on plaintiff's allegations that defendants had published a pamphlet during a campaign in which plaintiff sought political office which gave the false impression that plaintiff's opponent had been officially endorsed by the Democratic Party. The trial court had sustained defendants' demurrers to plaintiff's complaint, but on appeal the court of appeal reversed, holding that the complaint stated a good cause of action for the tort of interference with a prospective advantage alleged in the fourth count. However, based on *Allen v. Powell (1967) 248 Cal. App. 2d 502, 510, 56 Cal. Rptr. 715* (discussed in *§ 43.23[3][c]*), the common count was defective because it did not allege any consideration moving from plaintiff to defendants on which to base an implied promise of repayment on their part.

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4-43 California Points & Authorities § 43.24

§ 43.24 Supporting General Demurrer to Complaint--Common Count Does Not State Cause of Action--Failure to Allege Facts Showing Express or Implied Promise to Pay

[1] FORM

[*Caption. See § 43.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT FAILS TO ALLEGE FACTS SHOWING DIRECTLY OR BY IMPLICATION THE RELATIONSHIP OR THE EXPRESS OR IMPLIED LEGAL PRINCIPLE ON WHICH A PROMISE TO PLAINTIFF IS PREDICATED.

A. Objection by Demurrer. [*See § 43.20[1], Paragraph A.*]

B. Common Count Must Allege Express or Implied Promise. To be sufficiently pleaded, a common count must state not only the indebtedness of the defendant, but also, directly or impliedly, the relationship or the express or implied legal principle on which a promise to plaintiff is predicated (*Vaughn v. Certified Life Ins. Co. (1965) 238 Cal. App. 2d 177, 181, 47 Cal. Rptr. 619*).

[*Optional*] **C. Common Count Based on Unjust Enrichment Must Show Something Moving to Defendant.** [*See § 43.23[1], Paragraph D.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a demurrer to a complaint based on a common count when the count fails to allege facts showing that defendant expressly or impliedly promised to pay plaintiff. The general rule is that a promise to pay is not an essential allegation of a common count if plaintiff has otherwise pleaded defendant's indebtedness, consideration, and nonpayment. The reason is that, for example, in counts for money had and received, for goods sold and delivered, or for work, labor, and services rendered, the law implies the plaintiff's promise from the allegation that the money was received by, or the goods delivered or services rendered to, plaintiff [*see §§ 43.39 -43.42*]. This form is for use when other allegations show that the money was received, the goods delivered, or the services rendered under circumstances from which a promise could not be implied, or someone other than the defendant received the money, goods, or services [*see also § 43.23*].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Common Count Must Allege Express or Implied Promise

The factual background of ***Vaughn v. Certified Life Ins. Co.*** *(1965) 238 Cal. App. 2d 177, 47 Cal. Rptr. 619* , is discussed in *§ 43.23[3][b]*. In holding that plaintiff had not sufficiently pleaded a common count to recover the premium paid to defendant on an insurance policy, the court of appeal explained that historically, the common count derives from the writ system of the common law. It is based on an archetypical legal relationship, pleaded as a general conclusion of law, from which a plaintiff's right to the relief he seeks is derived. However liberal the rules permitting common counts maybe, there must be some certainty with respect to the obligation a plaintiff seeks to enforce. Stating the principle set out in Paragraph B of this form, the court found nothing was alleged in the common count which expressly or impliedly created an obligation to repay anything to defendant. Plaintiff had merely alleged that defendant became indebted to him in the sum of $128.25, which was the agreed price paid to defendant as a premium on a certain insurance policy, and that no part of it was paid to him. There was no allegation sufficient to show an implied-in-law contract to repay. Rather, the allegation that the money was paid as an agreed premium showed that defendant had the right to retain the money, a fact buttressed by the legal presumption that money paid by one person to another is due the latter [*see Evid. Code § 631*] (*238 Cal. App. 2d 177, 181)* .

[4] Additional Authorities

[a] Common Count Must Allege Express or Implied Promise

Smith v. Bentson (1932) 127 Cal. App. Supp. 789, 15 P.2d 910 , was an action in municipal court on a common count brought against defendants husband and wife for work, labor, and services plaintiff rendered as a dentist to the husband and for which both defendants had become indebted. Plaintiff did not allege that the wife had requested the performance of plaintiff's services or that she promised to pay for them. The trial court sustained her demurrer, defendant appealed, and the superior court affirmed. The court explained that if it were alleged that plaintiff's services were rendered to and received by the wife, the complaint would be good, because a promise to pay could be implied. But because plaintiff alleged that the services were rendered to another, no promise to pay could be implied and the complaint could not be upheld as a common count.

See *Filmservice Laboratories, Inc. v. Harvey Bernhard Enterprises, Inc. (1989) 208 Cal. App. 3d 1297, 256 Cal. Rptr.*

735 , discussed in *§ 43.20[4][b]*, and *Maggio, Inc. v. Neal (1987) 196 Cal. App. 3d 745, 241 Cal. Rptr. 883* , discussed in *§ 43.31[4][a]*.

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4-43 California Points & Authorities § 43.25

§ 43.25 Supporting General Demurrer to Complaint--Common Count Seeks Relief Other Than Money

[1] FORM

[*Caption. See § 43.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT RELIEF OTHER THAN MONEY IS SOUGHT ON A COMMON COUNT.

A. Objection by Demurrer. [*See § 43.20[1], Paragraph A.*]

B. Demurrer to Common Count as Proper Where Count Seeks Relief Other Than Money. A common count is improper where damages are sought for the breach of an express obligation to do things other than pay money (*Allen v. Merchants Elec. Co. (1960) 54 Cal. 2d 67, 69, 4 Cal. Rptr. 527, 351 P.2d 799*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a demurrer to a complaint pleaded on a common count where the demurrer asserts that the complaint is defective because a common count cannot be pleaded where the recovery sought is other than money.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Demurrer to Common Count as Proper Where Count Seeks Relief Other Than Money

In ***Allen v. Merchants Elec. Co.*** *(1960) 54 Cal. 2d 67, 4 Cal. Rptr. 527, 351 P.2d 799* , plaintiff pleaded a cause of action for damages for breach of express contracts in which defendant promised to install and furnish certain electrical equipment for plaintiff. Plaintiff attempted to obtain a writ of attachment for damages allegedly incurred as a result of the contracts, but the trial court held that a writ would not lie when the breached contract required other than the direct payment of money. The Supreme Court affirmed the judgment finding nothing from which an obligation to pay money could be implied in fact. Moreover, the Court noted, as dictum, that when damages are sought for breach of an express obligation to do other than pay money, neither attachment nor pleading on the common counts is proper (*54 Cal. 2d 67, 69)* .

[4] Additional Authorities

[a] Demurrer to Common Count as Proper Where Count Seeks Relief Other Than Money

In *Willett & Burr v. Alpert (1919) 181 Cal. 652, 185 P. 976* , plaintiff corporation alleged that defendants, as assignees of prior contracts, had a contractual obligation which required them to deliver certain rails to plaintiff. Plaintiff alleged that defendants had failed to deliver the rails to plaintiff's detriment in the amount of $6,562.50 and that defendants were therefore indebted to plaintiff in that amount. Since plaintiff had already paid the contract price, it sought damages and writ of attachment. The trial court denied the writ and plaintiff appealed. The Supreme Court affirmed, however, finding that the action was not on the contract but rather for breach of contract and, thus, that attachment was not authorized. Plaintiff had attempted to argue that the action was on an implied contract, similar to those on which common counts may be based. Analogizing the action to one on a common count to determine whether attachment was proper, the Court stated that a common count will not lie to recover damages for an unexecuted contract where the obligation breached is other than the payment of money. Further, the Court cited authority for the proposition that a common count is improper even if the obligation owing differs as slightly from money as a promissory note.

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4-43 California Points & Authorities § 43.26

§ 43.26 Supporting Special Demurrer to Complaint--Complaint Setting Forth Common Count Ambiguous and Uncertain as to Dates Alleged

[1] FORM

SUPERIOR COURT OF CALIFORNIA,		
COUNTY OF _____		
_____ [*name*],	)	
Plaintiff, vs.	)	
_____ [*name*],	)	NO. _____
	)	MEMORANDUM OF POINTS AND AUTHORIT-
Defendant.	)	IES IN SUPPORT OF DEMURRER TO COM-
	)	PLAINT ON GROUND OF UNCERTAINTY
	)	

PLAINTIFF'S COMPLAINT IS SUBJECT TO A SPECIAL DEMURRER IN THAT THE COMMON COUNT IS AMBIGUOUS AND UNCERTAIN AS TO THE DATES ON WHICH THE ALLEGED INDEBTEDNESS AROSE.

A. Objection by Demurrer. The party against whom a complaint has been filed may object by demurrer to the complaint on the ground that it is uncertain (*Code Civ. Proc. § 430.10(f)*) when the ground for such objection to the complaint appears on the face thereof [or from any matter of which the court is required to take judicial note] (*Code Civ. Proc. § 430.30(a)*).

B. Special Demurrer Appropriate When Count Is Ambiguous or Uncertain. A special demurrer for ambiguity or uncertainty is appropriate against a common count to ascertain the true dates on which defendant's indebtedness arose if such dates are ambiguously alleged in a special count and a common count pleaded generally (*Miller v. Brown (1951) 107 Cal. App. 2d 304, 307, 237 P.2d 320*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

CAUTION:
Special demurrers are not allowed in limited civil cases in which the amount in controversy is $25,000 or less [*see Code Civ. Proc. §§ 91(a), 92(c)*].

[a] Use of Form

These points and authorities may be submitted in support of a special demurrer to a complaint pleaded on a common count when the demurrer asserts that the complaint is ambiguous or uncertain as to dates alleged. This special demurrer exists as an exception to the general rule that neither general or special demurrers lie against a common count on grounds of uncertainty [*Pike v. Zadig (1915) 171 Cal. 273, 152 P. 923]* .

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Points and Authorities

In an appropriate case, the points and authorities set out in *§ 43.43* may be used in opposition to the demurrer supported by this memorandum of points and authorities.

[3] Discussion of Authorities

[a] Special Demurrer Appropriate When Count Is Ambiguous or Uncertain

In ***Miller v. Brown*** *(1951) 107 Cal. App. 2d 304, 237 P.2d 320* , the trial court sustained a special demurrer against a common count for ambiguity and uncertainty despite the general rule that neither special or general demurrers for uncertainty are sufficient against actions pleaded on the common counts [*see Pike v. Zadig (1915) 171 Cal. 273, 152 P. 923]* . The plaintiff in *Miller* sought to recover damages in a count for work and labor for breach of an alleged oral contract. The second count of the complaint contained contradictory language with respect to the date of indebtedness. Plaintiff generally alleged that defendant had become indebted to plaintiff within the last two years but specifically alleged that the indebtedness accrued from June 1946 to June 1948. Since the action was filed on June 10, 1948, the uncertainty of the specific allegation raised a question as to the timeliness of the action. The court of appeal upheld the demurrer but carefully stated that its holding was not on the basis that the action was barred by the statute of limitations, since that bar must affirmatively appear on the face of the complaint, but rather, because of the uncertainty and ambiguity of the dates and plaintiff's failure to amend the complaint after repeated opportunities to do so. In accordance with the general rule of construction that specific language controls over general, plaintiff's refusal to delete or clarify by amending the specific dates alleged in the complaint provided a sufficient basis on which to sustain a demurrer for ambiguity (*107 Cal. App. 2d 304, 307)* .

Counsel should note that another appellate district has limited *Miller* to its particular facts. In *Moya v. Northrup (1970) 10 Cal. App. 3d 276, 88 Cal. Rptr. 783* , plaintiffs set forth a complaint on a common count for money lent and paid. Defendants demurred to the complaint on the grounds that it failed to state a cause of action and that it could not be determined from the complaint whether the contract on which the action was based was oral or written. The trial court sustained the demurrer. The court of appeal reversed. Noting that a common count is not normally subject either to a general or special demurrer due to uncertainty, the court limited the impact of *Miller* to those cases where the ambiguity in question concerns the timeliness of the action pursuant to the applicable statute of limitations [*see also § 43.43[3][b]*].

California Points & Authorities

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CHAPTER 43 COMMON COUNTS AND BILLS OF PARTICULARS
PART II. FORMS

4-43 California Points & Authorities § 43.27

§ 43.27 Supporting Special Demurrer to Complaint--Common Counts Cannot Be United in One Count as One Cause of Action

[1] FORM

[*Caption. See § 43.26.*]

PLAINTIFF'S COMPLAINT IS SUBJECT TO A SPECIAL DEMURRER FOR UNCERTAINTY IN THAT DIVERSE COMMON COUNTS CANNOT BE UNITED IN ONE COUNT AS ONE CAUSE OF ACTION.

A. Objection by Demurrer. [*See § 43.26[1], Paragraph A.*]

B. Demurrer Proper if Diverse Common Counts United in One Count. Different common counts cannot be united in one count as one cause of action without any specification of the sums due on each cause (*Buckingham v. Waters (1859) 14 Cal. 146, 147-148)* .

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

CAUTION:

Special demurrers are not allowed in limited civil cases in which the amount in controversy is $25,000 or less [*see Code Civ. Proc. §§ 91(a), 92(c)*].

[a] Use of Form

These points and authorities may be submitted in support of a demurrer to a complaint pleaded on a common count if the demurrer asserts that the complaint is defective because diverse common counts are united in one count as one cause of action.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Demurrer Proper if Diverse Common Counts United in One Count

In ***Buckingham v. Waters*** *(1859) 14 Cal. 146* , plaintiff brought an action to recover $2,000 from defendant. The transaction on which recovery was sought involved the sale by defendant to plaintiff of certain horses and the "good will" of a mercantile house. Apart from the fact that the legal basis on which plaintiff predicated his claim for recovery was not clear, the Supreme Court found that uniting different common counts in one count as one cause of action, without any specification of the sums due under each count, was improper (*14 Cal. 146, 147-148)* .

[4] Additional Authorities

[a] Demurrer as Proper if Diverse Common Counts United in One Count

See *§ 43.20[3][b]* for the factual setting of *Zumbrun v. University of So. Cal. (1972) 25 Cal. App. 3d 1, 101 Cal. Rptr. 499* . In *Zumbrun*, the court of appeal affirmed the trial court's decision insofar as sustaining the special demurrers of defendants on grounds of uncertainty. The court stated that while the common count for work and labor performed was properly pleaded, it should have been pleaded separately from the common count for money had and received.

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4-43 California Points & Authorities § 43.28

§ 43.28 Supporting Motion for Change of Venue [Code Civ. Proc. §§ 396b, 397(a)]--In Action on Account Stated--Count Fails to Allege It Was Stated in County of Forum

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff, vs.	)	
_____ [*name*],	)	NO. _____
	)	MEMORANDUM OF POINTS AND AUTHORIT-
Defendant.	)	IES IN SUPPORT OF MOTION FOR CHANGE OF
	)	VENUE
	)	

_____

A MOTION FOR CHANGE OF VENUE SHOULD BE GRANTED IN AN ACTION ON ACCOUNT STATED WHEN THE COUNT FAILS TO ALLEGE THAT IT WAS STATED IN THE COUNTY OF THE FORUM.

A. Statutory Authority for Motion. The court may, on motion, change the place of trial when the court designated in the complaint is not the proper court (*Code Civ. Proc. § 397(a)*).

B. Transfer Mandatory on Proper Showing. The court must order the action transferred to the proper court when it appears at the hearing of the motion for change of venue that the action was not commenced in the proper court (*Code Civ. Proc. § 396b*).

C. Proper Court as in County of Defendant's Residence. Except as otherwise provided by law, the proper court for the trial of an action is a court in the county where the defendant resided when the action was commenced (*Code Civ. Proc. § 395(a)*).

D. Failure to Allege That Account Stated Was Stated in County of Forum. When a count for account stated is joined with one properly before the forum, yet the account stated count fails to allege that the account was made in the county of the forum, the defendant is entitled to a change of venue (*Tringali v. Vest (1951) 106 Cal. App. 2d 720, 721, 236 P.2d 171*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for change of venue if the action is pleaded on an account stated and the motion asserts that the defendant is entitled to a change of venue since the account was not stated in the county of the forum.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Points and Authorities

A related memoranda of points and authorities that may be useful in cases involving motions for change of venue in actions on account stated may be found in Ch. 238, *Venue* .

[3] Discussion of Authorities

[a] Failure to Allege That Account Stated Was Stated in County of Forum

In ***Tringali v. Vest*** *(1951) 106 Cal. App. 2d 720, 236 P.2d 171* , plaintiff filed an action against defendant set forth in two counts, one pleaded on an open book account and the second on an account stated. The action was filed in Monterey County where plaintiff had its offices. Defendant moved for a change of venue to San Francisco, the county in which defendant resided. The trial court denied defendant's motion, and defendant appealed. In reversing the denial of defendant's motion, the court of appeal found that defendant was entitled to a change of venue since the count pleaded as account stated failed to allege that the account was actually stated in Monterey County. The court further noted that it was immaterial that the other cause of action pleaded with the account stated count was properly brought in the county of the forum. It held that if defendant is entitled to a change of venue on any cause of action, such change must be granted even if defendant is not entitled to a change of venue on any other counts set forth (*106 Cal. App. 2d 720, 721*).

[4] Additional Authorities

[a] Failure to Allege That Account Stated Was Stated in County of Forum

For the factual setting of *Crofts & Anderson v. Johnson (1950) 101 Cal. App. 2d 418, 225 P.2d 594* , see *§ 43.30[4][a]*. In *Crofts*, the court of appeal held that a change of venue was appropriate in an action on an account stated where the count failed to allege that the account stated was made in the county of the forum and if defendant resided in another county. This result was true even if the account stated count was joined with another count properly within the venue of the forum.

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4-43 California Points & Authorities § 43.29

§ 43.29 Supporting Motion for Order [Code Civ. Proc. § 1003] to Exclude Evidence--Failure to Meet Demand for Bill of Particulars [Code Civ. Proc. § 454]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff, vs. _____ [*name*],	)	NO. _____
Defendant.	)	MEMORANDUM OF POINTS AND AUTHORIT-
	)	IES IN SUPPORT OF MOTION TO EXCLUDE
	)	EVIDENCE

_____

A MOTION TO EXCLUDE EVIDENCE SHOULD BE GRANTED WHEN PLAINTIFF FAILS TO MEET DEFENDANT'S DEMAND FOR A BILL OF PARTICULARS RELATING TO SUCH EVIDENCE.

Motion to Exclude as Proper on Failure to Satisfy Timely Demand for Bill of Particulars. If plaintiff fails to furnish a bill of particulars after adequate demand is made or if plaintiff furnishes an inadequate bill and furnishes no supplemental bill after demand is made, a motion to exclude evidence relating to the items demanded in the bill of particulars should be granted if made in a timely fashion prior to trial (*Burton v. Santa Barbara Nat'l Bank (1966) 247 Cal. App. 2d 427, 433, 55 Cal. Rptr. 529*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion to exclude evidence for failure to provide an adequate bill of particulars when the motion asserts that defendant has demanded a bill of particulars and plaintiff has failed to comply.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations which support the motion.

[b] Related Points and Authorities

In an appropriate case, the points and authorities set out in *§§ 43.47* through *43.49* may be used to oppose the motion supported by the memorandum of points and authorities.

[3] Discussion of Authorities

[a] Motion to Exclude as Proper on Failure to Satisfy Timely Demand for Bill of Particulars

In ***Burton v. Santa Barbara Nat'l Bank*** *(1966) 247 Cal. App. 2d 427, 55 Cal. Rptr. 529* , plaintiff brought suit on a rejected creditor's claim against defendant bank acting as special administrator of an estate. Plaintiff's claim was pleaded in the form of a common count for the reasonable value of services rendered in conjunction with collections plaintiff had made for decedent. Defendant demanded a bill of particulars regarding the services plaintiff allegedly rendered for decedent. After numerous attempts to procure an adequate bill of particulars, defendant requested a further bill of particulars and an order to exclude evidence. When plaintiff failed to provide the further bill, the trial court granted defendant's motion to exclude evidence relating to paragraph 5 of plaintiff's complaint. Plaintiff appealed since the order effectively prevented him from proceeding in that no further issues were left to be determined between plaintiff and defendant. On this basis, the court of appeal heard the appeal. In affirming the trial court's decision, the court held that the lower court had not abused its discretion in excluding evidence relating to paragraph 5 of the complaint. It determined that defendant had properly invoked the statutory provision by which a bill of particulars may be demanded. It further noted defendant's attempts to obtain the requested information by a further bill of particulars. Only when the further bill was ignored did defendant seek to exclude evidence. The court also found that plaintiff's promise to continue to try to locate the records and plaintiff's totally inadequate attempt at furnishing a bill of particulars, which was only a vague restatement of the complaint, did not constitute the requested itemization. The court concluded that the order to exclude was appropriate given plaintiff's numerous opportunities to comply with defendant's request to furnish a bill of particulars, plaintiff's total noncompliance, and defendant's timely filing of a motion to exclude prior to trial (*247 Cal. App. 2d 427, 433)* . The court noted as dictum that any insufficiency or failure to provide a bill of particulars is waived unless a motion to exclude is filed before trial.

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4-43 California Points & Authorities § 43.30

§ 43.30 Supporting Motion for Summary Judgment by Defendant--In Action on Account Stated--Does Not Create Independent Obligation

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff, vs.	)	
_____ [*name*],	)	NO. _____
	)	MEMORANDUM OF POINTS AND AUTHORIT-
Defendant.	)	IES IN SUPPORT OF MOTION FOR SUMMARY
	)	JUDGMENT
	)	

_____

SUMMARY JUDGMENT FOR DEFENDANT IS PROPER IN AN ACTION ON AN ACCOUNT STATED IF THERE IS NO PRIOR INDEBTEDNESS FOR WHICH PLAINTIFF IS LIABLE.

A. Summary Judgment. A defendant may move for summary judgment in any action or proceeding if it is contended that the action has no merit. Such a motion must be granted if all of the papers submitted show that there is no triable issue as to any material fact and that defendant is entitled to judgment as a matter of law (*Code Civ. Proc. § 437c*).

B. Account Stated Does Not Create Liability. Accounts stated are not intended to create obligations independent of the prior indebtedness, and, therefore, the rendering of an account cannot create a liability where no liability existed before (*Trafton v. Youngblood (1968) 69 Cal. 2d 17, 26, 69 Cal. Rptr. 568, 442 P.2d 648*).

[*Optional*] **C. Underlying Indebtedness Barred by Statute of Frauds.** An attempt to state an account on a liability subject to the statute of frauds without any writing on the part of the party sought to be charged does not create any

liability enforceable against the party (*Swim v. Juhl (1925) 72 Cal. App. 363, 366, 237 P. 552*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for summary judgment when the motion asserts that defendant is entitled to a judgment as a matter of law since there is no enforceable indebtedness on which the account stated may be based.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations that support the motion [*Code Civ. Proc. § 437c*].

[3] Discussion of Authorities

[a] Account Stated Does Not Create Liability

Trafton v. Youngblood *(1968) 69 Cal. 2d 17, 69 Cal. Rptr. 568, 442 P.2d 648* , involved, in part, a defendant attorney's affirmative defense of an account stated in an action to recover money retained by defendant as his fee after he had settled a dispute concerning plaintiff's right to the proceeds of a fire insurance policy. Defendant had sent plaintiff an itemized statement of services rendered and of costs advanced. This statement showed that defendant had retained all the money received from the proceeds of the policy as his fee and that, in fact, there was due and owing an additional sum. (Defendant cross complained for this sum in a cause of action on an account stated.) When plaintiff received this statement, he indicated he would respond in a few months. However, plaintiff never did contact defendant, who had continued to send several statements of the balance due for the legal services. The trial court rendered judgment for plaintiff for the entire sum defendant had retained, finding that defendant had not been authorized to retain the proceeds and that plaintiff had never agreed to the statement sent by defendant. The Supreme Court affirmed. The Court stated in pertinent part that because accounts stated were intended to preserve and protect legitimate demands but not to create obligations independent of prior indebtedness, the rendering of an account, although not objected to, cannot create a liability where no liability existed before. The Court concluded that the trial court had properly found no acquiescence in the statement of account arising from plaintiff's failure to object. Defendant had violated his fiduciary obligation by withholding the proceeds of the policy without plaintiff's authorization. These funds then were not liable for payment of the debt before the rendering of the account, and to imply such a consent by the failure to object would have permitted the creation of the obligation independent of any prior indebtedness (*69 Cal. 2d 17, 26*).

[b] Underlying Indebtedness Barred by Staute of Frauds

In ***Swim v. Juhl*** *(1925) 72 Cal. App. 363, 237 P. 552* , plaintiff, as assignee of a claim for medical services allegedly rendered to defendant Dorothy Bradley, joined defendants Ethel and Jesse Juhl in the action on the theory that Mrs. Juhl was the mother of Dorothy Bradley and had promised to pay for the services rendered. Defendants' motion for nonsuit

was granted at the close of plaintiff's case and plaintiff appealed. The action had been brought on a common count for the reasonable value of services rendered and on account stated. On appeal, plaintiff acknowledged the invalidity of the count for the reasonable value of services since the mother's oral agreement to pay if her daughter defaulted was void due to the statute of frauds. As to the account stated, plaintiff stated that after Dorothy Bradley was released from the hospital, plaintiff sent bills to the patient and, subsequently, bills for the same account to Mrs. Juhl. Despite the fact that no response was received from Mrs. Juhl, plaintiff based a claim of an account stated on having submitted the invoices. Plaintiff contended that defendants' failure to object constituted a new contract which was not controlled by the statute of frauds. The court of appeal found that mere failure to object does not create an account stated from a bill where no legal indebtedness existed. It further noted that an account stated cannot be used as an instrument to create liability where none existed before, such as in the instant case where the original obligation was void due to the statute of frauds (*72 Cal. App. 363, 366)* .

[4] Additional Authorities

[a] Underlying Indebtedness Barred by Statute of Frauds

In *Crofts & Anderson v. Johnson (1950) 101 Cal. App. 2d 418* , plaintiff, as assignee, brought a cause of action against defendant on two counts. One was a book account for goods, wares, and merchandise, and the other was in the form of an account stated. On a motion for change of venue, defendant averred that he was a resident of Humboldt County and did not become indebted to plaintiff or enter into an account stated with plaintiff in Alameda County as plaintiff claimed. The lower court found that the account stated was not made in Alameda County and granted an order for change of venue from which plaintiff appealed. The court of appeal affirmed, noting that it would not disturb the lower court's determinations of fact where there was a conflict of evidence as offered by affidavits. Moreover, the court observed that to establish an account stated there must be more than a showing that the statement setting forth the account was sent to the debtor. There must be an acknowledgment by the debtor of the correctness of such account. Thus, where there was no evidence on record of an account stated ever having been made, it could not be determined that it was in fact made in Alameda County. Finally, the court determined that in passing on a motion for change of venue in an action on an account stated it is not appropriate to consider the original contract, as contended by plaintiff, since an account stated constitutes a new contract which supersedes the old. In so holding, the court distinguished between inquiring into antecedent facts to determine whether there was a preexisting liability on which the account stated may be based and attempting to rely on the situs of the preexisting liability to fix venue in the action on an account stated. By way of dictum, the court noted the established principle that an account stated cannot be based on a prior indebtedness which is void because of the statute of frauds.

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4-43 California Points & Authorities § 43.31

§ 43.31 Supporting Motion for Summary Judgment by Defendant--In Action on Account Stated--Failure to Object to Statement Does Not Create Account

[1] FORM

[*Caption. See § 43.30.*]

SUMMARY JUDGMENT FOR DEFENDANT IS PROPER IN AN ACTION ON ACCOUNT STATED WHEN THE ONLY EVIDENCE OF DEFENDANT'S ASSENT IS HIS/HER MERE FAILURE TO OBJECT TO A STATEMENT SETTING FORTH THE ITEMS OF ACCOUNT.

A. Summary Judgment. [*See § 43.30[1], Paragraph A.*]

B. Failure to Object Does Not Create Account Stated. Mere failure by the debtor to object to a statement setting forth the account does not create an account stated where there is no assent to the correctness of the statement either directly or by acquiescence (*Crofts & Anderson v. Johnson (1950) 101 Cal. App. 2d 418, 421*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for summary judgment in an action on an account stated when the motion asserts that defendant is entitled to a judgment as a matter of law because the mere failure of the debtor to object to a statement setting forth the items of account does not create an account stated when there is no assent to the correctness of the statement either directly or by acquiescence.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations supporting the motion [*Code Civ. Proc. § 437c*].

[3] Discussion of Authorities

[a] Failure to Object Does Not Create Account Stated

See Additional Authorities, Underlying Indebtedness Barred by Statute of Frauds, § 43.30, for the factual setting of ***Crofts & Anderson v. Johnson*** *(1950) 101 Cal. App. 2d 418, 225 P.2d 594* . In *Crofts*, the court of appeal stated that to establish an account stated there must be more than a showing that the statement setting forth the account was sent to the debtor. The court determined that the debtor, either directly or by acquiescence, must admit the correctness of the account.

[4] Additional Authorities

[a] Failure to Object Does Not Create Account Stated

The court of appeal in *Maggio, Inc. v. Neal (1987) 196 Cal. App. 3d 745, 241 Cal. Rptr. 883* , modified the trial court's judgment by decreasing the award for plaintiff to eliminate amounts representing advances made more than two years before the action was brought, holding that recovery could only be premised on an oral contract subject to the two-year limitation period (*see Code Civ. Proc. § 339*). Plaintiff sued its former vice president under an oral contract, for an account stated, and on an open book account to recover what it characterized as loans and what defendant claimed were nonreimbursable advances against bonuses. There was no evidence to establish an agreement by the parties that the transactions would be carried as an account (*196 Cal. App. 3d 745, 752-753*). The court said that a creditor cannot create an account stated merely by creating a private record of an account without informing the debtor, nor can the creditor bootstrap this private record into an account stated merely by mailing a summary of accounts allegedly due to the debtor and treating the debtor's silence as acceptance (*196 Cal. App. 3d 745, 751-752*). Although the law will imply an agreement that an account is correct when a statement is rendered to a debtor and no reply is made within reasonable time, failure to reply cannot establish an account stated when the debtor did not know that he or she was indebted or that the creditor was maintaining an account (*196 Cal. App. 3d 745, 753)* .

See *§ 43.30[3][b]* for the factual setting of *Swim v. Juhl (1925) 72 Cal. App. 363, 237 P. 552* . In *Swim*, the court of appeal held that the mere failure by the debtor to object to a statement sent by the creditor does not create an account stated when no legal indebtedness exists.

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4-43 California Points & Authorities § 43.32

§ 43.32 Supporting Motion for Summary Judgment by Defendant--Common Count Barred When Based on Illegal Contract or Contract That Is Unenforceable by Plaintiff

[1] FORM

[*Caption. See § 43.30.*]

SUMMARY JUDGMENT FOR DEFENDANT IS PROPER UNDER THE GENERAL RULE THAT A GUILTY PARTY TO AN _____ [ILLEGAL *or* UNENFORCEABLE] CONTRACT CANNOT USE A COMMON COUNT TO RECOVER THE BENEFITS HE OR SHE HAS CONFERRED UNDER THAT CONTRACT.

A. Summary Judgment. [*See § 43.30[1], Paragraph A.*]

B. General Rule Prohibits Recovery Under Common Count. The general rule is that the guilty party to an illegal contract cannot recover through a common count the value of the benefits he or she has conferred under the illegal or unenforceable contract (*UFITEC, S.A. v. Carter (1977) 20 Cal. 3d 238, 250, 142 Cal. Rptr. 279, 571 P.2d 990* ; *Lewis & Queen v. N.M. Ball Sons (1957) 48 Cal. 2d 141, 146, 150-151, 308 P.2d 713*).

[*Optional*] **C. Failure to Give Automotive Repair Estimate.** An automotive repair dealer that fails to give its customer the written estimate required by *Bus. & Prof. Code § 9884.9* cannot use a common count to recover the value of any repairs made (*Donaldson v. Doe (1987) 194 Cal. App. 3d 817, 818, 821, 239 Cal. Rptr. 801* ; *Bennett v. Hayes (1975) 53 Cal. App. 3d 700, 704, 125 Cal. Rptr. 825* (dictum)).

[*Optional*] **D. No Recovery of Amount Paid Under Illegal Contract.** A court will not aid a party who is *in pari delicto* under an illegal contract by aiding that party's recovery of amounts paid under the contract before it was rescinded or abandoned (*Haruko Takeuchi v. Schmuck (1929) 206 Cal. 782, 785-788, 276 P. 345*).

[*Optional*] **E. Test for Severability of Illegal Consideration.** The illegal portion of a contract is severable if the court, consistent with the intent of the parties, can reasonably relate the illegal consideration on one side to some specified or

determinable portion of the consideration on the other side. If any part of several considerations for a single object is unlawful, the entire contract is void (*Lawn v. Camino Heights, Inc. (1971) 15 Cal. App. 3d 973, 980, 93 Cal. Rptr. 621*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted by a defendant in support of his or her motion for summary judgment in an action on a common count that seeks recovery of the value of the benefits conferred by plaintiff under an illegal or unenforceable contract. A motion for summary judgment also must be supported by statement of material facts that defendant contends are undisputed, as well as by supporting declarations or other evidence [*see Code Civ. Proc. § 437c*].

This form may also be adapted for use in another procedural context, such as a trial or appellate brief.

Counsel should add points of law regarding the particular illegality involved. Counsel should also insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth the facts constituting the particular illegality and plaintiff's knowledge of it.

[b] Related Pleading and Practice Forms

For discussion and forms relating to summary judgment generally, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender). For discussion and forms relating to the unenforceability of illegal contracts generally, see California Forms of Pleading and Practice, Ch. 127, *Consumer Contracts and Loans* ; Ch. 128, *Consumer Contracts--Statutes Regulating Specific Types of Contracts* ; Ch. 140, *Contracts* ; and Ch. 490, *Rescission and Restitution* (Matthew Bender).

[c] Related Points and Authorities

For points and authorities relating to motions for summary judgment generally, see Ch. 221, *Summary Judgments* . For points and authorities relating to the illegality or unenforceability of contracts generally, see Ch. 50, *Contracts* . For points and authorities relating to the use of common counts for recovery of attorney's fees, see Ch. 25, *Attorney's Fees* .

[d] Opposing Points and Authorities

In an appropriate case, the points and authorities set out in *§ 43.52* may be used to oppose a motion supported by the points and authorities in this form.

[3] Discussion of Authorities

[a] General Rule Prohibits Recovery Under Common Count

UFITEC, S.A. v. Carter *(1977) 20 Cal. 3d 238, 142 Cal. Rptr. 279, 571 P.2d 990* , was an action by a Swiss banking corporation to recover the amount of losses sustained under a security trading venture. The complaint included causes of action on the contract and common counts. With regard to the transactions involved, plaintiff acted as a broker within the meaning of *15 U.S.C. § 78g* and Regulation T (12 C.F.R. Part 220).

The California Supreme Court affirmed the judgment in favor of defendant on the ground that plaintiff violated federal securities law and regulations by extending credit to defendant for the full cost of the stock involved as opposed to the 20-percent legal maximum. Plaintiff contended that the illegality of the loans should not bar recovery on the common

counts because the violations were only technical. The Court disagreed and said this came within the general rule that a culpable party to an unlawful agreement may not recover in quasi-contract the value of its performance or the consideration paid (*20 Cal. 3d 238, 250)* . Plaintiff also claimed that its recovery should not be barred under the doctrine of *pari delicto* because it acted in good faith, while defendant's actions were allegedly reprehensible. The Court noted that at all relevant times, the federally imposed margin requirements forbade brokers from extending credit, but did not forbid customers from accepting it. The Court cited federal cases which held that Congress placed the responsibility for observing margin requirements on brokers because the original need for margin requirements derived from the common desire of investors to speculate unwisely on credit. Because defendant's conduct violated no law or regulation, while plaintiff's did, the Court said there was no basis for an exception to the *pari delicto* doctrine (*20 Cal. 3d 238, 250)* .

Lewis & Queen v. N.M. Ball Sons *(1957) 48 Cal. 2d 141, 308 P.2d 713* , was an action by an unlicensed partnership to recover damages for breach of contracts and for the reasonable value of equipment rentals in excess of the term of the written rental agreement. In denying recovery on either cause of action because of the fact that plaintiff was not licensed as required by law, the California Supreme Court discussed the theory and distinctions between denying any recovery and awarding equitable relief. Courts will not enforce an illegal contract nor lend their assistance to a party who seeks compensation for an illegal act. The reason for this refusal is not that the courts are unaware of possible injustice between the parties, or that the defendant may be left in possession of some benefits it should in good conscience turn over to the plaintiff, but that these considerations are outweighed by the importance of deterring illegal conduct (*48 Cal. 2d 141, 150)* . In some cases, on the other hand, the statute making the conduct illegal, in providing for a fine or administrative discipline, excludes by implication the additional penalty involved in holding the illegal contract unenforceable. In some situations, effective deterrence is best realized by enforcing the plaintiff's claim rather than leaving the defendant in possession of the benefit. In other words, the forfeiture resulting from unenforceability is disproportionately harsh considering the nature of the illegality. In each case, how the aims of the policy can best be achieved depends on the kind of illegality and the particular facts involved (*48 Cal. 2d 141, 151)* . The Court concluded that the licensing statutes in question represented a Legislative determination that the importance of deterring unlicensed persons from engaging in the contracting business outweighs any harshness between the parties and that deterrence can best be realized by denying the violators the right to maintain any action for compensation (*48 Cal. 2d 141, 146, 151)* .

[b] Failure to Give Automotive Repair Estimate

Bus. & Prof. Code § 9884.9 provides in part that an automotive repair dealer must give to the customer a written estimated price for labor and parts necessary for a specific job. No work may be done and no charges can accrue before authorization to proceed is obtained from the customer. No charge can be made for work done or parts supplied in excess of the estimated price without the oral or written consent of the customer, which must be obtained at some time after it is determined that the estimated price is insufficient and before the work not estimated is done or the parts not estimated are supplied [*Bus. & Prof. Code § 9884.9(a)*; *see Bus. & Prof. Code § 9884.9(d)* (customer may designate person, other than repair dealer or insurer, to give authorization for work or parts beyond what was estimated)].

Plaintiffs in ***Donaldson v. Doe*** *(1987) 194 Cal. App. 3d 817, 239 Cal. Rptr. 801* , had their Maserati towed to defendant's shop for repairs. Although plaintiffs gave oral authorization for some of the repairs, and although defendant was familiar with the law requiring written estimates, no written estimates were given. Plaintiffs made a substantial downpayment on the work, and defendant billed plaintiffs at the completion of the work. Plaintiffs were on the verge of filing bankruptcy and could not pay the final bill. Defendant commenced lien sale proceedings, and plaintiffs sued. Defendant released the car to plaintiffs after they posted a bond. The trial court awarded defendant $5,180. Plaintiffs appealed.

The court of appeal reversed. The court set forth *Bus. & Prof. Code §9884.9* and quoted dicta from *Bennett v. Hayes (1975) 53 Cal. App. 3d 700, 704, 125 Cal. Rptr. 825* (discussed *below*), to the effect that under the general rule, the

guilty party to an illegal contract cannot bring an action to enforce the contract and cannot recover through principles of quasi contract or common counts the benefits he or she has conferred under the illegal contract (*194 Cal. App. 3d 817, 820)* . The court also noted that the issue was not that the plaintiffs never authorized the work in writing but that defendant never gave them an initial written estimate. Finding no reason why defendant should be excused from compliance with the statute, the court reversed the judgment for defendant (*194 Cal. App. 3d 817, 818, 821)* .

Bennett v. Hayes *(1975) 53 Cal. App. 3d 700, 125 Cal. Rptr. 825* , involved an automobile repairer's complaint for breach of written contract and for recovery of agreed price. Defendant orally agreed to specific prices for some of the work involved, but plaintiff never provided defendant with a written estimate for any of the work done. Judgment was for defendant. Plaintiff appealed to the appellate department of the superior court. The case was transferred to the court of appeal pursuant to *Code Civ. Proc. § 911*.

The court of appeal affirmed the judgment of the municipal court. The court of appeal cited an Attorney General's opinion to the effect that the purpose of the Automotive Repair Act is to foster fair dealing and to eliminate misunderstandings (*53 Cal. App. 3d 700, 703)* . While recognizing the factor of unjust enrichment, the court said that the primary purpose of the rule of unenforceability is to discourage practices forbidden by law. Because defendant could easily have complied with *Bus. & Prof. Code § 9884.9*, the court found no reason to decline to follow the general rule of unenforceability in this case, and held that the violation of *Bus. & Prof. Code § 9884.9* rendered the contract unenforceable at law (*53 Cal. App. 3d 700, 704)* .

Plaintiff sought quantum meruit equitable relief for the first time on appeal. The court of appeal said that relief based on quantum meruit was precluded by plaintiff's failure to advance the theory or offer evidence on it earlier. Nevertheless, the court offered as dictum the statement of the general rule that the guilty party to an illegal contract cannot bring an action to enforce the contract and cannot recover through principles of quasi contract or common counts the benefits he or she has conferred under it, and concluded that plaintiff would not have qualified for any exceptions to that general rule (*53 Cal. App. 3d 700, 704)* .

[c] No Recovery of Amount Paid Under Illegal Contract

Haruko Takeuchi v. Schmuck *(1929) 206 Cal. 782, 276 P.345* , involved a contract for the purchase of land, ostensibly by plaintiff, but with the beneficial interest to be held by plaintiff's father, an alien ineligible for citizenship, in violation of the Alien Land Law. All parties to the contract knew of its illegal purpose (*206 Cal. 782, 785)* . The transaction was never consummated, in part due to the unwillingness of the title insurer and the escrow to participate in a transaction that so strongly appeared to be tainted with illegality. Plaintiff sued to recover the amount of the deposit and taxes paid under the agreement. Judgment for defendants was affirmed by the Supreme Court.

The Court said that it has long been the rule that courts will not compel parties to perform contracts which have for their object the performance of acts against sound public policy by either decreeing specific performance or awarding damages (*206 Cal. 782, 786)* . This rule is not applied to secure justice between parties who have made an illegal contract, but from regard for a higher interest, that of the public, whose welfare demands that certain transactions be discouraged (*206 Cal. 782, 786-787*). Although this action was not based on an affirmance of the illegal contract, but on an avoidance or rescission of the illegal contract, the cause of action still arose from an illegal transaction, and the law will not afford relief to either party (*206 Cal. 782, 788*).

[d] Test for Severability of Illegal Consideration

Lawn v. Camino Heights, Inc. *(1971) 15 Cal. App. 3d 973, 93 Cal. Rptr. 621* , is discussed in *§ 43.52[3][a]*.

[4] Additional Authorities

[a] General Rule Prohibits Recovery Under Common Count

Tiedje v. Aluminum Taper Milling Co. (1956) 46 Cal. 2d 450, 296 P.2d 554 , is discussed in *§ 43.52[3][b]*. Although holding that plaintiff might recover the consideration already given under the illegal contract, the court also stated the general rule precluding any relief (*46 Cal. 2d 450, 453-454)* .

Katsura v. City of San Buenaventura (2007) 155 Cal. App. 4th 104, 65 Cal. Rptr. 3d 762 , was an action for recovery, on the quantum meruit theory, of the value of additional services that a contractor rendered to a city in connection with performing an express contract. The trial court gave judgment for the amount remaining unpaid on the express contract but disallowed recovery on the quantum meruit count. The court of appeal affirmed on the ground that the additional work had been requested by city employees who, under the city's charter, were not authorized to bind the city to the implied contract, and that to allow a quantum meruit recovery therefore would be to enforce an unlawful contract. The court cited a general rule that a public entity cannot be liable on the quantum meruit theory (*155 Cal. App. 4th 104, 109-110)* .

Mansfield v. Hyde (1952) 112 Cal. App. 2d 133, 245 P.2d 577 , was an action for money had and received. The parties had an agreement under which plaintiff's minor grandchild lived with defendant, who was charged with the sole and exclusive care, training, and education of the child. Every month, plaintiff deposited money in a bank account for the child's expenses and defendant's compensation. Defendant was never licensed as a foster home or child care facility. About 10 months into the term of the agreement, plaintiff filed this action seeking return of all sums paid under the contract. Defendant cross complained for arrearages under the contract. Judgment for defendant and cross complainant was reversed with instructions that neither party recover anything, and that plaintiff was entitled to the balance on deposit in the bank account.

The court of appeal stated the general rule that a party to an illegal contract may not obtain the aid of the court either to enforce the illegal agreement directly or to recover any consideration parted with pursuant to the illegal agreement. The law leaves the parties as it finds them. Nor was there any basis for application of the recognized qualification that a party not equally at fault may secure relief from the consequences of an illegal agreement (*112 Cal. App. 2d 133, 139)* .

Fong v. Miller (1952) 105 Cal. App. 2d 411 , was an action by lessees and restaurant managers for the amount expended for equipment and reconstruction of the restaurant. The lease and management agreement provided that plaintiffs would be paid a percentage of the net profits from the restaurant and related "amusement machines," specifically a blackjack table, a roulette table, punchboards, and slot machines. Judgment for defendant was affirmed. The court stated the general rule that a party to an illegal contract can neither recover damages for its breach, nor by rescinding it recover any performance that he or she has rendered, or its value (*105 Cal. App. 2d 411, 413)* . There are exceptions when one party is not *in paridelicto*, but those did not apply in this case (*105 Cal. App. 2d 411, 413-414)* . Nor was plaintiffs' case advanced by waiver of any claim under the contract for lost profits and limitation of their demand to the cost of the equipment and improvements they added (*105 Cal. App. 2d 411, 414-415)* .

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4-43 California Points & Authorities § 43.33

§ 43.33 Supporting Motion for Summary Judgment by Defendant-- In Action for Quantum Meruit--Failure to Establish Both Request for Services and Benefit of Services

[1] FORM

[*Caption. See § 43.30*].

SUMMARY JUDGMENT FOR DEFENDANT IS PROPER IN AN ACTION FOR QUANTUM MERUIT WHEN PLAINTIFF CANNOT ESTABLISH BOTH THAT HE OR SHE WAS ACTING PURSUANT TO AN EXPRESS OR IMPLIED REQUEST FOR SERVICES FROM DEFENDANT, AND THAT THE SERVICES RENDERED WERE INTENDED TO AND DID BENEFIT THE DEFENDANT.

A. Summary Judgment. [*See § 43.30[1], Paragraph A.*]

B. Failure to Establish Both Request for Services and Benefit of Services. To recover under a quantum meruit theory, a plaintiff must establish both that he or she was acting pursuant to either an express or implied request for services from the defendant, and that the services rendered were intended to and did benefit the defendant (*Day v. Alta Bates (2002) 98 Cal. App. 4th 243, 248-249, 119 Cal. Rptr. 2d 606*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for summary judgment in an action for quantum meruit that seeks recovery of the value of services performed by plaintiff. Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law. In addition, counsel should attach affidavits or declarations that support the motion [*Code Civ. Proc. § 437c*].

[3] Discussion of Authorities

[a] Failure to Establish Both Request for Services and Benefit of Services

In ***Day v. Alta Bates*** *(2002) 98 Cal. App. 4th 243, 119 Cal. Rptr. 2d 606* , the trial court granted summary judgment for defendant hospital in a quantum meruit action against it by an attorney who, in a previous unsuccessful medical malpractice action, had represented a woman who had been treated at that hospital. The hospital had filed a lien pursuant to *Civ. Code § 3045.1*. The attorney asserted that the filing of the lien required him to perform, and that he did perform, legal services on the hospital's behalf for which he was entitled to compensation, *i.e.*, the lien filing required him to make an attempt to make a recovery for his client which also would benefit the hospital (*98 Cal. App. 4th 243, 246-248*). The court of appeal affirmed the summary judgment for defendant, holding that the attorney made no showing that his services either were performed "at the request" of the hospital, or were of "direct benefit" to it. In order to recover under a quantum meruit theory, a plaintiff must establish *both* that he or she was acting pursuant to either an express or implied request for services from the defendant, and that the services rendered were intended to and did benefit the defendant (*98 Cal. App. 4th 243, 248*). As the superior court found, the record was devoid of any evidence that fairly could be characterized as creating a disputed issue of material fact as to either the bestowal of any benefit on the hospital by the attorney, or any explicit or implicit request by it for his services in the malpractice action. Regarding the "benefit" requirement, the court of appeal noted that the attorney's lawsuit on behalf of the patient did not make it past the liability phase. Inasmuch as it never reached the damages phase, the hospital got nothing by virtue of either its lien or anything the attorney did in the malpractice action. With respect to the "request" requirement, the hospital's lack of response to the attorney's fax and e-mails regarding the malpractice case, which suggested that he was representing the lien claimant in some way, did not constitute any implied acceptance of his services (*98 Cal. App. 4th 243, 249-251)* . The court also held that under California Supreme Court precedent, the attorney was representing the injured party in her litigation and could not recover fees against a lien claimant who might arguably have received an incidental benefit from his actions (*98 Cal. App. 4th 243, 251-253)* .

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4-43 California Points & Authorities § 43.34

§ 43.34 Opposing Demurrer to Complaint--Common Count Based on Same Facts as Defectively Pleaded Special Count Sufficient Against Demurrer

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff, vs.	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Defendant.	)	IES IN OPPOSITION TO DEMURRER TO COM-
	)	PLAINT
	)	[*Code Civ. Proc. § 430.10(e)*]

_____

A COMMON COUNT ALLEGEDLY BASED ON THE SAME FACTS AS A DEFECTIVELY PLEADED SPECIAL COUNT IS SUBJECT TO DEMURRER ONLY IF THE COMMON COUNT CLEARLY APPEARS TO BE BASED ON THE INSUFFICIENT COUNT AND WOULD NOT ENTITLE PLAINTIFF TO A RECOVERY UNDER A DIFFERENT THEORY.

A. Common Count Sufficient if Plaintiff Entitled to Different Theory of Recovery. Although it is proper to sustain a demurrer to a common count when the recovery under the count is obviously based on the same set of facts specially pleaded in a second defective count, this rule is applied only to prevent a plaintiff from relying on different facts in the common count. A plaintiff may rely on a different theory of recovery in the common count as long as that theory is fully supported in the specific facts pleaded in the other counts (*Crocker-Anglo Nat'l Bank v. Kuchman (1964) 224 Cal. App. 2d 490, 497, 36 Cal. Rptr. 806*).

[*Optional*] **B. Common Count Defective Only If Clearly Based on Defective Count.** A common count based on facts substantially similar to facts alleged in a second count which does not state a cause of action is not subject to a

general demurrer if the common count is based on specific facts alleged in a third count which does state a cause of action and does not clearly appear to be based on the allegations in the insufficient second count (*Weitzenkorn v. Lesser (1953) 40 Cal. 2d 778, 793, 256 P.2d 947*).

[*Optional*] **C. Common Count Sufficient if Pleadings Show Valid Theory of Recovery.** If there is sufficient reference in all the pleadings to a general set of facts which would entitle plaintiff to recover under the common count, a complaint which does not state a cause of action may be amended to state a common count which would permit the plaintiff to recover under a valid theory of recovery even though the common count does not set forth any new facts (*Overholser v. Glynn (1968) 267 Cal. App. 2d 800, 807, 73 Cal. Rptr. 628*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a demurrer to a common count submitted on the ground that the common count is based on the same facts as a defectively pleaded special count when the allegations of the complaint or the pleadings show that the common count is not clearly based on the sufficient special count but supports a different and valid theory of recovery.

For a specific application of the rule set out in this form when the specific count is for damages for breach of contract which is unenforceable because of the statute of frauds, see *§ 43.35*.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Points and Authorities

In an appropriate case, these points and authorities may be used in opposition to a demurrer supported by the points and authorities set out in *§ 43.20*.

[3] Discussion of Authorities

[a] Common Count Sufficient if Plaintiff Entitled to Different Theory of Recovery

In *Crocker-Anglo Nat'l Bank v. Kuchman (1964) 224 Cal. App. 2d 490, 36 Cal. Rptr. 806* , plaintiffs brought an action against defendants to rescind a sale of capital stock in a certain corporation. Defendants had sold all of their capital stock in Comet Target Company to plaintiffs. (Now plaintiffs were deceased and were represented by the above-named bank as executor.) Plaintiffs pleaded their cause of action in three counts: actual fraud, constructive fraud (which incorporated all of the allegations of count one, except for paragraphs alleging knowledge, intent, and maliciousness), and a common count for money had and received. At trial, plaintiffs' counsel, subsequent to delivering his opening

statement, moved the court that he be given an opportunity to reopen his introductory statement to be able to explain to the jury that innocent misrepresentation or mutual mistake were grounds for constructive fraud. The court denied the motion, and defendants moved for an order striking the second cause of action. The court granted the motion and further denied plaintiffs' motion for leave to amend the second cause of action to one for mutual mistake and innocent misrepresentation. When plaintiffs rested their case, defendants moved for a nonsuit, which was granted.

On plaintiffs' subsequent appeal of the judgment, the court of appeal affirmed the judgment in part, holding that innocent misrepresentation is not constructive fraud, but declined to decide whether it was error to refuse to allow plaintiffs to amend the second count, holding that plaintiffs were entitled to prove their theory of innocent misrepresentation under count three, the common count. Defendants argued that even if innocent misrepresentation were a ground for rescission of the contract, plaintiffs were barred from proving it on their count pleaded as a common count since such count was based on the same facts as the defective special count. The court rejected this argument stating that the rule asserted by defendants applies only to prevent a plaintiff from relying on different facts in the common count. It held that plaintiffs were entitled to rely on a different theory of recovery in the common count as long as that theory is fully supported by the specific facts pleaded in other counts.

[b] Common Count Defective Only if Clearly Based on Defective Count

In *Weitzenkorn v. Lesser (1953) 40 Cal. 2d 778, 256 P.2d 947* , plaintiff sought damages for unlawful use of literary property. She allegedly submitted a composition to defendants on which they patterned a motion picture without paying plaintiff any compensation. The complaint was stated in three counts: one in contract for breach of a promise to pay plaintiff the reasonable value of the composition if defendants were to use all or any part of it; one in tort for plagiarism; and one on a common count of quantum valebant for the reasonable value of goods sold and delivered. Defendants demurred to all three counts, and the trial court sustained the demurrers. On appeal, however, the Supreme Court reversed, both as to the count for breach of contract and as to the quantum valebant count. The Court held that the breach of contract count stated a good cause of action since, although there was no similarity between the protectable portions of the composition and defendants' production, similarity may nevertheless have existed because of the combination of characters, locale, and myth, which were all questions of fact for the jury. The quantum valebant count therefore was also sufficient. The facts relied on in this count were identical to those set out in the breach of contract count, with the exception that no express promise to pay was alleged. The Court commented that the fact that the facts relied on in the second count were also substantially similar to those in the defective third count would not defeat the common count unless it clearly appeared to be based on the insufficient, rather than the sufficient, specific allegations. The Court added, however, that although plaintiff was not required to distinguish between an implied-in-fact contract and an implied-in-law contract (quasi contract) in the pleading, she would not be entitled to recover under a quasi-contract theory. For the same reasons that the tort count fell (that is, that there was no protectable property interest in the composition), plaintiff would not be able to present evidence tending to support a quasi-contract theory since the same proof was necessary to support recovery in quasi contract as in the tort for plagiarism.

[c] Common Count Sufficient if Pleadings Show Valid Theory of Recovery

In *Overholser v. Glynn (1968) 267 Cal. App. 2d 800, 73 Cal. Rptr. 628* , plaintiff alleged that he and defendant Glynn, along with other defendants, had been shareholders in an automobile rental business in which automobiles were financed through Community Bank with promissory notes secured by chattel mortgages on the vehicles. (Plaintiff and the other shareholders also had signed personal guaranties, but this fact was only alleged in defendant's answer.) When the business defaulted on its obligations, Community demanded surrender of the automobiles. All parties to the transaction had agreed that if the automobiles were sold at retail, the deficiency could probably be reduced by half of what would be received if the cars were sold to dealers. Plaintiff, as the only shareholder who possessed collateral acceptable to the bank, deposited with the bank securities in the amount of $15,000 on behalf of himself and his co-guarantors so that the bank would release the automobiles for sale. After the cars had been sold, the bank liquidated these securities, and plaintiff brought an action against his co-guarantors on express contract as assignee of the bank.

But because, as defendant alleged in his answer, plaintiff had no cause of action as assignee of the bank, plaintiff later amended his pleadings to state a cause of action in the form of a common count for money had and received based on an implied contract for contribution. The trial court rendered judgment against defendant, who appealed, arguing in part that because the trial court had concluded that plaintiff was not entitled to recover as the bank's assignee, plaintiff was not entitled to recover on the common count based on the same facts. In affirming, the court of appeal pointed out that in those decisions which have held that the common count falls with the defective specific count, it is clearly demonstrated that the plaintiff was relying on the same defective fact situation to establish the common count. Here, the facts originally pleaded by plaintiff were supplemented by the allegations in the answers showing that plaintiff had a right to contribution based on the joint obligation created by the guaranties. The complaint was properly amended to state a common count in reliance on a different and impregnable theory based on an implied contract for contribution.

In reaching this conclusion, the court also answered defendant's argument that the statute of limitations barred plaintiff's amended claim. The court held that the amendment had related back to the time the complaint was filed because the recovery sought in the amended complaint was based on the same general set of facts alleged in the original complaint. Again the court examined defendant's affirmative defense, that plaintiff had signed guaranties and was liable in the same respects as was defendant, to find a sufficient reference to the general set of facts to permit plaintiff to amend his complaint to set forth a second cause of action on an implied contract. Thus, the court applied an analysis very similar to its holding with respect to plaintiff's common count in holding that the statute of limitations had not run.

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4-43 California Points & Authorities § 43.35

§ 43.35 Opposing Demurrer to Complaint--Common Count Generally Sufficient Against Demurrer on Ground That Count Is Barred by Statute of Frauds

[1] FORM 43.35

[*The following may be included in a memorandum in opposition to a demurrer, or in an appellate brief.*]

THE STATUTE OF FRAUDS IS INAPPLICABLE TO A CAUSE OF ACTION BASED ON A COMMON COUNT, AND A DEMURRER BASED ON THE STATUTE OF FRAUDS WILL NOT LIE WITH RESPECT TO SUCH A CAUSE OF ACTION.

A. Party Who Conferred Benefit on Another Under Contract That Is Invalid Under Statute of Frauds Still May Recover Reasonable Value of Benefit Conferred. When a party has conferred on another with the latter's assent a benefit which was not intended as a gratuity, and the recipient cannot be held on his or her original promise to compensate by virtue of the statute of frauds, the law implies a promise to pay the reasonable value of whatever has been received under the contract (*Zellner v. Wassman (1920) 184 Cal. 80, 88, 193 P. 84* , *disapproved on other grounds,* *Sterling v. Taylor (2007) 40 Cal. 4th 757, 769, 770, 55 Cal. Rptr. 3d 116, 152 P.3d 420*).

B. Common Count Is Permissible Basis for Unjust Enrichment. No particular form of pleading is necessary to invoke the doctrine of unjust enrichment, and a common count suffices as a basis for the finding of a quasi contract in the award of damages for unjust enrichment (*Frank v. Tavares (1956) 142 Cal. App. 2d 683, 689, 298 P.2d 887*).

C. Statute of Frauds Does Not Bar Recovery on Common Count. A general demurrer based on the statute of frauds will not lie to a common count in which plaintiff seeks recovery of the reasonable value of services rendered under an otherwise valid contract. The rule that it is proper to sustain a general demurrer to a common count separately pleaded in a complaint when the recovery sought on the common count obviously is based on the same set of facts specifically pleaded in another count of the complaint, and the other count fails to state a cause of action, is inapplicable if the deficiency of the other count is that it pleads a contract that is unenforceable because it is not in writing. *White Lighting v. Wolfson (1968) 68 Cal. 2d 336, 346, 66 Cal. Rptr. 697, 438 P.2d 345* ; *Parker v. Solomon (1959) 171 Cal.*

App. 2d 125, 136, 340 P.2d 353 ; *Leoni v. Delany (1948) 83 Cal.App.2d 303, 306-307, 188 P2d 765* .)

[*Optional*] **D. Reasonable Value of Services May Be Recovered.** When continuous personal services are performed under an express agreement which is unenforceable because it is not in writing, the reasonable value of the services may be recovered, and the statute of limitations does not commence to run until the termination of the services (*Winder v. Winder (1941) 18 Cal. 2d 123, 127, 114 P.2d 347*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a demurrer to a common count when the demurrer is based on the grounds that the recovery sought under the common count arises out of a contract that was invalid under the statute of frauds. When a party who has rendered services or materials under a contract seeks recovery, a common pleading practice is to seek recovery both on the contract and, in the alternative, under a common count for goods or services rendered. The points and authorities in this form assert in substance that even if the purported contract was invalid because it failed to comply with the statute of frauds, the party who rendered the goods or services still may recover their reasonable value on a common count, because the statute of frauds has no application to a common count action. Although there is a general rule that a common count based on the same facts as a defective special count is also defective, that rule is inapplicable when the special count is defective only because it is barred by the statute of frauds. The distinction lies between a count which fails to allege facts sufficient to state a cause of action in contract and one which is barred by the statute of frauds because it is oral but which nevertheless gives the pleader the right to recover under the doctrine of unjust enrichment. For a discussion of opposing a demurrer to a common count based on the same facts as a special count, see *§ 43.34[2][a]*.

When appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Points and Authorities

In an appropriate case, these points and authorities may be used in opposition to a demurrer supported by the points and authorities set out in *§ 43.22*.

[3] Discussion of Authorities

[a] Party Who Conferred Benefit on Contract That Is Invalid Under Statute of Frauds May Still Recover Reasonable Value of Benefit Conferred

Zellner v. Wassman *(1920) 184 Cal. 80, 193 P. 84* , involved an action on an oral agreement to leave property by a will, brought against an administrator and the heirs at law of the decedent. The court of appeal held that the trial court had correctly nonsuited plaintiff on the ground that there was no legal or equitable basis for enforcing the contract that was barred by the statute of frauds. The California Supreme Court reversed, holding that plaintiff was entitled to some relief under the pleadings and that evidence showed that plaintiff had rendered services to decedent and that decedent promised to leave plaintiff a certain sum of money. The court stated the rule set forth in Paragraph A of this form and held that plaintiff had sufficiently pleaded facts showing he was entitled to the reasonable value of those services, having alleged facts showing: (1) the nature of the services performed; (2) a request for the services on the part of decedent; (3) that the services rendered were not gratuitous, but were, to some extent, at least, in expectation of and under a definite arrangement for compensation; and (4) that plaintiff had received no compensation therefor.

Note:

In ***Sterling v. Taylor*** *(2007) 40 Cal. 4th 757, 769, 770, 55 Cal. Rptr. 3d 116, 152 P.3d 420* , the

California Supreme Court disapproved all "statements in California cases barring consideration of extrinsic evidence to determine the sufficiency of a memorandum under the statute of frauds", including the following statement in *Zellner v. Wassman*: "The preeminent qualification of a memorandum under the statute of frauds is 'that it must contain the essential terms of the contract, expressed with such a degree of certainty that it may be understood without recourse to parol evidence to show the intention of the parties' " (*184 Cal. 80, 85-86)* . The ruling in *Zellner v. Wassman* regarding the recoverability of a benefit conferred under a purported contract that was defective for failure to comply with the statute of frauds is established law [*see* [c], *below*] and was not affected by the Supreme Court's disapproval.

[b] Common Count Is Permissible Basis for Unjust Enrichment

Frank v. Tavares *(1956) 142 Cal. App. 2d 683, 298 P.2d 887* , involved an action on an oral contract for the conveyance of real property pleaded in two causes of action, one for breach of contract and the second in the form of a common count. The instructions to the jury permitted the jury to find for plaintiffs on two bases, one, whether or not the evidence showed that defendant was estopped to plead the statute of frauds, and two, whether or not defendant was unjustly enriched by retaining the property. The jury returned verdicts in favor of plaintiffs, and defendant appealed. The court of appeal affirmed, holding in part that the trial court had not erred in instructing the jury on the theory of unjust enrichment. The court noted that the jury's answers to special interrogatories showed that the basis of the verdict was that defendant was estopped from asserting the statute of frauds. It added that an instruction to the jury on the doctrine of unjust enrichment under the pleading was proper in any event, since there is no particular form of pleading necessary to invoke the doctrine, and a common count is sufficient basis for the finding of a quasi contract in the award of damages for unjust enrichment.

[c] Statute of Frauds Does Not Bar Recovery on Common Count

In ***White Lighting v. Wolfson*** *(1968) 68 Cal. 2d 336, 66 Cal. Rptr. 697, 438 P.2d 345* , plaintiff corporation sued defendant for money allegedly due and owing. Defendant filed a cross complaint against plaintiff in which he alleged that an oral employment contract had existed between the parties and that plaintiff had breached the contact. Although defendant's cross complaint was amended several times, he essentially sought to recover the reasonable value of services he rendered for plaintiff corporation prior to the alleged breach. The lower court had sustained demurrers to defendant's counts based on the express oral contract as well as his count in quantum meruit. In reversing the demurrer as to the common count, the Supreme Court noted that the general rule that a common count which is based on the same facts as a defective special count is also defective does not apply when the special count is barred by the statute of frauds. The distinction, the court stated, citing *Parker v. Solomon (1959) 171 Cal. App. 2d 125, 136, 340 P.2d 353* , discussed *below*, and *Leoni v. Delany (1948) 83 Cal. App. 2d 303, 306-307* , discussed *below*, is between a count which fails to allege facts sufficient to establish the existence of a contract and one which is barred because it is oral rather than in writing.

In ***Parker v. Solomon*** *(1959) 171 Cal. App. 2d 125, 136, 340 P.2d 353* , the plaintiff sought quasi-specific performance of an oral agreement by the terms of which her father allegedly promised to transfer one-half of his $1.5 million estate to plaintiff. Plaintiff alleged that the oral agreement was in consideration of her agreement not to move to California and not to assert claims against her father for neglect and failure to support her as a child. In addition, plaintiff sought recovery in quantum meruit for work labor, and services that plaintiff allegedly performed for the decedent during his lifetime. The alleged "services" plaintiff agreed to perform for her father consisted of "supporting, educating and maintaining herself and her mother without the aid of decedent, remaining away from decedent's home and social and business life and not disclosing to decedent's friends and business associates in the Los Angeles community that she was decedent's daughter; all at the special instance and request of ... decedent" (*171 Cal. App. 2d 125, 135)* . The reasonable value of those "services" was alleged to be $750,000, the same amount sought on the contract claim. A general demurrer was granted, and plaintiff appealed.

The appellate court affirmed that the oral agreement in question was invalid under the statute of frauds and that the demurrer to the contract claim was properly sustained. With respect to plaintiff's claim for services, the court held that her remedy, if any, would lie in *quantum meruit* and not in an action on the alleged oral contract. The court reviewed the case law and concluded that ordinarily it is proper to sustain a general demurrer to a common count separately pleaded in a complaint when the recovery sought on the common count obviously is based on the same set of facts specifically pleaded in the count which fails to state a cause of action. However, under the rule of *Leoni v. Delany (1948) 83 Cal.App.2d 303, 306-307, 188 P.2d 765* , discussed *below*, if the deficiency of the first count is that it pleads a contract which is unenforceable because it is not in writing, a general demurrer will not lie to a common count in which plaintiff seeks recovery of the reasonable value of the services rendered under the otherwise valid contract (*171 Cal. App. 2d 125, 136)* .

Nevertheless, the court held that plaintiff failed properly to invoke the quantum meruit remedy because neither plaintiff's creditor's claim nor her action was premised on any right to recover the reasonable value of any actual *services* that would afford the basis for a recovery in *quantum meruit*. It appeared to the court that the only consideration for decedent's alleged promise consisted, not of services rendered, but rather of plaintiff's forbearance to assert a claim against decedent for support and for refraining from intruding herself into his life. Thus, plaintiff failed to bring herself within the rule of *Leoni v. Delany*, and the common count was subject to general demurrer (*171 Cal. App. 2d 125, 135-137)* .

In ***Leoni v. Delany*** *(1948) 83 Cal. App. 2d 303, 188 P.2d 765* , plaintiff instituted an action to recover for services she allegedly rendered to the decedent pursuant to an oral agreement. The action was pleaded on the theory of express contract in the first count and on a common count in the second. Testimony corroborated plaintiff's contentions that she had indeed provided food, shelter, clothing, and had generally cared for the decedent while he was ill. In affirming the judgment in favor of the plaintiff, the court stated that the unenforceability of the express oral contract would not defeat the common count. It distinguished between a count which fails to establish the existence of a contract and one which sufficiently pleads a contract which is not enforceable because it is not in writing. The court explained that it is the unenforceability of an otherwise valid contract which gives rise to the right of relief through the medium of a common count, since the law contemplates that when one receives a benefit at the expense or detriment of another, he should compensate the latter to the extent of the reasonable value of the benefit received. The special count was not defective because it failed to state sufficient facts to show a contractual relation; rather, it was defective because it showed an oral contract within the purview of the statute of frauds. In such a case an action generally will lie on a common count. (*83 Cal. App. 2d 303, 306, 307)* .

[d] Reasonable Value of Services May Be Recovered

Winder v. Winder *(1941) 18 Cal. 2d 123, 114 P.2d 347* , involved an action by the son of the decedent on a claim against the decedent's estate for the reasonable value of services rendered to decedent. The plaintiff had judgment, defendant appealed, and the Supreme Court affirmed. Defendant contended in part on appeal that because plaintiff was decedent's son, his services were presumed not to be performed for compensation or reward. However, the trial court had found that plaintiff and decedent had an understanding that in return for the services decedent would leave plaintiff decedent's home. The Court stated that it is settled law in California that when continuous personal services are performed under an express agreement for compensation on termination of those services, and the agreement is unenforceable because it is not in writing, the reasonable value of the services may be recovered, and the statute of limitations does not commence to run until the termination of the services, which, in this case was on the death of decedent. It agreed that the relationship between the parties may repel the idea of contract, and that in order to support a claim for services by a relative who remains with his parents after majority, the circumstances must show either an express contract or that compensation was contemplated by the parties. Nevertheless, the intention to pay and the expectation of compensation may be inferred from conduct where equity and justice require compensation, as well as from direct communications between the parties. The existence of higher motives prompted by affection or the sense of duty does not necessarily exclude the idea of pecuniary compensation.

[4] Additional Authorities

[a] Statute of Frauds Does Not Bar Recovery on Common Count

In *Shabrick v. Moore (1961) 195 Cal. App. 2d 56, 15 Cal. Rptr. 310* , plaintiff brought a cause of action against decedent's estate to recover for services she rendered decedent during his life. The action was pleaded in a count on an express contract alleged to have existed between plaintiff and decedent and also on a common count for the reasonable value of the services rendered. The trial court sustained defendant's demurrers, and plaintiff appealed from the judgment. The court of appeal reversed the judgment as to the count pleaded in quantum meruit. It found that the general rule, that a common count is defective when pleaded on the same facts as a defective special count, was not applicable, holding specifically that although the statute of frauds may bar a special count on an oral contract, a common count based on the same factual situation is not barred if plaintiff actually rendered the services.

California Points & Authorities

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PART II. FORMS

4-43 California Points & Authorities § 43.36

§ 43.36 Opposing Demurrer to Complaint--Common Count Sufficient Against Demurrer on Ground That Count Is Based on Express Contract--Contract Executed and Nothing Remains but Payment of Money

[1] FORM

[*Caption. See § 43.34.*]

A COMMON COUNT IS SUFFICIENTLY PLEADED AGAINST A DEMURRER ON THE GROUND THAT THE COUNT IS BASED ON AN EXPRESS CONTRACT IF PLAINTIFF HAS FULLY EXECUTED AND NOTHING REMAINS BUT THE PAYMENT OF MONEY.

A. Common Count Based on Express Contract Proper if Only Money Payment Remains. A common count is an appropriate form of pleading when the plaintiff has fully executed his or her part of the contract and only the payment of money by the defendant remains (*Castagnino v. Balletta (1899) 82 Cal. 250, 258, 23 P. 127*).

[*Optional*] **B. Measure of Damages for "Extras."** In an action pleaded in a common count to recover authorized "extras" for which there was no provision in the express contract, a plaintiff is not bound by the measure of damages set out in the express contract, but may recover the reasonable value of the "extras" (*Benson Elec. Co. v. Hale Bros. Assoc., Inc. (1966) 246 Cal. App. 2d 686, 697, 55 Cal. Rptr. 73*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a demurrer to a common count on the ground that the common count is based on an express contract if the contract is executed and nothing remains but the payment of money.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Points and Authorities

In an appropriate case, these points and authorities may be used in opposition to a demurrer supported by the points and authorities set out in *§ 43.21*.

[3] Discussion of Authorities

[a] Common Count Based on Express Contract Proper if Only Money Payment Remains

In ***Castagnino v. Balletta*** *(1899) 82 Cal. 250, 23 P. 127* , plaintiff sought to recover for work done and materials provided according to a construction contract which he had entered into with defendant. The contract provided, among other things, that plaintiff would be entitled to payment on acceptance of the completed houses by the architect. The plaintiff claimed to have fully complied with his part of the bargain. His testimony further established that the architect had been disposed to approve the construction work done until plaintiff had refused to pay the architect a form of kickback to insure the latter's approval. Defendant asserted that plaintiff's cause of action which was pleaded on a common count was improper in that common counts may not be used in an action on an express contract. The court upheld the use of the common count in this case as an exception to the general rule urged by defendant since the contract was fully executed on plaintiff's part and all that remained was payment of money by defendant (*82 Cal. 250, 258)* .

[b] Measure of Damages for "Extras"

Benson Elec. Co. v. Hale Bros. Assoc., Inc. *(1966) 246 Cal. App. 2d 686, 55 Cal. Rptr. 73* , was an appeal from a judgment of the trial court foreclosing a mechanic's lien in favor of plaintiff and intervener. Defendants' contentions on appeal concerned in part whether plaintiffs were entitled to recover any damages for "extras" 'which the trial court had found defendants had authorized plaintiffs to do in addition to the work to be performed under an express contract. Specifically, they contended that the trial court erred in permitting plaintiffs to amend their complaint to conform to proof. The amended complaint in substance was on a common count for the reasonable value of materials and labor furnished for a construction project and no mention was made of work done under an express contract. Defendants argued that a common count was not the proper way to plead a cause of action for "extras" when no recovery is sought on the original fixed-price contract. They pointed out that when a party pleads a common count and an express contract is shown, the measure of damages is the contract price, not reasonable value. However, in affirming the judgment, the court of appeal stated that when an express contract is fully executed and nothing remains but the payment of money, it is proper to plead a common count omitting any mention of the express contract, and there was no reason to apply a different rule when the contract is partly express and partly implied. The fact that plaintiffs did not seek the contract price was not in error since the authorized "extras" were in effect a separate implied contract under which defendants agreed to pay a reasonable price.

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4-43 California Points & Authorities § 43.37

§ 43.37 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Common Count Sufficient Against Demurrer on Ground That Count Is Based on Express Contract--Contract Has Been Deviated From or Modified by Consent of Parties

[1] FORM

[*Caption. See § 43.34.*]

A COMMON COUNT IS SUFFICIENTLY PLEADED AGAINST A DEMURRER ON THE GROUND THAT THE COUNT IS BASED ON AN EXPRESS CONTRACT IF THE CONTRACT WAS DEVIATED FROM OR MODIFIED BY CONSENT OF THE PARTIES AND PLAINTIFF FULLY PERFORMED.

Common Count as Properly Pleaded on Express Contract. A common count is properly pleaded on an express contract where the contract has been deviated from or modified by consent of the parties and the plaintiff has fully performed (*Rains v. Arnett (1961) 189 Cal. App. 2d 337, 343-344, 11 Cal. Rptr. 299*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a demurrer to a common count on the ground that the common count is based on an express contract if the contract has been deviated from or modified by consent of the parties and the plaintiff has fully performed.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Points and Authorities

In an appropriate case, these points and authorities may be used in opposition to a demurrer supported by the points and authorities set out in *§ 43.21*.

[3] Discussion of Authorities

[a] Common Count as Properly Pleaded on Express Contract

In ***Rains v. Arnett*** *(1961) 189 Cal. App. 2d 337, 11 Cal. Rptr. 299* , plaintiff and defendant had entered into a written agreement by which plaintiff leased from defendant a trailer and tractor. The rental payment due defendant consisted of the gross revenue from hauling less particular items of expense, such as commissions and repairs to the vehicles. However, because plaintiff was forced to make extraordinary repairs on the leased equipment, defendant agreed to repay plaintiff for any repair money advanced by the latter. At the end of the lease period defendant surreptitiously took back the truck and trailer and refused to repay plaintiff either for the cost of repairs or other unusual expenditures made by plaintiff for defendant. Thus, in the subsequent action, the trial court rendered judgment for plaintiff for money owed him by defendant. The action was pleaded in the form of a common count for money had and received. On appeal, defendant argued that an action on a common count is improper where the underlying transaction is on an express contract. The court of appeal affirmed the judgment setting forth the exceptions to the general rule that a common count does not lie on an express contract. It stated that one of the exceptions to the general rule is where the express contract has been deviated from or modified by consent of the parties and the plaintiff has fully performed. In such case, a common count is appropriate even though the count is based on an express contract.

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4-43 California Points & Authorities § 43.38

§ 43.38 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Common Count Sufficient Against Demurrer on Ground That Count Is Based on Express Contract--Defendant Repudiated Contract or Prevented Plaintiff From Performing

[1] FORM

[*Caption. See § 43.34.*]

A COMMON COUNT IS SUFFICIENTLY PLEADED AGAINST A DEMURRER ON GROUND THAT SUCH COUNT IS BASED ON AN EXPRESS CONTRACT IF DEFENDANT REPUDIATES THE CONTRACT OR PREVENTS PLAINTIFF FROM FULLY PERFORMING.

Common Count as Properly Pleaded on Express Contract. A common count is properly pleaded on an express contract where the defendant's acts or repudiation of the contract prevent the plaintiff from performing completely (*Rains v. Arnett (1961) 189 Cal. App. 2d 337, 343-344, 11 Cal. Rptr. 299*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a demurrer to a common count on the ground that the common count is based on an express contract.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Points and Authorities

In an appropriate case, these points and authorities may be used in opposition to a demurrer supported by the points and authorities set out in *§ 43.21*.

[3] Discussion of Authorities

[a] Common Count as Properly Pleaded on Express Contract

For the factual setting of ***Rains v. Arnett*** *(1961) 189 Cal. App. 2d 337, 11 Cal. Rptr. 299* , see *§ 43.37[3][a]*, the court of appeal set forth exceptions to the general rule that a common count will not lie on an express contract. Defendant in his appeal contended that an action on a common count is not appropriate where the action is based on an express contract. Holding that the action fell within one of the exceptions to the general rule, the court enumerated several of the exceptions. The court stated that a common count may be pleaded on an express contract if the plaintiff has been prevented from performing completely by the defendant's acts or by the defendant's repudiation of the contract.

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4-43 California Points & Authorities § 43.39

§ 43.39 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Common Count Sufficient Against Demurrer on Ground That Count for Goods Sold and Delivered Failed to Allege Defendant's Promise to Pay

[1] FORM

[*Caption. See § 43.34.*]

A COMMON COUNT FOR GOODS SOLD AND DELIVERED IS SUFFICIENTLY PLEADED AGAINST A DEMURRER ON THE GROUND THAT PLAINTIFF FAILED TO ALLEGE DEFENDANT'S PROMISE TO PAY.

Failure to Allege Promise to Pay. A complaint pleaded as a common count for goods sold and delivered is not subject to a demurrer for failure to state a cause of action on the ground that the plaintiff failed to aver that the defendant promised to pay (*Abadie v. Carrillo (1867) 32 Cal. 172, 175)* .

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a demurrer to a complaint pleaded on a common count

on the ground that the common count for goods sold and delivered failed to allege a promise by the defendant to pay.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Failure to Allege Promise to Pay

In ***Abadie v. Carrillo*** *(1867) 32 Cal. 172* , plaintiffs brought an action against defendant for goods sold and delivered. The trial court entered a judgment in favor of plaintiffs by default. On appeal defendant argued that a demurrer had been interposed and that it was error to enter a judgment on default. Alternatively, defendant argued that even if no demurrer had been made, it was not proper to enter a default judgment where the complaint does not state a cause of action for failure to allege defendant's promise to pay or the value of the goods allegedly delivered. The Supreme Court affirmed the trial court judgment holding that the complaint for goods sold and delivered was sufficient without any allegations of the value of the goods delivered or defendant's promise to pay.

[4] Additional Authorities

[a] Failure to Allege Promise to Pay

In *McFarland v. Holcomb (1898) 123 Cal. 84, 55 P. 761* , plaintiff brought an action against the estate of the decedent for nursing and other services plaintiff had allegedly rendered. The action was pleaded on a common count and defendant demurred on grounds of uncertainty. The trial court sustained defendant's demurrer, and plaintiff appealed. The Supreme Court in reversing the judgment stated that a claim on a common count is not uncertain or ambiguous where consideration and defendant's promise to pay may be implied from the nature of the transaction as set forth in the complaint. Moreover, the Court found that the promise to pay and the existence of consideration may also be implied in actions for goods sold and delivered or for money loaned.

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4-43 California Points & Authorities § 43.40

§ 43.40 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Common Count Sufficient Against Demurrer on Ground That Count for Goods Sold and Delivered Failed to Allege the Particular Value of Goods Delivered

[1] FORM

[*Caption. See § 43.34.*]

A COMMON COUNT FOR GOODS SOLD AND DELIVERED IS SUFFICIENTLY PLEADED AGAINST A DEMURRER ON THE GROUND THAT THE PLAINTIFF FAILED TO ALLEGE THE PARTICULAR VALUE OF GOODS DELIVERED.

Failure to Allege Value of Goods Delivered. A complaint pleaded as a common count for goods sold and delivered is not subject to a demurrer for failure to state a cause of action on the ground that the plaintiff failed to allege the particular value of the goods delivered (*Abadie v. Carrillo (1867) 32 Cal. 172, 175)* .

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a demurrer to a complaint pleaded on a common count on the ground that the common count for goods sold and delivered failed to allege the particular value of the goods delivered.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Failure to Allege Value of Goods Delivered

Abadie v. Carrillo *(1867) 32 Cal. 172* , is discussed in *§ 43.39[3][a]*.

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4-43 California Points & Authorities § 43.41

§ 43.41 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Common Count Sufficient Against Demurrer on Ground That Count for Money Had and Received Failed to Set Forth Time When Indebtedness Occurred

[1] FORM

[*Caption. See § 43.34.*]

A COMMON COUNT FOR MONEY HAD AND RECEIVED IS SUFFICIENTLY PLEADED AGAINST A DEMURRER ON THE GROUND THAT PLAINTIFF FAILED TO ALLEGE THE TIMES WHEN THE INDEBTEDNESS AROSE AS AN ESSENTIAL ELEMENT.

Failure to State When Indebtedness Arose. A complaint pleaded as a count for money had and received is not subject to demurrer for failure to set forth the times when the indebtedness arose or the items therefor since the defendant's remedy, if he or she desires more specificity, is to demand a bill of particulars (*Pike v. Zadig (1915) 171 Cal. 273, 277, 152 P. 923*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a demurrer to a complaint pleaded on a common count on the ground that the common count for money had and received failed to set forth the time when the indebtedness occurred.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Failure to State When Indebtedness Arose

See *§ 43.43[3][a]* for the factual setting of *Pike v. Zadig (1915) 171 Cal. 273, 152 P. 923* . In *Pike*, the Supreme Court reversed a judgment of the trial court in which the lower court had sustained a demurrer to a common count for money had and received on the ground that plaintiff failed to allege the times at which the indebtedness arose. The court held that the complaint was not subject to demurrer for failure to plead the times when the indebtedness, or elements thereof, accrued as an element of the common count. By way of dictum, the Court suggested that the defendant's remedy, if he or she desired more specificity, was to demand a bill of particulars.

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4-43 California Points & Authorities § 43.42

§ 43.42 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Common Count Sufficient Against Demurrer on Ground That Count for Work and Labor Failed to Allege That Defendant Requested Services or Promised to Pay Therefor Where Services Personally Rendered to Defendant

[1] FORM

[*Caption. See § 43.34.*]

A COMMON COUNT FOR WORK AND LABOR DONE IS SUFFICIENTLY PLEADED AGAINST A DEMURRER ON THE GROUND THAT PLAINTIFF FAILED TO ALLEGE THAT DEFENDANT REQUESTED SERVICES IF THE SERVICES WERE ALLEGED TO BE PERSONALLY RENDERED TO DEFENDANT WHO ENJOYED THEIR BENEFIT.

Failure to Allege Request for Services or Promise to Pay. A complaint on a common count for work and labor performed which shows that the plaintiff rendered services to the defendant which were received by the defendant in person, and were presumptively at his or her request, and of which he or she enjoyed the benefit, states facts from which the liability of the defendant therefor is presumed, and is good as against a general demurrer (*McFarland v. Holcomb (1898) 123 Cal. 84, 86, 55 P. 761*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a demurrer to a complaint pleaded on a common count on the ground that the common count for work and labor failed to allege that the defendant requested services or promised to pay for the services.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Failure to Allege Request for Services or Promise to Pay

In ***McFarland v. Holcomb*** *(1898) 123 Cal. 84, 55 P. 761* , plaintiff alleged in her complaint against decedent's estate that decedent had become indebted to plaintiff in a certain sum of money for taking care of decedent for 25 years. Defendants demurred on the ground that the complaint did not allege that plaintiff's services were rendered at decedent's request and therefore failed to state a cause of action against decedent's estate. The demurrer was sustained and judgment entered for defendants, but the Supreme Court reversed. It held that it is not necessary to allege either the consideration or the promise when they are implied as a legal conclusion from the facts alleged. It noted that while counsel and advice are frequently given without any request and may be of no benefit to the party to whom they are given, a complaint which shows that the plaintiff rendered services to the defendant which were received by the defendant in person, and were presumptively at the defendant's request, and of which he has enjoyed the benefit, states facts from which the liability of the defendant is presumed. The Court concluded that plaintiff's nursing of decedent and his acceptance from her of his board and lodging for 25 years was a consideration sufficient to support the promise for compensation which is implied in law and to render defendant liable (*123 Cal. 84, 86)* .

[4] Additional Authorities

[a] Failure to Allege Request for Services or Promise to Pay

In *Smith v. Bentson (1932) 127 Cal. App. Supp. 789, 15 P.2d 910* , plaintiff attempted to recover from Mrs. Bentson for dental services rendered to her husband. The trial court entered a judgment in favor of defendant, and plaintiff appealed. On appeal the Supreme Court affirmed. It found that in a count for work, labor, and services rendered by plaintiff, allegations that defendant requested the services and promised to pay are unnecessary when services are rendered to the defendant in person. Under such circumstances, the law may imply the consideration or promise as a legal conclusion from the facts alleged. When, however, services are not directly rendered to defendant, the Court held that a demurrer will lie to the common count for failure to allege a request and promise to pay for the services rendered.

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4-43 California Points & Authorities § 43.43

§ 43.43 Opposing Demurrer to Complaint--Common Count Sufficient Against Demurrer on Grounds of Uncertainty

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Defendant.	)	IES IN OPPOSITION TO DEMURRER TO COM-
	)	PLAINT FOR UNCERTAINTY
	)	

_____

A COMMON COUNT IS SUFFICIENTLY PLEADED AGAINST BOTH A SPECIAL AND A GENERAL DEMURRER ON GROUNDS OF UNCERTAINTY.

A. Common Count as Sufficient Against General or Special Demurrer. The established rule is that a common count is sufficiently pleaded against both a general and special demurrer on grounds of uncertainty (*Pike v. Zadig (1915) 171 Cal. 273, 276-277, 152 P. 923*).

B. Special Demurrer for Ambiguity as Lying Only When Dates Ambiguously Alleged. A common count is subject to a special demurrer for ambiguity only if the purpose is to determine the true dates of indebtedness when those dates are ambiguously set forth in the complaint and where the plaintiff has had an opportunity to correct the ambiguity by amendment and failed to do so (*Moya v. Northrup (1970) 10 Cal. App. 3d 276, 279, 283-285, 88 Cal. Rptr. 783* , expressly limiting *Miller v. Brown (1951) 107 Cal. App. 2d 304, 307, 237 P.2d 320* , to its facts).

[*Optional*] **C. Bill of Particulars as Appropriate Remedy.** If a defendant seeks more specificity in a complaint pleaded in the form of a common count, the appropriate remedy is to make a demand for a bill of particulars (*Farwell v. Murray (1894) 104 Cal. 464, 466-467, 38 P. 199*).

[*Optional*] **D. Common Count Not Required to Specify Whether Contract Oral or Written.** The provisions of *Code of Civil Procedure Section 430.10(g)* permitting a defendant to object to a complaint by way of demurrer on the ground that in an action founded on a contract it cannot be ascertained from the pleading whether the contract is written or oral does not apply to an action based on a recognized common count which is pleaded without an ambiguity on its face (*Moya v. Northrup (1970) 10 Cal. App. 3d 276, 285, 88 Cal. Rptr. 783*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a demurrer to a common count on grounds of ambiguity or uncertainty as to dates alleged in the complaint when plaintiff has had an opportunity to amend the pleading to correct the ambiguity and failed to do so.

In an appropriate case, these points and authorities may be used in opposition to a demurrer supported by the points and authorities set out in *§ 43.26*.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Common Count as Sufficient Against General or Special Demurrer

In ***Pike v. Zadig*** *(1915) 171 Cal. 273, 152 P. 923* , the Supreme Court set forth the general rule that common counts are sufficient against both general or special demurrers for uncertainty. In *Pike*, the trial court had sustained the defendants' demurrer to the plaintiff's complaint for money had and received. The demurrer was based on the grounds that the complaint failed to assert facts sufficient to constitute a cause of action, that it failed to state when defendants became indebted to plaintiff, when defendants received money for the use of plaintiff, when plaintiff discovered defendants' debt to him or her, and when plaintiff demanded the sum due from the defendants. The Supreme Court held, however, that a common count is not subject to a general demurrer for uncertainty or unintelligibility. The Court based its decision on established case authority approving the use of common counts in California in opposition to the general rules of code pleading (*171 Cal. 273, 276-277)* .

[b] Special Demurrer for Ambiguity as Lying Only When Dates Ambiguously Alleged

Moya v. Northrup *(1970) 10 Cal. App. 3d 276, 88 Cal. Rptr. 783* , limited *Miller v. Brown (1951) 107 Cal. App. 2d 304, 237 P.2d 320* , to its facts insofar as it considered the appropriateness of a demurrer to a common count for uncertainty. In *Miller*, the plaintiff sought to recover damages in a count for work and labor. The second count of the complaint, however, contained contradictory language with respect to the date of indebtedness. Plaintiff generally alleged that defendant had become indebted to plaintiff within the last two years but specifically alleged that the indebtedness accrued from June 1946 to June 1948. The specific allegation raised a question as to the timeliness of the action. The court of appeal upheld the demurrer but based its holding on the ambiguity and uncertainty of the dates alleged and failure of plaintiff to amend the complaint after repeated opportunities to do so. In *Moya*, plaintiff's complaint was based on the common counts for money lent and for money paid, laid out, and expended. Defendants demurred to the complaint on the grounds that it failed to state a cause of action and that it could not be determined from the complaint whether the contract on which the action was based was oral or written. In holding that a common count is not normally subject to either a general or special demurrer due to uncertainty, the court limited the impact of *Miller* to those cases in which the ambiguity in question concerns the timeliness of the action pursuant to the applicable statute of limitations. Thus, a special demurrer to a common count on the ground of ambiguity or uncertainty is proper only if there exist on the face of a complaint pleaded as a common count inconsistent dates as to when the cause of action arose (*10 Cal. App. 3d 276, 279, 283-285)* .

[c] Bill of Particulars as Appropriate Remedy

In ***Farwell v. Murray*** *(1894) 104 Cal. 464, 38 P. 199* , plaintiffs sought recovery of a certain sum of money allegedly due for work and labor performed for defendant and goods sold and delivered by plaintiffs to defendant. Defendant demurred to the complaint on the ground that it did not state a cause of action due to its uncertainty and unintelligibility as well as its failure to allege sufficient facts. The trial court overruled the demurrer. On appeal, the Supreme Court affirmed the lower court order overruling the demurrer. In so holding the Court suggested that the defendant's proper remedy was to demand a bill of particulars if he or she desired more particular information as to the items of the complaint (*104 Cal. 464, 466-467*).

[d] Common Count Not Required to Specify Whether Contract Oral or Written

The factual background of ***Moya v. Northrup*** *(1970) 10 Cal. App. 3d 276, 88 Cal. Rptr. 783* , is discussed in *§ 43.43[3][b]*. In holding that a special demurrer to a common count is proper only if on the face of the complaint there is an ambiguity as to when the cause of action arose, the court of appeal reasoned that it is no hardship on the defendant to require the defendant to take affirmative action by answer and motion for summary judgment if the defense of limitations of actions in fact exists to an adequately pleaded common count. Otherwise, the pleading of common counts would be rendered uncertain even though they have been used and approved over the years. The court concluded that the provisions of former Code Civ. Proc. § 430(8), now *Code Civ. Proc. § 430.10(g)*, governing demurrers on the ground that it cannot be determined whether the underlying contract is oral or written, should not apply to an action based on a recognized common count which is pleaded without an ambiguity on its face.

[4] Additional Authorities

[a] Common Count as Sufficient Against General or Special Demurrer

In *Jensen v. Dorr (1911) 159 Cal. 742, 116 P. 553* , plaintiff sought to recover from defendant for work and labor performed and materials furnished. The defendant demurred on grounds that the allegations were uncertain and ambiguous in that it could not be ascertained which part of the sum allegedly due was for materials and which part was for services. The Court ruled that the complaint was adequately pleaded on the common counts and that the defendant's remedy, if he or she so desired, was to demand a bill of particulars in order to obtain a precise breakdown of the amounts claimed for work and materials respectively.

[b] Bill of Particulars as Appropriate Remedy

In *Dobbins v. Hardister (1966) 242 Cal. App. 2d 787, 51 Cal. Rptr. 866* , plaintiff attempted to recover a certain sum from defendant based on counts of goods sold and delivered and account stated. The defendant filed a general, verified answer denying all charges on the basis of lack of information and belief. Plaintiffs' motion for judgment on the pleadings was subsequently granted, and judgment in favor of plaintiffs was rendered. On appeal, the court determined that the defendant had misconstrued his remedy and that leave to amend the answer, as requested by defendant, should have been granted. In reversing the trial court, the court of appeal noted the similarity between a demurrer for uncertainty and a demand for a bill of particulars: both represent an attempt by a defendant to ascertain how to frame his answer. Since the purpose of a bill of particulars, as enunciated by the court, is to apprise a defendant of the details of the plaintiff's claim so that he is able to intelligently present defenses, a bill of particulars is the appropriate remedy to a complaint pleaded on the common counts. The court found a general denial to be an inappropriate and incorrect answer to a common count since denials on information and belief cannot be made as to matters presumptively within the defendant's knowledge. The court also noted that modern discovery devices could not be effectively substituted for a bill of particulars since the purpose of discovery was to produce evidence for use at trial while the purpose of a bill of particulars was to assist the defendant in framing the issues by pleading.

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Volume 4 Chapters 40-49 CLAIM & DELIVERY---to---CONTINUANCE
CHAPTER 43 COMMON COUNTS AND BILLS OF PARTICULARS
PART II. FORMS

4-43 California Points & Authorities § 43.44

§ 43.44 Opposing Demurrer to Complaint--Common Count Sufficient Against Demurrer for Uncertainty on Ground That Count for Work and Materials Failed to Specify Which Claims Were for Work and Which for Materials

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
	)	IES IN OPPOSITION TO DEMURRER TO COM-
Defendant.	)	PLAINT ON GROUND OF UNCERTAINTY
	)	
	)	

_____

A COMMON COUNT FOR WORK AND MATERIALS IS SUFFICIENTLY PLEADED AGAINST A DEMURRER FOR UNCERTAINTY ON THE GROUND THAT PLAINTIFF FAILED TO SPECIFY WHICH CLAIMS WERE FOR WORK AND WHICH FOR MATERIALS.

Failure to Distinguish Work From Materials. In an action pleaded on a common count for work done and materials furnished, the complaint is sufficient against a demurrer for uncertainty even though the plaintiff failed to specify which claims were for work and which for materials (*Jensen v. Dorr (1911) 159 Cal. 742, 746, 116 P. 553*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a demurrer to a complaint pleaded on a common count on the ground that the count for work and materials failed to specify which claims were for work and which were for materials.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Failure to Distinguish Work From Materials

See *§ 43.43[4][a]*, for the factual setting of *Jensen v. Dorr (1911) 159 Cal. 742, 116 P. 553* . In *Jensen*, the Supreme Court, although reversing the trial court's judgment on the pleadings, held that the lower court had correctly overruled defendant's earlier special demurrer to plaintiff's complaint. It stated that a common count for work done and materials furnished is not subject to a special demurrer for uncertainty for failure to specify which part of the claim is for work and which part is for materials. The Court noted as dictum that defendant's proper remedy, if more specificity is desired, is to demand a bill of particulars.

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4-43 California Points & Authorities § 43.45

§ 43.45 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(f)]--Common Count Sufficient Against Demurrer on Ground That Count for Goods Sold and Delivered Failed to Allege Delivery of Goods

[1] FORM

[*Caption. See § 43.44.*]

A COMMON COUNT FOR GOODS SOLD AND DELIVERED IS SUFFICIENTLY PLEADED AGAINST A DEMURRER ON THE GROUND THAT PLAINTIFF FAILED TO ALLEGE THAT GOODS WERE DELIVERED.

Failure to Allege Delivery of Goods. A complaint pleaded as a common count for goods sold and delivered is sufficient against a demurrer for failure to allege that the goods were delivered (*Johnson v. Dixon Farms Co. (1915) 29 Cal. App. 52, 56, 58, 155 P. 134*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a demurrer to a complaint pleaded on a common count

on the ground that the count for goods sold and delivered failed to allege that the goods were delivered.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Failure to Allege Delivery of Goods

In ***Johnson v. Dixon Farms Co.*** *(1915) 29 Cal. App. 52, 155 P. 134* , plaintiff brought an action against defendant to recover for hay delivered to defendant for which no payment had been received. Plaintiff brought the action in the form of a common count for goods sold and delivered and judgment was entered in favor of plaintiff. On appeal, defendant contended that the trial court erred in overruling his demurrer to the complaint on the ground that the count was uncertain in that it failed to allege, among other things, whether the hay was delivered or whether defendant was required to pay for the hay before or after delivery. The court of appeal affirmed the trial court judgment, holding that a count for goods sold and delivered is sufficient against a demurrer for uncertainty, despite the failure to allege delivery, since delivery may be implied from the averment of sale.

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PART II. FORMS

4-43 California Points & Authorities § 43.46

§ 43.46 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(f)]--Common Count Sufficient Against Demurrer for Uncertainty on Ground That Common Count Failed to Specify Whether Action Was on Contract or for Reasonable Value of Goods

[1] FORM

[*Caption. See § 43.44.*]

A COMMON COUNT IS SUFFICIENTLY PLEADED AGAINST A DEMURRER FOR UNCERTAINTY ON THE GROUND THAT THE PLAINTIFF FAILED TO SPECIFY WHETHER THE ACTION WAS ON THE CONTRACT OR FOR THE REASONABLE VALUE OF THE GOODS.

Failure to Specify Nature of Contract. A complaint pleaded on a common count is not subject to special demurrer for uncertainty on the ground that it cannot be ascertained whether the action is based on an express contract or seeks recovery of the reasonable value of the goods delivered (*Preston v. Central Cal. Water & Irrigation Co. (1909) 11 Cal. App. 190, 196-197, 104 P. 462*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a demurrer to a complaint pleaded on a common count on the ground that the count for goods sold and delivered failed to specify whether the action was on the contract or for the reasonable value of the goods delivered.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Failure to Specify Nature of Contract

In ***Preston v. Central Cal. Water & Irrigation Co.*** *(1909) 11 Cal. App. 190, 104 P. 462* , plaintiff as assignee brought an action against defendant pleaded in the form of a count for goods sold and delivered to recover for lumber, material, and merchandise sold defendant. Judgment was rendered in favor of plaintiff, and defendant appealed. On appeal defendant claimed, among other contentions, that the count was specially demurrable for uncertainty for failure to specify whether the action was on the express contract or for the reasonable value of the goods. The court of appeal affirmed the trial court's judgment stating that while it would be better to state whether the indebtedness alleged resulted from an express or implied contract, no prejudice resulted to defendant as evidenced by his answer and the trial proceedings, and therefore, the count was sufficient against a special demurrer for uncertainty.

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4-43 California Points & Authorities § 43.47

§ 43.47 Opposing Motion for Order [Code Civ. Proc. § 1003] to Exclude Evidence for Failure to Meet Demand for Bill of Particulars [Code Civ. Proc. § 454]--Untimely Delivery Nonprejudicial to Defendant

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
	)	IES IN OPPOSITION TO MOTION TO EXCLUDE
Defendant.	)	[*Code Civ. Proc. § 454*]
	)	
	)	

_____

A MOTION TO EXCLUDE EVIDENCE FOR FAILURE TO DELIVER A BILL OF PARTICULARS SHOULD BE DENIED DESPITE THE FACT THAT DELIVERY WAS NOT TIMELY IF THE DEFENDANT IS NOT PREJUDICED BY THE DELAY.

Nonprejudicial Delivery Beyond Statutory Deadline. The provisions of *Section 454 of the Code of Civil Procedure* regarding the time period within which a bill of particulars is to be delivered are to be liberally construed by the court where delivery beyond the statutory deadline does not prejudice defendant (*McCarthy v. Tecarte Land & Water Co. (1896) 110 Cal. 687, 692-693, 43 P. 391*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion to exclude evidence for failure to meet the demand for a bill of particulars.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Points and Authorities

In an appropriate case, these points and authorities may be used in opposition to a motion supported by the points and authorities set out in *§ 43.29*.

[3] Discussion of Authorities

[a] Nonprejudicial Delivery Beyond Statutory Deadline

In ***McCarthy v. Tecarte Land & Water Co.*** *(1896) 110 Cal. 687, 43 P. 391* , plaintiff, as assignee of McCarthy & Co., sought to recover from defendant for goods sold and delivered to defendant at the latter's request. Plaintiff alleged having delivered goods valued at $2,500 for which defendant had paid only $250. Prior to trial defendant demanded and was served with a bill of particulars. Some 40 days afterward, trial began; at that time defendant objected to the reception of any evidence on the ground that the bill of particulars had not been delivered within the statutory time limit of *Code Civ. Proc. § 454*. The trial court rendered judgment for plaintiff and noted that no objection regarding late service of the bill of particulars had been made by defendant prior to trial. On appeal, the Supreme Court affirmed. It found that the provisions of *Code Civ. Proc. § 454* regarding timely delivery of a bill of particulars were discretionary and that the purpose of the statute was to protect the defendant from surprise at trial by enabling the adverse party to obtain in advance a detailed statement of the items of account. Since defendant had received the bill well in advance of trial and had ample time to prepare his defense, the court held that the purpose of the statute had been fulfilled. Defendant's remedy, the Court noted, if the bill had been objectionable or prejudicial in its delay, would have been to obtain an order to exclude evidence prior to trial.

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4-43 California Points & Authorities § 43.48

§ 43.48 Opposing Motion for Order [Code Civ. Proc. § 1003] to Exclude Evidence for Failure to Meet Demand for Bill of Particulars [Code Civ. Proc. § 454]--Failure to Demand Further Bill

[1] FORM

[*Caption. See § 43.47.*]

A MOTION TO EXCLUDE EVIDENCE FOR FAILURE TO DELIVER A BILL OF PARTICULARS SHOULD BE DENIED WHERE THE DEFENDANT FAILED TO DEMAND A FURTHER BILL AFTER THE PLAINTIFF HAD FURNISHED AN INADEQUATE ONE.

Further Bill of Particulars as Remedy to Inadequate Bill. Where the plaintiff furnishes an inadequate bill of particulars, the defendant's remedy, rather than a motion to exclude evidence, is a demand for a further bill (*Burton v. Santa Barbara Nat'l Bank (1966) 247 Cal. App. 2d 427, 433, 55 Cal. Rptr. 529*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion to exclude evidence for failure to meet the demand for a bill of particulars.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Points and Authorities

In an appropriate case, these points and authorities may be used in opposition to a motion supported by the points and authorities set out in *§ 43.29*.

[3] Discussion of Authorities

[a] Further Bill of Particulars as Remedy to Inadequate Bill

See *§ 43.29[3][a]* for the factual setting of ***Burton v. Santa Barbara Nat'l Bank*** *(1966) 247 Cal. App. 2d 427, 55 Cal. Rptr. 529* . In *Burton*, the court of appeal stated that the penalty of exclusion of evidence is not mandatory in cases in which a defective bill of particulars is delivered. On the contrary, the court determined that defendant's remedy was a noticed motion for a further bill of particulars. Moreover, a failure by defendant to demand a further account in such a case, the court held, would be construed as a waiver by defendant of any defects in the furnished bill, and the defendant would not be permitted to subsequently make a motion to exclude at trial.

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4-43 California Points & Authorities § 43.49

§ 43.49 Opposing Motion for Order [Code Civ. Proc. § 1003] to Exclude Evidence for Failure to Meet Demand for Bill of Particulars [Code Civ. Proc. § 454]--Demand Failed to Contain Clear Indication of Entitlement

[1] FORM

[*Caption. See § 43.47.*]

A MOTION TO EXCLUDE EVIDENCE FOR FAILURE TO DELIVER A BILL OF PARTICULARS SHOULD BE DENIED IF THE DEMAND FAILED TO CONTAIN A CLEAR INDICATION OF AN ENTITLEMENT TO AN ACCOUNT.

Necessity That Demand Show Entitlement to Account. Although *Section 454 of the Code of Civil Procedure* does not specify any particular form of demand other than that the demand be in writing, a demand should be signed by the party requesting the bill of particulars or otherwise contain a clear indication of the party's entitlement to the account (*Elmore v. Tingley (1926) 78 Cal. App. 460, 468, 248 P. 706*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion to exclude evidence for failure to meet the demand for a bill of particulars.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Points and Authorities

In an appropriate case, these points and authorities may be used in opposition to a motion supported by the points and authorities set out in *§ 43.29*.

[3] Discussion of Authorities

[a] Necessity That Demand Show Entitlement to Account

In ***Elmore v. Tingley*** *(1926) 78 Cal. App. 460, 248 P. 706* , plaintiff sought to recover on a promissory note allegedly delivered to him by defendant and the partnership of Tingley and Elmore. On dissolution of the partnership, defendant purchased from plaintiff the mercantile business which the partnership had conducted. In exchange, plaintiff was to be freed of all obligations owing under the partnership, except for one certain account, and was to receive specified land and money. In his complaint, plaintiff alleged that certain sums had been paid under the promissory note but that there remained an outstanding balance of $600. Defendant in his answer generally denied plaintiff's allegations and asserted counterclaims for which he prayed for relief against plaintiff in the sum of $1,250.59. The trial court found for plaintiff, and defendant appealed.

The court of appeal affirmed the judgment, rejecting defendant's contention that the bill of particulars furnished by plaintiff was insufficient in that it was not subscribed in the demandant's handwriting. The court noted that *Code Civ. Proc. § 454* does not specify a particular form of demand. Plaintiff's demand contained the name of plaintiff's attorney subscribed in a typewritten form and indicated that the attorney was acting for plaintiff. The court found that the requirements for demanding a bill of particulars had been met since the demand was submitted in writing, in accordance with *Code Civ. Proc. § 454*, and was signed by a party who gave clear indication of his right to make such demand, even though the demandant was not the plaintiff. The court indicated, however, that a demand for a bill of particulars is insufficient where there is no indication that the party making the demand is entitled to be furnished with information about the account.

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4-43 California Points & Authorities § 43.50

§ 43.50 Opposing Motion for Order [Code Civ. Proc. § 1003] to Exclude Evidence for Failure to Meet Demand for Bill of Particulars [Code Civ. Proc. § 454]--Failure to Make Motion Prior to Trial

[1] FORM

[*Caption. See § 43.47.*]

A MOTION TO EXCLUDE EVIDENCE FOR FAILURE TO DELIVER A SUFFICIENT BILL OF PARTICULARS SHOULD BE DENIED IF THE DEFENDANT FAILED TO MAKE A MOTION PRIOR TO TRIAL.

Motion to Exclude as Required Before Trial. A motion to exclude on failure to provide a sufficient bill of particulars is properly denied where no such motion is made prior to trial (*Glogau v. Hagan (1951) 107 Cal. App. 2d 313, 321, 237 P.2d 329*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion to exclude evidence for failure to meet the

demand for a bill of particulars if the motion to exclude was not made in a timely fashion before trial.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Points and Authorities

In an appropriate case, these points and authorities may be used in opposition to a motion supported by the points and authorities set out in *§ 43.29*.

[3] Discussion of Authorities

[a] Motion to Exclude as Required Before Trial,

In ***Glogau v. Hagan*** *(1951) 107 Cal. App. 2d 313, 237 P.2d 329* , plaintiff, as assignee, sued for legal services allegedly rendered to defendants. Judgment was rendered for plaintiff, and defendants appealed. Among the errors asserted on appeal, appellants contended that the court erred in denying their motion to preclude evidence for plaintiff's failure to provide a proper bill of particulars. The court of appeal, however, found that the determination of whether a furnished bill of particulars is adequate is within the sound discretion of the court. Moreover, the motion was properly denied because defendants were under an obligation to make a motion prior to trial to exclude introduction of evidence by plaintiff and had failed to do so.

[4] Additional Authorities

[a] Motion to Exclude as Required Before Trial

In *Conner v. Hutchinson (1861) 17 Cal. 279* , plaintiff sued defendant on a note. Defendant in his answer asserted counterclaims for work and labor and money paid for which plaintiff was allegedly indebted to him. Plaintiff requested a copy of the account of the alleged debts by means of a bill of particulars. Defendant provided plaintiff with a bill, and on request, also furnished a further bill of particulars. At trial defendant introduced evidence relating to the account to which plaintiff objected on the ground that the further bill furnished had not been adequate. The trial court excluded the evidence. On appeal, the Supreme Court reversed the judgment. The Court stated that the lower court had erred in not specifying the items to be furnished in the further demand for a bill of particulars. Moreover, it held that even if the further bill furnished by defendant had been defective, plaintiff failed to obtain an order excluding such evidence prior to trial.

See *§ 43.29[3][a]*, for the factual setting of *Burton v. Santa Barbara Nat'l Bank (1966) 247 Cal. App. 2d 427, 55 Cal. Rptr. 529* . In *Burton*, the court of appeal stated that a motion to exclude on failure to provide an adequate bill of particulars must be made by the defendant prior to trial in order to invoke the discretionary power of the court to exclude plaintiff's evidence.

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4-43 California Points & Authorities § 43.51

§ 43.51 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c] by Defendant--In Action for Account Stated--Circumstances Implying Account Stated Present Triable Issue of Fact

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORIT-
vs.	)	IES IN OPPOSITION TO DEFENDANT'S MOTION
_____ [*name*],	)	FOR SUMMARY JUDGMENT
	)	[*Code Civ. Proc. § 437c*]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Trial Date: _____]
		[Attached Documents: _____]

_____

PLAINTIFF'S EVIDENCE IMPLIES THE EXISTENCE OF AN ACCOUNT STATED AND THEREFORE PRESENTS ISSUES OF TRIABLE FACT PRECLUDING GRANTING OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

A. Rules Governing Summary Judgment Procedure. It is proper for a court to grant a motion for summary judgment only if the supporting papers are sufficient to sustain a judgment as a matter of law in favor of the moving party and the opposing party has not presented any facts that give rise to a triable issue as to any material fact (*see Code Civ. Proc. § 437c(c)*).

B. Implication of Account Stated Presents Issues of Triable Fact. Circumstances may imply the existence of an account stated and thus present issues of triable fact that precludes the granting of a motion for summary judgment by a defendant (*Truestone, Inc. v. Simi West Industrial Park II (1984) 163 Cal. App. 3d 715, 725-727, 209 Cal. Rptr. 757*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion to grant summary judgment by defendant in a cause of action for account stated if evidence implies the existence of an account stated. This form may be used even if the account stated is not integrated in one written document [*see Truestone, Inc. v. Simi West Industrial Park II (1984) 163 Cal. App. 3d 715, 726, 209 Cal. Rptr. 757]* .

Counsel should insert argument linking the points with the facts of his or her case. Counsel should therefore discuss the particular evidence or series of transactions that give rise to circumstances implying an account stated. Counsel should attach affidavits or declarations that oppose the motion, along with a separate statement in response to the moving party's statement of undisputed material facts [*Code Civ. Proc. § 437c(b)(2), (3)*].

[b] Related Pleading and Practice Forms

For discussion and forms relating to actions based on an account stated, see California Forms of Pleading and Practice, Ch. 8, *Accounts Stated and Open Accounts* (Matthew Bender).

[3] Discussion of Authorities

[a] Implication of Account Stated Presents Issues of Triable Fact

In ***Truestone, Inc. v. Simi West Industrial Park II*** *(1984) 163 Cal. App. 3d 715, 209 Cal. Rptr. 757* , plaintiff brought an action for the common count of account stated, among other causes of action, to recover the cost of materials delivered and used in construction on defendant's real property. Plaintiff based its cause of action for account stated on, among other evidence, a letter from defendant to plaintiff in which defendant acknowledged an outstanding debt in a specific sum for materials supplied by plaintiff, but proposed to pay plaintiff a percentage of the sum, contingent on agreement by other creditors to accept reduced amounts in full satisfaction of debts owed. Without specifying its reasons, the trial court granted defendant's motion for summary judgment on all counts and dismissed the complaint. Plaintiff appealed.

The court of appeal affirmed summary judgment on a cause of action for unjust enrichment, but reversed with respect to the other causes of action, including the action for the common count of account stated. The court first noted that the motion was granted without any reasons, and that in the absence of a showing of prejudice or a ruling granting a motion to strike, plaintiff's tardily filed counter declarations were a part of the record and raised a triable issue of fact

concerning the existence of prior business transactions. Defendant argued that its letter was an offer to compromise, and thus was inadmissible as an admission of liability, even though it was an offer to settle a different lawsuit. The court held that the letter nonetheless may be admitted as an admission against interest, independent of the compromise offer. The letter declared no contingency as to the existence of the underlying debt or its amount. Assuming that defendant agreed to accept past and future materials deliveries on an open account, the entire series of transactions could be reflected in a single balance struck between the parties. Since an account stated may be implied from the circumstances, the letter presented a triable issue of fact based on the showing of an agreement (*163 Cal. App. 3d 715, 725-726)* .

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CHAPTER 43 COMMON COUNTS AND BILLS OF PARTICULARS
PART II. FORMS

4-43 California Points & Authorities § 43.52

§ 43.52 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c] by Defendant--Recovery on Common Count Permitted Even Though Based on Void or Illegal Contract

[1] FORM

[*Caption. See § 43.51.*]

SUMMARY JUDGMENT FOR DEFENDANT ON THE COMMON COUNT IS NOT PROPER EVEN THOUGH THE EXPRESS CONTRACT OF THE PARTIES IS _____ [VOID *and/or* ILLEGAL], BECAUSE _____ [PLAINTIFF IS NOT IN PARI DELICTO *and/or* THE SERVICES PERFORMED BY PLAINTIFF AND FOR WHICH PLAINTIFF SEEKS COMPENSATION WERE NOT ILLEGAL].

A. Rules Governing Summary Judgment Procedure. [*See § 43.51[1], Paragraph A.*]

[*EITHER*]

B. One Party's Consideration Is Not Intrinsically Illegal. The distinction must be made between an illegal contract and a perfectly legal promise, the consideration for which turns out to be impossible of performance, or unenforceable, or void. Although the law does not imply a promise to pay for services illegally rendered under a contract expressly prohibited by statute, a party may recover on quantum meruit for services rendered under that void contract if the services themselves are not intrinsically illegal (*Lawn v. Camino Heights, Inc. (1971)15 Cal. App. 3d 973, 981-983, 93 Cal. Rptr. 621* ; *Trumbo v. Bank of Berkeley (1947) 77 Cal. App. 2d 704, 709-710, 176 P.2d 376*).

[*AND/OR*]

C. Parties Not *in Pari Delicto.* If the particular illegal contract is not *malum in se* but only *malum prohibitum*, the general rule barring any recovery based on an illegal contract is subject to an exception recognized in favor of a party

who is not *in pari delicto* with the other party to the contract and who is the more innocent of the two. This exception applies when the illegality of the bargain is due to facts of which the party seeking recovery is justifiably ignorant, and the other party is not, and allows the comparatively more innocent party or one not *in pari delicto* to repudiate the illegal contract before it is executed and to reclaim any consideration paid under it (*Tiedje v. Aluminum Taper Milling Co. (1956) 46 Cal. 2d 450, 453-454, 296 P.2d 554* ; *Smith v. Bach (1920) 183 Cal. 259, 263-264, 191 P. 14*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted by a plaintiff in opposition to a defendant's motion for summary judgment in an action in which a common count seeks recovery of the value of the benefits conferred by plaintiff under an illegal or unenforceable contract. The papers opposing the motion must also include a statement of material facts that responds to the moving party's statement, as well as opposing declarations or other evidence [*see Code Civ. Proc. § 437c*].

This form may also be adapted for use in another procedural context, such as a trial or appellate brief.

In an appropriate case, the points and authorities set out in this form may be used to oppose a motion supported by the points and authorities set out in *§ 43.32*.

Counsel should also insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth the facts establishing either that his or her client is comparatively innocent or that the compensation furnished by his or her client is not illegal.

[b] Related Pleading and Practice Forms

For discussion and forms relating to summary judgment generally, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender). For discussion and forms regarding voidness and unenforceability of illegal contracts generally, see California Forms of Pleading and Practice, Ch. 127, *Consumer Contracts and Loans* ; Ch. 140, *Contracts* ; and Ch. 490, *Rescission and Restitution* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda relating to motions for summary judgment generally, see Ch. 221, *Summary Judgments* . For forms of memoranda relating to the illegality or unenforceability of contracts generally, see Ch. 50, *Contracts* . For forms of memoranda relating to the use of common counts for recovery of attorney's fees, see Ch. 25, *Attorney's Fees* .

[3] Discussion of Authorities

[a] One Party's Consideration Is Not Intrinsically Illegal

The individual defendants in ***Lawn v. Camino Heights, Inc.*** *(1971) 15 Cal. App. 3d 973, 93 Cal. Rptr. 621* , wanted to subdivide and sell their agricultural real estate. Plaintiff, who held real estate broker, general contractor, and underground construction subcontractor licenses, advised them on several aspects of the transaction and suggested that it be accomplished by transferring the property to a corporation. Plaintiff prepared the incorporation papers and informed the individual defendants that a permit would be required before the corporate defendant could issue shares. Plaintiff also drafted a contract by which the corporate defendant hired him as a consultant for the project. Plaintiff's compensation was to be $8,400 per year for two years, payable in the form of stock of the corporate defendant; and five residential lots were to be conveyed to plaintiff. Although the parties intended to obtain a permit for the issuance of shares, and although plaintiff advanced fees for appraisals and other costs associated with the permit application, at no

time material to the case did the corporation have a permit. Plaintiff never received any of the compensation called for by the consultancy agreement, and sued for breach of contract and on a common count for services rendered. Judgment on both causes of action was for defendant on the ground that the contract was void, illegal, and unenforceable. Plaintiff appealed.

The court of appeal reversed the judgment on the common count. The court first set forth the rule relating to severability of partially illegal contracts that a contract is severable if the court, consistent with the intent of the parties, can reasonably relate the illegal consideration on one side to some specified or determinable portion of the consideration on the other side. If any part of several considerations for a single object is unlawful, the entire contract is void under *Civ. Code § 1608*. In this case, the promise to convey the lots was not severable from the promise to convey stock and thus recovery for damages under the written contract was barred (*15 Cal. App. 3d 973, 980)* . However, the court said, distinction must be made between an illegal contract and a perfectly legal promise, the consideration for which turns out to be impossible of performance, or unenforceable, or void. Then, an implied contract to pay the reasonable value of the services arises (*15 Cal. App. 3d 973, 981)* . The court noted that the fact that plaintiff drafted the contract at issue did not mean he was *in pari delicto* and cited *Trumbo v. Bank of Berkeley (1947) 77 Cal. App. 2d 704, 709-710, 176 P.2d 376* (discussed *below*), for the proposition that although the law does not imply a promise to pay for services illegally rendered under a contract expressly prohibited by statute, a party may recover on quantum meruit for services rendered under a void contract if the services themselves are not intrinsically illegal. Here, there was nothing illegal or against public policy in the nature of the services plaintiff performed (*15 Cal. App. 3d 973, 982)* . Further, defendant corporation would be unjustly enriched at plaintiff's expense if plaintiff could not recover from it the reasonable value of his services (*15 Cal. App. 3d 973, 983)* .

Plaintiff in ***Trumbo v. Bank of Berkeley*** *(1947) 77 Cal. App. 2d 704, 176 P.2d 376* , performed pre-incorporation services for the corporate defendant at the request of the individual defendants. As compensation, plaintiff was to be a vice-president of the corporate defendant for life at a specified salary. Plaintiff performed extensive pre-incorporation services, but was not made a vice president of the corporate defendant. Plaintiff sued for breach of contract and on a common count for reasonable value of work, labor, and services rendered at the specific request of defendants. Judgment of nonsuit was entered in the contract cause of action and in favor of the corporate defendant on the common count. Plaintiff was awarded $5,000 on the common count against the individual defendants. They appealed.

The court of appeal affirmed. The court noted that a contract by a shareholder or director of an existing corporation to put or maintain another person in office, or any other contract by which the shareholder or director attempts to contract away his or her discretionary vote on the board is violative of public policy and void. Appellants contended that because an illegal contract was relied on, regardless of the form of the action in which it was presented, the court could not enforce it, but, under the doctrine of *pari delicto*, had to leave the parties a sit found them. The court said that contracts for preincorporation services are not necessarily void (*77 Cal. App. 2d 704, 709)* . Here, the judgment rested on perfectly legal preincorporation services. There was nothing illegal or against public policy in the nature of the services rendered by plaintiff, and it would be unjust and inequitable to allow the promoters to take the benefits of plaintiff's efforts, all of which were legal, and escape liability on the ground that the consideration they agreed to furnish was illegal. The law does not imply a promise to pay for services illegally rendered under a contract expressly prohibited by statute. But, if a party renders services that are not themselves intrinsically illegal, he or she may recover on quantum meruit for what the other party actually received even if an action on the contract could not be maintained (*77 Cal. App. 2d 704, 710)* .

[b] Parties Not in Pari Delicto

Tiedje v. Aluminum Taper Milling Co. *(1956) 46 Cal. 2d 450, 296 P.2d 554* , was an action for declaratory relief to void an illegal sale of stock by restoring possession of stock, and to quiet title. Plaintiff owned stock in defendant and agreed to sell it back to defendant for money and a car. After plaintiff had delivered the stock to the defendant, plaintiff learned for the first time that the purchase was illegal in that payment of the purchase price would be from capital assets

and stated capital, as opposed to earned capital. Judgment was entered for defendant after sustaining of demurrers; and plaintiff appealed.

The Supreme Court reversed. The Court first set forth the general rule that a party to an illegal contract can neither recover damages for its breach, nor by rescinding recover any performance that he or she has rendered, or its value (*46 Cal. 2d 450, 453)* . A contract made contrary to public policy or against the express mandate of a statute may not serve as the foundation of any action, either in law or in equity (*46 Cal. 2d 450, 453-454)* . The parties will be left as they are found. These principles are not applied to secure justice between the parties, but from regard for a higher interest--that of the public whose welfare demands that certain transactions be discouraged (*46 Cal. 2d 450, 454)* . However, the Court noted, there are recognized exceptions to these rules in favor of a party who is not *in pari delicto* with the other party to the contract and who is the more innocent of the two. One exception applies when the illegality of the bargain is due to facts of which the party who is seeking recovery is justifiably ignorant and the other party is not. Whether the parties are equally guilty is a question of fact (*46 Cal. 2d 450, 454-455)* . Although plaintiff was chargeable with knowledge of the law prohibiting the transaction, the fact that plaintiff pleaded lack of knowledge of any facts that would bring that law into operation presented an issue of fact. Thus, sustaining the demurrers was improper (*46 Cal. 2d 450, 454-456)* .

The Supreme Court in ***Smith v. Bach*** *(1920) 183 Cal. 259, 191 P. 14* , reversed judgment for defendant in an action in assumpsit for money had and received. The money sought to be recovered had been paid under a void contract for the purchase and sale of land. The contract was void because it was for the sale of land by reference to an unrecorded map (*183 Cal. 259, 262-263*). The Court said that without denying the rule that an illegal contract cannot be enforced whether it is *malum in se* or *malum prohibitum*, authorities recognize that all the consequences that attend a contract contrary to public morals do not attend one that is merely *malum prohibitum.* If the particular contract is only *malum prohibitum*, the court will take notice of the circumstances of the contract and will give relief if justice and equity require restoration of money received by either party under the contract. Equitable relief may be given to the party who is not *in pari delicto* and for whose benefit the particular prohibition was designed (*183 Cal. 259, 263)* . The weight of authority allows the comparatively more innocent party or one not *in pari delicto* to repudiate an illegal contract before it is executed and to reclaim any consideration paid under the illegal contract. In this situation it is the duty of the court in furtherance of justice to permit recovery of money paid (*183 Cal. 259, 263-264)* .

[4] Additional Authorities

[a] One Party's Consideration Is Not Intrinsically Illegal

In *Huskinson & Brown, LLP v. Wolf (2004) 32 Cal. 4th 453, 9 Cal. Rptr. 3d 693, 84 P.3d 379* , a potential client approached plaintiff law firm regarding a medical malpractice claim. Plaintiff referred the matter to defendant law firm, but also paid a medical expert $800 and performed 20 hours of legal services on the case. In exchange for the referral, defendant orally agreed to pay plaintiff 25 percent of any attorney fees recovered. Defendant won a judgment in the client's favor but failed to pay plaintiff the referral fee. Plaintiff sued for breach of contract, unjust enrichment, and recovery in quantum meruit. The trial court denied recovery on the breach of contract cause of action, finding the fee-sharing agreement unenforceable because it was not disclosed to the client and her written consent was not obtained. However, it rendered an award on the unjust enrichment cause of action, with an alternative award in quantum meruit. The court of appeal reversed. The California Supreme Court granted plaintiff's petition for review, and reversed the judgment of the court of appeal. It held that even though *Cal. Rules Prof. Conduct, Rule 2-200* precluded plaintiff from recovering on its fee-sharing agreement with defendant, plaintiff nonetheless could recover from defendants the reasonable value of the legal services it rendered on the client's behalf (*32 Cal. 4th 453, 464)* .

In *Selten v. Hyon (2007) 152 Cal. App. 4th 463, 60 Cal. Rptr. 3d 896* , the plaintiff's action for breach of contract was unavailing because it was based on a contract that was partly illegal and consequently wholly unenforceable (in violation of *Bus. & Prof. Code § 6155*, the plaintiff was operating as an unregistered attorney referral service).

However, the plaintiff could recover quantum meruit for lawful services (that is, services other than attorney referrals) performed pursuant to that contract. The court of appeal noted that the plaintiff's recovery could not exceed the amount that the plaintiff would have recovered under the contract if it had been enforceable, and since the contract entitled the plaintiff to a fee only if the referred lawyer won the other party's case, the plaintiff's quantum meruit recovery could be paid only from whatever judgment or settlement proceeds that lawyer obtained for the other party (*152 Cal. App. 4th 463, 471-472)* .

The court of appeal in *Beley v. Municipal Court (1979) 100 Cal. App. 3d 5, 160 Cal. Rptr. 508* , affirmed the denial of a writ to compel summary judgment in defendants' favor. The illegality in the contract for remodeling and home improvements was its failure to include the notice of defendants' statutory right of cancellation within three days of the execution of the contract [*Civ. Code § 1689.7*]. Defendants canceled the contract after plaintiff had performed about $12,000 worth of work, towards which they had paid almost $9,000. *Civ. Code § 1689.11(c)* prohibits a contractor from recovering any compensation for work done prior to cancellation and requires the contractor to restore the property to substantially the same condition it was in at the time the services were rendered. Based on comments in the legislative history, the court interpreted *Civ. Code § 1689.11(c)* to apply to work done or materials furnished within the 3-day cancellation period, rather than to this situation (*100 Cal. App. 3d 5, 9-10)* . The court said this situation was akin to the one in *Trumbo v. Bank of Berkeley (1947) 77 Cal. App. 2d 704, 176 P.2d 376* . Here also, there was nothing illegal or immoral about the contract itself or the nature of the services and material to be furnished under it. Thus, even though plaintiff could not recover on the express contract, recovery on quantum meruit for the reasonable value of the improvements the defendants received was proper (*100 Cal. App. 3d 5, 8)* .

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4-43 California Points & Authorities § 43.53

§ 43.53 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] by Plaintiff--Agreed Price in Unenforceable Contract as Evidence of Reasonable Value of Services Rendered

[1] FORM

[*Caption. See § 43.30.*]

SUMMARY JUDGMENT FOR PLAINTIFF MAY BE AWARDED USING THE AGREED PRICE IN THE UNENFORCEABLE CONTRACT OF THE PARTIES AS EVIDENCE OF THE REASONABLE VALUE OF THE SERVICES RENDERED BY PLAINTIFF.

A. Summary Judgment. [*See § 43.30[1], Paragraph A.*]

B. Agreed Price Is Evidence of Reasonable Value. An agreed price set forth in an unenforceable or invalid contract is evidence, or a criterion, of the reasonable value of services rendered (*George v. Double-D Foods, Inc. (1984) 155 Cal. App. 3d 36, 42, 44, 201 Cal. Rptr. 870* ; *Ferrier v. Commercial Steel Corp. (1956) 142 Cal. App. 2d 424, 427, 298 P.2d 555*).

[*Optional*] **C. Oral Stipulation as Admission.** The oral stipulation of the parties regarding compensation to be paid for services rendered is in the nature of an admission by them of the reasonable value of those services (*George v. Double-D Foods, Inc. (1984) 155 Cal. App. 3d 36, 42, 44, 201 Cal. Rptr. 870* ; *Offeman v. Robertson-Cole Studios (1926) 80 Cal. App. 1, 13, 251 P. 830*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted by a plaintiff in support of his or her motion for summary judgment in an action on a common count that seeks recovery of the value of the services performed by plaintiff under an invalid or unenforceable contract. This form is for use when the only factual issue in dispute is the reasonable value of plaintiff's

services, and there is evidence of an agreed price, or formula, in the unenforceable or invalid contract. A motion for summary judgment must also be supported by statement of material facts that defendant contends are undisputed as well as by supporting declarations or other evidence [*see Code Civ. Proc. § 437c*].

This form may also be adapted for use in another procedural context, such as in support of a motion for a new trial, or in a trial or appellate brief.

Counsel should also insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth the facts constituting the particular agreement regarding price.

[b] Related Pleading and Practice Forms

For discussion and forms relating to summary judgment generally, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[c] Related Points and Authorities

For forms for memoranda relating to motions for summary judgment generally, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Agreed Price Is Evidence of Reasonable Value

George v. Double-D Foods, Inc. *(1984) 155 Cal. App. 3d 36, 201 Cal. Rptr. 870* , was an action by an administratrix and widow in quantum meruit to recover the unpaid balance of the reasonable value of decedent's services as an executive employee of defendant for a period of 28 months. According to plaintiff, an oral agreement between decedent and defendant called for decedent to be paid a salary, regular bonuses of 10 percent of defendant's yearly profits in excess of $200,000, and for decedent to have an option to purchase defendant's stock at its book value at the time of decedent's employment. Plaintiff was awarded $96,000; and defendant appealed.

The court of appealed reversed. Defendant contended that the trial court erred in admitting evidence regarding the bonus and the option. The court of appeal first cited *Foreman & Clark Corp. v. Fallon (1971) 3 Cal. 3d 875, 886, 92 Cal. Rptr. 162, 479 P.2d 362* (discussed in *§ 43.53[4][a]*) and other cases for the proposition that an agreed price set forth in an unenforceable or invalid contract is some evidence, or a criterion, of the reasonable value of services rendered. In other words, an oral stipulation of the parties regarding compensation to be paid for services rendered is in the nature of an admission by them of the reasonable value of those services. To qualify as an "agreed price," a promise that does not state a sum of money must assign a dollar value to property with which the performing party is to be compensated or provide a formula by which the ultimate agreed-on sum of money is readily ascertainable (*155 Cal. App. 3d 36, 42)* . The promise regarding the option failed to qualify as an agreed price in two regards. First, it was not a promise of payment, or compensation, but of an opportunity to let decedent purchase shares as an added inducement to accept employment with defendant. Second, and more important, it shed no light on the value of plaintiff's services. The promise provides indicia of the value of plaintiff's services only on the introduction of extrinsic evidence placing a monetary value on the shares in excess of their assigned book value (*155 Cal. App. 3d 36, 42-43*). Admission of the evidence regarding the option was prejudicial error (*155 Cal. App. 3d 36, 43, 44*).

Concerning the bonus, however, the court of appeal said that the promise for bonuses contained a precise formula by which the amount of compensation was readily ascertainable by simple mathematical calculation (*155 Cal. App. 3d 36, 43)* . Thus, the bonus evidence was proper (*155 Cal. App. 3d 36, 43-44)* .

Defendant also contended that there were errors in the instructions that the terms of an oral or written agreement constitute an admission or out-of-court declaration by a party to the action and that understandings and agreements

between the party performing services and the party receiving services could be considered evidence of the reasonable value of the performing party's services. The court held that those instructions were both proper (*155 Cal. App. 3d 36, 44)* .

Ferrier v. Commercial Steel Corp. *(1956) 142 Cal. App. 2d 424, 298 P.2d 555* , was an action for the balance owed under a written contract and for the reasonable value of the work performed beyond the scope of the original contract. The contract was for laundering, extracting, drying, and bundling cotton bags that had been damaged in a flood. The contract rate was .029 cents per pound. After plaintiffs started performing under the contract, defendants asked them also to remove ink from any of the sacks that had ink imprints and to iron the sacks. The judgment for plaintiff was based on a finding that the reasonable value of the imprint removal and ironing was ten percent of the original contract price. The finding was based largely on the testimony of a witness who had been in the industrial laundry business twelve years who said that the prevailing rate for washing, extracting, drying, and bundling was between three and four or four-and-one-half cents per pound; that an additional three percent should be added for removing the ink imprints; and that an additional seven percent should be added for ironing. Plaintiffs appealed.

The court of appeal affirmed. Plaintiffs argued that the amount allowed for the extra work was not reasonable because their bid, and thus the contract rate, had been too low. The court disagreed, pointing out that the contract rate was only one mil per pound less than the witness' minimum figure and only amounted to a $48 difference in the amount payable under the entire basic contract (*142 Cal. App. 2d 424, 426)* . Because the contract price was not too low, that figure could properly be used as a base for calculating the reasonable value for the extra work (*142 Cal. App. 2d 424, 426-427)* . The court cited numerous authorities and said it was well settled that the price agreed on by the parties for work to be done may be used as a criterion in determining reasonable value of services performed. The contract price of work to be performed furnishes some evidence of its reasonable value. Thus, there was ample basis to support the trial court's finding of the reasonable value of the extra work (*142 Cal. App. 2d 424, 427)* .

[b] Oral Stipulation as Admission

George v. Double-D Foods, Inc. *(1984) 155 Cal. App. 3d 36, 201 Cal. Rptr. 870* , is discussed in *§ 43.53[3][a]*.

Plaintiff in ***Offeman v. Robertson-Cole Studios*** *(1926) 80 Cal. App. 1, 251 P. 830* , sold household and business interests in New York and moved to California in reliance, it is alleged, on an oral agreement which provided that plaintiff should be defendant's general manager for three years at a salary of $500 per week, with defendant providing housing and paying other of plaintiff's expenses. Plaintiff relocated and worked for defendant, which paid some expenses, but payments never amounted to $500 per week. Defendant discharged plaintiff after a year. Judgment was for plaintiff. Defendant appealed.

The court of appeal reversed, unless plaintiff would accept remittitur to avoid double recovery. One of the contentions on appeal was that it was error to admit proof of the terms of the oral agreement as evidence of the reasonable value of plaintiff's services. The court said that even though an oral contract may be unenforceable, the oral stipulations of the parties as to the compensation to be paid for services rendered under it are in the nature of admissions by them as to the reasonable value of those services, and while not conclusive, are admissible in evidence. In this case, the terms of the oral agreement constitute the only evidence on the question of the value of plaintiff's services (*80 Cal. App. 1, 13)* .

[4] Additional Authorities

[a] Agreed Price Is Evidence of Reasonable Value

In *Watson v. Wood Dimension, Inc. (1989) 209 Cal. App. 3d 1359, 257 Cal. Rptr. 816* , the plaintiff had orally agreed with defendant to use plaintiff's friendship and influence with an officer of one of defendant's former customers to get the former customer again to place orders with defendant. That customer at one time had accounted for 30 to 50 percent

of defendant's business. The parties agreed that plaintiff would be paid three percent of orders received from the customer. The agreement was oral and made no provision for termination. About a year after the customer returned to defendant, defendant unilaterally terminated the agreement. The customer continued to place orders with defendant, but the officer died about eight months after the unilateral termination. The court of appeal said that plaintiff was entitled to post-termination commissions for a reasonable period of time based on quantum meruit (*209 Cal. App. 3d 1359, 1364)* . The reasonable period of time extended until a few weeks before the officer's death, because after that time, plaintiff would no longer be able to influence his business decisions (*209 Cal. App. 3d 1359, 1365)* . The commissions awarded were calculated at three percent of orders. The court of appeal cited *Ferrier v. Commercial Steel Corp. (1956) 142 Cal. App. 2d 424, 427* , as authority for the proposition that the court may consider the price agreed on by the parties as a criterion in ascertaining the reasonable value of services performed (*209 Cal. App. 3d 1359, 1365)* . The court of appeal went on to say that the reasonable value was not based on the value of plaintiff taking the officer golfing, but rather on the value of the benefit received by defendant (*209 Cal. App. 3d 1359, 1365)* .

The court of appeal in *LuMetta v. U.S. Robotics (9th Cir. 1987) 824 F.2d 768* , a diversity case applying California law, affirmed a judgment for plaintiff on an implied contract. Plaintiff was a nonexclusive reseller of defendant's products and also had an oral contract with defendant to find computer manufacturers interested in purchasing modems manufactured by defendant. Plaintiff arranged for one computer manufacturer to purchase $14.5 million of defendant's modems. The only issue in dispute was the rate to be used to calculate plaintiff's commission. The jury apparently considered conflicting testimony regarding discussions of commission rates, the rates paid under the reseller's contract, and the value of the benefit conferred on defendant. The court of appeal cited *George v. Double-D Foods, Inc. (1984) 155 Cal. App. 3d 36, 42, 201 Cal. Rptr. 870* , for the proposition that the agreed terms of an unenforceable contract are evidence of the reasonable value of the services rendered if the agreed price either assigns a dollar value to the promised performance or provides a formula by which an ultimate sum is readily ascertainable (*824 F.2d 768, 770*). While this evidence could not establish an exact monetary value to the agreement, it substantially supports the finding of a formula by which the value could be ascertained (*824 F.2d 768, 770)* .

The Supreme Court in *Foreman & Clark Corp. v. Fallon (1971) 3 Cal. 3d 875, 92 Cal. Rptr. 162, 479 P.2d 362* , affirmed a judgment for plaintiff lessor for damages for breach of a commercial lease arising from defendant's failure to deliver possession. The measure of damages for breach of a lease is the difference between the agreed rent and the rental value of the premises during the term of the lease (*3 Cal. 3d 875, 884*). Plaintiff argued that evidence of the agreed rent should not have been admitted because if that were done in every case, there would never be any damages awarded for the lessor's breach. The Court disagreed, saying there was other evidence of value before the court but that the agreed rental is still evidence of the rental value of the premises (*3 Cal. 3d 875, 886)* .

The court of appeal in *Burgermeister v. Wells Fargo Bank Etc. Co. (1961) 191 Cal. App. 2d 624, 13 Cal. Rptr. 123* , affirmed a $10,000 judgment for plaintiff in an action in quantum meruit for the value of nursing services rendered to decedent over many years. The action was based on a promise by decedent to bequeath plaintiff $10,000 in return for the nursing care. The court of appeal pointed out that plaintiff had a choice of two theories of action: specific performance or quantum meruit (*191 Cal. App. 2d 624, 627*). Having proceeded in quantum meruit, the vital elements required to be proved were the performance of the services, an oral promise to compensate by will, the failure of the decedent to perform, and the value of the services (*191 Cal. App. 2d 624, 627-628)* . Regarding the evidence establishing the value of the services, the court said the general rule is that when the services rendered are sufficiently shown, and the services are of a class the value of which is common knowledge, the trier of fact may fix the reasonable value of those services (*191 Cal. App. 2d 624, 630)* . Here, however, the evidence of the agreement between plaintiff and decedent established the amount agreed to be paid for plaintiff's services, and that alone was sufficient evidence on which the court can base its finding on the reasonable value (*191 Cal. App. 2d 624, 631)* .

The court of appeal in *Parker v. Maier Brewing Co. (1960) 180 Cal. App. 2d 630, 4 Cal. Rptr. 825* , modified regarding interest but otherwise affirmed a judgment for plaintiffs for the value of architectural and engineering services rendered to, and expenses incurred on behalf of, defendant. The contract between the parties provided that plaintiffs would be

paid six percent of the construction costs of all work called for by the plans and specifications prepared by plaintiffs. Defendant refused to follow plaintiffs' plans and specification, in accordance with which the low bid for construction was $65,980. The amount of the judgment was exactly equal to six percent of that bid plus the amount of plaintiffs' expenses. Plaintiffs testified that the reasonable value of their services would amounted to almost $1,000 more than the sum derived from the six-percent formula. Although the unaccepted bid patently is not the actual cost of construction, the award was not in error. A written contract providing for an agreed price is admissible in evidence and may be used as a criterion in establishing the reasonable value of the services rendered. When that evidence is admitted, it serves only as an aid to the court in fixing the amount recoverable as damages (*180 Cal. App. 2d 630, 635*).

California Points & Authorities

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Chapter 44 RESERVED

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California Points & Authorities

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Volume 4 Chapters 40-49 CLAIM & DELIVERY---to---CONTINUANCE
CHAPTER 45 CONSOLIDATION, SEVERANCE, AND COORDINATION OF ACTIONS

4-45 California Points & Authorities 45.syn

§ 45.syn Synopsis to Chapter 45: CONSOLIDATION, SEVERANCE, AND COORDINATION OF ACTIONS

§ 45.01 Scope of Chapter

§ 45.02 Governing Statutes

§ 45.03 Scope of Consolidation and Severance

[1] In General

[2] Mandate to Compel Consolidation or Severance

§ 45.04 Coordination Procedure

[1] In General

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§ 45.05 Peremptory Challenge of Assigned Judge

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§ 45.07 Related Pleadings and Practice Forms

§ 45.08 Related Points and Authorities

§§ 45.09-45.19 [Reserved]

§ 45.20 Supporting Motion to Consolidate [Code Civ. Proc. § 1048(a)]--For Trial of Related Issues Only--General Form

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Consolidation for Trial of Related Issues Only

[b] Separate Identities of Actions

[c] Evidence Applicable so Far as Relevant

[d] Consolidation of Loss of Consortium and Negligence Actions

[e] Consolidation of Franchise Fraud Actions

[4] Additional Authorities

[a] Consolidation for Trial of Related Issues Only

[b] Evidence Applicable so Far as Relevant

§ 45.21 Supporting Motion to Consolidate [Code Civ. Proc. § 1048(a)]--Actions for All Purposes--General Form

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Consolidation for All Purposes

[b] Complete Consolidation Where No Doubt of Applicability of Findings

[c] Consolidated Actions Normally Determined by Single Judgment

[4] Additional Authorities

[a] Consolidation for All Purposes

[i] In Actions to Recover Proceeds of Trust Account

[ii] In Conservatorship Proceedings

[iii] In Actions for Breach of Contract

§ 45.22 Supporting Motion to Consolidate [Code Civ. Proc. § 1048(a)]--Consolidation Proper Although Parties Not Identical

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Consolidation Proper Although Parties Not Identical

[4] Additional Authorities

[a] Consolidation Proper Although Parties Not Identical

§ 45.23 Supporting Motion to Consolidate [Code Civ. Proc. § 1048(a)]--Consolidation Proper if Issues Essentially the Same and Duplication of Time and Effort Is Avoided

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Consolidation Where Issues Essentially the Same

[b] Consolidation to Avoid Duplication of Time and Effort

[4] Additional Authorities

[a] Consolidation Where Issues Essentially the Same

[b] Consolidation to Avoid Duplication of Time and Effort

§ 45.24 Supporting Motion to Consolidate [Code Civ. Proc. § 377.62(b)]--Consolidation of Wrongful Death and Personal Injury Actions Arising out of Same Negligent Act Is Required on Motion of Any Interested Party

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Consolidation of Wrongful Death and Personal Injury Actions

§ 45.25 Opposing Motion to Consolidate [Code Civ. Proc. § 1048(a)]--Consolidation Improper in Tort Action if

Effect Would Be to Lessen Wrongdoer's Burden

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Consolidation Improper If Wrongdoer's Burden Lessened

§ 45.26 Opposing Motion to Consolidate [Code Civ. Proc. § 1048(a)]--Consolidation Improper if It Would Confuse Jury by Forcing Party to Assume Inconsistent Positions

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Consolidation Improper if Party Forced to Assume Inconsistent Positions

§ 45.27 Opposing Motion to Consolidate [Code Civ. Proc. § 1048(a)]--Consolidation Improper if It Forces Disclosure of Insurance in Tort Claim

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Consolidation Improper if It Discloses Insurance

§ 45.28 Supporting Motion to Sever [Code Civ. Proc. § 1048(b)]--Severance Proper to Avoid Prejudice to Parties

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Severance to Avoid Prejudice

[b] Severance When Actual Damage Claim Joined With Punitive Claim

§ 45.29 Supporting Motion to Sever [Code Civ. Proc. § 1048(b)]--Severance Proper to Avoid Inconvenience

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Severance to Avoid Inconvenience Resulting From Joinder

§ 45.30 Supporting Motion to Sever [Code Civ. Proc. § 1048(b)]--To Promote Expediency

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Severance to Promote Expediency

§ 45.31 Supporting Motion to Sever [Code Civ. Proc. § 1048(b)]--Severance Proper in Tort Action Where Defendant Has Filed Cross Complaint for Partial Equitable Indemnity Against Third Parties

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Right to Sever Cross Complaint for Partial Equitable Indemnity

§ 45.32 Opposing Motion to Sever [Code Civ. Proc. § 1048(b)]--Severance Improper in Class Action Prior to Determination of Suitability as Class

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Untimely Severance in Class Actions

§ 45.33 Opposing Motion to Sever [Code Civ. Proc. § 1048(b)]--Severance Improper if Tort Liability of One Defendant Dependent on Codefendant

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Tort Liability Dependent on Codefendant

[4] Additional Authorities

[a] Tort Liability Dependent on Codefendant

§§ 45.34-45.49 [Reserved]

§ 45.50 Supporting Petition for Coordination [Code Civ. Proc. § 404; Cal. Rules of Ct., Rules 3.520(b), 3.521(a)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Service of Memorandum

[c] Related Pleading and Practice Forms

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Benefits of Coordination Outweigh Potential Problems

[b] Balancing of Factors

[4] Additional Authorities

[a] Complex Action Defined

[b] Balancing of Factors

§ 45.51 Supporting Motion for Order Staying Proceedings in Action Included in Coordination Proceeding [Code Civ. Proc. § 404.5; Cal. Rules of Ct., Rules 3.515, 3.520(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Service of Memorandum

[c] Related Pleading and Practice Forms

§ 45.52 Opposing Petition for Coordination [Cal. Rules of Ct.,Rule 3.525]--Trial of Action Imminent [Cal. Rules of Ct., Rule 3.521(d)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Service of Memorandum

[c] Related Pleading and Practice Forms

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CHAPTER 45 CONSOLIDATION, SEVERANCE, AND COORDINATION OF ACTIONS
PART I. INTRODUCTION

4-45 California Points & Authorities § 45.01

§ 45.01 Scope of Chapter

This part contains memoranda for use in supporting [*see §§ 45.20 -45.24*] and opposing [*see §§ 45.25 -45.27*] motions to consolidate actions pending before the same court. It also contains memoranda for use in supporting [*see §§ 45.28 -45.31*] and opposing [*see §§ 45.32*, *45.33*] motions to sever causes of action or issues for separate trial.

For discussion relating to the consolidation of actions pending in different courts in the same county, see Part II, Introduction.

This part contains memoranda for use in supporting [*see § 45.50*] and opposing [*see § 45.52*] a petition for coordination of actions. It also includes a memorandum for use in supporting a motion for an order staying the proceedings in an action included in a coordination proceeding [*see § 45.51*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConsolidation of ActionsCivil ProcedurePretrial MattersSeparate TrialsCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral Overview

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4-45 California Points & Authorities § 45.02

§ 45.02 Governing Statutes

The consolidation of civil actions pending before the same court is governed generally by *Code Civ. Proc. § 1048(a)*. Procedure on a motion for consolidation is governed by *Cal. Rules of Ct., Rule 3.350*. The consolidation of particular actions is governed by *Code Civ. Proc. § 377.62(b)* (wrongful death and survival actions brought by a decedent's personal representative), *Civ. Code §§ 3149, 3175, 3214* (mechanics' lien proceedings), and *Lab. Code § 3853* (actions by an employer and employee against a third party).

The severance of causes of action or issues for separate trial is governed by *Code Civ. Proc. § 1048* and *Cal Rules of Ct, Rule 3.350*.

The coordination of civil actions pending in different courts is governed by *Code Civ. Proc. §§ 404-404.9* and *Cal. Rules of Ct., Rule 3.500 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConsolidation of ActionsCivil ProcedurePretrial MattersSeparate TrialsReal Property LawNonmortgage LiensMechanics' LiensTortsWrongful Death & Survival ActionsJoinder Requirements

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4-45 California Points & Authorities § 45.03

§ 45.03 Scope of Consolidation and Severance

[1] In General

Both consolidation and severance are discretionary, and a court's order to consolidate or sever will not be reviewed except on a clear showing of abuse of discretion [*see Fisher v. Nash Bldg. Co. (1952) 113 Cal. App. 2d 397, 402, 248 P.2d 466* ; *Mellone v. Lewis (1965) 233 Cal. App. 2d 4, 7, 43 Cal. Rptr. 412]* . The underlying policies of judicial economy and expediency support the apparent tendency of the courts to grant consolidation whenever possible. However, expedition, economy, and avoidance of prejudice are specifically set forth in the statutory language governing severance and, thus, severance and consolidationshould be viewed as counterbalances to each other and to the increasing liberalization in joinder of parties and causes of action [*see Landau v. Salam (1971) 4 Cal. 3d 901, 908, 95 Cal. Rptr. 46, 484 P.2d 1390]* . A trial court is entitled to change its mind before judgment and may vacate a prior order for consolidation and order a severance [*Omaha Indemnity Co. v. Superior Court (1989) 209 Cal. App. 3d 1266, 1274, 258 Cal. Rptr. 66]* . Since the basic underlying policies of consolidation and severance are complementary, counsel may, where appropriate, utilize certain points in motions opposing consolidation to support severance and conversely use points which oppose severance to support motions to consolidate.

[2] Mandate to Compel Consolidation or Severance

A petition for writ of mandate is the appropriate remedy to review a trial court's refusal to consolidate separate actions or sever an action when the petitioner seeks to compel either [*see Realty Mfg. Co. v. Superior Court (1913) 165 Cal. 543, 547, 132 P. 1048* ; *see also State Farm Mut. Auto. Ins. Co. v. Superior Court (1956) 47 Cal. 2d 428, 433, 304 P.2d 13]* . However, writ relief would be improper if the trial court denies a motion for severance without prejudice to making the motion at a later time [*Omaha Indemnity Co. v. Superior Court (1989) 209 Cal. App. 3d 1266, 1274, 258 Cal. Rptr. 66]* . Where mandate is sought, the forms of memoranda in this chapter may be modified to support the writ.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedurePretrial MattersConsolidation of ActionsCivil ProcedurePretrial MattersSeparate TrialsCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil

ProcedureAppealsStandards of ReviewAbuse of Discretion

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4-45 California Points & Authorities § 45.04

§ 45.04 Coordination Procedure

[1] In General

Civil actions pending in different courts may be coordinated when they share a common question of law or fact and when coordination is deemed to be appropriate after considering specified standards [*see Code Civ. Proc. § 404*]. These standards are set out in *Code Civ. Proc. § 404.1*.

Coordination may be initiated by submitting a petition to the Chair of the Judicial Council. The petition may be submitted by the presiding judge of one the of courts, by all the parties plaintiff and defendant in any such action, or after obtaining permission from the presiding judge, by any party to one of the actions [*Code Civ. Proc. § 404*; *see Cal. Rules of Ct., Rule 3.521(a)*]. A petition for coordination must be supported by a declaration stating facts showing that the actions are complex, as defined by the Judicial Council, and meet the standards stated in *Code Civ. Proc. § 404.1* [*Code Civ. Proc. § 404*] and by points and authorities [*Cal. Rules of Ct., Rule 3.521(a)*; *see § 45.50*] *Cal. Rules of Ct., Rule 3.502* directs the court to consider *Cal. Rules of Ct., Rule 3.400 et seq.* in determining whether a case is complex under *Code Civ. Proc. §§ 403* and *404*.

On receipt of a petition for coordination, the Chair may assign a judge to determine whether the actions are complex, and if so, whether coordination is appropriate [*see Code Civ. Proc. § 404*; *Cal. Rules of Ct., Rules 3.521(a), 3.524*]. The assigned judge may stay the proceedings of any action being considered for, or affecting an action being considered for, coordination pending his or her determination, on the motion of a party submitted either with the petition for coordination or at any subsequent time prior to the determination [*Code Civ. Proc. § 404.5*; *Cal. Rules of Ct., Rule 3.515*]. A motion for stay must also be supported by points and authorities [*Cal. Rules of Ct., Rule 3.515(a)*; *see § 45.51*].

Other parties may submit a response in support of the petition for coordination [*Cal. Rules of Ct., Rule 3.526*]. Alternatively, they may submit opposition to the petition, consisting of a memorandum and declarations [*Cal. Rules of Ct., Rule 3.525*; *see § 45.52*].

The matter is then determined after a hearing on the petition by the assigned judge [*see Cal. Rules of Ct., Rules*

3.527-3.529]. If the assigned judge grants coordination, similar proceedings may be initiated subsequently before the coordination trial judge to determine whether another action should be added to the coordinated actions [*see Code Civ. Proc. § 404.4*; *Cal. Rules of Ct., Rule 3.544*; *see also Cal. Rules of Ct., Rules 3.542* (subsequent remand of action or claim by coordination trial judge), *3.543* (transfer of action or claim by coordination trial judge)].

[2] Review by Writ of Mandate

Any party, within 20 days after service of notice of entry of an order made in a coordination proceeding under *Code Civ. Proc. §§ 404-404.9*, may petition the appropriate reviewing court for a writ of mandate for review of the order [*Code Civ. Proc. § 404.6*]. The superior court may, for good cause, and prior to the expiration of the initial 20-day period, extend the time for one additional period not to exceed 10 days [*Code Civ. Proc. § 404.6*]. If the actions sought to be coordinated are within the jurisdiction of more than one reviewing court, the judge assigned to determine a petition for coordination selects the reviewing court having appellate jurisdiction [*Code Civ. Proc. § 404.2*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamus

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4-45 California Points & Authorities § 45.05

§ 45.05 Peremptory Challenge of Assigned Judge

Any motion or affidavit of prejudice, pursuant to *Code Civ. Proc. § 170.6* (providing for the peremptory disqualification of judges on the ground of prejudice), regarding an assigned judge must be submitted in writing to the assigned judge within 20 days after service of the order assigning that judge to the coordination proceeding. All plaintiffs or similar parties in the included or coordinated actions constitute a side, and all defendants or similar parties in the actions constitute a side for the purposes of applying *Code Civ. Proc. § 170.6* [*Cal. Rules of Ct., Rule 3.516*]. The 20-day period is extended as provided in *Code Civ. Proc. § 1013* when the Judicial Council's order of assignment is served by mail [*Citicorp North America, Inc. v. Superior Court (1989) 213 Cal. App. 3d563, 566-571, 261 Cal. Rptr. 668]* . For a memorandum for use in proceedings to disqualify a coordination judge under *Code Civ. Proc. § 170.6*, see Ch. 130, *Judges* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral Overview

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4-45 California Points & Authorities § 45.06

§ 45.06 Page Limits on Points and Authorities

Generally, a supporting or opposing memorandum must not exceed 15 pages in length, or, in the case of a motion for summary judgment or summary adjudication, 20 pages in length. A reply or closing memorandum may not exceed 10 pages in length [*see Cal. Rules of Ct., Rule 3.1113(d)*]. The page limit does not include exhibits, declarations, attachments, the table of contents, the table of authorities, or the proof of service [*Cal. Rules of Ct., Rule 3.1113(d)*]. Any party desiring to file a longer memorandum must obtain leave of court [*see Cal. Rules of Ct., Rule 3.1113(e)*]. For further discussion of the page limitations under *Cal. Rules of Ct., Rule 3.1113*, and of other basic format requirements of memoranda, see *Chapter 1, Writing Legal Memoranda and Briefs, § 1.05*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureSummary JudgmentOppositionMemoranda in OppositionCivil ProcedureSummary JudgmentSupporting MaterialsMemoranda of Law

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4-45 California Points & Authorities § 45.07

§ 45.07 Related Pleadings and Practice Forms

For a discussion and forms of notices of motion and orders to consolidate and sever actions, see Ch. 125, *Consolidation, Severance, and Coordination of Actions* in California Forms of Pleading and Practice (Matthew Bender).

For discussion and forms for use in particular cases where consolidation or severance is appropriate, see in that set the following chapter:

- Ch. 3, *Abatement of Actions*.
- Ch. 395, *Parties*.
- Ch. 420, *Prayers*.
- Ch. 551, *Trial*.

For a discussion and forms of notices of motion, declarations, orders, and petitions relating to coordination proceedings, see *California Forms of Pleading and Practice, Ch. 125, Consolidation, Severance, and Coordination of Actions, § 125.10 et seq.* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityAbatement on Death of PartyCivil ProcedureParties General OverviewCivil ProcedurePretrial MattersConsolidation of ActionsCivil ProcedurePretrial MattersSeparate TrialsCivil ProcedureTrialsGeneral Overview

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4-45 California Points & Authorities § 45.08

§ 45.08 Related Points and Authorities

For related memoranda which may be useful in particular cases in support of or in opposition to consolidation and severance, see in this set:

- Ch. 10, *Abatement and Survival of Actions*.
- Ch. 124, *Intervention*.
- Ch. 152, *Mechanics' Liens*.
- Ch. 168, *Parties*.
- Ch. 220, *Subrogation*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityAbatement on Death of PartyCivil ProceduresPartiesInterventionGeneral OverviewReal Property LawNonmortgage LiensMechanics' LiensTortsProcedureCommencement & ProsecutionSurvivalGeneral Overview

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4-45 California Points & Authorities §§ 45.09-45.19

[Reserved]

§§ 45.09[Reserved]

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PART II. FORMS
A. CONSOLIDATION AND SEVERANCE OF ACTIONS

4-45 California Points & Authorities § 45.20

§ 45.20 Supporting Motion to Consolidate [Code Civ. Proc. § 1048(a)]--For Trial of Related Issues Only--General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN SUPPORT OF MOTION TO CONSOLID-
vs.	)	ATE
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

GRANTING A MOTION TO CONSOLIDATE IS PROPER FOR THE TRIAL OF RELATED ISSUES IN CONSOLIDATED ACTIONS.

A. Motion to Consolidate. Any party to a civil action containing common questions of law or fact may move the court for an order of consolidation. The motion may seek consolidation for the trial of related issues only with separate findings and judgments as necessary or may seek consolidation for all purposes. The court in its discretion may make any orders concerning the consolidated actions as may tend to avoid unnecessary costs or delays (*Code Civ. Proc. § 1048(a)*).

B. Consolidation for Trial of Related Issues Only. Consolidation for the purpose of trial of related issues only with separate judgments and findings as necessary is appropriate (*McClure v. Donovan (1949) 33 Cal. 2d 717, 722, 205 P.2d 17*).

C. Separate Identities of Actions. Where actions are consolidated for trial of related issues, each action maintains its own identity and independent dispositionsof the actions are necessary (*McFarland v. Booker (1967) 250 Cal. App. 2d 402, 416, 58 Cal. Rptr. 417*).

[*Optional*] **D. Evidence Applicable so far as Relevant.** Where pending actions are consolidated for the purpose of trial of related issues, evidence presented in one case is deemed applicable to the other so far as it is relevant (*McClure v. Donovan (1949) 33 Cal. 2d 717, 722, 205 P.2d 17*).

[*Optional*] **E. Consolidation of Loss of Consortium and Negligence Actions.** Separate actions for loss of consortium brought by one spouse and negligence or intentional injury by the other spouse are entitled to be consolidated for trial (*Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal. 3d 382, 407, 115 Cal. Rptr. 765, 525 P.2d 669*) (dictum).

[*Optional*] **F. Consolidation of Franchise Fraud Actions.** Consolidation of separate fraud actions involving similar misrepresentations made to plaintiff franchises is proper even though all of the testimony is not applicable in each action (*Morrell v. Clark (1951) 106 Cal. App. 2d 198, 203, 234 P.2d 774*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities is a general form which may be submitted in support of a motion to consolidate actions containing common questions of fact or law where consolidation is for trial of related issues only. Some of the decisions cited in the form predate the 1972 amendment to *Code Civ. Proc. § 1048(a)* which now makes clear that actions may be consolidated either for the trial of related issues only or for all purposes. Where counsel seeks consolidation for trial of related issues only, the points and authorities set forth in *§§ 45.22 -45.24* may be used in conjunction with the foregoing memorandum of points and authorities.

Counsel should add argument linking the points and authorities in this form with the facts of his or her case.

[3] Discussion of Authorities

[a] Consolidation for Trial of Related Issues Only

In ***McClure v. Donovan*** *(1949) 33 Cal. 2d 717, 205 P.2d 17* , plaintiff, as sister of Jefferson Caruthers, brought an action to annul his marriage to defendant on the grounds that Caruthers was incompetent and incapable of contracting

marriage due to his incompetency. Another proceeding was commenced at the same time for the appointment of a guardian of the estate and person of Mr. Caruthers. The two matters were consolidated for trial, and a judgment of annulment was subsequently entered and a guardian appointed. Defendant appealed from the judgment in the annulment proceeding. She contended, among other points, that the court had erred in ordering consolidation of the actions. The Supreme Court affirmed the judgment of the trial court. It stated that consolidation of actions for the purpose of trial of related issues is proper and that the court had correctly deemed evidence presented in one case applicable to the other insofar as relevant. Where cases are consolidated for trial of related issues, the Court held that separate judgments and findings must be made in each case. Noting that the mental condition of Mr. Caruthers was at issue in both proceedings, the Court determined that consolidation of actions for the limited purpose of receiving mutually relevant evidence and avoiding repetition was proper and nonprejudicial to defendant.

[b] Separate Identities of Actions

In ***McFarland v. Booker*** *(1967) 250 Cal. App. 2d 402, 58 Cal. Rptr. 417* , plaintiff instituted two actions for personal injuries arising at different times. The first was against the City and County of San Francisco for injuries allegedly sustained in a street car accident; the second against defendant Booker for injuries out of an automobile accident some nine months after the street car incident. The two actions were consolidated on plaintiff's motions, and the jury returned two verdicts, one for plaintiff in her action against the city and county, and the second for defendant Booker in the automobile accident. Defendant city and county moved for a new trial on grounds of insufficiency of evidence to support the verdict and excessive damages. The motion for a new trial was granted, and plaintiff appealed the order. With respect to the Booker action, plaintiff moved for a new trial; the motion was denied, and she appealed from that order. Among plaintiff's contentions on appeal was that the order granting a new trial to defendant city and county also operated to grant a new trial to defendant Booker, given the consolidated nature of the actions. The court of appeal affirmed the judgment in the Booker action as well as the new trial order for the city and county. In so holding, the court distinguished between the two types of consolidation: consolidation of actions for all purposes and consolidation of actions for trial of related issues. Determining that plaintiff's action was of thelatter variety, the court found no error in permitting a new trial as to defendant city and county while denying one in the Booker action. It reasoned that where actions are consolidated solely for the purpose of trial of related issues, the cases retain their separate identity and separate dispositions are necessary. Thus, a new trial as to one consolidated action did not mandate a new trial as to the other.

[c] Evidence Applicable so Far as Relevant

For the factual setting of ***McClure v. Donovan*** *(1949) 33 Cal. 2d 717, 205 P.2d 17* , see *§ 45.20[3][a]*. In *McClure*, the Supreme Court affirmed the trial court's decision appointing a guardian for Mr. Caruthers and annulling his marriage with appellant. The Court found that there was no error in receiving mutual evidence in the consolidated issues where the evidence was related, insofar as applicable, to the different issues presented in the cases and where separate dispositions of the matters were made. The Court stated that the evidence presented in one case is deemed applicable in the other, insofar as it is relevant, but that separate findings and judgment must be made in each case to dispose of the particular issues as independently submitted.

[d] Consolidation of Loss of Consortium and Negligence Actions

In ***Rodriguez v. Bethlehem Steel Corp.*** *(1974) 12 Cal. 3d 382, 115 Cal. Rptr. 765, 525 P.2d 669* , plaintiff sought to recover damages for loss of consortium as a result of a serious work injury suffered by her husband which left him paralyzed and an invalid, unable to care for himself, support her, or fulfill matrimonial obligations. Plaintiff filed her action jointly with one brought by her husband against defendant company in negligence. The trial court severed plaintiff's cause of action from that of her husband on the theory that in California a spouse has no action for loss of consortium where the other spouse has been injured, rather than killed, by the negligence of a third party. In reversing the lower court and expanding the scope of actions for loss of consortium in California, the Supreme Court, as dictum,

specifically approved of consolidation of negligence and loss of consortium claims.

[e] Consolidation of Franchise Fraud Actions

In ***Morrell v. Clark*** *(1951) 106 Cal. App. 2d 198, 234 P.2d 774* , plaintiff sought to recover money paid defendant for the exclusive privilege of selling within a certain territory a new automobile to be manufactured by International Motor Car Company. Plaintiff set forth a cause of action as a common count for money had and received, and based the claim on fraud and failure of consideration. Certain other plaintiffs who had also bought franchises sued for return of their money on the theory of money had and received. The actions were consolidated for trial, and judgment was rendered in favor of plaintiffs. Defendant Clark appealed the judgment contending, in part, that consolidation was improper. The court of appeal affirmed the judgment for plaintiffs finding that the consolidation saved time and expense and that there was no resulting prejudice to defendant even though all of the testimony did not apply in each action.

[4] Additional Authorities

[a] Consolidation for Trial of Related Issues Only

In *National Elec. Supply Co. v. Mount Diablo Unified School Dist. (1960) 187 Cal. App. 2d 418, 9 Cal. Rptr. 864* , plaintiff sought to foreclose a mechanic's lien for certain materials furnished defendant pursuant to a construction contract. After a stipulation that legal and equitable issues should be tried separately, the trial court received evidence, made findings of fact and conclusions of law, and dismissed the complaint. Plaintiff appealed the judgment in favor of defendant. Plaintiff contended that the trial court had abused its discretion in severing the issues of the complaint and cross complaint and in entering judgment on the complaint at that point in the proceedings. In affirming the trial court's decision, the court of appeal determined that there was no error in dismissing the complaint without rendering separate judgments. The court stated that pursuant to *Code Civ. Proc. § 1048*, not every severance requires separate judgments as not every consolidation requires only one set of findings and one judgment.

The factual background of *McFarland v. Booker (1967) 250 Cal. App. 2d 402, 58 Cal. Rptr. 417* , is set forth in Discussion of Authorities under Separate Identities of Actions. In that case, consolidation for trial of related issues was permitted in two separate automobile accidents occurring at different times and instituted against different defendants, the related issue being which injuries plaintiff sustained in each accident.

In *San Diego County v. Bank of America (1955) 135 Cal. App. 2d 143, 286 P.2d 880* , plaintiff began eminent domain proceedings involving numerous parcels of land, one of which belonged to defendant. Plaintiff's motion to consolidate actions was granted, the action was tried, and judgment was entered in favor of plaintiff. Defendant appealed the judgment and jury's award contending, among other issues, that the court erred in consolidating the actions pursuant to Code Civ. Proc. § 1244. The court of appeal affirmed the trial court's judgment. The court found that in the absence of proof that the trial court abused its discretion to the prejudice of defendant, the order of consolidation would not be disturbed.

This decision was predicated on Code Civ. Proc. § 1244, which is no longer in effect. Consolidation of condemnation proceedings is no longer governed by a specific statute, but generally by *Code Civ. Proc. § 1048(a)*.

In *Walker v. Walker (1960) 177 Cal. App. 2d 89, 1 Cal. Rptr. 871* , the husband filed for divorce and the wife subsequently filed a separate action to quiet title as to certain property. The actions were later consolidated. The husband filed a petition in the divorce case asking for dissolution of a temporary restraining orderand for permission to sell certain of the property in dispute. The petition, however, failed to mention the notice of lis pendens which had been recorded with respect to the property. The trial court granted the petition. A few days later, the court filed an amended order granting the petition and quashing the lis pendens. The wife appealed from the order. In vacating the order, the court of appeal noted that the actions consolidated in this instance were for trial of related issues only. Thus the actions

retained their separate identities and independent judgments and findings were necessary. Because the order of consolidation was not a consolidation for all purposes, it was improper for an order from the divorce case to attempt to render ineffectual the order from the quiet title action since the two cases were never totally merged. The actions retained their separate characters except for trial of related issues, and the quiet title action brought by the wife named defendants, other than the husband, who were not parties to the divorce action and could not properly have their rights adjudicated by means of that case.

[b] Evidence Applicable so Far as Relevant

In *McCarthy v. Mobile Cranes, Inc. (1962) 199 Cal. App. 2d 500, 18 Cal. Rptr. 750* , three actions arising from the same occurrence were consolidated for trial. The actions arose from the collapse of a crane owned by defendant Mobile Cranes in which one worker, McCarthy, was killed and another, Standridge, was injured. Mobile brought an action against McCarthy's employer Builders Steel Corporation for negligent damage to the crane. McCarthy's widow and infant child brought an action for wrongful death against Mobile, and Standridge sued Builders and Mobile for personal injuries. Judgment in the McCarthy action was entered in favor of defendant Mobile, and McCarthy appealed the decision. Plaintiff contended that the court in a consolidated action erred in refusing to allow plaintiff to cross examine Builders' expert witness on the grounds that plaintiff had technically rested his case and that Builders was not a party to plaintiff's action. The court of appeal reversed. It held that the mere technical resting of a case should not preclude plaintiff from meeting additional evidence or cross examining any party to a consolidated action. The court further found that where several actions are consolidated for trial, the evidence is deemed applicable in its entirety to each of the cases unless the record discloses the contrary or the evidence is found to be immaterial or irrelevant to a particular issue.

In *Jud Whitehead Heater Co. v. Obler (1952) 111 Cal. App. 2d 861, 245 P.2d 608* , plaintiff, as an individual and a corporation, sought to recover alleged misappropriations made by defendants. The cause of action brought by plaintiff as an individual attempted to recover money embezzled prior to the incorporation, while plaintiff in its corporate capacity sought to recover subsequent losses. Defendants, husband and wife, answered claiming that the money withdrawn by them from the corporation was with plaintiff's consent and, further, that defendants had made a loan to plaintiff which had not been repaid. Defendant Louis Obler was convicted of grand theft and subsequently stipulated that the sum of $105,434.32 was taken from plaintiff's businesses. The trial court made findings on purchases of personal and real property traceable to the embezzled funds and imposed appropriate liens. Defendants presented various issues on appeal, among them the propriety of consolidating the two actions. The court of appeal affirmed the judgment. With respect to consolidation of the two actions, it found that the defendants had not been prejudiced by consolidation of the individual and corporate actions against them and that there was no evidence of abuse of discretion of the trial court in ordering consolidation. The court of appeal also stated that the fact that evidence which was admissible in one case might not have been admissible in the other did not bar consolidation. The court noted that the actions were appropriate for consolidation since the causes rose out of the same series of transactions, namely, defendants' embezzlement of money from plaintiff and the subsequent corporation. Although evidence pertaining to misappropriations allegedly made by Obler prior to incorporation would not be applicable in the action for embezzlement subsequent to incorporation, the court found that plaintiff's tracing the money would be facilitated by consolidation, rather than separate trials.

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4-45 California Points & Authorities § 45.21

§ 45.21 Supporting Motion to Consolidate [Code Civ. Proc. § 1048(a)]--Actions for All Purposes--General Form

[1] FORM

[*Caption. See § 45.20.*]

CONSOLIDATION OF ACTIONS FOR ALL PURPOSES IS PROPER WHERE THE PLAINTIFFS COULD HAVE JOINED TOGETHER ORIGINALLY TO BRING THE ACTION.

A. Motion to Consolidate. [*See § 45.20, Paragraph A.*]

B. Consolidation for All Purposes. Complete consolidation for all purposes is appropriate where plaintiffs could have joined together originally to bring the action (*Jaffe v. Albertson Co. (1966) 243 Cal. App. 2d 592, 606, 53 Cal. Rptr. 25*).

C. Complete Consolidation Where No Doubt of Applicability of Findings. Complete consolidation with one set of findings and one judgment is correct where no doubt exists as to the applicability of the various findings to each of the consolidated actions (*Page v. Bakersfield Uniform & Towel Supply Co. (1966) 239 Cal. App. 2d 762, 772, 49 Cal. Rptr. 46*).

[*Optional*] **D. Consolidated Actions Normally Determined by Single Judgment.** Ordinarily, consolidated actions may be determined by one verdict or set of findings and one judgment with the allegations of the various complaints taken together and treated as one pleading (*Hamilton v. Asbestos Corp. (2000) 22 Cal. 4th 1127, 1147-1149, 95 Cal. Rptr. 2d 701, 998 P.2d. 403* ; *Didier v. American Casualty Co. (1968) 261 Cal. App. 2d 742, 752, 68 Cal. Rptr. 217*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion to consolidate actions containing common questions of law or fact where consolidation is for all purposes. The decisions cited in the form all predate the 1972 amendment of *Code Civ. Proc. § 1048(a)* which now makes clear that actions may be consolidated either for all purposes or for the trial of related issues only. When counsel seeks consolidation for all purposes, the points and authorities set forth in *§§ 45.22, 45.23* may be used in conjunction with this form.

Counsel should add argument linking the points and authorities in this form with the facts of his or her case.

[3] Discussion of Authorities

[a] Consolidation for All Purposes

In ***Jaffe v. Albertson Co.*** *(1966) 243 Cal. App. 2d 592, 53 Cal. Rptr. 25* , plaintiff Jaffe appealed from a judgment after the trial court had directed a verdict for defendant as to his first cause of action and a nonsuit as to the second and third causes. The case had been consolidated with two related actions on plaintiff's motion. The causes of action arose out of various negotiations between both defendant Albertson Corporation and its real estate broker, Kittle, and Gottlieb and his real estate broker, Jaffe, for the sale of certain property, owned by Albertson, to Gottlieb. Jaffe as broker for Gottlieb detailed various negotiations between the parties which he alleged as bases for his recovery. Jaffe's first count alleged breach of contract on the Albertson-Gottlieb oral contract to which he claimed to be a third-party beneficiary since the contract had provided for his commission. The second cause of action alleged that Albertson had made a direct oral promise to pay Jaffe a commission, and the third cause of action was against subsequent purchasers of the Albertson property for tortious interference of contract. Gottlieb had also filed several causes of action against Albertson and the subsequent purchasers, and various cross complaints were filed.

Among plaintiff's contentions on appeal was that he was denied his right to have certain issues determined by a jury by virtue of the consolidation of the actions and the determination of equitable issues first. The court of appeal found that plaintiffs Jaffe and Gottlieb had presented a motion to the court for consolidation of the actions. Such consolidation, where plaintiffs could have originally joined together, operated as though plaintiffs had originally joined together in bringing the action (*243 Cal. App. 2d 592, 606)* . Therefore, one judgment with one set of findings was appropriate and a decision by the trial court that Gottlieb was not entitled to specific performance because of the oral nature of the contract on which his action was based was determinative against Jaffe's action on the same contract. The court stated that since the trial court found in favor of defendant Albertson on the equitable issue of estoppel to assert the statute of frauds with regards to the oral contract with Gottlieb, the same finding was applicable and binding on Jaffe (*243 Cal. App. 2d 592, 606-610)* .

[b] Complete Consolidation Where No Doubt of Applicability of Findings

In ***Page v. Bakersfield Uniform & Towel Supply Co.*** *(1966) 239 Cal. App. 2d 762, 49 Cal. Rptr. 46* , plaintiffs as owners of laundry supply companies sued defendant laundry supply company for unfair business practices. Defendants

filed suit seeking injunctive relief and alleging virtually the same improper business practices against plaintiffs. The court issued a temporary restraining order against both parties against further violations of the Unfair Practices Act. At a nonjury trial, the issues presented were whether either party (1) had violated the Unfair Practices Act, (2) had violated the temporary restraining order, (3) was entitled to a permanent injunction, and (4) whether treble damages and attorney's fees should be awarded. Rendering one set of findings and judgment, the trial court determined that both parties had performed unlawful trade acts against the other and granted a permanent injunction against each. It declined to award damages since both parties had unclean hands and should be left as they were and, moreover, each sustained equal and proportional damages. It further found that the reasonable cost of attorneys' fees incurred by each were approximately the same. Although the actions had been consolidated for trial, plaintiffs appealed only that portion of the judgment which had been rendered against them and in favor of defendants. The court of appeal affirmed the trial court's judgment. Of the six issues presented on appeal, it found no error in the failure of the court to separate issues and make separate findings. The court held that the trial court was correct in making integrated findings covering both cases and in entering one judgment where there could be no possible doubt as to the applicability of the various findings to each of the two cases which had been consolidated for trial (*239 Cal. App. 2d 762, 772)* .

[c] Consolidated Actions Normally Determined by Single Judgment

Hamilton v. Asbestos Corp. *(2000) 22 Cal. 4th 1127, 95 Cal. Rptr. 2d 701, 998 P.2d 403* , involved two separate actions by plaintiff, one seeking to recover compensatory and punitive damages for plaintiff's asbestosis and one seeking to recover compensatory and punitive damages for plaintiff's mesothelioma. After defendant filed its answer in the second action, plaintiff's motion to consolidate the two action was granted. Ultimately, judgment for plaintiff was entered in the trial court and defendant appealed. The court of appeal reversed the judgment in its entirety and the California Supreme Court granted review.

The Supreme Court reversed the judgment of the court of appeal with directions to resolve certain issues in that court (*22 Cal. 4th 1127, 1150)* . The court concluded that the record supported the trial court's determination that the two actions were consolidated for all purposes and that defendant had made a general appearance in the second action. In so doing, the court noted that the trial court ordered plaintiff's two actions consolidated for all purposes. *Code Civ. Proc. § 1048(a)* authorizes the trial court, when appropriate, to "order a joint hearing or trial" or to "order all the actions consolidated." Under the statute and case law, there are thus two types of consolidation: a consolidation for purposes of trial only where the actions remain otherwise separate; and a complete consolidation or consolidation for all purposes, where the two actions are merged into a single proceeding under one case number and result in only one verdict or set of findings and one judgment. Consolidation under *Code Civ. Proc. § 1048* is permissive, and it is for the trial court to determine whether the consolidation is for all purposes or for trial only (*22 Cal. 4th 1127, 1147-1149)* .

In ***Didier v. American Casualty Co.*** *(1968) 261 Cal. App. 2d 742, 68 Cal. Rptr. 217* , plaintiff as administrator of the estate of her deceased husband brought a declaratory judgment action against two separate surety companies with whom her husband had executed surety bonds in conjunction with two school construction projects. On his death, the construction work under the contracts in question was approximately 50 to 70 percent completed. Plaintiff sought a judgment that the two contracts were personal in nature and ceased to exist at the date of her husband's death and that each defendant held funds as constructive trustee of the decedent's probate estate. Defendant surety companies argued that the contracts were not personal in nature and that the contracts continued as obligations of the decedent's estate. The trial court held that the two contracts survived Mr. Didier's death and continued as obligations of the estate. Plaintiff appealed the judgment arguing, in part, that the trial court erred in not making separate findings and conclusions of law in each case since actions had been consolidated at pretrial by stipulation of the parties for all further proceedings. The trial judge had then made a single set of findings of fact and conclusions of law and entered a single judgment. The court of appeal stated that the general rule was that consolidated actions may be determined by a single set of findings and judgment (*261 Cal. App. 2d 742, 752)* . It held that the trial court's failure to make an individual finding as to the amount of money due Didier at the time of his death on one of the contracts was not error since such finding would not have changed the trial court's decision (*261 Cal. App. 2d 742, 752-753)* .

[4] Additional Authorities

[a] Consolidation for All Purposes

[i] In Actions to Recover Proceeds of Trust Account

In *Kropp v. Sterling Sav. & L. Ass'n (1970) 9 Cal. App. 3d 1033* , plaintiff as sole surviving heir of her sister sought to recover the proceeds of two trust accounts established at Sterling by her sister and her sister's deceased husband. Defendant answered the complaint and filed a cross complaint in interpleader against plaintiff and the First National Bank of Arizona as administrator of the estates. The First National Bank also filed a cross complaint in interpleader and sought a declaratory judgment against plaintiff. The trial court ordered that the funds be paid to the National Bank and plaintiff appealed. One contention on appeal was that consolidation of plaintiff's action with that of the bank was prejudicial. The court of appeal affirmed the judgment noting that consolidation of the actions for all purposes was appropriate where the causes involved the same parties and the cases could be tried as one with one judgment and one set of findings of fact and conclusions of law (*9 Cal. App. 3d 1033, 1046-1047)* .

[ii] In Conservatorship Proceedings

In *Conservatorship of Oliver (1961) 192 Cal. App. 2d 832, 13 Cal. Rptr. 695* , two granddaughters of Elizabeth Ellen Oliver petitioned the court for appointment as conservators of the estate of their grandmother. Objection was filed by Elizabeth's son, Evan D. Oliver, on ground that there was another conservatorship proceeding pending in another court. The actions were consolidated by stipulation of counsel, and one of the granddaughters was appointed conservator. Evan Oliver appealed the appointment, then filed an abandonment of appeal, and subsequently filed a second notice of appeal. In dismissing the appeals, the court of appeal found that the first appeal filed by Evan Oliver sufficiently described both actions so as to include the whole of the judgments and orders entered in the consolidated action and not simply a part as urged by appellant in his attempt to distinguish between the first and second appeals (*192 Cal. App. 2d 832, 835-836)* . The court, as dictum, noted that where two lawsuits are ordered consolidated for trial and actually tried together, there should be only one set of findings of fact and conclusions of law and one judgment (*192 Cal. App. 2d 832, 836)* .

[iii] In Actions for Breach of Contract

In *Israel v. Campbell (1958) 163 Cal. App. 2d 806, 330 P.2d 83* , plaintiff and defendant sued each other in separate actions for breach of contract arising out of the same transaction. The actions were consolidated and judgment was entered in favor of Campbell; Israel appealed. One of the contentions made by appellant was that the court should have rendered two judgments in the case. The court of appeal affirmed the lower court judgment stating that it would have been improper for the court to grant two separate judgments in this case where both actions involved breach of the same contract. It reiterated the general principle that where actions are consolidated there should be only one set of findings and conclusions of law and one judgment (*163 Cal. App. 2d 806, 820-821)* .

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§ 45.22 Supporting Motion to Consolidate [Code Civ. Proc. § 1048(a)]--Consolidation Proper Although Parties Not Identical

[1] FORM

[*Caption. See § 45.20.*]

GRANTING A MOTION TO CONSOLIDATE IS PROPER EVEN THOUGH PARTIES TO THE CONSOLIDATION ACTIONS ARE NOT IDENTICAL.

A. Motion to Consolidate. [*See § 45.20, Paragraph A.*]

B. Consolidation Proper Although Parties Not Identical. Consolidation is appropriate even though the parties in the consolidated action are not the same (*Jud Whitehead Heater Co. v. Obler (1952) 111 Cal. App. 2d 861, 866-867, 245 P.2d 608*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted in support of a motion to consolidate actions containing common questions of fact or law even though parties in the actions to be consolidated are not the same.

Where appropriate, counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Consolidation Proper Although Parties Not Identical

The factual setting of *Jud Whitehead Heater Co. v. Obler (1952) 111 Cal. App. 2d 861, 245 P.2d 608* , is set forth in *§ 45.20[4][b]*. In *Obler*, the court of appeal affirmed the lower court's decision stating, among other findings, that the fact that parties to the consolidated actions are not the same does not defeat consolidation. The court explained that the fact that the plaintiffs were different did not affect the propriety of the consolidation since the plaintiff in the second action was a corporation formed by the plaintiff in the first action. The individual action had been brought to follow misappropriations into certain property, while the corporation action was brought to follow other misappropriations into other property. Both causes of action had arisen out of one series of transactions, that is, defendant's embezzlement from the corporation and its predecessor.

[4] Additional Authorities

[a] Consolidation Proper Although Parties Not Identical

In *People v. Chevalier (1959) 52 Cal. 2d 299, 340 P.2d 598* , judgment was rendered in favor of the city and state in consolidated eminent domain actions against defendants. Defendants appealed the judgment to condemn their land for street and access purposes alleging, among other grounds for error, that consolidation of the actions was an abuse of discretion. Defendants argued that the takings were distinct: the state was taking a right of access to a street which was closed off by the freeway and the city a strip of land for a street extension in the opposite direction. The Supreme Court affirmed the trial court's decision. It found that since the city and state actions were interrelated, there was no error in consolidating the actions to evaluate the combined effect of the city and state projects.

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§ 45.23 Supporting Motion to Consolidate [Code Civ. Proc. § 1048(a)]--Consolidation Proper if Issues Essentially the Same and Duplication of Time and Effort Is Avoided

[1] FORM

[*Caption. See § 45.20.*]

GRANTING A MOTION TO CONSOLIDATE IS PROPER IF THE ISSUES IN THE ACTIONS SOUGHT TO BE CONSOLIDATED ARE ESSENTIALLY THE SAME OR OVERLAPPING AND IF CONSOLIDATION AVOIDS DUPLICATION OF TIME AND EFFORT.

A. Motion to Consolidate. [*See § 45.20, Paragraph A.*]

B. Consolidation Where Issues Essentially the Same. Where two or more actions present essentially the same or overlapping issues, it is proper to consolidate and dispose of them as a single proceeding (*Spector v. Superior Court (1961) 55 Cal. 2d 839, 844, 13 Cal. Rptr. 189, 361 P.2d 909*).

C. Consolidation to Avoid Duplication of Time and Effort. Consolidation is proper to avoid duplication of time and effort in the trial of related issues (*Neubrand v. Superior Court (1970) 9 Cal. App. 3d 311, 322-323, 88 Cal. Rptr. 586*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted in support of a motion to consolidate actions containing common questions of fact or law where such actions present essentially the same or overlapping issues and where consolidation would avoid duplication of time and effort.

Where appropriate, counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Consolidation Where Issues Essentially the Same

In *Spector v. Superior Court (1961) 55 Cal. 2d 839, 13 Cal. Rptr. 189, 361 P.2d 909* , petitioner as director and member of a non-profit California corporation sought two writs of mandate, one prohibiting the superior court from proceeding further with the dissolution of the corporation and the second vacating an order denying his motion to modify a preliminary injunction allowing the dissolution. Finding procedural and constitutional errors, the Supreme Court ordered a single writ of mandate to issue encompassing both issues raised by petitioner. The Court sua sponte stated that since the corporate dissolution and the preliminary injunction actions presented essentially the same, or overlapping, issues they should be consolidated and disposed of by the trial court as a single proceeding.

[b] Consolidation to Avoid Duplication of Time and Effort

In *Neubrand v. Superior Court (1970) 9 Cal. App. 3d 311, 88 Cal. Rptr. 586* , petitioners sought a writ of mandate to compel respondent court to vacate its previous judgment and orders. The superior court sitting in probate had made and entered both orders and a judgment for partial distribution of the estate of Kitty M. Matthiessen in favor of two nieces who were appointed joint administrators and found to be sole surviving heirs. Subsequently, petitioners, who were relatives of the deceased husband of Kitty Matthiessen, moved to vacate the judgment by which partial distribution was made on the ground of extrinsic fraud, alleging that the administrators knew of the existence of petitioners and their relationship to the deceased. Petitioners further sought a declaratory judgment determining the rights of all parties concerned. The trial court denied the motion to vacate on the ground that the court lacked jurisdiction since the judgment had become final and not void on its face. Petitioners then filed an independent action in superior court setting forth allegations similar to those made in the motion to vacate the partial distribution order. At the same time petitioners filed a petition to determine heirship in the probate proceeding.

The court of appeal held that the probate court lacked jurisdiction to vacate its prior decree on the ground of extrinsic fraud. The court, however, noted petitioners' concern of duplication of time and effort in the preparation and trial of the two separate proceedings--the independent civil action pending in the superior court and the petition to determine heirship in probate. By way of dictum, the court suggested that consolidation for trial of related issues would be an appropriate vehicle to eliminate such duplication.

Counsel should note that although *Neubrand* concerned consolidation for the purpose of trial of related issues, consolidation of actions for all purposes may also be affected to avoid duplication of time and effort [*see Code Civ. Proc. § 1048(b)*].

[4] Additional Authorities

[a] Consolidation Where Issues Essentially the Same

In *Todd-Stenberg v. Dalkon Shield Claimants Trust (1996) 48 Cal. App. 4th 976, 56 Cal. Rptr. 2d 16* , plaintiffs alleged that they had suffered injuries resulting from use of an intrauterine device (IUD) known as the Dalkon Shield. The manufacturer of the Dalkon Shield had filed for relief under chapter 11 of the United States Bankruptcy Code, and as a result of the bankruptcy proceeding the defendant trust was formed. Thereafter, plaintiffs filed their separate actions against the defendant, and ultimately the trial court granted plaintiffs' motions to consolidate their actions for trial. The jury returned a verdict in favor of the plaintiffs in differing amounts and the defendant appealed.

The court of appeal affirmed the judgment. In holding that the consolidation was appropriate, the court noted that six actions were consolidated, but by the time of trial only three remained. In each, plaintiff claimed that plaintiff sufferedpelvic inflammatory disease (PID) as a result of plaintiff's use of a Dalkon Shield. The trial court had correctly anticipated that a large portion of the trial would be devoted to issues common to the three cases, i.e., how PID occurs, whether the use of a Dalkon Shield can cause it, and what other factors might contribute or cause the disease. The parties were able to use the same witnesses not only to discuss the general issues, but also to address the probable cause, extent and result of the PID in each of the plaintiffs. If there had been three separate trials the same deposition testimony would have been introduced, many of the same expert witnesses would have been called and the much of the same evidence would have been presented. Thus, based on the record before the court, consolidation was appropriate (*48 Cal. App. 4th 976, 979)* .

The factual setting of *McFarland v. Booker (1967) 250 Cal. App. 2d 402, 58 Cal. Rptr. 417* , is set forth in *§ 45.20[3][b]*. In *McFarland*, the trial court consolidated plaintiff's personal injury actions against two separate defendants arising out of two distinct accidents occurring at different times. On appeal, plaintiff had argued that the trial court's order granting a new trial to one defendant operated to grant a new trial in the other action also since the actions were consolidated. The court of appeal, however, distinguished between consolidation of actions for trial of related issues and consolidation of actions for all purposes with one judgment and one set of findings. The court noted that consolidation in this case had been solely for trial of related issues, in this instance, the issue of plaintiff's injuries.

The factual setting of *Jaffe v. Albertson Co. (1966) 243 Cal. App. 2d 592, 53 Cal. Rptr. 25* , is set forth in *§ 45.21[3][a]*. In *Jaffe*, plaintiff's action for breach of contract and tortious interference of contract was consolidated with two related actions con cerning the sale of the same property brought by other plaintiffs. The court of appeal affirmed the trial court's order to consolidate despite plaintiff's contention that consolidation denied him his right to have certain issues determined by a jury. The court found that plaintiffs were relying on the same contract and evidence to establish their cases and that the issues were essentially the same. Where, as here, plaintiffs could have joined together originally to bring a cause of action, consolidation for all purposes including a single judgment was appropriate.

[b] Consolidation to Avoid Duplication of Time and Effort

Todd-Stenberg v. Dalkon Shield Claimants Trust (1996) 48 Cal. App. 4th 976, 56 Cal. Rptr. 2d 16 , is discussed in *§ 45.23[4][a]*.

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4-45 California Points & Authorities § 45.24

§ 45.24 Supporting Motion to Consolidate [Code Civ. Proc. § 377.62(b)]--Consolidation of Wrongful Death and Personal Injury Actions Arising out of Same Negligent Act Is Required on Motion of Any Interested Party

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*],	)	IES IN SUPPORT OF MOTION TO CONSOLID-
Defendant.	)	ATE
	)	[*Code Civ. Proc. § 377*]
	)	

_____

GRANTING A MOTION TO CONSOLIDATE IS REQUIRED WHERE WRONGFUL DEATH AND PERSONAL INJURY ACTIONS AROSE OUT OF SAME NEGLIGENT ACT OF DEFENDANT WHEN THE MOTION IS MADE BY ANY INTERESTED PARTY.

A. Motion to Consolidate Under *Code of Civil Procedure Section 377.62(b)*. A cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by the decedent's _____ [personal representative *or* _____ (specify one or more persons enumerated in *Code Civ. Proc. § 377.60*, e.g., surviving spouse)] (*Code Civ. Proc. § 377.60*). An action for wrongful death and a pending _____ [action *or* proceeding] that does not abate on the decedent's death may be consolidated for trial as provided in *Code of Civil Procedure Section 1048* (*Code Civ. Proc. § 377.62(b)*).

B. Consolidation in Wrongful Death and Personal Injury Actions. Consolidation is appropriate on motion of any interested party where actions for wrongful death and personal injury sustained by the decedent arose out of the same accident and were caused by the same negligence of the defendant (*General Motors Corp. v. Superior Court (1966) 65 Cal. 2d 88, 92, 96-97, 52 Cal. Rptr. 460, 416 P.2d 492* (applying former Code Civ. Proc. § 377, which required consolidation)).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted in support of a motion to consolidate wrongful death and personal injury actions arising out of the same negligent conduct of the defendant.

Where appropriate, counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Consolidation of Wrongful Death and Personal Injury Actions

In *General Motors Corp. v. Superior Court (1966) 65 Cal. 2d 88, 52 Cal. Rptr. 460, 416 P.2d 492* , petitioner, a defendant in a personal injury action, sought a writ of prohibition to restrain the trial court from proceeding in the action on the theory that plaintiff had failed to bring the action to trial within the time prescribed by former Code Civ. Proc. § 583 [*now see Code Civ. Proc. § 583.310 et seq.*] The action against defendant arose from a car accident in which plaintiffs William and Bernice Maraska were injured allegedly due to defendant's negligent design and manufacture of an automobile. During normal pretrial and discovery activities, Bernice died. William Maraska and Martin Parsons, son of the decedent, then instituted an action against defendant for wrongful death alleging that the injuries from which Bernice died were sustained in the automobile accident. Plaintiffs had attempted to consolidate this action with others brought by other plaintiffs against defendant, but that motion was denied. The court did, however, grant their motion to consolidate the personal injury cause of action with the wrongful death action. Defendant's subsequent motion to dismiss the personal injury action for want of prosecution was denied and defendant sought a writ of prohibition.

The Supreme Court denied the writ. It observed that former Code Civ. Proc. § 377, which provided for mandatory consolidation of personal injury and wrongful death actions arising out of the same wrongful act, governed rather than the general consolidation statute, *Code Civ. Proc. § 1048(b)*. It further noted that plaintiffs had proceeded with diligence in both actions, but that the cause of action in wrongful death had not accrued until some three years after the accident and was not yet ready for trial at the time of the hearing for dismissal of the personal injury action. The same issue, the automobile's faulty design, was central to both actions and could be expected to involve complex mechanical and technical factual conflicts requiring the presentation of extensive expert testimony. Given the substantial benefit to be

gained by consolidation, the common purpose of §§ 377 and 583 to encourage speedy litigation, and the necessity of implying an exception to one of the statutes, the Court held that judicial economy was best met by implying an exception to § 583 based on the futility of requiring separate and successive trials and on the impracticability of bringing the consolidated actions to trial within five years of filing the personal injury action (pp. 96-97).

CAUTION:

Code Civ. Proc. § 377.62(b), which replaced former Code Civ. Proc. § 377, operative January 1, 1993, provides that wrongful death and survival actions "may be" consolidated for trial as provided in *Code Civ. Proc. § 1048*. This discretionary language differs from former Code Civ. Proc. § 377, which required consolidation. *General Motors Corp., supra* , was decided under prior law, and may be cited only as a persuasive rather than controlling authority.

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4-45 California Points & Authorities § 45.25

§ 45.25 Opposing Motion to Consolidate [Code Civ. Proc. § 1048(a)]--Consolidation Improper in Tort Action if Effect Would Be to Lessen Wrongdoer's Burden

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN OPPOSITION TO MOTION TO CONSOL-
vs.	)	IDATE
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

DENYING A MOTION TO CONSOLIDATE IS PROPER IF THE ONLY EFFECT WOULD BE TO LESSEN THE WRONGDOER'S BURDEN IN THE TORT ACTION.

Consolidation Improper if Wrongdoer's Burden Lessened. An alleged wrongdoer in a tort action is not permitted to bring in other defendants by consolidation where such parties' presence would not help to defeat plaintiff's claim but would only lessen the wrongdoer's burden (*General Elec. Co. v. California ex rel. Dep't of Public Works (1973) 32 Cal. App. 3d 918, 925, 108 Cal. Rptr. 543*) (dictum).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion to consolidate actions containing common questions of fact or law where the action is in tort and consolidation would not help to defeat the plaintiff's claim but, at best, only lessen the wrongdoer's burden.

The proposition cited in the foregoing form was dictum in *General Elec. Co. v. California ex rel. Dep't of Public Works (1973) 32 Cal. App. 3d 918, 925, 108 Cal. Rptr. 543* . Defendants were trying to state causes of action for either contribution or indemnification in cross complaints under former Code Civ. Proc. § 442 (*now Code Civ. Proc. § 428.20*) against third parties and were not attempting to consolidate two separate personal injury actions. Nevertheless, holding that the cross complaints did not state a cause of action, the court of appeal, quoting from *Thornton v. Luce (1962) 209 Cal. App. 2d 542, 551-552, 26 Cal. Rptr. 393* , applied the general principle that despite *Code Civ. Proc. § 1048* permitting consolidation, an alleged wrongdoer should not be permitted to bring in other persons whom he feels might in some fashion have contributed to the consequences of his own wrongful conduct since the plaintiff should be able to control the case by proceeding against the party or parties he feels to be most clearly liable [*see General Elec. Co. v. California ex rel. Dep't of Public Works (1973) 32 Cal. App. 3d 918, 925, 108 Cal. Rptr. 543]* . In addition, the specific holding in *General Elec.* is no longer valid since the Supreme Court held in *American Motorcycle Assn. v. Superior Court of Los Angeles County (1978) 20 Cal. 3d 578, 607* , that *Code Civ. Proc. § 428.20* permits a defendant to file a cross complaint against a concurrent tortfeasor for indemnity on a comparative fault basis, even when the tortfeasor was not named a defendant in the original complaint. Plaintiff's right to control his or her case was nevertheless preserved by the Court, which stated that the provisions of *Code Civ. Proc. § 1048(b)* permit a trial court to order separate trials of the cause of action asserted in the cross complaint [*see American Motorcycle Assn. v. Superior Court of Los Angeles County (1978) 20 Cal. 3d 578, 606* ; § 45.31].

[3] Discussion of Authorities

[a] Consolidation Improper If Wrongdoer's Burden Lessened

In ***General Elec. Co. v. California ex rel. Dep't of Public Works*** *(1973) 32 Cal. App. 3d 918, 108 Cal. Rptr. 543* , defendants in an automobile accident case filed cross complaints against the state and county. Defendants contended that the state and county had contributed to the accident in which plaintiff's car was hit from the rear by failing to provide adequate separation between lanes of traffic moving in opposite directions and that they were liable to cross complainants for indemnity, contribution, and equitable apportionment. The trial court sustaineddemurrers to the cross complaints without leave to amend, and they were dismissed. Defendants appealed and the court of appeal affirmed. With regard to defendants' cross complaint based on contribution under *Code Civ. Proc. § 875*, the court found that defendants had stated no cause of action. Further, the court cited authority for the proposition that a plaintiff should be able to control his case by proceeding against the party or parties he deems to be most liable. Thus, even considering the consolidation provisions of *Code Civ. Proc. § 1048*, the court noted as dictum that an alleged wrongdoer has no right to

bring in other parties who are potentially liable unless the theory asserted is that such other persons would defeat plaintiff's claims and not merely lessen the wrongdoer's burden.

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4-45 California Points & Authorities § 45.26

§ 45.26 Opposing Motion to Consolidate [Code Civ. Proc. § 1048(a)]--Consolidation Improper if It Would Confuse Jury by Forcing Party to Assume Inconsistent Positions

[1] FORM

[*Caption. See § 45.25.*]

DENYING A MOTION TO CONSOLIDATE IS PROPER IF CONSOLIDATION WOULD CONFUSE THE JURY BY FORCING A PARTY TO ASSUME MUTUALLY INCONSISTENT POSITIONS.

Consolidation Improper if Party Forced to Assume Inconsistent Positions. It is an abuse of discretion for the trial court to order consolidation of actions if consolidation would confuse the jury by requiring the opposing party to assume mutually inconsistent positions (*State Farm Mut. Auto. Ins. Co. v. Superior Court (1956) 47 Cal. 2d 428, 431, 304 P.2d 13*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion to consolidate actions containing common questions of fact or law where consolidation would result in confusion to the jury since consolidation of the actions would force a party to assume inconsistent positions.

Counsel should add argument linking the points and authorities in this form with the facts of his or her case.

[3] Discussion of Authorities

[a] Consolidation Improper if Party Forced to Assume Inconsistent Positions

In ***State Farm Mut. Auto. Ins. Co. v. Superior Court*** *(1956) 47 Cal. 2d 428, 304 P.2d 13* , petitioner insurance company sought a writ of mandate to compel the trial court to sever its declaratory relief action from certain personal injury actions. State Farm began the declaratory relief action against a certain policyholder to determine whether its policy covered an accident occurring when the policyholder was driving. While the declaratory relief action was pending, several personal injury actions were filed against the same policyholder that petitioner was defending. The personal injury actions and the declaratory relief action were subsequently consolidated. One of the two grounds set forth by petitioner in the writ of mandate was that the superior court erred in ordering the consolidation of the declaratory relief and personal injury actions. The Supreme Court sustained petitioner's position with regard to consolidation. It held that the trial court had abused its discretion, even though substantially the same evidence might be presented in the two actions, since the insurance company would be forced into the position of assuming inconsistent positions. The insurance policy in question provided that there was no coverage while the insured used his automobile as a public conveyance or while carrying people for charge. Because there was evidence that the automobile was being used as a public conveyance, in the declaratory relief action, State Farm maintained that its policyholder was carrying people for a charge within the meaning of the policy. However, if that argument were unsuccessful, State Farm could nevertheless urge that the riders were guests within the meaning of the guest statute and that they would have to prove willful misconduct on the part of the policyholder for State Farm to be liable in the personal injury action. Besides forcing the insurer to assume inconsistent positions at trial, the Court also found that consolidation would uquestionably confuse the jury since in the instruction different tests would be set out to apply to the same factual situation.

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4-45 California Points & Authorities § 45.27

§ 45.27 Opposing Motion to Consolidate [Code Civ. Proc. § 1048(a)]--Consolidation Improper if It Forces Disclosure of Insurance in Tort Claim

[1] FORM

[*Caption. See § 45.25.*]

DENYING A MOTION TO CONSOLIDATE IS PROPER WHERE CONSOLIDATION WOULD FORCE DEFENDANT TO DISCLOSE THAT HE/SHE HAS INSURANCE IN THE TORT CLAIM.

Consolidation Improper if It Discloses Insurance. It is an abuse of discretionfor the trial court to consolidate actions where consolidation of a declaratory judgment action and personal injury actions would force disclosure of the existence of insurance in the tort claims (*State Farm Mut. Auto. Ins. Co. v. Superior Court (1956) 47 Cal. 2d 428, 432, 304 P.2d 13*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion to consolidate actions containing common questions of fact or law where consolidation of a declaratory judgment action with personal injury actions would force disclosure of the existence of insurance. Although the case authority cited involves consolidation of a declaratory judgment action with personal injury actions, consolidation of personal injury actions with other types of causes would also appear improper if the result is to force disclosure of insurance in the tort claims.

By the same token, it would be a prejudicial abuse of discretion by the trial court to refuse an insurer's motion to sever an action against it for declaratory relief from the action against the insureds to establish liability for negligence [*see Omaha Indemnity Co. v. Superior Court (1989) 209 Cal. App. 3d 1266, 1273-1275, 258 Cal. Rptr. 66]* .

Counsel should add argument linking the points and authorities in this form with the facts of his or her case.

[3] Discussion of Authorities

[a] Consolidation Improper if It Discloses Insurance

The factual setting of ***State Farm Mut. Auto. Ins. Co. v. Superior Court*** *(1956) 47 Cal. 2d 428, 304 P.2d 13* , is set forth in *§ 45.26[3][a]*. In *State Farm*, the superior court on a writ of mandate determined that consolidation of an action had been an abuse of discretion. Along with forcing the insurer to assume inconsistent positions at trial and confusing the jury, the court found that by virtue of the declaratory judgment action the existence of liability insurance would be disclosed to the same jury which would decide the issues in the personal injury actions.

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4-45 California Points & Authorities § 45.28

§ 45.28 Supporting Motion to Sever [Code Civ. Proc. § 1048(b)]--Severance Proper to Avoid Prejudice to Parties

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*],	)	IES IN SUPPORT OF MOTION TO SEVER
Defendant.	)	[*Code Civ. Proc. § 1048(b)*]
	)	
	)	

_____

GRANTING A MOTION TO SEVER IS PROPER IF OTHERWISE CERTAIN PARTIES WOULD BE PREJUDICED.

A. Motion to Sever. Any party to a civil action may motion the court for an order of severance where separate trials would be conducive to expedition and economy. Severance may be of any cause of action or actions, including a cause of action asserted in a cross complaint, or of any separate issue or issues (*Code Civ. Proc. § 1048(b)*).

B. Severance to Avoid Prejudice. The possibility of undue prejudice to parties is properly avoided by the discretionary power of the court to sever issues for trial (*Bratton & Moretti v. Finerman & Son (1959) 171 Cal. App. 2d 430, 435, 340 P.2d 673*).

[*Optional*] **C. Severance When Actual Damage Claim Joined With Punitive Claim.** When a personal property claim involving little damage is joined with a punitive damages claim involving considerably greater damages, the possibility of prejudice to the defendant may be avoided by the discretionary power of the court to order severance of issues for trial (*Stencel Aero Eng'r Corp. v. Superior Court (1976) 56 Cal. App. 3d 978, 988, 128 Cal. Rptr. 691* (joining property claim for $200 and punitive damages claim for $10,000)).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted in support of a motion to sever actions or issues where there is the possibility of undue prejudice to parties, such as where the defendant is forced to defend a small personal property claim joined with a substantial punitive damages claim.

Where appropriate, counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Severance to Avoid Prejudice

In *Bratton & Moretti v. Finerman & Son (1959) 171 Cal. App. 2d 430, 340 P.2d 673* , plaintiffs brought an action on an open book account to recover for fertilizer allegedly sold and delivered to defendant shippers. Defendants by their answer denied generally, though admitting indebtedness in a certain amount, and filed a cross complaint against plaintiffs as well as growers Evans and Allen. Defendants alleged that pursuant to certain written contracts the growers had agreed to pay all charges incurred in connection with growing the crops. Defendants thus alleged that Allen and Evans were solely liable for all fertilizers used on their land and sought a judgment that defendants were not indebted to plaintiffs at all. Allen and Evans filed answers admitting the existence of the contracts but denying the other allegations. At trial at the conclusion of plaintiffs' evidence, Allen and Evans moved for severance of the cross complaint from the action pursuant to *Code Civ. Proc. § 1048*. The motion was granted. Plaintiffs' action against defendants continued, and judgment was rendered in favor of plaintiffs. Defendants appealed the judgment, one point of error being that the trial court erred in granting the motion for severance.The court of appeal affirmed the trial court's order. It found that plaintiffs were prejudiced by the added burden and cost of having to ferret out the nature of the agreement between defendants and Allen and Evans. It noted that plaintiffs were not relying on the contract between defendants and Allen and Evans in their action and that such contract was personal between those parties. Moreover, the court determined that defendants did not appear to be prejudiced by the order of severance.

[b] Severance When Actual Damage Claim Joined With Punitive Claim

In *Stencel Aero Eng'r Corp. v. Superior Court (1976) 56 Cal. App. 3d 978, 128 Cal. Rptr. 691* , plaintiffs were respectively the special administrator of the estate, widow, and minor son of Anthony McCarthy. The suit arose from the death of Anthony McCarthy in an airplane accident. It sought damages from Stencel Aero and other named and fictitiously named defendants who allegedly manufactured the aircraft and component parts of the craft involved in the accident. Stencel sought a judgment on the pleadings with respect to a $10,000,000 punitive damages claim brought by plaintiff heirs and by the decedent's special administrator. The trial court denied the motion for judgment on the pleadings and petitioner sought a writ of mandate to require the trial court to vacate its order and grant petitioner's motion. The court of appeal sustained the trial court order as to the special administrator but issued a peremptory writ as to plaintiff widow and minor son granting judgment on the pleadings since they were statutorily precluded from seeking punitive damages in a wrongful death action. As dictum, however, the court noted the possibility of prejudice to petitioners in that a claim for $10,000,000 in punitive damages was based on a $200 personal property claim. The court suggested, though, that any possible prejudice could be avoided by invoking the discretionary power of the court to sever issues for trial pursuant to *Code Civ. Proc. § 1048(b)*.

Although the court of appeal did not specify in what manner it perceived that petitioners would be prejudiced by joinder of a small property claim with a substantial claim for punitive damages, the force of the court's suggestion that severance of issues would provide an appropriate means of safeguard for petitioners would seem to extend to other situations in which inequities might result by the trial of greatly different actual and punitive claims together.

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4-45 California Points & Authorities § 45.29

§ 45.29 Supporting Motion to Sever [Code Civ. Proc. § 1048(b)]--Severance Proper to Avoid Inconvenience

[1] FORM

[*Caption. See § 45.28.*]

GRANTING A MOTION TO SEVER IS PROPER WHERE IT AVOIDS INCONVENIENCE.

A. Motion to Sever. [*See § 45.28, Paragraph A.*]

B. Severance to Avoid Inconvenience. Severance is an appropriate remedy to avoid inconvenience to parties (*Code Civ. Proc. § 1048(b)*).

[*Optional*] **C. Severance to Avoid Inconvenience Resulting From Joinder.** Severance is an appropriate remedy to avoid inconvenience to defendants resulting from joinder (*Landau v. Salam (1971) 4 Cal. 3d 901, 908, 95 Cal. Rptr. 46, 484 P.2d 1390* (dictum)).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted in support of a motion to sever actions or issues where necessary to avoid inconvenience to a party. Specifically, the foregoing memorandum is appropriate where actions have been joined pursuant to the liberalized rules of joinder of actions and where such joinder results in inconvenience to the defendants.

Where appropriate, counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Severance to Avoid Inconvenience Resulting From Joinder

In *Landau v. Salam (1971) 4 Cal. 3d 901, 95 Cal. Rptr. 46, 484 P.2d 1390* , plaintiff appealed from a judgment dismissing his action against defendants Salam, Charge A Car Inc., and Madison Properties for misjoinder of parties. The causes arose out of separate personal injury actions occurring respectively on April 28, 1968, and August 12, 1968, when plaintiff was injured in an automobile accident and subsequently suffered injuries on allegedly negligently maintained property. Plaintiff joined defendants pursuant to *Code Civ. Proc. § 379(c)* on the theory that he was unable to ascertain whether the injuries, medical costs, and loss of income resulted from the first or second accident. The trial court, however, sustained defendants' demurrer to plaintiff's action and dismissed the action without leave to amend. On appeal, the Supreme Court reversed. It found that the Legislature had enacted *Code Civ. Proc. § 379(a)-(c)* with the goal of liberalizing the procedures for permissive joinder of defendants. It held that plaintiff had properly joined defendants pursuant to *Code Civ. Proc. § 379(c)* and that the liberalized rules regarding joinder of parties should not be defeated by a narrow interpretation of joinder of causes of action. As dictum, however, the Court noted that when joinder of defendants falls within the provisions of *Code Civ. Proc. § 379(c)* yet inconvenience results to such defendants, the proper remedy is a motion for severance under *Code Civ. Proc. § 1048(b)* or a protective order under *Code Civ. Proc. § 379(b)* rather than a demurrer for misjoinder.

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4-45 California Points & Authorities § 45.30

§ 45.30 Supporting Motion to Sever [Code Civ. Proc. § 1048(b)]--To Promote Expediency

[1] FORM

[*Caption. See § 45.28.*]

GRANTING A MOTION TO SEVER IS PROPER WHERE SEPARATE TRIALS WOULD PROMOTE EXPEDIENCY.

A. Motion to Sever. [*See § 45.28, Paragraph A.*]

B. Severance to Promote Expediency. It is within the discretion of the trial court to order severance and separate trials when it promotes expediency (*McLellan v. McLellan (1972) 23 Cal. App. 3d 343, 353, 100 Cal. Rptr. 258*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted in support of a motion to sever actions where severance would promote expediency.

Where appropriate, counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Severance to Promote Expediency

In *McLellan v. McLellan (1972) 23 Cal. App. 3d 343, 100 Cal. Rptr. 258* , plaintiff wife instituted a divorce action against defendant husband on grounds of extreme mental cruelty and adultery. The action was filed prior to the enactment of the no-fault divorce provisions of the Family Law Act. Defendant filed an answer denying the grounds alleged by plaintiff and filed a cross complaint for divorce on the ground of extreme cruelty. After plaintiff's first witness, Lydia M., testified that she had committed adultery with defendant, the trial was continued in the hospital in which plaintiff, who was ill, was admitted. After plaintiff's testimony, plaintiff's counsel rested her case and moved that the court make a finding that plaintiff was entitled to a divorce on the two grounds she had alleged.Despite defendant's objection that he had not been given an opportunity to present his evidence on the issues decided and those raised in his cross complaint, the trial court granted the motion and entered an interlocutory order granting plaintiff a divorce from which defendant subsequently appealed.

Although trial continued with respect to defendant's entitlement to a divorce on the ground of extreme cruelty, defendant failed to present to present any evidence, and the court proceeded on the issues reserved in the interlocutory judgment. In defendant's appeals from the interlocutory judgment and a supplemental judgment awarding certain property and an order awarding plaintiff attorney's fees and costs, defendant contended, in part, that the court exceeded its jurisdiction in granting plaintiff's divorce on the basis of her and Lydia M.'s testimony without first having permitted defendant's presentation of his defense or evidence from his cross complaint. The court of appeal affirmed. It found that defendant had had the opportunity to present evidence on the issue of plaintiff's entitlement to a divorce but had declined to present any witnesses or other proof to rebut plaintiff's allegations. The court further found that the trial court in this instance did not abuse its discretion in treating the complaint and cross complaint as separate actions. It noted that the discretionary order of severance and separate trials of actions by the trial court will not be interfered with unless it clearly constitutes an abuse of discretion.

Although the court of appeal did not specify on what basis it concluded that severance of the complaint and the cross complaint was proper, it appears that severance, made after plaintiff's testimony in the hospital, was effected to promote expediency given the plaintiff's health, the necessity of holding court proceedings in the hospital, and the adequacy of testimony to support plaintiff's alleged grounds for relief. Alternative bases to the court's decision, however, could have been to avoid prejudice to plaintiff or to further convenience [see *Code Civ. Proc. § 1048(b)*].

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4-45 California Points & Authorities § 45.31

§ 45.31 Supporting Motion to Sever [Code Civ. Proc. § 1048(b)]--Severance Proper in Tort Action Where Defendant Has Filed Cross Complaint for Partial Equitable Indemnity Against Third Parties

[1] FORM

[*Caption. See § 45.28.*]

GRANTING A MOTION TO SEVER A CROSS COMPLAINT FOR PARTIAL EQUITABLE INDEMNITY FILED AGAINST THIRD PARTIES IS PROPER WHERE OTHERWISE THE PRESENCE OF SUCH PARTIES WOULD GREATLY COMPLICATE PLAINTIFF'S ACTION AND DEPRIVE HIM/HER OF THE RIGHT TO CONTROL THE SIZE AND SCOPE OF THE ACTION.

A. Motion to Sever. [*See § 45.28, Paragraph A.*]

B. Right to Sever Cross Complaint for Partial Equitable Indemnity. The explicit provision in *Section 1048(b) of the Code of Civil Procedure*, permitting a court to order a separate trial of a cause of action asserted in a cross complaint, permits the trial court to order severance of a cross complaint for partial equitable indemnity in a personal injury action where the effect otherwise would be to permit the defendant to bring in parties whom plaintiff has declined to join because it would greatly complicate the action and deprive plaintiff of the right to control the size and scope of the proceeding (*American Motorcycle Assn. v. Superior Court of Los Angeles County (1978) 20 Cal. 3d 578, 606*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted in support of a motion to sever a cause of action asserted in a cross complaint for partial equitable indemnity brought against third parties when the presence of the third parties in the plaintiff's personal injury action would greatly complicate the action and deprive him or her of the right to control the size and scope of the action.

Where appropriate, counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Right to Sever Cross Complaint for Partial Equitable Indemnity

American Motorcycle Assn. v. Superior Court of Los Angeles County (1978) 20 Cal. 3d 578 , was a landmark California Supreme Court decision in which the Court held that in a personal action a defendant could file a cross complaint against any person, whether already a party to the action or not, from whom defendant sought to obtain total or partial indemnity based on that person's alleged comparative negligence. In so holding, the Court noted plaintiff's andcross defendant's arguments, as real parties in interest, that the effect of permitting a defendant to bring in parties whom the plaintiff declined to join will have the undesirable effect of greatly complicating personal injury litigation and will deprive the plaintiff of the asserted right to control the size and scope of the proceeding. The Court stated that the problem may be partially obviated by the trial court's judicious use of the authority afforded by *Code Civ. Proc. § 1048*, which, the Court emphasized, permits a trial court to order a separate trial of any cause of action, including a cause of action asserted in a cross complaint. The Court cautioned that the trial court must take into consideration the fact that when the plaintiff is alleged to have been partially at fault for the injury, each of the third party defendants will have the right to litigate the question of the plaintiff's proportionate fault for the accident, the Court recognizing that as a consequence severance may not be an attractive alternative at times.

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4-45 California Points & Authorities § 45.32

§ 45.32 Opposing Motion to Sever [Code Civ. Proc. § 1048(b)]--Severance Improper in Class Action Prior to Determination of Suitability as Class

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*],	)	IES IN OPPOSITION TO MOTION TO SEVER
Defendant.	)	[*Code Civ. Proc. § 1048(b)*]
	)	
	)	

_____

GRANTING A MOTION TO SEVER IN A CLASS ACTION SUIT IS IMPROPER WHERE THE SUITABILITY OF THE SUIT AS A CLASS ACTION HAS NOT BEEN DETERMINED.

A. Motion to Sever. [*See § 45.28, Paragraph A.*]

B. Untimely Severance in Class Actions. It is improper to order separate trials of several issues in a class action suit prior to a determination of the suitability of the case as a class action, even if severance would be otherwise appropriate (*Home Sav. & Loan Assn v. Superior Court (1974) 42 Cal. App. 3d 1006, 1012, 117 Cal. Rptr. 485*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted in opposition to a motion to sever where severance is attempted prior to a determination of the suitability of a case as a class action.

Where appropriate, counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Untimely Severance in Class Actions

In *Home Sav. & Loan Assn v. Superior Court (1974) 42 Cal. App. 3d 1006, 117 Cal. Rptr. 485* , petitioner, defendants in a class action suit, sought a writ of mandate to prohibit the trial court from proceeding to adjudicate the validity of the claims of Lawrence and Rita Deutsch prior to a determination of the suitability of the action as a class action. The complaint alleged that Home had charged against plaintiffs and others similarly situated who had borrowed money from Home Savings and executed promissory notes secured by trust deeds to real property late charges in violation of *Civ. Code § 1670*. Pursuant to a pretrial motion of plaintiffs, the trial court ordered bifurcated trials on the issues of the validity of the Deutsches' late charges, whether they could recover the late charges plus attorneys' fees under their note, whether Home's affirmative defenses barred the Deutsches' suit, and whether Home was entitled to offset damages. The court of appeal issued the peremptory writ of prohibition restraining the trial court from proceeding to trial on the substantive issues of the case. In so doing, it found that severance of issues for trial prior to a determination of the suitability of the class action and notification of all potential members allowed "one-way intervention" in that potential members could reserve their decision to become part of the class until the validity of the cause brought by the named plaintiffs had already been adjudicated. Such a situation, the court of appeal stated, failed to protect the defendant's rights to a fair trial and due process. Moreover, the court found nothing in the language of *Code Civ. Proc. § 1048(b)* to suggest that "one-way intervention" in class action suits was sanctioned.

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4-45 California Points & Authorities § 45.33

§ 45.33 Opposing Motion to Sever [Code Civ. Proc. § 1048(b)]--Severance Improper if Tort Liability of One Defendant Dependent on Codefendant

[1] FORM

[*Caption. See § 45.32.*]

GRANTING A MOTION TO SEVER AN ACTION BROUGHT AGAINST TWO DEFENDANTS IS IMPROPER IF THE TORT LIABILITY OF ONE DEFENDANT IS DEPENDENT ON A CODEFENDANT

A. Motion to Sever. [*See § 45.28, Paragraph A.*]

B. Tort Liability Dependent on Codefendant. It is improper to order separate trials of actions in which separate judgments are rendered in a cause of action in tort where the liability of one defendant is dependent on that of another defendant (*Adams Mfg. & Eng'r Co. v. Coast Centerless Grinding Co. (1960) 184 Cal. App. 2d 649, 655, 7 Cal. Rptr. 761*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted in opposition to a motion to sever where such motion is made in a tort action where the liability of one defendant is dependent on that of another defendant.

Where appropriate, counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Points and Authorities

In an appropriate case, the foregoing points and authorities may be used in opposition to the motion supported by the points and authorities set out in *§ 45.31*.

[3] Discussion of Authorities

[a] Tort Liability Dependent on Codefendant

In *Adams Mfg. & Eng'r Co. v. Coast Centerless Grinding Co. (1960) 184 Cal. App. 2d 649, 7 Cal. Rptr. 761* , plaintiff sued for the reasonable value of services rendered and materials furnished. The action was brought against defendant Coast alone in count one and against Coast and Robert Black together as partners in count two. Judgment was rendered against Black by default and in favor of Coast. Plaintiff appealed the judgment. The court of appeal affirmed the portion of the judgment in favor of Coast and reversed the portion against Black. On appeal, plaintiff argued that Black and Coast were partners or joint venturers in the production of oil well equipment and that they were indebted to him for services and materials. The court found that the agreement on which plaintiff based his allegation of the existence of a partnership between defendants did not justify such a conclusion. Moreover, the court determined that since the cause of action against Black was predicated on the argument that a partnership in fact existed, Black's liability, if any, was dependent on a finding of liability of Coast. Thus, even though defendant Black defaulted, he was entitled to the benefit of codefendant Coast's establishing the nonexistence of a partnership. The court therefore reversed the default judgment against Black, holding that the cause ofaction against Black was not severable from that against Coast where one defendant's liability is dependent on that of a codefendant.

The court in *Adams* cited the well-established rule that where there are two or more defendants and the liability of one is dependent on that of another, the default of one does not preclude his or her having the benefit of the codefendant's establishing the absence of a controlling factor in the cause of action. Extending the principle enunciated in *Adams*, it is apparent that severance of tort actions where one defendant's liability is predicated on that of another would be prejudicial and in contravention of the goal of judicial economy as set forth in *Code Civ. Proc. § 1048(b)*.

[4] Additional Authorities

[a] Tort Liability Dependent on Codefendant

In *Mirabile v. Smith (1953) 119 Cal. App. 2d 685, 260 P.2d 179* , Steiner, as assignee for collection, brought an action in contract in municipal court against defendants Mirabile, Sherman and Louise Haynes, and others doing business as Sherman's Dine and Dance. The complaint alleged on information and belief that defendants were copartners and that Sherman acted for the other defendants when he entered into the contract. Defendants Haynes filed an answer generally denying the allegations of plaintiff's complaint and alleging payment. Defendant Mirabile failed to file an answer, and a default judgment was entered against him. He did not learn of the judgment until Steiner obtained a writ of execution against him. Mirabile then filed an action in superior court seeking to recover funds obtained by the writ and to restrain the municipal court from enforcing the default judgment. The superior court declared the municipal court default judgment void and vacated it. Smith, as municipal court judge, set aside the order but specified that it did not extend to the default judgment. The municipal court further denied Mirabile's request that the court refrain from entering further

judgment against him until the issues raised by codefendants were determined. The court refused and Mirabile sought and obtained from the superior court a writ of prohibition against the municipal court judge. The court of appeal affirmed the order. It stated that where the liability alleged is joint and not several and is predicated on a claim of partnership or joint venture that no judgment should be entered against a defaulting defendant until the merits of the partnership claim are settled.

The decision rests on *Section 579 of the Code of Civil Procedure* and the concomitant principle that the court may render individual judgments against codefendants when the liability of each is several. Analogously, several judgments, and hence severance pursuant to *Code Civ. Proc. § 1048(b)*, are improper where the liability of codefendants is joint and one defendant's liability is dependent on that of a codefendant. Under such circumstances, severance of actions or issues would contravene the stated purposes of the governing statute, namely judicial economy and avoidance of prejudice.

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4-45 California Points & Authorities §§ 45.34-45.49

[Reserved]

§§ 45.34[Reserved]

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4-45 California Points & Authorities § 45.50

§ 45.50 Supporting Petition for Coordination [Code Civ. Proc. § 404; Cal. Rules of Ct., Rules 3.520(b), 3.521(a)]--General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*]	)	NO. _____
Plaintiff and _____	)	MEMORANDUM IN SUPPORT OF PETITION
[*specify, e.g.*, Petitioner],	)	FOR COORDINATION
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant and _____	)	Location: _____
[*specify, e.g.*, Respondent].	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

COORDINATION SHOULD BE ORDERED BECAUSE IT IS APPROPRIATE UNDER THE STANDARDS SET OUT IN SECTION 404.1 OF THE CODE OF CIVIL PROCEDURE, IN THAT _____ [*specify, e.g.*, THE COMMON QUESTIONS OF FACT AND LAW PREDOMINATE AND ARE SIGNIFICANT TO THE LITIGATION, SO THAT COORDINATION WILL BE CONVENIENT TO THE PARTIES, WITNESSES, AND COUNSEL AND WILL AVOID DUPLICATIVE AND INCONSISTENT RULINGS, ORDERS, OR JUDGMENTS].

[*EITHER, when all parties plaintiff or defendant petition*]

A. When Petition May Be Made. When civil actions sharing a common question of fact or law are pending in different courts, all the parties _____ [plaintiff *or* defendant], in any one of the actions may submit a petition for coordination to the Chair of the Judicial Council, who on receiving the petition may assign a judge to determine whether the actions are complex, and if so, whether coordination of the actions is appropriate (*Code Civ. Proc. § 404*; *Cal. Rules of Ct., Rules 3.520(b), 3.521(a)*).

[*OR, when a party has been granted permission to petition*]

A. When Petition May Be Made. When civil actions sharing a common question of fact or law are pending in different courts, any party to one of the actions, after obtaining permission from the presiding judge, may submit a petition for coordination to the Chair of the Judicial Council, who on receiving the petition may assign a judge to determine whether the actions are complex, and if so, whether coordination of the actions is appropriate (*Code Civ. Proc. § 404*; *Cal. Rules of Ct., Rules 3.520(b), 3.521(a)*).

[*CONTINUE*]

B. Complex Action Defined. The court must consider *California Rules of Court, Rule 3.400 et seq.* in determining whether a case is complex within the meaning of *Code Civ. Proc. § 404* (*Cal. Rules of Ct., Rule 3.502*). Under *California Rules of Court, Rule 3.400(a),* a complex case is an action that requires exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel. The actions sought to be coordinated here are complex actions within this definition so as to allow their coordination under *Code of Civil Procedure Section 404*. These actions _____ [identify factors, including relevant factors listed in *Cal. Rules of Ct., Rule 3.400(b)* and any appplicable special category of claims listed in *Cal. Rules of Ct., Rule 3.400(c),* that show that the actions are complex].

C. When Coordination Is Appropriate. Coordination of civil actions sharing a common question of fact or law is appropriate if one judge hearing all of the actions for all purposes in a selected sight or sites will promote the ends of justice, taking into account the following factors (*Code Civ. Proc. § 404.1*):

(1) whether the common question of fact or law is predominating and significant to the litigation;

(2) the convenience of parties, witnesses, and counsel;

(3) the relative development of the actions and the work product of counsel;

(4) the efficient utilization of judicial facilities and manpower;

(5) the calendar of the courts;

(6) the disadvantages of duplicative and inconsistent rulings, orders, or judgments; and

(7) the likelihood of settlement of the actions without further litigation should coordination be denied.

In this case, _____ [*identify each factor present in the instant case that favors coordination*].

D. Benefits of Coordination Outweigh Potential Problems. Coordination should be ordered when its benefits outweigh potential complications or problems(*McGhan Medical Corp. v. Superior Court (1992) 11 Cal. App. 4th 804,*

812-813, 14 Cal. Rptr. 2d 264).

E. Balancing of Factors. The judge has discretion in weighing and balancing the factors to determine whether coordination best serves the ends of justice in a particular case. The judge's discretion is not abused if there is evidence to support the existence of many factors favoring the judge's decision (*Pesses v. Superior Court (1980) 107 Cal. App. 3d 117, 126, 165 Cal. Rptr. 680*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be used to support a petition for coordination submitted to the Chair of the Judicial Council [*Code Civ. Proc. § 404*; *Cal. Rules of Ct., Rule 3.521(a)*]. The petition either is submitted by all parties plaintiff or defendant to one of the actions to be coordinated, or in other cases is submitted after the petitioner obtains an order granting permission to submit the petition, which must be issued by the presiding judge of the court in which one of the actions to be coordinated is pending [*Cal. Rules of Ct., Rules 3.520(b), 3.521(a)*; *see Code Civ. Proc. § 404*]. A memorandum and declarations must be submitted in support of the petition [*Code Civ. Proc. § 404*; *Cal. Rules of Ct., Rules 3.521(a)*].

With appropriate modifications, these points and authorities may be used to support a number of other motions, requests, or other papers to which the standards for coordination set out under *Code Civ. Proc. § 404.1* also apply:

- A motion for permission to submit a petition for coordination, when this motion is a necessary prerequisite [*Cal. Rules of Ct., Rule 3.520(b)*; *see Code Civ. Proc. § 404*];

- A response by a party other than the petitioner supporting the petition for coordination [*Cal. Rules of Ct., Rule 3.526*];

- A request for an order coordinating an additional action with other actions previously ordered coordinated [*Code Civ. Proc. § 404.4*; *Cal. Rules of Ct., Rule 3.544*].

For further discussion, see the Introduction, under Coordination Procedure, *above.*

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should point to facts in the affidavits or declarations supporting the petition that show that the action is complex as defined by *Cal. Rules of Ct., Rule 3.400 et seq.* [*see Cal. Rules of Ct., Rule 3.502*], and that weigh in favor of coordination under the standards set out in *Code Civ. Proc. § 404.1*.

[b] Service of Memorandum

In coordination proceedings, all memoranda and declarations in support of any petition, motion, or application must be served and submitted at least nine court days before any hearing on the matter, unless otherwise provided in the rules, or directed by the assigned judge [*Cal. Rules of Ct., Rule 3.513*; *see also Cal. Rules of Ct., Rule 3.526* (time for response of another party in support of petition for coordination)]. Papers that must be submitted to the Chair of the Judicial Council under *Cal. Rules of Ct., Rule 3.511(a),* such as petitions for coordination and responses in opposition to petitions for coordination, may be submitted electronically to the Chair of the Judicial Council in San Francisco [*Cal. Rules of Ct., Rule 3.512*].

[c] Related Pleading and Practice Forms

For a form of petition for coordination, as well as other forms of notices of motions, supporting declarations, and orders relating to coordination proceedings, see *California Forms of Pleading and Practice Ch. 125, Consolidation, Severance, and Coordination of Actions, § 125.10 et seq.* (Matthew Bender).

[d] Opposing Points and Authorities

In an appropriate case, the points and authorities set out in *§ 45.52* may be used to oppose a petition supported by this form.

[3] Discussion of Authorities

[A] Benefits of Coordination Outweigh Potential Problems

McGhan Medical Corp. v. Superior Court *(1992) 11 Cal. App. 4th 804, 14 Cal. Rptr. 2d 264*), involved the issue of whether over 300 cases filed in approximately 20 counties should be coordinated. Plaintiffs in these cases were women with breast implants. Defendants were manufacturers of the devices, producers of the implant materials, and physicians who prescribed the implants' use. The trial court found that common questions of fact or law did not predominate (in that the cases involved different implants, designs, warnings, injuries, etc.) and, in light of the sheer number of cases pending and yet to befiled,that coordination would be impractical. The court also concluded that coordination would inconvenience all parties by requiring travel to one county and would unfairly tax the judicial resources of that county. Therefore, the coordination petition was denied (*11 Cal. App. 4th 804, 808)* .

The court of appeal granted the writ of mandate, reversing the trial court's order and ordering coordination. In reading the coordination statutes together with the rules promulgated by the Judicial Council for coordination, the court concluded that all cases did not have to be heard by the same judge and that the assigned judge had the discretion and flexibility to devise creative solutions such as (1) severing noncommon cases or issues, (2) ordering trial in more than one forum, (3) minimizing travel by all participants by lodging discovery materials in a central location accessible by computer networking or fax, and (4) centralizing motion practice in specific county courts (*11 Cal. App. 4th 804, 812-813)* . Thus, the benefits of coordination outweighed any potential delay or inequity.

[b] Balancing of Factors

Pesses v. Superior Court *(1980) 107 Cal. App. 3d 117, 165 Cal. Rptr. 680* , involved petitions for writs of mandate by plaintiffs in several wrongful death actions in which the plaintiffs had moved to remand or transfer the actions from the county where the actions were coordinated to the county where the actions were originally brought. The trial court denied the motions after weighing considerations of common questions of fact, efficient utilization of judicial facilities and manpower, the courts' calendars, and disadvantages of duplicative and inconsistent rulings, against the convenience of witnesses. Plaintiffs sought the writs to compel the trial court to remand or transfer.

The court of appeal denied the petitions and held that the coordination judge did not abuse his discretion because there

was evidence to support the existence of many factors favoring retention. The court stated that the parallel listing of the multiple factors in *Code Civ. Proc. § 404.1* (governing coordination generally) and *Cal. Rules of Ct., Rule 3.543* (governing transfer of action or claim) necessitates the exercise of discretion in weighing and balancing the factors to determine whether coordination, or severance, best serves the ends of justice in a particular case. The court further stated that there is no reason why the coordination judge's discretion in such matters is any different than that afforded the trial court normally in a trial of factual issues (*107 Cal. App. 3d 117, 125-126)* .

[4] Additional Authorities

[a] Complex Action Defined

In *Thayer v. Wells Fargo Bank (2001) 92 Cal. App. 4th 819, 112 Cal. Rptr. 2d 284* , the court explained that although coordination under *Code of Civ. Proc. § 404* is limited to "complex" cases, coordinated actions are not by definition difficult or novel. The criteria that determine whether actions are "complex" within the meaning of section 404 are set forth in the California Rules of Court, which defines a "complex case" as "an action that requires exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel" (*Cal. Rules of Court, Rule 3.400(a)*). In this case, the coordinated actions were "complex" within the meaning of the rule only because of the large number of represented parties in related actions pending in different counties. The court did not address the difficulty or novelty of the substantive legal issues presented because the petition to coordinate made no such claim; and the party seeking consolidation did so solely on the grounds the actions "are brought on behalf of overlapping classes, alleging virtually identical facts and legal theories, and involve the same defendant," and that coordination "would advance the convenience of the parties, witnesses and counsel" and thereby "promote the efficient utilization of judicial facilities and manpower ...#x2026; avoid the risk of duplicative and inconsistent rulings ...#x2026; [and] increase the possibility of settlement." The moving party did not allege, and the court did not find or even imply that the actions sought to be coordinated present "difficult or novel legal issues that will be time-consuming to resolve" (*92 Cal. App. 4th 819, 836 n.8*).

[b] Balancing of Factors

In *Keenan v. Superior Court (1980) 111 Cal. App. 3d 336, 168 Cal. Rptr. 561* , shortly after five civil actions had been submitted to a coordination motion judge to consider whether the actions were appropriate for coordination, the trial court in which the actions were pending granted defendants a change of venue in three of the actions. Plaintiff-Petitioners sought a writ of mandate requiring the trial court to vacate its order. The court of appeal issued the writ, holding that the trial court's order was an improper intrusion on cases which had been assigned to the coordination motion judge. The court stated that notwithstanding the fact that the petition for coordination had not yet been granted, the statutory system reflects the legislative intent to give priority to pending coordination proceedings and that the coordination procedure, when applicable, was clearly intended to govern subsequent activities without interference by any judge other than those designated as coordination motion judge or coordination trial judge (*111 Cal. App. 3d 336, 342-344)* .

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4-45 California Points & Authorities § 45.51

§ 45.51 Supporting Motion for Order Staying Proceedings in Action Included in Coordination Proceeding [Code Civ. Proc. § 404.5; Cal. Rules of Ct., Rules 3.515, 3.520(b)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION FOR
vs.	)	ORDER STAYING PROCEEDINGS
	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THE MOTION OF _____ [*specify, e.g.*, PLAINTIFF] _____ [*name*] FOR AN ORDER STAYING THE PROCEEDINGS IN THIS ACTION PENDING DETERMINATION OF THE COORDINATION PROCEEDING SHOULD BE GRANTED ON THE GROUND THAT A STAY WILL PROMOTE THE ENDS OF JUSTICE.

[*EITHER, if motion is for stay pending determination of petition for coordination*]

A. Action May Be Stayed Pending Determination of Petition. Pending any determination of whether coordination is appropriate, the judge making that determination may stay any action being considered for, or affecting an action being considered for, coordination (*Code Civ. Proc. § 404.5*).

[*OR, if motion is for stay to allow sufficient time to submit petition for coordination*]

A. All Related Actions May Be Stayed for Time to Petition. To provide sufficient time for a party to submit a petition, the judge may, stay all related actions pending in that court for a reasonable time not to exceed 30 calendar days (*Cal. Rules of Ct., Rule 3.520(b)(3)*).

B. Standards for Determining Whether Stay Is Appropriate. In ruling on an application for a stay order, the assigned judge must determine whether the stay will promote the ends of justice, considering (1) the imminence of any trial or other proceeding that might materially affect the status of the action to be stayed; and (2) whether a final judgment in that action would have a res judicata or collateral estoppel effect with regard to any common issue of the included actions (*Cal. Rules of Ct., Rule 3.515(f)*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be used to support a motion for an order staying proceedings in an action or actions included in coordination proceedings. Specifically, it may be used to support a motion for a stay of all actions included in the coordination proceeding pending determination of a petition for coordination by a judge assigned for that purpose [*Code Civ. Proc. § 404.5*; *Cal. Rules of Ct., Rule 3.515*]. Alternatively, it may be used to obtain a stay of up to 30 calendar days of included actions pending in a particular court that grants a motion for leave to submit a petition for coordination to the Chair of the Judicial Council [*Cal. Rules of Ct., Rule 3.520(b)*]. A motion for an order staying proceedings included in a coordination proceeding must be supported by a memorandum and by affidavits [*Cal. Rules of Ct., Rule 3.515(a)*]. For further discussion, see the Introduction under Coordination Procedure, *above.*

A motion for an order staying proceedings pending determination of a petition for coordination may be made either simultaneously with the petition, or at any later time prior to the determination of the petition [*Cal. Rules of Ct., Rule 3.515(a)*]. If the form is used to support a motion for a stay order that is made after the submission of a petition for coordination, the caption should be modified to reflect the special title and number of the coordination proceeding, which is assigned by the coordination attorney [*Cal. Rules of Ct., Rule 3.550(c)*; for a form of caption including such special title and number, see *California Forms of Pleading and Practice, Ch. 125, Consolidation, Severance, and Coordination of Actions, § 125.10 et seq.* (Matthew Bender)].

Counsel should insert argument in the form showing the relationship betweenthe facts of the case and the points of law stated. Thus, counsel should point tofacts in the affidavits establishing that the stay is appropriate under the standards set out in *Cal. Rules of Ct., Rule 3.515(f)*.

[b] Service of Memorandum

In coordination proceedings, all memoranda and declarations in support of any petition, motion, or application must be served and submitted at least nine court days before any hearing on the matter, unless otherwise provided in the rules, or directed by the assigned judge [*Cal. Rules of Ct., Rule 3.513*]. Papers that must be submitted to the Chair of the Judicial Council under *Cal. Rules of Ct., Rule 3.511(a)*, such as a motion for a stay, may be submitted electronically to the Chair of the Judicial Council in San Francisco [*Cal. Rules of Ct., Rule 3.512*].

[c] Related Pleading and Practice Forms

For form of motions for an order staying proceedings included in coordination proceedings, as well as related forms of declarations and orders, see *California Forms of Pleading and Practice, Ch. 125, Consolidation, Severance, and Coordination of Actions, § 125.10 et seq.* (Matthew Bender).

California Points & Authorities

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Volume 4 Chapters 40-49 CLAIM & DELIVERY---to---CONTINUANCE
CHAPTER 45 CONSOLIDATION, SEVERANCE, AND COORDINATION OF ACTIONS
PART II. FORMS
B. Coordination of Actions

4-45 California Points & Authorities § 45.52

§ 45.52 Opposing Petition for Coordination [Cal. Rules of Ct.,Rule 3.525]--Trial of Action Imminent [Cal. Rules of Ct., Rule 3.521(d)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff and _____	)	MEMORANDUM IN OPPOSITION TO PETITION
[*specify*, *e.g.*, Petitioner],	)	FOR COORDINATION
vs.	)	Date: _____
	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant and _____	)	[Judge: _____]
[*specify*, *e.g.*, Respondent].	)	Date Action Filed: _____
	)	[Trial Date: _____]
	)	NO. _____

_____

COORDINATION IS NOT APPROPRIATE BECAUSE A TRIAL IS IMMINENT IN ONE OF THE ACTIONS BEING CONSIDERED FOR COORDINATION.

Trial Is Imminent in an Action. The imminence of a trial in any action otherwise appropriate for coordination may be a ground for summary denial of a petition for coordination, in whole or in part (*Cal. Rules of Ct., Rule 3.521(d)*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be used to oppose a petition for coordination [*Cal. Rules of Ct., Rule 3.525*]. The ground for opposition is that a trial isimminent in one of the actions being considered for coordination [*Cal. Rules of Ct., Rule 3.521(d)*].

The term "petition for coordination" under *Cal. Rules of Ct., Rule 3.521*, includes requests for coordination of actions submitted to a coordination trial judge pursuant to *Cal. Rules of Ct., Rule 3.544* (add-on cases) [*Cal. Rules of Ct., Rule 3.501(14)*]. Thus, with appropriate modifications, these points and authorities may be used to oppose a request to coordinate an add-on case. Failure to serve and submit a memorandum and declarations in opposition may be a ground for granting the request to coordinate an add-on case [*Cal. Rules of Ct., Rule 3.544(b)*].

In an appropriate case, these points and authorities may be used to oppose a petition for coordination supported by the points and authorities set out in *§ 45.50*.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Service of Memorandum

All memoranda and declarations in opposition to a petition for coordination must be served and filed at least nine court days before the date set for hearing [*Cal. Rules of Ct., Rule 3.525*]. Papers that must be submitted to the Chair of the Judicial Council under *Cal. Rules of Ct., Rule 3.511(a)*, such as petitions for coordination and responses in opposition to petitions for coordination, may be submitted electronically to the Chair of the Judicial Council in San Francisco [*Cal. Rules of Ct., Rule 3.512*].

[c] Related Pleading and Practice Forms

For a form of statement in opposition to a petition for coordination, see *California Forms of Pleading and Practice, Ch. 125, Consolidation, Severance, and Coordination of Actions, § 125.10 et seq.* (Matthew Bender).

California Points & Authorities

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Volume 4 Chapters 40-49 CLAIM & DELIVERY---to---CONTINUANCE
CHAPTER 46 CONSPIRACY

4-46 California Points & Authorities 46.syn

§ 46.syn Synopsis to Chapter 46: CONSPIRACY

§ 46.01 Scope of Chapter

§ 46.02 Governing Statutes

§ 46.03 Page Limits on Points and Authorities

§ 46.04 Types of Joint Liability

§ 46.05 Related Pleading and Practice Chapters

§ 46.06 Related Points and Authorities Chapters

§§ 46.07-46.19 [Reserved]

§ 46.20 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Failure to Allege Underlying Civil Wrong--No Cause of Action for Civil Conspiracy Alone

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Elements Essential to Pleading Conspiracy

[b] No Cause of Action for Civil Conspiracy Alone

[c] Pleading of Facts Showing Independent Right to Action

[d] Necessity of Alleging Facts Showing Fraud, Not Generalities, Presumptions, and Conclusions

[e] General Allegations of Restraint of Trade

[4] Additional Authorities

[a] Elements Essential to Pleading Conspiracy

[b] No Cause of Action for Civil Conspiracy Alone

[c] Pleading of Facts Showing Independent Right of Action

[d] Necessity of Alleging Facts Showing Fraud, Not Generalities, Presumptions, and Conclusions

§ 46.21 Supporting Demurrer To Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Failure to Allege Underlying Civil Wrong--Legal Right to Do Act Complained of

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Legal Right to Commit Act Complained of

[b] Evil Motive for Act Not Unlawful

[c] Conspiracy to Commit Privileged Act

[d] Basic Policy Decisions of Governmental Agencies

[e] Termination of Contract Terminable at Will

[f] Termination of Employment

[g] Act of Litigation Is Privileged

[h] Lack of Capability of Committing Underlying Tort

[4] Additional Authorities

[a] Legal Right to Commit Act Complained of

[b] Lack of Capability of Committing Underlying Tort

§ 46.22 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Failure to Allege Underlying Civil Wrong--Civil Right as Not Necessarily Arising From Criminal Violation Involving Obstruction of Justice Through Perjury and Concealment of Documentary Evidence

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Civil Right Not Predicated on Violation of Criminal Statute

[b] Common Law Crime of Obstruction of Justice

[4] Additional Authorities

[a] Civil Right Not Predicated on Violation of Criminal Statute

§ 46.23 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Failure to Allege Underlying Civil Wrong--Contracting Party Incapable of Committing Tort of Interference With Own Contract

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Contracting Party Legally Incapable of Committing Tort of Interference With Own Contract

§ 46.24 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Failure to Allege Defendant's Knowing Entry Into Actionable Conspiracy

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Essential Allegations to Assertion of Conspiracy

[b] Necessity of Alleging Defendant's Knowledge of Conspiracy

[4] Additional Authorities

[a] Essential Allegations to Assertion of Conspiracy

§ 46.25 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Failure to Allege Facts in Action Against Corporation and Its Agents Showing That Agents Acted for Individual Advantage or Beyond Scope of Authority

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Two or More Persons or Entities Required

[b] Corporation Cannot Conspire With Itself or Its Agents

[c] Corporate Agents Cannot Conspire With Corporation

[4] Additional Authorities

[a] Corporate Agents Cannot Conspire With Corporation

§ 46.26 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Complaint Alleges Conspiracy by Agent to Violate Duty Binding on Principal Alone

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Duty Not Binding on Agent Defendant

[4] Additional Authorities

[a] Duty Not Binding on Agent Defendant

§ 46.27 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Failure to Allege Facts Showing Damage Resulting From Alleged Conspiracy

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Cause of Action for Resulting Damage

[4] Additional Authorities

[a] Cause of Action for Resulting Damage

[b] Facts Showing Causal Connection Between Wrong and Damages Claimed

§ 46.28 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Action Based on Alleged Attorney-Client Conspiracy--Failure to Obtain Order Establishing Reasonable Probability of Success [Civ. Code § 1714.10(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Plaintiff Must Establish Reasonable Probability of Prevailing in Action

[b] Defense of Failure to Obtain Order Applies to Single Conspiracy Action Brought Against Both Attorney and Law Firm

[c] Requirement to Obtain Order Does Not Violate Due Process Guaranty

[d] Requirement to Obtain Order Does Not Violate Equal Protection Guaranty

[e] Requirement to Obtain Order Does Not Violate Guaranty of Jury Trial in Civil Cases

[f] Denial of Order Is Res Judicata to Action

[g] Attorney's Financial Gain Exception Requires More Than Monetary Compensation for Legal Services

[4] Additional Authorities

[a] Attorney's Financial Gain Exception Requires More Than Monetary Compensation for Legal Services

§ 46.29 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Bar of Statute of Limitations--Conspiracy to Defraud [Code Civ. Proc. § 338(d)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Raising Statute of Limitations by Demurrer

[b] Applicable Statute Determined by Nature of Underlying Action

[c] Pleading Date of Last Overt Act

[d] Act Alleged to Be Last Overt Act Is Privileged

[e] Limitation Period Applicable to Fraud Action

[f] Pleading Discovery Within Three Years of Commencement

[4] Additional Authorities

[a] Applicable Statute Determined by Nature of Underlying Action

[b] Limitation Period Applicable to Fraud Action

[c] Pleading Discovery Within Three Years of Commencement

§ 46.30 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Bar of Statute of Limitations--Conspiracy to Commit Civil Wrong [Code Civ. Proc. §§ 335.1, 340(c)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Forms

§ 46.31 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Bar of Statute of Limitations--Conspiracy to Induce Breach of Contract [Code Civ. Proc. § 339(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Forms

[3] Discussion of Authorities

[a] Limitation Period for Conspiracy to Induce Breach of Contract

§ 46.32 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Bar of Statute of Limitations--Conspiracy to Interfere With Trade or Business [Code Civ. Proc. § 339(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Forms

[3] Discussion of Authorities

[a] Limitation Period for Conspiracy to Interfere With Trade or Business

§ 46.33 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Bar of Statute of Limitations--Conspiracy Based on Conversion [Code Civ. Proc. § 338(c)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Limitation Period Applicable to Action Based on Conversion

[4] Additional Authorities

[a] Applicable Statute Determined by Nature of Underlying Action

[b] Pleading Date of Last Overt Act

§ 46.34 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--RICO Claim--Common Law Tort as Not Constituting RICO Cause of Action

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Common Law Torts Are Not RICO Causes of Action

§ 46.35 Supporting Motion for Summary Judgment for Defendant [Code Civ. Proc. § 437c]--In Action Based on Conspiracy--Predicated on Illegal or Unenforceable Act or Transaction

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Illegal Act or Transaction

[b] Contract Unenforceable Because Unlawful

§ 46.36 Supporting Motion for Summary Judgment for Defendant [Code Civ. Proc. § 437c]--In Action Based on Conspiracy--Mere Knowledge, Acquiescence, or Approval in Conspiracy Is Insufficient

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Forms

[3] Discussion of Authorities

[a] Liability Predicated on Projected Joint Action

[4] Additional Authorities

[a] Liability Predicated on Projected Joint Action

§ 46.37 Supporting Motion for Summary Judgment for Defendant [Code Civ. Proc. § 437c]--In Action Based on Conspiracy--Defendant Corporation Organized After Alleged Wrongful Acts Occurred

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Forms

[3] Discussion of Authorities

[a] Corporation Organized After Wrongful Acts Occurred

§ 46.38 Supporting Motion for Summary Judgment for Defendant [Code Civ. Proc. § 437c]--In Action Based on Conspiracy--Bar of Statute of Limitations--Cause of Action for Defamation or Invasion of Privacy Disseminated in Public Media Accrues on Date of First General Dissemination

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Forms

[3] Discussion of Authorities

[a] Limitation Period for Conspiracy to Invade Privacy

[b] Defamation or Invasion of Privacy in Public Media

§ 46.39 Supporting Motion for Judgment Notwithstanding Verdict [Code Civ. Proc. § 629--In Action Based on Conspiracy--Acting Party Exonerated by Trier of Fact

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Exoneration of Acting Party

[4] Additional Authorities

[a] Exoneration of Acting Party

§ 46.40 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Liability of All Conspirators May Be Based on Allegations Showing Civil Wrong Committed by at Least One Conspirator With Resulting Damage

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Conditions for Liability for Conspiracy

[b] Liability of Coconspirators

[c] Act of One During Conspiracy Is Act of All

[d] Proposition 51 Did Not Change Rule of Joint and Several Liability Among Conspirators

[4] Additional Authorities

[a] Liability of Coconspirators

§ 46.41 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Conspirator Who Joins Subsequent to Commission of Overt Acts May Be Liable

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Joinder at Inception Unnecessary

[b] Conspirators as Parties to All Acts

[c] Termination of Conspiracy

[d] Termination of Conspiracy to Convert

[4] Additional Authorities

[a] Joinder at Inception Unnecessary

§ 46.42 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Status as Agent Does Not Preclude Liability

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Liability of Person Who Acts as Agent

[b] Acts of Attorney Joining Conspiracy

§ 46.43 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Agent or Employee Acting on Behalf of Corporation Owed Duty to Plaintiff Independent of Corporation's Duty

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Special Issues Relating to Authorities

[3] Discussion of Authorities

[a] Liability of Corporate Agent or Employee Owing Independent Duty to Plaintiff

§ 46.44 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Conspiracy Among Corporate Officers and/or Directors to Harm Third Parties Through Corporation

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Conspiracy Among Corporate Officers and/or Directors to Harm Third Parties Through Corporation

§ 46.45 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Allegation of Conspiracy Unnecessary

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Allegation of Conspiracy as Unnecessary

[4] Additional Authorities

[a] Allegation of Conspiracy as Unnecessary

§ 46.46 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Formation and Operation of Conspiracy Inferable From Other Allegations of Complaint

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Express Agreement Not Necessary

[b] General Allegation of Agreement

[c] Allegation of Character and Type of Facts and Circumstances

[d] Inference as to Existence of Conspiracy

[4] Additional Authorities

[a] General Allegation of Agreement

[b] Inference as to Existence of Conspiracy

§ 46.47 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Statute of Limitations--Cause of Action Accrues on Date of Last Overt Act

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Accrual of Cause of Action

[b] Period of Limitations May Be Tolled After Discovery of Fraud If Fraud Is Continuing Wrong

[c] Statute Runs From Time Disclosure Made

[d] Purposeful Attempts to Conceal Constitute Overt Acts for Purpose of Statute of Limitations

[4] Additional Authorities

[a] Accrual of Cause of Action

§ 46.48 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Statute of Limitations for Cause of Action for Conspiracy to Defraud [Code Civ. Proc. § 338(d)] Tolled by Delayed Discovery Rule

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Delayed Discovery Rule Can Be Basis for Finding of Timeliness Independent of Last Overt Act Doctrine

[b] Allegations of Delayed Discovery Establish Timeliness

§ 46.49 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Dismissal of One Defendant Does Not Release Remaining Defendants [Code Civ. Proc. § 877]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Release or Dismissal of One Co-Conspirator Does Not Release Others

§ 46.50 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Action Against Attorney Based on Attorney-Client Conspiracy--Statute of Limitations Tolled While Plaintiff Pursues Order Allowing Pleading [Civ. Code § 1714.10]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

§ 46.51 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Action Against Attorney Based on Alleged Attorney-Client Conspiracy [Civ. Code § 1714.10(a),(b)]--Order Establishing Reasonable Probability of Success Not Required [Civ. Code § 1714.10(c)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Order Establishing Reasonable Probability of Success Not Required in Action Alleging Independent Duty

[b] Civ. Code § 1714.10 Does Not Apply to Malicious Prosecution Action Against Attorney

[4] Additional Authorities

[a] Order Establishing Reasonable Probability of Success Not Required in Action Alleging Independent Duty

[b] Civil Code Section 1714.10 Does Not Apply to Malicious Prosecution Action Against Attorney

§ 46.52 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Liability May Be Based on Concert of Action [Civ. Code § 1714(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Elements of Liability Under Concerted Action Doctrine

[b] Tacit Understanding Is Sufficient

[4] Additional Authorities

[a] Elements of Liability Under Concerted Action Doctrine

§ 46.53 Opposing Contention That Motion to Amend Complaint to Add Attorney as Conspirator Should Be Denied--Requirement of Verified Petition [Civ. Code § 1714.10] Satisfied by Verified Complaint and Sworn Declarations

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Verified Complaint and Sworn Declaration Sufficient to Meet Requirement of Verified Petition

§ 46.54 Opposing Contention That Cause of Action Against Attorney for Civil Conspiracy With Client May Not Be Included in Complaint Without Civ. Code § 1714.10 Order--Party Against Whom Conspiracy Charged Waived Order Requirement by Failing to Timely Raise Defense [Civ. Code § 1714.10(a), (b)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Defense Must Be Raised on First Appearance

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CHAPTER 46 CONSPIRACY
PART I. INTRODUCTION

4-46 California Points & Authorities § 46.01

§ 46.01 Scope of Chapter

This chapter contains memoranda of points and authorities for use in supporting [*see §§ 46.20 -46.34*] and opposing [*see §§ 46.40 -46.51*] demurrers to a complaint for damages arising from an alleged civil conspiracy and supporting [*see §§ 46.35 -46.38*] motions for summary judgment for a defendant in such an action for damages arising from civil conspiracy. It also contains a general form supporting the contention that defendant is liable under the doctrine of concert of action [*see § 46.52*]. Also included is a memorandum of points and authorities supporting a motion for judgment notwithstanding the verdict if the acting member of a conspiracy has been exonerated and there has been a judgment against the other alleged conspirator [*see § 46.39*]. In addition, the chapter contains a memorandum in opposition to the contention that a motion to amend a complaint to add an attorney as a conspirator should be denied for failure to file a verified petition as required by *Civ. Code § 1714.10* [*see § 46.53*], and a memorandum in opposition to the contention that a cause of action may not be included in a complaint against an attorney for civil conspiracy with his or her client because a *Civ. Code § 1714.10* order had not been obtained, if the party against whom the conspiracy is charged waived the requirement by failing to object in a timely manner [*see § 46.54*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedureSummary JudgmentSupporting MaterialsMemoranda of LawCivil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding VerdictsTortsProcedureMultiple DefendantsConcerted ActionCivil ConspiracyGeneral Overview

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4-46 California Points & Authorities § 46.02

§ 46.02 Governing Statutes

Generally, case law governs actions based on civil conspiracies to engage in tortious conduct. However, *Civ. Code §§ 51.5*, *51.7*, and *52* govern actions based on civil conspiracies to discriminate against certain persons based on enumerated characteristics, and *Bus. & Prof. Code § 16720 et seq.* (Cartwright Act) govern actions based on conspiracies in restraint of trade.

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawMonopolizationConspiracy to MonopolizeState RegulationAntitrust & Trade LawPrivate ActionsInjuries & RemediesState RegulationTortsProcedureMultiple DefendantsConcerted ActionCivil ConspiracyGeneral Overview

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4-46 California Points & Authorities § 46.03

§ 46.03 Page Limits on Points and Authorities

Generally, a memorandum of points and authorities must not exceed 15 pages in length, or, in the case of a motion for summary judgment or summary adjudication, 20 pages in length. A reply or closing memorandum may not exceed 10 pages in length [*see Cal. Rules of Ct., Rule 3.1113(d)*]. Any party desiring to file a longer memorandum must obtain leave of court [*see Cal. Rules of Ct., Rule 3.1113(e)*]. For further discussion of the page limitations under *Cal. Rules of Ct., Rule 3.1113*, and of other basic format requirements of memoranda of points and authorities, see *Ch. 1, Writing Legal Memoranda and Briefs, § 1.01[4]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureSummary JudgmentOppositionMemoranda in OppositionCivil ProcedureSummary JudgmentSupporting MaterialsMemoranda of LawTortsProcedureMultiple DefendantsConcerted ActionCivil ConspiracyGeneral Overview

California Points & Authorities

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4-46 California Points & Authorities § 46.04

§ 46.04 Types of Joint Liability

In the law of torts there are five basic theories under which joint liability may be imposed. First, joint liability may be imposed under the doctrine of vicarious liability, under which a person who has personally committed no tortious act may be held liable for tortious acts committed by another. Second, joint liability may be imposed on independent tortfeasors who have each proximately caused an indivisible harm to the plaintiff [*see American Motorcycle Assn. v. Superior Court of Los Angeles County (1978) 20 Cal. 3d 578, 586]* . Third, joint liability may be imposed under the theory announced in *Summers v. Tice (1948) 33 Cal. 2d 80, 199 P.2d 1* . Fourth, joint liability may be imposed under the doctrine of civil conspiracy. Finally, joint liability may be imposed under the doctrine of concerted action liability.

There is a substantial overlap of the common law doctrines that may lead to joint liability. For example, the Restatement (Second) of Torts analyzes liability under the doctrine of civil conspiracy as a subcategory of concerted action liability [*see* Restatement (Second) of Torts § 876]. Although the California Supreme Court has generally endorsed the Restatement approach to concerted action [*see Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 604, 163 Cal. Rptr. 132, 607 P.2d 924]* , the reported decisions have not discussed the relationship between the doctrines of conspiracy and concerted action. In addition, the doctrine of concerted action liability, to the extent that it applies to persons acting negligently together when only one of the persons directly causes the harm, overlaps with general negligence principles of proximate cause under which a person may be deemed liable for harm caused in an indirect manner [*see Agovino v. Kunze (1960) 181 Cal. App. 2d 591, 598-600, 5 Cal. Rptr. 534]* . Finally, the relationship of the doctrine of *Summers v. Tice* to concerted action liability has not been clearly stated by the courts [*see Summers v. Tice (1948) 33 Cal. 2d 80, 84-85, 199 P.2d 1]* .

For points and authorities relating to the imposition of joint liability on independent tortfeasors who proximately cause an indivisible harm, and for points and authorities relating to the doctrine of *Summers v. Tice,* see Ch. 165, *Negligence* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceCausationProximate CauseGeneral OverviewTortsProcedureMultiple DefendantsConcerted ActionGeneral OverviewTortsProcedureMultiple DefendantsConcerted ActionCivil ConspiracyGeneral

OverviewTortsProcedureMultiple DefendantsJoint & Several Liability

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4-46 California Points & Authorities § 46.05

§ 46.05 Related Pleading and Practice Chapters

For discussion and procedures relating to actions based on civil conspiracy and forms of complaints and affirmative defenses relating to the memoranda in this chapter, see California Forms of Pleading and Practice, Ch. 126, *Conspiracy* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsProcedureMultiple DefendantsConcerted ActionCivil ConspiracyGeneral OverviewTortsProcedureMultiple DefendantsConcerted ActionCivil ConspiracyDefenses

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4-46 California Points & Authorities § 46.06

§ 46.06 Related Points and Authorities Chapters

Related memoranda of points and authorities that may be useful in particular cases which involve potential liability for civil conspiracy may be found in the following chapters:

- Ch. 15, *Alcoholic Beverage Licensing*.
- Ch. 15A, *Alcoholic Beverages: Civil Liability for Furnishing*.
- Ch. 21, *Assault and Battery*.
- Ch. 22, *Associations and Clubs*.
- Ch. 23, *Attachment*.
- Ch. 24, *Attorneys at Law: Substitution, Withdrawal, Disqualification, and Authority to Appear*.
- Ch. 24A, *Attorneys at Law: Malpractice*.
- Ch. 31, *Brokers and Salespersons*.
- Ch. 35, *Civil Rights: Unruh Civil Rights Act*.
- Ch. 35A, *Civil Rights: Equal Protection*.
- Ch. 41, *Class and Representative Actions*.
- Ch. 50, *Contracts*.
- Ch. 51, *Conversion*.

- Ch. 52, *Corporations*.
- Ch. 64, *Damages: Tort*.
- Ch. 65, *Damages: Contract*.
- Ch. 66, *Death and Survival Actions*.
- Ch. 71, *Demurrers and Motions for Judgment on the Pleadings*.
- Ch. 100, *Employer and Employee: Wrongful termination and Discipline*.
- Ch. 100A, *Employer and Employee: Respondeat Superior*.
- Ch. 105, *Fraud and Deceit*.
- Ch. 141, *Landlord and Tenant*.
- Ch. 142, *Libel and Slander (Defamation)*.
- Ch. 143, *Limitation of Actions*.
- Ch. 146, *Literary Property, Copyright, and the Protection of Ideas*.
- Ch. 153, *Mental Suffering and Emotional Distress*.
- Ch. 155, *Motions After Trial*.
- Ch. 165, *Negligence*.
- Ch. 170, *Partnerships and Joint Ventures*.
- Ch. 182, *Principal and Agent*.
- Ch. 183, *Privacy: State Constitutional Rights*.
- Ch. 184, *Privacy: Invasion Of Privacy*.
- Ch. 185, *Privacy: Collection, Dissemination, and Inspection of Information*.
- Ch. 225, *Trespass*.
- Ch. 239, *Workers' Compensation Exclusive Remedy Doctrine*.

For a discussion of how to use the forms in this chapter to draft a memorandum of points or authorities or a trial or appellate brief, and for a sample of a complete memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePretrial JudgmentsJudgment on the PleadingsCivil Rights LawProtection of Disabled PersonsAmericans With Disabilities ActDefenses & ExceptionsTortsIntentional TortsAssault & BatteryGeneral OverviewTortsIntentional TortsConversionGeneral OverviewTortsMalpractice & Professional LiabilityAttorneysTortsProcedureMultiple DefendantsConcerted ActionCivil ConspiracyGeneral OverviewTortsWrongful Death & Survival ActionsGeneral Overview

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4-46 California Points & Authorities §§ 46.07-46.19

[Reserved]

§§ 46.07[Reserved]

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4-46 California Points & Authorities § 46.20

§ 46.20 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Failure to Allege Underlying Civil Wrong--No Cause of Action for Civil Conspiracy Alone

[1] FORM

	)	
	)	NO. _____
	)	MEMORANDUM OF POINTS AND AUTHORIT-
SUPERIOR COURT OF CALIFORNIA,	)	IES IN SUPPORT OF DEMURRER TO COM-
COUNTY OF _____	)	PLAINT
_____ [*name*], Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*], Defendants.	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

PLAINTIFF'S COMPLAINT FOR DAMAGES ARISING FROM AN ALLEGED CIVIL CONSPIRACY FAILS TO STATE A CAUSE OF ACTION IN THAT IT FAILS TO ALLEGE THAT ANY DEFENDANT DID ANYTHING THAT, WITHOUT THE CONSPIRACY, WOULD GIVE RISE TO AN INDEPENDENT CAUSE OF ACTION.

A. Objection by Demurrer. The party against whom a complaint has been filed may object to the complaint by demurrer on the ground that it does not state facts sufficient to state a cause of action where such ground appears on the face of the complaint [or from any matter of which the court is required to or may take judicial notice] (*Code Civ. Proc. §§ 430.10(e), 430.30(a)*).

B. Elements Essential to Pleading Conspiracy. To state a cause of action for conspiracy, the complaint must allege facts showing: (1) the formation and operation of the conspiracy; (2) the wrongful act or acts done pursuant thereto; and

(3) the damage resulting therefrom (*Unruh v. Truck Ins. Exch. (1972) 7 Cal. 3d 616, 631, 102 Cal. Rptr. 815, 498 P.2d 1063* ; *Orloff v. Metropolitan Trust Co. (1941) 17 Cal. 2d 484, 488, 110 P.2d 396*).

C. No Cause of Action for Civil Conspiracy Alone. A civil conspiracy does not in and of itself give rise to a cause of action unless a civil wrong has been committed resulting in damage (*Unruh v. Truck Ins. Exch. (1972) 7 Cal. 3d 616, 631, 102 Cal. Rptr. 815, 498 P.2d 1063* ; *Moropoulos v. C.H. & O.B. Fuller Co. (1921) 186 Cal. 679, 683, 200 P. 601*).

D. Pleading of Facts Showing Independent Right of Action. In pleading a cause of action for damages based on conspiracy, the pleaded facts must show something was done which, without the conspiracy, would give rise to a right of action (*Moropoulos v. C.H. & O.B. Fuller Co. (1921) 186 Cal. 679, 683, 200 P. 601* ; *Tietz v. Los Angeles Unified Sch. Dist. (1965) 238 Cal. App. 2d 905, 913, 48 Cal. Rptr. 245*).

[*Optional*] **E. Necessity of Alleging Facts Showing Fraud, Not Generalities, Presumptions, and Conclusions.** A complaint containing nothing more than bare allegations that the defendants entered into a conspiracy to defraud the plaintiff and committed certain acts in furtherance thereof does not state a cause of action unless those acts are connected with alleged facts which, if true, would support the charge that they were wrongful--inferences, generalities, presumptions, and conclusions are insufficient (*Legg v. Ford (1960) 185 Cal. App. 2d 534, 542, 8 Cal. Rptr. 392*).

[*Optional*] **F. General Allegations of Restraint of Trade.** General allegations of a conspiracy in restraint of trade, without a statement of the facts constituting the conspiracy and its object and accomplishment in the restraint of trade, are legal conclusions, insufficient to constitute a cause of action for damages for civil conspiracy (*Chicago Title Ins. Co. v. Great W. Fin. Corp. (1968) 69 Cal. 2d 305, 315, 70 Cal. Rptr. 849, 444 P.2d 481*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a general demurrer to a complaint for damages arising from civil conspiracy where the demurrer asserts that the complaint fails to allege facts showing that any defendant did anything that, without the alleged conspiracy, would give rise to an independent cause of action.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion and forms regarding actions based on civil conspiracy, see California Forms of Pleading and Practice, Ch. 126, *Conspiracy* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities relating to specific actionable wrongs, see *§ 46.06*.

[3] Discussion of Authorities

[a] Elements Essential to Pleading Conspiracy

Unruh v. Truck Ins. Exch. *(1972) 7 Cal. 3d 616, 102 Cal. Rptr. 815, 498 P.2d 1063* , arose out of acts alleged to have been committed by the workers' compensation insurer of plaintiff's employer in the course of its investigation of plaintiff's workers' compensation claim. The Supreme Court affirmed the trial court's sustaining of a general demurrer to and dismissal of a conspiracy count of that portion of the complaint for damages alleging the negligent failure to control the conduct of the investigation, holding that the count failed to state a cause of action for a civil wrong. The negligence count alleged that after plaintiff had injured her back and undergone surgeries, the insurer's agents placed her under surveillance, befriended her, and enticed her to conduct herself beyond her usual physical capabilities and that on learning of the deception, she suffered a physical and mental breakdown requiring hospitalization.

The complaint for damages for these injuries alleged intentional torts as well, but the conspiracy count against the insurer incorporated only the negligence count. The Court held that the insurer was an alter ego of the employer in this case, rather than a person other than the employer, and was thus immune from suit under *Lab. Code §§ 3601* and *3852*, providing that a workers' compensation claim is an employee's exclusive remedy against the employer and that the employee may bring suit for job-related injuries only against persons other than the employer. Thus, the Court ruled that the negligence count did not state a cause of action for a civil wrong against the insurer.

As to the conspiracy count, the Court stated that a civil conspiracy, however atrocious, does not per se give rise to a cause of action unless a civil wrong has been committed and damage results. Conspiracy (the agreement) is ordinarily not actionable by itself. To state a cause of action for conspiracy, said the Court, the complaint must allege: (1) the formation and operation of the conspiracy; (2) the wrongful act or acts done pursuant thereto; and (3) the damage resulting. Since the conspiracy count incorporated only the allegations of the negligence count so far as the insurer was concerned, it added nothing to the acts alleged in the negligence count. Therefore, the negligence count did not state a cause of action for a civil wrong against the insurer, and the Court ruled that the conspiracy count, like the negligence count, must succumb to the insurer's demurrer (*7 Cal. 3d 616, 631)* .

In ***Orloff v. Metropolitan Trust Co.*** *(1941) 17 Cal. 2d 484, 110 P.2d 396* , the Supreme Court affirmed a trial court's order sustaining general demurrers to a third amended complaint containing a cause of action based on allegations of a civil conspiracy. The complaint alleged a contract for the purchase of stock of a brewery which provided that payments made to an escrow holder would be applied, after the satisfaction of claims of specified creditors, to other creditors, one of whom was plaintiff's assignor. The complaint further alleged a conspiracy by the defendants to defraud plaintiff by paying his assignor through certain dummies the sum due plaintiff under the assignment. The Court ruled that the allegations of the complaint were not sufficient since, to state a cause of action for conspiracy, facts must be alleged showing the formation and operation of a conspiracy and damage resulting from an act or acts done in furtherance of the plan and, since the cause of action is for the damage suffered and not the mere conspiracy, the complaint must state facts which show that a civil wrong was done resulting in damage. The Court added that the damage is the gist of the action. The complaint showed that the assignment gave the plaintiff no rights against anyone but the brewing company. His failure to receive payment from the escrow holder did not discharge the brewing company's obligation. From all that appeared in the complaint, the Court observed, the plaintiff could have recovered the full amount of the claim from the brewery. Thus, said the Court, the pleading lacked the required allegation of damage (*17 Cal. 2d 484, 488)* .

[b] No Cause of Action for Civil Conspiracy Alone

Unruh v. Truck Ins. Exch. *(1972) 7 Cal. 3d 616, 102 Cal. Rptr. 815, 498 P.2d 1063* , is discussed in *§ 46.20[3][a]*.

Moropoulos v. C.H. & O.B. Fuller Co. *(1921) 186 Cal. 679, 200 P. 601* , was an action alleging that the defendants had defrauded plaintiff of his interest in a partnership dairy farming business by conspiring: (1) to begin foreclosure

proceedings under certain preexisting chattel mortgages on personal property on land leased by plaintiff's partner and used by the partnership after plaintiff's partner had defaulted on his payments, and later to purchase the chattels at a foreclosure sale; and (2) to take possession of the leased land from plaintiff, ousting him, and operating the farm to plaintiff's damage. The trial court sustained a demurrer to the complaint. The Supreme Court affirmed as to the first allegation of conspiracy but reversed as to the second allegation.

As to the first allegation, the Court observed that conspiracy is not actionable unless the combination results in the perpetration of an unlawful act or of some injurious act by unlawful means, noting that there was only the bare allegation that defendants entered into a conspiracy to defraud plaintiff and that the various acts alleged were done for the purpose of defrauding plaintiff. The Court found that this was not a sufficient allegation of fraud unless connected with a showing of facts which, if true, would support the charge that they were wrongful. There was no showing of any unlawful or wrongful act on the part of the defendants in the transaction down to and including their purchase of the chattels at the foreclosure sale. Defendants were innocent encumbrancers for value and so far as the foreclosure suit and judgment were concerned, under the facts pleaded, defendants were within their rights. Moreover, they had a perfect right to purchase the chattels at the foreclosure sale (*186 Cal. 679, 683)* .

As to the second allegation, the Court observed that defendants did not have any right to possession of the land or the partnership business. The allegations in the complaint showed that the leasehold interest which had been held by defendants as security for the partner's debt had been satisfied and assigned to a trustee of plaintiff. Therefore, the right to the use and occupancy of the land was still a partnership asset in the rightful possession of the plaintiff. Under a second assignment by the partner and his subassignee, defendants took no new interest against the plaintiff. At the time of the second assignment, the original assignment had been turned over to plaintiff's trustee and defendants had notice that plaintiff was in possession under a partnership agreement which transferred the use and possession of the premises to the copartnership. Thus, the Court ruled, the transfer was void against the purchaser with notice as to the interests of the nonconsenting partner. Thus, the allegations concerning plaintiff's ouster, that it was done wrongfully in pursuance of the alleged conspiracy and that in pursuance of such purpose defendants took possession of the farm and converted plaintiff's crops to their own use, depriving plaintiff of any further use of the premises under the lease, furnished the basis for a cause of action (*186 Cal. 679, 683)* .

[c] Pleading of Facts Showing Independent Right to Action

Unruh v. Truck Ins. Exch. *(1972) 7 Cal. 3d 616, 102 Cal. Rptr. 815, 498 P.2d 1063* , is discussed in *§ 46.20[3][a]*.

Moropoulos v. C.H. & O.B. Fuller Co. *(1921) 186 Cal. 679, 200 P. 601* , is discussed in *§ 46.20[3][b]*.

In ***Tietz v. Los Angeles Unified Sch. Dist.*** *(1965) 238 Cal. App. 2d 905, 48 Cal. Rptr. 245* , the court of appeal affirmed a trial court's judgment of dismissal after sustaining demurrers to a complaint for damages for mental distress, physical injury, and conspiracy by an employee against a city school district. The complaint alleged the use of coercion, threats, and duress to persuade plaintiff to transfer employment from one school to another. The defendants were the public school agencies involved, the school principals, and the principals' wives. The court found that the complaint failed to state a cause of action against both the school agencies, since plaintiff had failed to file a claim for workers' compensation, and the principals, since they were immune from suit for discretionary acts performed within the scope of their authority. As to the allegation that the defendant wives aided, abetted, and conspired with the principals, the Court noted the long-established rule that a conspiracy, in and of itself, however atrocious, does not give rise to a cause of action unless a civil wrong has been committed resulting in damage. Such a rule requires a determination of whether or not the pleaded facts show that something was done which, without the conspiracy, would give rise to a right of action. No right of action was alleged against the actual perpetrators of the alleged wrong, and no facts were pleaded showing any direct action by the wives other than that they aided, abetted, and conspired with their husbands to harm the plaintiff. Thus, the Court held that if no cause of action was stated against the husbands the mere allegation of an act of conspiracy, without more, would not be actionable against the wives (*238 Cal. App. 2d 905, 913)* .

[d] Necessity of Alleging Facts Showing Fraud, Not Generalities, Presumptions, and Conclusions

In ***Legg v. Ford*** *(1960) 185 Cal. App. 2d 534, 8 Cal. Rptr. 392* , the court of appeal affirmed the trial court's judgment for defendants after demurrers to the complaint were sustained without leave to amend. The complaint was for fraud and conspiracy--the basic allegation of each cause of action being that defendants had conspired to defraud plaintiff, in her capacity as a judgment creditor, of the benefits due her under an insurance policy issued by one defendant. In the first cause of action, plaintiff alleged that (1) defendants conspired to deprive her of these rights by fraudulently protecting defendant's rights on appeal and in trial proceedings in a certain civil action, and (2) through the concerted acts and motives of defendants to aid the insurer and another defendant in collaboration with a judge, who was also a defendant, her age was improperly determined, thus depriving her of subsidy benefits. Similar allegations were set forth in other causes of action.

In observing that a conspiracy, in and of itself, however atrocious, does not give rise to a cause of action unless a civil wrong has been committed resulting in damage, the court of appeal added that a complaint which contains nothing more than bare allegations that the defendants entered into a conspiracy to defraud the plaintiff and committed certain acts in furtherance thereof does not state a cause of action unless those acts are connected with a showing of facts which, if true, would support the charge that they were wrongful--inferences, generalities, presumptions, and conclusions being insufficient. Moreover, it must be shown in the pleadings that the damage claimed was sustained by reason of the fraud, that is, that the fraud was the cause and the damage the effect. Without discussing the sufficiency of the allegations as to the formation and operation of the conspiracy or as to fraud in general, the court held that the complaint contained no factual allegations showing the relation between the asserted conspiracy to defraud and the damages alleged--that is, how or in what manner the alleged acts of the defendants affected plaintiff's rights as a judgment creditor if such rights existed. For this reason alone, the court held that none of the counts of the complaint stated facts sufficient to constitute a cause of action (*185 Cal. App. 2d 534, 542)* .

[e] General Allegations of Restraint of Trade

In ***Chicago Title Ins. Co. v. Great W. Fin. Corp.*** *(1968) 69 Cal. 2d 305, 70 Cal. Rptr. 849, 444 P.2d 481* , the facts and background of which are discussed in *§ 46.20[4][a]*, the Supreme Court ruled that contracts, combinations, or conspiracies in restraint of trade or commerce cannot be alleged generally in the words of the statute but that the facts which indicate their existence must be set forth. The Court added that general allegations of the existence and purpose of the conspiracy are insufficient and that the plaintiffs must alleged specific overt acts in furtherance thereof (*69 Cal. 2d 305, 315)* .

[4] Additional Authorities

[a] Elements Essential to Pleading Conspiracy

In *Wilcox v. Superior Court (1994) 27 Cal. App. 4th 809, 33 Cal. Rptr. 2d 446* , the plaintiff brought suit against the defendants for unfair business practice, intentional interference with economic advantage, and interference with existing contracts. The defendants filed a cross-complaint against the plaintiff for conspiracy to unlawfully restrain trade through a boycott of the defendants' shorthand reporting services. The trial court denied the plaintiff's motion to strike the cross-complaint, and the plaintiff appealed.

The court of appeal reversed, holding that the defendants failed to establish a probability that they would prevail. The court held that the defendants had not made a prima facie showing of facts to support the formation and operation of a conspiracy, because they produced no legally sufficient evidence of the plaintiff's agreeing with anyone else to injure their business ventures or reputations (*27 Cal. App. 4th 809, 828)* . A memo distributed by the plaintiff urging support for a pending lawsuit against the defendants was not unlawful. Nothing unlawful was agreed to in a phone conversation between the plaintiff and the lead plaintiff in this pending litigation. An agreement could not be inferred from claimed

similarities between the memo distributed by the plaintiff and another memo distributed by persons other than the plaintiff, which not only supported the lawsuit, but could be construed as calling for a boycott of the defendants' services, because there was no evidence that the plaintiff ever received this other memo, agreed with it, or agreed to take the actions urged in it (*27 Cal. App. 4th 809, 829)* .

Chicago Title Ins. Co. v. Great W. Fin. Corp. (1968) 69 Cal. 2d 305, 70 Cal. Rptr. 849, 444 P.2d 481 , was an action for injunctive relief and damages for unfair trade practices and combinations in restraint of trade in which plaintiffs appealed from the trial court's order of dismissal entered after it sustained without leave to amend demurrers to plaintiffs' fourth amended complaint. The Supreme Court affirmed, holding that the conspiracy allegations of the complaint were insufficient. The complaint contained allegations to the general effect that one defendant corporation had formed a second corporation at the insistence of a third corporation to divert business from the plaintiffs, and that a fourth corporation had prevailed on two others to send business to the third corporation, to the plaintiff's damage. The plaintiffs conceded that they had not pleaded facts concerning the violations of antitrust statutes alleged to have been committed by defendants but contended that such references were sufficient.

The Court ruled that to state a cause of action for conspiracy, the complaint must allege (1) the formation and operation of the conspiracy, (2) the wrongful act or acts done pursuant thereto, and (3) the damage resulting from such act or acts. The Court noted that general allegations of agreement are sufficient and that the conspiracy allegation is unnecessary, providing the unlawful acts or civil wrongs are otherwise sufficiently alleged. Finding that activities condemned by antitrust law are contracts, combinations, or conspiracies in restraint of trade or commerce, the Court held that they cannot be alleged generally in the words of the statute. Not only must facts which indicate the existence of such contracts, combinations, or conspiracies be set forth, thereby showing the existence of an unlawful trust or combination, but a plaintiff must also allege and prove that his business or property has been injured by the very fact of the existence and prosecution of such unlawful trust or combination *69 Cal. 2d 305, 316-317)* .

[b] No Cause of Action for Civil Conspiracy Alone

Bank of Cal. v. Pan Am. Tire Corp. (1982) 132 Cal. App. 3d 843, 183 Cal. Rptr. 470 , is discussed in *§ 46.40[4][a]*. In reversing a summary judgment against the defendants in an action for conspiracy to convert the plaintiff's property, the court of appeal noted that a conspiracy does not in and of itself give rise to a cause of action unless a civil wrong has been committed resulting in damages (*132 Cal. App. 3d 843, 848)* .

In *Minniear v. Tors (1968) 266 Cal. App. 2d 495, 72 Cal. Rptr. 287* , the court of appeal affirmed, in part, a trial court's judgment of nonsuit in an action for conspiracy to defraud plaintiff and convert his literary property to the use of defendants. The complaint sought damages, in part, based on allegations that there was a fraudulent conversion by defendants of a TV pilot film and the story outlines for subsequent episodes of a TV series. Although the court reversed the judgment of nonsuit insofar as it pertained to a cause of action for breach of contract to purchase the literary material, the court held that, nevertheless, there was no protectable property. Thus, in the absence of protectable property right, there could be no conversion of plaintiff's idea. Whatever the defendant learned when the pilot film was screened for him and from the mimeographed synopsis he retained, it was not sufficient to grant any property rights to the plaintiff for the eventual TV series. As to conspiracy, the court held that civil conspiracy is not an independent tort or cause of action. Without a tort or wrong to property, the conspiracy allegations against a defendant in a civil action are meaningless (*266 Cal. App. 2d 495, 506)* .

Tietz v. Los Angeles Unified Sch. Dist. (1965) 238 Cal. App. 2d 905, 48 Cal. Rptr. 245 , is discussed in *§ 46.20[3][c]*.

[c] Pleading of Facts Showing Independent Right of Action

Orloff v. Metropolitan Trust Co. (1941) 17 Cal. 2d 484, 110 P.2d 396 , is discussed in *§ 46.20[3][a]*.

[d] Necessity of Alleging Facts Showing Fraud, Not Generalities, Presumptions, and Conclusions

In *Beeler v. West Am. Fin. Co. (1962) 201 Cal. App. 2d 702, 20 Cal. Rptr. 190* , the facts and background of which are discussed in *§ 46.24[3][a]*, the court of appeal noted that the only allegations which tied the demurring defendant into an alleged conspiracy to defraud plaintiff consisted of general statements. It held that the allegations were merely generalities and conclusions and that they were insufficient as a statement of a cause of action against that defendant (*201 Cal. App. 2d 702, 707)* .

In *Kinney v. Postal Tel.-Cable Co. (1932) 123 Cal. App. 70, 10 P.2d 1043* , the court of appeal affirmed the trial court's sustaining of a general demurrer to a complaint alleging conspiracy to defraud. The complaint was against a telegraph company and others to recover damages for an alleged conspiracy to (1) harass and oppress plaintiff; (2) do him intentional wrong; (3) destroy, injure, and dissipate his property; (4) deprive him of credit and the means of obtaining a livelihood; and (5) acquire his property without consideration by those means. After reviewing the general law governing liability for civil conspiracy, the court commented that a complaint which contains nothing more than bare allegations that defendants entered into a conspiracy to defraud plaintiff and committed certain acts in furtherance thereof does not state a cause of action unless those acts are connected with a showing of facts which, if true, would support the charge that they were wrongful. In such a case, inferences, generalities, presumptions, and conclusions are insufficient. In the case at issue, the court held that the complaint failed to allege any fact or circumstance showing any violation of duty by the defendants (*123 Cal. App. 70, 75)* .

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4-46 California Points & Authorities § 46.21

§ 46.21 Supporting Demurrer To Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Failure to Allege Underlying Civil Wrong--Legal Right to Do Act Complained of

[1] FORM

[*Caption. See § 46.20[1].*]

PLAINTIFF'S COMPLAINT FOR DAMAGES ARISING FROM AN ALLEGED CIVIL CONSPIRACY FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION IN THAT IT ALLEGES ONLY THE COMMISSION OF ACTS WHICH THE ACTING PARTY HAD A LEGAL RIGHT TO DO.

A. Objection by Demurrer. [*See § 46.20[1], Paragraph A.*]

B. Elements Essential to Pleading Conspiracy. [*See § 46.20[1], Paragraph B.*]

C. No Cause of Action for Civil Conspiracy Alone. [*See § 46.20[1], Paragraph C.*]

D. Pleading of Facts Showing Independent Right of Action. [*See § 46.20[1], Paragraph D.*]

E. Legal Right to Commit Act Complained of. No cause of action for civil conspiracy can arise if one had a legal right to do the act complained of, no party becomes liable because he/she induced one to stand on and assert his/her legal rights, and it is not actionable coercion or duress to threaten to do what one has a legal right to do (*Agnew v. Parks (1959) 172 Cal. App. 2d 756, 764, 343 P.2d 118*).

[*Optional*] **F. Evil Motive for Act Not Unlawful.** An evil motive which inspires the doing of an act not unlawful will not of itself make the act unlawful (*Union Labor Hosp. Ass'n v. Vance Redwood Lumber Co. (1910) 158 Cal. 551, 554, 112 P. 886* ; *Lesperance v. North Am. Aviation, Inc. (1963) 217 Cal. App. 2d 336, 346, 31 Cal. Rptr. 873*).

[*Optional*] **G. Conspiracy to Commit Privileged Act.** The allegation of a conspiracy among the defendants to commit a privileged act does not remove the privilege (*Pettitt v. Levy (1972) 28 Cal. App. 3d 484, 491, 104 Cal. Rptr. 650*).

[*Optional*] **H. Basic Policy Decisions of Governmental Agencies.** A cause of action for conspiracy which alleges that governmental agencies conspired to act in matters involving a basic policy decision to which governmental immunity attaches does not allege that anything was done which, without the conspiracy, would give rise to a cause of action (*Osborne v. Huntington Beach Union High Sch. Dist. (1970) 5 Cal. App. 3d 510, 515, 85 Cal. Rptr. 793*).

[*Optional*] **I. Termination of Contract Terminable at Will.** No action lies against a defendant employer who is a party to a contract for conspiracy to breach such contract where it is terminable at will and the breach is not otherwise wrongful (*Patterson v. Philco Corp. (1967) 252 Cal. App. 2d 63, 68, 60 Cal. Rptr. 110* ; *Wise v. Southern Pac. Co. (1963) 223 Cal. App. 2d 50, 67-68, 35 Cal. Rptr. 652*).

[*Optional*] **J. Termination of Employment.** A complaint alleging conspiracy with a defendant employer to cause the termination of the plaintiff's employment does not transform the act of termination into a civil wrong giving rise to a cause of action when the termination was otherwise legal (*Lesperance v. North Am. Aviation, Inc. (1963) 217 Cal. App. 2d 336, 346, 31 Cal. Rptr. 873*).

[*Optional*] **K. Act of Litigation Is Privileged.** An overt act cannot be wrongful if the act is absolutely privileged based on considerations of public policy encouraging free access to the courts (*Thompson v. California Fair Plan Assn. (1990) 221 Cal. App. 3d 760, 767*).

[*Optional*] **L. Lack of Capability of Committing Underlying Tort.** No cause of action for conspiracy exists against one who is not legally capable of committing the underlying tort (*Weinbaum v. Goldfarb, Whitman & Cohen (1996) 46 Cal. App. 4th 1310, 1316, 54 Cal. Rptr. 2d 462*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a general demurrer to a complaint for damages arising from a civil conspiracy where the demurrer asserts that the complaint fails to state facts sufficient to constitute a cause of action in that it appears on the face thereof, or from any matter of which the court is required to or may take judicial notice, that the defendant or defendants had a legal right to do the act complained of and, thus, that the complaint fails to allege an underlying wrong.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

With appropriate modifications, these points and authorities may be used to support a motion for summary judgment [*Code Civ. Proc. § 437c*] where the use of affidavits or declarations is necessary to establish the legality of the act complained of.

[3] Discussion of Authorities

[a] Legal Right to Commit Act Complained of

In ***Agnew v. Parks*** *(1959) 172 Cal. App. 2d 756, 343 P.2d 118* , the trial court sustained a general demurrer to a cause of action for damages for conspiracy to keep certain doctors from testifying on her behalf in a prior medical malpractice action. The court of appeal affirmed. The plaintiff's allegations of conspiracy were against the doctors and a medical association and were to the effect that the doctors had refused to testify on her behalf because the association threatened to expel them from membership and to report them to their insurers to cause cancellation of their malpractice insurance. Noting that none of the doctors had been retained by the plaintiff to examine or treat her, the court held that there is no legal duty on a doctor's part to agree to serve as an expert witness for one with whom he has no preexisting contractual relationship (although a doctor who has treated or examined a patient may be compelled to testify for the patient). The court then stated that in a civil conspiracy no cause of action can arise if one had a legal right to do the act complained of, no party becomes liable by reason of the fact that he induced one to stand on and assert his legal rights, and it is not actionable coercion or duress to threaten to do what one has a legal right to do. These rules compelled the conclusion that regardless of motive, neither the alleged conduct preventing the doctors from testifying nor the activity of the association in controlling its members was actionable, either alone or in combination (*172 Cal. App. 2d 756, 764)* .

[b] Evil Motive for Act Not Unlawful

In ***Union Labor Hosp. Ass'n v. Vance Redwood Lumber Co.*** *(1910) 158 Cal. 551, 112 P. 886* , the Supreme Court reversed a trial court's judgment granting an injunction restraining defendants from conspiring to hinder and destroy plaintiff's hospital business. Plaintiff alleged in its complaint that defendant lumber companies had conspired to collect money from their employees in order to finance the employees' necessary medical treatment and to restrict the hospitals to which the employees could go for treatment to those on a list which excluded plaintiff. The trial court determined that defendants had perpetrated an illegal boycott and enjoined its continuance.

The Supreme Court stated that in the absence of contractual relations between plaintiff and defendants, the latter were under a duty only to refrain from inflicting a legal wrong on plaintiff. It found that defendants has acted solely for the purpose of serving their own interests. Even if their purpose were to injure plaintiff's business, unless they adopted illegal means to that end, their conduct did not render them liable, since an evil motive which may inspire the doing of an act not unlawful will not of itself make the act unlawful. The Court ruled that no illegal means were used in persuading their employees to contribute to the medical payment plan. If further observed that defendants had the undoubted right to deal with any hospital they desired to select and that they did not prohibit their employees from using the plaintiff's hospital. Thus, defendants were within their legal rights and their motive was not a subject for inquiry (*158 Cal. 551, 554)* .

In ***Lesperance v. North Am. Aviation, Inc.*** *(1963) 217 Cal. App. 2d 336, 31 Cal. Rptr. 873* , the court of appeal affirmed a trial court's judgment of dismissal of a complaint for damages for conspiracy to cause plaintiff's employment to be terminated after sustaining a demurrer to the second amended complaint. The complaint alleged that in mid-April plaintiff's supervisor informed plaintiff that he, plaintiff, was suffering from mental illness and ordered him to take two weeks off with pay and six months off without pay and to see a psychiatrist; that as a consequence, he did not subsequently report to work; and that in the first week of the next month, he received notice from his employer informing him of the termination of his employment for absence without notification. It further charged that the employer and other defendants entered into a conspiracy to cause the termination of his employment because of animosity toward him.

The court of appeal noted that a conspiracy cannot be made the subject of a civil action unless something is done which, without the conspiracy, would give a right of action and that the complaint must state facts which show that a civil wrong was done resulting in damages. Moreover, the court noted that an evil motive which may inspire the doing of an act not unlawful will not of itself make the act unlawful. Applying these principles to the pleading in this case, the court held that plaintiff had not stated a cause of action. The employer had the right--so far as it appeared--to terminate plaintiff's employment without committing a civil wrong. The fact that the employer may have been inspired by animosity toward the plaintiff would not make the termination unlawful. Likewise, the charge of conspiracy did not

transform a legal act into a civil wrong (*217 Cal. App. 2d 336, 346)* .

[c] Conspiracy to Commit Privileged Act

In ***Pettitt v. Levy*** *(1972) 28 Cal. App. 3d 484, 104 Cal. Rptr. 650* , the court of appeal affirmed the trial court's order sustaining a demurrer without leave to amend to a complaint that defendants had conspired to prepare and submit a false or forged document to city government authorities, causing plaintiff's application for a zoning variance to be denied. The court of appeal noted that a publication made in any legislative or other official proceeding authorized by law is privileged under former Civ. Code § 47(2) (*now see Civ. Code § 47(b)*), that underlying the privilege is the important public policy of affording the utmost freedom of access to such proceedings, and that the privilege is absolute. The court then held that contrary to plaintiff's contention the allegation of conspiracy among the defendants to do the privileged acts does not remove the privilege. Where a complaint charges a conspiracy and the commission of a wrongful act, the only significance of the conspiracy charge is that each member may be held responsible as a joint tortfeasor, regardless of whether or not he directly participated in the act. A conspiracy, in and of itself, however atrocious, does not give rise to a cause of action unless a civil wrong has been committed resulting in damage. It requires a determination of whether or not the pleaded facts show that something was done which, without the conspiracy, would give rise to a cause of action. The court concluded that the only acts alleged to have been done pursuant to the conspiracy were the preparation and submission of a false or forged building permit and that because those acts were privileged, the allegation of conspiracy added nothing and did not vitiate the privilege (*28 Cal. App. 3d 484, 491)* .

[d] Basic Policy Decisions of Governmental Agencies

In ***Osborne v. Huntington Beach Union High Sch. Dist.*** *(1970) 5 Cal. App. 3d 510, 85 Cal. Rptr. 793* , the court of appeal affirmed a judgment dismissing plaintiff's action, which was entered after the trial court had sustained general demurrers to plaintiff's complaint for damages arising from an alleged conspiracy to breach real estate broker contracts. The complaint alleged that plaintiff had been employed, pursuant to separate oral agreements, both to locate a parcel of real property for defendant school district and to purchase and locate a buyer for a parcel of property owned by defendant water district. It further alleged that on learning of these agreements, each district communicated with the other, "advised" the that there was a way to save money in the transaction by depriving plaintiff of his commission, and "advised" the other to breach its oral contract with the plaintiff. The court noted that the oral contracts were each subject to the statute of frauds, former Civ. Code § 1624(2), (5) (*now see Civ. Code § 1624(a)*) and were, therefore, unenforceable. The advice given by one governmental agency to another not to perform an unenforceable oral contract, to which the latter agency and a third person are parties, when the contract is an incident of a transaction in which the advising agency has an interest is the product of a basic policy decision to which immunity attaches. Thus, the court concluded that the demurrer had been properly sustained on the ground that the districts were immune from liability. The conspiracy cause of action did not allege that anything was done which, without the conspiracy, would give rise to a cause of action (*5 Cal. App. 3d 510, 515)* .

NOTE:

Civ. Code § 1624 was amended in 1998 and now provides that notwithstanding the statute of frauds, an agreement that is otherwise enforceable is not invalid for lack of a note, memorandum, or other writing and is enforceable if the agreement or contract is a qualified financial contract, as defined by this section, and there is sufficient evidence to indicate that a contract has been made or the parties agreed to be bound by the terms of the qualified financial contract.

[e] Termination of Contract Terminable at Will

In ***Patterson v. Philco Corp.*** *(1967) 252 Cal. App. 2d 63, 60 Cal. Rptr. 110* , the court of appeal affirmed a trial court's judgment of dismissal after sustaining a general demurrer to a complaint in an action against an employer for damages for conspiracy to wrongfully discharge the plaintiff. The complaint alleged that a fellow employee and certain others

sued by fictitious names acted to induce plaintiff's discharge and that as a result the employer wrongfully discharged him. The court noted that intentional and unjustifiable interference with contractual relations can be actionable and that the mere fact that an employment contract is terminable at will does not preclude damages in all circumstances. Nevertheless, the court held that plaintiff's employment was "at will" and did not come within the class of cases which hold that a conspiracy action will lie against a party to the contract who is included among the defendant conspirators. The court noted that in *Wise v. Southern Pac. Co. (1963) 223 Cal. App. 2d 50, 35 Cal. Rptr. 652* , the court of appeal had held that an action for conspiracy to breach a contract would lie against a party thereto but had refused to extend its holding to contracts terminable at will in the absence of a wrongful act. Since plaintiff's complaint did not state facts which would limit the right of the employer to discharge him, that is, that the discharge was prohibited by statute or reasons of public policy, it was not within that class of cases wherein the employer may be held liable for conspiring with third parties to breach the contract of employment. In holding that a cause of action for conspiracy to wrongfully breach a contract or induce the breach of contract will lie against the other party to the contract who is sued as a conspirator, the court of appeal noted the existing rule that where the contract is terminable at will and no wrongful act is alleged, no action can lie against the other party to the contract for conspiracy to do something that party can lawfully do. That rule, said the court, merely echoes the broad principle that a conspiracy is not actionable unless it results in the perpetration of an unlawful act or some injurious act by unlawful means (*252 Cal. App. 2d 63, 68)* .

[f] Termination of Employment

Lesperance v. North Am. Aviation, Inc. *(1963) 217 Cal. App. 2d 336, 31 Cal. Rptr. 873* , is discussed in *§ 46.21[3][b].*

[g] Act of Litigation Is Privileged

In ***Thompson v. California Fair Plan Assn.*** *(1990) 221 Cal. App. 3d 760* , plaintiff insured brought an action against her insurance company alleging a civil conspiracy between the insurance company and the former owner of her property to deprive her of the proceeds of a fire insurance policy on a structure which had burned. The insurance company demurred on the ground that the claim was barred by the statute of limitations. The trial court overruled the demurrer, finding that the insurer's opposition to an earlier declaratory judgment action was the last overt act in furtherance of the conspiracy and that act was alleged to have been done within the limitation period. The insurer thereafter filed a motion for summary judgment. The motion was granted on the ground that this last overt act was privileged under *Civ. Code § 47(b)* (allegation in pleading as privileged publication). The plaintiff appealed.

The court of appeal affirmed the summary judgment. The court stated that the issue was the viability of the only overt act that could prevent the statute of limitations from running on the cause of action for conspiracy. This act, the insurer's opposition to the earlier declaratory judgment action, could not be deemed a wrongful act because it was absolutely privileged based on considerations of public policy encouraging free access to the courts. Accordingly, the court held that no conspiracy liability could attach for the defense of the first lawsuit and the defense of the suit could not serve as an overt act sufficient to revive an otherwise time-barred claim on a conspiracy theory (*221 Cal. App. 3d 760, 767-768)* .

[h] Lack of Capability of Committing Underlying Tort

In ***Weinbaum v. Goldfarb, Whitman & Cohen*** *(1996) 46 Cal. App. 4th 1310, 54 Cal. Rptr. 2d 462* , allegedly wrongfully terminated employees brought an action for conspiracy against their employer and a third party. The complaint alleged that the employees were fired for refusing to participate in a fraudulent conspiracy which benefited the employer and the third party. The trial court sustained a demurrer by the third party, and ordered it dismissed.

The court of appeal affirmed the order of dismissal, declaring that tort liability arising from conspiracy presupposes that the coconspirator is legally capable of committing the tort. Since a nonemployer owes no tort duty to refrain from

discharging another's employee, it cannot be bootstrapped into tort liability through a plea of conspiracy (*46 Cal. App. 4th 1310, 1316-1317)* .

[4] Additional Authorities

[a] Legal Right to Commit Act Complained of

In *Beeler v. West Am. Fin. Co. (1962) 201 Cal. App. 2d 702, 20 Cal. Rptr. 190* , the facts and background of which are discussed in *§ 46.24[3][a]*, the court of appeal affirmed the trial court's sustaining of a general demurrer of a defendant in an action for damages arising from an alleged conspiracy, pointing out that the defendant trustee's act complained of consisted of the assignment of a defaulted note and deed of trust and that this was an act which it had a perfect legal right to do (*201 Cal. App. 2d 702, 707)* .

[b] Lack of Capability of Committing Underlying Tort

In *Klistoff v. Superior Court (2007) 157 Cal. App. 4th 469, 68 Cal. Rptr. 3d 704* , plaintiff city sued a waste hauling business and its principal for conspiracy to violate *Gov. Code § 1090*, which prohibits public officials from holding financial interests in public contracts. The complaint stemmed from payments made by defendants to a city official in order to ensure that defendants won a contract with the city. Defendants demurred to the cause of action for conspiracy, but the trial court overruled the demurrer. Defendants filed a writ petition, which was granted by the court of appeal. The court of appeal held that private parties could not be liable for conspiracy to violate the provisions of *Gov. Code § 1090*, which only prohibits public officials from holding financial interests in public contracts. Because the statute did not apply to private parties, defendants could not be held liable for conspiracy to violate the statute (*157 Cal. App. 4th 469, 479-480)* .

In *Everest Investors 8 v. Whitehall Real Estate Ltd. P'ship XI (2002) 100 Cal. App. 4th 1102, 123 Cal. Rptr. 2d 297* , the plaintiffs were limited partners in several limited partnerships. Following a suit brought against the general partners by other limited partners charging breach of fiduciary duty, the general partners agreed to sell the partnerships to a third party for significantly less than their fair market value, without soliciting bids and selling to the highest bidder or otherwise maximizing the return to the limited partners. The plaintiffs then brought their suit against the general partners and the third party buyer, alleging a conspiracy to breach the general partners' fiduciary duties to the limited partners. The third party successfully demurred on the grounds that it did not owe a fiduciary duty to the plaintiffs and thus could not be liable for conspiracy to commit a breach of fiduciary duty. The court of appeal agreed that the third-party buyer, who was not a fiduciary of the plaintiffs, was not liable for conspiring with the fiduciary to commit a breach of fiduciary duty. Although the plaintiffs argued that the third party could be liable for conspiracy because it was acting in its own interests, the court rejected this claim, noting that the plaintiffs were trying to apply an exception to the agent's immunity rule, under which an agent may be liable for conspiracy with its principal if the agent is acting to further its own interests, even though there was no agency relationship between the general partners and the buyer (*100 Cal. App. 4th 1102, 1106-1108)* .

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4-46 California Points & Authorities § 46.22

§ 46.22 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Failure to Allege Underlying Civil Wrong--Civil Right as Not Necessarily Arising From Criminal Violation Involving Obstruction of Justice Through Perjury and Concealment of Documentary Evidence

[1] FORM

[*Caption. See § 46.20[1].*]

PLAINTIFF'S COMPLAINT FOR DAMAGES ARISING FROM AN ALLEGED CIVIL CONSPIRACY TO OBSTRUCT JUSTICE THROUGH THE COMMISSION OF THE CRIMES OF PERJURY AND CONCEALMENT OF DOCUMENTARY EVIDENCE FAILS TO STATE A CAUSE OF ACTION IN THAT IT FAILS TO ALLEGE THAT ANYTHING WAS DONE ON WHICH A CIVIL RIGHT CAN BE PREDICATED.

A. Objection by Demurrer. [*See § 46.20[1], Paragraph A.*]

B. Elements Essential to Pleading Conspiracy. [*See § 46.20[1], Paragraph B.*]

C. No Cause of Action for Civil Conspiracy Alone. [*See § 46.20[1], Paragraph C.*]

D. Pleading of Facts Showing Independent Right of Action. [*See § 46.20[1], Paragraph D.*]

E. Civil Right Not Predicated on Violation of Criminal Statute. No civil right can be predicated on a mere violation of a criminal statute (*Babu v. Petersen (1935) 4 Cal. 2d 276, 288, 48 P.2d 689* ; *Agnew v. Parks (1959) 172 Cal. App. 2d 756, 765, 343 P.2d 118*).

F. Common Law Crime of Obstruction of Justice. One who has injured another through commission of the common law crime of obstruction of justice, which includes falsely testifying, suborning perjury, and concealing or withholding documentary evidence, is not answerable civilly (*Agnew v. Parks (1959) 172 Cal. App. 2d 756, 765-766, 343 P.2d 118*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a general demurrer to a complaint where the demurrer asserts that the complaint fails to state facts sufficient to constitute a cause of action in that it appears on the face thereof, or from any matter of which the court is required to or may take judicial notice, that the action is based on the violation of a criminal statute by one or more of the defendants.

Although this form states a general rule that no civil right can be predicated on a mere violation of a criminal statute involving the common law crime of obstruction of justice (withholding of documentary evidence or the giving or suborning of false testimony) and the statutory crimes of giving or suborning false testimony, it should be noted that, generally, civil liability for conspiracy to commit a civil wrong exists where there is a conspiracy to accomplish a criminal act by concerted action [*see § 46.52*] and that one is liable as a conspirator, even if he or she joins a criminal conspiracy after the completion of the criminal acts [*see § 46.41*].

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Points and Authorities

For a memorandum of points and authorities in support of a motion for summary judgment asserting that summary judgment is proper where it appears that the plaintiff's action is founded on an illegal act or transaction, see *§ 46.35*.

[3] Discussion of Authorities

[a] Civil Right Not Predicated on Violation of Criminal Statute

Babu v. Petersen *(1935) 4 Cal. 2d 276, 48 P.2d 689* , involved a suit by plaintiff, an alien, to foreclose a mortgage on certain land which defendant gave to plaintiff as collateral to secure her promissory note made to plaintiff. Defendant's cross complaint alleged that plaintiff was an alien and ineligible legally to own real property or any interest therein under the existing alien land law and that plaintiff and others had conspired to violate the law by colorable transfers of the land to defendant in order to prevent escheat to the state. The cross complaint also sought cancellation of the mortgage and note and quieting of title in the land in her. The trial court found, on evidence the Supreme Court found totally insufficient to support the findings, that all of the defendant's allegations were true and that she owned the land thus notwithstanding her participation in a conspiracy to violate the law. The Court ruled that plaintiff came within the provision of the law that if two or more persons conspire to violate any provision of the alien land law they would be subject to criminal penalties. However, it then held that no civil right can be predicated on the violation of a criminal statute and concluded that the defendant had no title to quiet and, moreover, was barred by the maxim of equity that a claimant cannot prevail on the weakness of his adversary's title but must stand or fall on the strength of his title (*4 Cal. 2d 276, 288)* .

In ***Agnew v. Parks*** *(1959) 172 Cal. App. 2d 756, 343 P.2d 118* , the trial court sustained a general demurrer to a cause of action for conspiracy to obstruct the orderly prosecution of a prior civil action through the subornation of perjury and fraud on the trial court in that action. The court of appeal affirmed. The complaint alleged a conspiracy on the part of a

medical association and a named doctor, wherein: (1) the association recommended that the court appoint the doctor as an unprejudiced witness to examine plaintiff and to testify that such recommendation was in accord with a plan to recommend a doctor favorable to defendant in that action, (2) after his appointment the named doctor appeared as an alleged disinterested witness for plaintiff but testified falsely and unfavorably to her case, and (3) pursuant to the conspiracy, certain x-ray evidence was concealed. The court noted that the common law crime of obstruction of justice is not recognized by statute, although perjury and subornation of perjury are statutory felonies. However, said the court, no civil right can be predicated on a mere violation of a criminal statute and, on the theory that there must be an end to litigation, aside from defamation and malicious prosecution, no injury is recognized from false testimony on which a civil action for damages can be maintained. Moreover, since one who by perjury has injured another is not answerable civilly, neither is the one procuring the same. Although concealing or withholding documentary evidence is a felony, the court stated that this too is subject to the rule foreclosing the maintenance of a civil action for injury (*172 Cal. App. 2d 756, 765)* .

[b] Common Law Crime of Obstruction of Justice

Agnew v. Parks *(1959) 172 Cal. App. 2d 756, 343 P.2d 118* , is discussed in *§ 46.22[3][a]*.

[4] Additional Authorities

[a] Civil Right Not Predicated on Violation of Criminal Statute

In *Legg v. Ford (1960) 185 Cal. App. 2d 534, 8 Cal. Rptr. 392* , the facts and background of which are discussed in *§ 46.20[3][d]*, the court of appeal noted that if plaintiff was attempting to allege that pursuant to the conspiracy pleaded the defendant judge made a finding for the purpose of causing plaintiff to commit perjury, such a theory attempted to charge a conspiracy to commit the crime of subornation of perjury under *Penal Code §§ 127* and *182*. Subornation of perjury, said the court, being a crime and not a tort, is subject to criminal prosecution brought in the interest of the state and not to redress a private wrong (*185 Cal. App. 2d 534, 542-543)* .

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4-46 California Points & Authorities § 46.23

§ 46.23 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Failure to Allege Underlying Civil Wrong--Contracting Party Incapable of Committing Tort of Interference With Own Contract

[1] FORM

[*Caption. See § 46.20[1].*]

PLAINTIFF'S COMPLAINT FOR DAMAGES ARISING FROM AN ALLEGED CIVIL CONSPIRACY FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION IN THAT IT ALLEGES DEFENDANT'S COMMISSION OF THE TORT OF INTERFERENCE WITH CONTRACT, WHICH DEFENDANT, AS A PARTY TO THAT CONTRACT, IS LEGALLY INCAPABLE OF COMMITTING.

A. Objection by Demurrer. [*See § 46.20[1], Paragraph A.*]

B. Elements Essential to Pleading Conspiracy. [*See § 46.20[1], Paragraph B.*]

C. No Cause of Action for Civil Conspiracy Alone. [*See § 46.20[1], Paragraph C.*]

D. Pleading of Facts Showing Independent Right of Action. [*See § 46.20[1], Paragraph D.*]

E. Contracting Party Legally Incapable of Committing Tort of Interference With Own Contract. A defendant cannot be liable for conspiracy to interfere with his/her/its own contract because only strangers to a contract, not the contracting parties themselves, are legally capable of committing the underlying tort of interference with a contract (*Applied Equip. Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 513-514, 28 Cal. Rptr. 2d 475, 869 P.2d 454*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a general demurrer to a complaint for damages arising from a civil conspiracy, if the demurrer asserts that the complaint fails to state facts sufficient to constitute a cause of action because it appears on the face of the complaint, or from any matter the court is required to or may take judicial notice of, that the defendant was a party to the contract in question and thus legally incapable of committing the tort of interference with contract, and therefore that the complaint fails to allege an underlying wrong.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. For example, counsel should state facts showing that the defendant was a party to the contract in question.

With appropriate modifications, these points and authorities may be used to support a motion for summary judgment [*Code Civ. Proc. § 437c*] if affidavits or declarations are necessary to establish that defendant was a party to the contract.

[b] Related Pleading and Practice Forms

For forms and discussion relating to conspiracy generally, see California Forms of Pleading and Practice, Ch. 126, *Conspiracy* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities supporting demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Contracting Party Legally Incapable of Committing Tort of Interference With Own Contract

In ***Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*** *(1994) 7 Cal. 4th 503, 28 Cal. Rptr. 2d 475, 869 P.2d 454* , plaintiff entered into a subcontract to supply spare parts under which plaintiff was entitled to a markup on the price of items purchased for the contractor, and plaintiff agreed to purchase electron tubes only from defendant, who manufactured them. Plaintiff issued a purchase order for 11 tubes to defendant, who accepted and acknowledged the order. Subsequently, the contractor and defendant agreed that defendant would sell only 6 tubes to plaintiff directly and would sell another 6 tubes at a lower price directly to the contractor. After defendant presented plaintiff with a renegotiated purchase order, which resulted in a reduction in plaintiff's commission, plaintiff sued defendant for breach of the contract created by the original purchase order and for tortious interference with the contract, including conspiracy to interfere. After a jury trial, the trial court entered judgment in plaintiff's favor both for contract damages and for tort damages for conspiracy to interfere with contract.

The court of appeal affirmed the contract awards, but reversed the tort judgment for inconsistency in the jury's verdicts. It rejected defendant's argument that defendant could not, as a matter of law, be held liable for conspiring to interfere with its own contract. Defendant petitioned for review of this issue in the Supreme Court, which reversed and remanded for further proceedings.

The Supreme Court agreed with defendant that a contracting party cannot be liable for conspiracy to interfere with its own contract, because conspiracy requires an underlying wrong and a party to a contract is legally incapable of

committing the tort of interference with contract (*7 Cal. 4th 503, 514)* . In so ruling, the Court rejected a court of appeal decision, *Wise v. Southern Pac. Co. (1963) 223 Cal. App. 2d 50, 65-72, 35 Cal. Rptr. 652* , which had concluded that holding a contracting party liable for conspiracy to interfere in its own contract was consistent with the principle that all involved in the common scheme are jointly and severally responsible for the ensuing wrong. The Court rejected the rule of *Wise* not only because it illogically expanded the doctrine of civil conspiracy by imposing tort liability for an alleged wrong--interference with a contract--that the alleged tortfeasor was legally incapable of committing, but also because it obliterated vital and established distinctions between contract and tort theories of liability by, in effect, permitting recovery of tort damages for an ordinary breach of contract (*7 Cal. 4th 503, 510)* . The Court noted that a party to a contract, whose duty is simply to perform the contract according to its terms and who owes no tort duty to refrain from interfering with its performance, cannot be bootstrapped into tort liability by pleading conspiracy (*7 Cal. 4th 503, 514)* .

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4-46 California Points & Authorities § 46.24

§ 46.24 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Failure to Allege Defendant's Knowing Entry Into Actionable Conspiracy

[1] FORM

[*Caption. See § 46.20[1].*]

PLAINTIFF'S COMPLAINT FOR DAMAGES ARISING FROM AN ALLEGED CIVIL CONSPIRACY FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION IN THAT IT FAILS TO ALLEGE FACTS SHOWING THAT DEFENDANT KNOWINGLY ENTERED INTO AN AGREEMENT FORMED FOR THE PURPOSE OF DOING A WRONGFUL ACT AGAINST THE PLAINTIFF.

A. Objection by Demurrer. [*See § 46.20[1], Paragraph A.*]

B. Essential Allegations to Assertion of Conspiracy. The essential allegations to the assertion of a cause of action based on an alleged conspiracy are (1) a concert of action between the defendants to accomplish the purpose of the conspiracy, (2) the illegality of their actions which furthered a common scheme or design to achieve the unlawful purpose of the conspiracy, and (3) knowledge on the part of the alleged conspirators of the conspiracy and its unlawful purpose (*Kidron v. Movie Acquisition Corp. (1995) 40 Cal. App. 4th 1571, 1581, 47 Cal. Rptr. 2d 752* ; *Holder v. Home Sav. & Loan Ass'n (1968) 267 Cal. App. 2d 91, 108, 72 Cal. Rptr. 704* ; *Beeler v. West Am. Fin. Co. (1962) 201 Cal. App. 2d 702, 707, 20 Cal. Rptr. 190*).

C. Necessity of Alleging Defendant's Knowledge of Conspiracy. In the absence of any allegation that a defendant had knowledge of the alleged wrongful act(s) or of the alleged conspiracy to do such act(s), the complaint fails to state sufficient facts to constitute a cause of action for damages based on conspiracy (*Kidron v. Movie Acquisition Corp. (1995) 40 Cal. App. 4th 1571, 1598, 47 Cal. Rptr. 2d 752* ; *Beeler v. West Am. Fin. Co. (1962) 201 Cal. App. 2d 702, 707, 20 Cal. Rptr. 190*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]

By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a general demurrer to a complaint for damages arising from a civil conspiracy where the demurrer asserts that the complaint fails to state facts sufficient to constitute a cause of action against the demurring defendant in that it fails to allege his or her knowing entry into an actionable conspiracy.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Points and Authorities

For a memorandum of points and authorities in support of a motion for summary judgment [*Code Civ. Proc. § 437c*] asserting the point that summary judgment for the defendant is proper where the defendant merely knew of, acquiesced in, or approved of the alleged conspiracy without cooperating or agreeing to cooperate with the other defendants, see *§ 46.36*.

[3] Discussion of Authorities

[a] Essential Allegations to Assertion of Conspiracy

In ***Kidron v. Movie Acquisition Corp.*** *(1995) 40 Cal. App. 4th 1571, 47 Cal. Rptr. 2d 752* , discussed in *§ 46.24[3][b]*, the court stated that to prove a claim of civil conspiracy the plaintiff was required to prove three elements: (1) the formation and operation of the conspiracy, (2) wrongful conduct in furtherance of the conspiracy, and (3) damages arising from the wrongful conduct (*40 Cal. App. 4th 1571, 1581)* .

In ***Holder v. Home Sav. & Loan Ass'n*** *(1968) 267 Cal. App. 2d 91, 72 Cal. Rptr. 704* , the court of appeal ruled that the trial court had properly dismissed a conspiracy count after granting a motion for nonsuit in an action for fraudulent concealment and misrepresentation. The complaint sought rescission of an agreement to purchase real property from defendant lender because of alleged fraudulent misrepresentations and concealments (allegedly made by the lender, its agents, and certain sales agents) as to the amount necessary and sufficient to cover a monthly prorating of taxes levied on the property.

The court acknowledged the rule that the existence of a conspiracy may be inferred from circumstances and that it need not be the result of an express agreement but may rest on tacit assent and acquiescence. However, the essentials to the existence of a conspiracy are: (1) concert of action between the conspirators to accomplish the purpose of the conspiracy; (2) the taking of illegal actions in furtherance of a common scheme or design to achieve the unlawful purpose of the conspiracy; and (3) knowledge on the part of the alleged conspirators of the conspiracy and its unlawful purpose. The court stated that the record did not show that any officer of the lender knew of an intent or misrepresent willfully the amount of existing tax liens or liabilities or of an intent to give assurance as a matter of fact of the amounts of any future tax levies and concluded, therefore, that the conspiracy count had properly been dismissed (*267 Cal. App. 2d 91, 108)* .

In ***Beeler v. West Am. Fin. Co.*** *(1962) 201 Cal. App. 2d 702, 20 Cal. Rptr. 190* , the court of appeal affirmed a judgment for a corporate trustee under a deed of trust entered by the trial court after it had sustained defendant trustee's

demurrer to a complaint for fraud and conspiracy. The court held that the complaint did not allege that the trustee had any knowledge of the alleged fraud or conspiracy or that there was any affirmative and knowing participation therein by the trustee. The complaint alleged that in the sale of the plaintiff's property, another defendant who was plaintiff's agent, learned of a note secured by the deed of trust on the property, that the trustee had recorded its notice of default thereon, and that the note could be substantially discounted to plaintiff's advantage, but that he used the information to aid a third and fourth defendant to obtain an interest in the property adverse to that of plaintiff. It further alleged that this was done in collaboration and conspiracy with the trustee under the deed of trust.

The court of appeal ruled that to assert a valid cause of action, a complaint based on an alleged conspiracy must show (1) a concert of action between the defendants to accomplish the purpose of the conspiracy, (2) the illegality of their actions which furthered a common scheme or design to achieve the unlawful purpose of the conspiracy, and (3) knowledge of the conspiracy and its unlawful purpose. The plaintiff contended that the allegation in his complaint which tied the demurring trustee in as a participant in the alleged conspiracy was that the other defendants acted in collaboration and conspiracy with the trustee. The court noted that no facts were alleged which in any way tied in the demurring defendant as a conspirator. It held that the allegations it cited were merely generalities and conclusions and insufficient to state a cause of action against defendant trustee. The court further observed that plaintiff had not alleged that the trustee had any knowledge of the agent's alleged violation of his fiduciary duty to his principal or of the alleged conspiracy between the agent and those who obtained an interest in the plaintiff's property. It then held that without an allegation of some fact to show the trustee's affirmative and knowing participation in the alleged fraud, the complaint was vulnerable to the trustee's general demurrer. From the record, said the court, it would appear that the trustee, as the owner and holder of the plaintiff's defaulted note and deed of trust, had assigned those instruments to the other defendants and that this was an act which it had a perfect legal right to do (*201 Cal. App. 2d 702, 707)* .

[b] Necessity of Alleging Defendant's Knowledge of Conspiracy

In ***Kidron v. Movie Acquisition Corp.*** *(1995) 40 Cal. App. 4th 1571, 47 Cal. Rptr. 2d 752* , the originator of the concept for a television series, sued his producers and a distributor for conspiracy to commit fraud in removing plaintiff from the venture. At the conclusion of plaintiff's case, the distributor moved for nonsuit, and the trial court granted the motion, dismissing the distributor. The court of appeal noted that to prove involvement in a conspiracy by the distributor, plaintiff was required to prove that the distributor knew about the alleged scheme by the producers to defraud plaintiff, and that it intentionally joined them in this scheme (*40 Cal. App. 4th 1571, 1597)* . However, plaintiff failed to produce any substantial evidence that the distributor either knew or intentionally agreed to join the producers in the perpetration of the alleged scheme. The court thus affirmed the judgment of nonsuit and the dismissal of the distributor as a conspirator (*40 Cal. App. 4th 1571, 1598)* .

Beeler v. West Am. Fin. Co. *(1962) 201 Cal. App. 2d 702, 20 Cal. Rptr. 190* , is discussed in *§ 46.24[3][a]*.

[4] Additional Authorities

[a] Essential Allegations to Assertion of Conspiracy

In *Choate v. County of Orange (2000) 86 Cal. App. 4th 312, 103 Cal. Rptr. 2d 339* , the plaintiffs brought a federal civil rights action and charges of a civil conspiracy against a group of sheriff's deputies. The lawsuit stemmed from a fight that occurred late one night after the plaintiffs and their companions attacked the deputies, who were off duty, as they were leaving a party. In the course of the fight, which resulted in several arrests, the off-duty deputies injured the plaintiffs prior to the arrival of two on-duty deputies. In the civil conspiracy claim, the plaintiffs alleged that the two on-duty deputies waited long enough before arriving on the scene for the off-duty deputies to "finish the plaintiffs off," and then subsequently filed knowingly false and misleading police reports to cover up this fact. The trial court granted a nonsuit of the plaintiffs' conspiracy claims and denied a motion for retrial, and the court of appeal affirmed. The court of appeal noted the heavy burden faced a plaintiff alleging a civil conspiracy to show that the defendants had an actual

agreement, a meeting of the minds, to commit the wrong forming the basis for the conspiracy claim. Independent actions combined with unsupported conjecture of a conspiracy is insufficient. In this case, the plaintiffs offered no proof that the deputies had agreed to commit battery on the plaintiffs and then intentionally engage in a cover-up (*86 Cal. App. 4th 312, 333-335)* .

California Points & Authorities

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CHAPTER 46 CONSPIRACY
PART II. FORMS

4-46 California Points & Authorities § 46.25

§ 46.25 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Failure to Allege Facts in Action Against Corporation and Its Agents Showing That Agents Acted for Individual Advantage or Beyond Scope of Authority

[1] FORM

[*Caption. See § 46.20[1].*]

PLAINTIFF'S COMPLAINT FOR DAMAGES ARISING FROM AN ALLEGED CONSPIRACY FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION IN THAT IT APPEARS ON THE FACE OF THE COMPLAINT THAT THE ALLEGED CONSPIRATORS ARE A CORPORATION AND ITS AGENTS AND EMPLOYEES AND THAT THE LATTER ARE SUED IN THEIR CAPACITIES AS AGENTS AND EMPLOYEES OF THE CORPORATION RATHER THAN AS INDIVIDUALS FOR ACTS PERFORMED FOR THEIR INDIVIDUAL ADVANTAGE OR ACTS BEYOND THE SCOPE OF THEIR AUTHORITY.

A. Objection by Demurrer. [*See § 46.20[1], Paragraph A.*]

B. Elements Essential to Pleading Conspiracy. [*See § 46.20[1], Paragraph B.*]

C. Two or More Persons or Entities Required. There must be two or more persons or entities to have a conspiracy (*Applied Equip. Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 512, n.4, 28 Cal. Rptr. 2d 475, 869 P.2d 454* ; *Black v. Bank of Am. (1994) 30 Cal. App. 4th 1, 4, 6, 35 Cal. Rptr. 2d 725*).

D. Corporation Cannot Conspire With Itself or Its Agents. A corporation cannot conspire with itself any more than a private individual can, and as a general rule, the acts of its agents are acts of the corporation (*Black v. Bank of Am. (1994) 30 Cal. App. 4th 1, 6, 35 Cal. Rptr. 2d 725*).

E. Corporate Agents Cannot Conspire With Corporation. Agents and employees of a corporation cannot conspire with their corporate principal or employer if they act in their official capacities on behalf of the corporation and not as individuals for their individual advantage, or beyond the scope of their authority (*Black v. Bank of Am. (1994) 30 Cal. App. 4th 1, 6, 35 Cal. Rptr. 2d 725*).

Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a general demurrer to a complaint that asserts that the complaint alleging a civil conspiracy on the part of a corporation and defendant agent fails to state facts sufficient to constitute a cause of action in that it appears on the face of the complaint that defendant was sued in his or her capacity as an agent or employee of the corporation rather than as an individual for acts performed for his or her own advantage.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms and discussion regarding conspiracy, see California Forms of Pleading and Practice, Ch. 126, *Conspiracy* (Matthew Bender).

[c] Related Points and Authorities

For forms and discussion relating to the relationship of principal and agent, see Ch. 182, *Principal and Agent* .

[d] Opposing Points and Authorities

The points and authorities in *§§ 46.42* and *46.43* may be used to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Two or More Persons or Entities Required

The facts and procedural background of ***Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*** *(1994) 7 Cal. 4th 503, 28 Cal. Rptr. 2d 475, 869 P.2d 454* , are discussed in *§ 46.23[3][a]*. In that case, the California Supreme Court ruled that a party to a contract cannot be held liable in tort for conspiring to interfere with its own contract, overruling a contrary holding in *Wise v. Southern Pac. Co. (1963) 223 Cal. App. 2d 50, 65-72, 35 Cal. Rptr. 652* . However, the Court quoted with approval the definition in *Wise* of the so-called "agent's immunity rule," under which agents and employees of a corporation cannot conspire with their corporate principal or employer if they are acting in their official capacities on behalf of the corporation and not as individuals for their individual advantage. The Court noted that other Court cases had endorsed and applied that rule and that nothing in its decision was intended to abrogate or impair the rule (*7 Cal. 4th 503, 512)* .

In ***Black v. Bank of Am.*** *(1994) 30 Cal. App. 4th 1, 35 Cal. Rptr. 2d 725* , plaintiffs had obtained financing, secured by a crop lien, from defendant bank for 17 years for their various agricultural enterprises. Plaintiffs began negotiations with defendant for loans for the 1984-85 operating year. Despite defendant's representations that it would renew existing

loans and grant new loans, defendant eventually notified plaintiffs that it would not provide loans for that operating year and called off all guarantees of existing loans. As a result, several of plaintiffs' companies filed for bankruptcy. Plaintiffs filed a complaint alleging that defendant bank and its employees had conspired to conceal from them the decision not to grant them further loans so that plaintiffs would continue to invest in the 1985 crops, making them more valuable when defendant foreclosed on this security. Defendants demurred, asserting that the complaint failed to state a cause of action. The trial court sustained the demurrer without leave to amend and dismissed the action, and plaintiffs appealed.

The court of appeal affirmed, citing the long-established rule that agents and employees of a corporation acting in their official capacities on behalf of the corporation and not for their individual advantage cannot conspire with their corporate principal or employer (*30 Cal. App. 4th 1, 4)* . The court acknowledged the exception to this so-called "agent's immunity" rule for corporate employees that owe a duty to a plaintiff independent of the corporation's duty, but noted that this exception threatens to swallow the rule (*30 Cal. App. 4th 1, 4-5)* . The court noted that cases applying this exception generally involved agents and employees outside the corporate structure of the principal, whereas the case before it involved a single corporation and its own employees; in the court's view, the agent's immunity rule has particular force in this type of situation (*30 Cal. App. 4th 1, 5-6)* . If a corporate employee acts on behalf of the corporation in the course of his or her employment, the two entities required to have a conspiracy are lacking because there is no entity with whom the employee can conspire. The court noted the settled rule that a corporation cannot conspire with itself any more than a private individual can; because the acts of its employees are the acts of the corporation, holding that a subordinate employee of a corporation can be liable for conspiring with the corporation would destroy this settled rule (*30 Cal. App. 4th 1, 6)* . The court also noted that plaintiffs could not rely on the exception to the agent's immunity rule that holds corporate employees liable for conspiracy with the corporation if they either act for their own individual advantage and not solely on the corporation's behalf, or act beyond the scope of their authority; plaintiff's complaint had clearly alleged that defendant bank employees had acted in the course and scope of their employment and agency (*30 Cal. App. 4th 1, 6)* .

[b] Corporation Cannot Conspire With Itself or Its Agents

Black v. Bank of Am. *(1994) 30 Cal. App. 4th 1, 35 Cal. Rptr. 2d 725* , is discussed in *§ 46.25[3][a]*.

[c] Corporate Agents Cannot Conspire With Corporation

Black v. Bank of Am. *(1994) 30 Cal. App. 4th 1, 35 Cal. Rptr. 2d 725* , is discussed in *§ 46.25[3][a]*.

[4] Additional Authorities

[a] Corporate Agents Cannot Conspire With Corporation

In *Zumbrun v. University of S. Cal. (1972) 25 Cal. App. 3d 1, 101 Cal. Rptr. 499* , the court of appeal reversed the trial court's sustaining of a general demurrer to a complaint for breach of contract but ruled that plaintiff's cause of action for conspiracy was vulnerable to demurrer. The complaint alleged that the university, certain of its trustees, and certain of its employees had conspired, as part of a faculty strike in protest against United States action in Cambodia, to breach the university's contract to complete the teaching of a required college course. The court of appeal noted that the plaintiff had not received all that she bargained for when she enrolled in the course and ruled that whether or not the partial failure of consideration justified refund of a portion of the tuition and fee allocable to the course was a matter for proof at trial and that it was error to sustain the demurrer as to the university. As to the conspiracy allegations, the court held that the complaint was vulnerable in its allegations pertaining to damages, since there was no allegation which informed defendants of the causal connection between the alleged wrongs and the damages claimed, and allegations of damages without allegations of fact to support them are but conclusions of law. The court added that, moreover, agents or employees of a corporation cannot conspire with the corporation while acting in their official capacities on behalf of the corporation rather than as individuals acting for their individual advantage (*25 Cal. App. 3d 1, 12-13)* .

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4-46 California Points & Authorities § 46.26

§ 46.26 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Complaint Alleges Conspiracy by Agent to Violate Duty Binding on Principal Alone

[1] FORM

[*Caption. See § 46.20[1].*]

PLAINTIFF'S COMPLAINT FOR DAMAGES ARISING FROM AN ALLEGED CIVIL CONSPIRACY BETWEEN DEFENDANT AND HIS/HER PRINCIPAL FAILS TO STATE A CAUSE OF ACTION BECAUSE THE DUTY DEFENDANT IS ALLEGED TO HAVE CONSPIRED TO VIOLATE IS A DUTY THAT IS BINDING ON THE PRINCIPAL ALONE.

A. Objection by Demurrer. [*See § 46.20[1], Paragraph A.*]

B. Duty Not Binding on Agent Defendant. A complaint that alleges a conspiracy by an agent to cause his or her principal to violate a duty that is binding on the principal alone, and that does not purport to rely on any other duty on the part of the agent, fails to state a cause of action for conspiracy against the agent (*Doctors' Co. v. Superior Court (1989) 49 Cal. 3d 39, 44, 49, 260 Cal. Rptr. 183, 775 P.2d 508*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a general demurrer to a complaint for damages arising from

a conspiracy between an agent and a principal to cause the principal to violate a duty that is binding on the principal alone.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing that the duty that the alleged conspiracy was intended to violate was one binding only on the principal, and not on the agent.

[3] Discussion of Authorities

[a] Duty Not Binding on Agent Defendant

In ***Doctors' Co. v. Superior Court*** *(1989) 49 Cal. 3d 39, 260 Cal. Rptr. 183, 775 P.2d 508* , the plaintiff in a medical malpractice action alleged that his physician's insurer, the insurer's attorney, and an expert witness hired by the insurer conspired to violate the insurer's statutory duty under *Ins. Code § 790.03(h)(5)* to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim in which liability has become reasonably clear. The defendants filed general demurrers to the complaint. The trial court overruled the demurrers, and the defendants petitioned the court of appeal for a writ of mandate to compel the trial court to sustain their demurrers. The court of appeal summarily denied issuance of the writ and the Supreme Court granted review. The Supreme Court issued a peremptory writ of mandate directing the superior court to vacate its order overruling the demurrers and to enter a new order sustaining the demurrers.

The Supreme Court held that an agent or employee may not be held liable for conspiracy to cause their principal to violate a duty that is binding on the principal alone. The Court, citing *Gruenberg v. Aetna Ins. Co. (1973) 9 Cal. 3d 566, 576, 108 Cal. Rptr. 480, 510 P.2d 1032* , and *Wise v. Southern Pac. Co. (1963) 223 Cal. App. 2d 50, 72, 35 Cal. Rptr. 652* , concluded that because the duty that the defendant agents are alleged to have conspired to violate is imposed by statute solely on persons engaged in the business of insurance under *Ins. Code § 790.01*, and the noninsurer defendants were acting merely as agents of the insurer and not as individuals for their individual advantage, they cannot be held accountable on a theory of conspiracy. The opinion distinguished, however, those circumstances in which the agent acted in furtherance of his or her own financial gain or in which the agent owed an independent duty to the plaintiff. The Supreme Court explicitly disapproved the contrary holding of *Wolfrich Corp. v. United Services Automobile Assn. (1983) 149 Cal. App. 3d 1206, 1211* (*49 Cal. 3d 39, 47-49)* .

[4] Additional Authorities

[a] Duty Not Binding on Agent Defendant

In *Gruenberg v. Aetna Ins. Co. (1973) 9 Cal. 3d 566, 108 Cal. Rptr. 480, 510 P.2d 1032* , the owner of a business damaged by fire sued his insurance carrier, its law firm, and outside adjusters for conspiracy to violate the implied covenant of good faith and fair dealing. Defendants filed general demurrers to the complaint, and the trial court sustained the demurrers with leave to amend. The Supreme Court reversed the judgment and remanded with directions to overrule the demurrer with respect to the insurance carrier. The Supreme Court affirmed the judgment sustaining the general demurrers with respect to the noninsurer defendants, and concluded that under *Wise v. Southern Pacific (1963) 223 Cal. App. 2d 50, 72* , because the noninsurer defendants were not subject to the implied duty, and the plaintiff contended they breached only the duty of good faith and fair dealing, the complaint did not state sufficient facts to constitute a cause of action against them (*9 Cal. 3d 566, 576, 581)* .

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4-46 California Points & Authorities § 46.27

§ 46.27 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Failure to Allege Facts Showing Damage Resulting From Alleged Conspiracy

[1] FORM

[*Caption. See § 46.20[1].*]

PLAINTIFF'S COMPLAINT FOR DAMAGES ARISING FROM AN ALLEGED CIVIL CONSPIRACY FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION IN THAT IT FAILS TO ALLEGE THAT THE PLAINTIFF INCURRED DAMAGE RESULTING FROM THE PERPETRATION OF A CIVIL WRONG AGAINST HIM/HER BY THE ALLEGED CONSPIRATORS.

A. Objection by Demurrer. [*See § 46.20[1], Paragraph A.*]

B. Elements Essential to Pleading Conspiracy. [*See § 46.20[1], Paragraph B.*]

C. Cause of Action for Resulting Damage. A civil conspiracy does not in and of itself give rise to a cause of action unless a civil wrong has been committed and damage results (*Unruh v. Truck Ins. Exch. (1972) 7 Cal. 3d 616, 631, 102 Cal. Rptr. 815, 498 P.2d 1063* ; *Orloff v. Metropolitan Trust Co. (1941) 17 Cal. 2d 484, 488, 110 P.2d 396*).

D. Facts Showing Causal Connection Between Wrong and Damages Claimed. Allegations of damages not supported by fact are but conclusions of law, which are not admitted by demurrer; thus, a complaint which fails to state fact informing the defendants of the causal connection between the alleged acts on defendants' parts and the damages claimed is vulnerable to a general demurrer (*Zumbrun v. University of S. Cal. (1972) 25 Cal. App. 3d 1, 12, 101 Cal. Rptr. 499*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a general demurrer to a complaint for damages arising out of a civil conspiracy when the demurrer asserts that it appears from the face of the complaint that no damage resulted to the plaintiff from the perpetration of the alleged conspiracy or that the complaint fails to state that damage did so result.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Cause of Action for Resulting Damage

Unruh v. Truck Ins. Exch. *(1972) 7 Cal. 3d 616, 102 Cal. Rptr. 815, 498 P.2d 1063* , is discussed in *§ 46.20[3][a]*.

In ***Orloff v. Metropolitan Trust Co.*** *(1941) 17 Cal. 2d 484, 110 P.2d 396* (the facts and background of which are discussed in *§ 46.20[3][a]*), the Supreme Court held that a complaint alleging a cause of action based on conspiracy was insufficient because it failed to allege any damage, stating that since the cause of action is for the damage suffered, and not the mere conspiracy, the complaint must state facts that show that a civil wrong was done resulting in damage. The Court noted that because the operation of the conspiracy did not discharge the obligation involved, which was owed to plaintiff by a third party and from whom plaintiff could have recovered, plaintiff suffered no damage by reason of the conspiracy (*17 Cal. 2d 484, 488)* .

[4] Additional Authorities

[a] Cause of Action for Resulting Damage

In *Bank of Cal. v. Pan Am. Tire Corp. (1982) 132 Cal. App. 3d 843, 183 Cal. Rptr. 470* , the court of appeal reversed a summary judgment against defendants in an action for conspiracy to convert plaintiff's property. The court noted that a conspiracy does not in and of itself give rise to a cause of action unless a civil wrong has been committed resulting in damage (*132 Cal. App. 3d 843, 848)* .

In *Straughter v. Safety Sav. & Loan Ass'n (1966) 244 Cal. App. 2d 159, 52 Cal. Rptr. 871* , the court of appeal affirmed a trial court's order dismissing a complaint following the sustaining of a demurrer. The complaint alleged that plaintiff was a licensed real estate broker, that defendants conspired to use his license without his knowledge by listing plaintiff as the broker in a scheme to obtain certain loans and deposits, and that defendants conspired to collect, and did collect, commissions for obtaining such loans and deposits in plaintiff's name, appropriating the commissions to defendants' own use and refusing to pay them to plaintiff after his discovery of the practice. The court ruled, however, that because there was no allegation that (1) plaintiff had rendered any services for, or had any contractual relationship with, defendants or the third persons from whom the commissions had been collected; (2) defendants had collected the commissions unlawfully; (3) plaintiff suffered financial loss, pecuniary damages to his business or reputation, or damage of any kind, as a result of the defendants' alleged misconduct; or (4) plaintiff had performed services or was damaged in his capacity as a real estate broker, the complaint did not show something which, without the purported conspiracy, would give rise to a cause of action (*244 Cal. App. 2d 159, 162-163)* .

[b] Facts Showing Causal Connection Between Wrong and Damages Claimed

Legg v. Ford (1960) 185 Cal. App. 2d 534, 8 Cal. Rptr. 392 , the facts and background of which are discussed in *§ 46.20[3][d]*, involved allegations of conspiracy to defraud plaintiff as a judgment creditor. The court of appeal stated the general principles that fraud without damage furnishes no ground for action and that it must be shown in the pleading that the damage claimed was sustained by reason of the fraud and that there was a relationship between the fraud and the damage alleged. There were no factual allegations in the complaint in this case that showed the relation between the alleged conspiracy to defraud and the damages alleged, that is, how or in what manner the alleged acts of the defendants affected plaintiff's rights, if any, as a judgment creditor (*185 Cal. App. 2d 534, 542)* .

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4-46 California Points & Authorities § 46.28

§ 46.28 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Action Based on Alleged Attorney-Client Conspiracy--Failure to Obtain Order Establishing Reasonable Probability of Success [Civ. Code § 1714.10(b)]

[1] FORM

[*Caption. See § 46.20[1].*]

PLAINTIFF'S COMPLAINT FOR DAMAGES ARISING FROM AN ALLEGED CIVIL CONSPIRACY BETWEEN DEFENDANT ATTORNEY AND HIS/HER CLIENT FAILS TO STATE A CAUSE OF ACTION IN THAT PLAINTIFF DID NOT ESTABLISH, PURSUANT TO THE PROCEDURE SET FORTH IN *CIVIL CODE SECTION 1714.10*, THAT THERE IS A REASONABLE PROBABILITY THAT HE/SHE/IT WOULD PREVAIL IN THE ACTION.

A. Objection by Demurrer. [*See § 46.20[1], Paragraph A.*]

B. Court's Permission Required Prior to Filing Complaint. A plaintiff may not include, in a complaint or other pleading, a cause of action against an attorney based on a civil conspiracy between the attorney and the attorney's client, arising from any attempt to contest or compromise a claim or dispute, and which is based on the attorney's representation of the client, unless the court has entered an order allowing the pleading to be filed (*Civ. Code § 1714.10(a)*).

C. Plaintiff Must Establish Reasonable Probability of Prevailing in Action. A court will allow such a claim for civil conspiracy to be filed only after it determines that the party seeking to file the pleading has established that there is a reasonable probability that the party will prevail in the action (*Civ. Code § 1714.10(a)*). A reasonable probability is established by plaintiff's prima facie showing (*Burtscher v. Burtscher (1994) 26 Cal. App. 4th 720, 726* ; *Hung v. Wang (1992) 8 Cal. App. 4th 908, 933-934, 11 Cal. Rptr. 2d 113*).

D. Failure to Obtain Order Is Defense. The failure to obtain an order when required by *Civil Code Section 1714.10(a)* is a defense to an action for civil conspiracy filed in violation of that subdivision (*Civ. Code § 1714.10(b)*).

[*Optional*] **E. Defense of Failure to Obtain Order Applies to Single Conspiracy Action Brought Against Both Attorney and Law Firm.** When a single conspiracy cause of action is brought against both an attorney and his or her law firm, the entire cause of action is subject to the defense of failure to meet the prefiling requirements of Section 1714.10, even if one of the exceptions of *Civ. Code § 1714.10(c)* applies to the conspiracy action as brought against the individual attorney (*Evans v. Pillsbury, Madison & Sutro (1998) 65 Cal. App. 4th 599, 607, 76 Cal. Rptr. 2d 679*).

[*Optional*] **F. Requirement to Obtain Order Does Not Violate Due Process Guaranty.** *Civil Code Section 1714.10* is rationally related to a legislative goal of reducing unmeritorious conspiracy claims against attorneys. The statute provides a plaintiff the opportunity to submit a verified petition and supporting affidavits, and the statute does not impose a higher standard of proof than would be imposed in the trial. Therefore, the statute does not violate the plaintiff's right to due process (*Hung v. Wang (1992) 8 Cal. App. 4th 908, 924-925, 11 Cal. Rptr. 2d 113*).

[*Optional*] **G. Requirement to Obtain Order Does Not Violate Equal Protection Guaranty.** *Civil Code Section 1714.10* is rationally related to the legislature's goal of relieving a perceived increase in legal malpractice insurance premiums and recusal of counsel resulting from claims that attorneys tortiously conspired with their clients. This is a peculiar harm that does not arise when nonattorneys are joined in a conspiracy cause of action. Therefore, the statute does not violate a plaintiff's right to equal protection of the law (*Hung v. Wang (1992) 8 Cal. App. 4th 908, 926, 11 Cal. Rptr. 2d 113*).

[*Optional*] **H. Requirement to Obtain Order Does Not Violate Guaranty of Jury Trial in Civil Cases.** *Civil Code Section 1714.10* requires a prefiling procedure to determine only whether the plaintiff's conspiracy pleading is legally sufficient and whether it is supported by sufficient evidence to make a prima facie case for the plaintiff. So construed, the statute does not violate the plaintiff's right to a jury trial (*Hung v. Wang (1992) 8 Cal. App. 4th 908, 931, 933-934, 11 Cal. Rptr. 2d 113*).

[*Optional*] **I. Denial of Order Is Res Judicata to Action.** An order denying a petition under *Civil Code Section 1714.10(b)* that was based on the same primary right as an action for conspiracy is res judicata and a bar to the conspiracy action (*Castro v. Higaki (1994) 31 Cal. App. 4th 350, 359, 37 Cal. Rptr. 2d 84*).

[*Optional*] **J. Attorney's Financial Gain Exception Requires More Than Monetary Compensation for Legal Services.** For purposes of the exception to the procedural requirements of *Civil Code Section 1714.10* found in subsection (c)(2), which excepts pleadings alleging that the attorney's acts go beyond the performance of a professional duty to serve the client and involve a conspiracy to violate a legal duty in furtherance of the attorney's financial gain, the phrase "in furtherance of the attorney's financial gain" requires that the attorney derive economic advantage over and above the monetary compensation received in exchange for professional services actually rendered on behalf of the client, regardless of whether the attorney fees charged are alleged to have been excessive (*Berg & Berg Enters. v. Sherwood Partners, Inc. (2005) 131 Cal. App. 4th 802, 835-836, 32 Cal. Rptr. 3d 325*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a general demurrer to a complaint for

damages that arises from a conspiracy between an attorney and the attorney's client, that arises from any attempt to contest or compromise a claim or dispute, and that is based on the attorney's representation of the client, if the plaintiff has failed to obtain an order authorizing the action pursuant to *Civ. Code § 1714.10*. Optional Paragraph I may be used if a basis of the demurrer is that plaintiff had previously attempted to obtain a *Civ. Code § 1714.10* order and the court had denied the petition.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. For example, if the plaintiff attempted to obtain a *Civ. Code § 1714.10* order by a verified petition, and the order was denied, defendant should set out the details of the application and denial.

In appropriate circumstances, a trial court may permit amendment of the complaint after sustaining a demurrer based on failure to comply with *Civ. Code § 1714.10* [*Central Concrete Supply Co., Inc. v. Bursak (2010) 182 Cal. App. 4th 1092, 1103, 105 Cal. Rptr. 3d 909]* . For example, amendment might be allowed when the plaintiff appears able to allege that the attorney was not providing legal representation at the time of the alleged conspiratorial conduct, as well as when plaintiff appears able to allege that the attorney's acts went beyond the performance of a professional duty to serve the client and involved a conspiracy to violate a legal duty in furtherance of the attorney's financial gain [*Central Concrete Supply Co., Inc. v. Bursak (2010) 182 Cal. App. 4th 1092, 1103, 105 Cal. Rptr. 3d 909* ; *see Civ. Code § 1714.10(a), (c)*]. Thus, as a practical matter, a plaintiff who did not seek a pre-filing order, but who has a compelling argument that the pre-filing order requirement does not apply, should be allowed to amend his or her complaint to specifically allege the facts supporting that conclusion if he or she failed to do so in the original complaint.

[b] Related Pleading and Practice Forms

For discussion and forms relating to actions for attorney-client conspiracy, see California Forms of Pleading and Practice, Ch. 126, *Conspiracy* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities relating to demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* in this publication.

[d] Opposing Points and Authorities

If appropriate, the points and authorities in *§ 46.51* may be used to oppose the demurrer supported by these points and authorities.

[3] Discussion of Authorities

[a] Plaintiff Must Establish Reasonable Probability of Prevailing in Action

In ***Burtscher v. Burtscher*** *(1994) 26 Cal. App. 4th 720, 31 Cal Rptr. 2d 682* , plaintiff filed suit against her ex-husband, his new wife, and their corporation, for their actions regarding certain disputed real and personal property, and later filed a motion for an order under *Civ. Code § 1714.10* to amend the complaint to allege civil conspiracy between the original defendants and the ex-husband's attorneys. The trial court issued the order after reviewing evidence that showed that one of the attorneys had accompanied the new wife (who intended to take possession) to the real property, had called a locksmith to open the house, had called a deputy sheriff to threaten the occupant with trespass, and had had plaintiff's personal property removed to a storage company. Defendants appealed from the order allowing plaintiff to add the conspiracy cause of action, and filed a petition for writ of supersedeas.

The court of appeal affirmed the trial court's order, rejecting defendants' argument that a party seeking an order under *Civ. Code § 1714.10* must make more than a prima facie showing to meet the requirement of establishing that the party

has a reasonable probability of prevailing in the action. The court noted that *Hung v. Wang (1992) 8 Cal. App. 4th 908, 933-934, 11 Cal. Rptr. 2d 113* , the "seminal" case interpreting *Civ. Code § 1714.10*, has held that reasonable probability means only a prima facie showing. The court saw no reason to depart from this standard, because trial courts ruling on this type of motion are merely performing a "gatekeeping" function by filtering out frivolous allegations of conspiracy; they are not weighing conflicting evidence, determining credibility, or drawing inferences (*26 Cal. App. 4th 720, 725-726)* . The court then rejected defendants' claim that plaintiff had failed to make a prima facie showing. The court held that the evidence clearly showed not only that the attorney was an active participant in retaking possession, but also that her resorting to self-help rather than filing an unlawful detainer action was conduct that went far beyond the role of legal representative (*26 Cal. App. 4th 720, 726-727)* .

The facts and procedural background of ***Hung v. Wang*** *(1992) 8 Cal. App. 4th 908, 11 Cal. Rptr. 2d 113* , are discussed in *§ 46.28[3][c]*. The plaintiff argued that *Civ. Code § 1714.10* violates the California Constitution's right to a jury trial in civil cases because it empowers the trial court to weigh the evidence on both sides and precludes the filing of a conspiracy complaint unless the trial court determines that plaintiff probably will prevail in a trial. In considering and rejecting this argument, the court interpreted the statutory language "reasonable probability" as meaning that the court must permit plaintiff to file the complaint if the proposed pleading is legally sufficient and if plaintiff has presented evidence showing that a prima facie case will be established at trial (*8 Cal. App. 4th 908, 933-934)* .

[b] Defense of Failure to Obtain Order Applies to Single Conspiracy Action Brought Against Both Attorney and Law Firm

In ***Evans v. Pillsbury, Madison & Sutro*** *(1998) 65 Cal. App. 4th 599, 76 Cal. Rptr. 2d 679* , plaintiffs filed a cross-complaint in a declaratory relief action, alleging, among other causes of action, a cause of action for civil conspiracy against the law firm seeking declaratory relief and an individual attorney in the firm. The law firm and attorney demurred to the conspiracy cause of action on the ground that it had been filed without compliance with *Civ. Code § 1714.10*. The cross-plaintiffs responded that the exceptions to the prefiling requirements found in *Civ. Code § 1714.10(c)* applied to their conspiracy action. The demurrer to the conspiracy cause of action was overruled.

The court of appeal reversed with directions to strike the conspiracy cause of action. The court of appeal held that the exception of *Civ. Code § 1714.10(c)(1)*, which applies when the attorney has an independent legal duty to the plaintiff, did not apply to the conspiracy claim brought against the law firm. The court of appeal also held that the exception of *Civ. Code § 1714.10(c)(2)*, which applies when the attorney's acts go beyond the performance of a professional duty to serve the client and involve a conspiracy to violate a legal duty in furtherance of the attorney's financial gain, also did not apply to the claim brought against the firm. Thus, the court found that the prefiling requirements of *Civ. Code § 1714.10* applied to the action as brought against the law firm. However, the court of appeal did conclude that one of the exceptions could be applied to the conspiracy action as brought against the individual attorney. Despite this, the court concluded that when a single conspiracy cause of action is brought against both an attorney and his or her law firm, the entire cause of action is subject to the defense of failure to meet the prefiling requirements of *Civ. Code § 1714.10*, since *Civ. Code § 1714.10(a)* directs that "[n]o cause of action against an attorney for a civil conspiracy ... shall be included in a complaint or other pleading unless the court enters an order allowing the pleading" (*65 Cal. App. 4th 599, 607)* .

[c] Requirement to Obtain Order Does Not Violate Due Process Guaranty

In ***Hung v. Wang*** *(1992) 8 Cal. App. 4th 908, 11 Cal. Rptr. 2d 113* , the plaintiff alleged a conspiracy by attorneys and their clients. The plaintiff deliberately did not seek an order under *Civ. Code § 1714.10*, because the plaintiff intended to test the constitutionality of the statute. (The plaintiff adopted this tactic after the trial court had denied a petition by the plaintiff under the statute in a related action. The plaintiff did not appeal from the denial but instead petitioned the court of appeal for an extraordinary writ, which the court refused to issue because the denial order was appealable.) The defendants moved to strike the complaint because of violation of the statute. The trial court granted the motion and

dismissed the action. On appeal the plaintiff attacked the statute on three constitutional grounds. Regarding two of those grounds, see *§ 46.28[3][d],[e]*.

The plaintiff argued that the statutory scheme failed to meet the minimum requirements of due process because of not providing for an impartial decision-maker, not providing an opportunity for discovery, and imposing a higher standard of proof to obtain the order than would be required at a trial. The court of appeal rejected the first argument as patently spurious. The second argument was meritless because plainly the statute provides for a special proceeding of a civil nature, which would be considered as an "action" under the Civil Discovery Act [*see Code Civ. Proc. § 2016.020(a)*]. The third argument failed for lack of supporting authority and because the court concluded, in analyzing the jury-trial issue, that the argument was simply wrong. The court said, "We conclude that section 1714.10 is rationally related to the legislative goal of reducing unmeritorious conspiracy claims against attorneys. As we have seen, the statute provides a plaintiff the opportunity to submit a verified petition, the proposed complaint, and supporting affidavits. The [trial] court must consider these, as well as any opposing affidavits, prior to determining whether the plaintiff has established that 'there is a reasonable probability that the party will prevail in the action.' This statutory scheme is within the legislature's plenary power to prescribe procedures defining and limiting tort litigation" (*8 Cal. App. 4th 908, 924-925)* .

[d] Requirement to Obtain Order Does Not Violate Equal Protection Guaranty

The procedural background of ***Hung v. Wang*** *(1992) 8 Cal. App. 4th 908, 11 Cal. Rptr. 2d 113* , is described in *§ 46.28[3][c]*.

The plaintiff argued on appeal that *Civ. Code § 1714.10* does not serve a compelling state interest and therefore violates the equal protection guaranty. The court of appeal observed that the proper test is not whether the statute serves a compelling state interest but is whether there is a rational relationship between the legislative goal and the class singled out for unequal treatment. The statute's requirement for an order permitting filing of the conspiracy complaint is analogous to the claim-filing procedure required under the California Tort Claims Act, which has been upheld against an equal-protection challenge. The court concluded, "Section 1714.10 is rationally related to the legislature's goal of relieving a perceived increase in legal malpractice insurance premiums and recusal of counsel resulting from claims that attorneys tortiously conspired with their clients. This is a peculiar harm which does not arise when nonattorneys are joined in a conspiracy cause of action. Section 1714.10 does not violate appellant's right to equal protection of the law" (*8 Cal. App. 4th 908, 925-926)* .

[e] Requirement to Obtain Order Does Not Violate Guaranty of Jury Trial in Civil Cases

The procedural background of ***Hung v. Wang*** *(1992) 8 Cal. App. 4th 908, 11 Cal. Rptr. 2d 113* , is described in *§ 46.28[3][c]*.

The plaintiff argued on appeal that *Civ. Code § 1714.10* violates the California constitutional right to a jury trial in civil cases because it empowers the trial judge to weigh the evidence on both sides, and it precludes the filing of a conspiracy complaint unless the judge determines that the plaintiff probably will prevail in a trial. The court of appeal first rejected the premise that the statute requires the trial judge to weigh the evidence and make an adjudicative decision. The plaintiff's argument rested on the meaning of the statutory language permitting the filing of a conspiracy complaint only "after the court determines that the party seeking to file the pleading has established that there is a reasonable probability that the party will prevail in the action" [*Civ. Code § 1714.10(a)*]. The court of appeal concluded that this requires the plaintiff to show that he or she has a case that will survive a motion for nonsuit and, if successful, will be supported by sufficient evidence to warrant affirmance on appeal (*8 Cal. App. 4th 908, 929)* . The statute "requires a prefiling procedure to determine whether the proposed conspiracy pleading is legally sufficient, and whether it is supported by a sufficient prima facie showing of facts to sustain a favorable decision if the evidence submitted by the petitioner is credited. If either of these requirements is not met, the petition must be denied; if both are satisfied, it must

be granted. This is a determination of law, not of fact" (*8 Cal. App. 4th 908, 931)* .

After determining what the statute requires, the court observed that the procedure under *Civ. Code § 1714.10* is similar to the summary judgment procedure, except that the burden of proof is shifted from the defending party to the pleading party. The court concluded, "As we construe section 1714.10, the trial court may not make findings as to the existence of facts based on a weighing of competing declarations. Whether or not the evidence is in conflict, if the petitioner has presented a sufficient pleading and has presented evidence showing that a prima facie case will be established at trial, the trial court must grant the petition. This test meets the high standard required under ... [*Walker v. Superior Court (1991) 53 Cal. 3d 257, 269-270, 279 Cal. Rptr. 576, 807 P.2d 418]* to avoid infringement of the right to jury trial" (*8 Cal. App. 4th 908, 933-934)* .

[f] Denial of Order Is Res Judicata to Action

In ***Castro v. Higaki*** *(1994) 31 Cal. App. 4th 350, 37 Cal. Rptr. 2d 84* , plaintiff's petition pursuant to *Civ. Code § 1714.10* for leave to file a complaint for conspiracy was denied. The original action was one by plaintiff for personal injuries sustained in a bombing, and plaintiff was successful in obtaining a substantial monetary judgment. While an appeal in the personal injury case was pending, plaintiff filed the petition for leave to file a complaint for conspiracy against the defendant's attorneys on the ground that they had conspired to transfer the defendant's assets overseas. The trial court denied the petition, and subsequently denied a motion for reconsideration. Plaintiff then appealed from the order denying the motion for reconsideration. Defendant moved to dismiss this appeal on the grounds that the order denying the motion for reconsideration was nonappealable, and that plaintiff had not prosecuted the appeal with diligence. While the appeal regarding the petition was still pending, the plaintiff filed a complaint which was virtually identical to the proposed complaint in the petition. Defendant demurred to the new complaint on the res judicata ground that plaintiff was attempting to split her cause of action because she was raising the same issue as in the petition to file a complaint for conspiracy. The trial court sustained the demurrer without leave to amend. Subsequently, the court of appeals granted the defendant's motion to dismiss plaintiff's appeal from the order denying the motion for reconsideration. Plaintiff then filed a motion to set aside the order sustaining the demurrer to the new complaint, claiming that she had never had her primary right adjudicated. The trial court denied the motion and dismissed the case, stating that the final determination of the petition to file a conspiracy complaint was res judicata as to the new complaint for conspiracy.

The court of appeal affirmed, concluding that the order denying the petition to file a conspiracy complaint was based on the same primary right as was asserted in the new complaint (*31 Cal. App. 4th 350, 359)* . The court noted that an adjudication of a petition under *Civ. Code § 1714.10* results in a final, appealable order, and that once the time for appeal of such an order has passed, the judgment resulting from the order becomes final (*31 Cal. App. 4th 350, 356-357)* . The determinative question was thus whether the same primary right was raised in the petition to file the complaint as in the new complaint, and whether the final judgment denying the petition was on the merits and thus res judicata to the new action. Stating that the primary right is determined by the harm suffered, the court concluded that since the new complaint was virtually identical to the proposed complaint under the petition, the new complaint was based on the same primary right (*31 Cal. App. 4th 350, 357)* . With regard to the question of whether the denial of the petition was a judgment on the merits, the court compared the procedure to the showing needed to survive a motion for nonsuit, and stated the rule that a judgment of nonsuit is an adjudication on the merits unless it is granted on a technical ground not involving the merits, in which case it is not res judicata (*31 Cal. App. 4th 350, 358)* . Since the petition for leave to file a conspiracy complaint was not denied because of a technicality, but rather because plaintiff failed to show that there was any theory of liability under which she could prevail, the denial of the petition was determined on the merits. Since the order denying the petition was based on the same primary right as the new complaint, and resulted in a final judgment on the merits, it was res judicata as to the new complaint (*31 Cal. App. 4th 350, 359)* .

[g] Attorney's Financial Gain Exception Requires More Than Monetary Compensation for Legal Services

In ***Berg & Berg Enters. v. Sherwood Partners, Inc.*** *(2005) 131 Cal. App. 4th 802, 32 Cal. Rptr. 3d 325* , the plaintiff was a real estate developer who agreed to construct two commercial buildings and then lease them to a network router developer company. However, the router developer company repudiated the lease before taking possession of the buildings, prompting a lawsuit by the plaintiff. The parties entered into a settlement in which the developer company agreed to pay the plaintiff $16 million secured by some of the company's assets. The company was unable to meet its financial obligations and assigned its assets to another company for the benefit of its creditors. The plaintiff and two other creditors attempted to force the debtor company into involuntary bankruptcy, but were ultimately unsuccessful. The plaintiff then filed suit against the company that had been assigned the assets of the debtor company, alleging that the defendant's actions had resulted in the depletion of the company's assets that would otherwise have been available to satisfy the debt owed to the plaintiff. In the meantime, the assignee company filed a motion for attorney's fees in the bankruptcy court, but the bankruptcy court denied the motion and excoriated the assignee company's law firm for charging $175,000 in fees in connection with a "straightforward" motion. Seizing on this reprimand by the bankruptcy court, the plaintiff attempted to amend the complaint in its pending lawsuit to add the law firm as a defendant on all causes of action and add a conspiracy claim as well, essentially arguing that the law firm's excessively high fees were part of the attempt to deplete the assets of the debtor company. Although the plaintiff did not comply with the procedural requirements of *Civ. Code § 1714.10*, the trial court allowed the amendment, treating it as a standard motion to amend. The defendants appealed.

The court of appeal reversed. The court noted the exceptions to the procedural requirements of *Civ. Code § 1714.10* found in subsection (c) of that statute. To come under those exceptions, a complaint must plead either that the attorney had an independent legal duty to the plaintiff, or that the attorney's acts went beyond the performance of a professional duty to serve the client and involved a conspiracy to violate a legal duty in furtherance of the attorney's financial gain. The court first concluded that the law firm did not owe an independent legal duty to the plaintiff. Embracing the rationale applied by courts in the bankruptcy setting, the court held that the attorney for an assignee for the benefit of creditors does not owe an independent duty to the creditors or to any one of them individually (*131 Cal. App. 4th 802, 825-833)* . The court then concluded that in interpreting the second exception, the phrase "in furtherance of the attorney's financial gain" requires that the attorney derive economic advantage over and above the monetary compensation received in exchange for professional services actually rendered on behalf of the client, regardless of whether the attorney fees charged are alleged to have been excessive. To reach this conclusion, the court relied on the rationale of court opinions that had reached a similar conclusion in applying the "financial advantage" exception to the agent's immunity rule, which predated the statutory exceptions of *Civ. Code § 1714.10(c)*, but were otherwise analogous. Given that all of the law firm's conduct alleged by the plaintiff as a basis for the firm's liability was conduct in the service of the client and in the course of representing the client, and the only financial advantage obtained was the fees charged for these services, the plaintiff's pleading did not meet the requirements of the second exception (*131 Cal. App. 4th 802, 835-836)* . Because all of the claims against the law firm in the plaintiff's pleading incorporated the facts of the conspiracy claim, the trial court erred in allowing the plaintiff to amend the pleading to add the law firm as a defendant without first meeting the procedural requirements of *Civ. Code § 1714.10* (*131 Cal. App. 4th 802, 836)* .

[4] Additional Authorities

[a] Attorney's Financial Gain Exception Requires More Than Monetary Compensation for Legal Services

In *Panoutsopoulos v. Chambliss (2007) 157 Cal. App. 4th 297, 68 Cal. Rptr. 3d 647* , plaintiffs were commercial tenants under a long-term lease with defendant limited partnership. Over the course of several years, the managing general partner engaged in a series of actions designed to either evict the plaintiffs for alleged lease violations or get plaintiffs to agree to increase the monthly rent from $10,000 to $21,320. In the course of defendant's efforts, the partnership's attorneys sent several communications to plaintiffs listing alleged "uncurable" lease violations and, in some cases, demanding that plaintiffs take specified actions or quit the property. In most instances, plaintiffs either sought unsuccessfully to get further information about the alleged breaches from the attorneys, tried to explain their version to the attorneys, or took actions designed to cure the alleged problems. Plaintiffs eventually sued the managing

partner for breach of the covenant of quiet enjoyment and intentional infliction of emotional distress. Plaintiffs sought to file an amended complaint to add causes of action against the attorneys for civil conspiracy, but did not first get a court order pursuant to *Civ. Code § 1714.10*. The trial court granted leave to amend, but the court of appeal reversed. The court of appeal concluded that plaintiffs had failed to follow the procedures for adding a conspiracy claim against the attorneys pursuant to *Civ. Code § 1714.10*, and neither of the exceptions of *Civ. Code § 1714.10(c)* applied. The court noted that nothing in plaintiffs' pleadings suggested that the attorneys were acting for their own benefit or expected that their actions would result in any financial advantage beyond the fees they were earning for representing their client. As such, the "financial gain" exception did not apply (*157 Cal. App. 4th 297, 306)* . The court also held that plaintiffs had not shown that the attorney's owed any actionable independent duty to them based on the attorneys' communications with plaintiffs about their possible lease violations. The court noted that the attorneys were not parties to the lease and owed no duty to plaintiffs under it. Additionally, plaintiffs had not shown any conduct by the attorneys, above and beyond actions taken in a representative capacity on behalf of their client, that had caused actionable harm to plaintiffs (*157 Cal. App. 4th 297, 306-308)* .

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Volume 4 Chapters 40-49 CLAIM & DELIVERY---to---CONTINUANCE
CHAPTER 46 CONSPIRACY
PART II. FORMS

4-46 California Points & Authorities § 46.29

§ 46.29 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Bar of Statute of Limitations--Conspiracy to Defraud [Code Civ. Proc. § 338(d)]

[1] FORM

[*Caption. See § 46.20[1].*]

PLAINTIFF'S COMPLAINT FOR DAMAGES ARISING FROM AN ALLEGED CIVIL CONSPIRACY TO DEFRAUD HIM/HER FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION IN THAT IT APPEARS ON THE FACE THEREOF THAT IT IS BARRED BY THE STATUTE OF LIMITATIONS IN THAT IT WAS NOT COMMENCED WITHIN THREE YEARS AFTER DISCOVERY BY PLAINTIFF OF THE FACTS CONSTITUTING THE ALLEGED FRAUD.

A. Objection by Demurrer. [*See § 46.20[1], Paragraph A.*]

B. Raising Statute of Limitations by Demurrer. The objection that an action is barred by a statute of limitations may be set up by demurrer (*California Safe Deposit & Trust Co. v. Sierra Valleys Ry. Co. (1910) 158 Cal. 690, 697-699, 112 P. 274* ; *Stafford v. Union Oil Co. (1959) 173 Cal. App. 2d 307, 314, 343 P.2d 380*).

C. Applicable Statute Determined by Nature of Underlying Action. Since there is no cause of action for conspiracy in and of itself, the applicable statute of limitations in an action for damages arising from an alleged conspiracy is determined by the nature of the action in which the conspiracy is alleged (*Agnew v. Parks (1959) 172 Cal. App. 2d 756, 765, 343 P.2d 118*).

D. Pleading Date of Last Overt Act. Since a cause of action based on civil conspiracy accrues on the date of the commission of the last overt act in pursuance of the conspiracy, it is imperative for the plaintiff to allege when the last overt act took place (*Bedolla v. Logan & Frazer (1975) 52 Cal. App. 3d 118, 137, 125 Cal. Rptr. 59*).

[*Optional*] **E. Act Alleged to Be Last Overt Act Is Privileged.** An act that is absolutely privileged is not sufficient to revive a cause of action for conspiracy that is otherwise barred by the statute of limitation (*see Thompson v. California Fair Plan Assn. (1990) 221 Cal. App. 3d 760, 767*).

F. Limitation Period Applicable to Fraud Action. An action for damages arising from a conspiracy to defraud the plaintiff is governed by the three-year statute of limitations (*Code Civ. Proc. § 338(d)*) applicable to an action for relief on the ground of fraud (*Agnew v. Parks (1959) 172 Cal. App. 2d 756, 766, 343 P.2d 118*).

G. Pleading Discovery Within Three Years of Commencement. When it is apparent on the face of a complaint for damages arising from a conspiracy to defraud the plaintiff that the last fraudulent act occurred over three years before the complaint was filed, the plaintiff must plead the discovery of the fraud within three years prior to the commencement of the action to avoid the bar of the statute of limitations (*Agnew v. Parks (1959) 172 Cal. App. 2d 756, 766, 343 P.2d 118*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a demurrer to a complaint for damages arising from a conspiracy to defraud the plaintiff where the demurrer asserts that it appears from the face of the complaint that the action was not commenced within three years after plaintiff's discovery of the facts constituting the alleged fraud and, thus, that it appears that the statute of limitations bars the action.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities set out in *§§ 46.47* and *46.48* may be used to oppose the demurrer supported by these points and authorities.

[c] Related Pleading and Practice Forms

For discussion and forms relating to statute of limitations issues, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* (Matthew Bender).

[d] Related Points and Authorities

For memoranda of points and authorities relating to statutes of limitations generally, see Ch. 143, *Limitation of Actions* .

[3] Discussion of Authorities

[a] Raising Statute of Limitations by Demurrer

California Safe Deposit & Trust Co. v. Sierra Valleys Ry. Co. *(1910) 158 Cal. 690, 112 P. 274* , was an action to foreclose a deed of trust securing corporate bonds. Although the defendant had failed to demur, he did assert in his answer that a statute of limitations barred the action. On appeal from a judgment on the merits, it was contended that

defendant waived the defense of limitation by failing to raise the issue by demurrer. In response, the Supreme Court stated that the only ground of demurrer applicable in the case at issue was the failure to state facts sufficient to constitute a cause of action and that this ground was, under the express provision of former Code Civ. Proc. § 434 (*now see Code Civ. Proc. § 430.80(a)*), not waived by failure to demur. The true rule, said the Court, is that the defendant may, if the defect appears on the face of the complaint, set up the bar of the statute either by demurrer or by answer. If the complaint does not show that the statute has run, the Court added, the defendant must plead his or her right by answer (*158 Cal. 690, 697-699)* .

In ***Stafford v. Union Oil Co.*** *(1959) 173 Cal. App. 2d 307, 343 P.2d 380* , the court of appeal affirmed a trial court's judgment for the defendants following its sustaining of a general demurrer to the fifth amended complaint without leave to amend in an action for the taking or removing of oil and gas from land by means of a slant-drilled well. By its demurrer, the defendant invoked the bar of the then applicable statute of limitations. In this connection, the court noted that whenever it appears on the face of the complaint that any possible cause of action therein alleged is necessarily barred by the statute of limitations, the defense is properly interposed by a general demurrer (*173 Cal. App. 2d 307, 314)* .

[b] Applicable Statute Determined by Nature of Underlying Action

In ***Agnew v. Parks*** *(1959) 172 Cal. App. 2d 756, 343 P.2d 118* , the facts and background of which are discussed in *§ 46.21[3][a]*, the first cause of action to which the trial court sustained a demurrer, included allegations of a conspiracy to damage plaintiff's rights in an earlier lawsuit by a doctor's false representations to both plaintiff and the court in the earlier action that he was a disinterested and unprejudiced witness, would give independent testimony, knew none of the parties to the action, and had not been on the staff of a particular hospital. Finding that one ground for sustaining the demurrer was that the cause of action was barred by the statute of limitations, the court ruled that since there is no cause of action for conspiracy in and of itself, the statute of limitations is determined by the nature of the action in which the conspiracy is alleged. The court observed that the gist of the alleged conspiracy was fraud, which is governed by the three-year statute of limitations under former Code Civ. Proc. § 338(4) (*now see Code Civ. Proc. § 338(d)*). Since it was apparent on the face of the complaint that the last fraudulent act occurred over three years before the pleading was filed, in order to avoid the bar of the statute of limitations, plaintiff was required to plead that his discovery of the fraud was within three years prior to the commencement of the action. Since the complaint failed to allege facts relating to discovery of the fraud, the court held that the cause of action was barred by the three-year statute (*172 Cal. App. 2d 756, 765)* .

[c] Pleading Date of Last Overt Act

In ***Bedolla v. Logan & Frazer*** *(1975) 52 Cal. App. 3d 118, 125 Cal. Rptr. 59* , the court of appeal affirmed a trial court's judgment against cross complainant entered on jury verdicts, finding that the claims raised in a cross complaint based on allegations of fraud and professional negligence against plaintiffs were barred by the statute of limitations. On appeal the cross complainants contended that the trial court had improperly refused to give their instructions on civil conspiracy. In rejecting this contention, the court of appeal noted that there is no cause of action for civil conspiracy itself and that in any action based on civil conspiracy the statute of limitations is determined by the nature of the action in which the conspiracy is alleged. The statutes of limitations applicable to the causes of action stated for fraud and professional negligence are former Code Civ. Proc. §§ 338(4) and 339(1) (*now see Code Civ. Proc. §§ 338(d)* and *340.5(2)*), respectively. In each instance, the statute commences to run only when the wrongful acts are discovered or with reasonable diligence could have been discovered. Although the court noted that cases support the proposition that a cause of action based on civil conspiracy accrues on the date of the commission of the last overt act in pursuance of the conspiracy, the court stated that it is imperative for the plaintiff to allege when the last overt act took place. Since it was alleged that the last overt wrongful acts had been committed on September 14, 1960, and the cross complaint was filed in December 1964, that was by itself indicative that the statutes had already run when the action was filed. Thus, under the circumstances, the giving of instructions on civil conspiracy would have been entirely meaningless and confusing to

the jury (*52 Cal. App. 3d 118, 137)* .

[d] Act Alleged to Be Last Overt Act Is Privileged

Thompson v. California Fair Plan Assn. *(1990) 221 Cal. App. 3d 760* , is discussed in *§ 46.21[3][g]*. In that case, the last alleged overt act in plaintiff's cause of action for conspiracy was a defendant's opposition to an earlier declaratory judgment action. Defendant sought and was granted summary judgment on the ground that this act was privileged under former Civ. Code § 47(2) (*now see Civ. Code § 47(b)*) (allegation in pleading as privileged publication), and that, but for this act, the cause of action was barred by the statute of limitations. The court of appeal affirmed, stating that the act in question was the only overt act that could prevent the statute of limitations from running on the cause of action for conspiracy. This act, however, could not be deemed a wrongful act because it was absolutely privileged based on considerations of public policy encouraging free access to the courts. Thus, the act could not serve as an overt act sufficient to revive an otherwise time-barred claim on a conspiracy theory (*221 Cal. App. 3d 760, 767-768)* .

[e] Limitation Period Applicable to Fraud Action

Agnew v. Parks *(1959) 172 Cal. App. 2d 756, 343 P.2d 118* , is discussed in *§ 46.29[3][b]*.

[f] Pleading Discovery Within Three Years of Commencement

Agnew v. Parks *(1959) 172 Cal. App. 2d 756, 343 P.2d 118* , is discussed in *§ 46.29[3][b]*.

[4] Additional Authorities

[a] Applicable Statute Determined by Nature of Underlying Action

Kenworthy v. Brown (1967) 248 Cal. App. 2d 298, 56 Cal. Rptr. 461 , is discussed with respect to this point in *§ 46.31[3][a]*.

In *Filice v. Boccardo (1962) 210 Cal. App. 2d 843, 26 Cal. Rptr. 789* , the court of appeal affirmed the trial court's judgment of dismissal of an action for damages for alleged perpetration of a fraudulent conspiracy after it had sustained demurrers to the complaint. The complaint alleged a fraudulent conspiracy on the part of attorneys and others to deprive plaintiff of a recovery in an earlier personal injury action. All of the defendants raised the statute of limitations as a bar to the action. The court noted the rule that a conspiracy, in and of itself, does not give rise to a cause of action unless a civil wrong has been committed resulting in damages. Since the complaint alleged a fraudulent conspiracy, the action was governed by the three-year period of limitation in former Code Civ. Proc. § 338(4) (*now see Code Civ. Proc. § 338(d)*). Although the last fraudulent act was alleged to be an attorney's delaying tactics, the court noted that the complaint specifically alleged that that attorney's part in the conspiracy terminated more than five years prior to the filing of the complaint. Where the face of the complaint reveals that the last fraudulent act occurred over three years before the pleading was filed, the plaintiff may avoid the bar of the statute of limitations only if he pleads discovery of the fraud within three years prior to commencement of the action. Since the complaint was entirely silent as to when the plaintiff discovered the existence of the fraudulent conspiracy, the court ruled that the complaint lacked an essential allegation and that the demurrers were properly sustained (*210 Cal. App. 2d 843, 846)* .

[b] Limitation Period Applicable to Fraud Action

Filice v. Boccardo (1962) 210 Cal. App. 2d 843, 26 Cal. Rptr. 789 , is discussed in *§ 46.29[4][a]*.

[c] Pleading Discovery Within Three Years of Commencement

Filice v. Boccardo (1962) 210 Cal. App. 2d 843, 26 Cal. Rptr. 789 , is discussed in *§ 46.29[4][a]*.

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4-46 California Points & Authorities § 46.30

§ 46.30 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Bar of Statute of Limitations--Conspiracy to Commit Civil Wrong [Code Civ. Proc. §§ 335.1, 340(c)]

[1] FORM

[*Caption, See § 46.20[1].*]

PLAINTIFFS COMPLAINT AND FOR DAMAGES ARISING FROM AN ALLEGED CIVIL CONSPIRACY TO _____ [*Specify tortious conduct governed by Code Civ. Proc. §§ 335.1, 340(c)*] FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION IN THAT IT APPEARS ON THE FACE THEREOF THAT IT WAS NOT COMMENCED WITHIN _____ [*Specify appropriate limitations period*] YEARS AFTER THE COMMISSION OF THE TORTIOUS ACT ALLEGED TO HAVE BEEN IN VIOLATION OF PLAINTIFF'S PERSONAL RIGHTS.

A. Objection by Demurrer. [*See § 46.20[1], Paragraph A.*]

B. Raising Statute of Limitations by Demurrer. [*See § 46.29[1], Paragraph B.*]

C. Applicable Statute Determined by Nature of Underlying Action. [*See § 46.29[1], Paragraph C.*]

D. Pleading Date of Last Overt Act. [*See § 46.29[1], Paragraph D.*]

[*Optional*] **E. Act Alleged to Be Last Overt Act Is Privileged.** [*See § 46.29[1], Paragraph E.*]

F. Limitation Periods. An action for libel, slander, false imprisonment, seduction of a minor, or by a depositor against a bank for the payment of a forged or raised check or one bearing a forged or unauthorized endorsement, or against a veterinarian or any person who boards or feeds an animal or fowl for neglect, must be commenced within one year (*Code Civ. Proc. § 340(c)*). An action for assault, battery, or injury or death caused by the wrongful act or neglect of another must be commenced within two years (*Code Civ. Proc. § 335.1*; *see also* former Code Civ. Proc. § 340(3) (one-year limitations period prior to January 1, 2003)).

Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a general demurrer to a complaint for damages arising from a civil conspiracy in violation of a plaintiff's personal rights if it appears from the face of the complaint that the action was not commenced within the statutorily prescribed period of limitations. For complaints alleging a conspiracy to commit assault, battery, or injury or death caused by the wrongful act or neglect of another, that period is two years (one year, prior to January 1, 2003) after the date of the alleged civil wrong or tortious act [*Code Civ. Proc. § 335.1* (*see* former Code Civ. Proc. § 340(3)); *see also California Forms of Pleading and Practice, Ch. 345, Limitation of Actions, § 345.14*]. For complaints alleging a conspiracy to commit libel, slander, false imprisonment, seduction of a minor, payment by a bank of a forged or raised check or one bearing a forged or unauthorized endorsement, or neglect by a veterinarian or any person who boards or feeds an animal or fowl, the prescribed period is one year after the date of the alleged civil wrong or tortious act [*Code Civ. Proc. § 340(c)*].

A somewhat different rule governs an action for defamation or invasion of privacy when the publication is made in a public medium because, under the Uniform Single Publication Act [*Civ. Code §§ 3425.1-3425.5*], a cause of action for defamation or invasion of privacy accrues on the date of the first general dissemination of the objectionable matter to the public [*Civ. Code § 3425.3*; *Belli v. Roberts Bros. Furs (1966) 240 Cal. App. 2d 284, 289-290, 49 Cal. Rptr. 625* ; *see § 46.38*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Forms

For references to related forms dealing with the statute of limitations, see *§ 46.29*.

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4-46 California Points & Authorities § 46.31

§ 46.31 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Bar of Statute of Limitations--Conspiracy to Induce Breach of Contract [Code Civ. Proc. § 339(1)]

[1] FORM

[*Caption. See § 46.20[1].*]

PLAINTIFF'S COMPLAINT FOR DAMAGES ARISING FROM AN ALLEGED CIVIL CONSPIRACY TO INDUCE BREACH OF CONTRACT FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION IN THAT IT APPEARS ON THE FACE THEREOF THAT THE ACTION IS BARRED BY THE STATUTE OF LIMITATIONS IN THAT IT WAS NOT COMMENCED WITHIN TWO YEARS AFTER THE COMMISSION OF THE LAST OVERT ACT ALLEGED TO HAVE BEEN COMMITTED IN PURSUANCE OF THE CONSPIRACY.

A. Objection by Demurrer. [*See § 46.20[1], Paragraph A.*]

B. Raising Statute of Limitations by Demurrer. [*See § 46.29[1], Paragraph B.*]

C. Applicable Statute Determined by Nature of Underlying Action. [*See § 46.29[1], Paragraph C.*]

D. Pleading Date of Last Overt Act. [*See § 46.29[1], Paragraph D.*]

[*Optional*] **E. Act Alleged to Be Last Overt Act Is Privileged.** [*See § 46.29[1], Paragraph E.*]

F. Limitation Period for Conspiracy to Induce Breach of Contract. The period of limitation applicable to a conspiracy to commit the tort of inducing breach of contract is two years [from the date the last overt act was committed pursuant to the conspiracy] (*Code Civ. Proc. § 339(1)*; *Kenworthy v. Brown (1967) 248 Cal. App. 2d 298, 301, 56 Cal. Rptr. 461*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a complaint for damages arising from a conspiracy to induce a breach of contract where it appears from the face of the complaint that the action was not commenced within two years after the last overt act was alleged to have been committed pursuant to the conspiracy.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Forms

For references to points and authorities and pleading and practice forms relating to the statute of limitations, see *§ 46.29*.

[3] Discussion of Authorities

[a] Limitation Period for Conspiracy to Induce Breach of Contract

In ***Kenworthy v. Brown*** *(1967) 248 Cal. App. 2d 298, 56 Cal. Rptr. 461* , the court of appeal affirmed the trial court's judgment of dismissal entered after it had sustained a demurrer to the second amended complaint alleging a conspiracy to commit the tort of inducing breach of contract. Defendants demurred on the ground that the action was barred by the statute of limitations. They relied on *Code Civ. Proc. § 339(1)*, which provides for a two-year limitation period on an action on a contract, obligation, or liability not founded on a written instrument. This provision was referred to by the court as a "catch all" for unusual tort actions not otherwise provided for. Plaintiffs claimed, on the other hand, that *Code Civ. Proc. § 343*, which provides a four-year limitation period for actions not otherwise provide for, was applicable.

There being no cause of action for civil conspiracy itself, the court stated that the applicable statute of limitations is determined by the nature of the action in which the conspiracy is alleged. The complaint alleged in pertinent part that defendants had conspired to deprive plaintiffs of the benefits of a contract they had previously entered into. The court concluded that it alleged a conspiracy to induce a breach of contract and that the statute of limitations applicable to that tort is the two-year period stated in *Code Civ. Proc. § 339(1)*. The cause of action accrued on the date that the last overt act was committed pursuant to the conspiracy, the court ruled, and since the complaint showed that the date of the last overt act necessary to complete the alleged conspiracy was more than two years before the action was commenced, the action was thus barred (*248 Cal. App. 2d 298, 301)* .

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4-46 California Points & Authorities § 46.32

§ 46.32 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Bar of Statute of Limitations--Conspiracy to Interfere With Trade or Business [Code Civ. Proc. § 339(1)]

[1] FORM

[*Caption. See § 46.20[1].*]

PLAINTIFF'S COMPLAINT FOR DAMAGES ARISING FROM AN ALLEGED CONSPIRACY TO INTERFERE WITH HIS/HER TRADE OR BUSINESS FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION IN THAT IT APPEARS ON THE FACE THEREOF THAT THE ACTION IS BARRED BY THE STATUTE OF LIMITATIONS IN THAT IT WAS NOT COMMENCED WITHIN TWO YEARS FROM THE COMMISSION OF THE WRONG.

A. Objection by Demurrer. [*See § 46.20[1], Paragraph A.*]

B. Raising Statute of Limitations by Demurrer. [*See § 46.29[1], Paragraph B.*]

C. Applicable Statute Determined by Nature of Underlying Action. [*See § 46.29[1], Paragraph C.*]

D. Pleading Date of Last Overt Act. [*See § 46.29[1], Paragraph D.*]

[*Optional*] **E. Act Alleged to Be Last Overt Act Is Privileged.** [*See § 46.29[1], Paragraph E.*]

F. Limitation Period for Conspiracy to Interfere With Trade of Business. The period of limitation applicable to the tort of interference with the plaintiff's trade or business is two years from the commission of the wrong (*Code Civ. Proc. § 339(1)*; *McFaddin v. H.S. Crocker Co. (1963) 219 Cal. App. 2d 585, 591-592, 33 Cal. Rptr. 389*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]

By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a general demurrer to a complaint for damages arising from a conspiracy to interfere with the plaintiff's trade or business where it appears from the face of the complaint that the action was not commenced within two years from the commission of the wrong and, thus, is barred by the statute of limitations.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Forms

For references to points and authorities and pleading and practice forms relating to the statute of limitations, see *§ 46.29*.

[3] Discussion of Authorities

[a] Limitation Period for Conspiracy to Interfere With Trade or Business

In ***McFaddin v. H.S. Crocker Co.*** *(1963) 219 Cal. App. 2d 585, 33 Cal. Rptr. 389* , the court of appeal affirmed the trial court's dismissal of an action for damages arising out of an alleged conspiracy to commit tortious interference with plaintiff's business and contractual relations. The trial court's order was entered after defendants had successfully objected to plaintiff's introduction of evidence on the ground that the complaint failed to state facts sufficient to constitute a cause of action. The complaint, which was filed on January 28, 1958, alleged in effect that on or about February 1, 1955, defendants had conspired to injure plaintiff's business reputation, to interfere with her contractual relations, and to deprive plaintiff of her business property by unjustifiably causing seizure thereof by the sheriff for the purpose of interfering with her business and inducing her customers not to deal with her. Noting that the applicable statute of limitations is determined by the nature of the action in which the conspiracy is alleged, the court held that this was an action on a liability not founded on a written instrument, and that it was barred because it was not commenced within two years of the commission of the wrong. The court added that its conclusion that the action was barred was not affected by the allegation that defendants had initiated and carried on a campaign to induce the plaintiff's customers not to deal with her, since the reference in the complaint was to a specific date, which was controlling for the purposes of the running of the statute of limitations, citing *Agnew v. Parks (1959) 172 Cal. App. 2d 756, 765, 343 P.2d 118* . In *Agnew*, the court of appeal observed that, although the pleading asserted that the conspiracy was entered into on May 4, 1945, and continued until November 24, 1948, it alleged no specific act on the latter date. Since the alleged conduct consisted of separate, distinct acts, the statute of limitations applicable in that case commenced to run from the time of their commission (*219 Cal. App. 2d 585, 591-592)* .

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4-46 California Points & Authorities § 46.33

§ 46.33 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Bar of Statute of Limitations--Conspiracy Based on Conversion [Code Civ. Proc. § 338(c)]

[1] FORM

[*Caption. See § 46.20[1].*]

PLAINTIFF'S COMPLAINT FOR DAMAGES ARISING FROM AN ALLEGED CONSPIRACY TO CONVERT HIS/HER TANGIBLE PROPERTY FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION BECAUSE IT APPEARS ON ITS FACE THAT THE ACTION IS BARRED BY THE STATUTE OF LIMITATIONS IN THAT IT WAS NOT COMMENCED WITHIN THREE YEARS FROM THE COMMISSION OF THE WRONG.

A. Objection by Demurrer. [*See § 46.20[1], Paragraph A.*]

B. Raising Statute of Limitations by Demurrer. [*See § 46.29[1], Paragraph B.*]

C. Applicable Statute Determined by Nature of Underlying Action. [*See § 46.29[1], Paragraph C.*]

D. Pleading Date of Last Overt Act. [*See § 46.29[1], Paragraph D.*]

[*Optional*] **E. Act Alleged to Be Last Overt Act Is Privileged.** [*See § 46.29[1], Paragraph E.*]

F. Limitation Period Applicable to Action Based on Conversion. In the case of an action for conspiracy based on conversion, the applicable statute of limitations is the three-year period of *Section 338(c) of the Code of Civil Procedure* (*Maheu v. CBS, Inc. (1988) 201 Cal. App. 3d 662, 673, 247 Cal. Rptr. 304*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a demurrer to a complaint for damages arising from a conspiracy to convert property, when the demurrer raises the bar of the statute of limitations by asserting that the complaint, on its face, shows that the action was not commenced within three years after the commission of the last overt act pursuant to the conspiracy [*see Code Civ. Proc. § 338(c)*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion and forms relating to statute of limitations issues generally, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* (Matthew Bender). For discussion of statute of limitations issues relating specifically to actions for conspiracy and conversion, see California Forms of Pleading and Practice, Ch. 126, *Conspiracy* , and Ch. 150, *Conversion* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities relating to statutes of limitations generally, see Ch. 143, *Limitation of Actions* . For memoranda of points and authorities relating to statutes of limitations issues in actions for damages based on conversion, see Ch. 51, *Conversion* . For memoranda of points and authorities relating to demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Limitation Period Applicable to Action Based on Conversion

In ***Maheu v. CBS, Inc.*** *(1988) 201 Cal. App. 3d 662, 247 Cal. Rptr. 304* , a former aide of the celebrated recluse Howard Hughes brought an action in 1985 against several defendants for, among other things, the alleged conversion of letters sent by Hughes to the aide over the course of many years. Plaintiff alleged that two of the defendants allegedly converted the letters in 1974, while other "media" defendants conspired to acquire the letters in 1977, resulting eventually in the 1984 publication of a book about Hughes. Plaintiff did not learn of the conversion until 1984. The trial court sustained demurrers, without leave to amend, to the causes of action based on conversion, on the grounds that the statute of limitations barred them. Plaintiff appealed.

The court of appeal affirmed. The court stated that in an action based on civil conspiracy the applicable statute of limitations is determined by the nature of the action in which the conspiracy is alleged. In this case, the conspiracy is based on conversion, for which the limitations period under former Code Civ. Proc. § 338(3) (*now see Code Civ. Proc. § 338(c)*) is three years. Normally, that statute commences to run from the date of the conversion, even though the injured person is ignorant of his or her rights, except when fraudulent concealment is alleged. Plaintiff in this case did not allege any fraudulent concealment. Therefore, the limitations period clearly had expired, if it were calculated either from the initial conversion in 1974 or the subsequent acquisition by the "media" defendants in 1977 (*201 Cal. App. 3d 662, 673)* . When a conspiracy exists, however, the statute does not commence to run until the date of the commission of the last overt act in pursuance of the conspiracy, a date that must be alleged (*201 Cal. App. 3d 662, 673-674)* . The court rejected plaintiff's argument that the last overt act in this instance was the publication of the book in 1984; this act

did not involve the taking of the property but rather the diminution of its value. The court concluded that there was no allegation of any act in furtherance of a conspiracy to convert property after 1977, and that therefore the causes of action were barred (*201 Cal. App. 3d 662, 674)* .

[4] Additional Authorities

[a] Applicable Statute Determined by Nature of Underlying Action

Maheu v. CBS, Inc. (1988) 201 Cal. App. 3d 662, 247 Cal. Rptr. 304 , is discussed in *§ 46.33[3][a]*.

[b] Pleading Date of Last Overt Act

Maheu v. CBS, Inc. (1988) 201 Cal. App. 3d 662, 247 Cal. Rptr. 304 , is discussed in *§ 46.33[3][a]*.

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4-46 California Points & Authorities § 46.34

§ 46.34 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--RICO Claim--Common Law Tort as Not Constituting RICO Cause of Action

[1] FORM

[*Caption. See § 46.20[1].*]

PLAINTIFF'S COMPLAINT FOR DAMAGES ARISING FROM AN ALLEGED CONSPIRACY TO _____[*describe alleged torts, e.g.,* INVADE PLAINTIFF'S PRIVACY, DEFAME PLAINTIFF, AND MISAPPROPRIATE PLAINTIFF'S IMAGE FOR COMMERCIAL GAIN] CANNOT CONSTITUTE A CLAIM UNDER THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS (RICO) ACT BECAUSE THE COMPLAINT ALLEGES NOTHING MORE THAN ORDINARY TORT CAUSES OF ACTION.

A. Objection by Demurrer. [*See § 46.20[1], Paragraph A.*]

B. Common Law Torts Are Not RICO Causes of Action. Ordinary tort allegations, such as invasion of privacy, intentional infliction of emotional distress, and libel, do not constitute the type of conduct that the Racketeer Influenced and Corrupt Organizations (RICO) Act was intended to prohibit. As a matter of law, the plaintiff is limited to the relief available in tort and may not seek triple damages through an improper attempt to place a RICO label on tort claims (*Globe Int'l, Inc. v. Superior Court (1992) 9 Cal. App. 4th 393, 396-397, 12 Cal. Rptr. 2d 109*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a demurrer to a complaint for damages arising from ordinary tort allegations, when the plaintiff alleges a conspiracy in contravention of the Racketeer Influenced and Corrupt Organizations (RICO) Act, based on those ordinary tort allegations.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Common Law Torts Are Not RICO Causes of Action

In ***Globe Int'l, Inc. v. Superior Court*** *(1992) 9 Cal. App. 4th 393, 12 Cal. Rptr. 2d 109* , the plaintiff sued a publishing company and its owners and employees for damages arising from invasion of privacy, defamation, and several other torts, based on the distribution of newspapers containing photographs of the plaintiff, who was a celebrity, and text that allegedly harmed the plaintiff on the several tort theories that were advanced. One count alleged that distribution of the newspapers was a conspiracy by the defendants to derive income from the alleged tortious activities and to reinvest the income in the publishing company so as to continue those activities. This conduct was alleged to constitute "racketeering activities" under the Racketeer Influenced and Corrupt Organizations (RICO) Act. The trial court overruled the defendants' demurrer, but the court of appeal issued a writ of mandate directing that the demurrer be sustained. "[W]e hold [that plaintiff] Collins cannot allege a RICO cause of action based solely upon allegations [that defendant] Globe invaded Collins's privacy by taking photographs of her while she was on private property, by publishing the photographs and accompanying text in a widely circulated tabloid and by distributing the tabloid to the general public, which publication and distribution allegedly caused injury to Collins. The attempt to allege a RICO cause of action is based on ordinary tort causes of action, [such as] libel, damage to reputation, invasion of privacy, false light, public disclosure of private facts, and intentional infliction of emotional distress. We find, as a matter of law, [that] Collins is limited to the relief available in tort and may not seek triple damages through an improper attempt to place a RICO label upon tort claims" (*9 Cal. App. 4th 393, 396-397)* .

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PART II. FORMS

4-46 California Points & Authorities § 46.35

§ 46.35 Supporting Motion for Summary Judgment for Defendant [Code Civ. Proc. § 437c]--In Action Based on Conspiracy--Predicated on Illegal or Unenforceable Act or Transaction

[1] FORM

SUPERIOR COURT OF CALIFORNIA, COUNTY OF _____ _____ [*name*], Plaintiff, vs. _____ [*names*], Defendants.	)))))))	NO. _____ MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT [*Code Civ. Proc. § 437c*]

SUMMARY JUDGMENT FOR DEFENDANT IS PROPER WHERE IT APPEARS THAT PLAINTIFF'S ACTION IS FOUNDED ON AN ILLEGAL ACT OR TRANSACTION TO WHICH HE/SHE WAS A PARTY.

A. Summary Judgment. A defendant may move for summary judgment in any action or proceeding if it is contended that the action has no merit. Such motion must be granted if all of the papers submitted show that there is no triable issue as to any material fact and that the defendant is entitled to a judgment as a matter of law (*Code Civ. Proc. § 437c*).

B. Illegal Act or Transaction. A cause of action for conspiracy does not exist if, in order to establish it, the plaintiff must rely on an illegal act or transaction to which he/she is a party (*Huber v. Peek-A-Boot, Inc. (1961) 189 Cal. App. 2d 512, 515, 11 Cal. Rptr. 467*).

[*Optional*] C. **Contract Unenforceable Because Unlawful.** There is no cause of action for a conspiracy to induce the breach of contract that is unenforceable because unlawful [on grounds of public policy] (*Mindenberg v. Carmel Film*

Prod., Inc. (1955) 132 Cal. App. 2d 598, 602, 282 P.2d 1024).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for summary judgment for the defendant where it can be shown that the plaintiff is attempting to rely on an illegal act or transaction to which the plaintiff was a party in order to establish his or her cause of action.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations which support the memorandum [*Code Civ. Proc. § 437c*].

CAUTION:
The point made in this form, that summary judgment for the defendant is proper where it appears that the plaintiff's action is founded on an illegal act or transaction, must be contrasted with the point that a conspiracy to induce breach of or to interfere with a voidable or unenforceable contract is actionable [*see § 46.31*].

[b] Related Pleading and Practice Forms

For discussion and forms relating to motions for summary judgments, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities supporting and opposing motions for summary judgments, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Illegal Act or Transaction

In ***Huber v. Peek-A-Boot, Inc.*** *(1961) 189 Cal. App. 2d 512, 11 Cal. Rptr. 467* , the court of appeal affirmed a trial court's judgment of dismissal after the trial court had sustained a demurrer to a second amended complaint without leave to amend, holding that the action was based on illegal acts plaintiff committed. Plaintiff alleged that while employed he had "borrowed" certain instruments belonging to his defendant employer and that the latter and other defendants induced him to execute a document implicating himself and others in the theft of these materials on the false promise that they would not prosecute him for the "borrowing" of the instruments and that his confession would not be used to his detriment. He further alleged that despite these promises, his confession was used as a basis for two suits against him.

The court found that based on plaintiff's pleading, the confession was false and that plaintiff knew it was false when he

made it, and that in fact, he had committed perjury, a felony. The court stated that a court will not lend assistance to one who bases his claim for recovery on his own illegal acts. Whether or not this rule should be applied depends on whether or not the plaintiff can establish his case other than through the medium of an illegal transaction to which he himself is party. If the plaintiff cannot open his case without showing that he has broken the law, the court will not assist him, whatever his claim of justice may be on the defendant (*189 Cal. App. 2d 512, 515)* .

[b] Contract Unenforceable Because Unlawful

In ***Mindenberg v. Carmel Film Prod., Inc.*** *(1955) 132 Cal. App. 2d 598, 282 P.2d 1024* , the court of appeal affirmed a judgment of nonsuit for certain defendants and reversed a judgment for plaintiff and against other defendants in an action for damages for fraud and conspiracy. The seventh amended complaint alleged a corporate defendant's wrongful procurement of a breach of contract to purchase its shares from plaintiff. The court determined that the corporation had agreed to purchase its own shares with funds other than its earned surplus and that such a contract was in violation of applicable statutory law. Such a contract cannot be enforced, the court ruled. Thus, the court held that the causing of its breach could not give rise to a cause of action for damages. Although it was alleged that defendants had acted pursuant to a conspiracy to induce is important only for the purpose of showing joint action and joint liability for the commission of a wrong. If no wrong is done, the conspiracy to accomplish the nontortious act does not create a cause of action (*132 Cal. App. 2d 598, 602)* .

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California Points & Authorities

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4-46 California Points & Authorities § 46.36

§ 46.36 Supporting Motion for Summary Judgment for Defendant [Code Civ. Proc. § 437c]--In Action Based on Conspiracy--Mere Knowledge, Acquiescence, or Approval in Conspiracy Is Insufficient

[1] FORM

[*Caption. See § 46.35[1].*]

SUMMARY JUDGMENT FOR DEFENDANT IS PROPER IF DEFENDANT IS ALLEGED TO BE A COCONSPIRATOR, AND DEFENDANT MERELY KNEW OF, ACQUIESCED IN, OR APPROVED OF THE ALLEGED CONSPIRACY BUT NEITHER COOPERATED NOR AGREED TO COOPERATE THEREIN.

A. Summary Judgment. [*See § 46.35[1], Paragraph A.*]

B. Liability Predicted on Projected Joint Action. Liability as a coconspirator depends on projected joint action and the mere knowledge, acquiescence, or approval of the act without cooperation or agreement to cooperate is not enough (*Wetherton v. Growers Farm Labor Ass'n (1969) 275 Cal. App. 2d 168, 176, 79 Cal. Rptr. 543*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for summary judgment for the defendant where declarations or affidavits submitted in support of the motion show that the defendant neither cooperated nor agreed to cooperate with the alleged conspirators, even though he or she may have known of, acquiesced

in, or approved of the alleged conspiracy.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations which support the memorandum [*Code Civ. Proc. § 437c*].

[b] Related Forms

For references to related pleading and practice forms and memoranda of points and authorities, see *§ 46.35*.

[3] Discussion of Authorities

[a] Liability Predicated on Projected Joint Action

In ***Wetherton v. Growers Farm Labor Ass'n*** *(1969) 275 Cal. App. 2d 168, 79 Cal. Rptr. 543* , the court of appeal reversed the trial court's granting of a motion for summary judgment for defendants. In discussing the liability of an individual defendant, who was the employee of a farm industry association, for an alleged conspiracy among an individual grower, the association and its employee (sued both individually and in his capacity as an employee), and other defendants to violate the rights of plaintiffs under certain Labor Code provisions, the court stated that liability depended on whether or not a plan was shown for concerted action to be taken by the individual defendant and the other defendants to achieve the unlawful purpose of depriving the plaintiffs of their rights under the Labor Code. Liability as a coconspirator depends on projected joint action and, said the court, the mere knowledge or approval of or acquiescence in the act, without cooperation or agreement to cooperate, is not enough. In the case at issue, plaintiffs' opposing declarations showed that the individual defendant had done more than merely advise or approve of the actions of a conspirator in violating the rights of the plaintiffs with respect to union activity. Rather, he had made statements with menacing connotations concerning union activity, specifically stating that plaintiffs would be fired if they joined a union. The court inferred from these circumstances a joint project on the part of the individual defendant and other conspirators to discharge plaintiffs if they should insist on joining a union (*275 Cal. App. 2d 168, 176)* .

[4] Additional Authorities

[a] Liability Predicated on Projected Joint Action

In *Harris v. Capitol Records Distrib. Corp. (1966) 64 Cal. 2d 454, 50 Cal. Rptr. 539, 413 P.2d 139* , the Supreme Court affirmed a trial court's summary judgment for defendants, holding, without determining the existence of triable issues of fact, that there was no legal theory on which the defendants could be held liable to plaintiff in an action for unfair business practices. The plaintiff owned and operated a retail record store, and one defendant was a subdistributor or rack-jobber of records who was entitled not only to the standard 38 percent dealer discount to which plaintiff was entitled but also to an additional 10 percent discount. That defendant opened a retail record store across the street from plaintiff's store and proceeded to sell records 50 percent off list price. Plaintiff thereupon sued that defendant and three record companies. The complaint alleged that the individual defendant was allowed to buy his stock at the rack-jobber's discount and sell as a retailer, thus enabling him to undersell plaintiff and damage his business. Plaintiff contended that the record companies had created an unlawful "locality discrimination" in violation of *Bus. & Prof. Code §§ 17031* and *17040*, which prohibit and define locality discrimination.

The Court found that plaintiff was contending, in effect, that the record companies had reason to know from various conversations with the rack-jobber that the latter intended to sell at retail the records he bought from them at the rack-jobber's discount, and that they took no action to prevent him from doing so. However, the Court held that the fact that defendants had reason to know that the rack-jobber was selling at retail as well as at wholesale was insufficient as a matter of law to establish that the defendants were guilty of collusion or conspiracy with him in his activity. To be a conspirator, said the Court, one must share a common purpose with another, not merely suspect or have knowledge of

the other's own private purpose (*64 Cal. 2d 454, 462)* .

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4-46 California Points & Authorities § 46.37

§ 46.37 Supporting Motion for Summary Judgment for Defendant [Code Civ. Proc. § 437c]--In Action Based on Conspiracy--Defendant Corporation Organized After Alleged Wrongful Acts Occurred

[1] FORM

[*Caption. See § 46.35[1].*]

SUMMARY JUDGMENT FOR DEFENDANT IS PROPER WHERE DEFENDANT WAS NOT ORGANIZED AS A CORPORATION UNTIL AFTER THE OCCURRENCE OF THE WRONGFUL ACTS ALLEGED.

A. Summary Judgment. [*See § 46.35[1], Paragraph A.*]

B. Corporation Organized After Wrongful Acts Occurred. A corporate defendant cannot be held liable for conspiracy with another defendant to commit a wrongful act where the defendant corporation was not organized until after the occurrence of the alleged wrongful acts and could have had nothing to do with them (*General Adver. Agency, Inc. v. Komer (1967) 251 Cal. App. 2d 805, 812, 60 Cal. Rptr. 10*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for summary judgment by a corporate defendant where it can be shown by supporting documentation that the moving defendant was organized after the occurrence of the wrongful acts alleged by the plaintiff, that is, after the termination of the alleged conspiracy. For a

memorandum of points and authorities setting forth the general rule that one who knowingly joins a conspiracy after its formation becomes a party to it [*de Vries v. Brumback (1960) 53 Cal. 2d 643, 648-650, 2 Cal. Rptr. 764, 349 P.2d 532*], see *§ 46.41*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations which support the memorandum [*Code Civ. Proc. § 437c*].

[b] Related Forms

For references to related pleading and practice forms and forms of memoranda of points and authorities, see *§ 46.35*.

[3] Discussion of Authorities

[a] Corporation Organized After Wrongful Acts Occurred

In ***General Adver. Agency, Inc. v. Komer*** *(1967) 251 Cal. App. 2d 805, 60 Cal. Rptr. 10* , the court of appeal reversed a trial court's judgment awarding plaintiff damages in an action for damages for unfair competition, holding as to one corporate defendant that it could not be liable since the alleged conspiracy had ended as of the time the corporation was organized. Plaintiff was an advertising agency which handled advertising for another defendant, a large chain store. One of its incorporators and a director of that incorporator was defendant Komer. The complaint charged unfair competition in that Komer had become affiliated with another agency and moved the chain store account to that agency and later formed his own corporate agency to handle that account. The court found that this latter corporation, which was joined as a coconspirator, was organized on June 1, 1963. Although it did handle the chain store account for a time, the court ruled that there could not possibly be any basis for a finding that in July 1962, the corporation conspired with Komer and others to influence the plantiff's clients to withdraw their accounts. Plaintiff argued that the corporation was liable on the theory that one who knowingly joins a conspiracy after its formation becomes a party to it. However, the court ruled that as of the date of the corporation's founding there wasn't any conspiracy since the only wrongful acts of which there was any evidence were committed in July 1962, and the corporation had nothing to do with those acts (*251 Cal. App. 2d 805, 812)* .

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4-46 California Points & Authorities § 46.38

§ 46.38 Supporting Motion for Summary Judgment for Defendant [Code Civ. Proc. § 437c]--In Action Based on Conspiracy--Bar of Statute of Limitations--Cause of Action for Defamation or Invasion of Privacy Disseminated in Public Media Accrues on Date of First General Dissemination

[1] FORM

[*Caption. See § 46.35[1].*]

SUMMARY JUDGMENT FOR DEFENDANT IS PROPER IN AN ACTION FOR DEFAMATION OR INVASION OF PRIVACY DISSEMINATED IN THE PUBLIC MEDIA WHERE MORE THAN ONE YEAR ELAPSED BETWEEN THE DATE OF THE FIRST DISSEMINATION OF THE ALLEGEDLY OBJECTIONABLE MATTER AND THE COMMENCEMENT OF THE ACTION HEREIN.

A. Summary Judgment. [*See § 46.35[1], Paragraph A.*]

[*EITHER*]

B. One-Year Limitation Period. [*See § 46.30[1], Paragraph F.*]

[*OR*]

B. Limitation Period for Conspiracy to Invade Privacy. An action for damages arising from a conspiracy to invade the plaintiff's privacy is governed by the two-year statute of limitations (*Code Civ. Proc. § 335.1*; *see* former Code Civ. Proc. § 340(3) (one-year statute of limitations prior to 2003); *Belli v. Roberts Bros. Furs (1966) 240 Cal. App. 2d 284, 286, 49 Cal. Rptr. 625*).

C. Defamation or Invasion of Privacy in Public Media. A cause of action based on objectionable matter appearing in a _____ [publication *or* performance *or* broadcast] accrues on the date of the first general dissemination thereof to the public in the first _____ [issue of a newspaper *or* magazine *or*

presentation to an audience *or* broadcast over _____ (radio *or* television) *or* exhibition of a motion picture] (*Civ. Code § 3425.3*; *Belli v. Roberts Bros. Furs (1966) 240 Cal. App. 2d 284, 289-290, 49 Cal. Rptr. 625*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a motion for summary judgment by a defendant in an action for defamation or invasion or privacy where the plaintiff commenced his or her action more than two years (one year, prior to 2003) [*Code Civ. Proc. § 335.1*; *see* former Code Civ. Proc. § 340(3); *see also California Forms of Pleading and Practice, Ch. 345, Limitation of Actions, § 345.14*] after the date of the first dissemination of the objectionable matter through the public media (as opposed to the rule applicable to defamation published by means other than the public media set forth in *§ 46.30*). The rule set forth in this form is a limitation on the general rule applicable to the running of the statute of limitations, which is that a cause of action accrues as of the date of the commission of the last overt act in pursuance of the conspiracy [*Kenworthy v. Brown (1967) 248 Cal. App. 2d 298, 301, 56 Cal. Rptr. 461* ; *Schessler v. Keck (1954) 125 Cal. App. 2d 827, 832-833, 271 P.2d 588* ; *see § 46.47*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations that support the form [*Code Civ. Proc. § 437c*].

[b] Related Forms

For references to related pleading and practice forms and forms of points and authorities, see *§ 46.35*.

[3] Discussion of Authorities

[a] Limitation Period for Conspiracy to Invade Privacy

In ***Belli v. Roberts Bros. Furs*** *(1966) 240 Cal. App. 2d 284, 49 Cal. Rptr. 625* , the court of appeal affirmed a trial court's grant of summary judgment for defendant in an action for damages allegedly caused by a conspiracy to publish defamatory matter in a newspaper which resulted in an invasion of plaintiff's right of privacy. The complaint, which was filed on February 14, 1963, alleged that defamatory material was published in a newspaper on February 14, 1962, although the matter was actually first published on February 13, 1962. Both parties agreed that the applicable statute was former Code Civ. Proc. § 340(3), providing a one-year limitation period (*now see Code Civ. Proc. § 335.1* (two-year limitations period beginning in 2003); however, plaintiffs argued that the last overt acts were committed on February 14, when the last two editions of the newspaper in which the matter appeared were sold to the public, citing *Schessler v. Keck (1954) 125 Cal. App. 2d 827, 832, 271 P.2d 588* , which held that while a conspiracy to defame is in existence, the statute of limitations does not begin to run until there is a cessation of the wrongful acts committed in furtherance of the conspiracy.

Rejecting this contention, the court of appeal first noted that the newspaper was not a party to the action, which would mean that the cause of action arose at the latest when the first publication of the newspaper was made, that is, on the evening of February 13. However, the court did not rest its decision on this ground. Rather, the court found that the action was governed by the California Uniform Single Publication Act (*Civ. Code §§ 3425.1-3425.5*), which provides

that no more than one cause of action exists for damages for defamation or invasion of privacy founded on any one edition of a newspaper. Since the first edition of the newspaper involved was first sold on February 13, although dated February 14, and the various editions of that newspaper comprised a single, integrated publication, the cause of action accrued on the first general distribution of the publication to the public. Thus, the court concluded that the statute of limitations barred the action (*240 Cal. App. 2d 284, 286)* .

[b] Defamation or Invasion of Privacy in Public Media

Belli v. Roberts Bros. Furs *(1966) 240 Cal. App. 2d 284, 49 Cal. Rptr. 625* , is discussed in *§ 46.38[3][a]*.

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4-46 California Points & Authorities § 46.39

§ 46.39 Supporting Motion for Judgment Notwithstanding Verdict [Code Civ. Proc. § 629--In Action Based on Conspiracy--Acting Party Exonerated by Trier of Fact

[1] FORM

	)	
SUPERIOR COURT OF CALIFORNIA	)	
COUNTY OF _____	)	
_____[*name*], Plaintiff.	)	NO. _____
	)	POINTS AND AUTHORITIES IN SUPPORT OF
vs.	)	MOTION FOR JUDGMENT THE VERDICT [*Code*
	)	*Civ. Proc. § 629*]
_____ [*name*], Defendants.	)	
	)	

A MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT SHOULD BE GRANTED FOR DEFENDANT IF HIS/HER COCONSPIRATOR WHO WAS CLAIMED TO HAVE BEEN THE ONLY PARTY TO HAVE ACTED PURSUANT TO THE ALLEGED CONSPIRACY HAS BEEN EXONERATED BY THE TRIER OF FACT.

A. Judgment Notwithstanding the Verdict. Before the expiration of its power to rule on a motion for a new trial, the court, on motion of a party against whom a verdict has been rendered, must render judgment in favor of the aggrieved party notwithstanding the verdict whenever a motion for a directed verdict for the aggrieved party should have been granted had a previous motion been made (*Code Civ. Proc. § 629*).

B. Exoneration of Acting Party. The exoneration of the party alleged to have committed the act on which a cause of

action for damages for conspiracy is based operates to exonerate that party's alleged coconspirators (*Vargas v. Giacosa (1953) 121 Cal. App. 2d 521, 525, 263 P.2d 840* , *overruled on other grounds,* *Hardy v. Vial (1957) 48 Cal. 2d 577, 581, 311 P.2d 494* .
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a defendant's motion for judgment notwithstanding the verdict in an action for damages arising from a conspiracy where, after trial, the only defendant found to have committed any overt act or acts in pursuance of the alleged conspiracy has been exonerated by the trier of fact. In such a case, if the party who is alleged to have been the sole actor in the furtherance of the alleged conspiracy is not liable, there is no basis for holding any alleged coconspirators liable.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations which support the memorandum [*Code Civ. Proc. § 437c*].

[b] Related Pleading and Practice Forms

For discussion and forms relating to judgments notwithstanding the verdict, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities supporting and opposing motions for judgments notwithstanding the verdict, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] Exoneration of Acting Party

In ***Vargas v. Giacosa*** *(1953) 121 Cal. App. 2d 521, 263 P.2d 840* , *overruled on other grounds,* *Hardy v. Vial (1957) 48 Cal. 2d 577, 581, 311 P.2d 494* , the court of appeal reversed a trial court's judgment for plaintiff on a conspiracy count, holding that as to one alleged overt act on the part of defendant coconspirators, there could be no liability because the defendant who had committed the alleged act had been exonerated by a jury verdict in the case. The complaint was filed against defendants Edward, Mario, Vincenzo, and Pasqualina for damages resulting from alleged unlawful acts connected with their attempts to evict plaintiff from their property. The conspiracy count alleged eight overt acts and utterances, including words uttered by Pasqualina. The jury awarded damages on the conspiracy count against Edward and Mario but exonerated Pasqualina (Vencenzo had been granted a nonsuit). The court held that the exoneration of Pasqualina on the conspiracy count exonerated her alleged coconspirators from liability for the words Pasqualina uttered. The court ruled that if the actor is not liable, there is no basis for holding the alleged coconspirators liable. The court also concluded that there was insufficient evidence of the other overt acts to support the verdict on the conspiracy count (*121 Cal. App. 2d 521, 525)* .

[4] Additional Authorities

[a] Exoneration of Acting Party

In *Peterson v. Cruickshank (1956) 144 Cal. App. 2d 148, 300 P.2d 915* , in affirming a jury verdict and trial court's judgment entered therein for plaintiff in an action for damages for false imprisonment arising out of an alleged conspiracy, the court of appeal ruled that the existence of the unlawful imprisonment and conspiracy was limited to events which occurred subsequent to the date on which the culpable defendants began to act and on which those defendants exonerated by the jury had ceased to act. The evidence showed that plaintiff became upset at the home of one defendant, was then taken to defendant hospital where she was treated by a third defendant, a doctor, and then transferred to the care of a fourth defendant, a psychiatrist, in another institution. The jury had exonerated the first doctor and hospital but found all other defendants liable. On appeal, the defendant from whose home the plaintiff was taken argued that the existence of any unlawful imprisonment and conspiracy could only be found in the events starting with and subsequent to the date plaintiff was transferred to the care of the psychiatrist and that the only evidence against him as to the latter events was that he paid the bills. The court agreed as to the limitation, stating that the jury must have found either that the plaintiff had consented to go to the hospital or that hospitalization under the circumstances was justified (*144 Cal. App. 2d 148, 163-164)* .

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§ 46.40 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Liability of All Conspirators May Be Based on Allegations Showing Civil Wrong Committed by at Least One Conspirator With Resulting Damage

[1] FORM

SUPERIOR COURT OF CALIFORNIA,	)	
COUNTY OF _____	)	
_____ [*name*],	)	
Plaintiff,	)	NO. _____
	)	MEMORANDUM OF POINTS AND AUTHORIT-
vs.	)	IES IN OPPOSITION TO DEMURRER TO COM-
	)	PLAINT [Code Civ. Proc. § 430.1(e)]
_____ [*names*],	)	
Defendants.	)	
	)	

AN ALLEGATION OF CONSPIRACY TO COMMIT A CIVIL WRONG IS SUFFICIENT TO STATE A CAUSE OF ACTION AGAINST ALL OF THE ALLEGED CONSPIRATORS IF THE ALLEGATIONS IN THE COMPLAINT SHOW THAT EACH OF THEM PARTICIPATED IN THE CONSPIRACY AND THAT ONE OR MORE OF THEM COMMITTED A CIVIL WRONG PURSUANT TO THE CONSPIRACY CAUSING PLAINTIFF ACTUAL DAMAGES.

A. Conditions for Liability for Conspiracy. Civil liability for conspiracy to commit a civil wrong exists where a conspiracy has been formed and operated to accomplish by concerted action a criminal or unlawful purpose or a lawful

purpose by criminal or unlawful means which results in actual damage (*Taylor v. S & M Lamp Co. (1961) 190 Cal. App. 2d 700, 706, 12 Cal. Rptr. 323* ; *Clark v. Lesher (1951) 106 Cal. App. 2d 403, 409, 235 P.2d 71*).

B. Liability of Coconspirators. In an action for damages arising from a civil conspiracy, the major significance of the conspiracy lies in the fact that it renders each participant in the wrongful act responsible as a joint tortfeasor for all damages ensuing from the wrong, irrespective of whether or not he/she was a direct actor and regardless of the degree of his/her activity (*Unruh v. Truck Ins. Exch. (1972) 7 Cal. 3d 616, 631, 102 Cal. Rptr. 815, 498 P.2d 1063* .)

C. Act of One During Conspiracy Is Act of All. The act of one conspirators during a conspiracy is the act of all of the conspirator if done in furtherance of the conspiracy (*de Vries v. Brumback (1960) 53 Cal. 2d 643, 648, 2 Cal. Rptr. 764, 349 P.2d 532*).

D. Liability of One Who Committed No Overt Act and Gained No Benefit. Since the act of one during a conspiracy is the act of all if done in furtherance thereof, defendants who are charged with participation in a conspiracy may be held liable who in fact committed no overt act whatsoever and gained no benefit therefrom (*Wetherton v. Growers Farm Labor Ass'n (1969) 275 Cal. App. 2d 168, 176, 79 Cal. Rptr. 543* , *disapproved on other grounds,* *Applied Equip. Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 521 n.10, 28 Cal. Rptr. 2d 475, 869 P.2d 454*).

[*Optional*] **E. Proposition 51 Did Not Change Rule of Joint and Several Liability Among Conspirators.** Despite the passage of the Fair Responsibility Act of 1986 (Proposition 51), joint and several liability for noneconomic damages is still the rule in a case of civil conspiracy, because liability in a case of conspiracy is not allocated based on comparative fault, but is premised on the concerted action of all tortfeasors acting as one in causing a single indivisible injury (*Kesmodel v. Rand (2004) 119 Cal. App. 4th 1128, 1143, 15 Cal. Rptr. 3d 118* ; *see Civ. Code § 1431.2*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a general demurrer where the demurrer asserts that the complaint fails to allege that the demurring defendant committed a wrongful act pursuant to the alleged conspiracy, but where the complaint alleges that each defendant participated in the conspiracy and that pursuant to this conspiracy, one or more defendants committed a civil wrong against plaintiff causing him or her actual damages.

In an appropriate case, this memorandum of points and authorities may be submitted in opposition to a general demurrer to a complaint for damages arising from an alleged conspiracy supported by the points and authorities set out in *§§ 46.20 -46.22*.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the point of law stated. In addition, if this form is modified for use in opposition to a motion for summary judgment, counsel should attach affidavits or declarations which support the memorandum [*Code Civ. Proc. § 437c*].

[b] Related Pleading and Practice Forms

For discussion and forms with respect to specific actionable wrongs, see California Forms of Pleading and Practice,

Cumulative Index (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities related to specific actionable wrongs, see *§ 46.06*.

[3] Discussion of Authorities

[a] Conditions for Liability for Conspiracy

In ***Taylor v. S & M Lamp Co.*** *(1961) 190 Cal. App. 2d 700, 12 Cal. Rptr. 323* , the court of appeal reversed a trial court's judgment for defendant, entered after defendant's motion to exclude evidence because of the insufficiency of the complaint was granted. The complaint alleged that plaintiff was a judgment creditor of certain third persons who were possessed of substantial assets and that on a stated date defendant conspired with and assisted them in concealing those assets, thus preventing plaintiff from recovering on his judgment. Defendant contended that the complaint failed to state a cause of action based on conspiracy since conspiracy is not actionable in and of itself and there was no statement of an actionable wrong. However, the court pointed out that it is contrary to public policy for a debtor to conceal his property for the purpose of defrauding his creditors [*see Civ. Code § 3439.07, Penal Code §§ 154, 155*]. It added that civil liability for conspiracy exists if a conspiracy has been formed and operated to accomplish by concerted action a criminal or unlawful purpose or a lawful purpose by criminal or unlawful means which results in actual damage. Thus, the court held that a debtor and those who conspire with him to conceal his assets for the purpose of defrauding creditors are guilty of committing a tort and each is liable in damages (*190 Cal. App. 2d 700, 706)* .

Clark v. Lesher *(1951) 106 Cal. App. 2d 403, 235 P.2d 71* , is discussed as to this point in *§ 46.40[4][a]*.

[b] Liability of Coconspirators

Unruh v. Truck Ins. Exch. *(1972) 7 Cal. 3d 616, 102 Cal. Rptr. 815, 498 P.2d 1063* , is discussed in *§ 46.20[3][a]*.

[c] Act of One During Conspiracy Is Act of All

In ***de Vries v. Brumback*** *(1960) 53 Cal. 2d 643, 2 Cal. Rptr. 764, 349 P.2d 532* , the facts and background of which are discussed in *§ 46.41[3][a]*, the Supreme Court stated that every one who enters into a civil conspiracy is a party to every act previously or subsequently done by any of the others pursuant to the conspiracy (*53 Cal. 2d 643, 648)* .

In ***Wetherton v. Growers Farm Labor Ass'n*** *(1969) 275 Cal. App. 2d 168, 79 Cal. Rptr. 543 , disapproved on other grounds, Applied Equip. Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 521 n.10, 28 Cal. Rptr. 2d 475, 869 P.2d 454* , the facts and background of which are discussed in *§ 46.36[3][a]*, in reversing a trial court's granting of summary judgment for defendants, the court noted that liability as a coconspirator depends on projected joint action and the mere knowledge of, acquiescence in, or approval of the act without cooperation or agreement to cooperate is not enough for liability to attach, but once plaintiff shows a plan for joint action, a defendant may be held liable who in fact committed no overt act and gained no benefit therefrom. Thus, the major significance of the conspiracy lies in the fact that it renders each participant in the wrongful act responsible as a joint tortfeasor for all damages ensuing from the wrong, irrespective of whether or not he was a direct actor and regardless of the degree of his activity (*275 Cal. App. 2d 168, 176)* .

[d] Proposition 51 Did Not Change Rule of Joint and Several Liability Among Conspirators

In ***Kesmodel v. Rand*** *(2004) 119 Cal. App. 4th 1128, 15 Cal. Rptr. 3d 118* , another tenant in the plaintiff's apartment building placed the plaintiff under citizen's arrest, in the presence of police officers, based on allegations by the other tenant and his mother that the plaintiff had been "peeping" into the mother's apartment window while she was

undressed. By law, the police were required to take the plaintiff into custody, where he was kept for 12 hours before being released. Because the incident was the latest in a series of confrontations between the parties, the plaintiff and his wife had been videotaping the incident, and the tape clearly showed that the plaintiff had not been "peeping" into the neighbor's window, but had merely been watering some plants and cleaning off the sidewalk. The district attorney declined to prosecute the plaintiff, and the plaintiff filed a civil action for false imprisonment against the other tenant and his mother. The jury found for the plaintiff, awarded damages against the other tenant for false imprisonment, and awarded damages against the mother for conspiracy for her role in prompting her son to make the false arrest. The compensatory damages awarded consisted of $3,500 in economic damages and $27,000 in noneconomic damages, for which the defendants were held jointly and severally liable. The defendants appealed.

The court of appeal affirmed. In reaching its decision, the court first rejected the defendants' contention that their conduct in making a citizen's arrest was absolutely privileged under *Civ. Code § 47(b)* (*119 Cal. App. 4th 1128, 1134-1140)* . The court then held that the facts supported imposing liability on the mother for conspiracy in her role in effecting the false arrest (*119 Cal. App. 4th 1128, 1141)* . Finally, the court rejected the defendants' contention that under Proposition 51 (codified as *Civ. Code § 1431.2*), their liability for noneconomic damages should have been several liability only. The court noted that the limitations on joint liability imposed by Proposition 51, which are predicated on comparing and allocating fault among multiple tortfeasors, were generally inapplicable if liability is vicarious, because vicariously liable parties are generally viewed as part of a single entity. By extension, the court reasoned that the same principle applied in the case of liability for conspiracy or other concerted action. Because each joint actor is liable for the act of each other joint actor in causing a single indivisible injury to a plaintiff, principles of comparative fault do not apply, and all conspirators are jointly and severally liable for the harm caused to the plaintiff (*119 Cal. App. 4th 1128, 1142-1143)* . The court also noted that its conclusion was supported by the Restatement (Third) of Torts, adopted in 1999 (*119 Cal. App. 4th 1128, 1143)* .

[4] Additional Authorities

[a] Liability of Coconspirators

In *Bank of Cal. v. Pan Am. Tire Corp. (1982) 132 Cal. App. 3d 843, 183 Cal. Rptr. 470* , the court of appeal reversed a summary judgment against the defendants in an action for conversion. The plaintiff, a bank, alleged that the defendants had conspired to convert a specified sum of money by issuing nine fraudulent cashier's checks on which the plaintiff became liable. The trial court's decision to grant summary judgment was based on its conclusion that under the doctrine of collateral estoppel, one of the defendants' prior criminal conviction of conspiracy on an indictment that incorporated by reference allegations that the defendants had caused the nine fraudulent checks to be issued conclusively established all of the defendants' liability in this civil action.

The court of appeal stated that if a civil action charges a conspiracy and the commission of a wrongful act, the major significance of the conspiracy charge is that each participant may be held responsible as a joint tortfeasor, whether or not that person directly participated in the wrongful acts and regardless of the degree of that person's activity (*132 Cal. App. 3d 843, 848*). The court further stated that the gist of an action charging civil conspiracy is not the conspiracy, but the damages suffered, and that a conspiracy does not in and of itself give rise to a cause of action unless a civil wrong has been committed resulting in damages. Therefore, the court held that summary judgment was proper only if there was no triable issue of fact as to (1) the formation and operation of the conspiracy, (2) the wrongful act or acts committed pursuant to the conspiracy, and (3) the damages resulting from those acts (*132 Cal. App. 3d 843, 848)* . The court noted that, under the doctrine of collateral estoppel, if a civil action follows the criminal prosecution of a defendant, any issue necessarily decided in the prior criminal trial is conclusively determined as to the parties in the subsequent civil action (*132 Cal. App. 3d 843, 848)* .

Applying these rules to the facts before it, the court noted that the jury in the prior criminal action could have based its guilty verdict on a conclusion that the defendants had caused the issuance of all, some, or only one of the fraudulent

checks mentioned in the indictment. Therefore, the court held that the prior conviction did not necessarily determine that the defendants' conspiracy damaged the plaintiff in the amount represented by all nine of the allegedly fraudulent checks, as was alleged in the complaint (*132 Cal. App. 3d 843, 850)* . Because a triable issue as to damages thus remained despite the prior conviction, the court concluded that summary judgment was improper (*132 Cal. App. 3d 843, 850)* .

In *Clark v. Lesher (1951) 106 Cal. App. 2d 403, 235 P.2d 71* , the court of appeal reversed a trial court's judgment for defendants after the trial court had sustained a demurrer to a complaint for damages suffered as a result of an alleged conspiracy in restraint of trade. The complaint alleged a conspiracy to eliminate the newspaper plaintiff published which was a competitor of a newspaper one defendant owned. It alleged particular acts of the conspirators pursuant to the conspiracy, including one defendant's purchase of the distributive shares in the newspaper from the heirs of the plaintiff's deceased partner, the appointment of a receiver as a means to cease publication of the newspaper, the receiver's procurement of a court order therefor based on false statements to the judge that there were no funds for continued publication, and a subsequent sale of the newspaper's assets to one defendant at a depreciated value. In reversing the judgment, the court commented that it is only when the plaintiff can show that a defendant has united or cooperated with others to inflict a wrong on him that he is entitled to a joint recovery of damages against such defendants. To accomplish this, the plaintiff must show (1) concert of action between the defendants to accomplish the purpose of the conspiracy; (2) the illegality of defendant's actions which furthered a common scheme or design to achieve the unlawful purpose of the conspiracy; and (3) defendant's knowledge of the conspiracy and its unlawful purpose. The court held that the allegations of the complaint measured up to these tests, since the alleged actions of the conspirators were not only unlawful but were of such a nature that if they were successful in their evil design, the damage done would be irremediable in that ceasing publication would destroy an established newspaper with valuable goodwill and would seriously deplete its assets (*106 Cal. App. 2d 403, 410-411)* .

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4-46 California Points & Authorities § 46.41

§ 46.41 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Conspirator Who Joins Subsequent to Commission of Overt Acts May Be Liable

[1] FORM

[*Caption. See § 46.40[1].*]

A DEFENDANT WHO HAS JOINED A CONTINUING CONSPIRACY IS JOINTLY LIABLE FOR ALL INJURIES RESULTING FROM THE CONSPIRACY EVEN THOUGH HE/SHE DID NOT JOIN THE CONSPIRACY AT ITS INCEPTION.

A. Conditions for Liability for Conspiracy. [*See § 46.40[1], Paragraph A.*]

B. Liability of Coconspirators. [*See § 46.40[1], Paragraph B.*]

C. Joinder at Inception Unnecessary. To render a person civilly liable for injuries resulting from a conspiracy of which he/she is alleged to be a member, he/she need not have joined the conspiracy at the time of its inception (*de Vries v. Brumback (1960) 53 Cal. 2d 643, 648, 2 Cal. Rptr. 764, 349 P.2d 532*).

D. Conspirators as Parties to All Acts. Every one who enters into a civil conspiracy is a party to every act any other conspirator has done previously or subsequently pursuant to the common design of the conspiracy (*de Vries v. Brumback (1960) 53 Cal. 2d 643, 648, 2 Cal. Rptr. 764, 349 P.2d 532*).

E. Liability for Prior Acts of Coconspirators. One who joins and actively participates in a preexisting conspiracy becomes liable as a joint tortfeasor for the previous acts of his/her coconspirators for all damages ensuing from the wrong (*de Vries v. Brumback (1960) 53 Cal. 2d 643, 648-650, 2 Cal. Rptr. 764, 349 P.2d 532*).

F. Termination of Conspiracy. The time when the common design of the conspirators is fully accomplished depends on the facts and circumstances of each case, and on the nature and purpose of the conspiracy--all matters for the determination of the trier of fact (*de Vries v. Brumback (1960) 53 Cal. 2d 643, 647, 2 Cal. Rptr. 764, 349 P.2d 532*).

[*Optional*] **G. Termination of Conspiracy to Convert.** A conspiracy to convert is a continuing concert of action lasting as long as the agreement to exercise dominion over another's property continues (*de Vries v. Brumback (1960) 53 Cal. 2d 643, 647, 2 Cal. Rptr. 764, 349 P.2d 532*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to a general demurrer which asserts that the complaint fails to state a cause of action in that it appears on the face thereof that the alleged wrongful acts occurred before the defendant knowingly entered into the conspiracy, but where the complaint alleges that the defendant joined a continuing conspiracy.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Points and Authorities

In an appropriate case, these points and authorities may be used in opposition to a general demurrer supported by the points and authorities set out in *§§ 46.24* and *46.36*.

[3] Discussion of Authorities

[a] Joinder at Inception Unnecessary

In ***de Vries v. Brumback*** *(1960) 53 Cal. 2d 643, 2 Cal. Rptr. 764, 349 P.2d 532* , the Supreme Court affirmed a trial court's judgment for plaintiff in an action for damages for civil conspiracy against both the defendants who had robbed plaintiff's assignor pursuant to a criminal conspiracy and the defendant (appellant) who, subsequent to the robbery, received some of the goods stolen by the other defendants. The trial court expressly found that the general purpose of the conspirators was to convert the stolen property, that the conspiracy had not terminated at the time appellant had joined, and that, therefore, he was liable for the value of the unrecovered property. On appeal, appellant contended that he should not be held liable for the value of property which had never been in his possession since all the goods he received had been recovered. Appellant contended that his civil liability was governed by the rule that one who joins a conspiracy after its formation may not be held liable in a criminal action for the unlawful acts of his fellow conspirators committed prior to his entry into the conspiracy.

However, the Court noted that there is a clear distinction between criminal and civil conspiracy: the gist of the crime of conspiracy is the agreement to commit the unlawful act while the gist of the tort is the damage resulting to the plaintiff from an overt act or acts done pursuant to the common design. Furthermore, the Court noted that conversion is a continuing tort and that it does not necessarily end when the original wrongdoer transfers possession of the converted goods to another. A conspiracy to convert is a continuing concert of action which lasts as long as the agreement to exercise dominion over another person's property continues. The findings established that appellant joined the conspiracy within a few hours after the robbery with full knowledge of the prior acts of his coconspirators and actively participated in the overall purpose to convert all of the stolen property. As such an active participant, said the Court,

appellant was a joint tortfeasor liable for the entire damage done in pursuance of the common design.

It is the settled rule, said the Court, that to render a person civilly liable for injuries resulting from a conspiracy of which he was a member, it is not necessary that he should have joined the conspiracy at the time of its inception. Every one who enters into such a common design is in law a party to every act previously or subsequently done by any of the others in pursuance of it. Thus, said the Court, having been found to have joined and actively participated in the continuing conspiracy to convert, the appellant became liable for the previous acts of his coconspirators, and the fact that some of the missing goods may never have come into his possession would not absolve him from liability (*53 Cal. 2d 643, 648)* .

[b] Conspirators as Parties to All Acts

de Vries v. Brumback *(1960) 53 Cal. 2d 643, 2 Cal. Rptr. 764, 349 P.2d 532* , is discussed in *§ 46.41[3][a]*.

[c] Termination of Conspiracy

de Vries v. Brumback *(1960) 53 Cal. 2d 643, 2 Cal. Rptr. 764, 349 P.2d 532* , is discussed in *§ 46.41[3][a]*.

[d] Termination of Conspiracy to Convert

de Vries v. Brumback *(1960) 53 Cal. 2d 643, 2 Cal. Rptr. 764, 349 P.2d 532* , is discussed in *§ 46.41[3][a]*.

[4] Additional Authorities

[a] Joinder at Inception Unnecessary

In *Schick v. Lerner (1987) 193 Cal. App. 3d 1321* , the plaintiff alleged a conspiracy between a woman with whom he had once cohabited and a psychotherapist who treated them as a couple. Subsequent to the treatment, the therapist disclosed privileged and confidential information about the plaintiff in a declaration that was filed in a family law proceeding. The plaintiff further alleged that the therapist's attorney joined the conspiracy and advised the therapist that he could legally execute the declaration. In affirming summary judgment for the attorney, the court of appeal set forth the following requirements for stating a cause of action, on a theory of vicarious liability, against one who joins a conspiracy after its inception: (1) the subsequent joiner had knowledge of the object and purpose of the conspiracy; (2) there was an agreement to injure the plaintiff; (3) there was a meeting of the minds on the objective and course of action; and (4) as a result, one of the conspirators committed an act that resulted in injury to the plaintiff. Although noting that a conspiracy between attorney and client was conceptually possible, the court held that no intent to injure could be inferred from an allegation of the mere rendering of legal advice, however faulty the advice may have been (*193 Cal. App. 3d 1321, 1328-1329)* .

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4-46 California Points & Authorities § 46.42

§ 46.42 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Status as Agent Does Not Preclude Liability

[1] FORM

[*Caption. See § 46.40[1].*]

ONE WHO ACTS MERELY AS AN AGENT IS LIABLE FOR HIS/HER PARTICIPATION IN A CONSPIRACY TO COMMIT A CIVIL WRONG.

A. Conditions for Liability for Conspiracy. [*See § 46.40[1], Paragraph A.*]

B. Liability of Person Who Acts as Agent. Persons who act merely as agents are liable for their participation in a conspiracy to commit a civil wrong (*Revert v. Hesse (1920) 184 Cal. 295, 302-303, 193 P. 943* ; *Wetherton v. Growers Farm Labor Ass'n (1969) 275 Cal. App. 2d 168, 177, 79 Cal. Rptr. 543*).

[*Optional*] **C. Acts of Attorney Joining Conspiracy.** A defendant's status as an attorney for another defendant does not immunize him or her from liability for either torts committed in person or wrongs done pursuant to a conspiracy joined by him or her (*Greenwood v. Mooradian (1955) 137 Cal. App. 2d 532, 539, 290 P.2d 955*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a demurrer asserting that the complaint fails to state a cause of action in that the moving defendant acted merely as an agent for another defendant and is sued in that capacity rather than as one who acted on his or her own behalf.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms and discussion regarding conspiracy, see California Forms of Pleading and Practice, Ch. 126, *Conspiracy* (Matthew Bender).

[c] Related Points and Authorities

For forms and discussion relating to the relationship of principal and agent, see Ch. 182, *Principal and Agent* .

[3] Discussion of Authorities

[a] Liability of Person Who Acts as Agent

In ***Revert v. Hesse*** *(1920) 184 Cal. 295, 193 P. 943* , the Supreme Court affirmed a trial court's judgment for plaintiff following a trial on the merits in an action for damages for fraudulent conversion in securing the possession and releasing of record of two mortgages on certain real property. The complaint alleged the execution of the mortgages in question as security for two promissory notes in favor of plaintiff, their assignment by plaintiff, their subsequent assignment to one defendant and subsequent release, without notice to plaintiff, to other defendants acting as trustees or agents for one of the defendants. The Court ruled that a pledgee of an evidence of debt who sells or releases the debt or security otherwise than on collection may be held for conversion by the pledger. Inasmuch as it was admitted that the assignees acted as trustees for one defendant and were subject to his directions in taking assignments of the pledge and releasing the mortgages, that defendant was liable for the conversion thus accomplished by him through his agents.

As to the liability of one defendant and his agent, the Court observed that although plaintiff was unable to prove any formal agreement between defendant and his agents, a conspiracy may, nevertheless, be inferred from the nature of the acts done, the relation of the parties, the interests of the alleged conspirators, and other circumstances. The fact that two of the defendants acted solely as the trustees or agents of the other defendant did not constitute a valid defense, said the Court, since a person is liable for his participation in a conspiracy to commit a wrongful act, even though he acts only as an agent for another and is unacquainted with the details of the scheme. Moreover, the Court said that it is no defense for any person who participated in a conspiracy to do an unlawful act to show that his participation was unnecessary in order to accomplish the purposes of the conspiracy and that it would have been consummated even if he had not become a conspirator, since each conspirator becomes responsible for the acts done to further the conspiracy. The Court also held that plaintiff's failure to show that the agents received compensation as a result of the conversion was immaterial since those who aid in the commission of a wrongful act by another are liable for the resulting damages, even though they expected no benefit and in fact received none (*184 Cal. 295, 302-303)* .

In ***Wetherton v. Growers Farm Labor Ass'n****(1969) 275 Cal. App. 2d 168, 79 Cal. Rptr. 543* , the facts and background of which are discussed in *§ 46.36[3][a],* the court of appeal reversed the trial court's grant of summary judgment for defendants in an action by certain farm laborers for damages arising out of an alleged conspiracy by which they were discharged from their employment as a result of their union activities. As to an individual defendant who was sued for his acts in advising the active member of the conspiracy and in acting as the party's agent, the court of appeal ruled that his participation in the conspiracy could be inferred from what was done to further the conspiracy and other surrounding circumstances. The court stated that if that individual in fact entered into a conspiracy calling for joint action, it would not be a defense that his actual participation amounted only to advising the active member of the conspiracy or acting as

his agent (*275 Cal. App. 2d 168, 177)* .

[b] Acts of Attorney Joining Conspiracy

In ***Greenwood v. Mooradian*** *(1955) 137 Cal. App. 2d 532, 290 P.2d 955* , the facts and background of which are discussed in *§ 46.45[4][a],* the complaint alleged that one defendant was an attorney for another defendant. The court held that facts were alleged which, if proved, would be sufficient to establish a conspiracy and the attorney's participation in and furtherance of the conspiracy. The defendant's status as attorney for one of the other defendants did not immunize him from liability for either torts committed in person or wrongs done pursuant to the conspiracy he had joined (*137 Cal. App. 2d 532, 539)* .

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4-46 California Points & Authorities § 46.43

§ 46.43 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Agent or Employee Acting on Behalf of Corporation Owed Duty to Plaintiff Independent of Corporation's Duty

[1] FORM

[*Caption. See § 46.40[1].*]

DEFENDANT IS LIABLE FOR CONSPIRACY WITH HIS/HER CORPORATE _____[PRINCIPAL *or* EMPLOYER], DESPITE ACTING ON BEHALF OF THE CORPORATION, BECAUSE HE/SHE OWES A DUTY TO THE PLAINTIFF THAT IS INDEPENDENT OF THE CORPORATION'S DUTY.

Liability of Corporate Agent or Employee Owing Independent Duty to Plaintiff. Agents and employees of a corporation who are acting on behalf of the corporation are liable for conspiracy with their corporate principal or employer if they owe a duty to the plaintiff independent of the corporation's duty; this liability is an exception to the agent immunity rule, which holds that corporate agents or employees acting on behalf of the corporation, within the scope of their authority, and not for their own individual advantage, cannot conspire with their corporate principal or employer (*see Applied Equip. Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 512, n.4, 28 Cal. Rptr. 2d 475, 869 P.2d 454* ; *Younan v. Equifax Inc. (1980) 111 Cal. App. 3d 498, 511, 169 Cal. Rptr. 478* ; *cf. Black v. Bank of Am. (1994) 30 Cal. App. 4th 1, 6, 35 Cal. Rptr. 2d 725*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a demurrer asserting that the complaint fails to state a cause of action because it alleges a conspiracy between a corporation and defendant, an agent or employee of the corporation, and it does not appear on the face of the complaint that defendant was acting as an individual for his or her own individual advantage or was acting beyond the scope of his or her authority.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts tending to show that the defendant was acting for his or her individual advantage, and/or facts tending to show that defendant acted beyond the scope of the employment or agency relationship.

If appropriate, these points and authorities may be used to oppose the points and authorities in *§ 46.25*.

[b] Related Pleading and Practice Forms

For forms and discussion regarding conspiracy, see California Forms of Pleading and Practice, Ch. 126, *Conspiracy* (Matthew Bender).

[c] Related Points and Authorities

For forms and discussion relating to the relationship of principal and agent, see Ch. 182, *Principal and Agent* .

[d] Special Issues Relating to Authorities

At least one court of appeal decision [*Black v. Bank of Am. (1994) 30 Cal. App. 4th 1, 4-6, 35 Cal. Rptr. 2d 725* ; *see § 46.25[3][a]*] has noted the "conundrum" created by the California Supreme Court's suggestion in *Applied Equip. Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 512 n.4, 28 Cal. Rptr. 2d 475, 869 P.2d 454* [*see § 46.43[3][a]*], that corporate employees may be liable for conspiring with the corporation, despite their acting on behalf of the corporation, if they owe a duty to the plaintiff independent of the corporation's duty. This court noted that the duty cited in *Applied Equipment* was the duty to abstain from injuring the plaintiff through express misrepresentation; the broadness of this type of duty and the ease with which its violation could be pled created an exception to the rule of agent immunity that, according to this court, threatened to swallow the rule. The court noted further that the Supreme Court in *Applied Equipment* did not reconcile its approval of this broad exception to the rule with its express affirmation of the rule; in the absence of a clear statement from the Supreme Court that it intended a change in the law, the court refused to apply the exception in a case involving a single corporate entity and its subordinate employees. Distinguishing the case before it from *Applied Equipment* and the cases on which it based its analysis, which involved agents and employees outside the corporate structure of the principal, the court held that the agent immunity rule has particular force in a single entity situation.

[3] Discussion of Authorities

[a] Liability of Corporate Agent or Employee Owing Independent Duty to Plaintiff

The facts and procedural background of ***Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*** *(1994) 7 Cal. 4th 503, 28 Cal. Rptr. 2d 475, 869 P.2d 454* , are discussed in *§ 46.23[3][a]*. In that case, the California Supreme Court ruled that a party to a contract cannot be held liable in tort for conspiring to interfere with its own contract, overruling a contrary holding in *Wise v. Southern Pac. Co. (1963) 223 Cal. App. 2d 50, 65-72, 35 Cal. Rptr. 652* . In its discussion, the Court suggested that corporate employees may be liable for conspiring with their corporation, despite acting on behalf of the corporation, if they owe a duty to the plaintiff independent of the corporation's duty, such as a duty to abstain from injuring the plaintiff through express misrepresentation (*7 Cal. 4th 503, 511-514)* .

In ***Younan v. Equifax Inc.*** *(1980) 111 Cal. App. 3d 498, 169 Cal. Rptr. 478* , plaintiff sued his insurance company, its representatives, and a doctor hired by the insurance company for bad faith, breach of contract, conspiracy to defraud, intentional infliction of emotional distress, fraud, and constructive fraud. The complaint alleged that defendants had conspired to prepare a false medical report and to improperly deny plaintiff's insurance claim. The trial court sustained a demurrer by some of the defendants and dismissed several of plaintiff's causes of action, including the cause of action for conspiracy. Plaintiff appealed.

The court of appeal reversed the order as to each dismissed cause of action except the cause of action for constructive fraud. Regarding the conspiracy cause of action, the court held that defendants could be liable for conspiracy under the facts alleged by plaintiff (*111 Cal. App. 3d 498, 511*). The court pointed out that no cause of action would lie against the insurer's agents and employees if plaintiff had alleged a conspiracy to breach the duty of good faith and fair dealing, because they were merely corporate agents and not parties to the contract (*111 Cal. App. 3d 498, 509-510)* . However, because plaintiff alleged that all defendants conspired to commit fraudulent acts, the duty allegedly breached was independent of the contract. Therefore, by joining with the insurer in a plan to defraud plaintiff, the agents and employees could be liable for conspiracy to commit fraud, despite not being parties to the insurance contract (*111 Cal. App. 3d 498, 511)* .

The facts and procedural background of ***Black v. Bank of Am.*** *(1994) 30 Cal. App. 4th 1, 35 Cal. Rptr. 2d 725* , are discussed in *§ 46.25[3][a]*. The court of appeal declined to apply the exception for breach of an independent duty (such as the duty to abstain from injuring a plaintiff through express misrepresentation) to a case involving defendants who are employees of the corporation with whom they are alleged to have conspired (*30 Cal. App. 4th 1, 5-6)* . The court stated that liability in such a case would destroy the settled rule that a corporation cannot conspire with itself (*30 Cal. App. 4th 1, 6)* .

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4-46 California Points & Authorities § 46.44

§ 46.44 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Conspiracy Among Corporate Officers and/or Directors to Harm Third Parties Through Corporation

[1] FORM

[*Caption. See § 46.40[1].*]

DEFENDANT _____[DIRECTORS *and/or* OFFICERS] WHO DIRECTLY ORDERED, AUTHORIZED, OR PARTICIPATED IN TORTIOUS CONDUCT BY THE CORPORATION ARE LIABLE FOR CONSPIRACY TO INJURE THIRD PARTIES THROUGH THE CORPORATION.

Conspiracy Among Corporate Officers and/or Directors to Harm Third Parties Through Corporation. Directors and officers of a corporation may become liable for the corporation's torts if they directly ordered, authorized or participated in the tortious conduct; this personal liability may rest on a conspiracy among the officers and directors to injure third parties through the corporation (*Wyatt v. Union Mortgage Co. (1979) 24 Cal. 3d 773, 785, 157 Cal. Rptr. 392, 598 P.2d 45*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a demurrer asserting that the complaint fails to state a cause of action because it alleges a conspiracy between a corporation and defendant, an agent or

employee of the corporation, and it does not appear on the face of the complaint that defendant was acting as an individual for his or her own individual advantage or was acting beyond the scope of his or her authority.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts tending to show that defendant(s) acted as officers and/or directors of a corporation, and that allegedly tortious acts were committed through the corporation.

If appropriate, these points and authorities may be used to oppose the points and authorities in *§ 46.25*.

[b] Related Pleading and Practice Forms

For forms and discussion regarding conspiracy, see California Forms of Pleading and Practice, Ch. 126, *Conspiracy* (Matthew Bender).

[3] Discussion of Authorities

[a] Conspiracy Among Corporate Officers and/or Directors to Harm Third Parties Through Corporation

In ***Wyatt v. Union Mortgage Co.****(1979) 24 Cal. 3d 773, 157 Cal. Rptr. 392, 598 P.2d 45* , defendants were a mortgage loan broker, its affiliated corporations, their principal shareholder, and several corporate officers and directors. Defendant broker carried on an extensive television advertising campaign, including a frequently-aired ad for a loan on favorable terms that was not in fact available. Lured by the ads, plaintiffs asked defendant broker to negotiate a second mortgage loan on their home, and agreed in writing to a loan with monthly payments and a balloon payment that defendant's loan officer described as "small." In contrast to the loan officer's assurances of a 10-day grace period for late charges and an interest rate of 7 or 8 percent, the loan documents actually imposed an interest rate of 10 percent, a five-day grace period for delinquent payments, an estimated balloon payment of nearly $1,000, and a late charge of 1 percent of the original loan balance for every overdue installment. The loan agreement also provided for application of monthly installments first to accrued late charges and interest rather than to reduction of principal, thus deferring unreduced principal until the end of the loan term, accruing additional interest, and increasing the final balloon payment. The loan officer never pointed out significant provisions of the loan agreement to plaintiffs or suggested that they read the documents carefully. After plaintiffs were late with several payments and faced a balloon payment larger than the amount of the original loan principal, defendant broker explained the late charge and interest provisions but refused to extend their loan. Because plaintiffs were unable to find other financing, they agreed to refinance the unpaid balance through defendant broker with a new loan with similar provisions. Although plaintiffs made timely payment of all installments of the new loan, defendant broker assessed late charges. After repeated threats of foreclosure on their home, plaintiffs brought suit alleging a breach of defendant broker's fiduciary duty resulting from a fraudulent conspiracy engaged in by all defendants. At trial, plaintiffs presented as evidence of conspiracy testimony by a former employee that defendant principal shareholder had frequently stated in meetings attended by other individual defendants that it was company policy to pursue late charges vigorously as a prime source of income and that if one payment was late, all subsequent payments were also to be considered late. After a jury verdict in plaintiffs' favor, the trial court denied defendants' motion for a new trial, and defendants appealed.

Before the California Supreme Court, defendants argued that there was no substantial evidence of a conspiracy because no one except defendant broker participated in making loans to plaintiffs. The Court disagreed, noting that as long as two or more persons agree to perform a wrongful act, all of them are civilly liable regardless of whether they actually commit the tort themselves (*24 Cal. 3d 773, 784)* . The Court held that directors and officers of a corporation may become personally liable for a corporation's torts if they directly ordered, authorized, or participated in the tortious conduct. This personal liability may rest on a conspiracy among the officers and directors to injure third parties through the corporation (*24 Cal. 3d 773, 785)* . The Court found that the following evidence in the record supported the conclusion that breach of one defendant's fiduciary duty to plaintiffs was undertaken pursuant to established company

polices agreed to by all defendants: (1) a company policy of luring potential borrowers through misleading "bait and switch" advertising; (2) instructions from defendant principal shareholder to other company officials to make late charges a prime source of income by treating as late all payments subsequent to the first late payment; (3) a tightly knit, family-oriented operation under the principal shareholder's close personal control; (4) other individual defendants' activity in management positions; and (5) the location in the same building of all headquarters offices of the corporate defendants (*24 Cal. 3d 773, 785-786)* .

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CHAPTER 46 CONSPIRACY
PART II. FORMS

4-46 California Points & Authorities § 46.45

§ 46.45 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Allegation of Conspiracy Unnecessary

[1] FORM

[*Caption. See § 46.40[1].*]

WHERE TWO OR MORE DEFENDANTS ARE SUED FOR A PARTICULAR WRONG INFLICTED ON THE PLAINTIFF, IT IS NEVER NECESSARY TO ALLEGE THEIR PREVIOUS COMBINATION IN ORDER TO SECURE A JOINT RECOVERY.

Allegation of Conspiracy Unnecessary. Where two or more defendants are sued for a particular wrong, although it may be necessary to prove previous combination in order to secure a joint recovery, it is never necessary to allege it, and if alleged, it is not to be considered a gist of the action (*Loeb v. Kimmerle (1932) 215 Cal. 143, 151-152, 9 P.2d 199*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a demurrer to a complaint for damages arising from a civil conspiracy where the demurrer asserts that the complaint fails to state a cause of action in that it does not allege the formation of the conspiracy, but where plaintiff's complaint alleges in some manner the defendants' responsibility for the underlying wrongful act. It should be noted, however, that although courts have held that a complaint which alleges merely that defendants committed particular acts permits the plaintiff to prove that these acts were committed pursuant to a conspiracy [*see Loeb v. Kimmerle (1932) 215 Cal. 143, 151-152, 9 P.2d 199* (discussed in *§ 46.45[3*][a]); *Unruh v. Truck Ins. Exch. (1972) 7 Cal. 3d 616, 631, 102 Cal. Rptr. 815, 498 P.2d 1063]* , some courts have assumed, nevertheless, that at least where plaintiff seeks to hold a defendant liable for a tort in which he or she took no active part, it is necessary to allege expressly or impliedly the formation and operation of the conspiracy [*see Schessler v. Keck (1954) 125 Cal. App. 2d 827, 833, 271 P.2d 588* ; *see also § 46.46* for a memorandum of points and authorities opposing a demurrer to a complaint for damages arising from civil conspiracy if the formation and

operation of the conspiracy is inferable from other allegations of the complaint].

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Allegation of Conspiracy as Unnecessary

In ***Loeb v. Kimmerle*** *(1932) 215 Cal. 143, 9 P.2d 199* , defendant Spurlin appealed from a judgment entered against him on a jury verdict, contending that the evidence was insufficient to warrant the implied finding of the jury that he was a conspirator along with another defendant in the assault and battery of plaintiff and that the complaint did not set out facts indicating a conspiracy so as to warn him that he was being held as a party to the assault because he did conspire with the other defendant. In affirming this portion of the judgment, the Supreme Court relied on several decisions and stated that where two or more are sued for a particular wrong, it may be necessary to prove previous combination in order to secure a joint recovery, but it is never necessary to allege it, and if alleged, it is not the gist of the action--that lies in the wrongful and damaging act done. The Court added that the actionable wrong is the tort committed. The liability is determined by the ultimate fact of whether or not the defendant participated in the commission of the wrong. The evidence establishing the conspiracy is merely proof of the ultimate fact (*215 Cal. 143, 151-152)* .

[4] Additional Authorities

[a] Allegation of Conspiracy as Unnecessary

In *Unruh v. Truck Ins. Exch. (1972) 7 Cal. 3d 616, 102 Cal. Rptr. 815, 498 P.2d 1063* , the facts and background of which are discussed in *§ 46.20[3][a]*, the Supreme Court noted that the labeling of an action as one for conspiracy to commit a tort is misleading, since conspiracy, that is, the agreement, is ordinarily not actionable by itself. The cause of action arises out of some wrongful act committed by one or more of the conspirators, and if such a wrongful act is set forth the conspiracy allegation is unnecessary to the statement of a cause of action (*7 Cal. 3d 616, 631)* .

In *Allen v. Powell (1967) 248 Cal. App. 2d 502, 56 Cal. Rptr. 715* , the court of appeals reversed the trial court's dismissal of an action for damages to recover certain real estate commissions after it had sustained a general demurrer. The complaint alleged a tortious conspiracy between a lessee and a lessor to interfere with and frustrate plaintiffs' contractual right to collect a commission for the services he rendered in leasing a specified property. The complaint alleged the formation of the alleged conspiracy in general terms, that is, that the defendants acted collusively and without plaintiffs' knowledge and with a joint intent to deprive plaintiffs of their commission. The court of appeal noted that to state a cause of action for conspiracy, the complaint must allege formation and operation of the conspiracy, the wrongful acts done pursuant thereto, and the damage resulting therefrom. The court determined that the wrongful acts had been properly alleged and that it only remained to be determined if formation and operation was sufficiently alleged. General terms such as "acted collusively," the court observed, have been held sufficient. Moreover, the court added, since the gravamen of the action is the unlawful act or civil wrong done pursuant to the agreement, the conspiracy allegation has been held unnecessary, providing the acts are otherwise sufficiently alleged. Thus, the court concluded that the complaint stated a cause of action (*248 Cal. App. 2d 502, 508-509)* .

In *Hege v. Worthington, Park & Worthington (1962) 209 Cal. App. 2d 670, 26 Cal. Rptr. 132* , the court of appeal reversed the trial court's judgment of dismissal after it had sustained demurrers to a complaint for damages arising out of a conspiracy. The complaint alleged that defendant contractor had failed to perform a contract for the construction of a residence and that plaintiff's former attorney had agreed and conspired with the contractor and its surety to allow the statute of limitations to run on the plaintiff's claim against the contractor. Defendants contended that the complaint failed to state facts sufficient to constitute a cause of action. The court noted that to state a cause of action for

conspiracy, plaintiff must allege facts which show the formation and operation of a conspiracy, the wrongful acts of any of the conspirators pursuant thereto which, without the conspiracy, would give rise to a cause of action, and damage resulting therefrom. In fact, said the court, if the wrongful act is set out, the conspiracy allegation is unnecessary to the cause of action (*209 Cal. App. 2d 670, 678)* .

In *Greenwood v. Mooradian (1955) 137 Cal. App. 2d 532, 290 P.2d 955* , the court of appeal reversed a trial court's judgment of nonsuit for defendants in an action for damages for conspiracy. The complaint alleged that defendant and others had conspired together to appropriate the benefits and assets of a joint venture which included the plaintiff. Defendants contended that the allegation of conspiracy was too general to allege sufficiently a cause of action and that the acts constituting the conspiracy, as well as those inflicting a wrong pursuant to the conspiracy, must be alleged. The court held that the acts that must be alleged are those which had been done pursuant to the conspiracy and had effectuated an actionable wrong *137 Cal. App. 2d 532, 537-538*).

In *Ramey v. General Petroleum Corp. (1959) 173 Cal. App. 2d 386, 343 P.2d 787* , the court of appeal reversed a judgment for defendants in an action for damages for conspiracy after the trial court had sustained defendants' demurrer without leave to amend. The complaint alleged a conspiracy between plaintiff's employer, an oil company, and an oil well drilling company to fraudulently conceal and defeat plaintiff's common law action against the drilling company. The latter contended on appeal that plaintiff did not allege that it had done anything other than remain silent. Insofar as this constituted an argument that the acts constituting the conspiracy, as well as those inflicting a wrong pursuant to the conspiracy must be alleged, the court ruled that the cases are to the contrary. Moreover, the court noted that the view that the defendant must be shown to have done some overt and independently tortious act to be liable as a conspirator is a mistaken one because each participant in the wrongful act is responsible as a joint tortfeasor for all damages ensuing from the wrong, regardless of whether or not the participant was a direct actor and regardless of the degree of his or her activity (*173 Cal. App. 2d 386, 403-404)* .

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4-46 California Points & Authorities § 46.46

§ 46.46 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Formation and Operation of Conspiracy Inferable From Other Allegations of Complaint

[1] FORM

[*Caption. See § 46.40[1].*]

AN ALLEGATION THAT DEFENDANTS CONSPIRED TO COMMIT A CIVIL WRONG IS SUFFICIENT TO ESTABLISH THE EXISTENCE OF A CONSPIRACY WHERE THE FORMATION AND OPERATION THEREOF MAY BE INFERRED FROM ALLEGATIONS SHOWING THE NATURE OF THE ACTS DONE, THE RELATIONS OF THE PARTIES, THE INTERESTS OF THE ALLEGED CONSPIRATORS, AND OTHER CIRCUMSTANCES SUGGESTING CONCERNED ACTION.

A. Express Agreement Not Necessary. A civil conspiracy is not necessarily based on an express agreement among the conspirators (*Wagner v. O'Bannon (1969) 274 Cal. App. 2d 121, 132, 79 Cal. Rptr. 44*).

B. General Allegation of Agreement. General allegations of "conspiracy," "combination," or "common design," or of the defendants "combining and conspiring," which while standing alone are conclusions, may be aided by other allegations in a complaint which elaborate on the defendants' mutual understanding (*Schessler v. Keck (1954) 125 Cal. App. 2d 827, 833, 271 P.2d 588*).

C. Allegation of Character and Type of Facts and Circumstances. A complaint which apprises the defendants of the character and type of facts and circumstances on which the plaintiff relies to establish the conspiracy is sufficient as against a general demurrer (*Bradley v. Hartford Accident & Indem. Co. (1973) 30 Cal. App. 3d 818, 825, 106 Cal. Rptr. 718* ; *Schessler v. Keck (1954) 125 Cal. App. 2d 827, 833, 271 P.2d 588*).

D. Inference as to Existence of Conspiracy. In determining the adequacy of a pleading of conspiracy, because of the clandestine nature of the scheme or undertaking engaged in, the existence of the conspiracy must often be inferentially and circumstantially derived from the character of the acts done, the relations of the parties, and other facts and circumstances suggestive of concerted action (*Ramey v. General Petroleum Corp. (1959) 173 Cal. App. 2d 386, 404-405, 343 P.2d 787* ; *Schessler v. Keck (1954) 125 Cal. App. 2d 827, 833, 271 P.2d 588*).

Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a demurrer to a complaint for damages arising from a civil conspiracy which asserts that the complaint fails to set forth facts sufficient to show the existence or formation and operation of a conspiracy, but where the complaint alleges that the defendants "conspired together" or "combined" to commit a civil wrong and where the formation and operation of the conspiracy may be inferred from other allegations showing the nature of the acts done, the relations of the parties, the interests of the alleged conspirators, and other circumstances suggestive of concerted action.

In an appropriate case, these points and authorities may be used in opposition to a demurrer to a complaint for damages arising from a civil conspiracy supported by the points and authorities set out in *§ 46.24*.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, where this form is modified for use in connection with a motion for summary judgment [*see § 46.35*], counsel should attach affidavits or declarations which support the memorandum [*Code Civ. Proc. § 437c*].

[3] Discussion of Authorities

[a] Express Agreement Not Necessary

In ***Wagner v. O'Bannon*** *(1969) 274 Cal. App. 2d 121, 79 Cal. Rptr. 44* , the court of appeal reversed a trial court's judgment, entered following a trial, denying relief to plaintiffs for an alleged conspiracy to discriminate against them in connection with a real estate transaction. The complaint alleged a conspiracy among real estate brokers, a realty board of which they were members, and the seller of property which plaintiffs had sought to buy. As to the liability of the realty board, the court of appeal noted that the listing agreements used by the brokers specifically mentioned the board and its multiple listing service and stated that the broker was a member of the board. The court cited evidence supporting the inference that the board exercised supervisory influence over the conduct of business by its members and stated that taken as a whole, the evidence supported an inference that the treatment accorded plaintiffs was a part of some kind of group plan or understanding. The court then ruled that the realty board was jointly liable since it was a party to an agreement or concerted action to inflict the wrong complained of. The court commented that a civil conspiracy is not necessarily based on an express agreement and may be shown by circumstantial evidence (*274 Cal. App. 2d 121, 132)* .

[b] General Allegation of Agreement

In ***Schessler v. Keck*** *(1954) 125 Cal. App. 2d 827, 271 P.2d 588* , the court of appeal reversed a trial court's judgment of dismissal of an action for conspiracy to defame after it had sustained defendants' general demurrers. The complaint alleged that plaintiff was a cook and caterer in the homes of the wealthy, that one defendant, a nurse in plaintiff doctor's office, discussed her medical condition with her, and that the nurse associated with a wealthy home owner had discussed plaintiff's medical situation with that person and his servants. The complaint charged that those persons

"combined and conspired" to discuss plaintiff with others in the community, stating that she was under medical treatment for a loathsome disease and that she should not be employed as a cook and that those statements were false, unprivileged, and damaging.

Defendants contended that the complaint failed to state a cause of action against them in that it should have contained more than a simple allegation that they "combined and conspired." the court of appeal observed that although such allegations, which were interspersed in the pleading, may be conclusions, nevertheless, the entire complaint showed that these terms were aided by other allegations which elaborated on defendants' mutual understanding, and that considering all of the allegations together, they adequately charged defendants with having acted jointly, according to a preconceived plan, to disseminate and publish statements imputing to plaintiff the present existence of an infectious or loathsome disease. Thus plaintiff had done far more than confine her complaint to a naked allegation of conspiracy. A greater quantum of detail was not required. This is particularly true where conspiracy is involved, said the court, since the courts recognized that because of the clandestine nature of the scheme or undertaking engaged in, its existence must often be inferentially and circumstantially derived from the character of the acts done, the relations of the parties, and other facts and circumstances suggesting concerted action. Thus, the court concluded that the complaint sufficiently apprised defendants of the character and type of facts and circumstances on which plaintiff was relying to establish the conspiracy (*125 Cal. App. 2d 827, 833)* .

[c] Allegation of Character and Type of Facts and Circumstances

In ***Bradley v. Hartford Accident & Indem. Co.*** *(1973) 30 Cal. App. 3d 818, 106 Cal. Rptr. 718* , the trial court dismissed a defamation action alleging a conspiracy after it had sustained demurrers to the complaint. The court of appeal reversed, holding, in part, that the complaint stated a cause of action for civil conspiracy. The complaint alleged that an insurance company and another defendant, acting jointly and in conspiracy, induced a state prisoner to make false and defamatory statements charging that plaintiffs had colluded and prevailed on a witness to give false testimony in a civil action and that they had manufactured evidence, suborned perjury, and conducted themselves unprofessionally and illegally in that action. The court of appeal ruled that where a cause of action for civil conspiracy to defame the plaintiff is pleaded, explicit details concerning the manner in which the defendants conspired to publish the alleged defamatory matter are not required. If the plaintiff's complaint sufficiently apprises the defendants of the character and type of facts and circumstances on which he relies to establish the conspiracy, the complaint is not vulnerable to a demurrer (*30 Cal. App. 3d 818, 825)* .

Schessler v. Keck *(1954) 125 Cal. App. 2d 827, 271 P.2d 588* , is discussed in *§ 46.46[3][b]*.

[d] Inference as to Existence of Conspiracy

In ***Ramey v. General Petroleum Corp.*** *(1959) 173 Cal. App. 2d 386, 343 P.2d 787* , the facts and background of which are discussed in *§ 46.45[4][a]*, the court of appeal stated that the allegations of conspiracy are to be aided by the other allegations of the complaint, and that in plaintiff's complaint allegations were aided by allegations of a hold harmless agreement between the two defendants, by facts showing one defendant's responsibility for the accident to plaintiff, by fraudulent statements of the other defendant, plaintiff's employer, concerning the liability for the accident, and by the failure of defendants to present full information to the Industrial Accident Commission. The court noted that inferences need not be pleaded. The tacit agreement giving rise to the conspiracy was a matter of inference. The law recognizes that persons who are engaged in a conspiracy do not by the nature of things leave a recognizable trail of their activities if they can avoid it. The allegations of conspiracy are treated as matters of inducement leading up to a more particular description of the acts from which conspiracy may be inferred. Thus, the court ruled that conspiracy may sometimes be inferred from the nature of the acts done, the relation of the parties, the interest of the alleged conspirators, and other circumstances (*173 Cal. App. 2d 386, 404-405)* .

Schessler v. Keck *(1954) 125 Cal. App. 2d 827, 271 P.2d 588* , is discussed in *§ 46.46[3][b]*.

[4] Additional Authorities

[a] General Allegation of Agreement

In *Allen v. Powell (1967) 248 Cal. App. 2d 502, 56 Cal. Rptr. 715* , the facts and background of which are discussed in *§ 46.45[4][a]*, the complaint alleged the information of the alleged conspiracy in general terms, that is, that the defendants "collusively and without plaintiffs' knowledge and with a joint intent to deprive, and for the purpose of depriving" deprived plaintiffs of certain commissions. Such general allegations of agreement, the court observed, have been held sufficient. Accordingly, the court concluded that the complaint stated a cause of action (*248 Cal. App. 2d 502, 509)* .

In *Farr v. Bramblett (1955) 132 Cal. App. 2d 36, 281 P.2d 372* , the court of appeal reversed a trial court's judgment of dismissal after it had sustained general and special demurrers to a complaint alleging a conspiracy to defame plaintiff, who was a politician, and his wife. The complaint alleged the defendants "did agree together" to further plaintiff's opponent's candidacy for public office by libeling plaintiff and his wife--implying affiliation with communist causes--and that they published certain articles pursuant to the conspiracy. A conspiracy to commit libel followed by the publication of libelous matter, said the court, was clearly an actionable tort. With respect to plaintiff's allegation of conspiracy, the court held that plaintiffs could not more clearly have alleged the ultimate fact of conspiracy than by pleading that defendants did agree together (*132 Cal. App. 2d 36, 47)* .

[b] Inference as to Existence of Conspiracy

In *Kimball v. Pacific Gas & Elec. Co. (1934) 220 Cal. 203, 30 P.2d 39* , the Supreme Court affirmed a judgment for plaintiff in an action for personal injuries sustained during his employment. Plaintiff initiated his action against both the employer and defendant company, but the trial court has sustained the employer's demurrer, and it was not appealed. At the time of his injury and up until approximately one month prior to bringing suit, plaintiff was unaware that he had been injuried by an employee of defendant. He had accepted compensation under workers' compensation in ignorance of his cause of action against defendant, and at no time did the employer disclose to him or the Industrial Accident Commission the fact that defendant caused the injury or that the two agreed to share the costs involved. On appeal defendant contended that the evidence did not show fraudulent concealment of the character necessary to toll the statute of limitations. However, said the court, when negotiations to settle the claim took place between plaintiff's employer and defendant, the employer had a positive duty to disclose the fact of the negotiations to plaintiff. Because the facts of the accident were concealed from plaintiff, the Court held that the jury was justified in inferring that the employer and defendant were acting in concert and that a tacit agreement existed between them that the defendant's liability should be kept concealed (*220 Cal. 203, 219-220)* .

In *Black v. Sullivan (1975) 48 Cal. App. 3d 557, 122 Cal. Rptr. 119* , the court of appeal reversed a trial court's grant of summary judgment for defendants in action for damages arising from a conspiracy, holding that the existence of a conspiracy could be inferred from certain documents plaintiff filed. Plaintiffs were the debtors and trustors under a deed of trust. They sought damages against the beneficiary payees and the assignees for security of the note the deed of trust for failure to comply with *Civ. Code § 2943*, which requires the beneficiary or assignee of a trust deed to supply certain information to the trustors, in that the payees and assignees had failed to furnish data as to the unpaid balance causing certain buyers of the property to refuse to complete the sale. Plaintiffs also alleged that the assignees and a law firm representing defendant beneficiaries conspired to prevent the sale of the property so that they could recover it through a trustee's sale.

The court observed that the significance of an action based on conspiracy lies in the fact that it renders each participant in the wrongful act responsible as a joint tortfeasor for all damages ensuing from the wrong, irrespective of whether or not he was a direct actor and regardless of the degree of his activity. A plaintiff is entitled to damages from such defendants as he can show have united, participated, or cooperated in inflicting a wrong on him. Since such

participation, cooperation, or unity of action is difficult to prove by direct evidence, it can be inferred from the nature of the act done, the relation of the parties, the interests of the alleged conspirators and other circumstances. It is not necessary that the plaintiffs produce evidence showing that the defendants met and actually agreed to undertake the performance of the unlawful act, the court added. Because it was clear that beneficiaries had failed to comply with *Civ. Code § 2943*, the fact that the other defendants, including the law firm, were not individually obligated to perform under the statute did not prevent their being liable under the theory that they aided, cooperated, and assisted in the beneficiaries' noncompliance or conspired to interfere with the escrow contract by preventing the close of the escrow (*48 Cal. App. 3d 557, 567)* .

In *Wetherton v. Growers Farm Labor Ass'n (1969) 275 Cal. App. 2d 168, 79 Cal. Rptr. 543* , the facts and background of which are discussed in *§ 46.36[3][a]*, the court of appeal reversed the trial court's grant of summary judgment for the defendants in an action by certain farm laborers against their former employer, a farm owner, and two farms industry associations and their employee, for damages arising from an alleged conspiracy among all of the defendants pursuant to which plaintiffs were discharged by the employer. As to the cause of action asserted against the association's employee, the court noted that because no compensable injury resulted from his direct action, plaintiffs' damages being the result of their discharge by the employer, a showing of conspiracy was essential to plaintiffs' claim against that person. Plaintiffs must show a plan for concerted action taken by the employee and the other defendants to achieve the unlawful purpose of depriving plaintiffs of their union organizing rights under the Labor Code. Liability as a coconspirator depends on projected joint action. The mere knowledge of acquiescence in, or approval of the act, without cooperation or agreement to cooperate, is not enough for liability to attach, said the court. However, the scope of a conspiracy may be inferred from what was done in furtherance of the alleged conspiracy and from other surrounding circumstances. In this case the court found that plaintiffs' supporting affidavit showed that defendant employee had done more than advise or approve of the actions of defendant farm owner; rather, he had questioned one plaintiff at length about union activity, told him that he and his coworkers could be fired, and instructed him to warn his coworkers that if they joined the union they would be fired. The court stated that it could be inferred that there was a joint project for the farm owner to discharge plaintiffs and for the association's employe to influence other farm owners in the area not to hire plaintiffs if they should insist on joining the union, adding that it would not be a defense that his actual participation amounted only to advising the active member of the conspiracy or acting as his agent (*275 Cal. App. 2d 168, 176-177)* .

In *Agnew v. Parks (1959) 172 Cal. App. 2d 756, 343 P.2d 118* , the court of appeal reversed the trial court's judgment of nonsuit against plaintiff in an action for damages for conspiracy based on allegations that defendant doctor had conspired with a medical association for the purpose of damaging plaintiff's rights in a malpractice action.

The action of appeal held that the complaint's reference to the acts of "all defendants" and "each of them" not only in furtherance of a conspiracy but in creation of a plan to misrepresent defendant doctor as an unprejudiced witness for the purpose of damaging plaintiff, properly alleged a general conspiracy. Reading the allegation of the complaint as a whole, the court stated that they charged a concert of action among all defendants according to a definite plan, their illegal actions in furtherance of the common scheme or design to achieve the unlawful purpose of their combination, and their knowledge of the conspiracy and its unlawful purpose (*172 Cal. App. 2d 756, 769-770)* .

In *James v. Herbert (1957) 149 Cal. App. 2d 741, 309 P.2d 91* , the court of appeal reversed a trial court's judgment of dismissal after it had sustained general and special demurrers to a complaint for damages alleging a conspiracy to deprive plaintiff of her share of the profits of a joint venture. The complaint alleged that plaintiff had entered into a joint venture agreement with defendants and that defendants thereafter had entered into a "wrongful conspiracy" to exclude her from further participation, to cheat and defraud her, to deprive her of her interest in the venture, and to obtain and retain the business and profits for themselves. The court of appeal stated that a conspiracy may be inferred from the nature of the acts done, the relations of the parties, the interests of the alleged conspirators, and other circumstances. To be entitled to a joint recovery of damages against defendants for inflicting a wrong through a conspiracy, plaintiff must allege and prove that there existed a concert of action between defendants to accomplish the purpose of the conspiracy,

that their actions were illegal and in furtherance of a common scheme or design to achieve the unlawful purpose of the conspiracy, and that defendants knew of the conspiracy and its unlawful purpose. Comparing plaintiff's allegations of conspiracy in other cases, the court concluded that the complaint in this case sufficiently alleged a cause of action for conspiracy (*149 Cal. App. 2d 741, 746-747)* .

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§ 46.47 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Statute of Limitations--Cause of Action Accrues on Date of Last Overt Act

[1] FORM

[*Caption. See § 46.40[1].*]

A CAUSE OF ACTION FOR DAMAGES ARISING FROM A CIVIL CONSPIRACY ACCRUES ON THE DATE THAT THE LAST OVERT ACT IS COMMITTED PURSUANT TO THE CONSPIRACY.

A. Accrual of Cause of Action. While a conspiracy is in existence, the statute of limitations does not begin to run until the wrongful acts committed pursuant to the conspiracy have ceased; thus, a cause of action based on conspiracy accrues on the date the last overt act is committed pursuant to the conspiracy (*Wyatt v. Union Mortgage Co. (1979) 24 Cal. 3d 773, 786, 157 Cal. Rptr. 392, 598 P.2d 45*).

[*Optional*] **B. Period of Limitations May Be Tolled After Discovery of Fraud if Fraud Is Continuing Wrong.** Just as the statute of limitations does not run against an action based on fraud so long as the fraud remains concealed, the statute may be tolled even after the fraud is discovered, for so long as the sheer economic duress or undue influence embedded in the fraud continues to hold the victim in place (*Wyatt v. Union Mortgage Co. (1979) 24 Cal. 3d 773, 788, 157 Cal. Rptr. 392, 598 P.2d 45* ; *Aaroe v. First Am. Title Ins. Co. (1990) 222 Cal. App. 3d 124, 128, 271 Cal. Rptr. 434*).

[*Optional*] **C. Statute Runs From Time Disclosure Made.** The statute of limitations does not begin to run on a cause of action based on a conspiracy to conceal another cause of action until a disclosure of the existence of the cause of action is made (*Ramey v. General Petroleum Corp. (1959) 173 Cal. App. 2d 386, 405, 343 P.2d 787*).

[*Optional*] **D. Purposeful Attempts to Conceal Constitute Overt Acts for Purpose of Statute of Limitations.** Purposeful attempts to conceal a conspiracy are an integral part of the conspiracy and thus constitute the last overt acts which trigger the statute of limitations period (*Livett v. F.C. Financial Associates (1981) 124 Cal. App. 3d 413, 420-421*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a demurrer to a complaint for damages arising from a civil conspiracy when the ground of the demurrer is that the cause of action is barred by an applicable statute of limitations, but the plaintiff can show that the last overt act committed in furtherance of the conspiracy was within the applicable statutory period.

In an appropriate case, these points and authorities may be submitted in opposition to the demurrer supported by the points and authorities set out in *§ 46.29*. With appropriate modifications, this memorandum may also be used in opposition to the motion supported by the points and authorities set out in *§ 46.38*. When used in the latter manner, counsel should attach supporting affidavits or declarations.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion and forms relating to the statutes of limitations, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities relating to the statutes of limitations, see Ch. 143, *Limitation of Actions* .

[3] Discussion of Authorities

[a] Accrual of Cause of Action

In ***Wyatt v. Union Mortgage Co.*** *(1979) 24 Cal. 3d 773, 157 Cal. Rptr. 392, 598 P.2d 45* , plaintiffs brought an action against a loan broker, its affiliated corporations, their principal shareholder, and several of the corporations' officers and directors alleging breach of duties toward the plaintiffs in connection with the negotiation of a second mortgage loan. Liability of all but one of the defendants was premised on a theory of civil conspiracy. Judgment was for the plaintiffs, imposing on the defendants compensatory and punitive damages, and the defendants appealed.

The Supreme Court affirmed. The defendants contended that the trial court erred in concluding that the statute of limitations on the plaintiffs' claims was tolled until the "last overt act" in the conspiracy, arguing that the three-year period allowed for commencing actions based on fraud under former Code Civ. Proc. § 338(4) [*now see Code Civ. Proc. § 338(d)*] had passed. The Court rejected that argument, agreeing with the trial court's conclusion that, when a civil conspiracy is properly alleged and proved, the statute of limitations does not begin to run on any part of a plaintiff's claims until the "the last overt act" pursuant to the conspiracy has been completed. In the case before it, stated the Court, the "last overt act" was the defendants' collection a few weeks before trial of the final payment on the subject loan. This was the culminating act in the conspiracy to defraud the plaintiffs that began with the first tortious act several years preceding. Therefore, held the Court, the trial judgment correctly refused to instruct the jury on the statute of limitations

(*24 Cal. 3d 773, 786)* . As their general purpose, statutes of limitation have to provide repose and to protect persons against the burden of having to defend against stale claims. So long as a person continues to commit wrongful acts in furtherance of a conspiracy to harm another, he or she can neither claim unfair prejudice at the filing of a claim against him or her, nor disturbance of any justifiable repose built on the passage of time (*24 Cal. 3d 773, 787)* . The Court also stated that when, as in the case before it, the underlying fraud is a continuing wrong, a convincing rationale exists for delaying the running of statute of limitations. Just as the statute of limitations does not run against an action based on fraud so long as the fraud remains concealed, so ought the statute be tolled even after the fraud is discovered, for so long as the sheer economic duress or undue influence embedded in the fraud continues to hold the victim in place (*24 Cal. 3d 773, 788)* .

[b] Period of Limitations May Be Tolled After Discovery of Fraud If Fraud Is Continuing Wrong

The facts and procedural background of ***Wyatt v. Union Mortgage Co.*** *(1979) 24 Cal. 3d 773, 157 Cal. Rptr. 392, 598 P.2d 45* , are discussed in *§ 46.47[3][a]*. In holding that the trial judge correctly refused to instruct the jury on the statute of limitations in a case in which the last overt act was defendants' collection of the final payment due on a fraudulent loan a few weeks before trial, the Supreme Court stated that when, as in the case before it, the underlying fraud is a continuing wrong, a convincing rationale exists for delaying the statute of limitations. Just as the statute of limitations does not run against an action based on fraud so long as the fraud remains concealed, so ought the statute be tolled even after the fraud is discovered, for so long as the sheer economic duress or undue influence embedded in the fraud continues to hold the victim in place (*24 Cal. 3d 773, 788)* .

The facts and procedural background of ***Aaroe v. First Am. Title Ins. Co.*** *(1990) 222 Cal. App. 3d 124, 271 Cal. Rptr. 434* , are discussed in *§ 46.48[3][a]*. The court of appeal, holding that a trial court erred in granting a nonsuit on statute of limitation grounds, cited *Wyatt v. Union Mortgage Co. (1979) 24 Cal. 3d 773, 157 Cal. Rptr. 392, 598 P.2d 45* , for the proposition that the last overt act doctrine prevents the statute of limitations from beginning to run in certain cases, even after the fraud is discovered, until the commission of the last overt act pursuant to the conspiracy (*222 Cal. App. 3d 124, 128)* .

[c] Statute Runs From Time Disclosure Made

In ***Ramey v. General Petroleum Corp.*** *(1959) 173 Cal. App. 2d 386, 343 P.2d 787* , the facts and background of which are discussed in *§ 46.45[4][a]*, the court of appeal ruled that the statute of limitations does not begin to run in the case of a conspiracy to conceal from plaintiff the facts relating to a cause of action until a disclosure of the cause of action is made, thereby terminating the wrongful concealment. Thus, the court ruled that defendant should not be rewarded for its alleged fraud in concealing from plaintiff his cause of action against a third party for employment-related injury. Since the statute of limitations was adopted to protect defendants against the stale claims of dilatory plaintiffs, it would be unconscionable under the facts alleged, said the court, to hold that plaintiff is unable to proceed with his action against the very parties who affirmatively misled him because his action was not commenced within the statutory period (*173 Cal. App. 2d 386, 405)* .

[d] Purposeful Attempts to Conceal Constitute Overt Acts for Purpose of Statute of Limitations

In ***Livett v. F.C. Financial Associates*** *(1981) 124 Cal. App. 3d 413* , an action for conspiracy to defraud, the court of appeal reversed a summary judgment for defendants based on expiration of the three-year statute of limitations period under former Code Civ. Proc. § 338(4) [*now see Code Civ. Proc. § 338(d)*]. Defendants, purchasers of certain real property and the bank which made them a development loan, allegedly conspired to deprive plaintiff, a real estate developer, from compensation for development of the property through a sham foreclosure sale defeating plaintiff's interest in the realty. The trial court granted defendants' motion for summary judgment on the grounds that the period of limitations commences to run on completion of the last overt act in furtherance of the conspiracy, and that in the instant case, that act was the foreclosure sale which had taken place more than three years prior to initiation of the lawsuit.

The court of appeal based its reversal of the summary judgment on the fact that evidence existed demonstrating defendants' attempts to conceal their scheme from plaintiff following the foreclosure sale. The court held that purposeful attempts to conceal a conspiracy constitute an integral part of the initial fraud and serve to extend the time period over which the conspiracy took place. The evidence, which had not been considered by the trial court, raised substantial factual issues concerning the date upon which the statute of limitations period expired, requiring resolution by trial, and therefore the summary judgment had been improper (*124 Cal. App. 3d 413, 418, 420-421)* .

[4] Additional Authorities

[a] Accrual of Cause of Action

In *Rodriguez v. North Am. Aviation, Inc. (1967) 252 Cal. App. 2d 889, 61 Cal. Rptr. 579* , the court of appeal reversed a trial court's judgment of dismissal after it has sustained a demurrer to the complaint. The complaint alleged that defendants conspired, on or about October 9, 1962, to slander plaintiff, that one defendant made slanderous statements about plaintiff on that date, that as a consequence thereof plaintiff was demoted, that other defendants made such statements on October 31, 1963, in effecting the conspiracy, that on December 9, 1963, another person made a republication thereof, which the defendants had reason to believe would be made, and that as a consequence thereof, plaintiff was discharged from his job. The complaint was filed on October 13, 1964. Plaintiff argued that the October 9, 1962, publication was actionable because since there was a civil conspiracy, the statute of limitations did not begin to run until the last overt act pursuant to the conspiracy had been committed. The court of appeal held that the essence of the action was for the damages caused by the October 31 publication and concluded that the judgment of dismissal was erroneous because the applicable statute of limitations, former Code Civ. Proc. § 340(3) [*now see Code Civ. Proc. § 340(c)*], did not bar an action based on that publication (*252 Cal. App. 2d 889, 892)* .

In *Kenworthy v. Brown (1967) 248 Cal. App. 2d 298, 56 Cal. Rptr. 461* , the court of appeal affirmed the trial court's judgment of dismissal of an action for damages for an alleged conspiracy after it had sustained a demurrer to the second amended complaint without leave to amend. As to when the cause of action accrued, the court held that a cause of action based on civil conspiracy accrues on the date the last overt act is committed pursuant to the conspiracy. Plaintiff contended that it was not possible to ascertain from the face of the second amended complaint that the applicable limitation period had elapsed since the accrual of the action. However, because the first amended complaint, of which the court took notice, showed that the date on which the last overt act necessary to complete the alleged conspiracy occurred more than two years before the action was filed, the court held that the plaintiffs were barred from proceeding further (*248 Cal. App. 2d 298, 302-303)* .

In *Filice v. Boccardo (1962) 210 Cal. App. 2d 843, 26 Cal. Rptr. 789* , the facts and background of which are discussed in *§ 46.29[4][a]*, the court of appeal acknowledged the general rule that the statute of limitations does not begin to run until the last overt act occurs in furtherance of the alleged conspiracy by observing that the last fraudulent act alleged to have been committed by any of the defendants occurred beyond the limitation period (*210 Cal. App. 2d 843, 846)* .

In *Agnew v. Parks (1959) 172 Cal. App. 2d 756, 343 P.2d 118* , which is discussed in *§ 46.29[4][a]*, the court of appeal acknowledged the general rule that the statute of limitations does not begin to run until the last overt act occurs in furtherance of the alleged conspiracy when it observed that it was apparent on the face of the complaint that the last fraudulent act occurred more than three years before the pleading was filed (*172 Cal. App. 2d 756, 766)* .

In *Schessler v. Keck (1954) 125 Cal. App. 2d 827, 271 P.2d 588* , the court of appeal held that the trial court had erred in sustaining general and special demurrers to a complaint for damages alleging a conspiracy to defame plaintiff, stating that the action was not barred by the applicable statute of limitations. Defendants contended that it appeared on the face of the complaint that the alleged slander was published beyond the one-year limitation period of former Code Civ. Proc.

§ 340(3) [*now see Code Civ. Proc. § 340(c)*]. However, noting that the complaint alleged an overt act pursuant to defendants' conspiracy within the limitation period, the court ruled that when the complaint alleges that libelous acts were committed pursuant to a conspiracy formed by defendants, the statute of limitations does not commence to run until the last overt act is committed pursuant to the conspiracy (*125 Cal. App. 2d 827, 833-834)* .

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CHAPTER 46 CONSPIRACY
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4-46 California Points & Authorities § 46.48

§ 46.48 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Statute of Limitations for Cause of Action for Conspiracy to Defraud [Code Civ. Proc. § 338(d)] Tolled by Delayed Discovery Rule

[1] FORM

[*Caption. See § 46.40[1].*]

THE DEFENDANT'S/CROSS DEFENDANT'S DEMURRER TO THE COMPLAINT/CROSS COMPLAINT SHOULD BE OVERRULED BECAUSE THE COMPLAINT/CROSS COMPLAINT ALLEGES THAT THE FRAUD WAS NOT DISCOVERED UNTIL LESS THAN THREE YEARS PRIOR TO COMMENCEMENT OF THE ACTION, AND THE ACTION WAS THEREFORE FILED WITHIN THE LIMITATIONS PERIOD.

A. Delayed Discovery Rule Can Be Basis for Finding of Timeliness Independent of Last Overt Act Doctrine. In cases in which it is alleged that the fraud was not discovered until less than three years prior to the filing of the suit, under *Section 338(d) of the Code of Civil Procedure* the action may be timely despite the fact that the last overt act is more than three years old (*Aaroe v. First Am. Title Ins. Co. (1990) 222 Cal. App. 3d 124, 128, 271 Cal. Rptr. 434*).

B. Allegations of Delayed Discovery Establish Timeliness. If a complaint alleges facts supporting a tolling of the limitations period due to delayed discovery, the allegations establish the timeliness of the action under *Section 338(d) of the Code of Civil Procedure* (*Aaroe v. First Am. Title Ins. Co. (1990) 222 Cal. App. 3d 124, 128-129, 271 Cal. Rptr. 434*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a demurrer to a complaint or cross complaint for damages arising from a civil conspiracy when the ground of the demurrer is that the cause of action is barred by the applicable statute of limitations, but the complaint alleges that the plaintiff or cross complaint did not discover the fraud until a date that is less than three years before the commencement of the action.

In an appropriate case, these points and authorities may be submitted in opposition to the demurrer supported by the points and authorities set out in *§ 46.29*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. That is, counsel should refer to the specific paragraph numbers of allegations in the complaint that allege facts relating to the delayed discovery of the fraud.

[3] Discussion of Authorities

[a] Delayed Discovery Rule Can Be Basis for Finding of Timeliness Independent of Last Overt Act Doctrine

Aaroe v. First Am. Title Ins. Co. *(1990) 222 Cal. App. 3d 124, 271 Cal. Rptr. 434* , involved an action for conspiracy brought by investors against a corporation who ran a trust deed investment program and a title insurance company who prepared title insurance or escrow statements supporting alleged self-dealing deeds of trust. The complaint alleged that the corporation and the title insurance company conspired to defraud plaintiffs of their money, and that they did not learn of the insurance company's participation in the conspiracy until about four months prior to the filing of the complaint. The defendants moved for nonsuit against the claims of the plaintiffs. Although the trial court recognized that suit was filed within three years of the alleged discovery of the fraud as required by *Code Civ. Proc. § 338(d)*, it granted the nonsuit on the ground that the plaintiffs could not have the benefit of that statute of limitations because the last overt act pursuant to the conspiracy to defraud occurred more than three years prior to the filing of the suit. The plaintiffs appealed from the judgment of nonsuit.

The court of appeal reversed and remanded. The court rejected the title insurance company's argument that § 338(d) must be modified and shortened, in a case alleging a conspiracy to defraud, by the last overt act doctrine as enunciated in *Wyatt v. Union Mortgage Co. (1979) 24 Cal. 3d 773, 157 Cal. Rptr. 392, 598 P.2d 45* . The court stated the last overt act doctrine prevents the statute of limitations from beginning to run in certain cases, even after the fraud is discovered, until the commission of the last overt act pursuant to the conspiracy. However, the court observed that *Wyatt* also recognized that the statute of limitations for a conspiracy to defraud is otherwise governed by § 338(d). Therefore, the court held that in cases in which it is alleged that the fraud was not discovered until less than three years prior to the filing of the suit, § 338(d) directs the action may be timely despite the fact that the last overt act is more than three years old. Any other rule, according to the court, would simply repeal the three-year discovery rule of § 338(d), which is applicable in fraud and conspiracy to defraud cases, and replace it with a straight three-year statute measured from the last fraudulent act. Thus, although one tolling doctrine--the last overt act doctrine--might not apply to save the action that was before the court, the delayed discovery rule could make the action timely (*222 Cal. App. 3d 124, 128)* .

[b] Allegations of Delayed Discovery Establish Timeliness

The facts and procedural background of ***Aaroe v. First Am. Title Ins. Co.*** *(1990) 222 Cal. App. 3d 124, 271 Cal. Rptr. 434* , are discussed in *§ 46.48[3][a]*. In that case, the court of appeal observed that the plaintiffs relied on the delayed discovery doctrine under *Code Civ. Proc. § 338(d)*, not the last overt act doctrine (*222 Cal. App. 3d 124, 128)* . They alleged facts in their complaint supporting a tolling of the limitations period due to their delayed discovery. These allegations, concluded the court, established the timeliness of their action in § 338(d). The fact that the plaintiffs did not additionally allege that the action was tolled under the last overt act doctrine was irrelevant because the that omission

cannot defeat the delayed discovery tolling that § 338(d) allows. Because the last overt act doctrine was the sole basis on which nonsuit was granted, and the evidence at trial did not negate the plaintiffs' claims to tolling under the delayed discovery rule, the court of appeal reversed the judgment of the trial court and remanded for further proceedings (*222 Cal. App. 3d 124, 129)* .

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4-46 California Points & Authorities § 46.49

§ 46.49 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Dismissal of One Defendant Does Not Release Remaining Defendants [Code Civ. Proc. § 877]

[1] FORM

[*Caption. See § 46.40[1].*]

DEFENDANT _____[*name*]'S DEMURRER TO THE COMPLAINT SHOULD BE OVERRULED BECAUSE THE EXISTENCE OF A CAUSE OF ACTION FOR CIVIL CONSPIRACY AGAINST HIM/HER IS NOT AFFECTED BY THE DISMISSAL OR RELEASE OF CO-DEFENDANTS.

Release or Dismissal of One Co-Conspirator Does Not Release Others. A release or dismissal, with or without prejudice, of one of several defendants in an action for civil conspiracy does not release the others (*Code Civ. Proc. § 877*; *Barney v. Aetna Cas. & Sur. Co. (1986) 185 Cal. App. 3d 966, 982-983, 230 Cal. Rptr. 215*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a general demurrer to a complaint for damages arising from a civil conspiracy that asserts that the complaint fails to state a cause of action because plaintiff dismissed all causes of action against a co-defendant, and consequently there is no underlying wrong on which to base the civil conspiracy allegation [*see Code Civ. Proc. § 877* (regarding tortfeasors liable for same tort generally)].

This memorandum may also be adapted for use in opposition to defendant's motion for judgment on the pleadings, or adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, these points and authorities may be used in opposition to a demurrer supported by the points and authorities in *§ 46.20*.

[3] Discussion of Authorities

[a] Release or Dismissal of One Co-Conspirator Does Not Release Others

In ***Barney v. Aetna Cas. & Sur. Co.*** *(1986) 185 Cal. App. 3d 966, 230 Cal. Rptr. 215* , plaintiff (insured) was involved in a traffic collision, and retained her own attorney, who advised her insurer of her injuries, and of her intent to pursue a claim against the third party. The third party brought an action against insured for damages arising from personal injury and property damage, and served both insured and insurer. The insurer retained another attorney to defend insured, whom it instructed to provide a limited defense and not to file a cross complaint. The insurer, through that attorney, settled the third-party claim and induced the third party to file a dismissal with prejudice, without first notifying the insured or her attorney, nor advising them to file a timely cross complaint. The insured brought an action against the third party, who successfully moved for summary judgment on the ground that the previous dismissal barred the action. The insured then brought an action against the insurer and insurance defense counsel. She then died, and her executor was substituted as plaintiff. The amended complaint stated a cause of action against the insurance defense counsel and the insurer for breach of the covenant of good faith and fair dealing and civil conspiracy, and against the same counsel for breach of fiduciary duty or legal malpractice. In the first half of the bifurcated trial, the jury found by special verdict that the third party and the insured were comparatively negligent, and assessed the proportion of damages. Subsequently, the insured settled its claim against insurance defense counsel, and dismissed all causes of action against them. The insurer filed motions for judgment on the pleadings on the ground that the complaint failed to state causes of action. With regard to civil conspiracy, insurer contended that dismissal of the cause of action against counsel left no underlying wrong on which to base the civil conspiracy allegation. The trial court granted the motions without leave to amend, and entered judgment for dismissal. Plaintiff appealed.

The court of appeal reversed. After disposing of issues regarding the bad-faith cause of action, the court held, with regard to civil conspiracy, that a release or dismissal, with or without prejudice, of one of several defendants does not release the others, pursuant to *Code Civ. Proc. § 877* (effect of release or dismissal on tortfeasors liable for same tort generally). Defendant misperceived the effect of a civil conspiracy allegation and its relation to a dismissal of one of the parties. The pleading of civil conspiracy is merely a procedural method of joining defendants, and is superfluous when, as in the instant case, concurrent or successive acts are alleged, unless the plaintiff cannot show or prove each defendant committed a wrongful act or some part of it. The only significance of a civil conspiracy allegation is that it renders each participant responsible as a contributory tortfeasor whether or not each one actually committed the wrongful act. The effect of a dismissal of a defendant in a civil conspiracy action is similar to that in an action involving the simple joinder of defendants in a single action without benefit of the procedural conspiracy allegation. *Code Civ. Proc. § 877* applies expressly to a release given to one or more of a number of tortfeasors claimed to be liable for the same tort, and therefore applies to defendants alleged to have committed separate wrongs (concurrent or successive) as well as to true joint tortfeasors. Plaintiff's dismissal of all causes of action against the attorney in no way affects any liability the insurer may have for plaintiff's damages (*185 Cal. App. 3d 966, 983)* .

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4-46 California Points & Authorities § 46.50

§ 46.50 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Action Against Attorney Based on Attorney-Client Conspiracy--Statute of Limitations Tolled While Plaintiff Pursues Order Allowing Pleading [Civ. Code § 1714.10]

[1] FORM

[*Caption. See § 46.40[1].*]

THE DEMURRER SHOULD NOT BE SUSTAINED ON THE GROUND THAT THE ACTION IS BARRED BY THE STATUTE OF LIMITATIONS BECAUSE THE STATUTE OF LIMITATIONS WAS TOLLED BY PLAINTIFF'S PURSUIT OF AN ORDER UNDER SECTION 1714.10 OF THE CIVIL CODE.

A. Court's Permission Required Prior to Filing Complaint. [*See § 46.28[1], Paragraph B.*]

B. Plaintiff Must Establish Reasonable Probability of Prevailing in Action. [*See § 46.28[1], Paragraph C.*]

C. Statute of Limitations Tolled Until Plaintiff Obtains Final Determination. The court may allow the filing of a pleading claiming liability based on a civil conspiracy following the filing of a verified petition accompanied by the proposed pleading and supporting affidavits stating the facts on which the liability is based. The court will order service of the petition on the party against whom the action is proposed to be filed and permit that party to submit opposing affidavits prior to making its determination. The filing of the petition, proposed pleading, and accompanying affidavits tolls the running of any statute of limitations until the final determination of the matter (*Civ. Code § 1714.10*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a demurrer to a complaint for damages arising from a civil conspiracy when the ground of the demurrer is that the cause of action is barred by an applicable statute of limitations. The ground for opposition is that plaintiff can show the running of the statute was tolled while seeking an order under Civ. Code Proc. § 1714.10 permitting the filing of a complaint against an attorney based on a civil conspiracy between the attorney and the attorney's client.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should specify the actions taken by plaintiff that tolled the statute, and mention the dates that these actions were taken.

[b] Related Pleading and Practice Forms

For discussion and forms relating to actions for attorney-client conspiracy, see California Forms of Pleading and Practice, Ch. 126, *Conspiracy* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities relating to demurrers generally, *see* Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

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4-46 California Points & Authorities § 46.51

§ 46.51 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Action Against Attorney Based on Alleged Attorney-Client Conspiracy [Civ. Code § 1714.10(a),(b)]--Order Establishing Reasonable Probability of Success Not Required [Civ. Code § 1714.10(c)]

[1] FORM

[*Caption. See § 46.40[1].*]

PLAINTIFF IS NOT REQUIRED, UNDER SECTION 1714.10 OF THE CIVIL CODE, TO OBTAIN AN ORDER DETERMINING REASONABLE PROBABILITY OF SUCCESS BECAUSE THE ATTORNEY DEFENDANT [_____ (*name*)], _____ [HAS AN INDEPENDENT LEGAL DUTY TO THE PLAINTIFF *or* HAS COMMITTED ACTS THAT GO BEYOND THE PERFORMANCE OF A PROFESSIONAL DUTY TO SERVE HIS/HER CLIENT AND INVOLVE A CONSPIRACY TO VIOLATE A LEGAL DUTY IN FURTHERANCE OF THE ATTORNEY'S FINANCIAL GAIN *or* MAY BE SUED FOR MALICIOUS PROSECUTION BASED ON REPRESENTATION OF A CLIENT WITHOUT PLEADING A CAUSE OF ACTION FOR CIVIL CONSPIRACY].

Order Establishing Reasonable Probability of Success Not Required in Action Alleging Independent Duty. The requirement under *Section 1714.10 of the Civil Code* that a plaintiff obtain an order allowing a pleading that includes a claim against an attorney for civil conspiracy with his or her client does not apply to a cause of action against an attorney if the attorney has an independent legal duty to the plaintiff (*Civ. Code § 1714.10(c)*); *see, e.g., Pavicich v. Santucci (2000) 85 Cal. App. 4th 382, 396-398, 102 Cal. Rptr. 2d 125*).

[*AND/OR*]

Order Establishing Reasonable Probability of Success Not Required in Action Alleging Conspiracy to Violate Legal Duty in Furtherance of Attorney's Financial Gain. The requirement under *Section 1714.10 of the Civil Code* that a plaintiff obtain an order allowing a pleading that includes a claim against an attorney for civil conspiracy with his or her client does not apply to a cause of action against an attorney if the attorney's acts go beyond the performance of a professional duty to serve the client and involve a conspiracy to violate a legal duty in furtherance of the attorney's

financial gain (*Civ. Code § 1714.10(c)*.

[*AND/OR*]

Civ. Code § 1714.10 **Does Not Apply to Malicious Prosecution Action Against Attorney.** *Civ. Code § 1714.10* does not apply to a malicious prosecution action against an attorney who allegedly prosecuted an action without probable cause and adequate investigation and which any reasonable attorney would have recognized as untenable (*Westamco Inv. Co. v. Lee (1999) 69 Cal. App. 4th 481, 488, 81 Cal. Rptr. 2d 634*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a demurrer to a complaint for damages against an attorney for a civil conspiracy with the attorney's client arising from an attempt to contest or compromise a claim or dispute, and that is based on the attorney's representation of the client, when the attorney has an independent legal duty to the plaintiff, or the attorney's acts go beyond the performance of a professional duty to serve the client and involve a conspiracy to violate a legal duty in furtherance of the attorney's financial gain [*Civ. Code § 1714.10(c)*]. The third alternative point may be used to oppose the contention that the requirements of *Civ. Code § 1714.10* apply to a plaintiff bringing a malicious prosecution action against an attorney.

The defense must be raised by the attorney charged with civil conspiracy on that attorney's first appearance by demurrer, motion to strike, or such other motion or application as may be appropriate. Failure to raise the defense will constitute a waiver of the defense [*Civ. Code § 1714.10(b)*; *see § 46.54*].

In an appropriate case, these points and authorities may be submitted in opposition to the demurrer supported by the points and authorities set out in *§ 46.28*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. For example, if the basis for the complaint is that the attorney defendant owes an independent legal duty to the plaintiff, counsel should identify by paragraph number the allegations in the complaint that establish that duty.

In appropriate circumstances, a trial court may permit amendment of the complaint after sustaining a demurrer based on failure to comply with *Civ. Code § 1714.10* [*Central Concrete Supply Co., Inc. v. Bursak (2010) 182 Cal. App. 4th 1092, 1103, 105 Cal. Rptr. 3d 909]* . For example, amendment might be allowed when the plaintiff appears able to allege that the attorney was not providing legal representation at the time of the alleged conspiratorial conduct, as well as when plaintiff appears able to allege that the attorney's acts went beyond the performance of a professional duty to serve the client and involved a conspiracy to violate a legal duty in furtherance of the attorney's financial gain [*Central Concrete Supply Co., Inc. v. Bursak (2010) 182 Cal. App. 4th 1092, 1103, 105 Cal. Rptr. 3d 909* ; *see Civ. Code § 1714.10(a), (c)*]. Thus, as a practical matter, a plaintiff who did not seek a pre-filing order, but who has a compelling argument that the pre-filing order requirement does not apply, should be allowed to amend his or her complaint to specifically allege the facts supporting that conclusion if he or she failed to do so in the original complaint.

[b] Related Pleading and Practice Forms

For discussion and forms relating to actions for attorney-client conspiracy, see California Forms of Pleading and Practice, Ch. 126, *Conspiracy* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities relating to demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Order Establishing Reasonable Probability of Success Not Required in Action Alleging Independent Duty

In ***Pavicich v. Santucci*** *(2000) 85 Cal. App. 4th 382, 102 Cal. Rptr. 2d 125* , an investor in a limited partnership, the limited partnership itself, and a related corporation filed cross-complaints against an attorney and his former clients, which included claims of a conspiracy between the attorney and his former clients. The cross-complaints alleged that the attorney failed to reveal, at the time that the investor was considering whether to invest in the partnership, that litigation was being threatened by former associates of the parties that had put together the partnership and corporation, and that this litigation dealt directly with the enterprise for which the legal entities had been formed. During the relevant period in which the investor was considering his potential investment in the project, the attorney, as well as the parties seeking the investment, had affirmatively stated in response to the investor's inquiries that the existence of a release precluded any potential claims against the partnership stemming from the early days of the venture, even though they knew that the release was being challenged as having been procured by fraud. The threatened litigation eventually materialized and resulted in the limited partnership agreeing to pay a substantial settlement. The cross-complaints at issue were then filed in subsequent litigation stemming from an indemnification dispute. The attorney demurred to the conspiracy claims brought against him on the grounds that the conspiracy cause of action did not comply with the requirements of *Civ. Code § 1714.10*. The trial court overruled the demurrer after concluding that the statute was inapplicable. The attorney appealed.

The court of appeal affirmed. The court reviewed the language and legislative history of *Civ. Code § 1714.10* and agreed that it was inapplicable to the facts of the case. After noting the exceptions to the pleading requirements provided by *Civ. Code § 1714.10(c)*, which include an exception for cases in which the attorney owes an independent legal duty to the plaintiff, the court questioned whether, in light of those exceptions, the pleading requirements could ever apply to any viable conspiracy action brought against an attorney. According to the court, those exceptions encompassed the only viable conspiracy claims that could be brought against an attorney for action taken in representing a client (*85 Cal. App. 4th 382, 394-396)* . The court then proceeded to apply the independent duty exception to the case before it. The court held that the attorney had a duty owed directly to the potential investor not to commit fraud through express misrepresentations when soliciting the investment, and that the facts alleged conduct that violated that duty. Therefore, the conspiracy claim brought by the investor fell within the independent duty exception to the pleading requirements (*85 Cal. App. 4th 382, 397-398)* . The court also held that the conspiracy claims brought by the limited partnership and the corporation were also viable, because the attorney had been acting as their attorney at the time of the alleged conspiracy to defraud and therefore had a fiduciary duty to both entities. Because an independent duty existed, the pleading requirements were inapplicable (*85 Cal. App. 4th 382, 398)* .

[b] Civ. Code § 1714.10 Does Not Apply to Malicious Prosecution Action Against Attorney

In ***Westamco Inv. Co. v. Lee*** *(1999) 69 Cal. App. 4th 481, 81 Cal. Rptr. 2d 634* , an investment company filed a malicious prosecution action against an attorney, his law firm, and a bank. The malicious prosecution action was based on two underlying complaints and an appeal filed unsuccessfully against the investment company by the attorney, who

was representing the bank in the dispute. The malicious prosecution complaint included allegations that the attorney failed to properly investigate the facts and the law relevant to the underlying claims, and this failure led to the filing of claims that were untenable. The attorney responded to the malicious prosecution action by filing a motion to strike under Civ. Code § 1714.10, contending that the malicious prosecution complaint, which alleged that the bank was acting "by and through" the attorney and his law firm, effectively alleged a cause of action against the attorney for conspiracy with the bank and necessitated compliance with the pre-filing court approval provisions of *Civ. Code § 1714.10*. The trial court denied the attorney's motion to strike and the attorney appealed.

The court of appeal affirmed the denial of the motion to strike the complaint. The court held that *Civ. Code § 1714.10* does not apply to a malicious prosecution action against an attorney who allegedly prosecuted an action without probable cause and adequate investigation and which any reasonable attorney would have recognized as untenable. The court concluded that a wholly independent malicious prosecution action may be brought against an attorney for his or her wrongful conduct in bringing an untenable action without pleading a civil conspiracy. In the case before the court, the complaint alleged a wholly independent action against the attorney, based on the failure to properly investigate the underlying claim, that was not contingent on any liability on the part of the bank (*69 Cal. App. 4th 481, 487-488)* .

[4] Additional Authorities

[a] Order Establishing Reasonable Probability of Success Not Required in Action Alleging Independent Duty

In *Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone (2003) 107 Cal. App. 4th 54, 131 Cal. Rptr. 2d 777* , the plaintiffs were homeowners who had obtained an arbitration judgment against a home remodeler, then subsequently filed suit against the remodeler's insurer and its attorney. This subsequent lawsuit, which included a claim for conspiracy between the insurer and its attorney, was based on allegedly fraudulent statements made by the attorney concerning the extent of coverage, statements that prompted the plaintiffs to accept much less than the policy limits in satisfaction of the judgment. The trial court sustained the attorney's demurrer to the conspiracy claim based on the plaintiffs' failure to comply with *Civ. Code § 1714.10*, but the court of appeal reversed. The court of appeal first concluded that the attorney had a legal duty to refrain from misrepresenting the amount of the insurer's liability (*107 Cal. App. 4th 54, 74-77)* . The court then held that the attorney owed this duty to the plaintiffs by virtue of his status as an attorney and was independent of any duty owed by the insurer. As such, the conspiracy claim fell under the independent duty exception of *Civ. Code § 1714.10*, and the statutory requirements for obtaining a court order prior to pursuing a conspiracy claim against the attorney did not apply (*107 Cal. App. 4th 54, 84)* .

[b] Civil Code Section 1714.10 Does Not Apply to Malicious Prosecution Action Against Attorney

In *Alden v. Hindin (2003) 110 Cal. App. 4th 1502, 2 Cal. Rptr. 3d 845* , the plaintiff was an attorney who brought an action against a former client and the plaintiff's successor attorneys for malicious prosecution and conspiracy following the plaintiff's successful defense of the former client's action for malpractice and breach of fiduciary duty. The successor attorneys filed a general demurrer on the grounds that the plaintiff had failed to obtain a pre-filing order pursuant to *Civ. Code § 1714.10*. The trial court sustained the demurrer and dismissed the entire complaint against the successor attorneys. The court of appeal reversed the dismissal of the malicious prosecution claim. The court noted that under *Westamco Investment Co. v. Lee*, summarized in *§ 46.51[3][b], Civ. Code § 1714.10* did not apply to the malicious prosecution action. Assuming for the sake of argument that the related conspiracy claim was subject to the statutory requirements of *Civ. Code § 1714.10*, the court held that the trial court erred in dismissing the malicious prosecution claim merely because it was included in the same complaint. The language of *Civ. Code § 1714.10(b)* makes clear that only the conspiracy claim was subject to the defense of failure to obtain pre-filing court approval under *Civ. Code § 1714.10(a)*. Therefore, although included in the same pleading, the malicious prosecution claim asserted by the plaintiff was not subject to dismissal for failure to comply with *Civ. Code § 1714.10* (*110 Cal. App. 4th 1502, 1506-1508)* .

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4-46 California Points & Authorities § 46.52

§ 46.52 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Damages Arising From Civil Conspiracy--Liability May Be Based on Concert of Action [Civ. Code § 1714(a)]

[1] FORM

[*Caption. See § 46.40[1].*]

A CAUSE OF ACTION IS STATED AGAINST DEFENDANT _____ [*name*] UNDER THE DOCTRINE OF CONCERT OF ACTION BECAUSE THE COMPLAINT ALLEGES THAT HE/SHE _____ [KNEW THAT THE CONDUCT OF THE OTHER DEFENDANT(S) CONSTITUTED A BREACH OF DUTY TO PLAINTIFF AND HE/SHE GAVE SUBSTANTIAL ASSISTANCE OR ENCOURAGEMENT TO DEFENDANT(S) *or* GAVE SUBSTANTIAL ASSISTANCE IN ACCOMPLISHING A TORTIOUS RESULT AND HIS/HER OWN CONDUCT, SEPARATELY CONSIDERED, CONSTITUTED A BREACH OF DUTY TO PLAINTIFF].

A. Elements of Liability Under Concerted Action Doctrine. For harm resulting to a third person from the tortious conduct of another, a person is liable if he or she (1) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other, or (2) gives substantial assistance to the other in accomplishing a tortious result and his or her own conduct, separately considered, constitutes a breach to the third person (*Orser v. George (1967) 252 Cal. App. 2d 660, 667-668, 60 Cal. Rptr. 708* ; *see Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 604, 163 Cal. Rptr. 132, 607 P.2d 924*).

[*Optional*] **B. Tacit Understanding Is Sufficient.** Express agreement is not necessary; all that is required is that there be a tacit understanding in pursuit of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt his or her acts done for their benefit, are equally liable with the wrongdoer. Express agreement is not necessary; all that is required is that there be a tacit understanding in pursuit (*see Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 604, 163 Cal. Rptr. 132, 607 P.2d 924*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a demurrer to a complaint for damages arising from a civil conspiracy when the demurrer asserts that the complaint fails to set forth facts sufficient to show the existence or formation of a conspiracy, but when the facts alleged are sufficient to state a cause of action under the related doctrine of concert of action. For discussion of the overlap between the doctrines of civil conspiracy and concerted action, *see § 46.04*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Points and Authorities

For memoranda of points and authorities relating to alternative theories of liability, *see* Ch. 165, *Negligence* . These include forms of points and authorities supporting the contention that defendant's conduct was a concurrent cause of an indivisible injury to plaintiff, and supporting the contention that, although plaintiff was injured by a single unidentified defendant, defendant was concurrently negligent and so has the burden to show that plaintiff's injury was caused solely by another defendant.

[3] Discussion of Authorities

[a] Elements of Liability Under Concerted Action Doctrine

Orser v. George *(1967) 252 Cal. App. 2d 660, 60 Cal. Rptr. 708* , was a wrongful death action brought against several hunters, three of whom allegedly shot towards a pond in a direction where their shots could hit someone on the farm across an adjoining road. During the period in which decedent must have been killed, Vierra had been shooting in decedent's direction with a pistol that fired the fatal bullet. It was disputed whether Jacobson also fired the pistol in decedent's direction. James fired alternately with Vierra in decedent's direction but was using a rifle so he could not have killed decedent. The trial court granted summary judgment in favor of five defendants, including Jacobson and James, and plaintiff appealed.

The court of appeal reversed the summary judgments as to Jacobson and James, holding that triable issues of fact remained (*252 Cal. App. 2d 660, 673)* . As to Jacobson, there was a possibility that he may have fired the pistol during the time decedent was killed (*252 Cal. App. 2d 660, 666 n.3*). As to James, summary judgment was improper because the record indicated he was firing alternately with Vierra at the same target, in the same line of fire and possibly tortiously (*252 Cal. App. 2d 660, 668)* . Therefore, James' conduct possibly came within the rule of concerted action liability set forth in Restatement of Torts § 876(b), (c) and approved in dictum in *Summers v. Tice (1948) 33 Cal. 2d 80, 199 P.2d 1* : for harm resulting to a third person from the tortious conduct of another, a person is liable if he or she (1) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other, or (2) gives substantial assistance to the other in accomplishing a tortious result and his or her own conduct, separately considered, constitutes a breach to the third person (*252 Cal. App. 2d 660, 666 n.4, 668-669)* . The court cited with approval Prosser's explanation of concerted action liability: those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt his or her acts done for their benefit, are equally liable with the wrongdoer. The court went on to affirm the summary judgment in favor of the remaining defendants because no evidence suggested that they knew that Vierra, or Jacobson, or James was shooting in the direction where his shots could hit anyone on the farm or the road. Quoting the Comments to Restatement of Torts § 876, the court said the assistance of or participation by the defendant may be so slight that he or she is not liable for the act of the other. In determining this, consideration is given to the nature of the act encouraged, the amount of assistance given by the defendant, his or her presence or absence at the time of the tort, his or her relation to the other, and his or her state of

mind. Ordinarily one is not liable for acts which, although done in connection with the intended tortious act, were not foreseeable by him or her. In determining liability, the factors are the same as those used in determining the existence of legal causation when there has been negligence (*252 Cal. App. 2d 660, 669)* .

In ***Sindell v. Abbott Labs.*** *(1980) 26 Cal. 3d 588, 163 Cal. Rptr. 132, 607 P.2d 924* , plaintiff, injured as the result of administration of the drug DES to her mother during pregnancy, brought a class action against eleven drug companies on behalf of other women similarly situated. The suit consisted of several causes of action, including negligence, strict liability, violation of express and implied warranties, and false and fraudulent representations. Each cause of action alleged that defendants were jointly liable because they acted in concert. The trial court dismissed the action after sustaining defendants' demurrers on the ground that plaintiff did not and could not identify which defendant had manufactured the drug responsible for her injuries. Plaintiff appealed.

The State Supreme Court reversed on the ground that a cause of action was stated against defendants on a market share liability theory (*26 Cal. 3d 588, 611-613)* (discussed in Ch. 190, *Products Liability*). The Court found that the facts did not state a cause of action under a concert of action theory. However, the Court recognized that the elements of the doctrine are prescribed in the rule for concerted action liability set forth in Restatement (Second) of Torts § 876(a)-(c): for harm resulting to a third person from the tortious conduct of another, one is subject to liability if he or she (1) does a tortious act in concert with the other or pursuant to a common design with that other person, or (2) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so conduct himself or herself, or (3) gives substantial assistance to the other in accomplishing a tortious result and his or her own conduct, separately considered, constitutes a breach of duty to the third person (*26 Cal. 3d 588, 604)* . The gravamen of plaintiff's charge was that defendants failed to test the drug adequately or to give sufficient warning of its dangers and that they relied on the tests performed by one another and took advantage of each other's promotional and marketing techniques. The Court said those allegations do not amount to a charge that there was a tacit understanding or a common plan among defendants to fail to conduct adequate tests or give sufficient warnings, and that they substantially aided and encouraged one another in these omissions (*26 Cal. 3d 588, 605)* . The Court also rejected plaintiff's contention that the fact that defendants produced DES from a common and mutually agreed-upon formula formed a basis for concerted action liability because, the Court found, DES is a scientific constant with which all pharmacists manufacturing the drug must comply. Similarly, the Court rejected the charge that defendants engaged in parallel or imitative conduct in heir reliance on each others' testing and promotion methods as a basis of a concert claim. It noted that the conduct was a common practice in the industry, and said that application of the concept of concerted action to that practice would expand the doctrine far beyond its intended scope and would render virtually any manufacturer liable for the defective products of an entire industry, even if it could be demonstrated that the product that caused the injury was not made by the defendant (*26 Cal. 3d 588, 605)* . Finally, the Court noted that there was no allegation that each defendant knew the other defendants' conduct was tortious toward the plaintiff, and that they assisted and encouraged one another to test DES inadequately and to provide inadequate warnings. The Court found it dubious whether liability on the concert of action theory can be predicated on substantial assistance and encouragement given by one alleged tortfeasor to another pursuant to a tacit understanding to *fail* to perform an act. Thus, there was no concert of action among defendants within the meaning of that doctrine (*26 Cal. 3d 588, 606)* .

[b] Tacit Understanding Is Sufficient

The facts and procedural background of ***Sindell v. Abbott Labs.*** *(1980) 26 Cal. 3d 588, 163 Cal. Rptr. 132, 607 P.2d 924* , are discussed in *§ 46.52[3][a]*. The Court cited with approval Prosser's explanation of concerted action liability: those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt his or her acts done for their benefit, are equally liable with the wrongdoer. Express agreement is not necessary; all that is required is that there be a tacit understanding (*26 Cal. 3d 588, 604)* . Plaintiff alleged that defendants' wrongful conduct was the result of planned and concerted action, express and implied agreements, collaboration in, reliance on, acquiescence in and ratification, exploitation and adoption of each other's testing, marketing methods, lack of warnings, and other acts or

omissions and that acting individually and in concert, defendants promoted, approved, authorized, acquiesced in, and reaped profits from sales of DES. These allegations, plaintiff contended, stated a "tacit understanding" among defendants to commit a tortious act against her (*26 Cal. 3d 588, 604-605)* . The Court found, however, that the gravamen of plaintiff's charge was that defendants failed to test the drug adequately or to give sufficient warning of its dangers and that they relied on the tests performed by one another and took advantage of each other's promotional and marketing techniques. The Court said those allegations do not amount to a charge that there was a tacit understanding or a common plan among defendants to fail to conduct adequate tests or give sufficient warnings, and that they substantially aided and encouraged one another in these omissions (*26 Cal. 3d 588, 605)* .

[4] Additional Authorities

[a] Elements of Liability Under Concerted Action Doctrine

Cully v. Bianca (1986) 186 Cal. App. 3d 1172, 231 Cal. Rptr. 279 , was a personal injury action brought against a driver who collided with plaintiff while intoxicated and against two other defendants who were drinking with the driver before the collision. Plaintiffs claimed that all three defendants were liable under the theory of concerted action liability because they were embarked on a joint enterprise to obtain and consume a bottle of tequila and to drive thereafter to some unspecified location. The trial court judgment was in favor of defendants on the ground that plaintiff had stated no cause of action. Plaintiffs appealed.

The court of appeal affirmed on the ground that plaintiffs could not state a cause of action under the concerted action doctrine (*186 Cal. App. 3d 1172, 1178)* . The court recognized that Restatement (Second) of Torts § 876 and the statement by Prosser, which was quoted in *Sindell* (discussed in *§ 46.52[3][a]*), set forth the rule for concerted action liability (*186 Cal. App. 3d 1172, 1177)* . The court ruled that an allegation that the driver drove the other defendants to and from the liquor store and to and from the area where the liquor was consumed, and that one defendant was with defendant driver at the time of the accident fell short of establishing the "substantial assistance or encouragement" required by Restatement (Second) of Torts § 876. The court acknowledged that the driver had been assisted in his decision to operate an automobile while intoxicated by the fact that the other defendants helped obtain the tequila that he consumed. However, the court found, the legislature decided to insulate from civil liability virtually all persons who provide alcohol to persons who thereafter drive while intoxicated. Because plaintiffs could point to no other facts constituting encouragement or assistance, other than the fact the passengers accompanied the driver after the tequila was consumed, the court concluded that the pleading was insufficient to state a cause of action under the concerted action or civil conspiracy theory of Restatement (Second) of Torts § 876 (*186 Cal. App. 3d 1172, 1178)* .

Agovino v. Kunze (1960) 181 Cal. App. 2d. 591, 5 Cal. Rptr. 534 , was a negligence action brought against a participant in a drag race for injuries to a plaintiff who collided with the car of another racer. After plaintiff's case was presented to the jury, defendant successfully moved for a nonsuit and the trial court entered judgment for defendant. Plaintiff appealed.

The trial court reversed the judgment, finding that it was for the jury to determine the manner of defendant's driving and whether it was done in concert with the driver who actually collided with plaintiff (*181 Cal. App. 2d. 591, 596)* . There was substantial evidence from which the jury could find that defendant was engaged in an illegal, high speed race through a residential neighborhood. The evidence also established that, whether the two drivers in so many words agreed to race or whether from their conduct a tacit mutual understanding of such an agreement could be inferred, the collision occurred during the time they were racing (*181 Cal. App. 2d. 591, 597-598)* . Therefore, the court said, the jury could have concluded that the defendant's conduct was the proximate cause of the collision--that is, defendant set in motion the events that led or contributed to the collision (*181 Cal. App. 2d. 591, 599)* .

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§ 46.53 Opposing Contention That Motion to Amend Complaint to Add Attorney as Conspirator Should Be Denied--Requirement of Verified Petition [Civ. Code § 1714.10] Satisfied by Verified Complaint and Sworn Declarations

[1] FORM

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

PLAINTIFF'S MOTION TO AMEND HIS/HER/ITS COMPLAINT TO ADD A CONSPIRACY CAUSE OF ACTION AGAINST DEFENDANT ATTORNEY AND HIS/HER/ITS CLIENT SHOULD NOT BE DENIED FOR FAILURE TO MEET THE REQUIREMENT, UNDER *CIVIL CODE SECTION 1714.10*, OF FILING A VERIFIED PETITION BECAUSE PLAINTIFF VERIFIED HIS/HER/ITS COMPLAINT AND AMENDED COMPLAINT AND FILED, IN SUPPORT OF THE MOTION, A VERIFIED COMPLAINT AND DECLARATIONS UNDER PENALTY OF PERJURY.

Verified Complaint and Sworn Declaration Sufficient to Meet Requirement of Verified Petition. Although *Civil Code Section 1714.10* requires the filing of a verified petition to obtain a court order permitting the filing of a pleading alleging civil conspiracy by an attorney with the attorney's client, verifying the complaint and amended complaint and filing declarations under penalty of perjury in support of a motion for leave to amend are sufficient to meet that requirement (*Burtscher v. Burtscher (1994) 26 Cal. App. 4th 720, 727-728*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose the contention that the trial court should deny plaintiff's motion for leave to amend the complaint to include a conspiracy cause of action against an attorney and the attorney's client, because plaintiff failed to file a verified petition as required by *Civ. Code § 1714.10*. The basis of opposition is that plaintiff's verifying his/her/its complaint and amended complaint and filing sworn declarations in support of the motion for leave to amend are sufficient to meet the statutory requirement.

Counsel should insert argument in the following form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms and discussion regarding conspiracy generally, see California Forms of Pleading and Practice, Ch. 126, *Conspiracy* (Matthew Bender).

[3] Discussion of Authorities

[a] Verified Complaint and Sworn Declaration Sufficient to Meet Requirement of Verified Petition

The facts and procedural background of ***Burtscher v. Burtscher*** *(1994) 26 Cal. App. 4th 720* , are discussed in *§ 46.28[3][a]*. Before the court of appeal, defendants claimed that plaintiff's motion to amend her complaint to add the conspiracy cause of action should have been denied because she had not filed a verified petition as required by *Civ. Code § 1714.10*. The court of appeal held that plaintiff had met that requirement by having verified the complaint and the amended complaint and having filed declarations under penalty of perjury in support of her motion. The court noted that these items have the same effect as a verified petition in tending to discourage frivolous allegations by requiring claimants to make their assertions under oath (*26 Cal. App. 4th 720, 727)* .

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§ 46.54 Opposing Contention That Cause of Action Against Attorney for Civil Conspiracy With Client May Not Be Included in Complaint Without Civ. Code § 1714.10 Order--Party Against Whom Conspiracy Charged Waived Order Requirement by Failing to Timely Raise Defense [Civ. Code § 1714.10(a), (b)]

[1] FORM

[*The following may be included in a memorandum or points and authorities, or in a trial or appellate brief.*]

_____ [*Identify party charged with civil conspiracy, e.g.,* DEFENDANT] WAIVED ANY DEFENSE HE/SHE MAY HAVE HAD UNDER SECTION 1714.10 OF THE CIVIL CODE BY FAILING TO RAISE THE DEFENSE ON HIS/HER FIRST APPEARANCE.

A. Failure to Timely Raise Defense Constitutes Waiver. A failure to timely raise the defense that _____ [*identify party who filed the pleading, e.g.,* plaintiff] has not obtained an order determining the reasonable probability of success under *Section 1714.10 of the Civil Code* constitutes a waiver of the defense (*Civ. Code § 1714.10(b)*).

B. Defense Must Be Raised on First Appearance. The defense must be raised by the attorney charged with civil conspiracy on that attorney's first appearance by demurrer, motion to strike, or such other motion or application as may be appropriate (*Civ. Code § 1714.10(b)*; *Villa Pac. Bldg. Co. v. Superior Court (1991) 233 Cal. App. 3d 8, 12, 284 Cal. Rptr. 227*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that no cause of action against an attorney for civil conspiracy with his or her client that arises from any attempt to contest or compromise a claim or dispute, and that is based on the attorney's representation of the client, shall be included in a complaint or other pleading because the court has not entered an order allowing the pleading as required by *Civ. Code § 1714.10*. The opposition is based on the failure of the attorney charged with the conspiracy to raise the defense in a timely manner, that is, on the attorney's first

appearance [*Civ. Code § 1714.10(b)*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should (1) identify the first appearance of the party charged with the civil conspiracy (for example, the defendant's answer to the complaint), and (2) refer to the documents filed with the court that demonstrate that the party failed to raise the defense on that occasion by demurrer, motion to strike, or other appropriate motion or application.

[3] Discussion of Authorities

[a] Defense Must Be Raised on First Appearance

Villa Pac. Bldg. Co. v. Superior Court *(1991) 233 Cal. App. 3d 8, 284 Cal. Rptr. 227* , involved an action by a corporation against a law firm it had retained to handle a variety of transactions involving the plaintiff's efforts to acquire and develop mobile home parks. The complaint alleged, among other things, that the law firm, another client of the law firm, and the plaintiff's vice president had conspired to interfere with the plaintiff's real estate acquisitions. The defendants answered the complaint, denying the allegations of wrongdoing and raising several affirmative defenses (but not *Civ. Code § 1714.10*). About a year later, the defendants moved to dismiss the complaint, asserting that the plaintiff's failure to comply with *Civ. Code § 1714.10* barred the action. The trial court in effect conditionally granted the motion, ordering the plaintiff to comply with the section within 45 days or suffer dismissal of its action. The plaintiff responded with a petition for writ of mandate.

The court of appeal issued a writ of mandate directing the trial court to vacate its order dismissing the complaint, and to issue a new order clarifying that the motion to dismiss was denied, and reinstating the complaint and answer. The court held that when a plaintiff fails to obtain court approval before filing suit against an attorney on a conspiracy theory involving a client, the benefit conferred by § 1714.10 is waived unless the attorney objects at the first available opportunity, which is at the time of the attorney's first appearance, whether by demurrer or motion to strike or such other motion or application as may be appropriate. The court stated that it necessarily follows that by answering and litigating the case for a year before moving to dismiss on the basis of § 1714.10, the defendants waived any rights they might have had under the statute (*233 Cal. App. 3d 8, 12)* .

NOTE:

In *Villa Pacific Building Co. v. Superior Court*, the court declined to reach the issue of whether *Civ. Code § 1714.10* applied to that action, and instead decided the case on the petitioner's theory that the respondents waited too long to raise the issue and waived any objection they might have had [*Villa Pac. Bldg. Co. v. Superior Court (1991) 233 Cal. App. 3d 8, 10-11, 11 n.3, 284 Cal. Rptr. 227* (court assumed § 1714.10 applies in all cases alleging conspiracy by lawyer with client)]. However, the case was based on a version of *Civ. Code 1714.10* in effect prior to the 1991 amendment, which restricted the prefiling order requirement to a cause of action against an attorney for a civil conspiracy with his or her client arising from any attempt to contest or compromise a claim or dispute, and based on the attorney's representation of the client.

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CHAPTER 47 CONTEMPT

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§ 47.30 Supporting Affidavit (or Declaration [Code Civ. Proc. § 2015.5]) Opposing Initiating Affidavit (or Declaration [Code Civ. Proc. § 2015.5]) Charging Indirect Contempt [Code Civ. Proc. § 1211]--Court Without Power in That Facts Stated Insufficient to Constitute Cause of Action in Contempt

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Initiating Affidavit or Declaration as Required to Set Forth Facts Constituting Alleged Contempt

[b] Failure to Allege Contemner's Knowledge of Order

[c] Failure to Allege Contemner's Past Ability to Comply With Order

[d] Failure to Allege Contemner's Present Ability to Comply With Order

[e] Failure to Allege Contemner's Willful Disobedience of Order

[4] Additional Authorities

[a] Failure to Allege Contemner's Present Ability to Comply With Order

§ 47.31 Supporting Affidavit (or Declaration [Code Civ. Proc. § 2015.5]) Opposing Initiating Affidavit (or Declaration [Code Civ. Proc. § 2015.5]) Charging Indirect Contempt [Code Civ. Proc. § 1211]--Disobedience of Void Order Not a Contempt

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Disobedience of Void Orders as Not Contempt

[b] Order Ineffective if Not Reduced to Writing or Entered in Minutes

[4] Additional Authorities

[a] Disobedience of Void Orders as Not Contempt

[b] Order Ineffective if Not Reduced to Writing or Entered in Minutes

§ 47.32 Supporting Affidavit (or Declaration [Code Civ. Proc. § 2015.51]) Opposing Initiating Affidavit (or Declaration [Code Civ. Proc. § 2015.5]) Charging Indirect Contempt [Code Civ. Proc. § 1211]--Court Without Jurisdiction to Imprison Contemner When Act to Be Compelled Not Required in Original Order

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] No Jurisdiction to Imprison Contemner When Act to Be Compelled Not Required in Original Order

§ 47.33 Supporting Initiating Affidavit (or Declaration [Code Civ. Proc. § 2015.5])--Allegation of Contemner's Knowledge Not Required

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Allegation of Contemner's Knowledge or Notice of Order Not Required

§ 47.34 Supporting Initiating Affidavit (or Declaration [Code Civ. Proc. § 2015.5])--Allegation of Ability to Comply Not Required When There Is Previous Finding

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Allegation of Contemner's Ability to Comply Not Required When Court Has Already Found Ability

[4] Additional Authorities

[a] Allegation of Contemner's Ability to Comply Not Required When Court Has Already Found Ability

§ 47.35 Supporting Initiating Affidavit (or Declaration [Code Civ. Proc. § 2015.5])--Contemner Has Burden of Proving Nonability to Comply With Support Order [Code Civ. Proc. § 1209.5]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Contemner Has Burden of Proving Nonability to Comply With Support Order

§ 47.36 Supporting Initiating Affidavit (or Declaration [Code Civ. Proc. § 2015.5])--Combination of Affidavits or Declarations Permitted

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Combination of Affidavits or Declarations Permitted to State Cause of Action in Contempt

§§ 47.37-47.49 [Reserved]

§ 47.50 Supporting Petition [Code Civ. Proc. § 1069] for Writ of Review [Code Civ. Proc. § 1068]--For Relief From Order of Contempt [Code Civ. Proc. § 1222]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memorandum

[3] Discussion of Authorities

[a] Nonappealability of Contempt Order

[b] When Writ Lies

[4] Additional Authorities

[a] When Writ Lies

§ 47.51 Supporting Petition [Penal Code § 1474] for Writ of Habeas Corpus [Penal Code § 1475]--For Relief From Order of Contempt [Code Civ. Proc. § 1222]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memorandum

[3] Discussion of Authorities

[a] When Writ Lies

[4] Additional Authorities

[a] When Writ Lies

§ 47.52 Supporting Petition [Code Civ. Proc. § 1103] for Writ of Prohibition [Code Civ. Proc. § 1102]--For Relief From Contempt Proceedings [Code Civ. Proc. §§ 1209-1222]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memorandum

[3] Discussion of Authorities

[a] When Writ Lies

§ 47.53 Supporting Petition for Writ of Review [Code Civ. Proc. §§ 1068, 1069], Prohibition [Code Civ. Proc. §§ 1102, 1103], or Habeas Corpus [Penal Code §§ 1474, 1475]--For Relief From Contempt Proceedings or Order of Contempt [Code Civ. Proc. § 1222]--Insufficient Recitals in Direct Contempt Order

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Recital of Facts Constituting Contempt as Jurisdictional

[b] Order Required to State Contempt Committed in Court's Presence

[c] Order Failed to Identify Provision Violated

[d] Order Fails to Indicate That Warning Was Given

[e] Order Fails to Describe in Detail Conduct Not Contemptuous on Its Face

[f] Order Fails to Describe Prior Order That Was Violated

[4] Additional Authorities

[a] Recital of Facts Constituting Contempt as Jurisdictional

§ 47.54 Supporting Petition for Writ of Review [Code Civ. Proc. §§ 1068, 1069], Prohibition [Code Civ. Proc. §§ 1102, 1103], or Habeas Corpus [Penal Code §§ 1474, 1475]--For Relief From Contempt Proceedings or Order of Contempt [Code Civ. Proc. § 1222]--Violation of Void Order

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Void Order May Not Result in Contempt Judgment

[b] Violation of Order in Excess of Jurisdiction Is Not Contempt

[c] What Constitutes Order in Excess of Jurisdiction

[d] Void Judgment Is Subject to Attack in Review of Contempt Proceedings

§ 47.55 Supporting Petition for Writ of Review [Code Civ. Proc. §§ 1068, 1069], Prohibition [Code Civ. Proc. §§ 1102, 1103], or Habeas Corpus [Penal Code §§ 1474, 1475]--For Relief from Contempt Proceedings or Order of Contempt [Code Civ. Proc. § 1222]--No Judgment Rendered or Entered

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] No Jurisdiction Where Order Not Entered

[b] No Jurisdiction Before Entry of Judgment

[4] Additional Authorities

[a] No Jurisdiction Before Entry of Judgment

§ 47.56 Supporting Petition for Writ of Review [Code Civ. Proc. §§ 1068, 1069], Prohibition [Code Civ. Proc. §§ 1102, 1103], or Habeas Corpus [Penal Code §§ 1474, 1475]--For Relief From Direct Contempt Proceedings or Order of Direct Contempt [Code Civ. Proc. § 1222]--Personally Embroiled Trial Judge in Direct Contempt

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Personally Embroiled Trial Judge as Violative of Due Process

[4] Additional Authorities

[a] Personally Embroiled Trial Judge as Violative of Due Process

§ 47.57 Supporting Petition for Writ of Review [Code Civ. Proc. §§ 1068, 1069], Prohibition [Code Civ. Proc. §§ 1102, 1103], or Habeas Corpus [Penal Code §§ 1474, 1475]--For Relief From Direct Contempt Proceedings or Order of Direct Contempt [Code Civ. Proc. § 1222]--Contemner's Specific Wrongful Intent Not Shown

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] When Specific Wrongful Intent Required

[b] Possession of Weapon in Courtroom

§ 47.58 Supporting Petition for Writ of Review [Code Civ. Proc. §§ 1068, 1069], Prohibition [Code Civ. Proc. §§ 1102, 1103], or Habeas Corpus [Penal Code §§ 1474, 1475]--For Relief From Indirect Contempt Proceedings on Order of Indirect Contempt [Code Civ. Proc. § 1222]--Trial Judge Disqualified for Cause in Indirect Contempt [Code Civ. Proc. § 170]

[1] FORM

[2] Comments

[a] Use of Form

[b] Peremptory Challenges in Contempt Proceedings

[c] Related Pleading and Practice Forms

[d] Related Memorandum

[3] Discussion of Authorities

[a] Power to Disqualify in Indirect Contempt Proceedings

[b] Orders of Disqualified Judge Void

§ 47.59 Supporting Petition [Code Civ. Proc. § 1069] for Writ of Review [Code Civ. Proc. § 1068] by Party Initiating Indirect Contempt Proceedings--For Relief From Order Wrongfully Divesting Court of Jurisdiction to Adjudicate Contempt

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memorandum

[3] Discussion of Authorities

[a] Wrongful Divesting of Jurisdiction to Hear Contempt

§ 47.60 Supporting Petition [Code Civ. Proc. § 1103] for Writ of Prohibition [Code Civ. Proc. § 1102]--For Relief From Contempt Proceedings [Code Civ. Proc. §§ 1209-1222]--Appearance by Contemner's Attorney Sufficient

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memorandum

[3] Discussion of Authorities

[a] Appearance by Attorney in Response to Order to Show Cause as Sufficient

§ 47.61 Supporting Petition for Writ of Review [Code Civ. Proc. §§ 1068, 1069], Prohibition [Code Civ. Proc. §§ 1102, 1103], or Habeas Corpus [Penal Code §§ 1474, 1475]--For Relief From Indirect Contempt Proceedings or Order of Indirect Contempt [Code Civ. Proc. § 1222]--Denial of Procedural Due Process

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Hearing as Required to Constitute Procedural Due Process

[b] Procedural Due Process in Indirect Contempt Proceedings

§ 47.62 Supporting Petition for Writ of Review [Code Civ. Proc. §§ 1068, 1069]--For Relief From Indirect Contempt Proceedings or Order of Indirect Contempt [Code Civ. Proc. § 1222]--Contempt Hearing Cannot Be Held Without Appearance by Contemner

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Contempt Hearing Cannot Proceed Without Appearance by Contemner

§ 47.63 Opposing Petition for Writ of Review [Code Civ. Proc. §§ 1068, 1069], Prohibition [Code Civ. Proc. §§ 1102, 1103], or Habeas Corpus [Penal Code §§ 1474, 1475]--Challenge to Court's Jurisdiction Premature

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Memorandum

[3] Discussion of Authorities

[a] Writ Premature Until Court's Judgment Final

§ 47.64 Opposing Petition for Writ of Review [Code Civ. Proc. §§ 1068, 1069], Prohibition [Code Civ. Proc. §§ 1102, 1103], or Habeas Corpus [Penal Code §§ 1474, 1475]--Contempt Order Incorporating Allegations of Affidavit (or Declaration [Code Civ. Proc. § 2015.5]) Sufficient

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Memorandum

[3] Discussion of Authorities

[a] Contempt Order Incorporating Allegations of Affidavit or Declaration Sufficient

§ 47.65 Opposing Petition for Writ of Review [Code Civ. Proc. §§ 1068, 1069], Prohibition [Code Civ. Proc. §§ 1102, 1103], or Habeas Corpus [Penal Code §§ 1474, 1475]--Statutory Formula "Immediate View and Presence" Not Required in Order Containing Sufficient Statement of Underlying Facts

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Memorandum

[3] Discussion of Authorities

[a] "Immediate View and Presence" Recital Is Not Essential

§ 47.66 Opposing Petition for Writ of Review [Code Civ. Proc. §§ 1068, 1069], Prohibition [Code Civ. Proc. §§ 1102, 1103], or Habeas Corpus [Penal Code §§ 1474, 1475]--Recitals for Direct Contempt Order Not Required If Judge Defers Adjudication of Contempt to Another Judge

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Memorandum

[3] Discussion of Authorities

[a] Contempt Committed in Presence of Judge Need Not Be Treated Summarily

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4-47 California Points & Authorities § 47.01

§ 47.01 Scope of Chapter

This chapter contains memoranda that may be submitted in contempt proceedings. It includes memoranda for use in supporting [*see §§ 47.30 -47.32*] and opposing [*see §§ 47.33 -47.36*] a demurrer to an initiating affidavit or declaration charging indirect contempt.

This chapter also contains memoranda for use in supporting [*see §§ 47.50 -47.62*] or opposing [*see §§ 47.63 -47.66*] petitions for writs of review, habeas corpus, or prohibition that seek relief from contempt orders or proceedings.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPleading & PracticeMotion PracticeSupporting MemorandaCivil ProceduresSanctionsContemptGeneral Overview

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§ 47.02 Governing Statutes

Code Civ. Proc. §§ 1209-1222 governs contempt proceedings.

The law governing the review of contempt proceedings is governed by *Code Civ. Proc. § 1222* (judgments and orders of contempt as final and conclusive) and by *Code Civ. Proc. §§ 1067-1077, 1107, 1108* (writs of review), *Penal Code §§ 1473-1508* (writs of habeas corpus), and *Code Civ. Proc. §§ 1088-1097, 1102-1105, 1107, 1108* (writs of prohibition).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsGeneral OverviewCivil ProcedureSanctionsContemptGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionFinal Judgment Rule

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§ 47.03 Civil and Criminal Contempt Distinguished

When the primary objective of a contempt proceeding under *Code Civ. Proc. §§ 1209-1222* is to protect the rights of the litigants, the proceeding is civil in character [*Morelli v. Superior Court (1969) 1 Cal. 3d 328, 333, 82 Cal. Rptr. 375, 461 P.2d 655* ; *see also Share v. Casiano Bel-Air Homeowners Assn. (1989) 215 Cal. App. 3d 515, 523, 263 Cal. Rptr. 753]* . When the objective is to vindicate the dignity or authority of the court, the contempt is criminal in character, even though it arises in a civil action [*Morelli v. Superior Court (1969) 1 Cal. 3d 328, 333, 82 Cal. Rptr. 375, 461 P.2d 655]* .

Civil contempt is remedial and coercive in nature, and the parties chiefly interested are the individuals whose private rights and remedies the proceeding was instituted to protect or enforce [*In re Morris (1924) 194 Cal. 63, 67, 227 P. 914]* . Criminal contempt is punitive in nature, and the government, the courts, and the people are interested in the prosecution of the proceeding [*In re Morris (1924) 194 Cal. 63, 67, 227 P. 914* ; *see Code Civ. Proc. § 1218(d)* (district attorney or city attorney may initiate contempt action against party who fails to comply with court order entered under Domestic Violence Protection Act, *Fam. Code § 6200 et seq.*)]. Thus, whether a contempt is civil or criminal depends on whether the punishment imposed is remedial and for the benefit of the complainant or punitive to vindicate the authority of the court [*Hicks v. Feiock (1988) 485 U.S. 624, 631, 108 S. Ct. 1423, 99 L. Ed. 2d 721]* .

If the punishment is a sentence of imprisonment, it is remedial if the contemner stands committed unless and until he or she performs the affirmative act required by the court's order, and it is punitive if the sentence is limited to imprisonment for a definite period [*Hicks v. Feiock (1988) 485 U.S. 624, 632, 108 S. Ct. 1423, 99 L. Ed. 2d 721]* .

Ordinarily, if the punishment is a fine, it is remedial when it is paid to the complainant and punitive when it is paid to the court (or a public agency designated by statute) [*see, e.g., Code Civ. Proc. § 1218(d)* (in contempt action for failure to comply with court order entered under Domestic Violence Protection Act, *Fam. Code § 6200 et seq.*, award of attorney's fees and costs must be paid to California Emergency Management Agency's account established under *Penal Code § 13823.15(f)* to fund domestic violence shelter services)]. However, a fine that would be payable to the court is also remedial when the defendant can avoid paying it simply by performing the affirmative act required by the court's order [*Hicks v. Feiock (1988) 485 U.S. 624, 632, 108 S. Ct. 1423, 99 L. Ed. 2d 721]* .

When the penalty is remedial, the conditional nature of the punishment renders the relief civil in nature because the contemner can end the sentence, or suspended sentence, and discharge himself or herself at any moment by doing what he or she had previously refused to do [*Hicks v. Feiock (1988) 485 U.S. 624, 633, 637 n.8, 108 S. Ct. 1423, 99 L. Ed. 2d 721]* . For example, when the contempt consists of an omission to perform an act which is still within the contemner's power to perform, such as obeying a duly served subpoena in a pending action, a court may treat that contemner's disobedience as a civil contempt by imprisoning the contemner pursuant to *Code Civ. Proc. § 1219* until he or she has performed the act [*Morelli v. Superior Court (1969) 1 Cal. 3d 328, 332, 82 Cal. Rptr. 375, 461 P.2d 655* (failure of expert witness to appear for deposition); *see In re Mark A. (2007) 156 Cal. App. 4th 1124, 1143, 68 Cal. Rptr. 3d 106* (court is not authorized to punish contempt by imposing evidence sanction, such as striking testimony of other witnesses)]. However, punishment may not be imposed in a civil contempt proceeding when it is clearly established that the alleged contemner is unable to comply with the terms of the court's order [*Hicks v. Feiock (1988) 485 U.S. 624, 638 n.9, 108 S. Ct. 1423, 99 L. Ed. 2d 721]* .

When the contempt consists of an omission to perform an act that is no longer possible for the contemner to perform, such as the inability of a contemner to obey a subpoena to testify in an action that has since terminated, a court may treat the contemner's disobedience as a criminal contempt by imposing a fine not exceeding $1,000, by imprisoning the contemner for a period not to exceed five days, or by imposing both a fine and imprisonment, pursuant to *Code Civ. Proc. § 1218* [*Morelli v. Superior Court (1969) 1 Cal. 3d 328, 332, 82 Cal. Rptr. 375, 461 P.2d 655* ; *see In re Mark A. (2007) 156 Cal. App. 4th 1124, 1143, 68 Cal. Rptr. 3d 106* (court is not authorized to punish contempt by imposing evidence sanction, such as striking testimony of other witnesses)]. When the penalty is punitive, the unconditional nature of the punishment renders the relief criminal in nature because the relief can neither undo or remedy what has been done nor afford any compensation to the complaining party, and the contemner cannot shorten the term by promising not to repeat the offense [*Hicks v. Feiock (1988) 485 U.S. 624, 633, 108 S. Ct. 1423, 99 L. Ed. 2d 721* ; *see also In re Feiock (1989) 215 Cal. App. 3d 141, 144-145, 263 Cal. Rptr. 437]* .

That a determinate sentence is suspended and the contemner put on probation does not make the remedy civil in nature, for a suspended sentence with a term of probation is not equivalent to a conditional sentence that would allow the contemner to avoid or purge the sanctions; rather, it remains a determinate sentence, and a fixed term of probation is itself a punishment that is criminal in nature [*Hicks v. Feiock (1988) 485 U.S. 624, 639 n.11, 108 S. Ct. 1423, 99 L. Ed. 2d 721]* .

Thus, an unconditional penalty is criminal in nature because it is solely and exclusively punitive in character, whereas a conditional penalty, by contrast, is civil because it is specifically designed to compel the doing of some act [*Hicks v. Feiock (1988) 485 U.S. 624, 633, 108 S. Ct. 1423, 99 L. Ed. 2d 721]* .

Any sentence must be viewed as remedial and hence civil in nature if the court conditions release on the contemner's willingness to comply with the order or imposes a determinate sentence which includes a purge clause [*Hicks v. Feiock (1988) 485 U.S. 624, 634, 635 n.7, 640, 108 S. Ct. 1423, 99 L. Ed. 2d 721]* . On the contrary, a criminal contempt proceeding would be characterized by the imposition of an unconditional sentence for punishment or deterrence [*Hicks v. Feiock (1988) 485 U.S. 624, 634-635, 108 S. Ct. 1423, 99 L. Ed. 2d 721]* . If both civil and criminal relief are imposed in the same proceeding, the criminal feature of the order is dominant and fixes its character for purposes of review by a higher court [*Hicks v. Feiock (1988) 485 U.S. 624, 638 n.10, 108 S. Ct. 1423, 99 L. Ed. 2d 721]* .

Either form of punishment has an incidental effect. If the case is civil and punishment is purely remedial, there is also a vindication of the court's authority. If the proceeding is for criminal contempt and punishment is solely punitive, to vindicate the authority of the law, the complainant may also derive some incidental benefit from the fact that the punishment tends to prevent a repetition of the disobedience. But such indirect consequences do not change punishment that is merely coercive and remedial into that which is solely punitive in character or vice versa [*Hicks v. Feiock (1988) 485 U.S. 624, 635-636, 108 S. Ct. 1423, 99 L. Ed. 2d 721]* .

The distinction between civil and criminal contempt is important because punishment that is criminal in nature may not be imposed unless federal constitutional protections are applied in the contempt proceeding [*Hicks v. Feiock (1988) 485 U.S. 624, 637, 108 S. Ct. 1423, 99 L. Ed. 2d 721]* . These protections include the requirement that the offense be proved beyond a reasonable doubt [*Hicks v. Feiock (1988) 485 U.S. 624, 632, 632 n.5, 108 S. Ct. 1423, 99 L. Ed. 2d 721]* . However, certain specific constitutional protections, such as the right to trial by jury, have been held inapplicable to those criminal contempts that can be classified as petty offenses [*Hicks v. Feiock (1988) 485 U.S. 624, 632 n.5, 108 S. Ct. 1423, 99 L. Ed. 2d 721* (citing *Bloom v. Illinois (1968) 391 U.S. 194, 208-210, 88 S. Ct. 1477, 20 L. Ed. 2d 522*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsContemptCivil ContemptCivil ProcedureSanctionsContemptCriminal ContemptCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesContemptPenalties

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§ 47.04 Special Limitations Periods for Support and Other Family Law Enforcement Actions

Code Civ. Proc. § 1218.5 sets forth two specific limitations periods for bringing contempt actions in family law matters. First, if the contempt alleged is for the failure to pay child, family, or spousal support, the period of limitations for commencing the contempt action is three years from the date that the payment was due [*Code Civ. Proc. § 1218.5(b)*].

Secondly, if the contempt action is for the enforcement of any other type of court order made under the Family Code [*see, e.g., Code Civ. Proc. § 1218(d)* (contempt action initiated by district attorney or city attorney against party who fails to comply with court order entered under Domestic Violence Protection Act, *Fam. Code § 6200 et seq.*)], the period of limitations for commencing the action is two years from the time that the alleged contempt occurred [*Code Civ. Proc. § 1218.5(b)*]. For a complete discussion of contempt as a remedy for the enforcement of support and other family law orders, see California Forms of Pleading and Practice, Ch. 258, *Family Law Enforcement: General Enforcement Principles and Remedies* , Part V, Ch. 135, *Contempt* (Matthew Bender), and Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, Ch. 140, *General Enforcement Principles and Remedies* , pt. G (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild CustodyEnforcementSanctionsFamily LawChild CustodyVisitationEnforcementSanctionsFamily LawChild SupportObligationsEnforcementContemptFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionEnforcementContemptFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementContemptGovernmentsLegislationStatutes of LimitationsTime Limitations

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4-47 California Points & Authorities § 47.05

§ 47.05 Use of Memoranda in Contempt Proceedings

The use of a memorandum in contempt proceedings depends on whether legal questions have been raised as to the adequacy of the proceedings. When the alleged contempt is not committed in the immediate view and presence of the court or of the judge at chambers, contempt proceedings are commenced by an affidavit (or declaration [*see Code Civ. Proc. § 2015.5*]) presented to the court or judge of the facts constituting the contempt [*Code Civ. Proc. § 1211(a)*]. (In family law proceedings, use of Judicial Council Form FL-410, "Order to Show Cause and Affidavit for Contempt," constitutes compliance with the affidavit requirement under *Code Civ. Proc. § 1211(b)*.)

The accused contemner may submit an affidavit or declaration in response to the initiating affidavit or declaration. This response has been characterized as an answer or plea [*see Lyon v. Superior Court (1968) 68 Cal. 2d 446, 452, 67 Cal. Rptr. 265, 439 P.2d 1* ; *Freeman v. Superior Court (1955) 44 Cal. 2d 533, 536, 282 P.2d 857]* , an answering affidavit [*Darden v. Superior Court of Tulare County, (1965) 235 Cal. App. 2d 80, 82, 45 Cal. Rptr. 44* ; *Oil Workers Int'l Union v. Superior Court (1951) 103 Cal. App. 2d 512, 524, 230 P.2d 71]* , a verified answer [*Bailey v. Superior Court (1956) 142 Cal. App. 2d 47, 50, 297 P.2d 795]* , an affidavit in opposition [*Nutter v. Superior Court (1960) 183 Cal. App. 2d 72, 74, 6 Cal. Rptr. 404]* , or a counteraffidavit [*Associated Lbr. & Box Co. v. Superior Court (1947) 79 Cal. App. 2d 577, 580, 180 P.2d 389]* . In addition, when the responsive affidavit or declaration objected to the initiating affidavit or declaration on the grounds that it did not state facts sufficient to constitute a cause of action in contempt, the Supreme Court considered the sustaining of that objection by the trial court as having the effect of the sustaining of a demurrer [*see Taylor v. Superior Court (1942) 20 Cal. 2d 244, 246, 125 P.2d 1]* .

In any case, the responsive affidavit or declaration should raise any questions as to the adequacy of the order to show cause or the affidavit or declaration on which the order is based [*Morelli v. Superior Court (1968) 262 Cal. App. 2d 262, 266, 68 Cal. Rptr. 572]* . When the responsive affidavit or declaration raises legal questions as to the adequacy of the contempt proceedings, such as questions respecting the jurisdiction of the court, the legal sufficiency of the facts contained in the initiating affidavit or declaration, or the clarity, certainty, or intelligibility of the initiating affidavit or declaration, a memorandum should accompany the responsive affidavit or declaration to aid the trial court in determining the legal issues raised by the affidavit or declaration.

In addition, objections to a trial court's jurisdiction to hear a contempt matter may take the form of a motion to dismiss [

Code Civ. Proc. § 581d; *see Butler v. Butler (1967) 255 Cal. App. 2d 132, 134, 62 Cal. Rptr. 825]* which should also be supported by a memorandum served and filed with the motion [*Cal. Rules of Ct., Rule 3.1113(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureSanctionsContemptGeneral Overview

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4-47 California Points & Authorities § 47.06

§ 47.06 Order of Contempt Not Appealable

The judgment and orders of the court or judge in contempt cases are final, conclusive [*Code Civ. Proc. § 1222*], and not appealable [*In re Buckley (1973) 10 Cal. 3d 237, 259, 110 Cal. Rptr. 121, 514 P.2d 1201* ; *Butler v. Butler (1967) 255 Cal. App. 2d 132, 135, 62 Cal. Rptr. 825]* .

Legal Topics:

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

California Points & Authorities

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4-47 California Points & Authorities § 47.07

§ 47.07 Use of Memoranda in Reviewing Contempt Orders

A contempt order may be reviewed by a petition for a writ of review [*Mitchell v. Superior Court (1972) 28 Cal. App. 3d 759, 764, 104 Cal. Rptr. 921]* , habeas corpus [*In re Carvallo (1973) 29 Cal. App. 3d 983, 986, 105 Cal. Rptr. 925]* , or prohibition [*Safer v. Superior Court (1975) 15 Cal. 3d 230, 235, 124 Cal. Rptr. 174, 540 P.2d 14* ; *Koehler v. Superior Court (2010) 181 Cal. App. 4th 1153, 1165, 104 Cal. Rptr. 3d 877* (habeas corpus is appropriate remedy for person imprisoned for contempt, but after release from imprisonment, prohibition lies to determine whether contempt order was invalid, and court of appeal may treat habeas petition as one for prohibition)].

A petition for a writ of review [*see Code Civ. Proc. § 1069*] or prohibition [*see Code Civ. Proc. § 1103*] to a reviewing court having original jurisdiction [*see Cal. Rules of Ct., Rule 8.485(a)*] must be accompanied by a memorandum [*Cal. Rules of Ct., Rule 8.486(a)(5)*]. When a petition for a writ of prohibition is sought before a superior court, it should be accompanied by a memorandum [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1090* (petition as motion), 1105 (*Code Civ. Proc. § 1090* as applicable to proceedings for writ of prohibition)].

Whenever a writ petition seeks review of a trial court's ruling, it must also be accompanied by a record adequate to permit review, including (1) copies of the ruling from which the petition seeks relief, (2) copies of all documents and exhibits submitted to the trial court supporting and opposing the petitioner's position, and (3) any other documents or portions of documents submitted to the trial court that are necessary for a complete understanding of the case and the ruling under review [*Cal. Rules of Ct., Rule 8.486(b)(1)(A)-(C)*; *see Cal. Rules of Ct., Rule 8.486(c)* (format for documents and exhibits)]. In exigent circumstances, these documents may be omitted if counsel files a declaration explaining the urgency and the circumstances making the documents unavailable and fairly summarizing their substance [*Cal. Rules of Ct., Rule 8.486(b)(2)*]. The record must also include a reporter's transcript of the oral proceedings that resulted in the ruling under review [*Cal. Rules of Ct., Rule 8.486(b)(1)(D)*]. If a reporter's transcript is unavailable, the record must include a declaration by counsel stating that a transcript has been ordered and is expected to be filed on a certain date, or if no transcript is available, explaining its unavailability and fairly summarizing the proceedings, including the parties' arguments and any statement by the court supporting its ruling [*Cal. Rules of Ct., Rule 8.486(b)(3)*]. If the petitioner does not submit the required record or explanations, or does not present facts sufficient to excuse the failure to submit them, the court may summarily deny the petition [*Cal. Rules of Ct., Rule 8.486(b)(4)*].

The petition must also be accompanied by a Certificate of Interested Entities or Persons [*Cal. Rules of Ct., Rule 8.488(b), (c)*; *see Cal. Rules of Ct., Rules 8.208(b), 8.488(a)* (certificate not required in family, juvenile, guardianship, and conservatorship cases); *see also* Cal. Judicial Council Form APP-008]. If the petitioner is an entity, that party's certificate must list any other entity or person the petitioner knows has an ownership interest of 10 percent or more in the petitioner [*Cal. Rules of Ct., Rule 8.208(e)(1)*]. An "entity" for this purpose is a corporation, partnership, firm, or other association, but it does not include a governmental entity or its agencies or a natural person [*Cal. Rules of Ct., Rule 8.208(c)(2)*]. If the petitioner knows of any other person or entity that has a financial or other interest in the outcome of the proceeding that the petitioner reasonably believes the justices of the appellate court should consider in determining whether to disqualify themselves under the Code of Judicial Ethics, the petitioner's certificate must list that entity or person and identify the nature of the interest of the person or entity [*Cal. Rules of Ct., Rule 8.208(e)(2)*]. If the petitioner knows of no entity or person that must be listed, the petitioner must so state in the certificate [*Cal. Rules of Ct., Rule 8.208(e)(3)*]. A failure to file the certificate may result in the striking of the petition [*Cal. Rules of Ct., Rule 8.488(d)(2)*; *see Cal. Rules of Ct., Rule 8.488(d)(1)* (if certificate does not accompany petition, clerk will notify petitioner that certificate must be filed)].

If the petition requests a temporary stay, the cover of the document must prominently display the notice "STAY REQUESTED" and identify the nature and date of the proceeding or act sought to be stayed [*Cal. Rules of Ct., Rules 8.116(a), 8.486(a)(7)*]. The petition must also (1) identify the trial court and department involved, (2) specify the name and telephone number of the trial judge whose order the request seeks to stay, and (3) explain the urgency [*Cal. Rules of Ct., Rules 8.116(a), 8.486(a)(7)*]. If the petitioner fails to comply with these requirements, the reviewing court may decline to consider the request for a stay [*Cal. Rules of Ct., Rule 8.116(c)*].

If a petitioner for a writ of habeas corpus is not represented by an attorney, the petitioner need not file a supporting memorandum [*Cal. Rules of Ct., Rule 8.380(b)*; *see Cal. Rules of Ct., Rule 8.384*]. Even if the petition is filed by an attorney for the petitioner, there is no specific requirement that a supporting memorandum be filed [*see Cal. Rules of Ct., Rule 8.384*]. Nevertheless, the better practice, when time and circumstances allow, is to include a memorandum supporting the granting of the writ in general and supporting the allegations that the imprisonment or the conditions of the imprisonment are illegal. Any supporting memorandum an attorney submits with the petition must comply with *Cal. Rules of Ct., Rule 8.204(a)* and *(b)* (specifying contents and form of briefs), and any supporting documents submitted by the attorney must comply with *Cal. Rules of Ct., Rule 8.486(c)* (specifying form of supporting documents) [*Cal. Rules of Ct., Rule 8.384(a)(2), (b)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsProhibitionCivil ProcedureSanctionsContemptGeneral OverviewCivil ProcedureAppealsRecords on Appeal

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4-47 California Points & Authorities § 47.08

§ 47.08 Use of Memoranda in Opposing Petition

Within five days after service and filing of a petition for a writ of review [*see Code Civ. Proc. § 1069*] or prohibition [*see Code Civ. Proc. § 1103*], the respondent, any real party in interest, or both, either separately or jointly, may serve and file memoranda in opposition to the petition and, in an appellate court, may state any fact not included in the petition which, in their opinion, is material. In an appellate court, no statement in opposition to the petition is required unless requested by the court. It should also be noted that the appellate court may deny the petition or issue an alternative writ without first requesting the filing of opposition.

Although nominally a respondent, the court that issued the contempt order ordinarily lacks standing to oppose the writ petition, but it may do so if (1) the real party in interest does not respond to the writ petition, and (2) the issue involved directly impacted the operations and procedures of the court or potentially imposed financial obligations that would directly affect the court's operations [*Koehler v. Superior Court (2010) 181 Cal. App. 4th 1153, 1166, 104 Cal. Rptr. 3d 877]* . If these requirements are not met, however, the reviewing court has discretion to treat a brief filed by the respondent court as an amicus brief filed in support of the real party in interest [*see Koehler v. Superior Court (2010) 181 Cal. App. 4th 1153, 1166, 104 Cal. Rptr. 3d 877]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureSanctionsContemptGeneral Overview

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4-47 California Points & Authorities § 47.09

§ 47.09 Related Pleadings and Practice Chapters

For discussion, procedures, and forms for use in contempt proceedings, see California Forms of Pleading and Practice, Ch. 135, *Contempt* (Matthew Bender). For related chapters in that publication containing discussions, procedures, and forms for use in particular contempt proceedings, see:

- Ch. 15, *Affidavits, Certificates, and Declarations*.
- Ch. 26, *Answers*.
- Ch. 108, *Captions and Introductions*.
- Ch. 123, *Complaints and Cross Complaints*.
- Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*.
- Ch. 258, *Family Law Enforcement: General Enforcement Principles and Remedies*.
- Ch. 318, *Judgments*.
- Ch. 372, *Motions and Orders*.
- Ch. 375, *Motions to Strike*.
- Ch. 389, *Nonsuit and Motions for Judgment*.
- Ch. 420, *Prayers*.
- Ch. 518, *Service of Summons and Papers*.

- Ch. 572, *Verification*.

For discussion, procedures, and forms for use in proceedings to review contempt orders or judgments, see California Forms of Pleading and Practice, Ch. 135, *Contempt* (Matthew Bender). For discussion, procedures, and forms for use in particular proceedings to review contempt orders or judgments, see the following chapters:

- Ch. 292, *Habeas Corpus*.
- Ch. 358, *Mandate and Prohibition*.
- Ch. 492, *Review (Certiorari), Writ of*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticePleadingsAnswersCivil ProceduresPleading & PracticePleadingsComplaintsGeneral OverviewCivil ProceduresPleading & PracticePleadingsComplaintsCross-ComplaintsCivil ProceduresPretrial JudgmentsJudgment on the PleadingsCivil ProceduresRemediesWritsCommon Law WritsMandamusCivil ProceduresRemediesWritsCommon Law WritsProhibitionCivil ProceduresSanctionsContemptGeneral Overview

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4-47 California Points & Authorities § 47.10

§ 47.10 Related Points and Authorities Chapters

Related memoranda that may be useful in particular contempt proceedings may be found in the following chapters:

- Ch. 61, *Cross Complaints*.
- Ch. 71, *Demurrers and Motions for Judgment on the Pleadings*.
- Ch. 160, *Motions to Strike*.
- Ch. 205, *Review (Certiorari), Writ of*.

Related memoranda that may be useful in particular proceedings to review contempt orders or judgments may be found in the following chapters:

- Ch. 110, *Habeas corpus*.
- Ch. 150, *Mandate and Prohibition*.
- Ch. 205, *Review (Certiorari), Writ of*.

For a discussion of how to use the forms in this chapter to draft a complete memorandum, or a trial or appellate brief, and for an illustration of a completed memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewCivil ProceduresPleading & PracticePleadingsComplaintsCross-ComplaintsCivil ProceduresPretrial JudgmentsJudgment on the PleadingsCivil

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[Reserved]

§§ 47.11[Reserved]

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PART II. FORMS
A. CONTEMPT PROCEEDINGS

4-47 California Points & Authorities § 47.30

§ 47.30 Supporting Affidavit (or Declaration [Code Civ. Proc. § 2015.5]) Opposing Initiating Affidavit (or Declaration [Code Civ. Proc. § 2015.5]) Charging Indirect Contempt [Code Civ. Proc. § 1211]--Court Without Power in That Facts Stated Insufficient to Constitute Cause of Action in Contempt

[1] FORM

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*],	)	NO. _____
[Plaintiff *or* Petitioner]	)	MEMORANDUM IN SUPPORT OF OPPOSING
vs.	)	_____ [AFFIDAVIT *or* DECLAR-
_____ [*name*],	)	ATION] RE CONTEMPT
[Defendant *or* Respondent].	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

THE COURT IS WITHOUT POWER TO PROCEED IN THE CONTEMPT MATTER BECAUSE PLAINTIFF'S/PETITIONER'S _____ [AFFIDAVIT *or* DECLARATION] FAILS TO ALLEGE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION IN CONTEMPT IN THAT _____ [*specify ground(s), e.g.,* IT DOES NOT SUFFICIENTLY ALLEGE THAT DEFENDANT/RESPONDENT HAD THE ABILITY TO COMPLY WITH THE ORDER AT THE TIME THAT HE/SHE/IT IS ALLEGED TO HAVE VIOLATED THE ORDER].

A. Initiating Affidavit or Declaration as Required to Set Forth Facts Constituting Alleged Contempt. An initiating affidavit or declaration in a proceeding for the adjudication of an indirect contempt must set forth the facts constituting the alleged contempt in order to confer jurisdiction on the court to exercise its contempt powers (*In re Liu (1969) 273 Cal. App. 2d 135, 140, 78 Cal. Rptr. 85*). A sufficient initiating affidavit or declaration is a jurisdictional prerequisite to a proceeding for the adjudication of an indirect contempt, and without one any contempt order is void (*Koehler v. Superior Court (2010) 181 Cal. App. 4th 1153, 1169, 104 Cal. Rptr. 3d 877*).

[*Optional*] **B. Failure to Allege Contemner's Knowledge of Order.** An initiating affidavit is defective if it fails to allege any facts showing that the accused contemner had notice or knowledge of the existence of the order which he or she is charged with violating at the time he or she is claimed to have violated it (*Freeman v. Superior Court (1955) 44 Cal. 2d 533, 537, 282 P.2d 857* ; *Phillips v. Superior Court (1943) 22 Cal. 2d 256, 257, 137 P.2d 838*).

[*EITHER*]

[*Optional*] **C. Failure to Allege Contemner's Past Ability to Comply With Order.** An initiating affidavit or declaration seeking to punish a contemner under *Code of Civil Procedure Section 1218* must allege that the accused contemner had the ability to comply with the order he or she is accused of violating at the time he or she is accused of violating it (*see* *In re Cassil (1995) 37 Cal. App. 4th 1081, 1087, 44 Cal. Rptr. 2d 267* ; *In re Liu (1969) 273 Cal. App. 2d 135, 141, 78 Cal. Rptr. 85* ; *see also* *Koehler v. Superior Court (2010) 181 Cal. App. 4th 1153, 1170, 104 Cal. Rptr. 3d 877*).

[*OR*]

[*Optional*] **C. Failure to Allege Contemner's Present Ability to Comply With Order.** An initiating affidavit or declaration seeking to compel compliance with an order under *Code of Civil Procedure Section 1219* must allege that the accused contemner is presently able to comply with the order he or she is accused of violating (*In re Liu (1969) 273 Cal. App. 2d 135, 141, 78 Cal. Rptr. 85* ; *In re Ny (1962) 201 Cal. App. 2d 728, 731-732, 20 Cal. Rptr. 114* ; *see Koehler v. Superior Court (2010) 181 Cal. App. 4th 1153, 1170, 104 Cal. Rptr. 3d 877*).

[*CONTINUE*]

[*Optional*] **D. Failure to Allege Contemner's Willful Disobedience of Order.** An initiating affidavit is defective if it fails to allege that the accused contemner willfully failed or refused to comply with the order he or she is charged with violating (*Warner v. Superior Court (1954) 126 Cal. App. 2d 821, 826, 273 P.2d 89*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant/Respondent _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of an affidavit or declaration opposing the initiating affidavit or

declaration in an indirect contempt proceeding [*Code Civ. Proc. § 1211*] on the ground that the initiating affidavit or declaration fails to state facts sufficient to constitute a cause of action [*see Code Civ. Proc. § 430.10(e)*] in contempt [*In re Liu (1969) 273 Cal. App. 2d 135, 140, 78 Cal. Rptr. 85* (facts essential to establish jurisdiction in contempt as making of order, notice or knowledge of order, contemner's ability to comply with order, and contemner's willful disobedience of order)].

This form should only be used when the objection to the initiating affidavit or declaration involves the factual sufficiency of the affiant's or declarant's case as well as the adequacy of the allegations contained in the affidavit or declaration since *Code Civ. Proc. § 1211.5*, enacted in 1970, abrogated the rule which made affidavits or declarations fatally defective for failure to state facts sufficient to constitute a cause of action in contempt [*see Freeman v. Superior Court (1955) 44 Cal. 2d 533, 537, 282 P.2d 857]* . Thus, insufficient affidavits and declarations are not fatally defective and do not deprive a court of jurisdiction to hear a contempt matter [*Mossman v. Superior Court (1972) 22 Cal. App. 3d 706, 710, 99 Cal. Rptr. 638]* . If no objection is made to the sufficiency of an affidavit or declaration at the contempt hearing, the trial court must amend an insufficient affidavit or declaration to conform to proof [*Code Civ. Proc. § 1211.5(a)*]. A court may, in addition, order or permit the amendment of an insufficient or defective affidavit or declaration at any stage of the proceedings and further order or permit the proceedings to continue as if the affidavit or declaration had been originally filed as amended [*Code Civ. Proc. § 1211.5(b)*; *see Mossman v. Superior Court (1972) 22 Cal. App. 3d 706, 713, 99 Cal. Rptr. 638* (applying *Code Civ. Proc. § 1211.5(b)* to permit affiant to amend initiating affidavit to allege accused contemner's notice of terms of judgment alleged to be violated)].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, this memorandum may be used to support a petition for a writ of review [*Code Civ. Proc. § 1069*], habeas corpus [*Penal Code § 1474*], or prohibition [*Code Civ. Proc. § 1103*] attacking the sufficiency of evidence to sustain an order of contempt in a proceeding for indirect contempt.

[c] Related Pleading and Practice Forms

For further discussion and forms, including a form of petition for a writ based on insufficiency of the evidence to sustain an order of contempt, see California Forms of Pleading and Practice, Ch. 135, *Contempt* (Matthew Bender).

[3] Discussion of Authorities

[a] Initiating Affidavit or Declaration as Required to Set Forth Facts Constituting Alleged Contempt

In re Liu *(1969) 273 Cal. App. 2d 135, 78 Cal. Rptr. 85* , involved contempt proceedings initiated by a spouse's declaration stating that her ex-husband had willfully disobeyed a temporary restraining order and two other custody orders with respect to the couple's minor children. The trial court issued an order to show cause based on the ex-wife's declaration. At the hearing on the order to show cause, the ex-husband was adjudged in contempt and imprisoned pursuant to *Code Civ. Proc. § 1219* until he purged himself of the contempts by complying with the orders. The ex-husband petitioned for a writ of habeas corpus to secure his release from custody.

The court of appeal granted the writ, finding that the initiating declaration had alleged the contemner's past ability to perform the acts required by the temporary restraining order and custody orders and that the allegation was sufficient if the contemner were to be punished for past contempts under *Code Civ. Proc. § 1218*. However, the allegation was insufficient when, as in this case, *Code Civ. Proc. § 1219* was invoked to compel future compliance with the orders (*273 Cal. App. 2d 135, 141)* . Holding that an initiating affidavit or declaration must set forth the facts constituting the alleged contempt in order to confer jurisdiction on the court to exercise its contempt powers (*273 Cal. App. 2d 135,*

140) , the court specifically held that the ex-wife's declaration was insufficient to confer jurisdiction on the trial court to enforce its orders by imprisonment under *Code Civ. Proc. § 1219* since it did not allege that the desired act was yet within the power of the contemner to perform (*273 Cal. App. 2d 135, 141-142)* . The court also held that the trial court was without jurisdiction to imprison the alleged contemner for the added reason that the act to be compelled--the return of the children to the mother's custody--was not the specific act required to be performed by the terms of the original order he was charged with violating (*273 Cal. App. 2d 135, 143-144)* .

In ***Koehler v. Superior Court*** *(2010) 181 Cal. App. 4th 1153, 104 Cal. Rptr. 3d 877*, the court of appeal reversed and annulled an order of indirect contempt. Among the reasons for the court of appeal's decision was the fact that the superior court had commenced the contempt proceedings on its own and with no initiating affidavit. The court of appeal explained that a sufficient initiating affidavit is a jurisdictional prerequisite to an indirect-contempt proceeding. Without a sufficient affidavit, any contempt order is void (181 Cal. App. 4th 1153, 1169).

[b] Failure to Allege Contemner's Knowledge of Order

In ***Freeman v. Superior Court*** *(1955) 44 Cal. 2d 533, 282 P.2d 857* , contempt proceedings arose out of a spouse's failure to pay attorney's fees and court costs in a dissolution action. The proceedings were initiated by an affidavit alleging, in part, that the nonpaying spouse had full knowledge of the provisions of the order requiring him to pay. In his answering affidavit, the nonpaying spouse denied that he had had knowledge of the order at the time he was charged with violating it and alleged that he was not in court when the order was made. At the hearing, the nonpaying spouse was adjudged in contempt. In his petition for a writ of review, he did not attack the sufficiency of the initiating affidavit but, rather, asserted that the evidence did not show he had notice or knowledge of the order. The Supreme Court affirmed the contempt order when it found that sufficient competent evidence had been introduced which showed that the accused contemner's attorney had been present in court when the order was made and had been served with a copy of the order. Because the trial court had merely resolved a conflict of evidence to determine the fact of the contemner's knowledge, its finding of contempt was not open to review by way of a writ challenging its jurisdiction. In passing on the contemner's petition, the Supreme Court reaffirmed the principle that an initiating affidavit is fatally defective if it fails to allege that the alleged contemner had notice or knowledge of the existence of the order which he was charged with violating at the time he was claimed to have violated it (*44 Cal. 2d 533, 537)* .

In ***Phillips v. Superior Court*** *(1943) 22 Cal. 2d 256, 137 P.2d 838* , a mother was ordered by the terms of an interlocutory decree in a dissolution to give her child over to the custody of the child's grandmother. When she failed to do so, the grandmother submitted an affidavit alleging that the mother had the child in her custody in violation of the order. An order to show cause re contempt issued on the affidavit and the mother was adjudged guilty of contempt. The mother petitioned for a writ of review on the ground that the trial court lacked jurisdiction to act in the contempt matter because the affidavit on which the order to show cause issued was fatally defective for failing to state any facts showing that the alleged contemner had knowledge of the order she was charged with violating. The Supreme Court annulled the order of contempt when it found that the grandmother's affidavit included no allegation that the accused contemner was served with notice of the order, had actual knowledge of its terms, or was present in court when it was made. The fact that the mother was a party to the litigation did not, of itself, charge her with notice of an order made in connection with the litigation. Since the allegation of the contemner's notice or knowledge of the order was a condition precedent to the trial court's exercise of jurisdiction, the Supreme Court held that the trial court had failed to acquire jurisdiction to hear the contempt (*22 Cal. 2d 256, 257)* .

[c] Failure to Allege Contemner's Past Ability to Comply With Order

In re Cassil *(1995) 37 Cal. App. 4th 1081, 44 Cal. Rptr. 2d 267* , arose out of foreclosure proceedings involving an office building. In connection with the foreclosure proceedings, the trial court issued a temporary restraining order appointing a receiver for the building and ordering the defendants to turn over any tenant security deposits to the receiver. When defendants failed to pay over any funds to the receiver, the plaintiff initiated contempt proceedings.

After a hearing, the trial court found defendants in contempt.

The court of appeal granted writs of review and habeas corpus and annulled the judgment of contempt. The court stated that an element of indirect contempt is that the person subject to the order has the ability to comply with the order. When a contempt is punitive in nature, as in this case, the court held that due process requires the moving party to prove its case beyond reasonable doubt (*37 Cal. App. 4th 1081, 1087)* . Defendants had argued that they had no ability to comply with the order because the security deposit funds had long ago been spent and were no longer in existence. Plaintiff argued that defendants nevertheless had the duty to expend their own funds in lieu of the security deposits. Reviewing the record in the case, the court found that, even assuming that defendants did have a duty to utilize their own funds to comply with the order, there was no substantial evidence that defendants had any funds to pay the receiver in lieu of the security deposits. Therefore, the plaintiff had failed to meet its burden of demonstrating that defendants had the ability to comply with the turnover order (*37 Cal. App. 4th 1081, 1088)* .

In re Liu *(1969) 273 Cal. App. 2d 135, 78 Cal. Rptr. 85* is discussed in *§ 47.30[3][a]*.

In ***Koehler v. Superior Court*** *(2010) 181 Cal. App. 4th 1153, 104 Cal. Rptr. 3d 877* , the court of appeal reversed and annulled a superior court's order of indirect contempt based on the contemner's failure to pay previously ordered sanctions. Among the reasons for the court of appeal's decision was the lack of substantial evidence that the contemner had the ability to pay the sanctions. Indeed, the contempt order did not include a finding that the contemner had the ability to pay the sanctions, and there was no initiating affidavit reciting that the contemner had the ability to pay. The court of appeal also noted that, except in child-support cases, where inability to pay is an affirmative defense (*see* *In re Ivey (2000) 85 Cal. App. 4th 793, 798, 102 Cal. Rptr. 2d 447* ; *see also § 47.35*), the party seeking a contempt order has the burden to prove that the contemner has the ability to pay (*181 Cal. App. 4th 1153, 1170* & n.9).

[d] Failure to Allege Contemner's Present Ability to Comply With Order

In ***In re Ny*** *(1962) 201 Cal. App. 2d 728, 20 Cal. Rptr. 114* , contempt proceedings were initiated when a mother failed to obey a court order to deliver physical custody of her two minor children to the children's father. The initiating affidavit or declaration of the father, on which the order to show cause was issued, alleged that the mother had heard the order as it was made and that she thereafter contemptuously failed to deliver the children to their father. At the hearing on the order to show cause, the mother was adjudged in contempt and ordered imprisoned under *Code Civ. Proc. § 1219* until she complied with the order. She then petitioned for a writ of habeas corpus to secure her release from custody. In granting the writ, the court of appeal held that one of the essential facts in establishing jurisdiction in a contempt proceeding is the contemner's ability to render compliance with the order and that the initiating affidavit must state this fact or the court is without jurisdiction (*201 Cal. App. 2d 728, 731)* . The court of appeal found that the initiating affidavit did not affirmatively show that the alleged contemner had physical custody of the children or that she was then able to comply with the order. Accordingly, in its order of contempt, the trial court's finding of the ability to comply was unsupported, and the order incarcerating her until she complied with the order to deliver the children was unauthorized (*201 Cal. App. 2d 728, 732)* .

In re Liu *(1969) 273 Cal. App. 2d 135, 78 Cal. Rptr. 85* is discussed in *§ 47.30[3][a]*. The pertinent holding of ***Koehler v. Superior Court*** *(2010) 181 Cal. App. 4th 1153, 104 Cal. Rptr. 3d 877* , is discussed in *§ 47.30[3][c]*.

[e] Failure to Allege Contemner's Willful Disobedience of Order

In ***Warner v. Superior Court*** *(1954) 126 Cal. App. 2d 821, 273 P.2d 89* , contempt proceedings were initiated by a former wife filing an affidavit in which she alleged a delinquency in the sums of money payable to her as spousal and child support. However, the former wife's affidavit did not accuse the former husband of having failed or refused to make any specific payments at any specific times under the support orders. At the contempt hearing, the former husband was adjudged in contempt and sentenced to imprisonment for his contempts. The accused contemner then petitioned for

a writ of prohibition to restrain enforcement of the contempt order. The court of appeal issued the writ because it found the initiating affidavit insufficient for failure to state facts constituting the contempt charged. More particularly, the initiating affidavit did not allege that the contemner willfully failed or refused to comply with the support orders (*126 Cal. App. 2d 821, 824)* . The affidavit was fatally defective in this respect since, in the absence of an allegation of willful disobedience, the failure to make the required payments was presumed to be as a result of the contemner's honest belief that he was not required to make the payments, especially in light of his assertion of ability and willingness to pay whatever sums were found due (*126 Cal. App. 2d 821, 826-827)* .

[4] Additional Authorities

[a] Failure to Allege Contemner's Present Ability to Comply With Order

In *Anderson v. Superior Court (1998) 68 Cal. App. 4th 1240, 80 Cal. Rptr. 2d 891* , the trial court adjudicated the director of the state Department of Social Services in contempt of court for disobeying the court's order that she cease utilizing certain provisions of the department's manual of to determine eligibility for federal foster care. The court of appeal determined, however, that a later enacted statute divested the director of authority to comply with the trial court's order. Under the under the circumstances of this case, the court held that the trial court erred in its adjudication of contempt and annulled the adjudication of contempt (*68 Cal. App. 4th 1240, 1243, 1250)* .

California Points & Authorities

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CHAPTER 47 CONTEMPT
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A. CONTEMPT PROCEEDINGS

4-47 California Points & Authorities § 47.31

§ 47.31 Supporting Affidavit (or Declaration [Code Civ. Proc. § 2015.5]) Opposing Initiating Affidavit (or Declaration [Code Civ. Proc. § 2015.5]) Charging Indirect Contempt [Code Civ. Proc. § 1211]--Disobedience of Void Order Not a Contempt

[1] FORM

[*Caption. See § 47.30.*]

THE COURT HAS NO JURISDICTION TO PUNISH RESPONDENT/DEFENDANT FOR CONTEMPT BECAUSE THE UNDERLYING ORDER ON WHICH THE CONTEMPT PROCEEDINGS ARE BASED IS VOID IN THAT _____ [*specify reasons why underlying order is void*].

A. Disobedience of Void Orders as Not Contempt. Disobedience of a void order of the issuing court does not constitute a contempt (*Silvagni v. Superior Court (1958) 157 Cal. App. 2d 287, 291, 321 P.2d 15*).

[*Optional*] **B. Order Ineffective if Not Reduced to Writing or Entered in Minutes.** A court lacks jurisdiction to adjudicate a contempt for willful disobedience of an order that is ineffective because it is not reduced to writing or entered in the court's minutes (*In re Marcus (2006) 138 Cal. App. 4th 1009, 1015-1017, 41 Cal. Rptr. 3d 861* ; *Ketscher v. Superior Court (1970) 9 Cal. App. 3d 601, 604-605, 88 Cal. Rptr. 357*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant/Respondent _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of an affidavit or declaration opposing the initiating affidavit or declaration in an indirect contempt proceeding [*Code Civ. Proc. § 1211*] on the ground that the order which the accused contemner is alleged to have violated is void [*Silvagni v. Superior Court (1958) 157 Cal. App. 2d 287, 291, 321 P.2d 15]* .

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

With appropriate modifications, this memorandum may be used to support a petition for a writ of review [*Code Civ. Proc. § 1069*], habeas corpus [*Penal Code § 1474*], or prohibition [*Code Civ. Proc. § 1103*] attacking the validity of an order of contempt.

[b] Related Pleading and Practice Forms

For a form of declaration for use in initiating indirect contempt proceedings, and a form of petition for a writ of review based on the invalidity of the order alleged to have been violated, see California Forms of Pleading and Practice, Ch. 135, *Contempt* (Matthew Bender).

[3] Discussion of Authorities

[a] Disobedience of Void Orders as Not Contempt

In ***Silvagni v. Superior Court*** *(1958) 157 Cal. App. 2d 287, 321 P.2d 15* , a trial court, in orally announcing its decision in a declaratory relief action, ordered the defendant in that action to make and deliver an assignment of stock to the plaintiffs before the entry of judgment. In addition, the trial court ordered the defendant to appear personally on a certain date to show cause why he had not assigned the stocks if that was the case. The defendant's attorney appeared at the hearing on the order to show cause and stated that defendant had made no assignment. At the conclusion of the hearing, the trial court directed the issuance of a warrant of attachment against the defendant to bring him personally to answer for contempt. The defendant then petitioned for a writ of prohibition to restrain the trial court from taking further proceedings to enforce its order directing the issuance of the warrant of attachment.

The court of appeal granted the writ. The court of appeal found, in part, that the trial court's oral pronouncement, which the defendant was accused of disobeying, was not a decision or judgment because written and signed findings of fact and conclusions of law were required in the action. Because disobedience of a void order made in excess of a court's jurisdiction does not constitute a contempt, defendant's failure to assign the stock could not become a contempt until a judgment containing a provision directing such an assignment was entered (*157 Cal. App. 2d 287, 291)* .

[b] Order Ineffective if Not Reduced to Writing or Entered in Minutes

In re Marcus *(2006) 138 Cal. App. 4th 1009, 41 Cal. Rptr. 3d 861* , was a marital dissolution proceeding. After entering a status-only judgment of dissolution, the family court issued a written order in February 2003 setting forth a very specific child-custody and timeshare schedule. By this time the mother and daughter had moved to New York, and the father resided in California. The February 2003 order provided that the mother would have primary physical custody of the daughter during the school year and that the father would have primary custody over the summer and during certain school holidays. The order also permitted the father one visit per month during the times the mother had primary custody, and it specified the times and places of those visits. In particular, the order stated that the October 2003 visit was to take place "in New York from October 24 until October 28" (*138 Cal. App. 4th 1009, 1012)* .

At a settlement conference on August 7, 2003, the parties reached an agreement modifying the custody order, and the agreement was read into the record in open court. Among other things, the parties agreed modify the order concerning the October 2003 visit by striking the words "in New York," although the pickup and return were to take place in New York. (It later became apparent that the parties disagreed about the meaning of this modification: the father contended that it allowed him to travel to California with the daughter during his visit, and the mother contended that it only allowed the father to travel locally with the daughter during his visit.) After the modifications were read into the record, the court stated that the parties' agreement "is an order of the court" and designated the father's attorney to prepare a written order. The written order prepared by the father's attorney specified that pickups and returns were to be in New York, but that the father was free to travel with the child during his monthly visits. The order was signed by the court and filed on October 21; it was served on the mother by mail on October 23, one day before the father's October visit was to begin (*138 Cal. App. 4th 1009, 1012-1013)* .

Before the mother received the signed order, the father informed her of his intention to bring the daughter to California during his October 2003 visit. Believing that this would violate the custody agreement, the mother went to court in New York and obtained a protective order preventing the removal of the daughter (*138 Cal. App. 4th 1009, 1013*).

The father then returned to California and filed a petition for an order to show cause why the mother should not be held in contempt for failing to comply with the court's order confirming the parties' August agreement concerning custody. At the hearing on the contempt petition, it was not disputed that the mother had not had notice of the October 21, 2003 written order. Therefore, the matter proceeded on the assumption that the oral ruling of August 7, 2003, was the basis for the alleged contempt. The trial court held that the mother was in contempt, finding that the August 7 order clearly permitted the father to travel with the daughter during his visitation time, that the mother had failed to take the opportunity to seek an emergency order from the California court (which she could have done through her California attorney), and that the mother had failed to alert the New York court of the existence of the California court's order. To punish the contempt, the trial court imposed a fine and jail time and ordered the mother to perform community service (*138 Cal. App. 4th 1009, 1013-1014)* .

The court of appeal granted the mother's petition for a writ of habeas corpus and annulled the trial court's finding of contempt. The court of appeal explained that the elements of proof necessary to support punishment for contempt are (1) a valid court order of sufficient particularity, (2) the alleged contemnor's knowledge of the order, and (3) noncompliance. Citing *Ketscher v. Superior Court (1970) 9 Cal. App. 3d 601, 88 Cal. Rptr. 357* (discussed immediately below), the court noted that in a case of indirect contempt (i.e., committed outside the presence of the court) it is settled that the first two elements cannot be satisfied unless the court's order is made a matter of record, either by a written order signed by the judge and filed with the court, or by a detailed entry in the court's minutes. Either way, a writing is essential to avoid the uncertainty that can arise when attempting to enforce an oral ruling, since an oral ruling is subject to varying memories and may not be clear or specific (*see Code Civ. Proc. § 1003* (defining "order" as direction of a court or judge, made or entered in writing")). Moreover, an oral ruling is not necessarily the unequivocal decision of the court, which may change its ruling until such time as it is reduced to writing and becomes the order of the court (*138 Cal. App. 4th 1009, 1014-1016)* .

Applying these principles to the present case, the court of appeal found that the oral proceedings in this case were ambiguous and could not serve as the basis for a finding of indirect contempt. The only clear, specific, and unequivocal order was the written order filed on October 21, 2003. Since the mother did not have notice of that order when the alleged contempt occurred, the court of appeal concluded that the elements of contempt had not been established (*138 Cal. App. 4th 1009, 1016-1017)* .

In ***Ketscher v. Superior Court*** *(1970) 9 Cal. App. 3d 601, 88 Cal. Rptr. 357* , the trial court, in an action for injunctive and other relief concerning disputed real property, orally directed the two parties to the lawsuit, who were brothers, to refrain from attacking one another. The contempt proceeding arose after one brother threw a rock through the window of his brother's automobile during a dispute arising from objections to the removal of a fence from the property. The

brother who had thrown the rock was adjudged in contempt at the conclusion of a hearing on an order to show cause. He was then sentenced to five days' imprisonment and petitioned for a writ of prohibition to restrain the trial court's execution of the sentence. In his petition, the brother asserted that the trial court's oral pronouncement was ineffective and, thus, that the trial court lacked jurisdiction to hold him in contempt for violating the order.

The court of appeal granted the writ, agreeing with the brother's assertion of the trial court's lack of jurisdiction. It found that the judge's direction that the brothers refrain from attacking each other was indefinite and, more importantly, was never reduced to writing nor entered in the court's minutes and, therefore, was ineffective. It held that a person could not be held in indirect contempt for willful disobedience of such an ineffective order (*9 Cal. App. 3d 601, 604-605)* .

[4] Additional Authorities

[a] Disobedience of Void Orders as Not Contempt

In *Gates v. Municipal Court (1992) 9 Cal. App. 4th 45, 11 Cal. Rptr. 2d 439* , the court of appeal affirmed a superior court's judgment vacating a contempt conviction. The municipal court had adjudged the sheriff guilty of contempt because the sheriff, to comply with a federal court order limiting the number of inmates that could be held in the county jail, had cited and released some inmates who, under a Penal Code provision, were not eligible for a citation-and-release program. The superior court and court of appeal rested their decisions on the absence of evidence that the sheriff had intentionally violated any order of the municipal court or any duty that the municipal court had appointed the sheriff to perform (*9 Cal. App. 4th 45, 51-52, 60)* . In fact, the municipal court had not issued any order or appointed the sheriff to perform any duty; rather, the presiding judge of the municipal court had merely called the sheriff's attention to the Penal Code violations. In its opinion, the court of appeal pointed out that the sheriff had acted to comply with a federal court order, which he was bound to obey under the *Supremacy Clause*. If there had been a municipal court order and the sheriff had been in violation of it, the court of appeal observed, his duty to obey the supervening federal court order would have been a complete defense to a charge of contempt based on violating the municipal court order (*9 Cal. App. 4th 45, 53-55)* .

[b] Order Ineffective if Not Reduced to Writing or Entered in Minutes

In *In re Littlefield (1992) 9 Cal. App. 4th 329, 11 Cal. Rptr. 2d 703* , a habeas corpus proceeding for review of a contempt conviction of a public defender who refused to obey a trial court's oral order to allow discovery by the prosecutor, the court of appeal observed that the written order adjudging the petitioner to be in contempt provided "a full and complete explanation of the events leading up to and constituting the contempt. Although it would have been preferable for the written order, on its face, to contain the express [oral] order of the court [that the petitioner had disobeyed], its failure to do so does not make the [adjudicating] order jurisdictionally defective. The order [that was disobeyed] is stated with sufficient detail to show that a contempt occurred[], without the aid of extrinsic evidence" (*9 Cal. App. 4th 329, 339)* .

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4-47 California Points & Authorities § 47.32

§ 47.32 Supporting Affidavit (or Declaration [Code Civ. Proc. § 2015.51]) Opposing Initiating Affidavit (or Declaration [Code Civ. Proc. § 2015.5]) Charging Indirect Contempt [Code Civ. Proc. § 1211]--Court Without Jurisdiction to Imprison Contemner When Act to Be Compelled Not Required in Original Order

[1] FORM

[*Caption. See § 47.30.*]

A TRIAL COURT IS WITHOUT JURISDICTION TO IMPRISON A CONTEMNER WHEN THE ACT TO BE COMPELLED BY SUCH IMPRISONMENT IS NOT THE ACT REQUIRED TO BE PERFORMED IN THE ORIGINAL ORDER.

No Jurisdiction to Imprison Contemner When Act to be Compelled Not Required in Original Order. A trial court is without jurisdiction to order the imprisonment of an alleged contemner pursuant to *Section 1219 of the Code of Civil Procedure* until he/she performs an act which is still in his/her power to perform when the act was not required to be performed by the terms of the original order which he/she is charged with violating (*In re Liu (1969) 273 Cal. App. 2d 135, 144, 78 Cal. Rptr. 85*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant/Respondent _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of an opposing affidavit or declaration in an indirect contempt

proceeding [*Code Civ. Proc. § 1211*] which seeks to enforce an order by means of imprisoning the contemner until he or she performs the act required in the original order when the act to be compelled was not required by the terms of the original order [*In re Liu (1969) 273 Cal. App. 2d 135, 144, 78 Cal. Rptr. 85]* .

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

With appropriate modifications, this memorandum may be used to support a petition for a writ of review [*Code Civ. Proc. § 1069*], habeas corpus [*Penal Code § 1474*], or prohibition [*Code Civ. Proc. § 1103*] when the act sought to be compelled pursuant to *Code Civ. Proc. § 1219* is not an act required by the terms of the original order.

[b] Related Pleading and Practice Forms

For a form of declaration for use in initiating indirect contempt proceedings, see California Forms of Pleading and Practice, Ch. 135, *Contempt* (Matthew Bender). For a form of petition for a writ based on the insufficiency of an initiating affidavit or declaration, see California Forms of Pleading and Practice, Ch. 135, *Contempt* (Matthew Bender).

[3] Discussion of Authorities

[a] No Jurisdiction to Imprison Contemner When Act to Be Compelled Not Required in Original Order

For a discussion of the factual background and points of law raised in ***In re Liu*** *(1969) 273 Cal. App. 2d 135, 78 Cal. Rptr. 85* , see the discussion in *§ 47.30[3][a]*.

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4-47 California Points & Authorities § 47.33

§ 47.33 Supporting Initiating Affidavit (or Declaration [Code Civ. Proc. § 2015.5])--Allegation of Contemner's Knowledge Not Required

[1] FORM

	)	
	)	NO. _____
SUPERIOR COURT OF CALIFORNIA	)	MEMORANDUM IN SUPPORT OF INITIATING
COUNTY OF _____	)	_____ [AFFIDAVIT *or* DE-
_____ [*name*],	)	CLARATION] RE CONTEMPT
[Plaintiff *or* Petitioner]	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
[Defendant *or* Respondent].	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE INITIATING _____ [AFFIDAVIT *or* DECLARATION] IS NOT REQUIRED TO ALLEGE CONTEMNER'S KNOWLEDGE OR NOTICE OF ORDER WHEN THE TRIAL COURT TAKES JUDICIAL NOTE THAT CONTEMNER'S ATTORNEY WAS PRESENT IN COURT WHEN THE ORDER WAS MADE.

Allegation of Contemner's Knowledge or Notice of Order Not Required. An affidavit or declaration is not required to allege that a contemner had knowledge or notice of the order he/she is charged with violating if a trial court takes judicial notice that the accused contemner's attorney was present in court when the order was made or that the attorney was served with notice of the order (*Mossman v. Superior Court (1972) 22 Cal. App. 3d 706, 711, 99 Cal. Rptr. 638*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff/Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of an initiating affidavit or declaration in an indirect contempt proceeding [*Code Civ. Proc. § 1211*] when the opposing affidavit or declaration states that the initiating affidavit or declaration fails to allege the contemner's knowledge or notice of the order he or she is charged with violating [*Mossman v. Superior Court (1972) 22 Cal. App. 3d 706, 711, 99 Cal. Rptr. 638]* .

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

With appropriate modifications, this memorandum may be used to oppose a petition for a writ of review [*Code Civ. Proc. § 1069*], habeas corpus [*Penal Code § 1474*], or prohibition [*Code Civ. Proc. § 1103*] when the petition attacks the sufficiency of the initiating affidavit or declaration in a proceeding for indirect contempt for failure to allege the contemner's knowledge or notice of the order he or she is accused of violating.

[b] Related Pleading and Practice Forms

For a form of declaration for use in initiating indirect contempt proceedings, see Ch. 135, *Contempt* in California Forms of Pleading and Practice.

[3] Discussion of Authorities

[a] Allegation of Contemner's Knowledge or Notice of Order Not Required

Mossman v. Superior Court *(1972) 22 Cal. App. 3d 706, 99 Cal. Rptr. 638* , concerned a Missouri judgment ordering an ex-husband to pay alimony and child support. That judgment was recognized in an action brought by the ex-wife in California in which the ex-husband was represented by counsel. Notice of entry of the sister state's judgment was also served on the ex-husband's attorney by mail. Thereafter, the ex-wife initiated contempt proceedings by an affidavit in which she alleged that her ex-husband had willfully disobeyed the order to make alimony and child support payments but failed to allege his knowledge or notice of the order. An order to show cause was issued and a hearing held at which the ex-husband's attorney objected to the trial court's jurisdiction, in part, on the ground that it did not appear from the record that the ex-husband had notice of the entry of the California judgment. The order to show cause was continued to another date and, in the interim, the ex-husband petitioned for a writ of prohibition. The court of appeal granted the writ for the purpose of allowing the ex-wife to amend her affidavit as provided by *Code Civ. Proc. § 1211.5* before the trial court continued the contempt proceedings against the ex-husband. The court of appeal held that a trial court may not supply allegations missing from an initiating affidavit. However a trial court may take judicial notice of the fact that an accused contemner, although not personally present, was represented in court by an attorney who participated in the hearing at which the order alleged to be violated was made. When a trial court takes judicial notice of this fact, a disputable presumption arises that the accused contemner had notice of the order. In addition, when the accused contemner's attorney is served with the order, a similar disputable presumption of notice to the accused contemner arises.

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4-47 California Points & Authorities § 47.34

§ 47.34 Supporting Initiating Affidavit (or Declaration [Code Civ. Proc. § 2015.5])--Allegation of Ability to Comply Not Required When There Is Previous Finding

[1] FORM

[*Caption. See § 47.33.*]

THE INITIATING _____ [AFFIDAVIT *or* DECLARATION] IS NOT REQUIRED TO ALLEGE THE CONTEMNER'S ABILITY TO COMPLY WITH THE ORDER OF WHICH THE CONTEMNER IS CHARGED TO BE IN CONTEMPT WHEN THE COURT HAS PREVIOUSLY FOUND SUCH ABILITY.

Allegation of Contemner's Ability to Comply Not Required When Court Has Already Found Ability. An affidavit or declaration is not required to allege that the contemner has the ability to comply with the order he/she is charged with violating when the court has already found the contemner's ability to comply with its order at the time the order was made (*In re Ivey (2000) 85 Cal. App. 4th 793, 798-802, 102 Cal. Rptr. 2d 447* ; *Sorell v. Superior Court (1967) 248 Cal. App. 2d 157, 163, 56 Cal. Rptr. 222*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff/Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of an initiating affidavit or declaration in an indirect contempt proceeding [*Code Civ. Proc. § 1211*] when the opposing affidavit or declaration states that the initiating affidavit or

declaration [*Code Civ. Proc. § 2015.5*] fails to allege the contemner's ability to comply with the order he or she is charged with violating [*Sorell v. Superior Court (1967) 248 Cal. App. 2d 157, 163, 56 Cal. Rptr. 222]* .

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

With appropriate modifications, these points and authorities may be used to oppose a petition for a writ of review [*Code Civ. Proc. § 1069*], habeas corpus [*Penal Code § 1474*], or prohibition [*Code Civ. Proc. § 1103*] when the petition attacks the sufficiency of the initiating affidavit or declaration in a proceeding for indirect contempt for failure to allege the contemner's ability to comply with the order he or she is accused of violating.

[b] Related Pleading and Practice Forms

For a form of declaration for use in initiating indirect contempt proceedings, see California Forms of Pleading and Practice, Ch. 135, *Contempt* (Matthew Bender).

[3] Discussion of Authorities

[a] Allegation of Contemner's Ability to Comply Not Required When Court Has Already Found Ability

In ***In re Ivey*** *(2000) 85 Cal. App. 4th 793, 102 Cal. Rptr. 2d 447* , the family law court found a father in contempt for failing to pay court-ordered attorneys' fees and expert witness fees in connection with a child-custody and support proceeding. The father petitioned for a writ of habeas corpus, contending that his ability to pay was an element of the contempt that had not been pleaded or proved in the contempt proceeding. The court of appeal denied the petition, holding that if a family law order to pay fees or support includes an implied determination of the ability to pay, the ability to pay will not be an element of the charge of contempt; rather, inability to pay is an affirmative defense that must be raised by the contemner. The only time the ability to pay becomes an element of the offense is when the alleged contempt occurs many years after the underlying order (*85 Cal. App. 4th 793, 798-801)* . The court rejected a contention that its holding should be limited to orders to pay child support under *Code Civ. Proc. § 1209.5*, which expressly provides that ability to pay court-ordered child support is not an element of contempt. The court noted that longstanding California precedent makes the principles of § 1209.5 applicable to other family law orders (*85 Cal. App. 4th 793, 801-802)* .

In ***Sorell v. Superior Court*** *(1967) 248 Cal. App. 2d 157, 56 Cal. Rptr. 222* , contempt proceedings arose from a husband's failure to obey an order requiring him to pay temporary support to his wife and attorney's fees to her attorney in a dissolution action. The initiating declaration submitted by the wife's attorney alleged, in part, that the husband, an attorney, had received sums of money from various legal matters he had handled since the time the order of payment had been made. The husband submitted no counter declarations or counter affidavits. At the hearing on the order to show cause re contempt, the trial court adjudged the husband in contempt and sentenced him to imprisonment. In its contempt order, the trial court found that the husband had had the ability to comply with the original order. The husband petitioned for a writ of review asserting that the wife's attorney had no standing to seek attorney's fees because he was not a party to the dissolution action and that the initiating declaration was insufficient for failure to allege the husband's ability to comply with the payment order. The court of appeal affirmed the contempt order and held that the wife's attorney had standing to seek attorney's fees by means of a contempt proceeding. With respect to the sufficiency of the initiating declaration, the court of appeal found that an affidavit or declaration was not required to allege that the contemner had the ability to comply with the order he was charged with violating when the court had already found the contemner's ability to comply at the time it issued its original order. In the instant case, the court granting the dissolution had found that the husband had the ability to make the required payments at the time it issued its order so that no allegation of ability to comply was required in the initiating declaration (*248 Cal. App. 2d 157, 163)* .

A special provision governs the failure to comply with an order for child support. *Code Civ. Proc. § 1209.5* provides that when a court of competent jurisdiction makes an order compelling a parent to furnish support, proof that such order was made, filed, and served on the parent or proof that the parent was present in court at the time the order was pronounced and proof of noncompliance therewith shall be prima facie evidence of a contempt of court. It has been held that proof of these basic facts proves the entire contempt, and once contempt is proved, any excuse or justification, such as inability to pay, is a matter of defense [*Moss v. Superior Court (1998) 17 Cal. 4th 396, 425, 71 Cal. Rptr. 2d 215, 950 P.2d 59* ; *In re Feiock (1989) 215 Cal. App. 3d 141, 147, 263 Cal. Rptr. 437* ; *see In re Ivey (2000) 85 Cal. App. 4th 793, 798-802, 102 Cal. Rptr. 2d 447* (longstanding California precedent makes principles of *Code Civ. Proc. § 1209.5* applicable to family law orders other than support orders, such as orders to pay attorneys' fees)].

[4] Additional Authorities

[a] Allegation of Contemner's Ability to Comply Not Required When Court Has Already Found Ability

In *Mossman v. Superior Court (1972) 22 Cal. App. 3d 706, 99 Cal. Rptr. 638* , an ex-wife initiated contempt proceedings by an affidavit in which she alleged that her ex-husband had willfully disobeyed a judgment ordering him to make alimony and child support payments but failed to allege his ability to comply with the order. At the hearing on the order to show cause, the ex-husband's attorney objected to the trial court's jurisdiction, in part, on the ground that it did not appear from the ex-wife's affidavit that the ex-husband had the ability to comply with the order. In granting a writ of prohibition for the purpose of allowing the ex-wife to amend her affidavit as provided by *Code Civ. Proc. § 1211.5*, the court of appeal held that the ex-wife's affidavit was sufficient even though it did not allege the ex-husband's ability to make the payments ordered because the court originally making the order had found the ex-husband's ability to make such payments at the time it had the order. Therefore, the ex-wife was only required to allege the making of the order and her ex-husband's disobedience of it. Moreover, the ex-husband had the opportunity to offer any legitimate excuse for noncompliance with the order at the hearing on the order to show cause.

California Points & Authorities

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Volume 4 Chapters 40-49 CLAIM & DELIVERY---to---CONTINUANCE
CHAPTER 47 CONTEMPT
PART II. FORMS
A. CONTEMPT PROCEEDINGS

4-47 California Points & Authorities § 47.35

§ 47.35 Supporting Initiating Affidavit (or Declaration [Code Civ. Proc. § 2015.5])--Contemner Has Burden of Proving Nonability to Comply With Support Order [Code Civ. Proc. § 1209.5]

[1] FORM

[*Caption. See § 47.33.*]

THE ALLEGED CONTEMNER _____ [CANNOT *or* HAS FAILED TO] MEET HIS/HER BURDEN OF PROOF ON THE ISSUE OF ABILITY TO COMPLY WITH THE SUPPORT ORDER.

Contemner Has Burden of Proving Nonability to Comply With Support Order. Ability to comply with a support order is not an element of the contempt that must be proven beyond a reasonable doubt by the petitioner. It is an affirmative defense that must be proven by a preponderance of the evidence by the alleged contemner (*Moss v. Superior Court (1998) 17 Cal. 4th 396, 425, 71 Cal. Rptr. 2d 215, 950 P.2d 59*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff/Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This form may be used to support an initiating affidavit or declaration in an indirect contempt proceeding [*Code Civ. Proc. § 1211*]. The basis of these points and authorities is that the burden of proof on the issue of an alleged contemner's ability to comply with a court's support order under *Code Civ. Proc. § 1209.5* is on the alleged contemner. Therefore, the alleged contemner must prove by a preponderance of the evidence that he or she is not able to comply with the

court's support order.

From a tactical standpoint, counsel may wish to use these points and authorities in a reply brief after an alleged contemner has contended that the initiating declaration fails to allege ability to comply or that the petitioner is unable to prove beyond a reasonable doubt that the contemner is able to comply with the order.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

With appropriate modifications, these points and authorities may be used to oppose a petition for a writ of review [*Code Civ. Proc. § 1069*], habeas corpus [*Penal Code § 1474*], or prohibition [*Code Civ. Proc. § 1103*] when the petition attacks the sufficiency of the initiating affidavit or declaration in a proceeding for indirect contempt for failure to allege the contemner's ability to comply with the order he or she is accused of violating. This form may also be used in a trial brief or appellate brief.

[b] Related Pleading and Practice Forms

For a form of declaration for use in initiating indirect contempt proceedings, see California Forms of Pleading and Practice, Ch. 135, *Contempt* (Matthew Bender).

[3] Discussion of Authorities

[a] Contemner Has Burden of Proving Nonability to Comply With Support Order

In ***Moss v. Superior Court*** *(1998) 17 Cal. 4th 396, 71 Cal. Rptr. 2d 215, 950 P.2d 59* , a "Declaration for Contempt" was executed by the custodial parent alleging that a judgment of dissolution ordered her noncustodial parent to pay a specified amount of support each month for the two children of the marriage. The declaration alleged that the noncustodial parent had knowledge of the order and was able to comply with each order when it was disobeyed. No payments were made during a specified period of time. The noncustodial parent was unemployed when the support order was made and the amount to be paid was based on his ability to earn a certain gross income per month. The declaration alleged 24 contempt counts and the court treated each of the 24 dates on which a payment had not been made as a separate count. The superior court issued an order to show cause directing the noncustodial parent to appear and show cause why he should not be found guilty of contempt for willful disobedience of the support order. The trial court held that the burden of proving inability to comply lay with the noncustodial parent and observed that there had been no evidence whatsoever that he was not able to work. The court found that the noncustodial parent had the ability to pay something in child support based on evidence before the court, and found him guilty of the 24 counts of contempt.

The noncustodial parent filed a petition for writ of mandate in the court of appeal, seeking to set aside the contempt judgment on the ground that, although he raised the issue of inability to pay, the custodial parent presented no evidence that he had any resources with which to pay child support and therefore had the ability to comply with the order. The court concluded that it was bound by the Supreme Court's decision in *Ex parte Todd (1897) 119 Cal. 57* , which was recognized as binding precedent in *In re Jennings (1982) 133 Cal. App. 3d 373* , and reluctantly held that to impose a contempt sanction in those circumstances is beyond the power of the court. The court of appeal annulled the trial court's judgment of contempt, and invited the Supreme Court to reconsider *Ex parte Todd* at least in the context of child support. The Supreme Court granted the custodial parent's petition for review.

The Supreme Court affirmed the judgment of the court of appeal, on the ground that holding that a willfully unemployed, nonsupporting parent subject to contempt sanctions if the parent fails to comply with a child support order might be deemed an unanticipated change in the law, and the custodial parent did not carry her burden of proof under

the existing law by showing that the alleged contemner had the actual financial ability to comply with the order. The Court addressed the burden of proof in the contempt proceedings for the Court, however, and concluded that inability to comply with a child support order is an affirmative defense. The alleged contemner must prove inability to comply by a preponderance of the evidence which was not done in the case before the Court (*17 Cal. 4th 396, 425)* . Ability to comply with a support order is not an element of the contempt which must be proven beyond a reasonable doubt by the petitioner. It is an affirmative defense which must be proven by a preponderance of the evidence by the alleged contemner (*17 Cal. 4th 396, 425)* .

The apparent basis for *Ex parte Todd (1897) 119 Cal. 57* , *above*, was either an assumption that employment sought under even an indirect threat of imprisonment for violation of the support order constituted involuntary servitude or a belief that imposition of a contempt or criminal sanction for failure to pay support constituted imprisonment for debt. The Supreme Court disapproved *Ex parte Todd (1897) 119 Cal. 57* insofar as it might be read to apply to child support orders.

California Points & Authorities

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CHAPTER 47 CONTEMPT
PART II. FORMS
A. CONTEMPT PROCEEDINGS

4-47 California Points & Authorities § 47.36

§ 47.36 Supporting Initiating Affidavit (or Declaration [Code Civ. Proc. § 2015.5])--Combination of Affidavits or Declarations Permitted

[1] FORM

[*Caption. See § 47.33.*]

_____ [AFFIDAVITS *or* DECLARATIONS] MAY BE COMBINED TO STATE FACTS SUFFICIENT TO STATE CAUSE OF ACTION IN CONTEMPT.

Combination of Affidavits or Declarations Permitted to State Cause of Action in Contempt. Several affidavits or declarations may be combined or grouped, if necessary, to embrace all essential facts constituting a contempt (*In re Morelli (1970) 11 Cal. App. 3d 819, 828, 91 Cal. Rptr. 72* ; *In re Roth (1934) 3 Cal. App. 2d 226, 236, 39 P.2d 490*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff/Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of an initiating affidavit or declaration in an indirect contempt proceeding [*Code Civ. Proc. § 1211*] when the opposing affidavit or declaration states that the initiating affidavit or declaration fails to state the essential facts constituting a contempt. This memorandum asserts that the essential facts constituting a contempt may be contained in several affidavits (or declarations [*Code Civ. Proc. § 2015.5*]) combined or grouped for the purpose of stating the necessary elements of a contempt [*In re Roth (1934) 3 Cal. App. 2d 226, 236,*

39 P.2d 490] .

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

With appropriate modifications, these points and authorities may be used to oppose for a writ of review [*Code Civ. Proc. § 1069*], habeas corpus [*Penal Code § 1474*], or prohibition [*Code Civ. Proc. § 1103*] when the petition attacks the sufficiency of an initiating affidavit or declaration in a proceeding for indirect contempt for stating all of the essential facts constituting a contempt wholly on information and belief.

[b] Related Pleading and Practice Forms

For a form of declaration for use in initiating indirect contempt proceedings, see California Forms of Pleading and Practice, Ch. 135, *Contempt* (Matthew Bender).

[3] Discussion of Authorities

[a] Combination of Affidavits or Declarations Permitted to State Cause of Action in Contempt

In ***In re Morelli*** *(1970) 11 Cal. App. 3d 819, 91 Cal. Rptr. 72* , at a hearing on an order to show cause, an intended nonparty expert witness in a personal injury action was adjudged in contempt of court of failure to appear at a deposition to which he had been validly subpoenaed. The contemner, sentenced to jail and ordered to pay a fine, petitioned for a writ of habeas corpus. One of his contentions was that not one document but several contained the papers supporting the trial court's issuance of the order to show cause. In discussing this contention, the court of appeal cited *In re Roth (1934) 3 Cal. App. 2d 226, 39 P.2d 490* , for the proposition that support for issuance of an order to show cause re contempt may be provided by a combination of documents so that the trial court was not deprived of its jurisdiction to try the contempt. Finding no merit in the foregoing contention of the contemner or in other contentions raised by him, the court of appeal denied the writ (*11 Cal. App. 3d 819, 828)* .

In re Roth *(1934) 3 Cal. App. 2d 226, 39 P.2d 490* , involved contempt proceedings initiated by an investigator's affidavit which was based wholly on information and belief except for allegations as to the affiant's status as an investigator. The affidavit recited a series of acts and transactions in which several contemners were alleged to have participated and of which the affiant-investigator had been informed but stated no source for any of the affiant's information. The trial court issued an order to show cause, and, at the hearing on the order, the alleged contemner appeared and objected to the trial court's jurisdiction based on the foregoing affidavit. The trial court found the alleged contemner guilty of contempt and imposed a jail sentence and fine. Thereafter, the contemner sought release by means of a petition for writ of habeas corpus of the ground that the initiating affidavit failed to confer jurisdiction because the statement of facts was based wholly on information and belief. In granting the writ, discharging the alleged contemnor, and exonerating his bail on the foregoing ground, the court of appeal also found that *Code Civ. Proc. § 1211* does not require all of the essential facts of a contempt to be alleged in a single affidavit based on a single affiant's knowledge. Rather, several affidavits could be combined or grouped, if necessary, to embrace all of the essential facts in one document or as part of a master affidavit or petition (*3 Cal. App. 2d 226, 236)* .

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4-47 California Points & Authorities §§ 47.37-47.49

[Reserved]

§§ 47.37[Reserved]

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B. REVIEW OF CONTEMPT PROCEEDINGS

4-47 California Points & Authorities § 47.50

§ 47.50 Supporting Petition [Code Civ. Proc. § 1069] for Writ of Review [Code Civ. Proc. § 1068]--For Relief From Order of Contempt [Code Civ. Proc. § 1222]--General Form

[1] FORM

[CIVIL NO. _____]

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA
[*OR*]
IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
_____ APPELLATE DISTRICT
[DIVISION _____]
[*OR*]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____,
APPELLATE DIVISION

_____ [*name*],	)	
Petitioner,	)	
vs.	)	
THE COURT OF APPEAL OF THE STATE OF	)	[CIVIL NO. _____]
CALIFORNIA FOR THE _____	)	MEMORANDUM IN SUPPORT OF PETITION
APPELLATE DISTRICT,	)	FOR WRIT OF REVIEW
[*OR*]	)	Date: _____
THE SUPERIOR COURT OF THE STATE OF	)	Time: _____
CALIFORNIA FOR THE [CITY AND] COUNTY	)	Location: _____
OF _____,	)	[Judge: _____]
[*OR*]	)	Date Action Filed: _____

_____ [*Name of board or officer or other person having custody of record or proceedings to be satisfied*] [*CONTINUE*] Respondent[,] [_____ (*name*), Real Party in Interest].	))))	[Trial Date: _____]

AN ORDER OR JUDGMENT OF CONTEMPT IS PROPERLY REVIEWED BY A WRIT OF REVIEW.

A. Order of Contempt Final. A judgment or order of contempt is final and conclusive (*Code Civ. Proc. § 1222*).

B. Nonappealability of Contempt Order. A judgment or order made in a contempt proceeding is not appealable (*In re Buckley (1973) 10 Cal. 3d 237, 259, 110 Cal. Rptr. 121, 514 P.2d 1201* ; *Butler v. Butler (1967) 255 Cal. App. 2d 132, 135, 62 Cal. Rptr. 825*).

C. Statutory Authority for Writ. A writ of review may be granted to review the proceedings of an inferior tribunal which has acted in excess of its jurisdiction and where there is no right of appeal and adequate remedy (*Code Civ. Proc. § 1068*).

D. When Writ Lies. A writ of review lies to review and annul a contempt order rendered without or in excess of jurisdiction (*Chula v. Superior Court (1962) 57 Cal. 2d 199, 204, 18 Cal. Rptr. 507, 368 P.2d 107* ; *Freeman v. Superior Court (1955) 44 Cal. 2d 533, 536, 282 P.2d 857*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition [*Code Civ. Proc. § 1069*] for a writ of review [*Code Civ. Proc. § 1068*] of a contempt proceeding [*Code Civ. Proc. § 1222*]. This is for use only as a general form, and the practitioner should examine subsequent forms [*see §§ 47.53 -47.61*] for authority supporting various factual situations.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms of petitions for writs of review for use in contempt proceedings, see California Forms of Pleading and Practice, Ch. 135, *Contempt* (Matthew Bender). For forms for use in petitioning for writs of review generally, see

California Forms of Pleading and Practice, Ch. 492, *Review (Certiorari), Writ of.*

[c] Related Memorandum

For forms of memoranda for use in supporting or opposing petitions for writs of review generally, see Ch. 492, *Review (Certiorari), Writ of.*

[3] Discussion of Authorities

[a] Nonappealability of Contempt Order

In ***In re Buckley*** *(1973) 10 Cal. 3d 237, 110 Cal. Rptr. 121, 514 P.2d 1201* , an attorney was cited for direct contempt for his remark to the judge in a criminal trial that the trial "court obviously doesn't want to apply the law." The court assessed a fine and imposed a jail sentence on the attorney with sentence stayed until the conclusion of the trial. The attorney petitioned for a writ of habeas corpus to annual the contempt order. The attorney contended, in part, that California procedure in contempt matters denied him equal protection of the law because it failed to provide for a stay or appeal as a matter of right. The Supreme Court denied the writ and affirmed that under *Code Civ. Proc. § 1222* an order made in a contempt proceeding was not appealable. It disposed of the contemner-attorney's contention of the denial of equal protection when it held that the nonappealability of contempt orders did not discriminate against him. The Supreme Court stated that the procedure for review by means of writs of review or habeas corpus safeguarded the contemner's right to a review of the contempt proceedings just as the usual appellate practice entitled a contemner convicted under *Penal Code § 166* (i.e., proceedings for misdemeanor contempt) to a review (*10 Cal. 3d 237, 259*).

In ***Butler v. Butler*** *(1967) 255 Cal. App. 2d 132, 62 Cal. Rptr. 825* , a husband and wife dissolved their marriage after agreeing to a property settlement which provided for support of the couple's minor children. Later, the ex-wife filed an order to show cause for a modification of the child support agreement and commenced contempt proceedings by filing a declaration alleging the ex-husband's failure to make required payments under the marriage termination agreement. At the hearing, the ex-husband's motion to dismiss the contempt proceeding for lack of jurisdiction was granted, as was his motion to take the modification matter off the calendar. The ex-wife then filed a notice of appeal. The court of appeal, in dismissing the attempted appeal, held that an order of dismissal of a contempt proceeding was not an appealable order under *Code Civ. Proc. § 1222* (*255 Cal. App. 2d 132, 135*).

[b] When Writ Lies

In ***Chula v. Superior Court*** *(1962) 57 Cal. 2d 199, 18 Cal. Rptr. 507, 368 P.2d 107* , an attorney failed to appear in court to represent his criminal client. The trial court issued an order to show cause why the attorney should not be punished for contempt for failure to appear. At the hearing on the order to show cause, the attorney was adjudged in contempt and a term of imprisonment imposed. The attorney then petitioned for a writ of review. In affirming the order of contempt, the Supreme Court found that the order was not void for failing to state facts showing him guilty of contempt. In response to the question of whether the attorney's acts were sufficiently contemptuous to give the trial court jurisdiction to punish him for contempt, the Supreme Court answered in the affirmative, holding that the sole function of a writ of review in a contempt matter was to annul proceedings taken in excess of jurisdiction. Whether acts complained of constituted a contempt was, thus, a jurisdictional question. A reviewing court considered evidence only for the purpose of ascertaining whether the trial court had any substantial evidence before it with which to sustain its jurisdiction. Only in the absence of any evidence showing that an actual contempt was committed, should the contempt order be annulled. The Supreme Court examined the record and found there was substantial evidence to support the trial court's finding that the attorney had the ability to appear at the ordered time and place and that he, nevertheless, failed to appear without sufficient reason or excuse (*57 Cal. 2d 199, 204*).

The factual background of ***Freeman v. Superior Court*** *(1955) 44 Cal. 2d 533, 282 P.2d 857* , is discussed in *§ 47.30[3][b]*. In affirming the trial court's order of contempt, the Supreme Court restated the rule that a writ of review

only lies to review and annul a contempt order rendered without or in excess of a court's jurisdiction. However, because the trial court had merely resolved a conflict of evidence to determine the fact of the contemner's knowledge, the Court held that the trial court's determination was not open to review by way of a writ challenging its jurisdiction to adjudicate the contempt (*44 Cal. 2d 533, 536*).

[4] Additional Authorities

[a] When Writ Lies

In *Coursey v. Superior Court (1987) 194 Cal. App. 3d 147, 239 Cal. Rptr. 365* , the court of appeal annulled a contempt judgment, holding that there was insufficient evidence that a custodial parent had the ability to comply with a visitation order or that she willfully violated that order. On review of a contempt adjudication, the sole question is one of the trial court's jurisdiction to render the judgment, and in such a case the review of the evidence is limited to determining whether there was any substantial evidence to sustain the trial court's jurisdiction (*Coursey v. Superior Court (1987) 194 Cal. App. 3d 147, 154, 239 Cal. Rptr. 365*).

In *San Diego Teachers Assn. v. Superior Court of San Diego County (1979) 24 Cal. 3d 1* , the court of appeal had summarily denied an application by a union and its president for a writ to review contempt orders finding them both guilty of violating a restraining order and a preliminary injunction by conducting a strike and fining them both and sentencing the president to jail. The Supreme Court granted hearing and ordered issuance of the writ. Petitioners were attacking the validity of the restraining order and preliminary injunction, and the Court stated, citing *In re Berry (1968) 68 Cal. 2d 137, 146-149, 65 Cal. Rptr. 273, 436 P.2d 273* , that a contempt conviction may be annulled when issuance of the order was beyond the court's authority. The Supreme Court annulled the contempt orders on the ground that the Public Employment Relations Board (PERB) had exclusive initial jurisdiction to determine whether strikes by public school employee organizations recognized or certified as exclusive representatives [*Gov. Code § 3540.1(e)*] are unfair labor practices and what, if any, remedies PERB should pursue.

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B. REVIEW OF CONTEMPT PROCEEDINGS

4-47 California Points & Authorities § 47.51

§ 47.51 Supporting Petition [Penal Code § 1474] for Writ of Habeas Corpus [Penal Code § 1475]--For Relief From Order of Contempt [Code Civ. Proc. § 1222]--General Form

[1] FORM

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA
[*OR*]
IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
_____ APPELLATE DISTRICT
[DIVISION _____]
[*OR*]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____,
APPELLATE DIVISION

In _____ [re *or* the Matter of the Application of] _____ [*name*], Petitioner, [in Behalf of _____ (*name*),] _____ [for a Writ of *or* on] Habeas Corpus.	)))))))))	NO. _____ MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS Date: _____ Time: _____ Location: _____ [Judge: _____] Date Action Filed: _____ [Trial Date: _____]

_____

AN ORDER OR JUDGMENT OF CONTEMPT IS PROPERLY REVIEWED BY A WRIT OF HABEAS CORPUS.

A. Order of Contempt Final. [*See § 47.50, Paragraph A.*]

B. Nonappealability of Contempt Order. [*See § 47.50, Paragraph B.*]

C. Statutory Authority for Writ. A person unlawfully restrained of his/her liberty may prosecute a writ of habeas corpus (*Penal Code § 1473*).

D. When Writ Lies. A writ of habeas corpus is an appropriate remedy to halt the enforcement of an invalid judgment of contempt and to review the jurisdiction of a trial court to punish and imprison for contempt (*In re Blaze (1969) 271 Cal. App. 2d 210, 211, 76 Cal. Rptr. 551*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition [*Penal Code § 1474*]) for a writ of habeas corpus [*Penal Code § 1475*] seeking relief from a contempt proceeding [*Code Civ. Proc. § 1222*]. It is for use only as a general form, and the practitioner should examine subsequent forms [*see §§ 47.53 -47.61*] for authority supporting various factual situations.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms of petitions for writs of habeas corpus seeking relief from contempt proceedings, see California Forms of Pleading and Practice, Ch. 135, *Contempt* (Matthew Bender). For forms for use in petitioning for writs of habeas corpus generally, see California Forms of Pleading and Practice, Ch. 292, *Habeas Corpus* .

[c] Related Memorandum

For forms of memoranda for use in supporting or opposing petitions for writs of habeas corpus generally, see Ch. 110, *Habeas Corpus* .

[3] Discussion of Authorities

[a] When Writ Lies

In ***In re Blaze*** *(1969) 271 Cal. App. 2d 210, 76 Cal. Rptr. 551* , contempt proceedings were initiated by an ex-husband's declaration in support of an order to show cause re contempt alleging that his former wife had violated the terms of orders made in the course of their dissolution proceedings. At the hearing on the order to show cause, the

ex-wife was adjudged in contempt and consecutive sentences of imprisonment imposed. She then petitioned for a writ of habeas corpus to review the contempt order. The court of appeal found that a writ of habeas corpus was an appropriate remedy to halt the enforcement of an invalid judgment of contempt and to review the jurisdiction of a trial court to punish and imprison for contempt (*In re Blaze (1969) 271 Cal. App. 2d 210, 211, 76 Cal. Rptr. 551*).

[4] Additional Authorities

[a] When Writ Lies

In *In re De La Parra (1986) 184 Cal. App. 3d 139, 228 Cal. Rptr. 864* , petitioner sought relief from a superior court order imposing a jail term for contempt for refusal to answer four interrogatories relating to his business interests in certain Mexican computers on the ground that Mexican law prevented him from divulging that information. In granting a writ of habeas corpus annulling petitioner's conviction of contempt, the court of appeal pointed out that habeas corpus is a suitable remedy to review a contempt citation and that, while relief in the form of a writ of prohibition is also appropriate to prevent imposition of unauthorized discovery sanctions, habeas corpus is the correct vehicle when the sanction imposed is imprisonment (*In re De La Parra (1986) 184 Cal. App. 3d 139, 141, 228 Cal. Rptr. 864*).

In *In re Jennings (1982) 133 Cal. App. 3d 373, 184 Cal. Rptr. 53* , petitioner sought relief by petition for writ of habeas corpus from a judgment of the superior court imposing a jail term for contempt for failure to pay spousal support and attorney's fees. The court of appeal considered the writ, holding that, while a decision of contempt was not appealable, the judgment may be attacked by writ, and review by habeas corpus was available if the contemner was imprisoned or otherwise deprived of his liberty (*In re Jennings (1982)133 Cal. App. 3d 373, 375, 184 Cal. Rptr. 53*).

In *In re Abrams (1980) 108 Cal. App. 3d 685, 166 Cal. Rptr. 749* , petitioner was convicted of criminal contempt for disobeying a subpoena duces tecum directing him to appear as a witness at the trial of a civil action. The subpoena was served on petitioner's attorney rather than on petitioner. Petitioner sought a writ of habeas corpus to vacate his conviction on the ground the court lacked personal jurisdiction over him. In annulling the conviction of contempt on the ground that *Code Civ. Proc. § 1987* requires personal service as a prerequisite to punishment for disobeying a subpoena, the court held that habeas corpus is a proper procedure to challenge the conviction (*In re Abrams (1980) 108 Cal. App. 3d 685, 687, 166 Cal. Rptr. 749*).

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B. REVIEW OF CONTEMPT PROCEEDINGS

4-47 California Points & Authorities § 47.52

§ 47.52 Supporting Petition [Code Civ. Proc. § 1103] for Writ of Prohibition [Code Civ. Proc. § 1102]--For Relief From Contempt Proceedings [Code Civ. Proc. §§ 1209-1222]--General Form

[1] FORM

[CIVIL NO. _____]

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA
[*OR*]
IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
_____ APPELLATE DISTRICT
[DIVISION _____]
[*OR*]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____,
APPELLATE DIVISION

_____ [*name*],)	
Petitioner,)	
vs.)	
THE COURT OF APPEAL OF THE STATE OF)	[CIVIL NO. _____]
CALIFORNIA FOR THE _____)	MEMORANDUM IN SUPPORT OF PETITION
APPELLATE DISTRICT,)	FOR WRIT OF PROHIBITION
[*OR*])	Date: _____
THE SUPERIOR COURT OF THE STATE OF)	Time: _____
CALIFORNIA FOR THE [CITY AND] COUNTY)	Location: _____
OF _____,)	[Judge: _____]
[*OR*])	Date Action Filed: _____

_____ [*Name of board or officer or other person having custody of record or proceedings to be satisfied*] [*CONTINUE*] Respondent[,] [_____ (*name*), Real Party in Interest].	))))	[Trial Date: _____]

A CONTEMPT PROCEEDING IS PROPERLY REVIEWED BY A WRIT OF PROHIBITION.

A. Order of Contempt Final. [*See § 47.50, Paragraph A.*]

B. Nonappealability of Contempt Order. [*See § 47.50, Paragraph B.*]

C. Statutory Authority for Writ. A writ of prohibition may be issued to arrest the proceedings of an inferior tribunal which are without or in excess of the tribunal's jurisdiction where there is not an adequate remedy in the ordinary course of law (*Code Civ. Proc. §§ 1102, 1103*).

D. When Writ Lies. A writ of prohibition lies when a court acts in excess of its jurisdiction in permitting the improper prosecution of contempt proceedings (*Safer v. Superior Court (1975) 15 Cal. 3d 230, 242, 124 Cal. Rptr. 174, 540 P.2d 14*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition [*Code Civ. Proc. § 1103*] for a writ of prohibition [*Code Civ. Proc. § 1102*] when the trial court has acted in excess of its jurisdiction in permitting the improper prosecution of a contempt proceeding [*Code Civ. Proc. § 1222*]. It is for use only as a general form, and the practitioner should examine subsequent forms [*see §§ 47.53 -47.61*] for authority supporting various factual situations.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms of petitions for writs of prohibition for use in seeking relief from contempt proceedings, see California Forms of Pleading and Practice, Ch. 135, *Contempt* (Matthew Bender). For forms for use in petitioning for writs of prohibition generally, see California Forms of Pleading and Practice, Ch. 358, *Mandate and Prohibition* .

[c] Related Memorandum

For forms of memoranda for use in supporting or opposing petitions for writs of prohibition generally, see Ch. 150, *Mandate and Prohibition* .

[3] Discussion of Authorities

[a] When Writ Lies

In ***Safer v. Superior CourtSafer v. Superior Court*** *(1975) 15 Cal. 3d 230, 124 Cal. Rptr. 174, 540 P.2d 14* , various growers proceeded against farm workers, who had set up picket lines around the growers' fields, in an action for injunctive relief and damages. While the action was pending, the growers obtained a temporary restraining order which limited the spacing and number of pickets. Thereafter, the sheriff arrested picketing farm workers who had assembled in violation of the temporary restraining order and charged them with misdemeanor contempt under *Penal Code § 166*. On the day set for the jury trials of the misdemeanor contempts, the district attorney dismissed the misdemeanor charges and served the accused contemners with orders to show cause in civil contempt proceedings under *Code Civ. Proc. §§ 1209-1222*. The accused contemners demurred and moved to dismiss, arguing, in part, that the district attorney lacked authority to initiate the civil contempt proceedings. The trial court ruled adversely to the accused contemners. They then petitioned for a writ of prohibition. The Supreme Court granted the writ of prohibition and held that a district attorney was without statutory or decisional power to intervene in or prosecute a contempt proceeding stemming from private civil litigation in order to enforce orders obtained by one of the litigants. The Supreme Court also found that, in permitting the district attorney to prosecute the civil contempts contrary to statutorily authorized procedures for such proceedings, the trial court acted in excess of its jurisdiction. Such lack of jurisdiction established the ground for the Supreme Court's issuance of the writ of prohibition because a writ of prohibition lies when a court acts in excess of its jurisdiction in permitting the improper prosecution of contempt proceedings (*15 Cal. 3d 230, 242)* .

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California Points & Authorities

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Volume 4 Chapters 40-49 CLAIM & DELIVERY---to---CONTINUANCE
CHAPTER 47 CONTEMPT
PART II. FORMS
B. REVIEW OF CONTEMPT PROCEEDINGS

4-47 California Points & Authorities § 47.53

§ 47.53 Supporting Petition for Writ of Review [Code Civ. Proc. §§ 1068, 1069], Prohibition [Code Civ. Proc. §§ 1102, 1103], or Habeas Corpus [Penal Code §§ 1474, 1475]--For Relief From Contempt Proceedings or Order of Contempt [Code Civ. Proc. § 1222]--Insufficient Recitals in Direct Contempt Order

[1] FORM

[*Caption. See §§ 47.50-47.52*]

AN ORDER OF DIRECT CONTEMPT IS VOID FOR FAILURE TO RECITE REQUIRED JURISDICTIONAL FACTS.

A. Order of Contempt Final. [*See § 47.50, Paragraph A.*]

B. Nonappealability of Contempt Order. [*See § 47.50, Paragraph B.*]

C. Statutory Authority for Writ. [*See §§ 47.50 -47.52, Paragraph C.*]

D. When Writ Lies. [*See §§ 47.50 -47.52, Paragraph D.*]

E. Requirements of Order in Summary Proceeding. In a summary contempt proceeding, an order must be made which recites the facts as occurring in the immediate view and presence of the court or of the judge at chambers, adjudges the person proceeded against guilty of a contempt, and prescribes the punishment for the person adjudged guilty of a contempt (*Code Civ. Proc. § 1211(a)*).

[*EITHER*]

F. Recital of Facts Constituting Contempt as Jurisdictional. The recital of facts showing acts which constitute a contempt is jurisdictional, and an order which assumes to punish summarily a direct contempt is void unless it shows on its face facts sufficient to constitute a legal contempt (*Chula v. Superior Court (1962) 57 Cal. 2d 199, 203, 18 Cal.*

Rptr. 507, 368 P.2d 107).

[*OR*]

F. Order Required to State Contempt Committed in Court's Presence. An order of direct contempt must recite the fact that the contempt was committed in the immediate view and presence of the court, or recited facts sufficient to show that the contempt was committed in the immediate view and presence of the court (*see Boysaw v. Superior Court (2000) 23 Cal. 4th 215, 220-221, 96 Cal. Rptr. 2d 531, 999 P.2d 748*).

[*CONTINUE*]

[*Optional*] **G. Order Failed to Identify Provision Violated.** A contempt order does not meet standards for contempt orders when the contempt order does not identify which provision the alleged contemner violated (*Runnion v. Workers' Comp. Appeals Bd. (1997) 59 Cal. App. 4th 277, 287, 69 Cal. Rptr. 2d 105*).

[*Optional*] **H. Order Fails to Indicate That Warning Was Given.** Unless the conduct is outrageous and immediately recognizable as an act of contempt, the judge must warn the person that further similar conduct will result in a citation for contempt. Such a warning should be made on the record, and any contempt order must indicate that the warning was given (*Boysaw v. Superior Court (2000) 23 Cal. 4th 215, 222-223, 96 Cal. Rptr. 2d 531, 999 P.2d 748*).

[*Optional*] **I. Order Fails to Describe in Detail Conduct Not Contemptuous on Its Face.** If an adjudication of contempt depends on the volume, accent, inflection, or tone of voice, or on manner, facial expression, or demeanor, the order of contempt must describe this conduct in detail (*see Boysaw v. Superior Court (2000) 23 Cal. 4th 215, 222, 96 Cal. Rptr. 2d 531, 999 P.2d 748*).

[*Optional*] **J. Order Fails to Describe Prior Order That Was Violated.** If an adjudication of direct contempt is based on the violation of a prior order, the written direct contempt order must describe the prior order (*In re Ringgold (2006) 142 Cal. App. 4th 1001, 1014, 48 Cal. Rptr. 3d 507*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for a writ seeking relief from an order of contempt proceeding when the order finding the accused contemner in direct contempt fails to recite either the facts constituting the contempt [*Chula v. Superior Court (1962) 57 Cal. 2d 199, 203, 18 Cal. Rptr. 507, 368 P.2d 107]* or the fact that the contempt was committed in the court's presence [*see Boysaw v. Superior Court (2000) 23 Cal. 4th 215, 220-221, 96 Cal. Rptr. 2d 531, 999 P.2d 748* (if order states facts clearing showing that contempt occurred in court's immediate view and presence, it is sufficient and need not also recite the "statutory formula" that the conduct so occurred)]. If an order punishing a party for direct contempt is found jurisdictionally invalid, contempt proceedings may not be reinstituted against that party [*Bloom v. Superior Court (1986) 185 Cal. App. 3d 409, 412-413, 229 Cal. Rptr. 747* (

disapproved on other grounds in Boysaw v. Superior Court (2000) 23 Cal. 4th 215, 221, 96 Cal. Rptr. 2d 531, 999 P.2d 748)].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms of allegation for use in a petition for a writ seeking relief from direct contempt proceedings by asserting insufficient recitals in the order of contempt, see California Forms of Pleading and Practice, Ch. 135, *Contempt* (Matthew Bender).

[3] Discussion of Authorities

[a] Recital of Facts Constituting Contempt as Jurisdictional

In ***Chula v. Superior Court*** *(1962) 57 Cal. 2d 199, 18 Cal. Rptr. 507, 368 P.2d 107* , an attorney failed to appear in court to represent his criminal client. The trial court issued an order to show cause why the attorney should not be punished for contempt for failure to appear. At the hearing on the order to show cause, the attorney was adjudged in contempt, and a term of imprisonment was imposed. The attorney then petitioned for a writ of review. The Supreme Court found that the order adjudicating the attorney in contempt was not void for failing to state facts showing him guilty of contempt. The recital of facts showing acts which constitute a contempt is jurisdictional, and an order which assumes to punish summarily a direct contempt is void unless it shows on its face facts sufficient to constitute a legal contempt, such as the failure to appear before a court at the appointed time. The order of the trial court was found to meet the foregoing requirements since the facts were stated showing that the attorney committed a contempt--the failure to appear--in the presence of the court, the absence constituting an affront to the authority of the court (*57 Cal. 2d 199, 203)* .

[b] Order Required to State Contempt Committed in Court's Presence

In ***Boysaw v. Superior Court*** *(2000) 23 Cal. 4th 215, 96 Cal. Rptr. 2d 531, 999 P.2d 748* , a deputy public defender was cross-examining a police officer, and the prosecutor objected. The court directed the public defender to give the witness time to answer and address the witness in a professional tone of voice. The prosecutor objected a second time, and the court sustained this objection. After the court sustained the objection, the public defender continued to argue the issue with the court. The court directed him not to argue, but the attorney persisted. The court excused the jury and called a recess. During the recess, the public defender interrupted the court while the judge was making the record. The trial court issued an order adjudging the public defender in direct contempt of court. According to the order, the allegedly contemptuous conduct consisted of "yelling at the judge in front of the jury in a loud, rude, hostile and disrespectful tone of voice."

The public defender sought a writ of certiorari to review the contempt order, on the ground that the order (1) failed to recite in so many words that the cited behavior occurred in the "immediate view and presence" of the court, and (2) failed to recite that petitioner was properly warned that his tone of voice was objectionable. After the court of appeal summarily denied the petition, the Supreme Court issued a writ of review.

The Supreme Court rejected the argument that the contempt order was invalid merely because it failed to recite "the magic phrase" that the conduct constituting a direct contempt occurred in the "immediate view and presence" of the court. In this case, the facts recited in the order, that the petitioner "yelled at the judge in front of the jury in a loud, rude, hostile, and disrespectful tone of voice," made it clear that the cited conduct did in fact occur in the immediate view and presence of the court. The court concluded that, when the underlying facts cited in an order of direct contempt sufficiently demonstrate that the contumacious conduct occurred in the immediate view and presence of the court, *Code*

Civ. Proc. § 1211(a) is satisfied in this regard, and the order need not also recited the statutory formula (*23 Cal. 4th 215, 220-221)* . The Court expressly disapproved of the following court of appeal decisions to the extent that they had held that a recitation of the statutory formula alone was sufficient to satisfy *Code Civ. Proc. § 1211(a)*, and were therefore inconsistent with its conclusion to the contrary: *In re Baroldi (1987) 189 Cal. App. 3d 101, 234 Cal. Rptr. 286* ; *Bloom v. Superior Court (1986) 185 Cal. App. 3d 409, 229 Cal. Rptr. 747* ; *In re Smith (1976) 65 Cal. App. 3d 291, 135 Cal. Rptr. 5* ; *In re Rosen (1973) 31 Cal. App. 3d 71, 106 Cal. Rptr. 757* ; *Morales v. Superior Court (1966) 239 Cal. App. 2d 947, 49 Cal. Rptr. 173* (*23 Cal. 4th 215, 221)* .

The Court went to on to hold that the contempt order was invalid because it failed to recite facts showing that it had properly warned the petitioner that his tone of voice was objectionable. For the Court's reasoning on this point, see *§ 47.53[3][d]*.

[c] Order Failed to Identify Provision Violated

In ***Runnion v. Workers' Comp. Appeals Bd.*** *(1997) 59 Cal. App. 4th 277, 69 Cal. Rptr. 2d 105* , the Workers' Compensation Appeals Board (Board) approved an order by a workers' compensation judge holding an attorney in contempt and sanctioned him for failing to appear at a scheduled hearing. The attorney petitioned the court of appeal for relief from the Board's order.

The court of appeal annulled the Board's contempt award, but sustained the sanctions order. The court stated that the workers' compensation judge's contempt order did not meet the standards for contempt orders. Although the workers' compensation judge discussed in some detail the facts leading to the contempt finding and found that the attorney did not have a valid excuse for missing the hearing, the contempt order did not even identify which provision of *Code Civ. Proc. § 1209(a)* the attorney violated. If, as implied by the workers' compensation judge's discussion, the attorney was held in contempt under *Code Civ. Proc. § 1209(a)(5)*, for violating an order to appear, the judge's contempt order improperly failed to identify the order directing him to appear, to state that the attorney knew he had been ordered to appear, and to determine that he willfully failed to comply with the order (*59 Cal. App. 4th 277, 287)* .

[d] Order Fails to Indicate That Warning Was Given

In ***Boysaw v. Superior Court*** *(2000) 23 Cal. 4th 215, 96 Cal. Rptr. 2d 531, 999 P.2d 748* , a deputy public defender was cross-examining a police officer, and the prosecutor objected. The court directed the public defender to give the witness time to answer and address the witness in a professional tone of voice. The prosecutor objected a second time, and the court sustained this objection. After the court sustained the objection, the public defender continued to argue the issue with the court. The court directed him not to argue, but the attorney persisted. The court excused the jury and called a recess. During the recess, the public defender interrupted the court while the judge was making the record. The trial court issued an order adjudging the public defender in direct contempt of court. According to the order, the allegedly contemptuous conduct consisted of "yelling at the judge in front of the jury in a loud, rude, hostile and disrespectful tone of voice."

The public defender sought a writ of certiorari to review the contempt order, on the ground that the order (1) failed to recite in so many words that the cited behavior occurred in the "immediate view and presence" of the court, and (2) failed to recite that petitioner was properly warned that his tone of voice was objectionable. After the court of appeal summarily denied the petition, the Supreme Court issued a writ of review.

As discussed more fully under Order Required to State Contempt Committed in Court's Presence, *above*, the Supreme Court rejected the argument that the contempt order was invalid merely because it failed to recite "the magic phrase" that the conduct constituting a direct contempt occurred in the "immediate view and presence" of the court (*23 Cal. 4th 215, 220-221)* .

The Supreme Court, however, went on to annul the order on the second ground urged by the petitioner. The Court noted that the petitioner was held in contempt for his *tone of voice.* The Court held that, when an order of contempt is based on the tone of voice used by the alleged contemnor, the order must recite that he or she was warned his or her tone of voice was objectionable. Although *Code Civ. Proc. § 1211(a)* does not expressly require the order to recite such a warning, the Court adopted this holding as a requirement correctly drawn from the case law by the authors of the California Judges Benchbook. The Court quoted from Cal. Judges Benchbook: Civil Proceedings Before Trial (CJER 1995), Sanctions & Contempt, § 17.98, that "[u]nless the conduct is outrageous and immediately recognizable as an act of contempt, the judge should warn the person that further similar conduct will result in a citation for contempt ..... [s]uch a warning should be made on the record, and any contempt order should indicate that a warning was given." The Court, citing *In re Hallinan (1969) 71 Cal. 2d 1179, 1183, 81 Cal. Rptr. 1, 459 P.2d 255* , added that a contempt order *must* recite any warning that is required, for example, one that is required because the conduct was not contemptuous on its face (*23 Cal. 4th 215, 222)* . When conduct is not contemptuous on its face, the Court concluded that something more is necessary to establish a direct contempt. A valid order must describe in detail not only that conduct, but also that the contemnor persisted in the conduct after being admonished that it was offensive (*23 Cal. 4th 215, 222-223)* . In other words, in the case of conduct not contemptuous on its face, it is the person's disrespectful persistence in that conduct after being apprised of its offensiveness that constitutes the contempt.

Therefore, the Court concluded that to support the finding of direct contempt in this case, the trial court's order should have recited that the attorney was warned that the tone of voice he was using toward the court was objectionable. The reason for this conclusion, stated the Court, is that the order may be the only record immediately available (*23 Cal. 4th 215, 223)* . The Court directed that the contempt order be annulled due to its failure to do this (*23 Cal. 4th 215, 224)* .

The Court noted also that, had the trial court rested its finding of contempt on the attorney's direct refusal to obey the court's order directing him not to continue arguing its evidentiary ruling, or on the rude, hostile, and disrespectful *content* of the attorney's response (*e.g.*, "The Court: Don't argue ..... [Petitioner:] I am arguing."), such a finding would have supported an order of contempt (*23 Cal. 4th 215, 223)* .

[e] Order Fails to Describe in Detail Conduct Not Contemptuous on Its Face

Boysaw v. Superior Court *(2000) 23 Cal. 4th 215, 96 Cal. Rptr. 2d 531, 999 P.2d 748* is discussed in *§ 47.53[3][d]*. The Court held that an order for direct contempt based on the alleged contemnor's tone of voice, was invalid because it did recite that the alleged contemnor had first been warned that the tone of voice was objectionable. In reaching this conclusion, the Court, citing *Gallagher v. Municipal Court (1948) 31 Cal. 2d 784, 797, 192 P.2d 905* , stated that when a contempt adjudication depends on the volume, accent, inflection, or tone of voice, or on manner, facial expression, or demeanor, this aspect must be described in the contempt order in detail (*23 Cal. 4th 215, 222)* .

[f] Order Fails to Describe Prior Order That Was Violated

In ***In re Ringgold*** *(2006) 142 Cal. App. 4th 1001, 48 Cal. Rptr. 3d 507* , the superior court entered an order adjudging a former trustee in direct contempt of an oral order to sign a document giving the new trustee access to trust property that was in a storage facility. The duty to sign the document arose from a prior written order to cooperate and turn over documents. The court of appeal annulled the contempt order because it failed to describe the prior written order. The court explained that the need to describe the prior order arose from the statutory requirement that a direct contempt order recite the facts constituting the contempt (*see Code Civ. Proc. § 1211(a)*). Thus, if a direct contempt is based on the violation of a prior order, the written direct contempt order must describe the prior order. As with other aspects of a written contempt order, the reference to the prior order must (1) recite the facts (what the prior order directed be done); (2) be stated with sufficient particularity that there is no need to refer to any extrinsic document in order to determine what was required by the prior order (except that a transcript may be attached to the order so as to put the contemptuous conduct in context); (3) be described with sufficient particularity to demonstrate on its face that the ensuing contemptuous conduct violated the prior order; and (4) not consist of the judge's conclusions regarding the prior order (

142 Cal. App. 4th 1001, 1014). Because the recitation-of-facts requirement is jurisdictional (*142 Cal. App. 4th 1001, 1011)* , the trial court's failure in this case to meet that requirement by describing the prior written order rendered the contempt order void. Therefore, the court of appeal annulled the contempt order (*142 Cal. App. 4th 1001, 1017)* .

[4] Additional Authorities

[a] Recital of Facts Constituting Contempt as Jurisdictional

McCann v. Municipal Court (1990) 221 Cal. App. 3d 527, 270 Cal. Rptr. 640 , was an appeal from a superior court judgment affirming, on certiorari, a municipal court judgment adjudging a deputy public defender guilty of three instances of contempt, and imposing a separate fine for each, for statements he made in the immediate view and presence of the trial court during closing arguments in a municipal court criminal prosecution.

The court of appeal affirmed, holding that the objectionable statements made were contemptuous on their face, manifesting an attack on the integrity of the court, and that all proper procedure had been followed. The court stated that an order adjudging a person guilty of contempt in the immediate view and presence of the court must recite facts that constitute a contempt, and that the facts must be stated with sufficient particularity to demonstrate on their face, without the aid of speculation, that the conduct constituted a legal contempt (*221 Cal. App. 3d 527, 536)* . The court further pointed out that a contempt committed in the immediate view and presence of the court, distinguished as direct contempt, may be treated summarily, and that all that is required is that an order be made reciting the facts, adjudging the person guilty, and prescribing the punishment (*221 Cal. App. 3d 527, 538)* .

In *In re De La Parra (1986) 184 Cal. App. 3d 139, 228 Cal. Rptr. 864* , petitioner sought relief from a superior court order imposing a jail term for contempt for his refusal to answer four interrogatories relating to his business interests in certain Mexican computers on the ground that Mexican law prevented him from divulging that information. In granting a writ of habeas corpus, the court of appeal said that the penalty of imprisonment has been permitted for contemptuous refusal to make payments, such as support payments, and held that to have a valid contempt adjudication, the trial court "must observe the procedures and requirements of *Code of Civil Procedure Section 1211 et seq.*, and specifically, the commitment order must demonstrate on its face that the citee is guilty of contempt" (*184 Cal. App. 3d 139, 144)* . The court further held that the order must recite the specific facts giving rise to the contempt and a finding of present ability to perform before the citee may be punished for disobeying a court order (*184 Cal. App. 3d 139, 144)* [*see Code Civ. Proc. §§ 1211, 1218, 1219*]. Holding that the brief committal order met none of the above-detailed jurisdictional requirements prerequisite to a valid finding of contempt, the court annulled the petitioner's conviction (*184 Cal. App. 3d 139, 144-145)* .

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4-47 California Points & Authorities § 47.54

§ 47.54 Supporting Petition for Writ of Review [Code Civ. Proc. §§ 1068, 1069], Prohibition [Code Civ. Proc. §§ 1102, 1103], or Habeas Corpus [Penal Code §§ 1474, 1475]--For Relief From Contempt Proceedings or Order of Contempt [Code Civ. Proc. § 1222]--Violation of Void Order

[1] FORM

[*Caption. See §§ 47.50-47.52.*]

AN ORDER OF CONTEMPT FINDING ONE IN CONTEMPT OF A VOID ORDER IS ITSELF VOID.

A. Order of Contempt Final. [*See § 47.50, Paragraph A.*]

B. Nonappealability of Contempt Order. [*See § 47.50, Paragraph B.*]

C. Statutory Authority for Writ. [*See §§ 47.50 -47.52, Paragraph C.*]

D. When Writ Lies. [*See §§ 47.50 -47.52, Paragraph D.*]

E. Void Order May Not Result in Contempt Judgment. A void order cannot be the basis of a valid contempt order (*People v. Gonzalez (1996) 12 Cal. 4th 804, 816, 50 Cal. Rptr. 2d 74, 910 P.2d 1366* ; *Davidson v. Superior Court (1999) 70 Cal. App. 4th 514, 517-518, 82 Cal. Rptr. 2d 739*).

[*Optional*] **F. Violation of Order in Excess of Jurisdiction Is Not Contempt.** The violation of an order in excess of the jurisdiction of the issuing court cannot produce a valid judgment of contempt (*Elysium, Inc. v. Superior Court (1968) 266 Cal. App. 2d 763, 764, 72 Cal. Rptr. 355*).

[*Optional*] **G. What Constitutes Order in Excess of Jurisdiction.** Any acts that exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of stare decisis, are in excess of jurisdiction (*Davidson v. Superior Court (1999) 70 Cal. App. 4th 514, 529, 82 Cal. Rptr. 2d 739* ; *see In re Nolan W. (2009) 45 Cal. 4th 1217,*

1224, 91 Cal. Rptr. 3d 140, 203 P.3d 454).

[*Optional*] **H. Void Judgment Is Subject to Attack in Review of Contempt Proceedings.** A judgment void on its face is subject to collateral attack in a review of the contempt proceeding arising from disobedience of the judgment (*Mitchell v. Superior Court (1972) 28 Cal. App. 3d 759, 764-765, 104 Cal. Rptr. 921*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for a writ seeking relief from an order of contempt or a contempt proceeding when the order that the accused contemner is charged with violating is void [*Elysium, Inc. v. Superior Court (1968) 266 Cal. App. 2d 763, 764, 72 Cal. Rptr. 355]* .

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

With appropriate modifications, this memorandum may be used to support a declaration opposing a declaration charging indirect contempt [*see § 47.30*].

[b] Related Pleading and Practice Forms

For forms of allegation for use in a petition for a writ seeking relief from contempt proceedings when the order which the accused contemner is charged with violating is void on its face, see Ch. 135, *Contempt* in California Forms of Pleading and Practice.

[3] Discussion of Authorities

[a] Void Order May Not Result in Contempt Judgment

In ***People v. Gonzalez*** *(1996) 12 Cal. 4th 804, 50 Cal. Rptr. 2d 74, 910 P.2d 1366* , Defendant violated a preliminary injunction issued by a county restricting the activities of gang members in a certain geographical area. The government sought a misdemeanor conviction against Defendant in the municipal court for criminal contempt. Defendant demurred to the complaint, seeking, among other things, to assert, on constitutional grounds, the facial invalidity of the injunction he was accused of violating. Defendant was convicted of four counts of contempt. The appellate department of the superior court affirmed. The court of appeal affirmed.

The Supreme Court reversed the judgment of the court of appeal. The Court recited the general rule, "The rule is well settled in California that a void order cannot be the basis for a valid contempt judgment" (*12 Cal. 4th 804, 816)* . The Court concluded that settled California law establishes that there can be no contempt of a void injunctive order, and that assertedly unconstitutional injunctive orders are subject to challenge when contempt is charged, and on review of any contempt judgment (*12 Cal. 4th 804, 809)* .

In ***Davidson v. Superior Court*** *(1999) 70 Cal. App. 4th 514, 82 Cal. Rptr. 2d 739* , the alleged contemnors were

running a junkyard establishment on their property. The city filed a lawsuit to force them to clean it up. A purported settlement was reached, and a settlement agreement was signed by the attorney for the alleged contemners and the city attorney. The agreement was presented ex parte to a judge who signed a judgment confirming the settlement. Later when compliance problems occurred, the alleged contemners were held in contempt and sentenced to five days in jail. The alleged contemners filed a petition for writ of habeas corpus and other appropriate relief.

The court of appeal annulled the judgment of contempt is annulled and issued a writ of mandate to vacate the void order. The court determined that, under the summary procedures of *Code Civ. Proc. § 664.6*, a written settlement agreement is not enforceable unless it is signed personally by the litigant [*see Levy v. Superior Court (1995) 10 Cal. 4th 578, 580, 41 Cal. Rptr. 2d 878, 896 P.2d 171]* . Thus, the stipulated order was in excess of the court's jurisdiction because it was not entered in compliance with section 664.6 or some other settlement enforcement mechanism. Thus, it was void and could not be the basis of a valid contempt order (*70 Cal. App. 4th 514, 517-518)* .

[b] Violation of Order in Excess of Jurisdiction Is Not Contempt

In ***Elysium, Inc. v. Superior Court*** *(1968) 266 Cal. App. 2d 763, 72 Cal. Rptr. 355* , Elysium appealed from an injunctive order forbidding it to use the word "Look" as part of the title of its magazine. While the appeal was pending, an order to show cause re contempt was issued, and Elysium was adjudged in contempt for 12 separate violations of the injunctive order. Elysium was assessed and paid a fine for its allegedly contemptuous violations of the injunctive order. On the reversal of the injunctive order, Elysium made a motion in the trial court seeking a refund of the fine it had paid on the invalid judgment. The trial court denied Elysium's motion for a refund and its subsequent motion for reconsideration. Elysium then sought a writ of mandate to compel the trial court to refund the fine. The court of appeal found Elysium entitled to a refund and issued the writ of mandate as requested. The court of appeal stated that no one may be punished in contempt for violation of a void order, noting that one method for challenging the validity of an injunctive order is to disobey the order. If it is later determined that the order was made without or in excess of the court's jurisdiction, the violation of the void order constitutes no punishable wrong. Thus, the contemner, like one convicted of crime who pays a fine, was entitled to a refund of the fine upon reversal of the judgment on appeal (*266 Cal. App. 2d 763, 764)* .

[c] What Constitutes Order in Excess of Jurisdiction

The facts and procedural background of ***Davidson v. Superior Court*** *(1999) 70 Cal. App. 4th 514, 82 Cal. Rptr. 2d 739* are *discussed in § 47.54[3][a]*. In *Davidson*, the court quoted from *People v. Gonzalez (1996) 12 Cal. 4th 804, 816, 50 Cal. Rptr. 2d 74, 910 P.2d 1366* , *discussed in § 47.54[3][a]*, the principle that an order in excess of the jurisdiction of the issuing court cannot produce a valid judgment of contempt, and that the "jurisdiction" in question extends beyond mere subject matter or personal jurisdiction. Rather, any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of stare decisis, are in excess of jurisdiction (*70 Cal. App. 4th 514, 529)* .

In re Nolan W. *(2009) 45 Cal. 4th 1217, 91 Cal. Rptr. 3d 140, 203 P.3d 454* , was a juvenile dependency case in which the juvenile court attempted to implement a reunification plan for the minor and his mother. As part of the reunification plan, the juvenile court ordered the mother to enroll in a substance-abuse program. Eventually, because the mother frequently missed recovery sessions, failed to stay in contact with the program, and did not submit to drug testing, the juvenile court found her in contempt and sentenced her to 300 days in custody (5 days each for 60 counts of noncompliance). However, the court stayed imposition of the judgment on condition that the mother enroll in and complete a residential drug-treatment program. When the mother failed to do so and failed to appear at a review hearing, the court terminated reunification services and lifted the stay of the contempt judgment. The mother sought review, contending that the juvenile court lacked the authority to issue the contempt order. The court of appeal declined to reach the merits of that claim, but it did reverse the contempt judgment on the ground that the 300-day sentence,

imposed after the termination of reunification services, was an abuse of discretion. The California Supreme Court affirmed, specifically holding that because of the unique nature of reunification orders, the juvenile court may not use its contempt power to incarcerate a parent solely for the failure to satisfy a condition of a voluntary reunification plan (*45 Cal. 4th 1217, 1225-1226)* .

The Supreme Court began its analysis by acknowledging the settled proposition that, in general, any court has inherent power to enforce compliance with its lawful orders through contempt; and *Welf. & Inst. Code § 213* expressly recognizes this power of the juvenile court: "Any willful disobedience or interference with any lawful order of the juvenile court or of a judge or referee thereof constitutes a contempt of court" (*45 Cal. 4th 1217, 1230)* .

The Supreme Court noted, however, that not every violation of a court order is subject to punishment as a contempt of court. Contempt is generally a summary procedure designed to protect the dignity of the court in the exercise of its jurisdiction. Thus, a court's power to compel compliance with its orders to ensure the orderly administration of justice does not extend to punishing violations of substantive law when such violations do not impair the dignity or functioning of the court. Moreover, when the Legislature has established a specific penalty for a transgression, courts may not impose a contempt punishment that is inconsistent with the legislative scheme (*45 Cal. 4th 1217, 1230-1231)* .

Turning to the specifics of dependency proceedings and reunification services, the Supreme Court observed that the juvenile court's authority to control the behavior of a parent in dependency proceedings is not direct, but rather ancillary to its jurisdiction over the child. When the court orders a parent to participate in certain services, compliance with the order is a condition the court has placed on the parent's reunification with the child. However, it is not the court's role to force a parent to participate in services. Rather, reunification services are voluntary and cannot be forced on an unwilling or indifferent parent. The Supreme Court therefore construed the statutory provision that a parent "shall be ordered to participate" in reunification services (*now see Welf. & Inst. Code § 361.5(a)(3)*) as imposing a duty on the juvenile court to make the order, but not imposing a duty on the parent to participate (*45 Cal. 4th 1217, 1233-1234)* .

Reviewing the statutory provisions covering reunification services, the Supreme Court concluded that the legislative scheme contemplates that the ultimate penalty for a parent's failure to satisfy a requirement of a reunification plan is the loss of parental rights (*see, e.g., Welf. & Inst. Code §§ 361.5(a)(3), 366.21(e), (f), 366.22(a), 366.26*). The Court concluded that the use of the juvenile court's contempt power to incarcerate a parent who fails to satisfy a reunification program requirement is inconsistent with the legislative scheme and therefore beyond the court's power (*45 Cal. 4th 1217, 1233-1234)* .

The Supreme Court closed by emphasizing that its decision in this case was not intended to strip the juvenile court of its well-established contempt authority to control the proceedings before it and protect the dignity of its exercise of jurisdiction. Thus, extreme parental misconduct that jeopardizes a child's safety, such as taking the child without permission or engaging in dangerous acts during visitation, could justify punishment by contempt, because that kind of conduct would interfere with the court's exercise of its own authority over the dependent child. The holding in this case, therefore, is limited to the use of contempt power to punish a parent's failure to satisfy a condition imposed simply to facilitate reunification (*45 Cal. 4th 1217, 1234-1238)* .

[d] Void Judgment Is Subject to Attack in Review of Contempt Proceedings

In ***Mitchell v. Superior Court*** *(1972) 28 Cal. App. 3d 759, 104 Cal. Rptr. 921* , contempt proceedings arose out of an action for money due on a promissory note. After security a default judgment, the plaintiff in that action sought the appointment of a receiver of the judgment debtor's share in the assets and profits of a partnership in order to satisfy the judgment. In appointing the receiver as requested, the trial court also ordered the two other partners to deliver to the receiver all assets belonging to the partner who was the judgment debtor. When the two other partners failed to comply, the receiver initiated contempt proceedings by submitting a declaration in which he recited the foregoing facts. An order to show cause was issued, and, at the hearing on the order to show cause, the two other partners were adjudged in

contempt. They then petitioned for a writ of review, which the court of appeal granted. The court of appeal found that the trial court had no authorization for the appointment of a receiver because the judgment creditor did not file an action against the debtors of the judgment debtor separate and apart from the supplemental proceedings to the original judgment. The court also found that the trial court exceeded its jurisdiction by going beyond the authorizing statute in appointing the receiver to take over and preserve contested property interests. Finally, the court held that the two other partners could attack the validity of the underlying order in their review of the contempt proceedings. It found that the trial court's judgment was void on its face and, thus, subject to attack for lack of jurisdiction (*28 Cal. App. 3d 759, 764-765)* .

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4-47 California Points & Authorities § 47.55

§ 47.55 Supporting Petition for Writ of Review [Code Civ. Proc. §§ 1068, 1069], Prohibition [Code Civ. Proc. §§ 1102, 1103], or Habeas Corpus [Penal Code §§ 1474, 1475]--For Relief from Contempt Proceedings or Order of Contempt [Code Civ. Proc. § 1222]--No Judgment Rendered or Entered

[1] FORM

[*Caption. See §§ 47.50-47.52.*]

A COURT LACKS JURISDICTION TO ADJUDICATE A CONTEMPT WHERE NO VALID JUDGMENT HAS BEEN RENDERED OR ENTERED.

A. Order of Contempt Final. [*See § 47.50, Paragraph A.*]

B. Nonappealability of Contempt Order. [*See § 47.50, Paragraph B.*]

C. Statutory Authority for Writ. [*See §§ 47.50 -47.52, Paragraph C.*]

D. When Writ Lies. [*See §§ 47.50 -47.52, Paragraph D.*]

[*EITHER*]

E. No Jurisdiction Where Order Not Entered. A court lacks jurisdiction to hold a person in indirect contempt when the order alleged to be willfully disobeyed is not reduced to writing or entered in the court's minutes (*In re Marcus (2006) 138 Cal. App. 4th 1009, 1015-1017, 41 Cal. Rptr. 3d 861* ; *Ketscher v. Superior Court (1970) 9 Cal. App. 3d 601, 604-605, 88 Cal. Rptr. 357*).

E. No Jurisdiction Where Order Not Entered. A court lacks jurisdiction to hold a person in indirect contempt when the order alleged to be willfully disobeyed is not reduced to writing or entered in the court's minutes (*In re Marcus (2006) 138 Cal. App. 4th 1009, 1015-1017, 41 Cal. Rptr. 3d 861* ; *Ketscher v. Superior Court (1970) 9 Cal. App. 3d*

601, 604-605, 88 Cal. Rptr. 357).

[*OR*]

E. No Jurisdiction Before Entry of Judgment. A court lacks jurisdiction to compel a person to answer to a charge of indirect contempt growing out of an alleged failure to obey certain oral pronouncements of the court before the entry of judgment (*Silvagni v. Superior Court (1958) 157 Cal. App. 2d 287, 290, 321 P.2d 15*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for a writ seeking relief from an order of contempt or a contempt proceeding when no judgment or order has been entered [*Ketscher v. Superior Court (1970) 9 Cal. App. 3d 601, 604-605, 88 Cal. Rptr. 357* ; *Silvagni v. Superior Court (1958) 157 Cal. App. 2d 287, 290, 321 P.2d 15]* .

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms of allegations for use in a petition for a writ seeking relief from contempt proceedings when the judgment which the accused contemner is charged with violating was neither rendered nor entered, see Ch. 135, *Contempt* in California Forms of Pleading and Practice.

[3] Discussion of Authorities

[a] No Jurisdiction Where Order Not Entered

In re Marcus *(2006) 138 Cal. App. 4th 1009, 41 Cal. Rptr. 3d 861* , is discussed in *§ 47.31[3][b]*.

Ketscher v. Superior Court *(1970) 9 Cal. App. 3d 601, 88 Cal. Rptr. 357* is discussed in *§ 47.31[3][b]*.

[b] No Jurisdiction Before Entry of Judgment

Silvagni v. Superior Court (1958) 157 Cal. App. 2d 287, 321 P.2d 15 is discussed in *§ 47.31[3][a]*.

[4] Additional Authorities

[a] No Jurisdiction Before Entry of Judgment

In re Blaze (1969) 271 Cal. App. 2d 210, 76 Cal. Rptr. 551 , concerned contempt proceedings in which an ex-wife was found in contempt for violating the terms of orders made in the course of a dissolution proceeding. In granting a writ of habeas corpus to the ex-wife, the court of appeal found that the trial court was without jurisdiction to adjudicate

her in contempt. The ex-husband's declaration and the contempt order referred to the ex-wife's alleged disobedience of orders made at a time before the interlocutory judgment has been signed. Any orders made prior to that time were merged into the interlocutory judgment. Thus, the earlier orders could not be a basis for an adjudication of contempt, and the ex-wife could not be held in contempt of nonexistent orders.

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4-47 California Points & Authorities § 47.56

§ 47.56 Supporting Petition for Writ of Review [Code Civ. Proc. §§ 1068, 1069], Prohibition [Code Civ. Proc. §§ 1102, 1103], or Habeas Corpus [Penal Code §§ 1474, 1475]--For Relief From Direct Contempt Proceedings or Order of Direct Contempt [Code Civ. Proc. § 1222]--Personally Embroiled Trial Judge in Direct Contempt

[1] FORM

[*Caption. See §§ 47.50-47.52.*]

DUE PROCESS IS VIOLATED WHEN A TRIAL JUDGE SITTING IN JUDGMENT ON AN ALLEGED CONTEMNER IN A DIRECT CONTEMPT PROCEEDING IS PERSONALLY EMBROILED WITH THE CONTEMNER.

A. Order of Contempt Final. [*See § 47.50, Paragraph A.*]

B. Nonappealability of Contempt Order. [*See § 47.50, Paragraph B.*]

C. Statutory Authority for Writ. [*See §§ 47.50 -47.52, Paragraph C.*]

D. When Writ Lies. [*See §§ 47.50 -47.52, Paragraph D.*]

E. Personally Embroiled Trial Judge as Violative of Due Process. Due process requires a new and impartial judge to sit in judgment on contemptuous behavior occurring before the court when there is evidence that the trial judge has become so personally embroiled with the alleged contemner as to make the trial judge unfit to sit in judgment on the contempt charge (*In re Buckley (1973) 10 Cal. 3d 237, 256, 110 Cal. Rptr. 121, 514 P.2d 1201*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for a writ seeking relief from an order of contempt or a contempt proceeding when the trial judge hearing the charge of direct contempt is personally embroiled with the accused contemner [*In re Buckley (1973) 10 Cal. 3d 237, 256, 110 Cal. Rptr. 121, 514 P.2d 1201]* .

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Personally Embroiled Trial Judge as Violative of Due Process

In ***In re Buckley*** *(1973) 10 Cal. 3d 237, 110 Cal. Rptr. 121, 514 P.2d 1201* , a criminal defense attorney, following the trial court's refusal to call the prosecutor as a witness, remarked to the trial judge that the "court obviously doesn't want to apply the law." The court immediately cited the attorney for direct contempt. It likewise assessed a fine and imposed a jail term on him with sentence stayed until the conclusion of the trial. The following day the attorney apologized for his remark of the previous day. However, the trial judge regarded the apology offered by the attorney as further insult to the court. Thereafter, the attorney petitioned for a writ of habeas corpus to annul the order adjudging him in contempt and assessing and sentencing him. His petition asserted, in part, that the trial judge was required to refer the adjudication of the alleged contempt to another judge as a matter of due process.

The Supreme Court denied the writ, relying on the rule that due process required a new and impartial judge to sit in judgment on contemptuous behavior occurring before the court only when there was evidence that the trial judge had become so personally embroiled with the alleged contemner as to make the trial judge unfit to sit in judgment of the contempt charge. It held that the attorney's conduct was disrespectful but did not give rise to a level of personal vilification which would give evidence of the trial judge's probable personal embroilment. The Supreme Court disposed of the attorney's contention that the trial judge demonstrated personal involvement in misconstruing the apology by holding that the mitigating effect, if any, of such an apology rested exclusively in the trial judge's discretion (*10 Cal. 3d 237, 256)* .

[4] Additional Authorities

[a] Personally Embroiled Trial Judge as Violative of Due Process

In *Betsworth v. Workers' Comp. Appeals Bd. (1994) 26 Cal. App. 4th 586, 31 Cal. Rptr. 2d 664* , an attorney made a comment before a workers' compensation referee. Outside the courtroom, the referee approached and admonished her. The next day, the referee telephoned the partners at the attorney's law firm, and asked them what they intended to do to alleviate the problem. The referee also sent them a letter about the matter, and sent a copy to a regular client of the law firm. A few months later, the attorney filed a petition requesting the referee's removal. At that point, the referee filed a formal accusation of contempt against the attorney. The removal petition was denied, the referee heard the matter, and imposed a $1000 sanction on the attorney. The court of appeal reversed, holding that the referee had engaged in a clear pattern of personal embroilment, requiring that another judge hear the contempt matter (*26 Cal. App. 4th 586, 597-600)* .

In *In re Martin (1977) 71 Cal. App. 3d 472, 139 Cal. Rptr. 451* , an attorney was cited for direct contempt for allegedly making false representations to the trial court with respect to the whereabouts of a material witness in a paternity action.

The attorney objected on the ground that the alleged misrepresentation constituted an indirect contempt requiring notice and a hearing. The trial court set aside the judgment of direct contempt and granted a rehearing on the charge. At that time the attorney requested that the charge of indirect contempt be heard before another judge. The trial judge denied this request and, at the hearing on the indirect contempt charge, adjudged the attorney in contempt and sentenced him to a term of imprisonment. The attorney then petitioned for a writ of habeas corpus, asserting a denial of due process. The court of appeal annulled the contempt order and remanded the matter to be heard before another judge. The court of appeal found that the trial judge had remarked at the hearing on the attorney's request for an indirect contempt hearing that the attorney had deliberately deceived him and that this comment suggested bias and a presumption of guilt against the attorney on the part of the trial judge. The court of appeal also found that the trial judge had acted at the hearing on the indirect contempt charge as an adversary of the attorney rather than as a trier of fact, even to the point of becoming a witness against the attorney when the judge offered his own recollection of events relevant to the alleged contempt (*71 Cal. App. 3d 472, 481)* .

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4-47 California Points & Authorities § 47.57

§ 47.57 Supporting Petition for Writ of Review [Code Civ. Proc. §§ 1068, 1069], Prohibition [Code Civ. Proc. §§ 1102, 1103], or Habeas Corpus [Penal Code §§ 1474, 1475]--For Relief From Direct Contempt Proceedings or Order of Direct Contempt [Code Civ. Proc. § 1222]--Contemner's Specific Wrongful Intent Not Shown

[1] FORM

[*Caption. See §§ 47.50-47.52.*]

AN ACT OF DIRECT CONTEMPT IS NOT ESTABLISHED WHEN THE EVIDENCE FAILS TO SHOW SPECIFIC WRONGFUL INTENT ON THE PART OF THE CONTEMNER WITH RESPECT TO CONTEMPTUOUS ACT(S) OF ONLY DOUBTFUL PROPRIETY IN WHICH INTENT IS THE GRAVAMEN OF THE OFFENSE.

A. Order of Contempt Final. [*See § 47.50, Paragraph A.*]

B. Nonappealability of Contempt Order. [*See § 47.50, Paragraph B.*]

C. Statutory Authority for Writ. [*See §§ 47.50 -47.52, Paragraph C.*]

D. When Writ Lies. [*See §§ 47.50 -47.52, Paragraph D.*]

E. When Specific Wrongful Intent Required. Specific wrongful intent must be shown to establish contempt when the allegedly contemptuous act involves a direct contempt of doubtful propriety in which intent is the gravamen of the offense (*In re Jasper (1973) 30 Cal. App. 3d 985, 988, 106 Cal. Rptr. 754*).

[*Optional*] **F. Possession of Weapon in Courtroom.** Possession in a courtroom of an instrument that may or may not be a dangerous weapon, depending on the possessor's intent or the manner in which it is used, does not constitute contempt in the absence of a reasonable inference of an intent to use it improperly in the courtroom (*In re Jasper (1973) 30 Cal. App. 3d 985, 989, 106 Cal. Rptr. 754* ; *In re Carvallo (1973) 29 Cal. App. 3d 983, 987, 105 Cal. Rptr. 925*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for a writ seeking relief from an order of contempt or contempt proceedings [*Code Civ. Proc. § 1222*] when the evidence has not established the contemner's wrongful intent with respect to a certain class of direct contempts [*In re Jasper (1973) 30 Cal. App. 3d 985, 988-989, 106 Cal. Rptr. 754]* .

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] When Specific Wrongful Intent Required

In ***In re Jasper*** *(1973) 30 Cal. App. 3d 985, 106 Cal. Rptr. 754* , a mother relieved her son of his knife before they entered a courtroom and placed the knife in her purse. The incident was observed and reported, so subsequently, her purse was searched and the knife discovered. At the hearing for direct contempt following the discovery of the knife, the accused contemner explained that her son used the knife as a screwdriver and had inadvertently placed the knife in his pocket when they left for court, and that she had no place to put the knife other than her purse. The mother was found in contempt and sentenced to five days' imprisonment, with execution stayed for 30 days at her attorney's request. She then petitioned for a writ of habeas corpus, which the court of appeal granted. In its opinion, the court of appeal noted that specific wrongful intent, though not ordinarily an element of an act of contempt, must be shown in order to establish contempt when the allegedly contemptuous act is of a certain class of direct contempts of doubtful propriety, such as the carrying of a concealed weapon, and intent goes to the gravamen of the offense. Because the court found that no direct or indirect evidence contradicted the mother's account of the possession of the knife, it, therefore, held that the mother was not in direct contempt (*30 Cal. App. 3d 985, 988)* .

[b] Possession of Weapon in Courtroom

In re Jasper *(1973) 30 Cal. App. 3d 985, 106 Cal. Rptr. 754* , is discussed in *§ 47.57[3][a]*.

In ***In re Carvallo*** *(1973) 29 Cal. App. 3d 983, 105 Cal. Rptr. 925* , a bailiff discovered the accused contemner carrying a concealed knife into a courtroom and reported the incident to the court. The court held a hearing and found the accused contemner in violation of former Code Civ. Proc. § 1209(4) and (8) (*now see Code Civ. Proc. § 1209(a)(4), (8)*, relating to abuse of, or unlawful interference with, the proceedings of a court) even though the accused contemner offered his explanation for carrying the knife. The accused contemner was then sentenced to five days' imprisonment and petitioned for a writ of habeas corpus. In granting the writ, the court of appeal noted that a court is entitled to protect itself from violence and to punish those who carry weapons into a courtroom. However, the court found that the evidence did not establish a case of contempt in that the contemner's knife was folded in a carrying case, its possession was satisfactorily explained by the contemner, and no reasonable inference could be drawn of the contemner's intent to use the knife improperly in the courtroom (*29 Cal. App. 3d 983, 987)* .

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4-47 California Points & Authorities § 47.58

§ 47.58 Supporting Petition for Writ of Review [Code Civ. Proc. §§ 1068, 1069], Prohibition [Code Civ. Proc. §§ 1102, 1103], or Habeas Corpus [Penal Code §§ 1474, 1475]--For Relief From Indirect Contempt Proceedings on Order of Indirect Contempt [Code Civ. Proc. § 1222]--Trial Judge Disqualified for Cause in Indirect Contempt [Code Civ. Proc. § 170]

[1] FORM

[*Caption. See §§ 47.50-47.52.*]

THE TRIAL JUDGE HAS BEEN PROPERLY CHALLENGED AND DISQUALIFIED FOR CAUSE IN THE INDIRECT CONTEMPT PROCEEDING, AND THUS MAY NOT HEAR ANY MATTER IN THE PROCEEDING INVOLVING A CONTESTED ISSUE OF LAW OR FACT, AND ANY SUBSEQUENT ORDER HE/SHE MAY RENDER IS VOID.

A. Order of Contempt Final. [*See § 47.50, Paragraph A.*]

B. Nonappealability of Contempt Order. [*See § 47.50, Paragraph B.*]

C. Statutory Authority for Writ. [*See §§ 47.50 -47.52, Paragraph C.*]

D. When Writ Lies. [*See §§ 47.50 -47.52, Paragraph D.*]

E. Statutory Basis for Challenge for Cause to Disqualify Judge. As provided in *Code of Civil Procedure Sections 170 through 170.5*, a judge has no power to act in any proceeding, except to the extent permitted by *Code of Civil Procedure Section 170.4*, when disqualified [*Code Civ. Proc. § 170.4(d)*]. Grounds for disqualification include the following reasons (*Code Civ. Proc. § 170.1(a)*):

(1) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding (*see Code Civ. Proc. § 170.1(a)(1)(B)*).

(2) The judge served as a lawyer in the proceeding, or in any other proceeding involving the same issues he or she served as a lawyer for any party in the present proceeding or gave advice to any party in the present proceeding on any matter involved in the action or proceeding (*see Code Civ. Proc. § 170.1(a)(2)(B),(C)*).

(3) The judge has a financial interest in the subject matter of, or a party to, the proceeding (*see Code Civ. Proc. § 170.1(a)(3)(B),(C)*).

(4) The judge, or the spouse of the judge, or a person within the third degree of relationship to either of them, or the spouse of such a person, is a party to the proceeding or an officer, director, or trustee of a party (*see Code Civ. Proc. § 170.1(a)(4)*).

(5) A lawyer or a spouse of a lawyer in the proceeding is the spouse, former spouse, child, sibling, or parent of the judge or the judge's spouse, or is associated with such a person, or is associated in the private practice of law with a lawyer in the proceeding (*see Code Civ. Proc. § 170.1(a)(5)*).

(6) For any reason (a) the judge believes that his or her recusal would further the interests of justice, (b) the judge believes that there is a substantial doubt as to his or her capacity to be impartial, or (c) a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial (*see Code Civ. Proc. § 170.1(a)(6)(A)*). Bias or prejudice toward a lawyer in the proceedings may be grounds for disqualification (*see Code Civ. Proc. § 170.1(a)(6)(B)*).

(7) By reason of permanent or temporary physical impairment, the judge is unable to properly perceive the evidence or conduct the proceeding (*see Code Civ. Proc. § 170.1(a)(7)*).

(8) The judge has a current arrangement concerning prospective employment or other compensated service as an arbitrator, mediator, or other type of dispute-resolution neutral (*see Code Civ. Proc. § 170.1(a)(8)(B)(iii)*) or is participating in, or within the last two years has participated in, discussions (*see Code Civ. Proc. § 170.1(a)(8)(B)(i)*) regarding prospective employment or service as a dispute-resolution neutral, or has been engaged in such employment or service, and either (a) the arrangement is, or the prior employment or discussion was, with a party to the proceeding; (b) the matter before the judge includes issues relating to the enforcement of either an agreement to submit a dispute to an alternative dispute- resolution process or an award or other final decision by a dispute-resolution neutral; (c) the judge directs the parties to participate in an alternative dispute-resolution process in which the dispute-resolution neutral will be an individual or entity with whom the judge has the arrangement, has previously been employed or served, or is discussing or has discussed the employment or service; or (d) the judge will select a dispute-resolution neutral or entity to conduct an alternative dispute-resolution process in the matter before the judge, and among those available for selection is an individual or entity with whom the judge has the arrangement, with whom the judge has previously been employed or served, or with whom the judge is discussing or has discussed the employment or service (*see Code Civ. Proc. § 170.1(a)(8)*).

A judge who refuses to recuse himself or herself after a party files a statement of disqualification under *Code of Civil Procedure Section 170.3(c)* may not pass on his or her own disqualification or on the sufficiency in law, fact, or otherwise, of the statement of disqualification, except to order the statement stricken if it is untimely filed or discloses on its face no legal grounds for disqualification [*Code Civ. Proc. §§ 170.3(c)(5), 170.4(b)*].

F. Power to Disqualify Judge in Indirect Contempt Proceedings. The provisions of *Code of Civil Procedure Section 170* governing disqualification of judges for cause, especially those provisions not permitting a judge to sit or pass on his/her own disqualification, apply to indirect contempt proceedings (*Briggs v. Superior Court (1931) 211 Cal. 619,*

631, 297 P. 3).

G. Orders of Disqualified Judge Void. If a judge is disqualified, every subsequent order by him/her is void (*Briggs v. Superior Court (1932) 215 Cal. 336, 341, 10 P.2d 1003* ; *Turkington v. Municipal Court (1948) 85 Cal. App. 2d 631, 638, 193 P.2d 795*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition seeking relief from an order of contempt or a contempt proceeding when the trial judge hearing the charge of indirect contempt is challenged for cause [*see* *Briggs v. Superior Court (1931) 211 Cal. 619, 622, 297 P. 3]* .

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Peremptory Challenges in Contempt Proceedings

Although no court has passed directly on the issue, a trial judge in indirect contempt proceedings may also be peremptorily challenged for prejudice provided the peremptory challenge is made prior to a contempt hearing and the hearing is not merely a continuation of the action from which it emanates before the same judge [*see* *McClenny v. Superior Court (1964) 60 Cal. 2d 677, 681-687, 36 Cal. Rptr. 459, 388 P.2d 691* (affirming trial judge's denial of accused contemner's motion to disqualify under *Code Civ. Proc. § 170.6* in contempt proceedings arising from dissolution action when motion made before same judge as has presided over dissolution action)]. For memoranda in support of a peremptory challenge to a judge not presiding at an earlier proceeding and in opposition to a peremptory challenge in supplementary proceedings which constitute a continuation of the original action, see Ch. 130, *Judges* .

[c] Related Pleading and Practice Forms

For forms relating to disqualifying a judge for cause or on a peremptory challenge, see Ch. 317, *Judges* in California Forms of Pleading and Practice.

[d] Related Memorandum

For memoranda relating to peremptory disqualification of judges or disqualification for cause, see Ch. 130, *Judges* .

[3] Discussion of Authorities

[a] Power to Disqualify in Indirect Contempt Proceedings

In ***Briggs v. Superior Court*** *(1931) 211 Cal. 619, 297 P. 3* , an accused contemner appeared for a contempt hearing in response to an order to show cause and moved to disqualify the trial judge for bias under former Code Civ. Proc. § 170 (*now see Code Civ. Proc. §§ 170.1(a)(6), 170.3(c)*). The judge then proceeded to hear the question of his own disqualification and ruled adversely to the accused contemner. The judge thereafter continued the contempt hearing to permit the accused contemner to seek appellate relief from the adverse ruling. The accused contemner accordingly petitioned for a writ of prohibition to determine the applicability of former Code Civ. Proc. § 170 (*now see Code Civ. Proc. § 170 et seq.*) to an indirect contempt proceeding. The Supreme Court granted the writ, confining its applicability to the judge in question and affirming a judge's inability under former Code Civ. Proc. § 170 (*now see Code Civ. Proc. § 170.3(c)(5)*) to pass on his or her own disqualification to hear a matter. It noted that, in a direct contempt proceeding, the judge acts immediately on his or her own observation and knowledge and administers instant and summary

punishment. On the other hand, indirect contempt proceedings follow the usual procedure in both civil and criminal cases. Thus, judges may be disqualified for cause in indirect contempt proceedings and the procedures described by former Code Civ. Proc. § 170 (*now see Code Civ. Proc. § 170.3(c)*) with respect to the challenge for cause and a judge's inability to pass on his or her own disqualifications must be followed (*211 Cal. 619, 631)* .

[b] Orders of Disqualified Judge Void

In ***Briggs v. Superior Court*** *(1932) 215 Cal. 336, 10 P.2d 1003* , accused contemners petitioned for a writ of prohibition to determine whether a trial judge could pass on a challenge to his or her qualifications in an indirect contempt proceeding. The Supreme Court held that former Code Civ. Proc. § 170 (*now see Code Civ. Proc. § 170 et seq.*, governing disqualification for cause) was applicable to indirect contempt proceedings and thus, that a trial judge was capable of being disqualified in an indirect contempt proceeding. Thereafter, another judge heard the accused contemners' challenge and ruled that the original trial judge was not disqualified for prejudice. The accused contemners again petitioned for a writ of prohibition arguing that the original trial judge was disqualified for prejudice as a matter law. The Supreme Court issued a peremptory writ of prohibition when it found that the original trial judge was disqualified for prejudice by his admittedly expressing an opinion as to the credibility and guilt of the accused contemners. When a judge is thus disqualified as a matter of law, every order he or she enters is equally void so that any judgment can be set aside (*215 Cal. 336, 341)* .

In ***Turkington v. Municipal Court*** *(1948) 85 Cal. App. 2d 631, 193 P.2d 795* , a municipal court judge filed an initiating affidavit in contempt alleging that certain persons had published a resolution that tended to interfere with the orderly administration of justice in cases involving traffic laws and regulations. On the date set for the hearing on the order to show cause, one of the accused contemners filed a statement challenging the qualifications of the judge to preside over a matter in which he was also the complaining witness and requested another judge to hear the matter. The judge then continued the proceeding with respect to that accused contemner but refused to hear similar objections from the other accused contemners because they had failed to file individual statements urging his disqualification. These other accused contemners were then tried and found guilty of contempt by the judge. Thereafter, they petitioned for a writ of review. In granting the writ of review and reversing the orders of contempt against the convicted contemners, the court of appeal found, in part, that until the question of a judge's disqualification is passed on by another judge, he or she is without jurisdiction to proceed. Thus, when the judge's qualifications were challenged by one of the accused contemners on a ground which was not limited to that accused contemner alone but applied to all of the accused contemners, the effect of the challenge was to deprive the challenged judge of jurisdiction over the proceedings until his qualifications were passed on. Furthermore, if a judge is qualified, every subsequent order by him or her is void. Thus, the orders of contempt issued by the judge after the challenge by one of the accused contemners were void (*85 Cal. App. 2d 631, 638)* .

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4-47 California Points & Authorities § 47.59

§ 47.59 Supporting Petition [Code Civ. Proc. § 1069] for Writ of Review [Code Civ. Proc. § 1068] by Party Initiating Indirect Contempt Proceedings--For Relief From Order Wrongfully Divesting Court of Jurisdiction to Adjudicate Contempt

[1] FORM

[*Caption. See § 47.50.*]

A WRIT OF REVIEW IS PROPER TO ANNUAL AN ORDER BY WHICH A TRIAL COURT WRONGFULLY DIVESTS ITSELF OF JURISDICTION TO HEAR THE CONTEMPT.

A. Order of Contempt Final. [*See § 47.50, Paragraph A.*]

B. Nonappealability of Contempt Order. [*See § 47.50, Paragraph B.*]

C. Statutory Authority for Writ. [*See § 47.50, Paragraph C.*]

D. When Writ Lies. [*See § 47.50, Paragraph D.*]

E. Wrongful Divesting of Jurisdiction to Hear Contempt. A writ of review is proper to hear and determine an order which a trial court wrongfully divests itself of jurisdiction to adjudicate a contempt (*Taylor v. Superior Court (1942) 20 Cal. 2d 244, 246, 125 P.2d 1* ; *Goodall v. Superior Court (1918) 37 Cal. App. 723, 726, 174 P. 924*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for a writ of review seeking relief from an order of contempt [*Code Civ. Proc. § 1222*] when the trial court has wrongfully divested itself of jurisdiction to hear and determine the contempt [*Taylor v. Superior Court (1942) 20 Cal. 2d 244, 246, 125 P.2d 1]* .

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms of allegation for use in a petition for a writ of review seeking relief from an order of contempt when a court wrongfully divests itself of jurisdiction to hear and determine a contempt, see Ch. 135, *Contempt* in California Forms of Pleading and Practice.

[c] Related Memorandum

For forms of memoranda for use in supporting or opposing petitions for writs of review generally, see Ch. 205, *Review (Certiorari), Writ of*

[3] Discussion of Authorities

[a] Wrongful Divesting of Jurisdiction to Hear Contempt

In ***Taylor v. Superior Court*** *(1942) 20 Cal. 2d 244, 125 P.2d 1* , a contempt proceeding was initiated when an employee of the petitioner filed an affidavit charging the respondent, in an action to establish a partnership between petitioner and respondent and to secure an accounting and declaratory relief, with violating a preliminary injunction restraining the respondent from withdrawing funds or disposing of certain equipment. The trial court issued an order to show cause against the respondent. Prior to the hearing on the order to show cause, the alleged contemner answered all of the charges made in the initiating affidavit in a counter affidavit. At the hearing, counsel for the alleged contemner objected to the introduction of any evidence on the ground that the initiating affidavit did not state facts sufficient to constitute a cause of action in contempt. The trial court sustained the objection not on the ground of the insufficiency of facts but on the ground that no bond had been filed as required in the order granting the preliminary injunction. The petitioner then sought a writ of review. The Supreme Court held that a writ of review was proper to hear and determine an order by which a trial court wrongfully divested itself of jurisdiction to hear a contempt. The Supreme Court found that the trial court had exceeded its jurisdiction in refusing to hear and determine the issues presented by the petitioner's and alleged contemner's affidavits and thus, annulled the order by which the trial court had sustained the alleged contemner's objection.

In ***Goodall v. Superior Court*** *(1918) 37 Cal. App. 723, 174 P. 924* , a judgment was rendered enjoining the owners and assigns of certain real property from obstructing the natural flow of water through a creek extending across an adjoining parcel of land. The enjoined defendants conveyed their property to another person who had notice of the injunction. On the new owner's refusal to comply with the injunction, the plaintiff in the original action filed an affidavit stating the foregoing facts and an order to show cause re contempt was issued. The successor in interest filed an affidavit in opposition to the initiating affidavit in which she demurred, asserting that the plaintiff was guilty of laches in seeking enforcement of the injunction and that the contempt proceeding was initiated by the plaintiff for the purpose of compelling the successor in interest to pay money to the plaintiff. The trial court agreed with the successor in interest's contentions and dismissed the contempt proceeding without a hearing. The plaintiff in the original action then petitioned for a writ of review to annual the order by which the trial court had dismissed the contempt proceeding. The

court of appeal held that, just as an unwarranted order adjudging a person in contempt may be annulled by a writ of review, the converse was also true. Thus, the court of appeal annulled the trial court's order of dismissal and held that an order should be annulled when a court, without any ground for its action, denied to the beneficiary of a judgment granting an injunction the process of that court when disobedience to the injunction was shown [*Goodall v. Superior Court (1918) 37 Cal. App. 723, 726, 174 P. 924]* .

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4-47 California Points & Authorities § 47.60

§ 47.60 Supporting Petition [Code Civ. Proc. § 1103] for Writ of Prohibition [Code Civ. Proc. § 1102]--For Relief From Contempt Proceedings [Code Civ. Proc. §§ 1209-1222]--Appearance by Contemner's Attorney Sufficient

[1] FORM

[*Caption. See § 47.52.*]

AN APPEARANCE BY AN ACCUSED CONTEMNER'S ATTORNEY IN RESPONSE TO AN ORDER TO SHOW CAUSE RE CONTEMPT IS SUFFICIENT TO CONSTITUTE A PERSONAL APPEARANCE BY THE ACCUSED CONTEMNER.

A. Order of Contempt Final. [*See § 47.50, Paragraph A.*]

B. Nonappealability of Contempt Order. [*See § 47.50, Paragraph B.*]

C. Statutory Authority for Writ. [*See § 47.52, Paragraph C.*]

D. When Writ Lies. [*See § 47.52, Paragraph D.*]

E. Appearance by Attorney in Response to Order to Show Cause as Sufficient. A trial court exceeds its jurisdiction in requiring a personal appearance by an accused contemner when the accused contemner's attorney has appeared on his/her behalf in response to an order to show cause re contempt (*Morelli v. Superior Court (1968) 262 Cal. App. 2d 262, 270, 68 Cal. Rptr. 572* ; *Silvagni v. Superior Court (1958) 157 Cal. App. 2d 287, 291, 321 P.2d 15*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for a writ of prohibition to arrest contempt proceedings [*Code Civ. Proc. §§ 1209-1222*] when the trial court requires a personal appearance by an accused contemner after an appearance by the accused contemner's attorney in response to an order to show cause re contempt [*Morelli v. Superior Court (1968) 262 Cal. App. 2d 262, 270, 68 Cal. Rptr. 572]* .

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms of order to show cause re contempt, bench warrants, and attachments for defaulters, see Ch. 135, *Contempt* in California Forms of Pleading and Practice. For a form of petition for a writ of prohibition where an accused contemner appears through his or her attorney at a hearing on a charge of contempt, see Ch. 135, *Contempt* in California Forms of Pleading and Practice.

[c] Related Memorandum

For forms of memoranda for use in supporting or opposing writs of prohibition generally, see Ch. 150, *Mandate and Prohibition* .

[3] Discussion of Authorities

[a] Appearance by Attorney in Response to Order to Show Cause as Sufficient

In ***Morelli v. Superior Court*** *(1968) 262 Cal. App. 2d 262, 68 Cal. Rptr. 572* , plaintiffs in a personal injury action had a subpoena duces tecum issued requiring Morelli, a nonparty expert witness employed by the defendants in the personal injury action, to appear at a deposition. On Morelli's failure to appear at the scheduled deposition, the trial court issued an order to show cause re contempt. The witness did not appear personally or through an attorney at the hearing on the order to show cause. Thereafter, the trial court ordered a bench warrant to issue against Morelli, and he was arrested. On the date set for the hearing, Morelli's attorney appeared on his behalf and filed with the court Morelli's declaration objecting to the trial court's jurisdiction. Because Morelli did not appear in person at this hearing, the trial court ordered another bench warrant to be issued for his arrest. Morelli then petitioned for a writ of prohibition to restrain contempt proceedings on both bench warrants. The court of appeal issued the writ with respect to the second bench warrant. It held that the trial court exceeded its jurisdiction in requiring the accused contemner to answer for contempt for failing to appear in person in response to an order to show cause re contempt when the accused contemner's attorney appeared on his behalf at that hearing [*Morelli v. Superior Court (1968) 262 Cal. App. 2d 262, 269-270, 68 Cal. Rptr. 572]* .

For additional discussion of the factual background and the reasoning of the court of appeal in *Silvagni v. Superior Court (1958) 157 Cal. App. 2d 287, 321 P.2d 15* , see the discussion in *§ 47.31[3][a]*. In that case, the trial court ordered the defendant to appear personally on a certain date to show cause, if he had any, why certain stocks, which were the subject of a dispute in the action before the trial court, were not assigned if they were not already assigned on that date. The defendant's attorney appeared at the hearing on the order to show cause. The trial court directed the issuance of a warrant of attachment against the defendant to bring him personally to answer for contempt. The defendant then petitioned for a writ of prohibition to restrain the trial court from taking further proceedings to enforce its order directing issuance of the warrant. The court of appeal granted the writ, holding that the appearance of the defendant's attorney in response to the order to show cause was sufficient. Thus, the trial court was without authority to direct issuance of the warrant of attachment against the defendant for failure to appear personally.

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4-47 California Points & Authorities § 47.61

§ 47.61 Supporting Petition for Writ of Review [Code Civ. Proc. §§ 1068, 1069], Prohibition [Code Civ. Proc. §§ 1102, 1103], or Habeas Corpus [Penal Code §§ 1474, 1475]--For Relief From Indirect Contempt Proceedings or Order of Indirect Contempt [Code Civ. Proc. § 1222]--Denial of Procedural Due Process

[1] FORM

[*Caption. See §§ 47.50-47.52.*]

AN ALLEGED CONTEMNER IS DENIED PROCEDURAL DUE PROCESS WHEN HE/SHE HAS NO OPPORTUNITY TO PRESENT EVIDENCE OR EXAMINE WITNESSES ON HIS/HER OWN BEHALF AT AN INDIRECT CONTEMPT HEARING.

A. Order of Contempt Final. [*See § 47.50, Paragraph A.*]

B. Nonappealability of Contempt Order. [*See § 47.50, Paragraph B.*]

C. Statutory Authority for Writ. [*See §§ 47.50 -47.52, Paragraph C.*]

D. When Writ Lies. [*See §§ 47.50 -47.52, Paragraph D.*]

E. Trial of Charge of Indirect Contempt. When a person has been brought up or has appeared, the court or judge must proceed to investigate the charge of contempt, must hear any answer which the alleged contemner may make to the charge, and may examine witnesses for or against the alleged contemner (*Code Civ. Proc. § 1217*).

F. Hearing as Required to Constitute Procedural Due Process. In order for a court to have jurisdiction to try a person charged with contempt, the hearing in the proceeding must be such as to constitute procedural due process (*Collins v. Superior Court (1956) 145 Cal. App. 2d 588, 594, 302 P.2d 805*).

G. Procedural Due Process in Indirect Contempt Proceedings. In a proceeding to have a person adjudged guilty of indirect contempt, the person cannot be deprived of property or liberty without evidence being offered against him/her

in accordance with established rules of evidence, without an opportunity to cross examine those whose evidence is given against him/her, and without the opportunity to present evidence on his/her own behalf (*Bone v. Superior Court (1966) 245 Cal. App. 2d 972, 973, 54 Cal. Rptr. 406* ; *Collins v. Superior Court (1956) 145 Cal. App. 2d 588, 594, 302 P.2d 805*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for a writ seeking relief from an order of contempt or a contempt proceeding when the accused contemner is not afforded procedural due process because legal evidence was not presented against him or her or he or she had no opportunity to present evidence or cross examine witnesses on his or her own behalf at the indirect contempt hearing [*Bone v. Superior Court (1966) 245 Cal. App. 2d 972, 973, 54 Cal. Rptr. 406* ; *Collins v. Superior Court (1956) 145 Cal. App. 2d 588, 594, 302 P.2d 805]* .

Where appropriate, counsel should insert argument in the foregoing from showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Hearing as Required to Constitute Procedural Due Process

In ***Collins v. Superior Court*** *(1956) 145 Cal. App. 2d 588, 302 P.2d 805* , an ex-wife filed affidavits accusing her ex-husband of contempt for his alleged failure to pay spousal and child support ordered by the trial court in annulment proceedings. At the hearing on the orders to show cause issued on these affidavits, attorneys for both of the ex-spouses stipulated to payment of certain agreed arrearages of spousal and child support and agreed that, based on the stipulation, the court need not find the ex-husband in contempt. However, the court immediately found the ex-husband in contempt over his attorney's objection without the ex-wife's affidavits being offered or received in evidence, without any opportunity for the ex-husband to cross examine the affiant or to refute statements made in the affidavits, and without any opportunity for the ex-husband to offer evidence on his own behalf. After being sentenced to five days in jail, the ex-husband petitioned for a writ of review. In granting the writ and annulling the order of contempt, the court of appeal held that, in order for a court to have jurisdiction to try a person charged with contempt, a hearing must be had in the proceedings which meets the requirements of procedural due process. Thus, in a proceeding to have a person adjudged guilty of indirect contempt, the person cannot be deprived of property or liberty without evidence being offered against him or her in accordance with established rules of evidence, without an opportunity to cross examine those whose evidence is given against him or her, and without the opportunity to present evidence on his or her own behalf. The court added that, although the trial court could take judicial notice of its own orders, it could not take judicial notice and assume the truth of the facts stated in the ex-wife's affidavits until the ex-husband had an opportunity to challenge as evidence the facts alleged in the affidavits.

[b] Procedural Due Process in Indirect Contempt Proceedings

In ***Bone v. Superior Court*** *(1966) 245 Cal. App. 2d 972, 973, 54 Cal. Rptr. 406* , a preliminary injunction required a defendant to do certain things with respect to the advertising of his business. Shortly after the preliminary injunction

was issued, plaintiffs filed a declaration supporting issuance of an order to show cause why the defendant should not be adjudged guilty of contempt for willfully disobeying the preliminary injunction. At the hearing, the defendant was present with his attorney but no evidence was introduced against him. The initiating declaration was not offered in evidence, and the declarant was not called as a witness. Nevertheless, the trial court adjudged the defendant guilty of contempt. The defendant then sought a writ of review annulling the contempt order. In granting the writ, the court of appeal stated that in a proceeding to have a person adjudged guilty of indirect contempt for alleged violation of an order of court, the person cannot be deprived of property or liberty without evidence being offered against him or her in accordance with established rules of evidence, without an opportunity to cross examine those whose evidence is given against him or her, and without the opportunity to present evidence on his or her own behalf. Therefore, the failure to offer the initiating declaration or to call the declarant as a witness deprived the defendant of a trial of the issues tendered by the declaration and, thus, deprived him of due process.

Collins v. Superior Court *(1956) 145 Cal. App. 2d 588, 302 P.2d 805* is discussed in *§ 47.61[3][a]*.

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4-47 California Points & Authorities § 47.62

§ 47.62 Supporting Petition for Writ of Review [Code Civ. Proc. §§ 1068, 1069]--For Relief From Indirect Contempt Proceedings or Order of Indirect Contempt [Code Civ. Proc. § 1222]--Contempt Hearing Cannot Be Held Without Appearance by Contemner

[1] FORM

[*Caption. See § 47.50.*]

A CONTEMPT HEARING MAY NOT BE HELD IN THE ABSENCE OF THE CONTEMNER AND HIS/HER ATTORNEY WHEN THERE IS NO FINDING THAT THE CONTEMNER WAS VALIDLY SERVED AND WILLFULLY ABSENT.

A. Order of Contempt Final. [*See § 47.50, Paragraph A.*]

B. Nonappealability of Contempt Order. [*See § 47.50, Paragraph B.*]

C. Statutory Authority for Writ. [*See § 47.50, Paragraph C.*]

D. When Writ Lies. [*See § 47.50, Paragraph D.*]

E. Contempt Hearing Cannot Proceed Without Appearance by Contemner. A contempt hearing cannot be held in the absence of the contemner and his or her attorney without a finding that there was valid service on the alleged contemner and that he or she was voluntarily absent (*Farace v. Superior Court (1983) 148 Cal. App. 3d 915, 917, 918, 196 Cal. Rptr. 297*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of a petition for a writ seeking relief from an order of contempt or a contempt proceeding when the accused contemner and his or her attorney did not appear at the hearing and the court made no finding that the accused contemner had been validly served and voluntarily absented himself or herself from the proceeding [*see Farace v. Superior Court (1983) 148 Cal. App. 3d 915, 917, 918, 196 Cal. Rptr. 297]* .

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Contempt Hearing Cannot Proceed Without Appearance by Contemner

In ***Farace v. Superior Court*** *(1983) 148 Cal. App. 3d 915, 196 Cal. Rptr. 297* , petitioner's ex-wife filed an affidavit charging petitioner with contempt for failure to pay child support as ordered. The ex-wife charged that petitioner was properly served, but petitioner claimed that at the time of service he was not at home and the papers were mistakenly served on his brother. The brother's attorney informed the ex-wife's attorney that the wrong person had been served. Petitioner claimed he never had actual knowledge of the contempt proceeding. At the hearing on the order to show cause, neither petitioner nor his attorney was present. The ex-wife's attorney alleged that petitioner had been evading service but that he was finally served; the attorney also informed the court that the wrong person had been served. The court made no finding on the validity of service on petitioner but found petitioner in contempt and issued a bench warrant for his arrest. Petitioner moved to quash the order to show cause and set aside the contempt order on the grounds of improper service. The court said it had no jurisdiction to set aside the order and proceeded to sentence petitioner.

The court of appeal issued a writ of mandate ordering the trial court to vacate the contempt order. The court held that a contempt hearing cannot be held in the absence of the accused contemner and his or her attorney when there is no finding the contemner was willfully absent (*148 Cal. App. 3d 915, 917)* . The court stated that civil contempt proceedings are quasi-criminal in nature because of the penalties that may be imposed, and that, therefore, certain procedural safeguards that are extended to criminal defendants must be extended to a contemner (*148 Cal. App. 3d 915, 917)* . Because of the criminal nature of the proceedings, the court stated that the contemner must appear at the hearing. The court said that the appearance may be in person, by an attorney, or by an affidavit. The situation could be analogized to a misdemeanor trial where the court, in the absence of an appearance by the defendant, may continue the matter, issue a bench warrant, or proceed with trial if the court finds the defendant has voluntarily absented him or herself with full knowledge that the trial is to be held. The court stated that any of those procedures could have been used, but that when there is no appearance and no finding of valid service and voluntary absence, it is error to proceed with the contempt hearing (*148 Cal. App. 3d 915, 918)* .

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4-47 California Points & Authorities § 47.63

§ 47.63 Opposing Petition for Writ of Review [Code Civ. Proc. §§ 1068, 1069], Prohibition [Code Civ. Proc. §§ 1102, 1103], or Habeas Corpus [Penal Code §§ 1474, 1475]--Challenge to Court's Jurisdiction Premature

[1] FORM

[*Caption. see §§ 47.50-47.52.*]

A WRIT IS PREMATURE UNTIL A COURT'S JUDGMENT IS FINAL.

Writ Premature Until Court's Judgment Final. An accused contemner's challenge to a trial court's jurisdiction in a contempt proceeding is premature until a judgment following from the power statutorily conferred on the trial court becomes final (*Morelli v. Superior Court (1968) 262 Cal. App. 2d 262, 267, 68 Cal. Rptr. 572*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Respondent _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a petition for a writ seeking relief from an order of contempt or a contempt proceeding when the petitioner's challenge to the trial court's jurisdiction is premature [*Morelli v. Superior Court (1968) 262 Cal. App. 2d 262, 267, 68 Cal. Rptr. 572]* .

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Memorandum

For forms of memoranda opposing petitions for writs of habeas corpus, prohibition, or review generally, see Ch. 110, *Habeas Corpus* , Ch. 150, *Mandate and Prohibition* and Ch. 205, *Review (Certiorari), Writ of* respectively.

[3] Discussion of Authorities

[a] Writ Premature Until Court's Judgment Final

For additional discussion of the factual background and reasoning of the court of appeal in ***Morelli v. Superior Court*** *(1968) 262 Cal. App. 2d 262, 68 Cal. Rptr. 572* , see the discussion in *§ 47.60[3][a]*. In that case, an expert witness subpoenaed to appear at a deposition failed to appear at the deposition. He likewise failed to appear, either personally or through an attorney, at a hearing on an order to show cause re contempt arising from his failure to appear at the deposition. The trial court ordered the first of two bench warrants to issue for the arrest of the expert witness. In his petition for a writ of prohibition after issuance of the second of the bench warrants, the expert witness challenged the trial court's jurisdiction to issue the bench warrants and asserted that service of the subpoena duces tecum was improper. The court of appeal held that the trial court was statutorily empowered to require the expert witness to appear for a deposition by means of a subpoena duces tecum and, likewise, was statutorily empowered to punish refusal to attend as a contempt pursuant to former Code Civ. Proc. § 2034 [*see now* Code Civ. Proc. § 2023(b)(5) (*Code Civ. Proc. § 2023.030(e)* operative July 1, 2005); *see also* Code Civ. Proc. § 2034(i) (*Code Civ. Proc. § 2034.410 et seq.* operative July 1, 2005) (deposition of expert witness)]. Because the trial court was invested with these powers, the accused contemner's challenge to the trial court's jurisdiction in the contempt proceeding was premature until a judgment following from the power statutorily conferred on the trial court became final. The court stated that any error committed in the exercise of those statutorily conferred powers by the trial court could be considered in a review of the final judgment. It should be noted, however, that the court granted a writ of prohibition in this case on other grounds.

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4-47 California Points & Authorities § 47.64

§ 47.64 Opposing Petition for Writ of Review [Code Civ. Proc. §§ 1068, 1069], Prohibition [Code Civ. Proc. §§ 1102, 1103], or Habeas Corpus [Penal Code §§ 1474, 1475]--Contempt Order Incorporating Allegations of Affidavit (or Declaration [Code Civ. Proc. § 2015.5]) Sufficient

[1] FORM

[*Caption. see §§ 47.50-47.52.*]

AN ORDER OF CONTEMPT WHICH INCORPORATES REQUIRED ALLEGATIONS OF THE INITIATING _____ [AFFIDAVIT *or* DECLARATION] IS SUFFICIENT.

Contempt Order Incorporating Allegations of Affidavit or Declaration Sufficient. An order of contempt which incorporates required allegations contained in the initiating affidavit or declaration satisfies the requirement that an order of contempt find each of the elements of the contempt (*Darden v. Superior Court (1965) 235 Cal. App. 2d 80, 84, 45 Cal. Rptr. 44*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Respondent _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a petition for a writ seeking relief from an order of contempt or from a contempt proceeding when the petitioner's challenge to the trial court's jurisdiction is based on the insufficiency

of a contempt order which had incorporated allegations from the initiating affidavit or declaration [*Darden v. Superior Court (1965) 235 Cal. App. 2d 80, 84, 45 Cal. Rptr. 44]* .

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Memorandum

For forms of memoranda opposing petitions for writs of habeas corpus, prohibition, or review generally, see Ch. 110, *Habeas Corpus* , Ch. 205, *Review (Certiorari), Writ of*, respectively.

[3] Discussion of Authorities

[a] Contempt Order Incorporating Allegations of Affidavit or Declaration Sufficient

In ***Darden v. Superior Court*** *(1965) 235 Cal. App. 2d 80, 45 Cal. Rptr. 44* , a husband was ordered to make two support payments a month to his wife as part of a dissolution action. When the husband failed to make full payments and neglected to make subsequent payments when due, the wife filed an affidavit in support of the issuance of an order to show cause re contempt, alleging, in part, that her husband had the ability to comply with the payment order. The husband filed a declaration opposing his wife's affidavit in which he claimed his inability to comply with the payment order. At the hearing on the order to show cause, the husband was adjudged guilty of contempt and ordered to be imprisoned and to pay a fine. The husband then petitioned for a writ of review asserting that the order of contempt, which incorporated the allegations of the wife's initiating affidavit, failed to contain a specific finding that the alleged contemner had the ability to make the payments called for by the earlier court order. The court of appeal affirmed the order of contempt. It held that an order of contempt stating that all of the allegations contained in a pleading were true was a sufficient finding. Therefore, an order of contempt which incorporated such allegations contained in the initiating affidavit satisfied the requirement that there be a finding that the contemner had the ability to comply with the order he or she was alleged to have violated if the affidavit contained an allegation to that effect.

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4-47 California Points & Authorities § 47.65

§ 47.65 Opposing Petition for Writ of Review [Code Civ. Proc. §§ 1068, 1069], Prohibition [Code Civ. Proc. §§ 1102, 1103], or Habeas Corpus [Penal Code §§ 1474, 1475]--Statutory Formula "Immediate View and Presence" Not Required in Order Containing Sufficient Statement of Underlying Facts

[1] FORM

[*Caption. See §§ 47.50-47.52.*]

THE CONTEMPT ORDER SHOULD BE AFFIRMED, EVEN THOUGH IT LACKS A RECITAL THAT A CONTEMPT OCCURRED IN THE "IMMEDIATE VIEW AND PRESENCE" OF THE COURT, BECAUSE THE ORDER RECITES FACTS THAT SUFFICIENTLY DEMONSTRATE THAT CONTUMACIOUS CONDUCT OCCURRED IN THE COURT'S IMMEDIATE VIEW AND PRESENCE.

"Immediate View and Presence" Recital Is Not Essential. If the underlying facts recited in an order of contempt sufficiently demonstrate that the contumacious conduct occurred in the immediate view and presence of the court, the order satisfies *Code of Civil Procedure Section 1211* in that regard, and the order need not recite the statutory formula (*Boysaw v. Superior Court (2000) 23 Cal. 4th 215, 220-221, 96 Cal. Rptr. 2d 531, 999 P.2d 748*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted to oppose a petition for a writ seeking relief from an order of contempt or from a

contempt proceeding when the petitioner contends that the contempt order is insufficient because it fails to recite in so many words that the contemptuous conduct occurred "in the immediate view and presence of the court" under *Code Civ. Proc. § 1211(a)*. The basis for this form is that the contempt order recites facts that sufficiently demonstrate that the contempt occurred in the immediate view and presence of the court.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should refer to specific language in the order that reciting the underlying facts of the alleged contempt, and point out that the facts sufficiently show that the cited conduct occurred in the court's immediate view and presence. For example, in *Boysaw v. Superior Court (2000) 23 Cal. 4th 215, 96 Cal. Rptr. 2d 531, 999 P.2d 748* , *discussed in § 47.65[3][a]*, the contempt order recited that petitioner "yell[ed] at the judge in front of the jury in a loud, rude, hostile and disrespectful tone of voice." The Court asserted that it was "clear beyond any cavil that the cited conduct did in fact occur in the immediate view and presence of the court" [*Boysaw v. Superior Court (2000) 23 Cal. 4th 215, 220, 96 Cal. Rptr. 2d 531, 999 P.2d 748]* .

[b] Related Memorandum

For forms of memoranda opposing petitions for writs of habeas corpus, prohibition, or review generally, see Ch. 110, *Habeas Corpus* , Ch. 150, *Mandate and Prohibition* , and Ch. 205, *Review (Certiorari), Writ of*, respectively.

[3] Discussion of Authorities

[a] "Immediate View and Presence" Recital Is Not Essential

The facts and procedural background of ***Boysaw v. Superior Court*** *(2000) 23 Cal. 4th 215, 96 Cal. Rptr. 2d 531, 999 P.2d 748* , are discussed in *§ 47.53[3][b]*. In *Boysaw*, the Supreme Court stated that an order adjudging a person guilty and prescribing the punishment must recite facts with sufficient particularity to demonstrate on its face that petitioner's conduct constituted a legal contempt. However, the Court rejected the petitioner's contention that a contempt order which fails to recite in so many words that the contemptuous conduct occurred "in the immediate view and presence of the court" is invalid under *Code Civ. Proc. § 1211(a)*, at least when the underlying facts recited in the order make that quite clear. The contempt order stated that the petitioner "yell[ed] at the judge in front of the jury in a loud, rude, hostile and disrespectful tone of voice." The Court stated that the above facts made it clear that the cited conduct did in fact occur in the immediate view and presence of the court, refusing to "exalt form over substance" (*23 Cal. 4th 215, 220)* . Thus, the Court held that if the underlying facts recited in an order of contempt sufficiently demonstrate that the contumacious conduct occurred in the immediate view and presence of the court, *Code Civ. Proc. § 1211* is satisfied in that regard, and the order need not recite the statutory formula (*23 Cal. 4th 215, 221)* .

The Court expressly disapproved of the following court of appeal decisions to the extent that they had held that recitation of the statutory formula alone was sufficient to satisfy *Code Civ. Proc. § 1211(a)* and were therefore inconsistent with its conclusion to the contrary: *In re Baroldi (1987) 189 Cal. App. 3d 101, 234 Cal. Rptr. 286* ; *Bloom v. Superior Court (1986) 185 Cal. App. 3d 409, 229 Cal. Rptr. 747* ; *In re Smith (1976) 65 Cal. App. 3d 291, 135 Cal. Rptr. 5* ; *In re Rosen (1973) 31 Cal. App. 3d 71, 106 Cal. Rptr. 757* ; *Morales v. Superior Court (1966) 239 Cal. App. 2d 947, 49 Cal. Rptr. 173* (*23 Cal. 4th 215, 221)* .

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California Points & Authorities

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Volume 4 Chapters 40-49 CLAIM & DELIVERY---to---CONTINUANCE
CHAPTER 47 CONTEMPT
PART II. FORMS
B. REVIEW OF CONTEMPT PROCEEDINGS

4-47 California Points & Authorities § 47.66

§ 47.66 Opposing Petition for Writ of Review [Code Civ. Proc. §§ 1068, 1069], Prohibition [Code Civ. Proc. §§ 1102, 1103], or Habeas Corpus [Penal Code §§ 1474, 1475]--Recitals for Direct Contempt Order Not Required If Judge Defers Adjudication of Contempt to Another Judge

[1] FORM

[*Caption. See §§ 47.50-47.52*]

THE CONTEMPT ORDER SHOULD BE AFFIRMED DESPITE THE LACK OF THE RECITALS REQUIRED IN A DIRECT CONTEMPT ORDER EVEN THOUGH IT WAS COMMITTED IN THE PRESENCE OF A JUDGE AND IT WAS PROPERLY ADJUDICATED UNDER INDIRECT CONTEMPT PROCEDURES.

Contempt Committed in Presence of Judge Need Not Be Treated Summarily. Although contemptuous conduct committed in the presence of a judge is usually treated as direct contempt and dealt with summarily, the judge may choose to use the procedures for indirect contempt and defer the contempt adjudication to another judge (*Hanson v. Superior Court (2001) 91 Cal. App. 4th 75, 82, 109 Cal. Rptr. 2d 782*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted to oppose a petition for a writ seeking relief from an order of contempt or from a contempt proceeding when the petitioner contends that the contempt order is insufficient to establish a direct contempt

because it fails to recite in so many words that the contemptuous conduct occurred "in the immediate view and presence of the court" under *Code Civ. Proc. § 1211(a)*. The basis for this form is that, even though the contempt was committed in the presence of the court (and thus could have been treated summarily as a direct contempt), it was adjudicated under the procedures for indirect contempt (and thus was not subject to the requirements for a direct contempt order).

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, for example, counsel should explain that the judge in whose presence the cited conduct occurred elected to defer the contempt adjudication to another judge.

[b] Related Memorandum

For forms of memoranda opposing petitions for writs of habeas corpus, prohibition, or review generally, see Ch. 110, *Habeas Corpus* , Ch. 150, *Mandate and Prohibition* , and Ch. 205, *Review (Certiorari), Writ of*, respectively.

[3] Discussion of Authorities

[a] Contempt Committed in Presence of Judge Need Not Be Treated Summarily

The petitioner in ***Hanson v. Superior Court*** *(2001) 91 Cal. App. 4th 75, 109 Cal. Rptr. 2d 782* was an attorney who represented a defendant in a criminal case. In closing argument, the petitioner stated to the jury in open court that his client had not received a fair trial and that the goal of the prosecution was to misrepresent the facts. The trial judge immediately admonished the petitioner and stated that a contempt proceeding would be conducted after a recess. However, the judge then granted the petitioner's request for a continuance. The next day, the judge filed an order to show cause why the petitioner should not be held in contempt. The judge also filed an affidavit that recited the statements made by the petitioner to the jury. Two months later, the matter came on for hearing before another judge of the trial court. That judge entered an order finding the petitioner in contempt and prescribing punishment. The petitioner then sought a writ of habeas corpus from the court of appeal, contending that the contempt order was invalid because it failed to recite the facts constituting the contempt. The petitioner argued that because the alleged contempt had occurred in the presence of the trial judge, it was a direct contempt, and the contempt order therefore was required to recite the facts constituting contempt. The court of appeal denied the petition, holding that although contemptuous conduct committed in the presence of a judge is usually treated as direct contempt, the judge may choose to use the procedures for indirect contempt and defer the contempt adjudication to another judge. In such a case, the contempt order need not comply with the requirements for direct contempt orders (*91 Cal. App. 4th 75, 82)* .

California Points & Authorities

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Volume 4 Chapters 40-49 CLAIM & DELIVERY---to---CONTINUANCE
CHAPTER 48 CONTINUANCE OF PROCEEDINGS

4-48 California Points & Authorities 48.syn

§ 48.syn Synopsis to Chapter 48: CONTINUANCE OF PROCEEDINGS

§ 48.01 Scope of Chapter

§ 48.02 Governing Law

§ 48.03 How to Use the Forms in This Chapter

[1] Written Motion Generally Required for Continuance

[2] Page Limits on Points and Authorities

[3] Using Forms to Build a Draft Memorandum

[4] Age of Cases

[5] Trial Court Delay Reduction Act and Local Rules

§ 48.04 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

[2] Related Points and Authorities

§§ 48.05-48.09 [Reserved]

§ 48.10 Good Cause Exists for Continuance Because, Despite Diligence of Moving Party and Counsel, a Significant, Unanticipated Change in Case Status Has Occurred

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Good Cause

[b] Significant, Unanticipated Change in Case Status Constitutes Good Cause for Continuance

[c] Continuance Sought as Soon as Reasonably Practical

[d] Opportunity for Full Presentation

§ 48.11 Written Stipulation for Continuance

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

§ 48.12 Party's Unavoidable Absence Constitutes Good Cause for Continuance

[1] Party's Unavailability Due to Illness, Death, or Excusable Circumstances

[a] FORM

[b] Comments

[i] Use of Form

[ii] Argument

[iii] Related Points and Authoritites

[iv] Opposing Points and Authorities

[c] Discussion of Authorities

[i] Party's Unavoidable Absence When Party's Presence Is Necessary

[ii] Party's Unavailability Due to Illness, Death, or Excusable Circumstances

[iii] Continuance Granted When Party Unavailable for Deposition

[iv] Party Is Necessary Witness

[2] Economic Necessity

[a] FORM

[b] Comments

[i] Use of Form

[ii] Argument

[iii] Related Points and Authorities

[iv] Opposing Points and Authorities

[c] Discussion of Authorities

[i] Economic Necessity

[ii] Party Required to Assist Counsel

[iii] Unique Knowledge of Facts

[iv] Inability to Consult With Counsel

[3] Party Is Member of Legislature

[a] FORM

[b] Comments

[i] Use of Form

[ii] Argument

[iii] Related Points and Authorities

[c] Discussion of Authorities

[i] Party Is Member of Legislature

[ii] Length of Postponement

[iii] When Postponement Is Mandatory

[4] Party Is in Military Service

[a] FORM

[b] Comments

[i] Use of Form

[ii] Argument

[iii] Related Points and Authorities

[iv] Opposing Points and Authorities

[c] Discussion of Authorities

[i] Automatic Stay Under Federal Law

[ii] Under State Statutes, Burden of Persuasion is on Party Resisting Continuance

[iii] Under State Statutes, Showing Required Is Less Than Required for Regular Continuance

§ 48.13 Witness's Absence Constitutes Good Cause for Continuance

[1] Materiality of Witness's Evidence

[a] FORM

[b] Comments

[i] Use of Form

[ii] Argument

[iii] Related Points and Authorities

[iv] Opposing Points and Authorities

[c] Discussion of Authorities

[i] Materiality and Diligence

[ii] Avoidance of Subpoena or Disregard of Agreement to Appear

[iii] Sole Method of Proof Supports Finding of Materiality

[iv] Important Evidence Is Material

[v] Affidavit May Be Waived

[d] Additional Authorities

[i] Sole Method of Proof Supports Finding of Materiality

[ii] Affidavit May Be Waived

[2] Witness's Unavailability Due to Illness, Death, or Excusable Circumstances

[a] FORM

[b] Comments

[i] Use of Form

[ii] Argument

[iii] Related Points and Authorities

[iv] Opposing Points and Authorities

[3] Principal Witness Is Member of Legislature

[a] FORM

[b] Comments

[i] Use of Form

[ii] Argument

[iii] Related Points and Authorities

[iv] Opposing Points and Authorities

[c] Discussion of Authorities

[i] Principal Witness Is Member of Legislature

[4] Surprise Is Basis for Continuance

[a] FORM

[b] Comments

[i] Use of Form

[ii] Argument

[iii] Related Points and Authorities

[iv] Opposing Points and Authorities

[c] Discussion of Authorities

[i] Surprise Is Basis for Continuance

§ 48.14 Attorney's Absence Constitutes Good Cause for Continuance

[1] Representation Not Available

[a] FORM

[b] Comments

[i] Use of Form

[ii] Argument

[iii] Related Points and Authorities

[iv] Opposing Points and Authorities

[c] Discussion of Authorities

[i] Attorney Unjustifiably Absent

[ii] Substitution of Trial Attorney

[2] Attorney Is Member of Legislature

[a] FORM

[b] Comments

[i] Use of Form

[ii] Argument

[iii] Related Points and Authorities

[iv] Opposing Points and Authorities

[c] Discussion of Authorities

[i] Attorney Is Member of Legislature

[3] Attorney's Inability to Prepare

[a] FORM

[b] Comments

[i] Use of Form

[ii] Argument

[iii] Related Points and Authorities

[iv] Opposing Points and Authorities

[c] Discussion of Authorities

[i] Attorney's Inability to Prepare

[4] Attorney's Unavailability Due to Illness, Death, or Excusable Circumstances

[a] FORM

[b] Comments

[i] Use of Form

[ii] Argument

[iii] Related Points and Authorities

[iv] Opposing Points and Authorities

[c] Discussion of Authorities

[i] Attorney's Illness

[5] Substitution of Attorney

[a] FORM

[b] Comments

[i] Use of Form

[ii] Argument

[iii] Related Points and Authorities

[iv] Opposing Points and Authorities

[6] Attorney's Other Trial

[a] FORM

[b] Comments

[i] Use of Form

[ii] Argument

[iii] Related Points and Authorities

[iv] Opposing Points and Authorities

[c] Discussion of Authorities

[i] Attorney's Other Trial

[ii] Short Continuance When Opposing Party Is Not Prejudiced

§ 48.15 Addition of New Party Constitutes Good Cause for Continuance

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

§ 48.16 Another Action Pending

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Continuance Proper When Other Action Is Pending

[b] Continuance Is Proper for Subsequently Begun Pending Action

§§ 48.17-48.29 [Reserved]

§ 48.30 Failure to Establish Good Cause for Continuance

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Continuance Is Not Matter of Right

§ 48.31 Failure to Establish That Matter Requiring Continuance Is a Significant, Unanticipated Change in Case Status

[1] Failure to Establish Emergency

[a] FORM

[b] Comments

[i] Use of Form

[ii] Argument

[iii] Related Points and Authorities

[c] Discussion of Authorities

[i] Failure to Establish Emergency

[ii] Alternatives to Continuance Are Available

[2] Party's Failure to Promptly Seek Continuance Allows Denial

[a] FORM

[b] Comments

[i] Use of Form

[ii] Argument

[iii] Related Points and Authorities

[c] Discussion of Authorities

[i] Party's Failure to Promptly Seek Continuance Allows Denial

[d] Additional Authorities

[i] Party's Failure to Promptly Seek Continuance Allows Denial

§ 48.32 Moving Party's Lack of Good Faith Allows Denial of Continuance

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Moving Party's Lack of Good Faith

[b] Moving Party's Purpose Is Delay

§ 48.33 Heavy Burden on Party Opposing Continuance Allows Denial of Continuance

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Granting Continuance Would Burden Opposing Party

§ 48.34 Written Stipulation Does Not Entitle Parties to Continuance

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Written Stipulation Does Not Entitle Parties to Continuance

§ 48.35 Party's Absence Does Not Warrant Continuance

[1] Absent Party Had Notice of Trial

[a] FORM

[b] Comments

[i] Use of Form

[ii] Argument

[iii] Related Points and Authorities

[c] Discussion of Authorities

[i] Trial May Proceed Without Party Who Has Been Given Notice

[ii] Method of Proving Notice

[2] Illness That Does Not Justify Continuance

[a] FORM

[b] Comments

[i] Use of Form

[ii] Argument

[iii] Related Points and Authorities

[c] Discussion of Authorities

[i] Illness Predates Trial Setting Conference

[ii] Illness Does Not Jeopardize Health

[3] Failure to Show Party's Presence Is Required at Trial

[a] FORM

[b] Comments

[i] Use of Form

[ii] Argument

[iii] Related Points and Authorities

[c] Discussion of Authorities

[i] Failure to Show Party's Presence Is Required at Trial

[ii] Counsel Is Familiar With Facts and Testimony

[iii] Out-of-Trial Consultation as Adequate

[4] Alternatives Exist to Party's Testifying at Trial

[a] FORM

[b] Comments

[i] Use of Form

[ii] Argument

[iii] Related Points and Authorities

[c] Discussion of Authorities

[i] Deposition Is Adequate

[ii] On-Site Taking of Testimony Is Alternative

[5] Party's Military Service Does Not Materially Affect Prosecution or Defense

[a] FORM

[b] Comments

[i] Use of Form

[ii] Argument

[iii] Related Points and Authorities

[c] Discussion of Authorities

[i] When Party in Military Service Is Not Entitled to Continuance

[ii] Failure to Show That Attendance Is Impossible

[iii] Party Is Judgment Proof

[iv] Real Effect Is Benefit to Nonmilitary Coparty

[d] Additional Authorities

[i] When Party in Military Service Is Not Entitled to Continuance

§ 48.36 Witness's Absence Does Not Require Continuance

[1] Failure to Establish Materiality of Expected Testimony and Diligence to Obtain It

[a] FORM

[b] Comments

[i] Use of Form

[ii] Argument

[iii] Related Points and Authorities

[c] Discussion of Authorities

[i] Materiality of Expected Testimony Must Be Shown

[ii] Failure to Submit Affidavit

[iii] Failure to Subpoena Witness or Obtain Witness's Agreement to Appear

[iv] Failure to Describe Testimony

[2] Witness Needed Only for Impeachment

[a] FORM

[b] Comments

[i] Use of Form

[ii] Argument

[iii] Related Points and Authorities

[c] Discussion of Authorities

[i] Witness Needed Only for Impeachment

[3] Cumulative Testimony

[a] FORM

[b] Comments

[i] Use of Form

[ii] Argument

[iii] Related Points and Authorities

[c] Discussion of Authorities

[i] Cumulative Testimony

[4] Alternative Methods of Proof

[a] FORM

[b] Comments

[i] Use of Form

[ii] Argument

[iii] Related Points and Authorities

[c] Discussion of Authorities

[i] Alternative Methods of Proof

[d] Additional Authorities

[i] Alternative Methods of Proof

[5] Failure to Anticipate Need for Witness

[a] FORM

[b] Comments

[i] Use of Form

[ii] Argument

[iii] Related Points and Authorities

[c] Discussion of Authorities

[i] Party Could Have Anticipated Need for Witness

[6] Agreement to Admit Expected Evidence

[a] FORM

[b] Comments

[i] Use of Form

[ii] Argument

[iii] Related Points and Authorities

[c] Discussion of Authorities

[i] Agreement to Admit Expected Evidence

[7] Failure to Determine When Witness Would Be Available

[a] FORM

[b] Comments

[i] Use of Form

[ii] Argument

[iii] Related Points and Authorities

[c] Discussion of Authorities

[i] Availability of Witness Is Undetermined

§ 48.37 Attorney's Unavailability Does Not Require Continuance

[1] Party's Insistence on Particular Attorney

[a] FORM

[b] Comments

[i] Use of Form

[ii] Argument

[iii] Related Points and Authorities

[c] Discussion of Authorities

[i] Party's Insistence on Particular Attorney

[ii] Party Has Not Established Diligence

[2] Substitution Is Unnecessary and Without Diligence

[a] FORM

[b] Comments

[i] Use of Form

[ii] Argument

[iii] Related Points and Authorities

[c] Discussion of Authorities

[i] Substitution Is Unnecessary and Without Diligence

[3] Alternative Representation Is Available

[a] FORM

[b] Comments

[i] Use of Form

[ii] Argument

[iii] Related Points and Authorities

[c] Discussion of Authorities

[i] Alternative Representation as Available

[d] Additional Authorities

[i] Alternative Representation as Available

[4] Attorney Is Absent or Unprepared

[a] FORM

[b] Comments

[i] Use of Form

[ii] Argument

[iii] Related Points and Authorities

[c] Discussion of Authorities

[i] Counsel Is Unprepared or Absent Due to Lack of Diligence

[ii] Conflicting Professional Engagement Is Not Sufficient

§ 48.38 Change in Status of Case Is Not Significant Enough to Warrant Continuance

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Insignificant Change

§ 48.39 Other Action Will Not Resolve All Important Issues

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Failure to Resolve Important Issue

[b] Failure to Resolve All Issues

§ 48.40 Continuance for Additional Evidence to Oppose Summary Judgment Motion Requires New Evidence Be Material

[1] FORM

[2] Comments

[3] Discussion of Authorities

§§ 48.41-48.59 [Reserved]

§ 48.60 Continuance May Not Be Conditioned on Payment of Attorney's Fees

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Continuance May Not Be Conditioned on Payment of Attorney's Fees

California Points & Authorities

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Volume 4 Chapters 40-49 CLAIM & DELIVERY---to---CONTINUANCE
CHAPTER 48 CONTINUANCE OF PROCEEDINGS
PART I. INTRODUCTION

4-48 California Points & Authorities § 48.01

§ 48.01 Scope of Chapter

This chapter contains forms of points and authorities relating to motions for continuances of trials and hearings in civil cases.

Part II, Subpart A, Supporting Continuance, includes the following types of forms:

- Authorities addressing good cause and the lack of alternatives for the continuance as well as the diligence with which continuance was sought (§ 48.10).
- Authorities supporting continuance based on a written stipulation (§ 48.11).
- Authorities supporting continuance based on a party's absence (§ 48.12).
- Authorities supporting continuance based on a witness's absence (§ 48.13).
- Authorities supporting continuance based on an attorney's absence (§ 48.14).
- Authorities supporting continuance based on a significant change in the status of the case (§ 48.15).
- Authorities supporting continuance based on the pendency of another case (§ 48.16).

Part II, Subpart B, Opposing Continuance, includes the following types of forms:

- Authorities addressing the lack of good cause for the continuance (§ 48.30).
- Authorities regarding the availability of alternatives to the continuance and the lack of promptness with which the continuance was sought (§ 48.31).
- Authorities opposing continuance based on the moving party's lack of good faith (§ 48.32).

- Authorities opposing continuance based on the heavy burden a continuance would place on the party opposing it (§ 48.33).
- Authorities opposing continuance based on a written stipulation (§ 48.34).
- Authorities opposing continuance based on a party's absence (§ 48.35).
- Authorities opposing continuance witness's absence (§ 48.36).
- Authorities opposing a continuance sought because of an attorney's unavailability (§ 48.37).
- Authorities opposing continuance based on a change in the status of the case (§ 48.38).
- Authorities opposing a continuance sought because of the pendency of another case (§ 48.39).

Part II, Subpart C, Reply Memorandum Supporting Continuance, includes the following form:

- Authorities addressing the court's lack of authority to condition a continuance on payment of attorney's fees (§ 48.60).

For discussion and forms of points and authorities relating to motions for precedence or preference and motions to advance, reset, or set a case specially for a trial setting conference or a trial, see *Ch. 180, Pretrial Proceedings, § 180.50* et seq.

Legal Topics:

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

California Points & Authorities

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Volume 4 Chapters 40-49 CLAIM & DELIVERY---to---CONTINUANCE
CHAPTER 48 CONTINUANCE OF PROCEEDINGS
PART I. INTRODUCTION

4-48 California Points & Authorities § 48.02

§ 48.02 Governing Law

The procedures governing motions for a continuance of proceedings and grounds for granting these motions are set out in *Code Civ. Proc. §§ 139, 473(a)(2), 594a-596, 1024, 1054,* and *1054.1* and *Cal. Rules of Ct., Rule 3.1332*. *Cal. Rules of Ct., Rule 3.1332(c)* provides the recommended standards for what constitutes good cause.

Stay of any action or proceeding in which a person in, or recently out of, military service is involved, is governed by the Servicemembers Civil Relief Act enacted in 2003 (formerly the Soldiers' and Sailors' Civil Relief Act) [*50 U.S.C. App. § 501 et seq.*] and state statutes for reservists and members of the National Guard [*Mil. & Vet. Code § 400 et seq.*].

Additional grounds for granting a continuance are recognized by case law.

Most trial courts also have established local rules of court governing continuances, when and before whom they may be made, the grounds therefor, and other requirements.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersContinuancesCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewMilitary & Veterans LawServicemembersSoldiers & Sailors Civil Relief Act

California Points & Authorities

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Volume 4 Chapters 40-49 CLAIM & DELIVERY---to---CONTINUANCE
CHAPTER 48 CONTINUANCE OF PROCEEDINGS
PART I. INTRODUCTION

4-48 California Points & Authorities § 48.03

§ 48.03 How to Use the Forms in This Chapter

[1] Written Motion Generally Required for Continuance

Except for good cause, motions for continuance are to be made on written notice to all other parties [*Cal. Rules of Ct., 3.1332(a)*], and a party filing a notice of motion must serve and file with it a memorandum [*Cal. Rules of Ct., Rule 3.1112(a)*]. The court may construe the absence of a memorandum as an admission that the motion is not meritorious and as cause for its denial [*Cal. Rules of Ct., Rule 3.1113(a)*]. Even in situations where good cause exists to dispense with the notice of motion, a written application and a memorandum will be required [*Cal. Rules of Ct., Rule 3.1201(4)*].

[2] Page Limits on Points and Authorities

One of the more significant drafting requirements to keep in mind are page limits: supporting and opposing memoranda must not exceed 15 pages, or 20 pages in the case of a motion for summary judgment. A reply or closing memorandum may not exceed 10 pages in length. Exhibits, declarations, attachments, tables of contents, tables of authorities, and proof of service are not counted. Any party must obtain leave of court to file a longer memorandum [*see Cal. Rules of Ct., Rule 3.1113(e)*]. These and other drafting requirements are discussed in further detail in *Ch. 1, Writing Legal Memoranda and Briefs, § 1.05*.

[3] Using Forms to Build a Draft Memorandum

The forms included in this chapter are designed to be combined with other points and authorities to form a complete memorandum. For a detailed discussion on how to select and use the forms in the publication to build a draft memorandum and complete the draft, with detailed discussion of all drafting requirements and strategic or stylistic considerations, see *Ch. 1, Writing Legal Memoranda and Briefs, § 1.10*.

[4] Age of Cases

Except for authorities supporting the granting of continuances on the ground of other pending actions, generally the authorities which support the granting of continuances are older than those which oppose the granting of continuances. Although these older cases may contain excellent discussions of relevant concepts [*see, e.g., Pacific Gas & Elec. Co.*

v. Taylor (1921) 52 Cal. App. 307, 308, 198 P. 651 , discussed in § 48.13[2][c][ii]], counsel should not rely too heavily on their statements of fact.

Although the principles may be still valid, application of these principles by contemporary judges with modern views of transportation, communication, medical science, and deposition practice could be more strict. For example, a contemporary court would probably not agree that if an attorney notifies an out-of-state client of the trial date by letter with return address and the letter is not returned, the attorney can assume that the client will be at the trial [*see Carl v. Thomas (1931) 116 Cal. App. 294, 2 P.2d 872* , discussed in § 48.13[2][c][iii]]. Similarly, although a continuance is proper if a party's presence is required at trial but the party is seriously ill, modern cases generally deny continuances on grounds of illness if the party is physically able to attend the trial [*see Kalmus v. Kalmus (1951) 103 Cal. App. 2d 405, 414, 230 P.2d 57]* without jeopardizing his or her health [*see Agnew v. Parks (1963) 219 Cal. App. 2d 696, 702, 33 Cal. Rptr. 465]* . Courts are more likely to make an independent assessment of the medical evidence. Thus, although in *Morehouse v. Morehouse (1902) 136 Cal. 332, 334, 68 P. 976* , the Supreme Court reversed the denial of a continuance to one who on the basis of the physician's affidavit could not be taken to the place of trial without great risk to his life, the court of appeal in *People v. Mazoros (1977) 76 Cal. App. 3d 32, 41-43* , using more sophisticated medical evidence, upheld the denial of a continuance to a criminal defendant even though a physician testified that the rigors of a trial would be extremely dangerous and that there was substantial likelihood of a fatal heart attack unless defendant was heavily sedated.

[5] Trial Court Delay Reduction Act and Local Rules

Superior courts in all California counties are required to implement delay reduction programs [*Gov. Code §§ 68605.5, 68620*].

Gov. Code § 68616 restricts the extent to which local delay reduction rules may shorten time periods [*see Gov. Code § 68616*]. Among other provisions, Section 68616 provides that within 30 days of service of the responsive pleadings, the parties may, by stipulation filed with the court, agree to a single continuance not to exceed 30 days [*Gov. Code § 68616(d)*]. Beyond this single authorized continuance, however, trial court delay reduction rules restrict continuances [*see, e.g.,* Alameda Co. Super. Ct. Rules, Rule 4.0(d) (court approval required for other stipulated continuances); Los Angeles Co. Super. Ct. Rules, Rules 7.7(b), 7.10 (same)]. Local rules should be checked before seeking any continuance.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeContent & FormCivil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPleading & PracticeMotion PracticeSupporting MemorandaCivil ProceduresPretrial MattersContinuances

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4-48 California Points & Authorities § 48.04

§ 48.04 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

For detailed legal background discussion, a research guide, procedural checklist, and forms of motions and other papers relating to continuances, see California Forms of Pleading and Practice, Ch. 136, *Continuances* (Matthew Bender).

Other related chapters in that publication include:

Ch. 425, *Pretrial Proceedings*;

Ch. 470, *Overview of Public Administrative Law* et seq.;

Ch. 524, *Shortening and Extension of Time*; and

Ch. 551, *Trial.*

[2] Related Points and Authorities

For forms of points and authorities relating to continuances allowed to suspended corporations so that they may revive their powers, see Ch. 52, *Corporations*

For forms of points and authorities relating to sanctions that may be levied against a party who engages in frivolous or bad faith delaying tactics, see Ch. 207, *Sanctions*

For forms of points and authorities relating to extensions of the time for bringing a notice of motion, see Ch. 212, *Shortening and Extension of Time*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersContinuancesCivil ProcedureSanctionsBaseless FilingsBad Faith MotionsCivil ProcedureSanctionsBaseless FilingsFrivolous Lawsuits

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4-48 California Points & Authorities §§ 48.05-48.09

[Reserved]

§§ 48.05[Reserved]

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4-48 California Points & Authorities § 48.10

§ 48.10 Good Cause Exists for Continuance Because, Despite Diligence of Moving Party and Counsel, a Significant, Unanticipated Change in Case Status Has Occurred

[1] FORM Good Cause Exists for Continuance Because, Despite Diligence of Moving Party and Counsel, a Significant, Unanticipated Change in Case Status Has Occurred

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF MOTION FOR
Plaintiff,	)	CONTINUANCE
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Dept: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

A CONTINUANCE SHOULD BE GRANTED BECAUSE IT RECENTLY CAME TO COUNSEL'S ATTENTION THAT GOOD CAUSE EXISTS FOR CONTINUANCE [IN THAT _____ *specify reason if desired, e.g.,* OTHERWISE RESPONDENT WILL NOT HAVE THE OPPORTUNITY TO BE HEARD] AND NO ALTERNATIVE BUT CONTINUANCE WILL ALLOW _____ [*moving party, e.g.,* PLAINTIFF *or* DEFENDANT] TO ADEQUATELY _____ [PROSECUTE *or* DEFEND *or* PREPARE FOR *or* ATTEND] [THE TRIAL OF] THE ACTION.

A. Good Cause. A court may grant a continuance before or during trial on an affirmative showing of good cause and

each request for a continuance must be considered on its own merits (*Cal. Rules of Ct., Rule 3.1332(c)*).

B. Significant, Unanticipated Change in Case Status Constitutes Good Cause for Continuance. The circumstances that may indicate good cause for a continuance include a significant, unanticipated change in the status of the case as a result of which the case is not ready for trial (*Cal. Rules of Ct., Rule 3.1332(c)(7)*).

C. Continuance Sought as Soon as Reasonably Practical. A party seeking a continuance of the date set for trial, whether contested or uncontested or stipulated to by the parties, must make the motion or application as soon as reasonably practical once the necessity for the continuance is discovered (*Cal. Rules of Ct., Rule 3.1332(b)*).

D. Opportunity for Full Presentation. Continuance should be granted if failure to allow the continuance would probably or possibly prejudice the party seeking the continuance by depriving that party of the opportunity to fully and fairly present his/her/its case (*Cadle Co. v. WorldWide Hospitality Furniture (2006) 144 Cal. App. 4th 504, 513-515, 50 Cal. Rptr. 3d 480* ; *In re Dolly A. (1986) 177 Cal. App. 3d 195, 199, 201, 222 Cal. Rptr. 741* ; *Cohen v. Herbert (1960) 186 Cal. App. 2d 488, 494, 8 Cal. Rptr. 922*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*party's status and name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a motion for continuance. It sets forth the basic requirements for a continuance [*Cal. Rules of Ct., Rule 3.1332*].

The authorities in this form should be combined with all of the forms set forth in *§§ 48.11 -48.16* that are applicable to the particular case. Sections 48.11-48.16 address particular situations that constitute good cause on which continuance may be sought, and therefore need only be used when they coincide with the ground or grounds on which a particular request for continuance is based.

[b] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, if the continuance is sought because of the illness of an expert witness, counsel's argument should focus on the critical points made in the supporting declarations regarding the sudden onset of the expert's illness [*see also* the form in *§ 48.13[2][a]*], when counsel first learned of the illness, attempts to arrange alternatives, the reasons why those alternatives will not suffice, and the speed with which counsel informed opposing counsel of the need for continuance and filed the motion for continuance.

It is also advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, or by affidavits or declarations. Although the requirement for affidavits or declarations may be waived by the trial court, for instance in a situation involving

emergency or surprise [*see, e.g., McCown v. Spencer (1970) 8 Cal. App. 3d 216, 228, 87 Cal. Rptr. 213* ; *Larson v. Solbakken (1963) 221 Cal. App. 2d 410, 430, 34 Cal. Rptr. 450]* , counsel must make a sufficiently detailed factual showing to support the motion for continuance; generalizations are not sufficient [*see, e.g., Watson v. Columbia Basin Dev. Co. (1913) 22 Cal. App. 556, 559, 135 P. 511]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Points and Authorities

The points and authorities in *§§ 48.30* and *48.31* may be used in an appropriate case to oppose the points and authorities set out in this form.

[3] Discussion of Authorities

[a] Good Cause

The dates for assigned for trial are firm, and all parties and their counsel must regard the date set for trial as certain [*Cal. Rules of Ct., Rule 3.1332(a)*].

A party seeking a continuance of the date set for trial, whether contested or uncontested or stipulated to by the parties, must make the request for a continuance by a noticed motion or an ex parte application under *Cal. Rules of Ct., Rule 3.1200 et seq.*, with supporting declarations; and the party must make the motion or application as soon as reasonably practical once the necessity for the continuance is discovered [*Cal. Rules of Ct., Rule 3.1332(b)*].

Although continuances of trials are disfavored, each request for a continuance must be considered on its own merits, and the court may grant a continuance only upon an affirmative showing of good cause requiring the continuance [*Cal. Rules of Ct., Rule 3.1332(c)*]. Circumstances that may indicate good cause include [*Cal. Rules of Ct., Rule 3.1332(c)*]:

- The unavailability of an essential lay or expert witness because of death, illness, or other excusable circumstances;

- The unavailability of a party because of death, illness, or other excusable circumstances;

- The unavailability of trial counsel because of death, illness, or other excusable circumstances;

- The substitution of trial counsel, but only where there is an affirmative showing that the substitution is required in the interests of justice;

- The addition of a new party if:

- the new party has not had a reasonable opportunity to conduct discovery and prepare for trial, or
- the other parties have not had a reasonable opportunity to conduct discovery and prepare for trial in regard to the new party's involvement in the case;
- A party's excused inability to obtain essential testimony, documents, or other material evidence despite diligent efforts; or
- A significant, unanticipated change in the status of the case as a result of which the case is not ready for trial.

In ruling on a motion or application for continuance, the court must consider all the facts and circumstances that are relevant to the determination, which may include [*Cal. Rules of Ct., Rule 3.1332(d)*]:

- The proximity of the trial date;
- Whether there was any previous continuance, extension of time, or delay of trial due to any party;
- The length of the continuance requested;
- The availability of alternative means to address the problem that gave rise to the motion or application for a continuance;
- The prejudice that parties or witnesses will suffer as a result of the continuance;
- If the case is entitled to a preferential trial setting, the reasons for that status and whether the need for a continuance outweighs the need to avoid delay;
- The court's calendar and the impact of granting a continuance on other pending trials;
- Whether trial counsel is engaged in another trial;
- Whether all parties have stipulated to a continuance;
- Whether the interests of justice are best served by a continuance, by the trial of the matter, or by imposing conditions on the continuance; and
- Any other fact or circumstance relevant to the fair determination of the motion or application.

[b] Significant, Unanticipated Change in Case Status Constitutes Good Cause for Continuance

The circumstances that may indicate good cause for a continuance include a significant, unanticipated change in the status of the case as a result of which the case is not ready for trial (*Cal. Rules of Ct., Rule 3.1332(c)(7)*).

[c] Continuance Sought as Soon as Reasonably Practical

A party seeking a continuance of the date set for trial, whether contested or uncontested or stipulated to by the parties, must make the motion or application as soon as reasonably practical once the necessity for the continuance is discovered (*Cal. Rules of Ct., Rule 3.1332(b)*).

[d] Opportunity for Full Presentation

In ***Cadle Co. v. WorldWide Hospitality Furniture*** *(2006) 144 Cal. App. 4th 504, 50 Cal. Rptr. 3d 480* , plaintiff filed a motion to preclude the defendant corporation from presenting a defense, based on evidence that its corporate powers had been suspended. The trial court granted them motion. After judgment, the corporation obtained a revival of its corporate powers. The court of appeal found the trial court abused its discretion in entering judgment against the corporation because a brief trial continuance would have permitted the corporation to restore its good standing and defend the action (*144 Cal. App. 4th 504, 513-515)* .

In re Dolly A. *(1986) 177 Cal. App. 3d 195, 222 Cal. Rptr. 741* , was a child dependency matter. The father, who had been accused of sexually molesting his daughter and was facing criminal charges in another court, was denied a continuance. After a hearing in which the father had not testified out of fear that his testimony would be tantamount to giving a "deposition" with respect to his pending criminal charges, the court made a finding of dependency. The father appealed.

The court of appeal reversed the finding of dependency, reasoning that proceeding with the dependency hearing forced the father to elect between giving up his right to testify in that hearing and his right not to be "deposed" as a criminal defendant. The court noted that there was an absence of any factors under *Welf. & Inst. Code § 352(a)* that might otherwise negate granting a continuance. It found that the risk of possible injury to the minor's interests was relatively slight in granting a continuance, whereas the infringement on the father's rights was a clear and serious danger (*177 Cal. App. 3d 195, 199, 201)* .

In ***Cohen v. Herbert*** *(1960) 186 Cal. App. 2d 488, 8 Cal. Rptr. 922* , plaintiffs filed an action for appointment of a receiver of defendants' card club in which plaintiffs had an interest as limited partners. After approximately one month had elapsed, the trial court issued an order to show cause why a receiver should not be appointed and scheduled a hearing on the order in 14 days hence. At the hearing which was held on a Monday, both defendants requested a continuance of one week. Counsel for one defendant stated that he had been employed after previous counsel was forced to withdraw because of a conflict of interest and that although he had diligently sought copies of all papers and motions, plaintiffs' attorney was not able to provide complete copies. Counsel did not receive a full set of case papers until the Friday before the Monday hearing date. Moreover, on Friday night and Sunday, he was compelled to attend a mandatory army reserve meeting and thus had only one day to prepare the case and insufficient time to familiarize himself with 70 pages of case papers and to confer with his client.

Counsel for a second defendant stated that although his client had received copies of all case papers three days after the order to show cause had issued, counsel did not receive them until the Wednesday before the Monday hearing date and had not had time to confer with his client. Counsel also argued that because defendants had operated the card club for 10 years and showed a profit for the current period, plaintiffs would not be prejudiced by a brief delay. The court denied both motions for continuance, heard arguments of counsel on the order to show cause, and later that day appointed a receiver. Defendants appealed.

The court of appeal reversed the order appointing a receiver. It pointed out that while the trial court has wide discretion in acting on a motion for continuance, it may not exercise its discretion arbitrarily. If denial of the continuance results in possible or probable prejudice, one may deduce that the order was not made in the exercise of sound discretion, and denial of a continuance which has the practical effect of denying the applicant a fair hearing is often held to be reversible error. In this case, the record failed to show a lack of diligence or good faith on the defendants' part. There was no showing that plaintiffs would be prejudiced in any way by a continuance of one week since more than a month and a half had already elapsed since the filing of the complaint. Further, the power to appoint a receiver is a delicate one which should be exercised with caution to avoid injury to the parties or their property (*186 Cal. App. 2d 488, 494)* .

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4-48 California Points & Authorities § 48.11

§ 48.11 Written Stipulation for Continuance

[1] FORM Written Stipulation for Continuance

[*This form should be combined with a general memorandum supporting a noticed motion or ex parte application for a continuance (see § 48.10) or included in an appellate brief.*]

A CONTINUANCE SHOULD BE GRANTED BECAUSE THE ATTORNEYS OF RECORD FOR ALL PARTIES WHO HAVE APPEARED AGREE TO A CONTINUANCE.

A. Written Stipulation for Continuance. In all cases, the court shall postpone a trial, [or the hearing of any motion or demurrer], for a period not to exceed thirty [30] days, when all attorneys of record of parties who have appeared in the action agree in writing to the continuance (*Code Civ. Proc. § 595.2*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a noticed motion or ex parte application for a continuance [*see Cal. Rules of Ct., Rule 3.1332(b)*, (d)(9)]. when attorneys for all parties who have appeared in the action have agreed in writing to a continuance of 30 days or less [*Code Civ. Proc. § 595.2*].

Despite its mandatory language, *Code Civ. Proc. § 595.2* is directory only [*see Lorraine v. McComb (1934) 220 Cal. 753, 755-757, 32 P.2d 960* ; *Pham v. Thi Nguyen (1997) 54 Cal. App. 4th 11, 15-17, 62 Cal. Rptr. 2d 422* (stipulation presented four days before trial), discussed in *§ 48.34[3]*]. Therefore, counsel should make out as full a case for continuance *aside* from the stipulation as possible, by combining this form with the authorities in *§ 48.10* and with any other authority in the forms set forth in *§§ 48.12* -48.17 that is applicable to the particular case.

[b] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, if the stipulated continuance is sought because of the illness of an expert witness, counsel's argument should focus on the critical points made in the supporting declarations regarding the sudden onset of the expert's illness, when counsel first learned of the illness, attempts to arrange alternatives, the reasons why those alternatives will not suffice, and the speed with which counsel informed opposing counsel of the need for continuance, obtained the stipulation for continuance, and filed the motion for continuance.

It is also advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, or by affidavits or declarations. The affirmative showing of good cause required for continuance is generally made by supporting declarations submitted along with the noticed motion or ex parte application and the memorandum [*see Cal. Rules of Ct., Rule 3.1332(b)*]. Although the requirement for affidavits or declarations may be waived by the trial court, for instance in a situation involving emergency or surprise [*see, e.g., McCown v. Spencer (1970) 8 Cal. App. 3d 216, 228, 87 Cal. Rptr. 213* ; *Larson v. Solbakken (1963) 221 Cal. App. 2d 410, 430, 34 Cal. Rptr. 450]* , counsel must make a sufficiently detailed factual showing to support the motion for continuance; generalizations are not sufficient [*see, e.g., Watson v. Columbia Basin Dev. Co. (1913) 22 Cal. App. 556, 559, 135 P. 511]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Points and Authorities

The points and authorities in *§ 48.34* may be used in an appropriate case to oppose the points and authorities set out in this form.

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4-48 California Points & Authorities § 48.12

§ 48.12 Party's Unavoidable Absence Constitutes Good Cause for Continuance

[1] Party's Unavailability Due to Illness, Death, or Excusable Circumstances

[a] FORM Party's Unavoidable Absence Constitutes Good Cause for Continuance

[*This form should be combined with a general memorandum supporting a noticed motion or ex parte application for a continuance (see § 48.10) or included in an appellate brief.*]

A CONTINUANCE SHOULD BE GRANTED BECAUSE _____ [*name party, e.g.,* PLAINTIFF'S *or* DEFENDANT'S] _____ [ILLNESS *or* DEATH *or* EXCUSABLE CIRCUMSTANCES] CONSTITUTES GOOD CAUSE FOR CONTINUANCE

A. Party's Unavoidable Absence When Party's Presence Is Necessary. When a party is unavoidably absent and that party's presence is necessary to the conduct of the case, a continuance should be granted (*Morehouse v. Morehouse (1902) 136 Cal. 332, 334, 68 P. 976* ; *see also* *Muller v. Tanner (1969) 2 Cal. App. 3d 445, 457, 82 Cal. Rptr. 738*).

B. Party's Illness, Death, or Excusable Circumstances. A party's unavailability because of death, illness, or other excusable circumstances should be considered good cause for a continuance of a trial date (Cal. Rules of Ct., Rule 3.1332(c)(2); *Morehouse v. Morehouse (1902) 136 Cal. 332, 334, 68 P. 976* ; *Jaffe v. Lilienthal (1894) 101 Cal. 175, 176-177, 35 P. 636*).

[*Optional*] **C. Continuance Granted When Party Unavailable for Deposition.** When an unavoidably absent party is unavailable for deposition and the party's testimony is required, a continuance should be granted (*Morehouse v. Morehouse (1902) 136 Cal. 332, 334, 68 P. 976* ; *see also* *Betts Spring Co. v. Jardine Mach. Co. (1914) 23 Cal. App. 705, 706-707, 139 P. 657*).

[*Optional*] **D. Party Is Necessary Witness.** When a party is unavoidably absent and that party is required as a witness, a continuance should be granted (*Betts Spring Co. v. Jardine Mach. Co. (1914) 23 Cal. App. 705, 706-707, 139 P. 657*).

[b] Comments

[i] Use of Form

This form of points and authorities may be combined with the form at § 48.10[1] and submitted in support of a noticed motion or ex parte application for continuance [*see Cal. Rules of Ct., Rule 3.1332(b)*, (c)(2)], when a party's illness prevents his or her attendance at trial or renders him or her unable to help counsel prepare for trial. The authorities in this form should also be combined with all of the forms set forth in *§§ 48.13* -48.17 that are applicable to the particular case, i.e., that address the particular ground or grounds of good cause on which continuance is sought.

Optional Paragraphs C and D of this form are for use to anticipate the objection that deposing the absent party is desirable to continuance and to emphasize that the ill party is a necessary witness.

Because the party's illness may be insufficient grounds for continuance if other witnesses are available or someone else can aid and advise counsel, counsel should use optional Paragraph D, or another authority from the form in [2], *below*, to establish the necessity for the party's presence. When the ill party is a necessary witness, counsel may also wish to consider adding authorities from the forms in *§ 48.13* that address absence of witnesses and expanding argument to address that need.

[ii] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, if the continuance is sought because of a party's illness, counsel's argument should focus on the critical points made in the supporting declarations regarding the sudden onset of the party's illness, when counsel first learned of the illness, attempts to arrange alternatives, the reasons why those alternatives will not suffice, and the speed with which counsel informed opposing counsel of the need for continuance and filed the motion for continuance.

It is also advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, or by affidavits or declarations. The affirmative showing of good cause required for continuance is generally made by supporting declarations submitted along with the noticed motion or ex parte application and the memorandum [*see Cal. Rules of Ct., Rule 3.1332(b)*, (c)(2)] *McCown v. Spencer (1970) 8 Cal. App. 3d 216, 228, 87 Cal. Rptr. 213* ; *Larson v. Solbakken (1963) 221 Cal. App. 2d 410, 430, 34 Cal. Rptr. 450]* , counsel must make a sufficiently detailed factual showing to support the motion for continuance; generalizations are not sufficient [*see, e.g.,* *Watson v. Columbia Basin Dev. Co. (1913) 22 Cal. App. 556, 559, 135 P. 511]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[iii] Related Points and Authoritites

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[iv] Opposing Points and Authorities

The points and authorities in *§ 48.35[1] -[4]*, and if the party is also needed as a witness, the points and authorities in *§ 48.36[1] -[7]*, may be used in an appropriate case to oppose the points and authorities set out in this form.

[c] Discussion of Authorities

[i] Party's Unavoidable Absence When Party's Presence Is Necessary

In ***Morehouse v. Morehouse*** *(1902) 136 Cal. 332, 68 P. 976* , decedent's widow sued defendant, the decedent's brother, to quiet title to land that defendant claimed he and decedent had purchased jointly. The trial court, after granting defendant several continuances because of a serious accident defendant had suffered, refused an additional continuance and held a trial at which judgment was rendered for plaintiff. Defendant appealed.

The Supreme Court reversed, acting in part because of the trial court's failure to grant defendant an additional continuance. The Court noted that while the physician's affidavit showed the impracticability of defendant's attendance, the nature and circumstances of the case, as well as counsel's affidavit, showed the necessity of his appearance (*136 Cal. 332, 334)* .

In ***Muller v. Tanner*** *(1969) 2 Cal. App. 3d 445, 82 Cal. Rptr. 738* , plaintiff sued defendant attorney for malpractice. Defendant filed a notice of motion to declare plaintiff a vexatious litigant and for security [*Code Civ. Proc. §§ 391-391.6*]. Six days before the hearing on defendant's motion, plaintiff filed a notice of motion for a continuance because on the date of the hearing, his presence was required in a different superior court. Three days later, the trial court offered to grant plaintiff a continuance if plaintiff would waive his objection to the timeliness of defendant's motion for security. Plaintiff refused and subsequently, the trial court entered a judgment of dismissal for failure to furnish security. Plaintiff appealed.

The court of appeal reversed and ordered a new hearing on the motion to declare plaintiff a vexatious litigant because the factual showing made was inadequate to entitle defendant to an order for security. In discussing the trial court's denial of plaintiff's motion for a continuance, the court of appeal stated as the applicable principle that it is an abuse of discretion to deny a timely request for a continuance made on the ground of unavoidable absence if the party's presence is necessary for the proper prosecution of the matter before the court (*2 Cal. App. 3d 445, 457)* . However, the trial court's denial of a continuance was not reversed because the record of the hearing on plaintiff's motion for a continuance was incomplete and plaintiff had rejected the conditional continuance offered to him (*2 Cal. App. 3d 445, 458)* .

[ii] Party's Unavailability Due to Illness, Death, or Excusable Circumstances

Morehouse v. Morehouse *(1902) 136 Cal. 332, 68 P. 976* , is discussed at [i], *above*. In reversing, the Supreme Court relied in part on the distinction in *Jaffe v. Lilienthal (1894) 101 Cal. 175, 177, 35 P. 636* [discussed *below*], that a party might waive the right to be present at the trial by a voluntary absence under circumstances in which reasonable people would not absent themselves (*136 Cal. 332, 334)* .

Jaffe v. Lilienthal *(1894) 101 Cal. 175, 35 P. 636* , was an action, the nature of which is undescribed in the report, against an administrator. On the day of trial, plaintiff's attorney requested a continuance for the reason that plaintiff, who resided out of state, was prevented from attending the trial by an attack of acute rheumatism which rendered him wholly unable to move or leave his room. In addition, plaintiff's presence was indispensable because he was the only person who knew the whereabouts of the witnesses and the matters to which they would testify. The trial court denied the motion and subsequently entered judgment for defendant. Defendant appealed.

On appeal, the Supreme Court reversed, reasoning that although the right of an absent party to attend the trial may be

voluntarily waived, it was not waived in this case, and the party's attendance was required. The court rejected defendant's contention that plaintiff had not been diligent in preparing for trial with the statement that it appeared that if plaintiff had not been ill, he could have prepared for trial (*101 Cal. 175, 176-177)* .

[iii] Continuance Granted When Party Unavailable for Deposition

Morehouse v. Morehouse *(1902) 136 Cal. 332, 68 P. 976* , discussed at [i], *above*, involved the trial court's denial of a continuance to a defendant who had been in an accident. In reversing, the Supreme Court noted that the affidavit submitted on defendant's behalf stated that in addition to being unable to attend trial, at no time since the accident had defendant's physical or mental condition permitted his taking a deposition and that it would be extremely dangerous to his health to take his deposition (*136 Cal. 332, 334)* .

Betts Spring Co. v. Jardine Mach. Co. *(1914) 23 Cal. App. 705, 139 P. 657* , is discussed in [iv], *below*. The court of appeal, in holding that defendant, who was the only witness on his own behalf, should have been granted a continuance, apparently considered defendant to be unavailable as a practical matter for deposition because he was in Europe recuperating from a stroke (*23 Cal. App. 705, 706-707)* .

[iv] Party Is Necessary Witness

In ***Betts Spring Co. v. Jardine Mach. Co.*** *(1914) 23 Cal. App. 705, 139 P. 657* , defendant suffered a stroke of apoplexy three months before the trial and on physician's advice traveled to Europe to recover. On the day of the trial, defendant's counsel moved for a continuance and submitted an affidavit stating the reason for defendant's absence and that defendant was the only witness on the matters in his defense. The trial court denied the motion and entered judgment for plaintiff. Defendant appealed.

The court of appeal reversed. The court found that defendant acted in good faith, he was his only witness, and plaintiff did not show injury or prejudice from delay. Although the case had been pending for two years, that delay could not be attributed to defendant (*23 Cal. App. 705, 706-707)* .

[2] Economic Necessity

[a] FORM Party's Unavoidable Absence Constitutes Good Cause for Continuance

[*This form should be combined with a general memorandum of points and authorities supporting a noticed motion or ex parte application for a continuance (see § 48.10) or included in an appellate brief.*]

A CONTINUANCE SHOULD BE GRANTED BECAUSE ECONOMIC NECESSITY REQUIRING _____ [*name party, e.g.,* PLAINTIFF'S *or* DEFENDANT'S] ABSENCE CONSTITUTES GOOD CAUSE FOR CONTINUANCE.

A. Economic Necessity. A party's absence is sufficient cause for continuance if the party's attendance at trial would result in serious economic loss to his or her business affairs (*Ferrari v. Mambretti (1945) 70 Cal. App. 2d 492, 494, 161 P.2d 275* ; *see also Wilkinson v. Parrott (1867) 32 Cal. 102, 103)* .

[*Optional*] **B. Party Required to Assist Counsel.** When a party is unavoidably absent and that party's knowledge of facts, witnesses' names, or testimony is needed to assist counsel, the continuance should be granted (*Pacific Gas & Elec. Co. v. Taylor (1921) 52 Cal. App. 307, 308, 198 P. 651*).

[*Optional*] **C. Unique Knowledge of Facts.** When a party is unavoidably absent and possessed with a unique knowledge of facts which cannot be adequately communicated to counsel in advance, a continuance should be granted (*Jaffe v. Lilienthal (1894) 101 Cal. 175, 176-177, 35 P. 636* ; *Carl v. Thomas (1931) 116 Cal. App. 294, 298, 2 P.2d*

872).

[*Optional*] **D. Party's Inability to Consult With Counsel.** When a party is unavoidably absent and, for the same reason, unable to consult with counsel before trial, a continuance should be granted (*Estate of Stevens (1922) 57 Cal. App. 160, 161, 206 P. 668*).

[b] Comments

[i] Use of Form

This form of points and authorities may be combined with the form at § 48.10[1] and submitted in support of a noticed motion or ex parte application for continuance [*see Cal. Rules of Ct., Rule 3.1332(b)*], when a party would incur economic hardship if forced to attend trial on the date scheduled. The authorities in this form should also be combined with all of the forms set forth in *§§ 48.13* -48.17 that are applicable to the particular case, i.e., that address the particular ground or grounds of good cause on which continuance is sought.

Because a party's absence due to economic hardship is insufficient grounds for continuance if other witnesses are available or someone else can aid and advise counsel [*see e.g., § 48.35[4]*], counsel should use optional Paragraphs B, C, or D, or optional Paragraph D from the form in [1], *above*, to establish the necessity for the party's presence.

[ii] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, if the continuance is sought because the party's presence at trial on the scheduled date will cause him or her economic hardship, counsel's argument should focus on the critical points made in the court's file and in supporting declarations regarding the substantial hardship involved for the party to attend on the scheduled date, when counsel first learned of the problem, what alternatives, if any, were considered and why they would not be sufficient, and the speed with which counsel informed opposing counsel of the need for continuance and filed the motion for continuance.

It is also advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, or by affidavits or declarations. The affirmative showing of good cause required for continuance is generally made by supporting declarations submitted along with the noticed motion or ex parte application and the memorandum [*see Cal. Rules of Ct., Rule 3.1332(b)*]. Although the requirement for affidavits or declarations may be waived by the trial court, for instance in a situation involving emergency or surprise [*see, e.g., McCown v. Spencer (1970) 8 Cal. App. 3d 216, 228, 87 Cal. Rptr. 213* ; *Larson v. Solbakken (1963) 221 Cal. App. 2d 410, 430, 34 Cal. Rptr. 450]* , counsel must make a sufficiently detailed factual showing to support the motion for continuance; generalizations are not sufficient [*see, e.g., Watson v. Columbia Basin Dev. Co. (1913) 22 Cal. App. 556, 559, 135 P. 511]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[iii] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of

this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[iv] Opposing Points and Authorities

The points and authorities in *§ 48.35[1], [3], [4]* may be used in an appropriate case to oppose the points and authorities set out in this form.

[c] Discussion of Authorities

[i] Economic Necessity

Ferrari v. Mambretti *(1945) 70 Cal. App. 2d 492, 161 P.2d 275* , involved a retrial of an action for reasonable value of services performed brought against the administratrix of an estate after a previous judgment for plaintiff had been reversed. Six days before trial was to commence in November, plaintiff moved for a continuance of the trial until January, stating in part that he could not be continuously present at the trial since his business was largely seasonal and given the wartime shortage of help, he would suffer serious economic loss if absent during November and December. The trial court denied the motion and, after plaintiff's counsel refused to proceed, dismissed the action. Plaintiff appealed.

Although the court of appeal affirmed the trial court's action for the reason that plaintiff failed to establish that his presence at trial was necessary, it conceded the sufficiency of plaintiff's showing that economic necessity prevented his attendance at the time scheduled for trial (*70 Cal. App. 2d 492, 494)* .

In ***Wilkinson v. Parrott*** *(1867) 32 Cal. 102* , plaintiff sued defendant for personal injuries which resulted when defendant's dog bit plaintiff's daughter. On the day of trial, defendant's counsel moved to postpone the trial for three days because defendant had left the state on important private business and the case could not be tried without his attendance. The trial court denied the motion; ultimately, the jury rendered a verdict for plaintiff. Defendant appealed.

The Supreme Court affirmed, stating that the refusal of the trial court to postpone the trial was not an abuse of discretion because defendant failed to show that the business activities were very important, required his personal attention, and could not be delayed for a few days (*32 Cal. 102, 103)* .

[ii] Party Required to Assist Counsel

In ***Pacific Gas & Elec. Co. v. Taylor*** *(1921) 52 Cal. App. 307, 198 P. 651* , plaintiff brought an action in condemnation against defendants. At the trial, defendants made no showing on their behalf and the jury awarded them only $51.50 as damages for condemnation despite the fact that their answer claimed $63,000 in damages. Defendants appealed on the ground that the trial court should have granted their motion for a continuance based on one defendant's absence.

The court of appeal agreed and reversed. The court found that, first, defendant's presence at the trial was essential. Counsel's affidavit stated that defendant was the only person familiar with the property, the facts constituting the defense, and the whereabouts of witnesses. Counsel was totally unprepared in these matters. Second, it found that defendant's absence was unavoidable and that he showed no lack of diligence. When defendant left the state on business, the case had not been set for trial, and if he had not become seriously ill in Boston, he would have had sufficient time to return. (The court excused the fact that illness was established by telegram rather than by affidavit). Previous to this, both parties had been expeditious in preparing the case for trial. Third, the court found that under these circumstances denial of the motion prejudiced defendants' substantial rights. Eminent domain cases, in particular, require that the landowner should receive every legal consideration in showing the extent of the damage that will be suffered (*52 Cal. App. 307, 308)* .

[iii] Unique Knowledge of Facts

The factual background of ***Jaffe v. Lilienthal*** *(1894) 101 Cal. 175, 35 P. 636* , is discussed in [1][c][ii], *above*. In this case, the Supreme Court reversed the trial court's denial of a continuance to an absent party, describing why, in some situations, advance preparation of counsel is not a substitute for the party's presence. The Court reasoned that even when a party is disqualified as a witness, it seldom happens that a trial can be properly had in the absence of the plaintiff, especially when it is to be tried on oral testimony. Despite careful preparation, some matter of vital importance is liable to be overlooked until the trial calls it to the party's recollection, and this is especially true in relationship to matters purely in rebuttal (*101 Cal. 175, 176-177)* .

In ***Carl v. Thomas*** *(1931) 116 Cal. App. 294, 2 P.2d 872* , plaintiffs filed an action to quiet title to property and to cancel defendant's interest in a deed in which both plaintiffs and defendant appeared as grantees on the ground that defendant's interest had been obtained by fraud and deceit; Defendant, who was in the coast guard in New York State notified his attorney that he could obtain a leave in April to attend the trial. A trial date was set in April, but defendant did not appear, and his attorney's request for a continuance was denied. Later, it was determined that defendant did not receive his attorney's notification of the trial date although the letter, sent in an envelope with return address and request for return if not delivered, was not returned to counsel. Subsequently, the trial court, after denying defendant's motions for continuances on other grounds, rendered a judgment for plaintiffs. Defendant appealed.

The court of appeal reversed solely because the trial court had clearly abused its discretion in denying defendant's several motions for continuances. Although today, it would likely require more than a single unanswered letter to establish a diligent effort to notify the party of a trial date [*see* *Young v. Redman (1976) 55 Cal. App. 3d 827, 831-832, 128 Cal. Rptr. 86* , discussed in *§ 48.31[1*][c][i]], the court of appeal in *Carl* found that both defendant and his counsel had made an effort to procure defendant's attendance and that neither was at fault for defendant's failure to appear. Defendant was the only person other than plaintiffs who had personal knowledge of many of the important issues to be decided by the court and was the only person who could have corrected plaintiffs' testimony if in error. Even an admission by plaintiffs' counsel that defendant if present would have testified contrary to plaintiffs' testimony could not substitute for defendant's attendance. Further, there was no showing of prejudice to the plaintiffs by the one-month continuance (*116 Cal. App. 294, 298)* . The court did not require defendant to show the impossibility of preparing counsel in advance; but said that, given the nature of the subject matter, it would have been difficult for the party to have adequately prepared counsel to rebut plaintiffs' misstatements (*116 Cal. App. 294, 298)* [*but see* *Foster v. Hudson (1939) 33 Cal. App. 2d 705, 707-708, 92 P.2d 959* , discussed in *§ 48.35[3*][c][ii], which required a showing that the absent party could not have advised counsel in advance].

[iv] Inability to Consult With Counsel

In ***Estate of Stevens*** *(1922) 57 Cal. App. 160, 206 P. 668* , two of the three parties contesting a will in probate proceedings in California were ill at their homes in New York; their mother, a material witness, also resided in New York. Three days before the trial was to begin, the attorney for the absent contestants filed a motion for continuance to take their depositions. This motion was heard on the day of trial when the executor's witnesses and a jury were already in attendance. The trial court denied the motion and, when contestants refused to proceed, dismissed the contest. The contestants appealed.

The court of appeal reversed, finding that the grounds for continuance were sufficient. The affidavit describing the parties' illnesses was not controverted and their attorney had never had an opportunity to confer with them. Because counsel filed the motion for a continuance within three days after learning about the illnesses, there was no lack of diligence (*57 Cal. App. 160, 161)* .

[3] Party Is Member of Legislature

[a] FORM Party's Unavoidable Absence Constitutes Good Cause for Continuance

[*This form should be combined with a general memorandum of points and authorities supporting a noticed motion or ex parte application for a continuance (see § 48.10) or included in an appellate brief.*]

A CONTINUANCE SHOULD BE GRANTED BECAUSE _____ [*name party, e.g.,* PLAINTIFF *or* DEFENDANT] IS A MEMBER OF THE LEGISLATURE, WHICH WILL BE IN SESSION AT THE TIME NOW SET FOR TRIAL.

A. Party Is Member of Legislature. The trial of any civil action shall be postponed to a date certain when it appears to the court before which the action is pending that a party to the action is a Member of the California Legislature and that the Legislature is in session or in a recess not exceeding forty (40) days, [or that a legislative interim committee of which the party is a duly appointed member is meeting, or is to meet within a period which the court finds does not exceed the time reasonably necessary to enable the member to reach the committee meeting by the ordinary mode of travel] (*Code Civ. Proc. § 595*).

B. Length of Postponement. When the Legislature is in session or in a recess not exceeding forty (40) days, that action [or proceeding] shall not, without the consent of the attorney of record therein be brought for trial [or hearing] before the expiration of thirty (30) days next following final adjournment of the Legislature or commencement of a recess of more than forty days. If a date is available during recess, continuance shall be given if possible to that earlier date (*Code Civ. Proc. § 595*).

[*Optional*] **C. Postponement Due to Legislative Committee Meeting.** When a legislative committee is meeting or is to meet within a period which the court finds does not exceed the time reasonably necessary to enable the member to reach the committee meeting by the ordinary mode of travel, the action [or proceeding] shall not, without the consent of the attorney of record therein, be brought for trial [or hearing] before the expiration of the period following the adjournment or recess of the committee meeting as the court finds is reasonably necessary to allow the member to reach the place of trial [or hearing] by the ordinary mode of travel from the place of the committee meeting, unless at the expiration of that period the Legislature is to be in session, and in that case the action [or proceeding] shall not, without such consent, be brought for trial [or hearing] the expiration of thirty (30) days next following final adjournment or a recess of more than forty (40) days. [If a date is available during recess, continuance shall be given to that earlier date] (*Code Civ. Proc. § 595*).

D. When Continuance Is Mandatory. Granting of a continuance pursuant to this section is mandatory unless the court determines that a continuance would defeat or abridge a right to relief pendente lite in a paternity action or a right to invoke a provisional remedy such as pendente lite support in a domestic relations controversy, attachment and sale of perishable goods, receivership of a failing business, and temporary restraining order or preliminary injunction, and that the continuance should not be granted (*Code Civ. Proc. § 595*).

[b] Comments

[i] Use of Form

This form of points and authorities may be combined with the form at § 48.10[1] and submitted in support of a noticed motion or ex parte application for continuance [*see Cal. Rules of Ct., Rule 3.1332(b)*], when a party is a member of the California Legislature and the Legislature is in session, or in recess for less than forty days, or when a committee of which the party is a member is in session or scheduled for session. There are exceptions noted in Paragraph D.

The authorities in this form should also be combined with all of the forms set forth in *§§ 48.13* -48.17 that are applicable to the particular case, i.e., that address the particular ground or grounds of good cause on which continuance

is sought.

[ii] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, if the continuance is sought because the party's presence at trial on the scheduled date conflicts with his or her Legislative duties, counsel's argument should focus on the critical points made in the court's file and in supporting declarations regarding the Legislative schedule, the travel modes and times involved, if any, the fact that none of the exceptions is applicable, why it is necessary for the party to attend the trial, when counsel first learned of the problem, what alternatives, if any, were considered and why they would not be sufficient, and the speed with which counsel informed opposing counsel of the need for continuance and filed the motion for continuance.

It is also advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, or by affidavits or declarations. The affirmative showing of good cause required for continuance is generally made by supporting declarations submitted along with the noticed motion or ex parte application and the memorandum [*see Cal. Rules of Ct., Rule 3.1332(b)*]. Although the requirement for affidavits or declarations may be waived by the trial court, for instance in a situation involving emergency or surprise [*see, e.g., McCown v. Spencer (1970) 8 Cal. App. 3d 216, 228, 87 Cal. Rptr. 213* ; *Larson v. Solbakken (1963) 221 Cal. App. 2d 410, 430, 34 Cal. Rptr. 450]* , counsel must make a sufficiently detailed factual showing to support the motion for continuance; generalizations are not sufficient [*see, e.g., Watson v. Columbia Basin Dev. Co. (1913) 22 Cal. App. 556, 559, 135 P. 511]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[iii] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[c] Discussion of Authorities

[i] Party Is Member of Legislature

Code Civ. Proc. § 595 applies not only to a trial of any civil action, but also to a proceeding in a court, or of any administrative proceeding before a state board or commission or officer, irrespective of the date of the filing of the matter or when it became at issue, or the hearing of any motion, demurrer, or other proceeding. In those situations, the determination is made by the board, commission, or officer before which the action or proceeding is pending [*Code Civ. Proc. § 595*].

[ii] Length of Postponement

Any postponement granted under the provisions set forth in Paragraphs B and C of the form in [a], *above*, suspends for the same period of time as the postponement, the running of any period of time for any ruling or proceeding by a court, board, commission, or officer, or for the performance by any party or any act affected by the postponement [*Code Civ.*

Proc. § 595].

[iii] When Postponement Is Mandatory

For discussion of *Thurmond v. Superior Court (1967) 66 Cal. 2d 836, 838-840, 59 Cal. Rptr. 273, 427 P.2d 985* , the case that led to the amendment of *Code Civ. Proc. § 595* to state that postponement is mandatory except in the situations listed, see *§ 48.30[3][a]*.

[4] Party Is in Military Service

[a] FORM Party's Unavoidable Absence Constitutes Good Cause for Continuance

[*This form should be combined with a general memorandum of points and authorities supporting a noticed motion or ex parte application for a continuance (see § 48.10) or included in an appellate brief.*]

[*EITHER, if seeking a continuance under the Servicemembers Civil Relief Act (50 U.S.C. App., § 501 et seq.)*]

A CONTINUANCE SHOULD BE GRANTED TO AN ABSENT PARTY IN MILITARY SERVICE.

[*OR, if seeking a continuance under Mil. & Vet. Code § 400 et seq.*]

A CONTINUANCE SHOULD BE GRANTED TO AN ABSENT PARTY IN MILITARY SERVICE UNLESS THE ABILITY OF THE PARTY TO _____ [PROSECUTE OR DEFEND] IS NOT MATERIALLY AFFECTED BY THE PARTY'S MILITARY SERVICE.

A. Statutory Basis. The Servicemembers Civil Relief Act (formerly, the Soldiers' and Sailors' Civil Relief Act) (*50 U.S.C. App., § 501 et seq.*) provides that in any action or proceeding in which a person in the military service is involved, the court is required to grant a stay of proceedings for a minimum period of 90 days (*50 U.S.C. App., §§ 521, 522*.). The stay is not discretionary, but is automatic under the Servicemembers Civil Relief Act; and the servicemember need not show that his or her ability to defend the action is "materially affected" by military service.

If the defendant in any action does not make an appearance and it appears that the defendant is in military service, an attorney is appointed for the defendant. The stay will be granted upon motion of the attorney or upon the court's own motion, if the court determines that: (1) there may be a defense to the action and a defense cannot be presented without the presence of the servicemember/defendant; or (2) after due diligence, counsel has been unable to contact the servicemember/defendant or otherwise determine if a meritorious defense exists (*50 U.S.C. App., § 521*).

If the defendant is in military service, or within 90 days after release from military service, and has received notice of an action or proceeding, the court must stay the action for a minimum of 90 days upon application of the servicemember or upon the court's own motion. The application from the servicemember must consist of a letter or other communication stating why the servicemember is unable to appear and when the servicemember will be able to appear and include a letter or other communication from the servicemember's commanding officer stating that the servicemember is unable to appear (*50 U.S.C. App., § 522*).

California statutes also protect service members that are officers and enlisted members of the National Guard called or ordered into active state service by the Governor or President, and Reservists of the United States Military Reserve who have been called to full-time active duty (*Mil. & Vet. Code § 400 et seq.*). The stay is not automatic under California law. Under the state statutes, at any stage in any action or proceeding in which a service member is involved, either as

plaintiff or defendant, during the period of military service or within 60 days thereafter, the court may, in its discretion on its own motion, and must, on application to it by the service member or some person on his/her behalf, stay the action or proceeding unless, in the opinion of the court, the ability of the _____ [plaintiff to prosecute the action or defendant to conduct his/her defense] is not materially affected by reason of his/her military service (*Mil. & Vet. Code § 403(a)*). Any stay of any action may be ordered for the period of military service and three months thereafter or any part of that period, and subject to those terms as may be just; and if the service member is a codefendant with others the plaintiff may nevertheless, by leave of court, proceed against the others (*see Mil. & Vet. Code § 403(d)*).

B. Automatic Stay under Federal Law. To protect military servicemember's rights, the Servicemembers Civil Relief Act grants an automatic 90 day stay in civil proceedings (*50 U.S.C. App., §§ 521, 522*). The stay is not discretionary, but is automatic; and the servicemember need not show that his or her ability to defend the action is "materially affected" by military service.

If no appearance by the defendant in the action has been made, and an attorney has been appointed for the defendant who appears to be in the military, the court *must* grant a 90 day stay if it appears that there may be a defense to the action that cannot be presented without the presence of the servicemember or the counsel has not been able to locate the servicemember to determine if a defense exists (*50 U.S.C. App., § 521*).

If a servicemember has received notice of an action or proceeding, the court *must* grant a 90 day stay if it receives a letter or other communication from the servicemember and the commanding officer stating that the servicemember cannot appear, when he or she will be available to appear, and that he or she is not authorized for leave (*50 U.S.C. App., § 522*).

While the initial 90-day stay is essentially automatic, the granting of an *additional* stay is discretionary. A request for an additional stay may be denied if the servicemember's ability to appear and participate in the civil action is not adversely affected by his or her military duties (*see George P. v. Superior Court (2005) 127 Cal. App. 4th 216, 225-226, 24 Cal. Rptr. 3d 919*).

C. Under State Statutes, Burden of Persuasion Is on Party Resisting Continuance. A request for a stay under *Section 403 of the Military and Veterans Code* should be granted if, in the opinion of the court, the ability of the plaintiff to prosecute the action or the defendant to conduct his or her defense is not materially affected by reason of his or her military service; and the burden of persuading the court to the contrary is on the party resisting the continuance (*see Chaffey v. Chaffey (1963) 59 Cal. 2d 792, 797, 31 Cal. Rptr. 325, 382 P.2d 365*).

D. Under State Statutes, Showing Required Is Less Than Required for Regular Continuance. A request for a stay under *Section 403 of the Military and Veterans Code* requires less of a showing than that required from a litigant requesting a continuance independently of the act (*see Miller v. Miller (1945) 26 Cal. 2d 119, 125, 156 P.2d 931*).

[b] Comments

[i] Use of Form

This form of points and authorities may be combined with the form at § 48.10[1] and submitted in support of a noticed motion or ex parte application for continuance [*see Cal. Rules of Ct., Rule 3.1332(b)*], when a party's absence is due to his or her military service. The authorities in this form should also be combined with all of the forms set forth in *§§ 48.13* -48.17 that are applicable to the particular case, i.e., that address the particular ground or grounds of good cause on which continuance is sought.

To establish the disadvantage at which the party in military service is placed for actions under *Mil. & Vet. Code § 400 et*

seq., counsel may wish add as many as are applicable of the authorities from Paragraph D. of the form in [1][a], *above*, or from Paragraphs B, C, or D of the form in [2][a], *above*.

[ii] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, if the continuance is sought because the party's presence at trial on the scheduled date conflicts with his or her military duties, counsel's argument should focus on the critical points made in the court's file and in supporting declarations regarding the party's military service, the location of that service and the travel modes and times involved between the place of service and the place of trial, why it is necessary for the party to attend the trial, when counsel first learned of the problem, what alternatives, if any, were considered and why they would not be sufficient, and the speed with which counsel informed opposing counsel of the need for continuance and filed the motion for continuance.

It is also advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, or by affidavits or declarations. The affirmative showing of good cause required for continuance is generally made by supporting declarations submitted along with the noticed motion or ex parte application and the memorandum [*see Cal. Rules of Ct., Rule 3.1332(b)*]. Although the requirement for affidavits or declarations may be waived by the trial court, for instance in a situation involving emergency or surprise [*see, e.g., McCown v. Spencer (1970) 8 Cal. App. 3d 216, 228, 87 Cal. Rptr. 213* ; *Larson v. Solbakken (1963) 221 Cal. App. 2d 410, 430, 34 Cal. Rptr. 450]* , counsel must make a sufficiently detailed factual showing to support the motion for continuance; generalizations are not sufficient [*see, e.g., Watson v. Columbia Basin Dev. Co. (1913) 22 Cal. App. 556, 559, 135 P. 511]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[iii] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[iv] Opposing Points and Authorities

The points and authorities in *§ 48.35[5]* may be used in an appropriate case to oppose the points and authorities set out in this form.

[c] Discussion of Authorities

[i] Automatic Stay Under Federal Law

In ***George P. v. Superior Court*** *(2005) 127 Cal. App. 4th 216, 24 Cal. Rptr. 3d 919* , a request for an *additional* stay under the federal Servicemembers Civil Relief Act [*50 U.S.C. App. § 501 et seq.*] was denied. During the course of a juvenile dependency proceeding regarding custody of a minor child, the father, a member of the National Guard, was sent to Iraq. The father was granted an initial 90-day stay by the juvenile court. He later filed a motion for an additional

stay on the ground that his military service prevented him from making further appearances in the case. The juvenile court denied the father's motion for an additional stay finding that the father had been given "more than a fair opportunity" to participate in the proceedings. The father then filed an extraordinary writ of review of that denial.

The father argued that the juvenile court erred in denying his request for an additional stay. The father argued that stays are mandatory under the Servicemembers Civil Relief Act. The court of appeal disagreed. While the initial 90-day stay is essentially automatic, the granting of an *additional* stay is discretionary. A request for an additional stay may be denied if the servicemember's ability to appear and participate in the civil action is not adversely affected by his or her military duties. In this instance, the court held that the father's military service did not adversely affect his participation in the case. The record demonstrated that the father had appeared in the action and received services for reunification with his child for essentially the entire period required by law. The father had also made a personal appearance during a leave of absence from the military and had already provided necessary testimony. Furthermore, the father had been represented by counsel at all times and had been able to communicate with social services staff and counsel while he was in Iraq. In this particular instance, the court opined that the father had already been given a full and fair opportunity to reunify with his child and that any additional stay was merely delaying the inevitable. Accordingly, the juvenile court did not abuse its discretion in denying the stay (*127 Cal. App. 4th 216, 225-226)* .

[ii] Under State Statutes, Burden of Persuasion is on Party Resisting Continuance

Note:

The Servicemembers Civil Relief Act, enacted in 2003 and replacing the Soldiers' and Sailors' Civil Relief Act, significantly changed the federal law to make the granting of initial stays essentially automatic. While the initial 90-day stay is automatic, the granting of an *additional* stay is discretionary. The case referenced below also may be useful in supporting a motion for a continuance brought under the Military and Veterans Code, which was patterned after the Soldiers' and Sailors' Civil Relief Act, and requires the servicemember to make a prima facie showing that his or her ability to prosecute or defend is materially affected by reason of military service [*see Mil. & Vet. Code § 403*].

In ***Chaffey v. Chaffey*** *(1963) 59 Cal. 2d 792, 31 Cal. Rptr. 325, 382 P.2d 365* , plaintiff, the defendant's former spouse, filed action to obtain custody of their children on the day before defendant was to leave California for Guam under military orders. On the next day, defendant was served with an order to show cause and a restriction on taking the children with him to Guam. Subsequently, on the day of the hearing, defendant's counsel requested a stay under former § 521 of the Soldiers' and Sailors' Civil Relief Act (now, the Servicemembers Civil Relief Act) because defendant was still stationed in Guam and could not attend the hearing. The trial court stated that the defendant's violation of the court order by taking the children from California disqualified him from requesting a stay of proceedings. The court then held the hearing and transferred custody from defendant to plaintiff. Defendant appealed.

The Supreme Court reversed because of the trial court's denial of the request for a stay of proceedings without a full hearing on the matter. The Court stated that although the trial court has the discretion to deny a stay, it does not have discretion to deny a full hearing on the issue because if defendant can make a prima facie showing, a postponement, in the absence of evidence by the adverse party, is mandatory (*59 Cal. 2d 792, 797)* . Relying on *Pacific Greyhound Lines v. Superior Court (1946) 28 Cal. 2d 61, 67, 168 P.2d 665* , the Court held that once the party requesting the stay had made a prima facie showing for relief, the burden of persuasion, if not proof, is on the party resisting the postponement to show that the moving party's ability to prosecute or defend is not materially affected by reason of military service (*59 Cal. 2d 792, 797)* .

[iii] Under State Statutes, Showing Required Is Less Than Required for Regular Continuance

Note:

The Servicemembers Civil Relief Act, enacted in 2003 and replacing the Soldiers' and Sailors' Civil Relief Act, significantly changed the federal law to make the granting of initial stays essentially

automatic. While the initial 90-day stay is automatic, the granting of an *additional* stay is discretionary. The case referenced below also may be useful in supporting a motion for a continuance brought under the Military and Veterans Code, which was patterned after the Soldiers' and Sailors' Civil Relief Act, and requires the servicemember to make a prima facie showing that his or her ability to prosecute or defend is materially affected by reason of military service [*see Mil. & Vet. Code § 403*].

Miller v. Miller *(1945) 26 Cal. 2d 119, 156 P.2d 931* , involved a divorce conflict between the parties. In 1941, plaintiff procured an interlocutory decree of divorce from defendant. In 1943, defendant procured entry of the final decree on presentation of an affidavit averring that he had fully complied with the provisions of the interlocutory decree and was not in default. Six months later, plaintiff moved to set aside the final decree on the ground that it had been procured by fraud because, contrary to his affidavit, defendant had been in default. At the hearing on plaintiff's motion, defendant's counsel submitted a petition signed by defendant's mother in which she alleged that defendant was then in the army, stationed in Mississippi, and requested a stay under former § 521 of the Soldiers' and Sailors' Civil Relief Act [*50 U.S.C. App. § 501 et seq.*]. The trial court denied this motion and a subsequent motion for a three-week continuance made on grounds which were independent of the federal act; it then granted plaintiff's motion to set aside the final decree, and defendant appealed.

The Supreme Court affirmed, holding that both decisions of the trial court were within its discretionary authority. However, the Court stated that when the trial court had approved the denial of a stay under the Soldiers' and Sailors' Civil Relief Act, it could logically approve the denial of the second request because the showing that one in the military service is required to make under the Soldiers' and Sailors' Civil Relief Act is much less than that required from a litigant requesting a limited continuance independently of the act (*26 Cal. 2d 119, 125)* .

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Volume 4 Chapters 40-49 CLAIM & DELIVERY---to---CONTINUANCE
CHAPTER 48 CONTINUANCE OF PROCEEDINGS
PART II. FORMS
A. SUPPORTING CONTINUANCE

4-48 California Points & Authorities § 48.13

§ 48.13 Witness's Absence Constitutes Good Cause for Continuance

[1] Materiality of Witness's Evidence

[a] FORM Witness's Absence Constitutes Good Cause for Continuance

[*This form should be combined with a general memorandum of points and authorities supporting a noticed motion or ex parte application for a continuance (see § 48.10) or included in an appellate brief.*]

THE COURT SHOULD GRANT THE CONTINUANCE TO PERMIT _____ [*name of absent witness*] TO TESTIFY, BECAUSE HIS/HER EXPECTED TESTIMONY IS MATERIAL AND _____ [*specify moving party, e.g.,* PLAINTIFF] HAS ATTEMPTED DILIGENTLY TO PROCURE THAT TESTIMONY.

A. Materiality and Diligence. A motion to postpone a trial on the ground of the absence of evidence can only be made on affidavit showing the evidence expected to be obtained is material and that due diligence has been used to procure it. Thus, when the party requesting a continuance to obtain the testimony of an absent witness has attempted diligently to procure the testimony and the expected testimony is material, a continuance is justified (*Code Civ. Proc. § 595.4*; *Jurado v. Toys "R" Us, Inc. (1993) 12 Cal. App. 4th 1615, 1618, 16 Cal. Rptr. 2d 158* ; *see also Larson v. Solbakken (1963) 221 Cal. App. 2d 410, 428-430, 34 Cal. Rptr. 450*).

B. Avoidance of Subpoena or Disregard of Agreement to Appear. The unavailability of a witness, should, under normal circumstances, be considered good cause for granting the continuance of a trial date only if the witness has been subpoenaed, or is beyond the reach of subpoena and has agreed to be present, and that witness's absence is due to unavoidable emergency that counsel did not know and could not reasonably have known at the time of the pretrial or trial setting conference (*Cal. Rules of Ct., Rule 3.1332(c)(1),* (7); *Jurado v. Toys "R" Us, Inc. (1993) 12 Cal. App. 4th 1615, 1618, 16 Cal. Rptr. 2d 158* ; *see Kramer v. Kramer (1961) 197 Cal. App. 2d 727, 731, 17 Cal. Rptr. 461* (upholding denial of continuance when witness had not been subpoenaed)).

[*Optional*] **C. Sole Method of Proof Supports Finding of Materiality.** The fact that an absent witness and expected

testimony has not been and cannot be established in any other manner supports a finding that the testimony is material (*Oak Knoll Broadcasting Corp. v. Hudgings (1969) 275 Cal. App. 2d 563, 566, 80 Cal. Rptr. 175* ; *Gibson v. Cobb (1965) 236 Cal. App. 2d 226, 237, 46 Cal. Rptr. 57*).

[*Optional*] **D. Important Evidence Is Material.** The fact that the expected testimony is important in determining a close question of fact presented by the case supports a finding of materiality, even though it is not the sole evidence supporting the same conclusion (*Murr v. Murr (1948) 87 Cal. App. 2d 511, 521-522, 197 P.2d 369*).

[*Optional*] **E. Affidavit May Be Waived.** If a party requesting a continuance to obtain the testimony of an absent witness has acted with diligence in attempting to procure that testimony and the expected testimony is material, a continuance is justified even though the request is not supported by affidavit, but, rather, by other proof in open court (*Larson v. Solbakken (1963) 221 Cal. App. 2d 410, 430, 34 Cal. Rptr. 450*).

[b] Comments

[i] Use of Form

This form of points and authorities may be combined with the form at § 48.10[1] and submitted in support of a noticed motion or ex parte application for continuance [*see Cal. Rules of Ct., Rule 3.1332(b)*], when a witness whose testimony is material is unavoidably absent [*see Code Civ. Proc. § 595.4*]. Materiality alone is insufficient grounds for continuance. Counsel must also have been diligent in attempting to arrange for that witness to testify (Paragraph B) The authorities in this form should also be combined with all of the forms set forth in *§§ 48.13* -48.17 that are applicable to the particular case, i.e., that address the particular ground or grounds of good cause on which continuance is sought.

Optional Paragraphs C and D are intended for use to demonstrate how the absent witness's testimony is material; and Optional Paragraph E is for use in the surprise situation when a witness does not appear as planned during trial and counsel must move for continuance at that point.

[ii] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, if the continuance is sought because the witness is ill, counsel's argument should focus on the critical points made in the court's file and in supporting declarations regarding the witness's illness, why it is necessary for this particular witness to testify, when counsel first learned of the illness, what alternatives, if any, were considered and why they would not be sufficient, and the speed with which counsel informed opposing counsel of the need for continuance and filed the motion for continuance.

It is also advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, or by affidavits or declarations. The affirmative showing of good cause required for continuance is generally made by supporting declarations submitted along with the noticed motion or ex parte application and the memorandum [*see Cal. Rules of Ct., Rule 3.1332(b)*]. Although the requirement for affidavits or declarations may be waived by the trial court, for instance in a situation involving emergency or surprise [*see, e.g., McCown v. Spencer (1970) 8 Cal. App. 3d 216, 228, 87 Cal. Rptr. 213* ; *Larson v. Solbakken (1963) 221 Cal. App. 2d 410, 430, 34 Cal. Rptr. 450]* , counsel must make a sufficiently detailed factual showing to support the motion for continuance; generalizations are not sufficient [*see, e.g., Watson v. Columbia Basin Dev. Co. (1913) 22 Cal. App. 556, 559, 135 P. 511]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to

establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[iii] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[iv] Opposing Points and Authorities

The points and authorities in *§ 48.36[1] -[7]* may be used in an appropriate case to oppose the points and authorities set out in this form.

[c] Discussion of Authorities

[i] Materiality and Diligence

Code Civ. Proc. § 595.4 also provides that when a request for continuance is made on the ground of the absence of a material witness, the court may require the moving party to state on affidavit the expected evidence; and, if the adverse party admits that the evidence would be given and that it be considered as actually given in the trial, or offered and overruled as improper, the trial must not be postponed. This aspect of *Code Civ. Proc. § 595.4* is addressed in the form in *§ 48.36[7]*.

In ***Jurado v. Toys "R" Us, Inc.*** *(1993) 12 Cal. App. 4th 1615, 16 Cal. Rptr. 2d 158* , the plaintiff filed an action for personal injuries. Plaintiff had successfully moved for a four-month continuance of trial on the ground that her treating physician had taken an "unexpected vacation" and was unavailable. Plaintiff obtained a new treating physician and had subpoenas served on both physicians to appear on the new trial date. In following up on the subpoenas, plaintiff's counsel learned the first physician moved without leaving a forwarding address, and the second physician was in Europe on the trial date. Plaintiff moved for continuance on the ground that plaintiff could not proceed without a medical witness. The trial court denied the continuance and granted defendant's motion for dismissal.

The appellate court reversed, holding that the request for a continuance because of the unavailability of a material witness was proper, and denial of the continuance was an abuse of discretion because less drastic means to redress the situation than dismissal, such as continuance until the witness's attendance could be compelled by body attachment, were available (*12 Cal. App. 4th 1615, 1620)* .

In ***Larson v. Solbakken*** *(1963) 221 Cal. App. 2d 410, 34 Cal. Rptr. 450* , plaintiff sued defendant for damages for personal injuries arising out of a collision between automobiles driven by the two parties. During the fourth day of trial, a Friday, defendant successfully moved for a continuance until the following Monday in order to call a witness who actually saw the accident and was returning to the state that weekend. Defendant's previous attempts to locate this witness had been discussed in court. The jury returned a verdict in favor of defendant, and plaintiff appealed.

The court of appeal affirmed. On appeal, plaintiff argued that defendant had failed to show materiality and diligence in an affidavit and thus court had committed prejudicial error in granting the continuance. In rejecting this argument, the court stated that based on the showing made, the trial court did not abuse its discretion, finding that plaintiff was not prejudiced by the continuance because the trial, in any event, could not have been concluded on that day (*221 Cal. App. 2d 410, 428-430)* .

[ii] Avoidance of Subpoena or Disregard of Agreement to Appear

The factual and procedural background of ***Jurado v. Toys "R" Us, Inc.*** *(1993) 12 Cal. App. 4th 1615, 16 Cal. Rptr. 2d 158* , are discussed in [i], *above*. Plaintiff had subpoenaed two medical witness, both of whom absented themselves at the time set for trial. After denying a continuance, the trial court dismissed plaintiff's case; and plaintiff appealed. In reversing, the court of appeal held that the failure of both witnesses to respect the subpoenas constituted an affirmative showing of good cause sufficient to justify continuance under the standards set forth in Cal. Rules of Ct., Rule 375(a) [*see now Cal. Rules of Ct., Rule 3.1332(c)*] (*12 Cal. App. 4th 1615, 1618)* .

In ***Kramer v. Kramer*** *(1961) 197 Cal. App. 2d 727, 17 Cal. Rptr. 461* , plaintiff filed an affidavit to obtain a writ of execution on a judgment against defendant, her former spouse, to collect money owed for child support. After the trial court issued the writ for over $7,000, defendant moved to quash the writ on the ground that, although he had not paid in cash the payments specified in plaintiff's affidavit, he had conveyed property to plaintiff as prepayment of the monthly payments. As part of the evidence heard by the trial court on this issue, plaintiff testified that she had sold the property and given defendant a check for $10,000. When defendant denied receiving this check, plaintiff's counsel asked for a continuance of 15 minutes to produce a rebuttal witness who was already in the downtown area. Stating that it should not have to wait during the noon hour for a witness to arrive, the trial court denied the motion and subsequently issued an order quashing the writ of execution. Plaintiff appealed, contending, in part, that the trial court erred in denying her motion for a continuance.

The court of appeal, in affirming, stated only that the witness had not been subpoenaed and it did not appear that the trial court had abused its discretion (*197 Cal. App. 2d 727, 731)* .

[iii] Sole Method of Proof Supports Finding of Materiality

In ***Oak Knoll Broadcasting Corp. v. Hudgings*** *(1969) 275 Cal. App. 2d 563, 80 Cal. Rptr. 175* , plaintiff had levied a claim against funds deposited by defendant in a savings and loan association. Defendant's spouse filed a third party claim under Code Civ. Proc. § 689, declaring the funds to be community property and not liable for the contracts of the wife after marriage. On the day of the hearing to determine title to the funds, plaintiff's attorney, after learning from the keeper of records at the savings and loan association that the records would not be ready until later in the week, requested a continuance. His motion was denied and judgment given subsequently for defendant. Plaintiff appealed, arguing that the trial court abused its discretion in denying the motion for continuance.

The court of appeal affirmed. In supporting its conclusion that the trial court had not abused its discretion when it denied plaintiff's motion for continuance to procure the absent witness, the court of appeal stated that when a continuance is requested because of the absence of a material witness, there must be a showing that the facts expected to be established by the witness cannot otherwise be proven. No such showing was made in this case (*275 Cal. App. 2d 563, 566)* .

In ***Gibson v. Cobb*** *(1965) 236 Cal. App. 2d 226, 46 Cal. Rptr. 57* , plaintiff landowner brought a quiet title action against defendants, owners of property adjacent to plaintiff's land. Near the close of trial, defendants requested a four-day continuance to call an absent witness and filed a supporting affidavit. The trial court characterized the testimony which defendants expected from the absent witness as not material, already testified to, and cumulative. After denying the request for a continuance, the trial court rendered a judgment for plaintiff. Plaintiff appealed.

The court of appeal affirmed. In addition to the defendants' lack of diligence, the court of appeal concluded that the deficiency in the expected testimony provided adequate reason to affirm the trial court's decision to deny the continuance (*236 Cal. App. 2d 226, 237)* .

[iv] Important Evidence Is Material

In ***Murr v. Murr*** *(1948) 87 Cal. App. 2d 511, 197 P.2d 369* , plaintiff initiated an action for divorce against his wife, alleging that she had given birth to an illegitimate child during their marriage. Defendant filed a cross complaint for divorce and the trial court granted her an interlocutory decree of divorce on her cross complaint, finding that she had not given birth to an illegitimate child. One of defendant's witnesses was a physician who provided medical attention to her and delivered the baby. Because of the physician-client privilege, plaintiff's attorney did not interview the doctor prior to trial, but after the physician had testified and before the case was scheduled for decision, he asked the physician to search for a missing record which would show when defendant first consulted him concerning her pregnancy. This record, turned over to plaintiff's attorney on the day that defendant finished her testimony, showed that defendant became pregnant while plaintiff was away in the navy. Plaintiff's attorney moved for a continuance to recall the physician; the trial court denied the motion, reasoning that plaintiff's counsel should have been aware of this information when the physician testified the first time. Judgment was for defendant, and plaintiff appealed.

In reversing, the court of appeal did not consider whether or not plaintiff had been diligent, nor did the court apply the rule that evidence is not material unless it cannot be proven in other ways, because other, less persuasive, evidence had been submitted to show that defendant may have gotten pregnant before plaintiff returned home. Instead, the court of appeal held that the continuance should have been granted because the proposed testimony was very material in that it would help determine a close question of fact presented by the case (*87 Cal. App. 2d 511, 521-522)* .

[v] Affidavit May Be Waived

The factual background of ***Larson v. Solbakken*** *(1963) 221 Cal. App. 2d 410, 34 Cal. Rptr. 450* , is discussed under [i], *above*. In that case, defendant's counsel successfully moved for a continuance in open court because of an absent witness, and on appeal, plaintiff objected that the motion had not been supported by affidavit. In affirming, the court of appeal held that the requirement of an affidavit in former Code Civ. Proc. § 595 [*now Code Civ. Proc. § 595.4*] was not jurisdictional and could be excused by the trial court. Furthermore, a showing for a continuance may be made not only by affidavit but also by other proof pursuant to a motion in open court (*221 Cal. App. 2d 410, 430)* .

[d] Additional Authorities

[i] Sole Method of Proof Supports Finding of Materiality

People ex. rel. ***Dep't of Public Works v. Busick*** *(1968) 259 Cal. App. 2d 744, 66 Cal. Rptr. 532* , was a proceeding in eminent domain to acquire defendants' property for highway purposes. After granting defendants' counsel's motions for two continuances, the trial court refused to grant a third. Judgment was entered for plaintiff, and defendant appealed. The court of appeal, in affirming, pointed out that it is reversible error and an abuse of discretion not to grant a motion for continuance for an absent, material witness, especially when that witness is the only person who can establish essential facts, citing *Betts Spring Co. v. Jardine Mach. Co. (1914) 23 Cal. App. 705, 139 P. 657* [discussed in *§ 48.12[1][c][iv]*], when the absent witness was also the party and the only witness on all matters in his defense. The court concluded, however, that the rule could not be applied in this case because the parties were voluntarily absent, diligence was not employed in arranging for real estate appraisers, and some of the testimony of missing witnesses could have been covered by other witnesses (*259 Cal. App. 2d 744, 749-750)* .

[ii] Affidavit May Be Waived

In ***Taylor v. Bell*** *(1971) 21 Cal. App. 3d 1002, 98 Cal. Rptr. 855* , decedent's executor brought an action to collect on promissory notes signed by defendant. At the trial on June 6, defendant called as a witness decedent's son who had been subpoenaed but was out of the state due to employment commitments. The court offered defendant a continuance but she not take it. On July 12, after both parties had rested, the court on its own motion set the cause for further hearing, first on July 18 and then on August 28, to obtain the testimony of the decedent's absent son. Defendant, on July 18, excused one of her witnesses who would be out of the country on August 28. After the court held her liable on the

promissory notes, defendant contended on appeal that the continuance from July 18 to August 28 had denied her right to proceed under appropriate provisions of the Code of Civil Procedure including *Code Civ. Proc. § 595.4*, which states that motions for continuance to produce an absent witness should be supported by affidavit. The court of appeal questioned the applicability of *Code Civ. Proc. § 595.4* because the continuance was not for the adverse party's benefit--the absent witness had been called originally by defendant--but nevertheless pointed out the rule that the requirement of an affidavit under Section 595.4 is not jurisdictional in nature and may be excused by the trial court in its discretion, and other proof, including oral representations of counsel, in open court is adequate (*21 Cal. App. 3d 1002, 1008)* .

[2] Witness's Unavailability Due to Illness, Death, or Excusable Circumstances

[a] FORM Witness's Absence Constitutes Good Cause for Continuance

[*This form should be combined with a general memorandum of points and authorities supporting a noticed motion or ex parte application for a continuance (see § 48.10) or included in an appellate brief* .]

THE COURT SHOULD GRANT THE CONTINUANCE TO PERMIT _____ [*name of absent witness*] TO TESTIFY, BECAUSE HIS/HER EXPECTED TESTIMONY IS MATERIAL AND HIS/HER _____ [ILLNESS *or* DEATH *or* EXCUSABLE CIRCUMSTANCE] PROVIDES GOOD CAUSE FOR CONTINUANCE.

A. Essential Lay Witness. The unavailability of an essential lay witness because of death, illness, or excusable circumstances is considered good cause for granting the continuance of a trial date (*Cal. Rules of Ct., Rule 3.1332(c)(1)*).

[AND/OR]

B. Essential Expert Witness. The unavailability of an essential expert witness because of death, illness, or excusable circumstances is considered good cause for granting the continuance of a trial date (*Cal. Rules of Ct., Rule 3.1332(c)(1)*).

[b] Comments

[i] Use of Form

The appropriate paragraph from this form of points and authorities may be combined with the forms at § 48.10[1] and in [1][a], *above* (regarding materiality of the evidence the witness is expected to present and whether the witness was subpoenaed or had agreed to appear), and submitted in support of a motion for continuance [*see Cal. Rules of Ct., Rule 3.1332(b)*] when a witness whose testimony is material and whose presence counsel has diligently sought to provide is unavoidably absent due to illness, death, or excusable circumstances [*see Code Civ. Proc. § 595.4*].

The authorities in this form should also be combined with all of the forms set forth in *§§ 48.13* -48.17 that are applicable to the particular case, i.e., that address the particular ground or grounds of good cause on which continuance is sought.

[ii] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, if the continuance is sought because of the illness of an expert witness, counsel's argument should focus on the critical points made in the court's file and in supporting declarations regarding the fact

that the witness had been subpoenaed or had agreed to testify, why it is necessary for this particular expert witness to testify, when counsel first learned that the witness was ill, what alternatives, if any, were considered and why they would not be sufficient, and the speed with which counsel informed opposing counsel of the need for continuance and filed the motion for continuance.

It is also advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, or by affidavits or declarations. The affirmative showing of good cause required for continuance is generally made by supporting declarations submitted along with the noticed motion or ex parte application and the memorandum [*see Cal. Rules of Ct., Rule 3.1332(b)*]. Although the requirement for affidavits or declarations may be waived by the trial court, for instance in a situation involving emergency or surprise [*see, e.g., McCown v. Spencer (1970) 8 Cal. App. 3d 216, 228, 87 Cal. Rptr. 213* ; *Larson v. Solbakken (1963) 221 Cal. App. 2d 410, 430, 34 Cal. Rptr. 450]* , counsel must make a sufficiently detailed factual showing to support the motion for continuance; generalizations are not sufficient [*see, e.g., Watson v. Columbia Basin Dev. Co. (1913) 22 Cal. App. 556, 559, 135 P. 511]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[iii] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[iv] Opposing Points and Authorities

The points and authorities in *§ 48.36[1] -[7]* may be used in an appropriate case to oppose the points and authorities set out in this form.

[3] Principal Witness Is Member of Legislature

[a] FORM Witness's Absence Constitutes Good Cause for Continuance

[*This form should be combined with a general memorandum supporting a noticed motion or ex parte application for a continuance (see § 48.10) or included in an appellate brief*].

A CONTINUANCE SHOULD BE GRANTED BECAUSE _____ [*name of absent witness*], WHO IS INTENDED BY _____ [*name party, e.g.,* PLAINTIFF *or* DEFENDANT] TO BE HIS/HER PRINCIPAL WITNESS, IS A MEMBER OF THE LEGISLATURE, WHICH WILL BE IN SESSION AT THE TIME NOW SET FOR TRIAL.

A. Principal Witness Is Member of Legislature. The trial of any civil action shall be postponed to a date certain when it appears to the court before which the action is pending that a principal witness in the action is a Member of the California Legislature and that the Legislature is in session or in a recess not exceeding forty (40) days, [or that a legislative interim committee of which the party is a duly appointed member is meeting, or is to meet within a period which the court finds does not exceed the time reasonably necessary to enable the member to reach the committee

meeting by the ordinary mode of travel] (*Code Civ. Proc. § 595*).

B. Length of Postponement. [*See § 48.12[3], Paragraph B.*]

[*Optional*] **C. Postponement Due to Legislative Committee Meeting.** [*See § 48.12[3], Paragraph C.*]

D. When Continuance Is Mandatory. [*See § 48.12[3], Paragraph D.*]

[b] Comments

[i] Use of Form

This form of points and authorities may be combined with the forms at § 48.10[1] and in [1][a], *above* (regarding materiality of the evidence the witness is expected to present and whether the witness was subpoenaed or had agreed to appear), and submitted in support of a noticed motion or ex parte application and the memorandum [*see Cal. Rules of Ct., Rule 3.1332(b)*], when a principal witness is a member of the California Legislature and the Legislature is in session, or in recess for less than forty days, or when a committee of which the principal witness is a member is in session or scheduled for session. There are exceptions noted in Paragraph D.

Counsel should also combine the authorities in this form with those in any form set forth in *§§ 48.13* -48.17 that are applicable to the particular case, i.e., that address the particular ground or grounds of good cause existing in his or her particular case.

[ii] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, if the continuance is sought because a principal witness's presence at trial on the scheduled date conflicts with his or her Legislative duties, counsel's argument should focus on the critical points made in the court's file and in supporting declarations regarding the Legislative schedule, the travel modes and times involved, if any, the fact that none of the exceptions is applicable, why it is necessary for the witness to attend the trial, when counsel first learned of the problem, what alternatives, if any, were considered and why they would not be sufficient, and the speed with which counsel informed opposing counsel of the need for continuance and filed the motion for continuance.

It is also advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, or by affidavits or declarations. The affirmative showing of good cause required for continuance is generally made by supporting declarations submitted along with the noticed motion or ex parte application and the memorandum [*see Cal. Rules of Ct., Rule 3.1332(b)*]. Although the requirement for affidavits or declarations may be waived by the trial court, for instance in a situation involving emergency or surprise [*see, e.g., McCown v. Spencer (1970) 8 Cal. App. 3d 216, 228, 87 Cal. Rptr. 213* ; *Larson v. Solbakken (1963) 221 Cal. App. 2d 410, 430, 34 Cal. Rptr. 450]* , counsel must make a sufficiently detailed factual showing to support the motion for continuance; generalizations are not sufficient [*see, e.g., Watson v. Columbia Basin Dev. Co. (1913) 22 Cal. App. 556, 559, 135 P. 511]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice*

(Matthew Bender).

[iii] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[iv] Opposing Points and Authorities

The points and authorities in *§ 48.36[1] -[7]* may be used in an appropriate case to oppose the points and authorities set out in this form.

[c] Discussion of Authorities

[i] Principal Witness Is Member of Legislature

Code Civ. Proc. § 595 applies not only to a trial of any civil action, but also to a proceeding in a court, or of any administrative proceeding before a state board or commission or officer, irrespective of the date of the filing thereof or when it became at issue, or the hearing of any motion, demurrer, or other proceeding. In those situations, the determination is made by the board, commission, or officer before which the action or proceeding is pending [*Code Civ. Proc. § 595*].

[4] Surprise Is Basis for Continuance

[a] FORM Witness's Absence Constitutes Good Cause for Continuance

[*This form should be combined with a general memorandum supporting a motion for a continuance (see § 48.10) or included in an appellate brief.*]

A CONTINUANCE SHOULD BE GRANTED TO PERMIT AN ABSENT WITNESS TO TESTIFY WHEN EVENTS OCCUR AT TRIAL WHICH COULD NOT HAVE BEEN ANTICIPATED AND REQUIRE THE PRODUCTION OF NEW MATERIAL EVIDENCE.

A. Surprise Is Basis for Continuance. When events occur at trial which could not have been anticipated and require the production of new material evidence, a continuance should be granted (*Crosby v. Martinez (1958) 159 Cal. App. 2d 534, 541-542, 324 P.2d 26*).

[b] Comments

[i] Use of Form

This form of points and authorities may be combined with the forms at § 48.10[1] and in [1][a], *above* (regarding materiality of the evidence the witness is expected to present and whether the witness was subpoenaed or had agreed to appear), and submitted in support of a noticed motion or ex parte application for a continuance [*see Cal. Rules of Ct., Rule 3.1332(b)*], when events which could not have been anticipated require production of new material evidence. In additions, counsel should combine the authorities in this form with those in any form set forth in *§§ 48.11* -48.17 that are applicable to the particular case, i.e., that address the particular ground or grounds of good cause existing in his or her particular case.

[ii] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, counsel's argument should focus on the critical points made in the court's file and in supporting declarations regarding the events that occurred during trial to require the new material evidence, why counsel was not likely to have anticipated those events, when the trial attorney first became aware of the problem, and the speed with which the attorney informed opposing counsel of the need for continuance and filed the motion for continuance.

It is also advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, or by affidavits or declarations. The affirmative showing of good cause required for continuance is generally made by supporting declarations submitted along with the noticed motion or ex parte application and the memorandum [*see Cal. Rules of Ct., Rule 3.1332(b)*]. Although the requirement for affidavits or declarations may be waived by the trial court, for instance in a situation involving emergency or surprise [*see, e.g., McCown v. Spencer (1970) 8 Cal. App. 3d 216, 228, 87 Cal. Rptr. 213* ; *Larson v. Solbakken (1963) 221 Cal. App. 2d 410, 430, 34 Cal. Rptr. 450]* , counsel must make a sufficiently detailed factual showing to support the motion for continuance; generalizations are not sufficient [*see, e.g., Watson v. Columbia Basin Dev. Co. (1913) 22 Cal. App. 556, 559, 135 P. 511]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[iii] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[iv] Opposing Points and Authorities

The points and authorities in *§ 48.36[1] -[7]*, perhaps most appropriately those in *§ 48.36[5]*, may be used in an appropriate case to oppose the points and authorities set out in this form.

[c] Discussion of Authorities

[i] Surprise Is Basis for Continuance

In ***Crosby v. Martinez*** *(1958) 159 Cal. App. 2d 534, 324 P.2d 26* , plaintiffs sued defendants for damages for personal injuries arising from a collision between automobiles driven by two of the parties. On the last morning of the trial, defendants' attorney elicited from a witness a statement attributed to another person, Harris, who saw the accident. The statement corroborated defendants' claim that plaintiffs had run a red light. Plaintiff's counsel requested a short continuance to bring in Harris to testify, but the trial court rejected the motion stating that plaintiffs' counsel had said previously he would not be calling Harris as a witness. Plaintiffs' counsel responded that when he made that statement he did not know that statement attributed to Harris would be admitted into evidence. The jury returned a verdict for defendants on which the trial court entered judgment. Plaintiffs appealed.

The court of appeal reversed, holding that the continuance should have been granted. Although the court did not specifically state that it was applying any particular rule to show that plaintiffs had been diligent, it characterized the

statement attributed to Harris as unadulterated, erroneously admitted hearsay which plaintiffs' counsel had no reason to anticipate and prepare for. Because counsel was doubtlessly surprised and became aware for the first time of the need to produce the witness, he was entitled to a short continuance (*159 Cal. App. 2d 534, 541-542)* .

California Points & Authorities

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Volume 4 Chapters 40-49 CLAIM & DELIVERY---to---CONTINUANCE
CHAPTER 48 CONTINUANCE OF PROCEEDINGS
PART II. FORMS
A. SUPPORTING CONTINUANCE

4-48 California Points & Authorities § 48.14

§ 48.14 Attorney's Absence Constitutes Good Cause for Continuance

[1] Representation Not Available

[a] FORM Attorney's Absence Constitutes Good Cause for Continuance

[*This form should be combined with a general memorandum of points and authorities supporting a noticed motion or ex parte application for a continuance (see § 48.10) or included in an appellate brief.*]

A CONTINUANCE SHOULD BE GRANTED TO PERMIT A PARTY TO OBTAIN LEGAL REPRESENTATION IF THE PARTY HAS BEEN DILIGENT BUT THAT PARTY'S ATTORNEY IS UNJUSTIFIABLY ABSENT ON THE DAY OF TRIAL.

A. Attorney Unjustifiably Absent. If a party requesting a continuance has made diligent and reasonable attempts to obtain alternative representation, but through no fault of that party, the party's [previous] attorney is unjustifiably absent on the day of trial, a continuance should be granted (*Thompson v. Thornton (1871) 41 Cal. 626, 629* ; *Vann v. Shilleh (1975) 54 Cal. App. 3d 192, 197-199, 126 Cal. Rptr. 401*).

[*Optional*] **B. Substitution of Trial Attorney.** The substitution of the trial attorney should, under normal circumstances, be considered good cause for granting the continuance of a trial date only when there is an affirmative showing that the substitution is required in the interests of justice (*see San Bernardino County v. Doria Mining & Eng'r Corp. (1977) 72 Cal. App. 3d 776, 783-784, 140 Cal. Rptr. 383*).

[b] Comments

[i] Use of Form

This form of points and authorities may be combined with the form at § 48.10[1] and submitted in support of a noticed motion or ex parte application for a continuance [*see Cal. Rules of Ct., Rule 3.1332(b)*]. Paragraph A is for use when, despite the party's diligence, the party's attorney is absent without justification or without a reason for his or her absence

that is considered good cause under *Code Civ. Proc. § 595* or [*see* forms in [2][a], [4][a], [5][a], [6][a], and [7][a], *below*]. Paragraph B may be used when a substitution of attorneys was required in the interest of justice. The apparent conflict between the cases in Paragraph A and that in Paragraph B seems to indicate that the real criteria is not whether the attorney's absence was voluntary or unavoidable, justified or unjustified, but whether the party was diligent in attempting to find other counsel. Thus, cases generally deny a continuance when counsel has put other activities above the client's business and there is no showing that the client had objected or made efforts to find alternative representation [*see Mann v. Pacific Greyhound Lines (1949) 92 Cal. App. 2d 439, 446, 207 P.2d 105* , discussed in *§ 48.37[4*][c][i]].

The authorities in this form should also be combined with all those in any form set forth in *§§ 48.11* -48.17 that are applicable to the particular case, i.e., that address the particular ground or grounds of good cause existing in his or her particular case.

[ii] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, argument should focus on the critical points made in the court's file and in supporting declarations regarding the reason for the attorney's absence, the party's attempts to obtain other counsel, when previous counsel withdrew or when the party first learned its attorney of record would not appear at the trial, and the speed with which opposing counsel was informed of the need for continuance and the motion for continuance was filed.

It is also advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, or by affidavits or declarations. The affirmative showing of good cause required for continuance is generally made by supporting declarations submitted along with the noticed motion or ex parte application and the memorandum [*see Cal. Rules of Ct., Rule 3.1332(b)*]. Although the requirement for affidavits or declarations may be waived by the trial court, for instance in a situation involving emergency or surprise [*see, e.g., McCown v. Spencer (1970) 8 Cal. App. 3d 216, 228, 87 Cal. Rptr. 213* ; *Larson v. Solbakken (1963) 221 Cal. App. 2d 410, 430, 34 Cal. Rptr. 450]* , counsel must make a sufficiently detailed factual showing to support the motion for continuance; generalizations are not sufficient [*see, e.g., Watson v. Columbia Basin Dev. Co. (1913) 22 Cal. App. 556, 559, 135 P. 511]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[iii] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[iv] Opposing Points and Authorities

The points and authorities in *§ 48.37[1] -[4]* may be used in an appropriate case to oppose the points and authorities set out in this form.

[c] Discussion of Authorities

[i] Attorney Unjustifiably Absent

In ***Thompson v. Thornton*** *(1871) 41 Cal. 626* , an action for ejectment, defendants learned on the day of trial that their attorney was told by a physician not to leave two members of his family who were sick. After an unsuccessful search to find new counsel, defendants requested a continuance so they could obtain new counsel. The trial court denied the request and, after defendants went to trial without benefit of counsel, rendered a judgment against them. Defendants appealed.

The Supreme Court reversed the trial court's denial of the continuance. Defendants had shown no lack of diligence and, except for the illness in their attorney's family, they were ready to go to trial. The Court stated that under these circumstances, defendants were entitled to some time to allow another attorney to become familiar with the case and thus, should have been granted opportunity to find new counsel (*41 Cal. 626, 629)* .

In ***Vann v. Shilleh*** *(1975) 54 Cal. App. 3d 192, 126 Cal. Rptr. 401* , plaintiffs sued defendants for breach of contract. Three days before the trial, when settlement negotiations broke down, the trial court permitted defendants' counsel to withdraw from the case. On the day of trial, the trial court denied defendants' motion for a continuance to obtain a new attorney. Defendants appeared during the trial in propria persona and, after a judgment was entered for plaintiff, filed an appeal, claiming that the court should have granted their request for a continuance.

The court of appeal reversed, holding that defendants had not acted improperly. The record did not support the allegation that defendants were dilatory in their rejection of the negotiated settlement, but, rather, their attorney's withdrawal was improper. Thus, it was the duty of the trial court to protect defendants, as far as possible, from their attorney's improper abandonment (*54 Cal. App. 3d 192, 197-199)* .

[ii] Substitution of Trial Attorney

San Bernardino County v. Doria Mining & Eng'r Corp. *(1977) 72 Cal. App. 3d 776, 140 Cal. Rptr. 383* , was a suit by the county to recover unpaid delinquent property taxes on mining claims. On the date set for trial, an attorney who was not defendant's attorney of record appeared on behalf of defendant and requested a continuance. The motion was denied and the attorney departed. The court then heard the county's evidence and, no evidence being presented on defendant's behalf, ruled in favor of the county. Defendant appealed, contending that the denial of the motion for continuance was an abuse of discretion.

The court of appeal affirmed. The court of appeal noted that there was no noticed motion, only an oral request made on the date set for trial. Nor was the motion made "promptly upon the necessity for the continuance being ascertained," as the problem had been apparent for over a week, though there was no showing when the attorney of record informed the defendant that he wished to withdraw. Thus, the court could not determine whether defendant used due diligence to obtain a new attorney. There was no showing that the substitution was necessary, i.e., that the attorney of record was unable or absolutely unwilling to represent defendant. The court then cited *Vann v. Shilleh (1975) 54 Cal. App. 3d 192, 197, 126 Cal. Rptr. 401* , for the proposition that an attorney's withdrawal from a case on the eve of trial may constitute a violation of professional ethics. Indeed, at the time of the motion, there had been no substitution, so the motion was premised on a hypothetical rather than an actual dilemma. The court concluded its consideration of this issue by noting that, although under former Cal. Rules of Ct., Appen., Div. I, § 9(4) lists substitution of attorneys as a ground for continuance, the standard for continuance, that substitution is a ground for continuance "only when there is an affirmative showing that the substitution is required in the interests of justice," was not met in this case (*72 Cal. App. 3d 776, 783-784)* . The court also noted the quoted portion of former Cal. Rules of Ct., Appen., Div. I, § 9(4) was supported by existing case authority, specifically, those cases discussed in *§ 48.37[1][c][i]* (*72 Cal. App. 3d 776, 783-784)* .

[2] Attorney Is Member of Legislature

[a] FORM Attorney's Absence Constitutes Good Cause for Continuance

[*This form should be combined with a general memorandum of points and authorities supporting a noticed motion or ex parte application for a continuance (see § 48.10) or included in an appellate brief*].

A CONTINUANCE SHOULD BE GRANTED BECAUSE _____ [*name of attorney*], _____ [PLAINTIFF'S *or* DEFENDANT'S] ATTORNEY OF RECORD, IS A MEMBER OF THE LEGISLATURE, WHICH WILL BE IN SESSION AT THE TIME NOW SET FOR TRIAL.

A. Attorney Is Member of Legislature. The trial of any civil action shall be postponed to a date certain when it appears to the court before which the action is pending that any attorney of record in the action is a Member of the California Legislature and that the Legislature is in session or in a recess not exceeding forty (40) days, [or that a legislative interim committee of which the attorney is a duly appointed member is meeting, or is to meet within a period which the court finds does not exceed the time reasonably necessary to enable the member to reach the committee meeting by the ordinary mode of travel] (*Code Civ. Proc. § 595*).

B. Length of Postponement. [*See § 48.12[3], Paragraph B.*]

[*Optional*] **C. Postponement Due to Legislative Committee Meeting.** [*See § 48.12[3], Paragraph C.*]

D. When Continuance Is Mandatory. [*See § 48.12[3], Paragraph D.*]

[b] Comments

[i] Use of Form

This form of points and authorities may be combined with the form at § 48.10[1] and submitted in support of a noticed motion or ex parte application for a continuance [*see Cal. Rules of Ct., Rule 3.1332(b)*], when any attorney of record in the action is a member of the California Legislature and the Legislature is in session, or in recess for less than forty days, or when a committee of which the attorney is a member is in session or scheduled for session. There are exceptions noted in Paragraph D.

The authorities in this form should also be combined with all those in any form set forth in *§§ 48.11* -48.17 that are applicable to the particular case, i.e., that address the particular ground or grounds of good cause existing in his or her particular case.

[ii] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, if the continuance is sought because an attorney's presence at trial on the scheduled date conflicts with his or her Legislative duties, counsel's argument should focus on the critical points made in the court's file and in supporting declarations regarding the Legislative schedule, the travel modes and times involved, if any, the fact that none of the exceptions is applicable, why it is necessary for the attorney to attend the trial, when counsel first learned of the problem, what alternatives, if any, were considered and why they would not be sufficient, and the speed with which counsel informed opposing counsel of the need for continuance and filed the motion for continuance.

It is also advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, or by affidavits or declarations. The affirmative

showing of good cause required for continuance is generally made by supporting declarations submitted along with the noticed motion or ex parte application and the memorandum [*see Cal. Rules of Ct., Rule 3.1332(b)*]. Although the requirement for affidavits or declarations may be waived by the trial court, for instance in a situation involving emergency or surprise [*see, e.g., McCown v. Spencer (1970) 8 Cal. App. 3d 216, 228, 87 Cal. Rptr. 213* ; *Larson v. Solbakken (1963) 221 Cal. App. 2d 410, 430, 34 Cal. Rptr. 450]* , counsel must make a sufficiently detailed factual showing to support the motion for continuance; generalizations are not sufficient [*see, e.g., Watson v. Columbia Basin Dev. Co. (1913) 22 Cal. App. 556, 559, 135 P. 511]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[iii] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[iv] Opposing Points and Authorities

The points and authorities in *§ 48.37[1]* and *[3]* may be used in an appropriate case to oppose the points and authorities set out in this form.

[c] Discussion of Authorities

[i] Attorney Is Member of Legislature

Code Civ. Proc. § 595 applies not only to a trial of any civil action, but also to a proceeding in a court, or of any administrative proceeding before a state board or commission or officer, irrespective of the date of the filing thereof or when it became at issue, or the hearing of any motion, demurrer, or other proceeding. In those situations, the determination is made by the board, commission, or officer before which the action or proceeding is pending [*Code Civ. Proc. § 595*].

Code Civ. Proc. § 595 also applies whether the attorney became an attorney of record in the action before or after commencement of the legislative session or before or after his or her appointment to a legislative committee [*Code Civ. Proc. § 595*].

[3] Attorney's Inability to Prepare

[a] FORM Attorney's Absence Constitutes Good Cause for Continuance

[*This form should be combined with a general memorandum of points and authorities supporting a noticed motion or ex parte application for a continuance (see § 48.10) or included in an appellate brief.*]

A CONTINUANCE SHOULD BE GRANTED TO GIVE COUNSEL TIME TO PREPARE WHEN BOTH THE PARTY AND COUNSEL HAVE BEEN DILIGENT, BUT COUNSEL HAS NOT BEEN ABLE TO PREPARE FULLY FOR TRIAL.

A. Attorney's Inability to Prepare. A continuance should be granted to give counsel time to prepare if the moving party and the attorney have been diligent, but the attorney has not been able to prepare fully for trial (*Cohen v. Herbert (1960) 186 Cal. App. 2d 488, 495-496, 8 Cal. Rptr. 922*).

[b] Comments

[i] Use of Form

This form of points and authorities may be combined with the form at § 48.10[1] and submitted in support of a noticed motion or ex parte application for a continuance [*see Cal. Rules of Ct., Rule 3.1332(b)*], when counsel requires additional time to prepare although both counsel and the party he or she represents have been diligent in proceeding with the case.

The authorities in this form should also be combined with all those in any form set forth in *§§ 48.11* -48.17 that are applicable to the particular case, i.e., that address the particular ground or grounds of good cause existing in his or her particular case.

[ii] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, counsel's argument should focus on the critical points made in the court's file and in supporting declarations regarding the reason or reasons for his or her inability to prepare's absence, counsel's diligent attempts to prepare and the party's diligence in helping counsel to prepare, when counsel first became aware that he or she would not be able to prepare in time for the trial, and the speed with which counsel informed opposing counsel of the need for continuance and filed the motion for continuance.

It is also advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, or by affidavits or declarations. The affirmative showing of good cause required for continuance is generally made by supporting declarations submitted along with the noticed motion or ex parte application and the memorandum [*see Cal. Rules of Ct., Rule 3.1332(b)*]. Although the requirement for affidavits or declarations may be waived by the trial court, for instance in a situation involving emergency or surprise [*see, e.g., McCown v. Spencer (1970) 8 Cal. App. 3d 216, 228, 87 Cal. Rptr. 213* ; *Larson v. Solbakken (1963) 221 Cal. App. 2d 410, 430, 34 Cal. Rptr. 450]* , counsel must make a sufficiently detailed factual showing to support the motion for continuance; generalizations are not sufficient [*see, e.g., Watson v. Columbia Basin Dev. Co. (1913) 22 Cal. App. 556, 559, 135 P. 511]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[iii] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[iv] Opposing Points and Authorities

The points and authorities in *§ 48.37[4]* may be used in an appropriate case to oppose the points and authorities set out in this form.

[c] Discussion of Authorities

[i] Attorney's Inability to Prepare

The factual and procedural background of ***Cohen v. Herbert*** *(1960) 186 Cal. App. 2d 488, 8 Cal. Rptr. 922* , is discussed in *§ 48.10[3][b]*. In that case, to explain why he was unprepared, counsel for one defendant stated that he had been employed after previous counsel was forced to withdraw because of a conflict of interest and that although he had diligently sought copies of all papers and motions, plaintiff's attorney was not able to provide complete copies. Counsel did not receive a full set of case papers until the Friday before the Monday hearing date. Moreover, on Friday night and Sunday, he was compelled to attend a mandatory army reserve meeting and thus had only one day to prepare the case. He had not had sufficient time to familiarize himself with 70 pages of case papers and to confer with client. In reversing the trial court's decision to deny defendants a continuance, the court of appeal stated that the record failed to show lack of diligence or good faith on defendant's part (*186 Cal. App. 2d 488, 495-496)* .

[4] Attorney's Unavailability Due to Illness, Death, or Excusable Circumstances

[a] FORM Attorney's Absence Constitutes Good Cause for Continuance

[*This form should be combined with a general memorandum supporting a noticed motion or ex parte application for a continuance (see § 48.10) or included in an appellate brief*].

A CONTINUANCE SHOULD BE GRANTED BECAUSE THE _____ [ILLNESS *or* DEATH *or* EXCUSABLE CIRCUMSTANCE] OF _____ [*name of attorney*], _____ [PLAINTIFF'S *or* DEFENDANT'S] ATTORNEY, CONSTITUTES GOOD CAUSE FOR CONTINUANCE.

A. Attorney's Unavailability Due to Illness, Death, or Excusable Circumstances. The unavailability of a party's trial counsel because of death, illness, or excusable circumstances should be considered good cause for granting the continuance of a trial date (*Cal. Rules of Ct., Rule 3.1332(c)(3)*; *Hernandez v. Superior Court (2004) 115 Cal. App. 4th 1242, 1247, 9 Cal. Rptr. 3d 821* ; *Eltzroth v. Ryan (1891) 91 Cal. 584, 588*).

[b] Comments

[i] Use of Form

This form of points and authorities may be combined with the form at § 48.10[1] and submitted in support of a noticed motion or ex parte application for a continuance [*see Cal. Rules of Ct., Rule 3.1332(b)*], when the illness, death, or excusable circumstance of a trial attorney too close to the trial date requires continuance [*see Cal. Rules of Ct., Rule 3.1332(c)(3)*].

The authorities in this form should also be combined with all those in any form set forth in *§§ 48.11* -48.17 that are applicable to the particular case, i.e., that address the particular ground or grounds of good cause existing in his or her particular case.

[ii] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the

facts of his or her case. For example, counsel's argument should focus on the critical points made in the court's file and in supporting declarations regarding the onset of the attorney's illness or death too close to trial, the complexity of the case, the unavailability of a substitution of attorney, the expected duration of the illness, and the speed with which counsel informed opposing counsel of the need for continuance and filed the motion for continuance.

It is also advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, or by affidavits or declarations. The affirmative showing of good cause required for continuance is generally made by supporting declarations submitted along with the noticed motion or ex parte application and the memorandum [*see Cal. Rules of Ct., Rule 3.1332(b)*]. Although the requirement for affidavits or declarations may be waived by the trial court, for instance in a situation involving emergency or surprise [*see, e.g., McCown v. Spencer (1970) 8 Cal. App. 3d 216, 228, 87 Cal. Rptr. 213* ; *Larson v. Solbakken (1963) 221 Cal. App. 2d 410, 430, 34 Cal. Rptr. 450]* , counsel must make a sufficiently detailed factual showing to support the motion for continuance; generalizations are not sufficient [*see, e.g., Watson v. Columbia Basin Dev. Co. (1913) 22 Cal. App. 556, 559, 135 P. 511]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[iii] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[iv] Opposing Points and Authorities

The points and authorities in *§ 48.37[1]* and *[3]* may be used in an appropriate case to oppose the points and authorities set out in this form.

[c] Discussion of Authorities

[i] Attorney's Illness

Hernandez v. Superior Court *(2004) 115 Cal. App. 4th 1242, 9 Cal. Rptr. 3d 821* , involved a personal injury action where the plaintiff's attorney litigated the action through arbitration and exchanged expert witness lists with the defense, but failed to designate on time an expert for liability purposes. In early September, plaintiff learned of his attorney's illness due to pancreatic cancer. On September 12, 2003, three days before the initial trial date, the trial court heard the plaintiff's ex parte application for a continuance due to attorney illness. The court continued the trial date to December 15, 2003, but the attorney died on September 20, 2003. The plaintiff learned of the attorney's death nine days later, obtained replacement counsel, and filed an ex parte application on October 17, 2003 seeking a continuance and permission to reopen discovery and supplement his expert witness list. At the hearing, the trial court noted that it continued the first trial date for three months due to the attorney's illness and said: "And now a month after he dies, you come in and ask for more time. That could have been done better." Plaintiff explained that he learned of his attorney's death on September 29, 2003, and that he started looking for a new lawyer that day. He denied real party's claims he had "known for months" that Stewart was terminally ill. Real party contended petitioner should not be permitted to supplement his expert witness list because the terminally ill attorney had missed the deadline to do so: "That was his

decision as attorney. You can't change that after you die. That will prejudice my client." Without requiring real party to provide any additional explanation of the potential prejudice, the trial court continued the trial date to January 26, 2004, and denied the request to reopen discovery. The trial court apparently did not consider that Rosenberg was unable to start trial on that date, or that petitioner was scheduled for spinal surgery December of 2003.

The reviewing court, on writ of mandate, reversed the trial court citing abuse of discretion and ordered the trial date continued and discovery reopened. The court found that if plaintiff's counsel's serious physical illness and its debilitating effects culminating in death during the final stages of litigation are not good cause for continuing a trial and reopening of discovery, there is no such thing as good cause (*115 Cal. App. 4th 1242, 1244)* . A plaintiff in a personal injury action is not chargeable with the continued good health of his or her attorney. Forcing such a plaintiff to trial without counsel or adequately prepared counsel is not likely to ensure fairness, the overall policy of the law (*115 Cal. App. 4th 1242, 1244)* . While the trial court the statutory obligation to enforce discovery cutoff dates and to set firm trial dates, efficiency is not an end in itself. What is required is balance. "While it is true that a trial judge must have control of the courtroom and its calendar and must have discretion to deny a request for a continuance when there is no good cause for granting one, it is equally true that, absent [a lack of diligence or other abusive] circumstances which are not present in this case, a request for a continuance supported by a showing of good cause usually ought to be granted"(*115 Cal. App. 4th 1242, 1244*). The trial court held petitioner and his prospective new counsel to discovery deadlines that were set before the attorney's death, without any allowance for the fact that his illness affected his trial preparation. The attorney was suffering from pancreatic cancer during the closing phases of discovery. He died 33 days after the last date on which to supplement his expert witness list and only 5 days after the initial trial date. It is possible that the attorney provided effective representation during this crucial phase of the litigation. But common sense and respect for the grim reality of terminal illness make it more likely that, during the waning period of his life, The attorney was not as organized, focused or vigorous an advocate as he had been in healthier times. The fact that he designated no experts on liability issues, even though real party included an accident reconstruction expert on his list, demonstrates the point. would be more plausible if the attorney had been healthy in the weeks leading up to the initial trial date, and then died in an accident or in some other unforeseen manner. But he wasn't healthy. He was dying of pancreatic cancer. We cannot assume that plaintiff's counsel was able to conduct business as usual while in the grip of such a severe illness. The trial court failed to appreciate that this medical condition adversely impacted his trial preparations. Similarly, the defense's assertion that plaintiff was delaying the trial so he could "shop around for attorneys" would make sense if the plaintiff had been dilatory in his search. But he wasn't. He started looking for a new lawyer the very day he learned of his attorney's death, and he filed his ex parte application only 12 business days later. Finally, the plaintiff informed the trial court that the December trial date conflicted with his need to have spinal surgery sometime between December 2003 and February 2004. The trial court's failure to consider petitioner's medical needs in setting the trial date is just one more indication that the trial court's order was an abuse of discretion (*115 Cal. App. 4th 1242, 1247*).

Eltzroth v. Ryan *(1891) 91 Cal. 584, 27 P. 932* , was an action to quiet title. Defendant first learned three days before trial that his attorney was too ill to attend. After an unsuccessful attempt to obtain other counsel, defendant prepared affidavits and employed counsel solely for the purpose of requesting a continuance. The trial court denied continuance, however, because defendant was not willing to pay costs. Defendant appealed from a judgment in favor of plaintiff.

The Supreme Court affirmed. The Court stated as a principle that postponement should be granted if the attorney suddenly becomes ill, but declined to reverse the action of the trial court because of defendant's refusal to pay costs (*91 Cal. 584, 588)* .

[5] Substitution of Attorney

[a] FORM Attorney's Absence Constitutes Good Cause for Continuance

[*This form should be combined with a general memorandum supporting a noticed motion or ex parte application for a continuance (see § 48.10) or included in an appellate brief.*]

A CONTINUANCE SHOULD BE GRANTED BECAUSE _____ [*name of attorney*], _____ [PLAINTIFF'S *or* DEFENANT'S] ATTORNEY, NEEDS TO BE SUBSTITUTED AS TRIAL COUNSEL.

A. Substitution of Trial Counsel. The substitution of trial counsel should be considered good cause for granting the continuance of a trial date when there is an affirmative showing that the substitution is required in the interest of justice (*Cal. Rules of Ct., Rule 3.1332(c)(4)*).

[b] Comments

[i] Use of Form

This form of points and authorities may be combined with the form at § 48.10[1] and submitted in support of a motion for continuance [*see Cal. Rules of Ct., Rule 3.1332(b)*] when trial counsel substitution is required when there is an affirmative showing that the substitution is required in the interest of justice [*Cal. Rules of Ct., Rule 3.1332(c)(4)*].

The authorities in this form should also be combined with all those in any form set forth in *§§ 48.11* -48.17 that are applicable to the particular case, i.e., that address the particular ground or grounds of good cause existing in his or her particular case.

[ii] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, argument should focus on the critical points made in the court's file and in supporting declarations regarding the reason for the attorney's substitution is and why the substitution is required in the interests of justice.

It is also advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, or by affidavits or declarations. The affirmative showing of good cause required for continuance is generally made by supporting declarations submitted along with the notice motion or ex parte application for continuance and the points and authorities [*see Cal. Rules of Ct., Rule 3.1332(b)*]. Although the requirement for affidavits or declarations may be waived by the trial court, for instance in a situation involving emergency or surprise [*see, e.g., McCown v. Spencer (1970) 8 Cal. App. 3d 216, 228, 87 Cal. Rptr. 213* ; *Larson v. Solbakken (1963) 221 Cal. App. 2d 410, 430, 34 Cal. Rptr. 450]* , counsel must make a sufficiently detailed factual showing to support the motion for continuance; generalizations are not sufficient [*see, e.g., Watson v. Columbia Basin Dev. Co. (1913) 22 Cal. App. 556, 559, 135 P. 511]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[iii] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[iv] Opposing Points and Authorities

The points and authorities in *§ 48.37[3]* may be used in an appropriate case to oppose the points and authorities set out in this form.

[6] Attorney's Other Trial

[a] FORM Attorney's Absence Constitutes Good Cause for Continuance

[*This form should be combined with a general memorandum supporting a noticed motion or ex parte application for a continuance (see § 48.10) or included in an appellate brief.*]

A CONTINUANCE SHOULD BE GRANTED BECAUSE _____ [*name of attorney*], _____ [PLAINTIFF'S *or* DEFENDANT'S] ATTORNEY, MUST TRY ANOTHER MATTER ON THE SAME DATE THAT THIS CASE IS SET FOR TRIAL.

A. Attorney's Other Trial. The unavailability of the trial attorney, when he or she is engaged in the trial of another case, [or in the hearing, investigative or formal, of a State Bar disciplinary matter], should, under ordinary circumstances, be considered good cause for continuance of a trial date (*Cal. Rules of Ct., Rule 3.1332(c)(3)*, (d)(8); *Oliveros v. County of Los Angeles (2004) 120 Cal. App. 4th 1389, 1398)* .

[*Optional*] **B. Short Continuance When Opposing Party Is Not Prejudiced.** When a party requests a short continuance to accommodate an attorney who is unavailable because the attorney is engaged in the trial of another matter, and the opposing party is not prejudiced, the continuance should be granted, even though the party's attorney has not been diligent in proceeding with the case (*Palomar Mortgage Co. v. Lister (1963) 212 Cal. App. 2d 236, 239, 27 Cal. Rptr. 863*).

[b] Comments

[i] Use of Form

This form of points and authorities may be combined with the form at § 48.10[1] and submitted in support of a noticed motion or ex parte application [*see Cal. Rules of Ct., Rule 3.1332(b)*], when the trial attorney is engaged in the trial of another matter [*see Cal. Rules of Ct., Rule 3.1332(c)(3)*, (d)(8)]. Optional Paragraph B is for use to seek a short continuance when the opposing party will not be prejudiced by a short continuance. This situation should be distinguished from one in which the party's own lack of diligence has contributed to the attorney's inability to represent the party [*see, e.g.,* *Flynn v. Fink (1923) 60 Cal. App. 670, 213 P. 716* , discussed in *§ 48.37[1*][c][i]].

The authorities in this form should also be combined with all those in any form set forth in *§§ 48.11* -48.17 that are applicable to the particular case, i.e., that address the particular ground or grounds of good cause existing in his or her particular case.

[ii] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, counsel's argument should focus on the critical points made in the court's file and in supporting declarations regarding the trial attorney's calendar conflict, the unavailability of other counsel to try the case, when the trial attorney first became aware of the conflict, and that he or she did not know of the conflict when he or she accepted the case in which the continuance is sought and the speed with which the attorney informed opposing counsel of the need for continuance and filed the motion for continuance.

It is also advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, or by affidavits or declarations. The affirmative showing of good cause required for continuance is generally made by supporting declarations submitted along with the noticed motion or ex parte application and the memorandum [*see Cal. Rules of Ct., Rule 3.1332(b)*]. Although the requirement for affidavits or declarations may be waived by the trial court, for instance in a situation involving emergency or surprise [*see, e.g., McCown v. Spencer (1970) 8 Cal. App. 3d 216, 228, 87 Cal. Rptr. 213* ; *Larson v. Solbakken (1963) 221 Cal. App. 2d 410, 430, 34 Cal. Rptr. 450]* , counsel must make a sufficiently detailed factual showing to support the motion for continuance; generalizations are not sufficient [*see, e.g., Watson v. Columbia Basin Dev. Co. (1913) 22 Cal. App. 556, 559, 135 P. 511]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[iii] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[iv] Opposing Points and Authorities

The points and authorities in *§ 48.37[4]* may be used in an appropriate case to oppose the points and authorities set out in this form.

[c] Discussion of Authorities

[i] Attorney's Other Trial

In ***Oliveros v. County of Los Angeles*** *(2004) 120 Cal. App. 4th 1389, 1398* , plaintiffs filed a medical malpractice action against defendant County. The County's attorney requested a continuance, as he was unexpectedly engaged in trial in another courtroom. The trial court denied the continuance suggesting that another lawyer in the County's office try the other case. After denial of continuance, the case proceeded to trial without the presence of the County or its attorney. After plaintiffs presented four days of evidence, the trial court directed a verdict in their favor.

On appeal, the court reversed, concluding that the trial court's failure to carefully balance all of the competing interests at stake, guided by the strong public policy in favor of deciding cases on the merits, constituted an abuse of discretion (*120 Cal. App. 4th 1389, 1398)* . The court noted that this was a complicated medical malpractice case in which the parties intended to present the testimony of 43 witnesses and in which substantial damages were at stake. The court stated that the trial court did not consider all of the facts and circumstances relevant to a ruling on the County's request for a continuance, nor the specific factors enumerated in former Cal. Rules of Ct., Rule 375 (now see Rule 3.1332). Rather, the judge's reported comments suggested that the only factor he took into consideration, and which became the decisive factor in his ruling, was the impact of a continuance on the court's calendar (*120 Cal. App. 4th 1389, 1398)* .

[ii] Short Continuance When Opposing Party Is Not Prejudiced

In ***Palomar Mortgage Co. v. Lister*** *(1963) 212 Cal. App. 2d 236, 27 Cal. Rptr. 863* , plaintiff sought declaratory relief

and damages for breach of contract. On the day of trial, an attorney, who was not plaintiff's counsel, appeared and submitted an affidavit signed by plaintiff's counsel which stated that he was the only member of the firm able to try the case and that he was engaged in a criminal case on the day of trial. Because of his other trial obligations, he requested a 12-day continuance. When it was clear that the trial court would deny the request, the substitute attorney requested a one-day continuance, offering to pay costs and seeking one hour in which to contact the offices of plaintiff's counsel. The trial court refused the one-hour delay, denied the request for a continuance, and without plaintiff's having any legal representation, held a jury trial which resulted in a verdict in favor of defendants. Plaintiff appealed.

The court of appeal reversed. The court conceded that denial of the request for a 12-day continuance could not be criticized, particularly because the conflict claimed by plaintiff's attorney on the date of trial was only an arraignment. Nevertheless, denial of the one-day continuance denied plaintiff any opportunity at all to present its case even though defendants, who consented to the one-day delay, would not apparently have been injuriously affected by the short delay (*212 Cal. App. 2d 236, 239)* .

California Points & Authorities

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Volume 4 Chapters 40-49 CLAIM & DELIVERY---to---CONTINUANCE
CHAPTER 48 CONTINUANCE OF PROCEEDINGS
PART II. FORMS
A. SUPPORTING CONTINUANCE

4-48 California Points & Authorities § 48.15

§ 48.15 Addition of New Party Constitutes Good Cause for Continuance

[1] FORM Addition of New Party Constitutes Good Cause for Continuance

[*This form should be combined with a general memorandum of points and authorities supporting a noticed motion or ex parte application for a continuance (see § 48.10) or included in an appellate brief*].

A CONTINUANCE SHOULD BE GRANTED BECAUSE A NEW PARTY WAS ADDED TO THE CASE AND THE NEW PARTY OF OTHER PARTIES HAVE NOT HAD A REASONABLE OPPORTUNITY TO CONDUCT DISCOVERY AND PREPARE FOR TRIAL.

A. Addition of New Party. The addition of a new party should be considered good cause for continuance of the trial date when the new party has not had a reasonable opportunity to conduct discovery and prepare for trial, or the other parties have not had a reasonable opportunity to conduct discovery and prepare for trial in regard to the new party's involvement in the case (*Cal. Rules of Ct., Rule 3.1332(c)(5)*).

[2] Comments

[a] Use of Form

This form of points and authorities may be combined with the form at § 48.10[1] and submitted in support of a noticed motion or ex parte application for a continuance [*see Cal. Rules of Ct., Rule 3.1332(b)*], when a new party has been added to the case and the new party has not had a reasonable opportunity to conduct discovery and prepare for trial, or the other parties have not had a reasonable opportunity to conduct discovery and prepare for trial in regard to the new party's involvement in the case [*Cal. Rules of Ct., Rule 3.1332(c)(5)*; *see also Code Civ. Proc. § 594a* (court's power to postpone trial on own motion when amendment or allowance of time to plead renders postponement necessary)].

The authorities in this form should also be combined with all those in any form set forth in *§§ 48.11* -48.17 that are applicable to the particular case, i.e., that address the particular ground or grounds of good cause existing in his or her particular case.

[b] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, counsel's argument should focus on the critical points made in the court's file and in supporting declarations regarding the change in the status of the case, the ways in which that change has rendered the case not ready for trial, the diligence with which counsel has proceeded the prepare the case for trial, when the trial attorney first became aware of the problem, and the speed with which the attorney informed opposing counsel of the need for continuance and filed the motion for continuance.

It is also advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450* et seq.], by references to the court's file, or by affidavits or declarations. The affirmative showing of good cause required for continuance is generally made by supporting declarations submitted along with the noticed motion or ex parte application and the memorandum [*see Cal. Rules of Ct., Rule 3.1332(b)*]. Although the requirement for affidavits or declarations may be waived by the trial court, for instance in a situation involving emergency or surprise [*see, e.g., McCown v. Spencer (1970) 8 Cal. App. 3d 216, 228, 87 Cal. Rptr. 213* ; *Larson v. Solbakken (1963) 221 Cal. App. 2d 410, 430, 34 Cal. Rptr. 450]* , counsel must make a sufficiently detailed factual showing to support the motion for continuance; generalizations are not sufficient [*see, e.g., Watson v. Columbia Basin Dev. Co. (1913) 22 Cal. App. 556, 559, 135 P. 511]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Points and Authorities

The points and authorities in *§ 48.38* may be used in an appropriate case to oppose the points and authorities set out in this form.

California Points & Authorities

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Volume 4 Chapters 40-49 CLAIM & DELIVERY---to---CONTINUANCE
CHAPTER 48 CONTINUANCE OF PROCEEDINGS
PART II. FORMS
A. SUPPORTING CONTINUANCE

4-48 California Points & Authorities § 48.16

§ 48.16 Another Action Pending

[1] FORM Another Action Pending

[*This form should be combined with a general memorandum supporting a noticed motion or ex parte application for a continuance (see § 48.10) or included in an appellate brief.*]

A CONTINUANCE MAY BE GRANTED WHEN ANOTHER ACTION IS PENDING AND THE OUTCOME OF THE PENDING ACTION WOULD RESOLVE OR SIMPLIFY THE DETERMINATION OF ONE OR MORE OF THE ISSUES IN THE INSTANT CASE.

A. Continuance Proper When Other Action Is Pending. A continuance is justified when a party requests a continuance on the ground that another action is pending and the outcome of the pending action would resolve or simplify the determination of one or more of the issues in the instant case. [This rule applies even if the other action is pending in a court other than a California court] ([*Thomson v. Continental Ins. Co. (1967) 66 Cal. 2d 738, 747-748, 59 Cal. Rptr. 101, 427 P.2d 765* ; *Anthony v. General Motors Corp. (1973) 33 Cal. App. 3d 699, 708, 109 Cal. Rptr. 254;] Margolis v. Superior Court (1957) 151 Cal. App. 2d 333, 334, 338, 311 P.2d 167* ; [*Simmons v. Superior Court (1950) 96 Cal. App. 2d 119, 123-125, 214 P.2d 844]*).

[*Optional*] **B. Continuance Is Proper for Subsequently Begun Pending Action.** A continuance may be justified on the ground that another action is pending even though the other action was begun after the case sought to be continued (*Ehrhart & Associates Inc. v. Superior Court (1960) 185 Cal. App. 2d 1, 5, 7 Cal. Rptr. 844*).

[2] Comments

[a] Use of Form

This form of points and authorities may be combined with the form at § 48.10[1] and submitted in support of a noticed motion or ex parte application for a continuance [*see Cal. Rules of Ct., Rule 3.1332(b)*], when another action is pending that would resolve or simplify the issues in the case which is sought to be continued. The authorities in this form should

also be combined with all those in any form set forth in *§§ 48.11* -48.17 that are applicable to the particular case, i.e., that address the particular ground or grounds of good cause existing in his or her particular case.

[b] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, if the continuance is sought because another pending action will resolve or simplify shared issues, counsel's argument should focus on the critical points made in the courts' files in both cases and in supporting declarations regarding the substantial similarity of parties and/or issues, when counsel first learned of the shared issues, and the speed with which counsel informed opposing counsel of the need for continuance and filed the motion for continuance [*cf. Code Civ. Proc. § 597* (when answer may be used to plead bar of another action pending)].

It is also advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, or by affidavits or declarations. The affirmative showing of good cause required for continuance is generally made by supporting declarations submitted along with the noticed motion or ex parte application and the memorandum [*see Cal. Rules of Ct., Rule 3.1332(b)*]. Although the requirement for affidavits or declarations may be waived by the trial court, for instance in a situation involving emergency or surprise [*see, e.g., McCown v. Spencer (1970) 8 Cal. App. 3d 216, 228* ; *Larson v. Solbakken (1963) 221 Cal. App. 2d 410, 430, 34 Cal. Rptr. 450]* , counsel must make a sufficiently detailed factual showing to support the motion for continuance; generalizations are not sufficient [*see, e.g., Watson v. Columbia Basin Dev. Co. (1913) 22 Cal. App. 556, 559, 135 P. 511]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Points and Authorities

The points and authorities in *§ 48.39* may be used in an appropriate case to oppose the points and authorities set out in this form.

[3] Discussion of Authorities

[a] Continuance Proper When Other Action Is Pending

In ***Thomson v. Continental Ins. Co.*** *(1967) 66 Cal. 2d 738, 747-748, 59 Cal. Rptr. 101, 427 P.2d 765* , after the trial court had dismissed plaintiff's suit for damages related to breach of insurance contracts under the doctrine of forum non conveniens, plaintiff appealed.

The Supreme Court reversed, finding that, generally, that doctrine has only an extremely limited application to a case when, as in this case, the plaintiff is a bona fide resident of the forum state. In its discussion, the Court pointed out that a

prior pending federal court action in Texas which involved nearly identical issues could provide a proper basis for a stay of proceedings, but not a dismissal. Counsel should note, however, the Court's explicit statement that despite misleading language in earlier cases, such as *Simmons v. Superior Court (1950) 96 Cal. App. 2d 119, 123-125, 214 P.2d 844* , the propriety of a stay is a matter of the trial court's discretion, rather than a right for the moving party (*66 Cal. 2d 738, 747-748)* .

In ***Anthony v. General Motors Corp.*** *(1973) 33 Cal. App. 3d 699, 109 Cal. Rptr. 254* , plaintiffs brought a class action suit against defendant truck manufacturer requesting that defendant recall and pay for the replacement of allegedly defective truck wheels. While the action was pending, the federal highway administrator determined that a defect in the wheels resulted in an unreasonable risk of harm and filed suit in federal district court to assess a fine against defendant. The trial court in the class action then dismissed the case on the ground that the action could not be brought as a class action and that because the federal action would determine the issue of inherent defect, the principle of collateral estoppel would make retrial of the issue unnecessary. Plaintiffs appealed.

The court of appeal reversed on both grounds. In regard to the principle of collateral estoppel, the court held that if the disposition of an action pending elsewhere could, by resolving one of the issues, shorten the trial in the instant case or obviate the necessity for a trial, the proper action is not dismissal but continuance (*33 Cal. App. 3d 699, 708)* .

Margolis v. Superior Court *(1957) 151 Cal. App. 2d 333, 311 P.2d 167* , arose out of a lawsuit for damages for conversion of dry cleaning equipment brought by two members of the Margolis family against a machinery corporation. The trial court in the damages action continued the case until resolution of a related case, then on appeal, in which a separate party had successfully pursued a claim against plaintiffs for the same equipment. Plaintiffs petitioned for a writ of mandate to require the trial court to proceed with the damages action.

The court of appeal denied petitioner's writ stating that the issue was whether or not the judgment in the other pending case would be determinative of one or more of the issues in the damages action; and under the principle of collateral estoppel, the answer was affirmative (*151 Cal. App. 2d 333, 334)* . Further, until the outcome of the appeal was clear, it would be extremely difficult to fix damages. Therefore, the trial court did not abuse its discretion by postponing the trial pending the outcome of the appeal. (*151 Cal. App. 2d 333, 338)* .

Simmons v. Superior Court *(1950) 96 Cal. App. 2d 119, 214 P.2d 844* , arose out of a divorce conflict between a couple residing in Texas. The wife had brought an action for divorce and other remedies on February 10 in Texas, and the husband filed suit on February 15 in California for a declaration that he was the owner of an undivided half interest in certain properties which were claimed in the Texas proceeding as his wife's separate property. The wife filed a motion in the California court to have the proceeding stayed until final determination of the Texas action. Her motion was denied. She then sought a writ of prohibition.

The court of appeal supported the wife's claim, although determining that mandate, not prohibition, was the proper remedy. The court concluded that the Texas action would determine all of the issues involved in the California action. The court also stated that while the fact that a prior action is pending in another state does not entitle the party in a second suit to an abatement as a matter of right, it is within the discretion of the court in which the second action is pending to stay the suit and the principle of comity between states requires California courts to refuse to proceed to a decision before the prior action has terminated (*96 Cal. App. 2d 119, 123-125)* .

[b] Continuance Is Proper for Subsequently Begun Pending Action

Ehrhart & Associates, Inc. v. Superior Court *(1960) 185 Cal. App. 2d 1, 7 Cal. Rptr. 844* , arose out of a conflict between petitioner, Ehrhart & Associates, and Valley Nitrogen Producers, Inc. (referred to as Valley). Petitioner had contracted to build an ammonium sulfate plant in Fresno County for Valley. In February, a payment dispute arose between the parties and petitioner attempted without success to invoke the arbitration clause in the contract. In May,

Valley notified petitioner that it was rescinding the contract. On June 3, petitioner filed a petition in Los Angeles County for appointment of an arbitrator and for an order directing arbitration. Claiming in its answer that it had rescinded the contract, Valley later filed a complaint for rescission on June 8 in Fresno County where the records were located and the principal witnesses resided. The trial court, then, stayed the proceedings on the arbitration petition during the pendency of the rescission action, stating specifically that its action was not based on convenience of the parties or a determination of where the arbitration matter should be tried. Petitioner sought a writ of mandate to compel the trial court to proceed.

The court of appeal denied the writ. The court pointed out that the trial court before deciding the arbitration petition would have to determine the equitable issue of rescission. Because the issue to be submitted to arbitration could well become moot by adjudication of the right to rescission, an unnecessary multiplicity of suits could result of the writ were granted. Thus, the trial court was entitled to exercise its discretion to grant a continuance or stay of the arbitration proceedings pending determination of controlling issues in the other action, even though the action was begun subsequently (*185 Cal. App. 2d 1, 5)* .

California Points & Authorities

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CHAPTER 48 CONTINUANCE OF PROCEEDINGS
PART II. FORMS
A. SUPPORTING CONTINUANCE

4-48 California Points & Authorities §§ 48.17-48.29

[Reserved]

§§ 48.17[Reserved]

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PART II. FORMS
B. OPPOSING CONTINUANCE

4-48 California Points & Authorities § 48.30

§ 48.30 Failure to Establish Good Cause for Continuance

[1] FORM Failure to Establish Good Cause for Continuance

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN OPPOSITION TO A MO-
Plaintiff,	)	TION FOR CONTINUANCE
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Dept: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

A COURT DOES NOT ABUSE ITS DISCRETION BY DENYING A MOTION FOR A CONTINUANCE WHEN THE PARTY SEEKING THE CONTINUANCE FAILS TO ESTABLISH GOOD CAUSE THEREFOR.

A. Good Cause. No continuance before or during trial may be granted except on an affirmative showing of good cause (*Cal. Rules of Ct., Rule 3.1332(b)*).

B. Continuance Is Not Matter of Right. The power to determine when a continuance should be granted is a necessary judicial power, and not even the Legislature can confer on a litigant the right to a continuance in any specific situation (*Thurmond v. Superior Court (1967) 66 Cal. 2d 836, 838-840, 59 Cal. Rptr. 273, 427 P.2d 985*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*party's status and name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to a motion for continuance [*see Cal. Rules of Ct., Rule 3.1332(b)*]. It should be combined with all of the forms set forth in *§§ 48.31 -48.39* that are applicable to the particular case.

This form and the forms in *§ 48.31[1]* and *[2]* address procedural requirements that are applicable in every case and should be used whenever the showing in support of the motion is deficient in that regard.

The forms in *§§ 48.34 -48.39* address particular circumstances that have been held *not* to constitute good cause, and therefore need only be used when they establish that the circumstances on which the particular request for continuance is based do not constitute good cause for continuance. The authorities in *§§ 48.32* and *48.33* may be used to augment a memorandum opposing a continuance if the request for continuance is not made in good faith or would place undue burden on the party opposing the continuance.

In an appropriate case, these points and authorities may be used to oppose the points and authorities set out in *§ 48.10*.

[b] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, if the continuance is sought because of the unavailability of an expert witness, counsel's argument should focus on the critical points made in both the supporting and opposing declarations regarding the reason for the expert's unavailability and whether that reason amounts to good cause [*see also* the form in *§ 48.13[3][a]*], when counsel for the moving party first learned of the unavailability, the lack or insufficiency of any attempts to arrange alternatives, the reasons, if any, why those alternatives are preferable to a continuance, and the lack of diligence with which counsel for the moving party informed opposing counsel of the need for continuance and filed the motion for continuance.

It is also advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, or by affidavits or declarations. Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish or negate the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Continuance Is Not Matter of Right

Thurmond v. Superior Court *(1967) 66 Cal. 2d 836, 59 Cal. Rptr. 273, 427 P.2d 985* , arose out of a paternity dispute in which an unborn child's guardian ad litem attempted to obtain support, maintenance, and medical expenses from the alleged father during pendency of the paternity action. The alleged father's attorney, who was a member of the Legislature, requested a continuance under predecessor of *Code Civ. Proc. § 595*, which stated in essence that a trial shall be postponed when any attorney of record therein is a member of the Legislature and the Legislature is in session [*see § 48.14[2]*]. The trial court granted a continuance and plaintiff filed a writ of mandate to compel the trial court to hold an early hearing.

The Supreme Court determined that the writ should issue. The Court stated that the statutory provisions must be viewed as directory only. A power inherent in the courts is the power to control their order of business so that the rights of all litigants may be safeguarded. The Court added that this power has been recognized as judicial in its nature and as a necessary appendage to a court organized to enforce rights and redress wrongs. In the instant case, the ability of the mother and child to apply for relief pendente lite would be materially impaired by a substantial continuance, therefore, the continuance was not proper (*66 Cal. 2d 836, 838-840)* . *Code Civ. Proc. § 595* has since been amended to provide for situations, including pendente lite relief in paternity actions, in which continuance for a member of the legislature is not mandatory [*see* Paragraph D in § 48.12[3]].

California Points & Authorities

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4-48 California Points & Authorities § 48.31

§ 48.31 Failure to Establish That Matter Requiring Continuance Is a Significant, Unanticipated Change in Case Status

[1] Failure to Establish Emergency

[a] FORM Failure to Establish That Matter Requiring Continuance Is a Significant, Unanticipated Change in Case Status

[*This form should be combined with a general memorandum opposing a noticed motion or ex parte application for a continuance (see § 48.30) or included in an appellate brief*].

A COURT DOES NOT ABUSE ITS DISCRETION BY DENYING A MOTION FOR A CONTINUANCE WHEN THE PARTY SEEKING THE CONTINUANCE FAILS TO ESTABLISH THAT THE CONTINUANCE IS REQUIRED BY AN UNFORESEEABLE OR UNAVOIDABLE EMERGENCY OCCURRING AFTER THE CASE WAS SET FOR TRIAL THAT CANNOT OTHERWISE BE PROVIDED FOR.

A. Continuance Requires Significant, Unanticipated Change in Status Supported by Good Cause. Dates assigned for trial are firm, and all parties must regard the date set for trial as certain (*Cal. Rules of Ct., Rule 3.1332(a)*). A continuance may be granted only upon an affirmative showing of good cause (*Cal. Rules of Ct., Rule 3.1332(c)*). In general, good cause is shown when there is a significant, unanticipated change in the status of the case as a result of which the case is not ready for trial (*Cal. Rules of Ct., Rule 3.1332(c)(7)*).

B. Failure to Establish Emergency. When a party requests a continuance but fails to establish that the continuance is required by an unforeseeable and unavoidable emergency occurring after the case was set for trial, the continuance may be denied (*Young v. Redman (1976) 55 Cal. App. 3d 827, 831, 128 Cal. Rptr. 86* ; *see Lazarus v. Titmus (1998) 64 Cal. App. 4th 1242, 1250, 75 Cal. Rptr. 2d 676*).

C. Alternatives to Continuance Are Available. A party may be denied a continuance if alternatives to a continuance are available (*People ex rel. Dep't of Public Works v. Busick (1968) 259 Cal. App. 2d 744, 749-750, 66 Cal. Rptr. 532* ; *Ferrari v. Mambretti (1945) 70 Cal. App. 2d 492, 496, 161 P.2d 275*).

[b] Comments

[i] Use of Form

This form of points and authorities may be submitted in opposition to a noticed motion or ex parte application for continuance [*see Cal. Rules of Ct., Rule 3.1332(b)*]. It should be combined with all of the forms set forth in *§§ 48.30 -48.39* that are applicable to the particular case.

This form and the forms in *§§ 48.30[1]* and *48.31[2]* address procedural requirements that are applicable in every case and should be used to whenever the showing in support of the motion is deficient in that regard.

The forms in *§§ 48.34 -48.39* address particular circumstances that have been held *not* to constitute good cause, and therefore need only be used when they establish that the circumstances on which the particular request for continuance is based do not constitute good cause for continuance.

The forms in *§§ 48.32* and *48.33* may be used to augment a memorandum opposing a continuance if the request for continuance is not made in good faith or would place undue burden on the party opposing the continuance.

In an appropriate case, these points and authorities may be used to oppose the points and authorities set out in *§ 48.10*.

[ii] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, if the continuance is sought because of the unavailability of an expert witness, counsel's argument should focus on the critical points made in both the supporting and opposing declarations regarding the reason for the expert's unavailability and whether that reason amounts to good cause [*see also* the form in *§ 48.13[3][a]*], when counsel for the moving party first learned of the unavailability, the lack or insufficiency of any attempts to arrange alternatives, the reasons, if any, why those alternatives are preferable to a continuance, and the lack of diligence with which counsel for the moving party informed opposing counsel of the need for continuance and filed the motion for continuance.

It is also advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, or by affidavits or declarations. Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish or negate the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits , Certificates, and Declarations*, and Ch. 321, *Judicial Notice* (Matthew Bender).

[iii] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[c] Discussion of Authorities

[i] Failure to Establish Emergency

In ***Young v. Redman*** *(1976) 55 Cal. App. 3d 827, 128 Cal. Rptr. 86* , plaintiff filed an action for breach of contract to purchase land from plaintiff on the grounds of mistake and misrepresentation. On March 5, the trial was set for May 28, and on May 13, defendant's attorney requested a continuance because defendant was out of the country on business. Defendant had adequate notice of the trial date but failed to adjust personal plans in order to attend. The trial court denied the motion and, after a three-day trial with defendant not present, entered judgment in favor of plaintiff. Defendant appealed, contending that the trial court had erred in failing to grant him a continuance.

The court of appeal affirmed, pointing out in part that to justify reversal there must be an affirmative showing of "good cause." The Former Standards of Judicial Administration for the Superior Courts [Cal. Rules of Ct., Appen., Div. I, § 9] [*since repealed and partially subsumed into Cal. Rules of Ct., Rule 3.1332*] recommended that good cause exists only when the necessity for the continuance results from an emergency occurring after the trial setting conference that could not have been anticipated or avoided with reasonable diligence and cannot be properly provided for other than by continuance. Defendant made no showing that an emergency required his absence from the country (*55 Cal. App. 3d 827, 831)* .

In ***Lazarus v. Titmus*** *(1998) 64 Cal. App. 4th 1242, 75 Cal. Rptr. 2d 676* , the plaintiff's counsel appeared on the day the case was set for trial and moved for a two-week continuance on the ground that the plaintiff had just accepted a new job that required plaintiff to attend an out-of-state orientation and training seminar. Plaintiff had known of the conflict on Thursday July 25, the day he received the job offer, but could not reach the attorney until Saturday July 27. The attorney prepared a motion for continuance, faxed it to defense counsel on Sunday (*64 Cal. App. 4th 1242, 1246-1247)* . The trial court denied the request, and ultimately dismissed the case due to counsel's inability to proceed in the plaintiff's absence. Plaintiff appealed.

The court of appeal affirmed. The court held that the trial court did not abuse its discretion in denying the motion to continue when the record showed that the trial court was unconvinced that plaintiff could not have arranged his work schedule to be available for trial, or that plaintiff could not have notified this attorney earlier so the motion could have been brought before the trial date. Plaintiff knew the trial date when he accepted the job, and under former Cal. Rules of Ct., Appen. Div. I, § 9, he was to regard the trial date as a definite court appointment that takes precedence over all nonemergencies (*64 Cal. App. 4th 1242, 1250-1251)* .

[ii] Alternatives to Continuance Are Available

The factual background of ***People ex rel. Dep't of Public Works v. Busick*** *(1968) 259 Cal. App. 2d 744, 66 Cal. Rptr. 532* , is discussed in *§ 48.13[1][d][i]*. In affirming the trial court's denial of a continuance because of the absence of certain witnesses, the court of appeal stated that the testimony of certain of the absent witnesses would have duplicated that of other witnesses. Further, although an important witness, an expert real estate appraiser, had personal business outside the county on the day set for trial, defendants failed to show that this witness would have been the first witness called or that the trial would not have continued long enough for the witness ultimately to be heard (*259 Cal. App. 2d 744, 749-750)* .

The factual background of ***Ferrari v. Mambretti*** *(1945) 70 Cal. App. 2d 492, 161 P.2d 275* , is discussed in *§ 48.12[2][c][i]*. The trial court denied plaintiff's motion for continuance and the court of appeal affirmed because plaintiff failed to show that his continuous presence at the trial was necessary. The court also pointed out that plaintiff would still be physically able to consult with and advise his attorney even if he was not present at the trial (*70 Cal. App. 2d 492, 496)* .

[2] Party's Failure to Promptly Seek Continuance Allows Denial

[a] FORM Failure to Establish That Matter Requiring Continuance Is a Significant, Unanticipated Change in Case Status

[*This form should be combined with a general memorandum of points and authorities opposing a noticed motion or ex parte application for a continuance (see § 48.30) or included in an appellate brief.*]

A COURT DOES NOT ABUSE ITS DISCRETION BY DENYING A CONTINUANCE WHEN THE MOTION FOR A CONTINUANCE WAS NOT MADE PROMPTLY AFTER ASCERTAINING THE NECESSITY FOR THE CONTINUANCE.

A. Continuance Must Be Sought Promptly. A party seeking a continuance of the date set for trial, whether contested or uncontested or stipulated to by the parties, must make the request for a continuance by a noticed motion or an ex parte application under Cal. Rules of Ct., Rule 3.1200 et seq., with supporting declarations; and the party must make the motion or application as soon as reasonably practical once the necessity for the continuance is discovered (*Cal. Rules of Ct., Rule 3.1332(b)*).

B. Party's Failure to Promptly Seek Continuance Allows Denial. A party may be denied a continuance if the motion is not made promptly after ascertaining the necessity for continuance (*see Lazarus v. Titmus (1998) 64 Cal. App. 4th 1242, 1250, 75 Cal. Rptr. 2d 676* ; *Zlotoff v. Tucker (1984) 154 Cal. App. 3d 988, 994, 201 Cal. Rptr. 692*).

[b] Comments

[i] Use of Form

This form of points and authorities may be submitted in opposition to a noticed motion or ex parte application for continuance [*see Cal. Rules of Ct., Rule 3.1332(b)*]. It should be combined with all of the forms set forth in *§§ 48.30 -48.39* that are applicable to the particular case.

This form and the forms in *§§ 48.30* and *48.31[1]* address procedural requirements that are applicable in every case and should be used to whenever the showing in support of the motion is deficient in that regard.

The forms in *§§ 48.34 -48.39* address particular circumstances that have been held *not* to constitute good cause, and therefore need only be used when they establish that the circumstances on which the particular request for continuance is based do not constitute good cause for continuance.

The forms in *§§ 48.32* and *48.33* may be used to augment a memorandum opposing a continuance if the request for continuance is not made in good faith or would place undue burden on the party opposing the continuance.

In an appropriate case, these points and authorities may be used to oppose the points and authorities set out in *§ 48.10*.

[ii] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, if the continuance is sought because of the unavailability of an expert witness, counsel's argument should focus on the critical points made in both the supporting and opposing declarations regarding the reason for the expert's unavailability and whether that reason amounts to good cause [*see also* the form in *§ 48.13[3][a]*], when counsel for the moving party first learned of the unavailability, the lack or insufficiency of any attempts to arrange alternatives, the reasons, if any, why those alternatives are preferable to a continuance, and the lack of diligence with which counsel for the moving party informed opposing counsel of the need for continuance and filed the motion for continuance.

It is also advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial

notice [*see Evid. Code § 450 et seq.*], by references to the court's file, or by affidavits or declarations. Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish or negate the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[iii] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[c] Discussion of Authorities

[i] Party's Failure to Promptly Seek Continuance Allows Denial

The facts and procedural background of ***Lazarus v. Titmus*** *(1998) 64 Cal. App. 4th 1242, 75 Cal. Rptr. 2d 676* , are discussed in [1][c][i], *above*. One of the factors the court noted in support of its holding the trial court did not abuse its discretion in denying the continuance was that the motion was made on the trial date, July 29 (*64 Cal. App. 4th 1242, 1250)* .

Zlotoff v. Tucker *(1984) 154 Cal. App. 3d 988, 201 Cal. Rptr. 692* , was an action for breach of contract and fraud. The trial court denied defendant's requests for continuance because of the illness of a defense witness. Judgment was for plaintiff; and defendant appealed.

The court of appeal affirmed. The court held that the trial court had not abused its discretion in denying a continuance. The court reasoned that defendant's motions for a continuance were all made in the two days immediately preceding the trial date, although defendant had known 11 days before that his witness would be unable to testify. The court also noted that defendant never attempted to preserve the witness's testimony by deposition, despite suggestions by the trial court, and had likewise made no showing that the witness's testimony was material to the issues at trial (*154 Cal. App. 3d 988, 994)* .

[d] Additional Authorities

[i] Party's Failure to Promptly Seek Continuance Allows Denial

The factual background of ***San Bernardino County v. Doria Mining & Eng'r Corp.*** *(1977) 72 Cal. App. 3d 776, 140 Cal. Rptr. 383* , is discussed in *§ 48.14[1][c][ii]*. The trial court denied defendant's motion for a continuance to appoint new counsel, and the court of appeal affirmed. In listing the reasons why the trial court did not abuse its discretion, the court of appeal pointed out that defendant's motion fell far short of the requirements of former Cal. Rules of Ct., Rule 224 (*now see Cal. Rules of Ct., Rule 3.1332(b)*), in that the motion was not made promptly on ascertaining the necessity for the continuance. The motion for continuance was not made until the day of trial, though the need for the new attorney had been apparent for over a week. There was no showing when the attorney of record informed the defendant that he wished to withdraw (*72 Cal. App. 3d 776, 783)* .

In ***Dineen v. City & County of San Francisco*** *(1940) 38 Cal. App. 2d 486, 101 P.2d 736* , plaintiff sued defendant city and county for damages from personal injuries caused by the collapse of a folding chair on which plaintiff had been sitting while he was observing a superior court trial. On Wednesday afternoon, the first day of the jury trial, plaintiff's

counsel, after presenting two witnesses, requested a continuance because several other witnesses to the accident were not available for subpoena but would return on Monday. The trial court denied the motion and then granted defendant's motion for a nonsuit. Plaintiff appealed.

The court of appeal affirmed. Counsel's request for a continuance was not made with due diligence. Counsel knew that the witnesses were not available when the jury was impaneled. The court also noted that counsel failed to state who the witnesses were or what their testimony would be (*38 Cal. App. 2d 486, 493)* .

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4-48 California Points & Authorities § 48.32

§ 48.32 Moving Party's Lack of Good Faith Allows Denial of Continuance

[1] FORM Moving Party's Lack of Good Faith Allows Denial of Continuance

[*This form should be combined with a general memorandum opposing a noticed motion or ex parte application for a continuance (see § 48.30) or included in an appellate brief.*]

THE COURT HAS DISCRETION TO DENY THE CONTINUANCE BECAUSE THE MOVING PARTY SHOWS A LACK OF GOOD FAITH.

A. Moving Party's Lack of Good Faith. A party may be denied a continuance if he/she shows a lack of good faith (*McElroy v. McElroy (1948) 32 Cal. 2d 828, 832-833, 198 P.2d 683*).

[*Optional*] **B. Moving Party's Purpose Is Delay.** A party may be denied a continuance if the purpose of the request is delay (*Sheldon v. Landwehr (1911) 159 Cal. 778, 781-782, 116 P. 44*).

[2] Comments

[a] Use of Form

This form of points and authorities may be used to augment a memorandum submitted in opposition to noticed motion or ex parte application for a continuance [*see Cal. Rules of Ct., Rule 3.1332(b)*] when, in addition to other reasons why the continuance may be denied, the moving party's actions indicate a lack of good faith, for example, if his or her primary purpose in seeking the continuance appears to be delay. It should be combined with all of the forms set forth in *§§ 48.30 -48.39* that are applicable to the particular case.

The forms in *§§ 48.30 -48.31* address procedural requirements that are applicable in every case and should be used to whenever the showing in support of the motion is deficient in that regard. Similarly, the forms in *§§ 48.34 -48.39* address particular circumstances that have been held *not* to constitute good cause, and therefore need only be used when they establish that the circumstances on which the particular request for continuance is based do not constitute good

cause for continuance. The form in *§ 48.33* may be used to augment a memorandum opposing a continuance if the request for continuance would place undue burden on the party opposing the continuance.

When using this form, counsel should consider whether to request sanctions based on the opposing party's delaying tactics. For points and authorities supporting the imposition of sanctions that may be combined with the authorities in this form, see Ch. 207, *Sanctions* . For discussion of the availability of sanctions, see California Forms of Pleading and Practice, Ch. 510, *Sanctions* (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, if the continuance is sought because of the unavailability of an expert witness, counsel's argument should focus on the critical points made in both the supporting and opposing declarations regarding the reason for the expert's unavailability and whether that reason amounts to good cause [*see also* the form in *§ 48.13[3][a]*], when counsel for the moving party first learned of the unavailability, the lack or insufficiency of any attempts to arrange alternatives, the reasons, if any, why those alternatives are preferable to a continuance, and the lack of diligence with which counsel for the moving party informed opposing counsel of the need for continuance and filed the motion for continuance. In addition, counsel should argue that the foregoing evidence a lack of good faith, or even an intent to delay, on the part of moving party.

It is also advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, or by affidavits or declarations. Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish or negate the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Moving Party's Lack of Good Faith

In ***McElroy v. McElroy*** *(1948) 32 Cal. 2d 828, 198 P.2d 683* , plaintiff sued her spouse for divorce and his parents for return of certain community funds. At the trial, the parents' attorney requested a continuance because the father was ill. Plaintiff, in response, filed an affidavit which stated her attorney's belief that the parents had not intended to attend the trial because of the cost of coming to California from their home in Oregon. The trial court denied the motion, but at the close of trial offered a continuance on its own motion to secure testimony of the father and son. Defendant's counsel was not able to assure the trial court that either would appear; and the trial court then rendered a judgment in plaintiff's favor. Defendant appealed.

On appeal, the Supreme Court affirmed. The Court stated that in deciding a motion for continuance, the trial court could take into consideration the good faith of the moving party. Given all the facts of this case, including the facts that defendants supported their motion only by an attorney's affidavit and that, in the six-day period between denial of the

motion and the end of the trial, they made no attempt to augment their motion with a personal or physician's affidavit, it was clear that no abuse of discretion occurred (*32 Cal. 2d 828, 832-833)* .

[b] Moving Party's Purpose Is Delay

In ***Sheldon v. Landwehr*** *(1911) 159 Cal. 778, 116 P. 44* , plaintiff sued to recover the balance due on four promissory notes. At the trial, defendant's counsel moved for a continuance because defendant was ill. In opposition, plaintiff argued that his security for the notes, defendant's mining stock, was in jeopardy because it would otherwise be sold in three weeks at a delinquent sale. Plaintiff would not agree to the continuance unless defendant would exercise his power to postpone the sale. Defendant's attorney said he would not attempt to procure a postponement. The trial court ruled that if the sale were not postponed by the next day, the trial would proceed. Because the sale was not postponed, on the following day the trial was begun. Judgment was for plaintiff; and defendant appealed.

The Supreme Court held that in considering whether or not to grant a continuance, a trial court could consider the good faith of the request; in this case, there was evidence to support the conclusion that defendant was not acting in good faith but, rather, with the real purpose of delaying plaintiff's enforcement of his rights (*159 Cal. 778, 781-782)* .

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4-48 California Points & Authorities § 48.33

§ 48.33 Heavy Burden on Party Opposing Continuance Allows Denial of Continuance

[1] FORM Heavy Burden on Party Opposing Continuance Allows Denial of Continuance

[*This form should be combined with a general memorandum opposing a noticed motion or ex parte application for a continuance (see § 48.30) or included in an appellate brief.*]

THE COURT HAS DISCRETION TO DENY THE CONTINUANCE BECAUSE GRANTING THE CONTINUANCE WOULD IMPOSE A HEAVY BURDEN ON THE OPPOSING PARTY.

A. Granting Continuance Would Burden Opposing Party. A party may be denied a continuance if granting the continuance would place a heavy burden on the party opposing the motion (*Joint Holdings & Trading Co., Ltd, v. First Union Nat'l Bank of N.C. (1975) 50 Cal. App. 3d 159, 167, 123 Cal. Rptr. 519*).

[2] Comments

[a] Use of Form

This form of points and authorities may be used to augment a memorandum submitted in opposition to noticed motion or ex parte application for a continuance [*see Cal. Rules of Ct., Rule 3.1332(b)*] when granting the continuance, in addition to other reasons why the continuance should not be granted, would unduly burden the party resisting the continuance. It should be combined with all of the forms set forth in *§§ 48.30 -48.39* that are applicable to the particular case.

The forms in *§§ 48.30 -48.31* address procedural requirements that are applicable in every case and should be used to whenever the showing in support of the motion is deficient in that regard. Similarly, §§ 48.34-48.39 address particular circumstances that have been held *not* to constitute good cause, and therefore need only be used when they establish that the circumstances on which the particular request for continuance is based do not constitute good cause for continuance. The form in *§ 48.32* may be used to augment a memorandum opposing a continuance if the request for continuance is not made in good faith.

[b] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, in addition to argument addressing the primary grounds for denial of the continuance, counsel's argument should focus on the critical points establishing the burden that granting the continuance would impose on the opposing party.

It is also advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, or by affidavits or declarations. Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish or negate the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Granting Continuance Would Burden Opposing Party

Joint Holdings & Trading Co., Ltd. v. First Union Nat'l Bank of N.C. *(1975) 50 Cal. App. 3d 159, 123 Cal. Rptr. 519* , was a controversy between competing creditors. Plaintiff had sued the owner of an inventory of trousers and obtained writs of attachment which the sheriff levied. Third party claimant, a bank, which had already perfected a security interest in the trousers in North Carolina filed a third party claim pursuant to Code Civ. Proc. §§ 689 and 689b, asserting a paramount security interest. At the hearing on the validity of the bank's asserted interest, the bank's attorneys stated their belief that the cause would be heard on affidavits rather than on in-court testimony and requested either permission to present the case on affidavits or a 60-day continuance to allow out-of-state witness to appear. The trial court denied the request and subsequently concluded that the bank's interest was subordinate to plaintiff's interest. The bank appealed on several grounds.

The court of appeal affirmed. In regard to the trial court's denial of the bank's request for a continuance, the court said that even if the bank's erroneous belief was reasonable, the trial court could validly refuse a continuance because plaintiff's witnesses had come from Hong Kong and American Samoa; and a 60-day continuance would have imposed a heavy burden on plaintiff (*50 Cal. App. 3d 159, 167)* .

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4-48 California Points & Authorities § 48.34

§ 48.34 Written Stipulation Does Not Entitle Parties to Continuance

[1] FORM Written Stipulation Does Not Entitle Parties to Continuance

[*This form should be combined with a general memorandum opposing a noticed motion or ex parte application for a continuance (see § 48.30) or included in an appellate brief.*]

THE COURT HAS DISCRETION TO DENY A CONTINUANCE ALL PARTIES HAVE STIPULATED TO IN WRITING [WHEN THE REQUEST FOR CONTINUANCE COMES TOO LATE].

A. Written Stipulation Does Not Entitle Parties to Continuance. *Section 595.2 of the Code of Civil Procedure*, despite its mandatory language, is directory and does not confer on the parties an entitlement to a continuance within the thirty-day period specified by the statute. The trial court has discretion to deny a stipulated continuance in accordance with its power to control its order of business (*Lorraine v. McComb (1934) 220 Cal. 753, 755-757, 32 P.2d 960* ; *Pham v. Thi Nguyen (1997) 54 Cal. App. 4th 11, 15-17, 62 Cal. Rptr. 2d 422* .

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to a noticed motion or ex parte application for a continuance [*see Cal. Rules of Ct., Rule 3.1332(b)*] that has been stipulated to in writing by all parties [*see Code Civ. Proc. § 595.2*, set forth in the form in *§ 48.11[1]*], or, more likely, in a reply brief on an appeal after a stipulated continuance has been denied. It should be combined with all of the forms set forth in *§§ 48.30 -48.39* that are applicable to the particular case. The forms in *§§ 48.30* and *48.31* address procedural requirements that are applicable in every case and should be used to whenever the showing in support of the motion is deficient in that regard. The forms in *§§ 48.35 -48.39* address particular circumstances that have been held *not* to constitute good cause, and therefore need only be used when they establish that the circumstances on which the particular request for continuance is based do not constitute good cause for continuance. The forms in *§§ 48.32* and *48.33* may be used to augment a memorandum opposing a continuance if the request for continuance is not made in good faith or would place undue burden on the

party opposing the continuance.

In an appropriate case, these points and authorities may be used to oppose the points and authorities set out in *§ 48.11*.

[b] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, if the continuance is sought because of the unavailability of an expert witness, counsel's argument should focus on the critical points made in both the supporting and opposing declarations regarding the reason for the expert's unavailability and whether that reason amounts to good cause [*see also* the form in *§ 48.13[3][a]*], when counsel for the moving party first learned of the unavailability, the lack or insufficiency of any attempts to arrange alternatives, the reasons, if any, why those alternatives are preferable to a continuance, and the lack of diligence with which counsel for the moving party informed opposing counsel of the need for continuance and filed the motion for continuance.

It is also advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, or by affidavits or declarations. Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish or negate the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Written Stipulation Does Not Entitle Parties to Continuance

Lorraine v. McComb *(1934) 220 Cal. 753, 32 P.2d 960* , was one of the first cases to interpret the statute that later became *Code Civ. Proc. § 595.2*. Trial was set for October 9, 1933. On that date, lawyers for all parties submitted a written agreement seeking postponement until October 24, 1933 or any other date within the 30-day period. The trial calendar judge refused to allow the postponement, and because the attorneys did not proceed with the trial, order the matter off calendar. The parties sought by writ to compel the court to reinstate the case to its former status on the calendar.

The Supreme Court denied the writ, although remarking that it should ordinarily be possible to accommodate parties who have mutually agreed to postponement. However, the Court noted that accommodation is not always practical, and when accommodation becomes impracticable, the judicial control reposed in the court by the Constitution must prevail (*220 Cal. 753, 755)* . The Court stated that the provisions of the statute were directory and that the parties were not entitled to a continuance. The court alluded to the separation of powers, in particular, the right of the judiciary to control its order of business (*220 Cal. 753, 755-757)* .

Pham v. Thi Nguyen *(1997) 54 Cal. App. 4th 11, 62 Cal. Rptr. 2d 422* , was a dental malpractice case that first went to judicial arbitration. The arbitration award was for defendant dentist, and plaintiff sought trial de novo. Four days

before trial the parties, submitted a written stipulation requesting continuance, claiming that they had not had time to depose their expert witnesses. The trial judge summarily denied the request. On the day of trial, defendant requested a continuance, arguing that she had just learned her expert was unavailable. That request was also denied. The matter was tried and resulted in a judgment for plaintiff. Defendant appealed, contending denial of both continuances was an abuse of discretion.

The court of appeal affirmed. The court of appeal reviewed *Lorraine v. McComb (1934) 220 Cal. 753, 32 P.2d 960* , and agreed that *Code Civ. Proc. § 595.2*, is directory only and does not entitle the parties to a continuance (*54 Cal. App. 4th 11, 15)* . It described *Code Civ. Proc. § 595.2* as setting forth legislative policy in favor of professional courtesy when counsel needs a continuance (*54 Cal. App. 4th 11, 16-17)* . The court stated it was a fairly close question whether the trial court had abused its discretion, but concluded that it had not: the parties did not invoke *Code Civ. Proc. § 595.2*; the stipulation stated that the parties were agreeing "*with the Honorable Court's permission*, to continue the trial for a short period to either of two indicated dates;" and the reason for the continuance, to depose witnesses, was contrary to the policy expressed in Code Civ. Proc. § 2024(f) [*Code Civ. Proc. § 2024.060* operative July 1, 2005], regarding the need for timely depositions of witnesses. The trial court did not act beyond the bounds of reason in denying the request when it was made at such a relatively late date (*54 Cal. App. 4th 11, 18)* .

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4-48 California Points & Authorities § 48.35

§ 48.35 Party's Absence Does Not Warrant Continuance

[1] Absent Party Had Notice of Trial

[a] FORM Party's Absence Does Not Warrant Continuance

[*This form should be combined with a general memorandum of points and authorities opposing a noticed motion or ex parte application for a continuance (see § 48.30) or included in an appellate brief.*]

THE COURT SHOULD PROCEED WITH THE _____ [TRIAL *or* HEARING] TO ALLOW _____ [*party present, e.g.,* DEFENDANT AND CROSS-COMPLAINANT] TO ESTABLISH HIS/HER/ITS RIGHT TO A _____ [DISMISSAL *or* VERDICT *or* JUDGMENT] BECAUSE _____ [*name of absent party*] HAD PROPER NOTICE OF TRIAL.

A. Trial May Proceed Without Party Who Has Been Given Notice. Unless the court for good cause otherwise directs, either party may bring an issue to trial or hearing and proceed with the case in the absence of the adverse party; provided, however, that if the issue to be tried is an issue of fact, proof shall first be made to the satisfaction of the court that the adverse party has had 15 days' notice of trial, [or five days' notice of trial in an unlawful detainer proceeding], as specified in subdivision (b). [If the adverse party has served notice of trial on the party seeking the dismissal, verdict, or judgment at least five days prior to the trial, the adverse party shall be deemed to have notice of trial] (*Code Civ. Proc. § 594(a)*; *see Berris & Seaton v. Meyers (1984) 163 Cal. App. 3d Supp 54, 59-60, 210 Cal. Rptr. 444*).

B. Method of Proving Notice. If notice of trial is served by a party, proof may be made by introduction into evidence of an affidavit or certificate pursuant to subdivision (1) or (2) of *Section 1013a of the Code of Civil Procedure* or other competent evidence. The fact that the trial court's file may have contained the notice and proof of its service at the time of trial is insufficient if those documents were not introduced into evidence (*Code Civ. Proc. § 594(b)*; *Irvine National Bank v. Han (1982) 130 Cal. App. 3d 693, 697-698, 186 Cal. Rptr. 864*).

[b] Comments

[i] Use of Form

This form of points and authorities may be submitted in opposition to noticed motion or ex parte application for a continuance [see *Cal. Rules of Ct., Rule 3.1332(b)*], when the absent party has been given notice of trial as required by *Code Civ. Proc. § 594*. Although *Code Civ. Proc. § 594* goes to jurisdiction [*see Irvine National Bank v. Han (1982) 130 Cal. App. 3d 693, 697-698, 186 Cal. Rptr. 864]* and mentions nothing about continuances, it is included here because it may be useful to combine with other authorities opposing continuance. The points and authorities in this form should be combined with those in all of the forms set forth in *§§ 48.30 -48.39* that are applicable to the particular case. The forms in *§§ 48.30* and *48.31* address procedural requirements that are applicable in every case and should be used to whenever the showing in support of the motion is deficient in that regard. The forms in *§§ 48.35 -48.39* address particular circumstances that have been held *not* to constitute good cause, and therefore need only be used when they establish that the circumstances on which the particular request for continuance is based do not constitute good cause for continuance. §§ 48.32 and 48.33 may be used to augment a memorandum opposing a continuance if the request for continuance is not made in good faith or would place undue burden on the party opposing the continuance.

In an appropriate case, these points and authorities may be used to oppose the points and authorities set out in *§ 48.12[1]* and *[2]*.

[ii] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, if counsel wishes to oppose a continuance and proceed with the trial of an absent party, counsel's argument should focus on the fact that the absent party received notice of trial. Counsel should request the court to take judicial notice [*see Evid. Code § 450 et seq.*] of any notice of trial and proof of its service on the absent party that may be in the court's file and should actually introduce the notice of trial and certificate of proof of its service into evidence. Although it is usually advisable for counsel to submit affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) to support or oppose a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5], in this instance, the introduction into evidence of the original certificate of service of the notice of trial is the only evidence that will suffice [*Code Civ. Proc. § 594(b)*].

[iii] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[c] Discussion of Authorities

[i] Trial May Proceed Without Party Who Has Been Given Notice

Berris & Seaton v. Meyers *(1984) 163 Cal. App. 3d Supp. 54, 210 Cal. Rptr. 444* , was an action by a law firm against two individuals for fees. The defendants cross-complained. After the case was filed, the attorney members of plaintiff terminated their association and agreed that one would collect the fees. One defendant paid the fees, but a dispute arose over the termination agreement and that attorney did not forward the fees to the other attorney. When the case was first set for trial, plaintiff's attorney had stipulated in open court to the continuance to the new trial date. Plaintiffs served defendants, cross-complainants, and another cross-defendant with a notice of the new trial date. Defendants and cross-complainants did not serve plaintiff with notice of trial, but had served a notice of continuance of trial date. Plaintiff did not appear at trial. The complaint was dismissed and the cross-complaint tried, resulting in a judgment for one of the defendants, which plaintiff sought to vacate. The motion to vacate was denied, and plaintiff appealed.

The appellate department of the superior court affirmed the denial of the motion to vacate the judgment. The appellate

department held that plaintiff was an adverse party under *Code Civ. Proc. § 594(a)*, who, having served notice of trial on the other parties, was deemed to have notice of the trial (*163 Cal. App. 3d Supp 54, 59-60*). The appellate department noted that prior to 1969 a party who wished to proceed with trial had to have given notice and could not rely on an opponent's notice, if the opponent who had given notice thereafter failed to appear at trial (*163 Cal. App. 3d Supp. 54, 60*).

[ii] Method of Proving Notice

Code Civ. Proc. § 594(b) provides in part, that if notice of trial is served by a party, proof may be made by introduction into evidence of an affidavit or certificate pursuant to *Code Civ. Proc. § 1013a(1)* or *(2)* or other competent evidence. If notice of trial is served by the clerk of the court, proof may be made by introduction into evidence of the clerk's certificate pursuant to *Code Civ. Proc. § 1013a(3)* or other competent evidence. These provisions are exclusive [*Code Civ. Proc. § 594(b)*].

Irvine National Bank v. Han *(1982) 130 Cal. App. 3d 693, 186 Cal. Rptr. 864* , was an action on two promissory notes. The trial was held on the scheduled date, but defendant did not appear. The court's file contained notice of the trial signed by plaintiff's attorney, with an attached proof of service on defendant stating that it was mailed more than 30 days prior to the trial date. Defendant did not appear, and the trial proceeded although the court was never asked to take judicial notice of the file containing the notice of trial. Judgment was for plaintiff. Defendant appealed, contending he had never received notice of trial.

The court of appeal reversed, stating that whether defendant did or did not receive notice of trial was not relevant because it is essential to the jurisdiction of the trial court in proceeding in the absence of defendant that proof first be made that defendant has been given statutory notice. The court noted that before 1975, *Code Civ. Proc. § 594* did not provide what kind of proof was required to show that notice had been given. In this case there was absolutely no competent evidence "introduced into evidence" to show that defendant had been served with notice of trial. Although the notice of trial and the attached proof of service were apparently in the superior court's file at the time of the trial those documents were not introduced into evidence as required by *Code Civ. Proc. § 594(b)*, which also provides that its provisions are exclusive. There was no testimony that the required notice was given, nor is there any suggestion in the judgment that the court even considered the matter. In the absence of actual evidence in the record made before the trial court that notice was given, the court was without jurisdiction to proceed in defendant's absence (*130 Cal. App. 3d 693, 697-698)* .

[2] Illness That Does Not Justify Continuance

[a] FORM Party's Absence Does Not Warrant Continuance

[*This form should be combined with a general memorandum of points and authorities opposing a noticed motion or ex parte application for a continuance (see § 48.30) or included in an appellate brief.*]

A COURT DOES NOT ABUSE ITS DISCRETION BY DENYING A MOTION FOR A CONTINUANCE ON THE GROUND THAT THE PARTY IS ABSENT DUE TO ILLNESS WHEN _____ [THE PARTY'S ILLNESS PREDATES THE TRIAL SETTING CONFERENCE *and/or* THE PARTY'S HEALTH WOULD NOT BE JEOPARDIZED BY ATTENDING THE TRIAL].

A. Illness Predates Trial Setting Conference. Unless an illness is a result of an emergency occurring after the trial setting conference, a continuance that is not requested by noticed motion and supported by the appropriate declaration of a medical doctor should be denied [*In re Marriage of Teegarden (1986) 186 Cal. App. 3d 401, 406-407, 226 Cal. Rptr. 417]* .

B. Illness Does Not Jeopardize Health. When a party's absence is due to illness but the party's health would not be jeopardized by attendance at trial, the continuance may be denied (*Agnew v. Parks (1963) 219 Cal. App. 2d 696, 702, 33 Cal. Rptr. 465* ; *Kalmus v. Kalmus (1951) 103 Cal. App. 2d 405, 414, 230 P.2d 57*).

[b] Comments

[i] Use of Form

This form of points and authorities may be submitted in opposition to a noticed motion or ex parte application for a continuance [*see Cal. Rules of Ct., Rule 3.1332(b)*], when a party seeking a continuance on the ground of his or her illness has failed to show good cause for the continuance. While the court of appeal in *Agnew v. Parks (1963) 219 Cal. App. 2d 696, 702, 33 Cal. Rptr. 465* , stated that a continuance could be denied if the party's health would not be jeopardized by attendance at trial, *Kalmus v. Kalmus (1951) 103 Cal. App. 2d 405, 414, 230 P.2d 57* , established a less rigorous test by stating that if the party was physically able to participate in the trial, there was no abuse of discretion in denying a continuance [*see* discussion in [c][ii], *below*].

This form should be combined with all of the forms set forth in *§§ 48.30 -48.39* that are applicable to the particular case. The forms in *§§ 48.30* and *48.31* address procedural requirements that are applicable in every case and should be used to whenever the showing in support of the motion is deficient in that regard. The forms in *§§ 48.34 -48.39* address particular circumstances that have been held *not* to constitute good cause, and therefore need only be used when they establish that the circumstances on which the particular request for continuance is based do not constitute good cause for continuance. The forms in *§§ 48.32* and *48.33* may be used to augment a memorandum opposing a continuance if the request for continuance is not made in good faith or would place undue burden on the party opposing the continuance.

In an appropriate case, these points and authorities may be used to oppose the points and authorities set out in *§ 48.12[1]*.

[ii] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, if the continuance is sought because of a party's illness, counsel's argument should focus on the critical points made in both the supporting and opposing declarations regarding the proof of the illness, or lack thereof, whether the party's presence is required at trial or alternatives to the party's presence, when counsel for the moving party first learned of the party's illness, the lack or insufficiency of any attempts to arrange alternatives, the reasons, if any, why those alternatives are preferable to a continuance, and the lack of diligence with which counsel for the moving party informed opposing counsel of the need for continuance and filed the motion for continuance.

It is also advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, or by affidavits or declarations. Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish or negate the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[iii] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of

this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[c] Discussion of Authorities

[i] Illness Predates Trial Setting Conference

The husband in ***In re Marriage of Teegarden*** *(1986) 186 Cal. App. 3d 401, 226 Cal. Rptr. 417* , became ill with lupus in 1977. Until then, both parties were gainfully employed. They separated in June, 1979, and when the wife filed the petition for dissolution in 1980, husband, who was receiving disability benefits, asked for and received temporary spousal support of $250 per month. The trial was set for Monday, November 9, 1981. The Friday before that Monday, husband notified his attorney that he was ill and might not be able to attend the trial. Husband's attorney asked opposing counsel to agree to a continuance, but the request was denied. In the master calendar department on the morning of trial husband's attorney asked for a continuance, presenting the court with a letter from husband's physician saying that husband was ill. The motion was heard in chambers; the letter was not made part of the record; and there was no transcript of the hearing. In chambers, wife's counsel agreed to stipulate that husband was entitled to and was receiving social security disability payments and that husband's financial declaration could be admitted into evidence. The motion was denied, as was a second motion made by husband's attorney in the trial department at the start of the trial. The court proceeded to trial and found that husband had not met his burden of proving his need for support. An interlocutory decree to that effect was entered. Husband moved for a new trial and supported that motion with a declaration from his physician stating that his condition had worsened between November 6 and November 8 and that husband was not able to appear in court at that time. The motion for new trial was also denied. Husband appealed the portion of the decree denying him spousal support, contending that the trial court abused its discretion in failing to grant him a continuance.

The court of appeal affirmed. The court reviewed the standards for continuance in former section 9 of the California Standards of Judicial Administration, and noted the lack of any record in support of the oral motion and the lack of any explanation for counsel's lack of diligence in preparing for an emergency which could reasonably have been anticipated for the husband's type of illness. The record on the motion for new trial, which did contain the husband's physician's affidavit, was no substitute (*186 Cal. App. 3d 401, 406*). On appeal, the husband was required to affirmatively show error by an adequate record. In the absence of a record, the court of appeal would not disturb the trial court's implied finding that husband failed to affirmatively show good cause for the continuance (*186 Cal. App. 3d 401, 407*).

[ii] Illness Does Not Jeopardize Health

Agnew v. Parks *(1963) 219 Cal. App. 2d 696, 33 Cal. Rptr. 465* , was a suit for damages based on conspiracy resulting from defendant's malpractice action. On March 12, 1961, after several continuances, the trial was set for June 18, 1961. Although plaintiff's attorney informed her two days later that he would no longer represent her, plaintiff did not employ new counsel and repeatedly demanded that her attorney continue. On June 18, plaintiff was substituted in propria persona. On June 20, she requested a 30-day continuance because she was physically and mentally unable to try the case herself at that time. The court gave plaintiff one day to submit medical reports and, after reviewing the reports, denied plaintiff's motion for the reason that plaintiff's health would not be jeopardized by proceeding to trial and that another delay would create serious schedule problems for opposing counsel. When plaintiff refused to proceed, the court dismissed the action. Plaintiff appealed.

The court of appeal affirmed. The issue of health was essentially one for the trial court's determination based on evaluation and interpretation of the medical reports. This determination, together with the other facts of the case, showed that the trial court was amply justified in denying a further continuance (*219 Cal. App. 2d 696, 702)* .

In ***Kalmus v. Kalmus*** *(1951) 103 Cal. App. 2d 405, 230 P.2d 57* , plaintiff filed three different actions against defendant, her former husband, related to financial matters of mutual interest. In one of these actions, set for trial on

June 1, plaintiff requested a continuance on May 24. She submitted affidavits supporting a claim of disabling illness which prevented her from traveling from Massachusetts to California and participating in the trial. At the hearing on plaintiff's motion, defendant sharply disputed the claim of disabling illness by submitting several affidavits in which witnesses described plaintiff's travels and other vigorous activities during the month of May as well as a physician's affidavit controverting the conclusion of her physician. The trial court denied the motion and, in the trial which followed, granted the defendant the relief prayed for in his cross complaint. Plaintiff appealed.

The court of appeal affirmed. In rejecting plaintiff's argument that the trial court erred in failing to grant her a continuance, the court of appeal stated that a trial court may take into consideration the legal sufficiency of the showing in support of the motion and the good faith of the moving party. Reviewing the facts of the case, it is clear that the trial court's conclusion that plaintiff was physically able to come to California and participate in the trial was not an abuse of discretion (*103 Cal. App. 2d 405, 414)* .

[3] Failure to Show Party's Presence Is Required at Trial

[a] FORM Party's Absence Does Not Warrant Continuance

[*This form should be combined with a general memorandum of points and authorities opposing a noticed motion or ex parte application for a continuance (see § 48.30) or included in an appellate brief*].

A COURT DOES NOT ABUSE ITS DISCRETION BY DENYING AN ABSENT PARTY'S MOTION FOR A CONTINUANCE IF THE PARTY FAILS TO ESTABLISH THAT HIS/HER/ITS PRESENCE AT TRIAL IS REQUIRED.

A. Failure to Show Party's Presence Is Required at Trial. When a party requests a continuance on the ground of his or her absence but fails to establish that his or her presence at trial is required, the continuance may be denied (*Nahas v. Nahhas (1955) 135 Cal. App. 2d 440, 441-442, 287 P.2d 381*).

[*Optional*] **B. Counsel Is Familiar With Facts and Testimony.** When an absent party requests a continuance claiming that he or she is needed to assist counsel at trial, but counsel is already familiar with the facts and testimony or could have been had the party shown diligence, a continuance may be denied (*Ferrari v. Mambretti (1945) 70 Cal. App. 2d 492, 494-496, 161 P.2d 275* ; *Foster v. Hudson (1939) 33 Cal. App. 2d 705, 707-709, 92 P.2d 959*).

[*Optional*] **E. Out-of-Trial Consultation Is Adequate.** When an absent party requests a continuance claiming that he or she is needed to assist counsel at trial, but sufficient assistance could be provided by periodic out-of-trial consultation, a continuance may be denied (*Ferrari v. Mambretti (1945) 70 Cal. App. 2d 492, 496, 161 P.2d 275*).

[b] Comments

[i] Use of Form

This form of points and authorities may be submitted in opposition to a noticed motion or ex parte application for a continuance [*see Cal. Rules of Ct., Rule 3.1332(b)*], when a party seeking a continuance on the ground of his or her absence has failed to show the need for his or her presence at the trial. This form should be combined with all of the forms set forth in *§§ 48.30 -48.39* that are applicable to the particular case. The forms in *§§ 48.30* and *48.31* address procedural requirements that are applicable in every case and should be used to whenever the showing in support of the motion is deficient in that regard. The forms in *§§ 48.34 -48.39* address particular circumstances that have been held *not* to constitute good cause, and therefore need only be used when they establish that the circumstances on which the particular request for continuance is based do not constitute good cause for continuance. The forms in *§§ 48.32* and *48.33* may be used to augment a memorandum opposing a continuance if the request for continuance is not made in good faith or would place undue burden on the party opposing the continuance.

In an appropriate case, these points and authorities may be used to oppose the points and authorities set out in *§ 48.12[1]* and *[2]*.

[ii] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, if the continuance is sought because of a party's absence, counsel's argument should focus on the critical points made in both the supporting and opposing declarations regarding the reason for the absence, or lack thereof, whether the party's presence is required at trial or alternatives to the party's presence, when counsel for the moving party first learned that the party would be absent, the lack or insufficiency of any attempts to arrange alternatives, the reasons, if any, why those alternatives are preferable to a continuance, and the lack of diligence with which counsel for the moving party informed opposing counsel of the need for continuance and filed the motion for continuance.

It is also advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, or by affidavits or declarations. Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish or negate the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[iii] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[c] Discussion of Authorities

[i] Failure to Show Party's Presence Is Required at Trial

In ***Nahas v. Nahhas*** *(1955) 135 Cal. App. 2d 440, 287 P.2d 381* , the case had been at issue for two years and continued, mostly at defendants' request, several times, when defendants' attorney orally moved on the day of trial for a continuance and substitution of counsel. The motion was denied and the case proceeded to trial in the absence of defendants. Following judgment for plaintiffs, defendants moved to vacate the judgment under *Code Civ. Proc. § 473* stating, by affidavit, that on the day of trial both defendants were ill and unable to travel from their homes to the place of trial. This motion was denied. Defendants appealed, arguing that by showing illness and inability to travel, they were entitled to a continuance.

The court of appeal affirmed the judgment of the trial court, holding that defendants had not been entitled to a continuance because the precedents defendants had relied on to support their argument all involved affidavits setting forth the reason for the absence with particularity. The court further stated that, as established in *Hurley v. Kazantzis (1947) 82 Cal. App. 2d 378, 379, 186 P.2d 434* , good cause for a continuance is not shown when the party does not cite facts to support the conclusion that the matter cannot be tried without the party's attendance (*135 Cal. App. 2d 440, 441-442)* .

[ii] Counsel Is Familiar With Facts and Testimony

The factual background of ***Ferrari v. Mambretti*** *(1945) 70 Cal. App. 2d 492, 161 P.2d 275* , is discussed in *§ 48.12[2][c][i]*. The trial court denied plaintiff's motion for a continuance on the ground of economic necessity, and the court of appeal affirmed because, among other things, plaintiff failed to show that his continuous presence at trial was necessary. The court pointed out that plaintiff could not testify on his own behalf and that because the case had been tried before, his counsel was already familiar with the witnesses and the testimony (*70 Cal. App. 2d 492, 494-496)* .

In ***Foster v. Hudson*** *(1939) 33 Cal. App. 2d 705, 92 P.2d 959* , plaintiffs filed on January 7 several actions for damages from personal injuries arising out of an automobile accident. Defendant did not file an answer until April 29 after he had demurred and received four extensions of time. On May 1, one day before the cases were set for trial on July 5, defendant left the state. On June 18 and at the trial, his attorney requested a continuance until after August 5 because defendant was in Missouri recovering from an operation. The trial court denied both motions and defendant appealed from a jury verdict in favor of plaintiffs, contending, in part, that the court erred in denying the continuance and refusing to admit evidence to show the reason for defendant's absence.

The court of appeal affirmed. During the five months which elapsed between filing the action and defendant's leaving the state, he had ample time to fully prepare his defense. Instead, he had never consulted with his attorney who was not familiar with the details of the defense. The cause of absence was irrelevant and the motions for continuance were properly denied (*33 Cal. App. 2d 705, 707-709)* .

[iii] Out-of-Trial Consultation as Adequate

The factual background of ***Ferrari v. Mambretti*** *(1945) 70 Cal. App. 2d 492, 161 P.2d 275* , is discussed in *§ 48.12[2][c][i]*. The trial court denied plaintiff's motion for a continuance, and the court of appeal affirmed because, among other things, plaintiff failed to show that his continuous presence at the trial was necessary. The court also pointed out that plaintiff would still be physically able to consult with and advise his attorney even if he was not present at the trial (*70 Cal. App. 2d 492, 496)* .

[4] Alternatives Exist to Party's Testifying at Trial

[a] FORM Party's Absence Does Not Warrant Continuance

[*This form should be combined with a general memorandum opposing a noticed motion or ex parte application for a continuance (see § 48.30) or included in an appellate brief.*]

A COURT DOES NOT ABUSE ITS DISCRETION BY DENYING AN ABSENT PARTY'S MOTION FOR A CONTINUANCE IF THE PARTY HAS GIVEN A DEPOSITION OR THE COURT IS WILLING TO TAKE ON-SITE TESTIMONY.

A. Deposition Is Adequate. A continuance may be denied an absent party who has requested the continuance in order to testify at trial if he or she has already given a deposition (*Young v. Redman (1976) 55 Cal. App. 3d 827, 832, 128 Cal. Rptr. 86*).

[*Optional*] **B. On-Site Taking of Testimony as Alternative.** A continuance may be denied an absent party who has requested the continuance in order to testify at trial if it is possible to adjourn the trial to where the party is for on-site taking of testimony (*Russell v. Roberts (1974) 39 Cal. App. 3d 390, 397, 114 Cal. Rptr. 305*).

[b] Comments

[i] Use of Form

This form of points and authorities may be submitted in opposition to a noticed motion or ex parte application for a continuance [*see Cal. Rules of Ct., Rule 3.1332(b)*], when a party seeking a continuance on the ground of his or her absence claims it is necessary for him or her to testify but has not addressed alternatives that are available.

This form should be combined with all of the forms set forth in *§§ 48.30 -48.39* that are applicable to the particular case. The forms in *§§ 48.30* and *48.31* address procedural requirements that are applicable in every case and should be used to whenever the showing in support of the motion is deficient in that regard. The forms in *§§ 48.34 -48.39* address particular circumstances that have been held *not* to constitute good cause, and therefore need only be used when they establish that the circumstances on which the particular request for continuance is based do not constitute good cause for continuance. The forms in *§§ 48.32* and *48.33* may be used to augment a memorandum opposing a continuance if the request for continuance is not made in good faith or would place undue burden on the party opposing the continuance.

In an appropriate case, these points and authorities may be used to oppose the points and authorities set out in *§ 48.12[1]* and *[2]*.

[ii] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, if the continuance is sought because of a party's absence, counsel's argument should focus on the critical points made in both the supporting and opposing declarations regarding the reason for the absence, or lack thereof, that the party's presence at trial is not required, the alternatives to the party's presence, when counsel for the moving party first learned that the party would be absent, the reasons, if any, why those alternatives are preferable to a continuance, and the lack of diligence with which counsel for the moving party informed opposing counsel of the need for continuance and filed the motion for continuance.

It is also advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, or by affidavits or declarations. Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish or negate the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[iii] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[c] Discussion of Authorities

[i] Deposition Is Adequate

The factual background of ***Young v. Redman*** *(1976) 55 Cal. App. 3d 827, 128 Cal. Rptr. 86* , is discussed in *§ 48.31[1][c][i]*. The court of appeal affirmed the trial court's action in denying a continuance to an absent party because the party simply failed to adjust personal plans in order to attend the trial. The court pointed out that even if defendant's absence had been avoidable, the trial court's action was justified because defendant's testimony was adequately preserved in a deposition which was entered into evidence by stipulation of the parties (*55 Cal. App. 3d 827, 832)* .

[ii] On-Site Taking of Testimony Is Alternative

In ***Russell v. Roberts*** *(1974) 39 Cal. App. 3d 390, 397, 114 Cal. Rptr. 305* , plaintiff sued defendants to collect money owed on a promissory note. The court entered judgment for plaintiff, and defendants appealed. One of their contentions on appeal was that the trial court erred in refusing their request for a continuance to procure the testimony of one of the defendants who was hospitalized.

In affirming, the court of appeal held that a continuance was unnecessary because the absent defendant had already given one deposition (and plaintiff offered to stipulate to its use) and the trial court was willing to adjourn court to the hospital to take defendant's testimony (*39 Cal. App. 3d 390, 397)* .

[5] Party's Military Service Does Not Materially Affect Prosecution or Defense

[a] FORM Party's Absence Does Not Warrant Continuance

[*This form should be combined with a general memorandum of points and authorities opposing a noticed motion or ex parte application for a continuance (see § 48.30) or included in an appellate brief.*]

A COURT DOES NOT ABUSE ITS DISCRETION BY DENYING A MOTION FOR A STAY OF PROCEEDINGS UNDER SECTION 403 OF THE MILITARY AND VETERANS CODE BECAUSE NEITHER THE MOVING PARTY NOR THE FACTS OF THE CASE SHOW THAT THE ABILITY OF THE PARTY TO _____ [PROSECUTE *or* DEFEND] IS MATERIALLY AFFECTED.

A. When Party in Military Service Is Not Entitled to Continuance. A request for a stay of proceedings under *Section 403 of Military and Veterans Code* should be denied if neither the moving party nor the facts of the case show that the ability of the absent party to _____ [prosecute *or* defend] is materially affected by reason of the party's military service (*see Miller v. Miller (1945) 26 Cal. 2d 119, 124-125, 156 P.2d 931* ; *Christine M. v. Superior Court (1999) 69 Cal. App. 4th 1233, 1243-1245, 82 Cal. Rptr. 2d 220* ; *Ridley v. Young (1944) 64 Cal. App. 2d 503, 514-515, 149 P.2d 76*). The mere fact that the party requesting the continuance is in military service, without more, is insufficient to warrant a stay of proceedings (*Christine M. v. Superior Court (1999) 69 Cal. App. 4th 1233, 1243-1245, 82 Cal. Rptr. 2d 220*). While the initial 90-day stay is essentially automatic, the granting of an *additional* stay is discretionary; and a request for an additional stay may be denied if the servicemember's ability to appear and participate in the civil action is not adversely affected by his or her military duties (*see George P. v. Superior Court (2005) 127 Cal. App. 4th 216, 225-226, 24 Cal. Rptr. 3d 919*).

[*Optional*] **B. Failure to Show That Attendance Impossible.** A request for a stay of proceedings under *Section 403 of the Military and Veterans Code* may be denied if the moving party fails to show that the party's attendance is impossible (*see Ridley v. Young (1944) 64 Cal. App. 2d 503, 514, 149 P.2d 76*).

[*Optional*] **C. Party Is Judgment Proof.** A request for a stay of proceedings under *Section 403 of the Military and Veterans Code* may be denied if the party is _____ [as a practical matter judgment proof *or* a nominal participant in the case] (*see Culver v. Superior Court (1954) 125 Cal. App. 2d 76, 78, 270 P.2d 78*).

[*Optional*] **D. Real Effect Is Benefit to Nonmilitary Coparty.** A request for a stay of proceedings under *Section 403 of the Military and Veterans Code* may be denied if the real effect of the stay is to benefit a nonmilitary coparty (*see Culver v. Superior Court (1954) 125 Cal. App. 2d 76, 78, 270 P.2d 78*).

[b] Comments

[i] Use of Form

This form of points and authorities may be submitted in opposition to a noticed motion or ex parte application for a continuance [*see Cal. Rules of Ct., Rule 3.1332(b)*], when a party seeking a continuance on the ground of his or her military service fails to establish that his or her military service actually affects his or her ability to prosecute or defend the action [*see 50 U.S.C. App. § 521*; *Mil. & Vet. Code § 403*].

The enactment of state statutes in 2002 protecting service members that are officers and enlisted members of the National Guard called or ordered into active state service by the Governor or President, and Reservists of the United States Military Reserve who have been called to full-time active duty [*see Mil. & Vet. Code § 400 et seq.*] originally paralleled the federal statutes of the Soldiers' and Sailors' Civil Relief Act. The Soldiers' and Sailors' Civil Relief Act has since been dramatically revised in 2003 and renamed the Servicemembers Civil Relief Act. State law, however, had not yet made such revisions. Accordingly, case law interpreting the former Soldiers' and Sailors' Relief Act may be used to make similar interpretations and assertions regarding the state statutes.

This form should be combined with all of the forms set forth in *§§ 48.30 -48.39* that are applicable to the particular case. The forms in *§§ 48.30* and *48.31* address procedural requirements that are applicable in every case and should be used to whenever the showing in support of the motion is deficient in that regard. The forms in *§§ 48.34 -48.39* address particular circumstances that have been held *not* to constitute good cause, and therefore need only be used when they establish that the circumstances on which the particular request for continuance is based do not constitute good cause for continuance. The forms in *§§ 48.32* and *48.33* may be used to augment a memorandum opposing a continuance if the request for continuance is not made in good faith or would place undue burden on the party opposing the continuance.

In 2003, the federal Servicemembers Civil Relief Act (formerly the Soldiers' and Sailors' Civil Relief Act) was significantly changed to make the granting of stays brought under this Act essentially automatic. The revisions to the federal law eliminated the requirement that servicemembers must show that their ability to defend the action is "materially affected" by military service in order to obtain a stay of proceedings. However, California law retains this requirement. The above referenced cases interpret the federal law prior to the 2003 revisions and may be useful in supporting a motion for a continuance brought under the California Military and Veterans Code which requires the servicemember to make a prima facie showing that his or her ability to prosecute or defend is materially affected by reason of military service [*Mil. & Vet. Code § 400 et seq.*].

In an appropriate case, these points and authorities may be used to oppose the points and authorities set out in *§ 48.12[4]*.

[ii] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, if the continuance is sought because of a party's military service, counsel's argument should focus on the critical points made in both the supporting and opposing declarations regarding the lack of showing that the party's military service actually affects the party's ability to prosecute or defend the action, such as whether the party can obtain leave to be present at the trial or to be deposed, whether the party's presence at trial is required, the alternatives to the party's presence, when counsel for the moving party first learned that the party would be absent, the reasons, if any, why those alternatives are preferable to a continuance, and the lack of diligence with which counsel for the moving party informed opposing counsel of the need for continuance and filed the motion for continuance.

It is also advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, or by affidavits or declarations. Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their

purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish or negate the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[iii] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[c] Discussion of Authorities

[i] When Party in Military Service Is Not Entitled to Continuance

Note:

The Servicemembers Civil Relief Act, enacted in 2003 and replacing the Soldiers' and Sailors' Civil Relief Act, significantly changed the federal law to make the granting of initial stays essentially automatic. While the initial 90-day stay is essentially automatic, the granting of an *additional* stay is discretionary. The cases referenced below also may be useful in opposing a motion for a continuance brought under the Military and Veterans Code, which was patterned after the Soldiers' and Sailors' Civil Relief Act, and requires the servicemember to make a prima facie showing that his or her ability to prosecute or defend is materially affected by reason of military service [*see Mil. & Vet. Code § 403*].

The factual background of ***Miller v. Miller*** *(1945) 26 Cal. 2d 119, 156 P.2d 931* , is discussed in *§ 48.12[4][c][ii]*. The trial court denied defendant's motion for a stay under former § 521 of the Soldiers' and Sailors' Civil Relief Act and the Supreme Court affirmed. The Court stated that the facts did not show how defendant was prejudiced by a hearing in his absence. All the relevant facts could be verified by defendant's counsel who represented him at all stages of the hearing. All necessary witnesses were available and subject to counsel's interrogation, and defendant's presence was not needed for an investigative purpose. The Court also pointed out that since defendant had procured the final decree while in the military service, the trial court could reasonably reject defendant's request to postpone any challenges against the decree by reason of military service (*26 Cal. 2d 119, 124-125)* .

In *Miller*, *Christine M. v. Superior Court (1999) 69 Cal. App. 4th 1233, 82 Cal. Rptr. 2d 220* , and *Ridley v. Young (1944) 64 Cal. App. 2d 503, 149 P.2d 76* , discussed, *below*, the courts were confronted by motions supported only by the fact that the parties were in military service. Those courts chose not to rely solely on the insufficiency of this showing in support of the motion but made an independent assessment of the facts to determine also that the party's ability to prosecute or defend was not materially affected.

In ***Christine M. v. Superior Court*** *(1999) 69 Cal. App. 4th 1233, 82 Cal. Rptr. 2d 220* , the juvenile court on September 29, 1997, declared a minor a ward of the court, ordered the mother to attend parenting class, drug counseling and to undergo random drug testing, and ordered the father to attend an approved program of parent education. Prior to that time, the father had told a social worker, among other things, that he was unable to care for the minor and that he had enlisted in the Navy and would leave for training on August 1, 1997. On August 28, 1997, the court appointed counsel to represent the father (*69 Cal. App. 4th 1233, 1236-1239)* . On April 14, 1998, the father's counsel filed a written request to stay the proceedings pursuant to the former Soldiers' and Sailors' Civil Relief Act asserting that the father's attendance in the armed forces away at sea made it impossible for the father to comply with any reunification order that he attend a parenting class. The request was denied. Thereafter, at the outset of a contested hearing under *Welf. & Inst. Code § 366.22*, father's counsel asked the court to reconsider its earlier denial of the request for a stay. The court denied the renewed request and after the hearing terminated family reunification services as to the mother and

father, and set the matter for hearing under *Welf. & Inst. Code § 366.26*. The mother and father then sought writ review of the court's order terminating family reunification services and setting the hearing under *Welf. & Inst. Code § 366.26* (*69 Cal. App. 4th 1233, 1235, 1239-1241)* .

The court of appeal denied the writ, rejecting the fathers claim, among others, that the evidence showed he could not attend the court-ordered parenting class because he was stationed at sea, and thus was entitled to a stay pursuant to the former Soldiers' and Sailors' Civil Relief Act (*69 Cal. App. 4th 1233, 1235, 1242-1243)* . The court, quoting from Johnson v. Johnson (1943), , stated that the Act does not grant an absolute right to a stay whenever it is made to appear that one of the parties is in military service. The Act was passed to relieve those in the armed services from the strain of litigation during their period of service where the fact of their service would adversely affect their prosecution or a defense of a pending case; the rights of civilian litigants must also be considered. The trial courts have a wide discretionary power to determine, in each case, whether the service man's or woman's rights would be adversely affected. However, if the rights of one in military service will be adversely affected unless a stay is given, the court must grant a stay. Doubtful cases should be resolved in favor of the service man or women (*69 Cal. App. 4th 1233, 1243)* . The court noted that an application for stay under the former Soldiers' and Sailors' Civil Relief Act depends on the facts and circumstances of each case (*69 Cal. App. 4th 1233, 1243)* . The record before the court disclosed, in addition to a lack of desire on the father's part to parent the minor without the mother, a lack of interest on the father's part in the minor's well-being. The father never appeared personally at any hearing, and the written motion for a stay filed by the father's counsel included no declaration from the father indicating how the father's efforts to comply with the case plan, if any, had been impeded by his attendance in the military. Cases construing the Act have required a showing by the party engaged in military service that he or she is actually unavailable to participate and that his or her rights would be adversely affected by virtue of absence from trial. Courts denying motions for stays under section 531 have noted that the mere contentions of unavailability, without affirmative representations that leave to attend the trial was sought by the serviceman and refused, are insufficient to warrant such relief (*69 Cal. App. 4th 1233, 1244)* .

Although the father assertedly was at sea at the time of the contested hearing under *Welf. & Inst. Code § 366.22*, the father failed to demonstrate how his military service had prevented him from complying with the order that he attend an approved parenting class. Thus, the father failed to demonstrate he was unable to comply with the case plan by reason of his attendance in the military and that a stay was needed to protect the father's interests or to permit him to defend the action (*69 Cal. App. 4th 1233, 1244-1245)* . The juvenile court indicated a willingness to give the father the benefit of the doubt and stated that if he had shown some interest and simply couldn't comply because of being at sea that would be a completely different case, but he showed no such interest (*69 Cal. App. 4th 1233, 1245)* . In sum, the juvenile court did not abuse its discretion. The mere fact that the father was in the navy and stationed in Virginia, without more, was insufficient to warrant a stay of proceedings. Balancing the father's asserted right to parent the minor against the minor's statutorily recognized interest in a stable placement, the juvenile court could properly conclude the only effect of the requested stay would be to postpone the minor's progress toward stable placement. Accordingly, the juvenile court properly could conclude from the showing made the defense would not be materially affected by a denial of a continuance (*69 Cal. App. 4th 1233, 1245)* .

In ***Ridley v. Young*** *(1944) 64 Cal. App. 2d 503, 149 P.2d 76* , plaintiff sought damages from defendant and others for personal injury and property damages arising out of a collision between a car driven by plaintiff and one owned by defendant. At the trial, defendant's attorney moved for a continuance under former § 521 of the Soldiers' and Sailors' Civil Relief Act on the ground that defendant was then engaged in the military service. The trial court denied the motion, which was unsupported by an affidavit or any other showing. Subsequently, the court rendered judgment against all the defendants. Defendant appealed.

The court of appeal affirmed. In regard to the denial of defendant's motion for a continuance, the court concluded that defendant failed to show that the defense would be materially affected by denial of the continuance. Although defendant was in the military service, he did not show that he could not get a leave to attend trial. Further, his presence was not required as a witness; he was not present at the accident and his answer conceded that he owned the car and had given

the other defendant permission to drive it. The court concluded that the federal act should not be invoked for the purpose of delaying or defeating an orderly and expeditious trial of a valid suit (*64 Cal. App. 2d 503, 514-515)* .

In ***George P. v. Superior Court*** *(2005) 127 Cal. App. 4th 216, 24 Cal. Rptr. 3d 919* , a request for an *additional* stay under the federal Servicemebers Civil Relief Act [*50 U.S.C. App. § 501 et seq.*] was denied. During the course of a juvenile dependency proceeding regarding custody of a minor child, the father, a member of the National Guard, was sent to Iraq. The father was granted an initial 90-day stay by the juvenile court. He later filed a motion for an additional stay on the ground that his military service prevented him from making further appearances in the case. The juvenile court denied the father's motion for an additional stay finding that the father had been given "more than a fair opportunity" to participate in the proceedings. The father then filed an extraordinary writ of review of that denial.

The father argued that the juvenile court erred in denying his request for an additional stay. The father argued that stays are mandatory under the Servicemembers Civil Relief Act. The court of appeal disagreed. While the initial 90-day stay is essentially automatic, the granting of an *additional* stay is discretionary. A request for an additional stay may be denied if the servicemember's ability to appear and participate in the civil action is not adversely affected by his or her military duties. In this instance, the court held that the father's military service did not adversely affect his participation in the case. The record demonstrated that the father had appeared in the action and received services for reunification with his child for essentially the entire period required by law. The father had also made a personal appearance during a leave of absence from the military and had already provided necessary testimony. Furthermore, the father had been represented by counsel at all times and had been able to communicate with social services staff and counsel while he was in Iraq. In this particular instance, the court opined that the father had already been given a full and fair opportunity to reunify with his child and that any additional stay was merely delaying the inevitable. Accordingly, the juvenile court did not abuse its discretion in denying the stay.

[ii] Failure to Show That Attendance Is Impossible

Note:

The Servicemembers Civil Relief Act, enacted in 2003 and replacing the Soldiers' and Sailors' Civil Relief Act, significantly changed the federal law to make the granting of initial stays essentially automatic. While the initial 90-day stay is automatic, the granting of an *additional* stay is discretionary. The case referenced below also may be useful in supporting a motion for a continuance brought under the Military and Veterans Code, which was patterned after the Soldiers' and Sailors' Civil Relief Act, and requires the servicemember to make a prima facie showing that his or her ability to prosecute or defend is materially affected by reason of military service [*see Mil. & Vet. Code § 403*].

The factual background of ***Ridley v. Young*** *(1944) 64 Cal. App. 2d 503, 149 P.2d 76* , is discussed in [i], *above*. In affirming the trial court's denial of defendant's request for a continuance under § 521 of the Soldiers' and Sailors' Civil Relief Act former the court pointed out that defendant only furnished a certificate that showed he was engaged in the military service. The court found not only that such an engagement by itself could not establish that defendant's ability to defend was materially affected, but also that such a certificate failed to show that defendant could not obtain a leave of absence to attend the trial (*64 Cal. App. 2d 503, 514*).

[iii] Party Is Judgment Proof

Note:

The Servicemembers Civil Relief Act, enacted in 2003 and replacing the Soldiers' and Sailors' Civil Relief Act, significantly changed the federal law to make the granting of initial stays essentially automatic. While the initial 90-day stay is automatic, the granting of an *additional* stay is discretionary. The case referenced below also may be useful in supporting a motion for a continuance brought under the Military and Veterans Code, which was patterned after the Soldiers' and Sailors' Civil Relief Act, and requires the servicemember to make a prima facie showing that his or her ability to prosecute or defend

is materially affected by reason of military service [*see Mil. & Vet. Code § 403*].

Culver v. Superior Court *(1954) 125 Cal. App. 2d 76, 270 P.2d 78* , involved a lawsuit against the driver of an automobile and his parents for damages arising from an automobile accident. Prior to the trial and at the trial, defendants' attorney requested a continuance under former § 521 of the Soldiers' and Sailors' Civil Relief Act because defendant's son was in the army overseas. The trial court denied the motion, but granted a short continuance for the purpose of taking the son's deposition in Korea. Defendants petitioned for a writ of prohibition to prevent the trial from proceeding further.

The court of appeal denied the writ. Plaintiffs' counsel conceded that the son was judgment proof; therefore, the ability of the son to conduct a defense was not materially affected. Although the parents would be denied the benefit of their son's testimony at trial, they would still be able to obtain a deposition. The court found also that the federal law confers no benefits on coparties of a member of the military service or civilians whose witnesses are in the military services (*125 Cal. App. 2d 76, 78)* .

[iv] Real Effect Is Benefit to Nonmilitary Coparty

Note:

The Servicemembers Civil Relief Act, enacted in 2003 and replacing the Soldiers' and Sailors' Civil Relief Act, significantly changed the federal law to make the granting of initial stays essentially automatic. While the initial 90-day stay is automatic, the granting of an *additional* stay is discretionary. The case referenced below also may be useful in supporting a motion for a continuance brought under the Military and Veterans Code, which was patterned after the Soldiers' and Sailors' Civil Relief Act, and requires the servicemember to make a prima facie showing that his or her ability to prosecute or defend is materially affected by reason of military service [*see Mil. & Vet. Code § 403*].

Culver v. Superior Court *(1954) 125 Cal. App. 2d 76, 270 P.2d 78* , is discussed in [iii], *above.*

[d] Additional Authorities

[i] When Party in Military Service Is Not Entitled to Continuance

Note:

The Servicemembers Civil Relief Act, enacted in 2003 and replacing the Soldiers' and Sailors' Civil Relief Act, significantly changed the federal law to make the granting of initial stays essentially automatic. While the initial 90-day stay is automatic, the granting of an *additional* stay is discretionary. The case referenced below also may be useful in supporting a motion for a continuance brought under the Military and Veterans Code, which was patterned after the Soldiers' and Sailors' Civil Relief Act, and requires the servicemember to make a prima facie showing that his or her ability to prosecute or defend is materially affected by reason of military service [*see Mil. & Vet. Code § 403*].

In ***Whealton v. Whealton*** *(1967) 67 Cal. 2d 656, 63 Cal. Rptr. 291, 432 P.2d 979* , plaintiff, a petty officer on active duty in the Navy and stationed in California, initiated an action for annulment against his spouse who lived in Maryland. The trial court entered a default judgment against defendant and annulled the marriage. When defendant subsequently moved to set aside the judgment and to file a cross complaint for separate maintenance, plaintiff was outside the country on military orders. His attorney moved for a stay of proceedings under former § 521 of the Soldiers' and Sailors' Civil Relief Act [*50 U.S.C. App. § 501 et seq.*], arguing that plaintiff would not be available to assist counsel or appear as a witness. Although the trial court denied plaintiff's request for a stay, it subsequently denied defendant's motion also, and defendant appealed.

The Supreme Court held that the default judgment must be set aside because it was entered prematurely. Plaintiff

attempted to avoid this holding by contending that the trial court should not have acted on defendant's motion in the first place because plaintiff was entitled to a stay of proceedings. However, the Court also held that plaintiff's ability to prosecute was not materially affected under former 50 U.S.C. App. § 521 because plaintiff's presence was not required. The court pointed out the plaintiff's attorney was already familiar with the facts and they were not in dispute; rather, the disputed question was one of law (*67 Cal. 2d 656, 665-666)* .

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California Points & Authorities

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Volume 4 Chapters 40-49 CLAIM & DELIVERY---to---CONTINUANCE
CHAPTER 48 CONTINUANCE OF PROCEEDINGS
PART II. FORMS
B. OPPOSING CONTINUANCE

4-48 California Points & Authorities § 48.36

§ 48.36 Witness's Absence Does Not Require Continuance

[1] Failure to Establish Materiality of Expected Testimony and Diligence to Obtain It

[a] FORM Witness's Absence Does Not Require Continuance

[*This form should be combined with a general memorandum of points and authorities opposing a noticed motion or ex parte application for a continuance (see § 48.30) or included in an appellate brief*].

A COURT DOES NOT ABUSE ITS DISCRETION BY DENYING A MOTION FOR A CONTINUANCE ON THE GROUND OF ABSENCE OF A MATERIAL WITNESS IF THE MOVING PARTY FAILS TO DESCRIBE THE EXPECTED TESTIMONY AND HAS NOT SUBPOENAED THE WITNESS OR OBTAINED THE WITNESS'S AGREEMENT TO TESTIFY.

A. Materiality and Diligence. A motion to postpone a trial on the ground of the absence of evidence can only be made on affidavit showing the evidence expected to be obtained is material and that due diligence has been used to procure it (*Code Civ. Proc. § 595.4*).

[*Optional*] **B. Materiality of Expected Testimony Must Be Shown.** If a party requests a continuance to produce an absent witness but fails to establish the materiality of the expected testimony, the continuance may be denied (*Lea v. Shank (1970) 5 Cal. App. 3d 964, 977*).

[*Optional*] **C. Failure to Submit Affidavit.** When a party requests a continuance to produce an absent witness but fails to submit an affidavit to support the request, the continuance may be denied (*Cade v. Mid-City Hosp. Corp. (1975) 45 Cal. App. 3d 589, 599-600, 119 Cal. Rptr. 571*).

[*Optional*] **D. Failure to Subpoena Witness or Obtain Witness's Agreement to Appear.** The unavailability of a witness only constitutes good cause for continuance when the witness has been subpoenaed or is beyond the reach of subpoena and has agreed to be present, and his or her absence is due to an unavoidable emergency that counsel did not know or could not reasonably have known at the time of the pretrial or trial setting conference *Marcucci v. Vowinckel*

(1913) 164 Cal. 693, 130 P. 430 ; *Kramer v. Kramer (1961) 197 Cal. App. 2d 727, 731, 17 Cal. Rptr. 461*).

[*Optional*] **E. Failure to Describe Testimony.** A continuance may be denied to a party who seeks to produce an absent witness if the party fails to describe the testimony which the witness will give (*Lewis v. Neptune Society Corp. (1987) 195 Cal. App. 3d 427, 430, 240 Cal. Rptr. 656* ; *Stephens v. Aviation Research & Dev. Pub. Corp. (1966) 243 Cal. App. 2d 349, 351, 52 Cal. Rptr. 322*).

[b] Comments

[i] Use of Form

This form of points and authorities may be combined with the form in *§ 48.30* and submitted in opposition to a noticed motion or ex parte application for a continuance [*see Cal. Rules of Ct., Rule 3.1332(b)*], when a party seeking a continuance to produce an absent witness fails to establish the materiality of the expected testimony or that the witness has been subpoenaed or, if the witness is beyond the reach of subpoena, has agreed to testify [*Code Civ. Proc. § 595.4*]. It should also be combined with any of the authorities in [2]-[7], *below* that address more specifically types of testimony that are not considered material and other procedural deficiencies in the showing required to support a motion for continuance based on the absence of a witness.

Counsel should also consider whether any of the authorities in the forms set forth in *§§ 48.31 -48.39* are applicable to the particular case, and if so, include those authorities as well. The forms in *§ 48.31* address procedural requirements that are applicable in every case and should be used to whenever the showing in support of the motion is deficient in that regard. The forms in *§§ 48.34 -48.39* address particular circumstances that have been held *not* to constitute good cause. The forms in *§§ 48.32* and *48.33* are for use to augment a memorandum opposing a continuance if the request for continuance is not made in good faith or would place undue burden on the party opposing the continuance.

In an appropriate case, these points and authorities may be used to oppose the points and authorities set out in *§ 48.13[1]*.

[ii] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, if the continuance is sought because of a the unavailability of a witness, counsel's argument should focus on the critical points made in both the supporting and opposing declarations regarding the insufficiencies in the showing in support of the motion: that the witness's testimony is not material, that counsel for the moving party was not diligent in anticipating the need for that testimony, and/or failed to subpoena that witness, the alternatives to the witness's testimony, the reasons, if any, why those alternatives are preferable to a continuance, when counsel for the moving party first learned that the witness would be absent, and the lack of diligence with which counsel for the moving party informed opposing counsel of the need for continuance and filed the motion for continuance.

It is also advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see* former Evid. Code § 450 et seq.], by references to the court's file, or by affidavits or declarations. Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish or negate the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[iii] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[c] Discussion of Authorities

[i] Materiality of Expected Testimony Must Be Shown

Lea v. Shank *(1970) 5 Cal. App. 3d 964* , was an action for personal injuries between parties involved in a truck collision. On the day of trial, defendant's attorney moved for a continuance to obtain a neurological examination of plaintiff, explaining that he had first learned two days earlier that a neurologist would testify for plaintiff. The attorney also stated he did not know how soon he could get a neurologist to make the examination and be available as a witness. The motion for continuance was denied. Subsequently, the case was submitted to the jury solely on the issue of proximate cause and damages; the jury found for plaintiff. Defendant appealed.

On appeal, the court of appeal in part held that the trial court did not abuse its discretion in denying the motion for a continuance for an indefinite time to obtain evidence of an unknown content. Although the court did not explicitly state that defendant had failed to show that the expected testimony would be material, it cited *Stephens v. Aviation Research & Dev. Pub. Corp. (1966) 243 Cal. App. 2d 349, 52 Cal. Rptr. 322* , discussed in [iii], *below*, which held that a similarly deficient statement failed to meet the requirements of *Code Civ. Proc. § 595* [*now Code Civ. Proc. § 595.4*] in materiality (*5 Cal. App. 3d 964, 977)* .

[ii] Failure to Submit Affidavit

In ***Cade v. Mid-City Hosp. Corp.*** *(1975) 45 Cal. App. 3d 589, 119 Cal. Rptr. 571* , decedent's heirs sued a hospital and several doctors for damages resulting from the alleged negligent treatment of decedent. Judgment was for defendant; and plaintiffs appealed, arguing, in part, that the trial court erred in refusing to grant plaintiffs a continuance in order to present an absent expert witness. Plaintiffs' counsel had first informed the judge that the witness was ill during his presentation of plaintiffs' evidence, but did not request the continuance until defendant's case was drawing to a close.

In affirming the action of the trial court, the court of appeal pointed out that plaintiffs had produced a letter rather than an affidavit stating the witness was ill, and while a showing by affidavit has not been regarded as mandatory, it reflects the policy of encouraging prompt trial of lawsuits. Further, the witness was not going to offer new, innovative testimony but was expected to support the view of plaintiffs' other expert witness (*45 Cal. App. 3d 589, 599-600)* .

[iii] Failure to Subpoena Witness or Obtain Witness's Agreement to Appear

In ***Marcucci v. Vowinckel*** *(1913) 164 Cal. 693, 130 P. 430* , plaintiff sued defendant physician to recover damages for injuries resulting from surgery. At the conclusion of plaintiff's presentation of evidence, the trial court granted defendant's motion for a nonsuit. Plaintiff appealed, contending that the trial court erred in denying her motion for a continuance which was made on the afternoon of the last day at trial and sought to continue the trial until the following morning to produce three additional witnesses.

The Supreme Court affirmed, determining that the record supported the action of the trial court in that there was no showing of any diligence whatsoever. As an illustration, the Court pointed out that plaintiff failed to show the issuance and service of a subpoena, the witness's promise of attendance, the nature and materiality of the testimony, or even the names of the witnesses (*164 Cal. 693, 694-695)* .

In ***Kramer v. Kramer*** *(1961) 197 Cal. App. 2d 727, 17 Cal. Rptr. 461* , plaintiff filed an affidavit to obtain a writ of execution on a judgment against defendant, her former spouse, to collect money owed for child support. After the trial

court issued the writ for over $7,000, defendant moved to quash the writ on the ground that, although he had not paid in cash the payments specified in plaintiff's affidavit, he had conveyed property to plaintiff as prepayment of the monthly payments. As part of the evidence heard by the trial court on this issue, plaintiff testified that she had sold the property and given defendant a check for $10,000. When defendant denied receiving this check, plaintiff's counsel asked for a continuance of 15 minutes to produce a rebuttal witness who was already in the downtown area. Stating that it should not have to wait during the noon hour for a witness to arrive, the trial court denied the motion and subsequently issued an order quashing the writ of execution. Plaintiff appealed, contending, in part, that the trial court erred in denying her motion for a continuance.

The court of appeal, in affirming, pointed out that the witness had not been subpoenaed and it did not appear that the trial court abused its discretion (*197 Cal. App. 2d 727, 731)* .

[iv] Failure to Describe Testimony

Lewis v. Neptune Society Corp. *(1987) 195 Cal. App. 3d 427, 240 Cal. Rptr. 656* , was an action by the assignee of a law firm against a corporation to recover legal fees owed the firm. On the day set for trial, the corporation's attorney appeared and requested a one-month continuance because of the inability of a witness to attend the trial. The witness's declaration stated that he had recently undergone surgery for skin cancer, which affected his ability to appear as a witness, and that, as a result of testifying in another trial, he was physically and mentally unable to testify. The motion was denied. Judgment was for plaintiff; and defendant appealed.

The court of appeal affirmed, noting that motions requesting continuances are to be made on written notice [*see* former Cal. Rules of Ct., Rule 375(b) , now Rule 3.1332(b), which was not done, and that the witness knew several days before trial that he would not appear and yet defendant made no attempt to notify plaintiff. The court said that, in addition, *Code Civ. Proc. § 595.4* requires an affidavit showing the materiality of the evidence expected to be obtained and that due diligence has been used to procure it, but that the witness's declaration failed to state what the witness's testimony would be (*195 Cal. App. 3d 427, 430)* .

In ***Stevens v. Aviation Research & Dev. Pub. Corp.*** *(1966) 243 Cal. App. 2d 349, 52 Cal. Rptr. 322* , plaintiff sued defendant, a New York corporation, for breach of contract. Although the pretrial conference order was filed on November 1, 1961, the trial court granted several continuances both at the plaintiff's and defendant's request, and on the court's own motion until June 25, 1963, when the court set the trial date for October 14, 1963, with no further continuances. On October 14, the trial court denied defendant's request for an additional continuance on the ground that defendant had gone into bankruptcy and neither the president nor another witness could attend the trial in California at that time. Following the entry of a judgment of damages for plaintiff, defendant appealed.

The court of appeal affirmed, stating that former Code Civ. Proc. § 595 [*now Code Civ. Proc. § 595.4*] requires an affidavit showing the materiality of the expected evidence but defendant's counsel gave no hint whatsoever of what the expected testimony would be (*243 Cal. App. 2d 349, 351)* .

[2] Witness Needed Only for Impeachment

[a] FORM Witness's Absence Does Not Require Continuance

[*This form should be combined with a general memorandum opposing a noticed motion or ex parte application for a continuance (see § 48.30) or included in an appellate brief.*]

A COURT DOES NOT ABUSE ITS DISCRETION BY DENYING A MOTION FOR A CONTINUANCE ON THE GROUND OF ABSENCE OF A MATERIAL WITNESS IF THAT WITNESS IS NEEDED ONLY FOR IMPEACHMENT.

A. Witness Needed Only for Impeachment. A party may be denied a continuance to produce an absent witness if the witness is needed only for impeachment (*In re Steiner (1955) 134 Cal. App. 2d 391, 395, 285 P.2d 972*).

[b] Comments

[i] Use of Form

This form of points and authorities may be combined with the forms in *§§ 48.30* and *[1], above*, and submitted in opposition to a noticed motion or ex parte application for a continuance [*see Cal. Rules of Ct., Rule 3.1332(b)*], when a party seeking a continuance to produce an absent witness would use the absent witness's testimony only for impeachment [*Code Civ. Proc. § 595.4*]. It may also be combined with any of the authorities in [3]-[7], *below*, that address other specific types of testimony that are not considered material and other procedural deficiencies in the showing required to support a motion for continuance based on the absence of a witness.

Counsel should also consider whether any of the authorities in the forms set forth in *§§ 48.31 -48.39* are applicable to the particular case, and if so, include those authorities as well. The forms in *§ 48.31* address procedural requirements that are applicable in every case and should be used to whenever the showing in support of the motion is deficient in that regard. The forms in *§§ 48.34 -48.39* address particular circumstances that have been held *not* to constitute good cause. The forms in *§§ 48.32* and *48.33* are for use to augment a memorandum opposing a continuance if the request for continuance is not made in good faith or would place undue burden on the party opposing the continuance.

In an appropriate case, these points and authorities may be used to oppose the points and authorities set out in *§ 48.13[1]*.

[ii] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, if the continuance is sought because of a the unavailability of a witness, but that witness would be used only for impeachment, counsel's argument should focus on the fact that impeachment testimony is not considered material.

It is also advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, or by affidavits or declarations. Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish or negate the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[iii] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[c] Discussion of Authorities

[i] Witness Needed Only for Impeachment

In re Steiner *(1955) 134 Cal. App. 2d 391, 285 P.2d 972* , involved a juvenile court proceeding at which Steiner was declared a ward of the juvenile court. The evidence at the hearing consisted mainly of the testimony of Steiner's victim; Steiner's counsel requested a continuance to produce witnesses who would impeach the victim's testimony by showing that in the past the victim had threatened Steiner--a statement which the victim flatly denied. The trial court denied the request.

The court of appeal affirmed, holding that, besides counsel's failure to name witnesses or submit affidavits, a continuance is properly refused if the testimony of the absent witness would only tend to impeach a witness of the adverse party (*134 Cal. App. 2d 391, 395)* .

[3] Cumulative Testimony

[a] FORM Witness's Absence Does Not Require Continuance

[*This form should be combined with a general memorandum opposing a noticed motion or ex parte application for a continuance (see § 48.30) or included in an appellate brief*].

A COURT DOES NOT ABUSE ITS DISCRETION BY DENYING A MOTION FOR A CONTINUANCE ON THE GROUND OF ABSENCE OF A MATERIAL WITNESS IF THE EXPECTED TESTIMONY WOULD BE MERELY CUMULATIVE OR SUPPORTIVE OF EVIDENCE ALREADY PRESENTED.

A. Cumulative Testimony. A party may be denied a continuance to produce an absent witness if the expected testimony would merely be cumulative or supportive of evidence already presented (*Lewis v. Neptune Society Corp. (1987) 195 Cal. App. 3d 427, 429, 240 Cal. Rptr. 656* ; *Cade v. Mid-City Hosp. Corp. (1975) 45 Cal. App. 3d 589, 600, 119 Cal. Rptr. 571* ; *Gibson v. Cobb (1965) 236 Cal. App. 2d 226, 235-237, 46 Cal. Rptr. 57*).

[b] Comments

[i] Use of Form

This form of points and authorities may be combined with the forms in *§§ 48.30* and *[1], above*, and submitted in opposition to a noticed motion or ex parte application for a continuance [*see Cal. Rules of Ct., Rule 3.1332(b)*], when a party seeking a continuance to produce an absent witness would use the absent witness's testimony as cumulative evidence [*Code Civ. Proc. § 595.4*]. It may also be combined with any of the authorities in [2], *above*, or [4]-[7], *below*, that address other specific types of testimony that are not considered material and other procedural deficiencies in the showing required to support a motion for continuance based on the absence of a witness.

Counsel should also consider whether any of the authorities in the forms set forth in *§§ 48.31 -48.39* are applicable to the particular case, and if so, include those authorities as well. The forms in *§ 48.31* address procedural requirements that are applicable in every case and should be used to whenever the showing in support of the motion is deficient in that regard. The forms in *§§ 48.34 -48.39* address particular circumstances that have been held *not* to constitute good cause. The forms in *§§ 48.32* and *48.33* are for use to augment a memorandum opposing a continuance if the request for continuance is not made in good faith or would place undue burden on the party opposing the continuance.

In an appropriate case, these points and authorities may be used to oppose the points and authorities set out in *§ 48.13[1]*.

[ii] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the

facts of his or her case. For example, if the continuance is sought because of a the unavailability of a witness, but that witness's testimony would be only cumulative of other testimony, counsel's argument should focus on the fact that the same evidence as that to be offered by the absent witness is available from another source.

It is also advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, or by affidavits or declarations. Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish or negate the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[iii] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[c] Discussion of Authorities

[i] Cumulative Testimony

The facts and procedural background of ***Lewis v. Neptune Society Corp.*** *(1987) 195 Cal. App. 3d 427, 240 Cal. Rptr. 656* , are discussed in [1][c][iii], *above*. In affirming the judgment for plaintiff, the court said it is not an abuse of discretion to deny a continuance when the testimony sought from an unavailable witness would be cumulative to that of other witnesses (*195 Cal. App. 3d 427, 429*).

The factual background of ***Cade v. Mid-City Hosp. Corp.*** *(1975) 45 Cal. App. 3d 589, 119 Cal. Rptr. 571* , is discussed in [2][c][i], *above*. In that case, the court of appeal found that an additional reason, besides the failure to submit an affidavit, for denying the motion for a continuance was the fact that the absent witness was expected to offer not new, innovative testimony, but rather, testimony supporting the view of plaintiff's other expert witness (*45 Cal. App. 3d 589, 600)* .

In ***Gibson v. Cobb*** *(1965) 236 Cal. App. 2d 226, 46 Cal. Rptr. 57* , plaintiff landowner brought a quiet title action against defendants, owners of property adjacent to plaintiff's land. Near the close of trial, defendants requested a four-day continuance to call an absent witness and filed a supporting affidavit. The trial court stated that the affidavit contained no material that was not cumulative or testified to in substance by other witnesses and suggested there had been a lack of due diligence. After denying the request for a continuance, the trial court rendered a judgment for plaintiff. Defendants appealed.

The court of appeal affirmed, holding that, given the nature of the proposed testimony, there was no abuse of discretion in denying the continuance (*236 Cal. App. 2d 226, 235-237)* . Furthermore, the court found that insofar as the affidavit contained statements based on information and belief, the trial court must disregard it as hearsay or mere opinion.

[4] Alternative Methods of Proof

[a] FORM Witness's Absence Does Not Require Continuance

[*This form should be combined with a general memorandum of points and authorities opposing a noticed motion or ex*

parte application for a continuance (see § 48.30) or included in an appellate brief].

A COURT DOES NOT ABUSE ITS DISCRETION BY DENYING A MOTION FOR A CONTINUANCE ON THE GROUND OF ABSENCE OF A MATERIAL WITNESS IF THE MOVING PARTY FAILS TO SHOW THAT THE EVIDENCE COULD NOT BE PROVEN IN OTHER WAYS.

A. Alternative Methods of Proof. A party may be denied a continuance to produce an absent witness if he or she fails to show that the evidence the witness would provide cannot be proven in other ways (*Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co. (1996) 47 Cal. App. 4th 464, 489, 54 Cal. Rptr. 2d 888* ; *Oak Knoll Broadcasting Corp. v. Hudgings (1969) 275 Cal. App. 2d 563, 565-566, 80 Cal. Rptr. 175* ; *Agnew v. Larson (1961) 197 Cal. App. 2d 444, 450, 17 Cal. Rptr. 538*).

[b] Comments

[i] Use of Form

This form of points and authorities may be combined with the forms in *§§ 48.30* and *[1], above*, and submitted in opposition to a noticed motion or ex parte application for a continuance [*see Cal. Rules of Ct., Rule 3.1332(b)*], when a party seeking a continuance to produce an absent witness has other ways of proving the facts to which that witness would testify [*Code Civ. Proc. § 595.4*]. The authority in this form may also be combined with any of the authorities in [2]-[3], *above*, or [5]-[7], *below*, that address other specific types of testimony that are not considered material and other procedural deficiencies in the showing required to support a motion for continuance based on the absence of a witness.

Counsel should also consider whether any of the authorities in the forms set forth in *§§ 48.31 -48.39* are applicable to the particular case, and if so, include those authorities as well. The forms in *§ 48.31* address procedural requirements that are applicable in every case and should be used to whenever the showing in support of the motion is deficient in that regard. The forms in *§§ 48.34 -48.39* address particular circumstances that have been held *not* to constitute good cause. The forms in *§§ 48.32* and *48.33* are for use to augment a memorandum opposing a continuance if the request for continuance is not made in good faith or would place undue burden on the party opposing the continuance.

In an appropriate case, these points and authorities may be used to oppose the points and authorities set out in *§ 48.13[1]*.

[ii] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, if the continuance is sought because of a the unavailability of a witness, but there is an alternative method of proving the same facts, counsel's argument should focus on those alternatives, and why they are preferable to a continuance, or at least do not prejudice the moving party.

It is also advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, or by affidavits or declarations. Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish or negate the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[iii] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[c] Discussion of Authorities

[i] Alternative Methods of Proof

In ***Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.*** *(1996) 47 Cal. App. 4th 464, 54 Cal. Rptr. 2d 888* , an action by a general contractor against its surety, the surety claimed that the trial court abused its discretion in denying its motion for a trial continuance when its underwriting expert suffered a stroke shortly before trial and was unable to testify. The court of appeal began its analysis by stating that on rulings on motions for continuances it would defer to the sound discretion of the trial court and would not disturb a ruling absent a clear showing of abuse of discretion. The court then noted that the expert's deposition testimony was available for use at trial, a former party witness testified competently as to surety practices, and the trial court forbade the general contractor from commenting to the jury about the absence of a nonparty surety expert witness (*47 Cal. App. 4th 464, 489)* . The court thus concluded that there was no abuse of discretion in denying an open-ended continuance.

In ***Oak Knoll Broadcasting Corp. v. Hudgings*** *(1969) 275 Cal. App. 2d 563, 80 Cal. Rptr. 175* , plaintiff had levied a claim against funds deposited by defendant in a savings and loan association. Defendant's spouse filed a third party claim under Code Civ. Proc. § 689, declaring the funds to be community property and not liable for the contracts of the wife after marriage. On the day of the hearing to determine title to the funds, plaintiff's attorney, after learning from the keeper of records at the savings and loan association that the records would not be ready until later in the week, requested a continuance. His motion was denied and judgment given subsequently for defendant. Plaintiff appealed, arguing that the trial court abused its discretion in denying the motion for continuance.

The court of appeal affirmed. Although plaintiff's attorney had received 10 days' notice of the hearing, he did not serve a subpoena deces tecum on the keeper of the records until seven days later. He also gave the keeper of the records permission to be placed "on call." The court concluded that plaintiff's attorney had thus not proceeded promptly to secure the attendance of the witness even though the statute providing for hearings on third party claims suggested that time was of the essence since it calls for a hearing within 20 days unless continued for good cause. Further, the court stated that when a continuance is requested because of the absence of a material witness, there must be a showing that the facts expected to be established by the witness cannot otherwise be proven. No such showing was made here (*275 Cal. App. 2d 563, 565-566)* .

In ***Agnew v. Larson*** *(1961) 197 Cal. App. 2d 444, 17 Cal. Rptr. 538* , plaintiff sued defendant doctor for malpractice. The trial court rendered a judgment for the defendant. Plaintiff appealed, contending, among other things, that the trial court had abused its discretion in denying her motion for a continuance which she requested because one of her witnesses was out of the state on the date set for trial and not available for approximately a month.

The court of appeal affirmed. The facts show that the witness had been served with a subpoena duces tecum almost two months before the scheduled trial date. On the other hand, the case had been set for trial and ordered off the calender at the request of plaintiff on five occasions. There had been, overall, 15 continuances and three mistrials prior to the trial in which plaintiff requested the continuance for the absent witness. The court of appeal concluded that most of the lost time was caused by plaintiff and her attorneys; it applied the rule that if a material witness is absent from the trial there must be a showing that the facts expected to be proved cannot otherwise be proved (*197 Cal. App. 2d 444, 450)* and pointed out plaintiff's concession that the witness she had called might have been a hostile witness.

[d] Additional Authorities

[i] Alternative Methods of Proof

The factual background of ***Young v. Redman*** *(1976) 55 Cal. App. 3d 827, 128 Cal. Rptr. 86* , is discussed in *§ 48.31[1][c][i]*. In that case the court of appeal upheld the denial of a continuance to an absent party because the party failed to establish that his absence was unavoidable. However, the court stated that even if the situation had been otherwise, denial of the continuance was justified because the party's testimony was adequately preserved in a deposition which was entered into evidence by stipulation of the parties (*55 Cal. App. 3d 827, 832)* .

[5] Failure to Anticipate Need for Witness

[a] FORM Witness's Absence Does Not Require Continuance

[*This form should be combined with a general memorandum opposing a noticed motion or ex parte application for a continuance (see § 48.30) or included in an appellate brief*].

A COURT DOES NOT ABUSE ITS DISCRETION BY DENYING A MOTION FOR A CONTINUANCE ON THE GROUND OF ABSENCE OF A MATERIAL WITNESS WHEN THE MOVING PARTY ATTEMPTS TO JUSTIFY ITS LACK OF DILIGENCE BUT COULD HAVE ANTICIPATED THE NEED FOR THE WITNESS.

A. Party Could Have Anticipated Need for Witness. A party may be denied a continuance to produce an absent witness if the party's lack of diligence is unjustified because he or she could have anticipated the need for the witness (*Estate of Smith (1973) 9 Cal. 3d 74, 81, 106 Cal. Rptr. 774, 507 P.2d 78*).

[b] Comments

[i] Use of Form

This form of points and authorities may be combined with the forms in *§§ 48.30* and *[1], above*, and submitted in opposition to a noticed motion or ex parte application for a continuance [*see Cal. Rules of Ct., Rule 3.1332(b)*] based on a witness's absence when the moving party's counsel could have known the absent witness's testimony would be required [*Code Civ. Proc. § 595.4*]. The authority in this form may also be combined with any of the authorities in [2]-[4], *above*, or [6]-[7], *below*, that address other specific types of testimony that are not considered material and other procedural deficiencies in the showing required to support a motion for continuance based on the absence of a witness.

Counsel should also consider whether any of the authorities in the forms set forth in *§§ 48.31 -48.39* are applicable to the particular case, and if so, include those authorities as well. The forms in *§ 48.31* address procedural requirements that are applicable in every case and should be used to whenever the showing in support of the motion is deficient in that regard. The forms in *§§ 48.34 -48.39* address particular circumstances that have been held *not* to constitute good cause. The forms in *§§ 48.32* and *48.33* are for use to augment a memorandum opposing a continuance if the request for continuance is not made in good faith or would place undue burden on the party opposing the continuance.

In an appropriate case, these points and authorities may be used to oppose the points and authorities set out in *§ 48.13[1]*.

[ii] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, if the continuance is sought because of a the unavailability of a witness, but counsel for the moving party could have anticipated the need for that witness, opposing counsel's argument should focus on any and all pleadings, discovery, pretrial statements, and declarations in support of the motion that would have put the moving party on notice the absent witness's testimony would be required and point out whether counsel for the

moving party made any attempt to obtain that witness's testimony.

It is also advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, or by affidavits or declarations. Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish or negate the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[iii] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[c] Discussion of Authorities

[i] Party Could Have Anticipated Need for Witness

In ***Estate of Smith*** *(1973) 9 Cal. 3d 74, 106 Cal. Rptr. 774, 507 P.2d 78* , plaintiff claimed a share of decedent's estate as the decedent's spouse. At the conclusion of the probate hearing on plaintiff's claim, plaintiff's counsel moved for a continuance to bring plaintiff, who lived in Australia, before the court to rebut evidence that decedent was married both before and after his marriage to plaintiff and to show that plaintiff and decedent had not been divorced. The trial court denied this motion and subsequently entered an order denying plaintiff's claim. Plaintiff appealed.

The Supreme Court, although reversing the trial court's order in regard to a separate claimant, affirmed the order denying plaintiff's claims. Without explaining what ground was urged in support of the continuance, the Court determined that denial of the continuance was proper because plaintiff had full advance knowledge, from both the replies to her petition and the will itself, that the issue of the termination of her marriage would be raised at the hearing (*9 Cal. 3d 74, 81)* .

[6] Agreement to Admit Expected Evidence

[a] FORM Witness's Absence Does Not Require Continuance

[*This form should be combined with a general memorandum of points and authorities opposing a noticed motion or ex parte application for a continuance (see § 48.30) or included in an appellate brief.*]

A COURT DOES NOT ABUSE ITS DISCRETION BY DENYING A MOTION FOR A CONTINUANCE ON THE GROUND OF ABSENCE OF A MATERIAL WITNESS IF THE ADVERSE PARTY ADMITS THAT THE EXPECTED EVIDENCE OF THE WITNESS WOULD BE CONSIDERED GIVEN AT TRIAL.

A. Agreement to Admit Expected Evidence. A party may be denied a continuance to produce an absent witness when the trial court has required the party to state upon affidavit the expected evidence but the adverse party admits that such evidence would be given and that it be considered as actually given on the trial, or offered and overruled as improper (*Code Civ. Proc. § 595.4*; *Eggink v. Robertson (1961) 191 Cal. App. 2d 496, 501, 13 Cal. Rptr. 76*).

[b] Comments

[i] Use of Form

This form of points and authorities may be combined with the forms in *§§ 48.30* and *[1], above*, and submitted in opposition to a noticed motion or ex parte application for a continuance [*see Cal. Rules of Ct., Rule 3.1332(b)*] on the ground of a witness's absence, when the party seeking the continuance has stated in an affidavit the expected evidence and the opposing party admits that such evidence would be considered as actually given at trial or, as offered and overruled as improper [*Code Civ. Proc. § 595.4*]. Although *Code Civ. Proc. § 595.4* states that the trial *must* not be postponed if the opposing party makes such an admission, other statutes mandating continuances have been interpreted as directory [*see Thurmond v. Superior Court (1967) 66 Cal. 2d 836, 838-839, 59 Cal. Rptr. 273, 427 P.2d 985* ; *see also Eggink v. Robertson (1961) 191 Cal. App. 2d 496, 13 Cal. Rptr. 76* , discussed in [c][i], *below*, in which the court avoided saying that under *Code Civ. Proc. § 595.4*, denial of a continuance was mandatory].

The authority in this form may also be combined with any of the authorities in [2]-[5], *above*, or [7], *below*, that address other specific types of testimony that are not considered material and other procedural deficiencies in the showing required to support a motion for continuance based on the absence of a witness.

Counsel should also consider whether any of the authorities in the forms set forth in *§§ 48.31 -48.39* are applicable to the particular case, and if so, include those authorities as well. The forms in *§ 48.31* address procedural requirements that are applicable in every case and should be used to whenever the showing in support of the motion is deficient in that regard. The forms in *48.34 -48.39* address particular circumstances that have been held *not* to constitute good cause. The forms in *§§ 48.32* and *48.33* are for use to augment a memorandum opposing a continuance if the request for continuance is not made in good faith or would place undue burden on the party opposing the continuance.

In an appropriate case, these points and authorities may be used to oppose the points and authorities set out in *§ 48.13[1]*.

[ii] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, if the continuance is sought because of a the unavailability of a witness, but counsel for the opposing party will or has agree that the expected testimony may be considered as actually given, or as offered and overruled as improper, opposing counsel's argument should focus that agreement or inadmissibility.

It is also advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, or by affidavits or declarations. Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish or negate the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[iii] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[c] Discussion of Authorities

[i] Agreement to Admit Expected Evidence

Code Civ. Proc. § 595.4 provides in part that when a request for continuance is made on the ground of the absence of a material witness, the court may require the moving party to state on affidavit the expected evidence; and, if the adverse party admits that the evidence would be given and that it be considered as actually given in the trial, or offered and overruled as improper, the trial must not be postponed.

In ***Eggink v. Robertson*** *(1961) 191 Cal. App. 2d 496, 13 Cal. Rptr. 76* , plaintiff sued defendants for damages for personal injuries as the result of a traffic accident. On the fourth day of the trial when one of the defendants and driver of a vehicle involved in the accident had to be hospitalized, defendant's counsel asked for a continuance on the ground of the absence of this witness and read a statement of evidence to which the absent witness would testify. Thereafter, plaintiff's counsel agreed to admit that such evidence would be given, arguing that the language of former Code Civ. Proc. § 595 (now 595.4), which states that when such an admission occurs, the trial must not be postponed, required denial of the continuance. The trial court did deny the continuance, and the jury rendered a judgment in plaintiff's favor. Defendants, on appeal, claimed that it was error to deny the continuance because the absent witness was the only one who could have testified as to what had occurred (plaintiff had been sleeping in the other vehicle) and would have testified that at the moment of impact, he was in the traffic lane and not on the shoulder where plaintiff's vehicle was parked.

The court of appeal affirmed, however, finding no abuse of discretion (*191 Cal. App. 2d 496, 501)* .

[7] Failure to Determine When Witness Would Be Available

[a] FORM Witness's Absence Does Not Require Continuance

[*This form should be combined with a general memorandum opposing a noticed motion or ex parte application for a continuance (see § 48.30) or included in an appellate brief*].

A COURT DOES NOT ABUSE ITS DISCRETION BY DENYING A MOTION FOR A CONTINUANCE ON THE GROUND OF THE ABSENCE OF A MATERIAL WITNESS IF THE MOVING PARTY CANNOT DETERMINE WHEN THAT WITNESS WILL BE AVAILABLE TO TESTIFY.

A. Availability of Witness Is Undetermined. A party may be denied a continuance to produce an absent witness if he or she cannot determine when the witness will be available to testify (*Allstate Ins. Co. v. King (1967) 252 Cal. App. 2d 698, 703, 60 Cal. Rptr. 892*).

[b] Comments

[i] Use of Form

This form of points and authorities may be combined with the forms in *§§ 48.30* and *[1], above*, and submitted in opposition to a noticed motion or ex parte application for a continuance [*see Cal. Rules of Ct., Rule 3.1332(b)*] on the ground of a witness's absence, when the party seeking the continuance is unable to determine when that witness will be available to testify [*Code Civ. Proc. § 595.4*]. The authority in this form may also be combined with any of the authorities in [2]-[6], *above*, that address other specific types of testimony that are not considered material and other procedural deficiencies in the showing required to support a motion for continuance based on the absence of a witness.

Counsel should also consider whether any of the authorities in the forms set forth in *§§ 48.31 -48.39* are applicable to the particular case, and if so, include those authorities as well. The forms in *§ 48.31* address procedural requirements that are applicable in every case and should be used to whenever the showing in support of the motion is deficient in that regard. The forms in *§§ 48.34 -48.39* address particular circumstances that have been held *not* to constitute good

cause. The forms in *§§ 48.32* and *48.33* are for use to augment a memorandum opposing a continuance if the request for continuance is not made in good faith or would place undue burden on the party opposing the continuance.

In an appropriate case, these points and authorities may be used to oppose the points and authorities set out in *§ 48.13[1]*.

[ii] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, if the continuance is sought because of a the unavailability of a witness, but counsel for the moving party cannot state when the absent witness would be available to testify, opposing counsel's argument should focus that fact.

It is also advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, or by affidavits or declarations. Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish or negate the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[iii] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[c] Discussion of Authorities

[i] Availability of Witness Is Undetermined

Allstate Ins. Co. v. King *(1967) 252 Cal. App. 2d 698, 60 Cal. Rptr. 892* , a declaratory relief action, arose out of a prior action for damages for personal injuries arising out of a collision between a motorcycle operated by plaintiff and pickup truck driven by a person insured by defendant insurance company. The earlier action was filed on May 3, 1962, and prior to July 26, 1962, the truck driver met with counsel and also gave a deposition, but after that date could no longer be located. Between April 3, 1963, and January 21, 1964, defendant's counsel obtained four continuances because of the absence of this witness. During that period, defendant had expended considerable time and effort in attempting to locate the missing driver. However, the trial court refused any further continuances and, after the trial was held, the jury rendered a verdict in plaintiff's favor. Defendant then filed this action for declaratory relief to determine its obligation under the insurance policy because the insured failed to cooperate by appearing at trial. The action resulted in a judgment for defendant and plaintiff appealed.

On appeal, the issue was not if the trial court in the earlier action had erred in refusing defendant an additional continuance, but if, as plaintiff contended, the inadequacies of defendant's motion for a continuance barred defendant from claiming any prejudice resulting from the absence of its insured. In affirming the trial court's judgment, the court of appeal rejected plaintiff's contention by pointing out that defendant could not have made an adequate motion for continuance unless it could have shown the court that there was a reasonable assurance that the truck driver would be present at the trial at some future date. But defendant's counsel could not make this showing and so the continuance was properly denied (*252 Cal. App. 2d 698, 703)* .

California Points & Authorities

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Volume 4 Chapters 40-49 CLAIM & DELIVERY---to---CONTINUANCE
CHAPTER 48 CONTINUANCE OF PROCEEDINGS
PART II. FORMS
B. OPPOSING CONTINUANCE

4-48 California Points & Authorities § 48.37

§ 48.37 Attorney's Unavailability Does Not Require Continuance

[1] Party's Insistence on Particular Attorney

[a] FORM Attorney's Unavailability Does Not Require Continuance

[*This form should be combined with a general memorandum of points and authorities opposing a noticed motion or ex parte application for a continuance (see § 48.30) or included in an appellate brief.*]

A COURT DOES NOT ABUSE ITS DISCRETION BY DENYING A MOTION FOR CONTINUANCE BECAUSE COUNSEL IS ABSENT IF THE PARTY HAS FAILED TO ACT DILIGENTLY BY INSISTING ON ONE PARTICULAR ATTORNEY.

A. Party's Insistence on Particular Attorney. A party may be denied a continuance because of the absence of his or her attorney when he or she has shown a lack of diligence by insisting on one particular attorney (*Agnew v. Parks (1963) 219 Cal. App. 2d 696, 701, 33 Cal. Rptr. 465* ; *Flynn v. Fink (1923) 60 Cal. App. 670, 672-674, 213 P. 716*).

B. Party Has Not Established Diligence. A party may be denied a continuance on the ground that his or her attorney is unavailable when the party has not been diligent in arranging adequate representation (*Agnew v. Parks (1963) 219 Cal. App. 2d 696, 701, 33 Cal. Rptr. 465* ; *Flynn v. Fink (1923) 60 Cal. App. 670, 672-674, 213 P. 716*).

[b] Comments

[i] Use of Form

This form of points and authorities may be combined with the form in *§ 48.30* and submitted in opposition to a noticed motion or ex parte application for a continuance [*see Cal. Rules of Ct., Rule 3.1332*] on the ground of an attorney's absence, when the party seeking the continuance has not been diligent in obtaining counsel in general, or specifically, by insisting on a particular attorney. The authority in this form may also be combined with any of the authorities in [2]-[4], *below*, that address other specific situations involving absence of counsel that are not considered good cause for

continuance.

Counsel should also consider whether any of the authorities in the forms set forth in *§§ 48.31 -48.39* are applicable to the particular case, and if so, include those authorities as well. The forms in *§ 48.31* address procedural requirements that are applicable in every case and should be used to whenever the showing in support of the motion is deficient in that regard. The forms in *§§ 48.34 -48.39* address particular circumstances that have been held *not* to constitute good cause. The forms in *§§ 48.32* and *48.33* are for use to augment a memorandum opposing a continuance if the request for continuance is not made in good faith or would place undue burden on the party opposing the continuance.

In an appropriate case, these points and authorities may be used to oppose the points and authorities set out in *§ 48.14[1] -[6]*.

[ii] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, if the continuance is sought because of a the unavailability of a particular attorney, but the moving party has not been diligent in seeking other counsel, opposing counsel's argument should focus on any delay by the moving party in arranging counsel, the availability of other counsel, and the length of time the moving party has had to arrange representation.

It is also advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, or by affidavits or declarations. Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish or negate the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[iii] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[c] Discussion of Authorities

[i] Party's Insistence on Particular Attorney

The factual background of ***Agnew v. Parks*** *(1963) 219 Cal. App. 2d 696, 33 Cal. Rptr. 465* , is discussed in *§ 48.35[2][c][ii]*. In that case, plaintiff's counsel informed her, approximately three months before the date of trial, that he would not continue to represent her. On the day of trial, she requested a continuance to obtain new counsel. The court denied the motion, and when plaintiff refused to proceed, dismissed the case. Plaintiff appealed.

The court of appeal affirmed the trial court's denial of plaintiff's motion, pointing out that not only did plaintiff make no attempt to sever her connection with her former counsel, but on the contrary her primary objective during the three-month period seemed to be to compel him to represent her. The court reasoned that because in criminal cases, a defendant cannot demand the services of a particular attorney, it is obvious that a civil plaintiff who has greater control over the case and whose personal liberty is not threatened cannot demand a greater privilege (*219 Cal. App. 2d 696, 701)* .

In ***Flynn v. Fink*** *(1923) 60 Cal. App. 670, 213 P. 716* , plaintiffs sought compensation for labor performed and materials furnished. Although the case was set on July 7 for trial on December 1, defendants replaced their counsel just five days before trial, and on the day of trial, defendants' new counsel requested a continuance because they were engaged in a separate trial which would take from seven to 10 days to complete. In argument, defendants' counsel stated that the two-person firm was engaged in that trial at the time they were substituted and knew, at that time, that the trial was not likely to be completed by December 1. The trial court denied the motion for continuance, took evidence on behalf of plaintiffs, and subsequently entered judgment in favor of plaintiffs. Defendants appealed.

The court of appeal, in affirming, stated that parties do not have an absolute right to change counsel at the last minute if that change will require a continuance in order that the case may properly be prepared. Quoting from *People v. Goldenson (1888) 76 Cal. 328, 341, 19 P. 161* , the court stated that even in a criminal case, to give defendant an absolute right to select counsel, with the unlimited right to insist on continuances, would subvert the prompt administration and execution of the laws. It added that in the instant case it was not unthinkable that one of the lawyers in the two-person firm might have been spared to try defendants' case (*60 Cal. App. 670, 672-674*).

[ii] Party Has Not Established Diligence

Agnew v. Parks *(1963) 219 Cal. App. 2d 696, 33 Cal. Rptr. 465* , and ***Flynn v. Fink*** *(1923) 60 Cal. App. 670, 213 P. 716* , are discussed in [i], *above.*

[2] Substitution Is Unnecessary and Without Diligence

[a] FORM Attorney's Unavailability Does Not Require Continuance

[*This form should be combined with a general memorandum of points and authorities opposing a noticed motion or ex parte application for a continuance (see § 48.30) or included in an appellate brief.*]

A COURT DOES NOT ABUSE ITS DISCRETION BY DENYING A MOTION FOR CONTINUANCE IF NEWLY SUBSTITUTED COUNSEL IS _____ [UNPREPARED FOR *or* UNABLE TO ATTEND] THE TRIAL WHEN THE MOVING PARTY FAILS TO SHOW BOTH THE NECESSITY FOR THE SUBSTITUTION AND DILIGENCE IN FINDING THE SUBSTITUTED COUNSEL.

A. Substitution Is Unnecessary and Without Diligence. If a party requests a continuance so that newly substituted counsel can _____ [prepare for *or* attend] trial, but the party fails to show both the necessity for the substitution and diligence in finding substituted counsel, the continuance may be denied (*San Bernardino County v. Doria Mining & Eng'r Corp. (1977) 72 Cal. App. 3d 776, 783, 140 Cal. Rptr. 383* ; *Berger v. Mantle (1936) 18 Cal. App. 2d 245, 248-249, 63 P.2d 335*).

[b] Comments

[i] Use of Form

This form of points and authorities may be combined with the form in *§ 48.30* and submitted in opposition to a noticed motion or ex parte application for a continuance [*see Cal. Rules of Ct., Rule 3.1332(b)*] to give newly substituted counsel time to prepare, when the party seeking the continuance has not shown the need for the substitution or that he or she was diligent in obtaining new counsel. The authority in this form may also be combined with any of the authorities in [1], *above*, or [3]-[4], *below*, that address other specific situations involving absence or unpreparedness of counsel that are not considered good cause for continuance.

Counsel should also consider whether any of the authorities in the forms set forth in *§§ 48.31 -48.39* are applicable to

the particular case, and if so, include those authorities as well. The forms in *§ 48.31* address procedural requirements that are applicable in every case and should be used to whenever the showing in support of the motion is deficient in that regard. The forms in *§§ 48.34 -48.39* address particular circumstances that have been held *not* to constitute good cause. The forms in *§§ 48.32* and *48.33* are for use to augment a memorandum opposing a continuance if the request for continuance is not made in good faith or would place undue burden on the party opposing the continuance.

In an appropriate case, these points and authorities may be used to oppose the points and authorities set out in *§ 48.14[1]*.

[ii] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, if the continuance is sought because a newly substituted attorney, thought the substitution was unnecessary and the moving party has not been diligent in seeking other counsel, opposing counsel's argument should focus on the lack of necessity for the substitution and any delay by the moving party in arranging for new counsel.

It is also advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, or by affidavits or declarations. Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish or negate the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[iii] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[c] Discussion of Authorities

[i] Substitution Is Unnecessary and Without Diligence

The factual background of ***San Bernardino County v. Doria Mining & Eng'r Corp.*** *(1977) 72 Cal. App. 3d 776, 140 Cal. Rptr. 383* , is discussed in *§ 48.14[1][c][ii]*. In that case, the trial court denied a request by defendant's new attorney for a continuance to prepare for trial. Judgment was for plaintiff; and defendant appealed.

The court of appeal affirmed. In response to defendant's contention that trial courts should be liberal in granting continuances, the court characterized unnecessary continuances as wasteful, nonproductive, time-consuming, and a fertile ground for public criticism of the courts. After reviewing and rejecting the precedents offered for the "liberality" doctrine, the court stated, in addition, that there was no abuse of discretion in the instant case. It cited as one reason that there was no showing of good cause because defendant failed to establish that the attorney substitution was necessary or that defendant used due diligence to obtain a new attorney (*72 Cal. App. 3d 776, 783)* .

In ***Berger v. Mantle*** *(1936) 18 Cal. App. 2d 245, 63 P.2d 335* , decedent's heir filed a claim against an estate for services rendered. Plaintiff filed her claim on October 15, 1935, and it was set for trial on July 16, 1936. Defendant granted plaintiff's California attorney additional time to communicate with plaintiff in Montana from February 14, 1936,

to June 4, 1936, before answering and setting the case for trial; yet, on the day of trial, a new counsel for plaintiff appeared, having been substituted on the previous day, and moved for a continuance on the ground that he had been retained for only six days and had not had time to interview the witnesses, all of whom lived outside California, or to review the voluminous documentation. Defendant's counsel contended by affidavit that the substitution was for the purpose of delay. The trial court denied the motion and, subsequently, dismissed the action. Plaintiff appealed.

The court of appeal affirmed. The court held that the trial court had not abused its discretion in denying the motion. Plaintiff had given no information that the change was necessary. The court stated that if litigants in all cases could demand a continuance by engaging new counsel just prior to trial, they could indefinitely avoid trial of the issues (*18 Cal. App. 2d 245, 248-249)* .

[3] Alternative Representation Is Available

[a] FORM Attorney's Unavailability Does Not Require Continuance

[*This form should be combined with a general memorandum opposing a noticed motion or ex parte application for a continuance (see § 48.30) or included in an appellate brief*].

A COURT DOES NOT ABUSE ITS DISCRETION BY DENYING A MOTION FOR CONTINUANCE IF THE PARTY'S COUNSEL IS _____ [ABSENT *or* UNPREPARED] BUT THE PARTY STILL HAS OR COULD HAVE ALTERNATIVE REPRESENTATION.

A. Alternative Representation as Available. A party may be denied a continuance because counsel is _____ [absent *or* unprepared] if the party still has or could have alternative representation (*Volkering v. Allen (1950) 96 Cal. App. 2d 804, 807, 216 P.2d 552* ; *Fejer v. Paonessa (1951) 104 Cal. App. 2d 190, 194-195, 231 P.2d 507*).

[b] Comments

[i] Use of Form

This form of points and authorities may be combined with the form in *§ 48.30* and submitted in opposition to a noticed motion or ex parte application for a continuance [*see Cal. Rules of Ct., Rule 3.1332(b)*] that seeks to give counsel time to attend or prepare, when the party seeking the continuance has, or could have, alternative representation. The authority in this form may also be combined with any of the authorities in [1]-[2], *above*, or [4], *below*, that address other specific situations involving absence or unpreparedness of counsel that are not considered good cause for continuance.

Counsel should also consider whether any of the authorities in the forms set forth in *§§ 48.31 -48.39* are applicable to the particular case, and if so, include those authorities as well. The forms in *§ 48.31* address procedural requirements that are applicable in every case and should be used to whenever the showing in support of the motion is deficient in that regard. The forms in *§§ 48.34 -48.39* address particular circumstances that have been held *not* to constitute good cause. The forms in *§§ 48.32* and *48.33* are for use to augment a memorandum opposing a continuance if the request for continuance is not made in good faith or would place undue burden on the party opposing the continuance.

In an appropriate case, these points and authorities may be used to oppose the points and authorities set out in *§ 48.14[1] -[6]*.

[ii] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, if the continuance is sought because a an attorney is absent or unprepared, but the

moving party has, or could have, alternative representation, opposing counsel's argument should focus on the availability of alternative counsel.

It is also advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, or by affidavits or declarations. Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish or negate the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[iii] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[c] Discussion of Authorities

[i] Alternative Representation as Available

In ***Volkering v. Allen*** *(1950) 96 Cal. App. 2d 804, 216 P.2d 552* , plaintiff sued defendant for damages from assault and battery arising from an altercation between the parties. Twenty days before the date of the trial, defendant's counsel suffered a heart attack which prevented his working for a period of 90 days. On the day of trial, another attorney, with the same business address as that of plaintiff's attorney, appeared for plaintiff's counsel and requested a continuance. The continuance was denied, and the second attorney conducted the case on behalf of defendant. The jury rendered a verdict in plaintiff's favor and defendant appealed, contending in part that the trial court's denial of a continuance forced defendant to proceed to trial without his chosen counsel and forced the second attorney to "represent" defendant.

The court of appeal affirmed after concluding that no error of any prejudicial nature had occurred. As far as denial of the continuance was concerned, the court stated that defendant received an orderly and able presentation of his case (*96 Cal. App. 2d 804, 807)* .

In ***Fejer v. Paonessa*** *(1951) 104 Cal. App. 2d 190, 231 P.2d 507* , plaintiff, a musician, sued defendant for moneys owed arising out of defendant's production of an operetta. Intervener, the star singer, filed a complaint intervention to collect for services rendered and for the use of her gowns. Defendant sought a continuance because his attorneys were unfamiliar with the case. One attorney had stated that he was willing to accept employment only if a continuance could be obtained. A second attorney had stated that he had been approached by defendant on the day before the trial. The trial court denied the continuance and entered a judgment in favor of plaintiff and intervener. Defendant appealed. One of the grounds defendant urged was that the trial court erred in denying his motion for continuance.

The court of appeal, in affirming, applied the principle that a party cannot take advantage of the party's own lack of diligence. This case had already been continued from November 7 to November 29, giving defendant ample time to employ counsel who could have familiarized themselves with the case. Moreover, a third attorney who had represented defendant since the start of the action was present at the trial and took an active part in the proceedings (*104 Cal. App. 2d 190, 194-195)* .

[d] Additional Authorities

[i] Alternative Representation as Available

In ***Thomas v. Toppins*** *(1928) 206 Cal. 18, 272 P. 1042* , the secretary of defendant's attorney appeared on the day of trial and requested a continuance because the attorney had become ill after the case was set for trial. The trial court denied the request and proceeded to trial. Defendant appealed from a judgment in plaintiff's favor.

The Supreme Court affirmed, stating that the trial court had apparently denied the continuance because defendant had ample time after the attorney became ill to procure alternative counsel and, therefore, the trial court's action was not an abuse of discretion (*206 Cal. 18, 19)* .

[4] Attorney Is Absent or Unprepared

[a] FORM Attorney's Unavailability Does Not Require Continuance

[*This form should be combined with a general memorandum opposing a noticed motion or ex parte application for a continuance (see § 48.30) or included in an appellate brief*].

A COURT DOES NOT ABUSE ITS DISCRETION BY DENYING A MOTION FOR CONTINUANCE WHEN COUNSEL IS _____ [UNPREPARED *or* ABSENT] IF COUNSEL WAS NOT DILIGENT IN AVOIDING THE DIFFICULTY AND THE PARTY WAS NOT DILIGENT IN FINDING ALTERNATIVE COUNSEL.

A. Counsel Is Unprepared or Absent Due to Lack of Diligence. A party may be denied a continuance because counsel is _____ [unprepared *or* absent] when counsel was not diligent in avoiding the difficulty and the party was not diligent in finding alternative counsel (*Beck v. Reinholtz (1956) 138 Cal. App. 2d 719, 723, 292 P.2d 906* ; *Mann v. Pacific Greyhound Lines (1949) 92 Cal. App. 2d 439, 446, 207 P.2d 105*).

[*Optional*] **B. Conflicting Professional Engagement Is Not Sufficient.** A party may be denied a continuance because of the absence of his or her attorney if counsel has a conflicting professional engagement and has not been diligent in attempting to avoid the conflict and the party was not diligent in finding alternative counsel (*Mann v. Pacific Greyhound Lines (1949) 92 Cal. App. 2d 439, 446, 207 P.2d 105* ; *Bixby v. Hotchkis (1945) 72 Cal. App. 2d 368, 371-372, 164 P.2d 808*).

[b] Comments

[i] Use of Form

This form of points and authorities may be combined with the form in *§ 48.30* and submitted in opposition to a noticed motion or ex parte application for a continuance [*see Cal. Rules of Ct., Rule 3.1332(b)*] on the ground of an attorney's absence or unpreparedness, when the attorney has not been diligent in seeking to prepare or to avoid a conflict with another professional engagement and the party seeking the continuance has not been diligent in seeking to engage alternative representation. Although none of the authorities if this form discuss the party's lack of diligence, if the party had shown that he or she had been diligent in finding alternative counsel, it would appear that a court should protect him or her from prejudice [*see, e.g.,* *Vann v. Shilleh (1975) 54 Cal. App. 3d 192, 197-199, 126 Cal. Rptr. 401* , discussed in *§ 48.14[1]*[c][i], which states that it is a court's duty to protect a party from counsel's improper withdrawal]. Nevertheless, these authorities do support the point that counsel's lack of diligence is sufficient ground to deny a continuance.

The authority in this form may be combined with any of the authorities in [1]-[3], *above*, that address other specific types of absence of counsel that are not considered good cause for continuance.

Counsel should also consider whether any of the authorities in the forms set forth in *§§ 48.31 -48.39* are applicable to the particular case, and if so, include those authorities as well. The forms in *§ 48.31* address procedural requirements that are applicable in every case and should be used to whenever the showing in support of the motion is deficient in that regard. The forms in *§§ 48.34 -48.39* address particular circumstances that have been held *not* to constitute good cause. The forms in *§§ 48.32* and *48.33* are for use to augment a memorandum opposing a continuance if the request for continuance is not made in good faith or would place undue burden on the party opposing the continuance.

In an appropriate case, these points and authorities may be used to oppose the points and authorities set out in *§ 48.14[1], [3], [6]*.

[ii] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, if the continuance is sought because of the unavailability or unpreparedness of the moving party's counsel, opposing counsel's argument should focus the opportunities moving party's counsel had to resolve the conflict or prepare and his or her lack of diligence in doing so.

It is also advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, or by affidavits or declarations. Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish or negate the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[iii] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[c] Discussion of Authorities

[i] Counsel Is Unprepared or Absent Due to Lack of Diligence

In ***Beck v. Reinholtz*** *(1956) 138 Cal. App. 2d 719, 292 P.2d 906* , plaintiffs filed an action to quiet title to property in Orange County. On March 4, defendants filed a notice of motion for summary judgment and for an order dismissing plaintiffs' complaint. Notice of hearing on the motion, set for March 18, was served on plaintiffs that same day. On March 17, plaintiffs' counsel filed a notice of motion for continuance of the hearing on the motion for summary judgment. Counsel stated in an affidavit that he first learned on March 14 that the file containing the pleadings in the action was not in his possession, that he was without the information necessary to respond to the motion, that he had requested copies of the complaint and motion for summary judgment from the court clerk on March 15, that plaintiffs now reside 150 miles from Orange County, and that he required two additional weeks to prepare the necessary documents. On the date of the hearing for the motion for summary judgment, the trial court granted plaintiffs' counsel five days to file points and authorities in support of the motion for continuance. Counsel did not respond and on March 25, the motion for summary judgment was granted and plaintiff's action dismissed. Plaintiffs appealed.

The court of appeal affirmed, saying that whether or not plaintiffs' counsel stated facts sufficient to support a continuance was within the discretion of the trial court and, under the circumstances shown, one cannot say that it

abused its discretion (*138 Cal. App. 2d 719, 723)* .

In ***Mann v. Pacific Greyhound Lines*** *(1949) 92 Cal. App. 2d 439, 207 P.2d 105* , plaintiffs sued a bus company and the driver of a second vehicle for damages resulting from death and serious injuries arising out of a vehicle collision. On August 4, after one continuance, the trial was set for September 31. On that day, an attorney representing plaintiff's counsel requested another continuance because plaintiffs' counsel believed that counsel for the bus company would continue the case and plaintiff's counsel was also concurrently engaged in another jury trial. The trial court denied the continuance and dismissed the case. On plaintiff's motion for relief under *Code Civ. Proc. § 473*, counsel for the bus company submitted an affidavit, corroborated by the second defendant's counsel, which stated that he had first proposed a continuance on August 22, but when he learned on August 25 that the second defendant would not agree to continue, he so informed plaintiffs' counsel. The trial court denied plaintiffs' motion for relief; and plaintiffs appealed.

The court of appeal affirmed. Distinguishing cases in which the parties had very strong reasons for not being present, the court of appeal stated that if a party chooses to be elsewhere on the day of trial or counsel takes on another professional engagement, that excuse is not valid. The court cited *Tobias v. Adams (1928) 206 Cal. 88, 89, 273 P. 579* , in which the party told the trial court that the attorneys who represented him were busy elsewhere, and on appeal, the Supreme Court said simply that the showing made was insufficient to justify a continuance (*92 Cal. App. 2d 439, 446)* .

[ii] Conflicting Professional Engagement Is Not Sufficient

Mann v. Pacific Greyhound Lines *(1949) 92 Cal. App. 2d 439, 207 P.2d 105* , is discussed in [i], *above.*

In ***Bixby v. Hotchkis*** *(1945) 72 Cal. App. 2d 368, 164 P.2d 808* , plaintiff sued defendant for the conversion of capital stock. The trial was scheduled for October 20 with notice served on October 4. On the day of trial, plaintiff's counsel was represented by another attorney solely for the purpose of moving for a continuance on the ground that plaintiff's counsel had begun a trial in municipal court on the previous day. The trial court denied the request and ultimately rendered a judgment for defendants. Plaintiff appealed.

The court of appeal affirmed. The technical basis for its decision was that because the trial involved only an issue of res judicata, plaintiff's rights were not prejudiced by this attorney's absence, but the court repeatedly pointed out the failure of plaintiff's counsel to attempt to avoid the case conflict. Counsel made no attempt to continue the municipal court trial or to absent himself from it even though there was evidence that the municipal court judge was willing to cooperate in resolving the conflict (*72 Cal. App. 2d 368, 371-372)* .

California Points & Authorities

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Volume 4 Chapters 40-49 CLAIM & DELIVERY---to---CONTINUANCE
CHAPTER 48 CONTINUANCE OF PROCEEDINGS
PART II. FORMS
B. OPPOSING CONTINUANCE

4-48 California Points & Authorities § 48.38

§ 48.38 Change in Status of Case Is Not Significant Enough to Warrant Continuance

[1] FORM Change in Status of Case Is Not Significant Enough to Warrant Continuance

[*This form should be combined with a general memorandum of points and authorities opposing a noticed motion or ex parte application for a continuance (see § 48.30) or included in an appellate brief.*]

A COURT DOES NOT ABUSE ITS DISCRETION BY DENYING A MOTION FOR A CONTINUANCE WHEN THE ONLY CHANGE IN THE STATUS OF THE _____ [CASE *or* PLEADINGS] IS INSIGNIFICANT.

A. Insignificant Change. A change in the status of a case or its pleadings that is insignificant and does not change the posture of the case does not warrant a continuance (*Cal. Rules of Ct., Rule 3.1332(c)(7)*; *Day v. Rosenthal (1985) 170 Cal. App. 3d 1125, 1174-1175, 217 Cal. Rptr. 89*).

[2] Comments

[a] Use of Form

This form of points and authorities may be combined with the forms in *§§ 48.30* and *48.31[1]* and submitted in opposition to a noticed motion or ex parte application for a continuance [*see Cal. Rules of Ct., Rule 3.1332(b)*] on the ground of a significant change in the status of the case or the pleadings, when the change involved is actually not significant. Optional Paragraph B is for use when the change was stipulated to by the parties, including the party seeking the continuance.

Counsel should also consider whether any of the authorities in the forms set forth in *§§ 48.31 -48.39* are applicable to the particular case, and if so, include those authorities as well. The forms in *§ 48.31* address procedural requirements that are applicable in every case and should be used to whenever the showing in support of the motion is deficient in that regard. The forms in *§§ 48.34 -48.39* address particular circumstances that have been held *not* to constitute good cause. The forms in *§§ 48.32* and *48.33* are for use to augment a memorandum opposing a continuance if the request for

continuance is not made in good faith or would place undue burden on the party opposing the continuance.

In an appropriate case, these points and authorities may be used to oppose the points and authorities set out in *§ 48.15*.

[b] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, if the continuance is sought because of an amendment to the pleadings that changed the posture of the case very little, opposing counsel's argument should focus the history of the pleadings and discovery in the case to show that the change is indeed insignificant and could reasonably have been anticipated by the moving party s counsel, who with appropriate diligence would have been prepared for them without the need of continuance.

It is also advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, or by affidavits or declarations. Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish or negate the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Insignificant Change

Day v. Rosenthal *(1985) 170 Cal. App. 3d 1125, 217 Cal. Rptr. 89* , involved consolidated actions by an actress, the estate of her late husband and manager, her son, and various corporate entities they controlled against former attorneys for malpractice, breach of fiduciary duties, fraud, injunctive relief, and to compel turn over of trust funds. Trial was set by stipulation for March 4, 1974. In December, 1973, after the trial date had been set and when some of the consolidated cases were more than five years old, defendant moved for continuance on the grounds that he needed to conduct additional discovery, a stipulated change in the pleadings by the addition of negligence claims was significant enough to require continuance, and the fact that counsel selected by his malpractice insurers wanted to take a more active part in the case. The trial court denied the request for continuance and judgment in excess of $25 million was awarded to plaintiffs. Defendants appealed, contending among other things, that the trial court had abused its discretion in failing to grant the continuance.

The court of appeal affirmed. Because the court of appeal agreed with the trial court that discovery defendant wanted was too voluminous, too late, and too onerous, no continuance to conduct that discovery was required (*170 Cal. App. 3d 1125, 1172-1173)* . Regarding defendant's claim that a continuance was warranted under former Cal. Rules of Ct., Appen., Div. I, § 9(b)(5), because of the addition of negligence causes of action, the court of appeal agreed with the trial court's finding that the amended pleadings didn't change the posture of the case one iota. The substance of the case was not changed (*170 Cal. App. 3d 1125, 1174)* . Further, the court of appeal said it appeared that "significant" change within the meaning of former Cal. Rules of Ct., Appen., Div. I, § 9(b)(5), is one that occurs as a result of a court order,

rather than because of a change to which the parties have agreed. The amended pleadings in this case hardly fit the *emergency* contemplated by the standard in former Cal. Rules of Ct., Appen., Div. I, § 9. The "new" allegations of negligence were not ordered by the court; they were permitted by stipulation, and they would seem to be *anticipated* the consequences of that agreement (*170 Cal. App. 3d 1125, 1175)* . The court of appeal also agreed with the trial court that the expanded involvement of one of defendant's attorneys around the time the continuance was sought was not the kind of change contemplated by the standard. Those attorneys sat back and for roughly five years thought they had no problems and couldn't care less. That was the choice they made, and they have to live with it (*170 Cal. App. 3d 1125, 1174-1175)* .

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Volume 4 Chapters 40-49 CLAIM & DELIVERY---to---CONTINUANCE
CHAPTER 48 CONTINUANCE OF PROCEEDINGS
PART II. FORMS
B. OPPOSING CONTINUANCE

4-48 California Points & Authorities § 48.39

§ 48.39 Other Action Will Not Resolve All Important Issues

[1] FORM Other Action Will Not Resolve All Important Issues

[*This form should be combined with a general memorandum opposing a noticed motion or ex parte application for a continuance (see § 48.30) or included in an appellate brief.*]

A COURT DOES NOT ABUSE ITS DISCRETION BY DENYING A MOTION FOR A CONTINUANCE ON THE GROUND THAT ANOTHER ACTION IS PENDING IF THE OTHER ACTION WOULD NOT RESOLVE ALL [IMPORTANT] ISSUES IN THE INSTANT CASE.

A. Failure to Resolve Important Issues. A party may be denied a continuance on the ground that another action is pending if that party fails to show that the other action would resolve an important issue or issues necessary for the decision in the instant case (*Farmland Irrigation Co. v. Dopplmaier (1957) 48 Cal. 2d 208, 215-216, 308 P.2d 732* ; *Pesquera del Pacifico v. Superior Court (1949) 89 Cal. App. 2d 738, 741, 201 P.2d 553*).

[*Optional*] **B. Failure to Resolve All Issues.** A party may be denied a continuance on the ground that another action is pending if that party fails to establish that the other action would settle the controversy by resolving all of the issues in the instant case (*Kalmus v. Kalmus (1951) 103 Cal. App. 2d 405, 415-417, 230 P.2d 57*).

[2] Comments

[a] Use of Form

This form of points and authorities may be combined with the form at § 48.30[1] and submitted in opposition to a noticed motion or ex parte application for a continuance [*see Cal. Rules of Ct., Rule 3.1332(b)*] when a party is seeking a continuance on the ground that another action is pending if the other action would not resolve all, or all important, issues in the case sought to be continued. This form should also be combined with all of the forms set forth in *§§ 48.31 -48.39* that are applicable to the particular case.

In an appropriate case, these points and authorities may be used to oppose the points and authorities set out in *§ 48.16*.

[b] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, if the continuance is sought because another action is pending, counsel's argument should focus on issues not involved in the other action that need to be resolved in the instant case and should stress how important those issues are to resolution of the instant case.

It is also advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, or by affidavits or declarations. Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish or negate the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Failure to Resolve Important Issue

In ***Farmland Irrigation Co. v. Dopplmaier*** *(1957) 48 Cal. 2d 208, 308 P.2d 732* , plaintiff sought a declaratory judgment that it was entitled to manufacture and sell certain equipment under a patent license agreement and a declaration of its duties under the royalty provisions of the license agreement. Plaintiff was the assignee of the corporation which made the agreement with the equipment's inventor; defendant was the inventor's assignee. Prior to this action, defendant had sued plaintiff's assignor in a federal court in Oregon for an accounting of the royalties due under the license. The federal court had denied the plaintiff's motion to intervene made on the ground that plaintiff had bound itself to pay any liability adjudged against its assignor. Plaintiff then brought this action in which the trial court determined that plaintiff was entitled to manufacture and sell the equipment and interpreted the royalty clause in a way favorable to plaintiff. Defendant appealed, contending in part that the trial court erred in denying its motion for a stay of the proceedings pending a final judgment in the Oregon action.

In affirming, the Supreme Court stated that in the exercise of its discretion to stay a proceeding, the trial court should consider:

- The importance of discouraging multiple litigation,
- The importance of avoiding unseemly conflicts with courts of other jurisdictions, and
- Whether or not the rights of the parties can best be determined by the court of the other jurisdiction due to:
    - The nature of the subject matter,

- Availability of witnesses, and
- The stage to which the proceedings in the other court has already advanced.

Citing the leading case of ***Pesquera del Pacifico v. Superior Court*** *(1949) 89 Cal. App. 2d 738, 741, 201 P.2d 553* (discussed *below*), the Court held that a stay may be denied if all the issues in the present action are not involved in the other pending case. The Court pointed out that the Oregon action did not call for an adjudication of the assignability of the license and plaintiff's rights thereunder. A stay of the present proceedings would therefore not only bring these issues no closer to determination, but would compel plaintiff to await a judgment that could not respond to its needs (*48 Cal. 2d 208, 215-216)* .

Pesquera del Pacifico v. Superior Court *(1949) 89 Cal. App. 2d 738, 201 P.2d 553* , was an application for a writ of prohibition in which petitioner sought to prevent further proceedings in an action in which plaintiffs had sued petitioner for damages resulting from petitioner's seizure of certain raw shelled clams. Petitioner claimed that a similar action was pending between the parties in Mexico. The trial court had denied petitioner's motion for a continuance, and the court of appeal denied the writ. It found that petitioner failed to show the following (*89 Cal. App. 2d 738, 741)* :

- If any or all of the issues in the Mexican law suit were similar to or identical with any of the issues in the California case or that the Mexican decision would be res judicata as to these,
- That the action could not be tried as conveniently in California as in Mexico, and
- That the issue of title to the clams in dispute had been raised or adjudicated in the Mexican action.

[b] Failure to Resolve All Issues

The factual background of ***Kalmus v. Kalmus*** *(1951) 103 Cal. App. 2d 405, 230 P.2d 57* , is discussed in *§ 48.35[2][c][ii]*. In that case, plaintiff requested a continuance because of illness and because a case pending in Massachusetts would determine the validity of a Massachusetts divorce decree that was the first stage in the conflict between the parties. The trial court denied the motion and the court of appeal affirmed.

In regard to the pending case in Massachusetts, the court found that the trial court did not abuse its discretion in denying a continuance on this ground because the Massachusetts action was brought after the California action and resolution of the California case, unlike completion of the Massachusetts case, would resolve all the issues raised by both cases (*103 Cal. App. 2d 405, 415-417)* .

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4-48 California Points & Authorities § 48.40

§ 48.40 Continuance for Additional Evidence to Oppose Summary Judgment Motion Requires New Evidence Be Material

[1] FORM Continuance for Additional Evidence to Oppose Summary Judgment Motion Requires New Evidence Be Material

[*This form should be combined with a general memorandum opposing a noticed motion or ex parte application for a continuance (see § 48.30) or included in an appellate brief.*]

A COURT DOES NOT ABUSE ITS DISCRETION BY DENYING A MOTION TO CONTINUE A SUMMARY JUDGMENT MOTION FOR PURPOSES OF OBTAINING ADDITIONAL EVIDENCE TO OPPOSE THE MOTION IF THE EVIDENCE SOUGHT IS IMMATERIAL.

A. Evidence Must Be Material. While *Code of Civil Procedure § 437c(h)* mandates a continuance of a summary judgment hearing upon a good faith showing by affidavit that a continuance is needed to obtain facts essential to justify opposition to the motion, the continuance should be denied if the evidence sought is immaterial (*Yuzon v. Collins (2004) 116 Cal. App. 4th 149, 168, 10 Cal. Rptr. 3d 18)* ; or where a defendant fails to file such an affidavit (*Oldcastle Precast, Inc. v. Lumbermens Mutual Casualty Co. (2009) 170 Cal. App. 4th 554, 577, 88 Cal. Rptr. 3d 363)* .

[2] Comments

This form of points and authorities may be combined with the forms in *§§ 48.30* and *48.31[1]* and submitted in opposition to a noticed motion or ex parte application for a continuance [see *Cal. Rules of Ct., Rule 3.1332(b)*] on the ground that additional evidence needs to be obtained to oppose a summary judgment motion [see *Code Civ. Proc. § 437c(h)*].

[3] Discussion of Authorities

In ***Yuzon v. Collins*** *(2004) 116 Cal. App. 4th 149* , 10 Cal. Rprt. 3d 18, an invitee was bitten by a dog at an apartment complex. The plaintiff filed an action against the landlord. In his opposition to the summary judgment motion, plaintiff

requested a continuance of the summary judgment hearing. Plaintiff contended that his animal behavior expert, Richard H. Polsky, Ph.D., needed more time to review discovery materials and prepare his declaration.

After the plaintiff's continuance request was denied and the landlord's motion for summary judgment was granted, the injured party sought review.

The appellate court affirmed the denial of the continuance, holding that the power to determine when a continuance should be granted is generally within the discretion of the court, and there is no right to a continuance as a matter of law. However, *Code Civ. Proc. § 437c(h)* mandates a continuance of a summary judgment hearing upon a good faith showing by affidavit that a continuance is needed to obtain facts essential to justify opposition to the motion. In this case, plaintiff sought a continuance to obtain Dr. Polsky's expert declaration regarding the landlord's' actual knowledge of the dog's vicious propensities. While the subject matter (Collins' knowledge of the dog's vicious propensities) was essential to plaintiff's opposition to the summary judgment motion, the trial court was ultimately proven correct in concluding Dr. Polsky's declaration has no material relevance regarding that issue. Dr. Polsky's declaration, when reviewed by the trial court with regard to the motion for reconsideration, failed to create a triable issue of material fact. Accordingly, there was no error in denying the motion for continuance (*116 Cal. App. 4th 149, 167)* .

In affirming, the court determined that the landlord only had a duty of care to protect the invitee if he had actual knowledge of the dog's vicious nature in time to protect against the dangerous condition on his property. He did not have a duty to inspect the premises. The evidence showed that the landlord allowed the tenants to have a dog. The landlord thought that the tenants still owned a dog that had died. He was not aware that they owned the dog involved in the incident. The dog in question was kept inside of the apartment, and the landlord rarely visited. The dog's act of pushing on a door and barking constituted normal animal behavior; it was not enough to put the landlord on notice of the dog's existence or its allegedly violent propensities. The landlord was not aware of any acts of aggression by the dog. Finally, the motion to reconsider was properly denied because an expert witness did not raise an issue of fact about the landlord's knowledge.

In ***Oldcastle Precast, Inc. v. Lumbermens Mutual Casualty Co.*** *(2009) 170 Cal. App. 4th 554, 88 Cal. Rptr. 3d 363* , defendants contended that the trial court abused its discretion by refusing to grant defendants' request for a continuance of the hearing on the summary judgment motion and the opportunity to revise their separate statement. The appellate court noted that a party opposing summary judgment does not have an automatic right for a second chance to prepare a responsive separate statement or present evidence; instead, the party must demonstrate a reason for the trial court to exercise its discretion, by offering a good faith showing by affidavit that a continuance is needed to obtain facts essential to justify opposition to the motion. Where no such affidavit is filed, and where defendants do not contend they needed a continuance to obtain essential facts, a trial court does not abuse its discretion by declining to grant a continuance (*170 Cal. App. 4th 554, 577-578)* .

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4-48 California Points & Authorities §§ 48.41-48.59

[Reserved]

§§ 48.41[Reserved]

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C. REPLY MEMORANDUM SUPPORTING CONTINUANCE

4-48 California Points & Authorities § 48.60

§ 48.60 Continuance May Not Be Conditioned on Payment of Attorney's Fees

[1] FORM Continuance May Not Be Conditioned on Payment of Attorney's Fees

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	REPLY MEMORANDUM OF POINTS AND AU-
Plaintiff,	)	THORITIES IN SUPPORT OF MOTION FOR CON-
vs.	)	TINUANCE
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Dept: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

THE TRIAL COURT HAS NO AUTHORITY TO REQUIRE _____ [*specify moving party, e.g.,* PLAINTIFF *or* DEFENDANT] TO PAY _____ [*specify adverse party, e.g.,* DEFENDANT'S *or* PLAINTIFF'S] ATTORNEY'S FEES AS A CONDITION OF CONTINUANCE.

A. Continuance May Not Be Conditioned on Payment of Attorney's Fees. *Section 1024 of the Code of Civil Procedure* does not give the court discretion to condition a continuance on payment of attorneys' fees; and unless a trial court makes a finding of subjective bad faith on the part of the party requesting the continuance, no attorney fee award can be made pursuant to *Section 128.5 of the Code of Civil Procedure* (*Levine v. Pollack (1995) 37 Cal. App. 4th 129,*

139, 43 Cal. Rptr. 2d 491).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*party's status and name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in a reply memorandum in support of a noticed motion or ex parte application for a continuance [*see Cal. Rules of Ct., Rule 3.1332(b)*] when the party resisting the continuance requests payment of its attorney fees as a condition for the continuance. This form assumes there is no evidence of subjective bad faith or frivolous delay on the part of the party seeking the continuance that would. The authorities in this form should be combined with all of the forms set forth in *§§ 48.10* -48.17 that are applicable to the particular case.

[b] Argument

Counsel should add argument linking the points in this form, and in the other forms combined with this form, with the facts of his or her case. For example, counsel's argument should focus on the lack of any evidence of the moving party's subjective bad faith or frivolous delaying tactics in the court's file or in declarations opposing the continuance, or if there is such evidence, submit declarations countering the allegation.

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For related legal background, research and procedural guides, and forms of notices of motion regarding imposition of attorney's fees and costs, with related declarations and orders, see California Forms of Pleading and Practice, Ch. 174, *Costs and Attorney's Fees* (Matthew Bender).

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Continuance May Not Be Conditioned on Payment of Attorney's Fees

Levine v. Pollack *(1995) 37 Cal. App. 4th 129, 43 Cal. Rptr. 2d 491* , was an action by an individual and her wholly-owned corporation against two of their former attorneys for damages resulting from malpractice. After approximately six continuances, on joint motion by the parties, another continuance was granted to April 27, 1992. In February, 1992, plaintiffs' counsel was allowed to withdraw; and plaintiff sought other counsel, who advised her that if he had to try the matter, he needed at least a 60-day continuance beyond April 27 to adequately prepare the case. Plaintiff, in propria persona, filed a motion to continue the trial and set it for the day of trial. Counsel for one defendant was resigning to take a job as in-house counsel for a corporation and indicated that if the matter was continued, new counsel would have to take over the file and estimated new counsel's cost to prepare for trial at $15,000 to $25,000. Counsel for the other defendant indicated that he would have to rework much of his preparation. At the time, *Code Civ. Proc. § 1024* gave the court discretion to require payment of expenses occasioned by the postponement as a condition of granting one. The court gave plaintiff the choice of having the case dismissed or granting the continuance conditioned on plaintiff's paying the cost of defendants' counsel to again prepare for trial. Plaintiff agreed to pay the attorneys' fees, indicating that she didn't think she had much choice in the matter. The court granted the continuance, basing the order for attorneys' fees on *Code Civ. Proc. § 1024*, and continued the case until June 29. On June 4, the court set the amount of fees to be paid, vacated the June trial date, and scheduled a motion to dismiss for October 20 if the fees had not been paid by that time. The fees were not paid. The trial date was vacated; and on February 17, 1993, the court, on its own motion, dismissed the case for failure to be brought to trial within 5 years. Plaintiffs appealed.

The court of appeal reversed both the order of dismissal and the order imposing attorneys' fees. Until 1986, *Code Civ. Proc. § 1024* provided that *costs* occasioned by the postponement of a trial could be imposed as a condition of granting the postponement. Case law interpreting *Code Civ. Proc. § 1024* at that time held that attorneys' fees were not costs which could be imposed as a condition for granting a continuance [*DeCesare v. Lembert (1983) 144 Cal. App. 3d 20, 23, 192 Cal. Rptr. 354]* . The court of appeal found dictum to the contrary in *Medford v. Superior Court (1983) 140 Cal. App. 3d 236, 241-242, 189 Cal. Rptr. 227* to be questionable authority (*37 Cal. App. 4th 129, 135-137*). The court noted that the intent of the legislature in enacting *Code Civ. Proc. § 128.5* (attorney's fees as sanctions for frivolous or bad faith delaying tactics) was to authorize monetary sanctions not then available. The court considered other statutory amendments, including the 1987 amendment to *Civ. Code § 1717* to refer to attorney's fees as *other* costs, and the 1993 amendment to *Code Civ. Proc. § 1033.5(a)(10)(A)* to include attorney's fees provided by contract or by law among the items allowable as costs under *Code Civ. Proc. § 1032*. The court stated it had no doubt that the Legislature was aware of its incorporation of attorney fees into the statutory scheme providing for costs within the same chapter as *Code Civ. Proc. § 1024* and of the juxtaposition of costs and attorney fees within that statutory scheme, and concluded that by the amendment to *Code Civ. Proc. § 1024* changing the term *costs* to *expenses* the legislature did not intend a trial court to have discretion to award attorney fees as a condition to a continuance pursuant to *Code Civ. Proc. § 1024*. The court noted that the record was devoid of any evidence suggesting subjective bad faith on plaintiff's part and that no such findings were made by the trial court. Thus, they could not uphold the award of attorney fees based on *Code Civ. Proc. § 128.5* (*37 Cal. App. 4th 129, 139*).

Regarding defendants' contention that plaintiffs agreed to pay their attorneys' fees and were estopped to contest the condition, the court of appeal noted that this argument applied only to the individual plaintiff. The corporation's presence was not recognized at the hearing on the continuance because defendants had successfully obtained dismissal of the corporate plaintiff by reason of the loss of its corporate powers (later revived). The court of appeal did not find any real agreement by the individual plaintiff to pay attorney fees, noting that her agreement was reluctant, she was given no option, she was representing herself, and that she was apparently misled by the court regarding its ability to order attorney fees as a condition for continuance (*37 Cal. App. 4th 129, 139*).

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§ 50.10 Failure to Allege or Prove All Elements of Cause of Action for Damages for Breach of Contract

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

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[a] Elements to Be Pleaded

[b] Requirement of Alleging Agreement With Certainty

[4] Additional Authorities

[a] Elements to Be Pleaded

[b] Requirement of Alleging Agreement With Certainty

§ 50.11 All Elements of Cause of Action for Damages for Breach of Contract Are Alleged or Proven

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

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[a] Elements That State Cause of Action

[b] Every Term of Contract Need Not Be Stated

[c] Written Contract May Be Pleaded Without Attaching Copy to Complaint

[4] Additional Authorities

[a] Elements That State Cause of Action

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§ 50.20 Failure to Plead Plaintiff's Performance or Excuse for Nonperformance of Condition Precedent

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

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[a] Performance or Excuse for Nonperformance of Conditions Precedent Must Be Alleged

[b] Alleging Performance of Conditions Precedent

[c] Excuses for Nonperformance Must Be Alleged Specifically

[d] Condition Must Be Specifically Pleaded When It Is Event

[e] Promise to Pay When Able

[f] Existence of Fund From Which Plaintiff Is to Be Paid

[g] Request That Defendant Perform Contract

[h] Specific Allegations Control General Pleadings

[4] Additional Authorities

[a] Performance or Excuse for Nonperformance of Conditions Precedent Must Be Alleged

[b] Condition Must Be Specifically Pleaded When It Is Event

[c] Existence of Fund From Which Plaintiff Is to Be Paid

§ 50.21 Performance of Condition Precedent Is Sufficiently Pleaded by General Allegation

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Pleading Performance of Conditions

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[a] Pleading Performance of Conditions

§ 50.22 Excuse for Nonperformance of Condition Precedent Is Sufficiently Shown by Prevention

[1] FORM

[2] Comments

[a] Use of Form

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[c] Related Pleading and Practice Chapters

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[3] Discussion of Authorities

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[a] Means of Prevention Need Not Be Alleged

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[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

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[3] Discussion of Authorities

[a] Anticipatory Breach Is Excuse for Nonperformance

§ 50.24 Obligor's Statement of Intended Breach of Contractual Promise, Which Substantially Impairs Value of Contract, Constitutes Repudiation

[1] FORM

[2] Comments

[a] Use of Form

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[c] Related Pleading and Practice Chapters

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[3] Discussion of Authorities

[a] Obligor's Statement of Intended Breach Constitutes Repudiation

§§ 50.25-50.29 [Reserved]

§ 50.30 Contract Was Substantially Performed

[1] FORM

[2] Comments

[a] Use of Form

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[a] Substantial Performance of Contract

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[a] Substantial Performance of Contract

§ 50.31 Contract Was Not Substantially Performed

[1] FORM

[2] Comments

[a] Use of Form

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[a] General Rule Requiring Full Performance

[b] Substantial Performance Is Question of Fact

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[d] Substantial Performance Exists Only When Deviations Are Inadvertent

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[f] Accumulation of Trivial Defects Negates Substantial Performance

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§ 50.40 Strict Performance Was Waived

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[a] Use of Form

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[a] Waiver Is Relinquishment of Right

[b] Waiver by Party Who Would Benefit From Waived Provision

[c] Waiver Precludes Assertion of Breach of Waived Condition

[d] Continuing to Accept Performance With Knowledge of Previous Breach May Constitute Waiver of Breach

[e] Condoning Late Periodic Payments Is Waiver of Time-of-the-Essence Clause

[f] Acceptance of Building Is Waiver of Defects

[g] Waiver Is Created by Conduct

[4] Additional Authorities

[a] Acceptance of Building Is Waiver of Defects

§ 50.41 Strict Performance Was Not Waived

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

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[3] Discussion of Authorities

[a] Waiver Is Question of Fact

[b] Doubtful Case Must Be Decided Against Waiver

[c] Burden of Proof Is on Party Asserting Waiver

[d] Waiver Must Always Be Intentional With Knowledge of All Facts

[e] Waiver Must Be Clearly Expressed

[f] Mere Payment or Acceptance of Work Under Construction Contract Does Not Constitute Waiver

[g] When Obligation Is Continuous, Waiver to Certain Time Does Not Preclude Assertion of Subsequent Breach

[h] Allowance of Performance After Completion Date Does Not Constitute Waiver of Breach

§§ 50.42-50.49 [Reserved]

§ 50.50 Failure to Plead Breach by Defendant

[1] Breach Must Be Alleged

[a] FORM

[b] Comments

[i] Use of Form

[ii] Argument

[iii] Split of Authorities

[iv] Related Pleading and Practice Chapters

[v] Related Memoranda

[c] Discussion of Authorities

[i] Requirement of Alleging Breach

[ii] Pleading Defendant's Breach

[iii] Requirement of Stating Facts of Breach Unequivocally

[iv] Requirement of Alleging Promise and Its Nonperformance

[v] Breach Alleged in Conclusionary Language

[d] Additional Authorities

[i] Requirement of Alleging Breach

[2] Demand for Performance Must Be Pleaded When No Time Was Specified for Performance

[a] FORM

[b] Comments

[i] Use of Form

[ii] Argument

[iii] Related Pleading and Practice Chapters

[iv] Related Memoranda

[c] Discussion of Authorities

[i] Demand for Performance Must Be Made

[3] Nonpayment Must Be Pleaded in Action Based on Promise to Pay

[a] FORM

[b] Comments

[i] Use of Form

[ii] Argument

[iii] Related Pleading and Practice Chapters

[iv] Related Memoranda

[v] Opposing Memoranda

[c] Discussion of Authorities

[i] Allegation of Nonpayment Is Necessary

[ii] Alleging Only That Amount Is Owing Is Insufficient

§ 50.51 Allegation of Nonpayment Is Not Necessary to Plead Defendant's Breach When Contract Is Not Only for Payment of Money

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Allegation of Nonpayment Is Not Necessary When Contract Is Not Only for Payment of Money

§ 50.52 Defendant's Breach Established by Admission of Owing Certain Sum

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Defendant Admits Owing Part of Amount Due

§ 50.53 Defendant's Breach by Nonpayment Is Not Cured Until Check Is Paid

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Obligation Is Not Discharged Until Check Is Paid

[b] Creditor Did Not Direct Payment by Mail

[c] Obligation Is Not Discharged When Check Is Lost in Mail

[4] Additional Authorities

[a] Obligation Is Not Discharged Until Check Is Paid

§§ 50.54-50.59 [Reserved]

§ 50.60 Failure to Plead Damages

[1] Damages Must Be Pleaded

[a] FORM

[b] Comments

[i] Use of Form

[ii] Argument

[iii] Related Pleading and Practice Chapters

[iv] Related Memoranda

[v] Opposing Memoranda

[c] Discussion of Authorities

[i] Damages Must Be Alleged

[ii] Special Damages Must Be Pleaded With Particularity

[iii] Damages Must Be Legally Actionable

[iv] Damages Cannot Be Recovered for Injury to Reputation

[d] Additional Authorities

[i] Damages Must Be Legally Actionable

[2] Uncertain Damages Not Necessarily Resulting From Breach Must Be Alleged

[a] FORM

[b] Comments

[i] Use of Form

[ii] Argument

[iii] Related Pleading and Practice Chapters

[iv] Related Memoranda

[c] Discussion of Authorities

[i] Damages Not Necessarily Resulting From Breach Must Be Alleged

[d] Additional Authorities

[i] Damages Not Necessarily Resulting From Breach Must Be Alleged

§ 50.61 Damages Are Sufficiently Alleged

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Sufficient Allegation of General Damages

[b] Nature and Extent of Damages Need Not Be Alleged

[c] Damages Naturally Resulting From Breach May Be Alleged Generally

[d] Improper Averment of Damages Is Not Important

§§ 50.62-50.99 [Reserved]

§ 50.100 Plaintiff Cannot Sue as Promisee for Benefit of Donee Third Party

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Promisee for Donee Third Party's Benefit Is Not Damaged by Breach

[4] Additional Authorities

[a] When Third Party Is Not Creditor Beneficiary

§ 50.101 Plaintiff Failed to Exhaust Arbitration Remedies

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Court Must Determine Arbitrability of Dispute

[b] Failure to Exhaust Arbitration Remedies

[c] Expiration of Agreement Does Not Terminate Arbitration Rights

[d] Meaning of Collective Bargaining Agreement Is Arbitration Matter

[e] Arbitration Procedures Are Not Avoided by Artful Pleading

[f] Service-of-Suit Clause Does Not Conflict With Arbitration Clause

[4] Additional Authorities

[a] Court Must Determine Arbitrability of Dispute

[b] Failure to Exhaust Arbitration Remedies

§ 50.102 Plaintiff Failed to Allege or Prove License as Contractor

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Contractor Must Allege or Prove Existence of License

[b] Completion of Contract by Unlicensed Party

[c] Dissolution of Licensed Partnership Terminates License

[d] Undisclosed Agent's Lack of License Bars Recovery

[e] Knowledge That Contractor Lacked License

[f] Bus. & Prof. Code § 7031 Applies to Contractor's Assignee

[g] Painting Contractor Must Be Licensed

[h] No Exception for Isolated Transaction

[i] Fraud Claim Is Barred

[j] Purpose of Statute

[4] Additional Authorities

[a] Contractor Must Allege or Prove Existence of License

[b] Painting Contractor Must Be Licensed

§ 50.103 Plaintiff Failed to Allege or Prove Required License

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Validity of Contracts by Unlicensed Persons

[b] Contract of Unlicensed Dealer of Farm Produce Is Not Enforceable

§§ 50.104-50.109 [Reserved]

§ 50.110 Defendant Waived Right to Require Arbitration

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Right to Arbitrate May Be Waived

[b] Waiver of Arbitration Is Question of Fact

§ 50.111 Contractor Unlicensed at Time of Contract's Execution May Sue If Licensed During Performance

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Contractor Unlicensed at Time of Contract's Execution but Licensed During Performance

[4] Additional Authorities

[a] Contractor Unlicensed at Time of Contract's Execution but Licensed During Performance

§ 50.112 Substantial Compliance With Contractors' License Law Is Sufficient

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Purpose of Licensing Requirement

[b] Substantial Compliance With Licensing Requirement Is Sufficient

[c] Elements of Substantial Compliance

§ 50.113 Plaintiff Need Not Allege or Prove License When Contract Is Outside Scope of Licensing Statute

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] License Is Unnecessary When Contract Is Outside Scope of Licensing Statute

§ 50.114 Defendant Cannot Rely on Licensing Requirement to Avoid Payment to Innocent Party

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Party Cannot Rely on Licensing Requirement to Avoid Payment to Innocent Party

§§ 50.115-50.119 [Reserved]

§ 50.120 Action Is Barred by Statute of Limitations

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Accrual of Cause of Action

[b] Running of Limitation Period

[c] Requirement That Writing Contain Contract

[d] Requirement of Indication of Acceptance

[e] Plaintiff's Writings Cannot Prove Defendant's Acceptance

[f] Limitation Period Governing Open Book Account Is Inapplicable

[g] Tolling of Limitation Period

[4] Additional Authorities

[a] Running of Limitation Period

[b] Limitation Period Governing Open Book Account Is Inapplicable

§ 50.121 Contract Provision Supersedes Statute of Limitations

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

[3] Discussion of Authorities

[a] Contract May Shorten Limitation Period

[b] Period Fixed Must Not Be Unreasonable

[c] Reasonableness Equates With Effective Remedy

§§ 50.122-50.129 [Reserved]

§ 50.130 Fraud Tolls Running of Statutory Limitation Period

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Fraud Tolls Running of Statute

[b] Breach Accomplished Secretly

[4] Additional Authorities

[a] Fraud Tolls Running of Statute

§ 50.131 Statutory Limitation Period Runs From Occurrence of Event When Contract of Warranty Relates to Future Event

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Running of Limitation Period in Action Involving Warranty

[b] Limitation Period Tolled

§ 50.132 Four Year Limitation Period Applies to Action on Contract Evidenced by Writing

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Letter Accepted by Party Is Instrument in Writing

[b] Receipt for Money Containing Promise Is Instrument in Writing

[c] Action by Third Party Beneficiary Is on Written Contract

[d] Action by Employees Involving Collective Bargaining Agreement

[e] Escrow Instructions in Writing Constitute Written Contract

[f] Blanks in Contract

[4] Additional Authorities

[a] Limitation Period for Written Contract

§ 50.133 Signature of Party to Be Charged Is Not Required for Four-Year Limitation Period to Apply

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Signature of Party

[4] Additional Authorities

[a] Signature of Party

§ 50.134 Implied Promise Is Part of Written Instrument

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Promise Inferred From Writing

§ 50.135 Limitation Period Has Not Run on Installment Obligation

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Running of Limitation Period

[b] Acceleration Clause Affects Running of Limitation Period

[c] Services Paid for Monthly

[d] Rent Payable in Installments

[e] Monthly Payments for Life

§ 50.136 Action on Promise to Pay When Able Accrues When Debtor Is Able to Pay

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Accrual of Action on Promise to Pay When Able

§ 50.137 Employee's Action for Constructive Breach of Employment Contract Accrues on Actual Termination Rather Than When Intolerable Working Conditions Arise

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Accrual of Action Based on Constructive Termination of Employment

§§ 50.138-50.149 [Reserved]

§ 50.150 Agreement for Illegal Purpose Is Not Enforceable

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] What Is Unlawful Contract

[b] Illegal Contract Is Not Enforceable

[c] Contract for Object Prohibited by Penal Law Is Void

[d] Contract Void When its Purpose Is to Defraud Creditors

[e] Claim Is Based on Illegal Contract

[f] Bargain Requiring Nondisclosure of Discreditable Facts Is Illegal

[g] Illegal Consideration Is Inseparable

[4] Additional Authorities

[a] What is Unlawful Contract

[b] Illegal Contract Is Not Enforceable

[c] Claim Is Based on Illegal Contract

[d] Bargain Requiring Nondisclosure of Discreditable Facts Is Illegal

[e] Illegal Consideration Is Inseparable

§ 50.151 Gambling Contract Is Not Enforceable

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Wagering Contracts Are Not Enforceable

[b] Contract Founded on Gambling Consideration Is Unenforceable

[c] Checks Cashed for Gambling Purposes

[d] Money Lent for Gambling Purposes

[4] Additional Authorities

[a] Wagering Contracts Are Not Enforceable

[b] Money Lent for Gambling Purposes

§§ 50.152-50.159 [Reserved]

§ 50.160 Party May Maintain Action When Aid of Illegal Agreement Is Not Required

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Action Is Permitted When Aid of Illegal Agreement Is Not Required

§ 50.161 Relief May Be Granted Under Illegal Contract

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Public Importance of Discouraging Prohibited Transactions

[b] Relief May Be Granted Under Illegal Contract

[4] Additional Authorities

[a] Relief May Be Granted Under Illegal Contract

§ 50.162 Party Justifiably Ignorant of Contract's Illegality May Recover for Performance

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Recovery Permitted for Party Who Is Justifiably Ignorant

[b] Recovery Permitted When Defendant Misrepresented Facts

§ 50.163 Contract Can Be Enforced Insofar as Illegal Consideration Can Be Severed

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Illegal Consideration Can Be Severed and Contract Can Be Enforced

§§ 50.164-50.169 [Reserved]

§ 50.170 Minor Is Without Capacity to Enter Into Contract Relating to Real Property or to Personal Property Not in Minor's Immediate Possession and Control

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Disaffirmance Is Not Necessary

[b] Void Contracts Are Not Ratifiable

[c] Direction to Pay Wages to Another Is Void

§ 50.171 Contract Was Disaffirmed by Minor

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Minor's Power to Disaffirm Certain Contracts

[d] Related Pleading and Practice Chapters

[e] Related Memoranda

[f] Opposing Memoranda

[3] Discussion of Authorities

[a] Disaffirmance Is Rescission

[b] Restoration of Consideration Is Not Necessary

[c] Manner of Disaffirming Contract

[d] Minor Is Not Estopped From Disaffirming Contract

[e] Mature Appearance Does Not Estop Minor From Disaffirming Contract

[f] False Representation of Age Does Not Preclude Disaffirmance

§§ 50.172-50.179 [Reserved]

§ 50.180 Minor Is Not Permitted to Disaffirm Certain Contracts for Necessaries

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Implied Contract to Pay for Necessaries

[b] Lodging Is Necessary

[c] Attorney's Services Are Necessary

§ 50.181 Minor Is Not Permitted to Disaffirm Certain Court-Approved Contracts

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Court Approval of Contract Precludes Disaffirmance During and After Minority

[b] Approval Encompasses Options for Extension

§§ 50.182-50.189 [Reserved]

§ 50.190 Recovery Is Precluded by Unconscionability Doctrine

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Right to Present Evidence Regarding Unconscionability

[b] Indicia of Unconscionability

[c] Contract of Adhesion Defined

[d] Unconscionability Applied to Commercial Code Transactions

[e] Relevant Considerations Regarding Unconscionability of Price Term

[f] Market Price Set by Oligopoly Is Subject to Scrutiny

[g] Unconscionability of Warranty Disclaimer

[h] Unconscionable Limitation or Exclusion of Consequential Damages Under Commercial Code

[i] Unconscionability Is Question of Law

[4] Additional Authorities

[a] Indicia of Unconscionability

[b] Contract of Adhesion Defined

[c] Unconscionable Limitation or Exclusion of Consequential Damages Under Commercial Code

§§ 50.191-50.199 [Reserved]

§ 50.200 Adhesion Contract Is Not Unconscionable and Defendant's Expectations Are Not Reasonable

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Test for Enforceability of Adhesion Contract

[b] Expectations of Nonparty Are Irrelevant

[c] Tests for Reasonableness of Expectations

[4] Additional Authorities

[a] Test for Enforceability of Adhesion Contract

§ 50.201 Party Claiming Unconscionability Must Show That Alternative Sources Were Unavailable

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Available Alternative Sources of Supply Defeat Claim of Unconscionability

[b] Claim of Unconscionability Must Show Unavailability of Alternative Sources of Supply

[4] Additional Authorities

[a] Available Alternative Sources of Supply Defeat Claim of Unconscionability

§ 50.202 Price for Goods or Services Was Not Unconscionable

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[c] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Price Was Not Unconscionable

§§ 50.203-50.209 [Reserved]

§ 50.210 Delay of Performance Is Defense When Time Is of Essence of Contract

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Delay of Performance by Plaintiff When Time Is of Essence Constitutes Defense

§ 50.211 Defendant's Failure or Delay in Performance Is Excused When Caused by Acts of Plaintiff

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Definition of Creditor in Civ. Code § 1511

[d] Related Pleading and Practice Chapters

[e] Related Memoranda

[3] Discussion of Authorities

[a] Delay in Performance Is Excused When Caused by Acts of Obligee

[b] Contractual Stipulation Precluding Excuse of Prevention Is Not Valid

[c] Failure to Apply for Extension of Time Is Not Basis for Liability When Performance Was Delayed by Obligor

[d] Denial of Access to Land Is Prevention

§§ 50.212-50.229 [Reserved]

§ 50.230 Performance Was Prevented by Operation of Law

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Impossibility as Excuse for Nonperformance

[d] Related Pleading and Practice Chapters

[e] Related Memoranda

[f] Opposing Memoranda

[3] Discussion of Authorities

[a] Nonperformance Is Excused When Performance Is Prevented by Operation of Law

§ 50.231 Performance Was Prevented or Delayed by Irresistible, Superhuman Cause or Act of God

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Irresistible, Superhuman Cause Defined

§ 50.232 Performance Was Impossible Because of Impracticability

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Nonperformance Is Excused When Performance Is Impracticable

[4] Additional Authorities

[a] Nonperformance Is Excused When Performance Is Impracticable

§ 50.233 Performance Was Impossible Due to Death of Person or Destruction of Specific Thing Necessary for Performance

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Destruction or Nonexistence of Subject Matter

[b] Impossibility Due to Death of Person

[c] Impossibility Due to Incapacity of Person

§§ 50.234-50.239 [Reserved]

§ 50.240 Defense of Prevention of Performance by Operation of Law Is Not Applicable to Prevention by Judicial Order Obtained by Private Litigant

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Defense of Prevention of Performance by Operation of Law Is Applicable Only to Governmental Interference

[b] Defense of Impossibility by Operation of Law Is Not Applicable to Prevention by Judicial Order Obtained by Private Litigant

§ 50.241 Reasonably Anticipated Natural Phenomenon Is Not Irresistible, Superhuman Cause Excusing Failure to Perform

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Reasonably Anticipated Natural Event Is Not Irresistible, Superhuman Cause

[b] Reasonably Anticipated High Water Is Not Irresistible, Superhuman Cause

§ 50.242 Inability of Obligor Does Not Constitute Impossibility

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Burden of Proving Impossibility

[b] Inability of Obligor Does Not Constitute Impossibility

[c] Failure to Obtain Consent of Third Party

§ 50.243 Increased Expense or Difficulty Does Not Make Performance Impossible or Impracticable Unless Extreme or Unreasonable

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Increased Expense or Difficulty Does Not Necessarily Excuse Performance as Impossible or Impracticable

§ 50.244 Death of Obligor Does Not Terminate Personal Service Contract That Others Can Perform

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Personal Service Contract Is Not Terminated by Death of Contracting Party When Others Can Perform

§§ 50.245-50.249 [Reserved]

§ 50.250 Recovery Is Precluded by Frustration-of-Purpose Doctrine

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Performance Is Excused When Purpose of Contract Is Frustrated

[4] Additional Authorities

[a] Performance Is Excused When Purpose of Contract Is Frustrated

§§ 50.251-50.259 [Reserved]

§ 50.260 Risk of Frustrating Event Was Reasonably Foreseeable

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Defense of Frustration Is Not Available When Risk of Frustrating Event Was Reasonably Foreseeable

§ 50.261 Parties Assumed Risk of Frustrating Event

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Defense of Frustration Is Not Applicable When Parties Assumed Risk

§ 50.262 Value of Counterperformance Was Not Totally Destroyed

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Defense of Frustration Is Not Available Unless Value of Counterperformance Was Totally Destroyed

§ 50.263 Purpose Allegedly Frustrated Was Not Contemplated by Both Parties

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Defense of Frustration Is Not Applicable Unless Frustrated Purpose Was Contemplated by Both Parties

§§ 50.264-50.269 [Reserved]

§ 50.270 Recovery Is Precluded by Failure of Consideration

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Failure of Consideration Is Ground for Rescission or Defense in Action on Contract

[b] Failure of Consideration Is Available as Defense Despite Failure to Rescind

[c] Failure of Consideration Must Be Based on Events Subsequent to Making of Contract

[d] Annexation of Unwarranted Condition to Offer of Performance Constitutes Failure of Consideration

[e] Inability to Deliver Thing Sold Constitutes Failure of Consideration

[f] Failure to Make Progress Payments in Building Contract Is Failure of Consideration

[4] Additional Authorities

[a] Failure to Make Progress Payments in Building Contract Is Failure of Consideration

§§ 50.271-50.279 [Reserved]

§ 50.280 Recovery Is Not Precluded When Failure of Consideration Is Not Shown

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Burden of Proof of Failure of Consideration Is on Defendant

[b] Deviations From the Contract in Trivial Matters Do Not Constitute Failure of Consideration

[c] No Failure of Consideration When Consideration Proves Worthless

[d] Partial Failure of Consideration Is Not Complete Defense

[e] Delay in Performance Ordinarily Is Not Failure of Consideration

[4] Additional Authorities

[a] No Failure of Consideration When Consideration Proves Worthless

§§ 50.281-50.299 [Reserved]

§ 50.300 Change of Venue Is Proper--Complaint Alleges Improper Venue or Does Not Allege Venue

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Contract Must State Place of Performance Before Action May Be Brought in County of Performance

[b] Place Contract Was Made

[c] Defendant's Right to Have Action Tried in County of Residence

[d] Requirement That Venue Be Proper in All Causes of Action

[e] Contract's Statement of Place of Execution Is Not Conclusive

[f] Inquiry and Notification Relative to Credit Are Not Part of Contract

[g] Contractual Venue Selection Clause Requiring Improper Venue Is Contrary to Public Policy and Void

[4] Additional Authorities

[a] Defendant's Right to Have Action Tried in County of Residence

[b] Contract's Statement of Place of Execution Is Not Conclusive

§ 50.301 Change of Venue Is Proper--No Special Contract Designates Place of Performance

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Special Contract Defined

[b] Civil Code Section 1489 Does Not Have Effect of Special Contract

[c] Check Is Not Special Contract

[d] Contract Containing Address of Insured Does Not Make Contract Performable in County of Insured's Address

[4] Additional Authorities

[a] Contract Must State Place of Performance Before Action May Be Brought in County of Performance

§§ 50.302-50.309 [Reserved]

§ 50.310 Current Venue Is Proper--Contract Was Not Made in Presence of Contracting Parties and Is Deemed Made Where Acceptance Was Given or Placed in Mail

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Propriety of Chosen Venue

[b] Contract Action Commenced in One of Several Proper Counties

[c] Acceptance by Mail

[d] Contract Subject to Approval Is Made Where Acceptance Is Mailed

[4] Additional Authorities

[a] Contract Subject to Approval Is Made Where Acceptance Is Mailed

§ 50.311 Current Venue Is Proper--Obligation Was Incurred Where and When Option Contract Was Made

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Obligation Is Incurred When Option Contract Is Made

[b] Contract With Public Body Is Made When Public Body Accepts Written Bid

§ 50.312 Current Venue Is Proper--Unilateral Contract Was Made at Place of Performance

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Unilateral Contract Was Made at Place of Performance

[b] Broker's Listing Agreement Is Unilateral Contract

§ 50.313 Current Venue Is Proper--Contract Made by Telephone Was Made in County Where Offeree Accepted

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Place Contract by Telephone Is Made

§ 50.314 Current Venue Is Proper--Suretyship Contract Was Made Where Creditor Accepted Guaranty

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Suretyship Contract Is Made Where Creditor Accepts Guaranty

[4] Additional Authorities

[a] Suretyship Contract Is Made Where Creditor Accepts Guaranty

§ 50.315 Current Venue Is Proper--Check Is Contract for Venue Purposes

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Check Is Contract

§ 50.316 Current Venue Is Proper--Contract Containing Condition Precedent Was Made Where Condition Precedent Was Performed

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Place Condition Precedent Was Performed Is Place Contract Was Made

[b] Condition Precedent of Insurance Premium Payment

§ 50.317 Current Venue Is Proper--Specification of Place of Performance Was Incorporated by Reference

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Incorporation of Place of Performance by Reference

[4] Additional Authorities

[a] Incorporation of Place of Performance by Reference

§ 50.318 Current Venue Is Proper--Special Contract Specifies Place of Performance

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Special Contract Specifying Place of Performance

[b] Place Specified for Payment Is Place of Performance

[c] Place for Payment of Note Is Place of Performance

[d] Letterhead Specified Place of Performance

§ 50.319 Current Venue Is Proper--Supplemental Agreement or Contract Correcting Errors Does Not Affect Venue

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Supplemental Agreement Is Not Controlling When Action Is Founded on Original Agreement's Obligations

[b] Contract Correcting Minor Errors Does Not Affect Venue

[4] Additional Authorities

[a] Supplemental Agreement Is Not Controlling When Action Is Founded on Original Agreement's Obligations

§ 50.320 Current Venue Is Proper--Place for Corporation's Performance of Obligation That Was Breached Is Decisive Factor

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Where Corporation's Obligation Was to Be Performed Is Determinative

[b] Burden of Proof and Practice of Parties

§ 50.321 Current Venue Is Proper--Code of Civil Procedure Section 395(b) Applies to Action by Consumer or Action Against Consumer

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Code of Civil Procedure Section 395(b) Applies to Action by Consumer or Action Against Consumer

[b] Statutory Reference to "Buyer or Lessee" Means Consumer

§§ 50.322-50.349 [Reserved]

§ 50.350 Complaint Shows Only Agreement to Agree

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Agreement to Agree Is Determined by Reference to Parties' Expressed Intentions

[b] No Remedy for Failure to Agree

[c] Pleader's Interpretation of Ambiguous Agreement Must Be Alleged

[d] Interpretation Is Judicial Function

[e] Intent That Agreement Be Formalized

[f] Words Are to Be Given Their Ordinary Meanings

[g] Condition of Attorney's Approval Is Implied

[h] When Leave to Amend Need Not Be Given

[4] Additional Authorities

[a] Agreement to Agree is Determined by Reference to Parties' Expressed Intentions

[b] Interpretation Is Judicial Function

[c] Words Are to Be Given Their Ordinary Meanings

§ 50.351 No Contract Was Formed Because Acceptance Was Not Effective Until After Offer Was Revoked

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Memoranda

[3] Discussion of Authorities

[a] Acceptance Is in Transmission When Offeree Relinquishes Control

[b] Postmark Is Substantial Evidence

[c] Exercise of Option

§ 50.352 Qualified Acceptance Was Not Effective Except as Counteroffer

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Memoranda

[3] Discussion of Authorities

[a] No Contract Is Formed by Qualified Acceptance

§ 50.353 Posting Revised Consumer Contract on Web Site Does Not Make New Terms Enforceable

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Memoranda

[3] Discussion of Authorities

[a] Posting Revised Consumer Contract on Web Site Does Not Make New Terms Enforceable

§§ 50.354-50.359 [Reserved]

§ 50.360 Complaint Shows Contract to Negotiate Agreement

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Contract to Negotiate Agreement May Be Formed and Breached Like any Other Contract

§§ 50.361-50.369 [Reserved]

§ 50.370 No Valid Contract Exists Without Mutuality of Obligation

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Requirement of Mutuality of Obligation

[b] Contract Lacks Consideration

[c] Unrestricted Right to Withdraw

[4] Additional Authorities

[a] Requirement of Mutuality of Obligation

§§ 50.371-50.379 [Reserved]

§ 50.380 Lack of Mutuality of Obligation Is Immaterial to Executed Contract

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Requirement of Mutuality Is Not Applicable to Executed Contract

[b] Plaintiff Is Entitled to Full Recovery on Executed Contract

[4] Additional Authorities

[a] Requirement of Mutuality Is Not Applicable to Executed Contract

§ 50.381 Doctrine of Mutuality Does Not Apply to Unilateral Contracts

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Unilateral Contract Defined

[b] Doctrine of Mutuality Is Not Applicable to Unilateral Contracts

§ 50.382 Right to Terminate Contract on Specified Conditions Does Not Render Contract Unenforceable

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Right to Terminate Contract on Specified Conditions Does Not Render Contract Unenforceable

§ 50.383 Mutuality of Obligation Is Not Required When Consideration Exists

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Mutuality of Obligation Is Not Required When Consideration Exists

§§ 50.384-50.389 [Reserved]

§ 50.390 Contract Cannot Be Ascertained Whether Oral, Written, or Implied by Conduct

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Insufficiency of Contract Allegations

[4] Additional Authorities

[a] Insufficiency of Contract Allegations

§ 50.391 Complaint Is Based on Instrument in Writing That Does Not Constitute Contract

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] When Written Instrument Is Contract

[b] Letters Are Not Written Instruments

[4] Additional Authorities

[a] Consideration Required

§ 50.392 Complaint Fails to Allege Consideration for Oral Contract

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Consideration for Oral Contract Must Be Alleged

§§ 50.393-50.399 [Reserved]

§ 50.400 Consideration Need Not Be Pleaded When Contract Is Written

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Consideration for Written Instruments Need Not Be Alleged

[b] When Instrument in Writing Is Considered Contract

[4] Additional Authorities

[a] Consideration for Written Instruments Need Not Be Alleged

§ 50.401 Allegations of Terms of Oral Contract Show Consideration

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Allegations of Terms of Oral Contract Show Consideration

§ 50.402 Failure to Allege Specific Duration of Oral Commercial Agreement Does Not Render Complaint Fatally Defective

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Pleading Specific Duration of Oral Commercial Agreement

§§ 50.403-50.409 [Reserved]

§ 50.410 Cause of Action Is Based on Promissory Estoppel

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Promise May Be Binding Without Consideration Under Promissory Estoppel Doctrine

[b] Pleading Elements of Promissory Estoppel

[c] Requirement That Injustice Be Unavoidable Except by Enforcing Promise

[4] Additional Authorities

[a] Pleading Elements of Promissory Estoppel

[b] Requirement That Injustice Be Unavoidable Except by Enforcing Promise

§§ 50.411-50.419 [Reserved]

§ 50.420 Complaint Fails to Allege Elements of Promissory Estoppel

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Elements of Promissory Estoppel

[b] Mere Expression of Intent Is Not Promise

[c] Requirement of Definite and Substantial Action

[d] Promissory Estoppel Is Not Applicable When Reliance Is Result of Bargaining

[4] Additional Authorities

[a] Elements of Promissory Estoppel

§§ 50.421-50.429 [Reserved]

§ 50.430 Contract Providing for Performance to Party's Satisfaction Is Not Illusory

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Contract Providing for Performance to Party's Satisfaction Is Not Illusory

[b] Reasonable-Person Standard Applies to Commercial Satisfaction Clause

[c] Good-Faith Standard Applies When Party's Judgment Is Involved

[4] Additional Authorities

[a] Contract Providing for Performance to Party's Satisfaction Is Not Illusory

[b] Good-Faith Standard Applies When Party's Judgment Is Involved

§ 50.431 Contract Is Not Illusory Merely Because Seller Unilaterally Determines Price

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Contract Providing That Seller May Unilaterally Determine Price Is Not Illusory

§ 50.432 Unilateral Contract Is Not Illusory When One Party Has Implied Power to Terminate or Modify It, If Exercise Is Subject to Limitations

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Unilateral Contract Is Not Illusory When One Party Has Implied Power to Terminate or Modify It, If Exercise Is Subject to Limitations

§§ 50.433-50.449 [Reserved]

§ 50.450 Obligation Sued On Was Supplanted by New Obligation

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Contract Was Supplanted by New Obligation

§ 50.451 Contract Is Unenforceable Against Defendant Because New Debtor Was Substituted for Defendant

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] New Debtor Was Substituted for Old Debtor

[4] Additional Authorities

[a] New Debtor Was Substituted for Old Debtor

§ 50.452 Plaintiff Was Substituted as New Creditor With Intent to Transfer Original Creditor's Rights to Plaintiff

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] New Creditor Was Substituted for Old Creditor

§§ 50.453-50.459 [Reserved]

§ 50.460 Alleged Novation Contract Fails to Conform to General Contract Rules

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Lack of Mutual Assent

[b] Lack of Consideration

[4] Additional Authorities

[a] Lack of Mutual Assent

§ 50.461 Novation by Substitution of New Obligation Is Not Shown

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Lack of Intent to Substitute New Obligation

[b] Burden of Proof

[4] Additional Authorities

[a] Lack of Intent to Substitute New Obligation

[b] Burden of Proof

§ 50.462 Novation by Substitution of New Debtor Is Not Shown

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Lack of Intent to Release Old Debtor

[b] Mere Acceptance of Payments From Another Debtor Is Insufficient to Release Old Debtor

[4] Additional Authorities

[a] Lack of Intent to Release Old Debtor

§ 50.463 Creditor Rescinded Acceptance of New Debtor Under Novation Agreement

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

§ 50.464 Past Forgiveness of Installments Does Not Constitute Execution of Oral Agreement to Reduce Future Installments Under Written Contract

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Oral Modification Lacking Consideration Is Executed Contract Only When Obligee Accepts Performance in Accordance With Terms of Modification

[b] Past Forgiveness of Installments Due Does Not Constitute Executed Oral Agreement to Reduce Future Payments

§§ 50.465-50.469 [Reserved]

§ 50.470 Contract Was Rescinded or Abandoned by Mutual Consent

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Release From Obligations

[b] Consideration for Mutual Rescission or Abandonment

[c] Written Contract May Be Rescinded or Abandoned by Oral Agreement

[d] Abandonment or Rescission May Be Implied by Conduct of Parties

[e] Abandonment or Rescission May Be Implied by Subsequent Negotiations for New Contract

[f] Abandonment or Rescission May Be Implied by Acquiescence in Other Party's Refusal to Comply

§§ 50.471-50.479 [Reserved]

§ 50.480 Intent to Rescind or Abandon Contract Was Not Mutual

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Intent to Rescind or Abandon Must Be Mutual

[b] Termination of Contract Because of Other Party's Noncompliance Is Not Mutual Abandonment or Rescission

[c] Repossession of Property Does Not Necessarily Indicate Consent to Rescission

[4] Additional Authorities

[a] Intent to Rescind or Abandon Must Be Mutual

[b] Repossession of Property Does Not Necessarily Indicate Consent to Rescission

§§ 50.481-50.499 [Reserved]

§ 50.500 Contract Is Ambiguous

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Contract Is Ambiguous When Susceptible to Two Different Meanings

[b] Right to Introduce Evidence Concerning Ambiguous Contract

[4] Additional Authorities

[a] Right to Introduce Evidence Concerning Ambiguous Contract

§ 50.501 Contract Is Uncertain as to Material Features

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Whether Agreement Created Legal Obligation Is Question of Law

[b] Contract Unenforceable in Absence of Meeting of Minds

[4] Additional Authorities

[a] Contract Unenforceable in Absence of Meeting of Minds

§ 50.502 Contract Stipulations Generally Are Interpreted as Covenants, Not Conditions Precedent

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Stipulations Must Be Construed as Covenants When Possible

[b] Condition That Third Party Take Action Must Be Construed as Covenant

[c] Stipulations Are Covenants When Forfeiture or Inequitable Consequences Is Involved

[4] Additional Authorities

[a] Stipulations Must Be Construed as Covenants When Possible

§§ 50.503-50.509 [Reserved]

§ 50.510 Contract Is Not Ambiguous

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Meaning of Unambiguous Contract Is Question of Law

[4] Additional Authorities

[a] Meaning of Unambiguous Contract Is Question of Law

§ 50.511 Plaintiff's Construction of Ambiguous Contract Must Be Accepted

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Plaintiff's Construction of Ambiguous Contract Must Be Accepted

[4] Additional Authorities

[a] Plaintiff's Construction of Ambiguous Contract Must Be Accepted

§§ 50.512-50.519 [Reserved]

§ 50.520 Oral Contract Was Modified by Written Consent

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Modification Defined

[b] Oral Contract May Be Modified by Written Agreement Without New Consideration

§ 50.521 Written Contract Was Modified Pursuant to Its Own Terms

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Written Contract May Expressly Provide for Modification

[b] Modification Pursuant to Contract Provision

§ 50.522 Written Contract Was Modified by Written Agreement or by Oral Agreement Supported by New Consideration

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Modification of Contracts

[d] Related Pleading and Practice Chapters

[e] Related Memoranda

[3] Discussion of Authorities

[a] Modification of Written Contract by Oral Agreement Supported by New Consideration

§ 50.523 Written Contract Was Modified by Executed Oral Agreement

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Executed Oral Agreement Is Sufficient to Modify Written Contract Without Consideration

[b] Performance by Promisee Alone Is Sufficient When Oral Modification Is Supported by Consideration

[c] Effect of Contract Provision Requiring Written Modification

[d] Nonperformance Is Execution of Oral Agreement Not to Perform

[e] Burden of Proof

[4] Additional Authorities

[a] Executed Oral Agreement Is Sufficient to Modify Written Contract Without Consideration

[b] Performance by Promisee Alone Is Sufficient When Oral Modification Is Supported by Consideration

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5-50 California Points & Authorities § 50.01

§ 50.01 Scope of Chapter

This chapter contains memoranda for use in actions for damages for breach of contract, with the exception of actions involving the sale of goods, which are primarily covered in Ch. 206, *Sales* .

Part II includes the following forms:

- Subpart A contains forms supporting or opposing contentions relating to the elements necessary to plead and prove a cause of action for damages for breach of contract, including contentions relating to the plaintiff's performance or excuse for nonperformance of conditions precedent, substantial performance by each party, waiver of strict performance, the defendant's breach, and the plaintiff's damages [§ 50.10 et seq.].

- Subpart B contains forms supporting or opposing contentions relating to the following defenses that may be pleaded and proved in an action for contract damages:

  - Plaintiff's standing to sue on the contract [§ 50.100 et seq.].

  - Lapse of the statute of limitations [§ 50.120 et seq.].

  - Application of the illegal purpose doctrine [§ 50.150 et seq.].

  - Contracts with minor defendants [§ 50.170 et seq.].

  - Unconscionability [§ 50.190 et seq.].

  - Plaintiff's actions caused defendant's breach in performance [§ 50.210 et seq.].

  - Other events caused defendant's performance to be impossible or impracticable [§ 50.230 et seq.].

- The frustration of the purpose of the contract [§ 50.250 et seq.].
- Failure of consideration [§ 50.270 et seq.].

- Subpart C contains forms supporting or opposing contentions relating to the proper venue of an action for damages for breach of contract [§ 50.300 et seq.].

- Subpart D contains forms supporting or opposing contentions relating to the existence of a contract on the following grounds:

  - Offer and acceptance [§ 50.350 et seq.].
  - Mutuality of obligation [§ 50.370 et seq.].
  - Requirements particular to written or oral contracts [§ 50.390 et seq.].
  - Recovery based on application of the Promissory Estoppel doctrine [§ 50.410 et seq.].
  - Illusory contracts [§ 50.430 et seq.].
  - Novation of contracts [§ 50.450 et seq.].
  - Mutual rescission or abandonment of contracts [§ 50.470 et seq.].

- Subpart E contains forms supporting or opposing contentions relating to the interpretation of a contract, including contentions relating to the resolution of an ambiguous contract [§ 50.500 et seq.] and modification of the contract [§ 50.520 et seq.].

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5-50 California Points & Authorities § 50.02

§ 50.02 Governing Statutes

[1] In General

Contracts in general are governed by the basic contract rules set out in *Civ. Code § 1549 et seq.* Obligations in general are governed by *Civ. Code § 1427 et seq.*, while obligations arising from particular transactions are governed by *Civ. Code § 1738 et seq.*

Statutes governing the capacity of minors to make contracts are set out in *Fam. Code § 6700 et seq.* Statutes governing the capacity of persons of unsound mind to make contracts are in *Civ. Code § 38 et seq.* and *Prob. Code § 810 et seq.*, and are discussed in Ch. 117, *Insane and Incompetent Persons* .

Contracts for the sale of goods are governed by *Com. Code § 2101 et seq.* Points and authorities concerning these types of contracts are discussed in Ch. 206, *Sales* .

Gov. Code § 810 et seq., commonly known as the Government Claims Act (or Tort Claims Act), applies to a claim for damages based on breach of a contract by the state or a local public entity [*City of Stockton v. Superior Court (2007) 42 Cal. 4th 730, 734, 737-740, 68 Cal. Rptr. 3d 295, 171 P.3d 20]* . Therefore, "all claims for money or damages against the state ... on express contract" and all such claims against a local public entity are required to be presented in accordance with a prescribed procedure, not later than one year after the accrual of the cause of action [*Gov. Code §§ 905, 905.2(b)(3), 911.2(a)*]. No suit for money or damages may be brought against the state or local public entity "on a cause of action for which a claim is required to be presented in accordance with ... [the prescribed procedure] until a written claim therefor has been presented to the public entity and has been acted upon ... or has been deemed to have been rejected" [*Gov. Code § 945.4*]. For discussion of the prescribed claim procedure [*see generally Gov. Code § 900 et seq.*] and related memoranda, see Ch. 196, *Public Entities* .

[2] Venue

Venue in contract actions generally (except consumer actions and actions against corporations) is governed by *Code Civ. Proc. § 395(a)*.

Venue in a consumer action is governed by *Civ. Code § 1812.10* if the action arises from a retail installment sale, or by *Civ. Code § 2984.4* if the action arises from a transaction subject to the Rees-Levering Motor Vehicle Sales and Finance Act, or by *Code Civ. Proc. § 395(b)* if the action arises from an offer or provision of goods, services, loans or extensions of credit intended primarily for personal, family or household use, other than an obligation described in *Civ. Code § 1812.10* or *2984.4*, or arises from a transaction consummated as a proximate result of either an unsolicited telephone call made by a seller engaged in the business of consummating transactions of that kind or a telephone call or electronic transmission made by the buyer or lessee in response to a solicitation by the seller.

Venue for actions against corporations, including actions based on contract, is governed by *Code Civ. Proc. § 395.5*.

A contractual venue selection clause designating a venue improper under statute is void and unenforceable as contrary to public policy [*General Acceptance Corp. v. Robinson (1929) 207 Cal. 285, 289, 277 P. 1039* ; *Arntz Builders v. Superior Court (2004) 122 Cal. App. 4th 1195, 1204, 19 Cal. Rptr. 3d 346* ; *Alexander v. Superior Court (2003) 114 Cal. App. 4th 723, 732, 8 Cal. Rptr. 3d 111]* . Likewise, a contractual waiver of a statutory exception to venue selection rules is void [*Arntz Builders v. Superior Court (2004) 122 Cal. App. 4th 1195, 1204, 1206-1207, 19 Cal. Rptr. 3d 346]* . However, statutory venue arguments may be waived by delay in asserting them once a lawsuit has been filed [*Newman v. County of Sonoma (1961) 56 Cal. 2d 625, 628, 15 Cal. Rptr. 914* ; *Arntz Builders v. Superior Court (2004) 122 Cal. App. 4th 1195, 1204, 19 Cal. Rptr. 3d 346* ; *Ventura Unified School District v. Superior Court (2001) 92 Cal. App. 4th 811, 815, 112 Cal. Rptr. 2d 260]* . Whether a contract may validly specify venue in only one of multiple venues that would be proper under the statute has not been conclusively resolved [*Arntz Builders v. Superior Court (2004) 122 Cal. App. 4th 1195, 1202 n.5, 19 Cal. Rptr. 3d 346]* .

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§ 50.03 How to Use the Forms in This Chapter

[1] Page Limits

One of the more significant drafting requirements to keep in mind is page limits: supporting and opposing memoranda must not exceed 15 pages (20 pages for a summary judgment motion or summary adjudication motion). Exhibits, declarations, attachments, a table of contents, a table of authorities, and the proof of service are not included in the page limitation. A reply or closing memorandum may not exceed 10 pages [*Cal. Rules of Ct., Rule 3.1113(d)*]. A party desiring to file a longer memorandum must obtain leave of court [*see Cal. Rules of Ct., Rule 3.1113(e)*]. These and other drafting requirements are discussed in detail in *Ch. 1, Writing Legal Memoranda and Briefs, § 1.05*.

[2] Using the Forms to Build a Draft Memorandum

The forms included in this chapter are designed to be combined with other forms to form a complete memorandum. For a detailed discussion of how to select and use the forms in this publication to build a draft memorandum and complete the draft, with detailed discussion of all drafting requirements and strategic and stylistic considerations, see Ch. 1, *Writing Legal Memoranda and Briefs* .

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§ 50.04 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

For discussion, a procedural guide, and forms for use in actions for damages for breach of contract, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[2] Related Points and Authorities Chapters

Related memoranda that may be useful in particular cases when a contract is involved may be found in the following chapters in this publication:

- Ch. 11, *Accord and Satisfaction*.
- Ch. 64, *Damages: Tort*.
- Ch. 65, *Damages: Contract*.
- Ch. 206, *Sales*.
- Ch. 214, *Specific Performance*.

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[Reserved]

§§ 50.05[Reserved]

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A. Action for Damages for Breach of Contract

5-50 California Points & Authorities § 50.10

§ 50.10 Failure to Allege or Prove All Elements of Cause of Action for Damages for Breach of Contract

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE COMPLAINT FAILS TO ALLEGE THE ESSENTIAL ELEMENTS OF A CAUSE OF ACTION FOR DAMAGES BASED ON BREACH OF CONTRACT.

A. Elements to Be Pleaded. The essential elements to be pleaded in an action for breach of contract are (1) the contract, (2) the plaintiff's performance of the contract or excuse for nonperformance, (3) the defendant's breach, and (4) the resulting harm to the plaintiff (*Careau & Co. v. Security Pacific Business Credit, Inc. (1990) 222 Cal. App. 3d 1371, 1388, 272 Cal. Rptr. 387*).

[*Optional*] **B. Requirement of Alleging Agreement With Certainty.** The complaint must set forth the contract between the parties with sufficient certainty to show any right on the plaintiff's part to performance on the defendant's part (*Hays v. Temple (1937) 23 Cal. App. 2d 690, 694, 73 P.2d 1248*).

[2] Comments

[a] Use of Form

This form supports a defendant's contention that all necessary elements of a cause of action for damages for breach of contract have not been properly pleaded or proven. Thus, it may be used in a memorandum submitted in support of a general demurrer to a complaint, on the ground that the complaint fails to state facts sufficient to constitute a cause of action in that it does not allege all the essential elements of a cause of action for damages for breach of contract. With appropriate modification, optional Paragraph B may be submitted in support of a demurrer to a complaint for breach of contract on the ground of uncertainty [*see Hays v. Temple (1937) 23 Cal. App. 2d 690, 694, 73 P.2d 1248]* .

This form may also be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context

in which relief is sought on the basis of plaintiff's failure to plead or prove the necessary elements of the cause of action for contract damages. For example, it may be used in support of a motion for summary judgment on the ground that undisputed facts preclude the existence of one or more of the necessary elements.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case, for example, an analysis of the allegations in plaintiff's complaint demonstrating that one or more of the necessary elements has not been pleaded.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to the elements of an enforceable contract, and forms relating to an action for contract damages, including forms of demurrer, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

This form may be combined, when appropriate, with the more specific memoranda based on failure to plead a particular element, such as § 50.20 (performance or excuse for nonperformance of conditions not alleged), § 50.50[1] (breach of contract not alleged), § 50.60[1] (damages not alleged), § 50.350 (no contract, only an agreement to agree, is alleged), and § 50.370 (lack of mutuality of obligation). It may also be combined with other forms that set out additional requirements to plead a breach of contract in a particular situation, such as § 50.50[3] (nonpayment not alleged), § 50.60[2] (amount due not clearly alleged), § 50.390 (inability to ascertain whether the contract was oral or written), and § 50.391 (consideration not alleged in a complaint based on an instrument in writing not satisfying legal requirements).

For memoranda relating to the elements of a cause of action for contract damages based on a sales agreement governed by the Commercial Code, see *Ch. 206, Sales, § 206.30* et seq., "Sales Under Commercial Code."

This memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a general demurrer, they may be combined with appropriate memoranda set out in Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publicationin drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

In an appropriate case, the memoranda *set out in § 50.11* may be used in opposition to the memoranda of this form.

[3] Discussion of Authorities

[a] Elements to Be Pleaded

The facts and procedural background of ***Careau & Co. v. Security Pacific Business Credit, Inc.*** *(1990) 222 Cal. App. 3d 1371, 272 Cal. Rptr. 387* , are discussed in *§ 50.20[3][b]*. The case involved breach of alleged loan commitments. In reversing the trial court's judgment with respect to the causes of action for breach of contract and holding that the plaintiffs were entitled to leave to amend, the court of appeal began its analysis by stating that a cause of action for breach of contract is composed of the following elements: (1) the contract, (2) the plaintiff's performance or excuse for nonperformance, (3) the defendant's breach, and (4) the resulting damages to the plaintiff (*222 Cal. App. 3d 1371, 1388)* .

[b] Requirement of Alleging Agreement With Certainty

Hays v. Temple *(1937) 23 Cal. App. 2d 690, 73 P.2d 1248* , was an action for damages for breach of contract. The plaintiff claimed the exclusive right to the services of the individual defendants' daughter as a child actress, pursuant to a contract signed by her parents. The complaint alleged that the plaintiff negotiated an agreement with the defendant film-producing corporations, under which the plaintiff agreed to lend the services of the daughter to the corporations that employed her as an actress, for which her parents would receive compensation. The complaint alleged that this compensation was never paid to the plaintiff. Some of the defendant corporations, demurred on the ground that the complaint was ambiguous, unintelligible, and uncertain. The trial court sustained the demurrer.

The court of appeal affirmed. The court concluded that the complaint failed to set forth the agreement between the plaintiff and the corporations with sufficient certainty to show any right on the plaintiff's part to any of the compensation paid to the parents. There was also a total absence of any allegation of a contractual relation between the plaintiff and the corporations, nor was there an allegation that any person other than the parents made any promise to the plaintiff (*23 Cal. App. 2d 690, 694-695)* .

[4] Additional Authorities

[a] Elements to Be Pleaded

In *Otworth v. Southern Pac. Transportation Co. (1985) 166 Cal. App. 3d 452, 212 Cal. Rptr. 743* , the court of appeal affirmed the dismissal of an action after the defendant demurred generally. The complaint, which alleged numerous theories of recovery, including breach of contract, arose out of a dispute concerning income tax withholding by an employer. The complaint failed to allege whether the employment contract was written or oral, it did not set forth the contract terms, and it did not assert whether the plaintiff, the employee, had performed. It also failed to allege whether the contract required the employer to refrain from withholding, even though that type of contract provision might have been invalid (*166 Cal. App. 3d 452, 458-459)* .

Lortz v. Connell (1969) 273 Cal. App. 2d 286, 78 Cal. Rptr. 6 , was an action for breach of a contract under which the plaintiff was to purchase the defendant's interest in a business owned by both of them. The complaint alleged that the defendants made a written contract for the sale of the defendants' interest in a logging company, the defendants breached this agreement by retaking possession of the company and all of its assets from the plaintiff, and they caused the plaintiff to be arrested to prevent him from taking possession of the company and managing it. The plaintiff claimed damages for loss of assets of the corporation and for loss of profits. When the case had been partially tried, the court granted the defendants' motion for judgment on the pleadings, denied the plaintiff's motion to amend the complaint, and rendered judgment for the defendants. The court of appeal held that the complaint failed to state a cause of action, but the court reversed on the ground that the plaintiff should have been permitted to amend the complaint. The essential elements to be pleaded in an action for breach of contract are: (1) the contract, (2) the plaintiff's performance of the contract or excuse for nonperformance, (3) the defendant's breach, and (4) the resulting damage to the plaintiff (*273 Cal. App. 2d 286, 290)* . With regard to the second essential element, the plaintiff argued that prevention of performance by one party to a contract excuses performance by the other. The court agreed that the allegations of seizure of the corporation and its assets and of the plaintiff's arrest showed facts that might have excused the plaintiff's further performance, but they did not reveal what was done by the plaintiff before the alleged breach by the defendants. Thus, there was a failure to set forth an essential allegation, and the complaint was defective (*273 Cal. App. 2d 286, 291)* .

[b] Requirement of Alleging Agreement With Certainty

Austin v. Southern Pacific Co. (1942) 50 Cal. App. 2d 292, 123 P.2d 39 , was an action in part by a railroad employee to be restored to a certainstatus on seniority lists and for payment of money due. The trial court sustained the defendants' demurrer and the court of appeal affirmed. The complaint alleged that the plaintiff's seniority with the

railroad entitled him to a chef's rating, but he had been employed as a second cook for a period of years after which he was displaced because of lack of seniority. The complaint alleged on information and belief that the railroad secretly and without notifying the plaintiff made a written contract with the plaintiff's union defining the seniority status of dining-car employees by which the plaintiff's senior status was fraudulently and arbitrarily determined so that he lost his correct seniority ranking. Two distinct contracts were mentioned in the pleading: the plaintiff's contract of employment with the railroad and the contract between the railroad and the union. With respect to the first contract, the allegations showed nothing more than month-to-month employment terminable by either party (*50 Cal. App. 2d 292, 294)* . The plaintiff did not charge a breach of this contract because the complaint alleged continuous service by the plaintiff. Additionally, the pleading did not tell the court what seniority status the plaintiff was entitled to or why he was entitled to it. The alleged grievance was the loss of this status, but there was nothing to tell the court the right on which the suit was based or the source of that right except the statement that the plaintiff was entitled to the rating of chef because of his seniority. With respect to the second contract, it was not possible to tell from the complaint whether the plaintiff claimed that his senior status was initiated by the union contract or destroyed by it. Without proper allegations as to the origin of the right, it was difficult and perhaps impossible to determine the legal consequences of its loss (*50 Cal. App. 2d 292, 296)* .

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5-50 California Points & Authorities § 50.11

§ 50.11 All Elements of Cause of Action for Damages for Breach of Contract Are Alleged or Proven

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

A COMPLAINT STATES A CAUSE OF ACTION FOR BREACH OF CONTRACT IF IT ALLEGES THE CONTRACT, THE PLAINTIFF'S PERFORMANCE OR EXCUSE FOR NONPERFORMANCE, THE DEFENDANT'S BREACH, AND THE RESULTING DAMAGE TO THE PLAINTIFF.

A. Elements That State Cause of Action. A complaint states a cause of action for breach of contract if it alleges the contract, the plaintiff's performance or excuse for nonperformance, the defendant's breach, and the resulting damage to the plaintiff (*Wise v. Southern Pacific Co. (1963) 223 Cal. App. 2d 50, 59, 35 Cal. Rptr. 652*).

[*Optional*] **B. Every Term of Contract Need Not Be Stated.** In a complaint for breach of contract, every term of the contract need not be stated in great detail; only the essentials of the contract need be agreed on and be ascertainable (*Domino v. Mobley (1956) 144 Cal. App. 2d 24, 28, 300 P.2d 324*).

[*Optional*] **C. Written Contract May Be Pleaded Without Attaching Copy to Complaint.** Although a written contract is usually pleaded by alleging its making and attaching a copy that is incorporated by reference, a written contract can also be pleaded by alleging the making and the substance of the relevant terms (*Perry v. Robertson (1988) 201 Cal. App. 3d 333, 341, 247 Cal. Rptr. 74*).

[2] Comments

[a] Use of Form

These memoranda support a plaintiff's contention that all necessary elements of a cause of action for damages for breach of contract have been properly pleaded or proven. Thus, they may be used in a memorandum submitted in opposition to a defendant's general demurrer made on the ground that the complaint fails to allege all the essential

elements necessary to state a cause of action for damages for breach of contract. Optional Paragraph B may be used when a complaint does not state the contract in its entirety but nevertheless alleges the essential terms, and Optional Paragraph C may be used when the complaint does not have a copy of the contract attached but nevertheless alleges the making and relevant substance of the contract.

This form may also be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a defendant is seeking relief on the basis of plaintiff's failure to plead or prove the necessary elements of the cause of action for contract damages. For example, it may be used in a memorandum opposing a motion for summary judgment that was brought on the ground that undisputed facts preclude the existence of one or more of the necessary elements.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case, for example, an analysis of the plaintiff's allegations showing that all necessary elements of the cause of action for contract damages have been pleaded.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to the elements of an enforceable contract, and forms relating to an action for contract damages, including forms of demurrer, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a general demurrer, they may be combined with appropriate memoranda set out in Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum in a given procedural context, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

In an appropriate case, the memoranda *set out in § 50.10* may be used in opposition to this form.

[3] Discussion of Authorities

[a] Elements That State Cause of Action

The facts and procedural background of ***Wise v. Southern Pacific Co.*** *(1963) 223 Cal. App. 2d 50, 35 Cal. Rptr. 652* , are discussed in *§ 50.50[1][c][ii]*. In holding that the plaintiff adequately pleaded the elements of an action for breach of an employment contract, the court of appeal noted that the essential elements are (1) the contract, (2) the plaintiff's performance or excuse for nonperformance, (3) the defendant's breach, and (4) the resulting damage to the plaintiff. The court found that the plaintiff adequately pleaded these elements (*223 Cal. App. 2d 50, 59)* .

[b] Every Term of Contract Need Not Be Stated

Domino v. Mobley *(1956) 144 Cal. App. 2d 24, 300 P.2d 324* , was an action for damages for breach of a contract for the sale of real property. The complaint alleged that the plaintiffs and the defendants made a written agreement in the

form of escrow instructions by which the plaintiffs agreed to buy and the defendants agreed to sell certain property, the defendants represented that they could convey title in fee, free and clear of all encumbrances, there were no restrictions (when there were actually oil andmineral right restrictions on the property), and the defendants failed and refused to perform the acts to be done by them under the escrow and failed and refused to convey the property in accordance with its terms, to the plaintiffs' damage. The defendants objected to the introduction of any evidence on the ground that the complaint did not state facts sufficient to constitute a cause of action. Treating the objection as a general demurrer to the complaint, the trial court sustained the objection and rendered judgment for the defendant. On appeal the defendants' principal contention was that the contract in the form of the escrow instructions was too uncertain to constitute a contract.

The court of appeal reversed. This was an action for damages. An action at law is founded on mere nonperformance by a defendant, and this negative conclusion can often be established without determining all of the terms of the contract with exactness. It is not necessary that each term be spelled out in minute detail; only the essentials of the contract need be agreed on and be ascertainable. Thus, the complaint stated facts sufficient to constitute a cause of action (*144 Cal. App. 2d 24, 28)* .

[c] Written Contract May Be Pleaded Without Attaching Copy to Complaint

In ***Perry v. Robertson*** *(1988) 201 Cal. App. 3d 333, 247 Cal. Rptr. 74* , the plaintiff obtained a verdict in an action against real estate brokers and salespersons, asserting liability for inadequate compensation received for the sale of her house. The liability was attributable to the defendants' negligence in drafting the written sales agreement under which the house was sold. The defendants acted for the plaintiff under a written listing agreement, which provided for attorney's fees to the prevailing party in any action to enforce the agreement. After prevailing in the action, the plaintiff filed a timely motion for costs and attorney's fees. The defendants opposed the motion, contending that a fee award would be improper because the plaintiff had pursued her cause of action on a tort theory rather than a contract theory. The defendants argued that the plaintiff's allegations could not have supported a recovery for breach of contract because the plaintiff failed to append the written listing agreement to the complaint. The defendants' motion to tax costs was denied.

The court of appeal affirmed. The plaintiff had properly raised a contract claim and did not elect a distinctive remedy in tort (*201 Cal. App. 3d 333, 341, 344)* . The plaintiff's omission of the written listing agreement was not dispositive. Usually a written contract is pleaded by alleging its making and attaching a copy that is incorporated by reference. However, a written contract can also be pleaded by alleging the making and the substance of the relevant terms. Here, the plaintiff alleged the nature of the contract as one engaging the defendants as agents for purposes of selling her residence. The purpose of the "specific pleading of a written contract"requirement is to permit the defendant to demur to the breach-of-contract claim based on the construction of the text of the contract, a question of law unless extrinsic facts bearing on meaning are alleged. In this case, the pleading was legally sufficient to put the defendant on notice of the contract claim (*201 Cal. App. 3d 333, 341)* .

[4] Additional Authorities

[a] Elements That State Cause of Action

In *Je Ho Lim v. The.TV Corporation International (2002) 99 Cal. App. 4th 684, 121 Cal. Rptr. 2d 333* , a pleading case in which a demurrer was sustained without leave to amend, a businessman brought an action for breach of contract and fraud with respect to defendant's Internet auction of a domain name. He alleged that by offering registration of the domain name Golf.tv through its Internet website, defendant intended to transfer that name to the person who submitted the highest bid. Offering the name at auction was an offer, and plaintiff's bid was an acceptance conditioned on there being no higher bids. Since plaintiff accepted the offer precisely as it was made, and no one submitted a higher bid, a contract resulted. Plaintiff authorized charging his credit card for the amount of the bid. Defendant memorialized the

contract by an e-mail to plaintiff and charged plaintiff's credit card for the amount of the bid. The e-mail notification was entitled "E-mail Invoice for Domain Registration" and stated that he had won the auction. Plaintiff also alleged that the defendant later tried to disavow the agreement, by claiming that its e-mail concerned a different domain name ("-golf," an invalid Internet name due to the dash), and publicly offered the first name with a much higher opening bid. The trial court sustained defendant's demurrer without leave to amend, and the court of appeal reversed. The court found that plaintiff adequately pleaded a contract. Although he did not set out the website announcement in hac verba, he was not required to do so. Further, although he made alternative legal arguments in his amended complaints, the essential facts of the contract cause of action did not change. With respect to any special rules applicable to auctions, plaintiff pleaded that defendant made an offer by its website statement, that he accepted the offer by his bid, and that he gained the contract because he was not overbid. There was no insufficiency in that pleading. Finally, with respect to any inconsistencies in the domain name which plaintiff sought to acquire, any discrepancy arose only in defendant's invoice e-mail after the contract was formed. Even if viewed as defendant's acceptance of plaintiff's bid on the name, the e-mail clearly was not a counteroffer but rather acceptance of the contract formed (*99 Cal. App. 4th 684, 690-693)* .

In *Collins v. Vickter Manor, Inc. (1957) 47 Cal. 2d 875, 306 P.2d 783* , the plaintiff sued to recover a real estate broker's commission. The complaint alleged that the defendant orally employed the plaintiff to find apurchaser for certain real property owned by the defendant and agreed to pay the plaintiff a commission. The plaintiff found a purchaser who agreed to pay a certain sum for the property. The purchaser and the defendant executed a deposit receipt, incorporated into the complaint, which the plaintiff also signed. Several conditions were outlined in the receipt that the plaintiff averred were subsequent to the formation of a valid contract for the sale of the property but were precedent to the purchaser's duty to pay the purchase price. The complaint further alleged that the purchaser was ready, willing, and able to purchase the property on the terms and conditions imposed by the defendant, but the defendant prevented the purchaser's performance by failing to deposit the necessary papers in escrow and furnish several documents and by giving written notice of withdrawal from the escrow. The defendant demurred generally, and the trial court sustained the demurrer without leave to amend. The Supreme Court reversed. The allegations of the complaint with the incorporated deposit receipt sufficiently stated the cause of action against the defendant: the defendant employed the plaintiff to find a purchaser; the plaintiff found a purchaser ready, able, and willing to purchase on terms sufficiently expressed in the deposit receipt; the defendant approved and agreed to those terms; the deposit receipt appeared to satisfy the statute of frauds as a written and signed memorandum of the defendant's agreement to pay the plaintiff for services; the defendant breached its agreement to pay the plaintiff's commission. The complaint alleged facts from which a court could infer that the plaintiff and the purchaser did everything that the agreement required of them and that consummation of the transaction was prevented solely by the defendant's arbitrary refusal to proceed with the transaction. In these circumstances, the defendant could not be allowed to take advantage of its own acts to defeat the plaintiff's recovery. Consequently the complaint was not defective merely because the plaintiff was not able to allege that the transaction had been consummated (*47 Cal. 2d 875, 881)* .

M.G. Chamberlain & Co. v. Simpson (1959) 173 Cal. App. 2d 263, 343 P.2d 438 , was in part an action for breach of contract. The complaint alleged that the defendant contracted orally to pay the plaintiff a finder's fee of 5 percent of the purchase price of any business that the plaintiff found for him and he purchased; that at the same time, the defendant named Thurmond as his agent in dealing with the plaintiff, and Thurmond so acted; and that the plaintiff introduced Thurmond to Anderson, whom neither the defendant nor Thurmond had previously known. It was also alleged that pursuant to oral negotiations of which the plaintiff had no knowledge, an oral contract of sale and purchase of a business was made. The plaintiff further averred that he had performed all duties to be performed on his part and had demanded payment of the finder's fee by the defendant, which had been refused. The defendant demurred generally, and the trial court sustained the demurrer without leave to amend. Thecourt of appeal reversed. By the terms of the contract pleaded, the plaintiff was required only to find or introduce to the defendant a person interested in selling and who subsequently did sell, in order to recover the fee agreed to be paid by the defendant. The elements of a cause of action for breach of contract are the making of the contract and its terms, the plaintiff's performance, the defendant's breach, and damage to the plaintiff. The complaint alleged the making of a contract by the defendant with the plaintiff by which the defendant agreed to pay a finder's fee of 5 percent of the purchase price of any business the plaintiff found and the

defendant purchased; the plaintiff's performance by finding the sellers; the purchase; the defendant's breach by nonpayment of the fee; and damage to the plaintiff. Thus the complaint contained all the averments necessary to state a cause of action for breach of contract (*173 Cal. App. 2d 263, 274)* .

California Points & Authorities

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Volume 5 Chapters 50-59 CONTRACTS---to---CORPORATIONS
CHAPTER 50 CONTRACTS
PART II. FORMS
A. Action for Damages for Breach of Contract

5-50 California Points & Authorities §§ 50.12-50.19

[Reserved]

§§ 50.12[Reserved]

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Volume 5 Chapters 50-59 CONTRACTS---to---CORPORATIONS
CHAPTER 50 CONTRACTS
PART II. FORMS
A. Action for Damages for Breach of Contract

5-50 California Points & Authorities § 50.20

§ 50.20 Failure to Plead Plaintiff's Performance or Excuse for Nonperformance of Condition Precedent

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief*].

THE COMPLAINT SHOWS AS A CONDITION PRECEDENT TO THE DEFENDANT'S PERFORMANCE THAT _____ [*specify condition precedent required by contract*], BUT THE COMPLAINT DOES NOT ALLEGE EITHER PERFORMANCE OF THE CONDITION PRECEDENT OR AN EXCUSE FOR NONPERFORMANCE.

A. Elements to Be Pleaded. [*See § 50.10[1], Paragraph A.*]

B. Performance or Excuse for Nonperformance of Conditions Precedent Must Be Alleged. A complaint for breach of contract failsto state a cause of action unless it alleges either performance of any conditions precedent or an excuse for their nonperformance (*Daum v. Superior Court (1964) 228 Cal. App. 2d 283, 287, 39 Cal. Rptr. 443*).

[*EITHER*]

C. Alleging Performance of Conditions Precedent. In order to state a cause of action for breach of contract, performance of conditions precedent must be alleged either generally or specifically (*Code Civ. Proc. § 457*; *Careau & Co. v. Security Pacific Business Credit, Inc. (1990) 222 Cal. App. 3d 1371, 1389, 272 Cal. Rptr. 387* ; *Gordon Bldg. Corp. v. Gibraltar Sav. & L. Assn. (1966) 247 Cal. App. 2d 1, 6, 55 Cal. Rptr. 884*).

[*OR*]

C. Excuses for Nonperformance Must Be Alleged Specifically. Excuses for nonperformance of conditions precedent

must be pleaded specifically (*Careau & Co. v. Security Pacific Business Credit, Inc. (1990) 222 Cal. App. 3d 1371, 1391, 272 Cal. Rptr. 387* ; *Nelson v. Specialty Records, Inc. (1970) 11 Cal. App. 3d 126, 141, 89 Cal. Rptr. 540*).

[*CONTINUE*]

[*Optional*] **D. Condition Must Be Specifically Pleaded When It Is Event.** If a condition precedent is an event that must happen before the defendant's duty of performance accrues, a specific allegation of the happening of the condition is necessary to adequately plead the defendant's breach (*Careau & Co. v. Security Pacific Business Credit, Inc. (1990) 222 Cal. App. 3d 1371, 1389, 272 Cal. Rptr. 387* ; *Byrne v. Harvey (1962) 211 Cal. App. 2d 92, 113, 27 Cal. Rptr. 110*).

[*Optional*] **E. Promise to Pay When Able.** In an action on a contract to pay "when able," the complaint fails to state a cause of action if it does not allege the defendant's ability to pay (*Horacek v. Smith (1948) 33 Cal. 2d 186, 191, 199 P.2d 929* ; *Van Buskirk v. Kuhns (1913) 164 Cal. 472, 476, 129 P. 587*).

[*Optional*] **F. Existence of Fund From Which Plaintiff Is to Be Paid.** If the plaintiff is to be paid out of a certain fund, the plaintiff must allege the existence of the fund or a lawful reason for its nonexistence in order to state a cause of action for breach of contract based on the failure to pay the plaintiff a certain sum of money (*Eddy v. Hickman (1933) 136 Cal. App. 103, 105, 28 P.2d 66*).

[*Optional*] **G. Request That Defendant Perform Contract.** When it is essential to the cause of action for breach of contract that the plaintiff should have actually requested the defendant to perform its contract, that request must be alleged (*California Canneries Co. v. Great Western Lumber Co., (1919) 44 Cal. App. 69, 71, 185 P. 1008, 207 P. 908*).

[*Optional*] **H. Specific Allegations Control General Pleadings.** General pleadings are controlled by specific allegations. A general allegation of due performance will not suffice if the plaintiff also sets forth what has actually occurred and the specific facts do not constitute due performance. A complaint that would have been sufficient with general allegations alone is rendered defective by the inclusion of inconsistent specific allegations (*Careau & Co. v. Security Pacific Business Credit, Inc. (1990) 222 Cal. App. 3d 1371, 1389-1390, 272 Cal. Rptr. 387*).

[2] Comments

[a] Use of Form

These memoranda support a defendant's contention that plaintiff has failed to allege a necessary element of a cause of action for damages for breach of contract, specifically, the plaintiff's performance, or excuse for nonperformance, of conditions precedent. Thus, they may be used in a memorandum submitted in support of a general demurrer to a complaint, on the ground that the complaint fails to state facts sufficient to constitute a cause of action in that it does not allege all the essential elements of a cause of action for damages for breach of contract. The optional paragraphs are designed for use in particular situations as follows:

- Optional Paragraphs D and F are for use when the condition precedent was the occurrence of an event or the existence of a fund.

- Optional Paragraph E is for use when the defendant promised to pay when able rather than at a specific time.

- Optional Paragraph G is for use when the plaintiff was required to request that the defendant perform

the contract and such request is not alleged.

- Optional Paragraph H sets forth the general rule of interpretation that general pleadings are controlled by specific allegations. It would most often be used in connection with the second alternative Paragraph C or with Optional Paragraph D.

This form may also be used in a trial or appellate brief, or in a memorandum submitted in another procedural context in which a defendant seeks relief on the basis of plaintiff's failure to plead his or her performance or excuse for nonperformance of a condition precedent in a cause of actionfor contract damages. For example, it may be used in a memorandum supporting a motion for judgment on the pleadings.

Note that generally, a court will construe provisions in a contract as conditions precedent only when clear and unambiguous language requires that construction [*see Alpha Beta Food Mkt. v. Retail Clerks (1955) 45 Cal. 2d 764, 771, 291 P.2d 433 , cert. denied, 350 U.S. 996 (1956)* ; *see also § 50.502*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case, for example, in supporting a demurrer, an analysis of the allegations in plaintiff's complaint demonstrating a condition precedent for which plaintiff has failed to allege performance or excuse for nonperformance.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a general demurrer, they may be combined with appropriate memoranda set out in Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in §§ 50.21 -50.23*, and in § 50.502 may be submitted in opposition to a demurrer to a complaint supported by this form.

[3] Discussion of Authorities

[a] Performance or Excuse for Nonperformance of Conditions Precedent Must Be Alleged

Daum v. Superior Court *(1964) 228 Cal. App. 2d 283, 39 Cal. Rptr. 443* , involved an action on a contract. The plaintiff and the defendant had madea contract under which the plaintiff was an exclusive agent in negotiating and obtaining certain long-term leases of commercial sites. Payment for the plaintiff's performance was conditioned on the accrual of the defendant's right to receive rent under each of the leases and the obtaining of two loans to cover on-site construction costs. The plaintiff's first amended complaint alleged a contract, full performance by the plaintiff, and a breach in that, on demand, the defendant failed and refused to pay the money due the plaintiff for performance rendered

pursuant to the contract. The defendant demurred, and the trial court sustained the demurrer without leave to amend until the conditions precedent in the contract between the parties had occurred. After the trial court denied the plaintiff's motion to file a second amended complaint, the plaintiff sought a writ of mandate to compel the trial court to permit the plaintiff to file the second amended complaint.

The court of appeal issued the writ. A plaintiff cannot enforce a defendant's obligation unless the plaintiff has performed the conditions precedent imposed by the contract. Accordingly, the plaintiff must allege either performance of the conditions precedent or an excuse. The trial court had properly sustained the demurrer to the plaintiff's first amended complaint since, although it had alleged the obtaining of a long-term loan for on-site construction, it had not alleged the happening of the other condition precedent, that is, the accrual of the right to the first rental payment under the leases. Nevertheless, the trial court's denial of the plaintiff's motion to file a second amended complaint was an abuse of discretion, since it had alleged an excuse of anticipatory breach that created an immediate right of action [*see § 50.23*] (*228 Cal. App. 2d 283, 287-289)* .

[b] Alleging Performance of Conditions Precedent

Careau & Co. v. Security Pacific Business Credit, Inc. *(1990) 222 Cal. App. 3d 1371, 272 Cal. Rptr. 387* , involved consolidated actions by two entities that were controlled by the same principal. Each entity claimed to have a loan commitment from the defendant to finance the acquisition of another company. The complaints contained multiple causes of action. The primary ones at issue on appeal were for breach of contract, tortious breach of the implied covenant of good faith and fair dealing, and bad-faith denial of the existence of the contract. The complaint alleged that (1) the loan officer (also a defendant) had stated to the plaintiffs' principal and to the seller that "conditions 8.1, 8.3, 8.4. 8.5, and 8.7 had been met and satisfied and that defendants were fully satisfied that the conditions had been met," (2) the buyer advised the principal that the sale had been approved on the terms of the August 25 letter (the plaintiffs argued that this satisfied condition 8.6), (3) based on conversations of September 7 and 8 "defendants waived ..... the need to satisfy any of the conditions numbered 8.1 through 8.8, inclusive ..... . Thus all Conditions Precedent of thewritten commitment contract had either been met and satisfied or waived or excused," (4) all conditions precedent of the written commitment contract were satisfied not later than September 23, 1983, except 8.2 (requiring plaintiff to have clear title to all collateral) and 8.8 (concerning execution of loan documents, security agreements, etc.), which would have been satisfied at closing, and (5) since the defendants gave notice between October 4 and 6, 1983, that they would not perform the commitment to make the loan, conditions 8.2 and 8.8 were excused. Demurrers to the causes of action were sustained without leave to amend.

The court of appeal affirmed as to the count for tortious breach of the implied covenant of good faith and fair dealing but reversed to allow amendments to the counts for breach of contract and bad-faith denial of the existence of the contract. The alleged loan commitments were evidenced by letters dated July 19, 1983, and August 25, 1983, which were incorporated into the complaints. Section 8 of the letter dated August 25, 1983, set forth eight conditions precedent (designated 8.1 through 8.8) to the defendant's obligation to make the loan, such as approval of the defendant's credit committee, completion of a survey, completion of an appraisal of the equipment of the entity being acquired, initial cash equity of $250,000 from the plaintiff, and the seller's agreement to accept deferred payment of $8 million of the purchase price on terms and conditions satisfactory to the defendant. A cause of action for breach of contract is composed of the following elements: (1) the contract, (2) the plaintiff's performance or excuse for nonperformance, (3) the defendant's breach, and (4) the resulting damages to the plaintiff. The plaintiffs in this case failed to adequately allege the due satisfaction of several conditions precedent to the formation of a binding contract (*222 Cal. App. 3d 1371, 1388)* . When contract liability depends on the satisfaction or performance of conditions precedent, the allegation of that satisfaction or performance is an essential part of the cause of action. This requirement can be satisfied by allegations in general terms. It is sufficient for the plaintiff simply to allege that he or she duly performed all of the conditions on his or her part. However, this rule is subject to two important caveats, both of which were applicable (*222 Cal. App. 3d 1371, 1389)* . For further discussion relating to these caveats, see [iv], *below*.

Gordon Bldg. Corp. v. Gibraltar Sav. & L. Assn. *(1966) 247 Cal. App. 2d 1, 55 Cal. Rptr. 884* , involved a cross complaint by a building corporation, the defendant in an action for money due and owing, against the savings and loan association to recover, in part, damages for breach of a contract involving a construction loan agreement. The trial court sustained the cross defendant's general demurrer.

The court of appeal affirmed. In order to state a cause of action for breach of contract, the performance of conditions precedent must be alleged either generally or specially (*247 Cal. App. 2d 1, 6)* . The cross complaint wasfatally defective, in part, because it failed to allege that the corporation had duly performed all conditions precedent in that, although it alleged that a construction loan escrow was handled by an escrow company, it did not allege the execution of this agreement or that the contemplated escrow was ever undertaken or completed (*247 Cal. App. 2d 1, 5-6)* .

[c] Excuses for Nonperformance Must Be Alleged Specifically

The facts and procedural background of ***Careau & Co. v. Security Pacific Business Credit, Inc.*** *(1990) 222 Cal. App. 3d 1371, 272 Cal. Rptr. 387* , are discussed in [b], *above*. The court ended its discussion of the breach of contract causes of action by saying that the conclusional allegations were not sufficient with regard to excuse or waiver. Excuse or waiver of performance of conditions precedent requires specific, not general, allegations. Nevertheless, the court of appeal could not conclude, without effectively resolving factual issues, whether there was a reasonable possibility that the plaintiffs could make the direct allegations necessary to demonstrate the existence of a binding contract. Therefore, the court found it appropriate that the plaintiffs be given leave to amend (*222 Cal. App. 3d 1371, 1391)* .

Nelson v. Specialty Records, Inc. *(1970) 11 Cal. App. 3d 126, 89 Cal. Rptr. 540* , was an action by an assignee of contract rights, for breach of a contract for the sale and purchase of rights to distribute and exhibit a photoplay. Although the plaintiff alleged that his assignor had fully performed, at trial the plaintiff's counsel stated in an opening statement that the evidence would show that the plaintiff's assignor had not made shipment and delivery on the date required in the contract. The defendants moved for a dismissal, contending that the statement showed a failure to perform in accordance with the agreement, and any evidence to show a waiver or excuse of the performance called for by the contract provisions would constitute an impermissible material variance from the pleadings. The plaintiff moved to amend the pleadings to allege that the time of shipment of the print was waived or unenforceable, that the defendants were estopped because they did not return the contract until after the date of shipment, or that the defendants had made compliance impossible. The trial court denied the motion to amend and granted the defendants' motion to dismiss.

The court of appeal affirmed. Proof of any waiver or excuse for nonperformance would have constituted a material variance. Performance of conditions precedent may be alleged generally, but excuses must be pleaded specifically. Since the plaintiff did not specifically plead an excuse for nonperformance, the dismissal was proper (*11 Cal. App. 3d 126, 141-142)* .

[d] Condition Must Be Specifically Pleaded When It Is Event

The facts and procedural background of ***Careau & Co. v. Security Pacific Business Credit, Inc.*** *(1990) 222 Cal. App. 3d 1371, 272 Cal. Rptr. 387* , are discussed in [b], *above*. After citing the general rule that satisfaction or performance of conditions precedent may be alleged in general terms, the court of appeal noted that the rule is subject to two important caveats, both of which were applicable. If the condition is an event, as distinguished from an act to be performed by the plaintiff, then a specific allegation of the happening of the condition is a necessary part of pleading the defendant's breach (*222 Cal. App. 3d 1371, 1389)* . Because six of the eight conditions were events that had to occur or exist, and not acts that had to be performed by the plaintiffs, the general allegations were not adequate (*222 Cal. App. 3d 1371, 1390)* . Nevertheless, because the court of appeal could not conclude that the plaintiffs would not be able to make the direct allegations necessary to demonstrate the existence of a binding contract, the plaintiffs should be given leave to amend (*222 Cal. App. 3d 1371, 1391)* .

Byrne v. Harvey *(1962) 211 Cal. App. 2d 92, 27 Cal. Rptr. 110* , was an action for breach of an agreement between the plaintiffs and the administrator of a decedent's estate. The agreement concerned the plaintiffs' claims to the decedent's share of a trust and required that court approval of any compromise be obtained and that other qualifying heirs enter into the agreement in order for it to take effect. The defendant's general demurrer was sustained without leave to amend.

The court of appeal affirmed. The complaint did not allege court approval of the agreement or the consent of other qualifying heirs to the agreement, although these were conditions (*211 Cal. App. 2d 92, 117)* . Although *Code Civ. Proc. § 457* only requires a plaintiff to plead that it duly performed all of the conditions on his or her part, the statute does not apply to all possible applicable conditions to a contract (*211 Cal. App. 2d 92, 112-113)* . If a condition precedent imposed by the contract is an act to be performed by the plaintiff, he or she may allege performance in general terms. But if the condition is an event that must happen before the defendant's duty of performance accrues, the happening of the condition must be alleged as part of the defendant's breach (*211 Cal. App. 2d 92, 113)* . Approval was an event that had to happen before the defendant's duty of performance accrued (*211 Cal. App. 2d 92, 115-116)* . In addition, an allegation that no other qualifying heirs had refused to enter into the agreement was essential to the plaintiffs' cause of action. Since the pleading did not contain allegations that court approval was obtained or a valid excuse for the lack of approval and that the other qualifying heirs did not refuse to enter the agreement or a valid excuse for refusal, the complaint failed to allege facts sufficient to state a cause of action (*211 Cal. App. 2d 92, 117)* .

[e] Promise to Pay When Able

Horacek v. Smith *(1948) 33 Cal. 2d 186, 199 P.2d 929* , was an action on an employment contract. The complaint alleged that the defendants employed the plaintiff as a housekeeper at a particular monthly salary plus room and board, which the defendants lowered with the understanding that if the plaintiff continued to serve at whatever they could afford to pay, the defendants would make up the difference when their financial condition improved. The plaintiff continued in the defendants' employ for 10 years at reduced compensation. In her amended complaint, the plaintiff alleged her belief that the defendants' financial condition improved during the later years of her employment to the point where the defendants could pay her the money claimed to be owing. After a jury trial, judgment was rendered for the plaintiff. On appeal, the defendants asserted in part that the complaint did not state facts sufficient to constitute a cause of action.

The Supreme Court affirmed. In an action on a contract to pay when able, the promise is conditional, and no cause of action accrues until the condition is performed, that is, until the debtor is able to pay. Accordingly, the complaint fails to state a cause of action if it does not allege the defendants' ability to pay. But the amended complaint in this case pleaded the plaintiff's belief that the defendants' financial condition had improved to the point that the defendants could pay her. Since material facts may be alleged on information and belief, any failure to state more specifically the circumstances in this regard was one of uncertainty or ambiguity that could have been cured if brought to the attention of the trial court. In the absence of a demurrer, the defect is waived (*33 Cal. 2d 186, 191)* .

Van Buskirk v. Kuhns *(1913) 164 Cal. 472, 129 P. 587* , was an action to foreclose a mortgage. The plaintiff alleged that the defendant's intestate, Reynolds, while indebted to the plaintiff, borrowed a further sum from the plaintiff and promised to pay the plaintiff the entire sum whenever he was able to do so. As security for the debt, Reynolds executed and delivered to the plaintiff a bargain-and-sale deed of property. The trial court found for the plaintiff. The defendant's principal contention on appeal was that the action was barred by the statute of limitations.

The Supreme Court reversed. A promise to pay when able is conditional, and no cause of action accrues until the debtor is able to pay. With respect to the statute of limitations, the trial court was justified in finding that the defendant failed to show that Reynolds had the ability to pay and that the cause of action against him accrued more than the statutory time before the filing of the complaint. But the very fact that prevented the statute from running, Reynolds's inability to pay his debt, operated also to prevent the plaintiff from maintaining his action. If the promise to pay is conditional on ability

to do so, it is incumbent on a plaintiff to allege and prove that the condition has been complied with. The plaintiff alleged a promise by the defendant to pay when able but did not allege, and the court did notfind, that the event on which the obligation depended had occurred. Thus, the complaint did not allege facts sufficient to state a cause of action (*164 Cal. 472, 475-476)* .

[f] Existence of Fund From Which Plaintiff Is to Be Paid

In ***Eddy v. Hickman*** *(1933) 136 Cal. App. 103, 28 P.2d 66* , the plaintiff sued for payment of certain commissions earned as a real estate agent. By the terms of the contracts between the plaintiff and the defendant, the defendant was to pay the plaintiff the commissions from the loans obtained by the purchasers of the real estate and, if the purchase price of any of the real estate was made from crop shares, the defendant was to pay the plaintiff a percentage of the money received from the crop shares. At the beginning of the trial, the defendant objected to the plaintiff's production of evidence on the ground that the complaint did not state facts sufficient to constitute a cause of action. Reserving its ruling, the trial court failed to pass on the objection, but since it rendered judgment for the plaintiff, the court presumptively overruled the objection.

The court of appeal reversed. Performance of a condition precedent on which recovery depends must be alleged. The complaint did not allege that the funds from which the plaintiff's commissions were to be paid at any time came into existence. Therefore, since the plaintiff failed to allege the existence of the fund out of which he was to be paid or a lawful reason for its nonexistence, he failed to state a cause of action (*136 Cal. App. 103, 105)* .

[g] Request That Defendant Perform Contract

In *California Canneries Co. v. Great Western Lumber Co., (1919) 44 Cal. App. 69, 185 P. 1008, 207 P. 908* , the plaintiff sought to recover damages for a breach of a contract to furnish material for making boxes. Under the terms of the contract, the defendant agreed to sell to the plaintiff the plaintiff's entire requirements in box-shook (material for making boxes) for its own use. The complaint alleged that the defendant failed, neglected, and refused to deliver an amount of box-shook. The defendant's demurrer was overruled, and the trial court found for the plaintiff. On appeal the defendant contended that the complaint did not state a cause of action because it did not allege that the plaintiff made a demand for the delivery of the box-shook as required.

The court of appeal affirmed. When it is essential to the cause of action that the plaintiff should have actually requested the defendant to perform the contract, the request must be stated in the complaint (*44 Cal. App. 69, 71)* . However, in this case the giving of the necessary orders to the defendant could be inferred from the allegation of the complaint that the defendant failed, neglected, and refused to deliver the box-shook (*44 Cal. App. 69, 75)* .

[h] Specific Allegations Control General Pleadings

The facts and procedural background of ***Careau & Co. v. Security Pacific Business Credit, Inc.*** *(1990) 222 Cal. App. 3d 1371, 272 Cal. Rptr. 387* , are discussed in [b], *above*. After citing the general rule that satisfaction or performance of conditions precedent may be alleged in general terms, the court of appeal noted that the rule is subject to two important caveats, both of which were applicable (*222 Cal. App. 3d 1371, 1389)* . The second caveat is that general pleadings are controlled by specific allegations. Thus, a general allegation of due performance will not suffice if the plaintiff also sets forth what has actually occurred, and those specific facts do not constitute due performance (*222 Cal. App. 3d 1371, 1389-1390)* . For example, if the plaintiff alleged a permissible conclusion of law such as the due performance of a condition precedent but also averred specific additional facts that either do not support that conclusion or are inconsistent with it, the specific allegations control, and the complaint is rendered defective. The plaintiffs' pleadings in this case failed to state a cause of action for breach of contract. There were no specific allegations of any of the conditions. The allegations that all conditions had been met and satisfied, that the defendants were fully satisfied that the conditions had been met, and that all conditions precedent had either been met and satisfied or waived or

excused, were general conclusions. The allegations of the loan officer's oral statements were not sufficient specific allegations of performance. While the loan officer's statements might be some evidence that one or more of the conditions were satisfied, they do not constitute the direct, specific allegation of performance that is required. A complaint must allege the ultimate facts necessary to the statement of an actionable claim. It is both improper and insufficient for a plaintiff to simply plead the evidence by which it hopes to prove the ultimate fact (*222 Cal. App. 3d 1371, 1390)* . Nevertheless, because the court of appeal could not conclude that the plaintiffs would not be able to make the direct allegations necessary to demonstrate the existence of a binding contract, the court held that the plaintiffs should be given leave to amend (*222 Cal. App. 3d 1371, 1391)* .

[4] Additional Authorities

[a] Performance or Excuse for Nonperformance of Conditions Precedent Must Be Alleged

In *Wiz Technology, Inc. v. Coopers & Lybrand LLP (2003) 106 Cal. App. 4th 1, 130 Cal. Rptr. 2d 263* , a company that developed computer games alleged tort and contract causes of action against its auditor for the auditor's purportedly improper resignation prior to completion of a 1996 audit. In an engagement letter, the auditor had originally agreed to audit the company's financial statements for the 1995 fiscal year. In 1996, apartner in defendant auditor's organization met with plaintiff's president and chief executive officer, and discussed the conditions under which defendant might continue its relationship with plaintiff and audit plaintiff's financial statements for the 1996 fiscal year. The partner advised defendant's officers of three conditions under which defendant would continue as auditor, including the condition that plaintiff had to replace its existing securities attorney with competent legal counsel, as defendant had concerns about plaintiff's current attorney's understanding of various securities laws and regulations. On behalf of plaintiff company, the officers agreed to the three conditions. However, the parties never signed any agreement regarding a 1996 audit, and plaintiff continued using the same securities counsel. The auditor then resigned, and the company filed its action. The trial court granted defendant's motion for summary judgment, finding that there was no written, oral, or implied contract for a 1996 audit and that the auditor had good cause to resign because the company violated the condition to replace the securities counsel. The court of appeal affirmed. It held that the auditor's resignation was justified by the company's failure to satisfy the condition that it forgo using the existing counsel for securities matters, which was a prerequisite to any 1996 audit by defendant (*106 Cal. App. 4th 1, 11-14)* .

[b] Condition Must Be Specifically Pleaded When It Is Event

The court of appeal in *Beverly Way Associates v. Barham (1990) 226 Cal. App. 3d 49, 276 Cal. Rptr. 240* , affirmed a judgment denying specific performance on the basis of sustaining of a demurrer without leave to amend. The real estate purchase contract involved provided that "it shall be a condition precedent to Buyer's obligation to close escrow that Buyer shall have approved" the items specified, including an ALTA survey of the property showing all improvements on the property and the location of all exceptions referred to in the preliminary title report. The plaintiff rejected the survey but later demanded that the seller perform. The court stated that the buyer's disapproval was express and unequivocal, and once it was communicated to the seller, that terminated the contract. This left the buyer with no power to create obligations against the seller with a late "waiver" of its objections and acceptance of the proffered documentation (*226 Cal. App. 3d 49, 56)* .

Draper v. Patterson (1958) 156 Cal. App. 2d 606, 319 P.2d 694 , was an action, in part, to recover damages for the breach of a contract. The defendant filed a general demurrer that was overruled by the trial court, and judgment was rendered for the plaintiff. The court of appeal reversed. The contract between the plaintiff and the defendant provided that the defendant was to pay his portion of the amount for the leveling and clearing of certain land by the plaintiff from the profit of crops grown on the land thatwas to be cleared. The defendant contended that the cause of action based on the written contract did not state facts sufficient to constitute a cause of action because it did not allege that there was any profit from the land cleared. The plaintiff, however, had alleged that the defendant beneficially used the land. If a promise is conditional on the defendant's ability to pay, the plaintiff must allege and prove that the condition was

complied with. The allegation in the complaint that the defendant beneficially used the land is not equivalent to an allegation that he made a profit from any crop or crops off the land in question. The contract clearly provided that the defendant's obligation to pay was a conditional one, and thus it was incumbent on the plaintiff to allege and prove that the condition had been complied with (*156 Cal. App. 2d 606, 608-609)* .

[c] Existence of Fund From Which Plaintiff Is to Be Paid

Rose v. Ames (1942) 53 Cal. App. 2d 583, 128 P.2d 65 , was an action for breach of a contract. The complaint alleged that, in consideration of giving information that would enable the levying on property in satisfaction of a judgment, the plaintiff would receive a share of the money recovered by sale or compromise. The defendant demurred generally, and the trial court sustained the demurrer. The court of appeal affirmed. An essential allegation for the plaintiff to recover on the agreement would be that the defendants had recovered money either by sale or compromise. Since that was not alleged in the complaint, the demurrer was properly sustained (*53 Cal. App. 2d 583, 588)* .

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5-50 California Points & Authorities § 50.21

§ 50.21 Performance of Condition Precedent Is Sufficiently Pleaded by General Allegation

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief*].

IN PLEADING THE PERFORMANCE OF CONDITIONS PRECEDENT IN A CONTRACT, IT MAY BE STATED GENERALLY THAT THE PLAINTIFF DULY PERFORMED ALL OF THE CONDITIONS ON THE PLAINTIFF'S PART.

Pleading Performance of Conditions. In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing performance, but it may be stated generally that the plaintiff duly performed all of the conditions on the plaintiff's part (*Code Civ. Proc. § 457*; *Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 830 n.6, 69 Cal. Rptr. 321, 442 P.2d 377*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that the complaint sufficiently alleges the performance of conditions precedent on the plaintiff's part because the complaint alleges that the plaintiff fully performed all the conditions on his or her part to be performed. Thus, they may be used by a plaintiff in an action for contract damages when the underlying contract includes one or more conditions precedent, in a memorandum that opposes a defendant's general demurrer which is based on a supposed failure to allege plaintiff's performance or excuse for nonperformance of a condition precedent.

This form may also be used in a trial or appellate brief, or in a memorandum submitted in another procedural context in which a defendant seeks relief on the basis of plaintiff's failure to plead performance or nonperformance of a condition precedent. For example, it may be used in a memorandum opposing a motion for judgment on the pleadings.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to the elements of an enforceable contract, including the performance, or excuse for nonperformance, of anyconditions precedent, as well as forms relating to an action for contract damages, including forms of demurrer, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

The memoranda *set out in §§ 50.22* and *50.23* may be used in the alternative when a plaintiff is alleging excuse for nonperformance, rather than performance, of a condition precedent.

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a general demurrer, they may be combined with appropriate memoranda set out in Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

In an appropriate case, the memoranda *set out in § 50.20* may be used in opposition to the memoranda of this form. Note in particular § 50.21[1], Paragraph D, which states the point that a general allegation of performance is not sufficient, and a specific allegation is needed, if the condition precedent to be performed was the occurrence of a particular event.

[3] Discussion of Authorities

[a] Pleading Performance of Conditions

Reichert v. General Ins. Co. *(1968) 68 Cal. 2d 822, 69 Cal. Rptr. 321, 442 P.2d 377* , was an action for damages for malicious nonpayment of fire insurance. The defendant insurance companies demurred generally. The trial court sustained the demurrer.

The Supreme Court affirmed on the principal ground that the causes of action pleaded were vested not in the plaintiff but in the trustee in bankruptcy. However, the plaintiff pleaded a cause of action for damages for breach of contract, namely, the particular insurance policy involved, and to that end attempted to allege the essential elements of the cause of action. The plaintiff alleged that he did all things necessary on his part to do. In alleging performance, the plaintiff may allege that he duly performed all the conditions on his part [*see Code Civ. Proc. § 457* (pleading performanceof conditions)]. Thus the plaintiff's allegation of performance was proper (*68 Cal. 2d 822, 830 n.6*).

[4] Additional Authorities

[a] Pleading Performance of Conditions

Needham v. Chandler (1908) 8 Cal. App. 124, 96 P. 325 , was an action to recover a balance of money paid out and commissions earned by the plaintiff under a contract for the construction of a building for the defendant. After trial,

judgment was rendered for the plaintiff. In affirming, the court of appeal noted that *Code Civ. Proc. § 457* provides that, in pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing performance, but it may be stated generally that the party duly performed all of the conditions on his or her part. If the allegations are controverted, the party pleading must establish at the trial facts showing performance. Consequently, the plaintiff's allegation that he had complied with all of the terms and conditions of the agreement and completed and fulfilled his part in every way was a sufficient allegation of performance of conditions (*8 Cal. App. 124, 127)* .

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5-50 California Points & Authorities § 50.22

§ 50.22 Excuse for Nonperformance of Condition Precedent Is Sufficiently Shown by Prevention

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE PLAINTIFF'S ALLEGATION THAT THE PLAINTIFF WAS PREVENTED FROM PERFORMING SATISFIES THE REQUIREMENT THAT THE PLAINTIFF ALLEGE EITHER PERFORMANCE OR EXCUSE FOR NONPERFORMANCE.

Means of Prevention Need Not Be Alleged. An allegation in a complaint that the plaintiff was prevented from completing a contract is sufficient to state a cause of action even though the method by which the plaintiff was prevented from performing is not stated (*Cox v. Western P. R. Co. (1873) 47 Cal. 87, 89-90)* .

[2] Comments

[a] Use of Form

This form supports the contention that the plaintiff sufficiently alleged an excuse for the nonperformance of a condition precedent because thecomplaint states that the defendant prevented the plaintiff's performance. Thus, it may be included in a plaintiff's memorandum opposing a general demurrer which is based on plaintiff's supposed failure to allege performance or excuse for nonperformance of a condition precedent.

This form may also be used in a trial or appellate brief, or in a memorandum submitted in another procedural context in which a defendant seeks relief on the basis of plaintiff's failure to plead performance or nonperformance of a condition precedent. For example, it may be used in a memorandum opposing a motion for judgment on the pleadings.

Note that the authority relied on in this form has never been overruled or questioned, but it also has not been cited in recent years. The Supreme Court did not consider the effect of the rule that excuses for nonperformance must be pleaded specifically; nevertheless, it could be argued that pleading prevention is a specific allegation of excuse in that it

identifies the type of excuse although it does not allege the exact means of prevention.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to the elements of an enforceable contract, including the performance, or excuse for nonperformance, of any conditions precedent, as well as forms relating to an action for contract damages, including forms of demurrer, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

The memoranda *set out in § 50.23* may be used in the alternative when a plaintiff is alleging excuse for nonperformance based on anticipatory breach, rather than prevention.

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a general demurrer, they may be combined with appropriate memoranda set out in Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

In an appropriate case, the memoranda *set out in § 50.20* may be used in opposition to the memoranda of this form. Note in particular § 50.20[1], Paragraph C, which states the point that a specific rather than general allegation is needed, to allege an excuse for nonperformance [*but see* comment in [a], *above*].

[3] Discussion of Authorities

[a] Means of Prevention Need Not Be Alleged

Cox v. Western P. R. Co. *(1873) 47 Cal. 87* , was an action for breach of a contract. The trial court sustained the defendants' general demurrer, and the action was dismissed.

The Supreme Court reversed. The plaintiffs' complaint alleged that the plaintiffs were prevented by the defendants from completing the contract. If the plaintiffs were so prevented, they were fully justified in abandoning the contract and had a right to be paid a fair compensation for work that had been performed under the contract. Although the plaintiffs did not allege how or by what means they were prevented from performing, their averment was sufficient when tested by a general demurrer (*47 Cal. 87, 89-90)* .

[4] Additional Authorities

[a] Means of Prevention Need Not Be Alleged

De La Falaise v. Gaumont-British Picture Corp. Ltd. (1940) 39 Cal. App. 2d 461, 103 P.2d 447 , was an action for breach of contract resulting from the defendant's failure to perform a condition precedent. The trial court found for the plaintiff but granted a motion for a new trial. Reversing the order for a new trial, the court of appeal noted that the

contract provided that the plaintiff was to appear as an actress in two movies. The first picture was produced and completed. The contract provided when the starting date for the second picture should have been, but the plaintiff never received notice of the actual starting date for the picture as required by the contract, and the movie was never made. The defendant asserted that the plaintiff failed to state a cause of action in her complaint because she failed to allege performance or a tender of performance or that the defendant prevented performance or that performance was excused. However, the plaintiff was never in default under the contract and therefore was not required to tender performance before suing for breach. It was enough that she alleged that she was ready, able, and willing to perform her obligations under the contract, but the defendant had failed to fix the time and place for performance (*39 Cal. App. 2d 461, 470)* .

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5-50 California Points & Authorities § 50.23

§ 50.23 Excuse for Nonperformance of Condition Precedent Is Sufficiently Shown by Anticipatory Breach

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

AN ALLEGATION OF THE DEFENDANT'S ANTICIPATORY BREACH IS A SUFFICIENT PLEADING OF AN EXCUSE FOR THE PLAINTIFF'S NONPERFORMANCE.

Anticipatory Breach Is Excuse for Nonperformance. An anticipatory breach by the defendant creates an immediate right of action, and consequently an allegation of anticipatory breach is a sufficient pleading of excuse for nonperformance (*Daum v. Superior Court (1964) 228 Cal. App. 2d 283, 287, 39 Cal. Rptr. 443*).

[2] Comments

[a] Use of Form

This form supports the contention that the plaintiff sufficiently alleged an excuse for the nonperformance of a condition precedent because the complaint alleges anticipatory breach by the defendant. Thus, it may be included in a plaintiff's memorandum opposing a general demurrer which is based on plaintiff's supposed failure to allege performance or excuse for nonperformance of a condition precedent.

This form may also be used in a trial or appellate brief, or in a memorandum submitted in another procedural context in which a defendant seeks relief on the basis of plaintiff's failure to plead performance or nonperformance of a condition precedent. For example, it may be used in a memorandum opposing a motion for judgment on the pleadings.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to the elements of an enforceable contract, including the performance, or excuse for nonperformance, of any conditions precedent, as well as forms relating to an action for contract damages, including forms of demurrer, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

The memoranda *set out in § 50.22* may be used in the alternative when a plaintiff is alleging excuse for nonperformance based on prevention rather than anticipatory breach.

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a general demurrer, they may be combined with appropriate memoranda set out in Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

In an appropriate case, the memoranda *set out in § 50.20* may be used in opposition to the memoranda of this form.

[3] Discussion of Authorities

[a] Anticipatory Breach Is Excuse for Nonperformance

The facts and procedural background of ***Daum v. Superior Court*** *(1964) 228 Cal. App. 2d 283, 39 Cal. Rptr. 443* , are discussed in *§ 50.21[3][a]*. In granting the writ to permit the plaintiff to file the second amended complaint, the court of appeal noted that a definite and unconditional repudiation of a contract by a promisor communicated to the promisee, being a breach of the contract, creates an immediate right of action even though it takes place long before the time prescribed for the promised performance and before conditions specified in the contract have ever occurred. Since the plaintiff's second amended complaint alleged an excuse in that it alleged an anticipatory breach, the trial court should not have denied the plaintiff's motion to file the complaint (*228 Cal. App. 2d 283, 287)* .

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5-50 California Points & Authorities § 50.24

§ 50.24 Obligor's Statement of Intended Breach of Contractual Promise, Which Substantially Impairs Value of Contract, Constitutes Repudiation

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

A STATEMENT BY AN OBLIGOR TO THE OBLIGEE INDICATING THAT IT WILL BREACH AN IMPORTANT CONTRACTUAL PROMISE, THEREBY SUBSTANTIALLY IMPAIRING THE VALUE OF THE CONTRACT, CONSTITUTES REPUDIATION OF THE CONTRACT.

Obligor's Statement of Intended Breach Constitutes Repudiation. An obligor's statement to the obligee indicating that the obligor will breach an important contractual promise, thereby substantially impairing the value of the contract, constitutes repudiation of the contract (*Mobil Oil Exploration & Producing Southeast, Inc. v. United States (2000)*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that an obligor's statement to the obligee indicating its intent to breach an important contractual promise that will substantially impair the value of the contract constitutes repudiation of that contract.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a party seeks to raise this contention.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender). For discussion of contract damages, see California Forms of Pleading and Practice, Ch. 177, *Damages*, § 117.140 et seq. (Matthew Bender).

[d] Related Memoranda

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publicationin drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* . For discussion of contract damages, see Ch. 65, *Damages: Contract* .

[3] Discussion of Authorities

[a] Obligor's Statement of Intended Breach Constitutes Repudiation

In ***Mobil Oil Exploration & Producing Southeast, Inc. v. United States*** *(2000) 147 L.Ed. 2d 528* , two oil companies--Mobil and Marathon--sought restitution of $156 million that they had paid to the federal government in return for lease contracts giving them rights to explore for and develop oil off the North Carolina coast. The rights were conditioned on the companies obtaining a set of further governmental permissions. The companies claimed that the government repudiated the contracts when it denied them certain elements of the permission-seeking opportunities that the contracts had promised (120 St. Ct. 2423, 2429). They brought suit for breach of contract in the Court of Federal Claims. On motions for summary judgment, the court found that the government had broken its contractual promise to follow provisions of the Outer Continental Shelf Lands Act (OCSLA), particularly that requiring the Department of the Interior to approve an exploration plan that satisfied OCSLA's requirement within 30 days of its submission to the Department of the Interior; that the government thereby repudiated the contracts; and that repudiation entitled the companies to restitution of the up-front cash bonus payments it had made. A panel of the Court of Appeals for the Federal Circuit reversed, finding that the government's refusal to consider the companies' final exploration plan was not the "operative cause" of any failure to carry out the contracts' terms (120 St. Ct. 2423, 2432).

The U.S. Supreme Court reversed and remanded. The Court first noted that when the United States enters into contractual relations, its rights and duties are governed by the law applicable to contracts between private individuals. It then reviewed the applicable contract principles set forth in the Restatement of Contracts. Under the Restatement, when one party to a contract repudiates the contract, the other party is entitled to restitution for any benefit that he or she has conferred on the repudiating party by way of part performance or reliance [citing Restatement (2d) § 373]. "Repudiation" is a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach [citing Restatement (2d) § 250]. "Total breach" is a breach that so substantially impairs the value of the contract to the injured party at the time of the breach that it is just in the circumstances to all him or her to recover damages based on all of his or her remaining rights to performance [citing Restatement (2d) § 373]. As applied to thefacts, those principles meant that if the government said it would break, or did break, an important contractual promise, thereby substantially impairing the value of the contracts to the companies, then unless the companies waived their rights to restitution, the government must give the companies their money back. Furthermore, it must do so whether or not the contracts ultimately would have proved financially beneficial to the companies (120 St. Ct. 2423, 2429-2430).

In the contract, the U.S. promised the companies that they could explore for oil and develop any oil that they found

provided that they received exploration and development permissions in accordance with various statutes and regulations to which the lease contracts were made subject. The OCSLA, and Coastal Zone Management Act (CZMA) required leaseholding companies wishing to explore and drill to successfully complete four procedures (120 St. Ct. 2423, 2430). The Court found that the record made clear that OCSLA required Interior to approve within 30 days a submitted exploration plan that met OCSLA's requirements; that Interior had told Mobil that the companies' submitted plan met those requirements; that Interior had told Mobil that it would not approve the submitted plan for at least 13 months, and possibly longer, due to a new law (OBPA) prohibiting approval of exploration plans until additional governmental actions had taken place; and that the Department of the Interior had never either approved or disapproved the plan (120 St. Ct. 2423, 2432-2433). The Court then concluded that the government's actions violated the contracts, and in fact the new statute required the Department of the Interior to impose the contract-violating delay. The changes made by the statute were changes in approval procedures and standards that the contracts had incorporated through cross-reference. Therefore, by communicating to the companies its intent to follow OBPA, the government was communicating its intent to violate the contracts (120 St. Ct. 2423, 2433-2435). The Court next found that the incorporated procedures and standards amount to a gateway to the companies' enjoyment of all other rights. To significantly narrow that gateway violated material conditions in the contracts. The breach was substantial, depriving the companies of the benefit of the bargain. The government's communication of it intent to commit that breach amounted to a repudiation of the contracts (120 St. Ct. 2423, 2435-2436). The Court held further that the companies did not waive their right to restitution (120 St. Ct. 2423, 2436-2437). Finally, the court held that because the government repudiated the lease contracts, the law entitled the companies to restitution whether or not the contracts would have ultimately produced a financial gain or led them to obtain a definite right to explore (120 St. Ct. 2423, 2437). In sum, the Court held that the oil companies gave the government $158 million in return for a contractual promise to follow the terms of pre-existing statutes and regulations. The new statute prevented the government from keeping that promise. The breach substantially impaired the value of the contracts. The government,therefore, was required to give the companies their money back (120 St. Ct. 2423, 2437-2438).

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[Reserved]

§§ 50.25[Reserved]

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5-50 California Points & Authorities § 50.30

§ 50.30 Contract Was Substantially Performed

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE _____ [PLAINTIFF *or* DEFENDANT] HAS SUBSTANTIALLY PERFORMED HIS/HER/ITS OBLIGATIONS UNDER THE CONTRACT, AND THE _____ [PLAINTIFF *or* DEFENDANT] MAY NOT BE DENIED THE BENEFIT OF THE BARGAIN BECAUSE OF MINOR DEPARTURES FROM COMPLETE PERFORMANCE OF THE CONTRACT.

Substantial Performance of Contract. When the party who is bound to make payment has enjoyed the fruits of the other party's good faith substantial performance of the contract, if the failure to make full performance can be reflected in damages to be deducted from the price, and if the omissions or deviations from complete performance were not willful or fraudulent and do not substantially affect the purpose for which the paying party made the contract, the performing party may, in an action on the contract, recover the amount of the contract price that remains unpaid, less the amount allowed as damages for the failure to strictly perform (*Lowy v. United Pac. Ins. Co. (1967) 67 Cal. 2d 87, 92-93, 60 Cal. Rptr. 225, 429 P.2d 577* ; *Thomas Haverty Co. v. Jones (1921) 185 Cal. 285, 289-291, 197 P. 105*).

[2] Comments

[a] Use of Form

These memoranda support the contention that, when there substantial performance by one party made in exchange for payment by the other party, the performing party does not breach the contract for minor defects or less than strict performance, and is entitled to payment by the paying party, less any damages for the minor failure to perform fully. Although the doctrine of substantial performance is primarily applied in construction contract situations, it may be applied in other contracts calling for performance by one party and payment by the other [*see, e.g.,* *Posner v. Grunwald-Marx, Inc. (1961) 56 Cal. 2d 169, 186-187, 14 Cal. Rptr. 297, 363 P.2d 313* , discussed in [4][a], *below*].

The form may also be used in a trial or appellate brief, or in a memorandum submitted in an appropriate proceeding for raising the contention.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to the doctrine of substantial performance, together with discussion and forms relating to contract actions ingeneral, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

This form should be combined with other memoranda pertaining to the specific procedural context in which counsel wishes to raise this substantive contention.

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

In an appropriate case, the memoranda *set out in § 50.31* may be used in opposition to the memoranda of this form.

[3] Discussion of Authorities

[a] Substantial Performance of Contract

In ***Lowy v. United Pac. Ins. Co.*** *(1967) 67 Cal. 2d 87, 60 Cal. Rptr. 225, 429 P.2d 577* , land owners contracted with a licensed contractor for excavation and grading work. After the contractor had performed 98 percent of the excavation and grading, a dispute arose regarding payment for additional work necessitated by changes made by the owners. The contractor ceased performance, and the owners sued for breach of contract. The contractor cross complained for breach of contract. The trial court concluded that the owners were entitled to nothing, but the contractor recovered on the cross complaint (*67 Cal. 2d 87, 89)* .

The Supreme Court affirmed. The contractor had not entirely performed his obligations under the contract. However, the doctrine of substantial performance, ordinarily applicable to building contracts, applied because the evidence demonstrated that the contractor completed 98 percent of the work (*67 Cal. 2d 87, 92)* . The doctrine of substantial performance is that in the case of a building contract when the owner has taken possession of the building and is enjoying the fruits of the contractor's work in the performance of the contract, if there has been a substantial performance by the contractor in good faith, and the failure to make full performance can be compensated in damages to be deducted from the price or allowed as a cross complaint, and if the omissions and deviations were not willful or fraudulent and do not substantially affect the usefulness of the building or the purpose for which it was intended, the contractor may, in an action on the contract, recover the amount of the contract price remainingunpaid, less the amount allowed as damages for the contractor's failure to strictly perform. Furthermore, in this case, since there was substantial evidence to support the trial court's finding that the owners themselves breached the contract and thus precluded full performance on the contractor's part, the trial court properly rendered judgment for the contractor for the unpaid balance on the contract, less the amount of expenses the contractor would incur in completing the unfinished 2 percent of the job (*67 Cal. 2d 87, 92-93)* .

In ***Thomas Haverty Co. v. Jones*** *(1921) 185 Cal. 285, 197 P. 105* , the plaintiff was hired by the defendant, on a $27,000 contract, to install plumbing, heating, and ventilation in a building being constructed at a cost of $186,000. Following completion of the work, the plaintiff sued to recover the balance allegedly due on the contract. The defendant contended the plaintiff had not fully performed the contract and cross complained for damages. The trial court found that the plaintiff had substantially performed the contract and rendered judgment for the plaintiff for the contract price less $99.21 for the cost of remedying trivial defects and $2,180.88 as the reduction in value to the defendant's building caused by defects in the plaintiff's work of a trifling character that could not be corrected (*185 Cal. 285, 287-288)* .

The Supreme Court affirmed. When a person agrees to do a thing for another for a specified sum of money to be paid on full performance, he or she is not entitled to any part of the sum until he or she has done the thing agreed to do, unless full performance has been excused, prevented, or delayed by the act of the other party, by operation of law, or by an act of God or a public enemy (*185 Cal. 285, 288-289)* . Thus, at common law, when a person failed to strictly perform a building contract, he or she could not recover on the contract; if, however, the person sued in quantum meruit, he or she could recover the reasonable value of the work performed if the work actually benefitted the owner and to some extent served the owner's purpose. Since the common law forms of action were abolished, and since the contractor would in justice be entitled to recover the reasonable value of the work done, not exceeding the contract price, no good reason appeared why the contractor, in a suit on the contract, should not be allowed to recover the price, less the reasonable compensation to the owner for any damages arising from a failure to completely perform, provided the contractor has acted in good faith and the work is so far completed that it reasonably serves the purpose for which it was intended by the owner. Substantial justice is provided by this course of procedure, and no real property right is violated (*185 Cal. 285, 290-291)* . Therefore, especially in the case of building contracts, when the owner has taken possession of the building and is enjoying the fruits of the contractor's work in the performance of the contract, if there has been a substantial performance by the contractor in good faith, and the failure to make full performance can be compensated in damages to be deducted from the price orallowed on a cross complaint, and if the omissions and deviations were not willful or fraudulent and do not substantially affect the usefulness of the building for the purposes for which it was intended, the contractor may, in an action on the contract, recover the amount unpaid on the contract price, less the amount allowed as damages for the contractor's failure to strictly perform (*185 Cal. 285, 289)* .

The question of what constitutes substantial performance is one of some difficulty and usually is determined in each case with reference to the facts and circumstances. There is a substantial performance when the variance from the specifications of the contract does not impair the building or structure as a whole, and when after it is erected the building is actually used for the intended purpose, or when the defects can be remedied without great expenditure and without material damage to other parts of the structure. The defects, however, must not run through the whole work so that the object of the owner in having the work done in a particular way is not accomplished or so that a new contract is not substituted for the original one, nor be so substantial as not to be capable of a remedy or that the allowance out of the contract price will not give the owner essentially what he or she contracted for (*185 Cal. 285, 291)* .

[4] Additional Authorities

[a] Substantial Performance of Contract

In *Posner v. Grunwald-Marx, Inc. (1961) 56 Cal. 2d 169, 14 Cal. Rptr. 297, 363 P.2d 313* , the Supreme Court indicated that the doctrine of substantial performance is applicable in a nonconstruction contract situation. A labor union originally sued to compel the employer to arbitrate the question of whether employees were entitled to vacation and holiday pay because of having substantially completed the conditions precedent for the pay before their termination when the employer moved its business operations to Arizona (*56 Cal. 2d 169, 173)* . The trial court denied the petition to compel arbitration (*56 Cal. 2d 169, 174)* . In reversing the trial court, the Supreme Court noted, in dictum, that in response to the employer's contention that complete performance of a condition precedent is necessary before employees are entitled to vacation pay, it can be argued that the vacation provisions do not require complete performance because the doctrine of substantial performance is applicable. At common law, recovery under a contract

for work done depended on a complete performance, although hardship might be avoided by permitting recovery in quantum meruit. The prevailing doctrine, applied chiefly in building contracts, is that substantial performance is sufficient, and justifies an action on the contract, but the other party is entitled to a reduction in the amount called for by the contract to compensate for the defects. What constitutes substantial performance is a question of fact, but it is essential that there beno willful departure from the terms of the contract, and that the defects be easily remedied or compensated, so that the promisee may get practically what the contract calls for (*56 Cal. 2d 169, 186-187)* .

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CHAPTER 50 CONTRACTS
PART II. FORMS
A. Action for Damages for Breach of Contract

5-50 California Points & Authorities § 50.31

§ 50.31 Contract Was Not Substantially Performed

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE _____ [PLAINTIFF *or* DEFENDANT] HAS NOT SUBSTANTIALLY PERFORMED THE CONTRACT IN THAT THERE HAS NOT BEEN FULL PERFORMANCE OF THE CONTRACT AND _____ [THE DEVIATIONS FROM FULL PERFORMANCE SUBSTANTIALLY AFFECT THE USEFULNESS OF THE CONSIDERATION *or* THE _____ (PLAINTIFF *or* DEFENDANT) HAS NOT ACTED IN GOOD FAITH *or* THE DEVIATIONS FROM FULL PERFORMANCE CANNOT BE COMPENSATED IN DAMAGES *or* THERE IS AN ACCUMULATION OF MANY DEFECTS].

A. General Rule Requiring Full Performance. When a person agrees to do a thing for another for a specified sum of money to be paid on full performance, he or she is not entitled to any part of the sum until he or she has done the thing as agreed, unless full performance has been excused, prevented, or delayed by the act of the other party, by operation of law, or by an act of God or a public enemy (*see Lowy v. United Pac. Ins. Co. (1967) 67 Cal. 2d 87, 92, 60 Cal. Rptr. 225, 429 P.2d 577* ; *Thomas Haverty Co. v. Jones (1921) 185 Cal. 285, 288-289, 197 P. 105*).

B. Substantial Performance Is Question of Fact. What constitutes substantial performance is always a question of fact, a matter of degree, and a question that must be determined relative to all of the other factors that exist (*Thomas Haverty Co. v. Jones (1921) 185 Cal. 285, 291, 197 P. 105* ; *Tolstoy Constr. Co. v. Minter (1978) 78 Cal. App. 3d 665, 672, 143 Cal. Rptr. 570*).

[*Optional*] **C. No Substantial Performance When Usefulness of Consideration Is Substantially Affected.** The doctrine of substantial performance cannot be applied when the deviations from full performance substantially affect the usefulness of the consideration for which the nonbreaching party bargained (*see Tolstoy Constr. Co. v. Minter (1978) 78 Cal. App. 3d 665, 672-673, 143 Cal. Rptr. 570* ; *Williams v. Elliott (1954) 127 Cal. App. 2d 357, 364, 273 P.2d 953*).

[*Optional*] **D. Substantial Performance Exists Only When Deviations Are Inadvertent.** The doctrine of substantial performance is available only when the omissions or deviations from full performance are the result of mistake or inadvertence, not when the omissions or deviations are intentional or fraudulent (*Perry v. Quackenbush (1894) 105 Cal. 299, 309-310, 38 P. 740* ; *see Shell v. Schmidt (1958) 164 Cal. App. 2d 350, 365-366, 330 P.2d 817 , cert. denied, 359 U.S. 959*).

[*Optional*] **E. Substantial Performance Exists Only When Damages Can Compensate for Deviations.** The doctrine of substantial performance can be applied only if the failure to make full performance can be compensated in damages to be deducted from the price or allowed on a cross complaint (*see Lowy v. United Pac. Ins. Co. (1967) 67 Cal. 2d 87, 92-93, 60 Cal. Rptr. 225, 429 P.2d 577* ; *Thomas Haverty Co. v. Jones (1921) 185 Cal. 285, 289, 197 P. 105*).

[*Optional*] **F. Accumulation of Trivial Defects Negates Substantial Performance.** Performance rendered under a contract may be held to be less than substantial by reason of the accumulation of many defects, although any one of them standing alone would be minor in character (*Tolstoy Constr. Co. v. Minter (1978) 78 Cal. App. 3d 665, 673, 143 Cal. Rptr. 570*).

[2] Comments

[a] Use of Form

These memoranda support the contention that the adverse party did not substantially perform as required by the contract and therefore is not entitled to payment under the substantial performance doctrine.

This form should be combined with memoranda pertaining to the specific procedural context in which counsel wishes to raise the substantive issue. For example, this contention might be raised in opposition to the adverse party's contention that there was substantial performance, raised, for example, in a motion for summary adjudication [*see § 50.30*]. The form may also be used in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised in opposition to a motion for summary adjudication, the memorandum would include an analysis of the facts in the supporting and opposing papers showing thatthere is a triable issue of fact on the issue whether there was actually substantial performance by the moving party.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to the doctrine of substantial performance, together with discussion and forms relating to contract actions in general, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

In an appropriate case, the memoranda *set out in § 50.30* may be used in opposition to the memoranda of this form.

[3] Discussion of Authorities

[a] General Rule Requiring Full Performance

The facts and procedural backgrounds of ***Lowy v. United Pac. Ins. Co.*** *(1967) 67 Cal. 2d 87, 60 Cal. Rptr. 225, 429 P.2d 577* and ***Thomas Haverty Co. v. Jones*** *(1921) 185 Cal. 285, 197 P. 105* , are discussed in *§ 50.30[3][a]*. In *Lowy*, the Supreme Court reaffirmed and applied the principles announced in *Haverty* (*67 Cal. 2d 87, 92-93)* . In *Thomas Haverty Co.*, the Supreme Court stated the general rule requiring full performance for actions on a contract for the contract price. The Court went on to hold, however, that this general rule has been greatly relaxed, and the doctrine of substantial performance, as stated in the opinion and discussed in *§ 50.30[3][a]*, is settled law (*185 Cal. 285, 288-289)* .

[b] Substantial Performance Is Question of Fact

The facts and procedural background of ***Thomas Haverty Co. v. Jones*** *(1921) 185 Cal. 285, 197 P. 105* , are discussed in *§ 50.30[3][a]*. The Supreme Court held that the question of what constitutes substantial performance is usually to be determined in each case with reference to the facts and circumstances (*185 Cal. 285, 291)* .

In ***Tolstoy Constr. Co. v. Minter*** *(1978) 78 Cal. App. 3d 665, 143 Cal. Rptr. 570* , the plaintiff construction company contracted with the defendant to build a residence. Following the defendant's refusal to make apayment, the plaintiff stopped work and sued for breach of contract. The defendant, claiming that the plaintiff had failed to perform the contract in a substantial and workmanlike manner, cross complained for damages for the plaintiff's breach of the contract. The trial court found that the plaintiff had substantially performed under the contract and rendered judgment for the plaintiff for the amount due under the contract, less a small sum for the work not performed by the plaintiff. The defendant was denied all relief (*78 Cal. App. 3d 665, 668, 671)* . On appeal the defendant contended that the evidence was insufficient for the trial court to invoke the doctrine of substantial performance.

The court of appeal reversed. There were many examples of the plaintiff's deviations from the contract and unworkmanlike construction (*78 Cal. App. 3d 665, 668-671)* . The doctrine of substantial performance is the law of California (*78 Cal. App. 3d 665, 671-672)* , but what constitutes substantial performance is always a question of fact, a matter of degree, and a question that must be determined in relation to all of the other complex factors that exist in every instance (*78 Cal. App. 3d 665, 672)* . In this case, since what the defendant contracted for and what she actually received were two entirely different things, the trial court committed reversible error in applying the doctrine of substantial performance and allowing the contractor to recover on the contract. Although it was clear that the defendant suffered severe damage as a result of the manifold imperfections in the plaintiff's work, the court of appeal affirmed the denial of relief to the defendant on her cross complaint because she offered insufficient evidence to support a judgment (*78 Cal. App. 3d 665, 673)* .

[c] No Substantial Performance When Usefulness of Consideration Is Substantially Affected

The factual and procedural background of ***Tolstoy Constr. Co. v. Minter*** *(1978) 78 Cal. App. 3d 665, 143 Cal. Rptr. 570* , are discussed in [b], *above*. The court of appeal held that since what the defendant contracted for, a home of reasonable quality, and what she actually received, a building addition with many significant defects, were two entirely different things, the trial court committed reversible error when it applied the doctrine of substantial performance and allowed the contractor to recover on the contract (*78 Cal. App. 3d 665, 673)* .

In ***Williams v. Elliott*** *(1954) 127 Cal. App. 2d 357, 273 P.2d 953* , a contractor sued to establish a mechanic's lien for the unpaid balance due on a contract for the construction of a roof. The owner cross complained for damages, claiming that the contractor's poor workmanship and defects in the roof constituted a breach of contract on the contractor's part. The trial court found that the roof, as constructed, was of no value and had to be replaced. The court rendered judgment

for the owner. On appeal thecontractor contended that he had substantially performed the contract (*127 Cal. App. 2d 357, 359-360, 364)* .

The court of appeal affirmed. This was clearly not a case for application of the substantial-performance doctrine because there was evidence to support the finding that the roof, as constructed, was of no value (*127 Cal. App. 2d 357, 364)* .

[d] Substantial Performance Exists Only When Deviations Are Inadvertent

In ***Perry v. Quackenbush*** *(1894) 105 Cal. 299, 38 P. 740* , a case dealing with the doctrine of substantial performance, a land owner contracted with a contractor to build a house. The owner filed an action for cancellation of the promissory note and mortgage that he had executed to the contractor. The owner claimed, and the trial court found, that the contractor intentionally breached the contract by using second-hand materials and by building the house in an unworkmanlike manner. The trial court found the difference in value in the house as built, as opposed to how it should have been built, to be $350, and deducted this sum from the owner's note. On appeal the owner contended that the judgment was not supported by the findings of fact (*105 Cal. 299, 302-305)* .

The Supreme Court modified the judgment to cancel the owner's promissory note and mortgage (*105 Cal. 299, 310)* . The old rule requiring strict performance has been relaxed, and the more liberal rule of substantial performance applies (*105 Cal. 299, 305)* . However, the owner is entitled to have the structure that was contracted-for. Good faith on the part of the contractor is not enough to invoke the doctrine of substantial performance. The owner has a right to a structure that in all essential particulars is the one contracted-for. A trial court cannot say that anything is immaterial that the parties have made material by their contract. The owner had the right to determine for himself what he deemed a good foundation or what materials were to be used; and the owner having contracted for them, neither the contractor nor a court had the right to compel him to accept something else, even if it were shown by witnesses to be just as good or even better. No precise rule can or ought to be laid down on the subject, but whenever a case arises, courts and juries should see to it that the design of the owner is not defeated in any important respect (*105 Cal. 299, 309-310)* . To justify a recovery on the contract as substantially performed, the omissions or deviations must be the result of a mistake or inadvertence, and not intentional, much less fraudulent; and they must be slight or susceptible of remedy, so that an allowance out of the contract price will give the other party substantially what was contracted-for (*105 Cal. 299, 309)* .

In ***Shell v. Schmidt*** *(1958) 164 Cal. App. 2d 350, 330 P.2d 817 , cert. denied, 359 U.S. 959* , third-party beneficiaries of a construction contractbetween the federal government and a contractor, sued for breach of the contract. On a previous appeal, it was decided that the contractor had breached the contract, and the case was sent back to the trial court to ascertain the amount of damages. In this appeal, the contractor contended that the trial court erred in the manner in which it determined the damages (*164 Cal. App. 2d 350, 351)* .

The court of appeal affirmed. There cannot be the necessary good faith required by the substantial performance rule if there have been willful and intentional major deviations from the terms of the contract (*164 Cal. App. 2d 350, 358)* .

[e] Substantial Performance Exists Only When Damages Can Compensate for Deviations

In ***Lowy v. United Pac. Ins. Co.*** *(1967) 67 Cal. 2d 87, 60 Cal. Rptr. 225, 429 P.2d 577* , the Supreme Court, in dealing with the doctrine of substantial performance (discussed in *§ 50.30[3][a],* the Supreme Court applied the rule of ***Thomas Haverty Co. v. Jones*** *(1921) 185 Cal. 285, 197 P. 105* , which is also discussed in *§ 50.30[3][a]* (*67 Cal. 2d 87, 92-93)* . In the earlier case, the Supreme Court held that a contractor may recover the contract price, less the amount allowed as damages for failure to strictly perform, only when there has been substantial performance in good faith and when the failure to make full performance can be compensated in damages to be deducted from the price or allowed on a cross complaint (*185 Cal. 285, 289)* .

[f] Accumulation of Trivial Defects Negates Substantial Performance

The facts and procedural background of ***Tolstoy Constr. Co. v. Minter*** *(1978) 78 Cal. App. 3d 665, 143 Cal. Rptr. 570* , are discussed in [b], *above*. The court of appeal held that the performance rendered may be held to be less than substantial by reason of the accumulation of many defects, although any one of them standing alone would be minor in character (*78 Cal. App. 3d 665, 673)* .

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[Reserved]

§§ 50.32[Reserved]

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5-50 California Points & Authorities § 50.40

§ 50.40 Strict Performance Was Waived

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE PLAINTIFF WAIVED THE RIGHT TO REQUIRE STRICT PERFORMANCE FROM THE DEFENDANT.

A. Waiver Is Relinquishment of Right. Waiver is the intentional relinquishment of a known right, which can be shown by conduct warranting an inference of the relinquishment of the right or may result from an express agreement or be inferred from other circumstances indicating an intent to waive (*Panno v. Russo (1947) 82 Cal. App. 2d 408, 412, 186 P.2d 452* ; *see* *Roesch v. DeMota (1944) 24 Cal. 2d 563, 572, 150 P.2d 422*).

B. Waiver by Party Who Would Benefit From Waived Provision. A contracting party may waive provisions placed in a contract solely for his or her benefit (*Wyler Summit Partnership v. Turner Broadcasting (9th Cir. 1998) 135 F.3d 658, 662-664* ; *Wyler Summit Partnership v. Turner Broadcasting (9th Cir. 2000) 235 F. 3d 1184, 1190-1192* ; *Doryon v. Salant (1977) 75 Cal. App. 3d 706, 712, 142 Cal. Rptr. 378* ; *Wesley N. Taylor Co. v. Russell (1961) 194 Cal. App. 2d 816, 828, 15 Cal. Rptr. 357*).

C. Waiver Precludes Assertion of Breach of Waived Condition. Waiver by an obligee of a contractual condition precludes the obligee from asserting failure of the waived condition as a breach of contract (*see* *Knarston v. Manhattan Life Ins. Co. (1903) 140 Cal. 57, 64-66, 73 P. 740* ; *Silva v. National American Life Ins. Co. (1976) 58 Cal. App. 3d 609, 614-615, 130 Cal. Rptr. 211* ; *Panno v. Russo (1947) 82 Cal. App. 2d 408, 412-413, 186 P.2d 452*).

[*Optional*] **D. Continuing to Accept Performance With Knowledge of Previous Breach May Constitute Waiver of Breach.** When an injured party, with full knowledge of a breach, continues to accept performance from the breaching party, that conduct may constitute a waiver of the breach (*see* *Kern Sunset Oil Co. v. Good Roads Oil Co. (1931) 214 Cal. 435, 440, 6 P.2d 71* ; *Whitney Inv. Co. v. Westview Dev. Co. (1969) 273 Cal. App. 2d 594, 603, 78 Cal. Rptr. 302*).

[*Optional*] **E. Condoning Late Periodic Payments Is Waiver of Time-of-the-Essence Clause.** When time is made of the essence in a contract for the payment of money, acceptance of late payments, without objection, constitutes a waiver of the breach, and the right to future timely payments can be restored only by giving a definite and specific notice of an intention to enforce the provision (*Stevinson v. Joy (1912) 164 Cal. 279, 285, 128 P. 751* ; *see Boone v. Templeman (1910) 158 Cal. 290, 295, 110 P. 947*).

[*Optional*] **F. Acceptance of Building Is Waiver of Defects.** The acceptance of a building, in the absence of fraud or mistake, implies a waiver of any claim for damages on account of nonperformance in any particular (*G & P Elec. Co. v. Dumont Constr. Co. (1961) 194 Cal. App. 2d 868, 878, 15 Cal. Rptr. 757* ; *see Smith v. Mathews Constr. Co. (1919) 179 Cal. 797, 802, 179 P. 205*).

[*Optional*] **G. Waiver Is Created by Conduct.** Waiver may be shown by conduct. It may be the result of an act which, according to its natural import, is so inconsistent with the intent to enforce the right in question as to induce a reasonable belief that the right has been relinquished (*Medico-Dental Bldg. Co. v. Horton & Converse (1942) 21 Cal. 2d 411, 432, 132 P.2d 457* ; *Howard J. White, Inc. v. Varian Associates (1960) 178 Cal. App. 2d 348, 355, 2 Cal. Rptr. 871*).

[2] Comments

[a] Use of Form

These memoranda support the contention that a plaintiff seeking contract damages waived the right to require strict performance from the defendant.

This form may be combined with memoranda pertaining to the specific procedural context in which counsel wishes to raise the substantive issue. For example, this contention might be raised in a motion for a new trial on the ground of insufficiency of the evidence, pursuant to *Code Civ. Proc. § 657(6)*, or a motion to vacate the judgment pursuant to *Code Civ. Proc. § 663*. For memoranda relating to motions for a new trial generally, see Ch. 155, *Motions After Trial* .

This form may be adapted for use when the defendant asserts failure by the plaintiff to fulfill a condition precedent to the defendant's obligation, and the plaintiff asserts that the defendant waived the condition.

The form may also be used in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised in support of a defendant's motion for summary judgment, the memorandum would include an analysis of the facts in the supporting and opposing papers showing that undisputed facts establish clearly and convincingly a waiver by plaintiff of strict performance on defendant's part.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to waiver, together with discussion and forms relating to contract actions in general, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing*

Legal Memoranda and Briefs .

[e] Opposing Memoranda

In an appropriate case, the memoranda *set out in § 50.41* may be used in opposition to the memoranda of this form.

[3] Discussion of Authorities

[a] Waiver Is Relinquishment of Right

The facts and procedural background of ***Panno v. Russo*** *(1947) 82 Cal. App. 2d 408, 186 P.2d 452* , are discussed in [c], *below*. The court of appeal defined waiver as the intentional relinquishment of a known right or conduct warranting an inference of the relinquishment of the right, which may result from an express agreement or be inferred from circumstances indicating an intent to waive (*82 Cal. App. 2d 408, 412)* .

The facts and procedural background of ***Roesch v. DeMota*** *(1944) 24 Cal. 2d 563, 150 P.2d 422* , are discussed in *§ 50.41[3][d]*. The Supreme Court defined waiver as the intentional relinquishment of a known right after knowledge of the facts (*24 Cal. 2d 563, 572)* .

[b] Waiver by Party Who Would Benefit From Waived Provision

Wyler Summit Partnership v. Turner Broadcasting *(9th Cir. 1998) 135 F.3d 658* , a film director's successor in interest sued the producer's successor in interest to recover compensation due under a 1958 contract for the direction of a film. The contract provided that the director's percentage compensation would be payable in annual installments not to exceed $50,000 in any one year. That provision was inserted at the director's request, to reduce income tax liability. The film eventually generated more than $3.3 million in total percentage compensation for the director and his heirs, but the director and his heirs were paid only $1.8 million (in $50,000 annual payments). The producer retained $1.5 million in deferred percentage compensation, which after the director's death became payable to the director's heirs. The heirs proposed to waive the instalment-payment provision, but the producer's successor in interest rejected the proposal. The heirs then sought a judicial annulment of the instalment-payment provision, recovery of the deferred compensation, and recovery of the interest income that the producer and successor in interest had received on the deferred compensation (*135 F.3d 658, 659-661)* . The trial court granted a motion to dismiss the action for failure to state a claim on which relief can be granted. The court of appeals reversed. The trial court incorrectly applied California contract law as stated in *Doryon v. Salant (1977) 75 Cal. App. 3d 706, 712, 142 Cal. Rptr. 378* , and *Wesley N. Taylor Co. v. Russell (1961) 194 Cal. App. 2d 816, 828, 15 Cal. Rptr. 357* , both discussed *below*. A contracting party may waive conditions placed in a contract solely for the party's benefit. In this case, the heirs' complaint stated a cause of action for breach of contract on the basis of the proffered waiver of the instalment-payment provision and the rejection of that waiver by the producer's successor in interest (*135 F.3d 658, 662-664)* .

On remand, in ***Wyler Summit Partnership v. Turner Broadcasting*** *(9th Cir. 2000) 235 F. 3d 1184* , the district court granted summary judgment to defendant, and plaintiff appealed. Plaintiff contended, among other things, that a genuine issue of material fact existed as to whether a particular provision of the 1958 contract between the film director and the original producer (defendant's predecessor) was inserted for the sole benefit of the director or for the mutual benefit of both parties. The court stated that under California law, the test of whether a contractual provision may be waived by one party is not whether the parties believed or assumed that it could be waived. Instead, the determinative inquiry is whether the provision was inserted for the sole benefit of one of the parties. The court concluded that the director's successor in interest presented sufficient evidence to raise a triable issue of fact as to whether the original director and producer included the installment payment provision in the 1958 contract for the sole benefit of the director (*235 F. 3d 1184, 1190-1192)* .

In ***Doryon v. Salant*** *(1977) 75 Cal. App. 3d 706, 142 Cal. Rptr. 378* , purchasers sued for specific performance of a

contract for the sale of residential property. The contract was made subject to the condition that within 21 days, the purchasers would obtain a first-lien loan according to terms in the contract (*75 Cal. App. 3d 706, 708-709)* . Even though the purchasers were only able to obtain a loan for a sum less than that specified in the contract, they signed supplemental escrow instructions waiving the contingency regarding financing (*75 Cal. App. 3d 706, 709-710)* . The vendors subsequently refused to close escrow because they thought the price was too low (*75 Cal. App. 3d 706, 710)* . At the end of the plaintiffs' case, the trial court granted the vendors' motion for judgment under *Code Civ. Proc. § 631.8* because the court found that the contract lacked essential terms (*75 Cal. App. 3d 706, 710-711)* .

The court of appeal reversed. The trial court's findings were not supported by the evidence in that none of the essential terms required for a written contract was missing. Although the purchasers had not obtained the exact loan specified in the contract, the vendors could not rely on this to avoid their contractual obligation. A contracting party may waive provisions placed in a contract solely for his or her benefit. The provision in the contract regarding loan terms was there solely for the purchasers' benefit. They had the right to, and did, waive this condition precedent to their performance and, once having done so, the vendors were contractually assured of obtaining the full purchase price in cash. The vendors had contracted to sell the property for cash. The vendors would receive the purchase price in cash regardless of the method of financing chosen by the purchasers. Thus, if the purchasers were willing and able to produce the necessary cash despite their inability to obtain a loan on favorable terms as described in the contract, the vendors had no right to complain of the purchasers' waiver of the condition (*75 Cal. App. 3d 706, 712)* .

Wesley N. Taylor Co. v. Russell *(1961) 194 Cal. App. 2d 816, 15 Cal. Rptr. 357* , involved two consolidated actions arising out of failure to perform a contract for the sale of real property. The first action was brought by the purchaser to compel specific performance; the second action wasbrought by the real estate broker to collect a commission (*194 Cal. App. 2d 816, 818)* . The contract of sale was made contingent on the purchaser's ability to obtain a first-lien loan according to certain terms. Even though the purchaser was able to obtain a loan only on terms that were less favorable than those specified in the contract, the purchaser waived the condition that it be able to obtain a loan on the specified terms. The vendor contended that the purchaser's inability to obtain the specified loan automatically voided the contract, and the vendor refused to perform (*194 Cal. App. 2d 816, 820)* . The trial court found for the plaintiffs in both actions. The court of appeal dismissed the appeal of the judgment granting specific performance to the purchaser because the judgment was interlocutory and, therefore, not appealable (*194 Cal. App. 2d 816, 820)* .

The court of appeal affirmed the judgment for the broker. The trial court's finding that the subject condition was placed in the contract by the purchaser and was for its sole benefit was supported by the evidence and the law. It is well settled that a contracting party may waive provisions placed in a contract solely for his or her benefit. A provision of the type at issue in this case is for the sole benefit of the purchaser. A cash vendor's sole interest is in receiving the purchase price. The paramount obligation of the respective parties is the payment of the cash by the one party and the delivery of title to the property by the other party, and the method of financing is incidental to the contract (*194 Cal. App. 2d 816, 828-829)* .

[c] Waiver Precludes Assertion of Breach of Waived Condition

Knarston v. Manhattan Life Ins. Co. *(1903) 140 Cal. 57, 73 P. 740* , was an action to recover the benefits of a life insurance policy. The insured died after the scheduled due date for payment of the premium on his policy but before expiration of an oral extension of the time for payment. The policy provided for forfeiture in the event that payment of the premium was not made by the scheduled due date. Judgment was rendered on a verdict for the beneficiary. On appeal the insurance company contended that any purported waiver of the forfeiture provision in the policy would have been an alteration of the terms of the contract that would have been ineffective because not in writing (*140 Cal. 57, 60-62)* .

The Supreme Court affirmed. The granting of the extension was not a binding contract that precluded the insurance company from repudiating it at any time by notice to the insured. However, in the absence of a repudiation, the actions

of the company amounted to a waiver of the provision for forfeiture in the policy, and parol evidence was admissible to prove the waiver (*140 Cal. 57, 67)* . A waiver is not a contract that requires consideration but rather is in the nature of an estoppel. When the insured failed to pay his premium by the due date, the insurance company could have stood on the terms of the contract and considered the policy forfeited.Instead of doing this, it started negotiations with the insured, treating the policy as still in force and evidencing an intention to waive any right it might have had to insist on the forfeiture. Having granted the extension, the company recognized the policy as continuing in existence. Because the company did not repudiate the extension before the insured's death, the law would not permit the company to claim that its conduct did not constitute a waiver (*140 Cal. 57, 64-65)* .

Silva v. National American Life Ins. Co. *(1976) 58 Cal. App. 3d 609, 130 Cal. Rptr. 211* , was an action to recover the benefits of a life insurance policy. The defendant issued the insurance policy in conjunction with a mortgage loan. After selling the mortgaged property, the insured stopped making payments on the policy, and because of the nonpayment of the premium, the policy lapsed two months before the insured's death (*58 Cal. App. 3d 609, 611-612)* . On the date of the insured's death, the defendant had coincidentally written a letter to the insured offering to convert the mortgage insurance to individual insurance on payment of past due premiums. The trial court granted the insurance company's motion for summary judgment. On appeal the plaintiff contended that the company waived, or was estopped from relying on, the automatic lapse of the policy for nonpayment of premiums because the letter constituted negotiations with the insured, which was evidence that the company recognized the continued validity of the policy (*58 Cal. App. 3d 609, 612)* .

The court of appeal affirmed. An express provision of an insurance contract stipulating that a default in payment renders the policy void or causes it to lapse is valid. However, like any other contracting party, an insurance company may waive provisions placed in a policy solely for its own benefit and may, by its conduct, be estopped from asserting defenses that might otherwise be available (*58 Cal. App. 3d 609, 614-615)* . To constitute a waiver, there must be an existing right, a knowledge of its existence, and an actual intention to relinquish it, or conduct so inconsistent with the intent to enforce the right as to induce a reasonable belief that it has been relinquished. The party who has the right may waive it without reliance by another. The doctrine of estoppel, however, is based on the theory that the party estopped has, by declarations or conduct, misled another to the other's prejudice so that it would be inequitable to allow the true facts to be used against the misled party (*58 Cal. App. 3d 609, 615)* . If an insurance company, after knowledge of any default for which it might terminate the contract of insurance, enters into negotiations or transactions with the insured and so recognizes the continued validity of the policy and treats it as still in force, the right to claim a forfeiture for a previous default is waived (*58 Cal. App. 3d 609, 617)* . However, the facts of this case clearly did not fit within that general rule since the most that could be said for the defendant's letter is that it was an attempt to negotiate with the insured for reinstatement of the lapsed policy oncondition that all delinquent premiums be paid and future premiums be paid in advance on an annual basis (*58 Cal. App. 3d 609, 616)* .

Panno v. Russo *(1947) 82 Cal. App. 2d 408, 186 P.2d 452* , was an action for damages based on the defendant's breach of a contract to sell a crop of oranges to the plaintiff. The contract called for the plaintiff to pay a $5,000 deposit then pay $20,000 on January 1, 1944. On that date the plaintiff paid the defendant $10,000, and both parties agreed that the remaining $10,000 need not be paid until demanded by the defendant. The defendant sold the crop to a third party and notified the plaintiff that it had canceled their agreement. The trial court rendered judgment for the plaintiff (*82 Cal. App. 2d 408, 409-410)* .

The court of appeal affirmed. A party to a contract may, by conduct or representation, waive the performance of a condition or be held estopped by conduct or representations to deny that he or she has waived performance. Whether the established facts in any given case constitute an estoppel or a waiver is not always easily distinguishable. Waiver is the intentional relinquishment of a known right, which may be shown by conduct warranting an inference of the relinquishment of the right or may result from an express agreement or be inferred from other circumstances indicating an intent to waive. The doctrine of promissory estoppel applies when the promisor says, in essence, "I will perform even though you do not comply with the condition," or "even though you subject yourself to a legal defense." To bring the

case within the rule, it is essential that the promisee could and would have performed the condition, or would not have allowed the defense to arise, had it not been for the promisor's waiver (*82 Cal. App. 2d 408, 412)* . In this case, the defendant waived a provision of the contract made for its benefit, and by reason of that conduct, the doctrine of estoppel was properly invoked against the defendant (*82 Cal. App. 2d 408, 413)* .

[d] Continuing to Accept Performance With Knowledge of Previous Breach May Constitute Waiver of Breach

In ***Kern Sunset Oil Co. v. Good Roads Oil Co.*** *(1931) 214 Cal. 435, 6 P.2d 71* , a lessor sought a judgment declaring the forfeiture of a lease of oil lands. The lessor had continued to accept a share of the revenues from the land despite knowing that the lessee had not complied with the lease provision requiring the lessee to drill and put into production two wells a year for eight years. The trial court rendered judgment for the defendant after finding that the plaintiff had waived the right to assert the alleged breach as a ground for forfeiture of the lease (*214 Cal. 435, 437-439)* .

The Supreme Court affirmed. The acceptance of rent by a landlord, after full knowledge of a breach of a condition of the lease, is a waiver of the breach. By accepting rent under these circumstances, the lessor is recognizing the existence of the lease. It would be inconsistent for the lessor torecognize the existence of the lease and accept benefits under it, and at the same time claim that the lease is forfeited and seek to recover the fruits of a forfeiture (*214 Cal. 435, 445)* .

Whitney Inv. Co. v. Westview Dev. Co. *(1969) 273 Cal. App. 2d 594, 78 Cal. Rptr. 302* , was an appeal by real estate brokers from an adverse judgment in their action to recover a commission allegedly due under an exclusive listing agreement for the sale of certain properties owned by the defendant (*273 Cal. App. 2d 594, 597)* . The trial court found that before the defendant's sale of a property through another agent, the brokers had failed to perform certain obligations under the contract. The trial court rendered judgment for the defendant (*273 Cal. App. 2d 594, 599-600)* . On appeal the brokers contended that despite their failure to perform all of their promises, the parties had continued to treat the contract as being alive; therefore, the defendant had waived the breach.

The court of appeal reversed. A breach does not terminate a contract as a matter of course but is only a ground for termination at the option of the injured party. Furthermore, when the injured party, with knowledge of the breach, continues to accept performance from the guilty party, that conduct may constitute a waiver of the breach. Although the trial court did find that the brokers breached the contract by failing to perform all of their promises, the court's failure to make a finding as to whether the defendant had terminated the contract by reason of the partial breach, or had waived the breach, required a reversal (*273 Cal. App. 2d 594, 602-604)* .

[e] Condoning Late Periodic Payments Is Waiver of Time-of-the-Essence Clause

In ***Stevinson v. Joy*** *(1912) 164 Cal. 279, 128 P. 751* , a vendor sued to quiet title to a parcel of land and to enjoin the purchaser from removing a building constructed on the land. The vendor had made an instalment sale contract requiring the purchaser to make weekly payments and expressly making time of the essence. The vendor had continually accepted payments from the purchaser long after they were due. On receipt from the purchaser of a late payment after the contract had been in effect for more than a year, the vendor returned the payment along with a letter declaring the forfeiture because of the purchaser's failure to make timely payments. The trial court, finding that the vendor had waived the "time of the essence" provision, rendered judgment for the purchaser (*164 Cal. 279, 280-283)* .

The Supreme Court affirmed. When time is of the essence of a contract for the payment of money, but the covenant has been waived by the acceptance of the money after it is due, and with knowledge of the facts, that conduct will be regarded as creating a temporary suspension of the rightof forfeiture, which can be restored only by giving a definite and specific notice of an intention to enforce it (*164 Cal. 279, 285)* .

In ***Boone v. Templeman*** *(1910) 158 Cal. 290, 110 P. 947* , a purchaser sued for specific performance of a contract for

the sale of land. The contract, which specifically made time of the essence, provided that if any monthly payment was more than 60 days overdue, the vendor could declare a forfeiture. Nevertheless, the vendor continually accepted late payments with no objection. Furthermore, after receiving no payment for over three years, and more than one year after the final payment was due, and with no demand or notification to the purchaser that he was delinquent in his payments, the vendor notified the purchaser that he rescinded the contract. The purchaser then offered to pay the entire balance due, which was refused. The trial court sustained the vendor's demurrer (*158 Cal. 290, 292-294)* .

The Supreme Court reversed. From the facts alleged, the acceptance of payments of installments on the price by the vendor, without objection, long after they had become due, was a waiver of all breaches that had occurred at or before the time the payments were actually made, and the vendor could not insist on a forfeiture on the basis of late payments (*158 Cal. 290, 295)* .

[f] Acceptance of Building Is Waiver of Defects

In ***Smith v. Mathews Constr. Co.*** *(1919) 179 Cal. 797, 179 P. 205* , a contractor sued for the balance due, as well as compensation for certain extras performed, under a construction contract. The defendants cross complained for damages, claiming that the work was done in an unworkmanlike manner, and defective materials had been used. The trial court rendered judgment for the contractor for the entire sum claimed and against the defendants on their cross complaint (*179 Cal. 797, 798-800)* .

The Supreme Court affirmed. The contract gave the architect discretionary power to order any imperfect work re-executed. By the defendants' failure to demand any re-execution of the work or change in materials before their acceptance of the building, the departures from the strict performance of the work according to the very letter of the specifications were waived (*179 Cal. 797, 802)* .

In ***G & P Elec. Co. v. Dumont Constr. Co.*** *(1961) 194 Cal. App. 2d 868, 15 Cal. Rptr. 757* , an electrical subcontractor sued building owners and the general contractor for the balance allegedly due under the subcontract. The owners claimed that the subcontractor had not performed the work in accordance with the plans and specifications (*194 Cal. App. 2d 868, 872-873)* . The trial court rendered judgment for the subcontractor.

The court of appeal affirmed. After taking possession of the building, the owners signed a release with the contractor agreeing to make no furtherclaims of any nature whatsoever pursuant to the original contract. Having released the general contractor from all claims for deficient performance, the owners could not be allowed to complain against the subcontractor about the work performed under the subcontract (*194 Cal. App. 2d 868, 877-878)* . The acceptance of a building, in the absence of fraud or mistake, implies a waiver of any claim for damages on account of nonperformance in any particular (*194 Cal. App. 2d 868, 878)* .

[g] Waiver Is Created by Conduct

In ***Medico-Dental Bldg. Co. v. Horton & Converse*** *(1942) 21 Cal. 2d 411, 132 P.2d 457* , a landlord sued for rent due under a lease. The defendant operated a drug store on the leased premises. The lease contained a restrictive covenant by which the lessor agreed not to rent any other portion of the building to a tenant that would compete with the defendant (*21 Cal. 2d 411, 414-415)* . Despite this restrictive covenant, another tenant in the building began dispensing drugs in competition with the defendant. Following negotiations, the landlord informed the defendant that nothing could be done to prevent the other tenant from dispensing drugs. The defendant then informed the landlord that the defendant intended to vacate the premises in order to avoid a waiver of its exclusive right to maintain a drug store in the building. The defendant vacated the building within two weeks (*21 Cal. 2d 411, 417)* . The trial court, finding that the landlord had breached the lease and caused a material failure of consideration to the defendant, rendered judgment for the defendant. On appeal the landlord contended that the defendant had waived the alleged breach (*21 Cal. 2d 411, 417-418)* .

The Supreme Court affirmed. There was no waiver by the defendant. Once the defendant had been told by the landlord that the landlord would not force the other tenant to stop dispensing drugs, the defendant was forced to elect whether it would continue under its lease after the next rent payment day and waive the breach, or vacate before the end of month, as it did. This immediate election was necessary because waiver may be shown by conduct and may be the result of an act that, according to its natural import, is so inconsistent with the intent to enforce the right in question as to induce a reasonable belief that the right has been relinquished (*21 Cal. 2d 411, 432)* .

Howard J. White, Inc. v. Varian Associates *(1960) 178 Cal. App. 2d 348, 2 Cal. Rptr. 871* , was an action by a contractor to recover a sum due under a construction contract. The defendant cross complained, alleging that the contractor's tardy completion of the contract had caused significant damages to the defendant (*178 Cal. App. 2d 348, 350, 352)* . Despite the contract's requirement that all change orders had to be in writing, many change orders were made orally. The contractor alleged that the change orders necessitated completion of the project after the completiondate. The defendant alleged that the contract required changes to be in writing, including any extension, and the contractor's tardy completion could not be excused on the basis of oral change orders. The trial court rendered judgment for the contractor.

The court of appeal affirmed. It is settled law that the parties may, by their conduct, waive the requirement of a written contract that no extra work shall be done except on written order. In this case, the parties, by their previous conduct, had clearly waived the requirement that change orders be in writing (*178 Cal. App. 2d 348, 353)* . Waiver may be shown by conduct and may be the result of an act that, according to its natural import, is so inconsistent with the intent to enforce the right in question as to induce a reasonable belief that the right has been relinquished (*178 Cal. App. 2d 348, 355)* .

[4] Additional Authorities

[a] Acceptance of Building Is Waiver of Defects

In *Atowich v. Zimmer (1933) 218 Cal. 763, 25 P.2d 6* , owners sued a contractor for breach of a contract to build a building. The plaintiffs alleged that the defendant omitted certain features called for by the plans and specifications (*218 Cal. 763, 764-765)* . The trial court found that there was substantial compliance with the contract, and the changes and omissions were made with the consent of the plaintiffs' agent (*218 Cal. 763, 767)* . Furthermore, at the time the contractor sought payment for extras, his claim was reduced by an allowance by the contractor to the owners of certain credits for omissions (*218 Cal. 763, 768)* . Judgment was rendered for the contractor. The Supreme Court affirmed. The owners' acceptance and taking of possession of the completed structure was coincident with the settlement of the contractor's claim and the owners' counterclaims for changes, alterations, and omissions; and, in the absence of any showing of fraud or mistake, neither of which was urged by the owners in this case, the owners waived of any claim for damages on account of nonperformance in any particular (*218 Cal. 763, 768)* .

California Points & Authorities

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Volume 5 Chapters 50-59 CONTRACTS---to---CORPORATIONS
CHAPTER 50 CONTRACTS
PART II. FORMS
A. Action for Damages for Breach of Contract

5-50 California Points & Authorities § 50.41

§ 50.41 Strict Performance Was Not Waived

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE PLAINTIFF DID NOT WAIVE THE RIGHT TO STRICT PERFORMANCE BY THE DEFENDANT.

A. Waiver Is Question of Fact. Whether a party has waived any contractual rights is a question of fact that must be determined from the circumstances of the case (*Sparling v. Housman (1950) 96 Cal. App. 2d 159, 163, 214 P.2d 837* ; *Banducci v. Frank T. Hickey, Inc. (1949) 93 Cal. App. 2d 658, 663, 209 P.2d 398*).

B. Doubtful Case Must Be Decided Against Waiver. When there is doubt as to whether there has been a waiver, the issue is to be decided against the one who claims a waiver (*Bass v. John Hancock Mut. Life Ins. Co. (1974) 10 Cal. 3d 792, 796, 112 Cal. Rptr. 195, 518 P.2d 1147*).

C. Burden of Proof Is on Party Asserting Waiver. The burden of proof is on the party claiming a waiver, to prove it by clear and convincing evidence that does not leave the matter to speculation (*Bass v. John Hancock Mut. Life Ins. Co. (1974) 10 Cal. 3d 792, 796, 112 Cal. Rptr. 195, 518 P.2d 1147*).

[*Optional*] **D. Waiver Must Always Be Intentional With Knowledge of All Facts.** Waiver always rests on intent. Waiver is the intentional relinquishment of a known right after knowledge of the facts (*Ukiah v. Fones (1966) 64 Cal. 2d 104, 107, 48 Cal. Rptr. 865, 410 P.2d 369* ; *Roesch v. DeMota (1944) 24 Cal. 2d 563, 572, 150 P.2d 422*).

[*Optional*] **E. Waiver Must Be Clearly Expressed.** A waiver must be clearly expressed (*see Spellman v. Dixon (1967) 256 Cal. App. 2d 1, 5, 63 Cal. Rptr. 668*).

[*Optional*] **F. Mere Payment or Acceptance of Work Under Construction Contract Does Not Constitute Waiver.** Mere payment or acceptance of work under a construction contract does not constitute a waiver by the owner of a

breach by the contractor, unless the circumstances show an intent to waive or create an estoppel against the subsequent assertion of the right to damages (*see Leonard v. Home Builders (1916) 174 Cal. 65, 68-69, 161 P. 1151* ; *Banducci v. Frank T. Hickey, Inc. (1949) 93 Cal. App. 2d 658, 662, 209 P.2d 398*).

[*Optional*] **G. When Obligation Is Continuous, Waiver to Certain Time Does Not Preclude Assertion of Subsequent Breach.** When an obligation is continuous, a waiver of a breach up to a certain time does not necessarily preclude the promisee from asserting a subsequent breach (*Woodard v. Glenwood Lbr. Co. (1915) 171 Cal. 513, 523, 153 P. 951* ; *Bowman v. Santa Clara County (1957) 153 Cal. App. 2d 707, 713, 315 P.2d 67*).

[*Optional*] **H. Allowance of Performance After Completion Date Does Not Constitute Waiver of Breach.** Consent on the part of the promisee to allow the promisor to perform after the agreed time is not a waiver of the promisor's breach of contract for failure to render timely performance (*Bryson v. McCone (1898) 121 Cal. 153, 157, 53 P. 637* ; *Wilkinson & Co. v. McKinley (1948) 84 Cal. App. 2d 100, 105, 190 P.2d 35*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that strict performance was not waived.

This form may be combined with memoranda pertaining to the specific procedural context in which counsel wishes to raise the substantive issue. For example, this contention might be raised in opposition to the adverse contention [*see § 50.40*] presented in a motion for a new trial on the ground of insufficiency of the evidence, pursuant to *Code Civ. Proc. § 657(6)*, or motion to vacate the judgment pursuant to *Code Civ. Proc. § 663*. For forms relating to motions for a new trial generally, see Ch. 155, *Motions After Trial* .

The form may also be used in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised in opposing a defendant's motion for summary judgment, the memorandum would include an analysis of the facts in the supporting and opposing papers showing that there is a triable issue of fact concerning whether or not plaintiff's conduct clearly and convincingly constitutes a waiver of defendant's strict performance.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to waiver, together with discussion and forms relating to contract actions in general, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing amemorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

In an appropriate case, the memoranda *set out in § 50.40* may be used in opposition to the memoranda of this form.

[3] Discussion of Authorities

[a] Waiver Is Question of Fact

In ***Sparling v. Housman*** *(1950) 96 Cal. App. 2d 159, 214 P.2d 837* , a home owner withheld the last payment due to a contractor under a contract for the construction of a house. The owner claimed the contractor had failed to build the building in accordance with the plans and specifications. The contractor sued to collect $1,950 due under the contract. After listening to substantial evidence of deviations from the plans by the contractor, the court, sitting without a jury, allowed the owner an offset of $1,200 (*96 Cal. App. 2d 159, 160)* . On appeal the contractor contended that the owner's moving into the house and failing to object to the manner in which the work was done constituted a waiver of strict performance of the contract (*96 Cal. App. 2d 159, 162)* .

The court of appeal affirmed. The question of whether a party has waived the right to recover for failure of performance is a factual question for the trier of fact (*96 Cal. App. 2d 159, 163)* .

Banducci v. Frank T. Hickey, Inc. *(1949) 93 Cal. App. 2d 658, 209 P.2d 398* , was an action to recover damages for failure to strictly perform an oral contract to grade and level land (*93 Cal. App. 2d 658, 659)* . The court rendered judgment for the land owner. On appeal the contractor contended that since the owner accepted and took possession of the completed work, in the absence of fraud or mistake, the owner waived the right to strict performance and cannot recover, and the jury should have been so instructed (*93 Cal. App. 2d 658, 661, 662)* .

The court of appeal affirmed. A mere acceptance, without more, does not necessarily preclude the owner from showing that the work was done in an unworkmanlike manner, especially when the defects were latent or when the owner had no reasonable means of ascertaining the defects and, when they were ascertained, gave timely notice, even though the owner paid the contract price (*93 Cal. App. 2d 658, 662)* . The general rule is that whether a waiver is implied is a question of fact that must be determined from all of the circumstances (*93 Cal. App. 2d 658, 663)* .

[b] Doubtful Case Must Be Decided Against Waiver

In ***Bass v. John Hancock Mut. Life Ins. Co.*** *(1974) 10 Cal. 3d 792, 112 Cal. Rptr. 195, 518 P.2d 1147* , a life insurance beneficiary sued to recoverbenefits. In 1964, the plaintiff's husband, one of 3,500 employees, was the only employee at his company to waive, in writing, the benefits provided without charge to all employees. In 1967, as part of a new union contract, the insurance plan was amended to provide increased benefits. The company did not ask the husband whether he wished to receive benefits under the new plan, but he did receive a booklet telling him that the benefits became applicable to him if he was working on the day the plan went into effect (*10 Cal. 3d 792, 794-795)* . The trial court, finding that the husband had refused the insurance coverage, rendered judgment for the defendant (*10 Cal. 3d 792, 795)* .

The Supreme Court reversed and directed judgment for the plaintiff for the benefit amount under the policy. Although the rights of a third-party beneficiary may be voluntarily waived or disclaimed, the burden is on the party claiming the waiver to prove it by clear and convincing evidence that does not leave the matter to speculation, and doubtful cases will be decided against a waiver (*10 Cal. 3d 792, 796)* . The 1964 waiver was not necessarily controlling with respect to rights under the expanded 1967 insurance program. Although one might assume that the husband, having refused free insurance under the 1964 plan, probably would also refuse similar coverage under the 1967 plan, one could also assume that he finally appreciated the benefits and intended to accept benefits under the new plan. However, the very necessity of speculation demonstrated that the proof of waiver was not clear and convincing (*10 Cal. 3d 792, 796-798)* .

[c] Burden of Proof Is on Party Asserting Waiver

The facts and procedural background of ***Bass v. John Hancock Mut. Life Ins. Co.*** *(1974) 10 Cal. 3d 792, 112 Cal. Rptr. 195, 518 P.2d 1147* , are discussed in [b], *above*. The Supreme Court held that the burden is on the party claiming the waiver to prove it by clear and convincing evidence that does not leave the matter to speculation, and doubtful cases

will be decided against a waiver (*10 Cal. 3d 792, 796)* .

[d] Waiver Must Always Be Intentional With Knowledge of All Facts

In ***Ukiah v. Fones*** *(1966) 64 Cal. 2d 104, 48 Cal. Rptr. 865, 410 P.2d 369* , a janitor at a municipal library had been summarily dismissed from his job by the librarian and the library's board of trustees. The city council ordered his reinstatement on the ground that he was a civil service employee and had not been accorded the procedural safeguards prescribed by the civil service ordinance. Following the library board's refusal to comply with the order of reinstatement, the city sued for declaratory relief seeking to assert the jurisdiction of its civil service system over the library's employees. The dismissed employee stipulated that if he had been wrongfully terminated, he would be entitled to salary from the date of dismissalto the date of the filing of the complaint (*64 Cal. 2d 104, 106)* . Following a determination that the employee was wrongly terminated, the trial court found that the stipulation was a waiver of the employee's right to back pay accruing after the filing of the complaint (*64 Cal. 2d 104, 107)* .

The Supreme Court reversed. Waiver always rests on intent and is the intentional relinquishment of a known right after knowledge of the facts. The burden is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and doubtful cases will be decided against a waiver (*64 Cal. 2d 104, 107-108)* . In attempting to determine whether the stipulation was a waiver, a court may find it necessary to speculate on the motives that dictated the choice of language used in the stipulation. The very necessity of speculation would demonstrate that the proof of waiver was not clear and convincing. Therefore found, as a matter of law, there was no waiver (*64 Cal. 2d 104, 108, 110)* . Although this case did not involve waiver in a contractual setting, the Court's citation to *Roesch v. DeMota (1944) 24 Cal. 2d 563, 572, 150 P.2d 422* , *below*, indicates that the principles applied here would also apply to an asserted waiver of contractual rights.

Roesch v. DeMota *(1944) 24 Cal. 2d 563, 150 P.2d 422* , was an action to enjoin a scheduled trustee's sale of mining property under two deeds of trust (*24 Cal. 2d 563, 565)* . In 1923 and 1925, the owner of the mining property obtained two admittedly usurious loans secured by deeds of trust on the property (*24 Cal. 2d 563, 566)* . The fact that the notes were usurious was not recognized until some time after a 1927 court decision (*24 Cal. 2d 563, 572)* . The defendant pleaded that the defense of usury had been waived and was therefore unavailable to the owner. The trial court found that the notes were usurious and the defense of usury was available to the owner. It enjoined the sale of the property for amounts in excess of the face value of the notes plus certain charges and fees to which the parties had stipulated (*24 Cal. 2d 563, 568)* .

The Supreme Court affirmed. Waiver always rests on intent. Waiver is the intentional relinquishment of a known right after knowledge of the facts. Since the parties did not know that the notes were usurious at the time they made the agreement, and since the agreements could not be interpreted as imputing to the parties an intention not within their contemplation at the time of the execution of the agreements, it could not be held that the parties had waived the defense of usury (*24 Cal. 2d 563, 572)* .

[e] Waiver Must Be Clearly Expressed

In ***Spellman v. Dixon*** *(1967) 256 Cal. App. 2d 1, 63 Cal. Rptr. 668* , the plaintiffs had agreed to purchase the defendant's real property. The escrow instructions included a subordination clause that was placed in the instructions solely for the purchasers' benefit. The vendor repudiated the agreement, terminated the escrow, and offered to return all considerationthat she had received from the purchasers. The purchasers informed the vendor that they were willing and able to complete performance of the agreement. They also offered to waive the subordination clause if the vendor went through with the contract, although the language used in the asserted waiver was somewhat ambiguous. The vendor did not accept this offer but sold the property to third persons. The purchasers then sued for specific performance of the agreement or, in the alternative, for damages. The trial court held that the agreement, particularly the subordination clause, was too uncertain to enforce and rendered judgment for the vendor. On appeal, the purchasers contended that

their waiver of the subordination clause had removed the uncertainty and rendered the contract enforceable.

The court of appeal affirmed. To be valid, a waiver must be a clear expression made with a full knowledge of the facts and an intent to waive the right. Doubtful cases are decided against the one who claims a waiver. The language of the purported waiver was ambiguous and misleading and, therefore, ineffectual (*256 Cal. App. 2d 1, 5)* .

[f] Mere Payment or Acceptance of Work Under Construction Contract Does Not Constitute Waiver

Leonard v. Home Builders *(1916) 174 Cal. 65, 161 P. 1151* , was an action by home owner against a contractor to recover damages resulting from the contractor's failure to build a house according to the plans and specifications (*174 Cal. 65, 66)* . Following the introduction of the owner's evidence, the trial court determined that the owner voluntarily had made the last payment under the contract. It therefore concluded that the owner had waived his right to sue for defects in performance. The trial court granted a motion for nonsuit (*174 Cal. 65, 67)* .

The Supreme Court reversed. The trial court erred in deciding that there was a waiver by the owner in merely voluntarily making the last payment under the contract. Payments under the contract, whether in part or in full, voluntary or involuntary, will not operate as a waiver of the paying party's right to damages unless the circumstances show an intent to waive or create an estoppel against the subsequent assertion of the right to damages (*174 Cal. 65, 69)* . When a building contractor breaches the covenant to build in a good and workmanlike manner, neither occupation of the building by the owner after its supposed completion nor payment of the price, even with knowledge of the defective construction, is sufficient, taken alone, to operate as a waiver of the breach of the covenant. A right of action for damages is not necessarily waived by the mere fact of payment with knowledge of the defects or by the taking possession of the subject matter of the contract, but these facts may be considered on the question of a waiver of this character (*174 Cal. 65, 68)* .

The facts and procedural background of ***Banducci v. Frank T. Hickey, Inc.*** *(1949) 93 Cal. App. 2d 658, 209 P.2d 398* , are discussed in [a], *above*. The court of appeal held that a mere acceptance, without more, does not necessarily preclude the owner from showing that the work was done in an unworkmanlike manner, especially when the defects were latent or when the owner had no reasonable means of ascertaining the defects and, when they were ascertained, gave timely notice, even though the owner paid the contract price (*93 Cal. App. 2d 658, 662)* .

[g] When Obligation Is Continuous, Waiver to Certain Time Does Not Preclude Assertion of Subsequent Breach

In ***Woodard v. Glenwood Lbr. Co.*** *(1915) 171 Cal. 513, 153 P. 951* , a land owner sued to rescind a contract with a lumber company by which the company agreed to cut and ship about four million board-feet of lumber annually from the owner's land and to pay a set price per board-foot (*171 Cal. 513, 516-517)* . Two years after the company ceased timber-harvesting operations, the plaintiff attempted to rescind the agreement. The company claimed in the trial court, and contended on appeal after judgment was rendered for the owner, that the owner lost his right of rescission by his failure to assert it promptly after the occurrence of the facts giving him the right to rescind.

The Supreme Court affirmed. The obligation to cut the timber, manufacture it into lumber, and ship it, was a continuing covenant. Every day's failure, without justification, to resume operations was a new breach of the contract, and the fact that the owner may have waived the breach up to a given time did not preclude him from asserting a subsequent breach (*171 Cal. 513, 523)* .

In ***Bowman v. Santa Clara County*** *(1957) 153 Cal. App. 2d 707, 315 P.2d 67* , a subcontractor sued the general contractor for damages for breach of a contract requiring the subcontractor to dig a trench at the rate of 400 feet a day for $.50 a foot. Implicit in the agreement was the contractor's obligation to pay at a higher rate if the subcontractor was not allowed to dig at the rate of 400 feet per day (*153 Cal. App. 2d 707, 712-714)* . After working on the job from July

28 to August 21, the subcontractor walked off the job because of constant interruptions and wasted standby time caused by the contractor (*153 Cal. App. 2d 707, 710)* . The subcontractor returned to work a week later after an exchange of letters that constituted an explicit agreement that the contractor would pay for standby time. The trial court found that the subcontractor was entitled to recover for standby time after August 31, for which the contractor was billed. The subcontractor was not entitled to recover for standby time during the initial period of digging, apparently on the theory of waiver, because of a longdelay in billing the contractor for it (*153 Cal. App. 2d 707, 713)* . Judgment was rendered for the plaintiff.

The court of appeal affirmed. The subcontractor had waived his right to payment for standby time for the period before he withdrew from the job by not billing the contractor for it. A waiver may be shown by conduct. What constitutes a waiver is a question of fact determined by the trier of fact. In continuing-obligation cases, a waiver of a breach up to a certain time does not necessarily preclude the promisee from asserting a subsequent breach. In this case, the subcontractor's waiver of his right to collect for standby time before he temporarily stopped work was not a waiver of his right to collect for standby time after he resumed work (*153 Cal. App. 2d 707, 713)* .

[h] Allowance of Performance After Completion Date Does Not Constitute Waiver of Breach

Bryson v. McCone *(1898) 121 Cal. 153, 53 P. 637* , was an action to recover damages for breach of a contract to install new ice-making machinery in the plaintiff's plant by a particular date. Even though there was no agreement to extend the time for performance, the plaintiff allowed the defendant to continue working on the plant after the expiration of the time for performance. In the trial court, the defendant unsuccessfully claimed that this conduct constituted a waiver by the plaintiff of the defendant's breach. Judgment was rendered for the plaintiff.

The Supreme Court affirmed. The plaintiff's consent to the defendant's continuing to work beyond the agreed time for completion was not a waiver of damages or of the breach. Following the defendant's breach, the plaintiff had the right to rescind or permit the defendant to complete the work and sue for damages occasioned by the failure to complete the work in a timely fashion (*121 Cal. 153, 157-158)* .

Wilkinson & Co. v. McKinley *(1948) 84 Cal. App. 2d 100, 190 P.2d 35* , was an action by a drilling company to recover money due under a contract to drill a well for the defendant. The defendant cross complained for damages for loss of a crop due to the plaintiff's failure to complete the well by the agreed date. The trial court rendered judgment for the plaintiff but allowed the defendant an offset for the value of the lost crop. On appeal the plaintiff contended that by permitting the work to be begun after the time for performance under the contract had expired, the defendant had waived the time for performance and any damages resulting to any crops from failure to complete the well within that time (*84 Cal. App. 2d 100, 101-103)* .

The court of appeal affirmed. As a matter of law, there was no waiver of the defendant's right to damages resulting to his crop by allowing theplaintiff to begin work after the time for performance under the contract had expired (*84 Cal. App. 2d 100, 105)* .

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Volume 5 Chapters 50-59 CONTRACTS---to---CORPORATIONS
CHAPTER 50 CONTRACTS
PART II. FORMS
A. Action for Damages for Breach of Contract

5-50 California Points & Authorities §§ 50.42-50.49

[Reserved]

§§ 50.42[Reserved]

California Points & Authorities

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Volume 5 Chapters 50-59 CONTRACTS---to---CORPORATIONS
CHAPTER 50 CONTRACTS
PART II. FORMS
A. Action for Damages for Breach of Contract

5-50 California Points & Authorities § 50.50

§ 50.50 Failure to Plead Breach by Defendant

[1] Breach Must Be Alleged

[a] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE COMPLAINT DOES NOT ALLEGE THAT THE CONTRACT WAS BREACHED [SINCE IT FAILS TO STATE ANY SPECIFIC CONDUCT THAT THE PLAINTIFF CLAIMS VIOLATED THE CONTRACT].

A. Elements to Be Pleaded. [*See § 50.10[1][a], Paragraph A.*]

B. Requirement of Alleging Breach. If a complaint does not contain an allegation of breach of contract, no cause of action for breach of contract is shown (*Moore v. Besse (1866) 30 Cal. 570, 572* ; *Blatt v. University of So. Cal. (1970) 5 Cal. App. 3d 935, 944, 85 Cal. Rptr. 601*).

C. Pleading Defendant's Breach. In pleading breach of the contract by the defendant, the plaintiff must allege sufficient facts to apprise the defendant of the specific conduct that the plaintiff claims violated the contract (*Wise v. Southern Pacific Co. (1963) 223 Cal. App. 2d 50, 60, 35 Cal. Rptr. 652*).

[*Optional*] **D. Requirement of Stating Facts of Breach Unequivocally.** The essential facts of the breach must be stated directly or in unequivocal language and not left to be inferred (*Moore v. Besse (1866) 30 Cal. 570, 572)* .

[*Optional*] **E. Requirement of Alleging Promise and Its Nonperformance.** In an action on a contract based on a breach of a promise by the defendant, the plaintiff must set forth the promise and the fact that it was not performed (*see Blatt v. University of So. Cal. (1970) 5 Cal. App. 3d 935, 944, 85 Cal. Rptr. 601*).

[*Optional*] **F. Breach Alleged in Conclusionary Language.** An allegation that the defendant breached or violated the contract or that an act was wrongful, illegal, without authority, unlawful,unjust, arbitrary, or fraudulent, is conclusionary

and defective and, without additional allegations, raises no triable issue (*Wise v. Southern Pacific Co. (1963) 223 Cal. App. 2d 50, 60, 35 Cal. Rptr. 652*).

[b] Comments

[i] Use of Form

These memoranda may be submitted in support of the contention that a complaint for contract damages does not state all the necessary elements of the cause of action because the facts alleged are insufficient to apprise the defendant of the specific conduct that the plaintiff claimed violated the contract, such as when the plaintiff alleges merely that the defendant breached or violated the contract or that the defendant's act was wrongful, illegal, without authority, unlawful, unjust, arbitrary, or fraudulent, with no further allegations with regard to the breach of the contract [*see Wise v. Southern Pacific Co. (1963) 223 Cal. App. 2d 50, 60, 35 Cal. Rptr. 652]* . Thus, this form may be used in a memorandum submitted in support of a general demurrer to a complaint, on the ground that the complaint fails to state facts sufficient to constitute a cause of action.

This form may also be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a defendant seeks relief on the basis of plaintiff's failure to plead or prove the necessary elements of the cause of action for contract damages. For example, it may be used in a memorandum supporting a motion for judgment on the pleadings.

[ii] Argument

Counsel should add argument linking the points in this form with the facts of the case, for example, an analysis of the allegations in plaintiff's complaint demonstrating that the contract does sufficiently allege facts apprising defendant of the breach claimed by plaintiff.

[iii] Split of Authorities

A slight division of authority exists as to whether a general allegation that the defendant has failed and refused to perform the contract, without more, is a sufficient allegation of breach [*Wise v. Southern Pacific Co. (1963) 223 Cal. App. 2d 50, 60, 35 Cal. Rptr. 652]* . The weight of authority holds that a general allegation is not sufficient [*Fisher v. Pearson (1874) 48 Cal. 472, 478* (allegation that defendant failed and refused to perform contract was radically defective and insufficient to support judgment); *Byrne v. Harvey (1962) 211 Cal. App. 2d 92, 105, 27 Cal. Rptr. 110* (statement that defendant failed and refused, and still fails and refuses, to perform contractwas conclusionary and lacking in particularity)]. On the other hand, an old court of appeal case allowed a general allegation (that defendant wrongfully and without cause failed and refused to perform agreement according to its terms or at all) to stand against a general demurrer, on the nonsubstantive ground that objection should have been taken by a special demurrer for uncertainty [*Nohl v. Del Norte County (1919) 45 Cal. App. 306, 310, 187 P. 761]* .

[iv] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[v] Related Memoranda

This form may be combined, when appropriate, with the general memoranda based on failure to plead a particular element [*see § 50.10* et seq.]. They may also be combined with the additional memoranda relating to the allegation of a breach by defendant [*see* [2], [3], *below*].

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a general demurrer, they may be combined with appropriate memoranda set out in Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[c] Discussion of Authorities

[i] Requirement of Alleging Breach

Moore v. Besse *(1866) 30 Cal. 570* , was an action on a contract to deliver potatoes. Although the defendant was entitled to deliver the potatoes at any time during a three-month period, the plaintiff claimed to state a breach by alleging that on December 4, when the defendant had nearly two months left within which to perform, the defendant refused to deliver the potatoes. The defendant demurred generally, the trial court overruled the demurrer, and the defendant declined to answer. Judgment by default was rendered for the plaintiff.

The Supreme Court reversed. The allegation in question was not an averment of a breach. It was not averred that the defendant refused to perform the contract or to deliver at some future date within the two months or that he did not in fact deliver the potatoes within that timeperiod. Furthermore, the allegation did not show that a right of action had accrued on December 5; and if the allegation was insufficient to show that a right of action accrued at once, it was insufficient to show a breach at that time. Since a breach must be stated else no cause of action is shown, and the essential facts of the breach must be stated directly in unequivocal language and not left to be inferred, the complaint was defective in not stating a breach (*30 Cal. 570, 572)* .

Blatt v. University of So. Cal. *(1970) 5 Cal. App. 3d 935, 85 Cal. Rptr. 601* , was an action to compel the university to admit the plaintiff to membership in a national honorary legal society. The complaint alleged that there was an offer by the university consisting of representations by certain university officials that if the plaintiff ranked in the top 10 percent of his class, he would be eligible for election to membership in the society. The plaintiff was considered for membership but was not elected to the society, and the society elected several people below him in scholastic achievement. The university's general demurrer was sustained without leave to amend.

The court of appeal affirmed. The plaintiff did not plead a breach of contract since he alleged, not a promise that he would in fact be admitted to membership if he graduated in the top 10 percent of his class, but only a promise that he would be eligible for election if he attained the position. The complaint alleged that his name was on the eligible list and did receive consideration by the election committee under the general standards set forth in the legal society's constitution--which is all that the university promised. The facts pleaded did not support a conclusion that there was a breach of contract (*5 Cal. App. 3d 935, 944)* .

[ii] Pleading Defendant's Breach

Wise v. Southern Pacific Co. *(1963) 223 Cal. App. 2d 50, 35 Cal. Rptr. 652* , was an action for wrongful discharge from employment. The plaintiff alleged that he was a member of the Brotherhood of Railroad Carmen and was employed by the defendant as a railroad carman. A collective bargaining agreement between the union and the railroad covered this employment. The plaintiff further alleged that under the terms of this collective bargaining agreement, he could not be dismissed without just cause or without first having a fair hearing, and as a union committee member, he could not be discriminated against. He then alleged six instances of specific conduct on the railroad's part as violative of these covenants of the agreement. The railroad demurred generally, and the trial court sustained the demurrer without leave to amend.

The court of appeal reversed. An allegation that the defendant breached or violated its contract or that an act was wrongful, illegal, without authority, unlawful, unjust, arbitrary, or fraudulent, would clearly be conclusionary and, without additional allegations, insufficient. A generalallegation, without more, that the defendant has failed and refused to perform its contract might also be insufficient although there is a division of authority in the California cases on this point [*see* [b][i], *above*]. The plaintiff must allege sufficient facts to apprise the defendant of the specific conduct that the plaintiff assigns as violative of the contract, which in this case the plaintiff did (*223 Cal. App. 2d 50, 60)* .

[iii] Requirement of Stating Facts of Breach Unequivocally

Moore v. Besse *(1866) 30 Cal. 570* , is discussed in [i], *above*.

[iv] Requirement of Alleging Promise and Its Nonperformance

Blatt v. University of So. Cal. *(1970) 5 Cal. App. 3d 935, 85 Cal. Rptr. 601* , is discussed in [i], *above*.

[v] Breach Alleged in Conclusionary Language

Wise v. Southern Pacific Co. *(1963) 223 Cal. App. 2d 50, 35 Cal. Rptr. 652* , is discussed in [ii], *above*.

[d] Additional Authorities

[i] Requirement of Alleging Breach

Dodge v. Kimple (1898) 121 Cal. 580, 54 P. 94 , was an action for breach of an obligation to pay money. The plaintiff alleged that he spent a certain sum of money in completing the construction of a building, and the defendant was liable to him for half of that sum. The complaint did not allege in any manner that the plaintiff had not been paid and did not allege a breach of the defendant's obligation to pay. The defendant demurred generally. The trial court overruled the demurrer but, after trial, rendered judgment for the defendant. The Supreme Court affirmed. In all cases, it is necessary to allege both the contract, agreement, or other facts out of which the obligation to pay money arose and also the breach of that obligation. Since a breach was not alleged, the complaint did not state a cause of action (*121 Cal. 580, 581)* .

Du Brutz v. Jessup (1886) 70 Cal. 75, 11 P. 498 , was an action to recover a sum of money for a breach of contract. The complaint alleged that the defendant, owner of a tract of land, made a contract with the plaintiffs to obtain the formation of a corporation that would purchase the land; the defendant promised to pay the plaintiffs whatever amount the purchaser paid over and above a certain amount; and the plaintiffs undertook the performance of the contract on those terms and obtained the incorporationof a corporation from which the plaintiffs obtained an agreement or offer to buy the land on the terms agreed to by the defendant. The complaint further alleged that a written instrument setting out the terms of the agreement was executed under the seal of the corporation and tendered to the defendant for his signature, and the writing was in strict accordance with the terms on which the defendant had authorized the plaintiffs to negotiate a sale of the land, but the defendant refused to execute the agreement and continued to refuse and still refused to execute the agreement at the time of the action. The trial court rendered judgment for the plaintiffs. The Supreme Court reversed. According to the complaint, there was no agreement between the defendant and the plaintiffs that any writing would be executed by the defendant to them or to any other person or corporation, except a deed of sale to the purchaser of the land at the proper time. That time had not yet arrived. Therefore, the breach alleged in the complaint, that the defendant would not execute the written agreement, was not a breach of any promise stated in the complaint as having been made by him. If he never made a promise, an allegation of the breach of that promise would show no cause of action against him. On the other hand, the complaint showed no breach of the promise that was alleged in the complaint: that he would pay the plaintiffs whatever amount the purchaser paid over and above a certain sum. Since the complaint did not allege a breach of the promise alleged to have been made, it did not state a cause of action (*70 Cal. 75, 77-78)* .

[2] Demand for Performance Must Be Pleaded When No Time Was Specified for Performance

[a] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

NO TIME WAS SPECIFIED FOR PERFORMANCE, YET THE COMPLAINT DOES NOT ALLEGE THAT A DEMAND FOR PERFORMANCE WAS MADE.

Demand for Performance Must Be Made. When no time is specified for the doing of an act other than the payment of money, a demand for performance must be made, to put the promisor in default (*World Sav. & L. Ass'n v. Kurtz Co. (1960) 183 Cal. App. 2d 319, 326, 6 Cal. Rptr. 665* ; *Caner v. Owners Realty Co. (1917) 33 Cal. App. 479, 480, 165 P. 727*).

[b] Comments

[i] Use of Form

These memoranda may be submitted in support of the contention that a complaint for contract damages does not state all the necessary elements of the cause of action because there is no allegation by that plaintiff made a demand for performance and there is no allegation that the contract otherwise specifies a time for defendant's performance: thus there is no adequate allegation of a breach of the contract terms by defendant. This form may be used in a memorandum submitted in support of a general demurrer to a complaint, on the ground that the complaint fails to state facts sufficient to constitute a cause of action.

This form may also be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a defendant seeks relief on the basis of plaintiff's failure to plead or prove the necessary elements of the cause of action for contract damages. For example, it may be used in a memorandum supporting a motion for summary judgment on the ground that undisputed facts preclude the existence of any demand by plaintiff for defendant's performance.

[ii] Argument

Counsel should add argument linking the points in this form with the facts of the case, for example, an analysis of the allegations in plaintiff's complaint demonstrating that the contract does not call for a specific time for defendant's performance and there is no allegation that plaintiff demanded defendant's performance.

[iii] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[iv] Related Memoranda

This form may be combined, when appropriate, with the more general memoranda based on failure to plead a particular element [*see § 50.10* et seq.]. The form may also be combined with other memoranda, as appropriate, relating to the failure to allege a breach of the contract terms by defendant [*see* [1], *above*, and [3], *below*].

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a general demurrer, they may be combined with appropriate memoranda set out in Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[c] Discussion of Authorities

[i] Demand for Performance Must Be Made

World Sav. & L. Ass'n v. Kurtz Co. *(1960) 183 Cal. App. 2d 319, 6 Cal. Rptr. 665* , was an action for money due under a written contract for sharing the cost of installing off-site improvements in certain subdivisions. The contract involved in part an agreement to share the cost of installing a sewer but did not specify when the sewer was to be installed or what party was to cause the work to be done. The plaintiff contracted with a firm for construction of the sewer, but the defendant refused to pay any part of the cost. The defendant at no time made a demand on the plaintiff to install the sewer. In fact, the defendant encouraged the plaintiff to refuse to install the sewer. The trial court rendered judgment for the plaintiff.

The court of appeal affirmed. When no time is specified for the doing of an act, other than the payment of money, a demand for performance is necessary to put the promisor in default. Since the defendant never demanded that the plaintiff install the sewer line, the defendant's claim that the plaintiff unreasonably delayed doing the work contemplated, and so breached the contract, was without merit (*183 Cal. App. 2d 319, 326)* .

Caner v. Owners Realty Co. *(1917) 33 Cal. App. 479, 165 P. 727* , was an action to recover damages for the breach of a particular covenant in a contract, that the defendants guarantied to grade streets at their expense. However, although time was acknowledged to be of the essence in the contract, the covenant did not specify, and the complaint did not allege, that the plaintiff ever demanded that the defendants perform the covenant. The defendants' general demurrer was sustained.

The court of appeal affirmed. When no time is specified for the doing of an act other than the payment of money, a demand for performance is necessary in order to put the promisor in default. No time having been fixed by the covenant for the performance of the obligation, and the complaint having failed to allege a demand on the defendants for performance, the complaint was fatally defective and failed to state facts sufficient to constitute a cause of action (*33 Cal. App. 479, 480)* .

[3] Nonpayment Must Be Pleaded in Action Based on Promise to Pay

[a] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE COMPLAINT IS BASED ON A PROMISE TO PAY, BUT NONPAYMENT IS NOT ALLEGED.

A. Elements to Be Pleaded. [*See § 50.10[1][a], Paragraph A.*]

B. Allegation of Nonpayment Is Necessary. In a suit on a promise to pay, an allegation of nonpayment is essential (*Hurley v. Ryan (1897) 119 Cal. 71, 72, 51 P. 20*).

[*Optional*] **C. Alleging Only That Amount Is Owing Is Insufficient.** In an action on a promissory note, a complaint that states only that the entire amount of the note was owing from the defendant to the plaintiff and does not allege the fact of nonpayment fails to state a cause of action (*Knox v. Buckman Contracting Co. (1903) 139 Cal. 598, 599, 73 P. 428*).

[b] Comments

[i] Use of Form

These memoranda may be submitted in support of the contention that a complaint for contract damages does not state all the necessary elements of the cause of action because the contract calls for payment by the defendant and there is no sufficient allegation of defendant's nonpayment: thus there is no adequate allegation of a breach of the contract terms by defendant. This form may be used in a memorandum submitted in support of a general demurrer to a complaint, on the ground that the complaint fails to state facts sufficient to constitute a cause of action.

This form may also be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a defendant seeks relief on the basis of plaintiff's failure to plead or prove the necessary elements of the cause of action for contract damages. For example, it may be used in a memorandum supporting a motion for judgment on the pleadings.

[ii] Argument

Counsel should add argument linking the points in this form with the facts of the case, for example, an analysis of the allegations in plaintiff'scomplaint demonstrating that, in a contract calling for payment by defendant, there is no allegation of nonpayment by defendant.

[iii] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[iv] Related Memoranda

This form may be combined, when appropriate, with the more general memoranda based on failure to plead a particular element [*see § 50.10* et seq.]. The form may also be combined with other memoranda, as appropriate, relating to the failure to allege a breach of the contract terms by defendant [*see* [1], [2], *above*].

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a general demurrer, they may be combined with appropriate memoranda set out in Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[v] Opposing Memoranda

The memoranda *in § 50.51* may be submitted in opposition to the contention supported by this form.

[c] Discussion of Authorities

[i] Allegation of Nonpayment Is Necessary

Hurley v. Ryan *(1897) 119 Cal. 71, 51 P. 20* , was an action against an administrator of an estate for funeral expenses and administrative and traveling expenses incurred by the plaintiff while he was special administrator of the estate. The plaintiff also claimed damages for services in nursing and providing board and lodging for decedent in his lifetime. The

defendant demurred on the ground that the facts alleged did not show that the debts sued-on had not been paid. The trial court overruled the demurrer and, after a jury trial, rendered judgment for the plaintiff.

The Supreme Court reversed. In an action on a debt, the breach of the promise to pay is the essence of the cause of action and must be alleged.Since there was no attempt in the complaint to allege that the debt had not been paid, the demurrer should have been sustained (*119 Cal. 71, 72)* .

[ii] Alleging Only That Amount Is Owing Is Insufficient

Knox v. Buckman Contracting Co. *(1903) 139 Cal. 598, 73 P. 428* , was an action on several promissory notes. The only averment in the complaint as to a breach of the defendant's contract to pay any of the notes was that the whole of the note was owing from the defendant to the plaintiff. The defendant demurred generally. The trial court overruled the demurrer. Judgment was rendered for the plaintiff.

The Supreme Court reversed. That averment is not an averment of the fact of nonpayment, and a complaint containing no other averment as to nonpayment does not state facts sufficient to constitute a cause of action (*139 Cal. 598, 599)* .

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CHAPTER 50 CONTRACTS
PART II. FORMS
A. Action for Damages for Breach of Contract

5-50 California Points & Authorities § 50.51

§ 50.51 Allegation of Nonpayment Is Not Necessary to Plead Defendant's Breach When Contract Is Not Only for Payment of Money

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

WHEN A CONTRACT IS FOR MORE THAN THE PAYMENT OF MONEY, A COMPLAINT FOR DAMAGES BASED ON BREACH OF THE CONTRACT NEED NOT ALLEGE NONPAYMENT.

Allegation of Nonpayment Is Not Necessary When Contract Is Not Only for Payment of Money. When the contract is not only for the payment of money, a complaint is sufficient without an allegation of nonpayment (*Franz v. Bieler (1899) 126 Cal. 176, 179, 58 P. 466*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in opposition to a contention that a complaint for contract damages is insufficient because it does not allege nonpayment by defendant. The basis for the contention is that defendant's performance under the contract is something other the payment of money. This form may be used in a memorandum submitted in opposition to a general demurrer to a complaint made on the groundthat the complaint fails to state facts sufficient to constitute a cause of action.

This form may also be used in a trial or appellate brief, or in a memorandum submitted in any other appropriate procedural context. For example, it may be used in a memorandum opposing a motion for judgment on the pleadings.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case, for example, an analysis of the

allegations in plaintiff's complaint demonstrating that, in fact, the contract calls for performance by defendant of something other than the payment of money.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a general demurrer, they may be combined with appropriate memoranda set out in Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.50[3]* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Allegation of Nonpayment Is Not Necessary When Contract Is Not Only for Payment of Money

Franz v. Bieler *(1899) 126 Cal. 176, 56 P. 249, 58 P. 466* , was an action on a contract not to set up a rival business. After a jury trial, judgment was rendered for the plaintiffs. On appeal, the defendant contended that the complaint did not state a cause of action.

The Supreme Court affirmed. The contract was not simply for the payment of money but was a contract not to set up a rival business; and it included a provision to pay $2,000 in case of a breach of the covenant. When the plaintiff alleged the establishment of a rival business, he showed a breach of the contract and a cause of action and was not required to allege nonpayment of the liquidated damages provided by the contract (*126 Cal. 176, 179)* .

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5-50 California Points & Authorities § 50.52

§ 50.52 Defendant's Breach Established by Admission of Owing Certain Sum

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

IF AN AMOUNT OWING UNDER A CONTRACT IS IN DISPUTE, AND THE DEFENDANT ADMITS OWING A PORTION OF THAT SUM, AND THERE IS NO TRIABLE ISSUE OF FACT REGARDING THE REMAINDER OF THE SUM CLAIMED BY THE PLAINTIFF, THE PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT FOR THE AMOUNT THAT THE DEFENDANT HAS ADMITTED IS OWING UNDER THE CONTRACT.

Defendant Admits Owing Part of Amount Due. If there is a dispute regarding the amount owing under a contract, but the defendant admits that he or she owes a portion of that amount, and there is no triable issue of fact regarding the plaintiff's entitlement to the remainder of the sum claimed by the plaintiff, the plaintiff is entitled to summary judgment for the amount the defendant admits is owed (*Smithers v. Ederer (1956) 146 Cal. App. 2d 227, 229, 303 P.2d 771*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of a contention that, in an action for contract damages calling for payment by defendant, when there is a dispute as to the amount of payment owed by defendant, and defendant has admitted owing a portion of plaintiff's claimed amount, and further there is no triable issue as to the remaining amount claimed by plaintiff, the plaintiff is entitled to summary judgment for the amount that the defendant has admitted owing. This form may be used in a memorandum submitted in support of a motion for summary judgment.

This form may also be used in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In addition, in a motion for summary judgment, counsel should attach affidavits or declarations that support the motion, together with a separate statement of material facts that the moving party contends are undisputed, with references to the supporting evidence [*Code Civ. Proc. § 437c(b)*].

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Defendant Admits Owing Part of Amount Due

Smithers v. Ederer *(1956) 146 Cal. App. 2d 227, 303 P.2d 771* , was an action for money lent to finance a dramatic production. The complaint alleged that the plaintiff had lent the defendant $5,000 and asked for judgment in this amount. In answer, the defendant alleged that the understanding between the plaintiff and the defendant was that if the production for which the $5,000 was lent was successful, the plaintiff was to receive back the $5,000 with interest plus a half interest in the profits, but if the production was unsuccessful, the plaintiff was to get back only $2,500 without interest. The defendant further alleged that the production was unsuccessful, and thus the defendant was indebted to the plaintiff only in the sum of $2,500 without interest. The plaintiff stated in a motion for summary judgment that if the court was of the opinion that trial could not be had on the remaining amount claimed by the plaintiff, the plaintiff would waive all claim and demand for judgment over the amount of moneythat the defendant admitted owing. The plaintiff's motion for summary judgment in a certain amount was granted by the trial court.

The court of appeal modified the judgment and, as modified, affirmed it. There could be no question that the plaintiff was entitled to a judgment for $2,500, since the defendant expressly consented to that judgment in his answer, but no trial could be had with respect to the disputed amount. However, the inclusion of interest in the judgment was improper, and the court modified the judgment by striking the interest provision (*146 Cal. App. 2d 227, 229)* .

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5-50 California Points & Authorities § 50.53

§ 50.53 Defendant's Breach by Nonpayment Is Not Cured Until Check Is Paid

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

AN OBLIGATION IS NOT DISCHARGED UNTIL A CHECK GIVEN IN PAYMENT IS ITSELF PAID.

A. Obligation Is Not Discharged Until Check Is Paid. If an uncertified check is given in payment, the underlying obligation is not discharged until the check itself is paid, unless the parties have expressly agreed that the check is taken in payment (*Com. Code § 3310(b)*; *Cornwell v. Bank of America (1990) 224 Cal. App. 3d 995, 1000-1001, 274 Cal. Rptr. 322*).

[*Optional*] **B. Creditor Did Not Direct Payment by Mail.** A creditor is not deemed to have directed the manner of performance within the meaning of *Civil Code Section 1476* merely by providing the debtor with self-addressed envelopes and payment coupons that state "Detach and mail with payment" and "Mail this coupon with check payable to" the creditor [when the creditor also accepts payments by other methods, such as delivery in the creditor's office and transfers by wire or automated teller networks] (*Cornwell v. Bank of America (1990) 224 Cal. App. 3d 995, 999-1001, 274 Cal. Rptr. 322*).

[*Optional*] **C. Obligation Is Not Discharged When Check Is Lost in Mail.** If the creditor has not directed that payment be made by mail, and a check mailed by the debtor is lost in the mail, the underlying obligation is not discharged (*Cornwell v. Bank of America (1990) 224 Cal. App. 3d 995, 998-1001, 274 Cal. Rptr. 322*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of a contention that, in an action for contract damages calling for payment by defendant, defendant has not performed when defendant has paid by ordinary check and the check has not

yet been paid. Unless otherwise agreed, if an uncertified check is taken for an obligation, the obligation is suspended to the same extent that the obligation would be discharged if an amount of money equal to the amount of the check were taken. The suspension continues until the check is dishonored, paid, or certified. Payment or certification of the check results in discharge of the obligation to the extent of the amount of the check [*Com. Code § 3310(b)*].

Optional Paragraphs B and C may be included, if appropriate, to oppose a contention that the plaintiff directed the defendant to make payments through the mail, and the debtor claims a payment check was mailed, but the check was lost before it was negotiated by the plaintiff. If a creditor, or any one of two or more joint creditors, at any time directs the debtor to perform the obligation in a particular manner, the obligation is extinguished by performance in that manner, even though the creditor does not receive the benefit of that performance [*Civ. Code § 1476*].

This form may also be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a plaintiff seeks damages for a defendant's nonpayment under a contract, and defendant claims that payment was made by noncertified check. For example, it may be used in support of a motion for summary judgment on the ground that undisputed facts show payment by an ordinary check that was dishonored or has otherwise not been paid.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. The best proof will be the defendant's inability to produce the canceled check; however, if the plaintiff negotiated the check, and it was not honored and was returned to the plaintiff with the usual dishonor reasons stamped on it, that should be noted. In addition, in a motion for summary judgment, counsel should attach affidavits or declarations that support the motion, together with a separate statement of material facts that the moving party contends are undisputed, with references to the supporting evidence [*Code Civ. Proc. § 437c(b)*].

[c] Related Pleading and Practice Chapters

For detailed discussion and forms relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For further memoranda relating to the negotiation of checks, see Ch. 34, *Checks and Banks* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Obligation Is Not Discharged Until Check Is Paid

The plaintiff in ***Cornwell v. Bank of America*** *(1990) 224 Cal. App. 3d 995, 274 Cal. Rptr. 322* , had a mortgage loan from the bank and always made timely payments. One payment check was lost after the plaintiff deposited it in the mail, in a self-addressed envelope provided by the bank, with a payment coupon provided by the bank. Instructions on the coupon were "Detach and mail with payment" and "Mail this coupon with check payable to Bank of America." The check was never cashed, and the bank threatened to foreclose. The plaintiff sued for declaratory relief, claiming that as a

matter of law payment had been made when the check was deposited in the mail. The bank obtained a summary judgment.

The court of appeal affirmed. The fundamental reason for the court's affirmance was its application of former Com. Code § 3802(1)(b) [*see Com. Code § 3310(b)*]. The court discussed the Uniform Commercial Code Official Comment to that section, saying that a check is conditional payment. Taking the check is a surrender of the right to sue on the obligation until the check is presented. If the check is not paid on presentment, the right to sue on the underlying obligation is revived. Under these rules, the plaintiff's obligation for the mortgage payment would not have been discharged until the check had been paid by the plaintiff's bank (*224 Cal. App. 3d 995, 1000)* . A check is never payment of the debt for which it is given until the check itself is paid or otherwise discharged, unless expressly agreed to be taken in payment. Thus, even if the check was received by the bank and lost by it, payment would not have been made. If the check was received by the bank and then dishonored on presentment, payment would not have been made. While the parties may vary these rules by agreement, the payment coupon was not evidence of an agreement (*224 Cal. App. 3d 995, 1001)* .

[b] Creditor Did Not Direct Payment by Mail

The facts and procedural background of ***Cornwell v. Bank of America*** *(1990) 224 Cal. App. 3d 995, 274 Cal. Rptr. 322* , are discussed in [a], *above*. The plaintiff claimed that the bank had directed mail as a manner of payment and thus, under *Civ. Code § 1476*, payment was complete when the check was deposited in the mail. That statute had rarely been used or cited (*224 Cal. App. 3d 995, 998)* . The court held that the statements on the payment coupon did not amount to a direction to send loan payments by mail (*224 Cal. App. 3d 995, 999, 1001)* . The bank accepted payments made at its branches or by wire transfer, and nothing in the coupon prevented payment otherwise than by mail. The plaintiff argued that the only logical interpretation of *Civ. Code § 1476* is that it is applicable whenever a creditor designates any particular manner of payment, regardless of whether other means are available. The court stated that the statute was inapplicable without a specific direction to pay by mail. "Direct" as used in the statute refers to a single method of payment. A creditor is not held to have "directed" all methods of payment it makes available (*224 Cal. App. 3d 995, 1000)* .

[c] Obligation Is Not Discharged When Check Is Lost in Mail

Cornwell v. Bank of America *(1990) 224 Cal. App. 3d 995, 274 Cal. Rptr. 322* , is discussed in [i], *above*.

[4] Additional Authorities

[a] Obligation Is Not Discharged Until Check Is Paid

The Supreme Court in Navrides v. Zurich Ins. Co. (1971) 5 Cal. 3d 698, 97 Cal. Rptr. 309, 488 P.2d 637 , reversed a judgment for the plaintiff, a personal injury victim, on the ground that by suing the insurer, the plaintiff ratified a previously unauthorized settlement made by her attorney (*5 Cal. 3d 698, 704)* . The attorney had forged the plaintiff's endorsement of the settlement check (*5 Cal. 3d 698, 712)* . In analyzing whether negotiation of the check by the attorney, as agent for the plaintiff, discharged the insurer's obligation to the plaintiff, the Court stated the rule that a check is never payment of the debt for which it is given until the check is paid or otherwise discharged unless expressly agreed to be taken in payment (*5 Cal. 3d 698, 706)*

Hale v. Bohannon (1952) 38 Cal. 2d 458, 241 P.2d 4 , involved a motion for change of venue in a contract action. The place of performance was one of the criteria on which venue could be based. Checks issued on a bank in Humboldt County were drawn in and mailed from San Mateo County.In holding that Humboldt County could be considered the place of performance under this pattern of conduct by the parties, the Supreme Court noted that a check is not payment until cashed, and the party attempting to prove payment by mere delivery or acceptance of a check must go further and prove that delivery and acceptance were in accordance with an agreement that the check was to be accepted as payment

(*38 Cal. 2d 458, 467)* .

In *Long v. Cuttle Construction Co. (1998) 60 Cal. App. 4th 834, 70 Cal. Rptr. 2d 698* , a judgment for damages was paid by a check, which was promptly deposited in the creditor's bank, but the bank placed a five-day hold on payment. Consequently, the trial court had to resolve a minor dispute between the parties concerning interest during that five-day period. The trial court ruled that interest on the judgment continued to run during the period (*60 Cal. App. 4th 834, 835-836)* . The court of appeal reversed, holding that interest ceased to accrue on the judgment when the check was delivered, even though the creditor's bank put a five-day hold on payment. Under *Com. Code § 3310(b)(1),* once a check is honored, the underlying obligation is considered fully discharged as of the date the check was received by the creditor (*60 Cal. App. 4th 834, 837-838)* .

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[Reserved]

§§ 50.54[Reserved]

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5-50 California Points & Authorities § 50.60

§ 50.60 Failure to Plead Damages

[1] Damages Must Be Pleaded

[a] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE COMPLAINT FAILS TO ALLEGE DAMAGES.

A. Elements to Be Pleaded. [*See § 50.10[1][a], Paragraph A.*]

B. Damages Must Be Alleged. In an action for damages for breach of contract, a complaint does not allege sufficient facts to state a cause of action if it does not allege damages (*Brumfield v. Crocker-Anglo Nat'l Bank (1960) 185 Cal. App. 2d 759, 764-765, 8 Cal. Rptr. 591*).

[*Optional*] **C. Special Damages Must Be Pleaded With Particularity.** Unlike general damages, special damages are those losses that do not arise directly and inevitably from any similar breach of any similar agreement. They are secondary or derivative losses arising from circumstances that are particular to the contract or to theparties, and are recoverable if the special or particular circumstances from which they rise were actually communicated to or known by the breaching party, or were matters of which the breaching party should have been aware at the time of contracting. Special damages must be pled with particularity, and must also be proven to be certain both as to their occurrence and their extent (*Lewis Jorge Construction Management, Inc. v. Pomona Unified School District (2004) 34 Cal. 4th 960, 968-969, 975, 22 Cal. Rptr. 3d 340*).

[*Optional*] **D. Damages Must Be Legally Actionable.** The damages alleged in the complaint for breach of contract must be legally actionable (*Gautier v. General Telephone Co. (1965) 234 Cal. App. 2d 302, 305-306, 44 Cal. Rptr. 404*).

[*Optional*] **E. Damages Cannot Be Recovered for Injury to Reputation.** In a breach of contract action, the plaintiff is

not entitled to recover damages for injury to his or her name, character, or personal reputation (*Gautier v. General Telephone Co. (1965) 234 Cal. App. 2d 302, 306, 44 Cal. Rptr. 404*).

[b] Comments

[i] Use of Form

These memoranda may be submitted in support of the contention that a complaint for contract damages does not sufficiently allege damages, one of the essential elements of the cause of action. Thus, this form may be used in a memorandum submitted in support of a general demurrer to a complaint, on the ground that the complaint fails to state facts sufficient to constitute a cause of action. With appropriate modifications, the form may be submitted in support of a special demurrer to a complaint on the ground that the complaint is uncertain, ambiguous, and unintelligible [*see Brumfield v. Crocker-Anglo Nat'l Bank (1960) 185 Cal. App. 2d 759, 760, 765, 8 Cal. Rptr. 591* , discussed in [c][i], *below*].

This form may also be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a defendant seeks relief on the basis of plaintiff's failure to plead or prove the necessary elements of the cause of action for contract damages. For example, it may be used in a memorandum supporting a motion for judgment on the pleadings.

[ii] Argument

Counsel should add argument linking the points in this form with the facts of the case, for example, an analysis of the allegations in plaintiff'scomplaint demonstrating that the contract does sufficiently allege damages.

[iii] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[iv] Related Memoranda

This form may be combined, when appropriate, with the general memoranda based on failure to plead a particular element [*see § 50.10* et seq.]. They may also be combined with the additional memoranda relating to the allegation of a breach by defendant [*see* [2], *below*].

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a general demurrer, they may be combined with appropriate memoranda set out in Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[v] Opposing Memoranda

The memoranda in § 60.61 may be submitted in opposition to the contention supported by this form.

[c] Discussion of Authorities

[i] Damages Must Be Alleged

Brumfield v. Crocker-Anglo Nat'l Bank *(1960) 185 Cal. App. 2d 759, 8 Cal. Rptr. 591* , was an action for damages for failure to defend a suit in which the plaintiff, the bank, and others, including a partner of the plaintiff in a mining venture, were named as the defendants. The plaintiff alleged that the partner had agreed to defend the suit but breached the agreement and allowed a judgment to become a lien on the plaintiff's interest in the partnership. The plaintiff proceeded to defend the suit as far as her interest was concerned but lost, and as a result, her interest in the partnership was levied on and sold pursuant to a valid execution. The partner demurred generally. The trial court sustained the demurrer with leave to amend, but the plaintiff declined to amend, and judgment was rendered for the defendant.

The court of appeal affirmed. When an agreement is merely to defend a lawsuit, not to defend it successfully, damages for failure to defend are not to be measured by the amount of any judgment rendered in the suit but are to be measured by the cost of defending the suit. Since the partner in this case was not a lawyer, the agreement to defend was at most an agreement to retain counsel and pay expenses. The partner's refusal to do that resulted in the plaintiff's doing it. The complaint did not contain any allegations that it cost the plaintiff anything to defend the suit. The complaint was defective because in an action for damages, the complaint must show damages. This point may be made by general demurrer (*185 Cal. App. 2d 759, 764-765)* . (In this case, the point was also properly raised by a special demurrer that the complaint was uncertain, ambiguous, and unintelligible in that it was not alleged in the complaint nor could it be ascertained how or in what manner the plaintiff was injured or damaged in the sum claimed.)

[ii] Special Damages Must Be Pleaded With Particularity

In ***Lewis Jorge Construction Management, Inc. v. Pomona Unified School District*** *(2004) 34 Cal. 4th 960, 22 Cal. Rptr. 3d 340* , a school district terminated a construction contract after the contractor failed to complete it in a timely manner. The contractor's bonding company then hired another construction company to complete the project, and first suspended and then later reduced the amount of bonding for the original contractor, which ultimately went out of business. The original contractor successfully sued the school district for breach of contract, recovering as damages approximately $3 million for potentially lost profits that the contractor claimed it would have earned on prospective construction contracts it never won because of its impaired bonding capacity. These lost profits were awarded as an element of general damages. Although the construction company did not plead its lost future profits as special damages, the issue of their availability as special damages was presented to the jury, and the school district expressly stated that it was not relying on that pleading omission. The court of appeal concluded that those potential profits were a proper item of general damages (*34 Cal. 4th 960, 965)* .

The California Supreme Court reversed, holding that it was improper to award lost profits from future construction contracts as an element of general damages. General damages are those that flow directly and necessarily from a breach of contract, or that are a natural result of a breach. Because general damages are a natural and necessary consequence of a contract breach, they are said to be within the contemplation of the parties, meaning that because their occurrence is sufficiently predictable, the parties at the time of contracting are deemed to have contemplated them (*34 Cal. 4th 960, 968)* . The Court observed that while unearned profits sometimes havebeen used as the measure of general damages for breach of a construction contract when the breaching party's conduct prevented the other side from undertaking performance, the profits involved were purely profits unearned on the very contract that was breached (*34 Cal. 4th 960, 971)* . In this case, the Court was unwilling to say that the parties' bargain included the contractor's potential profits on future construction projects it had not bid on or been awarded. Full performance by the school district would simply have provided the contractor with full payment of the contract price for the construction. Thus, award of lost profits as an element of general damages was improper (*34 Cal. 4th 960, 975)* .

The Court also held that the award also could not be sustained as an award of special damages. Special damages are those losses that do not arise directly and inevitably from any similar breach of any similar agreement, but rather are secondary or derivative losses arising from circumstances that are particular to the contract or to the parties. Under the rule of *Hadley v. Baxendale (1854) 156 Eng. Rep. 145* , as articulated in the California case law, special damages are

recoverable if the special or particular circumstances from which they arise (1) were actually communicated to or known by the breaching party, or (2) were matters of which the breaching party should have been aware at the time of contracting (*34 Cal. 4th 960, 968-969)* . The Court noted that such damages must be pled with particularity, and must also be proven to be certain both as to their occurrence and their extent, albeit not with mathematical precision. In this case, when the school district signed the contract it did not know what the contractor's balance sheet showed, or what criteria its surety ordinarily used to evaluate a contractor's bonding limits. Absent such knowledge, the profits that the contractor claimed it would have made on future, unawarded contracts were not actually foreseen or reasonably foreseeable, and hence were unavailable as special damages (*34 Cal. 4th 960, 977)* . The Court observed that although the school district's termination of the contract was "the first event in a series of misfortunes" that culminated in the contractor closing down its construction business, those consequences are not the natural and necessary result of the breach of every construction contract involving bonding (*34 Cal. 4th 960, 978)* .

[iii] Damages Must Be Legally Actionable

Gautier v. General Telephone Co. *(1965) 234 Cal. App. 2d 302, 44 Cal. Rptr. 404* , was an action for breach of contract for failure to provide telephone service. The plaintiffs were customers of the telephone company, and they had paid all charges for their service. The complaint alleged that certain persons attempting to call the plaintiff's were told by the telephone company that the plaintiffs' telephone was disconnected. Although the urgency of the incoming calls was explained to the operator, the calls were not transferred to the plaintiffs. It was further alleged that the company'sacts or omissions proximately caused harm or emotional distress, inconvenience, and humiliation to the plaintiffs and exposed them to public contempt and ridicule to their damage in a sum set forth in the complaint. The defendant demurred generally, and the trial court sustained the demurrer without leave to amend.

The court of appeal affirmed. An allegation must be made showing that the damage to the plaintiffs, resulting from the defendant's breach of contract, is legally actionable. In a breach of contract action, the plaintiff is not entitled to damages for injury to his or her name, character, or personal reputation. Thus the complaint did not state a cause of action (*234 Cal. App. 2d 302, 305-306)* .

[iv] Damages Cannot Be Recovered for Injury to Reputation

Gautier v. General Telephone Co. *(1965) 234 Cal. App. 2d 302, 44 Cal. Rptr. 404* , is discussed in [ii], *above*.

[d] Additional Authorities

[i] Damages Must Be Legally Actionable

In *Harris v. Time, Inc. (1987) 191 Cal. App. 3d 465, 236 Cal. Rptr. 471* , a consumers' class action seeking damages for breach of contract arising from opening envelopes offering a free prize "just for opening the envelope" and finding after opening the envelopes that the recipient had to subscribe to the magazine in order to receive the prize, the court of appeal affirmed the sustaining of a demurrer on the ground that the action was de minimis in the extreme (*191 Cal. App. 3d 465, 477-479)* . Although a contract existed, because the envelope was an offer for a unilateral contract and opening it was sufficient consideration (*191 Cal. App. 3d 465, 474-476)* , the only real damage was feeling foolish for having opened what obviously was junk mail, and only in circumstances of actual detriment should the court intervene (*191 Cal. App. 3d 465, 479)* .

[2] Uncertain Damages Not Necessarily Resulting From Breach Must Be Alleged

[a] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE DAMAGES ALLEGED DO NOT NECESSARILY RESULT FROM THE BREACH OF THE CONTRACT, AND THE PLAINTIFF DID NOT SPECIFICALLY PLEAD THE FACTS SHOWING THE DAMAGES.

Damages Not Necessarily Resulting From Breach Must Be Alleged. When damages do not necessarily result from the breach of a contract, the plaintiff must specifically plead the facts showing the damages that resulted because of the defendant's act (*Comstock v. Coronet Heating Supply Co. (1952) 111 Cal. App. 2d 600, 603-604, 245 P.2d 35*).

[b] Comments

[i] Use of Form

These memoranda may be submitted in support of the contention that the complaint is uncertain because the damages alleged were not a necessary result of the breach and the plaintiff did not specifically plead the damages that were incurred. This form may be used in a memorandum submitted in support of a special demurrer to a complaint on the ground that the complaint is uncertain.

The form may also be used in a trial or appellate brief.

[ii] Argument

Counsel should add argument linking the points in this form with the facts of the case, for example, an analysis of the allegations in plaintiff's complaint demonstrating that the contract alleges damages that are not a necessary result of the alleged breach, and there are no additional allegations from which it is possible to ascertain how or in what manner plaintiff was damaged by the alleged breach.

[iii] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[iv] Related Memoranda

This form may be combined, when appropriate, with the more general memoranda based on failure to plead a particular element [*see § 50.10* et seq.]. The form may also be combined with other memoranda, as appropriate, relating to the failure to allege damages [*see* [1], *above*].

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a general demurrer, they may be combined with appropriate memoranda set out in Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[c] Discussion of Authorities

[i] Damages Not Necessarily Resulting From Breach Must Be Alleged

Comstock v. Coronet Heating Supply Co. *(1952) 111 Cal. App. 2d 600, 245 P.2d 35* , involved a cross action for breach of contract and breach of warranty. The cross complaint did not allege facts in either cause of action from which it was possible to ascertain how or in what manner the cross complainant was damaged by breach of contract by the

cross defendant. It did not allege how the cross defendant's hiring a person to circulate price lists in a certain area, in which the cross complainant had exclusive rights to sell the cross defendant's goods, had injured the cross complainant, nor did it state how the cross defendant's breach of warranty damaged the cross complainant. The cross defendant demurred specially to both causes of action in the cross complaint on the grounds that the causes of action were uncertain and unintelligible in that it could not be ascertained from the facts alleged in either cause of action in what manner the cross complainant had been damaged. The demurrer was sustained with leave to amend. When the cross complainant failed to amend, the trial court dismissed the cross complaint.

The court of appeal affirmed. When damages do not necessarily result from the breach of a contract, an injured party must specifically plead the facts showing the damage that has resulted because of the wrongful act of the other party to the contract. A general allegation of damages is insufficient as against a special demurrer for uncertainty or unintelligibility (*111 Cal. App. 2d 600, 603-604)* .

[d] Additional Authorities

[i] Damages Not Necessarily Resulting From Breach Must Be Alleged

In *Metzenbaum v. R.O.S. Associates (1986) 188 Cal. App. 3d 202, 232 Cal. Rptr. 741* , the court of appeal affirmed a directed verdict for the defendant in a real estate loan broker's action for a commission based on the defendant's obtaining a loan elsewhere during the term of their contract. The facts established that the plaintiff's performance was impossible; therefore, the plaintiff's damages did not flow from the defendant's breach (*188 Cal. App. 3d 202, 211-214)* .

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5-50 California Points & Authorities § 50.61

§ 50.61 Damages Are Sufficiently Alleged

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

A COMPLAINT FOR DAMAGES FOR BREACH OF CONTRACT SUFFICIENTLY ALLEGES DAMAGES IF THE PLAINTIFF ALLEGES FACTS SHOWING THE EXISTENCE OF INJURY AND PRAYS FOR A SPECIFIC SUM.

A. Sufficient Allegation of General Damages. A complaint for damages for breach of contract sufficiently avers general damages if the plaintiff alleges facts that show the existence of injury and a prayer for a specific sum, even if there is no specific allegation of damages in any stated sum or the pleading states facts invoking an inapplicable measure of recovery (*Domino v. Mobley (1956) 144 Cal. App. 2d 24, 29-30, 300 P.2d 324*).

B. Nature and Extent of Damages Need Not Be Alleged. If the complaint alleges a violation of the plaintiff's legal right by the defendant and damages proximately resulting, a cause of action is stated, and it is not necessary to point out in detail the nature and extent of the damages (*Colvig v. RKO Gen., Inc. (1965) 232 Cal. App. 2d 56, 68-69, 42 Cal. Rptr. 473*).

[*Optional*] **C. Damages Naturally Resulting From Breach May Be Alleged Generally.** The natural and ordinary damages resulting from a breach of contract may be recovered under a general allegation of damages without alleging how the damages have arisen (*Colvig v. RKO Gen., Inc. (1965) 232 Cal. App. 2d 56, 69, 42 Cal. Rptr. 473*).

[*Optional*] **D. Improper Averment of Damages Is Not Important.** Whether the correct measure of damages is pleaded or damages are improperly alleged is not an issue in determining whether a complaint states a cause of action (*Watson v. Aced (1957) 156 Cal. App. 2d 87, 91, 319 P.2d 83* ; *Domino v. Mobley (1956) 144 Cal. App. 2d 24, 30, 300 P.2d 324*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that damages were sufficiently alleged because the complaint at leastalleges facts showing the existence of damage and prays for a specific sum. This form may be used in a memorandum submitted in opposition to a general demurrer to a complaint made on the ground that the complaint fails to state facts sufficient to constitute a cause of action.

This form may also be used in a trial or appellate brief, or in a memorandum submitted in any other appropriate procedural context. For example, it may be used in a memorandum opposing a motion for judgment on the pleadings.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case, for example, an analysis of the allegations in plaintiff's complaint demonstrating that damages are sufficiently alleged.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a general demurrer, they may be combined with appropriate memoranda set out in Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.60[1]* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Sufficient Allegation of General Damages

The facts and procedural background of ***Domino v. Mobley*** *(1956) 144 Cal. App. 2d 24, 300 P.2d 324* , are discussed in *§ 50.11[3][b]*. The plaintiffs alleged that they were damaged in an amount that was the difference between the contract price and the market value on the date of the defendant's breach of the agreement. The defendants contended on appealthat the complaint pleaded a measure of damages not authorized by any statute. The court of appeal noted that even if the argument were well taken, the matter was of no consequence. If facts are alleged that show the existence of damages, and a prayer for a specific sum is stated in the pleading, the averment of damages is sufficient even if there is no specific allegation of damages in any stated sum, or if the pleading states facts invoking an inapplicable measure of recovery (*144 Cal. App. 2d 24, 29-30)* .

[b] Nature and Extent of Damages Need Not Be Alleged

Colvig v. RKO Gen., Inc. *(1965) 232 Cal. App. 2d 56, 42 Cal. Rptr. 473* , was an action for damages for breach of contract. The complaint alleged that, pursuant to an arbitration award, the plaintiff was restored to his position as a staff

announcer at the defendant's radio station. The award recognized that the plaintiff had a right to practice his profession at that station. While the defendants paid the plaintiff the salary due under the award, they intentionally and tortiously refused to permit him to practice his profession on the radio, thus causing him to lose his popularity as a radio announcer and damaging him in his profession to his detriment in a certain sum. The defendants demurred generally. The trial court sustained the demurrer without leave to amend.

The court of appeal reversed. If the allegations of a complaint set forth a legal right on the plaintiff's part, a violation of that right by the defendant, and damages proximately resulting, a cause of action is stated. It is not necessary to point out in detail in the pleadings the nature and extent of the damages unless special damages are claimed. The complaint in this case satisfied the requirement with respect to general damages. It sufficed as a basis for all damages that would compensate the plaintiff for the detriment proximately caused by the alleged breach or that in the ordinary course of things was likely to result (*232 Cal. App. 2d 56, 68-69)* .

[c] Damages Naturally Resulting From Breach May Be Alleged Generally

The facts and procedural background of ***Colvig v. RKO Gen., Inc.*** *(1965) 232 Cal. App. 2d 56, 42 Cal. Rptr. 473* , are discussed in [b], *above*. The court of appeal noted that the natural and ordinary damages resulting from a breach of contract may be recovered under a general allegation of damages. The question as to how general damages have arisen, otherwise than as disclosed by the general allegation of damages, is the subject of the rules of evidence rather than the rules of pleading. Thus, the complaint sufficiently averred damages and consequently stated a cause of action (*232 Cal. App. 2d 56, 69)* .

[d] Improper Averment of Damages Is Not Important

Watson v. Aced *(1957) 156 Cal. App. 2d 87, 319 P.2d 83* , was an action for damages for breach of contract. The plaintiff alleged that the defendants breached the contract, and as a result the plaintiff was damaged in the amount of $4,025. The defendants demurred generally, but the trial court overruled the demurrer. After a trial, judgment was rendered for the plaintiff.

The court of appeal affirmed. The improper allegation of damages or the items of damages is not a ground for a general demurrer (*156 Cal. App. 2d 87, 91)* .

The facts and procedural background of ***Domino v. Mobley*** *(1956) 144 Cal. App. 2d 24, 300 P.2d 324* , are discussed in *§ 50.11[3][b]*. In reviewing the plaintiffs' allegation concerning damages and the defendants' contention that the complaint failed to state a cause of action, the court noted that whether the correct measure of damages is pleaded by a complaint is not important in the context of a general demurrer (*144 Cal. App. 2d 24, 30)* .

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Volume 5 Chapters 50-59 CONTRACTS---to---CORPORATIONS
CHAPTER 50 CONTRACTS
PART II. FORMS
A. Action for Damages for Breach of Contract

5-50 California Points & Authorities §§ 50.62-50.99

[Reserved]

§§ 50.62[Reserved]

California Points & Authorities

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Volume 5 Chapters 50-59 CONTRACTS---to---CORPORATIONS
CHAPTER 50 CONTRACTS
PART II. FORMS
B. Defenses to Breach of Contract Action
1. Plaintiff's Lack of Standing to Sue

5-50 California Points & Authorities § 50.100

§ 50.100 Plaintiff Cannot Sue as Promisee for Benefit of Donee Third Party

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE CONTRACT HAVING BEEN MADE FOR THE BENEFIT OF A THIRD PARTY, AND THE PLAINTIFF HAVING FAILED TO ALLEGE THAT THE PLAINTIFF WAS BOUND TO PROVIDE THE PROMISED BENEFIT TO THE THIRD PARTY, THE PLAINTIFF MAY NOT RECOVER DAMAGES FOR BREACH OF THE CONTRACT, BECAUSE THE THIRD PARTY IS A DONEE BENEFICIARY.

Promisee for Benefit of Third Party Is Not Damaged by Breach. When a contract is made for the benefit of a third party, and the promisee is not bound to provide the promised benefit to the third party, the promisee may not recover damages, in the event that the promisor breaches the contract, because the third party is a donee beneficiary, not a creditor beneficiary (*In re Marriage of Smith & Maescher (1993) 21 Cal. App. 4th 100, 107, 26 Cal. Rptr. 2d 133*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that the plaintiff is a promisee of a contract for the benefit of a donee third party, and thus plaintiff is not entitled to recover damages for any breach of the contract by the defendant promisor, since only the donee third party, and not plaintiff, could have incurred damages as the result of any breach.

This form may also be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a defendant seeks to raise this contention in order to vitiate an allegation or claim that the plaintiff incurred damages. For example, it may be used to support a motion for summary judgment when undisputed facts show that the plaintiff is the promisee of a contract for the benefit of a donee third party.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised in support of a defendant's motion for summary judgment, the memorandum would include an analysis of the supporting and opposing papers showing that undisputed facts establish that plaintiff is a promisee of a contract for the benefit of a donee third party.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Promisee for Donee Third Party's Benefit Is Not Damaged by Breach

In ***In re Marriage of Smith & Maescher*** *(1993) 21 Cal. App. 4th 100, 26 Cal. Rptr. 2d 133* , a marital settlement agreement included the husband's promise to pay certain college expenses for the benefit of the spouses' child. When he failed to pay the expenses, the wife paid them, although at no time was she obligated to pay them. Subsequently she obtained an enforcement order directing the husband to reimburse her.

The court of appeal reversed. The wife, as promisee of a contract for the benefit of a donee third party, was not entitled to recover damages for breach of the contract. The promisee is not damaged by breach of the contract. Since the promisee could not recover damages (except, perhaps, nominal damages), the promisee's only remedy is a suit for specific performance (*21 Cal. App. 4th 100, 107)* . If the promisee was bound, when the contract was made, to provide the promised benefit to the third party (who would be, in that case, a creditor beneficiary, not a donee beneficiary), thenthe promisee could sue for damages in the event of a breach of the contract (*21 Cal. App. 4th 100, 106-107)* .

[4] Additional Authorities

[a] When Third Party Is Not Creditor Beneficiary

In *Mission Oaks Ranch, Ltd. v. County of Santa Barbara (1998) 65 Cal. App. 4th 713, 77 Cal. Rptr. 2d 1* , *disapproved on another point in Briggs v. Eden Council for Hope and Opportunity (1999) 19 Cal. 4th 1106, 1123, 81 Cal. Rptr. 2d 471, 969 P.2d 564* , the court of appeal held that a developer whose proposed project was denied after a consultant hired by the county prepared an EIR could not sue the county for damages caused by county's alleged failure to prepare a proper EIR, as the developer was not a third-party creditor beneficiary of the county's contract with the consultant. One who is not a party to a contract has no right to enforce it unless it is an intended third-party beneficiary of the contract. Whether a putative third party is an intended beneficiary of the contract depends on whether such an intent appears from the written terms of the contract. The court found that in this case, the written terms of the contract showed the parties' intent that the developer was not an intended beneficiary (*65 Cal. App. 4th 713, 724)* .

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B. Defenses to Breach of Contract Action
1. Plaintiff's Lack of Standing to Sue

5-50 California Points & Authorities § 50.101

§ 50.101 Plaintiff Failed to Exhaust Arbitration Remedies

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE ONLY ISSUES INVOLVED IN THE CAUSE OF ACTION ARE COVERED BY AN ARBITRATION CLAUSE IN THE CONTRACT, AND THE PLAINTIFF HAS FAILED TO EXHAUST THESE ARBITRATION REMEDIES.

A. Court Must Determine Arbitrability of Dispute. Whether the parties are bound to arbitrate and what issues may be subject to arbitration are matters to be determined by the court on the basis of the contract (*Thornton v. Victor Meat Co. (1968) 260 Cal. App. 2d 452, 467, 67 Cal. Rptr. 887*).

B. Failure to Exhaust Arbitration Remedies. If the only issues to be litigated are covered by an arbitration clause of the contract, and the plaintiff has not exhausted the arbitration remedies, judgment for defendant is proper (Charles J. Rounds Co. v. Joint Council of Teamsters No. 42 *(1971) 4 Cal. 3d 888, 899, 95 Cal. Rptr. 53, 484 P.2d 1397* ; *Johnson v. Hydraulic Research & Mfg. Co. (1977) 70 Cal. App. 3d 675, 679, 139 Cal. Rptr. 136*).

[*Optional*] **C. Expiration of Agreement Does Not Terminate Arbitration Rights.** The expiration of the terms of a collective bargaining agreement does not terminate any rights that may have accrued under the agreement, including the right and correlative duty to arbitrate (*Thornton v. Victor Meat Co. (1968) 260 Cal. App. 2d 452, 471, 67 Cal. Rptr. 887*).

[*Optional*] **D. Meaning of Collective Bargaining Agreement Is Arbitration Matter.** If a collective bargaining agreement provides for arbitration of all disputes pertaining to the meaning, interpretation, and application of the collective bargaining agreement and its provisions, any dispute as to the meaning, interpretation, and application of any specific matter covered by the collective bargaining agreement is a matter of arbitration. Doubts as to whether the

arbitration clause applies are to be resolved in favor of coverage (*Posner v. Grunwald-Marx, Inc. (1961) 56 Cal. 2d 169, 175, 14 Cal. Rptr. 297, 363 P.2d 313*).

[*Optional*] **E. Arbitration Procedures Are Not Avoided by Artful Pleading.** If the subject matter of the dispute falls within the grievance and arbitration procedures of the agreement, a plaintiff may not avoid those procedures merely by artfully pleading the complaint and omitting reference to the agreement (*Johnson v. Hydraulic Research & Mfg. Co. (1977) 70 Cal. App. 3d 675, 682, 139 Cal. Rptr. 136*).

[*Optional*] **F. Service-of-Suit Clause Does Not Conflict With Arbitration Clause.** A service-of-suit clause in a contract does not conflict with an arbitration clause as long as the service-of-suit clause can be interpreted as having been intended to facilitate enforcement of the arbitration clause: for instance, when the arbitration clause is qualified by an introductory phrase such as "Notwithstanding every other provision of this contract ..... " (*Boghos v. Certain Underwriters at Lloyd's of London (2005) 36 Cal. 4th 495, 502-503, 30 Cal. Rptr. 3d 787, 115 P.3d 68*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that defendant is entitled to judgment because all the issues to be determined in plaintiff's cause of action for contract damages are covered by an arbitration clause in the contract, and plaintiff failed to exhaust these arbitration remedies before bringing the action.

This form may also be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a defendant seeks to raise this contention. For example, it may be used to support a motion by defendant for summary judgment when undisputed facts show that the issues in the action are covered by an arbitration agreement but plaintiff did not exhaust these arbitration remedies.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised in support of a defendant's motion for summary judgment, the memorandum would include an analysis of the supporting and opposing papers showing that undisputed facts establish that plaintiff failed to exhaust arbitration remedies as required by the terms of the contract.

[c] Related Pleading and Practice Chapters

For affirmative defenses stating that arbitration is a condition precedent to suit, and arbitration is a sole remedy that was not availed of within the time specified, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender). For detailed discussion relating to contracts generally, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For memoranda relating to arbitration generally, see Ch. 20, *Arbitration: Compelling* , and Ch. 20A, *Arbitration: Resisting* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms

of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.110* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Court Must Determine Arbitrability of Dispute

Thornton v. Victor Meat Co. *(1968) 260 Cal. App. 2d 452, 67 Cal. Rptr. 887* , was an action by union members to recover wages from meat processors under a collective bargaining agreement. One issue was whether the plaintiffs could sue to recover wages under a contract that guarantied them 40 hours of work a week, when the defendants had locked them out for four days of a five-day work week. The contract provided for arbitration of any dispute that arose as to its interpretation, although it specifically excluded controversies regarding hours or wages. The defendants claimed that the plaintiffs were bound by the contract provisions for arbitration, and the issue of arbitrability itself should be arbitrated. The trial court granted the defendants' motion for summary judgment on the ground that the issue concerning the wages was subject to arbitration.

The court of appeal affirmed. Whether the plaintiffs were bound to arbitrate as well as what issues were subject to arbitration were matters to be determined by the trial court on the basis of the contract. In this case, the exception in the contract concerning hours or wages should be limited to disputes directly involving the number of hours of employment or the rate of wages to be paid, but by locking out the employees, the defendants had treated the collective bargaining agreement as terminated and thus could not insist on arbitration (*260 Cal. App. 2d 452, 467)* .

[b] Failure to Exhaust Arbitration Remedies

In **Charles J. Rounds Co. v. Joint Council of Teamsters No. 42** *(1971) 4 Cal. 3d 888, 95 Cal. Rptr. 53, 484 P.2d 1397* , an employer sued a union for damages for breach of a no-strike clause in a collective bargaining agreement after the plaintiff had discharged a union member and the union then struck the plaintiff. When the case came to trial, the defense of whether the dispute was covered by an arbitration clause in the agreement was tried first by stipulation of the parties. The trial court dismissed the complaint on the ground that the dispute was covered by that clause.

The Supreme Court affirmed. When the only issue litigated is covered by the arbitration clause, and the plaintiff has not first pursued or attempted to pursue the arbitration remedy, the plaintiff has implicitly waived the right to arbitrate, so that the defendant could elect to submit the matter to the jurisdiction of the court. The defendant may elect to demur or move for summary judgment on the ground that the plaintiff has failed to exhaust arbitration remedies. The defendant may instead elect to move for a stay of proceedings pending arbitration, if the defendant also moves to compel arbitration. In this case, the plaintiff at no time attempted to pursue the arbitration remedy even though the no-strike clause was subject to arbitration under the agreement, and thus the defendant was entitled to the dismissal (*4 Cal. 3d 888, 899)* .

Johnson v. Hydraulic Research & Mfg. Co. *(1977) 70 Cal. App. 3d 675, 139 Cal. Rptr. 136* , was an action by a former employee against the company and its manager of employee relations. The complaint alleged a wrongful interference with the plaintiff's contractual relations with a doctor and a conspiracy to violate the plaintiff's rights. A collective bargaining agreement provided specific, exclusive grievance and arbitration procedures to resolve disputes of the nature involved in this case. The plaintiff's dispute concerned his termination based on a report by a physician to whom the plaintiff had been referred by the defendants. The plaintiff put into motion the grievance and arbitration procedures but did not pursue them to a final conclusion. The trial court granted the defendants' motion for summary judgment of the ground that the action was barred by the plaintiff's failure to exhaust the grievance and arbitration

remedies.

The court of appeal affirmed. A party to a collective bargaining contract that provides grievance and arbitration machinery for the settlement of disputes within the scope of the contract must exhaust the internal remedies before resorting to the courts in the absence of facts excusing exhaustion. The plaintiff's failure in this case to exhaust those procedures precluded the attempt to resort to the courts instead (*70 Cal. App. 3d 675, 679)* .

[c] Expiration of Agreement Does Not Terminate Arbitration Rights

The facts and procedural background of ***Thornton v. Victor Meat Co.*** *(1968) 260 Cal. App. 2d 452, 67 Cal. Rptr. 887* , are discussed in *§ 50.101[3][a]*. A second issue in the case arose because the agreement expired on October 1 but was extended until a negotiating session on October 5 of the year in question. At issue was the parties' intent with respect to the extension of the contract, since the plaintiffs were locked out on October 6. The court noted that expiration of the term of a collective bargaining agreement does not terminate any rights, including the right and correlative duty to arbitrate, that may have accrued under the agreement. Grievances that are based on conditions arising during the term of the agreement to arbitrate are arbitrable after that term has ended. However this principle has no application to grievances that arise after the expiration of the agreement to arbitrate. The defendants' actions indicated that in their view the collective bargaining agreement terminated on October 5. These actions, consisting of locking out the employees, were in effect self-help and were inconsistent with the no-lockout clause of the grievance and arbitration provisions. It would have been improper to allow the defendants to insist on arbitration over the plaintiffs' objection (*260 Cal. App. 2d 452, 471)* .

[d] Meaning of Collective Bargaining Agreement Is Arbitration Matter

In ***Posner v. Grunwald-Marx, Inc.*** *(1961) 56 Cal. 2d 169, 14 Cal. Rptr. 297, 363 P.2d 313* , a union brought a proceeding to compel the corporation to arbitrate a question concerning vacation and holiday pay. When the corporation had moved its plant from California to Arizona, it terminated employees on a date making their eligibility for vacation and holiday pay doubtful. The bargaining agreement, in providing for that pay, did not expressly provide for the contingency of the plant's removal or the termination of the employees. The trial court denied the petition, on finding that the defendant was not in default under the arbitration provisions of the collective bargaining agreement was unambiguous as to vacation and holiday pay.

The Supreme Court reversed. The trial court applied an erroneous rule in making its decision to deny the petition. The Court adopted the federal rule to the extent that it states that if the collective bargaining agreement provides for arbitration of all disputes pertaining to the meaning, interpretation, and application of the collective bargaining agreement and its provisions, any dispute as to the meaning, interpretation, and application of any specific matter covered by the agreement is a matter for arbitration. Doubts as to whether the arbitration clause applies are to be resolved in favor of coverage. Since the bargaining agreement in this case provided that any dispute arising between the parties relating directly or indirectly to the provisions of the agreement, whether concerning discharges or any other terms, should be arbitrated, the dispute involved in the case was subject to arbitration (*56 Cal. 2d 169, 175)* .

[e] Arbitration Procedures Are Not Avoided by Artful Pleading

The facts and procedural background of ***Johnson v. Hydraulic Research & Mfg. Co.*** *(1977) 70 Cal. App. 3d 675, 139 Cal. Rptr. 136* , are discussed in *§ 50.101[3][b]*. In this action arising from an employer's wrongful interference with the plaintiff's contractual relations with a doctor and a conspiracy to violate the plaintiff's rights, the plaintiff claimed that since he was not relying on the collective bargaining agreement, and its terms were raised as a matter of defense and not in the complaint, the exhaustion rule did not apply. However, the court disagreed, stating that if the subject matter of a dispute falls within the grievance and arbitration procedures of the agreement, a plaintiff may not avoid those procedures merely by artfully pleading a tort and omitting reference to the agreement (*70 Cal. App. 3d 675, 682)* .

[f] Service-of-Suit Clause Does Not Conflict With Arbitration Clause

In ***Boghos v. Certain Underwriters at Lloyd's of London*** *(2005) 36 Cal. 4th 495, 30 Cal. Rptr. 3d 787, 115 P.3d 68* , the plaintiff was receiving payments under a disability insurance contract from the defendants, who were underwriters at Lloyd's of London. The underwriters abruptly stopped making payments, and the plaintiff sued on several theories of contract law. The underwriters sought to compel arbitration pursuant to an arbitration clause in the contract. The trial court refused to order arbitration, on the ground that a service-of-suit clause in the contract conflicted with the arbitration clause, and any ambiguity between the two clauses should be resolved in the plaintiff's favor. The court of appeal affirmed.

The Supreme Court reversed. In the service-of-suit clause, the underwriters agreed to submit to the personal jurisdiction of designated courts for specified purposes related to the contract. Generally, because of the public policy favoring arbitration in lieu of litigation, courts have tended to hold that a service-of-suit clause can co-exist in a contract along with an arbitration clause--that is, the two clauses will not be in conflict--as long as the service-of-suit clause can be interpreted as having been intended to facilitate enforcement of the arbitration clause. This was easily possible in this case because the arbitration clause was qualified by the introductory phrase, "Notwithstanding any other item set forth herein ..... " (*36 Cal. 4th 495, 502-503)* .

[4] Additional Authorities

[a] Court Must Determine Arbitrability of Dispute

Larkin v. Williams, Woolley, Cogswell, Nakazawa & Russell (1999) 76 Cal. App. 4th 227, 90 Cal. Rptr. 2d 195 was an action by one partner for dissolution of the law partnership and an accounting. The complaint alleged that one of the partners had breached the partnership agreement. The firm petitioned to compel arbitration based on an arbitration clause in the partnership agreement which stated "[a]ny controversy or claim arising out of or relating to any provision of this agreement or the breach thereof shall be settled by arbitration in accordance with the rules then in effect of the American Arbitration Association ..... ." The trial court denied the petition to compel arbitration and the court of appeal reversed. It held that the language of the arbitration clause was very broad and extended to plaintiff's action, which arose out of or related to the partnership agreement (*76 Cal. App. 4th 227, 230-231)* .

[b] Failure to Exhaust Arbitration Remedies

Clogston v. Schiff-Lang Co. (1935) 2 Cal. 2d 414, 41 P.2d 555 , was an action for damages for breach of contract. The trial court overruled thedefendant's demurrer to the complaint on the ground that there was a written agreement to arbitrate any differences arising under the contract, and the plaintiff had not alleged that arbitration had taken place or that he had offered to submit to arbitration. The defendant then answered that the contract contained a provision for arbitration, and the defendant had offered in writing to submit the dispute to arbitration, but the plaintiff refused to do so. The trial court found that the contract did not provide for the settlement of any differences by arbitration to the exclusion of the settlement of the differences by the courts. The Supreme Court reversed. When a provision for arbitration in a contract is enforceable, arbitration or an attempt to obtain it is a condition precedent to the right to maintain an action for breach of the contract. In the absence of arbitration or any attempt on the plaintiff's part to arbitrate any contractual differences that have arisen, the judgment for the plaintiff was erroneous (*2 Cal. 2d 414, 416-417)* .

Don da *Roza, Inc. v. Northern Cal. Dist. Council Hod Carriers Union (1965) 233 Cal. App. 2d 96, 43 Cal. Rptr. 264* , was an action for damages for breach of a no-strike clause in a collective bargaining agreement. The defendants had struck and picketed the plaintiff's construction operations in violation of the no-strike provision. The trial court granted the defendants' motion for summary judgment on the ground that the plaintiff had failed to exhaust the arbitration procedures provided for in the agreement. The agreement provided that there would be no strike, slowdown, or work

stoppage in any dispute. All disputes would be arbitrated, and the arbitrators' decision would be final and binding on the parties. The court of appeal affirmed. The dispute was subject to the arbitration provision, and the plaintiff's failure to refer the violation of the no-strike clause to arbitration constituted a sufficient ground for granting the defendants' motion for summary judgment. A party to a collective bargaining contract that provides for arbitration of disputes within the scope of the contract must exhaust those internal remedies before resorting to the courts, in the absence of facts that would excuse him or her from pursuing the remedies (*233 Cal. App. 2d 96, 103-104)* .

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5-50 California Points & Authorities § 50.102

§ 50.102 Plaintiff Failed to Allege or Prove License as Contractor

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE COMPLAINT DOES NOT ALLEGE THAT THE PLAINTIFF WAS A DULY LICENSED CONTRACTOR AT ALL TIMES DURING THE PERFORMANCE OF THE CONTRACT.

A. Contractor Defined. The term "contractor" for purposes of the Contractors' License Law is synonymous with "builder" and includes subcontractors and specialty contractors. It means any person who undertakes to or offers to undertake to or purports to have the capacity to undertake to or submits a bid to, or does himself or herself or by or through others, construct, alter, repair, add to, subtract from, improve, move, wreck, or demolish any building, highway, road, parking facility, railroad, excavation, or other structure, project, development, or improvement, or to do any part, including the erection of scaffolding or other structures or works in connection with it, or the cleaning of grounds or structures in connection with it, or the preparation and removal of roadway construction zones, lane closures, flagging, or traffic diversions, or the installation, repair, maintenance, or calibration of monitoring equipment for underground storage tanks, whether or not the performance of the work involves the addition to or fabrication into any structure, project, development, or improvement, of any material or article of merchandise (*Bus. & Prof. Code § 7026*).

B. Contractor Must Allege or Prove Existence of License. No person engaged in the business or acting in the capacity of a contractor may bring or maintain any action, or recover in law or equity in any action, in any California court for the collection of compensation for the performance of any act or contract for which a license is required by the Contractors' License Law, without alleging that he or she was a duly licensed contractor at all times during the performance of the act or contract, regardless of the merits of the cause of action brought by the person, except that this prohibition does not apply to contractors who are each individually licensed under the Contractors' License Law but who fail to comply with *Business and Professions Code Section 7029* (license for joint venture) (*Bus. & Prof. Code § 7031(a)*; *MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co. (2005) 36 Cal. 4th 412, 419, 425-431,*

30 Cal. Rptr. 3d 755, 115 P.3d 41 ; *Lewis & Queen v. N.M. Ball Sons (1957) 48 Cal. 2d 141, 149-150, 308 P.2d 713* . [If an allegation of the existence of a contractor's license is controverted, the burden of proof to establish a proper license is on the licensee, and the licensee must produce a verified certificate from the Contractors' State License Board showing a license in the proper classification at all times during the performance of any act or contract covered by the action (*Bus. & Prof. Code § 7031(d)*)].

[*Optional*] **C. Completion of Contract by Unlicensed Party.** If a party that is licensed as a contractor begins work on the contractbut later relinquishes control over further performance of the contract to an unlicensed party, the licensed person cannot recover in an action for compensation on the contract (*Weeks v. Merritt Bldg. & Constr. Co. (1974) 39 Cal. App. 3d 520, 523-525, 114 Cal. Rptr. 209*).

[*Optional*] **D. Dissolution of Licensed Partnership Terminates License.** Dissolution of a licensed partnership automatically terminates its license, so that when a partner leaves a partnership, the continuing partner cannot sue for work performed under the terminated license (*Frank v. Kozlovsky (1970) 13 Cal. App. 3d 120, 124-125, 91 Cal. Rptr. 297*).

[*Optional*] **E. Undisclosed Agent's Lack of License Bars Recovery.** A licensed contractor cannot recover on a contract made, performed, and completed by an unlicensed subcontractor as an undisclosed agent (*Muth v. Leineke (1970) 9 Cal. App. 3d 433, 435-436, 88 Cal. Rptr. 1*).

[*Optional*] **F. Knowledge That Contractor Lacked License.** *Business and Professions Code Section 7031* applies even though the party against whom the action is brought knew that the contractor was unlicensed (*Pickens v. American Mortgage Exchange (1969) 269 Cal. App. 2d 299, 302, 74 Cal. Rptr. 788*).

[*Optional*] **G. Statute Applies to Contractor's Assignee.** In order for an assignee to recover on a construction contract, he or she must allege and prove that the contractor had a valid contractor's license during the performance of the contract, that the plaintiff was a holder in due course, or that he or she took an assignment of the contract in good faith without knowledge of any infirmity attached to the contract (*Walker v. Nitzberg (1970) 13 Cal. App. 3d 359, 367-368, 91 Cal. Rptr. 526*).

[*Optional*] **H. Painting Contractor Must Be Licensed.** A painting contractor is a contractor under the statutory definition of contractor in *Business and Professions Code Section 7026* (*Howard v. California (1948) 85 Cal. App. 2d 361, 364, 193 P.2d 11*).

[*Optional*] **I. No Exception for Isolated Transaction.** There is no exemption from *Business and Professions Code Section 7031* for "special circumstances" or an "isolated transaction" that would allow an unlicensed contractor [from another state] to recover for [specialized] construction services performed on a one-time basis [in the capacity of a subcontractor] (*Hydrotech Systems, Ltd. v. Oasis Waterpark (1991) 52 Cal. 3d 988, 994-998, 277 Cal. Rptr. 517, 803 P.2d 370*).

[*Optional*] **J. Fraud Claim Is Barred.** In a dispute over money owed to an unlicensed contractor, the contractor cannot evade *Business and Professions Code Section 7031* by alleging that the express or implied promise to pay for the work was fraudulent. However artful the pleading, if the primary fraud alleged is a false promise to pay for unlicensed construction work, and the primary relief sought is compensation for the work, that statute bars the action (*Hydrotech Systems, Ltd. v. Oasis Waterpark (1991) 52 Cal. 3d 988, 1002, 277 Cal. Rptr. 517, 803 P.2d 370*).

[*Optional*] **K. Purpose of Statute.** The purpose of *Business and Professions Code Section 7031* is to protect the public from incompetence and dishonesty in those who provide building materials and construction services. The licensing requirements provide minimal assurance that all persons offering those services in California have the requisite skill and character, understand applicable local laws and codes, and know the rudiments of administering a contracting business.

That statute advances this purpose by withholding judicial aid from those who seek compensation for unlicensed contract work. The statute represents a legislative determination that the importance of deterring unlicensed persons from engaging in the contracting business outweighs any harshness between the parties, and deterrence can best be realized by denying violators the right to maintain any action for compensation in California courts (*Hydrotech Systems, Ltd. v. Oasis Waterpark (1991) 52 Cal. 3d 988, 995, 277 Cal. Rptr. 517, 803 P.2d 370*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that the plaintiff in an action for contract damages performed as a contractor under the contract but failed to allege that he or she was a duly licensed contractor at all times during the performance of the contract as required by *Bus. & Prof. Code § 7031*.

This form may also be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a defendant seeks to raise this contention. For example, it may be used to support a demurrer on the ground that plaintiff has failed to allege the existence of a license, a statutory prerequisite to bringing or maintaining an action on a contract involving plaintiff's performance in the capacity of a contractor.

Similarly, by using the optional language in Paragraph B, the form may be used to support a motion by defendant for summary judgment when undisputed facts show that the plaintiff was a contractor not licensed during a portion of the contract term [*see Pickens v. American Mortgage Exchange (1969) 269 Cal. App. 2d 299, 302, 74 Cal. Rptr. 788]* . A contractor who has properly alleged a license need not prove its existence unless this allegation is controverted [*Bus. & Prof. Code § 7031(d)*]. When the allegation is controverted, however, the contractor has the burden of proof to establish a proper license is on the licensee, and must meet this burden by producing a verified certificate from the Contractors' State License Board showing a license in the proper classification at all times during the performance of any act or contract covered by the action [*Bus. & Prof. Code § 7031(d)*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised in support of a defendant's motion for summary judgment, the memorandum would include an analysis of the supporting and opposing papers showing that undisputed facts establish that plaintiff failed to prove the existence of a contractor's license during all times covered by the contract.

[c] Related Pleading and Practice Chapters

For discussions and forms relating to contractor licensing requirements in California, see California Forms of Pleading and Practice, Ch. 104, *Building Contracts* (Matthew Bender). For discussion and forms relating to licensing matters generally, see Ch. 471B, *Licensing by Public Agencies* , in that publication. For detailed discussion relating to contracts generally, see Ch. 140, *Contracts* , in that publication. See also California Legal Forms, Ch. 88, *Licensing of Contractors* (Matthew Bender).

[d] Related Memoranda

These memoranda may be combined with those in § 50.103 for submission in support of the contention that recovery may not be had by an unlicensed contractor. For memoranda supporting the contention that the complaint fails to allege that the plaintiff was duly licensed as a real estate broker or salesman, see Ch. 31, *Brokers and Salespersons* . For memoranda supporting a demurrer to a complaint to foreclose a mechanics' lien when the complaint fails to allege that the plaintiff was a duly licensed contractor, see Ch. 152, *Mechanics' Liens* .

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in §§ 50.111 -50.114* may be used in appropriate cases to oppose the contention supported by this form. In particular, § 50.112 contains authority that permits unlicensed contractors in certain exceptional circumstances to plead substantial compliance in order to support a claim for damages for breach of contract [*Bus. & Prof. Code § 7031(e), (f)*].

[3] Discussion of Authorities

[a] Contractor Must Allege or Prove Existence of License

In ***MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co.*** *(2005) 36 Cal. 4th 412, 30 Cal. Rptr. 3d 755, 115 P.3d 41* , the plaintiff was a contractor subject to the Contractors' State License Law. The plaintiff sought recovery on a contract under which the plaintiff had commenced work before obtaining the required license. The plaintiff obtained the license a few weeks after starting work and thereafter was fully licensed for the ensuing period in which the work was completed. The trial court granted the defendant's summary judgment motion. The court of appeal reversed and held that while the contractor could not recover for work performed under the contract during the relatively short time before the license was obtained, the contractor could recover for every individual act performed under the contract after the license was in place. Thus, the plaintiff was entitled to prove amounts due for work on the contract after the license was issued.

The Supreme Court reversed, thus reinstating the summary judgment in favor of the defendant. The court, relying in part on *Lewis & Queen v. N.M. Ball Sons (1957) 48 Cal. 2d 141, 308 P.2d 713* (discussed *below*), held that when *Bus. & Prof. Code § 7031(a)* applies, it bars a person from suing to recover compensation for any work done under an agreement for services requiring a contractor's license unless a proper license was in place at all times during that contractual performance. Moreover, the statute does not allow a contractor to recover compensation for any individual acts performed while duly licensed, if the contractor was unlicensed at any time during contractual performance (*36 Cal. 4th 412, 419, 425-431)* .

In ***Lewis & Queen v. N.M. Ball Sons*** *(1957) 48 Cal. 2d 141, 308 P.2d 713* , a partnership in the contracting business sued for damages for breach of equipment rental agreements. One partner had an individual license, the other did not, and the partnership had no license. The partnership claimed that even if it acted as a contractor under *Bus. & Prof. Code § 7026*, it substantially complied with the requirement of *Bus. & Prof. Code § 7028* (contracting without license as misdemeanor) since one partner had an individual license. The trial court gave judgment to the defendants, finding that because the plaintiff had acted as a contractor within the meaning of *Bus. & Prof. Code § 7026* without a license required by *Bus. & Prof. Code § 7028*, it was barred by *Bus. & Prof. Code § 7031* from maintaining any action for compensation. The entity that did the contracting work and was required by *Bus. & Prof. Code § 7028* to have a license, however, was the partnership, and it had no license.

The Supreme Court affirmed. Undoubtedly there are situations in which substantial compliance with the licensing requirements satisfies the policy of the statute. Nevertheless, there could be no question that the statutes regulating the contracting business were clearly violated. Since the plaintiff did not comply with the statute, it could not bring or

maintain any action for the collection of compensation (*48 Cal. 2d 141, 149-150)* .

[b] Completion of Contract by Unlicensed Party

Weeks v. Merritt Bldg. & Constr. Co. *(1974) 39 Cal. App. 3d 520, 114 Cal. Rptr. 209* , was an action by a subcontractor against the general contractor for the balance due under the subcontract. The issue was presented to the court on a stipulated statement of facts. The subcontractor, who was properly licensed, suffered a heart attack when three fourths of the subcontract was complete. He then relinquished further control over the subcontract to his surety who was not licensed under *Bus. & Prof. Code § 7031*. Neither the firm employed by the surety nor the firm's representative on the job held a license. The trial court concluded that the action was barred by *Bus. & Prof. Code § 7031*.

The court of appeal affirmed. Because the plaintiff relinquished all control over the performance of the contract after his heart attack, he violated *Bus. & Prof. Code § 7031*, since it is the person who performs the contract who must have the required license, not just the person who happens to have a right to maintain a suit for money owed under the contract. One purpose of the Contractors' License Law is to guard against the possibility that unlicensed persons will complete projects begun by a properly licensed person (*39 Cal. App. 3d 520, 523-524)* .

[c] Dissolution of Licensed Partnership Terminates License

In ***Frank v. Kozlovsky*** *(1970) 13 Cal. App. 3d 120, 91 Cal. Rptr. 297* , a partnership sought damages arising out of a contract to build a commercial building. When the partnership made the contract with the defendants, a license existed in the partnership name, but it had been issued to one of the partners and another person doing business under the same name. That partnership had been terminated, and the new partnership did not apply for a license until after the contract with the defendants had been completed. Following a nonjury trial, the court rendered judgment for the plaintiffs, finding that the plaintiffs in good faith had substantially complied with the licensing requirements of the state.

The court of appeal reversed. The plaintiffs had not substantially complied with the licensing statutes in part because at the time of the contracting, the partnership did not hold a valid license. Dissolution of the old partnership by a change in its personnel automatically terminated its license. Additionally, the qualifying partner did not hold an individual license. To hold that the licensing requirements were satisfied would be to defeat the Legislature's policy. Thus, the plaintiffs could not recover on the contract (*13 Cal. App. 3d 120, 124-126)* .

[d] Undisclosed Agent's Lack of License Bars Recovery

Muth v. Leineke *(1970) 9 Cal. App. 3d 433, 88 Cal. Rptr. 1* , was an action by a licensed contractor to recover for the labor and materials furnished by a subcontractor to the defendants. The subcontractor, doing business without a contractor's license, orally agreed to do certain work for the defendants. Unknown to the defendants, the subcontractor was the plaintiff's undisclosed agent at the time of the making, performance, and completion of the contract. The trial court, finding that the subcontractor did not have the license required by *Bus. & Prof. Code § 7031*, rendered judgment for the defendants.

The court of appeal affirmed. In an action on a contract by an undisclosed principal, the other party to the contract has all of the defenses that could be raised against the agent until the principal is discovered. In this case, the defendants could have raised the bar of *Bus. & Prof. Code § 7031* as a defense against an action by the subcontractor. The plaintiff asserted that *Bus. & Prof. Code § 7031* was satisfied because, since the plaintiff was licensed, substantial compliance existed as to the subcontractor. However, the trial court did not find that the subcontractor substantially complied with the licensing statute. The court of appeal noted that the fact that the plaintiff was duly licensed did not change the fact that the subcontractor was not. The public needs protection from admitted undisclosed principals whose unlicensed and undisclosed agents could recover the value of the work done leaving the customer open to suit and the possibility of

double recovery by the principal if the undisclosed principal doctrine is not applied. Consequently, the court concluded that the undisclosed agent's lack of license, under the undisclosed principal doctrine,was properly applied in this case to bar the plaintiff's recovery (*9 Cal. App. 3d 433, 436-437)* .

[e] Knowledge That Contractor Lacked License

Pickens v. American Mortgage Exchange *(1969) 269 Cal. App. 2d 299, 74 Cal. Rptr. 788* , was an action for money due under a contract. The trial court granted the defendants' motion for summary judgment on the ground that the plaintiffs were not licensed general contractors. One plaintiff had a painter's license but not a general contractor's license.

The court of appeal reversed but noted that failure to be licensed during any portion of the term of a contract requires a dismissal of an action on a motion for summary judgment. The plaintiffs alleged that they informed the defendants that they were unlicensed; however, this allegation did not protect them from the proscription of *Bus. & Prof. Code § 7031*. Despite the plaintiffs' failure to have a contractor's license, they set forth three causes of action in their complaint involving fraud, the sale of products, and the employer-employee relationship, that were not barred by *Bus. & Prof. Code § 7031* (*269 Cal. App. 2d 299, 302)* .

[f] Bus. & Prof. Code § 7031 Applies to Contractor's Assignee

Walker v. Nitzberg *(1970) 13 Cal. App. 3d 359, 91 Cal. Rptr. 526* , was an action on a contract by a contractor's assignee against a home owner. Although the defendant was notified of the contract's assignment, he paid the contractor a portion of the contract price, following which the plaintiff brought this action for that sum. The trial court, finding that the defendant paid the contractor with the sincere belief that the contractor needed the money to pay for labor and materials used for the job and to avoid lien claims against the property by persons supplying labor and materials, rendered judgment for the defendant.

The court of appeal affirmed. The contractor was unlicensed at the time of the contract's performance, and *Bus. & Prof. Code § 7031* requires that a contractor allege that he was licensed at all times during the performance of the contract. This disability attaches to the contractor's assignee to whom the contractor's right to compensation has been assigned when the assignee is not a holder in due course or did not take the assignment without knowledge of the problem. Consequently, an assignee must allege and prove that the contractor had a valid contractor's license during the performance of the contract. Since the plaintiff did not allege or prove that the contractor was licensed during the performance of the contract or that the plaintiff was a holder in due course or took the assignment in good faith without knowledge of the infirmity that attached to the assigned contract, the plaintiff could not recover on the contract (*13 Cal. App. 3d 359, 367-368)* .

[g] Painting Contractor Must Be Licensed

Howard v. California *(1948) 85 Cal. App. 2d 361, 193 P.2d 11* , was an action by a painter to restrain the state and state and county officials from prosecuting him for violations of the Business and Professions Code due to his entering into contracts as a painter for consideration other than wages. The plaintiff did not possess and was unable to obtain a license issued under the Business and Professions Code. The trial court sustained the individual the defendant's demurrers. On appeal, the plaintiff contended that the Business and Professions Code does not apply to the business of painting buildings or other structures, reasoning that those whose business it is to build a building are contractors but those in the business of altering, repairing, or adding to buildings or other structures are not contractors unless the alterations, repairs, or additions also constituted building.

The court of appeal affirmed. If not all contractors who engage in the work described in *Bus. & Prof. Code § 7026* are builders under the common definitions of those words, they are made so by the special definition in the code provision.

Therefore, one who undertakes to, or does, construct, alter, repair, add to, subtract from, improve, move, wreck, or demolish any building is a contractor, and there is only that one definition of a contractor in *Bus. & Prof. Code § 7026*. Since altering, repairing, adding to, or improving a structure might involve painting the structure, a painting contractor is a contractor under the statutory definition (*85 Cal. App. 2d 361, 363-364)* .

[h] No Exception for Isolated Transaction

The plaintiff in ***Hydrotech Systems, Ltd. v. Oasis Waterpark*** *(1991) 52 Cal. 3d 988, 277 Cal. Rptr. 517, 803 P.2d 370* , a New York corporation that admittedly did not have a California contractor's license, manufactured and installed patented equipment designed to simulate ocean waves. The defendant owned and operated a water-oriented amusement park in Palm Springs. A general contractor for the defendant had contracted with the plaintiff in 1985 to design and construct a 29,000 square-foot surfing pool in the park at a total contract price of $850,000. The contract called for progress payments with a retainage to be held back pending satisfactory completion and operation of the pool. The plaintiff sued for $110,000 in retainage after the pool had been completed and was performing as specified, asserting causes of action for fraud, breach of implied contract, money due and owing, and breach of written contract. The defendants demurred on the ground that the complaint failed to allege that the plaintiff had a California contractor's license. The plaintiff claimed that application of *Bus. & Prof. Code § 7031* was unnecessary and unjust because the plaintiff possesses unique expertise in its field and provided construction services only at its customer's insistence and in reliance on the generalcontractor's repeated requests that it perform the work and promises to pay. The trial court sustained the demurrer to the written contract claim but granted the plaintiff leave to amend; with respect to all other causes of action, the demurrer was granted without leave to amend. The trial court then entered an order dismissing all defendants except the general contractor. On appeal the plaintiff contended that (1) the protective purposes of the licensing law are not served by applying *Bus. & Prof. Code § 7031* to a nonresident who subcontracted at its customer's specific request to provide unique construction services in an "isolated" California transaction, and (2) *Bus. & Prof. Code § 7031* does not bar claims for fraudulent induceent to enter a construction contract.

The court of appeal reversed the portion of the judgment that dismissed the fraud claim and affirmed the dismissal in all other respects. On review in the Supreme Court the plaintiff contended that the "exceptional circumstances" of its dealings with the defendants made application of *Bus. & Prof. Code § 7031* unnecessary and unjust. The plaintiff claimed that it reluctantly provided construction services on a one-time basis only because the park operator solicited its specialized wave-generating expertise, which was not available anywhere else. The plaintiff argued that the "isolated" provision of the specialized services by a mere subcontractor should be deemed exempt from the statute (*52 Cal. 3d 988, 994)* .

The Supreme Court determined that (1) there was no "isolated transaction" exception and (2) the fraud claim was barred by *Bus. & Prof. Code § 7031* (*52 Cal. 3d 988, 994)* . *Bus. & Prof. Code § 7026* specifies that the term "contractor" includes subcontractor and specialty contractor (*52 Cal. 3d 988, 994-995)* . Additionally, *Bus. & Prof. Code § 7040*, which lists numerous exemptions from the contractors' licensing law, does not provide exemptions for foreign contractors, isolated transactions, or "unique" building services and capabilities (*52 Cal. 3d 988, 995)* . The purpose of the licensing law is to protect the public from incompetence and dishonesty in those who provide building materials and construction. The licensing requirements provide minimal assurance that all persons offering the services in California have the requisite skill and character, understand applicable local laws and codes, and know the rudiments of administering a contracting business. *Bus. & Prof. Code § 7031* advances this purpose by withholding judicial aid from those who seek compensation for unlicensed contract work. The obvious legislative intent is to discourage persons who have failed to comply with the licensing law from offering or providing their unlicensed services for pay. Because of the strength and clarity of this policy, it is well settled that the statute applies despite injustice to the unlicensed contractor. The statute represents a legislative determination that the importance of deterring unlicensed persons from engaging in the contracting business outweighs any harshness between the parties, and deterrence can best be realized by denying violators the right to maintain any action for compensation in California courts (*52 Cal. 3d 988, 995)* .

The plaintiff argued that cases had recognized "exceptional circumstances" in which literal application of *Bus. & Prof. Code § 7031* would not further the purposes of the licensing law. Those authorities, however, related to the well-established doctrine of substantial compliance, which applies when the contractor's license is defective only in form (*52 Cal. 3d 988, 995-996)* . That was not the case here (*52 Cal. 3d 988, 996)* . Also, after the contract here at issue was made and performed, Stats. 1990, ch. 368, amended the statute to provide that the doctrine of substantial compliance was no longer applicable (*52 Cal. 3d 988, 996 n.2*). It was not apparent from the pleadings that the plaintiff's activities in California were "isolated," but even if they were, there is no implied exception for "isolated" transactions by foreign contractors. Equally irrelevant was the plaintiff's "reluctance" to engage in the transaction and the defendant's insistence that it do so (*52 Cal. 3d 988, 996)* . Perhaps the plaintiff's good faith alters the balance of equities in its favor, but the deterrence purpose of *Bus. & Prof. Code § 7031* outweighs any harshness in a particular case (*52 Cal. 3d 988, 997)* . Again, Stats. 1990, ch. 368, amended *Bus. & Prof. Code § 7031* to provide that no recovery was allowed "at law or in equity" to an unlicensed contractor "regardless of the merits of the case" (*52 Cal. 3d 988, 997 n.6*). The plaintiff's claim that the law's protective purpose was served because it only acted as a subcontractor and did not hold itself out to the public was without merit. The law protects both owners and general contractors. Thus, there was no exception that would exempt the plaintiff from the statute (*52 Cal. 3d 988, 997)* .

[i] Fraud Claim Is Barred

The facts and procedural background of ***Hydrotech Systems, Ltd. v. Oasis Waterpark*** *(1991) 52 Cal. 3d 988, 277 Cal. Rptr. 517, 803 P.2d 370* , are discussed in *§ 50.102[3][h]*. With regard to the cause of action for fraud, the California Supreme Court noted that regardless of the equities, *Bus. & Prof. Code § 7031* bars all actions, however they are characterized, that effectively seek "compensation" for illegal unlicensed contract work. Thus, actions for the agreed price or for the reasonable value of labor and materials are barred, even if the person for whom the work was performed knew the contractor was unlicensed (*52 Cal. 3d 988, 997)* . It follows that an unlicensed contractor may not circumvent the clear provisions and purposes of *Bus. & Prof. Code § 7031* simply by alleging that when the contract was made, the other party had no intention of performing it (*52 Cal. 3d 988, 998)* . The Court disagreed with the court of appeal's view that disallowing the fraud claim would contravene the protective policies of the licensing law by encouraging professional contractors to seek out unlicensed subcontractors, secure in the knowledge that the work obtained would not have to be compensated. *Bus. & Prof. Code § 7118* subjects a general contractor to disciplinary action for hiring an unlicensed subcontractor. Moreover, the unusual circumstances of this case aside, a general contractor would not usually risk liability for claims that an unlicensed subcontractor had performed substandard work (*52 Cal. 3d 988, 998)* . In addition, the deterrent and protective purposes of *Bus. & Prof. Code § 7031* preclude recovery even when the person who solicited the unlicensed work did so fraudulently or in bad faith (*52 Cal. 3d 988, 999)* .

[j] Purpose of Statute

Hydrotech Systems, Ltd. v. Oasis Waterpark *(1991) 52 Cal. 3d 988, 994-998, 277 Cal. Rptr. 517, 803 P.2d 370* , is discussed in *§ 50.102[3][h]*.

[4] Additional Authorities

[a] Contractor Must Allege or Prove Existence of License

Advantec Group, Inc. v. Edwin's Plumbing Co. (2007) 153 Cal. App. 4th 621, 63 Cal. Rptr. 3d 195 , addressed the question of when licensure is "controverted" so as to trigger the contractor's burden to produce the proof required by *Bus. & Prof. Code § 7031(d)*. The court held that a defendant's answer containing a general denial of the material allegations of the contractor's claim [*Code Civ. Proc. § 431.30(b)(1)*] is sufficient to controvert the contractor's allegation of licensure and thus invokes the requirement that the contractor prove licensure by producing a verified certificate (*153 Cal. App. 4th 621, 624)* .

Banis Rest. Design, Inc. v. Serrano (2005) 134 Cal. App. 4th 1035, 36 Cal. Rptr. 3d 532 , was an action by an

unlicensed contractor. The defendant demurred on the ground that *Bus. & Prof. Code § 7031* barred recovery. The trial court sustained the demurrer without leave to amend, and the plaintiff appealed, arguing that the trial court should have permitted amendment of the complaint so as to allege facts demonstrating that the absolute bar of the statute did not apply. The court of appeal affirmed, however, because the proposed amendment would have directly contradicted the original complaint, which alleged facts revealing that the work for which the plaintiff sought compensation was work of a kind for which a license was required (*134 Cal. App. 4th 1035, 1045-1047)* .

Rushing v. Powell (1976) 61 Cal. App. 3d 597, 130 Cal. Rptr. 110 , was an action for amounts due for services performed and materials furnished to the defendants pursuant to a written contract for the construction of a swimming pool. The pool construction license under which the plaintiff purported to act was obtained by representing to the Contractors' License Board that a person already licensed for the specialty was engaged in the joint venture with the plaintiff. In fact, the licensed person did not participate in the business of swimming pool construction. Thus, the plaintiff was permitted to engage in a specialty in which he had not demonstrated qualification by taking and passing the appropriate examination and for which he had not been licensed as an individual. The issue of the plaintiff's failure to comply with the Contractors' License Law was raised by demurrer and again at the pretrial conference and by motion for nonsuit. At the conclusion of the evidence, the trial court found that the Contractors' License Law had been substantially complied with. The court rendered judgment for the plaintiff.

[b] Painting Contractor Must Be Licensed

Franklin v. Nat C. Goldstone Agency (1949) 33 Cal. 2d 628, 204 P.2d 37 , was an action to enforce an arbitration award directing payment for certain painting work performed by interior decorators pursuant to an agreement. The trial court confirmed the award. The owner contended on appeal that the decorators had no legal standing in court to enforce their claim for compensation because none of the documents relating to the arbitrator's award indicated that they were licensed contractors at all times during the performance of the agreement. Reversing the trial court, the Supreme Court noted that a contractor is defined by *Bus. & Prof. Code § 7026* as any person who undertakes himself or by or through others, to construct, alter, repair, add to, subtract from, or improve any building. The field of specialty contracting is classified as a separate branch of the contracting business and includes a contractor who performs construction work requiring special skill and whose principal contracting business involves the use of specialized building trades and crafts. The Contractors' State License Board, in recognition of the fact that the construction industry embraces numerous specialized crafts requiring certain arts and skills, has expressly listed painting and decorating contractors among the classified specialists coming within the scope of the licensing statutes. Consequently, the decorators should have been regarded as contractors within the scope of the statute and the rules and regulations adopted in pursuance of the statute, and compliance with the state licensing requirements was necessary to validate their undertaking to do and their doing the work (*33 Cal. 2d 628, 630)* .

California Points & Authorities

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Volume 5 Chapters 50-59 CONTRACTS---to---CORPORATIONS
CHAPTER 50 CONTRACTS
PART II. FORMS
B. Defenses to Breach of Contract Action
1. Plaintiff's Lack of Standing to Sue

5-50 California Points & Authorities § 50.103

§ 50.103 Plaintiff Failed to Allege or Prove Required License

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE PLAINTIFF IS NOT LICENSED AS A [*specify licensed profession*], AND [*specify statute or ordinance*] IMPOSES A PENALTY FOR CARRYING ON THAT BUSINESS WITHOUT A LICENSE. THE CONTRACT SUED ON BY PLAINTIFF WAS THEREFORE MADE IN VIOLATION OF THAT [STATUTE *or* ORDINANCE] AND IS VOID.

A. Validity of Contracts by Unlicensed Persons. If the object of a statute or ordinance in requiring a license for the privilege of carrying on a certain business is to prevent improper persons from engaging in that particular business or to regulate the business for the protection of the public or in the interest of public morals, health, or policy, the imposition of the penalty amounts to a prohibition against doing business without a license, and a contract made by an unlicensed person in violation of the statute or ordinance is void (*California Chicks, Inc. v. Viebrock (1967) 254 Cal. App. 2d 638, 641, 62 Cal. Rptr. 269*).

[*Optional*] **B. Contract of Unlicensed Dealer of Farm Produce Is Not Enforceable.** The contract of a farm produce dealer who is not licensed under *Food and Agricultural Code Section 56101* etseq. is unenforceable (*California Chicks, Inc. v. Viebrock (1967) 254 Cal. App. 2d 638, 641, 62 Cal. Rptr. 269*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that the plaintiff failed to have a required license to carry on the business involved in the contract, and, as the purpose of the licensing requirement and the penalty for doing business without the license is to prevent improper persons from engaging in the business, the contract entered into by

the plaintiff is void as one in violation of the applicable licensing requirements.

This form may also be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a defendant seeks to raise this contention. For example, it may be used to support a motion by defendant for summary judgment when undisputed facts show that the plaintiff was a not licensed during some or all of the contract term to carry on the business covered by the contract.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised in support of a defendant's motion for summary judgment, the memorandum would include an analysis of the supporting and opposing papers showing that undisputed facts establish that plaintiff failed to prove the existence of a license that plaintiff was required, by specified statute or ordinance, to have in order to carry on the business covered by the contract.

[c] Related Pleading and Practice Chapters

For discussions and forms relating to licensing requirements generally, see California Forms of Pleading and Practice, Ch. 471B, *Licensing by Public Agencies* (Matthew Bender). For detailed discussion relating to contracts generally, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

These memoranda may be combined with those in § 50.102 for submission in support of the contention that recovery may not be had by an unlicensed contractor.

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in §§ 50.111 -50.114* may be used in appropriate cases to oppose the contention supported by this form. The memoranda *in §§ 50.260 -50.263* may also be used to oppose this form.

[3] Discussion of Authorities

[a] Validity of Contracts by Unlicensed Persons

California Chicks, Inc. v. Viebrock *(1967) 254 Cal. App. 2d 638, 62 Cal. Rptr. 269* , was an action for damages for breach of a contract for the purchase of eggs. The trial court found that the contract was unenforceable on the ground that the plaintiff had no farm produce dealer's license as required by former Agric. Code § 1263.

The court of appeal affirmed. The plaintiff was clearly a dealer in the purchase of farm produce within the sense of former Agric. Code § 1261 et seq. [*see Food & Agric. Code § 56101 et seq.* (restating former Agriculture Code sections)]. Thus, former Agric. Code § 1263, which provided that no person may act as a dealer without having obtained a license, applied. The qualifications of people and corporations engaged in this work are of the essence, and it

is public policy to make sure that no individual or firm that does not have the necessary qualifications as defined by law be permitted to carry on a business of this type. Although the Food and Agricultural Code does not specifically prohibit a produce dealer who has no license from bringing an action on a contract for the purchase of farm produce, when the object of a statute requiring a license for the privilege of carrying on a certain business is to prevent improper persons from engaging in that particular business or to regulate it for the protection of the public, the imposition of the penalty amounts to a prohibition against doing business without a license. A contract made by an unlicensed person in violation of the statute or ordinance is void (*254 Cal. App. 2d 638, 641)* .

[b] Contract of Unlicensed Dealer of Farm Produce Is Not Enforceable

California Chicks, Inc. v. Viebrock *(1967) 254 Cal. App. 2d 638, 62 Cal. Rptr. 269* , is discussed in *§ 50.110[3][a]*.

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CHAPTER 50 CONTRACTS
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B. Defenses to Breach of Contract Action
1. Plaintiff's Lack of Standing to Sue

5-50 California Points & Authorities §§ 50.104-50.109

[Reserved]

§§ 50.104[Reserved]

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5-50 California Points & Authorities § 50.110

§ 50.110 Defendant Waived Right to Require Arbitration

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

ALTHOUGH A PROVISION IN A CONTRACT REQUIRING ARBITRATION IS CONSIDERED A CONDITION PRECEDENT TO MAINTAINING A LEGAL ACTION, IT IS SUBJECT TO WAIVER, AND WHETHER THE PROVISION WAS WAIVED IS A QUESTION OF FACT.

A. Right to Arbitrate May Be Waived. A party to an arbitration agreement can waive the right to arbitrate (*Sawday v. Vista Irrigation Dist. (1966) 64 Cal. 2d 833, 836, 52 Cal. Rptr. 1, 415 P.2d 816*).

B. Waiver of Arbitration Is Question of Fact. Whether the parties have waived arbitration procedures in a contract that requires arbitration as a condition precedent is ordinarily a question of fact (*Sawday v. Vista Irrigation Dist. (1966) 64 Cal. 2d 833, 836, 52 Cal. Rptr. 1, 415 P.2d 816* ; *Berman v. Health Net (2000) 80 Cal. App. 4th 1359, 1363-1364, 96 Cal. Rptr. 2d 295* ; *Daugherty Co. v. Kimberly-Clark Corp. (1971) 14 Cal. App. 3d 151, 157-158, 92 Cal. Rptr. 120*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the plaintiff's contention that the defendant waived an arbitration provision, and therefore plaintiff's failure to pursue arbitration in accordance with a contract provision does not preclude plaintiff from bringing a cause of action for contract damages based on claims otherwise covered by the arbitration agreement.

This form may also be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context

in which a defendant seeks to raise this contention. For example, it may be used to oppose a motion by defendant for summary judgment when undisputed facts show that defendant waived the arbitration requirement of the contract.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised in opposition to a defendant's motion for summary judgment, the memorandum would include an analysis of the supporting and opposing papers showing that undisputed facts establish that defendant waived the arbitration requirements of the contract.

[c] Related Pleading and Practice Chapters

For discussion relating to the defense that arbitration is a condition precedent to suit, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender). For detailed discussion relating to contracts generally, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For memoranda relating to arbitration generally, see Ch. 20, *Arbitration: Compelling* , and Ch. 20A, *Arbitration: Resisting* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.101* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Right to Arbitrate May Be Waived

In ***Sawday v. Vista Irrigation Dist.*** *(1966) 64 Cal. 2d 833, 52 Cal. Rptr. 1, 415 P.2d 816* , an irrigation district sued for declaratory relief and anorder terminating arbitration with a lessee of the district, who countered with a petition to compel arbitration. The proceedings were consolidated. The lease provided that if the lessee was damaged by the district's removal of water from the land as permitted in the lease, the monthly rent would be reduced. If the parties failed to agree on the amount of reduction, the matter was to be determined by arbitration. When the district started removing water from the premises in 1950, the lessee informed the district that the water removal would damage the lessee. Three years later, she claimed that she had been damaged and stated that she felt that there should be a reduction of rentals, but the district refused any adjustment. The lessee did not press her claim but continued to pay the full rent and gave notice of the exercise of her option for another five-year term beginning in 1955 on the terms and conditions and at the same rent provided in the lease. In 1960 the lessee demanded arbitration of her damages over the entire period for which the district had pumped and removed water, from 1950 to the end of the lease term in 1960. The trial court concluded that the lessee had been guilty of laches to the district's prejudice so as to waive her right to compel arbitration with respect to matters arising before 1959, but the court ordered arbitration of the lessee's claim with respect

to matters arising after 1959.

The Supreme Court affirmed. A party to an arbitration agreement can waive the right to arbitrate. In this case, the lessee should have made her claim for adjustment in rent within one year after the year in which the damages were incurred, and by not doing so, she was guilty of laches. Thus she waived her right to compel arbitration as to the amount of rent reduction to which she might otherwise be entitled because of damages suffered by the removal of water before 1959 (*64 Cal. 2d 833, 836)* .

[b] Waiver of Arbitration Is Question of Fact

The facts and procedural background of ***Sawday v. Vista Irrigation Dist.*** *(1966) 64 Cal. 2d 833, 52 Cal. Rptr. 1, 415 P.2d 816* , are discussed in *§ 50.110[3][a]*. In concluding that the lessee waived her right to compel arbitration with respect to matters arising before 1959, the Supreme Court stated that whether there has been waiver of a right to arbitrate is ordinarily a question of fact. A finding of waiver, if supported by sufficient evidence, is binding on an appellate court. In this case, the trial court's finding of waiver was supported by sufficient evidence (*64 Cal. 2d 833, 836)* .

In ***Berman v. Health Net*** *(2000) 80 Cal. App. 4th 1359, 96 Cal. Rptr. 2d 295* , the plaintiff sued his health insurer, asserting various causes of action with regard to the insurer's handling of plaintiff's deceased wife's health care benefits. The insurer filed a petition to compel arbitration. The insured opposed the petition, arguing that the insurer had waived the right to compel arbitration by engaging in substantial discovery. The trial court denied the petition to compel arbitration and denied the insured's motion for reconsideration. The court of appeal affirmed, finding that the insured had been prejudiced by the insurer's conduct of extensive discovery. It found that the insured had demonstrated adequate prejudice to support the trial court's finding of waiver. The test for prejudice is whether defendants used the discovery processes of the court to gain information about plaintiff's case which defendant could not have gained in arbitration. That test was met (*80 Cal. App. 4th 1359, 1367-1369)* . Further, the insured was prejudiced even though he engaged in discovery of his own. The court also found that any supposed lack of surprise did not support the insurer's position, and subjective bad faith was not a required element of waiver. It finally found that the existence of the insured's non-arbitrable claim for injunctive relief did not nullify the insurer's waiver (*80 Cal. App. 4th 1359, 1371-1373)* .

In ***Daugherty Co. v. Kimberly-Clark Corp.*** *(1971) 14 Cal. App. 3d 151, 92 Cal. Rptr. 120* , the plaintiff sued for compensation for work performed in connection with a contract. The trial court granted the defendants' motion for summary judgment, concluding that as a matter of law, the plaintiff's failure to comply strictly with certain arbitration procedures in the contract prevented recovery. The trial court found that the contract provisions requiring arbitration were a condition precedent to maintaining legal action, and the plaintiff had never demanded that arbitration proceedings be begun.

The court of appeal reversed. Arbitration procedures are no more binding on the parties to a contract than other contract terms. The arbitration agreement may be rescinded, repudiated, or avoided, and the ordinary arbitration statutes do not deprive the parties of this power. Whether the parties have waived arbitration procedures is ordinarily a question of fact. In this case, after complaint was filed, the defendants paid the plaintiff a certain sum on disputed claims. If the defendants were convinced that arbitration was a condition precedent to a suit, there was no reason why they should have made this payment. Clearly a question of fact was presented as to whether the parties waived the arbitration terms, abandoned the contract, or replaced it or any of its terms by means of an executed oral agreement, or one implied by the conduct of the parties (*14 Cal. App. 3d 151, 157-158)* .

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5-50 California Points & Authorities § 50.111

§ 50.111 Contractor Unlicensed at Time of Contract's Execution May Sue If Licensed During Performance

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF WAS FULLY LICENSED AT ALL TIMES DURING PERFORMANCE OF THE WORK THAT WAS THE SUBJECT MATTER OF THE CONTRACT, AND THEREFORE IS NOT BARRED FROM RECOVERING COMPENSATION FOR THE WORK SOLELY BECAUSE PLAINTIFF WAS UNLICENSED WHEN THE CONTRACT WAS EXECUTED.

Contractor Unlicensed at Time of Contract's Execution but Licensed During Performance. If fully licensed at all times during contractual performance, a contractor that is subject to the Contractors' State License Law is not barred from recovering compensation for the work solely because the contractor was unlicensed when the contract was executed (*MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co. (2005) 36 Cal. 4th 412, 419, 435-445, 30 Cal. Rptr. 3d 755, 115 P.3d 41*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that the plaintiff was licensed as a contractor during the performance of the contract, and therefore may maintain an action on the contract, as it is not relevant if the plaintiff was not licensed at the time the contract was executed.

This form may also be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a defendant seeks to raise this contention. For example, the form may be used to oppose a defendant's motion for summary judgment when undisputed facts show that, although the plaintiff may not have been licensed when the contract was executed, he or she was licensed at all times during the performance of the contract.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised in opposition to a defendant's motion for summary judgment, the memorandum would include an analysis of the supporting and opposing papers showing that undisputed facts establish that plaintiff was licensed to conduct the business covered by the contract during the time of plaintiff's performance.

[c] Related Pleading and Practice Chapters

For discussion and forms relating to licensing matters generally, see California Forms of Pleading and Practice, Ch. 471B, *Licensing by Public Agencies* (Matthew Bender). For detailed discussion relating to contracts generally, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

These memoranda may be combined with those in §§ 50.112-50.114, as appropriate, to support a contention that a plaintiff may recover notwithstanding issues relating to the plaintiff's license to conduct the business covered by the contract.

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in §§ 50.102, 50.103* may be used in appropriate cases to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Contractor Unlicensed at Time of Contract's Execution but Licensed During Performance

In ***MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co.*** *(2005) 36 Cal. 4th 412, 30 Cal. Rptr. 3d 755, 115 P.3d 41* , the plaintiff was a contractor subject to the Contractors' State License Law. The plaintiff sought recovery on a contract that the parties executed before the plaintiff had the required license. After execution of the contract but before commencement of the work, the plaintiff obtained the required license, which the plaintiff retained during the entire time of performing work under the contract. The trial court granted the defendant's summary judgment motion, but the court of appeal reversed and held that the contract was not unenforceable merely because of the plaintiff's unlicensed status at the time the contract was executed.

The Supreme Court affirmed. The court cited two earlier cases in which the issue had been resolved in favor of the contractor: *Gaines v. Eastern Pacific (1982) 136 Cal. App. 3d 679, 186 Cal. Rptr. 421* , and *Vitek, Inc. v. Alvarado Ice Palace, Inc. (1973) 34 Cal. App. 3d 586, 110 Cal. Rptr. 86* , both of which are discussed in *§ 50.111[4][a]*. The court, explicitly confirming the conclusions reached in those cases on the issue, held that if a contractor was subject to the Contractors' State License Law and was fully licensed at all times during contractual performance, the contractor is not barred by *Bus. & Prof. Code § 7031(a)* from recovering compensation for the work solely because the contractor was unlicensed when the contract was executed (*36 Cal. 4th 412, 419, 435-445)* .

[4] Additional Authorities

[a] Contractor Unlicensed at Time of Contract's Execution but Licensed During Performance

In *Gaines v. Eastern Pacific (1982) 136 Cal. App. 3d 679, 186 Cal. Rptr. 421* , a subcontractor sued the general contractor for breach of contract, and the general contractor cross complained against the subcontractor. Judgment was rendered for the general contractor on the cross complaint.

The court of appeal affirmed. Even though the contractor was unlicensed during the first month of the contract period, it was licensed at all times during performance of the contract (*136 Cal. App. 3d 679, 682)* . *Bus. & Prof. Code § 7031* did not bar recovery on the cross complaint (*136 Cal. App. 3d 679, 683)* .

In *Vitek, Inc. v. Alvarado Ice Palace, Inc. (1973) 34 Cal. App. 3d 586, 110 Cal. Rptr. 86* , an action on a construction contract, the trial court rendered judgment for the plaintiff finding that the plaintiff was a duly licensed contractor at all times during the performance of the contract. The defendants contended on appeal that there was no substantial evidence to support this finding. The plaintiff had not been licensed at the time of the execution of the contract but had been licensed at all times while performance was taking place.

The court of appeal affirmed. When there is a violation of a regulating statute, the prescribed penalty is the equivalent of an express prohibition, and a contract made contrary to its terms is void even though the statute does not pronounce the fact. However, this rule is subject to exceptions, and the statute must be examined as a whole to determine whether the legislature meant that a contract in contravention of it should be void. This case clearly presented an act that was wrong merely because it was prohibited (*malum prohibitum*), not an act of an immoral character and opposed to sound public policy or designed to further a crime or obstruct justice. The contract was void only if it fell within the area that the legislature intended to prohibit as a necessary deterrence to protect the public interest. *Bus. & Prof. Code § 7031* denies all recovery for performance unless the contractor had a license at all times during performance. If the legislature had in mind that the contract was void, it could have acknowledged the fact by omitting the words "during the performance" or adding "while so acting," but since it did not do so, possession of a license on the date of execution was not a matter of concern in the legislature's design for public protection. In this case, although the plaintiff may have committed a misdemeanor, nothing in the law allowed the trial court to impose civil sanctions not authorized by the statute. Any other conclusion would work a distinct hardship on the contractor, and the licensing law should not be used as a shield for the avoidance of a just obligation (*34 Cal. App. 3d 586, 590-594)* .

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5-50 California Points & Authorities § 50.112

§ 50.112 Substantial Compliance With Contractors' License Law Is Sufficient

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

A CONTRACTOR MAY MAINTAIN AN ACTION FOR COMPENSATION FOR WORK PERFORMED IF HE/SHE HAS SUBSTANTIALLY COMPLIED WITH THE CONTRACTORS' LICENSE LAW AS SET FORTH IN BUSINESS AND PROFESSIONS CODE SECTION 7031(e), EVEN THOUGH HE/SHE DID NOT STRICTLY COMPLY WITH THE LICENSING REQUIREMENT.

A. Purpose of Licensing Requirement. The purpose of the licensing requirement is to protect the public from incompetent or untrustworthy contractors (*Davis Co. v. Superior Court (1969) 1 Cal. App. 3d 156, 158, 81 Cal. Rptr. 453*).

B. Substantial Compliance With Licensing Requirement Is Sufficient. A contractor may maintain an action on a contract even though he or she has not strictly complied with *Business and Professions Code Section 7031* requiring a license, if he or she substantially complied with the statute (*Bus. & Prof. Code § 7031(e)*; *Slatkin v. White (2002) 102 Cal. App. 4th 963, 971-972, 126 Cal. Rptr. 2d 54*).

[*EITHER*]

C. Elements of Substantial Compliance. The contract in this case was made after 1991, and this action was _____ [commenced before 1995 *or* previously commenced before 1995 then was dismissed and recommenced after 1994]. The elements of substantial compliance are present because (1) the plaintiff was a duly licensed contractor during [a portion of] the 90 days immediatelypreceding the performance of the act or contract for which compensation was sought, (2) the plaintiff's category of license would have authorized the act or contract, and (3)

noncompliance was the result of inadvertent clerical error and other error or delay not caused by negligence (*Bus. & Prof. Code § 7031(e)*; *see Bus. & Prof. Code § 7031(f)* (actions and proceedings to which statutory elements of substantial compliance with licensing requirements apply)).

[*OR*]

C. Elements of Substantial Compliance. The contract in this case was made after 1991, and this action was commenced after 1994. The elements of substantial compliance are present because (1) the plaintiff was duly licensed as a contractor in California before the performance of the act or contract, (2) the plaintiff acted reasonably and in good faith to maintain the license, (3) the plaintiff did not know and reasonably should not have known that the plaintiff was not duly licensed, and (4) the plaintiff acted promptly and in good faith to reinstate the plaintiff's license on learning that it was invalid (*Bus. & Prof. Code § 7031(e)*; *see Bus. & Prof. Code § 7031(f)* (actions and proceedings to which statutory elements of substantial compliance with licensing requirements apply)).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that, if the plaintiff did not comply with the Contractors' License Law, the plaintiff substantially complied with the exceptions set forth in *Bus. & Prof. Code § 7031(e)* and therefore may maintain an action on the contract to recover damages for nonpayment for his or her contract performance.

This form may also be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a defendant seeks to raise this contention. For example, the form may be used to oppose a defendant's motion for summary judgment when undisputed facts show that, although the plaintiff may not have complied with the License Law in all particulars, he or she nevertheless substantially complied with the exceptions in *Bus. & Prof. Code § 7031(e)*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised in opposition to a defendant's motion for summary judgment, the memorandum would include an analysis of the supporting and opposing papers showing that undisputed facts establish that plaintiff substantially complied with *Bus. & Prof. Code § 7031(e)*.

[c] Related Pleading and Practice Chapters

For discussions and forms relating to contractor licensing requirements in California, see California Forms of Pleading and Practice, Ch. 104, *Building Contracts* (Matthew Bender). For discussion and forms relating to licensing matters generally, see California Forms of Pleading and Practice, Ch. 471B, *Licensing by Public Agencies* (Matthew Bender). For detailed discussion relating to contracts generally, see California Forms of Pleading and Practice, Ch. 140, *Contracts* , (Matthew Bender). See also California Legal Forms, Ch. 88, *Licensing of Contractors* (Matthew Bender).

[d] Related Memoranda

These memoranda may be combined with those in §§ 50.111, 50.113, and 50.114, as appropriate, to support a contention that a plaintiff may recover notwithstanding issues relating to the plaintiff's license to conduct the business covered by the contract.

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are

used. For example, if used in a memorandum opposing a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

In an appropriate case, these memoranda may be submitted in opposition to the contention supported by the memoranda *in § 50.102*.

[3] Discussion of Authorities

[a] Purpose of Licensing Requirement

Davis Co. v. Superior Court *(1969) 1 Cal. App. 3d 156, 81 Cal. Rptr. 453* , involved an unlicensed subcontractor who cross-complained forbreach of warranty by a materialman furnishing material used by the subcontractor in performing his subcontract. The materialman had sued the subcontractor and others to recover the value of materials furnished for use in performance of the subcontract. The materialman moved for summary judgment on the cross complaint on the ground that the subcontractor was not a licensed contractor. The trial court granted the motion.

The court of appeal reversed, stating that the purpose of the licensing requirement is to protect the public from the perils incident to contracting with incompetent or untrustworthy contractors (*1 Cal. App. 3d 156, 159)* . The court went on to hold that penalty provision proscribing the maintenance of an action by an unlicensed contractor is limited to an action for the collection of compensation for the performance of any act or contract for which a license is required. Thus, illegality attendant on engaging in the business or acting in the capacity of a contractor without a license attaches only to transactions or contracts for construction and similar work described in *Bus. & Prof. Code § 7026*. As a consequence, an unlicensed contractor may sue for breach of a contract not within the scope of the protective purpose of the statute. In this case, the subcontractor, by the cross complaint, was not seeking compensation for the performance of an illegal contract to provide services to the general contractor. Instead, the cross action arose out of the transaction between the subcontractor as a *buyer* and the materialman as a *seller* of materials that were warranted to be fit for the purpose intended (*1 Cal. App. 3d 156, 159)* .

[b] Substantial Compliance With Licensing Requirement Is Sufficient

The doctrine of substantial compliance may allow an unlicensed contractor to recover damages for breach of contract, but only in limited circumstances. Former Bus. & Prof. Code § 7031(d), operative January 1, 1990 (Stats. 1989, ch. 368), enumerated circumstances in which the judicial doctrine of substantial compliance may apply, and overruled the holding of *Latipac, Inc. v. Superior Court (1966) 64 Cal. 2d 278, 281-282, 49 Cal. Rptr. 676, 411 P.2d 564* . Legislation effective January 1, 1995, changed the elements of substantial compliance [*see Bus. & Prof. Code § 7031(e)*; Stats. 1994, ch. 550]. A statement of the purpose of *Bus. & Prof. Code § 7031* is given in *Hydrotech Systems, Ltd. v. Oasis Waterpark (1991) 52 Cal. 3d 988, 995, 277 Cal. Rptr. 517, 803 P.2d 370* , which is discussed in *§ 50.102[3][h]*.

In ***Slatkin v. White*** *(2002) 102 Cal. App. 4th 963, 126 Cal. Rptr. 2d 54* , a contractor recorded a mechanic's lien against plaintiffs' residence for money allegedly owed for the construction of the residence. Plaintiff owners then filed a complaint seeking damages for breach of contract and a mandatory injunction to vacate the lien and prohibit the filing of further liens, on the ground that the contractor did not have a current license. The contractor withdrew the original lien and filed a new one limited to the cost of work performed while his license was not under suspension. He filed an answer and cross-complaint seeking to foreclose the lien. Although he conceded that his license had been suspended

because a bonding company had canceled a bond, he claimed he was entitled to file a lien for work he had performed because he had substantially complied with the licensing requirements. Plaintiffs moved for a preliminary injunction seeking to order the release of the second lien. The contractor opposed the motion, claiming that he was licensed when he signed the contract on April 8, 1998. On December 27, 2000, he received notice from the CSLB that his license had been suspended effective August 27, 2000 because of the cancellation of a bond. He immediately attempted to obtain a new one, doing so on June 21, 2001, with an effective date of March 12, 2001. The CSLB reinstated his license retroactive to the March date (*102 Cal. App. 4th 963, 966-967)* .

The trial court refused to direct the contractor to release the lien. The appellate court affirmed. It reviewed the substantial compliance requirements of *Bus. & Prof. Code § 7031(e)*, finding that the most sensible construction of that section is that a contractor does not necessarily lose the right to be compensated simply because he or she performs additional work after discovering the loss of licensure, as long as the individual did not have knowledge or notice of the loss before the start of the job (*102 Cal. App. 4th 963, 968-971)* . Based on the record, the court could not reach a conclusive determination of whether the contractor had substantially complied with the licensing requirements, although the limited facts suggested that he did. The issue before the court was whether the superior court had abused its discretion by determining that the contractor should not be ordered to release his lien without affording him an evidentiary hearing. The court concluded that the record did not establish a likelihood that plaintiffs would prevail in defeating the mechanic's lien and that there had been no abuse of discretion (*102 Cal. App. 4th 963, 971-972)* .

[c] Elements of Substantial Compliance

The doctrine of substantial compliance applies to all contracts made after 1991 and to all actions and arbitrations arising from those contracts, and allows a claim by an unlicensed contractor for damages for breach of contract if the elements of substantial compliance are shown to exist at an evidentiary hearing [*Bus. & Prof. Code § 7031(e)*]. The elements of substantial compliance depend generally on whether the action or arbitration was commenced before 1995 [*see Bus. & Prof. Code § 7031(f)*]. The elements applicable to actions and arbitrations commenced before 1995 (or after 1994, if the action or arbitration was commenced before 1995 and subsequently dismissed) are contained in the first alternative Paragraph C. The elements applicable to actions and arbitrations commenced after1994 (except those previously commenced and then dismissed) are contained in the second alternative Paragraph C.

Note that the statutory exception for substantial compliance is not available to a contractor who was not duly licensed at some time before beginning performance under the contract [*MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co. (2005) 36 Cal. 4th 412, 419, 431-435, 30 Cal. Rptr. 3d 755, 115 P.3d 41* (contractor that obtained license only after starting work under contract had no standing to invoke statutory exception for substantial compliance), discussed in *§ 50.111[3][a]*].

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1. Plaintiff's Lack of Standing to Sue

5-50 California Points & Authorities § 50.113

§ 50.113 Plaintiff Need Not Allege or Prove License When Contract Is Outside Scope of Licensing Statute

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

AN UNLICENSED PARTY TO A CONTRACT MAY MAINTAIN AN ACTION FOR THE BREACH OF THAT CONTRACT THAT IS NOT WITHIN THE SCOPE OF THE PROTECTIVE PURPOSE OF THE LICENSING STATUTE.

A. Contractor Defined. [*See § 50.102, Paragraph A.*]

B. License Is Unnecessary When Contract Is Outside Scope of Licensing Statute. Since the illegality attendant on engaging in the business or acting in the capacity of a contractor without a license attaches only to transactions or contracts for construction and similar work described in the Contractors' License Law, an unlicensed contractor may bring and maintain an action for the breach of a contract not within the scope of the protective purpose of the statute (*Davis Co. v. Superior Court (1969) 1 Cal. App. 3d 156, 159, 81 Cal. Rptr. 453*).

C. Purpose of Licensing Requirement. [*See § 50.112, Paragraph A.*]

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that the contract involved in the action is not within the protective scope of a given licensing statute and that plaintiff, although unlicensed under that statute, may therefore maintain an action on the contract.

This form may also be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context

in which a defendant seeks to raise this contention. For example, the form may be used to oppose a defendant's motion for summary judgment when undisputed facts show that, although the plaintiff may be unlicensed under a given licensing statute, the contract is nevertheless not within the protective scope of that statute and is enforceable by plaintiff.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised in opposition to a defendant's motion for summary judgment, the memorandum would include an analysis of the supporting and opposing papers showing that undisputed facts establish that plaintiff substantially complied with *Bus. & Prof. Code § 7031(e)*.

[c] Related Pleading and Practice Chapters

For discussion and forms relating to licensing matters generally, see California Forms of Pleading and Practice, Ch. 471B, *Licensing by Public Agencies* (Matthew Bender). For detailed discussion relating to contracts generally, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

These memoranda may be combined with those in §§ 50.111, 50.112, and 50.114, as appropriate, to support a contention that a plaintiff may recover notwithstanding issues relating to the plaintiff's license to conduct the business covered by the contract.

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

In an appropriate case, these memoranda may be submitted in opposition to the contention supported by the memoranda *in §§ 50.102* or *50.103*.

[3] Discussion of Authorities

[a] License Is Unnecessary When Contract Is Outside Scope of Licensing Statute

Davis Co. v. Superior Court *(1969) 1 Cal. App. 3d 156, 81 Cal. Rptr. 453* , is discussed in *§ 50.112[3][a]*.

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1. Plaintiff's Lack of Standing to Sue

5-50 California Points & Authorities § 50.114

§ 50.114 Defendant Cannot Rely on Licensing Requirement to Avoid Payment to Innocent Party

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

WHEN THE ILLEGALITY OF A CONTRACT CONSISTS OF THE FAILURE TO OBTAIN A LICENSE, AND THE TRANSACTION HAS BEEN WHOLLY CONSUMMATED, THE CULPABLE PARTY CANNOT RELY ON THE LICENSING REQUIREMENT TO RETAIN THE PROCEEDS OF THE TRANSACTION AND AVOID PAYMENT TO THE INNOCENT PARTY.

Party Cannot Rely on Licensing Requirement to Avoid Payment to Innocent Party. When the illegality of a contract consists of the failure to obtain a license, and the transaction has been wholly consummated as concerns the parties designed to be protected by the licensing statute, the culpable party cannot rely on the licensing requirement to retain the proceeds of the transaction and avoid payment to the innocent party (*Holland v. Morgan & Peacock Properties (1959) 168 Cal. App. 2d 206, 211, 335 P.2d 769*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that illegality of the contract based on failure to be licensed cannot be asserted by the culpable unlicensed party against the innocent party.

This form may also be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a defendant seeks to raise this contention. For example, the form may be used to oppose a defendant's motion for summary judgment when undisputed facts show that plaintiff performed fully under the contract while ignorant of defendant's lack of a proper license. Therefore plaintiff, as the innocent party, may recovery any amount owed by defendant to plaintiff under the contract, and defendant, as the culpable party, may not assert his or her lack of a license

to avoid paying that amount.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised in opposition to a defendant's motion for summary judgment, the memorandum would include an analysis of the supporting and opposing papers showing that undisputed facts establish that plaintiff performed fully as innocent parties and defendant, as the culpable, unlicensed party, has retained proceeds owing to plaintiff under the contract.

[c] Related Pleading and Practice Chapters

For discussion and forms relating to licensing matters generally, see California Forms of Pleading and Practice, Ch. 471B, *Licensing by Public Agencies* (Matthew Bender). For detailed discussion relating to contracts generally, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

In an appropriate case, these memoranda may be submitted in opposition to the contention supported by the memoranda *in § 50.103*.

[3] Discussion of Authorities

[a] Party Cannot Rely on Licensing Requirement to Avoid Payment to Innocent Party

The facts and procedural background of ***Holland v. Morgan & Peacock Properties*** *(1959) 168 Cal. App. 2d 206, 335 P.2d 769* , are discussed in *§ 50.162[3][a]*. In this case plaintiff brokers sought to recover a part of a commission on the sale and purchase of real property that defendants had promised to share with plaintiffs if plaintiffs helped find a purchaser for the property. Defendants later sought to avoid sharing the commission by claiming the contract was void in that not all defendants were properly licensed as brokers, a fact which they concealed from plaintiffs until after plaintiffs completed their promised performance. The court of appeal, in affirming a judgment in favor of plaintiffs, noted that when the illegality of a contract consists of the failure of one party to obtain a license, and the transaction has been wholly consummated as concerns the party designed to be protected by the licensing statute, the culpable, unlicensed party cannot rely on the licensing requirement to retain proceeds of the transaction and avoid payment to the innocent party (*168 Cal. App. 2d 206, 211)* .

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5-50 California Points & Authorities §§ 50.115-50.119

[Reserved]

§§ 50.115[Reserved]

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B. Defenses to Breach of Contract Action
2. Lapse of Statute of Limitations

5-50 California Points & Authorities § 50.120

§ 50.120 Action Is Barred by Statute of Limitations

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief*].

THIS ACTION IS BARRED BY THE STATUTE OF LIMITATIONS.

A. Accrual of Cause of Action. A cause of action for breach of contract accrues on the failure of the promisor to do the thing contracted for at the time and in the manner contracted (*Waxman v. Citizens Nat'l Trust & Sav. Bank (1954) 123 Cal. App. 2d 145, 149, 266 P.2d 48*).

[*EITHER*]

B. Running of Limitation Period. The limitation period begins to run at the time of the breach of the contract (*Baker v. Joseph (1860) 16 Cal. 173, 177* ; *Barlow v. Collins (1958) 166 Cal. App. 2d 274, 278-279, 333 P.2d 64*).

[*OR*]

B. Running of Limitation Period. The limitation period on an instalment contract begins to run from each date an instalment becomes due (*Tillson v. Peters (1940) 41 Cal. App. 2d 671, 676, 107 P.2d 434*).

[*EITHER*]

C. Limitation Period. An action on a written contract must be commenced within four years after the cause of action has accrued (*Code Civ. Proc. § 337*).

[*OR*]

C. Limitation Period. An action on a contract not founded on an instrument in writing must be commenced within two years after the cause of action has accrued (*Code Civ. Proc. § 339*).

[*CONTINUE*]

[*Optional*] **D. Requirement That Writing Contain Contract.** An instrument in writing is not a contract unless it contains the contract to do the thing for the nonperformance of which an action may be brought. The writing must create a duty before a duty may beinferred from the writing. It is not sufficient that a cause of action is in some way remotely or indirectly connected with an instrument in writing or that the instrument is a link in the chain establishing the cause of action (*Citizens Cas. Co. v. Otis Clark & Co. (1971) 19 Cal. App. 3d 294, 299-300, 96 Cal. Rptr. 838*).

[*Optional*] **E. Requirement of Indication of Acceptance.** In order for an action to be founded on an instrument in writing, there must be some tangible written indication of acceptance of the terms of the writing by the defendant (*James De Nicholas Associates, Inc. v. Heritage Constr. Corp. (1970) 5 Cal. App. 3d 421, 424, 85 Cal. Rptr. 233*).

[*Optional*] **F. Plaintiff's Writings Cannot Prove Defendant's Acceptance.** When all the writings tending to show the terms of an agreement are the plaintiff's writings, they cannot be used to show the defendant's acceptance (*James De Nicholas Associates, Inc. v. Heritage Constr. Corp. (1970) 5 Cal. App. 3d 421, 425, 85 Cal. Rptr. 233*).

[*Optional*] **G. Limitation Period Governing Open Book Account Is Inapplicable.** When an action is one to recover installments due under a written contract, the contract provisions are controlling as to the running of the limitation period. The plaintiff may not change the nature of the action into one on an open book account even though the plaintiff keeps a memorandum book in which he or she charges the accounts accruing under the contract and credits the payments made on dates other than that specified under the contract (*Stewart v. Claudius (1937) 19 Cal. App. 2d 349, 352, 65 P.2d 933*).

[*Optional*] **H. Tolling of Limitation Period.** The statute of limitations in a cause of action for breach of contract is tolled by a resident's absence from the state pursuant to *Code Civ. Proc. § 351* only if the out-of-state travel is unrelated to interstate commerce (*Filet Menu, Inc. v. Cheng (1999) 71 Cal. App. 4th 1276, 1282-1284, 84 Cal. Rptr. 2d 384*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that the action is barred by either the two-year statute of limitations for oral contracts or the four-year limitation periods for written contracts.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a defendant seeks to raise this contention. For example, it may be used to support a general demurrer; if it appears on the face of the complaint, or from a matter of which the court must or may take judicial notice, that the action is barred by the statute of limitations, an objection that an action is barred by the statute of limitations may be set up by demurrer [*Baillargeon v. Department of Water & Power (1977) 69 Cal. App. 3d 670, 675, 138 Cal. Rptr. 338]* and must be deemed to be included in the ground of a general demurrer that the complaint does not state facts sufficient

to constitute a cause of action [*Bell v. Bank of Cal. (1908) 153 Cal. 234, 245, 94 P. 889]* . The form may also be used to support a motion for summary judgment when it is not apparent from the face of the complaint that the statutory limitations period has run, but this fact later becomes an indisputable fact in the course of summary judgment proceedings.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised in support of a defendant's general demurrer, the memorandum would include an analysis of the complaint's allegations showing that the applicable statutory limitations period has lapsed prior to the filing of the complaint.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a general demurrer, they may be combined with appropriate memoranda set out in Ch. 71, *Demurrers and Motion* for Judgment on the Pleadings, and if used in a memorandum supporting a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.130* et seq. may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Accrual of Cause of Action

Waxman v. Citizens Nat'l Trust & Sav. Bank *(1954) 123 Cal. App. 2d 145, 266 P.2d 48* , was an action for damages for a divorced father's failure to have a policy of life insurance in force on his life at the time of his death. As part of a property settlement agreement with his former wife, the decedent promised to name their daughter as beneficiary of a life insurance policy. He obtained two policies, each worth $5,000, but one of the policies lapsed before his death. The plaintiff filed a claim against the decedent's estate for $5,000. The trial court rendered judgment for the plaintiff. On appeal, the defendant contended that the cause of action was barred by the four-year statute of limitations, *Code Civ. Proc. § 337(1)*. The defendant argued that the plaintiff had a cause of action on the date the decedent let the policy lapse by ceasing to pay the premiums.

The court of appeal held that a cause of action for breach of contract accrues on the failure of the promisor to do the thing contracted for at the time and in the manner contracted. The decedent, at any time before his death, could have complied with his obligation. Thus, the breach of the obligation did not occur until he died without the $5,000 policy in force. The plaintiff had no right to sue until the agreement had been breached by his failure to have in force, at death, a policy for $5,000 for her benefit and thus, the statute of limitations was not set in motion until the date of the obligation's promised performance--the date of decedent's death (*123 Cal. App. 2d 145, 149)* .

[b] Running of Limitation Period

In ***Baker v. Joseph*** *(1860) 16 Cal. 173* , the plaintiff sued to recover several sums of money from the defendant. The plaintiff deposited some money with the defendant in April 1854 to be invested by the defendant in loans at interest, and the principal and interest to be paid to the plaintiff on request. When the plaintiff demanded the money in December 1858, the defendant refused to pay. The defendant included in his answer the defense of the statute of limitations. The plaintiff demurred to the plea of the statute of limitations, and the trial court sustained the demurrer.

The Supreme Court affirmed. The repayment of the money was not to be made until demanded by the plaintiff. The limitation period does not begin to run from the making of a contract but runs from the breach of it; and a depository is not in default, as a general rule, until demand. Theplaintiff thus brought the action within the period allowed by the statute of limitations (*16 Cal. 173, 177)* .

In ***Barlow v. Collins*** *(1958) 166 Cal. App. 2d 274, 333 P.2d 64* , the plaintiff sued for breach of contract. The plaintiff alleged that for a number of years the plaintiff and the defendant lived together as husband and wife without the benefit of a marriage license or ceremony, and during these years they agreed to pool their earnings. The defendant later left with the proceeds of a bank account in which they had been placing their joint earnings. The plaintiff demanded his share of the money, but the defendant refused to give it to him. After trial, judgment was rendered for the plaintiff. On appeal the defendant contended that the plaintiff was barred by the statute of limitations from asserting any claim to her share on the profits or wages accumulated beyond the period prescribed by the statute of limitations.

The court of appeal affirmed. The limitation period would run from the time of the breach (which apparently was when the defendant left with the proceeds) or termination of the agreement or when the cause of action accrued. The plaintiff was not barred from claiming his share of the profits because he had brought his action within the period following the breach allowed by the statute of limitations (*166 Cal. App. 2d 274, 278-279)* .

Tillson v. Peters *(1940) 41 Cal. App. 2d 671, 107 P.2d 434* , was an action to recover unpaid installments of rent due under an oral contract for the leasing of real property. The defendant answered and affirmatively alleged that the cause of action was barred by the statute of limitations. The demurrer was apparently overruled. At the trial the plaintiff sought to avoid the effect of the statute of limitations by attempting to prove that the action was founded on a balance of rental shown to be due on an open book account. After trial, judgment was rendered for the plaintiff.

The court of appeal reversed. The fulfillment of the terms of a contract, either written or oral, may not be avoided by attempting to convert the suit for breach of the specific terms of a contract into an action based on an open book account. A suit to recover unpaid installments of rent due according to the terms of a contract, in specified monthly sums, is subject to the bar of the statute of limitations from each date an instalment becomes due. If the action is on an oral contract, the statute of limitations may not be extended from two to four years by attempting to convert the cause into a suit based on an open book account. Since the action was founded on an oral contract that specified the exact installments of rent that became due each month during the term of lease, the limitation period ran on each monthly instalment for two years from the date it became due. Since the action was commenced more than two years after the termination of the lease, the defense of the statute of limitations barred all unpaid installments of rent (*41 Cal. App. 2d 671, 676)* .

[c] Requirement That Writing Contain Contract

Citizens Cas. Co. v. Otis Clark & Co. *(1971) 19 Cal. App. 3d 294, 96 Cal. Rptr. 838* , involved an action against two insurance brokers for breach of an agreement to obtain reinsurance contracts. A loan association had requested the defendant brokers to obtain an all-risk insurance policy for a three-year term. The plaintiff agreed to undertake this policy subject to the express condition that the defendants obtain reinsurance for 50 percent of the risk it assumed. An insurance broker and company (also sued for reformation of the reinsurance agreement) agreed to take 25 percent each

of the plaintiff's risk for a one-year term, unaware that the term of the principal policy was for three years or that the plaintiff had instructed the defendants to have the reinsurance for a three-year term. Thereafter, the defendants wrote a letter to the plaintiff in which they reminded the plaintiff of the oral agreement and reported on the progress they had made in fulfilling its oral agreement. Eighteen months after the underlying policy was issued, the loan association was burglarized, at which time the plaintiff claimed that it discovered that the term of the underlying policy was for three years and the reinsurance certificates were for only a one-year term. The plaintiff brought the action more than two years after the burglary. The plaintiff claimed that the agreement with the defendant was a written agreement consisting of the letter written by the defendants to the plaintiff together with the binder, and therefore, the statute of limitations would not bar the action until four years after the burglary. The trial court determined that the cause of action was barred by the statute of limitations and rendered judgment for the defendant.

The court of appeal affirmed. The cause of action was based on an oral agreement. The instrument itself must contain the contract to do the thing for the nonperformance of which the action is brought. It is not sufficient that the cause of action is in some way remotely or indirectly connected with an instrument in writing or that the instrument is a link in the chain establishing the cause of action. The writing must create the duty before a duty may be implied from the writing. The letter from the brokers to the plaintiff did not purport by itself to establish the terms of an agreement. It was the work product of the agreement rather than the agreement itself. Since the action was not filed until more than two years after knowledge of the breach sued upon, it was barred by *Code Civ. Proc. § 339(1)* prescribing the limitation periods for oral contracts (*19 Cal. App. 3d 294, 299-300)* .

[d] Requirement of Indication of Acceptance

James De Nicholas Associates, Inc. v. Heritage Constr. Corp. *(1970) 5 Cal. App. 3d 421, 85 Cal. Rptr. 233* , was an action for breach of contract. In consideration of the plaintiff's waiving any rights it had to acquire the controlling stock of an investment company and making available to thedefendant certain material that the plaintiff had gathered, the defendant orally agreed to pay the plaintiff $10,000 plus certain expenses incurred by the plaintiff. The plaintiff confirmed the terms of the oral contract by a letter and offered to accept $13,000 for the consideration set forth. The defendant made a partial payment to the plaintiff of $5,000, and the plaintiff sent a second letter to the defendant acknowledging the partial payment. The defendant refused to pay the balance of $8,000. The trial court sustained the defendant's demurrer to the second amended complaint on the ground that the plaintiff's cause of action was barred by *Code Civ. Proc. § 339*.

The court of appeal affirmed. The plaintiff asserted that a cause of action may be founded on an instrument in writing, notwithstanding that the instrument was not signed by the defendant, when the defendant accepts the contract, relying on the rule of *Amen v. Merced County Title Co. (1962) 58 Cal. 2d 528, 532, 25 Cal. Rptr. 65, 375 P.2d 33* , discussed in *§ 50.132[3][e]*. The court of appeal distinguished that case by noting that in the present case any writings tending to show the terms of the agreement were all the plaintiff's writings and not the defendant's. Therefore they could not be used to show the defendant's acceptance. Additionally, there was no written indication of acceptance on the defendants' part. Thus there were no tangible written words of acceptance of the terms of the writing by the defendant (*5 Cal. App. 3d 421, 424)* .

[e] Plaintiff's Writings Cannot Prove Defendant's Acceptance

James De Nicholas Associates, Inc. v. Heritage Constr. Corp. *(1970) 5 Cal. App. 3d 421, 85 Cal. Rptr. 233* , is discussed in [d], *above*.

[f] Limitation Period Governing Open Book Account Is Inapplicable

Stewart v. Claudius *(1937) 19 Cal. App. 2d 349, 65 P.2d 933* , was an action on a written contract for the payment of tuition for the defendant's son in a military academy operated by the plaintiff. The answer pleaded the statute of

limitations. The cause was tried before the court, and judgment was rendered for the plaintiff.

The court of appeal modified the judgment and affirmed. When an action is one to recover installments due under a written contract, the provisions of the contract are controlling as to the running of the limitation period; and even though the plaintiff keeps a memorandum book in which he or she charges the accounts accruing under the contract and credits the several payments made, the entries in the book account do not fix a new date for the running of the period. Thus, the court found that the portion of the indebtedness based on the first instalment was barred by the statute oflimitations since the action was filed more than four years after the plaintiff had made written demand for the payment of the instalment (*19 Cal. App. 2d 349, 352)* .

[g] Tolling of Limitation Period

In ***Filet Menu, Inc. v. Cheng*** *(1999) 71 Cal. App. 4th 1276, 84 Cal. Rptr. 2d 384* , a California corporation asserted claims for breach of contract, alter ego liability, account stated, and quantum meruit against defendant California resident after he refused to pay for goods shipped and to accept further deliveries. The complaint alleged that any applicable statute of limitations was tolled as against defendant because he had been out of the state for a sufficient amount of time to prevent the running of any applicable statute, including the four-year statute of limitation for breach of a written contract, and therefore *Code Civ. Proc. § 351* tolled the four-year statute. Defendant demurred to the complaint, contending that plaintiff's claims were time-barred. The trial court sustained the demurrer, reasoning that the tolling provisions of *Code of Civ. Proc. § 351* violated the Commerce Clause of the United States Constitution. The court of appeal reversed. It concluded that *Code Civ. Proc. § 351* impermissibly burdens interstate commerce with respect to residents who travel in the course of interstate commerce (*71 Cal. App. 4th 1276, 1280-1283)* . However, although the complaint alleged that defendant was absent from California for periods sufficient to toll the running of the applicable statutory period, it did not allege the specific reasons for his out-of-state travel. Because the allegations did not describe the extent to which his absences from the state were in the course of interstate commerce, they did not establish that applying *Code Civ. Proc. § 351* in the circumstances of this case violated the commerce clause, and the demurrer was improperly sustained (*71 Cal. App. 4th 1276, 1284)* .

[4] Additional Authorities

[a] Running of Limitation Period

Niles v. Louis H. Rapoport & Sons (1942) 53 Cal. App. 2d 644, 128 P.2d 50 , was an action to recover for legal services rendered to the defendants by the plaintiff's assignor. In 1931 the defendants retained the plaintiff's assignor to bring an action against a couple named Stern to recover a deficiency judgment after foreclosure of a mortgage. In August 1931 the plaintiff's assignor filed the action, and judgment was rendered for the deficiency. The plaintiff's assignor stated that it was agreed that his fee for this work would be 50 percent of anything recovered, and this fee arrangement was confirmed by the defendants from time to time. In 1939 the plaintiff's assignor arranged a settlement between the defendants and Stern. According to the plaintiff's assignor, he and the defendants agreedthat he was to be paid half of the monthly amortized payments provided for in the note executed by Stern in compliance with the settlement. The defendants' answer raised the bar of the statute of limitations. The trial court rendered judgment for the plaintiff. The defendants contended on appeal that the trial court had failed to make any findings on the issue of the statute of limitations. The court of appeal disagreed. The record indicated that the original agreement for the payment of a portion of the recovery on the Stern litigation was made by the defendants in 1931 and confirmed by them from time to time. There was also evidence that the plaintiff's assignor continued to work on the matter of collecting the account up to and beyond the time the note was made in 1939. The limitation period does not begin to run from the time of making a contract but commences when the cause of action accrues, which is the date of breach of the obligation. In the present case, the trial court had implicitly found that the breach occurred at the time the defendants took possession of the note and proceeds and failed or refused to pay the plaintiff's assignor his half interest (*53 Cal. App. 2d 644, 650-651)* .

Trigg v. Arnott (1937) 22 Cal. App. 2d 455, 71 P.2d 330 , was an action on a promissory note. The defendant's answer included the defense of the statute of limitations. After a trial, judgment was rendered for the defendant. In reversing the judgment, the court of appeal stated that the note on which the action was based was by its terms payable in monthly installments, and interest on the principal amount should also be paid monthly. Consequently, the cause of action was barred as to all installments of principal and interest that had become due more than four years before the date the action was commenced. The action was not barred as to the installments that became due less than four years after the action was commenced, and the plaintiff was entitled to recover (*22 Cal. App. 2d 455, 459)* .

[b] Limitation Period Governing Open Book Account Is Inapplicable

In *Tsemetzin v. Coast Federal Savings (1997) 57 Cal. App. 4th 1334, 67 Cal. Rptr. 2d 726* , a lessor sued to recover rent. The lessee, claiming that the limitation period had long since run on all of the lessor's claims, moved for summary judgment. The lessor responded that since the lessee hadmade some partial payments of rent and had exchanged correspondence with the lessor acknowledging that a dispute existed as to the amount of unpaid rent due, an "open book" account had been established between them, and the limitation period did not begin until the date of the last item. The trial court granted the motion for summary judgment (*57 Cal. App. 4th 1334, 1340-1341)* . The court of appeal reversed. The lessor could not expand the limitation period by characterizing the lessee's lease obligations as "open book" items. Money that becomes due under an express contract, such as rent due under a lease, cannot, in the absence of a contrary agreement between the parties, be treated as items under an open book account so as to extend the statutory limitation period. However, in this case the lessor was at least entitled to seek recovery of the unpaid rent for the four years preceding the filing of the complaint (*57 Cal. App. 4th 1334, 1343-1344)* .

In *Maggio, Inc. v. Neal (1987) 196 Cal. App. 3d 745, 241 Cal. Rptr. 883* , the plaintiff had sued its former vice-president for marketing to recover what it characterized as loans. The defendant claimed they were nonreimbursable advances against bonuses. The trial court found that the advances constituted an open book account and an account stated. The court of appeal disagreed, finding no evidence to establish an agreement by the parties that the transactions would be carried as an account (*196 Cal. App. 3d 745, 752-753)* . The four-year limitation does not apply when the creditor acts in a self-serving manner by creating what is in effect a private record of an account without informing the debtor. There is no reason to permit a creditor to turn this private record into an account stated merely by mailing a summary of accounts allegedly due to the debtor and treating the debtor's silence as acceptance (*196 Cal. App. 3d 745, 751-752)* . The court of appeal modified the judgment by decreasing the award for the plaintiff to eliminate amounts representing advances made more than two years before the action was brought (*196 Cal. App. 3d 745, 754)* .

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5-50 California Points & Authorities § 50.121

§ 50.121 Contract Provision Supersedes Statute of Limitations

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THIS ACTION IS BARRED BY A CONTRACT PROVISION THAT SUPERSEDES THE STATUTE OF LIMITATIONS.

A. Contract May Shorten Limitation Period. In California there is no public policy objection to a contract provision shortening the statutory limitation period for an action on the contract (*Tebbets v. Fidelity & Cas. Co. (1909) 155 Cal. 137, 139, 99 P. 501*).

B. Period Fixed Must Not Be Unreasonable. If a contract provision shortens the limitation period, the period fixed must be not so unreasonable as to show imposition or undue advantage in some way (*Beeson v. Schloss (1920) 183 Cal. 618, 622, 192 P. 292*).

C. Reasonableness Equates With Effective Remedy. A shortened limitation period is not unreasonable if it allows sufficient time for the plaintiff to effectively pursue a judicial remedy (*Moreno v. Sanchez (2003) 106 Cal. App. 4th 1415, 1430, 131 Cal. Rptr. 2d 684*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a contention that an action is barred by a contract provision that supersedes the statute of limitations. Typically, this would be a provision specifying a period shorter than the applicable statute of limitations within which a party to the contract is permitted make a claim against another party to the contract. These memoranda should be combined with other memoranda pertaining to the specific procedural context in which they are

raised. For example, they might be combined with a general memorandum supporting a motion for summary adjudication or summary judgment. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion and forms for use in pleading limitation of the action as an affirmative defense, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* (Matthew Bender).

[c] Related Memoranda

For additional forms for memoranda relating generally to limitation of an action, see Ch. 143, *Limitation of Actions* .

[3] Discussion of Authorities

[a] Contract May Shorten Limitation Period

In ***Tebbets v. Fidelity & Cas. Co.*** *(1909) 155 Cal. 137, 99 P. 501* , the plaintiff sued to recover on a life insurance policy which provided that "legal proceedings for recovery hereunder may not be brought ... unless begun within six months from time of death." The trial court sustained a general demurrer because the complaint showed that the action was commenced more than six months after the date of death.

The California Supreme Court affirmed. The court stated, "The general rule, supported by the great weight of authority, is that a condition in a policy of insurance, providing that no recovery shall be had thereon unless suit be brought within a given time, is valid, if the time limited be in itself not unreasonable." The plaintiff relied on a Kentucky case holding that, on grounds of public policy, the statute of limitations may not be shortened by contract. The California court disagreed. "Such is not the rule in this state, where such statutes are regarded as statutes of repose, carrying with them, not a right protected under the rule of public policy, but a mere personal right for the benefit of the individual, which may be waived. [Citations omitted.] We are unable to perceive that any distinction can be made upon the ground of public policy between the right of a party to waive the plea of the statute of limitations as a defense to an action, and his right to waive a portion of the time granted by the statute for the commencement of an action. The supreme court of Kentucky seems to be at variance with the consensus of judicial opinion upon this question" (*155 Cal. 137, 139)* .

The fact that the contract in question was an insurance policy was not relevant. The court cited its opinion in an action against sureties on a bond [*State Loan & Trust Co. v. Cochran (1900) 130 Cal. 245, 62 P. 466*] as "declaring that the authorities uphold the validity of an agreement shortening for a definite or limited period the statute of limitations" (*155 Cal. 137, 139)* . That opinion had relied on the court(s earlier opinion in an action to collect a debt under a contract [*Wells, Fargo & Co. v. Enright (1900) 127 Cal. 669, 60 P. 439*], in which the court said, "In this state, at least, the validity of such agreements must be regarded as established" (*130 Cal. 245, 252)* .

[b] Period Fixed Must Not Be Unreasonable

Beeson v. Schloss *(1920) 183 Cal. 618, 192 P. 292* , was an action for recovery of commissions alleged to be due for services rendered to the defendant by the plaintiff as a traveling salesman, under a written contract. The defendant pleaded that the action was barred by a limitation provision in the contract: "nor shall any suit or proceedings of any kind be brought against Schloss Bros. & Co. after the lapse of six months from" a specified event. The action was commenced after the lapse of that six-month period, but the trial court entered judgment for the plaintiff because the court concluded that the six-month limitation period fixed by the contract was unreasonable.

The California Supreme Court reversed. Citing the *Tebbets* case [*see* [a], *above*], the court said, "It is a well-settled proposition of law that the parties to a contract may stipulate therein for a period of limitation, shorter than that fixed by the statute of limitations, and that such stipulation violates no principle of public policy, provided the period fixed be not so unreasonable as to show imposition or undue advantage in some way" (*183 Cal. 618, 622)* . The court then held, "In making its ruling ... the court below put it on the ground that the limitation was unreasonable because of the fact that the plaintiff could not get jurisdiction of defendants by personal service of process in California. This was not a sufficient reason. ... The ground upon which the court below ruled, is, in our opinion, wholly untenable. ... The limitation of six months was not unreasonable as a matter of law" (*183 Cal. 618, 623-624)* . Furthermore, the court concluded, after summarizing the evidence, the circumstances did not render that period unreasonable: "It is certain, therefore, that the plaintiff, if he had begun his action in time [within six months as provided in the contract], would have had the same facilities for pleading and proving his case as he had in the action begun some five months too late" (*183 Cal. 618, 626)* .

[c] Reasonableness Equates With Effective Remedy

In ***Moreno v. Sanchez*** *(2003) 106 Cal. App. 4th 1415, 131 Cal. Rptr. 2d 684* , buyers sued a home inspector for failing to discover and report certain defects in the house they ultimately purchased. The trial court entered a judgment of dismissal after sustaining the inspector's demurrer to the second amended complaint, on the ground that the one-year limitation period specified in the home inspection contract barred the action.

The court of appeal reversed and directed the trial court to overrule the demurrer. Citing the *Beeson* case [*see* [b], *above*], the court stated, "It is true California courts have afforded contracting parties considerable freedom to modify the length of a statute of limitations. Courts generally enforce parties' agreements for a shorter limitations period than otherwise provided by statute, provided it is reasonable. 'Reasonable' in this context means the shortened period nevertheless provides sufficient time to effectively pursue a judicial remedy" (*106 Cal. App. 4th 1415, 1430)* .

The contract in this case required an action to be commenced within one year from the date of the home inspection. (This provision was in a standardized contract. The buyers initially objected to it but ultimately signed the contract after the home inspector refused to remove the provision.) In the context of this case, that one-year period was unreasonably short because it undercut the delayed-discovery rule. The court concluded that a contractual provision "waiving the benefits of the delayed discovery rule runs afoul of important public policy considerations. Also, ... we are unable to find a contractual provision 'reasonable' where it only gives homeowners a single year to discover their causes of action against home inspectors. A four-year outside limit on the time permitted for the homeowner to discover the inspector's negligence and its adverse consequences is clearly 'reasonable.' A contractual provision setting a somewhat shorter outside limit conceivably might be 'reasonable,' too. But a one-year outside boundary completely vitiates the delayed discovery rule. Indeed, such a provision blatantly substitutes a straight one-year statute of limitations for the delayed discovery rule. Consistent with the policies behind this rule, we hold the buyers' causes of action did not accrue under the one-year statute of limitations provided in the home inspection contract until they discovered, or with the exercise of reasonable diligence, should have discovered the home inspector negligently failed to discover, or negligently failed to report, material defects in the home" (*106 Cal. App. 4th 1415, 1434)* .

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5-50 California Points & Authorities §§ 50.122-50.129

[Reserved]

§§ 50.122[Reserved]

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5-50 California Points & Authorities § 50.130

§ 50.130 Fraud Tolls Running of Statutory Limitation Period

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

WHEN A BREACH OF CONTRACT INTEGRALLY INVOLVES FRAUD, THE ELEMENTS OF WHICH HAVE BEEN PLEADED, THE ACTION, AS REGARDS THE BAR OF THE STATUTE OF LIMITATIONS, MUST BE TREATED AS ONE FOR RELIEF ON THEGROUND OF FRAUD, AND THE LIMITATION PERIOD DOES NOT BEGIN UNTIL DISCOVERY OF THE FACT CONSTITUTING THE FRAUD, AS PRESCRIBED BY CODE OF CIVIL PROCEDURE SECTION 338.

A. Fraud Tolls Running of Statute. When fraud is ingrained with a breach of contract, the action, as regards the bar of the statute of limitations, must be treated as one for relief on the ground of fraud, and the limitation period does not run until the discovery of the facts constituting the fraud as prescribed by *Code of Civil Procedure Section 338* (*Gregory v. Spieker (1895) 110 Cal. 150, 153, 42 P. 576*).

[*Optional*] **B. Breach Accomplished Secretly.** When a breach of contract is accomplished by the defendant's secret confederacy with another person in which the other person's name is used to hide the defendant's actions, fraud is so ingrained with the breach of a contract that the action, as regards the bar of the statute of limitations, must be treated as one for relief on the ground of fraud (*Gregory v. Spieker (1895) 110 Cal. 150, 153, 42 P. 576*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that an action for contract damages is not barred by lapse of the applicable statute of limitations, because the complaint alleges the elements of fraud as well as breach of contract, the applicable period therefore begins to run from the date the plaintiff discovers or reasonably should have discovered

the facts constituting the fraud, and the action was initiated within the period so calculated. When rights arising out of fraud and contract are blended, the statute of limitations on a contract begins to run on the discovery by the aggrieved party of the facts constituting fraud [*see San Fillippo v. Griffiths (1975) 51 Cal. App. 3d 640, 645, 124 Cal. Rptr. 399]* .

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a plaintiff seeks to raise this contention. For example, it may be used by plaintiff to oppose a defendant's general demurrer interposed on the ground that the applicable limitation period has lapsed.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised in opposition toa defendant's general demurrer, the memorandum would include an analysis of the complaint's allegations showing that the elements of fraud are alleged, and that the action was timely commenced when calculating the applicable limitation period from the date of plaintiff's discovery of the facts constituting the fraud.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

These memoranda may be combined, when appropriate, with the memoranda *set out in § 50.131* et seq., which set out other grounds for arguing that an action for contract damages is not barred by the applicable statute of limitations.

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a general demurrer, they may be combined with appropriate memoranda set out in Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.120* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Fraud Tolls Running of Statute

Gregory v. Spieker *(1895) 110 Cal. 150, 42 P. 576* , was an action to enjoin violations of a contract and to recover damages for the fraudulent breach. The defendant, who owned a liquid compound and the formula for its manufacture, sold the compound to Lee, who then assigned it to the plaintiff. The defendant agreed not to manufacture or sell any of the compound in the county but later secretly combined with Lash to manufacture and sell it under a different name. These facts were divulged on the trial of an action between Lash and the defendant. The defendant pleaded the bar of the statute of limitations, but the trial court, ruling that the action was not barred, rendered judgment for the plaintiff.

The Supreme Court reversed and remanded for a new trial because of the trial court's error concerning the correct measure of damages. However, the facts as found by the trial court showed that fraud was so ingrained with the defendant's breach of the contract that the action, as regards the bar of the statute of limitations, must be treated as one

for relief on the ground of fraud. Thus, the action was saved by the provision of *Code Civ. Proc. § 338*, that in an action for relief on the ground of fraud, the cause of action is not to be deemed to have accrued until the discovery of the facts constituting the fraud (*110 Cal. 150, 153)* .

[b] Breach Accomplished Secretly

Gregory v. Spieker *(1895) 110 Cal. 150, 42 P. 576* , is discussed in [a], *above*.

[4] Additional Authorities

[a] Fraud Tolls Running of Statute

Souza & McCue Constr. Co. v. Superior Court (1962) 57 Cal. 2d 508, 20 Cal. Rptr. 634, 370 P.2d 338 , involved an action seeking damages for breach of a contract for the construction of a storm sewer. The defendant answered and cross complained for damages for the balance due under the contract for goods and services furnished. The plaintiff knew before entering into the contract that the soil at the construction site was unstable and failed to inform the defendant of the adverse soil conditions and represented in its plans and specifications that the soil was stable, with the intent of inducing the defendant to make a lower bid than it would make on the basis of the actual soil conditions. The defendant relied on the misrepresentation in making a low bid, and as a result of the unstable soil conditions, the cost to the defendant of doing the work was much greater than it otherwise would have been. The plaintiff refused to pay the claim for damages that the defendant presented. When the plaintiff's answer to the cross complaint raised the statute of limitations, the defendant moved for leave to file an amended answer and cross complaint, which was denied. The defendant then sought a writ of mandate to direct the trial court to permit the filing of the amended pleading. The Supreme Court granted the writ. The amended pleadings alleged facts showing the fraudulent breach of a contractual duty because of fraud. For purposes of the statute of limitations, an action for relief on the ground of fraud is not deemed to accrue until discovery of the fraud. The action alleged in the proposed pleading by the defendant, which is based on a fraudulent breach of a contractual duty, comes under this provision (*57 Cal. 2d 508, 511)* .

In *Watts v. Crocker-Citizens National Bank (1982) 132 Cal. App. 3d 516, 183 Cal. Rptr. 304* , an action for breach of contract to furnish water to certain property owners, the trial court dismissed one owner's action asbarred by the four-year statute of limitations set by *Code Civ. Proc. § 337*. The trial court ruled that the statute began to run when the defendant completed the pipeline but failed to supply water as required by the contract, rather than when the owner first discovered the absence of water two years later. The court of appeal reversed, holding that the defendant's failure to inform the owner of its failure to supply water constituted fraud, and the fraud was not vitiated by the owner's delayed discovery, since no circumstances existed to cause him to investigate. Accordingly, the statute of limitations was tolled until his actual discovery of the breach of contract (*132 Cal. App. 3d 516, 523)* .

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5-50 California Points & Authorities § 50.131

§ 50.131 Statutory Limitation Period Runs From Occurrence of Event When Contract of Warranty Relates to Future Event

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

WHEN A CONTRACT OF WARRANTY RELATES TO A FUTURE EVENT BEFORE WHICH THE DEFECT CANNOT BE DISCOVERED BY THE EXERCISE OF REASONABLE DILIGENCE, THE WARRANTY IS PROSPECTIVE IN CHARACTER, AND THE LIMITATION PERIOD BEGINS TO RUN AS OF THE TIME OF THE EVENT.

A. Running of Limitation Period in Action Involving Warranty. When a contract of warranty relates to a future event before which the defect cannot be discovered by the exercise of reasonable diligence, the warranty, even if accompanied by a representation as to present condition, is prospective in character, and the limitation period begins to run as of the time of that event (*Aced v. Hobbs-Sesack Plumbing Co. (1961) 55 Cal. 2d 573, 584, 12 Cal. Rptr. 257, 360 P.2d 897*).

[*Optional*] **B. Limitation Period Tolled.** The statute of limitations in a cause of action for breach of warranty is tolled as long as the warrantor claims that the problem can be remedied and is attempting to correct the problem (*Southern Cal. Enterprises v. Walter & Co. (1947) 78 Cal. App. 2d 750, 755, 178 P.2d 785*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that an action for contract damages is not barred by lapse of theapplicable statute of limitations, because the complaint alleges facts that show the contract sued on was for breach of a warranty relating to a future event, and the defect could not have been discovered by the exercise of

reasonable diligence before the event.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a plaintiff seeks to raise this contention. For example, it may be used by plaintiff to oppose a defendant's general demurrer interposed on the ground that the applicable limitation period has lapsed.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised in opposition to a defendant's general demurrer, the memorandum would include an analysis of the complaint's allegations showing that the contract sued on included a warranty relating to a future event, and the defect could not have been discovered by the exercise of reasonable diligence before the occurrence of that event.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

These memoranda may be combined, when appropriate, with the memoranda *set out in § 50.130* and *§ 50.132* et seq., which set out other grounds for arguing that an action for contract damages is not barred by the applicable statute of limitations. For memoranda relating to warranties generally, see Ch. 206, *Sales* .

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a general demurrer, they may be combined with appropriate memoranda set out in Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.120* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Running of Limitation Period in Action Involving Warranty

Aced v. Hobbs-Sesack Plumbing Co. *(1961) 55 Cal. 2d 573, 12 Cal. Rptr. 257, 360 P.2d 897* , was in part a cross action by a general contractor against a subcontractor. The general contractor had contracted to build a home with a radiant heating system, which the subcontractor installed in the concrete slab floor. Numerous leaks developed in the tubing, and two years after installation, the entire system had to be replaced. The homeowners sued the general contractor, who in turn filed a cross complaint defendant subcontractor. The general contractor's cross complaint relied solely on the theory that defendant subcontractor had breached an implied warranty of merchantability. The trial court initially rendered judgment for the cross defendant on several ground, including the ground that the action was barred by the applicable statute of limitations. The cross complainant moved for a new trial, however, and the court granted this motion. The cross defendant appealed.

The Supreme Court affirmed and remanded for a new trial. With regard to the issue of the statute of limitations, the

subcontractor argued that the four-year period began to run when he completed his work on the heating system, and the cross complaint was filed more than four years afterwards. The Court, however, disagreed, holding that the four-year period began to run when the leaks developed, and the cross complaint was timely filed within four years of this occurrence. The Court reasoned that the case came within the operation of the principle that, if a warranty relates to a future event before which the defect cannot be discovered by the exercise of reasonable diligence, the warranty, even though accompanied by a representation as to present condition, is prospective in character, and the limitation period begins to run as of the time the future event occurs (*55 Cal. 2d 573, 584)* . In this case, the implied warranty would include a prospective warranty that the tubing would not, within a reasonable period of time, corrode and leak. Since, however, the tubing was embedded in the concrete floor, there was no way, in the exercise of reasonable diligence, to discover whether the pipe were defective until actual leaking began (*55 Cal. 2d 573, 583-584)* .

[b] Limitation Period Tolled

Southern Cal. Enterprises v. Walter & Co. *(1947) 78 Cal. App. 2d 750, 178 P.2d 785* , was an action for damages for breach of warranty made on the sale of a carpet. The plaintiff bought the carpet from the defendant after entering into an oral agreement by which the defendant agreed that if the plaintiff would purchase the carpet, the carpet when installed in the plaintiff's place of business would last for six-to-eight years. Within twoyears before the commencement of the action but less than six years after installation, the carpet became unfit for the plaintiff's use. The defendant attempted to repair the imperfections in the carpet by removing and replacing portions and recementing other portions but without success. The defendant demurred on the ground that the cause of action was barred by the statute of limitations set forth in *Code Civ. Proc. § 339(1)*. The trial court sustained the demurrer without leave to amend.

The court of appeal reversed. The cause of action was on a warranty of a future happening that had not arisen, and the limitation period did not begin to run at the date of sale but was postponed until the future event failed to materialize. The statute is tolled as long as the vendor claims that the defect in the article can be remedied and is attempting to correct the error (*78 Cal. App. 2d 750, 755)* . (It is not clear whether the warrantor must be actually attempting to correct the error or may be merely claiming to remedy the problem.)

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5-50 California Points & Authorities § 50.132

§ 50.132 Four Year Limitation Period Applies to Action on Contract Evidenced by Writing

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE FOUR-YEAR LIMITATION PERIOD APPLIES TO A CONTRACT FOUNDED ON AN INSTRUMENT IN WRITING.

A. Limitation Period for Written Contract. The four-year limitation period applies to a contract founded on an instrument in writing (*Code Civ. Proc. § 337(1)*).

[*Optional*] **B. Letter Accepted by Party Is Instrument in Writing.** A letter that constitutes an offer and was accepted by the plaintiff is evidence of a writing signed by the party to be charged; therefore, the four-year statute of limitations is applicable to an action for damages for breach of the contract by the offeror (*Ravel v. Hubbard (1952) 112 Cal. App. 2d 255, 258-259, 246 P.2d 88*).

[*Optional*] **C. Receipt for Money Containing Promise Is Instrument in Writing.** A written receipt for money that contains words from which a promise may be inferred, arising directly from the receipt itself and including its terms, is an instrument in writing to which the four-year statute of limitations provided by *Code of Civil Procedure Section 337(1)* applies. All obligations and promises that the writing's words necessarily import must be regarded as beingincluded in the terms of the writing (*O'Brien v. King (1917) 174 Cal. 769, 773, 164 P. 631* ; *Ashley v. Vischer (1864) 24 Cal. 322, 327-329)* .

[*Optional*] **D. Action by Third Party Beneficiary Is on Written Contract.** An action by a third party beneficiary is one on an obligation founded on a written instrument within the meaning of *Code of Civil Procedure Section 337,* although parol evidence may be necessary to show that the party maintaining the action is within the class intended to be benefitted by the contract and to show the extent of the party's interest (*Division of Labor Law Enforcement v.*

Dennis (1947) 81 Cal. App. 2d 306, 311, 183 P.2d 932).

[*Optional*] **E. Action by Employees Involving Collective Bargaining Agreement.** The four-year limitation period prescribed by *Code of Civil Procedure Section 337(1)* applies to an action by orally hired employees to recover the difference between the wages actually received and the amounts claimed to have been payable to them under the provisions of collective bargaining agreements between the employer and unions (*Division of Labor Law Enforcement v. Dennis (1947) 81 Cal. App. 2d 306, 310-311, 183 P.2d 932*).

[*Optional*] **F. Escrow Instructions in Writing Constitute Written Contract.** An action for failure to comply with escrow instructions is on a written contract to which the four-year limitation period prescribed in *Code of Civil Procedure Section 337* applies, if the instructions are in writing and the escrow holder accepts them, or if the escrow holder prepares the instructions and offers to perform them, and the buyer and seller accept the offer (*Amen v. Merced County Title Co. (1962) 58 Cal. 2d 528, 532, 25 Cal. Rptr. 65, 375 P.2d 33*).

[*Optional*] **G. Blanks in Contract.** The omission of information to be inserted in blanks in a written instrument does not invalidate the agreement as a written contract (*Benard v. Walkup (1969) 272 Cal. App. 2d 595, 602, 77 Cal. Rptr. 544*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that a particular contract action is governed by the four-year limitations period applicable to written contracts [*Code Civ. Proc. § 337(1)*], rather than the two-year period applicable to oral contracts [*Code Civ. Proc. § 339(1)*].

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a plaintiff seeks to raise this contention. For example, it may be used by plaintiff to oppose a defendant's general demurrer interposed on the ground that the action is barred by lapse of the two-year period.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised in opposition to a defendant's general demurrer, the memorandum would include an analysis of the complaint's allegations which set out, or allege the substance of, a contract embodied in an instrument in writing within the meaning of *Code Civ. Proc. § 337(1)*.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

These memoranda may be combined, when appropriate, with the memoranda *set out in §§ 50.130, 50.131*, and *§ 50.133* et seq., which set out other grounds for arguing that an action for contract damages is not barred by the applicable statute of limitations. In particular, they may be combined with the memoranda *set out in § 50.133*, which relates to application of the four-year period to a written contract lacking the defendant's signature, or with those *set out in § 50.134*, which relate to application of this period to a contract that includes an implied promise.

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are

used. For example, if used in a memorandum opposing a general demurrer, they may be combined with appropriate memoranda set out in Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.120* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Letter Accepted by Party Is Instrument in Writing

Ravel v. Hubbard *(1952) 112 Cal. App. 2d 255, 246 P.2d 88* , was an action to recover damages for breach of a contract by which the plaintiff was to haul the defendant's prefabricated houses. The defendant wrote a letter to the plaintiff in which the defendant stated that it was eager to have a mutual agreement regarding the trucking of its houses. The terms and conditions of the agreement were outlined in the letter and accepted by the plaintiff, who started performance of the agreement. The defendant later permitted other persons to haul the houses and attempted to terminate the plaintiff's agreement. The plaintiff sued to recover for lost profits. The defendant demurred on the ground that the cause of action was barred by the two-year statute of limitations applicable to oral contracts. The trial court overruled the demurrer.

The court of appeal affirmed. The letter signed by the defendant was an offer that was accepted by the plaintiff. At that time it became a contract evidenced by a writing signed by the party to be charged. Therefore, the four-year statute of limitations, not the two-year statute, was applicable (*112 Cal. App. 2d 255, 258-259)* .

[b] Receipt for Money Containing Promise Is Instrument in Writing

O'Brien v. King *(1917) 174 Cal. 769, 164 P. 631* , was an action on a debt. The plaintiff had lent a sum of money to the defendant, who acknowledged receiving the money in writing that also stated the date and that the money was received at 5-percent interest. The defendant answered the amended complaint and pleaded the bar of the statute of limitations. Judgment was rendered for the plaintiff. On appeal, the defendant contended that the contract was oral and was barred by the two-year statute of limitations, *Code Civ. Proc. § 339(1)*.

The Supreme Court affirmed. In order for an action to be founded on an instrument in writing, the instrument must, itself, contain a contract to do the thing for the nonperformance of which the action is brought. In this case the writing was more than a mere receipt. The words "at five percent interest" imported into the writing an additional and significant element. By embodying the statement that the money had been received at a given rate of interest, the only reasonable meaning was that the money was received as a loan at the specified interest rate. Therefore, a loan being established by the writing, a promise to repay was implied by necessary inference of law and fact. The promise must be one arising directly from the writing itself and included in its terms. In determining whether the obligation is supported by an express promise or stipulation in the writteninstrument, all obligations and promises that the writing's words necessarily import must be regarded as being included in the terms of the writing. Since the promise in the receipt in this case arose directly from the writing itself, the four-year statute of limitations for written contracts, *Code Civ. Proc. § 337(1)*, applied (*174 Cal. 769, 773)* .

Ashley v. Vischer *(1864) 24 Cal. 322* , was an action on a debt. The defendant had signed a receipt for money stating that he was the holder of three checks in a certain amount that were to be converted into cash and then to be applied to the account of John Morrison. The trial court ruled that the action was not barred by the two-year statute of limitations

and rendered judgment for the plaintiff.

The Supreme Court affirmed. The words "To be converted into cash as best possible and to be applied to the account of John Morrison" went beyond a mere acknowledgment of the receipt of money. The receipt indicated to whom the money belonged and contained a promise to apply it to Morrison's account. Thus the instrument showed on its face a liability to the account. Consequently, the liability was founded on an instrument of writing, and the four-year limitation period applied (*24 Cal. 322, 327-329)* .

[c] Action by Third Party Beneficiary Is on Written Contract

Division of Labor Law Enforcement v. Dennis *(1947) 81 Cal. App. 2d 306, 183 P.2d 932* , was an action by an assignee of the defendant's former employees to recover the difference between the wages actually paid to the employees and the amounts claimed to have been payable to them under collective bargaining agreements. The defendant's demurrer was sustained without leave to amend on the ground that it appeared on the face of the complaint that all claims alleged were barred by *Code Civ. Proc. § 339* providing for a two-year limitation period.

The court of appeal reversed. Two separate and distinct contracts were involved: the oral contract of hire between the employees and the employer and the written collective bargaining agreement between the employer and the unions. In this situation, *Civ. Code § 1559* (a contract made expressly for the benefit of a third person is enforceable by that person) must be taken into consideration. The written contract contained an agreement by the defendant to pay certain wages to anyone working for him in certain capacities. The complaint alleged that the plaintiff's assignors did certain work for the defendant in some of these classifications and in accordance with the contract, and certain amounts thus became due under the contract. There was a definite promise to pay anyone of a certain class, and all that was required was for the plaintiff's assignors to identify themselves as members of that class and show the amount of work done. Although the promise must be one arising directly from the writing itselfand included in its terms, in determining whether the obligation is supported by an express promise in the written instrument, the court must regard as included in the terms of the writing all obligations and promises that its words necessarily import. Under this rule, and under *Civ. Code § 1559*, the action was based on an obligation or liability founded on an instrument in writing within the meaning of *Code Civ. Proc. § 337*. An action by a third party beneficiary can be an action on an obligation founded on a written instrument within the meaning of *Code Civ. Proc. § 337*, even though parol evidence may be necessary to show that the party maintaining the action is within the class intended to be benefitted by the other contract and to show the extent of the party's interest (*81 Cal. App. 2d 306, 311)* .

[d] Action by Employees Involving Collective Bargaining Agreement

Division of Labor Law Enforcement v. Dennis *(1947) 81 Cal. App. 2d 306, 183 P.2d 932* , is discussed in [c], *above*.

[e] Escrow Instructions in Writing Constitute Written Contract

Amen v. Merced County Title Co. *(1962) 58 Cal. 2d 528, 25 Cal. Rptr. 65, 375 P.2d 33* , was an action for breach of an escrow contract and for negligence. The plaintiff and her husband made a contract to buy a tavern. The contract, in the form of escrow instructions, was typed on forms provided by the defendant and was signed by the sellers and by the plaintiff and her husband. The instructions to the defendant stated that any debts over $10,000 would be paid by the defendant out of the proceeds of the sale; that the escrow was accepted by the defendant subject to all terms and conditions set forth in the contract and printed on the back; and that the terms, conditions, and the instructions given in the contract had been read and agreed to by all parties signing the escrow instructions. The defendant failed to inform the plaintiff of the potential liability for state sales taxes owed by the sellers. When the sellers failed to pay the sales taxes, the plaintiff received notice of her liability as successor to the sellers and thus she became liable for the debts of the sellers in an amount greater than $10,000 despite the fact that she had instructed the defendant to pay debts exceeding $10,000 out of the proceeds. The plaintiff alleged that the defendant breached an implied promise to inform

her of the potential tax liability. The trial court sustained the defendant's demurrer on the ground that the two-year statute of limitations applicable to an action on a contract not founded on an instrument of writing barred the action.

The Supreme Court reversed. An action is on a written contract even though it is based on a promise implied by the writing, and thus the action was not barred by the statute of limitations. When escrow instructions arein writing and the escrow holder prepares the instructions and offers to perform them, and the buyer and seller accept the offer, an action for failure to comply with the instructions is on a written contract. The contract may be in writing for purposes of the statute of limitations even though it was accepted orally or by an act other than signing (*58 Cal. 2d 528, 532)* .

[f] Blanks in Contract

In ***Benard v. Walkup*** *(1969) 272 Cal. App. 2d 595, 77 Cal. Rptr. 544* , the plaintiff sued for legal malpractice based on a contingent-fee contract for legal services. The defendant pleaded the statute of limitations. The trial court found that the plaintiff's cause of action was not barred because it was governed by the four-year statute of limitations for actions on written instruments [*see Code Civ. Proc. § 337*] and not by the two-year statute of limitations for actions on oral contracts [*see Code Civ. Proc. § 339*].

The court of appeal affirmed. The action was founded on an instrument in writing. The omission of information that was to be inserted in blanks in the contract did not invalidate the agreement but merely rendered it ambiguous. Any ambiguities caused by the draftsman of a contract must be resolved against that party. Additionally, any ambiguities were clarified by the defendant when he completed the terms of the contract before the applicable four-year period expired (*272 Cal. App. 2d 595, 602)* .

[4] Additional Authorities

[a] Limitation Period for Written Contract

Nomellini Constr. Co. v. Harris (1969) 272 Cal. App. 2d 352, 77 Cal. Rptr. 361 , included a cross action by a subcontractor (the defendant in the original action) against a manufacturer for breach of contract. The subcontractor alleged that he gave the manufacturer an order in the form of a list of materials that specifically recited: "Material to Meet Federal Specifications"; that the manufacturer undertook to supply the ordered materials; that the parts shipped were rejected on several successive occasions by a government inspector, resulting in a temporary stop order; and that, as a result of the breach by the manufacturer, the subcontractor was unable to comply with the terms of his contract with the plaintiff in the original action. On the cross action, the trial court found for the subcontractor. One of the principal issues on appeal was whether the cause of action was barred by the two-year statute of limitations [*Code Civ. Proc. § 339*]. The court of appeal affirmed. The writing, in setting forth the parts required and carrying the provision that government standards must be complied with, was apparently calculated to set forth the parts that were to be supplied by the manufacturer; it was approved on its face by the manufacturer's representative; and it clearly implied that it would be usable as thespecifications of a contract. The subcontractor's claim was not barred by the statute of limitations, since the action was brought within four years after the breach, as required by *Code Civ. Proc. § 337(1)* governing actions on written instruments (*272 Cal. App. 2d 352, 360-362)* .

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CHAPTER 50 CONTRACTS
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2. Lapse of Statute of Limitations

5-50 California Points & Authorities § 50.133

§ 50.133 Signature of Party to Be Charged Is Not Required for Four-Year Limitation Period to Apply

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

A WRITTEN INSTRUMENT DOES NOT NEED TO BE SIGNED BY THE PARTY TO BE CHARGED IN ORDER FOR THE FOUR-YEAR STATUTE OF LIMITATIONS, CODE OF CIVIL PROCEDURE SECTION 337, SUBDIVISION (1), TO APPLY, SO LONG AS THAT PARTY HAS AGREED TO THE WRITING,

A. Limitation Period for Written Contract. [*See § 50.132[1], Paragraph A.*]

B. Signature of Party. The four-year statute of limitations applicable to instruments in writing does not require that the writing be signed by the party to be charged when that party has agreed to the writing (*Amen v. Merced County Title Co. (1962) 58 Cal. 2d 528, 533, 25 Cal. Rptr. 65, 375 P.2d 33*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that a particular contract action is governed by the four-year limitations period applicable to written contracts [*Code Civ. Proc. § 337(1)*], notwithstanding the fact that the defendant did not sign the writing that constitutes the contract.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a plaintiff seeks to raise this contention. For example, it may be used by plaintiff to oppose a defendant's general demurrer interposed on the ground that the action is barred by lapse of the two-year period applicable to oral contracts.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised in opposition toa defendant's general demurrer, the memorandum would include an analysis of the complaint's allegations which, although they may disclose that the written contract lacked defendant's signature, nevertheless shows that the defendant agreed to the contract.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

These memoranda may be combined, when appropriate, with the memoranda *set out in §§ 50.130 -50.132*, and *§ 50.134* et seq., which set out other grounds for arguing that an action for contract damages is not barred by the applicable statute of limitations. In particular, they may be combined with the memoranda *set out in § 50.132*, which relate generally to application of the four-year period to written contracts, or with those *set out in § 50.134*, which relate to application of this period to a written contract that includes an implied promise.

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a general demurrer, they may be combined with appropriate memoranda set out in Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.120* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Signature of Party

The facts and procedural background of ***Amen v. Merced County Title Co.*** *(1962) 58 Cal. 2d 528, 25 Cal. Rptr. 65, 375 P.2d 33* , are discussed in *§ 50.132[3][d]*. In reversing the judgment, the Supreme Court held that the action was on a written contract even though the defendant had not signed the agreement but instead had orally accepted the obligation to actas escrow agent. When a party has agreed to the writing, there is no reason to invoke the two-year statute of limitations applicable to oral agreements. The four-year statute of limitations, unlike the statute of frauds, does not require that the writing be signed by the party to be charged. Had the legislature meant to make a signature mandatory in order for a writing to qualify for the longer limitation period, it would have so provided (*58 Cal. 2d 528, 533)* .

[4] Additional Authorities

[a] Signature of Party

In *E.O.C. Ord, Inc. v. Kovakovich (1988) 200 Cal. App. 3d 1194, 246 Cal. Rptr. 456* , an attorney sued his clients to recover attorney's fees. The attorney had spelled out the terms of the parties' agreement in a letter to the clients, and the clients had assented to the agreement in a telephone conversation with the attorney. The trial court determined that the action was barred under *Code Civ. Proc. § 339(1)* (two-year statute of limitations for breach of oral contracts). The

court of appeal reversed, holding that the four-year statute of limitations for written contracts under *Code Civ. Proc. § 337(1)* applied (*200 Cal. App. 3d 1194, 1202, 1206)* . For the four-year statute of limitations to apply, it is sufficient that there is a writing containing all terms, and the party to be charged has accepted it. The acceptance may be proved by evidence of a particular act other than signing, such as words spoken (*200 Cal. App. 3d 1194, 1201)* .

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5-50 California Points & Authorities § 50.134

§ 50.134 Implied Promise Is Part of Written Instrument

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

AN ACTION IS ON A WRITTEN CONTRACT AND THEREFORE SUBJECT TO THE FOUR-YEAR LIMITATION PERIOD EVEN THOUGH IT IS BASED ON A PROMISE INFERRED FROM THE WRITING.

A. Limitation Period for Written Contract. [*See § 50.132[1], Paragraph A.*]

[*EITHER*]

B. Promise Inferred From Writing. An action on a written contract is subject to the four-year limitation period even though it is based on a promise inferred from the writing (*Amen v. Merced County Title Co. (1962) 58 Cal. 2d 528, 532, 25 Cal. Rptr. 65, 375 P.2d 33*).

[*OR*]

B. Promise Inferred From Writing. An action on an obligation implied in law as an element of a written instrument is a part of the contract, and the four-year statute of limitations applies (*Comunale v. Traders & General Ins. Co. (1958) 50 Cal. 2d 654, 662, 328 P.2d 198*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that a particular contract action is governed by the four-year limitations period applicable to written contracts [*Code Civ. Proc. § 337(1)*], notwithstanding the fact that the action is based on the breach of a promise not expressly stated but implied in the contract. This form is not for use when the liability involved is quasi-contractual, that is, when the promise is implied in law by a situation evidenced by a writing, since such an action is not based on the written contract and consequently, the four-year statute of limitations does not apply [*O'Brien v. King (1917) 174 Cal. 769, 774, 164 P. 631* ; *see Comunale v. Traders & General Ins. Co. (1958) 50 Cal. 2d 654, 662, 328 P.2d 198]* .

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a plaintiff seeks to raise this contention. For example, it may be used by plaintiff to oppose a defendant's general demurrer interposed on the ground that the action is barred by lapse of the two-year period applicable to oral contracts.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised in opposition to a defendant's general demurrer, the memorandum would include an analysis of the complaint showing that the action is based on a written contract, even though it is based on the breach of promise impliedly but not expressly set out in the contract.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

These memoranda may be combined, when appropriate, with the memoranda *set out in §§ 50.130 -50.133*, and *§ 50.135* et seq., which set out other grounds for arguing that an action for contract damages is not barred by the applicable statute of limitations. In particular, they may be combined with the memoranda *set out in § 50.132*, which relate generally to application of the four-year period to written contracts, or with those *set out in § 50.133*, which relate to application of this period to a written contract that lacks the defendant's signature.

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a general demurrer, they may be combined with appropriate memoranda set out in Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.120* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Promise Inferred From Writing

Amen v. Merced County Title Co. *(1962) 58 Cal. 2d 528, 25 Cal. Rptr. 65, 375 P.2d 33* , is discussed in *§ 50.132[3][e]*.

Comunale v. Traders & General Ins. Co. *(1958) 50 Cal. 2d 654, 328 P.2d 198* , was an action by the assignee of an insured party against the liability insurer to recover the portion of his judgment against the insured that was in excess of the policy limits. In a personal injury action brought previously by the plaintiff against insured, the insured told the insurance company that the plaintiff would compromise the case. However, the insurance company refused to make a settlement. The jury returned a verdict for the plaintiff, but the trial court rendered judgment for the defendant notwithstanding the verdict. On appeal the defendant contended that an action on an implied obligation arising out of the contract was not on the written instrument, and therefore the four-year statute of limitations prescribed in *Code Civ. Proc. § 337(1)* did not apply.

The Supreme Court reversed with directions to enter judgment on the verdict. Every contract contains an implied covenant of good faith and fair dealing that neither party will do anything that will injure the right of the other to receive the benefits of the agreement. This implied obligation requires an insurer to settle an appropriate case although the express terms of the policy do not impose such a duty. The promise that is implied in law as an element of the contract is as much a part of the instrument as if it were written out, and thus the four-year statute of limitations applies (*50 Cal. 2d 654, 662)* .

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5-50 California Points & Authorities § 50.135

§ 50.135 Limitation Period Has Not Run on Installment Obligation

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

WHEN MONEY IS PAYABLE IN INSTALLMENTS, THE LIMITATION PERIOD BEGINS TO RUN ON THE CAUSE OF ACTION FOR THE RECOVERY OF EACH UNPAID INSTALMENT AT THE TIME THE INSTALMENT IS PAYABLE.

A. Running of Limitation Period. When money is payable in installments, the limitation period begins to run on the cause of action for the recovery of an unpaid instalment at the time the instalment is payable (*Bank of America v. McLaughlin (1957) 152 Cal. App. 2d Supp. 911, 915 , 313 P.2d 220*).

[*Optional*] **B. Acceleration Clause Affects Running of Limitation Period.** When the contract contains an acceleration clause, but the creditor did not take any affirmative action to invoke the benefit of the clause after the defendant failed to make a payment, the period begins to run not when the defendant first breached the obligation by not making a payment but when the next future payment falls due (*Stewart v. Claudius (1937) 19 Cal. App. 2d 349, 353, 65 P.2d 933*).

[*Optional*] **C. Services Paid for Monthly.** When services performed under a contract are to be paid for at regular intervals, for example at the end of each month, the limitation period for an action to recover for the value of the services begins to run, as to each regular payment, on the date the regular payment was due (*Konjoyan v. Der Zakarian (1961) 191 Cal. App. 2d 110, 113-114, 12 Cal. Rptr. 389* (dictum)).

[*Optional*] **D. Rent Payable in Installments.** If rent becomes due in monthly installments, the limitation period begins to run on each monthly instalment of rent from the date the instalment is due (*Tillson v. Peters (1940) 41 Cal. App. 2d 671, 674-675, 107 P.2d 434*).

[*Optional*] **E. Monthly Payments for Life.** A contract that provides for monthly payments for life is an instalment contract, and the limitation period runs from the date each instalment is due (*Conway v. Bughouse, Inc. (1980) 105 Cal. App. 3d 194, 199-200, 164 Cal. Rptr. 585*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that a contract action is not barred by the applicable statute of limitations because, although a period longer than that allowed by the statute may have passed since the defendant first failed to make an instalment payment as required by the contract, the limitation period has not run as to all of the installments.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a plaintiff seeks to raise this contention. For example, it may be used by plaintiff to oppose a defendant's general demurrer interposed on the ground that the action is barred by lapse of the applicable limitation period.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised in opposition to a defendant's general demurrer, the memorandum would include an analysis of the complaint showing that the action is based on an instalment contract, and even though plaintiff may be barred from recovery for defendant's failure to pay earlier installments, recovery for defendant's failure to pay later installments is not barred by the applicable statute of limitations.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

These memoranda may be combined, when appropriate, with the memoranda *set out in §§ 50.130 -50.134*, and *§§ 50.136*,50.137, which set out other grounds for arguing that an action for contract damages is not barred by the applicable statute of limitations.

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a general demurrer, they may be combined with appropriate memoranda set out in Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.120* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Running of Limitation Period

Bank of America v. McLaughlin *(1957) 152 Cal. App. 2d Supp. 911 , 313 P.2d 220* , included a cross complaint founded on an assignment of an interest in a contract for the purchase of property against the assignee who had defaulted in the payments that were due in installments. The trial court rendered judgment for the cross complainants.

The appellate department of the superior court modified the judgment. When money is payable in installments, the limitation period begins to run on the cause of action for the recovery of an unpaid instalment at the time it is payable. In this case, the statute of limitations was a defense to all installments that accrued before the applicable period but was no defense to those installments that became due within two years before the cross complaint was filed (*152 Cal. App. 2d Supp. 911, 915)* .

[b] Acceleration Clause Affects Running of Limitation Period

Stewart v. Claudius *(1937) 19 Cal. App. 2d 349, 65 P.2d 933* , was an action on a written contract for the payment of tuition for the defendant's son who attended a military academy operated by the plaintiff. The defendant was to pay the tuition in two installments; he had paid a portion of the first and nothing of the second. Before the second instalment came due, the defendant's son was dismissed from the academy, and the plaintiff made a written demand on the defendant to pay the remainder of the firstinstalment. The plaintiff later brought suit on the contract more than four years after the date of the written demand but less than four years after the date the second instalment was due. The defendant pleaded the statute of limitations in his answer. After trial before the court, the trial court rendered judgment for the plaintiff.

The court of appeal affirmed insofar as the judgment found that the defendant owed the plaintiff the amount of the second instalment. Whether the second instalment was barred by the statute of limitations depended on whether at any time between the date of the dismissal of the defendant's son and the due date of the second instalment, the plaintiff attempted to invoke rights under the acceleration clause of the contract. Since acceleration clauses are not self-operative, the limitation period begins to run on the date the future payment falls due, not the date of the breach of the obligation, if the creditor has not taken some affirmative action to invoke the benefit of the acceleration clause. In this case, the plaintiff had not invoked the acceleration clause; consequently, the action was not barred by the statute of limitations, since it had been brought within four years after the second instalment was due (*19 Cal. App. 2d 349, 353)* .

[c] Services Paid for Monthly

Konjoyan v. Der Zakarian *(1961) 191 Cal. App. 2d 110, 12 Cal. Rptr. 389* , was an action for compensation for services relating to trading in market commodities. A dispute arose over a sum of money the plaintiff received from the defendant, a portion of which he repaid on the defendant's demand. The plaintiff and the defendant differed as to whether this sum was a loan or an advance on an undetermined compensation to be paid in the future. According to both the plaintiff and the defendant, the defendant told the plaintiff that the defendant would make it worth the plaintiff's while for the work the plaintiff was doing, but the evidence conflicted as to whether the defendant ever agreed to compensate the plaintiff in any way other than by assisting the plaintiff to profit by market investment. The trial court found for the plaintiff. On appeal, the defendant contended that since the plaintiff's action was based on an oral contract, it was barred by the two-year statute of limitations.

The court of appeal affirmed. When services are to be paid for month-to-month, the limitation period begins to run on the due date of each monthly payment. However, in this case there was ample evidence from which the trial court was justified in concluding that the intention of the parties was payment at the termination of services; consequently, the action was not barred by the statute of limitations (*191 Cal. App. 2d 110, 113-114)* .

[d] Rent Payable in Installments

Tillson v. Peters *(1940) 41 Cal. App. 2d 671, 107 P.2d 434* , was an action for rent due for a dairy ranch. The complaint alleged a cause ofaction for unpaid installments of rent due for a specified period from 1931 to April 1, 1936. The trial court overruled the defendant's demurrer on the ground of uncertainty regarding the terms of the lease. The defendant additionally had pleaded by means of demurrer and in his answer that the cause of action was barred by the statute of limitations.

The court of appeal reversed. The uncontradicted evidence showed that the rent became due in monthly installments. The limitation period began to run on each monthly instalment from the date it was due. The contract was an oral contract of lease. The limitation period expired on each monthly instalment two years from the date it became due. Since the plaintiff alleged that the lease expired on April 1, 1936, and the last payment was made not later than April 1, 1935, and more than two years had elapsed since the termination of the lease before the action was commenced, the statute of limitations barred all unpaid installments of rent (*41 Cal. App. 2d 671, 674-675)* .

[e] Monthly Payments for Life

Conway v. Bughouse, Inc. *(1980) 105 Cal. App. 3d 194, 164 Cal. Rptr. 585* , was an action for instalment payments due to the assignee of an interest in monthly payments for life. The trial court, in granting partial summary judgment for the plaintiff, found that since the agreement was an instalment contract, the statute of limitations ran only from the date of payment of each instalment.

The court of appeal affirmed. Since the payments were to be made for the rest of the assignor's life, and the total amount of money to be paid was not a fixed sum to be paid out over a period of time, and each payment was separable from the others and not a part of a total payment, the agreement was an instalment contract for purposes of applying the statute of limitations. Consequently, limitation period should run from the date of each instalment (*105 Cal. App. 3d 194, 199-200)* .

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5-50 California Points & Authorities § 50.136

§ 50.136 Action on Promise to Pay When Able Accrues When Debtor Is Able to Pay

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

WHEN A PROMISE TO PAY IS CONDITIONAL ON THE DEBTOR'S ABILITY TO PAY, THE CAUSE OF ACTION DOES NOT ACCRUE UNTIL THE DEBTOR IS ABLE TO PAY.

Accrual of Action on Promise to Pay When Able. When a promise to pay is conditional on the debtor's ability to pay, the causeof action does not accrue until the debtor is able to pay (*Horacek v. Smith (1948) 33 Cal. 2d 186, 191, 199 P.2d 929* ; *Van Buskirk v. Kuhns (1913) 164 Cal. 472, 474-476, 129 P. 587*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that a contract action is not barred by the applicable statute of limitations because the complaint alleges that the debtor promised to pay when able, and the action was brought within the limitation period as calculated from the date that defendant became able to pay.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a plaintiff seeks to raise this contention. For example, it may be used by plaintiff to oppose a defendant's general demurrer interposed on the ground that the action is barred by lapse of the applicable limitation period.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised in opposition to a defendant's general demurrer, the memorandum would include an analysis of the complaint

showing that the contract called for defendant to pay when, and other facts alleged show the date that defendant became able to pay.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

These memoranda may be combined, when appropriate, with the memoranda *set out in §§ 50.130 -50.135*, and *§ 50.137*, which set out other grounds for arguing that an action for contract damages is not barred by the applicable statute of limitations.

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a general demurrer, they may be combined with appropriate memoranda set out in Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publicationin drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.120* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Accrual of Action on Promise to Pay When Able

The facts and procedural background of ***Horacek v. Smith*** *(1948) 33 Cal. 2d 186, 199 P.2d 929* , are discussed in *§ 50.20[3][e]*. In affirming the judgment, the Supreme Court noted that, in an action on a contract to pay when able, the promise is conditional, and no cause of action accrues until the condition is performed, that is, until the debtor is able to pay. Since the plaintiff's amended complaint alleged on information and belief that the defendant's financial condition had improved to the point where the defendant could have paid the money, this requirement was satisfied (*33 Cal. 2d 186, 191)* .

The facts and procedural background of ***Van Buskirk v. Kuhns*** *(1913) 164 Cal. 472, 129 P. 587* , are discussed in *§ 50.20[3][e]*. In affirming the judgment, the Supreme Court stated that a promise to pay when able is conditional, and no cause of action accrues until the debtor is able to pay. Although the evidence was meager, the trial court was justified in making a finding that the action was not barred since defendant did not have the ability to pay until a time prior to the commencement of the action that was within the limitation period (*164 Cal. 472, 474-476)* .

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5-50 California Points & Authorities § 50.137

§ 50.137 Employee's Action for Constructive Breach of Employment Contract Accrues on Actual Termination Rather Than When Intolerable Working Conditions Arise

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE CAUSE OF ACTION ACCRUED WHEN THE PLAINTIFF'S EMPLOYMENT WAS ACTUALLY TERMINATED, NOT WHEN THE INTOLERABLE WORKING CONDITIONS AROSE THAT LED TO THE TERMINATION OF EMPLOYMENT.

Accrual of Action Based on Constructive Termination of Employment. The limitation period for an employee's action for breach of contract based on constructive termination begins to run on the date employment actually is terminated, not when the intolerable working conditions arise that lead to the termination of employment (*Mullins v. Rockwell Internat. Corp. (1997) 15 Cal. 4th 731, 733-734, 743, 63 Cal. Rptr. 2d 636, 936 P.2d 1246*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that a action is not barred by the applicable statutes of limitation, because the action is one for constructive termination of plaintiff employee by defendant employer due to intolerable working conditions, and breach of the employment contract, and the action for breach of contract was commenced with the limitation period calculated from the date employment actually terminated.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a plaintiff seeks to raise this contention. For example, it may be used by plaintiff to oppose a defendant's general demurrer interposed on the ground that the action is barred by lapse of the applicable limitation period.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised in opposition to a defendant's general demurrer, the memorandum would include an analysis of the complaint showing that the date of plaintiff's termination of employment due to intolerable working conditions.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

These memoranda may be combined, when appropriate, with the memoranda *set out in §§ 50.130 -50.136*, which set out other grounds for arguing that an action for contract damages is not barred by the applicable statute of limitations. For memoranda relating to tort causes of action for wrongful termination based constructive termination due to intolerable working conditions, see Ch. 100, *Employer and Employee: Wrongful Termination and Discipline* .

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a general demurrer, they may be combined with appropriate memoranda set out in Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.120* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Accrual of Action Based on Constructive Termination of Employment

In ***Mullins v. Rockwell Internat. Corp.*** *(1997) 15 Cal. 4th 731, 63 Cal. Rptr. 2d 636, 936 P.2d 1246* , an employee sued the employer based on constructive termination because of intolerable working conditions. The complaint alleged (1) wrongful termination, (2) wrongful termination based on a breach of the covenant of good faith and fair dealing, and (3) breach of an oral employment contract. The employee alleged that he was forced to resign because the employer was going to demote him and reduce his pay and benefit level when he returned from sick leave. He submitted his resignation while still, technically, in a high-level management position. In addition, he alleged the existence of an oral contract of employment arising from his long service, his promotions, his bonuses, his stock rights, the praise given him, and the employer's practices and policies, which implicitly prohibited termination of employment except for good cause. The employer moved for summary judgment on the grounds that the first cause of action was barred by the one-year statute of limitations for tort actions [former Code Civ. Proc. § 340(3) (*now see Code Civ. Proc. § 335.1*, allowing two years)], and the second and third causes of action, involving breach of the covenant of good faith and fair dealing and breach of an oral contract, were barred by the two-year statute of limitations [*Code Civ. Proc. § 339*]. The applicability of these statutes was not the subject of dispute; rather, the issue was when the limitation periods began to run. The trial court granted the motion for summary judgment (*15 Cal. 4th 731, 735-736)* . The court of appeal affirmed. With respect to the contract causes of action, the court of appeal declared that the limitation period for a wrongful discharge claim begins when the employee is given notice of termination or the basisfor constructive discharge, not when termination occurs. The court reasoned that the limitation period begins when the circumstances

have developed so that the employee is entitled to a legal remedy. Applying this theory, the court determined that the contract claims accrued at the latest when the employee became aware of all of the facts underlying the employer's new hostile attitude toward him (*15 Cal. 4th 731, 736)* .

The Supreme Court reversed. Constructive discharge occurs only when an employer terminates employment by forcing the employee to resign, either by creating working conditions that are intolerable under an objective standard or by failing to remedy objectively intolerable working conditions that actually are known to the employer (*15 Cal. 4th 731, 737)* . In this case, the employee alleged that he was constructively discharged in breach of an implied contract not to terminate his employment absent good cause. The limitation period for a claimed breach of an implied contract not to terminate employment without good cause begins to run at the time of actual termination of employment, even when the employer has issued an unequivocal notification of termination at an earlier date. Similar reasoning applies to a breach of contract action based upon an alleged constructive discharge. The breach of contract alleged is the termination of employment without good cause. To the extent that the employer's creation or knowing exploitation of intolerable working conditions for the purpose of forcing a resignation in the future also may be a breach of contract, it is similar to an announcement that employment will be terminated in the future (*15 Cal. 4th 731, 738)* . In this case, the employee alleged that the termination of his employment was a breach of contract. Any possible earlier breach of contract committed through the creation of intolerable working conditions did not rescind the contract, for the employee continued to perform (or, for certain periods, took temporary leave, authorized by the employer, while hoping for an amelioration of his employment situation) until he resigned. In these circumstances, he had an election of remedies, and the limitation period did not begin to run until he made that election by resigning (*15 Cal. 4th 731, 739)* . Because (1) constructive discharge is an employer-directed termination of employment, (2) termination normally is the breach alleged, and (3) the employee may elect to overlook earlier adverse actions of the employer in the hope of conciliation, the limitation period does not begin to run until actual termination. An employee is not barred from bringing his or her claim on the basis of the statute of limitations as long as the claim is brought in a timely manner after the actual termination of employment (*15 Cal. 4th 731, 743)* .

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5-50 California Points & Authorities §§ 50.138-50.149

[Reserved]

§§ 50.138[Reserved]

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3. Illegal Purpose Doctrine

5-50 California Points & Authorities § 50.150

§ 50.150 Agreement for Illegal Purpose Is Not Enforceable

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE CONTRACT ON WHICH THE ACTION IS BASED IS ILLEGAL AND VOID.

[*EITHER*]

A. Illegality Defined. A contract is void and illegal if the object is unlawful (*Civ. Code § 1598*).

[*OR*]

A. Illegality Defined. A contract is void and illegal if any part of a single consideration for several objects or any of several considerations for a single object is unlawful (*Civ. Code § 1608*).

[*CONTINUE*]

B. What Is Unlawful Contract. An agreement is not lawful that is (1) contrary to an express provision of law, (2) contrary to the policy of express law, although not expressly prohibited, or (3) otherwise contrary to good morals (*Civ. Code § 1667*; *McIntosh v. Mills (2004) 121 Cal. App. 4th 333, 344, 17 Cal. Rptr. 3d 66* ; *Kashani v. Tsann Kuen China Enter. Co. (2004) 118 Cal. App. 4th 531, 537, 13 Cal. Rptr. 3d 174* ; *Diosdado v. Diosdado (2002) 97 Cal. App. 4th 470, 474, 118 Cal. Rptr. 2d 494* ; *Bovard v. American Horse Enterprises, Inc. (1988) 201 Cal. App. 3d 832, 838-841, 247 Cal. Rptr. 340*).

C. Illegal Contract Is Not Enforceable. A court will not enforce an illegal contract if the contract is contrary to common standards of morality (*malum in se*), or if the illegality derives from violation of statute (*malum prohibitum*) and the parties are *in pari delicto* or there is an overriding public interest to be served by voiding the agreement (*McIntosh v. Mills (2004) 121 Cal. App. 4th 333, 344 n.10, 347, 17 Cal. Rptr. 3d 66* ; *Wong v. Tenneco, Inc. (1985) 39 Cal. 3d 126, 136-138, 216 Cal. Rptr. 412, 702 P.2d 570* ; *Shenson v. Fresno Meat Packing Co. (1950) 96 Cal. App. 2d 725, 731, 216 P.2d 156*).

[*Optional*] **D. Contract for Object Prohibited by Penal Law Is Void.** If a statute prohibits or attaches a penalty to the doing of an act, the act is void, notwithstanding that the statute does not expressly pronounce it so and regardless of whether the thing forbidden is *malum in se* or merely *malum prohibitum*. The imposition by statute of a penalty implies a prohibition of the act to which the penalty is attached, and a contract founded on that act is void (*Contractor's Safety Ass'n v. California Compensation Ins. Co. (1957) 48 Cal. 2d 71, 76, 307 P.2d 626*).

[*Optional*] **E. Contract Void When its Purpose Is to Defraud Creditors.** An executory contract is void if the parties have made the contract for the purpose of defrauding creditors of one of the parties (*Severance v. Knight-Counihan Co. (1947) 29 Cal. 2d 561, 568, 177 P.2d 4*).

[*Optional*] **F. Claim Is Based on Illegal Contract.** A court will not enforce a contract if the plaintiff must disclose, in addition to the contract on which the action is based, an illegal contract or transaction as the basis of the claim (*Shenson v. Fresno Meat Packing Co. (1950) 96 Cal. App. 2d 725, 731, 216 P.2d 156*).

[*Optional*] **G. Bargain Requiring Nondisclosure of Discreditable Facts Is Illegal.** A bargain that includes as part of its consideration the nondisclosure of discreditable facts is illegal (*Allen v. Jordanos' Inc. (1975) 52 Cal. App. 3d 160, 166, 125 Cal. Rptr. 31*).

[*Optional*] **H. Illegal Consideration Is Inseparable.** If the illegal consideration is not separable and any part of a single consideration for several objects, or any of several considerations for a single object, is unlawful, the entire contract is void (*Civ. Code § 1608*; *McIntosh v. Mills (2004) 121 Cal. App. 4th 333, 344, 17 Cal. Rptr. 3d 66* ; *Taylor v. Fields (1986) 178 Cal. App. 3d 653, 664-665, 224 Cal. Rptr. 186*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that a contract action is based on an illegal contract that is unenforceable.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a defendant seeks to raise this contention. For example, it may be used by defendant in moving for summary judgment, on the ground that undisputed facts show that plaintiff's cause of action is based on an illegal and therefore unenforceable contract.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised in support of a defendant's motion for summary judgment, the memorandum would include an analysis of the supporting and opposing papers showing that undisputed facts establish that plaintiff's cause of action is based on an illegal contract.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

These memoranda may be combined, when appropriate, with the memoranda *set out in § 50.151* (unenforceable gambling contract). They may also be combined in an appropriate cases with those *set out in §§ 50.102* and *50.103*, which set out other grounds for arguing that a contract action is unenforceable as it is one in which plaintiff's performance violates licensing laws.

For memoranda supporting the contention that a contract made by a corporation whose powers have been suspended is voidable at the option of the other party, see Ch. 52, *Corporations* .

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The rule requiring courts to withhold relief under the terms of an illegal contract is not an inflexible one, and exceptions are recognized [*McIntosh v. Mills (2004) 121 Cal. App. 4th 333, 347, 17 Cal. Rptr. 3d 66]* . For memoranda authorites that set out these exceptions and may be used in oppositionto the contention supported by this form, see *§ 50.160* et seq. [*see also §§ 50.111 -50.114*].

[3] Discussion of Authorities

[a] What Is Unlawful Contract

In ***McIntosh v. Mills*** *(2004) 121 Cal. App. 4th 333, 17 Cal. Rptr. 3d 66* , a nonlawyer sued to enforce a fee-sharing agreement with an attorney. The court held that because fee-sharing agreements between lawyers and nonlawyers are expressly prohibited by a rule of professional conduct, the object of the contract was illegal, and it did not matter that the nonlawyer trying to enforce the contract was not subject to that rule. The court further held that although fee sharing was prohibited, and therefore the contract, while illegal, was not necessarily unenforceable, the defendant was at least as culpable as the attorney in the illegal conduct, and therefore was not entitled to relief under an exception to unenforceability for parties not *in pari delicto* (*121 Cal. App. 4th 333, 344)* . The doctrine of illegality "considers whether the *object* of the contract is illegal. It does not turn on whether the illegality applies to the *party* seeking to enforce the agreement" (*121 Cal. App. 4th 333, 346)* . Further, the in pari delicto exception allows an illegal contract to be enforced only as long as the party seeking its enforcement is less morally blameworthy than the party against whom the contract is being asserted, and there is no overriding public interest to be served by voiding the agreement (*121 Cal. App. 4th 333, 347)* . Under the facts of the case, the nonlawyer's conduct rendered him as legally blameworthy as the attorney in pursuit of the contract's objective (*121 Cal. App. 4th 333, 351)* .

In ***Kashani v. Tsann Kuen China Enter. Co.*** *(2004) 118 Cal. App. 4th 531, 13 Cal. Rptr. 3d 174* , plaintiffs alleged that they executed a written agreement with defendants whereby plaintiffs would establish an Iranian corporation in Iran to build a plant there for manufacturing defendants' computer products to be sold in Iran. They also would provide defendants with 18 percent of the shares of the corporation. Plaintiffs alleged that in reliance on this agreement, they

spent money on the project and began setting up the plant. Thereafter, defendants ceased doing business in the computer industry and did not proceed with the agreement. Plaintiffs filed an action for breach of contract, seeking their expenditures and anticipated lost profits as damages for breach of the agreement. The trial court granted defendants' motion for summary judgment on the ground that the alleged agreement was unenforceable because it was illegal and against public policy. It violated United States presidential executive orders and implementing regulations, both of which prohibited any United States person from engaging, without a license, in any transaction directly or indirectly in the export, sale, or supply of goods, technology, or services to Iran. The court of appeal affirmed, holding that plaintiffs legally could not establish their claim because the agreement on which their claim was based was illegal and against public policy (*118 Cal. App. 4th 531, 537)* .

Diosdado v. Diosdado *(2002) 97 Cal. App. 4th 470, 118 Cal. Rptr. 2d 494* , was an action brought by a woman against her former husband for breach of a contract, made during their marriage, which provided for the payment of liquidated damages if one spouse chose to terminate the marriage because the other spouse was unfaithful. The trial court entered judgment on the pleadings for the former husband, and the appellate court affirmed. The court stated that the only question before it was whether the agreement was enforceable. Under *Civ. Code § 1550(3)*, a contract must have a lawful object to be enforceable. Furthermore, under *Civ. Code § 1667*, a contract is unlawful if it is contrary to an express provision of law, contrary to the policy of express law, or otherwise contrary to good morals. In this case, when the agreement attempted to impose a penalty on one of the parties as a result of that party's "fault" during the marriage, it was contrary to the public policy underlying the no-fault provisions for dissolution of marriage set forth in *Fam. Code §§ 2310* and *2335*. For that reason, the court held that the agreement was unenforceable (*97 Cal. App. 4th 470, 474-475, 118 Cal. Rptr. 2d 494*).

The action in ***Bovard v. American Horse Enterprises, Inc.*** *(1988) 201 Cal. App. 3d 832, 247 Cal. Rptr. 340* , began as one to enforce notes made by the defendant in payment for a company bought from the plaintiff. The company manufactured jewelry and drug paraphernalia. A stipulated judgment was rendered against the defendant. The defendant never signed the stipulation, claimed his attorney did not have authority to make it, and had the judgment vacated. The plaintiff then filed a second amended complaint, including a cause of action for enforcement of the settlement agreement. That cause of action was tried first. In the course of the trial, it became clear that the company produced very little jewelry and mostly produced drug paraphernalia. At that point, the trial court dismissed the action. On appeal the plaintiff contended that since the statutes making the manufacture of drug paraphernalia illegal were not enacted until after the sale of the company, they could not provide the basis for holding the contract void as against public policy.

The court of appeal affirmed. Any court has authority, whenever it becomes aware that a contract is illegal, to refrain from entertaining an action to enforce the contract. Similarly, a court will not permit the parties to maintain an action to settle or compromise a claim based on an illegal contract (*201 Cal. App. 3d 832, 838)* . In determining whether the subject of a given contract violates public policy, courts must rely on the state of the law as it existed at the time the contract was made (*201 Cal. App. 3d 832, 840 n.3*). At the time the company was sold, however, statutes made it illegal to possess, use, or transfer marijuana, and that was sufficientbasis to hold that the contract at issue was void because it was against public policy (*201 Cal. App. 3d 832, 839-841)* .

[b] Illegal Contract Is Not Enforceable

McIntosh v. Mills *(2004) 121 Cal. App. 4th 333, 17 Cal. Rptr. 3d 66* is discussed in [a], *above*.

In ***Wong v. Tenneco, Inc.*** *(1985) 39 Cal. 3d 126, 216 Cal. Rptr. 412, 702 P.2d 570* , the Supreme Court upheld the denial of enforcement of a marketing agreement relating to crops grown in Mexico, when it was well known to the defendant that the plaintiff, in flagrant violation of the Mexican Constitution, owned the property on which the crops were grown, although title was held in trust for him by Mexicans. As no California public policy was offended, doctrines of comity required that the contract, illegal in Mexico, be denied enforcement in California courts (*39 Cal.*

3d 126, 136-138) .

Shenson v. Fresno Meat Packing Co. *(1950) 96 Cal. App. 2d 725, 216 P.2d 156* , was an action for an accounting with respect to certain subsidies. The plaintiffs had agreed to sell and deliver to the defendant cattle that the defendant was to process and sell, and the defendant had received governmental subsidies for the slaughter of the cattle by falsely and fraudulently representing that all of the cattle in question were owned by the defendant at the time of the slaughter. However, the plaintiffs could not have recovered directly from the government the subsidies to which they claimed they were entitled, since that would have been illegal under government regulations. The trial court granted the defendant's motion for nonsuit at the close of the plaintiffs' case.

The court of appeal affirmed. The issue was whether the plaintiffs required the aid of the defendant's illegal transaction with the government to establish their case. The general rule is that when two or more have concocted a fraudulent scheme for the purpose of obtaining property in which all are to share, and the scheme has been carried out so that all of the results of the fraud are in the hands of the parties, a court of equity will not interfere on behalf of the others to aid them in obtaining their shares but will leave the parties in the position in which they have placed themselves. A party to an illegal contract or an illegal transaction cannot come into a court of law and ask it to carry out the illegal contract or to enforce rights arising out of the illegal transaction. The party cannot set up a case in which he or she necessarily must disclose the illegal contract or the illegal transaction as the basis of the claim. Whenever illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case (*96 Cal. App. 2d 725, 731)* .

[c] Contract for Object Prohibited by Penal Law Is Void

Contractor's Safety Ass'n v. California Compensation Ins. Co. *(1957) 48 Cal. 2d 71, 307 P.2d 626* , was an action to recover dividends on an agreement made in conjunction with the purchase of a workers' compensation insurance policy. The plaintiff alleged that the defendant had represented that it would pay dividends according to a stated schedule to group insureds carrying workers' compensation insurance issued by the defendant if the insured's loss-premium ratio was a certain percentage and a surplus was available for payment of the dividends. The plaintiff accepted the offer, including one for additional dividends, and the defendant issued to the plaintiff its standard workers' compensation policy. The plaintiff further alleged that it relied on the representations; its loss experience was within a range that would entitle it to dividends in a certain sum; the defendant had sufficient surplus to meet the payment of the dividend, but it arbitrarily reduced the dividend to a smaller sum and paid that amount. The complaint asked that the balance of the dividend be paid to the plaintiff. The trial court dismissed the action after sustaining the defendant's oral demurrer to the introduction of any evidence on the plaintiff's behalf.

The Supreme Court affirmed. A consideration of the relevant laws concerning payment of rebates under insurance policies showed that the dividend agreement was contrary to law. Acceptance or receipt of an unlawful rebate is a misdemeanor, and violation of the minimum-rating law is also a misdemeanor. A contract must have a lawful object, and a contract for an object prohibited by a penal law is void. The general rule controlling cases of this character is that when a statute prohibits or attaches a penalty to the doing of an act, the act is void, notwithstanding that the statute does not expressly pronounce it so, and it is immaterial whether the thing forbidden is *malum in se* or merely *malum prohibitum*. The imposition by statute of a penalty implies a prohibition of the act to which the penalty is attached, and a contract founded on the act is void. Since the contract in the case was illegal, the plaintiff could not recover (*48 Cal. 2d 71, 76)* .

[d] Contract Void When its Purpose Is to Defraud Creditors

Severance v. Knight-Counihan Co. *(1947) 29 Cal. 2d 561, 177 P.2d 4* , was an action to recover possession of personal property. The defendant operated a printing plant and employed the plaintiff as a salesman of its tariff business. When the plaintiff resigned, he notified the defendant of his decision to exercise an option to purchase at their metal value all tariff plates used in the defendant's business. The parties agreed on the amount of the metal value and

agreed that their value as tariff plates was aboutfour times more than the metal value. The evidence showed without conflict that when the agreement was signed, the defendant was in unsound financial condition, and the parties feared that the defendant's creditors would either take over the business or force the defendant into liquidation. The tariff business was a valuable part of the defendant's printing enterprise and could be saved from the creditors if a way were found to withhold the tariff plates. The trial court rendered judgment for the defendant after finding that the agreement was made for the purpose of defrauding the defendants' creditors, and it was contrary to good morals and public policy, illegal, void, and unenforceable.

The Supreme Court affirmed. The agreement was void because it was made to defraud creditors. Even if it is assumed that the creditors could have been satisfied at the time of the agreement, the agreement would still have been fraudulent as impairing the rights of future creditors, since future creditors as well as present creditors are protected by the legislation relating to fraudulent conveyances. Although it is recognized that a transferor of property conveyed to defraud creditors cannot revoke the conveyance, it is also recognized that an executory contract is void if the parties have made the contract for the purpose of defrauding creditors of one of the parties (*29 Cal. 2d 561, 568)* .

[e] Claim Is Based on Illegal Contract

Shenson v. Fresno Meat Packing Co. *(1950) 96 Cal. App. 2d 725, 216 P.2d 156* , is discussed in [b], *above*.

[f] Bargain Requiring Nondisclosure of Discreditable Facts Is Illegal

Allen v. Jordanos' Inc. *(1975) 52 Cal. App. 3d 160, 125 Cal. Rptr. 31* , was an action in part for breach of contract. The plaintiff claimed that there was a valid, enforceable oral contract between the parties. Under the agreement, the plaintiff and the defendants promised not to demand an impartial arbitration to determine the truth or falsity of certain charges of theft and dishonesty that the defendants had made against the plaintiff and instead to lay off the plaintiff. The defendants also promised to allow the plaintiff to obtain unemployment benefits and not to communicate to prospective employers that the plaintiff was discharged or resigned for dishonesty, theft, and bad employment attitude, or that they would not rehire the plaintiff. The defendants filed a general demurrer that the trial court granted.

The court of appeal affirmed. A substantial part of the contract was for the defendants to allow the plaintiff to obtain unemployment benefits to which he would otherwise not be entitled. Thus, the plaintiff was bargaining for an act that was illegal by definition--to withhold information from, or give false information to, a state agency. The nondisclosure was a major and substantial consideration of the agreement. A bargain that includes as part of its consideration nondisclosure of discreditable facts is illegal. Since a substantial part of the contract was illegal and void, there was no consideration. Without consideration, a contract did not exist, and the general demurrer was properly sustained (*52 Cal. App. 3d 160, 166)* .

[g] Illegal Consideration Is Inseparable

The plaintiff in ***Taylor v. Fields*** *(1986) 178 Cal. App. 3d 653, 224 Cal. Rptr. 186* , had been the mistress of the defendant's husband for 42 years. Although they had never lived together, he promised to take care of her financially and see that she would live comfortably for the rest of her life if she did not marry anyone else during the period of their relationship. After her lover died, the plaintiff sued his wife for breach of oral contract, breach of implied contract, breach of fiduciary duty, and fraudulent transfer, and to impose a constructive trust on property that the decedent transferred during his lifetime to an inter vivos trust of which the defendant was the trustee. The defendant's motion for summary judgment was granted.

The court of appeal affirmed. *Marvin v. Marvin (1976) 18 Cal. 3d 660, 134 Cal. Rptr. 815, 557 P.2d 106* , and its progeny did not apply because those cases all involved couples who lived together. Moreover, the agreement alleged in *Marvin* did not rest on illegal consideration. Agreements of cohabiting couples regarding the ordering of their economic

affairs are enforceable as long as they do not rest on illicit meretricious consideration and unless sexual acts form an inseparable part of the consideration for the agreement. In this case the plaintiff alleged that she acted as decedent's confidante, friend, travel companion, and lover. Nothing in the alleged agreement rested on the plaintiff's acting as friend, traveling companion, or confidante as distinguished from her role as paramour; hence the entire agreement was invalid (*178 Cal. App. 3d 653, 664-665)* .

[4] Additional Authorities

[a] What is Unlawful Contract

In *Cariveau v. Halferty (2000) 83 Cal. App. 4th 126, 99 Cal. Rptr. 2d 417* , a securities dealer brought an action against her customer in a securities transaction for breach of a confidentiality clause in a settlement agreement that prohibited the customer from discussing the dealer's misconduct with regulatory authorities. The trial court refused to enforce the clause on the grounds that the confidentiality clause was void and unenforceable as a violation of public policy, and the court of appeal affirmed. After executing the settlement agreement, the customer had complained about plaintiff's conduct. The NASD then investigated and censured the dealer, who broughtthis action related to defendant customer's disclosure of the information regarding the plaintiff's dealings in violation of the confidentiality clause of the forbearance agreement. The dealer subsequently was shot to death, and the trustee of the assets of her estate was substituted in as plaintiff. The court of appeal found that public policy, express and implied from the securities laws and regulations, outweighed the general interest in settling disputes without litigation. To permit the dealer's violations of rules and shield them from administrative review in an agreement to silence wrongdoing would undermine the public's confidence in the integrity of securities oversight (*83 Cal. App. 4th 126, 133-137)* . The court held that the trial court's decision was supported by the law pertaining to the NASD, the Securities Exchange Act of 1934, and the policy against enforcement of contract terms that violate the express public policies requiring NASD members to observe the high standards and equitable principles of trade and refrain from suppressing disclosure to the regulatory bodies (*83 Cal. App. 4th 126, 138)* .

In *Dunkin v. Boskey (2000) 82 Cal. App. 4th 171, 98 Cal. Rptr. 2d 44* , the court of appeal concluded that an agreement between the parties to grant defendant paternity rights to a child conceived by artificial insemination was binding and could be enforced to the extent of an action for unjust enrichment. Plaintiff and defendant, while an unmarried couple, entered into a written contract entitled "Consent for Artificial Insemination" to create a child by the use of artificial insemination through the use of the sperm of an anonymous donor. Under the contract, the parties agreed that "the male partner and the female partner acknowledge that the child shall be the lawful child of both the mother and the male partner, and that neither of them shall assert a contrary position in any subsequent proceeding." Defendant, the female partner, gave birth to a girl after artificial insemination. Several years later defendant terminated her cohabitation and relationship with plaintiff, moved with the child from California to Wisconsin, and thereafter denied plaintiff any custody or visitation with the child. Plaintiff filed a complaint in California to establish his paternity and custody rights to the child. The trial court dismissed his action in California, based upon a finding that he lacked standing to sue for custody and visitation. After plaintiff's breach of contract action was also dismissed, plaintiff appealed. Defendant argued that agreements between a parent and a "non-parent" are "illegal and unenforceable because they are in an area entirely preempted by statutory mechanisms for creating or establishing parenthood." The court of appeal cited *Bovard v. American Horse Enterprises, Inc. (1988) 201 Cal. App. 3d 832, 840, 247 Cal. Rptr. 340* , discussed *above*, on the issue of whether a contract violates public policy (*82 Cal. App. 4th 171, 183-184)* . It found nothing in the agreement between the parties that so offended public policy as to require the court to find it illegal or invalid. To the contrary, recognizing the validity of plaintiffs's contractual promise to care for and support and educate the child as though it were his natural child served rather than contravened the compelling public policies of family law to legitimate children, provide for their support, foster the best interests of the child, and promote familial responsibility (*82 Cal. App. 4th 171, 189-190)* . The court therefore concluded that the agreement upon which the breach of contract action for damages was based was not in its entirety illegal or unenforceable (*82 Cal. App. 4th 171, 192)* .

[b] Illegal Contract Is Not Enforceable

In *Yoo v. Robi (2005) 126 Cal. App. 4th 1089, 24 Cal. Rptr. 3d 740* , plaintiff sued to recover a commission allegedly due him under a personal management contract with one of the original members of the singing group The Platters. The singer's widow and successor in interest was the named defendant, while plaintiff's trustee in bankruptcy was substituted as plaintiff. Defendant did not raise invalidity of the contract as an affirmative defense. However, during the pending superior court action, defendant filed a petition with the California Labor Commissioner alleging that throughout the contract period plaintiff acted as an unlicensed talent agency while procuring engagements for the singer, and thus the contracts providing for commissions for plaintiff's services were void as a matter of law. The Commissioner ruled in defendant's favor, issuing a decision finding that the oral contracts were unlawful and void. Plaintiff filed a notice in the contract action appealing that decision and requesting trial de novo. The court then declared all contracts between the parties void and unenforceable and dismissed the complaint. Both parties appealed [*126 Cal. App. 4th 1089, 1094-1097]* .

The appellate concluded that substantial evidence supported the trial court's finding that plaintiff procured performance engagements for the singer in violation of the Talent Agencies Act [*Lab. Code § 1700*], thus rendering his contracts with the singer void and barring his recovery of a commission for procuring a recording contract for the singer. The court rejected plaintiff's argument that plaintiff waived the illegality defense by not specifically pleading it in the answer to the complaint [*126 Cal. App. 4th 1089, 1103]* , and also held that plaintiff was not entitled to have his commission for a legal activity severed from his commissions for illegal activities [*126 Cal. App. 4th 1089, 1103-1104]* .

In *Johnson v. Superior Court (2000) 80 Cal. App. 4th 1050, 95 Cal. Rptr. 2d 864* , a child and her parents brought an action for professional negligence, fraud, and breach of contract against a sperm bank, its employees, officers, and directors, claiming that defendants failed to disclose that the sperm they sold came from a donor (John Doe) with a family history of kidney disease. That sperm was used to conceive plaintiff child, who was diagnosed to have that serious kidney disease. When plaintiffs sought to take the deposition and obtain documents of John Doe, the person believedto be the anonymous sperm donor, defendants filed motions to quash the deposition subpoena. At the same time, plaintiffs filed a motion to compel compliance with the deposition subpoena. The trial court denied plaintiffs' motion and granted the motions to quash the deposition subpoena. Plaintiffs sought a writ of mandate directing the superior court to vacate its order and issue a different order compelling John Doe's deposition and the production of records. The court of appeal ordered issuance of a writ of mandate directing the trial court to vacate its order denying plaintiffs' motion and to grant the motion to compel the donor's deposition and to order production of records. The court of appeal concluded that the sperm bank's agreement with the plaintiffs precluding disclosure of the donor's identity and other information pertaining to the donor under all circumstances was contrary to public policy and therefore unenforceable. Based on the policy expressed in *Fam. Code § 7613*, inspection of insemination records, including a sperm donor's identity and related information contained in those records, may be disclosed under certain circumstances. Thus, to prohibit disclosure of the donor's identity and related information in every situation and under all circumstances, as in the sperm bank's agreement, would be contrary to the policy expressed in the statute. Because a third party beneficiary such as John Doe can only enforce a contract when there is a valid and subsisting obligation between the promisor and the promisee, the court held that the sperm bank's agreement with plaintiffs did not preclude disclosure of the donor's identity and related information about the donor. However, it did require that his identity should remain undisclosed to the fullest extent possible (*80 Cal. App. 4th 1050, 1065-1067)* .

R.M. Sherman Co. v. W.R. Thomason, Inc. (1987) 191 Cal. App. 3d 559, 236 Cal. Rptr. 577 , was an action by a subcontractor on a public works project to recover money due under the subcontract. The defendant cross complained for damages under a previous public works contract that had been subcontracted to the plaintiff in violation of *Pub. Contract Code §§ 4106* and *4107*. The trial court declared the previous contract illegal and void but held that the prime contractor could set off its former claim against the plaintiff's present claim. In the judgment, each party's claim was set off by the other's. The court of appeal reversed insofar as the judgment allowed the setoff and directed that the plaintiff take nothing, and otherwise affirmed. The previous contract violated *Pub. Contract Code §§ 4106* and *4107* and was

therefore void under *Civ. Code §§ 1598* and *1608* (*191 Cal. App. 3d 559, 563)* . If the contract was truly void, it created no right or claim whatsoever. A void contract is no contract at all, binds no one, and is a nullity. No rights are enforceable under a void contract. A contract void due to illegality has no existence for any purpose and may not serve as the foundation of any action, either at law or in equity. As a general rule, a setoff must rest on a claim enforceable in its own right. Because the agreement conferred no rights whatsoever and was a legal nullity, it could furnish no basis for a setoff (*191 Cal. App. 3d 559, 563)* . The Fair Practices Act [*Pub. Contract Code § 4100 et seq.*] recognizes that a subcontractor may sue under a noncomplying contract but provides that illegality is no defense to the contractor [*Pub. Contract Code § 4112*], implying legislative recognition of the general rule of unenforceability. Under the rule that to express one thing is to exclude all others of the kind (*expressio unius est exclusio alterius*), the contract is in all other respects subject to the rule of unenforceability (*191 Cal. App. 3d 559, 565)* .

In *Prime v. Hyne (1968) 260 Cal. App. 2d 397, 67 Cal. Rptr. 170* , an action for declaratory relief under contracts and a lease, the court of appeal affirmed the summary judgment for the defendants. The agreements were illegal and void for violation of the rule against perpetuities (*260 Cal. App. 2d 397, 402)* .

[c] Claim Is Based on Illegal Contract

The court of appeal in *Homami v. Iranzadi (1989) 211 Cal. App. 3d 1104, 260 Cal. Rptr. 6* , reversed a judgment for the plaintiff. The plaintiff and the defendant were brothers-in-law, and the plaintiff had lent $250,000 to the defendant, evidenced by a note reciting that it bore no interest. The plaintiff testified, however, that the parties had orally agreed that the defendant would pay 12-percent interest. The oral agreement was to allow the plaintiff not to report the interest income on state and federal income tax returns. A contract legal on its face may be discredited by evidence introduced to establish its illegal character. If the substance of the transaction is illegal, it does not matter when or how the illegality is raised; whether the evidence comes from one side or the other, it is fatal to the case (*211 Cal. App. 3d 1104, 1112)* . When the parties are *in pari delicto*, this rule may leave the defendant with an unexpected benefit from the transaction. Nevertheless, the rule that courts will not enforce an illegal contract is not applied in order to correct injustice between the parties, but in regard of a higher interest--that of the public, whose welfare demands that the transaction be discouraged. Knowing that they will receive no help from the courts is intended to be a deterrent to make parties less likely to enter into illegal agreements (*211 Cal. App. 3d 1104, 1111-1112)* .

[d] Bargain Requiring Nondisclosure of Discreditable Facts Is Illegal

In *Philippine Export & Foreign Loan Guarantee Corp. v. Chuidian (1990) 218 Cal. App. 3d 1058, 267 Cal. Rptr. 457* , the court refused to set aside a settlement agreement and stipulated judgment challenged as illegal on several grounds, one of which was that part of the consideration for the agreement was a "warranty of silence." The "warranty" consisted of the defendant's promises (1) to sign a statement that the Marcoses did not ownshares in the defendant's corporations, (2) to provide another statement by a corporate officer that in the officer's opinion, the Marcoses had never tried to acquire the companies, (3) to turn over copies of the defendant's deposition in another matter in which the defendant testified that the Marcos family was trying to take over the defendant's companies, and (4) that the settlement agreement be kept private. The court of appeal stated that although it is illegal and against public policy for one who has a duty to reveal a material fact to the court to agree to conceal that fact, this case did not involve ongoing litigation or an administrative matter (*218 Cal. App. 3d 1058, 1082)* . The statement that the Marcoses did not own the company was apparently true. Other copies of the deposition were available from the public records. There was no agreement to suppress or withhold evidence from the court or from any party to the lawsuit. Thus, the consideration for the agreement was not illegal as a matter of law (*218 Cal. App. 3d 1058, 1082-1083)* .

[e] Illegal Consideration Is Inseparable

The court of appeal in *Schaefer v. Williams (1993) 15 Cal. App. 4th 1243, 19 Cal. Rptr. 2d 212* , affirmed a judgment for the defendant on a demurrer to a contract cause of action. The plaintiff and the defendant were candidates for the

same office. The defendant signed a pledge to abide by the Code of Fair Campaign Practices [*see Elec. Code § 20400 et seq.* (restatingformer Elec. Code § 12500 et seq.)], which provided that no candidate would use character defamation or attacks. The defendant circulated a campaign brochure that discussed legal difficulties the plaintiff had in the 1980s. The court of appeal stated that the concept of unlawful consideration includes a promise to refrain from committing a crime or a tort or from deceiving or wrongfully injuring the promisee or a third person. A contract for which such a promise is the sole consideration is illegal and void (*15 Cal. App. 4th 1243, 1246)* .

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CHAPTER 50 CONTRACTS
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3. Illegal Purpose Doctrine

5-50 California Points & Authorities § 50.151

§ 50.151 Gambling Contract Is Not Enforceable

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE ACTION IS BASED ON A GAMBLING CONTRACT THAT IS UNLAWFUL AND THEREFORE UNENFORCEABLE.

A. What Is Unlawful Contract. [*See § 50.150[1], Paragraph B.*]

B. Wagering Contracts Are Not Enforceable. The rule that the courts will not recognize an illegal contract and will not aid the parties is rigidly enforced to deny any relief in the courts to parties seeking to recover either their stakes or their winnings under a wagering contract that is in violation of law, whether the party against whom the relief is sought is a party to the wager or a stakeholder for the parties to the wager (*Kyne v. Kyne (1940) 16 Cal. 2d 436, 438, 106 P.2d 620* ; *Bradley v. Doherty (1973) 30 Cal. App. 3d 991, 994, 106 Cal. Rptr. 725 , cert. denied, 414 U.S. 878*).

[*Optional*] **C. Contract Founded on Gambling Consideration Is Unenforceable.** A contract that is founded on a consideration based on any type of gambling, whether prohibited by statute or not, is unenforceable under *Civil Code Section 1667* (*Lavick v. Nitzberg (1948) 83 Cal. App. 2d 381, 382, 188 P.2d 758*).

[*Optional*] **D. Checks Cashed for Gambling Purposes.** The owner of a gambling house who honors a check for the purpose of providing a prospective customer with funds with which to gamble and who then participates in the transaction thus promoted by his or her act cannot recover on the check (*Hamilton v. Abadjian (1947) 30 Cal. 2d 49, 52, 179 P.2d 804* ; *Braverman v. Horn (1948) 88 Cal. App. 2d 379, 381, 198 P.2d 948*).

[*Optional*] **E. Money Lent for Gambling Purposes.** A lender who advances money to a borrower with the understanding that it is tobe used in gambling or who participates and shares in the gambling transaction promoted by

his or her act cannot recover the money advanced (*Rose v. Nelson (1947) 79 Cal. App. 2d 751, 751-752, 180 P.2d 749*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that a contract action is based on an illegal gambling or wagering contract, and the underlying contract is therefore unenforceable.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a defendant seeks to raise this contention. For example, it may be used by defendant in moving for summary judgment, on the ground that undisputed facts show that plaintiff's cause of action is based on an unenforceable gambling contract.

Note that one court of appeal has expressed the view that given California's expanded acceptance of gambling, as evidenced by the introduction of the state lottery, a judgment from a jurisdiction that allows casino gambling should be entitled to comity in California [*Crockford's Club, Ltd. v. Si-Ahmed (1988) 203 Cal. App. 3d 1402, 1406, 250 Cal. Rptr. 728* (permitting enforcement of English judgment for aggregate amount of dishonored checks given to gambling club to purchase gambling tokens)]. Even so, no California case has allowed a foreign casino or its assignee to recover in a suit initially filed in California.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised in support of a defendant's motion for summary judgment, the memorandum would include an analysis of the supporting and opposing papers showing that undisputed facts establish that plaintiff's cause of action is based on an unenforceable gambling contract.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender). For discussion and forms relating to the unenforceability of gambling contracts, see also California Forms of Pleading and Practice, Ch. 272, *Gambling* (Matthew Bender).

[d] Related Memoranda

These memoranda may be combined, when appropriate, with the memoranda *set out in § 50.150* (illegal contract generally).

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

In an appropriate case, the memoranda *in § 50.160* et seq. may be submitted in opposition to the contention supported

by this form.

[3] Discussion of Authorities

[a] Wagering Contracts Are Not Enforceable

Kyne v. Kyne *(1940) 16 Cal. 2d 436, 106 P.2d 620* , involved a proceeding in which certain third parties claimed money that had been levied-on by a sheriff on behalf of a judgment creditor of the defendant. The third-party claims rested on the successful outcome of an unlawful wagering agreement with the defendant, who accepted wagers concerning various events, including the claimants' wagers on the outcome of an election. The money levied-on comprised the wagers, and the third-party claimants represented bettors who had successfully placed bets on the election but had not been paid their winnings. The trial court rendered judgment for the claimants.

The Supreme Court reversed. Courts will not recognize an illegal contract and will not aid the parties but will leave them where it finds them. This rule has been rigidly enforced to deny any relief in the courts to parties seeking to recover either their stakes or their winnings under a wagering contract that is in violation of law, whether the party against whom the relief was sought was a party to the wager or a stakeholder for the parties to the wager. The wagering agreements involved in this case were illegal contracts to which the rule applied. The burden was on the third-party claimants to prove that their claims to the money were superior to the judgment creditor's claim. They could not do this without relying on the wagering agreements and thus they were not entitled to prevail (*16 Cal. 2d 436, 438)* .

In ***Bradley v. Doherty*** *(1973) 30 Cal. App. 3d 991, 106 Cal. Rptr. 725 , cert. denied, 414 U.S. 878* , the plaintiff alleged that the defendant fraudulently obtained money from the plaintiff by betting on sides or hands of various games, including pinball games. The trial court sustained thedefendant's demurrer on the ground that the allegations of the complaint showed that the plaintiff was attempting to collect money that he had lost in betting on the outcome of pinball games; the plaintiff was *in pari delicto*; and, as the betting was illegal, one engaged in such betting could not recover his losses even if the gambling game was fixed and crooked.

The court of appeal affirmed. The courts will not recognize such an illegal betting contract and will not aid the parties but will leave them where it finds them. This rule has been rigidly enforced to deny any relief in the courts to parties seeking to recover either their stakes or their winnings under a wagering contract that is in violation of law. The gambling activity in this case could only be classified as an unlawful and forbidden enterprise to which the doctrine of *in pari delicto* applied. Whether the plaintiff was a compulsive gambler was of no importance. A compulsive gambler is no less *in pari delicto* when indulging in illegal gambling than a noncompulsive one (*30 Cal. App. 3d 991, 994)* .

[b] Contract Founded on Gambling Consideration Is Unenforceable

Lavick v. Nitzberg *(1948) 83 Cal. App. 2d 381, 188 P.2d 758* , was an action on checks given in payment for chips to be used in gambling. The plaintiff, who conducted a gambling establishment, received four checks from the defendant in payment for chips to be used by the defendant in a game of draw poker. The plaintiff knew that the checks were given for the purchase of chips, the chips would be used by the defendant in the game, and one of the plaintiff's employees would participate in the game. The defendant lost all of the chips and subsequently stopped payment on the checks. The trial court rendered judgment for the defendant. The plaintiff contended on appeal that since draw poker is not a game declared illegal by *Penal Code § 330* (punishment for gaming, as defined), it was a lawful transaction.

The court of appeal affirmed. Because *Civ. Code § 1667* states that an act is not lawful if it is contrary to an express provision of law, contrary to the policy of express law, even though not expressly prohibited, or otherwise contrary to good morals, that statute, not *Penal Code § 330*, determines what is an unlawful contract. Because draw poker is a game of chance, in other words, gambling, the consideration for the notes given in a gambling game in a gambling house is contrary to good morals and unlawful under *Civ. Code § 1667*. Promissory notes given in a gambling house to the

keeper of the house for the purpose of enabling the maker to participate in any game of chance with the keeper or his or her employees are unenforceable under that statute (*83 Cal. App. 2d 381, 382)* .

[c] Checks Cashed for Gambling Purposes

Hamilton v. Abadjian *(1947) 30 Cal. 2d 49, 179 P.2d 804* , was an action to enforce payment on checks cashed by the plaintiff's assignor. Theproceeds of the checks were lost at a blackjack table in the casino of the hotel belonging to the plaintiff's assignor. The trial court found that the plaintiff was entitled to recover on four out of six checks cashed.

The Supreme Court affirmed. The two checks that the plaintiff was not allowed to recover on were cashed at the blackjack table. The owner of a gambling house who honors a check for the purpose of providing a prospective customer with funds with which to gamble and who then participates in the transaction promoted by his or her act cannot recover on the check. Therefore, the plaintiff in this case, as assignee of the two checks, was not entitled to recover (*30 Cal. 2d 49, 52)* .

In ***Braverman v. Horn*** *(1948) 88 Cal. App. 2d 379, 198 P.2d 948* , the plaintiff sued on a check taken in payment of a gambling debt. The plaintiff's assignor had cashed a series of checks while the defendant was shooting dice. After the defendant had lost the entire sum to the knowledge of the assignor, the latter accepted one check in lieu of all the smaller checks, which were then destroyed. The plaintiff was the assignee of that replacement check. The trial court granted the defendant's motion for summary judgment.

The court of appeal affirmed. A payer who honors checks by payment in cash or chips for the purpose of enabling the drawer to use the proceeds in a gambling game conducted by the payer has no cause of action on the checks. The underlying principle supporting the judgment was that the check in suit was a contract in payment of a gambling debt and, as such, against good morals (*contra bonos mores*) and unenforceable under *Civ. Code § 1667* (*88 Cal. App. 2d 379, 381)* .

[d] Money Lent for Gambling Purposes

Rose v. Nelson *(1947) 79 Cal. App. 2d 751, 180 P.2d 749* , was an action to recover on an unpaid check. During a game of poker, the defendant gave the plaintiff seven IOUs for cash used by the defendant to continue the game. Thereafter the defendant gave the plaintiff his check for the sum of the IOUs. The check was returned from the bank unpaid. The trial court granted the defendant's motion for summary judgment.

The court of appeal affirmed. A lender who advances money to a borrower with the understanding that it is to be used in gambling, or who participates and shares in the gambling transaction promoted by his or her act, becomes *particeps criminis* and cannot recover the money advanced. If the lender takes any active part in the gambling contract, such as depositing the loan as margins, he or she cannot recover. Money lent by one player to another while both are participating in a poker game without further stipulation as to its use cannot be recovered by the lender (*79 Cal. App. 2d 751, 751-752)* .

[4] Additional Authorities

[a] Wagering Contracts Are Not Enforceable

In *Szadolci v. Hollywood Park Operating Co. (1993) 14 Cal. App. 4th 16, 17 Cal. Rptr. 2d 356* , the plaintiffs had purchased shares from the defendant in a worthless canceled horse racing ticket. At the time the defendant sold the shares, he was aware that the ticket was invalid and was intending to defraud the purchasers. The defendant personally purchased the ticket for $4,860, canceled it, and then bribed a pari-mutuel clerk to let him keep it. The horses listed on the canceled ticket won, and the plaintiffs brought a tort action against the seller, the racetrack, and other parties, alleging negligence, conspiracy, and negligent hiring. The court of appeal held that the plaintiffs had no remedy,

because the bets were unauthorized by the Business and Professions Code and illegal (*14 Cal. App. 4th 16, 21)* . Generally courts will not recognize an illegal betting contract and will not aid the parties but will leave them where it finds them (*14 Cal. App. 4th 16, 19)* .

[b] Money Lent for Gambling Purposes

The court of appeal in *Metropolitan Creditors Service v. Sadri (1993) 15 Cal. App. 4th 1821, 19 Cal. Rptr. 2d 646* , affirmed a judgment declining to enforce a Nevada-licensed gambling establishment's cause of action against a California resident to recover $22,000 in bad checks and memoranda of indebtedness executed in Nevada to finance baccarat losses over a two-day period. The court of appeal discussed the history and purpose of California's public policy, noting the inclusion in the 1987 American Psychiatric Association's characterization of pathological gambling as a mental disorder (*15 Cal. App. 4th 1821, 1824-1830)* , and concluded that the reasoning and public policy underlying older cases still apply: the owner of a gambling house who honors a check for the purpose of providing a prospective customer with funds with which to gamble and then participates in the transaction promoted cannot recover on the check (*15 Cal. App. 4th 1821, 1832)* .

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[Reserved]

§§ 50.152[Reserved]

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5-50 California Points & Authorities § 50.160

§ 50.160 Party May Maintain Action When Aid of Illegal Agreement Is Not Required

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

ALTHOUGH THERE MAY BE SOME ILLEGAL FEATURES INDIRECTLY CONNECTED WITH A TRANSACTION INVOLVED IN AN ACTION FOR BREACH OF CONTRACT, THE PLAINTIFF MAY RECOVER DAMAGES FOR THE BREACH IF HE/ SHE DOES NOT REQUIRE THE AID OF THE ILLEGAL CONTRACT TO ESTABLISH HIS/HER CASE.

Action Is Permitted When Aid of Illegal Agreement Is Not Required. Although there may be some illegal features indirectly connected with a transaction involved in an action, the plaintiff may recover if the cause of action is otherwise legitimate and he or she can make a case without calling the illegal agreement to his or her aid. The test of whether the demand can be enforced at law is whether the plaintiff requires the aid of the illegal contract to establish his or her case (*Cal-Neva Lodge, Inc. v. Marx (1960) 178 Cal. App. 2d 186, 189, 2 Cal. Rptr. 889*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that the plaintiff does not require the aid of an illegal contract to establish maintain an action for contract damages.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a plaintiff seeks to raise this contention. For example, it may be used by plaintiff in opposing a defendant's motion for summary judgment, made on the ground that the underlying contract is illegal and unenforceable.

With respect to illegal gambling contracts, see also the editorial *comment in § 50.151[2][a]*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised in opposition to a defendant's motion for summary judgment, the memorandum would include an analysis of the supporting and opposing papers showing that there is, at least, a triable issue of fact concerning the legality of the underlying contract, when the opposing papers show a contract that involves an entirely legitimate transaction, although it may be indirectly related to illegal activity.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender). Fordiscussion and forms relating to the unenforceability of gambling contracts, see also California Forms of Pleading and Practice, Ch. 272, *Gambling* (Matthew Bender).

[d] Related Memoranda

These memoranda may be combined, when appropriate, with the memoranda *set out in § 50.161* et seq.

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

In an appropriate case, the memoranda *set out in § 50.150* and *§ 50.151* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Action Is Permitted When Aid of Illegal Agreement Is Not Required

Cal-Neva Lodge, Inc. v. Marx *(1960) 178 Cal. App. 2d 186, 2 Cal. Rptr. 889* , was an action for money received for the plaintiff's use and benefit. The defendant admitted that pursuant to an agreement with the plaintiff, he received the claimed sums of money for the plaintiff's use. Nevertheless, he claimed that he could withhold the amounts due and belonging to the plaintiff since the money collected was a result of credit the plaintiff extended to various persons who engaged in games of chance in the plaintiff's gambling casinos. The trial court rendered judgment for the plaintiff.

The court of appeal affirmed. That this was not a suit to collect a gambling debt from one who participated in an illegal enterprise. Instead, although there may have been some illegal features indirectly connected with the transaction involved in this case, the plaintiff nevertheless could recover if the cause of action was otherwise legitimate and the plaintiff could make out a case without calling the illegal agreement to the plaintiff's aid. The test of whether the demand can be enforced at law is whether theplaintiff requires the aid of the illegal contract to establish the case. Because the plaintiff in this case established that the defendant, as its agent, had collected money for the plaintiff's use and benefit and failed to pay the money to the plaintiff, the plaintiff did not require the aid of any illegal agreement or transaction. The defendant's duty to pay the plaintiff arose from a separate agreement to collect for and pay to his principal the money in question (*178 Cal. App. 2d 186, 189)* .

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Volume 5 Chapters 50-59 CONTRACTS---to---CORPORATIONS
CHAPTER 50 CONTRACTS
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B. Defenses to Breach of Contract Action
3. Illegal Purpose Doctrine

5-50 California Points & Authorities § 50.161

§ 50.161 Relief May Be Granted Under Illegal Contract

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE PLAINTIFF MAY RECOVER DAMAGES IN AN ACTION FOR BREACH OF CONTRACT, EVEN THOUGH THE CONTRACT IS ILLEGAL, IF THE TRANSACTION HAS BEEN COMPLETED, NO SERIOUS MORAL TURPITUDE IS INVOLVED, THE DEFENDANT IS GUILTY OF THE GREATER MORAL FAULT, AND OTHERWISE THE DEFENDANT WOULD BE UNJUSTLY ENRICHED AT THE PLAINTIFF'S EXPENSE.

A. Public Importance of Discouraging Prohibited Transactions. The rule requiring courts to withhold relief under the terms of an illegal contract is based on the rationale that the public importance of discouraging the prohibited transactions outweighs equitable considerations of possible injustice between the parties (*Southfield v. Barrett (1970) 13 Cal. App. 3d 290, 294, 91 Cal. Rptr. 514*).

[*EITHER*]

B. Relief May Be Granted Under Illegal Contract. The rule against enforcement of illegal contracts is not inflexible when the object of the contract is merely contrary to a statute, regulation, or rule (*malum prohibitum*) and not contrary to commonly accepted standards or morality (*malum in se*). In such a case, the contract may be enforced by a party who is not *in pari delicto* (*McIntosh v. Mills (2004) 121 Cal. App. 4th 333, 344 n.10, 347B351, 17 Cal. Rptr. 3d 66* ; *Cain v. Burns (1955) 131 Cal. App. 2d 439, 442, 280 P.2d 888*).

[*OR*]

B. Relief May Be Granted Under Illegal Contract. The rule against enforcement of illegal contracts is not inflexible when the object of the contract is merely contrary to a statute, regulation, or rule (*malum prohibitum*) and not contrary to commonly accepted standards or morality (*malum in se*). In such a case, the contract may be enforced when the public interests promoting the statute in question are not advanced by rendering the agreement unenforceable (*McIntosh v. Mills (2004) 121 Cal. App. 4th 333, 344 n.10, 349, 17 Cal. Rptr. 3d 66* ; *Emmons, Williams, Mires & Leech v. State Bar (1970) 6 Cal. App. 3d 565, 86 Cal. Rptr. 367*).

[*OR*]

B. Relief May Be Granted Under Illegal Contract. If by applying the rule that relief under the terms of an illegal contract will not be granted, the public cannot be protected because the transaction has been completed, no serious moral turpitude is involved, the defendant is the one guilty of the greater moral fault, and to apply the rule would permit the defendant to be unjustly enriched at the plaintiff's expense, the rule should not be applied, and the plaintiff should be granted a remedy (*Tri-Q, Inc. v. Sta-Hi Corp. (1965) 63 Cal. 2d 199, 219, 45 Cal. Rptr. 878, 404 P.2d 486* ; *Southfield v. Barrett (1970) 13 Cal. App. 3d 290, 294, 91 Cal. Rptr. 514*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that a plaintiff in an action for contract damages may recover even though the underlying contract is illegal, when the public cannot be protected because the transaction has been completed, no serious moral turpitude is involved, and the defendant otherwise would be unjustly enriched at the plaintiff's expense. The defendant would be unjustly enriched by the amount of the contract price because of receiving a service or goods without paying, and consequently, the measure of the plaintiff's recovery may be the contract price. The plaintiff may also use this contention in an action for rescission and restitution, in order to be granted a remedy consisting of restitution of the items or money by which the defendant has been unjustly enriched.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a plaintiff seeks to raise this contention. For example, it may be used by plaintiff in opposing a motion for summary judgment, made on the ground that the underlying illegal contract is not enforceable.

With respect to illegal gambling contracts, see also the editorial *comment in § 50.151[2][a]*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised in opposition to a defendant's motion for summary judgment, the memorandum would include an analysis of the supporting and opposing papers showing that there are triable issues of fact concerning circumstances that would entitle plaintiff to recover damages, notwithstanding the illegality of the underlying contract.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender). For discussion and forms relating to the unenforceability of gambling contracts, see also California Forms of Pleading and Practice, Ch. 272, *Gambling* (Matthew Bender).

[d] Related Memoranda

These memoranda may be combined, when appropriate, with the memoranda *set out in § 50.160* and *§§ 50.162, 50.163*.

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

In an appropriate case, the memoranda *in § 50.150* and *§ 50.151* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Public Importance of Discouraging Prohibited Transactions

Southfield v. Barrett *(1970) 13 Cal. App. 3d 290, 91 Cal. Rptr. 514* , was an action on a contract by which, in return for an advance of a sum of money, the defendant agreed to harvest and deliver hay to the plaintiff. The plaintiff agreed to market the hay and to credit the defendant with the proceeds less certain deductions, including commissions. After partial performance, the defendant refused to make further deliveries. As a defense to the plaintiff's action for breach of contract, the defendant pleaded that the contract was illegal in that the plaintiff was acting as a commission merchant without a license in violation of the applicable statutory provisions. The issue of illegality was tried by the court before the trial of any other issues. The trial court concluded that the contract was illegal and void and rendered judgment for the defendant.

The court of appeal reversed. The rule that courts are required to withhold relief under the terms of an illegal contract is based on the rationale that the public importance of discouraging the prohibited transactions outweighs equitable considerations of possible injustice as between the parties. If the public cannot be protected because the transaction has already been completed, no serious moral turpitude is involved, and the defendant is the one guilty of the greater moral fault and would be unjustly enriched at the plaintiff's expense if the rule were applied, the general rule should not be applied. Equitable solutions have been fashioned to avoid unjust enrichment to a defendant and a disproportionately harsh penalty on the plaintiff. The violation of law in this case was one that did not involve serious moral turpitude. The policy of protecting the public from the future consequences of the contract would not be furthered because the transaction had been completed. Neither party could be said to have been guilty of the greater moral fault. The defendant would be unjustly enriched at the plaintiff's expense were he not required at least to pay the balance owing on the advance payment. The penalty resulting from denial of relief would be disproportionately harsh in relation to the violation involved (*13 Cal. App. 3d 290, 294)* .

[b] Relief May Be Granted Under Illegal Contract

In ***McIntosh v. Mills*** *(2004) 121 Cal. App. 4th 333, 17 Cal. Rptr. 3d 66* a nonlawyer sued to enforce a fee-sharing agreement with an attorney. The court held that because fee-sharing agreements between lawyers and nonlawyers are expressly prohibited by a rule of professional conduct, the object of the contract was illegal, and it did not matter that the nonlawyer party trying to enforce the contract was not subject to that rule. The court further held that although fee sharing was prohibited, and therefore the contract, while illegal, was not necessarily unenforceable, an analysis of the relative culpability of the parties showed that the plaintiff was at least as culpable as the defendant attorney in the illegal conduct. For that reason, and because serious moral turpitude was involved, the plaintiff was not entitled to relief under the exception to unenforceability for parties not *in pari delicto* (*121 Cal. App. 4th 333, 344)* .

Southfield v. Barrett *(1970) 13 Cal. App. 3d 290, 91 Cal. Rptr. 514* , is discussed in [a], *above.*

In ***Emmons, Williams, Mires & Leech v. State Bar*** *(1970) 6 Cal. App. 3d 565, 86 Cal. Rptr. 367* , a law firm sought declaratory relief that its fee-splitting agreement with a bar association's referral service was illegal and unenforceable. The court upheld the agreement, holding that none of the concerns underlying the rule against fee splitting with nonlawyers would be implicated by the agreement in question; to the contrary, under the specific circumstances of the case, it was in the public interest to enforce the agreement (*6 Cal. App. 3d 565, 573B575)* .

Tri-Q, Inc. v. Sta-Hi Corp. *(1965) 63 Cal. 2d 199, 45 Cal. Rptr. 878, 404 P.2d 486* , involved a cross complaint to recover the balance due under a contract to purchase certain stock of a corporation when the cross defendant (plaintiff in the principal action) terminated his employment. The contract specifically provided for the payment in semi-annual installments of the remaining amount of the purchase price after two previous contracts had already been negotiated. The cross defendant made the first four payments and then brought the principal action to rescind the agreement, alleging that the defendant had breached a clause of the agreement providing that he would not enter into competition with the cross defendant. The defendant cross complained for the balance due. The trial court found that neither party was entitled to relief since the agreement had afforded a means by which both parties could have taken improper advantage of the federal and state governments.

The Supreme Court reversed. The general rule requires a court to withhold relief under the terms of an illegal contract or agreement that violates public policy. Rules barring enforcement of illegal contracts are intended either to prevent the guilty party from reaping the benefits of his or her wrongful conduct or to protect the public from the future consequences of an illegal contract. They do not necessarily apply to both parties to the agreement unless both are truly *in pari delicto*. Thus, if the public cannot be protected because the transaction has been completed, no serious moral turpitude is involved, the defendant is the one guilty of the greater moral fault, and to apply the rule would permit the defendant to be unjustly enriched at the plaintiff's expense, the rule should not be applied. In this case there was no reason why the cross complainant should be denied the court's aid in obtaining the agreed consideration for the stock delivered to the plaintiff. Except for payment of that consideration, the transaction had been completed, and the public required no further protection. The cross defendant was clearly guilty of the greater moral fault, and the cross complainant's conduct involved little, if any, serious moral turpitude. Refusal of the courts to enforce the agreement would permit the cross defendant to be unjustly enriched. Such a course would result in a forfeiture disproportionately harsh considering the nature of the illegality and the respective conduct of the parties. Finally, effective deterrence would be best realized by enforcing the cross complainant's claim rather than by leaving the cross defendant in possession of the benefit (*63 Cal. 2d 199, 219)* .

In ***Cain v. Burns*** *(1955) 131 Cal. App. 2d 439, 442, 280 P.2d 888* , a private investigator sued an attorney for refusing to pay a percentage of the attorney's fee in a case, which the lawyer had promised to do in exchange for the plaintiff's investigative services. The court held that the rule against enforcement of illegal contracts was not to be blindly applied to every case in which some illegality appeared in the transaction. Because the transaction had been completed (except for payment to the investigator), and no serious moral turpitude was involved, enforcement of the rule would not protect the public interest. Moreover, determination of whether the parties were *in pari delicto* required analysis of the relative culpability of each, and the investigator was relatively less blameworthy than the attorney, who was attempting to gain advantage from his own disregard of a rule intended to govern his (and not the investigator's) conduct. Accordingly, under the facts of that case, the court enforced the agreement (*131 Cal. App. 2d 439, 443)* .

[4] Additional Authorities

[a] Relief May Be Granted Under Illegal Contract

Asdourian v. Araj (1985) 38 Cal. 3d 276, 211 Cal. Rptr. 703, 696 P.2d 95 , was a suit by a contractor to recover in excess of $25,000 under several contracts, including two oral home improvement contracts, for work done on

investment properties owned by a friend with whom he had previously had business dealings. Home improvement contracts in excess of $500 are required by *Bus. & Prof. Code § 7159* to be in writing; otherwise the contractor is guilty of a misdemeanor punishable by a fine. The trial court awarded the plaintiff $45,000, which included the excess of the reasonable value of his services provided under three agreements over the amounts paid previously by the owner. The Supreme Court affirmed. In view of the history of *Bus. & Prof. Code § 7159*, including a 1975 amendment deleting a provision that contracts not in compliance with that section were not to be deemed invalid solely because of the noncompliance, the express penalty provisions of the statute are not exclusive, and some oral contracts may in fact be void (*38 Cal. 3d 276, 292)* . The Court specifically disapproved the holding of *Calwood Structures, Inc. v. Herskovic (1980) 105 Cal. App. 3d 519, 521-522, 164 Cal. Rptr. 463* , that *Bus. & Prof. Code § 7159* implicitly excludes additional penalties (*38 Cal. 3d 276, 293 n.11*). The Court reviewed the criteria for enforcing an illegal contract--a statute does not expressly prohibit enforcement; the violation is only *malum prohibitum*, not *malum in se*; the policy purpose of the statute will not be furtheredby denying enforcement; the penalty of denying relief would be disproportionately harsh in relation to the violation; and the failure to allow the plaintiff compensation would unjustly enrich the defendant. In these circumstances, an illegal contract may be enforced (*38 Cal. 3d 276, 292-294)* .

The court of appeal in *Davenport & Co., Inc. v. Spieker (1988) 197 Cal. App. 3d 566, 242 Cal. Rptr. 911* , followed *Asdourian v. Araj (1985) 38 Cal. 3d 276, 291-294, 211 Cal. Rptr. 703, 696 P.2d 95* (discussed *above*), in affirming a contractor's recovery for work done on oral change orders, even though *Bus. & Prof. Code § 7159* requires changes to be in writing. The defendant home owner who negotiated for the extra work was a partner in a real estate investment and development firm. Further, the home owner was not displeased with the work and should not be allowed to retain the benefits of the oral change orders without compensating the contractor (*197 Cal. App. 3d 566, 570, 571)* .

In *Johnson v. Johnson (1987) 192 Cal. App. 3d 551, 237 Cal. Rptr. 644* , the court of appeal affirmed, with certain modifications, a judgment imposing a resulting trust in favor of a mother against her son. The son had purchased a home with GI financing, but the mother had provided all of the son's purchase money. The mother could not have obtained the GI loan, and it would have been illegal for her to obtain the benefits of the GI loan (*192 Cal. App. 3d 551, 556)* . The issue of illegality was not raised in the trial court. The son, not the mother, initiated the transaction. The public policy prohibiting enforcement of illegal contracts was designed to protect the public. The contract may be enforced when the public cannot be protected because the transaction is completed, there is no serious moral turpitude involved, the defendant is the one guilty of the greater fault, and refusal to grant relief would unjustly enrich the defendant at the plaintiff's expense (*192 Cal. App. 3d 551, 558)* . Even had the issue of illegality been raised in the trial court, it would have been well within the court's discretion to impose the resulting trust (*192 Cal. App. 3d 551, 559)* .

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5-50 California Points & Authorities § 50.162

§ 50.162 Party Justifiably Ignorant of Contract's Illegality May Recover for Performance

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

IF THE ILLEGALITY OF A CONTRACT IS DUE TO FACTS OF WHICH THE PLAINTIFF WAS JUSTIFIABLY IGNORANT AND THE DEFENDANT WAS NOT, THE ILLEGALITY DOES NOT BAR THE PLAINTIFF'S RECOVERY OF COMPENSATION FOR HIS/HER PERFORMANCE RENDERED WHILE REMAINING JUSTIFIABLY IGNORANT.

A. Recovery Permitted for Party Who Is Justifiably Ignorant. If the illegality of a contract is due to facts of which one party is justifiably ignorant and the other party is not, the illegality does not bar recovery by the innocent party of compensation for performance rendered while he or she remained justifiably ignorant of the facts establishing illegality (*Holland v. Morgan & Peacock Properties (1959) 168 Cal. App. 2d 206, 210, 335 P.2d 769*).

[*Optional*] **B. Recovery Permitted When Defendant Misrepresented Facts.** When the defendant has misrepresented the facts so that the plaintiff was unaware of any illegality involved in the contract, the plaintiff may recover for performance rendered while he or she believed the facts to be as represented by the defendant (*Holland v. Morgan & Peacock Properties (1959) 168 Cal. App. 2d 206, 210, 335 P.2d 769*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that the plaintiff in an action for contract damages was justifiably ignorant of the facts establishing the illegality of the contract, and is therefore entitled to maintain the action.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in

which a plaintiff seeks to raise this contention. For example, it may be used by plaintiff in opposing a motion for summary judgment, made on the ground that the underlying illegal contract is not enforceable.

With respect to illegal gambling contracts, see also the editorial *comment in § 50.151[2][a]*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised in opposition to a defendant's motion for summary judgment, the memorandum would include an analysis of the supporting and opposing papers showing that there are triable issues of fact showing plaintiff's justifiable ignorance of the illegality of the contract.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender). For discussion and forms relating to the unenforceability of gambling contracts, see also California Forms of Pleading and Practice, Ch. 272, *Gambling* (Matthew Bender).

[d] Related Memoranda

These memoranda may be combined, when appropriate, with the memoranda *set out in §§ 50.160*, *50.161* and *§ 50.163*.

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

In an appropriate case, the memoranda *in § 50.150* and *§ 50.151* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Recovery Permitted for Party Who Is Justifiably Ignorant

Holland v. Morgan & Peacock Properties *(1959) 168 Cal. App. 2d 206, 335 P.2d 769* , was an action to enforce an oral agreement requiring the defendants to share their commissions with the plaintiff brokers. The defendants had agreed to pay the plaintiffs half of the commissions if the plaintiffs were to find purchasers for properties owned by clients of the defendants. The plaintiffs had found a prospective purchaser whose name they disclosed to one defendant. The properties were actually sold to a corporation formed by that purchaser, who provided a large part of the financing, but the plaintiffs never received any portion of their commissions. Only one of the defendants was a licensed real estate broker; the other was licensed as a salesman, and the defendants' partnership did not have a separate license. The individual defendants represented to the plaintiffs, at the outset, that they and their partnership were licensed brokers, who had written contracts with the owners of the properties they sought to sell. In addition, the plaintiffs did not know the true licensing situation until after their services were rendered. Judgment was rendered on a verdict for the plaintiffs.

The court of appeal affirmed. To the extent that enforceability of the contract with the plaintiffs depended on the

defendants acting as brokers, the contract was illegal and void. However, the plaintiffs came within a recognized exception to the rule barring recovery on contracts tainted with illegality. If the illegality is due to facts of which one party is justifiably ignorant and the other party is not, the illegality does not bar recovery by the innocent party of compensation for performance rendered while he or she remains justifiably ignorant of the facts establishing illegality. Permitting the plaintiff to recover was therefore proper, since denying recovery would unreasonably enrich the defendants by leaving them in possession of gains that stemmed from their misrepresentations (*168 Cal. App. 2d 206, 210)* .

[b] Recovery Permitted When Defendant Misrepresented Facts

Holland v. Morgan & Peacock Properties *(1959) 168 Cal. App. 2d 206, 335 P.2d 769* , is discussed in [a], *above*.

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5-50 California Points & Authorities § 50.163

§ 50.163 Contract Can Be Enforced Insofar as Illegal Consideration Can Be Severed

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

AN ILLEGAL CONTRACT WILL BE ENFORCED WHEN ONLY PART OF THE CONSIDERATION GIVEN FOR THE CONTRACT INVOLVES ILLEGALITY. NOTWITHSTANDING AN ILLEGAL CONSIDERATION, THE COURT MAY SEVER THE ILLEGAL PORTION OF THE CONTRACT FROM THE REST OF THE AGREEMENT.

Illegal Consideration Can Be Severed and Contract Can Be Enforced. Illegal contracts will be enforced in certain circumstances, such as when only part of the consideration given for the contract involves illegality. In other words, notwithstanding an illegal consideration, courts may sever the illegal portion of the contract from the rest of the agreement. Only when the court is unable to distinguish between the lawful and unlawful parts of theagreement will the illegality taint the entire contract and make the entire transaction illegal and unenforceable (*Birbrower, Montalbano, Condon & Frank v. Superior Court (1998) 17 Cal. 4th 119, 138, 70 Cal. Rptr. 2d 304, 949 P.2d 1*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that the plaintiff in an action for contract damages was justifiably ignorant of the facts establishing the illegality of the contract, and is therefore entitled to maintain the action.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a plaintiff seeks to raise this contention. For example, it may be used by plaintiff in opposing a motion for summary judgment, made on the ground that the underlying illegal contract is not enforceable.

With respect to illegal gambling contracts, see also the editorial *comment in § 50.151[2][a]*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised in opposition to a defendant's motion for summary judgment, the memorandum would include an analysis of the supporting and opposing papers showing that there are triable issues of fact concerning the severability of illegal portions of the contract and maintaining an action on the remaining portions.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender). For discussion and forms relating to the unenforceability of gambling contracts, see also California Forms of Pleading and Practice, Ch. 272, *Gambling* (Matthew Bender).

[d] Related Memoranda

These memoranda may be combined, when appropriate, with the memoranda *set out in §§ 50.160 -50.162*.

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

In an appropriate case, the memoranda *in § 50.150* and *§ 50.151* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Illegal Consideration Can Be Severed and Contract Can Be Enforced

In ***Birbrower, Montalbano, Condon & Frank v. Superior Court*** *(1998) 17 Cal. 4th 119, 70 Cal. Rptr. 2d 304, 949 P.2d 1* , an out-of-state law firm, not licensed to practice law in California, violated *Bus. & Prof. Code § 6125* when it performed legal services in California for a California-based client under a fee agreement stipulating that California law would govern all matters in the representation. See Ch. 25, *Attorney's Fees* , for further discussion of that aspect of the case. The case arose because the client sued for malpractice, and the firm counterclaimed for its fee under the agreement. The trial court granted the client's motion for summary adjudication of the counterclaim, and the court of appeal denied the firm's petition for a writ of mandate.

The Supreme Court reversed and remanded on the firm's counterclaim for fees after affirming on the issue of the violation of *Bus. & Prof. Code § 6125*. The firm could not recover under the fee agreement for services constituting the unlawful practice of law in California, but the firm could recover under the agreement for any services performed for the client outside California and not constituting the practice of law in California. While it is true that courts will not ordinarily aid in enforcing an agreement that is either illegal or against public policy, nevertheless illegal contracts will be enforced in certain circumstances, such as when only part of the consideration given for the contract involves illegality. In other words, notwithstanding an illegal consideration, a court may sever the illegal portion of a contract

from the rest of the agreement. Only if the court is unable to distinguish between the lawful and unlawful parts of the agreement will the illegality taint the entire contract and make the entire transaction illegal and unenforceable. In this case, the firm's statutoryviolation required exclusion of the portion of the fee attributable to the illegal services, but that violation did not necessarily preclude recovery under the fee agreement for limited services performed outside California. Thus, the portion of the fee agreement that included payment for services rendered outside California was enforceable to the extent that the illegal compensation could be severed from the rest of the agreement (*17 Cal. 4th 119, 138-139)* .

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[Reserved]

§§ 50.164[Reserved]

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4. Minor Defendant's Incapacity

5-50 California Points & Authorities § 50.170

§ 50.170 Minor Is Without Capacity to Enter Into Contract Relating to Real Property or to Personal Property Not in Minor's Immediate Possession and Control

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE DEFENDANT LACKED CAPACITY TO CONTRACT IN THAT HE/SHE WAS A MINOR AT THE TIME THE CONTRACT WAS MADE, AND THE CONTRACT _____ [RELATES TO (AN INTEREST IN) REAL PROPERTY *or* RELATES TO (AN INTEREST IN) PERSONAL PROPERTY NOT IN THE DEFENDANT'S IMMEDIATE POSSESSION OR CONTROL *or* DELEGATES A POWER].

A. Minors Defined. A minor is an individual under 18 years of age. The period of minority is measured from the first minute of the day the individual is born to the same minute of the corresponding day completing the period of minority (*Fam. Code § 6500*).

B. Minor's Incapacity to Make Certain Contracts. A minor cannot give a delegation of power or make a contract relating to real property or any interest in real property or relating to any personal property not in his or her immediate possession or control (*Fam. Code § 6701*).

C. Disaffirmance Is Not Necessary. Contracts described in *Family Code Section 6701* (formerly *Civil Code Section 33*) are deemed absolutely void, and a minor need not expressly disaffirm them in order to avoid their apparent effect (*Hakes Inv. Co. v. Lyons (1913) 166 Cal. 557, 560-561, 137 P. 911*).

[*Optional*] **D. Void Contracts Are Not Ratifiable.** Contracts of minors that are void from the beginning may not be made valid by subsequent acts of ratification (*Hakes Inv. Co. v. Lyons (1913) 166 Cal. 557, 561, 137 P. 911*).

[*Optional*] **E. Direction to Pay Wages to Another Is Void.** A minor's direction to pay his or her wages to another

person constitutes an assignment of a chose in action and is void under *Family Code Section 6701* (formerly *Civil Code Section 33*) (*Morgan v. Morgan (1963) 220 Cal. App. 2d 665, 675, 34 Cal. Rptr. 82*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that plaintiff's cause of action for contract damages is based on a contract that is void because the defendant was a minor at the time it was made, and the contract relates to an interest in real property, relates to personal property not under the defendant's immediate possession or control, or delegates a power [*see Fam. Code § 6701* (restating former Civ. Code § 33)]. Optional Paragraph D is for use to address the procedural issue that dissaffirmance is not required because the contract was void. Optional Paragraph E illustrates one common type of "delegation of power" that a minor cannot make: that is, an assignment of wages.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a defendant seeks to raise this contention. For example, it may be used by defendant in supporting a motion for summary judgment made on the ground that the underlying contract is void under *Fam. Code § 6701*.

If a minor's contract neither relates to real property nor relates to personal property not under the minor's immediate possession and control and does not delegate a power, the contract is not void, but it is subject to the right of the minor to disaffirm the contract before he or she reaches the age of majority or within a reasonable time thereafter, with the exception of certain type of contracts [*see Fam. Code §§ 6700, 6710*]. For further discussion see *§ 50.171[2][a]* and *[c]*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised in support of a defendant's motion for summary judgment, the memorandum would include an analysis of the supporting and opposing papers showing that there are undisputable facts showing that the contract was of a type deemed void under *Fam. Code § 6701*.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender). For discussion and forms relating to the minors and contracts, see California Forms of Pleading and Practice, Ch. 365, *Minors: Contract Actions* , (Matthew Bender).

[d] Related Memoranda

These memoranda may be combined, when appropriate, with the memoranda *set out in § 50.171*.

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Disaffirmance Is Not Necessary

In ***Hakes Inv. Co. v. Lyons*** *(1913) 166 Cal. 557, 137 P. 911* , the plaintiff sued to quiet title to certain real property. The plaintiff's grantor and the defendant were at one time co-owners of the property, each having an undivided half-interest. The defendant then executed a deed purporting to convey his half-interest to the plaintiff's grantor for a consideration of one dollar. At the time he executed the deed, the defendant was 14 years old. The defendant did not attempt to disaffirm or repudiate the transaction until he filed his answer to the quiet title action, which was 35 years after the deed was executed and 28 years after he had attained the age of majority (which, at that time, was 21 years old). The trial court rendered judgment for the plaintiff.

The Supreme Court reversed. The question of whether the plaintiff had title depended on whether the defendant was required to disaffirm the deed within a reasonable time after coming of age, in order to render it ineffectual and avoid the transfer of title to the plaintiff. Under the common law preceding the enactment of former Civ. Code § 33, the contracts described by that section [*see Fam. Code § 6701* (restating former Civ. Code § 33)] would be deemed absolutely void, with no necessity to disaffirm them to avoid their apparent effect (*166 Cal. 557, 560)* . It logically follows that the provisions of former Civ. Code § 35 concerning disaffirmance of contracts made by a minor under 18 years old [*see Fam. Code § 6710* (restating former Civ. Code § 35)] were to be understood as intended to refer solely to contracts other than those described in former Civ. Code § 33, and it was not the purpose to make a disaffirmance necessary to avoid a contract of a minor relating to real property, or to personal property not in his or her immediate possession or control, or delegating a power (*166 Cal. 557, 560-561)* . Since the deed was absolutely void, the doctrine of ratification had no application, since the effect of a ratification is to preclude a party from afterward disaffirming a contract, which implies that the contract would be binding but for the disaffirmance. When, however, the contractis not binding in any event, but is utterly void from the beginning, no ratification can make it valid (*166 Cal. 557, 561)* .

[b] Void Contracts Are Not Ratifiable

Hakes Inv. Co. v. Lyons *(1913) 166 Cal. 557, 137 P. 911* , is discussed in [a], *above*.

[c] Direction to Pay Wages to Another Is Void

In ***Morgan v. Morgan*** *(1963) 220 Cal. App. 2d 665, 34 Cal. Rptr. 82* , the plaintiff sued to recover the amounts of payroll checks issued to him when he was under 18 years of age under a contract of employment as an actor. The plaintiff was employed by the defendant studio when he was 12 years old to play a role in a television series. The written employment contract was approved on a petition to the superior court, pursuant to former Civ. Code § 36 [*see Fam. Code § 6751* (restating former Civ. Code § 36)]. Pursuant to another contract approved by the court, the plaintiff's mother relinquished all right to compensation paid to the plaintiff pursuant to the acting contract. Thereafter, pursuant to the employment contract, the plaintiff received payroll checks. Some of these checks were delivered by the studio to a management agency that endorsed the checks, at the plaintiff's written direction, and issued its own checks to the plaintiff for the same amount, less a commission for its services. By one of the counts of his complaint, the plaintiff sought to recover from the studio and from the agency the amount of the checks issued by the studio. The trial court denied the plaintiff recovery on this count, except for the amount of the commission retained by the agency.

The court of appeal, affirming on another ground, held that the plaintiff's authorization to the agency to endorse the checks was a delegation of power and therefore void under former Civ. Code § 33 [*see Fam. Code § 6701* (restating former Civ. Code § 33)] (*220 Cal. App. 2d 665, 674)* . Because the delegation of power was void and not necessary to the accomplishment of the purpose of the contract to have the plaintiff's wages paid to him through the medium of checks, the agency's endorsement of the plaintiff's name on the checks was unauthorized, and the payment of the checks by the bank did not discharge the studio's obligation to the plaintiff (*220 Cal. App. 2d 665, 674-675)* . The studio had not extinguished its obligation to pay the plaintiff's wages by delivering the checks to the agency merely because the plaintiff had directed the studio to pay his wages to the agency. Even assuming that the direction to deliver the checks to

the agency and the related oral direction to the agency to endorse and cash them constituted a direction to pay the wages to the agency, the studio was, nevertheless, not relieved of its obligation for wages, because the plaintiff's right to wages was not personal property in his possession and his direction topay the wages to another constituted an assignment of a chose in action, which was void (*220 Cal. App. 2d 665, 675)* .

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5-50 California Points & Authorities § 50.171

§ 50.171 Contract Was Disaffirmed by Minor

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE DEFENDANT WAS A MINOR AT THE TIME THE CONTRACT WAS MADE, AND THE DEFENDANT DISAFFIRMED THE CONTRACT PURSUANT TO FAMILY CODE SECTION 6710.

A. Minors Defined. [*See [1][a], Paragraph A, above.*]

B. Minor's Power to Disaffirm Contracts. Except as otherwise provided by statute, the contract of a minor may be disaffirmed by the minor, either before his or her majority or within a reasonable time afterwards, or, in case of his or her death within that period, may be disaffirmed by his or her heirs or personal representatives (*Fam. Code § 6710*).

C. Disaffirmance Is Rescission. Disaffirmance of an executed or executory contract by a minor, whether declared before or after majority, has the effect of a rescission (*Warner Bros. Pictures v. Brodel (1948) 31 Cal. 2d 766, 771, 192 P.2d 949*).

D. Restoration of Consideration Is Not Necessary. A minor who disaffirms a contract pursuant to *Family Code Section 6710* (formerly *Civil Code Section 35*) may do so without restoring or offering to restore to the other party the consideration received by the minor under the contract (*see Tracy v. Gaudin (1930) 104 Cal. App. 158, 161, 285 P. 720*).

E. Manner of Disaffirming Contract. Disaffirmance of a contract by a minor may be made by any act or declaration, and express notice to the other party is not necessary (*Celli v. Sports Car Club of America, Inc. (1972) 29 Cal. App. 3d 511, 517, 105 Cal. Rptr. 904*).

[*Optional*] **F. Minor May Not Be Estopped From Disaffirming Contract.** A minor cannot be estopped to disaffirm a contract while the minor is under the age of majority (*Morgan v. Morgan (1963) 220 Cal. App. 2d 665, 675, 34 Cal. Rptr. 82*). In order to operate as an estoppel, the acts allegedly estopping the minor to disaffirmthe contract must occur after the minor has reached the age of majority (*Lee v. Hibernia Sav. & L. Soc'y (1918) 177 Cal. 656, 660, 171 P. 677*).

[*Optional*] **G. Mature Appearance Does Not Estop Minor From Disaffirming Contract.** A minor is not estopped to disaffirm a contract because of having had a mature appearance at the time of making the contract (*Lee v. Hibernia Sav. & L. Soc'y (1918) 177 Cal. 656, 660, 171 P. 677*).

[*Optional*] **H. False Representation of Age Does Not Preclude Disaffirmance.** A minor is not estopped to disaffirm a contract because he or she falsely represented his or her age at the time of making the contract (*Lee v. Hibernia Sav. & L. Soc'y (1918) 177 Cal. 656, 660, 171 P. 677* ; *Williams v. Leon T. Shettler Co. (1929) 98 Cal. App. 282, 283, 276 P. 1065*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that, in an action for contract damages, the defendant effectively disaffirmed the contract as one made while the defendant was a minor [*see Fam. Code § 6710*]. See also discussion in [c], *below*.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a defendant seeks to raise this contention. For example, it may be used by defendant in supporting a motion for summary judgment made on the ground that the underlying contract has been disaffirmed under *Fam. Code § 6710*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised in support of a defendant's motion for summary judgment, the memorandum would include an analysis of the supporting and opposing papers showing by undisputable facts that the contract was disaffirmed by defendant under *Fam. Code § 6710*.

[c] Minor's Power to Disaffirm Certain Contracts

If a minor's contract involves real property, personal property not under the minor's immediate possession and control, or a delegation of a power, that contract is void and need not be disaffirmed [*see Fam. Code § 6701*; *Hakes Inv. Co. v. Lyons (1913) 166 Cal. 557, 560-561, 137 P. 911* ; see *§ 50.170*]. If a minor's contract involves none of these things, the contract is not void, but it is subject to the right of the minor to disaffirm the contract before he or she reaches the age of majority or within a reasonable time thereafter [*see Fam. Code §§ 6700, 6710*]. Certain contracts are made expressly not disaffirmable on the ground of minority:

- Contracts expressly authorized by statute [*Fam. Code § 6711*].
- Contracts for necessaries [*Fam. Code § 6712*; *see § 50.180*].
- Contracts relating to the minor's services as an actor or in professional sports or relating to literary or artistic compositions [*Fam. Code § 6750 et seq.*; *see § 50.181*].

In addition, a number of sections in the Family Code provide that a minor's consent to the rendering of certain specified

medical and psychiatric services cannot be disaffirmed on the ground of minority [*see Fam. Code § 6920 et seq.*]. The sections do not expressly indicate whether a minor may disaffirm a contract to pay for the services, and no reported appellate decision has considered the question. Thus, it is unclear whether these provisions create additional exceptions to the minor's power to disaffirm his or her contracts or whether the provisions were intended only to shield the provider of the services from tort liability when the services are provided without the consent of the minor's parent or guardian.

Emancipated minors are considered adults for purposes of contracts [*see Fam. Code § 7050(e)*].

Under former Civ. Code § 35, in all cases other than those specified in former Civ. Code §§ 36 and 37 [*see Fam. Code §§ 6711, 6712, 6750 et seq.*], "the contract of a minor, if made whilst he is under the age of eighteen may be disaffirmed by the minor himself, either before his majority or within a reasonable time afterwards; or, in case of his death within that period, by his heirs or personal representatives; and if the contract be made by the minor whilst he is over the age of eighteen, it may be disaffirmed in like manner upon restoring the consideration to the party from whom it was received, or paying its equivalent." Restoration of consideration was thus required to accompany disaffirmance of a contract made by a minor who was more than 18 years old, but not when the minor was under that age [*see Burnand v. Irigoyen (1947) 30 Cal. 2d 861, 865, 186 P.2d 417]* . In 1971, the age of majority was lowered to 18, and former Civ. Code § 35 was amended to eliminate the references to the minor's age. Although no case interpreted former Civ. Code § 35 after its amendment, the language of *Fam. Code § 6710* is identical to that formerly applied only to minors under the age of 18. Thus, apparently, a minor need not restore consideration furnished to him or her pursuant to a contract that he or she has disaffirmed.

[d] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender). For discussion and forms relating to the minors and contracts, see California Forms of Pleading and Practice, Ch. 365, *Minors: Contract Actions* , (Matthew Bender).

[e] Related Memoranda

These memoranda may be combined, when appropriate, with the memoranda *set out in § 50.170*.

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[f] Opposing Memoranda

The memoranda *in §§ 50.180* and *50.181* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Disaffirmance Is Rescission

The facts and procedural background of ***Warner Bros. Pictures v. Brodel*** *(1948) 31 Cal. 2d 766, 192 P.2d 949* , are discussed in *§ 50.181[3][a]*. The Supreme Court noted that a minor's disaffirmance, whether declared before or after majority, of a contract, whether executed or executory, under former Civ. Code § 35 has the effect of a rescission (*31 Cal. 2d 766, 771)* .

[b] Restoration of Consideration Is Not Necessary

In ***Tracy v. Gaudin*** *(1930) 104 Cal. App. 158, 285 P. 720* , the plaintiff, as administrator of a decedent's estate, sued to recover a sum paid by the decedent, then a minor under the age of 18 years, to the defendant as the price of an automobile. At the time the contract was made, the decedent was under the care of a court-appointed guardian. The guardian had deposited a sum of money belonging to the decedent in a bank. When the guardian withheld permission to use that money to buy an automobile,the decedent forged the guardian's signature and obtained the money, with which he bought the car from the defendant. A few days later, the minor traded in the car to another person as part payment on a more expensive car. The decedent died a month later, and the plaintiff was appointed administrator of his estate. At no time did either the decedent or the plaintiff restore, or offer to restore to the defendant, the automobile that the decedent had bought from him, or its value. The trial court rendered judgment for the plaintiff.

The court of appeal affirmed. Except in certain specified instances not applicable in this case, a contract of a minor under the age of 18 years could be disaffirmed by the minor, or by his personal representatives in case of the minor's death, and returning the consideration received by the minor was implicitly not required (*104 Cal. App. 158, 160)* . Thus, because the decedent was under the age of 18 years at the time he paid the defendant for the automobile, his personal representative could disaffirm the contract and recover the money without restoring, or offering to restore, the consideration to the defendant (*104 Cal. App. 158, 161)* .

[c] Manner of Disaffirming Contract

In ***Celli v. Sports Car Club of America, Inc.*** *(1972) 29 Cal. App. 3d 511, 105 Cal. Rptr. 904* , three plaintiffs, one of whom was a minor, sued for personal injuries sustained while they were spectators at an automobile race operated and sponsored by the defendants. The plaintiffs, who had been admitted to the infield area of the race track pursuant to a pit pass issued by the defendants, were injured when, during a practice run, a car left the track and skidded into the infield area, striking the plaintiffs. The trial court rendered judgment for each plaintiff. On appeal, the defendants contended that the trial court had erred in failing to admit the pit passes into evidence on the issues of liability and assumption of risk. The passes purported to release the defendants from liability for any injury caused by an accident or any other occurrence.

The court of appeal affirmed. The release agreements in any event were invalid and unenforceable as to the minor, who was nine years old at the time of the accident. Under former Civ. Code § 35 then applicable, a contract of a minor made while under the age of 18 could be disaffirmed by the minor himself either before his majority or within a reasonable time thereafter [*see Fam. Code § 6710* (restating former Civ. Code § 35)]. The disaffirmance could be made by any act or declaration, and express notice to the other party was unnecessary; the filing of an action was sufficient (*29 Cal. App. 3d 511, 517)* . On this ground alone, the trial court did not err in excluding the pit passes signed by or on behalf of the minor (*29 Cal. App. 3d 511, 517-518)* .

[d] Minor Is Not Estopped From Disaffirming Contract

In ***Lee v. Hibernia Sav. & L. Soc'y*** *(1918) 177 Cal. 656, 171 P. 677* , the plaintiff sued to have a mortgage and deed of trust on real property owned by the plaintiff declared void on the ground that the plaintiff was a minor under the age of 18 at the time she executed these instruments. The plaintiff had executed the instruments to secure loans made by the defendants, without informing the defendants that she was under 18 years of age. Thereafter, when the defendants threatened to foreclose the instruments because of the plaintiff's default in making the loan payments, the defendants were informed that the plaintiff had been under the age of 18 years when the instruments were executed. The plaintiff falsely represented that she would be 18 within a month and promised that if they would forgo sale of the property on account of the default and advance to her and her mother an additional sum secured by the deed of trust, the plaintiff would ratify and confirm the trust deed after she reached majority. Thereafter, the plaintiff executed an instrument purporting to ratify the trust deed and falsely swearing that she was over 18 years of age. The trial court found that the

defendants had been deceived by the affidavit as to the plaintiff's age; at the time the trust deed was executed, the plaintiff had had the physical appearance and mentality of an adult woman. The trial court, however, rendered judgment for the plaintiff. On appeal, the defendants contended that the findings of fact showed that the plaintiff should be estopped from asserting that she was under 18 years old at the time the trust deed was executed and at the time she purportedly ratified the trust deed.

The Supreme Court affirmed. The trial court had specifically found that the plaintiff was under 18 years of age at the time she executed the instruments and, hence, was incapable of making the trust deed. Although some act that is the equivalent of a new contract may in some cases act as an estoppel to disaffirm the contract, nevertheless, the acts must be performed after the minor reaches an age when she has capacity to act in order to operate as an estoppel. It would nullify the plain provisions of former Civ. Code §§ 33 and 35 [*see Fam. Code §§ 6701, 6710* (restating former Civ. Code §§ 33 and 35)] to hold that a minor under 18 years of age is, because of her mature appearance and false representations as to her age, estopped to disaffirm a conveyance of real estate without restoring the consideration received by her (*177 Cal. 656, 660)* .

The facts and procedural background of ***Morgan v. Morgan*** *(1963) 220 Cal. App. 2d 665, 34 Cal. Rptr. 82* , are discussed in *§ 50.170[3][c]*. The defendants contended that the plaintiff was estopped to disaffirm the transaction. In rejecting this contention, the court of appeal noted that, in that case, all of the elements of estoppel were present if the right to disaffirm were to be asserted by an adult; however, the defendants had cited no authority holding that a minor may be estopped to assert the rightgiven him or her by former Civ. Code § 35 [*see Fam. Code § 6710* (restating former Civ. Code § 35)] to disaffirm his contract. The court observed that all authorities that had been called to its attention [*see, e.g.,* *Lee v. Hibernia Sav. & L. Soc'y (1918) 177 Cal. 656, 660, 171 P. 677* , discussed *above*] hold to the contrary (*177 Cal. 656, 171 P. 677)* .

[e] Mature Appearance Does Not Estop Minor From Disaffirming Contract

Lee v. Hibernia Sav. & L. Soc'y *(1918) 177 Cal. 656, 171 P. 677* , is discussed in [d], *above*.

[f] False Representation of Age Does Not Preclude Disaffirmance

Lee v. Hibernia Sav. & L. Soc'y *(1918) 177 Cal. 656, 171 P. 677* , is discussed in [d], *above*.

In ***Williams v. Leon T. Shettler Co.*** *(1929) 98 Cal. App. 282, 276 P. 1065* , the plaintiff, who was a minor, bought an automobile from the defendant under an installment contract. In partial payment of the price, the plaintiff delivered another automobile and a sum of cash to the defendant. Twelve days thereafter, the plaintiff disaffirmed the contract and demanded that the defendant return the automobile and cash to the plaintiff, in part, because the plaintiff was a minor. When the defendant refused to do so, the plaintiff commenced an action to recover the consideration furnished by him. The defendant later assigned the contract to a finance company. The trial court rendered judgment for the plaintiff. On appeal, the defendant contended that the plaintiff should not have been permitted to disaffirm the contract because at the time the agreement was made, the plaintiff had falsely represented to the defendant seller that he was 22 years old.

The court of appeal affirmed. Neither former Civ. Code § 35 [*see Fam. Code § 6710* (restating former Civ. Code § 35)] nor any other statutory provision contained any intimation that fraud of the nature practiced by the plaintiff could have the effect of preventing the minor from disaffirming the contract (*98 Cal. App. 282, 283)* .

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[Reserved]

§§ 50.172[Reserved]

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5-50 California Points & Authorities § 50.180

§ 50.180 Minor Is Not Permitted to Disaffirm Certain Contracts for Necessaries

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE CONTRACT WAS ONE BY WHICH THE DEFENDANT AGREED TO PAY THE REASONABLE VALUE OF THINGS ACTUALLY FURNISHED TO AND NECESSARY FOR THE SUPPORT OF THE _____ [DEFENDANT *or* DEFENDANT'S FAMILY], WHICH WAS MADE BY THE DEFENDANT WHEN HE/SHE WAS NOT UNDER THE CARE OF A PARENT OR GUARDIAN ABLE TO PROVIDE FOR THE DEFENDANT OR HIS/HER FAMILY, AND WHICH IS THEREFORE NOT SUBJECT TO DISAFFIRMANCE ON THE GROUND OF THE DEFENDANT'S MINORITY.

A. Contracts for Necessaries Are Not Subject to Disaffirmance. A contract, otherwise valid, that is made during minority and while the minor is not under the care of a parent or guardian who is able to provide for the minor or his or her family, by which the minor agrees to pay the reasonable value of things necessary for his or her support, or that of his or her family, cannot be disaffirmed on the ground of minority, either during minority or thereafter, if those things have been actually furnished to the minor or to his or her family (*Fam. Code § 6712*).

B. Implied Contract to Pay for Necessaries. An obligation on the part of a minor to pay for necessaries furnished to the minor or his or her family on his or her own credit is implied in law, if not otherwise prohibited. A contract by a minor to pay for necessaries actually furnished to him or her is not inherently invalid, whether the contract is express or implicit (*Burnand v. Irigoyen (1947) 30 Cal. 2d 861, 867, 868, 186 P.2d 417*).

[*Optional*] **C. Lodging Is Necessary.** Lodging is necessary. If shelter or lodging is furnished to a minor, and a promise to pay for it can be inferred from the circumstances, the minor is liable for its reasonable value (*see Burnand v. Irigoyen (1947) 30 Cal. 2d 861, 867, 186 P.2d 417*).

[*Optional*] **D. Attorney's Services Are Necessary.** The services of an attorney rendered to a minor in a proceeding personal to him or her are necessaries of life of the minor, and a promise by the minor to pay the attorney for the reasonable value of the services is implied in law (*Leonard v. Alexander (1942) 50 Cal. App. 2d 385, 387-389, 122 P.2d 984*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that, in an action for contract damages, the defendant, although aminor at the time of contracting, may not not disaffirm the contract on the ground of minority, because the contract is one for necessaries and is expressly excepted from disaffirmance on that ground [*see Fam. Code § 6712*].

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a plaintiff seeks to raise this contention. For example, it may be used by plaintiff in opposing a motion for summary judgment made on the ground that the underlying contract has been disaffirmed under *Fam. Code § 6710*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised in support of a plaintiff's opposition to a motion for summary judgment, the memorandum would include an analysis of the supporting and opposing papers showing that there is, at least, a triable issue on whether defendant may disaffirm the contract on grounds of minority, in that the contract falls within the exception set out in *Fam. Code § 6712*.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender). For discussion and forms relating to the minors and contracts, see California Forms of Pleading and Practice, Ch. 365, *Minors: Contract Actions* , (Matthew Bender).

[d] Related Memoranda

These memoranda may be combined, when appropriate, with the memoranda *set out in § 50.181*.

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.171* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Implied Contract to Pay for Necessaries

In ***Burnand v. Irigoyen*** *(1947) 30 Cal. 2d 861, 186 P.2d 417* , the plaintiff and her husband made a contract to convey a residence to the defendant, then a minor, and her mother, brother, and stepfather. After taking possession of the property, the purchasers defaulted in their performance on the contract. The plaintiff brought an action in ejectment, after the commencement of which the purchasers surrendered possession of the property. Thereafter, the plaintiff sued to quiet title to the property. The defendant filed a cross complaint based on her disaffirmance of the contract, for recovery of payments made on the purchase price. On the issues presented by the cross complaint, the trial court concluded that the defendant was not entitled to recover anything paid under the contract.

The Supreme Court affirmed. As to the express contract for purchase of the property, although a minor under the age of 18 was entitled, on disaffirmance, to recover all benefits paid under the contract, it was incumbent on the defendant to show that she had made payments on the contract executed by her before she could recover (*30 Cal. 2d 861, 866-867)* . The record in this case indicated that the defendant's parents, and not the defendant, had made all of the payments. Moreover, even if the defendant had made some of the payments, an obligation on the part of a minor to pay for necessaries furnished to him or her and his or her family on his or her own credit is implied in law, if otherwise not prohibited. Lodging is necessary. If shelter or lodging has been furnished to a minor, and a promise to pay is implicit in the circumstances, the minor will be liable for the reasonable value, unless statutory prohibitions apply (*30 Cal. 2d 861, 867)* . The policy of the law of California that protects minors against their own improvidence does not extend to depriving others of the reasonable value of necessaries that they have furnished to minors who have the capacity to contract for those necessaries, since the law recognizes that minors must have their needs provided-for (*30 Cal. 2d 861, 867-868)* . Thus, there is no invalidity inherent in a minor's contract to pay for necessaries actually furnished to him, whether that contract is express or implied (*30 Cal. 2d 861, 868)* . In this case, the trial court had found, on sufficient evidence, that the parents of the minors were unable to provide shelter, and the home that they occupied and the reasonable rental value were necessary for the support of the minors. The record showed that the rental value of the property exceeded the amounts paid under the contracts, and there was no showing that a home of the class occupied by the members of the family was not in accord with their station and requirements, or that the amounts paid to the plaintiff did not represent he reasonable rental value for the period of occupancy (*30 Cal. 2d 861, 868)* .

[b] Lodging Is Necessary

Burnand v. Irigoyen *(1947) 30 Cal. 2d 861, 186 P.2d 417* , is discussed in [a], *above*.

[c] Attorney's Services Are Necessary

In ***Leonard v. Alexander*** *(1942) 50 Cal. App. 2d 385, 122 P.2d 984* , an attorney sued to recover for services rendered to the defendant, then a minor, in an action for damages caused by medical malpractice. The plaintiff had originally been hired by the defendant and his mother to represent the plaintiff in the action on a contingent fee, but, after the defendant and his mother expressed dissatisfaction with the plaintiff's services, another attorney was substituted. The plaintiff agreed to the substitution without prejudice to his rights to attorney's fees for services previously rendered in the event the defendant ultimately recovered. After the defendant reached majority, he compromised the claim and received a sum of money in settlement of the claim. The trial court rendered judgment for the defendant in the action by the attorney for recovery of fees.

The court of appeal reversed. The general rule concerning the fees of attorneys for services rendered to a person under disability to contract is that the services are usually considered necessaries, and a promise to pay for them is implied in law when they are rendered in a proceeding personal that individual (*50 Cal. App. 2d 385, 388)* . The services rendered by the plaintiff in this case were for necessaries of life of the minor, and their reasonable value was recoverable from him (*50 Cal. App. 2d 385, 389)* .

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5-50 California Points & Authorities § 50.181

§ 50.181 Minor Is Not Permitted to Disaffirm Certain Court-Approved Contracts

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE CONTRACT WAS APPROVED BY THE SUPERIOR COURT PURSUANT TO _____ [FORMER CIVIL CODE SECTION 36 *or* FAMILY CODE SECTION 6751] AND IS THEREFORE NOT SUBJECT TO DISAFFIRMANCE ON THE GROUND OF THE DEFENDANT'S MINORITY AT THE TIME THE CONTRACT WAS MADE.

[*EITHER*]

A. Court-Approved Contracts for Artistic or Creative Services Are Not Subject to Disaffirmance. A contract or agreement, otherwise valid, that is made during minority, by which the minor isemployed or agrees to render artistic or creative services, cannot be disaffirmed on the ground of minority, either during the actual minority of the person entering into the contract or thereafter, if the contract or agreement has been approved by the superior court (*Fam. Code §§ 6750(a)(1), 6751(a)*). For this purpose, "artistic or creative services" include, but are not limited to, services as an actor, actress, dancer, musician, comedian, singer, stunt-person, voice-over artist, or other performer or entertainer, or as a songwriter, musical producer or arranger, writer, director, producer, production executive, choreographer, composer, conductor, or designer (*Fam. Code §§ 6750(a)(1), 6751(a)*).

[*OR*]

A. Court-Approved Contracts Relating to Literary, Musical, or Dramatic Properties Not Subject to Disaffirmance. A contract or agreement, otherwise valid, that is made during minority, by which the minor agrees to

buy, otherwise obtain, sell, lease, license, or otherwise dispose of, literary, musical, or dramatic properties (either tangible or intangible) or any rights in those properties for use in motion pictures, television, the production of sound records, the legitimate or living stage, or otherwise in the entertainment field, cannot be disaffirmed on the ground of minority, either during the actual minority of the person entering into the contract or thereafter, if the contract or agreement has been approved by the superior court (*Fam. Code §§ 6750(a)(2), 6751(a)*).

[*OR*]

A. Court-Approved Contracts for Services in Sports Are Not Subject to Disaffirmance. A contract or agreement, otherwise valid, that is made during minority, by which the minor is employed or agrees to render services as a participant or player in a sport cannot be disaffirmed on the ground of minority, either during the actual minority of the person entering into the contract or thereafter, if the contract or agreement has been approved by the superior court (*Fam. Code §§ 6750(a)(3), 6751(a)*).

[*CONTINUE*]

[*Optional*] **B. Court Approval of Contract Precludes Disaffirmance During and After Minority.** When a court approves a contract pursuant to the statute, the minor cannot disaffirm the contract during his or her minority or thereafter (*see Warner Bros. Pictures v. Brodel (1948) 31 Cal. 2d 766, 770-771, 192 P.2d 949*).

[*Optional*] **C. Approval Encompasses Options for Extension.** When court approval of a contract is given pursuant to the statute, it extends to the whole of the contract and all of its terms and provisions, including but not limited to, any optional or conditional provisions in the contract for extending, prolonging, or terminating the contract (*see Warner Bros. Pictures v. Brodel (1948) 31 Cal. 2d 766, 770-771, 192 P.2d 949*).

[*EITHER*]

[*Optional*] **D. Plaintiff Is Minor's Employer.** If a minor is employed or agrees to render services directly for any person or entity, then that person or entity is considered the minor's employer [*Fam. Code § 6750(b)(1)*].

[*OR*]

[*Optional*] **D. Plaintiff Is Minor's Employer.** If a minor's services are being rendered through a third-party individual or personal services corporation, then the person to whom or entity to which that third party is providing the minor's services is considered the minor's employer [*Fam. Code § 6750(b)(2)*].

[*OR*]

[*Optional*] **D. Plaintiff Is Minor's Employer.** If a minor renders services as an extra, background performer, or in a similar capacity through an agency or service that provides one or more of those performers for a fee, then the agency or service is considered the minor's employer [*Fam. Code § 6750(b)(3)*].

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that in an action for contract damages, the defendant, although a minor at the time of contracting, may not not disaffirm the contract on the ground of minority, because the contract is one for the performance of artistic or creative services, or for the performance of services as an athlete, or for the purchase, sale, or other disposition of literary, musical, or dramatic properties, in support of the contention that the defendant could not disaffirm the contract on the ground of being a minor at the time the contract was made. The contention is based on the fact that the contract was approved by the superior court pursuant to *Fam. Code § 6751* and is therefore not subject to disaffirmance on the ground of the minority.

Optional Paragraph B is for use when attempted disaffirmance occurred after the minor has attained majority. Optional Paragraph C is for use whenthe attempted disaffirmance related to an extension, termination, or other option, condition, or provision. Optional Paragraph D is for use when the plaintiff is one of the following [*Fam. Code § 6750(b)*]:

- An individual or entity directly employing the minor [*see* Paragraph D, first alternative];

- An individual or entity obtaining the minor's services through a loan-out company [*see* Paragraph D, second alternative]; or

- A casting agency through which the minor's services are provided. In that case, the plaintiff is considered the minor's employer [*see* Paragraph D, third alternative].

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a plaintiff seeks to raise this contention. For example, it may be used by plaintiff in opposing a motion for summary judgment made on the ground that the underlying contract has been disaffirmed.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised in support of a plaintiff's opposition to a motion for summary judgment, the memorandum would include an analysis of the supporting and opposing papers showing that there is, at least, a triable issue on whether defendant is precluded from disaffirming the contract by application of *Fam. Code § 6751*.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender). For discussion and forms relating to the minors and contracts, see California Forms of Pleading and Practice, Ch. 365, *Minors: Contract Actions* , (Matthew Bender). See also California Legal Forms, Ch. 100B, *Contracts and Employment of Minors* (Matthew Bender).

[d] Related Memoranda

These memoranda may be combined, when appropriate, with the memoranda *set out in § 50.180*.

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publicationin drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.170* or *50.171* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Court Approval of Contract Precludes Disaffirmance During and After Minority

In ***Warner Bros. Pictures v. Brodel*** *(1948) 31 Cal. 2d 766, 192 P.2d 949* (decided under former Civ. Code § 36), a producer of motion pictures made a contract with the defendant, then a minor, by which the defendant agreed to perform dramatic services exclusively for the plaintiff during the term of the contract. The contract provided for a one-year term and gave the plaintiff six separate options to extend the contract for additional successive one-year periods at successively higher salary rates. The contract was submitted to and approved by the superior court pursuant to former Civ. Code § 36 [*see Fam. Code §§ 6750(a)(1), 6751* (restating former Civ. Code § 36)]. The defendant performed her obligations under the agreement for the first year, and when the plaintiff elected to exercise the first three options, she continued to perform for three additional years. Before the fifth year, the defendant reached her majority. When the plaintiff notified the defendant of its election to exercise its fourth option, the defendant replied that she was disaffirming the contract and would perform no further services for the plaintiff. The plaintiff then sued to enjoin the defendant from performing for other motion picture producers. The trial court sustained demurrers to the complaint and dismissed the action. On appeal, the defendant contended that under former Civ. Code § 36, the minor's statutory right to disaffirm the contract was precluded only for the period of minority, and the minor could still disaffirm the contract within a reasonable time after majority.

The Supreme Court reversed. Former Civ. Code § 35 granted the power of disaffirmance only in cases other than those specified in former Civ. Code §§ 36 and 37 [*see Fam. Code §§ 6711, 6712, 6750, 6751*]. Moreover, former Civ. Code § 36 conferred on the superior courts the power, by their approval of contracts of minors, to remove from the obligations incurred the uncertainty that otherwise attends contract obligations of a minor because of the right of disaffirmance [*see Fam. Code §§ 6712, 6750, 6751*]. Disaffirmance of a contract, executed or executory, whether declared before or after majority, has the effect of a rescission. If former Civ. Code § 36 prohibited disaffirmance of a contract approved by the court duringminority only, it would not remove the uncertainty attending the right of disaffirmance but would only prolong it, since a minor who intended to disaffirm the contract would have to leave the matter in suspense until reaching majority (*31 Cal. 2d 766, 771)* .

[b] Approval Encompasses Options for Extension

Warner Bros. Pictures v. Brodel *(1948) 31 Cal. 2d 766, 192 P.2d 949* , is discussed in [a], *above*. The point is now reflected in *Fam. Code § 6751(b).*

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[Reserved]

§§ 50.182[Reserved]

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5. Unconscionable Contract

5-50 California Points & Authorities § 50.190

§ 50.190 Recovery Is Precluded by Unconscionability Doctrine

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE CONTRACT IS UNCONSCIONABLE AS APPLIED TO DEFENDANT IN LIGHT OF ITS TERMS AND ALL THE EVIDENCE PRESENTED AS TO ITS COMMERCIAL SETTING, PURPOSE, AND EFFECT.

A. Right to Present Evidence Regarding Unconscionability. When it is claimed or appears to the court that a contract or any provision of it may be unconscionable, the parties must be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect (*Civ. Code § 1670.5(b)*; *Perdue v. Crocker National Bank (1985) 38 Cal. 3d 913, 926, 928-929, 216 Cal. Rptr. 345, 702 P.2d 503* ; *see U.S. Roofing, Inc. v. Credit Alliance Corp. (1991) 228 Cal. App. 3d 1431, 1450, 279 Cal. Rptr. 533*).

B. Indicia of Unconscionability. Under California law, the doctrine of unconscionability has a procedural and a substantive element. Procedural unconscionability turns on adhesiveness--a set of circumstances in which the weaker or "adhering" party is presented a contract drafted by the stronger party on a take it or leave it basis. Substantive unconscionability involves basic fairness of the agreement. Both elements must appear in order to invalidate a contract or one of its individual terms. These elements, however, need not be present in the same degree. The more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa. (*Little v. Auto Stiegler (2003) 29 Cal. 4th 1064, 1071-1072, 1076, 130 Cal. Rptr. 2d 892, 63 P.3d 979* ; *Armendariz v. Foundation Health Psychcare Service, Inc. (2000) 24 Cal. 4th 83, 113-114, 6 P.3d 669*).

[*Optional*] **C. Contract of Adhesion Defined.** The term "contract of adhesion" signifies a standardized contract that, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract orreject it. The adhering party's freedom to choose not to contract at all is irrelevant. The

question is whether he or she is free to negotiate and alter the printed terms of the proffered agreement. A signature card, drafted by the bank and offered to the customer without negotiation, is a classic example of a contract of adhesion (*Perdue v. Crocker National Bank (1985) 38 Cal. 3d 913, 924-925, 216 Cal. Rptr. 345, 702 P.2d 503* ; *Pardee Construction Company v. Superior Court (2002) 100 Cal. App. 4th 1081, 1086-1087, 123 Cal. Rptr. 2d 288* ; *Flores v. Transamerica Homefirst, Inc. (2001) 93 Cal. App. 4th 846, 853-855, 113 Cal. Rptr. 2d 376* ; *Parr v. Superior Court (1983) 139 Cal. App. 3d 440, 444, 188 Cal. Rptr. 801*).

[*Optional*] **D. Test for Enforceability of Adhesion Contract.** [*See § 50.200[1], Paragraph A.*]

[*Optional*] **E. Unconscionability Applied to Commercial Code Transactions.** Although California did not adopt Uniform Commercial Code Section 2-302, the identical language has been enacted as *Civil Code Section 1670.5*, which applies to all contracts, including those governed by the Commercial Code. Thus, when nonnegotiable terms on preprinted form agreements combine with disparate bargaining power, resulting in the allocation of commercial risks in a socially or economically unreasonable manner, the concept of unconscionability as codified in Uniform Commercial Code Sections 2-302 and 2-719, Subdivision 3, furnishes legal justification for refusing enforcement of the offensive result (*U.S. Roofing, Inc. v. Credit Alliance Corp. (1991) 228 Cal. App. 3d 1431, 1447-1448, 279 Cal. Rptr. 533* ; *A & M Produce Co. v. FMC Corp. (1982) 135 Cal. App. 3d 473, 484-485, 493, 186 Cal. Rptr. 114*).

[*Optional*] **F. Relevant Considerations Regarding Unconscionability of Price Term.** Factors generally considered in determining whether a price term is reasonable are the basis and justification for the charge, the price being paid by other similarly situated consumers in similar transactions, the price that would be determined in a competitive business environment, whether any competition existed for the goods or services, the inconvenience imposed on the seller, the true value of the goods or services, the buyer's absence of a meaningful choice, the sophistication of the buyer, and whether deceptive practices are involved (*Civ. Code § 1670.5(b)*; *Perdue v. Crocker National Bank (1985) 38 Cal. 3d 913, 926-929, 216 Cal. Rptr. 345, 702 P.2d 503* ; *Truta v. Avis Rent A Car System (1987) 193 Cal. App. 3d 802, 820-821, 238 Cal. Rptr. 806*).

[*Optional*] **G. Market Price Set by Oligopoly Is Subject to Scrutiny.** While it is unlikely that a court would find a price set by a freely competitive market to be unconscionable, the market price set by an oligopoly is not immune from scrutiny (*Perdue v. Crocker National Bank (1985) 38 Cal. 3d 913, 927, 216 Cal. Rptr. 345, 702 P.2d 503*).

[*Optional*] **H. Unconscionability of Warranty Disclaimer.** [The specific provisions of *Commercial Code Section 2316* do not foreclose the application of *Civil Code Section 1670.5* or *Commercial Code Section 2719, Subdivision (3)*, to warranty disclaimer provisions. Thus, an unconscionable warranty disclaimer may be denied enforcement despite its technical compliance with *Commercial Code Section 2316*]. It is patently unreasonable to assume that a buyer would willingly take a standardized, mass-produced product from an industry seller without any performance standards. A disclaimer of warranties that leaves nothing guarantied about what the product will do and thus undermines the fundamental basis for the contract is commercially unreasonable and may be unconscionable. This is especially true in a transaction involving an inexperienced buyer, since the seller's representations as to the product's performance are absolutely necessary to allow the buyer to make an intelligent choice among the competitive options available (*A & M Produce Co. v. FMC Corp. (1982) 135 Cal. App. 3d 473, 491-492, 186 Cal. Rptr. 114*).

[*Optional*] **I. Unconscionable Limitation or Exclusion of Consequential Damages Under Commercial Code.** Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is invalid unless it is proved that the limitation is not unconscionable. Limitation of consequential damages when the loss is commercial is valid unless it is proved that the limitation is unconscionable. It is a commercial reality that a breach of seller's warranties makes consequential damages not merely reasonably foreseeable but explicitly obvious (*Com. Code § 2719(3)*; *A & M Produce Co. v. FMC Corp. (1982) 135 Cal. App. 3d 473, 492, 186 Cal. Rptr. 114*).

[*Optional*] **J. Unconscionability Is Question of Law.** The question of whether a contact or clause is unconscionable is one of law. [Thus, it is error to submit the matter to a jury.] (*U.S. Roofing, Inc. v. Credit Alliance Corp. (1991) 228 Cal. App. 3d 1431, 1447-1448, 279 Cal. Rptr. 533* ; *A & M Produce Co. v. FMC Corp. (1982) 135 Cal. App. 3d 473, 489, 186 Cal. Rptr. 114*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that the contract at issue in an action for contract damages is unconscionable and is therefore not unenforceable on that ground [*see Civ. Code § 1670.5(b)*].

The form includes the following optional memoranda:

- Optional Paragraph C defines a contract of adhesion, although unconscionability may be relevant in other situations [*see, e.g., Com. Code § 2719(3)*]. Optional Paragraphs C and D apply when the contract at issue is a contract of adhesion.

- Optional Paragraph E describes the relationship between the Civil Code provisions and Commercial Code provisions relating to unconscionability and may be relevant when the contract is governed by the Commercial Code.

- Optional Paragraph F is for use when a price term is claimed to be unconscionable.

- Optional Paragraph G should be used when a price term is claimed to be unconscionable and the defendant establishing the price is part of an oligopoly.

- Optional Paragraph H is for use when the provision claimed to be unconscionable is a disclaimer of warranty.

- Optional Paragraph I sets forth the provisions of the Commercial Code governing enforcement of provisions excluding or limiting consequential damages. If the facts involved personal injury in the case of consumer goods, the optional second sentence may be used. The optional third sentence may be used when commercial losses are involved. If the facts involve both a breach of warranty and an exclusion or limitation of consequential damages, the last optional sentence applies.

- Optional Paragraph J may be used to argue that the question of unconscionability is one of law, and it is error to submit the matter to a jury.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a defendant seeks to raise this contention. For example, it may be used by defendant in supporting a motion for summary judgment made on the ground that the underlying contract is unconscionable.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised in support of a defendant's motion for summary judgment, the memorandum would include an analysis of the supporting and opposing papers showing that, given the undisputed facts, the court may find as a matter of law that the contract is unconscionable.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender). For discussion and forms relating to the enforcement or nonenforcement of arbitration provisions, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

[d] Related Memoranda

For memoranda concerning unconscionability of arbitration provisions, see Ch. 20A, *Arbitration: Resistant* . For memoranda addressing the unconscionability of exculpatory clauses, releases, assumptions of the risk, and waivers, when used as defenses to a tort cause of action for negligence, see Ch. 165, *Negligence* .

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.200* or *§ 50.201* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Right to Present Evidence Regarding Unconscionability

The facts and procedural background of ***Perdue v. Crocker National Bank*** *(1985) 38 Cal. 3d 913, 216 Cal. Rptr. 345, 702 P.2d 503* , arediscussed in *§ 50.431[3][a]*. In reversing the sustaining of the demurrer with respect to the second cause of action, which sought a judicial declaration that NSF charges were oppressive and unconscionable, the Supreme Court noted that *Civ. Code § 1670.5(b)* requires that the parties be afforded a reasonable opportunity to present evidence as to the commercial setting, purpose, and effect of the contract (*38 Cal. 3d 913, 928-929)* .

The facts and procedural background of ***U.S. Roofing, Inc. v. Credit Alliance Corp.*** *(1991) 228 Cal. App. 3d 1431, 279 Cal. Rptr. 533* , are discussed in [d], *below* [*see also* discussion in [b], *below*]. The court stated that a determination of unconscionability involves various factual considerations, including the business conditions in which the contract was formed, the relative bargaining power of the parties, their reasonable expectations, and the commercial reasonableness of the risk allocation as provided in the agreement. The court of appeal concluded, however, that in this case the defendant lessor's disclaimer of warranties was not unconscionable (*228 Cal. App. 3d 1431, 1450)* .

[b] Indicia of Unconscionability

In ***Little v. Auto Stiegler*** *(2003) 29 Cal. 4th 1064, 130 Cal. Rptr. 2d 892, 63 P.3d 979* , an employee of an auto dealership claimed that he was demoted and then terminated for reporting warranty fraud. He brought an action for tortious demotion and termination in violation of public policy, breach of an implied contract of continued employment, and breach of the implied covenant of good faith and fair dealing. Plaintiff had signed mandatory arbitration agreements that permitted either party to appeal an arbitration award of more than $50,000 to a second arbitrator. The employer's motion to compel arbitration initially was granted, then denied upon reconsideration following the decision in *Armendariz v. Foundation Health Psychcare Services Inc. (2000) 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669* , discussed *below* (*29 Cal. 4th 1064, 1069-1071)* .

The court of appeal reversed, finding that the arbitration agreement was not unconscionable, and the California Supreme Court granted review. The Supreme Court held that the appellate arbitration provision was unconscionable. It recapitulated the principles of unconscionability set forth in *Armendariz*. With respect to the procedural element, the court found that the arbitration agreement was adhesive (*29 Cal. 4th 1064, 1071)* . The court then stated that one kind of substantively unconscionable provision occurs when the party imposing arbitration mandates a post-arbitration proceeding, either judicial or arbitral, wholly or largely to its benefit at the expense of the party on which the arbitration is imposed (*29 Cal. 4th 1064, 1071-1072)* . In this case, the $50,000 award threshold inordinately benefitted defendants, with no legitimate commercial need other than the employer's desire to maximize its advantage in the arbitration process. The court therefore concluded that the arbitral appeal provision in this particularagreement was unconscionably one-sided and could not be enforced (*29 Cal. 4th 1064, 1073-1074)* . However, the court determined that the offending provision could be severed. Unlike the agreement in *Armendariz,* this contract involved only a single provision that was unconscionable--the one sided arbitration appeal--and no contract reformation was required. The offending provision could be severed and the rest of the arbitration agreement left intact (*29 Cal. 4th 1064, 1074-1076)* .

The facts and procedural background of ***Armendariz v. Foundation Health Psychcare Services, Inc.*** *(2000) 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669* are discussed in *Ch. 20, Arbitration: Compelling, § 20.23[3][a]*. In *Armendariz*, the California Supreme Court reversed an order compelling arbitration, concluding that the arbitration provision relied on was unconscionable and unenforceable. Citing *A & M Produce Co. v. FMC (1982) 135 Cal. App. 3d 473, 486-487, 186 Cal. Rptr. 114* , discussed *below*, the Court stated that unconscionability has both a procedural and a substantive element. The former focuses on oppression or surprise due to unequal bargaining power, and the latter focuses on overly harsh or one-sided results. Although procedural and substantive unconscionability both must be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability, they need not be present in the same degree. Essentially a sliding scale is invoked; the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa (*24 Cal. 4th 83, 113-114)* .

Applying the above principles to the case, the Court first determined that the pre-employment arbitration "agreement" at issue in the case was adhesive. This "agreement" was imposed on employees as a condition of employment and there was no opportunity to negotiate (*24 Cal. 4th 83, 115-116)* . With respect to substantive unconscionability, the employees contended that the contract required only employees to arbitrate their wrongful termination claims against the employer, but did not require the employer to arbitrate claims it may have against the employees. The Court agreed that there must be a "modicum of bilaterality" in an arbitration agreement. The unconscionable one-sidedness of the arbitration agreement was compounded in this case by the fact that it did not permit the full recovery of damages for employees, while placing no such restriction on the employer (*24 Cal. 4th 83, 121)* . With respect to severability of the unconscionable provisions, the Court found that two factors weighed against severance of the unlawful provisions. First, the arbitration agreement contained more than one unlawful provision--it had both an unlawful damages provision and an unconscionably unilateral arbitration clause. Such multiple defects indicate a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage. In other words,given the multiple unlawful provisions, the trial court did not abuse its discretion in concluding that the arbitration agreement was permeated by an unlawful purpose. Second, in the case of the agreement's lack of mutuality, permeation was indicated by the fact that there was no single provision a court could strike or restrict in order to remove the unconscionable taint from the agreement. Rather, the Court would have to reform the contract, not through severance or restriction, but by augmenting it with additional terms. Because the Court was unable to cure this unconscionability through severance or restriction and was not permitted to cure it through reformation and augmentation, it must void the entire agreement (*24 Cal. 4th 83, 124-125)* .

[c] Contract of Adhesion Defined

The facts and procedural background of ***Perdue v. Crocker National Bank*** *(1985) 38 Cal. 3d 913, 216 Cal. Rptr. 345, 702 P.2d 503* , are discussed in *§ 50.431[3][a]*. Although the bank conceded that the signature card was a contract of adhesion, the Supreme Court noted that the term contract of adhesion signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it. A signature card, drafted by the bank and offered to the customer without negotiation, is a classic example of a contract of adhesion (*38 Cal. 3d 913, 924-925)* .

The facts and procedural background of ***Pardee Construction Company v. Superior Court*** *(2002) 100 Cal. App. 4th 1081, 123 Cal. Rptr. 2d 288* , are discussed in [b], *above*. In *Pardee*, the court of appeal held that the superior court properly concluded that the real estate purchase agreements were contracts of adhesion. Citing the criteria set forth in *Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669* , discussed in [b], *above*, the court of appeal found that the contract provision presented each entry-level home buyer with a "take it or leave it" proposition. The buyers were unlikely to have significant economic bargaining power against the developer, and little choice other than to sign the agreement (*100 Cal. App. 4th 1081, 1086-1087)* .

In ***Flores v. Transamerica Homefirst, Inc.*** *(2001) 93 Cal. App. 4th 846, 113 Cal. Rptr. 2d 376* , a senior citizen couple filed suit against their lender for unfair business practices with respect to a reverse mortgage on their home. The lender petitioned to compel arbitration pursuant to clauses contained in the loan agreement. The plaintiffs opposed the petition on the ground that the underlying loan documents were unconscionable. The trial court denied the petition, finding the arbitration clauses to be unconscionable and unenforceable pursuant to the then-recent decision of the California Supreme Court in *Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669* (discussed under [b], *above*). The court of appeal affirmed. The appellate court stated that an analysis of unconscionability begins with an inquiry into whether the contract was a contract of adhesion, *i.e.*, a standardized contract imposed on the subscribing party without an opportunity to negotiate the terms. The court noted that a finding of a contract of adhesion is essentially a finding of procedural unconscionability. The court found that the arbitration clauses contained in the loan agreement and deed of trust constituted a contract of adhesion. The lender had superior bargaining strength, plaintiffs were offered no opportunity to negotiate, plaintiffs were required to sign the standardized loan documents to obtain the reverse mortgage and plaintiffs were told that they had no real choice of alternate lenders. In sum, the facts indicated that the arbitration agreement was imposed on plaintiffs on a "take it or leave it" basis. The arbitration agreement was a contract of adhesion and thereby procedurally unconscionable. Substantive unconscionability focuses on the one-sidedness of the contract terms. In the context of an arbitration agreement, the agreement is unconscionable unless there is a "modicum of bilaterality" in the arbitration remedy. The court found no bilaterality, and concluded that the unilateral obligation to arbitrate was so one-sided as to be substantively unconscionable (*93 Cal. App. 4th 846, 853-855)* . The court refused to sever the invalid provisions. Because it was faced with an arbitration agreement in which no single provision could be stricken to remove the unconscionable taint, the court affirmed the trial court's order denying the lender's motion to compel arbitration (*93 Cal. App. 4th 846, 857-858)* .

In ***Parr v. Superior Court*** *(1983) 139 Cal. App. 3d 440, 188 Cal. Rptr. 801* , a bank customer and shareholder sought a writ of mandate to vacate the trial court's order compelling arbitration of his dispute with the bank. Although the writ did not issue, because the arbitration clause was found not to be unconscionable and was found to be within the plaintiff's reasonable expectations, the court of appeal considered the contract between the parties and found it to be a contract of adhesion. In setting forth the criteria for a contract of adhesion, the court of appeal noted that the adhering party's freedom to choose not to contract at all is irrelevant. The question is whether he or she is free to negotiate and alter the printed terms of the proffered agreement (*139 Cal. App. 3d 440, 444)* .

[d] Unconscionability Applied to Commercial Code Transactions

In ***U.S. Roofing, Inc. v. Credit Alliance Corp.*** *(1991) 228 Cal. App. 3d 1431, 279 Cal. Rptr. 533* , a buyer-lessee of a crane sued the manufacturer and the financing lessor. The manufacturer knew that the crane was being purchased for

lease and sale to the plaintiff. In fact, the purchase was negotiated between the manufacturer and the plaintiff. The manufacturerreferred the plaintiff to two arrangers of credit, one of whom became the financing lessor. The lease disclaimed all implied and express warranties from the financing lessor to the lessee. The plaintiff never returned the certificate of acceptance because it never received the full package. The financing lessor paid the manufacturer the full purchase price, less two deposits that the plaintiff had made to the manufacturer. The crane was out of service for several months for repairs, during which time it could not be made to conform and remained unsafe. The plaintiff stopped making payments under the lease when the defect was discovered. The jury found the crane to be defective, and judgment was rendered for the plaintiff against both the manufacturer and the financing lessor on the ground of breach of warranty. On appeal the defendant lessor contended that the disclaimer was valid because it comported with the requirements of *Com. Code § 2316*.

The court of appeal reversed the judgment against the financing lessor because it found the disclaimer to be valid. The judgment against the manufacturer was remanded on the issue of damages. The financing lessor had validly disclaimed all warranties, and the plaintiff's only remedies were against the manufacturer. The plaintiff had the right, as against the manufacturer, to revoke acceptance as soon as the defect appeared. The court stated that, although California did not adopt U.C.C. § 2-302, which permits the court to refuse to enforce any provision of a contract that it finds unconscionable as a matter of law, the doctrine of unconscionability is recognized in California as a common law doctrine and has thus been applied by courts in the absence of specific statutory authority (*228 Cal. App. 3d 1431, 1447)* . Further, language identical to U.C.C. § 2-302 was enacted as *Civ. Code § 1670.5*. A warranty disclaimer is subject to this doctrine (*228 Cal. App. 3d 1431, 1448)* .

The plaintiff in ***A & M Produce Co. v. FMC Corp.*** *(1982) 135 Cal. App. 3d 473, 186 Cal. Rptr. 114* , had purchased a weight-sizing machine from the defendant. The machine was to be used to harvest the plaintiff's first tomato crop. After speaking with two of the defendant's representatives on two occasions, the plaintiff placed an order on a standard form, which was printed on both sides and contained the same terms as the form contract he later received, and paid a $5,000 deposit. The defendant's engineering department analyzed the layout of the plaintiff's packing shed and compiled a list of equipment that was sent to the plaintiff on a form contract. The reverse of the two-sided contract (signatures were on the front side) in bold print disclaimed all warranties and in smaller print disclaimed all liability for consequential damages. The total bill was $32,000. A 20-foot extension to the packing shed was required to house the equipment. The machine did not have a speed control, so tomatoes backed up, overflowed and fell on the ground, and were thus bruised, which made them susceptible to fungus. The entire crop was essentially ruined. The plaintiff offeredto return the machine. The defendant rejected the offer and demanded payment of the balance owing. The plaintiff sued for breach of express and implied warranties. Judgment was rendered for the plaintiff for the net sum of $255,000 plus attorney's fees. On appeal the defendant conceded that *Com. Code § 2719* allows a court to declare a consequential-damages limitation unconscionable, but the defendant contended that the provisions of *Com. Code § 2316*, relating to wording and interpretation of warranty disclaimers, foreclosed application of any other statute to the warranty disclaimer.

The court of appeal affirmed. Although California had not adopted U.C.C. § 2-302, the identical language was enacted as *Civ. Code § 1670.5*, which applies to all contracts, including those governed by the Commercial Code (*135 Cal. App. 3d 473, 484-485, 493)* . Thus, an unconscionable warranty disclaimer may be denied enforcement despite technical compliance with *Com. Code § 2316* (*135 Cal. App. 3d 473, 484)* .

[e] Relevant Considerations Regarding Unconscionability of Price Term

The facts and procedural background of ***Perdue v. Crocker National Bank*** *(1985) 38 Cal. 3d 913, 216 Cal. Rptr. 345, 702 P.2d 503* , are discussed in *§ 50.431[3][a]*. In reversing the sustaining of a demurrer with respect to the second cause of action, which sought a judicial declaration that NSF charges were oppressive and unconscionable, the Supreme Court reviewed the cases setting forth the considerations relevant to whether a price is reasonable or unconscionable. Those factors include, but are not limited to, the basis and justification for the charge, the price being paid by other similarly situated consumers in similar transactions, the inconvenience imposed on the seller, the true value of the goods

or services, the buyer's absence of meaningful choice, the sophistication of the buyer, and whether deceptive practices are involved (*38 Cal. 3d 913, 926-929)* .

In ***Truta v. Avis Rent A Car System*** *(1987) 193 Cal. App. 3d 802, 238 Cal. Rptr. 806* , the plaintiff alleged that the price for collision damage waivers in the standardized, nonnegotiable adhesion contracts offered by car rental companies was far in excess of the price that would be determined in a competitive business environment, that on an annualized basis the rate charged was two times the amount of insurance provided, and that no competition existed between the defendants for the insurance. The trial court sustained the defendant's demurrer.

The court of appeal reversed with respect to the plaintiffs' claims of unconscionability related to the price of the collision damage waivers. The court discussed indicia of unconscionability in general, saying that unconscionability encompasses both procedural abuses in the contract formation and substantive abuses relating to the terms of the contract, such asunexpectedly harsh terms manifested in the form of price disparity. Coincidence of both forms would be necessary to a finding of unconscionability. The court cited *A & M Produce Co. v. FMC Corp. (1982) 135 Cal. App. 3d 473, 486, 186 Cal. Rptr. 114* (discussed in [d], *above*), for the proposition that unconscionability generally includes situations in which there is an absence of meaningful choice on the part of one of the parties, together with contract terms that are unreasonably favorable to the other party (*193 Cal. App. 3d 802, 819)* . Regarding unconscionability of the price, the allegations were sufficient indicia of unconscionability to survive a demurrer (*193 Cal. App. 3d 802, 820-821)* .

[f] Market Price Set by Oligopoly Is Subject to Scrutiny

The facts and procedural background in ***Perdue v. Crocker National Bank*** *(1985) 38 Cal. 3d 913, 216 Cal. Rptr. 345, 702 P.2d 503* , are discussed in *§ 50.431[3][a]*. The Supreme Court reversed the sustaining of a demurrer with respect to the second cause of action, which sought a judicial declaration that NSF charges were oppressive and unconscionable. After reviewing the factors generally considered in determining whether a price is reasonable or unconscionable, the Court noted that while it was unlikely that a price set by competitive market forces would be found unconscionable, the same could not be said about market prices in an oligopoly. Oligopoly market prices are subject to scrutiny (*38 Cal. 3d 913, 927)* .

[g] Unconscionability of Warranty Disclaimer

The facts, procedural background, and some of the discussion in ***A & M Produce Co. v. FMC Corp.*** *(1982) 135 Cal. App. 3d 473, 186 Cal. Rptr. 114* , of the Civil Code and Commercial Code provisions applicable to warranty disclaimers are discussed in [d], *above*. Applying those principles to the facts of the case, the court of appeal pointed out that it is patently unreasonable to assume that a buyer would purchase a standardized, mass-produced product from an industry seller without any performance standards. A disclaimer of warranties that leaves nothing guarantied about what the product will do and thus undermines the fundamental basis for the contract is commercially unreasonable and may be unconscionable. This is especially true if the buyer is inexperienced, since in that situation, the seller's representations as to the product's performance are absolutely necessary to allow the buyer to make an intelligent choice among the competitive options available (*135 Cal. App. 3d 473, 491-492)* .

[h] Unconscionable Limitation or Exclusion of Consequential Damages Under Commercial Code

The facts, procedural background, and some of the discussion in ***A & M Produce Co. v. FMC Corp.*** *(1982) 135 Cal. App. 3d 473, 186 Cal. Rptr. 114* , of the Commercial Code provisions applicable to consequential-damages limitations and exclusions are discussed in *§ 50.190[3][d]*. Applying those principles to the facts of the case, the court of appeal pointed out that it is a commercial reality that a breach of the seller's warranties makes consequential damages not merely foreseeable but explicitly obvious (*135 Cal. App. 3d 473, 492)* .

[i] Unconscionability Is Question of Law

The facts and procedural background of ***U.S. Roofing, Inc. v. Credit Alliance Corp.*** *(1991) 228 Cal. App. 3d 1431, 279 Cal. Rptr. 533* , are discussed in *§ 50.190[3][d]*. The jury was instructed, "It is the position of the plaintiff that the limitation of warranties contained in the lease, as well as the measure of damages contained in the lease, are unenforceable under the doctrine of unconscionability. Said clauses shall not be valid and shall be unenforceable, if the plaintiff proves the provisions are unconscionable. The law does not precisely define what is or is not unconscionable. Unconscionability is recognized to include: An absence of meaningful choice on the part of one of the parties, together with contract terms which are unreasonably favorable to the other party." The only other proposed instruction on the issue, by the plaintiff, stated that the court had found the disclaimer unconscionable as a matter of law, but the court refused to give this instruction (*228 Cal. App. 3d 1431, 1446)* . The defendants contended that the plaintiff could not raise the issue for the first time on appeal, but the court of appeal stated that the plaintiff was contending that the instruction contained an incorrect statement of the law, and thus the issue could be raised on appeal without an objection at trial (*228 Cal. App. 3d 1431, 1446-1447)* . The question of whether a contact or clause is unconscionable is one of law [*Civ. Code § 1670.5(a)*] (*228 Cal. App. 3d 1431, 1448)* .

The facts and procedural background of ***A & M Produce Co. v. FMC Corp.*** *(1982) 135 Cal. App. 3d 473, 186 Cal. Rptr. 114* , are discussed in *§ 50.190[3][d]*. In considering whether the warranty disclaimer at issue was unconscionable, the court of appeal stated that unconscionability is ultimately a question of law, although numerous factual inquiries bear on the question (*135 Cal. App. 3d 473, 489)* .

[4] Additional Authorities

[a] Indicia of Unconscionability

In *Ting v. AT&T (9th Cir. 2003) 319 F.3d 1126, 1148-1152* , a long distance telecommunications carrier sent its customers a new consumer services agreement containing "legal remedies provisions" which were designed to limit customers' rights and remedies in the event of a dispute with the carrier, including, among other things, mandatory binding arbitration, a prohibition against class actions, and significant limitations on the right to award damages and attorney's fees. Plaintiffs brought a class action alleging that those provisions violated California's consumer protection and contract laws. The district court concluded that theprovisions violated California's law on unconscionability. The Ninth Circuit agreed with the district court that the agreement was procedurally unconscionable. The carrier mailed the agreement in a envelope that few customers realized contained a contract, and offered its terms on a take-it-or-leave-it basis. The imposition of the contract on customers without the opportunity for negotiation, modification, or waiver rendered it procedurally unconscionable (*319 F.3d 1126, 1148-1149)* . With respect to substantive unconscionability, the Ninth Circuit cited *Armendariz,* discussed in *§ 50.190[3][b],* for the requirement that an arbitration agreement must have a "modicum of bilaterality." It affirmed the district court's conclusion that the one-sided contract terms which barred class actions, imposed an arbitration fee scheme, and required any arbitration to remain confidential, rendered the contract substantively unconscionable (*319 F.3d 1126, 1149-1152)* .

In *Ferguson v. Countrywide Credit Industries, Inc. (9th Cir. 2002) 298 F.3d 778* , a woman filed a complaint against her employer and supervisor for sexual harassment and retaliation. The employer filed a petition for an order compelling arbitration of her claims. The district court denied the petition on the grounds of unconscionability and the Ninth Circuit affirmed. The appellate court found that the arbitration agreement was procedurally unconscionable, as the employee was in a position of unequal bargaining power and was presented with offending contract terms without an opportunity to negotiate (*298 F.3d 778, 784)* . Further, the agreement was substantively unconscionable, in that it was unfairly one-sided, required the employee to pay arbitration fees, and contained a one-sided discovery provision (*298 F.3d 778, 785-787)* . Finally, the court found that the agreement was so permeated with unconscionable clauses that it could not sever or limit them (*298 F.3d 778, 788)* .

In *Soltani v. Western & Southern Life Insurance Co. (9th Cir. 2001) 258 F.3d 1038* , plaintiff employees who sold life

insurance as agents for defendant insurance company brought suit alleging wrongful termination. The employer removed the suit to federal court based on diversity of citizenship and, invoking an employment contract provision requiring suits to be brought within six months of termination, moved for summary judgment on the ground that the suit was time-barred. In addition, the employer invoked another contract provision requiring that 10 days notice to be given before commencing suit in seeking summary judgment with respect to one plaintiff. The district court found that the clauses were enforceable and granted summary judgment to the employer, rejecting plaintiffs' arguments that the contractual provisions were unconscionable and therefore unenforceable. The plaintiffs filed an appeal. The Ninth Circuit first examined the enforceability of the shortened limitations provision. It used the analysis set forth in *Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669* , discussed in *§ 50.190[3][b],* to determine whether the contractual provision was unconscionable. Pursuant to that analysis, even if there is a showing of procedural unconscionability and a contract is adhesive, the court applies a sliding scale. There must be some showing of substantive unconscionability. The court held that the six-month contractual limitation was not substantively unconscionable under California law (*258 F.3d 1038, 1042-1045)* . However, the court then examined the 10-day notice provision, finding it unenforceable. As in *Armendariz,* the effect of that provision was to maximize employer advantage without reasonable justification for that arrangement. The failure to comply with the provision deprived an employee of a judicial forum and its concomitant rights (*258 F.3d 1038, 1045-1047)* .

In *Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 64 Cal. Rptr. 2d 843, 938 P.2d 903* , an HMO petitioned to compel arbitration of a medical malpractice claim asserted on behalf of a deceased plan participant. The trial court denied the petition. The court of appeal reversed. The claimant petitioned for review (*15 Cal. 4th 951, 969-971)* . The Supreme Court concluded that there was evidence to support the trial court's initial findings that the HMO engaged in fraudulent conduct justifying a denial of its petition to compel arbitration, but questions of fact remained to be resolved by the trial court before it could be determined whether the HMO's conduct was actually fraudulent. Similarly, there was a factual question as to whether the HMO's actions constituted a waiver of its right to compel arbitration. The Court therefore reversed the judgment of the court of appeal and directed it to remand the case to the trial court for factual determinations (*15 Cal. 4th 951, 960)* . On the issue of unconscionability, the Court concluded that the agreement, which was offered to the plan participant on a take-it-or-leave-it basis, had characteristics of an adhesion contract but did not on its face lack "minimum levels of integrity" and was not unconscionable (*15 Cal. 4th 951, 984-986)* .

Higgins v. Superior Court (2006) 140 Cal. App. 4th 1238, 45 Cal. Rptr. 3d 293 , raised the issue of whether an arbitration clause in a contract for a television show was unconscionable. The weaker parties were five siblings who were young and unsophisticated and had recently lost both parents. The arbitration provision appeared in one paragraph near the end of a lengthy, single-spaced document. No words were printed in bold letters or larger font, nor were they capitalized. Although the siblings were required to place their initials in boxes adjacent to six other paragraphs, no box appeared next to the arbitration provision. These facts indicated procedural unconscionability. The arbitration provision was also substantively unconscionable. It required only the siblings to submit their claims to arbitration; only the television show producers, not the siblings, could compel arbitration; and the provision barred only the siblings from seeking appellate review of the arbitrator's decision. The harsh, one-sided nature of the arbitration provision, combined with the elements of procedural unconscionability, led the court to conclude that the arbitration provision was unenforceable (*140 Cal. App. 4th 1238, 1252-1254)* .

In *Trend Homes, Inc. v. Superior Court (2005) 131 Cal. App. 4th 950* , purchasers of a subdivision home failed to present evidence sufficient to support their assertion that a provision for judicial reference as the exclusive remedy under the purchase contract was unconscionable. The court recited the evidence that was submitted on both of the issues (procedural unconscionability and substantive unconscionability) and explained why, as to each evidentiary point and also as to the entire body of evidence, the purchasers failed to carry their burden of proof (*131 Cal. App. 4th 950, 957-964*).

Crippen v. Central Valley RV Outlet (2004) 124 Cal. App. 4th 1159, 22 Cal. Rptr. 3d 189 , involved a buyer's purchase of a used motor home that was allegedly faulty. When the buyer sued the dealer, the dealer moved to compel arbitration under the terms of the dealer's standard form contract of sale. The buyer objected that the arbitration clause was unconscionable and therefore unenforceable. The court noted that unconscionability has both procedural and substantive elements, that it is the burden of the party asserting unconscionability to prove the elements, and that the more evidence there is of one element the less is required of the other (*124 Cal. App. 4th 1159, 1164-1165)* . Moreover, the mere fact that the contract was standard form did not make the contract one of adhesion, and the court found nothing inherent in the relationship between motor home buyer and seller from which to infer a great disparity of bargaining power. To the contrary, the record disclosed nothing to indicate the buyer was under any economic compulsion (*124 Cal. App. 4th 1159, 1164-1166)* .

In *Greenbriar Homes Communities, Inc. v. Superior Court (2004) 117 Cal. App. 4th 337, 11 Cal. Rptr. 3d 371* , a number of homeowners brought a construction defect action against the developer (petitioner's predecessor in interest). The purchase and sale agreements required all disputes arising out of the agreement to be determined by a judicial referee. Petitioner filed a motion to compel the court to order that the action be heard by a referee. The homeowners opposed the motion on the grounds that the provision was unconscionable and that enforcement of the provision would result in a multiplicity of lawsuits. The trial court denied the motion, but made no determination regarding whether the reference provision was unconscionable. The court of appeal issued an alternative writ of mandate for petitioner. It discussed the doctrine of unconscionability, and found that the provision was neither procedurally nor substantively unconscionable. Unlike the reference provision at issue in *Pardee Construction Co. v. Superior Court (2002) 100 Cal. App. 4th 1081, 123 Cal. Rptr. 2d 288* [discussed in *§ 50.190[3][b]*], the provision in this case was not buried in the form or physically difficult to read. It appeared where the purchaser was almost certain to see it--immediately above where the purchaser had to sign. Furthermore, unlike *Pardee*, the reference provision did not limit the purchaser's relief, and provided that the referee's fees were to be shared equally (*117 Cal. App. 4th 337, 344-346)* .

In *Abramson v. Juniper Networks, Inc. (2004) 115 Cal. App. 4th 638, 9 Cal. Rptr. 3d 422* , an employee sued his former employer, asserting breach of contract, wrongful termination, and other claims. His employment agreement contained arbitration provisions, which he challenged as unenforceable. The trial court ordered the parties to arbitration, and after several unsuccessful attempts at arbitration, ultimately entered summary judgment for the defense on the ground that plaintiff failed to exhaust his arbitration remedies. The court of appeal concluded that the arbitration agreement was unenforceable in its entirety, and reversed the judgment. It found procedural unconscionability in that plaintiff lacked equal bargaining power with respect to the arbitration agreement, which was presented on a take it or leave it basis. The court found substantive unconscionability, which was demonstrated by the extremely one-sided nature of the arbitration provision (*115 Cal. App. 4th 638, 666)* . The court further held that because illegality and unconscionability permeated the agreement, its objectionable terms could not be severed and the entire agreement was found to be void and unenforceable (*115 Cal. App. 4th 638, 668)* .

In *Harper v. Ultimo (2003) 113 Cal. App. 4th 1402, 7 Cal. Rptr. 3d 418* , plaintiff homeowners signed preprinted construction contracts with defendant to stabilize soil and re-level a pool on their property. The arbitration provisions required all controversies under the contracts to be settled in accordance with the Uniform Rules for Better Business Bureau Arbitration, which were not attached to the contracts. As a result of property damage occurring during construction, plaintiffs sued defendant for negligence, fraud, and breach of contract. Defendant brought a motion to compel arbitration, which the trial court denied. The court of appeal affirmed. It reviewed the requirement that both procedural and substantive unconscionability must be present, although not necessarily in equal amounts. The court stated, "Here both procedural and substantive unconscionability are so present that it is almost impossible to keep tripping over them." With respect to procedural unconscionability, the court found surprise and oppression by virtue of the fact that the customer's inability to receive full relief was hidden by referencing rules that were not attached to the contract. As to substantive unconscionability, the court found the arbitration provision to be even more one-sided against the customer than clauses in which other courts have found substantive unconscionability (*113 Cal. App. 4th 1402, 1406-1407)* .

In *Woodside Homes v. Superior Court (2003) 107 Cal. App. 4th 723, 132 Cal. Rptr. 2d 35* , buyers of tract homes sued the builder, who moved to compel judicial reference pursuant to a clause in the standard purchase contracts. The trial court found the provision for mandatory judicial reference to be unconscionable and unenforceable. The court of appeal granted the builder's petition for writ of mandate. It held that the provision was neither procedurally or substantively unconscionable. With respect to procedural unconscionability, there was no evidence of de facto coercion, lack of choice, or lack of sophistication on the partof the buyers. The contract was not misleading or hard to penetrate; the buyers had to initial the judicial reference paragraph separately, and the caption was not misleading (*107 Cal. App. 4th 723, 728-730)* . With respect to substantive unconscionability, the court found that none of the issues that concerned the trial court had substantial weight: the developer's power to "opt out," the lack of provision for attorney fees, the possibility that a nonjudge could be selected, the confidentiality of the transcript, or the lack of provisions for mediation. As for expense, the buyers failed to show that the fees they were likely to pay would be greater than those which would accrue in litigation before a court. With respect to waiver of the right to jury trial, both parties made such a waiver. Thus, the court held that this particular agreement for judicial reference was valid and enforceable (*107 Cal. App. 4th 723, 730-736)* .

In *O'Hare v. Municipal Resource Consultants (2003) 107 Cal. App. 4th 267, 132 Cal. Rptr. 2d 116* , an employee who had been fired sued his employer, which moved to compel arbitration pursuant to an arbitration provision contained in the employment contract. The trial court refused to enforce the arbitration provision, finding it did not meet the criteria established by case law. The court of appeal affirmed, finding the provision to be both substantively and procedurally unconscionable. Citing *Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669* , discussed in *§ 50.190[3][b]*, the court reviewed the governing legal principles used to determine unconscionability (*107 Cal. App. 4th 267, 272-273)* . Under these criteria, the court found a lack of mutuality in the arbitration agreement (*107 Cal. App. 4th 267, 274)* , and additionally determined that the costs provision applicable to the arbitration proceeding was inconsistent with the *Armendariz* requirements (*107 Cal. App. 4th 267, 279)* . Further, because unconscionability permeated the entire agreement, severance was not appropriate (*107 Cal. App. 4th 267, 279)* .

In *Pardee Construction Company v. Superior Court (2002) 100 Cal. App. 4th 1081, 123 Cal. Rptr. 2d 288* , a construction defect action, the homeowners' real estate purchase agreements contained a provision requiring all disputes to be submitted to judicial reference. Plaintiffs filed a class action suit, and defendants sought a stay and appointment of a judicial referee. Plaintiffs claimed that the parties' agreements, including the judicial reference provisions, were contracts of adhesion, unconscionable, and against public policy. The superior court denied defendants' motion, concluding that the agreements were contracts of adhesion, the provisions requiring judicial reference were unconscionable, and the agreements in their entirety were contrary to the public policy against compelling homeowners to submit construction defect claims to alternative dispute resolution. The court of appeal denied defendants' petition for a writ of mandate. It held that the purchase agreements requiring all disputes to be submitted to judicial reference were adhesive contracts fatally infected with procedural and substantive unconscionability. Citing *Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669* , discussed in *§ 50.190[3][b]*, it found the judicial reference provisions procedurally unconscionable because there was no real bargaining about those provisions, the provisions were difficult to read and misleading, and the agreements omitted mention of the economically significant matter of referee's fees (*100 Cal. App. 4th 1081, 1088-1090)* . Furthermore, because those provisions gave buyers nothing in return for their waiver of the right to a jury trial, they were so one-sided as to be substantively unconscionable (*100 Cal. App. 4th 1081, 1090-1092)* .

In *Szetela v. Discover Bank (2002) 97 Cal. App. 4th 1094, 118 Cal. Rptr. 2d 862* , a credit card account holder filed an action against the credit card company for breach of contract, breach of the implied covenant of good faith and fair dealing, misrepresentation, and deceptive business practices. Based on an arbitration clause which purportedly was added to the cardholder agreement as an insertion to the plaintiff's billing statement, the credit card company moved to compel arbitration of the claim. The trial court granted the motion, and the plaintiff appealed. He argued that the

arbitration provision, to the extent it prohibited class treatment of small individual claims, was unconscionable and unenforceable. The court of appeal agreed, issuing a writ of mandate directing the trial court to strike the portion of the arbitration clause prohibiting class or representative actions. Citing *Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669* , discussed in *§ 50.190[3][b],* the court noted that arbitration agreements are valid except upon grounds, such as unconscionability, that exist at law or in equity for revocation of the contract. It reiterated that unconscionability includes both substantive and procedural elements, which need not be present to the same degree. The more substantively oppressive the contract term, the less evidence of procedural unconscionability is required for the conclusion that the term is unenforceable, and vice versa (*97 Cal. App. 4th 1094, 1099-1100)* . The court held that the oppressive "take it or leave it" manner in which the amendment to the cardholder agreement was imposed established the necessary element of procedural unconscionability. Furthermore, the provision at issue was clearly one-sided. The manner of arbitration--prohibiting class or representative actions--violated fundamental notions of fairness and thus was substantively unconscionable (*97 Cal. App. 4th 1094, 1101-1102)* .

In *Mercurio v. Superior Court (2002) 96 Cal. App. 4th 167* , an employee and his wife sought a writ of mandate overturning thetrial court's order compelling them to arbitrate their employment-related tort claims against a securities corporation, the husband's former employer. Although the employee had misgivings and initially refused to sign a contract agreeing to arbitrate certain disputes which might arise between sales personnel and the company, he ultimately signed the contract after pressure from management. The court of appeal first stated that its review was controlled by *Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669* , discussed in [3][b], *above*. With respect to procedural unconscionability, there was no doubt that the employer used oppressive tactics to secure the employee's signature on the arbitration agreement. The economic pressure that it exerted on its employee was particularly acute since the employee was 52 years old, had just moved to California from Florida, and had only been with the company for a year. He obviously was not in a position to give up his job over an arbitration agreement which might never come into play. The court stated that given the employer's highly oppressive conduct in securing the employee's consent, the employee need only make a minimal showing of the agreement's substantive unconscionability (*96 Cal. App. 4th 167, 174-175)* . On that issue, it found that the agreement was unfairly one-sided in requiring arbitration of most claims of interest to employees, but exempting from arbitration most claims of interest to the employer. Further, the agreement failed to guarantee a neutral arbitrator (*96 Cal. App. 4th 167, 176-179)* . With respect to severability, the court again cited *Armendariz* for the general rule that if the central purpose of a contract is permeated with unconscionability, then the contract as a whole cannot be enforced. However, if unconscionability is collateral to the main purpose and the offending provisions can be excised from the contract by means of severance or limitation, then the remainder of the contract can be enforced (*96 Cal. App. 4th 167, 184-185)* . In *Mercurio,* the court found that the arbitration agreement was unenforceable because it was permeated with unconscionability and illegality, and could not be cured by excising the offending provisions. The court would have to rewrite the contract, which it lacked the power to do (*96 Cal. App. 4th 167, 185-186)* . The court therefore issued a peremptory writ of mandate directing the trial court to vacate its order compelling arbitration (*96 Cal. App. 4th 167, 187)* .

The facts and procedural background of *Flores v. Transamerica Homefirst, Inc. (2001) 93 Cal. App. 4th 846, 113 Cal. Rptr. 2d 376* , are discussed in [3][c], *above*. In that case, the court of appeal reviewed the analytic framework for determining whether a particular contractual provision is unconscionable and found the arbitration agreement in the plaintiffs' loan agreement to be both procedurally and substantively unconscionable (*93 Cal. App. 4th 846, 852-855)* . Following *Armendariz v. Foundation Health Psychcare Services, Inc*, discussed in [3][b], *above*, the court refused to sever the invalid provisions. Because it was faced with an arbitration agreement in which no single provision could be stricken to remove theunconscionable taint, the court affirmed the trial court's order denying the lender's motion to compel arbitration (*93 Cal. App. 4th 846, 857-858)* .

In *Blake v. Ecker (2001) 93 Cal. App. 4th 728, 113 Cal. Rptr. 2d 422* , an ex-employee sued her former employer and certain individuals for sexual harassment. The defendants moved to compel arbitration, their motion was granted, and plaintiff's civil action was stayed pending the arbitration. Thereafter, *Armendariz v. Foundation Health Psychcare Services, Inc., 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669* , discussed in [3][b], *above,* was decided. Defendants

moved to dismiss plaintiff's complaint, and in response plaintiff moved to vacate the order compelling arbitration, citing *Armendariz*. The trial court granted defendants' motion to dismiss and refused to consider plaintiff's motion, because it was moot after dismissal of the civil action. The court of appeal reversed. It held that the trial court, having granted defendants' motion to compel arbitration, had no jurisdiction to rule on defendants' motion to dismiss. The court also held that the trial court should have ruled on plaintiff's motion to vacate the order to compel arbitration in light of the then-recent *Armendariz* decision (*93 Cal. App. 4th 728, 733)* . The court of appeal thus remanded the case to trial court, stating that the critical question before the trial court would be whether *Armendariz* applied to make the parties' arbitration agreement unenforceable. The court of appeal found that *Armendariz* could be applied retroactively (*93 Cal. App. 4th 728, 740-741)* . It also reviewed the general principles of unconscionability set forth in *Armendariz* (*93 Cal. App. 4th 728, 741-743)* . It noted that pursuant to those principles, if an agreement is determined to contain unconscionable provisions, a court may sever those provisions and enforce the balance of the agreement. In this case, the agreement itself expressly provided for severance of provisions that resulted in plaintiff's claim of unconscionability. The trial court therefore was directed to consider these issues in deciding whether the arbitration clause was enforceable (*93 Cal. App. 4th 728, 745-747)* .

In *Marin Storage & Trucking, Inc. v. Benco Contracting and Engineering, Inc. (2001) 89 Cal. App. 4th 1042, 107 Cal. Rptr. 2d 645* , a subcontractor's employee who was injured working on a freeway construction project sued both the supplier of the crane involved in the accident and the general contractor. The crane company then cross-complained against the general contractor for express indemnity. The parties' practice, which was followed on the day of the accident, involved the crane company supplying the general contractor with a "Work Authorization and Contract" for signature at the end of any day in which the crane company had provided a crane. The form indicated the number of hours worked at a job site, noted above the signature line that it was a contract that included all terms and conditions on the reverse side, and contained an indemnification clause among other provisions on that reverse side. During trial, on its own motion, the trial court raised the issue of whether the Work Authorization and Contractcontaining the indemnification clause was an unconscionable contract of adhesion. The trial court entered judgment for the contractor on the cross-complaint, finding that the indemnification clause in the form was unenforceable because there was no mutual assent of the parties and because the clause was procedurally unconscionable.

The court of appeal reversed. It noted initially that the trial court's findings were inconsistent, as a finding of no mutual assent constituted a finding that no contract had been formed, yet a finding of unconscionability presupposes an existing contract. The court of appeal, however, construed the trial court's ruling to rest on alternative grounds. The court of appeal first concluded that the trial court erred in finding no contract was formed, based on the parties' course of conduct over the years using the contract containing the indemnity clause. The court of appeal next addressed the issue of unconscionability by reviewing the applicable principles set forth in California case law, including *A & M Produce Co. v. FMC Corp. (1982) 135 Cal. App. 3d 473, 186 Cal. Rptr. 114* , discussed in [3][d], *above*. It stated that to be unenforceable, a contract must be both procedurally and substantively unconscionable. As to procedural unconscionability, the court of appeal found no error in the trial court's conclusion that the parties' contract was one of adhesion. However, the flaw in the trial court's decision was that it ended its analysis with that determination (*89 Cal. App. 4th 1042, 1052-1054)* . As to substantive unconscionability, the standard is whether the contract terms "shock the conscience." The court concluded that the indemnification clause was not so unreasonable, unjustified, or one-sided as to shock the conscience. It stated that there is a sliding scale or balancing relationship between the two elements of unconscionability, such that the greater the degree of unfair surprise or unequal bargaining power, the less the degree of substantive unconscionability required to annul the contract, and vice versa. In this case, the procedural unconscionability was not great since the contractor had a meaningful choice in renting from other crane operators and had used the contract in question over a period of years. In light of the low level of procedural unfairness, the court concluded that a greater degree of substantive unfairness than that shown was required before the contract could be found substantively unconscionable (*89 Cal. App. 4th 1042, 1054-1057)* .

In *Bolter v. Superior Court (2001) 87 Cal. App. 4th 900, 104 Cal. Rptr. 2d 888* , franchisees brought an action against the franchisor for breach of contract. The trial court granted the franchisor's motion to compel arbitration in Utah,

pursuant to an arbitration provision in the franchise agreement. The franchisees claimed that the provision was unconscionable. The court of appeal held that under the circumstances, which included the fact that the franchisor was a large international corporation and the franchisees were small "Mom and Pop" operations, the "place and manner" arbitration clauses in franchise agreement were unduly oppressive. Theagreement required franchisees wishing to resolve a dispute to close down their shops, pay for airfare to Utah and incur costs of having counsel familiar with Utah law. The court determined, however, that those provisions could be severed from the remainder of the agreement pursuant to *Civ. Code § 1670.5*, leaving an otherwise valid and complete agreement to submit disputes to arbitration (*87 Cal. App. 4th 900, 909-911)* .

In *Pinedo v. Premium Tobacco Stores, Inc. (2000) 85 Cal. App. 4th 774, 102 Cal. Rptr. 2d 435* , an employee who claimed he was subjected to workplace harassment and discrimination because of his national origin brought a FEHA action against his employer. The defendants filed a petition to compel arbitration based on an arbitration provision in the employment agreement. The trial court denied the motion to compel arbitration and the court of appeal affirmed. The court stated that the appeal presented the same issue focused on in *Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669* , discussed in [3][b], *above*: whether the so-called "agreement" to arbitrate was so one-sided that it should not be enforced (*85 Cal. App. 4th 774, 776)* . The court found that the arbitration provision was at least as unconscionable as that presented in *Armendariz*. It precluded recovery of any and all damages contemplated within the FEHA. It also required that all costs initially be borne by the employee. The employee was further disadvantaged by being required to arbitrate in a particular city. The agreement was also inherently one-sided as it addressed only claims involving terms of employment that would normally be brought by the employee against the employer. The limitation on damages applied only to damages awarded in favor of the employee, not to damages claimed by the employer. The court therefore affirmed the order of the trial court denying compelled arbitration (*85 Cal. App. 4th 774, 780-781)* .

In *Villa Milano Homeowners Association v. Il Davorge (2000) 84 Cal. App. 4th 819, 102 Cal. Rptr. 2d 1* , the homeowners of a condominium complex filed a complaint against the developer for construction and design defects. The developer filed a petition to compel arbitration, which the trial court denied. The court of appeal affirmed. The court held that the arbitration clause contained in the CC&Rs was an unconscionable adhesion contract that was unenforceable to the extent it applied to construction and design defect claims against the developer who drafted, signed, and recorded the CC&Rs (*84 Cal. App 4th 819, 835-836)* . It was procedurally unconscionable because it was drafted and recorded by the developer years before the purchasers were involved, the individual buyers could not negotiate the terms of the CC&Rs, and the clause was buried within the CC&Rs (*84 Cal. App. 4th 819, 828-829)* . It was also substantively unconscionable, since it violated public policy expressed in both statutory and regulatory provisions governing arbitration clauses in real property sales documentation (*84 Cal. App. 4th 819, 833)* .

In *Coast Plaza Doctors Hospital v. Blue Cross of California (2000) 83 Cal. App. 4th 677, 99 Cal. Rptr. 2d 809* , a hospital filed an action against Blue Cross on numerous tort theories related to reimbursement rates paid by Blue Cross pursuant to a service agreement with the hospital. Blue Cross then filed a petition to compel arbitration pursuant to an arbitration clause in the service agreement. The hospital opposed the motion on the grounds that, among other things, the arbitration provision was unconscionable and therefore unenforceable. The trial court denied a Blue Cross motion for arbitration. The court of appeal reversed and remanded. The hospital argued that the arbitration clause was (1) procedurally unconscionable because Blue Cross was a much larger and financially stronger company than the hospital and thus was able to impose terms that were unfavorable to the hospital, and (2) substantively unconscionable because the hospital's right to discovery, which it might enjoy in a judicial proceeding, was much more restricted, thus permitting Blue Cross to engage in tortious misconduct which the hospital would be unable to uncover (*83 Cal. App. 4th 677, 687)* . The court of appeal reviewed the principles applicable to the doctrine of unconscionability as set forth in various cases, including *A & M Produce Co. v. FMC Corp. (1982) 135 Cal. App. 3d 473, 186 Cal. Rptr. 114* , discussed *above*. The evidence of unconscionability presented by the hospital included only a declaration from its attorney who had no personal involvement with negotiation of the service agreement, and two newspaper articles containing quotes from an officer of the hospital on the reasons for filing the lawsuit. The court of appeal found that

none of that material was competent evidence sufficient to establish unconscionability as a defense to mandatory arbitration (*83 Cal. App. 4th 677, 687-689)* . Even assuming that a disparity in size and certain economic considerations would permit the service agreement to be considered adhesive, the hospital made no showing that it was "surprised" by the clause imposing mandatory arbitration as the required means of dispute resolution. Further, nothing concerning the presence of the arbitration clause in the agreement would support the conclusion that it was so one-sided as to shock the conscience (a conclusion necessary for finding substantive unconscionability). Finally, the court rejected the assertion that the mere fact that opportunities for formal discovery were limited under the American Arbitration Association's rules made the arbitration agreement "one-sided" and so unfair as to shock the conscience. The court of appeal thus concluded that the hospital could not avoid arbitration on a claim of unconscionability (*83 Cal. App. 4th 677, 689-690)* .

In *Robison v. City of Manteca (2000) 78 Cal. App. 4th 452, 92 Cal. Rptr. 2d 748* , a refuse collector sought a writ of mandate directing defendant city to reinstate him to his position. Plaintiff claimed that after he tested positive for controlled stimulants in a random drug test, his employee-organization representative coerced him into executing a recovery agreement with defendant. The agreement required him to undertake asubstance-abuse treatment plan and waived his right to appeal any discipline to defendant's personnel board. The city notified him by letter, in advance of its action, that it would be firing him for failure to comply with the recovery agreement. It then fired him and noted he had waived his right to appeal to the personnel board. Plaintiff sought a writ of mandate. The trial court sustained defendant's demurrer without leave to amend and entered a judgment of dismissal. On appeal, plaintiff claimed that the circumstances under which he executed the recovery agreement constituted both "undue influence," and "unconscionability." The court of appeal found that the claim of unconscionability was lacking in merit, as plaintiff failed to establish procedural unconscionability. The only "surprise" he alleged was absence of an appeal to the personnel board if dismissed for failure to comply with the agreement. This was not a provision even remotely material to his dismissal for refusal to participate in a substance-abuse program. He did not allege he was prevented from reading the agreement upon execution, only that it was open to the signature page. The court found no evidence that these shortcomings could reasonably be overcome in an amended pleading. In the absence of any procedural unconscionability, the court did not consider substantive unconscionability (*78 Cal. App. 4th 452, 458-459)* .

In *Stirlen v. Supercuts, Inc. (1997) 51 Cal. App. 4th 1519, 60 Cal. Rptr. 2d 138* , the trial court refused to enforce a compulsory arbitration clause of an employment contract, on the grounds that it was against public policy and unconscionable. The court of appeal affirmed, holding that in the circumstances of the case, the governing state law pertaining to unconscionable contracts, *Civ. Code § 1670.5*, was not preempted by the Federal Arbitration Act [*9 U.S.C. § 1 et seq.*]. The court reviewed the judicially developed criteria for determining whether an arbitration clause is unconscionable and therefore unenforceable (*51 Cal. App. 4th 1519, 1530-1531)* . The analysis begins with the determination of whether the agreement to arbitrate is a contract of adhesion. If it is, the court must determine whether other factors operate to render it unenforceable. The court cited *A & M Produce Co. v. FMC Corp. (1982) 135 Cal. App. 3d 473, 486, 186 Cal. Rptr. 114* , discussed in [3][d], *above*, for the proposition that unconscionability has both a procedural element and a substantive element (*51 Cal. App. 4th 1519, 1531-1532)* . The court applied these criteria and determined that the agreement to arbitrate was a contract of adhesion and unconscionable. The terms of an arbitration clause in an employment contract that provides the employer more rights and greater remedies than would otherwise be available and concomitantly deprives employees of significant rights and remedies they would normally enjoy, considered in light of the commercial context in which it operates and the legitimate needs of the parties at the time it was made, was unconscionable according to the mores and business practices of the time and place (*51 Cal. App. 4th 1519, 1542)* . The Federal Arbitration Act [*9 U.S.C. § 1 et seq.*] did notpreclude a state court from finding that the arbitration clause was unconscionable and unenforceable under *Civ. Code § 1670.5* (*51 Cal. App. 4th 1519, 1552)* .

In *Olsen v. Breeze, Inc. (1996) 48 Cal. App. 4th 608, 55 Cal. Rptr. 2d 818* , a skier challenged the legality of a release from liability required as a condition for purchasing, renting, or obtaining service on ski bindings. The trial court dismissed his two claims. On appeal the plaintiff contended that the agreements skiers are required to sign are contracts of adhesion and objectively unreasonable under the circumstances presented. The court of appeal affirmed, concluding

that the use of releases in the ski industry does not violate either state unfair-competition laws or the Consumers Legal Remedies Act. Even assuming that the doctrine of unconscionability may be used affirmatively as the predicate of an unfair-competition claim, it was inapplicable. There is nothing inherently unreasonable in skiers agreeing with ski equipment distributors or service providers to allocate to skiers the risk of injury from failure of a ski binding to release properly. It is not unconscionable for ski equipment distributors and retailers to require and use the releases at issue as a condition for doing business (*48 Cal. App. 4th 608, 622-623)* .

The court of appeal in *Carboni v. Arrospide (1991) 2 Cal. App. 4th 76, 2 Cal. Rptr. 2d 845* , affirmed a finding that an interest rate of 200 percent a year was unconscionable and thus unenforceable in a loan that was exempt from usury law because it was made by a real estate broker and secured by a fourth deed of trust on the plaintiff's residence. The court held that the note and deed of trust could be enforced with an interest rate of 24 percent. After noting that neither party had found any case in which *Civ. Code § 1670.5* was applied to an interest rate, the court discussed the concept of unconscionability in general, saying that it was meant to counteract two forms of abuses, the coincidence of both being necessary for a finding of unconscionability. One abuse relates to procedural deficiencies in the contract formation process and takes the form of deception or refusal to bargain over contract terms. The second abuse involves the substantive contract terms and may include unexpectedly harsh terms such as price disparity (*2 Cal. App. 4th 76, 81)* . The procedural aspect is manifested by oppression, which refers to an inequality of bargaining power resulting in no meaningful choice for the weaker party, or surprise, which occurs when the supposedly agreed-on terms are hidden in a prolix document (*2 Cal. App. 4th 76, 81-82, 85)* . Substantive unconscionability refers to an overly harsh allocation of risks or costs that is not justified by the circumstances in which the contract was made. Normally, both procedural and substantive unconscionability must be present before a contract is held unenforceable. However, the greater the degree of substantive unconscionability, the lesser the degree of procedural unconscionability that is required to annul the contract or clause (*2 Cal. App. 4th 76* ,82). As in this case, a compelling showing of substantive unconscionability may overcome a weaker showing of procedural unconscionability (*2 Cal. App. 4th 76, 86)* . This case did not involve surprise, but, viewed in the light most favorable to the judgment, the court had to presume that the plaintiff was acting under emotional distress when the loan was negotiated (*2 Cal. App. 4th 76, 85)* . The loan was necessary to pay the plaintiff's parents' medical expenses, and the plaintiff had apparently attempted unsuccessfully to obtain a loan from other sources. The loan agreement recited that fact. Consequently, the defendant was able to offer the plaintiff the loan on a take-it-or-leave-it basis. The plaintiff had no meaningful choice and no alternative for obtaining credit (*2 Cal. App. 4th 76, 86)* .

The facts and procedural background of *U.S. Roofing, Inc. v. Credit Alliance Corp. (1991) 228 Cal. App. 3d 1431, 279 Cal. Rptr. 533* , are discussed in [3][d], *above*. The court of appeal stated that unconscionability involves both procedural and substantive aspects. The procedural element focuses on the oppression arising from an inequality of bargaining power between the parties and the surprise of a clause hidden in a printed document. The substantive element is concerned with terms that are overly harsh or one-sided (*228 Cal. App. 3d 1431, 1448)* . Recognizing that California courts had not previously considered whether a disclaimer of warranties in a financing lease was unconscionable, the defendant relied on cases from other jurisdictions. The court reviewed those cases and concluded that there was nothing per se unconscionable about a financing lessor disclaiming all express and implied warranties in equipment selected solely by the lessee-buyer, as long as the lessee has some remedy for defective (nonconforming) equipment, which in this case it did against the manufacturer (*228 Cal. App. 3d 1431, 1450)* . Because the issue of unconscionability had (erroneously) been presented to the jury, all of the relevant evidence was in the record for the court of appeal's evaluation. The disclaimer met the conspicuousness requirement of *Com. Code § 2316*, because the disclaimer was printed in red above the signature line and used the term "as is." Further, nothing suggested that the plaintiff was in an unequal bargaining position with the finance lessor. The plaintiff's principal had 30 years of experience in the roofing business, and the company had received a large government contract. Once the plaintiff decided to purchase the crane, it discussed financing with at least one other financing lessor. This was not a take-it-or-leave-it situation. The procedural element thus indicated no unconscionability (*228 Cal. App. 3d 1431, 1451)* .

The facts and procedural background of *A & M Produce Co. v. FMC Corp. (1982) 135 Cal. App. 3d 473, 186 Cal. Rptr. 114* , are discussed in [3][d], *above*. The appellate court discussed procedural unconscionability, which encompasses the analyses usually involved in defining a contract as one of adhesion and determining whether the adhering party's expectations arereasonable and, if so, whether they have been frustrated (*135 Cal. App. 3d 473, 485-487)* . Substantive unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties, together with contract terms that are unreasonably favorable to the other party. Overly harsh terms or one-sided results may be indicia of unconscionability; however, the outcome turns not only on a one-sided result but on the absence of justification for it. A contract term is suspect if it allocates the risks of the bargain in an objectively unreasonable or unexpected manner. Not all unreasonable allocations of risk are unconscionable; rather, enforceability is tied to the procedural aspects of unconscionability; that is, the greater the unfair surprise or inequality of bargaining power, the less an unreasonable risk allocation will be tolerated (*135 Cal. App. 3d 473, 487)* . Although courts have not been solicitous of businesses in the name of unconscionability, the concept should be applied to a business in situations like the one at hand, in which the plaintiff was a relatively small business while the defendant was an enormous diversified corporation. The analysis does not turn alone on size or sophistication. Some experienced but legally unsophisticated business managers may be surprised by unconscionable contract terms, and even a large corporation may have relatively little bargaining power in some circumstances (*135 Cal. App. 3d 473, 489)* . The defendant in this case knew the plaintiff's needs, perhaps better than the plaintiff, and was the only party reasonably able to prevent the plaintiff's loss by not selling a machine inadequate to the plaintiff's known needs. This type of risk allocation, namely, the shifting to one party of a risk that only the other party can avoid, is a type of risk allocation that should be subjected to special scrutiny (*135 Cal. App. 3d 473, 493)* .

[b] Contract of Adhesion Defined

In *YMCA v. Superior Court (1997) 55 Cal. App. 4th 22, 63 Cal. Rptr. 2d 612* , the YMCA sought extraordinary review of an order denying its motion for summary judgment. The trial court agreed with the plaintiff that the YMCA's release form, by which participants in a Seniors Program released the YMCA for personal injury arising from the YMCA's negligence, was invalid because it was against the public interest. The court of appeal directed the trial court to enter summary judgment for the defendant. Although an exculpatory adhesion contract will be unenforceable if it violates public policy [*see* *Tunkl v. Regents of University of California (1963) 60 Cal. 2d 92, 98-101, 32 Cal. Rptr. 33, 383 P.2d 441* (enumerating factors indicating public policy violation)], the court held that the provision signed by the plaintiff exhibited none of the coercive aspects typically found in an adhesion contract (*55 Cal. App. 4th 22, 27-28)* .

In *Central Bank v. Kaiperm Santa Clara Fed. Credit Union (1987) 191 Cal. App. 3d 186, 236 Cal. Rptr. 262* , the court of appeal affirmed ajudgment for a bank against its agent for recovery of sums paid by the bank on money orders stolen from the agent. The were not checks (because no drawer's signature was required), and Division 4 of the Commercial Code did not govern the relationship of the parties (*191 Cal. App. 3d 186, 202)* . Their relationship was governed instead by the contract between them that placed the risk of loss on the agent. Unconscionability involves both procedural and substantive elements and requires an initial showing that there has been an absence of meaningful choice on the part of one of the parties in addition to which that party must have accepted terms unreasonably favorable to the other party (*191 Cal. App. 3d 186, 204-205)* . The determination of unconscionability, although a question of law, involves various factual considerations, including the business conditions under which the contract was formed, the relative bargaining power of the parties, the reasonableness of their expectations, and the commercial reasonableness of the risk allocation provided by the agreement (*191 Cal. App. 3d 186, 205)* .

In *Izzi v. Mesquite Country Club (1986) 186 Cal. App. 3d 1309, 231 Cal. Rptr. 315* , the court of appeal reversed the trial court's order denying arbitration under a contract claimed to be adhesive. The court of appeal said that although the contract was on a standardized form, that alone was insufficient to establish its adhesive character. The record was silent on the relative bargaining powers of the parties or the availability of comparable subject matter on comparable or superior terms, and the contract was not adhesive (*186 Cal. App. 3d 1309, 1318)* .

[c] Unconscionable Limitation or Exclusion of Consequential Damages Under Commercial Code

In *Nunes Turfgrass, Inc. v. Vaughan-Jacklin Seed Co., Inc. (1988) 200 Cal. App. 3d 1518, 246 Cal. Rptr. 823* , the court of appeal affirmed a judgment for the plaintiff buyer limited only to the cost of rye grass seed. The parties had been doing business for over 20 years, and the limitation was clearly set forth on the seed packs. The court of appeal noted, however, that each case must be determined on its own facts (*200 Cal. App. 3d 1518, 1538-1539)* .

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5. Unconscionable Contract

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[Reserved]

§§ 50.191[Reserved]

California Points & Authorities

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5-50 California Points & Authorities § 50.200

§ 50.200 Adhesion Contract Is Not Unconscionable and Defendant's Expectations Are Not Reasonable

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE CONTRACT AT ISSUE IS NOT UNCONSCIONABLE AND THE ALLEGED EXPECTATIONS OF THE DEFENDANT(S) ARE UNREASONABLE.

A. Test for Enforceability of Adhesion Contract. A contract of adhesion is enforceable unless it is unconscionable or does not fall within the reasonable expectations of the weaker or adhering party (*Perdue v. Crocker National Bank (1985) 38 Cal. 3d 913, 925, 216 Cal. Rptr. 345, 702 P.2d 503* ; *Allan v. Snow Summit, Inc. (1996) 51 Cal. App. 4th 1358, 1376-1377, 59 Cal. Rptr. 2d 813* ; *San Francisco Newspaper Printing Co. v. Superior Court (1985) 170 Cal. App. 3d 438, 442, 216 Cal. Rptr. 462*).

[*Optional*] **B. Expectations of Nonparty Are Irrelevant.** The expectations of a person not a party to the contract are not relevant in determining whether an adhesion contract is or is not enforceable (*San Francisco Newspaper Printing Co. v. Superior Court (1985) 170 Cal. App. 3d 438, 442, 216 Cal. Rptr. 462*).

[*Optional*] **C. Tests for Reasonableness of Expectations.** One cannot reasonably expect a clause to mean something other than what it says; and failing to read the contract is no excuse (*San Francisco Newspaper Printing Co. v. Superior Court (1985) 170 Cal. App. 3d 438, 443, 216 Cal. Rptr. 462*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the plaintiff's contention that the contract is not unconscionable, and the defendant's expectations are unreasonable.

This form is based in part on a unique situation in which the contract at issue had been judicially interpreted in prior cases not to be unconscionable. Generally, when the issue of unconscionability has been raised, the parties have the right to present evidence as to the commercial setting, purpose, and effect of the contract [*Civ. Code § 1670.5(b)*; *see § 50.200[3][a]*].

It does not matter whether an insurance policy is labeled adhesive or not, because the canons of construction governing insurance policies are well established and have independent vitality even though the applicable principles grew out of contracts of adhesion [*Equitable Life Assurance Society v. Berry (1989) 212 Cal. App. 3d 832, 837, 260 Cal. Rptr. 819]* .

Optional Paragraph B is for use when the defendant whose expectations are not met is not a party to the contract. Optional Paragraph C is for use when the defendant's expectations are claimed to be unreasonable.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a plaintiff seeks to raise this contention. For example, it may be used by plaintiff in opposing a motion for summary judgment made on the ground that the underlying contract is unconscionable. Note that unconscionability is usually raised as a defense to enforcement of a contract, so that this form in most cases would be used by the plaintiff. However, the form may be used by a defendant in some cases, for example, when the plaintiff raises the issue of unconscionability in the context of a complaint for declaratory judgment [*see, e.g., Perdue v. Crocker National Bank (1985) 38 Cal. 3d 913, 216 Cal. Rptr. 345]* or a complaint seeking to have imposition of the challenged term held to be an unlawful practice under the Consumers Legal Remedies Act [*see, e.g., Truta v. Avis Rent A Car System (1987) 193 Cal. App. 3d 802, 238 Cal. Rptr. 806* ; *Civ. Code § 1750 et seq.*] or an unfair or unlawful business practice under *Bus. & Prof. Code § 17200* [*see, e.g., Shadoan v. World Savings & Loan Assn. (1990) 219 Cal. App. 3d 97, 268 Cal. Rptr. 207* ; *see generally* Ch. 235, *Unfair Competition*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised to oppose a defendant's motion for summary judgment, the memorandum would include an analysis of the supporting and opposing papers showing that there is a triable issue as to unconscionability or that, given undisputed facts, the court may summarily adjudicate the issue and find as a matter of law that the contract is not unconscionable.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender). For discussion and forms relating to the enforcement or nonenforcement of arbitration provisions, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

[d] Related Memoranda

In an appropriate case, these memoranda may be combined with those *set out in § 50.201*.

For forms concerning unconscionability of arbitration provisions, see Ch. 20, *Arbitration: Compelling* , and Ch. 20A, *Arbitration: Resisting* .

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a motion for summaryjudgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.190* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Test for Enforceability of Adhesion Contract

The facts and procedural background of ***Perdue v. Crocker National Bank*** *(1985) 38 Cal. 3d 913, 216 Cal. Rptr. 345, 702 P.2d 503* , are discussed in *§ 50.431[3][a]*. In reversing the sustaining of a demurrer with respect to the second cause of action, which sought a judicial declaration that NSF charges were oppressive and unconscionable, the Supreme Court quoted at length from *Graham v. Scissor-Tail, Inc. (1981) 28 Cal. 3d 807, 820, 171 Cal. Rptr. 604, 623 P.2d 165* , the general rule as to enforcement of adhesion contracts. Adhesion contracts are fully enforceable according to their terms unless certain other factors are present, which under established judicial and legislative rules operate to render it otherwise. A contract or provision that does not fall within the reasonable expectations of the weaker or adhering party will not be enforced against him or her. An equitable principle applicable to all contracts generally is that a contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or unconscionable (*38 Cal. 3d 913, 925)* .

In ***Allan v. Snow Summit, Inc.*** *(1996) 51 Cal. App. 4th 1358, 59 Cal. Rptr. 2d 813* , as a condition of enrolling in ski school, a skier signed a release in which he agreed to hold the resort and its employees harmless for any injuries incurred. After he was injured, he sued the resort for injuries he allegedly suffered during a ski lesson. The trial court granted the resort's motion for summary judgment on the basis of the skier's release and waiver. On appeal the skier contended that the release was an unconscionable, unenforceable contract of adhesion.

The court of appeal affirmed. The release agreement, which was concededly a condition precedent to permission for the skier to ski or to receive ski lessons, was an adhesion contract. However, such a characterization was only the beginning of the analysis (*51 Cal. App. 4th 1358, 1375)* . Acontract of adhesion is fully enforceable according to its terms unless certain other factors are present, which under established legal rules operate to render it otherwise. A court might preclude enforcement of an adhesion contract when the contract does not fall within the reasonable expectations of the weaker or adhering party or, even if it does, when the contract is unduly oppressive or unconscionable when considered in the context. Among the factors that affect the assessment of whether the contract was within the reasonable expectations of the adhering party are notice and the extent to which the contract affects the public interest. The notice in this case was adequate to have altered the skier's subjective expectations that the resort would be liable for negligent instruction. Furthermore, the contract did not affect the public interest (*51 Cal. App. 4th 1358, 1375-1376)* . It was not objectively unreasonable or unexpected to allocate the risk of injury entirely to the plaintiff, and the release requirement was not substantively unconscionable (*51 Cal. App. 4th 1358, 1376-1377)* .

In ***San Francisco Newspaper Printing Co. v. Superior Court*** *(1985) 170 Cal. App. 3d 438, 216 Cal. Rptr. 462* , the widow of a newspaper dealer sought a declaration that two identical dealership contracts, for two papers published by the defendant SFNA, survived the death of her husband. She was not a party to the contracts; only the SFNA and her husband were parties. The court of appeal issued a writ of mandate vacating an injunction pendente lite that prohibited the SFNA from terminating the dealership. An adhesion contract is enforceable unless it is unconscionable or does not fall within the reasonable expectations of the weaker or adhering party (*170 Cal. App. 3d 438, 442)* . Identical contracts had been the subject of prior litigation in which the fact that the dealership could not devolve by will or

intestacy was inferred from the nonassignment clause. The clause provided that the agreements were "not assignable nor transferable in whole or in part by Dealer, voluntarily, by operation of law, or otherwise" (*170 Cal. App. 3d 438, 440-441)* [*see Miller v. San Francisco Newspaper Agency (1985) 164 Cal. App. 3d 315, 317, 210 Cal. Rptr. 159]* . There is nothing unconscionable about nonassignment clauses; they are not inherently suspect and are routinely enforced (*170 Cal. App. 3d 438, 442)* .

[b] Expectations of Nonparty Are Irrelevant

The facts and procedural background of ***San Francisco Newspaper Printing Co. v. Superior Court*** *(1985) 170 Cal. App. 3d 438, 216 Cal. Rptr. 462* , are discussed in [a], *above*. The court of appeal addressed the sufficiency of the evidence. The portions of the complaint alleging that the contracts were adhesive were made on information and belief and therefore were inadequate as a matter of law (*170 Cal. App. 3d 438, 441-442)* . The widow's declaration that she expected the contracts to continue was irrelevant, as she was not a party to the contracts (*170 Cal. App. 3d 438, 442)* . Since the SFNA could not compel her to perform her husband's dutiesunder the contracts, she could not enforce them against the SFNA, even on the theory that she had a community property interest in the dealership (*170 Cal. App. 3d 438, 443)* .

[c] Tests for Reasonableness of Expectations

The facts and procedural background of ***San Francisco Newspaper Printing Co. v. Superior Court*** *(1985) 170 Cal. App. 3d 438, 216 Cal. Rptr. 462* , are discussed in [a], *above*. The court of appeal, in considering the husband's reasonable expectations, in the event a declaration admissible under *Evid. Code § 1251* regarding his expectations were to be provided, noted that the dealer could not reasonably have expected the nonassignability clause to mean anything other than what it said, it having been conclusively presumed for purposes of the lawsuit that the provision was clear and unambiguous (*170 Cal. App. 3d 438, 443)* . The court cited *Parr v. Superior Court (1983) 139 Cal. App. 3d 440, 445-446, 188 Cal. Rptr. 801* , discussed in *§ 50.190[3][c],* and *A & M Produce Co. v. FMC Corp. (1982) 135 Cal. App. 3d 473, 486, 186 Cal. Rptr. 114* , discussed in *§ 50.190[3][d],* for the proposition and reasoning that failing to read the contract does not provide an excuse for the adhering party; otherwise all contracts of adhesion would be unenforceable at the whim of the adhering party (*170 Cal. App. 3d 438, 443)* . Turning to the contract in issue, the court of appeal noted that the contract required the dealer to keep certain records, to make earnest, conscientious, and continuing efforts to promote and increase circulation, and to furnish a temporary substitute acceptable to the SFNA at the dealer's expense whenever a substitute was necessary to perform the dealer's obligations under the contract. Given those provisions that made the right to rely on the skill, energy, and initiative of the particular dealer important rights of the publisher, the court of appeal said that a dealer could not reasonably expect to be able to transfer the dealership on death when he or she could not have done so in life, even temporarily, without the SFNA's approval (*170 Cal. App. 3d 438, 443-444)* .

[4] Additional Authorities

[a] Test for Enforceability of Adhesion Contract

In *Williams v. California Physicians' Service (1999) 72 Cal. App. 4th 722, 85 Cal. Rptr. 2d 497* , plaintiffs alleged breach of contract and breach of the duty of good faith and fair dealing based on defendant Blue Shield's refusal to pay for plaintiff wife's physical therapy under defendant's health care service plan. At the time of her accident, plaintiff's service plan covered unlimited physical therapy. Blue Shield, however, later modified the plan pursuant to a written provision in the plan, reducing physical therapy services to a stated maximum per year. Blue Shield filed a cross-complaint for declaratory relief to obtain a judicial determination that plaintiffs werebound by the contract as amended. It then moved for summary judgment as to the complaint and/or the cross-complaint. Plaintiffs opposed the motion, asserting among other things that the clause relied on by Blue Shield should be held unconscionable. The trial court denied Blue Shield's motion for summary judgment as to plaintiffs' complaint but granted Blue Shield summary judgment on the cross-complaint for declaratory relief, determining that Blue Shield could reduce the benefits pursuant

to the terms of its health service agreement, which contained a clear and conspicuous statement to that effect. The parties settled their differences as to other matters and entered into a stipulated judgment in favor of Blue Shield, with plaintiffs retaining their right to appeal. The court of appeal affirmed, holding that the plan was not unconscionable since the amendments were subject to review by the Department of Corporations as required under *Health & Saf. Code § 1352.1*, and the plan clearly and conspicuously allowed for the type of reduction that took place (*72 Cal. App. 4th 722, 741-744)* .

The court of appeal in *West v. Henderson (1991) 227 Cal. App. 3d 1578, 278 Cal. Rptr. 570* , affirmed a judgment for a landlord based on a six-month limitation period in a lease. The tenant challenged the limitation as an unconscionable term. The limitation period applied only to the tenant's actions against the landlord, not to the landlord's actions against the tenant. Nevertheless, the six-month limitation period was not unconscionable; indeed, the lease was not an adhesion contract (*227 Cal. App. 3d 1578, 1585-1588)* . The circumstances of the signing of the lease were not oppressive. While the tenant had no previous business experience and was not represented by an attorney, there was time for the tenant to have consulted an attorney, and the printed lease form had "CONSULT YOUR ATTORNEY" above the signature line (*227 Cal. App. 3d 1578, 1586)* . The six-month limitation period was not standard in other commercial leases. There was no evidence that the tenant had inferior bargaining power or could not go to another lessor and get more favorable terms (*227 Cal. App. 3d 1578, 1586)* . The fact that the six-month limitation period operated only against the tenant was a lack of mutuality that made the term suspect in the analysis of the substantive aspect of unconscionability. The one-sided application of the term was justified by the fact that any pending litigation by the tenant could inhibit the lessor's ability to lease the property to another party, while pending litigation by the lessor against the lessee would probably not have the same consequences (*227 Cal. App. 3d 1578, 1588)* .

In *Izzi v. Mesquite Country Club (1986) 186 Cal. App. 3d 1309, 231 Cal. Rptr. 315* , the court of appeal reversed the trial court's order denying arbitration under a contract claimed to be adhesive. The court of appeal did not find that the contract was adhesive but noted that an adhesion contract is fully enforceable unless all or part of it falls outside the reasonable expectations of the weaker party, or it is unduly oppressive orunconscionable under applicable principles of equity (*186 Cal. App. 3d 1309, 1317)* . Even if the contract was an adhesion contract, the arbitration provision was enforceable because its provisions did not appear to conflict with the reasonable expectations of an ordinary person or to be unduly oppressive or unconscionable (*186 Cal. App. 3d 1309, 1318)* .

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Volume 5 Chapters 50-59 CONTRACTS---to---CORPORATIONS
CHAPTER 50 CONTRACTS
PART II. FORMS
B. Defenses to Breach of Contract Action
5. Unconscionable Contract

5-50 California Points & Authorities § 50.201

§ 50.201 Party Claiming Unconscionability Must Show That Alternative Sources Were Unavailable

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

UNCONSCIONABILITY OF [A PROVISION OF] THE CONTRACT IS NOT PROVABLE EXCEPT BY FACTS SUFFICIENT TO ESTABLISH THAT THE _____ [GOODS *or* SERVICES] WERE NOT AVAILABLE FROM ALTERNATIVE SOURCES WITHOUT THE OFFENDING PROVISION.

[*EITHER*]

A. Available Alternative Sources of Supply Defeat Claim of Unconscionability. Any claim of oppression may be defeated if the complaining party had reasonably available alternative sources of supply from which to obtain the desired goods or services free of the terms claimed to be unconscionable (*Dean Witter Reynolds, Inc. v. Superior Court (1989) 211 Cal. App. 3d 758, 768, 259 Cal. Rptr. 789*).

[*AND/OR*]

B. Claim of Unconscionability Must Show Unavailability of Alternative Sources of Supply. Unconscionability includes an absence of meaningful choice on the part of one of the parties, together with contract terms that are unreasonably favorable to the other party. Thus, a party challenging a contract [provision] as unconscionable cannot establish his or her lack of true bargaining power without facts indicating that he or she could not obtain more favorable terms elsewhere or from the other party by altering their agreement (*Shadoan v. World Savings & Loan Assn. (1990) 219 Cal. App. 3d 97, 102-103, 268 Cal. Rptr. 207*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that the unconscionability of a contract provision is not proved in the absence of facts showing that the goods or services could not be obtained from other sources without the challenged term being part of the transaction.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a plaintiff seeks to raise this contention. For example, it may be used by plaintiff in opposing a motion for summary judgment made on the ground that the underlying contract is unconscionable. Note that unconscionability is usually raised as a defense to enforcement of a contract, and this form in most cases would therefore be used by the plaintiff. However, the form may be used by a defendant in some cases, for example, when the plaintiff raises the issue of unconscionability in the context of a complaint for declaratory judgment [*see, e.g., Perdue v. Crocker National Bank (1985) 38 Cal. 3d 913, 216 Cal. Rptr. 345, 702 P.2d 503]* or a complaint seeking to have imposition of the challenged term held to be an unlawful practice under the Consumers Legal Remedies Act [*see, e.g., Truta v. Avis Rent A Car System (1987) 193 Cal. App. 3d 802, 238 Cal. Rptr. 806* ; *Civ. Code § 1750 et seq.*] or an unfair or unlawful business practice under *Bus. & Prof. Code § 17200* [*see, e.g., Shadoan v. World Savings & Loan Assn. (1990) 219 Cal. App. 3d 97, 268 Cal. Rptr. 207* ; *see generally* Ch. 235, *Unfair Competition*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised to oppose a defendant's motion for summary judgment, the memorandum would include an analysis of the supporting and opposing papers showing that there is a triable issue as to unconscionability based on facts, or the lack thereof, concerning the availability of alternate sources for the product, service, etc. that is the subject of the action.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender). For discussion and forms relating to the enforcement or nonenforcement of arbitration provisions, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

[d] Related Memoranda

In an appropriate case, these memoranda may be combined with those *set out in § 50.200*.

For memoranda concerning unconscionability of arbitration provisions, see Ch. 20, *Arbitration: Compelling* , and Ch. 20A, *Arbitration: Resisting* .

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.190* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Available Alternative Sources of Supply Defeat Claim of Unconscionability

In ***Dean Witter Reynolds, Inc. v. Superior Court*** *(1989) 211 Cal. App. 3d 758, 259 Cal. Rptr. 789* , a financial services corporation petitioned for a writ of mandate to vacate the trial court's order certifying the class in a class action challenging the fees charged by the corporation in connection with its self-directed IRA accounts. Three issues were before the court of appeal: (1) whether the $20 set-up fee, the $20 annual fee, and the $50 termination fee constituted unfair business practices under *Bus. & Prof. Code § 17200 et seq., (2)* whether the termination fee was unconscionable under *Civ. Code § 1670.5, (3)* and whether the termination fee was unconscionable under former Civ. Code § 1770(s) [*see Civ. Code § 1770(a)(19)*] in the Consumer Legal Remedies Act. The corporation contended that the unconscionability claims lacked merit because the representative plaintiff could have gone to a competing financial services corporation and opened an IRA free of the offending provisions.

The court of appeal issued the writ vacating the certification order. The doctrine of unconscionability has generally been recognized to include situations in which there is an absence of meaningful choice on the part of one of the parties, together with contract terms that unreasonably favorthe other party (*211 Cal. App. 3d 758, 767)* . Unconscionability presents procedural and substantive aspects, and the procedural aspect includes oppression, which refers to an inequality of bargaining power resulting in no real negotiation and the absence of meaningful choice as well as surprise, which occurs when the supposedly agreed-on terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms (*211 Cal. App. 3d 758, 767-768)* . Also relevant is the buyer's sophistication or lack of it. Substantive unconscionability consists of an allocation of risks or costs that is overly harsh or one-sided and is not justified by the circumstances in which the contract was made (*211 Cal. App. 3d 758, 768)* . Normally, both procedural and substantive unconscionability must be present before a contract will be held unenforceable. However, a relatively larger degree of one will compensate for a relatively smaller degree of the other (*211 Cal. App. 3d 758, 768)* . Any claim of oppression may be defeated if the complaining party had reasonably available alternative sources of supply from which to obtain the desired goods or services free of the terms claimed to be unconscionable. If oppression refers to the absence of meaningful choice, then the existence of a meaningful choice to do business elsewhere must tend to defeat any claim of oppression (*211 Cal. App. 3d 758, 768)* . One mark of a contract of adhesion is that was accepted on a take-it-or-leave-it basis, without opportunity for bargaining and or otherwise obtaining the desired product or service except by acquiescing in the form agreement (*211 Cal. App. 3d 758, 769-770)* . Procedural unconscionability includes the element of oppression, which depends in part on the absence of meaningful choice by a party, and even though a contract may be adhesive, the existence of meaningful alternatives available to that party in the form of other sources of supply tends to defeat any claim of unconscionability (*211 Cal. App. 3d 758, 770)* . In this case, the fact that others offered competing IRAs that lacked the challenged provisions defeated any attempt to demonstrate that the $50 termination fee was unconscionable (*211 Cal. App. 3d 758, 771)* .

[b] Claim of Unconscionability Must Show Unavailability of Alternative Sources of Supply

The plaintiffs in ***Shadoan v. World Savings & Loan Assn.*** *(1990) 219 Cal. App. 3d 97, 268 Cal. Rptr. 207* , had a loan from the defendant that contained both a prepayment penalty and a call provision that allowed the defendant to call the entire loan due and payable on six months' notice. No prepayment penalty was payable if the defendant called the loan. The plaintiffs paid the loan before maturity and paid a $5,189.18 prepayment penalty to the defendant. Then the plaintiffs sued, individually and on behalf of others similarly situated, alleging that the prepayment penalty was an unconscionable and an unfair business practice, seeking to enjoin the defendant from collecting prepayment penalties from other borrowersand seeking recovery of the prepayment penalty they had paid. The plaintiffs alleged, "Borrowers such as plaintiffs rely on banking institutions such as defendant for real estate financing. Borrowers such as plaintiffs have no bargaining power in obtaining real estate financing from banking institutions such as defendant. Plaintiffs and similar borrowers have no choice but to acquiesce to the unilateral call and prepayment penalty provisions when obtaining real estate financing from defendant. When defendant's preprinted form prepayment penalty and unilateral

call provisions are both in effect during the term of a real estate loan, the loan agreement is a contract of adhesion that is unconscionable and unlawful." The defendant's demurrer was sustained, the action was dismissed, and the defendant was awarded attorney's fees on the basis of a provision in the loan agreement.

The court of appeal affirmed and remanded for redetermination of the amount of attorney's fees awarded to the defendant. *Civ. Code § 1670.5* by its terms only provides that unconscionability is a defense to enforcement of a contract or contract term but does not speak to the case of a person who has performed or complied with the offending term and seeks restitution. However, the fact that a contractual term is unconscionable may be relevant to the question of whether a party who drafted, and seeks to enforce, the provision has committed an unfair business practice [*see Bus. & Prof. Code § 17203*, discussed in Ch. 235, *Unfair Competition*] (*219 Cal. App. 3d 97, 101)* . Unconscionability includes an absence of meaningful choice on the part of one of the parties, together with contract terms that are unreasonably favorable to the other party. The absence of meaningful choice occurs when a party has little choice but to accept the terms stated by the other party or when a party is wholly unable to obtain the same consideration on other terms, for example, automobile warranties (*219 Cal. App. 3d 97, 102)* . Here, the plaintiffs alleged no facts indicating that they were unable to receive more favorable terms from another lender, or from the defendant by paying a different interest rate or by accepting a different type of loan or one with a different term. Thus, they alleged no fact from which it could be concluded that they lacked true bargaining power. To allege that the contract was unconscionable states no more than a legal conclusion. Nor does the allegation that the agreement was an adhesion contract state facts demonstrating lack of bargaining power. An adhesion contract is fully enforceable according to its terms unless certain other facts are present. These loan provisions were not so oppressive or unreasonably favorable to the defendant as to make them unconscionable (*219 Cal. App. 3d 97, 103)* . Civ. Code § 294.9 specifically authorizes prepayment penalties, and *Fin. Code § 7504* implicitly authorizes prepayment penalties and call provisions by not including them in a list of prohibited provisions (219 Cl. App. 3d 97, 104). *Fin. Code § 7504(b)(5)(A)* and *(B)* do not mandate that the risk of changes in interest rate be equally shared by the borrower and the lender (*219 Cal. App. 3d 97, 104-105)* .The risk allocation in this case was neither objectively unreasonable nor unexpected. The type of risk allocation usually found to be unconscionable is one by which the stronger party shifts the risk of its own negligence or the defectiveness of its own product to the weaker party (*219 Cal. App. 3d 97, 105)* . It is simply less disturbing and less unexpected that a lender would shift the risk of market fluctuations to the party using the lender's money (*219 Cal. App. 3d 97, 106)* .

[4] Additional Authorities

[a] Available Alternative Sources of Supply Defeat Claim of Unconscionability

In *Crippen v. Central Valley RV Outlet (2004) 124 Cal. App. 4th 1159, 22 Cal. Rptr. 3d 189* , a buyer purchased a used motor home that was allegedly faulty. When the buyer sued the dealer, the dealer moved to compel arbitration under the terms of the dealer's standard form contract of sale. The buyer objected that the arbitration clause was unconscionable and therefore unenforceable. The buyer introduced no evidence of procedural unconscionability, but argued that unconscionability could be inferred from the dealer's standard form contract itself and from the nature of the buyer-dealer relationship. The court noted that the mere fact the contract was the dealer's standard form did not make the contract one of adhesion and that there was nothing in the dealer's contract form that showed procedural unconscionability (*124 Cal. App. 4th at 1165*). Moreover, in contrast to the relationship between a job applicant (who needs to find work) and an employer, the court found nothing inherent in the relationship between motor home buyer and seller from which to infer a great disparity of bargaining power (*124 Cal. App. 4th at 1166*). Although not expressly stated, it seems implicit in the court's discussion of this point not only that other sources of supply were available to the buyer, but that the purchase was entirely discretionary in the first place. However, this case does not go so far as to state a rule that a contract involved in a discretionary purchase can never be a contract of adhesion.

In *Freeman v. Wal-Mart Stores, Inc. (2003) 111 Cal. App. 4th 660, 3 Cal. Rptr. 3d 860* , a purchaser of a Wal-Mart shopping card alleged in his first cause of action that a service fee applicable if the card was not used within 24 months was unconscionable and thus unlawful under *Civ. Code § 1770(a)(19)*. The trial court sustained defendant's demurrer as

to this cause of action and plaintiff appealed. The court of appeal affirmed, holding that the trial court appropriately concluded that the service fee was not an unconscionable term and thus did not abuse its discretion in sustaining the demurrer. Plaintiff was not deprived of submitting evidence on the issue of unconscionability, but chose not to amend to allege additional facts establishing unconscionability. The court of appeal reviewed theprinciples of unconscionability, and concluded under these standards that the shopping card fee term was not unconscionable. Its terms were not shockingly one-sided or surprising to the customer. The card stated on the back that a monthly $1 fee would be imposed if the card was not used within 24 months. The fee would continue until the balance of the card was reduced to zero by the monthly fee, but imposition of the fee would cease upon use of the card. Plaintiff had the option of using the card within two years without incurring a fee, and after two years could terminate the fee at any time by using the card. Further, the card was not an adhesion contract. Plaintiff was not subjected to a take-it-or-leave-it situation in which there was no reasonable alternative but to accept the shopping card terms. Plaintiff could simply decline to purchase a shopping card and make purchases by other means (*111 Cal. App. 4th 660, 667-670)* .

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5-50 California Points & Authorities § 50.202

§ 50.202 Price for Goods or Services Was Not Unconscionable

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE PRICE FOR _____ [*specify item or service that plaintiff alleged was unconscionably priced*] WAS NOT UNCONSCIONABLE AS A MATTER OF LAW BECAUSE (1) THE PRICE WAS CLEARLY DISCLOSED, (2) THE PLAINTIFF HAD AN OPTION NOT TO BUY _____ [*specify item or service*], (3) THE PLAINTIFF COULD HAVE DONE BUSINESS WITH OTHER SUPPLIERS INSTEAD OF DEALING WITH THE DEFENDANT, AND (4) THERE WAS NO INDICATION OF OLIGOPOLISTIC PRICING.

Price Was Not Unconscionable. The price that a buyer is required to pay for goods or services is not unconscionable as a matter of law when (1) the price is clearly disclosed, (2) the buyer has an option not to buy the goods or services in question, (3) the buyer has a range of choices for doing business with other suppliers, and (4) there is no indication, in the pleadings or the evidence, that the market for those goods or services is an oligopoly (*Wayne v. Staples, Inc. (2006) 135 Cal. App. 4th 466, 482-483, 37 Cal. Rptr. 3d 544*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in opposition to a contention that the price for specified goods or services was unconscionable, by a party contending that the price was not unconscionable as a matter of law, under *Civ. Code § 1670.5*.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context, in which a defendant seeks to raise that contention. For example, it may be used to support a demurrer on the ground that the complaint reveals the existence of the first three salient facts (disclosure, an option not to buy, and a choice of other

suppliers) while failing to allege the existence of an oligopolistic market.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised in support of the defendant's motion for summary judgment, the memorandum would include an analysis of the supporting and opposing papers showing that undisputed facts establish that the plaintiff has conceded or cannot refute the first three salient facts and cannot prove the existence of an oligopolistic market.

[c] Related Pleading and Practice Chapters

For discussion and forms relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[c] Related Memoranda

In an appropriate case, these memoranda may be combined with those *set out in §§ 50.200* and *50.201*.

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.190* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Price Was Not Unconscionable

In ***Wayne v. Staples, Inc.*** *(2006) 135 Cal. App. 4th 466, 37 Cal. Rptr. 3d 544* , the trial court granted a retailer's summary judgment motion in an action by a consumer asserting unconscionable pricing, among other claims. The retailer, as an authorized shipping outlet for a parcel delivery service, offered declared-value insurance coverage to shipping customers and clearly disclosed the price for that coverage but did not inform customers that the price included a 100 percent markup or margin, compared to the amount that the parcel delivery service would have charged for the same coverage in dealing with the customer directly.

The court of appeal upheld the judgment for the retailer as to the customer's claim of unconscionable pricing. The pricing was not unconscionable as a matter of law under *Civ. Code § 1670.5* because the price was clearly disclosed, a customer had the option not to buy the insurance coverage, and potential customers had a wide range of choices for shipping their packages, other than dealing with the retailer. Moreover, there was no indication, either in the complaint or in the evidence, that the market for package shipping services was an oligopoly. In fact, the retailer showed that a 100 percent markup or profit margin was wholly within the range of commonly accepted notions of fair profitability (*135 Cal. App. 4th 466, 482-483)* .

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5-50 California Points & Authorities §§ 50.203-50.209

[Reserved]

§§ 50.203[Reserved]

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5-50 California Points & Authorities § 50.210

§ 50.210 Delay of Performance Is Defense When Time Is of Essence of Contract

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

BECAUSE THE CONTRACT MADE TIME OF THE ESSENCE AND THE PLAINTIFF DID NOT PERFORM IN A TIMELY FASHION, DEFENDANT'S NONPERFORMANCE IS EXCUSED.

Delay of Performance by Plaintiff When Time Is of Essence Constitutes Defense. When a contract makes it clear, unequivocal, and unmistakable that time is of the essence, failure by one party to render timely performance excuses nonperformance by the other party and may be asserted as a defense to an action by the first party for breach of the contract (*see Jozovich v. Central Cal. Berry Growers Ass'n (1960) 183 Cal. App. 2d 216, 227-228, 6 Cal. Rptr. 617* ; *Leiter v. Handelsman (1954) 125 Cal. App. 2d 243, 250-251, 270 P.2d 563*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that, in an action for contract damages, the plaintiff did not render timely performance when the contract clearly made time of the essence, and therefore defendant's breach or nonperformance is excused.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a defendant seeks to raise this contention. For example, it may be used by defendant in supporting a motion for summary judgment.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised to support a defendant's motion for summary judgment, the memorandum would include an analysis of the supporting and opposing papers such that undisputed facts show that defendant's nonperformance is excused by plaintiff's delay in performance.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

In an appropriate case, these memoranda may be combined with those *set out in § 50.211*.

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Delay of Performance by Plaintiff When Time Is of Essence Constitutes Defense

In ***Jozovich v. Central Cal. Berry Growers Ass'n*** *(1960) 183 Cal. App. 2d 216, 6 Cal. Rptr. 617* , the plaintiff contracted to build for the defendant a machine that would freeze strawberries at the rate of 2,000 pounds an hour. The contract required completion of the machine before May 1, the commencement of the strawberry season, and expressly made time of the essence. The defendant gave the plaintiff an extension until June 23 to complete the machine, but the plaintiff was unable to meet this extension. The defendant then prevented the plaintiff from working on the machine. Judgment was rendered for the plaintiff for the reasonable value of his services and equipment (*183 Cal. App. 2d 216, 218, 227)* . On appeal the defendant contended that the plaintiff's failure to complete the machine within the time specified in the contract relieved him of any duty to pay the plaintiff.

The court of appeal reversed. A reasonable time for performance of this contract, which expressly made time of the essence, had expired by June 23. Since the plaintiff failed to perform under the contract by that date, the defendant had no further obligation to the plaintiff (*183 Cal. App. 2d 216, 228, 230)* .

In ***Leiter v. Handelsman*** *(1954) 125 Cal. App. 2d 243, 270 P.2d 563* , the defendants contracted to purchase clear title to real estate owned bythe plaintiffs. The escrow was to be completed on or before 30 days from February 28. Not until after that period expired did the plaintiffs attempt to eliminate an easement on the property. When the easement was not removed by April 17, the defendants canceled the escrow and received their money back. The vendors then brought this action for damages for breach of contract. Judgment was rendered for the defendants (*125 Cal. App. 2d 243, 245, 246, 251)* .

The court of appeal affirmed. The general rule is that time is not of the essence unless it has been made so by the express terms of a contract or is necessarily so from the very nature of the contract. A contractual provision rendering time of the essence must be clear, unequivocal, and unmistakable. When time is not of the essence, compliance within a reasonable time after the specified due date constitutes compliance (*125 Cal. App. 2d 243, 250-251)* . While the evidence did not reflect that the vendors were dilatory in any respect, all of the events indicated that the purchasers

acted in good faith and not arbitrarily. The purchasers proposed to purchase clear title to real property. Within a reasonable time after the specified date, clear title was not offered to them, and they were therefore not responsible for any damages to the plaintiff caused by the plaintiff's inability to deliver clear title in a timely fashion (*125 Cal. App. 2d 243, 252)* .

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5-50 California Points & Authorities § 50.211

§ 50.211 Defendant's Failure or Delay in Performance Is Excused When Caused by Acts of Plaintiff

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE _____ [*obligor, e.g.,* DEFENDANT'S] PERFORMANCE WAS _____ [PREVENTED *or* DELAYED] BY THE ACTS OF THE _____ [*obligee, e.g.,* PLAINTIFF].

[*EITHER*]

A. Failure to Perform Is Excused When Performance Is Prevented by Obligee. The want of performance of an obligation, or of an offer of performance, in whole or in part, is excused to the extent that the performance or offer is prevented by the act of the obligee (*see Civ. Code § 1511(1)*).

[*OR*]

A. Delay in Performance Is Excused When Caused by Acts of Obligee. An obligor's delay in performance is excused to the extentthat acts of the obligee caused the delay (*see Civ. Code § 1511(1)*; *Semas v. Bergmann (1960) 178 Cal. App. 2d 758, 762, 3 Cal. Rptr. 277*).

[*Optional*] **B. Contractual Stipulation Precluding Excuse of Prevention Is Not Valid.** A provision in a contract that a promisor is not excused from late or defective performance caused by the promisee is inoperative (*Civ. Code § 1511(1)*; *Peter Kiewit Sons' Co. v. Pasadena City Junior College Dist. (1963) 59 Cal. 2d 241, 244, 28 Cal. Rptr. 714, 379 P.2d 18*).

[*Optional*] **C. Failure to Apply for Extension of Time Is Not Basis for Liability When Performance Was Delayed by Obligor.** A provision in a contract requiring the obligor to make an application for an extension of time before he or she may be excused for a delay caused by the obligee's conduct constitutes a substantial limitation on the policy declared by *Civil Code Section 1511(1)*. Thus, noncompliance with a contractual provision requiring application for an extension of time is not a proper basis for holding an obligor liable for late performance caused by the obligee's conduct (*Peter Kiewit Sons' Co. v. Pasadena City Junior College Dist. (1963) 59 Cal. 2d 241, 244, 245, 28 Cal. Rptr. 714, 379 P.2d 18*).

[*Optional*] **D. Denial of Access to Land Is Prevention.** When the performance of a contract depends on the obligor's having access to certain land, the obligee's blocking of access, whether by actual physical force or by order, constitutes prevention that excuses the obligor's nonperformance (*see* *Crawford v. Pioneer Box & Lbr. Co. (1930) 105 Cal. App. 760, 765-767, 288 P. 694*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that, in an action for contract damages, the defendant obligor's failure or delay in performance is excused because it was a result of acts of the plaintiff obligee.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a defendant seeks to raise this contention. For example, it may be used by defendant in supporting a motion for summary judgment.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised to support adefendant's motion for summary judgment, the memorandum would include an analysis of the supporting and opposing papers such that undisputed facts show that defendant's failure or delay in performance was caused by acts of the plaintiff.

[c] Definition of Creditor in Civ. Code § 1511

Civ. Code § 1511(1), by its terms, purports to excuse nonperformance only when performance is prevented or delayed by acts of "the creditor." The Civil Code contains no special definition of the term "creditor" as it is used in *Civ. Code § 1511*. Although the term "creditor" usually connotes a person in whose favor an obligation exists for the payment of money [*see, e.g., Civ. Code § 3430*], the term is also used throughout *Civ. Code § 1473 et seq.* (governing extinction of obligations in general) and apparently refers to a person entitled to the performance of any type of obligation--in short, an obligee. For example, an owner of real property who is a party to a construction contract is a creditor within the meaning of *Civ. Code § 1511(1)*, and any delay in performance by the builder is excused to the extent that performance has been delayed by the owner's acts [*see* *Peter Kiewit Sons' Co. v. Pasadena City Junior College Dist. (1963) 59 Cal. 2d 241, 243-244, 28 Cal. Rptr. 714, 379 P.2d 18* , discussed in [c][ii], *below*]. Therefore, the broader term "obligee" is used in this form, instead of the term "creditor."

[d] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[e] Related Memoranda

In an appropriate case, these memoranda may be combined with those *set out in § 50.210*.

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Delay in Performance Is Excused When Caused by Acts of Obligee

In ***Semas v. Bergmann*** *(1960) 178 Cal. App. 2d 758, 3 Cal. Rptr. 277* , the plaintiff agreed to construct a store building for the defendants and to complete it by a certain date. If the plaintiff failed to complete the building by the specified date, he would be liable to the defendants for $100 each working day the work remained uncompleted, but if the building was completed before that date, the defendants would be liable for the same amount for each working day the building was completed ahead of schedule. The building was completed 69 days late. The plaintiff sued for recovery of the balance due on the contract and for foreclosure of a mechanic's lien. The defendants claimed that the entire 69-day delay was due to inclement weather, the risk of which the plaintiff had assumed, as well as the plaintiff's incompetence. The plaintiff claimed that the delay was due to the defendants' acts. The trial court found that all but 20 days of the delay were excused and rendered judgment for the plaintiff for the balance due on the contract, less a $2,000 offset for the late performance. On appeal, the defendants contended that the evidence was insufficient to support the trial court's finding that some of the delay was excused.

The court of appeal affirmed. After reviewing the evidence concerning the defendants' acts that allegedly caused the delay, the court of appeal concluded that it created, at most, a conflict that the trial court could have decided either way. The court could not say, as a matter of law, that the evidence compelled a conclusion in the defendants' favor. A promisor's delay in performance is excused to the extent that acts of the promisee caused the delay (*178 Cal. App. 2d 758, 762)* .

[b] Contractual Stipulation Precluding Excuse of Prevention Is Not Valid

In ***Peter Kiewit Sons' Co. v. Pasadena City Junior College Dist.*** *(1963) 59 Cal. 2d 241, 28 Cal. Rptr. 714, 379 P.2d 18* , the plaintiff agreed to construct school facilities for the defendant, the work to be completed by a certain day, and liquidated damages of a certain sum per day were to be deducted from the final payment for each day's delay after that date. The plaintiff could obtain an extension of time, but only for certain causes, which included any act of neglect of duty or default by the defendant. Extensions were to be granted only if the plaintiff submitted a written application for the extension to the defendant and the architect. The work was not completed within the time specified, nor within the time allowed by extensions granted by the defendant. The defendant withheld a portion of the final payment pursuant to the liquidated-damages provision of the contract. The plaintiff sued to recover this amount. The trial court foundthat the late completion was caused by matters beyond the plaintiff's control, including delays caused by the defendant, and concluded that the delay was excusable. It concluded that the defendant was not entitled to liquidated damages and rendered judgment for the plaintiff. On appeal, the defendant contended that the judgment could be sustained only if it were proper to take into account various delays caused by the defendant's conduct as to which the plaintiff had failed to request an extension of time, as required by the contract. In the absence of compliance with the contractual provision, the defendant contended, the plaintiff's late performance could not be excused.

The Supreme Court affirmed. *Civ. Code § 1511(1)* provides that any delay in the performance of an obligation is

excused when performance is delayed by the act of the creditor even though there may have been a stipulation that this could not be an excuse (*59 Cal. 2d 241, 243-244)* . An owner who is a party to a construction contract is a creditor within the meaning of *Civ. Code § 1511*, and a provision in an agreement that the contractor is not to be excused for late completion caused by the owner is rendered inoperative by the statute. A provision in a contract that would require the contractor to make an application for an extension of time before he could be excused for a delay caused by the owner's conduct would obviously constitute a substantial limitation on the policy declared by *Civ. Code § 1511* (*59 Cal. 2d 241, 244)* . Noncompliance with a provision requiring an application for an extension of time is not a proper basis for holding a contractor liable in liquidated damages for late completion that is caused by the owner's conduct (*59 Cal. 2d 241, 245)* .

[c] Failure to Apply for Extension of Time Is Not Basis for Liability When Performance Was Delayed by Obligor

Peter Kiewit Sons' Co. v. Pasadena City Junior College Dist. *(1963) 59 Cal. 2d 241, 28 Cal. Rptr. 714, 379 P.2d 18* , is discussed in [b], *above*.

[d] Denial of Access to Land Is Prevention

In ***Crawford v. Pioneer Box & Lbr. Co.*** *(1930) 105 Cal. App. 760, 288 P. 694* , the plaintiff agreed to fell timber on certain land owned by the defendant and to deliver it to the defendant's loading skids. The defendant was to pay the plaintiff a certain amount per log delivered. Pursuant to the contract, the plaintiff began cutting operations on the land. Before all of the timber had been felled, however, the defendant ordered the plaintiff to cease his operations until further notice. When the plaintiff received no further notice, he sued for damages for breach of contract. The trial court rendered judgment on a verdict for the plaintiff. On appeal, the defendant contended that the orders to stop were not sufficient to warrant the plaintiff in declaring the contract breached. The plaintiff could have, and shouldhave, wholly ignored the orders and gone on with the contract, delivering logs until the defendant refused to accept more. The defendant further contended that, irrespective of the orders, the plaintiff was bound under his contract to deliver the logs, and the defendant was bound to do nothing other than accept and pay for the logs.

The court of appeal affirmed. The performance of the contract here depended wholly and entirely on the plaintiff's access to the defendant's lands. Access having being blocked by the defendant, he could proceed no further. If the lands had been so situated that access was possible only over a certain road or trail, it would be readily apparent that a blocking or destruction of the road by the defendant would have accomplished a complete prevention of performance. The order by the defendant for the plaintiff to stop was only slightly less of a barrier to access, since under the contract, no interest in or title to the lands involved passed to the plaintiff, and all that distinguished the plaintiff from a mere trespasser was the defendant's implied license. Whether the plaintiff was removed from the lands by actual physical force or merely by order, the effect was the same (*105 Cal. App. 760, 767)* .

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5-50 California Points & Authorities §§ 50.212-50.229

[Reserved]

§§ 50.212[Reserved]

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5-50 California Points & Authorities § 50.230

§ 50.230 Performance Was Prevented by Operation of Law

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE DEFENDANT'S NONPERFORMANCE WAS EXCUSED IN THAT PERFORMANCE WAS PREVENTED BY OPERATION OF LAW.

Nonperformance Is Excused When Performance Is Prevented by Operation of Law. A party is not liable for breach of a contract whose performance has been prevented by operation of law (*Civ. Code § 1511(1)*; *Baird v. Wendt Enterprises, Inc. (1967) 248 Cal. App. 2d 52, 55, 56 Cal. Rptr. 118*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that, in an action for contract damages, the defendant's nonperformance is excused because performance was prevented by operation of law.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a defendant seeks to raise this contention. For example, it may be used by defendant in supporting a motion for summary judgment.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised to support a defendant's motion for summary judgment, the memorandum would include an analysis of the supporting and opposing papers such that undisputed facts show that defendant's performance was prevented by

operation of law.

[c] Impossibility as Excuse for Nonperformance

Although there are numerous decisions stating that "impossibility" is not a defense in certain situations [*see §§ 50.242, 50.243*], no reported decision defines "impossibility" and applies it as an excuse for nonperformance. Itappears, however, that the term "impossibility" refers to any one of at least four separate excuses for nonperformance:

- Prevention of performance by operation of law [*Civ. Code § 1511(1)*].

- Prevention of performance by an irresistible, superhuman force (or "act of God") [*Civ. Code § 1511(2)*; *see § 50.231*].

- Impracticability of performance [*Mineral Park Land Co. v. Howard (1916) 172 Cal. 289, 293, 156 P. 458* ; *see § 50.232*].

- Destruction of a person or thing necessary to performance of the contract [*see § 50.233*].

[d] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[e] Related Memoranda

In an appropriate case, these memoranda may be combined with alternate or additional memoranda relating to impossibility of performance, *set out in §§ 50.231 -50.233* [*see* [c], *above*, regarding definition of "impossibility"].

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[f] Opposing Memoranda

The memoranda *in § 50.240* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Nonperformance Is Excused When Performance Is Prevented by Operation of Law

Civ. Code § 1511 provides, in part, as follows:

> The want of performance of an obligation, or an offer of performance, in whole or in part, or any delay therein, is excused by the following causes, to the extent to which they operate:
>
> 1. When such performance or offer is prevented or delayed by the act of the creditor, or by the operation of law, even though there may have been a stipulation that this shall not

> be an excuse; however, the parties may expressly require in a contract that the party relying on the provisions of this paragraph give written notice to the other party or parties, within a reasonable time after the occurrence of the event excusing performance, of an intention to claim an extension of time or of an intention to bring suit or of any other similar or related intent, provided the requirement of such notice is reasonable and just.

In ***Baird v. Wendt Enterprises, Inc.*** *(1967) 248 Cal. App. 2d 52, 56 Cal. Rptr. 118* , the plaintiff agreed to convey a leasehold interest in certain real property, together with plans and specifications for construction of a high-rise hotel-apartment building on the property. The parties agreed to a certain closing date at which time the plaintiff was to furnish a title report and an effective building permit. The plaintiff obtained a building permit but informed the defendant that the permit would expire within 15 months unless substantial construction was begun under the permit within that time, and if the permit expired, the building could not be constructed according to the original specifications because of a new building code passed after the issuance of the original permit. The parties later agreed to extend the closing date for the transaction beyond the date when the building permit expired. Neither party took any steps to arrange for the commencement of construction. By the time of the extended closing date, the building permit had expired without possibility of renewal. The deal was never closed, and the plaintiff sued for damages for breach of contract. The defendant counterclaimed for damages for breach of contract. The trial court found that both parties had defaulted in their obligations under the contract and refused to award damages to either.

The court of appeal affirmed. Although the plaintiff had failed to furnish a valid building permit at the close of escrow, the terms of the original contract had been altered by the parties with knowledge, if not appreciation, of the resulting risks to performance of the contract on its original terms. By extending the duration of escrow, the defendant agreed to a postponement of the performance of the contract to a time when performance on its original terms would become impossible. Neither party attempted to renegotiate the contract to authorize the start of substantial construction on the project earlier to keep the building permit alive, with the result that on the scheduled date for the close of escrow, performance of the contract was prevented by operation of law because of the new building code. Since there is no liability for breach of a contract whose performance has been made impossible by operation of law, the plaintiff's inability to perform the contract, as extended, was excused (*248 Cal. App. 2d 52, 54, 55)* .

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5-50 California Points & Authorities § 50.231

§ 50.231 Performance Was Prevented or Delayed by Irresistible, Superhuman Cause or Act of God

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

NONPERFORMANCE WAS EXCUSED IN THAT PERFORMANCE WAS PREVENTED BY AN IRRESISTIBLE, SUPERHUMAN CAUSE.

A. Nonperformance Is Excused to Extent Performance Is Prevented by Irresistible, Superhuman Cause. The want or delay of performance of an obligation or of an offer of performance, in whole or in part, is excused to the extent that it is prevented or delayed by an irresistible, superhuman cause, unless the parties have expressly agreed to the contrary (*Civ. Code § 1511(2)*).

B. Irresistible, Superhuman Cause Defined. Under *Civil Code Section 1511*, an irresistible, superhuman cause is equivalent to the phrase "act of God" and refers to natural causes, the effects of which cannot be prevented by the exercise of prudence, diligence, and care (*Ryan v. Rogers (1892) 96 Cal. 349, 353, 31 P. 244*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that, in an action for contract damages, a defendant's nonperformance is excused because it was prevented by an irresistible, superhuman cause.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a defendant seeks to raise this contention. For example, it may be used by defendant in supporting a motion for summary judgment.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised to support a defendant's motion for summary judgment, the memorandum would include an analysis of the supporting and opposing papers such that undisputed facts show that defendant's performance was prevented by an irresistible, superhuman cause.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender). For discussion and a form of affirmative defense of an irresistible, superhuman force, see California Forms of Pleading and Practice, Ch. 10, *Act of God* (Matthew Bender).

[d] Related Memoranda

In an appropriate case, these memoranda may be combined with alternate or additional memoranda relating to impossibility of performance, *set out in § 50.230* and *§§ 50.232, 50.233* [*see § 50.230[2*][c], regarding definition of "impossibility"].

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.241* may be submitted in opposition to contention supported by this form.

[3] Discussion of Authorities

[a] Irresistible, Superhuman Cause Defined

In ***Ryan v. Rogers*** *(1892) 96 Cal. 349, 31 P. 244* , the defendants made a written contract with the plaintiff's assignor to deliver five carloads of lima beans to the assignor on or before a certain date. The plaintiff sued for damages for breach of contract, alleging that the defendants failed to deliver the beans. As a defense, the defendants alleged that they had attempted to deliver the beans on the particular date but had been prevented from doing so because they were unable to cross a certain river that was swollen by recent rains so as to render it impassable. The trial court rendered judgment for the plaintiff. On appeal, the defendants contended that they were prevented from performing the contract by an irresistible and superhuman cause, and facts constituting such a defense had been alleged in the answer.

The Supreme Court affirmed. The words "irresistible, superhuman force," within the meaning of *Civ. Code § 1511*, are equivalent to the phrase "actof God" and refer to those natural causes, the effects of which cannot be prevented by the exercise of prudence, diligence, and care, and the use of those appliances that the situation of the party renders it reasonable for him to use (*96 Cal. 349, 352-353)* . An act of God, in legal phraseology, means an accident against which ordinary skill and foresight is not expected to provide. The facts alleged in the answer were not sufficient to show that the defendants were prevented by an irresistible, superhuman cause from performing their contract (*96 Cal. 349, 353)* .

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5-50 California Points & Authorities § 50.232

§ 50.232 Performance Was Impossible Because of Impracticability

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

FAILURE TO PERFORM WAS EXCUSED IN THAT PERFORMANCE COULD ONLY HAVE BEEN ACCOMPLISHED AT AN EXCESSIVE AND UNREASONABLE COST AND WAS THEREFORE IMPRACTICABLE.

Nonperformance Is Excused When Performance Is Impracticable. Nonperformance of an obligation is excused as legally impossible if performance is impracticable. Performance is impracticable if it can only be accomplished at an excessive and unreasonable cost (*Mineral Park Land Co. v. Howard (1916) 172 Cal. 289, 293, 156 P. 458*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that, in an action for contract damages, a defendant's nonperformance is excused because performance was impracticable.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a defendant seeks to raise this contention. For example, it may be used by defendant in supporting a motion for summary judgment.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised to support adefendant's motion for summary judgment, the memorandum would include an analysis of the

supporting and opposing papers such that undisputed facts show that defendant's performance was rendered impracticable.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

In an appropriate case, these memoranda may be combined with alternate or additional memoranda relating to impossibility of performance, *set out in §§ 50.230, 50.231* and *§ 50.233* [*see § 50.230[2*][c], regarding definition of "impossibility"].

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in §§ 50.242, 50.243* may be submitted in opposition to contention supported by this form.

[3] Discussion of Authorities

[a] Nonperformance Is Excused When Performance Is Impracticable

In ***Mineral Park Land Co. v. Howard*** *(1916) 172 Cal. 289, 156 P. 458* , the defendants had made a contract with public authorities for construction of a bridge. They made a contract with the plaintiff by which they agreed to remove all gravel and earth necessary for construction of the bridge from the plaintiff's land and to pay the plaintiff a certain amount per cubic yard of earth removed. In constructing the bridge, the defendants used 101,000 cubic yards of earth and gravel, but less than half of this was taken from the plaintiff's land. The plaintiff sued for damages for breach of contract. The first count sought to recover the unpaid amountdue for the earth and gravel that was actually removed by the defendants. The second count sought to recover damages for the defendants' failure to remove more earth and gravel than was actually removed. The trial court found that although the plaintiff's land contained earth and gravel in excess of 101,000 cubic yards, only the amount actually taken by the defendants was above the water table; no greater quantity could have been taken by the defendants except by use of a steam dredger at prohibitive cost. The trial court nevertheless concluded that the facts found did not justify the defendants' failure to take from the plaintiff's land all of the earth and gravel required for the construction job. The trial court rendered judgment for the plaintiff.

The Supreme Court modified the judgment by deducting damages for the defendants' failure to remove additional earth and gravel from the plaintiff's land. When performance depends on the existence of a thing assumed to exist as the basis of the agreement, nonperformance is excused to the extent that the thing ceases to exist or turns out to be nonexistent (*172 Cal. 289, 292)* . The findings of fact in this case fell within this rule. The parties had contracted for the right to take earth and gravel to be used in the construction of the bridge, and in so doing, they contemplated and assumed that the land contained the requisite quantity available for use. The defendants did not bind themselves to take what was not there. Although there was gravel on the land, it was so situated that the defendants could not take it by ordinary means, except at a prohibitive cost, so that, to all fair intents, it was impossible for the defendants to take it. A thing is

impossible in legal contemplation when it is not practicable, and a thing is impracticable when it can only be done at an excessive and unreasonable cost. While the defendants could not excuse themselves merely by showing the existence of conditions that would make performance of their obligation more expensive than they had anticipated, or that would entail a loss on them, nevertheless, when the difference in cost is great as in this case and has the effect of making performance impracticable, the situation is not different from that of a total absence of earth and gravel (*172 Cal. 289, 293)* .

[4] Additional Authorities

[a] Nonperformance Is Excused When Performance Is Impracticable

In *Vernon v. Los Angeles (1955) 45 Cal. 2d 710, 290 P.2d 841* , the City of Vernon had made a number of contracts with Los Angeles by which Los Angeles agreed to dispose of Vernon's sewage through the Los Angeles outfall sewer system. Over the years, the Los Angeles sewer system gradually became inadequate to handle the increased sewage from its own system as well as that from Vernon and from other cities using the Los Angelessystem. Eventually, the State of California brought an abatement action against Los Angeles, Vernon, and other cities, which resulted in issuance of an injunction requiring Los Angeles to build new sewage treatment facilities and requiring Vernon and other cities to either provide their own facilities for safe and sanitary disposal of their sewage or arrange to finance their proportional share of the cost of the new Los Angeles sewage facilities. Vernon elected to dispose of its sewage through the new Los Angeles facilities but did not arrange to finance its share of the cost of the facilities until it was compelled to do so by contempt proceedings. Thereafter, Vernon sued for declaratory and injunctive relief, seeking a declaration that under the previous contracts between Vernon and Los Angeles, Vernon was entitled to discharge its sewage through the Los Angeles sewer system without charge. The trial court found that Los Angeles could not continue performance under its previous contracts with Vernon except at an excessive and unreasonable cost, and further performance by Los Angeles under the contracts was therefore excused. It rendered judgment for Los Angeles. The Supreme Court affirmed. The controlling principles as to legal impossibility excusing performance have long been recognized in California. A thing is impossible in legal contemplation when it is not practicable, and a thing is impracticable when it can only be done at an excessive and unreasonable cost [*Mineral Park Land Co. v. Howard (1916) 172 Cal. 289, 293, 156 P. 458* , discussed in [3][a], *above*] (*45 Cal. 2d 710, 719-720)* . In this case, when the parties contracted, they had contemplated that there would be disposal facilities available for legal use, whether in existence or to be constructed, the cost of which would not be completely disproportionate to the costs expressly referred to in the contracts (*45 Cal. 2d 710, 720)* .

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5-50 California Points & Authorities § 50.233

§ 50.233 Performance Was Impossible Due to Death of Person or Destruction of Specific Thing Necessary for Performance

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

NONPERFORMANCE IS EXCUSED BECAUSE OF THE _____ [DESTRUCTION OF THE THING *or* DEATH OF THE PERSON] THAT WAS THE SUBJECT OF THE CONTRACT AND ON WHOSE EXISTENCE PERFORMANCE OF THE CONTRACT DEPENDED.

[*EITHER*]

Destruction or Nonexistence of Subject Matter. When performance of a contract depends on the existence of a thing assumedby the parties to exist as the basis of the agreement, nonperformance is excused to the extent that the thing ceases to exist or turns out to be nonexistent (*Mineral Park Land Co. v. Howard (1916) 172 Cal. 289, 292, 156 P. 458*).

[*OR*]

Impossibility Due to Death of Person. When performance of a contract depends on the continued existence of a certain person, a condition is implied that the impossibility of performance arising from the perishing of the person will excuse nonperformance (*Farnon v. Cole (1968) 259 Cal. App. 2d 855, 858, 66 Cal. Rptr. 673*).

[*OR*]

Impossibility Due to Incapacity of Person. If a contract contemplates the personal services of a particular person, nonperformance is excused if that person dies or becomes otherwise incapable of performing (*Cazares v. Saenz (1989) 208 Cal. App. 3d 279, 284-286, 256 Cal. Rptr. 209*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that, in an action for contract damages, a defendant's nonperformance is excused because performance was rendered impossible by the death or incapacity of the specific person or by the destruction of the specific thing that was the subject of the contract and on whose existence performance depended.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a defendant seeks to raise this contention. For example, it may be used by defendant in supporting a motion for summary judgment.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised to support a defendant's motion for summary judgment, the memorandum would include an analysis of the supporting and opposing papers such that undisputed facts show that defendant's performance was rendered impossible due the death of a person, or the destruction of a thing, upon which performance depended.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

In an appropriate case, these memoranda may be combined with alternate or additional memoranda relating to impossibility of performance, *set out in §§ 50.230 -50.232* [*see § 50.230[2*][c], regarding definition of "impossibility"].

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.244* may be submitted in opposition to contention supported by this form.

[3] Discussion of Authorities

[a] Destruction or Nonexistence of Subject Matter

The facts and procedural background of ***Mineral Park Land Co. v. Howard*** *(1916) 172 Cal. 289, 156 P. 458* , are discussed in *§ 50.232[3][a]*. The Supreme Court, in holding the defense of impossibility of performance applicable to the facts of the case, noted that when performance of a contract depends on the existence of a thing assumed to exist as the basis of the agreement, nonperformance is excused to the extent that the thing ceases to exist or turns out to be nonexistent (*172 Cal. 289, 292)* .

[b] Impossibility Due to Death of Person

In ***Farnon v. Cole*** *(1968) 259 Cal. App. 2d 855, 66 Cal. Rptr. 673* , a famous popular singer had made a written contract by which the plaintiff agreed to render services as the defendant's musical director for a one-year period. The contract provided for a certain weekly compensation for the services rendered, with a guarantied minimum compensation for the entire year. The plaintiff rendered performance under the contract until thesinger died, about six months after the contract was executed. Thereafter, the plaintiff sued the estate to recover the amount of the minimum compensation under the contract, less the compensation actually paid to the plaintiff before the singer's death. The trial court found that the contract was terminated by the singer's death. Judgment was rendered for the defendant.

The court of appeal affirmed. When distinctly personal considerations are at the foundation of the contract, the relation of the parties is dissolved by the death of the person whose personal qualities constituted the particular inducement to the contract. When performance depends on the continued existence of a certain person, a condition is implied that the impossibility of performance arising from the perishing of the person will excuse the performance. The implication arises in spite of the unqualified character of the promissory words because, from the nature of the contract, it is apparent that the parties contracted on the basis of the continued existence of the particular person (*259 Cal. App. 2d 855, 858)* . In this case, the contract expressed the parties' intent that the contract be conditioned on the singer's continued existence and personal participation. There was no doubt that the singer's artistic skill, talent, and renown were inducements to the plaintiff to enter into the contract. The plaintiff's services were to be rendered exclusively to the singer personally, or to the corporation or company at which the singer would be rendering services, and at times and places the singer was to designate. The singer's personal appearance or personal recording was an implied condition precedent to the plaintiff's rendition of services as a musical director. With the singer's untimely death, both parties were excused from further performance, and the contract was terminated (*259 Cal. App. 2d 855, 859)* .

[c] Impossibility Due to Incapacity of Person

Cazares v. Saenz *(1989) 208 Cal. App. 3d 279, 256 Cal. Rptr. 209* , was an action by two former partners of a law firm to collect fees from a sole practitioner who had associated with the firm in a personal injury action. At the time of the association agreement, all three attorneys contemplated that most of the work on the case would be done by one of the partners (the major partner) because of that partner's experience and reputation, and because he was bilingual. Two and a half years into the contract, the major partner was appointed to the bench. The sole practitioner refused to work with the other partner and associated himself with other attorneys. The personal injury action was settled, and the plaintiffs sued for half of the contingency fee earned by the defendant. Judgment was rendered for the plaintiffs.

The court of appeal reversed. The major partner's judicial appointment rendered the partner incapable of performing and discharged the obligations of the parties (*208 Cal. App. 3d 279, 282)* . All parties contemplatedthat the major partner would do most, if not all, of the work on the case, and the defendant was entitled to refuse to work with the other partner (*208 Cal. App. 3d 279, 284)* . When a contract contemplates the personal services of a party, another party's nonperformance is excused when the contemplated party dies or becomes otherwise incapable of performing. Once the major partner was appointed to the bench, he was legally incapable of performing. If the existence of a particular person is necessary for the performance of a duty, that person's death or any incapacity making performance impracticable is an event the nonoccurrence of which was a basic assumption on which the contract was made (*208 Cal. App. 3d 279, 285)* . At least when the contract contemplates the unique personal services of a firm member, both the obligations of the firm and those of the party retaining the firm are discharged by the incapacity (*208 Cal. App. 3d 279, 286)* .

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5-50 California Points & Authorities §§ 50.234-50.239

[Reserved]

§§ 50.234[Reserved]

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5-50 California Points & Authorities § 50.240

§ 50.240 Defense of Prevention of Performance by Operation of Law Is Not Applicable to Prevention by Judicial Order Obtained by Private Litigant

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE DEFENDANT'S PERFORMANCE WAS PREVENTED BY A JUDICIAL ORDER OBTAINED BY A PRIVATE LITIGANT, AND THE DEFENSE OF PREVENTION BY OPERATION OF LAW DOES NOT APPLY TO JUDICIAL ORDERS.

A. Defense of Prevention of Performance by Operation of Law Is Applicable Only to Governmental Interference. The defense that performance has been rendered impossible by operation of law applies only to governmental interference that results from the passage of a statute or ordinance making the contemplated performance illegal, or from a condemnation proceeding brought by the state or other public agency (*Webster v. Southern Cal. First Nat'l Bank (1977) 68 Cal. App. 3d 407, 415, 137 Cal. Rptr. 293*).

B. Defense of Impossibility by Operation of Law Is Not Applicable to Prevention by Judicial Order Obtained by Private Litigant. The defense that performance has been rendered impossible by operation of law does not apply when performance has been prevented by a court order or process obtained by a private litigant,as in the case of an injunction or attachment obtained against the promisor by some third party (*Webster v. Southern Cal. First Nat'l Bank (1977) 68 Cal. App. 3d 407, 415-416, 137 Cal. Rptr. 293*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that, in an action for contract damages, the defense that defendant's performance was prevented by operation of law is applicable only to governmental interference in the

form of passage of a statute or ordinance making the contemplated performance illegal, and not to prevention by court order or process obtained by a private litigant.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a plaintiff seeks to raise this contention. For example, it may be used by plaintiff in opposing a motion for summary judgment.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised to support a plaintiff's opposition to a motion for summary judgment, the memorandum would include an analysis of the supporting and opposing papers showing that undisputed facts establish nonperformance due to judicial process obtained through private litigation rather than due to the enactment of prohibitive statute or ordinance.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

In an appropriate case, these memoranda may be combined with alternate or additional memoranda that resist a defense of impossibility of performance, *set out in §§ 50.241 -50.244* [*see § 50.230[2*][c], regarding definition of "impossibility"].

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.230* may be submitted in opposition to contention supported by this form.

[3] Discussion of Authorities

[a] Defense of Prevention of Performance by Operation of Law Is Applicable Only to Governmental Interference

In ***Webster v. Southern Cal. First Nat'l Bank*** *(1977) 68 Cal. App. 3d 407, 137 Cal. Rptr. 293* , the seller of a bar and restaurant opened an escrow with the bank and deposited the purchase price along with directions to pay the bona fide claims of the seller's creditors who filed their claims in the escrow, pursuant to *Bus. & Prof. Code § 24074* (requiring the transferor of a liquor license to place the entire purchase price in escrow to pay bona fide claims of the transferor's creditors). The plaintiff's assignor, holder of three promissory notes executed by the seller, filed a claim with the bank for the amount due on the notes. Thereafter, two of the seller's shareholders filed an action against the seller seeking rescission of their stock purchases, return of their money, and a declaration that their claims had priority over other creditors' claims in the escrow. The last of a series of court orders ordered the bank to pay specified claims out of the escrow, which did not include the notes held by the plaintiff's assignor, and to pay the balance of the funds in the escrow

to the attorneys for the two shareholders pending further order of the court. The bank paid the claims and closed the escrow without informing the court of the plaintiff's assignor's notes and without informing the plaintiff's assignor of the lawsuit or injunction. The plaintiff then sued for the amount due on the notes plus interest. On the theory that the plaintiff's assignor was a creditor-beneficiary of the escrow agreement, the plaintiff charged the bank with breach of contract, negligence, conversion, and violation of the bulk transfer laws, based solely on the bank's failure to pay the amount due under the notes. The trial court granted the bank's motion for summary judgment. On appeal, in support of the judgment, the bank contended that performance according to *Bus. & Prof. Code § 24074* and the terms of the escrow agreement was rendered impossible by operation of law because of the court orders in the action brought by the two shareholders.

The court of appeal reversed. The defense of prevention by operation of law applies only to governmental interference that results from the passage of a statute or ordinance making the contemplated performance illegal, or from a condemnation proceeding brought by the state or other public agency. Prevention by court order or process obtained by a private litigant, as in the case of an injunction or attachment obtained against the promisor by some third party, is not considered an excuse (*68 Cal. App. 3d 407, 415-416)* .

[b] Defense of Impossibility by Operation of Law Is Not Applicable to Prevention by Judicial Order Obtained by Private Litigant

Webster v. Southern Cal. First Nat'l Bank *(1977) 68 Cal. App. 3d 407, 137 Cal. Rptr. 293* , is discussed in [a], *above*.

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5-50 California Points & Authorities § 50.241

§ 50.241 Reasonably Anticipated Natural Phenomenon Is Not Irresistible, Superhuman Cause Excusing Failure to Perform

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PERFORMANCE WAS NOT PREVENTED BY AN IRRESISTIBLE, SUPERHUMAN CAUSE BECAUSE THE EVENTS THAT ALLEGEDLY PREVENTED PERFORMANCE WERE NATURAL PHENOMENA THAT WERE REASONABLY TO BE ANTICIPATED AT THE PARTICULAR TIME AND PLACE THEY OCCURRED AND AGAINST THE EFFECTS OF WHICH THE _____ [*nonperforming party, e.g.,* DEFENDANT] COULD HAVE BEEN PROTECTED THROUGH THE EXERCISE OF ORDINARY SKILL AND FORESIGHT.

A. Reasonably Anticipated Natural Event Is Not Irresistible, Superhuman Cause. Irresistible, superhuman causes do not include natural phenomena that are reasonably to be anticipated at the particular time and place they occur and against the effects of which ordinary skill and foresight are expected to protect (*see Ryan v. Rogers (1892) 96 Cal. 349, 353, 31 P. 244*).

[*Optional*] **B. Reasonably Anticipated High Water Is Not Irresistible, Superhuman Cause.** With respect to watercourses, irresistible, superhuman causes include only floods or extraordinary freshets, not a rising of water in a stream that is usual or ordinaryand reasonably to be anticipated at particular times of the year (*Ryan v. Rogers (1892) 96 Cal. 349, 353, 31 P. 244*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that, in an action for contract damages, the defense that defendant's performance was prevented by an irresistible, superhuman cause, because the events allegedly

preventing the performance were reasonably anticipated natural phenomena and therefore do not constitute an irresistible, superhuman causes sufficient to excuse nonperformance.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a plaintiff seeks to raise this contention. For example, it may be used by plaintiff in opposing a motion for summary judgment.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised to support a plaintiff's opposition to a motion for summary judgment, the memorandum would include an analysis of the supporting and opposing papers showing that undisputed facts concerning events that do not constitute irresistible, superhuman causes.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

In an appropriate case, these memoranda may be combined with alternate or additional memoranda that resist a defense of impossibility of performance, *set out in §§ 50.240* and *50.242 -50.244* [*see § 50.230[2*][c], regarding definition of "impossibility"].

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publicationin drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.231* may be submitted in opposition to contention supported by this form.

[3] Discussion of Authorities

[a] Reasonably Anticipated Natural Event Is Not Irresistible, Superhuman Cause

The facts and procedural background of ***Ryan v. Rogers*** *(1892) 96 Cal. 349, 31 P. 244* , are discussed in *§ 50.231[3][a]*. The Supreme Court, in affirming a judgment for the plaintiff in an action for damages for breach of contract, rejected the defendants' contention that their performance had been prevented by an irresistible, superhuman cause. The Court noted that the phrase irresistible, superhuman cause was equivalent to the phrase "act of God," which in legal phraseology means an accident against which ordinary skill and foresight are not expected to provide. As applied to watercourses, this includes only floods or extraordinary freshets, not a rising of water in a stream that is usual or ordinary and reasonably to be anticipated at particular times of the year. The facts alleged in the defendants' answer were insufficient to show that the defendants' performance was prevented by an irresistible, superhuman cause. It did not appear that there was anything unusual for that season of the year in the rising of the waters referred to in the defendants' answer, and the high water was therefore something that ordinary prudence might have anticipated and

taken proper steps to guard against any delay. The defendants had not alleged that they could not have reached the place they were to deliver the beans by another route or that it was impossible for them to communicate with that place and direct the delivery to be made by some other agent (*96 Cal. 349, 353)* .

[b] Reasonably Anticipated High Water Is Not Irresistible, Superhuman Cause

Ryan v. Rogers *(1892) 96 Cal. 349, 31 P. 244* , is discussed in [a], *above*.

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5-50 California Points & Authorities § 50.242

§ 50.242 Inability of Obligor Does Not Constitute Impossibility

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief*].

PERFORMANCE IS NOT IMPOSSIBLE OR IMPRACTICABLE WHEN THE IMPOSSIBILITY OR IMPRACTICABILITY IS DUE TO THE DEFENDANT'S INABILITY TO PERFORM, NOT TO THE NATURE OF THE ACT TO BE PERFORMED.

A. Burden of Proving Impossibility. The burden of proving the defense of impossibility of performance rests on the party asserting it (*Hensler v. Los Angeles (1954) 124 Cal. App. 2d 71, 83, 268 P.2d 12*).

B. Inability of Obligor Does Not Constitute Impossibility. To excuse nonperformance of a contract, the impossibility of performance must attach to the nature of the thing to be done and not to the inability of the obligor to do it (*Hensler v. Los Angeles (1954) 124 Cal. App. 2d 71, 83, 268 P.2d 12*). If performance is not inherently impossible, and there is an unconditional promise to perform, nonperformance is a breach when the obligor becomes unable to perform, even though through causes beyond his or her control, since he or she might have provided against them in his or her contract (*El Rio Oils v. Pacific Coast Asphalt Co. (1949) 95 Cal. App. 2d 186, 197, 213 P.2d 1*).

[*Optional*] **C. Failure to Obtain Consent of Third Party.** One who binds himself or herself to a contract that cannot be performed without the consent or cooperation of a third person is not relieved of liability because of his or her inability to obtain the required consent or cooperation (*Hensler v. Los Angeles (1954) 124 Cal. App. 2d 71, 83, 268 P.2d 12*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that, in an action for contract damages, a defendant's nonperformance is not excused on the ground of impossibility or impracticability, because this defense does not apply when the nonperformance results from the inability of the promisor instead of the nature of the act to be performed.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a plaintiff seeks to raise this contention. For example, it may be used by plaintiff in opposing a motion for summary judgment.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised to support a plaintiff's opposition to a motion for summary judgment, the memorandum would include an analysis of the supporting and opposing papers showing that, at the least, there is a triable issue of fact whether the events alleged to have prevented defendant's performance are sufficient to give rise to a defense that the performance was impossible or impracticable.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

In an appropriate case, these memoranda may be combined with alternate or additional memoranda that resist a defense of impossibility of performance, *set out in §§ 50.240, 50.241, 50.243,* and *50.244* [*see § 50.230[2*][c], regarding definition of "impossibility"].

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.232* may be submitted in opposition to contention supported by this form.

[3] Discussion of Authorities

[a] Burden of Proving Impossibility

In ***Hensler v. Los Angeles*** *(1954) 124 Cal. App. 2d 71, 268 P.2d 12* , the plaintiff contracted to construct runways and taxiways at an airportoperated by Los Angeles. Part of the work required removal of a road that traversed the area over which the plaintiff would be installing runways and taxiways. Both parties knew that completion of the contract would require that traffic over the road be discontinued and diverted to a new road being built by a different contractor. The contract provided for construction in two stages. The first stage of the work included all work except removal of the road and construction in the area occupied by the road. The second stage involved completion of the remaining work. The plaintiff began work on the project and continued until the city issued an order deleting certain items of work to be performed under the contract. These items related to the removal of the road and construction in the area traversed by

the road. The city ordered these items deleted on discovering that it would be unable to divert traffic from the road and make the job site available to the plaintiff because of the refusal by the state highway department to grant consent for connection of the new road to existing highways. The plaintiff sued for damages for breach of contract based, in part, on the city's deletion of this work from the contract. The trial court rendered judgment for the plaintiff. On appeal, the city contended that it should not be held liable for canceling a portion of the work because completion of the work had become impossible due to the state highway department's failure to permit diversion of traffic from the road.

The court of appeal affirmed. In every construction contract, there is a covenant, implied in law when necessary, that the owner will furnish the selected site of operations to the contractor in order to enable him to adequately carry on the construction and complete the work (*124 Cal. App. 2d 71, 82-83)* . The burden of proving the defense of impossibility is on the party asserting it. In this case, the city had failed to carry this burden. The record merely showed that the city could not obtain permission to divert traffic from the road in time to enable the plaintiff to proceed with the contract, although it was able to get consent and reroute the traffic at a later time. The city failed to show that it could not, by greater diligence or better planning, have arranged for the diversion to be accomplished on the date required. In order to be an excuse for nonperformance of a contract, the impossibility of performance must attach to the nature of the thing to be done and not to the inability of the obligor to do it. One who binds himself to a contract that cannot be performed without the consent or cooperation of a third person is not relieved of liability because of his inability to obtain the required consent or cooperation (*124 Cal. App. 2d 71, 83)* .

[b] Inability of Obligor Does Not Constitute Impossibility

Hensler v. Los Angeles *(1954) 124 Cal. App. 2d 71, 268 P.2d 12* , is discussed in [a], *above*.

In ***El Rio Oils v. Pacific Coast Asphalt Co.*** *(1949) 95 Cal. App. 2d 186, 213 P.2d 1* , the defendant agreed to buy and the plaintiff agreed to sellall of the oil produced by the plaintiff from certain property leased by the plaintiff, to the extent that the oil could be used by the defendant in the production of asphalt and other products. Thereafter, the defendant made a contract with the intervener to sell all of the asphalt produced from the oil located on the premises leased by the plaintiff. The intervener agreed to buy all of that asphalt. The plaintiff later refused to deliver to the defendant any oil produced from its wells. Thereafter, the plaintiff, a shareholder of the defendant, filed a complaint seeking dissolution of the corporation on the ground of internal dissension. The defendant filed a cross complaint against the plaintiff seeking specific performance of its contract with the defendant and damages for breach of contract. The intervener filed a complaint in intervention seeking damages against the defendant for breach of its contract with him. The trial court rendered judgment for the defendant against the plaintiff and for the intervener against the defendant. On the defendant's appeal from the portion of the judgment awarding the intervener damages against the defendant, the defendant contended that performance of its contract with the intervener was rendered impossible because of the plaintiff's failure to deliver the oil to the defendant.

The court of appeal affirmed. Impossibility of performance must result from the nature of the thing to be done and not from the inability of the obligor to do it. If performance is not inherently impossible, and there is an unconditional promise to perform, nonperformance is a breach when the obligor becomes unable to perform, even though through causes beyond his control, since he might have provided against them in his contract (*95 Cal. App. 2d 186, 197)* . In this case, the impossibility of performance by the defendant consisted not in the nature of the thing to be done but in the defendant's inability to perform the contract. The defendant could have protected itself against damages resulting from the facts in this case had it provided in its contract that it should not be liable in the event the plaintiff failed to deliver oil to it. Not having done so, the defendant was liable for breach of its unconditional contract with intervener (*95 Cal. App. 2d 186, 198)* .

[c] Failure to Obtain Consent of Third Party

Hensler v. Los Angeles *(1954) 124 Cal. App. 2d 71, 268 P.2d 12* , is discussed in [a], *above*.

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5-50 California Points & Authorities § 50.243

§ 50.243 Increased Expense or Difficulty Does Not Make Performance Impossible or Impracticable Unless Extreme or Unreasonable

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PERFORMANCE OF THE CONTRACT IS NOT IMPOSSIBLE OR IMPRACTICABLE BECAUSE THE MERE FACT THAT PERFORMANCE IS MORE DIFFICULT OR EXPENSIVE THAN THE DEFENDANT ORIGINALLY CONTEMPLATED DOES NOT EXCUSE NONPERFORMANCE WHEN THE INCREASED DIFFICULTY OR EXPENSE IS NOT EXTREME AND UNREASONABLE.

A. Burden of Proving Impossibility. [*See § 50.242[1], Paragraph A.*]

B. Increased Expense or Difficulty Does Not Necessarily Excuse Performance as Impossible or Impracticable. Mere increase in expense does not excuse performance unless extreme and unreasonable difficulty, expense, injury, or loss is involved (*Butler v. Nepple (1960) 54 Cal. 2d 589, 599, 6 Cal. Rptr. 767, 354 P.2d 239*). Although performance may be excused on the ground of impossibility when it is so difficult and expensive that it may be described as impracticable, the defense of impracticability may not be interposed unless the facts that make performance harder or more costly than the parties contemplated are of the gravest importance (*Kennedy v. Reece (1964) 225 Cal. App. 2d 717, 724-725, 37 Cal. Rptr. 708*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that, in an action for contract damages, a defendant's nonperformance is not be excused on the ground of impossibility or impracticability merely because it is more difficult or expensive than the party contemplated at the time the contract was made, unless the increased difficulty or expense is

extreme and unreasonable.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a plaintiff seeks to raise this contention. For example, it may be used by plaintiff in opposing a motion for summary judgment.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised to support a plaintiff's opposition to a motion for summary judgment, the memorandum would include an analysis of the supporting and opposing papers showing that, at the least, there is a triable issue of fact whether the events alleged to have prevented defendant's performance are sufficient to give rise to a defense that the performance was impracticable.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

In an appropriate case, these memoranda may be combined with alternate or additional memoranda that resist a defense of impossibility of performance, *set out in §§ 50.240 -50.242* and *50.244* [*see § 50.230[2*][c], regarding definition of "impossibility"].

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.232* may be submitted in opposition to contention supported by this form.

[3] Discussion of Authorities

[a] Increased Expense or Difficulty Does Not Necessarily Excuse Performance as Impossible or Impracticable

Butler v. Nepple *(1960) 54 Cal. 2d 589, 6 Cal. Rptr. 767, 354 P.2d 239* , involved an assignment of an oil and gas lease from the plaintiff to the defendant. Under the assignment agreement, the defendant agreed that if he did not either begin drilling operations within a certain period or reassign the lease to the plaintiff, he would pay a certain amount per monthto the plaintiff as rent until he either began drilling operations or reassigned the lease to the plaintiff. The defendant failed to begin drilling operations by the specified date and eventually reassigned the lease to the plaintiff. The plaintiff sued to recover rent due under the contract. The defendant alleged, as a defense, that he was unable to comply with the drilling schedule because a steel strike prevented him from obtaining a sufficient quantity of well casing, and performance was excused under a *force majeure* clause in the lease. The evidence showed that some casing was available, although the defendant characterized the available casing as grossly overpriced. The trial court rendered

judgment for the plaintiff.

The Supreme Court affirmed. Mere increase in expense does not excuse nonperformance unless extreme and unreasonable difficulty, expense, injury, or loss is involved. In this case, the defendant gave the trial court no factual evidence on which to base a finding that the increase in price was extreme and unreasonable, other than his own characterization of the increased prices of the casing. The trial court properly determined that the defendant had not carried the burden of proving impossibility of performance (*54 Cal. 2d 589, 599)* .

In ***Kennedy v. Reece*** *(1964) 225 Cal. App. 2d 717, 37 Cal. Rptr. 708* , the plaintiff contracted to drill a water well to a certain depth and case it. The plaintiff abandoned work after drilling two shallower holes, claiming that he had struck hard rock. The plaintiff did not insert any casing in either hole. Thereafter, the plaintiff sued to recover compensation for the portion of the work completed. The defendants answered and counterclaimed, alleging that the contract required the plaintiff to drill a hole of a certain depth and to case it, which the plaintiff had failed to do, for a fixed price. The counterclaim sought damages for the plaintiff's breach of the contract. The trial court rendered judgment for the defendants on both the plaintiff's claim and the counterclaim. On appeal, the plaintiff contended that he was relieved from the duty of completing his contract because of impossibility resulting when he struck hard rock during the drilling.

The court of appeal affirmed. Although enforcement of a contract may be denied on the ground of impossibility when performance is so difficult and expensive that it is impracticable, this does not mean that any facts making performance more difficult or expensive than the parties anticipated would discharge a duty that has been created by the contract (*225 Cal. App. 2d 717, 724)* . Facts that make performance harder or more costly than the parties contemplated when the agreement was made do not constitute a ground for the defense of impracticability unless the facts are of the gravest importance. The difference is one of degree rather than kind (*225 Cal. App. 2d 717, 724-725)* . In this case, neither the pleadings nor the facts as found by the trial court warranted the application of the doctrine of impossibility or impracticability (*225 Cal. App. 2d 717, 726-727)* .

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5-50 California Points & Authorities § 50.244

§ 50.244 Death of Obligor Does Not Terminate Personal Service Contract That Others Can Perform

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PERFORMANCE WAS NOT IMPOSSIBLE DUE TO DEATH OF THE PERSON WHO WAS TO PERFORM BECAUSE THE _____ [SERVICE TO BE PERFORMED WAS OF SUCH A CHARACTER THAT IT COULD HAVE BEEN PERFORMED AS WELL BY OTHERS *or* CONTRACT, BY ITS TERMS, SHOWS THAT THE PARTIES CONTEMPLATED PERFORMANCE BY PERSONS OTHER THAN THE DECEDENT].

A. Burden of Proving Impossibility. [*See § 50.242[1], Paragraph A.*]

B. Personal Service Contract Is Not Terminated by Death of Contracting Party When Others Can Perform. The rule that an executory contract of a strictly personal nature is terminated by the death of the party by whom the personal service is to be performed is not applicable when the service is of such a character that it may as well be performed by another, or when the contract, by its terms, shows that performance by others was contemplated (*Howard v. Adams (1940) 16 Cal. 2d 253, 258, 105 P.2d 971*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that, in an action for contract damages, the death of the person who was to perform services required by the contract does not terminate the contract if others are able to perform the service or if the contract, by its terms, indicates that the parties contemplated performance by persons other than the decedent.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in

which a plaintiff seeks to raise this contention. For example, it may be used by plaintiff in opposing a motion for summary judgment.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised to support aplaintiff's opposition to a motion for summary judgment, the memorandum would include an analysis of the supporting and opposing papers showing that there is a triable issue of fact on the issue whether another person could have performed the services that defendant claims could not be performed due to the death of an indispensable person.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

In an appropriate case, these memoranda may be combined with alternate or additional memoranda that resist a defense of impossibility of performance, *set out in §§ 50.240 -50.243* [*see § 50.230[2*][c], regarding definition of "impossibility"].

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.233* may be submitted in opposition to contention supported by this form.

[3] Discussion of Authorities

[a] Personal Service Contract Is Not Terminated by Death of Contracting Party When Others Can Perform

Howard v. Adams *(1940) 16 Cal. 2d 253, 105 P.2d 971* , was an action to recover damages for breach of an oral contract for support and maintenance. The plaintiff was the defendant's niece, but the relationship between the parties resembled that of mother and daughter. When the niece informed the defendant of her intention to divorce her husband, the defendant, seeking to avoid a family scandal, suggested that the niece go to Nevada to obtain a divorce. When the niece responded that she could not get alimony if she obtained a divorce in Nevada, the defendant orallypromised that if the niece went to Nevada to obtain the divorce, the defendant would support the niece for the rest of her life and support and educate the niece's children. The niece acted immediately on the defendant's proposal, and the defendant supported the niece and her children until, following a quarrel between the niece and the defendant's husband, the niece and her children were ousted from the defendant's house. The defendant died just before the close of trial. The trial court correctly instructed the jury that the action was one that survived, and the defendant's death just before submission of the case did not affect the issues to be decided in any way. Judgment was rendered for the niece.

The Supreme Court affirmed. An executory contract of a strictly personal nature terminates on the death of the party

required to perform the personal service, but this rule is not applicable when the service is of such a character that it may as well be performed by another or when the contract, by its terms, shows that performance by others was contemplated (*16 Cal. 2d 253, 258)* . In this case, no strictly personal service was required of the defendant, nor was any intent manifested that performance should depend on her continued existence. The defendant's promise to support the niece for life and to educate and care for the children until they became self-supporting did not involve the rendition of any personal service; the allowance of a fixed sum of money would have constituted a full and practical compliance with all that the defendant agreed to do (*16 Cal. 2d 253, 258)* .

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5-50 California Points & Authorities §§ 50.245-50.249

[Reserved]

§§ 50.245[Reserved]

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5-50 California Points & Authorities § 50.250

§ 50.250 Recovery Is Precluded by Frustration-of-Purpose Doctrine

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE PURPOSE OF THE PARTIES IN ENTERING INTO THE CONTRACT HAS BEEN FRUSTRATED BY AN UNANTICIPATED SUPERVENING EVENT THAT HAS SUBSTANTIALLY DESTROYED THE VALUE OF THE _____ [*adverse party, e.g.,* PLAINTIFF'S] PERFORMANCE TO THE _____ [*contending party, e.g.,* DEFENDANT].

Performance Is Excused When Purpose of Contract Is Frustrated. A party is excused from performing his or her duty under a contract, even though performance remains possible, if the fundamental reason of both parties for entering into the contract has been frustrated by an unanticipated supervening circumstance that substantially destroys the value of performance by the party standing on the contract (*see Cutter Laboratories, Inc. v. Twining (1963) 221 Cal. App. 2d 302, 314-315, 34 Cal. Rptr. 317* ; *Federal Leasing Consultants, Inc. v. Mitchell Lipsett Co. (1978) 85 Cal. App. 3d Supp. 44, 47* , *150 Cal. Rptr. 82*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that, in an action for contract damages, the parties' purpose in entering into the contract was frustrated by an unanticipated supervening event that destroyed the value of performance for defendant.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a defendant seeks to raise this contention. For example, it may be used by defendant in supporting a motion for summary judgment.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised to support adefendant's motion for summary judgment, the memorandum would include an analysis of the supporting and opposing papers such that undisputed facts show that the value of defendant's performance was destroyed by an unanticipated supervening event.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.260* et seq. may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Performance Is Excused When Purpose of Contract Is Frustrated

In ***Cutter Laboratories, Inc. v. Twining*** *(1963) 221 Cal. App. 2d 302, 34 Cal. Rptr. 317* , a vice president of a corporation made an arrangement to avoid estate tax (under then-prevailing law) by having the corporation agree to buy back some of his stock at a set price after his death. The stock was placed in escrow for this purpose. The stock eventually became worth much more than the fixed buy-back price. Nevertheless, over many years the vice president repeatedly ignored or rejected numerous opportunities to change or cancel the buy-back agreement. The vice president ultimately transferred all of his property to his son in trust, and the son, as trustee, then attempted to rescind the buy-back agreement. The corporation sued for a declaration of its rights and obligations under the contract. The trial court declared that the agreement was binding. On appeal, the son contended that the doctrine of frustration of purpose was applicable because (1) the estate tax laws had been changed so that the proceeds of the saleon the defendant's death were now subject to tax, and (2) the corporation's stock was now publicly traded and had increased greatly in value.

The court of appeal affirmed. The doctrine of frustration applies when performance remains possible, but the fundamental reason of both parties for entering into the contract has been frustrated by an unanticipated supervening circumstance, thus destroying substantially the value of performance by the party standing on the contract (*221 Cal. App. 2d 302, 314-315)* . The doctrine did not apply to the facts of this case because the vice president's basic purpose in entering into the contract was found by the trial court to be the protection of his wife in the event of his death, by the creation of an investment of fixed cash value. The basic purpose of both parties was to protect the wife, and that purpose was not frustrated (*221 Cal. App. 2d 302, 315)* .

In ***Federal Leasing Consultants, Inc. v. Mitchell Lipsett Co.*** *(1978) 85 Cal. App. 3d Supp. 44* , *150 Cal. Rptr. 82* , the plaintiff and the defendant made a written lease for an electronic burglar alarm system that operated on certain radio

frequencies and was intended to provide security for the defendant's place of business. Under the lease, title to the equipment remained in the plaintiff, and the defendant was obligated to pay monthly rent and to return the equipment in good condition to the plaintiff at the end of the lease. Some time after the lease was executed, a U.S. district court issued an injunction requiring that this equipment and all other equipment similar to it be rendered inoperable because it interfered with secret government radio frequencies. At the time the contract was executed, neither party was aware of this problem. The defendant later became aware of the problem and immediately took steps to rescind the lease. The plaintiff then sued to recover the remaining lease payments. The trial court ruled that the doctrine of commercial frustration was applicable and rendered judgment for the defendant.

The appellate department of the superior court affirmed. The doctrine of commercial frustration operates when a supervening event, which is not reasonably foreseeable, totally or nearly totally destroys the value of counterperformance in a contract or lease. There was no dispute that the risk of the frustrating event in this case was not reasonably foreseeable (*85 Cal. App. 3d Supp. 44, 47)* . The purpose of the lease agreement was not merely to finance the defendant's purchase of the alarm system from a third party. The fundamental purpose of the lease contract was clearly to give the defendant a functioning burglar alarm system. There was no reason, in the absence of an express agreement to the contrary, to assume that the plaintiff had agreed to acquire ownership of and lease to the defendant a burglar alarm system that could not be used or that the defendant had agreed to pay rent for the nonuse of such a system (*85 Cal. App. 3d Supp. 44, 49)* .

[4] Additional Authorities

[a] Performance Is Excused When Purpose of Contract Is Frustrated

In *Johnson v. Atkins (1942) 53 Cal. App. 2d 430, 127 P.2d 1027* , the appellants made a contract to buy copra from the respondents for shipment and resale to a buyer in a foreign country. After a portion of the copra was shipped to the foreign country and paid for by the appellants, the appellants learned that no more copra could be shipped there because permission for entry had either been denied or canceled by the authorities of the foreign country. The appellants paid the respondents for certain incidental expenses incurred in handling the remainder of the copra and then requested that the respondents make other disposition of the remainder. The respondents refused to do so and submitted the controversy to arbitration, pursuant to a provision in the contract. The arbitrators made an award to the respondents. The appellants protested the submission of the dispute to arbitration and then contested the arbitration proceedings in superior court. The trial court rendered judgment confirming the arbitration award. On appeal, the appellants contended that submission of the contract to arbitration was improper because the arbitration clause of the contract fell when the object of the contract was frustrated, and the trial court had erred in refusing to admit evidence of frustration of purpose in the proceedings to contest the arbitration award. The court of appeal agreed and reversed the judgment. When the assumed possibility of a desired object or effect to be attained by either party to a contract forms the basis on which both parties enter into it, and this object or effect is or surely will be frustrated, a promisor who is without fault in causing the frustration, and who is harmed, is discharged from the duty of performing the promise unless a contrary intention appears (*53 Cal. App. 2d 430, 433-434)* . In this case, if the facts pleaded by the appellants were true, the contract was terminated on the ground of frustration of purpose, and no arbitration was permissible (*53 Cal. App 2d 430, 435)* .

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5-50 California Points & Authorities §§ 50.251-50.259

[Reserved]

§§ 50.251[Reserved]

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5-50 California Points & Authorities § 50.260

§ 50.260 Risk of Frustrating Event Was Reasonably Foreseeable

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief*].

THE PURPOSE OF THE PARTIES IN ENTERING INTO THE CONTRACT WAS NOT FRUSTRATED BECAUSE THE RISK OF THE FRUSTRATING EVENT WAS REASONABLY FORESEEABLE.

Defense of Frustration Is Not Available When Risk of Frustrating Event Was Reasonably Foreseeable. A promisor seeking to be excused from performance on the ground that the purpose of the contract has been frustrated must prove that the risk of the frustrating event was not reasonably foreseeable (*Gold v. Salem Lutheran Home Ass'n (1959) 53 Cal. 2d 289, 291, 1 Cal. Rptr. 343, 347 P.2d 687* ; *Lloyd v. Murphy (1944) 25 Cal. 2d 48, 54, 153 P.2d 47*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that, in an action for contract damages, a defendant is not excused from performance on the ground of the purpose of the contract being frustrated when the frustrating event was one that was reasonably foreseeable.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a plaintiff seeks to raise this contention. For example, it may be used by plaintiff in opposing a motion for summary judgment.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is

raised to oppose a defendant's motion for summary judgment, the memorandum would include an analysis of the supporting and opposing papers showing that a triable issue of fact exists on the issue whether the unanticipated supervening event was reasonably foreseeable.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

In an appropriate case, these memoranda may be combined with alternate or additional memoranda refuting the defense that the purpose of the contract was frustrated, *set out in §§ 50.261 -50.263*.

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. Forexample, if used in a memorandum opposing a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.250* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Defense of Frustration Is Not Available When Risk of Frustrating Event Was Reasonably Foreseeable

In ***Gold v. Salem Lutheran Home Ass'n*** *(1959) 53 Cal. 2d 289, 1 Cal. Rptr. 343, 347 P.2d 687* , the plaintiffs' decedent made a contract with the defendant, a nonprofit corporation that operated a home for elderly persons, by which the defendant agreed to care for the decedent for the rest of his life in return for a lump-sum payment, the amount of which was determined by reference to life expectancy tables. The decedent, who was 84 years old at the time the contract was executed, died two days after the contract was executed. The plaintiffs sued to recover the lump-sum payment. The trial court rendered judgment for the defendant. On appeal, the plaintiffs contended that the doctrine of frustration of purpose was applicable to the case.

The Supreme Court affirmed. Frustration of purpose is no defense if the frustrating event was reasonably foreseeable, and the burden of proving that the risk of the frustrating event was not reasonably foreseeable rests with the party seeking to excuse nonperformance of a contractual obligation (*53 Cal. 2d 289, 291)* . The fact that death may at any unexpected time overcome a man of the decedent's age is, by common observation, readily classified as reasonably foreseeable. In this case, each party to the contract had clearly assumed the risk of variation of the life span from that predicted by the mortality tables, and the doctrine of frustration was not applicable (*53 Cal. 2d 289, 291-292)* .

In ***Lloyd v. Murphy*** *(1944) 25 Cal. 2d 48, 153 P.2d 47* , the plaintiffs leased certain premises to the defendant for a five-year term for the sole purpose of conducting the business of displaying, selling, servicing, and repairing new automobiles, and for no other purpose without the plaintiff's written consent. Subsequent to the execution of the lease, the federalgovernment enacted wartime restrictions on the sale of new automobiles. Although the plaintiffs offered to waive the restrictions on use of the leased premises and to reduce the rent, the defendant chose to vacate the premises. After attempting unsuccessfully to persuade the defendant to perform his obligations under the lease, the plaintiffs

rented the premises to other tenants for the purpose of mitigating damages and sued for recovery of unpaid rent. The trial court rendered judgment for the plaintiffs. On appeal, the defendant contended that the purpose for which the premises were leased was frustrated by the restrictions placed on the sale of new automobiles by the federal government, terminating his duties under the lease.

The Supreme Court affirmed. Under the doctrine of frustration, the courts have required a promisor seeking to be excused from performance to prove that the risk of the frustrating event was not reasonably foreseeable, and the value of counterperformance is totally or nearly totally destroyed; for frustration is no defense if it was foreseeable or controllable by the promisor, or if counterperformance remains valuable (*25 Cal. 2d 48, 54)* . At the time the lease in this case was executed, federal law authorizing the President to allocate materials and mobilize industry for national defense had been in effect for more than a year, and the automotive industry was in the process of conversion to supply the needs of the nation's growing mechanized army and to meet lend-lease commitments. These facts were commonly known, and it could not be said that the risk of war and its consequences necessitating restriction of the production and sale of automobiles was so remote a contingency that its risk could not be foreseen by the defendant, who was an experienced automobile dealer. The defendant had failed to prove that the possibility of war and its consequences on the production and sale of new automobiles was an unanticipated circumstance wholly outside the contemplation of the parties (*25 Cal. 2d 48, 55-56)* .

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5-50 California Points & Authorities § 50.261

§ 50.261 Parties Assumed Risk of Frustrating Event

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE PURPOSE OF THE PARTIES IN ENTERING INTO THE CONTRACT WAS NOT FRUSTRATED BECAUSE THE PARTIES CONTRACTED WITH REFERENCE TO THE FRUSTRATING EVENT, AND THE _____ [*adverse party, e.g.,* DEFENDANT] ASSUMED THE RISKS ARISING FROM IT.

Defense of Frustration Is Not Applicable When Parties Assumed Risk. Parties to a contract may not invoke the doctrine offrustration to escape their obligations if they have contracted with reference to the frustrating event or have contemplated the risks arising from it (*Glenn R. Sewell Sheet Metal, Inc. v. Loverde (1969) 70 Cal. 2d 666, 676, 75 Cal. Rptr. 889, 451 P.2d 721*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support the contention that, in an action for contract damages, the frustration-of-purpose defense is not available to defendant because the parties contracted with reference to the frustrating event, and the defendant assumed the risks arising from it.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a plaintiff seeks to raise this contention. For example, it may be used by plaintiff in opposing a motion for summary judgment.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised to oppose a defendant's motion for summary judgment, the memorandum would include an analysis of the supporting and opposing papers showing that, under undisputed facts, the defendant assumed the risk of the frustrating event.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

In an appropriate case, these memoranda may be combined with alternate or additional memoranda refuting the defense that the purpose of the contract was frustrated, *set out in §§ 50.260* 50.262, and 50.263.

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publicationin drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.250* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Defense of Frustration Is Not Applicable When Parties Assumed Risk

In ***Glenn R. Sewell Sheet Metal, Inc. v. Loverde*** *(1969) 70 Cal. 2d 666, 75 Cal. Rptr. 889, 451 P.2d 721* , the plaintiff subleased certain real property from the defendants for the purpose of operating a trailer park. The plaintiff agreed to comply with all federal, state, county, city, and district laws, ordinances, rules, and regulations. He also agreed that he had examined the premises and knew of their condition, the defendants had made no representation as to their condition, and the defendants were relieved of all obligations as to the repair or maintenance of the improvements. After successfully operating the premises as a trailer park for some time, the plaintiff had difficulties with the septic system. The plaintiff unsuccessfully attempted to alleviate the resulting pooling of effluent on the grounds. He was then ordered by the county health department to either connect the trailer park sewage system to nearby public sewer lines or terminate use of the premises as a trailer park. After determining that connection to the public sewer system would be too expensive, the plaintiff elected to terminate his operation of the trailer park and ordered the occupants to leave. Thereafter, he abandoned the premises 11 months before the end of the sublease and paid no rent for that period. The plaintiff sued for a declaratory judgment that the sublease was unenforceable and to recover a deposit paid to the defendants. The trial court rendered judgment for the defendants.

The Supreme Court affirmed. The plaintiff had assumed the obligation of complying with sewage disposal laws, and this included the obligation either to connect the sewer system to a public sewer or to cease using the premises as a trailer park (*70 Cal. 2d 666, 671-676)* . Accordingly, he assumed the risk that complying with sewage disposal laws might interfere with his use of the premises or render it less profitable. Having voluntarily assumed this duty and its attendant risk, the plaintiff could not avail himself of the common law doctrine of frustration because it is settled that if parties have contracted with reference to the frustrating event or have contemplated the risks arising from it, they may

not invoke the doctrine of frustration to escape their obligations (*70 Cal. 2d 666, 676)* .

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5-50 California Points & Authorities § 50.262

§ 50.262 Value of Counterperformance Was Not Totally Destroyed

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE PURPOSE OF THE PARTIES IN ENTERING INTO THE CONTRACT WAS NOT FRUSTRATED IN THAT THE VALUE OF THE _____ [*contending party, e.g.,* PLAINTIFF'S] COUNTERPERFORMANCE TO THE _____ [*adverse party, e.g.,* DEFENDANT] WAS NOT TOTALLY OR NEARLY TOTALLY DESTROYED BY THE FRUSTRATING EVENT.

Defense of Frustration Is Not Available Unless Value of Counterperformance Was Totally Destroyed. A promisor seeking to be excused from performance under a contract on the ground of frustration of purpose must prove that the value of the counterperformance was totally or nearly totally destroyed by the frustrating event (*Lloyd v. Murphy (1944) 25 Cal. 2d 48, 54, 153 P.2d 47*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support the contention that, in an action for contract damages, the frustration-of-purpose defense is not available to defendant because the frustrating event did not totally or in effect destroy the value of defendant's performance.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a plaintiff seeks to raise this contention. For example, it may be used by plaintiff in opposing a motion for summary judgment.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised to oppose a defendant's motion for summary judgment, the memorandum would include an analysis of the supporting and opposing papers showing that there is a triable issue on whether the value of defendant's performance was destroyed sufficiently to give rise to a frustration-of-purpose defense.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

In an appropriate case, these memoranda may be combined with alternate or additional memoranda refuting the defense that the purpose of the contract was frustrated, *set out in §§ 50.260* 50.261, and 50.263.

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.250* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Defense of Frustration Is Not Available Unless Value of Counterperformance Was Totally Destroyed

The facts and procedural background of ***Lloyd v. Murphy*** *(1944) 25 Cal. 2d 48, 153 P.2d 47* , are discussed in *§ 50.260[3][a]*. The Supreme Court, in holding the doctrine of frustration inapplicable to the facts of the case, noted that a promisor seeking to be excused from performance must prove that the risk of the frustrating event was not reasonably foreseeable, and the value of counterperformance was totally or nearly totally destroyed (*25 Cal. 2d 48, 54)* . In this case, the defendant had not sustained the burden of proving that the value of the lease had been destroyed. The sale of automobiles had not been made impossible or illegal but was merely restricted, and the defendant could still use the premises for the purpose for which they were leased. Moreover, the defendant had testified that he continued to sell new automobiles exclusively at another location in the same county. If governmental regulation does not entirely prohibit the business to be carried on in the leased premises but only limits or restricts it, making it less profitable or more difficult to continue, the lease is not terminated, and the lessee is not excused from further performance (*25 Cal. 2d 48, 56)* .

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5-50 California Points & Authorities § 50.263

§ 50.263 Purpose Allegedly Frustrated Was Not Contemplated by Both Parties

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE PURPOSE ALLEGEDLY FRUSTRATED WAS NOT ONE CONTEMPLATED BY THE PARTIES AT THE TIME THE CONTRACT WAS MADE.

Defense of Frustration Is Not Applicable Unless Frustrated Purpose Was Contemplated by Both Parties. The defense of frustration of purpose is not applicable unless the frustrated purpose was contemplated by both parties to the contract (*see Brown v. Oshiro (1945) 68 Cal. App. 2d 393, 397, 156 P.2d 976*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support the contention that, in an action for contract damages, the frustration-of-purpose defense is not available to defendant because the purpose allegedly frustrated was not one contemplated by both parties at the time the contract was made.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a plaintiff seeks to raise this contention. For example, it may be used by plaintiff in opposing a motion for summary judgment.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised to oppose a defendant's motion for summary judgment, the memorandum would include an analysis of the

supporting and opposing papers showing that a triable issue as to whether the purpose allegedly frustrated was not one contemplated by both parties at the time the contract was made.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

In an appropriate case, these memoranda may be combined with alternate or additional memoranda refuting the defense that the purpose of the contract was frustrated, *set out in §§ 50.260 -50.262*.

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.250* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Defense of Frustration Is Not Applicable Unless Frustrated Purpose Was Contemplated by Both Parties

In ***Brown v. Oshiro*** *(1945) 68 Cal. App. 2d 393, 156 P.2d 976* , the plaintiffs leased a portion of a building to the defendant for use as a hotel. The defendant operated a hotel business on the premises until he was evacuated from the city, pursuant to a federal governmental wartime order that excluded all persons of Japanese ancestry from the area. The defendant then sublet the premises to a third person. The plaintiff sued for declaratory relief seeking a determination that the lease was still binding on the defendant. The trial court found that at the time of the execution of the lease, the parties intended that the defendant should personally conduct a hotel business catering primarily to persons of Japanese ancestry, and this purpose had been frustrated or prevented by the government order removing all persons of Japanese ancestry from the area. The trial court determined that the lease was not binding.

The court of appeal reversed. Assuming that the evidence was sufficient to support a finding that the defendant's purpose was to operate a Japanese hotel, this alone was not sufficient to support a judgment. For the defense of frustration to be applicable, it is not sufficient that the purpose or desired object of one of the parties to the contract has been frustrated;the purpose or desired object of both parties must have been frustrated. In other words, the applicability of the doctrine of frustration depends on the total or nearly total destruction of the purpose for which, in the contemplation of both parties, the contract was made. There was no evidentiary support for a finding that the plaintiffs' purpose in executing the lease was other than that stated, that is, for conducting a hotel and renting office space. This purpose was not frustrated (*68 Cal. App. 2d 393, 397-398)* .

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5-50 California Points & Authorities §§ 50.264-50.269

[Reserved]

§§ 50.264[Reserved]

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9. Failure of Consideration

5-50 California Points & Authorities § 50.270

§ 50.270 Recovery Is Precluded by Failure of Consideration

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE CONTRACT IS NOT ENFORCEABLE BECAUSE THERE WAS A FAILURE OF CONSIDERATION IN THAT _____ [*specify, e.g.,* THE PLAINTIFF REFUSED TO PERFORM THE OBLIGATIONS TO BE PERFORMED ON THE PLAINTIFF'S PART UNLESS _____ (*specify unwarranted additional condition*), WHICH WAS A CONDITION NOT CREATED BY THE CONTRACT AND AN UNWARRANTED ADDITIONAL CONDITION].

A. Failure of Consideration Is Ground for Rescission or Defense in Action on Contract. Failure by a promisor to execute a material promise going to the essence of the contract, performance of which has been exchanged for performance by the promisee, excuses nonperformance by the promisee and constitutes a ground for rescission by the promisee or a defense to an action on the contract by the promisor (*see Civ. Code § 1689(b)(2), (4); Bliss v. California Coop. Producers (1947) 30 Cal. 2d 240, 248-249, 181 P.2d 369* ; *Wyler v. Feuer (1978) 85 Cal. App. 3d 392, 403-404, 149 Cal. Rptr. 626* ; *Taliaferro v. Davis (1963) 216 Cal. App. 2d 398, 410-412, 31 Cal. Rptr. 164*).

B. Failure of Consideration Is Available as Defense Despite Failure to Rescind. A party does not waive the right to rely on failure of consideration as a defense to an action on the contract by having failed to rescind the contract on the same ground (*Benson v. Andrews (1955) 138 Cal. App. 2d 123, 136, 292 P.2d 39* ; *see Bliss v. California Coop. Producers (1947) 30 Cal. 2d 240, 250, 181 P.2d 369*).

C. Failure of Consideration Must Be Based on Events Subsequent to Making of Contract. The defense of failure of consideration must be based on facts occurring subsequent to the making of the contract (*Taliaferro v. Davis (1963) 216 Cal. App. 2d 398, 411, 31 Cal. Rptr. 164* ; *Benson v. Andrews (1955) 138 Cal. App. 2d 123, 132, 292 P.2d 39*).

[*Optional*] **D. Annexation of Unwarranted Condition to Offer of Performance Constitutes Failure of Consideration.** If one who isbound to perform a contract annexes an unwarranted condition to his or her offer of performance, there is, in effect, a refusal to perform and a failure of consideration (*Loop Bldg. Co. v. De Coo (1929) 97 Cal. App. 354, 364, 275 P. 881* ; *see* *Steelduct Co. v. Henger-Seltzer Co. (1945) 26 Cal. 2d 634, 646, 160 P.2d 804*).

[*Optional*] **E. Inability to Deliver Thing Sold Constitutes Failure of Consideration.** A vendor's inability to deliver the thing contracted for constitutes a failure of consideration and prevents the vendor from enforcing the contract (*see Post v. Palpar, Inc. (1960) 184 Cal. App. 2d 676, 680, 7 Cal. Rptr. 823* ; *McDorman v. Moody (1942) 50 Cal. App. 2d 136, 141, 122 P.2d 639*).

[*Optional*] **F. Failure to Make Progress Payments in Building Contract Is Failure of Consideration.** In the case of a building contract, the failure by the owner to make progress payments as required by the contract may constitute a failure of consideration justifying rescission by the contractor (*American-Hawaiian Eng'r & Constr. Co. v. Butler (1913) 165 Cal. 497, 516, 133 P. 280*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that there was a failure of consideration, which justified rescission [*Civ. Code § 1689(b)(2), (4)*].

Civ. Code § 1689(b)(2) provides that a party to a contract may rescind the contract if the consideration for the obligation of the rescinding party fails, in whole or in part, through the fault of the party as to whom he or she rescinds.

Civ. Code § 1689(b)(4) provides that a party to a contract may rescind the contract if the consideration for the obligation of the rescinding party, before it is rendered to him or her, fails in a material respect from any cause.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a party seeks to raise this contention. For example, it may be used by plaintiff to support a motion for summary judgment.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised to support a plaintiff's motion for summary judgment, the memorandum would includean analysis of the supporting and opposing papers such that undisputed facts show that there was a failure of consideration justifying the remedy of rescission.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.280* may be submitted in opposition to contention supported by this form.

[3] Discussion of Authorities

[a] Failure of Consideration Is Ground for Rescission or Defense in Action on Contract

Bliss v. California Coop. Producers *(1947) 30 Cal. 2d 240, 181 P.2d 369* , was an action on promissory notes that had been taken by a corporation in consideration of the corporation's assistance in the marketing and processing of the defendants' products and in further consideration of the corporation's payment of premiums on life insurance policies for the defendants. The notes were pledged to the plaintiffs by the corporation. The central issue was whether the plaintiffs, who accepted the notes after the defendants failed to make the first instalment payment, were holders in due course. The defendants asserted failure of consideration for the notes, a good defense to an action on a negotiable instrument by one who is not a holder in due course, in that the corporation failed to perform under the marketing contract, failed to pay the life insurance premiums, and subsequently became insolvent (*30 Cal. 2d 240, 248)* . The trial court rendered judgment for the plaintiffs.

The Supreme Court reversed. Failure of consideration is the failure to execute a promise, the performance of which has been exchanged for performance by the other party. Among other situations, the failure may arise from the wilful breach of the promise. In the case of a bilateral contract, failure of consideration is a defense to an action for a breach of the contract inasmuch as it is contemplated that the performance of the unilateral promises shall be in exchange for each other, the performances being considered as equivalent in value (*30 Cal. 2d 240, 248)* . In all executory contracts, the several obligations of the parties constitute to each, reciprocally, the consideration of the contract; a failure to perform constitutes a failure of consideration, either partial or total, within the meaning of *Civ. Code § 1689* (*30 Cal. 2d 240, 248-249)* . The insolvency of a promisor in a bilateral continuing contract is tantamount to a breach of the contract. Although the general rule is that an assignee of a chose in action is subject to all equities and defenses existing at or before the notice of the assignment, when there is a failure of consideration under a bilateral contract consisting of a breach by the assignor, the failure is a good defense to an action by the assignee, whether it occurred before or after the notice of assignment (*30 Cal. 2d 240, 250)* .

Wyler v. Feuer *(1978) 85 Cal. App. 3d 392, 149 Cal. Rptr. 626* , was an action by a limited partner seeking rescission of the limited partnership agreement on the grounds of fraud and failure of consideration. The plaintiff contended that the defendants' inability to obtain $850,000 in financing for the production of a motion picture that was the subject of the agreement constituted a failure of consideration. The jury had been instructed that a party may rescind a contract if, through the fault of the other party, the consideration that the rescinding party was to receive fails in whole or in a material part; or if the consideration fails in a material respect from any cause before it is rendered to the rescinding party (*85 Cal. App. 3d 392, 403)* . Judgment was rendered on a verdict for the defendants. On appeal, the plaintiff asserted the insufficiency of the evidence and error in the jury instruction concerning failure of consideration (*85 Cal. App. 3d 392, 395, 399)* . The plaintiff contended that this instruction was erroneous because *Civ. Code § 1689(b)(2)* does not require a "material" failure of consideration.

The court of appeal affirmed. Case law has uniformly held that a failure of consideration must be "material," or go to the "essence" of the contract, before rescission is appropriate (*85 Cal. App. 3d 392, 403-404)* . The 1961 amendment of *Civ. Code § 1689* (which coincided with the repeal of *Civ. Code § 3406* on equitable rescission) did not abrogate the need for materiality; *Civ. Code § 1689* was reenacted in substantially the same words as the original enactment in 1872.

When a statute construed by the courts in a particular fashion is reenacted in substantially the same terms, the legislature is presumed to have been familiar with that construction and to have adopted it. Since *Civ. Code § 1689(b)(2), (4)* substantially reenactedprior law, the judicial construction requiring materiality was, and has been, properly carried forward. Therefore, the jury instruction regarding failure of consideration was correct (*85 Cal. App. 3d 392, 404)* .

Taliaferro v. Davis *(1963) 216 Cal. App. 2d 398, 31 Cal. Rptr. 164* , was an interpleader action by tenants of divorced spouses. After their landlords' divorce and in view of proceedings in consequence of the divorce, the tenants sought a determination of whether they should pay rent to the husband or to the wife. A property settlement agreement in the divorce action stipulated that the leased property would remain under the management and control of the husband. Nevertheless, the wife obtained a writ of execution on the property pursuant to a judgment the husband for arrearages in support payments. In the tenants' interpleader action, the husband cross complained that the wife's execution and sale of the property constituted a failure of consideration for the original property settlement agreement (*216 Cal. App. 2d 398, 404-405)* . The trial court rendered judgment for the wife on the husband's cross complaint (*216 Cal. App. 2d 398, 408)* .

The court of appeal affirmed. Failure of consideration is the failure to execute a promise, the performance of which has been exchanged for performance by the other party. The failure may arise from the willful breach of the promise (*216 Cal. App. 2d 398, 410-411)* . Failure of consideration does not vitiate the contract from the beginning; until rescinded or terminated, a contract once in effect remains in effect. This is because failure of consideration is based not on facts existing at the time the mutual promises bargained for in a bilateral contract are made, but on some fact or contingency that occurs between the time of the making of the contract and the action, which results in the material failure of performance by one party (*216 Cal. App. 2d 398, 411)* . Failure of consideration is a ground for rescission of a bilateral contract as well as a defense to an action for breach of the contract (*216 Cal. App. 2d 398, 411)* . When the consideration fails in whole or in part through the fault of a party whose duty it is to render it, the other party may invoke the failure as a basis for rescinding or terminating the contract, provided the failure or refusal to perform constitutes a breach in such an essential particular as to justify rescission or termination. The right of the injured party to claim release from obligations, and thus to elect to terminate the contract, depends on the gravity of the breach (*216 Cal. App. 2d 398, 412)* . The husband in this case contended that there was a failure of consideration for the property settlement agreement because the wife had enforced the husband's obligation under the agreement to the extent provided for by law; however, that contention was absurd (*216 Cal. App. 2d 398, 412)* .

[b] Failure of Consideration Is Available as Defense Despite Failure to Rescind

The facts and procedural background of ***Benson v. Andrews*** *(1955) 138 Cal. App. 2d 123, 292 P.2d 39* , are discussed in [c], *below*. The court of appeal held that the defendants did not waive their right to rely on failure of consideration as a defense to the action on the note by failing to announce a formal rescission. When there is a failure of consideration, a party may elect whether to rescind the transaction or to do nothing and then assert failure of consideration as a defense in an action by the other party for breach of the contract (*138 Cal. App. 2d 123, 136)* .

The facts and procedural background of ***Bliss v. California Coop. Producers*** *(1947) 30 Cal. 2d 240, 181 P.2d 369* , are discussed in [a], *above*. The Supreme Court recognized that a failure of consideration that constitutes a ground for rescission under *Civ. Code § 1689* can also be used as a defense to an action for breach of contract (*30 Cal. 2d 240, 248-249)* .

[c] Failure of Consideration Must Be Based on Events Subsequent to Making of Contract

The facts and procedural background of ***Taliaferro v. Davis*** *(1963) 216 Cal. App. 2d 398, 31 Cal. Rptr. 164* , are discussed in [a], *above*. The court of appeal stated that failure of consideration must be based not on facts existing at the time the mutual promises bargained for in a bilateral contract are made, but on some fact or contingency that occurs between the time of the making of the contract and the action, which results in the material failure of performance by

one party (*216 Cal. App. 2d 398, 411)* .

Benson v. Andrews *(1955) 138 Cal. App. 2d 123, 292 P.2d 39* , was an action by an assignee to enforce the defendants' promissory note secured by a deed of trust to a contractor. Before assigning the instruments to the plaintiff, the contractor had committed several material breaches of his contract with the defendants for the construction of a house. The defendants raised the affirmative defense of failure of consideration. The trial court rendered judgment for the plaintiff (*138 Cal. App. 2d 123, 125)* .

The court of appeal reversed. It was inescapable from any aspect of the case that there was a total failure of consideration for the note and deed of trust, and the trial court's determination that there was no failure of consideration was completely contrary to the facts and unsupported by the evidence. Since the plaintiff stood in the same position as the contractor, being a mere assignee of the note and not a holder in due course, he was subject to the same defense of failure of consideration as the contractor (*138 Cal. App. 2d 123, 135)* . The defense of failure of consideration, in its precise sense, rests not on facts existing at the time the mutual promises bargained for in a bilateral contract are made, but on some fact or contingency that occurs between the time of the making of the contract and theaction, which results in the material failure of performance by one party (*138 Cal. App. 2d 123, 132)* .

[d] Annexation of Unwarranted Condition to Offer of Performance Constitutes Failure of Consideration

Loop Bldg. Co. v. De Coo *(1929) 97 Cal. App. 354, 275 P. 881* , was an action to rescind a contract for the purchase of $5,000 worth of stock and to recover $1,080 already paid toward its purchase. The plaintiff claimed that the defendant refused to complete the sale as agreed unless the plaintiff bought a block of $10,000 worth of stock. The trial court granted a motion for nonsuit (*97 Cal. App. 354, 356, 361)* .

The court of appeal reversed. A refusal or failure of a party fully to perform his or her part of a contract constitutes a partial failure of consideration and gives the other party a right to rescind under *Civ. Code § 1689*. If one who is bound to perform a contract annexes an unwarranted condition to his or her offer of performance, there is, in effect, a refusal to perform (*97 Cal. App. 354, 364)* .

In ***Steelduct Co. v. Henger-Seltzer Co.*** *(1945) 26 Cal. 2d 634, 160 P.2d 804* , the defendant agreed to act as the plaintiff's exclusive sales agent in California. Before expiration of the contract term, the defendant repudiated the contract. In subsequent discussions with the plaintiff, the defendant agreed to reinstatement of the contract if the plaintiff would agree to a further condition not contained in the original contract. The plaintiff refused to assent to this new condition and sued for damages for breach of contract. Judgment was rendered for the defendant. On appeal, the plaintiff contended that the trial court committed error in its jury instructions (*26 Cal. 2d 634, 639, 646)* .

The Supreme Court reversed. Annexing an unwarranted condition to an offer of performance is a refusal to perform (*26 Cal. 2d 634, 646)* .

[e] Inability to Deliver Thing Sold Constitutes Failure of Consideration

In ***Post v. Palpar, Inc.*** *(1960) 184 Cal. App. 2d 676, 7 Cal. Rptr. 823* , purchasers sued to rescind a contract for the purchase of land. The contract provided that if the vendor could not perfect a marketable title within 90 days, the purchasers would have the option of receiving back their deposit. The agreement further stated that time was of the essence (*184 Cal. App. 2d 676, 677)* . Despite several extensions of time granted by the purchasers, the vendor failed to perfect title. Judgment was rendered for the purchasers.

The court of appeal affirmed. The failure to tender marketable title at the time the contract matured was a material breach of the contract that entitled the purchasers to rescind, to refuse to make further payments,and to recover any amount paid under the contract (*184 Cal. App. 2d 676, 680)* .

In ***McDorman v. Moody*** *(1942) 50 Cal. App. 2d 136, 122 P.2d 639* , the plaintiff's assignor had contracted with the defendant to transfer 1,500 shares of stock on the defendant's completion of agreed monthly payments. The contract provided that if the corporation whose stock was the subject of the contract should be adjudicated a bankrupt, then the defendant would no longer be liable for further payments. The contract further provided that if the defendant defaulted on any payments, the entire balance would become due (*50 Cal. App. 2d 136, 137-138)* . On hearing that the corporation had filed a petition for bankruptcy, the defendant stopped payment on a check he had just sent to the plaintiff's assignor. The contract was then assigned to the plaintiff who sued for the balance due under the contract. Judgment was rendered for the defendant (*50 Cal. App. 2d 136, 138-139)* .

The court of appeal affirmed. Competent proof established that the plaintiff was not able or ready to deliver, and would never have been able to deliver, any part of the shares sold under the contract. It is a general rule that one who cannot perform his or her part of a contract is not entitled to performance by the other party. Even if the seller had offered to deliver the stock, the offer would have been of no effect in view of the inability of the seller to perform according to the offer (*50 Cal. App. 2d 136, 140-141)* . A contract for the purchase of property cannot be enforced by the seller when the consideration for the purchase price wholly fails in a material respect. When the promise of the seller to deliver corporate stock has failed without fault on the part of the buyer, the consideration for the buyer's promise fails in a material respect. An agreement to sell implies the ability to deliver the thing sold. When the seller becomes unable to execute his or her part of the contract, his or her right to enforce the payment of the purchase price fails (*50 Cal. App. 2d 136, 141)* . Because of the inability of the plaintiff's assignor to deliver what he sold, the buyer was released from making further payments after discovery of the failure (*50 Cal. App. 2d 136, 142)* .

[f] Failure to Make Progress Payments in Building Contract Is Failure of Consideration

In ***American-Hawaiian Eng'r & Constr. Co. v. Butler*** *(1913) 165 Cal. 497, 133 P. 280* , a contractor ceased working on a building and sued for rescission and damages following the owner's refusal to make a monthly payment as required under a construction contract. The owner hired another contractor to finish the building and cross complained for damages, claiming that the contractor had violated the terms of the contract. The trial court rendered judgment for the contractor (*165 Cal. 497, 502-503)* .

The Supreme Court affirmed. Due demand having been made by the contractor for the monthly payment, the refusal of the owner to pay was unjustifiable and a breach of the contract. As to the contractor, the consideration for the contract had to that extent failed. The refusal to make the monthly payment under these circumstances was sufficient cause for rescission by the contractor and for a suit *in quantum meruit* for the reasonable value of the work and material furnished to date (*165 Cal. 497, 516)* .

[4] Additional Authorities

[a] Failure to Make Progress Payments in Building Contract Is Failure of Consideration

In *Integrated, Inc. v. Alec Fergusson Elec. Contractor (1967) 250 Cal. App. 2d 287, 58 Cal. Rptr. 503* , an electrical subcontractor gave notice of rescission and refused to complete performance of a contract as a result of a dispute over progress payments. The contractor sued the subcontractor for breach of contract for the damages incurred by having to hire someone else to complete the work. The subcontractor filed his own action for breach of contract. The actions were consolidated and judgment was rendered for damages to the general contractor and no relief on the subcontractor's separate action (*250 Cal. App. 2d 287, 289-290)* . The court of appeal reversed because the trial court had erred in interpreting the contract. Because of this error, the trial court never decided whether the contractor should have made payments "immediately" on receipt of payment from the principal, as required by the contract (*250 Cal. App. 2d 287, 295)* . A retrial was necessary to determine this factual issue. In building-contract cases, a failure to make progress payments is not such a breach as will authorize a contractor to abandon the work and sue for damages, but it does

constitute such a breach as will justify rescission and recovery of the reasonable value of labor and materials furnished (*250 Cal. App. 2d 287, 296)* . A contract requiring "immediate" payment is usually construed to require payment within a reasonable time having due regard to the nature and circumstances of the case. Ordinarily, a party may unilaterally rescind a contract only when there has been a total or material breach by the other party. If the other party has violated a covenant of minor importance, not going to the root of the matter, and one that can be readily compensated in damages, the party injured cannot rescind, but must perform his part of the contract and seek compensation in damages. A slight deviation either in time or amount of progress payments should not justify rescission or abandonment (*250 Cal. App.2d 287, 295-297)* . Although the court did not specifically use the phrase "failure of consideration," it is clear that the court was applying this concept from theprinciples it applied and from its citations to cases and secondary authority dealing with failure of consideration.

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B. Defenses to Breach of Contract Action
9. Failure of Consideration

5-50 California Points & Authorities §§ 50.271-50.279

[Reserved]

§§ 50.271[Reserved]

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5-50 California Points & Authorities § 50.280

§ 50.280 Recovery Is Not Precluded When Failure of Consideration Is Not Shown

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THERE IS NO FAILURE OF CONSIDERATION WHEN _____ [*specify, e.g.,* THERE HAS BEEN SUBSTANTIAL PERFORMANCE, AND THE ONLY DEVIATIONS OR OMISSIONS FROM STRICT PERFORMANCE ARE TRIVIAL].

A. Burden of Proof of Failure of Consideration Is on Defendant. The burden of proving failure of consideration as a matter of defense is on the party who asserts it (*Boswell v. Reid (1962) 199 Cal. App. 2d 705, 712-713, 19 Cal. Rptr. 29*).

[*Optional*] **B. Deviations From the Contract in Trivial Matters Do Not Constitute Failure of Consideration.** When there has been a substantial performance of the contract, trivial omissions or deviations do not constitute a failure of consideration sufficient to warrant a rescission of the contract (*Giberson v. Fink (1915) 28 Cal. App. 25, 34, 151 P. 371*).

[*Optional*] **C. No Failure of Consideration When Consideration Proves Worthless.** When a party gets the promised consideration, the fact that it proves worthless or of little value because of an unexpected occurrence does not constitute a failure of consideration (*Konecko v. Konecko (1958) 164 Cal. App. 2d 249, 253, 330 P.2d 393*).

[*Optional*] **D. Partial Failure of Consideration Is Not Complete Defense.** When there is a partial failure of consideration, the part that failed is simply a nullity and imparts no taint to the remaining consideration. If there is a substantial consideration left, it will be sufficient to sustain the contract (*Del Riccio v. Photochart (1954) 124 Cal. App. 2d 301, 312, 268 P.2d 814*).

[*Optional*] **E. Delay in Performance Ordinarily Is Not Failure of Consideration.** Mere delay in performing a contract is not asubstantial breach constituting failure of consideration unless time has been expressly made of the essence in the contract (*Johnson v. Alexander (1976) 63 Cal. App. 3d 806, 813, 134 Cal. Rptr. 101*) or unless the delay in performance warrants the conclusion that the other side does not intend to perform (*Hofland v. Gustafson (1955) 132 Cal. App. 2d Supp. 907, 909-910* , *282 P.2d 1039*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that there was no failure of consideration [*see Civ. Code § 1689(b)(2), (4)*], and that there should be no rescission granted in a suit to rescind a contract.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a party seeks to raise this contention. For example, it may be used by a defendant to oppose a motion for summary judgment.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised to oppose a plaintiff's motion for summary judgment, the memorandum would include an analysis of the supporting and opposing papers showing that there is a triable issue of fact whether there was a failure of consideration justifying the remedy of rescission.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

An unexpected occurrence that substantially destroys the value of the other party's performance may, in some instances, give rise to the defense of frustration of purpose [*see Federal Leasing Consultants, Inc. v. Mitchell Lipsett Co. (1978) 85 Cal. App. 3d Supp. 44, 47* , *150 Cal. Rptr. 82]* . For memoranda supporting the contention that a party's nonperformance is excused because of frustration of purpose, see *§ 50.250*.

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a motion for summaryjudgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.270* may be submitted in opposition to contention supported by this form.

[3] Discussion of Authorities

[a] Burden of Proof of Failure of Consideration Is on Defendant

In ***Boswell v. Reid*** *(1962) 199 Cal. App. 2d 705, 19 Cal. Rptr. 29* , the plaintiff sued on an unsecured promissory note taken from the owner of land on which a housing project was to be built. The note was given in exchange for an agreement to obtain construction financing and interim and take-out loans. The defendant raised the defense of failure of consideration but did not prove it. The trial court rendered judgment for the plaintiff (*199 Cal. App. 2d 705, 706, 713)* .

The court of appeal affirmed. Failure of consideration is the failure to execute a promise, the performance of which has been exchanged for performance by the other party. Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration. The burden of proving failure of consideration as a matter of defense is on the party who asserts it (*199 Cal. App. 2d 705, 713)* .

[b] Deviations From the Contract in Trivial Matters Do Not Constitute Failure of Consideration

In ***Giberson v. Fink*** *(1915) 28 Cal. App. 25, 151 P. 371* , the plaintiff paid the defendant $1,000 toward the purchase of a house that the defendant contracted to construct for the plaintiff. The plaintiff sued for rescission of the contract and return of her $1,000 after the defendant had allegedly deviated substantially from the agreed-on plans (*28 Cal. App. 25, 27, 28)* . Judgment was rendered for the defendant.

The court of appeal affirmed. The alleged deviations were not significant enough to justify the conclusion that the contract was not substantially performed. Trivial omissions occur in the execution of the terms of nearly all building contracts. When the building is constructed in substantialconformity with the plans and specifications, trivial omissions cannot be the basis for a claim of failure of consideration sufficient to justify a rescission of the contract (*28 Cal. App. 25, 34)* .

[c] No Failure of Consideration When Consideration Proves Worthless

In ***Konecko v. Konecko*** *(1958) 164 Cal. App. 2d 249, 330 P.2d 393* , the plaintiff and his wife had made a property settlement agreement by which he gave her a large portion of the community property in lieu of support payments. The wife died intestate less than seven months later, and her children received her entire estate. The plaintiff then sued the administrator to rescind the property settlement agreement contending that there was a failure of consideration in that he would not have made the property settlement agreement if he had known that his wife would die before the divorce was final (*164 Cal. App. 2d 249, 250-252)* . After a demurrer to the second amended complaint was sustained, the plaintiff failed to amend.

The court of appeal affirmed. When a party gets the consideration promised, the fact that it proves worthless or of little value because of an unexpected occurrence, such as the wife's death in this case, is not a failure of consideration warranting rescission (*164 Cal. App. 2d 249, 253)* .

[d] Partial Failure of Consideration Is Not Complete Defense

Del Riccio v. Photochart *(1954) 124 Cal. App. 2d 301, 268 P.2d 814* , was an action to recover royalties under an agreement to license patents covering several photographic devices and methods. A federal court had invalidated a few of the many patents that were the subject of the agreement. The defendant claimed that there was a failure of consideration for the agreement because the invalidated patents were the substance of the agreement. The trial court rendered judgment for the plaintiff (*124 Cal. App. 2d 301, 304, 307-308)* .

The court of appeal affirmed. The invalidity of a few of the patents constituted only a partial failure of the entire consideration for the agreement. The general rule as to partial failure of consideration is that when there is a failure of a part of a lawful consideration, the part that failed is simply a nullity and imparts no taint to the residue. In such a case,

since no particular amount of consideration is required, the promise may be enforced. In other words, if there is a substantial consideration left, it will be sufficient to sustain the contract. In this case, since the heart of the agreement did not fail, the defense of failure of consideration could not prevail (*124 Cal. App. 2d 301, 312)* .

[e] Delay in Performance Ordinarily Is Not Failure of Consideration

In ***Johnson v. Alexander*** *(1976) 63 Cal. App. 3d 806, 134 Cal. Rptr. 101* , plaintiff agreed to dismiss an existing lawsuit in exchange for the defendants' payment of $30,000. Subsequently, because of the defendants' failure to pay the $30,000 in its entirety, the plaintiff sued and obtained a prejudgment writ of attachment. The defendants appealed from the trial court's denial of their motion to dissolve the writ of attachment (*63 Cal. App. 3d 806, 809-810)* . On appeal, the defendants contended that the writ should have been dissolved because there was a failure of consideration for the original agreement on which the writ was based. The alleged failure of consideration consisted of the plaintiff's failure to dismiss the previous lawsuit until a few months after the signing of the settlement agreement (*63 Cal. App. 3d 806, 812-813)* .

The court of appeal affirmed. Delay in performance is a material failure only if time is of the essence, that is, if prompt performance is, by the express language of the contract or by its very nature, a vital matter. When no time is specified for the doing of an act, other than the payment of money, a demand for performance is necessary to put the promisor in default. In this case, a delay of a few months in dismissing the first lawsuit did not amount to a failure of consideration (*63 Cal. App. 3d 806, 813)* .

In ***Hofland v. Gustafson*** *(1955) 132 Cal. App. 2d Supp. 907* , *282 P.2d 1039* , the plaintiff attempted to rescind a written release on the ground of failure of consideration because the payment for the release had not been received eight days after the signing of the release. The trial court set aside the release and rendered judgment in the underlying negligence action for an amount in excess of the release (*132 Cal. App. 2d Supp. 907, 908)* .

The appellate department of the superior court reversed. The fact that the consideration was not paid until a few days after the release was executed did not constitute such a material failure of consideration as to entitle the plaintiff to rescind. Mere delay in performing a contract is not considered a substantial breach, justifying rescission, unless the delay warrants the conclusion that the other side does not intend to perform. When time is not of the essence of the contract, payment within a reasonable time is sufficient. The delay in the receipt of the check by the plaintiff was not such a material failure of consideration that it gave her a right to rescind the release (*132 Cal. App. 2d Supp. 907, 909-910)* .

[4] Additional Authorities

[a] No Failure of Consideration When Consideration Proves Worthless

The court of appeal in *Mosher v. Mayacamas Corp. (1989) 215 Cal. App. 3d 1, 263 Cal. Rptr. 373* , affirmed a judgment for the vendor, who suedfor breach of contract, and against the purchaser, who cross complained for rescission. The case involved the sale of Lake Tahoe vacation properties in 1982. Beginning in 1985, property values at Lake Tahoe declined drastically. It was assumed for purposes of the case that the principal cause of the decline was the impending tax legislation, later enacted as the Tax Reform Act of 1986, which substantially eliminated tax benefits for secondary residences. The purchaser stopped making payments under the contract and sought rescission on the grounds of mistake of fact and failure of consideration. The court of appeal said that as a matter of law, the purchaser's predicament resulted from an error in judgment rather than a mistake of fact or failure of consideration. The purchaser chose to enter into the contract knowing that the tax benefits were a major aspect of the value of the properties and presumably knowing that the availability of those benefits could be affected by future legislation, yet it made no provision with respect to tax matters in the contract. Thus, the purchaser alone had to bear this risk and was not entitled to avoid, rescind, or reform the contract (*215 Cal. App. 3d 1, 6)* .

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5-50 California Points & Authorities §§ 50.281-50.299

[Reserved]

§§ 50.281[Reserved]

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C. Venue for Breach of Contract Action

5-50 California Points & Authorities § 50.300

§ 50.300 Change of Venue Is Proper--Complaint Alleges Improper Venue or Does Not Allege Venue

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE PROPER COURT FOR THE TRIAL OF AN ACTION IS IN THE COUNTY OF THE DEFENDANT'S RESIDENCE WHEN THE COMPLAINT DOES NOT ALLEGE SUFFICIENT FACTS TO SHOW EITHER THAT VENUE IS PROPER ELSEWHERE OR SPECIFICALLY THAT THE ACTION WAS BROUGHT IN THE COUNTY WHERE THE CONTRACT WAS MADE OR THE COUNTY OF PERFORMANCE.

A. Statutory Authority for Change of Venue. The court may, on motion, change the place of trial when the court designated in the complaint is not the proper court (*Code Civ. Proc. § 397(a)*).

B. Transfer Is Mandatory on Proper Showing. The court must order the action transferred to the proper court when it appears at the hearing of the motion for change of venue that the action was not commenced in the proper court (*Code Civ. Proc. § 396b*).

C. Proper Court for Contract Action Not Based on Consumer Contract. Except as provided in *Code of Civil Procedure Section 395(b)* (concerning venue in actions arising from certain consumer transactions), when a defendant has contracted to perform an obligation in a particular county, either the county where the obligation is to be performed or the contract in fact was made or the county where any defendant resides at the commencement of the action is a proper county for the trial of an action founded on the obligation (*Code Civ. Proc. § 395(a)*).

D. Contract Must State Place of Performance Before Action May Be Brought in County of Performance. The county where an obligation was incurred is deemed to be the county where it was to be performed unless there is a special contract in writing to the contrary. Before an action may be brought in the county of performance, the contract must specifically state in writing the place of performance. If the contract so states, then the provision as to place of performance is both express and special (*see* Code Civ. Proc.§ 395(a); *Wathen v. Superior Court (1963) 212 Cal. App.*

2d 125, 129, 27 Cal. Rptr. 840).

E. Place Contract Was Made. The place of making of a contract is the place the last act necessary for its validity was done, usually the act constituting the acceptance (*Braunstein v. Superior Court (1964) 225 Cal. App. 2d 691, 696, 37 Cal. Rptr. 666*).

F. Defendant's Right to Have Action Tried in County of Residence. The general rule is that a defendant is entitled to have actions tried in the county of his or her residence. The plaintiff's right to have the action tried elsewhere is an exceptional right that must find its justification in the terms of some statute. It is the plaintiff's duty to bring himself or herself within some exception; otherwise, the defendant's right is to have the case tried in the county of his or her residence (*Wheeler v. Moschetti (1961) 188 Cal. App. 2d 827, 829-830, 10 Cal. Rptr. 722* ; *Goossen v. Clifton (1946) 75 Cal. App. 2d 44, 47, 170 P.2d 104*).

[*Optional*] **G. Requirement That Venue Be Proper in All Causes of Action.** When a defendant is entitled to a change of venue as to one contractual cause of action, a motion for change of venue should be granted even though there are other causes of action as to which he or she is not entitled to a transfer (*Sure-Grip Skate Wheel Co., Inc. v. Bergin (1962) 208 Cal. App. 2d 562, 565, 25 Cal. Rptr. 413*).

[*Optional*] **H. Contract's Statement of Place of Execution Is Not Conclusive.** The unessential designation of the time and place of the execution of a contract in the contract is not conclusive and may be refuted by extrinsic evidence (*Taylor v. Lundblade (1941) 43 Cal. App. 2d 638, 640, 111 P.2d 344*).

[*Optional*] **I. Inquiry and Notification Relative to Credit Are Not Part of Contract.** Inquiry and notification relative to credit do not constitute part of a contract within the meaning of *Code of Civil Procedure Section 395(a).* Consequently the county where the credit was granted is not a proper county for a contract action. (*Garrett v. Superior Court (1967) 248 Cal. App. 2d 263, 267, 56 Cal. Rptr. 418*).

[*Optional*] **J. Contractual Venue Selection Clause Requiring Improper Venue Is Contrary to Public Policy and Void**. A contractual venue selection clause designating a venue improper under statute is void and unenforceable as contrary to public policy. Likewise, a contractual waiver of a statutory exception to venue selection rules is void (*General Acceptance Corp. v. Robinson (1929) 207 Cal. 285, 289, 277 P. 1039* ; *Arntz Builders v. Superior Court (2004) 122 Cal. App. 4th 1195, 1204, 1206-1207, 19 Cal. Rptr. 3d 346* ; *Alexander v. Superior Court (2003) 114 Cal. App. 4th 723, 732, 8 Cal. Rptr. 3d 111*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the general contention that a complaint for contract damages does not allege facts showing that it was brought in the proper court, and that is therefore proper for the court to grant a motion to change the venue to the county of defendant's residence.

This form normally will be used to support a defendant's motion for change of venue, and should be combined when appropriate with memoranda relating to that proceeding. For memoranda relating to change of venue proceedings, see Ch. 238, *Venue* .

With appropriate modifications these memoranda may be submitted in support of a motion for change of venue to the county where the contract was made or the county of performance.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, in supporting a motion for change of venue, the memorandum would include an analysis of the complaint or supporting declarations showing that it is proper to change the current venue to the county of defendant's residence.

[c] Related Pleading and Practice Chapters

For detailed discussion and forms for motions relating to venue, see California Forms of Pleading and Practice, Ch. 571, *Venue* (Matthew Bender).

[d] Related Memoranda

In an appropriate case, these memoranda may be combined with alternate or additional memoranda relating to change of venue *set out in § 50.301*.

For memoranda supporting a motion for change of venue by a corporate the defendant, see Ch. 52, *Corporations* . There are additional bases of venue in an action against a corporation, and the definition of place of performance is different when an action on a contract involves a corporate the defendant.

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.310* et seq. may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Contract Must State Place of Performance Before Action May Be Brought in County of Performance

In ***Wathen v. Superior Court*** *(1963) 212 Cal. App. 2d 125, 27 Cal. Rptr. 840* , the plaintiffs sued on a contract in Santa Clara County. One of the defendants moved to have the action changed to Fresno County on the grounds that all of the defendants resided there, the contract was made there, and since there was no special contract in writing to the contrary, the contract was to be performed there. The trial court denied the motion for change of venue based on the plaintiffs' affidavit that a letter of agreement was sent to the defendants under the plaintiffs' letterhead stating its address as Palo Alto, California, and the original letter agreement clearly indicated that delivery to the plaintiffs was intended to be at the plaintiffs' Santa Clara County office. The defendants' affidavit denied that the agreement was under such a letterhead.

The court of appeal denied the defendants' petition for writ of mandate compelling the court to change the place of trial. Before an action may be brought under *Code Civ. Proc. § 395* in the county where the obligation forming the basis of the suit is performable, the contract must specifically state the place of performance of the obligation. If the contract so states, then the provision as to place of performance is both express and special. This requirement may be met by an agreement to pay money in a particular county, to deliver goods at a particular place, or to perform an obligation in a particular city. The question in this case was whether the contract sufficiently designated Santa Clara County as the place of performance of the defendants' obligation when the contract stated that delivery was to be to the plaintiffs, who had various places of business. It would be technical and unrealistic to require that the address of delivery be restated in the agreement when it was stated in the letterhead, in order to satisfy *Code Civ. Proc. § 395*. Taking the instrument as a whole, it was apparent that the plaintiffs' office in Santa Clara County was intended as the place of delivery, and the place of performance was thus specifically designated in the instrument (*212 Cal. App. 2d 125, 129)* .

[b] Place Contract Was Made

Braunstein v. Superior Court *(1964) 225 Cal. App. 2d 691, 37 Cal. Rptr. 666* , was an action for goods sold and delivered and services performed based on a written contract. The contract consisted of a letter addressed to the defendant at her home in Los Angeles. The letter confirmed the understanding and agreement between the parties, setting forth the terms, and asking the defendant specifically to approve and accept the terms if they were in accordance with the defendant's understanding of the agreement. The defendant signed the agreement in Los Angeles and forwarded it to the plaintiff in Monterey. The defendant moved to transfer the action to Los Angeles County, the county of her residence. The defendant contended that the contract was made and executed in Los Angeles, while the plaintiff argued that it was not because all negotiations and preparation of the contract occurred in Ventura County and the actual offer and acceptance took place in Monterey County. The plaintiff filed a countermotion to retain venue in Monterey County for the convenience of witnesses. The trial court denied the defendant's motion for change of venue and granted the plaintiff's motion.

The court of appeal granted the defendant's petition for writ of mandate to compel the transfer of the case and ordered that the action be transferred to Los Angeles County. The place of making a contract is the place the last act necessary for its validity was done, usually the act constituting the acceptance. On the face of the agreement in this case, it appeared that it was prepared by the plaintiff and then sent to the defendant at the Los Angeles address appearing on the document for acceptance and signing. This fact, plus the plaintiff's failure to deny that it was executed in Los Angeles as claimed by the defendant, compelled the conclusion that the contract was made in Los Angeles (*225 Cal. App. 2d 691, 696)* .

[c] Defendant's Right to Have Action Tried in County of Residence

Wheeler v. Moschetti *(1961) 188 Cal. App. 2d 827, 10 Cal. Rptr. 722* , was an action on an oral contract. The complaint was in the form of a common count alleging that the defendants were indebted to the plaintiff in a certain sum and had promised to pay that sum in Yuba County. The trial court denied the defendants' motion for a change of venue from Yuba County to San Francisco, where the defendants resided. The defendants' supporting affidavit stated that the parties had made two written contracts in Yuba County by which the defendants had sold to the plaintiff certain fixtures to be delivered in Yuba County. However, when the time for delivery arrived, the plaintiff no longer wanted the equipment, and three weeks after the sale, the plaintiff orally agreed in San Francisco that the defendants should sell the undelivered fixtures for the plaintiff's account on a commission basis. Those fixtures were then sold in Oakland.

The court of appeal reversed. Generally a defendant is entitled to have actions tried in the county of his or her residence. The plaintiff's right to have the action tried elsewhere is the exceptional right and must find its justification in the terms of some statute. The proper place of trial in this case was San Francisco. Even if the verified complaint, alleging that the defendants promised to pay the sum in Yuba County (the only evidence opposing the defendants' affidavit), could be said to raise a conflict with the affidavit, the conflict, if resolved in the plaintiff's favor, would still not defeat the defendants' right to a change of venue since there was no allegation of any written promise to perform the oral agreement in Yuba County. In the absence of such a special contract in writing to the contrary, the county where the obligation is incurred is the venue of an action arising out of it. In this case, the allegation in the appellants' affidavit that the oral contract was made in San Francisco was uncontested (*188 Cal. App. 2d 827, 829-830)* .

Goossen v. Clifton *(1946) 75 Cal. App. 2d 44, 170 P.2d 104* , was an action on a contract in which the complaint failed to contain an allegation that the cause of action arose, or the contract was made or was to have been performed, in the county where suit was filed. The defendants sought a change of venue to the county where they were residents. The trial court denied the motion.

The court of appeal reversed. Generally a defendant is entitled to have an action tried in the county of his or her residence, and the plaintiff's right to have an action tried elsewhere is the exceptional right that must find its justification

in the terms of some statute. It is the plaintiff's burden to come within some exception if possible; otherwise, the defendant's right is to have the case tried in the county of the defendant's residence. The right to have the action tried in the county where the defendants, or some of them, reside is remedial and should be liberally construed to the end that the defendants may not be unjustly deprived of that right (*75 Cal. App. 2d 44, 47)* .

[d] Requirement That Venue Be Proper in All Causes of Action

Sure-Grip Skate Wheel Co., Inc. v. Bergin *(1962) 208 Cal. App. 2d 562, 25 Cal. Rptr. 413* , was an action on the common counts for the agreed price of goods, an account stated, and an open book account. The complaint alleged three causes of action. The trial court denied the defendant's motion for change of venue to the county of his residence.

The court of appeal affirmed. If a defendant is entitled to a change of venue as to one contractual cause of action, a motion for a change of venue should be granted even if there are other causes of action as to which the defendant is not entitled to a transfer. However, there is a presumption that the county where the action is commenced is the proper county for the trial, and the burden of overcoming the presumption rested on the defendant. His declaration that he was a resident of a certain county was not sufficient to overcome that presumption (*208 Cal. App. 2d 562, 565)* .

[e] Contract's Statement of Place of Execution Is Not Conclusive

In ***Taylor v. Lundblade*** *(1941) 43 Cal. App. 2d 638, 111 P.2d 344* , the plaintiffs sued on a contract for the sale of a tractor. The defendants moved for change of venue on the ground that the action was not brought in the county of the defendants' residence or the county where the contract was made. The defendants asserted that because the attestation clause of the contract recited where the contract was executed, that recital was conclusive, and the plaintiffs' attempt to prove that the contract was made in fact in the county where the action was brought violated the parol evidence rule. The trial court denied the motion.

The court of appeal affirmed. The legislature provided that a proper county for the trial of a contract action is the county where the contract was in fact made, not where it may have been made, where it was declared to have been made, or where the parties may have stipulated it was made. The attestation clause, particularly the recital that the contract was executed in a certain city, could not be held a material part of the agreement. The parol evidence rule does not extend to nonessential facts in contract. Thus the unessential designation of the time and place of the execution could be contradicted by extrinsic evidence. The place of execution designated in a contract is presumed to be where it was made, but this may be rebutted by other evidence (*43 Cal. App. 2d 638, 640)* .

[f] Inquiry and Notification Relative to Credit Are Not Part of Contract

Garrett v. Superior Court *(1967) 248 Cal. App. 2d 263, 56 Cal. Rptr. 418* , was a mandate proceeding to compel the trial court to grant the defendant's motion for a change of venue of a contract action from Kings County to Orange County where he resided. None of the purchase contracts, which made up the open account sued on and were the basis of the complaint, had been made in Kings County, performance had taken place in counties other than Kings, and there had been no special contract in writing relative to the business relationship. However, the defendant preliminarily had applied to the plaintiff's head office in Kings County for a line of credit, which was granted.

The court of appeal granted the writ. The initial extension of potential credit was not part of any contract. It was simply a preliminary matter that looked to a future relationship between the parties but did not commiteither of the parties to any specific purchase. Thus, the inquiry and notification relative to credit did not constitute a part of any contract within the meaning of the venue statutes, and the plaintiff brought the action in an improper county (*248 Cal. App. 2d 263, 267)* .

[g] Contractual Venue Selection Clause Requiring Improper Venue Is Contrary to Public Policy and Void

In ***General Acceptance Corp. v. Robinson*** *(1929) 207 Cal. 285, 277 P. 1039* the plaintiff sued in the county designated in a contractual venue selection clause. At that time, the only proper county under the statute was the county of the defendant's residence, and the defendant therefore moved to transfer venue to his home county. The trial court granted the motion, and the California Supreme Court affirmed, holding that private parties are not free to contract around considerations of general judicial convenience and expediency or proper administration of justice.

In ***Arntz Builders v. Superior Court*** *(2004) 122 Cal. App. 4th 1195, 1204, 19 Cal. Rptr. 3d 346* , the defendant and a county had entered into a contract containing a waiver of defendant's statutory right under *Code Civ. Proc. § 394* to transfer any action filed by the county to a neutral county. The court held that *General Acceptance Corp. v. Robinson* (discussed *above*) was still controlling law, and that "[p]ermitting a county to extract an advance waiver of the right of a private party to have disputes with the county resolved in a neutral forum would be at odds with the fundamental principle that a party may not waive the benefits of a statute enacted primarily for a public purpose" (*122 Cal. App. 4th 1195, 1206)* .

In ***Alexander v. Superior Court*** *(2003) 114 Cal. App. 4th 723, 8 Cal. Rptr. 3d 111* , plaintiff filed suit in the county specified in the contract and opposed defendant's motion for change of venue on the basis of the contractual venue clause. The court of appeal ruled that *General Acceptance Corp. v. Robinson* (discussed *above*) remained good law and remanded for consideration of whether venue was currently proper under the statutory framework of *Code Civ. Proc. § 395*.

[4] Additional Authorities

[a] Defendant's Right to Have Action Tried in County of Residence

In *International Inv. Co. v. Chagnon (1959) 170 Cal. App. 2d 441, 339 P.2d 147* , the plaintiffs sued on a written contract and an implied contract.The trial court granted the defendant's motion for change of venue to the county of his residence. On appeal the plaintiff contended that the complaint showed on its face that the contract was executed in the county where the action was brought. However, the plaintiffs alleged the place of execution for the written contract only and failed to allege in what county the implied contract was made. The court of appeal affirmed. The general rule is that a defendant is entitled to have actions tried in the county of his or her residence. The plaintiff's right to have the action tried elsewhere is the exceptional right and must find its justification in the terms of a statute. If a plaintiff unites in one complaint two causes of action, only one of which the defendant has the right to have tried in the county of his or her residence, the defendant is entitled to have the entire cause tried in the county of his or her residence. The trial court's order was correct since the defendant was entitled to have the cause of action on the implied contract tried in the county of her residence. The fact entitling a party to try the action in a county other than the defendant's residence may be shown by affidavit when the complaint is silent on the subject (*170 Cal. App. 2d 441, 443)* .

Bloom v. Carpenter (1946) 74 Cal. App. 2d 790, 169 P.2d 388 , was an action on a contract brought in San Francisco. The trial court denied the defendants' motion for change of venue to the county of the defendant's residence. The court of appeal affirmed. In an action on a contract in which one individual appears to be the real party in interest, in the absence of allegations that the defendant had contracted to perform an obligation in a particular county, or that the contract was made in a certain county, the venue is in the county where the individuals resided at the time of the commencement of the action. However in this case, the complaint alleged in substance that the plaintiff consigned goods to the defendants as a carrier for a reasonable reward in San Francisco, and the goods were to be transported to Oregon. There was no averment in the defendants' affidavit to the contrary. For venue purposes, the contract was made in San Francisco, and the allegations of the complaint were sufficient to establish a basis for venue in the county where the action was brought (*74 Cal. App. 2d 790, 792)* .

[b] Contract's Statement of Place of Execution Is Not Conclusive

Wilson v. Hoffman (1947) 81 Cal. App. 2d 664, 184 P.2d 951 , was an action on a contract in which the defendant moved to change the place of trial from Orange County to Los Angeles County where he resided. The trial court denied the motion, and the court of appeal reversed. The contract recited that it was made at Santa Ana, California, and described the property involved as being in Los Angeles County. The complaint stated that the contract was made in Orange County where the obligation suedon was incurred and was payable. The defendant contended that the contract was made and signed in his home. The plaintiff argued that the recitation in the contract that it was made in Orange County was sufficient to retain the trial in that county. However, the legislature provided that the proper county for an action on a contract is where the contract was in fact made. Since the contract was in fact made in Los Angeles County, and the contract contained no special provision that payment was to be made elsewhere, the proper county for trial was Los Angeles County (*81 Cal. App. 2d 664, 666)* .

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5-50 California Points & Authorities § 50.301

§ 50.301 Change of Venue Is Proper--No Special Contract Designates Place of Performance

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE DEFENDANT MAY HAVE THE ACTION TRANSFERRED TO THE COUNTY OF HIS/HER RESIDENCE WHEN THE ACTION IS BROUGHT IN A DIFFERENT COUNTY, BUT THERE WAS NO SPECIAL CONTRACT SPECIFYING THE COUNTY OF PERFORMANCE.

A. Statutory Authority for Motion. [*See § 50.300[1], Paragraph A.*]

B. Transfer Is Mandatory on Proper Showing. [*See § 50.300[1], Paragraph A.*]

C. Proper Court for Contract Action. [*See § 50.300[1], Paragraph A.*]

D. Contract Must State Place of Performance Before Action May Be Brought in County of Performance. [*See § 50.300[1], Paragraph A.*]

E. Defendant's Right to Have Action Tried in County of Residence. [*See § 50.300[1], Paragraph A.*]

F. Special Contract Defined. A special contract is one whose provisions are express and not dependent on implication (*Caffrey v. Tilton (1952) 38 Cal. 2d 371, 374, 240 P.2d 273*).

[*Optional*] **G. *Civil Code Section 1489* Does Not Have Effect of Special Contract.** *Civil Code Section 1489*, which states that in the absence of an express provision to the contrary, an offer of performance may be made at the option of the debtor wherever the personto whom the offer ought to be made can be found, does not have the effect of a special contract in writing permitting the obligee of a contract to control the venue of an action by staying in the county he or she chooses as the place for the action (*Caffrey v. Tilton (1952) 38 Cal. 2d 371, 373-374, 240 P.2d 273*).

[*Optional*] **H. Check Is Not Special Contract.** A check is not a special contract specifying the place of performance and requiring suit to be brought in the county where the bank on which the check is drawn is located (*Gulick v. Justice's Court (1929) 101 Cal. App. 619, 622, 281 P. 1031*).

[*Optional*] **I. Contract Containing Address of Insured Does Not Make Contract Performable in County of Insured's Address.** An insurance contract showing the address and place of business of the insured does not raise the presumption that the place of performance was intended to be in the county of insured's residence (*Yedor v. Ocean Acc. & Guar. Corp. (1948) 85 Cal. App. 2d 698, 704-705, 194 P.2d 95*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support the contention that it is proper to change the current venue of an action for contract damages from that in which it was brought to the county of defendant's residence, because although the complaint was allegedly brought in the county of performance, there is no special contract designating the county of performance and the action has not been brought in the county where the obligation was incurred.

This form will normally be used to support a defendant's motion for change of venue, and should be combined when appropriate with memoranda relating to that proceeding. For memoranda relating to change of venue proceedings, see Ch. 238, *Venue* .

With appropriate modifications these memoranda may be submitted in support of a motion for change of venue from the county where the action was brought to the county where the contract was made.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, in supporting a motion for change of venue, the memorandum would include an analysis of the complaint or supporting declarations showing that it is proper to change the current venue to the county of defendant's residence.

[c] Related Pleading and Practice Chapters

For detailed discussion and forms of motion relating to venue, see California Forms of Pleading and Practice, Ch. 571, *Venue* (Matthew Bender).

[d] Related Memoranda

In an appropriate case, these memoranda may be combined with alternate or additional memoranda relating to change of venue *set out in § 50.300*.

For memoranda supporting a motion for change of venue by a corporate the defendant, see Ch. 52 *Corporations* . There are additional bases of venue in an action against a corporation, and the definition of place of performance is different when an action on a contract involves a corporate the defendant.

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.310* et seq. may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Special Contract Defined

In ***Caffrey v. Tilton*** *(1952) 38 Cal. 2d 371, 240 P.2d 273* , the plaintiff sued in San Francisco for declaration of his rights under a contract that had been made in Los Angeles County where the defendant resided. The defendant's motion for change of venue to Los Angeles County was denied by the trial court. The plaintiff contended that there was a special contract in writing sufficient to justify the denial of the requested change of venue to Los Angeles County. Although no place of performance had been specified in the letter setting forth the agreement, the plaintiff relied on *Civ. Code § 1489*, providing that in the absence of an express provision to the contrary, an offer of performance may be made, at the option of the debtor, wherever the person to whom the offer ought to be made can be found. The plaintiff contended that San Francisco, the place of his residence, was the place of performance by the defendant and *Civ. Code § 1489* had the effect of a special contract in writing within the meaning of *Code Civ. Proc. § 395(a)* (venue in contract actions).

The Supreme Court reversed. If the plaintiff's contention were to prevail, the obligee of a contract could control the venue of an action by simply sojourning in whatever county he or she chose as the place for trial of the action, since that county would be the county where he or she might be found. Although *Civ. Code § 1489* is an implied provision of the parties' agreement, it is not a special contract in writing within the meaning of *Code Civ. Proc. § 395*, since a special contract is one whose provisions are express and not dependent on implication (*38 Cal. 2d 371, 374)* .

[b] Civil Code Section 1489 Does Not Have Effect of Special Contract

Caffrey v. Tilton *(1952) 38 Cal. 2d 371, 240 P.2d 273* , is discussed in [a], *above*.

[c] Check Is Not Special Contract

In ***Gulick v. Justice's Court*** *(1929) 101 Cal. App. 619, 281 P. 1031* , the plaintiff sued on a debt. The defendant had incurred the debt in Riverside County and gave the plaintiff a check payable to the plaintiff, dated at Los Angeles and drawn on a Los Angeles bank. When the check reached the Los Angeles bank, payment had been stopped by the defendant. The defendant demurred on the ground that the court had no jurisdiction over him because he was not a resident of the county where the action was brought and there was a special contract in writing. At the time of the action, former Code Civ. Proc. § 832 required that actions in justice courts be tried, when the defendant was a nonresident of the county, in any township or city where he or she could be found or, when a person contracted to perform an obligation at a particular place and resided in another county, in the township or city in which the obligation was to be performed or in which he or she resided. The township or city in which the obligation was incurred was deemed to be the township or city in which it was to be performed unless there was a special contract in writing to the contrary. (Former Code Civ. Proc. § 832 contained the same language as *Code Civ. Proc. § 395(a)* with respect to special contracts.) The trial court overruled the demurrer. The superior court denied the defendant's application for a writ of prohibition.

The court of appeal affirmed. The defendant did not show that he was a resident of Los Angeles County. In using the words "special contract," the legislature must have had in mind some contract other than one ordinarily and usually used in everyday transactions of business life, otherwise the word "special" would have no significance and need not have been inserted in the statute. In using the word "special," the legislature had in mind those contracts in which there was a direct and definite promise to pay at a certain place, such as some forms of promissory notes. In this case, the check was not a special contract that of itself would requirethe suit to be brought in Los Angeles County. To hold otherwise would require merchants accepting checks from customers living in distant parts of the state, in payment for goods sold, to

follow those debtors to their homes or the homes of their banks if the checks were not paid [*see § 50.315[3][a]*] (*101 Cal. App. 619, 622)* .

[d] Contract Containing Address of Insured Does Not Make Contract Performable in County of Insured's Address

Yedor v. Ocean Acc. & Guar. Corp. *(1948) 85 Cal. App. 2d 698, 194 P.2d 95* , was an action to recover on a workers' compensation policy after the insurer refused to pay a judgment that one of the insureds' employees had recovered. None of the clauses of the insurance policy mentioned the county where the action was brought as the place for the insurer's performance of any obligation under the policy. The trial court denied the defendant's motion for a change of venue to the county of its residence.

The court of appeal reversed. Although the address and place of the insured's business, which was contained in the policy, was shown to be in the county where the action was brought, that alone was insufficient to raise the presumption that the place of performance was intended to be in that county. Thus, the parties had neither specially nor implicitly agreed that the contract should be performed in the county where the action was brought. Instead the obligations were to be performed in the county of the defendant's residence where the contract was made and where the obligations were incurred (*85 Cal. App. 2d 698, 704-705)* .

[4] Additional Authorities

[a] Contract Must State Place of Performance Before Action May Be Brought in County of Performance

Armstrong v. Smith (1942) 49 Cal. App. 2d 528, 122 P.2d 115 , was an action commenced in Alameda County on a contract for the construction of a house. The only stipulation in the contract, which was executed in San Francisco, as to where any of its covenants were to be performed was that the plaintiff bound himself to build on a lot in Alameda County. The trial court denied the defendant's motion for change of venue to San Mateo County, the county of the defendant's residence. The court of appeal reversed. The limitation in *Code Civ. Proc. § 395(a)*, that the county where the obligation is incurred is deemed to be the county where it is to be performed, cuts down the number of counties in which an action on a contract may be tried to two. Those two counties are the county where the defendant resides and the county where the contract is made. The legislature also provided an exception to this limitation: that if it is specially contracted in writing as to the county of performance, that county is alsoa proper county for the trial of an action. The court held that before an action may be brought under *Code Civ. Proc. § 395(a)* in the county where the obligation forming the basis of the suit is performable, the contract must specifically state the place of performance of the obligation. If the contract so states, then the provision as to place of performance is both express and special. Thus there does not need to be a separate contract special in its nature on the same subject matter as the original contract before *Code Civ. Proc. § 395(a)* would apply. All that is needed is that an express stipulation with respect to the obligation in question be embodied in the agreement giving rise to the action. The place of performance of the defendant's obligation sued on in the action was implied and not specially contracted. Consequently the county where the obligation was incurred and the county of the defendant's residence were the only proper counties for the trial of the action (*49 Cal. App. 2d 528, 535-537)* .

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5-50 California Points & Authorities §§ 50.302-50.309

[Reserved]

§§ 50.302[Reserved]

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5-50 California Points & Authorities § 50.310

§ 50.310 Current Venue Is Proper--Contract Was Not Made in Presence of Contracting Parties and Is Deemed Made Where Acceptance Was Given or Placed in Mail

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE PLAINTIFF BROUGHT THE ACTION IN A PROPER COUNTY SINCE, WHEN A CONTRACT IS NOT MADE IN THE PRESENCE OF THE CONTRACTING PARTIES, THE CONTRACT IS DEEMED MADE WHERE THE UNCONDITIONAL ACCEPTANCE OF THE OFFER IS MADE OR PLACED IN THE MAIL.

A. Propriety of Chosen Venue. In the absence of an affirmative showing to the contrary, the presumption is that the county where the title of the action shows that it is brought is the proper county for the commencement and trial of the action (*Sea World, Inc. v. Superior Court (1970) 13 Cal. App. 3d 100, 103, 91 Cal. Rptr. 336*).

B. Proper Court for Contract Action. [*See § 50.300[1], Paragraph C.*]

C. Contract Action Commenced in One of Several Proper Counties. In order to overcome the presumption that the county where the action is commenced is the proper county for trial, the defendant must show that he or she is not a resident of that county,and the contract was not made or to be performed in the county where the action is pending (*Ward Mfg. Co. v. Miley (1955) 131 Cal. App. 2d 603, 606-607, 281 P.2d 343*).

D. Acceptance by Mail. When a contract is not made in the presence of the contracting parties, the contract is generally deemed made where the unconditional acceptance of the offer is made or placed in the mail (*Marchese Bros. v. A. Lyon & Sons (1954) 123 Cal. App. 2d 193, 198, 266 P.2d 556*).

[*Optional*] **E. Contract Subject to Approval Is Made Where Acceptance Is Mailed.** When a contract is subject to approval and acceptance, the contract is made and becomes binding in the county where the acceptance was mailed (*Di Giorgio Fruit Corp. v. Zachary (1943) 60 Cal. App. 2d 560, 562, 141 P.2d 8*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support the contention that the current venue of an action for contract damages is proper, because it was brought in the county in which acceptance was made or was placed in the mail.

This form will normally be used to oppose a defendant's motion for change of venue, and should be combined when appropriate with memoranda relating to that proceeding. For memoranda relating to change of venue proceedings, see Ch. 238, *Venue* .

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, in opposing a motion for change of venue, the memorandum would include an analysis of the complaint or opposing declarations showing that acceptance was made or was placed in the mail in the county in which the action was brought.

[c] Related Pleading and Practice Chapters

For detailed discussion and forms of motion relating to venue, see California Forms of Pleading and Practice, Ch. 571, *Venue* (Matthew Bender).

[d] Related Memoranda

In an appropriate case, these memoranda may be combined with alternate or additional memoranda opposing a change of venue *set out in § 50.311* et seq.

For memoranda supporting a motion for change of venue by a corporate the defendant, see Ch. 52, *Corporations* . There are additional bases of venue in an action against a corporation, and the definition of place of performance is different when an action on a contract involves a corporate the defendant.

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.300* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Propriety of Chosen Venue

In ***Sea World, Inc. v. Superior Court*** *(1970) 13 Cal. App. 3d 100, 91 Cal. Rptr. 336* , the defendant sought a writ of mandate compelling the superior court to vacate and set aside its order denying the defendant's motion for change of venue.

The court of appeal ordered the issuance of the writ. In the absence of an affirmative showing to the contrary, the presumption is that the county where the title of the action shows that it is brought is the proper county for the commencement and trial of the action. However, when the plaintiff fails to bring the action in any of the counties specified as proper, the defendant is entitled to a change of venue. In this case, the action had not been brought in a

proper court and therefore the defendant's motion for change of venue should have been granted (*13 Cal. App. 3d 100, 103)* .

[b] Contract Action Commenced in One of Several Proper Counties

Ward Mfg. Co. v. Miley *(1955) 131 Cal. App. 2d 603, 281 P.2d 343* , was an action on a contract. The complaint alleged first an action on account stated and second a common count for goods sold and delivered. The complaint alleged that the account was stated between the plaintiff and the defendant and a balance was found due to the plaintiff from the defendant. The defendant had agreed to pay the balance but had not done so. In the second count, the plaintiff alleged that the defendant was indebted to the plaintiff in a certain sum on an account for goods and merchandise sold and delivered by the plaintiff to the defendant, but no part had been paid. The defendant's motion for change of venue to the county of thedefendant's residence and the county where the obligation was incurred was denied by the trial court.

The court of appeal affirmed. With respect to the first cause of action, the complaint fixes prima facie the proper place for trial. The averments of a complaint are deemed to be true on a motion for change of venue, at least to the extent that they are not controverted. The first cause of action alleged that the account was stated in Los Angeles County. The burden of overthrowing the prima facie venue showing rested on the defendant. The defendant's residence in another county was not enough. He had to show that the contract was not made or to be performed in the county where the action was pending. This rule is the same as to both individuals and corporations. The defendant's affidavit was insufficient because he did not discuss the account stated but instead devoted the affidavit to the consideration for the account stated if there was one. Thus the trial court correctly denied the motion for change of venue (*131 Cal. App. 2d 603, 606-607)* .

[c] Acceptance by Mail

Marchese Bros. v. A. Lyon & Sons *(1954) 123 Cal. App. 2d 193, 266 P.2d 556* , was an action for the breach of an express written warranty. Orders for the purchase of brandy were solicited from the plaintiffs in San Jose. The plaintiffs offered to buy a certain number of barrels on the condition that the seller make a warranty. This offer was sent to the defendants' broker in Los Angeles. The broker submitted it to the defendants who accepted it in Los Angeles. This acceptance was shown not only by what was said to the broker but by the invoices, containing the express warranty and the terms of the sale, and the other documents, all of which were executed in Los Angeles and mailed to the plaintiffs from that city. The defendants moved to transfer the action from Santa Clara County to Los Angeles County on the grounds that they resided there, and the contract was made in that county. The trial court denied the motion.

The court of appeal reversed. When a contract is not made in the presence of the parties, it is generally deemed made where the last event necessary to make it a binding agreement occurs. That, normally, is where the unconditional acceptance of the offer is made or placed in the mail. Thus the contract was made in Los Angeles, and the action should have been transferred there (*123 Cal. App. 2d 193, 198)* .

[d] Contract Subject to Approval Is Made Where Acceptance Is Mailed

In ***Di Giorgio Fruit Corp. v. Zachary*** *(1943) 60 Cal. App. 2d 560, 141 P.2d 8* , the plaintiff sought recovery of the purchase price for some wine sold and delivered by the plaintiff's predecessor under two separate writtencontracts. One of the contracts was admittedly made in San Francisco. The other contract was negotiated by one of the salespersons of the plaintiff's predecessor in Los Angeles County. An order signed there by the salesperson and by the defendants' representative was on a printed form containing the provision that the order was subject to approval and acceptance by the office in San Francisco. Pursuant to this provision, a letter of acceptance of the order was mailed in San Francisco to the defendants. Under the express terms of the writing, it did not become a binding contract until the signing and mailing of the letter of acceptance. The trial court denied the defendants' motion for change of venue from San Francisco to Los Angeles County.

The court of appeal affirmed. Since the mailing occurred in San Francisco, the contract was made there, and that was a proper place for trial under *Code Civ. Proc. § 395(a)* (*60 Cal. App. 2d 560, 562)* .

[4] Additional Authorities

[a] Contract Subject to Approval Is Made Where Acceptance Is Mailed

De Campos v. State Comp. Ins. Fund (1946) 75 Cal. App. 2d 13, 170 P.2d 60 , was an action on a workers' compensation insurance policy. The trial court denied the defendant's motion for change of venue from Placer County to San Francisco. The court of appeal reversed. The policy provided that it would not be binding on the insurance fund unless countersigned by a duly authorized officer or representative of the fund. The policy was countersigned in San Francisco by the authorized representative. When a contract contains a provision that it is subject to the approval and acceptance of a certain office and acceptance is mailed from that office, the contract is made at that place. Consequently the insurance policy in this case was made where it was countersigned, in San Francisco, and the plaintiff's motion for transfer of the action to San Francisco should have been granted (*75 Cal. App. 2d 13, 22-23)* .

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5-50 California Points & Authorities § 50.311

§ 50.311 Current Venue Is Proper--Obligation Was Incurred Where and When Option Contract Was Made

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

IN THE CASE OF AN ACTION ON AN OPTION CONTRACT, THE OBLIGATION IS INCURRED WHERE AND WHEN THE OPTION CONTRACT IS MADE, NOT WHEN THE OPTION IS EXERCISED.

A. Propriety of Chosen Venue. [*See § 50.310[1], Paragraph A.*]

B. Proper Court for Contract Action. [*See § 50.300[1], Paragraph C.*]

C. Contract Action Commenced in One of Several Proper Counties. [*See § 50.310[1], Paragraph C.*]

D. Obligation Is Incurred When Option Contract Is Made. In the case of an option contract, even though the option has been exercised and suit is by the optionee, the optionor is bound and the obligation is incurred when the option contract is made. Thus a proper county for venue purposes is the county where the option contract was made (*Dawson v. Goff (1954) 43 Cal. 2d 310, 318, 273 P.2d 1*).

[*Optional*] **E. Contract With Public Body Is Made When Public Body Accepts Written Bid.** When a public body advertises for bids, a binding contract is formed when the public body, acting by responsible officers, accepts the written bid of a bidder. In such a case, the contract is made at the place the acceptance occurs (*Elsinore Union Etc. School Dist. v. Kastorff (1954) 129 Cal. App. 2d 60, 65, 276 P.2d 112*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support the contention that the current venue of an action for contract damages

is proper, because the contract contains an option which was made in the county where the action was brought.

This form will normally be used to oppose a defendant's motion for change of venue, and should be combined when appropriate with memoranda relating to that proceeding. For memoranda relating to change of venue proceedings, see Ch. 238, *Venue* .

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, in opposing a motion for change of venue, the memorandum would include an analysis of the complaint or opposing declarations that showing the contract contains an option which was made in the county where the action was brought.

[c] Related Pleading and Practice Chapters

For detailed discussion and forms of motion relating to venue, see California Forms of Pleading and Practice, Ch. 571, *Venue* (Matthew Bender).

[d] Related Memoranda

In an appropriate case, these memoranda may be combined with alternate or additional memoranda opposing a change of venue *set out in § 50.310* and *§ 50.312* et seq.

For forms generally opposing a motion for change of venue in a contract action when the action was commenced in a proper county or the defendant's obligation was pursuant to a consumer contract, an installment contract or account, or an automobile sales contract, see Ch. 238, *Venue* .

For memoranda supporting a motion for change of venue by a corporate the defendant, see Ch. 52, *Corporations* . There are additional bases of venue in an action against a corporation, and the definition of place of performance is different when an action on a contract involves a corporate the defendant.

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.300* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Obligation Is Incurred When Option Contract Is Made

Dawson v. Goff *(1954) 43 Cal. 2d 310, 273 P.2d 1* , was an action for breach of a binding option contract. The contract had been executed in San Diego County, where the defendants resided, and provided that the defendants agreed to buy shares of stock from the plaintiffs on the plaintiffs' written or oral demand. The plaintiffs had mailed a written demand covering a specified number of shares from Los Angeles County, but the defendants refused to buy. The defendants moved for a change of venue to San Diego County. The plaintiffs contended that the contract had been made in Los Angeles County, the county where the action was brought, because they accepted the defendants' offer in the option contract bymailing the written demand in that county. The trial court granted the motion.

The Supreme Court affirmed. There were two contracts, the binding option contract and the contract to which it related.

In the case of an option contract, when an optionee incurs no liability with regard to the contract as to which he or she holds an option, the optionor has irrevocably promised on the exercise of the option to perform the contract on the terms specified in the binding offer. The creation of the final contract requires no promise or other action by the optionor, since the contract is completed by the acceptance of the irrevocable offer of the optionor by the optionee. The contract has already been made as far as the optionor is concerned, but it is subject to conditions that are removed by the acceptance. In this case, even though the option has been exercised and suit is by the optionee, the optionor was bound--the obligation was incurred--as far as he or she is concerned, when the option contract was made. Since it was executed in San Diego County, that is the county where the contract was made. In addition that was the county where it was deemed the obligation was to be performed and in which the defendants resided. Thus the plaintiffs failed to bring themselves within an exception of *Code Civ. Proc. § 395(a)*, and the motion for change of venue was granted correctly (*43 Cal. 2d 310, 318)* .

[b] Contract With Public Body Is Made When Public Body Accepts Written Bid

Elsinore Union Etc. School Dist. v. Kastorff *(1954) 129 Cal. App. 2d 60, 276 P.2d 112* , was an action on a proposal bond brought by a school district in Riverside County against a contractor and the surety on the contractor's bond. The district had advertised for bids for the construction of two classroom buildings. The contractor submitted a bid along with a bid bond signed by the contractor and the surety. The bond was signed by the contractor in Orange County and by the surety in Los Angeles. The district accepted the bid, but the contractor declined to enter the contract. The district contended that the contracts were executed in Riverside County, and the obligation sought to be enforced was incurred and was to be performed in that county. The trial court denied the defendants' motion for change of venue, which was made on the grounds that none of the contracts was executed in Riverside County, and the proper county for trial was Orange County, the residence of the contractor.

The court of appeal affirmed. According to *Code Civ. Proc. § 1933*, the execution of an instrument requires both subscribing a name to it and delivering it; therefore, the contractor's written offer or bid was not executed merely by his signing it. Likewise, the mere signature on the proposal bond, standing alone, meant nothing to the district. No obligation arose until the bid was accepted. Delivery of the instrument to the district andacceptance and approval by the district were necessary to give it the legal effect intended by the obligors. The general rule is that when a public body advertises for bids, a good and binding contract is formed when the public body, acting by responsible officers, accepts the written bid of a bidder. The view is almost uniform that a bid submitted to a municipal corporation in response to an advertisement constitutes an irrevocable offer. In this case, the act that brought the obligation into being was the act by which the district unconditionally signified its acceptance of the contractor's proposal. Necessarily involved in that act was the tacit approval and acceptance of the proposal bond. Therefore at the time and place of the district's act of acceptance that occurred in Riverside County, the defendants incurred an obligation on the proposal bond (*129 Cal. App. 2d 60, 65)* .

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CHAPTER 50 CONTRACTS
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C. Venue for Breach of Contract Action

5-50 California Points & Authorities § 50.312

§ 50.312 Current Venue Is Proper--Unilateral Contract Was Made at Place of Performance

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE CONTRACT WAS UNILATERAL AND WAS MADE AND PERFORMED IN THE COUNTY WHERE THE ACTION WAS COMMENCED.

A. Propriety of Chosen Venue. [*See § 50.310[1], Paragraph A.*]

B. Proper Court for Contract Action. [*See § 50.300[1], Paragraph C.*]

C. Contract Action Commenced in One of Several Proper Counties. [*See § 50.310[1], Paragraph C.*]

D. Unilateral Contract Was Made at Place of Performance. Since a unilateral contract is accepted by performance, and a contract is deemed to be made when the last act required to make the contract obligatory is performed, a unilateral contract is made at the place it is performed (*see Richardson v. Rose (1961) 197 Cal. App. 2d 318, 322, 17 Cal. Rptr. 84*).

[*Optional*] **E. Broker's Listing Agreement Is Unilateral Contract.** A loan broker's listing agreement, by the terms of which the borrower agrees to pay the broker's commission in the event that the broker obtains a ready, willing, and able lender within the listing period, constitutes a unilateral contract (*Richardson v. Rose (1961) 197 Cal. App. 2d 318, 322, 17 Cal. Rptr. 84*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support the contention that the current venue of an action for contract damages

is proper, because the action was brought in the county where a unilateral contract was performed and hence was brought in the county where the contract was made.

This form will normally be used to oppose a defendant's motion for change of venue, and should be combined when appropriate with memoranda relating to that proceeding. For memoranda relating to change of venue proceedings, see Ch. 238, *Venue* .

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, in opposing a motion for change of venue, the memorandum would include an analysis of the complaint or opposing declarations showing that the unilateral contract was performed in the county where the action was brought.

[c] Related Pleading and Practice Chapters

For detailed discussion and forms of motion relating to venue, see California Forms of Pleading and Practice, Ch. 571, *Venue* (Matthew Bender).

[d] Related Memoranda

In an appropriate case, these memoranda may be combined with alternate or additional memoranda opposing a change of venue *set out in §§ 50.310, 50.311* and *§ 50.313* et seq.

For memoranda supporting a motion for change of venue by a corporate the defendant, see Ch. 52, *Corporations* . There are additional bases of venue in an action against a corporation, and the definition of place of performance is different when an action on a contract involves a corporate the defendant.

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.300* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Unilateral Contract Was Made at Place of Performance

Richardson v. Rose *(1961) 197 Cal. App. 2d 318, 17 Cal. Rptr. 84* , was an action to recover a broker's commission pursuant to the terms of a written agreement by which the defendants authorized the plaintiff to act as their exclusive agent for a 10-day period to obtain for them a loan of $50,000 on specified terms and promised to pay him a commission of $5,000 in the event he succeeded in negotiating the loan. After the listing agreement had been signed by the defendants, it was delivered to the plaintiff in Los Angeles County where he accepted it by performance. The defendants moved for a change of venue from Los Angeles County to Orange County where they resided and where the contract was made. The trial court granted the motion.

The court of appeal reversed. The agreement by its terms was a unilateral contract since the borrower agreed to pay the broker's commission in the event the broker obtained a ready, willing, and able lender within the listing period. A unilateral contract is accepted by performance. A contract is deemed made when the last act required to make the contract obligatory is performed. Consequently, the contract was made and wholly performed in Los Angeles County.

When an action on a contract is brought in the county where the contract was made, the plaintiff is entitled to have the action tried there despite the defendant's residence in another county (*197 Cal. App. 2d 318, 322)* .

[b] Broker's Listing Agreement Is Unilateral Contract

Richardson v. Rose *(1961) 197 Cal. App. 2d 318, 17 Cal. Rptr. 84* , is discussed in [I], *above*.

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5-50 California Points & Authorities § 50.313

§ 50.313 Current Venue Is Proper--Contract Made by Telephone Was Made in County Where Offeree Accepted

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

A CONTRACT MADE BY A TELEPHONE CALL TO THE OFFEREE IS MADE AT THE PLACE THE RECIPIENT OF THE CALL IS AT THE TIME HE/SHE ACCEPTS THE OFFER.

A. Propriety of Chosen Venue. [*See § 50.300[1], Paragraph A.*]

B. Proper Court for Contract Action. [*See § 50.300[1], Paragraph C.*]

C. Contract Action Commenced in One of Several Proper Counties. [*See § 50.300[1], Paragraph C.*]

D. Place Contract by Telephone Is Made. A contract made by a telephone call to the offeree is made at the place the recipient of the call is at the time he or she accepts the offer (*Wilson v. Scannavino (1958) 159 Cal. App. 2d 369, 371, 324 P.2d 350*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support the contention that the current venue of an action for contract damages is proper, because the action was brought in the county where the contract was made based on the fact that the contract offer was accepted by telephone in that county.

This form will normally be used to oppose a defendant's motion for change of venue, and should be combined when appropriate with memoranda relating to that proceeding. For memoranda relating to change of venue proceedings, see Ch. 238, *Venue* .

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, in opposing a motion for change of venue, the memorandum would include an analysis of the complaint or opposing declarations showing that the contract offer was accepted by telephone in the county where the action was brought.

[c] Related Pleading and Practice Chapters

For detailed discussion and forms of motion relating to venue, see California Forms of Pleading and Practice, Ch. 571, *Venue* (Matthew Bender).

[d] Related Memoranda

In an appropriate case, these memoranda may be combined with alternate or additional memoranda opposing a change of venue *set out in §§ 50.310 -50.312* and *§ 50.314* et seq.

For memoranda supporting a motion for change of venue by a corporate the defendant, see Ch. 52, *Corporations* . There are additional bases of venue in an action against a corporation, and the definition of place of performance is different when an action on a contract involves a corporate the defendant.

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.300* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Place Contract by Telephone Is Made

Wilson v. Scannavino *(1958) 159 Cal. App. 2d 369, 324 P.2d 350* , was an action on an open book account. The defendant moved for a change of venue to San Joaquin County where he resided. In his affidavit, the defendant alleged that the plaintiff did some subhauling pursuant to a telephone request from the defendant, and the plaintiff hauled loads from California and Nevada, none of which had as its destination any point in Butte County, the county where the action was brought. The plaintiff, in his affidavit, admitted the truth of the defendant's affidavit but stated that the contract was made by telephone, and Butte County was a proper county for the action because the plaintiff received and accepted the defendant's telephone request to do the subhauling in that county. The trial court denied the motion.

The court of appeal affirmed. A contract made by a telephone call to the offeree is made at the place the recipient of the call is at the time he or she accepts the offer. Since the plaintiff was in Butte County when he accepted the offer by telephone, Butte County was the place of contract and was a proper county for trial (*159 Cal. App. 2d 369, 371)* .

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5-50 California Points & Authorities § 50.314

§ 50.314 Current Venue Is Proper--Suretyship Contract Was Made Where Creditor Accepted Guaranty

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

A SURETYSHIP CONTRACT IS MADE AT THE PLACE THE CREDITOR ACCEPTS THE GUARANTY.

A. Propriety of Chosen Venue. [*See § 50.310[1], Paragraph A.*]

B. Proper Court for Contract Action. [*See § 50.300[1], Paragraph C.*]

C. Contract Action Commenced in One of Several Proper Counties. [*See § 50.310[1], Paragraph C.*]

D. Suretyship Contract Is Made Where Creditor Accepts Guaranty. A contract involving a guaranty of loans is not complete until the creditor has accepted the surety's guaranty either by acting on the guaranty and extending credit or by communicating his or her acceptance to the surety. Consequently, the contract is made at the place the creditor accepts the guaranty (*Skaggs-Stone, Inc. v. LaBatt (1960) 182 Cal. App. 2d 142, 143, 5 Cal. Rptr. 882*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support the contention that the current venue of an action for contract damages is proper, because the contract was a suretyship and the action was brought in the county where the creditor accepted the guaranty.

This form will normally be used to oppose a defendant's motion for change of venue, and should be combined when appropriate with memoranda relating to that proceeding. For memoranda relating to change of venue proceedings, see Ch. 238, *Venue* .

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, in opposing a motion for change of venue, the memorandum would include an analysis of the complaint or opposing declarations showing that the contract was a suretyship and the creditor accepted the guaranty in the county where the action was brought.

[c] Related Pleading and Practice Chapters

For detailed discussion and forms of motion relating to venue, see California Forms of Pleading and Practice, Ch. 571, *Venue* (Matthew Bender).

[d] Related Memoranda

In an appropriate case, these memoranda may be combined with alternate or additional memoranda opposing a change of venue *set out in §§ 50.310 -50.313* and *§ 50.315* et seq.

For memoranda supporting a motion for change of venue by a corporate the defendant, see Ch. 52, *Corporations* . There are additional bases of venue in an action against a corporation, and the definition of place of performance is different when an action on a contract involves a corporate the defendant.

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.300* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Suretyship Contract Is Made Where Creditor Accepts Guaranty

In ***Skaggs-Stone, Inc. v. LaBatt*** *(1960) 182 Cal. App. 2d 142, 5 Cal. Rptr. 882* , the plaintiff filed a complaint in Alameda County alleging that a certain company was indebted to it, the defendants had guarantied the account in writing, and the plaintiff sought to collect the amount owed by the company from the guarantors. The plaintiff prepared the loan guaranty, and forwarded it to the defendants in Stanislaus County where they signed it and returned it to the plaintiff by mail. The trial court denied the defendants' motion for a change of venue, which was based on the ground that the defendants resided in Stanislaus County where the contract was made. The defendants argued that when they signed the guaranty and deposited it in the mail in Stanislaus County the contract was complete.

The court of appeal affirmed. Although the defendants' argument followed the general rule of offer and acceptance, suretyship contracts differ in that the creditor must accept the surety's guaranty, either by acting on it and extending credit or by communicating his or her acceptance to the surety. Logically, there does not seem to be any way a creditor could extend credit in reliance on a guaranty until he or she had knowledge of the guarantor's undertaking. The contract in any case could be reasonably interpreted to provide for performance in Alameda County since not only was the guaranty addressed to the plaintiff's place of business in Alameda County, where the credit was to be extended, but also it provided that it was to remain in full force and effect until written notice of its withdrawal had been served by the guarantors at the creditor's principal office as shown in the guaranty. Thus, credit was to be extended when the plaintiff receivedthe guaranty at its place of business in Alameda County and could be withdrawn by the guarantors only on their giving notice in writing to the plaintiff in Alameda County. Consequently, Alameda County was a proper place for trial

(*182 Cal. App. 2d 142, 143)* .

[4] Additional Authorities

[a] Suretyship Contract Is Made Where Creditor Accepts Guaranty

Pacific Nat'l Bank v. Covington Inv. Co. (1959) 169 Cal. App. 2d 868, 338 P.2d 56 , was an action for the payment of loans guarantied by the defendants. Two guaranties had been signed by an investment company and by officers of the investment company. The company's guaranty provided that, in consideration of any loans the plaintiff made to the debtor, the company guarantied their payment, provided the debtor's notes to the plaintiff were first approved by the company. The company officers' guaranty provided that, in consideration of the plaintiff's acceptance of the company's guaranty, the officers guarantied the company's performance. Both instruments were signed in Los Angeles and handed there to debtor's agent. The investment company's approval of the plaintiff's notes was signed in Los Angeles and mailed to the plaintiff in San Francisco, where its only place of business was located. Neither the letter of approval nor either of the guaranties provided for the defendants' performance in San Francisco nor any place of performance. The debtor's agent had delivered the guaranties to the plaintiff in San Francisco. The defendants moved for change of venue from San Francisco to Los Angeles County. The trial court found that as between the plaintiff and the defendant guarantors, the contracts were made in San Francisco when the plaintiff made a loan to the debtor, accepting the defendants' guaranties. The trial court denied the motion. The court of appeal affirmed. The plaintiff was not a signatory to either contract, and as far as the plaintiff was concerned, the guaranties were mere offers to guaranty performance by the debtor in the event that the plaintiff made loans to the debtor based on the guaranties. These loans were to be, and were, made and payable in San Francisco. The acceptance of the offers was made in San Francisco by the making of the loans to be guarantied. Thus, the contract between the plaintiff and the defendants was made in San Francisco, and consequently that was proper place for trial (*169 Cal. App. 2d 868, 870-872)* .

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5-50 California Points & Authorities § 50.315

§ 50.315 Current Venue Is Proper--Check Is Contract for Venue Purposes

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief*].

A CHECK THAT WAS MADE, EXECUTED, AND DELIVERED IN A CERTAIN COUNTY IS A CONTRACT THAT WAS MADE IN THAT COUNTY.

A. Propriety of Chosen Venue. [*See § 50.310[1], Paragraph A.*]

B. Proper Court for Contract Action. [*See § 50.300[1], Paragraph C.*]

C. Contract Action Commenced in One of Several Proper Counties. [*See § 50.310[1], Paragraph C.*]

D. Check Is Contract. A check is a contract subject to the laws governing contracts, and a check that was made, executed, and delivered in a certain county is a contract that was made in that county, which is, therefore, a proper county for trial of an action on the check (*Roff v. Crenshaw (1945) 69 Cal. App. 2d 536, 538, 540-541, 159 P.2d 661*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support the contention that the current venue of an action for contract damages is proper, because the action involves a check and the check was made, executed, and delivered, and consequently made, in the county where the action was brought.

This form will normally be used to oppose a defendant's motion for change of venue, and should be combined when appropriate with memoranda relating to that proceeding. For memoranda relating to change of venue proceedings, see

Ch. 238, *Venue* .

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, in opposing a motion for change of venue, the memorandum would include an analysis of the complaint or opposing declarations showing that the action involves a check made, executed, and delivered in the county where the action was brought.

[c] Related Pleading and Practice Chapters

For detailed discussion and forms of motion relating to venue, see California Forms of Pleading and Practice, Ch. 571, *Venue* (Matthew Bender).

[d] Related Memoranda

In an appropriate case, these memoranda may be combined with alternate or additional memoranda opposing a change of venue *set out in §§ 50.310 -50.314* and *§ 50.316* et seq.

For memoranda supporting a motion for change of venue by a corporate the defendant, see Ch. 52, *Corporations* . There are additional bases of venue in an action against a corporation, and the definition of place of performance is different when an action on a contract involves a corporate the defendant.

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.300* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Check Is Contract

Roff v. Crenshaw *(1945) 69 Cal. App. 2d 536, 159 P.2d 661* , was an action on a check. The complaint alleged that the defendant executed and delivered a check in San Luis Obispo County, and it was presented for payment in Millbrae, San Mateo County, where it was refused payment on a written order executed by the defendant stopping payment. The defendant's motion for change of venue to the county of the defendant's residence and the county where the check was payable was denied by the trial court. On appeal the defendant contended, first, that the plaintiff did not allege in the complaint or by way of affidavit that the contract was in fact made in San Luis Obispo County, and second, that the check was to be paid and performed in San Mateo County. The defendant further contended that a check is not a contract, hence the laws governing the venue of contract actions do not apply.

The court of appeal affirmed. The allegation of the complaint that the check was executed and delivered in San Luis Obispo County wasequivalent to saying that the contract was in fact made in that county. A check is a contract. Thus, the action could be tried in the county where the check was issued (*69 Cal. App. 2d 536, 538)* .

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5-50 California Points & Authorities § 50.316

§ 50.316 Current Venue Is Proper--Contract Containing Condition Precedent Was Made Where Condition Precedent Was Performed

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

A PROPER COUNTY FOR AN ACTION FOR THE BREACH OF A CONTRACT CONTAINING A CONDITION PRECEDENT IS WHERE THE CONDITION PRECEDENT IS TO BE PERFORMED. THUS, WHEN THE ACTION FOR BREACH OF CONTRACT HAS NOT BEEN BROUGHT IN THE COUNTY OF THE DEFENDANT'S RESIDENCE OR THE COUNTY OF PERFORMANCE, THE COUNTY WHERE THE CONDITION PRECEDENT WAS PERFORMED IS THE PROPER COUNTY FOR THE ACTION.

A. Propriety of Chosen Venue. [*See § 50.310[1], Paragraph A.*]

B. Proper Court for Contract Action. [*See § 50.300[1], Paragraph C.*]

C. Contract Action Commenced in One of Several Proper Counties. [*See § 50.310[1], Paragraph C.*]

D. Place Condition Precedent Was Performed Is Place Contract Was Made. When the contract fixes the time and place for performing a condition precedent to make the contract binding and operative, that place is the place the obligations were incurred and, consequently, the place the contract was made [*Limited Mut. Compensation Ins. Co. v. Curtis (1941) 45 Cal. App. 2d 507, 509, 114 P.2d 404]* .

[*Optional*] **E. Condition Precedent of Insurance Premium Payment.** When an insurance contract provides that as a condition precedent, the policy is void unless the initial premium is paid to a certain office, the contract is made at that office [*Yedor v. Ocean Acc. & Guar. Corp. (1948) 85 Cal. App. 2d 698, 704, 194 P.2d 95]* .

[2] Comments

[a] Use of Form

These memoranda may be submitted in support the contention that the current venue of an action for contract damages is proper, because the contract contained a condition precedent and the action was brought in the county where the condition precedent was performed.

This form will normally be used to oppose a defendant's motion for change of venue, and should be combined when appropriate with memoranda relating to that proceeding. For memoranda relating to change of venue proceedings, see Ch. 238, *Venue* .

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, in opposing a motion for change of venue, the memorandum would include an analysis of the complaint or opposing declarations showing that the contract contained a condition precedent that was performed in the county where the action was brought.

[c] Related Pleading and Practice Chapters

For detailed discussion and forms of motion relating to venue, see California Forms of Pleading and Practice, Ch. 571, *Venue* (Matthew Bender).

[d] Related Memoranda

In an appropriate case, these memoranda may be combined with alternate or additional memoranda opposing a change of venue *set out in §§ 50.310 -50.315* and *§ 50.317* et seq.

For memoranda supporting a motion for change of venue by a corporate the defendant, see Ch. 52, *Corporations* . There are additional bases of venue in an action against a corporation, and the definition of place of performance is different when an action on a contract involves a corporate the defendant.

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.300* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Place Condition Precedent Was Performed Is Place Contract Was Made

In ***Limited Mut. Compensation Ins. Co. v. Curtis*** *(1941) 45 Cal. App. 2d 507, 114 P.2d 404* , the plaintiff sued in San Francisco to recover premiums claimed to be due on three policies of workers' compensation insurance that the plaintiff issued to the defendant. The trial court denied the defendant's motion for change of venue to Los Angeles County where he resided.

The court of appeal affirmed. Because the insurance policies provided that as a condition precedent, the policies were null and void unless the total initial premium was paid to the plaintiff or its agents at its office in San Francisco on or before a certain date, the obligations imposed by the contracts were incurred in San Francisco. No obligations whatever

arose under the contracts until the defendant performed the condition precedent of paying the premiums to the plaintiff at its San Francisco office. In other words, by the terms of the contracts, the parties themselves fixed the time and place the condition precedent should be performed to make the contracts binding and operative. It followed, therefore, that the place they became binding and operative was the place the obligations were incurred. Consequently, San Francisco was a proper county for the trial (*45 Cal. App. 2d 507, 509)* .

[b] Condition Precedent of Insurance Premium Payment

The facts and procedural background of ***Yedor v. Ocean Acc. & Guar. Corp.*** *(1948) 85 Cal. App. 2d 698, 194 P.2d 95* , are discussed in *§ 50.301[3][e]*. The insurance policy provided that, as a condition precedent, the policy was null and void unless the total initial premium was paid to the State Compensation Insurance Fund at its office in San Francisco by a certain date. When a provision in a contract fixes the place a condition precedent should be performed to make the contracts binding and operative, that place is the place the obligations were incurred and the contract was made. Since the plaintiff failed to show a special contract specifying that the place of performance was in the county where the action was brought, and since the defendant's residence was in San Francisco and the contract was made there, the trial court should have transferred the action to San Francisco (*85 Cal. App. 2d 698, 704)* .

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5-50 California Points & Authorities § 50.317

§ 50.317 Current Venue Is Proper--Specification of Place of Performance Was Incorporated by Reference

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

WHEN A CONTRACT DOES NOT SPECIFY THE PLACE OF PERFORMANCE BUT INCORPORATES BY REFERENCE A DOCUMENT THAT DOES SPECIFY IT, THE PLACE OF PERFORMANCE IS EFFECTIVELY FIXED, AND THE COUNTY DESIGNATED FOR PERFORMANCE IS A PROPER COUNTY FOR TRIAL OF THE ACTION.

A. Propriety of Chosen Venue. [*See § 50.310[1], Paragraph A.*]

B. Proper Court for Contract Action. [*See § 50.300[1], Paragraph C.*]

C. Contract Action Commenced in One of Several Proper Counties. [*See § 50.310[1], Paragraph C.*]

D. Incorporation of Place of Performance by Reference. When a contract does not specify the place of performance but incorporates by reference a document that does specify the place of performance, the place of performance is as effectively fixed by the document as though the place had been expressly fixed in the contract itself [*East-West Dairymen's Ass'n v. Dias (1943) 59 Cal. App. 2d 437, 441, 138 P.2d 772]* .

[2] Comments

[a] Use of Form

These memoranda may be submitted in support the contention that the current venue of an action for contract damages is proper, because the county of performance as designated in a document incorporated by reference into the contract is that in which the action was brought.

This form will normally be used to oppose a defendant's motion for change of venue, and should be combined when appropriate with memoranda relating to that proceeding. For memoranda relating to change of venue proceedings, see Ch. 238, *Venue* .

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, in opposing a motion for change of venue,the memorandum would include an analysis of the complaint or opposing declarations showing that the county in which the action was brought is the county of performance is designated in a document incorporated by reference into the contract.

[c] Related Pleading and Practice Chapters

For detailed discussion and forms of motion relating to venue, see California Forms of Pleading and Practice, Ch. 571, *Venue* (Matthew Bender).

[d] Related Memoranda

In an appropriate case, these memoranda may be combined with alternate or additional memoranda opposing a change of venue *set out in §§ 50.310 -50.316* and *§§ 50.318, 50.319*.

For memoranda supporting a motion for change of venue by a corporate the defendant, see Ch. 52, *Corporations* . There are additional bases of venue in an action against a corporation, and the definition of place of performance is different when an action on a contract involves a corporate the defendant.

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.300* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Incorporation of Place of Performance by Reference

In ***East-West Dairymen's Ass'n v. Dias*** *(1943) 59 Cal. App. 2d 437, 138 P.2d 772* , a marketing organization sued to enjoin the defendant from disposing of his dairy products to persons other than the plaintiff and to recover damages for the defendant's failure and refusal to continue delivering his dairy products to the plaintiff as provided in his member's contract. The bylaws of the organization provided that each member was to sell and deliver to the organization's plant in Newman, Stanislaus County, all milk and cream produced or controlled by the member. The member's contract, which was signed by the defendant, stated that the defendant had read and was familiar with the organization's bylaws, ratified and adopted them,and agreed to be bound by them and any changes or amendments. The trial court denied the defendant's motion for change of venue to the county of his residence. The defendant contended that the contract was silent as to the place of performance, and since the contract was made in the county of the defendant's residence, that county must be deemed to be the county where it was to be performed.

The court of appeal affirmed. The member's contract did not purport to set forth in detail the agreement of the parties but incorporated by reference all provisions of the organization's bylaws and all changes or amendments. It was immaterial that the member's contract did not expressly specify the place of performance, for the effect of the contract

was to incorporate all provisions of then-existing bylaws and all reasonable amendments. In other words, for the purpose of determining venue in an action brought under the contract, the place of performance was as effectively fixed by the bylaws as though the place had been expressly fixed in the contract itself or by a provision in the contract expressly permitting the other party to fix any reasonable place for performance (*59 Cal. App. 2d 437, 441)* .

[4] Additional Authorities

[a] Incorporation of Place of Performance by Reference

In *Stute v. Burinda (1981) 123 Cal. App. 3d Supp. 11* , *177 Cal. Rptr. 102* , a breach of contract action, an appendix to the contract provided for performance at the plaintiff's place of business, located in the county where the action was brought. The trial court denied the defendants' motion for change of venue to the county of their residence. The defendants conceded that venue is proper in the county of performance if so specified in writing by the contract but contended that they were not bound by the performance provision, since it was not contained in the original contract executed 12 years earlier. The appellate department of the superior court affirmed. The contract became operative by automatic renewal of the original. A written agreement may incorporate other written agreements by reference, and the contract containing the performance clause could be construed as one with the original contract. The defendants were bound by the performance clause, which adequately supported the venue chosen by the plaintiffs (*123 Cal. App. 3d Supp. 11, 15-16)* .

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Volume 5 Chapters 50-59 CONTRACTS---to---CORPORATIONS
CHAPTER 50 CONTRACTS
PART II. FORMS
C. Venue for Breach of Contract Action

5-50 California Points & Authorities § 50.318

§ 50.318 Current Venue Is Proper--Special Contract Specifies Place of Performance

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE CONTRACT SPECIFICALLY STATES IN WRITING THE PLACE OF PERFORMANCE.

A. Propriety of Chosen Venue. [*See § 50.310[1], Paragraph A.*]

B. Proper Court for Contract Action. [*See § 50.300[1], Paragraph C*].

C. Contract Action Commenced in One of Several Proper Counties. [*See § 50.310[1], Paragraph C.*]

D. Special Contract Specifying Place of Performance. If a contract specifically states in writing the place of performance, the action may be brought in the county of performance. When the contract states the place of performance, the provision is both express and special [*Wathen v. Superior Court (1963) 212 Cal. App. 2d 125, 129, 27 Cal. Rptr. 840]* .

[*Optional*] **E. Place Specified for Payment Is Place of Performance.** In a complaint on an account stated, an allegation that the defendant contracted to pay the account in a particular county is sufficient to place venue in that county on the basis that the county where an obligation is to be performed is a proper county for trial of the action [*Atwater v. Argonne Van & Storage Co. (1946) 74 Cal. App. 2d 410, 412, 168 P.2d 776]* .

[*Optional*] **F. Place for Payment of Note Is Place of Performance.** When a promissory note requires payment in a certain county or city, that county or city is adequately established as the place of performance [*Causley v. Superior Court (1968) 267 Cal. App. 2d 757, 758, 73 Cal. Rptr. 585]* .

[*Optional*] **G. Letterhead Specified Place of Performance.** When a contract is set forth under a company's letterhead,

and the subject matter of the contract is to be delivered to the company but the address for delivery is not stated, and the company has several offices, then the place of delivery and consequently the place of performance may be considered to be the address in the letterhead [*Wathen v. Superior Court (1963) 212 Cal. App. 2d 125, 129-130, 27 Cal. Rptr. 840]* .

[2] Comments

[a] Use of Form

These memoranda may be submitted in support the contention that the current venue of an action for contract damages is proper, becausethe contract specifically states the place of performance and the action was brought in that county.

This form will normally be used to oppose a defendant's motion for change of venue, and should be combined when appropriate with memoranda relating to that proceeding. For memoranda relating to change of venue proceedings, see Ch. 238, *Venue* .

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, in opposing a motion for change of venue, the memorandum would include an analysis of the complaint or opposing declarations showing that it specifically states as the place of performance the county in which the action was brought.

[c] Related Pleading and Practice Chapters

For detailed discussion and forms of motion relating to venue, see California Forms of Pleading and Practice, Ch. 571, *Venue* (Matthew Bender).

[d] Related Memoranda

In an appropriate case, these memoranda may be combined with alternate or additional memoranda opposing a change of venue *set out in §§ 50.310 -50.317* and *§ 50.319*.

For memoranda supporting a motion for change of venue by a corporate the defendant, see Ch. 52, *Corporations* . There are additional bases of venue in an action against a corporation, and the definition of place of performance is different when an action on a contract involves a corporate the defendant.

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.300* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Special Contract Specifying Place of Performance

Wathen v. Superior Court *(1963) 212 Cal. App. 2d 125, 27 Cal. Rptr. 840* , is discussed in *§ 50.300[3][a]*.

[b] Place Specified for Payment Is Place of Performance

Atwater v. Argonne Van & Storage Co. *(1946) 74 Cal. App. 2d 410, 168 P.2d 776* , was an action on an account

stated for the balance due for the installation of a truck motor. The verified complaint alleged that the defendant contracted to pay the account in the county where the action was brought. The defendant moved for a change of venue to the county of his residence. The justice court denied the motion and transferred the case to the superior court when the defendant renewed his motion for change of venue. The superior court denied the motion.

The court of appeal affirmed. The allegation in the complaint was properly considered in opposition to the motion for change of venue. Since the county where the obligation is to be performed is a proper county for the trial of the action, the motion for change of venue was correctly denied (*74 Cal. App. 2d 410, 412)* .

[c] Place for Payment of Note Is Place of Performance

Causley v. Superior Court *(1968) 267 Cal. App. 2d 757, 73 Cal. Rptr. 585* , was an action on the promissory note of two individuals who were the president and the secretary of a corporation. The complaint set out the promissory note by incorporating it by reference. The note provided that it was to be paid at Santa Rosa, California. The trial court granted the defendants' motion for change of venue to the county of the defendants' residences.

The court of appeal granted a writ of mandate directing the trial court to vacate its order. A note so incorporated by reference becomes a part of the complaint, which thus alleges its contents. Consequently, the complaint directly alleged that the obligation of the note was to be performed in Sonoma County, in which Santa Rosa is located. A contract action against an individual is properly brought in the county where the obligation is to be performed. The provision of the note requiring payment in Santa Rosa, California adequately established that city as the place of performance, whether by the corporation or the individuals. It satisfies the requirement of a special contract in writing since it specifically provides that payment is to be at Santa Rosa (*267 Cal. App. 2d 757, 758)* .

[d] Letterhead Specified Place of Performance

Wathen v. Superior Court *(1963) 212 Cal. App. 2d 125, 27 Cal. Rptr. 840* , is discussed in *§ 50.300[3][a]*.

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CHAPTER 50 CONTRACTS
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5-50 California Points & Authorities § 50.319

§ 50.319 Current Venue Is Proper--Supplemental Agreement or Contract Correcting Errors Does Not Affect Venue

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

A SUPPLEMENTAL AGREEMENT OR SECOND CONTRACT DOES NOT AFFECT VENUE, AND THE PROPER PLACE FOR TRIAL IS THE PLACE THE ORIGINAL CONTRACT WAS MADE, IF THE ACTION IS FOUNDED ON THE OBLIGATIONS OF THE ORIGINAL CONTRACT RATHER THAN THE SUPPLEMENTAL AGREEMENT OR IF THE SECOND CONTRACT MERELY CORRECTS ERRORS IN THE ORIGINAL CONTRACT.

A. Propriety of Chosen Venue. [*See § 50.310[1], Paragraph A.*]

B. Proper Court for Contract Action. [*See § 50.300[1], Paragraph C.*]

C. Contract Action Commenced in One of Several Proper Counties. [*See § 50.310[1], Paragraph C.*]

[*EITHER*]

D. Supplemental Agreement Is Not Controlling When Action Is Founded on Original Agreement's Obligations. If the action is founded on the obligations of the original contract and not on any obligations incurred by a supplemental agreement, venue is controlled by the original agreement, and the place it was made is a proper place for trial (*Joe Lowe Corp. v. Rasmusson (1942) 53 Cal. App. 2d 490, 494, 127 P.2d 1002*).

[*OR*]

D. Contract Correcting Minor Errors Does Not Affect Venue. When a second contract is executed to correct minor errors in the original contract, with no intention on the part of the parties of effecting a novation, the proper place for trial is the place the original contract was made, not the place the second contract was made (*Standard Mach. Co. v. Coleman (1956) 140 Cal. App. 2d 748, 749-750, 296 P.2d 89*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support the contention that the current venue of an action for contract damages is proper, because, notwithstanding a second agreement or contract supplementing the original one that was made in the county of the defendant's residence, the action is founded on the obligations created by the original contract and the second agreement in fact contains only minor modifications.

This form will normally be used to oppose a defendant's motion for change of venue, and should be combined when appropriate with memoranda relating to that proceeding. For memoranda relating to change of venue proceedings, see Ch. 238, *Venue* .

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, in opposing a motion for change of venue, the memorandum would include an analysis of the complaint or opposing declarations showing that the action is founded on the obligations created by the original contract and a second agreement that was made in the county of defendant's residence only contains minor modifications.

[c] Related Pleading and Practice Chapters

For detailed discussion and forms of motion relating to venue, see California Forms of Pleading and Practice, Ch. 571, *Venue* (Matthew Bender).

[d] Related Memoranda

In an appropriate case, these memoranda may be combined with alternate or additional memoranda opposing a change of venue *set out in §§ 50.310 -50.318*.

For memoranda supporting a motion for change of venue by a corporate the defendant, see Ch. 52, *Corporations* . There are additional bases of venue in an action against a corporation, and the definition of place of performance is different when an action on a contract involves a corporate the defendant.

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.300* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Supplemental Agreement Is Not Controlling When Action Is Founded on Original Agreement's

Obligations

Joe Lowe Corp. v. Rasmusson *(1942) 53 Cal. App. 2d 490, 127 P.2d 1002* , was an action for damages for breach of contract brought in Los Angeles County. The parties had made a contract in San Francisco, but one week later made a second agreement to alter the terms of payment. This agreement was executed in Los Angeles. The trial court denied the defendant's motion to transfer the action to Sacramento County where he resided. The trial court regarded the act of signing the supplemental agreement as the final act of the parties in the execution of the contract and accordingly ruled that the obligation on which the action was founded was incurred in Los Angeles.

The court of appeal reversed. The obligations on which the action was founded were incurred by the terms of and at the time of the signing of the original agreement. The supplemental agreement signed in Los Angeles imposed on the defendant no additional obligation except to forgo the right to receive the total purchase price in cash and to accept payment on other terms. The action was not founded on any obligation of the defendant incurred by the supplemental agreement, if it could even be said that he assumed an obligation at all in agreeing to extend the time for the payment of a portion of the purchase price. The supplemental agreement was so lacking in materiality to the issues involved that the case could be tried and determined without proof of the supplemental agreement itself (*53 Cal. App. 2d 490, 494)* .

[b] Contract Correcting Minor Errors Does Not Affect Venue

Standard Mach. Co. v. Coleman *(1956) 140 Cal. App. 2d 748, 296 P.2d 89* , was an action on a contract for the sale of a truck-crane brought in San Francisco. The original contract under which the truck-crane was sold was negotiated and made in San Francisco. The truck-crane was delivered to the defendants on the basis of the original contract. However, some errors were discovered in the contract form, and it was retyped and taken to one of the defendants in Mendocino County to be signed again. The trial court denied the defendants' motion to transfer the action to Mendocino County where they resided.

The court of appeal affirmed. The intent of the parties was merely to correct minor errors in the first contract and not to rescind the first contract and substitute the second, effecting a novation. Consequently, the action was on the original contract, as modified by the second contract, and venue was in San Francisco where the original contract was made (*140 Cal. App. 2d 748, 749-750)* .

[4] Additional Authorities

[a] Supplemental Agreement Is Not Controlling When Action Is Founded on Original Agreement's Obligations

Miller v. Hale (1961) 193 Cal. App. 2d 567, 14 Cal. Rptr. 472 , was an action in Santa Clara County for rescission of a contract, or, in the alternative, damages. The plaintiff had purchased a boat from the defendants in Contra Costa County where the defendants had their place of business. After taking possession of the boat, the plaintiff telephoned one of the defendants, informing him that the boat leaked, whereupon the defendant informed the plaintiff that the boat would be picked up and repaired or replaced. The plaintiff claimed that the boat was picked up but never returned. He contended that the telephone conversation was a contractual agreement made in Santa Clara County. However, the plaintiff also alleged that the defendants originally promised that the boat would be a new boat, in good and merchantable condition and seaworthy, but due to defective manufacture the boat leaked so much when it floated in the water that it was in danger of sinking. The trial court granted the defendants' motion for change of venue to Contra Costa County, where the defendants resided, which was also the county where the trial court found the contract was made. The court of appeal affirmed. The allegations forced the conclusion that the plaintiff was suing under the original obligation and provisions of the contract made in Contra Costa County, not under any telephone conversation agreement. Since no new obligation was incurred by the telephone conversation, venue was controlled by the prior or original agreement, and the defendants' motion was appropriately granted (*193 Cal. App. 2d 567, 570-571)* .

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CHAPTER 50 CONTRACTS
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5-50 California Points & Authorities § 50.320

§ 50.320 Current Venue Is Proper--Place for Corporation's Performance of Obligation That Was Breached Is Decisive Factor

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE PLAINTIFF BROUGHT THE ACTION IN A PROPER COUNTY, SINCE THE COUNTY FOR PERFORMANCE BY A CORPORATION OF THE OBLIGATION THAT WAS BREACHED IS THE DECISIVE FACTOR.

A. Statutory Authority for Motion. [*See § 50.300[1], Paragraph A.*]

B. Transfer Is Mandatory on Proper Showing. [*See § 50.300[1], Paragraph B.*]

C. Where Corporation's Obligation Was to Be Performed Is Determinative. In a breach of contract action against a corporation, the place the plaintiff performed its obligations under the contract does not determine the proper venue. The decisive factor in determining venue is the place the defendant was to perform the obligation, the breach of which is pleaded as the cause of action (*Code Civ. Proc. § 395.5*; *Anaheim Extrusion Co. v. Superior Court (1985) 170 Cal. App. 3d 1201, 1203-1204, 216 Cal. Rptr. 815*).

[*Optional*] **D. Burden of Proof and Practice of Parties.** A corporation as defendant has the burden of negating the propriety of venue as laid on all possible grounds. Thus, if the contract does not specify where the corporation is to make payments under the contract, and the defendant introduces no evidence on the issue, venue will be upheld in the county of the plaintiff's office at which it has been the defendant's practice to make payments (*Anaheim Extrusion Co. v. Superior Court (1985) 170 Cal. App. 3d 1201, 1203-1204, 216 Cal. Rptr. 815*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support the contention that the current venue of an action for contract damages is proper, because the action was brought by a corporation in the county for performance of the obligation, the breach of which provided the basis for the cause of action. The basis for the contention is that *Code Civ. Proc. § 395.5*, rather than *Code Civ. Proc. § 395*, establishes the venue for an action against a corporation, and provides that a corporation may be sued on a contract in the county where the contract is to be performed [*Code Civ. Proc. § 395.5*; *see Hale v. Bohannon (1952) 38 Cal. 2d 458, 470-478, 241 P.2d 4]* .

This form will normally be used to oppose a defendant's motion for change of venue, and should be combined when appropriate with pointsand authorities relating to that proceeding. For memoranda relating to change of venue proceedings, see Ch. 238, *Venue* .

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, in opposing a motion for change of venue, the memorandum would include an analysis of the complaint or opposing declarations showing that the action was brought by a corporation in the county for performance of the obligation, the breach of which provided the basis for the cause of action.

[c] Related Pleading and Practice Chapters

For detailed discussion and forms of motion relating to venue, see California Forms of Pleading and Practice, Ch. 571, *Venue* (Matthew Bender).

[d] Related Memoranda

In an appropriate case, this memorandum may be combined with alternate or additional memoranda opposing a change of venue *set out in §§ 50.310 -50.319*.

For memoranda supporting a motion for change of venue by a corporate the defendant, see Ch. 52, *Corporations* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memorandum *in § 50.301* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Where Corporation's Obligation Was to Be Performed Is Determinative

In ***Anaheim Extrusion Co. v. Superior Court*** *(1985) 170 Cal. App. 3d 1201, 216 Cal. Rptr. 815* , the corporation had taken delivery of goods in Los Angeles County. The corporation sought to have venue placed there because, according to the corporation, that was where the contract was to be performed.

The court of appeal issued a writ of mandate vacating an order changing venue as the corporation had requested because the corporation did not meet its burden of proof. The place of performance of the obligation that was breached is the decisive factor. In this case, the place of performance was the place payment was to be made (*170 Cal. App. 3d 1201, 1203)* .

[b] Burden of Proof and Practice of Parties

The facts and procedural background of ***Anaheim Extrusion Co. v. Superior Court*** *(1985) 170 Cal. App. 3d 1201, 216 Cal. Rptr. 815* , are discussed in *§ 50.320[3][a]*. The contract was silent as to where payment was to be made, but the past practice of the parties was that the defendant made payments to the plaintiff's offices in Orange County, where the action was brought. The corporation's failure to present any evidence on the issue entitled the plaintiff to maintain the action in Orange County (*170 Cal. App. 3d 1201, 1203-1204)* .

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5-50 California Points & Authorities § 50.321

§ 50.321 Current Venue Is Proper--Code of Civil Procedure Section 395(b) Applies to Action by Consumer or Action Against Consumer

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE PLAINTIFF BROUGHT THE ACTION IN A PROPER COUNTY BECAUSE CODE OF CIVIL PROCEDURE SECTION 395(b) APPLIES, AND THE ACTION WAS BROUGHT IN THE COUNTY WHERE _____ [PLAINTIFF *or* DEFENDANT] _____ [IN FACT SIGNED THE CONTRACT *or* RESIDED AT THE TIME THE CONTRACT WAS ENTERED INTO *or* RESIDED AT THE COMMENCEMENT OF THE ACTION].

A. Venue in Action Based on Consumer Transaction Depends on Consumer-Related Facts. In an action arising from an offer or provision of goods, services, loans, or extensions of credit intended primarily for personal, family, or household use, other than an obligation described in *Civil Code Section 1812.10* (Unruh Retail Installment Sales Act) or *Civil Code Section 2984.4* (Rees Levering Motor Vehicle Sales and Finance Act), or in an action arising from a transaction consummated as a proximate result of either an unsolicited telephone call made by a seller engaged in the business of consummating transactions of that kind or a telephone call or electronic transmission made by the buyer or lessee in response to a solicitation by the seller, the superior court in the county where the buyer or lessee in fact signed the contract, or where the buyer or lessee resided at the time the contract was entered into, or where the buyer or lessee resides at the commencement of the action, is the proper court for the trial of the action (*Code Civ. Proc. § 395(b)*).

B. *Code of Civil Procedure Section 395(b)* Applies to Action by Consumer or Action Against Consumer. There is nothing in the language of *Code of Civil Procedure Section 395(b)* that limits its application to actions brought against a consumer defendant. Whether the action is brought *against a consumer defendant or by a consumer plaintiff,* the venue provisions of that statute apply as long as the action arises from a consumer transaction specified in the statute (*Fontaine v. Superior Court (CashCall, Inc.) (2009) 175 Cal. App. 4th 830, 838, 96 Cal. Rptr. 3d 607*).

C. Statutory Reference to "Buyer or Lessee" Means Consumer. In view of the legislative history of the 1991 amendments by which "buyer or lessee" was inserted in place of "defendant" in *Code of Civil Procedure Section 395(b)*, the Legislature intended to provide that, for an action arising from a consumer transaction described in the statute, venue would be proper either in the county where the consumer signed the contract or the county of the consumer's residence, consistent with the venue provisions of other consumer protection laws (*Fontaine v. Superior Court (CashCall, Inc.) (2009) 175 Cal. App. 4th 830, 838-839, 96 Cal. Rptr. 3d 607*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support the contention that the current venue of a consumer-contract action is proper because *Code Civ. Proc. § 395(b)* applies, and the action was brought in the county specified in the statute.

This form will normally be used to oppose a defendant's motion for change of venue, and should be combined when appropriate with points and authorities relating to that proceeding. For memoranda relating to change of venue proceedings, see Ch. 238, *Venue* .

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, in opposing a motion for change of venue, the memorandum would include an analysis of the complaint or opposing declarations showing that the action was brought by a corporation in the county for performance of the obligation, the breach of which provided the basis for the cause of action.

[c] Related Pleading and Practice Chapters

For detailed discussion and forms of motions relating to venue, see California Forms of Pleading and Practice, Ch. 571, *Venue* (Matthew Bender).

[d] Related Memoranda

In an appropriate case, this memorandum may be combined with alternative or additional memoranda opposing a change of venue *set out in §§ 50.310 -50.320*.

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memorandum in § 50.301 may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Code of Civil Procedure Section 395(b) Applies to Action by Consumer or Action Against Consumer

Fontaine v. Superior Court (CashCall, Inc.) *(2009) 175 Cal. App. 4th 830, 96 Cal. Rptr. 3d 607* , was a consumer's action against a corporation and four of its employees individually. The consumer had obtained a loan for personal, famil,y or household use, from the corporation, and the complaint alleged that the defendants used collection methods in

violation of the Rosenthal Fair Debt Collection Practices Act [*Civ. Code § 1788 et seq.*]. The action was commenced in Santa Clara County, where the consumer resided. The corporation and two of the individual defendants moved to transfer venue to Orange County, contending that (1) the general venue rule in *Code Civ. Proc. § 395(a)* is that a defendant is entitled to have an action tried in the county of his or her residence, (2) one of the individual defendants, who was a moving party, was a resident of Orange County and requested that the action be transferred there, and (3) no exception to the general venue rule was applicable. The consumer, opposing the motion, asserted that venue was proper in Santa Clara County under *Code Civ. Proc. § 395(b)* because the action arose from a loan that he had obtained primarily for personal, family, or household purposes, and he was a resident of Santa Clara County at the time the action was commenced. The trial court granted the motion after determining that *Code Civ. Proc. § 395(b)* did not apply because the action was not commenced *against* the consumer. The consumer petitioned the court of appeal for a writ of mandamus to prevent the change of venue.

The court of appeal granted the petition and directed the trial court to deny the motion for change of venue. The court concluded, "We find that the plain language of section 395, subdivision (b) provides that an action arising from certain consumer transactions, including a loan or extension of credit intended primarily for personal, family or household use, must be tried in the superior court of the county where either (1) the buyer or lessee signed the contract; (2) the buyer or lessee resided at the time he or she entered into the contract; or (3) the buyer or lessee resided at the commencement of an action. There is nothing in the language of section 395, subdivision (b) that limits its application to collection actions brought against a consumer defendant. Therefore, whether the action is brought *against a consumer defendant* or *by a consumer plaintiff*, the venue provisions of section 395, subdivision (b) apply as long as the action arises from a consumer transaction specified in the statute. [P] We are not convinced by defendants' argument that the venue provision of section 395, subdivision (b) is properly interpreted to apply only to actions against a consumer defendant, or, alternatively, does not apply where the consumer is the plaintiff and one of the defendants is an individual. Even assuming that there is some ambiguity regarding the scope of section 395, subdivision (b), we believe that the legislative history supports our plain language interpretation" (*175 Cal. App. 4th 830, 838)* (original emphasis). Regarding the meaning of the statutory reference to "buyer or lessee" in the context of this case involving a consumer loan, see *§ 50.321[3][b]*.

In addition the court concluded, "Finally, we find no merit in defendants' alternative argument that section 395, subdivision (b) does not apply to this action because the action does not arise from [an] individual defendant['s] ... provision of a loan. There is nothing in either the language of section 395, subdivision (b) or its legislative history to indicate that this venue exception does not apply where one of the defendants is an individual" (*175 Cal. App. 4th 830, 840)* .

[b] Statutory Reference to "Buyer or Lessee" Means Consumer

The facts and procedural history of ***Fontaine v. Superior Court (CashCall, Inc.)*** *(2009) 175 Cal. App. 4th 830, 96 Cal. Rptr. 3d 607* , are given in § 50.321[3][a].

The court, in discussing its reliance on the legislative history of *Code Civ. Proc. § 395(b)*, noted that amendments in 1991 inserted "buyer or lessee" in place of "defendant" three times and also inserted "arising from an offer or provision of" in place of "founded upon an obligation of the defendant for" in the text of that subsection. The court concluded, "The legislative history further reveals that the 1991 amendments to section 395, subdivision (b) were intended to provide that an action arising from a consumer credit transaction would be 'venued' either in the county where the consumer signed the contract or the county where the consumer resides, consistent with the venue provisions of other consumer protection laws. ... [P] Thus, as intended by the Legislature, section 395, subdivision (b) provides a statutory exception to the general venue rule, by authorizing venue in the county where a consumer plaintiff resides at the commencement of his or her action arising from a consumer transaction as specified in the statute. Because [the plaintiff's] action arises from a loan that he obtained primarily for personal, family or household use, which is a consumer transaction specified in section 395, subdivision (b), and [the plaintiff] resided in Santa Clara County at the

time his action commenced, venue is proper in Santa Clara County Superior Court" (*175 Cal. App. 4th 830, 838-839)* .

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[Reserved]

§§ 50.322[Reserved]

California Points & Authorities

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Volume 5 Chapters 50-59 CONTRACTS---to---CORPORATIONS
CHAPTER 50 CONTRACTS
PART II. FORMS
D. Existence of Contract
1. Offer and Acceptance

5-50 California Points & Authorities § 50.350

§ 50.350 Complaint Shows Only Agreement to Agree

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE COMPLAINT SHOWS ONLY AGREEMENT TO SOME PRELIMINARY TERMS AND NOTHING MORE THAN AN AGREEMENT TO AGREE.

A. Agreement to Agree Is Determined by Reference to Parties' Expressed Intentions. Whether a writing constitutes a final agreement or is merely an agreement to make an agreement depends primarily on the intention of the parties. In the absence of ambiguity, this must be determined by a construction of the instrument taken as a whole (*Rennick v. O.P.T.I.O.N. Care, Inc. (9th Cir. 1996) 77 F.3d 309, 314-316* ; *Banner Entertainment v. Superior Court (1998) 62 Cal. App. 4th 348, 358, 72 Cal. Rptr. 2d 598* ; *Beck v. American Health Group Internat. Inc. (1989) 211 Cal. App. 3d 1555, 1562, 260 Cal. Rptr. 237* ; *Smissaert v. Chiodo (1958) 163 Cal. App. 2d 827, 830, 330 P.2d 98*).

B. No Remedy for Failure to Agree. Neither law nor equity provides a remedy for breach of an agreement to agree in the future. An agreement to agree cannot be made the basis of a cause of action (*Autry v. Republic Productions, Inc. (1947) 30 Cal. 2d 144, 151, 180 P.2d 888*).

[*Optional*] **C. Pleader's Interpretation of Ambiguous Agreement Must Be Alleged.** When an ambiguous written contract is pleaded by attachment to and incorporation in a complaint or set forth *in haec verba*, and the complaint fails to allege the meaning ascribed by the pleader, the court will construe the language of the contract on its face to determine whether, as a matter of law, the contract is reasonably subject to a construction sufficient to sustain a cause of action for breach (*Beck v. American Health Group Internat. Inc. (1989) 211 Cal. App. 3d 1555, 1561-1562, 260 Cal. Rptr. 237* ; *Hillsman v. Sutter Community Hospitals (1984) 153 Cal. App. 3d 743, 749-750, 200 Cal. Rptr. 605*).

[*Optional*] **D. Interpretation Is Judicial Function.** Interpretation of a written instrument is solely a judicial function

unless the interpretation turns on the credibility of extrinsic evidence (*Oceanside 84 Ltd. v. Fidelity Federal Bank (1997) 56 Cal. App. 4th 1441, 1451, 66 Cal. Rptr. 2d 487* ; *Beck v. American Health Group Internat. Inc. (1989) 211 Cal. App. 3d 1555, 1561, 260 Cal. Rptr. 237*).

[*Optional*] **E. Intent That Agreement Be Formalized.** If there is a manifest intention that an agreement is not complete until it has been reduced to writing and signed by the parties, there is no binding or completed contract until that has been done (*Rennick v. O.P.T.I.O.N. Care, Inc. (9th Cir. 1996) 77 F.3d 309, 315-316* ; *Banner Entertainment v. Superior Court (1998) 62 Cal. App. 4th 348, 358, 72 Cal. Rptr. 2d 598* ; *Beck v. American Health Group Internat. Inc. (1989) 211 Cal. App. 3d 1555, 1562, 260 Cal. Rptr. 237* ; *Smissaert v. Chiodo (1958) 163 Cal. App. 2d 827, 830-831, 330 P.2d 98*).

[*Optional*] **F. Words Are to Be Given Their Ordinary Meanings.** The words of a written instrument are generally to be understood in their ordinary and popular sense (*Beck v. American Health Group Internat. Inc. (1989) 211 Cal. App. 3d 1555, 1562, 260 Cal. Rptr. 237* ; *Smissaert v. Chiodo (1958) 163 Cal. App. 2d 827, 830, 330 P.2d 98*).

[*Optional*] **G. Condition of Attorney's Approval Is Implied.** Assignment of the drafting of a formal, finalized agreement to an attorney usually evidences an expectation that the terms set forth in the letter agreement are subject to the attorney's approval (*see* *Beck v. American Health Group Internat. Inc. (1989) 211 Cal. App. 3d 1555, 1563, 260 Cal. Rptr. 237*).

[*Optional*] **H. When Leave to Amend Need Not Be Given.** Although it is usually error to sustain a demurrer without leave to amend if there is a reasonable possibility that the defect can be cured by amendment, it is not necessary to allow an amendment when the only contract the plaintiff could allege would be illegal and void (*Beck v. American Health Group Internat. Inc. (1989) 211 Cal. App. 3d 1555, 1563-1565, 260 Cal. Rptr. 237*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that the complaint alleges nothing more than an agreement to agree.

This form includes optional paragraphs that set out various rules of interpretation and pleading requirements that may be used as appropriate in the particular situation. Additional rules of pleading and interpretation applicable to ambiguous contracts are provided in § 50.500 et seq.

This form may be used in combination with other memoranda for submission of a complete memorandum appropriate to the procedural context in which it raised, such as a memorandum in support of a demurrer or motion for summary judgment. It may also be incorporated into a trial or appellate brief. However used, counsel should add argument linking the points in this form with the facts of the case.

[b] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[c] Related Memoranda

In an appropriate case, these memoranda may be combined with the memoranda supporting the contention that no contract was formed because there is uncertainty as to material terms [*see § 50.501*].

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Memoranda

The memoranda *in § 50.360* may be used in appropriate cases to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Agreement to Agree Is Determined by Reference to Parties' Expressed Intentions

Rennick v. O.P.T.I.O.N. Care, Inc. *(9th Cir. 1996) 77 F.3d 309* was an action for breach of contract to enter into a franchise relationship. The plaintiffs, who sought to become a corporation's sole Canadian franchisee, claimed that an agreement was reached at a meeting that was concluded with a ceremonious shaking of hands, and the terms of the agreement were set forth in a draft letter of intent circulated after the meeting. No interim or final agreement was ever signed. The trial court entered summary judgment for the corporation.

The court of appeals affirmed. The parties had not made a contract. Although in appropriate circumstances a handshake or a letter of intent could manifest agreement, in this case the express provisions of the letter of intent established that as a matter of law no contract was made (*77 F.3d 309, 314-316)* .

In ***Banner Entertainment v. Superior Court*** *(1998) 62 Cal. App. 4th 348, 72 Cal. Rptr. 2d 598* , a film producer sued for declaratory relief, claiming that a dispute between the producer and its overseas marketing agent was not subject to mandatory arbitration. The trial court ordered arbitration, and the producer petitioned for a writ of mandate to compel the court to vacate its order (*62 Cal. App. 4th 348, 355-356)* . The producer contended that there was no agreement to arbitrate because the parties' conduct did not establish that there was such an agreement, and preliminary draft agreements, which provided that by signing them the producer would manifest its intent to agree to the draft agreements' terms, were never signed.

The court of appeal granted the petition. No substantial evidence supported the trial court's implicit finding that the parties agreed to arbitration. The uncontradicted evidence showed that the parties never reached an agreement that included all of the terms contained in the draft agreements. No enforceable agreement to arbitrate existed (*62 Cal. App. 4th 348, 358-361)* .

Beck v. American Health Group Internat. Inc. *(1989) 211 Cal. App. 3d 1555, 260 Cal. Rptr. 237* , is discussed in [c], *below*.

Smissaert v. Chiodo *(1958) 163 Cal. App. 2d 827, 330 P.2d 98* , was an action for specific performance of a contract for the sale and leaseback of real estate or, in the alternative, for damages and declaratory relief. A candy company placed its property on the market, intending to use the sale and leaseback as a financing device. An offer was presented, on a standard deposit receipt that included all material terms of the sale and lease. In accepting it, the company added this addendum: "It is further mutually understood and agreed by and between the parties to this agreement that the validity of the proposed agreement is subject and conditioned upon the parties agreeing upon and reducing to writing all terms and conditions necessary and incidental to the validity of said proposed agreement and that seller shall pay a total real estate commission of 5% upon completion of said sale." Negotiations followed regarding a higher price, higher rent, and security for the lease. Eventually the company notified the plaintiff that the property was being taken off the market. This action followed, and the trial court rendered judgment for the defendant on findings that the deposit receipt was not intended by the parties as their final contract.

The court of appeal affirmed. Whether a writing constitutes a final agreement or merely an agreement to make an agreement depends primarily on the intention of the parties. In the absence of ambiguity, this mustbe determined by a construction of the instrument taken as a whole (*163 Cal. App. 2d 827, 830)* . When all of the essential terms are agreed on in writing, there is a binding contract even though there is an intention that a formal writing will be executed later; but the objective intent of the parties is determined by an objective standard and not by an unexpressed stateof mind (*163 Cal. App. 2d 827, 830)* . When any terms are left for future negotiation, or when there is a manifest intention that the formal agreement is not to be complete until reduced to a formal writing to be executed, there is no binding contract until this has been done (*163 Cal. App. 2d 827, 830-831)* . Applying the foregoing principles, it is only necessary to quote the language of the addendum to show that the parties intended and agreed not to be bound until a formal contract was executed (*163 Cal. App. 2d 827, 831)* .

[b] No Remedy for Failure to Agree

Autry v. Republic Productions, Inc. *(1947) 30 Cal. 2d 144, 180 P.2d 888* , was an action for declaratory relief of the rights and obligations of the parties arising from contracts between them. The second contract in question was supplemental to a previous contract made in 1938 and was executed after the plaintiff was ordered to report for physical examination under the Selective Service Act. It granted the defendant an additional option for one year commencing on the expiration of its last option under the 1938 contract, to require the plaintiff to appear in eight plays for a compensation of $15,000 each. The agreement provided, at Paragraph 24: "In the event Artist [the plaintiff] shall be required to serve in the armed forces of the United States pursuant to the Selective Service Act, or shall volunteer for such service, the parties hereto will agree upon their mutual rights and obligations hereunder in view of military service." The plaintiff enlisted in July 1942, at which time there remained five plays to be photographed under the third option granted by the 1938 contract. In March 1944, the defendant notified the plaintiff of its election to extend performance under the fourth option of the 1938 contract for a period equal to that of the plaintiff's military service. In June 1944, the plaintiff served the defendant a notice of termination of the agreements and employment by reason of military service and filed the action for declaratory relief. The trial court determined that the plaintiff's performance was suspended during the term of his military service, but thereafter the plaintiff was obligated for 21 more plays, and this would not place any substantial burden on the plaintiff.

The Supreme Court reversed. Generally, military service would terminate or suspend a contract under the doctrine of impossibility (*30 Cal. 2d 144, 148-150)* . The revival of a personal-services contract interrupted by war is a matter of equitable considerations, requiring findings that discharge of performance would not place substantially greater burdens on either party. The trial court had made such a finding, but the Supreme Court disagreed (*30 Cal. 2d 144, 155-157)* . More to the point, the doctrine of frustration did not apply here, because the negotiations of the parties and Paragraph 24 indicated that the parties had contracted with reference to a state of war and contemplated the risks arising from it (*30 Cal. 2d 144* ,148). Paragraph 24 was a special agreement that the parties' mutual obligations should continue during the period of military service, but they would make a new agreement concerning their rights and obligations. The parties had attempted to negotiate a new contract but had been unable to agree. There is no remedy for breach of an agreement to agree, and an agreement to agree cannot be made the basis of a cause of action. It does not follow from their failure to agree that there was no performance in legal contemplation. Nor does the failure to come to agreement operate to restore or revive the original terms that were abrogated (*30 Cal. 2d 144, 151-154)* .

[c] Pleader's Interpretation of Ambiguous Agreement Must Be Alleged

In ***Beck v. American Health Group Internat. Inc.*** *(1989) 211 Cal. App. 3d 1555, 260 Cal. Rptr. 237* , a psychiatrist alleged that he had a contract with a hospital, which was owned by a health care group, to act as the hospital's medical director for mental health services for a term of five years. The first amended complaint contained causes of action for breach of contract, bad-faith denial of the existence of a contract, breach of implied covenant of good faith and fair dealing, and intentional and negligent interference with an economic relationship. The plaintiff alleged that the contract was made on May 21, 1987, the date of a letter attached to the complaint and drafted by the hospital. It was signed by

both the plaintiff and the executive director of the hospital. The letter began "It is a pleasure to draft the outline of our future agreement after these many months of discussion" and ended "If this is a general understanding of the agreement, I ask that you sign a copy of this letter, so that I might forward it to Corporate Counsel for the drafting of a contract. When we have a draft, we will discuss it, and hopefully have a completed contract and operating unit in the very near future." The plaintiff further alleged that on July 22, 1987, the hospital, by letter to the plaintiff from the health care group, gave notice that it would not perform the contract and repudiated it, as a proximate result of which the plaintiff sustained general and special damages. The defendants demurred on the grounds that no binding, enforceable contract existed as shown by the language of the writing attached to and incorporated into the first amended complaint, and even if the letter constituted a contract, it was illegal in that it fixed the plaintiff's compensation as a percentage of room and board charged to all general psychiatric patients, which was in violation of former Bus. & Prof. Code § 650. The demurrer was sustained on the ground that there was no contract or contractual relationship as a matter of law, and any prospective economic benefit to the plaintiff was too speculative to support the claims alleged. On appeal the plaintiff contended that the court erred in construing the writing on demurrer because judicial interpretation of a written instrument is proper only after the parties have had an opportunity to present extrinsic evidence bearing on their intent and the meaning of the writing.

The court of appeal affirmed. The rule cited by the plaintiff applies only when the plaintiff has alleged the meaning that he or she ascribes to an ambiguous writing attached to and incorporated in the complaint. If a contract that is set out *in haec verba* is ambiguous, the pleader must put some definite construction on it by averment. When, as here, a complaint fails to allege the meaning ascribed by the plaintiff to an ambiguous writing that is attached to and incorporated into the complaint or set forth *in haec verba*, the court is free to interpret the ambiguous agreement. The first amended complaint did not allege the plaintiff's interpretation except for the conclusional allegation that the incorporated letter was the contract of the parties. Ordinarily, a written contract is sufficiently pleaded if it is set out in full or its terms are alleged according to their legal effect. But if the instrument is ambiguous, the pleader must allege the meaning he or she ascribes to it (*211 Cal. App. 3d 1555, 1561-1562)* .

Hillsman v. Sutter Community Hospitals *(1984) 153 Cal. App. 3d 743, 200 Cal. Rptr. 605* , was an action by a physician for breach of employment contract. The letter agreement of the parties stated no specific term of employment but provided that the agreement could be terminated or renegotiated by either party on 30 days' notice. It also contained the statement, "We look forward to a long, pleasant, and mutually satisfactory relationship with you and the Sutter Community Hospitals." The defendant terminated the agreement, and the plaintiff contested the termination on the grounds that (1) it was done in violation of an express provision of the letter agreement that allowed termination only for cause, (2) the defendant was barred from terminating the agreement because the plaintiff had furnished extra consideration in the form of leaving other more lucrative employment to take the position with the defendant, and (3) it was done in violation of an implied covenant that the plaintiff's service could only be terminated in accordance with the hospital bylaws providing grounds for discipline, notice, and hearing. On appeal, the plaintiff contested the sustaining of demurrers to two causes of action without leave to amend.

The court of appeal reversed with respect to the cause of action based on the implied covenant incorporating bylaws but affirmed the dismissal with respect to the claim of an express provision requiring cause for termination. The letter agreement was pleaded in its entirety by attachment to the complaint. Ordinarily a written contract is sufficiently pleaded if it is set out in full or its terms are alleged according to their legal effect, but if the instrument is ambiguous, the pleader must allege the meaning that he or she ascribes to it (*153 Cal. App. 3d 743, 749)* . When a written contract is pleaded by attachment to and incorporation in a complaint, and the complaint fails to allege that the terms of the contract have any special meaning, a court will construe the language of the contract on its face to determine whether, as a matter of law, the contract is reasonably subject to a construction sufficient to sustain a cause of action for breach (*153 Cal. App. 3d 743, 749-750)* . Because the plaintiff in this case did not pleadthat the language of the letter agreement was subject to any special meaning, the court could construe the language itself (*153 Cal. App. 3d 743, 750)* . That language expressed a mere hope or expectation rather than a promise. The defendant could not promise a mutually satisfactory relationship, because it had no control over the plaintiff's conduct and could not guaranty that the plaintiff's

performance would be satisfactory. The plaintiff's interpretation twisted the defendant's polite closing remark far beyond its obvious purpose, which was simply to add a touch of personal warmth to a business letter. That language did not promise the plaintiff employment for a specified term of more than one month (*153 Cal. App. 3d 743, 750)* . That fact, together with the language in the letter agreement allowing renegotiations or termination by either party on 30 days' notice, prompted the court to conclude that the letter agreement did not contain an express promise of employment terminable only for cause (*153 Cal. App. 3d 743, 751)* .

[d] Interpretation Is Judicial Function

Oceanside 84 Ltd. v. Fidelity Federal Bank *(1997) 56 Cal. App. 4th 1441, 66 Cal. Rptr. 2d 487* , was a breach of contract action by a commercial borrower, based on a bank's improper choice of the month from which to recompute the interest on a loan pursuant to the loan agreement's provision for a rate adjustment every six months after the borrower's initial payment. The trial court rendered judgment for the bank (*56 Cal. App. 4th 1441, 1446-1447)* . On appeal the borrower contended that since the issue of contract interpretation depended on the credibility of the parties' experts concerning custom and practice in the industry, the borrower was entitled to a jury trial.

The court of appeal affirmed. The interpretation of a written instrument is essentially a judicial function, even when it involves what might be called questions of fact. That function is to be exercised according to generally accepted canons of interpretation so that the purposes of the instrument may be given effect. It is therefore solely a judicial function to interpret a written instrument unless the interpretation turns upon the credibility of extrinsic evidence. In this case, the question as to proper interpretation of the loan documents was one of law for the trial court, on which the parties had no right to a jury trial (*56 Cal. App. 4th 1441, 1451)* .

The facts and procedural background of ***Beck v. American Health Group Internat. Inc.*** *(1989) 211 Cal. App. 3d 1555, 260 Cal. Rptr. 237* , are discussed in [iii], *above*. The court of appeal stated that when a written contract is pleaded by incorporation in the complaint, and the complaint fails to allege that the terms of the contract have any special meaning, a court will construe the language of the contract on its face to determine whether, as a matter of law, the contract is reasonably subject to a construction sufficient to sustain a cause of action for breach. This ruleis a variation on the well-recognized theme that it is solely a judicial function to interpret a written instrument unless the interpretation turns on the credibility of extrinsic evidence. Here, the agreement was left to speak for itself without any allegation that the writing was ambiguous (*211 Cal. App. 3d 1555, 1561)* .

[e] Intent That Agreement Be Formalized

Rennick v. O.P.T.I.O.N. Care, Inc. *(9th Cir. 1996) 77 F.3d 309* is discussed in [a], *above*.

Banner Entertainment v. Superior Court *(1998) 62 Cal. App. 4th 348, 72 Cal. Rptr. 2d 598* , is discussed in [a], *above*.

The facts and procedural background of ***Beck v. American Health Group Internat. Inc.*** *(1989) 211 Cal. App. 3d 1555, 260 Cal. Rptr. 237* , are discussed in [c], *above*. The court of appeal held that it was free to interpret the contract in light of the following principles. First, whether a writing constitutes a final agreement or merely an agreement to make an agreement depends primarily on the intention of the parties. In the absence of ambiguity, this must be determined by a construction of the instrument taken as a whole. Preliminary negotiations or an agreement for future negotiations cannot be the functional equivalent of a valid, subsisting agreement. A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he or she has made a further manifestation of assent. Thus, if it is part of the understanding between the parties that the terms of their contract are to be reduced to writing and signed, their assent to the terms must be evidenced in the manner agreed, otherwise it does not become a binding or completed contract (*211 Cal. App. 3d 1555, 1562)* .

Smissaert v. Chiodo *(1958) 163 Cal. App. 2d 827, 330 P.2d 98* , is discussed in [a], *above*.

[f] Words Are to Be Given Their Ordinary Meanings

The facts and procedural background of ***Beck v. American Health Group Internat. Inc.*** *(1989) 211 Cal. App. 3d 1555, 260 Cal. Rptr. 237* , are discussed in [iii], *above*. With regard to the proper interpretation of the letter in question, the court of appeal stated that the words of a written instrument are generally to be understood in their ordinary and popular sense. The objective intent as evidenced by the words of the instrument, not the parties' subjective intent, governs the court's interpretation. The outward manifestation or expression of assent is controlling, and what the language of an instrument means is a matter of interpretation for the courts and not controlled in any sense by what either of the parties intended or thought its meaning to be (*211 Cal. App. 3d 1555, 1562)* .

The facts and procedural background of ***Smissaert v. Chiodo*** *(1958) 163 Cal. App. 2d 827, 330 P.2d 98* , are discussed in [a], *above*. The plaintiff contended that the word "validity" in the addendum was used to mean "not repugnant to some statute or public policy" rather than to mean "not binding." The court of appeal said that the plaintiff's narrow interpretation was contrary to the general meaning of "effective" or "having legal force" (*163 Cal. App. 2d 827, 832)* .

[g] Condition of Attorney's Approval Is Implied

The facts and procedural background of ***Beck v. American Health Group Internat. Inc.*** *(1989) 211 Cal. App. 3d 1555, 260 Cal. Rptr. 237* , are discussed in [c], *above*. The court of appeal concluded that taken in their ordinary sense, the words of the letter manifested an intention of the parties that no binding contract would come into being until the terms of the letter agreement were embodied in a formal contract to be drafted by corporate counsel. Assignment of the drafting to an attorney evidences an expectation that the terms set forth in the letter were subject to the attorney's approval. In fact, in this case, the letter of July 22, 1987, was from the health care group's attorney and concluded that the terms of the proposed contract were unlawful. In addition, the letter stated, "When we have a draft, we will discuss it." This statement contemplated further negotiations, and by signing the letter, the plaintiff assented that no binding agreement would result until a formal contract was drafted by counsel. Whether the plaintiff intended or believed otherwise is immaterial in the face of the language in the letter that plainly indicated that no contract would come into existence when the letter was signed (*211 Cal. App. 3d 1555, 1563)* .

[h] When Leave to Amend Need Not Be Given

The facts and procedural background of ***Beck v. American Health Group Internat. Inc.*** *(1989) 211 Cal. App. 3d 1555, 260 Cal. Rptr. 237* , are discussed in [iii], *above*. The court of appeal concluded that the letter did not constitute a binding contract but was only "an agreement to agree," which cannot be made the basis of a cause of action (*211 Cal. App. 3d 1555, 1563)* . Although it is usually error to sustain a demurrer without leave to amend if there is a reasonable possibility that the defect can be cured by amendment, it is not necessary to allow the plaintiff to amend the complaint by adding allegations regarding his or her construction of ambiguous language (*211 Cal. App. 3d 1555, 1562-1563)* . The contract embodied in the letter would be illegal, in that it would violate *Bus. & Prof. Code § 650*, and hence no cause of action could be stated for its breach (*211 Cal. App. 3d 1555, 1564-1565)* .

[4] Additional Authorities

[a] Agreement to Agree is Determined by Reference to Parties' Expressed Intentions

In *Herman v. County of Los Angeles (2002) 98 Cal. App. 4th 484, 119 Cal. Rptr. 2d 691* , a transportation authority ("MTA") abolished its police force and contracted with a county to provide it with law enforcement services through the county sheriff, pursuant to a contract which provided for transfer of MTA officers to the county sheriff's department if they passed the sheriff's personnel review process. The contract provided that, as to MTA officers who did not pass the

sheriff's review, the parties would meet and reach mutual agreement on the placement of those personnel. When a former MTA officer did not pass the sheriff's review process and neither agency offered him an alternative position, he filed a petition for writ of mandate seeking an order directing the agencies to meet and reach mutual agreement on a job for him as required by the contract. The trial court denied the writ and the officer appealed. The court of appeal reversed, rejecting the county's argument that the contract language providing "the parties shall meet and reach mutual agreement" on the placement of former MTA police officers left an essential element of the contract undetermined, voiding the contract. The court stated that there is nothing unlawful or even unusual about contracting parties agreeing to cross certain bridges when they are reached. The parties did provide for the contingency regarding former MTA police officers who did not pass the review process and therefore were not given jobs as deputy sheriffs, by agreeing to meet and reach mutual agreement of that person's placement. Furthermore, the parties agreed that if they could not reach accord on the placement of a former MTA officer after a good faith effort to resolve the dispute, they would submit the matter to mediation. Accordingly, it held the contract was not void for failure to reach agreement on an essential term (*98 Cal. App. 4th 484, 487-488)* .

In *Harris v. Rudin, Richman & Appel (1999) 74 Cal. App. 4th 299, 87 Cal. Rptr. 2d 822* , plaintiff brought a malpractice claim against a law firm and several attorneys, alleging negligent drafting of a trust. A letter from defendants' counsel to plaintiff's counsel set out settlement terms but was signed by only two of the four individual defendants and was not signed by plaintiff. The trial court denied plaintiff's motion to enforce the settlement agreement, finding that statutory prerequisites had not been satisfied because not all the parties had signed the letter. The trial court granted plaintiff leave to amend the complaint to add causes of action for breach of written contract and intentional infliction of emotional distress, but sustained defendants' demurrers without leave to amend to those causes of action. The court of appeal directed the trial court on remand to vacate the judgment and reinstate the cause of action for breach of writtencontract and granted leave to amend to state a cause of action for breach of oral contract. The court held that the trial court erred in sustaining defendants' demurrer without leave to amend as to plaintiff's cause of action for breach of contract, because the allegations in the complaint were sufficient to state a claim for breach of an oral contract. Although defendants asserted that the complaint failed to state a cause of action for breach of contract because the letter on its face demonstrated it was merely an agreement to agree in the future, as in *Beck v. American Health Group Internat. Inc., 211 Cal. App. 3d 1555, 260 Cal. Rptr. 237* , discussed *above*, the court distinguished the two cases. Here, the letter drafted by respondents' own counsel and signed by two individual respondents purported to embody the "essential terms" of the agreement. It was signed under a signature block noting "[a]ccepted and agreed," and thus was far different from *Beck* in which the writing itself as expressly denominated as an outline of a "future agreement." Further, plaintiff's complaint in *Beck* merely relied on the language of the letter and unlike this case, did not attempt to plead any facts alleging the plaintiff's interpretation of the letter (*74 Cal. App. 4th 299, 306-309)* .

[b] Interpretation Is Judicial Function

Greater Middleton Assn. v. Holmes Lumber Co. (1990) 222 Cal. App. 3d 980, 271 Cal. Rptr. 917 , involved the construction of covenants in deeds. Although the court of appeal affirmed the trial court's construction of the covenants, it began its analysis by setting forth the relevant rules of construction, including the fact that interpretation of a contract is solely a judicial function unless the interpretation turns on the credibility of extrinsic evidence, which it did not. Thus, the court made an independent interpretation of the deeds (*222 Cal. App. 3d 980, 989-990)* .

[c] Words Are to Be Given Their Ordinary Meanings

In *Appalachian Ins. Co. v. McDonnell Douglas Corp. (1989) 214 Cal. App. 3d 1, 262 Cal. Rptr. 716* , the court of appeal affirmed a summary judgment and held that the contract involved was clear and unambiguous (*214 Cal. App. 3d 1, 18)* . Generally the words of a contract are to be understood in their ordinary and popular sense, unless a contrary intent is shown, such as a specialized meaning due to trade custom and practice or a prior course of dealing. Interpretation of a written contract is solely a judicial function unless the interpretation turns on the credibility of extrinsic evidence (*214 Cal. App. 3d 1, 11)* .

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5-50 California Points & Authorities § 50.351

§ 50.351 No Contract Was Formed Because Acceptance Was Not Effective Until After Offer Was Revoked

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

NO CONTRACT WAS EVER FORMED BETWEEN THESE PARTIES BECAUSE THE PLAINTIFF'S ACCEPTANCE WAS NOT EFFECTIVE UNTIL AFTER THE DEFENDANT HAD REVOKED THE OFFER.

A. Revocation Is Allowed Before Acceptance. An offer may be revoked at any time before its acceptance is communicated to the offeror, but not afterward (*Civ. Code § 1586*).

B. When Acceptance Is Deemed Effective. Consent is deemed to be fully communicated between the parties as soon as the party accepting an offer has put the acceptance in the course of transmission to the offeror, in conformity with *Civil Code Section 1582* (*Civ. Code § 1583*).

C. Acceptance Is in Transmission When Offeree Relinquishes Control. Acceptance is placed "in the course of transmission" within the meaning of *Civil Code Section 1583* when it has passed out of the control of the offeree. When an acceptance is being transmitted by mail, it is considered to be placed in the course of transmission when it is delivered to the post office. Thus, acceptance of an offer is effective and deemed communicated when it is deposited in the mail (*Palo Alto Town & Country Village, Inc. v. BBTC Company (1974) 11 Cal. 3d 494, 500-501, 113 Cal. Rptr. 705, 521 P.2d 1097* ; *Gibbs v. American Savings & Loan Assn. (1990) 217 Cal. App. 3d 1372, 1376, 266 Cal. Rptr. 517*).

[*Optional*] **D. Appropriate Mode of Acceptance.** If an offer prescribes any conditions concerning the communication of the acceptance, the offeror is not bound unless they are conformed to; but in other cases any reasonable and usual mode may be adopted (*Civ. Code § 1582*).

[*Optional*] **E. Postmark Is Substantial Evidence.** The date on a postmark constitutes substantial evidence that an acceptance contained in that envelope was mailed on the date shown on the postmark (*Gibbs v. American Savings & Loan Assn. (1990) 217 Cal. App. 3d 1372, 1375, 266 Cal. Rptr. 517*).

[*Optional*] **F. Exercise of Option.** *Civil Code Sections 1582* and *1583* apply to irrevocable options as well as to revocable offers. In the absence of any provision in the option contract to the contrary, by virtue of *Civil Code Section 1583*, the exercise of an option becomes effective when a written notice of acceptance is deposited in the mail (*Palo Alto Town & Country Village, Inc. v. BBTC Company (1974) 11 Cal. 3d 494, 113 Cal. Rptr. 705, 521 P.2d 1097*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that no contract was in fact formed because the plaintiff's acceptance was not communicated until after the defendant's offer had been revoked [*Civ. Code §§ 1582, 1583, 1586*].

This form may be used in combination with other memoranda for submission of a complete memorandum appropriate to the procedural context in which it raised, such as a memorandum in support of a demurrer or motion for summary judgment. It may also be incorporated into a trial or appellate brief. However used, counsel should add argument linking the points in this form with the facts of the case.

[b] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[c] Related Memoranda

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publicationin drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Acceptance Is in Transmission When Offeree Relinquishes Control

Palo Alto Town & Country Village, Inc. v. BBTC Company *(1974) 11 Cal. 3d 494, 113 Cal. Rptr. 705, 521 P.2d 1097* , was a declaratory relief action by a lessor, who claimed that the lessee had not effectively exercised its option, and the lease was therefore terminated. The option had to be exercised by July 1. On June 5, the defendant prepared and signed a letter to the plaintiff notifying the plaintiff that it was exercising its option to extend the lease. The defendant deposited the letter in the mail in a stamped envelope addressed to plaintiff. The plaintiff claimed it never received the letter. The trial court rendered judgment for the defendant, declaring that the option had been exercised and the lease term extended for five years.

The Supreme Court affirmed. *Civ. Code § 1583* governed the situation. Exercise of an option is tantamount to acceptance of an irrevocable offer (*11 Cal. 3d 494, 498-502)* . The optionee was the "party accepting" within the language of *Civ. Code § 1583*, and notice of exercise was an acceptance of that offer and signified the optionee's consent to be bound by the terms of the bilateral contract created by the acceptance (*11 Cal. 3d 494, 504)* . Notice of exercise of an option is governed by the "effective on posting" rule (*11 Cal. 3d 494, 500-501, 504)* .

In ***Gibbs v. American Savings & Loan Assn.*** *(1990) 217 Cal. App. 3d 1372, 266 Cal. Rptr. 517* , the plaintiffs had submitted an offer to the defendant to purchase a foreclosed property. After a long silence, they received a counteroffer from the defendant in the mail. It made no mention of price but added certain conditions. The plaintiffs signed the counteroffer, and one the plaintiffs prepared an envelope and certified mail receipt, enclosed the executed acceptance of the counteroffer in the envelope, and gave it to the mail clerk in her office to deposit in the U.S. mail. The plaintiff testified that the mail clerk returned at about 10:15 a.m. June 6 with the receipt. At 11:00 a.m. one of the defendant's employees telephoned to say the counteroffer had been in error in that it neglected to include an increased purchase price and was therefore revoked. The postmark on the envelope in which the plaintiffs returned the counteroffer was dated June 7, which was also the day after the plaintiffs mailed it. Summary judgment was rendered for the defendant.

The court of appeal affirmed. The date on the postmark constituted substantial evidence that the acceptance was mailed June 7, not June 6,and would support affirmance of the judgment for the defendants (*217 Cal. App. 3d 1372, 1375)* . *Civ. Code § 1583* provides that consent is deemed fully communicated between the parties as soon as the party accepting an offer has put the acceptance in the course of transmission to the offeror. This rule has long been interpreted to require that the acceptance be placed out of the control of the accepting party in order to be considered "in the course of transmission." Typically, this occurs when the acceptance is delivered to the post office. California's "effective on posting" rule, as codified in *Civ. Code § 1583*, thus holds than an acceptance of an offer is effective and deemed communicated when it is deposited in the mail. The postmark on the counteroffer established that the deposit occurred June 7, not June 6. The counteroffer was not placed in the course of transmission beyond the control of the offeree when the plaintiff gave it to the mail clerk in her office. Thus, under *Civ. Code § 1586*, the revocation by telephone was effective (*217 Cal. App. 3d 1372, 1376)* .

[b] Postmark Is Substantial Evidence

Gibbs v. American Savings & Loan Assn. *(1990) 217 Cal. App. 3d 1372, 266 Cal. Rptr. 517* , is discussed in [a], *above*.

[c] Exercise of Option

The facts and procedural background of ***Palo Alto Town & Country Village, Inc. v. BBTC Company*** *(1974) 11 Cal. 3d 494, 113 Cal. Rptr. 705, 521 P.2d 1097* , are discussed in [a], *above*. The Supreme Court noted that under *Civ. Code § 1582*, when no method of communication of acceptance is specified, any reasonable and usual mode may be adopted. Further, under the option contract, ordinary mail was specified as the means of giving notice. Thus, the defendant's use of ordinary mail to give notice of exercise of the option was appropriate (*11 Cal. 3d 494, 500)* .

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5-50 California Points & Authorities § 50.352

§ 50.352 Qualified Acceptance Was Not Effective Except as Counteroffer

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

NO CONTRACT WAS FORMED BECAUSE THE _____ [*offeree, e.g.,* PLAINTIFF] DID NOT UNEQUIVOCALLY ACCEPT THE _____ [*offeror, e.g.,* DEFENDANT'S] OFFER BUT GAVE ONLY A QUALIFIED ACCEPTANCE, WHICH WAS AT MOST A COUNTEROFFER.

No Contract Is Formed by Qualified Acceptance. Terms proposed in an offer must be met exactly, precisely, and unequivocally in order for the acceptance to result in the formation of a contract. A qualified acceptance amounts to a new proposal or counteroffer, putting an end to the original offer (*Panagotacos v. Bank of America (1998) 60 Cal. App. 4th 851, 855-856, 70 Cal. Rptr. 2d 595*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that no contract was in fact formed because the acceptance was not unequivocal but was qualified, amounting to a counteroffer.

This form may be used in combination with other memoranda for submission of a complete memorandum appropriate to the procedural context in which it raised, such as a memorandum in support of a demurrer or motion for summary judgment. It may also be incorporated into a trial or appellate brief. However used, counsel should add argument linking the points in this form with the facts of the case.

[b] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[c] Related Memoranda

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] No Contract Is Formed by Qualified Acceptance

In ***Panagotacos v. Bank of America*** *(1998) 60 Cal. App. 4th 851, 70 Cal. Rptr. 2d 595* , the plaintiff sued a bank for damages because of the bank's tardy recordation of a reconveyance under a trust deed. The complaint alleged that the plaintiff became unable to complete the purchase of a house, which then was sold to someone else, after the bank's tardy recordation of the reconveyance prevented the plaintiff's obtaining necessary financing before the deadline for consummating the purchase. The financing was dependent on the clearing of the bank's lien in the title record. In fact the lien had been discharged several years earlier, and the bank had simply failed to record the reconveyance. The bank moved for summary adjudication on a showing that the plaintiff could not prove the formation of a contract to purchase the house in question, and therefore, the bank's delay in recording the reconveyance could not have harmed the plaintiff. The plaintiff's purported acceptance of the vendor's offer to sell was qualified by an implicit rejection of the vendor's explicit condition that payment was to be received in Germany. The vendor insisted on that condition. Two days before the vendor-imposed deadline for closing the transaction, the plaintiff requested an extension and stated that payment could be made in Germany or Amsterdam approximately two months hence. The vendor declined to extend and sold the house to a different purchaser. The trial court granted the bank's motion for summary adjudication and subsequently rendered judgment for the plaintiff for nothing more than a trivial statutory penalty in consequence of the bank's tardy recordation of the reconveyance.

The court of appeal affirmed. Terms proposed in an offer must be met exactly, precisely, and unequivocally in order for the acceptance to result in the formation of a contract. A qualified acceptance amounts to a new proposal or counteroffer, putting an end to the original offer. In this case, the plaintiff's counteroffer was not accepted by the vendor, who viewed the condition that the money be paid in Germany as essential. Although the vendor continued to entertain discussion on the matter with the plaintiff, no contract was formed. The plaintiff's final communication, in which the plaintiff arguably agreed to send the money to Germany (or Amsterdam), did not constitute an acceptance of the original offer because the plaintiff again proposed additional terms: a two-month extension of the original deadline. The plaintiff lost the opportunity to purchase the house because of simply failing to timely accept the vendor's offer. The bank's tardy recordation of the reconveyance did not cause that failure (*60 Cal. App. 4th 851, 855-856)* .

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5-50 California Points & Authorities § 50.353

§ 50.353 Posting Revised Consumer Contract on Web Site Does Not Make New Terms Enforceable

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE REVISED CONTRACT POSTED ON THE DEFENDANT'S WEB SITE CANNOT BE ENFORCED AGAINST PLAINTIFF BECAUSE PLAINTIFF DID NOT RECEIVE NOTICE OF HOW THE CONTRACT HAD BEEN CHANGED AND DID NOT SIGNIFY ASSENT TO THE CHANGES.

Posting Revised Consumer Contract on Web Site Does Not Make New Terms Enforceable. If a consumer service provider revises its service contract and posts the revised contract on the provider's web site, the revised contract cannot be enforced against an existing customer who did not receive notice of how the contract was changed and did not then signify assent to the changes (*Douglas v. United States Dist. Court (9th Cir. 2007) 495 F.3d 1062, 1066-1067)* .

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that posting a revised version of a consumer service contract on the service provider's web site does not make the new terms enforceable against an existing customer who had no notice (apart from the posting of the contract on the web site) as to how the contract was changed.

This form may be combined with other memoranda for submission of a complete memorandum appropriate to the procedural context in which it raised, such as a memorandum in support of a demurrer or motion for summary judgment. It may also be incorporated into a trial or appellate brief. However used, counsel should add argument linking the points in this form with the facts of the case.

[b] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[c] Related Memoranda

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Posting Revised Consumer Contract on Web Site Does Not Make New Terms Enforceable

In ***Douglas v. United States Dist. Court*** *(9th Cir. 2007) 495 F.3d 1062* , the plaintiff, an individual, had a long-distance telephone service contract with a service provider that posted a revised contract on its web site but did not notify the plaintiff of the changes, which included increased charges, a class-action waiver, an arbitration requirement, and a choice-of-law provision. On discovering that charges had been increased without notice, the plaintiff filed a class action in federal court. The provider moved to compel arbitration based on the revised contract, and the district court granted the motion. The plaintiff sought a writ of mandamus to vacate the district court's order.

The Ninth Circuit Court of Appeals issued the writ. The plaintiff had no obligation to check the terms of the contract on a periodic basis in order to learn whether they had been changed by the service provider. Indeed, the plaintiff could not have known when to check the web site for possible changes to the contract terms without being notified as to how the contract has been changed. Even if the plaintiff checked the contract every day for possible changes, still, without such notice, an examination would have been fairly cumbersome, as the plaintiff would have been obliged to compare every word of the posted contract with the existing contract in order to detect whether it had changed. It is elementary that a party cannot unilaterally change the terms of a contractbut must obtain the other party's consent to do so. Presenting a revised contract amounts to nothing more than making an offer and does not bind the other party until it is accepted. Generally an offeree cannot actually assent to an offer unless the offeree knows of its existence. Even if the plaintiff's continued use of the provided telephone service could be considered assent, such assent could not be inferred until after the plaintiff received proper notice of the proposed changes (*495 F.3d 1062, 1066-1067)* .

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5-50 California Points & Authorities §§ 50.354-50.359

[Reserved]

§§ 50.354[Reserved]

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5-50 California Points & Authorities § 50.360

§ 50.360 Complaint Shows Contract to Negotiate Agreement

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief*].

THE COMPLAINT SHOWS A CONTRACT TO NEGOTIATE AN AGREEMENT, WHICH CAN BE FORMED AND BREACHED LIKE ANY OTHER CONTRACT.

Contract to Negotiate Agreement May Be Formed and Breached Like any Other Contract. A contract to negotiate an agreement is distinguishable from an "agreement to agree" and can be formed and breached like any other contract (*Copeland v. Baskin Robbins U.S.A. (2002) 96 Cal. App. 4th 1251, 1253, 117 Cal. Rptr. 2d 875*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that the complaint alleges a contract to negotiate an agreement, which may be formed and breached like any other contract.

This form may be used in combination with other memoranda for submission of a complete memorandum appropriate to the procedural context in which it raised, such as a memorandum in support of a demurrer or motion for summary judgment. It may also be incorporated into a trial or appellate brief. However used, counsel should add argument linking the points in this form with the facts of the case.

[b] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[c] Related Memoranda

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For discussion of damages for breach of a contract to negotiate, see *Ch. 65, Damages: Contract, § 65.22*.

[d] Opposing Memoranda

The memoranda *in § 50.350* may be used in appropriate cases to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Contract to Negotiate Agreement May Be Formed and Breached Like any Other Contract

In ***Copeland v. Baskin Robbins U.S.A.*** *(2002) 96 Cal. App. 4th 1251, 117 Cal. Rptr. 2d 875* , the individual purchaser of an ice creammanufacturing plant brought an action for breach of contract against the seller. When the parties were negotiating for the sale, plaintiff purchaser made it clear that plaintiff's agreement to purchase the plant was continent on defendant seller's agreement to purchase the ice cream plaintiff manufactured there. This ice cream purchase arrangement, known as "co-packing," was critical to the deal. Defendant sent plaintiff a letter setting forth the terms for the sale of the plant, in which it stated it would agree, subject to a separate co-packing agreement and negotiated pricing, to provide plaintiff with a three-year co-packing agreement. Plaintiff accepted the terms of the letter by signing the statement and returning it along with a $3,000 non-refundable deposit check. The parties then continued negotiating over the terms of the co-packing agreement. The issues to be settled included the price defendant would pay for the ice cream, the flavors that plaintiff would produce, and who would bear the loss from spoilage. Defendant thereafter wrote to plaintiff breaking off negotiations over the co-packing arrangement, and returned the deposit. Plaintiff brought an action for breach of contract, claiming he suffered expectation damages in the form of lost profits. His discovery responses did not provide or allege that he could provide evidence of damages he suffered as a result of his reliance on defendant's promise to negotiate a co-packing agreement.

The trial court granted defendant's motion for summary judgment, concluding that the letter failed as a contract because the essential terms of the co-packing deal were never agreed to and there was no reasonable basis upon which to determine them. The court of appeal affirmed on a different ground. The court first noted that plaintiff, rather than insisting that the parties had formed a co-packing contract which defendant had breached, claimed that the letter between the parties constituted a contract to negotiate the remaining terms of the co-packing agreement. Plaintiff claimed that defendant breached this contract by refusing without excuse to continue negotiations, or alternatively, by failing to negotiate in good faith. Although noting that no reported California case has held that breach of a contract to negotiate an agreement gives rise to a cause of action for damages, the court held that a contract to negotiate an agreement is distinguishable from a so-called "agreement to agree," and can be formed and breached just like any other contract. The court first stated that it found no reason why in principle the parties could not enter into a valid, enforceable contract to negotiate the terms of a co-packing agreement. The contract to negotiate the terms of a second agreement was neither illegal or immoral pursuant to *Civ. Code § 1667*. The court further found that a contract to negotiate the terms of an agreement differs from a mere agreement to agree because failure to agree is not itself a breach of a contract to negotiate. A party will be liable only if a failure to reach ultimate agreement resulted from a breach of that party's obligation to negotiate or to negotiate in good faith (*96 Cal. App. 4th 1251, 1256-1257)* .

The court ultimately held, however, that the appropriate remedy for breach of a contract to negotiate is not damages for the injured party's lost profits under the prospective contact, but rather damages caused by the injured party's reliance on the agreement to negotiate. Reliance damages include plaintiff's out-of pocket costs in conducting the negotiations, and

any lost opportunity costs (*96 Cal. App. 4th 1251, 1260-1264)* . In this case, plaintiff sought only damages derived from what he would have received if the underlying contract had been consummated, i.e., lost profits. Satisfactory proof of such damages was impossible because there was no way to know what the eventual terms of the co-packing agreement would have been, or even if the parties would have reached an agreement. The court therefore held that defendant was entitled to summary judgment because it had showed that plaintiff could not establish reliance damages (*96 Cal. App. 4th 1251, 1263-1264)* .

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5-50 California Points & Authorities §§ 50.361-50.369

[Reserved]

§§ 50.361[Reserved]

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5-50 California Points & Authorities § 50.370

§ 50.370 No Valid Contract Exists Without Mutuality of Obligation

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

NO CONTRACT EXISTS BECAUSE THERE WAS NO MUTUALITY OF OBLIGATION.

A. Consideration Is Required. It is essential to the existence of a contract that there should be a sufficient cause or consideration (*Civ. Code § 1550*).

B. Requirement of Mutuality of Obligation. When parties attempt to make a contract and promises are exchanged as the consideration, the promises must be mutual in obligation. For the contract to bind either party, both must have assumed some legal obligation, and each of the reciprocal promises must have been given as inducement for the other promise at the time each party gave consent (*Mattei v. Hopper (1958) 51 Cal. 2d 119, 122, 330 P.2d 625* ; *Jara v. Suprema Meats, Inc. (2004) 121 Cal. App. 4th 1238, 1249, 18 Cal. Rptr. 3d 187*).

C. Contract Lacks Consideration. Without mutuality of obligation, an agreement lacks consideration, and no enforceable contract has been created (*Mattei v. Hopper (1958) 51 Cal. 2d 119, 122, 330 P.2d 625*).

[*Optional*] **D. Unrestricted Right to Withdraw.** If a promise leaves a party free to perform or to withdraw from the agreement at his or her own unrestricted pleasure, the promise is illusory and provides no consideration, and the contract is unenforceable (*Mattei v. Hopper (1958) 51 Cal. 2d 119, 122, 330 P.2d 625*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that the complaint alleges a contract but there was no

mutuality of obligation.

As a general rule, consideration need not be pleaded if the contract is written. Thus, this form is for use if the complaint alleges a written contract and there is no consideration because mutuality of obligation is lacking, or if an oral contract is the basis of the action and the allegation of consideration shows that there was no mutuality of obligation.

This form may be used in combination with other memoranda for submission of a complete memorandum appropriate to the procedural context in which it raised, such as a memorandum in support of a demurrer or motion for summary judgment. It may also be incorporated into a trial or appellate brief. However used, counsel should add argument linking the points in this form with the facts of the case.

[b] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[c] Related Memoranda

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Memoranda

The memoranda *in §§ 50.380 -50.382* and in §§ 50.430, 50.431 may be used in appropriate cases to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Requirement of Mutuality of Obligation

In ***Mattei v. Hopper*** *(1958) 51 Cal. 2d 119, 330 P.2d 625* , the plaintiff sued for a breach of contract for failure to convey real property according to the terms of a deposit receipt that the parties had executed. Under the parties' written agreement, the plaintiff was required to deposit a portion of the total purchase price for the property with a real estate agent and was given a number of days to examine the title and consummate the purchase. The concluding paragraph of the deposit receipt provided that it was subject to the real estate agent's obtaining leases satisfactory to the purchaser. After a trial without jury, the court concluded that the agreement was illusory and lacking in mutuality.

The Supreme Court reversed. The deposit receipt and the clause concerning the obtaining of leases must be read as making the plaintiff'sperformance dependent on the obtaining of satisfactory leases. The plaintiff was given the power and privilege to terminate the contract if he did not obtain the leases. When the parties attempt, as they did in this case, to make a contract, and promises are exchanged as the consideration, the promises must be mutual in obligation. In other words, for the contract to bind either party, both must have assumed some legal obligations. Without this mutuality of obligation, the agreement lacks consideration, and no enforceable contract has been created. Additionally, if one of the promises leaves a party free to perform or to withdraw from the agreement at his own unrestricted pleasure, the promise is deemed illusory, and it provides no consideration. The contract here was neither illusory nor lacking in mutuality of obligation because the parties inserted a provision in the contract making the plaintiff's performance dependent on his satisfaction with the leases to be obtained by him. Thus his right to withdraw was not unrestricted because the satisfaction clause required that the plaintiff determine in good faith that he was not satisfied (*51 Cal. 2d 119, 122)* .

In ***Jara v. Suprema Meats, Inc.*** *(2004) 121 Cal. App. 4th 1238, 18 Cal. Rptr. 3d 187* , one of three shareholders owning a corporation sued the other two shareholders for increasing their own compensation as officers in violation of what the plaintiff claimed was a contract not to raise any officer's compensation without the consent of all shareholders. The trial court rendered judgment for the plaintiff on the premise that all three shareholders had exchanged promises not to vote for increases in compensation without the approval of the other two (analogous to a voting trust). The court of appeal reversed because the evidence (including the plaintiff's own testimony) established that when one of the other shareholders made that promise, it was not conditioned on receiving a similar commitment from the plaintiff or on any expectation of some other promise in exchange. That promise amounted to nothing more than an expression of goodwill or perhaps an offer to enter into some future contract regarding voting rights (*121 Cal. App. 4th 1238, 1252)* .

[b] Contract Lacks Consideration

Mattei v. Hopper *(1958) 51 Cal. 2d 119, 330 P.2d 625* , is discussed in [a], *above*.

[c] Unrestricted Right to Withdraw

Mattei v. Hopper *(1958) 51 Cal. 2d 119, 330 P.2d 625* , is discussed in [a], *above*.

[4] Additional Authorities

[a] Requirement of Mutuality of Obligation

In *Kremen v. Cohen (9th Cir. 2003) 337 F.3d 1024* , the registrant of an Internet domain name brought an action for breach of contract, among other things, against the exclusive domain name registrar who had later transferred that domain name to another party. The third party had sent a fraudulent letter to the registrar, asserting that the registrant had abandoned the name. The trial court granted summary judgment for the registrar. The court of appeals affirmed on the breach of contract count, holding that the registrant did not give any consideration for his domain name so he had no contract with the registrar. The court cited *Civ. Code § 1605* for the requirement that the party claiming breach must show that it conferred some benefit that the other party was not already entitled to receive, or suffered some prejudice that it was not already bound to endure. In this case, the registrant did not pay the registrar for his domain name, nor did he provide any marketing data with his contact information. The registrar was giving away domain names because the National Science Foundation was paying it to do so. Knowledge of the recipient's identity was a consequence of the gift. Absent evidence it was something the donor bargained for, it was not consideration (*337 F.3d 1024, 1028-1029)* .

In *Schaefer v. Williams (1993) 15 Cal. App. 4th 1243, 19 Cal. Rptr. 2d 212* , the court of appeal affirmed a judgment for the defendant on a contract cause of action. The plaintiff and the defendant were candidates for the same political office. The defendant signed a pledge to abide by the Code of Fair Campaign Practices [*see Elec. Code § 20400 et seq.* (formerly *Elec. Code § 12500 et seq.*)], which provided that no candidate would use character defamation or attacks. The defendant circulated a campaign brochure that discussed legal difficulties the plaintiff had in the 1980s. The court of appeal set forth the elements necessary for a contract under *Civ. Code § 1550* and concluded that the pledge was not a contract, it was only a promise by one party (*15 Cal. App. 4th 1243, 1246)* .

Hancock Oil Co. v. McClellan (1955) 135 Cal. App. 2d 667, 288 P.2d 39 , was an action on a book account for the balance due for gasoline sold and delivered. The defendant raised the special defense that it was the custom of the industry to allow a temperature correction and adjustment on all gasoline, and if that was allowed, the defendant would be entitled to credit for overcharges made for a number of gallons that were charged for but were not delivered because of the change in temperature. The defendant claimed that the contract of distributorship between the plaintiff and the defendant was the contract of sale of the petroleum products, and each delivery of gasoline was in pursuance of that contract. In affirming the trial court's judgment, the court of appeal held that since the distributorship agreement was not mutually obligatory and reserved to the plaintiff theright to terminate it at will, it was not enforceable and could not be the basis for recovery (*135 Cal. App. 2d 667, 669-670)* .

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5-50 California Points & Authorities §§ 50.371-50.379

[Reserved]

§§ 50.371[Reserved]

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5-50 California Points & Authorities § 50.380

§ 50.380 Lack of Mutuality of Obligation Is Immaterial to Executed Contract

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE REQUIREMENT OF MUTUALITY OF OBLIGATION TO MAKE A CONTRACT ENFORCEABLE DOES NOT APPLY TO AN EXECUTED CONTRACT.

A. Requirement of Mutuality Is Not Applicable to Executed Contract. The requirement of mutuality of obligation does not apply to an executed contract or to executed portions of an executory contract (*Mutz v. Wallace (1963) 214 Cal. App. 2d 100, 109, 29 Cal. Rptr. 170*).

[*Optional*] **B. Plaintiff Is Entitled to Full Recovery on Executed Contract.** If the plaintiff has fully performed his or her side of the bargain so that the contract is executed, the plaintiff is entitled to a full recovery on the entire contract (*see* *Mutz v. Wallace (1963) 214 Cal. App. 2d 100, 109, 29 Cal. Rptr. 170*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that a contract is enforceable despite lack of mutuality of obligation, because the contract was executed, or key portions of it were executed and the action for contract damages involves those executed portions.

This form may be used in combination with other memoranda for submission of a complete memorandum appropriate to the proceduralcontext in which it raised, such as a memorandum in opposition to a demurrer or motion for summary judgment. It may also be incorporated into a trial or appellate brief. However used, counsel should add argument linking the points in this form with the facts of the case.

[b] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[c] Related Memoranda

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Memoranda

The memoranda *in § 50.370* may be used in appropriate cases to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Requirement of Mutuality Is Not Applicable to Executed Contract

Mutz v. Wallace *(1963) 214 Cal. App. 2d 100, 29 Cal. Rptr. 170* , was an action for specific performance of a contract to make a will. The plaintiff and the decedent had executed a written instrument that was a valid and binding contract in which the plaintiff promised to render certain personal services faithfully and efficiently throughout the natural life of the decedent, and the decedent promised to pay the plaintiff a monthly salary and to execute a will leaving $10,000 and some real property to the plaintiff. The plaintiff fully performed his side of the bargain. The trial court rendered judgment for the plaintiff for specific performance. On appeal the executor argued that the contract could be binding only if the decedent had performed.

The court of appeal affirmed. There was no merit in that argument since the defense of want of mutuality of obligation applies only to executory contracts, not to an executed contract or provision (*214 Cal. App. 2d 100, 109)* .

[b] Plaintiff Is Entitled to Full Recovery on Executed Contract

Mutz v. Wallace *(1963) 214 Cal. App. 2d 100, 29 Cal. Rptr. 170* , is discussed in [a], *above*.

[4] Additional Authorities

[a] Requirement of Mutuality Is Not Applicable to Executed Contract

J.A. Folger & Co. v. Williamson (1954) 129 Cal. App. 2d 184, 276 P.2d 645 , was an action for damages for breach of a contract involving the loss of goods. The trial court rendered judgment for the plaintiff against several the defendants, which was affirmed on appeal except as to one defendant against whom the judgment was reversed. Under the contract, the plaintiff agreed to tender to a partnership as many of its shipments as its general business and market conditions warranted during the term of the contract, and the partnership agreed to accept, transport, and deliver shipments that were tendered to it. The partnership handled a number of the plaintiff's shipments under this contract. In discussing whether the contract was lacking in mutuality, the court noted that the defect of want of mutuality applies only to executory contracts and not to an executed contract nor to the executed portion of a contract. Since some shipments had been made under the contract, part of the contract was executed, and the defense of lack of mutuality did not apply to the shipment that was lost (*129 Cal. App. 2d 184, 187)* .

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2. Mutuality of Obligation

5-50 California Points & Authorities § 50.381

§ 50.381 Doctrine of Mutuality Does Not Apply to Unilateral Contracts

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE DOCTRINE OF MUTUALITY OF OBLIGATION DOES NOT APPLY TO UNILATERAL CONTRACTS.

A. Unilateral Contract Defined. A unilateral contract is a bargain to exchange an act for a promise. A contract comes into existence when the act is completed (*Anchor Cas. Co. v. Surety Bond Sav. & L. Ass'n (1962) 204 Cal. App. 2d 175, 182, 22 Cal. Rptr. 278*).

B. Doctrine of Mutuality Is Not Applicable to Unilateral Contracts. The doctrine of mutuality of obligation does not apply tounilateral contracts (*Asmus v. Pacific Bell (2000) 23 Cal. 4th 1, 14-15, 96 Cal. Rptr. 2d 179, 999 P.2d 71* ; *Anchor Cas. Co. v. Surety Bond Sav. & L. Ass'n (1962) 204 Cal. App. 2d 175, 182, 183, 22 Cal. Rptr. 278*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that the contract is enforceable despite lack of mutuality of obligation, because the contract is unilateral.

This form may be used in combination with other memoranda for submission of a complete memorandum appropriate to the procedural context in which it raised, such as a memorandum in opposition to a demurrer or motion for summary judgment. It may also be incorporated into a trial or appellate brief. However used, counsel should add argument linking the points in this form with the facts of the case.

[b] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[c] Related Memoranda

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Memoranda

The memoranda *in § 50.370* may be used in appropriate cases to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Unilateral Contract Defined

Anchor Cas. Co. v. Surety Bond Sav. & L. Ass'n *(1962) 204 Cal. App. 2d 175, 22 Cal. Rptr. 278* , was an action by a city against a contractor and his surety on a subdivision bond in which the surety filed a cross complaint in part for damages against the city, the contractor, and a savings and loan association as guarantor. The contractor had obtained a permit from the city to construct and subdivide a residential housingproject. The contractor indicated in a certificate of dedication that he would cause certain streets, street lighting facilities, and other offsite improvements to be put in and dedicated to the city. The city required the contractor to obtain a bond from a surety company for the faithful performance of the offsite improvement work. Before executing the bond, pursuant to the surety's request, the association made a written commitment in the form of a letter that in the event a loan was made, it would disburse a certain sum for the payment of offsite improvements to guaranty their completion. The improvements were never completed, and as a result of the contractor's default under the bond, the surety completed the improvements, but the association refused to pay. The trial court rendered judgment for the surety. On appeal the association contended that there was no written agreement between the parties because there was no consideration given and no mutuality.

The court of appeal affirmed. The agreement involved constituted a unilateral contract. There was a bargain to exchange an act for a promise, which in this case was a conditional promise. The contract came into existence when the act was completed, that is, when the surety executed the bond. The promise to disburse the sum for the payment of offsite improvements in order to guaranty the completion of the improvements was conditioned on the association's making the loan. Once the loan was made, the promise became absolute (*204 Cal. App. 2d 175, 182)* .

[b] Doctrine of Mutuality Is Not Applicable to Unilateral Contracts

In ***Asmus v. Pacific Bell*** *(2000) 23 Cal. 4th 1, 96 Cal. Rptr. 2d 179, 999 P.2d 71* , the California Supreme Court granted the request of the United States Court of Appeals for the Ninth Circuit for an answer to the following certified question of law: "Once an employer's unilaterally adopted policy--which requires employees to be retained so long as a specified condition does not occur--has become a part of the employment contract, may the employer thereafter unilaterally terminate the policy, even though the specified condition has not occurred?" The court concluded the answer to the certified question was yes. An employer may unilaterally terminate a policy that contains a specified condition, if the condition is one of indefinite duration, and the employer effects the change after a reasonable time, on reasonable notice, and without interfering with the employees' vested benefits (*23 Cal. 4th 1, 5, 18)* . The employer had issued a management employment security policy (MESP) that it would offer all management employees who continued to meet its changing business expectations employment security through reassignment, even if their present jobs were eliminated, as long as there was no change that would materially affect its business plan achievement. It later notified its managers that would terminated its MESP to competemore successfully in the marketplace. Sixty former

management employees filed an action seeking declaratory and injunctive relief, and damages for breach of contract, breach of fiduciary duty, fraud and ERISA violations. The district court certified for interlocutory appeal the issue whether the employer breached the MESP, and the Ninth Circuit accepted the interlocutory appeal. The Ninth Circuit stated its certification request and noted that the answer to the certified question by the Supreme Court would determine the remaining portion of the case pending before it (*23 Cal. 4th 1, 8-9)* .

The plaintiffs contended that the employer gave no valid consideration to bind the proposed MESP termination and subsequent modification. When it unilaterally terminated the contract to create a new contract with different terms, it left its employees with no opportunity to bargain for additional benefits or other consideration. Plaintiffs claimed that the parties' obligations were unequal, and there was no mutuality of obligation for the change. The Supreme Court disagreed, citing authority to the effect that the mutuality of obligation principle requiring new consideration for contract termination applies only to bilateral contracts. In the unilateral contract context, there is no mutuality of obligation. For an effective modification, there is consideration in the form of continued employee services (*23 Cal. 4th 1, 14-15)* .

Anchor Cas. Co. v. Surety Bond Sav. & L. Ass'n *(1962) 204 Cal. App. 2d 175, 22 Cal. Rptr. 278* , is discussed in [a], *above*.

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5-50 California Points & Authorities § 50.382

§ 50.382 Right to Terminate Contract on Specified Conditions Does Not Render Contract Unenforceable

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

A CONTRACT IS NOT UNENFORCEABLE EVEN THOUGH IT CONTAINS A PROVISION GIVING ONE PARTY AN OPTION TO TERMINATE IT ON SPECIFIED CONDITIONS.

Right to Terminate Contract on Specified Conditions Does Not Render Contract Unenforceable. A contract giving one party an option to terminate it on specified conditions is enforceable and is not lacking in mutuality (*Benard v. Walkup (1969) 272 Cal. App. 2d 595, 604, 77 Cal. Rptr. 544*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that the contract is enforceable even though one of the parties has a right to terminate the contract, because the right is dependent on certain conditions.

This form may be used in combination with other memoranda for submission of a complete memorandum appropriate to the procedural context in which it raised, such as a memorandum in opposition to a demurrer or motion for summary judgment. It may also be incorporated into a trial or appellate brief. However used, counsel should add argument linking the points in this form with the facts of the case.

[b] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[c] Related Memoranda

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Memoranda

The memoranda *in § 50.370* may be used in appropriate cases to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Right to Terminate Contract on Specified Conditions Does Not Render Contract Unenforceable

In ***Benard v. Walkup*** *(1969) 272 Cal. App. 2d 595, 77 Cal. Rptr. 544* , the plaintiff sued for legal malpractice based in part on a contingent fee contract for legal services. The trial court rendered for the plaintiff on the breach of contract cause of action. On appeal the defendant contended that the contingent fee agreement was invalid because it lacked mutuality. Under the terms of the agreement, he was permitted to withdraw from the case if, in his opinion, investigation disclosed that one of several situations existed.

The court of appeal affirmed. A contract is lacking in mutuality when one party has the right to terminate it at any time at his or her pleasure. However, it is equally true that a contract may give one party an option to terminate it on specified conditions. In this case, the defendant's right of withdrawal was only on the occurrence of an extrinsic event, the unfavorable results of an investigation. Furthermore, although the defendant's opinion would be involved in any withdrawal, this provision was analogous to a right to terminate for cause or for good cause, so that the right must involve an opinion formed on reasonable grounds and in good faith (*272 Cal. App. 2d 595, 604)* .

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5-50 California Points & Authorities § 50.383

§ 50.383 Mutuality of Obligation Is Not Required When Consideration Exists

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

MUTUALITY OF OBLIGATION IS NECESSARY IN BILATERAL CONTRACTS ONLY BECAUSE THERE ARE MUTUAL PROMISES. WHEN SUFFICIENT CONSIDERATION IS OTHERWISE PRESENT, MUTUALITY IS NOT ESSENTIAL.

Mutuality of Obligation Is Not Required When Consideration Exists. Mutuality of obligation is necessary in bilateral contracts only because there are mutual promises. When sufficient consideration is otherwise present, mutuality is not essential (*Principal Mut. Life Ins. Co. v. Vars, Pave, McCord & Freedman (1998) 65 Cal. App. 4th 1469, 1488-1489, 77 Cal. Rptr. 2d 479*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that the contract is enforceable even though there is no mutuality of obligation, because there is sufficient consideration otherwise.

This form may be used in combination with other memoranda for submission of a complete memorandum appropriate to the procedural context in which it raised, such as a memorandum in opposition to a demurrer or motion for summary judgment. It may also be incorporated into a trial or appellate brief. However used, counsel should add argument linking the points in this form with the facts of the case.

[b] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[c] Related Memoranda

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Memoranda

The memoranda *in § 50.370* may be used in appropriate cases to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Mutuality of Obligation Is Not Required When Consideration Exists

In ***Principal Mut. Life Ins. Co. v. Vars, Pave, McCord & Freedman*** *(1998) 65 Cal. App. 4th 1469, 77 Cal. Rptr. 2d 479* , a partnership signed a lease, which each partner personally guarantied, for the firm's office space. The lease provided expressly that in the event of a trust-deed foreclosure sale of the landlord's interest, the firm would, on request, attorney to the purchaser as the successor landlord, on the same terms. The lease was subordinate to a trust deed, and eventually the beneficiary of the trust deed foreclosed and took over the landlord's interest. The beneficiary, now acting as the new landlord, invoked the attornment provision of the lease and requested that the firm sign a new lease on the same terms as the original lease. The firm viewed the foreclosure as extinguishing the lease, however; and after giving notice, the firm vacated the premises. The new landlord sued the firm for breach of the lease and sued the partners individually on their personal guaranties. The trial court rendered judgment for the new landlord. On appeal, the partners as guarantors contended that the attornment provision in the lease was unenforceable because it vested the new landlord with full control over whether the lease would continue, and therefore, the lease lacked mutuality of obligation.

The court of appeal affirmed. Normally, unless the parties to a lease agree otherwise, a lease is subordinate to a trust deed that the landlord executed before the lease was signed; and in the event of foreclosure under the trust deed, the lease would be extinguished (*65 Cal. App. 4th 1469, 1478)* . In this case, the attornment provision in the lease was an agreement for adifferent result, namely, that in the event of foreclosure under a superior trust deed, although the lease would be extinguished, the lessee would, on request, remain in possession and accede to a new tenancy, on the same terms, under the original landlord's successor in interest (*65 Cal. App. 4th 1469, 1487-1488)* . Even though the new landlord was free to choose whether to require that the firm attorney, there was no fatal lack of mutuality of obligation. Mutuality of obligation is necessary in bilateral contracts only because there are mutual promises. The new landlord was not a party to the lease, however, but was a third-party beneficiary of the lease, particularly the attornment provision, which was a contract between the firm and the original landlord. A third-party beneficiary need not supply any consideration in order to enforce an agreement made for the third party's benefit. There was no doubt that the lease, particularly the attornment provision, was supported by ample consideration. When sufficient consideration is otherwise present, mutuality is not essential (*65 Cal. App. 4th 1469, 1488-1489)* .

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[Reserved]

§§ 50.384[Reserved]

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5-50 California Points & Authorities § 50.390

§ 50.390 Contract Cannot Be Ascertained Whether Oral, Written, or Implied by Conduct

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

IT CANNOT BE ASCERTAINED FROM THE COMPLAINT WHETHER THE CONTRACT ON WHICH THE ACTION IS BASED IS WRITTEN, ORAL, OR IMPLIED BY CONDUCT.

Insufficiency of Contract Allegations. The party against whom a complaint has been filed may object to the complaint by demurrer on the ground that it cannot be ascertained from the complaint whether the contract is written, oral, or implied by conduct (*Code Civ. Proc. § 430.10(g)*; *see Zumbrun v. University of So. Cal. (1972) 25 Cal. App. 3d 1, 9, 101 Cal. Rptr. 499*) when the ground appears on the face of the complaint or from any matter of which the court is required to or may take judicial notice (*Code Civ. Proc. § 430.30(a)*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of a demurrer that the complaint does not allege whether the contract was written, oral, or implied by conduct [*see Code Civ. Proc. § 430.10(g)*].

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a party seeks to raise this contention. For example, its usual use will be to support a demurrer under *Code Civ. Proc. § 430.10(g)*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is

raised in support of a defendant's demurrer, the memorandum would include an analysis of the complaint's allegations showing that they do not sufficiently allege a contract, whether one that is written, oral, or implied by conduct.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a demurrer, they may be combined with appropriate memoranda set out in Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Insufficiency of Contract Allegations

Zumbrun v. University of So. Cal. *(1972) 25 Cal. App. 3d 1, 101 Cal. Rptr. 499* , was an action for damages for breach of contract. The plaintiff alleged in her complaint that she enrolled in a university to conclude her college education and, in reference to a course that was a prerequisite to other courses necessary to her major field, the university and a professor represented and warranted to the plaintiff that this course would be a full and complete course, but the professor refused to teach the class partway through the course. The plaintiff did not allege whether the contract was written or oral. The university demurred on the ground that it could not be ascertained whether the contract on which the plaintiff's action was based was written or oral. The trial court sustained the special demurrer.

The court of appeal reversed on other grounds but noted that, since the contractual relationship between a student and a university arises out of both oral and written elements, the special demurrer was well taken (*25 Cal. App. 3d 1, 9)* .

[4] Additional Authorities

[a] Insufficiency of Contract Allegations

In *Otworth v. Southern Pac. Transportation Co. (1985) 166 Cal. App. 3d 452, 212 Cal. Rptr. 743* , the court of appeal affirmed the dismissal of an action following a general demurrer. The complaint, which alleged numerous theories of recovery including breach of contract, arose out of a disputeconcerning wage withholding for income tax purposes by an employer. One of the grounds for upholding the trial court action was that the complaint failed to allege whether the employment contract was written or oral (*166 Cal. App. 3d 452, 458-459)* .

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5-50 California Points & Authorities § 50.391

§ 50.391 Complaint Is Based on Instrument in Writing That Does Not Constitute Contract

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

ALTHOUGH THE COMPLAINT PURPORTS TO BE BASED ON AN INSTRUMENT IN WRITING, THE INSTRUMENT DOES NOT SATISFY THE LEGAL PREREQUISITES FOR A CONTRACT.

A. Consideration Required. It is essential to the existence of a contract that there should be a sufficient cause or consideration (*Civ. Code § 1550*).

B. Written Instrument Presumptive of Consideration. A written instrument is presumptive evidence of consideration (*Civ. Code § 1614*).

C. When Written Instrument Is Contract. An instrument in writing is not a contract unless the instrument itself contains the contract to do the thing for the nonperformance of which an action may be brought. The writing must create a duty before a duty may be inferred from the writing. It is not sufficient that a cause of action is in some way remotely or indirectly connected with an instrument in writing or that the instrument is a link in the chain establishing the cause of action (*Citizens Cas. Co. v. Otis Clark & Co. (1971) 19 Cal. App. 3d 294, 299-300, 96 Cal. Rptr. 838*).

[*Optional*] **D. Letters Are Not Written Instruments.** An ordinary letter expressing feelings and intentions but not stating a completed contract is not an instrument in writing within *Civil Code Section 1614*, and a complaint based on an ordinary letter must allege consideration (*Michaelian v. State Fund (1996) 50 Cal. App. 4th 1093, 1112, 58 Cal. Rptr. 2d 133* ; *Foltz v. First Trust & Sav. Bank (1948) 86 Cal. App. 2d 59, 61-62, 194 P.2d 135* ; *Weisbrod v. Weisbrod (1938) 27 Cal. App. 2d 712, 719, 81 P.2d 633*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that, while the complaint purports to be based on a contract evidenced by an instrument in writing, the instrument alleged does not meet the legal requirements for a contract and the complaint does not allege any consideration for the promise sued on.

The cases that construe *Civ. Code § 1614*, which provides that a written instrument is presumptive evidence of consideration, generally do not appear to set forth any standard by which a particular writing may be determined to be a "written instrument" for purposes of the statute. This form therefore is based on the case law definition of "instrument in writing," which the courts have developed for the purpose of determining whether the statute of limitations has run in an action alleged to be based on an instrument in writing [*see § 50.60*].

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a party seeks to raise this contention. For example, it may be used to support a demurrer on the ground that the complaint fails to allege a valid written contract.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised in support of a defendant's demurrer, the memorandum would include an analysis of the complaint's allegations showing that they do not sufficiently allege a written contract.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a demurrer, they may be combined with appropriate memoranda set out in Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing amemorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.400* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] When Written Instrument Is Contract

Citizens Cas. Co. v. Otis Clark & Co. *(1971) 19 Cal. App. 3d 294, 96 Cal. Rptr. 838* , is discussed in *§ 50.120[3][c]*.

[b] Letters Are Not Written Instruments

In ***Michaelian v. State Fund*** *(1996) 50 Cal. App. 4th 1093, 58 Cal. Rptr. 2d 133* , an employee sued his employer's liability insurer on contract, tort, and constructive-trust theories after the insurer withdrew from defending him against

another employee's claims of sexual harassment, constructive discharge, assault and battery, and intentional and negligent infliction of emotional distress. The trial court sustained the insurer's general demurrer without leave to amend. On appeal the employee's principal contention was that the first amended complaint sufficiently alleged an enforceable agreement, consisting of the State Fund's reservation-of-rights letter as modified by a letter from the employee's counsel, and the State Fund materially breached the agreement by not paying all defense costs incurred after a certain date. The employee contended that the State Fund letter constituted an offer, the employee's letter was a counteroffer, and the State Fund's later payment of some defense costs was an acceptance.

The court of appeal affirmed. The State Fund letter was not an offer (*50 Cal. App. 4th 1093, 1110-1112)* . The employee had not shown there was sufficient consideration for the State Fund's conditional agreement to defend. The employee relied on *Civ. Code § 1614* in arguing that the consideration requirement was met. However, *Foltz v. First Trust & Sav. Bank (1948) 86 Cal. App. 2d 59, 61-62, 194 P.2d 135* , and *Weisbrod v. Weisbrod (1938) 27 Cal. App. 2d 712, 718-721, 81 P.2d 633* , discussed *below*, held that "written instrument" as it appears in that statute does not apply to letters but applies only to more formal legal documents (*50 Cal. App. 4th 1093, 1112)* .

Foltz v. First Trust & Sav. Bank *(1948) 86 Cal. App. 2d 59, 194 P.2d 135* , was an action against an executor of a decedent's will and a legatee to recover on a contract. The plaintiff alleged that before the decedent's death, the decedent wrote a letter in which he stated that quarterly he would send the plaintiff a check. The decedent did not make any otherprovision, either by will, trust, or annuity, to pay the plaintiff the amount referred to in the letter. The complaint sought a judgment against the executor and the sole legatee under the decedent's will. The defendants demurred generally. The trial court sustained the demurrer.

The court of appeal affirmed. *Civ. Code § 1614*, which states that a written instrument is presumptive evidence of a consideration, is not applicable to ordinary letters and does not raise a presumption that there is consideration for them. The document signed by the decedent in this case was merely a letter written to the plaintiff, in which decedent made certain promises. As the letter was not an instrument within the provisions of *Civ. Code § 1614*, there was no presumption that it was supported by consideration. The complaint failed to allege any prior valuable consideration for the promise. Any moral obligation resting on the decedent in the plaintiff's favor was not a sufficient consideration to convert the letter into a contract (*86 Cal. App. 2d 59, 61-62)* .

Weisbrod v. Weisbrod *(1938) 27 Cal. App. 2d 712, 81 P.2d 633* , was an action for declaratory relief in which the plaintiffs alleged an agreement to divide an estate among the plaintiffs and the defendant in consideration of the plaintiffs' refraining from contesting the will. Under the will, the defendant received the bulk of the estate. The defendant wrote letters to her brother and sister in which she informed them of the will and that she was executrix. She stated that after the debts of the estate had been paid, the remainder would be divided among the living heirs, share and share alike. The plaintiffs sought a judgment declaring their rights in the estate. The trial court, in rendering judgment for the defendant, found that the defendant had not contracted with any of the plaintiffs respecting the distribution of the estate.

The court of appeal affirmed. The letters were expressive of the defendant's feelings and intentions as they were when the letters were written, but the letters were not completed contracts nor written instruments that could be said under *Civ. Code § 1614* to be presumptive evidence of consideration. The term "instrument in writing" includes bills, bonds, conveyances, leases, mortgages, promissory notes, and wills, but not accounts, ordinary letters, or memoranda. The term "instrument," as applied to documents, necessarily imports a paper writing; but not every paper writing is necessarily an instrument within the settled statutory meaning of the term. With reference to writings, the term "instrument," as used in California statutes, has been defined to mean an agreement expressed in writing, signed, and delivered by one person to another, transferring the title to or creating a lien on real property, or giving a right to a debt or duty (*27 Cal. App. 2d 712, 719)* .

[4] Additional Authorities

[a] Consideration Required

In *O'Byrne v. Santa Monica-UCLA Medical Center (2001) 94 Cal. App. 4th 797* , the court of appeal affirmed the trial court's grant of summary judgment for defendant medical center as to plaintiff physician's claim for breach of contract. The medical center had denied the physician attending staff privileges. The plaintiff's cause of action for breach of contract was based on the allegation that the medical center's bylaws constituted a contract between himself and the medical center. The court stated that the crucial question was whether the hospital's bylaws created an enforceable contract (*94 Cal. App. 4th 797, 805)* . It noted that whether a set of bylaws constitutes a contract turns on whether the elements of a contract are present, and cited *Civ. Code § 1550(4)* as to the requirement of consideration. The court found that *22 Cal. Code Reg. §§ 70701* and *70703* required the medical center to appoint a medical staff, to adopt bylaws, and to abide by those bylaws. It found that there was no consideration given for the bylaws--neither the medical center nor the plaintiff conferred on the other any more than what was required by law. The court of appeal held that under California contract law, medical staff bylaws adopted pursuant to *22 Cal. Code Reg. § 70703(b)* do not in and of themselves constitute a contract between a hospital and a physician on its medical staff. The plaintiff, however, was not deprived of a remedy, as an aggrieved physician can enjoin a hospital from contravening the terms and provisions of the bylaws (*94 Cal. App. 4th 797, 808-810)* .

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5-50 California Points & Authorities § 50.392

§ 50.392 Complaint Fails to Allege Consideration for Oral Contract

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE COMPLAINT ALLEGES THAT THE CONTRACT IS ORAL, BUT THERE IS NO ALLEGATION OF CONSIDERATION.

Consideration for Oral Contract Must Be Alleged. If the complaint does not allege that the contract was in writing, a consideration must be alleged (*Acheson v. Western Union Tel. Co. (1892) 96 Cal. 641, 644, 31 P. 583*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that when the complaint shows the contract to be oral, consideration must be alleged.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a party seeks to raise this contention. For example, it may be used to support a demurrer on the ground that the complaint fails to allege a valid oral contract.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised in support of a defendant's demurrer, the memorandum would include an analysis of the complaint's allegations showing that they do not sufficiently allege a oral contract.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a demurrer, they may be combined with appropriate memoranda set out in Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.402* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Consideration for Oral Contract Must Be Alleged

Acheson v. Western Union Tel. Co. *(1892) 96 Cal. 641, 31 P. 583* , was an action for a breach of a contract to send a telegram. The complaint alleged that the plaintiff's assignors presented a message to the defendant, and the defendant undertook to forward it. The message was in the complaint. Several words in the message were transmitted by telegraph incorrectly. The defendant demurred generally. The trial court overruled the demurrer and entered a default judgment when the defendant did not answer.

The Supreme Court reversed. No consideration was alleged for the defendant's undertaking to transmit the message. Contracts, to be valid, must be formed on a consideration, and except as to contracts that imply it, the consideration must be proved and consequently should be stated. The exception at common law was for contracts under seal, and the exception under statute is for all contracts in writing [*Civ. Code § 1614*]. The agreement in this case to forward the message in question was not alleged to have been in writing, and therefore a consideration should have been alleged (*96 Cal. 641, 644)* .

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5-50 California Points & Authorities §§ 50.393-50.399

[Reserved]

§§ 50.393[Reserved]

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5-50 California Points & Authorities § 50.400

§ 50.400 Consideration Need Not Be Pleaded When Contract Is Written

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

A WRITTEN INSTRUMENT IS PRESUMPTIVE EVIDENCE OF CONSIDERATION; THEREFORE, CONSIDERATION NEED NOTBE ALLEGED IN AN ACTION BASED ON A WRITTEN INSTRUMENT.

A. Consideration Is Presumed for Written Instrument. A written instrument is presumptive evidence of consideration (*Civ. Code § 1614*).

B. Consideration for Written Instruments Need Not Be Alleged. Since consideration for a written contract is presumed, it is not necessary to allege the consideration in an action on a written instrument (*Henke v. Eureka Endowment Asso. (1893) 100 Cal. 429, 432-433, 34 P. 1089*).

[*Optional*] **C. When Instrument in Writing Is Considered Contract.** An instrument in writing is a contract if the instrument itself contains the contract to do the thing for the nonperformance of which an action may be brought. The writing must create a duty before a duty may be inferred from the writing (*Citizens Cas. Co. v. Otis Clark & Co. (1971) 19 Cal. App. 3d 294, 299-300, 96 Cal. Rptr. 838*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that the complaint alleges consideration for the contract because the complaint alleges that the contract was in writing or the action was based on a written contract.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in

which a party seeks to raise this contention. For example, it may be used to oppose a demurrer that has been interposed on the ground that the complaint fails to allege a valid written contract.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised in opposition to a defendant's demurrer, the memorandum would include an analysis of the complaint's allegations showing that they sufficiently allege a written contract.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a demurrer, they may be combined with appropriate memoranda set out in Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.391* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Consideration for Written Instruments Need Not Be Alleged

Henke v. Eureka Endowment Asso. *(1893) 100 Cal. 429, 34 P. 1089* , was an action for breach of a contract to pay a sum of money. The plaintiff alleged that the defendant executed a contract in writing that on a given date, the defendant would pay the plaintiff a certain sum of money. The defendant demurred generally and specially. The trial court overruled the demurrers. Judgment was rendered for the plaintiff.

The Supreme Court affirmed. *Civ. Code § 1614* states that a written instrument is presumptive evidence of consideration. When the plaintiff in this case alleged that the contract was in writing, she stated facts from which the law presumed a consideration. Hence it was unnecessary to allege specially the consideration (*100 Cal. 429, 432-433)* .

[b] When Instrument in Writing Is Considered Contract

Citizens Cas. Co. v. Otis Clark & Co. *(1971) 19 Cal. App. 3d 294, 96 Cal. Rptr. 838* , is discussed in *§ 50.120[3][c]*.

[4] Additional Authorities

[a] Consideration for Written Instruments Need Not Be Alleged

Cuthill v. Peabody (1912) 19 Cal. App. 304, 125 P. 926 , was an action for the price of shares of stock that the defendants contracted to buy fromthe plaintiff. The contract was not alleged to have been expressed in writing nor

pleaded in its own words. However, the complaint alleged that the defendants promised and agreed to buy the stock from the plaintiff for a certain sum on a certain date if the plaintiff desired to sell it; on that date, the plaintiff notified the defendants that he desired to sell the stock at the price stated and tendered the stock, duly endorsed for transfer, to the defendants; but they refused to buy or pay for the stock as agreed, notwithstanding that the plaintiff had kept and performed all of the conditions required of him by the contract. The trial court sustained the defendants' demurrer, in which the defendants contended that the complaint was defective in not alleging that the contract was founded on an adequate or any consideration. The court of appeal reversed. As a matter of pleading, the plaintiff was not required to allege that the contract was founded on a consideration. To be valid under the statute of frauds, the contract must have been in writing, and the law presumes that such a contract was in writing. Presumptions of law need not be pleaded. In this case the presumption that the contract was in writing necessarily followed the allegation of its making. Since every contract expressed in writing carries with it the presumption of a consideration for its execution, the burden of showing a want of consideration is on the party who seeks to avoid the contract, and it was not necessary to allege specifically the consideration for the contract (*19 Cal. App. 304, 307-308)* .

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5-50 California Points & Authorities § 50.401

§ 50.401 Allegations of Terms of Oral Contract Show Consideration

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

WHEN THE ALLEGATIONS CONSTRUED TOGETHER SUFFICIENTLY SHOW ADEQUATE CONSIDERATION FOR AN ORAL CONTRACT, A SPECIAL ALLEGATION OF CONSIDERATION IS UNNECESSARY.

Allegations of Terms of Oral Contract Show Consideration. When all of the allegations in a complaint construed together show that the consideration for an oral contract was adequate, a special allegation of consideration is unnecessary (*Johnson v. Servaes (1962) 210 Cal. App. 2d 392, 399, 26 Cal. Rptr. 733*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that a complaint for breach of an oral contract alleges consideration because the allegations of the complaint construed together show adequate consideration.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a party seeks to raise this contention. For example, it may be used to oppose a demurrer that has been interposed on the ground that the complaint fails to allege a valid oral contract.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised in opposition to a defendant's demurrer, the memorandum would include an analysis of the complaint's

allegations showing that they sufficiently allege the consideration given in an oral contract.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a demurrer, they may be combined with appropriate memoranda set out in Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.392* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Allegations of Terms of Oral Contract Show Consideration

Johnson v. Servaes *(1962) 210 Cal. App. 2d 392, 26 Cal. Rptr. 733* , was an action for specific performance of an oral agreement to cancel a note and release a deed of trust by which the note was secured. The complaint alleged an oral agreement between a broker and the defendants concerning property that had been deeded to an irrigation district before the agreement was made. The plaintiffs would pay all amounts due the irrigation district and persuade the district to reconvey the property to one of the plaintiffs. The broker would satisfy the remaining liens on the property except for one defendant's deed of trust and would pay certain of the defendants' attorney's fees and other debts. The consideration to be given for the real property was in excess of the fair and reasonable value, and as a further consideration to induce the broker to undertake efforts to obtain a reconveyance of the property, two of the defendants agreed to cancel the note and release the property from the lien without any payment of money. The trial court rendered judgment for the plaintiffs.

The court of appeal affirmed. There was no direct allegation of adequacy of consideration, but when all of the allegations of the complaint were construed together, the complaint sufficiently alleged adequate consideration. Since the facts were sufficiently pleaded, the complaint did not need to contain an allegation in so many words that the contract was supported by adequate consideration (*210 Cal. App. 2d 392, 399)* .

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5-50 California Points & Authorities § 50.402

§ 50.402 Failure to Allege Specific Duration of Oral Commercial Agreement Does Not Render Complaint Fatally Defective

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE COMPLAINT PLEADS A CAUSE OF ACTION FOR TERMINATION OF AN ORAL COMMERCIAL CONTRACT WITHOUT REASONABLE NOTICE; THEREFORE, THE COMPLAINT IS NOT REQUIRED TO ALLEGE THE SPECIFIC DURATION OF THE AGREEMENT.

Pleading Specific Duration of Oral Commercial Agreement. When a plaintiff bringing an action for breach of a commercial contract alleges no specific duration of the agreement, the mereabsence of the allegation does not render the complaint fatally vague, as long as what constitutes a commercially reasonable time is presumptively within the defendant's knowledge (*Khoury v. Maly's of California (1993) 14 Cal. App. 4th 612, 616, 17 Cal. Rptr. 2d 708*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that an action for damages for breach of an oral commercial contract may be maintained even though the duration of the agreement is uncertain, because the law implies a reasonable duration.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a party seeks to raise this contention. For example, it may be used to oppose a demurrer that has been interposed on the ground that the complaint fails to allege a valid oral commercial contract.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised in opposition to a defendant's demurrer, the memorandum would include an analysis of the complaint's allegations showing that they sufficiently allege the an oral commercial contract.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a demurrer, they may be combined with appropriate memoranda set out in Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Pleading Specific Duration of Oral Commercial Agreement

In ***Khoury v. Maly's of California*** *(1993) 14 Cal. App. 4th 612, 17 Cal. Rptr. 2d 708* , the complaint alleged a cause of action for breach of an oral contract. The parties made an oral agreement that the defendant would supply a certain brand of hair care products to the plaintiff's beauty salon, for sale to the plaintiff's customers, and the plaintiff and his employees agreed to attend a training class and to sell the products. Pursuant to the agreement, the plaintiff and his employees attended the training, the defendant supplied the products, and the plaintiff displayed and sold the products. The plaintiff developed a clientele loyal to the products who would accept no substitutes. Thereafter, the defendant refused to continue to supply the plaintiff with the products, allegedly damaging the plaintiff's business. The trial court sustained the defendant's demurrer to this cause of action without leave to amend, on the ground that the allegations were uncertain as to the nature and duration of the oral agreement.

The court of appeal reversed. The plaintiff's allegations were sufficient to plead a cause of action for damages for termination without reasonable notice. An oral contract may be pleaded generally as to its effect, because it is rarely possible to allege the exact words. Furthermore, a demurrer for uncertainty is strictly construed, even when a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures. While the plaintiff alleged no specific duration of the agreement, a reasonable term is implied in law; even assuming the contract to be terminable at will, *Com. Code § 2309* requires reasonable notice to be given before termination. The complaint was not unfairly vague, because what constitutes a commercially reasonable time is presumptively within the defendant's knowledge as much as the plaintiff's (*14 Cal. App. 4th 612, 616)* .

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5-50 California Points & Authorities §§ 50.403-50.409

[Reserved]

§§ 50.403[Reserved]

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5-50 California Points & Authorities § 50.410

§ 50.410 Cause of Action Is Based on Promissory Estoppel

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE COMPLAINT ALLEGES THE ELEMENTS OF PROMISSORY ESTOPPEL, AND NO CONSIDERATION NEED BE SHOWN.

A. Promise May Be Binding Without Consideration Under Promissory Estoppel Doctrine. The doctrine of promissory estoppel makes a promise binding even though there is no consideration in the sense of something that is bargained for and given in exchange (*Drennan v. Star Paving Co. (1958) 51 Cal. 2d 409, 414, 333 P.2d 757*).

B. Pleading Elements of Promissory Estoppel. If the complaint discloses that the defendant made a clear unambiguous promise to the plaintiff, that the defendant had reason to believe that the plaintiff would rely on the promise, that the plaintiff did rely on the promise, and that foreseeable damages resulted to the plaintiff, the complaint alleges a cause of action based on promissory estoppel (*see* *Morrison v. Home Sav. & L. Ass'n (1959) 175 Cal. App. 2d 765, 768-773, 346 P.2d 917*).

[*Optional*] **C. Requirement That Injustice Be Unavoidable Except by Enforcing Promise.** The requirement under the doctrine of promissory estoppel that it must appear that injustice can be avoided only by enforcing the promise is met when the plaintiff alleges responsive action of such a nature as to create a substantial and complete change of the plaintiff's position (*Morrison v. Home Sav. & L. Ass'n (1959) 175 Cal. App. 2d 765, 773, 346 P.2d 917*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that consideration existed and was alleged because the

doctrine of promissory estoppel is applicable.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a party seeks to raisethis contention. For example, it may be used to oppose a demurrer that has been interposed on the ground that the complaint fails to allege consideration.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised in opposition to a defendant's demurrer, the memorandum would include an analysis of the complaint's allegations showing that they sufficiently allege facts which give rise to application of the promissory estoppel doctrine.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

For memoranda addressing the related doctrine of equitable estoppel [*see Evid. Code § 623*], see Ch. 166, *Negotiable Instruments* .

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a demurrer, they may be combined with appropriate memoranda set out in Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.420* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Promise May Be Binding Without Consideration Under Promissory Estoppel Doctrine

Drennan v. Star Paving Co. *(1958) 51 Cal. 2d 409, 333 P.2d 757* , a landmark decision, was an action for damages for refusal to perform paving work according to a bid submitted to the plaintiff as the general contractor. The trial court found that the defendant made a definite offer to do the paving, and the plaintiff relied on the defendant's bid in computing his ownbid. Judgment was rendered for the plaintiff. On appeal, the defendant contended that there was no enforceable contract between the parties since it had made a revocable offer and had revoked it before the plaintiff communicated his acceptance to the defendant.

The Supreme Court affirmed. There was no evidence that the defendant offered to make its bid irrevocable in exchange for the plaintiff's use of its figures in computing his bid. Nor was there evidence that would warrant interpreting the plaintiff's use of the defendant's bid as the acceptance, binding the plaintiff, on condition that he receive the main contract, to award the subcontract to the defendant. Thus there was neither an option supported by consideration nor a bilateral contract binding on both parties. However, a promise that the promisor should reasonably expect would induce action or forbearance of a definite and substantial character on the part of the promisee is binding if it does induce

action or forbearance, and if injustice can be avoided only by enforcement of the promise. The absence of consideration is not fatal to the enforcement of the promise. The very purpose of the doctrine of promissory estoppel is to make a promise binding even though there was no consideration in the sense of something that is bargained for and given in exchange. Reasonable reliance serves to hold the offeror in lieu of the consideration ordinarily required to make the offer binding. When the plaintiff used the defendant's offer in computing his own bid, he bound himself to perform in reliance on the defendant's terms. Although the defendant did not bargain for this use of its bid, neither did the defendant make it idly, indifferent to whether it would be used or not. The defendant had reason to expect the plaintiff to rely on its bid and to want him to. Given this interest and the fact that the plaintiff was bound by his own bid, it was only fair that the plaintiff should have at least an opportunity to accept the defendant's bid after the general contract had been awarded to him. Thus the doctrine of promissory estoppel was applicable to the case (*51 Cal. 2d 409, 414)* .

[b] Pleading Elements of Promissory Estoppel

Morrison v. Home Sav. & L. Ass'n *(1959) 175 Cal. App. 2d 765, 346 P.2d 917* , was an action for damages against a savings and loan association for breach of contract. The plaintiffs alleged that the association orally promised to lend a sum of money on the plaintiffs' property to a prospective purchaser. In reliance the plaintiffs authorized a realty company to sell the property. Purchasers were found. The association notified the realty company that it would lend a certain sum, which was satisfactory to the parties. In reliance on this loan commitment, the plaintiffs and purchasers made a written agreement for the sale of the property, and the plaintiffs made and consummated an agreement with a third person to purchase a new residence. The association later stated that it would not make the loan without an all-physical-loss insurance policy covering the property.Since such a policy could not be obtained, the association did not make the loan. The trial court sustained the association's general demurrer.

The court of appeal reversed. The plaintiffs sufficiently alleged a cause of action for promissory estoppel since the pleading disclosed that the association made a clear and well-defined promise to the plaintiffs, the association had reason to expect and foresee that if it made such a promise, the plaintiffs would rely on it, the plaintiffs relied on the promise, and the plaintiffs were damaged by the change in their position as a result of their reliance on the association's promise (*175 Cal. App. 2d 765, 768-773)* .

[c] Requirement That Injustice Be Unavoidable Except by Enforcing Promise

The facts and procedural background of ***Morrison v. Home Sav. & L. Ass'n*** *(1959) 175 Cal. App. 2d 765, 346 P.2d 917* , are discussed in [b], *above*. The doctrine of promissory estoppel should be applied only if injustice can be avoided only by enforcing the promise. The court concluded that it was obvious from the pleading that the action taken by the plaintiffs in reliance on the association's conduct and loan commitment was of such a nature as to create a substantial and complete change of their position since, after the plaintiffs agreed to sell their house, they consummated a purchase of another house for themselves resulting in the ownership of two residences and the obligations accompanying them. The nature and extent of this hardship appeared to be substantial and consequently relief should be granted (*175 Cal. App. 2d 765, 768-773)* .

[4] Additional Authorities

[a] Pleading Elements of Promissory Estoppel

The plaintiff in *A-C Company, Inc. v. Security Pacific National Bank (1985) 173 Cal. App. 3d 462, 219 Cal. Rptr. 62* , had not returned loan renewal documents by the time stated in a bank's offer to renew the loans, but the plaintiff sought to make the bank's offer irrevocable on the basis of promissory estoppel. The court of appeal reversed a judgment for the plaintiff, because the jury had been allowed to decide the equitable issues by advisory verdict. It is proper to have a jury render advisory verdicts on factual issues that apply to promissory estoppel in a case in which promissory estoppel is only one issue relevant to claims based on legal theories. However, the trial court is required to make its own findings, adopt or reject the jury's findings, and decide equitable issues such as whether injustice can be avoided only by

enforcing the promise and whether the party asserting promissory estoppel has unclean hands (*173 Cal. App. 3d 462, 472-473)* . A promise that the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee is binding if it does induce action or forbearance, and ifinjustice can be avoided only by enforcement of the promise (*173 Cal. App. 3d 462, 472)* .

H.W. Stanfield Constr. Corp. v. Robert McMullan & Son, Inc. (1971) 14 Cal. App. 3d 848, 92 Cal. Rptr. 669 , was an action for damages by general contractors against a subcontractor for refusal to do work in compliance with a bid submitted to the plaintiffs. The defendant submitted a bid to the plaintiffs on a contract that was much lower than the other bids the plaintiffs had received. After the plaintiffs requested confirmation of the bid from the defendant, he submitted a second bid that was higher than the previous one but still lower than the other bids. The plaintiffs used the defendant's second bid in preparing their bid on the prime contract and so advised the defendant. Two weeks after their bid was accepted, the plaintiffs submitted a proposed written contract to the defendant, which the defendant refused to sign. After trial, the court rendered judgment for the plaintiffs. The court of appeal affirmed. A promise that the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee is binding if it does induce action or forbearance, and if injustice can be avoided only by enforcement of the promise. The contention that the plaintiffs' reliance on the defendant's bid was not justifiable or reasonable was without merit, since the plaintiffs expressed concern respecting the defendant's first bid and inferentially were entitled to assume that its second bid was not the product of any misconception, misunderstanding, or mistake. The contention that the plaintiffs unreasonably delayed acceptance of the defendant's bid and made a counteroffer in lieu of acceptance was also without merit, since the plaintiffs had both informed the defendant that its bid had been included in their bid on the same day that they submitted their bid and also sent the proposed contract to the defendant within two weeks of the acceptance of the plaintiffs' bid. The court held that the contract submitted to the defendant by the plaintiffs was not a counteroffer. The only reason the defendant refused to perform was that under its bid it was required to do certain work that it apparently had not considered in making its bid. The doctrine of promissory estoppel was applicable (*14 Cal. App. 3d 848, 852-853)* .

Hilltop Properties v. California (1965) 233 Cal. App. 2d 349, 43 Cal. Rptr. 605 , was an action for breach of contract. The complaint alleged that the plaintiff owned two strips of land that were taken by the defendant for the widening of a freeway, and the defendant made certain promises to the plaintiff with regard to these strips of land, stating that if the plaintiff reserved the land, the defendant would purchase it at a specified price, and that intent was communicated to the plaintiff in writing. The complaint further alleged that the plaintiff relied on the defendant's promise by leaving the property undeveloped, thus rendering it useless and of no value; the defendant should have expected and did expect a substantialchange of position by the plaintiff in reliance on the promise; and the defendant repudiated its proposal to purchase the property. The trial court sustained the defendant's general demurrer. In reversing as to the promissory estoppel cause of action, the court of appeal noted that a promise that the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee is binding if it does induce the action or forbearance, and if injustice can be avoided only by enforcement of the promise. Since detrimental reliance is an essential feature of promissory estoppel, that doctrine cannot be invoked when the promisee's reliance was bargained-for, the law of consideration being applicable. The court concluded that, although the allegations of the complaint were susceptible to the interpretation that at the time the alleged promise was made, the defendant requested the plaintiff to withhold the subject parcels from development, thus bargaining for the plaintiff's reliance by making the doing of what was requested the consideration, the allegations were equally susceptible to the interpretation that the plaintiff's act of withholding the parcels from development was not given in exchange for the defendant's promise to purchase the parcels. The court held that these allegations, as well as those purporting to allege that the defendant reasonably expected to induce forbearance of a definite and substantial character on the plaintiff's part, were sufficient as against a general demurrer (*233 Cal. App. 2d 349, 362-368)* .

In *Thomson v. International Alliance of Stage Employees (1965) 232 Cal. App. 2d 446, 42 Cal. Rptr. 785* , the plaintiffs sued for breach of contract. The plaintiffs were members of the sound technicians' union and were paid under an agreement referred to as Schedule B. For many years members of the union could be employed under four different

schedules, but in 1946 the defendants demanded the elimination of two of the schedules because they had become inequitable and discriminatory to the members. Eventually one schedule was eliminated. Two years later, instead of eliminating the other schedule, a memorandum agreement was executed that provided for an increase in wages. The memorandum provided that it was not in final contract language, and a formal agreement would be drafted as soon as possible. An oral agreement was reached by the negotiating committees that any and all tentative agreements reached (such as the memorandum agreement) would not be final until ratified by the memberships of the various locals of the union and approved by each of the producers. The members of the union approved by a majority a different plan by which wage rates under the three schedules would be increased disproportionately, resulting in no wage increase for persons paid under Schedule B. After a trial without a jury, the trial court rendered judgment for the defendants. The plaintiffs contended on appeal that the defendants were estopped from asserting the lack of ratification of the memorandum agreement, and the memorandum agreement was a promise clear and unambiguous. The court of appeal affirmed. The elements of promissory estoppelare a promise clear and unambiguous in its terms, reliance by the party to whom the promise is made, the party's reasonable and foreseeable reliance, and resulting injury to the party asserting the estoppel. The court found that not all of the elements of promissory estoppel were present because, although the plaintiffs asserted that the deprivation of a wage increase represented injury to them, the plaintiffs did not establish that the injury was the result of reliance on the memorandum agreement (*232 Cal. App. 2d 446, 453-454)* .

[b] Requirement That Injustice Be Unavoidable Except by Enforcing Promise

In *Kajima/Ray Wilson v. Los Angeles MTA (2000) 23 Cal. 4th 305, 96 Cal. Rptr. 2d 747* , the California Supreme Court considered whether the lowest responsible bidder that was wrongfully denied a public contract has a cause of action for monetary damages against the public entity, and if so, whether those damages include bid preparation costs and lost profits. The court concluded that bid preparation costs but not lost profits were available under a theory of promissory estoppel (*23 Cal. 4th 305, 308)* . After soliciting bids to build the Red Line Hollywood/Highland station and tunnels, the Los Angeles MTA rejected all bids and solicited new bids for the same public project. The contract was awarded to a bidder whose bid was higher than plaintiff's bid. Plaintiff filed suit against MTA, seeking an injunction, issuance of a writ of mandate or prohibition, and damages. It sought bid and protest expenses, unabsorbed overhead expenses, and lost profits. In addition to a peremptory writ of mandate, the court awarded plaintiff bid expenses, unabsorbed overhead, lost profits, and prejudgment interest. The court of appeal affirmed (*23 Cal. 4th 305, 309-310)* . The California Supreme Court examined the doctrine of promissory estoppel, stating that the remedy for breach may be limited as justice requires. Although it applied the doctrine in this case, it noted that it fit the circumstances imperfectly. The court used promissory estoppel primarily to further certain public policies by creating a damages remedy for a public entity's statutory violation. That fact, plus the fact that unlike the usual promissory estoppel situation, the MTA retained discretion to reject all bids, played a role in determining the measure of damages available under a promissory estoppel theory (*23 Cal. 4th 305, 315)* . The Court stated that in the context of competitive bidding statutes, neither estoppel nor any other equitable principle could be invoked against a governmental body if it would operate to defeat the effective operation of a policy adopted to protect the public. The general public would not benefit from allowing a disappointed bidder to recover lost profits. In fact, if those profits were recoverable, the possibility of significant monetary gain alone might encourage frivolous litigation and further expend public resources (*23 Cal. 4th 305, 315-317)* . Noting that the court of appeal's conclusion thatdisappointed bidders may recover lost profits as damages was a distinctly minority position, the California Supreme Court reversed (*23 Cal. 4th 305, 320-321)* .

In reversing the trial court's judgment for the defendant employer, the court of appeal in *Sheppard v. Morgan Keegan & Co. (1990) 218 Cal. App. 3d 61, 266 Cal. Rptr. 784* , held that the doctrine of promissory estoppel applied to prevent the defendant from terminating the plaintiff before the date the plaintiff was to report for work (thus foreclosing the plaintiff's opportunity to demonstrate his ability to satisfy the job requirements), after the plaintiff had severed his former employment and moved across the country. A promise that the promisor reasonably expects to induce action or forbearance on the part of the promisee or a third person is binding if it does induce action or forbearance, and if injustice can be avoided only by enforcement of the promise (*218 Cal. App. 3d 61, 67)* .

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Volume 5 Chapters 50-59 CONTRACTS---to---CORPORATIONS
CHAPTER 50 CONTRACTS
PART II. FORMS
D. Existence of Contract
4. Promissory Estoppel Doctrine

5-50 California Points & Authorities §§ 50.411-50.419

[Reserved]

§§ 50.411[Reserved]

California Points & Authorities

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5-50 California Points & Authorities § 50.420

§ 50.420 Complaint Fails to Allege Elements of Promissory Estoppel

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE COMPLAINT IS BASED ON THE DOCTRINE OF PROMISSORY ESTOPPEL BUT DOES NOT ALLEGE THE ESSENTIAL ELEMENTS OF PROMISSORY ESTOPPEL.

A. Elements of Promissory Estoppel. The elements that must be alleged in a cause of action for promissory estoppel are: a promise, clear and unambiguous in its terms; reliance by the party to whom the promise is made; both reasonable and foreseeable reliance; injury as a result of the reliance; and a causal connection between breach of the promise and injury to the party to whom the promise is made (*US Ecology, Inc. v. State (2005) 129 Cal. App. 4th 887, 891, 908, 28 Cal. Rptr. 3d 894* ; *Lange v. TIG Insurance Company (1998) 68 Cal. App. 4th 1179, 1186-1187, 81 Cal. Rptr. 2d 39* ; *Laks v. Coast Fed. Sav. & L. Ass'n (1976) 60 Cal. App. 3d 885, 890, 131 Cal. Rptr. 836*).

[*Optional*] **B. Mere Expression of Intent Is Not Promise.** The defendant made no promise sufficient to support a claim of promissory estoppel if the defendant's expression of intent to do or refrain from doing a specified act was not addressed or directed to the plaintiff or to someone else for the plaintiff's benefit and was not communicated to the plaintiff by either the defendant or any authorized agent of the defendant (*Trans-World Intern. v. Smith-Hemion Productions (C.D. Cal. 1997) 972 F. Supp. 1275, 1284-1286)* .

[*Optional*] **C. Requirement of Definite and Substantial Action.** The doctrine of promissory estoppel is not applicable when the promises or representations did not induce action of a definite and substantial character on the part of the promisee (*Blatt v. University of So. Cal. (1970) 5 Cal. App. 3d 935, 944, 85 Cal. Rptr. 601*).

[*Optional*] **D. Promissory Estoppel Is Not Applicable When Reliance Is Bargained-for.** If the promisee's performance was requested at the time the promisor made his or her promise, and that performance was bargained-for,

the doctrine of promissory estoppel is inapplicable (*Youngman v. Nevada Irrigation Dist. (1969) 70 Cal. 2d 240, 249, 74 Cal. Rptr. 398, 449 P.2d 462*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that the cause of action is based on promissory estoppel but the complaint does not allege the essential elements of promissory estoppel.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a party seeks to raise this contention. For example, it may be used to support a demurrer that has been interposed on the ground that the complaint fails to allege facts insufficient for relief under the promissory estoppel doctrine.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised in support of a defendant's demurrer, the memorandum would include an analysis of the complaint's allegations showing that they fail to allege sufficient facts to permit relief under the promissory estoppel doctrine.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

For memoranda addressing the related doctrine of equitable estoppel [*see Evid. Code § 623*], see Ch. 166, *Negotiable Instruments* .

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a demurrer, they may be combined with appropriate memoranda set out in Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.410* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Elements of Promissory Estoppel

In ***US Ecology, Inc. v. State*** *(2005) 129 Cal. App. 4th 887, 28 Cal. Rptr. 3d 894* , the Department of Health Services had selected the plaintiff to develop and operate California's first low-level radioactive waste storage facility. The plaintiff and state officials thereafter identified a location for the facility and completed environmental reviews for that site. However, the facility was never built. The plaintiff blamed the state government for failing to do what was promised, namely, use best efforts to acquire the selected site from the federal government. Claiming to have spent

millions of dollars in development costs in reliance on the state's promise to use best efforts to acquire the site, the plaintiff sued the state, alleging a promissory estoppel cause of action. The trial court found that the cause of the plaintiff's injury was actually the federal government's political decision not to transfer the site to the state, and the court entered judgment in favor of the state, on the ground that the plaintiff had failed to prove that the plaintiff's injury was proximately caused by any breach of promise by the state. The plaintiff's argument on appeal was that causation is not an element of a promissory estoppel cause of action.

The court of appeal affirmed. Addressing what the court described as an issue of first impression--whether a plaintiff pursuing a claim for promissory estoppel must prove that the defendant caused the plaintiff's injury--the court concluded that, as in ordinary contract actions, a plaintiff seeking recovery on a promissory estoppel theory must prove that the defendant's breach of promise was a substantial factor in causing the plaintiff's injury. Further, even if causation is not a necessary element of all promissory estoppel claims, the court held that because promissory estoppel is an equitable remedy, courts have the discretion in an appropriate case to deny relief when the plaintiff cannot demonstrate that the defendant's actions caused the plaintiff's injury (*129 Cal. App. 4th 887, 891, 908)* .

In ***Lange v. TIG Insurance Company*** *(1998) 68 Cal. App. 4th 1179, 81 Cal. Rptr. 2d 39* , an insurer terminated its agency agreement with an insurance brokerage for cause in April after an audit revealed irregularities. Respondent brokers threatened the insurer with legal action if it did not allow them to continue selling new policies until the date in July originally stated as the date for termination of the agency agreement. Respondents' theory was they had a third party contractual relationship with the insurer despite having had no direct dealings or contractual relationship. The insurer responded by bringing an action against the brokers for declaratory relief, seeking a judgment that they were not third-party beneficiaries of the agency agreement with the insurance brokerage and had no greater rights than the agent. The brokers counterclaimed, alleging promissory estoppel and negligent interference with prospective economic advantage. The basis of their claim for promissory estoppel was a statement made in a letter from the insurer that notice of termination of the agency agreement was effective on a date in July. They asserted that the statement constituted a binding promise that the agreement would not be terminated under any circumstances before that date. The superior court ruled in favor of the brokers. The court of appeal reversed. It reviewed the elements for promissory estoppel set forth in **Laks v. Coast Fed. Sav. & L. Ass'n**, discussed *below*. The court did not find a promise of any sort in the letter, let alone a promise of sufficient definitiveness and clarity to justify applying promissory estoppel. It found that the statement regarding the termination date was simply a recitation of the historical fact that notice of termination had been served and would take effect on a particular date (*68 Cal. App. 4th 1179, 1185-1187)* .

Laks v. Coast Fed. Sav. & L. Ass'n *(1976) 60 Cal. App. 3d 885, 131 Cal. Rptr. 836* , was an action for damages resulting from the defendant's failure to make a loan as stated in a letter of conditional commitment. The defendant demurred generally, and the plaintiffs replied that the complaint sufficiently stated the elements of promissory estoppel. The trial court sustained the demurrer without leave to amend, holding that the letter was not an enforceable contract.

The court of appeal affirmed. The required elements for promissory estoppel are (1) a promise clear and unambiguous in its terms, (2) reliance by the party to whom the promise is made, (3) provided that the reliance must be both reasonable and foreseeable, and (4) resulting injury to theparty asserting the estoppel. The first element was missing in this case because the defendant did not make a clear and unambiguous promise to make a loan. Additionally, the third element was absent because the plaintiffs' reliance was not reasonable and foreseeable, since the plaintiffs were experienced businessmen (*60 Cal. App. 3d 885, 890)* .

[b] Mere Expression of Intent Is Not Promise

In ***Trans-World Intern. v. Smith-Hemion Productions*** *(C.D. Cal. 1997) 972 F. Supp. 1275* , a production company sued a performer on a claim of promissory estoppel based on the performer's expression of intent toappear in a show. The performer signed a letter stating unequivocally that he would appear in the show, but he subsequently recanted and refused to appear, and the show was canceled. The production company sought compensation for debts that the

company had incurred to produce the show, having received no revenue to cover those debts because the show had to be canceled. The company incurred those debts in reliance on the performer's statement, in the letter, that he would appear in the show.

The U.S. district court rendered judgment for the performer. The performer did not make any promise on which the production company's claim of promissory estoppel could be based. The letter was not delivered to the company by the performer or by any of the performer's authorized agents, nor did the company ever ask the performer or any of his authorized agents for a copy of the letter or for any other expression of the performer's intent to appear in the show. The letter was not addressed to the company; indeed, it was not addressed to anyone but was merely a signed statement of the performer's intent to appear in the show. The letter had been solicited by the performer's brother for the purpose of satisfying the brother and their mother of the performer's intention to appear in the show, in which the brother and their mother were financially interested. The brother showed the letter to the production company, which undertook its role in producing the show solely in reliance on the letter. However, if the company relied on a promise to the company, in concluding that the performer would appear, it was a promise made by the brother or by some other family member, not by the performer or by any representative of the performer. If the company relied on any promise made by the performer, it relied on a promise from the performer to members of his family, not to the company. Neither of these scenarios alone, nor the two together, can satisfy the requirement that the performer must have made a promise to the production company, in order for the promissory estoppel claim to be supportable. Moreover, the production company was not the intended beneficiary of any promise made by the performer to any third person (*972 F. Supp. 1275, 1284-1286)* .

[c] Requirement of Definite and Substantial Action

The facts and procedural background of ***Blatt v. University of So. Cal.*** *(1970) 5 Cal. App. 3d 935, 85 Cal. Rptr. 601* , are discussed in *§ 50.100[3][a]*. The plaintiff argued that he suffered detriment and a change of position because he might have decided to take an easier path through law school and graduate with an average scholastic record instead of attaining excellence; that he had this initial choice, that after the defendants enticed him by their promises, he took the tougher road; and that his extra effort for scholastic achievement was in reliance on and motivated by the representations of the promised award. In affirming the sustaining of the general demurrer, the court of appeal noted that since no benefitflowed to the defendants as a result of the plaintiff's hard work or class ranking, no consideration existed for any promise by the defendants and therefore, if any contractual liability existed, it was because of the applicability of the doctrine of promissory estoppel. The doctrine of promissory estoppel is that a promise that the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee is binding if it does induce action or forbearance, and if injustice can be avoided only by enforcement of the promise. Although the validity of consideration does not depend on its value and the law does not ordinarily take its measure, in this case it could not be said that the alleged promises or representations induced action of a definite and substantial character on the part of the promisee (*5 Cal. App. 3d 935, 944)* .

[d] Promissory Estoppel Is Not Applicable When Reliance Is Result of Bargaining

Youngman v. Nevada Irrigation Dist. *(1969) 70 Cal. 2d 240, 74 Cal. Rptr. 398, 449 P.2d 462* , was an action for declaratory relief by an employee of an irrigation district, to determine his right to a merit increase in pay. The plaintiff alleged as one cause of action that the plaintiff relied on an express oral promise by the defendant's agent, namely that annual pay increases would be granted by accepting employment with the defendant, continuing in its employ, and refraining from accepting another job; and the district was estopped to refuse to consider and grant him a merit step increase in pay. The trial court sustained the defendant's general and special demurrer on the ground that the complaint did not indicate how the defendant could be bound by implication under the circumstances alleged, and the oral agreement did not comply with the legal requirements for procedures to be followed by an irrigation district in entering into a contract.

The Supreme Court reversed. A promisor is bound when he or she should reasonably expect a substantial change of position, either by act or by forbearance, in reliance on the promise, if injustice can be avoided only by its enforcement. The purpose of the doctrine of promissory estoppel is to make a promise binding, under certain circumstances, without consideration in the usual sense: something bargained-for and given in exchange. If the promisee's performance was requested at the time the promisor made the promise, and that performance was bargained-for, the doctrine is inapplicable. The defendant's promise, through its agent, that the plaintiff would be afforded a raise each year was part of the bargain under which the plaintiff entered the employment and by remaining in his position and presumably rendering satisfactory service, the plaintiff performed his part of the bargain and rendered the consideration called for by the employment contract. Consequently, the doctrine of promissory estoppel was not applicable since it is used only to supply consideration for a promise when no actual consideration was given by the promisee (*70 Cal. 2d 240, 249)* .

[4] Additional Authorities

[a] Elements of Promissory Estoppel

In *Glen Holly Entertainment Inc. v. Tektronix Inc. (9th Cir. 2003) 352 F.3d 367* , plaintiff brought a private antitrust action against defendant, together with state law claims for fraud, negligent misrepresentation, and promissory estoppel. The district court dismissed the promissory estoppel claim in its entirety, concluding that the alleged promises did not constitute actionable promises because they were too vague or indefinite, and because no allegations supported the conclusion that injustice could only be avoided by enforcing them. On that issue, the Ninth Circuit affirmed. It agreed with the district court that plaintiff's representations were not definite enough to be enforceable. The court found that plaintiff had adequate remedies through its viable fraud and negligent misrepresentation claims, and therefore a promissory estoppel claim was not necessary to avoid injustice (*352 F.3d 367, 381)* .

The court of appeal in *Smith v. City and County of San Francisco (1990) 225 Cal. App. 3d 38, 275 Cal. Rptr. 17* , affirmed a judgment in an inverse condemnation action in which the plaintiffs also alleged breach of contract based on promissory estoppel. The court held that no cause of action for promissory estoppel had been stated because the plaintiffs' pleadings of reliance were conclusionary and insufficient and did not show that the plaintiffs changed their position in reliance on statements of city personnel. All facts relied on must be specifically pleaded. A promise that the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person is binding if it does induce action or forbearance, and if injustice can be avoided only by enforcement of the promise (*225 Cal. App. 3d 38, 48)* .

Division of Labor Law Enforcement v. Transpacific Transp. Co. (1977) 69 Cal. App. 3d 268, 137 Cal. Rptr. 855 , was an action to recover wages. The plaintiff's assignors were the defendant's employees who had been paid an annual bonus for a number of years. The defendant terminated the employees approximately two weeks before it paid its annual bonus, and the plaintiff sued to recover the bonus. The trial court rendered judgment for the defendant. In affirming the trial court's judgment, the court of appeal noted that in order for the plaintiff to recover on the theory of promissory estoppel, the elements of promise, reliance, and injury had to be present, and the existence of these elements constituted a question of fact. The trial court had found that although the defendant had paid bonuses as a gift in the past, it made neither an express promise nor an implicit promise to pay any bonus to its employees. Since the doctrine of promissory estoppel is inapplicable in the absence of a showing that a promise had been made on which the complaining party relied to his or her prejudice, the plaintiff could not recover the bonuses because there was no showing of a promise (*69 Cal. App. 3d 268, 275-278)* .

Landberg v. Landberg (1972) 24 Cal. App. 3d 742, 101 Cal. Rptr. 335 , was a divorce action involving the defendant's right to buy the plaintiff's stock in two corporations pursuant to an agreement between them and the corporations. The property settlement agreement, pursuant to which the plaintiff received 60 percent and the defendant received 40 percent of the stock of the corporations, provided a procedure by which either spouse could sell stock to or buy stock from the other. Pursuant to this procedure, the plaintiff submitted to the defendant an offer to buy or sell, and the

defendant replied by letter stating a desire to buy the plaintiff's stock. Since the defendant refused to accept three conditions set forth in the offer, the plaintiff replied that the defendant's acceptance was not valid. The defendant then sent a telegram stating that the telegram was again notice to the plaintiff that she elected to buy the plaintiff's interests in the corporations, and if her earlier communication was not a valid election to buy, the telegram was acceptance of his offer and election to buy. The plaintiff's attorney then sent a telegram to the defendant stating that since the defendant did not properly accept the plaintiff's offer, the defendant declined to sell his interests to her. The defendant testified that after she sent her letter accepting the plaintiff's offer, the plaintiff came into the corporation's office and said that he was literally through with the business, and the defendant was in charge. A couple of days later he telephoned the defendant to tell her that he did not feel the defendant's acceptance was valid. The trial court denied the defendant's motion for an order declaring that the defendant had exercised her right to buy the plaintiff's stock. On appeal the defendant contended that under the doctrine of promissory estoppel, the plaintiff's conduct estopped the plaintiff to avoid acquiescence in her buying his interest in the corporations, on the basis that she took extensive action in reliance. In affirming the trial court's judgment, the court of appeal noted that the doctrine of promissory estoppel is based on the principle that a promise that the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee is binding if it does induce action or forbearance, and if injustice can be avoided only by enforcement of the promise. The facts alleged in the defendant's opening brief did not set out any evidence of the alleged extensive action on which reliance was predicated; consequently, the doctrine of promissory estoppel did not apply (*24 Cal. App. 3d 742, 758-759)* .

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5-50 California Points & Authorities §§ 50.421-50.429

[Reserved]

§§ 50.421[Reserved]

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5. Illusory Contract

5-50 California Points & Authorities § 50.430

§ 50.430 Contract Providing for Performance to Party's Satisfaction Is Not Illusory

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

A CONTRACT THAT PROVIDES FOR PERFORMANCE TO THE SATISFACTION OF ONE OF THE PARTIES IS NOT ILLUSORY.

A. Right to Terminate Contract on Specified Conditions Does Not Render Contract Unenforceable. [*See § 50.382[1].*]

B. Contract Providing for Performance to Party's Satisfaction Is Not Illusory. A contractual provision for performance to the satisfaction of one of the parties does not render the contract illusory (*Collins v. Vickter Manor, Inc. (1957) 47 Cal. 2d 875, 882-883, 306 P.2d 783*).

[*Optional*] **C. Reasonable-Person Standard Applies to Commercial Satisfaction Clause.** When a contract calls for the satisfaction of one of the parties as to commercial value of quality, operative fitness, or mechanical utility, the standard of a reasonable person is used to determine whether satisfaction has been received (*Mattei v. Hopper (1958) 51 Cal. 2d 119, 123, 330 P.2d 625* ; *Collins v. Vickter Manor, Inc. (1957) 47 Cal. 2d 875, 882-883, 306 P.2d 783*).

[*Optional*] **D. Good-Faith Standard Applies When Party's Judgment Is Involved.** When a contract calls for performance to the satisfaction of one of the parties, and the question of the party's satisfaction is one of fancy, taste, or judgment, the promisor's duty to exercise his or her judgment in good faith is adequate consideration to support the contract (*Mattei v. Hopper (1958) 51 Cal. 2d 119, 123-124, 330 P.2d 625* ; *Moreland Development Co. v. Gladstone Holmes, Inc. (1982) 135 Cal. App. 3d 973, 977, 186 Cal. Rptr. 6*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that the contract is not illusory merely because it provides that performance is to be to the satisfaction of one of the parties.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a party seeks to raise this contention. For example, it may be used to oppose a defendant's motion for summary judgment.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised in opposition to a defendant's motion for summary judgment, the memorandum would include an analysis of the moving and opposing papers showing that there is a triable issue of fact as to whether the contract is illusory.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.370* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Contract Providing for Performance to Party's Satisfaction Is Not Illusory

Collins v. Vickter Manor, Inc. *(1957) 47 Cal. 2d 875, 306 P.2d 783* , was an action to recover a real estate broker's commission. The plaintiff alleged that he had found a purchaser for certain property that the defendant wanted to sell, and the plaintiff, the purchaser, and the defendant signed a deposit receipt, incorporated into the complaint, which required the vendor to furnish a satisfactory soil compaction report on eachsite from a reliable testing firm and also provided that the final contour map and filing map be subject to the purchaser's approval. The defendant successfully demurred to the complaint on the ground that it did not state a cause of action since the deposit receipt was not an enforceable contract in that it gave the purchaser the right at his uncontrolled discretion to refuse to perform if he was not satisfied as to the soil compaction report and maps.

The Supreme Court reversed, holding that if the provisions as to soil compaction report and maps were contained in an otherwise enforceable contract, those provisions would not make the purchaser's obligation illusory; the purchaser could not withdraw from the contract at his pleasure. A contractual provision for performance to the satisfaction of one of the parties ordinarily calls for performance that would be satisfactory to a reasonable person. If acceptance or rejection of

the soil compaction report and maps had been dependent on the purchaser's uncontrolled caprice, then he would have been the sole judge of his own satisfaction and could have withdrawn from the contract without regard to the reasonableness of his decision. But when the question is whether an agreed performance will satisfy a requirement of commercial value or quality, operative fitness, or mechanical ability, the party to whom performance is tendered is not justified in claiming arbitrarily, unreasonably, or capriciously to be unsatisfied, in order to evade liability. A standard for the soil compaction report was stated in the deposit receipt when it stated that the report was to be from a reliable testing firm, and from the receipt as a whole it could be determined that the report and maps should meet reasonable standards for the commercial purpose of subdivision. In these circumstances, the purchaser could not evade liability by arbitrary rejection of the report and maps. Thus, the plaintiff alleged the existence of a valid contract (*47 Cal. 2d 875, 882-883)* .

[b] Reasonable-Person Standard Applies to Commercial Satisfaction Clause

The facts and procedural background of ***Mattei v. Hopper*** *(1958) 51 Cal. 2d 119, 330 P.2d 625* , are discussed in *§ 50.370[3][a]*. In holding that the contract involved in the action was not illusory, the Supreme Court noted that satisfaction clauses in contracts usually are given effect and are divided into two primary categories, each of which has received different treatment. If the condition calls for satisfaction as to commercial value or quality, operative fitness, or mechanical utility, then dissatisfaction cannot be claimed arbitrarily, unreasonably, or capriciously, and the standard of a reasonable person is used to determine whether satisfaction has been received. On the other hand, when the question is one of judgment, fancy, or taste, the promisor's duty to act in good faith is adequate consideration to support the contract (*51 Cal. 2d 119, 123-124)* .

Collins v. Vickter Manor, Inc. *(1957) 47 Cal. 2d 875, 306 P.2d 783* , is discussed in [a], *above*.

[c] Good-Faith Standard Applies When Party's Judgment Is Involved

Mattei v. Hopper *(1958) 51 Cal. 2d 119, 330 P.2d 625* , is discussed in *§ 50.370[3][a]*.

In ***Moreland Development Co. v. Gladstone Holmes, Inc.*** *(1982) 135 Cal. App. 3d 973, 186 Cal. Rptr. 6* , an action for breach of contract by a purchaser of real property arising out of the seller's refusal to comply with the contract, the plaintiff's obligation to purchase and close escrow was conditioned on approval of the transaction by the plaintiff's board of directors. The trial court granted the defendant's motion for summary judgment on the ground that the contract was illusory.

The court of appeal reversed. It could not be said as a matter of law that a bilateral contract was not made (*135 Cal. App. 3d 973, 978)* . The condition of board approval does not give the plaintiff the absolute right to escape its obligation under the agreement, since there is an implicit obligation on the part of the plaintiff's officers to carry out the objectives of the contract in good faith by submitting the proposal to the board (*135 Cal. App. 3d 973, 977)* . Part of the implicit obligation would be that the board would actually confer and decide whether to approve the proposed sale (*135 Cal. App. 3d 973, 977-978)* .

[4] Additional Authorities

[a] Contract Providing for Performance to Party's Satisfaction Is Not Illusory

In *Chodos v. West Publishing Co, Inc. (9th Cir. 2002) 292 F.3d 992* , a legal publisher and author entered into a standard industry agreement under which the author agreed to write a legal treatise. After the author had spent some years fulfilling his part of the bargain and had submitted a completed manuscript, the publisher decided not to publish the work, citing solely sales and marketing reasons. The author sued for damages in quantum meruit. In addition to an allegation that the publisher breached the contract, he argued that the agreement was illusory because the contract required him to produce a work of publishable quality but allowed the publisher in its discretion to decide unilaterally

whether or not to publish the work. The district court held that under the terms of the contract the publisher's decision not to publish was within its discretion, and granted summary judgment in the publisher's favor. The court of appeals reversed. The court found that the agreement did impose numerous obligations on the author but gave the publisher "the right in itsdiscretion to terminate" the publishing relationship after receiving the manuscript and determining that it was unacceptable. However, it concluded that the contract was not illusory because the publisher's duty to exercise its discretion was limited by its duty of good faith and fair dealing. Specifically, because the standard agreement obligated the publisher to make a judgment as to the quality or literary merit of the author's work-to determine whether the work was "acceptable" or "unacceptable"--it must make that judgment in good faith, and could not reject a manuscript for other, unrelated reasons (*292 F.3d 992, 996-997)* . The court of appeals next found that the author's alternative argument, that a contract existed and it was breached, was more persuasive. It held that the author was entitled to sue for restitution for the time and effort he reasonably invested in writing the manuscript (*292 F.3d 992, 1001-1002)* .

[b] Good-Faith Standard Applies When Party's Judgment Is Involved

In *Larwin-Southern Cal., Inc. v. JGB Inv. Co. (1979) 101 Cal. App. 3d 626, 162 Cal. Rptr. 52* , a would-be purchaser of real estate sought specific performance of a written contract. Among the provisions of the contract were two requiring the purchaser's approval of the preliminary title report and the engineering report. The trial court sustained the defendant's demurrer without leave to amend, based in part on the lack of mutuality of obligation because of these "satisfaction" clauses. The court of appeal reversed, holding that, with the type of subjective satisfaction clauses in this case, the party whose satisfaction is required is under a duty of exercising its approval or disapproval in good faith. The existence of an additional clause, indicating that the purchaser's approval was subject to its sole discretion and judgment, did not change the result (*101 Cal. App. 3d 626, 638-640)* .

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5-50 California Points & Authorities § 50.431

§ 50.431 Contract Is Not Illusory Merely Because Seller Unilaterally Determines Price

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

A CONTRACT THAT PROVIDES FOR THE SELLER'S UNILATERALLY DETERMINATION OF THE PRICE IS NOT ILLUSORY.

Contract Providing That Seller May Unilaterally Determine Price Is Not Illusory. The fact that one party has power to set or vary the price does not render a contract illusory. That party is obligated by the covenant of good faith and fair dealing to set or vary a price that is objectively reasonable (*Perdue v. Crocker National Bank (1985) 38 Cal. 3d 913, 923-924, 216 Cal. Rptr. 345, 702 P.2d 503*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that the contract is not illusory merely because the price term is to be unilaterally determined by one party, typically the seller.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a party seeks to raise this contention. For example, it may be used to oppose a defendant's motion for summary judgment.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised in opposition to a defendant's motion for summary judgment, the memorandum would include an analysis of the

moving and opposing papers showing that there is a triable issue of fact as to whether the contract is illusory.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. Forexample, if used in a memorandum opposing a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.370* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Contract Providing That Seller May Unilaterally Determine Price Is Not Illusory

Perdue v. Crocker National Bank *(1985) 38 Cal. 3d 913, 923-924, 216 Cal. Rptr. 345, 702 P.2d 503* , was a class action regarding charges imposed by a bank for processing and dishonoring checks because the drawer had "not sufficient funds" on deposit (NSF checks and NSF charges). The plaintiff pleaded five causes of action: (1) for a judicial declaration that the bank's signature card was not a contract authorizing NSF charges, (2) for a judicial declaration that the NSF charges were oppressive and unconscionable, (3) for damages for unjust enrichment derived from the bank's collection of illegal NSF charges, (4) for an injunction against unfair and deceptive practices, namely the bank's failure to inform customers of the contractual nature of the signature card and its practice of waiving NSF charges for certain preferred customers, and (5) for damages for the difference between the NSF charges and the bank's actual expenses in processing NSF checks, on the theory that the charges represented an unreasonable attempt to fix liquidated damages. The bank's general demurrer was sustained without leave to amend as to all causes of action.

The Supreme Court reversed and remanded with instructions that the plaintiff be allowed to amend the complaint to seek a judicial declaration determining whether the charges set by the bank were consonant with good faith and fair dealing. The plaintiff was not entitled to a declaration that the signature card was not a contract; the signature card was a contract. The fact that the signature-card contract empowered the bank to unilaterally determine and vary the amount NSF charges did not make the contract illusory but imposed on the bank the obligation of good faith and fair dealing. The bank's conduct in setting and varying the NSF charges must be objectively reasonable (*38 Cal. 3d 913, 923-924)* .

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5-50 California Points & Authorities § 50.432

§ 50.432 Unilateral Contract Is Not Illusory When One Party Has Implied Power to Terminate or Modify It, If Exercise Is Subject to Limitations

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE FACT THAT ONE PARTY RESERVES THE IMPLIED POWER TO TERMINATE OR MODIFY A UNILATERAL CONTRACT IS NOT FATAL TO ITS ENFORCEMENT IF THE EXERCISE OF THE POWER IS SUBJECT TO LIMITATIONS SUCH AS FAIRNESS AND REASONABLE NOTICE.

Unilateral Contract in Which One Party Has Power to Terminate or Modify Is Not Illusory If Exercise of Power Is Subject to Limitations. The fact that one party reserves the implied power to terminate or modify a unilateral contract is not fatal to its enforcement if the exercise of the power is subject to limitations, such as fairness and reasonable notice (*Asmus v. Pacific Bell (2000) 23 Cal. 4th 1, 15-16, 96 Cal. Rptr. 2d 179, 999 P.2d 71*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that a unilateral contract is not illusory merely because one party has the power to terminate or modify it. This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a party seeks to raise this contention.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised in opposition to a defendant's motion for summary judgment, the memorandum would include an analysis of the moving and opposing papers showing that there is a triable issue of fact as to whether the contract is illusory.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Unilateral Contract Is Not Illusory When One Party Has Implied Power to Terminate or Modify It, If Exercise Is Subject to Limitations

The facts and procedural background of *Asmus v. Pacific Bell (2000) 23 Cal. 4th 1, 96 Cal. Rptr. 2d 179, 999 P.2d 71* are discussed in *§ 50.381[3][b]*. Plaintiffs claimed that their employer's management employment security policy (MESP) would be an illusory contract if the employer could unilaterally modify it. They relied on the rule that when a party to a contract retains the unfettered right to terminate or modify the agreement, the contract is deemed to be illusory. The Supreme Court stated that an unqualified right to modify or terminate the contract is not enforceable. However, the fact that one party reserves the implied power to terminate or modify a unilateral contract is not fatal to its enforcement if the exercise of the power is subject to limitations, such as fairness and reasonable notice. In this case, the MESP was not illusory because plaintiff employees obtained the benefits of the policy while it was in effect. As long as the MESP remained in force, the employer could not treat the contract as illusory by refusing to adhere to its terms. The employer's promise pursuant to the MESP was fully enforceable until terminated or modified (*23 Cal. 4th 1, 15-16)* .

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[Reserved]

§§ 50.433[Reserved]

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5-50 California Points & Authorities § 50.450

§ 50.450 Obligation Sued On Was Supplanted by New Obligation

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

A NEW OBLIGATION BETWEEN THE SAME PARTIES WAS SUBSTITUTED FOR THE CONTRACT [ON WHICH THE _____ (VERDICT *or* DECISION) FOR THE PLAINTIFF IS BASED], WITH THE INTENT TO EXTINGUISH THE ORIGINAL OBLIGATION[, AND THE DEFENDANT HAS FULFILLED THE NEW OBLIGATION].

A. Novation Defined. Novation is the substitution of a new obligation for an existing one (*Civ. Code § 1530*).

B. Contract Was Supplanted by New Obligation. A contract that is the basis of an action for breach is not enforceable when it clearly appears that a novation was made by the substitution of a new obligation between the same parties with the intent to extinguish the old obligation (*see Civ. Code § 1531(1)*); *Producers Fruit Co. v. Goddard (1925) 75 Cal. App. 737, 754-756, 243 P. 686*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that a novation was made by the substitution of a new obligation between the same parties with the intent to extinguish the original contract [*Civ. Code § 1531(1)*; *see Code Civ. Proc. § 657(6)*].

Although a novation might ordinarily be asserted by a defendant as a defense to enforcement of the original obligation, novation by substitution of a new obligation may be also be asserted offensively by a plaintiff who is seeking to enforce the new obligation [*see, e.g., Childs v. Hunt (1970) 9 Cal. App. 3d 276, 279, 88 Cal. Rptr. 34* ; *San Gabriel Valley*

Ready-Mixt v. Casillas (1956) 142 Cal. App. 2d 137, 139-141, 298 P.2d 76] .

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a party seeks to raise this contention. For example, it may be used to support a defendant's motion for summary judgment.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised in support of a defendant's motion for summary judgment, the memorandum would include an analysis of the moving and opposing papers showing that there is a triable issue of fact as to whether the original contract has been replaced by a new agreement.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda in §§ 50.560, *50.461*, and *50.464* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Contract Was Supplanted by New Obligation

Producers Fruit Co. v. Goddard *(1925) 75 Cal. App. 737, 243 P. 686* , was an action for breach of contract against a fruit grower for failure to deliver canning fruit pursuant to a written contract. As a special defense, the defendant alleged that the parties had subsequently made an oral agreement for the delivery of shipping and canning fruit at market price. Judgment was rendered for the defendant on a counterclaim for breach of the oral agreement. On appeal the plaintiff contended that the oral agreement could not extinguish the written contract because it was invalid under the statute of frauds as an agreement not able to be performed within a year from its making.

The court of appeal affirmed. Because of the difference in terms between the two agreements, the jury was justified in finding that the oral agreement was made with the intention by both parties that it should constitute a novation, as defined in *Civ. Code § 1531*. An oral agreement that is otherwise valid but is required to be in writing is effective for all purposes for which it was made until its enforcement is voided because it is not in writing. Since it clearly appeared that the parties intended to replace the written agreement with the oral agreement, the written agreement was entirely extinguished. Additionally, because a novation was shown, the provision of *Civ. Code § 1698* requiring that a written contract be modified by a written contract or an executed oral agreement had no application (*75 Cal. App. 737,*

754-757) .

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5-50 California Points & Authorities § 50.451

§ 50.451 Contract Is Unenforceable Against Defendant Because New Debtor Was Substituted for Defendant

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE CONTRACT IS NOT ENFORCEABLE AGAINST _____ THE [*original obligor, e.g.,* DEFENDANT] BECAUSE A NOVATION WAS MADE BY THE SUBSTITUTION OF A NEW DEBTOR IN PLACE OF THE _____ [*original obligor, e.g.,* DEFENDANT] WITH THE INTENT TO RELEASE THE _____ [*original obligor, e.g.,* DEFENDANT].

A. Novation Defined. [*See § 50.450[1], Paragraph A.*]

B. New Debtor Was Substituted for Old Debtor. A contract is not enforceable against an old debtor when a novation has been made by the substitution of a new debtor in place of the old debtor with the intent to release the old debtor (*see Civ. Code § 1531(2)*; *Alexander v. Angel (1951) 37 Cal. 2d 856, 860-863, 236 P.2d 561*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that a novation was made by the substitution of a new debtor in the defendants' place, with the intent to release the defendant [*Civ. Code § 1531(2)*; *see Code Civ. Proc. § 657(6)*].

Although a novation substituting debtors might ordinarily be asserted by a defendant as a defense to enforcement of the obligation as to him or her, a novation by substitution of a new debtor may also be asserted offensively by a plaintiff who is seeking to enforce the obligation against the new debtor [*see, e.g., Baxter v. Chico Constr. Co. (1916) 31 Cal. App. 492, 493-494, 160 P. 1084]* .

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a party seeks to raise this contention. For example, it may be used to support a defendant's motion for summary judgment.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised in support of a defendant's motion for summary judgment, the memorandum would include an analysis of the moving and opposing papers showing that there is a triable issue of fact as to whether defendant has been substituted by a new obligor.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in §§ 50.462, 50.463* may in an appropriate case be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] New Debtor Was Substituted for Old Debtor

Alexander v. Angel *(1951) 37 Cal. 2d 856, 236 P.2d 561* , was an action to foreclose a chattel mortgage on business fixtures given as security for two promissory notes for the purchase of a restaurant. The defendant pleaded, by affirmative defense and cross complaint, that the property had been conveyed to third parties who made a separate agreement with the plaintiffs to assume the defendant's obligation and release him from all liability. The two obligations differed in that (1) the new obligation with the third parties provided for monthly payments whereas the defendant's notes came due on specified dates, (2) the agreement with the third parties provided for interest payments while the defendant's notes did not, and (3) the new agreement contained an acceleration clause, which also was not in the notes. On the execution of the new agreement with the third parties, the plaintiff made no attempt to contact the defendant or obtain his consent to these material changes made in the terms of the obligation, and this conduct indicated the plaintiff's intent to release the defendant from liability on the original agreement. An arrearage accumulated on the new agreement over a 13-month period, but the plaintiff made no demand on the defendant during that time. The trial court sustained the defendant's claim of novation. Judgment was rendered for the defendant.

The Supreme Court affirmed. Under *Civ. Code § 1530*, a novation is the substitution of a new obligation for an existing one. One of the ways a novation may be consummated is by the substitution of a new debtor in place of the old one,

with the intent to release the old debtor, pursuant to *Civ. Code § 1531*. A novation must be pleaded either expressly or by unequivocal implication, and the burden of proof is on the party asserting it. The question of whether a novation has taken place is always one of intention, with the controlling factor being the intent of the obligee to effect a release of the original obligor under the original agreement. While the evidence in support of a novation must be clear and convincing, the question is one of fact, with the weight and sufficiency of the proof being matters for the determination of the trier of fact. In this case, distinguishing factors between the two obligations relating to the restaurant sale indicated not merely the assumption of a preexisting obligation but the consummation of an entirely new agreement, as to parties and obligation, in relation to the mortgage debt. When it satisfactorily appears that a new agreement was intended by the parties to take the place of an existing one, as in this case when the parties proceeded to act for some 15 months in reliance solely on the substituted agreement, it necessarily follows that the old agreement has been entirely abrogated or extinguished. The trial court could reasonably infer that the substitution of a new obligation for the existing one was intended (*37 Cal. 2d 856, 860-863)* .

[4] Additional Authorities

[a] New Debtor Was Substituted for Old Debtor

Porter Pin Co. v. Sakin (1952) 112 Cal. App. 2d 760, 247 P.2d 81 , was an action for an accounting under a license agreement. The plaintiff, the owner of letters patent on safety pins, granted to the defendants the exclusive right to manufacture and distribute the safety pins. The agreement established a guarantied monthly royalty and gave the defendants the right to assign the contract to a corporation to be formed. The defendants assigned the contract to the corporation, of which they became officers and directors. The agreement provided for a royalty to be paid monthly as long as the defendants sold and distributed the pins. The defendants never sold the safety pins, but the corporation did. The trial court denied relief against the defendants on the ground that a novation existed. In affirming the judgment for the defendants, the court of appeal held that there was substantial evidence supporting the finding that the defendants were released from liability by the agreement to substitute the corporation for them. Conduct may form the basis for a novation. Looking to the parties' conduct, the court noted that only the corporation, not the defendants, sold and distributed the pins. The defendants never paid any royalties or rendered any accountings, and the plaintiff conducted all business dealings with the corporation (*112 Cal. App. 2d 760, 761-762)* .

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5-50 California Points & Authorities § 50.452

§ 50.452 Plaintiff Was Substituted as New Creditor With Intent to Transfer Original Creditor's Rights to Plaintiff

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE PLAINTIFF WAS SUBSTITUTED IN PLACE OF THE ORIGINAL CREDITOR WITH THE INTENT TO TRANSFER THE RIGHTS OF THE ORIGINAL CREDITOR UNDER THE CONTRACT TO THE PLAINTIFF.

A. Novation Defined. [*See § 50.450[1], Paragraph A.*]

B. New Creditor Was Substituted for Old Creditor. A contract by which a new creditor was substituted in place of the old creditor, with the intent to transfer the rights of the old creditor to the new creditor, may be enforced by the new creditor (*see Civ. Code § 1531(3)*; *Eckart v. Brown (1939) 34 Cal. App. 2d 182, 187, 93 P.2d 212*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that the plaintiff in an action for damages against a debtor for breach of an alleged novation contract was substituted in place of the old creditor, with the intent to transfer the rights of the old creditor to the plaintiff [*see Civ. Code § 1531(3)*; *Code Civ. Proc. § 657(6)*].

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a party seeks to raise this contention. For example, it may be used to oppose a defendant's motion for summary judgment purporting that plaintiff was not a party to the contract.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised to oppose a defendant's motion for summary judgment, the memorandum would include an analysis of the moving and opposing papers showing that there is a triable issue of fact as to whether plaintiff has been properly substituted as the creditor or obligee.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] New Creditor Was Substituted for Old Creditor

Eckart v. Brown *(1939) 34 Cal. App. 2d 182, 93 P.2d 212* , was an action to recover the price of shares of stock. The defendant offered to transferstock to a third person in consideration of his acceptance of an employment offer. The contract was assigned to the plaintiff, and the defendant agreed to the assignment, with the additional promise by the defendant to buy the stock from the plaintiff on request. The plaintiff brought the action when the defendant refused to buy the stock on demand. Judgment was rendered for the plaintiff.

The court of appeal affirmed. A novation is the substitution of a new obligation for an existing one. The effect of a novation is to make the original agreement a nullity, and the rights of the new parties are governed solely by the new agreement. In this case, the stock buy-back agreement, together with the assignment to the plaintiff that was approved by the defendant, resulted in a novation and a new agreement. Thus, as the other questions on appeal were decided in the plaintiff's favor, the defendant was obligated to buy the shares of stock from the plaintiff at a fixed price within a given period (*34 Cal. App. 2d 182, 187-188)* .

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[Reserved]

§§ 50.453[Reserved]

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5-50 California Points & Authorities § 50.460

§ 50.460 Alleged Novation Contract Fails to Conform to General Contract Rules

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE ALLEGED CONTRACT OF NOVATION FAILS TO CONFORM TO THE RULES GOVERNING CONTRACTS IN GENERAL IN THAT _____ [*specify reason why contract creating novation is invalid, e.g.,* THE PARTIES DID NOT MUTUALLY ASSENT TO THE SUBSTITUTION OF A NEW OBLIGATION FOR THE OLD OBLIGATION].

A. Novation Is Subject to Contract Rules. Novation is made by contract and is subject to all of the rules concerning contracts in general (*Civ. Code § 1532*).

[*Optional*] **B. Lack of Mutual Assent.** There is no novation when the parties do not mutually assent to the new contract (*Duncanson-Harrelson Co. v. Travelers Indem. Co. (1962) 209 Cal. App. 2d 62, 69, 25 Cal. Rptr. 718* ; *Ayoob v. Ayoob (1946) 74 Cal. App. 2d 236, 251, 168 P.2d 462*).

[*Optional*] **C. Lack of Consideration.** There is no novation when there is a lack of consideration for the new contract (*Hunt v. Smyth (1972) 25 Cal. App. 3d 807, 810, 101 Cal. Rptr. 4* ; *Ybarra v. Solarz (1942) 56 Cal. App. 2d 342, 346, 132 P.2d 880*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that an alleged novation contract fails to conform to the rules governing contracts in general.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a party seeks to raise this contention. For example, it may be used to oppose a defendant's motion for summary judgment.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised to oppose a defendant's motion for summary judgment, the memorandum would include an analysis of the moving and opposing papers showing that there is a triable issue of fact as to whether the obligation sued on was in fact replaced by a new agreement.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

In a proper case this form may be combined with the memoranda *set out in § 50.461*.

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.450* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Lack of Mutual Assent

Duncanson-Harrelson Co. v. Travelers Indem. Co. *(1962) 209 Cal. App. 2d 62, 25 Cal. Rptr. 718* , was an action by a subcontractor against the surety on a public works contractor's bond for materials furnished to the contractor. The plaintiff rented steel sheet piling and pile-driving equipment to the contractor, with rental the period to terminate June 10. When the contractor was declared in default and the contract was terminated on March 3, the public entity made an agreement with the contractor by which it assumed liability for all rental charges after March 3. The trial court granted judgment for the plaintiff. On appeal the defendant contended that a novation existed in that the public entity agreed to assume liability for all rental charges with the contractor, and thus the public entity, not the contractor or its surety, should be liable.

The court of appeal affirmed. An essential element of a novation is the agreement of all of the parties to the new contract. There was no evidence that the plaintiff was a party to the alleged agreement between the public entity and the contractor, and the rental agreement was still controlling between the contractor and the plaintiff (*209 Cal. App. 2d 62, 69-70)* .

Ayoob v. Ayoob *(1946) 74 Cal. App. 2d 236, 168 P.2d 462* , was an action against the estate of the plaintiff's husband

to recover on an alleged oral antenuptial agreement. The plaintiff's husband had promised to pay her $5,000 from his estate after his death if she would marry him, move to America, and care for him. After their marriage, the husband told the plaintiff that he had made her the beneficiary of his $5,000 life insurance policy. After the husband's death, the plaintiff received the policy proceeds but sued to recover on the oral promise. The defendant alleged that the parties substituted the agreement to make the plaintiff a beneficiary under the life insurance policy in place of the antenuptial agreement. The trial court found that the oral promise to change beneficiaries had been satisfied but did not find evidence that the agreement to change beneficiaries constituted a novation. Judgment was rendered for the defendants.

The court of appeal reversed. The burden of proving the novation was on the defendant, but the evidence in this case was insufficient to satisfy the burden. It is the plaintiff's intent that would be controlling in trying to establish a novation. Novation is a bilateral or multilateral contract requiring the mutual assent of all parties, and as between the obligor and the obligee, the intent of the obligee is controlling on the question of waiver or release of the obligation under the original agreement. Even if the husband had intended the original obligation to be superseded by the new acts and promise, they would have been insufficient to constitute a novation in that they were only illusory and did not amount to an executed consideration. Moreover, the plaintiff testified that nothing was said toindicate that the change of beneficiaries would constitute satisfaction of the original promise to pay $5,000 out of the husband's estate; this was corroborated by the fact that she was allowed to keep a written memorandum of the husband's original promise at his suggestion, and it was evidence against the existence of a novation and in favor of the subsistence of the original agreement (*74 Cal. App. 2d 236, 251-252)* .

[b] Lack of Consideration

The facts and procedural background of ***Hunt v. Smyth*** *(1972) 25 Cal. App. 3d 807, 101 Cal. Rptr. 4* , are discussed in *§ 50.464[3][b]*. In affirming judgment for the defendant, the court of appeal rejected the plaintiff's argument that the parties made a novation by substituting a lower monthly payment on a promissory note. In the absence of some agreement, the mere acceptance of partial payments of what is due on an obligation does not discharge the balance or modify the terms of payment. There must be some consideration flowing from the obligor, either a benefit to the obligee or a detriment to the obligor for which the obligee bargained, before a novation can be found. The court held the evidence to be insufficient to establish a novation (*25 Cal. App. 3d 807, 810)* .

Ybarra v. Solarz *(1942) 56 Cal. App. 2d 342, 132 P.2d 880* , was an action to cancel a trust deed and promissory note and to restrain foreclosure proceedings against real property. The plaintiff agreed to purchase the property from the defendants. The agreement provided that the vendors reserved the right at any time to give a deed and take back a trust deed for the unpaid balance, payable in accordance with the terms of the contract. The plaintiff alleged that the vendors induced him to execute a trust deed which, contrary to the terms of the agreement, provided that the unpaid balance would become due and payable on a specified future date. When the vendors indicated their intention to foreclose after this date had passed, the plaintiff commenced this action, alleging lack of consideration for the new terms. The vendors' general demurrer was sustained without leave to amend. On appeal, the vendors contended that the parties made a novation through the execution of the trust deed and promissory note, and the unpaid balance of the purchase price, being an antecedent debt, constituted sufficient consideration.

The court of appeal reversed. A novation is subject to the rules of contracts and requires a consideration to support it. If the terms of sale had remained the same, the plaintiff would have had no cause for complaint because the consideration for the original contract sufficed. However, the complaint alleged a change in the terms of the agreement between the parties, which resulted in a more onerous burden on the plaintiff without any consideration from the vendors. These allegations were sufficient as against a general demurrer (*56 Cal. App. 2d 342, 346)* .

[4] Additional Authorities

[a] Lack of Mutual Assent

Molera v. Cooper (1916) 173 Cal. 259, 160 P. 231 , was an action to collect on a promissory note that the defendant had made to the plaintiff's testator. The defendant answered that the parties to the note had agreed that in consideration of its extinguishment, the defendant would hold the amount of the note in trust for the benefit of two minors. A demurrer to the answer was sustained, and judgment was rendered for the plaintiff. The Supreme Court affirmed, with modifications concerning the amount of interest. There was no trust as there was no trust property in existence, and a mere promise to obtain money and hold it in trust is insufficient. A novation had not occurred. None of the three alternatives under *Civ. Code § 1531* applied, as there was no agreement between the same parties, and no new debtor or creditor was substituted. The defendant contended that a new obligation to third parties, the two children, had been created. However, neither the children nor their guardians consented to the new obligation. For the same reason, there was no transfer to them of the rights of the original obligee. Such a novation would require the consent both of the original parties to change the old contract or their relations to it and extinguish the liability, and of the new parties to create the new contract (*173 Cal. 259, 262-263)* .

California Points & Authorities

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Volume 5 Chapters 50-59 CONTRACTS---to---CORPORATIONS
CHAPTER 50 CONTRACTS
PART II. FORMS
D. Existence of Contract
6. Novation of Contract

5-50 California Points & Authorities § 50.461

§ 50.461 Novation by Substitution of New Obligation Is Not Shown

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THERE WAS NO NOVATION BY SUBSTITUTION OF A NEW OBLIGATION BECAUSE IT DOES NOT CLEARLY APPEAR THAT THE PARTIES INTENDED TO EXTINGUISH THE ORIGINAL OBLIGATION.

A. Lack of Intent to Substitute New Obligation. There is no novation by substitution of a new obligation when it does not clearly appear from the evidence that the parties intended to extinguish the old obligation (*see Civ. Code § 1531(1)*; *Paykar Construction, Inc. v. Spilat Construction Corp. (2001) 92 Cal. App. 4th 488, 494, 111 Cal. Rptr. 2d 863* ; *Wade v. Diamond A Cattle Co. (1975) 44 Cal. App. 3d 453, 457, 118 Cal. Rptr. 695* ; *Davies Mach. Co. v. Pine Mountain Club, Inc. (1974) 39 Cal. App. 3d 18, 25, 113 Cal. Rptr. 784*).

B. Burden of Proof. The burden of proof is on the party asserting that a novation has been consummated (*Davies Mach. Co. v. Pine Mountain Club, Inc. (1974) 39 Cal. App. 3d 18, 24-25, 113 Cal. Rptr. 784* ; *Ehrenreich v. Shelton (1963) 213 Cal. App. 2d 376, 378-379, 28 Cal. Rptr. 855*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that a novation did not occur by the substitution of a new obligation because it does not clearly appear that the parties intended to extinguish the old obligation.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a party seeks to raise this contention. For example, it may be used to oppose a defendant's motion for summary judgment.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised to oppose a defendant's motion for summary judgment, the memorandum would include an analysis of the moving and opposing papers showing that there is a triable issue of fact as to whether the obligation sued on was in fact replaced by a new agreement.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

In a proper case this form may be combined with the memoranda *set out in § 50.460*.

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing amemorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.450* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Lack of Intent to Substitute New Obligation

Paykar Construction, Inc. v. Spilat Construction Corp. *(2001) 92 Cal. App. 4th 488, 494, 111 Cal. Rptr. 2d 863* was an action by a subcontractor against a general contractor for amounts due under a subcontract which the general contractor and the property owners had executed jointly and severally. In a prior action against the same parties, the subcontractor had settled with the owners, released a mechanic's lien and dismissed the entire action without prejudice. Under the terms of the settlement, the owners executed a promissory note to the subcontractor, secured by deeds of trust on other properties, and also agreed to pay specified amounts. In a subsequent action, the subcontractor sued the general contractor alleging causes of action for breach of contract and a common count for book account. The jury found a substantial breach and awarded damages. The general contractor moved for judgment notwithstanding the verdict or new trial. It argued that both its debt to the subcontractor and the owners' debt to the subcontractor were based on the same obligation to pay for work performed under the subcontract. Therefore, when the owners provided a promissory note in lieu of the original debt, the subcontractor's debt was "merged" into the promissory note and extinguished. The trial court denied the motion, and the court of appeal affirmed. With respect to novation, the court of appeal stated that it saw no indication in the record on appeal that the subcontractor intended to extinguish the general contractor's obligation, much less evidence compelling that conclusion. There was no document stating that the subcontractor's obligation was extinguished or excused in any manner, and the events surrounding the settlement did not established as a matter of law that the subcontractor intended to excuse the general contractor's debt. The court found of particular importance the fact that upon settling with the owners, the subcontractor dismissed its first action against the general contractor and the owners *without prejudice*, thereby preserving its rights against the general contractor (*92 Cal. App. 4th 488, 494)* .

Wade v. Diamond A Cattle Co. *(1975) 44 Cal. App. 3d 453, 118 Cal. Rptr. 695* , was an action for money due involving three separate transactions for the buying, feeding and fattening, and reselling of cattle. The defendant conducted a feed yard on its own account and also as agent andfactor for the accounts of others including the plaintiff. The defendant also financed customers' purchases up to 75 percent of the price. The amount financed with interest was deducted from the price at the time of resale. The plaintiff alleged that in one of the transactions, the defendant orally agreed to buy a certain number of head of cattle for the plaintiff's account. The parties also made a written financing agreement for cattle at $27 per hundredweight, under which the plaintiff made a small equity payment and the balance was financed by the defendant. The defendant resold the cattle but paid to the plaintiff only a part of the plaintiff's net profit on the resale and the plaintiff's original equity payment. The plaintiff's sued to recover the balance due. The defendant answered by alleging the existence of an earlier written contract by which the defendant sold cattle to the plaintiff at $33 per hundredweight. The defendant alleged that the $27 price appeared in the financing agreement because of mistake and inadvertence. As the defendant had already advanced part of the balance owing to the plaintiff based on the $27 price, the defendant cross complained for the amount of overpayment based on the $33 price. The trial court found that the basic agreement was for $33 per hundredweight, and the price of $27 in the financing agreement was a unilateral mistake by the defendant known to the plaintiff. Judgment was rendered for the plaintiff but awarding the defendant a setoff based on the reasonable market value of the cattle at the time the original contract was executed.

The court of appeal affirmed. The court construed the plaintiff's contention that the written contract at $33 per hundredweight was modified by the financing agreement, based on the $27 price, to be a contention for a novation. There is no valid novation unless the parties intend that the rights and obligations of the new contract be substituted for the terms and conditions of the old contract. Although the evidence was highly conflicting, there was substantial evidence to support the finding that the intentwas lacking because of the defendant's inadvertence and mistake in using the $27 price (*44 Cal. App. 3d 453, 457)* .

The facts and procedural background of ***Davies Mach. Co. v. Pine Mountain Club, Inc.*** *(1974) 39 Cal. App. 3d 18, 113 Cal. Rptr. 784* , are discussed in [b], *below*. The parties orally agreed that the contractor make payments on the maintenance account based on the hours he used the equipment. In holding that the oral agreement did not constitute a novation of the security agreement for the purchase of the equipment, the court stated that the intention of the parties to extinguish the prior obligation and to substitute a new agreement in its place must clearly appear. The court found the evidence of the intent to be lacking, and the new arrangement for payment under the contract was not, in itself, sufficient to effect a novation (*39 Cal. App. 3d 18, 25-26)* .

[b] Burden of Proof

Davies Mach. Co. v. Pine Mountain Club, Inc. *(1974) 39 Cal. App. 3d 18, 113 Cal. Rptr. 784* , was an action to foreclose a mechanic's lien against the club's real property, for breach of a contract to buy land-leveling equipment, and to collect against an insurance company that bonded the buyer against liens on the property. The plaintiff had made a security agreement for the sale of earth-moving equipment to a land-leveling contractor. When the contractor became delinquent in the contract payments and on the open account established for maintenance and repair of the equipment, he made an oral agreement with the plaintiff to keep the equipment and to make payments based on the number of hours the equipment was used. After the contractor began leveling work on the club's land, he again became delinquent on both the maintenance account and the hourly rate for the equipment. The plaintiff served a preliminary notice on the club of recording a mechanic's lien and filing of a stop notice. When the contractor ceased working on the job, the plaintiff recorded a mechanic's lien against the property and commenced the foreclosure action. The trial court found that the oral agreement by implication canceled and terminated all prior written agreements between the parties respecting the equipment. Judgment was rendered for the plaintiff against the contractor, and a lien was charged against the club's property.

The court of appeal affirmed the judgment against the contractor but reversed both the judgment foreclosing the

mechanic's lien against the club's property and the judgment against the insurance company. The judgment ordering foreclosure of the lien could be upheld only if the plaintiff was the lessor of the equipment at the time it was used by the contractor for the job on the defendant's land. Sellers who have only a security interest in the equipment used by contractors or subcontractors on the property are not included within the class of persons entitled to a mechanic's lien under *Civ. Code § 3110*, as they are not beneficial owners of the equipment.The trial court's finding that the oral agreement by implication canceled the prior written agreement was an apparent finding of a novation, by which an oral lease agreement was substituted in place of the purchase agreement with the intent to extinguish the latter. Generally the burden of proving a novation is on the party asserting that a novation has been consummated, and the intent of the parties must clearly appear (*39 Cal. App. 3d 18, 24-25)* . There was no evidence that the parties expressly stated an intent to extinguish the purchase contract. To the contrary, as shown by their subsequent conduct and testimony, the parties intended that when the maintenance account was paid up, the payments were to be credited on the price of the equipment. Testimony indicated that the oral agreement was for the purpose of arranging lower monthly payments, and the plaintiff never released its equity in the equipment. Additionally, the plaintiff's standard lease form was not used; the contractor paid the personal property taxes on the equipment, which would have been paid by the plaintiff under a bona fide lease arrangement; the contractor made safety modifications on the equipment; and the principal charges declined over a period of a year, raising the inference that the hourly payments were credited to the purchase price. Thus, since the evidence indicated that the parties did not intend to substitute a lease agreement for the purchase agreement, the plaintiff was not a lessor entitled to a mechanic's lien, and the judgment of foreclosure was reversed (*39 Cal. App. 3d 18, 25-27)* .

Ehrenreich v. Shelton *(1963) 213 Cal. App. 2d 376, 28 Cal. Rptr. 855* , was an action on a promissory note. The plaintiff had lent the defendant a sum of money in connection with the formation of a corporation. The parties subsequently modified the defendant's note to provide that the defendant would not be liable after the corporation was actually completed and formed. At the same time, they drew up two instruments. The first was an unsigned preincorporation subscription agreement that the sum disbursed to the defendant would be considered a loan to be repaid only from dividends from the corporation's stock. The second was a signed ancillary agreement by which the defendant was relieved from liability to the plaintiff for the sum if he did not rescind the agreement before a certain date. The trial court ruled that a novation was effected, and liability on the note was thus terminated. Judgment was rendered for the defendant.

The court of appeal reversed. Because there was some doubt as to which version of the facts was correct, the trial court erroneously placed the burden of proof on the plaintiff, whereas the burden of proving a novation is on the party asserting it (*213 Cal. App. 2d 376, 378-379)* . There was considerable doubt as to the parties' intent in making the secondary agreements. Generally in determining whether there has been a novation, the intent of the parties must be investigated and is determinative, and the evidence to establish the intent must be clear and convincing (*213 Cal. App. 2d 376, 381)* .

[4] Additional Authorities

[a] Lack of Intent to Substitute New Obligation

The court of appeal in *Meadows v. Grimsgaard (1985) 175 Cal. App. 3d 475, 221 Cal. Rptr. 22* , affirmed the trial court's judgment for the defendants. The plaintiff, purchaser under a "back-up" contract, sought declaratory relief and specific performance. The back-up contract was conditioned on the failure, termination, cancellation, or novation of the original contract. Despite the fact that the original contract called for a cash down payment but the deal was consummated by purchasers' giving exchange property, no novation was found. Since the only issue was the intent of the parties to the original contract, in the absence of any showing of fraud or collusion against the plaintiff, the policy against interference with contracts by third parties, the intent of parties to the original contract, and the fact they were the parties to the original contract controlled (*175 Cal. App. 3d 475, 483-484)* .

Goodman v. Citizens Life & Cas. Ins. Co. (1967) 253 Cal. App. 2d 807, 61 Cal. Rptr. 682 , was an action for declaratory relief and damages for breach of contract resulting from wrongful termination of an agency contract. The plaintiffs and an insurance company made a general agency contract by which the plaintiffs would sell insurance policies. The parties later made a new agreement by which the plaintiffs worked as the company's area supervisors on a commission basis, recruiting sales agents. A disagreement arose concerning one of the accounts recruited by the plaintiffs, resulting in the company's threatening to terminate the agreement. The court of appeal affirmed the trial court's judgment that the company did not terminate or attempt to terminate the contract, and the plaintiffs were not entitled to damages for breach. At trial, the plaintiffs attempted to introduce evidence that the parties had made an oral agreement by which the clause in their agreement permitting termination by the defendant without cause was altered. The trial court excluded the evidence under the parol evidence rule. One of the plaintiffs' arguments to justify admitting the evidence was that the oral agreement constituted a novation. The court summarized the rule that for a novation, the intention of the parties to extinguish the prior obligation and to substitute a new agreement in its place must clearly appear, and the controlling factor is the intent of the obligee to effect a release of the original obligor. The evidence of intent was insufficient in that the alteration only dealt with the termination clause, and if a novation was made, the sole agreement would have consisted of a termination clause without any underlying contract (*253 Cal. App. 2d 807, 816-817)* .

U.S. Gypsum Co. v. Synder-Ashe Co. (1934) 139 Cal. App. 731, 34 P.2d 767 , included causes of action for an unpaid balance on an open account for materials furnished by the plaintiff to the defendant, for an accountstated, and for materials sold and delivered. The defendant alleged that the obligation was extinguished when the defendant agreed to pay the plaintiff $2,000 and deliver its promissory notes for the balance. The trial court rendered judgment for the plaintiff, finding that the defendant never made the payment, and the plaintiff refused to accept the promissory notes. On the defendant's appeal, the court of appeal affirmed. The evidence showed that the cash payment was a condition precedent to the acceptance of the notes, and until both payment and notes were received by the plaintiff, the original obligation remained in effect, and the novation was not effective. A novation, strictly speaking, implies (1) a previous valid obligation, (2) the agreement of all the parties to the new contract, (3) the extinguishment of the old contract, and (4) the validity of the new contract. There was nothing in the evidence to show an extinguishment of the old contract (*139 Cal. App. 731, 733)* .

[b] Burden of Proof

The court of appeal in *Howard v. County of Amador (1990) 220 Cal. App. 3d 962, 269 Cal. Rptr. 807* , affirmed a judgment for taxpayers who challenged reassessment of their mineral rights. The county contended that reassessment was proper because the twelfth lease amendment constituted a novation and thus a change of ownership. The court disagreed, saying that it is essential to a novation that it clearly appear that the parties intended to extinguish rather than merely modify the original agreement. The burden of proof is on the party asserting that a novation has been consummated. The court commented that this was an unusual case because the parties to the lease denied that a novation occurred and it was a third party who asserted a novation (*220 Cal. App. 3d 962, 977)* . The third party in that position has a heavy burden of proof, and in the absence of fraud or collusion, a court would be warranted in finding for the original parties to the contract simply because they are the original parties (*220 Cal. App. 3d 962, 977-978)* .

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Volume 5 Chapters 50-59 CONTRACTS---to---CORPORATIONS
CHAPTER 50 CONTRACTS
PART II. FORMS
D. Existence of Contract
6. Novation of Contract

5-50 California Points & Authorities § 50.462

§ 50.462 Novation by Substitution of New Debtor Is Not Shown

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THERE WAS NO NOVATION BY SUBSTITUTION OF A NEW DEBTOR IN PLACE OF THE ORIGINAL DEBTOR BECAUSE THE PARTIES DID NOT INTEND TO RELEASE THE ORIGINAL DEBTOR.

A. Lack of Intent to Release Old Debtor. There is no novation by substitution of a new debtor in place of the old debtor when the parties did not intend to release the old debtor (*see Civ. Code § 1531(2)*; *Transport Clearings-Bay Area v. Simmonds (1964) 226 Cal. App. 2d 405, 430-431, 38 Cal. Rptr. 116*).

B. Burden of Proof. [*See § 50.461[1], Paragraph B.*]

[*Optional*] **C. Mere Acceptance of Payments From Another Debtor Is Insufficient to Release Old Debtor.** The acceptance of payments by the creditor from another debtor does not alone amount to a contract of novation to release the original debtor (*University of Redlands v. Ford (1942) 56 Cal. App. 2d 151, 152, 132 P.2d 238*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that a novation did not occur by the substitution of a new debtor in place of the original debtor because it has not been shown that the parties intended to release the original debtor from the contract obligations.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a party seeks to raise this contention. For example, it may be used to oppose a defendant's motion for summary

judgment.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised to oppose a defendant's motion for summary judgment, the memorandum would include an analysis of the moving and opposing papers showing that there is a triable issue of fact as to whether the defendant was in fact replaced by a new debtor or obligor.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

In a proper case this form may be combined with the memoranda *set out in § 50.463*.

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.451* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Lack of Intent to Release Old Debtor

Transport Clearings-Bay Area v. Simmonds *(1964) 226 Cal. App. 2d 405, 38 Cal. Rptr. 116* , was an action to recover sums disbursed by the plaintiff in clearing freight bills of the defendant's trucking company. The plaintiff was a private clearinghouse for carriers' freight bills; it would advance the amount of a bill to the carrier then collect the amount from the obligor. The defendant was a clearinghouse member. The defendant sold its trucking business, subject to approval by the Public Utilities Commission, and made a management agreement for the buyer to manage the business until approval of the sale or expiration of the contract. The plaintiff accepted freight bills from the defendant's buyer, which were chargeable to an out-of-state corporation owned by the buyer. After many of that debtor's checks were dishonored, the plaintiff met with the defendant's buyer and agreed to accept an unsecured promissory note for the debt along with the buyer's personal guaranty. When the buyer failed to provide additional security and the plaintiff discovered that none of the submitted bills represented charges due on cargo handled in the local area, the plaintiff made a demand on the defendant for the unrecovered amounts of the freight bills and then commenced this action. The plaintiff's motion for a directed verdict was denied, and a verdict was returned for the defendant. The plaintiff's motion for judgment notwithstanding the verdict was denied, and judgment was rendered for the defendant.

The court of appeal reversed. The defendant was the owner of the business since there could be no transfer before approval of the sale by the Public Utilities Commission (*226 Cal. App. 2d 405, 421)* . The buyer was the defendant's agent with implicit authority to submit the freight bills (*226 Cal. App. 2d 405, 424-427)* , and the defendant failed to

establish the defense of estoppel (*226 Cal. App. 2d 405, 427-429)* . The defendant's claim that a novation was effected by substituting the buyer as a new debtor in the defendant's place, with the intent to release the defendant, was not supported by the evidence. Whether a novation has taken place is a question of intention, with the controlling factor being the obligee's intent to release the original obligor. The plaintiff in this case never intimated during negotiations with the buyer that transactions between them were to be deemed in any way a release of any obligations incurred by the defendant. Since the plaintiff lacked the necessary intent, there could be no novation as a matter of law (*226 Cal. App. 2d 405, 430-431)* .

[b] Mere Acceptance of Payments From Another Debtor Is Insufficient to Release Old Debtor

University of Redlands v. Ford *(1942) 56 Cal. App. 2d 151, 132 P.2d 238* , was an action to direct a decedent's executor to allow the plaintiff's claim against the estate. The decedent had made a promissory note to the plaintiff, secured by a deed of trust on real and personal property. The defendant alleged that the real property securing the note was sold to third parties subject to the lien of the deed of trust, and the defendant attempted to plead a novation. The trial court rendered judgment for the plaintiff.

The court of appeal affirmed. The defendant alleged that a novation had occurred by the sale of the property to third parties but failed to allege any agreement with the plaintiff to release the decedent from his obligation and substitute the promise of the third parties. In order to complete a novation successfully by the substitution of one debtor for another, the creditor must consent to it. The acceptance of payments from the new owner does not amount to a contract to release the original debtor. A novation was neither properly pleaded nor proved (*56 Cal. App. 2d 151, 152)* .

[4] Additional Authorities

[a] Lack of Intent to Release Old Debtor

Engineering etc. Corp. v. Longridge Inv. Co. (1957) 153 Cal. App. 2d 404, 314 P.2d 563 , was an action to foreclose a mechanic's lien. The defendants had formed a joint venture for the purpose of subdividing real property and selling lots. One of the defendants had individually hired the plaintiff to conduct preliminary engineering studies the property. The defendants later converted their joint venture into a development corporation. The plaintiff obtained a decree of foreclosure of its mechanic's lien that held the defendants personally liable. The court of appeal affirmed. The defendants argued that a novation occurred when, after the development corporation was formed, the plaintiff sent its bills for services rendered to the corporation. However, there were no conversations between the plaintiff andanyone representing the corporation about the substitution of the corporation as debtor in the place of the individual joint venturers. To accomplish a novation by the substitution of a new debtor, the substitution must be with the consent of the creditor, and the parties must intend that the obligation of the original debtor be released. The acceptance of payments from the new owner does not amount to a contract to release the original debtor. Thus, the joint venturers remained liable after assumption of the obligation by the corporation (*153 Cal. App. 2d 404, 413-414)* .

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5-50 California Points & Authorities § 50.463

§ 50.463 Creditor Rescinded Acceptance of New Debtor Under Novation Agreement

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

A NOVATION DID NOT OCCUR BY THE SUBSTITUTION OF A NEW DEBTOR FOR THE _____ [*e.g.*, DEFENDANT] BECAUSE THE _____ [*e.g.*, PLAINTIFF] RESCINDED ACCEPTANCE OF THE NEW DEBTOR'S OBLIGATION, PURSUANT TO SECTION 1533 OF THE CIVIL CODE.

[*EITHER*]

Creditor May Rescind Acceptance When Debtor Prevents Compliance With Order or Fulfillment of Obligation. When _____ [the obligation of *or* an order on] a third person is accepted in satisfaction of a former debtor's obligation, the creditor may rescind the acceptance if the old debtor prevents the new debtor from _____ [fulfilling the obligation *or* complying with the order] (*Civ. Code § 1533*).

[*OR*]

Creditor May Rescind Acceptance When New Debtor Is Insolvent. When _____ [the obligation of *or* an order on] a third person is accepted in satisfaction of a former debtor's obligation, the creditor may rescind the acceptance if the third person _____ [is insolvent at the time the _____ (obligation *or* order) is received, and this fact is unknown to the creditor *or* becomes insolvent before the creditor can with reasonable diligence present the order to him/her] (*Civ. Code § 1533*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that a novation did not occur by the substitution of a new debtor in the place of the original debtor because the creditor rescinded acceptance of the obligation of or an order on the new debtor in satisfaction of the contract obligation [*see Civ. Code § 1533*].

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a party seeks to raise this contention. For example, it may be used to oppose a defendant's motion for summary judgment.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised to oppose a defendant's motion for summary judgment, the memorandum would include an analysis of the moving and opposing papers showing that there is a triable issue of fact as to whether the defendant was in fact replaced by a new debtor or obligor.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

In a proper case this form may be combined with the memoranda *set out in § 50.462*.

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.451* may be submitted in opposition to the contention supported by this form.

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5-50 California Points & Authorities § 50.464

§ 50.464 Past Forgiveness of Installments Does Not Constitute Execution of Oral Agreement to Reduce Future Installments Under Written Contract

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE CONTRACT WAS NOT MODIFIED BY AN EXECUTED ORAL AGREEMENT BECAUSE THERE WAS NO CONSIDERATION FOR ANY MODIFICATION OF THE CONTRACT BY THE _____ [*contending party, e.g.*, PLAINTIFF], AND, IN THE ABSENCE OF CONSIDERATION, FORGIVENESS OF PAST INSTALLMENTS UNDER THE WRITTEN CONTRACT DID NOT CONSTITUTE EXECUTION OF AN ORAL AGREEMENT TO REDUCE THE AMOUNT OF FUTURE INSTALLMENTS.

A. Oral Modification Lacking Consideration Is Executed Contract Only When Obligee Accepts Performance in Accordance With Terms of Modification. When an oral modification agreement requires no act or forbearance on the part of the obligor other than as required by the original contract, such an agreement is executed within the meaning of *Civil Code Section 1698* only to the extent that the obligee accepts performance in accordance with the terms of the modification agreement (*D.L. Godbey & Sons Constr. Co. v. Deane (1952) 39 Cal. 2d 429, 432, 246 P.2d 946*

B. Past Forgiveness of Installments Due Does Not Constitute Executed Oral Agreement to Reduce Future Payments. In the absence of a new consideration or of a writing that modifies the contract, the mere forgiveness of past installments under a written contract does not constitute execution of an oral agreement to reduce the amount of future installments under the contract (*see Stoltenberg v. Harveston (1934) 1 Cal. 2d 264, 266-267, 34 P.2d 472* ; *Hunt v. Smyth (1972) 25 Cal. App. 3d 807, 810, 101 Cal. Rptr. 4*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that the contract was not modified by an executed oral agreement to reduce the amount of installment payments under the contract, because past forgiveness of a portion of the installments due does not constituteexecution of an oral modification agreement to reduce the amount of future installment payments.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a party seeks to raise this contention. For example, it may be used to oppose a defendant's motion for summary adjudication.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised to oppose a defendant's motion for summary adjudication, the memorandum would include an analysis of the moving and opposing papers showing that the undisputed facts indicate there is no valid modification justifying nonpayment of the installments from which defendant claims to be excused.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a motion for summary adjudication, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.450* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Oral Modification Lacking Consideration Is Executed Contract Only When Obligee Accepts Performance in Accordance With Terms of Modification

The facts and procedural background of ***D.L. Godbey & Sons Constr. Co. v. Deane*** *(1952) 39 Cal. 2d 429, 246 P.2d 946* , are discussed in *§ 50.523[3][b]*. The Supreme Court noted that *Civ. Code § 1698* has the effect of validating executed oral modification agreements that might otherwise fail for lack of consideration. Agreements to accept less than is due under the terms of a written contract or to accept performance at a later date than that provided in writing are typical of this type of agreement. Since the modification agreement requires no additional act or forbearance on the part of the obligor, it can be executed only to the extent that the obligee accepts performance in accordance with its terms. Thus, in the absence of a valid waiver of a condition or facts establishing an estoppel to rely on *Civ. Code § 1698*, the statute can be satisfied only by execution on the part of the obligee by accepting less than his due (*39 Cal. 2d 429, 432)* .

[b] Past Forgiveness of Installments Due Does Not Constitute Executed Oral Agreement to Reduce Future

Payments

Stoltenberg v. Harveston *(1934) 1 Cal. 2d 264, 34 P.2d 472* , was a landlord's action against tenants who held over after default in the payment of rent. The defense to the action was that the plaintiff had orally agreed to reduce the rent under the written lease. The trial court rendered judgment for the plaintiff.

The Supreme Court affirmed. Regarding whether a written lease specifying a certain monthly rent may be modified by an oral agreement to accept a lesser sum: as to those payments actually made and accepted as rent in full for the period covered by them, the oral agreement reducing the rent was executed, and no claim for recovery of rent during the period covered by those payments could be maintained. However, a different rule governs the monthly payments of rent due under the lease and not actually paid by the lessees. As to those payments: the oral agreement to accept amounts less than those called for in the written lease had not been executed (*1 Cal. 2d 264, 266)* .

In ***Hunt v. Smyth*** *(1972) 25 Cal. App. 3d 807, 101 Cal. Rptr. 4* , was an action to prevent foreclosure proceedings. The plaintiffs had purchased real property from the defendant and had given a note secured by a second deed of trust on the property for the balance of the price. The note provided for monthly installments of $250 for eight years then $350 until the balance was paid. The plaintiffs became delinquent on their payments and paid only $250 a month after eight years had passed. When the defendant discovered that the noted called for $350 monthly payments after eight years, he demanded that the plaintiffs immediately pay all delinquent installments and pay $350 a month thereafter. The plaintiffs commenced this action when the defendant filed a notice of default. The trial court rendered judgment for the defendant, requiring the plaintiffs to pay the amounts owing on the note and the defendant's attorney's fees.

The court of appeal affirmed. When periodic payments are due under a lease or a settlement agreement, and a lesser sum than that provided in the written agreement is tendered and accepted in full satisfaction of the agreement, the obligee cannot subsequently collect the difference. However, in the absence of a new consideration or a writing that modifies the contract, the mere forgiveness of a portion of past installments will not effect an agreement to reduce future installments (*25 Cal. App. 3d 807, 810)* . In this case, an agreement to waive $100 of each payment and extend the maturity of the note could not be inferred from the circumstances (*25 Cal. App. 3d 807, 812)* .

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[Reserved]

§§ 50.465[Reserved]

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5-50 California Points & Authorities § 50.470

§ 50.470 Contract Was Rescinded or Abandoned by Mutual Consent

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

[THE EVIDENCE IS NOT SUFFICIENT TO SUPPORT THE _____ (VERDICT *or* DECISION) FOR THE PLAINTIFF IN THAT] THE CONTRACT WAS _____ [RESCINDED *or* ABANDONED] BY THE MUTUAL CONSENT OF THE PARTIES.

A. Mutual Rescission of Contract. A contract may be rescinded if all of the parties consent (*Civ. Code § 1689(a)*).

B. Release From Obligations. A contract may be mutually abandoned or rescinded by the parties at any stage of its performance or before any performance has been commenced, and by abandonment or rescission, each party is released from any further performance or any performance at all (*see Honda v. Reed (1958) 156 Cal. App. 2d 536, 540, 319 P.2d 728*).

C. Consideration for Mutual Rescission or Abandonment. When parties to an executory bilateral agreement mutually agree to rescind or abrogate the contract, the promise of one party to forgo his or her rights under the contract is sufficient consideration for the promise of the other party to forgo his or her rights (*Jura v. Sunshine Biscuits, Inc. (1953) 118 Cal. App. 2d 442, 447, 258 P.2d 90* ; *Sass v. Hank (1951) 108 Cal. App. 2d 207, 215, 238 P.2d 652*).

[*Optional*] **D. Written Contract May Be Rescinded or Abandoned by Oral Agreement.** The mutual rescission or abrogation of a written contract may be effected by an oral agreement, whether executed or not (*Sass v. Hank (1951) 108 Cal. App. 2d 207, 215, 238 P.2d 652*).

[*Optional*] **E. Abandonment or Rescission May Be Implied by Conduct of Parties.** A mutual abandonment or rescission of a contract may be shown by the conduct of the parties and need not be expressly stated in writing or orally

(*Honda v. Reed (1958) 156 Cal. App. 2d 536, 537, 319 P.2d 728*).

[*Optional*] **F. Abandonment or Rescission May Be Implied by Subsequent Negotiations for New Contract.** Abandonment of acontract may be implied by the acts of the parties in negotiating for a new and different contract concerning the same property or subject matter (*Honda v. Reed (1958) 156 Cal. App. 2d 536, 539, 319 P.2d 728*).

[*Optional*] **G. Abandonment or Rescission May Be Implied by Acquiescence in Other Party's Refusal to Comply.** Abandonment or rescission of a contract by mutual consent may be implied when one party acquiesces in the other party's refusal to comply with the contract (*McCreary v. Mercury Lbr. Distributors (1954) 124 Cal. App. 2d 477, 486, 268 P.2d 762* ; *Dessert Seed Co. v. Garbus (1944) 66 Cal. App. 2d 838, 847, 153 P.2d 184*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that the parties rescinded or abandoned the contract by mutual consent [*see Civ. Code § 1689(a)*].

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a party seeks to raise this contention. For example, it may be used to support a defendant's motion for summary judgment.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised to support a defendant's motion for summary judgment, the memorandum would include an analysis of the moving and opposing papers showing that the undisputed facts indicate the parties, by mutual consent, abandoned or rescinded the contract sued upon.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.480* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Release From Obligations

In ***Honda v. Reed*** *(1958) 156 Cal. App. 2d 536, 319 P.2d 728* , the defendant agreed to lease an apartment building and sell the furniture in it to the plaintiffs. An escrow was to be opened at a bank to consummate the transaction; however, escrow instructions were never signed, and the escrow contemplated by the contract was never opened. None of the consideration for the lease and sale was ever paid to the defendant. The parties later negotiated for a new and different agreement with respect to the apartment building. After these negotiations failed, the plaintiffs sued for damages for the breach of the initial agreement. The trial court found that the contract had been abandoned by the mutual consent of the parties and rendered judgment for the defendant.

The court of appeal affirmed. An abandonment may be shown by the conduct of the parties and need not be expressly stated orally or in writing (*156 Cal. App. 2d 536, 537)* . Thus, abandonment of a contract may be implied by the acts of the parties in negotiating for a new and different contract concerning the same property or subject matter (*156 Cal. App. 2d 536, 539)* . Also, former Civ. Code § 1698, which provided that a written agreement could be altered by a contract in writing or by an executed oral agreement, and not otherwise, was not applicable to the abandonment of such a contract by mutual consent. Abandonment terminates a contract and abrogates as much of it as is unperformed; abandonment does not merely alter or modify the contract (*156 Cal. App. 2d 536, 539-540)* . A contract may be mutually abandoned by the parties at any stage of its performance or before any performance has been commenced, and by abandonment, each party is released from any further performance, or, as in this case, each party is released from any performance at all (*156 Cal. App. 2d 536, 540)* .

[b] Consideration for Mutual Rescission or Abandonment

In ***Jura v. Sunshine Biscuits, Inc.*** *(1953) 118 Cal. App. 2d 442, 258 P.2d 90* , the plaintiffs sued to recover the price of figs sold pursuant toa written contract. The defendant answered that the parties had orally agreed to extinguish that contract and substitute a new agreement for it. The trial court found that, before the delivery of the figs to the defendant, the parties had made an agreement terminating the written contract by mutual consent and providing that thereafter the plaintiffs would sell to the defendant whatever quantities of figs the defendant might order, at a price to be agreed on by the parties. The trial court rendered judgment for the defendant. On appeal, the plaintiffs contended that, assuming that there was an oral agreement to terminate the original written contract, there was no valid consideration to support such an agreement.

The court of appeal affirmed. The written agreement was a bilateral contract that had not been performed by either side, and under the terms of the oral agreement, the plaintiffs were freed of their obligation to sell the fig crop to the defendant, and the defendant was freed of its obligation to buy the crop. If the parties to a bilateral contract agree to rescind or modify it, there is no difficulty in finding consideration, whether the agreement to rescind is made before or after a breach of the original contract, as long as neither party has completely performed or been discharged from his or her obligation. The promise of one party to forgo his or her rights under the contract is sufficient consideration for the promise of the other party to forgo his or her rights (*118 Cal. App. 2d 442, 447)* . In this case, there was sufficient consideration to support the oral agreement of the parties (*118 Cal. App. 2d 442, 448)* .

In ***Sass v. Hank*** *(1951) 108 Cal. App. 2d 207, 238 P.2d 652* , the plaintiffs agreed in writing to lend certain photographic negatives containing original art work to the defendants for the purpose of manufacturing greeting cards. The defendants agreed to produce and sell a certain minimum number of greeting cards and to pay the plaintiffs a royalty equal to a certain percentage of the gross billing price of the cards. The contract also provided that the contract should have a two-year period, and the contract would be automatically renewed for an additional two-year period unless the parties gave written notice of intention to terminate the contract at least 60 days before the expiration of the initial two-year period. Thereafter, the plaintiffs sued to recover royalties under the contract, based on the guarantied minimum-production provision, for the initial two-year period and for the subsequent two-year period. The trial court found that the defendants had not agreed to a minimum production or royalty, and, although no written notice of termination of the agreement had been given, the parties had orally agreed to rescind, cancel, and abandon the

agreement before the expiration of the initial two-year period. The trial court rendered judgment for the plaintiffs based on the actual sales of the cards during the first two-year period and denying royalties entirely for the second two-year period.

The court of appeal modified the judgment and affirmed. The defendants had agreed to a minimum production and royalty by the express terms ofthe written contract, and the court modified the judgment to award royalties based on the minimum production for the initial two-year period. The court affirmed the judgment insofar as it denied the plaintiffs royalties for the second two-year period. Although the contract provided for an automatic two-year renewal unless the parties gave 60 days' written notice of cancellation, the trial court had found that the parties later orally agreed to terminate their agreement after the expiration of the original period of two years. The mutual rescission or abrogation of a written contract may be effected by an oral agreement, whether executed or not. Although such an agreement must be supported by sufficient consideration, the consideration was present in this case in the form of the mutual cancellation of executory contractual rights. Each party suffered a legal detriment in giving up rights, and the consideration is adequate (*108 Cal. App. 2d 207, 215)* .

[c] Written Contract May Be Rescinded or Abandoned by Oral Agreement

Sass v. Hank *(1951) 108 Cal. App. 2d 207, 238 P.2d 652* , is discussed in [b], *above*.

[d] Abandonment or Rescission May Be Implied by Conduct of Parties

Honda v. Reed *(1958) 156 Cal. App. 2d 536, 319 P.2d 728* , is discussed in [a], *above*.

[e] Abandonment or Rescission May Be Implied by Subsequent Negotiations for New Contract

Honda v. Reed *(1958) 156 Cal. App. 2d 536, 319 P.2d 728* , is discussed in [a], *above*.

[f] Abandonment or Rescission May Be Implied by Acquiescence in Other Party's Refusal to Comply

McCreary v. Mercury Lbr. Distributors *(1954) 124 Cal. App. 2d 477, 268 P.2d 762* , was an action to rescind a written contract for the sale of timber and to quiet title to real property. The defendant was to fell and remove all timber on a certain tract owned by the plaintiffs and to pay the plaintiffs a certain amount per thousand board feet for the timber removed. Although the written contract was silent as to the time within which the timber was to be removed, the trial court found that the parties had intended that the timber be removed from the plaintiffs' land as soon as possible. After execution of the contract, the defendant delayed logging operations for some time and then logged only sporadically. The defendant also failed to pay for some of the logs removed from the plaintiffs' property.Thereafter, the plaintiffs repudiated the contract, locked the gate on the road leading to the tract of land where the timber was located, and sent the defendant a notice of rescission. The parties then attempted to negotiate either for a modification of the old contract or for a new contract, but the negotiations failed to produce a new agreement. The trial court found that the plaintiffs and the defendant had mutually agreed to rescind and abandon the original contract. Judgment was rendered for the plaintiffs. On appeal, the defendants contended that the trial court's finding of mutual rescission was not supported by the evidence.

The court of appeal affirmed. An abandonment of a contract may be implied by the acts of the parties, and this may be accomplished by the repudiation of the contract by one of the parties and by the acquiescence of the other party in the repudiation. It is not necessary that the parties say, in so many words, that they do mutually rescind the contract; rescission may be proved by other words and acts. In this case, acquiescence was shown by the negotiations for a new contract, after the plaintiffs had locked the gate, and by the absence of a showing that the defendant had claimed any further rights under the old contract before the commencement of the action by the plaintiffs (*124 Cal. App. 2d 477, 486)* .

In ***Dessert Seed Co. v. Garbus*** *(1944) 66 Cal. App. 2d 838, 153 P.2d 184* , the plaintiff contracted over the phone to buy the defendants' growing onion crop. Following their conversation, the plaintiff sent a letter setting forth the terms of the oral contract and a check and a note for the price. A few days later, one of the defendants went to the plaintiff's office with the check, note, and papers and stated to the plaintiff that the deal was off. The plaintiff subsequently tore his signature off these papers. The parties then engaged in further negotiations with respect to the sale of the onion crop, which failed to result in an agreement. The defendants grew and harvested the crop, paying all expenses of doing so. When the seed was about to be taken, the plaintiff sued for specific performance and for damages for breach of contract and attached the crop. The trial court rendered judgment for the defendants.

The court of appeal affirmed. An abandonment of a contract may be implied by the acts of the parties, and this may be accomplished by the repudiation of the contract by one of the parties and by the acquiescence of the other party in the repudiation. In this case, the evidence warranted a conclusion that there had been a mutual abandonment or rescission of the oral contract (*66 Cal. App. 2d 838, 847)* .

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[Reserved]

§§ 50.471[Reserved]

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5-50 California Points & Authorities § 50.480

§ 50.480 Intent to Rescind or Abandon Contract Was Not Mutual

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE CONTRACT HAS NOT BEEN RESCINDED OR ABANDONED BECAUSE [THE EVIDENCE IS SUFFICIENT TO SHOW THAT] THE INTENT TO RESCIND OR ABANDON THE CONTRACT WAS NOT MUTUAL.

A. Intent to Rescind or Abandon Must Be Mutual. When mutual rescission or abandonment is asserted as a defense to a contract, the intent to rescind or abandon the contract must be mutual (*Lubin v. Lubin (1956) 144 Cal. App. 2d 781, 796, 302 P.2d 49*).

[*Optional*] **B. Termination of Contract Because of Other Party's Noncompliance Is Not Mutual Abandonment or Rescission.** Termination of a contract by one party solely because of the other party's failure and refusal to live up to the agreement does not amount to a mutual cancellation, rescission, or abandonment (*see* *Ross v. Frank W. Dunne Co. (1953) 119 Cal. App. 2d 690, 699, 260 P.2d 104*).

[*Optional*] **C. Repossession of Property Does Not Necessarily Indicate Consent to Rescission.** A seller's repossession of property sold, pursuant to an express or implied contract provision, does not necessarily indicate that he or she has elected to rescind the agreement (*Kreisa v. Stoddard (1954) 127 Cal. App. 2d 627, 631, 274 P.2d 164*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that the contract was not rescinded or abandoned by mutual consent of the parties, because the intent to rescind or abandon the contract was not shown to be mutual.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a party seeks to raise this contention. For example, it may be used to oppose a defendant's motion for summary judgment.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised to oppose a defendant's motion for summary judgment, the memorandum would include an analysis of the moving and opposing papers showing that the undisputed facts indicate the parties lacked mutual consent in any abandonment or rescission of the contract sued upon.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.470* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Intent to Rescind or Abandon Must Be Mutual

In ***Lubin v. Lubin*** *(1956) 144 Cal. App. 2d 781, 302 P.2d 49* , the divorcing spouses' property settlement agreement provided that the husband was to maintain insurance policies on his life for the wife's benefit. The divorce decree incorporated, by reference, the provisions of the agreement. Thereafter, the wife sued to enforce the life insurance provisions of the agreement. The trial court concluded that the agreement to maintain the life insurance policies had been rescinded by the mutual consent of the parties and rendered judgment for the defendant.

The court of appeal reversed. Although it is not necessary for the parties to say, in so many words, that they are rescinding the contract, it must be shown that the intent to abandon or rescind is mutual (*144 Cal. App.2d 781, 796)* . The evidence in this case did not sustain the finding of mutual consent to an abandonment or rescission of the agreement (*144 Cal. App. 2d 781, 797)* .

[b] Termination of Contract Because of Other Party's Noncompliance Is Not Mutual Abandonment or Rescission

In ***Ross v. Frank W. Dunne Co.*** *(1953) 119 Cal. App. 2d 690, 260 P.2d 104* , the plaintiff agreed to act as exclusive distributor of certain paint products produced by the defendant. After signing the agreement, the parties had numerous

disagreements about the deal. Finally, after a conference with the plaintiff, the defendant indicated that it would not proceed further under the distributorship agreement. Thereafter, the plaintiff sued for damages for breach of contract. The trial court rendered judgment for the plaintiff. On appeal, the defendant contended that the contract had been mutually rescinded or abandoned by the parties on one of two dates.

The court of appeal affirmed. The question of whether a contract has been canceled, rescinded, or abandoned is a mixed question of law and fact that is addressed to the trial court, and the finding of the trial court will be upheld if it is supported by substantial evidence (*119 Cal. App. 2d 690, 698-699)* . In this case, there was conflicting evidence on the issue. The parties carried on their dealings after the first alleged date of rescission, so that it could hardly be said that there was a cancellation or rescission on that date. As to the second date, the record showed that the parties did terminate their dealings, but the plaintiff did so only because the defendant failed and refused to live up to the agreement. This did not amount to a mutual cancellation, rescission, or abandonment (*119 Cal. App. 2d 690, 699)* .

[c] Repossession of Property Does Not Necessarily Indicate Consent to Rescission

In ***Kreisa v. Stoddard*** *(1954) 127 Cal. App. 2d 627, 274 P.2d 164* , the defendant agreed to buy the plaintiffs' floral business together with the good will and fixtures and to take over the lease of the premises the business was conducted. The plaintiffs reserved title to all of the property sold until full payment was made, but the contract did not expressly provide for repossession by the plaintiffs as a remedy in the event of breach of the agreement by the defendant. After the defendant had defaulted on one of the payments, the defendant notified the plaintiffs that he had elected to terminate the agreement, and he was returning all equipment and goodwill of the business to the plaintiffs. With the defendant's authorization, the plaintiffs entered the premises, restored the property, and soldit to another buyer, crediting the proceeds to the amount owed by the defendant. The plaintiffs sued to recover the amount of the deficiency from the defendant. The trial court rendered judgment for the plaintiffs. On appeal, the defendant contended that the return of the property that was the subject of the agreement and the acceptance by the plaintiffs constituted an election by the plaintiffs to rescind the contract.

The court of appeal affirmed. A seller's retaking or repossessing, under an express or implicit contract provision, does not necessarily demand the conclusion that in so doing the seller has elected to rescind; the application of the doctrine of election of remedies must be modified by the facts of the particular case (*127 Cal. App. 2d 627, 631)* . When a buyer has repudiated a contract, abandoned the goods, or in some other way manifested an intention not to fulfill contractual obligations, the seller may, to secure the obligations, retake the property and, after reselling it and applying the proceeds to the outstanding balance, still be entitled to enforce the contract against the buyer for the payment of any deficiency (*127 Cal. App. 2d 627, 631-632)* . In this case, the trial court properly concluded that there was no rescission by mutual consent within the meaning of *Civ. Code § 1689*, and the plaintiffs' acts did not constitute an election of remedies so as to preclude them from recovering on the contract (*127 Cal. App. 2d 627, 632-633)* .

[4] Additional Authorities

[a] Intent to Rescind or Abandon Must Be Mutual

In *Pennel v. Pond Union School Dist. (1973) 29 Cal. App. 3d 832, 105 Cal. Rptr. 817* , a school teacher was reassigned from teaching first grade to teaching fourth grade. Although she had initially indicated that she would not teach fourth grade, she later reluctantly signed a contract to do so. Thereafter, claiming that she was ill, she failed to attend various school meetings and the first two days of the school year. The school board determined that she had vacated her position and terminated her services, without giving her notice or a hearing. She petitioned for a writ of mandate to compel her reinstatement and payment of back salary. The trial court rendered judgment for the school district, finding that the teacher had abandoned her teaching position by refusing to perform her obligations as a teacher. The court of appeal reversed. There was no substantial evidence to support the trial court's finding that the teacher intended to abandon her contract for the school year. Although the teacher had previously voiced her opposition to teaching fourth

grade, she nevertheless signed a contract to teach fourth grade during the coming school year. Her actions during the summer before the opening of school may have been equivocal as to whether she intended to honor her contract; however, when she failed to appear for the teacher orientation meeting and for the first day of school,she gave illness as the reason for her failure to appear. The assertion of an excuse for nonperformance at the time performance became due logically precluded any inference of an intent on her part to abandon her contract (*29 Cal. App. 3d 832, 837)* . Although an executory bilateral contract may be rescinded by the mutual consent of the parties, and the rescission may be oral or manifested by conduct, nevertheless, a mutual rescission requires an intent to rescind on the part of both parties (*29 Cal. App. 3d 832, 837-838)* . In this case, at no time did the teacher expressly repudiate or refuse to comply with her contract. There was no substantial evidence from which to deduce that she intended to rescind the contract. To have an implied abandonment, the acts and conduct relied on must be positive, unequivocal, and inconsistent with the contract (*29 Cal. App. 3d 832, 838)* .

[b] Repossession of Property Does Not Necessarily Indicate Consent to Rescission

In *Phillips v. Stark (1921) 186 Cal. 369, 199 P. 509* , the plaintiff contracted to sell a bakery to the defendants. At the time the contract was made, the defendants gave the plaintiff a check for part of the price, agreed to pay the balance the next day, and received immediate possession of the premises. When the plaintiff called on the defendants the next day to collect the balance of the price, the defendants tricked the plaintiff into giving them possession of their first check. The defendants then tore up the check, refused to pay anything on the price, and told the plaintiff that the deal was off, and he could do whatever he pleased with the property. After the defendants abandoned the property, the plaintiff retook possession of it and sold it at a public auction. The plaintiff then sued to recover the difference between the contract price and the amount realized on the auction sale. The trial court held that the plaintiff had elected a remedy to which he was not entitled and entered a judgment of nonsuit. The Supreme Court reversed. Rescission was one of the remedies to which the plaintiff was entitled on the defendants' repudiation and consequent breach of the contract, and after the plaintiff chose this remedy, he could not obtain the different and wholly inconsistent remedy of damages. However, unless the contract was rescinded, the plaintiff was entitled to the remedy of damages. The question in this case was whether the plaintiff's repossession or resale of the property amounted to a rescission. If the plaintiff had retaken possession of the property so as to show an acquiescence on his part in the defendant's assertion that the sale was off, there would at once have been a rescission by mutual consent. When the defendants not only refused to pay but also repudiated the contract and abandoned the property, the plaintiff's act in retaking possession did not indicate any acquiescence on his part in the repudiation or any intent to end the sale. The defendants had thrust the necessity of taking possession for the protection of the property on the plaintiff against his will. In thecircumstances, there was no rescission (*186 Cal. 369, 372)* . For similar reasons, the plaintiff's resale of the property did not constitute a rescission (*186 Cal. 369, 373)* .

In *Rice v. Navarro (1949) 91 Cal. App. 2d 233, 204 P.2d 633* , the plaintiffs agreed to buy jukeboxes from the defendant. The contract provided that title to the property was to remain in the seller until the price was paid, and the seller had the right to repossess the jukeboxes in the event of any default in payment. The contract also provided that if the seller should take possession, all of the buyers' rights under the contract would be terminated, and the seller could, but was not obligated to, resell the property and apply the proceeds to the expenses of repossession and resale and to the unpaid balance of the price. After making a down payment and one installment payment, the buyers gave notice of rescission of the contract and surrendered the jukeboxes to the seller. The seller repossessed them and sued for the balance due on the contract. The buyers sued for rescission of the contract on the ground of fraud. The actions were consolidated for trial, and the trial court rendered judgment for the seller in both actions. On appeal, the buyers contended that the evidence proved a mutual rescission of the agreement because the seller took possession of the jukeboxes after the buyers had given notice of rescission. The court of appeal affirmed. The contract gave the seller the right, on the buyers' default, to repossess the jukeboxes and the right to resell them, and there was evidence that the seller was obliged to take possession in order to protect them. The seller's act in doing so did not establish, as a matter of law, a mutual rescission of the agreement (*91 Cal. App. 2d 233, 237)* .

California Points & Authorities

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Volume 5 Chapters 50-59 CONTRACTS---to---CORPORATIONS
CHAPTER 50 CONTRACTS
PART II. FORMS
D. Existence of Contract
7. Mutual Rescission or Abandonment of Contract

5-50 California Points & Authorities §§ 50.481-50.499

[Reserved]

§§ 50.481[Reserved]

California Points & Authorities

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Volume 5 Chapters 50-59 CONTRACTS---to---CORPORATIONS
CHAPTER 50 CONTRACTS
PART II. FORMS
E. Interpretation of Contract
1. Ambiguous Contract

5-50 California Points & Authorities § 50.500

§ 50.500 Contract Is Ambiguous

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

WHEN A CONTRACT IS AMBIGUOUS OR UNCERTAIN, A FULL OPPORTUNITY MUST BE AFFORDED THE PARTIES TO PRODUCE EVIDENCE OF THE FACTS, CIRCUMSTANCES, AND CONDITIONS SURROUNDING ITS EXECUTION AND THE CONDUCT OF THE PARTIES.

A. Contract Is Ambiguous When Susceptible to Two Different Meanings. When the language used in a contract is fairly susceptible to either two constructions without doing violence to its usual and ordinary import, an ambiguity arises (*Walsh v. Walsh (1941) 18 Cal. 2d 439, 444, 116 P.2d 62* ; *Wolf v. Superior Court (2004) 114 Cal. App. 4th 1343, 1346, 1350-1351, 8 Cal. Rptr. 3d 649* ; *Walter E. Heller, Inc. v. Tecrim Corp. (1987) 196 Cal. App. 3d 149, 158, 241 Cal. Rptr. 677*).

B. Right to Introduce Evidence Concerning Ambiguous Contract. When a contract is, in any of its terms or provisions, ambiguous or uncertain, parol evidence is admissible to explain the ambiguity and presents a question of fact, which precludes summary judgment if the evidence, or the inferences to be drawn from it, are in conflict (*Walsh v. Walsh (1941) 18 Cal. 2d 439, 443-444, 116 P.2d 62* ; *Wolf v. Superior Court (2004) 114 Cal. App. 4th 1343, 1346, 1350-1351, 8 Cal. Rptr. 3d 649* ; *Walter E. Heller, Inc. v. Tecrim Corp. (1987) 196 Cal. App. 3d 149, 158, 241 Cal. Rptr. 677*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that the contract is ambiguous or uncertain.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a party seeks to raisethis contention. For example, it may be used to oppose another party's motion for summary judgment.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised to oppose a motion for summary judgment, the memorandum would include an analysis of the moving and opposing papers showing that triable issues of fact exist concerning the interpretation or meaning of contract terms.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.510* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Contract Is Ambiguous When Susceptible to Two Different Meanings

Walsh v. Walsh *(1941) 18 Cal. 2d 439, 116 P.2d 62* , was an action for the breach of a property settlement agreement that the defendant was to support and maintain the plaintiff, her adopted son. The agreement provided that the defendant, as long as she received the payments provided for in the agreement, would properly care for, maintain, and educate the "child or children" in respect of whom the payments had been made. The plaintiff claimed that the words "child or children" were purely descriptive as far as the duration of benefits to be received by them from the defendantwere concerned. The defendant, however, insisted that the agreement pertained to the care of the children during minority, so that the defendant's undertaking to support the plaintiff terminated on his attaining majority. The trial court granted the defendant's motion for summary judgment.

The Supreme Court reversed. When the language in a contract is fairly susceptible to either of two constructions without doing violence to its usual and ordinary import, an ambiguity arises. Extrinsic evidence may be used for the purpose of explaining the intention of the parties. In this case, the words "child or children" were ambiguous and indefinite since on its face the phraseology of the agreement considered in its entirety was reasonably consistent with either of the interpretations advanced by the plaintiff and the defendant. Thus, the motion for summary judgment should not have been granted (*18 Cal. 2d 439, 444)* .

In ***Wolf v. Superior Court*** *(2004) 114 Cal. App. 4th 1343, 8 Cal. Rptr. 3d 649* , plaintiff author, who had written an original novel creating various characters, agreed to option the rights to the novel to defendant Walt Disney Pictures and

Television. Disney exercised its option to purchase the rights, and the parties executed a purchase agreement. In the paragraph governing royalty rights to character merchandising, the parties used the term "gross receipts" without definition. They later entered into a subsequent agreement which clarified or modified certain terms of the first agreement, but plaintiff's right to a five percent royalty on merchandise depicting his characters remained intact. None of the parties to either agreement could recall any discussion regarding the meaning of plaintiff's right to a royalty on gross receipts from character merchandise. Disney then entered into various promotional third-party agreements with for which it received no cash; Disney took the position that it was not obligated to pay plaintiff any royalty unless or until it received actual cash from a licensing agreement.

Plaintiff filed suit against Disney, which in turn filed a cross-complaint for declaratory relief, reformation, money had and received, and unjust enrichment. Disney moved for summary adjudication on its cross-complaint, seeking a declaration that the parties' contract only obligated it to pay royalties on cash it received for character merchandising. Disney argued that it was entitled to summary adjudication because the clear and unambiguous meaning of "gross receipts" could only mean receipt of cash money. Plaintiff presented extrinsic evidence in the form of expert testimony to refute Disney's assertion. The expert stated that the term "gross receipts" in the entertainment industry meant "money or the value of other consideration received by the studio," when not otherwise defined or limited by written agreement. The trial court held that the term was not reasonably susceptible to the meaning urged by plaintiff, rejected his proffered extrinsic evidence, and granted summary adjudication in favor of Disney (*114 Cal. App. 4th 1343, 1346-1349)* .

Plaintiff filed a petition for writ of mandate to compel the trial court to vacate its order. The court of appeal held that the trial court erred in concluding that the term "gross receipts" was not reasonably susceptible to the interpretation urged by plaintiff--that according to industry custom and usage the term meant cash and other valuable consideration received. The court granted the petition for writ of mandate with directions for the trial court to vacate its order and remanded for further proceedings (*114 Cal. App. 4th 1343, 1346, 1358)* .

In ***Walter E. Heller, Inc. v. Tecrim Corp.*** *(1987) 196 Cal. App. 3d 149, 241 Cal. Rptr. 677* , the trial court found that a subordination agreement, by which the defendant's security interest in a third party's inventory was subordinated to the plaintiff's security interest in the same inventory, was supported by consideration. Resolution of the issue of consideration was also the basis of the trial court's finding that there were no triable issues of fact on other causes of action, including fraud, mistake, and breach of the covenant of good faith and fair dealing. The trial court granted the defendant's motion for summary judgment.

The court of appeal reversed. The introductory recital and fifth paragraph of the subordination agreement were inconsistent and made it unclear what the consideration was supposed to be. The agreement stated that the consideration for the subordination was the plaintiff's continued extension of credit to the debtor, but it did not specify how long the plaintiff was obligated to continue the financing. The contract was one with two equally plausible interpretations of its language, and it was ambiguous (*196 Cal. App. 3d 149, 158)* .

[b] Right to Introduce Evidence Concerning Ambiguous Contract

The facts and procedural background of ***Walsh v. Walsh*** *(1941) 18 Cal. 2d 439, 116 P.2d 62* , are discussed in [a], *above*. The Supreme Court concluded that the words "child or children" as used in the agreement were ambiguous and indefinite. When a contract is in any of its terms or provisions ambiguous or uncertain, it is primarily the duty of the trial court to construe it after a full opportunity is afforded to all parties in the case to produce evidence of the facts, circumstances, and conditions surrounding execution of the contract and the conduct of the parties relating to it (*18 Cal. 2d 439, 443)* . In such a case, when the meaning of the language of a contract is uncertain or doubtful and parol evidence is introduced in aid of its interpretation, the question of its meaning is one of fact (*18 Cal. 2d 439, 444)* . The trial court should have denied the defendant's motion for summary judgment so that the issue raised between the parties as to the duration of the defendant's undertaking to furnish support and maintenance to the plaintiff might be tried on its merits (*18 Cal. 2d 439, 444)* .

The facts and procedural background of ***Wolf v. Superior Court*** *(2004) 114 Cal. App. 4th 1343, 8 Cal. Rptr. 3d 649* , are discussed in [a], *above*. On the issue of the right to introduce evidence concerning ambiguity, the court of appeal held that the trial court erred in its treatment of the proffered extrinsic evidence on the issue of whether the contract was ambiguous (*114 Cal. App. 4th 1343, 1355)* . Because there was no evidence of objective manifestations of the parties' intent, and because the term at issue was undefined, the only way to construe the meaning of the term was to consider the nature of the contract and the circumstances under which the parties negotiated. Both the nature of the contract and the circumstances involved the motion picture industry. The proffered evidence regarding trade usage and custom was relevant to prove an interpretation to which the agreements were reasonably susceptible in the entertainment industry context (*114 Cal. App. 4th 1343, 1357)* . The court also held that the conflicting interpretations of the contract term raised factual issues which precluded a determination as a matter of law (*114 Cal. App. 4th 1343, 1359)* .

The facts and procedural background of ***Walter E. Heller, Inc. v. Tecrim Corp.*** *(1987) 196 Cal. App. 3d 149, 241 Cal. Rptr. 677* , are discussed in [a], *above*. The court of appeal said that when two equally plausible interpretations of the language of a contract may be made, as here, parol evidence is admissible to aid in interpreting the agreement, which presents a question of fact that precludes summary judgment if the evidence is contradictory. The trial court was required to give the parties a full opportunity to produce evidence of the facts, conduct, and circumstances surrounding execution of the contract. Summary judgment was not proper because the trial court had made a factual determination of what constituted consideration (*196 Cal. App. 3d 149, 158)* .

[4] Additional Authorities

[a] Right to Introduce Evidence Concerning Ambiguous Contract

In *Blackburn v. Charnley (2004) 117 Cal. App. 4th 758* , the plaintiffs sought specific enforcement of a developer's contracts for the sale of homes that were to be built on specified lots in a subdivision tract for which government approval was still pending. After the real estate market appreciated significantly while construction was delayed, the developer sought to avoid the contracts and contended they were not sufficiently definite to be enforceable. The court of appeal affirmed a judgment of specific enforcement, holding that parol evidence, consisting of the tract map, site plans, standard home-feature sheets, floor plans, and elevation plans, was properly admissible to render the purchase agreements sufficiently definite to create a legal obligation (*117 Cal. App. 4th 758, 766)* .

In *Kavruck v. Blue Cross of California (2003) 108 Cal. App. 4th 773, 134 Cal. Rptr. 2d 152* , a health insurance policy holder initiated a class action composed of subscribers whose health insurance policies were changed so that their premiums were no longer based on their initial enrollment age but on their attained age at the time of renewal. The insurer moved for summary judgment on the breach of contract cause of action. The trial court concluded that there was no triable issue of material fact concerning the propriety of the insurer's exercise of its right under the agreement to modify its age rating position, and granted the motion for summary judgment. The court of appeal reversed. The issue on appeal was whether the insurer had established as a matter of law that it did not breach the entry age contracts of plaintiff and other members of the certified class. The court concluded that the contract was ambiguous with respect to the provision which seemed to authorize the insurer to change any term of the policy upon proper notice. Plaintiff was entitled to submit parol evidence to establish the objectively reasonable expectations of the insureds that the contract protected the entry age rating from modification unless the insured changed coverage (*108 Cal. App. 4th 773, 781-782)* .

In *Darling v. Controlled Environments Construction, Inc. (2001) 89 Cal. App. 4th 1221, 108 Cal. Rptr. 2d 213* , a concrete subcontractor sued the general contractor to recover retention proceeds withheld by the contractor. The contractor filed a counterclaim, arguing that the subcontractor failed to comply with contractual specifications regarding the flatness required for a concrete floor. The trial court held that an ambiguity existed in the contract with regard to the flatness requirement and awarded the subcontractor its retention, but denied its request for statutory penalties and

attorney fees. The general contractor appealed, contending that the trial court erred in allowing the subcontractor to offer extrinsic oral testimony which contradicted the plain, unambiguous meaning of the contract provision at issue. The court of appeal disagreed. It cited *Code Civ. Proc. § 1856(g)*, which allows introduction of evidence to explain an extrinsic ambiguity or otherwise interpret the terms of the agreement. It found that the subcontract was ambiguous with regard to the flatness standard, and therefore extrinsic evidence was admissible to assist the court in ascertaining the parties' intent with regard to the applicable provision (*89 Cal. App. 4th 1221, 1234-1236)* . Because there was no meeting of the minds as to the required flatness of the floor, the trial court was left to resolve the remaining ambiguity. It relied on external facts and custom and usage in the industry to supply the deficiency. In essence, it supplied a reasonable term when the parties had failed to reach an agreement: the floor had to meet industry standards and be suitable for the building owner's use. It correctly determined that the subcontractor was entitled to the full amount of retention withheld by the general contractor because it provided a floor in keeping with industry standards and suitable for the owner's use. The court of appeal thus held that the judgment was amply supported by the applicable law of contracts and the evidence (*89 Cal. App. 4th 1221, 1236-1238)* .

In *Bionghi v. Metropolitan Water District of Southern California (1999) 70 Cal. App. 4th 1358, 83 Cal. Rptr. 2d 388* , after a water district terminated its contract with a company that provided temporary employees, the company brought an action against the district for breach of contract and breach of the implied covenant of good faith and fair dealing. The contract provided that the district could terminate with 30 days notice, and included an integration clause. The district gave the company 30 days notice and terminated the contract. The trial court found the contract could not reasonably be interpreted to mean that good cause was required for termination, and therefore extrinsic evidence offered by the company to establish that requirement was inadmissible. It granted summary adjudication and judgment to the district. The court of appeal affirmed. The appellate court reviewed the rules regarding the introduction of evidence concerning ambiguous provisions. A court first must determine whether the language of a contract is reasonably susceptible to the meanings urged by the parties. In so doing, the court must give consideration to any evidence offered to show that the parties' understanding of words used differed from the common understanding. If the court determines that the contract is reasonably susceptible of the meanings urged, extrinsic evidence relevant to prove the meaning agreed to by the parties is admissible (*70 Cal. App. 4th 1358, 1364-1366)* . In this case, however, the court of appeal found that none of the evidence offered by the company indicated that the words or phrases of the termination clause were ambiguous. The court held that the contract was integrated and in unambiguous termsrequired only notice for termination. The language of the contract was not on its face reasonably susceptible of a reading requiring good cause, and the company offered no extrinsic evidence which would indicate it was susceptible of such a meaning. Thus, the trial court correctly found that parol evidence was not admissible to prove the terms of the contract (*70 Cal. App. 4th 1358, 1369)* .

The court of appeal in *Haskell v. Carli (1987) 195 Cal. App. 3d 124, 240 Cal. Rptr. 439* , reversed the a summary judgment in a case seeking specific performance of an ambiguous contract. Both parties to the contract were deceased, and their heirs or successors had introduced a will of one of the parties and a residence affidavit of another. The will and affidavit may not have been proper evidence, but since no objection was made on the basis of parol evidence, the trial court was bound to consider them in reaching its decision [*see Code Civ. Proc. § 437c(b)(5), (c)*] (*195 Cal. App. 3d 124, 129-132)* . When the meaning of contract language is doubtful or uncertain and parol evidence has been introduced to aid in the interpretation of the contract, the question of meaning is a question of fact, and a summary judgment is not proper (*195 Cal. App. 3d 124, 132-133)* .

Daugherty Co. v. Kimberly-Clark Corp. (1971) 14 Cal. App. 3d 151, 92 Cal. Rptr. 120 , was an action for compensation for additional work performed in connection with changes in an original contract to build a paper mill. The trial court granted the defendant's motion for summary judgment, but the court of appeal reversed. In support of the summary judgment, the defendant contended that the plaintiff had not performed a condition precedent by asking the engineer on the project to make a decision on its claim as the contract required. The contract also provided that if the engineer failed to reach a decision within 10 days, the contractor could demand arbitration. In practice the engineer did not make decisions within 10 days. The evidence was that in many respects the claims procedures required by the

contract were ignored in practice. When the terms of a contract are at issue and any of its provisions are ambiguous or uncertain, the trial court should not grant a motion for summary judgment but should allow the parties a full opportunity to produce evidence of the facts, circumstances, and conditions surrounding execution of the contract and the conduct of the parties relating to it (*14 Cal. App. 3d 151, 157)* .

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CHAPTER 50 CONTRACTS
PART II. FORMS
E. Interpretation of Contract
1. Ambiguous Contract

5-50 California Points & Authorities § 50.501

§ 50.501 Contract Is Uncertain as to Material Features

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE AGREEMENT ON WHICH THE ACTION IS BASED DOES NOT EVINCE A MEETING OF THE MINDS OF THE PARTIES ON ESSENTIAL FEATURES.

A. Whether Agreement Created Legal Obligation Is Question of Law. Whether an agreement is sufficiently definite and certain in its essential terms to give rise to a legal obligation is a question of law (*Robinson & Wilson, Inc. v. Stone (1973) 35 Cal. App. 3d 396, 407, 110 Cal. Rptr. 675*).

B. Contract Is Unenforceable in Absence of Meeting of Minds. When a contract is so uncertain and indefinite that the intention of the parties in material particulars cannot be ascertained, the contract is void and unenforceable. Although the terms of the contract need not be stated in the minutest detail, it must evince a meeting of the minds on the essential features of the agreement, and the scope of the duty and limits of acceptable performance must be at least sufficiently defined to provide a rational basis for the assessment of damages (*Robinson & Wilson, Inc. v. Stone (1973) 35 Cal. App. 3d 396, 407, 110 Cal. Rptr. 675*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that the agreement between the parties fails to evidence a meeting of minds on essential features. This form should not be used when there is a dispute as to the meaning of the contract terms, in which case the plaintiff's interpretation is accepted by the court unless, despite the validity of the plaintiff's interpretation, there is no meeting of the minds [*see Robinson & Wilson, Inc. v. Stone (1973) 35 Cal. App. 3d 396, 406, 110 Cal. Rptr. 675]* .

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a party seeks to raise this contention. For example, it may be used to support a party's motion for summary judgment.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised to support a motion for summary judgment, the memorandum would include an analysis of the moving and opposing papers showing that undisputed disclose a failure of the parties to agree on essential elements of the contract.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

For memoranda supporting the contention that no contract was formed and the parties have only an agreement to agree, see *§ 50.350*.

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Whether Agreement Created Legal Obligation Is Question of Law

Robinson & Wilson, Inc. v. Stone *(1973) 35 Cal. App. 3d 396, 110 Cal. Rptr. 675* , was an action by contractors for damages for breach of a contract to build a medical building. The owners counterclaimed for breach of the same contract by the plaintiffs. According to Article 20 of the contract, the total contract price included $30,040 for completion of the undesigned portions of the building. The parties disagreed as to the contractors' obligation under Article 20. The contractors claimed that the $30,040 was intended as an allowance against the ultimate cost of the work on the undesigned portions, while the owners contended that the contractors were required to complete minimum basic medical suites in the undesigned portion of the building, and if the tenants of those areas wanted any extras, they were to pay for them. Following a consolidated nonjury trial, the court rendered judgment for the owners. One issue on appeal was whether Article 20 of the contract was so uncertain and indefinite that it had given rise to no legally enforceable obligation.

The court of appeal reversed. When a contract is so uncertain and indefinite that the parties' intentions cannot be ascertained, the contract is void and unenforceable. Although the contract terms need not be stated in the minutest detail, the contract cannot be enforced unless it evinces a meeting of the minds on the agreement's essential features, and the scope of theduty and limits of acceptable performance must be sufficiently defined to provide a rational basis for the assessment of damages. In the absence of plans and specifications, an agreement to provide labor and materials for the completion of standard medical suites is too indefinite and uncertain to evince a meeting of the minds respecting the scope of the work or to provide an objective basis for assessment of damages. The wide disparity in the estimates of

the cost of completing the undesigned areas that were introduced into evidence revealed the uncertainty of the term "standard medical suites." The term could neither form a basis for a meeting of the minds nor provide a rational objective for assessment of damages. In addition, Article 20 was uncertain in other essential respects such as in its provision concerning the reasonable value of extras required by tenants; there was no evidence as to how the reasonable value of the extras was to be determined, nor was there certainty as to who was to pay for the extras. Consequently, it did not give rise to a legally enforceable obligation (*35 Cal. App. 3d 396, 406)* .

[b] Contract Unenforceable in Absence of Meeting of Minds

Robinson & Wilson, Inc. v. Stone *(1973) 35 Cal. App. 3d 396, 110 Cal. Rptr. 675* , is discussed in [a], *above*.

[4] Additional Authorities

[a] Contract Unenforceable in Absence of Meeting of Minds

In *First Street Plaza Partners v. City of Los Angeles (1998) 65 Cal. App. 4th 650, 76 Cal. Rptr. 2d 626* , the court of appeal held that if the requirements of a city's charter for formation of contract are not satisfied, no contract is formed. The court found that the Charter of the City of Los Angeles plainly mandated (through use of the mandatory verb "shall") that a city contract of the type involved in that case must be signed by the Mayor, approved by the City Council, and approved as to form by the City Attorney. None of those requirements were met (*65 Cal. App. 4th 650, 662-664)* . Further, in those circumstances, the city could not be equitably estopped from denying that a contract had been formed (*65 Cal. App. 4th 650, 667-668)* .

Jackson v. Grant (9th Cir. 1989) 890 F.2d 118 , involved Truth in Lending Act violations in a loan transaction. One finding was that no contract to lend money existed at the time the borrower signed the loan documents, because at the time, no lender had committed to make the loan. Those documents had been drafted by an arranger of credit, and no lender was named in them. The court of appeals held that since an essential elementwas reserved for future agreement, there was no contract (*890 F.2d 118, 120-121)* .

The court of appeal in *Peterson Development Co. v. Torrey Pines Bank (1991) 233 Cal. App. 3d 103, 284 Cal. Rptr. 367* , affirmed a judgment for a bank based on the fact that a commitment letter for permanent (takeout) financing was not a contract but was only an agreement to agree. Even though the commitment letter was construed with the related construction loan agreement [*see Civ. Code § 1642*] naming a nonsignatory affiliate of the bank as permanent lender and requiring a permanent loan commitment as a condition of construction financing, the commitment letter left too many terms for future definition and used terms too broad to be made certain. The borrowers were not identified, except generically as prospective homeowners; the amounts of the loans to individual borrowers were not specified, except as a percentage of the sale price or appraisal value; the terms of repayment were not specified, and the interest rates were described as the bank's "standard interest rate quoted from time to time during the term of the commitment" (*233 Cal. App. 3d 103, 115)* .

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CHAPTER 50 CONTRACTS
PART II. FORMS
E. Interpretation of Contract
1. Ambiguous Contract

5-50 California Points & Authorities § 50.502

§ 50.502 Contract Stipulations Generally Are Interpreted as Covenants, Not Conditions Precedent

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

STIPULATIONS IN A CONTRACT ARE TO BE CONSTRUED AS COVENANTS, NOT AS CONDITIONS PRECEDENT; AND PERFORMANCE, OR AN EXCUSE FOR NONPERFORMANCE, MUST BE ALLEGED, UNLESS A CONSTRUCTION AS CONDITIONS PRECEDENT IS REQUIRED BY CLEAR, UNAMBIGUOUS LANGUAGE.

A. Stipulations Must Be Construed as Covenants When Possible. Stipulations in a contract should be construed as covenants, not as conditions precedent, unless a construction as conditions precedent is required by clear, unambiguous language (*Alpha Beta Food Mkt. v. Retail Clerks (1955) 45 Cal. 2d 764, 771, 291 P.2d 433 , cert. denied, 350 U.S. 996 (1956)* .

[*Optional*] **B. Condition That Third Party Take Action Must Be Construed as Covenant.** A condition that a third party must take some action should be construed as a covenant rather than a condition precedent, when the terms of the agreement can be so construed (*Patrick J. Ruane, Inc. v. Parker (1960) 185 Cal. App. 2d 488, 504, 8 Cal. Rptr. 379*).

[*Optional*] **C. Stipulations Are Covenants When Forfeiture or Inequitable Consequences Is Involved.** The general rule that stipulations in an agreement should be interpreted as covenants instead of conditions precedent should be especially applied if otherwise a forfeiture or other inequitable consequence would result (*Alpha Beta Food Mkt. v. Retail Clerks (1955) 45 Cal. 2d 764, 771, 291 P.2d 433 , cert. denied, 350 U.S. 996 (1956)* .

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that, if performance of conditions precedent has not been alleged, the stipulations in the contract should be construed as covenants, performance or excuse for nonperformance of which need not be alleged.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a party seeks to raise this contention. For example, it may be used to oppose a defendant's general demurrer interposed on the ground that plaintiff has not alleged performance of conditions precedent.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised to oppose a demurrer, the memorandum would include an analysis of the allegations showing that the terms in questions are properly covenants rather than conditions precedent.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a demurrer, they may be combined with appropriate memoranda set out in Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing amemorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

In an appropriate case these memoranda may be used in opposition to the contention supported by the memoranda *in § 50.20*.

[3] Discussion of Authorities

[a] Stipulations Must Be Construed as Covenants When Possible

Alpha Beta Food Mkt. v. Retail Clerks *(1955) 45 Cal. 2d 764, 291 P.2d 433 , cert. denied, 350 U.S. 996 (1956)* , was an action for declaratory relief respecting an arbitration award in the period of wage controls during the Korean War. The case involved a "submission agreement" providing for submitting to arbitration the question of what, if any, changes should be made in premium pay for employees who performed night, holiday, and Sunday work. If the arbitration award provided for any change in pay, the award had to be submitted for approval to the federal Wage Stabilization Board. An arbitration award was made in favor of pay increases, and the Wage Stabilization Board was in the process of reviewing the award when the President terminated wage controls. The employees contended that all wage increases would become automatically effective immediately following termination of wage controls, but the employers contended that there was no duty on their part to pay increases unless and until the pay was specifically allowed and approved by the Wage Stabilization Board--in other words, approval of the pay increases was a condition precedent to liability and duty on the employers' part. The trial court rendered judgment declaring the arbitration award to be valid.

The Supreme Court affirmed. In interpreting contracts, stipulations in an agreement are not to be construed as conditions precedent unless that construction is required by clear, unambiguous language, especially when a forfeiture or other inequitable consequence would result. Reasonably interpreted, the submission agreement indicated that the parties agreed to be bound by the terms of the arbitration award in final settlement of their disputed issues as to premium pay. Thus the employees gave up the right to demand an annual reopening as to changes in the wage scale until a certain date. The statement in the agreement respecting Wage Stabilization Board approval in the submission agreement was no more than recognition of a requirement under federal law. The insertion of that statement in the agreement was unnecessary, neither adding nor taking away anything in the expressed and implied obligations of the parties in their agreement. Thus the requirement of the board's approval was not acondition precedent, and when wage controls were terminated, the increase in pay benefits could lawfully go into effect without the board's approval (*45 Cal. 2d 764, 771)* .

[b] Condition That Third Party Take Action Must Be Construed as Covenant

In ***Patrick J. Ruane, Inc. v. Parker*** *(1960) 185 Cal. App. 2d 488, 8 Cal. Rptr. 379* , a general contractor sued a subcontractor for damages for breach of contract. The action arose out of a construction project in which an architect passed on the merits of materials and workmanship, made written decisions regarding all owner's or contractor's claims, and interpreted the contract documents on all questions arising in connection with the execution of the work. The plaintiff maintained that the subcontractor was bound to repair certain defects in the exterior and interior plaster regardless of their cause. The subcontractor claimed that the architect's demand that the defects be remedied required that the plaintiff do the repairs at his expense regardless of the cause of the defects, asserting in part that the architect's approval of the work was a condition precedent to the plaintiff's right to recover the cost of remedying the defects that the subcontractor had subtracted from the amount due the plaintiff on the contract. After a trial, the court rendered judgment for the plaintiff.

The court of appeal affirmed. A condition that a third party take some action, such as action by the architect, is to be construed against the party relying on it and will be held to be a covenant, rather than a condition, when the terms of the agreement can be so construed. In this case, the architect's certificate was not unequivocally made a condition precedent to the plaintiff's right to recover, nor was the architect's decision final or conclusive. Thus it was not a condition precedent to the plaintiff's right of recovery (*185 Cal. App. 2d 488, 504)* .

[c] Stipulations Are Covenants When Forfeiture or Inequitable Consequences Is Involved

Alpha Beta Food Mkt. v. Retail Clerks *(1955) 45 Cal. 2d 764, 291 P.2d 433 , cert. denied, 350 U.S. 996 (1956)* , is discussed in [i], *above*.

[4] Additional Authorities

[a] Stipulations Must Be Construed as Covenants When Possible

The court of appeal in *In re Marriage of Hasso (1991) 229 Cal. App. 3d 1174, 280 Cal. Rptr. 919* , affirmed the trial court's judgment enforcing a marital settlement agreement over the objections of one spouse that theagreement was subject to the approval of the parties' attorneys. This contention was based on signature lines at the bottom for each of the parties' attorneys under the caption "Approved As To Form" and acknowledgments by each party that they had retained their own counsel to advise them in connection with their rights under the agreement. Conditions precedent are not favored, and contractual provisions will not be construed as conditions precedent in the absence of language plainly requiring such a construction. The agreement contained no basis for such a construction (*229 Cal. App. 3d 1174, 1181-1182)* .

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[Reserved]

§§ 50.503[Reserved]

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5-50 California Points & Authorities § 50.510

§ 50.510 Contract Is Not Ambiguous

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

SUMMARY JUDGMENT FOR THE _____ [PLAINTIFF *or* DEFENDANT] IS PROPER WHEN THERE IS NO CONFLICT AS TO THE TERMS OF THE CONTRACT AND ITS PROVISIONS ARE NOT UNCERTAIN OR AMBIGUOUS, THERE IS OTHERWISE NO TRIABLE ISSUE OF FACT AS TO WHETHER THE DEFENDANT BREACHED THE CONTRACT, AND AS A MATTER OF LAW, JUDGMENT SHOULD BE RENDERED IN FAVOR OF THE _____ [PLAINTIFF *or* DEFENDANT].

Meaning of Unambiguous Contract Is Question of Law. When there is no conflict as to the terms of a contract, and its provisions are not uncertain or ambiguous, its meaning and effect and the relation of the parties to it become questions of law to be decided by the court, and a motion for summary judgment may be granted (*Goldstein v. Hoffman (1963) 213 Cal. App. 2d 803, 814, 29 Cal. Rptr. 334*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that a contract's terms are clear and unambiguous.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a party seeks to raise this contention. For example, it may be used to support a party's motionfor summary judgment on a particular ground, based on the theory that the terms are unambiguous and therefore the matter at issue may be resolved as a matter of law on motion for summary judgment.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised to support a motion for summary judgment, the memorandum would include an analysis of the moving and opposing papers showing that undisputed facts disclose a clear and unambiguous contract.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.500* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Meaning of Unambiguous Contract Is Question of Law

Goldstein v. Hoffman *(1963) 213 Cal. App. 2d 803, 29 Cal. Rptr. 334* , was an action to declare the plaintiffs the owners of assets belonging to the estate of a decedent. The plaintiffs had transferred real property to the decedent in consideration for which the decedent was to leave his entire estate to the plaintiffs. When the decedent's will did not comply with the terms of the agreement, the plaintiffs asked the court to declare that all of the assets belonging to the decedent's estate were the plaintiffs' property. The plaintiffs filed as exhibits the agreement between the plaintiffs and thedecedent, an earlier will that the decedent had executed complying with the agreement, and the later will executed by the decedent, which did not comply with the agreement. The plaintiffs' evidence was uncontroverted. The trial court reached the following conclusions. Exhibit A was a valid agreement to make a will. Pursuant to the agreement, a will (Exhibit B) was executed, leaving the decedent's estate in equal shares to the plaintiffs. The agreement provided that the will would not be revoked without the plaintiffs' written consent. Exhibit B was revoked by the execution of the last will (Exhibit C), which specifically provided that all other wills were revoked. To the extent that the last will left each of the plaintiffs one third of the residue of the decedent's estate, it complied with Exhibit A. By revoking Exhibit B and specifically bequeathing his interest in specific property to the defendant, the decedent breached Exhibit A. The plaintiffs were entitled to distribution of the estate. The trial court granted the plaintiffs' motion for summary judgment.

The court of appeal affirmed. The plaintiffs' affidavit and exhibits set forth facts which, if true, established every element necessary to sustain a judgment, and these facts were uncontroverted. There being no conflict as to the terms of the exhibits, and it appearing that the provisions were not uncertain or ambiguous, the meaning and effect of the exhibits and the relation of the parties became questions of law to be decided by the court. The trial court's application of the law to the uncontroverted facts led the court to correct conclusions (*213 Cal. App. 2d 803, 814)* .

[4] Additional Authorities

[a] Meaning of Unambiguous Contract Is Question of Law

In *Appling v. State Farm Mut. Auto. Ins. Co. (9th Cir. 2003) 340 F.3d 769, 777-779* , independent contractor insurance agents brought a breach of contract action against the defendant insurer. The district court granted the insurance company's motion for summary judgment and the agents appealed. They disputed the district court's conclusion that the termination provision in their contract allowed termination at will, and argued that parol evidence could be used to interpret the provision to show that it required good cause. The Ninth Circuit stated that in *Pacific Gas & Elec. Co v. G.W. Thomas Drayage & Rigging Co. (1968) 69 Cal. 2d 33, 69 Cal. Rptr. 561, 442 P.2d 641* the California Supreme Court established rules governing the use of parol evidence in determining the meaning of words in a contract where the contract is clear and unambiguous and integrated. *Pacific Gas* made clear that extrinsic evidence is not admissible to add to, detract from, or vary the terms of a written contract, but only to define the terms in a contract. Here, the agents were seeking to add a good cause term to the termination provision, not to interpret the words of that provision. *Pacific Gas* clearly prohibited such an attempt to graft a good cause requirementonto the termination provision's plain language allowing termination at will. The court of appeals therefore affirmed the district court's holding that there was no genuine issue of material fact as to meaning of termination provision (*340 F.3d 769, 777-779)* .

In *Crow Winthrop Dev. Ltd.Pshp. (9th Cir. 2001) 241 F.3d 1121* , two partnerships (Crow Operating and Crow Development) were formed to acquire office buildings and land. After a dispute and litigation regarding management of the property, the parties entered into a settlement agreement. The agreement allowed an affiliate of Crow Operating to manage the common areas and parking. It also contained a change in ownership provision which provided that the management provisions would terminate if Crow Operating no longer owned the office buildings. Crow Operating subsequently filed for bankruptcy and the bankruptcy court transferred ownership of the office buildings to a new owner. Crow Operating requested and obtained the bankruptcy court's approval of the assignment of the settlement agreement to the new owner. The new owner then began receiving notices from Crow Development purporting to terminate the management provisions of the settlement agreement pursuant to the change in ownership provision. The new owner filed a motion asking the bankruptcy court to determine the validity of the change in ownership provision under *11 U.S.C. § 365(f)*, which invalidates anti-assignment clauses in debtors' contracts. The bankruptcy court issued an order invalidating the change in ownership provision as an anti-assignment clause. The district court affirmed.

The Ninth Circuit first determined that the bankruptcy court properly considered the validity of the change in ownership provision on a motion rather than in an adversary proceeding. It then held that the bankruptcy court did not err in invalidating the change in ownership provision as an unenforceable anti-assignment clause under *11 U.S.C. § 365(f)*. Finally, the court concluded that the bankruptcy court had sufficient evidence before it to determine the validity of the change in ownership provision. Under California law, if a contract's terms are unambiguous, a court may interpret the contract without recourse to extrinsic evidence. The court found that to the extent that factual findings were necessary to its determination, the evidence in the record was more than sufficient to dispel any suggestion of clear error (*241 F.3d 1121, 1123-1124)* .

In *Beard v. Goodrich (2003) 110 Cal. App. 4th 1031, 2 Cal. Rptr. 3d 160* , an attorney filed a complaint seeking a declaration that he was entitled to payment of the full amount of attorney fees awarded in the underlying action, plus the costs incurred in that action. The client, defendant in the underlying action, cross-complained for failure to pay sums due under the contingency fee contract, claiming entitlement to 60 percent of the settlement funds. The trial court agreed with the client, finding that under the terms of the parties' fee agreement, the attorney was entitled to 40 percentof the settlement amount after a deduction for unpaid costs. The attorney appealed, claiming that the court misinterpreted the fee agreement. He argued that under the terms of the agreement, he was entitled to 40 percent of the client's "net recovery," defined in the fee agreement as including not only all amounts received but also including the forgiveness or discharge of debt. He asserted that the contract should have been interpreted to include not only the recovery on the cross-complaint, but also 40 percent of the unrecovered damages sought by the plaintiff in the underlying action. The court of appeals noted that as the underlying case settled, the attorney's entitlement to fees was defined not by the underlying judgment (which was vacated as part of the settlement) or the settlement (which did not

include an attorney fee award), but by the attorney fee contract. The merits of the attorney's contention turned on the meaning of the contractual provision defining net recovery as including "the forgiveness or discharge of debt." The trial court had ruled that the phrase was not ambiguous, and that undetermined and unrecovered claims did not constitute the forgiveness or discharge of debt. The court of appeal affirmed, stating that to determine the objective intent, the question was what a reasonable person would believe the parties intended. The ordinary meaning of the term "debt" is something that is owed. A reasonable person would not construe it to include an unresolved and possibly unfounded claim. The court of appeal held that the trial court was justified in concluding that the phrase was not reasonably susceptible to a meaning that includes "unrecovered unliquidated claims." The trial court, therefore, correctly concluded that the attorney had not shown that the phrase was ambiguous (*110 Cal. App. 4th 1031, 1037-1039)* .

In *Roden v. Bergen Brunswig Corporation (2003) 107 Cal. App. 4th 620, 132 Cal. Rptr. 2d 549* , an executive who was terminated without cause brought suit against his employer. Ultimately, he accepted a "section 998" settlement offer [*see Code Civ. Proc. § 998*], and then successfully filed an application for entry of judgment and to enforce the judgment. The employer filed a motion for reconsideration, which was denied, and then appealed from the order interpreting the judgment. The issue was whether the lump sum payment required by the judgment included an amount for retirement benefits, or whether continuing retirement benefits were to be provided to plaintiff under the judgment provision requiring defendant to continue employment benefits. The court of appeal affirmed the post-judgment order. It held that the judgment was clear and unambiguous. It required defendant to continue to provide specified employment benefits, including retirement benefits, to plaintiff. Consequently, the amount defendant was required to pay as a lump sum under the judgment did not resolve defendant's liability with respect to plaintiff's retirement benefits. The court stated that the language of the judgment was not reasonably susceptible of the interpretation the employer suggested, and thus the court did not need to consider the employer's extrinsic evidence. Even ifit did so, however, and if the proffered evidence were admissible, the result would be the same (*107 Cal. App. 4th 620, 623, 633)* .

In *Benedek v. PLC Santa Monica, LLC (2002) 104 Cal. App. 4th 1351, 129 Cal. Rptr. 2d 197* , a member of a health club suffered personal injuries from a falling television while on the club's premises. He had signed a waiver of liability which released the health club from liability for all personal injuries sustained by a member on the premises "whether using exercise equipment or not." The member brought an action against the health club for negligence and premises liability. The club answered the complaint, asserting the affirmative defenses of assumption of risk and waiver or release. It then moved for summary judgment on the basis that the written release expressly negated any duty it owed the member. The trial court granted the summary judgment motion, concluding that the written release clearly and unambiguously defeated the lawsuit. The member filed an appeal. The court of appeal concluded that the express language of the unambiguous release of the health club from all premises liability defined its scope. In this case, the broad language of the release applied to the liability of the health club for the fitness-unrelated personal injuries suffered by the health club member. The court affirmed the summary judgment in favor of the health club (*104 Cal. App. 4th 1351, 1361)* .

In *Sanchez v. Bally's Total Fitness Corporation (1998) 68 Cal. App. 4th 62, 79 Cal. Rptr. 2d 902* a health club member sued the club for negligence after she fell on the premises. The trial court granted summary judgment for the club. The plaintiff claimed on appeal that the release clause in her contract with the health club was ineffective to relieve the club of liability for her injuries because the exculpatory provision was not set out in large or italicized letters emphasizing to the reader that she was forgoing her right to assert a claim for injuries and damages, and because the word "negligence" was not found among its terms. The court of appeal affirmed, holding that the member's claim was barred by the release she executed when she joined the club. The court stated that whether a contract provision is clear and unambiguous is a question of law, not fact. It found that the health club release and assumption of risk provision was clear, explicit, and comprehensible in itself and when considered with entire agreement, and thus plaintiff's cause of action for negligence was barred by the terms of the agreement (*68 Cal. App. 4th 62, 69)* .

The court of appeal in *Equitable Life Assurance Society v. Berry (1989) 212 Cal. App. 3d 832, 260 Cal. Rptr. 819* , affirmed a judgment for an insurer upholding its interpretation of a policy and denying coverage. The plaintiff

contended on appeal that the trial court had erred in holding the contract unambiguous and thus depriving the plaintiff of a jury trial. The court of appeal said that the jury trial issue was a red herring because even if the court had not determined the matter itself, it would have beenrequired to hear the evidence bearing on the meaning of the contract outside the presence of the jury (*212 Cal. App. 3d 832, 836)* . The procedure when the proponent of extrinsic evidence urges a particular interpretation of a contract is for the court, outside the presence of the jury, to permit the parties to introduce, conditionally or subject to a motion to strike, all available evidence on the issue of the meaning to be given to the written instrument. If the evidence has the effect of imparting to the written instrument a meaning to which the instrument is not readily susceptible, the extrinsic evidence is stricken. The jury is involved only if the court determines that (1) the wording of the instrument is reasonably susceptible to the interpretation contended for by the proponent of the extrinsicevidence, (2) the extrinsic evidence is relevant to prove the proposed meaning, and (3) the credibility of the proponent's parol evidence is disputed (*212 Cal. App. 3d 832, 838)* . A determination whether an ambiguity exists in a contract is one of law. Thus, the trial court's ruling was not binding on the reviewing court, and its review is de novo (*212 Cal. App. 3d 832, 840)* .

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5-50 California Points & Authorities § 50.511

§ 50.511 Plaintiff's Construction of Ambiguous Contract Must Be Accepted

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

IF AN INSTRUMENT PLEADED IN A COMPLAINT IS AMBIGUOUS, THE CONSTRUCTION, IF REASONABLE, THAT IS ADOPTED IN THE COMPLAINT MUST BE ACCEPTED BY THE COURT IN RULING ON A GENERAL DEMURRER.

Plaintiff's Construction of Ambiguous Contract Must Be Accepted. When the provisions of a contract are ambiguous, the court in ruling on a general demurrer must accept as correct the plaintiff's reasonable allegations as to the meaning of the agreement (*Pigeon Point Ranch, Inc. v. Perot (1963) 59 Cal. 2d 227, 233, 28 Cal. Rptr. 865, 379 P.2d 321* ; *Aragon-Haas v. Family Security Ins. Services, Inc. (1991) 231 Cal. App. 3d 232, 239, 282 Cal. Rptr. 233*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that plaintiff's allegations of a contract provide a reasonable construction that must be accepted.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a party seeks to raise this contention. Usually, for example, it would be used to oppose a defendant's general demurrer interposed on the ground that complaint alleges a contract the terms of which are ambiguous and uncertain.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is

raised to oppose a demurrer, the memorandum would include an analysis of the allegations showing that the terms in questions are unambiguous when given plaintiff's alleged reasonable construction.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a demurrer, they may be combined with appropriate memoranda set out in Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

In an appropriate case these memoranda may be used in opposition to memoranda such as those *set out in § 50.350*.

[3] Discussion of Authorities

[a] Plaintiff's Construction of Ambiguous Contract Must Be Accepted

Pigeon Point Ranch, Inc. v. Perot *(1963) 59 Cal. 2d 227, 28 Cal. Rptr. 865, 379 P.2d 321* , was an action by a corporation to recover funds misappropriated by an officer. The complaint alleged that the officer was to receive a sum of money for the express and sole purpose of paying attorney's fees owed by the corporation. However, the written agreement incorporated in the complaint provided that the officer did not agree to discharge the corporation's obligation of accrued attorney's fees for services to the corporation, and he assumed all of those fees in excess of a certain sum, although a later provision, by interlineation, stated that the officer was to receive a sum for attorney's fees as well as another sum. The complaint alleged that the officer violated the agreement in that he did not use the sum he received to pay the attorney's fees but instead converted that amount to his own use and paid the fees out of the corporation's funds. The officer demurred generally. The trial court sustained the demurrer and entered a judgment of dismissal.

The Supreme Court reversed. The provisions of the contract, although not clear as to whether the officer was required to use the sum to pay the fees, were subject to that interpretation and consistent with the corporation's allegation. The cause of action thus was not one in which the pleading placed a clearly erroneous construction on an unambiguous contract provision, and in the circumstances it was proper, if not essential, for the corporation to allege its own construction of the agreement. Accordingly, in passing on the sufficiency of the complaint, the trial court had to accept as correct the corporation's allegations as to the meaning of the agreement (*59 Cal. 2d 227, 233)* .

Aragon-Haas v. Family Security Ins. Services, Inc. *(1991) 231 Cal. App. 3d 232, 282 Cal. Rptr. 233* , was a wrongful termination case that included causes of action for breach of contract and breach of the covenant of good faith and fair dealing. Section 1.01 of the employment agreement gave the defendant the right to terminate the plaintiff's employment during the first year "as provided in Section 8.01," in other words, with or without cause, and "thereafter this Agreement shall be automatically extended" for six consecutive one-year terms. The contract was ambiguous. The trial court sustained a demurrer to the cause of action for breach of contract without leave to amend. On appeal, the defendant contended that the cause of action for breach of contract was properly dismissed because the employment agreement was integrated, and evidence sustaining the plaintiff's interpretation of the agreement was inadmissible

because it would vary the terms of the agreement.

The court of appeal reversed. When an ambiguous contract is the basis of an action, it is proper, if not essential, for the plaintiff to allege a construction of the agreement. As long as the pleading does not place a clearly erroneous construction on the provisions of the contract, in passing on the sufficiency of the complaint, the trial court must accept as correct the plaintiff's allegation as to the meaning of the agreement. Whether a contract is ambiguous is a question of law. In this case, the word "thereafter" in Section 1.01 made it unclear whether the right to terminate existed only during the first year of the plaintiff's employment or the right continued throughout the term of employment specified in the contract. Section 1.01 was ambiguous, and it was reasonably susceptible of the meaning alleged by the plaintiff: that after successful completion of the first year of employment, the plaintiff could be discharged only for good cause (*231 Cal. App. 3d 232, 239)* . When a complaint sets out a contract in full, a general demurrer admits not only the contents of the contract but also any pleaded meaning to which the contract is reasonably susceptible. While the plaintiff's interpretation of the contract ultimately may prove invalid, it was improper to resolve the issue against her solely on her own pleading. In ruling on a demurrer, the likelihood that the pleader will be able to prove his or her allegations is not the question (*231 Cal. App. 3d 232, 239)* .Additionally, the defendant's contention on the integration issue was without merit (*231 Cal. App. 3d 232, 239-240)* . When the parties to a written contract have agreed to it as an "integration," that is, a complete and final embodiment of the terms of an agreement, parol evidence cannot be used to add to or to vary its terms [*Code Civ. Proc. § 1856(a)*]. Extrinsic evidence is admissible, however, to explain what the parties meant by the language they used. Although extrinsic evidence is not admissibl to add to, detract from, or vary the terms of a written contract, the terms must first be determined before the court can decide whether extrinsic evidence is being offered for a prohibited purpose. The fact that the terms of the instrument appear clear to a judge does not preclude the possibility that the parties chose the language of the instrument to express different terms. Accordingly, rational interpretation requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties (*231 Cal. App. 3d 232, 240)* .

[4] Additional Authorities

[a] Plaintiff's Construction of Ambiguous Contract Must Be Accepted

In *Safeco Insurance Company of America v. Robert S. (2001) 26 Cal. 4th 758, 110 Cal. Rptr. 2d 844* , a 16 year old boy accidentally shot a friend to death and the juvenile court sustained a petition alleging commission of involuntary manslaughter. The decedent's parents then brought a wrongful death action against the minor and his parents. They tendered defense to their insurer, who undertook the defense under a reservation of rights. The insurer brought an action in superior court seeking a declaration that it had no duty to defend or indemnify its insureds under a homeowners policy because the policy excluded coverage for an "illegal act." The insurer unsuccessfully moved for summary judgment, contending that the accidental killing fell within the policy exclusion for an "illegal act." The decedent's parents and the insureds then moved for summary judgment, claiming that as a matter of law, the insurer had a duty to defend and indemnify. The trial court granted the motion, ruling that the policy's "illegal act" exclusion could reasonably be interpreted as excluding coverage only for an intentional illegal act. The insurer appealed, and the court of appeal reversed. It concluded that the illegal act exclusion in the policy precluded coverage for any act in violation of civil or criminal law, and held that the policy did not provide coverage for an act causing death that resulted in a juvenile court adjudication of involuntary manslaughter. The California Supreme Court subsequently reversed the judgment of the court of appeal. It examined the controlling principles of insurance contract interpretation regarding ambiguity, and noted that the phrase "illegal act" was susceptible of two reasonable meanings (*26 Cal. 4th 758, 762-763)* . The court stated that the court of appeal's constructionof the phrase as meaning violation of any civil or criminal law was so broad as to render the policy's liability coverage practically meaningless. It found that the proper inquiry was whether reasonable insureds expect their homeowners policy to protect them against liability for accidental injury or death occurring in their home, and answered in the affirmative (*26 Cal. 4th 758, 763-766)* . Therefore, it concluded that the wrongful death action was within the liability coverage of the homeowners policy at issue (*26 Cal. 4th 758, 767)* .

In *Badie v. Bank of America (1999) 67 Cal. App. 4th 779, 803-804, 79 Cal. Rptr. 2d 273* , bank customers sought a declaration regarding the validity of an alternative dispute resolution clause that the bank had attempted to add to their existing credit account agreements. The trial court entered judgment in favor of the bank. The court of appeal held that the provision in the original credit account agreements that the bank could change any "term, condition, service or feature" of the account was ambiguous as to whether the bank could impose the alternative dispute resolution clause. The court applied the rule that ambiguous contract language must be interpreted most strongly against the party who prepared it, finding that the parties did not intend that the change of terms provision should permit the bank to add new contract terms that differ in kind from the terms and conditions included in the original agreements (*67 Cal. App. 4th 779, 798-803)* .

In *Marina Tenants Assn. v. Deauville Marina Development Co. (1986) 181 Cal. App. 3d 122, 226 Cal. Rptr. 321* , a suit by tenants of individual units claiming to be third-party beneficiaries of a master lease between a county as lessor and a developer, the court of appeal found the master lease ambiguous in its dual purposes to maximize revenue for the county and to ensure that rental rates for the ultimate tenants were fair and reasonable (*181 Cal. App. 3d 122, 131-132)* . The developer's demurrer was sustained because the tenants could not assert greater rights in the contract than the county, which had power to do so but had never challenged the rents at issue. Nevertheless, in determining that the tenants were third-party beneficiaries, the court of appeal reiterated and relied on the rule that when a contract is ambiguous, the plaintiffs are entitled to allege their construction in the complaint. In ruling on a demurrer, that construction, if it is not clearly erroneous, must be accepted as correct (*181 Cal. App. 3d 122, 128, 132)* .

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5-50 California Points & Authorities §§ 50.512-50.519

[Reserved]

§§ 50.512[Reserved]

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5-50 California Points & Authorities § 50.520

§ 50.520 Oral Contract Was Modified by Written Consent

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE ORAL CONTRACT WAS MODIFIED BY THE WRITTEN CONSENT OF THE PARTIES, AND THE DEFENDANT FULFILLED HIS/HER/ITS OBLIGATIONS UNDER THE CONTRACT AS MODIFIED.

A. Modification Defined. A modification of a contract is a change in one or more respects that introduces new elements into the details of the contract, or cancels some of them but leaves the general purpose and effect of the contract undisturbed (*Grant v. The Aerodraulics Co. (1949) 91 Cal. App. 2d 68, 74, 204 P.2d 683*).

B. Oral Contract May Be Modified by Written Agreement Without New Consideration. A contract not in writing may be modified in any respect by the consent of the parties, in writing, without a new consideration, and is extinguished to the extent of the modification (*Civ. Code § 1697*; *see Roehm Distrib. Co. v. Burgermeister Brewing Corp. (1961) 196 Cal. App. 2d 678, 681, 16 Cal. Rptr. 881*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that an oral contract was modified by the mutual written consent of the parties and the defendant fulfilled his or her obligations under the contract as modified.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a party seeks to raise this contention. For example, it may be used to support a defendant's motion for summary judgment.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised to support a motion for summary judgment, the memorandum would include ananalysis of the moving and opposing papers showing that undisputed facts disclose a modification under which defendant fully performed.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

In an appropriate case, this form may be combined with the memoranda *set out in § 50.521* and *§ 50.522*.

For memoranda supporting and opposing the contention that a novation has occurred by which the parties substituted a new obligation for the one the plaintiff is attempting to enforce, see *§ 50.450* and *§ 50.523*.

For memoranda supporting and opposing the contention that the contract has been rescinded or abandoned by the mutual consent of the parties, see *§§ 50.470, 50.480*.

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Modification Defined

In ***Grant v. The Aerodraulics Co.*** *(1949) 91 Cal. App. 2d 68, 204 P.2d 683* , the plaintiff granted to the defendant an exclusive world-wide license to produce and sell a certain type of valve and to obtain a patent for the device. The defendant agreed to pay the plaintiff a minimum guarantied royalty. Thereafter, the defendant refused to pay the plaintiff the unpaid balance of the royalty debt. The plaintiff sued to recover this amount. As an affirmative defense, the defendant alleged that after the execution of the agreement, the parties orally agreed that in consideration of the payment by the defendant of a lesser sum, the contract would be terminated and canceled. The defendant further alleged that it had tendered payment of this lesser amount, but the plaintiff refused to accept it. The trial court rendered judgment on the pleadings for the plaintiff. On appeal,the plaintiff contended that since the alleged agreement to terminate was not in writing and was not fully executed, it was completely ineffective to accomplish its purported purpose under former Civ. Code § 1698, which at that time provided, "A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise."

The court of appeal affirmed the judgment on the ground that the alleged oral agreement to terminate the contract was not supported by consideration (*91 Cal. App. 2d 68, 75-77)* . The plaintiff's contention on appeal was not correct, however. A well-recognized distinction exists between the alteration and the termination of a contract. An alteration is a modification or change in one or more respects that introduces new elements into the details of the contract or cancels some of them, but leaves the general purpose and effect undisturbed (*91 Cal. App. 2d 68, 74)* . On the other hand, to terminate a contract means to abrogate as much of it as remains unperformed, doing away with the existing agreement

on the terms and with the consequences agreed on. The termination or abrogation of a written contract may be achieved by an oral agreement, whether executed or not, and *Civ. Code § 1698* would have no application in that case (*91 Cal. App. 2d 68, 75)* .

[b] Oral Contract May Be Modified by Written Agreement Without New Consideration

In ***Roehm Distrib. Co. v. Burgermeister Brewing Corp.*** *(1961) 196 Cal. App. 2d 678, 16 Cal. Rptr. 881* , the plaintiff orally agreed to act as exclusive distributor of the defendant's product. It was an industry practice that such an agreement could be terminated only on reasonable notice, usually 60 days, from the manufacturer to the distributor. After making the oral agreement, the plaintiff and the defendant exchanged letters stating that their contractual relation might be terminated at any time by written notice. Thereafter, the defendant gave written notice of termination to the plaintiff. The plaintiff sued for damages for breach of the oral agreement. The trial court granted the defendant's motion for summary judgment. On appeal, the plaintiff contended that the letters were invalid as a modification of the oral contract because there was no consideration.

The court of appeal affirmed. *Civ. Code § 1697* contains a clear, direct, and unequivocal statutory mandate that no new consideration is required for the "alteration" (now "modification") of an oral contract by a written agreement (*196 Cal. App. 2d 678, 681)* .

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5-50 California Points & Authorities § 50.521

§ 50.521 Written Contract Was Modified Pursuant to Its Own Terms

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE CONTRACT WAS MODIFIED IN ACCORDANCE WITH ITS OWN TERMS, AND THE DEFENDANT HAS FULFILLED HIS/HER/ITS OBLIGATIONS UNDER THE CONTRACT AS MODIFIED.

A. Modification Defined. [*See § 50.520[1], Paragraph A.*]

B. Written Contract May Expressly Provide for Modification. A written contract may expressly provide for its modification (*Busch v. Globe Indus. (1962) 200 Cal. App. 2d 315, 320, 19 Cal. Rptr. 441*).

[*Optional*] **C. Modification Pursuant to Contract Provision.** When modification of a written contract is in accordance with a provision of the contract authorizing and setting forth the method for the modification, the provisions of *Civil Code Section 1698* restricting oral modification of a written contract are inapplicable (*see Busch v. Globe Indus. (1962) 200 Cal. App. 2d 315, 320, 19 Cal. Rptr. 441*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that a written contract was modified in accordance with its terms and the defendant has fulfilled his or her obligations under the contract as modified.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a party seeks to raise this contention. For example, it may be used to support a defendant's motion for summary judgment.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised to support a motion for summary judgment, the memorandum would include an analysis of the moving and opposing papers showing that undisputed facts disclose a modification by terms of the contract under which defendant fully performed.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

In an appropriate case, this form may be combined with the memoranda *set out in § 50.520* and *§ 50.522*.

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Written Contract May Expressly Provide for Modification

In ***Busch v. Globe Indus.*** *(1962) 200 Cal. App. 2d 315, 19 Cal. Rptr. 441* , the plaintiff became an exclusive agent for the distribution of kitchen utensils produced by the defendant. The written agreement provided that the defendant would not enter into any contract contemplating the shipment of its products into the plaintiff's territory without first communicating with the plaintiff and obtaining his consent to such a transaction. Subsequently, the defendant negotiated with several national companies for the promotion of its products. The plaintiff was orally informed of these negotiations and advised that, if consummated, they would result in some sales within his exclusive territory. The plaintiff did not object to these negotiations and, in fact, participated in some of them. The negotiations eventually led to a contract between the defendant and another corporation, which resulted in some sales in the plaintiff's territory. Sometime thereafter, the plaintiff informed the defendant that he wished to get out of the business, and the parties started negotiations that resulted in the defendant's buying back all of its merchandise from the plaintiff. Thereafter, the plaintiff sued for breach of the exclusive agency agreement based on the sales in the plaintiff's territory pursuant to the promotional program. After a trial without a jury, the trial court rendered judgment for the defendant on finding that the exclusive agency contract had been orally modified by the parties with the plaintiff's consent.

The court of appeal affirmed. Under former Civ. Code § 1698, a contract could be altered by a contract in writing or by an executed oral agreement, and not otherwise. However, a written contract may expressly provide for its own modification. When a modification is in accordance with a provision of a contract authorizing and setting forth a method for its revision, the rule that a contract in writing may be altered only by another written contract or an executed oral agreement has no application because there is no alteration of the contract; the modification is merely conducted in accordance with the terms of the contract. In this case, the contract provided that the defendant would not enter into any contract contemplating the shipment of its products into the plaintiff's territory without first communicating with the plaintiff and obtaining his agreement. The evidence showed that there was a communication regarding the promotional program to the plaintiff, and his conduct indicated his consent. Therefore, there was no alteration or revision of the

contract; there was only conduct pursuant to and in conformity with the agreement. If considered a modification, the method of modifying the contract was provided for and followed by the parties (*200 Cal. App. 2d 315, 320)* .

[b] Modification Pursuant to Contract Provision

Busch v. Globe Indus. *(1962) 200 Cal. App. 2d 315, 320, 19 Cal. Rptr. 441* , is discussed in [a], *above*.

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5-50 California Points & Authorities § 50.522

§ 50.522 Written Contract Was Modified by Written Agreement or by Oral Agreement Supported by New Consideration

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE WRITTEN CONTRACT WAS MODIFIED BY _____ [A SUBSEQUENT WRITTEN CONTRACT *or* AN ORAL AGREEMENT SUPPORTED BY A NEW CONSIDERATION] BETWEEN THE PARTIES, AND THE DEFENDANT HAS FULFILLED HIS/HER/ITS OBLIGATIONS UNDER THE CONTRACT AS MODIFIED.

A. Modification Defined. [*See § 50.520[1], Paragraph A.*]

[*EITHER*]

B. Modification of Written Contract by Another Written Contract. A contract in writing may be modified by a contract in writing (*Civ. Code § 1698(a)*).

[*AND/OR*]

C. Modification of Written Contract by Oral Agreement Supported by New Consideration. Unless the contract otherwise expressly provides, a contract in writing may be modified by an oral agreement supported by new consideration (*Civ. Code § 1698(c)*; *Wagner v. Glendale Adventist Medical Center (1989) 216 Cal. App. 3d 1379, 1388, 265 Cal. Rptr. 412*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that the contract was modified by a subsequent written contract or an oral agreement supported by new consideration [*see Civ. Code § 1698(a), (c)* and discussion in [c], *below*], and a party's obligations were fulfilled under the contract as modified.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a party seeks to raise this contention. For example, it may be used to support a defendant's motion for summary judgment.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised to support a motion for summary judgment, the memorandum would include an analysis of the moving and opposing papers showing that undisputed facts disclose a subsequent modification under which defendant fully performed.

[c] Modification of Contracts

Modification of a contract for the sale of goods is governed by the provisions of *Com. Code § 2209*, rather than *Civ. Code § 1698*. Thus, the memoranda set forth in this form are inapplicable in an action for damages for breach of a contract for the sale of goods. An agreement modifying such a contract needs no consideration to be binding [*Com. Code § 2209(1)*]. However, a signed agreement that excludes modification or rescission, except by a signed writing, cannot be otherwise modified or rescinded. Except as between merchants, when such a requirement is contained in a form supplied by the merchant, it must be separately signed by the other party [*Com. Code § 2209(2)*].

Former *Civ. Code § 1698* provided that a contract in writing may be altered by a contract in writing, or by an executed oral agreement, and nototherwise. The section was amended in 1976. Under the amended version, a written contract may still be modified by a written contract and by an executed oral agreement [*see Civ. Code § 1698(a), (b)*]. In addition, now a contract in writing may be modified by an oral agreement supported by a new consideration, unless the written contract expressly provides otherwise. However, the contract must satisfy the statute of frauds [*Civ. Code § 1624*] if the contract, as modified, is within its provisions [*Civ. Code § 1698(c)*].

The statute does not preclude the application, in an appropriate case, of rules of law concerning estoppel, oral novation and substitution of a new agreement, rescission of a written contract by an oral agreement, waiver of a provision of a written contract, or oral independent collateral contracts [*Civ. Code § 1698(d)*].

[d] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[e] Related Memoranda

In an appropriate case, this form may be combined with the memoranda *set out in § 50.520* [*see also § 50.521*].

For memoranda supporting the contention that a written contract was modified by an executed oral agreement, see *§ 50.523*.

For memoranda supporting and opposing the contention that a novation occurred by which the parties substituted a new obligation for the one the plaintiff is attempting to enforce, see *§ 50.450* and *§ 50.461*.

For memoranda supporting and opposing the contention that a contract was rescinded or abandoned by the mutual consent of the parties, see *§ 50.470* and *§ 50.480*.

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Modification of Written Contract by Oral Agreement Supported by New Consideration

The court of appeal in ***Wagner v. Glendale Adventist Medical Center*** *(1989) 216 Cal. App. 3d 1379, 265 Cal. Rptr. 412* , affirmed a judgment for an employer, concluding that there was insufficient evidence of subsequent oral representations to support a modification as alleged by the plaintiff. Nevertheless, the court did note that when one party has, through oral representations and conduct or custom, behaved after execution of a contract in a manner antithetical to one or more of the terms of an express written contract and induced the other party to rely on those representations and conduct or custom, it is inequitable to deny the relying party the benefit of the other party's apparent modification of the written contract (*216 Cal. App. 3d 1379, 1388)* .

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5-50 California Points & Authorities § 50.523

§ 50.523 Written Contract Was Modified by Executed Oral Agreement

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE WRITTEN CONTRACT WAS MODIFIED BY AN EXECUTED ORAL AGREEMENT BETWEEN THE PARTIES, AND THE DEFENDANT HAS FULFILLED HIS/HER/ITS OBLIGATIONS UNDER THE CONTRACT AS MODIFIED.

A. Modification Defined. [*See § 50.520[1], Paragraph A.*]

B. Modification of Written Contract by Executed Oral Agreement. A contract in writing may be modified by an oral agreement to the extent that the oral agreement is executed by the parties (*Civ. Code § 1698(b)*).

C. Executed Oral Agreement Is Sufficient to Modify Written Contract Without Consideration. An executed oral agreement serves as a modification of a written agreement without regard to the presence or absence of consideration (*Julian v. Gold (1931) 214 Cal. 74, 76, 3 P.2d 1009* ; *Eluschuk v. Chemical Eng'rs Termite Control, Inc. (1966) 246 Cal. App. 2d 463, 469, 54 Cal. Rptr. 711*).

[*Optional*] **D. Performance by Promisee Alone Is Sufficient When Oral Modification Is Supported by Consideration.** If thereexists sufficient consideration for an oral modification agreement, then full performance by the promisee alone is sufficient to render the agreement executed and therefore enforceable under *Civil Code Section 1698* (*D.L. Godbey & Sons Constr. Co. v. Deane (1952) 39 Cal. 2d 429, 433-434, 246 P.2d 946*).

[*Optional*] **E. Effect of Contract Provision Requiring Written Modification.** An executed oral agreement may alter a written contract, even though the original contract provides that all changes must be in writing (*Miller v. Brown (1955) 136 Cal. App. 2d 763, 775, 289 P.2d 572*).

[*Optional*] **F. Nonperformance Is Execution of Oral Agreement Not to Perform.** When the parties orally modify a written contract by agreeing that a certain act contemplated by the contract will not be performed, the modification is to be deemed executed, within the meaning of *Civil Code Section 1698*, when the party who was to perform the act does not perform it and the other party does not demand performance (*see Coldwell Banker & Co. v. Pepper Tree Office Center Associates (1980) 106 Cal. App. 3d 272, 280-281, 165 Cal. Rptr. 51*).

[*Optional*] **G. Burden of Proof.** An oral modification of a written contract, to be sustained, need be proved only by a preponderance of the evidence, and it is prejudicial error to instruct the jury that the elements of an oral modification must be proved by clear and convincing evidence (*Barrett v. Bank of America (1986) 183 Cal. App. 3d 1362, 1370-1371, 229 Cal. Rptr. 16*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of the contention that the contract was modified by an executed oral agreement [*see Civ. Code § 1698(b)*], and a party's obligations were fulfilled under the contract as modified.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a party seeks to raise this contention. For example, it may be used to support a defendant's motion for summary judgment.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is raised to support amotion for summary judgment, the memorandum would include an analysis of the moving and opposing papers showing that undisputed facts disclose a modification under which defendant fully performed.

[c] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Memoranda

In an appropriate case, this form may be combined with the memoranda *set out in § 50.520* and *§ 50.522*.

For memoranda supporting and opposing the contention that a novation occurred by which the parties substituted a new obligation for the one the plaintiff is attempting to enforce, see *§ 50.450* and *§ 50.461*.

For memoranda supporting and opposing the contention that a contract was rescinded or abandoned by the mutual consent of the parties, see *§ 50.470* and *§ 50.480*.

These memoranda should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a motion for summary judgment, they may be combined with appropriate memoranda set out in Ch. 221, *Summary Judgments* .

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 50.464* may be submitted in opposition to the contention supported by this form.

[3] Discussion of Authorities

[a] Executed Oral Agreement Is Sufficient to Modify Written Contract Without Consideration

In ***Julian v. Gold*** *(1931) 214 Cal. 74, 3 P.2d 1009* , the defendants agreed in writing to lease certain real property from the plaintiff. Subsequently, the parties made an oral agreement by which the monthly rent was reduced from the amount provided for in the written lease. The plaintiff accepted the defendants' performance under the oral agreement for more than two years, until the defendants defaulted in their performance under the oralagreement. The plaintiff then sued to recover back rent equal to the difference between the amount provided for in the written lease and the amount actually paid by the defendants. After a trial without a jury, the trial court concluded that since the agreement to reduce the rent, although carried out, was oral and unsupported by consideration, it was void and subject to repudiation by the plaintiff at any time. The trial court rendered judgment for the plaintiff.

The Supreme Court reversed. An executed oral agreement serves as a modification or release of a written agreement without regard to the presence or absence of consideration (*214 Cal. 74, 76)* . Although some prior opinions contained statements that an executed oral modification of a contract required consideration to be valid, the statements were merely dicta (*214 Cal. 74, 76-78)* .

In ***Eluschuk v. Chemical Eng'rs Termite Control, Inc.*** *(1966) 246 Cal. App. 2d 463, 54 Cal. Rptr. 711* , the plaintiff agreed in writing to render services to the defendant as a salesman, field representative, and solicitor for a one-year period at a commission equal to a certain percentage of the gross sales made by him. The plaintiff was prohibited from competing with the defendant for a two-year period following termination of the agreement. The plaintiff would be obligated to pay the defendant a certain sum as liquidated damages in the event of breach of the contract by the plaintiff, and the defendant could apply any money due to the plaintiff as an offset against damages. Immediately after making the written agreement, the plaintiff and the defendant orally agreed that the plaintiff would not be required to render services as a solicitor or field representative but only as a salesman, and the plaintiff would receive a smaller commission than that provided for in the written agreement. Before expiration of the written contract, the plaintiff terminated his employment with the defendant without notice or legal excuse and went to work for the defendant's competitor. Pursuant to the liquidated-damages provision of the written agreement, the defendant retained the amount that it owed the plaintiff for services rendered. The plaintiff sued to recover this amount. The trial court found that all of the terms and conditions of the written employment contract, except as modified by the executed oral agreement pertaining to duties and salary, were valid and enforceable, and the plaintiff had breached the written agreement by prematurely leaving the defendant's employment, refusing to perform his duties as a salesman, and competing with the defendant during the term of the agreement. The trial court rendered judgment for the defendant. The court of appeal affirmed. The oral agreement substituting duties and salary for those provided in the written agreement did not, under the facts o the case, constitute a novation so as to extinguish the written contract (*246 Cal. App. 2d 463, 468)* . The provisions of the written agreement relating to the plaintiff's duties and salary were modified by a fully-executed oral agreement that left all other provisions of the written agreement in effect. An executed oralagreement will serve as a modification of a written agreement without regard to the presence or absence of consideration. However, an executed oral modification of a term or provision of a written contract does not extinguish the contract; the effect is to alter only those portions of the written contract directly affected by the oral agreement, leaving the remaining portions intact. Thus, the executed oral agreement did not relieve the plaintiff from the terms of the written contract that prohibited him from competing with the defendant and provided for damages for his breach of the contract (*246 Cal. App. 2d, 463, 469)* .

[b] Performance by Promisee Alone Is Sufficient When Oral Modification Is Supported by Consideration

In ***D.L. Godbey & Sons Constr. Co. v. Deane*** *(1952) 39 Cal. 2d 429, 246 P.2d 946* , the plaintiff made a written contract to perform the cement work for a building that the defendants were erecting. The plaintiff was to be paid a certain amount per cubic foot, and the basis of the payment would be determined by the actual measurement of the forms into which the concrete would be poured. Thereafter, before commencing performance, the parties orally agreed that the plaintiff would instead be paid on the basis of the actual amount of concrete delivered and poured, less an allowance for shrinkage and waste. The parties further agreed that the plaintiff would furnish the defendants with delivery tickets showing the actual amount of concrete poured on the job site every day. The plaintiff sued for breach of contract, alleging that it had performed the contract, as modified, and had supplied the required daily reports of deliveries, and under the terms of the contract, as modified, there remained a certain amount owing. The trial court sustained a demurrer to the complaint without leave to amend and rendered judgment for the defendants. On appeal, the defendants contended that the alleged modification of the written contract was invalid because of lack of consideration and because it was not in writing, and therefore the complaint was fatally defective in failing to allege that any sum was due and unpaid under the terms of the original written contract.

The Supreme Court reversed. Since the modification was made before performance was started, the substitution of new rights and duties based on the new method of measurement was adequate consideration for the relinquishment of the reciprocal rights of the parties under the old method (*39 Cal. 2d 429, 431)* . The defendants' contention that the oral modification was invalid because it was not executed had no merit. Former Civ. Code § 1698, as it read at that time [*see Civ. Code § 1698(a), (b)*], had a dual operation. On the one hand, it invalidated oral contracts of modification that were unexecuted, and on the other hand, it validated executed agreements that might otherwise fail for lack of consideration. Agreements to accept less than is due under the terms of a written contract or to acceptperformance at a later date than that provided in writing are typical of the latter category of agreement. Since the modification agreement requires no act or forbearance on the part of the obligor, it can only be executed to the extent that the obligee accepts performance in accordance with its terms. Thus, in the absence of a valid waiver of a condition or facts establishing an estoppel to rely on *Civ. Code § 1698*, the statute can only be satisfied by execution on the part of the obligee by accepting less than is due (*39 Cal. 2d 429, 432)* . The situation is different when there is consideration for an oral modification agreement. The rights and duties of both parties to the contract are affected, and by performing the contract as modified, each party will be in a position to execute the oral agreement. There was a conflict in the language of prior decisions as to whether execution by one party is sufficient to allow enforcement of an oral modification against the other. However, in those cases in which there was adequate consideration for the oral modification, and in which the party relying on it had fully performed, the contract was enforced as modified whether or not the other party had performed (*39 Cal. 2d 429, 433)* . In this case, since the plaintiff had alleged an adequate consideration for the oral modification and full performance on its part, it had stated a cause of action (*39 Cal. 2d 429, 433-434)* .

[c] Effect of Contract Provision Requiring Written Modification

In ***Miller v. Brown*** *(1955) 136 Cal. App. 2d 763, 289 P.2d 572* , the defendant contracted in writing to build a house for the plaintiff. The defendant was to purchase the materials and supervise performance of the work required for construction of the house. The plaintiff was to pay the costs of the labor and materials, and the defendant was to receive a fee equal to a percentage of the costs. The defendant guarantied that the total cost would not exceed a specified sum unless changes were made in the plans. Any changes and deviations from the plans were to be made in writing and signed by both parties. After the house was completed, its total cost was considerably more than the amount provided for in the contract. The plaintiff sued to recover from the defendant the difference between the actual cost and the maximum guarantied cost specified in the contract. The defendant answered that the difference in cost represented extras that were ordered by the plaintiff. The trial court rendered judgment for the defendant. On appeal, the plaintiff contended that he was entitled to recover the cost of some of the extras because the contract required that any alterations be in writing, and the plaintiff had approved only one alteration in writing.

The court of appeal affirmed. The plaintiff had, in fact, ordered and approved the extras, and under the law, this

amounted to a modification of the written contract. Under *Civ. Code § 1698*, an executed oral agreement may alter an agreement in writing, even though, as in this case, theoriginal contract provides that all changes must be approved in writing. This is so because the executed oral agreement may modify the portion of the contract requiring written approval of changes as well as other provisions (*136 Cal. App. 2d 763, 775)* .

[d] Nonperformance Is Execution of Oral Agreement Not to Perform

In ***Coldwell Banker & Co. v. Pepper Tree Office Center Associates*** *(1980) 106 Cal. App. 3d 272, 165 Cal. Rptr. 51* , the plaintiff agreed in writing to act as exclusive agent for the defendants in obtaining tenants for an office building to be built by the defendants. The defendants were to pay the plaintiff a commission if the plaintiff obtained a tenant during the term of the agreement or if the property was leased through the efforts of anyone other than the defendants. After the execution of this agreement, the parties orally agreed that the plaintiff would not conduct any further negotiations with certain prospective tenants. The defendants developed their own proposals for these particular leases and submitted them to the prospective tenants through the tenants' brokers. Agreements to lease the property to these tenants were eventually reached. Thereafter, the plaintiff sued to recover commissions for these leases. The trial court concluded that the parties had orally modified the original written agreement, and the plaintiff was not entitled to commissions on the leases under the contract as modified. It rendered judgment for the defendants.

The court of appeal affirmed. Under *Civ. Code § 1698*, an enforceable oral modification of the written agreement between the plaintiff and the defendants could be found if the oral agreement was either supported by consideration or fully executed (*106 Cal. App. 3d 272, 279)* . In this case, under the agreement as modified, the plaintiff had agreed to limit its duty and not do further work seeking prospective tenants for the building, while the defendants gave up their rights to use the plaintiff's best efforts in obtaining leases and avoided the expenditure of resources that this would entail. This forbearance was adequate consideration to support the modification under *Civ. Code § 1698(c)* (*106 Cal. App. 3d 272, 280)* . As to execution, an agreement not to perform certain duties was executed by not performing. Thus, the plaintiff had executed its part of the oral agreement by taking a passive role with respect to these leases, and the defendants had performed by choosing not to use the plaintiff's services (*106 Cal. App. 3d 272, 280)* . The oral modification of the written agreement was fully executed by the parties and thus satisfied *Civ. Code § 1698(b)* (*106 Cal. App. 3d 272, 281)* .

[e] Burden of Proof

Barrett v. Bank of America *(1986) 183 Cal. App. 3d 1362, 229 Cal. Rptr. 16* , was an action by borrowers against a bank for damages for breach ofcontract, fraud, conspiracy to defraud, intentional infliction of emotional distress, and negligence based on the bank's failure to honor its oral promise to release the plaintiffs' personal guaranties after the merger of the company in which the plaintiffs were the principal shareholders and another company. The agreement constituted a modification of the written guaranty agreement between the plaintiffs and the bank. The trial court rendered judgment for the bank.

The court of appeal reversed because of the trial court's refusal to instruct the jury on constructive fraud; however, the court stated that the burden of proof for oral modification of a written contract is a preponderance of the evidence [*see Evid. Code § 115*], not clear and convincing evidence (*183 Cal. App. 3d 1362, 1370* ; *but see Coldwell Banker & Co. v. Pepper Tree Office Center Associates (1980) 106 Cal. App. 3d 272, 165 Cal. Rptr. 51* , discussed in [d], *above*). There are no degrees of quality of evidence, apart from its relevancy, and while the trier of fact must be satisfied based on admissible evidence that modification of a written instrument is intended, this in no way increases the plaintiff's burden of proof beyond the mere preponderance of the evidence required in most civil cases, including actions for fraud (*183 Cal. App. 3d 1362, 1371)* .

[4] Additional Authorities

[a] Executed Oral Agreement Is Sufficient to Modify Written Contract Without Consideration

In *Price v. Price (1938) 24 Cal. App. 2d 462, 75 P.2d 655* , divorcing spouses made a written property settlement agreement by which the husband was to pay the wife a certain amount weekly for her support. Thereafter, when the husband was in arrears in his payments, the parties met and made a new agreement that modified the original agreement by reducing the amount of the payments to be received by the wife. The husband made all payments in accordance with the modified agreement until the wife's remarriage. The wife then sued to recover payments due her in accordance with the original agreement. The trial court concluded that the agreement modifying the original contract was ineffective because of lack of consideration. It rendered judgment for the wife. The court of appeal reversed. The agreement modifying the original agreement was fully executed, and therefore no consideration was necessary. An executed agreement will serve as a modification or release of a written agreement, without regard to the presence or absence of a consideration (*24 Cal. App. 2d 462, 464)* .

[b] Performance by Promisee Alone Is Sufficient When Oral Modification Is Supported by Consideration

Sanders Construction Co. v. San Joaquin First Fed. Sav. & Loan Assn. (1982) 136 Cal. App. 3d 387, 186 Cal. Rptr. 218 , involved an action forbreach of contract brought by a land owner against a savings and loan association that had contracted to construct a building on the property. The trial court found that the original contract, which had called for construction of the building by the land owner, had been modified by an executed oral agreement that the savings and loan association would have the building constructed by an independent contractor. The building was never completed, and the land owner sued for breach of contract. The court of appeal affirmed the trial court's conclusion that the oral modification agreement was valid. Not only had it been executed by the promisee's nonperformance, but also it was supported by sufficient consideration in that the land owner had relinquished his right to make a profit from construction of the building (*136 Cal. App. 3d 387, 396-397)* .

In *Kelley v. R.F. Jones Co. (1969) 272 Cal. App. 2d 113, 77 Cal. Rptr. 170* , the plaintiff owned a building that it leased to the defendant, pursuant to a written lease. Before the expiration of the lease, the plaintiff attempted to sell the building. The plaintiff's real estate agent found a prospective purchaser that wanted to take possession before the expiration of the defendant's lease. The plaintiff instructed the agent to proceed with the sale transaction. The agent then orally informed the defendant that the plaintiff had a purchaser for the building, and the parties were willing to terminate the lease early if the defendant would agree to vacate the premises by a certain date. The defendant agreed to this and vacated the property by that date. The sale ultimately was not consummated. The plaintiff then sued to recover rent for the remainder of the lease. The trial court rendered judgment for the plaintiff. On appeal, the plaintiff contended that the duration of the written lease could be modified only by operation of law or by an instrument in writing. The court of appeal rejected this contention, noting that an oral modification of a written lease is binding to the extent that it is executed. Also, an oral agreement fully executed by one party, if supported by a valid consideration, will constitute a valid modification of a prior written agreement (*272 Cal. App. 2d 113, 119)* . Hence, as the agent had authority to speak for the plaintiff, his statements to the defendant constituted a promise to terminate the lease early in consideration for the defendant's promise to vacate the premises early (*272 Cal. App. 2d 113, 120-121)* .

California Points & Authorities

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CHAPTER 51 CONVERSION

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[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Conversion Defined

[b] Necessary Allegations

[c] General Allegation of Wrongful Conversion Sufficient

[4] Additional Authorities

[a] Necessary Allegations

§ 51.21 Supporting Contention That Defendant Has Converted Plaintiff's Personal Property--Personal Property, Tangible or Intangible, Can Be Subject to Conversion

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Personal Property, Tangible or Intangible, Can Be Subject to Conversion

[b] Specific Money as Property Subject to Conversion

[c] Equitable Interest in Real Property Subject to Conversion

[d] Customer List as Property Subject to Conversion

[e] Shares of Stocks and Bonds as Property Subject to Conversion

[f] Fixtures as Property Subject to Conversion

[4] Additional Authorities

[a] Equitable Interest in Real Property Subject to Conversion

[b] Shares of Stocks and Bonds as Property Subject to Conversion

[c] Fixtures as Property Subject to Conversion

§ 51.22 Supporting Contention That Defendant Has Converted Plaintiff's Personal Property--Plaintiff Owned or Had Right to Immediate Possession of Property Converted

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Plaintiff Owned or Had Right to Immediate Possession of Property Converted

[b] Actual Possession of Property, Rather Than Ownership, Sufficient Interest in Property Converted

[c] Plaintiff With Right to Immediate Possession Need Not Be in Actual Possession at Time of Conversion

[d] Owner of Automobile on Which Repairs Were Made Without Prior Written Estimate

[e] Purchaser Under Automobile Installment Sale Contract Who Is Denied Right to Reinstate Contract

[f] When Plaintiff Owner Need Not Have Right to Immediate Possession at Time of Conversion

[g] Secured Party Having Special Interest With Right to Immediate Possession on Default

[h] Owner of Property in Which Another Has Special Interest

[i] Assignee of Cause of Action for Conversion Has Right to Maintain Action Without Ownership or Right to Possession

[j] Attorney With Valid Charging Lien May Pursue Conversion Action When Proceeds are Wrongfully Withheld

§ 51.23 Supporting Contention That Defendant Has Converted Plaintiff's Personal Property--Act of Conversion as Unwarranted Interference With Rights or Interests in Personal Property of Another

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Act of Conversion as Unwarranted Interference With the Rights or Interests in Personal Property of Another

[b] Lack of Knowledge or Good Faith No Defense to Conversion

[c] Denial of Access to Property as Conversion

[d] Misdelivery of Personal Property as Conversion

[e] Purchase of Property of Another in Unauthorized Sale as Conversion

[f] Unauthorized Sale of Property of Another as Conversion

[g] Willful Omission to Act as Conversion

[h] Wrongful Appropriation of Property as Conversion

[i] Bailee's Failure to Investigate Conflicting Claim of Possession as Conversion

[4] Additional Authorities

[a] Lack of Knowledge or Good Faith No Defense to Conversion

[b] Denial of Access to Property as Conversion

[c] Misdelivery of Personal Property as Conversion

[d] Unauthorized Sale of Property of Another as Conversion

[e] Willful Appropriation of Property as Conversion

§ 51.24 Supporting Contention That Defendant Has Converted Plaintiff's Personal Property--Measure of Damages for Conversion [Civ. Code § 3336]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Measure of Damages for Conversion

[b] Damages for Expenditures in Pursuit of Property

[c] Loss of Profits as Measure of Damages

[d] Loss of Use as Measure of Special Damages

[e] Cost of Property as Proof of Value

[f] Face Value of Written Instrument as Proof of Value

[g] Full Value as Measure of Damages for Owner of Limited Interest in Property as Against Stranger Without Ownership Rights

[h] Prejudgment Interest Available

[4] Additional Authorities

[a] Face Value of Written Instrument as Proof of Value

§ 51.25 Supporting Contention That Defendant Has Converted Plaintiff's Personal Property--Emotional Distress Damages Recoverable

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Emotional Distress Damages Recoverable

§ 51.26 Opposing Contention That Defendant Has Converted Plaintiff's Personal Property--Real Property as Not Subject to Conversion

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Real or Immovable Property

[b] Real Property as Property Not Subject to Conversion

[c] Fixtures Treated as Real Property by Terms of Conveyance Not Subject to Conversion

[4] Additional Authorities

[a] Real Property as Property Not Subject to Conversion

§ 51.27 Opposing Contention That Defendant Has Converted Plaintiff's Personal Property--Intangible and Indefinite Property Rights Not Subject to Conversion

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Property That Is Intangible, Uncertain, and Indefinite as Not Subject to Conversion

[b] Goodwill of Business and Customer List for Specific Route as Property Not Subject to Conversion

[c] Literary Property as Incorporeal Right

[d] Gambling Losses Not Subject to Conversion

§ 51.28 Opposing Contention That Defendant Has Converted Plaintiffs Personal Property--Plaintiff Failed to Show Ownership With Right to Possession or Actual Possession

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[d] Relating Pleading and Practice Forms

[3] Discussion of Authorities

[a] Plaintiff Failed to Show Ownership With Right to Possession or Actual Possession

[b] Defendant Having Superior Interest in Property

[c] Defaulting Chattel Mortgagor as Having No Right of Possession

[d] Imposition of Constructive Trust Does Not Retroactively Create Ownership Interest Superior to That of Levying Creditor

[e] Medical Patient Does Not Retain Ownership Interest in Body Cells Removed With Consent and Later Used for Research

[f] Mere Promise to Hold Property in Trust Does Not Create Sufficient Property Interest

[4] Additional Authorities

[a] Plaintiff Failed to Show Ownership With Right of Possession or Actual Possession

§ 51.29 Opposing Contention That Defendant Has Converted Plaintiff's Personal Property--Plaintiff Failed to Show Wrongful Interference With Property

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Plaintiff Failed to Show Wrongful Interference With Property

[b] Interference With Property Not Substantial

[c] Refusal to Deliver Property Pending Reasonable Inquiry Into Plaintiff's Rights to Property as Not Conversion

[d] Mere Movement of Property Is Not Conversion

[e] Act by Mortgagee in Possession of Property to Protect and Preserve Property as Not Conversion

[f] Impossibility of Redelivery of Stored Property Because of Loss or Destruction as Not Conversion

[g] Filing of Complaint in Interpleader Insufficient to Support Conversion Action

[4] Additional Authorities

[a] Plaintiff Failed to Show Wrongful Interference With Property

[b] Interference With Property Not Substantial

§ 51.30 Supporting Contention That Claims for Damages for Expenditures Paid in Pursuit of Converted Property Must Be Necessary and Reasonable

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Expenditures Made in Pursuit of Recovery of Converted Property Must Be Necessary and Reasonable

[b] Attorney's Fees Not Recoverable as Money Expended in Pursuit of Property

§ 51.31 Supporting Contention That Recovery by Plaintiff of Converted Property Acts as Mitigation of Damages

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Recovery of Property by Plaintiff as Mitigation of Damages

§ 51.32 Supporting Contention That Plaintiff Who Regains Possession of Converted Property Prior to Adjudication of Entitlement to Possession May Recover Prejudgment Interest Calculated to Entry of Judgment

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Right to Interest Extends to Entry of Judgment

§ 51.33 Supporting Contention That Plaintiff's Action for Conversion of Personal Property Is Barred by the Statute of Limitations [Code Civ. Proc. § 338(c)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Three-Year Statute of Limitations for Action for Conversion

[b] Statute of Limitations Commences at Time of Conversion

[4] Additional Authorities

[a] Statute of Limitations Commences at Time of Conversion

§ 51.34 Supporting Contention That Plaintiff's Consent to Taking of Personal Property Is Defense to Action for Conversion

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Plaintiff's Consent to Taking of Personal Property Is Defense to Action for Conversion

[4] Additional Authorities

[a] Plaintiff's Consent to Taking of Personal Property Is Defense to Action to Conversion

§ 51.35 Supporting Contention That Plaintiff Required to Make Demand for Return of Property Before Bringing Action for Conversion

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Plaintiff Required to Make Demand for Return of Property Before Bringing Action for Conversion

§ 51.36 Supporting Contention That Plaintiff's Waiver of Interest in Property Is Bar to Recovery for Conversion

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Plaintiff's Waiver of Interest in Property Is Bar to Recovery for Conversion

§ 51.37 Supporting Contention That Plaintiff Equitably Estopped From Asserting Title to Property Not Entitled to Recover for Conversion

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Plaintiff Equitably Estopped From Asserting Title to Property Not Entitled to Recover for Conversion

§ 51.38 Supporting Contention That Defendant Is Not Liable for Conversion--Defendant Took Possession as Personal Representative of Decedent's Estate in Good Faith Belief That Property Was Part of Decedent's Estate [Prob. Code § 9651(c)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Personal Representative Is Not Liable for Taking Possession of Property in Good-Faith Belief That It Is Part of Decedent's Estate

§ 51.39 Supporting Contention That Defendant Is Not Liable for Conversion--Defendant Delivered Decedent's Tangible Personal Property to Surviving Spouse, Relative, or Conservator or Guardian of Estate [Prob. Code § 330]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Defendant Is Immune From Liability for Loss or Damage to Property of Decedent Because Property Was Properly Delivered and Statutory Requirements Were Met

§ 51.40 Supporting Contention That Defendant Is Not Liable for Conversion--Defendant Took Possession to Protect Own Interests

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

§ 51.41 Supporting Contention That Defendant Is Not Liable For Conversion--Bank Not Liable For Mortgage Loan Broker's Conversion of Note Payments Deposited in Bank Trust Accounts

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Banks Have No Duty to Prevent Breaches of Fiduciary Duty

§ 51.42 Opposing Contention That Plaintiff's Action for Conversion of Personal Property Is Barred by the Statute of Limitations--Fraudulent Concealment of Conversion Tolls Statute of Limitations

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Fraudulent Concealment of Conversion Tolls Statute of Limitations

[b] Discovery of Whereabouts of Art or Artifact

[4] Additional Authorities

[a] Fraudulent Concealment of Conversion Tolls Statute of Limitations

[b] Discovery of Whereabouts of Art or Artifact

§ 51.43 Opposing Contention That Plaintiff's Action for Conversion of Personal Property Is Barred by the Statute of Limitations-- Cause of Action Does Not Accrue Until Owner Learns of Conversion When Original Taking Lawful

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Cause of Action Does Not Accrue Until Owner Learns of Conversion When Original Taking Lawful

[4] Additional Authorities

[a] Cause of Action Does Not Accrue Until Owner Learns of Conversion When Original Taking Lawful

§ 51.44 Opposing Contention That Plaintiff's Action for Conversion of Personal Property Is Barred by Statute of Limitations--Statute Tolled While Plaintiff Legally Restrained from Protecting Interest [Code Civ. Proc. § 356]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Suspension of Statute When Plaintiff Legally Restrained

§ 51.45 Opposing Contention That Plaintiff's Consent to Taking of Personal Property Is Defense to Action for Conversion--Consent Obtained by Fraud as Not Constituting Defense to Conversion

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Consent Obtained by Fraud as Not Constituting Defense to Action for Conversion

§ 51.46 Opposing Contention That Plaintiff Required to Make Demand for Return of Property Before Bringing Action for Conversion-- Demand for Return of Property Not Necessary When Original Taking Wrongful [Civ. Code § 1713]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Duty to Return Property Obtained Without Consent or Unlawfully Taken

[b] Demand for Return of Property Not Necessary When Original Taking Wrongful

[4] Additional Authorities

[a] Demand for Return of Property Not Necessary When Original Taking Wrongful

§ 51.47 Opposing Contention That Plaintiff Required to Make Demand for Return of Property Before Bringing Action for Conversion-- Demand for Return of Property Not Necessary When Demand Would Be Futile

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Demand for Return of Property Not Necessary When Demand Would Be Futile

[b] Demand for Return of Property Not Necessary When Property Actually Converted

[4] Additional Authorities

[a] Demand for Return of Property Not Necessary When Property Actually Converted

§ 51.48 Opposing Contention That Plaintiff Waived Interest in Personal Property--No Intentional Relinquishment of Known Right of Property

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Plaintiff Waived Interest in Property

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Volume 5 Chapters 50-59 CONTRACTS---to---CORPORATIONS
CHAPTER 51 CONVERSION
PART I. INTRODUCTION

5-51 California Points & Authorities § 51.01

§ 51.01 Scope of Chapter

This chapter contains memoranda of points and authorities for use in supporting or opposing the respective parties' contentions relating to conversion of personal property. The chapter contains a general form for use in supporting the contention that the defendant has converted the plaintiff's personal property [*see § 51.20*], forms relating to specific points in support of that contention [*see §§ 51.21 -51.25*].

The chapter also contains general forms for use in opposing the contention that the defendant has converted the plaintiff's personal property [*see §§ 51.26 -51.29*] together with general forms for use in supporting the contention that the damages awarded plaintiff are improperly computed [*see §§ 51.30, 51.31*].

Also included in this chapter are a form relating to the recovery of prejudgment interest [*see § 51.32*], forms for use in supporting the contentions relating to various affirmative defenses to an action for conversion [*see §§ 51.33 -51.41*], and forms for use in opposing those contentions [*see §§ 51.42 -51.48*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsConversionDefensesTortsIntentional TortsConversionElementsTortsIntentional TortsConversionRemedies

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§ 51.02 Governing Law

Conversion is basically governed by case law. However, damages recoverable for conversion of property are governed by *Civ. Code §§ 3336-3338*. In addition, *Code Civ. Proc. § 338(c)* governs the time period in which an action for conversion must be brought, and *Civ. Code §§ 1712* and *1713* set forth the requirement that a person return wrongfully acquired property and provide that the owner need not make any demand for the return of wrongfully acquired property in order to bring an action for conversion. *Prob. Code § 9651* establishes immunity from both civil and criminal liability for a decedent's personal representative who takes possession of real or personal property in the good faith belief that it is part of decedent's estate. For discussion of other statutes relating to conversion, see California Forms of Pleading and Practice, Ch. 150, *Conversion* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDamagesGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime LimitationsTortsIntentional TortsConversionDefensesTortsIntentional TortsConversionElementsTortsIntentional TortsConversionRemedies

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§ 51.03 Alternate Remedies for Conversion of Personal Property

When a party brings an action for conversion of personal property, he or she is seeking to recover the reasonable value of the property converted [*see Civ. Code § 3336*; *see also § 51.24*]. When the converter still retains the property at the time of the action, the plaintiff in essence is forcing the converter to buy the property. Plaintiff may also bring an action for claim and delivery to recover the property itself [*see Civ. Code § 3379*; *Code Civ. Proc. §§ 511.010-516.050*; *see also* California Forms of Pleading and Practice, Ch. 119, *Claim and Delivery* (Matthew Bender)]. The plaintiff may also elect to waive the tort and sue on an implied contract, thereby, in effect, consenting to the conversion [*see Hill v. Superior Court (1940) 16 Cal. 2d 527, 530, 106 P.2d 876* ; *Bank of Am. Nat'l Trust & Sav. Ass'n v. Hill (1937) 9 Cal. 2d 495, 499, 500, 71 P.2d 258* ; *see also* California Forms of Pleading and Practice, Ch. 121, *Common Counts* (Matthew Bender)]. When the converted property is money belonging to the plaintiff that defendant has refused to return, plaintiff that may sue for money had and received [*see Bank of Am. Nat'l Trust & Sav. Ass'n v. Hill (1937) 9 Cal. 2d 495, 499, 71 P.2d 258* ; *see also* California Forms of Pleading and Practice, Ch. 121, *Common Counts* (Matthew Bender)]. Suing in contract makes available the provisional remedy of attachment, which is not available in conversion [*see Code Civ. Proc. § 483.010*; *Los Angeles Drug Co. v. Superior Court (1936) 8 Cal. 2d 71, 75, 63 P.2d 1124* ; *see also* California Forms of Pleading and Practice, Ch. 62, *Attachment* (Matthew Bender)]. However, punitive damages are not available when the action is on the contract [*see Civ. Code § 3294*; *see also* Ch. 177, *Damages,* § 177.40 et seq., in California Forms of Pleading and Practice (Matthew Bender)].

When defendant's interference with plaintiff's personal property was not substantial enough to sustain an action for conversion, plaintiff may seek an action for trespass to personal property. Recovery in those cases is limited to actual damages suffered by reason of the impairment of the property or loss of its use [*Zaslow v. Kroenert (1946) 29 Cal. 2d 541, 551, 176 P.2d 1* ; *see § 51.29[3][a]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDamagesGeneral OverviewTortsIntentional TortsConversionDefensesTortsIntentional TortsConversionElementsTortsIntentional TortsConversionRemedies

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§ 51.04 Related Discussion and Forms

[1] Related Pleading and Practice Forms

For discussion and forms relating to the measure of damages generally, see California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender).

For discussion and forms relating to the time period in which to bring an action in tort generally, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* (Matthew Bender).

[2] Related Points and Authorities

For points and authorities for use in actions to recover possession of personal property, see Ch. 40, *Claim and Delivery* .

Related memoranda of points and authorities that may be used in supporting or opposing damages awarded may be found in Ch. 64, *Damages: Tort* .

Related memoranda of points and authorities that may be used in supporting or opposing contentions that an action was timely brought may be found in Ch. 143, *Limitation of Actions* .

For a discussion of the format requirements governing memoranda generally, including page limits, and discussion of how to use the forms in this chapter to draft a memorandum of points or authorities or a trial or appellate brief, and for a sample of a complete memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

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[Reserved]

§§ 51.05[Reserved]

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5-51 California Points & Authorities § 51.20

§ 51.20 Supporting Contention That Defendant Has Converted Plaintiff's Personal Property--General Form

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT'S ACT OF _____ [FAILING TO RETURN *or* WITHHOLDING *or state other specific act of conversion*] PERSONAL PROPERTY OF PLAINTIFF IS AN ACT OF WILLFUL INTERFERENCE WITH THAT PROPERTY, DONE WITHOUT LAWFUL JUSTIFICATION, BY WHICH PLAINTIFF, THE PERSON ENTITLED TO THE PROPERTY, IS DEPRIVED OF ITS USE AND POSSESSION, AND CONSTITUTES AN ACT OF CONVERSION.

A. Conversion Defined. Conversion is any act of willful interference with the personal property of another, or any act of dominion exerted over another's personal property, done without legal justification, depriving that person entitled to the property of its use and possession (*see* de *Vries v. Brumback (1960) 53 Cal. 2d 643, 647, 2 Cal. Rptr. 764, 349 P.2d 532* ; *Weiss v. Marcus (1975) 51 Cal. App. 3d 590, 599, 124 Cal. Rptr. 297*).

B. Necessary Allegations. In order to state a cause of action for conversion, the plaintiff must allege first, his or her ownership or right to possession of tangible property at the time of the conversion; second, the defendant's conversion of the property; and third, damages (*Franklin v. Municipal Court (1972) 26 Cal. App. 3d 884, 901, 103 Cal. Rptr. 354*).

[*Optional*] **C. General Allegation of Wrongful Conversion Sufficient.** A general allegation that defendant converted property to his or her own use is sufficient to state a good cause of action in the absence of a demurrer for uncertainty (*see* *Haigler v. Donnelly (1941) 18 Cal. 2d 674, 681, 117 P.2d 331* ; *Lowe v. Ozmun (1902) 137 Cal. 257, 260, 70 P. 87* ; *Franklin v. Municipal Court (1972) 26 Cal. App. 3d 884, 902, 103 Cal. Rptr. 354*).

[*Add additional points and authorities pertaining to particular allegations necessary to state a cause of action for conversion (see §§ 51.21 -51.24).*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of plaintiff's contention in an action for conversion that defendant has converted plaintiff'spersonal property by wrongfully depriving him or her of the use and possession of that property. Paragraph A sets out the general definition of conversion. Paragraph B sets forth the necessary allegations to state a cause of action for conversion. The points and authorities in the optional Paragraph C may be used to support the contention that a general allegation that the defendant has wrongfully converted the property to his or her own use is sufficient to state a cause of action for conversion.

The argument supported by this memorandum may be raised in response to an assertion that plaintiff has failed to adequately allege or prove a cause of action for conversion.

This form is not a complete form, but is designed as a framework to be used in combination with additional forms of memoranda of points and authorities pertaining to the elements of a cause of action for conversion (*see §§ 51.21 -51.24*) as well as with other points and authorities, as appropriate, that may be used in response to the raising of affirmative defenses [*see §§ 51.42 -51.48*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing how the facts of the case demonstrate that the defendant converted the property belonging to the plaintiff by an act of willful interference with that property, that the act was done without legal justification, and that the act thereby deprived the plaintiff of his or her rightful use and possession of the property.

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which the substantive issue arises; for example, this form may be used in opposition to a demurrer or a motion for summary judgment, when counsel wishes to respond to an assertion that plaintiff has not alleged or proved a cause of action for conversion of personal property.

[3] Discussion of Authorities

[a] Conversion Defined

Plaintiff in ***de Vries v. Brumback*** *(1960) 53 Cal. 2d 643, 2 Cal. Rptr. 764, 349 P.2d 532* , filed an action for conversion of certain property taken in a robbery and not subsequently recovered. Plaintiff was an assignee of a jewelry firm that was robbed of money, precious stones, and jewelry, which had a value totalling approximately $112,000.00. Defendant neither participated in the robbery, nor had any part in its planning. However, he obtained the greater portion of the stolen property from a receiver of the stolen goods, who had conspired with others to rob the jewelry firm and to dispose of the property in a manner beneficial to the robbers and the receiver. Subsequently, the property obtained by defendant for disposition was recovered. However, approximately $21,947.00 worth of items remained unrecovered. The trial court gave judgment for plaintiff for the $21,947.00. The trial court also made findings of fact, including a finding that defendant had joined, ratified, and participated in a conspiracy to convert all of the property stolen in the robbery of the jewelry firm to their own use and benefit, and that the conspiracy had not terminated by the time the defendant had joined, ratified, and participated in the conspiracy. Defendant appealed, contending that he was improperly held liable for property over which he at no time exercised any dominion, and which was never in his possession. Defendant claimed that the conspiracy to rob the jewelry firm terminated when, after the robbery, the greater part of the stolen goods was delivered to the receiver, and a new conspiracy to convert the property of the jewelry firm took place. Consequently, defendant argued, his liability could not extend beyond the amount of goods he obtained from the receiver, and since all those goods were subsequently recovered, no damages could properly be assessed against him by reason of this second conversion.

The Supreme Court, in affirming the judgment of the trial court, rejected defendant's contention that he could not be held liable for the unrecovered goods. The basis of the damage claim, the Court said, was the alleged conversion of goods taken in the robbery of the jewelry firm. Citing prior California law, the Court defined conversion as an act of willful interference with a chattel, done without lawful justification, by which any person entitled thereto is deprived of its use and possession (*53 Cal. 2d 643, 647)* . The case, the Court continued, was tried on the theory of conspiracy and trial court expressly found that the general purpose of the conspirators was to convert all of the stolen property obtained in the robbery to their own use and benefit. As long as the person entitled to the use and possession of the property was deprived of the property, the Court stated, the tort of conversion continued. Similarly, the Court continued, a conspiracy to convert is a continuing concert of action lasting so long as the agreement to exercise dominion over another's property continues. Apparently, disposition of the stolen property was a primary feature of the conspiracy, and that had not been accomplished when defendant joined in the conspiracy and subsequently aided in the disposition of the stolen goods. Consequently, the Court concluded, defendant's active participation in the disposition of the property by taking the greater part of the stolen property into his possession and custody was an overt act clearly in furtherance of the general plan of the conspirators to exercise dominion over all the property as against the owner, and to convert it to their own use and benefit (*53 Cal. 2d 643, 647)* .

Weiss v. Marcus *(1975) 51 Cal. App. 3d 590, 124 Cal. Rptr. 297* , involved an action to recover the reasonable value of legal services rendered. Among other things, plaintiff charged that defendants converted the sum of $6,750 to their ownuse, to plaintiff's damage, that the sum belonged to and was the property of plaintiff by virtue of his lien for attorney's fees that attached to the proceeds of the settlement in a case involving his former client, one of the defendants in the action. Plaintiff claimed that by oral agreement, he had been retained by defendant Oran to prosecute a claim for injuries and damages. By the terms of the agreement, defendant Oran agreed to pay plaintiff a certain percentage of the amounts recovered as fees for legal services rendered. Subsequently, by written agreement, defendant Oran granted plaintiff a lien on all amounts recovered as security for payment of the fees due plaintiff under the oral agreement. Plaintiff began processing the suit, but was subsequently discharged by Oran. Plaintiff claimed that up to the time of the discharge, he had performed legal services of the reasonable value of $6,750. Defendant Oran ultimately obtained a judgment of $35,000, and plaintiff claimed that he became entitled to his attorney's fee of $6,750, but defendant Oran and his lawyers refused to pay plaintiff that sum, or any part of it. The trial court sustained defendants' demurrer to plaintiff's first amended complaint without leave to amend and dismissed the action as to defendant attorneys. Plaintiff appealed the order of dismissal.

The court of appeal reversed the judgment of dismissal as to the count alleging conversion. The court described conversion as any act of dominion wrongfully exerted over another's personal property in denial of, or inconsistent with, the owner's rights in the property. Plaintiff, the court said, by alleging that $6,750 of the $35,000 paid to defendants belonged to him, had sufficiently stated a cause of action for conversion (*51 Cal. App. 3d 590, 599)* .

[b] Necessary Allegations

In ***Franklin v. Municipal Court*** *(1972) 26 Cal. App. 3d 884, 103 Cal. Rptr. 354* , plaintiff brought an action for conversion or, in the alternative, claim and delivery. The item alleged to have been converted was a revolver that had been introduced into evidence at a preliminary hearing in a criminal action in the municipal court. Plaintiff was the defendant in that action and was charged with violating former Penal Code § 217 (assault with intent to commit murder; since repealed). After the preliminary hearing was held, the judge sitting at the hearing dismissed the action; however, he issued an order confiscating the revolver pursuant to former Penal Code § 1418 (*now see Penal Code § 1417 et seq.*) Plaintiff filed an application for return of the weapon under former Penal Code § 1418, but the judge refused to order its return. Plaintiff then filed an action against the court and the judge in both his official and individual capacities. In addition to the allegation of conversion, plaintiff also sought a petition for a writ of mandate compelling the court to return the revolver to him. In the conversion and claim and delivery action, plaintiff alleged on information and belief that the revolver was in the possession of the judge in his individual capacity since records of the municipal court indicated that the judge had issued an order releasing the weapon to himself in his individual capacity. The weapon,

plaintiff alleged, belonged to him at the time of his arrest, and he was still the lawful owner and entitled to its possession. Plaintiff also alleged that the weapon had a value of $100. He also sought special damages for loss of work as a security guard resulting from his being deprived of the use of his revolver. Defendants answered, alleging that the weapon was no longer in the jurisdiction of the municipal court and that it was not in the possession of the judge. The petition for the writ of mandamus was heard separately and was denied. Subsequently, defendants' motion for summary judgment as to the conversion and claim and delivery action was granted. Plaintiff appealed from both judgments, and the cases were consolidated on appeal.

The court of appeal affirmed the judgment denying plaintiff's petition for a writ of mandate, but reversed the judgment as to the judge in his individual capacity in the action for conversion. In order to state a cause of action for conversion, the court stated, the plaintiff must allege first, his or her ownership or right to possession of tangible property at the time of the conversion; second, the defendant's conversion of the property; and third, damages (*26 Cal. App. 3d 884, 901)* . The court found that in this case, plaintiff had alleged that he was the lawful owner and entitled to possession of the subject revolver, and that such allegation was sufficient to show ownership and right to possession (*26 Cal. App. 3d 884, 902)* . Plaintiff had also, the court added, alleged facts sufficient to show a conversion on the part of the judge by stating on information and belief that the judge was in possession of the revolver in his individual capacity, that he demanded return of the revolver, that the judge refused to deliver it to plaintiff, and that the judge retained the revolver without plaintiff's consent (*26 Cal. App. 3d 884, 902)* . Finally, the court concluded, plaintiff also made a sufficient allegation of damages by alleging that the revolver was valued at $100 and by alleging special damages resulting from his loss of possession of the revolver. Consequently, the court held, plaintiff had sufficiently alleged a cause of action for conversion, and it was error for the trial court to have dismissed that action as to the judge in his individual capacity (*26 Cal. App. 3d 884, 902)* .

The court of appeal observed that pursuant to former Penal Code §§ 1418 and 1419, a judge is not entitled to keep or retain an exhibit or to exercise any dominion over it other than in his or her official capacity as a judge and representative of the court. In his or her official capacity, a judge is obligated to return the exhibit to the person who is entitled to it unless it is unlawful property as described in former Penal Code § 1419, in which case he or she may order it destroyed or otherwise disposed of [*see now Penal Code § 1417 et seq.*; *see also Penal Code § 12028* (disposition of unlawfully concealed or possessed weapons)].

[c] General Allegation of Wrongful Conversion Sufficient

Haigler v. Donnelly *(1941) 18 Cal. 2d 674, 117 P.2d 331* , arose out of an action for money had and received and for conversion of money collect ed. Plaintiffs, owners of a furnished apartment house, listed the house and furniture with defendant, a licensed real estate broker. Under the listing agreement, plaintiffs wanted net payments of $250 per month for the house lease, and $3,000 in cash for sale of the furniture. Subsequently, plaintiffs gave defendant another listing authorizing sale of the apartment house and furniture for $27,000, with 5 percent commission to defendant. Defendant secured a lessee for the apartment at the net payment of $250 per month. The lessee also agreed to buy the furniture, but at $2,500. Plaintiffs accepted, and a contract was executed according to the agreed terms. The lessee paid defendant $3,500, $2,500 representing the price of the furniture, and $1,000 representing payment on account of the lease. Defendant retained $1,150 of the sum as commission, and tendered to plaintiffs the balance. Plaintiffs demanded the full amount, and upon refusal, filed complaints for money had and received and for conversion. In the action for conversion, plaintiffs incorporated the allegation of the demand contained in the action for money had and received, and further alleged that defendant, as agent for plaintiffs, maliciously and fraudulently refused to account to plaintiffs for money belonging to them that defendant had collected on their account. Plaintiffs asked for damages in the amount collected, minus a small amount of prorated rents, and for exemplary damages in the amount of $3,000. At the trial, plaintiffs contended that under the original listing, defendant was entitled to receive for her services only those amounts she secured for the rent and sale in excess of the net prices specified in the listing. Defendant contended that the original listing was canceled at the time of the second listing. Since the lease and sale to the lessee were not within the terms of the second listing, defendant based her alleged right to a commission on the theory of an implied contract to pay the

reasonable value of her services.The trial court gave judgment to plaintiffs, and defendant appealed, contending that the conversion of the money was not sufficiently alleged.

The Supreme Court, in affirming the judgment of the trial court, rejected defendant's contention concerning the insufficiency of the allegation of conversion. Citing prior California law, the Court stated that a complaint charging defendant with exercising dominion over property inconsistent with the ownership of plaintiff sets forth a good cause of action for conversion when no special demurrer for uncertainty is interposed (*18 Cal. 2d 674, 681)* .

Plaintiff in ***Lowe v. Ozmun*** *(1902) 137 Cal. 257, 70 P. 87* , brought an action for conversion of certain personal property consisting of bonds and coupons given as security to defendant's testator for an indebtedness owed to testator by plaintiff. Plaintiff alleged that defendant's testator unlawfully converted and disposed of the described property to his own use, that the property belonged to plaintiff on the day it was given to defendant's testator as security, and that, on the indebtedness being fully paid and discharged, the property was in the possession of the testator who knew that the bonds and coupons were the property of plaintiff and should be returned to him. Defendant demurred to the complaint on the ground that the action was not brought within the two-year limitation period required for actions on a contract, obligation, or liability, not founded upon an instrument in writing [*see § 51.33*]. The trial court sustained the demurrer, and plaintiff appealed. Defendant contended in response that since its demurrer was general, the judgment should be affirmed if, for any reason, the complaint does not contain a sufficient statement of facts to constitute a cause of action, and that in this case, the allegation of conversion was not sufficient since there was not a statement of the particular facts, or acts and methods, by which the conversion was accomplished.

The Supreme Court reversed the judgment of the trial court. The Court held that the allegation that the defendant's testator unlawfully converted and disposed of the property described in the complaint to his own use was sufficient. An allegation that a defendant converted and disposed of the property to his own use is sufficient, in the absence of a special demurrer, to allege the fact of conversion and to sustain a judgment of conversion (*137 Cal. 257, 260)* .

The facts and procedural background of ***Franklin v. Municipal Court*** *(1972) 26 Cal. App. 3d 884, 103 Cal. Rptr. 354* , are discussed in *§ 51.20[3][b]*. The court, in discussing the allegations necessary to state a cause of action for conversion, cited prior California law illustrating the types of general allegations held sufficient to allege conversion. These cases, the court said, have found conversion to have been sufficiently alleged, in the absence of a special demurrer for uncertainty, when the complaint stated that the defendant converted the property to his own use; when the complaint stated that plaintiff demanded return of the property and that the defendant refused to return the property in question, even though plaintiff may have added the additional conclusionary statement that the defendant acted unlawfully; and when a complaint charged a defendant with exercising dominion over property inconsistent with the ownership of plaintiff (*26 Cal. App. 3d 884, 902)* .

[4] Additional Authorities

[a] Necessary Allegations

The facts and procedural background of *Hartford Fin. Corp. v. Burns (1979) 96 Cal. App. 3d 591, 158 Cal. Rptr. 169* , are discussed in *§ 51.22[3][g]*. The court of appeal stated that the elements of a cause of action for conversion of personal property are: (1) plaintiff's ownership or right to possession of the property at the time of the conversion; (2) defendant's conversion by a wrongful act ordisposition of plaintiff's property rights; and (3) damages (*96 Cal. App. 3d 591, 598)* .

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5-51 California Points & Authorities § 51.21

§ 51.21 Supporting Contention That Defendant Has Converted Plaintiff's Personal Property--Personal Property, Tangible or Intangible, Can Be Subject to Conversion

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with the general form of memorandum of points and authorities pertaining to conversion of plaintiff's personal property (see § 51.20).*]

PROPERTY CONVERTED BY DEFENDANT WAS THE PERSONAL PROPERTY OF PLAINTIFF CONSISTING OF_____ [A CERTAIN SUM OF MONEY IN THE AMOUNT OF $_____ *or describe other specific property converted*] AND THEREFORE WAS PROPERTY SUBJECT TO CONVERSION.

A. Personal Property, Tangible or Intangible, Can Be Subject to Conversion. Every species of personal property, both tangible and intangible and capable of being identified, can be subject to conversion (*Payne v. Elliot (1880) 54 Cal. 339, 340-342)* .

[*Optional*] **B. Specific Money as Property Subject to Conversion.** A specific sum of money that is capable of being identified is personal property and subject to conversion (*Haigler v. Donnelly (1941) 18 Cal. 2d 674, 681, 117 P.2d 331* ; *Weiss v. Marcus (1975) 51 Cal. App. 3d 590, 599, 124 Cal. Rptr. 297*).

[*Optional*] **C. Equitable Interest in Real Property Subject to Conversion.** A person who deprives an equitable owner of his or her right to any real property converts the equitable title to real property to personal property in the form of a right to a money judgment for damages, and if the person denies or repudiates his or her obligation to pay those damages, he or she, in effect, converts the personal property to his or her own use (*Gherman v. Colburn (1977) 72 Cal. App. 3d 544, 568-569, 140 Cal. Rptr. 330* ; see also *Murphy v. Wilson (1957) 153 Cal. App. 2d 132, 135-136, 314 P.2d 507*).

[*Optional*] **D. Customer List as Property Subject to Conversion.** Property consisting of a cabinet of index cards containing names and valuable information regarding prospective and actual customers may be personal property

subject to conversion (*see Palm Springs-La Quinta Dev. Co. v. Kieberk Corp. (1941) 46 Cal. App. 2d 234, 240, 115 P.2d 548*).

[*Optional*] **E. Shares of Stocks and Bonds as Property Subject to Conversion.** Shares of stock and bonds are personal property subject to conversion (*Payne v. Elliot (1880) 54 Cal. 339, 341-342* ; *Nichols v. Leach (1931) 114 Cal. App. 545, 550, 300 P. 103*).

[*Optional*] **F. Fixtures as Property Subject to Conversion.** Fixtures, such as emblements, industrial growing crops, and things attached to or forming part of the land, which are agreed to be severed before a sale or under the contract of sale, are to be treated as goods and to be governed by the provisions of the Civil Code regulating the sales of goods; thus, wrongful interference with this type of property will give rise to an action for conversion (*see Civ. Code §§ 658, 660*; *Carey v. Glenco Citrus Prods. (1965) 235 Cal. App. 2d 572, 578-580, 45 Cal. Rptr. 365* ; *Bedell v. Mashburn (1948) 87 Cal. App. 2d 417, 422-423, 197 P.2d 98*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of plaintiff's contention in an action for conversion that the defendant has converted plaintiff's personal property by wrongfully depriving him or her of the use and possession of that property. This form sets forth the point that personal property, tangible or intangible, that is capable of being identified, can be subject to conversion. The optional paragraphs may be included as appropriate whenever the opposing party asserts that the property in question as illustrated by that paragraph is not personal property subject to conversion.

The argument supported by this memorandum may be raised in response to an assertion that the property alleged to have been converted was not personal property, or was intangible property not capable of being identified.

This form should be combined with the general form of memorandum of points and *authorities in § 51.20*, and, if appropriate, with other forms of memoranda supporting the contention that defendant converted plaintiff's personal property [*see, e.g., §§ 51.22 -51.24*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing that the property of plaintiff alleged to have been converted was personal property, either tangible or intangible, that was capable of being identified and therefore subject to conversion. For example, when the property in question could be considered either real or personal property, counsel should discuss the operative facts that demonstrate that the property is personal, as in a contract of conveyance of real property when the parties have agreed that certain attached fixtures are to retain their character as personal property and are removable by the seller [*see Carey v. Glenco Citrus Prod. (1965) 235 Cal. App. 2d 572, 578-580, 45 Cal. Rptr. 365* ; *see also § 51.20[3][f]*].

These points and authorities may be combined, when appropriate, with pointsand authorities relating to the specific procedural context in which the substantive issue arises; for example, this form may be used in opposition to a demurrer or a motion for summary judgment, when counsel wishes to respond to an assertion that the property alleged to have been converted was not personal property capable of being identified, and therefore was not subject to conversion. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

For discussion of property considered to be personal property subject to conversion, see California Forms of Pleading and Practice, Ch. 150, *Conversion* (Matthew Bender).

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 51.26* and *51.27* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Personal Property, Tangible or Intangible, Can Be Subject to Conversion

Plaintiff in ***Payne v. Elliot*** *(1880) 54 Cal. 339* , brought an action of trover for an alleged conversion of 100 shares of stock in a mining company. The trial court overruled defendants' demurrer, and, after a trial held in the absence of defendants and their attorneys, gave judgment to plaintiff. Defendants appealed, contending that the trial court erred in overruling their demurrer to the complaint on the ground that there was no allegation that the plaintiff owned, or that the defendants converted, any certificates of shares of stock.

The Supreme Court, in affirming the judgment of the trial court that defendants had converted the shares of stock of plaintiff, rejected defendants' contention that conversion could only lie in the conversion of certificates of stock and not in the shares themselves. The Court reviewed the common law history of trover, finding that it was the proper remedy for a conversion of personal property that was tangible, capable of being identified, and taken into actual possession. The conversion of the property was the gist of the action, and conversion did not take place unless the defendant actually possessed the property by some means, whether by finding it or otherwise. Shares of stock, for example, and other similar things did not belong to that class of property known as chattels because they were considered to be incorporeal, intangible things existing in idea and incapable of being subjected to actual possession. Nor did these incorporeal things denote possession since they had no other evidence of an existence than, as in the case of shares of stock, the certificate that was issued to the person who claimed a right to what the certificate represented. It was a right to a thing in action, but not possession, and the certificates themselves were considered evidence of property, but not property itself. Consequently, under common law, personal rights were not reducible into possession, but were recoverable by law, and trover was not a proper remedy for their conversion (*54 Cal. 339, 340-341)* . The Court, however, citing authorities from various jurisdictions, stated that trover no longer existed as it did at common law, and that it had developed into a remedy for the conversion of every species of personal property, including certificates of stock (*54 Cal. 339, 341)* . At the same time, the Court continued, the words "things in action" had also undergone a development from their original meaning and now represented things that could be the subject of contract, sale, gift, mortgage, bailment, and pledge, and under the provision of California law, were personal property subject to taxation, attachment, execution, levy, and sale (*54 Cal. 339, 341-342)* .

[b] Specific Money as Property Subject to Conversion

The facts and procedural background of ***Haigler v. Donnelly*** *(1941) 18 Cal. 2d 674, 117 P.2d 331* , are discussed in *§ 51.20[3][c]*. The Supreme Court affirmed the judgment of the trial court in finding that defendant real estate broker had converted a portion of monies collected by her for the benefit of plaintiffs. Defendant, as an agent or broker of plaintiffs, had negotiated a lease of an apartment house and had received a stipulated sum of money belonging to plaintiffs, and then refused to account for it after a demand by plaintiffs. Defendant had alleged that she was entitled to a commission for services rendered. The Court, citing California and other authorities, stated that a broker or agent is ordinarily liable for converting the funds of his or her principal when he or she refused to account for them upon proper demand. When an agent is required to turn over to his or her principal a definite sum received by him or her on the principal's account, the remedy of conversion, the Court held, was proper. While money cannot be the subject of an action for conversion unless a specific sum capable of identification is involved, it is not necessary, the Court noted, that each coin or bill be earmarked (*18 Cal. 2d 674, 681)* .

The facts and procedural background of ***Weiss v. Marcus*** *(1975) 51 Cal. App. 3d 590, 124 Cal. Rptr. 297* , are discussed in *§ 51.20[3][a]*. The court of appeal found that the trial court erred in sustaining defendants' demurrer to a

count of conversion of $6,750 owed to plaintiff by one of the defendants for legal services rendered. The court held that an allegation that a certain specific sum belonged to plaintiff and that defendants converted that sum to their own use sufficiently stated a cause of action for conversion. The court stated that while money cannot be the subject of an action unless a specific sum capable of identification is involved, it is not necessary that each coin or bill be earmarked (*51 Cal. App. 3d 590, 599)* .

[c] Equitable Interest in Real Property Subject to Conversion

Gherman v. Colburn *(1977) 72 Cal. App. 3d 544, 140 Cal. Rptr. 330* , arose out of an action for damages for tortious exclusion of a joint venturer in thatdefendants wrongfully repudiated or breached the joint venture agreement and converted all of the joint venture assets to themselves. Plaintiffs alleged that they and defendants had entered into an oral agreement of joint venture to acquire and sell certain real property and to divide the proceeds of the sale according to an agreed formula. The joint venture purchased the land for approximately $4 million, and one of defendant Colburn's wholly owned subsidiary corporations took title. Thereafter, plaintiffs, as part of the agreement, formulated plans for marketing the properties and lined up several prospective buyers, including one which would have produced a profit of $5 million to the joint venture. Defendants at this time denied the existence of a joint venture and denied that plaintiffs had any interest in the land. Plaintiffs brought this action for conversion. The jury at trial rendered a verdict in favor of plaintiffs and defendants appealed, contending that there can be no conversion of real property and that the term conversion applies only to personal property.

The court of appeal affirmed the judgment of the trial court. Addressing itself to the issue of whether or not real property could be the subject of conversion, the court stated that normally, at law, a person could only convert personal property and could not be guilty of converting real property. However, the court pointed out, this rule was not true in equity when the person guilty of conversion was the holder of legal title to real property, and his or her victim had at most only an equitable title or right to that property. In this case, the court said, defendants had legal title to the property purchased. The court agreed with plaintiffs' contention and the jury's implied findings that defendant Colburn's subsidiary corporation held title to the land as nominee for the joint venture and therefore in trust for the use and benefit of the joint venture, and when defendants repudiated the joint venture and denied that plaintiffs had any equitable right or title in the land and claimed the entire parcel of land for themselves, they became obligated to pay plaintiffs damages in the form of money. The actions of defendants, stated the court, constituted a conversion in equity. Citing *Black's Law Dictionary*, the court defined a conversion in equity as the exchange of property from real to personal or from personal to real, which takes place under some circumstances in the consideration of the law, for example, to give effect to directions in a will or settlement or to stipulations in a contract, although no such change has actually taken place, and by which exchange the property dealt with becomes invested with the properties and attributes of that into which it is supposed to have been converted. Consequently, the court concluded, when defendants repudiated the existence of the joint venture, denied that plaintiffs had any equitable right or title to the property in question, and claimed the entire parcel for defendants' own exclusive benefit, they converted plaintiffs' equitable title in real property to personal property in the form of a right to a money judgment for damages; and when defendants denied and repudiated their obligation to pay those damages, they in effect converted plaintiffs' personal property to their own use and benefit. Since plaintiffs elected to seek a money judgment, the court added, a conversion within the concept of equity occurred (*72 Cal. App. 3d 544, 568-569)* .

The court of appeal observed that plaintiffs might also have sued to impress a trust, either express, constructive, or resulting, on the real property in question (*72 Cal. App. 3d 544, 568, 569 ns. 15, 16*).

Murphy v. Wilson *(1957) 153 Cal. App. 2d 132, 314 P.2d 507* , involved an action for declaratory relief and to adjudge certain conveyances as mortgages. Plaintiff had contracted with the federal government to construct a diversion dam in New Mexico; however, he did not have enough capital to carry out his contract. Plaintiff subsequently arranged for a loan of $50,000 from defendant. As security for the loan, plaintiff gave a bill of sale and chattel mortgage of his vehicles and equipment in use on the dam and also conveyed a deed to his California home to defendant. These

conveyances were placed in escrow. If plaintiff paid $75,000 to defendant by a certain date, the conveyances would be returned; if not, they would go to defendant. Plaintiff was unable to continue with the construction work and defendant took possession of all the property to which title had been put in escrow. Eventually, defendant sold all of the property. At trial, the presiding judge found that defendant had charged plaintiff a usurious rate of interest in excess of that permitted under the laws of New Mexico. The trial court further found that defendant had not foreclosed on plaintiff's property under the terms of the chattel mortgage, and that defendant had sold outright the equipment and plaintiff's home. The court awarded plaintiff $2,238, the amount of the rentals on equipment rented out before their sale. Plaintiff appealed on ground of inadequate damages.

The court of appeal reversed the judgment, holding that the trial court had erred in not awarding plaintiff the fair market value of all of the property converted as of the date defendant took the property into his possession, together with interest. The court reformulated the amount of damages to be awarded and included in the formulation plaintiff's equity of $15,000 in his California home (*153 Cal. App. 2d 132, 135-136)* .

NOTE:

The court of appeal in *Murphy* did not explicitly discuss whether conversion could be committed with respect to real property. It is unclear whether the court considered it was plaintiff's home that was converted, or his equity in the home. The court of appeal in *Munger v. Moore (1970) 11 Cal. App. 3d 1, 7, 89 Cal. Rptr. 323* [*see § 51.26[4][a]*], criticized the holding in *Murphy* to the extent that the case seems to imply that there may be a conversion of real property. The court said that the *Murphy* decision was articulating a rule with respect to real property that has been applied in other jurisdictions. This rule, the court said, citing authorities from various jurisdictions, is that a trustee or mortgagee may be liable to the trustor or mortgagor for damages sustained when there has been an illegal, fraudulent, or willfully oppressive sale of property under a power of sale contained in a mortgage or deed of trust. This rule of liability, the court went on to say, is alsoapplicable in California under the basic principle of tort liability declared in the Civil Code that every person is bound by law not to injure the person or property of another or infringe on any of his or her rights [*Civ. Code § 1708*] .

[d] Customer List as Property Subject to Conversion

Palm Springs-La Quinta Dev. Co. v. Kieberk Corp. *(1941) 46 Cal. App. 2d 234, 115 P.2d 548* , involved two consolidated cases. Kieberk Corp., both as cross complainant and plaintiff, sought damages for conversion of some 27,000 lead cards containing lists of customers and other trade information used for procuring sales of real property. Plaintiff and defendant Palm Springs Co. entered into an agreement that the index cards and the cabinets in which they were contained could be used by Palm Springs for the limited purpose expressed in the contract. Judgment was rendered in favor of Kieberk Corp. and Palm Springs appealed, contending that damages would not lie for the appropriation, loss or conversion of a list of customers, together with information that may constitute such individuals as valuable prospects for sales of real property.

The court of appeal affirmed the judgment of the trial court. Addressing itself to the issue of whether or not a customer list together with its attendant information was property subject to conversion, the court concluded that it was. In this case, the court said, appellants were charged with damages for destroying and appropriating tangible personal property consisting of a cabinet of lead cards containing the names and valuable information regarding prospective and actual purchasers of real property, contrary to the express terms of a written contract. Appellant's reliance on *Olschewski v. Hudson (1927) 87 Cal. App. 282, 288, 262 P. 43* [*see § 51.27[3][a]*], the court said, was not apt. In that case, the defendant was not charged with converting an index list of customers. Rather, the court continued, he was charged with selling the good will of a business in a specific district and the court in that case merely held that to be an intangible property right not subject to conversion (*46 Cal. App. 2d 234, 240)* .

[e] Shares of Stocks and Bonds as Property Subject to Conversion

The facts and procedural background of ***Payne v. Elliot*** *(1880) 54 Cal. 339* , are discussed in *§ 51.21[3][a]*.

The Supreme Court said that shares of stock under common law were not personal property, but were a right consisting of the privilege of voting in the concerns of the corporation, and of participating in the profits of the corporation. It subsisted only in law or contract. This right, although represented by a certificate, was not reducible to possession, since the certificate was merely evidence of property and not property itself. Under the common law, trover was not a proper remedy for the conversion of things that were considered to be mere personal rights. However, the Court stated, citing authorities from various jurisdictions, trover no longer existed as it did in common law and had developed into a remedy for the conversion of every species of personal property, including certificates of stock. At the same time that trover was being expanded, the Court continued, the words "things in action," which under the common law included rights under a contract or at law, had also developed away from their original meaning, and that they now represented things that were the subject of contract, sale, gift, mortgage, bailment, and pledge. Under the provisions of California law, the Court added, these things were personal property subject to taxation, attachment, execution, levy, and sale (*54 Cal. 339, 340-342)* . Consequently, the Court held, it was the shares of stock themselves that constituted the property that belonged to the shareholder and that were converted. Otherwise, the Court stated, the property would be in the certificate, which was only some evidence of property. The certificate, the Court said, had no intrinsic value disconnected from the stock it represented, and its conversion did not constitute the entire wrong. The court concluded that the real act done was the conversion of the shares, and therefore the trial court did not err in overruling defendant's demurrer (*54 Cal. 339, 342)* .

Plaintiffs in ***Nichols v. Leach*** *(1931) 114 Cal. App. 545, 300 P. 103* , brought an action for conversion of stocks and bonds given as collateral security for a promissory note. Plaintiffs alleged that they were owners of the note and of certain stocks and bonds, and that these instruments were deposited with defendants pursuant to an agreement that these items were to be used to purchase certain bank stock in which plaintiffs wanted to gain controlling interest. The complaint further alleged that these instruments were to be returned to plaintiffs at a certain date, but that defendants failed to deliver these items, having in the meantime sold the stocks and bonds, appropriated the proceeds of the sale to their own use, and retained the note. The trial court rendered judgment for plaintiffs, and defendants appealed, contending that the transaction between the parties was a joint venture and that plaintiffs failed to allege or prove the elements necessary to establish an involuntary trust of the property.

The court of appeal, in affirming the judgment of the trial court, rejected defendant's contentions that the action was one for involuntary trust and that plaintiffs therefore had failed to allege or prove the necessary elements. The court conceded that plaintiffs had made certain allegations to the effect that the proceeds of the sale of the stocks and bonds constituted a trust in the hands of defendants; however, the court found those allegations to be surplusage and harmless. Plaintiffs' complaint, the court said, contained adequate allegations constituting a cause of action sounding in trover. Moreover, the court added, the case was tried on that theory (*114 Cal. App. 545, 549)* . Shares of stocks and bonds, the court held, constitute tangible property and are subject to an action of conversion when they are deposited as collateral security for payment of a note and are unlawfully appropriated (*114 Cal. App. 545, 550)* .

[f] Fixtures as Property Subject to Conversion

In ***Carey v. Glenco Citrus Prods.*** *(1965) 235 Cal. App. 2d 572, 45 Cal. Rptr. 365* , defendant Glenco filed a cross action against plaintiffs for conversion of certain industrial crops that, by the terms of the contract of purchase, were severable. Plaintiff Carey had leased a certain portion of its land to Construction Company, who had subsequently assigned its interest in the lease to Capitol Estates. Construction Company thereafter sold the orange crop on the premises to Glenco. Both the assignment of the lease and the sale of the crop were executed by the same person. The agreement also included crops from an adjoining parcel of land owned by plaintiff Powell, and by the terms of the agreement, Glenco was to pay for all care of the grove, including irrigation and pest control, from the date of the sale until the crop was harvested, and that permission was given to Glenco to maintain the crop on the land. Subsequently,

Capitol Estates and Construction Company defaulted on their agreement to pay county taxes due, and they assigned their interests in the property to World Properties. Plaintiff Carey terminated the lease after failure of the lessees to pay the county taxes and rental payments due. Plaintiff Carey also notified defendant Glenco not to pick up the remaining orange crop and harvested the balance of the crop himself. Plaintiff Carey then instituted this action to quiet title in the property leased and named as defendants Construction Company, Capitol Estates, World Properties, and Glenco Citrus Products. Defendant Glenco answered and filed the cross action; the other defendants defaulted and judgment was entered against them. On the cross action, the trial court entered judgment for defendant Glenco. Plaintiff appealed, contending that defendant Glenco had not obtained title to the orange crop because it had obtained its agreement for the sale of the crop from Construction Company rather than from Capitol Estates, which was the assignee of the lease agreement. Plaintiff also contended that even if the interest of the lessee in the orange crop had been transferred to Glenco, it was not the owner of the crop remaining on the trees at the time of the alleged conversion because defendant's right thereto terminated upon termination of the leases.

The court of appeal affirmed the judgment against plaintiffs regarding the finding that they were liable for conversion of defendant's interest in the orange crop. The court held that Construction Company and Capitol Estates were one and the same legal entity (*235 Cal. App. 2d 572, 575)* , that title to the orange crop passed to defendant Glenco at the time of the execution of the agreement of sale, and that termination of the leases did not affect Glenco's interest in the unharvested fruit growing on the leased premises. For some purposes, growing crops are regarded as part of the realty upon which they are growing, the court said. In California, statutory law provides that industrial growing crops that are agreed to be severed under the contract of sale shall be treated as goods to be treated by the provisions of *Civ. Code §§ 658, 660*, and *1796*, regulating the sale of goods. In reviewing prior California law, the court stated that growing crops that are agreed to be severed under a contract of sale cease to be a part of the realty and become personalty. There occurs, the court said, a constructive severance of the crop from the realty (*235 Cal. App. 2d 572, 578-579)* . The refusal of plaintiffs to permit defendant Glenco to harvest the crop that was its personal property constituted a conversion (*235 Cal. App. 2d 572, 580)* .

Bedell v. Mashburn *(1948) 87 Cal. App. 2d 417, 197 P.2d 98* , arose out of an action for conversion of various items of personal property, including a water heater that was attached to the real property. Plaintiffs alleged that they delivered certain personal property to defendants pursuant to an agreement by which defendants purchased the real property, and were to purchase the personal property in question at a reasonable price to be determined by plaintiffs, but that defendants refused to pay the price asked. Evidence produced at trial indicated that the parties were unable to agree on a price for the property and in the meantime defendants made use of some of the property for their own benefit, including household furniture, a truck, various animals, and a water heater. By the terms of the conveyance of the real property to defendants, the water heater was to retain its character as personal property and become removable by plaintiffs. The trial court found for plaintiffs, awarding damages for the market value or rental value of the various items used, and returned possession of the truck and household furniture to plaintiffs. Defendants retained the water heater. Defendants appealed, contending that the damages awarded in relation to the water heater were excessive, apparently on the ground that either the value of the property was less than the damages awarded, a fact conceded by plaintiff, or that the water heater was a fixture and therefore ran with the land and was not personal property and consequently, not subject to conversion.

The court of appeal in affirming the judgment of the trial court, modified the amount of damages awarded for the conversion of the water heater. The court apparently agreed with the trial court's finding that the water heater was personal property. In regard to a conveyance of real property between parties, the court stated, an agreement that an attached article shall retain its character as personal property and become removable by the owner of the realty will be binding upon the parties. In this case, the court concluded that the trial court had found that the parties agreed that the water heater should retain its character as personal property and therefore was subject to conversion (*87 Cal. App. 2d 417, 422-423)* .

[4] Additional Authorities

[a] Equitable Interest in Real Property Subject to Conversion

Katz v. Enos (1945) 68 Cal. App. 2d 266, 156 P.2d 461 , involved an action by a brother against the estate of his deceased sister to recover for the wrongful conversion of 42 acres of land deeded to her by the brother in order to raise money to pay for his medical expenses. The court of appeal affirmed the findings of thetrial court that the deed was for a limited purpose, that it established a trust for the benefit of the brother, and that the sister failed to carry out the trust but sold the property and appropriated the proceeds of the sale to her own use (*68 Cal. App. 2d 266, 273-274)* .

The court did not discuss whether conversion could be committed with respect to real property. Although the court may have implied this since the action was for wrongful conversion of land [*see Munger v. Moore (1970) 11 Cal. App. 3d 1, 7, 89 Cal. Rptr. 323]* , it seems more likely that the court considered that the property converted was the proceeds of the sale of the land. As the court noted, the purpose of the brother in deeding the land to the sister was to raise money to pay his medical expenses, but she instead appropriated the money raised to her own use. The court did not say that the actual sale of the property constituted conversion (*68 Cal. App. 2d 266, 274)* .

[b] Shares of Stocks and Bonds as Property Subject to Conversion

In *Virtanen v. O'Connell (2006) 140 Cal. App. 4th 688, 44 Cal. Rptr. 3d 702* , an attorney acted as an escrow holder in a stock transaction in which his client was the purchaser. The seller deposited his stock certificates and related documents with the attorney. Under instructions accompanying the stock, the attorney was to hold the materials until the attorney received fully executed closing documents, the seller had confirmed that he had received the first payment, and the stock and assignment documents could be delivered to another escrow agent according to the terms of a secured promissory note regarding payment over time of the balance due. Less than a week after the delivery, the seller notified the attorney and the buyers that he was rescinding the sale offer and demanded return of his stock. Instead of returning the stock certificates, and despite the fact that none on the prerequisites for delivery of the stock to the closing agent had been met, the attorney ignored the seller's demands and finished the closing anyway. The seller sued the attorney and his law firm for conversion, breach of fiduciary duty, and negligence. The jury found for the seller and the court of appeal upheld the verdict. The court held that the attorney, acting as an escrow agent, was liable for conversion of the stock certificates. The attorney had exercised dominion over and disposed of the property in a way that was not in accordance with the escrow instructions, and contradicted the seller's notice of rescission and demand for return of the property (*140 Cal. App. 4th 688, 706-708)* .

[c] Fixtures as Property Subject to Conversion

In *Story v. Christin (1939) 14 Cal. 2d 592, 95 P.2d 925* , plaintiff leased certain land to grow walnut and orange trees and to purchase the land on installment payments. Plaintiff failed to pay the required interest and taxes pursuant to agreement, and defendant canceled the contract of sale, repossessed the land, and refused to allow plaintiff to remove the nursery trees that plaintiff claimed were part of his stock in trade. The Supreme Court reversed the trial court's judgment in favor of defendant, holding that the nursery stock, even though they were attached to the land by their roots, were not an annual crop that was a profit of the land; rather, the Court stated they were, under the circumstances of the case, part of plaintiff's stock in trade and therefore classified as personal property (*14 Cal. 2d 592, 595-596)* .

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Volume 5 Chapters 50-59 CONTRACTS---to---CORPORATIONS
CHAPTER 51 CONVERSION
PART II. FORMS

5-51 California Points & Authorities § 51.22

§ 51.22 Supporting Contention That Defendant Has Converted Plaintiff's Personal Property--Plaintiff Owned or Had Right to Immediate Possession of Property Converted

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with the general form of memorandum of points and authorities pertaining to conversion of plaintiff's personal property (see § 51.20).*]

PLAINTIFF _____ [IS OWNER *or* HAS RIGHT TO IMMEDIATE POSSESSION *or state other applicable property interest*] OF THE PROPERTY CONVERTED AND THEREFORE HAS SUFFICIENT INTEREST IN THE PROPERTY TO MAINTAIN AN ACTION FOR CONVERSION.

A. Plaintiff Owned or Had Right to Immediate Possession of Property Converted. In order to state a cause of action for conversion, the plaintiff must allege his or her ownership or right to possession of the property in question at the time of the alleged conversion (*Franklin v. Municipal Court (1972) 26 Cal. App. 3d 884, 902, 103 Cal. Rptr. 354*).

[*Optional*] **B. Actual Possession of Property, Rather Than Ownership, Sufficient Interest.** It is not necessary for a plaintiff in an action against a wrongdoer for conversion to be the legal owner of the property; it is sufficient if he or she had actual possession at the time of the alleged act of conversion (*Igauye v. Howard (1952) 114 Cal. App. 2d 122, 127, 249 P.2d 558* ; *Fletcher Aviation Corp. v. Landis Mfg. Co. (1950) 95 Cal. App. 2d 905, 908, 214 P.2d 400*).

[*Optional*] **C. Plaintiff With Right to Immediate Possession Need Not Be in Actual Possession at Time of Conversion.** A plaintiff who has the right to immediate possession of the property at the time of the alleged conversion need not be in actual possession of the property at the time to maintain an action for conversion (*see* *Franklin v. Municipal Court (1972) 26 Cal. App. 3d 884, 901-902, 103 Cal. Rptr. 354*).

[*Optional*] **D. Owner of Automobile on Which Repairs Were Made Without Prior Written Estimate.** An automotive repairer who repairs a vehicle without first giving the owner the written estimate required by *Bus. & Prof.*

Code§ 9884.9 is not entitled to any compensation for that work, has no lien on the vehicle and has no right to retain or retake possession of the vehicle. The repairer's retention of possession or repossession of the vehicle in that situation constitutes conversion (*Bus. & Prof. Code § 9884.9*; *Zhadan v. Downtown L.A. Motor Distribs. Inc. (1979) 100 Cal. App. 3d 821, 831-833, 161 Cal. Rptr. 225* ; *see Donaldson v. Doe (1987) 194 Cal. App. 3d 817, 820-821, 239 Cal. Rptr. 801* ; *Bennett v. Hayes (1975) 53 Cal. App. 3d 700, 703-704, 125 Cal. Rptr. 825*).

[*Optional*] **E. Purchaser Under Automobile Installment Sale Contract Who Is Denied Right to Reinstate Contract.** The purchaser of a vehicle under an installment sale contract who has been denied the right granted by *Civ. Code § 2983.3* to reinstate that contract and to redeem the repossessed vehicle has the right to possession of the vehicle and standing to maintain a cause of action for conversion against the seller or holder (*Cerra v. Blackstone (1985) 172 Cal. App. 3d 604, 609-610, 218 Cal. Rptr. 15*).

[*Optional*] **F. When Plaintiff Owner Need Not Have Right to Immediate Possession at Time of Conversion.** A plaintiff who is owner of property allegedly converted, but who did not have a right to immediate possession, may bring an action for conversion when the act constituting conversion would entirely divest the owner of his or her title to the property (*see Reynolds v. Lerman (1956) 138 Cal. App. 2d 586, 596-597, 292 P.2d 559*).

[*Optional*] **G. Secured Party Having Special Interest With Right to Immediate Possession on Default.** A secured party, although not an owner, does have a special interest in property secured with a right of possession if there is a default and the security agreement allows the secured party to take possession (*Hartford Fin. Corp. v. Burns (1979) 96 Cal. App. 3d 591, 599-600, 158 Cal. Rptr. 169*).

[*Optional*] **H. Owner of Property in Which Another Has Special Interest.** Ownership, either general or special, or the right to immediate possession of property, is all that is required to maintain an action for conversion, and the fact that another party may have a special interest in the property does not affect the owner's right to maintain such an action (*Everfresh, Inc. v. Goodman (1955) 131 Cal. App. 2d 818, 820, 281 P.2d 560*).

[*Optional*] **I. Assignee of Cause of Action for Conversion Has Right to Maintain Action Without Ownership or Right to Possession.** A cause of action arising out of the violation of property right may be assigned, and the assignee of the cause of action need not show either ownership or right of immediate possession of the property in order to maintain the action as long as he or she can assert that the assignor was the owner or had a right to immediate possession at the time of the alleged conversion of the property (*Staley v. McClurken (1939) 35 Cal. App. 2d 622, 625-627, 96 P.2d 805*).

[*Optional*] **J. Attorney With Valid Charging Lien May Pursue Conversion Action When Proceeds are Wrongfully Withheld.** An attorney may maintain an action for conversion against any party who wrongfully withholds or disburses funds subject to a valid attorney's lien (*Plummer v. Day/Eisenberg, LLP (2010) 184 Cal. App. 4th 38, 45, 108 Cal. Rptr. 3d 455*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of plaintiff's contention in an action for conversion that defendant has converted plaintiff's personal property by wrongfully depriving him or her of the use and possession of that property. This form sets forth the point that plaintiff sufficiently asserted ownership or a right to immediate possession of the property alleged to have been converted at the time of the conversion. One or more optional paragraphs may be included as appropriate to plaintiff's particular situation or interest in the property converted.

The argument supported by this memorandum may be raised in response to an assertion that the plaintiff was not the

owner, or did not have a right of immediate possession of the property in question, at the time of the alleged conversion.

This form should be combined with the general form of memorandum of points and *authorities in § 51.20* and, if appropriate, with other forms of memoranda supporting the contention that defendant converted the personal property of the plaintiff [*see, e.g., §§ 51.21, 51.23 -51.24*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing the nature of plaintiff's ownership interest in the property in question, and how this interest gives him or her a right of immediate possession. If the plaintiff is basing his or her action for conversion on the ground that he or she had actual possession of the property at the time of the alleged conversion, counsel should include discussion showing plaintiff's superior right to possession to the property in question as against defendant.

It is important to set forth the relevant facts establishing plaintiff's right to bring an action for conversion in those situations that appear to be outside the general rule. For example, a plaintiff who owns property that has been lawfully attached but wrongfully sold, although not having the right to immediate possession, may nevertheless bring an action for conversion [*see Reynolds v. Lerman (1956) 138 Cal. App. 2d 586, 597, 292 P.2d 559* ; *see also § 51.22[3][f]*]. Similarly, an assignee of a cause of action for conversion may maintain the action, even though he or she has no interest in the converted property itself, as long as the assignor was the owner or had the right to immediate possession of the property at the time of the conversion [*see Staley v. McClurken (1939) 35 Cal. App. 2d 622, 625-627, 96 P.2d 805* ; *see also § 51.22[3][i]*].

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which the substantive issue arises; for example, this form may be used in opposition to a demurrer or a motion for summary judgment, when counsel wishes to respond to an assertion that the plaintiff was not the owner, or did not have a right of immediate possession of the property, at the time of the alleged conversion. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

For further discussion of the types of interest in personal property necessary for a plaintiff to maintain an action for conversion, see California Forms of Pleading and Practice, Ch. 150, *Conversion* (Matthew Bender).

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 51.28* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Plaintiff Owned or Had Right to Immediate Possession of Property Converted

The facts and procedural background of ***Franklin v. Municipal Court*** *(1972) 26 Cal. App. 3d 884, 103 Cal. Rptr. 354* , are discussed in *§ 51.20[3][b]*. The court of appeal reversed the judgment of the trial court in granting defendants' motion for summary judgment in an action for conversion against a municipal court judgein his individual capacity. The court held that a cause of action for conversion was sufficiently stated in an action arising out of confiscation of plaintiff's revolver by a municipal court judge in violation of former Penal Code §§ 1418-1419 [*now see Penal Code §§ 1417-1417.7*]. In order to state a cause of action for conversion, the court ruled, the plaintiff must first allege his or her ownership or right to possession of tangible property at the time of the conversion. In this case, the court concluded, plaintiff, in alleging that he was the lawful owner and entitled to the possession of the subject revolver at the time the revolver was taken from him following his arrest for assault with intent to commit murder, had alleged facts sufficient to show ownership and right to possession (*26 Cal. App. 3d 884, 901-902)* .

[b] Actual Possession of Property, Rather Than Ownership, Sufficient Interest in Property Converted

Plaintiff in ***Igauye v. Howard*** *(1952) 114 Cal. App. 2d 122, 249 P.2d 558* , brought an action for wrongful eviction and for conversion of personal property detained by defendant landlord. Plaintiff alleged that he and defendant entered into a written lease of a hotel that contained a provision that in case of default on the rent, defendant had the option of terminating the lease. Subsequently, plaintiff could not make the rental payments, and defendant entered the hotel and took possession of it, changed the lock on the door of the office, removed certain monies belonging to plaintiff from the cash register, and converted to his own use certain personal property belonging to plaintiff. The trial court entered judgment for plaintiff, and defendant appealed, contending that the hotel was operated by plaintiff's father, who was in fact the owner of the property and therefore was the real party in interest, and that the action could not be prosecuted in plaintiff's name.

The court of appeal, in affirming the judgment of the trial court, rejected defendant's contention that plaintiff did not have sufficient interest in the property to sue for conversion. Even assuming the facts urged by defendant to be true, the court said, the plaintiff could prosecute the case in his own name since under these facts, plaintiff was a trustee of an express trust with the father being the beneficial owner of the lease (*114 Cal. App. 2d 122, 125)* . Moreover, the court concluded, the fact that plaintiff's father, not plaintiff, may have been the owner was not material. Plaintiff had possession of the property at the time of the conversion. It is not necessary that a plaintiff in an action for conversion be the owner of the property; it is sufficient if he or she had actual possession at the time of the alleged act of conversion (*114 Cal. App. 2d 122, 127)* .

Fletcher Aviation Corp. v. Landis Mfg. Co. *(1950) 95 Cal. App. 2d 905, 214 P.2d 400* , arose out of an action for conversion of patterns and dies and for the value of a leasehold estate of which plaintiff was dispossessed. Plaintiff alleged that it was in the business of designing and manufacturing airplanes and that it had a contract with the federal government to produce airplanes until the government terminated it. Plaintiff then subleased a room in a factory building in which plaintiff stored plaster patterns and metal dies that were used in the manufacturing of airplanes. Subsequently, defendant purchased the factory building subject to the lease and sublease, and pursuant to an agreement with the lessee, entered the storage room, removed the patterns and dies, changed the lock, and thereafter occupied the room without plaintiff's consent. Defendant apparently sold the metal dies to a junk dealer and hauled the plaster patterns to a dump. The trial court found for plaintiff, and defendant appealed, contending that plaintiff was not the owner and was not in lawful possession of the patterns and dies, which belonged to the federal government, the rightful owner of all property acquired or produced by plaintiff in the performance of the contract to manufacture airplanes. Plaintiff responded that it was the owner of the patterns and dies by the provisions of the contract with the government that specifically reserved to plaintiff the exclusive right to reproduce the airplanes and any parts. Plaintiff also asserted that it had sufficient interest in the patterns and dies to entitle it to sue for conversion.

The court of appeal affirmed the judgment of the trial court, holding that in an action for conversion, it is not necessary that plaintiff be the owner of the property involved, if the plaintiff had actual possession of the property at the time of the alleged conversion. Whether or not plaintiff had lawful possession was not material to the issue, the court said. Plaintiff had acquired the pattern and dies in a lawful manner and it was not necessary, the court stated, to determine in the action for conversion who had the superior interest in the property, the United States or plaintiff. The court concluded that one having possession is merely the owner as against a wrongdoer (*95 Cal. App. 2d 905, 908)* .

[c] Plaintiff With Right to Immediate Possession Need Not Be in Actual Possession at Time of Conversion

The facts and procedural background of ***Franklin v. Municipal Court*** *(1972) 26 Cal. App. 3d 884, 103 Cal. Rptr. 354* , are discussed in *§ 51.20[3][b]*. The court of appeal held that plaintiff had sufficiently alleged possession and ownership of a revolver even though at the time of the conversion of the revolver, it was not in his possession, but in the custody of the municipal court. The municipal court judge, after dismissing criminal charges against plaintiff, ordered plaintiff's revolver confiscated pursuant to former Penal Code § 1418 [*now see Penal Code §§ 1417-1417.7*].

Subsequently the same municipal judge signed an order releasing the weapon to his own custody in his individual capacity, thereby converting the property to his own use (*26 Cal. App. 3d 884, 901-902)* .

[d] Owner of Automobile on Which Repairs Were Made Without Prior Written Estimate

The court of appeal in ***Donaldson v. Doe*** *(1987) 194 Cal. App. 3d 817* , *239 Cal. Rptr. 801* , reversed a judgment for defendant automobile repairer. Although plaintiffs gave oral authorization for some of the repairs and made a substantial down payment, no written estimate was given. When plaintiffs could not pay defendant's final bill, defendant commenced lien sale proceedings. Plaintiffs sued for return of the car. The court of appeal reasoned that if recovery was barred on the contract when the repairer violated *Bus. & Prof. Code § 9884.9* by failing to provide a written estimate, recovery on a common count should also be barred in view of the public policy purpose behind that statute (*194 Cal. App. 3d 817, 820-821)* .

Zhadan v. Downtown L.A. Motor Distribs. *(1976) 100 Cal. App. 3d 821, 161 Cal. Rptr. 225* , was the second appeal, after the second trial [*see Zhadan v. Downtown L.A. Motors (1976) 66 Cal. App. 3d 481, 136 Cal. Rptr. 132]* of plaintiff's action for conversion. After being presented with a bill for almost $2,000 for repairs that she had not authorized, plaintiff did not pay the bill and used a second set of keys to take her car from defendant's lot. Defendant repossessed the car, and plaintiff sued for conversion and punitive damages. Judgment for plaintiff was affirmed.

Most of defendant's contentions on appeal related to the amount of the punitive damages award. The portion of the opinion considering the propriety of the punitive damage award is discussed in Ch. 64, *Damages: Tort* .

Defendant also contested the sufficiency of the evidence to support the verdict (*100 Cal. App. 3d 821, 831)* . There were conflicts in testimony, but the evidence was sufficient to support the judgment for plaintiff (*100 Cal. App. 3d 821, 832-833)* . The court of appeal concluded that the evidence was sufficient to establish that defendant failed to provide the written estimate in violation of *Bus. & Prof. Code § 9884.9*, that plaintiff never approved any estimate, and that the invoice in many respects failed to contain the specificity and breakdowns required by *16 Cal. Code Reg. §§ 3353-3354* (*100 Cal. App. 3d 821, 833)* .

The court of appeal in ***Bennett v. Hayes*** *(1975) 53 Cal. App. 3d 700, 125 Cal. Rptr. 825* , affirmed a judgment for defendant owner in an automobile repairer's action for breach of written contract and for recovery of agreed price. Defendant orally agreed to specific prices for some of the work involved, but plaintiff never provided defendant with a written estimate for any of the work done. The court of appeal cited an Attorney General's opinion to the effect that the purpose of the Automotive Repair Act is to foster fair dealing and to eliminate misunderstandings (*53 Cal. App. 3d 700, 703)* . While recognizing that unjust enrichment is a factor allowing enforcement of some contracts that contain technical violations of the law, the court said that the primary purpose of the rule of unenforceability, namely to discourage practices forbidden by law, would best be served here by holding the contract unenforceable (*53 Cal. App. 3d 700, 704)* .

[e] Purchaser Under Automobile Installment Sale Contract Who Is Denied Right to Reinstate Contract

Cerra v. Blackstone *(1985) 172 Cal. App. 3d 604, 218 Cal. Rptr. 15* , was an action for conversion instituted by an installment sales contract purchaser of a truck. Defendant lawfully repossessed the truck, but then sent a notice of intent to sell the truck that "did not even come close to complying" with *Civ. Code § 2983.2*. Among other things, the notice did not specify the amount necessary to reinstate the contract. Defendant eventually resold the truck. The trial court entered judgment for defendant, after granting its motion for summary judgment. Plaintiff appealed.

The court of appeal reversed. Defendant contended that the only penalty for failure to give notice of the amount required to reinstate is that a deficiency judgment is barred. The court disagreed, saying that since *Civ. Code § 2983.3* was totally rewritten in 1976 the right of reinstatement is absolute for most types of default, and certainly for the failure

to make payments, which was plaintiff's only default (*172 Cal. App. 3d 604, 608-609)* . The court said that once it is determined that a purchaser has a right to reinstate the contract, the first element of conversion, namely the right to possession of the property at the time of conversion, is also established. That purchaser has a right to possession of the vehicle and standing to bring an action for conversion. Unjustified refusal to turn over possession by the withholder on demand constitutes conversion even when.possession by the withholder was originally obtained lawfully (*172 Cal. App. 3d 604, 609)* . The court said that a buyer who has the right to reinstate the contract does not have to prove that he or she tendered the amount necessary to reinstate the contract when the seller or holder has never advised of the amount necessary to reinstate (*172 Cal. App. 3d 604, 609)* . The court concluded that *Zeff v. Harvey Smith Oldsmobile Co. (1957) 154 Cal. App. 2d 1, 315 P.2d 371* , which held that a dealer did not convert an automobile when he repossessed and sold it after the purchaser had defaulted on a conditional sale contract, was not persuasive because that case was decided under prior law. The buyer's right to regain possession of a vehicle after repossession was first created in 1957 (*172 Cal. App. 3d 604, 610)* .

NOTE:

For forms of memoranda of points and authorities for use in actions involving conditional sales of motor vehicles under the Rees-Levering Motor Vehicle Sales and Finance Act (*Civ. Code §§ 2981-2984.4*), see Ch. 206, *Sales* .

[f] When Plaintiff Owner Need Not Have Right to Immediate Possession at Time of Conversion

In ***Reynolds v. Lerman*** *(1956) 138 Cal. App. 2d 586, 292 P.2d 559* , plaintiffdebtor filed an action for conversion of attached property against defendant sheriff who had levied an attachment on plaintiff's personal property seized at his place of business. Plaintiff alleged that his attaching creditor met all demands of the sheriff for fees and deposits, but that the warehouse company that stored the property sold it for nonpayment of warehouse charges. Plaintiff further alleged that the warehouse company was defendant sheriff's agent, that the warehouse company had notified the sheriff of planned sale but had not notified plaintiff, and that the warehouse company sold the property without authority of any court order. The trial court found the sheriff negligent and awarded judgment to plaintiff. Defendant sheriff appealed, contending that plaintiff, as an attachment debtor, was not entitled to the return of the property at the time of the sale of the property and therefore could not recover for its wrongful conversion.

The court of appeal, in affirming the judgment against the defendant sheriff, rejected his contentions that plaintiff did not have a proper cause of action in conversion. The court agreed that plaintiff did not have a right to immediate possession at the time of the sheriff's tortious sale; however, the court stated, plaintiff was the owner at the time of the sale and that whenever a sale wrongfully divests the owner's title entirely, right of immediate possession is not essential to his or her recovery for conversion. The court admitted that this holding ran counter to the general rule in trover that title without immediate right to possession is not sufficient basis for a conversion action. This rule, said the court, had no sound basis for survival with respect to factual situations such as the present case and conflicted with *Civ. Code § 3523*, which contains the maxim of jurisprudence that every wrong has a remedy. Moreover, prior California law had already determined that a sheriff was liable for conversion when property levied under his or her authority is wrongfully sold (*138 Cal. App. 2d 586, 596-597)* .

[g] Secured Party Having Special Interest With Right to Immediate Possession on Default

Hartford Fin. Corp. v. Burns *(1979) 96 Cal. App. 3d 591, 158 Cal. Rptr. 169* , involved an action for conversion of personal property consisting of heavy equipment, including trucks, tractors, and vans, in which plaintiff had a security interest. Plaintiff alleged that it had a security interest in certain motor vehicles as a result of loans made to debtor trucking company. The property was stored on the premises owned by defendants and leased to the debtor. Following default on the loans, plaintiff sought to obtain possession of the vehicles subject to the security agreements; however, defendants had locked the doors to the area where the property was stored, refused to allow plaintiff's representative access to the property, and advised him that the property would not be released until the rent due from the debtor

trucking firm was paid, thereby converting the property to their own use. The trial court found for plaintiff, and defendants appealed from the judgment of the trial court, contending that plaintiff did not have sufficient right to possession of the personal property involved because it failed to perfect its secured interest in the motor vehicles involved according to the provisions of *Veh. Code §§ 6301-6303*, and that it could not have obtained possession of the property without a breach of the peace in violation of former Com. Code § 9503 [*now see Com. Code § 9609*].

The court of appeal affirmed the judgment of the trial court, holding that plaintiff had a sufficient right to possession of the personal property involved as a result of its security interest (*96 Cal. App. 3d 591, 600)* . Citing prior California law, the court stated that one of the elements of a cause of action for conversion was that plaintiff must show ownership or right to possession of the property at the time of the conversion, but that it was not essential that the plaintiff be the absolute owner of the property converted if plaintiff could show that he or she was entitled to immediate possession. Furthermore, the court added, decisional law has recognized that a secured party, although not an owner, does not have a special interest in the property secured with a right of possession if there is a default and the security agreement allows the secured party to take possession. In this case, the court found that the security agreements gave plaintiff the right to take possession of the property on default of the debtor trucking firm and that its security interest was not affected by any provisions of the Vehicle Code as far as its ability to bring an action in conversion (*96 Cal. App. 3d 591, 599-600)* . The court also found that defendants' reliance on former Com. Code § 9503 or on decisional law interpreting that section was not helpful to his case, since plaintiff proceeded by judicial action, as authorized by the statute, rather than by obtaining possession by acts constituting a breach of the peace (*96 Cal. App. 3d 591, 600)* .

[h] Owner of Property in Which Another Has Special Interest

Everfresh, Inc. v. Goodman *(1955) 131 Cal. App. 2d 818, 281 P.2d 560* , arose out of an action for conversion. Plaintiff alleged that he had leased certain premises from defendant and subsequently, in response to a notice, quit the premises leaving behind, with defendant's permission, certain personal property. Plaintiff retained a key and had access to the premises, and had informed defendant that attempts were being made to sell the stored property in order to satisfy creditors. The property was under lien to the federal government, and title to the property was apparently held by certain holders of conditional sales contracts, or other holders of special interests. Plaintiff further alleged that defendant had removed the property and had disposed of it without notice to, or consent by, plaintiff. The trial court gave judgment for plaintiff, and defendant appealed, contending that plaintiff was not the real party in interest and therefore plaintiff could not prosecute the action pursuant to *Code Civ. Proc. § 367*.

In affirming the judgment of the trial court, the court of appeal rejected defendant's contention that the action was not prosecuted by the real party in interest. Citing prior California law, the court said that it has long been establishedthat ownership, either general or special, or the right to immediate possession, is all that is required to maintain an action for conversion. In the present case, the court found that plaintiff was clearly in this category of persons with a right to bring an action for conversion. The fact that the federal government might have a lien on the property, or that conditional sales owners might have actual title, the court concluded, did not alter the situation (*131 Cal. App. 2d 818, 820)* .

[i] Assignee of Cause of Action for Conversion Has Right to Maintain Action Without Ownership or Right to Possession

Plaintiff in ***Staley v. McClurken*** *(1939) 35 Cal. App. 2d 622, 96 P.2d 805* , brought an action for conversion of certain personal property. Plaintiff alleged that, as owner of certain timberland, she leased these premises to defendant. According to the terms of the lease agreement, plaintiff leased all of her real and personal property consisting of 142 acres of timberland and one complete shingle mill, all buildings, and other equipment. Plaintiff had been living on the premises in the large cabin with her mother and sister. After the premises were leased, they stored their personal property and effects in that cabin and secured the door with a padlock. On taking possession of the land, defendant broke the padlock, took possession of the large cabin together with the property and effects left by plaintiff and her family. Defendant used the furnishings in the cabin, but apparently either threw out personal clothing stored there, or

placed the clothing in a location where it was damaged or lost. Defendant refused to restore the property in question, and plaintiff brought her action for conversion in three counts. The first count alleged conversion of plaintiff's personal property. The second one charged conversion of the mother's personal property and alleged an assignment of her claim of conversion to plaintiff. The third count charged conversion of personal property of plaintiff's sister and alleged an assignment by the sister of her claim to plaintiff. The trial court found for plaintiff and defendant appealed, contending that plaintiff failed to allege that she was the owner or entitled to immediate possession to the property alleged to be converted in the second and third counts.

The court of appeal affirmed the judgment of the trial court for plaintiff on the second and third counts. The court conceded that most of the property involved in the suit belonged to plaintiff's mother and sister and that their portion of the personal property was never sold or transferred to plaintiff. However, the court held, the right to maintain an action for conversion of personal property may be based on an assignment of a chose in action subsequently executed after the conversion and before the filing of the suit. Furthermore, the court stated, it was not necessary that the assignment also have transferred title to the property, or the possession of it (*35 Cal. App. 2d 622, 625)* . The rule that it is necessary for plaintiff to show either ownership of the property or the right to immediate possession at the time of the conversion, the court said, means that the owner of the property must have either title or the right of immediate possession of the property. Consequently, the court concluded, it was not necessary for an assignee of a chose in action to show that he or she was the owner of the property, nor that he or she was entitled to the possession of the property at the time of the conversion. The fact that both assignors were the owners of and entitled to immediate possession of their respective property met the requirements of the law (*35 Cal. App. 2d 622, 626-627)* . The court also stated that under *Civ. Code § 954*, the assignments were proper because a cause of action arising out of the violation of a right of property may be transferred by the owner (*35 Cal. App. 2d 622, 625)* .

[j] Attorney With Valid Charging Lien May Pursue Conversion Action When Proceeds are Wrongfully Withheld

In ***Plummer v. Day/Eisenberg, LLP*** *(2010) 184 Cal. App. 4th 38, 108 Cal. Rptr. 3d 455* , plaintiff attorney was associate counsel when representing a client in a personal injury action. The client had contracted with one law firm to provide representation, but the retainer agreement contained a separate page that specifically acknowledged that plaintiff would work on the case in an "of counsel" role, would receive 50 percent of any and all legal fees, and was specifically granted an attorney's lien to protect his right to fees. After working on the case for a year, plaintiff was allegedly forced off of the case by the retaining law firm and was eventually replaced by another law firm. When the case settled, the remaining parties and attorneys cashed the settlement check without his endorsement, even though he was listed on the check as a payee, and plaintiff was not paid the fee to which he was entitled. He sued the law firm that replaced him, alleging causes of action for conversion and interference with economic advantage. The trial court granted summary judgment for the defendant law firm on the conversion cause of action, concluding that because plaintiff did not have a direct contract with the client, he did not have a valid attorney's lien on the settlement proceeds and could not state a claim for conversion. Plaintiff appealed.

The court of appeal reversed. The court noted that the existence of a lien can establish an immediate right to possess sufficient to support an action for conversion if the proceeds subject to the lien are wrongfully disposed of without authority. Under this general principle, an attorney may therefore maintain a conversion action against those who wrongfully withhold or disburse funds that are subject to an attorney's lien (*184 Cal. App. 4th 38, 45)* . While the defendant law firm argued that plaintiff did not have a valid attorney's lien because he did not have a direct contractual relationship with the clients, plaintiff had presented evidence of the original attorney retention agreement which specifically gave plaintiff a right to a share of the attorneys' fees as well as a lien on any proceeds from the action. In light of that evidence, the court concluded that a triable issue existed as to whether plaintiff had a direct contractual relationship with the clients sufficient to support a valid lien (*184 Cal. App. 4th 38, 47-48)* . The court went on to hold that a written contingency fee agreement need not comply with *Rule 3-300 of the Rules of Professional Conduct* in order to create a valid attorney's lien (*184 Cal. App. 4th 38, 49)* , and that triable issues also existed on other elements

of both the conversion and interference causes of action such that summary judgment for defendant was improper (*184 Cal. App. 4th 38, 50-51)* .

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Volume 5 Chapters 50-59 CONTRACTS---to---CORPORATIONS
CHAPTER 51 CONVERSION
PART II. FORMS

5-51 California Points & Authorities § 51.23

§ 51.23 Supporting Contention That Defendant Has Converted Plaintiff's Personal Property--Act of Conversion as Unwarranted Interference With Rights or Interests in Personal Property of Another

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with the general form of memorandum of points and authorities pertaining to conversion of plaintiff's personal property (see § 51.20).*]

DEFENDANT'S ACT OF _____ [DENYING PLAINTIFF ACCESS TO HIS OR HER PROPERTY *or* SELLING PLAINTIFF'S PROPERTY WITHOUT AUTHORIZATION *or state other specific act*] CONSTITUTED AN UNWARRANTED INTERFERENCE WITH THE RIGHTS AND INTERESTS OF PLAINTIFF IN HIS OR HER PROPERTY THAT RESULTED IN INJURY TO PLAINTIFF.

A. Act of Conversion as Unwarranted Interference With the Rights or Interests in Personal Property of Another. Conversion is based on a person's unwarranted interference with another's personal property in denial of, or inconsistent with, his or her rights in the property and from which injury to the latter results. The act is founded on a conjoint right of property and possession and constitutes any act of a defendant that negates or is inconsistent with such right (*see Gruber v. Pacific States Sav. & Loan Co. (1939) 13 Cal. 2d 144, 147-149, 88 P.2d 137* ; *see also Poggi v. Scott (1914) 167 Cal. 372, 375-376, 139 P. 815*).

[*Optional*] **B. Lack of Knowledge or Good Faith No Defense to Conversion.** The foundation for the action of conversion rests neither in the knowledge nor the intent of the defendant; therefore, neither good nor bad faith, neither care nor negligence, neither knowledge nor ignorance, are the gist of the action (*Varela v. Wells Fargo Bank (1971) 15 Cal. App. 3d 741, 750, 93 Cal. Rptr. 428* ; *Culp v. Signal Van & Storage Co. (1956) 142 Cal. App. 2d Supp. 859, 862* , *298 P.2d 162* .

[*Optional*] **C. Denial of Access to Property as Conversion.** A refusal by a holder of real property to permit access by another to his or her personal property located on the real property constitutes a wrongful exercise of dominion andcontrol over the personal property and is an act of conversion (*see Hartford Fin. Corp. v. Burns (1979) 96 Cal.*

App. 3d 591, 601-603, 158 Cal. Rptr. 169 ; *Carey v. Glenco Citrus Prods. (1965) 235 Cal. App. 2d 572, 578-582, 45 Cal. Rptr. 365*).

[*Optional*] **D. Misdelivery of Personal Property as Conversion.** Misdelivery of personal property by one entrusted with the property of another constitutes conversion, even though the person who misdelivered the goods acted innocently and by mistake (*Byer v. Canadian Bank of Commerce (1937) 8 Cal. 2d 297, 299-302, 65 P.2d 67*).

[*Optional*] **E. Purchase of Property of Another in Unauthorized Sale as Conversion.** One who purchases personal property of another from a person having no title to the property or right to sell it is guilty of conversion as against the true owner (*Culp v. Signal Van & Storage Co. (1956) 142 Cal. App. 2d Supp. 859, 861* , *298 P.2d 162* ; *see Strutt v. Ontario Sav. & Loan Ass'n (1972) 28 Cal. App. 3d 866, 874-875, 105 Cal. Rptr. 395*).

[*Optional*] **F. Unauthorized Sale of Property of Another as Conversion.** An unauthorized sale of personal property of another in possession of defendant constitutes an act of conversion (*see Reynolds v. Lerman (1956) 138 Cal. App. 2d 586, 591-594, 292 P.2d 559*).

[*Optional*] **G. Willful Omission to Act as Conversion.** A willful omission of a party entrusted with the personal property of another may serve as a foundation for the action of conversion when that property has been lost or destroyed (*see Schroeder v. Auto Driveaway Co. (1974) 11 Cal. 3d 908, 918, 114 Cal. Rptr. 622, 523 P.2d 662*).

[*Optional*] **H. Wrongful Appropriation of Property as Conversion.** A person who wrongfully appropriates to his or her own use personal property of another is liable for conversion (*see De Vries v. Brumback (1960) 53 Cal. 2d 643, 647-649, 2 Cal. Rptr. 764, 349 P.2d 532* ; *Miller v. Rau (1963) 216 Cal. App. 2d 68, 76-77, 30 Cal. Rptr. 612*).

[*Optional*] **I. Bailee's Failure to Investigate Conflicting Claim of Possession as Conversion.** When a professional bailee is presented with reasonably compelling evidence demonstrating a party other than the bailor is entitled to possession, the bailee's failure to investigate the third party claim or file an interpleader action in which the claims of possession will be adjudicated may subject the bailee to liability for conversion (*Messerall v. Fulwider (1988) 199 Cal. App. 3d 1324, 1329-1333, 245 Cal. Rptr. 548*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of plaintiff's contention in an action for conversion that defendant has converted plaintiff's personal property by wrongfully depriving him or her of the use and possession of that property. This form sets forth the point that defendant's act in relation to the property in question was an unwarranted interference with the rights and interests of the plaintiff in his or her personal property. The optional paragraphs may be included when an issue arises regarding whether or not defendant's act, as illustrated by the particular paragraph, constitutes a conversion.

The argument supported by this memorandum may be raised in response to an assertion that defendant's act did not constitute conversion because he or she did not have the intent to convert, or that the act did not amount to substantial interference with the property in question.

This form should be combined with the general form of memorandum of points and *authorities in § 51.20* and, if appropriate, with other forms of memoranda supporting the contention that defendant converted the personal property of the plaintiff [*see §§ 51.21, 51.22,* and *51.24*].

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific

procedural context in which the substantive issue arises; for example, this form may be used in opposition to a demurrer or a motion for summary judgment, when counsel wishes to respond to an assertion that the act of the defendant in relation to the property in question did not constitute a conversion of the property. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion of the act of the defendant in relation to the property and demonstrate that this act constituted an unwarranted interference with plaintiff's rights in the property and that the plaintiff suffered injury as a result of defendant's act. For example, in a case involving retention of property by a landlord until rent is paid, counsel should include discussion of the landlord-tenant relationship, plaintiff's departure from the premises for failure to pay rent due, the landlord's refusal to permit plaintiff access to his or her personal property until payment of the sum required, and the applicable law that holds that a landlord cannot retain personal property of a tenant for rent due [*see Gruber v. Pacific States Sav. & Loan Co. (1939) 13 Cal. 2d 144, 147-149, 88 P.2d 137* ; *see also § 51.23[3*][a], [4][b]].

NOTE:
For further discussion of types of acts constituting conversion of personal property, see California Forms of Pleading and Practice, Ch. 150, *Conversion* (Matthew Bender).

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 51.29* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Act of Conversion as Unwarranted Interference With the Rights or Interests in Personal Property of Another

Gruber v. Pacific States Sav. & Loan Co. *(1939) 13 Cal. 2d 144, 88 P.2d 137* , arose out of an action for conversion of certain road grading equipment and other personal property. Plaintiff alleged that he had rented a portion of certain premises from defendant and that he had stored the subject personal property within the premises, and in order to secure that property, had nailed shut all doors and windows except for one door to which he retained the key. After failure to pay rent due, an agent of defendant wrote to plaintiff, informing him that all of his equipment stored on the premises would be sold to discharge the indebtedness. The letter also stated that the only way in which plaintiff could have the property released to him was by payment in full of the rent due. Plaintiff contacted defendant to request additional time for payment and to object to the proposed sale of his property. Defendant denied the request and informed plaintiff that only full payment would prevent the sale of his property. At trial, plaintiff testified that he had twice requested permission to enter the premises and remove a portion of his property stored there, but that his requests were denied by agents of defendant. Subsequently, the real property was sold by defendant and the building in which plaintiff's property had been stored was torn down. None of the property stored was ever returned to plaintiff's possession. A jury returned a verdict in favor of plaintiff, and the trial court entered judgment accordingly. Defendant appealed, contending that the property in question had at all times remained in the exclusive possession of plaintiff, that it had not had its agents seize or otherwise take possession of the property to the exclusion of plaintiff, and, at best, it had merely threatened to sell plaintiff's property, and this threat was insufficient to support the jury's finding of conversion.

The Supreme Court, in affirming the judgment of the trial court, found defendant's contentions to be without merit. The Court said that the evidence not only disclosed a written threat to convert plaintiff's property, but also showed repeated refusals by defendant's agents to permit plaintiff to remove his equipment from the premises, a right plaintiff had as the owner of the property, and one to which he was entitled without interference from defendant or its agents (*13 Cal. 2d 144, 147)* . The fact that plaintiff had failed to make payments of rent due, the Court stated, did not warrant defendant

lessor in exercising dominion over plaintiff's personal property located on the premises rented by defendant to plaintiff, since a landlord has no lien on a tenant's property for unpaid rent. It is the unwarranted interference with the dominion over another's personal property in denial of or inconsistent with his or her rights in the property and from which injury to the latter results that constitutes conversion, the Court ruled. It is not necessary that there be an actual manual taking of the property in question, the Court continued, as the action of trover, being founded on a conjoint right of property and possession, constitutes any act of a defendant that negates or is inconsistent with such right. The question is whether or not the defendant exercised a dominion over the property in exclusion or in defiance of plaintiff's right. If defendant did so, then under the law it was conversion, and the fact that defendant never had possession of the property, nor handled it, cannot defeat a claim of conversion. Consequently, the Court held, the acts and conduct of defendant, operating through its agents, improperly and wrongfully interfered with plaintiff's absolute ownership of, and dominion over, his equipment and constituted a conversion of that property that ultimately resulted in plaintiff's financial detriment (*13 Cal. 2d 144, 149)* .

Plaintiff in ***Poggi v. Scott*** *(1914) 167 Cal. 372, 139 P. 815* , sued to recover damages for the unlawful conversion by defendant of barrels of plaintiff's wine stored in a building owned by defendant. Plaintiff had originally rented the building from its former owner and stored his wine in barrels in the building's cellar. Later, the building was leased to a laundry in which plaintiff had some stock. Plaintiff subleased the cellar from the laundry, and the rent was deducted from dividends due to him. Subsequently, the owner sold the building to defendant, informing him of the tenant and subtenant. Plaintiff was not informed of the change in ownership. Thereafter, the laundry vacated the premises, and defendant sold the wine under the mistaken belief that he was selling empty barrels. Defendant was apparently a victim of a fraud and theft of the wine by persons who knew of the location of the barrels and that they contained wine. The trial court granted defendant's nonsuit on the ground that plaintiff had failed to prove a sufficient case for the jury. Plaintiff appealed from the subsequent judgment. In response to the appeal, defendant contended that he thought that he was disposing of so much junk or rubbish in the form of barrels, and therefore he could not be held liable for the conversion of full barrels of wine or for the value of the wine in the barrels, or that the loss of the wine could be attributable in any way to any act of his.

The Supreme Court, in reversing the judgment of the trial court, found that defendant's contentions of nonliability were incorrect. The foundation for the action of conversion, the Court stated, rests neither in the knowledge nor the intent of the defendant. Rather, the Court added, it rests upon the unwarranted interference by defendant with the dominion over the property of plaintiff from which injury to the latter results (*167 Cal. 372, 375)* . Conversion, the Court said, was in a class of cases in which the tort consists in what may be called an absolute duty; the act itself is unlawful and redressible as a tort. Consequently, the Courtconcluded, the all-important fact in this case was the defendant's sale of barrels that did not belong to him, but that belonged, together with their contents, to plaintiff. In so doing, defendant exercised an unjustifiable and unwarranted dominion and control over property of another, and from his acts, great loss resulted to the other (*167 Cal. 372, 376)* .

[b] Lack of Knowledge or Good Faith No Defense to Conversion

Varela v. Wells Fargo Bank *(1971) 15 Cal. App. 3d 741, 93 Cal. Rptr. 428* , involved an action for conversion of a 1965 automobile and three diamond rings located in the vehicle's glove compartment. Plaintiff had purchased the subject automobile, and as part of the transaction, executed a conditional sales contract with the auto agency, in which the agency retained title to the vehicle. The contract was subsequently assigned to defendant bank. Plaintiff alleged that there were three diamond rings in the car at the time defendant repossessed it. Plaintiff demanded that defendant return the auto and the diamond rings, and on defendant's failure to do so, filed a complaint for conversion. The trial court found that defendant had converted the automobile and the rings and awarded damages to plaintiff. Defendant appealed, contending, with regard to the conversion of the rings, that there was no conversion because it did not know of their presence in the auto nor did it intend to take ownership of them.

The court of appeal affirmed the judgment of the trial court, holding that it was not necessarily a matter of conscious

wrongdoing that constituted conversion, rather it was an intent to exercise a dominion or control over the property that is inconsistent with plaintiff's rights. When an auto is repossessed, the court said, the repossessor, unless he or she empties the glove compartment and the trunk, intends to possess, at least temporarily, its contents and to deprive the owner of them. Having taken possession of the car with the rings in it, the bank had the duty to protect the rings since it had no right to their possession, even temporarily. The court said that the foundation for the action of conversion rests neither in the knowledge nor in the intent of the defendant. It rests upon the unwarranted interference by defendant with the dominion over the property of plaintiff from which injury to the latter results. Therefore, neither good nor bad faith, care nor negligence, knowledge nor ignorance are of the gist of the action [*see Poggi v. Scott (1914) 167 Cal. 372, 375, 139 P. 815* ; *see also § 51.23[3][a]*]. Consequently, the court held, defendant was properly liable for conversion since it took the rings without right, even assuming it had the right to repossess the car, and failed to return them on demand (*15 Cal. App. 3d 741, 750)* .

In **Culp v. Signal Van & Storage Co.** (1956) 142 Cal. App. 2d, Supp. 859, *298 P.2d 162* , intervenor filed a complaint in intervention for conversion of property that was the subject of an action to recover personal property. Intervenor sold several jukeboxes to defendant under terms of a conditional sales contract by which intervenor retained title until full payment. Defendant, without intervenor's knowledge, sold the jukeboxes to plaintiff, who in return resold them to defendant, also pursuant to a conditional sales contract in which plaintiff retained title. Defendant defaulted under the contract, and plaintiff brought his action to recover the property, alleging ownership of the property and entitlement to the possession of it. Intervenor, by leave of court, filed his complaint in intervention. Plaintiff responded, denying that intervenor was the owner or that he was entitled to the possession of the jukeboxes, and denying that plaintiff had converted the property. The case went to trial on the complaint in intervention, and the trial court, although finding that intervenor was the true owner, gave judgment to plaintiff on the ground that it was not guilty of conversion of the property. Intervenor appealed from the judgment, and plaintiff, in response, contended that no conversion took place since it had returned the property to defendant pursuant to a conditional sales contract.

The appellate department of the superior court reversed the trial court's judgment that plaintiff was not guilty of conversion. The court stated that one who, though honestly and in good faith, purchases personal property from one having no title to, or right to sell, the property is guilty of conversion. The court held that even though plaintiff returned the property to defendant in this case, it was guilty of conversion as against the true owner according to California law (142 Cal. App. 2d, Supp. 859, 861). Moreover, the court added that this was not a case in which plaintiff returned the property free from any restraint, but rather the so-called "return" was pursuant to a contract of sale in which plaintiff, as owner of the property, agreed to sell the property to defendant and to retain title to the property until payment of the purchase price. In addition, the court continued, plaintiff instituted an action to recover possession of the property in question on the assertion and under the claim that it was the owner and entitled to the possession of the property as against defendant, and also in response to the complaint in intervention, as against intervenor. An act of conversion may occur by a wrongful assertion of ownership or a wrongful denial of plaintiff's ownership, the court held, and plaintiff's conduct, however honestly or in good faith it may have acted, constituted a denial of, and was inconsistent with, intervenor's rights in and to the property in question (142 Cal. App. 2d, Supp. 859, 862).

NOTE:

The dissent in *Culp* argued that there was no conversion since plaintiff's return of the property to defendant placed the true owner of the property, intervenor, in exactly the same position as it was before the sale and resale of the property. Consequently the dissent claimed, intervenor suffered no damage from plaintiff's action. The dissent based its contention on prior California decisions in which return of the converted property by an innocent receiver of the property mitigated the damages claimed [*see § 51.31[3][a]*]. However, the dissent seemed to ignore the thrust of the majority opinion in that there was no "return" of theproperty in a real sense, and that plaintiff wrongfully asserted ownership of the property in question and denied the rightful ownership of the true owner, intervenor.

[c] Denial of Access to Property as Conversion

The facts and procedural background of ***Hartford Fin. Corp. v. Burns*** *(1979) 96 Cal. App. 3d 591, 158 Cal. Rptr. 169* , are discussed in *§ 51.22[3][g]*. The court of appeal affirmed the judgment of the trial court, finding that defendants had converted plaintiff's property. Plaintiff had a security interest in some of the trucking company's equipment to secure a debt owed by the trucking company to plaintiff. The equipment was stored on premises leased by defendant to the trucking company. When the trucking company defaulted on its debt to plaintiff, plaintiff demanded return of the equipment. After the trucking company defaulted, it abandoned the leased premises and the property located there. The Internal Revenue Service subsequently seized the property, but thereafter released it to defendant, who locked the doors to the area where the equipment was stored and refused plaintiff's demand for surrender of the property. On appeal, defendants contended that they never had possession of the property or exercised any dominion or control over it at the times plaintiff demanded its possession. Defendants took the position that the property was in the possession of their tenant, the trucking firm. Defendants further contended that (1) their action in refusing to surrender the property could be characterized only as a threat to prevent access by plaintiff to the personal property involved; and (2) as involuntary bailee, they had a right to refuse to surrender the property until rent owed to defendants by the trucking firm was paid.

The court of appeal rejected these contentions. The court observed that defendants' contentions that they never had possession of the property or exercised dominion and control over it was in conflict with the evidence. The trial court, the court of appeal stated, could reasonably have concluded that after the trucking firm abandoned the premises and the property located on it, and after the Internal Revenue Service released its dominion and control over it to defendants, that defendants exerted dominion and control over the property by locking the doors to the area and building where the property was stored, and by refusing plaintiff's demand by asserting to plaintiff that surrender of the property would be made only when back rent owed by plaintiff's debtor was paid. Conversion, stated the court, is any act of dominion wrongfully exerted over another's property in denial or inconsistent with his or her rights in the property. Citing prior California law, the court observed that the liability of one in possession of real property for the conversion of personal property that he or she finds on it, depends in most cases on a determination of whether or not the conduct of the defendant indicates an assumption of control or ownership over the goods in question. It was clear, the court continued, that under some circumstances refusal of one in possession of real property to permit on demand the owner of chattels that were left there to remove his or her goods constitutes conversion. The court further noted that not every failure to deliver goods to the owner constituted conversion. To establish a conversion, the court declared, it was incumbent on the plaintiff to show an intention or purpose to convert the goods and to exercise ownership over them, or to prevent the owner from taking possession of his or her property. In the present case, the court held, the evidence justified the trial court's conclusion that defendants intended to and did exercise ownership over the personal property involved in order to preclude plaintiff from taking possession of it (*96 Cal. App. 3d 591, 601-602)* . Defendants' claim to being an involuntary bailee entitled to rent or reasonable storage costs of the property before turning over the property to plaintiff was also untenable, the court stated. Defendants may have been entitled to the reasonable value of the storage costs had they advised plaintiff that if it did not remove the property on their premises, the property would be placed in storage at plaintiff's expense. However, the court pointed out, this was not the case in the present action. In this case, the court said, defendants refused to surrender possession to plaintiff of personal property originally belonging to defendants' tenant, the trucking firm, and based their refusal on the fact that there was back rent owed to them and that payment of that rent was a condition precedent to their release of the property. A landlord, the court said, is not entitled to hold a tenant's goods as ransom for the payment of back rent under the guise of storage costs. Unpaid rent and storage costs are separately incurred debts, the court added, and the liability for each arises under separate and different obligations. Consequently, the court held, defendants were not entitled to retain possession of personal property of its tenant, which was subject to a security interest in plaintiff, until the back rent was paid and therefore had no right to refuse plaintiff access to its property (*96 Cal. App. 3d 591, 603)* .

The facts and procedural background of ***Carey v. Glenco Citrus Prods.*** *(1965) 235 Cal. App. 2d 572, 45 Cal. Rptr. 365* , are discussed in *§ 51.21[3][f]*. The court of appeal held that a lessee of real property holds title to the crops growing on the property and may sell the same. The lessee in this case sold its interest in an orange crop growing on the premises to defendant Glenco. The right to sell a crop, the court stated, conferred on the buyer a license to harvest the crop within a

reasonable time after the fruit matured, and also the right to go on the leased premises to carry out the harvest. If a license to go on the land to harvest is terminated, the licensee nonetheless, the court said, must be given a reasonable opportunity to remove himself or herself, or his or her effects from the land, including any crop growing on the land that the licensee had previously purchased. Consequently, the court concluded, defendant's right to go on the land and to complete the harvest of the orange crop was not affected by the termination of the leases on account of the lessee's default in payment of rent and taxes.Therefore, the court added, since defendant Glenco was the owner of the orange crop at the time of the alleged termination of the leases, the fruit was its personal property, and refusal of plaintiffs to permit Glenco to harvest it constituted a conversion (*235 Cal. App. 2d 572, 578-582)* .

[d] Misdelivery of Personal Property as Conversion

Byer v. Canadian Bank of Commerce *(1937) 8 Cal. 2d 297, 65 P.2d 67* , arose out of an action for conversion of bonds and stock. Plaintiff, a former resident of Canada, continued to maintain an account with defendant bank, as well as a safe deposit box. Plaintiff arranged to have certain bonds and stock placed into his safe deposit box in defendant's bank. Thereafter, he granted a power of attorney to a certain R.T. O'Brien to act in his behalf regarding the collection of certain securities. O'Brien apparently sent a telegram to defendant instructing it to forward to plaintiff the bonds and stock that plaintiff had previously arranged to be placed in his safe deposit box. The bank sent the securities by registered mail to plaintiff but had not restricted delivery to plaintiff. The package was signed for by an employee of O'Brien. Plaintiff alleged that he never received the stock and sued to recover its reasonable value. The trial court found for plaintiff, and defendant appealed, contending that there was no conversion because the facts did not show a tortious detention of the property or an act in exclusion or defiance of the owner's rights.

The Supreme Court, in affirming the judgment of the trial court, rejected defendant's contention that there was no conversion. Citing prior California law, the Court held that misdelivery by one entrusted with the property of another constituted a conversion even though the person who misdelivered the goods acted innocently and by mistake. The foundation for the action of conversion, the Court stated, rests neither on the knowledge nor the intent of the defendant; rather, it rests on the unwarranted interference by defendant with the dominion over the property of plaintiff from which injury to the latter results. The Court added that defendant's liability is not founded on negligence. Citing authorities from other jurisdictions, the Court stated that delivery of property to a person not authorized to receive it made the deliverer responsible for its value without regard to the question of negligence. The complaint against a defendant in a case such as this, the Court continued, is not that he or she was negligent or grossly negligent, but that he or she intentionally disposed of the property in a manner not authorized by the terms of the trust. Consequently, the Court concluded, even though the securities were addressed to plaintiff, defendant subjected them to a risk that plaintiff, as bailor, did not contemplate, and therefore defendant was liable for the loss resulting from the misdelivery (*8 Cal. 2d 297, 299-302)* .

[e] Purchase of Property of Another in Unauthorized Sale as Conversion

The facts and procedural background of **Culp v. Signal Van & Storage Co.** (1956) 142 Cal. App. 2d, Supp. 859, *298 P.2d 162* , are discussed in *§ 51.23[3][b]*. The appellate department of the superior court reversed the judgment of the trial court in finding that a good faith purchaser of property from a person not authorized to sell the property was not guilty of conversion. Citing prior California law, the court observed that one who purchases personal property of another from a person who has no title to the property or right to sell the property is guilty of conversion (142 Cal. App. 2d, Supp. 859, 861). Plaintiff in

Strutt v. Ontario Sav. & Loan Ass'n *(1972) 28 Cal. App. 3d 866, 105 Cal. Rptr. 395* , brought an action against defendant for, among other things, conversion of his personal property and wrongful exercise of a private power of sale of certain real property owned by plaintiff and secured by defendant. After default on payment of money due, defendant, under the terms of its deed of trust, posted and published a notice of sale and purchased the property. Plaintiff, arrested on a criminal charge, had been sent to a state mental hospital for care and treatment until such time as

he could assist counsel in his defense. The guardianship division of the Department of Mental Hygiene made an investigation of plaintiff's property to determine what action, if any, should be taken with respect to his real and personal property and determined that plaintiff no longer had any interest in the real property but had personal property reasonably valued at $100 in and about the real property. Defendant paid the guardianship division for the personal property and thereafter took possession of it. Plaintiff was subsequently released from the mental hospital and criminal charges were ultimately dismissed in the interest of justice. The trial court found adversely against plaintiff on all counts, and he appealed.

The court of appeal affirmed the judgment of the trial court but found that the trial court was in error when it determined that defendant did not convert plaintiff's property. The court stated that under the applicable provisions of law governing the rights and duties of the Department of Mental Hygiene concerning a patient's property, the guardianship division properly investigated the nature, extent, and value of plaintiff's property. The department also had the right to receive funds in the name of plaintiff and to take into possession for safekeeping certain personal property; however, the court said, these rights to handle plaintiff's personal property did not give it a right to compromise disputed claims concerning money or property, nor to sell any of plaintiff's property except in conformity with the statutory provisions governing sale of a mental patient's personal property. Consequently, the court concluded, when defendant paid the department $100 and took possession of plaintiff's personal property, it converted that property. However, the court said, the judgment as to the count for conversionwas affirmed because substantial evidence produced at trial indicated that the value of the property in question was the same as that which defendant had paid to the department, and that plaintiff was only entitled to the reasonable value of the property, plus interest, at the time of conversion (*28 Cal. App. 3d 866, 874-875)* .

[f] Unauthorized Sale of Property of Another as Conversion

The facts and procedural background of ***Reynolds v. Lerman*** *(1956) 138 Cal. App. 2d 586, 292 P.2d 559* , are discussed in *§ 51.22[3][f]*. The court of appeal affirmed the judgment of the trial court awarding damages for the wrongful sale of plaintiff's property under a levy of attachment for nonpayment of warehouse charges. Defendant sheriff contended on appeal that plaintiff could not recover since he had failed to file a claim pursuant to the Government Code as to property damaged as a result of negligence or carelessness of any public officer or employee. The court of appeal rejected this contention. This action, the court said, was not for negligence but for conversion. Citing prior California law, the court stated that a sheriff who has attached certain personal property and placed it in storage and who subsequently allowed the property to be sold for payment of storage costs without having sought payment from the attaching creditor, giving notice to plaintiff, or obtaining a court order, was guilty of conversion (*138 Cal. App. 2d 586, 592)* . The court held that the fact that the trial court found the sheriff negligent did not change the cause of action. It is important, the court said, to not confuse the unlawful conduct, that is the negligence of the sheriff, which gave rise to the cause of action, with the cause of action itself. The sheriff was under a duty to safely keep attached property sufficient to satisfy the attaching creditor's demands, and property that unnecessarily deteriorated while in the sheriff's possession may constitute a breach of that duty. However, the court concluded, an unauthorized sale of property in the possession of the sheriff violated the sheriff's obligation to keep the property, and therefore the sheriff was liable for conversion for the wrongful sale by is agent of the personal property of plaintiff (*138 Cal. App. 2d 586, 591-594)* .

[g] Willful Omission to Act as Conversion

Plaintiff in ***Schroeder v. Auto Driveaway Co.*** *(1974) 11 Cal. 3d 908, 114 Cal. Rptr. 622, 523 P.2d 662* , filed an action for wrongful conversion of a van and goods contained within it, which were destroyed in a accident in which a driver hired by defendant carrier was involved. Plaintiffs had engaged defendant common carrier to transport their van and certain commercial goods contained in it from Arizona to a location in Northern California where plaintiffs planned to open a shop stocked with the goods contained within the van. In signing the contract engaging the common carrier, plaintiffs failed to notice certain fine print disclaimers of liability placed on the back of the contract form. These disclaimers affected liability for property that exceeded $250, and for various items of unusual value, such as guns,

cameras, and the like. However, plaintiffs had notified carrier's agent that the van contained valuable goods and that they had put all their money into the property. The carrier's agent picked up the van in person and was in a position to observe the extent of the goods within the van and the weight of the load. The agent never informed plaintiffs as to the Interstate Commerce Commission conditions on transportation under limited liability arrangements that provide that the carrier is liable for the full value of the property shipped when the shipper is not informed of the limitation and given a fair opportunity to choose between a higher and lower liability or to refuse to make the shipment if the property exceeds the value of the liability the shipper is willing to undertake at the agreed-upon rate of shipment. The agent hired a driver to transport the van to California; however, the driver and her companion detoured to the Grand Canyon for sightseeing. En route, the van skidded off a mountain road. The van was totally destroyed and many of the contents were damaged. In addition to conversion, plaintiff also alleged breach of contract and fraudulent misrepresentation by the agent that defendant carrier was authorized to transport plaintiffs' van and goods, although he knew that the value of the goods far exceeded $250. The jury returned a verdict for plaintiffs, awarding $25,000 in compensatory damages and $10,000 in punitive damages. Defendants appealed from the judgment, contending, among other things, that thee was no conversion since conversion can only result from conduct intended to affect the chattel and not for mere negligent interference with it.

The Supreme Court affirmed the judgment of the trial court. Addressing itself to the issue of conversion, the Court held that in this case conversion was a proper remedy. The Court agreed that defendants had stated the general rule that conversion can result only from conduct intended to affect the property in question and that negligence would not constitute interference with the property. However, the Court said, there are situations in which a willful omission that deprives the plaintiff of his or her property can serve as a foundation for the action of conversion. For example, stated the Court, when one person is in possession of the property, or when he or she has such control over it that he or she can readily get possession (as when he or she has stored it with a bailee), and another person demands it, and the first person fails to deliver it, no modern court will save the other from being a converter on the ground that there was only a nonfeasance. The above cited example, the Court said, was squarely in point in the facts of the present case (*11 Cal. 3d 908, 918)* .

[h] Wrongful Appropriation of Property as Conversion

The facts and procedural background of **de** ***Vries v. Brumback*** *(1960) 53 Cal. 2d 643, 2 Cal. Rptr. 764, 349 P.2d 532* , are discussed in *§ 51.20[3][a]*. The Supreme Court affirmed the judgment of the trial court that defendant was liablefor conversion of jewels and other precious metals taken in a robbery. The Court stated that conversion was a continuing tort and existed as long as the person entitled to the use and possession of his or her property was deprived of it. The Court said that the case was tried on the theory of conspiracy and that the trial court expressly found that the general purpose of the conspirators, the robbers, and the receiver of the stolen property was to convert all of the stolen property taken in the robbery to their own use and benefit. Consequently, the Court held, when defendant subsequently took possession of the greater part of the stolen goods, he joined the conspiracy and became a part of the continuing plan to convert stolen property to the use and benefit of the conspirators (*53 Cal. 2d 643, 647-648)* .

In ***Kaiser Found. Health Plan, Inc. v. Aguiluz*** *(1996) 47 Cal. App. 4th 302, 54 Cal. Rptr. 2d 665* , an insurer sued an attorney who had represented its insured, who had been injured in a motorcycle accident. After the insurer paid the insured's medical expenses, he hired the attorney to sue the other driver involved in the accident. At the insurer's request the insured executed an agreement acknowledging that his insurance contract required him to reimburse his insurer for the cost of treating the injuries he sustained in his accident, and required his attorney to reimburse the insurer by disbursing the money from any settlement or judgment directly to the insurer. The attorney knew about the agreement, and nonetheless disbursed the entire amount of a settlement of the personal injury action without any attempt to protect the insurer's interest. The insurer obtained a judgment against attorney. The court of appeal affirmed, holding that under the rule of *Miller v. Rau (1963) 216 Cal. App. 2d 68, 30 Cal. Rptr. 612* , the attorney was liable for the settlement proceeds disbursed to his client in knowing disregard of the insurer's lien. *Miller* established that an attorney on notice of a third party's contractual right to funds received on behalf of his client disburses those funds to his client at his own

risk. The court concluded that since the attorney knew about the reimbursement agreement his client signed, the insurer was entitled to recover (*47 Cal. App. 4th 302, 307)* .

Miller v. Rau *(1963) 216 Cal. App. 2d 68, 30 Cal. Rptr. 612* , arose out of an action for money and accounting by plaintiff against defendant involving an alleged conversion of funds by one joint venturer to the exclusion of the other. Plaintiff and Aivex agreed to form a joint venture in which plaintiff was to purchase certain British surplus was aircraft and prepare them for shipment to the United States for sale. Aivex was to provide the capital for the purchase of the planes and for the attendant expenses involved in the purchase. At first the agreement was for an equal share of the net profits after deduction of the costs of the purchase; however, the agreement was later modified so that plaintiff was to receive 25 percent of the net profits. To raise the funds to purchase the planes, Aivex entered into a limited partnership agreement with several other persons. Upon return to the United States after purchase of the aircraft, plaintiff informed defendant, attorney for the limited partnership, that he objected to the limited partnership agreement and claimed not to be bound by it. Subsequently, plaintiff brought an action against Aivex and others, but not against defendant, for a declaration of rights concerning the purchased aircraft. Plaintiff notified defendant of the suit and cautioned him not to disburse any of the proceeds arising from the sale of the planes without written approval of plaintiff. The trial court in that action decreed, among other things, that plaintiff and Aivex were joint venturers, that net profits were to be divided 25 percent to plaintiff and 75 percent to Aivex, and that plaintiff and Aivex had joint control of the aircraft in question. The aircraft were sold during the pendency of that suit for a gross price of $199,000, less advances by the purchaser and for damages and missing parts. One payment of $70,355.14 was made to one of the limited partners, and the other two payments were made directly to defendant and Aivex. These latter two remittances were endorsed by Aivex and delivered to defendant who thereafter had sole custody and control of the funds. Defendant did not notify plaintiff that he had received the funds or that he distributed the funds back to Aivex to pay off its various debts. The trial court found that plaintiff was entitled to receive as his share of the sale of the aircraft 25 percent of the net profits, for a total of $30,264.98, and rendered judgment for plaintiff in that amount. Defendant appealed, contending that it was Aivex who had converted the property and not defendant who had delivered the money from the sale to Aivex as required by the terms of the limited partnership agreement.

The court of appeal, in affirming the judgment of the trial court, rejected defendant's contention as to nonliability. The court held that the agreement between Aivex and the limited partners could have no effect on plaintiff's original agreement and continuing interest in the funds from the proceeds of the sale of the aircraft in question as expressed in the joint venture agreement between plaintiff and Aivex. The court stated that a joint proprietary interest and right of mutual control over the subject matter of an enterprise, or over property engaged in the enterprise, are essential to a joint venture, and when members of a joint venture have appropriated the venture's assets to their own use and to the exclusion of another venturer, the latter innocent joint venturer may treat the matter as a conversion and sue for such (*216 Cal. App. 2d 68, 75-76)* . Defendant's liability, the court said, was based on the legal principle recognized in other jurisdictions that an agent who receives money to which his or her principal has no right, and has received notice not to pay the money to the principal, has a duty to hold for the rightful owner of the money so much of the proceeds as represented the owner's interest in it. Should the agent proceed to disburse the funds to his or her principal, an action for money had and received would lie against the agent. Applying this principle to the present case, the court held that not only did defendant not have a duty to pay the funds to the limited partnership, but that defendant had a positive duty to hold 25 percent of the net profits for plaintiff.Consequently, the court held, when defendant, by reason of Aivex's instructions relative to checks to be paid, knew that none of the funds was intended to be paid to plaintiff, payment by defendant to Aivex failed to satisfy his obligation to plaintiff (*216 Cal. App. 2d 68, 76-77)* .

[i] Bailee's Failure to Investigate Conflicting Claim of Possession as Conversion

In ***Messerall v. Fulwider*** *(1988) 199 Cal. App. 3d 1324, 245 Cal. Rptr. 548* , plaintiff, purchaser of a boat and trailer, registered the property with the Department of Motor Vehicles in his own name and listed as legal owner the bank from whom he obtained the loan. When plaintiff later sold the property, it was agreed that he would retain title until the purchaser's final payment had been made, and that he had the right to retake possession of the property on default. The

registration was never changed. Sometime later, the purchaser brought the property to defendant for repairs. Because the purchaser was behind on the payments, plaintiff considered him in default and decided to get possession of the property from defendant. Plaintiff met with defendant, offered to pay the storage fees (the purchaser had already paid for the repairs), and presented documentary evidence of his claim. Defendant refused to release possession unless and until plaintiff presented a court order establishing a right of possession. Plaintiff filed a complaint against defendant for conversion, and defendant filed a cross complaint in interpleader seeking a judicial determination of who had the superior right to possession. The trial court granted judgment in favor of plaintiff on both the complaint and cross complaint. Defendant appealed.

The court of appeal affirmed, finding that when a professional bailee is presented with reasonably compelling evidence demonstrating a third party is entitled to possession, the bailee must investigate the third-party claim (*199 Cal. App. 3d 1324, 1327)* . The court observed that conversion does not require that the plaintiff be the absolute owner of the property converted, but the plaintiff must show entitlement to immediate possession at the time of conversion. Thus, one who wrongfully withholds personal property from another who is entitled to it under a security agreement may be liable for conversion (*199 Cal. App. 3d 1324, 1329)* . The court said that in a conversion action, in order for a bailee to defeat a third party's claim to possession of the property, the bailee must show that he or she had a right to possession. Defendant argued that he had a right to possession of the property because he had a lien on it for storage charges. The court agreed, but observed that a lien is sufficient to deny the owner's right to possession only until the lien was redeemed, and redemption may be made by offering to pay the holder of the lien (*199 Cal. App. 3d 1324, 1330)* . The court said that plaintiff, as the holder of a security interest, had an interest in the property and was therefore entitled to redeem defendant's lien. Thus, given plaintiff's offer to pay the outstanding storage charges on the property, whatever lien defendant had was redeemed. The court went on to point out that defendant's other right to possession depended on his status as bailee of the boat. That status placed on him a duty to investigate plaintiff's claim and gave him a limited right of possession during the investigation (the registration certificate in his name, a statement executed under penalty of perjury asserting his right to immediate possession, and a copy of the security agreement on which that right was founded). When this evidence was furnished, the burden fell on defendant to investigate the validity of the claim (*199 Cal. App. 3d 1324, 1332)* . The court noted that defendant undertook no investigation at all, but insisted on a court order, thereby refusing to deliver possession without any justification, and concluded that he was properly held liable for conversion (*199 Cal. App. 3d 1324, 1332)* . The court said that if defendant had sought and failed to obtain the purchaser's consent to a release of the property, he should have filed an interpleader action under *Code Civ. Proc. § 386(b)*. In such an action, costs and attorney's fees may be awarded in the discretion of the court under *Code Civ. Proc. § 386.6*, and ordinarily should be awarded to a diligent bailee (*199 Cal. App. 3d 1324, 1332-1333)* .

[4] Additional Authorities

[a] Lack of Knowledge or Good Faith No Defense to Conversion

The facts and procedural background of *Poggi v. Scott (1914) 167 Cal. 372, 139 P. 815* , are discussed in *§ 51.23[3][a]*. Defendant contended that he could not be held liable for conversion of wine contained in barrels sold since he did not know that the barrels contained wine and thought that he was merely disposing of junk or rubbish in the form of barrels. The Supreme Court, in reversing judgment for defendant, held that the foundation on which conversion is based rested neither on the knowledge nor the intent of the defendant; rather, it rested on the unwarranted interference by defendant with the dominion over the property of plaintiff from which injury to the latter results. Consequently, the Court held, neither good nor bad faith, care nor negligence, knowledge nor ignorance are the gist of the action, and defendant's wrongful sale of property not belonging to him constituted conversion of it and the property contained within, regardless of defendant's knowledge of the contents (*167 Cal. 372, 375-376)* .

Beverly Fin. Co. v. American Cas. Co. (1969) 273 Cal. App. 2d 259, 78 Cal. Rptr. 334 , involved, among other things, an action for conversion of a 1961 Cadillac by Beverly Finance. The automobile in question was stolen from its lot in St. Louis, Missouri, and the subrogee-owner paid the owner and took back an assignment of the owner's rights in the

vehicle. The car was subsequently purchased by an auto agency in California, sold under a conditional sales contract, and subsequently repossessed by Beverly Finance as assignee of the contract. Beverly Finance obtained a certificate of ownership from the Department of Motor Vehicles. Eventually, the subrogee-owner learned of the whereabouts of thevehicle and demanded that Beverly Finance return the vehicle to it. The court of appeal affirmed the trial court's rejection of Beverly Finance's contention that it acted in good faith and without notice, holding that Beverly Finance's assertion of legal ownership of the car was in derogation of the rightful owner's title and that the fact that Beverly Finance acted in good faith constituted no defense. Conversion, stated the court, is an instance of strict liability in which care, good faith, and lack of knowledge will not save defendant (*273 Cal. App. 2d 259, 264)* .

[b] Denial of Access to Property as Conversion

The facts and procedural background of *Gruber v. Pacific States Sav. & Loan Co. (1939) 13 Cal. 2d 144, 88 P.2d 137* , are discussed in *§ 51.23[3][a]*. The Supreme Court, in affirming the judgment of the trial court for plaintiff, held that defendant landlord, who refused to permit plaintiff to have access to his property, or to remove the property from the landlord's premises while plaintiff was arrears in rent, constituted an improper and wrongful exercise of dominion over plaintiff's property in violation of his rights as owner, and amounted to conversion of plaintiff's property.

Kessinger v. Organic Fertilizers, Inc. (1957) 151 Cal. App. 2d 741, 312 P.2d 345 , involved two consolidated actions in which plaintiff sought declaratory relief and defendant sought, among other things, damages for conversion of worm farm equipment stored on a lot adjacent to plaintiff's. Access to that lot was available only by use of a driveway on plaintiff's land. The court of appeal affirmed the judgment of the trial court in awarding defendant damages for plaintiff's conversion of its personal property. Citing prior California law, the court held that plaintiff's action in denying defendant the right to use her driveway in order to remove its personal property constituted conversion, since plaintiff had no right of dominion over land adjacent to her land, had participated and acquiesced in defendant's use of her driveway, and consequently exercised and assumed dominion and control over the property. If all the other requirements of a conversion were met, the court concluded, it was immaterial that the property in question was in the actual possession of a third party (*151 Cal. App. 2d 741, 751-755)* .

[c] Misdelivery of Personal Property as Conversion

In *Smith v. Miller (1935) 5 Cal. App. 2d 564, 43 P.2d 347* , assignee of purchaser of furniture brought an action against a public warehouseman for conversion. Defendant admitted his failure to deliver the goods on demand of the assignors, but offered as a defense to the charge of conversion that he delivered the furniture to the true owner, a conditional vendor, on its demand. The court of appeal upheld the trial court's judgment in favor of plaintiff, holding that the holder of the conditional sales contract, by its actions in refusing the assignors' previous requests that the furniture be returned, and by its insistent demand for payment, had elected to treat the sale as an absolute one with title in the assignors. Consequently, the court concluded, defendant's delivery of the goods to the alleged true owner constituted a conversion of the property since a warehouseman, though justified in delivering goods to their true owner on demand, acts at his or her peril in purporting to do so if such person is not in fact entitled to their possession (*5 Cal. App. 2d 564, 572)* .

[d] Unauthorized Sale of Property of Another as Conversion

Plaintiff in *Swim v. Wilson (1891) 90 Cal. 126, 27 P. 33* , brought an action for conversion against defendant stockbroker. Plaintiff alleged that stock owned by him was stolen by an employee in his office and delivered to defendant who subsequently sold the stock and turned over the proceeds to the employee. In affirming the judgment of the trial court, the Supreme Court held that defendant stockbroker was guilty of conversion and liable to the true owner of the stock for its true value even though at the time the broker received the stock, he believed that the employee was the true owner and, in good faith and without notice of the theft, sold the stock and paid the employee the net proceeds for its sale (*90 Cal. 126, 128-131)* .

[e] Willful Appropriation of Property as Conversion

In *Fischer v. Machado (1996) 50 Cal. App. 4th 1069, 58 Cal. Rptr. 2d 213* , a farmer sued a commission merchant for conversion, alleging that the merchant commingled the proceeds of the sale of consigned farm products with its general accounts and then went out of business. The trial court found defendants liable and they appealed. The court of appeal affirmed, holding that because defendant was designated as commission merchant in the written agreement between the parties, it had an obligation to turn over the money received by it on plaintiff's account. The court rejected defendant's argument that there was no liability for conversion as a matter of law because there was no duty to segregate specific funds. The court ruled that an agent, with knowledge of another's right to receive a specific amount of money, can be liable for conversion when the agent applies it for his or her own use (*50 Cal. App. 4th 1069, 1073)* .

NOTE:

In *Mendoza v. Continental Sales Co. (2006) 140 Cal. App. 4th 1395, 1405, 45 Cal. Rptr. 3d 525* , the court of appeal held that the court's rationale in *Fischer v. Machado,* discussed *above,* could also be applied to subagents of a grower who dealt only with an intermediary commission merchant. The court in *Mendoza,* in reversing a judgment on the pleadings granted in favor of defendants, held that a grower had stated a cognizable claim for conversion against parties who had purchased a farmer's crops for an amount below market value from a commission merchant and resold them for a much higher amount as part of an alleged scheme to prevent the grower from receiving the amount due under hiscontract with the commission merchant.

California Points & Authorities

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Volume 5 Chapters 50-59 CONTRACTS---to---CORPORATIONS
CHAPTER 51 CONVERSION
PART II. FORMS

5-51 California Points & Authorities § 51.24

§ 51.24 Supporting Contention That Defendant Has Converted Plaintiff's Personal Property--Measure of Damages for Conversion [Civ. Code § 3336]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with the general form of memorandum of points and authorities pertaining to conversion of plaintiff's personal property (see § 51.20).*]

THE PROPER MEASURE OF DAMAGES IN AN ACTION FOR CONVERSION OF PERSONAL PROPERTY IS THE VALUE OF THE PROPERTY AT THE TIME OF THE CONVERSION, PLUS INTEREST FROM THE TIME OF CONVERSION, OR AN AMOUNT SUFFICIENT TO INDEMNIFY PLAINTIFF FOR THE NATURAL, REASONABLE, AND PROXIMATE RESULT OF THE WRONGFUL ACT COMPLAINED OF, AND WHICH A PROPER DEGREE OF PRUDENCE ON HIS OR HER PART WOULD NOT HAVE AVERTED.

A. Measure of Damages for Conversion. The detriment caused by the wrongful conversion of personal property is presumed to be the value of the property at the time of the conversion, plus interest from the time of conversion, or an amount sufficient to indemnify the party for the natural, reasonable, and proximate result of the wrongful act complained of, and which a proper degree of prudence on his or her part would not have averted (*see Civ. Code § 3336*).

[*Optional*] **B. Damages for Expenditures in Pursuit of Property.** Damages may be awarded for fair compensation for the time and money properly expended in pursuit of the property converted (*see Civ. Code § 3336*; *Gladstone v. Hillel (1988) 203 Cal. App. 3d 977, 992, 250 Cal. Rptr. 372*).

[*Optional*] **C. Loss of Profits as Measure of Damages.** An award for damages that includes plaintiff's loss of profits as a result of the wrongful conversion of personal property may be proper when the awarding of such damages would indemnify plaintiff for the loss suffered that was the natural, reasonable, and proximate result of the wrongful act complained of, and when determination of damages based on value of the property at the time of conversion would be manifestly unjust (*see Myers v. Stephens (1965) 233 Cal. App. 2d 104, 116-118, 43 Cal. Rptr. 420*).

[*Optional*] **D. Loss of Use as Measure of Special Damages.** Loss of use of property wrongfully converted by defendant may be pleaded, proved, and awarded as special damages (*see Franklin v. Municipal Court (1972) 26 Cal. App. 3d 884, 902, 103 Cal. Rptr. 354*).

[*Optional*] **E. Cost of Property as Proof of Value.** Cost of goods is a circumstance tending to show value, and that evidence may be taken into consideration, along with other circumstances, when determining the subsequent value of property converted in order to establish the loss sustained (*Wade v. Markwell & Co. (1953) 118 Cal. App. 2d 410, 431-432, 258 P.2d 497*).

[*Optional*] **F. Face Value of Written Instrument as Proof of Value.** When personal property converted is a written instrument, the face value of the instrument converted is, prima facie, its true value (*Knudsen v. Hill (1964) 227 Cal. App. 2d 639, 642-643, 38 Cal. Rptr. 859* ; *Acme Paper Co. v. Goffstein (1954) 125 Cal. App. 2d 175, 181, 270 P.2d 505*).

[*Optional*] **G. Full Value as Measure of Damages for Owner of Limited Interest in Property as Against Stranger Without Ownership Rights.** In an action for conversion, a plaintiff owning a limited or qualified interest in the property in question may, as against a stranger who has no ownership interest in the property, recover full value of the property converted (*Hartford Fin. Corp. v. Burns (1979) 96 Cal. App. 3d 591, 604-605, 158 Cal. Rptr. 169* ; *Camp v. Ortega (1962) 209 Cal. App. 2d 275, 288-289, 25 Cal. Rptr. 873*).

[*Optional*] **H. Prejudgment Interest Available.** If the measure of damages is an amount sufficient to indemnify the party for the loss suffered, prejudgment interest may be awarded pursuant to the general prejudgment interest authority of *Civ. Code § 3287(a)* (*Moreno v. Greenwood Auto Ctr. (2001) 91 Cal. App. 4th 201, 210-211, 110 Cal. Rptr. 2d 177*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a plaintiff's contention in an action for conversion that defendant has converted the personal property of the plaintiff by wrongfully depriving him or her of the use and possession of that property. This form sets forth the point that the proper measure of damages for the wrongful conversion of the property in question is the value of the property at the time of the conversion, or an amount sufficient to indemnify the plaintiff for the natural, reasonable, and proximate result of the foreseeable loss suffered. The optional paragraphs may be included in the points and authorities, when appropriate, whenever the point illustrated by a particular paragraph is at issue.

The argument supported by this memorandum may be used in support of an assertion that damages awarded were inadequate, or in response to an assertion that the damages sought or awarded were excessive.

This form should be combined with the general form of memorandum of points and *authorities in § 51.20* and, if appropriate, with other forms of memoranda supporting the contention that defendant converted the personal property of the plaintiff [*see §§ 51.21 -51.23*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing the value of the property involved at the time of the conversion, and show that the value is the proper amount of damages for conversion of the property. When damages based on that formula would be inadequate compensation, counsel should set forth facts showing that the amount of damages sought is sufficient to indemnify the owner of the property for the loss suffered.

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which the substantive issue arises; for example, this form may be used in opposition to a demurrer, a motion for summary judgment or a motion for a new trial on ground of excessive damages, when counsel wishes to respond to an assertion that the damages sought or awarded are excessive. The points and authorities may also be used in support of a motion for a new trial for inadequate damages. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 51.30* and *51.31* may be used to oppose the contention supported by these points and authorities.

[c] Related Pleading and Practice Forms

For discussion of damages in relation to conversion of personal property, see California Forms of Pleading and Practice, Ch. 150, *Conversion* (Matthew Bender). For discussion, forms, and procedures relating to damages generally, see California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender).

[d] Related Points and Authorities

For forms of memoranda of points and authorities relating to damages generally, see Ch. 64, *Damages: Tort* .

[3] Discussion of Authorities

[a] Measure of Damages for Conversion

Civ. Code § 3336 provides that the detriment caused by the wrongful conversion of personal property is presumed to be the value of the property at the time of the conversion, plus interest from the time of conversion, or an amount sufficient to indemnify the party for the natural, reasonable, and proximate result of the wrongful act complained of, and which a proper degree of prudence on his or her part would not have averted.

Although this section appears to provide for alternate provisions for awarding damages, the first alternative provision, the value of the property at the time of the conversion, is considered to be the proper one. The second alternative provision, an amount sufficient to indemnify the party for the loss suffered, is resorted to only when the determination on the basis of value at the time of the conversion would be manifestly unjust [*see, e.g., Myers v. Stephens (1965) 233 Cal. App. 2d 104, 116, 43 Cal. Rptr. 420* ; *see also § 51.24[3][c]*].

Damages are an essential element of conversion and must be pleaded. An allegation that the property converted was of a certain value and when appropriate, that plaintiff suffered additional loss as a result of being deprived of its use, is sufficient to allege damages and special damages [*see, e.g., Franklin v. Municipal Court (1972) 26 Cal. App. 3d 884, 902, 103 Cal. Rptr. 354* ; *see also § 51.24[3][d]*].

[b] Damages for Expenditures in Pursuit of Property

In ***Gladstone v. Hillel*** *(1988) 203 Cal. App. 3d 977, 250 Cal. Rptr. 372* , the plaintiff, a jeweler who crafted unique, limited-edition jewelry, sued his ex-partners for fraud and conversion of his jewelry designs and molds. At trial, plaintiff obtained a judgment against defendants for $90,400 in compensatory damages, including $10,000 in damages for efforts to recover the property, $100,000 in punitive damages, and injunctive relief. With regard to the award for efforts to recover property, the defendants objected that nearly all the expenses listed were connected to the litigation.

The court of appeal affirmed the judgment with regard to the compensatory and punitive damages but held that the

decree for injunctive relief had to be modified so that it did not enforce rights equivalent to copyright on a theory of conversion. With regard to the portion of damages attributable to efforts to recover property, the court held that under modern conditions, the legislative purpose of *Civ. Code § 3336* would be defeated by rigorously excluding all items having some connection with litigation, because the only modern means of recovering property withheld is the institution of legal process. The court stated that the statute should at least extend to efforts that had a purpose independent of the litigation, such as preparation of lists of missing property, inspection of inventories, meetings with the other party, contacts with law enforcement authorities, and inquiries regarding appropriate courses of action (*203 Cal. App. 3d 977, 992)* .

[c] Loss of Profits as Measure of Damages

Myers v. Stephens *(1965) 233 Cal. App. 2d 104, 43 Cal. Rptr. 420* , arose out of an action for specific performance for the sale of a house. Plaintiff later amended the complaint to allege conversion of the house. Defendant was president of a real estate development company that owned a single unit residence on land that it wanted to develop. He contacted a real estate broker and authorized the agent to sell the house. Subsequently, plaintiff offered to buy the house for $250, but said that he would need some time to move the house off of the property. The agent called defendant on the telephone in plaintiff's presence and transmitted the offer. Defendant responded that the time indicated by plaintiff was too long, that the price was immaterial, but that if the agent could improve on the time, he could go ahead and sell it. After the phone conversation, plaintiff and the agent agreed that plaintiff could have the house for $250 if he could remove it within 30 days. Plaintiff agreed and gave a check in that amount to the agent. The following day, defendant, without knowledge that the agent had accepted plaintiff's offer, sold the house to another party who had agreed to remove the house within 15days. At trial, plaintiff introduced evidence to the effect that after removal, renovation, and relocation, he would have sold the house and the land on which it stood for a profit of approximately $5,000 to $6,000. The trial court awarded plaintiff damages of $3,040 for conversion of the house. Defendant appealed, contending that it was improper to award damages to plaintiff based on his loss of profits from his anticipated resale of the house since they were, among other things, speculative and uncertain.

The court of appeal affirmed the judgment of the trial court, holding that its awarding to plaintiff of his loss of profits as a result of the wrongful resale of the house in question was proper. Although the more appropriate measure for damages as provided in *Civ. Code § 3336* was the value of the property converted at the time of conversion, the court stated, the second alternative measure of damages, the awarding to an injured party of an amount sufficient to indemnify him or her for the loss suffered that was the natural, reasonable, and proximate result of the wrongful act complained of, could be resorted to when the determination on the basis of value at the time of conversion would be manifestly unjust. The court agreed with the lower court's determination that there were special circumstances in the present case that required a different measure of damages to be applied than that provided under the first alternative provision. In addition, the court found that the trial court's award of $3,040 to plaintiff was supported by the evidence. The court stated that anticipated profits may be established within the range of selling prices and aggregate costs testified to. Consequently, the court computed, a resale value of the house less the commission on the sale, cost of the lot, moving, and renovation costs would leave plaintiff a net profit in the amount awarded by the trial court (*233 Cal. App. 2d 104, 117-118)* .

[d] Loss of Use as Measure of Special Damages

The facts and procedural background of ***Franklin v. Municipal Court*** *(1972) 26 Cal. App. 3d 884, 103 Cal. Rptr. 354* , are discussed in *§ 51.20[3][b]*. The court of appeal reversed the trial court's ruling that plaintiff had failed to state a cause of action against a municipal judge in his capacity as an individual for conversion of a revolver. In his complaint, plaintiff alleged that the value of the revolver was $100 and that because his work as a security guard required him to have a weapon, he was unable to procure work until he was subsequently able to borrow a gun, and that he was seeking damages for loss of use of his property. The court held that these allegations of damages were sufficiently pleaded (*26 Cal. App. 3d 884, 902)* .

[e] Cost of Property as Proof of Value

Plaintiff in ***Wade v. Markwell & Co.*** *(1953) 118 Cal. App. 2d 410, 258 P.2d 497* , brought an action against defendant for conversion of a fur coat that she gave to defendant as security for a pledge for $300. Under the terms of the pledge, plaintiff was to repay the loan within 30 days, and in the event of default, she waived the giving of notice of time, place, and sale of the coat. The agreement also provided that the pledgee could be a purchaser of the property at any such sale. Plaintiff also arranged to have defendant clean the coat. Although the pledge was due in 30 days, plaintiff made no payments on the principal, interest, or cleaning costs of the coat; however, defendant charged plaintiff's account $4 per month interest for each month that payment was outstanding. Eight months later, plaintiff, in response to a notice by defendant, informed defendant that she wished to redeem the coat and was told that a 24-hour notice requirement was necessary, but that she could pick up her coat anytime within a week. Several days later, plaintiff presented herself at defendant's place of business to redeem her coat and was informed that the coat had been sold for the value of the pledge. Plaintiff demanded the return of the coat, but defendant refused, and subsequently resold the coat to a third party connected with the business. At trial, plaintiff testified that she had purchased the coat only two months before pledging it to defendant at a cost of $3,750, plus luxury and sales tax, for a total of $4,612.50. Defendant countered with testimony of an employee that it was only worth some $500. The trial court found that defendant, by its actions, had waived its rights under the pledge contract and awarded damages to plaintiff of $3,278, less the amount of the loan, interest, and cleaning costs. Defendant appealed, contending, among other things, that the trial court awarded excessive damages.

The court of appeal affirmed the judgment of the trial court. It is generally recognized, the court stated, that the owner of property, whether generally familiar with such values or not, is competent to estimate its worth. Moreover, the court added, testimony as to cost of goods is a circumstance tending to show value, and that such evidence may be taken into consideration, along with other circumstances such as the extent of the use of the property, and its condition and depreciation, in order to determine the subsequent value of the property and establish the loss sustained as the result of the unlawful conversion (*118 Cal. App. 2d 410, 431)* . The amount of compensation, however, must be left to the sound discretion of the trier of fact, and the weight of the evidence on value is for the trial court's determination after consideration of the facts and circumstances of the case. In this case, the court said, the trial court's findings implied that it chose to believe plaintiff as to the condition of the coat and awarded damages accordingly, and since the record contained substantial evidence to support the finding, the damages awarded were proper (*118 Cal. App. 2d 410, 432)* .

[f] Face Value of Written Instrument as Proof of Value

Knudsen v. Hill *(1964) 227 Cal. App. 2d 639, 38 Cal. Rptr. 859* , arose out of an action for conversion of a pledged promissory note. Defendants loaned plaintiff $18,000 to be used to build a motel. Plaintiff built and sold the motel to a thirdparty who, as part of the purchase price, gave plaintiff a promissory note for $26,500. This note was later pledged by plaintiff to defendants to secure the $18,000 loan. Thereafter, defendants sold the note to an agent of the third party who had purchased the motel and had given the note to plaintiff. The trial court fixed damages to plaintiff in the amount of $16,052.26, the sum for which defendants had sold the note. Plaintiff appealed, contending that the proper amount of the judgment awarded should have been the face value of the note.

The court of appeal, in modifying the judgment of the trial court, agreed with plaintiff's contention and increased the amount of damages consistent with the face value of the promissory note. In the United States, the court stated, the measure of damages arising out of conversion is to be measured by the value at the time of the conversion, and when the personal property converted is a written instrument, the face value of the bill or note converted is, prima facie, its true value. However, this rule is only applicable, the court noted, when the instrument imposes a personal liability on the maker or drawer, and when a promissory note imposes no personal liability on the maker, but is collectable only from property mortgaged to secure its payment, the measure of damages is the value of the security as of the date of the conversion. The court said that California statutory law provides that the value of an instrument in writing is a sum equal to the property to which it entitles its owner [*see Civ. Code § 3356*]. In the present case, the court held, the note's

value was the prima facie evidence of its true value and should have been the proper measure of damages applied in this case in order to compensate plaintiff for all the detriment proximately caused by defendant's wrong. The court concluded that there could be no fairer yardstick to measure loss than to award plaintiff a sum equal to the value of the note, since that was the sum of his security against his debtors that defendants had, by their action, wiped out (*227 Cal. App. 2d 639, 643-644)* .

Plaintiff in ***Acme Paper Co. v. Goffstein*** *(1954) 125 Cal. App. 2d 175, 270 P.2d 505* , brought an action against its defendant warehouse foreman for money had and received, based on a conversion perpetrated by fraud and deceit. Defendant had arranged a simulated series of purchases from a certain dealer with which plaintiff company had a previous transaction. On defendant's representations, purchase orders were made out, and checks issued to cover the cost of the purchased goods were given to defendant to pay to the driver on delivery of the goods. A co-conspirator of defendant would deliver merchandise to plaintiff and receive payment in the form of the checks made out to the dealer. The checks were endorsed in the dealer's name and cashed by the conspirators. Most of the delivered goods were subsequently sold by plaintiff in the regular course of its business. The trial court found for plaintiff and awarded damages to plaintiff in the amount of $6,954.90, the amount paid for the merchandise in the form of checks, plus exemplary damages. Defendant appealed, contending, among other things, that plaintiff incurred no damage since most, if not all the items, for which plaintiff paid for were subsequently sold.

The court of appeal, in affirming the judgment of the trial court, rejected defendant's contention. The court said that the presumption of damage to plaintiff for the conversion of his or her personal property cannot be repelled in favor of one whose possession was wrongful from the beginning, by the subsequent application of the property to the benefit of the owner, without his or her consent [citing *Civ. Code § 3337*]. Under the circumstances, the court said, it was unnecessary to determine whether or not any merchandise was received, and impliedly later sold. Plaintiff, in this case, did not consent to the purchases and never ratified them after discovery. This was an action for money had and received, the court stated, based on a conversion perpetrated by fraud and deceit. The subject matter of the conversion was the checks received by defendant and applied to his own use, or that of his fellow conspirator. Proof of the measure of damages applicable in this case, the court concluded, was the face value of the checks converted (*125 Cal. App. 2d 175, 181)* .

[g] Full Value as Measure of Damages for Owner of Limited Interest in Property as Against Stranger Without Ownership Rights

The facts and procedural background of ***Hartford Fin. Corp. v. Burns*** *(1979) 96 Cal. App. 3d 591, 158 Cal. Rptr. 169* , are discussed in *§ 51.22[3][g]*. The court of appeal affirmed the judgment of the trial court in awarding the full value of the property converted as the amount of damages. Plaintiff in this case had a security interest in certain heavy equipment vehicles. At trial, plaintiff offered no evidence as to the remaining balance owed, and the trial court ruled that defendants' proffered evidence on the subject was irrelevant. On appeal, defendants contended that a holder of a security interest, in an action for conversion of the property in question, was limited to recovery of the remaining amount of indebtedness owed by the debtor on the property in the event that the total value of the property exceeded the amount of indebtedness.

The court of appeal rejected defendants' contention, holding that in an action for conversion, a plaintiff owning a limited or qualified interest in the property in question may, as against a stranger who has no ownership interest in the property, recover full value of the property converted (*96 Cal. App. 3d 591, 605)* . Citing prior California law, the court stated that the underlying basis for this rule was the fact that the party having the limited or qualified interest would be liable to the owner of the remaining interest and, in order to be adequately compensated, must receive sufficient compensation not only to satisfy his or her own loss, but also to satisfy the demands of the remaining owner. The court distinguished the facts of the present case from those types of cases in which an owner of a limited interest in property sues the owner of the property for conversion, if the property was wrongfully disposed of by the owner without authority. In those types of cases, thecourt said, the measure of damages was limited to the amount of the limited interest owned by the plaintiff, which was the amount of money owed to plaintiff by defendant. In the present case, however, the court

pointed out, defendants were not the owners of the property in which plaintiff was a lien holder or other type of security holder, but were instead nondebtors and strangers to the security holder (*96 Cal. App. 3d 591, 604-606)* .

NOTE:

In an action by a security holder for conversion against the owner of property who wrongfully disposed of the property, the measure of damages can be no greater than the amount secured [*see Civ. Code § 3338*; *see also Service v. Trombetta (1963) 212 Cal. App. 2d 313, 316, 28 Cal. Rptr. 68* ; *Bastanchury v. Times-Mirror Co. (1945) 68 Cal. App. 2d 217, 236, 156 P.2d 488]* .

Camp v. Ortega *(1962) 209 Cal. App. 2d 275, 25 Cal. Rptr. 873* , involved an action for conversion of certain motion picture equipment stored in premises leased from defendant. Plaintiff had formed a partnership with another film producer to make motion pictures but a disagreement ensued, and the partnership dissolved, with plaintiff attempting to seek a new associate. In the meantime, the motion picture equipment was stored in defendant's premises; however, because of failure to pay rent, defendant locked plaintiff out of the premises and claimed all of the property contained in the premises as his. The trial court found for plaintiff and awarded damages of $3,125 to plaintiff. Plaintiff appealed, contending that the trial court had improperly excluded the sum of $4,600 from the amount of damages awarded, which was the amount of money subject to a chattel mortgage in the property held by a person other than defendant.

The court of appeal modified the judgment of the trial court by increasing the amount of damages awarded by $4,600, plus interest. In an action for conversion, the court stated, a plaintiff, although owning only a limited or qualified interest in property may, as against a stranger who has no ownership interest in the property in question, recover the full value of the converted property. The rationale of the rule, the court said, is that the owner of the limited or qualified interest is still liable to the person owning the superior or remainder interest for his or her share in the property. This rule, the court held, is applicable to owners of property such as plaintiff as well as to holders of secured interests in property (*209 Cal. App. 2d 275, 286-289)* .

[h] Prejudgment Interest Available

In ***Moreno v. Greenwood Auto Ctr.*** *(2001) 91 Cal. App. 4th 201, 110 Cal. Rptr. 2d 177* , the plaintiff brought suit against a car dealership for conversion and other causes of action based on the defendant's actions in convincing the plaintiff to trade in her 1996 pickup truck for a 1997 model. Although the plaintiff, who spoke little English, thought she was buying the 1997 truck, she was actually executing a lease agreement. When the plaintiff refused to sign new papers in conjunction with the transaction and tried to rescind the agreement, the defendant repossessed the 1997 truck and refused to return the 1996 truck. The plaintiff prevailed on the conversion claim after a jury trial and was awarded damages for loss of use of the 1996 truck. The trial court entered judgment for the plaintiff, including prejudgment interest on the conversion damages, after reduction pursuant to remittitur. The defendant appealed.

The court of appeal affirmed. The court noted that the jury was never asked to determine the value of the 1996 truck, but was only asked through special verdict forms to determine the value of the loss of use of that truck and its accessories. Therefore, the damages awarded were damages under the second alternative found in *Civ. Code § 3336*--that is, an amount sufficient to indemnify the injured party for the loss suffered. The court held that although *Civ. Code § 3336* does not specifically indicate that prejudgment interest is available if this measure of damages is used, prejudgment interest may still be awarded pursuant to the general prejudgment interest authority of *Civ. Code § 3287(a)*. Under that statute, an award of prejudgment interest is proper on any damages certain, or capable of being made certain by calculation, if the right to recover vests on a particular day (*91 Cal. App. 4th 201, 210-211)* .

[4] Additional Authorities

[a] Face Value of Written Instrument as Proof of Value

In *Stenseth v. Wells Fargo Bank (1995) 41 Cal. App. 4th 457, 48 Cal. Rptr. 2d 192* , plaintiff sued his bank for letting

his employee cash checks on his forged endorsement. After judgment was entered for plaintiff, the bank appealed on evidentiary issues, and plaintiff cross appealed on a trial court ruling that his damages could not include the time and effort he spent in uncovering the theft. Plaintiff relied on *Civ. Code § 3336*, which provides that damages for conversion may include fair compensation for time and money expended in pursuit of the property. However, the court of appeal noted that *Com. Code § 3420* limits damages to the face amount of the converted instrument. As to whether the Civil Code or Commercial Code should govern, the court noted that in *Sun N Sand, Inc. v. United Cal. Bank (1978) 21 Cal. 3d 671, 696, 148 Cal. Rptr. 329, 582 P.2d 920* , the Supreme Court has held that if the Commercial Code establishes a loss distributive scheme that applies, then that provision displaces any other provision of law (*41 Cal. App. 4th 457, 466)* . The court thus concluded that plaintiff's recovery was limited to the face value of the instrument. Since the trial court did not err in excluding evidence relating to for time and effort spent attempting to recover the converted property, the judgment was affirmed in this regard.

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5-51 California Points & Authorities § 51.25

§ 51.25 Supporting Contention That Defendant Has Converted Plaintiff's Personal Property--Emotional Distress Damages Recoverable

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with the general form of memorandum of points and authorities pertaining to conversion of plaintiff's personal property (see § 51.20)*].

PLAINTIFF IS ENTITLED TO AN AWARD OF EMOTIONAL DISTRESS DAMAGES ARISING OUT OF DEFENDANT'S CONVERSION OF PERSONAL PROPERTY.

Emotional Distress Damages Recoverable. A plaintiff is entitled to recover emotional distress damages growing out of a defendant's conversion of his or her personal property (*Gonzales v. Personal Storage, Inc. (1997) 56 Cal. App. 4th 464, 477, 65 Cal. Rptr. 2d 473*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a plaintiff is entitled to recover emotional distress damages growing out of a defendant's conversion of his or her personal property.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should provide facts showing that defendant interfered with plaintiff's dominion over the property and argue that plaintiff suffered emotional distress as a result.

[c] Related Pleading and Practice Forms

For discussion of damages resulting from the conversion of personal property, see California Forms of Pleading and Practice, Ch. 150, *Conversion* (Matthew Bender). For discussion, forms and procedures relating to damages generally, see California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender).

[d] Related Points and Authorities

For memoranda of points and authorities relating to the measure of damages for conversion, see *§ 51.24*. For memoranda of points and authorities relating to damages generally, see Ch. 64, *Damages: Tort* .

[3] Discussion of Authorities

[a] Emotional Distress Damages Recoverable

In ***Gonzales v. Personal Storage, Inc.*** *(1997) 56 Cal. App. 4th 464, 65 Cal. Rptr. 2d 473* , a self-storage facility converted approximately $60,000 of a tenant's personal property. The jury awarded plaintiff $232,582 in emotional distress damages. On appeal defendant argued that the jury should not have been permitted to award plaintiff damages for her emotional distress. The court of appeal let the jury award stand, holding that damages for emotional distress growing out of a defendant's conversion of personal property are recoverable. In support of its holding the court cited *Schroeder v. Auto Driveaway Co. (1974) 11 Cal. 3d 908, 921, 114 Cal. Rptr. 622, 523 P.2d 662* , as the only California case it could find which dealt directly with a claim for emotional distress growing out of the conversion of personal property, and the Restatement (Second) of Torts § 927, illustration m, which provides: that where property has been converted if the deprivation is the legal cause of harm to the feelings, damages may be allowable for the harm. The court ruled that although the landlord-tenant relationship imposed no duty on it to protect plaintiff's emotional well-being, the limits on emotional distress damages which exist in negligence cases did not apply in conversion cases; where the act of dominion over the property of another provides the converter with very direct knowledge of the likely consequences of the interference. The court reasoned that in conversion cases there is far less likelihood that allowing recovery for emotional distress damages will create liability which is out of proportion to the nature of the defendant's act and concluded that notwithstanding further developments in the law of negligence, damages for emotional distress growing out of a defendant's conversion of personal property were recoverable (*56 Cal. App. 4th 464, 477)* .

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5-51 California Points & Authorities § 51.26

§ 51.26 Opposing Contention That Defendant Has Converted Plaintiff's Personal Property--Real Property as Not Subject to Conversion

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

REAL PROPERTY CANNOT BE THE SUBJECT OF AN ACTION FOR CONVERSION.

A. Real or Immovable Property. Real or immovable property consists of land, that which is affixed to land, that which is incidental or appurtenant to land, and that which is immovable by law, except for those items which are agreed to be treated as goods under a contract of sale (*Civ. Code § 658*).

B. Real Property as Property Not Subject to Conversion. An action forconversion of real property will not lie (*Graner v. Hogsett (1948) 84 Cal. App. 2d 657, 662, 191 P.2d 497*).

[*Optional*] **C. Fixtures Treated as Real Property by Terms of Conveyance Not Subject to Conversion.** Fixtures specifically enumerated as part of the real property and as part of the security by the terms of a conveyance are real property and therefore not subject to conversion (*see McAllister v. Metzger (1963) 220 Cal. App. 2d 692, 701-705, 33 Cal. Rptr. 879*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to plaintiff's contention in an action for conversion that defendant has converted plaintiff's personal property by wrongfully depriving him or her of the use and possession of that property. This form sets forth the point that real property is property that cannot be the subject of conversion. The optional paragraph may be included in the points and authorities whenever the real property in question concerns fixtures or other property that by the terms of a conveyance, is considered to be real property.

The argument supported by this memorandum may be raised in response to an assertion by the plaintiff that the property in question was property subject to conversion.

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which the substantive issue arises; for example, this form may be used in support of a demurrer or a motion for a summary judgment, when counsel wishes to assert that the property in question is real property and therefore not subject to conversion. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing the nature of the property in question and demonstrate that under the facts of the case and under California law, the property in question is real property and therefore not subject to conversion.

This form may be used in opposition to the contention supported by the points and *authorities in § 51.21*.

For further discussion of property not subject to conversion because it is considered to be real property, see Ch. 150, *Conversion* , in California Forms of Pleading and Practice.

[3] Discussion of Authorities

[a] Real or Immovable Property

Civ. Code § 658 provides that real or immovable property consists of: (1) land; (2) that which is affixed to land; (3) that which is incidental or appurtenant to land; and (4) that which is immovable by law; except that for the purposes of sale, emblements, industrial growing crops and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale, are to be treated as goods and be governed by the provisions of the Civil Code regulating the sales of goods.

[b] Real Property as Property Not Subject to Conversion

Plaintiff in ***Graner v. Hogsett*** *(1948) 84 Cal. App. 2d 657, 191 P.2d 497* , brought an action for conversion of certain personal and real property. Plaintiff executed a contract to purchase both the real and personal property which was to be conveyed to him after completion of certain installment payments agreed to in the sale of the property. Plaintiff failed to make complete payments, and the property was sold to defendant purchasers with the consent and participation of plaintiff. Plaintiff subsequently sued for conversion, contending, among other things, that he had received no consideration for the transfer of his interest in the property. The trial court entered judgment for defendants, and plaintiff appealed.

The court of appeal affirmed the judgment of the trial court. The court held that the complaint in trover for the wrongful conversion of the real property in question was defective. An action for conversion will not lie for real property. There was no theory, the court added, on which it could be held that a cause of action is stated as to conversion of real property (*84 Cal. App. 2d 657, 662)* .

[c] Fixtures Treated as Real Property by Terms of Conveyance Not Subject to Conversion

McAllister v. Metzger *(1963) 220 Cal. App. 2d 692, 33 Cal. Rptr. 879* , involved an action for conversion of a sprinkler system and removable cottage. Defendants executed a purchase money deed of trust with plaintiffs to secure payment on a balance due after sale of certain real property to plaintiffs. Included in the sale were a sprinkling system consisting of connectable pipes, various sprinkler heads, and related equipment. The pipes could be moved, dismantled, and stored. The sprinklers were mounted on wheels and could be moved while sprinkling. As part of the terms of the

deed of trust, all fixtures, either installed at the time of the conveyance, or to be installed thereafter, were to be considered as part of the real estate in order to protect the security of the trust deed. Included as fixtures were sprinklers, sprinkler systems and equipment, and flumes. After plaintiffs acquired the land, they added flumes to the water system. These flumes were individual redwood troughs connected together. Plaintiffs also brought ontothe land a removable five-room cottage and placed it on mud sills. Subsequently, plaintiffs defaulted and defendants obtained a court order appointing a receiver for the property. The receiver, on instructions of defendants, tagged all the property on the ranch as property under the control of the receiver, including the sprinkling system, flumes, and cottage. The trial court entered judgment for defendants as to the sprinkling system and flumes. Plaintiffs appealed, contending, among other things, that there was a conversion as a matter of law of the sprinkling system and flumes. Plaintiffs further contended that these items were not installed, nor were they fixtures, but were their personal property.

The court of appeal affirmed the judgment of the trial court. Addressing itself to the issue of the conversion of the sprinkler system and flumes, the court agreed with the trial court's finding that the sprinkler, pipe, and flumes were affixed and appurtenant to the real property, and were therefore a part of the real property and of the security of the deed of trust. This finding, the court said, was supported by the terms of the deed of trust, quite apart from any consideration of the law of fixtures. According to the terms of the trust, the court stated, items such as sprinklers and sprinkling systems and equipment pipes, as well as flumes were specifically enumerated and all could go under the term sprinkling system. The fact that the sprinkling system was mobile and could be disconnected and stored did not negate its function as a fixture, the court added, as its being set up for use constituted an installment on the property and was therefore within the terms of the deed of trust. Consequently, the court held, the receiver was properly authorized to take possession of the system and use it in connection with his management of the property (*220 Cal. App. 2d 692, 701, 705)* .

[4] Additional Authorities

[a] Real Property as Property Not Subject to Conversion

Munger v. Moore (1970) 11 Cal. App. 3d 1, 89 Cal. Rptr. 323 , involved an action for damages for wrongful sale of real property. Defendant beneficiary of a deed of trust ordered the trustee of the deed of trust to foreclose on certain property even though plaintiff had made a timely tender of the sum needed to cure the default. In affirming the judgment of the trial court, the court of appeal noted that it was generally acknowledged that conversion was a tort that could not be committed in relation to real property and agreed with plaintiff's theory that a trustee or mortgagee can be liable to the trustor or mortgagor for damages sustained as a result of an illegal, fraudulent, or willfully oppressive sale of property under a power of sale contained in a mortgage or deed of trust (*11 Cal. App. 3d 1, 6-7)* .

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5-51 California Points & Authorities § 51.27

§ 51.27 Opposing Contention That Defendant Has Converted Plaintiff's Personal Property--Intangible and Indefinite Property Rights Not Subject to Conversion

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S PROPERTY ALLEGED TO HAVE BEEN CONVERTED, _____ [CUSTOMER LIST *or* GOOD WILL OF BUSINESS *or state other intangible property right as appropriate*], IS PROPERTY THAT IS TOO INTANGIBLE, UNCERTAIN, AND INDEFINITE TO BE SUBJECT TO CONVERSION.

A. Property That Is Intangible, Uncertain, and Indefinite as Not Subject to Conversion. Conversion is a proper remedy for the wrongful appropriation of goods, chattels, or personal property which is specific enough to be identified, and is not an available remedy for property which is indefinite, intangible, and uncertain (*see Olschewski v. Hudson (1927) 87 Cal. App. 282, 286-289, 262 P. 43*).

[*Optional*] **B. Goodwill of Business and Customer List for Specific Route as Property Not Subject to Conversion.** Goodwill of a business or patronage of a specific list of customers in a definite route is not property subject to conversion (*Adkins v. Model Laundry Co. (1928) 92 Cal. App. 575, 582-583, 268 P. 939* ; *Olschewski v. Hudson (1927) 87 Cal. App. 282, 286-289, 262 P. 43*).

[*Optional*] **C. Literary Property as Incorporeal Right.** A literary property is an incorporeal right, existing separate and apart from the paper on which it is written, and does not come within the definition of goods or chattels (*see Italiani v. Metro-Goldwyn-Mayer Corp. (1941) 45 Cal. App. 2d 464, 466-467, 114 P.2d 370*).

[*Optional*] **D. Gambling Losses Not Subject to Conversion.** A generalized claim for gambling losses, even if the losses were the result of other players' cheating which a card club failed to prevent, is not actionable as conversion (*Vu v. California Commerce Club, Inc. (1997) 58 Cal. App. 4th 229, 235, 68 Cal. Rptr. 2d 31*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to plaintiff's contention in an action for conversion that defendant has converted plaintiff's personal property by wrongfully depriving him or her of the use and possession of that property. This form sets forth the point that property that is intangible,uncertain, and indefinite cannot be subject to conversion.

The argument supported by this memorandum may be raised in response to an assertion by the plaintiff that the property in question was property subject to conversion.

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which the substantive issue arises; for example, this form may be used in support of a demurrer or a motion for a summary judgment, when counsel wishes to assert that the property in question is too intangible, uncertain, and indefinite to be subject to conversion. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing the nature of the property in question and demonstrate that the property is too intangible, uncertain, and indefinite to be subject to conversion.

This form may be used in opposition to the contention supported by the points and *authorities in § 51.21*.

For further discussion of property not subject to conversion, see California Forms of Pleading and Practice, Ch. 150, *Conversion* , (Matthew Bender).

[3] Discussion of Authorities

[a] Property That Is Intangible, Uncertain, and Indefinite as Not Subject to Conversion

Plaintiff in ***Olschewski v. Hudson*** *(1927) 87 Cal. App. 282, 262 P. 43* , brought an action against defendant for wrongful conversion of property rights in a laundry route. Plaintiff was trustee in bankruptcy and sold various routes of the laundry company to other laundries. Thereafter, he demanded that defendant's agent of the bankrupt laundry company turn over all the memoranda and list of customers to the route to the purchaser of the route. Instead, deceased agent sold the route to another laundry company. Defendant demurred to the complaint on the ground that it failed to state a cause of action. The trial court sustained the demurrer, and, on plaintiff's failure to amend the complaint, entered judgment in favor of defendant. Plaintiff appealed.

The court of appeal upheld the judgment of the trial court, holding that an action for conversion of the customer route would not lie (*87 Cal. App. 282, 289)* . A list of laundry customers, the court said, is a property right which may be appropriately protected, but, citing prior California law, it is not a tangible right which may be handled and transferred like stocks, bonds, personal effects, household goods, or animals. The property right of a laundry route is akin to the goodwill of a business and is susceptible of ownership, and such ownership, along with the benefits of trade, patronage of a specific list of customers in a definite route is protectible by injunctive relief. However, the court continued, there is nothing definite or tangible in the character of the ordinary list of laundry customers which makes an effort to transfer the district in which they live subject to an action for conversion. Conversion, the court stated, was not intended to reach this type of intangible, uncertain, and indefinite property right. The very meaning of the word conversion is to change into another form, substance, or state; to transform, or change; at law it means the wrongful appropriation to one's own use the goods of another. The very definition of the word, the court continued, presupposed the existence of tangible goods or chattels in a form capable of being changed, transformed, turned over, delivered, or appropriated for the use and benefit of the wrongdoer. In reviewing the history of trover and conversion, the court observed that these actions

provided a remedy for recovering the value of specific chattels wrongfully converted, and not for money had and received for payment of debts. Trover and conversion did not operate on chattels generally, but specifically, on chattels or property capable of being identified as the actual property or thing wrongfully taken or converted. Consequently, the court noted, it appeared that trover or conversion lies only for the wrongful appropriation of goods, chattels, or personal property which is specific enough to be identified, and not for indefinite, intangible, and uncertain property rights such as the mere goodwill of a business, trade secrets, or routes with specific customers. The deceased agent, the court held, acquired no title to property, and having none, his attempt to transfer the route to another conveyed no title. Since the agent conveyed no specific tangible property right, the court of appeal concluded that the action of the trial court in sustaining the demurrer to the complaint was proper (*87 Cal. App. 282, 286-289)* .

The court of appeal discussed *Payne v. Elliot (1880) 54 Cal. 339, 340-342* [*see § 51.21[3][a]*]. The court of appeal said that the Supreme Court in *Payne* had stated that conversion lies for the wrongful appropriation of every character of personal property, and found this to be a too broad a statement when applied to the doctrine of conversion. In *Payne,* all that was involved, the court said, was whether shares of stock that were wrongfully appropriated could be the subject of conversion. Since shares of stock were represented by certificates which were evidence of a definite interest in the assets of a company, the court said, they were tangible, capable of being identified, and subject to conversion. However, the Supreme Court in *Payne* had actually said, in reviewing the history of trover and conversion, that under modern law, conversion and trover had developed into a proper remedy for the conversion of every species of personal property, including certificates of stock (*54 Cal. 339, 341)* . These certificates of stock, however, were but evidence of shares of stock, and shares of stock, though intangible rights to property, could be the subject of contract, sale, gift, mortgage, bailment, andpledge, and, under California law, were personal property subject to taxation, attachment, execution, levy, and sale, and therefore also subject to conversion (*54 Cal. 339, 342)* .

[b] Goodwill of Business and Customer List for Specific Route as Property Not Subject to Conversion

Plaintiff in ***Adkins v. Model Laundry Co.*** *(1928) 92 Cal. App. 575, 268 P. 939* , brought an action for an alleged breach of contract against defendant, apparently on the basis of an unlawful interference with plaintiff's property right to a certain laundry route that he had purchased from the previous driver of the route. Defendant subsequently dismissed plaintiff from the route. The jury in the case awarded damages to plaintiff and defendant appealed.

The court of appeal reversed the judgment of the trial court, holding that a suit at law for a breach of contract was not a proper remedy for wrongful interference with intangible property rights (*92 Cal. App. 575, 585)* . Unlawful interference with property rights in the goodwill of a business, benefits of trade, or patronage of a specific list of customers in a definite laundry route may be protected by injunctive relief, the court stated; however, there is no such property right in the intangible interest of an exclusive privilege to collect laundry or sell newspapers in a specific district which will authorize damages in a suit at law for conversion (*92 Cal. App. 575, 582-583)* .

The facts and procedural background of ***Olschewski v. Hudson*** *(1927) 87 Cal. App. 282, 262 P. 43* , are discussed in *§ 51.27[3][a]*. The court of appeal affirmed the trial court's sustaining of defendant's demurrer on the ground that the complaint failed to state a cause of action for conversion of property consisting of a list of customers of a certain laundry route. Patronage of a specific list of customers in a definite route is protectible by injunctive relief, the court said, but there is nothing definite or tangible in the character of the ordinary list of laundry customers that makes an effort to transfer the district in which they live subject to an action for conversion. Consequently, the court held, the trial court did not err in sustaining defendant's demurrer.

[c] Literary Property as Incorporeal Right

Plaintiff in ***Italiani v. Metro-Goldwyn-Mayer Corp.*** *(1941) 45 Cal. App. 2d 464, 114 P.2d 370* , brought an action for damages for plagiarism of a moving-picture scenario. Plaintiff alleged that he had submitted to defendant studio a scenario entitled "Johnny of the Circus," but that it was returned to him with the explanation that it was not suitable for

moving pictures. Thereafter, defendant studio produced and released a film entitled "O'Shaughnessy's Boy," which, plaintiff claimed, was plagiarized from the script that he had previously submitted to defendant and that defendant had unlawfully appropriated and converted to its own use. The trial court sustained defendant's demurrer to an amended complaint on the ground that plaintiff failed to bring his action within the two-year period required by *Code Civ. Proc. § 339(1)* for actions arising out of an oral contract. Plaintiff appealed, contending that his action was for conversion of literary property and therefore the three-year time limit under *Code Civ. Proc. § 338(c)* applied.

The court of appeal, in affirming the judgment of the trial court, held that the property that was the basis of the action was incorporeal, and as such, it had no physical existence that allowed it to come under the designation of goods and chattels. Plaintiff's scenario, the court stated, was what the law designated as an intellectual production, though the court admitted that in some instances this designation was a misnomer. As an intellectual product, the court added, it was an intangible incorporeal right, and existed separate and apart from the property in the paper on which it was written, or the physical substance in which it was embodied. *Code Civ. Proc. § 338(c)*, the court declared, applied to the taking, detaining, or injuring of any goods or chattels, or the recovery of personal property. The statute prescribed a limitation for those actions which, the court noted, could be classed broadly as the common law actions of trover, detinue, and replevin. All of these actions, the court observed, involved the concept of interference with possession of, or damage to, some specific tangible property, and were not concerned with intangible or incorporeal rights which have existed in connection with, or entirely apart from, any particular piece of physical property (*45 Cal. App. 2d 464, 466-467)* .

[d] Gambling Losses Not Subject to Conversion

In ***Vu v. California Commerce Club, Inc.*** *(1997) 58 Cal. App. 4th 229, 68 Cal. Rptr. 2d 31* , plaintiffs appealed from a summary judgment in favor of a card club, in an action to recover moneys plaintiffs lost while playing card games at the club, allegedly as a result of cheating. Plaintiffs asserted causes of action for conversion against the club and certain employees and players based on the alleged cheating. Plaintiffs subsequently recharacterized the conversion charges as involving the club's retaining of funds confiscated from Pan-Nine games in which the club detected cheating. The club moved for summary judgment arguing that plaintiffs could not establish that it had converted any specific sums from them. In response to the motion, plaintiffs offered little direct evidence that they had encountered the alleged cheating in their play at the club, and no evidence that cheating had been the cause of their losses.

The court of appeal affirmed. It stated that while the subject of the conversion action was the funds plaintiffs lost, neither their pleading nor responsive proof identified any specific, identifiable sums that the club took from them. This rendered the generalized claim for money not actionable as conversion (*58 Cal. App. 4th 229, 235)* .

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5-51 California Points & Authorities § 51.28

§ 51.28 Opposing Contention That Defendant Has Converted Plaintiffs Personal Property--Plaintiff Failed to Show Ownership With Right to Possession or Actual Possession

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO SHOW HIS/HER/ITS OWNERSHIP AND RIGHT TO POSSESSION OF THE PROPERTY IN QUESTION, OR ACTUAL POSSESSION OF THE PROPERTY.

A. Plaintiff Failed to Show Ownership With Right to Possession or Actual Possession. In an action for conversion, plaintiff must show that he or she is the owner with right to possession, or actual possession, of the property in question at the time of the alleged conversion (*General Motors Acceptance Corp. v. Dallas (1926) 198 Cal. 365, 371, 373, 245 P. 184* ; *Kronsberg v. Milton J. Wershow Co. (1965) 238 Cal. App. 2d 170, 174-175, 47 Cal. Rptr. 592*).

[*Optional*] **B. Defendant Having Superior Interest in Property.** A defendant who retains, under a contract, title to property transferred to plaintiff and who has a right to repossession of the property on default of payment for the property has a superior interest in the property over plaintiff and may exercise his or her right under the contract to repossess the subject property (*see* *Silverstin v. Kohler & Chase (1919) 181 Cal. 51, 54, 183 P. 451*).

[*Optional*] **C. Defaulting Chattel Mortgagor as Having No Right of Possession.** A defaulting chattel mortgagor whose property is subject to repossession on default by the terms of the chattel mortgage has no right of possession to the property as against the mortagee, even if the terms of the chattel mortgage provide that the mortgagor retains an equitable interest in the property (*see* *Gardena Valley Airport, Inc. v. All Am. Sports Enters., Inc. (1964) 230 Cal. App. 2d 478, 481, 41 Cal. Rptr. 93*).

[*Optional*] **D. Imposition of Constructive Trust Does Not Retroactively Create Ownership Interest Superior to That of Levying Creditor.** The judicial imposition of a constructive trust on property does not retroactively interfere with a third-party creditor's claim on that property that has previously been reduced to judgment and levied upon and therefore cannot support a conversion action against the levying creditor by the beneficiary of the constructive trust (

CHoPP Computer Corp. v. United States (9th Cir. 1993) 5 F.3d 1344, 1348-1349 (applying California law)).

[*Optional*] **E. Medical Patient Does Not Retain Ownership Interest in Body Cells Removed With Consent and Later Used for Research.** A medical patient who gives informed consent to the removal of certain body cells does not retain ownership in those cells once they are removed, and may not state a cause of action in conversion against researchers who later use those cells for potentially lucrative purposes (*Moore v. Regents of Univ. of Cal. (1990) 51 Cal. 3d 120, 136-142, 271 Cal. Rptr. 146, 793 P.2d 479*).

[*Optional*] **F. Mere Promise to Hold Property in Trust Does Not Create Sufficient Property Interest.** Insurance policy language which binds insured's to hold "in trust" for insurer any third party recovery, without any showing of detrimental reliance or unjust enrichment, does not create a sufficient equitable interest in that property to sustain an action for conversion (*Farmers Ins. Exch. v. Zerin (1997) 53 Cal. App. 4th 445, 454-455, 61 Cal. Rptr. 2d 707*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to plaintiff's contention in an action for conversion that the defendant has converted the personal property of the plaintiff by wrongfully depriving him or her of the use and possession of that property. This form sets forth the point that in an action for conversion, the plaintiff must show ownership and/or right to possession, or actual possession, at the time of the alleged conversion. The optional paragraphs may be included in the points and authorities, as appropriate, whenever a point illustrated by a particular paragraph is at issue.

The argument supported by this memorandum may be raised in response to an assertion by the plaintiff that he or she was the owner or a person with the right of possession, or had actual possession of the property in question, at the time of the alleged conversion.

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which the substantive issue arises; for example, this form may be used in support of a demurrer or a motion for a summary judgment, when counsel wishes to assert that the plaintiff was not the owner, did not have the right to possession, or did not have actual possession of the property in question at the time of the alleged conversion. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing that plaintiff was not the owner of the property in question or some other person with the right of immediate possession, or that he or she was not in actual possession at the time of the alleged conversion. For example, if the property was repossessed subject to a conditional sales contract on default of thepurchaser, counsel should discuss how, under California law, the seller had a superior interest in the property and a right to immediate possession under the terms of the contract [*see Silverstin v. Kohler & Chase (1919) 181 Cal. 51, 54, 183 P. 451* ; *see also § 51.28[3][b]*].

[c] Opposing Points and Authorities

This form may be used in opposition to the contention supported by the points and *authorities in § 51.22*.

[d] Relating Pleading and Practice Forms

For further discussion of the necessity of showing ownership, or a right of possession, or actual possession at the time of

the alleged conversion, see California Forms of Pleading and Practice, Ch. 150, *Conversion* (Matthew Bender).

[3] Discussion of Authorities

[a] Plaintiff Failed to Show Ownership With Right to Possession or Actual Possession

Plaintiff in ***General Motors Acceptance Corp. v. Dallas*** *(1926) 198 Cal. 365, 245 P. 184* , brought an action for conversion of two automobiles allegedly converted by defendant sheriff when he seized the property pursuant to a writ of attachment. Plaintiff was a finance company who purchased two conditional sales contracts from an automobile dealer. Under the terms of these contracts, plaintiff's assignor retained title. At trial, the trial court found, however, that plaintiff failed to prove the existence of valid conditional sales contracts covering the two vehicles in question and therefore acquired nothing by the assignment to it of the purported contracts. The trial court entered judgment in favor of defendant, and plaintiff appealed. On appeal, defendant responded by referring to provisions of the Motor Vehicle Act governing the method of the transfer of title and right of possession of a motor vehicle, which required that reregistration in the name of the transferee of an automobile within a certain time was a prerequisite to the passing of title, and that plaintiff failed to comply with these provisions.

The Supreme Court, in affirming the judgment of the trial court, held that in an action for conversion, the plaintiff had the burden to sustain the affirmative of the issue and prove either ownership and the right of possession or actual possession of the two vehicles in question (*198 Cal. 365, 370)* . The evidence, the Court said, showed that plaintiff was not in actual possession of the automobiles at the time of the alleged conversion. Moreover, the Court held, plaintiff had failed to show that it had obtained title and thereby ownership with a right to possession pursuant to the provisions of the Motor Vehicle Act governing transfer of title and right of possession of a motor vehicle. Consequently, the Court concluded, the judgment of the trial court had to be sustained even though its decision was based on a different theory (*198 Cal. 365, 371, 373)* .

Kronsberg v. Milton J. Wershow Co. *(1965) 238 Cal. App. 2d 170, 47 Cal. Rptr. 592* , arose out of an action for breach of contract, conversion, and fraud. Plaintiffs and defendant entered into an agreement in which plaintiffs would convey their real and personal property to defendant to sell at an auction. Apparently, not all of the property was sold within the agreed-upon time. Plaintiffs alleged that defendant failed to reconvey an air facility; however, under the terms of the contract, defendant had not agreed to reconvey the property, but to arrange financing for it. After granting defendant's motion to strike the fourth amended complaint, the trial court entered dismissal of the action on plaintiffs' refusal to amend further. Plaintiffs subsequently appealed.

The court of appeal affirmed the trial court's judgment on all counts, including the action for conversion, holding that the right of recovery in an action for conversion was derived from ownership with the right of possession, or from actual possession of the property in question at the time of the alleged conversion. Under the circumstances of the case, the court stated, plaintiffs could not qualify under either of the required categories. The air facility and attendant equipment had, the court observed, been conveyed to defendant, therefore plaintiffs were not the owners of and entitled to the possession of the property. Since plaintiffs' complaints for conversion each alleged that defendant's lawful possession of the property was terminated and that plaintiffs' demand for reconveyance was refused, the trial court's striking these complaints or sustaining defendant's demurrers to them was proper (*238 Cal. App. 2d 170, 174-175)* .

NOTE:

General Motors Acceptance Corp. and *Kronsberg* set forth the point that in an action for conversion, the plaintiff must show that he or she is the owner with right to possession of the property in question, or have actual possession of the property at the time of the alleged conversion. However, this language should not be interpreted to mean that the plaintiff must be the absolute owner of the property, but that he or she has an interest in the property superior to that of the defendant. In order to state a cause of action for conversion, the plaintiff must allege his or her ownership of the property in question or a right to

immediate possession of the property [*see* *Franklin v. Municipal Court (1972) 26 Cal. App. 3d 884, 902, 103 Cal. Rptr. 354* ; *see also § 51.22* regarding the interest necessary to maintain an action for conversion].

[b] Defendant Having Superior Interest in Property

Plaintiffs in ***Silverstin v. Kohler & Chase*** *(1919) 181 Cal. 51, 183 P. 451* , brought an action for conversion of a piano that it had leased from defendant's assignor. By the terms of the lease, the seller retained title to the piano, but titlewould pass to plaintiffs on payment in full, plus one dollar. The price of the piano was $500 and plaintiffs had paid $130. After failure to make further payments, defendant assignee sued plaintiffs for the amount of installments due; however, it allowed plaintiffs to remain in possession of the piano. Defendant obtained a judgment, but plaintiffs failed to pay that judgment or to make any further payments on installments subsequently accrued, and defendant repossessed the piano. Plaintiffs thereafter brought this action for conversion. By the terms of the contract, the seller had the option of terminating the lease and repossessing the piano, or accelerating the payments due and demanding payment in full. The trial court entered judgment for plaintiff, and defendant appealed.

The Supreme Court reversed the judgment of the trial court on the issue of conversion. Defendant acted in accordance with the contract which was, the Court concluded, a conditional sales contract in the form of a lease. Defendant had not declared the whole of the purchase due and sued for that amount; rather, it sued for the installments due under the terms of the contract and allowed plaintiffs to remain in possession of the piano until plaintiffs failed to pay that judgment or subsequently accrued installments. Consequently, the Court held, defendants had a right under its contract to retake possession of the piano (*181 Cal. 51, 54)* .

NOTE:

Silverstin sets forth the point that in an action for conversion, the plaintiff must show that he or she is the owner with right to possession of the property in question, or have actual possession of the property at the time of the alleged conversion. However, this language should not be interpreted to mean that the plaintiff must be the absolute owner of the property, but that he or she has an interest in the property superior to that of the defendant. In order to state a cause of action for conversion, the plaintiff must allege his or her ownership of the property in question, or a right to immediate possession of the property [*see* *Franklin v. Municipal Court (1972) 26 Cal. App. 3d 884, 902, 103 Cal. Rptr. 354* ; *see also § 51.22* regarding the interest necessary to maintain an action for conversion].

[c] Defaulting Chattel Mortgagor as Having No Right of Possession

Gardena Valley Airport, Inc. v. All Am. Sports Enters., Inc. *(1964) 230 Cal. App. 2d 478, 41 Cal. Rptr. 93* , involved a cross action for conversion by a mortgagor against its mortgagees of personal property which was the subject of a chattel mortgage. Mortgagees brought two separate actions against defendant mortgagor for recovery of monies due on a lease, and to recover the deficiency due on a promissory note secured by a chattel mortgage after sale of mortgaged items. Mortgagees leased certain premises to mortgagor, which mortgagor used as an auto racetrack. The mortgagor was facing financial difficulties, and a chattel mortgage was executed between the parties concerning certain personal property on the premises used in connection with the racing of cars. By the terms of the chattel mortgage, mortgagees had the right, on default of payment due, to foreclose on the property and sell all rights, title, and interest of mortgagor in the property. Subsequently, mortgagor failed to make payments and abandoned the premises. Mortgagees took possession of the premises and the property contained within it in order to sell the property subject to the terms of the chattel mortgage. Before the sale of the property, mortgagees operated the racetrack using the equipment of mortgagor. They also leased the premises, along with the property subject to the chattel mortgage, to another racing organization. The trial court entered judgment for mortgagees on their actions and against mortgagor on its cross action. Mortgagor subsequently appealed.

The court of appeal affirmed the judgment of the trial court, holding that there was no wrongful conversion of the subject items. For an action in conversion, the court said, it was necessary for plaintiff to show ownership of the property with a right to possession, or actual possession. In the present case, the court held, mortgagor had, at the time of the alleged conversion, neither ownership of the property nor actual possession of it. Mortgagor claimed that it had a vested interest in the property, but could not demand possession of the property. The court agreed that the mortgagor could not make a lawful demand for the property since the mortgagees' right to the property was established, as the court pointed out, by the terms of the chattel mortgage (*230 Cal. App. 2d 478, 481)* .

NOTE:

Gardena Valley Airport sets forth the point that in an action for conversion, the plaintiff must show that he or she is the owner with right to possession of the property in question, or have actual possession of the property at the time of the alleged conversion. However, this language should not be interpreted to mean that the plaintiff must be the absolute owner of the property, but that he or she has an interest in the property superior to that of the defendant. In order to state a cause of action for conversion, the plaintiff must allege his or her ownership of the property in question, or a right to immediate possession of the property [*see Franklin v. Municipal Court (1972) 26 Cal. App. 3d 884, 902, 103 Cal. Rptr. 354* ; *see also § 51.22* regarding the interest necessary to maintain an action for conversion] .

[d] Imposition of Constructive Trust Does Not Retroactively Create Ownership Interest Superior to That of Levying Creditor

The plaintiff in ***CHoPP Computer Corp. v. United States*** *(9th Cir. 1993) 5 F.3d 1344* , had sued a former investment promoter (Laurins) in California superior court, alleging a tortious conspiracy to disparage plaintiff and thereby drive down the price of its stock so that Laurins and others could profit from short sales of the stock. The state court issued a preliminary injunction prohibiting Laurins fromwithdrawing any proceeds from any short sales of the stock. While this suit was pending, the United States government had launched a tax investigation against one of Laurins' alter ego companies. As a result of Laurins' failure to comply with a discovery order of the federal district court, Laurins was assessed fines and civil penalties totaling $694,000. The United States obtained writs of execution to collect on the judgment and fine and then levied on a stock brokerage account controlled by Laurins. Subsequently, plaintiff recovered a $29 million judgment against Laurins in the state court action. The superior court judgment imposed a constructive trust in favor of plaintiff on all proceeds of short sales by Laurins of plaintiff's stock, which included the funds contained in the stock brokerage account. Plaintiff then brought an action against the United States and the stock brokerage firm in federal district court, alleging that the government's levy and retention of the funds from the account (and the brokerage firm's disbursement of the funds to the government) constituted a conversion under California law. The district court granted defendants' motion for summary judgment, and the Ninth Circuit Court of Appeals affirmed.

The appellate court noted that California substantive law governed the action. The court observed that in order to maintain an action for conversion under California law, plaintiff must show that it had title to or a right to possess the funds in the account and that plaintiff's interest must have existed at the time of the levy or at the time that plaintiff demanded return of the funds after entry of final judgment in the state court action (*5 F.3d 1344, 1347)* . Plaintiff argued that it had an ownership interest in the account as a result of the constructive trust. The court conceded that some California cases suggest that a constructive trust "springs into existence" at the moment a wrongful taking occurs. The court disagreed, however, that cases dealing with limitations or other rights between the "trustor" and the "trustee" of a constructive trust establish that imposition of such a trust may interfere with a third party's prior claim that has been reduced to judgment and levied upon. The court observed that retroactive creation of a constructive trust is not necessarily a self-executing award of equitable title. Moreover, the court noted, there was no California law that suggests that plaintiff may rely on a 1990 judgment to impede satisfaction in 1988 of a competing judgment that was already final. The preliminary judgment did not give plaintiff a prior claim to the brokerage account since it was not final, was addressed only to the parties to the state court action, and did not purport to impose a constructive trust on the account. Only the final state court judgment recognized the existence of a constructive trust, and it came too late for the

purpose of defeating the government's earlier levy (*5 F.3d 1344, 1348)* . The court concluded that imposition of the constructive trust did not give plaintiff title to the account at the time of the government's levy. Therefore, the government did not commit a conversion when it levied on the account, and the brokerage firm did not commit conversion when it surrendered the funds to the government (*5 F.3d 1344, 1349)* .

[e] Medical Patient Does Not Retain Ownership Interest in Body Cells Removed With Consent and Later Used for Research

In ***Moore v. Regents of Univ. of Cal.*** *(1990) 51 Cal. 3d 120, 271 Cal. Rptr. 146, 793 P.2d 479* , a medical patient sued medical personnel and researchers in conversion for the use of cells removed from his body for potentially lucrative research purposes. Plaintiff, after learning that he had "hairy-cell leukemia," consented in writing to the removal of his spleen. Following the operation, plaintiff returned to the hospital several times, when his physician removed blood samples. Using cells obtained from these samples, the physician established a "cell line" for which he applied for a patent, which was based on the physician-negotiated agreements for commercial development of the cell line and products to be derived from it. Plaintiff sued the hospital, his physician, and researchers, stating many causes of action, including conversion, based on the use of his cells in that manner without his permission. The trial court sustained all defendants' demurrers to the complaint, and the court of appeal reversed. Defendants obtained review from the California Supreme Court.

The California Supreme Court reversed the decision of the court of appeal with respect to the cause of action in conversion, holding that under the facts plaintiff did not state a cause of action (*51 Cal. 3d 120, 148)* . (The Court also held that plaintiff stated a cause of action for breach of fiduciary duty and lack of informed consent with regard to plaintiff's physician (*51 Cal. 3d 120, 148)* .) With respect to the conversion cause of action, the Court noted that to establish a conversion, plaintiff must establish an actual interference with his or her ownership or right of possession. A plaintiff who has neither title to the property alleged to have been converted, nor possession of it, cannot maintain an action for conversion. Inasmuch as plaintiff did not expect to retain possession of his cells following their removal, to sue for their conversion he must have retained an ownership interest in them (*51 Cal. 3d 120, 136-137)* . The Court stated that there are several reasons to doubt that he did retain any such interest. First, no reported judicial decision supports his claim, either directly or by close analogy (*51 Cal. 3d 120, 137-140)* . Second, California statutory law, such as *Health & Safety Code § 7054.4* (concerning waste disposal of human tissues following scientific use), drastically limits any continuing interest of a patient in excised cells. Third, the subject matters of the patent cannot be plaintiff's property, in that the patented cell line is both factually and legally distinct from the cells taken from his body (*51 Cal. 3d 120, 140-141)* . Federal law permits the patenting of organisms that represent the product of "human ingenuity," but not naturally occurring organisms (*51 Cal. 3d 120, 141-142)* . Human cell lines are patentable as an inventive effort. Therefore, plaintiff's allegations that he owns the cell line and the products derived from it are inconsistent with the patent, which constitute an authoritative determination that the cell line is the product of invention (*51 Cal. 3d 120, 142)* .

The Court then considered whether it should extend the theory of conversion to impose liability based on plaintiff's allegations, and concluded that it would be inappropriate to do so. The Court held that a fair balancing of the relevant policy considerations counsels against extending the tort, for example, the protection of a competent patient's right to make autonomous medical decisions, and the protection of researchers engaged in socially useful activities who have no reason to believe that their conduct contravenes a donor's wishes (*51 Cal. 3d 120, 142-143)* . The Court concluded that existing disclosure obligations, rather than an unprecedented extension of the conversion theory, protects patients' rights of privacy and autonomy without unnecessarily hindering research (*51 Cal. 3d 120, 144)* . The Court also stated that the extension of liability to this area is the proper prerogative of the legislature (*51 Cal. 3d 120, 147)* .

[f] Mere Promise to Hold Property in Trust Does Not Create Sufficient Property Interest

In ***Farmers Ins. Exch. v. Zerin*** *(1997) 53 Cal. App. 4th 445, 61 Cal. Rptr. 2d 707* , an auto insurer sued the attorney

representing its insureds in connection with their claims against third party tortfeasors allegedly responsible for their injuries. Two of plaintiff's causes of action stated claims for conversion. The complaint alleged that (1) plaintiff had property rights in any third party recoveries by virtue of insurance policy language which provided that when an insured had been paid damages by plaintiff under the policy and also recovered from another, the amount recovered from the other must be held by insured in trust for plaintiff and reimbursed to plaintiff to the extent of its payment; (2) defendant had notice of plaintiff's rights; and (3) defendant failed to pay any portion of the amount recovered from third parties to plaintiff. Defendant demurred, and the trial court sustained the demurrer and granted defendant's subsequent motion to dismiss.

The court of appeal affirmed, holding that the insurance policy language did not create an equitable lien in favor of plaintiff upon third party recoveries, and therefore, plaintiff had not sufficiently plead its ownership or right to possession of the property. The court noted that neither a promise to pay a debt out of a particular fund nor a promise to hold property in trust for another, without more, created an equitable interest in that property. Although detrimental reliance or unjust enrichment might make a mere promise to pay sufficient, this case did not involve either. The court reasoned that plaintiff had not detrimentally relied on a promise of reimbursement in performing its contractual obligation because, under the insurance policy, plaintiff's obligation to pay medical benefits was independent of any right of reimbursement. Moreover, the court stated that this was not a case in which equity required the rescue of a party otherwise without recourse. Rather, the court categorized the claim as nothing more than an attempt by plaintiff to avoid the necessity of seeking repayment from the parties primarily responsible by giving notice to their legal representative (*53 Cal. App. 4th 445, 456-457)* .

[4] Additional Authorities

[a] Plaintiff Failed to Show Ownership With Right of Possession or Actual Possession

In *Symonds v. Mercury Sav. & Loan Ass'n (1990) 225 Cal. App. 3d 1458, 275 Cal. Rptr. 871* , the trial court sustained a demurrer to the complaint in an action brought by a checking account customer against her bank stating several causes of action. The bank had credited plaintiff's account with the amount of a check plaintiff had deposited, but had then charged the account for that amount eight months later when the deposited check was returned for insufficient funds. The appellate court reversed in part and affirmed in part, holding that plaintiff could not maintain a cause of action for conversion, because any money allegedly debited from the account was in fact only a revocation of the provisional credit made at the time of deposit, not a deprivation of the plaintiff's personal property (*225 Cal. App. 3d 1458, 1468)* .

In *Otworth v. Southern Pac. Transp. Co. (1985) 166 Cal. App. 3d 452, 212 Cal. Rptr. 743* , the court of appeal affirmed the dismissal of an action following a successful demurrer, holding that the complaint failed to state a cause of action. The complaint, which alleged numerous theories of recovery, including conversion, arose out of a dispute concerning wage withholdings for income tax purposes by an employer. The court reasoned, in part, that the complaint did not allege that plaintiff (employee) had or was entitled to possession of money withheld by the employer. In order to state a cause of action for conversion, one of the essential elements is that plaintiff must allege that he owned or had the right to possess the withheld money at the time of the conversion (*166 Cal. App. 3d 452, 458)* .

Plaintiff in Del E. Webb Corp. v. Structural Materials Co. (1981) 123 Cal. App. 3d 593, 176 Cal. Rptr. 824 , brought an action against its supplier of roofing materials after the supplier, among other things, failed to supply certain materials. The court of appeal affirmed the trial court's grant of summary judgment to defendant on the issue of conversion. Although plaintiff had paid for delivery of the materials at some future date, title in the materials had not passed to plaintiff on issuance of the checks. Moreover, plaintiff, according to the evidence, never had possession of the materials. Consequently, the court concluded, plaintiff, having neither possession nor title to the property, could not maintain an action for conversion (*123 Cal. App. 3d 593, 610-611)* .

The facts and procedural background of *Eistrat v. Western Hardwood Lumber Co. (1958) 164 Cal. App. 2d 374, 330*

P.2d 629 , are discussed in *§ 51.36[3][a]*. The court of appeal affirmed the judgment of the trial court and its finding thatdefendant had not converted plaintiff's property by taking lumber previously ordered from plaintiff's lessee from plaintiff's land. Under the agreement between plaintiff and the logging company lessee, title passed to the logging company upon timber being severed. The court held that plaintiff failed to establish a cause of action for conversion. The court said that in an action for conversion, plaintiff must prove either ownership with the right of possession, or actual possession of the property claimed to have been converted at the time of the alleged conversion. In this case, title to the lumber, both under the law and under the terms of the contract, passed to the logging company upon severance, and ultimately to the defendant purchaser (*164 Cal. App. 2d 374, 378-379)* .

NOTE:

Eistrat sets forth the point that in an action for conversion, the plaintiff must show that he or she is the owner with right to possession of the property in question, or have actual possession of the property at the time of the alleged conversion. However, this language should not be interpreted to mean that the plaintiff must be the absolute owner of the property, but that he or she has an interest in the property superior to that of the defendant. In order to state a cause of action for conversion, the plaintiff must allege his or her ownership of the property in question, or a right to immediate possession of the property [*see* *Franklin v. Municipal Court (1972) 26 Cal. App. 3d 884, 902, 103 Cal. Rptr. 354* ; *see also § 51.22* regarding the interest necessary to maintain an action for conversion].

Scutt v. Bassett (1948) 86 Cal. App. 2d 373, 194 P.2d 781 , arose out of an action for conversion of certain automobile cranes which defendant agreed to build for plaintiff. In reversing the judgment of the trial court which found a conversion of five undelivered cranes, the court of appeal held that, as to the undelivered goods, plaintiff had made no demand for their delivery or offer of payment, and therefore did not have either ownership with the right to possession or the actual possession of the machines (*86 Cal. App. 2d 373, 375)* .

California Points & Authorities

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Volume 5 Chapters 50-59 CONTRACTS---to---CORPORATIONS
CHAPTER 51 CONVERSION
PART II. FORMS

5-51 California Points & Authorities § 51.29

§ 51.29 Opposing Contention That Defendant Has Converted Plaintiff's Personal Property--Plaintiff Failed to Show Wrongful Interference With Property

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO SHOW THAT DEFENDANT'S INTERFERENCE WITH THE PROPERTY IN QUESTION WAS WRONGFUL IN THAT DEFENDANT HAD AN INTENT OR PURPOSE TO CONVERT PLAINTIFF'S PROPERTY AND TO EXERCISE OWNERSHIP OVER IT, OR TO PREVENT PLAINTIFF FROM TAKING POSSESSION OF HIS/HER/ITS PROPERTY.

A. Plaintiff Failed to Show Wrongful Interference With Property. In an action for conversion, a plaintiff must show that defendant's interference with the property in question was wrongful by showing an intention or purpose on the part of the defendant to convert the personal property of the plaintiff and to exercise ownership over it, or to prevent the owner from taking possession of his or her property (*see Aronson v. Bank of Am. Nat'l Trust & Sav. Ass'n (1937) 9 Cal. 2d 640, 643-646, 72 P.2d 548* ; *Oakes v. Suelynn Corp. (1972) 24 Cal. App. 3d 271, 278-279, 100 Cal. Rptr. 838*).

[*Optional*] **B. Interference With Property Not Substantial.** In an action for conversion, the conduct of the defendant in relation to plaintiff's property must constitute a substantial interference with that property, and any act of defendant done without an intent to exercise ownership over the property in question or to prevent the owner from taking possession of his or her property does not amount to a substantial interference with plaintiff's possession (*see Zaslow v. Kroenert (1946) 29 Cal. 2d 541, 549-551, 176 P.2d 1* ; *Itano v. Colonial Yacht Anchorage (1968) 267 Cal. App. 2d 84, 89-90, 72 Cal. Rptr. 823*).

[*Optional*] **C. Refusal to Deliver Property Pending Reasonable Inquiry Into Plaintiff's Rights to Property as Not Conversion.** A qualified refusal to surrender property demanded by plaintiff is not a conversion of plaintiff's property if the real and stated purpose of defendant is to secure a reasonable opportunity to inquire into the claimant's right to it (*Giacomelos v. Bank of Am. (1965) 237 Cal. App. 2d 99, 100-101, 46 Cal. Rptr. 612*).

[*Optional*] **D. Mere Movement of Property Is Not Conversion.** A defendant's movement of personal property from one place to another, without asserting ownership or preventing the owner from exercising rights of ownership in the property, does not constitute a conversion (*Simonian v. Patterson (1994) 27 Cal. App. 4th 773, 782, 32 Cal. Rptr. 2d 722* ; *Itano v. Colonial Yacht Anchorage (1968) 267 Cal. App. 2d 84, 89, 72 Cal. Rptr. 823*).

[*Optional*] **E. Act by Mortgagee in Possession of Property to Protect and Preserve Property as Not Conversion.** A chattel mortgagee in possession of the property subject to the mortgage may act to protect his or her rights under the lien; any acts in relation to the property that are done to preserve and protect the property so that it may remain subject to the lien and that are beneficial to those have subordinate rights, and not in antagonism to those rights, are not acts constituting conversion of personal property by the lienholder (*see* *Gardena Valley Airport, Inc. v. All Am. Sports Enters., Inc. (1964) 230 Cal. App. 2d 478, 482-483, 41 Cal. Rptr. 93* ; *Kertz v. Paris (1959) 168 Cal. App. 2d 67, 69-70, 335 P.2d 154*).

[*Optional*] **F. Impossibility of Redelivery of Stored Property Because ofLoss or Destruction as Not Conversion.** When redelivery of stored goods is impossible due to loss or destruction, with or without the bailee's negligence, there is no conversion (*George v. Bekins Van & Storage (1949) 33 Cal. 2d 834, 837-838, 205 P.2d 1037*).

[*Optional*] **G. Filing of Complaint in Interpleader Insufficient to Support Conversion Action.** A person such as an attorney who, acting as a mere custodian, intermediary, or conduit, files a complaint in interpleader when faced with conflicting claims against litigation proceeds, does not exercise dominion over those funds sufficient to support an action for conversion (*Shopoff & Cavallo LLP v. Hyon (2008) 167 Cal. App. 4th 1489, 1508, 85 Cal. Rptr. 3d 268*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to plaintiff's contention in an action for conversion that defendant has converted plaintiff's personal property by wrongfully depriving him or her of the use and possession of that property. This form sets forth the point that in an action for conversion, the plaintiff must show that defendant's interference with plaintiff's property was wrongful by showing an intention or purpose on the part of the defendant to convert the personal property of plaintiff and to exercise ownership over it, or to prevent the owner from taking possession of his or her property. The optional paragraphs may be included in the points and authorities, as appropriate, whenever a point illustrated by a particular paragraph is at issue.

The argument supported by these points and authorities may be raised in response to an assertion by plaintiff that defendant's interference with the property in question was wrongful.

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which the substantive issue arises; for example, this form may be used in support of a demurrer or a motion for a summary judgment, when counsel wishes to assert that the plaintiff has failed to show any wrongful interference by the defendant with the plaintiff's property. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing that plaintiff failed to assert or show any wrongful interference by defendant with plaintiff's property. For example, if the personal property was left on the real property of defendant after the plaintiff quit the premises for failure to pay rent, counsel should discuss facts showing that the defendant removed the property for safekeeping from one place to another without asserting ownership or preventing the owner from gaining access to the property [*see, e.g.,* *Itano v. Colonial Yacht Anchorage (1968) 267 Cal. App. 2d*

84, 89-90, 72 Cal. Rptr. 823 (discussed in *§ 51.29[3*][b])].

This form may be used in opposition to the contention supported by the points and *authorities in § 51.23*.

For further discussion of the requirement that plaintiff show that the interference by defendant with plaintiff's property was wrongful, see California Forms of Pleading and Practice, Ch. 150, *Conversion* (Matthew Bender).

[3] Discussion of Authorities

[a] Plaintiff Failed to Show Wrongful Interference With Property

Plaintiffs in ***Aronson v. Bank of Am. Nat'l Trust & Sav. Ass'n*** *(1937) 9 Cal. 2d 640, 72 P.2d 548* , brought an action for conversion of shares of stock in two banks against the administrators of their deceased's estate and the defendant bank, which was the purchaser and successor in interest of the two banks in question. Plaintiffs alleged that the stock in question was inventoried as an asset of the estate, but that no accounting of certain transfers of the stock in question was made to the probate court. The administrators allegedly had the old certificates of shares of stock standing in the name of the deceased, or in the name of the estate, canceled and new certificates issued without order of the probate court or other authority. The complaint alleged that the administrators, in changing the certificates, had the intent and purpose to use and dispose of the shares represented thereby for their individual benefit and profit. The complaint did not, however, allege that they actually used the shares as alleged nor that they had ever disposed of them. The trial court entered a dismissal of the case after sustaining a general demurrer to the complaint. Before entry of the judgment, plaintiffs were allowed to submit an amended complaint, but the trial court denied leave to file the complaint after a hearing. Plaintiffs appealed on the ground that the trial court erred when it denied leave to amend.

The Supreme Court, in affirming the judgment and order of the trial court, held that plaintiffs failed to show that defendants had interfered with the dominion over plaintiffs' property. Conversion, the Court said, implies some act of ownership or exercise of dominion over property of another in defiance of his or her rights, and is the unwarranted interference by defendant with the dominion over plaintiff's property. In regard to the defendant administrators, the Court stated, plaintiffs failed to allege that the administrators were not acting as administrators of the estate at the time of the alleged conversion. Nor did plaintiffs allege any facts to rebut the presumption that the administrators were acting as such, and in that capacity their possession of the property in question was not an interference with the dominion of plaintiff, and that the administrators held the property for the heirs and not adversely to them. The complaint, the Court said, did not plead any facts on which an inference of fraud, wrong, or unfair dealing could be found. The only reasonable inference that could be drawn from the facts pleaded, the Court concluded, was that for some undisclosed reason, the names on the certificates were changed, but that the administrators held the shares as administrators for the use and benefit of plaintiffs (*9 Cal. 2d 640, 643)* . Directing its attention to the defendant bank, the Supreme Court found that plaintiffs had also failed to pleadfacts showing plaintiffs suffered any injury in the transactions. As stockholders in the original banks, the Court said, they were entitled to their proportionate part of the sales to defendant bank; however, plaintiffs failed to show that they were denied their share of the proceeds of the sale or that any fraud existed on the part of any of the banks involved (*9 Cal. 2d 640, 644)* . Defendant bank could not be liable for the alleged wrongful transfer by the original banks since the banks transferred the shares on their books on presentation by the administrators of the original certificates. Citing existing California law that governed the transfer of shares of stock, the Court stated that transfers of shares of stock could be made by endorsement by signature of the proprietor, his or her agent, attorney, or legal representative, and the delivery of the certificate. The Court held that when a party follows the terms of a statute that purports to measure the power or prescribes the mode of conduct of an act, the party cannot be charged with a wrong. Consequently, the Court concluded, since the complaint alleged that the selling banks did no more than follow the terms of the statute governing transfer of shares of stock, there was no conversion on the part o the original banks under the facts pleaded, and therefore no liability to the purchasing defendant bank (*9 Cal. 2d 640, 644-646)* .

Oakes v. Suelynn Corp. *(1972) 24 Cal. App. 3d 271, 100 Cal. Rptr. 838* , involved an action for conversion and copyright infringement of certain architectural plans relating to converting a ferryboat into a nightclub and restaurant. Plaintiffs were hired to design an airport, motel, and marina project and had prepared plans for the renovation of a ferryboat to be converted into a restaurant and nightclub. The corporation that hired them went bankrupt, and defendant corporation purchased the boat in question and hired defendant architects to complete the renovation of the boat for the purpose of making it into an office building. At trial, one of the defendant architects testified that he was provided with a copy of plaintiffs' plans by the trustee in bankruptcy and assumed that the plans were included in the purchase of the boat and had used the plans only insofar as they depicted the existing condition of the boat and to avoid necessity of remeasuring various areas of the boat. Moreover, plaintiffs had been informed that defendants had a set of the plans, but made no demand for their return. At the conclusion of the trial, the trial court granted defendants' motion to strike the conversion count; however, through inadvertance, dismissal of the conversion charge was omitted from the judgment for defendants. Plaintiffs appealed, contending, among other things, that the trial court erred in striking the conversion count of their complaint.

The court of appeal modified the judgment to include dismissal of the conversion count and affirmed the judgment of the trial court as modified. Addressing itself to the conversion count, the court held that the evidence failed to disclose any intention on the part of defendants to convert plaintiffs' plans or to exercise ownership over them, or to prevent plaintiffs from taking possession of them. Conversion, the court stated, is any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his or her rights in the property. In order to establish conversion, the court added, plaintiff must show an intention or purpose on the part of the defendant to convert the goods and to exercise ownership over them, or to prevent the owner from taking possession of his or her property. Defendants in this case, the court found, lawfully came into possession of plaintiff's plans. Moreover, defendants at no time used the plans in such a way as to interfere with a protectible interest of plaintiffs in their property and referred to the plans only to establish the existing conditions and measurements of the boat. In addition, the court said, defendants never denied plaintiffs' ownership in the plans, had notified them that they had a set of the plans, and plaintiffs had not at that time nor subsequently, made a demand for their return. Consequently, the court concluded, plaintiffs failed to establish that defendants possessed the requisite intent to convert plaintiff's plans (*24 Cal. App. 3d 271, 278-279)* .

[b] Interference With Property Not Substantial

Zaslow v. Kroenert *(1946) 29 Cal. 2d 541, 176 P.2d 1* , arose out of an action for conversion and trespass. Plaintiff claimed title to certain real property by the foreclosure of a street assessment bond, while defendant was the grantee in a tax deed made by the state to the same property. After acquiring the property, defendant had her agent take possession of the property and notified plaintiff by mail that he could obtain his personal property left on the premises through her attorney's office. After plaintiff failed to contact the attorney, defendant had the property removed and placed in storage at plaintiff's expense, pursuant to her notice to plaintiff. No demand was ever made for the property. The trial court found for plaintiff, awarding plaintiff $1,200 as damages for conversion, plus additional amounts for trespass and exemplary damages. Defendant appealed.

The Supreme Court reversed the judgment of the trial court with directions to redetermine the amount of damages awarded on the basis that defendant's conduct amounted to only an ouster of plaintiff of his interest in the real property and trespass to his interests in the personal property. Addressing itself to the issue of conversion, the Court, citing prior California law and other authorities, reviewed the tort of conversion as it related to personal property left on real property. The Court stated that conversion is any act of dominion wrongfully exerted over another's personal property in denial of, or inconsistent with, the owner's rights in the property. The liability of one in possession of real property for the conversion of personal property that he or she finds on it, depends, in most cases, on a determination of whether the conduct of the defendant indicated an assumption of control or ownership over the goods in question. The refusal by an owner of real property to permit, on demand, the owner of chattels left on the real property to remove his or her goods constitutes conversion. Moreover, if thepossessor of the real property appropriates the chattels to his or her own use in obvious defiance of the owner's rights, he or she is liable to the owner for the conversion of them. However, the Court

observed, every failure to deliver goods on demand is not necessarily so serious an interference with the owner's dominion that the defendant should be required to pay the full value of the goods withheld. The act of taking a building and locking it does not, of itself, the Court noted, constitute a conversion of the personal property contained within. To establish conversion, the Court stated, the plaintiff must show an intention or purpose to convert the goods and to exercise ownership over them, or to prevent the owner from taking possession of his or her property. In the present case, the Court found that all defendant's agent did was to remove plaintiff's goods from the defendant's real property and place them in storage. There was no evidence, the Court said, to show that defendant otherwise exerted any dominion over plaintiff's property in denial of or inconsistent with his rights. Plaintiff made no demand for the return of his property, nor attempted to obtain his property through defendant's attorney or at the place of storage. Moreover, the Court added, defendant's agent, acting as custodian of the goods, recognized plaintiff's complete title and right to them. Therefore, the Court concluded, when the conduct complained of does not amount to a substantial interference with possession or right to possession, but consists of intermeddling with or use of or damages to the personal property, the owner has a cause of action for trespass or case, and may recover only the actual damages suffered by reason of the impairment of the property or loss of its use (*29 Cal. 2d 541, 549-551)* .

The Supreme Court in this case and in a companion case [*see Kroenert v. Zaslow (1946) 29 Cal. 2d 878, 879, 176 P.2d 8]* ruled that both plaintiff and defendant held the property as tenants in common. The trial court in this case operated under the assumption that defendant had no interest in the property because her tax deed from the state was invalid on the ground that, because of an overlevy of taxes (eighty-three cents) the state did not acquire a valid deed to the property. The Supreme Court, however, ruled that a minor overlevy did not invalidate the entire tax levy and must be deemed to have been waived by failure to enter an appropriate objection. Therefore, defendant obtained a valid deed and accordingly, both plaintiff and defendant became tenants in common on the vesting of title from the respective taxing agencies (*29 Cal. 2d 541,547-548)* . Consequently, the Court said, plaintiff, as a cotenant, had the right of possession of the realty, which included the right to keep his personal goods on the property, and, therefore, defendant's agent, in placing the goods in storage, although not asserting ownership or substantially interfering with the property in question, committed a trespass by intermeddling with the possession of plaintiff and he was, as result of such acts, entitled to actual damages in an amount sufficient to compensate him for any impairment of the property or loss of its use (*29 Cal. 2d 541, 551-552)* .

Plaintiff in ***Itano v. Colonial Yacht Anchorage*** *(1968) 267 Cal. App. 2d 84, 72 Cal. Rptr. 823* , brought an action for damages for the sinking of a small vessel following its removal from its moorings. Defendant operated a shipyard and maintained a wharf for the mooring of boats. Plaintiff purchased the boat in question from a party who had leased space at the wharf. By the terms of the lease, defendant reserved the right to assign or move any boat to any other mooring at any time. At the time of the purchase, the boat was moored at defendant's wharf. Defendant learned of the sale and adjusted its records accordingly and billed plaintiff for fees due, even though no formal lease was executed. Plaintiff maintained an erratic payment schedule, and became behind in payments. As a result, defendant requested plaintiff find a different moorage so that defendant could rerent the slip occupied by plaintiff to a good-paying customer. Plaintiff requested, and was granted, several delays. After several months, defendant towed plaintiff's boat to a work slip where it was secured by a lock and cable across the slip opening. Plaintiff made no effort to remove the boat, and testimony taken at trial indicated that defendant would not have interfered with any effort by plaintiff to do so. A week later, the boat sank. The jury returned a verdict of $9,150 in favor of plaintiff, and defendant moved for a judgment notwithstanding the verdict. The trial court denied the motion and entered judgment for plaintiff. Defendant appealed from the judgment and from the denial of an order for a judgment notwithstanding the verdict.

The court of appeal reversed the judgment of the trial court, holding that plaintiff could not recover on the theory of conversion. Conversion, the court said, is defined as any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his or her rights in the property. To establish conversion, the court added, plaintiff must show an intention or purpose on the part of the defendant to convert the goods and to exercise ownership over them, or to prevent the owner from taking possession of his or her property. The purpose for removing the boat from one slip to another was to provide the defendant with a slip available for a paying customer, the court said, and

there was no evidence that defendant intended to prevent plaintiff from using or removing his boat. Defendant did not use or make any claim of ownership to the boat. The act of removing personal property from one place to another, without an assertion of ownership or preventing the owner from exercising all rights of ownership in the personal property, the court stated, is not enough to constitute a conversion. Consequently, the court held, the moving of the boat from one slip to another within defendant's anchorage, with no intent to exercise ownership over it or to prevent the owner from taking possession of his property, did not amount to a substantial interference with plaintiff's possession (*267 Cal. App. 2d 84, 89-90)* .

[c] Refusal to Deliver Property Pending Reasonable Inquiry Into Plaintiff's Rights to Property as Not Conversion

Giacomelos v. Bank of Am. *(1965) 237 Cal. App. 2d 99, 46 Cal. Rptr. 612* , was an action for damages for conversion of proceeds of the sale from real property left to plaintiff widow for life with remainder to defendant as trustee for deceased's two children by a previous marriage. The property was sold under threat of condemnation, and plaintiff wanted the proceeds applied to her life estate. Defendant, relying on certain statutory provisions, felt that it was required to divide the proceeds of the sale and instituted a petition to the probate court to determine the matter. The probate court ruled that the proceeds must be divided; however, that decision was reversed by an appellate court. Plaintiff then brought this action for the additional income she would have had between the date of the sale of the real property and the date the proceeds were invested to produce income for her for life. The trial court entered judgment for defendant, and plaintiff appealed.

The court of appeal, in affirming the trial court's judgment, held that there was no conversion. Conversion, the court said, was the intentional exercise of dominion over a chattel that interferes with the right of another to control it. The good faith of the bank in believing that the law required division of the proceeds of the sale of the real property was not a defense; however, the court stated, the law recognized that a qualified refusal to surrender property demanded by the plaintiff was not a conversion if the real and stated purpose of defendant was to secure a reasonable opportunity to inquire into the claimant's right to it. In the present action, the court held, defendant bank asserted no right of its own; it acted solely as a testamentary trustee obligated to defend the rights of the remaindermen and to act in doubtful cases only on court order. Therefore, concluded the court, defendant was in a comparable position to a bailee who made a qualified refusal to surrender the property demanded until it ascertained whether or not the claimant had a valid interest in the property, and acted properly when, in relying on the state of the law as it understood it to be, it sought a prompt determination of the question (*237 Cal. App. 2d 99, 100-101)* .

[d] Mere Movement of Property Is Not Conversion

In ***Simonian v. Patterson*** *(1994) 27 Cal. App. 4th 773, 32 Cal. Rptr. 2d 722* , plaintiff brought an action against his ex-fiancee's father for conversion and various other causes of action, arising out of his efforts to retrieve various items of personal property from his fiancee after their relationship had ended. The defendant father had helped his daughter move various items of personal property from the apartment that plaintiff and the daughter had shared to the daughter's new apartment. Plaintiff alleged that certain of these items (record albums and Christmas decorations) were moved without his permission and against his wishes, and that defendant had failed to return them on demand or to assist plaintiff in securing their return from defendant's daughter. The trial court sustained defendant's demurrer to all causes of action and dismissed the action, and the court of appeal affirmed.

The court of appeal rejected plaintiff's argument that the trial court had erred in granting defendant's demurrer to the conversion cause of action. The court noted that from the complaint as a whole, it was plain that the record albums and Christmas decorations were no longer in the defendant's possession and that they were obviously outside his power to return. The court observed that a refusal to deliver personal property is not a conversion unless the party has the power to deliver the goods at the time of demand for their return. The court deemed it irrelevant that the items might not have been moved in the first instance had the defendant exercised due care in ascertaining their rightful owner. The court

analogized to the law of bailments, under which the bailee is not liable for conversion if he or she fails to redeliver goods because they have been lost or destroyed, even if the loss or destruction is the result of the bailee's negligence (*27 Cal. App. 4th 773, 781)* . Furthermore, the court held, the defendant did not exercise dominion over the items sufficient to convert them to his own use in violation of the plaintiff's ownership rights. Relying on the rule applicable to common carriers and to bailees, the court held that removing personal property from one place to another, without asserting ownership or preventing the owner from exercising his or her rights of ownership, does not constitute a conversion. Thus, the court concluded, that the simple act of moving items apparently belonging to defendant's daughter to her new apartment did not constitute a conversion of those items (*27 Cal. App. 4th 773, 781-782)* .

Itano v. Colonial Yacht Anchorage *(1968) 267 Cal. App. 2d 84, 72 Cal. Rptr. 823* , is discussed in *§ 51.29[3][b]*.

[e] Act by Mortgagee in Possession of Property to Protect and Preserve Property as Not Conversion

The facts and procedural background of ***Gardena Valley Airport, Inc. v. All Am. Sports Enters., Inc.*** *(1964) 230 Cal. App. 2d 478, 41 Cal. Rptr. 93* , are discussed in *§ 51.28[3][c]*. The court of appeal affirmed the judgment of the trial court against defendant in its cross action for conversion against plaintiffs for equipment used by plaintiffs and their lessees in the operation of an auto racetrack that plaintiffs took over after defendant's default on certain promissory notes. Addressing itself to the issue of whether or not plaintiff's actions constituted conversion, the court of appeal found that plaintiffs had a right to possession of the chattels in question pursuant to the terms of its chattel mortgage with defendant and that defendant relinquished possession of the premises and the property contained within it in the face of mounting financial difficulties. When the original possession of claimant's property is lawfully obtained, or there is an acknowledgment of the mortgagor's interest, the dominion exercised by the mortgagee, thecourt stated, is not a conversion. Plaintiffs in this case, the court held, obtained possession lawfully through the terms of its chattel mortgage, and acknowledged defendant's interest in the property by taking steps for the foreclosure and sale of the property. Moreover, the court said, plaintiffs had a right to protect their lien rights in the property and any act done to preserve and protect the property so that it may remain subject to the lien, which was equally beneficial to those having subordinate rights, and not in antagonism to those rights, was not a wrongful conversion within the meaning of *Civ. Code § 2910*, which provides that wrongful conversion of personal property by a lien holder extinguishes the lien. Consequently, the court held, the use of defendant's chattels by plaintiffs under the circumstances was not a wrongful conversion since plaintiffs were justified in using and leasing defendant's property during the time preceding the foreclosure sale (*230 Cal. App. 2d 478, 482-483)* .

Plaintiffs in ***Kertz v. Paris*** *(1959) 168 Cal. App. 2d 67, 335 P.2d 154* , brought an action to foreclose a chattel mortgage on defendants' property, and defendants filed a cross complaint for conversion of certain personal property subject to a chattel mortgage. Plaintiff leased certain premises to defendants and executed a promissory note secured by a chattel mortgage on the personal property contained within the premises consisting of fixtures and equipment used in the operation of defendants' laundry business. Defendants quit the premises after receiving a notice to quit following default on the promissory note. The personal property listed on the chattel mortgage remained in the building. Plaintiffs subsequently leased the premises to new tenants, who used defendants' chattels and kept them in repair. Defendants made no demand on plaintiff for return of the property, nor did they demand that the new tenants cease using the chattels. At trial, all parties testified that it was better to use the equipment than to permit it to remain idle. The trial court entered judgment adverse to defendants on their claim for conversion, and they appealed.

The court of appeal affirmed the judgment of the trial court, holding that there was no conversion. The court stated that when the original possession of the chattels is lawfully obtained, or there is an acknowledgment of the mortgagor's interest, the dominion exercised by the mortgagee is not unlawful, and therefore is not a conversion. Moreover, damages against a lessor for the alleged conversion of the lessee's property are properly refused when it appears that the property remained on the premises and lessee has not been refused its possession. In addition, the court said, a chattel mortgagee in possession after default may act to protect his or her rights under the lien, and an act done to preserve and protect property so that it may remain subject to the lien, which is equally beneficial to those having subordinate rights

and not in antagonism to those rights, is not a wrongful conversion within the meaning of *Civ. Code § 2910*, governing the effect of a wrongful conversion of personal property by a lien holder. Consequently, the court held, the use of defendant's equipment by the new tenants was not a conversion, and the trial court properly found against defendants on their cross action (*168 Cal. App. 2d 67, 69-70)* .

[f] Impossibility of Redelivery of Stored Property Because of Loss or Destruction as Not Conversion

George v. Bekins Van & Storage *(1949) 33 Cal. 2d 834, 205 P.2d 1037* , arose out of six causes of action to recover value of goods destroyed by fire, including a cause of action for conversion. Plaintiffs wired defendant, inquiring if it would store their valuable furniture in its ware house. The goods were shipped to defendant's warehouse on defendant's affirmative response. Subsequently, defendant sent to plaintiffs a warehouse receipt and contract together with an identification card. The warehouse receipt contained a clause limiting defendant's liability to $10 per 100 pounds per article unless the depositor of the goods fixed a greater value in writing at the time of delivery and the depositor agreed to pay an additional charge. The receipt also contained a paragraph in which the company would only be liable for failure to use ordinary care, and then only to the value of depositor's declared valuation of the goods. The identification card signed by plaintiffs acknowledged receipt of the warehouse receipt and contract, and their acceptance of its terms and conditions. Plaintiffs' household furnishings and effects were destroyed by fire while in possession of defendant's warehouse. The trial court found that defendant had converted plaintiffs' goods and that the goods were destroyed by fire as a result of defendant's negligence. Defendant appealed, contending that the evidence did not support these findings.

The Supreme Court, in reversing the judgment of the trial court, held that there was no conversion. Citing prior California law, the Court stated that the tort of conversion existed if there was an exertion of wrongful dominion over the personal property of another in denial of or inconsistent with his or her rights in the property. When a bailee refuses to redeliver goods to which the bailor is entitled, the tort of conversion is committed; and a prima facie case for conversion is made out by proof of the bailment and subsequent refusal of the bailee to make delivery on demand. However, the Court observed, if redelivery is impossible because the goods have been lost or destroyed, either without fault on the part of the bailee, or merely because of his or her negligence, there was no conversion. Negligence, the Court noted, was not an act of dominion that was necessary to make the bailee liable as a converter. The Court held that since the trial court found that plaintiffs' goods were destroyed by fire as a result of defendant's negligence, the finding that defendant converted plaintiffs' goods could not be sustained (*33 Cal. 2d 834, 837-838)* .

[g] Filing of Complaint in Interpleader Insufficient to Support Conversion Action

In *Shopoff & Cavallo LLP v. Hyon (2008) 167 Cal. App. 4th 1489, 85 Cal. Rptr. 3d 268* , an attorney filed a complaint in interpleader to resolve multiple conflicting claims made by plaintiffs and several attorneys against the proceeds derived from a multiparty global settlement agreement. This complaint alleged that the recovery funds were in imminent danger of loss due to the impasse between the conflicting claimants and the various conflicting demands. One of the plaintiffs in the underlying action filed a cross-complaint in the interpleader action alleging conversion and other causes of action. The trial court eventually sustained a demurrer to the conversion cause of action. Plaintiff appealed.

The court of appeal affirmed the trial court's decision to sustain the demurrer on the conversion claim. The court agreed with the plaintiff's contention that some of the proceeds from the recovery, including stock in a business enterprise, could be the proper subject of a conversion action (*167 Cal. App. 4th 1489, 1507)* . However, the court held that plaintiff failed to plead that the attorney exercised dominion over the proceeds and converted them to his own use. Instead, as trustee of the recovery proceeds, the attorney retained and interpled the funds precisely in order to avoid potential liability for conversion, liability that he might have incurred had he disbursed funds to an improper party with knowledge that another claimant had lawful contractual rights to the proceeds. According to the court, the attorney, as a mere custodian, intermediary, or conduit who filed the interpleader action to resolve conflicting claims to the proceeds, did not exercise dominion over the funds sufficient to convert them to his own use in denial of the plaintiff's rights (

167 Cal. App. 4th 1489, 1508) .

[4] Additional Authorities

[a] Plaintiff Failed to Show Wrongful Interference With Property

In *Home v. Kramer (1936) 7 Cal. 2d 361, 60 P.2d 854* , defendant Gorbach soldmarket premises to a third party, including fixtures, which, by the terms of a lease agreement with defendant Kramer, constituted security for the faithful performance of the lease. A sublessee had taken control over a portion of the premises, including the fixtures, and on becoming bankrupt the trustee in bankruptcy claimed ownership of the fixtures. When Gorbach sold the fixtures to the purchaser, he advised the purchaser of the trustee's claim. The Supreme Court reversed the judgment for plaintiff, holding that defendant Gorbach's sale of the fixtures was not a conversion since he sold only the interest he had in the property subject to plaintiff's claim, and therefore the sale was not a denial of or act inconsistent with plaintiff's claim because there was no assertion of right or title hostile to that claim (*7 Cal. 2d, 361, 363-364)* .

In *Software Design & Application, Ltd. v. Hoefer & Arnett, Inc. (1996) 49 Cal. App. 4th 472, 56 Cal. Rptr. 2d 756* , plaintiffs, who had lost assets to a financial consultant through a scheme involving a series of fictitious brokerage and bank accounts, sought to recover their money through an action for conversion against the brokerage firms and banks. The trial court sustained demurrers and dismissed the action. The court of appeal affirmed, stating that plaintiffs could not state a common law count for conversion of money because conversion requires an act of dominion over the property. Furthermore, money cannot be the subject of a conversion action unless a specific sum capable of identification is involved. For the banks, money came into various accounts in various sums, without any indication that it was held in trust for plaintiff. As for the brokers, they were bailees acting in good faith on instructions from their customer (*49 Cal. App. 4th 472, 485)* .

In *Otworth v. Southern Pac. Transp. Co. (1985) 166 Cal. App. 3d 452, 212 Cal. Rptr. 743* , the court of appeal affirmed the dismissal of an action following a successful demurrer, holding that the complaint failed to state a cause of action. The complaint, which alleged numerous theories of recovery, including conversion, arose out of a dispute concerning wage withholdings for income tax purposes by an employer. The court of appeal reasoned, in part, that the complaint did not allege that defendant willfully and without legal justification interfered with plaintiff's right to possession of the withheld money, an essential element of the cause of action for conversion. In fact, the complaint indicated that the money was withheld for tax purposes and turned over to the I.R.S. Furthermore, it has been established by case law that employees have no cause of action against employers who, pursuant to directives or regulations of the I.R.S, withold wages and pay them over to the government in satisfaction of federal income tax liability (*166 Cal. App. 3d 452, 458)* .

Estergren v. Sager (1940) 39 Cal. App. 2d 401, 103 P.2d 177 , involved an action for, among other things, conversion of a jointly owned tractor. In reversing the judgment for defendant, the court of appeal held that plaintiff's complaint failed to establish the elements of conversion on the ground that common property was in existence and in the possession of one of the coowners. The property, the court said, was not lost, destroyed, or removed from the state, and therefore plaintiff could not recover the value of his undivided interest in the property (*39 Cal. App. 2d 401, 403)* .

Travelers Fire Ins. Co. v. Brock & Co. (1938) 30 Cal. App. 2d 112, 85 P.2d 905 , arose out of an action for conversion of a diamond brooch lost after transfer of the brooch by the bailee to a subbailee for repair work that plaintiff hired defendant to do. The court of appeal reversed the judgment for plaintiff, holding that a bailee for repairs does not wrongfully assume control of the bailor's property in placing the bailed article with another for repairs unless the bailment agreement expressly or impliedly requires the bailee to perform the labor personally (*30 Cal. App. 2d 112, 114)* .

[b] Interference With Property Not Substantial

Plaintiff in Jordan v. Talbot (1961) 55 Cal. 2d 597, 12 Cal. Rptr. 488, 361 P.2d 20 , sued her former landlord for conversion after he entered her apartment, removed her personal property to a warehouse, and stored it in her name. The Supreme Court affirmed the trial court's granting a new trial, holding that the verdict for conversion was unsupported by the evidence. Citing *Zaslow v. Kroenert (1946) 29 Cal. 2d 541, 551, 176 P.2d 1* [*see § 51.29[3][b]*], the Court said that removal of another's property and storing it in the owner's name without any exercise of dominion or control was not conversion since it did not amount to a substantial interference with the possession or the right to possession of the property (*55 Cal. 2d 597, 610)* .

McAllister v. Metzger (1963) 220 Cal. App. 2d 692, 33 Cal. Rptr. 879 , involved an action for, among other things, conversion of a sprinkler system included as part of the sale of the land to plaintiffs by defendants, and a removable cottage placed on mud sills by plaintiffs. Plaintiffs defaulted on a promissory note secured by a deed of trust and defendants obtained a court order appointing a receiver of all the real property, improvements, and crops growing on the land. The receiver began tagging various items of personal property, including the removable cottage as property under the control of the receiver. The court of appeal affirmed the judgment of the trial court and held that the receiver's tagging of the cottage was not a substantial interference with plaintiff's property since plaintiff produced no evidence to show that defendants or their receiver dispossessed plaintiffs or exerted a physical control over the cottage inconsistent with plaintiff's rights (*220 Cal. App. 2d 692, 697-708)* .

California Points & Authorities

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Volume 5 Chapters 50-59 CONTRACTS---to---CORPORATIONS
CHAPTER 51 CONVERSION
PART II. FORMS

5-51 California Points & Authorities § 51.30

§ 51.30 Supporting Contention That Claims for Damages for Expenditures Paid in Pursuit of Converted Property Must Be Necessary and Reasonable

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

IN AN ACTION FOR CONVERSION, CLAIMS FOR DAMAGES FOR EXPENDITURES PAID OUT IN PURSUIT OF PROPERTY THAT WAS CONVERTED MUST BE BASED ON EVIDENCE THAT THE EXPENDITURES WERE NECESSARY AND REASONABLE.

A. Expenditures Made in Pursuit of Recovery of Converted Property Must Be Necessary and Reasonable. Claims for damages for expenditures made in pursuit of converted property must be based on evidence that the expenditures were necessary and reasonable (*Beetson v. Hollywood Athletic Club (1930) 109 Cal. App. 715, 722-723, 293 P. 821*).

[*Optional*] **B. Attorney's Fees Not Recoverable as Money Expended in Pursuit of Property.** Attorney's fees incurred to recover converted property are not within the rule of *Section 3336 of the Civil Code* authorizing recovery of money paid out in pursuit of property (*Russell v. United Pac. Ins. Co. (1963) 214 Cal. App. 2d 78, 91-92, 29 Cal. Rptr. 346*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of defendant's contention in an action for conversion that a claim for damages arising out of expenditures made in pursuit of recovery of the converted property must be based on evidence that the expenditures were necessary and reasonable. The optional paragraph may be included in the points and authorities whenever the damages sought or awarded are for attorney's fees paid out in connection with plaintiff's pursuit of the converted property.

The argument supported by this memorandum may be raised in response to claims by the plaintiff for damages arising out of expenditures paid out in pursuit of the converted property.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing that the expenditures that plaintiff paid out in pursuit of the converted property in question were not necessary or reasonable under the particular circumstances of the case.

This form may be used in opposition to the contention supported by the points and *authorities in § 51.24*.

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which the substantive issue arises; for example, this form may be used in support of a demurrer, a motion for a summary judgment, or for a motion for a new trial on grounds of excessive damages, when counsel wishes to assert that plaintiff has failed to show that expenditures paid out in pursuit of the converted property were reasonable or necessary. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

[b] Related Points and Authorities

For points and authorities pertaining to damages in tort actions generally, including punitive damages, see Ch. 64, *Damages: Tort* .

[3] Discussion of Authorities

[a] Expenditures Made in Pursuit of Recovery of Converted Property Must Be Necessary and Reasonable

In ***Beetson v. Hollywood Athletic Club*** *(1930) 109 Cal. App. 715, 293 P. 821* , plaintiff sued for conversion for loss of his automobile while parked in defendant's lot. Plaintiff's vehicle was subsequently recovered, and plaintiff sought damages to the automobile sustained in connection with the disappearance of the vehicle, plus damages for loss of use and for expenses in pursuit of recovery of his car. Plaintiff offered proof that the vehicle in question had sustained damage in the amount of $254.19, that he had expended $440 in the recovery of the property, and had sustained a loss of $350 for loss of use. The expenses entailed in procuring the automobile included $8 for telegrams, $50 to the sheriff in the county where the car was located, $326 for the cost of freight, and $45 to an investigator to locate the car. The evidence as to the loss of use consisted of the cost of rental of another vehicle for two months at $300 and $50 spent in taxicabs before plaintiff obtained the rental vehicle. The trial court found for plaintiff and awarded the damages prayed for. Defendant appealed, contending, that the damages awarded were excessive because the trial court erred in computing damages allowable to plaintiff.

The court of appeal affirmed the judgment after modifying the amount of damages awarded. Addressing itself to the damages awarded to plaintiff as to expenses incurred in pursuit of property, the court found that plaintiff had been awarded excessive damages. The court held that since there was nothing in the record to support the necessity of the $8 for the telegrams, the $50 to the sheriff, or the reasonableness of the $45 for the investigator, there was no basis for the trial court to award these damages to plaintiff. The burden as to the necessity andreasonableness of these expenditures, the court ruled, rested on plaintiff, and in the absence of proof, the trial court should not have allowed these expenditures (*109 Cal. App. 715, 722-723)* .

[b] Attorney's Fees Not Recoverable as Money Expended in Pursuit of Property

Russell v. United Pac. Ins. Co. *(1963) 214 Cal. App. 2d 78, 29 Cal. Rptr. 346* , involved consolidated actions for conversion of mining ore and recovery of attorney's fees expended in litigating certain actions taken against plaintiffs by some of the defendants. Plaintiffs, in an earlier and separate action, had brought an action against individual defendants in this case for injunctive relief and recovery of certain real property on which individual defendants were conducting ore mining operations. The individual defendants cross complained and obtained a restraining order against plaintiffs

barring them from entering or interfering with the mine. Subsequently, these same defendants obtained a preliminary injunction against plaintiffs from working or interfering with the mine. However, after trial, the trial court entered judgment for plaintiffs. Defendants turned over the mine to plaintiffs, but refused to deliver ore previously mined from it, and plaintiffs brought the present action. The trial court awarded damages to plaintiffs, including recovery of expenditures paid out in pursuit of recovery of the property, including surveyor's fees, and attorney's fees expended in contesting the preliminary injunction and temporary restraining hearings in the previous case. Both sets of parties appealed, with plaintiff contesting the failure of the trial court to award prejudgment interest on the value of ore converted and on the counsel fees awarded.

The court of appeal, in modifying the judgment of the trial court, held that the award of attorney's fees allowed in the conversion action was erroneous (*214 Cal. App. 2d 78, 92)* . The general rule regarding attorney's fees, the court stated, is that they are not a proper item of recovery from the adverse party, either as costs, damages, or otherwise, unless there is express statutory authority or contractual liability for their recovery. *Civ. Code § 3336*, the court said, does not expressly provide for attorney's fees for the converting of property (that is, for the expenditures paid out in pursuit of recovery of the property converted). Consequently, the court held, citing prior California law, attorney's fees are not within the rule of damages provided by *Civ. Code § 3336*, and the party defendants to the conversion action are not liable for any expenditures for attorney's fees in that action (*214 Cal. App. 2d 78, 91-92)* .

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5-51 California Points & Authorities § 51.31

§ 51.31 Supporting Contention That Recovery by Plaintiff of Converted Property Acts as Mitigation of Damages

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF CANNOT RECOVER THE VALUE OF THE PROPERTY CONVERTED WHEN HE/SHE/IT HAS RECOVERED THE PROPERTY, SINCE RECOVERY OF THE PROPERTY ACTS AS MITIGATION OF DAMAGES.

Recovery of Property by Plaintiff as Mitigation of Damages. In an action for conversion, when the plaintiff has recovered his or her property that had been unlawfully taken, he or she is considered to have received the property in mitigation of damages, and the measure of damages, absent special damage, is the expense of procuring its return with interest (*Blewett v. Miller (1900) 131 Cal. 149, 151, 63 P. 157* ; *Beetson v. Hollywood Athletic Club (1930) 109 Cal. App. 715, 722, 293 P. 821*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of defendant's contention in an action for conversion that recovery by plaintiff of the property converted acts as a mitigation of damages. The argument supported by this memorandum may by raised in response to a claim by plaintiff for the reasonable value of the property converted when he or she has recovered the property.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing that although plaintiff has asked for damages for the reasonable value of the property converted, he or she has actually recovered the property converted.

This form may be used in opposition to the contention supported by the points and *authorities in § 51.24*.

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which the substantive issue arises; for example, this form may be used in support of a demurrer, a motion for a summary judgment, or a motion for a new trial on ground of excessive damages, when counsel wishes to assert that plaintiff has recovered the property converted and therefore is not entitled to the reasonable value of the property, but only for any money expended in recovery of the property, or specialdamages, if any. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

[b] Related Points and Authorities

For points and authorities pertaining to damages in tort actions generally, including punitive damages, see Ch. 64, *Damages: Tort* .

[3] Discussion of Authorities

[a] Recovery of Property by Plaintiff as Mitigation of Damages

Blewett v. Miller *(1900) 131 Cal. 149, 63 P. 157* , arose out of an action for conversion of a harvester and five gang plows attached, levied, and sold by defendant sheriff, although they were exempt from execution. The trial court found for plaintiff and awarded the sum of $1,060. Defendant moved for a new trial on the ground of newly-discovered evidence. In his affidavit, the sheriff disclosed that all of the property levied on, including the property alleged to have been converted from plaintiff's intestate, was sold back to plaintiff's intestate for only $1,100 and that some of the property, such as 23 mules, were alone worth more than that sum.

The Supreme Court ordered a reversal of the judgment of the trial court and ordered a new trial. Had this information been known, the Court said, the amount of damages awarded to plaintiff would have been different. When one recovers his or her wrongfully taken property, the Court stated, he or she is considered to have received it in mitigation of damages and the measure of damages in that event, in the absence of special damages, is the expense of procuring its return, with interest. Consequently, the Court concluded, when plaintiff's property was seized and sold by defendant sheriff and was repurchased by the plaintiff from one who bought it at the sheriff's sale, the measure of damages was the amount paid to repurchase the property (*131 Cal. 149, 151)* .

The facts and procedural background of ***Beetson v. Hollywood Athletic Club*** *(1930) 109 Cal. App. 715, 293 P. 821* , are discussed in *§ 51.30[3][a]*. The court of appeal modified and affirmed the judgment of the trial court. Directing its attention to the issue of plaintiff's damages when the converted property has been recovered by plaintiff, the court stated that when one recovers his or her property that had been unlawfully taken from him or her, he or she is considered to have received the property in mitigation of damages, and the measure of damages, in the absence of special damage, is the expense of procuring its return with interest. In this case, the court held, plaintiff was entitled to his damages in pursuit of his property as well as for special damages incurred as a result of injury sustained to the vehicle during its absence, and loss of use of the car during the same period (*109 Cal. App. 715, 722)* .

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5-51 California Points & Authorities § 51.32

§ 51.32 Supporting Contention That Plaintiff Who Regains Possession of Converted Property Prior to Adjudication of Entitlement to Possession May Recover Prejudgment Interest Calculated to Entry of Judgment

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

EVEN THOUGH THE PLAINTIFF REGAINED POSSESSION OF THE CONVERTED PROPERTY PRIOR TO TRIAL, THE PLAINTIFF IS ENTITLED TO PREJUDGMENT INTEREST CALCULATED TO THE DATE OF ENTRY OF JUDGMENT.

Right to Interest Extends to Entry of Judgment. If a plaintiff regains possession of converted goods prior to adjudication of the right to possession of those goods, either through a writ of possession under *Code Civ. Proc. § 512.010 et seq.* or otherwise, the plaintiff's right to prejudgment interest continues beyond the point at which the plaintiff regained possession and extends to the entry of judgment (*Irving Nelkin & Co. v. South Beverly Hills Wilshire Jewelry & Loan (2005) 129 Cal. App. 4th 692, 702-703, 28 Cal. Rptr. 3d 815*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the plaintiff, despite regaining possession of converted property prior to trial, is entitled to recover prejudgment interest, based on the value of that property, calculated to the date on which judgment was rendered in the plaintiff's favor.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which these points are raised. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form showing the relationship between the facts of the case and the point of law

stated. Thus, counsel should include facts showing when judgment was entered in favor of the plaintiff on the conversion claim.

[3] Discussion of Authorities

[a] Right to Interest Extends to Entry of Judgment

In **Irving Nelkin & Co. v. South Beverly Hills Wilshire Jewelry & Loan** *(2005) 129 Cal. App. 4th 692, 28 Cal. Rptr. 3d 815* , the plaintiff was a wholesale jewelry dealer that consigned goods to another party in August and September of 1999. The plaintiff filed a UCC financing statement to protect its goods. Despite the fact that the consignment agreement specifically prohibited this other party from pledging the plaintiff's property as security for a loan, that party did so nonetheless, pledging the plaintiff's property as collateral for loans made by the defendant, who took possession of the property. The plaintiff filed suit in October 1999 and obtained writs of possession under *Code Civ. Proc. § 512.010 et seq.* Pursuant to these writs, the defendant returned the goods to the plaintiff. In November 2002, the plaintiff obtained summary adjudication in its favor on causes of action for recovery of personal property and conversion. The plaintiff served notice of outstanding issues for trial, but eventually decided to abandon further adjudication and, in November 2003, obtained judgment on the actions decided through summary adjudication. As part of its damages award, the plaintiff sought and obtained prejudgment interest from the date of conversion to the date of entry of judgment. The defendant appealed, arguing that the plaintiff was not entitled to prejudgment interest past the date on which the plaintiff regained possession of the property.

The court of appeal affirmed, with amendment. The court held that if a plaintiff regains possession of converted goods prior to adjudication of the right to possession of those goods, either through a writ of possession under *Code Civ. Proc. § 512.010 et seq.* or otherwise, the plaintiff's right to prejudgment interest continues beyond the point at which the plaintiff regained possession and extends to the date of entry of judgment (*129 Cal. App. 4th 692, 695)* . The court reasoned that prior to adjudication, the plaintiff faces the prospect of losing possession of the goods after trial, effectively depriving the plaintiff of the liberty of dealing with the goods as the plaintiff sees fit until such adjudication is made (*129 Cal. App. 4th 692, 702-703)* . However, the court also held that if the right to possession is determined through summary adjudication and all that remains to be determined is the amount of damages, as in this particular case, the right to interest extends only to the date of the order granting summary adjudication in the plaintiff's favor. Therefore, the judgment was amended to provide that the plaintiff's right to interest extended only to the date in November 2002 of the order granting summary adjudication, and the court remanded the case for recalculation of the interest owed (*129 Cal. App. 4th 692, 704-705)* .

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5-51 California Points & Authorities § 51.33

§ 51.33 Supporting Contention That Plaintiff's Action for Conversion of Personal Property Is Barred by the Statute of Limitations [Code Civ. Proc. § 338(c)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF CANNOT RECOVER ON HIS/HER/ITS ACTION FOR CONVERSION OF PERSONAL PROPERTY BECAUSE THE ACTION IS BARRED BY THE STATUTE OF LIMITATIONS, WHICH REQUIRES THAT THE ACTION FOR CONVERSION BE BROUGHT WITHIN THREE YEARS FROM THE DATE OF THE ALLEGED CONVERSION.

A. Three-Year Statute of Limitations for Action for Conversion. An action for taking, detaining, or injuring any goods or chattels must be brought within three years (*Code Civ. Proc. § 338(c)*).

B. Statute of Limitations Commences at Time of Conversion. The statute of limitations in an action for conversion commences to run at the time of the alleged conversion, and not at the time of the acquisition of knowledge of the conversion (*Barnes v. Witt (1962) 207 Cal. App. 2d 441, 444-445, 24 Cal. Rptr. 545* ; *Coy v. E.F. Hutton (1941) 44 Cal. App. 2d 386, 390-391, 112 P.2d 639*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of defendant's contention in an action for conversion that plaintiff's action is barred by the statute of limitations because he or she did not bring the action within three years from the date of the alleged conversion. The argument may be raised in response to a claim for damages for conversion of plaintiff's personal property when the action is brought more than three years from the date of the alleged conversion.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing that plaintiff's cause of action is barred because it was not

brought until after three years had expired between the date of the alleged conversion and the filing of the complaint.

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which the substantive issue arises; for example, this form may be used in support of a demurrer when counsel wishes to assert that plaintiff's action for conversion is barred because the action was not begun until after the three-year period in which the action could bebrought had expired. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 51.42 -51.44* may be used to oppose the contention supported by these points and authorities.

[c] Related Pleading and Practice Forms

For discussion of the statute of limitations as a bar to an action for conversion, see California Forms of Pleading and Practice, Ch. 150, *Conversion* (Matthew Bender). For discussion, forms, and procedures relating to the statute of limitations generally, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* (Matthew Bender).

[d] Related Points and Authorities

For forms of memoranda of points and authorities in support of defendant's contention that the statue of limitations is a bar to plaintiff's action generally, see Ch. 143, *Limitation of Actions* .

[3] Discussion of Authorities

[a] Three-Year Statute of Limitations for Action for Conversion

Code Civ. Proc. § 338(c) provides that an action for taking, detaining, or injuring any goods or chattels must be brought within three years.

NOTE:

There are some exceptions to this rule. For example, *Code Civ. Proc. § 341a* provides for only a 90-day period in which an action can be brought for conversion of property left at a hotel, rest home, sanitarium, boarding or lodging house, or furnished apartment or bungalow; and *Code Civ. Proc. § 349*3/4 provides for a 180-day time period in which to bring an action for conversion of well-drilled oil, gas, or liquid or fluids. Other exceptions to *Code Civ. Proc. § 338(c)* are *set out in §§ 51.42 -51.44*.

[b] Statute of Limitations Commences at Time of Conversion

Plaintiff in ***Barnes v. Witt*** *(1962) 207 Cal. App. 2d 441, 24 Cal. Rptr. 545* , brought an action for conversion, among other things, of three trucks that defendant allegedly took by forcibly entering plaintiff's premises and towing the trucks away. The trial court sustained defendant's demurrer to plaintiff's first amended complaint on the ground that the action was barred by the statute of limitations. The original complaint was filed on August 16, 1961. Both the original and amended complaints alleged that the wrongful actions took place on or about September 20, 1955. The trial court entered judgment for defendant, and plaintiff appealed.

The court of appeal affirmed the judgment of the trial court, holding that the ruling of the trial court on the basis of the statute of limitations was unquestionably correct. More than three years had gone by, the court said, since the alleged seizure of the trucks. The three-year statute of limitations, the court said, applied to both the amended and original

complaints in the action for conversion. The period of limitation for a conversion action commences at the time of the conversion, the court ruled, and not at the time of acquisition of knowledge of the acts constituting the conversion, unless plaintiff can show affirmatively that the offending party voluntarily concealed from plaintiff the facts constituting the cause of action. Consequently, the court held, the action for conversion in this case was barred by the statute of limitations since the successive complaints showed that the trucks were taken on September 20, 1955 (*207 Cal. App. 2d 441, 444-445)* .

Coy v. E.F. Hutton *(1941) 44 Cal. App. 2d 386, 112 P.2d 639* , arose out of an action for conversion of stock owned by plaintiff that defendant had sold. In April 1932, plaintiff Coy informed defendant that he was leaving California and returning to Ohio. On May 11, 1932, a telegram arrived at defendant's place of business that purported to authorize defendant to sell certain stock owned by plaintiff. The telegram was signed "E.M. Coy." Coy had apparently suffered a mental breakdown on his return to Ohio, and his mother placed him in a rest home. To pay for his care, the mother had sent the telegram to defendants. She applied the proceeds of the sale to an account maintained for plaintiff's care at the rest home. In February of 1934, plaintiff escaped from the rest home and returned to California where he inquired about his stock. Defendant, through its agent, informed plaintiff of the previous sale of the stock on May 12, 1932, at his instructions. Plaintiff returned to Ohio, and in March 1935, wrote defendant with instructions to sell the stock and pay a certain indebtedness. The firm again informed him of the previous sale. Approximately two years later, plaintiff made a demand for the return of the stock, and after refusal, filed the present action on February 15, 1937. The trial court made no findings on the issue of conversion, but entered judgment for defendant on the ground, among other things, that plaintiff's action for conversion was barred by the three-year statute of limitations. In its written opinion, the trial court stated that in the action for conversion, the statute started to run from the date of the alleged conversion and was not tolled by the fact that the owner may have been ignorant of the conversion. Plaintiff appealed.

The court of appeal affirmed the judgment of the trial court. Plaintiff's cause of action, the court stated, was barred because the sale of stock took place on May 12, 1932, and the action was not filed until February 15, 1937, or more than fouryears and nine months from the date of the alleged conversion. The court rejected plaintiff's contention that his cause of action for conversion did not accrue and that the statute of limitations did not start to run until the making of the demand for the return of the stock. When possession is obtained lawfully, and there has been an actual conversion, the court said, a demand is not necessary, and the cause of action is complete at the time of the wrongful disposal of the property with the statute of limitations starting to run at that time. Citing secondary authority on the law of stockbrokers and stock exchanges, the court said that in an action by the customer for conversion of his or her securities, the period of limitation commenced on the date of the conversion. The cause of action was complete. No tender or demand was necessary and the running of the statute could not be extended by making a tender and demand at a later date. Nor, the court concluded, was it necessary that the customer be informed of the fact that his or her securities had been converted, since the time started running even though he or she was ignorant of his or her rights (*44 Cal. App. 2d 386, 390-391)* .

[4] Additional Authorities

[a] Statute of Limitations Commences at Time of Conversion

In *Maheu v. CBS, Inc. (1988) 201 Cal. App. 3d 662, 247 Cal. Rptr. 304* , a former aide of the celebrated recluse Howard Hughes brought an action in 1985 against several defendants for, among other things, the alleged conversion of letters sent by Hughes to the aide over the course of many years. Plaintiff alleged that two of the defendants allegedly converted the letters in 1974, while other "media" defendants conspired to acquire the letters in 1977, resulting eventually in the 1984 publication of a book about Hughes. Plaintiff did not learn of the conversion until 1984. The trial court sustained demurrers, without leave to amend, to the causes of action based on conversion, and plaintiff appealed. The court of appeal affirmed. The court stated that both an action for conversion and an action for conspiracy based on conversion are subject to the three-year limitations period of *Code Civ. Proc. § 338(c)*. Normally, this statute commences to run from the date of the conversion, even though the injured person is ignorant of his or her rights, except when fraudulent concealment is alleged (*201 Cal. App. 3d 662, 673)* . In the case of an action for conspiracy

based on conversion, this statute commences to run from the date of the last overt act committed in pursuance of the conspiracy. The court rejected the argument that the last overt act in this instance was the publication of the book in 1984; this act did not involve conversion of the property but rather the diminution of its value. The court concluded that, because the latest alleged act relating to conversion of the property occurred no later than 1977, the causes of action based on conversion were barred by the statute of limitations (*201 Cal. App. 3d 662, 673-674)* .

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5-51 California Points & Authorities § 51.34

§ 51.34 Supporting Contention That Plaintiff's Consent to Taking of Personal Property Is Defense to Action for Conversion

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S CONSENT TO TAKING OF HIS/HER/ITS PERSONAL PROPERTY BY DEFENDANT IS A DEFENSE TO AN ACTION FOR CONVERSION.

Plaintiff's Consent to Taking of Personal Property Is Defense to Action for Conversion. A plaintiff who consented to the taking of his or her personal property by defendant cannot recover damages against the defendant in an action for conversion since consent is a complete defense to conversion (*see Klett v. Security Acceptance Co. (1952) 38 Cal. 2d 770, 789-790, 242 P.2d 873* ; *Wade v. Southwest Bank (1962) 211 Cal. App. 2d 392, 410, 27 Cal. Rptr. 337*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of defendant's contention in an action for conversion that plaintiff's consent to the taking of the personal property of plaintiff by defendant is complete defense to the action for conversion. The argument may be raised in response to a claim for damages for conversion of plaintiff's personal property by defendant.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing that defendant took plaintiff's personal property in response to or with plaintiff's consent.

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 51.45* may be used to oppose the contention supported by these

points and authorities.

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which the substantive issue arises; for example, this form may be used in support of a demurrer or a motion for a summary judgment, when counsel wishes to assert that plaintiff consented to the taking of the personal property by defendant, and therefore defendant has a complete defense to the action for conversion. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

For further discussion of the defense of consent in relation to conversion, see California Forms of Pleading and Practice, Ch. 150, *Conversion* (Matthew Bender).

[3] Discussion of Authorities

[a] Plaintiff's Consent to Taking of Personal Property Is Defense to Action for Conversion

Plaintiff in ***Klett v. Security Acceptance Co.*** *(1952) 38 Cal. 2d 770, 242 P.2d 873* , brought an action against defendant for, among other things, conversion of certain furniture from plaintiff's retail store. Plaintiff, facing financial difficulties, arranged with defendant that he would pay defendant 90 percent of the wholesale purchase price of various major-item furniture for purpose of sale at plaintiff's store. Defendant secured its interest in the property by executing a trust receipt agreement with plaintiff in which the property was held by plaintiff in trust for defendant with plaintiff having the right to sell the items subject to the agreement but obligated to immediately turn over the secured portion of the proceeds of any sale. Under the terms of the agreement, defendant had the right, on default of plaintiff for failure to pay any monies due, to all monies secured immediately due and payable and to forfeiture of plaintiff's interest in the property in cancellation of any remaining debt. Approximately one year after the trust receipts agreement, plaintiff became delinquent in payments, and defendant demanded full payment on all amounts due, or that plaintiff surrender possession of all property subject to the security agreement. On plaintiff's failure to pay, defendant informed plaintiff that it would take all the property subject to the agreement as well as other property not subject to the agreement equal in value to the furniture sold without delivery of the proceeds to the sale to defendant. Plaintiff agreed to the arrangement and cooperated with defendant's agents in removal of the subject property. Defendant subsequently sold the property in satisfaction of the debt. The trial court entered judgment in favor of defendant, and plaintiff appealed, contending, among other things, that the sale of the furniture was an act of conversion.

The Supreme Court, in affirming the judgment of the trial court, rejected plaintiff's contention that the sale of the property constituted conversion. The Court concurred with the trial court's finding that plaintiff had consented to the taking of the property in question. Since plaintiff consented to the taking of the furniture, the Court stated, defendant's taking of the property was not a conversion and plaintiff's contentions were without merit (*38 Cal. 2d 770, 789-790)* .

Wade v. Southwest Bank *(1962) 211 Cal. App. 2d 392, 27 Cal. Rptr. 337* , involved consolidated actions for conversion against defendant bank and defendant moving and storage company for conversion of certain motion picture equipment purchased by plaintiff's actress wife. Plaintiff claimed that the property belonged to him and was wrongfully taken from his studio-residence. Plaintiff had become bankrupt and was also involved in divorce proceedings. Defendant held a note signed by defendant bank and his wife that was secured by the subject property, and plaintiff was unable to pay it. Because plaintiff declared the property to be community property, the bank became concerned and suggested, as an alternative to foreclosure, that the property be placed in storage pending the outcome of divorce proceedings and plaintiff's ability to pay on the note. Defendant bank, through its agents, hired defendant moving and storage company and prepared a written consent for plaintiff to sign, although it was felt that a signed consent was not necessary. Plaintiff refused to sign, saying that the property was all his wife's; however, evidence produced at trial, though contradicted to some extent by plaintiff and his later reconciled wife, tended to show that plaintiff cooperated with the movers by assisting in preparation and attachment of tags and markers to the equipment taken from both the studio and adjoining residence. The trial court entered judgment for defendants, and plaintiff appealed, contending that

the trial court erred in finding that plaintiff consented to the taking of the property from the studio-residence, and that the consent obtained for the property was obtained through fraud and misrepresentation. Plaintiff asserted that any consent given was done so with the understanding that plaintiff would have access to the property; however, only plaintiff's wife and her attorney were listed as persons authorized to have access to the property.

The court of appeal affirmed the judgment of the trial court, implying that the evidence in the case supported its finding that plaintiff consented to the taking of the property for safekeeping rather than subjecting the property to foreclosure and therefore no conversion took place. In discussing what constituted a valid consent, the court said, in response to plaintiff's claims concerning the nature of the evidence, that consent in law was more than a mere formal act of the mind. Citing prior California law and other authorities, the court stated that consent in law means a voluntary agreement by a person in the possession and exercise of sufficient mentality to make an intelligent choice, or to do something proposed by another. Consent, the court added, differed from assent, in that consent implied some positive action and involved submission, while assent meant mere passivity and submission without consent. Consent, the court continued, could be given directly by voice or in writing, or it could be implied as manifested by signs, actions, or facts, or by inaction or silence, from which an inference arises that the consent has been given (*211 Cal. App. 2d 392, 406)* . As to plaintiff's contention that the consent was obtained by fraud, the court said that plaintiff failed to raise this issue in his complaints or in the proceedings at trial, and the court refused to discuss the issue (*211 Cal. App. 2d 392, 410)* .

[4] Additional Authorities

[a] Plaintiff's Consent to Taking of Personal Property Is Defense to Action to Conversion

French v. Smith Booth Usher Co. (1942) 56 Cal. App. 2d 23, 131 P.2d 863 , involved an action for, among other things, conversion of cement hauling equipment that was subject to a conditional sales contract and repossessed by defendant on plaintiff's default on a note secured by the subject property. Defendant contended that plaintiff has consented to the taking of the property since he could not make the payment due and demanded on the note. The court of appeal, in affirming the judgment of the trial court for defendant, stated that to constitute conversion, nonconsent to the possession and disposition of the property by defendant is indispensable. If an owner expressly or impliedly assented to or ratified the taking, use, or disposal of the property, he or she cannot recover damages for conversion of the property. Plaintiff's consent, the court concluded, needed no consideration, since his act of consent merely prevented defendant's acts from becoming a conversion, and was not a making of a contract (*56 Cal. App. 2d 23, 27-28)* .

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§ 51.35 Supporting Contention That Plaintiff Required to Make Demand for Return of Property Before Bringing Action for Conversion

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

WHEN DEFENDANT LAWFULLY ACQUIRED POSSESSION OF PLAINTIFF'S PERSONAL PROPERTY WITH CONSENT OF OWNER, PLAINTIFF MUST MAKE A DEMAND ON THE DEFENDANT FOR RETURN OF THE PROPERTY IN ORDER TO CREATE A LIABILITY FOR CONVERSION OF THE PROPERTY ON THE PART OF DEFENDANT.

Plaintiff Required to Make Demand for Return of Property Before Bringing Action for Conversion. When a defendant lawfully acquires possession of property with the consent of the owner, demand for its possession is necessary to create a liability for conversion or unlawful withholding of the property (*Flennaugh v. Heinrich (1948) 89 Cal. App. 2d 214, 221-222, 200 P.2d 580*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of defendant's contention in an action for conversion that plaintiff is required under the facts of the case to make a demand that defendant return the property in question in order to create defendant's liability for conversion of the property. The argument may be raised in response to a complaint that defendant converted or wrongfully withheld the property of the plaintiff.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing that the defendant originally acquired the property with the consent of the owner and that plaintiff has failed to make a demand for the return of the property from the defendant.

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific

procedural context in which the substantive issue arises; for example, this form may be used in support of a demurrer or a motion for a summary judgment, when counsel wishes to assert that plaintiff cannot maintain an action for conversion since he or she made no demand of the defendant for return of the property as required when possession of the property was lawfully acquired with the consent of the owner. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 51.46* and *51.47* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Plaintiff Required to Make Demand for Return of Property Before Bringing Action for Conversion

Plaintiff in ***Flennaugh v. Heinrich*** *(1948) 89 Cal. App. 2d 214, 200 P.2d 580* , brought an action for conversion of trucks and hauling equipment used by plaintiff as a trucker of farm produce. Defendant paid in full certain notes owed by plaintiff to a bank and received an assignment of plaintiff's chattel mortgage on the trucks and other hauling equipment. Plaintiff executed and delivered powers of attorney to defendant authorizing defendant to sign and transfer the certificates of ownership of the vehicles, and ratifying any action defendant might take with respect to the transfers of title. Defendant also, on plaintiff's request, paid for the insurance on plaintiff's vehicles that were used for hauling produce and that were subject to the chattel mortgage. One vehicle and trailer was involved in an accident and removed to a repair shop. Plaintiff, relying on defendant to pay for repair bill nonetheless requested the repair shop to release the vehicles to him in the event that he was able to raise the necessary money. In answer, the repair shop merely indicated that it understood that the truck and trailer were insured by defendant and belonged to him. Thereafter, plaintiff never saw defendant about recovery of the truck and trailer and never made any demand on him for their possession. Plaintiff also instructed his employee to deliver another truck todefendant, who would see to it that it would be repaired. Plaintiff never made any demand for the return of this truck; rather, he testified that he sold the truck to defendant in return for defendant's paying a certain debt of plaintiff's. The trial court found that defendant had converted plaintiff's property and entered judgment for plaintiff on that issue. Defendant appealed.

The court of appeal reversed the judgment of the trial court on the issue of conversion. The trial court's findings, the court said, were inadequate to support the judgment on the theory of unlawful conversion of plaintiff's properties because there was no allegation or proof that plaintiff demanded a return of the properties before bringing the action for conversion. The court stated that, when, as in this case, a defendant lawfully acquires possession of property with the consent of the owner, demand for its possession is necessary to create a liability for conversion (*89 Cal. App. 2d 214, 222)* . The truck and trailer that had been involved in the accident were removed to a repair shop and left there by plaintiff. With plaintiff's knowledge and consent, defendant had paid the insurance premiums on the vehicles and had incurred the obligation to pay for their repairs. Although the repair shop had a mechanic's lien on the property, plaintiff never demanded that defendant have the property delivered to plaintiff. With respect to the other truck left with defendant, plaintiff instructed that the truck be taken to defendant, that he knew it was there, and that he had agreed with defendant for defendant's purchase of it in return for payment of plaintiff's debt to a bank. Plaintiff never sought return of this equipment from defendant (*89 Cal. App. 2d 214, 221)* . Consequently, since no demand was ever made for the return of any of the subject property, there was no conversion by defendant (*89 Cal. App. 2d 214, 222)* .

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5-51 California Points & Authorities § 51.36

§ 51.36 Supporting Contention That Plaintiff's Waiver of Interest in Property Is Bar to Recovery for Conversion

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S WAIVER OF HIS/HER/ITS INTEREST IN THE PROPERTY ALLEGED TO HAVE BEEN CONVERTED CONSTITUTES A BAR TO RECOVERY IN AN ACTION FOR CONVERSION.

Plaintiff's Waiver of Interest in Property Is Bar to Recovery for Conversion. Evidence of plaintiff's waiver of his or her interest in property in relation to defendant is sufficient to support a finding that defendant is not liable for conversion of that property (*see Eistrat v. Western Hardwood Lumber Co. (1958) 164 Cal. App. 2d 374, 381, 330 P.2d 629*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of defendant's contention in an action for conversion that under the facts of the case plaintiff's waiver of his or her interest in the property in question may be used as a defense to an action for conversion of that property. The argument may be raised in response to a complaint that defendant converted or wrongfully withheld plaintiff's property.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing that plaintiff, by his or her conduct, waived any interest in relation to defendant in the property in question and therefore plaintiff's waiver is a defense to the action for conversion.

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which the substantive issue arises; for example, this form may be used in support of a demurrer or a motion for a summary judgment, when counsel wishes to assert that plaintiff's waiver of his or her interest in the property in relation to defendant constitutes a defense to conversion of the property in question. The points and

authorities set forth in this form may also be adapted for use in a trial or appellate brief.

For further discussion of waiver as a defense in an action for conversion, see California Forms of Pleading and Practice, Ch. 150, *Conversion* (Matthew Bender).

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 51.48* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Plaintiff's Waiver of Interest in Property Is Bar to Recovery for Conversion

Eistrat v. Western Hardwood Lumber Co. *(1958) 164 Cal. App. 2d 374, 330 P.2d 629* , involved an action for conversion of lumber against a purchaser of the lumber from a lumber and logging company that had a agreement to cut and remove timber from plaintiff's timberlands. According to terms of the agreement, the logging company was required to pay weekly for timber cut during the previous week and comply with all the laws and regulations relating to logging. Furthermore, failure to make the weekly payments or comply with logging regulations would result in loss of cutting rights, and the logging company couldnot proceed to cut additional timber without written authorization from plaintiff. Plaintiff became dissatisfied with the logging company's inadequate fire protection and advised it to quit the premises. Defendant buyer had purchased considerable amounts of timber from the logging company before the notice to quit, and two occasions thereafter, took from plaintiff's land three loads of lumber previously ordered. A short time later, defendant purchaser made final payment to the logging company for its purchases. Subsequently, the logging company was unable to pay plaintiff money due, and plaintiff informed defendant's vice president of his intent to sue the logging company. When the logging company filed for bankruptcy, plaintiff requested and received defendant's help in establishing his claim against the logging company by supplying plaintiff with an account of the amount of lumber purchased from it. After the logging company's discharge in bankruptcy, plaintiff made his first and only demand on defendant for the return of the lumber that defendant had purchased and fully paid for, or its purchase price. The trial court, entered judgment for defendant finding that plaintiff had waived any rights he had against defendant.

The court of appeal affirmed the judgment of the trial court. Substantial evidence in the record, the court said, sustained the trial court's finding that plaintiff waived any rights he had against defendant purchaser for conversion, and elected to pursue his remedy against the logging company. He advised defendant purchaser of his intention to do so, and later sought and obtained defendant's assistance in his claim against the logging company in the bankruptcy court. The court observed that plaintiff had not made any demand on defendant purchaser for return of the property in question until after he had exhausted his remedies against the logging company and failed to satisfy his alleged claim (*164 Cal. App. 2d 374, 381)* .

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5-51 California Points & Authorities § 51.37

§ 51.37 Supporting Contention That Plaintiff Equitably Estopped From Asserting Title to Property Not Entitled to Recover for Conversion

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF IS EQUITABLY ESTOPPED FROM ASSERTING TITLE TO THE PROPERTY ALLEGEDLY CONVERTED AND THEREFORE MAY NOT RECOVER DAMAGES FOR CONVERSION OF THAT PROPERTY.

Plaintiff Equitably Estopped From Asserting Title to Property Not Entitled to Recover for Conversion. Plaintiff is not entitled to recover damages for conversion of his or her personal property when he or she is equitably estopped from asserting title to that property against defendant (*see Jessup v. Cattle Ctr., Inc. (1968) 259 Cal. App. 2d 434, 437-439, 66 Cal. Rptr. 361*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of defendant's contention in an action for conversion that under the facts of the case plaintiff is equitably estopped from asserting title to the property involved as to defendant and therefore is not entitled to recovery in an action for conversion. The argument may be raised in response to a complaint that defendant converted or wrongfully withheld plaintiff's property.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing that plaintiff is equitably estopped from asserting title to the property in question against defendant and that plaintiff cannot therefore recover for conversion.

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which the substantive issue arises; for example, this form may be used in support of a demurrer or

a motion for a summary judgment, when counsel wishes to assert that the plaintiff is equitably estopped from asserting title to the property in question against defendant and therefore is not entitled to recover for conversion. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

For further discussion of equitable estoppel as a defense in an action for conversion, see California Forms of Pleading and Practice, Ch. 150, *Conversion* (Matthew Bender).

[3] Discussion of Authorities

[a] Plaintiff Equitably Estopped From Asserting Title to Property Not Entitled to Recover for Conversion

Plaintiffs in ***Jessup v. Cattle Ctr., Inc.*** *(1968) 259 Cal. App. 2d 434, 66 Cal. Rptr. 361* , brought an action against defendants for fraud and conversion of certain cattle sold to defendant dealer and auctioned off by defendant auctioneer. Defendant dealer paid for his purchase of the cattle by a draft known by him to be drawn on insufficient funds, and consigned the cattle to defendant auctioneer to be sold. Defendant auctioneer sold the cattle to bona fide purchaser and delivered the proceeds of the sale to defendant dealer. Some evidence in the case tended to show that defendant auctioneer knew that defendant dealer's bank had discontinued giving him credit. Evidence also showed that plaintiffs had the cattle inspected, that an official brand inspection certificate showing purchase of the cattle by defendant dealer was issued, and that the plaintiffs knew the cattle wereshipped to defendant auctioneer's stockyard on consignment for the account of defendant dealer. The trial court concluded that plaintiffs were estopped by their conduct from asserting title to the cattle against defendant auctioneer and entered judgment for him as to the action for conversion. Plaintiffs thereafter appealed.

The court of appeal, in affirming the judgment of the trial court on the issue of conversion, found that there was sufficient evidence in the case to support the trial court's finding that plaintiffs were estopped from asserting title to the cattle as against defendant auctioneer. The court stated that although plaintiffs were ignorant of the fact that the draft given to them would not be honored by the drawer bank, they knew that they were accepting a draft, payable at a later time, yet immediately parted with possession of their cattle. This conduct, the court continued, clothed the purchaser with the indicia of title. However, in relation to defendant auctioneer, plaintiffs were in the better position to inquire into their buyer's ability to honor his draft, whereas defendant auctioneer, who dealt with many dealers with large amounts of cattle, could not reasonably be expected to investigate the exact terms of the purchase of each lot of cattle presented to it. Citing prior California law, the court stated that a bona fide purchaser for value who takes cattle directly or indirectly from an auctioneer is not liable in conversion to the true owner who has been defrauded by accepting a bad check. In the present case, the court held, that the trial court correctly ruled that plaintiffs were not entitled to recover for conversion of their cattle from the innocent auctioneer on the ground of equitable estoppel. Plaintiffs, the court held, knew that: (1) the cattle were to be sent to defendant auctioneer on consignment for the account of their purchaser; (2) by transferring their property to the buyer and placing their cattle in the stream of commerce for immediate sale, plaintiffs acted in such a manner that defendant auctioneer could reasonably believe that they intended their conduct to be acted on; (3) defendant auctioneer was ignorant of the fact that the dealer had paid for the cattle with a draft written on insufficient funds; and (4) defendant auctioneer accepted the cattle in the regular course of business, and in reliance of defendant dealer's possession, the brand certificate, and shipping orders, sold the cattle at auction and accounted to defendant dealer for the receipts (*259 Cal. App. 2d 434, 437-438)* .

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5-51 California Points & Authorities § 51.38

§ 51.38 Supporting Contention That Defendant Is Not Liable for Conversion--Defendant Took Possession as Personal Representative of Decedent's Estate in Good Faith Belief That Property Was Part of Decedent's Estate [Prob. Code § 9651(c)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS NOT LIABLE TO PLAINTIFF FOR TAKING POSSESSION OF THE PROPERTY WHICH IS THE SUBJECT OF THIS ACTION BECAUSE DEFENDANT TOOK POSSESSION IN GOOD FAITH AS A PERSONAL REPRESENTATIVE OF A DECEDENT'S ESTATE AND REASONABLY BELIEVED THAT THE PROPERTY WAS PART OF DECEDENT'S ESTATE.

Personal Representative Is Not Liable for Taking Possession of Property in Good Faith Belief That It Is Part of Decedent's Estate. A personal representative who in good faith takes into possession real or personal property, and reasonably believes that the property is part of the estate of the decedent, is not civilly liable to any person for so doing (*Prob. Code § 9651(a)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of defendant's contention in an action for conversion that defendant is not civilly liable for taking possession of the property that is the subject of the action since he or she did so in good faith as the personal representative of a decedent's estate, and reasonably believed that the property was part of the decedent's estate [*see Prob. Code § 9651(a)*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include facts establishing the reasonable efforts taken by defendant to determine the true nature of, and title to, the property taken into possession [*see Prob. Code § 9651(b)*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the personal representative's immunity based on his or her good faith belief that the property was part of his or her decedent's estate. They may also be adapted for use in a trial or appellate brief.

[3] Discussion of Authorities

[a] Personal Representative Is Not Liable for Taking Possession of Property in Good-Faith Belief That It Is Part of Decedent's Estate

Prob. Code § 9651 provides civil immunity for the reasonable good faith taking of property by one acting as a personal representative of a decedent's estate, and provides that a personal representative must make reasonable efforts to determine the true nature and title of property that it takes into possession under the belief that it is part of a decedent's estate [*Prob. Code § 9651(a), (b)*]. In addition, it provides that a personal representative who good faith takespossession of real or personal property is entitled, during that possession, to the rents, issues, and profits from the property. If the property is later determined not to be property of the estate, the representative must deliver, or cause to be delivered, possession of the property to the person or persons legally entitled to it, together with all rents, issues, and profits from the property received by the representative, less any expenses incurred in the protection and maintenance of the property and in the collection of the rents, issues, and profits. The representative may request court approval before delivering the property [*Prob. Code § 9651(c)*].

The court may allow the representative and reasonable compensation for services rendered in connection with the duties of *Prob. Code § 9651* as to property later determined not to be property of the decedent's estate, if the court finds either that the services were of benefit to the estate or that the services were essential to the preservation, protection, and maintenance of the property. If compensation is awarded because the services benefitted the estate, the fees are a proper expense of administration. If compensation is awarded because the services were essential to the preservation, protection, and maintenance of the property, the expense is deductible from the rents, issues, and profits received by the representative, or if those are insufficient, are a lien on the property [*Prob. Code § 9651(d)*].

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5-51 California Points & Authorities § 51.39

§ 51.39 Supporting Contention That Defendant Is Not Liable for Conversion--Defendant Delivered Decedent's Tangible Personal Property to Surviving Spouse, Relative, or Conservator or Guardian of Estate [Prob. Code § 330]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS NOT LIABLE TO PLAINTIFF FOR ANY LOSS OR DAMAGE TO THE DECEDENT'S PROPERTY CAUSED BY THE PERSON TO WHOM DEFENDANT DELIVERED THE PROPERTY, BECAUSE DEFENDANT REQUIRED REASONABLE PROOF OF THE STATUS AND IDENTITY OF THE PERSON TO WHOM THE PROPERTY WAS DELIVERED, DEFENDANT KEPT A PROPER RECORD OF THE DELIVERY, AND DEFENDANT HAD NO REASON TO BELIEVE THERE WAS ANY DISPUTE OVER THE RIGHT TO POSSESSION OF THE PROPERTY AT THE TIME OF DELIVERY OF THE PROPERTY.

Defendant Is Immune From Liability for Loss or Damage to Property of Decedent Because Property Was Properly Delivered and Statutory Requirements Were Met. If a public administrator, government official, law enforcement agency, the hospital or institution in which the decedent died, or the decedent's employer delivers the property of the decedent to the decedent's surviving spouse, relative, or the conservator or guardian of the estate, with no knowledge or reason to believe that there is a dispute of the right to possession of the property, after requiring reasonable proof of the status and identity of the person to whom the property is delivered, he or she will not be liable for loss or damage to the property caused by the person to whom the property is delivered (*Prob. Code § 330*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of defendant's contention in an action for conversion that defendant is not civilly liable for any loss or damage to property caused by a person to whom defendant delivered the property of a decedent when defendant has met all the statutory requirements [*see Prob. Code § 330*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include facts establishing that he or she was one of the parties specified by statute to deliver decedent's property after decedent's death, that the party to whom defendant delivered the property was a person specified by statute and one whom defendant identified by reasonable proof, that defendant had no reason to believe there was a dispute over the right to possession of the property, and that defendant kept appropriate records of the delivery, and status and identity of the person to whom the property was delivered [*see Prob. Code § 330(a)-(d), (f)*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the defendant's immunity on the basis of his or her performance of the statutory requirements for such immunity [*see Prob. Code § 330*]. These points and authorities may also be adapted for use in a trial or appellate brief.

[3] Discussion of Authorities

[a] Defendant Is Immune From Liability for Loss or Damage to Property of Decedent Because Property Was Properly Delivered and Statutory Requirements Were Met

Prob. Code § 330 provides that a public administrator, government official, law enforcement agency, hospital or institution where a decedent died, or the decedent's employer may, without the need to wait 40 days after death, deliver the tangible personal property of the decedent in its possession, including keys to the decedent's residence, to the decedent's surviving spouse, relative, or conservatoror guardian of the estate acting in that capacity at the time of death [*Prob. Code § 330(a)*]. Provided that the person delivering the property has no reason to believe there is a dispute over the property, that he or she requires reasonable proof of the identity and status of the person to whom the property is delivered, and that he or she keeps required records of the delivery, he or she is not liable for loss or damage to the property caused by the person to whom the property was delivered [*see Prob. Code § 330(b)-(d), (f)*].

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5-51 California Points & Authorities § 51.40

§ 51.40 Supporting Contention That Defendant Is Not Liable for Conversion--Defendant Took Possession to Protect Own Interests

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS NOT LIABLE TO PLAINTIFF FOR TAKING POSSESSION OF THE PROPERTY THAT IS THE SUBJECT OF THIS ACTION BECAUSE DEFENDANT DID SO FOR THE PURPOSE OF DEFENDING HIMSELF/HERSELF FROM _____ [*specify nature of threat to defendant's interests, e.g.,* PHYSICAL HARM], IN THE REASONABLE BELIEF THAT PLAINTIFF INTENDED TO HARM HIM/HER IN THAT MANNER, AND THAT THE HARM COULD SAFELY BE PREVENTED ONLY BY TAKING THE PROPERTY.

Conditional Privilege of Protection of Interests of Self or Another. One is privileged to commit an act that would otherwise be a conversion of a chattel in the possession of another, for the purpose of defending himself or herself, when he or she reasonably believes that the other person intends to cause injury to him or her, or that the injury is reasonably probable, and that the injury can be safely prevented only by taking possession of the chattel (*Church of Scientology v. Armstrong (1991) 232 Cal. App. 3d 1060, 1072, 283 Cal. Rptr. 917*).

[2] Comments

[a] Use of Form

This form of memorandum of points and authorities may be submitted in support of the contention that the defendant is not liable for conversion, based on the conditional privilege that protects one who took possession of the property in order to avert injury to himself or herself, with the reasonable belief that it was necessary to do so [*see Church of Scientology v. Armstrong (1991) 232 Cal. App. 3d 1060, 1072, 283 Cal. Rptr. 917]* .

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should describe the circumstances under which defendant took the property that is the

subject of the action, and show how defendant's own interests would have been injured had he or she not done so.

These points authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the conditional privilege of the protection of the interests of oneself or another. They may also be adapted for use in a trial or appellate brief.

[b] Related Pleading and Practice Forms

For discussion and forms relating to conversion generally, see California Forms of Pleading and Practice, Ch. 150, *Conversion* (Matthew Bender).

[3] Discussion of Authorities

In ***Church of Scientology v. Armstrong*** *(1991) 232 Cal. App. 3d 1060, 283 Cal. Rptr. 917* , a church sued a former church member who was seeking the return of documents taken by defendant, related injunctive relief, and a constructive trust over the property. The wife of the church's founder, who was the subject of the documents, filed a complaint-in-intervention, alleging causes of action for conversion and invasion of privacy, and declaratory and injunctive relief. Defendant's cross complaint sought damages for fraud, intentional infliction of emotional distress, libel, breach of contract, and tortious interference with contract. According to the evidence, which was found credible by the trial court, defendant had, at the time of the incidents subject to the action, been a dedicated church member for 12 years, and ultimately a member of one of its elite groups. At one point, fearing a raid by law enforcement agencies, church representatives ordered the shredding of a huge volume of church documents (regarding church-controlled organizations and financing). While shredding the documents, defendant reviewed biographical material concerning the church's founder, and requested permission to research it for a planned biography. Defendant became the official researcher, and, together with the author, eventually noticed discrepancies between the archive information and previous representations made concerning the founder. As a result, the church charged that defendant was openly criticizing the founder, and subjected defendant to a crude lie-detector test in an attempt to determine which materials he had delivered to the author. Defendant subsequently wrote a report urging accuracy in the materials published about the founder, and relating examples of factual inaccuracies in previous publications. Shortly thereafter, he and his wife left the church, surreptitiously moving their possessions from the church premises because they knew that persons attempting to leave were locked up, subjected to security checks, and forced to sign promissory notes to the church, confessions of "blackmailable" material obtained from their personal files, and incriminating documents. Two months later, the church in effect labeled defendant an enemy of the church, and charged that he hadtaken an unauthorized leave, was spreading destructive rumors about senior church officials, and secretly planned to leave the church. Defendant was consequently subjected to the "Fair Game Doctrine" of the church, which permits a person to be "tricked, sued or lied to or destroyed ...#x2026; [or] deprived of property or injured by any means" by any church member. During that time, the church confiscated photographs of the founder that defendant had arranged to sell. When defendant demanded return of the photographs, he was ordered from church property and told to get an attorney. He then received a letter from the church counsel threatening him with a lawsuit, and became aware that private investigators were watching his house and following him. Defendant feared that his life and the life of his wife were in danger, and that he would be made the target of costly and harassing lawsuits. He therefore took a number of documents from the author and sent them to his attorney. After the commencement of the instant action, defendant was pushed or shoved by one of the church's investigators. In later incidents, an investigator, driving a vehicle, struck defendant's elbow, pulled in front of defendant on the freeway and slammed on his brakes, and crossed a lane as if to push him off the road. Plaintiff asserts that the investigators were hired solely to retrieve the documents taken by defendant.

After trial on the complaint and complaint-in-intervention, the court found in favor of defendant, awarding him costs and disbursements. The cross action filed by defendant was settled and dismissed, and the record was sealed pursuant to a stipulation by the parties. Plaintiffs appealed the order dismissing their action with prejudice. Two years later, a plaintiff in another action against the church intervened, seeking access to the sealed record for the limited purpose of

preparing his own case. The trial judge had retired, and a different judge issued orders vacating the original sealing order, and opening the record to the general public. Plaintiffs appealed those orders. The court of appeal issued a stay order regarding the unsealing of the records, to the extent those orders applied to the general public, and protected the records from dissemination beyond that required by the plaintiff in the subsequent case for purposes of litigation. The appeals were consolidated.

The court of appeal affirmed the judgment for defendant, and reversed the order vacating the order sealing the trial court records (*232 Cal. App. 3d 1060, 1074)* . With respect to plaintiffs' causes of action for conversion, the court stated that, pursuant to Restatement (Second) of Torts § 261, one is privileged to commit an act that would otherwise be a trespass to or a conversion of a chattel in the possession of another, for the purpose of defending himself or herself, or a third person, against the other, under the same conditions that would afford a privilege to inflict a harmful or offensive contact on the other for the same purpose. For the purpose of defending his or her own person, an actor is privileged to make intentional invasions of another's interests or personalty when the actor reasonably believes that the other person intends to cause a confinement or a harmful or offensive contact to the actor, or that the invasion of his or her interests is reasonably probable, and the actor reasonably believes that the apprehended harm can be safely prevented only by the infliction of harm on the other. A similar privilege is afforded an actor for the protection of certain third persons [*see* Restatement (Second) of Torts § 261, cmt. b]. The court noted that no reported California case had yet adopted these privileges, and held that the trial court had acted properly in doing so (*232 Cal. App. 3d 1060, 1072-1073)* . In its statement of decision, the trial court found that defendant believed that he and his wife were in danger, that is, that the church threatened to harm them physically, as well as file harassing lawsuits against them. He believed that the only way he could defend himself was to take the archive materials, which would corrobate his assertions about the founder and the church, and refute the allegations made against him; and that the only way the documents would remain secure for his future use was by his sending them to his attorneys. The court of appeal held that the trial court's findings were substantially supported by the evidence (*232 Cal. App. 3d 1060, 1073)* . (In its resolution of the issue regarding the sealing of the trial court records, the court of appeal vacated the second trial judge's order unsealing the records, because the time had expired for reconsideration of the order sealing the documents; the court of appeal also held, however, that the record on appeal was not subject to sealing, absent further and particularized showing for doing so (*232 Cal. App. 3d 1060, 1068-1071)* .)

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5-51 California Points & Authorities § 51.41

§ 51.41 Supporting Contention That Defendant Is Not Liable For Conversion--Bank Not Liable For Mortgage Loan Broker's Conversion of Note Payments Deposited in Bank Trust Accounts

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

THE BANK IS NOT LIABLE FOR THE MORTGAGE LOAN BROKER'S CONVERSION OF NOTE PAYMENTS DEPOSITED IN BANK TRUST ACCOUNTS BECAUSE THE BANK HAS NO DUTY TO MONITOR TRUST ACCOUNTS FOR BREACHES OF FIDUCIARY DUTY.

A. *Financial Code Section 952*. Notice to any bank of an adverse claim to a deposit standing on its books to the credit of any person shall be disregarded, and the bank, notwithstanding the notice, shall honor the checks, notes, or other instruments requiring payment of money by or for the account of the person to whose credit the account stands without any liability on the part of the bank. (*Fin. Code § 952(a)*). This section shall be applicable even thought the name of the person appearing on the bank's books to whose credit the deposit stands or for whose account the property is held is modified by a qualifying or descriptive term such as "agent," "trustee," or other work or phrase indicating that the person maynot be the owner in his or her own right of the deposit (*Fin. Code § 952(c)*).

B. *Financial Code Section 953*. When the depositor of a commercial or savings account has authorized any person to make withdrawals from the account, the bank, in the absence of written notice otherwise, may assume that any check, receipt, or order of withdrawal drawn by such person in the authorized form or manner, including checks drawn to his or her personal order and withdrawal orders payable to him or her personally, was drawn for a purpose authorized by the depositor and within the scope of the authority conferred upon such person (*Fin. Code § 953*).

C. Banks Have No Duty to Prevent Breaches of Fiduciary Duty. Under governing principles of banking law, a bank has no duty to police fiduciary accounts so as to prevent breaches of fiduciary duty. Specifically, it has no duty to prevent commingling of assets in fiduciary accounts, to monitor fiduciary accounts for irregular transactions, to prevent improper disbursements from the accounts, or to conduct an investigation of possible misappropriation of funds (

Chazen v. Centennial Bank (1998) 61 Cal. App. 4th 532, 541, 71 Cal. Rptr. 2d 462 ; *Fin. Code § 952(a), (c)*; *Fin. Code § 953*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a bank is not liable for a mortgage loan broker's conversion of note payments deposited in bank trust accounts.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should provide facts showing the conversion of funds deposited in bank trust accounts by a fiduciary (i.e. mortgage loan broker) and argue that because it had no duty to monitor trust accounts for breaches of fiduciary duty, the bank may not share liability for the conversion.

[c] Related Pleading and Practice Forms

For discussion of damages resulting from the conversion of personal property, see California Forms of Pleading and Practice, Ch. 150, *Conversion* (Matthew Bender). For discussion, forms and procedures relating to general banking principles, see California Forms of Pleading and Practice, Ch. 95, *Banks, Deposits, and Checks* (Matthew Bender).

[d] Related Points and Authorities

For memoranda of points and authorities relating to banking, see Ch. 34, *Checks and Banks* .

[3] Discussion of Authorities

[a] Banks Have No Duty to Prevent Breaches of Fiduciary Duty

Chazen v. Centennial Bank *(1998) 61 Cal. App. 4th 532, 71 Cal. Rptr. 2d 462* was a consolidated appeal reviewing actions against the same defendant bank. Both complaints sought to hold the bank liable for the actions of a mortgage loan broker. Plaintiffs had purchased second mortgages through the loan broker who agreed to service the loans by collecting payments due and remitting them to plaintiffs. For this purpose he opened three accounts with he bank which were designated on the bank's signature card as "payment trust account," "custodial account," and "escrow account." The broker deposited note payments into the accounts and then withdrew substantial amounts for his own use, including much of the principal payments on a series of notes that were paid in full. Plaintiffs sued the broker for conversion. The bank demurred and the trial court sustained the demurrers.

The court of appeal affirmed, holding that because a bank has no duty to monitor trust accounts for breaches of fiduciary duty, the bank could not be held liable for the mortgage loan broker's conversion of note payments which were deposited in bank trust accounts (*61 Cal. App. 4th 532, 541)* . The court stated that under governing principles of banking law, a bank has no duty to police fiduciary accounts so as to prevent breaches of fiduciary duty. Specifically, it has no duty to prevent commingling of assets in fiduciary accounts, to monitor fiduciary accounts for irregular transactions, to prevent improper disbursements from the accounts, or to conduct an investigation of possible misappropriation of funds. Instead, the bank is obliged under *Financial Code Section 953* to honor withdrawals from fiduciary accounts by authorized persons who draw on the account in an authorized manner, and it is required by *Financial Code Section 952* to disregard notice of adverse claims to the account, including notice conveyed by circumstantial evidence or documents in the bank's possession, unless the claims are made through an appropriate affidavit or court order.

Citing dicta in *Blackmon v. Hale (1970) 1 Cal. 3d 548, 556, 83 Cal. Rptr. 194, 463 P.2d 418* , the court dismissed plaintiffs' argument that the bank is liable because it had actual or constructive knowledge of the misappropriation of trust funds. It opined that the *Blackmon* dicta should not be interpreted in a manner that would undermine the judicial principles and statutory mandates which relieve banks of any duty to police fiduciary accounts. It interpreted the dicta as a prudent judicial qualification recognizing that banks may in some extreme circumstances engage in wrongdoing affecting a fiduciary account that would merit the imposition of liability. However, it concluded that the following allegation was sufficient to state a conversion cause of action against the bank: that the bank caused disbursements from the trust accounts for the purpose of satisfying the loan broker's personal obligations to the bank and took a security interest in theTrust Accounts to secure the obligations (*61 Cal. App. 4th 532, 543)* .

California Points & Authorities

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5-51 California Points & Authorities § 51.42

§ 51.42 Opposing Contention That Plaintiff's Action for Conversion of Personal Property Is Barred by the Statute of Limitations--Fraudulent Concealment of Conversion Tolls Statute of Limitations

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

IN AN ACTION FOR CONVERSION, THE STATUTE OF LIMITATIONS DOES NOT COMMENCE TO RUN WHEN DEFENDANT HAS FRAUDULENTLY CONCEALED THE FACTS FROM PLAINTIFF UNTIL PLAINTIFF DISCOVERS OR OUGHT TO HAVE DISCOVERED THE EXISTENCE OF HIS/HER/ITS CAUSE OF ACTION FOR CONVERSION.

A. Fraudulent Concealment of Conversion Tolls Statute of Limitations. In an action for conversion, the statute of limitations does not commence to run when the defendant has fraudulently concealed the facts of the conversion from the plaintiff until the plaintiff has discovered or ought to have discovered the existence of his or her cause of action for conversion (*see Code Civ. Proc. § 338(d)*; *Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 559-563, 305 P.2d 20*).

[*Optional*] **B. Discovery of Whereabouts of Art or Artifact.** A cause of action for theft of any art or artifact does not accrue until the discovery of the whereabouts of the art or artifact by the aggrieved party, his or her agent, or the law enforcement agency which originally investigated the theft (Civ. Code § 338(c); *see Society of Cal. Pioneers v. Baker (1996) 43 Cal. App. 4th 774, 783, 50 Cal. Rptr. 2d 865*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to defendant's contention in an action for conversion that plaintiff's action is barred by the statute of limitations. This form states that when defendant has fraudulently concealed the facts of the conversion from the plaintiff, the statute of limitations does not commence to run until he or she has discovered, or ought to have discovered, the existence of the cause of action for conversion.

This form may be used in combination with other forms of memoranda either opposing defendant's contentions that plaintiff does not have a cause of action against defendant [*see, e.g., §§ 51.43 -51.48*], or supporting the contention that defendant converted the personal property of the plaintiff on the specific grounds asserted [*see, e.g., §§ 51.20 -51.24*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing that defendant fraudulently concealed from plaintiff the conversion of plaintiff's property and that plaintiff brought the action within three years after he or she discovered the existence of the cause of action for conversion.

This form may be used in opposition to the contention supported by the points and *authorities in § 51.33*.

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which the substantive issue arises; for example, this form may be used in opposition to a demurrer or a motion for summary judgment, when counsel wishes to respond to an assertion by defendant that plaintiff's action is barred by the three-year statute of limitations governing actions for conversion. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

[b] Related Pleading and Practice Forms

For discussion, forms, and procedures relating to opposing defendant's contention that the cause of action is barred by the statute of limitations generally, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda of points and authorities opposing defendant's contention that plaintiff's cause of action is barred by the statute of limitations generally, see Ch. 143, *Limitation of Actions* .

[3] Discussion of Authorities

[a] Fraudulent Concealment of Conversion Tolls Statute of Limitations

Plaintiff in ***Bennett v. Hibernia Bank*** *(1956) 47 Cal. 2d 540, 305 P.2d 20* , brought an act for declaration of rights in membership of defendant bank. In 1945, the bank filed an in rem suit to determine membership rights. The suit listed 15 named defendants together with all unknown persons claiming any right of membership. The only service given to the unknown defendants was through publication and posting. The trial court found that the 15 named defendants were the sole members and the only persons having any right or interest in its property and assets. In 1947, defendant reorganized itself under its current name with stock in the amount of $7 million divided among the 15 individual defendants named in the in rem suit. In 1951, plaintiffs, by court order, received the residue of a certain estate, which included a membership in defendant bank originally held by aCallaghan Curtin, and passed by right of succession to plaintiffs through Mary, his sole legatee. Thereafter, plaintiffs discovered that Curtin had been an early depositor in the bank, had signed certain bylaws of the bank in 1860, and had become a member of the bank. Plaintiffs also discovered the 1945 suit, the conversion of defendant into a stock bank, and the distribution of all its stock to the 15 named defendants in the suit. Plaintiffs filed their action in January, 1953, claiming that Mary had received no notice of the in rem suit and had no knowledge of its judgment.

The trial court sustained defendant's general demurrer without leave to amend. Plaintiffs thereafter appealed. In response, defendant claimed, among other things, that the statute of limitations in relation to plaintiffs' action began to run at the rendition of the judgment in the in rem suit in 1946, and that the running of the statute did not depend on plaintiffs' knowledge of the judgment. Defendants also contended that the complaint alleged facts constituting a conversion, and therefore the statute of limitations would have started to run at the time of the reorganization

proceedings of defendant bank in 1947.

The Supreme Court reversed the judgment of the trial court, holding that plaintiffs had stated facts sufficient to state a cause of action, that defendant knew of Curtin's membership in the bank and of his death leaving successors, that it knew of Mary's address, and that it knew, or in the exercise of reasonable diligence, could have discovered, that Mary was Curtin's successor. Addressing itself to the issue of whether or not plaintiffs' action was barred by the statute of limitations, the Court ruled that the suit was timely filed. The Court based its ruling on four similar rules. Directing its attention to actions by a shareholder or member of a corporation to establish his or her interest in a corporation, the Court, citing prior California law, stated that if lapse of time could bar this type of action, the statutory period did not commence to run until the stockholder had knowledge or notice that his or her rights were denied, or that his or her status was repudiated or controverted by the corporation (*47 Cal. 2d 540, 559)* . Similarly, the Court said, citing California case law and former Code Civ. Proc. § 338(4) [*now see Code Civ. Proc. § 338(d)*], in cases involving fraud or mistake, the statute of limitations commences to run when the plaintiff discovers he or she has a cause of action, or through reasonable diligence, should have discovered it (*47 Cal. 2d 540, 559-560)* . The Court also directed itself to defendant's contention that plaintiffs' allegations constituted a charge of conversion, and that the statute of limitations began to run as to any membership rights that Mary obtained from Curtin at the time of the reorganization proceedings of the bank in 1947. Ordinarily, the Court said, the statute of limitations that applies in conversion actions is former Code Civ. Proc. § 338(3) [*now see Code Civ. Proc. § 338(c)*], which begins to run from the date of the conversion even though the injured person is ignorant of his or her rights. This rule, the Court pointed out, citing prior California law, is not absolute. For example, when there has been a fraudulent concealment of the facts of the conversion, the statute of limitations does not commence to run until the aggrieved party discovers or ought to have discovered the existence of the cause of action for conversion (*47 Cal. 2d 540, 561)* . The Court noted that a fiduciary has a duty to make full disclosure of facts that materially affect the rights of the parties, and that any act by the fiduciary amounting to a conversion of trust property was akin to a fraudulent concealment. Moreover, the Court added, citing prior California law, the statute of limitations do not begin to run against an action for breach of a voluntary trust until there has been a repudiation of the trust that is brought home to the beneficiary (*47 Cal. 2d 540, 561-562)* . Consequently, the Court held, because of the existence of a fiduciary duty, a plaintiff need not disprove that an earlier discovery could have been made on a diligent inquiry, but need only show that he or she made an actual discovery of previously unknown information within the statutory period before filing the action. Therefore, plaintiffs' complaint, which alleged discovery of the facts within two years of the filing of the action, sufficiently alleged the circumstances of the discovery to meet the requirements that the cause of action be brought within three years after its discovery (*47 Cal. 2d 540, 561-564)* .

Counsel should note that the Supreme Court stated that the 1945 in rem action repudiated any claims to membership rights that Mary may have had in the defendant bank and that the complaint alleged that neither Mary nor any of the plaintiffs had any knowledge of the action prior to the death of Mary in 1951, and that therefore the applicable statute of limitations was former Code Civ. Proc. § 338(4) [*now see Code Civ. Proc. § 338(d)*] (*47 Cal. 2d 540, 560)* . The Court merely quoted from that statute without further elaboration. However, this statute normally applies only when fraud or mistake is the gravamen of the original action. Independent of that statute is the rule that when a defendant is guilty of fraudulent concealment of the cause of action, the statute is tolled until discovery and that on discovery, the statute applicable to the particular cause of action (in the case of conversion, former Code Civ. Proc. § 338(3) [*now see Code Civ. Proc. § 338(c)*]) then commences to run [*see Kimball v. Pacific Gas & Elec. Co. (1934) 220 Cal. 203, 210, 30 P.2d 39* ; *see also Pashley v. Pacific Elec. Ry. Co. (1944) 25 Cal. 2d 226, 229, 153 P.2d 325]* .

In ruling that the same rules apply to pleading fraudulent concealment of a cause of action as to pleading facts to avoid the bar of the statute of limitations in cases of fraud in general, the Supreme Court has determined that the complaint must allege (1) when the fraud was discovered, (2) the circumstances under which it was discovered, and (3) facts showing that plaintiff is not at fault in failing to discover the fraud sooner and that plaintiff has no actual or presumptive knowledge of facts sufficient to put him or her on inquiry [*see Kimball v. Pacific Gas & Elec. Co. (1934) 220 Cal. 203, 215, 30 P.2d 39]* .

[b] Discovery of Whereabouts of Art or Artifact

In ***Society of Cal. Pioneers v. Baker*** *(1996) 43 Cal. App. 4th 774, 50 Cal. Rptr. 2d 865* , plaintiff brought a conversion action with regard to an antique cane handle. The trial court determined that the current version of *Civ. Code § 388(c)*, the statute of limitations, did not apply, and thus applied a prior version of the statute which did not contain a discovery provision. Concluding that the action was barred, the trial court granted a defense motion for nonsuit.

The court of appeal found that the amended version of *Civ. Code § 388(c)* applied, so that the action did not accrue until plaintiff discovered the whereabouts of the cane handle (*43 Cal. App. 4th 774, 783)* . The court then noted that no facts were produced indicating that plaintiff had actual notice or knowledge of any facts that would have imputed constructive notice of the location of the stolen item or to a line of further inquiry that would have led to notice or knowledge (*43 Cal. App. 4th 774, 786)* . Concluding that whether the correct standard is actual or constructive notice, plaintiff could not have been charged with notice of the location of the item more than three years before the action was commenced, the court reversed the judgment of nonsuit.

[4] Additional Authorities

[a] Fraudulent Concealment of Conversion Tolls Statute of Limitations

Strasberg v. Odyssey Group, Inc. (1996) 51 Cal. App. 4th 906, 59 Cal. Rptr. 2d 474 , involved the conversion of certain personal effects of Marilyn Monroe. Ms. Monroe bequeathed all her personal effects to her acting coach, who subsequently bequeathed them to plaintiff. However, Ms. Monroe's business manager retained certain documents and personal items that had belonged to Ms. Monroe, and neither identified these items to the probate court nor turned them over to the proper heir. These items eventually came into the possession of the manager's nephew, who believed that his aunt had rightfully owned them either because Ms. Monroe had given them to her prior to her death or because the acting coach had not wanted them. The nephew then consigned the items to defendant, an auction house, and the items were prepared for auction. Plaintiff learned of the auction and filed suit for conversion and constructive trust. Defendants demurred and moved for summary judgment, contending that the action was barred by the statute of limitations. The trial court denied the motions, and entered a judgment imposing a constructive trust following a jury determination that the items had been wrongfully converted. The court of appeal affirmed, stating that where there has been a fraudulent concealment of the facts the statute of limitations does not commence to run until the aggrieved party discovers or ought to have discovered the existence of the cause of action for conversion (*51 Cal. App. 4th 906, 916)* . The court rejected an argument that the statute of limitations was triggered when the manager failed to disclose the personal effects to the probate court, reasoning that repudiation of a trust is not effective until the fact of repudiation is brought home to the beneficiary (*51 Cal. App. 4th 906, 917)* . Similarly, the court rejected an argument that the cause of action accrued when the manager's nephew took possession of the items, reasoning again that since plaintiff had no knowledge of the property there was no responsibility to take action to enforce the right to the property (*51 Cal. App. 4th 906, 918)* .

Bartlett v. Pacific Nat'l Bank (1952) 110 Cal. App. 2d 683, 244 P.2d 91 , involved an action for conversion of attorney's fees due under a contract. Defendant bank held certain monies received from the Reconstruction Finance Corporation for distribution to certain bondholders and had informed plaintiff that it would respect his notices and demands for one-forth of the amount by withholding sufficient monies for him before distribution. In affirming the judgment of the trial court, the court rejected defendant's contention that the statute of limitations barred plaintiff's action. Ordinarily, the court stated, the statute of limitations runs from the date of conversion and lack of knowledge by the injured party does not toll the statute. However, the court held, defendant's actions in fraudulently representing to plaintiff that it would withhold money due him, and its fraudulent concealment of the conversion of the money by distributing all of the money held to the bondholders brought the case within the rule that when the defendant was guilty of fraudulent concealment on the cause of action, the statute of limitations did not become operative until the aggrieved party discovered its existence (*110 Cal. App. 2d 683, 694)* .

[b] Discovery of Whereabouts of Art or Artifact

In *Naftzger v. American Numismatic Soc'y (1996) 42 Cal. App. 4th 421, 49 Cal. Rptr. 2d 784* , a museum sought to recover coins which had been stolen prior to 1970, before a 1983 amendment to *Code Civ. Proc. § 338(c)*. Defendant, who had purchased the coins from the alleged thief, refused to return the coins, and entered a demurrer to the museum's complaint to quiet title. The trial court sustained the demurrer, finding that the current version of *Code Civ. Proc. § 338(c)* should not apply retroactively to the case, since the coins were stolen before the effective date of an applicable 1983 amendment, and that under the former version of the statute the museum's cause of action accrued on the date of the theft. The museum appealed, and the court of appeal reversed, agreeing with the museum that under the pre-1983 version of the statute, the limitation period did not accrue at the time of the theft. The court noted that the general principles regarding when a cause of action accrues are that it accrues on the date of injury, or upon the occurrence of the last element essential to the cause of action (*42 Cal. App. 4th 421, 428)* . Since the thief fraudulently concealed the taking, the limitations period for prosecuting the thief did not commence until the crime was discovered. The court reasoned that it would be inconsistent to bar the museumfrom suing defendant when the criminal limitations period against the thief did not commence until the crime was discovered (*42 Cal. App. 4th 421, 429)* . The court noted that in a conversion situation, the owner can immediately sue the person who was originally entrusted with possession because the identity of that person is known. However, in a theft situation, the owner cannot sue the thief or the innocent purchaser prior to discovering their identities (*42 Cal. App. 4th 421, 431)* . The court ultimately held that the museum's cause of action, based on the prior version of *Code Civ. Proc. § 338(c)*, did not accrue until the museum discovered the identity of the person in possession of the property (*42 Cal. App. 4th 421, 433)* . The court also rejected a contention by the defendant that it could not imply a discovery rule when there was none stated in the pre-1983 version of the statute, stating that a discovery rule may be implied by judicial decision (*42 Cal. App. 4th 421, 434)* .

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5-51 California Points & Authorities § 51.43

§ 51.43 Opposing Contention That Plaintiff's Action for Conversion of Personal Property Is Barred by the Statute of Limitations-- Cause of Action Does Not Accrue Until Owner Learns of Conversion When Original Taking Lawful

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

IN AN ACTION FOR CONVERSION, THE STATUTE OF LIMITATIONS DOES NOT COMMENCE TO RUN UNTIL THE OWNER OF PROPERTY ORIGINALLY TAKEN LAWFULLY HAS DEMANDED RETURN OF THE PROPERTY AND THERE HAS BEEN A REFUSAL, OR UNTIL A REPUDIATION OF THE OWNER'S TITLE HAS BEEN CLEARLY AND UNEQUIVOCALLY BROUGHT HOME TO HIM/HER/IT.

Cause of Action Does Not Accrue Until Owner Learns of Conversion When Original Taking Lawful. When the original taking is lawful, the statute of limitations is not set in motion until the return of the property has been demanded and refused, or until a repudiation of the owner's title is clearly and unequivocally brought home to him or her (*Bufano v. City & County of San Francisco (1965) 233 Cal. App. 2d 61, 70-71, 43 Cal. Rptr. 223* ; *Niiya v. Goto (1960) 181 Cal. App. 2d 682, 688-690, 5 Cal. Rptr. 642*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to defendant's contention in an action for conversion that plaintiff's action is barred by the statute of limitations. This form sets forth the point that when the original taking of plaintiff's property was lawful, the statute of limitations does not commence to run until the owner's demand for return of the property has been refused, or until a repudiation of the owner's title is clearly and unequivocally brought to his or her attention.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing that the original taking by defendant of the personal

property was lawful, that the plaintiff made a demand for the return of the property and was refused, or that plaintiff learned that the property was converted, and that subsequently the plaintiff brought his or her action for conversion within three years of the refusal or the knowledge that his or her title in the property had been repudiated.

This form may be used in opposition to the contention supported by the points and *authorities in § 51.33*.

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which the substantive issue arises; for example, this form may be used in opposition to a demurrer or a motion for summary judgment, when counsel wishes to respond to an assertion that plaintiff's action is barred by the statute of limitations because it was not brought within three years of the taking of the property. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

[b] Related Pleading and Practice Forms

For discussion, forms, and procedures relating to the statute of limitations generally, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda of points and authorities opposing defendant's contention that plaintiff's cause of action is barred by the statute of limitations generally, see Ch. 143, *Limitation of Actions* .

[3] Discussion of Authorities

[a] Cause of Action Does Not Accrue Until Owner Learns of Conversion When Original Taking Lawful

Plaintiff in ***Bufano v. City & County of San Francisco*** *(1965) 233 Cal. App. 2d 61, 43 Cal. Rptr. 223* , brought an action against defendant city for conversion of two granite statues. The city alleged that plaintiff's cause of action was barred by the statute of limitations because the conversion occurred in 1942 and plaintiff did not bring his action until 1962. Evidence produced at trial showed that plaintiffwas one of a number of artists employed as a sculptor by the Works Progress Administration (WPA) before World War II. Plaintiff's project was sponsored by the city and plaintiff and other artists produced works only at the request of the sponsoring entity. The work was part time, and plaintiff and other artists would also use the project studios to work on items other than WPA art projects. Plaintiff lent WPA a sculpture entitled Torso for exhibition. Because he did not have his own studio, plaintiff stored Torso, and another work in progress, Bear, at the studio. After the beginning of World War II, the federal government terminated WPA. The WPA art project studio, together with all items in the studio, including Bear and Torso, were turned over to the city. The city art commission approved by resolution the allocation of the property to defendant. At that particular time, plaintiff was in Washington D.C. Plaintiff acquiesced in the city's possession of the items and from time to time knew that they were exhibited by the city. Although the city asserted title to Torso and other works exhibited, evidence showed that many of the art works were not property of the city but were on loan. In 1961, the Board of Supervisors of defendant city passed a resolution allowing plaintiff access to certain city property where Bear was placed in order for him to work on it. However, plaintiff became concerned that language in the resolution indicated that the property inured to the benefit of the city. After consulting an attorney, plaintiff demanded that defendant return Bear and Torso. When the city refused, asserting that it acquired the property from the WPA in 1942, plaintiff brought his action for conversion. After the jury returned a verdict in favor of plaintiff, the trial court gave judgment notwithstanding the verdict to defendant. Plaintiff appealed from the judgment of the trial court and defendant cross appealed from the judgment rendered on the verdict.

The court of appeal reversed the judgment of the trial court in granting defendant's motion for judgment notwithstanding the verdict, holding that plaintiff's action was timely filed. The court found that the WPA was a gratuitous bailee and that when the city received and stored plaintiff's sculptures after the WPA project was

discontinued, its custody was an extension of its own WPA art project and it was normal for plaintiff to regard it as such. Consequently, the court held, the formal assumption of control by the art commission's resolution did not terminate the bailment. Addressing itself to the issue of whether or not plaintiff's action was barred by the statute of limitations, the court stated, citing prior California law, that there is no conversion, and the statute of limitations does not start to run against an owner of property and in favor of a bailee until the bailee's adverse claim is brought to the owner's knowledge. When an original taking is wrongful, the bar of the statute runs from the time of the unlawful taking, the court continued; but when the original taking is lawful, the statute is not set in motion until the return of the property has been demanded and refused, or until a repudiation of the owner's title is clearly and unequivocally brought to his or her attention. The city's art commission resolution accepting the property did not constitute such notice, the court held, as there was no testimony that plaintiff had knowledge of its passage. Other acts by the city such as exhibiting plaintiff's works, and permitting him access to city property to work on various sculptures, were entirely consistent, the court said, with his consent to defendant's possession. Consequently, the court held, there was substantial evidence to support the jury verdict that defendant city did not assert ownership over Torso and Bear until 1961 (*233 Cal. App. 2d 61, 70-71)* .

Niiya v. Goto *(1960) 181 Cal. App. 2d 682, 5 Cal. Rptr. 642* , arose out of an action for conversion of furniture and furnishings that plaintiff stored on defendant's property. Plaintiff testified that she left the property with defendant so that he could have the use of the property in his house and she would not have to pay storage on the condition that he would return the property to her if he moved, or she had need of it. Four years later, plaintiff demanded return of the property, but defendant refused, and plaintiff brought the action for conversion. The trial court found for defendant; however, on plaintiff's motion the court granted a new trial on grounds of insufficiency of the evidence. Defendant appealed, contending, among other things, that the action was barred by the statute of limitations.

The court of appeal, in affirming the order granting a new trial, rejected defendant's contention that the action was barred by the statute of limitations. The parties' relationship, the court stated, was that of a bailor and bailee. The general rule, the court said, is that the statute of limitations does not run against a bailor and owner of the property and in favor of a bailee claiming to hold adversely to the owner until such adverse claim is brought to the knowledge of the bailor. Citing prior California law, the court held that so long as the bailee holds the property in recognition of the bailor's right, the statute does not run, and will not run until there is an illegal exercise of dominion over the property. If the original taking is wrongful, the court stated, the bar of the statute of limitations runs from the time of the unlawful taking, but when the original taking is lawful, the statute is not set in motion until the return of the property has been demanded and refused, or until repudiation of the owner's title that is clearly and unequivocally brought home to him or her is made. The court found that, on the record, defendant did not do anything inconsistent with plaintiff's right of ownership or in repudiation of that right until plaintiff's demand for the return of her property and defendant's subsequent refusal. The statute of limitations, the court concluded, did not begin to run until the time of the refusal, and therefore the action, being filed within three years from defendant's first claimed ownership of the property, not barred by the statute of limitations (*181 Cal. App. 2d 682, 688-690)* .

[4] Additional Authorities

[a] Cause of Action Does Not Accrue Until Owner Learns of Conversion When Original Taking Lawful

Martin v. Bank of Am. Nat'l Trust & Sav. Ass'n (1935) 4 Cal. App. 2d 431, 41 P.2d 200 , involved an action for recovery for value of certain bonds deposited with defendant in trust in July 1927. Four years later, plaintiff became entitled to the bonds under the terms of the trust agreement and in the following year demanded their return. The trial court found that defendant had converted the bonds by turning them over to a bondholders' protective committee without plaintiff's knowledge or consent and that when plaintiff learned of the conversion she brought the present action within the applicable statute of limitations. The court of appeal affirmed the judgment of the trial court, holding that plaintiff began her action within three years from the discovery of the repudiation by defendant of its obligation under the trust agreement regarding plaintiff's rights in her property (*4 Cal. App. 2d 431, 436)* .

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5-51 California Points & Authorities § 51.44

§ 51.44 Opposing Contention That Plaintiff's Action for Conversion of Personal Property Is Barred by Statute of Limitations--Statute Tolled While Plaintiff Legally Restrained from Protecting Interest [Code Civ. Proc. § 356]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S ACTION FOR CONVERSION IS NOT BARRED BY THE STATUTE OF LIMITATIONS BECAUSE THE STATUTE WAS TOLLED FOR THE PERIOD DURING WHICH PLAINTIFF WAS LEGALLY RESTRAINED BY _____ [AN INJUNCTION *or specify statutory prohibition*] FROM TAKING ACTION TO PROTECT HIS/HER/ITS INTERESTS.

Suspension of Statute When Plaintiff Legally Restrained. Although a cause of action for conversion normally accrues on commission of the act of conversion, the running of the statute of limitations is suspended during any period in which the plaintiff is legally restrained, by injunction or statutory prohibition, from taking action to protect his or her interests (*see Code Civ. Proc. § 356*; *Eistrat v. Cekada (1958) 50 Cal. 2d 289, 291-292, 324 P.2d 881*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that plaintiff's action for conversion is barred by the statute of limitations. This form sets forth the point that the running of the statute of limitations is tolled during any period in which plaintiff is legally restrained from taking action to protect his or her interests.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing that plaintiff was under an injunction, other judicially-imposed restraint, or a statutory prohibition legally restraining him or her from commencing the action against defendant for a period of time before the filing of the suit and that the injunction, other judicially-imposed restraint, or statutory prohibition caused the delay in bringing the action.

This form may be used in opposition to the contention supported by the points and *authorities in § 51.33*.

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which the substantive issue arises; for example, this form may be used in opposition to a demurrer or a motion for summary judgment, when counsel wishes to respond to an assertion by defendant that plaintiff's action is barred by the three-year statute of limitations governing actions for conversion. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

[b] Related Pleading and Practice Forms

For discussion, forms, and procedures relating to the statute of limitations generally, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda of points and authorities opposing defendant's contention that plaintiff's cause of action is barred by the statute of limitations generally, see Ch. 143, *Limitation of Actions* .

[3] Discussion of Authorities

[a] Suspension of Statute When Plaintiff Legally Restrained

Plaintiff in ***Eistrat v. Cekada*** *(1958) 50 Cal. 2d 289, 324 P.2d 881* , brought an action for conversion of lumber from his timberlands. In June 1949, plaintiff's lessee, a logging company, filed for bankruptcy, claiming title to certain lumber and the right to operate a sawmill on plaintiff's property free from interference by plaintiff. The referee in bankruptcy granted an order enjoining plaintiff from bringing suit against the debtor and from interfering with the debtor in the possession of his property and in the operation of his lumber mill and business. In September 1949, plaintiff filed a petition in the bankruptcy proceedings toreclaim the lumber involved in this action; however, final action on the petition was postponed. In November, defendant paid the receiver in bankruptcy a certain sum for whatever right, title, or interest the receiver had in the property in question and took possession of it. In October 1951, the bankruptcy court granted plaintiff's petition, finding that neither the receiver in bankruptcy, nor the debtor who was plaintiff's lessee, had any right, title, or interest in the subject property. In late November of 1951, plaintiff demanded that defendant return the lumber, but defendant refused. Plaintiff brought his action in September of 1954. Defendant pleaded the three-year statute of limitations. The trial court concluded that the restraining order issued in the bankruptcy proceedings merely restrained plaintiff from commencing any action against the bankrupt debtor, and not against defendant, and found that since plaintiff's cause of action arose in November 1949, and that plaintiff had knowledge of the sale of the lumber to defendant shortly thereafter, the complaint filed in September of 1954 was barred by the three-year statute of limitations. Plaintiff appealed from the judgment of the trial court. Defendant, in response, contended that the bankruptcy court's dissolution of the restraining order in April of 1951, which related specifically to plaintiff's interference with the possession of the real property and the operation of the mill and lumber business on it, removed all physical restraint and that the statute of limitations commenced to run at that time.

The Supreme Court reversed the judgment of the trial court. It is the general rule, the Court stated, citing prior California law, that a cause of action accrues immediately upon the commission of the act of conversion and that normally the statute of limitations begins to run at that time. However, the Court noted, *Code Civ. Proc. § 356* provides that the running of the statute is suspended during any period in which the plaintiff is legally restrained from taking action to protect his or her interests. Citing federal authority, the Court observed that on the filing of a petition in bankruptcy, the bankruptcy court acquires exclusive jurisdiction over the bankrupt debtor and his on her estate, and may restrain any suit to recover a debt that might be dischargeable from the estate. The Court said that it should be assumed that the bankruptcy court would not condone the commencement of an action against the receiver in bankruptcy, or against the receiver's assignee, defendant, and any action commenced would constitute an interference with the debtor

in the possession of the property. The Court rejected defendant's contention that the dissolution of that part of the restraining order relating to plaintiff's interference with the possession of the real property and the operation of the mill and lumber business on plaintiff's property removed all physical restraint. The partial dissolution affected only the real property and the operation of the mill on it, the Court held, and did not allow plaintiff to interfere with the debtor in the possession of his property, as prohibited in the original order (*50 Cal. 2d 289, 291-293)* .

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CHAPTER 51 CONVERSION
PART II. FORMS

5-51 California Points & Authorities § 51.45

§ 51.45 Opposing Contention That Plaintiff's Consent to Taking of Personal Property Is Defense to Action for Conversion--Consent Obtained by Fraud as Not Constituting Defense to Conversion

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

CONSENT BY PLAINTIFF TO THE TAKING OF HIS/HER/ITS PERSONAL PROPERTY THAT IS OBTAINED BY FRAUD DOES NOT CONSTITUTE A DEFENSE TO AN ACTION FOR CONVERSION OF THE PROPERTY IN QUESTION.

Consent Obtained by Fraud as Not Constituting Defense to Action for Conversion. When plaintiff's consent to the taking of his or her personal property was obtained by fraud, the consent does not constitute a defense to an action for conversion (*see Freedman v. Queen Ins. Co (1961) 56 Cal. 2d 454, 457-458, 15 Cal. Rptr. 69, 364 P.2d 245*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to defendant's contention that plaintiff's consent to the taking of the property operates as a defense to an action for conversion. This form sets forth the point that when consent is obtained by fraud, the consent does not constitute a defense to an action for conversion.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing that plaintiff's consent to the taking of his or her personal property was obtained by fraud.

This form may be used in opposition to the contention supported by the points and *authorities in § 51.34*.

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which the substantive issue arises; for example, this form may be used in opposition to a demurrer

or a motion for summary judgment, when counsel wishes to respond to an assertion by defendant that plaintiff's consent to the taking of his or her personal property operates as a defense to an action for conversion. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

[3] Discussion of Authorities

[a] Consent Obtained by Fraud as Not Constituting Defense to Action for Conversion

Plaintiff in ***Freedman v. Queen Ins. Co*** *(1961) 56 Cal. 2d 454, 15 Cal. Rptr. 69, 364 P.2d 245* , brought an action to recover the value of diamond jewelry against his insurer. Plaintiff alleged that he received a telephone call from a certain person who represented himself to be one with whom plaintiff was well acquainted. The caller requested that plaintiff let him have several diamonds on memorandum, that is, for examination and approval by a prospective customer. Since this was the custom in the trade, plaintiff agreed and turned over the diamonds to an alleged messenger of the caller. The jewelry disappeared with the messenger and plaintiff brought this action under its insurance policy. Defendant carrier refused to honor its coverage on the ground that its policy with plaintiff excluded recovery for loss through conversion of the property insured by any person to whom the property was entrusted or delivered. The trial court found for defendant, ruling that under the exclusionary clause of the policy, defendant was exonerated from any liability. Plaintiff appealed from the adverse judgment accordingly entered and from the order denying his motion to vacate the judgment.

The Supreme Court reversed the judgment of the trial court. It was clear, the Court stated, that under the facts of the case there was a theft of the diamonds accomplished by false personation and that the theft by fraudulent representations would support an action for conversion. The Court said that consent, in law, is more than a mere formal act of the mind; it is an act unclouded by fraud, duress, or sometimes even mistake. Citing the Restatement of Torts, the Court noted that one who by fraudulent representations induces another to surrender the possession of a chattel to him or her has dispossessed the other of the chattel and assent to the actor's taking possession of the chattel is ineffectual to constitute a consent to the taking. The exclusionary clause of the policy in question excepted from coverage property loss through conversion when the insured had delivered or entrusted the property to another. Citing former Civ. Code § 1796, the Court stated that delivery is the voluntary transfer of possession. To entrust, the Court said, is defined in Webster's New International Dictionary (2d ed. 1958) as to deliver to another something in trust. Consequently, the Court concluded, one tenable construction of the words of the policy was that there can be no valid delivery or entrustment of property to another when the possession of the property was acquired by means of some fraudulent device (*56 Cal. 2d 454, 457-458)* .

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5-51 California Points & Authorities § 51.46

§ 51.46 Opposing Contention That Plaintiff Required to Make Demand for Return of Property Before Bringing Action for Conversion-- Demand for Return of Property Not Necessary When Original Taking Wrongful [Civ. Code § 1713]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEMAND BY PLAINTIFF FOR THE RETURN OF HIS/HER/ITS PERSONAL PROPERTY IS NOT NECESSARY IN ORDER TO BRING AN ACTION FOR CONVERSION OF THAT PROPERTY WHEN THE ORIGINAL TAKING WAS WRONGFUL.

A. Duty to Return Property Obtained Without Consent or Unlawfully Taken. One who obtains property without the lawful consent of its owner, or by an unlawful taking, must restore the property to the person from whom it was obtained (*see Civ. Code § 1712*).

B. Demand for Return of Property Not Necessary When Original Taking Wrongful. No demand by plaintiff is necessary for the return of property wrongfully taken in order to institute an action for conversion of the property (*see Civ. Code § 1713*; *Haydell v. Silva (1962) 201 Cal. App. 2d 20, 23-24, 19 Cal. Rptr. 705*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to defendant's contention in an action for conversion that plaintiff must make a demand for the return of his or her property as a prerequisite to instituting an action for conversion of that property. This form sets forth the point that when the original taking was wrongful, no demand for its return by the plaintiff is necessary.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing that the original taking of plaintiff's personal property was

wrongful.

This form may be used in opposition to the contention supported by the points and *authorities in § 51.35*.

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which the substantive issue arises; for example, this form may be used in opposition to a demurrer or a motion for summary judgment, when counsel wishes to respond to an assertion bydefendant that a demand for the return of the property involved is a prerequisite to plaintiff instituting an action for conversion of that property. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

[3] Discussion of Authorities

[a] Duty to Return Property Obtained Without Consent or Unlawfully Taken

Civ. Code § 1712 provides that one who obtains a thing without the consent of its owner, or by a consent afterwards rescinded, or by an unlawful exaction that the owner could not at the time prudently refuse, must restore it to the person from whom it was obtained, unless he or she has acquired title to the property superior to that of the other person, or unless transaction was corrupt and unlawful on both sides.

[b] Demand for Return of Property Not Necessary When Original Taking Wrongful

Plaintiff in ***Haydell v. Silva*** *(1962) 201 Cal. App. 2d 20, 19 Cal. Rptr. 705* , brought an action for conversion of restaurant and bar equipment, fixtures, and stock. On failure to pay one month's rent, defendant lessor padlocked the premises and denied plaintiff access to her property. The trial court found that plaintiff had not made any demand for the return of her property, and therefore she was not entitled to any judgment for conversion of her personal property detained on defendant's premises. Plaintiff appealed the judgment entered on behalf of defendant.

The court of appeal reversed the judgment of the trial court, stating that plaintiff had not ipso facto forfeited her leasehold for failure to pay the rent due and that the lessor of the demised premises was not entitled to take possession by forcible entry under a provision in the lease to the effect that if rent is due and unpaid, the lessor could enter and remove all persons from the demised premises. Consequently, the court held, plaintiff had a right to occupy the premises under the lease and to continue her restaurant operations until her lease expired or was terminated by her landlord in the manner provided by law. Therefore, the court concluded, the trial court erred in finding that a demand was necessary under the facts of the case. Citing prior California law, the court held that since defendant's reentry was wrongful, no demand was necessary as a prerequisite to the accrual of a cause of action for damages for detention of personal property or for the conversion of personal property (*201 Cal. App. 2d 20, 23-24)* .

[4] Additional Authorities

[a] Demand for Return of Property Not Necessary When Original Taking Wrongful

The facts and procedural background of *Igauye v. Howard (1952) 114 Cal. App. 2d 122, 249 P.2d 558* , are discussed in *§ 51.22[3][b]*. Defendant landlord wrongfully evicted plaintiff from the premises and converted plaintiff's personal property to his own use. The court of appeal affirmed the trial court's judgment for plaintiff. The court held, among other things, that under the facts of the case, a demand for a return of the property was not a condition precedent to institution of the action when possession was originally acquired by a tort (*114 Cal. App. 2d 122, 127)* .

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5-51 California Points & Authorities § 51.47

§ 51.47 Opposing Contention That Plaintiff Required to Make Demand for Return of Property Before Bringing Action for Conversion-- Demand for Return of Property Not Necessary When Demand Would Be Futile

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEMAND BY PLAINTIFF FOR THE RETURN OF HIS/HER/ITS PERSONAL PROPERTY IS NOT NECESSARY IN ORDER TO BRING AN ACTION FOR CONVERSION OF PROPERTY WHEN A DEMAND WOULD BE FUTILE.

A. Demand for Return of Property Not Necessary When Demand Would Be Futile. A demand for the return of personal property is not necessary in order to bring an action for conversion of that property when the demand would be futile (*Scott's Valley Fruit Exch. v. Growers Refrigeration Co. (1947) 81 Cal. App. 2d 437, 450, 184 P.2d 183*).

[*Optional*] **B. Demand for Return of Property Not Necessary When Property Actually Converted.** When there has been an actual conversion by wrongful disposition of personal property, a demand on the defendant for the return of the property before the institution of an action for conversion is not necessary (*see Metzler v. Foster Holding Co. (1936) 5 Cal. 2d 278, 282, 54 P.2d 467* ; *Mier v. Southern Cal. Ice Co. (1922) 56 Cal. App. 512, 518, 206 P. 83*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to defendant'scontention in an action for conversion that plaintiff must make a demand for the return of his or her property as a prerequisite to instituting an action for conversion of that property. This form sets forth the point that when a demand for the return of the property would be futile, plaintiff is not required to make a demand before bringing his or her action for conversion.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing that the property taken was actually converted through

destruction, consumption, or use, or otherwise wrongfully disposed of, thus making any demand on the part of the plaintiff unnecessary.

This form may be used in opposition to the contention supported by the points and *authorities in § 51.35*.

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which the substantive issue arises; for example, this form may be used in opposition to a demurrer or a motion for summary judgment, when counsel wishes to respond to an assertion by defendant that a demand for the return of the property involved is a prerequisite to plaintiff instituting an action for conversion of that property. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

[3] Discussion of Authorities

[a] Demand for Return of Property Not Necessary When Demand Would Be Futile

Plaintiff in ***Scott's Valley Fruit Exch. v. Growers Refrigeration Co.*** *(1947) 81 Cal. App. 2d 437, 184 P.2d 183* , brought an action against defendant corporation for conversion of fruit stored in its warehouse and allowed to decay. According to provisions of the Agriculture Code, it is a criminal offense to transport or sell pears that are not free from decay or other serious damage. Containers of pears cannot have more than 10 percent of the contents below these requirements. Plaintiff alleged that it had stored 1,816 lugs, or containers, of pears in defendant's warehouse, and that these lugs were 75 percent destroyed, with each lug being more than 10 percent defective in relation to the requirements of the Agriculture Code. Defendant appealed the resulting judgment of the trial court entered on behalf of plaintiff, contending, among other things, that there was no evidentiary support for the finding of the trial court that plaintiff had made a demand for the return of the pears on the date that it first discovered their destruction.

The court of appeal affirmed the judgment of the trial court, holding that under the circumstances of the case, no demand was necessary. A demand, the court stated, was normally a condition precedent to the bringing of a conversion action. However, the court pointed out, a demand is not always indispensable. The trial court's finding that the pears were 75 percent destroyed and that each lug was more than 10 percent defective was supported by the evidence, the court observed. Consequently, the court noted, it would have been unlawful, under the provisions of the Agriculture Code, to move the pears without resorting and repacking. Under such circumstances, the court held, a demand was unnecessary since the law does not require useless and futile acts, and it would have been futile to have demanded that defendant do something that the law forbade (*81 Cal. App. 2d 437, 450)* .

NOTE:

Scott's Valley Fruit Exchange was tried on the theory of defendant's negligent destruction of the pears. Although the court did not discuss the point, a demand for the return of the pears would probably have been futile on the ground that the pears were destroyed and unusable and were therefore already actually converted as a result of defendant's negligent conduct [*see § 51.47[3][b]*].

[b] Demand for Return of Property Not Necessary When Property Actually Converted

Metzler v. Foster Holding Co. *(1936) 5 Cal. 2d 278, 54 P.2d 467* , arose out of an action for conversion of animal stock and grain. Defendant's lessee executed and delivered to plaintiff a chattel mortgage to secure a note and attorney's fees in case of collection. The note was to cover indebtedness to other creditors, and a trust agreement was prepared with a list of creditors and amounts owed to each. However, the next day, the lessee quit the premises as requested by defendant. At that time, the lessee apparently told a representative of defendant that it could have what property he had on the ranch to apply to his indebtedness to defendant. Defendant corporation took possession of the ranch subsequent to the recordation of its lessee's chattel mortgage to plaintiff. It proceeded to consume the hay, ensilage, corn, and alfalfa, and to sell the livestock that the lessee had left on the ranch. Defendant applied the proceeds of the sale to the lessee's indebtedness to it. The trial court entered judgment for plaintiff, and defendant subsequently appealed from that

judgment and from the court's judgment for plaintiff on defendant's cross complaint, contending, among other things, that a demand for the return of the property was a prerequisite to an action for conversion.

The Supreme Court affirmed, with some modification, the judgment of the trial court, holding that the trial court's findings were correct and supported by the evidence. Addressing itself to defendant's contention that a demand by plaintiff for the return of the property was a prerequisite to bringing the action for conversion, the Court replied that all the property was either sold or fed to stock. Consequently, the Court concluded, the sale and use of the property was sufficientto take the case out of the general rule that a demand for the return of the property was necessary (*5 Cal. 2d 278, 282)* .

Mier v. Southern Cal. Ice Co. *(1922) 56 Cal. App. 512, 206 P. 83* , involved an action to recover damages for the conversion by defendants of a crane and its equipment. Plaintiff alleged that the crane was sold to him by defendants under an agreement to make delivery when requested. However, plaintiff contended that defendants had sold, unknown to him and without authority, the crane and attendant equipment to another party that it had been shipped to the purchaser, and that plaintiff therefore had lost his contract to sell the crane to a purchaser he had acquired. An agent for defendants subsequently offered to ship the crane to plaintiff's purchaser, but plaintiff refused. From the judgment on the verdict for plaintiff, defendants appealed, contending, among other things, that there was no evidence of a demand for the return of the property.

The court of appeal, in affirming the judgment of the trial court, found that the evidence supported the trial court's judgment. Addressing itself to the issue of whether or not a demand was necessary in order for plaintiff to bring his action, the court held that no demand was necessary. When defendants sold the crane to plaintiff, the court said, it became the property of plaintiff, and its subsequent unauthorized sale and shipment to another purchaser was a conversion. The rule in this case, the court declared, is that when there has been an actual conversion such as a wrongful sale of plaintiff's property, a demand on the defendant for the return of the property before the institution of the action for trover is not necessary. Demand and refusal, the court observed, do not of themselves constitute conversion, but are only evidence from which conversion in certain cases could be found. Moreover, the court concluded, the conversion may be established by proof of other acts on the part of the defendant, for example, a sale and delivery of plaintiff's property to some third person in defiance of the rights of the true owner (*56 Cal. App. 512, 518)* .

NOTE:

Metzler and *Mier*, the court was apparently distinguishing between property wrongfully withheld by a defendant, and property actually converted or appropriated to the defendant's own use. Plaintiff's property that has been wrongfully sold by defendant, or consumed, destroyed, or otherwise disposed of is property that has been converted in the sense of the very meaning of the word conversion, that is, property that was capable of being changed into another form, substance, or state; turned over, delivered, transformed, or appropriated for the use and benefit of the wrongdoer [*see Olschewski v. Hudson (1927) 87 Cal. App. 282, 286, 262 P. 43* ; *see also § 51.27[3][a]*].

[4] Additional Authorities

[a] Demand for Return of Property Not Necessary When Property Actually Converted

In *United Bank & Trust Co. v. Powers, (1928) 89 Cal. App. 690, 265 P. 403* , plaintiff brought an action for conversion of cattle subject to its chattel mortgage. Defendant also had a chattel mortgage on other cattle owned by the joint debtor; however, his mortgage was inferior to that of plaintiff's. On default by plaintiff's debtor, defendant took possession of all of the cattle and sold them to satisfy the debt owed to him by the mortgagor. The court of appeal, in affirming the judgment of the trial court in favor of plaintiff, rejected defendant's contention that, among other things, plaintiff had not made the necessary demand for return of its property. In reply, the court held that the record in the case showed that plaintiff's property was taken by defendant and sold by him before the beginning of the action. Consequently, the court

concluded, no demand was necessary (*89 Cal. App. 690, 694)* .

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5-51 California Points & Authorities § 51.48

§ 51.48 Opposing Contention That Plaintiff Waived Interest in Personal Property--No Intentional Relinquishment of Known Right of Property

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

TO CONSTITUTE A WAIVER OF INTEREST IN PROPERTY, THERE MUST BE A SHOWING THAT PLAINTIFF INTENTIONALLY RELINQUISHED A KNOWN RIGHT IN HIS/HER/ITS PROPERTY.

Plaintiff Waived Interest in Property. In order to show that plaintiff waived his or her interest in the property alleged to have been converted, there must be evidence that plaintiff intentionally relinquished a known right in his or her property (*see* Imperial NH3 v. *Central Valley Feed Yards, Inc. (1977) 70 Cal. App. 3d 513, 518-519, 139 Cal. Rptr. 8*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to defendant's contention in an action for conversion that plaintiff waived his or her interest in the property alleged to have been converted. This form sets forth the point that in order to constitute a waiver of interest in the property, there must be a showing that plaintiff intentionally relinquished a known right in his or her property.

Counsel should insert argument in this form, showing the relationship betweenthe facts of the case and the points of law stated. Thus, counsel should include discussion showing that plaintiff's conduct in relation to the property alleged to have been converted did not constitute a waiver of interest in the property since he or she did not intentionally relinquish known rights in the property.

This form may be used in opposition to the contention supported by the points and *authorities in § 51.36*.

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which the substantive issue arises; for example, this form may be used in opposition to a demurrer or a motion for summary judgment, when counsel wishes to respond to an assertion by defendant that plaintiff waived his or her interest in the property alleged to have been converted. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

[3] Discussion of Authorities

[a] Plaintiff Waived Interest in Property

Plaintiff in **Imperial NH3 v.** ***Central Valley Feed Yards, Inc.*** *(1977) 70 Cal. App. 3d 513, 139 Cal. Rptr. 8* , brought an action against defendant to recover damages for the conversion of the proceeds of a hay crop in which plaintiff had perfected a security interest pursuant to the provisions of the California Uniform Commercial Code. Plaintiff fertilizer company had been supplying its customer, a farmer, with fertilizer and insecticide on credit. On learning of the customer's difficulties with his bank, plaintiff executed a security agreement and financing statement with its customer to secure past and future purchases. Thereafter, plaintiff continued to sell fertilizer to its customer, who continued to harvest and sell hay in the ordinary course of business. Afterwards, he would deliver proceeds from the crop to his bank, which had a first lien on the crops only. Defendant and plaintiff's customer agreed that in return for $68,000 advanced for operating expenses, the customer would deliver a certain large quantity of hay. Plaintiff's customer subsequently delivered the hay to defendant. When plaintiff discovered the arrangement between its customer and defendant, it advised defendant of its security interest and that it would not be waived. The trial court entered judgment for defendant on the theory that plaintiff had waived its security interest in the crop by impliedly authorizing its harvest and delivery to defendant. Plaintiff appealed from the judgment, contending that the trial court erred in concluding that plaintiff had waived its security interest in the crop and proceeds.

The court of appeal reversed the judgment of the trial court. Although waiver can be relied on as a defense to conversion, the court said, the evidence in the case was insufficient to establish an implied waiver. Citing prior California law, the court said that waiver is the intentional relinquishment of a known right. Plaintiff's acquiescence to its customer's delivery of the crop to his regular customers and the proceeds to his bank, the court said, was a recognition that the bank had a superior interest. However, the court pointed out, plaintiff acted promptly to protect its interest when it first learned of the arrangement between its customer and defendant, by informing defendant of its security interest in the crop and the proceeds, and that it would not waive that interest. The court held that there was nothing in the conduct of plaintiff that could be interpreted as relinquishing a known right (*70 Cal. App. 3d 513, 518-519)* .

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§ 52.01 Scope of Chapter

§ 52.02 Governing Statutes

[1] In General

[2] Application of General Corporation Law

[3] Existing Corporations

[4] Limited Liability Companies

[5] Foreign Corporations

[6] Alter Ego Doctrine

[7] Corporate Records

[8] Duties and Liabilities of Directors and Managers

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§ 52.03 Other Procedures for Imposing Alter Ego Liability

§ 52.04 Alter Ego Liability Is Joint and Several

§ 52.05 Page Limits on Memoranda

§ 52.06 Related Pleadings and Practice Chapters

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§§ 52.08-52.19 [Reserved]

§ 52.20 Supporting Motion for Summary Judgment--In Action Maintained by Foreign Corporation--Corporation Transacting Intrastate Business Without Having Obtained Certificate of Qualification [Corp. Code §§ 2105, 2203(c)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Transaction of Intrastate Business

[b] Nonqualified Foreign Corporation Barred From Maintaining Suit

[c] Action by Assignee of Nonqualified Foreign Corporation

[4] Additional Authorities

[a] Transaction of Intrastate Business

§ 52.21 Supporting Motion for Summary Judgment--In Action Maintained by Foreign Corporation--Foreign Corporation Not Subject to California Registration Suspended Under Law of State of Incorporation

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Memoranda

[3] Discussion of Authorities

[a] Law of State of Incorporation as Determining Continuing Corporate Status of Foreign Corporation

§ 52.22 Supporting Corporate Defendant's Motion for Change of Venue--To County of Corporation's Principal Place of Business [Code Civ. Proc. § 395.5]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

[3] Discussion of Authorities

[a] Motion for Change of Venue

[b] Venue of Corporations

[c] Proper County When General Venue Provisions Govern

[d] Foreign Corporations

[e] Two or More Corporate Defendants

[f] Place of Making of Contract

[g] Anticipatory Breach of Contract

[h] Place of Performance of Contract

[i] Place of Performance In Payment of Debt

[j] Where Tort Liability Arises

[k] Allegation of "Doing Business"

§ 52.23 Supporting Corporate Defendant's Motion for Change of Venue [Code Civ. Proc. §§ 396b, 397(a)]--In Action for Removal of Director--To County of Corporation's Principal Executive Office or County of Sacramento [Corp. Code §§ 177, 304]

[1] FORM

[2] Comments

[a] Use of Form

§ 52.24 Supporting Corporate Defendant's Motion for Change of Venue [Code Civ. Proc. §§ 396b, 397(a)]--In Application for Order to Compel Holding of Annual Shareholder's Meeting--To County of Corporation's Principal Executive Office or County of Sacramento [Corp. Code §§ 177, 600(c)]

[1] FORM

[2] Comments

[a] Use of Form

§ 52.25 Supporting Corporate Defendant's Motion for Change of Venue [Code Civ. Proc. §§ 396b, 397(a)]--In Action for Determination of Shares as Dissenting Shares and/or Value of Such Shares--To County of Corporation's Principal Executive Office or County of Sacramento [Corp. Code §§ 177, 1304(a)]

[1] FORM

[2] Comments

[a] Use of Form

§ 52.26 Supporting Corporate Defendant's Motion for Change of Venue [Code Civ. Proc. §§ 396b, 397(a)]--In Proceeding to Enforce Right of Inspection of Corporate Records and Reports--To County of Corporation's Principal Executive Office or County of Sacramento [Corp. Code §§ 177, 1603(a)]

[1] FORM

[2] Comments

[a] Use of Form

§ 52.27 Supporting Corporate Defendants' Motion for Change of Venue [Code Civ. Proc. §§ 396b, 397(a)]--In Action for Involuntary Dissolution of Corporation--To County of Corporation's Principal Executive Office or County of Sacramento [Corp. Code §§ 177, 1800(a)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Corporation's Right to Control Venue in Mixed Action

§ 52.28 Supporting Corporate Defendant's Motion for Change of Venue [Code Civ. Proc. §§ 396b, 397(a)]--In Petition for Court to Take Jurisdiction of Voluntary Dissolution--To County of Corporation's Executive Office or County of Sacramento [Corp. Code §§ 177, 1904]

[1] FORM

[2] Comments

[a] Use of Form

§ 52.29 Supporting Corporate Defendant's Motion for Change of Venue [Code Civ. Proc. §§ 396b, 397(a)]--In Action for Determination of Right or Interest in Real Property--To County Where Real Property Is Situated [Code Civ. Proc. § 392]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Determination That Action Is Local in Nature

[b] Proper County for "Local" Action

§ 52.30 Supporting Motion for Summary Judgment--By Plaintiff--In Action to Enforce Provision of Corporations Code--Defendant Foreign Corporation Is "Nominally Foreign" Corporation and Subject to the Provisions of California General Corporation Law [Corp. Code § 2115]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Memoranda

[3] Discussion of Authorities

[a] "Nominally Foreign" Corporations

[b] Foreign Parent Corporations Not Transacting Intrastate Business

[c] Commencement of Time Period Subjecting Foreign Corporations to California Law

[d] Cumulative Voting Required

§ 52.31 Supporting Motion for Summary Judgment--In Action by or Against Corporation--Corporate Powers of Plaintiff or Defendant Suspended or Forfeited for Nonpayment of Franchise Tax [Rev. & Tax. Code § 23301]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[3] Discussion of Authorities

[a] Suspension of Powers of Domestic or Foreign Corporation

[b] Effective Date of Suspension or Forfeiture

[c] Inability to Prosecute Action

[d] Inability to Defend Action

[e] Waiver of Defense

[f] Accrual of Substantive Defense

[g] No Substantial Compliance Is Shown

[h] Directors May Not Be Substituted in Place of Suspended Corporation

[i] Liability Insurer May Not Defend in Name of Suspended Corporation

[4] Additional Authorities

[a] Waiver of Defense

[b] Accrual of Substantive Defense

[c] Renewal of Judgment

§ 52.32 Supporting Motion for Summary Judgment--In Action on Contract [Civ. Code § 3300 or 3384]--By Defendant--Against Corporation That Was Suspended at Time Contract Was Formed [Rev. & Tax. Code § 23304.1]

[1] FORM

[2] Comments

[a] Use of Form

[b] Limitations on Declaring Contract Voidable

[3] Discussion of Authorities

[a] Contract Is Voidable

[b] Avoidance Not Barred by Equitable Estoppel

[c] When Prior Law Is Determinative

§ 52.33 Supporting Motion for Summary Judgment Against Corporation--Corporate Powers Suspended for Failure to File Required Information Statement [Corp. Code §§ 1502, 2205]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Suspension of Corporate Powers for Failure to File Required Information Statement

§ 52.34 Opposing Motion for Summary Judgment--Foreign Corporation Permitted to Maintain Suit When It Is Not Considered to Be Transacting Intrastate Business

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Rules Governing Summary Judgment Procedure

[b] Summary Judgment Not Proper When Triable Issue Remains as to Whether Foreign Corporation Transacted Intrastate Business

[c] Burden of Proof

[d] Single, Isolated Transactions

[e] Actions Arising Out of Interstate or Foreign Commerce

[f] Jurisdictional Requirements Distinguished From Intrastate Business Transaction Requirements

[g] Corporations Incorporated Under Act of Congress

[h] Goods Transported in Interstate Commerce

[4] Additional Authorities

[a] Transaction of Intrastate Business

[b] Goods Transported in Interstate Commerce

§ 52.35 Opposing Motion for Summary Judgment--Foreign Corporation Permitted to Maintain Suit When It Has Filed Designation of Agent for Service Under Old Law and Filed Amended Statement Designation [Corp. Code § 2102]

[1] FORM

[2] Comments

[a] Use of Form

[3] Additional Authorities

[a] Filing of Designation of Agent Under Previous Law

§ 52.36 Opposing Motion for Summary Judgment--Foreign Corporation Permitted to Maintain Suit Without Providing Proof of Payment of State Taxes When It Has Obtained Certificate of Qualification Before Commencing Suit [Corp. Code §§ 2105, 2203(c)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Certificate of Qualification Obtained Before Action Commenced

§ 52.37 Opposing Corporate Defendant's Motion for Change of Venue--Insufficient Showing That Venue Was Improper

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[3] Discussion of Authorities

[a] Presumption That Venue Is Proper

[b] Burden of Proof on Motion to Change Venue, Generally

[c] Corporation's Burden of Proof

[d] Foreign Corporation's Burden of Proof

[e] When Corporation Is Permitted to Change Venue

[f] Foreign Corporation's Designation of Principal Place of Business in Statement Filed With Secretary of State

[g] Domestic Corporation's Designation of Principal Place of Business in Statement Filed With Secretary of State

[h] Continuing Effect of Tortious Conduct

[4] Additional Authorities

[a] Presumption That Venue Is Proper

[b] Corporation's Burden of Proof

§ 52.38 Opposing Motion for Summary Judgment--In Action to Enforce Provision of Corporations Code Against Foreign Corporation--Nationally Traded or Wholly Owned Corporation Is Not Subject to California Law [Corp. Code § 2115(c)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Nationally Traded or Wholly Owned Corporation is Not Subject to California Law

§ 52.39 Opposing Motion for Summary Judgment--In Action to Enforce Provision of Corporations Code Against Foreign Corporation--Inapplicability of "Nominally Foreign" Status to Defendant Corporation [Corp. Code § 2115(a), (d), (e)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Time Period in Which "Nominally Foreign" Status Applicable to Foreign Corporation

[b] Nominee Holders

[c] "Voting Power"

§ 52.40 Opposing Motion for Summary Judgment--In Action by or Against Foreign Corporation--Forfeiture of Corporate Powers Not Effective Because Preliminary Notification or Transmission to Secretary of State Was Not Made [Rev. & Tax. Code § 23302]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Preliminary Notice Requirement

[b] Transmission to Secretary of State

§ 52.41 Opposing Motion for Summary Judgment--In Action by or Against Foreign Corporation--Suspension and Forfeiture Provisions Do Not Apply Unless Foreign Corporation Has Qualified to Do Business in California [Corp. Code § 2105; Rev. & Tax. Code § 23301.6]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Suspension Provision Not Applicable to Unqualified Foreign Corporation

§ 52.42 Opposing Motion for Summary Judgment--In Action by or Against Foreign Corporation--Reinstatement of Corporate Powers Following Payment of Franchise Tax as Validating Prior Acts [Rev. & Tax. Code § 23305a]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Memoranda

[3] Discussion of Authorities

[a] Plea in Abatement

[b] Effect of Issuance of Certificate

[c] Satisfying Purpose for Suspension or Forfeiture

[d] Effect of Revival of Corporate Powers

[e] Suspension or Forfeiture Does Not Affect Court's Jurisdiction

[f] Substantial Compliance

[g] Bond, Deposit, or Other Security for Liability

[4] Additional Authorities

[a] Plea in Abatement

[b] Effect of Revival of Corporate Powers

§ 52.43 Opposing Motion for Summary Judgment--In Action on Contract [Civ. Code § 3300 or 3384]--By Corporation That Was Suspended at Time Contract Was Formed--Right to Apply for Relief From Voidability [Rev. & Tax. Code § 23305.1]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Right to Apply for Relief From Voidability

[4] Additional Authorities

[a] Contract Entered Into Before January 1, 1991

§§ 52.44-52.59 [Reserved]

§ 52.60 Supporting Demurrer to Complaint Against Individual on Corporate Obligations--Failure to Allege Facts Showing That Individual and Corporation Are Same Entity and That Recognition of Separate Entity Would Consummate Wrong

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Pleading Elements of Alter Ego Doctrine

[b] Allegation of Control and Domination of Corporation

[c] Pleading of Consummation of Wrong

[d] Allegation That Corporation Is Alter Ego of Stockholder

[4] Additional Authorities

[a] Pleading Elements of Alter Ego Doctrine

[b] Allegation of Control and Domination of Corporation

[c] Pleading of Consummation of Wrong

§ 52.61 Supporting Demurrer to Complaint Against Individual On Corporate Obligations--Failure to Allege That Individual Defendant Had Beneficial Ownership in Corporation

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Requirement of Beneficial Ownership

[b] Failure to Allege Beneficial Ownership

§ 52.62 Supporting Plaintiff's Motion to Amend Judgment to Include as Judgment Debtor Name of Individual Who Was Alter Ego of Corporate Judgment Debtor

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Judgment Amendment to Include Alter Ego Litigant

[b] Hearing of Extrinsic Evidence

[c] Requirements For Holding Individual as Alter Ego of Corporation

[d] Factors Pertinent to Court's Determination

[e] Evidence of Equitable Ownership

[f] Ownership of One Share

[g] Alter Ego Doctrine Aplicable to Tort Claim

[h] Liability of Two or More Controllers or Dominators

[i] Wholly Owned Subsidiaries

[j] Manipulation of Corporate Affairs to One's Own Ends

[k] Inadequate Capitalization and Active Corporate Participation

[l] Concentration of Liabilities in Insolvent Corporation

[m] Holding Oneself Out as Personally Liable

[n] Settlement With Corporation Does Not Bar Alter Ego Liability

[o] Confirmation of Arbitration Award

[4] Additional Authorities

[a] Judgment Amendment to Include Alter Ego Litigant

[b] Requirements for Holding Individual as Alter Ego of Corporation

[c] Wholly Owned Subsidiaries

§ 52.63 Opposing Demurrer to Complaint Against Individual on Corporate Obligations--Allegations in Plaintiff's Complaint Satisfy Liberal Requirements for Pleading Alter Ego Doctrine

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Liberal Policy in Pleading Alter Ego Doctrine

[b] Essential Facts Required to Be Pleaded

[c] Proof of Actual Fraud as Unnecessary

[4] Additional Authorities

[a] Essential Facts Required to be Pleaded

§ 52.64 Opposing Demurrer to Complaint Against Individual on Corporate Obligations--Allegation Charging Defendant With Liability Sufficient to Raise Alter Ego Doctrine on Defendant's Denial Thereof if Defendant Is Not Prejudiced Thereby

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Denial of Liability by Individual Defendant is Sufficient to Place Alter Ego Liability at Issue

[4] Additional Authorities

[a] Denial of Liability by Individual Defendant is Sufficient to Place Alter Ego Liability at Issue

§ 52.65 Opposing Motion to Amend Judgment on Grounds That Individual Was Alter Ego of Corporate Defendant--Insufficient Showing to Bind Individual to Judgment

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Required Showing

[b] Question of Fact

[c] Inadequacy of Capitalization

[d] Mere Existence of Unsatisfied Creditor Is Insufficient Showing

§ 52.66 Opposing Motion to Amend Judgment on Grounds That Individual Was Alter Ego of Corporate Defendant--Plaintiff Estopped to Deny Corporate Existence

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Estoppel of Plaintiff to Deny Corporate Existence

[b] Knowledge of Shareholder's Relationship With Corporation

[4] Additional Authorities

[a] Estoppel of Plaintiff to Deny Corporate Existence

§ 52.67 Opposing Motion to Amend Judgment on Grounds That Individual Was Alter Ego of Corporate Defendant--Failure to Observe Corporate Formalities Pursuant to Shareholders' Agreement Is Not a Basis for Imposition of Alter Ego Doctrine [Corp. Code § 300(e)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Informalities in Conduct of Close Corporation's Affairs

§ 52.68 Opposing Motion to Amend Judgment on Grounds That Individual Was Alter Ego of Corporate Defendant--Greater Inequity Resulting From Imposition of Alter Ego Doctrine

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Alter Ego Doctrine Inapplicable if Greater Inequity Results

[b] Obligation Inflicted on Innocent Corporation or Minority Shareholders

§ 52.69 Opposing Motion to Amend Judgment on Grounds That Individual Was Alter Ego of Corporate Defendant--Judgment Not Binding on Individual Who Was Not Party to and Had No Control of Action

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Requirements for Binding Individual to Judgment

[b] Due Process Requirement

[c] Degree of Control Required

[d] Similarity of Interests Required

[4] Additional Authorities

[a] Requirements for Binding Individual to Judgment

§ 52.70 Opposing Motion to Amend Judgment on Grounds That Individual Was Alter Ego of Corporate Defendant--No Showing of Due Diligence in Seeking Amendment

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Due Diligence Required

§§ 52.71-52.79 [Reserved]

§ 52.80 Opposing Motion to Amend Judgment on Ground That Corporation Was Alter Ego of Shareholder-Defendant--Outside Reverse Piercing of Corporate Veil Is Not Recognized in California

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Outside Reverse Piercing Not Recognized

§§ 52.81-52.89 [Reserved]

§ 52.90 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] Enforcing Legal Right--By Shareholder--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Mandamus Is Appropriate Remedy to Enforce a Legal Right

§ 52.91 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--To Order Corporation to Open Its Books, Records, and Minutes for Inspection--By Shareholder [Corp. Code § 1601]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Mandamus as Enforcing Legal Right

[b] Shareholder's Inspection Rights

[c] Establishment of Value of Stock Is Reasonable Purpose

[d] Effect of Majority Shareholders on Policy Is Reasonable Purpose

[e] Directors Unfriendly to Minority Shareholders Is Reasonable Purpose

[f] Ascertaining Value of Stock Is Reasonable Purpose

[g] Investigation to Determine Validity of Shareholder Records Is Reasonable Purpose

[h] Beneficial Interest Is Unnecessary for Registered Shareholder

[i] Inspection of Books of Successor Corporation

[4] Additional Authorities

[a] Shareholder's Inspection Rights

§ 52.92 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--To Order Corporation to Permit Inspection of Corporate Property--By Shareholder

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Mandamus Is Appropriate for Enforcing Legal Right

[b] Right to Inspect Corporate Property

[4] Additional Authorities

[a] Nominally Foreign Corporations as Subject to Shareholder's Inspection Rights

§ 52.93 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--To Order Corporation to Permit Inspection of Corporate Books, Records, Documents, and Properties--By Director [Corp. Code § 1602]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Mandamus Is Appropriate Remedy to Enforce A Legal Right

[b] Restrictions on Director's Rights of Inspection

[4] Additional Authorities

[a] Director's Rights of Inspection

[b] Restrictions on Director's Rights of Inspection

[c] Right Extended to Foreign Corporations

§ 52.94 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--To Order Corporation to Permit Inspection of the Record of Shareholders--By Major Stockholder [Corp. Code § 1600(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Mandamus Is Appropriate for Enforcing Legal Right

[4] Additional Authorities

[a] Inspection of Record of Shareholders

§ 52.95 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Petitioner Is Not Registered Shareholder [Corp. Code § 1601]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Inspections Rights Available Only to Shareholders of Record

[b] Inspection Rights Unassignable

§ 52.96 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Petitioner Does Not Have a Reasonable Purpose for Inspection [Corp. Code § 1601]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Right of Inspection Limited

[b] Shareholders' Rights of Inspection Limited

[c] Necessity of a Hearing as to Purpose

§§ 52.97-52.109 [Reserved]

§ 52.110 Supporting Demurrer to Complaint--For Damages for Liability Created by Statute Against Directors of Corporation--Action Barred by Statute of Limitations [Code Civ. Proc. § 359]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

[3] Discussion of Authorities

[a] Failure to State Cause of Action

[b] When Action Must Be Brought

[c] Creation of Liability

[d] Obtaining Judgment Against Corporation

[e] Illegal Distribution of Assets by Directors

[f] Director's Negligence or Breach of Fiduciary Duty to Corporation

[g] When Directors Liable for Failure to Cause Corporation to File Lawsuit

[4] Additional Authorities

[a] When Action Must Be Brought

§ 52.111 Supporting Demurrer to Complaint--For Damages for Fraud Against Directors of Corporation--Action Barred by Statute of Limitations [Code Civ. Proc. § 338(d)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[3] Discussion of Authorities

[a] Failure to State Cause of Action

[b] Applicable Statute of Limitations

[c] Statute Not Tolled

§ 52.112 Supporting Demurrer to Complaint--For Damages for Fraudulent Breach of Fiduciary Duty--Against Directors of Corporation--Action Barred by Statute of Limitations [Code Civ. Proc. § 339(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[3] Discussion of Authorities

[a] Failure to State Cause of Action

[b] Applicable Statute of Limitations

[4] Additional Authorities

[a] Applicable Statute of Limitations

§ 52.112A Supporting Demurrer to Complaint--For Damages for Fraudulent Breach of Fiduciary Duty--Against Directors of Corporation--Action Barred by Statute of Limitations [Code Civ. Proc. § 339(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[3] Discussion of Authorities

[a] Directors Owe No Fiduciary Duty to Creditor of Insolvent Corporation

[b] No Fiduciary Duty When Corporation Operates in "Zone of Insolvency"

§ 52.113 Supporting Demurrer to Complaint--For Removal of Directors of Corporation for Cause [Corp. Code § 304]--Failure of Complaint to Allege Facts Rather Than Conclusions

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Memoranda

[3] Discussion of Authorities

[a] Specific Facts Adequate to Show Fraud Are Required

§ 52.114 Supporting Demurrer to Answer to Petition for Appointment of Provisional Director of Corporation When Board Is Deadlocked [Corp. Code § 308]--Estoppel and Unclean Hands Not Defenses

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Estoppel and Unclean Hands Are Not Defenses

§ 52.115 Supporting Motion for Summary Judgment--By Defendant--Director Lacks Authority to Institute Action in Name of Corporation Against Codirector and Equal Shareholder

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] No Authority for Director to Bring Action Against Codirector Who Is Equal Shareholder

§ 52.116 Supporting Motion for Summary Judgment--By Defendant--In Action to Remove Defendant From Office for Acts Committed as Director [Corp. Code § 314]--Defendant Reelected After Acts Complained Of

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Subsequently Reelected Director Not Removable

[4] Additional Authorities

[a] Subsequently Reelected Director Not Removable

§ 52.117 Supporting Motion for Indemnification of Director, Officer, or Other Agent of Corporation--For Expenses in Defending Suit Without Success on Merits [Corp. Code § 317(b), (c)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Expenses Incurred in Criminal Proceeding

[c] Related Pleading and Practice Forms

[3] Additional Authorities

[a] Corporate Agent

[b] Expenses for Purposes of Indemnification

§ 52.118 Opposing Demurrer to Complaint--For Damages for Fraud Against Directors of Corporation--Proper Statute of Limitations Is Code Civ. Proc. § 338(d) Rather Than Code Civ. Proc. § 359

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Applicability of Section 359 of the Code of Civil Procedure

[b] When Liabilities Are Created by Common Law

[c] Statute of Limitations for Fraud Actions Against Directors

[4] Additional Authorities

[a] Applicability of Section 359 of the Code of Civil Procedure

§ 52.119 Opposing Demurrer to Complaint--For Damages for Fraudulent Breach of Fiduciary Duty Against Directors--Action Barred by Statute of Limitations [Code Civ. Proc. § 338(d)]--Statute Was Tolled

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Statute of Limitations Does Not Run Against Directors in Control

[4] Additional Authorities

[a] Statute of Limitations Does Not Run Against Directors in Control

§ 52.120 Opposing Motion for Indemnification of Director, Officer, or Other Agent of Corporation--For Expenses in Defending Suit Without Success on Merits--Derivative Suit [Corp. Code § 317(c)]--Indemnification Forbidden by Statute [Corp. Code § 317(c)(1)-(3)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Judgment Against Agent

[c] Settlement of Action

§ 52.121 Opposing Motion for Award of Attorney's Fees and Expenses--Outside Attorney Retained to Represent Corporation Is Not Corporate Agent Entitled Under Corp. Code § 317(d) to Recover Attorney's Fees and Costs in Subsequent Malpractice Action

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Outside Attorney Sued for Malpractice Is Not Corporate Agent for Purposes of Corporations Code Section 317

§§ 52.122-52.139 [Reserved]

§ 52.140 Supporting Demurrer to Complaint--Failure Specifically to Allege Facts Rebutting Applicability of Business Judgment Rule [Corp. Code § 309]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Memoranda

[3] Discussion of Authorities

[a] Business Judgment Rule Under Common Law

[b] Business Judgment Rule Codified Under Corporations Code Section 309

[c] Assumption Underlying Business Judgment Rule

[d] Immunity Granted by Business Judgment Rule

[e] Specific Allegations of Fraud or Bad Faith Required

[f] Acts Clearly Opposed to Corporation's Interest

[g] Decisions Regarding Litigation

[h] Decisions Regarding Executive Compensation

[i] Presumption Favors Board

[j] Reliance on Board Committee

[k] Litigation Committee

[4] Additional Authorities

[a] Immunity Granted by Business Judgment Rule

§ 52.141 Supporting Demurrer to Complaint--Suit Improperly Filed in an Individual Capacity

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Stockholder's Individual Suit Distinguished from a Derivative Suit

[b] Injury to Corporation Maintained in Representative Capacity Only

[4] Additional Authorities

[a] Stockholder's Individual Suit Distinguished from a Derivative Suit

[b] Injury to Corporation Maintained in Representative Capacity Only

§ 52.142 Supporting Demurrer to Complaint--Failure to Allege Plaintiff Is Registered or Beneficial Shareholder or Holder of a Voting Trust Certificate [Corp. Code § 800(b)(1)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Additional Authorities

[a] Objection by Demurrer

[b] Registered Shareholder or Holder of Voting Trust Certificates Condition

§ 52.143 Supporting Demurrer to Complaint--Failure to Allege That Plaintiff Has Informed Board of Directors or Corporation of Lawsuit [Corp. Code § 800(b)(2)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Additional Authorities

[a] Failure to Inform Board of Directors or Corporation

§ 52.144 Supporting Demurrer to Complaint--Failure to Allege With Particularity Efforts to Secure Action by Board of Directors [Corp. Code § 800(b)(2)]--By Director

[1] FORM

[2] Comments

[a] Use of Form

[3] Additional Authorities

[a] Failure to Make Demand

§ 52.145 Supporting Demurrer to Complaint--Failure to Allege With Particularity Facts to Establish Futility of Demanding Action by Board of Directors [Corp. Code § 800(b)(2)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Failure to Allege Reasons for Futility

[4] Additional Authorities

[a] Failure to Allege Reasons for Futility

§ 52.146 Supporting Demurrer to Complaint--Posting Bond [Corp. Code § 800(e)] Is Not Substitute for Prefiling Demand or Sufficient Allegation of Futility of Demand [Corp. Code § 800(b)(2)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Posting Bond No Substitute for Demand

§ 52.147 Supporting Motion for Summary Judgment--Good-Faith Business Judgment by Board of Directors [Corp. Code § 309]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Memoranda

[3] Discussion of Authorities

[a] Procedural Alternatives Available to Corporation

[b] Adoption of Means Not Limited by Law

[c] Hindsight Not Relevant

§ 52.148 Supporting Motion for Judgment on the Pleadings--Shareholder's Derivative Action Against Corporation's Outside Counsel Cannot Proceed in Absence of Corporation's Waiver of Attorney-Client Privilege

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Derivative Lawsuit for Malpractice Against Corporate Outside Counsel Raises Unique Attorney-Client Issues

§ 52.149 Supporting Motion for Security [Corp. Code §§ 800(c)-(f)]--In a Derivative Action [Corp. Code §§ 800(a), (b)]--By Defendant

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Aggregate Amount of Security Limited

[3] Additional Authorities

[a] No Benefit to Corporation

§ 52.150 Supporting Motion for Attorney's Fees--By Plaintiff(s) in Shareholders' Derivative Suit

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Substantial Benefit Rule

[b] Beneficiaries Must Share Litigation Expenses

§ 52.150A Supporting Motion for Attorney's Fees--By Successful Defendants in Derivative Action--Security Posted by Plaintiff [Corp. Code § 800]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Defendant Has Recourse to Security

[b] Absence of Benefit to Corporation Need Not Be Shown

[4] Additional Authorities

[a] Defendant Has Recourse to Security

§ 52.151 Supporting Motion for Attorney's Fees--By Successful Defendants in Derivative Action [Civ. Code § 1717]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Attorney's Fees Provided by Contract

[b] Nonsignatories May Be Liable for Attorney's Fees

[4] Additional Authorities

[a] Attorney's Fees Provided by Contract

[b] Nonsignatories May Be Liable for Attorney's Fees

§ 52.152 Supporting Motion to Permit Plaintiff in a Derivative Action to Waive Requirement of Being Shareholder, Registered or Beneficial, or Holder of Voting Trust Certificates at Time of Wrongdoing to the Corporation [Corp. Code § 800(b)(1)]

[1] FORM

[2] Comments

[a] Use of Form

§ 52.153 Supporting Motion for Order Approving Compromise Settlement Between Plaintiff Shareholder and Defendant in Shareholder's Derivative Suit and for Judgment Entered Thereon

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Compromise Settlement as Permitted if Corporation's Rights Fully Protected

§ 52.154 Supporting Motion for Order Modifying Amount of Bond Plaintiff Must Post in Shareholder's Derivative Suit [Code Civ. Proc. § 996.010]

[1] FORM

[2] Comments

[a] Use of Form

[b] Limitation on Aggregate Amount of Security

[3] Discussion of Authorities

[a] Expenses to Be Incurred on Appeal

§ 52.155 Supporting Motion for Order and Judgment Dismissing Shareholder's Derivative Suit for Failure to Post

Security [Corp. Code § 800(d)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

[3] Discussion of Authorities

[a] Dismissal of Action for Failure to Furnish Security for Corporation

[4] Additional Authorities

[a] Dismissal for Failure to Furnish Security

§ 52.155A Supporting Motion for Order and Judgment Dismissing Shareholder's Derivative Suit--Plaintiff Is No Longer Shareholder [Corp. Code § 800(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Dismissal Is Required When Plaintiff Is No Longer Shareholder

§ 52.156 Opposing Demurrer to Complaint--Plaintiff-Shareholder Has Satisfied the Requirements to File Derivative Action on Behalf of Corporation [Corp. Code § 800]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Necessary Elements for Derivative Action

[b] Derivative Action as Equitable Remedy

[c] Directors Required to Be Diligent

[d] Plaintiff's Right to Amend Complaint to Include Particulars

[4] Additional Authorities

[a] Plaintiff's Right to Amend Complaint to Include Particulars

§ 52.157 Opposing Demurrer to Complaint--Plaintiff Suing as Representative of Shareholder's Estate [Corp. Code § 800(b)(1)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Powers of Representative of Estate

[b] Representative of Estate as Bringing Derivative Action

[4] Additional Authorities

[a] Representative of Estate as Bringing Derivative Action

§ 52.158 Opposing Demurrer to Complaint--Plaintiff as Beneficial Owner of Shares in Corporation [Corp. Code § 800(b)(1)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Beneficial Ownership of Shares

[4] Additional Authorities

[a] Beneficial Ownership of Shares

§ 52.159 Opposing Demurrer to Complaint--Plaintiff Suing in a Derivative Action as Shareholder by Operation of Law [Corp. Code § 800(b)(1)]

[1] FORM

[2] Comments

[a] Use of Form

§ 52.160 Opposing Demurrer to Complaint--Plaintiff as Pledgee of Stock of Corporation

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Pledgee of Stock as Plaintiff

§ 52.161 Opposing Demurrer to Complaint--Demand for Action by Board of Directors Would Be Futile [Corp. Code § 800(b)(2)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Demand for Action Not Required When It Would Have Been Futile

§ 52.161A Opposing Demurrer to Complaint--Equitable Considerations Warrant Exception to Continuous Ownership Requirement

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Equitable Considerations May Warrant Exception to Continuous Ownership Requirement

[b] Equitable Considerations Might Apply If Plaintiff Was Wrongfully Deprived of Standing

§ 52.162 Opposing Demurrer to Complaint--Plaintiff's Cause of Action Is in Individual Capacity

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Individual Suit to Enforce Shareholder's Individual Right

[b] Minority Shareholder May Maintain an Individual Action Against Majority Shareholders for Diminution in Value of Stock

[c] Minority Shareholder May Maintain Individual Action for Deprivation of Proportional Share of Corporate Profits or Value of Corporate Assets

[d] Person Injured Both As Individual and As Owner

§ 52.163 Opposing Motion for Summary Judgment--Questions of Fact Presented Regarding Application of Business Judgment Rule [Corp. Code § 309]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Prerequisites for Application of Business Judgment Rule

[b] Regular Rules Governing Summary Judgment Apply

[c] "Similar Circumstances" Within Meaning of Corporations Code Section 309(a)

[d] Right to Rely on Committee's Recommendation

[e] "Golden Parachute" Defined

[f] Purpose of "Golden Parachutes"

[g] Application of Business Judgment Rule to Approval of "Golden Parachutes"

[h] Business Judgment Rule Is Not Applicable to Conduct of "Inside Director" in Obtaining Agreement From Which He or She Benefits

[i] Questions of Fact Presented Regarding Whether Board Committee Members Exercised Their Best Business Judgment

[j] Questions of Fact Presented Regarding Whether Board Members Exercised Their Best Business Judgment in Relying on Recommendation of Board Committee

[4] Additional Authorities

[a] Regular Rules Governing Summary Judgment Apply

§ 52.164 Opposing Motion for Summary Judgment--Compliance With Corp. Code § 310 Does Not Bar Derivative Action Regarding Same Transaction

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Compliance With Corp. Code § 310 Does Not Bar Derivative Action

[4] Additional Authorities

[a] Compliance With Corp. Code § 3310 Does not Bar Derivative Action

§ 52.165 Opposing Motion for Summary Judgment--Doctrine of Corporate Ratification Not Applicable to Bar Derivative Action Regarding Ratified Transaction

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Corporate Ratification Does Not Bar Derivative Action

§ 52.166 Opposing Motion for Security Requested Pursuant to Corp. Code § 800(c)-(f)--Action Not a Derivative Suit--By Plaintiff

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Provision Requiring Security Improperly Applied

§ 52.167 Opposing Motion for Security Requested Pursuant to Corp. Code § 800--Aggregate Amount of Security Is Limited to $50,000

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Aggregate Amount of Security Is Limited

§ 52.168 Opposing Motion for Attorney's Fees by Successful Defendant in Derivative Action--Recovery Is Limited to Security Posted by Plaintiff [Corp. Code § 800]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Attorney's Fees Limited by Posted Security

§§ 52.169-52.179 [Reserved]

§ 52.180 Supporting Petition for Judicial Supervision of Voluntary Winding Up of Corporation [Corp. Code § 1904]--Corporation Dissolved at Election of Shareholders [Corp. Code § 1900(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Corporation in Process of Winding Up

[b] Validity of Election

[c] "Vote" as Including Written Consent

[d] Determination of Good Faith

[e] Jurisdiction Over Dissolution of Foreign Corporation

[f] Parties in Interest

[g] Judicial Supervision Necessary Where Board Deadlocked

[h] Judicial Supervision Necessary Where Board Unable to Agree on Dissolution Plan

[i] Judicial Supervision Necessary Where Dissension Causes Substantial Delay in Dissolution

[4] Additional Authorities

[a] Determination of Good Faith

[b] Parties in Interest

§ 52.181 Supporting Petition for Judicial Supervision of Voluntary Winding Up of Corporation [Corp. Code § 1904]--Corporation Dissolved at Election of Board of Directors [Corp. Code § 1900(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Corporation in Process of Winding Up

[b] Jurisdiction Over Dissolution of Foreign Corporation

[c] Parties in Interest

[d] Judicial Supervision Necessary Where Board Unable to Agree on Dissolution Plan

[e] Judicial Supervision Necessary Where Discussion Causes Substantial Delay in Dissolution

[4] Additional Authorities

[a] Parties in Interest

§ 52.182 Supporting Motion to Dismiss Complaint Seeking Involuntary Dissolution of Corporation [Corp. Code § 1800]--No Jurisdiction of Subject Matter If Filed by Unauthorized Person

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Special Appearance

[b] Strict Construction of Statute Authorizing Action

[c] Court Without Jurisdiction

[d] Constructive Transfer or Surrender of Shares

[4] Additional Authorities

[a] Plaintiffs Authorized by Statute

§ 52.183 Supporting Motion for Summary Judgment--Involuntary Dissolution Not Reasonably Necessary to Protect Shareholder Rights or Interests [Corp. Code § 1800(b)(5)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Liquidation Must be Reasonably Necessary to Protect Shareholder Rights or Interests.

§ 52.184 Supporting Motion by Shareholder or Creditor to Intervene [Code Civ. Proc. § 387; Corp. Code § 1800(c)]--In Action for Involuntary Dissolution of Corporation [Corp. Code § 1800(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Right to Intervene Unqualified

[b] Intervention Takes Place When Order Is Made

[c] Intervention Before Hearing Is Timely

[d] Right of Shareholder Not of Record to Intervene

[e] Intervention After Default But Before Hearing Is Timely

[f] Security for Costs Not Required

[g] Ex Parte Motion Permissible

[h] Right to Bring Separate Action Does Not Preclude Intervention

[i] Timely Intervention Does Not Depend on Service of Complaint

§ 52.185 Supporting Petition for Determination of Identity of Directors or for Appointment of Directors to Wind up Affairs of Corporation [Corp. Code § 2003]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Interested Person

§ 52.186 Supporting Motion [Code Civ. Proc. § 1003] to Approve Intermediate Accounts of Directors [Corp. Code § 1806(d)] and to Determine Claims Against Corporation [Corp. Code § 1806(b)] and Rights of Shareholders to Assets [Corp. Code § 1806(c)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Jurisdiction of Court to Determine Creditors' Rights

[4] Additional Authorities

[a] Rights of Shareholders to Assets

§ 52.187 Supporting Motion for Order Staying Dissolution Proceedings and Appointing Appraisers to Ascertain Value of Stock [Corp. Code §§ 2000(a)-(c)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Statutory Authority for Purchase

[b] Election to Purchase by Corporation

[c] Stay of Proceedings Mandatory

[d] Determination of Fair Value

[e] Court May Choose Between Discordant Appraisals

[f] Purchase by Majority Shareholders Does Not Justify Devaluation of Minority Shares in Closely Held Corporation

[g] Majority's Personal Control Over Sales Does Not Justify Reduction in Value of Minority Shares

[h] Fair Value of Shares Includes Value and Effect of Pending Derivative Action

[4] Additional Authorities

[a] Statutory Authority for Purchase

[b] Stay of Proceedings Mandatory

[c] Determination of Fair Value

[d] Purchase by Majority Shareholders Does Not Justify Devaluation of Minority Shares in Closely Held Corporation

§ 52.188 Supporting Petition for Order Declaring Corporation Duly Wound Up and Dissolved [Corp. Code § 1907]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

§ 52.189 Supporting Motion for Summary Judgment--By Defendant--In Action by Creditor Against Dissolved Corporation--Failure to Present Claim in Timely Manner Bars Claim

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

§ 52.190 Opposing Petition for Judicial Supervision of Voluntary Dissolution of Corporation [Corp. Code §

1904]--No Valid Election to Dissolve

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Limits on Jurisdiction

[b] Requirement of Statutory Compliance

[c] Requirement of Election to Dissolve

[d] Court Without Jurisdiction In Futuro

§ 52.191 Opposing Petition for Judicial Supervision of Voluntary Dissolution of Corporation [Corp. Code § 1904]--Election to Dissolve Revoked

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Limits on Jurisdiction

[b] Revocation Terminates Dissolution Process

[c] Failure to File with Secretary of State as Not Affecting Validity of Revocation.

§ 52.192 Opposing Motion to Approve Intermediate Accounts of Directors [Corp. Code § 1806(d)] and to Determine Claims Against Corporation [Corp. Code § 1806(b)] and Rights of Shareholders to Assets [Corp. Code § 1806(c)]--Objection by Creditor to Claim of Competing Creditor

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Standing of Creditor to Object to Another Creditor's Claim

[b] Failure to Perfect Personal Property Tax Lien Bars Priority Claim

California Points & Authorities

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Volume 5 Chapters 50-59 CONTRACTS---to---CORPORATIONS
CHAPTER 52 CORPORATIONS
PART I. INTRODUCTION

5-52 California Points & Authorities § 52.01

§ 52.01 Scope of Chapter

This chapter contains memoranda dealing with legal issues arising specifically with respect to corporations, including forms dealing with the following:

- Supporting [*see §§ 52.20, 52.21*] and opposing [*see §§ 52.34 -52.36*] a motion for summary judgment in an action maintained by a foreign corporation that has not qualified to transact intrastate business or is suspended under the laws of its state of incorporation.

- Supporting [*see § 52.30*] and opposing [*see §§ 52.38, 52.39*] a motion for summary judgment on the ground that a defendant foreign corporation is a "nominally foreign" corporation.

- Supporting [*see § 52.31*] and opposing [*see §§ 52.40 -52.42*] a motion for summary judgment on the ground that a corporate party has had its powers suspended or forfeited for nonpayment of its franchise taxes.

- Supporting [*see § 52.32*] and opposing [*see § 52.43*] a motion for summary judgment on the ground that a contract is voidable when entered into by a corporation during a period of suspension or forfeiture.

- Supporting a motion for summary judgment against a corporation that has had its corporate powers suspended in failure to file the information statement required by law [*see § 52.33*].

- Supporting [*see §§ 52.22 -52.29*] and opposing [*see § 52.37*] a motion for change of venue by a defendant corporation.

- Supporting [*see §§ 52.60, 52.61*] and opposing [*see §§ 52.63, 52.64*] a demurrer to a complaint against an individual for liability on the obligations of a corporation based on the alter ego doctrine.

- Supporting [*see § 52.62*] and opposing [*see §§ 52.65 -52.70*] a plaintiff's motion to amend a judgment rendered against a corporation so as to include as a judgment debtor the name of an individual

who was the alter ego of a corporate judgment debtor.

- Opposing a plaintiff's motion to amend a judgment so as to include as a judgment debtor the name of a corporation in which the defendant happens to own shares, when the motion is based on the doctrine of outside reverse piercing of the corporate veil (a theory that the corporation, as the alter ego of the shareholder, can be liable to a third-party judgment creditor of the shareholder, which is not recognized in California) [*see § 52.80*].

- Supporting [*see §§ 52.90 -52.94*] and opposing [*see §§ 52.95, 52.96*] petitions for a writ of mandate to compel a corporation to permit inspection of its books, records, and other documents and its properties under *Corp. Code §§ 1600-1605*. (Note that not all corporate inspection rights will be governed by *Corp. Code § 1600 et seq.* For instance, inspection rights of shareholders of state savings and loan associations are governed by *Fin. Code § 6050* [*Feldman v. San Mateo Financial Corp. (1990) 226 Cal. App. 3d 543, 547, 276 Cal. Rptr. 285]* .)

- Supporting [*see §§ 52.110 -52.112*] and opposing [*see §§ 52.118, 52.119*] demurrers to complaints for damages against directors and other agents of the corporation, on the ground of expiration of the period of the statute of limitations.

- Supporting a demurrer to a creditor's complaint for damages against directors of an insolvent corporation, on the ground that the directors owe no fiduciary duty to creditors of an insolvent corporation [*see § 52.112A*].

- Supporting a demurrer to a complaint for removal of directors for failure of the complaint to state a cause of action [*see § 52.113*].

- Supporting a demurrer to an answer to a petition for appointment of a provisional director on the ground that estoppel and unclean hands are not defenses in such proceedings [*see § 52.114*].

- Supporting a motion by a defendant for summary judgment on the ground that a director lacks authority to institute an action in the corporation's name against a co-director and equal shareholder [*see § 52.115*].

- Supporting a motion by defendant for summary judgment in an action to remove a director from office [*see § 52.116*].

- Supporting [*see § 52.117*] and opposing [*see § 52.120*] a motion by a corporate agent for indemnification of expenses incurred in defending claims.

- Supporting [*see §§ 52.140 -52.146*] and opposing [*see §§ 52.156 -52.162*] demurrers to a complaint in a derivative action on the basis that there has been a failure to meet the statutory prerequisites for a derivative action.

- Supporting [*see § 52.149*] and opposing [*see §§ 52.166, 52.167*] a defendant's motion for security for attorney's fees and costs in a derivative action.

- Supporting a successful plaintiff's motion [*see § 52.150*], or supporting [*see §§ 52.150A, 52.151*] and opposing [*see § 52.168*] a successful defendant's motion, for attorney's fees and costs in a derivative action.

- Supporting a motion to permit a plaintiff to waive the requirement of being a registered or beneficial shareholder or a holder of voting trust certificates at the time of the wrongdoing to the corporation [*see § 52.152*].

- Supporting motions to approve a compromise settlement [*see § 52.153*], to modify the amount of the bond [*see § 52.154*], and to dismiss for failure to post security [*see § 52.155*] or because the plaintiff no longer is a shareholder of the corporation [*see § 52.155A*].

- Supporting [*see § 52.147*] and opposing [*see §§ 52.163 -52.165*] a motion for summary judgment based on application of the business judgment rule.

- Supporting a motion for judgment on the pleadings on the ground that a derivative action against the corporation's outside counsel cannot proceed in the absence of a corporate waiver of the attorney-client privilege [*see § 52.148*].

- Supporting [*see §§ 52.180, 52.181*] and opposing [*see §§ 52.190, 52.191*] a petition for judicial supervision of the voluntary dissolution of a corporation.

- Supporting a motion to dismiss a complaint seeking involuntary dissolution of a corporation [*see § 52.182*].

- Supporting a motion for summary judgment on the ground that involuntary dissolution is not reasonably necessary to protect shareholder rights or interests [*see § 52.183*].

- Supporting a motion by a shareholder or creditor to intervene in an action for involuntary dissolution [*see § 52.184*].

- Supporting a petition for the determination of the identity, or for the appointment of directors during dissolution proceedings [*see § 52.185*].

- Supporting [*see § 52.186*] and opposing [*see § 52.192*] a motion for approval of intermediate accounts of directors, determination of claims of creditors and rights of shareholders to assets.

- Supporting a motion for stay of dissolution proceedings and for appointment of appraisers to ascertain the value of stock in connection with the exercise of statutory "buy-out" rights [*see § 52.187*].

- Supporting a petition for an order declaring a corporation duly wound up and dissolved [*see § 52.188*].

- Supporting a motion for summary judgment by the defendant in an action by a creditor against a dissolved corporation [*see § 52.189*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesCauses of ActionFraudBusiness & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesCauses of ActionNegligent Acts of Directors & OfficersBusiness & Corporate LawCorporationsShareholdersDisregard of Corporate EntityAlter EgoGeneral OverviewCivil ProcedureSummary JudgmentMotions for Summary JudgmentWritten Motions

California Points & Authorities

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Volume 5 Chapters 50-59 CONTRACTS---to---CORPORATIONS
CHAPTER 52 CORPORATIONS
PART I. INTRODUCTION

5-52 California Points & Authorities § 52.02

§ 52.02 Governing Statutes

[1] In General

The law governing corporations is contained in Division I of the Corporations Code [*Corp. Code § 100 et seq.*], referred to in this chapter as the General Corporation Law. In addition to the provisions of the General Corporation Law, provisions governing the jurisdiction of, and service of process on corporations are contained in *Code Civ. Proc. § 410.10 et seq.*, and provisions governing the suspension or forfeiture of corporations for their failure to pay franchise taxes are governed by the Corporation Tax Law [*Rev. & Tax. Code § 23001 et seq.*].

Limited liability companies [*see § 52.02[4]*] are governed by the Beverly-Killea Limited Liability Company Act [*Corp. Code § 17000 et seq.*].

[2] Application of General Corporation Law

Subject to the transitional provisions of *Corp. Code § 2300 et seq.*, the General Corporation Law applies to corporations organized under the General Corporation Law and to domestic corporations that were not subject on December 31, 1976, to *Corp. Code § 5000 et seq.* (nonprofit corporations), *Corp. Code § 12000* (corporations for specific purposes), *Corp. Code § 12200 et seq.* (consumer cooperative corporations), *Corp. Code § 13200 et seq.* (fish marketing), *Corp. Code § 14000 et seq.* (small business financial development corporations), and that are not organized or existing under any statute of California other than the Corporations Code. The General Corporation Law applies to any other corporation only to the extent expressly included in a particular provision of the General Corporation Law [*Corp. Code § 102(a)*].

[3] Existing Corporations

The existence of a corporation formed or existing on the date of enactment or reenactment of the General Corporation Law is not affected by the enactment or reenactment of the General Corporation Law, nor by any change in the requirements for the formation of corporations, nor by the amendment or repeal of laws under which they were formed [*Corp. Code § 102(b)*].

In addition, no repeal effected by the enactment or reenactment of the General Corporation Law, nor the enactment of Title 1 of the Corporations Code [*Corp. Code § 1 et seq.*], nor the amendment of Title 1, impairs or takes away any existing liability or cause of action against any corporation, its shareholders, directors, or officers incurred prior to the time of the enactment, reenactment, or amendment [*Corp. Code § 102(c)*].

[4] Limited Liability Companies

A limited liability company or domestic limited liability company (LLC) is an entity that has one or more members, is organized under the Beverly-Killea Limited Liability Company Act, and is subject to the provisions on personal liability of members set forth in *Corp. Code § 17101* [*Corp. Code § 17001(t)*; *see Corp. Code § 17000 et seq.*]. A properly structured California LLC can have essentially the income tax transparency of a partnership on both the federal and California level, without some of the restrictions imposed on corporations and limited partnerships [*see I.R.C. § 701*; Treas. Reg. § 301.7701-2; *Rev. Proc. 95-10, 1995-1 C.B. 501* ; FTB Notice 92-5]. Properly structured LLCs can provide their members, managers, and officers with limited liability similar to that enjoyed by corporateshareholders; that is, liability generally limited to their investments and commitments to invest in the LLC [*Corp. Code §§ 17101(a), 17158*; *see Corp. Code §§ 17101(b), (c), 17153, 17254(e), 17255(a)*; *Rev. & Tax Code § 6829(c)* (exceptions to limited liability)]. LLCs offer great flexibility of form and structure, which can range from extremely simple to very complex and, if desired, can closely approximate management and ownership structures of either corporations or partnerships.

An LLC may engage in any lawful business activity (subject to any limitations contained in its articles of organization and to compliance with any applicable laws), whether or not for profit, except banking, insurance, or trust company business [*Corp. Code § 17002(a)*; *see Corp. Code § 17002(b)* (LLC may operate as health care service plan)]. An LLC also may not render professional services that may be lawfully rendered only pursuant to a license, certification, or registration authorized by the Business and Professions Code, Chiropractic Act, or Osteopathic Act [*see Corp. Code § 13401(a)*], or pursuant to a license, certification, or registration authorized by the Yacht and Ship Brokers Act [*see Corp. Code § 13401.3*; *see also Harb. & Nav. Code § 700 et seq.*] in California [*Corp. Code § 17375* (codifying previously uncodified provision); *see* Stats. 1994, ch. 1200, § 93].

The Beverly-Killea Limited Liability Company Act is designed especially to assist the formation and operation of small, closely-held or closely-controlled business arrangements. Unlike the limited liability company statutes of some other states, the California Act permits structures sufficiently flexible to be attractive to larger, more complex business ventures. Business areas in which the LLC structure seems particularly useful include real estate, joint ventures (particularly ventures with foreign partners), high technology and venture capital, oil and gas, and theatrical investments. It seems likely that LLCs may often be used when a partnership or S corporation previously might have been used.

For more detailed discussion of LLCs, see Ballantine & Sterling, California Corporation Laws, Ch. 27, *Limited Liability Companies* (Matthew Bender). For discussion and forms relating to the formation and operation of LLCs, see California Legal Forms, Ch. 12C, *Limited Liability Companies* (Matthew Bender). For forms relating to litigation involving LLCs, see California Forms of Pleading and Practice, Ch. 346, *Limited Liability Companies* (Matthew Bender).

[5] Foreign Corporations

Corp. Code §§ 171, 191, 2100-2260 govern foreign corporations generally, and in particular, *Corp. Code § 2105* governs the qualifications of foreign corporations transacting intrastate business; *Corp. Code §§ 2105, 2117,* and *2117.1* govern statements required to be filed by foreign corporations transacting intrastate business in California; and *Corp. Code § 2115* governs "nominally foreign" corporations, that is, corporations that are subject to those corporate laws of California contained in *Corp. Code § 2115(b). Code Civ. Proc. § 395.5* governs the venue of an action maintained against a corporation. In addition, *Corp. Code §§ 2108(d), 2204-2206,* govern forfeiture or suspension of powers of

foreign corporations for failure to comply with California reporting requirements, and *Rev. & Tax. Code § 23301 et seq.* govern the suspension and forfeiture of corporations that have failed to pay their franchise taxes.

If a foreign corporation is not transacting sufficient California business to be subject to the registration requirements, California law will apply the law of the state of incorporation to determine the continuing existence of the foreign corporation [*CM Records Corp. v. MCA Records, Inc. (1985) 168 Cal. App. 3d 965, 967, 214 Cal. Rptr. 409]* .

[6] Alter Ego Doctrine

Although the General Corporation Law does not contain provisions governing, in general, the alter ego doctrine, *Corp. Code § 300(e)* does provide that the relaxation of the formalities of directors and shareholders meetings in a close corporation pursuant to a shareholder's agreement [*see Corp. Code § 300(b)*] is not to be considered a factor tending to establish that the shareholders have personal liability for corporate obligations.

[7] Corporate Records

Corporate records and reports and the rights of inspection of shareholders and directors are governed by *Corp. Code §§ 1500-1605*. Provisions regarding the issuance of writs of mandate are governed by *Code Civ. Proc. §§ 1085* and *1086*.

[8] Duties and Liabilities of Directors and Managers

The duties and liabilities of directors and managers generally are governed by *Corp. Code § 300 et seq.*

The provisions for maintaining a derivative action are set forth in *Corp. Code § 800(a)-(f)*. The business judgment rule, which is often applied in derivative actions, is codified in *Corp. Code § 309*. *Corp. Code §§ 310-317* address other aspects of directors' duties and liability, including those involved in transactions between a director and the corporation.

[9] Involuntary Dissolution

Provisions relating to involuntary dissolution are contained in *Corp. Code § 1800 et seq.* Voluntary dissolution proceedings are governed by Corp. Code *§ 1900 et seq. Corp. Code* § 2000 et seq. contain general provisions relating to dissolution. Definitions and general provisionsapplicable to all sections of the General Corporation Law are found in *Corp. Code § 100 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsFinanceFranchise TaxGeneral OverviewBusiness & Corporate LawCorporationsShareholdersActions Against CorporationsDerivative ActionsEnforcement of Corporate RightsBusiness & Corporate LawCorporationsShareholdersShareholder Duties & LiabilitiesPersonal LiabilityBusiness & Corporate LawForeign BusinessesQualificationsCivil ProcedureVenueCorporations

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§ 52.03 Other Procedures for Imposing Alter Ego Liability

The following procedures provide the bases for the forms in this part:

- Alleging the facts for imposition of alter ego liability in the complaint and proving them at trial, or

- Moving after trial to amend the judgment against the corporation to include the alter egos as additional judgment debtors.

In addition, the following procedures may be used to obtain a judgment imposing alter ego liability on an entity or person who was not a party to the initial action against the corporation, although not all of these procedures will be appropriate in every situation:

- Petition for an order to show cause why the judgment should not be amended to add the controlling person as judgment debtor [*Motores De Mexicali v. Superior Court (1958) 51 Cal. 2d 172, 174-176, 331 P.2d 1* ; *Schoenberg v. Romike Properties (1967) 251 Cal. App. 2d 154, 168, 59 Cal. Rptr. 359]* ;

- Separate action against the controlling person or entity to establish its liability for the original judgment [*Silverman v. Superior Court (1988) 203 Cal. App. 3d 145, 151-152, 249 Cal. Rptr. 724* ; *Taylor v. Newton (1953) 117 Cal. App. 2d 752, 753-757, 257 P.2d 68]* ; or

- Joint debtor proceedings under *Code Civ. Proc. §§ 989-993* [*see* *Silverman v. Superior Court (1988) 203 Cal. App. 3d 145, 147-148, 152, 249 Cal. Rptr. 724* (dictum); *Marcus v. Superior Court (1977) 75 Cal. App. 3d 204, 211 n.3, 141 Cal. Rptr. 890* (dictum)]. Joint debtor proceedings are limited to establishing liability for contract obligations and are only available against a person who was named as a defendant, albeit a fictitious one, in the original complaint [*Code Civ. Proc. § 989*; *Vincent v. Grayson (1973) 30 Cal. App. 3d 899, 905-906, 106 Cal. Rptr. 733* ; *McRae v. Bates (1961) 196 Cal. App. 2d 510, 512, 16 Cal. Rptr. 565]* . For further discussion of joint debtor proceedings, see California Forms of Pleading and Practice Ch. 254, *Executions and Enforcement of Judgments* (Matthew Bender).

When a person is sued on the theory that a corporation is the person's alter ego, that person has standing to enforce the corporation's agreement to arbitrate the underlying dispute, even though that person was not a party to the agreement [*Rowe v. Exline (2007) 153 Cal. App. 4th 1276, 1285, 63 Cal. Rptr. 3d 787]* . For points and authorities supporting a motion to compel arbitration pursuant to an agreement to arbitrate, see Ch. 20, *Arbitration: Compelling* , and Ch. 20A, *Arbitration: Resisting* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsShareholdersDisregard of Corporate EntityAlter EgoCorporate FormalitiesBusiness & Corporate LawCorporationsShareholdersDisregard of Corporate EntityAlter EgoInadequate CapitalizationCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend

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5-52 California Points & Authorities § 52.04

§ 52.04 Alter Ego Liability Is Joint and Several

If the corporate veil is pierced, each defendant as to whom it is pierced is jointly and severally liable for the full amount of the corporation's obligation. Alter ego liability is not apportioned according to the ownership interests of each defendant. A person who is not made a defendant or against whom alter ego liability is not established does not have to contribute to payment of the corporate obligation [*Minnesota Mining & Manufacturing Co. v. Superior Court (1988) 206 Cal. App. 3d 1025, 1028-1029, 253 Cal. Rptr. 908]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsShareholdersDisregard of Corporate EntityAlter EgoCorporate FormalitiesBusiness & Corporate LawCorporationsShareholdersDisregard of Corporate EntityAlter EgoInadequate CapitalizationCivil ProcedureJudgmentsEntry of JudgmentsMultiple Claims & Parties

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§ 52.05 Page Limits on Memoranda

Generally, an opening or responding memorandum must not exceed 15 pages, or in the case of a motion for summary judgment or summary adjudication, 20 pages. A reply or closing memorandum may not exceed 10 pages [*see Cal. Rules of Ct., Rule 3.1113(d)*]. The page limit does not include exhibits, declarations, attachments, the table of contents, the table of authorities, or the proof of service [*Cal. Rules of Ct., Rule 3.1113(d)*]. Any party desiring to file a longer memorandum must obtain leave of court [*see Cal. Rules of Ct., Rule 3.1113(e)*]. A memorandum that exceeds 10 pages must include a table of contents and a table of authorities. A memorandum that exceeds 15 pages must also include an opening summary of argument [*Cal. Rules of Ct., Rule 3.1113(f)*]. Pagination of a memorandum that includes a table of contents and authorities is governed by *Cal. Rules of Ct., Rule 3.1113(h)*. For further discussion of the page limitations under *Cal. Rules of Ct., Rule 3.1113*, and of other basic format requirements of memoranda, see *Ch. 1, Writing Legal Memoranda and Briefs, § 1.05*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPleading & PracticeMotion PracticeSupporting MemorandaCivil ProceduresSummary JudgmentSupporting MaterialsMemoranda of Law

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§ 52.06 Related Pleadings and Practice Chapters

For a discussion and forms for allegations and affirmative defenses involving the organization and existence of corporations, see California Forms of Pleading and Practice, Chapters 160-170 (Matthew Bender).

For a discussion and forms for use in particular cases involving the jurisdiction, capacity, and venue of corporations, see the following chapters in that publication:

- Ch. 3, *Abatement of Actions*.
- Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances*.
- Ch. 518, *Service of Summons and Papers*.
- Ch. 571, *Venue*.

For a discussion and a complaint, allegations, an affirmative defense, a notice, of motion, and an order to amend a judgment to include an alter ego litigant, and a declaration in support of such a motion, see California Forms of Pleading and Practice, Ch. 161, *Corporations: Alter Ego Liability* (Matthew Bender).

For a discussion, procedural guide, and forms for use in mandate proceedings, see California Forms of Pleading and Practice, Ch. 358, *Mandate and Prohibition* (Matthew Bender). For a discussion and forms for petitions for writs of mandate to enforce rights of inspection, see California Forms of Pleading and Practice, Ch. 165, *Corporations: Corporate Records and Reports* (Matthew Bender).

For discussion and forms relating to actions and proceedings involving directors, officers, and controlling shareholders, see California Forms of Pleading and Practice, Ch. 167, *Corporations: Directors and Management* (Matthew Bender).

For a discussion and related forms for filing a derivative action, see California Forms of Pleading and Practice, Ch. 168, *Corporations: Derivative Actions* (Matthew Bender).

For a discussion and forms for certificates, petitions, motions, declarations, orders, and a complaint relating to the dissolution of corporations, see California Forms of Pleading and Practice, Ch. 170, *Corporations: Dissolution and Winding Up* (Matthew Bender).

For discussions and forms relating to particular procedural issues, see the following chapters in California Forms of Pleading and Practice (Matthew Bender):

- Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances*.
- Ch. 324, *Subject Matter Jurisdiction*.
- Ch. 371, *Motions After Trial*.
- Ch. 395, *Parties*.
- Ch. 537, *Summary Judgment*.

For discussions and forms for use in actions involving control and management of corporations generally, of particular types of corporations and other business organizations, and for use in actions relating to the disposition of their property on dissolution, liquidation, or other form of structural change, see the following chapters in California Forms of Pleading and Practice (Matthew Bender):

- Ch. 7, *Accounting, Action For*.
- Ch. 95, *Banks, Deposits, and Checks*.
- Ch. 110, *Churches and Religious Organizations*.
- Ch. 120, *Class Actions*.
- Ch. 124, *Condominiums and Other Common Interest Developments*.
- Ch. 270, *Fraudulent Conveyances*.
- Ch. 307, *Insolvency*.
- Ch. 355, *Lost and Unclaimed Property*.
- Ch. 486, *Receivers*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsFormationDe Facto CorporationsChallenging ExistenceBusiness & Corporate LawCorporationsShareholdersDisregard of Corporate EntityAlter EgoGeneral OverviewCivil ProcedureJurisdictionGeneral OverviewCivil ProcedureVenueCorporationsCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral Overview

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§ 52.07 Related Memoranda Chapters

For a discussion of how to use the forms in this chapter to draft a memorandum or a trial or appellate brief, and for a sample of a complete memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For memoranda addressing suspension or forfeiture and failure of a foreign corporation to qualify to do intrastate business in the context of pleas in abatement, see Ch. 10, *Abatement and Survival of Actions* .

For memoranda relating to motions to quash service of summons for lack of personal jurisdiction over a domestic or foreign corporate defendant, its officers, counsel, or shareholders, and memoranda relating to motions to stay or dismiss an action for inconvenient forum, see Ch. 132, *Jurisdiction: Personal Jurisdiction and Inconvenient Forum* .

Memoranda for writs of mandate in general situations may be found in Ch. 150, *Mandate and Prohibition* .

Related memoranda that may be useful in connection with proceedings for the dissolution of a corporation may be found in the following chapters in this publication:

- Ch. 12, *Accounting*.
- Ch. 30, *Bankruptcy*.
- Ch. 124, *Intervention*.
- Ch. 132, *Jurisdiction: Personal Jurisdiction and Inconvenient Forum*.
- Ch. 133, *Jurisdiction: Subject Matter Jurisdiction*.
- Ch. 200, *Receivers*.
- Ch. 221, *Summary Judgments*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessMethodsForeign ServiceCivil ProcedureRemediesWritsCommon Law WritsMandamus

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[Reserved]

§§ 52.08[Reserved]

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5-52 California Points & Authorities § 52.20

§ 52.20 Supporting Motion for Summary Judgment--In Action Maintained by Foreign Corporation--Corporation Transacting Intrastate Business Without Having Obtained Certificate of Qualification [Corp. Code §§ 2105, 2203(c)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], a(n)	)	NO. _____
_____	)	MEMORANDUM IN SUPPORT OF MOTION FOR
[*name of state or foreign country*]	)	SUMMARY JUDGMENT
Corporation, Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD BE GRANTED BECAUSE PLAINTIFF IS A FOREIGN CORPORATION WHICH IS TRANSACTING INTRASTATE BUSINESS AND HAS NOT OBTAINED FROM THE SECRETARY OF STATE A CERTIFICATE OF QUALIFICATION AS REQUIRED BY SECTION 2105 OF THE CORPORATIONS CODE.

A. Summary Judgment. A defendant may move for summary judgment in any action or proceeding if it is contended that the action has no merit. The motion must be granted if all of the papers submitted show that there is no triable issue as to any material fact and that defendant is entitled to a judgment as a matter of law (*Code Civ. Proc. § 437c*).

B. Foreign Corporation Defined. A foreign corporation means any corporation other than one formed under the laws of California (*Corp. Code §§ 167, 171*).

[*Optional*] **C. Foreign Association.** The term "foreign corporation" includes a business association organized as a trust under the laws of a foreign jurisdiction (*Corp. Code §§ 170, 171*).

D. Certificate of Qualification Is Required If Foreign Corporation Transacting Intrastate Business. A foreign corporation may not transact intrastate business without having first obtained from the Secretary of State a certificate of qualification as provided in *Corporations Code Section 2105* (*Corp. Code § 2105*).

E. Transaction of Intrastate Business. A foreign corporation is considered to be transacting intrastate business if it enters into repeated and successive transactions of its business in California, other than interstate or foreign commerce (*Corp. Code § 191(a)*; *see Neogard Corp. v. Malott & Peterson-Grundy (1980) 106 Cal. App. 3d 213, 226-227, 164 Cal. Rptr. 813* (example of sufficient interstate activity)).

F. Nonqualified Foreign Corporation Barred From Maintaining Suit. A foreign corporation subject to the provisions of *Corporations Code Sections 2100-2116*, which transacts intrastate business without complying with *Corporations Code Section 2105* by first obtaining a certificate of qualification from the Secretary of State, may not maintain any action or proceeding in any court of California, on any of the intrastate business so transacted, commenced prior to compliance with *Corporations Code Section 2105* until it has complied with the provisions thereof and has paid to the Secretary of State a penalty of two hundred and fifty dollars ($250), in addition to the fees due for filing the statement and designation required by *Corporations Code Section 2105*, and has filed with the clerk of the court, in which the action is pending, receipts showing the payment of these fees and penalty and all franchise taxes, and other taxes on business or property in California which should have been paid for the period during which it transacted intrastate business (*Corp. Code § 2203(c)*; *see Neogard Corp. v. Malott & Peterson-Grundy (1980) 106 Cal. App. 3d 213, 225-227, 164 Cal. Rptr. 813* (statute does not violate Commerce Clause).

[*Optional*] **G. Action by Assignee of Nonqualified Foreign Corporation.** An assignee of a foreign corporation is barred from maintaining an action in California when the corporation would be barredfor failure to comply with the requirements of transacting intrastate business in California *(Thorner v. Selective Cam Transmission Co. (1960) 180 Cal. App. 2d 89, 93, 4 Cal. Rptr. 409*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for summary judgment by defendant in an action being maintained by a foreign corporation on the corporation's intrastate business when the corporation has not first obtained a certificate from the Secretary of State as required by *Corp. Code § 2105*. In a particular case counsel may also wish to include selected points and authorities set out in opposition to § 52.34 in order to distinguish his or her particular fact situation.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations which support the motion [*Code Civ. Proc. § 437c*].

With appropriate modifications, this form may be used to support a demurrer to a complaint based on the plaintiff foreign corporation's want of capacity to sue when the procedural defect of the failure of the corporation to obtain a certificate of qualification appears on the face of the complaint [*see H. D. Haley & Co. v. McVay (1924) 70 Cal. App. 438, 440, 233 P. 409]* . It should be noted, however, that the failure to allege affirmatively the capacity of a corporation to sue is not a proper ground for general demurrer [*Los Angeles Ry. Co. v. Davis (1905) 146 Cal. 179, 180-181, 79 P. 865]* . Failure to obtain a certificate to transact intrastate business may also be raised as a plea in abatement at a motion for separate trial of special defense. For a form raising the issue in that procedural context, see Ch. 10, *Abatement and Survival of Actions* . Note, however, that an evidentiary hearing may be necessary to determine whether the extent of intrastate business is sufficient to require the foreign corporation to obtain a certificate of qualification [*see, e.g., Mediterranean Exports, Inc. v. Superior Court (1981) 119 Cal. App. 3d 605, 615, 174 Cal. Rptr. 169* (motion to strike treated as motion for summary judgment)].

These points and authorities can also be modified for use in a trial or appellate brief, or in opposition to a writ of prohibition or mandate, or in a motion to strike.

[b] Opposing Memoranda

In an appropriate case, the points and authorities *set out in §§ 52.34* and *52.35* may be submitted in opposition to a motion for summary judgment supported by this form.

[3] Discussion of Authorities

[a] Transaction of Intrastate Business

Plaintiff in ***Neogard Corp. v. Malott & Peterson-Grundy*** *(1980) 106 Cal. App. 3d 213, 164 Cal. Rptr. 813* , had transacted business in California for nine years. Nevertheless, it had not obtained a certificate of qualification under *Corp. Code § 2105* and, on this basis, the trial court dismissed its breach of contract action against a local firm.

The court of appeal upheld the dismissal, finding that plaintiff's activities enumerated below constituted intrastate business, when taken together, despite the fact that plaintiff maintained no payrolled office in California (*106 Cal. App. 3d 213, 226)* . Plaintiff established relations with and paid commissions to manufacturer's representatives residing in California. It sent sales representatives intrastate to induce construction contracts between California project designers and California waterproofing subcontractors. It assisted the waterproofing subcontractors in obtaining those contracts. It entered into contracts with subcontractors and utilized this fact to induce contracts between interstate parties. It supervised the physical in-state application of its waterproofing system. It signed contracts in-state to guarantee those projects and provided in-state supervision when defects appear. This, the court said, amounted to more than entry into California merely to contribute to or to conclude a unitary interstate transaction (*106 Cal. App. 3d 213, 226)* .

Plaintiff also contended that the cause of action related to purely interstate contracts involving defendant's obligation to pay for product received, and thus could not be dismissed under *Corp. Code § 2203(c)* or the commerce clause. The court of appeal disagreed, concluding that the fact that the contract under suit is part and parcel of a course of business they deemed "intrastate" for purposes of *Corp. Code § 2105* renders that contract action one on intrastate business for purposes of *Corp. Code § 2203(c)* (*106 Cal. App. 3d 213, 227)* .

[b] Nonqualified Foreign Corporation Barred From Maintaining Suit

The facts and procedural background of ***Neogard Corp. v. Malott & Peterson-Grundy*** *(1980) 106 Cal. App. 3d 213,*

164 Cal. Rptr. 813 are *discussed in § 52.01[3][a]*. Plaintiff also contended that the dismissal violated the commerce clause of the United States Constitution. The court discussed the fact that the commerce clause addressed interstate commerce as opposed to intrastate activities and discussed the United States Supreme court's analysis of a similar New Jersey statute (*106 Cal. App. 3d 213, 225-226)* . The court concluded that because the qualification statute [*Corp. Code § 2203*] protects important state interests, does not discriminate against out-of-state corporations, imposes a minimal burden on the out-of-state corporation relative to the interests served, and was enforced in a manner ordinarily involving no onerous consequences, the dismissal should be affirmed (*106 Cal. App. 3d 213, 226-227)* . The court noted that while the commerce clause prevents a state from conditioning a foreign corporation's right to sue on a contract for the interstate sale of goods, there was more involved here. The heart of the controversy actually concerned who was to pay for intrastate repairs on projects already completed, and thus involved both the joint guarantee signed by plaintiff in California and the supervision of the actual construction. Those critical questions were entirely separate from any particular interstate sale and the power of the state was not limited (*106 Cal. App. 3d 213, 227)* .

[c] Action by Assignee of Nonqualified Foreign Corporation

In ***Thorner v. Selective Cam Transmission Co.*** *(1960) 180 Cal. App. 2d 89, 4 Cal. Rptr. 409* , the court of appeal held that the defendant failed to meet its burden of proof on defendant's motion to dismiss for failure of the plaintiff, an assignee of a foreign corporation, to obtain a certificate of qualification as required by former Corp. Code § 6801 [*now see Corp. Code § 2203(c)*]. In its holding, the court also considered the plaintiff's argument that former Corp. Code § 6801 [*now see Corp. Code § 2203(c)*] does not bar an action by an assignee and held that it does. The court noted the generally accepted rule in other jurisdictions which barred an assignee of a foreign corporation from suing when the corporation would be barred for failure to comply with the requirements of transacting intrastate business. In following this rule, the court stated it was unwilling to place the plaintiff's narrow technical construction of former Corp. Code § 6801 when to do so would obviously frustrate the purpose of the statute (*180 Cal. App. 2d 89, 93)* .

[4] Additional Authorities

[a] Transaction of Intrastate Business

Lilly & Co. v. Sav-On-Drugs (1961) 366 U.S. 276, 81 S. Ct. 1316, 6 L. Ed. 2d 288 was an appeal to the United States Supreme Court by an Indiana corporation which brought suit in New Jersey on a contract made in New Jersey. The New Jersey courts had held that the corporation must first obtain a certificate authorizing it to do business in that state before it may bring suit on the contract when it had maintained 18 employees in New Jersey to promote sales of its products to retailers who bought the products in intrastate commerce from wholesalers. The Supreme Court affirmed and held that under the terms of the New Jersey statute, the New Jersey courts could compel the Indiana corporation, under the United States Constitution, to comply with its statute since the corporation was doing business by virtue of the fact that its salesmen were in the business of "inducing" intrastate sales. The fact that the business was primarily a promotional and service business, which did not include a systematic solicitation of orders, went only to the nature of the intrastate business the corporation was carrying on, not to the question of whether it is carrying on an intrastate business (*366 U.S. 276, 282-284* .

United Medical Management Ltd. v. Gatto (1996) 49 Cal. App. 4th 1732, 57 Cal. Rptr. 2d 600 involved a foreign corporation that entered into a contract with a California corporation to transact intrastate business, without first qualifying to transact intrastate business pursuant to *Corp. Code § 2105*. The California corporation breached the contract. The foreign corporation then qualified to transact intrastate business and brought an action for breach of contract. The trial court granted a motion to dismiss the complaint for failure to comply with *Corp. Code § 2203(c)*. The court of appeals held that a foreign corporation that has qualified to transact intrastate business after transacting, but prior to commencing an action on, intrastate business may maintain the action without complying with *Corp. Code § 2203(c)* (*49 Cal. App. 4th 1732, 1742)* . The court also noted that a foreign corporation transacting intrastate business that has failed to qualify may nevertheless *defend* an action brought against it in state court. A foreign corporation

transacting intrastate business that has failed to qualify may also *commence* an action in state court; it is the act of *maintaining* an action commenced prior to qualification that requires compliance with *Corp. Code § 2203(c)* (*49 Cal. App. 4th 1732, 1739* ; *see § 52.36*).

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5-52 California Points & Authorities § 52.21

§ 52.21 Supporting Motion for Summary Judgment--In Action Maintained by Foreign Corporation--Foreign Corporation Not Subject to California Registration Suspended Under Law of State of Incorporation

[1] FORM

[*Caption. See § 52.20.*]

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD BE GRANTED BECAUSE PLAINTIFF IS A FOREIGN CORPORATION WHICH, THOUGH NOT TRANSACTING INTRASTATE BUSINESS IN CALIFORNIA, IS SUSPENDED UNDER THE APPLICABLE LAW OF THE STATE IN WHICH IT WAS INCORPORATED.

A. Summary Judgment. [*See § 52.20, Paragraph A.*]

B. Law of State of Incorporation as Determining Continuing Corporate Status of Foreign Corporation. _____ [Even when a valid choice of law clause applies California law, if *or* If] a foreign corporation is not transacting sufficient California business to be subject to the registration requirements, the capacity of that foreign corporation to maintain suit in California is determined by the law of the state of its incorporation (*CM Records Corp. v. MCA Records, Inc. (1985) 168 Cal. App. 3d 965, 967, 969, 214 Cal. Rptr. 409*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for summary judgment by defendant in an action by a foreign corporation that is not doing sufficient business in California to be subject to the registration requirement of *Corp. Code § 2105* but whose capacity to maintain the suit has been suspended under the laws of the state in which it was incorporated.

Counsel should set forth the applicable foreign statutes and cases. Counsel should also insert argument in this form showing the relationship between the facts of the case and the points of law stated. Properly authenticated documentary evidence or declarations or affidavits and request for judicial notice of the foreign law should be included in support of the motion [*see Evid. Code §§ 452(a), 453* (judicial notice)].

In the unlikely event that the lack of corporate capacity appears on the face of the complaint, these points and authorities, with appropriate modifications, may be used in support of a demurrer [*see H.D. Haley & Co. v. McVay (1924) 70 Cal. App. 438, 440, 233 P. 409]* . Failure to affirmatively allege corporate capacity to sue is not a proper ground for a general demurrer [*Los Angeles Ry. Co. v. Davis (1905) 146 Cal. 179, 180-181, 79 P. 865]* . With appropriate modifications, these points and authorities may be used in a trial or appellate brief.

[b] Related Memoranda

For discussion and a form that may be adapted for use in a special trial of the issue of corporate capacity, see Ch. 10, *Abatement and Survival of Actions* in this publication.

[3] Discussion of Authorities

[a] Law of State of Incorporation as Determining Continuing Corporate Status of Foreign Corporation

CM Records Corp. v. MCA Records, Inc. *(1985) 168 Cal. App. 3d 965, 214 Cal. Rptr. 409* was a breach of contract action arising out of a contract executed by the parties on April 3, 1979. Plaintiff was a Missouri corporation; defendant was a California corporation. The contract provided that it was to be "governed and construed under the laws and judicial decisions of the State of California." Plaintiff's corporate charter had been forfeited in Missouri on January 1, 1979, for failure to observe that state's registration requirements. Plaintiff commenced suit in California on April 29, 1980, and the Missouri secretary of state rescinded plaintiff's forfeiture on July 11, 1980. Defendant had raised the suspension of plaintiff's charter as an affirmative defense and moved for summary judgment on that basis. After defendant's motion for summary judgment was granted, plaintiff appealed.

The court of appeal upheld the choice of law provision in the contract and noted that both parties agreed that California law recognizes that the continuing legal existence of a corporation depends on the law of the state of its incorporation (*168 Cal. App. 3d 965, 967)* . Missouri law provides that no corporation shall prosecute any action enumerated in Mo. Rev. Stat. § 351.535 following a rescission of its forfeiture if the action was filed after the forfeiture of the corporation's rights but prior to the rescission of that forfeiture (Mo. Rev. Stat. § 351.540(2)). Section 351.535 includes an action for enforcement of a contract made after forfeiture of the certificate andbefore rescission of the forfeiture. The court concluded that as plaintiff had no capacity to enforce the contract in Missouri, it could not do so in California (*168 Cal. App. 3d 965, 969)* .

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5-52 California Points & Authorities § 52.22

§ 52.22 Supporting Corporate Defendant's Motion for Change of Venue--To County of Corporation's Principal Place of Business [Code Civ. Proc. § 395.5]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF MOTION FOR
Plaintiff,	)	CHANGE OF VENUE TO PROPER COURT
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
a Corporation, Defendant.	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THE COURT MUST ORDER A[N] _____ [ACTION *or* PROCEEDING] COMMENCED AGAINST A CORPORATION TRANSFERRED TO THE COUNTY OF THE CORPORATION'S PRINCIPAL PLACE OF BUSINESS IF IT APPEARS THAT THE _____ [ACTION *or* PROCEEDING] WAS NOT COMMENCED IN A PROPER COURT.

A. When Change of Venue Proper. The court may, on motion, change the place of trial when the court designated in the complaint is not the proper court (*Code Civ. Proc. § 397(a)*).

B. Motion for Change of Venue. The court must order the _____ [action *or* proceeding] transferred to the proper court where it appears on a motion for an order transferring the same to the proper court that the _____ [action *or* proceeding] was not commenced in that court (*Code Civ. Proc. § 396b*).

C. Venue of Corporation--Generally. A corporation may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs; or in the county where the principal place of business of such corporation is situated (*Code Civ. Proc. § 395.5*; *see Rosas v. Superior Court (1994) 25 Cal. App. 4th 671, 30 Cal. Rptr. 2d 609* (location of corporation's principal place of business established for venue purposes)).

D. Proper County When General Venue Provisions Govern. Where the plaintiff fails to bring its action in any of the counties specified in former Section 16 of Article XII of the California Constitution (now *Section 395.5 of the Code of Civil Procedure*), and such action is not governed by any specific provision of the Corporations Code, the corporation then is entitled to a change of venue to the county of its principal place of business (*Hale v. Bohannon (1952) 38 Cal. 2d 458, 478, 241 P.2d 4* ; *Sea World, Inc. v. Superior Court (1970) 13 Cal. App. 3d 100, 104, 91 Cal. Rptr. 336*).

[*Optional*] **E. Foreign Corporations.** The provisions of former Section 16 of Article XII of the California Constitution (now *Section 395.5 of the Code of Civil Procedure*) applies to foreign corporations as well as domestic corporations (*Ellis v. National Cas. Co. (1950) 99 Cal. App. 2d 77, 79, 221 P.2d 127*).

[*Optional*] **F. Two or More Corporate Defendants.** Where more than one corporate defendant challenges venue in the same action, such defendants have an absolute right on request to have the trial moved to one or the other of the counties of their residence; that is, the counties of their principal places of business (*Gutierrez v. Superior Court (1966) 243 Cal. App. 2d 710, 717-718, 52 Cal. Rptr. 592*).

[*Optional*] **G. Place of Making of Contract.** A contract for venue purposes is held to have been made where the last act required for the completion of its execution was performed (*Rawson v. J. C. Forkner Fig Gardens, Inc. (1928) 206 Cal. 4, 6, 272 P. 1057* ; *Bank of Yolo v. Sperry Flour Co. (1903) 141 Cal. 314, 315, 74 P. 855*).

[*Optional*] **H. Anticipatory Breach of Contract.** An anticipatory repudiation of a contract by letter is a breach at the time when, and the place where, the letter is dispatched (*Karson Indus., Inc. v. Superior Court (1969) 273 Cal. App. 2d 7, 10, 77 Cal. Rptr. 714*).

[*Optional*] **I. Place of Performance of Contract.** In a suit on the contract of a corporation, where there is no place of performance expressly stipulated, it ought to be held performable in the place where the circumstances, viewed in the light of pertinent code provisions, indicate that the parties expected or intended it to be performed (*Hale v. Bohannon (1952) 38 Cal. 2d 458, 466, 241 P.2d 4* ; *Bank of Yolo v. Sperry Flour Co. (1903) 141 Cal. 314, 315, 74 P. 855*).

[*Optional*] **J. Place of Performance in Payment of Debt.** By the terms of *Sections 1488* and *1489 of the Civil Code*, the place of performance in the payment of a debt, if there is no agreement or stipulation to the contrary, is the place where the creditor resides, or at his/her place of business, if he/she has one, or wherever else he/she may be found (*Hale v. Bohannon (1952) 38 Cal. 2d 458, 467, 241 P.2d 4*).

[*Optional*] **K. Where Tort Liability Arises.** In tort the liability arises where the wrongful invasion of legal rights occurs (*Sea World, Inc. v. Superior Court (1970) 13 Cal. App. 3d 100, 104, 91 Cal. Rptr. 336*).

[*Optional*] **L. Allegation of "Doing Business."** An allegation in plaintiff's complaint that a corporate defendant is "doing business" in the county in which the title of the action shows that it is brought is insufficient to controvert the positive averment of such defendant that its principal place of business is in another specified county (*Sea World, Inc. v. Superior Court (1970) 13 Cal. App. 3d 100, 104, 91 Cal. Rptr. 336*).

Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion made by a defendant corporation for a transfer of an action or proceeding commenced against it to the county of the corporation's principal place of business when the general venue provisions of *Code Civ. Proc. § 395.5* govern and the action was not commenced in the county where the contract was made or was to be performed, if the action was based on contract, or where the obligation or liability arose, or the breach occurred.

When appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law raised.

With appropriate modifications these points and authorities may be used to support a defendant corporation's petition for a writ of mandaterequiring transfer of the trial of the case to the proper court when the trial court has denied a motion to change the place of trial on the grounds that the court designated in the complaint is the proper court. They may also be used to oppose a petition for a writ of mandate requiring trial of the case in the designated court when the trial court has granted a corporate defendant's motion to change the place of trial on the grounds that the designated court was an improper court [*see Code Civ. Proc. § 400*].

[b] Related Pleading and Practice Forms

For forms for an allegation of the principal place of business of a corporate defendant, of a notice of motion for a change of place of trial, and a petition for writ of mandate by a party aggrieved by an order denying a motion for a change of venue, see California Forms of Pleading and Practice.

[c] Related Memoranda

For a related memorandum in support of a defendant's motion for change of venue to a county of his or her residence on the grounds that (1) local and transitory actions were joined, or (2) that transitory actions were joined, one of which entitled defendant to trial in the county of his or her residence, or (3) that the main relief sought is transitory, see Ch. 238, *Venue* .

[3] Discussion of Authorities

[a] Motion for Change of Venue

Code Civ. Proc. § 396b(a) provides that if an action or proceeding is commenced in a court having jurisdiction of the subject matter other than the court designated as the proper court for the trial thereof under the provisions of *Code Civ. Proc. § 392 et seq.* (place of trial of civil actions), the action may, notwithstanding, be tried in the court in which it was commenced, unless the defendant, at the time he or she answers, demurs, or moves to strike, or, at his or her option, without answering, demurring, or moving to strike, and within the time otherwise allowed to respond to the complaint, files with the clerk a notice of motion for an order transferring the action or proceeding to the proper court, together

with proof of service, on the adverse party, of a copy of those papers. On the hearing of the motion the court must, if it appears that the action or proceeding was not commenced in the proper court, order it transferred to the proper court. In any case, if an answer is filed, the court may consider opposition to the motion, if any, and may retain the action in the county where commenced if it appears that the convenience of the witnesses or the ends of justice will thereby be promoted [*Code Civ. Proc. § 396b(d)*].

[b] Venue of Corporations

Rosas v. Superior Court *(1994) 25 Cal. App. 4th 671, 30 Cal. Rptr. 2d 609* is discussed in *§ 52.37[3][g]*.

[c] Proper County When General Venue Provisions Govern

Hale v. Bohannon *(1952) 38 Cal. 2d 458, 241 P.2d 4* , involved an action for breach of an employment contract brought in Humboldt County against a corporation, a lumber company with its principal place of business in San Mateo County. The contract provided for plaintiff's employment by defendant as superintendent of logging operations in Humboldt County. Defendant moved the trial court for a change of venue to San Mateo County on the grounds that the contract was made there, its performance was to be rendered there, the breach, if any, occurred there, and it had its principal place of business there. In addition, it contended that *Code Civ. Proc. § 395* applied to corporations and required that San Mateo County be deemed the place of performance in the absence of a special contract in writing to the contrary. In opposition to the motion, plaintiff contended that the contract was performable in Humboldt County, the breach occurred there, and *Code Civ. Proc. § 395* was inapplicable to corporate defendants. The trial court denied the motion, defendant appealed, and the Supreme Court affirmed. The most extensive part of the court's opinion dealt with the question of whether *Code Civ. Proc. § 395* applies to corporations, and therefore limited the application of the provisions of former Cal. Const., Art. XII, § 16 (now *Code Civ. Proc. § 395.5*), to actions against corporations. *Code Civ. Proc. § 395.5* provides in substance that all actions arising in contract must be tried in the county in which the defendant resides, or in which the contract was made, unless the defendant has contracted specially and in writing as to the county in which his or her obligation is to be performed, in which event that county is also a proper county for the trial of the action. If this provision did apply to defendant, then San Mateo County was the only proper county for the trial since the Court found that the contract was signed in that county and, therefore was made there. The Court concluded, however, that *Code Civ. Proc. § 395* did not apply to corporations. Although part of its reasoning is based on the rules of construction is conflicts between constitutional and statutory provisions, the Court also based its conclusion on the fact that the intention of the constitutional convention in adopting former Cal. Cont., Art. XII, § 16, was to benefit the plaintiff, who otherwise would be obliged to travel to the corporation's principal place of business to commence his or her action by providing a venue for actions against corporations greatly enlarged over that for actions against other defendants. The Court noted that only where the plaintiff fails to bring his or her action in any of the counties specified by the Constitution, is the corporation thenentitled to a change of venue to the county of its principal place of business under the last clause of the constitutional provision [*see* Paragraph C of the foregoing form].

In ***Sea World, Inc. v. Superior Court*** *(1970) 13 Cal. App. 3d 100, 91 Cal. Rptr. 336* , petitioner sought a writ of mandate compelling respondent court to vacate and set aside its order denying petitioner's motion for change of venue from Los Angeles County to San Diego County, and to grant such change. The action, which was for false imprisonment of a minor plaintiff and allegedly took place on petitioner's premises in San Diego, was commenced in the county of plaintiffs' residence where it was alleged that petitioner was "doing business." In support of its motion, petitioner submitted a declaration of one of its officers alleging that it had always maintained its executive offices and principal place of business in San Diego County. The court of appeal issued the peremptory writ of mandate as prayed. The court held that the allegation in plaintiffs' complaint that petitioner was a corporation "doing business" in Los Angeles County was but the conclusion of the pleader and that such a bare allegation, unsupported by probative facts, was insufficient to controvert the positive averment of the corporate defendant that its principal place of business was in San Diego County. The court stated that it had long been held that the county in which the principal place of business of a corporation is located is the county of its residence. In addition, it stated that former Calif Const, Art XII, § 16 (now

Code Civ. Proc. § 395.5) specifically refers to the county where the principal place of business of such corporation is situated, and that for purposes of corporate venue, the county of the corporation's principal place of business is, thus, its "residence." This was the county to which defendant was entitled to a transfer unless the obligation or liability arose in Los Angeles County where the action was commenced.

[d] Foreign Corporations

In ***Ellis v. National Cas. Co.*** *(1950) 99 Cal. App. 2d 77, 221 P.2d 127* , defendant, a Michigan corporation authorized and qualified to transact business in California, appealed from an order denying its motion for a change of venue in an action for breach of contract. The motion was made on the grounds that the contract was not made or entered into, to be performed, or breached in the county in which the action was commenced and that, therefore, petitioner was entitled to have the cause transferred to the county of its principal place of business. The complaint was based on an insurance contract and contained no allegation that the contract was made, to be performed, or breached in the county in which the action was commenced. The court of appeal reversed the trial court's order. After quoting the provisions of former Calif Const, Art XII, § 16 (now *Code Civ. Proc. § 395.5*), the court stated that the rules contained in these provisions applicable to domestic corporations also applied to foreign corporations. In stating in addition that the plaintiff must frame his or her complaint to establish his or her right to retain the trial of the action in the county in which it is commenced, the court found that the failure to allege any grounds for holding the county in which the action was commenced to be the proper county required a reversal of the trial court.

[e] Two or More Corporate Defendants

Gutierrez v. Superior Court *(1966) 243 Cal. App. 2d 710, 52 Cal. Rptr. 592* was a mandamus proceeding to compel the trial court to vacate an order granting a change of venue. In the action, which was for personal injuries, two defendant corporations named in the complaint moved for a change of venue from the county of San Francisco in which the action was commenced to the county of Ventura which the county in which only one of the defendants had its principal place of business. The motion was based on the fact that none of the named defendants had their principal places of business in San Francisco and that the alleged injury took place in Ventura County. The court of appeal issued a peremptory writ, holding that San Francisco was a proper county for trial. Although the principal question on appeal was whether the trial court could disregard the residence of a party who had been sued by a fictitious name, and whose true name was substituted after a motion for change of venue, but before the hearing thereon, which the court of appeal decided the trial court could not do, the court noted at the outset that a corporate defendant challenging venue may obtain an order changing venue only to the county of its principal place of business unless more than one corporate defendant challenges venue in the same action. In the latter event, the court stated that such defendants have an absolute right on request to have the trial moved to one or the other of the counties of their residence; that is, the counties of their principal places of business.

[f] Place of Making of Contract

In ***Rawson v. J. C. Forkner Fig Gardens, Inc.*** *(1928) 206 Cal. 4, 272 P. 1057* , defendant corporation appealed from an order denying its motion for change of place of trial from Los Angeles County to Fresno County in an action for breach of contract. The motion was based on the fact that defendant's principal place of business was in Fresno, and that the contract was made, was to be performed, and, if breached, was breached in Fresno. The contract in question, although executed and signed by defendant's president in Los Angeles, was thereafter delivered to a branch in Fresno for the purpose of having the contract further executed, as required by the by-laws of defendant. These latter acts, completing the execution of the contract were performed in Fresno. The Supreme Court reversed the order, holding that the contract must be held to have been made wherethe last act required for the completion of its execution was performed which was in Fresno. Since every other condition set forth in former Calif Const, Art XII, § 16 (now *Code Civ. Proc. § 395.5*) was compiled with insofar as this section related to the commencement of an action of this character against a corporation, the defendant was entitled to a change of place of trial to Fresno County.

In ***Bank of Yolo v. Sperry Flour Co.*** *(1903) 141 Cal. 314, 74 P. 855* , the defendant, a California corporation having its principal place of business in San Francisco, appealed from the trial court's denial of a motion for a change of venue from Yolo County to San Francisco County on the grounds that the contract sued upon neither was made in Yolo nor was to be performed there. The plaintiff, a banking corporation doing business in Yolo, had advanced money to defendant at defendant's request in a communication over the telephone in return for which defendant promised to repay the sum advanced. The Supreme Court affirmed the trial court's order. In holding that the contract was not made in Yolo, the Court stated that a contract must be made at some place, and the place where it becomes complete is the place where it is made. Where a contract is made by exchange of letters or telegrams, the Court stated that it is made at the place where the letter is mailed, or telegram filed, containing the unconditional acceptance by one party of the offer of the other; while if the communication between parties on opposite sides of a county line is oral, the same principle requires that the contract be deemed to be made in the county where the offer of one is accepted by the other--which, in this case was outside of Yolo county. However, the Court did hold that the contract was to be performed in Yolo. It stated that in the absence of a contrary stipulation, a promise to repay money is a promise to pay at the place where it is lent. The Court also noted that, in general, in a suit on a contract of a corporation, where no place of performance is expressly stipulated, it ought to be held performable in the place where the circumstances, viewed in the light of pertinent code provisions, indicate that the parties expected or intended it to be performed.

[g] Anticipatory Breach of Contract

In ***Karson Indus., Inc. v. Superior Court*** *(1969) 273 Cal. App. 2d 7, 77 Cal. Rptr. 714* , defendant corporation petitioned for a writ of mandate directing trial of action against it to be held in San Bernardino County rather than Contra Costa County following the trial court's denial of the defendant's motion for a change of venue. The defendant contended that the only proper county for the trial of the action which was for anticipatory breach of contract was the county of its principal place of business which was San Bernardino. The plaintiff contended that Contra Costa was a proper county for trial because a letter which was the basis of plaintiff's action from defendant's sales manager to plaintiff in Contra Costa, posted in San Bernardino, canceling certain contracts was not an effective repudiation of these contracts until the repudiation was acted upon; that is, until plaintiff elected to treat the contracts to be terminated. The court of appeal, however, issued a peremptory writ directing the trial court to set aside its order. It noted that plaintiff's contention was based on the erroneous idea that a repudiation amounted to an offer required to be acted upon before becoming effective, and held that the better reasoned cases support the rule that a repudiation by a letter is a breach at the time when and the place where the letter is dispatched.

[h] Place of Performance of Contract

The facts of ***Hale v. Bohannon*** *(1952) 38 Cal. 2d 458, 241 P.2d 4* are *discussed in § 52.22[3][c]*. In determining that a proper county for the trial of plaintiff's action was Humboldt County, the Court found (1) as a matter of law, that the contract was executed and delivered in San Mateo County, and, in legal effect, was made there, and held (2) that considering all the evidence in the light of the surrounding circumstances, it reasonably supported the conclusion of the trial court that payment was to be made in Humboldt, and that since performance was due in Humboldt, the breach as well occurred there. In reaching this holding, the Court reasoned that the contract did not provide where defendant was to make its payments, and that, therefore, the place where the obligation, the breach of which was pleaded as plaintiff's cause of action, was to be performed was the decisive factor insofar as venue was concerned. The Court then stated the rule of venue that in a suit on a corporation's contract, where no place of performance was expressly stipulated, it ought to be held performable in the place where the circumstances, viewed in the light of pertinent code provisions, indicated that the parties expected or intended it to be performed. The Court stated that this determination of the place of performance was one of fact to be made by the trial court which will not be disturbed by the appellate courts if there is any substantial evidence in the record to support it. In considering pertinent code provisions, the Court noted those provisions set forth in *Civ. Code §§ 1488* and *1489* which state the rules as to the place of performance in the payment of a debt. Under *Civ. Code §§ 1488* or *1489*, as at common law, if there be no agreement or stipulation to the contrary, a

debt is payable at the place where the creditor resides, or at his or her place of business, if he or she has one, or wherever else he or she may be found. Since a reading of the contract between plaintiff and defendant did not require a conclusion that the placing of checks in the mail in San Mateo was the performance contemplated by the contract, the receipt of the payments in Humboldt under *Civ. Code §§ 1488* and *1489* was, thus, sufficient to support the trial court's finding that Humboldt County was a proper county for plaintiff's action.

Bank of Yolo v. Sperry Flour Co. *(1903) 141 Cal. 314, 74 P. 855* is *discussed in § 52.22[3][f]*.

[i] Place of Performance In Payment of Debt

This portion of the opinion in ***Hale v. Bohannon*** *(1952) 38 Cal. 2d 458, 241 P.2d 4* is *discussed in § 52.22[3][h]*.

[j] Where Tort Liability Arises

The facts of ***Sea World, Inc. v. Superior Court*** *(1970) 13 Cal. App. 3d 100, 91 Cal. Rptr. 336* are *discussed in § 52.22[3][c]*. In holding that the obligation or liability of defendant did not arise in Los Angeles County, the court stated that it was clear that the alleged tortious conduct, that is, minor plaintiff's false imprisonment, occurred in San Diego County and that petitioner's liability must, therefore, have arisen there. In support of this holding, the court stated the general rule that in tort the liability arises where the injury occurs and that in this context, the word "injury" means a wrongful injury of legal rights. Plaintiffs did not contend that the arrest and imprisonment did not occur in San Diego County, but argued that although the liability first arose in San Diego, the injury followed the minor plaintiff to his county of residence, Los Angeles. This argument was based on the fact that the minor plaintiff was caused to have an arrest record and that this continuing libel caused additional expense to plaintiff in Los Angeles. However, the court found that the gist of the cause of action pleaded was the unlawful violation of the person and liberty of the minor plaintiff, and that although the amount of damages might be affected by subsequent circumstances, it was clear that the alleged tortious conduct occurred in San Diego County.

[k] Allegation of "Doing Business"

This portion of the opinion in ***Sea World, Inc. v. Superior Court*** *(1970) 13 Cal. App. 3d 100, 91 Cal. Rptr. 336* is *discussed in § 52.22[3][c]*.

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A. CAPACITY AND VENUE

5-52 California Points & Authorities § 52.23

§ 52.23 Supporting Corporate Defendant's Motion for Change of Venue [Code Civ. Proc. §§ 396b, 397(a)]--In Action for Removal of Director--To County of Corporation's Principal Executive Office or County of Sacramento [Corp. Code §§ 177, 304]

[1] FORM

[*Caption. See § 52.22.*]

THE COURT SHOULD ORDER AN ACTION COMMENCED AGAINST A CORPORATION [WITH NO PRINCIPAL EXECUTIVE OFFICE IN CALIFORNIA] FOR THE REMOVAL OF A DIRECTOR TRANSFERRED TO THE COUNTY OF _____ [THE CORPORATION'S PRINCIPAL EXECUTIVE OFFICE *or* SACRAMENTO] WHEN IT APPEARS THAT THE ACTION WAS NOT COMMENCED IN THAT COUNTY.

A. When Change of Venue Proper. [*See § 52.22, Paragraph A.*]

B. Motion for Change of Venue. [*See § 52.22, Paragraph B.*]

C. Venue of Shareholder's Suit to Remove Director. The proper county for an action for the removal from office of a director who has committed fraudulent or dishonest acts or who has grossly abused his/her authority with reference to the corporation is the county _____ [where the principal executive office of the corporation is located, *or if principal executive office is located outside state or the corporation has no such office,* of Sacramento] (*Corp. Code §§ 177, 304*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be used by a defendant corporation in support of a motion for the transfer of an action for the removal of a director under *Corp. Code § 304* when the action was not commenced in the county of the corporation's principal executive office or in Sacramento County, if the corporation has no principal executive office in California, or has no principal executive office [*see Corp. Code § 177*].

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law raised.

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5-52 California Points & Authorities § 52.24

§ 52.24 Supporting Corporate Defendant's Motion for Change of Venue [Code Civ. Proc. §§ 396b, 397(a)]--In Application for Order to Compel Holding of Annual Shareholder's Meeting--To County of Corporation's Principal Executive Office or County of Sacramento [Corp. Code §§ 177, 600(c)]

[1] FORM

[*Caption. See § 52.22.*]

THE COURT SHOULD ORDER AN APPLICATION FOR A SUMMARY COURT ORDER TO COMPEL THE HOLDING OF THE ANNUAL MEETING OF SHAREHOLDERS OF A CORPORATION [WITH NO PRINCIPAL EXECUTIVE OFFICE IN CALIFORNIA] TRANSFERRED TO THE COUNTY OF _____ [THE CORPORATION'S PRINCIPAL EXECUTIVE OFFICE *or* SACRAMENTO] WHEN IT APPEARS THAT THE APPLICATION WAS NOT MADE IN THAT COUNTY.

A. When Change of Venue Proper. [*See § 52.22, Paragraph A.*]

B. Motion for Change of Venue. [*See § 52.22, Paragraph B.*]

C. Venue of Proceedings to Compel Annual Meeting of Shareholders. The proper county for a hearing of a shareholder's application for a summary order by the superior court to compel the holding of an annual meeting of shareholders is the county _____ [where the principal executive office of the corporation is located, *or if principal executive office is located outside state or the corporation has no such office*, of Sacramento] (*Corp. Code §§ 177, 600(c)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted by a defendant corporation in support of a motion for the transfer of an application for a summary court order to compel the holding of the annual meeting of the corporation's shareholders when the application was not made either in the county of the corporations' principal executive office or, if the corporation has no principal executive office in California, or has no principal executive office [*see Corp. Code § 177*], in Sacramento County.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law raised.

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A. CAPACITY AND VENUE

5-52 California Points & Authorities § 52.25

§ 52.25 Supporting Corporate Defendant's Motion for Change of Venue [Code Civ. Proc. §§ 396b, 397(a)]--In Action for Determination of Shares as Dissenting Shares and/or Value of Such Shares--To County of Corporation's Principal Executive Office or County of Sacramento [Corp. Code §§ 177, 1304(a)]

[1] FORM

[*Caption. See § 52.22.*]

THE COURT SHOULD ORDER AN ACTION COMMENCED AGAINST A CORPORATION [WITH NO PRINCIPAL EXECUTIVE OFFICE IN CALIFORNIA] FOR THE DETERMINATION OF _____ [CERTAIN SHARES AS DISSENTING SHARES *or* THE FAIR MARKET VALUE OF CERTAIN DISSENTING SHARES *or both*] TRANSFERRED TO THE COUNTY OF _____ [THE CORPORATION'S PRINCIPAL EXECUTIVE OFFICE *or* SACRAMENTO] WHEN IT APPEARS THAT THE ACTION WAS NOT COMMENCED IN THAT COUNTY.

A. When Change of Venue Proper. [*See § 52.22, Paragraph A.*]

B. Motion for Change of Venue. [*See § 52.22, Paragraph B.*]

C. Venue of Action for Determination of Shares as Dissenting Shares. The proper county for an action for the determination of _____ [whether certain shares are dissenting shares *or* the fair market value of certain dissenting shares *or both*] being maintained by a _____ [shareholder demanding purchase of these shares under *Section 1300 of the Corporations Code or* an interested corporation] is the county _____ [where the principal executive office of the corporation is located, *or if principal executive office is located outside state or the corporation has no such office,* of Sacramento] (*Corp. Code §§ 170, 1304(a)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted by a defendant corporation in support of a motion for the transfer of an action under *Corp. Code § 1304(a)* for the determination of whether certain shares are dissenting shares and/or the fair market value of those shares when the action was not commenced either in the county of the corporation's principal executive office or, if the corporation has no principal executive office in California, or has no principal executive office [*see Corp. Code § 177*], in Sacramento County.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law raised.

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5-52 California Points & Authorities § 52.26

§ 52.26 Supporting Corporate Defendant's Motion for Change of Venue [Code Civ. Proc. §§ 396b, 397(a)]--In Proceeding to Enforce Right of Inspection of Corporate Records and Reports--To County of Corporation's Principal Executive Office or County of Sacramento [Corp. Code §§ 177, 1603(a)]

[1] FORM

[*Caption. See § 52.22.*]

THE COURT SHOULD ORDER A PROCEEDING COMMENCED IN A SUPERIOR COURT TO ENFORCE A DIRECTOR'S OR SHAREHOLDER'S RIGHT OF INSPECTION OF CORPORATE RECORDS AND REPORTS TRANSFERRED TO THE COUNTY OF _____ [THE CORPORATION'S PRINCIPAL EXECUTIVE OFFICE *or* SACRAMENTO] WHEN IT APPEARS THAT THE PROCEEDING WAS NOT COMMENCED IN THAT COUNTY.

A. When Change of Venue Proper. [*See § 52.22, Paragraph A.*]

B. Motion for Change of Venue. [*See § 52.22, Paragraph B.*]

C. Venue of Proceeding to Enforce Right of Inspection. The proper county for a proceeding to enforce a director's or shareholder's right to inspect the records, reports, and other properties of a corporation is the county _____ [where the principal executive office of the corporation is located, *or if principal executive office is located outside state or the corporation has no such office,* of Sacramento] (*Corp. Code §§ 177, 1603(a)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted by a defendant corporation in support of a motion for the transfer of a proceeding under *Corp. Code § 1603(a)* to enforce a director's or shareholder's right of inspection of corporate records, reports, and properties when the proceedings were not commenced either in the county of the corporation's principal executive office or, if the corporation has no principal executive office in California, or has no principal executive office [*see Corp. Code § 177*], in the County of Sacramento.

Counsel should insert argument in the form, showing the relationship between the facts of his or her case and the points of law raised.

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5-52 California Points & Authorities § 52.27

§ 52.27 Supporting Corporate Defendants' Motion for Change of Venue [Code Civ. Proc. §§ 396b, 397(a)]--In Action for Involuntary Dissolution of Corporation--To County of Corporation's Principal Executive Office or County of Sacramento [Corp. Code §§ 177, 1800(a)]

[1] FORM

[*Caption. See § 52.22.*]

THE COURT SHOULD ORDER AN ACTION COMMENCED AGAINST A CORPORATION [WITH NO PRINCIPAL EXECUTIVE OFFICE IN CALIFORNIA] FOR ITS INVOLUNTARY DISSOLUTION TRANSFERRED TO THE COUNTY OF _____ [THE CORPORATION'S PRINCIPAL EXECUTIVE OFFICE *or* SACRAMENTO] WHEN IT APPEARS THAT THE ACTION WAS NOT COMMENCED IN THAT COUNTY.

A. When Change of Venue Proper. [*See § 52.22, Paragraph A.*]

B. Motion for Change of Venue. [*See § 52.22, Paragraph B.*]

C. Venue of Action for Involuntary Dissolution. The proper county for an action for the involuntary dissolution of a corporation as provided in *Corporations Code Section 1800(a)* is the county _____ [where the principal executive office of the corporation is located, *or if principal executive office is located outside state or the corporation has no such office*, of Sacramento] (*Corp. Code §§ 177, 1800(a)*).

[*Optional*] **D. Corporation's Right to Control Venue in Mixed Action.** When transitory causes of action are joined with a cause of action for involuntary dissolution [and when individual defendants, if any, do not object], the corporation's motion for change of venue to the county in which its principal executive office is located must be granted (*Capp Care, Inc. v. Superior Court (1987) 195 Cal. App. 3d 504, 508, 241 Cal. Rptr. 741*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted by a defendant corporation in support of a motion for the transfer of an action under *Corp. Code § 1800(a)* for the involuntary dissolution of the corporation when the action was not commenced either in the county of the corporation's principal executive office or, if the corporation has no principal executive office in California, or has no principal executive office [*see Corp. Code § 177*], in Sacramento County. Optional Paragraph D is for use when transitory causes of action have been joined with a cause of action for involuntary dissolution.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law raised.

[3] Discussion of Authorities

[a] Corporation's Right to Control Venue in Mixed Action

In ***Capp Care, Inc. v. Superior Court*** *(1987) 195 Cal. App. 3d 504, 241 Cal. Rptr. 741* , one of two founding shareholders brought an action against the corporation and the other founding shareholder for involuntary dissolution and nine transitory causes of action. The action was filed in Los Angeles County, where the individual defendant resided and had an office. The corporation also had an office in Los Angeles County, but its principal office was in Orange County. The corporate and individual defendants both wanted venue in Orange County, and the corporate defendant moved for a change of venue. Respondent court denied the motion on the ground that *Corp. Code § 1800* was not mandatory and that the general venue statute relating to corporations (*Code Civ. Proc. § 395.5*) controlled. The corporate defendant petitioned for writ of mandate to direct respondent court to grant defendant's motion for change of venue.

The court of appeal granted the writ. The court stated that when transitory causes of action are joined with a cause of action for in voluntary dissolution, the corporation's motion for change of venue to the county in which its principal executive office is located must be granted. When two or more inconsistent venue provisions apply to the same case, a defendant is entitled to a change of venue on any one cause of action (*195 Cal. App. 3d 504, 508)* .

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5-52 California Points & Authorities § 52.28

§ 52.28 Supporting Corporate Defendant's Motion for Change of Venue [Code Civ. Proc. §§ 396b, 397(a)]--In Petition for Court to Take Jurisdiction of Voluntary Dissolution--To County of Corporation's Executive Office or County of Sacramento [Corp. Code §§ 177, 1904]

[1] FORM

[*Caption. See § 52.22.*]

THE COURT SHOULD ORDER A PETITION FOR THE COURT TO TAKE JURISDICTION OVER A VOLUNTARY DISSOLUTION OF A CORPORATION [WITH NO PRINCIPAL EXECUTIVE OFFICE IN CALIFORNIA] TO THE COUNTY OF _____ [THE CORPORATION'S PRINCIPAL EXECUTIVE OFFICE *or* SACRAMENTO] WHEN IT APPEARS THAT THE PETITION WAS NOT BROUGHT IN THAT COUNTY.

A. When Change of Venue Proper. [*See § 52.22, Paragraph A.*]

B. Motion for Change of Venue. [*See § 52.22, Paragraph B.*]

C. Venue of Hearing of Petition for Jurisdiction over Voluntary Dissolution. The proper county for the bringing of a petition for the superior court to take jurisdiction over a voluntary winding-up proceeding is the county _____ [where the principal executive office of the corporation is located, *or if principal executive office is located outside state or the corporation has no such office,* of Sacramento] (*Corp. Code §§ 177, 1904*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted by a defendant corporation in support of a motion for the transfer of a petition for the superior court to take jurisdiction over proceedings to voluntarily wind-up the corporation where the petition was not brought either in the county of the corporation's principal executive office, or, if the corporation has no principal executive office in California, or has no principal executive office [*see Corp. Code § 177*], in Sacramento County.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law raised.

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5-52 California Points & Authorities § 52.29

§ 52.29 Supporting Corporate Defendant's Motion for Change of Venue [Code Civ. Proc. §§ 396b, 397(a)]--In Action for Determination of Right or Interest in Real Property--To County Where Real Property Is Situated [Code Civ. Proc. § 392]

[1] FORM

[*Caption. See § 52.22.*]

THE COURT MUST ORDER AN ACTION FOR THE DETERMINATION OF A RIGHT OR INTEREST IN REAL PROPERTY BROUGHT AGAINST A CORPORATION TRANSFERRED TO THE COUNTY IN WHICH THE REAL PROPERTY IS SITUATED, OR SOME PART THEREOF, WHERE IT APPEARS THAT THE ACTION WAS NOT COMMENCED IN THAT COUNTY.

A. When Change of Venue Proper. [*See § 52.22, Paragraph A.*]

B. Motion for Change of Venue. [*See § 52.22, Paragraph B.*]

C. Determination That Action Is Local in Nature. If the complaint shows that the principal relief sought involves recovery of the possession of the title to real property, or any estate or right or interest therein, or the enforcement of a lien thereon or an injury thereto, the action is to be deemed local in character even though the plaintiff may, as an incident to his/her cause of action as to the real property, ask for relief which, if sought alone would be transitory in character (*Fletcher v. Nordesta Homes, Inc. (1961) 192 Cal. App. 2d 33, 35, 13 Cal. Rptr. 226*).

D. Proper Court for "Local" Action. The proper court for an action for the determination of a right or interest in real property brought against a corporation is the superior court in the county where the real property, or some part thereof, is situated (*Code Civ. Proc. § 392*; *Grocers' Fruit Growing Union v. Kern etc. Co. (1907) 150 Cal. 466, 473-475, 89 P. 120*).

E. Right to Change of Venue. The power of the court to change the place of trial under former Section 16 of Article XII of the California Constitution (now *Section 395.5 of the Code of Civil Procedure*) entitles a corporation which is the

defendant in an action for the determination of a right or interest in real property to have the place of trial changed to the county in which the real property, or some part thereof, is situated whenever plaintiff has commenced his/her/its action in some other county (*Grocers' etc. Union v. Kern etc. Co. (1907) 150 Cal. 466, 473-475, 89 P. 120*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted by a defendant corporation in support of a motion for the transfer of an action for the determination of a right or interest in real property when the action was not commenced in the county where the real property, or some part of the property, is situated.

If appropriate, counsel should insert argument in the form showing the relationship between the facts of the case and the points of law raised.

[3] Discussion of Authorities

[a] Determination That Action Is Local in Nature

In ***Fletcher v. Nordesta Homes, Inc.*** *(1961) 192 Cal. App. 2d 33, 13 Cal. Rptr. 226* , the appellants appealed from an order granting defendants' motion changing the place of trial of an action for damages for breach of a contract to purchase real property from Ventura County, where the action was commenced, to Los Angeles County. The motion was made on the grounds that the action was local in character and that, therefore, the county in which the real property was situated, Ventura, was the proper county for the action. Although the court did not agree, and affirmed the trial court's order, the court stated the applicable rule, set forth in Paragraph C of the above form, in determining whether an action is to be deemed local or transitory (*192 Cal. App. 2d 33, 35)* .

[b] Proper County for "Local" Action

Code Civ. Proc. § 392(a) provides that, subject to the power of the court to transfer actions and proceedings as provided in *Code Civ. Proc. §§ 392-404.8*, the superior court in the county where the real property, which is the subject of the action, or some part thereof, is situated, is the proper court for the trial of the following actions: (1) for the recovery of real property, or of an estate or interest therein, or for the determination in any form, of that right or interest, and for injuries to real property; and (2) for the foreclosure of all liens and mortgages on real property.

In ***Grocers' etc. Union v. Kern etc. Co.*** *(1907) 150 Cal. 466, 89 P. 120* , defendant moved the trial court to change the place of trial from San Francisco County to Kern County on the grounds that, because the action was one for the specific performance of a contract to convey lands in Kern County, the court had no jurisdiction and under *Code Civ. Proc. § 392(a)(1)* was required to transfer the action to Kern County. The trial court denied the motion and the Supreme Court reversed. The Court held that although the complaint prayed for an accounting of monies received by defendant while in possession of the subject property, the action, stripped to its essentials, was for the specific performance of a contract for the sale of land under an allegation that the purchase price had been paid. In response to the plaintiff's contention that *Code Civ. Proc. § 392(a)(1)* did not apply to corporations, the Court stated that no conceivable reason could be given why a natural person should have the right of trial of an action involving an interest in land in the county

where the land was situated, and, yet, the same right should be denied to a corporation. Although it appeared that former Calif Const, Art XII, § 16 (*see now Code Civ. Proc. § 395.5*) should by its terms and by the rules of construction except corporations from the provisions of *Code Civ. Proc. § 392(a)(1)*, the Court stated that such an interpretation would be unconstitutional under the United States Constitution and by reason of the last clause of former Calif Const, Art XII, § 16, was unnecessary. The Court held that that last clause, giving the Court power to change the place of trial, as in other cases, should be read that any and all actions may be brought against corporations in the county of the principal place of business of the corporation, provided, however, that the Court may change the place of trial of such actions in accordance with the laws governing such places of trial. The Court concluded that by thus being construed, the right still remains in a plaintiff to commence his or her action in the county of the principal place of business, but the right remains as well in the corporation to have the place of trial changed under the exercise of the court's power in enforcing the legislative enactments in regard thereto. It followed, therefore, that Kern was the proper county for the trial of plaintiff's action (*150 Cal. 466, 473-475)* .

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5-52 California Points & Authorities § 52.30

§ 52.30 Supporting Motion for Summary Judgment--By Plaintiff--In Action to Enforce Provision of Corporations Code--Defendant Foreign Corporation Is "Nominally Foreign" Corporation and Subject to the Provisions of California General Corporation Law [Corp. Code § 2115]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM IN SUPPORT OF MOTION FOR
_____ [*name*], [a Corporation],	)	SUMMARY JUDGMENT
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*], a(n)	)	Location: _____
_____ [*name of state or foreign*	)	[Judge: _____]
country] Corporation, Defendant.	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD BE GRANTED IN THIS ACTION TO ENFORCE SECTION(S) _____ OF THE CORPORATIONS CODE BECAUSE DEFENDANT FOREIGN CORPORATION IS A "NOMINALLY FOREIGN" CORPORATION AS A MATTER OF LAW IN THAT IT IS SUBJECT TO THE PROVISIONS OF SECTION 2115 OF THE CORPORATIONS CODE.

A. Summary Judgment. A plaintiff may move for summary judgment in any action or proceeding if it is contended that there is no defense to the action. Such a motion will be granted if all of the papers submitted show that there is no triable issue as to any material fact and that plaintiff is entitled to a judgment as a matter of law (*Code Civ. Proc. §*

437c(a), (c)).

B. "Nominally Foreign" Corporations. A foreign corporation is subject [to the provisions of] Sections 2115 and _____ [*specify provisions or sections as set forth in Corp. Code § 2115(b)*] of the Corporations Code to the exclusion of the law of the jurisdiction in which it is incorporated if (1) the average of the property factor, the payroll factor, and the sales factor (as defined in *Sections 25129, 25132,* and *25134 of the Revenue and Taxation Code*) with respect to that corporation is more than 50 percent during its latest full income year, and (2) if more than one-half of its outstanding voting securities are held of record by persons having addresses in California appearing on the books of the corporation on the record date for the latest meeting of shareholders held during its latest full income year or, if no meeting was held during that year, on the last day of the latest full income year (*Corp. Code §§ 2115(a), (b)*).

[*Optional*] **C. Foreign Parent Corporations Not Transacting Intrastate Business.** A foreign parent corporation, although not itself transacting intrastate business, is subject to *Section 2115 of the Corporations Code* and the provisions of the California General Corporation Law contained therein if the average of the property factor, the payroll factor, and the sales factor of the parent and all of its subsidiaries in which it owns directly or indirectly more than 50 percent of the outstanding shares entitled to vote for the election of directors, computed in the manner described in *Section 2115(a) of the Corporations Code*, is more than 50 percent during its latest full income year, and if more than one-half of its outstanding voting securities are held of record by persons having addresses in California appearing on the books of the corporation on the record date for the latest meeting of shareholders held during its latest full income year or, if no meeting was held during that year, on the last day of the latest full income year (*Corp. Code §§ 2115(a), (b)*).

D. Commencement of Time Period Subjecting Foreign Corporations to California Law. A foreign corporation is subject to the provisions of *Section 2115 of the Corporations Code* and the provisions of the California General Corporation Law contained therein on the first day of the first income year of the corporation _____ [commencing on or after the 135th day of the income year immediately following the latest income year with respect to which the tests referred to in *Section 2115(a) of the Corporations Code* have been met *or* commencing on or after the entry of a final order by a court of competent jurisdiction declaring that the tests referred to in *Section 2115(a) of the Corporations Code* have been met] (*Corp. Code § 2115(d)*).

[*Optional*] **E. Cumulative Voting Required.** The cumulative voting requirements of *Section 708 of the Corporations Code* that are made applicable pursuant to *Section 2115(b) of the Corporations Code* to nominally foreign corporations are constitutional and require cumulative voting for all shareholders (*see Wilson v. Louisiana-Pacific Resources, Inc. (1982) 138 Cal. App. 3d 216, 222-231, 231, 187 Cal. Rptr. 852*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for summary judgment in an action against a "nominally foreign" corporation to enforce a provision of the California General Corporation Law set forth in *Corp. Code § 2115(b)* to the exclusion of any provision of the law of the jurisdiction in which the corporation is incorporated. This form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law raised. Counsel should attach affidavits or declarations that support the motion [*Code Civ. Proc. § 437c(b)*].

[b] Related Memoranda

For general points and authorities supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] "Nominally Foreign" Corporations

Corp. Code § 2115(a) provides that those foreign corporations that may be subject to *Corp. Code § 2115* and the provisions of the California General Corporation Law contained therein include foreign parent corporations even though they do not themselves transact intrastate business, but do not include foreign nonprofit corporations or foreign associations; that is, business associations organized as trusts under the laws of foreign jurisdictions [*Corp. Code § 170*].

Corp. Code § 2115(a) also provides that the tests of the property, payroll, and sales factors set forth in Paragraph B of the above form required to be met before a corporation will be subject to *Corp. Code § 2115* and the provisions of the California General Corporation Law contained therein, are those used in computing the portion of the foreign corporation's income allocable to California in its franchise tax return, or with respect to corporations the allocation of whose income is governed by special formulas or which are not required to file separate or any tax returns, which would have been so used if they were governed by the three-factor formula. The determination of these factors with respect to any parent corporation is made on a consolidated basis, including in a unitary computation (after elimination of intercompany transactions) the property, payroll, and sales of the parent and all of its subsidiaries in which it owns directly or indirectly more than 50 percent of the outstanding shares entitled to vote for the election of directors, but deducting a percentage of such property, payroll, and sales of any subsidiary equal to the percentage minority ownership, if any, in that subsidiary. For the purpose of *Corp. Code § 2115(a)*, any securities held to the knowledge of the issuer in the names of broker-dealers, nominees for broker-dealers (including clearing corporations) or banks, associations, or other entities holding securities in a nominee name or otherwise on behalf of a beneficial owner (collectively "nominee holders"), are not considered outstanding [*Corp. Code § 2115(a)*]. However, if the foreign corporation requests all nominee holders to certify, with respect to all beneficial owners for whom securities are held, the number of shares held for those beneficial owners having addresses (as shown on the records of the nominee holder) in and outside California, then all shares so certified must be considered "outstanding" and held of record by persons having addresses either in or outside California, provided that the certification must be retained with the record of shareholders and made available for inspection and copying in the same manner as is provided in *Corp. Code § 1600*. A current list of beneficial owners of a foreign corporation's securities provided to the corporation by one or more nominee holders or their agent pursuant to the requirements of Rule 14b-1(b)(3) or 14b-2(b)(3) as adopted December 9, 1986, and promulgated under the Securities Exchange Act of 1934, will constitute an acceptable certification with respect to beneficial owners [*Corp. Code § 2115(a)*]. The requirements of *Corp. Code § 1600(a)* are *set forth in § 52.94*.

The following sections of the General Corporation Law apply to foreign corporations subject to *Corp. Code § 2115* (to the exclusion of the law of the jurisdiction in which it is incorporated): *Corp. Code §§ 100-195* (general provisions and definitions), to the extent applicable to the following provisions; *Corp. Code § 301* (annual election of directors); *Corp. Code § 303* (removal of directors without cause); *Corp. Code § 304* (removal of directors by court proceedings); *Corp. Code § 305(c)* (filling of director vacancies where less than a majority in office elected by shareholders); *Corp. Code § 309* (directors' standard of care); *Corp. Code § 316* (excluding subdivisions (a)(3) and (f)(3) (liability of directors for unlawful distributions); *Corp. Code § 317* (indemnification of directors, officers, and others); *Corp. Code §§ 500-505*

(limitations on corporate distributions in cash orproperty); *Corp. Code § 506* (liability of shareholder who receives unlawful distribution); *Corp. Code § 600(b), (c)* (requirement for annual shareholders' meeting and remedy if same not timely held); *Corp. Code § 708(a), (b), (c)* (shareholders' right to cumulate votes at any election of directors); *Corp. Code § 710* (supermajority vote requirements); *Corp. Code § 1001(d)* (limitations on sale of assets); *Corp. Code § 1101* (provisions following subdivision (e) limitations on mergers); *Corp. Code §§ 1200, 1201* (reorganizations); *Corp. Code §§ 1300-1312* (dissenters' rights); *Corp. Code §§ 1500, 1501* (records and reports); *Corp. Code § 1508* (actions by Attorney General); *Corp. Code §§ 1600-1605* (rights of inspection) [*Corp. Code § 2115(b)*].

Any foreign corporation that is subject to the requirements of *Corp. Code § 2115(b)*, must advise any shareholder of record, any officer, director, employee, or other agent [*see Corp. Code § 317* (definition)] and any creditor of the corporation in writing, within 30 days of receipt of written request for that information, whether or not it is subject to *Corp. Code § 2115(b)* at the time the request is received. If any party obtains a final determination by a court of competent jurisdiction that the corporation failed to provide to the party the required information or provided the party incorrect information, the court in its discretion has the power to include in its judgment recovery by the party from the corporation of all court costs and reasonable attorneys' fees incurred in that legal proceeding to the extent they relate to obtaining that final determination [*Corp. Code § 2115(f)*].

For a further discussion of the scope of the regulation of "nominally foreign" corporations and the property, payroll, and sales factors used in the apportionment and allocation formulas defined in *Rev. & Tax. Code §§ 25129, 25132, 25134*, see Ballantine & Sterling, California Corporation Laws, Ch. 18, *Foreign Corporations* , and Ch. 22, *Corporate Franchise and Income Taxes in California* (Matthew Bender).

[b] Foreign Parent Corporations Not Transacting Intrastate Business

For a discussion of the provisions of ***Corp. Code § 2115(a)*** as they relate to foreign parent corporations, see *§ 52.30[3][a]*.

[c] Commencement of Time Period Subjecting Foreign Corporations to California Law

A foreign corporation is subject to the provisions of ***Corp. Code § 2115*** only on the first day of the first income year of the corporation commencing on or after the 135th day of the income year immediately following the latest income year with respect to which the tests referred to in *Corp. Code § 2115(a)* have been met, or commencing on or after the entry of a final order by a court of competent jurisdiction declaring that those tests have been met [*see Corp. Code § 2115(d)*].

[d] Cumulative Voting Required

In ***Wilson v. Louisiana-Pacific Resources, Inc.*** *(1982) 138 Cal. App. 3d 216, 187 Cal. Rptr. 852* , plaintiff brought an action seeking declaratory judgment that defendant met the tests of *Corp. Code § 2115*, and that he was therefore entitled to cumulative voting in accordance with *Corp. Code § 708*. Defendant contended that the requirement of cumulative voting violated the full faith and credit clause of the United States Constitution, the commerce clause of the United States Constitution, the property and vested right protections of the United States and California Constitutions, and the contract clauses of the United States and California Constitutions. The trial court held that there existed no constitutional obstacle to the application of the cumulative voting requirement to defendant, that cumulative voting was in effect a judicial addendum to defendant's articles of incorporation, and that all of defendant's shareholders were entitled to cumulative voting whether or not they were California residents. Defendant appealed.

The court of appeal affirmed. The court found that the California Legislature had mandated that California corporate law be applied when the criteria of *Corp. Code § 2115* was met, as here, and that such a mandate was constitutional (*138 Cal. App. 3d 216, 223-224)* . The court also found that any effect on interstate commerce was incidental and minimal in relation to the purpose that *Corp. Code § 2115* was designed to achieve, that there was no due process

violation in the application of *Corp. Code § 2115*, that only minimal alteration was made to the charter agreement and no showing of hardship was made, and that the criteria exempting certain foreign corporations were neutral (*138 Cal. App. 3d 216, 225-228)* . Therefore, the court held the cumulative voting requirements of *Corp. Code §§ 708* and *2115* to be constitutional and applicable to all shareholders (*138 Cal. App. 3d 216, 231)* .

Note that listed corporations may now eliminate cumulative voting in accordance with *Corp. Code § 301.5* [*see Corp. Code § 708(a)* (acknowledging exception created by *Corp. Code § 301.5*)].

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5-52 California Points & Authorities § 52.31

§ 52.31 Supporting Motion for Summary Judgment--In Action by or Against Corporation--Corporate Powers of Plaintiff or Defendant Suspended or Forfeited for Nonpayment of Franchise Tax [Rev. & Tax. Code § 23301]

[1] FORM

	)	
	)	NO. _____
SUPERIOR COURT OF CALIFORNIA,	)	MEMORANDUM IN SUPPORT OF MOTION FOR
COUNTY OF _____	)	SUMMARY JUDGMENT
_____ [*name*], [a Corporation],	)	Date: _____
Plaintiff,	)	Time: _____
vs.	)	Location: _____
_____ [*name*], [a Corporation],	)	Date Action Filed: _____
Defendant.	)	[Trial Date: _____]
_____		

SUMMARY JUDGMENT FOR _____ [DEFENDANT *or* PLAINTIFF] IS PROPER IF _____ [PLAINTIFF *or* DEFENDANT] CORPORATION'S _____ [POWERS, RIGHTS, AND PRIVILEGES HAVE BEEN SUSPENDED *or if corporation is foreign corporation* RIGHT TO EXERCISE ITS POWERS, RIGHTS, AND PRIVILEGES HAVE BEEN FORFEITED] FOR FAILURE TO PAY ITS FRANCHISE TAXES, PENALTIES, OR INTEREST DUE AND PAYABLE ON OR BEFORE THE TIMES PRESCRIBED BY LAW.

A. Summary Judgment. A _____ [defendant *or* plaintiff] may move for summary judgment in any action or proceeding if it is contended that _____ [the action has no merit *or* there is no defense to the action] (*Code Civ. Proc. § 437c(a)*; *see Code Civ. Proc. § 437c(f)(1)*, (h)-(o)). The motion must be granted if all of the papers submitted show that there is no triable issue as to any material fact and that _____ [defendant *or* plaintiff] is entitled to a judgment as a matter of law (*Code Civ. Proc. § 437c*).

B. Suspension of Powers of Domestic or Foreign Corporation. Except for the purposes of filing an application for exempt status or amending the articles of incorporation as necessary either to perfect that application or to set forth a new name, _____ [the corporate powers, rights, and privileges of a domestic taxpayer may be suspended *or* the exercise of the corporate powers, rights, and privileges of a foreign taxpayer in California may be forfeited] if [the franchise taxes, penalties, or interest due and payable are not paid on or before the times prescribed in *Section 23301 of the Revenue and Taxation Code and/or* if the taxpayer fails to file a return] (Rev. & Tax. Code § _____ [23301 (failure to pay taxes) *and/or* 23301.5 (failure to file return)]).

C. Effective Date of Suspension or Forfeiture. The _____ [suspension *or* forfeiture] provided for in Section 23301 or *Section 23301.5 of the Revenue and Taxation Code* becomes effective on the transmission of the name of the delinquent taxpayer to the Secretary of State by the Franchise Tax Board (*Rev. & Tax. Code § 23302(c)*).

[*EITHER*]

D. Inability to Prosecute Action. The right to institute or maintain an action is denied to corporations as part of the penalty the corporation must incur when its powers have been suspended or forfeited for failure to pay its franchise taxes (*Ransome-Crummey Co. v. Superior Court (1922) 188 Cal. 393, 394-397, 205 P. 446* ; *Graceland v. Peebler (1942) 50 Cal. App. 2d 545, 546, 123 P.2d 527*).

[*OR*]

D. Inability to Defend Action. During the period that its corporate powers have been suspended or forfeited, a corporation has no right to defend in an action commenced against it, nor even to participate therein during the period of suspension (*Sade Shoe Co. v. Oschin & Snyder (1990) 217 Cal. App. 3d 1509, 1512, 266 Cal. Rptr. 619* ; *Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp. (1957) 155 Cal. App. 2d 46, 50, 317 P.2d 649*).

[*Optional*] **E. Certificate as Prima Facie Evidence.** The certificate of the Secretary of State is prima facie evidence of the suspension or forfeiture of a corporation's powers (*Rev. & Tax. Code § 23302(c)*).

[*Optional*] **F. Waiver of Defense.** The failure to raise the issue of a corporation's suspension or forfeiture for failure to pay its franchise taxes at the earliest opportunity is not a bar to the later determination of the issue by the court if the corporation indicates no intention to pay its delinquent taxes (*Gar-Lo, Inc. v. Prudential Sav. & L. Ass'n (1974) 41 Cal. App. 3d 242, 244, 116 Cal. Rptr. 389*).

[*Optional*] **G. Accrual of Substantive Defense.** The accrual of a substantive defense during the period of the suspension or forfeiture

of a corporation's powers is not prejudiced by the reinstatement of the suspended or forfeited corporation under *Revenue and Taxation Code Section 23305a* because, by the terms of this section, the reinstatement is without prejudice to any action, defense, or right which has accrued by reason of the original suspension or forfeiture; [thus, although a corporation's action may be timely filed, the accrual of the defense of the statute of limitations during the period of a corporation's suspension or forfeiture cannot be prejudiced by the revival of that corporation under Section 23305a] (*ABA Recovery Services, Inc. v. Konold (1988) 198 Cal. App. 3d 720, 724-725, 244 Cal. Rptr. 27* ; *Welco Construction, Inc. v. Modulux, Inc. (1975) 47 Cal. App. 3d 69, 70-74, 120 Cal. Rptr. 572*).

[*Optional*] **H. No Substantial Compliance Is Shown.** Although the doctrine of substantial compliance applies to allow a suspended corporation to prosecute or defend its action even though the certificate of revivor has not been issued,

substantial compliance is not established when the suspended corporation still owes taxes, penalties, or interest (*Sade Shoe Co. v. Oschin & Snyder (1990) 217 Cal. App. 3d 1509, 1515-1516, 266 Cal. Rptr. 619*).

[*Optional*] **I. Directors May Not Be Substituted in Place of Suspended Corporation.** The directors of a suspended corporation may not be substituted as plaintiffs in order to prosecute an action in the corporation's stead if the substitution would affect the defendant's meritorious defense (*Sade Shoe Co. v. Oschin & Snyder (1990) 217 Cal. App. 3d 1509, 1516-1517, 266 Cal. Rptr. 619*).

[*Optional*] **J. Real Estate Transactions.** If a taxpayer's powers, rights, and privileges are forfeited or suspended pursuant to *Section 23301*, *23301.5*, or *23775 of the Revenue and Taxation Code*, without limiting other consequences of the forfeiture or suspension, the taxpayer is not entitled to sell, transfer, or exchange real property in California during the period of suspension (*Rev. & Tax. Code § 23302(d)*).

[*Optional*] **K. Liability Insurer May Not Defend in Name of Suspended Corporation.** When an insurance company seeks to provide a defense in pending litigation for a corporation that has been suspended for nonpayment of its taxes, the insurance company must intervene in the action to protect its own interests and those of its insured. The insurance company may not answer and litigate the lawsuit in the name of the suspended corporation without intervening in the case (*Kaufman & Broad Cmtys., Inc. v. Performance Plastering, Inc. (2006) 136 Cal. App. 4th 212, 216, 39 Cal. Rptr. 3d 33*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for summary judgment in an action which has been either brought by a corporation or defended by a corporation that has had its corporate powers, rights, and privileges suspended or forfeited for failure to pay its franchise taxes, penalties, or interest due and payable on or before the times prescribed in *Rev. & Tax. Code § 23301* or for failure to file a return [*see Rev. & Tax. Code § 23301.5*]. The authority used in Optional Paragraph G is subject to the exception, discussed in *§ 52.32*, that a corporation that entered into a contract during the period of forfeiture or suspension, or in the case of a foreign corporation that never qualified to do business in California, during the period specified in *Rev. & Tax. Code § 23304.1(c)*, has the opportunity to cure the voidability of that contract pursuant to *Rev. & Tax. Code § 23305.1*.

Another limitation on the use of this form is that *Rev. & Tax. Code §§ 23301*, *23301.5*, and *23775* apply to a foreign corporation only if the corporation is qualified to do business in California. A corporation that is required under *Corp. Code § 2105* (*see § 52.20*) to qualify to do business is not deemed to have qualified to do business for purposes of *Rev. & Tax. Code § 23301 et seq.* unless the corporation has in fact qualified with the Secretary of State [*see Rev. & Tax. Code § 23301.6* (*set forth in § 52.41*)]. However, if the foreign corporation is "transacting intrastate business" within the meaning of *Corp. Code § 191* and is not exempted on interstate commerce or other grounds, it will still lack capacity to maintain or defend an action on that intrastate business as provided by *Corp. Code § 2203*, discussed in *§ 52.20* [*see also § 52.34* (opposing existence of criteria requiring qualification)].

Counsel should insert argument in this form showing the relationship between the facts of his or her case and the points

of law raised. In addition, counsel should attach affidavits or declarations which support the motion [*Code Civ. Proc. § 437c*].

[b] Related Uses

With appropriate modifications these points and authorities may be used to support any of the following:

- A motion to strike the answer made by a suspended or forfeited corporation [*see Code Civ. Proc. §§ 435-437*; *Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp. (1957) 155 Cal. App. 2d 46, 50, 317 P.2d 649* (motion to strike answer made on last day of trial as proper even though objection that corporate powers were forfeited not raised in pleadings)].

- A motion for judgment on the pleadings when the motion is made by a defendant in an action brought by a suspended or forfeited corporation [*see Graceland v. Peebler (1942) 50 Cal. App. 2d 545, 546, 123 P.2d 527* (motion granted)].

- A motion to dismiss made by a defendant in an action brought by a suspended or forfeited corporation [*see Maryland Cas. Co. v. Superior Court (1928) 91 Cal. App. 356, 358* (assuming without deciding that motion was proper)].

- A motion to dismiss an appeal on the ground that appellant's powers were suspended or forfeited [*see Gar-Lo, Inc. v. Prudential Sav. & L. Ass'n (1974) 41 Cal. App. 3d 242, 245, 116 Cal. Rptr. 389* (taking appeal from adverse judgment as one of privileges which law denies to domestic corporation suspended under *Rev. & Tax. Code § 23301*)].

[c] Related Pleading and Practice Forms

For a form for an affirmative defense of lack of legal capacity to sue, based on the suspension or forfeiture of a corporate plaintiff's powers for failure to comply with tax statutes, see California Forms of Pleading and Practice, Ch. 3, *Abatement of Actions* (Matthew Bender).

[d] Related Memoranda

The points and *authorities in §§ 52.40 -52.42* may be used to oppose those in this form. The points and *authorities in §§ 52.32* and *52.43* support and oppose, respectively, the other party's right to void a contract entered into with a corporation while that corporation's powers were suspended for failure to pay taxes or file returns.

For a memorandum in support of a separate trial of the issue of plaintiff's incapacity to sue based on its suspension of its corporate powers for nonpayment of taxes, see Ch. 10, *Abatement and Survival of Actions* .

For a memorandum supporting a motion for summary judgment on the basis of suspension of corporate powers for failure to file a required information statement pursuant to *Corp. Code §§ 1502, 2205*, see *§ 52.33*.

[3] Discussion of Authorities

[a] Suspension of Powers of Domestic or Foreign Corporation

Rev. & Tax. Code § 23301 provides that, except for the purposes of filing an application for exempt status or amending the articles of incorporation as necessary either to perfect that application or to set forth a new name, the corporate powers, rights, and privileges of a domestic taxpayer may be suspended, and the exercise of the corporate powers, rights, and privileges of a foreign taxpayer in this state may be forfeited if any of the following conditions

occur: (1) if any tax, penalty, or interest, or any portion thereof, which is due and payable either at the time the return is required to be filed, or on or before the 15th day of the ninth month following the close of the taxable year is not paid, on or before 6 o'clock p.m. on the last day of the 12th month after the close of the taxable year under the Corporation Tax Law (*Rev. & Tax. Code § 23001 et seq.*) or the administrative provisions (*Rev. & Tax. Code § 19001 et seq.*); (2) if any tax, penalty, or interest, or any portion thereof, due and payable on notice and demand from the Franchise Tax Board, including that due and payable under the Corporation Tax Law (*Rev. & Tax. Code § 23001 et seq.*) or the administrative provisions (*Rev. & Tax. Code § 18401 et seq.*) is not paid on or before 6 o'clock p.m. on the last day of the 11th month following the due date of the tax; or (3) if any liability, or any portion of liability, that is due and payable under Article 7 of Part 10.7 (Rev. & Tax. Code § 19131 et seq., Penalties and Additions to Tax) et seq. is not paid on or before 6 p.m. on the last day of the 11th month following the date on which the tax liability is due and payable.

Additional formalities for suspension or forfeiture are discussed in *§§ 52.40* and *52.41*.

[b] Effective Date of Suspension or Forfeiture

Additional technical requirements for forfeiture provide that they can only occur and become effective as expressly provided in *Rev. & Tax. Code § 23302* [*Rev. & Tax. Code § 23302(a)*]. In order for a corporation's powers, rights, and privileges to be suspended pursuant to *Rev. & Tax. Code § 23571* or forfeited pursuant to *Rev. & Tax. Code § 23301, 23301.5*, or *23775*, the Franchise Tax Board must have mailed the corporation a notice of preliminary suspension that indicates that the corporation will be suspended by a date certain. The preliminary notice must be mailed to the corporation at least 60 days before the date certain [*Rev. & Tax. Code §§ 21020, 23302(b)*].

[c] Inability to Prosecute Action

Ransome-Crummey Co. v. Superior Court *(1922) 188 Cal. 393, 205 P. 446* was a petition for a writ of mandate to compel the trial court to take jurisdiction of a motion for new trial made by a petitioner, a corporation, in an action commenced by it to foreclose a lien on certain property. At the hearing of the motion, counsel for defendant called the trial court's attention to the fact that petitioner's corporate powers had been suspended because of the nonpayment of its license and franchise taxes. Although following a postponement of the hearing, petitioner's corporate powerswere restored, on further hearing by the court, the court declined to pass on the merits of petitioner's purported motion and dismissed it. The Supreme Court denied the writ, holding that, during the time its powers were suspended, petitioner could not be given notice of entry of judgment, nor could it give notice of intention to move for a new trial, since these disabilities resulted from its suspension. In reaching this conclusion, the Court noted that in contrast to prior law, which would have required petitioner to cease to exist during the period of its suspension, under present law, petitioner was shorn of all rights save those expressly reserved by the statutes. The Court stated, in addition, that the right to institute suit or maintain an action is not included in this reservation, but is denied to corporations as a part of the penalty (*188 Cal. 393, 394-397)* .

In ***Graceland v. Peebler*** *(1942) 50 Cal. App. 2d 545, 123 P.2d 527* , the sole question presented for appeal was whether the surviving directors of a corporation, whose charter was suspended for non-payment of its franchise tax, could maintain an action on behalf of its stockholders and creditors to quiet title to realty. The trial court, holding that the action could not be maintained, sustained a motion for judgment on the pleadings which was sustained by the court of appeal. In the pertinent part of the court's opinion, the court noted that the appellant directors had conceded that neither the corporation nor they, on its behalf, could maintain the action as the applicable statutes barred a corporation which failed to make timely payment of its franchise tax from exercising any corporate powers, rights, or privileges (*50 Cal. App. 2d 545, 546)* .

[d] Inability to Defend Action

Sade Shoe Co. v. Oschin & Snyder *(1990) 217 Cal. App. 3d 1509, 266 Cal. Rptr. 619* is *discussed in § 52.31[3][g]*.

In ***Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp.*** *(1957) 155 Cal. App. 2d 46, 317 P.2d 649* , appellant, which had commenced an action against respondent corporation to have declared canceled a lease of mining property and equipment, during the course of the trial, moved to strike all pleadings and evidence of respondent and to enter the default of respondent on the ground that as a foreign corporation it had forfeited its right to transact business in California, including the right to defend appellant's action. The motion was denied by the trial court, and following the trial, the court entered judgment for the corporation. The court of appeal reversed and held that respondent corporation had no right to defend in the action, or even to participate therein during the time that its corporate rights were suspended. The court relied on the basic rule set forth in previous California decisions that on the issue of suspension of the corporation for failure to pay its franchise tax, the corporation may not prosecute or defend an action nor appeal from an adverse judgment in an action while its corporate rights are suspended. The court also noted, in reply to respondent's contention that the objection should have been in the pleadings, that in previous California cases, the issue was presented to the court after the commencement of proceedings by motion to dismiss just as it was in the case before it, and that this appeared to be an appropriate method by which to present the matter at any time it is brought to the attention of the court. With respect to this portion of the court's opinion, it should be noted that in *Reed v. Norman (1957) 48 Cal. 2d 338, 309 P.2d 809* , a motion to dismiss the appeal was made on the ground that the corporation in whose right the action had allegedly been brought had been suspended for failure to pay its franchise taxes. The motion was denied. One of the reasons given was that this issue had not been raised prior to the making of the motion, and a opportunity should have been given to pay the taxes and reinstate the corporation (*155 Cal. App. 2d 46, 50)* .

[e] Waiver of Defense

Gar-Lo, Inc. v. Prudential Sav. & L. Ass'n *(1974) 41 Cal. App. 3d 242, 116 Cal. Rptr. 389* , involved a motion to dismiss an appeal on the ground that the appellant was a corporation whose powers were suspended before the filing of its action against respondent by reason of its failure to pay its franchise taxes. A summary judgment had been entered against appellant on the grounds of its suspension. In opposition to the motion, appellant argued that its lack of capacity to sue could only have been raised by plea in abatement, and that respondent waived the defense by failing to raise it in the trial court at the earliest opportunity. The court granted the motion, following the basic rule that taking an appeal from an adverse judgment of the trial court is one of the privileges which the law denies to a domestic corporation suspended under *Rev. & Tax. Code § 23301*. It noted that, while the suspension of corporate powers was a plea in abatement, appellant indicated no intention to pay its delinquent franchise taxes. The court stated that appellant could not acquire an irrevocable license to carry on litigation in defiance of *Rev. & Tax. Code § 23301*, since the main purpose of the statutory suspension was to collect a tax, and that in this respect, respondent was only an incidental beneficiary of that law. The court noted, in addition, that the suspension was raised in the trial court (*41 Cal. App. 3d 242, 244)* .

[f] Accrual of Substantive Defense

The court of appeal in ***ABA Recovery Services, Inc. v. Konold*** *(1988) 198 Cal. App. 3d 720, 244 Cal. Rptr. 27* , affirmed a trial court judgment in favor of defendants after granting defendants' motion for summary judgment based on the bar of the statute of limitations. The applicable limitation period ran during the corporate plaintiff's suspension for failure to pay taxes. The corporate powers were revived after the action was filed. The court of appeal said that under *Rev. & Tax. Code § 23305a*, proceduralacts in the prosecution or defense of a suit are retroactively validated by revival, but revival is without prejudice to any action, defense, or right that accrued by reason of suspension. Thus, a substantive defense, such as the statute of limitations, which accrues during suspension, is not affected by revival (*198 Cal. App. 3d 720, 724-725)* .

In ***Welco Constr., Inc. v. Modulux, Inc.*** *(1975) 47 Cal. App. 3d 69, 120 Cal. Rptr. 572* , plaintiff corporation appealed from a judgment for defendant granted on the trial court's finding that the plaintiff's causes of action for breach of contract and fraud were barred by the statute of limitations. Plaintiff filed its complaint two months after it had been

suspended as a corporation for nonpayment of its franchise tax. On the trial date, nearly three years after the statute of limitations had run on the causes of action, the defendant challenged the plaintiff's standing to prosecute its action because of the suspension. The trial court granted plaintiff's motion for a continuance. During the continuance, plaintiff obtained a certificate of revivor, whereupon defendant moved to amend its answer to plead the statute of limitations. The motion was granted and the court thereafter granted defendant judgment of nonsuit on the ground that the action was barred by the statute of limitations. The court of appeal affirmed the trial court's judgment. It distinguished previous decisions, which had held that the revival of corporate powers by the payment of delinquent taxes validated otherwise invalid prior action, by finding that these holdings were limited to procedural acts which in the prosecution or defense of a lawsuit could be validated retroactively by the corporate revival. The court stated that these holdings, however, do not apply to substantive defenses which have accrued during the corporate suspension. The court concluded by finding that the statute of limitations was a substantive defense, that it had accrued by its running during the period of appellant's suspension, and that it could not be prejudiced by the revival of the suspended corporation (*47 Cal. App. 3d 69, 70-74)* .

[g] No Substantial Compliance Is Shown

Plaintiff's underlying cause of action in ***Sade Shoe Co. v. Oschin & Snyder*** *(1990) 217 Cal. App. 3d 1509, 266 Cal. Rptr. 619* , accrued on September 16, 1982. Plaintiff was suspended on October 1, 1982. On October 15, 1982, plaintiff filed its tax return and paid its taxes, and on November 1, it filed a Domestic Stock Statement. On December 22, the Secretary of State told plaintiff that it would waive the penalty for failure to timely file the Domestic Stock Statement, that the Franchise Tax Board would be instructed to waive the penalty, and that the waiver would take approximately 90 days. Plaintiff still owed $90.85 for penalties and interest. Plaintiff filed its complaint on December 30, 1982. The statute of limitations expired on September 15, 1984. On March 31, 1987, defendant moved for summary judgment on the ground that the statute of limitations expired during plaintiff's suspension. The certificate of revivor was issued on April 22, 1987. Thereafter, defendant's motion was granted, and plaintiff appealed.

The court of appeal affirmed. The court reviewed the grounds for suspension under *Rev. & Tax. Code § 23301* and the fact that a corporation whose powers are suspended has no capacity to prosecute or defend a civil action during its suspension (*217 Cal. App. 3d 1509, 1512)* . Accordingly, when a suspended corporation commences an action during its suspension, the statute of limitations continues to run. A corporation may be revived by compliance with the requirements of *Rev. & Tax. Code § 23305*, but if the limitation period expires before the corporation's revivor the corporation's action will be time-barred even if the complaint would otherwise have been timely. This result is imposed by *Rev. & Tax. Code § 23305a*, which provides that the issuance of the certificate of revivor is without prejudice to any action, defense, or right that accrued by reason of the original suspense or forfeiture. Plaintiff's powers were suspended before it filed the complaint, thus the filing of the complaint was ineffective to toll the statute of limitations. Nor were its powers revived until after the limitation period expired (*217 Cal. App. 3d 1509, 1513)* .

Still, plaintiff argued that it had substantially complied with *Rev. & Tax. Code § 23305* and should be allowed to prosecute its action. The court of appeal noted that no court had previously considered whether a corporation's substantial compliance with *Rev. & Tax. Code § 23305* was sufficient to allow it to prosecute an action (*217 Cal. App. 3d 1509, 1514)* . The court noted that the purpose of the suspension scheme was to provide incentive for corporations to timely pay their taxes and that the defense of suspension was a plea in abatement, and thus to be strictly construed against the party asserting it. The court of appeal concluded that a corporation that has been suspended under *Rev. & Tax. Code § 23301* and/or *Rev. & Tax. Code § 23301.5* may prosecute or defend an action prior to official revivor provided there has been substantial compliance with the revival statute (*217 Cal. App. 3d 1509, 1515)* .

The test for substantial compliance is whether the acts alleged to constitute it satisfy the policy of the statute, which in this case is to pressure corporations into paying delinquent taxes (*217 Cal. App. 3d 1509, 1515)* . *Rev. & Tax. Code § 23305* requires the suspended corporation to pay the tax and any interest and penalties for nonpayment of which the suspension or forfeiture occurred together with all other taxes, deficiencies, interest and penalties due (*217 Cal. App.*

3d 1509, 1515-1516) . The court of appeal concluded that it would be inconsistent with the statutory scheme to allow the corporation to claim substantial compliance when it had only paid the taxes, not the penalties and interest (*217 Cal. App. 3d 1509, 1516)* .

[h] Directors May Not Be Substituted in Place of Suspended Corporation

The facts and procedural background of ***Sade Shoe Co. v. Oschin & Snyder*** *(1990) 217 Cal. App. 3d 1509, 266 Cal. Rptr. 619* are *discussed in § 52.31[3][g]*. Plaintiff had also requested that its directors be substituted as the plaintiffs in the action, citing as authority a case in which substitution had been allowed during trial. The trial court had denied the request, and the court of appeals agreed, saying that plaintiff ignored the fact that the other case held that substitution would be impermissible if it would affect a defendant's meritorious defense. That is exactly what substitution would accomplish in this situation. If plaintiff's directors were allowed to substitute as plaintiffs, defendant's statute of limitations defense would be defeated (*217 Cal. App. 3d 1509, 1516-1517)* .

[i] Liability Insurer May Not Defend in Name of Suspended Corporation

In ***Kaufman & Broad Cmtys., Inc. v. Performance Plastering, Inc.*** *(2006) 136 Cal. App. 4th 212, 39 Cal. Rptr. 3d 33* , the rights and privileges of the defendant corporation had been suspended under *Rev. & Tax. Code § 23301* for nonpayment of taxes. The corporation's liability insurer hired a law firm to file an answer, which designated the responding party as "Performance Plastering, Inc., a suspended corporation, by and through its general liability insurance carrier, CalFarm Insurance Company." The insurance company did not move to intervene in the case. The law firm served a settlement offer under *Code Civ. Proc § 998*, the plaintiff subsequently dismissed the complaint, and the law firm filed a memorandum of costs and moved for attorney's fees. The plaintiff moved to strike the memorandum of costs and opposed the motion, arguing that the insurance company was not a party because it had not intervened in the action and that Performance Plastering, Inc., as a suspended corporation, was not entitled to recover fees or costs because of its suspension. The trial court agreed.

The court of appeal dismissed the law firm's appeal, holding that when an insurance company seeks to provide a defense in pending litigation for a corporation that has been suspended for nonpayment of its taxes, the insurance company must intervene in the action to protect its own interests and those of its insured. The insurance company may not answer and litigate the lawsuit in the name of the suspended corporation without intervening in the case (*136 Cal. App. 4th 212, 216)* . In this case, because the insured was barred from exercising corporate powers, rights, and privileges and the insurance company was not a party, the insurance company's failure to intervene barred any application for fees and costs, even though the insurance company and insured were successful in persuading the plaintiff to dismiss its lawsuit (*136 Cal. App. 4th 212, 216)* .

[4] Additional Authorities

[a] Waiver of Defense

Color-Vue, Inc. v. Abrams (1996) 44 Cal. App. 4th 1599, 52 Cal. Rptr. 2d 443 is discussed in *§ 52.42[4][a]*. The court of appeal held that the trial court abused its discretion in denying the corporation's motion for continuance to pay its taxes and revive its corporate powers, granting the defendants' motion to dismiss the corporation's complaint, and permitting the defendants to proceed with a default prove-up when the defendants had been aware of the corporation's failure to pay taxes but had failed to raise the issue until trial. The appellate court specifically noted the corporation's intention to pay its delinquent taxes and the fact that it obtained a certificate of revivor two weeks after the defendants first raised the issue of overdue taxes (*44 Cal. App. 4th 1599, 1605-1606)* .

[b] Accrual of Substantive Defense

In *Community Electric Service v. National Elec. Contr. (9th Cir. 1989) 869 F.2d 1235* , the Ninth Circuit Court of

Appeals affirmed the dismissal of an antitrust action by corporation whose powers had been suspended by the Franchise Tax Board on July 1, 1983. The federal suit was filed on January 13, 1986, the statute of limitations on the antitrust claim expired on May 6, 1987, and the Franchise Tax Board reinstated plaintiff's powers on June 8, 1987. Relying on *Welco Construction, Inc. v. Modulux, Inc. (1975) 47 Cal. App. 3d 69, 70-74, 120 Cal. Rptr. 572* , and *ABA Recovery Services, Inc. v. Konold (1988) 198 Cal. App. 3d 720, 724-725, 244 Cal. Rptr. 27* , the court of appeals said that a statute of limitations is a defense, not a plea in abatement, and the corporation's revivor does not validate the prior filing of the suit (*869 F.2d 1235, 1240-1241* .

[c] Renewal of Judgment

In *Timberline v. Jaisinghani (1997) 54 Cal. App. 4th 1361, 1368-1369, 64 Cal. Rptr. 2d 4* , the court of appeal held that during the period of suspension, a suspended corporation that failed to revive its powers by paying delinquent taxes cannot renew a judgment obtained while it was in good standing. The court noted that the plain language of *Rev. & Tax. Code § 23301* expressly deprives the corporation of all corporate powers, rights, and privileges. Therefore, under the statutory language and the decisional authority interpreting those provisions, the corporation's action in requesting the court to renew the judgment was an unauthorized act by a suspended corporation that was attempting to exercise the rights, powers, and privileges of a going concern. Consequently, it was error for the trial court to deny defendant's motion to vacate the renewal of judgment (*54 Cal. App. 4th 1361, 1368-1369)* .

California Points & Authorities

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Volume 5 Chapters 50-59 CONTRACTS---to---CORPORATIONS
CHAPTER 52 CORPORATIONS
PART II. FORMS
A. CAPACITY AND VENUE

5-52 California Points & Authorities § 52.32

§ 52.32 Supporting Motion for Summary Judgment--In Action on Contract [Civ. Code § 3300 or 3384]--By Defendant--Against Corporation That Was Suspended at Time Contract Was Formed [Rev. & Tax. Code § 23304.1]

[1] FORM

[*Caption. See § 52.31.*]

SUMMARY JUDGMENT FOR DEFENDANT IS PROPER BECAUSE PLAINTIFF'S POWERS, RIGHTS AND PRIVILEGES WERE SUSPENDED WHEN THE CONTRACT WAS FORMED [AND DEFENDANT DID NOT LEARN OF THE SUSPENSION UNTIL LATER].

A. Summary Judgment. [*See § 52.31, Paragraph A.*]

B. Suspension of Powers of Domestic or Foreign Corporation. [*See § 52.31, Paragraph B.*]

[*EITHER*]

C. Contract Is Voidable. A contract entered into by a corporation while its powers, rights, and privileges are suspended or forfeited pursuant to Revenue and Taxation Code Section _____ [23301 *and/or 23301.5 and/or 23775*] is, subject to *Revenue and Taxation Code Section 23304.5*, voidable at the instance of any party to the contract other than the taxpayer (*Rev. & Tax. Code § 23304.1(a)*).

[*OR, if corporation is foreign corporation that has not qualified to do business and DOES NOT HAVE a corporate account number from the Franchise Tax Board*]

C. Contract of Unqualified Foreign Corporation Without Franchise Tax Account. A contract entered into in California during the applicable period specified in *Sections 23304.1(c) of the Revenue and Taxation Code* by a foreign

taxpayer that neither is qualified to do business nor has a corporate account number from the Franchise Tax Board and that failed to file a return required by Sections 23101 et seq. or 23501 et seq. of the Revenue and Taxation Code, is, subject to *Section 23304.5 of the Revenue and Taxation Code*, voidable at the instance of any party to the contract other than the taxpayer (*Rev. & Tax. Code § 23304.1(b)*).

[*OR, if corporation is foreign corporation that has not qualified to do business and HAS a corporate account number from the Franchise Tax Board*]

C. Contract of Unqualified Foreign Corporation With Franchise Tax Account. If a foreign taxpayer that has not qualified to do business under *Section 2105 of the Corporations Code* but that has a corporate account number from the Franchise Tax Board failed _____ [to file a return required by Sections 23101 et seq. or 23501 et seq. of the Revenue and Taxation Code *and/or* to pay any tax or other amount owing to the Franchise Tax Board under Section(s) _____ (23101 et seq. *or* 23501 et seq. *or* 23707 *or* 23772) of the Revenue and Taxation Code *and/or* to file any statement or return required under *Section 23772* or *23774 of the Revenue and Taxation Code*], within 60 days of receiving written demand therefor from the Franchise Tax Board, and made a contract in California during the period beginning at the end of the 60-day demand period and ending on the date the taxpayer qualifies to do business in California, or satisfies the liability to the Franchise Tax Board, [including through an assumption of liability, or a bond, deposit, or other security for taxpayer's liability under *Section 23305.2 of the Revenue and Taxation Code*], that contract is voidable at the instance of any party to the contract other than the taxpayer (*Rev. & Tax. Code § 23304.1(d)*).

[*CONTINUE*]

[*Optional*] **D. Applicable Period for Voidable Contract of Unqualified Foreign Corporation Without Franchise Tax Account.** For purposes of *Section 23304.1(b) of the Revenue and Taxation Code*, the applicable period begins on January 1, 1991, or on the first day of the taxable year for which the taxpayer has failed to file a return or pay taxes, whichever is earlier, and ends on the later of the date the taxpayer qualified to do business in California or the date the taxpayer obtained a corporate account number from the Franchise Tax Board (*Rev. & Tax. Code § 23304.1(c)*).

[*Optional*] **E. Avoidance Not Barred by Equitable Estoppel.** The other party's right under *Section 23304.1 of the Revenue and Taxation Code* to avoid a contract entered into with a corporation while that corporation was suspended is not barred by equitable estoppel unless the other party knew of the corporation's disability at the time the contract was formed (*Damato v. Slevin (1989) 214 Cal. App. 3d 668, 675, 262 Cal. Rptr. 879* (decided under former Rev. & Tax. Code § 23304).

[*Optional*] **F. Voidability Must Be Asserted in Court Proceeding.** A party that has a right to declare a contract to be voidable pursuant to *Section 23304.1 of the Revenue and Taxation Code* may exercise that right [only] in a lawsuit brought by either party to the contract in a court of competent jurisdiction. [The rights of parties to the contract are not effected by *Section 23304.1 of the Revenue and Taxation Code* except to the extent expressly provided by a final judgment of the court.] If the court finds the contract to be voidable under Section 23304.1, the court must order the contract to be rescinded (*Rev. & Tax. Code § 23304.5*).

[*EITHER, if relief was sought before January 1, 1991*]

[*Optional*] **G. When Prior Law Is Determinative.** Notwithstanding other transition provisions of Chapter 926 of Statutes of 1990, the Legislature intends that Chapter 926 not be construed in any manner that would affect the rights of any party to any action that has been commenced in a court of competent jurisdiction prior to January 1, 1991, or the

rights of any such party in a subsequent action based on the same claims as those asserted in the prior action. All such rights are to be determined without application of any provisions of Chapter 926 and by the law in effect prior to January 1, 1991 (Stats. 1990, ch. 926, § 17(c)).

[*OR, when relief is sought on or after January 1, 1994*]

[*Optional*] **G. When Prior Law Is Determinative.** Notwithstanding subdivision (a), the Legislature intends that Chapter 680 of the Statutes of 1993 not be construed in any manner that would affect the rights of any party to any action that has been commenced ina court of competent jurisdiction prior to the date of January 1, 1994, or the rights of that party in a subsequent action based on the same claims as those asserted in the prior action. All those rights shall be determined without the application of any of the provisions of Chapter 680 and shall be determined by the law in effect prior to January 1, 1994 (Stats. 1993, ch. 680, § 2(c)).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These memorandum may be submitted in support of a motion for summary judgment by a defendant who has been sued for breach of contract or against whom a contract is sought to be enforced by a corporation that entered into the contract in question when it was suspended for nonpayment of taxes or failure to file a return [*Rev. & Tax. Code §§ 23301, 23301.5, 23301.6, 23304.1(a)*], or, in the case of a foreign corporation that was required but never did qualify to do business in California, a contract that it made in California during the applicable periods set forth in *Rev. & Tax. Code § 23304.1(c)* and *(d)* (third Alternative Paragraph C, Paragraph D).

These points and authorities should be combined with additional authorities from § 52.31 when appropriate. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form showing the relationship between the facts of the particular case and the points of law raised. In addition, it is necessary to attach declarations or documentary evidence in support of the motion [*see Code Civ. Proc. § 437c(b)*], most notably in this situation, a certificate or declaration from the appropriate custodian of records for the Franchise Tax Board or Secretary of State establishing the suspension.

[b] Limitations on Declaring Contract Voidable

Significant limitations on the right to have a contract declared voidable for a corporation's failure to comply with tax laws, specifically the corporation's right to an opportunity to comply and the requirement of restitution if voidability is established are discussed in *§ 52.43*. These restrictions relate mainly to the fact that prior to January 1, 1994, former Rev. & Tax. Code § 23305.1(e) required a corporation to seek relief from voidability at the same time it applied for a certificate of revivor. That is no longer the case, but the penalties set forth in *Rev. & Tax. Code § 23305.1(b)* provide a financial incentive to do so [*see § 52.43*; *Rev. & Tax. Code § 23304.5*]. Note also that *Rev. & Tax. Code §§ 23301, 23301.5, 23301.6, 23304.1(a)* apply to a foreign corporation only if it is qualified to do business in California. A foreign corporation that is required under *Corp. Code § 2105* [*see § 52.20*] to qualify to do business is not deemed to have qualified to do business for purposes of *Rev. & Tax. Code § 23301 et seq.* unless it has in fact qualified with the

Secretary of State [*see Rev. & Tax. Code § 23301.6* (*set forth in § 52.41*)]. However, if the foreign corporation is "transacting intrastate business" within the meaning of *Corp. Code § 191* and is not exempted on interstate commerce or other grounds, it will still lack capacity to maintain or defend an action on that intrastate business as provided by *Corp. Code § 2203*, discussed in *§ 52.20* [*see also § 52.34* (opposing existence of criteria requiring qualification)].

[3] Discussion of Authorities

[a] Contract Is Voidable

Rev. & Tax. Code § 23304.1 was added by Stats. 1990, ch. 926.

[b] Avoidance Not Barred by Equitable Estoppel

In 1983, defendant in ***Damato v. Slevin*** *(1989) 214 Cal. App. 3d 668, 262 Cal. Rptr. 879* , agreed to purchase a cafe, and sublease for the premises on which the caf was located, from plaintiff's assignor. After taking possession of the premises and making a few payments, defendant defaulted in 1985, and plaintiff commenced the action for damages for breach of contract. Defendant moved for summary judgment, based on the fact that the seller's corporate privileges had been suspended on June 1, 1981. That fact was established by a declaration of a custodian of records of the Franchise Tax Board. In opposition to the motion, plaintiff submitted a certificate from the Secretary of State, acknowledging that the corporate seller was suspended on June 1, 1981, but also noting that its powers had been revived on August 11, 1987, after the motion for summary judgment was filed. The trial court granted the motion and entered judgment thereon. Plaintiff appealed, contending in part that defendant was equitably estopped to raise the issue of the corporate suspension.

The court of appeal affirmed. The court of appeal said the four elements necessary for estoppel are (1) the party to be estopped must be apprised of the facts; (2) the party to be estopped must intend that his or her conduct will be acted on or must act so that the party asserting the estoppel hada right to believe it was so intended; (3) the other party must be ignorant of the true state of facts, and (4) must rely on the conduct in such a way that it led his or her injury. To prevail on its claim of equitable estoppel, plaintiff had to show that defendant knew of the corporate assignor's suspension while plaintiff, who was the corporation's president, did not. Plaintiff's declaration provided absolutely no basis for concluding that defendant was aware of the corporation's disability. Thus, defendant's right to summary judgment was not barred by equitable estoppel (*214 Cal. App. 3d 668, 675)* .

[c] When Prior Law Is Determinative

Stats. 1993, ch. 680 is operative with respect to taxpayers that file applications for relief on or after January 1, 1994, without regard to income years [Stats. 1993, ch. 680, § 2(a); *see also § 52.43[3]*].

California Points & Authorities

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Volume 5 Chapters 50-59 CONTRACTS---to---CORPORATIONS
CHAPTER 52 CORPORATIONS
PART II. FORMS
A. CAPACITY AND VENUE

5-52 California Points & Authorities § 52.33

§ 52.33 Supporting Motion for Summary Judgment Against Corporation--Corporate Powers Suspended for Failure to File Required Information Statement [Corp. Code §§ 1502, 2205]

[1] FORM

[*The following may be included in a memorandum in support of a motion for summary judgment, or in a trial or appellate brief.*]

SUMMARY JUDGMENT FOR _____ [DEFENDANT(S) *or* PLAINTIFF(S)] IS PROPER BECAUSE _____ [PLAINTIFF *or* DEFENDANT] CORPORATION'S POWERS HAVE BEEN SUSPENDED FOR FAILURE TO FILE A REQUIRED INFORMATION STATEMENT.

A. Summary Judgment. A _____ [defendant *or* plaintiff] may move for summary judgment in any action or proceeding if it is contended that _____ [the action has no merit *or* there is no defense to the action] (*Code Civ. Proc. § 437c*).

B. Suspension of Corporate Powers for Failure to File Required Information Statement. A corporation suspended for failure to file a required information statement is disqualified from participating in litigation activities (*Corp. Code §§ 1502, 2205*; *Palm Valley Homeowners Association, Inc. v. Design MTC (2000) 85 Cal. App. 4th 553, 559-562, 102 Cal. Rptr. 2d 350*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for summary judgment in an action that either has been brought by a corporation, or defended by a corporation, that has had its corporate powers, rights, and privileges suspended for failure to file a required information statement [*Corp. Code §§ 1502, 2205*]. Although this issue normally would arise in the context of a motion for summary judgment, the form may be adapted to any other context in which the issue is raised.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law raised. In addition, counsel should attach affidavits or declarations that support the motion [*Code Civ. Proc. § 437c*].

[b] Related Pleading and Practice Forms

For a notice of motion for summary adjudication based on a corporation's lack of capacity to participate in litigation activities, see California Forms of Pleading and Practice, Ch. 160, *Corporations : Capacity*, § 160.63 (Matthew Bender). For an order granting summary adjudication on that basis, see *§ 160.64* of that chapter.

[3] Discussion of Authorities

[a] Suspension of Corporate Powers for Failure to File Required Information Statement

Corp. Code § 1502 provides that every corporation must file an annual statement containing the names and addresses of its incumbent directors; the number of board vacancies, if any; the names and addresses of its officers; the street address of its principal executive office, or its mailing address if different; if the principal executive office is not in California, the street address of its principal business office in California; a statement of the corporation's general type of business; and its agent for service of process [*Corp. Code § 1502(a), (b)*; *see also Corp. Code § 1502.1* (additional information required for publicly traded corporations)]. *Corp. Code § 2204* provides that if a corporation fails to file its required information statement under *Corp. Code § 1502*, the Secretary of State will give the corporation notice of the delinquency. Sixty days after notice of the delinquency, if the corporation has not filed the required statement, the Secretary of State must certify the name of the corporation to the Franchise Tax Board, and the Franchise Tax Board imposes a penalty upon the corporation [*see Rev. & Tax. Code § 19141*]. If a corporation fails to file a statement under *Corp. Code § 1502*, fails to file a statement for 24 months, and has been assessed a penalty under *Corp. Code § 2204* during that 24-month period, then the corporation is subject to suspension under *Corp. Code § 2205*. The Secretary of State must notify the corporation that its corporate powers, rights, and privileges will be suspended after an additional 60 days, if the corporation fails to file the required statement. If the corporation fails to comply within 60 days, the Secretary of State certifies to the Franchise Tax Board that the corporation is suspended, and mails a notice to the suspended corporation. Except for the purpose of amending the articles of incorporation to set forth a new name, the corporate powers, rights, and privileges of the corporation are suspended [*Corp. Code § 2205(c)*; *see* Ballantine & Sterling, California Corporation Laws, Ch. 13, *Records, Reports, and Inspection Rights* (Matthew Bender)].

In ***Palm Valley Homeowners Association, Inc. v. Design MTC*** *(2000) 85 Cal. App. 4th 553, 102 Cal. Rptr. 2d 350* , the trial court imposed sanctions on a law firm for bad faith acts and discovery abuses in underlying construction defect litigation, on the grounds that the firm pursued litigation activities on behalf of its client even after the law firm knew that the client was a suspended corporation pursuant to *Corp. Code § 2205*. In the underlying action, a group of homeowners had filed a construction defect lawsuit against the developer of their homes. The developer then cross-complained against subcontractors and suppliers. The law firm represented one of the subcontractors. When the firm leaned that its client had been suspended after failingto file a required information statement with the Secretary of State as provided in *Corp. Code § 2205*, the firm did not report the suspension to the court or to any other parties, but instead continued to represent the suspended corporation in the litigation, filing and responding to pleadings and motions. After the homeowners' investigator discovered that the firm's client was a suspended corporation, the homeowners moved for sanctions against both the corporation and the firm. The trial court granted the motion for sanctions and the firm appealed.

The court of appeal noted that the statutory suspension provisions of the Corporations Code have never been interpreted expressly to indicate that a corporation suspended for failure to file the required information statement is legally disabled from acting to the same extent as a corporation suspended under the Revenue and Taxation Code for nonpayment of taxes (*85 Cal. App. 4th 553, 558)* . It stated, however, that upon a reading of the statutory provisions, it

was clear that a corporation suspended for failure to file a required statement under *Corp. Code § 1502*, like a corporation suspended for failure to pay taxes under *Rev. & Tax. Code § 23301*, is disabled from participating in any litigation activities. Just as the state may wish to persuade its corporate citizens to pay their taxes, it also may wish to persuade them to comply with basic filing requirements which are fundamental to holding a corporation accountable for its actions. The statutory language of the relevant sections was more than sufficient to put any reasonable attorney on notice that a corporation suspended under the Corporations Code was disabled from participating in any litigation activities (*85 Cal. App. 4th 553, 560-561)* . Further, the law firm could not in good faith have believed that there was a legitimate difference in the effect of the two suspensions. It did not rely on any purported distinction between a Corporations Code suspension and a Revenue and Taxation Code suspension in deciding to conceal its knowledge of the client's suspended status from court and opposing counsel (*85 Cal. App. 4th 553, 562-563)* . Thus, the trial court did not abuse its discretion in imposing discovery sanctions against the firm (*85 Cal. App. 4th 553, 563-564)* .

California Points & Authorities

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CHAPTER 52 CORPORATIONS
PART II. FORMS
A. CAPACITY AND VENUE

5-52 California Points & Authorities § 52.34

§ 52.34 Opposing Motion for Summary Judgment--Foreign Corporation Permitted to Maintain Suit When It Is Not Considered to Be Transacting Intrastate Business

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*], a(n)	)	MEMORANDUM IN OPPOSITION TO MOTION
_____ [*name of state or foreign*	)	FOR SUMMARY JUDGMENT
country]	)	[*Code Civ. Proc. § 437c*]
Corporation, Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

A FOREIGN CORPORATION MAY MAINTAIN AN ACTION IN CALIFORNIA WITHOUT HAVING FIRST OBTAINED A CERTIFICATE OF QUALIFICATION WHEN DEFENDANT HAS FAILED TO SUSTAIN HIS/HER/ITS BURDEN OF PROOF THAT THE CORPORATION IS MAINTAINING AN ACTION ON INTRASTATE BUSINESS IN WHICH IT HAS ENTERED INTO REPEATED AND SUCCESSIVE TRANSACTIONS IN CALIFORNIA, OTHER THAN INTERSTATE OR FOREIGN COMMERCE.

A. Rules Governing Summary Judgment Procedure. It is proper for a court to grant a motion for summary judgment only if the affidavits supporting the motion establish every element necessary to sustain a judgment in favor of the

moving party and the opposing party has not presented any facts which give rise to a triable issue. In ruling on the motion, the moving party's affidavits are strictly construed, and doubts as to the propriety of granting the motion should be resolved in favor of the opposing party (*Corwin v. Los Angeles Newspaper Serv. Bureau, Inc. (1971) 4 Cal. 3d 842, 851 n.6, 851-852, 94 Cal. Rptr. 785, 484 P.2d 953*). The court may not properly grant summary judgment based on inferences reasonably deducible from the papers submitted, if such inferences are contradicted by other inferences which raise a triable issue of fact (*Hepp v. Lockheed-California Co. (1978) 86 Cal. App. 3d 714, 717-718, 150 Cal. Rptr. 408*).

B. Summary Judgment Not Proper When Triable Issue Remains as to Whether Foreign Corporation Transacted Intrastate Business. In an action brought by a foreign corporation, a motion for summary judgment on the ground that the corporation has not obtained a certificate of qualification, as required by *Section 2105(a) of the Corporations Code*, should not be granted when there is a triable issue of fact as to whether the corporation's activities in California amounted to the transaction of intrastate business within the meaning of *Section 191 of the Corporations Code* (*Mediterranean Exports, Inc. v. Superior Court (1981) 119 Cal. App. 3d 605, 616-617, 174 Cal. Rptr. 169*).

C. Transaction of Intrastate Business. A foreign corporation must have entered into repeated and successive transactions of its business in California before it will be considered to have transacted intrastate business for the purposes of requiring the corporation before transacting such business or maintaining an action arising out of that business to obtain first a certificate of qualification (*Corp. Code §§ 191(a), 2105(a), 2203(c)*).

D. Burden of Proof. The burden of proving that a foreign corporation which has not obtained a certificate of qualification is statutorily precluded from maintaining an action on intrastate business transacted in California, other than interstate or foreign commerce, is on the party pleading the bar of the statute (*Automotriz Del Golfo De Cal. v. Resnick (1957) 47 Cal. 2d 792, 794, 306 P.2d 1, 63 A.L.R.2d 1042*).

[*EITHER*]

E. Single, Isolated Transactions. A foreign corporation must transact a substantial part of its business within California to justify a finding that the corporation was transacting intrastate business, and the transaction of an isolated business act is not carrying on or transacting business within the meaning of the statutory language (*McMillan Process Co. v. Brown (1939) 33 Cal. App. 2d 279, 283, 284, 91 P.2d 613*).

[*OR*]

E. Actions Not Arising Out of Corporation's Intrastate Business. A foreign corporation which has not complied with the statutory requirements for transacting intrastate business in California

is precluded only from maintaining actions arising out of its intrastate business (*Corp. Code § 2203(c)*).

[*OR*]

E. Actions Arising Out of Interstate or Foreign Commerce. The term "transact intrastate business" does not mean entering into repeated and successive transactions of business involving interstate or foreign commerce. A corporation, therefore, may sue on such transactions without compliance with the statutory requirements for transacting intrastate business in California (*Corp. Code § 191(a)*; *Automotriz Del Golfo De Cal. v. Resnick (1957) 47 Cal. 2d 792, 794, 306 P.2d 1, 63 A.L.R.2d 1042*).

[*CONTINUE*]

[*Optional*] **F. Excluded Activities by Foreign Corporation.** A foreign corporation is not considered to be transacting intrastate business solely by reason of carrying on in California the activity of _____ [maintaining or defending any action or suit or any administrative or arbitration proceeding, or effecting the settlement thereof or the settlement of claims or disputes *or* holding meetings of its board or shareholders or carrying on other activities concerning its internal affairs *or* maintaining bank accounts *or* maintaining offices or agencies for the transfer, exchange and registration of its securities or depositary with relation to its securities *or* effecting sales through independent contractors *or* soliciting or procuring orders, whether by mail or through employees or agents or otherwise, when such orders require acceptance without California before binding contract *or* creating evidences of debt of mortgages, liens, or security interest on real or personal property *or* conducting an isolated transaction completed within a period of 180 days and not in the course of a number of repeated transactions of like nature *or specify any combination of the above*] (*Corp. Code § 191(c)*).

[*Optional*] **G. Excluded Activities by Foreign Lending Institution.** Any _____ [foreign banking corporation *or* foreign corporation all of the capital stock of which is owned by one or more foreign banking corporations *or* foreign savings and loan association *or* foreign insurance company *or* foreign corporation or association authorized by its charter to invest in loans secured by real and personal property, whether organized under the laws of the United States or of any other state, district or territory *or specify other foreign lending institution*] is not considered to be transacting business in California solely by reason of engaging _____ [on its own behalf *or* as a trustee of a _____(pension plan *or* employment profit sharing plan *or* retirement plan *or* testamentary trust *or* inter vivos trust *or specify other fiduciary capacity*)] in the _____ [acquisition by purchase, by contract to purchase, by making of advance commitments to purchase or by assignment of loans, secured or unsecured, or any interest therein, when such activities are carried on from outside California by the lending institution *or* making by an officer or employee of physical inspections and appraisals of real or personal property securing or proposing to secure any loan, if the officer or employee making any physical inspection or appraisal is not a resident of and does not maintain a place of business for such purpose in California *or* ownership of any loans and the enforcement of any loans by trustee's sale, judicial process or deed in lieu of foreclosure or otherwise *or* modification, renewal or extension, transfer, or sale of loans or the acceptance of substitute or additional obligors thereon, if the activities are carried on from outside California by the lending institution *or* contractual arrangements with corporations, firms, or associations, qualified to do business in California, which are not subsidiaries or parents of the lending institution and which are not under common management with the lending institution, to make collections and to service loans in any manner whatsoever, including the payment of ground rents, taxes, assessments, insurance, and the like and the making, on behalf of the lending institution, of physical inspections and appraisals of real or personal property securing any loans or proposed to secure any loans, and the performance of any such engagement *or* acquisition of title to the real or personal property covered by any mortgage, deed of trust, or other security instrument by trustee's sale, judicial sale, foreclosure or deed in lieu of foreclosure, or for the purpose of transferring title to any federal agency or instrumentality as the insurer or guarantor of any loan, and the retention of title to any real or personal property so acquired pending the orderly sale or other disposition thereof *or specify any combination of those activities*] [and activities necessary or appropriate to carry out any of the foregoing activity(ies)] (*Corp. Code § 191(d)*).

[*Optional*] **H. Transaction of Intrastate Business by Subsidiary.** A foreign corporation is not considered to be transacting intrastate business merely because its subsidiary transacts intrastate business or merely because of its status as _____ [a shareholder of a domestic corporation *or* a shareholder of a foreign corporation transacting intrastate business *or* a limited partner of a domestic limited partnership *or* a limited partner of a foreign limited partnership transacting intrastate business *or* a member or manager of a domestic limited liability company *or* a member or manager of a foreign limited liability company transacting intrastate business *or specify any combination of the above*] (*Corp. Code § 191(b)*).

[*Optional*] **I. Jurisdictional Requirements Distinguished From Intrastate Business Transaction Requirements.** A foreigncorporation engaged in interstate commerce or "doing business" in California, as that term was construed under former Section 411 of the Code of Civil Procedure, may have sufficient contacts with California so as to make it amenable to service of process, but have insufficient contacts with California necessary to constitute the transaction of intrastate business. Thus, cases concerned with the minimum contacts necessary for California to obtain jurisdiction over a defendant foreign corporation are not authority for the requirements necessary to find a foreign corporation transacting intrastate business (*Carl F. W. Borgward, G.M.B.H. v. Superior Court (1958) 51 Cal. 2d 72, 75-77, 330 P.2d 789*).

[*Optional*] **J. Corporations Incorporated Under Act of Congress.** A corporation incorporated under an act of Congress may transact business in California without complying with the state laws governing foreign corporations (*see Corp. Code § 171*; *Home Owners' Loan Corp. v. Gordon (1939) 36 Cal. App. 2d 189, 193, 97 P.2d 845*).

[*Optional*] **K. Goods Transported in Interstate Commerce.** The scope of interstate commerce, which the power to regulate is expressly committed to Congress and impliedly withheld from the several states by Article I, Section 8, Clause 3, of the United States Constitution, is not confined to transportation from one state to another, but comprehends all commercial intercourse between different states and all the component parts of that intercourse, such that when goods in one state are transported into another for purposes of sale, the commerce does not end with the transportation, but embraces as well the purchase, sale and exchange of the goods (*Dahnke-Walker Milling Co. v. Bondurant (1921) 257 U.S. 282, 290-291, 42 S. Ct. 106, 66 L. Ed. 239*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted by counsel for a foreign corporation in opposition to a motion for summary judgment when the moving party asserts that the corporation is barred from maintaining its suit because it was transacting intrastate business without having first obtained from the Secretary of State a certificate of qualification as required by *Corp. Code § 2105(a)*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated, including argument showing the insufficiency of the supporting affidavits or declarations, the existence of a triable issue of fact, or both. In addition, counsel should attach affidavits or declarations which oppose the motion [*see Code Civ. Proc. § 437c*].

It should be noted that optional Paragraphs F and G specify activities which, solely by reason of one or more of them being carried on in California, will not be considered the transaction of intrastate business. When the facts of a particular case come within the description of one or more of these activities, counsel should accordingly retitle the heading of the paragraph to fit the particular description. These specified activities are not intended by the Legislature to exclude other activities which also may not constitute transaction of intrastate business [*see Corp. Code §§ 191(c)* (foreign corporations), 191(d) (foreign lending institutions)].

[3] Discussion of Authorities

[a] Rules Governing Summary Judgment Procedure

Plaintiffs in ***Corwin v. Los Angeles Newspaper Serv. Bureau, Inc.*** *(1971) 4 Cal. 3d 842, 94 Cal. Rptr. 785, 484 P.2d 953* , filed an action against defendant for violations of *Bus. & Prof. Code §§ 16720, 16726* (prohibited restraints on trade under Cartwright Act). The trial court granted defendants' motion for summary judgment, and plaintiffs appealed from the judgment entered in favor of defendants. The Supreme Court concluded that the trial court had erroneously granted the summary judgment and reversed the judgment. In reviewing the trial court's action, the Court commented that summary judgment is a drastic procedure to be used with caution so that it does not become a substitute for the open trial method of determining facts and repeated its previous summary of the rules governing summary judgment procedure set out in Paragraph A of the foregoing form (*4 Cal. 3d 842, 851-852)* .

Hepp v. Lockheed-California Co. *(1978) 86 Cal. App. 3d 714, 150 Cal. Rptr. 408* was an action for breach of contract and fraud. The trial court granted summary judgment for defendant, and the court of appeal reversed the judgment of dismissal. The court of appeal reviewed the rules for granting summary judgment. It relied on *Code Civ. Proc. § 437c* and *4* Witkin, California Procedure (2d ed.), *Proceedings Without Trial,* in stating that summary judgment may not be granted on the basis of inferenceswhich are contradicted by other inferences which raise a triable issue of fact (*86 Cal. App. 3d 714, 717-718)* .

[b] Summary Judgment Not Proper When Triable Issue Remains as to Whether Foreign Corporation Transacted Intrastate Business

In ***Mediterranean Exports, Inc. v. Superior Court*** *(1981) 119 Cal. App. 3d 605, 174 Cal. Rptr. 169* , plaintiff, a California corporation, sued defendant, a foreign corporation, and defendant filed an answer and a cross complaint in the action. Plaintiff moved for an order striking both pleadings on the ground that defendant lacked capacity to defend the action, and to sue on its cross complaint because it was a foreign corporation transacting intrastate business in California and had failed to obtain a certificate of qualification pursuant to *Corp. Code § 2105*. The trial court granted the motion.

The court of appeal issued a writ of mandate directing the trial court to set aside the order granting the motion, stating that plaintiff's motion to strike was not authorized by *Code Civ. Proc. § 435* and, therefore, must be treated and tested as if it were a motion for summary judgment (*119 Cal. App. 3d 605, 615)* . The court held that there was a triable issue of fact as to whether defendant's activities in California amounted to the transaction of "intrastate business" as defined by *Corp. Code § 191* because defendant showed, in opposition to the motion, that its activities consisted of solicitation by salesmen who were independent contractors, that orders placed in California required acceptance outside the state before they became binding contracts, and that the office and staff in California were maintained for use by the salesmen (*119 Cal. App. 3d 605, 616-617)* .

[c] Burden of Proof

In ***Automotriz Del Golfo De Cal. v. Resnick*** *(1957) 47 Cal. 2d 792, 306 P.2d 1, 63 A.L.R.2d 1042* , a Mexican corporation brought an action for the balance due on the price of eight automobiles which it had alleged were sold to defendants. After a trial on the merits, the trial court found for plaintiff, and defendants appealed, contending, in part, that the transactions being sued upon were intrastate and plaintiff had not alleged or proved that it had qualified to transact business in California in compliance with former Corp. Code §§ 6400-6409 [*now see Corp. Code § 2105*]. In affirming the judgment, the Supreme Court rejected this contention. It noted that the burden of proving that plaintiff was statutorily precluded from maintaining the action was upon the party pleading the bar of the statute and that defendants, therefore, in order to prove that the statute applied, were required to show that the particular transaction involved was an intrastate sale. The Court held that on the evidence the trial court was clearly justified in concluding that defendants failed to meet this burden, since the transactions were arranged by telephone with plaintiff in Mexico and defendants in California, and that defendants paid the cost of transporting the cars from Mexico. The Court concluded that sales made

in this manner were not intrastate transactions.

[d] Single, Isolated Transactions

In ***McMillan Process Co. v. Brown*** *(1939) 33 Cal. App. 2d 279, 91 P.2d 613* , a Nevada corporation brought an action in California for the recovery of possession of certain machines or for the value thereof in the event possession could not be had. In his answer, defendant set forth, among several defenses, the defense that the plaintiff foreign corporation was not entitled to maintain the action because of its failure to comply with the laws of California respecting qualification of foreign corporations. After a trial on the merits, the trial court gave judgment for plaintiff and the court of appeal affirmed. With respect to the defense of nonqualification, the court noted that the evidence showed that plaintiff was involved in no more than two transactions in California. Relying on former Civ. Code § 405 [now *Corp. Code § 191(a)*], requiring a corporation to qualify when it has entered into repeated and successive transactions in California, the court stated the generally held view that a foreign corporation must transact a substantial part of its business within the state to justify a finding that the business transacted constitutes transaction of intrastate business and that a casual, sporadic, isolated business act is not carrying on or transacting intrastate business. It should be noted that, in part, this rule has been codified in *Corp. Code § 191(c)(8)*, and set forth in Paragraph F of the foregoing form which states that, without excluding other activities, a foreign corporation is not considered to be transacting intrastate business solely by reason of conducting an isolated transaction completed within a period of 180 days which is not in the course of a number of repeated transactions of like nature.

[e] Actions Arising Out of Interstate or Foreign Commerce

Automotriz Del Golfo De Cal. v. Resnick *(1957) 47 Cal. 2d 792, 306 P.2d 1, 63 A.L.R.2d 1042* is *discussed in § 52.34[3][c]*.

[f] Jurisdictional Requirements Distinguished From Intrastate Business Transaction Requirements

In ***Carl F. W. Borgward, G.M.B.H. v. Superior Court*** *(1958) 51 Cal. 2d 72, 330 P.2d 789* , German corporation sought a writ of mandate to compel the trial court to enter an order quashing service of summons in an action brought against the corporation by plaintiffs to enforce an agreement theyhad with the corporation's exclusive importer. The defendant corporation argued it was not "doing business" within the meaning of former Code Civ. Proc. § 411(2) (service of process on foreign corporations) [*now see Code Civ. Proc. § 410.10*]. In part, the defendant argued that the applicable standard to be applied in construing Code Civ. Proc. § 411(2) was to be found in Corp. Code § 6203 [*now see Corp. Code § 191(a)*] defining the terms "transact intrastate business" to mean entering into repeated and successive transactions of business in California, other than interstate or foreign commerce, and in cases decided under this code section. In denying the writ, the Supreme Court held that this argument misconstrued the scope and purpose of the regulatory and penal provisions of the Corporations Code governing foreign corporations engaged in the transaction of intrastate business as against the provisions of the Civil Code governing service of process. The term "doing business" in California, necessary for the service of process on a foreign corporation, is equivalent to the minimum contacts with a state required by the due process clause so that a suit maintained against the corporation does not offend traditional notions of fair play and substantial justice. Thus, the term is synonymous with the power of the state to subject foreign corporations to local process. On the other hand, the Court stated that the minimum requirements necessary to find a corporation to be transacting intrastate business were not intended by the Legislature to be equivalent to the standards governing "doing business," since these requirements reflect the standard by which a foreign corporation will be considered sufficiently involved in intrastate business that it should be subject to certain of California's regulatory and penal provisions.

[g] Corporations Incorporated Under Act of Congress

Corp. Code § 171 provides in part that the term "foreign corporation" as used in *Corp. Code § 2100 et seq.* does not include a corporation or association charted under the law of the United States.

In ***Home Owners' Loan Corp. v. Gordon*** *(1939) 36 Cal. App. 2d 189, 97 P.2d 845* , plaintiff, a corporation incorporated under an act of Congress, filed an action to foreclose a mortgage on real property. Defendants in their answer sought, among other defenses, to abate the action under the foreign corporation statutes of California because of the failure of plaintiff to qualify as a foreign corporation. After a trial on the merits, the trial court found for plaintiff and the court of appeal affirmed. With respect to the failure of plaintiff to qualify in California, the appellate court took judicial notice of the manner of plaintiff's incorporation and held that as a corporation created by federal statute it need not comply with the state laws governing foreign corporations. The court stated that the rule of unlimited state control over foreign corporations is subject to an exception for corporations engaged in the business of the general government which are permitted to transact such business in other states without obtaining a license or other permit (*36 Cal. App. 2d 189, 193)* . It should be noted that the facts of this case are now considered activities under *Corp. Code § 191(d)(3),* set forth in Paragraph G of this form, which do not constitute the transaction of intrastate business.

[h] Goods Transported in Interstate Commerce

Dahnke-Walker Milling Co. v. Bondurant *(1921) 257 U.S. 282, 42 S. Ct. 106, 66 L. Ed. 239* , involved an action to recover damages for the breach of a contract for the sale and delivery of a crop of wheat brought by a Tennessee corporation in a Kentucky state court. That court, in a judgment affirmed by the Kentucky court of appeals, held that the plaintiff corporation was barred from maintaining its suit since it had not complied with a Kentucky statute prescribing the conditions in which foreign corporations might do business in Kentucky. The Supreme Court reversed, holding that since the crop sold was for immediate shipment to the plaintiff's Tennessee mill, the goods were part of interstate commerce and Kentucky had no power to regulate their sale by virtue of U.S. Const., art. I, § 8, cl. 3 (commerce clause). The court noted that interstate commerce, which only Congress was permitted to regulate, was not confined to transportation of goods or commodities from one state to another, but comprehended all commercial intercourse between different states and all the component parts of that intercourse. Thus, the Court stated, when goods in one state are transported into another for purposes of sale, the commerce does not end with the transportation, but also embraces the sale, purchase, and exchange of the goods after they reach their destination.

[4] Additional Authorities

[a] Transaction of Intrastate Business

In *United Systems of Arkansas, Inc. v. Stamison (1998) 63 Cal. App. 4th 1001, 74 Cal. Rptr. 2d 407* , an out-of-state bidder on a DMV contract to provide certified mail forms and accompanying software and printers protested the award of the contract to another bidder. After its protest was denied, the bidder petitioned for a writ of mandate to compel the DMV to award the contract to it, or to receive, consider, and act on its protest. The superior court denied the petition and the bidder appealed. The DMV and the successful bidder contended that the appeal should be dismissed. They asserted that the action was barred because the out-of-state bidder was not qualified to do business in California. The court of appeal held that simply submitting a bid in response to a request for quotation by the DMV was not "transacting intrastate business," and that the out-of-state bidder could maintain its suit challenging the award of the contract to another bidder without obtaining a certificate of qualification from the Secretary of State (*63 Cal. App. 4th 1001, 1006-1007)* .

[b] Goods Transported in Interstate Commerce

Cone-Mills Corp. v. Hurdle (N.D. Miss. 1974) 369 F. Supp. 426 , involved suits brought in a Mississippi federal district court order under that court's diversity jurisdiction by two foreign corporations which had purchased "forward contracts" (future contracts) of cotton from Mississippi growers and producers. At the time of the purchase the agent of these corporations contemplated shipment of the cotton to the corporations' mills outside Mississippi. The defendants moved to dismiss the action for failure of the corporations to comply with the Mississippi statute prescribing the conditions in which foreign corporations might transact business in Mississippi. The district court denied the motion on

the ground that the exceptions set forth in this statute for business transacted in interstate commerce applied, and that in applying this exception, the court is obligated to adopt a construction of the Mississippi statute that will not force state law into a potential conflict with the federal Constitution, unless an opposite construction is plainly required by clear state court precedent. The court then applied the rule of *Dahnke-Walker Milling Co. v. Bondurant (1921) 257 U.S. 282, 42 S. Ct. 106, 66 L. Ed. 239* , set forth in Paragraph K of this form, holding that although the cotton might have been diverted intrastate, in view of the recognized course of the cotton business and the original intent of the agent of the corporations, the particular transactions were of an interstate character.

Charlton Silk Co. v. Jones (1923) 190 Cal. 341, 212 P. 203 was an action to recover the wholesale purchase price of goods sold by a foreign corporation to defendant. The trial court found that the plaintiff shipped the goods to defendant in California after defendant placed an order with plaintiff's salesmen in California. Although the trial court evidently dismissed the action for failure of plaintiff to qualify under California law, the Supreme Court reversed based on the trial court's finding, holding that the business was done in interstate commerce. Therefore, the Court stated that the qualifying provisions of California law did not apply, since the right to collect the proceeds of interstate commerce was incidental thereto, and could not be prevented by state legislation (*190 Cal. 341, 342)* .

It should be noted that this California Supreme Court case and the appellate court case discussed below of *Detsch & Co. v. Calbar, Inc. (1964) 228 Cal. App. 2d 556, 39 Cal. Rptr. 626* , would appear, insofar as the facts of these cases are concerned, to be codified in *Corp. Code § 191(c)(6)*, set forth in Paragraph F of this form since they involve the solicitation of orders by agents where such orders required acceptance outside California. They are discussed here, however, to show that the California courts have appeared not to adopt a standard in their construction of the interstate commerce exception to the foreign corporation qualification requirements under *Corp. Code §§ 191(a), 2105(a),* that would be in any potential conflict with the interstate commerce clause [U.S. Const., art. I, § 8, cl. 3] or the construction of that clause by the federal courts.

In *Detsch & Co. v. Calbar, Inc. (1964) 228 Cal. App. 2d 556, 39 Cal. Rptr. 626* , the plaintiff appealed from an order quashing service of summons on defendant foreign corporation. The critical question, as framed by the appellate court, was whether the corporation's business on which suit was being brought involved intrastate business transacted in California within the meaning of former Corp. Code § 6203 [*now see Corp. Code § 191(a)*], or whether the corporation was engaged solely in interstate commerce. The court held that when a solicitation is made within California of orders for goods by a local distributor or agency acting on behalf of a foreign corporation, with those orders being subject to acceptance or rejection by a foreign corporation in another state, and when, on approval of the orders, the goods are purchased and shipped directly from that other state to the purchasers in California, the sales and shipment constitute interstate commerce and the prior solicitation is a part of that interstate transaction and is not intrastate commerce (*228 Cal. App. 2d 556, 567)* .

California Points & Authorities

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Volume 5 Chapters 50-59 CONTRACTS---to---CORPORATIONS
CHAPTER 52 CORPORATIONS
PART II. FORMS
A. CAPACITY AND VENUE

5-52 California Points & Authorities § 52.35

§ 52.35 Opposing Motion for Summary Judgment--Foreign Corporation Permitted to Maintain Suit When It Has Filed Designation of Agent for Service Under Old Law and Filed Amended Statement Designation [Corp. Code § 2102]

[1] FORM

[*Caption. See § 52.34.*]

A FOREIGN CORPORATION MAY MAINTAIN AN ACTION WITHOUT HAVING OBTAINED A CERTIFICATE OF QUALIFICATION WHEN IT HAS FILED A DESIGNATION OF AGENT FOR SERVICE OF PROCESS PURSUANT TO THE REQUIREMENTS IN FORCE AT TIME OF FILING AND HAS FILED AN AMENDED STATEMENT AND DESIGNATION PURSUANT TO SECTION 2107 OF THE CORPORATIONS CODE.

A. Rules Governing Summary Judgment Procedure. [*See § 52.34, Paragraph A.*]

B. Filing of Designation of Agent Under Previous Law. A foreign corporation that has filed a designation of an agent for the service of process, pursuant to the requirements of any law relating to the qualification of foreign corporations in force at the time of the filing, need not file the statement provided for in *Corporations Code Section 2105*, which otherwise must be filed in order to obtain acertificate of qualification, if the corporation has filed an amended statement and designation when required by *Corporations Code Section 2107* (*Corp. Code § 2102*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion for summary judgment when the moving party asserts that the corporation is barred from maintaining its suit by its failure to obtain from the Secretary of State a certificate of qualification as required by *Corp. Code § 2105(a).*

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated, including argument showing the insufficiency of the supporting affidavits or declarations, the existence of a triable issue of fact, or both. In addition, counsel should attach affidavits or declarations that oppose the motion [*see Code Civ. Proc. § 437c*] and certified copies of the amended statement and designation filed pursuant to *Corp. Code § 2117* [*see also Corp. Code § 2117.1* (additional information required for publicly traded foreign corporations)].

[3] Additional Authorities

[a] Filing of Designation of Agent Under Previous Law

Corp. Code § 2107(d) provides that filing the statement required by *Corp. Code § 2117*, which shows a new agent for service of process, is a proper method pursuant to *Corp. Code § 2107* of designating a new agent for service of process.

California Points & Authorities

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CHAPTER 52 CORPORATIONS
PART II. FORMS
A. CAPACITY AND VENUE

5-52 California Points & Authorities § 52.36

§ 52.36 Opposing Motion for Summary Judgment--Foreign Corporation Permitted to Maintain Suit Without Providing Proof of Payment of State Taxes When It Has Obtained Certificate of Qualification Before Commencing Suit [Corp. Code §§ 2105, 2203(c)]

[1] FORM

[*Caption. See § 52.34.*]

A FOREIGN CORPORATION MAY MAINTAIN AN ACTION WITHOUT PROVIDING PROOF OF PAYMENT OF ITS STATE TAXES PURSUANT TO CORPORATIONS CODE SECTION 2203(c) WHEN IT HAS OBTAINED A CERTIFICATE OF QUALIFICATION BEFORE COMMENCING SUIT, EVEN IF IT TRANSACTED INTRASTATE BUSINESS BEFORE QUALIFYING.

A. Rules Governing Summary Judgment Procedure. [*See § 52.34, Paragraph A.*]

B. Certificate of Qualification Obtained Before Action Commenced. A foreign corporation that has qualified to transact intrastate business after transacting, but prior to commencing an action on, intrastate business may maintain the action without complying with *Corporations Code section 2203(c)* (*United Medical Management Ltd. v. Gatto (1996) 49 Cal. App. 4th 1732, 1742, 57 Cal. Rptr. 2d 600*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion for summary judgment when the moving party asserts that the corporation is barred from maintaining its suit by its failure to provide proof of payment of its state taxes as required by *Corp. Code § 2203(c)*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated, including argument showing the insufficiency of the supporting affidavits or declarations, the existence of a

triable issue of fact, or both. In addition, counsel should attach affidavits or declarations which oppose the motion [*see Code Civ. Proc. § 437c*] and a certified copy of the corporation's certificate of qualification [*see Corp. Code §§ 2105, 2106*].

[3] Discussion of Authorities

[a] Certificate of Qualification Obtained Before Action Commenced

In ***United Medical Management Ltd. v. Gatto*** *(1996) 49 Cal. App. 4th 1732, 57 Cal. Rptr. 2d 600* , a foreign corporation entered into a contract with a California corporation to transact intrastate business, without first qualifying to transact intrastate business pursuant to *Corp. Code § 2105*. The California corporation breached the contract. The foreign corporation filed its first complaint for breach, which the trial court dismissed for failure to comply with *Corp. Code § 2203(c)*. The foreign corporation then qualified to transact intrastate business, and thereafter brought a second action for breach of contract. The trial court again granted a motion to dismiss the complaint for failure to comply with *Corp. Code § 2203(c)*. The court of appeal reversed the judgment of dismissal, holding that a foreign corporation that has qualified to transact intrastate business after transacting, but prior to commencing an action on, intrastate business may maintain the action without complying with *Corp. Code § 2203(c)* (*49 Cal. App. 4th 1732, 1742)* . The court examined the purpose of *Corp. Code § 2203(c)*, which permits abatement of an action only if the foreign corporation failed to qualify before commencing the action. That section is literally and unambiguously inapplicable to actions commenced after compliance with *Corp. Code § 2105* (*49 Cal. App. 4th 1732, 1740-1741)* . In this case, the foreign corporation commenced its action following qualification and was not subject to abatement. It therefore was not required to comply with *Corp. Code § 2203(c)* (*49 Cal. App. 4th 1732, 1742)* .

The court also noted that a foreign corporation transacting intrastate business that has failed to qualify may nevertheless *defend* an action brought against it in state court. A foreign corporation transacting intrastate business that has failed to qualify may also *commence* an action in state court. It is the act of *maintaining* an action commenced prior to qualification that requires compliance with *Corp. Code § 2203(c)* (*49 Cal. App. 4th 1732, 1739)* . However, a foreign corporation that qualifies to transact intrastate business after transacting, but before commencing an action on, intrastate business, may maintain the action without complying with *Corp. Code § 2203(c)* so long as the Franchise Tax Board has not suspended the corporation for failure to pay taxes before it commences the action (*49 Cal. App. 4th 1732, 1742)* .

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5-52 California Points & Authorities § 52.37

§ 52.37 Opposing Corporate Defendant's Motion for Change of Venue--Insufficient Showing That Venue Was Improper

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM IN OPPOSITION TO MOTION
_____ [*name*], Plaintiff,	)	FOR CHANGE OF VENUE TO PROPER COURT
vs.	)	Date: _____
_____ [*name*], a Corporation,	)	Time: _____
Defendant.	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THE COURT SHOULD DENY THE MOTION FOR AN ORDER TRANSFERRING THE ABOVE DESIGNATED _____ [ACTION *or* PROCEEDING] TO A PROPER COURT WHERE DEFENDANT HAS MADE AN INSUFFICIENT SHOWING THAT THE _____ [ACTION *or* PROCEEDING] WAS COMMENCED IN AN IMPROPER COURT.

A. Presumption That Venue Is Proper. In the absence of an affirmative showing to the contrary, the presumption is that the county in which the title of the action shows that it is brought is, prima facie, the proper county for the commencement and trial of the action (*Sea World, Inc. v. Superior Court (1970) 13 Cal. App. 3d 100, 103, 91 Cal. Rptr. 336* ; *Smith v. Stanford Research Inst. (1963) 212 Cal. App. 2d 750, 753, 28 Cal. Rptr. 481*).

B. Burden of Proof on Motion to Change Venue, Generally. A motion for change of venue must satisfy two requirements: (1) it must be shown the action is proper in the county to which the movant seeks transfer; and (2) it must be shown the county in which the action was filed was improper under any applicable theory (*Easton v. Superior Court (1970) 12 Cal. App. 3d 243, 245-246, 90 Cal. Rptr. 642*).

C. Corporation's Burden of Proof. A corporate defendant seeking a change of venue must show not only that its principal place of business is located in the county to which it seeks to have the action transferred, it must show also that the contract was not made, that it was not to be performed, that the obligation or liability did not arise, and that the breach did not occur in the county in which the venue is originally placed by the filing of plaintiff's complaint (*Sea World, Inc. v. Superior Court (1970) 13 Cal. App. 3d 100, 104, 91 Cal. Rptr. 336* ; *Smith v. Stanford Research Inst. (1963) 212 Cal. App. 2d 750, 754, 28 Cal. Rptr. 481*).

[*Optional*] **D. Foreign Corporation's Burden of Proof.** A foreign corporation may only invoke the venue provisions of *Code of Civil Procedure Section 395.5* in the same manner as a domestic corporation if it establishes that it has qualified to do business in California under *Corporations Code Section 2105*. The failure to submit any proof of compliance with the provisions of *Corporations Code Section 2105* renders the status of the foreign corporation as that of a foreign corporation only, and as such, the corporation may be sued in any county in the state (*Easton v. Superior Court (1970) 12 Cal. App. 3d 243, 246-247, 90 Cal. Rptr. 642* ; decided under former Cal. Const., Art. XII, § 16, and Corp. Code § 6403).

[*Optional*] **E. When Corporation Is Permitted to Change Venue.** A corporate defendant challenging venue may obtain an order changing venue only to the county of its principal place of business (*Gutierrez v. Superior Court (1966) 243 Cal. App. 2d 710, 717, 52 Cal. Rptr. 592* ; *Beutke v. American Sec. Co. (1955) 132 Cal. App. 2d 354, 360-362, 282 P.2d 201* ; *see Rosas v. Superior Court (1994) 25 Cal. App. 4th 671, 30 Cal. Rptr. 2d 609* (location of corporation's principal place of business established for venue purposes)).

[*Optional*] **F. Foreign Corporation's Designation of Principal Place of Business in Statement Filed With Secretary of State.** A foreign corporation's designation of its principal office within the state in its statement filed with the Secretary of State (*see Corp. Code § 2105*) establishes the corporation's principal place of business for venue purposes as matter of law (*Rosas v. Superior Court (1994) 25 Cal. App. 4th 671, 676, 30 Cal. Rptr. 2d 609*).

[*Optional*] **G. Domestic Corporation's Designation of Principal Place of Business in Statement Filed With Secretary of State.** A domestic corporation's designation of the location of its principal business office in its domestic stock corporation statement filed with the Secretary of State [*Corp. Code § 1502*] conclusively fixes the corporation's principal place of business for venue purposes as a matter of law (*Rosas v. Superior Court (1994) 25 Cal. App. 4th 671, 675-676, 30 Cal. Rptr. 2d 609*).

[*Optional*] **H. Continuing Effect of Tortious Conduct.** Although in tort the liability arises where the wrongful invasion of legal rights occurs, when there is further conduct or an event or an occurrence of any kind that takes place in the county in which the tort action is commenced and that ensues in the natural and ordinary course of events from a corporate defendant's conduct in the county in which the tort liability originally arose, such as the continuing damage to a plaintiff caused by his or her arrest in a malicious prosecution action, the county in which the action is commenced is a proper county for the trial of the action (*Ray Wong v. Earle C. Anthony, Inc. (1926) 199 Cal. 15, 17-20, 247 P. 894*).

Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion made by a defendant corporation for a transfer of an action or proceeding commenced against it to the proper county for the commencement of such an action or proceeding under the provisions of *Code Civ. Proc. § 395.5* (venue for corporations generally) or *Corp. Code §§ 304* (action for removal of director), 660(c) (application for order to compel holding of annual shareholder's meeting), 1304(a) (action for determination of shares as dissenting shares and/or market value), 1603(a) (proceeding to enforce right of inspection of corporate records and reports), 1800(a) (action for involuntary dissolution of corporation), or 1904 (petition for court to take jurisdiction of voluntary dissolution).

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law raised.

[b] Related Uses

With appropriate modifications, these points and authorities may be used to oppose a petition for a writ of mandate requiring transfer of thetrial of the case to the proper court when the trial court has denied a motion to change the place of trial on the grounds that the court designated in the complaint is the proper court. They may also be used to support a petition for a writ of mandate requiring trial in the court designated in the complaint when the trial court has granted a motion to change the place of trial on the grounds that the designated court was an improper court [*see Code Civ. Proc. § 400*].

[c] Related Pleading and Practice Forms

For a petition for writ of mandate by a party aggrieved by an order granting a motion for change of venue to compel vacation of an order for change of venue on the grounds that one defendant is corporate and the action was properly brought in the county of its residence, see California Forms of Pleading and Practice, Ch. 571, *Venue* (Matthew Bender).

[d] Related Memoranda

For a memorandum in opposition to a defendant's motion for change of venue to the county of the defendant's residence on the ground that the action was commenced in the county of the resident of the moving defendant's codefendant, see Ch. 238, *Venue* .

[3] Discussion of Authorities

[a] Presumption That Venue Is Proper

In ***Sea World, Inc. v. Superior Court*** *(1970) 13 Cal. App. 3d 100, 91 Cal. Rptr. 336* , petitioner sought a writ of mandate compelling respondent court to vacate and set aside its order denying petitioner's motion for a change of venue from Los Angeles County to San Diego County, and to grant that change. The action which was for false imprisonment which allegedly took place on petitioner's premises in San Diego was commenced in the county of plaintiff's residence. In support of its motion, petitioner submitted a declaration of one of its officers alleging that it always maintained its executive offices and principal place of business in San Diego County. Although the court of appeal issued the peremptory writ of mandate as prayed, it noted at the outset of its opinion those rules which govern motions for a

change of venue by corporations. The court stated that the language of former Cal. Const., art. XII, § 16 [*see now Code Civ. Proc. § 395.5*] is designed to permit a wider choice of venue in suits against corporations than is permitted in suits against individuals by having its language couched in the disjunctive, thereby permitting a plaintiff to bring his or her action in any county which will satisfy any one of its provisions. Moreover, the court stated that in the absence of an affirmative showing to the contrary, the presumption is that the county in which the title of the action shows that it is brought is, prima facie, the proper county for the commencement and trial of the action. This presumption can be overcome by a corporation only by showing (1) that its principal place of business is located in the county to which it seeks to have the action transferred, and (2) that the contract was not made, that it was not to be performed, that the obligation or liability did not arise, and that the breach did not occur in the county wherein the venue was originally placed by the filing of plaintiff's complaint (*13 Cal. App. 3d 100, 103)* .

In ***Smith v. Stanford Research Inst.*** *(1963) 212 Cal. App. 2d 750, 28 Cal. Rptr. 481* , the plaintiffs appealed from an order of the trial court granting corporate defendants' motion for a change of venue. The plaintiffs contended that defendants' affidavits filed in support of the motion were not sufficient to support the court's order as a matter of law. The court of appeal agreed and reversed the order. Plaintiff's causes of action were for negligence and for breach of express and implied warranties relating to the fitness of equipment installed in an airplane which subsequently crashed. After discussing those same provisions and rules set forth above in *Sea World, Inc. v. Superior Court (1970) 13 Cal. App. 3d 100, 91 Cal. Rptr. 336* , the court found that although the plaintiffs did not allege where the contracts underlying the breach of warranty counts were entered into or where they were to have been performed, or the place where defendants' obligation or liabilities to plaintiffs arose, or when defendants' breach occurred, nevertheless, venue was presumptively proper, and the burden rested on defendants to demonstrate to the court that venue was not proper. This they failed to do because none of their affidavits made any direct reference to the causes of action for claimed breach of warranty; none of them affirmatively alleged that the claimed warranties were not made or entered into in the county in which the action was commenced, or that defendants' obligation with respect to the warranties did not arise there. The only showing made in the affidavits was that defendant's principal places of business were in a county other than the one in which the action was commenced, and this was insufficient to warrant the trial court's granting of the motion for the change of venue (*212 Cal. App. 2d 750, 754)* .

[b] Burden of Proof on Motion to Change Venue, Generally

In ***Easton v. Superior Court*** *(1970) 12 Cal. App. 3d 243, 90 Cal. Rptr. 642* , the plaintiff petitioned the court of appeal for a writ of mandate to vacate an order transferring venue of its action from San Diego to Los Angeles County, and to compel trial in San Diego. Since there was no basis for venue in Los Angeles, the court granted the writ. Plaintiff and others sued a Chicago based commodity brokerage firm and its office manager. When the motion for change of venue was made, the office manager wasno longer employed by the firm and the firm had closed its Los Angeles office and withdrawn from California. In that portion of the court's opinion dealing with the brokerage firm's grounds for a transfer of the action, the court noted that it is the long established rule that a motion for change of venue must satisfy the two requirements set forth in Paragraph B of the foregoing form. The court stated that, although a foreign corporation may invoke the constitutional venue provisions in the same manner as a domestic corporation, a foreign corporation must first establish that it has qualified to do business in California under former Corp. Code § 6403 [*see now Corp. Code § 2105*]. The court found that nothing showed the firm ever designated the location and address of its principal office in California or complied with any of the provisions of Corp. Code § 6403. The only relevant affidavit submitted alleged that the firm's principal office was in Chicago. None of the documents showed whether it had an office in Los Angeles when the action was commenced. Since the requirements of Corp. Code § 6403 were not satisfied, the court concluded that the firm's status was that of a foreign corporation only, and that as such, it could be sued in any county in California (*12 Cal. App. 3d 243, 245-246)* .

[c] Corporation's Burden of Proof

Sea World, Inc. v. Superior Court *(1970) 13 Cal. App. 3d 100, 91 Cal. Rptr. 336* , and ***Smith v. Stanford Research***

Inst. *(1963) 212 Cal. App. 2d 750, 28 Cal. Rptr. 481* are *discussed in § 52.37[3][a]*.

[d] Foreign Corporation's Burden of Proof

Easton v. Superior Court *(1970) 12 Cal. App. 3d 243, 246-247, 90 Cal. Rptr. 642* is *discussed in § 52.37[3][b]*.

[e] When Corporation Is Permitted to Change Venue

Rosas v. Superior Court *(1994) 25 Cal. App. 4th 671, 30 Cal. Rptr. 2d 609* is *discussed in § 52.37[3][g]*.

Gutierrez v. Superior Court *(1966) 243 Cal. App. 2d 710, 52 Cal. Rptr. 592* was a mandamus proceeding to compel the trial court to vacate an order granting a change of venue. In the action which was for personal injuries, two defendant corporations named in the complaint moved for a change of venue from San Francisco County in which the action was commenced to Ventura County which was the county in which only one of the defendants had its principal place of business. The motion was based on the fact that with respect to the named defendants, San Francisco was not a proper county for the trial of plaintiff's action. Although the principal question on appeal was whether the trial court could disregard the residence of a party who had been sued by a fictitious name, and whose true name, Libbey, Inc., was substituted after the motion for change of venue, but before the hearing thereon, which the court of appeal decided the trial court could not do, the court noted at the outset that a corporation's principal place of business is its residence for purposes of determining venue, and that, accordingly, a corporate defendant challenging venue may obtain an order changing venue only to the county of its principal place of business (*243 Cal. App. 2d 710, 717)* .

In ***Beutke v. American Sec. Co.*** *(1955) 132 Cal. App. 2d 354, 282 P.2d 201* , the plaintiffs appealed from an order granting defendants' motion for a change of venue from Shasta County to Alameda County. Among other contentions, the plaintiffs argued that since the principal place of business of defendants was the County of San Francisco and not Alameda County, the defendants had the right to have the action transferred only to San Francisco. The defendants responded by contending that once they show that Shasta was not a proper county, then they have the right to have the venue changed to any place where the plaintiff might have brought the action. In reversing the trial court, the court of appeal agreed with plaintiffs and found that former Cal. Const., art. XII, § 16 [*see now Code Civ. Proc. § 395.5*] was permissible only and not mandatory. The court, quoting an earlier Supreme Court decision, stated that the section denies the absolute right of the corporation to a change of venue to the county of its principal place of business, when sued in any one of the other counties named in the section. Thus, the court was of the opinion that if an action is not commenced in a proper county, a corporation may change the venue to the county of its residence, but that there was no authority for changing it to some other county in which a plaintiff could have brought the action (*132 Cal. App. 2d 354, 360-362)* .

[f] Foreign Corporation's Designation of Principal Place of Business in Statement Filed With Secretary of State

Rosas v. Superior Court *(1994) 25 Cal. App. 4th 671, 30 Cal. Rptr. 2d 609* is *discussed in § 52.37[3][g]*.

[g] Domestic Corporation's Designation of Principal Place of Business in Statement Filed With Secretary of State

Rosas v. Superior Court *(1994) 25 Cal. App. 4th 671, 30 Cal. Rptr. 2d 609* was a mandamus proceeding to compel the trial court to vacate an order granting a change of venue. In a bad faith action against a domestic insurance company, brought in the county designated as the company's principal business office in its domestic stock corporation statement [*see Corp. Code § 1502*], the trial court transferred the matter to another county, which the company maintained had been its principal place ofbusiness for 11 years. Plaintiff contended that the company's designation of the location of its principal business on its statement filed with the Secretary of State, and on various filings with the Department of Insurance, fixed its location as a matter of law. In a petition for writ of mandate, the plaintiff challenged the granting of

the company's motion to change venue. The court of appeal granted the petition, holding that for purposes of venue under *Code Civ. Proc. § 395.5*, a domestic corporation's designation of the location of its principal place of office in its annual statement filed with the Secretary of State conclusively fixed the corporation's principal place of business (25 Cal. App. 3th 671, 672).

The court reexamined *Gutierrez v. Superior Court (1966) 243 Cal. App. 2d 710, 728, 52 Cal. Rptr. 592* , *discussed in § 52.37[3][e]*. The court noted that former Corp. Code § 6403, the statute relied on in *Gutierrez*, was replaced by *Corp. Code § 2105*. This revision merely substituted "address of its principal executive office" for "location and address of its main office" and substituted "address of its principal office within this state, if any" for "location and address of its principal office within this State." Such a minor revision, the court concluded, did not undercut the analysis of the *Gutierrez* decision, holding that a foreign corporation's designation of its principal office in California in its statement filed with the Secretary of State established the corporation's principal place of business for venue purposes as a matter of law (*25 Cal. App. 4th 671, 676)* .

[h] Continuing Effect of Tortious Conduct

Ray Wong v. Earle C. Anthony, Inc. *(1926) 199 Cal. 15, 247 P. 894* was an action for malicious prosecution. Plaintiff alleged that defendant caused a complaint to be filed in Sacramento charging him, a resident of San Joaquin County, with embezzlement; that a warrant of arrest was issued pursuant to which plaintiff was arrested in San Joaquin and placed in jail there; and that he was thereafter tried in Sacramento where he was acquitted. Defendant corporation moved for a change of venue from San Joaquin to Sacramento County on the ground that its principal place of business was in Sacramento and that the liability for the tort alleged did not arise in San Joaquin. In affirming the order denying the motion, the Supreme Court stated that the term "prosecution" is sufficiently comprehensive to include every step in an action for its commencement to its final determination. The disgraceful imputation caused by the arrest and the inconvenience and expense incident to defending the proceedings, were consequences which ensued in the ordinary and natural course of events, though those consequences were immediately brought about by intervening agents. As long as those agents were set in motion by the primary wrongdoer, or those acts that caused the damage were the necessary or legal and natural consequences of the wrongful act, both of which were true in this case, the defendant was liable for that damage. Therefore, the court concluded that the liability arose in San Joaquin. The court noted that the principal was the same as that applied in *Tingley v. Times-Mirror Co. (1904) 144 Cal. 205, 77 P. 918* , a libel action based on a newspaper report brought in San Diego County where the paper was circulated. Although in *Tingley*, liability arose first in the county of the newspaper's publication, the alleged injury occurred had its most lasting effect in the county of the plaintiff's residence, San Diego. In the same manner, the Court reasoned that, in this case, the fact that defendant did not directly do anything in San Joaquin County was wholly immaterial since the arrest and imprisonment in the county were the natural consequences of the accusation, ensuing in the regular course of the proceeding which the defendant set in motion (*199 Cal. 15, 17-20)* .

[4] Additional Authorities

[a] Presumption That Venue Is Proper

Mission Imports, Inc. v. Superior Court (1982) 31 Cal. 3d 921, 184 Cal. Rptr. 296, 647 P.2d 1075 , arose out of an action commenced in San Francisco by a national beer importer against its California distributor. The plaintiff sought a declaration of its rights under a letter agreement that was entered into in Los Angeles, along with an injunction to prevent the defendant from interfering further with its current and prospective contractual relationships with other distributors. After a dispute had arisen between the parties and the plaintiff purported to terminate the agreement, the defendant's attorney sent a letter to subdistributors in the state explaining the defendant's intent to file suit against the plaintiff and claim to be the master distributor until determination of that action. After the plaintiff filed suit, the defendant moved to change venue to Los Angeles, its principal place of business. The trial court denied the motion, and the denial was upheld by the Supreme Court. The court stated that the suit was a transitory action governed by *Code*

Civ. Proc. § 395.5. In the absence of an affirmative showing to the contrary, the presumption is that the county in which the title of the action shows that it is brought is, prima facie, the proper county for the commencement and trial of the action (*31 Cal. 3d 921, 928)* . *Code Civ. Proc. § 395.5* permits tort claims against a corporation to be tried in any county in which liability arises as well as in the county where the corporation's principal place of business is located. As San Francisco was presumptively the proper county for a trial of the action, the burden of proving otherwise rested with the defendant. To prevail on the motion, the defendant had to demonstrate not only that its principal place of business was not in San Francisco, a fact conceded by the plaintiff, but also that the alleged liability did not arise in San Francisco (*31 Cal. 3d 921, 929)* . The plaintiff had alleged that the letter was received by a particular distributor of its beer, and the defendant offered evidence that the distributor had distributed the beer in San Francisco. Taking theallegations and evidence together, the court held that it was established that the plaintiff may have suffered injury in San Francisco. As the defendant had not met its burden of showing that the injury did not occur there, venue was proper as laid (*31 Cal. 3d 921, 930)* .

[b] Corporation's Burden of Proof

In *Mission Imports, Inc. v. Superior Court (1982) 31 Cal. 3d 921, 184 Cal. Rptr. 296, 647 P.2d 1075* , the Supreme Court discussed a corporation's burden of proof on a motion for change of venue (*31 Cal. 3d 921, 928-929)* . For further discussion, see *§ 52.37[4][a]*.

In *Anaheim Extrusion Co. v. Superior Court (1985) 170 Cal. App. 3d 1201, 216 Cal. Rptr. 815* , an action to recover payment for goods sold and delivered to a corporation, the trial court granted a defense motion to change venue from Orange County to Los Angeles County, and the plaintiff petitioned for a writ of mandate to vacate this order. The court of appeal issued the writ. The court stated the rule that, when a corporate defendant moves to change venue, it has the burden of negating the propriety of venue as laid on all possible grounds (*170 Cal. App. 3d 1201, 1203)* . The court concluded that the defendant had failed to meet this burden, in that it did not negate the fact that Orange County was the county in which the contract was to be performed, which is one of the grounds for venue under *Code Civ. Proc. § 395.5*. The court reasoned that although the goods were to be delivered in Los Angeles County, the alleged breach of performance was nonpayment rather than nondelivery. The contract was silent about the place for making payment, but the plaintiff had indicated that it had received payments in the past at its office in Orange County, and the defendant failed to present any evidence to the contrary (*170 Cal. App. 3d 1201, 1203-1204)* .

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5-52 California Points & Authorities § 52.38

§ 52.38 Opposing Motion for Summary Judgment--In Action to Enforce Provision of Corporations Code Against Foreign Corporation--Nationally Traded or Wholly Owned Corporation Is Not Subject to California Law [Corp. Code § 2115(c)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM IN OPPOSITION TO MOTION
_____ [*name*],	)	FOR SUMMARY JUDGMENT
a(n) _____ [*name*	)	Date: _____
of state or foreign country]	)	Time: _____
Corporation,	)	Location: _____
Defendant.	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

DEFENDANT FOREIGN CORPORATION IS NOT SUBJECT TO CORPORATIONS CODE SECTION 2115(b) BECAUSE _____ [*specify applicable reason, e.g.,* ALL OF ITS VOTING SHARES ARE OWNED BY A CORPORATION THAT IS NOT SUBJECT TO CORPORATIONS CODE SECTION 2115], AND THUS THE MOTION FOR SUMMARY JUDGMENT ON THE GROUND THAT DEFENDANT IS A "NOMINALLY FOREIGN" CORPORATION SHOULD BE DENIED.

A. Rules Governing Summary Judgment Procedure. [*See § 52.34, Paragraph A.*]

[*EITHER*]

B. Securities Listed on Specified Exchange. *Corporations Code Section 2115* does not apply to any corporation with outstanding securities listed on the New York Stock Exchange , the NYSE Amex, the NASDAQ Global Market, or the NASDAQ Capital Market (*Corp. Code § 2115(c)(1)*).

[*OR*]

B. Subsidiary Corporation. *Corporations Code § 2115* does not apply to any corporation if all of its voting shares (other than a director's qualifying shares) are owned directly or indirectly by a corporation or corporations that are not subject to *Corporations Code § 2115* (*Corp. Code § 2115(c)(2)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion for summary judgment in an action to enforce a provision of the Corporations Code listed under *Corp. Code § 2115(b)* if the motion is based on the ground that the defendant foreign corporation is a "nominally foreign" corporation under *Corp. Code § 2115(a)*. Counsel should use whichever Paragraph B is applicable. This form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law raised. In addition, counsel should attach affidavits or declarations that support the memorandum, as well as a separate statement in response to the moving party's statement of undisputed material facts [*see Code Civ. Proc. § 437c(b)*].

[3] Discussion of Authorities

[a] Nationally Traded or Wholly Owned Corporation is Not Subject to California Law

Corp. § 2115(c) provides that the application of California law set forth in *Corporations Code § 2115(b)* does not apply to any corporation (1) with outstanding securities listed on the New York Stock Exchange, the NYSE Amex, the NASDAQ Global Market, or the NASDAQ Capital Market, or (2) if all of its voting shares (other than directors' qualifying shares) are owned directly or indirectly by a corporation or corporations not subject to *Corp.Code § 2115*.

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5-52 California Points & Authorities § 52.39

§ 52.39 Opposing Motion for Summary Judgment--In Action to Enforce Provision of Corporations Code Against Foreign Corporation--Inapplicability of "Nominally Foreign" Status to Defendant Corporation [Corp. Code § 2115(a), (d), (e)]

[1] FORM

[*Caption. See § 52.38.*]

DEFENDANT FOREIGN CORPORATION IS NOT SUBJECT TO CORPORATIONS CODE SECTION 2115(b) BECAUSE THE TESTS REFERRED TO IN CORPORATIONS CODE SECTION 2115(a) ARE _____ [INAPPLICABLE *or* NOT MET], AND THUS THE MOTION FOR SUMMARY JUDGMENT ON THE GROUND THAT DEFENDANT IS A "NOMINALLY FOREIGN" CORPORATION SHOULD BE DENIED.

A. Rules Governing Summary Judgment Procedure. [*See § 52.34, Paragraph A.*]

[*EITHER*]

B. Corporation Not "Nominally Foreign" When Tests Not Met. A foreign corporation is not subject to *Corporations Code § 2115* _____ [if the average of its property factor, payroll factor,and sales factor as defined in *Revenue and Taxation Code § 25129, 25132,* and *25134* is 50 percent or less *or* if one half or less of its outstanding voting securities are held of record by persons having addresses in California appearing on the books of the corporation on the record date for the latest meeting of shareholders held during its latest full income year or, if no meeting was held during that year, on the last day of the latest full income year] (*Corp. Code § 2115(a)*).

[*OR*]

B. Time Period in Which "Nominally Foreign" Status Applicable to Foreign Corporation. The provisions of

Corporations Code § 2115(a), making a foreign corporation subject to *Corporations Code § 2115* when the tests referred to in Corporations Code Section § 2115(a) have been met, becomes applicable only [on the first day of the first income year of the corporation _____ [commencing on or after the 135th day of the income year immediately following the latest income year with respect to which the tests referred to in *Corporation Code § 2115(a)* have been met *or* commencing on or after the entry of a final order by a court of competent jurisdiction declaring that the tests referred to in *Corporation Code § 2115(a)* have been met] (*Corp. Code § 2115(a), (d)*).

[*OR*]

B. Cessation of "Nominally Foreign" Corporation Status. *Corporations Code § 2115(a)*, making a foreign corporation subject to *Corporations Code § 2115* when the tests referred to in *Corporations Code § 2115(a)* have been met, ceases to be applicable _____ [at the end of the first income year of the corporation immediately following the latest income year with respect to which at least one test referred to in *Corporation Code § 2115(a)* is not met *or* at the end of the income year of the corporation during which a court of competent jurisdiction has not entered a _____ (contrary order before the end of the income year *or* final order declaring that one of the tests referred to in *Corporation Code § 2115(a)* is not met)] (*Corp. Code § 2115(a), (e)*).

[*CONTINUE*]

[*Optional*] **C. Nominee Holders.** Securities held to the knowledge of the issuer in the names of broker-dealers, nominees for broker-dealers (including clearing corporations) or banks, associations, or other entities holding securities in a nominee name or otherwise on behalf of a beneficial owner (collectively "nominee holders"), are not considered outstanding. [However, if the foreign corporation requests all nominee holders to certify, with respect to all beneficial owners for whom securities are held, the number of shares held for those beneficial owners having addresses (as shown on the records of the nominee holder) in and outside California, then all shares so certified must be considered "outstanding" and held of record by persons having addresses either in or outside California as so certified, provided that the certification is retained with the record of shareholders and made available for inspection and copying in the same manner as is provided in *Corporations Code § 1600*. A current list of beneficial owners of a foreign corporation's securities provided to the corporation by one or more nominee holders or their agent pursuant to the requirements of Rule 14b-1(b)(3) or 14b-2(b)(3), as adopted on January 6, 1992, and promulgated under the Securities Exchange Act of 1934, constitutes an acceptable certification with respect to beneficial owners] (*Corp. Code § 2115(a)*).

[*Optional*] **D. "Voting Power."** The term "voting power" means the power to vote for the election of directors at the time any determination of voting power is made and does not include the rights to vote on the happening of some condition or event that has not yet occurred (*Corp. Code § 194.5*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion for summary judgment in an action to enforce a

provision of the Corporations Code enumerated in *Corp. Code § 2115(b)* when the motion is based on the ground that the defendant foreign corporation is a "nominally foreign" corporation under *Corp. Code § 2115(a)*. This form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition,counsel should attach affidavits or declarations that support the motion, as well as a separate statement in response to the moving party's statement of undisputed material facts [*see Code Civ. Proc. § 437c(b)*].

[3] Discussion of Authorities

[a] Time Period in Which "Nominally Foreign" Status Applicable to Foreign Corporation

A foreign corporation is subject to the requirements of *Corp. Code § 2115(b)* commencing on the date specified in *Corp. Code § 2115(d)* and continuing until the date specified in *Corp. Code § 2115(e)* [*Corp. Code § 2115(a)*]. *Corp. Code § 2115(d)*, as set forth in Paragraph B of this form, specifies when the provisions of *Corp. Code § 2115(a)* become applicable, and *Corp. Code § 2115(a)* defines when a foreign corporation is subject in general to the provisions of *Corp. Code § 2115*. A foreign corporation is required to comply with the provisions of the General Corporation Law specified in *Corp. Code § 2115(b)*, therefore, only for the period when its status as a "nominally foreign" corporation commences under *Corp. Code § 2115(d)* and ceases under *Corp. Code 2115(e)*, also set forth in Paragraph B of this form. Thus, although an action may be brought to enforce a provision of the Code during the period in which *Corp. Code § 2115(a)* applies to the corporation under *Corp. Code § 2115(d)*, when the facts giving rise to the action occurred before this period commenced, it would appear that the corporation would not be required to comply with the particular provision.

[b] Nominee Holders

As set forth in Paragraph C, securities held by nominee holders are not considered outstanding unless the corporation requests all such holders to certify the number of shares held for beneficial owners. Broker-dealers, nominees for broker dealers (including clearing corporations) or banks, associations, or other entities holding securities in a nominee name or otherwise on behalf of a beneficial owner are collectively referred to as "nominee holders" [*Corp. Code § 2115(a)*].

[c] "Voting Power"

The term "voting securities" is not defined as such in the definitional sections of General Corporation Law [*see Corp. Code §§ 1-195*]. However, the term "voting power," set forth in Paragraph D of this form and contained in *Corp. Code § 194.5*, would appear to be applicable in determining whether one half of the voting securities of a foreign corporation are held of record by persons having addresses in California under *Corp. Code § 2115(a)*.

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5-52 California Points & Authorities § 52.40

§ 52.40 Opposing Motion for Summary Judgment--In Action by or Against Foreign Corporation--Forfeiture of Corporate Powers Not Effective Because Preliminary Notification or Transmission to Secretary of State Was Not Made [Rev. & Tax. Code § 23302]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
[a Corporation],	)	MEMORANDUM IN OPPOSITION TO MOTION
Plaintiff,	)	FOR SUMMARY JUDGMENT
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
[a Corporation],	)	Location: _____
Defendant.	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THE MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE THE FRANCHISE TAX BOARD _____ [DID NOT GIVE _____ (*name of corporation*) PRELIMINARY NOTICE OF _____ (SUSPENSION *or* FORFEITURE) AS REQUIRED BY REVENUE AND TAXATION CODE SECTIONS 21020 AND 23302 *and/or* HAS NOT TRANSMITTED THE NAME OF THE CORPORATION TO THE SECRETARY OF STATE PURSUANT TO REVENUE AND TAXATION CODE SECTION 23302] AND, THEREFORE, THE FORFEITURE OF CORPORATE POWERS IS NOT EFFECTIVE.

A. Rules Governing Summary Judgment Procedure. [*See § 52.34, Paragraph A.*]

[*EITHER*]

B. Preliminary Notice Requirement. In order for a corporation's powers, rights, and privileges to be suspended or forfeited pursuant to Revenue and Taxation Code § [§] _____ [23301 *and/or* 23301.5 *and/or* 23775], the Franchise Tax Board must have mailed the taxpayer a notice of preliminary suspension that indicates thatthe taxpayer will be suspended by a date certain. The preliminary notice must be mailed to the taxpayer at least 60 days before the date certain (*Rev. & Tax. Code §§ 21020, 23302(b)*).

[*AND/OR*]

B. Transmission to Secretary of State. If the Franchise Tax Board has not transmitted the name of the tax-delinquent foreign corporation to the Secretary of State, the forfeiture of the corporation's powers, rights, and privileges for failure to pay franchise taxes pursuant to *Revenue and Taxation Code Sections 23301, 23301.5*, or *23775* is not effective and the corporation thus does not lack legal capacity to maintain the action, because forfeiture is not automatic and notification to the Secretary of State is required under *Revenue and Taxation Code Section 23302* (*Rev. & Tax. Code § 23302(a), (c)*; *see Mediterranean Exports, Inc. v. Superior Court (1981) 119 Cal. App. 3d 605, 617-618, 174 Cal. Rptr. 169*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion for summary judgment made by a defendant or plaintiff in an action being maintained by or against a corporation if the motion is made on the ground that the corporation's powers to maintain or defend the action have been forfeited pursuant to *Rev. & Tax. Code § 23301*, but the Franchise Tax Board either has failed to give the preliminary notice required by *Rev. & Tax. Code §§ 21020, 23302(b)* or has not transmitted the name of the corporation to the Secretary of State pursuant to *Rev. & Tax. Code § 23302(c)*.

Rev. & Tax. Code §§ 23301, 23301.5, and *23775* apply to a foreign corporation only if the corporation is qualified to do business in California. A corporation that is required under *Corp. Code § 2105* [*see § 52.20*] to qualify to do business is not deemed to have qualified to do business for purposes of *Rev. & Tax. Code § 23301 et seq.* unless the taxpayer has in fact qualified with the Secretary of State [*see Rev. & Tax. Code § 23301.6*(*set forth in § 52.41*)]. However, if the foreign corporation is "transacting intrastate business" within the meaning of *Corp. Code § 191* and is not exempted on interstate commerce or other grounds, it will still lack capacity to maintain or defend an action on that intrastate business as provided by *Corp. Code § 2203*, discussed in *§ 52.20* [*see also § 52.34* (opposing existence of criteria requiring qualification)].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations that support the motion [*Code Civ. Proc. § 437c*].

[3] Discussion of Authorities

[a] Preliminary Notice Requirement

Rev. & Tax. Code § 23302(b) was added by Stats. 1990, ch. 926, a transition provision of which specifies that the Legislature did not intend the act to be construed to affect the rights of any party to an action commenced prior to January 1, 1991 [*see* Stats. 1990, ch. 926, § 17(c) (*set forth in § 52.32*)].

[b] Transmission to Secretary of State

Rev. & Tax. Code § 23302(c) provides that the Franchise Tax Board must transmit to the Secretary of State the names of taxpayers whose powers, rights, and privileges are being suspended or forfeited and that the suspension or forfeiture becomes effective on transmission.

Rev. & Tax. Code § 23302(a) provides that forfeiture or suspension of a corporation's rights, powers, and privileges pursuant to *Rev. & Tax. Code § 23302*, *23301.5*, or *23775* only occurs or becomes effective as expressly provided in *Rev. & Tax. Code § 23302*.

The facts and procedural background of *Mediterranean Exports, Inc. v. Superior Court (1981) 119 Cal. App. 3d 605, 174 Cal. Rptr. 169* are discussed in *§ 52.34[3][b]*. In that case, the court of appeal held that there was a triable issue of fact as to whether defendant's activities in California amounted to the transaction of "intrastate business" as defined by *Corp. Code § 191*. The court also held that a triable issue of fact existed regarding the corporation's legal capacity to maintain the action due to the forfeiture of corporate powers, rights, and privileges for failure to pay franchise taxes pursuant to *Rev. & Tax. Code § 23301* because forfeiture is not automatic and is effective only when the Franchise Tax Board transmits the name of the tax-delinquent foreign corporation to the Secretary of State pursuant to *Rev. & Tax. Code § 23302* and there was evidence that the board had not done this (*119 Cal. App. 3d 605, 617)* .

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5-52 California Points & Authorities § 52.41

§ 52.41 Opposing Motion for Summary Judgment--In Action by or Against Foreign Corporation--Suspension and Forfeiture Provisions Do Not Apply Unless Foreign Corporation Has Qualified to Do Business in California [Corp. Code § 2105; Rev. & Tax. Code § 23301.6]

[1] FORM

[*Caption. See § 52.40.*]

THE MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE REVENUE AND TAXATION CODE SECTION[S] _____ [23301 *and/or* 23301.5 *and/or* 23775] DO NOT APPLY TO _____ [*party, e.g.,* PLAINTIFF].

A. Rules Governing Summary Judgment Procedure. [*See § 52.34, Paragraph A.*]

B. Suspension Provision Not Applicable to Unqualified Foreign Corporation. *Revenue and Taxation Code Sections 23301, 23301.5,* and *23775* apply to a foreign corporation only if the corporation is qualified to do business in California. A corporation that is required under *Corporations Code Section 2105* to qualify to do business is not deemed to have qualified to do business for purposes of the suspension and revivor provisions of the Bank and Corporations Franchise Tax Law (*Revenue and Taxation Code Section 23301*) unless the taxpayer has in fact qualified with the Secretary of State (*Rev. & Tax. Code § 23301.6*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted by a foreign corporation that is required to, but has not, qualified to do business in California [*see Corp. Code § 2105, set forth in § 52.20*] in opposition to a motion for summary judgment that seeks to have the foreign corporation deemed suspended, or its powers deemed forfeited, pursuant to *Rev. & Tax. Code §§ 23301*, *23301.5*, or *23775*. The ground of opposition is that those sections to not apply to an unqualified foreign corporation [*Rev. & Tax. Code § 23301.6*]. Note, however, that some contracts of the unqualified foreign corporation may still be voidable under *Rev. & Tax. Code § 23304.1(b)-(d)*, discussed in *§ 52.32*. Furthermore, if the foreign corporation is "transacting intrastate business" within the meaning of *Corp. Code § 191* and is not exempted on interstate commerce or other grounds, the action may still be abated pursuant to *Corp. Code § 2203*, discussed in *§ 52.20* [*see also § 52.34* (opposing existence of criteria requiring qualification)].

Counsel should insert argument in the form showing the relationship between the facts of the particular case and the points of law raised. In addition, it is necessary to attach declarations or documentary evidence in support of the motion [*see Code Civ. Proc. § 437c(b)*], most notably in this situation, a certificate or declaration from the appropriate custodian of records for the Secretary of State.

This memorandum may be adapted for use in a trial or appellate brief.

[3] Discussion of Authorities

[a] Suspension Provision Not Applicable to Unqualified Foreign Corporation

Rev. & Tax. Code § 23301.6 was added by Stats. 1990, ch. 926, the transition provisions of which are discussed in *§§ 52.32* and *52.43*.

For a case addressing the effect of registration and compliance by a foreign corporation before the applicability of the 1990 statutes, see *Gardiner Solder v. Superior Alloy (1991) 232 Cal. App. 3d 1537, 284 Cal. Rptr. 206* , discussed in *§ 52.43[4][a]*.

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5-52 California Points & Authorities § 52.42

§ 52.42 Opposing Motion for Summary Judgment--In Action by or Against Foreign Corporation--Reinstatement of Corporate Powers Following Payment of Franchise Tax as Validating Prior Acts [Rev. & Tax. Code § 23305a]

[1] FORM

[*Caption. See § 52.40.*]

THE MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE THE _____ [SUSPENDED *or* FORFEITED] POWERS, RIGHTS, AND PRIVILEGES, OF A CORPORATION HAVE BEEN REINSTATED, THEREBY VALIDATING PRIOR ACTS TAKENBY THE CORPORATION AND PERMITTING IT TO PROCEED WITH THE ACTION.

A. Rules Governing Summary Judgment Procedure. [*See § 52.34, Paragraph A.*]

B. Plea in Abatement. A plea of lack of capacity of a corporation to maintain an action by reason of a suspension or forfeiture of corporate powers for nonpayment of its taxes is a plea in abatement which is not favored in law, is strictly construed, and must be supported by facts warranting the abatement at the time of the plea (*Traub Co. v. Coffee Break Serv., Inc. (1967) 66 Cal. 2d 368, 370, 57 Cal. Rptr. 846, 425 P.2d 790*).

C. Relief From Suspension or Forfeiture. Any taxpayer who has suffered the suspension or forfeiture provided for in *Revenue and Taxation Code Section 23301* or *23301.5* may be relieved therefrom on making application in writing to the Franchise Tax Board and on the filing of all tax returns required by the Franchise Tax Board and on payment of the tax, additions to tax, penalties, interest, and any other amounts for nonpayment of which the suspension or forfeiture occurred, together with all other taxes, additions to tax, penalties, interest, and any other amounts due under the Bank and Corporation Franchise Law, and on issuance by the Franchise Tax Board of a certificate of revivor (*Rev. & Tax. Code § 23305*).

D. Effect of Issuance of Certificate. On the issuance of a certificate of revivor by the Franchise Tax Board, the taxpayer named therein becomes reinstated, although reinstatement is without prejudice to any action, defense, or right which has accrued by reason of the original suspension or forfeiture, [except that contracts which were voidable

pursuant to *Revenue and Taxation Code Section 23304.1*, but which have not been rescinded pursuant to *Revenue and Taxation Code Section 23305*, may have that voidability cured in accordance with *Revenue and Taxation Code Section 23304.5*] (*Rev. & Tax. Code § 23305a*).

E. Certificate Is Prima Facie Evidence. The certificate of revivor is prima facie evidence of the reinstatement of the taxpayer named therein (*Rev. & Tax. Code § 23305a*).

F. Satisfying Purpose for Suspension or Forfeiture. The purpose of *Revenue and Taxation Code Section 23301* providing for the suspension or forfeiture of a corporation which has not paid its franchise taxes is to pressure the delinquent corporation to pay its taxes, and that purpose is satisfied by a rule which views a corporation's tax delinquencies, after correction, as mere irregularities (*Peacock Hill Ass'n v. Peacock Lagoon Constr. Co. (1972) 8 Cal. 3d 369, 371, 105 Cal. Rptr. 29, 503 P.2d 285* ; *Gardiner Solder v. SupAlloy Corp. Inc. (1991) 232 Cal. App. 3d 1537, 1542-1545, 284 Cal. Rptr. 206*).

G. Effect of Revival of Corporate Powers. Regardless of whether a corporation, which has had its corporate powers suspended or forfeited for failure to pay its franchise taxes, takes court action during the period of its suspension or forfeiture prior to judgment or after judgment, the revival of corporate powers under *Revenue and Taxation Code Section 23305a* has the effect of validating the earlier acts and permitting the corporation to proceed with the prosecution or defense of the action or an appeal from an adverse judgment in an action (*Peacock Hill Ass'n v. Peacock Lagoon Constr. Co. (1972) 8 Cal. 3d 369, 373, 105 Cal. Rptr. 29, 503 P.2d 285* ; *Rochin v. Pat Johnson Manufacturing Company (1998) 67 Cal. App. 4th 1228, 1236-1237, 79 Cal. Rptr. 2d 719* ; *Benton v. County of Napa (1991) 226 Cal. App. 3d 1485, 1491-1492, 277 Cal. Rptr. 541*).

[*Optional*] **H. Suspension or Forfeiture Does Not Affect Court's Jurisdiction.** The suspended or forfeited status of corporate powers at the time of filing of an action by the corporation does not affect the jurisdiction of the court to proceed; nor does a suspension after the filing of an action, but before rendition of judgment, deprive the court of jurisdiction (*Traub Co. v. Coffee Break Serv., Inc. (1967) 66 Cal. 2d 368, 371, 57 Cal. Rptr. 846, 425 P.2d 790*).

[*Optional*] **I. Substantial Compliance.** The doctrine of substantial compliance applies to allow a suspended corporation to prosecute or defend its action even though the certificate of revivor has not been issued, if the suspended corporation has paid all taxes, deficiencies, penalties, and interest as required by *Revenue and Taxation Code Section 23305* (*see Sade Shoe Co. v. Oschin & Snyder (1990) 217 Cal. App. 3d 1509, 1515-1516, 266 Cal. Rptr. 619*).

[*Optional*] **J. Bond, Deposit, or Other Security for Liability.** Notwithstanding Revenue and Taxation Code, which Sections 23305 and 23305.1 require a corporation to pay any liability to the Franchise Tax Board as a condition to revivor or relief from voidability, the Franchise Tax Board must issue a certificate of _____ [revivor under *Revenue and Taxation Code Section 23305 or* relief from voidability under *Revenue and Taxation Code Section 23305.1*], if the corporation provides the Franchise Tax Board with an assumption of liability, or a bond, deposit, or othersecurity for the taxpayer's liability, that is acceptable to the Franchise Tax Board (*Rev. & Tax. Code § 23305.2*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion for summary judgment made by a defendant or plaintiff in an action being maintained by or against a corporation which has had its corporate powers suspended for failure to pay its franchise taxes on the grounds that the corporation is unable to prosecute or defend the action.

The suspension and forfeiture provisions [*see Rev. & Tax. Code §§ 23301, 23301.5*, and *23775*] apply to a foreign corporation that is required under *Corp. Code § 2105* [*see § 52.20*] to qualify to do intrastate business in California only if the corporation has in fact qualified with the Secretary of State [*see Rev. & Tax. Code § 23301.6* (*set forth in § 52.41*)]. However, such a corporation may still be vulnerable to a plea in abatement under *Corp. Code § 2203*, discussed in *§§ 52.20* and *52.34*.

Counsel should add argument linking the points in this form with the facts of his or her case. In addition, it is necessary to attach declarations or documentary evidence in support of the motion [*see Code Civ. Proc. § 437c(b)*], most notably in this situation, certified copies of the certificate of revivor or application for revivor or other certificate or declaration from the appropriate custodian of records for the Franchise Tax Board or Secretary of State establishing that the opposing party has applied for revivor, or a declaration that the opposing intends to apply for revivor and has the financial resources to pay the amounts required to do so.

This form may also be adapted for use in a trial or appellate brief.

[b] Related Memoranda

If the opposing party also needs to apply for relief from voidability of contract, see *§ 52.43*.

[3] Discussion of Authorities

[a] Plea in Abatement

In ***Traub Co. v. Coffee Break Serv., Inc.*** *(1967) 66 Cal. 2d 368, 57 Cal. Rptr. 846, 425 P.2d 790* , cross defendants appealed from an order denying their motion to vacate and set aside a judgment which had already become final in favor of cross complainant, a California corporation. The ground of the motion was that before entry of the judgment and continuously to the time of the motion, the corporate powers of cross complainant had been suspended under *Rev. & Tax. Code § 23301*. In support of their motion, cross defendants submitted a certificate from the Secretary of State showing cross complainant's suspension and the fact that it had not been reinstated. The suspension had not previously been brought to the court's attention. Following the trial court's denial of cross defendant's motion, the corporate powers of cross complainant were reinstated. On appeal, cross defendants contended that the suspension prior to rendition and entry of judgment rendered the judgment void and subject to collateral attack even though the corporation's lack of capacity does not appear from the face of the judgment roll. The Supreme Court affirmed the order appealed from and held that the trial court was correct in its view that the final judgment was immune from the collateral attack attempted. The Supreme Court noted that, although under previous California law where the corporate charter was forfeited for nonpayment of franchise taxes, collateral attack of a judgment rendered in favor of a forfeited corporation was permitted, under present Bank and Corporation Franchise Law, a plea of lack of capacity of a corporation to maintain an action by reason of a suspension of corporate powers for nonpayment of its taxes is a plea in abatement which is not favored in law and is to be strictly construed and which must be supported by facts warranting the abatement at the time of the plea. The Court concluded that in light of recent holdings under the present law, the suspended status of corporate powers at the time of filing of action by a corporation does not affect the jurisdiction of the court to proceed; therefore, it followed that such a suspension after the filing of action, but before rendition of judgment, likewise would not deprive the court of jurisdiction or render the judgment void and subject to collateral attack after it had become final.

[b] Effect of Issuance of Certificate

The provisions of *Rev. & Tax. Code § 23305a* relating to voidability of contracts were added by Stats. 1990, ch. 926, and are discussed in *§§ 52.32* and *52.43*.

[c] Satisfying Purpose for Suspension or Forfeiture

In ***Peacock Hill Ass'n v. Peacock Lagoon Constr. Co.*** *(1972) 8 Cal. 3d 369, 105 Cal. Rptr. 29, 503 P.2d 285* , respondent, a nonprofit corporationmoved to dismiss the appeal from an adverse judgment by appellant, a California corporation. The basis for the motion was that appellant's corporate powers had been suspended pursuant to *Rev. & Tax. Code § 23301*. In opposition to the motion, appellant filed a declaration accompanied by a receipt from the Franchise Tax Board indicating that it had paid its delinquent taxes. Subsequently, the Secretary of State issued a certificate of revivor to appellant, showing that it had been reinstated. In denying the motion, the Supreme Court found that in a number of previous California decisions [*see § 52.42[4][b]*] the revival of corporate powers by the payment of delinquent taxes had been held to validate otherwise invalid prior action. The Court noted that in these cases it was held that the purpose of *Rev. & Tax. Code § 23301* was to put pressure on a delinquent corporation to pay its taxes, and that that purpose was satisfied by a rule which viewed the corporation's tax delinquencies after correction as mere irregularities. Following a discussion of these cases, the Court stated that these authorities made clear that as to matters occurring prior to judgment, the revival of corporate powers had the effect of validating the earlier acts and permitting the corporation to proceed with the action, prosecution or defense of an action. The Court concluded that the same rule should ordinarily apply with respect to matters occurring subsequent to judgment.

In a case predating the applicability of the 1990 statutes, the court of appeal in ***Gardiner Solder v. SupAlloy Corp. Inc.*** *(1991) 232 Cal. App. 3d 1537, 284 Cal. Rptr. 206* , reversed a judgment for the defendant and ordered judgment entered in favor of a foreign corporation that had shipped goods to the defendant (which never paid for them) and commenced suit for restitution before it qualified to do business in California or registered with the Franchise Tax Board. After the suit was commenced, the plaintiff qualified to do business in California, registered with the Franchise Tax Board, and paid applicable taxes, interest, and penalties. The court of appeal based its reversal on equitable grounds, noting that the purpose of the suspension statute had been achieved in that the plaintiff did register and pay appropriate taxes and penalties, and finding that it would be inequitable to grant the defendant a windfall (*232 Cal. App. 3d 1537, 1542-1545)* .

[d] Effect of Revival of Corporate Powers

Peacock Hill Ass'n v. Peacock Lagoon Constr. Co. *(1972) 8 Cal. 3d 369, 105 Cal. Rptr. 29, 503 P.2d 285* is *discussed in § 52.42[3][c]*.

In ***Rochin v. Pat Johnson Manufacturing Company*** *(1998) 67 Cal. App. 4th 1228, 1236-1237, 79 Cal. Rptr. 2d 719* , plaintiff brought an action for personal injury against defendant ladder manufacturer. Defendant's corporate powers, rights, and privileges had been suspended for failure to pay franchise taxes before the personal injury action had been brought against it, and before plaintiff's subsequent action to vacate the amended judgment entered in that action. The issue arose as to whether defendant corporation was entitled to defend plaintiff's appeal from the trial court's order sustaining defendant's demurrer in the action to vacate the amended judgment. In response, the corporation filed a certificate of revivor of its corporate status which became effective during the pendency of the appeal. The court of appeal concluded that the revival of defendant's corporate powers validated the procedural steps taken on behalf of the corporation while it was under suspension and permitted it to proceed with the appeal (*67 Cal. App. 4th 1228, 1236-1237)* .

Benton v. County of Napa *(1991) 226 Cal. App. 3d 1485, 277 Cal. Rptr. 541* , involved issuance of a use permit to construct a winery. The permit was valid for one year and then expired. The permit was extended when the corporate applicant's powers were suspended. Petitioners sought to have the extension revoked, but the county declined, and the court of appeal affirmed the resulting discharge of alternative writ and denial of petition for mandate. The court said that

the purpose of the suspension statute had been satisfied in that the applicant paid its taxes (*226 Cal. App. 3d 1485, 1490)* , and that applying for and being granted an extension of an expired use permit was procedural, not substantive. Thus, the corporation's revivor served to validate the extension (*226 Cal. App. 3d 1485, 1491-1492)* .

[e] Suspension or Forfeiture Does Not Affect Court's Jurisdiction

Traub Co. v. Coffee Break Serv., Inc. *(1967) 66 Cal. 2d 368, 371, 57 Cal. Rptr. 846, 425 P.2d 790* is *discussed in § 52.42[3][a]*.

[f] Substantial Compliance

Sade Shoe Co. v. Oschin & Snyder *(1990) 217 Cal. App. 3d 1509, 266 Cal. Rptr. 619* is discussed in *§ 52.31[3][g]*.

[g] Bond, Deposit, or Other Security for Liability

Rev. & Tax. Code § 23305.2 was added by Stats. 1990, ch. 926, the transition provisions of which are discussed in *§§ 52.32* and *52.43*.

[4] Additional Authorities

[a] Plea in Abatement

In *Color-Vue, Inc. v. Abrams (1996) 44 Cal. App. 4th 1599, 52 Cal. Rptr. 2d 443* , an attorney sued a corporation in municipal court for unpaid legal fees. The corporation then sued the attorney in superior court for malpractice, and the cases were consolidated. When the corporation announcedthat it was ready for trial, the attorney moved to dismiss the corporation's action on the ground that it had been suspended for failure to pay franchise taxes. The corporation moved for a continuance to pay its taxes and revive its corporate powers, but the trial court denied the motion and granted the motion to dismiss. It then allowed the attorney to prove up his case as an uncontested matter. The corporation paid its franchise taxes and was in good standing at the time the court entered its judgment. The appellate court stated that a plea in abatement such as lack of capacity to sue, unlike an objection to standing to sue, must be raised at the earliest opportunity or it is waived. Therefore, it held that the trial court had abused its discretion in denying the corporation's motion for a continuance to pay its taxes and revive its powers when the issue of incapacity was raised for the first time at trial (*44 Cal. App. 4th 1599, 1603-1606)* .

[b] Effect of Revival of Corporate Powers

In *Grell v. Lace Le Beau Corp. (1999) 73 Cal. App. 4th 1300, 87 Cal. Rptr. 2d 358* , plaintiffs/appellants appealed an order denying their motion to vacate judgment in their coordinated wrongful death and survival actions. They contended the trial court erroneously ruled the statute of limitations was not tolled during the period of time respondent's corporate status was suspended. Respondent contended the order denying the motion to vacate is not appealable, and that the statute of limitations was not tolled. The court of appeal affirmed. Respondent corporation's corporate status was suspended on April 1, 1992, pursuant to *Rev. & Tax. Code § 23302*, and revived on January 29, 1996. Appellants conceded that both actions were filed beyond the period permitted by the statute of limitations, and argued only that the statute of limitations was tolled during the period of respondent's corporate suspension. The trial court rejected the tolling argument and ruled that the action was barred by the statute of limitations. Appellants moved to vacate the judgment on the ground that while respondent's corporate status was suspended, it wrongfully used the courts to assert the statute of limitations in contravention of *Rev. & Tax. Code § 23301*. The trial court denied the motion on the merits, ruling that the statute of limitations continues to run against a corporation suspended for nonpayment of taxes. The court of appeal affirmed. The court noted that appellants had not cited, nor had the court independently uncovered, any statute or judicial decision tolling the statute of limitations while a corporation is suspended for failure to pay taxes. Neither respondent's suspended corporate status nor any conduct by respondent prevented appellants from filing their

complaints timely and moving their actions forward. Appellants failed to demonstrate the existence of circumstances which effectively rendered timely commencement of their actions impossible or impracticable. Further, although respondent's demurrer to one of the plaintiffs' fourth amended complaint was improperly filed while it was suspended, the hearing and order sustaining the demurrer against the wrongful death plaintiffs occurred after respondent's corporate status was reinstated. Thereafter, respondent obtained summary judgment on statute of limitations grounds. Had respondent asserted its statute of limitations defense against the wrongful death plaintiffs as it did against the estate's action once its corporate status was reinstated, it would have prevailed. Consequently, its premature filing of the demurrer to the fourth amended complaint was harmless (*73 Cal. App. 4th 1300, 1304-1307)* .

In *Diverco Constructors, Inc. v. Wilstein (1970) 4 Cal. App. 3d 6, 85 Cal. Rptr. 851* , plaintiff corporation was suspended during the pendency of a lawsuit. Just before expiration of the five-year period within which an action must be brought to trial under former Code Civ. Proc. § 583 [*now see Code Civ. Proc. §§ 583.310-583.360*], plaintiff moved for a request for an early trial setting conferences. The cause was dismissed by the trial court when the defendant notified the court that plaintiff's corporate powers had been suspended at the time the motion was made, even though plaintiff was reinstated before the suspension was brought to the court's attention. In reversing the trial court, the court of appeal held that suspension of corporate powers is a defense which may be asserted so long as the corporate party is under disability; on revival of its corporate powers, the party may proceed with the prosecution or defense of the action. The court reasoned that since plaintiff's corporate powers had been revived two days before defendants made their motion, the motion was, therefore, groundless. The court noted that during its period of suspension, the activities of plaintiff, in undertaking discovery and appearing on and filing motions, were not nullity since its legal rights were merely suspended and were revived, like an unconscious person revived by artificial respiration.

In *A.E. Cook Co. v. K S Racing Enterprises, Inc. (1969) 274 Cal. App. 2d 499, 79 Cal. Rptr. 123* , the trial court had denied a motion for summary judgment and a motion to dissolve an attachment made by a defendant on the grounds that under *Rev. & Tax. Code § 23301* the plaintiff's corporate powers had been suspended for nonpayment of franchise taxes. Before the motions were heard, plaintiff revived its corporate powers by paying its delinquent taxes. The defendant appealed its motion to dissolve the writ of attachment. In affirming the trial court's refusal to dissolve the attachment, the court of appeal stated that on revivor of its corporate powers, a corporation may continue an action commenced during the period of suspension and not previously dismissed, even though the opposing party pleaded the suspension prior to the revivor. The court noted that a challenge based on the suspension of a corporation's powers is a disfavored plea in abatement, and that such a plea does not vest a right to dismissal which cannot be abrogated by a subsequent revivor of corporate powers. The court concluded that the same logic which sustained actions commenced prior to revivor of corporate powers sustains the validity of provisional remedies ancillary to such actions.

In *Duncan v. Sunset Agricultural Minerals (1969) 273 Cal. App. 2d 489, 78 Cal. Rptr. 339* , the defendant corporation appealed from an adverse judgment in an action to quiet title. During the trial, plaintiffs introduced in evidence a certificate by the Secretary of State showing the suspension of defendant's corporate powers for nonpayment of its franchise taxes. Defendant informed the court that proceedings were then pending to obtain a reinstatement. The court reserved a ruling on the question. After the trial was completed, the court denied defendant's motion for leave to file an amended answer which was accompanied by an attached certificate of revivor and gave judgment for plaintiff on the basis of defendant's suspension. In reversing the trial court's judgment, the court of appeal held that the trial court had abused its discretion in refusing to grant defendant's motion since the case had been completely tried and should have been decided on its merits rather than on the basis of a technicality that resulted in forfeiture. In so holding, the court found it particularly significant that when the question was raised at trial, the court, being fully advised, reserved a ruling and proceeded to try the case thoroughly on the merits; thus, after the certificate of revivor was filed, no retrial was required, but simply a submission of the case on the evidence already presented.

In *Schwartz v. Magyar House, Inc. (1959) 168 Cal. App. 2d 182, 335 P.2d 487* , plaintiff moved for judgment at the outset of trial on the grounds that the defendants were barred by law from defending the lawsuit since its corporate powers had been suspended for nonpayment of its franchise taxes. The defendant moved for and was granted a

continuance in order that it might obtain reinstatement. The defendant paid its taxes, was reinstated, was then granted leave to file amended answers, participated in the trial, and had judgment. The plaintiff appealed. In affirming the judgment, the court of appeal held that nothing under *Rev. & Tax. Code § 23301* bars a court from recognizing a suspended corporation for the limited purpose of permitting it to inform the court of facts which would warrant the court in construing the action for a limited period. The court stated that such a motion does constitute a defense or actual participation on the merits of the action, and that to construe the section to be an absolute bar to participation in an action would defeat its purpose of enforcing payment of delinquent franchise taxes. The court noted, in addition, that the taking of a default judgment is not an accrued right under *Rev. & Tax. Code § 23305a* (reinstatement of suspended or forfeited corporation as without prejudice to any right or defense which has accrued by reason of that suspension or forfeiture) since this section appeared to be limited to a situation such as contracts made by corporations which are voidable because entered into while the corporate powers were suspended or forfeited [*see* Rev. & Tax. Code § 23005a].

California Points & Authorities

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Volume 5 Chapters 50-59 CONTRACTS---to---CORPORATIONS
CHAPTER 52 CORPORATIONS
PART II. FORMS
A. CAPACITY AND VENUE

5-52 California Points & Authorities § 52.43

§ 52.43 Opposing Motion for Summary Judgment--In Action on Contract [Civ. Code § 3300 or 3384]--By Corporation That Was Suspended at Time Contract Was Formed--Right to Apply for Relief From Voidability [Rev. & Tax. Code § 23305.1]

[1] FORM

[*Caption. See § 52.40.*]

THE MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED _____ [TO ALLOW _____ (*party, e.g.,* PLAINTIFF) TO APPLY FOR RELIEF FROM VOIDABILITY *or* BECAUSE _____ (*party, e.g.,* PLAINTIFF) HAS APPLIED FOR RELIEF FROM VOIDABILITY]

A. Rules Governing Summary Judgment Procedure. [*See § 52.34, Paragraph A.*]

B. Right to Apply for Relief From Voidability. A corporation may make application to the Franchise Tax Board for relief from the voidability provisions of *Revenue and Taxation Code Section 23304.1*. On filing of any returns required to be filed and paying any tax, additions to tax, penalties, interest, and any other amounts owing to the Franchise Tax Board, the Franchise Tax Board will issue a certificate indicating that _____ [*party, e.g.,* plaintiff] is granted relief from voidability (*Rev. & Tax. Code § 23305.1(a)-(c)*).

C. Effect of Relief From Voidability. On satisfaction of all considerations specified in *Revenue and Taxation Code Section 23305.1(a)*, including those to be considered through application of *Revenue and Taxation Code Section 23305.2*, all contracts entered into during the period for which relief is granted that have not been rescinded by final court order pursuant to *Revenue and Taxation Code Section 23304.5* may be enforced, in the same manner and to the same extent, with regard to both the parties to the contract and any third parties, as if the contract had never been voidable (*Rev. & Tax. Code § 23305.1(c)(1)(A)*).

D. Certificate of Relief Is Prima Facie Evidence. The certificate of relief from voidability issued by the Franchise Tax Board is prima facie evidence of the relief from voidability for contracts entered into during the period of relief stated on the certificate [and the certificate may be recorded in the office of the county recorder of any county in

California] (*Rev. & Tax. Code § 23305.1(d)*).

[*Optional*] **E. Restitution Required.** The court cannot order rescission of the contract unless _____ [*party, e.g.*, plaintiff] receives full restitution of the benefits provided by _____ [*party, e.g.*, plaintiff] under the contract (*Rev. & Tax. Code § 23304.5*).

[*Optional*] **F. Bond, Deposit, or Other Security for Liability.** [*See § 52.42, Paragraph J.*]

[*EITHER*]

[*Optional*] **G. Certificate of Revivor Obtained in 1990.** [Subject to the limitations set forth in Section 17 of Chapter 926 of the Statutes of 1990], A corporate taxpayer that received a certificate of revivor between January 1, 1990, and January 1, 1991, may apply for relief from voidability (*Rev. & Tax. Code § 23305.1(e)*).

[*OR*]

[*Optional*] **G. Certificate of Revivor Obtained in 1991, 1992, or 1993.** A taxpayer that was issued a certificate of revivor between January 1, 1991, and before January 1, 1994, and that entered into contracts for which voidability relief could have been granted had the application for relief been filed simultaneously with the application for revivor, may file for relief from voidability on or after January 1, 1994, although it will be subject to the penalties provided in subdivision (b)(2) (Stats. 1993, ch. 680, § 2(b)).

[*Optional*] **H. Contract Entered Into Before January 1, 1991.** A contract entered into prior to January 1, 1991, by a corporation during the time that its powers, right, and privileges in California were suspended or forfeited is only voidable if the suspension or forfeiture was accomplished by the Franchise Tax Board through notice to the Secretary of State as provided in *Revenue and Taxation Code Section 23302* (Stats. 1990, ch. 926, § 17(a) (thus abrogating, without expressly mentioning, the decision in *White Dragon Productions, Inc. v. Performance Guarantees, Inc. (1987) 196 Cal. App. 3d 163, 241 Cal. Rptr. 745* ; *see also Rev. & Tax. Code § 23301.6*).

[*Optional*] **I. Contract Entered Into After January 1, 1991.** A contract entered into after January 1, 1991, by a corporation whose powers, right, and privileges have not been suspended or forfeited by the Franchise Tax Board through notice to the Secretary of State is voidable only to the extent expressly provided in *Revenue and Taxation Code Section 23304.1(b)* or *(d)* (Stats. 1990, ch. 926, § 17(a)).

[*Optional*] **J. Retroactive Right to Apply for Relief From Voidability.** A corporation that entered into a contract during a time that its powers, right, and privileges were suspended or forfeited by the Franchise Tax Board in accordance with the procedures set forth in *Revenue and Taxation Code Section 23302*, even if the contract was entered into before January 1, 1991, is entitled to apply for relief from voidability pursuant to *Revenue and Taxation Code Section 23305.1* in connection with an application for revivor [Stats. 1990, ch. 926, § 17(b)].

[*Optional*] **K. Relief From Voidability for Corporation Fulfilling Specifications of Voluntary Disclosure Agreement.** A corporation that entered into a contract when its powers, rights, and privileges were suspended or forfeited by the Franchise Tax Board, as provided in *Revenue and Taxation Code Section 23302*, may apply for relief from contract voidability if the corporation enters into a voluntary disclosure agreement with the Franchise Tax Board (*see Rev. & Tax. Code § 19191 et seq.*) and fulfills to the satisfaction of the Franchise Tax Board all of the specifications of the agreement, as provided in *Revenue and Taxation Code Section 19191(d)(2)*, and the Franchise Tax Board finds that none of the circumstances described in *Revenue and Taxation Code Section 19194* has rendered the agreement null and void (*Rev. & Tax. Code § 23305.1(a)(6)*).

Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion for summary judgment seeking to assert the voidability of a contract entered into by a corporation during a time when its powers, rights, and privileges were suspended or forfeited for nonpayment of taxes or failure to file a return [*Rev. & Tax. Code §§ 23301, 23301.5, 23301.6, 23304.1*; *see § 52.32*]. The ground for opposition is that the party seeking to enforce the contract is entitled to apply, or has applied, for relief from voidability according to *Rev. & Tax. Code § 23305.1* and any applicable transition provisions of Stats. 1990, ch. 926 or Stats. 1994, ch. 680 [*see* Optional Paragraphs G]. This form should be combined with additional authorities from § 52.42 when appropriate and generally oppose those in § 52.32. This form may be adapted for use in a trial or appellate brief.

Counsel should add argument linking the points in this form with the facts of the case. In addition, it is necessary to attach declarations or documentary evidence in support of the motion [*see Code Civ. Proc. § 437c(b)*], most notably in this situation, certified copies of the application for relief or other certificate or declaration from the appropriate custodian of records for the Franchise Tax Board or Secretary of State establishing that the opposing party has applied for relief from voidability and/or a declaration that the opposing party intends to apply for relief from voidability and has the financial resources to pay the amounts required to do so.

[3] Discussion of Authorities

[a] Right to Apply for Relief From Voidability

Rev. & Tax. Code § 23305.1(a) provides that to be relieved from voidability, the corporation must do all of the following:

- Provide Franchise Tax Board with an application, in a form and manner prescribed by the Franchise Tax Board, for relief from contract voidability.

- Include on the application the period for which relief is requested, which if simultaneous revivor is sought, must begin on the date that one of the corporation's income years begins and ends on the date the application is made.

- File any tax returns required to be filed with the Franchise Tax Board, including returns for the period for which relief is requested.

- Pay any tax, additions to tax, penalties, interest, and any other amounts owing to the Franchise Tax Board, including any liability attributable to the period for which relief is requested.

- Pay any penalty imposed under *Rev. & Tax. Code § 23305.1(b)* for the period for which relief is requested.

In the case of a corporation that applies for and enters into an approved voluntary disclosure agreement [*see Rev. & Tax. Code § 19191*], the corporation will be considered to have met the last three requirements listed above if the corporation fulfills to the satisfaction of the Franchise Tax Board all of the specifications of the voluntary disclosure agreement [*see Rev. & Tax. Code § 19191(d)(2)*] and if the Franchise Tax Board has not found that any of the circumstances described in *Rev. & Tax. Code § 19194* has rendered the agreement null and void [*Rev. & Tax. Code § 23305.1(a)(6)*].

When the corporate taxpayer seeks relief from voidability and revivor simultaneously, the period for which relief is requested begins on the date one of the taxpayer's taxable years begins and ends on the date relief is granted [*Rev. & Tax. Code § 23305.1(b)(1)(A)*]. In this case, the penalty is equal to $100 per day for each day of the period for which relief from voidability is granted, but not to exceed the amount of tax for the period for which relief is requested [*Rev. & Tax. Code § 23305.1(b)(1)(B)*].

If the corporate taxpayer seeks relief from voidability after having filed an application for revivor and the certificate of revivor has been issued, the period for which relief from voidability may be obtained begins on the date the taxpayer's powers, rights, and privileges were forfeited, and ends on the date relief is granted [*Rev. & Tax. Code § 23305.1(b)(2)(A)*]. In this case, the penalty is equal to $100 per day for each day of the period for which relief from voidability is granted, but not to exceed the total penalty equal to the amount of the tax that would be imposed under *Rev. & Tax. Code § 23151* and, except as noted below with respect to unrelated income of exempt organizations, that penalty must be equal to no less than the amount of the minimum tax provided under *Rev. & Tax. Code § 23153* for the period for which relief is requested [*Rev. & Tax. Code § 23305.1(b)(2)(B)*]. For exempt organizations subject to the California tax on unrelated business income [*see Rev. & Tax. Code § 23731 et seq.*], the daily penalty may not exceed a total penalty equal to the amount of tax imposed on its unrelated business taxable income for the period for which relief is requested [*Rev. & Tax. Code § 23305.1(b)(2)(C)*]. Any penalty imposed under *Rev. & Tax. Code § 23305.1(b)* is, subject to *Rev. & Tax. Code § 23305.2*, due and payable on demand by the Franchise Tax Board [*Rev. & Tax. Code § 23305.1(b)(3)*].

Rev. & Tax. Code § 23305.1(c) provides in part that on being granted relief from voidability, the Franchise Tax Board must certify that relief in a form and manner prescribed by it. The certificate must be issued or mailed to the corporate taxpayer, as directed by the taxpayer, and must indicate the period for which relief is granted.

Note that simultaneous applications for revivor and relief from voidability were required from January 1, 1991 through December 31, 1993 [*see* former Rev. & Tax. Code § 23305.1(e)], except for corporations that had received certificates of revivor during 1990 and sought relief from voidability of a contract entered into during the period of suspension or forfeiture [Stats. 1990, ch. 926, § 17(b)]. Beginning with applications for relief from voidability filed on or after January 1, 1994 [*see* Stats. 1993, ch. 680, § 2(a)], the simultaneous application requirement was dropped, although as a practical matter, simultaneous applications are probably best, so as to avoid having to pay an "additional" penalty imposed by *Rev. & Tax. Code § 23305.1(b)(2)* (set out, *above*) when relief from voidability is not sought until after the certificate of revivor has already been issued.

In the case of corporate taxpayers that are issued certificates of revivor prior to January 1, 1994, the 1993 amendments apply only if the corporation both (1) received its certificate of revivor between January 1, 1991, and January 1, 1994, and (2) had contracts for which voidability reliefcould have been granted had that application for relief been filed simultaneously with the application for revivor [Stats. 1993, ch. 680, § 2(b)].

[4] Additional Authorities

[a] Contract Entered Into Before January 1, 1991

In a case predating the applicability of the 1990 statutes, the court of appeal in *Gardiner Solder v. SupAlloy Corp. Inc. (1991) 232 Cal. App. 3d 1537, 284 Cal. Rptr. 206* , reversed a judgment for defendant and ordered judgment entered in

favor of a foreign corporation that had shipped goods to defendant, which never paid for them, and commenced suit for restitution before it qualified to do business in California or registered with the Franchise Tax Board. After the suit was commenced, plaintiff qualified to do business in California, registered with the Franchise Tax Board, and paid applicable taxes, interest, and penalties. The court of appeal based its reversal on equitable grounds, noting that the purpose of the suspension statute had been achieved in that plaintiff did register and pay appropriate taxes and penalties, and finding it would be inequitable to grant defendant a windfall (*232 Cal. App. 3d 1537, 1542-1545)* .

California Points & Authorities

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Volume 5 Chapters 50-59 CONTRACTS---to---CORPORATIONS
CHAPTER 52 CORPORATIONS
PART II. FORMS
A. CAPACITY AND VENUE

5-52 California Points & Authorities §§ 52.44-52.59

[Reserved]

§§ 52.44[Reserved]

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Volume 5 Chapters 50-59 CONTRACTS---to---CORPORATIONS
CHAPTER 52 CORPORATIONS
PART II. FORMS
B. DISREGARDING THE CORPORATE ENTITY

5-52 California Points & Authorities § 52.60

§ 52.60 Supporting Demurrer to Complaint Against Individual on Corporate Obligations--Failure to Allege Facts Showing That Individual and Corporation Are Same Entity and That Recognition of Separate Entity Would Consummate Wrong

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM IN SUPPORT OF DEMURRER
_____ [*name*], Plaintiff,	)	OF _____ [*name*] TO COMPLAINT
vs.	)	OF _____ [*name*]
_____ [*name*], Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION AGAINST DEFENDANT FOR LIABILITY ON A CORPORATION'S OBLIGATIONS IN THAT IT FAILS TO ALLEGE FACTS SHOWING THAT THE DEFENDANT AND THE CORPORATION WERE THE SAME ENTITY AND THAT RECOGNITION OF THE SEPARATE ENTITY OF CORPORATION WOULD CONSUMMATE A WRONG.

A. Objection by Demurrer. The party against whom a complaint has been filed may object, by demurrer as provided in *Code of Civil Procedure Section 430.30*, to the complaint on the ground that it does not state facts sufficient to

constitute a cause of action (*Code Civ. Proc. § 430.10(e)*). When any ground for objection to a complaint appears on the face of the complaint [*or* from any matter of which the court is required to or may take judicial notice], theobjection on that ground may be taken by a demurrer to the complaint (*Code Civ. Proc. § 430.30(a)*).

B. Pleading Elements of Alter Ego Doctrine. To state a cause of action against a particular person for liability for the acts and obligations of a corporation, the complaint must show, first, not only that the corporation is influenced and governed by that person, but that there is a unity of interest and ownership so that the individuality, or separateness, of the person and the corporation has ceased; and, second, that the facts are such that an adherence to the fiction of the separate existence of the corporation would, under the particular circumstances, sanction a fraud or promote injustice (*Minifie v. Rowley (1921) 187 Cal. 481, 487, 202 P. 673*).

[*Optional*] **C. Allegation of Control and Domination of Corporation.** An allegation that an individual owns more than a majority of the capital stock of a corporation and that he controls, dominates, and manages the corporation and all of its shares does not allege an essential element of the alter ego doctrine, that the two entities are one and the same person (*Dos Pueblos Ranch & Improvement Co. v. Ellis (1937) 8 Cal. 2d 617, 621, 67 P.2d 340*).

[*Optional*] **D. Pleading of Consummation of Wrong.** In order that the acts and obligations of a corporation be legally recognized as those of a particular person, and vice versa, the complaint must allege that the organization of the corporation is in some manner fraudulent or prompted by dishonesty, that the corporation committed or intended to commit a fraud, or that injustice will be done if the corporate entity is not disregarded (*Judelson v. American Metal Bearing Co. (1948) 89 Cal. App. 2d 256, 263, 200 P.2d 836*).

[*Optional*] **E. Allegation That Corporation Is Alter Ego of Stockholder.** An allegation that a corporation is the alter ego of the individual stockholders is insufficient to justify disregarding the corporate entity in the absence of allegations of facts from which it appears that justice cannot otherwise be accomplished (*Norins Realty Co., Inc. v. Consol. A. & G. Co. (1947) 80 Cal. App. 2d 879, 883, 182 P.2d 593*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a demurrer to a complaint against an individual for liability on the obligations of a corporation on the grounds that the individual was alter ego of the corporation where the complaint fails to allege facts showing the presence of the two requirements necessary for the application of the alter ego doctrine--that is (1) that there is such a unity of ownership and interest that the individuality or separateness of the person and the corporation have ceased, and (2) that the facts are such that an adherence to the fiction of the separate existence would sanction a fraud or promote injustice.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law raised.

[b] Related Pleading and Practice Forms

For a complaint against a corporation and its controlling shareholder on a corporate obligation alleging that the

controlling shareholder was the alter ego of the corporation, see California Forms of Pleading and Practice, Ch. 160, *Corporations* (Matthew Bender).

[3] Discussion of Authorities

[a] Pleading Elements of Alter Ego Doctrine

In ***Minifie v. Rowley*** *(1921) 187 Cal. 481, 202 P. 673* , the defendants demurred to plaintiff's complaint which was for the amount of a certain note executed by defendant Rowley Investment Company on the grounds, among others, that the individual defendant named in the complaint, Forrest Rowley, was not a party to the note, and that the facts alleged in the complaint were insufficient to disregard the corporate existence of Rowley Investment Company and compel recognition of the liability of Rowley on the note. The allegations of the complaint were, in effect: (1) that defendant Rowley was the owner of all the capital stock of Rowley Investment Company, except for a sufficient number of shares to qualify others to act as directors; (2) that he controlled the board of directors; (3) that he was the only person interested in the corporation; (4) that he had been indebted to plaintiffs for the sum sued upon; (5) that, for the purpose of renewing the note, he executed the note which was the subject of the action as a representative of Rowley Investment Company; (6) that at the time of the execution, Rowley was but the alter ego of Rowley Investment Company; and (7) that there were no dealings between plaintiffs and the corporation as distinct from the individual Rowley. The trial court sustained defendants' demurrer and the plaintiffs appealed. Although theSupreme Court reversed, holding that the complaint stated a cause of action against Rowley, it stated the tests set forth in Paragraph B of the foregoing form with which the complaint must have complied if it was to be upheld on the theory of the identity of Rowley Investment Company with Rowley (*187 Cal. 481, 487)* .

[b] Allegation of Control and Domination of Corporation

In ***Dos Pueblos Ranch & Improvement Co. v. Ellis*** *(1937) 8 Cal. 2d 617, 67 P.2d 340* , the trial court struck certain portions of defendant's answer on the motion of plaintiff, a corporation, in its action to terminate and cancel a certain lease executed in favor of defendant. Plaintiff, thereafter, was granted the motion for a judgment on the pleadings and the defendants appealed, contending that the acts complained of in plaintiff's complaint were performed by it in conjunction with, and with the active cooperation of Herbert Wylie, who was one and the same entity as plaintiff. The answer had alleged that Wylie was the owner of more than a majority of the issued shares of the capital stock of plaintiff and retained absolute control, domination, and management of all the shares of the corporation. The Supreme Court affirmed the trial court's judgment. Noting that the only theory by which defendants' allegations in their answer could become material was that Wylie was the alter ego of the plaintiff corporation, the court stated that these allegations were completely inadequate to conclude that the two entities were one and the same person. The court said that the mere circumstances that all of the capital stock of a corporation was owned or controlled by one or more persons does not destroy its separate existence since, were it otherwise, few private corporations could preserve their distinct identities (*8 Cal. 2d 617, 621)* .

[c] Pleading of Consummation of Wrong

Judelson v. American Metal Bearing Co. *(1948) 89 Cal. App. 2d 256, 200 P.2d 836* , involved an appeal by a Texas corporation from a judgment rendered against it for damages for services rendered by plaintiff's assignor as an attorney for appellant. The appellant contended on appeal that plaintiff had not made proof of its corporate existence and that the evidence showed no more than that plaintiff assignor's contract was with a particular individual doing business under the fictitious name of appellant corporation. Respondent argued in part that the doctrine of alter ego applied as between the individual and appellant in that the act of the individual should be considered the act of the corporation. In rejecting all of respondent's contentions, the court of appeal reversed the judgment. In response to respondents' alter ego argument, the court made the statement set forth in Paragraph D of this form and found that the doctrine could not be pleaded here since there was no pleading and the record was devoid of any evidence that appellant was, in effect, the double of Wyllis or that Wyllis used appellant to perpetrate a fraud on respondent (*89 Cal. App. 2d 256, 263)* .

[d] Allegation That Corporation Is Alter Ego of Stockholder

In ***Norins Realty Co., Inc. v. Consol. A. & G. Co.*** *(1947) 80 Cal. App. 2d 879, 182 P.2d 593* , defendant corporation was granted a change of venue in plaintiff's action against it for breach of a contract to supply water to certain properties which plaintiff and defendant were developing. The plaintiff appealed, contending that five individual defendants named in its complaint were proper party defendants. Their liability on the corporation's contract was predicated on the facts, alleged in plaintiff's complaint, that they were the sole shareholders of the corporation, that the corporation had, for a number of years, been dormant and not actively engaged in business, that it was, at the time of the commencement of plaintiff's action, completely controlled, dominated, managed, and operated by the individual defendants, and that the corporation had been at all times the alter ego of the individual defendants. On plaintiff's appeal, the court of appeal affirmed the trial court's order, holding that the allegations of the complaint were not sufficient to support a judgment against the individual defendants. Specifically, the allegation that the corporation was the alter ego of the individual stockholders was insufficient to justify disregarding the corporate entity in the absence of allegations of facts from which it would have appeared that justice could not otherwise be accomplished. In addition, the allegations of the control and management of the corporations alone, were insufficient to disregard the corporate entity (*80 Cal. App. 2d 879, 883)* .

[4] Additional Authorities

[a] Pleading Elements of Alter Ego Doctrine

In Disenos Artisticos E Indus. v. Costco Wholesale (9th Cir. [Cal.] 1996) *97 F.3d 377* , Lladro USA and DAISA, a wholly-owned corporation of Lladro and the copyright owner, alleged that Costco's sale of Lladro figurines was unauthorized and in violation of Copyright Act provisions prohibiting importation of copyrighted goods into the U.S. without the authority of the owner of the copyright. On motions for summary judgment, the district court granted summary judgment in favor of Lladro USA and DAISA on the theory that the Costco sales were not authorized. The court of appeals reversed, holding that the retailer's sales without the consent of the copyright owner's parent did not violate the Act because the copyright owner, DAISA, gave the retailer implied authority to import the figurines. The court noted that although DAISA was a subsidiary of Lladro, that did not mean that the parent owned the copyright. Lladro essentially sought to pierceits own corporate veil. The court stated that the alter ego doctrine should not be applied when the corporation itself raises the issue for its own benefit. A corporation is not entitled to establish and use its affiliates' separate legal existence for some purposes but have its own separate corporate existence disregarded for its own benefit against third parties. The corporate veil generally can be pierced only by an adversary of the corporation, not by the corporation itself for its own benefit (*97 F.3d 377, 380)* .

IBEW, Local 332 v. *Hyland, Wilson Electrical Contractors, Inc. (9th Cir. 1989) 881 F.2d 820* was a federal case in which the court refused to impose alter ego liability for an arbitration award on the controlling shareholder. The court said the federal standard for piercing the corporate veil considers three factors: the amount of respect given to the separate identity of the corporation by the shareholders; the degree of injustice that would result from recognition of the corporate entity; and whether there was any fraudulent intent of the incorporators (*881 F.2d 820, 821)* .

Bd. of Trustees v. Valley Cabinet & Mfg. Co. (9th Cir. 1989) 877 F.2d 769 was a federal case in which the court upheld a decision refusing to pierce the corporate veil and impose liability for pension fund contributions on the estate of the deceased controlling shareholder. The court said that in determining whether to disregard the corporate form, a federal court applies federal substantive law, but may look to state law for guidance. The federal standard considers three factors: the amount of respect given to the separate identity of the corporation by the shareholders; the degree of injustice that would result from recognition of the corporate entity; and whether there was any fraudulent intent of the incorporators (*877 F.2d 769, 772)* .

In *Erkenbrecher v. Grant (1921) 187 Cal. 7, 200 P. 641* , the plaintiff sued on a note that was assigned to it by a

corporation of which plaintiff was the owner of all the outstanding shares of capital stock. Plaintiff controlled the corporation, dictating the management and affairs of the company. In effect, plaintiff had made use of the company for the purpose of conducting his business for his own personal convenience. In addition, plaintiff advanced to the corporation the sum with which it paid for the notes that plaintiff subsequently acquired. Defendant contended that the cause of action was barred by the statute of limitations, since the company's payment for the notes amounted to payment by plaintiff as a joint obligor on the note. The trial court agreed and found for defendant. On appeal by plaintiff, the Supreme Court reversed. The Court held that the facts did not warrant the application of the alter ego doctrine and, therefore, plaintiff was not a joint obligor on the note. The Court stated that there was no showing that plaintiff's relationship with his company was in any manner fraudulent or prompted by dishonesty, nor that the company, in purchasing the notes, committed or intended to commit any fraud whatsoever (*187 Cal. 7, 10)* . The personal advancement of the sums with which the corporation purchased the notes was considered by the Court to be consistent with honesty and fair dealing (*187 Cal. 7, 10-11)* . Finally, no showing had been made that plaintiff's transactions with his company in any way wronged or prejudiced defendant (*187 Cal. 7, 10, 14)* .

In *Seretti v. Superior National Ins. Co. (1999) 71 Cal. App. 4th 920* , the shareholders of a small, closely held corporation sought to pierce the veil of their own corporation and substitute themselves in the place of the corporation as the named insured under a workers compensation policy. In an action against the shareholders of the corporation which arose from injuries sustained by employees of the corporations, the shareholders brought a cross-complaint against the corporation's workers' compensation insurer for failing to defend the actions and for entering into a settlement with the employees which was adverse to the interests of the corporation. The superior court sustained the insurer's demurrer and the shareholders appealed. The court of appeal held that the shareholders lacked standing to assert a claim against the insurer for bad faith insurance practices. The court found that the shareholders' inability to maintain individual actions against their corporation's workers' compensation carrier did not constitute the type of "grave injustice" that justified ignoring a corporation's separate existence. The fact that individual shareholders would not be able to pursue bad faith insurance claims against the corporation's insurer did not allow the insurer to escape liability for improper conduct. The corporation itself, as named insured, could pursue its own rights, and the shareholders would profit indirectly. It stated that shareholders who elect to avail themselves of the benefits of the corporate structure cannot complaint about their inability to take personal advantage of a right belonging to corporation alone (*71 Cal. App. 4th 920, 931)* .

In *Laird v. Capital Cities/ABC Inc. (1998) 68 Cal. App. 4th 727, 80 Cal. Rptr. 2d 454* , plaintiff employee sued her former employer's corporation for wrongful termination and sex/age discrimination. The superior court granted summary judgment to the parent and the court of appeal affirmed. Plaintiff claimed, among other things, that there was a triable issue of material fact as to the parent's liability on the theory that the subsidiary was the parent's alter ego. The court stated that to justify piercing the corporate veil on an alter ego theory in order to hold a parent corporation liable for the acts or omissions of its subsidiary, a plaintiff must show that there is such a unity of interest and ownership between the two corporations that their separate personalities no longer exist, and that an inequitable result would follow if the parent were not held liable. In other words, the plaintiff must show "specific manipulative conduct" by the parent toward the subsidiary which relegates the subsidiary to the status of merely an instrumentality, agency, conduit or adjunct of the parent. The court held that plaintiff had failed to make such a showing (*68 Cal. App. 4th 727, 742)* .

Brooklyn Navy Yard Cogeneration Partners v. Superior Court (1997) 60 Cal. App. 4th 248, 70 Cal. Rptr. 2d 419 was an action by defendants for a writ of mandamus/prohibition to challenge the order of the superior court disqualifying their law firm for conflict of interest. The issue, one of first impression in California, was whether a conflict of interest arises when an attorney represents a subsidiary corporation in one matter while undertaking a representation directly adverse to the subsidiary's parent in another unrelated matter. The trial court specifically concluded that a "unity of interests" between the parent and subsidiary corporations sufficed to make the parent a client of the law firm for conflict purposes (*60 Cal. App. 4th 248, 252)* . The appellate court granted the writ. It concluded that an attorney's duty of loyalty to a corporate client does not bar the attorney from representing an interest adverse to the client's parent. It held that only in those limited circumstances in which one corporation is the alter ego of the other should parent and

subsidiary corporations be treated as the same entity for conflict purposes. If an entity is an attorney's client, its alter ego shares the client's expectation of loyalty from the attorney. A corporation, therefore, should be entitled to assert its status as the alter ego of a lawyer's existing client. The appellate court found that the trial court failed to determine whether the parent and its subsidiary were alter egos and applied the wrong legal standard in finding that the law firm had a conflict of interest in undertaking a representation adverse to the parent. It thus sent the matter back to the trial court to allow it to consider the motion in light of the proper standard (*60 Cal. App. 4th 248, 258-259)* .

Robbins v. Blecher (1997) 52 Cal. App. 4th 886, 60 Cal. Rptr. 2d 815 was a malicious prosecution action in which plaintiffs and appellants appealed from a judgment of dismissal following the sustaining of demurrers in favor of defendants and respondents. Defendant had brought an alter ego action against plaintiff to enforce a judgment it had obtained against plaintiff's corporation. When the judgment against the corporation was reversed on appeal, defendant dismissed the alter ego action. The sole issue presented on appeal was whether the voluntary dismissal of the alter ego action constituted a favorable termination on the merits. The court reviewed the requirements for application of the alter ego doctrine, quoting extensively from *Communist Party v. 522 Valencia, Inc. (1995) 35 Cal. App. 4th 980, 41 Cal. Rptr. 2d 618* (discussed *below*) (*52 Cal. App. 4th 886, 892)* . It held that when an action brought to enforce a judgment is voluntarily dismissed after reversal of the underlying judgment, the voluntary dismissal does not constitute a favorable termination on the merits (*52 Cal. App. 4th 886, 894-895)* .

In *Communist Party v. 522 Valencia, Inc. (1995) 35 Cal. App. 4th 980, 41 Cal. Rptr. 2d 618* , the Communist Party alleged that it was the beneficial owner of two public benefit corporations, and that the alter ego doctrine established a relationship between the Party and the defendant corporations, thereby allowing the Party to obtain the corporations' assets. The trial court imposed a constructive trust over the assets of the public benefit corporations, and the defendants appealed. The court of appeal reversed, holding that the Communist Party was not entitled to a constructive trust (*35 Cal. App. 4th 980, 992-993)* and could not use the alter ego doctrine to pierce the corporate veil of public benefit corporations it claimed to have set up for its own benefit (*35 Cal. App. 4th 980, 995)* . The court reviewed the requirements for applying the alter ego doctrine [*see § 52.60[3][a]*] (*35 Cal. App. 4th 980, 993)* and explained that the doctrine is used to prevent two parties with the same interest from inequitably using the corporate form to thwart a third party's rights; it is not designed to unite two separate entities with opposing interests for the benefit of one claiming to control the other (*35 Cal. App. 4th 980, 995)* .

[b] Allegation of Control and Domination of Corporation

In *Firstmark Capital Corp. v. Hempel Financial Corp. (9th Cir. 1988) 859 F.2d 92* , a diversity action, the Ninth Circuit reversed a judgment imposing alter ego liability on the spouse of the managing employee, and remanded for findings regarding whether the spouse influenced or governed the corporation or was an actor in the course of conduct that was the abuse of the corporate privilege (*859 F.2d 92, 95)* . The court said that under California law, although a spouse's community property interest [*see* former Civ. Code § 5105, repealed and replaced by *Fam. Code § 751,* operative January 1, 1994] in shares held in the name of the officer-director spouse will satisfy the ownership requirement for imposition of alter ego liability (*859 F.2d 92, 94)* , mere passive acceptance of the benefits of disregarding the corporate entity is insufficient basis for imposition of alter ego liability (*859 F.2d 92, 95)* . Citing *Wood v. Elling Corp. (1977) 20 Cal. 3d 353, 365 n.9, 142 Cal. Rptr. 696, 572 P.2d 755* , and *American Home Ins. Co. v. Travelers Indemnity Co. (1981) 122 Cal. App. 3d 951, 966, 175 Cal. Rptr. 826* (discussed in *§ 52.68[3][b]*), the court said that alter ego liability can only be imposed on one who has actively influenced or governed the corporation in the course of conduct that constitutes the abuse of the corporate privilege. Because the trial court had not made any findings regarding those issues, the court of appeals remanded (*859 F.2d 92, 95)* .

[c] Pleading of Consummation of Wrong

In *Hollywood Cleaning & Pressing Co. v. Hollywood Laundry Serv., Inc. (1932) 217 Cal. 124, 17 P.2d 709* , the Supreme Court affirmed that portion of the trial court's judgment from which the plaintiff appealed in its action for

breach of contract. The plaintiff and defendant had entered into a contract by which defendant agreed to solicit business for plaintiff's dry cleaning operation. The contract included a clause that required defendant to include in the agreement any laundry plant which it might acquireduring the continuation of the agreement. The plaintiff showed that defendant was wholly owned by Frank Meline who also owned all the stock in Frank Meline, Inc., a corporation, and that Meline, Inc., had acquired laundry plants during the period in which the agreement was in effect and had not turned over these laundries' dry cleaning business to plaintiff. Plaintiff contended before the Supreme Court that the profits lost by reason of the failure to turn over these plants should have been included as damages in its action against defendant. The Court disagreed and noted that plaintiff had failed to plead or prove that title was taken to the newly acquired laundries in the name of Meline, Inc., rather than in defendant's name, with the intent, or for the purpose of evading liability under the contract (*217 Cal. 124, 128)* . The Court said that the mere fact that one or two individuals or corporations own all of the stock of another corporation is not in itself sufficient to cause a court to disregard the corporate entity of the other corporation and to treat it as the alter ego of the individual or corporation that owns its stock. The Court added that it must be shown not only that there was such a unity of interest and ownership that the individuality of the corporation and the owner or owners of its stock had ceased, but that the observance of the fiction of the separate existence would sanction a fraud or promote injustice. That is, bad faith in one form or another must be shown before a court may disregard the fiction of separate corporate existence (*217 Cal. 124, 129)* .

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Volume 5 Chapters 50-59 CONTRACTS---to---CORPORATIONS
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B. DISREGARDING THE CORPORATE ENTITY

5-52 California Points & Authorities § 52.61

§ 52.61 Supporting Demurrer to Complaint Against Individual On Corporate Obligations--Failure to Allege That Individual Defendant Had Beneficial Ownership in Corporation

[1] FORM

[*Caption. See § 52.60.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION AGAINST DEFENDANT FOR LIABILITY ON A CORPORATION'S OBLIGATIONS WHERE IT FAILS TO ALLEGE THAT DEFENDANT HAD A BENEFICIAL INTEREST IN THE CORPORATION.

A. Objection by Demurrer. [*See § 52.60, Paragraph A.*]

B. Requirement of Beneficial Ownership. Unity of interest and ownership between an individual sought to be charged with liability for a corporation's debts and the corporation, so that the personalities of the corporation and the individual are no longer separate does not exist where the individual held none of the corporation's stock, had no interest as an owner in the corporate enterprise, or had no right to share in any of the profits which the corporation made (*Riddle v. Leuschner (1959) 51 Cal. 2d 574, 335 P.2d 107*).

C. Failure to Allege Beneficial Ownership. A complaint does not state a cause of action against an individual for liability for a corporation's obligations on the basis that the individual was the alter ego of the corporation where it does not allege that the individual had any beneficial interest in the stock of the corporation (*Shea v. Leonis (1939) 14 Cal. 2d 666, 670, 96 P.2d 332*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a demurrer to a complaint against an individual for liability on the obligations of a corporation on the basis that the individual was the alter ego of the corporation when the complaint fails to allege facts showing that the individual had a beneficial ownership in the corporation.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law raised.

[3] Discussion of Authorities

[a] Requirement of Beneficial Ownership

In ***Riddle v. Leuschner*** *(1959) 51 Cal. 2d 574, 335 P.2d 107* , plaintiffs as creditors of Yosemite Creek Company, a corporation, commenced an action against Yosemite, Kadota Creek Company, a second corporation, and most of the shareholders, officers, and directors of the two companies. Judgment was rendered against Yosemite, Kadota, and three individual defendants. The trial court found that Yosemite was indebted to plaintiffs, that Yosemite and Kadota were at all times completely controlled, dominated, managed, and operated by the three defendants, that the corporation was a mere fiction employed by the individual defendants to assist them in evading the payment of their obligations, and that each of the corporations was the alter ego of the individual defendants. On appeal, the Supreme Court affirmed the judgment with respect to two of the defendants and reversed with respect to a third. The Court found that the evidencewas insufficient to bring the third defendant within the requirement for disregarding a corporate entity, since there was insufficient evidence to show that there was such a unity of interest and ownership that the separate personalities of the corporation and the individual no longer existed. The Court stated that it was undisputed that this defendant held none of the stock, that he had no interest as an owner in the business operations by either corporation, or that he had a right to share in any of the profits that they might make. He could only be regarded as the managing employee of the two corporations, and his control was that which would be exercised by a managing agent rather than that exercised by a shareholder or owner.

See also *Firstmark Capital Corp. v. Hempel Financial Corp. (9th Cir. 1988) 859 F.2d 92, 94* , discussed in *§ 52.60[4][b]*.

[b] Failure to Allege Beneficial Ownership

In ***Shea v. Leonis*** *(1939) 14 Cal. 2d 666, 96 P.2d 332* , the plaintiffs appealed from a judgment entered in favor of defendants on four of the five counts of plaintiffs' complaint for the recovery of rent after the trial court sustained defendants' general and special demurrers to the counts. The Supreme Court affirmed in part and reversed in part. Although the Court held that the several counts stated a cause of action against several of the defendants for their liability for certain corporate obligations as the alter ego of that corporation, the Court also held that the complaint stated no cause of action against one individual defendant since it did not aver that that defendant had any beneficial interest in the stock of the corporation. The Court stated that the failure to include this allegation meant that liability against this defendant on the theory of disregarding the corporate identity could not be made out.

California Points & Authorities

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Volume 5 Chapters 50-59 CONTRACTS---to---CORPORATIONS
CHAPTER 52 CORPORATIONS
PART II. FORMS
B. DISREGARDING THE CORPORATE ENTITY

5-52 California Points & Authorities § 52.62

§ 52.62 Supporting Plaintiff's Motion to Amend Judgment to Include as Judgment Debtor Name of Individual Who Was Alter Ego of Corporate Judgment Debtor

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*], Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION TO
vs.	)	AMEND JUDGMENT
	)	Date: _____
_____ [*name*], a Corporation,	)	Time: _____
Defendant.	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

ON MOTION OF A PLAINTIFF, A COURT MAY, PURSUANT TO ITS IMPLIED POWERS, AMEND A JUDGMENT ENTERED AGAINST A CORPORATION TO INCLUDE AS A JUDGMENT DEBTOR AN INDIVIDUAL WHO WAS THE ALTER EGO OF THE CORPORATION AND WHO HAD CONTROL OF THE LITIGATION.

A. Power to Adopt Course of Proceeding Not Provided in Code. When jurisdiction is, by the constitution or this code, or by any other statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are

also given and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this code or the statute, any suitable process or mode of proceeding may be adopted which may appear most comfortable to the spirit of the Code of Civil Procedure (*Code Civ. Proc. § 187*).

B. Judgment Amendment to Include Alter Ego Litigant. Pursuant to the implied powers to adopt a course of proceeding not provided in the Code of Civil Procedure under *Section 187 of the Code of Civil Procedure*, a court may, after entry of judgment against a corporate defendant and on the motion or application of a plaintiff, amend the judgment to add as an additional judgment debtor a person or entity that is the alter ego of the original judgment debtor and that controlled the initial litigation (*Jack Farenbaugh & Son v. Belmont Construction, Inc. (1987) 194 Cal. App. 3d 1023, 1029-1031, 240 Cal. Rptr. 78* ; *Dow Jones Co. v. Avenel (1984) 151 Cal. App. 3d 144, 148-151, 198 Cal. Rptr. 457* ; *Schoenberg v. Romike Properties (1967) 251 Cal. App. 2d 154, 168, 59 Cal. Rptr. 359* (order to show cause); *Mirabito v. San Francisco Dairy Co. (1935) 8 Cal. App. 2d 54, 57-60, 47 P.2d 530* (motions to amend)).

C. Hearing of Extrinsic Evidence. Although no testimony may have been offered in the original action to indicate the relationship between a defendant corporation and an individual sought to be charged with the liability of the corporation on the basis that he/she was its alter ego and no finding may have been made in such action that the defendant corporation was such individual's alter ego, a court may, on the hearing of plaintiff's application to amend the judgment and designate such individual as a defendant, in the original action, admit extrinsic evidence to show both the relationship between the corporation and such individual and the fact that such individual was the corporation's alter ego (*Jack Farenbaugh & Son v. Belmont Construction, Inc. (1987) 194 Cal. App. 3d 1023, 1029-1032, 240 Cal. Rptr. 78* ; *Thomson v. L. C. Roney & Co. (1952) 112 Cal. App. 2d 420, 426-427, 246 P.2d 1017*).

D. Requirements for Holding Individual as Alter Ego of Corporation. The two basic requirements that must be satisfied before a corporate defendant's entity may be disregarded and an individual may be considered to be the corporate defendant's alter ego are: (1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist; and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow (*Mesler v. Bragg Management Co. (1985) 39 Cal. 3d 290, 300, 216 Cal. Rptr. 443, 702 P.2d 601* ; *Automotriz Del Golfo De Cal. v. Resnick (1957) 47 Cal. 2d 792, 796, 306 P.2d 1* ; *NEC Electronics Inc. v. Hurt (1989) 208 Cal. App. 3d 772, 777, 256 Cal. Rptr. 441*).

E. Factors Pertinent to Court's Determination. Possible factors which may be pertinent to the trial court's determination that the alter ego doctrine should apply include: (1) the commingling of funds and other assets, the failure to segregate funds of the separate entities, and the unauthorized diversion of corporate funds or assets to other than corporate uses; (2) the treatment by an individual of the assets of the corporation as his/her own; (3) the failure to issue or subscribe to stock and the failure to obtain authority to issue or subscribe to stock; (4) the representation by an individual that he/she is personally liable for the debts of the corporation; (5) the failure to maintain minutes or adequate corporate records and the confusion of the records of the separate entities; (6) the identical equitable ownership in the two entities; (7) the identification of the equitable owners thereof with the domination and control of the two entities; (8) the identification of the directors and officers of the two entities in the responsible supervision and management; (9) the failure to adequately capitalize the corporation; (10) the absence of corporate assets, and undercapitalization; (11) the use of a corporation as a mere shell, instrumentality, or conduit for a single venture or the business of an individual or another corporation; (12) the concealment and misrepresentation of the identity of the responsible ownership, management, and financial interest or concealment of personal business activities; (13) the disregard of legal formalities and the failure to maintain arm's length relationships among related entities; (14) the use of the corporate entity to procure labor, services, or merchandise for another person or entity; (15) the diversion of assets from a corporation by or to a stockholder or other person or entity to the detriment of creditors, or the manipulation of assets and liabilities between entities so as to concentrate the assets in one and the liabilities in another; (16) the contracting with another with intent to avoid performance by use of a corporation as a subterfuge for illegal transactions; and (17) the formation and use of a corporation to transfer to it the existing liability of another person or entity (*Arnold v. Browne (1972) 27 Cal. App. 3d 386, 394-395, 103 Cal. Rptr. 775* ; *Associated Vendors, Inc. v. Oakland Meat Co. (1962) 210 Cal. App.*

2d 825, 838-840, 26 Cal. Rptr. 806).

[*Optional*] **F. Evidence of Equitable Ownership.** Evidence that an individual sought to be charged with the debts of a corporation on the basis of the alter ego doctrine was to receive shares to be issued by the corporation supports an inference that he/she was an equitable owner (*Minton v. Cavaney (1961) 56 Cal. 2d 576, 580, 15 Cal. Rptr. 641, 364 P.2d 473*).

[*Optional*] **G. Ownership of One Share.** The fact that a particular individual held but one share of a corporation's stock is sufficient to permit holding him/her personally liable to creditors of that corporation on the basis of the alter ego doctrine, provided that the doctrine is otherwise applicable (*Riddle v. Leuschner (1959) 51 Cal. 2d 574, 580, 335 P.2d 107* ; *see* *Stark v. Coker (1942) 20 Cal. 2d 839, 846-849, 129 P.2d 390*).

[*Optional*] **H. Alter Ego Doctrine Applicable to Tort Claim.** The alter ego doctrine applies to tort claims held by creditors of a corporation as well as to claims based on contract (*Minton v. Cavaney (1961) 56 Cal. 2d 576, 580, 15 Cal. Rptr. 641, 364 P.2d 473* ; *see* *Mesler v. Bragg Management Co. (1985) 39 Cal. 3d 290, 304-306, 216 Cal. Rptr. 443, 702 P.2d 601* (considering settlement with corporation)).

[*Optional*] **I. Liability of Two or More Controllers or Dominators.** The fact that two individuals controlled and dominated a corporation of which they are claimed to be alter egos does not preclude holding each of them personally liable for the obligations of the business, since it is settled that two or more shareholders of a corporation may be liable as principals or partners under the alter ego doctrine (*Riddle v. Leuschner (1959) 51 Cal. 2d 574, 581, 335 P.2d 107*).

[*Optional*] **J. Wholly Owned Subsidiaries.** If a subsidiary corporation is used by its parent as a mere conduit for the transaction of its own business, the parent will be considered the alter ego of the subsidiary and liable for the debts of the subsidiary if recognition of the parent and subsidiary as separate entities would otherwise produce fraud or injustice (*Mesler v. Bragg Management Co. (1985) 39 Cal. 3d 290, 300, 216 Cal. Rptr. 443, 702 P.2d 601* ; *see* *Thomson v. L. C. Roney & Co. (1952) 112 Cal. App. 2d 420, 426-427, 246 P.2d 1017*).

[*Optional*] **K. Manipulation of Corporate Affairs to One's Own Ends.** The manipulation of the affairs of the corporation by an individual who is sought to be charged with liability for the corporation's debts on the basis of the alter ego doctrine and who manipulates the affairs of the corporation in order to foster his/her own purposes to the disadvantage of the corporation and its creditors is considered to be inequitable conduct for the purpose of disregarding the separate entity of a corporation (*Riddle v. Leuschner (1959) 51 Cal. 2d 574, 582, 335 P.2d 107*).

[*Optional*] **L. Inadequate Capitalization and Active Corporate Participation in Corporate Affairs.** The equitable owner of a corporation is personally liable for the debts of the corporation when he/she provides inadequate capitalization and actively participates in the conduct of corporate affairs (*Minton v. Cavaney (1961) 56 Cal. 2d 576, 579, 15 Cal. Rptr. 641, 364 P.2d 473* ; *Automotriz Del Golfo De Cal. v. Resnick (1957) 47 Cal. 2d 792, 796-798, 306 P.2d 1*).

[*Optional*] **M. Concentration of Liabilities in Insolvent Corporation.** Personal liability for a corporation's debts may be found based on the alter ego doctrine when the corporation is rendered insolvent due to the manipulation of assets and liabilities between the corporation and a second corporate entity so as to concentrate the assets in the second corporation and the liabilities in the first (*Riddle v. Leuschner (1959) 51 Cal. 2d 574, 581-582, 335 P.2d 107* ; *Rosen v. E. C. Losch Co. (1965) 234 Cal. App. 2d 324, 334, 44 Cal. Rptr. 377*).

[*Optional*] **N. Holding Oneself Out as Personally Liable.** An equitable owner of a corporation is personally liable for the debts of the corporation as that corporation's alter ego when he/she holds himself/herself out as being personally liable for such debts (*Stark v. Coker (1942) 20 Cal. 2d 839, 847, 129 P.2d 390*).

[*Optional*] **O. Settlement With Corporation Does Not Bar Imposition of Alter Ego Liability on Parent.** The policies underlying California's contribution statutes require that those statutes be interpreted to allow a plaintiff full recovery to the extent that others are responsible for his or her injuries. This policy would be violated if a corporation alleged to be the alter ego of its subsidiary were to be dismissed because the subsidiary had settled with the plaintiff, especially if the plaintiff had accepted a modest settlement because the subsidiary was undercapitalized. Thus, a plaintiff who has settled with a corporate defendant is not barred from proceeding against its alter ego (*Mesler v. Bragg Management Co. (1985) 39 Cal. 3d 290, 304-306, 216 Cal. Rptr. 443, 702 P.2d 601*).

[*Optional*] **P. Confirmation of Arbitration Award.** A judgment confirming an arbitration award may be amended to add an alter ego as an additional judgment debtor (*Hall, Goodhue, Haisley & Barker, Inc. v. Marconi Conference Center Board (1996) 41 Cal. App. 4th 1551, 1555, 49 Cal. Rptr. 2d 286*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a plaintiff's motion to amend a judgment rendered in his or her favor against a corporation to include as a judgment debtor the name of an individual or other corporation that is the alter ego of the judgment debtor. Paragraphs A-C and Paragraph O address procedural requirements for adding the alter ego as additional judgment debtor, while Paragraphs D--N address specific factual elements that will have to be established. Paragraph D sets forth the broad general requirements, while Paragraph E contains an extensive list of considerations that may be relevant in a particular situation. In submitting the foregoing, counsel should select those factors set forth in Paragraph E of the foregoing form that are applicable to his or her case and change the heading of the paragraph appropriately.

Paragraphs K-N set forth more elaborately some of the more important factors courts have considered in determining whether the corporate existence should be disregarded in a particular case. Courts are careful, however, not to consider any one factor controlling or determinative in considering the application of the alter ego doctrine, since that consideration is always one of fact [*see Arnold v. Browne (1972) 27 Cal. App. 3d 386, 394-396, 103 Cal. Rptr. 775* ; *see also § 52.64*]. In fact, the undercapitalization of a corporation alone has been held to be insufficient standing to warrant the application of the doctrine [*Harris v. Curtis (1970) 8 Cal. App. 3d 837, 841-843, 87 Cal. Rptr. 614]* .

Counsel should include argument in the foregoing form showing the relationship between the facts of the particular case and the points of law stated. In addition, if counsel anticipates opposition based on any delay in seeking the amendment [*see § 52.70*], counsel may wish to support the motion with declarations explaining the discovery of the facts establishing alter ego liability and showing that plaintiff moved quickly to discover those facts and then to seek the amendment.

[b] Related Pleading and Practice Forms

For a form for a notice of motion for an order amending a judgment to include as a judgment debtor, the name of the alter ego of that judgment debtor a declaration in support of the notice of motion, alleging facts discovered during a creditor's examination, and an order amending the judgment to include the name of defendant's alter ego as a judgment debtor, see Ch. 160, *Corporations* in California Forms of Pleading and Practice.

[3] Discussion of Authorities

[a] Judgment Amendment to Include Alter Ego Litigant

Jack Farenbaugh & Son v. Belmont Construction, Inc. *(1987) 194 Cal. App. 3d 1023, 240 Cal. Rptr. 78* , arose from a construction contract dispute and resulted in judgment against defendant corporate contractor. After entry of the original judgment, plaintiff discovered, on examination of the corporate defendant's president and majority shareholder, that defendant had no assets, no bank account, and had not had any income for several years. Basically, the corporation had been dissolved in 1980, its two principals dividing the assets and going their separate ways. The contractor's license had been reissued in another name, which was listed as a sole proprietorship of that individual (*194 Cal. App. 3d 1023, 1033-1034)* . Plaintiff successfully moved to include defendant's president and major shareholder as a judgment debtor. Defendant appealed.

The court of appeal affirmed. Citing *Schoenberg v. Romike Properties (1967) 251 Cal. App. 2d 154, 158, 59 Cal. Rptr. 359* (discussed *below*), and *Alexander v. Abbey of the Chimes (1980) 104 Cal. App. 3d 39, 44-46, 163 Cal. Rptr. 377* (discussed in *§ 52.70[3][a]*), the court first noted that the trial court had inherent power under *Code Civ. Proc. § 187* to impose alter ego liability on one who had control of the litigation (*194 Cal. App. 3d 1023, 1029)* . Appellant, the individual defendant, did not contest the procedure of the postjudgment motion, but claimed that the evidence was insufficient and that the judge, who had also been the trial judge, was disqualified to hear the motion. The court of appeal noted that in ruling on the motion to amend the judgment, the trial court was not limited to evidence testified to at trial, but that it could admit extrinsic evidence, on proper notice to the other party (*194 Cal. App. 3d 1023, 1029)* . The appellate court agreed that the individual defendant could be added as a judgment debtor because he sufficiently controlled the litigation (*194 Cal. App. 3d 1023, 1031)* . Defendant's deposition testimony, his conduct at the trial, and his testimony at the order of examination were referred to in plaintiff's attorney's declaration in support of the motion to amend. Defendant's declaration referred to an instance during the trial when the corporation's attorney's refused to call as a witness a person defendant had wanted to testify. Defendant claimed that the incident proved that he did not control the litigation. The trial court noted that plaintiff's attorney's declaration coincided with its own recollection of the trial, and that the individual defendant testified, counseled with the corporation's attorney, and figured very prominently in the original trial (*194 Cal. App. 3d 1023, 1030-1031)* .

The court also stated that the trial court's personal observations and their use in determining the motion were proper. Expressions of opinion by a judge disclosing a state of mind adverse to one party do not amountto prejudice and are not grounds for disqualification under *Code Civ. Proc. § 170.1(a)(6)* if based on actual observation of the witnesses and the evidence given during the trial (*194 Cal. App. 3d 1023, 1031-1032)* . The remainder of the court's opinion is *discussed in § 52.62[4][b]*.

In ***Dow Jones Co. v. Avenel*** *(1984) 151 Cal. App. 3d 144, 148-150, 198 Cal. Rptr. 457* , plaintiff filed suit on an account and later filed a motion for summary judgment. The trial court granted the motion and awarded damages to plaintiff. Plaintiff then filed a motion to amend the judgment to add, as judgment debtors, the alter egos of defendant who were not parties to the original action. The judgment was amended and the alter ego judgment debtors appealed.

The court of appeal affirmed. The court found that, under *Code Civ. Proc. § 187* and the general rule that a court may amend its judgment at any time so that the judgment will properly designate the real defendants, a trial court has the authority to amend a judgment in order to add additional judgment debtors. The court found that appellants were the real defendants and that the trial court correctly amended the summary judgment to reflect that fact (*151 Cal. App. 3d 144, 148-149)* . Although appellants' alter ego liability could not have been determined at the hearing on the motion for summary judgment, in this case the issue was determined at the hearing on the motion to amend the judgment and the later hearing did not taint the previous summary judgment proceeding (*151 Cal. App. 3d 144, 149)* . In addition, appellants had not been denied due process rights because, while technically they were not given the opportunity to convince the trial court that material issues of fact existed because they were not named parties, they were able to do so

through the vehicle of defendant (*151 Cal. App. 3d 144, 150)* . The court said that the significant distinction is not whether the matter was fully litigated or whether the persons sought to be added as judgment debtors participated in the trial, but whether that person had the opportunity to do so (*151 Cal. App. 3d 144, 150)* . Here, the record was clear that appellants had controlled and participated in the corporation's defense in the action (*151 Cal. App. 3d 144, 150-151)* .

In ***Schoenberg v. Romike Properties*** *(1967) 251 Cal. App. 2d 154, 59 Cal. Rptr. 359* , plaintiffs were awarded damages for fraud and negligence in the sale of plaintiff's property. Judgment was against the purchasers, a corporation engaged in a real estate brokerage business, and other named defendants. After entry of judgment and following plaintiffs' failure to satisfy this judgment, plaintiffs applied for an order to be issued directed to the shareholders of the corporation who were not defendants in the action to show cause why they should not be joined as defendants. The court granted the application and, after a hearing, they were ordered joined and subjected to the same judgment liability as the corporation on the basis that the corporation was the alter ego of the shareholders. The shareholders and other defendants appealed and the court of appeal affirmed. On appeal, the appellant shareholders contended, in part, that they could not be held liable under the judgment without either an opportunity to relitigate the issues or a showing that they had control of the litigation. In response to this contention, the court stated that appellants had misconceived the nature of the proceeding under the order to show cause in that the proceeding was not a method for obtaining a new trial or for attacking the judgment (*251 Cal. App. 2d 154, 167-168)* . The court commented that it was well settled that the authority of the court under *Code Civ. Proc. § 187* [*see* Paragraph A of the foregoing form] will be exercised to impose liability under a judgment on the alter ego who has had control of the litigation (*251 Cal. App. 2d 154, 168)* . This control was demonstrated by the fact of the shareholders' control of the corporation since no one, except the shareholders, had authority to employ attorneys and provide for the expense or was interested in the corporation's fate (*251 Cal. App. 2d 154, 168)* .

Mirabito v. San Francisco Dairy Co. *(1935) 8 Cal. App. 2d 54, 47 P.2d 530* was an appeal by a corporation from an order of the trial court refusing to set aside its order, which added a second corporation to the judgment after the same had become final on appeal, and the judgment of the Supreme Court affirming the same had been made and entered. The Court ordered the second corporation added to the judgment on the basis that it was the alter ego of the defendant corporation already named in the judgment. The appellant corporation contended, in part, that the addition of its name to the judgment was in excess of the trial court's jurisdiction and was a denial of due process. The respondent contended in response that, by virtue of the inherent authority of a court to make its records speak the truth, the trial court had jurisdiction to amend the judgment, and that the amendment did not add a new defendant to the judgment, but merely set forth the correct name of the real defendant (*8 Cal. App. 2d 54, 57, 60)* . In affirming the trial court's order, the court of appeal stated that a court may, at any time, amend its judgment so that the latter will properly designate the real defendants (*8 Cal. App. 2d 54, 57, 60)* . The court found that appellant was fully aware of all the proceedings of the action, and of all the facts and circumstances surrounding the accident that gave rise to its corporate alter ego's liability. Its secretary had been served with a copy of the complaint and had verified the answer of the original corporate defendant. Appellant had, in addition, expended sums in the original corporate defendant's defense, and its attorneys were also the attorneys for the defendant. Finding also that the evidence supported holding appellant the alter ego of the original corporate defendant, the court concluded that the trial court had jurisdiction to add appellant to the judgment, and appellant was not, thereby, denied due process (*8 Cal. App. 2d 54, 57-60)* .

[b] Hearing of Extrinsic Evidence

Jack Farenbaugh & Son v. Belmont Construction, Inc. *(1987) 194 Cal. App. 3d 1023, 240 Cal. Rptr. 78* is *discussed in § 52.62[3][a]*.

Thomson v. L. C. Roney & Co. *(1952) 112 Cal. App. 2d 420, 246 P.2d 1017* , involved an appeal by Southwestern Development Company, a corporation, from an order adding its name as a judgment debtor to a final judgment previously rendered against the initial defendant, L. C. Roney, Inc., a corporation. Following the judgment against the initial defendant, Roney, plaintiff obtained an order for examination of Roney as a judgment debtor. This examination

revealed that all the outstanding shares of Roney had been owned by Southwestern, that the president and the secretary of both corporations were identical, that the members of the board were substantially identical, and that approximately one year before plaintiff commenced his action, Roney had transferred all its assets to Southwestern which, on the following day, filed a certificate that it was conducting business under the fictitious name of L. C. Roney, Inc. On the basis of this, plaintiff filed a petition for an order to show cause why Southwestern should not be added as a judgment debtor. At the hearing of the order to show cause, evidence was produced to show that Roney was a subsidiary of Southwestern, that Southwestern exercised full control over Roney, and that it used Roney as an instrumentality or business conduit to carry on its business operations by advancing large sums of money to Roney. On appeal, Southwestern contended, in part, that the trial court had acted in excess of its jurisdiction in adding its name to the judgment by arguing that: (1) no testimony was offered in the original trial to indicate the existence of any relationship between appellant and Roney; and (2) that no finding was made in the original proceeding that Roney was appellant's alter ego. In affirming the trial court's order, the court of appeal stated that the limitation contended for by appellant would better the court's ability to do justice between the parties and would award a premium to a litigant's capacity or conceal his or her real identity (*112 Cal. App. 2d 420, 426-427* . The court stated in addition, that since the court had jurisdiction over the defendant, it had jurisdiction to make its judgment reflect the defendant's true name (*112 Cal. App. 2d 420, 427*). It pointed out that, since a question had arisen as to the identity and character of the defendant on whom the judgment was binding, the court possessed the power to adopt a suitable procedure for the purpose of determining that question under *Code Civ. Proc. § 187* [*see* Paragraph A of the foregoing form], and that under the authority of this section, the court could properly exercise its power by taking evidence, after proper notice, in order to determine the true name of defendant (*112 Cal. App. 2d 420, 427)* .

[c] Requirements For Holding Individual as Alter Ego of Corporation

Mesler v. Bragg Management Co. *(1985) 39 Cal. 3d 290, 216 Cal. Rptr. 443, 702 P.2d 601* , arose from a worker's injury. After plaintiff settled with the corporation that owned the equipment on which he was injured, he learned that that corporation was controlled by its parent corporation. Plaintiff then moved to amend the complaint to include the parent corporation as a defendant. The motion was denied, and defendant moved successfully for summary judgment. Plaintiff appealed; and the Supreme Court reversed. The Supreme Court said there is no litmus test to determine when the corporate veil will be pierced; rather, the result will depend on the circumstances of each particular case. There are, nevertheless, two general requirements, the Court said, citing *Automotriz Del Golfo De Cal. v. Resnick (1957) 47 Cal. 2d 792, 796, 306 P.2d 1* : (1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow (*39 Cal. 3d 290, 300)* . Only a difference in wording is used in stating the same concept when the entity sought to be held liable under the alter ego doctrine is another corporation instead of an individual (*39 Cal. 3d 290, 300)* . The portion of the opinion considering the effect of the settlement is *discussed in § 52.62[3][n]*.

In ***Automotriz Del Golfo De Cal. v. Resnick*** *(1957) 47 Cal. 2d 792, 306 P.2d 1* , plaintiff had judgment for the balance due on the price of eight automobiles sold to three individual defendants. Prior to the transaction sued on, the defendants had formed a corporation in which each of them had a right to share in the profits and which was formed to carry on the business of purchasing automobiles. The corporation never issued stock, no capital had been contributed to the corporation, and no bank account was ever maintained by the corporation. Although the method of financing the purchase of the automobiles was complex, it was clear that the funds were supplied by one of the defendants. Prior to entering into the transactions it eventually sued on, plaintiff had been assured that the corporation it was dealing with would be backed up by one of the defendants. In appealing from the judgment entered, the defendants contended, in part, that the evidence was insufficient to support the trial court's finding that they had been doing business as individuals. The Supreme Court, however, affirmed. The Court noted that, although it is the general rule that the conditions under which a corporate entity may be disregarded will vary according to the circumstances of each case, two requirements which must be met for application of this doctrine are (1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow (*47 Cal. 2d792, 796)* . The Court

summarized the factors that would indicate that the defendants were doing business as individuals. One was the failure to issue stock or to apply at any time for a permit. Although this was not conclusive evidence, it was an indication that defendants were doing business as individuals (*47 Cal. 2d 792, 796)* . Another factor was the lack of an attempt to provide adequate capitalization (*47 Cal. 2d 792, 796-797)* . In this regard the Court quoted from Ballantine and Sterling California Corporation Laws, which had commented that the attempt to do corporate business without providing any sufficient basis of financial responsibility to creditors, was an abuse of the separate entity (*47 Cal. 2d 792, 797)* . The text stated that where the capital was illusory or trifling compared with the business to be done and the risks of loss, the privilege of conducting business as a entity should be denied (*47 Cal. 2d 792, 797)* . In finding the capital insufficient in view of the volume of business conducted, the Court concluded that the two factors--the failure to issue stock and the inadequate capitalization--were ample support for the trial court's finding that defendants were doing business as individuals (*47 Cal. 2d 792, 797-798)* .

NEC Electronics Inc. v. Hurt *(1989) 208 Cal. App. 3d 772, 256 Cal. Rptr. 441* is discussed in *§ 52.70[3][d]*.

[d] Factors Pertinent to Court's Determination

In ***Arnold v. Browne*** *(1972) 27 Cal. App. 3d 386, 103 Cal. Rptr. 775* , the plaintiffs appealed from that portion of the trial court's judgment denying recovery in their action against the individual defendants on the grounds of alter ego. Although the trial court affirmed the trial court's finding of no liability, the court listed those factors set forth in Paragraph E of the foregoing form which would be pertinent to the trial court's determination (*27 Cal. App. 3d 386, 394-395)* . These factors were first listed and supported by authority in the opinion in *Associated Vendors, Inc. v. Oakland Meat Co. (1962) 210 Cal. App. 2d 825, 26 Cal. Rptr. 806* . In *Arnold,* the court noted that the presence or absence of any of these factors, as well as the consideration of any other circumstances which would have warranted the trier of fact to disregard the corporate entity, were within the province of the trial court (*27 Cal. App. 3d 386, 395)* . Thus, a finding by an appellate court that there was ample evidence to support the trial court's finding, as in this case, is all that is required to affirm a trial court's judgment of the presence or absence of the alter ego doctrine (*27 Cal. App. 3d 386, 395-397)* .

Associated Vendors, Inc. v. Oakland Meat Co. *(1962) 210 Cal. App. 2d 825, 26 Cal. Rptr. 806* was an action for breach of lease in which plaintiff-lessor sought to hold the corporate lessee and its individual principals liable on the theory that the individuals were alter egos of the corporate defendant. Judgment was for plaintiff against the corporate defendant, but in favor of the individual defendants. Plaintiff appealed, and the court of appeal affirmed. The court set forth the various factors that could be considered in establishing alter ego liability (*210 Cal. App. 2d 825, 838-840)* . The presence or absence of those factors, as well as other circumstances that would warrant disregarding the corporate entity are within the province of the trial court (*210 Cal. App. 2d 825, 840)* . Here, the evidence did not establish any unity of interest (*210 Cal. App. 2d 825, 840-841)* .

[e] Evidence of Equitable Ownership

The facts in ***Minton v. Cavaney*** *(1961) 56 Cal. 2d 576, 15 Cal. Rptr. 641, 364 P.2d 473* , were that plaintiff's daughter had drowned in a pool which Seminole Hot Springs Corporation was operating as a public swimming pool. The plaintiffs then recovered a judgment from Seminole which remained unsatisfied and, thereafter, brought this action against defendant Cavaney to hold him personally liable for the Seminole judgment. Plaintiffs introduced evidence that Cavaney was the director, secretary, and treasurer of Seminole, that, five months after the drowning, he had applied, along with two other individuals, for permission to issue three shares of stock, of which one share was to be held by each individual, and that permission was refused and, thereafter, the application abandoned. In addition, evidence introduced showed that Seminole used Cavaney's office to keep records and to receive mail and that Seminole had no assets of any kind or character. The trial court found that Cavaney was personally liable for the judgment obtained against Seminole from which defendant, the executrix of Cavaney's estate, appealed. The Supreme Court reversed because of the failure of the plaintiffs to show that Cavaney, not being a party to the action against Seminole, had

control of the litigation leading to judgment (*56 Cal. 2d 576, 581-582)* . However, the Court found that the alter ego doctrine otherwise would apply. The Court stated that, as a rule, the equitable owners of a corporation are personally liable when they treat the assets of the corporation as their own and add or withdraw capital from the corporation at will (*56 Cal. 2d 576, 579)* ; when they hold themselves out as being personally liable for the debts of the corporation [*see* the *discussion under § 52.62[3][m]*] (*56 Cal. 2d 576, 579)* ; or when, as was the case before the Court, they provide inadequate capitalization and actively participate in the conduct of the corporate affairs (*56 Cal. 2d 576, 579)* . The Court stated that the evidence was undisputed, that there was no attempt to provide adequate capitalization, and that whatever capitalization was provided was trifling compared with the business to be done and the risks of loss (*56 Cal. 2d 576, 580)* . The evidence was also undisputed that Cavaney actively participated in the conduct of the business, being the secretary, treasurer, and the only director of the corporation. The Court found that the evidence that Cavaney was to receive one-third of the shares to be issued, supported an inference that he was an equitable owner (*56 Cal. 2d 576, 580)* . The Court also found no merit in defendant's contention that the alter ego doctrine applied only to contractual debts andnot to tort claims (*56 Cal. 2d 576, 580)* that the plaintiff's cause of action abated when Cavaney died (*56 Cal. 2d 576, 580-581)* , or that the judgment in the action against the corporation barred plaintiffs from bringing the present action (*56 Cal. 2d 576, 581)* .

[f] Ownership of One Share

Riddle v. Leuschner *(1959) 51 Cal. 2d 574, 335 P.2d 107* , involved an action commenced by plaintiffs as creditors of Yosemite Creek Company, a corporation, against Yosemite Kadota Creek Company, a second corporation, and most of the shareholders, officers, and directors of the two companies. Judgment was rendered against Yosemite, Kadota and three individual defendants, one of whom held but one share of Yosemite stock. During the relevant period of time with which this case was concerned, the directors of the corporations were identical and all of the stock of Kadota and practically all the shares of Yosemite were held by persons who were related by blood or marriage. During this period of time, each corporation held but one shareholders' meeting, held no regular directors meetings, and shared the same offices, bookkeeper, and attorneys. The three individual defendants made several loans to the corporation which had never been approved or authorized. The defendants, in addition, had other transactions with the corporations which were, in effect, transactions among themselves as individuals and as agents of the corporations. Finally, evidence showed that the two corporations were manipulated in such a way that the assets of Yosemite were intermingled with the assets of Kadota to suit the convenience of the defendants and to assist them in evading payment of their obligations. The trial court found that the two corporations were, in fact, one, and that there was no individuality or separateness insofar as the corporation and the defendants were concerned. On defendants' appeal, the Supreme Court affirmed the trial court's finding and judgment, except as to one defendant who could not be held to hold any beneficial interest in Yosemite (*51 Cal. 2d 574, 580)* . The Court, citing *Stark v. Coker (1942) 20 Cal. 2d 839, 846-849, 129 P.2d 390* (*discussed in § 52.62[3][m]*), stated that the fact that one of the two remaining defendants had only one share of Yosemite stock was sufficient to permit holding her personally liable to creditors of the corporation, provided that the alter ego doctrine was otherwise applicable (*51 Cal. 2d 574, 580)* . In holding that doctrine was applicable, the Court found that there was no separateness between the individual defendants and the corporations. It stated that the evidence supported inferences that the two defendants transferred most of the assets of Yosemite to Kadota, that Yosemite's corporate procedures were not followed, and that personal transactions entered into by the defendants were disadvantageous to Yosemite and done without prior corporate approval. The fact that the two defendants controlled and dominated the corporations did not preclude holding each of them personally liable for the obligations of the business, since the law was settled that two or more shareholders of a corporation may be liable as principals or partners under the alter ego doctrine (*51 Cal. 2d 574, 581)* . Finally, the Court found that the evidence supported the conclusion that an inequitable result would follow if the acts complained of were treated as those of the corporation alone (*51 Cal. 2d 574, 581)* . The transference of the assets of Yosemite to Kadota, without regard to the interests of Yosemite or its creditors, and at a time when Yosemite was insolvent, and the manipulations, in general, of the affairs of Yosemite were designed to foster their own purposes and operated to the disadvantage of Yosemite and its creditors (*51 Cal. 2d 574, 581-582)* .

[g] Alter Ego Doctrine Aplicable to Tort Claim

Minton v. Cavaney *(1961) 56 Cal. 2d 576, 15 Cal. Rptr. 641, 364 P.2d 473* is *discussed in § 52.62[3][e]*.

Mesler v. Bragg Management Co. *(1985) 39 Cal. 3d 290, 216 Cal. Rptr. 443, 702 P.2d 601* is *discussed in § 52.62[4][b]*.

[h] Liability of Two or More Controllers or Dominators

Riddle v. Leuschner *(1959) 51 Cal. 2d 574, 335 P.2d 107* is *discussed in § 52.62[3][f]*.

[i] Wholly Owned Subsidiaries

Mesler v. Bragg Management Co. *(1985) 39 Cal. 3d 290, 216 Cal. Rptr. 443, 702 P.2d 601* is *discussed in § 52.62[4][b]*.

The facts of ***Thomson v. L. C. Roney & Co.*** *(1952) 112 Cal. App. 2d 420, 246 P.2d 1017* are *discussed in § 52.62[3][b]*. Finding that the procedure the trial court followed was sufficient to bind Southwestern to the judgment rendered against Roney, the court then determined that Southwestern was, in fact, the alter ego of Roney. The court found that there was a complete unity of ownership and interest in the facts of the interlocking directorships of the two corporations, of the complete identity of their officers, of the commingling of the two corporations' assets--since Southwestern had been vested with a blanket authority to advance large sums of money to Roney without security and, in fact, had made such loans in excess of the amount Roney had been authorized to borrow--of the sharing by both corporations of the same attorney, and following Roney's sale to Southwestern, of the carrying on by Roney of its business in precisely the same fashion as had been followed when it was a subsidiary of Southwestern. The collective weight of these facts clearly supported the trial court's finding that Roney was merely an instrumentality through which Southwestern was transacting its own operations as a business convenience, and that the control exercised by Southwestern over Roney would promote an injustice if the separate corporate identities were preserved.

[j] Manipulation of Corporate Affairs to One's Own Ends

Riddle v. Leuschner *(1959) 51 Cal. 2d 574, 335 P.2d 107* is *discussed in § 52.62[3][f]*.

[k] Inadequate Capitalization and Active Corporate Participation

Minton v. Cavaney *(1961) 56 Cal. 2d 576, 15 Cal. Rptr. 641, 364 P.2d 473* is *discussed in § 52.62[3][e]*.

Automotriz Del Golfo De Cal. v. Resnick *(1957) 47 Cal. 2d 792, 306 P.2d 1 , discussed in § 52.62[4][b],* describes how to determine if capitalization is inadequate.

[l] Concentration of Liabilities in Insolvent Corporation

Riddle v. Leuschner *(1959) 51 Cal. 2d 574, 335 P.2d 107* is *discussed in § 52.62[3][f]*.

Rosen v. E. C. Losch Co. *(1965) 234 Cal. App. 2d 324, 44 Cal. Rptr. 377* , involved an appeal from a judgment which cross complainant, defendant in the original action, had obtained against cross defendants individually for its share of the profits under a joint venture agreement for the installation of gas and water systems servicing certain housing units. Appellants contended on appeal that contract was one solely between cross complainant and the Cabot Construction Company, and that the trial court wrongly invoked the alter ego doctrine in reaching its determination that appellants were joint venturers with cross complainant in the work to be performed under the agreement. Specifically, appellants contended that cross complainant knew it was doing business with another corporation, that appellants in good faith

conducted a separate business enterprise through a corporation, and that they should not be called on to respond personally simply because it would appear that the corporation may be unable to do so. The court of appeal, however, disagreed, and affirmed the trial court's judgment. The facts indicated that appellants were the sole shareholders, officers, and directors of Cabot, that they held interest in corporations with which Cabot was doing business so that it could not be said that Cabot was dealing at arm's length with such companies, and that the corporation was undercapitalized (*234 Cal. App. 2d 324, 332-334)* . Although the court did not rest its decision exclusively on this ground, the court noted, in addition, that decisions citing *Riddle v. Leuschner, above* and *Talbot v. Fresno-Pacific Corp. (1960) 181 Cal. App. 2d 425, 5 Cal. Rptr. 361* , likewise held that personal liability will attach when a corporation is rendered insolvent due to the manipulation of assets and liabilities between entities so as to concentrate the assets in one and the liabilities in another (*234 Cal. App. 2d 324, 334)* . Appellants had accomplished this by having Cabot cancel a debt owed to one corporation under the joint venture agreement and, in effect, by transferring to the other corporations wholly owned by appellants, the funds of the canceled note. It should be noted, however, that the court concluded that, in the last analysis, the determination of the existence of the factors contributing to the invoking of the alter ego doctrine is one for the trial court whose conclusion will not be disturbed if supported by substantial evidence (*234 Cal. App. 2d 324, 334)* .

[m] Holding Oneself Out as Personally Liable

In ***Stark v. Coker*** *(1942) 20 Cal. 2d 839, 129 P.2d 390* , defendants, husband and wife, and a corporation of which they were, in effect, the sole shareholders, appealed from a judgment against them on a note executed by them as president and secretary of the corporation, respectively. The note renewed a previous debt and was executed pursuant to an accord and satisfaction. The appellants' chief contention on appeal was that the evidence was insufficient to justify the trial court in disregarding the corporate entity of the defendant corporation and in holding the individual defendants personally liable on the note. The Supreme Court found, however, that there was sufficient evidence and affirmed the trial court's judgment. The pertinent facts were that, at the same time the note was executed, the corporation had no elected officers, no meetings of the board of directors or stockholders had been held, and there were no minute entries (*20 Cal. 2d 839, 846)* . There were 150 outstanding shares of stock: 139 were owned by the husband; one was owned by the wife; and 11 shares were held in escrow, the whereabouts of their owner being unknown. The absent shareholder did not participate in the corporation's business (*20 Cal. 2d 839, 846-847)* . The affairs of the corporation were conducted by the husband at his home (*20 Cal. 2d 839, 847)* . The corporation had no business and no assets. With respect to the execution of the note, there was testimony to the effect that, in the presence of the holder of the note, the husband claimed that he and his wife were the corporation (*20 Cal. 2d 839, 847-848)* . In addition, when plaintiff accepted the note, he might have been able to recover a substantial amount of the indebtedness if the payment of the note had not been extended by the accord and satisfaction (*20 Cal. 2d 839, 848)* . The Court concluded that these facts would justify the trial court in determining that the corporation was the alter ego of the individual defendants since it could be well inferred that the renewal note was accepted under the belief that the defendants were, in reality, the true parties obligated (*20 Cal. 2d 839, 848-849)* .

[n] Settlement With Corporation Does Not Bar Alter Ego Liability

The facts and procedural background of ***Mesler v. Bragg Management Co.*** *(1985) 39 Cal. 3d 290, 216 Cal. Rptr. 443, 702 P.2d 601* , and theCourt's statement of the general requirement for imposing alter ego liability are *discussed in § 52.62[4][b]*. In considering whether the settlement with the original defendant, the subsidiary corporation, barred imposition of alter ego liability on the parent corporation, the Court first considered the policies underlying California's contribution statutes (*39 Cal. 3d 290, 304)* . These policies require that the contribution statutes be interpreted to allow a plaintiff full recovery to the extent that others are responsible for his or her injuries. This policy would be violated if a corporation alleged to be the alter ego of its subsidiary were to be dismissed because the subsidiary had settled with the plaintiff, especially if the plaintiff had accepted a modest settlement because the subsidiary was undercapitalized (*39 Cal. 3d 290, 304-305)* . Thus, plaintiff was not barred from proceeding against the parent corporation because he has settled with the subsidiary (*39 Cal. 3d 290, 306)* .

[o] Confirmation of Arbitration Award

In ***Hall, Goodhue, Haisley & Barker, Inc. v. Marconi Conference Center Board*** *(1996) 41 Cal. App. 4th 1551, 49 Cal. Rptr. 2d 286* , the plaintiff firm appealed an order denying its motion to amend a judgment confirming an arbitration award to add a corporation alleged to be the alter ego of the defendant, a nonprofit organization, as an additional judgment debtor. The court stated that judgments confirming arbitration awards are subject to all of the provisions of law relating to a judgment in a civil action and may be enforced like any other civil judgment. In this case, the parties agreed that the arbitrator had no power to determine the rights and obligations of anyone not a party to the arbitration proceedings. Therefore, the arbitrator could not proceed under *Code Civ. Proc. § 1284*, which establishes the procedure for an arbitrator to correct an award. Because only the superior court has jurisdiction to amend the award to add an alter ego, the court held that the plaintiff firm was entitled to a hearing before the trial court on its motion to amend the judgment (*41 Cal. App. 4th 1551, 1555)* .

[4] Additional Authorities

[a] Judgment Amendment to Include Alter Ego Litigant

In *McClellan v. Northridge Park Townhome Owners Association, Inc. (2001) 89 Cal. App. 4th 746, 107 Cal. Rptr. 2d 702* , a contractor entered into a contract with a condominium owners association to perform earthquake repair work. The association failed to pay for the work, and the contractor commenced an arbitration proceeding to collect the amount due. The association failed to appear at the arbitration hearing, the arbitrator awarded the contractor a default arbitration award, and the superior court entered judgment against the association. The board of directors of the condominium association, on advice of a bankruptcy attorney, filed a bankruptcy petition under Chapter 7 (although the case was later dismissed by the bankruptcy court). In addition, it formed a new corporation which immediately became the homeowners association for the complex. The contractor then filed a motion in superior court to amend the judgment to add the new corporation as a judgment debtor, on the grounds that it was merely a continuation of the first association and was created to hinder, delay, and defraud its predecessor's creditors. The trial court granted to motion to amend, finding that the new corporation was the successor corporation to the original association and that good cause existed to grant the motion to amend. The court of appeal affirmed. It first noted that a trial court has jurisdiction under *Code Civ. Proc. § 187* to add additional judgment debtors. Whether the theory relied on is alter ego, piercing the corporate veil, or some other challenge to the fiction of the corporate entity, the doctrine of disregarding the corporate entity limits the exercise of the corporate privilege to prevent its abuse (*89 Cal. App. 4th 746, 752-753)* . In this case, the plaintiff invoked *Code Civ. Proc. § 187* to include the new corporation as a judgment debtor on the ground that it was a successor corporation which was essentially the same entity as the original association. The court reviewed the principle that when a new corporation is a mere continuation of its predecessor, the separate entities may be disregarded and the new corporation held liable for the obligations of the old. Under the facts of this case, it determined that substantial evidence, including identical members, boards, and income, as well as the predecessor's failure to dissolve or wind up its affairs, supported the trial court's conclusion that the new corporation was a "mere continuation" of the old corporation. It thus held that the trial court properly named the new corporation as an additional judgment debtor due to its status as successor (*89 Cal. App. 4th 746, 753-756)* .

[b] Requirements for Holding Individual as Alter Ego of Corporation

The facts, procedural background, and portion of the opinion considering the sufficiency and propriety of the evidence at the hearing of the motion to amend in *Jack Farenbaugh & Son v. Belmont Construction, Inc. (1987) 194 Cal. App. 3d 1023, 240 Cal. Rptr. 78* are discussed in *§ 52.62[3][a]*. The court of appeal said that in order to impose alter ego liability, (1) there must be sufficient unity of interest and ownership so that the separate personalities of the corporation and the individual no longer exist, and (2) if the acts are treated as those of the corporation alone, an inequitable result will follow (*194 Cal. App. 3d 1023, 1032)* . Imposition of alter ego liability is essentially a question of fact, and the trial court's conclusion will not be disturbed on appeal if it is supported by substantial evidence (*194 Cal. App. 3d*

1023, 1032-1033) . After reviewing the facts, the courtagreed there was substantial evidence to support the imposition of liability on the individual defendant (*194 Cal. App. 3d 1023, 1033-1034)* .

NEC Electronics Inc. v. Hurt (1989) 208 Cal. App. 3d 772, 777, 256 Cal. Rptr. 441 (discussed in *§ 52.69[3][d]*), and *Alexander v. Abbey of the Chimes (1980) 104 Cal. App. 3d 39, 46-47, 163 Cal. Rptr. 377* (discussed in *§ 52.70[3][a]*), also contain statements of the general requirements for imposition of alter ego liability.

In *SEC v. Hickey (9th Cir. 2003) 322 F.3d 1123* , the SEC filed a complaint against an individual and several corporate entities controlled by that individual. The parties entered into a consent decree in which the individual agreed he would not assert that he did not violate federal securities laws if the SEC sought disgorgement in the future. The district court ultimately granted the SEC's motion for summary judgment on the disgorgement issue and the individual failed to disgorge any of his unlawful gains. At a contempt hearing, the parties argued over whether the assets of a brokerage owned by the individual's mother should be available to satisfy the disgorgement order. The district court issued an order holding the individual in contempt and freezing the brokerage's assets. On appeal, the brokerage argued that the district court abused its discretion because the brokerage was not the individual's alter ego. Citing *Mesler v. Bragg Mgmt. CoMesler v. Bragg Mgmt. Co (1985) 216 Cal. Rptr. 443* , discussed *above*, the Ninth Circuit reiterated that ownership in a corporation is a prerequisite to alter ego liability under California law (*322 F.3d 1123, 1128-1129)* . However, the lack of an alter ego relationship did not mean that the district court abused its discretion. The existence of an alter ego relationship is necessary only when some type of piercing is sought. The court concluded that the district court's broad equitable powers, drawn from a tradition of allowing courts to reach third parties in order to effect orders in securities fraud enforcement actions, authorized the asset freeze (*322 F.3d 1123, 1131)* .

In *Playboy Enterprises, Inc. v. Welles (9th Cir. 2002) 279 F.3d 796* , the publisher of Playboy magazine sued a former Playboy Playmate of the Year, her corporation, and her webmasters for trademark infringement, unfair competition and breach of contract, with respect to her use of the title "Playboy Playmate of the Year 1981" and other trademarked terms on her website. When defendant agreed to be a Playmate of the Year in 1981, her corporation signed a contract with Playboy containing a term that required prior written approval from Playboy before she made any non-Playboy use of her name with the designation "Playmate of the Year." The corporation was dissolved in 1984. Playboy argued that the corporation was the individual's alter ego and that the terms of the contract were thus enforceable against her. The district court rejected this argument and granted summary judgment against Playboy on its contract claims. The Ninth Circuit affirmed. Although it concluded that the plaintiff advanced sufficient evidence to establish unity of interest, the first prong of the alter ego test, it agreed with the district court that the plaintiff advanced insufficient evidence to defeat summary judgment on the second prong (*citing Associated Vendors, Inc. v. Oakland Meat Co. (1962) 210 Cal. App. 2d 825, 837, 26 Cal. Rptr. 806*): plaintiff did not show that the facts were such that adherence to the fiction of the separate existence of the corporation, under these circumstances, would sanction a fraud or promote injustice (*279 F.3d 796, 806-807)* .

[c] Wholly Owned Subsidiaries

In *United States v. Bestfoods (1998) 524 U.S. 51, 118 S. Ct. 1876, 141 L. Ed. 2d 43* , the United States brought an action for the costs of cleaning up industrial waste generated by a chemical plant. The United States District Court imposed operator liability on the parent corporations. On appeal, the Court of Appeals reversed in part. After a grant of certiorari, the issue before the Supreme Court was, under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) [*42 U.S.C. § 9601 et seq.*], whether a parent corporation that actively participated in, and exercised control over, the operations of a subsidiary may, without more, be held liable as an operator of a polluting facility owned or operated by the subsidiary. The Court answered no, unless the corporate veil may be pierced. However, a corporate parent that actively participated in, and exercised control over, the operations of the facility itself may be held directly liable in its own right as an operator of the facility. The Supreme Court stated that it is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries. There is

an equally fundamental principle of corporate law, applicable to the parent-subsidiary relationship as well as generally, that the corporate veil may be pierced and the shareholder held liable for the corporation's conduct when, inter alia, the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder's behalf. Nothing in CERCLA purports to rewrite this well-settled rule. Thus, the Court of Appeals was accordingly correct in holding that when (but only when) the corporate veil may be pierced, a parent corporation may be charged with derivative CERCLA liability for its subsidiary's acts (*118 S. Ct. 1876, 1885-1886)* .

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Volume 5 Chapters 50-59 CONTRACTS---to---CORPORATIONS
CHAPTER 52 CORPORATIONS
PART II. FORMS
B. DISREGARDING THE CORPORATE ENTITY

5-52 California Points & Authorities § 52.63

§ 52.63 Opposing Demurrer to Complaint Against Individual on Corporate Obligations--Allegations in Plaintiff's Complaint Satisfy Liberal Requirements for Pleading Alter Ego Doctrine

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM IN OPPOSITION TO DEMUR-
_____ [*name*], Plaintiff,	)	RER TO COMPLAINT
vs.	)	Date: _____
_____ [*name*], Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

PLAINTIFF'S COMPLAINT STATES A CAUSE OF ACTION WHEN IT SATISFIES THE LIBERAL REQUIREMENTS FOR PLEADING THE ALTER EGO DOCTRINE AND ALLEGES IN ESSENCE THE UNITY OF INTEREST AND OWNERSHIP BETWEEN DEFENDANT AND THE CORPORATION AND THE PROMOTION OF INJUSTICE BY MAINTAINING THE FICTION OF A SEPARATE CORPORATE EXISTENCE.

A. Liberal Policy in Pleading Alter Ego Doctrine. Courts have followed a liberal policy of applying the alter ego doctrine when the equities and justice of the situation appear to call for it rather than restricting it to the technical niceties depending on pleading and procedure. (*First Western Bank & Trust Co. v. Bookasta (1968) 267 Cal. App. 2d 910, 915, 73 Cal. Rptr. 657*).

B. Essential Facts Required to Be Pleaded. A complaint against an individual for liability on the obligations of a corporation sufficiently pleads the elements of the alter ego doctrine if it alleges, in essence, facts showing the existence of the two requirements of the alter ego doctrine; that is, the unity of interest and ownership and the promotion of an injustice by the maintenance of the fiction of a separate corporate existence (*First Western Bank & Trust Co. v. Bookasta (1968) 267 Cal. App. 2d 910, 915, 73 Cal. Rptr. 657*).

[*Optional*] **C. Proof of Actual Fraud as Unnecessary.** Although plaintiff, in order to invoke the alter ego doctrine, must show that recognition of the fiction of separate corporate existence would foster an injustice or further a fraud, it is not necessary that he/she prove actual fraud. It is sufficient for the invocation of the alter ego doctrine that the recognition of the two entities as separate result in an injustice (*Gordon v. Aztec Brewing Co. (1949) 33 Cal. 2d 514, 522, 203 P.2d 522*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a demurrer to a complaint against an individual for liability on the obligations of a corporation when the demurrer was made on the grounds that the complaint fails to allege facts showing the presence of the two requirements necessary for the application of the alter ego doctrine; that is, the unity of interest and ownership between the defendant and the corporation and the promotion of an injustice by maintaining the fiction of a separate corporate existence.

Counsel should include argument in the form showing the relationship between the facts of the case and the points of law raised.

[3] Discussion of Authorities

[a] Liberal Policy in Pleading Alter Ego Doctrine

In ***First Western Bank & Trust Co. v. Bookasta*** *(1968) 267 Cal. App. 2d 910, 73 Cal. Rptr. 657* , plaintiff appealed from an order of dismissal following the trial court's sustaining of defendants' general demurrer to plaintiff's complaint. The complaint's first count was for damages for nonpayment of a note executed by a corporation and its second count purported to state a cause of action based on the corporation's alleged indebtedness against individual defendants on an alter ego theory of liability. The allegations in the second count alleged in substance that theindividuals dominated the affairs of the corporation, that a unity of interest and ownership existed between the individuals and the corporation, that the corporation was a mere shell and naked framework for individual manipulations, that its income was diverted to the use of the individuals, that the corporation was, in effect, inadequately capitalized, that the corporation failed to issue stock and to abide by the formalities of corporate existence, that the corporation was and had been insolvent, and that adherence to the fiction of separate corporate existence would, under the circumstances, promote injustice. The court of appeal affirmed the trial court's order in part, but reversed it with respect to the cause of action stated against the individual defendants. The court commented that it appeared that the courts had followed a liberal policy of applying the alter ego doctrine when the equities and injustice of the situation appear to call for it rather than restricting it to the technical niceties depending upon pleading and procedure. The court stated that it was essential, principally, that a

showing be made that both requirements, i.e., the unity of interest and ownership, and the promotion of injustice by the fiction of separate corporate existence, exist in a given situation. With respect to the allegations in the complaint, assuming that these facts could be proved, each of the several shareholders of the corporation, regardless of the size of their respective interests, could be held liable as principals or partners under the alter ego doctrine (*267 Cal. App. 2d 910, 915)* .

[b] Essential Facts Required to Be Pleaded

First Western Bank & Trust Co. v. Bookasta *(1968) 267 Cal. App. 2d 910, 73 Cal. Rptr. 657* is *discussed in § 52.63[3][a]*.

[c] Proof of Actual Fraud as Unnecessary

Gordon v. Aztec Brewing Co. *(1949) 33 Cal. 2d 514, 203 P.2d 522* was an action arising out of injuries to plaintiff's eye suffered when a bottle of ABC beer, a product of defendant, exploded. From a judgment on a verdict in favor of plaintiff, defendant appealed. The defendant contended, in part, that any cause of action for injuries resulting from defects in ABC beer bottles should have been brought against Aztec Brewing Company, a partnership, and not Aztec Brewing Company, a corporation. Apparently, plaintiff did not learn of the details of defendants financial structure until after the action was commenced. The evidence showed that prior to plaintiff's injury, the company had operated as a corporation, but thereafter, had transferred its structure to a partnership, continuing business as before. The corporation was not dissolved, but remained in existence to collect debts owed to it. The Supreme Court affirmed the judgment. In pertinent part, it held that the confusion which would be promoted and the injustice which would result if the two entities controlled by the same person and having an identical name were kept separate, which had the effect of frustrating plaintiff's claim, required affirmation of the trial court's determination that, as a matter of law, the corporate defendant was the alter ego of the partnership. The Court held, in addition, that it was not necessary that the plaintiff prove actual fraud since it was sufficient to show that recognition of the two entities would result in an injustice (*33 Cal. 2d 514, 522)* .

[4] Additional Authorities

[a] Essential Facts Required to be Pleaded

The court of appeal in *Las Palmas Associates v. Las Palmas Center Associates (1991) 235 Cal. App. 3d 1220, 1 Cal. Rptr. 2d 301* , affirmed the application of the alter ego doctrine to impose liability for fraud on the parent corporation of the general partner of a development limited partnership. The court noted that only a difference in wording distinguishes the application of the alter ego doctrine against a corporation instead of an individual. The requirements for piercing the corporate veil are the same: (1) that there be such unity of interest and ownership that the separate personalities of the corporations (or of the corporation and the individual) no longer exist, and (2) that if the acts are treated as those of the corporation alone, an inequitable result will follow (*235 Cal. App. 3d 1220, 1249)* . The fact that the parent had guaranteed $42 million of the subsidiary's loans strongly suggested that the subsidiary was undercapitalized for a company in the business of developing shopping centers (*235 Cal. App. 3d 1220, 1250)* . The parent argued that because the subsidiary's worth exceeded the judgment, it was not necessary to an equitable result to impose alter ego liability. The court disagreed, noting that the parent had been actively involved in the transaction from the beginning, the subsidiary's staff and operations had been substantially curtailed since the beginning of the transaction, and that it would be possible for the subsidiary to totally deplete its assets before plaintiff could realize on the judgment (*235 Cal. App. 3d 1220, 1251)* .

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B. DISREGARDING THE CORPORATE ENTITY

5-52 California Points & Authorities § 52.64

§ 52.64 Opposing Demurrer to Complaint Against Individual on Corporate Obligations--Allegation Charging Defendant With Liability Sufficient to Raise Alter Ego Doctrine on Defendant's Denial Thereof if Defendant Is Not Prejudiced Thereby

[1] FORM

[*Caption. See § 52.63.*]

WHEN AN INDIVIDUAL DEFENDANT IS CHARGED WITH LIABILITY ON A CORPORATE OBLIGATION, HIS/HER DENIAL OFLIABILITY IS SUFFICIENT TO RAISE THE ALTER EGO DOCTRINE IF DEFENDANT IS NOT PREJUDICED THEREBY.

A. Denial of Liability by Individual Defendant is Sufficient to Place Alter Ego Liability at Issue. When an individual defendant is charged with liability, his/her denial of such liability is sufficient to authorize the reception of evidence to establish liability on the principal of alter ego, even if the complaint is devoid of such an allegation, if the defendant thereafter would not be prejudiced by the introduction of evidence supporting the application of the alter ego doctrine (*Auer v. Frank (1964) 227 Cal. App. 2d 396, 403-404, 38 Cal. Rptr. 684* ; *Pan Pac. Sash & Door Co. v. Greendale Park, Inc. (1958) 166 Cal. App. 2d 652, 655-656, 333 P.2d 802*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a demurrer to a complaint against an individual for liability on the obligations of a corporation when the demurrer is made on the grounds that the complaint fails to join the corporation as a party defendant and otherwise fails to state a cause of action against the corporation.

Counsel should include argument in the form showing the relationship between the facts of the case and the points of law raised.

It should be noted that in *Los Angeles Cemetery Ass'n v. Superior Court (1968) 268 Cal. App. 2d 492, 74 Cal. Rptr. 97* , the court stated that it was the law of California that the alter ego issue may be raised by a simple allegation that the defendant sought to be charged had made the contract involved. However, an examination of the case shows that plaintiff was able to submit evidence on the alter ego issue when it had not stated a cause of action against the corporation only when the appellate court had, in fact, made the additional finding that the defendant was not prejudiced by the introduction of such evidence [*see § 52.64[3*][a], [4][a]; *see also Design Associates, Inc. v. Welch (1964) 224 Cal. App. 2d 165, 36 Cal. Rptr. 341* (alter ego issue not permitted to be raised when corporation not joined as defendant and no cause of action stated against it)].

[3] Discussion of Authorities

[a] Denial of Liability by Individual Defendant is Sufficient to Place Alter Ego Liability at Issue

Auer v. Frank *(1964) 227 Cal. App. 2d 396, 38 Cal. Rptr. 684* was an appeal by plaintiff from a judgment in favor of an individual defendant who was sought to be held responsible for obligations incurred by the corporate defendant on a contract for the construction of dwelling houses. Plaintiff contended that the trial court failed to find on the material issue of alter ego, while the defendants urged on appeal that the pleadings in the case raised no issue of fact involving the alter ego doctrine and that, therefore, no findings were necessary. Although the court of appeal affirmed the trial court, holding that the trial court did make a finding on the alter ego issue, it also held that the application of the alter ego doctrine was an issue in the case. The court noted that although there appeared to be some authority to the effect that the alter ego doctrine must be pleaded in the complaint, there was also authority that when and individual defendant is charged with liability, his or her denial is sufficient to establish liability on the principle of alter ego (i.e., to support the introduction of evidence and a finding on that issue) even though the complaint was devoid of such an allegation. This was the situation presented by the circumstances of this case. Not only did the defendants deny liability, but they affirmatively asserted in their brief before the appellate court that the liability sought to be established was not that of defendants, as individuals, but that of the corporation.

There may be two limitations on the application of the rule stated by the court. One is that the court noted one authority relied on by the court to be an action on a common count, as was the case before the court, and that under the common count pleading the courts have permitted evidence of fraud, unjust enrichment, and secret profits. A second limitation is that the parties and the trial court proceeded throughout the trial on the theory that the alter ego issue was presented for adjudication. The court held that, regardless of plaintiff's pleadings, the doctrine of estoppel precluded either party from thereafter asserting that no such issue was in controversy (*227 Cal. App. 2d 396, 403-404)* .

Pan Pac. Sash & Door Co. v. Greendale Park, Inc. *(1958) 166 Cal. App. 2d 652, 333 P.2d 802* , presented the same issue on appeal as that raised by defendants in *Auer v. Frank, above.* The defendants had appealed from a judgment in favor of plaintiff. The cause of action pleaded by plaintiff against individual and corporate defendants was in the form of a common court for goods, wares, and merchandise sold and delivered to defendants. One individual defendant denied liability in his answer. At a pretrial hearing, plaintiff stated that it would contend that the owners of the stock in the two corporate defendants were the same or substantially the same,so that one corporation was the alter ego of the other. In response, counsel for defendant contended that the complaint did not set forth facts sufficient to constitute a cause of action based on the alter ego principal. At the trial following the opening statement of plaintiff, defendants' counsel stated that he would object to all evidence on the alter ego issues, and did thereafter object to all evidence

tending to establish the application of the doctrine. The trial court overruled these objections and at the conclusion of trial found for plaintiff. In affirming the trial court's judgment, the court of appeal noted that, although it was true that the complaint was devoid of any allegation on the alter ego doctrine, it was the established doctrine in California that when a defendant was charged with liability his or her denial thereof was sufficient to authorize the reception of evidence to establish liability under the principle of alter ego, or, at least under circumstances that were present before the court, the reception of that evidence did not constitute reversible error. The court found authority in *Gordon v. Aztec Brewing Co. (1949) 33 Cal. 2d 514, 203 P.2d 522* , in which, although the alter ego issue was not pleaded in plaintiff's complaint, the defendant's answer denied that it was engaged in the business alleged in plaintiff's complaint. This answer was held sufficient to cure any defects that the complaint may have contained. Likewise, here the defendants were appraised well in advance of the trial that the plaintiff intended to rely on the doctrine of alter ego; that, in fact, both corporations were parties to the action and were represented by the same counsel; and finally, that the officers and principal stockholders of both corporations who were in possession of all of the facts relative to the creation of both corporations and their relations and transactions with each other had testified in the trial. Under these circumstances it could not be said that the defendants were misled to their prejudice by any variance between the pleading and the proof (*166 Cal. App. 2d 652, 655-656)* .

[4] Additional Authorities

[a] Denial of Liability by Individual Defendant is Sufficient to Place Alter Ego Liability at Issue

In *Los Angeles Cemetery Ass'n v. Superior Court (1968) 268 Cal. App. 2d 492, 74 Cal. Rptr. 97* , petitioner filed suit against the seller of a certain piece of real estate and against Thriftimart, Inc., alleging that the seller and Thriftimart had made fraudulent representations to petitioner as to the seller's financial status. Subsequently, petitioner attempted to amend his complaint to state a count against Thriftimart on the basis that it was the alter ego of the seller. A demurrer to this cause of action was sustained with leave to amend. The time within which petitioner could amend his complaint had not expired when it served Thriftimart interrogatories seeking information on its alter ego theory. On the trial court's granting of Thriftimart's motion for a protective order against the interrogatories, the petitioner sought a writ to compel the answers. In granting the writ, the court of appeal noted that: (1) the order permitting petitioner to amend meant that the alter ego issue was still involved in the case; and (2) while it was the better practice to allege facts on which a plaintiff sought to hold a defendant on an alter ego theory, it was still the law of California that that issue may be raised by a simple allegation that the defendant sought to be charged had made the contract involved. The court held that, since petitioner could have sought discovery on the basis of such a conclusory but permissible allegation, it was an abuse of the trial court's discretion to deny it the opportunity to obtain information relevant to its theory when petitioner desired to utilize a form of pleading more informative to the real party in interest (*268 Cal. App. 2d 492, 493-494)* .

California Points & Authorities

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Volume 5 Chapters 50-59 CONTRACTS---to---CORPORATIONS
CHAPTER 52 CORPORATIONS
PART II. FORMS
B. DISREGARDING THE CORPORATE ENTITY

5-52 California Points & Authorities § 52.65

§ 52.65 Opposing Motion to Amend Judgment on Grounds That Individual Was Alter Ego of Corporate Defendant--Insufficient Showing to Bind Individual to Judgment

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM IN OPPOSITION TO MOTION
_____ [*name*], Plaintiff,	)	TO AMEND JUDGMENT
vs.	)	Date: _____
_____ [*name*], a Corporation,	)	Time: _____
Defendant.	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THE MOTION TO AMEND THE JUDGMENT TO INCLUDE AS A JUDGMENT DEBTOR AN INDIVIDUAL WHO IS ALLEGED TO BE THE ALTER EGO OF A CORPORATE DEFENDANT SHOULD BE DENIED WHEN PLAINTIFF MAKES AN INSUFFICIENT SHOWING OF THE PRESENCE OF THE ELEMENTS OF THE ALTER EGO DOCTRINE.

A. Required Showing. In order to cast aside the legal fiction of distinct corporate existence as distinguished from those who own its capital stock, it is not enough that the corporation is so organized and controlled and its affairs so managed as to make it merely an instrumentality, conduit, or adjunct of its stockholders, but it must further appear that they are the business conduits and alter ego of one another, and that to recognize their separate entities would aid the

consummation of a wrong (*Erkenbrecher v. Grant (1921) 187 Cal. 7, 11* ; *Katzir's Floor and Home Design, Inc. v. M-MLS.com (9th Cir. 2004) 394 F.3d 1143, 1149-1150)* .

B. Question of Fact. The presence of any one of the factors that cases have considered pertinent to the court's determination does not require, as a matter of law, the invoking of the alter ego doctrine since the determination of whether the requirements which must be found to exist before the corporate existence will be disregarded is a question of fact and not one of law (*Arnold v. Browne (1972) 27 Cal. App. 3d 386, 394-396, 103 Cal. Rptr. 775* , *disapproved in part on other grounds* in *Reynolds Metal Co. v. Alperson (1979) 25 Cal. 3d 124, 129, 158 Cal. Rptr. 1, 599 P.2d 83*).

[*Optional*] **C. Inadequacy of Capitalization.** Standing alone, the inadequacy of the capitalization of an enterprise is insufficient to invoke the doctrine of alter ego and render the shareholders of the corporation liable for the debts of the corporation (*Harris v. Curtis (1970) 8 Cal. App. 3d 837, 841-843, 87 Cal. Rptr. 614*).

[*Optional*] **D. Mere Existence of Unsatisfied Creditor Is Insufficient Showing.** It is not sufficient to show merely that a creditor will remain unsatisfied if the corporate veil is not pierced, since the purpose of the doctrine is not to protect every unsatisfied creditor, but rather to afford the creditor protection, when some conduct amounting to bad faith makes it inequitable for the equitable owner of a corporation to hide behind its corporate veil (*Arnold v. Browne (1972) 27 Cal. App. 3d 386, 397, 103 Cal. Rptr. 775*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion to amend a judgment rendered against a corporation to include as a judgment debtor the name of an individual who was the alter ego of the corporation when the plaintiff has made an insufficient showing of the presence of the elements of the alter ego doctrine.

When appropriate, counsel should include argument in the forms showing the relationship between the facts of the case and the points of law raised.

[3] Discussion of Authorities

[a] Required Showing

In ***Erkenbrecher v. Grant*** *(1921) 187 Cal. 7, 200 P. 641* , plaintiff sued on a note which was assigned to it by a corporation wholly owned by plaintiff. Plaintiff controlled the corporation by dictating the management and affairs of the company. In addition, plaintiff had advanced to the corporation the sums with which the corporation paid for the subject notes and which plaintiff had previously guaranteed. In effect, plaintiff had made use of the corporation for the purpose of conducting his business for his own personal convenience. Defendant contended that the cause of action was barred by the statute of limitations since the company's payment for the notes amounted to payment by plaintiff as a joint obligor on the notes (*187 Cal. 7, 9)* . The trial court agreed and found for defendant. On appeal by plaintiff, the Supreme Court reversed. The Court held that since the facts did not warrant the application of the alter ego doctrine, plaintiff was not a joint obligor on the note and, thus, was not barred by the statute of limitations. The Court made the

statement set forth in Paragraph A of this form (*187 Cal. 7, 11)* and held that defendant had made no showing that plaintiff's relationship with his company was in any manner fraudulent or prompted by dishonesty, or that the company, in purchasing the notes, committed or intended to commit any fraud whatsoever. In this respect, the Court considered that the personal advancement of the sums with which the corporation purchased the notes and which thereafter were assigned to plaintiff was consistent with honesty and fair dealing (*187 Cal. 7, 10-11)* .

In ***Katzir's Floor and Home Design, Inc. v. M-MLS.com*** *(9th Cir. 2004) 394 F.3d 1143* , a corporation wholly owned by the individual appellant sold a used machine to plaintiff, who ultimately brought a state court action that was removed to federal court on the basis of diversity. A default judgment against the corporation was entered. The corporation's assets were sold to another corporation owned by appellant's wife. Plaintiff moved to modify the federal court default judgment to reflect the true names of the debtors by adding the individual and his new corporation, which was using the first corporation's website. The district court granted the motion on the bases that the individual was the alter ego of the first corporation, and that the second corporation was the successor corporation of the first corporation. The court of appeal found that *Code Civ. Proc. § 187*, allowing amendment of a judgment to add judgment debtors, requires that the new party be the alter ego of the old party, and that--in order to satisfy due process requirements--the new party had controlled the litigation. On the first issue, the court held that the district court clearly erred in finding the individual to be the alter ego of the corporation solely by the fact of control. It noted that the alter ego doctrine is a limited doctrine that is only invoked when recognition of the corporate form would work an injustice to a third person. Certain critical facts are needed to establish that it would be inequitable to respect separate corporate identities. The district court made none of those critical findings before determining that the individual was an alter ego (*394 F.3d 1143, 1149)* . For this reason, the court reversed the district court's order adding the appellants to the judgment against the first corporation (*394 F.3d 1143, 1152)* .

[b] Question of Fact

In ***Arnold v. Browne*** *(1972) 27 Cal. App. 3d 386, 103 Cal. Rptr. 775* (disapproved in part on other grounds in *Reynolds Metal Co. v. Alperson (1979) 25 Cal. 3d 124, 129, 158 Cal. Rptr. 1, 599 P.2d 83*), the plaintiffs appealed from that portion of the judgment denying recovery in their action for breach of a stock purchase and sale of assets agreement against individual defendants whose liability was predicated on the alter ego doctrine. In this agreement, the parties agreed that defendant's obligations could be assigned to a corporation yet to be formed. After execution of the agreement, the obligations were assigned and, thereafter, the corporation defaulted. The corporation had obtained permission to issue stock and capitalized itself in the sum of $50,000. The individual defendants made themselves directors and officers of the corporation, and, as agents of the corporation, executed a security agreement, guaranteeing payment of the obligations owed to plaintiffs, and a pledge agreement whereby the corporation pledged all of the shares acquired as security for the performance under the promissory note (*27 Cal. App. 3d 386, 389-392)* . In affirming the trial court, the court of appeal held that there was substantial evidence to support the trial court's judgment. The court stated that the gist of the cases which have considered the alter ego doctrine is that the determination of the presence of requirements which must be found to exist before the corporate existence will be disregarded, is primarily one for the trial court and is not a question of law and that the conclusion of the trier of fact will not be disturbed if it is supported by substantial evidence. The court found that there was ample evidence to support the inferences drawn by the trial court that there was not such a unity of interest between the corporation and the individual defendants as to destroy the individuality of the corporation (*27 Cal. App. 3d 386, 389-392)* . In this respect, the court noted the additional fact that the agreement reached by plaintiffs and defendants was part of a standard promoters' agreement, the intent and consequences of which were known and understood by all of the parties, who were all represented by legal counsel. In addition, the court noted, in response to the plaintiffs' contention that the corporation was undercapitalized, that, in order to justify such a finding, it is not sufficient to show merely that a creditor will remain unsatisfied if the corporate veil is not pierced, and thus set up such an unhappy circumstance as proof of an inequitable result, since, in almost every instance in which a plaintiffhas attempted to invoke the doctrine, the plaintiff is an unsatisfied creditor. The court stated that the purpose of the doctrine is not to protect every unsatisfied creditor, but rather, to afford him or her protection, when some conduct amounting to bad faith makes it inequitable for the equitable owner to hide behind the corporate

veil (*27 Cal. App. 3d 386, 397)* .

[c] Inadequacy of Capitalization

Harris v. Curtis *(1970) 8 Cal. App. 3d 837, 87 Cal. Rptr. 614* was an action against a corporation and the individual shareholders of that corporation for sums advanced to the corporation. The complaint alleged that the corporation was a mere shell and naked framework which the individual defendants used for the conduct of their personal affairs and that, in effect, it was the alter ego of the individual defendants. Judgment was entered against the corporation, but in favor of the individual defendants. Plaintiff appealed, and the court of appeal affirmed (*8 Cal. App. 3d 837, 841)* . The principal question on appeal was whether or not lack of capital contribution to the corporation was sufficient to make the individual shareholders liable. The court noted that although there was no question that the corporation in this case was underfinanced, it was common knowledge that many such corporations had been highly successful, that others had prospered, but without such success, and that still others had failed because of inadequate capitalization. The court stated, however, that this was part of the free enterprise system, and, that as a result, it would not declare that inadequate capitalization, per se, renders the shareholders, officers, and directors liable for the obligations of the corporation. Rather, undercapitalization was a factor to be considered along with all other facts present in the case in determining whether individuals were the alter ego of a corporation (*8 Cal. App. 3d 837, 841-843)* .

[d] Mere Existence of Unsatisfied Creditor Is Insufficient Showing

Arnold v. Browne *(1972) 27 Cal. App. 3d 386, 103 Cal. Rptr. 775* is *discussed in § 52.65[3][b]*.

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§ 52.66

Opposing Motion to Amend Judgment on Grounds That Individual Was Alter Ego of Corporate Defendant--Plaintiff Estopped to Deny Corporate Existence

[1] FORM

[*Caption. See § 52.65.*]

A PLAINTIFF IS ESTOPPED TO DENY A CORPORATION'S EXISTENCE WHERE HE/SHE _____ [ACTED AS A CORPORATE OFFICER *or* WAS FAMILIAR WITH INDIVIDUAL SHAREHOLDER'S RELATIONSHIP TO CORPORATION] AND DEALT WITH THE CORPORATION'S BUSINESS AS BEING THAT OF THE CORPORATION.

[***EITHER***]

A. Estoppel of Plaintiff to Deny Corporate Existence. Where a plaintiff seeking to hold an individual liable for a corporation's debts on the grounds that that individual was the corporation's alter ego has in his/her relationship with the corporation acted as its officer and dealt with the business of the corporation as being that of the corporation and not that of the individual, he/she is estopped to deny that there was an effective corporate existence (*Granoff v. Yackle (1961) 196 Cal. App. 2d 253, 256, 16 Cal. Rptr. 394*).

[***OR***]

A. Knowledge of Shareholder's Relationship With Corporation. A plaintiff who had knowledge concerning a shareholder's relationship with a corporation, but who chose or consented to deal with the shareholder only as an officer of the corporation, cannot complain that that shareholder should be held personally liable for the debts of the corporation (*Lynch v. McDonald (1909) 155 Cal. 704, 706, 102 P. 918*).

Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a plaintiff's motion to amend a judgment rendered against a corporation so as to include a judgment debtor the name of an individual who was the alter ego of the corporation where the plaintiff is estopped to deny the corporation's separate existence, having knowledge of the corporate framework and having dealt with the corporation's business as that of the corporation.

When appropriate, counsel should include argument in this form showing the relationship between the facts of the case and the points of law raised.

[b] Related Pleading and Practice Forms

For a form of affirmative defense to a complaint against a corporation and its controlling shareholder on a corporate obligation alleging the plaintiff's knowledge of facts regarding the relationship between the shareholder as alter ego and the corporation, see California Forms of Pleading and Practice, Ch. 160, *Corporations* (Matthew Bender).

[3] Discussion of Authorities

[a] Estoppel of Plaintiff to Deny Corporate Existence

Granoff v. Yackle *(1961) 196 Cal. App. 2d 253, 16 Cal. Rptr. 394* was an action for the recovery of certain sums of money representing accounts receivable, which defendants, as officers of a corporation, were to pay to plaintiff in repayment of a loan plaintiff made to the corporation. At a pretrial conference, the trial court issued an order in which, in pertinent part, the issue in dispute was stated to be whether there was, in fact, a corporation. Evidently, as part of his theory of recovery, plaintiff was alleging that the officers were personally liable for the loan. Evidence produced at trial showed that plaintiff was made secretary-treasurer of the corporation in order that he could more properly supervise the repayment of his loan. In his capacity as secretary-treasurer, plaintiff had filed the corporation's tax return and had also learned that one officer had taken money for a job which had been performed for a customer, but had not turned the money in. The trial court, after a trial on the merits, found for the defendants, and the plaintiff appealed. The trial court reversed on the ground that defendants were personally liable to plaintiff for monies they had converted to their personal use. However, the court found no merit in plaintiff's contention that the evidence was of such a nature to require that the corporate entity be disregarded and liability be placed on the individual defendants for that reason. The court noted that throughout most of his relationship with the corporation, the plaintiff acted as an officer of the corporation and that he dealt with the business as being that of the corporation and not that of the officers of the corporation as individuals. Accordingly, the court concluded that the trial court's refusal to disregard the corporate entity was justified inasmuch as there was substantial support in the evidence for a determination that the plaintiff was estopped to deny that there was an effective corporate existence.

[b] Knowledge of Shareholder's Relationship With Corporation

Lynch v. McDonald *(1909) 155 Cal. 704, 102 P. 918* was an action by plaintiff for services rendered as an attorney to

defendant corporation. The plaintiff appealed from that portion of the judgment which dismissed the complaint as to McDonald, an individual defendant who was president of the corporation and owned nearly all of its capital stock. Plaintiff contended on appeal that McDonald dominated the corporation, that it was his alter ego, and that, therefore, its acts were McDonald's. The Supreme Court, however, affirmed the judgment. The Court noted that, if the action were one by a stranger to the corporation, then there was evidence to support the application of the alter ego principle. However, plaintiff was not just the corporation's attorney, but one who, by years of association with McDonald and service for him and the company, was thoroughly familiar with all the facts concerning the president's relation with the corporation. Even though there was evidence that McDonald deceived plaintiff concerning the profits of the corporation, this did not affect the fact that plaintiff was aware of McDonald's relationship with the corporation. Therefore, the Court held that if plaintiff was content to act under a contract with McDonald which McDonald refused to sign except as an officer of the corporation, plaintiff could not now complain that McDonald, who was not a party signatory to the instrument, was not bound.

[4] Additional Authorities

[a] Estoppel of Plaintiff to Deny Corporate Existence

Wynn v. Treasure Co. (1956) 146 Cal. App. 2d 69, 303 P.2d 1067 was an appeal from a judgment in favor of plaintiff by defendant Treasure, a corporation, and defendant de Bretteville, the sole shareholder and president of Treasure. The trial court had found that de Bretteville was the alter ego of Treasure and that Treasure's duty to account to plaintiff for the royalties from an oil well drilling operation was also the duty of de Bretteville. Plaintiff had been employed by Treasure, was its officer and director, assisted in the promotion of operating capital for the corporation, obtained leases for it, participated in the negotiation for the contract for funds tocomplete the drilling of the oil, the royalties from which was the subject of plaintiff's suit, and regularly represented Treasure in its various corporate enterprises. In reversing the trial court with respect to the trial court's finding that de Bretteville was the alter ego of Treasure, the court stated that, on the facts, plaintiff was estopped to deny the corporate existence of Treasure. The court stated, quoting 13 Am Jur 207, § 203, that it is the general rule that one who deals with an apparent corporation as such and in such a manner as to recognize its corporate existence, de jure or de facto, is thereby estopped to deny the fact thus admitted. This rule may be applied in actions brought by either of the contracting parties against the other, and in actions by the person dealing with the corporation, wherein the existence of the corporation is assailed for the purpose of establishing individual partnership liability on the part of its members. The court found that, having been an officer and director of the corporation, having acted on its behalf as a corporation, having treated it as a separate and distinct entity at all times prior to this action, and, in addition, having previously sued it in another case in which plaintiff alleged the corporate existence of Treasure without any claim that it s the alter ego of any individual, plaintiff could not now deny Treasure's corporate existence and contend it was the alter ego of de Bretteville.

Bellerue v. Business Files, Inst., Inc. (1963) 215 Cal. App. 2d 383, 30 Cal. Rptr. 232 was an action commenced against BFI, a corporation, on certain promissory notes it had executed and delivered and against two individual defendants and CMC, a second corporation, on the theory that each of the latter was the alter ego of BFI in the transaction wherein the notes were given. The two individual defendants, Hilliard and Hedden, had formed CMC for the purpose of seeking prospects for profitable investments in various business activities. One of these activities led to the formation of BFI. Although Hilliard and Hedden had expended considerable sums in contributions to the operation of BFI, it had become clear after a period of time that more capital was needed. To accomplish this, Hilliard and Hedden brought in other investors, one of whom was plaintiff who invested in BFI in the same manner as Hilliard had contributed his capital to BFI; that is, by making loans to BFI in return for which he was issued shares of stock in BFI. Plaintiff was thereafter elected to the board of directors. At board meetings, plaintiff had become aware, or at least was put on notice, of BFI's large indebtedness to CMC. Eventually, BFI failed. Subsequently, plaintiff commenced an action to rescind his agreement and for damages for fraud. The trial court in that action had found for defendants on the basis that plaintiff was well aware of the financial structure of BFI. Plaintiff's appeal in that action was pending when he commenced this action. The trial court gave judgment for plaintiff and defendants appealed. The court of appeal

reversed as to all defendants except BFI. The court stated in the pertinent portion of its opinion that, although conceivable, a stranger to a corporation might unsuccessfully prosecute an action against a corporation and its officers and directors seeking to rescind a loan agreement made with it on the theory that he or she had been defrauded, and, after that unsuccessful action, then brig suit on the notes themselves and seek to pierce the corporate veil, one such as plaintiff who had been found to have been a director of the corporation, and who actively engaged in its activities with full knowledge of its financial condition, should not be permitted to proceed in this fashion. In other words, one who unsuccessfully has sought to recover from his or her associates what he or she concedes to have been an investment in a joint venture, on the theory that they have taken unfair advantage of him or her, should not be heard thereafter to assert that he or she was no more tn an ordinary creditor and otherwise a stranger to the transaction (*215 Cal. App. 2d 383, 398-399)* .

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§ 52.67 Opposing Motion to Amend Judgment on Grounds That Individual Was Alter Ego of Corporate Defendant--Failure to Observe Corporate Formalities Pursuant to Shareholders' Agreement Is Not a Basis for Imposition of Alter Ego Doctrine [Corp. Code § 300(e)]

[1] FORM

[*Caption. See § 52.65.*]

THE FAILURE TO OBSERVE CORPORATE FORMALITIES IN A CLOSE CORPORATION PURSUANT TO A SHAREHOLDER'S AGREEMENT UNDER CORPORATIONS CODE SECTION 300(b) MAY NOT BE CONSIDERED AS A FACTOR IN ESTABLISHING THE PERSONAL LIABILITY OF A SHAREHOLDER FOR A CORPORATE OBLIGATION.

A. "Close Corporation" Defined. "Close corporation" means a corporation organized under the General Corporation Law, the articles of which contain, in addition to the provisions required by *Corporations Code Section 202*, a provision that all of the corporation's issued shares of all classes shall be held of record by not more than a specified number of persons, not exceeding 35, and a statement "This corporation is a close corporation" (*Corp. Code § 158(a)*).

B. Informalities in Conduct of Close Corporation's Affairs. The failure of a close corporation, pursuant to a shareholders' agreement authorized by *Corporations Code Section 300(b)*, to observe corporate formalities relating to meetings of directors or shareholders in connection with the management of any phase of the corporation'saffairs, may not be considered a factor tending to establish that the shareholders have personal liability for corporate obligations (*Corp. Code §§ 300(b), (e)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion to amend a judgment rendered against a corporation so as to include as a judgment debtor the name of an individual who was the alter ego of the corporation when the motion is based on the failure of the corporation to observe the corporate formalities relating to meetings of directors or shareholders.

Counsel should include argument in the form showing the relationship between the facts of the case and the points of law raised.

[3] Discussion of Authorities

[a] Informalities in Conduct of Close Corporation's Affairs

Corp. Code § 300(b) , relating to a shareholder's agreement referred to in *Corp. Code § 300(e)*, provides that, notwithstanding *Corp. Code § 300(a)* (management and exercise of corporate powers by board of directors) or any other provision of the General Corporation Law, but subject to *Corp. Code § 300(c), below*, no shareholder's agreement, which relates to any phase of the affairs of a close corporation, including, but not limited to management of its business, division of its profits, or distribution of its assets on liquidation, is invalid as between the parties thereto on the ground that it so relates to the conduct of the affairs of the corporation as to interfere with the discretion of the board or that it is an attempt either to treat the corporation as if it were a partnership or to arrange their relationships in a manner which would be appropriate only between partners.

A shareholder's agreement made pursuant to *Corp. Code § 300(b)* terminates when the corporation ceases to be a close corporation, except that, if the agreement so provides, it may continue to the extent it is enforceable apart from *Corp. Code § 300(b)* [*Corp. Code § 300(b)*].

Corp. Code § 300(c) provides that no agreement entered into pursuant to *Corp. Code § 300(b)* may alter or waive any of the provisions of *Corp. Code §§ 158* (close corporations defined), 417, 418 (contents of share certificates), 500 and 501 (when corporate distributions may be made), 1111 (mergers of close corporations), 1201(e) (reorganizations of close corporations), 1500-1508 (records and reports), 1600-1605 (rights of inspection), 1800-1809 (involuntary dissolution), 2009, 2010, and 2011 (actions by corporations in process of winding up and by shareholders and creditors of corporation), and 2200-2260 (crimes and penalties. All other provisions of the General Corporation Law may be waived or altered as between the parties in a shareholders' agreement, except the required filing of any document with the Secretary of State [*Corp. Code § 300(e)*].

To the extent that, and as long, as the direction or powers of the board in its management of corporate affairs is controlled by a shareholders' agreement under *Corp. Code § 300(b)*, such an agreement imposes on each shareholder who is a party thereto liability for managerial acts performed or omitted by that person pursuant thereto which is otherwise imposed by the General Corporation Law on directors, and the directors are relieved, to that extent, from liability.

The precise extent of the relaxation of the alter ego doctrine provided for in *Corp. Code § 300(e)*, set forth in Paragraph B of the *above* form, is unclear. Although it has been stated that the language of *Corp. Code § 300(e)* should be interpreted to mean that in effect, it eliminates from those practices commonly found in cases to satisfy the alter ego doctrine the practice of the informality in the conduct of corporate affairs caused by the failure to hold meetings of the board of directors and shareholders [*see* Note, "Separate Statutory Treatment of the Close Corporation in California: Progress and Problems," *27 Hastings L.J. 433, 471 (1973)*], it would appear that *Corp. Code § 300(e)* is limited in its

application only to instances in which a shareholder conducted himself or herself in accordance with a shareholder's agreement under *Corp. Code § 300(b)*. In such a situation, under *Corp. Code § 300(e)*, the shareholder would not, by reason of that conduct, be held accountable for the debts incurred by the corporation.

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CHAPTER 52 CORPORATIONS
PART II. FORMS
B. DISREGARDING THE CORPORATE ENTITY

5-52 California Points & Authorities § 52.68

§ 52.68 Opposing Motion to Amend Judgment on Grounds That Individual Was Alter Ego of Corporate Defendant--Greater Inequity Resulting From Imposition of Alter Ego Doctrine

[1] FORM

[*Caption. See § 52.65.*]

THE ALTER EGO DOCTRINE MAY NOT BE INVOKED IF A GREATER INEQUITY AND INJUSTICE WOULD RESULT FROM ITS IMPOSITION.

A. Alter Ego Doctrine Inapplicable if Greater Inequity Results. The corporate veil may not be pierced under the alter ego doctrine if to do so would accomplish a greater inequity and injustice than would result if the separate entity of the corporation were maintained (*Bellerue v. Business Files Institute, Inc. (1963) 215 Cal. App. 2d 383, 399, 30 Cal. Rptr. 232*).

[*Optional*] **B. Obligation Inflicted on Innocent Corporation or Minority Shareholders.** The doctrine of disregarding the corporate entity may not be used to inflict an obligation on an innocent corporation or its minority shareholders since the purpose of the doctrine is to prevent fraud (*American Home Ins. Co. v. Travelers Indemnity Co. (1981) 122 Cal. App. 3d 951, 966-967, 175 Cal. Rptr. 826* ; *Meyer v. Glenmoor Homes, Inc. (1966) 246 Cal. App. 2d 242, 260-261, 54 Cal. Rptr. 786, 55 Cal. Rptr. 502*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a plaintiff's motion to amend a judgment rendered against a corporation so as to include as a judgment debtor the name of an individual who was the alter ego of the corporation if granting the motion would result in a greater inequity than would result from maintaining recognition of the separate corporate existence. The foregoing points and authorities amplify the second of the two general requirements for imposition of alter ego liability *set forth in § 52.62*, Paragraph D. The points and *authorities in § 52.70* address another aspect of the equitable element, namely due diligence. Counsel may wish to combine the points and authorities in this form with those in § 52.62 setting forth the two general requirements or with those in § 52.70 relating to a lack of diligence.

Counsel should include argument in the foregoing form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should describe the inequitable ramifications likely to result by imposition of alter ego liability.

[3] Discussion of Authorities

[a] Alter Ego Doctrine Inapplicable if Greater Inequity Results

Bellerue v. Business Files, Inst., Inc. *(1963) 215 Cal. App. 2d 383, 30 Cal. Rptr. 232* was an action commenced against BFI, a corporation, on certain promissory notes it had executed and delivered and against two individual defendants and CMC, a second corporation, on the theory that each of the latter was the alter ego of BFI in the transaction in which the notes were given. The two individual defendants, Hilliard and Hedden, had formed CMC for the purpose of seeking prospects for profitable investments in various business activities. One of these activities led to the formation of BFI. Although Hilliard and Hedden had expended considerable sums in contributions to the operation of BFI, it had become clear after a period of time that more capital was needed. To accomplish this, Hilliard and Hedden brought in other investors, one of whom was plaintiff who invested in BFI in the same manner as Hilliard had contributed his capital to BFI. Plaintiff made loans to BFI in return for which he was issued shares of stock in BFI. Plaintiff was thereafter elected to the board of directors. At board meetings, plaintiff was aware, or at least was put on notice, of BFI's large indebtedness to CMC. Eventually, BFI failed. Subsequently, plaintiff commenced an action to rescind his agreement and for damages for fraud. The trial court in that action found for defendants on the basis that plaintiff was well aware of the financial structure of BFI. In this action, however, plaintiff recovered judgment in the trial court and the defendants appealed.

The court of appeal reversed as to all defendants except BFI. The trial court apparently based its finding of the alter ego liability of defendants Hilliard and Hedden on the basis that BFI was undercapitalized. The court found that the trial court's finding was not supported by the evidence produced at the trial. Moreover, the court noted that, because plaintiff knew that defendant Hilliard had invested in the venture in the same fashion as plaintiff himself had done, it was difficult to see how the corporationwas any more the alter ego of one than of the other. Justice would not be served by requiring Hilliard to bear plaintiff's loss in addition to his own individual loss which was more than three times that of plaintiff's (*215 Cal. App. 2d 383, 399)* . The court stated, in this regard, that the corporate veil may at times be pierced to do equity and justice, but never to accomplish the reverse (*215 Cal. App. 2d 383, 399)* .

[b] Obligation Inflicted on Innocent Corporation or Minority Shareholders

In ***American Home Ins. Co. v. Travelers Indemnity Co.*** *(1981) 122 Cal. App. 3d 951, 175 Cal. Rptr. 826* , plaintiff liability insurer sought reformation of a processing agreement executed between an automobile maintenance company and a Toyota distributor for whom the maintenance company provided services. Pursuant to the agreement, the distributor was named as an additional insured under an insurance contract between the maintenance company and defendant insurer. Plaintiff sought to modify the processing agreement to include its own assured, a sales division

related to the distributor, as an additional insured under defendant's policy on grounds that the distributor, which was wholly owned by the sales division and which had identical officers and directors, was the alter ego of the sales division and had therefore entered into the processing agreement on the sales division's behalf.

The trial court sustained defendant's demurrer to the complaint, and the court of appeal affirmed. The case was largely decided on the basis of the plaintiff's lack of standing to sue, but the court also discussed the alter ego doctrine's application to the facts. That doctrine, stated the court, is invoked to prevent fraud or inequity, and in the absence of such factors, may not be utilized to prejudice an innocent third party who has dealt with a corporation. The doctrine cannot be applied merely to eliminate the consequences of corporate operations. Defendant had not been a party to any inequitable conduct; it had merely provided insurance coverage pursuant to the agreement between the distributor and the maintenance company, and neither of those parties had manifested any intent to include the sales division as an additional insured under defendant's policy. Even if the facts of the relationship between the distributor and the sales division supported a finding of alter ego, equitable considerations prevented application of the doctrine to create an obligation on the part of the innocent insurer (*122 Cal. App. 3d 951, 966-967)* .

Meyer v. Glenmoor Homes, Inc. *(1966) 246 Cal. App. 2d 242, 54 Cal. Rptr. 786, 55 Cal. Rptr. 502* , involved an action against a corporation on a note signed under the corporate name by plaintiff's deceased husband, the president of the corporation. Shortly before the execution of the note, three associates, who were shareholders of defendant, and among whom was plaintiff's deceased husband, desired permanent financing for an apartment in order to pay off a loan used for the construction of the property and, thus, to hold the property as a long-term investment. In order to do this, the property had to be conveyed from a subsidiary of defendant to the three associates as partners. A second deed required to complete this transaction was signed by the associates' spouses. Plaintiff testified that she did not sign the deed until the corporation had given her the note sued on representing her interest in the corporation. The fact that this note was signed and delivered, however, was not discovered by the remaining officers, directors, and stockholders of defendant until after the death of plaintiff's husband. A judgment for plaintiff was rendered at the trial level, entered on a jury verdict, and the defendant appealed.

In reversing the trial court, the court of appeal held, in pertinent part, that the execution of the note was never authorized or ratified by the defendant and that the corporation had never received any consideration for the note. The plaintiff contended that the defendant bargained for the detriment that she suffered by arguing that, by obtaining plaintiff's signature, the three associates obtained the needed financing for the conveyance of the apartment, and that this was a consideration that would support the note from the defendant on the basis that it was the alter ego of the associates. However, the court found that the evidence affirmatively showed that the interests in the partnership and the corporation were different, and that, moreover, since the purpose of the doctrine of disregarding the corporate entity was to prevent fraud, it could not be used to inflict an obligation on an innocent corporation or its minority shareholders (*246 Cal. App. 2d 242, 260-261)* .

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5-52 California Points & Authorities § 52.69

§ 52.69 Opposing Motion to Amend Judgment on Grounds That Individual Was Alter Ego of Corporate Defendant--Judgment Not Binding on Individual Who Was Not Party to and Had No Control of Action

[1] FORM

[*Caption. See § 52.65.*]

A JUDGMENT ENTERED AGAINST A CORPORATION DOES NOT BIND AN INDIVIDUAL ALLEGED TO BE THE CORPORATION'S ALTER EGO IF THAT INDIVIDUAL IS NOT A PARTY TO THE ACTION AGAINST THE CORPORATION AND DID NOT HAVE CONTROL OF THE LITIGATION.

A. Requirements for Binding Individual to Judgment. An individual who is sought to be held personally liable on a judgment rendered against a corporation cannot be held so liable without an opportunity to relitigate the issues of the corporation's liability ifthat individual (1) is not a party to the action against the corporation and (2) did not participate in the control of the action and was unable to determine whether or not an appeal should be taken from the adverse judgment against the corporation (*Minton v. Cavaney (1961) 56 Cal. 2d 576, 581, 15 Cal. Rptr. 641, 364 P.2d 473* ; *Motores De Mexicali v. Superior Court (1958) 51 Cal. 2d 172, 176, 331 P.2d 1* ; *NEC Electronics Inc. v. Hurt (1989) 208 Cal. App. 3d 772, 778-781, 256 Cal. Rptr. 441* ; *Katzir's Floor and Home Design, Inc. v. M-MLS.com (9th Cir. 2004) 394 F.3d 1143, 1149-1150)* .

B. Due Process Requirement. Use of the amendment procedure to add individuals summarily as judgment debtors would constitute a denial of due process of law if the individuals were never given the opportunity to litigate any question beyond their relationship to the corporation (*Motores De Mexicali v. Superior Court (1958) 51 Cal. 2d 172, 176, 331 P.2d 1*).

C. Degree of Control Required. Amendment of a judgment against a corporation to include the alter ego as an additional judgment debtor is only appropriate when the alter ego in fact had control of the litigation, was virtually represented in the lawsuit, and individually or through a representative had occasion to conduct the litigation with a diligence corresponding to the risk of personal liability involved. Control of the litigation sufficient to overcome due process objections clearly contemplates some active defense of the underlying claim (*NEC Electronics Inc. v. Hurt*

(1989) 208 Cal. App. 3d 772, 778-779, 781, 256 Cal. Rptr. 441).

D. Similarity of Interests Required. In determining whether the alter ego had sufficient control of the litigation, the court should consider whether the corporate defendant's interests and those of the alter ego were so similar that the trial strategy of the corporate defendant effectively represented the interests of the alter ego. If their interests were so different that the corporation did not conduct the litigation with a diligence corresponding to the risk of personal liability involved for alter ego, amendment of the judgment to include the alter ego as judgment debtor is not proper (*NEC Electronics Inc. v. Hurt (1989) 208 Cal. App. 3d 772, 780-781, 256 Cal. Rptr. 441*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

There points and authorities may be submitted in opposition to a motion to amend a judgment rendered against a corporation to include as a judgment debtor the name of an individual who was the alter ego of the corporation. The ground of opposition is that the individual sought to be added as judgment debtor was not a party to the underlying litigation and did not have control of it. Paragraph A sets forth the basic rule regarding control of the underlying litigation, and Paragraphs B through D address particular aspects of the determination.

Counsel may wish to combine the points and authorities in this form with those from §§ 52.65-52.68 or 52.70 that address any other deficiency in the showing made in support of the motion to amend.

Counsel should include argument in the form showing the relationship between the facts and the points of law raised. For instance, counsel should point out whether the underlying action was contested or whether judgment was by default.

[3] Discussion of Authorities

[a] Requirements for Binding Individual to Judgment

The facts, procedural background, and portion of the opinion in ***Minton v. Cavaney*** *(1961) 56 Cal. 2d 576, 15 Cal. Rptr. 641, 364 P.2d 473* , discussing circumstances that would have established alter ego liability if decedent had controlled the initial litigation are discussed in *§ 52.62[3][a]*. Although the Court found that the evidence was sufficient to support the application of the alter ego doctrine, the Court held that plaintiffs had failed to show that Cavaney, who was not a party to the action against Seminole, had control of the litigation leading to the judgment. Plaintiff's had not alleged or presented any evidence on the issue of Seminole's negligence or on the amount of damages sustained by plaintiffs, relying solely on the judgment against Seminole (*56 Cal. 2d. 576, 581)* . The Court held that the judgment in that action was therefore not binding on Cavaney unless he controlled the litigation leading to the judgment in support of this holding, the Court, quoting from Restatement, Judgments § 84, comment e, stated that in order for a person in control of the litigation to be bound by a judgment, it is necessary that that person, against whom the rules of res judicata operate, participate in the control of the action, and if the judgment is adverse, be able to determine whether or not an appeal should betaken. In this regard, it is not sufficient that the person supply the funds for the defense, that such person appear as a witness or cooperate without having control (*56 Cal. 2d 576, 581)* .

Petitioner in ***Motores De Mexicali v. Superior Court*** *(1958) 51 Cal. 2d 172, 331 P.2d 1* , sought a writ of mandate to

compel respondent to proceed with a hearing on its petition for an order to show cause why its judgment against a corporate defendant should not be amended to add as additional judgment debtors three individuals alleged to be alter egos of the corporation. Respondent indicated its intention to dismiss the petition without a hearing on the ground that it lacked jurisdiction. The Supreme Court agreed (*51 Cal. 2d 172, 176)* .

Default judgment was entered against the corporation in 1953. The corporation filed bankruptcy shortly thereafter, and petitioner received about 20 percent of its judgment from the bankruptcy estate. In the course of the bankruptcy proceeding petitioner first learned of the alter ego relationships. In 1957, it brought the petition for amendment, relying on *Mirabito v. San Francisco Dairy Co. (1935) 8 Cal. App. 2d 54, 60, 47 P.2d 530* (discussed in *§ 52.62[3][a]*), and *Thomson v. L. C. Roney & Co. (1952) 112 Cal. App. 2d 420, 429, 246 P.2d 1017* (discussed in *§ 52.62[3][b]*). The Court distinguished those to cases, noting that in *Mirabito* the relationship of the two corporations had been explored at the original trial and that in both cases the defense had been conducted by attorneys who represented both corporations (*51 Cal. 2d 172, 175)* . Here, the individuals sought to be added as judgment debtors did not participate in the defense of the basic action against the corporation (*51 Cal. 2d 172, 176)* . To extend the use of the amendment procedure to add the individuals summarily as judgment debtors in this situation would constitute a denial of due process of law because those individuals would never have an opportunity to litigate any question beyond their relationship to the corporation. This difficulty could not be overcome by holding that the individuals should have intervened in the initial action, because they were under no duty to do so (*51 Cal. 2d 172, 176)* .

NEC Electronics Inc. v. Hurt *(1989) 208 Cal. App. 3d 772, 256 Cal. Rptr. 441* is *discussed in § 52.69[3][d]*.

The facts, procedural background, and portion of the opinion in ***Katzir's Floor and Home Design, Inc. v. M-MLS.com*** *(9th Cir. 2004) 394 F.3d 1143* discussing alter ego are discussed in *§ 52.65[3][a]*. With respect to protection of the individual appellant's interests in the underlying action, the court cited *NEC Electronics Inc. v. Hurt (1989) 208 Cal. App. 3d 772* , *discussed in § 52.69[3][d]*, to the effect that *Code Civ. Proc. § 187* is an equitable procedure that binds new individual defendants if it can be demonstrated that in their capacity as alter ego of the corporation they in fact had control of the previous litigation and thus were virtually represented in the lawsuit. The purpose of the requirement is to protect the party's due process rights. Here, the district court failed to address this requirement as it applied to the individual appellant. He was not named individually, knew that the corporation was on the verge of dissolution, and had no personal duty to defend the underlying lawsuit. The Ninth Circuit held that the district court clearly erred in adding him to the judgment against the first corporation (*394 F.3d 1143, 1150)* .

[b] Due Process Requirement

Motores De Mexicali v. Superior Court *(1958) 51 Cal. 2d 172, 331 P.2d 1* is *discussed in § 52.69[3][a]*.

Note that *NEC Electronics Inc. v. Hurt (1989) 208 Cal. App. 3d 772, 256 Cal. Rptr. 441* (*discussed in § 52.69[3][d]*), contains the statement that control of the litigation sufficient to overcome due process objections clearly contemplates some active defense of the underlying claim (*208 Cal. App. 3d 772, 781)* .

[c] Degree of Control Required

NEC Electronics Inc. v. Hurt *(1989) 208 Cal. App. 3d 772, 256 Cal. Rptr. 441* is *discussed in § 52.69[3][d]*.

[d] Similarity of Interests Required

NEC Electronics Inc. v. Hurt *(1989) 208 Cal. App. 3d 772, 256 Cal. Rptr. 441* , involved a successful plaintiff's motion after trial to amend its judgment against a corporation to include defendant, the corporation's sole shareholder and chief executive officer, as an additional judgment debtor. When the suit was filed, the corporation answered by filing a general denial. Defendant corporation was on the verge of bankruptcy and turned its efforts to negotiating with

plaintiff and other creditors to avoid bankruptcy or to agree on a plan for a Chapter 11 reorganization. The individual defendant was represented as willing to invest $1.5 million of personal funds to the proposed plan. Two days before the case was to go to trial, plaintiff wrote counsel for the corporate defendant that it was rejecting the proposed plan, that it intended to prosecute its action to conclusion and to analyze carefully its rights against the individual defendant and other entities, and that it was willing to settle its claim for $80,000 or approximately half of its claim. The day before the trial, corporate counsel informed plaintiff that the corporate defendant would not appear at trial. The individual defendant did not appear either, and judgment was entered in favor of plaintiff and against the corporate defendant. The corporate defendant filed bankruptcy less than two months later. In the course of the bankruptcy proceeding, plaintiff deposed the individual defendant and the corporate defendant's chief financial officer. Six months later, plaintiff moved to amend the judgment. The motion was granted. The individualdefendant appealed on the grounds that he was not the alter ego of the corporation, that he did not control the litigation, and that plaintiff knew of his relationship with the corporate defendant when it commenced the underlying action and was therefore estopped to add the individual defendant at so late a stage of the proceeding

The court of appeal reversed. The court first set forth the two requirements for imposition of alter ego liability: (1) there must be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist; and (2) it must be demonstrated that, if the acts are treated as those of the corporation alone, an inequitable result will follow (*208 Cal. App. 3d 772, 777)* . Here, the court said, there was ample evidence to support both the unity of interest and equitable findings necessary to establish that the individual defendant was the alter ego of the corporate defendant (*208 Cal. App. 3d 772, 777)* . Defendant had taken approximately $2.8 million in undocumented loans and advances from the corporation and had paid personal expenses, such as 30 monthly mortgage payments, with corporate funds. Defendant had also paid corporate expenses and debts with personal funds and advanced $375,000 for the reorganization plan (*208 Cal. App. 3d 772, 777-778)* .

On the issue of control of the litigation, citing Ballentine & Sterling, California Corporation Laws, § 299.04 (Matthew Bender), and Rest. 2d, Judgments, § 59, the court said the procedure of amending the judgment to include the alter ego as an additional judgment debtor is only appropriate when the individual defendant in fact had control of the litigation, was virtually represented in the lawsuit, and individually or through a representative had occasion to conduct the litigation with a diligence corresponding to the risk of personal liability involved (*208 Cal. App. 3d 772, 778-779)* . The court then reviewed and compared the evidence of control involved in *Motores De Mexicali v. Superior Court (1958) 51 Cal. 2d 172, 176, 331 P.2d 1* (*discussed in § 52.69[3][a]*); *Dow Jones Co. v. Avenel (1984) 151 Cal. App. 3d 144, 150, 198 Cal. Rptr. 457* (discussed in *§ 52.62[3][a]*); *Jack Farenbaugh & Son v. Belmont Construction, Inc. (1987) 194 Cal. App. 3d 1023, 1031, 240 Cal. Rptr. 78* (discussed in *§ 52.62[3][a]*); and *Mirabito v. San Francisco Dairy Co. (1935) 8 Cal. App. 2d 54, 60, 47 P.2d 530* (discussed in *§ 52.62[3][a]*) (*208 Cal. App. 3d 772, 779-780)* . The court pointed out that in *Dow Jones, Farenbaugh,* and *Mirabito* the underlying actions were contested and therefore the alter ego's interests were effectively represented by the defense presented by the corporation (*208 Cal. App. 3d 772, 780)* . Citing *Minton v. Cavaney (1961) 56 Cal. 2d 576, 581, 15 Cal. Rptr. 641, 364 P.2d 473* (*discussed in § 52.69[3][a]*), the court pointed out that control of the litigation sufficient to overcome due process objections clearly contemplates some active defense of the underlying claim (*208 Cal. App. 3d 772, 781)* . In contrast, in *Motores,* the judgment was obtained by default, and the court stressed the fact that the alter ego's interests were not represented in the underlying action (*208 Cal. App. 3d 772, 780)* . The *Motores* court also emphasized that adding the alter egos as additional judgment debtors would violate late due process. This court of appeal said that *Motores* controlled here. The corporate defendant did not appear at trial and did not make any attempt to defend the lawsuit. As a consequence, the alter ego's interests were not represented (*208 Cal. App. 3d 772, 780)* .

In addition, in this case the corporate defendant's interests and those of the alter ego were not the same. The corporate defendant had a defense, but did not pursue it because it planned to file bankruptcy. This is in contrast to the usual situation in which the interests of the corporate defendant and the alter ego are so similar that the trial strategy of the corporate defendant effectively represents the interests of the alter ego. Plaintiff's argument that the alter ego had an opportunity to defend ignores the reality that the alter ego was not named as a defendant, had no risk of personal

liability, and therefore was not required to intervene (*208 Cal. App. 3d 772, 780)* . Because their interests were so different, the court said it could not conclude that the alter ego had occasion to conduct the litigation with a diligence corresponding to the risk of personal liability involved or that he was virtually represented in the lawsuit (*208 Cal. App. 3d 772, 781)* . Nor was there sufficient evidence that the alter ego controlled the litigation. The individual defendant's efforts to avoid bankruptcy and his knowledge of the underlying action did not constitute control of the defense (*208 Cal. App. 3d 772, 781)* .

[4] Additional Authorities

[a] Requirements for Binding Individual to Judgment

Plaintiff in Silverman v. Superior Court (1988) 203 Cal. App. 3d 145, 152, 249 Cal. Rptr. 724 , brought a second action, entitled "Complaint for Money Due on Judgment and Alter Ego," against the shareholder of the corporation that was the only defendant in the first action. The shareholder, a Nevada resident, was served while in California to attend a mandatory settlement conference in a difference action, and sought a writ of mandate to compel the superior court to grant his motion to quash service of that summons. The court of appeal affirmed the validity of service. In discussing why the superior court could deny the motion to quash service after having denied the motion to amend the judgment in the first action to include the shareholder as judgment debtor, the court of appeal noted that the postjudgment motion required a factual determination not required for resolution of the validity of service, namely a finding that plaintiff show that the shareholder controlled the underlying litigation (*203 Cal. App. 3d 145, 152)* .

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5-52 California Points & Authorities § 52.70

§ 52.70 Opposing Motion to Amend Judgment on Grounds That Individual Was Alter Ego of Corporate Defendant--No Showing of Due Diligence in Seeking Amendment

[1] FORM

[*Caption. See § 52.65.*]

IT IS AN ABUSE OF DISCRETION TO AMEND A JUDGMENT AGAINST A CORPORATION TO INCLUDE AN ALTER EGO AS AN ADDITIONAL JUDGMENT DEBTOR WHEN THERE IS NO SHOWING THAT THE PLAINTIFF ACTED WITH DUE DILIGENCE TO SEEK THE AMENDMENT AFTER FIRST LEARNING OF THE RELATIONSHIP BETWEEN THE CORPORATION AND THE ALTER EGO.

Due Diligence Required. A decision to permit amendment of a judgment under *Code of Civil Procedure Section 187* rests in the sound discretion of the trial court, but the alter ego doctrine is an equitable one, and equitable relief will not ordinarily be granted to one who has failed to act diligently in accordance with known facts. Thus, allowance of the amendment without any explanation for a delay in moving for the amendment is an abuse of discretion (*Alexander v. Abbey of the Chimes (1980) 104 Cal. App. 3d 39, 47-49, 163 Cal. Rptr. 377*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion to amend a judgment against a corporation to include an alter ego as an additional judgment debtor when there is no showing that the judgment creditor acted with due diligence to seek the amendment after learning the facts of the relationship between the corporation and the alter ego. The case relied on in the form may also be authority for the contention that plaintiff is required to show attempts to satisfy the judgment against the corporation [*see Alexander v. Abbey of the Chimes (1980) 104 Cal. App. 3d 39, 48-49, 163 Cal. Rptr. 377]* .

Counsel may wish to combine the points and authorities in this form with those from § 52.66 that address specific facts

of lack of diligence. Counsel may also wish to combine the points and authorities in the foregoing form with those from §§ 52.65 and 52.67-52.69 that raise some other deficiency in the showing made in support of the motion to amend.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should point out when plaintiff first knew of the relationship and that no attempts to seek the amendment were made for some time.

[3] Discussion of Authorities

[a] Due Diligence Required

Alexander v. Abbey of the Chimes *(1980) 104 Cal. App. 3d 39, 163 Cal. Rptr. 377* , involved a successful plaintiff's motion after trial to amend two judgments against a corporation to include the corporation's sole shareholder as an additional judgment debtor. The obligations on which the original judgments were based were incurred before the alleged alter ego became a shareholder of the corporate defendant. In 1969, during the pendency of the underlying actions, the alleged alter ego sold all of the corporate assets to another corporation, which agreed to assume all liabilities of the corporate defendant. The agreement made specific reference to the pending litigation and required the buyer to pay any judgments entered. The judgments were entered in February, 1971. There was no evidence of any attempt by plaintiff to satisfy the judgments against the corporate defendant or the buyer. However, in December, 1977, plaintiff moved to amend the judgments to include the former sole shareholder as an additional judgment debtor. The motion was granted. The alleged alter ego appealed, contending that he had insufficient control of the initial litigation and that plaintiff had failed to establish grounds for disregarding the corporate entity.

The court of appeal reversed. Although he was not the trial attorney, the alleged alter ego had discussed the underlying litigation with plaintiff's attorney in his capacity as attorney for the corporate defendant, and had been kept fully informed by defendant's trial counsel. Thus, the court of appeal concluded that the alleged alter ego had sufficient opportunity to control the underlying litigation (*104 Cal. App. 3d 39, 46)* . Generally speaking, the court said, there are two requirements for disregarding the corporate entity: (1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow (*104 Cal. App. 3d 39, 46-47)* . The court of appeal concluded that there was sufficient evidence to establish both the unity of interest and the fact that an inequitable result would follow if the corporate entity were not disregarded (*104 Cal. App. 3d 39, 47)* . However, the court of appeal held that plaintiff's failure to act with due diligence required reversal of the amendment (*104 Cal. App. 3d 39, 47-49)* . The court pointed out that a decision to permit amendment of a judgment under *Code Civ. Proc. § 187* rests in the sound discretion of the trial court, and in this case, that discretion was abused (*104 Cal. App. 3d 39, 47)* . To justify the addition of new defendants, the plaintiff must have acted withdue diligence. In this case, there was no explanation for the almost seven-year delay in filing the motion. There was no suggestion that plaintiff ever made any attempt to satisfy the judgment; nor was there any suggestion that plaintiffs were unaware of the alter ego's connection with the corporation at the time the complaints were filed or the matters tried (*104 Cal. App. 3d 39, 48)* . The application of the alter ego doctrine is equitable, and equitable relief ordinarily will not be granted to one who has failed to act diligently in accordance with known facts. The court contrasted this situation with the one in *Thomson v. L. C. Roney & Co. (1952) 112 Cal. App. 2d 420, 246 P.2d 1017* (discussed in *§ 52.62[3][b]*), in which the plaintiff did not discover the alter ego relationship until two years after the litigation (*104 Cal. App. 3d 39, 48)* . In the absence of any explanation for the delay in moving for the amendment, the trial abused its discretion in granting the amendment (*104 Cal. App. 3d 39, 48-49)* .

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5-52 California Points & Authorities §§ 52.71-52.79

[Reserved]

§§ 52.71[Reserved]

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5-52 California Points & Authorities § 52.80

§ 52.80 Opposing Motion to Amend Judgment on Ground That Corporation Was Alter Ego of Shareholder-Defendant--Outside Reverse Piercing of Corporate Veil Is Not Recognized in California

[1] FORM

[*Caption. See § 52.65.*]

IT IS AN ABUSE OF DISCRETION TO AMEND A JUDGMENT AGAINST A SHAREHOLDER OF A CORPORATION TO INCLUDE THE CORPORATION AS AN ADDITIONAL JUDGMENT DEBTOR, WHEN THE PLAINTIFF IS A THIRD-PARTY JUDGMENT CREDITOR AND THE MOTION IS BASED ON THE DOCTRINE OF OUTSIDE REVERSE PIERCING OF THE CORPORATE VEIL.

Outside Reverse Piercing Not Recognized. In California, a third-party judgment creditor of a shareholder may not pierce the corporate veil to reach corporate assets in order to satisfy the shareholder's liability. The theory of outside reverse piercing (or third-party piercing) of the corporate veil, by which the corporate veil is pierced to permit a third-party judgment creditor to reach corporate assets to satisfy claims against a shareholder, is not recognized in California (*Postal Instant Press, Inc. v. Kaswa Corp. (2008) 162 Cal. App. 4th 1510, 1513, 77 Cal. Rptr. 3d 96*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion to amend a judgment against a shareholder of a corporation, so as to include the corporation as an additional judgment debtor, when the plaintiff is a third-party judgment creditor--that is, the plaintiff has a judgment against a shareholder on a claim unrelated to the corporation--and the motion is based on the doctrine of outside reverse piercing of the corporate veil.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should point out that the plaintiff is a third-party judgment creditor whose judgment is based on a claim that is unrelated to the corporation.

[3] Discussion of Authorities

[a] Outside Reverse Piercing Not Recognized

In ***Postal Instant Press, Inc. v. Kaswa Corp.*** *(2008) 162 Cal. App. 4th 1510, 77 Cal. Rptr. 3d 96* , the plaintiff obtained a judgment enforcing an arbitration award against an individual who had been the plaintiff's franchisee and had lost an arbitrated dispute under the franchise agreement. The defendant had formed a corporation and used it to operate the business, but legally the corporation was a bystander, since the franchise agreement had not been amended to add the corporation as a franchisee. The corporation was thinly capitalized but had an apparent asset in the form of a contract claim based on a purported sale of the franchise assets by the corporation. The trial court granted the plaintiff's motion for amendment of the judgment to add the corporation as a judgment debtor, finding that the corporation was the defendant's alter ego at the time of entry of the judgment (although at the time the motion was granted, the defendant no longer controlled the corporation, which had been acquired in a merger).

The corporation appealed, and the court of appeal reversed. The alter ego doctrine traditionally is applied to pierce the corporate veil so that a shareholder may be held liable for the debts or conduct of the corporation. Some courts recognize that the corporate veil may be pierced in reverse so that a corporation may be held liable for the debts or conduct of a shareholder. The typical case involves a corporate insider, or someone claiming through such a person, attempting to pierce the corporate veil from within so that the corporate entity and the individual will be considered one and the same. This is sometimes called "inside reverse piercing." A variant of the reverse piercing theory, sometimes called "outside reverse piercing" (or third-party piercing), occurs when a third party, an outsider to the corporation, seeks to reach corporate assets to satisfy claims against an individual shareholder. The California Supreme Court has not spoken on the issue of outside reverse piercing of the corporate veil; therefore, whether to accept or reject the doctrine was an issue of first impression in California (*162 Cal. App. 4th 1510, 1518)* . After considering the positions taken in cases from other jurisdictions, the court of appeal concluded, "We agree with the sound reasoning and analysis of the cases rejecting outside reverse piercing of the corporate veil. ... As those cases explain, outside reverse piercing is a radical and problematic change in standard alter ego law" (*162 Cal. App. 4th 1510, 1519, 1521)* . "The true issue that outside reverse piercing seeks to address is not the misuse of the corporate form to shield the shareholder from personal liability. Rather, the issue addressed by outside reverse piercing is the shareholder's transfer of personal assets to the corporation to shield the assets from collection by a creditor of the shareholder. In other words, outside reverse piercing seeks to protect the judgment creditor from the shareholder's fraudulent transfer of assets to the corporation. But, as explained in ... [some of the cases], conversion and fraudulent conveyance already afford judgment creditors protection in that situation. Outside reverse piercing, accomplished by the expedient means of a postjudgment motion, is an unacceptable shortcut to pursue those remedies" (*162 Cal. App. 4th 1510, 1523)* .

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5-52 California Points & Authorities §§ 52.81-52.89

[Reserved]

§§ 52.81[Reserved]

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5-52 California Points & Authorities § 52.90

§ 52.90 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] Enforcing Legal Right--By Shareholder--General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Petitioner,	)	MEMORANDUM IN SUPPORT OF PETITION
vs.	)	FOR WRIT OF MANDATE
_____ [*name(s) of corporation(s) or person(s)*],	)	Date: _____
Respondent(s).	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

SINCE THERE IS NO ADEQUATE REMEDY AT LAW, A WRIT OF MANDATE SHOULD BE ISSUED TO ENFORCE A SHAREHOLDER'S LEGAL RIGHTS.

A. Legal Remedy Inadequate. A writ of mandate must be issued in all cases where there is no plain, speedy, and adequate remedy in the ordinary course of law (*Code Civ. Proc. § 1086*).

B. Mandamus Is Appropriate Remedy to Enforce A Legal Right. A petition for writ of mandate is the appropriate

remedy to be sought by a shareholder seeking to enforce a statutory right against a corporation (*Johnson v. Langdon (1902) 135 Cal. 624, 625-628, 67 P. 1050*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for a writ of mandate to compel a corporation to permit a shareholder to exercise his or her legal rights. This form may be used if there is no specific form [*see §§ 52.91 -52.94*] which may be used to support a shareholder's legal right against the corporation of which he or she is a shareholder. Argument should be included which included which indicates the legal rights which the shareholder is seeking to enforce and the facts which necessitate resort to the courts to enforce the shareholder's rights.

[b] Related Pleading and Practice Forms

For a general form for a petition for a writ of mandate, see California Forms of Pleading and Practice, Ch. 358, *Mandate and Prohibition* (Matthew Bender).

For a form for a petition for a writ of mandate to enforce a shareholder's right to inspect corporate records, see *California Forms of Pleading and Practice, Ch. 165, Corporations: Corporate Records and Reports, § 165.70* (Matthew Bender).

[3] Discussion of Authorities

[a] Mandamus Is Appropriate Remedy to Enforce a Legal Right

In ***Johnson v. Langdon*** *(1902) 135 Cal. 624, 67 P. 1050* , a shareholder in a corporation, petitioned for a writ of mandate to compel the defendant, the secretary of the corporation, to permit him to inspect the books, records, and journals of the corporation as was his right as a shareholder under the statute then enacted. The Supreme Court granted the shareholder's petition, stating that mandamus is the appropriate remedy of a stockholder in a situation where his exercise of a statutory right had been refused. The Court reasoned that as a stockholder, the petitioner was interested in all the affairs and the management of the corporation since he was, in one sense, part owner of the assets. An action at law for damages would not be a plain, speedy, or adequate remedy. Such an action could be delayed until judgment obtained in the action could not be enforced. The Court stated that the very information sought by the stockholder and withheld from him by the corporation might be the basis of an action for damages.

It should be noted that in the foregoing situation, the applicable laws did not require a shareholder to show a reasonable purpose in his or her petition; the present Corporations Code section with respect to the inspection rights of a shareholder does require such a showing [*see Corp. Code § 1601*].

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5-52 California Points & Authorities § 52.91

§ 52.91 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--To Order Corporation to Open Its Books, Records, and Minutes for Inspection--By Shareholder [Corp. Code § 1601]

[1] FORM

[*Caption. See § 52.90.*]

A WRIT OF MANDATE SHOULD BE ISSUED TO ORDER A CORPORATION TO OPEN ITS BOOKS, RECORDS, AND MINUTES FOR INSPECTION BY A SHAREHOLDER EXERCISING HIS/HER LEGAL RIGHT FOR A REASONABLE PURPOSE.

A. Shareholder's Inspection Rights. The accounting books, records, and minutes of proceedings of the shareholders, board, and committees of the board of any domestic corporation, and of any foreign corporation keeping any such records in this state, or having its principal executive office in this state, must be open to inspection upon the written demand on the corporation by any shareholder or holder of a voting trust certificate. The inspection should take place at any reasonable time during usual business hours and it should be for a purpose reasonably related to the holder's interest as a shareholder or as the holder of a voting trust certificate (*Corp. Code § 1601(a)*).

B. Action to Enforce Right of Inspection. On the refusal of a lawful demand for inspection, the superior court of the proper county may enforce the right of inspection with just and proper conditions or may, for good cause shown, appoint one or more competent inspectors or accountants to audit the books and records kept in California and investigate the property, funds, and affairs of any domestic corporation or any foreign corporation keeping records in California and of any subsidiary corporation thereof, domestic or foreign, keeping records in California and to report thereon in such manner as the court may direct (*Corp. Code § 1603(a)*).

C. Mandamus as Enforcing Legal Right. A petition for a writ of mandate is the appropriate remedy to be sought by a shareholder seeking to enforce a statutory right against a corporation (*Johnson v. Langdon (1902) 135 Cal. 624, 625-628, 67 P. 1050*).

[*Optional*] **D. Inspection of Corporate Subsidiaries.** The right of inspection created in *Corporations Code Section*

1601(a) extends to the records of each subsidiary of a corporation subject to that section (*Corp. Code § 1601(a)*).

[*Optional*] **E. Inspection in Person or by Agent.** The inspection by a shareholder or holder of a voting trust certificate may be made in person or by an agent or attorney (*Corp. Code § 1601(b)*).

[*Optional*] **F. Right to Copy and Make Extracts.** The right of inspection includes the right to copy and make extracts (*Corp. Code § 1601(b)*).

[*Optional*] **G. Nominally Foreign Corporations Is Subject to Shareholder's Inspection Rights.** Shareholder's inspection rights may be asserted against any nominally foreign corporation which meets the requirements set forth in *Corporations Code Section 2115(a)* or upon the entry of a final order by a court of competent jurisdiction declaring that such tests have been met (*Corp. Code §§ 2115(b), (d)*).

[*Optional*] **H. Establishment of Value of Stock Is Reasonable Purpose.** A shareholder's demand to inspect corporate books and records in order to determine the reasons for the disparity in value between the published annual report of the corporation and the market price of the outstanding shares is a purpose reasonably related to the shareholder's interest (*Private Investors v. Homestake Mining Co. (1936) 11 Cal. App. 2d 488, 496-497, 54 P.2d 535* (decided under former Civ. Code § 355, *see now Corp. Code § 1601*).

[*Optional*] **I. Effect of Majority Shareholders on Policy Is Reasonable Purpose.** An inspection of corporate books and records in order to determine whether the outstanding stock is held by a few majority shareholders who dictate accounting policies is a reasonable purpose for a shareholder inspection (*Private Investors v. Homestake Mining Co. (1936) 11 Cal. App. 2d 488, 496-497, 54 P.2d 535* (decided under former Civ. Code § 355, *see now Corp. Code § 1601*).

[*Optional*] **J. Directors Unfriendly to Minority Shareholders Is Reasonable Purpose.** An inspection of corporate books, records, and minutes in order to determine if the relations of the directors are against the interests of the minority shareholders is a reasonable purpose for a shareholder inspection (*Private Investors v. Homestake Mining Co. (1936) 11 Cal. App. 2d 488, 496-497, 54 P.2d 535* (decided under former Civ. Code § 355, *see now Corp. Code § 1601*).

[*Optional*] **K. Ascertaining Value of Stock Is Reasonable Purpose.** An inspection of corporate books, records, and minutes in order to determine the present value of a stockholder's shares is a reasonable purpose for a shareholder inspection (*Private Investors v. Homestake Mining Co. (1936) 11 Cal. App. 2d 488, 496-497, 54 P.2d 535* (decided under former Civ. Code § 355, *see now Corp. Code § 1601*).

[*Optional*] **L. Investigation To Determine Validity of Shareholder Records Is Reasonable Purpose.** Shareholder's allegation that inspection of corporate records is for purpose of ascertaining whether the stockholders of record are the real stockholders and whether the corporation is paying dividends to bona fide stockholders are purposes reasonably related to interests as a shareholder (*Gilmore v. Emsco Derrick & Equip. Co. (1937) 22 Cal. App. 2d 64, 65-67, 70 P.2d 251* (decided under former Civ. Code § 355, *see now Corp. Code § 1601*).

[*Optional*] **M. Beneficial Interest Is Unnecessary for Registered Shareholder.** One may be a bona fide shareholder without owning any beneficial interest in the shares and, thus, be entitled to exercise the shareholder's rights of inspection (*Webster v. Bartlett Estate Co. (1917) 35 Cal. App. 283, 284-287, 169 P. 702*).

[*Optional*] **N. Inspection of Books of Successor Corporation.** In certain situations where there may be a breach of the trust relationship between shareholders and officers of a corporation which is a successor to one in which the shareholders held an interest, the right to inspect the books, records, and minutes derived from the first corporation may extend to similar documents of the second corporation (*Austin v. Turrentine (1930) 30 Cal. App. 2d 750, 763-765, 87 P.2d 72* (decided under former Civ. Code § 355, *see now Corp. Code § 1601*).

Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for a writ of mandate to compel a corporation to permit a shareholder to exercise his or her statutory rights to inspect the books, records, and minutes of proceedings of the shareholders and the board and committees of the corporation.

It should be noted that *Corp. Code § 1603(a)*, set forth in Paragraph B of the form, does not specify whether the suit to enforce the right of inspection is a civil action or a special proceeding of a civil nature, such as a mandate proceeding. Under the predecessor section to Corp. Code § 1603(a), Civ. Code § 355, the right was enforced by a writ of mandate. Since *Corp. Code § 1603(a)* does not evidence any legislative intent to change the remedy used to enforce the right, it would appear that the writ of mandate remains the appropriate remedy for doing so.

Counsel should insert a statement of the particular facts indicating when and how the corporation or its officers have denied the shareholder access to the documents, thus necessitating a resort to the courts for a writ of mandate, and the reasonable purpose for which the shareholder is seeking an inspection.

[b] Related Pleading and Practice Forms

For a general form for a petition for a writ of mandate, see California Forms of Pleading and Practice, Ch. 358, *Mandate and Prohibition* (Matthew Bender). For a form for a petition for a writ of mandate to enforce a shareholder's right to inspect corporate records, see *California Forms of Pleading and Practice, Ch. 165, Corporations: Corporate Records and Reports, § 165.70* (Matthew Bender).

[3] Discussion of Authorities

[a] Mandamus as Enforcing Legal Right

In ***Johnson v. Langdon*** *(1902) 135 Cal. 624, 67 P. 1050* , a shareholder in a corporation, petitioned for a writ of mandate to compel the defendant the secretary of the corporation, to permit him to inspect the books, records, and journals of the corporation as was his right as a shareholder under the statute then enacted. The Supreme Court granted the shareholder's petition, stating that mandamus is the appropriate remedy of a stockholder in a situation where his exercise of a statutory right had been refused. The Court reasoned that, as a stockholder, the petitioner was interested in all the affairs and the management of the corporation since he was, in one sense, part owner of the assets. An action at law for damages would not be a plain, speedy, or adequate remedy. Such an action could be delayed until judgment obtained in the action could not be enforced. The Court stated that the very information sought by the stockholder and withheld from him by the corporation might be the basis of an action for damages.

In the above situation, the applicable laws did not require a shareholder to show a reasonable purpose in his or her petition; the present Corporations Code section requires such a showing [*see Corp. Code § 1601*].

[b] Shareholder's Inspection Rights

In ***Private Investors v. Homestake Mining Co.*** *(1936) 11 Cal. App. 2d 488, 54 P.2d 535* [decided under former Civ. Code § 355, *see now Corp. Code § 1601*] a shareholder petitioned for a writ of mandate to compel a corporation to permit him to examine the records of a corporation. He alleged four reasons as to why he wished to see the books: (1) to determine the reasons for the disparity in value between the published annual report of the corporation and the market value or price of the outstanding stock; (2) to determine whether the outstanding stock was held by a few majority shareholders who dictated the accounting policies; (3) to determine whether the relation of the directors was against the interests of the minority shareholders; and (4) to ascertain the present value of the stock owned by the petitioner. The corporation demurred and raised four points that it claimed the petitioner had failed to allege: (1) that his rights as a shareholder were likely to be seriously prejudiced; (2) that the application did not have the marks of a fishing expedition; (3) that a bona fide dispute existed between the parties; and (4) that the purposes set forth were "reasonably related to his interests as a shareholder," as set forth in former Corp. Code § 355 [*see now Corp. Code § 1601(a)*]. The court of appeal stated that the four points raised by the corporation were not meritorious. It pointed out that the statute [former Civ. Code § 355] did not require the shareholder to meet any of the requirements that the corporation sought to impose in its first three points, and any statement that the purposes of the inspection were "reasonable" would be a conclusion of law and unnecessary since any of the four purposes given would have been reasonable for an inspection.

[c] Establishment of Value of Stock Is Reasonable Purpose

A discussion of this point is made in a discussion of ***Private Investors v. Homestake Mining Co.*** *(1936) 11 Cal. App. 2d 488, 54 P.2d 535* , under § 52.91[3][b].

[d] Effect of Majority Shareholders on Policy Is Reasonable Purpose

A discussion of this point is made in a discussion of ***Private Investors v. Homestake Mining Co.*** *(1936) 11 Cal. App. 2d 488, 54 P.2d 535* , under § 52.91[3][b].

[e] Directors Unfriendly to Minority Shareholders Is Reasonable Purpose

A discussion of this point is made in a discussion of ***Private Investors v. Homestake Mining Co.*** *(1936) 11 Cal. App. 2d 488, 54 P.2d 535* , under § 52.91[3][b].

[f] Ascertaining Value of Stock Is Reasonable Purpose

A discussion of this point is made in a discussion of ***Private Investors v. Homestake Mining Co.*** *(1936) 11 Cal. App. 2d 488, 54 P.2d 535* , under § 52.91[3][b].

[g] Investigation to Determine Validity of Shareholder Records Is Reasonable Purpose

In ***Gilmore v. Emsco Derrick & Equip. Co.*** *(1937) 22 Cal. App. 2d 64, 70 P.2d 251* [decided under former Civ. Code § 355, *see now Corp. Code § 1601*], the plaintiff-shareholder petitioned for an order directing the defendant officers of the defendant corporation to permit her to inspect and make extracts of the records of the corporation. The corporation's secretary had furnished her with the names of the seven directors of the company and their respective shareholdings, but refused to permit her to see the corporate records. The corporation alleged that the petitioner was not requesting an inspection for a purpose reasonably related to her interests as a shareholder, but for the purpose of procuring the names of the shareholders and other information concerning the corporation with the design of harassing and causing serious detriment to the corporation. At the trial, the petitioner testified that the directors of the defendant corporation were also directors of an eastern corporation against which there were federal indictments and which had problems regarding shareholders of record not being bona fide. She alleged that she wanted to inspect the corporate records in order to ascertain whether the stockholders of record were the real stockholders and whether the defendant corporation was paying dividends to bona fide holders. She also testified that she had not been asked to obtain the information for

anyone else nor had she ever investigated the corporation or its directors, and that her purchase of stock had been solely for investment purposes. The corporation's officer testified that he had refused to permit the petitioner to make the extracts because the petitioner was an investigator connected with a private detective agency and he had wanted to protect the privacy of the stockholders since he suspected ulterior motives. The lower court denied the petition. The court of appeal reversed the decisions stating that the shareholder had testified to a motive reasonably related to her interests as a shareholder. The mere suspicion as to her motives aroused in the mind of the officer, because of her connections with a detective agency, were insufficient grounds for denying the petition absent adequate facts establishing an ulterior motive.

[h] Beneficial Interest Is Unnecessary for Registered Shareholder

In ***Webster v. Bartlett Estate Co.*** *(1917) 35 Cal. App. 283, 169 P. 702* , the petitioner's petition for a writ of mandate to compel a corporation in which she owned one share to permit her to inspect the books was denied by the trial court. The defendants had urged that the petitioner was not a bona fide shareholder, alleging that she had paid no consideration for the share, that she had received it solely for the purpose of qualifying as a director of the corporation, and that she had received the share from another shareholder to whom she had agreed to return the share in the event that she ceased to be a director of the corporation. The court of appeal reversed the decision of the trial court, stating that one may be a bona fide shareholder without owning any beneficial interest in the shares. Since the petitioner actually held the share of stock, and it was registered in her name on the corporate books, she had made herself vulnerable to the liabilities and obligations imposed on the registered owners of stock. Therefore, she should also be able to exercise concurrently the rights of ownership.

[i] Inspection of Books of Successor Corporation

In ***Austin v. Turrentine*** *(1930) 30 Cal. App. 2d 750, 87 P.2d 72* [decided under former Civ. Code § 355, *see now Corp. Code § 1601*], in connection with discovery proceedings, the plaintiff petitioned the court of appeal to issue a writ of mandate compelling the lower court to exercise its jurisdiction by issuing an order permitting the petitioner to inspect the books and records of the defendant corporation pursuant to a subpoena duces tecum. Petitioner alleged that he had contributed funds to a corporation formed to hold and develop oil leases. The corporation was incorporated in Nevada and petitioner had stock issued to him which had been held by one of the defendants for him. Subsequently, the defendants were alleged to have formed a new corporation in California bearing the same name as the Nevada corporation for the purpose of taking over the assets, responsibilities, and liabilities of the Nevada corporation. An application was made to the Corporations Commissioner for a permit to issue stock to all those who had held stock in the first corporation. Petitioner alleged that, in making the application, the defendants did not mention the interest of petitioner in the corporation, that he had never received stock in the new corporation, and had never received any monies or other profits from the oil leases which were profitable. The court of appeal issued the order, holding that under the allegations of the pleadings, a trust relationship had been created between petitioner and the officers of the corporation, and a breach of that trust relationship had occurred; therefore, the petitioner had a right to have produced for inspection the books, papers, records, and journals which might be material and pertinent. The court added that if a right existed as to the examination of the books of the first corporation formed in the instant case, then that same right, under the circumstances of the particular case, extended to the second corporation.

[4] Additional Authorities

[a] Shareholder's Inspection Rights

In *Capron v. Pacific S.W. Discount Corp. (1935) 6 Cal. App. 2d 436, 44 P.2d 629* [decided under former Civ. Code § 355, *see now Corp. Code § 1601*], a shareholder's petition for a writ of mandate asked the lower court to compel a corporation in which he owned shares to permit him to examine its corporate records. He alleged as his purpose his belief that the corporate funds had been misused by the corporation's president so as to have a detrimental financial effect on the corporation. The corporation filed an answer alleging that the shareholder's true purpose for inspecting the

records was to procure the names of other shareholders with a view to making a profit at the expense of the corporation. It alleged that the board of directors had announced a plan to repurchase certain outstanding shares and that the petitioner sought the names of the shareholders in order to purchase their options and then resell them to the corporation at an excessive price. The petitioner demurred to the answer and the lower court sustained his demurrer without leave to amend and issued the writ of mandate. The corporation appealed. The court of appeal stated that while the shareholder's alleged purpose was a reasonable purpose for inspection, the answer of the corporation had raised the issue of the true purpose of the shareholder's request. The order sustaining the demurrer and granting the writ was overturned and the case remained for a hearing or other proceeding to resolve the conflict in the allegations.

Schnabel v. Superior Court (1993) 5 Cal. 4th 704, 21 Cal. Rptr. 2d 200, 854 P.2d 1117 , involved the efforts of a 30-percent shareholder/employee of a closely held corporation to quash a subpoena duces tecum issued by his wife in their dissolution proceeding. The shares were community property. The Supreme Court upheld the subpoena in so far as it compelled the corporation to produce business records and corporate tax returns and quarterly payroll tax information regarding the husband, but reversed as to any payroll tax information identifying other persons (*5 Cal. 4th 704, 723)* . The Court held that whatever right the husband had to inspect records of the corporation, the wife also had, either indirectly, through her husband, or directly by means of third-party discovery. The wife's purpose in seeking the corporate records--to ascertain the value of the shares and the community's and husband's financial status--was related to her interest as a shareholder and therefore was proper under *Corp. Code § 1601(a)* (*5 Cal. 4th 704, 715)* .

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§ 52.92 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--To Order Corporation to Permit Inspection of Corporate Property--By Shareholder

[1] FORM

[*Caption. See § 52.90.*]

A WRIT OF MANDATE SHOULD BE ISSUED TO ORDER THE CORPORATION TO PERMIT INSPECTION OF THE CORPORATE PROPERTY BY A SHAREHOLDER EXERCISING HIS/HER LEGAL RIGHT FOR A REASONABLE PURPOSE.

A. Legal Remedy Inadequate. [*See § 52.90, Paragraph A.*]

B. Mandamus Is Appropriate for Enforcing Legal Right. A petition for a writ of mandate is the appropriate remedy to be sought by a shareholder seeking to enforce a statutory right against a corporation (*Johnson v. Langdon (1902) 135 Cal. 624, 625-628, 67 P. 1050*).

C. Shareholder's Inspection Rights. The accounting books, records, and minutes of proceedings of the shareholders' board, and committees of the board of any domestic corporation, and of any foreign corporation keeping any such records in this state or having its principal executive office in this state, must be open to inspection upon the written demand on the corporation by any shareholder or holder of a voting trust certificate. The inspection should take place at any reasonable time during usual business hours and it should be for a purpose reasonably related to the holder's interest as a shareholder or as the holder of a voting trust certificate (*Corp. Code § 1601(a)*).

D. Right to Inspect Corporate Property. A stockholder who is entitled to inspect the records and books of a corporation is also entitled to an inspection of the corporate property to verify thestatements contained in the books (*Hobbs v. Tom Reed Gold Mining Co. (1913) 164 Cal. 497, 501-503, 129 P. 781*).

[*Optional*] **E. Nominally Foreign Corporations as Subject to Shareholder's Inspection Rights.** Shareholder's inspection rights may be asserted against any nominally foreign corporation which meets the requirements set forth in

Section 2115(a) of the Corporations Code or upon the entry of a final order by a court of competent jurisdiction declaring that those tests have been met (*Corp. Code §§ 2115(b), (d)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for a writ of mandate to compel a corporation to permit a shareholder to exercise his or her legal right to inspect the corporate property.

Counsel should insert a statement of the particular facts indicating when and how the corporation or its officers have denied the shareholder the right to inspect the corporation's property, thus necessitating a resort to the courts for a writ of mandate, and the reasonable purpose for which the shareholder is seeking the inspection.

[b] Related Pleading and Practice Forms

For a general form for a petition for a writ of mandate, see California Forms of Pleading and Practice, Ch. 358, *Mandate and Prohibition* (Matthew Bender).

[3] Discussion of Authorities

[a] Mandamus Is Appropriate for Enforcing Legal Right

In ***Johnson v. Langdon*** *(1902) 135 Cal. 624, 67 P. 1050* , a shareholder in a corporation, petitioned for a writ of mandate to compel the defendant, the secretary of the corporation, to permit him to inspect the books, records, and journals of the corporation as was his right as a shareholder under the statute then enacted. The Supreme Court granted the shareholder's petition, stating that mandamus is the appropriate remedy of a stockholder in a situation where his exercise of a statutory right had been refused. The Court reasoned that, as a stockholder, the petitioner was interested in all the affairs and the management of the corporation since he was, in one sense, part owner of the assets. An action at law for damages would not be a plain, speedy, or adequate remedy. Such an action could be delayed until judgment obtained in the action could not be enforced. The Court stated that the very information sought by the stockholder and withheld from him by the corporation might be the basis of an action for damages.

It should be noted that, in the above situation, the applicable laws did not require a shareholder to show a reasonable purpose in his or her petition; the present Corporations Code section requires such a showing [*see Corp. Code § 1601*].

[b] Right to Inspect Corporate Property

In ***Hobbs v. Tom Reed Gold Mining Co.*** *(1913) 164 Cal. 497, 129 P. 781* , the plaintiff, a shareholder in a corporation of which the defendants were officers, petitioned the court for a writ of mandate ordering the board of directors to permit him to inspect the corporate property. The Supreme Court held that a shareholder had the right to inspect corporate property. It held that since a shareholder had the right to inspect the books of a corporation, he also had the right to inspect the property in order to ascertain that the condition and value of the property had not been concealed or misrepresented and that the property was well managed. The right to inspect the property gave a shareholder an

opportunity to verify the statements on the books.

[4] Additional Authorities

[a] Nominally Foreign Corporations as Subject to Shareholder's Inspection Rights

In *Hobbs v. Tom Reed Gold Mining Co. (1913) 164 Cal. 497, 129 P. 781* (*discussed in § 52.92[3][b]*), a shareholder petitioned for a writ to mandate to order a corporation to permit him to inspect corporate property which was located out-of-state. The corporation had been incorporated in the state of Arizona but the principal place of business of the corporation was in California, all the directors and officers of the corporation resided and worked in California, and part of the corporation's business was conducted in the state. The Supreme Court granted the writ, reasoning that while it did not have jurisdiction over the corporate property and its management personnel since they were located out-of-state, it did have jurisdiction over the officers and directors of the corporation, and the corporation was, for many purposes, a resident of the state. Reasoning that any order permitting a shareholder inspection would emanate from this state rather than Arizona, the Court ordered the corporate officers to issue an order to the property managers permitting the shareholder to inspect the property.

This case should be used with caution since the case occurred before passage of the Corporations Code. Nevertheless, from the facts of the case, it appears that the foreign corporation may have met the tests set forth in *Corp. Code § 2115(a)* and, thus, would have been subject to the jurisdiction of the courts of this state.

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5-52 California Points & Authorities § 52.93

§ 52.93 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--To Order Corporation to Permit Inspection of Corporate Books, Records, Documents, and Properties--By Director [Corp. Code § 1602]

[1] FORM

A WRIT OF MANDATE SHOULD BE ISSUED TO ORDER A CORPORATION TO PERMIT AN INSPECTION OF ITS BOOKS, RECORDS, DOCUMENTS, AND PROPERTIES BY A DIRECTOR OF THE CORPORATION.

[*Caption. See § 52.90.*]

A. Legal Remedy Inadequate. [*See § 52.90, Paragraph A.*]

B. Mandamus Is Appropriate Remedy to Enforce A Legal Right. A petition for a writ of mandate is the appropriate remedy to be sought by a shareholder seeking to enforce a statutory right against a corporation (*Johnson v. Langdon (1902) 135 Cal. 624, 625-628, 67 P. 1050*).

C. Director's Rights of Inspection. Every director has the absolute right at any reasonable time to inspect and copy all books, records, and documents of every kind and to inspect the physical properties of the corporation of which that person is a director (*Corp. Code § 1602*).

D. Restrictions on Director's Rights of Inspection. An imposition of restrictions on a director's absolute right of inspection should only be made in an egregious case (*Saline v. Superior Court (2002) 100 Cal. App. 4th 909, 915-916, 122 Cal. Rptr. 2d 813*).

[*Optional*] **E. Rights of Inspection Extend to Corporate Subsidiaries.** The rights of a director to inspect corporate books, records, and documents and the physical properties of the corporation also extend to a corporation's subsidiary corporations, whether domestic or foreign (*Corp. Code § 1602*).

[*Optional*] **F. Right to Make Copies.** The rights of inspection granted a director in *Corp. Code § 1602* also include the right to copy and make extracts (*Corp. Code § 1602*).

[*Optional*] **G. Right Extended to Foreign Corporations.** The rights of inspection given a director by *Corp. Code § 1602* also apply to the director of any foreign corporation having its principal executive office in this state or customarily holding meetings of its board in this state (*Corp. Code § 1602*).

[*Optional*] **H. Nominally Foreign Corporations.** Directors' inspection rights may be asserted against any nominally foreign corporation which meets the requirements set forth in *Corp. Code § 2115(a)* or upon the entry of a final order by a court of competent jurisdiction declaring that those tests have been met (*Corp. Code §§ 2115(b),(d)*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for a writ of mandate to compel a corporation to permit a director to exercise his or her statutory rights to inspect the books, records, and other documents, and the physical properties of a corporation.

Corp. Code §§ 1602 and *2115* both refer to the applicability of inspection-rights provisions. These two sections operate concurrently, however, as each establishes a separate and distinct test for determining whether a foreign corporation must comply with *Corp. Code § 1602* [*Havlicek v. Coast-to-Coast Analytical Services, Inc. (1995) 39 Cal. App. 4th 1844, 1853-1854, 46 Cal. Rptr. 2d 696]* .

Counsel should add argument linking the points in this form with the facts of his or her case; for example, when or how the director is being frustrated in his or her attempts to exercise a director's statutory rights, therefore necessitating a petition for a writ of mandate.

[b] Related Pleading and Practice Forms

For a general form for a petition for a writ of mandate, see California Forms of Pleading and Practice, Ch. 358, *Mandate and Prohibition* (Matthew Bender).

For an allegation by a director to enforce the right to inspect corporate records, see *California Forms of Pleading & Practice, Ch. 165, Corporations: Corporate Records and Reports, § 165.76* (Matthew Bender).

[3] Discussion of Authorities

[a] Mandamus Is Appropriate Remedy to Enforce A Legal Right

In ***Johnson v. Langdon*** *(1902) 135 Cal. 624, 67 P. 1050* , a shareholder in a corporation, petitioned for a writ of mandate to compel the defendant, the secretary of the corporation, to permit him to inspect the books, records, and journals of the corporation as was his right as a shareholder under the statute then enacted. The Supreme Court granted the shareholder's petition, stating that mandamus is the appropriate remedy of a stockholder in a situation where his exercise of a statutory right had been refused. The Court reasoned that, as a stockholder, the petitioner was interested in all the affairs and the management of the corporation since he was, in one sense, part owner of the assets. An action at law for damages would not be a plain, speedy, or adequate remedy. Such an action could be delayed until judgment obtained in the action could not be enforced. The Court stated that the very information sought by the stockholder and withheld from him by the corporation might be the basis of an action for damages.

In the above situation, the applicable laws did not require a shareholder to show a reasonable purpose in his or her

petition; the present Corporations Code section requires such a showing [*see Corp. Code § 1601*].

[b] Restrictions on Director's Rights of Inspection

In ***Saline v. Superior Court*** *(2002) 100 Cal. App. 4th 909, 122 Cal. Rptr. 2d 813* , a director who was denied access to corporate documents brought an action to enforce his inspection rights. The trial court issued an order requiring the corporation to allow inspection, but imposing a restriction that prohibited the director from disclosing or discussing the corporate documents with anyone other than his counsel or the board members. The director sought a writ of mandate challenging the condition. The court of appeal reviewed the language of *Corp. Code § 1602* providing for inspection rights, and also the holding in *Havlicek v. Coast-to-Coast Analytical Services, Inc. (1995) 39 Cal. App. 4th 1844, 1855-1856, 46 Cal. Rptr. 2d 696* , *discussed in § 52.93[4][b]*, that a court could place "just and proper" restrictions on access to corporate records. The court of appeal agreed with the *Havlicek* court that in an egregious case, restrictions may be appropriate. To establish the propriety of restrictions, however, the corporation must demonstrate by evidentiary showing that a protective order is necessary to prevent a tort against the corporation. In this case, however, the corporation did not produce evidence that the director intended to use the documents for anything but a proxy fight with the corporation's management. Without evidence that the director intended to use the documents sought to commit a tort against the corporation, the trial court improperly limited the director's access to corporate documents. While the court of appeal agreed with the principle set forth in *Havlicek*, it stated that it should only be applied in extreme circumstances where a preponderance of the evidence establishes a director's clear intent to use the documents to commit an egregious tort--one that cannot be easily remedied by subsequent monetary damages--against the corporation (*100 Cal. App. 4th 909, 914-915)* . The court of appeal therefore directed the superior court to vacate its order limiting the director's access to corporate records and his speech regarding those records, and to enter a new and different order directing the corporation to provide him complete access to the records in accordance with *Corp. Code § 1602* (*100 Cal. App. 4th 909, 916)* .

[4] Additional Authorities

[a] Director's Rights of Inspection

In *NFL Properties Inc. v. Superior Court (1998) 65 Cal. App. 4th 100, 75 Cal. Rptr. 2d 893* , the Oakland Raiders football club sued the NFL, National Football League Properties, Inc. (NFLP), and others, alleging that NFL management's wrongful control of the NFL entities resulted in a breach of fiduciary duty and adverse treatment of the Raiders. During litigation, a discovery dispute arose over the Raiders' right to inspect the corporate documents of NFLP, which were protected by the attorney-client privilege. The superior court ordered NFLP to produce its privileged documents to the Raiders on the grounds that the club had a director's right of inspection. NFLP objected to the order and filed a petition for writ of mandate, arguing that the Raiders club was a shareholder that does not have a right to inspect corporate documents which are protected by the attorney-client privilege. The court of appeal issued a peremptory writ of mandate directing the superior court to vacate its discovery order compelling production of attorney-client privileged documents by NFLP. The court stated that the discovery dispute between NFLP and the Raiders could not be resolved by looking to a director's right to inspect corporate records, as no NFLP director was a party to this dispute. Although *Corp. Code § 1602* grants a director an absolute right of inspection, the Raiders' representative on NFLP's board of directors was not asserting his own right as a director of NFLP to inspect corporate documents, but was acting as a representative of the Raiders its capacity as a shareholder of NFLP. He could not act as a director to request privileged corporate documents which he intended to pass on to a shareholder for use in litigation against the corporation, as that act would be inconsistent with his fiduciary duty to the corporation (*65 Cal. App. 4th 100, 109-110)* .

[b] Restrictions on Director's Rights of Inspection

In *Tritek Telecom, Inc. v. Superior Court (2009) 169 Cal. App. 4th 1385, 87 Cal. Rptr. 3d 455* , an individual who was both a director and a substantial shareholder sued the corporation on a shareholder's claim for damages. Subsequently he

filed a separate action to enforce his inspection rights as a director, with the intention of getting access to documents that had been generated in defense of his action against the corporation. The trial court issued the writ of mandate sought by the director-shareholder. The court of appeal directed the trial court to vacate its judgment and recall its writ, stating, "[Petitioner] filed this action to enforce his inspection rights as a director *after* he filed the shareholder action against [the corporation] ... in his individual capacity as a shareholder to vindicate his personal rights. Accordingly, [Petitioner] is not a disinterested director and the presumption of good faith does not apply. Additionally, enforcing [Petitioner]'s 'absolute' inspection rights in this case is problematic because it gives him access to documents he could not obtain via discovery in the shareholder action. [P] Although [Petitioner] is still a ... director, his filing of the shareholder action makes him [the corporation]'s adversary. [Petitioner] cannot take off his 'shareholder's hat' and swap it for his 'director's hat' and claim an absolute right to access all corporate documents. In this situation, a court may properly limit a director's inspection rights because the director's loyalties are divided and documents obtained by a director in his or her capacity as a director could be used to advance the director's personal interest in obtaining damages against the corporation. [P] Accordingly, we conclude that a corporate director does not have the right to access documents that are covered by the attorney-client privilege and were generated in defense of a suit for damages that the director filed against the corporation" (*169 Cal. App. 4th 1385, 1391-1392)* (citation omitted).

[c] Right Extended to Foreign Corporations

In *Havlicek v. Coast-to-Coast Analytical Services, Inc. (1995) 39 Cal. App. 4th 1844, 46 Cal. Rptr. 2d 696* , directors of a Delaware corporation sought to inspect the corporation's books and records. The appellate court rejected the corporation's argument that because *Corp. Code §§ 1602* and *2115* both refer to the applicability of inspection rights provisions, the corporation need not comply with *Corp. Code § 1602* because it did not meet the test of § 2115 for the application of California law to a foreign corporation. The court held that each section establishes a separate and distinct test for determining whether a foreign corporation must comply with *Corp. Code § 1602*, and that the corporation met one such test and therefore must comply (*39 Cal. App. 4th 1844, 1853-1854)* . The court also rejected the corporation's argument that *Corp. Code § 1602* violates the Commerce Clause or Full Faith and Credit Clause (*39 Cal. App. 4th 1844, 1854-1855)* . It concluded that the trial court could impose limitations on the directors' inspection rights under *Corp. Code §§ 1602* and *2115* (*39 Cal. App. 4th 1844, 1855-1856)* .

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5-52 California Points & Authorities § 52.94

§ 52.94 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--To Order Corporation to Permit Inspection of the Record of Shareholders--By Major Stockholder [Corp. Code § 1600(a)]

[1] FORM

[*Caption. See § 52.90.*]

A WRIT OF MANDATE SHOULD BE ISSUED TO ORDER THE CORPORATION TO PERMIT INSPECTION OF THE RECORDS OF SHAREHOLDERS BY A SHAREHOLDER EXERCISING HIS/HER STATUTORY RIGHT UNDER CORPORATIONS CODE SECTION 1600(a).

A. Legal Remedy Inadequate. [*See § 52.90, Paragraph A.*]

B. Mandamus Is Appropriate for Enforcing Legal Right. A petition for a writ of mandate is the appropriate remedy to be sought by a shareholder seeking to enforce a statutory right against a corporation (*Johnson v. Langdon (1902) 135 Cal. 624, 625-628, 67 P. 1050*).

C. Inspection of Record of Shareholders. A shareholder or shareholders holding at least five percent of the aggregate of the outstanding voting shares of a corporation or who hold at least one percent of such voting shares and have filed Schedule 14A with the United States Securities and Exchange Commission, have absolute rights, on or before five business days after a written demand is received by the corporation or on the date specified in the demand, to: (1) inspect and copy the record of shareholders' names and addresses during usual business hours; or (2) obtain from the transfer agent for the corporation upon demand and upon the tender of its usual charge for such a list, a list of the shareholders' names and addresses who are entitled to vote for the election of directors and their shareholdings, as of the most recent record date for which the list has been compiled, or as of a date specified by the shareholder subsequent to the date of demand (*Corp. Code § 1600(a)*).

[*Optional*] **D. Corporation as Responsible for Agent.** A corporation has the responsibility of seeing that its transfer agent complies with *Corporations Code Section 1600(a)* (*Corp. Code § 1600(a)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for a writ of mandate to compel a corporation to permit a shareholder to exercise his or her statutory right to examine the record of shareholders.

When appropriate, counsel should insert a statement of the particular facts indicating when and how the corporation or its officers have denied the shareholder the right to inspect the records.

[b] Related Pleading and Practice Forms

For a general form for a petition for a writ of mandate, see California Forms of Pleading and Practice, ch. 358, *Mandate and Prohibition* (Matthew Bender).

For forms for petitions for writs of mandate to enforce shareholder rights, see California Forms of Pleading and Practice, Ch. 165, *Corporations: Corporate Records and Reports* (Matthew Bender).

[3] Discussion of Authorities

[a] Mandamus Is Appropriate for Enforcing Legal Right

In ***Johnson v. Langdon*** *(1902) 135 Cal. 624, 67 P. 1050* , a shareholder in a corporation, petitioned for a writ of mandate to compel the defendant, the secretary of the corporation, to permit him to inspect the books, records, and journals of the corporation as was his right as a shareholder under the statute then enacted. The Supreme Court granted the shareholder's petition, stating that mandamus is the appropriate remedy of a stockholder in a situation where his exercise of a statutory right had been refused (*135 Cal. 624, 626)* . The Court reasoned that, as a stockholder, the petitioner was interested in all the affairs and the management of the corporation since he was, in one sense, part owner of the assets. An action at law for damages would not be a plain, speedy, or adequate remedy. Such an action could be delayed until judgment obtained in the action could not be enforced. The Court stated that the very information sought by the stockholder and withheld from him by the corporation might be the basis of an action for damages (*135 Cal. 624, 625-626)* .

It should be noted that in this situation, the applicable laws did not require a shareholder to show a reasonable purpose in his or her petition; the present Corporations Code section does require such a showing [*see Corp. Code § 1601*].

[4] Additional Authorities

[a] Inspection of Record of Shareholders

In *Valtz v. Penta Investment Corp. (1983) 139 Cal. App. 3d 803, 188 Cal. Rptr. 922* , a shareholder who owned more than five percent of the outstanding stock sought to obtain a list of the shareholders. The corporation had its sole executive office in California, although it was incorporated in Delaware, and it refused to permit the inspection on the ground that under Delaware law inspection was required only for a proper, investment-related use. The shareholder petitioned for a writ of mandate, which the corporation opposed on the ground that the application of *Corp. Code §*

1600 to a foreign corporation was unconstitutional in that it violated the full faith and credit clause of the federal Constitution.

The court of appeal held that *Corp. Code § 1600* was applicable to a foreign corporation with its principal executive office in California (*139 Cal. App. 3d 803, 810)* . In deciding to apply California law to the corporation, the court relied on the limited nature of any interest of Delaware in the inspection of shareholder lists (an incident of stock ownership rather than an internal affair of the corporation) and on what the court perceived as California's considerable interest in preserving the rights of California shareholders to inspect shareholder lists (*139 Cal. App. 3d 803, 807-808)* .

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5-52 California Points & Authorities § 52.95

§ 52.95 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Petitioner Is Not Registered Shareholder [Corp. Code § 1601]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Petitioner,	)	MEMORANDUM OPPOSING PETITION FOR
vs.	)	WRIT OF MANDATE
_____ [*name(s) of corporation(s) or person(s)*],	)	Date: _____
Respondent(s).	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THE PETITION FOR A WRIT OF MANDATE SHOULD NOT BE ISSUED SINCE PETITIONER IS NOT A REGISTERED SHAREHOLDER AND HAS NO LEGAL RIGHT TO SEE THE CORPORATE BOOKS, RECORDS, AND MINUTES.

A. Definition of Shareholder. A shareholder is a holder of record of shares (*Corp. Code § 185*).

B. Inspection Rights Available Only to Shareholders of Record. When a petition for a writ of mandate fails to allege that a petitioner is a shareholder of record, the petition does not allege a proper basis for issuing a writ of mandate since the Corporations Code provides that records of a corporation are open to inspection by a shareholder and a shareholder

is defined as a holder of record of shares or a shareholder of record (*Hagan v. Fairfield (1960) 183 Cal. App. 2d 703, 706, 7 Cal. Rptr. 248* (decided under former Corp. Code § 3003, *see now Corp. Code § 1601*).

[*Optional*] **C. Inspection Rights Unassignable.** Inspection rights are unassignable and a new shareholder must enforce his or her request for an inspection only in his or her own right and not by virtue of the rights claimed of the shareholder who assigned the share (*Farrington v. Fairfield (1961) 194 Cal. App. 2d 237, 238-239, 16 Cal. Rptr. 119* (decided under former Corp. Code § 3003, *see now Corp. Code § 1601*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a petition for a writ of mandate to compel a corporation to permit a shareholder to inspect its records. The memorandum alleges that the petitioner has no basis for his or her petition since the law permits only shareholders of record or holders of record to inspect the records, and the petitioner has failed to allege that he or she is a shareholder.

Counsel should insert any facts, which would further tend to disprove petitioner's claim to the statutory right.

If appropriate to the particular facts of a case, counsel may wish to include authority from § 52.182 regarding a shareholder's lack of standing after constructive surrender of his or her shares. Although the authority arose from an action for involuntary dissolution, it seems applicable to any situation in which shareholder status is required for standing.

[b] Related Pleading and Practice Forms

For general forms for opposing a writ of mandate, see California Forms of Pleading and Practice, Ch. 165, *Corporations: Corporate Records and Reports* (Matthew Bender). For forms for opposing a writ of mandate to enforce a shareholder's right to inspect corporate records, see California Forms of Pleading and Practice, Ch. 160, *Corporations* (Matthew Bender).

[3] Discussion of Authorities

[a] Inspections Rights Available Only to Shareholders of Record

In ***Hagan v. Fairfield*** *(1960) 183 Cal. App. 2d 703, 7 Cal. Rptr. 248* [decided under former Corp. Code § 3003, *see Corp. Code § 1601*], petitioner sought a writ of mandate to compel the respondents to "recognize" an assignment of a share of stock to him by another shareholder; to record the assignment on the books of the corporation; to issue a new certificate showing the share in his name, and to permit him to examine the books and records. The petitioner's writ was denied by the lower court and he appealed solely on the denial of his petition to examine the corporate books and records. The court of appeal affirmed the order denying the petition, stating that the right of inspection was conferred only on a shareholder of record. Since the petitioner's petition did not allege that he was a shareholder of record, the petition did not allege a proper basis for issuing a writ of mandate (*183 Cal. App. 2d 703, 706)* .

[b] Inspection Rights Unassignable

In ***Farrington v. Fairfield*** *(1961) 194 Cal. App. 2d 237, 16 Cal. Rptr. 119* [decided under former Corp. Code § 3003, *see now Corp. Code § 1601*], the petitioner appealed from an order denying his motion that he be substituted as petitioner in the place of another party in a mandamus proceeding. The other party, a registered shareholder of a corporation, had issued on his behalf a peremptory writ of mandate ordering a managing agent of the corporation to permit the shareholder to inspect the records and books of the corporation. Subsequently, the shareholder had assigned to the petitioner all his title and interest in the mandamus proceedings and his share in the corporation. The petitioner had then tried to have a court enforce the rights of the first shareholder for himself and was denied. The court of appeal affirmed the denial. It stated that the purpose of a writ was to enforce a clear legal right. Here, while the original shareholder had a right to inspect the corporate books, the assignment had changed the fact situation. The new shareholder could enforce his request only in his own right and not by virtue of the rights of another party (*194 Cal. App. 2d 237, 238-239)* .

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5-52 California Points & Authorities § 52.96

§ 52.96 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Petitioner Does Not Have a Reasonable Purpose for Inspection [Corp. Code § 1601]

[1] FORM

[*Caption. See § 52.95.*]

A PETITION FOR A WRIT OF MANDATE SHOULD NOT BE ISSUED SINCE PETITIONER'S PURPOSE IN DEMANDING A RIGHT OF INSPECTION IS NOT REASONABLY RELATED TO HIS/HER INTERESTS AS A SHAREHOLDER.

A. Inspection for Reasonably Related Purpose. *Corp. Code § 1601* gives a shareholder of a corporation the right to inspect the accounting books, records and minutes of proceedings of the shareholders, board, and committees for a purpose reasonably related to his or her interests (*Corp. Code § 1601(a)*).

B. Right of Inspection Limited. The provisions of the Corporations Code giving a shareholder the right of inspection does not confer the right to examine corporate records whenever the shareholder desires to do so, but limits the right to cases where the examination is for a purpose reasonably related to his or her interests as a shareholder (*see Capron v. Pacific S.W. Discount Corp. (1935) 6 Cal. App. 2d 436, 438-441, 44 P.2d 629* (decided under former Civ. Code § 355, *see now Corp. Code § 1601*).

[*Optional*] **C. Shareholders' Rights of Inspection Limited.** While shareholders have some right to corporate information not available to the general public, shareholder status does not in and of itself entitle an individual to unfettered access to corporate confidences and secrets (*Goldstein v. Lees (1975) 46 Cal. App. 3d 614, 621-624, 120 Cal. Rptr. 253*).

[*Optional*] **D. Necessity of a Hearing as to Purpose.** A conflict in the allegations as to the true purpose for a shareholder's demand to inspect corporate records necessitates a hearing on the facts (*Capron v. Pacific S.W. Discount Corp. (1935) 6 Cal. App. 2d 436, 438-441, 44 P.2d 629* (decided under former Civ. Code § 355, *see now Corp. Code § 1601*).

Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be used to oppose a petition for a writ of mandate. It alleges that the shareholder should not have the writ issued since the statute specifically states that an inspection of corporate documents and records may be made only for a purpose reasonably related to the petitioner's interest as a shareholder, and the shareholder does not have such a reasonable interest.

Counsel should insert a statement of facts that would indicate the improper or unreasonable motive of the shareholder.

[b] Related Pleading and Practice Forms

For general forms for opposing a petition for a writ of mandate, see California Forms of Pleading and Practice, Ch. 358, *Mandate and Prohibition* (Matthew Bender). For forms for opposing a petition for a writ of mandate by a shareholder seeking to inspect corporate books, records, and minutes, see California Forms of Pleading and Practice, Ch. 165, *Corporations: Corporate Records and Reports* (Matthew Bender).

[3] Discussion of Authorities

[a] Right of Inspection Limited

In ***Capron v. Pacific S.W. Discount Corp.*** *(1935) 6 Cal. App. 2d 436, 44 P.2d 629* [decided under former Civ. Code § 355, *see now Corp. Code § 1601*], a shareholder's petition for a writ of mandate asked the lower court to compel a corporation in which he owned shares to permit him to examine its corporate records. He alleged as his purpose his belief that the corporate funds had been misused by the corporation's president to the financial detriment of the corporation. The corporation filed an answer alleging that the shareholder's true purpose for inspecting the records was to procure the names of other shareholders with a view to making a profit at the expense of the corporation. It alleged that the board of directors had announced a plan to repurchase certain outstanding shares and that the petitioner sought the names of the shareholders in order to purchase their options and then resell them to the corporation at an excessive price. The petitioner demurred to the answer and the lower court sustained his demurrer without leave to amend and issued the writ of mandate. The corporation appealed. The court of appeal stated that while the shareholder's alleged purpose was a reasonable purpose for inspection, the answer of the corporation had raised the issue of the true purpose of the shareholder's request. The order sustaining the demurrer and granting the writ was overturned and the case remanded for a hearing of other proceeding to resolve the conflict in the allegations (*6 Cal. App. 2d 436, 438-441)* .

[b] Shareholders' Rights of Inspection Limited

In ***Goldstein v. Lees*** *(1975) 46 Cal. App. 3d 614, 120 Cal. Rptr. 253* [decided under former Corp. Code § 3003, *see now Corp. Code § 1601*], an attorney filed an amended complaint claiming money for services rendered to minority shareholders in a proxy fight with the majority shareholders of a corporation. The plaintiff-attorney also had been the corporate counsel to the corporation before leading the proxy fight for the minority shareholders. The plaintiff was denied any recovery by the court of appeals, which deemed that plaintiff had breached the attorney-client relationship

between himself and the corporation in violation of the ethical rules by undertaking the fight for the minority shareholders. The court stated that, while shareholders have some right to corporate information not available to the general public, shareholder status does not in and of itself entitle an individual to unfettered access to corporate confidences and secrets. It noted that former Corp. Code § 3003 [*see now Corp. Code § 1601*] confined the shareholders' rights to the share register, the books of account, and the minutes of proceedings of the shareholders, the board of directors, and the executive committees. Thus, by statute, shareholders have less right to acquire information than do directors. The minority shareholders did not have a right to hear certain confidential information that the attorney might have revealed to them in the course of the proxy fight (*46 Cal. App. 3d 614, 621-624)* .

This case should be used with caution since, while the dicta of the court states that there are limits to a shareholder's right to have access to corporate secrets, the decision of the case was made on other grounds.

[c] Necessity of a Hearing as to Purpose

For discussion of ***Capron v. Pacific S.W. Discount Corp.*** *(1935) 6 Cal. App. 2d 436, 44 P.2d 629* [decided under former Civ. Code § 355, *see now Corp. Code § 1601*], see *§ 52.96[3][a]*.

California Points & Authorities

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Volume 5 Chapters 50-59 CONTRACTS---to---CORPORATIONS
CHAPTER 52 CORPORATIONS
PART II. FORMS
C. CORPORATE RECORDS AND REPORTS

5-52 California Points & Authorities §§ 52.97-52.109

[Reserved]

§§ 52.97[Reserved]

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Volume 5 Chapters 50-59 CONTRACTS---to---CORPORATIONS
CHAPTER 52 CORPORATIONS
PART II. FORMS
D. ACTIONS INVOLVING CORPORATE DIRECTORS, OFFICERS, AND AGENTS

5-52 California Points & Authorities § 52.110

§ 52.110 Supporting Demurrer to Complaint--For Damages for Liability Created by Statute Against Directors of Corporation--Action Barred by Statute of Limitations [Code Civ. Proc. § 359]

[1] FORM

[*Caption. See § 52.60.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION BECAUSE IT APPEARS ON THE FACE THEREOF THAT IT IS BARRED BY THE STATUTE OF LIMITATIONS.

A. Objection by Demurrer. [*See § 52.60, Paragraph A.*]

B. Failure to State Cause of Action. The objection that an action is barred by a statute of limitations must be deemed to be included in the ground of demurrer that the complaint does not state facts sufficient to constitute a cause of action (*Bell v. Bank of Cal. (1908) 153 Cal. 234, 245, 94 P. 889*).

C. Statute of Limitations. The provisions of *Code of Civil Procedure Sections 312 through 363* governing in general the time of commencement of civil actions do not affect actions against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts on which the penalty of forfeiture attached, or the liability was created (*Code Civ. Proc. § 359*).

D. When Action Must Be Brought. Actions against directors or shareholders of a corporation to enforce a liability created by law must be brought within three years of the time at which the liability was created. When the action is one to enforce a liability created by law rather than to recover a penalty or forfeiture, the time of discovery of the facts is not the time from which the statute begins to run, but rather the time at which the liability was created (*Hoover v. Galbraith (1972) 7 Cal. 3d 519, 522, 102 Cal. Rptr. 733, 498 P.2d 981*).

E. Creation of Liability. The liability is created by the consummation of the contract, art, or omission by which the liability is incurred, whatever the character of the liability. It may be absolute or contingent; it may be unconditional or

limited; it may be presently enforceable by action, or there may be time given for its performance (*Hoover v. Galbraith (1972) 7 Cal. 3d 519, 524-525, 102 Cal. Rptr. 733, 498 P.2d 981*).

[*Optional*] **F. Obtaining Judgment Against Corporation.** A judgment obtained against the corporation does not create a new liability or extend the time prescribed by the statute for bringing suit against the shareholders or directors (*Chambers v. Farnham (1920) 182 Cal. 191, 193-194, 187 P. 732*).

[*Optional*] **G. Illegal Distribution of Assets by Directors.** The liability of directors to creditors under former Section 826 of the Corporations Code (now *Corp. Code § 316(a)(2)*) is a new liability, independent of the underlying debt or claim. It arises not when the creditor obtains judgment or when judgment becomes final, but when the directors distribute the assets of the corporation without making provision for payment of the creditor's claim and without having disclosed the existence of the claim as required. The act of distributing the assets, accompanied by the omission to disclose the claim, creates a contingent liability (*Hoover v. Galbraith (1972) 7 Cal. 3d 519, 525, 102 Cal. Rptr. 733, 498 P.2d 981* (decided under former Corp. Code § 826).

[*Optional*] **H. Director's Negligence or Breach of Fiduciary Duty to Corporation.** Actions against directors for negligence or breach of their fiduciary duty to the corporation involve liability created by law, specifically Section _____ [309 *or, for nonprofit mutual benefit corporation,* 7231] of the Corporations Code, and are subject to the three-year limitation set out in *Section 359 of the Code of Civil Procedure* (*Smith v. Superior Court (1990) 217 Cal. App. 3d 950, 953-954, 266 Cal. Rptr. 253* ; *but see* *Briano v. Rubio (1996) 46 Cal. App. 4th 1167, 1175, 54 Cal. Rptr. 2d 408* (holding that Smith misapplied phrase "liability created by law" by concluding that if there was statutory basis for action, it automatically constituted "liability created by law," regardless of whether statute merely codified existing common law)).

[*Optional*] **I. When Directors Liable for Failure to Cause Corporation to File Lawsuit.** Directors' liability for failure to cause the corporation to commence timely litigation against a third party arises when the statute of limitations on the corporation's cause of action against the third party expires (*Smith v. Superior Court (1990) 217 Cal. App. 3d 950, 953-954, 266 Cal. Rptr. 253*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a general demurrer to a complaint (or, with slight modification of wording, a cross complaint), when the demurrer asserts that the complaint fails to state facts sufficient to constitute a cause of action in that it appears on the face thereof, or from a matter of which the court is required to or may take judicial notice, that the action is barred by a statute of limitation.

Counsel should add argument linking the points in this form with the facts of his or her case.

With appropriate modifications, these points and authorities may be used to support a defendant's motion for judgment on the pleading [*see* *Wrightson v. Dougherty (1936) 5 Cal. 2d 257, 261-265, 54 P.2d 13]* , or a defendant's motion for summary judgment [*see Code Civ. Proc. § 437c*; *Graham v. Bank of Cal. (1961) 197 Cal. App. 2d 438, 439-444, 17*

Cal. Rptr. 279] .

[b] Related Pleading and Practice Forms

For a form of demurrer to a complaint based on the bar of a statute of limitations, see California Forms of Pleadings and Practice, Ch. 345, *Limitation of Actions* (Matthew Bender).

[c] Related Memoranda

For memoranda of points and authorities in support of a demurrer on the ground that the complaint is barred by a statute of limitations, see Ch. 143, *Limitation of Actions* .

[3] Discussion of Authorities

[a] Failure to State Cause of Action

Bell v. Bank of Cal. *(1908) 153 Cal. 234, 94 P. 889* was an action for the recovery of shares of stock. The defendant asserted in a general demurrer that the action was barred by a statute of limitations, and the trial court sustained the demurrer and dismissed the action. The method of asserting the defense of bar of a statute of limitations was not, apparently, at issue either in the trial court or on appeal; but the Supreme Court noted that the bar of the statute of limitations is not specified in the Code of Civil Procedure as a ground of demurrer, and that objection to a complaint, while required to be stated in the demurrer, must be deemed to be included within the ground of want of facts sufficient to constitute a cause of action.

[b] When Action Must Be Brought

Hoover v. Galbraith *(1972) 7 Cal. 3d 519, 102 Cal. Rptr. 733, 498 P.2d 981* was an action by a judgment creditor of a defunct corporation against the former directors to collect the debt represented by the judgment pursuant to former Corp. Code §§ 824 and 826 [*now see Corp. Code § 316*]. In the trial court, the judge ruled against the defendant directors' motion for summary judgment, finding that the directors knew of a pending suit against the corporation by the plaintiff creditor, that they did not determine that all known debts and liabilities had been paid or adequately provided for as required by statute, that no part of the judgment debt had been paid by the corporation or any of the defendants, and that plaintiff did not delay an unreasonable time in bringing the action. Judgment was for plaintiff and defendants appealed. On appeal, defendants raised the issue of the barring of the action by the statute of limitations provisions of *Code Civ. Proc. § 359*. The Supreme Court held that, since this was not an action to recover a penalty or forfeiture, the time of discovery was not important in determining whether the statute had run. The inquiry was as to when the liability was created and whether this action had been brought within three years thereafter, excluding any period of time in which the statute of limitations was tolled. The Court held that the limitation period of *Code Civ. Proc. § 359* commences when the liability is created and not when the cause of action accrues. That liability may be absolute or contingent; unconditional or limited; whatever its character, it is created by the consummation of the contract, act, or omission by which the liability is incurred. The Court found that in the case of distribution of corporate assets by the directors, the liability arose not when a judgment for the creditor came final, but when the directors distributed the assets of the corporation without making provisions for the payment of the creditor's claim and without disclosing the existence of the claim. However, the Court also held that the time before the appeal making plaintiff a judgment creditor was excluded from the period of limitation provided by *Code Civ. Proc. § 359* because the statute was tolled during the time in which the appeal from the judgment making plaintiff a judgment creditor was pending. Plaintiff's action was, therefore, not barred by the statute.

It should be noted that the statute under which *Hoover v. Galbraith (1972) 7 Cal. 3d 519, 102 Cal. Rptr. 733, 498 P.2d 981* was decided, former Corp. Code § 826, required plaintiff to be a judgment creditor of the corporation as a prerequisite to bringing an action against the directors of the corporation. Liability of the directors is now governed by

Corp. Code § 316. This section provides that suit may be brought in the name of the corporation to enforce liability against any or all directors liable by the judgment creditor whose claims arose prior to the corporate action, whether or not the creditor has reduced the claims to judgment [*Corp. Code § 316(c)(2)*]. The expiration of the limitation period set by *Code Civ. Proc. § 359* for actions against directors for illegal distributions, assuming that *Code Civ. Proc. § 359* will continue to be the applicable statute of limitations, will not then be tolled by the appeal of an action to establish the plaintiff as a judgment creditor, since being a judgment creditor will no longer be a prerequisite to bringing an action. Thus, it would appear that an action would have to be brought within three years from the illegal distribution without waiting for plaintiff to become a judgment creditor.

[c] Creation of Liability

Hoover v. Galbraith *(1972) 7 Cal. 3d 519, 102 Cal. Rptr. 733, 498 P.2d 981* is *discussed in § 52.110[3][b]*.

[d] Obtaining Judgment Against Corporation

Chambers v. Farnham *(1920) 182 Cal. 191, 187 P. 732* was an action by the creditors of a corporation against the shareholders to enforce shareholder liability pursuant to former Calif Const, Art XII, § 3, for the debts of the corporation. The action was based on the liability of the corporation for damages for breach of a lease. The trial court found that the action was barred by the statute of limitations because it was not brought within three years of the execution of the lease. It is unclear how defendant raised the issue of the statute of limitations, but it appears to have done so by answer to the complaint. Plaintiff appealed, and the court of appeal held that the action was barred by the statute of limitations provisions of *Code Civ. Proc. § 359*, because the action was not brought within three years of the execution of the lease, at which point the liability was created. The court rejected the contentions that the liability was created at the time of breach of the lease or at the time the judgment was obtained by the creditors against the corporation before proceeding with the action against the shareholders.

[e] Illegal Distribution of Assets by Directors

Hoover v. Galbraith *(1972) 7 Cal. 3d 519, 102 Cal. Rptr. 733, 498 P.2d 981* is *discussed in § 52.110[3][b]*.

[f] Director's Negligence or Breach of Fiduciary Duty to Corporation

Corp. Code § 309 is *set forth in § 52.140[3][b]*.

Smith v. Superior Court *(1990) 217 Cal. App. 3d 950, 266 Cal. Rptr. 253* was a proceeding for writ of mandate arising out of an action by a homeowners' association, a nonprofit corporation, against its directors for negligence and breach of fiduciary duty. Plaintiff claimed the directors were negligent in failing to inquire and reasonably to investigate the cause of distress and damage to the common areas and failing to have the association file an action against the developer until more than ten years after notices of completion were filed for all the buildings in the complex. The last notice of completion was filed on April 4, 1974. The association did file an action against the developer on January 21, 1986, but the primary causes of action were barred by the 10-year limitation of *Code Civ. Proc. § 337.15*. The action against the directors was filed on April 27, 1987. One director moved for summary adjudication on the grounds that the action was conclusively barred by *Code Civ. Proc. § 359* because it was not filed by April 4, 1987. After the trial court denied that motion, the director sought a writ of mandate requiring the trial court to vacate its order.

The court of appeal granted the writ and ordered the trial court to enter a new order granting the motion. The court of appeal said that "liability created by law" is liability that exists by virtue of an express statute but does not extend to actions arising under the common law. By its plain language, the three-year limitation of *Code Civ. Proc. § 359* applies when there is a statutory basis for actions against directors, shareholders, or members of a corporation. The court said that when the Legislature enacted *Corp. Code § 309* in 1975, they codified the standard of care for directors. *Corp. Code § 309(c)* precludes liability if the standard is met. The court set forth portions of the legislative committee

comments to the effect that the purpose of the statute is to relieve a person from any liability by reason of being or having been a director of a corporation if that person has exercised his or her duties in the manner contemplated by *Corp. Code § 309*. By codifying the standard of care and precluding further liability, *Corp. Code § 309* conveys the legislature's intent that any action by a beneficiary of the fiduciary relationship must necessarily flow from the statute (*217 Cal. App. 3d 950, 953)* . The court noted that *Corp. Code § 7231* makes the same standard applicable to nonprofit mutual benefit corporations (*217 Cal. App. 3d 950, 953 n.3*). The fiduciary duty is distinguished from the common law duty to third persons and is governed by the statute, not common law. Even though *Corp. Code § 309* was not mentioned in the complaint, the action is based on the statutory standard, and thus is governed by the three-year limitation (*2217 Cal. App. 3d 950, 954)* .

Briano v. Rubio *(1996) 46 Cal. App. 4th 1167, 54 Cal. Rptr. 2d 408* was a derivative action by minority shareholders against the directors andmajority shareholders for violation of the articles of incorporation, negligence, and breach of fiduciary duty. The trial court entered judgment for the plaintiff, finding negligence, violation of the articles, and breach of the directors' fiduciary duty to the corporation and minority shareholders. Rubio, a director and one of the majority shareholders, appealed on the ground that the cause of action for breach of fiduciary duty was time-barred under *Code Civ. Proc. § 359*. The plaintiffs had filed the complaint in 1991. Rubio claimed that *Corp. Code § 309*, which set forth the standard for determining the personal liability of a director for breach of fiduciary duty, was the "liability created by law." He argued that the liability was created in 1978 or 1980, when the share purchase and board meeting at issue occurred, and thus the action was time-barred because the suit was filed more than three years later (*46 Cal. App. 4th 1167, 1173)* .

The court of appeal affirmed the judgment, holding that *Code Civ. Proc. § 359* was inapplicable (*46 Cal. App. 4th 1167, 1169)* . It concluded that *Smith v. Superior Court (1990) 217 Cal. App. 3d 950, 266 Cal. Rptr. 253* , discussed *above*, misapplied the phrase "liability created by law" by concluding that if there was a statutory basis for an action, it automatically constituted a "liability created by law," regardless of whether the statute merely codified existing common law. The court further concluded that the cases on which the *Smith* court relied did not support its conclusion (*46 Cal. App. 4th 1167, 1175)* . The court determined that *Corp. Code § 309* did not create a new form of liability against directors of corporations but merely codified and refined existing law. *Under Coombes v. Getz (1933) 217 Cal. 320, 18 P.2d 939* , therefore, *Corp. Code § 309* does not constitute a "liability created by law," and consequently the limitation period set forth in *Code Civ. Proc. § 359* was inapplicable (*46 Cal. App. 4th 1167, 1179-1180)* .

[g] When Directors Liable for Failure to Cause Corporation to File Lawsuit

Smith v. Superior Court *(1990) 217 Cal. App. 3d 950, 266 Cal. Rptr. 253* is *discussed in § 52.110[3][f]*.

[4] Additional Authorities

[a] When Action Must Be Brought

Coombes v. Getz (1933) 217 Cal. 320, 18 P.2d 939 was an action by the creditor of a corporation to recover from the directors of the corporation the amount of a debt for goods sold to the corporation and was based on former Calif. Const., Art. XII, § 3 (now repealed), which made directors liable to the creditors of the corporation for all money embezzled or misappropriated by directors during their term of office. Defendant demurred on the ground that the complaint was barred by the statute of limitations, *Code Civ. Proc. § 359*. The trial court sustained the demurrer of defendant to plaintiff's amended complaint, plaintiff refused to amend, and the trial court gave judgment against plaintiff, from which plaintiff appealed. Since the complaint was not filed until five years after the last of the acts of the directors complained of, and *Code Civ. Proc. § 359* provides a limitation period of three years after the liability was created, the Supreme Court held that the action was barred. The Court also held that, when the cause of action is to enforce a liability created by law rather than a penalty or forfeiture, *Code Civ. Proc. § 359* commences to run when the liability was created, not when the facts were discovered. Plaintiff also argued that former Code Civ. Proc. § 338(4) [

now see Code Civ. Proc. § 388(d)], rather than *Code Civ. Proc. § 359*, was the applicable statute of limitations, because the action was based on facts constituting fraud. The Court noted that *Code Civ. Proc. § 359* applies only to liability created by law, and "created by law" has the restricted meaning in this statute of created by express statute or Constitutional provision. Nevertheless, the Court found that the liability in this case was imposed only by former Calif. Const., Art. XII, § 3, making directors liable for funds misappropriated by other directors, rather than on the common-law liability of directors for fraud, and that, therefore, *Code Civ. Proc. § 359*, rather than former Code Civ. Proc. § 338(4) [*now see Code Civ. Proc. § 388(d)*], applied to the action.

Pourroy v. Gardner (1932) 122 Cal. App. 521, 10 P.2d 815 was an action by the shareholders against the directors of a defunct corporation, based on illegal payments of dividends out of funds from which such dividends should not have been paid according to former Civ. Code § 309 [*see* former Corp. Code § 824, now *Corp. Code § 316*], which specifically provided for liability of the directors to creditors. After defendants demurred on several grounds, including the bar of the statute of limitations, the action was dismissed and plaintiff appealed. The court of appeal, in affirming the dismissal, held that *Code Civ. Proc. § 359* was the applicable statute of limitations, and that when the action is one to enforce a liability created by law rather than to recover a penalty or forfeiture, the action must be brought within three years from the time when the liability was created. In deciding that *Code Civ. Proc. § 359* was applicable, the court held that the liability under former Civ. Code § 309 was purely statutory, and that the action was therefore not subject to any other statute of limitations applicable to common-law actions. The court also held that, where *Code Civ. Proc. § 359* is the applicable statute, the discovery of the wrong is the starting point of the period of limitation only in actions to recover a penalty or forfeiture, not to enforce a liability created by law.

Richardson v. Craig (1938) 11 Cal. 2d 131, 77 P.2d 1077 was an action by the Superintendent of Banks to enforce an assessment against shareholders of an insolvent bank pursuant to the provisions of the Bank Stockholders' Liability Act. Defendants demurred on the ground that the actionwas barred by the statute of limitations and the trial court sustained the demurrer. The trial court overruled the demurrer. On appeal, defendants raised the issue of the applicable statute of limitations and the issue of when the statute began to run. The court of appeal found that the liability of the shareholders was established by the Bank Stockholders' Liability Act, which did not contain a specific statute of limitations. The court therefore found that *Code Civ. Proc. § 359* was the applicable statute of limitations. In deciding when the statute began to run, the court noted that *Code Civ. Proc. § 359* differs from other statutes of limitations because the period begins to run when the liability was created, rather than when the cause of action accrued. Thus, the court found that the liability was created when the assessment was levied on the shareholders.

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D. ACTIONS INVOLVING CORPORATE DIRECTORS, OFFICERS, AND AGENTS

5-52 California Points & Authorities § 52.111

§ 52.111 Supporting Demurrer to Complaint--For Damages for Fraud Against Directors of Corporation--Action Barred by Statute of Limitations [Code Civ. Proc. § 338(d)]

[1] FORM

[*Caption. See § 52.60.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT APPEARS ON THE FACE THEREOF THAT IT IS BARRED BY THE STATUTE OF LIMITATIONS.

A. Objection by Demurrer. [*See § 52.60, Paragraph A.*]

B. Failure to State Cause of Action. The objection that an action is barred by a statute of limitations must be deemed to be included in the ground of demurrer that the complaint does not state facts sufficient to constitute a cause of action (*Bell v. Bank of Cal. (1908) 153 Cal. 234, 245, 94 P. 889*).

C. Applicable Statute of Limitations. The three-year period of limitation prescribed by *Section 338(d) of the Code of Civil Procedure* for actions based on fraud or mistake applies to actions against directors based on fraud (*Burt v. Irvine Co. (1965) 237 Cal. App. 2d 828, 866, 47 Cal. Rptr. 392*).

D. Statute of Limitations. An action for relief on the ground of fraud or mistake must be commenced within three years of the accrual of the cause of action. The cause of action in such a case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake (*Code Civ. Proc. § 338(d)*).

[*Optional*] **E. Statute Not Tolled.** The principle that the statute of limitations for actions based on fraud is tolled for the period in which the directors responsible for the fraud are in control of the corporation does not apply where there has been an actual discovery of the fraud (*Burt v. Irvine Co. (1965) 237 Cal. App. 2d 828, 866-867, 47 Cal. Rptr. 392*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a general demurrer to a complaint (or, with slight modification of wording, a cross complaint), when the demurrer asserts that the complaint fails to state facts sufficient to constitute a cause of action in that it appears on the face of the complaint, or from a matter of which the court is required to or may take judicial notice, that the action is barred by the statute of limitations provisions of *Code Civ. Proc. § 338(d)*.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law raised.

[b] Related Uses

With appropriate modifications these points and authorities may be used to support a defendant's motion for judgment on the pleadings [*see Wrightson v. Dougherty (1936) 5 Cal. 2d 257, 261-265, 54 P.2d 13]* , or a defendant's motion for summary judgment [*see Code Civ. Proc. § 437c*; *Graham v. Bank of Cal. (1961) 197 Cal. App. 2d 438, 439-444, 17 Cal. Rptr. 279]* .

[c] Related Pleading and Practice Forms

For a demurrer to a complaint based on the bar of the statute of limitations, see California Forms of Pleading and Practice Ch. 345, *Limitation of Actions* (Matthew Bender).

[d] Related Memoranda

For memoranda of points and authorities in support of a demurrer on the ground that the complaint is barred by a statute of limitations, see Ch. 143, *Limitation of Actions* .

[3] Discussion of Authorities

[a] Failure to State Cause of Action

Bell v. Bank of Cal. *(1908) 153 Cal. 234, 94 P. 889* was an action for the recovery of shares of stock. The defendant asserted in a general demurrer that the action was barred by a statute of limitations, and the trial court sustained the demurrer and dismissed the action. The method of asserting the defense of bar of a statute of limitations was not, apparently, at issue either in the trial court or on appeal; but the Supreme Court said that the bar of the statute of limitations is not specified in the code as a ground of demurrer, and that objection to a complaint, while required to be stated in the demurrer, must be deemed to be included within the ground of want of facts sufficient to constitute a cause of action (*153 Cal. 234, 245)* .

[b] Applicable Statute of Limitations

Burt v. Irvine Co. *(1965) 237 Cal. App. 2d 828, 47 Cal. Rptr. 392* was an action in two counts: a shareholders' derivative action against defendant directors of the corporation, a foundation that owned 59 percent of the shares of the corporation; and various business enterprises owned by one of the directors. The alleged liability was based on a real

estate transaction in which the corporation exchanged some of its land. Plaintiffs sought to recover the difference between the alleged fair market value of the land conveyed and the value received by the corporation in exchange for that land. They also sought to recover the alleged loss to the corporation resulting from the exchange, rather than the retention for leasing, of some of the corporation's land and to recover alleged profits made by an officer of the corporation in the development of a portion of the property received by the officer and by the business enterprises in which the officer was interested. Plaintiffs alleged losses to the corporation due to the directors' approval of the transaction in which one director, through these business enterprises, had received the land transferred by the corporation at less than the value which could have been obtained through competitive bidding and without full disclosure of his interest. The defendant foundation and all of the director defendants other than the director interested in the other businesses demurred to the complaint on the grounds that it failed to state a cause of action and that it was barred by the statute of limitations provisions of *Code Civ. Proc. § 339(1)*. The other defendant director and the business enterprises filed a demurrer on these same grounds among others. The plaintiffs filed a proposed amended complaint, but the trial court sustained the demurrers without leave to amend, the demurrer of the foundation and related defendants on both grounds asserted, and the demurrer of the other director and the associated businesses enterprises on the ground of failure to state a cause of action. Plaintiffs appealed from the trial court's judgment for defendants.

The court of appeal reached the issue of whether the complaint would be barred by the statute of limitations because it found that the plaintiff could amend the complaint to state a cause of action and should be allowed to do so if not barred by the statute of limitations. In deciding which statute should be applied, the court found that the nature of the liability of each defendant depended on the degree of participation charged. As to those directors who actively participated in the selection of buyers for the property and concealed the interests of the interested director, their liability was in fraud or constructive fraud. As to those directors who merely passively approved of the action, their liability was found to be in negligence rather than fraud. These defendants did not know of the fraud and did not act in concert with the active directors to conceal it, and the court found that from other documents in the case there was no evidence on which plaintiffs could amend their complaint to show active participation and thus charge these directors with fraud. The liability of the passive directors was barred by *Code Civ. Proc. § 339(1)* which applies to an action on an obligation or liability not founded on an instrument of writing. An action predicated on the neglect or acquiescence of directors and majority shareholders was barred at the expiration of the two-year period prescribed by this statute, and the court, therefore, held that the demurrer to the complaint against these directors was properly sustained on that ground. On the other hand, the three-year statute of limitations of former Code Civ. Proc. § 338(4) (*see now Code Civ. Proc. § 338(d)*) which governs an action for relief on the ground of fraud or mistake applied to the cause of action against the directors who actively participated in the transaction under attack. The conduct alleged was a breach of the fiduciary duty owed by the directors to the corporation, so that the fraud statute applied. *Code Civ. Proc. § 359* (penalties, forfeitures, liabilities crated by law) did not apply, since it is applicable only to liability created by express statute or the Constitution. *Code Civ. Proc. § 343* (actions not otherwise provided for) did not apply, although it had been applied as a statute of limitations for breach of the written provisions of an express trust or to an action to recover the assets of a corporation which have been illegally transferred. Although it had been generally held that an action for fraud committed against a corporation is tolled for the period that those responsible remain in control of the corporation, the court held that the tolling does not apply to actions for negligence against corporate directors. The court of appeal therefore sustained the demurrer of the defendant directors charged with negligence without leave to amend due to the bar of the statute of limitations, but reversed the trial court's judgment as to the active directors and found that the plaintiff should have leave to file its amended complaint (*237 Cal. App. 2d 828, 866)* .

[c] Statute Not Tolled

Burt v. Irvine Co. *(1965) 237 Cal. App. 2d 828, 47 Cal. Rptr. 392* is *discussed in § 52.111[3][b]*.

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5-52 California Points & Authorities § 52.112

§ 52.112 Supporting Demurrer to Complaint--For Damages for Fraudulent Breach of Fiduciary Duty--Against Directors of Corporation--Action Barred by Statute of Limitations [Code Civ. Proc. § 339(1)]

[1] FORM

[*Caption. See § 52.60.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT APPEARS ON THE FACE THEREOF THAT IT IS BARRED BY THE STATUTE OF LIMITATIONS.

A. Objection by Demurrer. [*See § 52.60, Paragraph A.*]

B. Failure to State Cause of Action. The objection that an action is barred by a statute of limitations must be deemed to be included in the ground of demurrer that the complaint does not state facts sufficient to constitute a cause of action (*Bell v. Bank of Cal. (1908) 153 Cal. 234, 245, 94 P. 889*).

C. Applicable Statute of Limitations. An action based on the neglect or acquiescence of the directors is barred at the expiration of the two-year period of limitation provided by *Code of Civil Procedure Section 339(1)*, which runs at the expiration of two years following the transaction questioned (*Burt v. Irvine Co. (1965) 237 Cal. App. 2d 828, 865, 47 Cal. Rptr. 392*).

D. Statute of Limitations. An action on a contract, obligation, or liability not founded on an instrument of writing must be commenced within two years (*Code Civ. Proc. § 339(1)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities is for use in supporting a demurrer to a complaint for damages for negligent breach of duty against directors of a corporation. The demurrer is based on the ground that the action is barred by the statute of limitations, *Code Civ. Proc. § 339(1)*.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law raised.

[b] Related Uses

With appropriate modifications, these points and authorities may be used to support a defendant's motion for judgment on the pleadings [*see Wrightson v. Dougherty (1936) 5 Cal. 2d 257, 261-265, 54 P.2d 13]* , or a defendant's motion for summary judgment [*see Code Civ. Proc. § 437c*; *Graham v. Bank of Cal. (1961) 197 Cal. App. 2d 438, 439-444, 17 Cal. Rptr. 279]* .

[c] Related Pleading and Practice Forms

For a demurrer to a complaint based on the bar of the statute of limitations, see California Forms of Pleading and Practice Ch. 345, *Limitation of Actions* (Matthew Bender).

[d] Related Memoranda

For memoranda of points and authorities in support of a demurrer on the ground that the complaint is barred by a statute of limitations, see Ch. 143, *Limitation of Actions* .

[3] Discussion of Authorities

[a] Failure to State Cause of Action

Bell v. Bank of Cal. *(1908) 153 Cal. 234, 94 P. 889* was an action for the recovery of shares of stock. The defendant asserted in a general demurrer that the action was barred by a statute of limitations, and the trial court sustained the demurrer and dismissed the action. The method of asserting the defense of bar of a statute of limitations was not, apparently, at issue either in the trial court or on appeal, but the Supreme Court said that the bar of the statute of limitations is not specified in the code as a ground of demurrer, and that objection to a complaint, while required to be stated in the demurrer, must be deemed to be included within the ground of want of facts sufficient to constitute a cause of action (*153 Cal. 234, 245)* .

[b] Applicable Statute of Limitations

Burt v. Irvine Co. *(1965) 237 Cal. App. 2d 828, 47 Cal. Rptr. 392* was an action in two counts, a shareholders' derivative action against defendant directors of the corporation, a foundation which owned 59 percent of the shares of the corporation, and various business enterprises owned by one of the directors. The alleged liability was based on a real estate transaction in which the corporation exchanged some of its land. Plaintiffs sought to recover the difference between the alleged fair market value of the land conveyed and the value received by the corporation in exchange for that land. They also sought to recover the alleged loss to the corporation resulting from the exchange rather than the retention for leasing, of some of the corporation's land and to recover alleged profits made by an officer of the corporation in the development of a portion of the property received by the officer and by the business enterprises in which the officer was interested. Plaintiffs alleged losses to the corporation due to the directors' approval of the

transaction in which one director, through these business enterprises, had received the land transferred by the corporation at less than the value which could have been obtained through competitive bidding and without full disclosure of his interest. The defendant foundation and all of the director defendants other than the director interested in the other businesses demurred to the complaint on the grounds that it failed to state a cause of an action and that it was barred by the statute of limitations provisions of *Code Civ. Proc. § 339(1)*. The other defendant director and the business enterprises filed a demurrer on these same grounds among others. The plaintiffs filed a proposed amended complaint, but the trial court sustained the demurrers without leave to amend, the demurrer of the foundation and related defendants on both grounds asserted, and the demurrer of the other director and the associated businesses enterprises on the ground of failure to state a cause of action. Plaintiffs appealed from the trial court's judgment for defendants.

The court of appeal reached the issue of whether the complaint would be barred by the statute of limitations because it found that the plaintiff could amend the complaint to state a cause of action and should be allowed to do so if not barred by the statute of limitations. In deciding which statute should be applied, the court found that the nature of the liability of each defendant depended on the degree of participation charged. As to those directors who actively participated in the selection of buyers for the property and concealed the interests of the interested director, their liability was in fraud or constructive fraud. As to those directors who merely passively approved of the action, their liability was found to be in negligence rather than fraud. These defendants did not know of the fraud and did not act in concert with the active directors to conceal it, and the court found that from other documents in the case there was no evidence on which plaintiffs could amend their complaint to show active participation and, thus, charge these directors with fraud. The liability of the passive directors was barred by *Code Civ. Proc. § 339(1)* which applies to an action on an obligation or liability not founded on an instrument of writing. An action predicated on the neglect or acquiescence of directors and majority shareholders was barred at the expiration of the two-year period prescribed by this statute, and the court, therefore, held that the demurrer to the complaint against these directors was properly sustained on that ground. On the other hand, the three-year statute of limitations of former Code Civ. Proc. § 338(4) (*see now Code Civ. Proc. § 338(d)*) which governs an action for relief on the ground of fraud or mistake applied to the cause of action against the directors who actively participated in the transaction under attack. The conduct alleged was a breach of the fiduciary duty owed by the directors to the corporation, so that the fraud statute applied. *Code Civ. Proc. § 359* (penalties, forfeitures liabilities created by law) did not apply, since it is applicable only to liability created by express statute or the Constitution. *Code Civ. Proc. § 343* (actions not otherwise provided for) did not apply, although it had been applied as a statute of limitations for breach of the written provisions of an express trust or to an action to recover the assets of a corporation which have been illegally transferred. Although it had been generally held that an action for fraud committed against a corporation is tolled for the period that those responsible remain in control of the corporation, the court held that the tolling does not apply to actions for negligence against corporate directors. The court of appeal therefore sustained the demurrer of the defendant directors charged with negligence without leave to amend due to the bar of the statute of limitations, but reversed the trial court's judgment as to the active directors and found that the plaintiff should have leave to file its amended complaint (*237 Cal. App. 2d 828, 865)* .

[4] Additional Authorities

[a] Applicable Statute of Limitations

Southern Counties Thrift Co. v. Rairdon (1941) 47 Cal. App. 2d 770, 118 P.2d 828 was an action by a loan company against its directors for the amount of loans unlawfully made. One defendant demurred to the complaint on the ground that the action was barred by the statute of limitations provided by *Code Civ. Proc. § 339(1)*. The trial court sustained the demurrer. On appeal the plaintiff argued that the obligation or liability of the directors was a liability created by statute so that the cause of action was within the limitation period provided by *Code Civ. Proc. § 359*. The court of appeal affirmed the trial court's judgment. The court found that the liability of the directors was not based on an instrument in writing [within the meaning of *Code Civ. Proc. § 337*] and was not a liability created by statute [within the meaning of *Code Civ. Proc. § 359*]. Plaintiff argued that if the loans had been made in good faith, then only the restrictions of statute made them illegal, and that the liability, therefore, was one createdby statute. The court found that

although corporations are creatures of law and their functions are regulated largely by statute, that does not make their claims or liabilities or their acts those created by statute. The court stated that when the acts are expressly prohibited by statute but the liability for the violation of the statute is not imposed on corporate officers by statute, the doing of the act does not make the directors liable under the statute. Rather, the liability of the directors rests on the common-law rule of the duty of an agent to the principal. Since the statute in this case did not place on the directors the duty to make good the loans or losses resulting from them, that obligation rested on the duty imposed by common law. The period of limitation set forth in *Code Civ. Proc. § 359*, thus, did not apply, because the liability was not one imposed by law within the meaning of that statute as interpreted to mean liability imposed by express statute. The applicable statute of limitations was therefore *Code Civ. Proc. § 339(1)* (which governs actions based on a contract, obligation, or liability not founded on an instrument in writing) (*47 Cal. App. 2d 770, 772)* .

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5-52 California Points & Authorities § 52.112A

§ 52.112A Supporting Demurrer to Complaint--For Damages for Fraudulent Breach of Fiduciary Duty--Against Directors of Corporation--Action Barred by Statute of Limitations [Code Civ. Proc. § 339(1)]

[1] FORM

[*Caption. See § 52.60.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT ALLEGES NO FACTS ON WHICH, UNDER CALIFORNIA LAW, DEFENDANT, AS A DIRECTOR OF _____ [*name of corporation*], COULD BE LIABLE TO PLAINTIFF, AS A CREDITOR OF THE CORPORATION, SOLELY BECAUSE OF THE CORPORATION'S INSOLVENCY.

A. Objection by Demurrer. [*See § 52.60, Paragraph A.*]

B. Directors Owe No Fiduciary Duty to Creditor of Insolvent Corporation. In California, the directors of an insolvent corporation owe no fiduciary duty of due care or loyalty to the corporation's creditors solely because the corporation is insolvent. The scope of any noncontractual duty owed by corporate directors to the insolvent corporation's creditors is limited, in California, to the avoidance of acts that divert, dissipate, or unduly risk corporate assets which might otherwise be used to pay creditors' claims, including acts that involve self dealing or the preferential treatment of creditors (*Berg & Berg Enters. v. Boyle (2009) 178 Cal. App. 4th 1020, 1041, 100 Cal. Rptr. 3d 875*).

[*Optional*] **C. No Fiduciary Duty When Corporation Operates in "Zone of Insolvency."** There is no fiduciary duty prescribed under California law that is owed to creditors by directors of a corporation solely by virtue of its operating in any so-called "zone of insolvency" without being actually insolvent (*Berg & Berg Enters. v. Boyle (2009) 178 Cal. App. 4th 1020, 1041, 100 Cal. Rptr. 3d 875*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum is for use in supporting a demurrer to a complaint for damages for breach of fiduciary duty against directors of a corporation. The demurrer is based on the ground that no cause of action is stated by a complaint alleging, in material part, that the plaintiff is a creditor of the corporation and that the defendant, as a director, owed a fiduciary duty to the plaintiff once the corporation became insolvent or, optionally, while the corporation was operating in a so-called "zone of insolvency" without being actually insolvent.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law raised.

[b] Related Uses

With appropriate modifications, these points and authorities may be used to support a defendant's motion for judgment on the pleadings [*see Wrightson v. Dougherty (1936) 5 Cal. 2d 257, 261-265, 54 P.2d 13*], or a defendant's motion for summary judgment [*see Code Civ. Proc. § 437c*; *Graham v. Bank of Cal. (1961) 197 Cal. App. 2d 438, 439-444, 17 Cal. Rptr. 279*].

[3] Discussion of Authorities

[a] Directors Owe No Fiduciary Duty to Creditor of Insolvent Corporation

In ***Berg & Berg Enters. v. Boyle*** *(2009) 178 Cal. App. 4th 1020, 100 Cal. Rptr. 3d 875* , the plaintiff, a creditor of a corporation, attempted to allege a violation of the directors' fiduciary duty, complaining that when the corporation was on the verge of becoming insolvent, the directors effected an assignment for the benefit of creditors rather than investigating, exploring, or pursuing a bankruptcy reorganization through which, the plaintiff theorized, the value of the corporation's accumulated net operating losses could have been maximized for the benefit of the plaintiff and the other creditors. The directors demurred on the ground of failure to state a cause of action, and the trial court sustained the demurrer without leave to amend, relying on case law to the effect that the only duty owed by directors to an insolvent corporation's creditors is the duty to avoid acts that divert, dissipate, or unduly risk corporate assets which might otherwise be used to pay creditors' claims. In all of the versions of the plaintiff's complaint (the original version, two earlier amended versions, and the last, the third amended version), there were no allegations indicating that the defendants had done any such acts.

The court of appeal affirmed. The court observed that some California cases are in accord with a so-called trust-fund doctrine, to the effect that all of the assets of a corporation, immediately on its becoming insolvent, become a trust fund for the benefit of all of its creditors, in order to satisfy their claims (178 Cal. App. 4th 1020, 1040). However, this does not mean that the directors of an insolvent corporation are in the position of a trustee with respect to the corporation's creditors. The court held that in California, the directors of an insolvent corporation owe no fiduciary duty of due care or loyalty the corporation's creditors solely because the corporation is insolvent. The scope of any noncontractual duty owed by corporate directors to the insolvent corporation's creditors is limited, in California, to the avoidance of acts that divert, dissipate, or unduly risk corporate assets which might otherwise be used to pay creditors' claims [*cf. Civ. Code § 1708* (every person is bound, without contract, to abstain from "injuring the person or property of another, or infringing upon any of his or her rights")]; and this would include acts that involve self dealing or the preferential treatment of creditors (*178 Cal. App. 4th 1020, 1041)* .

[b] No Fiduciary Duty When Corporation Operates in "Zone of Insolvency"

The facts and principal holding of ***Berg & Berg Enters. v. Boyle*** *(2009) 178 Cal. App. 4th 1020, 100 Cal. Rptr. 3d 875* , are discussed in *§ 52.112A[3][a]*. The plaintiff had attempted to allege, as an additional basis for the directors' liability, that the directors owed a duty to creditors during a period when the corporation was operating in a so-called "zone of insolvency," a period when the corporation was not actually insolvent but was almost certainly going to become insolvent. The court of appeal rejected that notion, holding that there is no fiduciary duty prescribed under California law that is owed to creditors by directors of a corporation solely by virtue of its operating in any so-called "zone of insolvency" (or in the "vicinity of insolvency," as some courts have described it) without being actually insolvent (*178 Cal. App. 4th 1020, 1041)* .

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5-52 California Points & Authorities § 52.113

§ 52.113 Supporting Demurrer to Complaint--For Removal of Directors of Corporation for Cause [Corp. Code § 304]--Failure of Complaint to Allege Facts Rather Than Conclusions

[1] FORM

[*Caption. See § 52.60.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT THE ALLEGATIONS OF FRAUDULENT ACTS OF THE DIRECTORS ARE IN GENERAL AND CONCLUSIONARY TERMS WITHOUT SPECIFIC FACTS ADEQUATE TO SHOW THE BASIS FOR THE GENERAL CHARGES.

A. Objection by Demurrer. [*See § 52.60, Paragraph A.*]

B. Specific Facts Adequate to Show Fraud Are Required. Allegations of fraudulent acts sufficient to justify removal of directors from office pursuant to *Corporations Code Section 304* cannot be in the form of general charges of fraud and bad faith on the part of the directors. Such general allegations are insufficient in the absence of allegations of specific facts adequate to show the basis for the general charges (*Starbird v. Lane (1962) 203 Cal. App. 2d 247, 255, 257, 21 Cal. Rptr. 280*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a demurrer to a complaint for removal of a corporate director for cause pursuant to *Corp. Code § 304* [former Corp. Code § 811] when the demurrer asserts that the complaint fails to state a cause of action in that the plaintiff has not alleged specific facts constituting fraudulent or dishonest acts on the part of the directors.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law raised.

[b] Related Memoranda

For a memorandum supporting a demurrer to a complaint for fraud on the ground that the complaint fails to state a cause of action in that the complaint states the elements of fraud only as legal conclusions, see Ch. 105, *Fraud and Deceit* , and Ch. 92, *Duress, Menace, Fraud, Undue Influence, and Mistake* .

[3] Discussion of Authorities

[a] Specific Facts Adequate to Show Fraud Are Required

Starbird v. Lane *(1962) 203 Cal. App. 2d 247, 21 Cal. Rptr. 280* was an action for declaratory relief, appointment of a receiver, removal of directors of a corporation, and an injunction. The action was brought by the shareholders and members against an incorporated club and the directors and former directors of the corporation. The trial court sustained the demurrer of the former directors to the complaint without leave to amend. It also sustained the demurrer of the present directors but with leave to amend. Plaintiffs failed to amend the complaint as allowed within the proper time and also purported to appeal from the granting of the demurrer of the former directors without leave to amend. On appeal, the court affirmed the trial court's judgment. In determining whether the final unamended complaint stated a cause of action against any of the defendants, the court of appeal stated that it is a well-established rule that in a case of removal of directors for fraud, general charges of fraud, conspiracy and bad faith on the part of corporate directors are insufficient in the absence of allegations of specific facts adequate to show the basis for the general charges. The court, therefore, held that the trial court was correct in sustaining the demurrer of the presently acting director defendants because plaintiffs failed, among other things, to plead any acts or conduct on the part of defendants which could be said to constitute fraudulent or dishonest acts or gross abuse of authority or discretion with reference to the corporation, in that the charges were stated as general conclusions (*203 Cal. App. 2d 247, 255-257)* .

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5-52 California Points & Authorities § 52.114

§ 52.114 Supporting Demurrer to Answer to Petition for Appointment of Provisional Director of Corporation When Board Is Deadlocked [Corp. Code § 308]--Estoppel and Unclean Hands Not Defenses

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF DEMURRER
Petitioner,	)	TO ANSWER TO PETITIONER
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Respondent.	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THE ANSWER TO THE PETITION DOES NOT STATE FACTS SUFFICIENT TO CONSTITUTE A DEFENSE IN THAT _____ [IT ALLEGES THE UNCLEAN HANDS OF PETITIONER *or* IT ALLEGES THAT PETITIONER IS ESTOPPED TO SEEK THE REQUESTED RELIEF].

A. Demurrer to Answer. A party against whom an answer has been filed may object, by demurrer as provided in *Code of Civil Procedure Section 430.30*, to the answer on the ground that the answer does not state facts sufficient to constitute a defense (*Code Civ. Proc. § 430.20*).

B. Estoppel and Unclean Hands Are Not Defenses. In actions to appoint a provisional director of a corporation

which is deadlocked, brought pursuant to *Code of Civil Procedure Section 308*, the doctrines of unclean hands and estoppel are inapplicable as defenses. The question before the court is whether there is a deadlock and not why the deadlock may exist (*In re Jamison Steel Corp. (1958) 158 Cal. App. 2d 27, 39, 322 P.2d 246*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a demurrer to an answer to a petition to appoint a provisional director of a corporation if the shareholders are deadlocked so they cannot elect the directors to be elected at an annual shareholders' meeting [*see Corp. Code § 308*]. When the answer to such a petition alleges unclean hands and estoppel, the demurrer is on the ground that unclean hands and estoppel as to the petitioners are not defenses to such a proceeding.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law raised.

[b] Related Pleading and Practice Forms

For a petition for appointment of a provisional director of a corporation with an even number of directors, see *California Forms of Pleading and Practice, Ch. 167, Corporations: Directors and Management, § 167.160* (Matthew Bender).

[3] Discussion of Authorities

[a] Estoppel and Unclean Hands Are Not Defenses

In re Jamison Steel Corp. *(1958) 158 Cal. App. 2d 27, 322 P.2d 246* was a proceeding for the appointment of a provisional director of a corporation with four directors on the board who were unable to break the deadlock created by tie votes on important corporate issues. There was evidence before the trial court which supported the conclusion that the corporation's business could not be conducted to advantage and that its business and property were in danger of being impaired by the situation. The trial court found for petitioners and ordered the appointment of a provisional director. On appeal by respondents from this judgment, the court of appeal found that the granting of the remedy was proper under the circumstances and that the doctrines of unclean hands and estoppel were inapplicable to petitioners, since these doctrines have no applicability under former Corp. Code § 819 [*now see Corp. Code § 308*]. The court of appeal found that estoppel and unclean hands are irrelevant because the only question before the court in such a case is whether there is a deadlock, not why one exists (*158 Cal. App. 2d 27, 39)* .

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5-52 California Points & Authorities § 52.115

§ 52.115 Supporting Motion for Summary Judgment--By Defendant--Director Lacks Authority to Institute Action in Name of Corporation Against Codirector and Equal Shareholder

[1] FORM

[*Caption. See § 52.31.*]

SUMMARY JUDGMENT FOR DEFENDANT DIRECTOR IS PROPER BECAUSE PLAINTIFF, A CODIRECTOR AND EQUAL SHAREHOLDER, HAS NO AUTHORITY TO BRING AN ACTION AGAINST THE DEFENDANT IN THE NAME OF THE CORPORATION.

A. Summary Judgment. [*See § 52.31, Paragraph A.*]

B. No Authority for Director to Bring Action Against Codirector Who Is Equal Shareholder. A corporate director has no presumptive or implied authority to institute litigation in the name of the corporation against a codirector and equal shareholder (*Anmaco, Inc. v. Bohlken (1993) 13 Cal. App. 4th 891, 899-900, 16 Cal. Rptr. 2d 675*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for summary judgment when the motion asserts that plaintiff has no authority to institute litigation in the name of the corporation against the defendant because the

defendant is a codirector who is an equal shareholder in the corporation. The form may also be used in support of a demurrer, when all the relevant facts appear on the face of the complaint or are subject to judicial notice [*see Code Civ. Proc. § 430.30(a)*].

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations that support the motion [*Code Civ. Proc. § 437c*].

[3] Discussion of Authorities

[a] No Authority for Director to Bring Action Against Codirector Who Is Equal Shareholder

Anmaco, Inc. v. Bohlken *(1993) 13 Cal. App. 4th 891* , involved a dispute between the two sole directors of a corporation, each of whom owned 50 percent of the corporation's shares. Plaintiff director, the corporation's president, brought suit on the corporation's behalf against defendant director, the corporation's chief executive officer. Plaintiff's complaint set forth numerous causes of action based on various wrongs allegedly committed by defendant director against the corporation. The trial court granted summary judgment on these causes of action. Plaintiff appealed.

The court of appeal affirmed. The court held that there is no presumptive or implied authority in a corporate president to institute litigation in the name of the corporation against a codirector and equal shareholder. Pressing the corporation into litigation as a plaintiff is inappropriate, noted the court, when the other shareholder director could claim equal authority to bring suit in the corporate name. The court pointed out that the inappropriateness of such action was particularly evident in the instant case, because defendant was not only an equal director and shareholder, but also was a chief executive officer of the company. The court remarked that the proper vehicle for such a suit, when the gravamen of the complaint is injury to the corporation, is a shareholder's derivative action (*13 Cal. App. 4th 891, 899-900)* . In upholding the summary judgment, the court declined to express a view on the president's power to institute or defend litigation in an emergency or involving an outsider or when the bylaws may grant the power to do so (*13 Cal. App. 4th 891, 899 n.2*).

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5-52 California Points & Authorities § 52.116

§ 52.116 Supporting Motion for Summary Judgment--By Defendant--In Action to Remove Defendant From Office for Acts Committed as Director [Corp. Code § 314]--Defendant Reelected After Acts Complained Of

[1] FORM

[*Caption. See § 52.31.*]

SUMMARY JUDGMENT FOR DEFENDANT DIRECTOR IS PROPER WHEN PLAINTIFF SEEKS TO REMOVE DEFENDANT FROM OFFICE FOR ACTS COMMITTED DURING THE TERM OF OFFICE AND DEFENDANT HAS BEEN REELECTED SUBSEQUENT TO THESE ACTS.

A. Summary Judgment. [*See § 52.31, Paragraph A.*]

B. Subsequently Reelected Director Not Removable. As a general rule, a director will not be removed for acts committed during the term of office if the director is subsequently reelected (*Starbird v. Lane (1962) 203 Cal. App. 2d 247, 256, 21 Cal. Rptr. 280*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for summary judgment when the motion asserts that defendant is entitled to a judgment as a matter of law since defendant has been reelected as a director of the corporation

subsequent to the time of the acts alleged in the complaint as the basis for removal from office.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law raised. In addition, counsel should attach affidavits or declarations which support the motion [*Code Civ. Proc. § 437c*].

With appropriate modification, the foregoing points and authorities may be used to support a demurrer to a complaint for removal of a director where the director has been reelected subsequent to the acts complained of.

[3] Discussion of Authorities

[a] Subsequently Reelected Director Not Removable

Starbird v. Lane *(1962) 203 Cal. App. 2d 247, 21 Cal. Rptr. 280* was an action for declaratory relief, appointment of a receiver, removal of directors of a corporation, and an injunction. The action was brought by the shareholders and members against an incorporated club and the directors and former directors of the corporation. The trial court sustained the demurrer of the former directors to the complaint without leave to amend. It also sustained the demurrer of the present directors but with leave to amend. Plaintiffs failed to amend the complaint as allowed within the proper time and also appealed from the granting of the demurrer without leave to amend. The court of appeal considered whether the final unamended complaint stated a cause of action against any of the defendants. In sustaining the demurrers of those directors who had been reelected, the court of appeal stated, among other reasons for sustaining the demurrers, that as a general rule a director will not be removed for acts committed during his term of office if the director is subsequently reelected. The court also found that the complaint failed to state a cause of action in that it alleged only general conclusions and failed to state causes of action for other types of relief requested.

[4] Additional Authorities

[a] Subsequently Reelected Director Not Removable

Remillard Brick Co. v. Remillard-Dandini (1952) 109 Cal. App. 2d 405, 241 P.2d 66 was an action by a minority shareholder to void contracts between directors and a corporation, to oust directors, and to recover fees and profits. The trial court found that the directors should be removed if they did not repay the amounts to the corporation which they had obtained through fraud. In affirming that part of the trial court's judgment, the court of appeal found that there was no abuse of the trial court's discretion in allowing the directors to return to their posts after paying the required amounts, where the acts complained of occurred prior to their reelection by the shareholders of the corporation as directors. The court of appeal noted that it is a general rule that a director will not be removed for acts committed during the term of office if the director is subsequently reelected.

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5-52 California Points & Authorities § 52.117

§ 52.117 Supporting Motion for Indemnification of Director, Officer, or Other Agent of Corporation--For Expenses in Defending Suit Without Success on Merits [Corp. Code § 317(b), (c)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF MOTION FOR
Plaintiff,	)	INDEMNIFICATION
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

DEFENDANT IN THE ABOVE-ENTITLED ACTION IS ENTITLED TO BE INDEMNIFIED FOR THE EXPENSES INCURRED IN CONNECTION WITH DEFENDING AGAINST THE ABOVE-ENTITLED ACTION IN THAT DEFENDANT IS AN "AGENT" OF THE CORPORATION, THE ABOVE-ENTITLED ACTION IS A "PROCEEDING," ALL EXPENSES INCURRED ARE "EXPENSES," AND DEFENDANT MEETS THE APPLICABLE STANDARD FOR INDEMNIFICATION UNDER SECTION 317 OF THE CORPORATIONS CODE.

[*EITHER*]

A. Corporate Agent. An "agent" means any person who is or was a director, officer, employee, or other agent of the corporation (*Corp. Code § 317(a)*).

[*OR*]

A. Corporate Agent. An "agent" means any person who is or was serving at the request of the corporation as a director, officer, employee, or agent of another foreign or domestic corporation, partnership, joint venture, trust, or other enterprise (*Corp. Code § 317(a)*).

[*OR*]

A. Corporate Agent. An "agent" means any person who was a director, officer, employee, or agent of a foreign or domestic corporation which was a predecessor corporation of the corporation or of another enterprise at the request of such predecessor corporation (*Corp. Code § 317(a)*).

B. Proceeding for Purposes of Indemnification. "Proceeding" means any threatened, pending, or completed action or proceeding, whether civil, criminal, administrative, or investigative (*Corp. Code § 317(a)*).

C. Expenses for Purposes of Indemnification. The term "expenses" for the purposes of indemnification includes, without limitation, attorney's fees and any expenses of establishing a right to indemnification under Section 317(d) or *Section 317(e)(4) of the Corporations Code* (*Corp. Code § 317(a)*).

D. Indemnification of Defendant Without Success on the Merits. Except as provided for defendants successful on the merits, indemnification may be made by the corporation if authorized in the specific case, on a determination that indemnification of the agent is proper in the circumstances because the agent has met the applicable standard of conduct set forth in Sections 317(b) or (c) of the Corporations Code (*Corp. Code § 317(e)*). This determination may be made

[*EITHER*]

by a majority vote of a quorum consisting of directors who are not parties to the proceeding (*Corp. Code § 317(e)(1)*).

[*OR*]

, if a quorum consisting of directors who are not parties to the proceeding is not obtainable, by independent legal counsel in a written opinion (*Corp. Code § 317(e)(2)*).

[*OR*]

by approval of the shareholders [as defined in *Section 153 of the Corporations Code*], with the share owned by the person to be indemnified not being entitled to vote on the matter (*Corp. Code § 317(e)(3)*).

[*OR*]

by the court in which the proceeding is or was pending on application made by the corporation, agent, attorney, or other person rendering services in connection with the defense, whether or not the application by the agent, attorney, or other person is opposed by the corporation (*Corp. Code § 317(e)(4)*).

[*CONTINUE*]

[*EITHER*]

E. Indemnification of Defendant Without Success on the Merits in a Derivative Action. A corporation has the power to indemnify any person who was or is a party, or is threatened to be made a party, to any threatened, pending, or completed action by or in the right of the corporation to procure a judgment in its favor by reason of the fact that such person is or was an agent of the corporation, against expenses actually and reasonably incurred by the person in connection with the defense or settlement of such action if the person acted in good faith, in a manner such person believed to be in the best interests of the corporation and its shareholders (*Corp. Code § 317(c)*).

[*OR*]

E. Indemnification of Defendant Without Success on the Merits in a Nonderivative Action. A corporation has the power to indemnify any person who was or is a party, or is threatened to be made a party, to any proceeding (other than an action by or in the right of the corporation) by reason of the fact that such person is or was an agent of the corporation, against expenses, judgments, fines, settlements, and other amounts actually and reasonably incurred in connection with such proceeding if such person acted in good faith in a manner such person reasonably believed to be in the best interests of the corporation, and, in the case of a criminal proceeding, had no reasonable cause to believe the conduct of such person was unlawful (*Corp. Code § 317(b)*).

[*CONTINUE*]

[*Optional*] **F. Outcome of Proceeding Does Not Create a Presumption.** The termination of any proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent shall not, of itself, create a presumption that the person did not act in good faith and in a manner which the person reasonably believed to be in the best interests of the corporation or create a presumption that the person had reasonable cause to believe that his/her conduct was unlawful (*Corp. Code § 317(b)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for indemnification of a director, officer, or employee of a

corporation for expenses incurred in defense of a suit. This procedure should only be needed to the extent that a defendant has not been successful on the merits in defending against the suit, because the General Corporation Law provides for mandatory indemnification by the corporation of corporate agents who have been successful in defense of a derivative or non-derivative suit, to the extent successful on the merits [*see Corp. Code § 317(d)*].

When appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law raised.

[b] Expenses Incurred in Criminal Proceeding

Although cases decided under former Corp. Code § 830 dealing with indemnification held that indemnification for expenses incurred in defending a criminal proceeding may be sought only in a plenary civil proceeding for that purpose against the corporation, especially when the criminal proceedings have been concluded [*see P.S. & S., Inc. v. Superior Court (1971) 17 Cal. App. 3d 354, 360, 94 Cal. Rptr. 738]* , present *Corp. Code § 317* specifically provides that the determination that indemnification is proper, if such a determination is required for indemnification, is to be made by the court in which the proceeding is or was pending on application made by the corporation, agent, attorney, or other person rendering services in connection with the defense [*see Corp. Code §§ 317(e)(4), 317(c)(1)*]. It seems, therefore, that application must be made to the court in which the original proceeding is or was pending and that a separate civil action would be improper.

[c] Related Pleading and Practice Forms

For notices of motion for indemnification and declaration in support of motion for indemnification of expenses incurred in defense of suit by a director, officer, or employee of a corporation, see California Forms of Pleading and Practice, Ch. 167, *Corporations: Directors and Management* (Matthew Bender).

[3] Additional Authorities

[a] Corporate Agent

In *Channel Lumber Company, Inc. v. Porter Simon (2000) 78 Cal. App. 4th 1222, 93 Cal. Rptr. 2d 482* , the court of appeal reversed an order of the trial court awarding attorney's fees and expenses to a corporation's retained counsel pursuant to *Corp. Code § 317(d)*. It stated that *Corp. Code § 317* is intended not only to afford reasonable protection to corporate agents, but also to impose safeguards to protect shareholders by restricting indemnity to situations in which liability is sought to be imposed upon an individual by reason of the fact that the person was an agent of a corporation. The court concluded that an outside attorney retained by a corporation to represent it at trial, who is then sued by the corporation for alleged legal malpractice while representing the corporation, is not a party to the malpractice suit "by reason of the fact [the attorney] is or was an agent of the corporation," within the meaning and purposes of *Corp. Code § 317* (*78 Cal. App. 4th 1222, 1232)* .

[b] Expenses for Purposes of Indemnification

In *Wilshire-Doheny Associates, Ltd. v. Stanley Shapiro (2000) 83 Cal. App. 4th 1380, 100 Cal. Rptr. 2d 478* , appellants claimed the trial court erred in finding that they were not entitled to be indemnified for attorney's fees and costs incurred in successfully defending a cross-complaint against them under contractual indemnity provisions and *Corp. Code § 317*. The court of appeal held that the trial court erred in determining as a matter of law that *Corp. Code § 317* did not apply, because the question of its application was a factual one. A trial on the allegations of the complaint was necessary to determine whether appellants' alleged acts were taken on behalf of the corporation, or whether they were acting to further their own personal interests (*83 Cal. App. 4th 1380, 1390)* .

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5-52 California Points & Authorities § 52.118

§ 52.118 Opposing Demurrer to Complaint--For Damages for Fraud Against Directors of Corporation--Proper Statute of Limitations Is Code Civ. Proc. § 338(d) Rather Than Code Civ. Proc. § 359

[1] FORM

[*Caption. See § 52.63.*]

THE COMPLAINT STATES A CAUSE OF ACTION AND IS NOT BARRED BY THE STATUTE OF LIMITATIONS BECAUSE THE APPLICABLE STATUTE IS CODE OF CIVIL PROCEDURESECTION 338(d) RATHER THAN CODE OF CIVIL PROCEDURE SECTION 359.

A. Applicability of *Code of Civil Procedure Section 359*. *Code of Civil Procedure Section 359* applies only to liabilities of directors created by law. The phrase "created by law" has been consistently interpreted to mean only those liabilities which exist by virtue of an express statute and not those arising under the common law (*People v. Clauson (1964) 231 Cal. App. 2d 374, 380, 41 Cal. Rptr. 691*).

B. When Liabilities Are Created by Common Law. The fact that corporations are creatures of law and their functions are regulated largely by statute does not make their claims or liability or their acts those created only by statute, within the meaning of "created by law" in *Code of Civil Procedure Section 359*. The liability of directors is not imposed on them by statute within the meaning of that code section merely because a statute makes the doing of an act a violation of the statute. Rather, absent excess provision for liability, directors' liability rests on the common law rule which renders every agent liable who violates the authority to the damage of the principal (*Southern Counties Thrift Co. v. Rairdon (1941) 47 Cal. App. 2d 770, 771-772, 118 P.2d 828*).

C. Statute of Limitations for Fraud Actions Against Directors. A complaint charging fraud of directors of a corporation is governed by the statute of limitations provisions of *Code of Civil Procedure Section 338(d)*, setting the period of limitation for actions based on fraud, not by *Code of Civil Procedure Section 359*, governing actions against corporate directors or shareholders created by law (*Campbell v. Clark (1958) 159 Cal. App. 2d 439, 443, 324 P.2d 55*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a demurrer to a complaint for damages against the directors of a corporation for a fraudulent breach of their fiduciary duty to the corporation, when the action sought to be brought by plaintiff would be barred by *Code Civ. Proc. § 359* but not by *Code Civ. Proc. § 338(d)* as the statute of limitations. The memorandum shows that *Code Civ. Proc. § 338(d)* is the applicable statute of limitations.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law raised.

[3] Discussion of Authorities

[a] Applicability of Section 359 of the Code of Civil Procedure

People v. Clauson *(1964) 231 Cal. App. 2d 374, 41 Cal. Rptr. 691* was an action in which a corporation had not paid its tax liability under the Sales and Use Tax Law. It was alleged that the corporation and the individuals owning the stock were one and the same and that the individuals used the corporation for the purpose of avoiding debts incurred by them. Respondents demurred on the ground that their personal liability was barred by former Code Civ. Proc. § 338(4) (*now see Code Civ. Proc. §§ 343* and *359*) and *Rev. & Tax. Code § 6711*. The trial court sustained the demurrer and dismissed the action but did not decide which statute was applicable. In reversing, the court of appeal found, among other things, that *Code Civ. Proc. § 359* was inapplicable because decisions have interpreted it as limited to those liabilities created by law, meaning those liabilities which exist by virtue of an express statute and not those arising under common law. Since the liability sought to be imposed in this case did not arise by reason of any statutory obligation on respondents as shareholders qua shareholders but would attach only by reason of a judicially created equitable doctrine, the doctrine of corporate alter ego, the statute of limitations was not that provided by *Code Civ. Proc. § 359* (*231 Cal. App. 2d 374, 380)* .

[b] When Liabilities Are Created by Common Law

Southern Counties Thrift Co. v. Rairdon *(1941) 47 Cal. App. 2d 770, 118 P.2d 828* was an action by a loan company against its directors for the amount of loans unlawfully made. One defendant demurred to the complaint on the ground that the action was barred by the statute of limitations provided by *Code Civ. Proc. § 339(1)*. The trial court sustained the demurrer. On appeal the plaintiff argued that the obligation or liability of the directors was a liability created by statute so that the cause of action was within the limitation period provided by *Code Civ. Proc. § 359*. The court of appeal affirmed the trial court's judgment. The court found that the liability of the directors was not based on an instrument in writing [within the meaning of *Code Civ. Proc. § 337*] and was not a liability created by statute [within the meaning of *Code Civ. Proc. § 359*]. Plaintiff arguedthat if the loans had been made in good faith then only the restrictions of statute made them illegal and that the liability was therefore one created by statute. The court found that although corporations are creatures of law and their functions are regulated largely by statute, that does not make their claims or liabilities or their acts those created only by statute. The court stated that where the acts are expressly prohibited by statute but the liability for the violation of the statute is not imposed on corporate officers by statute, the doing of the act does not make the directors liable under the statute. Rather, the liability of the directors rests on the common-law rule of the duty of an agent to the principal. Since the statute in this case did not place on the directors the

duty to make good the loans or losses resulting from them, that obligation rested on the duty imposed by common law. The period of limitation set forth in *Code Civ. Proc. § 359* thus did not apply, because the liability was not imposed by law within the meaning of that statute as interpreted to mean liability imposed by express statute. The applicable statute of limitations was, therefore, *Code Civ. Proc. § 339(1)*, governing actions based on a contract, obligation, or liability not founded on an instrument in writing (*47 Cal. App. 2d 770, 771-772)* .

[c] Statute of Limitations for Fraud Actions Against Directors

Campbell v. Clark *(1958) 159 Cal. App. 2d 439, 324 P.2d 55* was an action by a minority shareholder against the directors of a corporation for fraudulent misrepresentations which coerced her into selling her shares for less than their worth. After defendant's demurrer was rejected as untimely, the trial court sustained defendant's objection to the introduction of evidence, holding that the complaint failed to state a cause of action and denying plaintiff leave to amend. The court of appeal found that the complaint could be amended to state a cause of action and reversed the trial court's judgment of dismissal. Defendant had contended on appeal that the complaint was barred by the applicable statute of limitations, either *Code Civ. Proc. § 359* or former Code Civ. Proc. § 338(4) (*see now Code Civ. Proc. § 338(d)*). However, the court of appeal held that former Code Civ. Proc. § 338(4) (*see now Code Civ. Proc. § 338(d)*) was the applicable statute for an action against directors for fraud, rather than *Code Civ. Proc. § 359*, and that the action was not barred by the statute of limitations (*159 Cal. App. 2d 439, 443)* .

[4] Additional Authorities

[a] Applicability of Section 359 of the Code of Civil Procedure

Burt v. Irvine Co. (1965) 237 Cal. App. 2d 828, 47 Cal. Rptr. 392 was an action in two counts: a shareholders' derivative action against defendant directors of the corporation, a foundation which owned 59 percent of the shares of the corporation; and various business enterprises owned by one of the directors. The alleged liability was based on a real estate transaction in which the corporation exchanged some of its land. Plaintiffs sought to recover the difference between the alleged fair market value of the land conveyed and the value received by the corporation in exchange for that land. They also sought to recover the alleged loss to the corporation resulting from the exchange rather than the retention for leasing, of some of the corporation's land and to recover alleged profits made by an officer of the corporation in the development of a portion of the property received by the officer and by the business enterprises in which the officer was interested. Plaintiffs alleged losses to the corporation due to the directors' approval of the transaction in which one director, through these business enterprises, had received the land transferred by the corporation at less than the value which could have been obtained through competitive bidding and without full disclosure of his interest. The defendant foundation and all of the director defendants other than the director interested in the other businesses demurred to the complaint on the grounds that it failed to state a cause of action and that it was barred by the statute of limitations provisions of *Code Civ. Proc. § 339(1)*. The other defendant director and the business enterprises filed a demurrer on these same grounds among others. The plaintiffs filed a proposed amended complaint, but the trial court sustained the demurrers without leave to amend, the demurrer of the foundation and related defendants on both grounds asserted, and the demurrer of the other director and the associate businesses enterprises on the ground of failure to state a cause of action. Plaintiffs appealed from the trial court's judgment for defendants.

The court of appeal reached the issue of whether the complaint would be barred by the statute of limitations because it found that the plaintiff could amend the complaint to state a cause of action and should be allowed to do so if not barred by the statute of limitations. In deciding which statute should be applied, the court found that the nature of the liability of each defendant depended on the degree of participation charged. As to those directors who actively participated in the selection of buyers for the property and concealed the interests of the interested director, their liability was in fraud or constructive fraud. As to those directors who merely passively approved of the action, their liability was found to be in negligence rather than fraud. These defendants did not know of the fraud and did not act in concert with the active directors to conceal it, and the court found that from other documents in the case there was no evidence on which

plaintiffs could amend their complaint to show active participation and thus charge these directors with fraud. The liability of the passive directors was barred by *Code Civ. Proc. § 339(1)*, which applies to an action on an obligation or liability not founded on an instrument of writing. An action predicated on the neglect or acquiescence of directors and majorityshareholders was barred at the expiration of the two-year period prescribed by this statute, and the court therefore held that the demurrer to the complaint against these directors was properly sustained on that ground. On the other hand, the three-year statute of limitations of former Code Civ. Proc. § 338(4) (*see now Code Civ. Proc. § 338(d)*) which governs an action for relief on the ground of fraud or mistake applied to the cause of action against the directors who actively participated in the transaction under attack. The conduct alleged was a breach of the fiduciary duty owed by the directors to the corporation, so that the fraud statute applied. *Code Civ. Proc. § 359* (penalties, forfeitures, and liabilities created by law) did not apply, since it is applicable only to liability created by express statute or the Constitution. *Code Civ. Proc. § 343* (actions not otherwise provided for) did not apply, although it had been applied as a statute of limitations for breach of the written provisions of an express trust or to an action to recover the assets of a corporation which have been illegally transferred. Although it had been generally held that an action for fraud committed against a corporation is tolled for the period that those responsible remain in control of the corporation, the court held that the tolling does not apply to actions for negligence against corporate directors. The court appeal, therefore, sustained the demurrer of the defendant directors charged with negligence without leave to amend due to the bar of the statute of limitations, but reversed the trial court's judgment as to the active directors and found that the plaintiff should have leave to file its amended complaint (*237 Cal. App. 2d 828, 869)* .

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5-52 California Points & Authorities § 52.119

§ 52.119 Opposing Demurrer to Complaint--For Damages for Fraudulent Breach of Fiduciary Duty Against Directors--Action Barred by Statute of Limitations [Code Civ. Proc. § 338(d)]--Statute Was Tolled

[1] FORM

[*Caption. See § 52.63.*]

PLAINTIFF'S COMPLAINT FOR FRAUDULENT BREACH OF THE DIRECTORS' DUTY IS NOT BARRED BY THE STATUTE OF LIMITATIONS SINCE SECTION 338(d) OF THE CODE OF CIVIL PROCEDURE IS THE APPLICABLE STATUTE AND THE PERIOD PROVIDED DOES NOT RUN WHEN THE DIRECTORS HAVE REMAINED IN CONTROL OF THE CORPORATION AND THE FRAUD HAS NOT BEEN ACTUALLY DISCOVERED.

A. Statute of Limitations Does Not Run Against Directors in Control. As a corollary of the general principle that an action for relief on the grounds of fraud or mistake may be brought within three years of the discovery of the facts constituting the fraud or mistake, it is generally held that an action for fraud committed against a corporation is tolled for the period that those responsible for the fraud remain in control of the corporation and the fraud has not been actually discovered (*Burt v. Irvine Co. (1965) 237 Cal. App. 2d 828, 866-867, 47 Cal. Rptr. 392*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a general demurrer to a complaint for fraudulent breach of fiduciary duty against the directors of a corporation, when the demurrer asserts that the complaint on its face shows that the statute of limitations has run against the plaintiff.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law raised.

[b] Related Pleading and Practice Forms

For an allegation excusing the failure of the plaintiff to learn of the facts constituting fraud so as to come within the late discovery provisions of Code Civ. Proc. § 338(d), see Ch. 269, *Fraud and Deceit* , in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Statute of Limitations Does Not Run Against Directors in Control

Burt v. Irvine Co. *(1965) 237 Cal. App. 2d 828, 47 Cal. Rptr. 392* was an action in two counts: a shareholders' derivative action against defendant directors of the corporation, a foundation which owned 59 percent of the shares of the corporation; and various business enterprises owned by one of the directors. The alleged liability was based on a real estate transaction in which the corporation exchanged some of its land. Plaintiffs sought to recover the difference between the alleged fair market value of the land conveyed and the value received by the corporation in exchangefor that land. They also sought to recover the alleged loss to the corporation resulting from the exchange rather than the retention for leasing, of some of the corporation's land and to recover alleged profits made by an officer of the corporation in the development of a portion of the property received by the officer and by the business enterprises in which the officer was interested. Plaintiffs alleged losses to the corporation due to the directors' approval of the transaction in which one director through these business enterprises had received the land transferred by the corporation at less than the value which could have been obtained through competitive bidding and without full disclosure of his interest. The defendant foundation and all of the director defendants other than the director interested in the other businesses demurred to the complaint on the grounds that it failed to state a cause of action and that it was barred by the statute of limitations provisions of *Code Civ. Proc. § 339(1)*. The other defendant director and the business enterprises filed a demurrer on these same grounds among others. The plaintiffs filed a proposed amended complaint, but the trial court sustained the demurrers without leave to amend, the demurrer of the foundation and related defendants on both grounds asserted, and the demurrer of the other director and the associated businesses enterprises on the ground of failure to state a cause of action. Plaintiffs appealed from the trial court's judgment for defendants.

The court of appeal reached the issue of whether the complaint would be barred by the statute of limitations because it found that the plaintiff could amend the complaint to state a cause of action and should be allowed to do so if not barred by the statute of limitations. In deciding which statute should be applied, the court found that the nature of the liability of each defendant depended on the degree of participation charged. As to those directors who actively participated in the selection of buyers for the property and concealed the interests of the interested director, their liability was in fraud or constructive fraud. As to those directors who merely passively approved of the action, their liability was found to be in negligence rather than fraud. These defendants did not know of the fraud and did not act in concert with the active directors to conceal it, and the court found that from other documents in the case there was no evidence on which plaintiffs could amend their complaint to show active participation and thus charge these directors with fraud. The liability of the passive directors was barred by *Code Civ. Proc. § 339(1)* which applies to an action on an obligation or liability not founded on an instrument of writing. An action predicated on the neglect or acquiescence of directors and majority shareholders was barred at the expiration of the two-year period prescribed by this statute, and the court, therefore, held that the demurrer to the complaint against these directors was properly sustained on that ground. On the other hand, the three-year statute of limitations of former Code Civ. Proc. § 338(4) (*see now Code Civ. Proc. § 338(d)*)

which governs an action for relief on the ground of fraud or mistake applied to the cause of action against the directors who actively participated in the transaction under attack. The conduct alleged was a breach of the fiduciary duty owed by the directors to the corporation, so that the fraud statute applied. *Code Civ. Proc. § 359* (penalties, forfeitures, and liabilities created by law) did not apply, since it is applicable only to liability created by express statute or the Constitution. *Code Civ. Proc. § 343* (actions not otherwise provided for) did not apply, although it had been applied as a statute of limitations for breach of the written provisions of an express trust or to an action to recover the assets of a corporation which have been illegally transferred. Although it had been generally held that an action for fraud committed against a corporation is tolled for the period that those responsible remain in control of the corporation, the court held that the tolling does not apply to actions for negligence against corporate directors. The court of appeal, therefore, sustained the demurrer of the defendant directors charged with negligence without leave to amend due to the bar of the statute of limitations, but reversed the trial court's judgment as to the active directors and found that the plaintiff should have leave to file its amended complaint (*237 Cal. App. 2d 828, 866-867)* .

[4] Additional Authorities

[a] Statute of Limitations Does Not Run Against Directors in Control

San Leandro Canning Co., Inc. v. Perillo (1931) 211 Cal. 482, 295 P. 1026 was a suit by a corporation against its former directors to require the directors to repay money to the corporation which had been illegally withdrawn from its treasury through the action of the defendants while they were directors. The defendants demurred to the plaintiff's amended complaint on the grounds that the complaint did not state facts sufficient to constitute a cause of action and that the plaintiff's cause of action as alleged was barred by the statute of limitations provisions of former Code Civ. Proc. § 338(1), (4) (*see now Code Civ. Proc. § 338(a), (d)*) or *Code Civ. Proc. § 359* (*211 Cal. 482, 487)* . The trial court sustained the demurrer on each of these grounds and entered judgment for defendant after plaintiff declined to further amend the complaint. Plaintiff appealed from this judgment, and the court of appeal reversed the judgment, expressly holding that the action was not barred on the date of its commencement by any statute of limitations because the complaint alleged that, during all of the times mentioned in the complaint, the defendants were in full control of the plaintiff corporation as directors. On the return of the case to the trial court, defendants answered the complaint and again raised the defense of the statutes of limitations. The trial court found that some of the amounts claimed by plaintiff were barred by the statutes of limitations. Plaintiff appealed. In reversing the trial court, the Supreme Court found that since the directors had in fact remained in control of the corporationuntil a time within three years of the commencement of the case, the trial court could not properly find that any of the amounts claimed were barred by the statutes of limitations, since the statutes of limitations does not commence to run against unlawful acts and expenditures of directors of the corporation while they are in full control of its affairs and of the expenditure of its funds. The Court did not, however, consider which of the three proposed statutes of limitations should apply, former Code Civ. Proc. § 338(1) or (4) (*see now Code Civ. Proc. § 338(a)* or *(d)*) or Civ. Code § 359 (*211 Cal. 482, 487-490)* .

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5-52 California Points & Authorities § 52.120

§ 52.120 Opposing Motion for Indemnification of Director, Officer, or Other Agent of Corporation--For Expenses in Defending Suit Without Success on Merits--Derivative Suit [Corp. Code § 317(c)]--Indemnification Forbidden by Statute [Corp. Code § 317(c)(1)-(3)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM IN OPPOSITION TO MOTION
_____ [*name*], Plaintiff,	)	FOR INDEMNIFICATION
vs.	)	Date: _____
_____ [*name*], Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

DEFENDANT IN THE ABOVE-ENTITLED ACTION IS NOT ENTITLED TO BE INDEMNIFIED BY THE CORPORATION FOR _____ [AMOUNTS PAID *or* EXPENSES INCURRED] IN _____ [*where appropriate*, SETTLING *or allege other means of disposing of*] THE ABOVE-ENTITLED ACTION, BECAUSE _____ [*specify, e.g.,* THE ABOVE-ENTITLED ACTION WAS AN ACTION IN THE RIGHT OF THE CORPORATION AND WAS SETTLED WITHOUT COURT APPROVAL, SO THAT INDEMNIFICATION IS THEREFORE PROHIBITED BY CORPORATIONS CODE SECTION 317(c)(2) AND (3)].

[*EITHER*]

A. Indemnification Not Allowed Without Special Court Determination. No indemnification may be made, with regard to an action by or in the right of the corporation to procure a judgment in its favor by reason of the fact that the person is or was an agent of the corporation, in respect of any claim, issue, or matter as to which the person shall have been adjudged to be liable to thecorporation in the performance of that person's duty to the corporation, unless and only to the extent that the court in which the action was brought determines on application that, in view of all the circumstances of the case, that person is fairly and reasonably entitled to indemnity for the expenses which the court shall determine (*Corp. Code § 317(c)(1)*).

[*OR*]

A. Indemnification for Amounts Paid in Settling Not Allowed. No indemnification may be made, with regard to an action by or in the right of the corporation to procure a judgment in its favor, by reason of the fact that the person is or was an agent of the corporation, of amounts paid in settling or otherwise disposing of a threatened or pending action, without court approval (*Corp. Code § 317(c)(2)*).

[*OR*]

A. Indemnification for Expenses in Defending Case Settled Without Court Approval Not Allowed. No indemnification may be made, with regard to an action by or in the right of the corporation to procure a judgment in its favor, by reason of the fact that the person is or was an agent of the corporation, of expenses incurred in defending a threatened or pending action which is settled or otherwise disposed of without court approval (*Corp. Code § 317(c)(3)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion by a corporate director, officer, employee, or other agent, who has been made a defendant in a derivative action brought in behalf of the employing corporation, when the agent seeks indemnification of expenses incurred in defending or settling the action or threatened action but has not been successful on the merits of the action. It should be noted that to the extent that the corporate agent has been successful on the merits in any proceeding or on any claim issue, or matter in the proceeding, the agent is entitled to indemnification for all expenses actually and reasonably incurred without the necessity of applying to the court for relief [*see Corp. Code § 317(d)*].

On the other hand, when the corporate agent is not successful on the merits of a proceeding or threatened proceeding brought by or in the right of the corporation, that is, in a derivative action, in order to be indemnified, the corporate agent, in addition to meeting the usual standard of conduct required of an applicant for indemnification in a nonderivative action [*see Corp. Code § 317(b)*], must not fall within one of the special areas in which indemnification is

prohibited in derivative actions [*see Corp. Code § 317(c)(1)-(3)*].

[b] Judgment Against Agent

No indemnification is to be made in derivative actions in respect of any claim, issue, or matter as to which the agent has been adjudged to be liable to the corporation in the performance of the agent's duty to the corporation and its shareholders, unless and only to the extent that the court in which the action was brought determines on application that, in view of all the circumstances of the case, the agent is fairly and reasonably entitled to indemnity for the expenses, and then only to the extent that the court determines [*Corp. Code § 317(c)(1)*]. This prohibition covers the situation in which the action has proceeded to judgment against the corporate agent, and requires that the agent make special application to the court for indemnification rather than being indemnified by vote of the shareholders, directors, or by legal opinion of independent legal counsel as allowed in the case of nonderivative actions [*see Corp. Code § 317(e)(1)-(3)*]. It also requires that the agent meet the test of being fairly and reasonably entitled to indemnification in addition to the standard of good faith conduct required for indemnification in any case [*see Corp. Code § 317(b),(c)*].

[c] Settlement of Action

With regard to settling or otherwise disposing of threatened or pending derivative actions, there are prohibitions on indemnification. When the action is settled or disposed of without court approval, no indemnification may be made of expenses incurred or of amounts paid in settling or otherwise disposing of a pending action [*Corp. Code § 317(c)(2), (3)*]. A 1987 amendment to *Corp. Code § 317* deleted a prohibition against indemnification of an agent for any amounts expended in settling or otherwise disposing of an action with court approval [former Corp. Code § 317(c)(2), *see now Corp. Code § 317(c)(2), (3)*, as amended by Stats. 1987, ch. 1203].

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5-52 California Points & Authorities § 52.121

§ 52.121 Opposing Motion for Award of Attorney's Fees and Expenses--Outside Attorney Retained to Represent Corporation Is Not Corporate Agent Entitled Under Corp. Code § 317(d) to Recover Attorney's Fees and Costs in Subsequent Malpractice Action

[1] FORM

[*Caption. See § 52.120.*]

DEFENDANT IN THE ABOVE-ENTITLED ACTION IS NOT ENTITLED TO RECOVER COSTS AND ATTORNEY'S FEES FROM PLAINTIFF PURSUANT TO CORPORATIONS CODE SECTION 317(d) BECAUSE DEFENDANT IS NOT AN AGENT OF PLAINTIFF CORPORATION WITHIN THE MEANING OF THAT SECTION FOR PURPOSES OF THIS ACTION.

Outside Attorney Sued for Malpractice Is Not Corporate Agent for Purposes of *Corporations Code Section 317*. An outside attorney retained by a corporation to represent it at trial, who is then sued by the corporation for alleged legal malpractice while representing the corporation, is not an agent of the corporation within the meaning and purposes of *Corporations Code Section 317* with respect to the malpractice action, and therefore is not entitled to indemnification for costs and attorney's fees under that section [*Corp. Code § 317(a), (c), (d)*; *Channel Lumber Company, Inc. v. Porter Simon (2000) 78 Cal. App. 4th 1222, 1232, 93 Cal. Rptr. 2d 482]* .
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion for attorney's fees when those fees are being sought under *Corp. Code § 317(d)* by a law firm that previously had been employed as outside trial counsel by a corporation, subsequently was sued by the corporation for legal malpractice based on the law firm's handling of the underlying case, and successfully defended the malpractice action brought by its former corporate client. The points and authorities assert that in this situation, the law firm is not entitled to indemnification from the corporation for costs and attorneys fees because it is not an agent of the corporation for purposes of *Corp. Code § 317*. In appropriate circumstances, these points and authorities may also be used in a trial or appellate brief in which the entitlement of an outside counsel to attorney's fees under *Corp. Code § 317(d)* is at issue.

This memorandum may be modified for use in other situations in which a party wishes to argue that *Corp. Code § 317* is inapplicable by virtue of the fact that the relationship between the corporation and the party seeking recovery of costs and expenses does not come within the definition of an "agent" of the corporation as that term is used in *Corp. Code § 317(a)*.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law raised.

[3] Discussion of Authorities

[a] Outside Attorney Sued for Malpractice Is Not Corporate Agent for Purposes of Corporations Code Section 317

Corp. Code § 317(c) provides that (with specified exceptions) a corporation has the power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending, or completed action by or in the right of the corporation to procure a judgment in its favor by reason of the fact that the person is or was an agent of the corporation, against expenses actually and reasonably incurred by that person in connection with the defense or settlement of the action if the person acted in good faith, in a manner the person believed to be in the best interests of the corporation and its shareholders. ***Corp. Code § 317(d)*** provides that to the extent that an agent of a corporation has been successful on the merits in defense of any such proceeding, or in defense of any claim, issue, or matter therein, the agent *must* be indemnified against expenses actually and reasonably incurred by the agent in that connection. ***Corp. Code § 317(a)*** provides that for these purposes, "agent" means any person who is or was a director, officer, employee or other agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another foreign or domestic corporation, partnership, joint venture, trust or other enterprise, or was a director, officer, employee or agent of a foreign or domestic corporationwhich was a predecessor corporation of the corporation or of another enterprise at the request of the predecessor corporation.

Channel Lumber Company, Inc. v. Porter Simon *(2000) 78 Cal. App. 4th 1222, 93 Cal. Rptr. 2d 482* was a legal malpractice action by a corporation against a law firm that had previously been hired as outside trial counsel to represent the corporation in ligation involving shopping mall leases. After the corporation lost in the underlying action, it sued the law firm for professional negligence in handling the litigation. The trial court in the malpractice action granted the defendant law firm summary judgment on the merits, and awarded the law firm attorney's fees of $83,860, relying on *Corp Code § 317(d)*. The corporation appealed, arguing *Corp Code § 317* was inapplicable to the defendant law firm.

The court of appeal, by a 2-1 margin, agreed with the corporation and reversed the award of attorney's fees. The court stated that *Corp Code § 317(c)* establishes corporate authority to indemnify an agent who is made or threatened to be made a party to an action by or in the right of the corporation, while *Corp Code § 317(d)* makes indemnification obligatory when the agent successfully defends such a proceeding on the merits. Read together, these subdivisions limit the right to seek reimbursement to a person who (1) is an agent of the corporation, and (2) is made or threatened to be

made a party to an action or proceeding by reason of the fact that the person is or was an agent of the corporation. Since *Corp Code § 317(a)*, which defines "agent" for purposes of that section, does not expressly define what is meant by "other agent of the corporation" for purposes of the statute, general principles of agency law may be used in resolving questions under *Corp Code § 317* (*78 Cal. App. 4th 1222, 1226-1227)* . Examining these principles, the court concluded that the relationship of an outside trial attorney and a corporate client does not readily satisfy all of the usual criteria of agency. When a corporation retains a trial attorney to defend it in litigation, it hires the attorney to perform services in a court of justice, rather than to act for, and in its place, in dealings with third persons. A corporation is not free to appoint any person to represent it in court; it may hire only a licensed attorney. A corporation does not hire an attorney by authorizing him or her to do acts which the corporation might do, since the corporation is legally prohibited from doing what it hires the attorney to do--representing the corporation in court. In determining whether an agency relationship exists, the primary right of control is particularly persuasive, and other factors in determining the nature of the relationship include whether the "principal" and "agent" are engaged in distinct occupations; the skill required to perform the agent's work; whether the principal or agent supplies the workplace and tools; the length of time for completion; whether the work is part of the principal's regular business; and whether the parties intended to create an agent/principal relationship. The court concluded that an analysis of these factors demonstrated that an outside trial attorney is an independent contractor, rather than an agent, of his or her corporate client (*78 Cal. App. 4th 1222, 1228-1229)* .

The court also noted that *Corp. Code § 317* is an indemnity fee statute, not an attorney's fee statute. It does not authorize an award of attorney fees whenever an agent is successful in litigation with a corporate principal, but rather limits indemnification to actions in which a person is involved by reason of the fact that the person is or was an agent of the corporation. It was enacted to encourage capable individuals to act for and in the place of the corporation by affording them indemnification for the expenses of defending against lawsuits to which they are made parties because they are agents of the corporation. But it is also intended to impose safeguards to protect shareholders by restricting indemnity to situations in which liability is sought to be imposed upon an individual by reason of the fact the person was an agent of a corporation, i.e., based upon acts or omissions in which, under general principles of agency law, the person was charged with acting for and in the place of the corporation. The court concluded that neither of these purposes is advanced by applying the section to an outside attorney retained by a corporation to represent it at trial, who then is sued by the corporation on the ground that the attorney committed legal malpractice while representing the corporation (*78 Cal. App. 4th 1222, 1230-1232)* . The court therefore concluded that an outside attorney retained by a corporation to represent it at trial, who then is sued by the corporation for alleged legal malpractice while representing the corporation, is not a party to the malpractice suit "by reason of the fact [the attorney] is or was an agent of the corporation," within the meaning and purposes of *Corp. Code § 317* (*78 Cal. App. 4th 1222, 1232)* .

A dissenting judge argued that the plain language of the statute, including use of the term "other agent" in *Corp. Code § 317(a)*, requires indemnification to outside attorneys under the circumstances that were present in this case (*78 Cal. App. 4th 1222, 1237)* .

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[Reserved]

§§ 52.122[Reserved]

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E. SHAREHOLDER DERIVATIVE ACTIONS

5-52 California Points & Authorities § 52.140

§ 52.140 Supporting Demurrer to Complaint--Failure Specifically to Allege Facts Rebutting Applicability of Business Judgment Rule [Corp. Code § 309]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name(s)*],	)	MEMORANDUM IN SUPPORT OF DEMURRER
Plaintiff(s), vs.	)	Date: _____
_____ [*name*],	)	Time: _____
a Corporation, and _____	)	Location: _____
[*name(s)*],	)	[Judge: _____]
Defendant(s).	)	Date Action Filed: _____
	)	[Trial Date: _____]
	)	

_____

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT FAILS TO ALLEGE ANY SPECIFIC FACTS SHOWING THAT THE BUSINESS JUDGMENT OF THE [_____ (*specify board committee, if any, e.g.,* LITIGATION) COMMITTEE OF THE] BOARD OF DIRECTORS WAS NOT EXERCISED IN GOOD FAITH.

A. Objection by Demurrer. [*See § 52.60, Paragraph A.*]

B. Business Judgment Rule Under Common Law. A director is not liable for a mistake in business judgment that is made in good faith and in what he or she believes to be the best interests of the corporation, if no conflict of interest

exists (*Biren v. Equality Emergency Medical Group, Inc. (2002) 102 Cal. App. 4th 125, 136-138, 125 Cal. Rptr. 2d 325* ; *Gaillard v. Natomas Co. (1989) 208 Cal. App. 3d 1250, 1263, 256 Cal. Rptr. 702 , disapproved on other grounds, Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119 n.16, 72 Cal. Rptr. 3d 129, 175 P.3d 1184* ; *Fornaseri v. Cosmosart Realty etc. Corp. (1929) 96 Cal. App. 549, 557, 274 P. 597* ; FDIC v. Castetter (9th Cir. [Cal.] 1999) *184 F.3d 1040, 1044-1046)* .

C. Business Judgment Rule Codified Under *Corporations Code Section 309*. *Corporations Code Section 309* codifies the business judgment rule and insulates a person from liability based on any alleged failure to discharge his or her obligations as a director when he or she has performed the duties of a director in accordance with subdivisions (a) and (b) of that section (*Corp. Code § 309*; *Gaillard v. Natomas Co. (1989) 208 Cal. App. 3d 1250, 1264, 256 Cal. Rptr. 702 , disapproved on other grounds, Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119 n.16, 72 Cal. Rptr. 3d 129, 175 P.3d 1184*).

[*Optional*] **D. Assumption Underlying Business Judgment Rule.** The business judgment rule is premised on the notion that the directors are better able than the courts to judge whether or not a particular act or transaction is helpful to the conduct of corporate affairs or expedient for the attainment of corporate purposes (*Will v. Engebretson & Co. (1989) 213 Cal. App. 3d 1033, 1040, 261 Cal. Rptr. 868* ; *Gaillard v. Natomas Co. (1989) 208 Cal. App. 3d 1250, 1263, 256 Cal. Rptr. 702 , disapproved on other grounds, Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119 n.16, 72 Cal. Rptr. 3d 129, 175 P.3d 1184*).

E. Immunity Granted by Business Judgment Rule. The business judgment rule reflects a judicial policy of deference to the business judgment of corporate directors in the exercise of their broad discretion in making corporate decisions, which prevents either a court or minority shareholders from substituting their judgment for that of the directors when the directors have acted in good faith and used their best business judgment on behalf of the corporation (*Marsili v. Pacific Gas & Elec. Co. (1975) 51 Cal. App. 3d 313, 324, 124 Cal. Rptr. 313* ; *Findley v. Garrett (1952) 109 Cal. App. 2d 166, 178, 240 P.2d 421* ; *see also Will v. Engebretson & Co. (1989) 213 Cal. App. 3d 1033, 1040, 261 Cal. Rptr. 868* ; *Gaillard v. Natomas Co. (1989) 208 Cal. App. 3d 1250, 1263, 256 Cal. Rptr. 702* (stating rule, but holding it inapplicable to specific situation involved), *disapproved on other grounds, Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119 n.16, 72 Cal. Rptr. 3d 129, 175 P.3d 1184*).

F. Specific Allegations of Fraud or Bad Faith Required. In a derivative action, general charges of fraud, conspiracy, and bad faith on the part of the corporate directors are insufficient in the absence of allegations of specific facts adequate to show the basis for the general charges. The complaint must plead specific acts or conduct on the part of the directors that could be said to constitute fraudulent or dishonest acts or gross abuse of their authority or discretion with respect to the corporation (*Starbird v. Lane (1962) 203 Cal. App. 2d 247, 255, 257, 21 Cal. Rptr. 280* ; *see Eldridge v. Tymshare, Inc. (1986) 186 Cal. App. 3d 767, 776, 230 Cal. Rptr. 815*).

[*Optional*] **G. Acts Clearly Opposed to Corporation's Interest.** To warrant interference by a court in favor of minority stockholders, a case must be made out which plainly shows that an action is so far opposed to the true interests of the corporation itself as to lead to the clear inference that no one so acting could have been influenced by any honest desire to secure such interest, but that he or she must have acted with an intent to serve some outside purpose, regardless of the consequences to the company (*Fornaseri v. Cosmosart Realty & Bldg. Corp. (1929) 96 Cal. App. 549, 557, 274 P. 597*).

[*Optional*] **H. Decisions Regarding Litigation.** The decision whether or not to commence litigation to redress an alleged wrong committed against a corporation is within the scope of the discretionary powers of a board of directors. Thus, if the board acts in good faith in refusing to commence litigation, reasonably believing its decision is good business judgment and in the best interests of the corporation, the board's refusal to commence an action is not subject to attack in a shareholder derivative action (*Findley v. Garrett (1952) 109 Cal. App. 2d 166, 174, 177-178, 240 P.2d 421*).

[*Optional*] **I. Decisions Regarding Executive Compensation.** The form and amount of executive compensation are fundamentally corporate business decisions;thus, *Corp. Code § 309* governs a court's review of the conduct of directors, other than the director whose compensation is at issue, in approving a compensation package (*Gaillard v. Natomas Co. (1989) 208 Cal. App. 3d 1250, 1265, 256 Cal. Rptr. 702 , disapproved on other grounds,* *Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119 n.16, 72 Cal. Rptr. 3d 129, 175 P.3d 1184*).

[*Optional*] **J. Presumption Favors Board.** Every presumption is in favor of the good faith of the board of directors. Interference with their discretion is not warranted in doubtful cases (*Starbird v. Lane (1962) 203 Cal. App. 2d 247, 255, 21 Cal. Rptr. 280* ; *Fairchild v. Bank of America (1961) 192 Cal. App. 2d 252, 257, 13 Cal. Rptr. 491*).

[*Optional*] **K. Reliance on Board Committee.** The provisions of *Corporations Code Section 309(a)* and *(b)*, which state the basic standard for a corporate director's performance of his or her duties and give him or her the right to rely on information prepared by specified persons, enlarge the right of reliance that existed under former law. By the provision permitting reliance on a committee of the board, the drafters of *Corporations Code Section 309* intended to permit reliance on the work product of a board committee resulting from a more detailed investigation undertaken by that committee and that forms the basis for action taken by the board (*Corp. Code § 309(b)(3)*; *Gaillard v. Natomas Co. (1989) 208 Cal. App. 3d 1250, 1264, 256 Cal. Rptr. 702 , disapproved on other grounds,* *Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119 n.16, 72 Cal. Rptr. 3d 129, 175 P.3d 1184*).

[*Optional*] **L. Litigation Committee.** The business judgment rule permits a corporation to appoint a special litigation committee to decide whether the maintenance of a shareholders' derivative suit is in the corporation's best interests. If the committee makes a good faith determination that the derivative action should be dismissed, the corporation may demur, move for judgment on the pleadings, make a motion in the trial court to dismiss the suit, or seek summary judgment (*see Corp. Code § 309(b)(3)*; *Lewis v. Anderson (9th Cir. 1979) 615 F.2d 778, 783* (federal court applying California law); *Desaigoudar v. Meyercord (2003) 108 Cal. App. 4th 173, 179, 133 Cal. Rptr. 2d 408* ; *Will v. Engebretson & Co. (1989) 213 Cal. App. 3d 1033, 1040-1041, 261 Cal. Rptr. 868* ; *Finley v. Superior Court (2000) 80 Cal. App. 4th 1152, 1161-1163, 96 Cal. Rptr. 2d 128*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in a derivative action to support a demurrer that asserts that a complaint fails to state a cause of action because plaintiff has failed to allege facts specifically demonstrating an injury to the corporation or other circumstances that defeat the ordinary application of the business judgment rule (Paragraphs F--H, K, L) [*see Corp. Code § 309*]. Optional paragraphs may be used if applicable to the particular situation. Counsel may also wish to include other authorities from § 52.147 or 52.163 that address particular aspects of the business judgment rule as applied to particular fact situations.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law raised.

[b] Related Uses

With appropriate modifications, these points and authorities may be used to support a defendant's motion for judgment on the pleadings or a defendant's motion for summary judgment [*see Code Civ. Proc. § 437c*].

[c] Related Memoranda

For points and authorities addressing the limitation period that governs an action against a director for negligence or breach of his or her fiduciary duty to the corporation, see *§ 52.110*.

[3] Discussion of Authorities

[a] Business Judgment Rule Under Common Law

In ***Biren v. Equality Emergency Medical Group, Inc.*** *(2002) 102 Cal. App. 4th 125, 136-138, 125 Cal. Rptr. 2d 325* , five emergency room physicians created a business in which each physician was a corporate officer, director, and 20 percent shareholder. They entered into an agreement governing management, which required the prior written consent of shareholders holding a majority of shares for entering contracts for billing services. Plaintiff, the CFO with responsibility for billing services, discovered significant problems with the patient and insurance billing contractor. She terminated the contractor and orally authorized another contractor to process the billing, without obtaining prior shareholder approval. Plaintiff stated that she acted alone because the other directors were either on vacation or otherwise unavailable, and it was her fiduciary responsibility in a crisis situation to maintain the financial stability of the business and make a quick and emergency decision. After the new billing company began experiencing problems, the corporation dismissed it, and a majority of the directors and shareholders voted to remove plaintiff as officer and director and to redeem her shares. A dispute then arose concerning share valuation (*102 Cal. App. 4th 125, 132-136)* .

Plaintiff brought an action for breach of fiduciary duty and breach of contract, and the corporation cross-complained. The trial court found that plaintiff materially breached the agreement by not obtaining prior shareholder approval with respect to the billing companies, but also decided that she did not breach her fiduciary duty to the corporation. The parties appealed. The court of appeal held that the trial court properly decided that plaintiff's acts and omissions were protected by the business judgment rule. The trial court's finding that plaintiff "reasonably relied" on information that she believed to be correct was tantamount to a finding that she acted in good faith. Her breach of the agreement resulted from her mistaken belief that as a director and officer she had the authority to act on behalf of the corporation. The court noted that this was a small corporation run informally by busy emergency physicians. Plaintiff was given a great deal of responsibility and the corporation did not prove that she intentionally usurped her authority. No evidence of conflict of interest, fraud, or self-dealing existed (*102 Cal. App. 4th 125, 136-138)* .

Gaillard v. Natomas Co. *(1989) 208 Cal. App. 3d 1250, 256 Cal. Rptr. 702 , disapproved on other grounds, Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119 n.16, 72 Cal. Rptr. 3d 129, 175 P.3d 1184* , involved several shareholder derivative actions arising from the merger of Natomas Company into Diamond Shamrock Corporation. Shareholders of both corporations challenged "golden parachute" agreements and other benefits provided to five "inside directors" of Natomas. The complaint against all Natomas directors alleged breach of fiduciary duty, waste, mismanagement, negligence, and conversion. Summary judgments were granted in favor of defendants, on the basis of the business judgment rule.

The court of appeal reversed, holding that (1) the business judgment rule did not apply to "inside directors" and (2) triable questions of fact were presented concerning whether the outside directors' adoption of the golden parachutes constituted a proper exercise of their business judgment (*208 Cal. App. 3d 1250, 1257)* .

When the merger negotiations began, Natomas's board consisted of the five "inside directors," that is, directors who were also officers of the company and its principal operating subsidiary, and 12 "outside directors" who were generally

officers of unrelated businesses. When the first hostile takeover offer was made, two of the five inside directors, the chairman and chief executive officer (CEO) and a vice-president, already had "golden parachute" employment contracts that required they be paid salaries for three years after any merger. After the initial offer, the two chairmen met and proposed that the offer be withdrawn but that a merger and reorganization occur. Then, Natomas's chairman and CEO suggested that all employee agreements be reviewed and that 17 key executives receive some sort of "golden parachute." He instructed outside counsel, a merger specialist, to prepare the key executives' agreements for review by the compensation committee of the board.

The compensation committee consisted of five outside directors, one of whom, the committee's chairman, was absent when the committee met with inside and outside counsel and a Natomas vice-president to consider the golden parachute agreements. Outside counsel informed the members of the committee that the proposed agreements were favored by Diamond, which was concerned that key management remain in place. The proposed golden parachute agreements for the chairman and CEO and for the vice-president who already had one provided that they could terminate their employment with the new entity for good reason within six months following the merger and for any reason thereafter. After termination, each would receive a lump-sum payment equal to five times his annual compensation, but the lump sum would be reduced proportionately for the length of time he remained an employee following the six-month period. The proposed agreement regarding another vice-president was similar, except that he was entitled to a lump-sum payment equal to his total compensation multiplied by the greater of the number of years remaining in the term of his employment contract, then 7 years, or the number one. The proposed agreement regarding the other inside director/vice-president was similar, except that the lump-sum payment was three times his annual compensation. The reorganization plan provided that the principal operating subsidiary would be spun off into another corporation. The committee proposed to offer the president and CEO of the principal operating subsidiary a contract as head of the company being spun off. Because that officer was singularly knowledgeable about Natomas's Indonesian operations, the compensation committee decided to offer him in addition a four-year consulting agreement at $250,000 per year. During the term of the proposed consulting agreement, the consultant could engage in any other business or employment activity on a full-time basis in any field.

After meeting for about two hours, the compensation committee approved the foregoing proposed agreements and recommended their adoption by the full board. The board met the same day. The director who had chaired the compensation committee told the board that Diamond considered the agreements essential to the merger and recommended their approval. The inside directors then left the meeting, and outside counsel told the remaining directors that in mergers it was common to adopt arrangements to ensure continuity of management and provide economic protection for those key employees who might be affected and that Diamond had agreed that arrangements should be made to serve those objectives. The outside directors approved the golden parachutes and the proposed merger and reorganization agreements.

The final form of the golden parachutes was next considered at a meeting of the compensation committee approximately one month later. At that meeting, after the committee's chairman stated that the appropriateness of the agreements was a primary concern of Diamond, and that if Diamond acquiesced it was unlikely that the compensation committee would find it appropriate to dissent, cost information was circulated, but not discussed. The compensation committee approved the agreements. Immediately after the conclusion of the committee meeting, the full board met. The chairman of the compensation committee recommended approval of the golden parachutes and advised the full board that Diamond had approved them. Without further discussion, the board, with the five inside directors present but abstaining, approved the agreements.

The golden parachute agreements were disclosed in the proxy solicitations regarding the merger, which was approved by shareholders in August 1983. Four of the five officers covered by golden parachutes resigned for cause effective December 31, 1983, citing differing management philosophies that made it impossible to work with the officers appointed by Diamond. They received approximately $10 million pursuant to the agreements. The consultant was paid $1 million over the four-year term of the consultancy agreement, although he devoted less than a full day to consulting

duties.

After defining golden parachutes (discussed in *§ 52.163[3][e]*), the court of appeal began by discussing the business judgment rule. The court said that the common law business judgment rule refers to a judicial policy of deference to the business judgment of corporate directors in the exercise of their broad discretion in making corporatedecisions (*208 Cal. App. 3d 1250, 1263)* . The business judgment rule is premised on the notion that the directors are better able than the courts to judge whether or not a particular act or transaction is helpful to the conduct of corporate affairs or expedient for the attainment of corporate purposes. The business judgment rule establishes a presumption that a director is not liable for a mistake in business judgment that is made in good faith and in what he or she believes to be the best interests of the corporation, if no conflict of interest exists (*208 Cal. App. 3d 1250, 1263)* . However, the court continued, the business judgment rule does not immunize a director from liability in the case of his or her abdication of corporate responsibilities. When the courts say that they will not interfere in matters of business judgment, it is presumed that business judgment, which is to say reasonable diligence, has in fact been exercised (*208 Cal. App. 3d 1250, 1263)* . A director cannot close his or her eyes to what is going on in the conduct of the business of the corporation and have it said that he or she is exercising business judgment (*208 Cal. App. 3d 1250, 1263-1264)* .

Fornaseri v. Cosmosart Realty etc. Corp. *(1929) 96 Cal. App. 549, 274 P. 597* is *discussed in § 52.140[3][f]*.

In **FDIC v. Castetter** (9th Cir. [Cal.] 1999) *184 F.3d 1040* , the Federal Deposit Insurance Corporation (FDIC) seized an insolvent bank, was appointed receiver, and instituted a lawsuit against the directors. The FDIC contended that the directors were negligent in the performance of their directorial duties and should be personally liable for the losses in the bank's portfolio. The suit proceeded to trial, in which the jury reached a verdict for the FDIC. The district court granted the directors' motion for judgment as a matter of law, and in the alternative, for a new trial. The appellate court reversed the district court's grant of judgment as a matter of law, but affirmed the district court's grant of a new trial. On remand, the district court granted the directors' motion for summary judgment, and the FDIC timely appealed. On appeal, the Ninth Circuit had to decide whether, under the California business judgment rule, directors of a federally-insured national bank may be held individually liable for losses sustained by the bank under a theory of simple negligence. The court concluded that under the circumstances of the case, the California business judgment rule insulated the directors from liability, and affirmed the district court. The FDIC had claimed that the directors were not entitled to the protection of the business judgment rule because they negligently failed to investigate and inform themselves of the bank's financial condition. However, quoting *Gaillard v. Natomas Co.*, discussed *above*, the court noted that California allows non-officer directors to rely upon company employees and advisors without a duty of further inquiry absent special circumstances. The directors established they acted in good faith and made a prima facie showing of a reasonable investigation. Because they did so without rebuttal, and relied on the type of information identified in *Corp. Code § 309(b)*, they were entitled to immunity from claims of ordinary negligence (*184 F.3d 1040, 1044-1046)* .

[b] Business Judgment Rule Codified Under Corporations Code Section 309

A person who performs the duties of a director in accordance with ***Corp. Code § 309(a)*** **and** ***(b)*** has no liability based on any alleged failure to discharge his or her obligations as a director [*Corp. Code § 309(c)*]. In addition, the liability of a director for monetary damages may be eliminated or limited in a corporation's article to the extent provided in *Corp. Code § 204(a)(10)* [*Corp. Code § 309(c)*].

In performing the duties of a director, a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, in each case prepared or presented by any of the following [*Corp. Code § 309(b)*]:

> (1) One or more officers or employees of the corporation whom the director believes to be reliable and competent in the matters presented;

(2) Counsel, independent accountants, or other persons with regard to matters that the director believes to be within that person's professional or expert competence;

(3) A committee of the board on which the director does not serve, with regard to matters within its designated authority, which committee the director believes to merit confidence, so long as, in any such case, the director acts in good faith, after reasonable inquiry when the need for inquiry is indicated by the circumstances and without knowledge that would cause such reliance to be unwarranted.

A director must perform the duties of a director, including duties as a member of any committee of the board on which the director may serve, in good faith, in a manner that the director believes to be in the best interests of the corporation and its shareholders, and with such care, including reasonable inquiry as an ordinarily prudent person in a like position would use under similar circumstances [*Corp. Code § 309(a)*].

The facts and procedural background of ***Gaillard v. Natomas Co.*** *(1989) 208 Cal. App. 3d 1250, 256 Cal. Rptr. 702* , *disapproved on other grounds*, *Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119 n.16, 72 Cal. Rptr. 3d 129, 175 P.3d 1184* , are *discussed in § 52.140[3][a]*. After discussing the common-law business judgment rule, the court of appeal said that *Corp. Code § 309*, enacted by Stats. 1976, ch. 682, and effective January 1, 1977, codifies California's business judgment rule (*208 Cal. App. 3d 1250, 1264)* . *Corp. Code § 309* incorporates the concept of a director's immunity from liability for an honest mistake of business judgment with the concept of a director's obligation of reasonable diligence in the performance of his or her duties (*208 Cal. App. 3d 1250, 1264)* .

[c] Assumption Underlying Business Judgment Rule

Will v. Engebretson & Co. *(1989) 213 Cal. App. 3d 1033, 261 Cal. Rptr. 868* is discussed in *§ 52.163[3][b]*.

Gaillard v. Natomas Co. *(1989) 208 Cal. App. 3d 1250, 256 Cal. Rptr. 702* is *discussed in § 52.140[3][a]*.

[d] Immunity Granted by Business Judgment Rule

Marsili v. Pacific Gas & Elec. Co. *(1975) 51 Cal. App. 3d 313, 124 Cal. Rptr. 313* is discussed in *§ 52.147[3][b]*.

In ***Findley v. Garrett*** *(1952) 109 Cal. App. 2d 166, 240 P.2d 421* , the plaintiffs fileda derivative action against all of the directors of an aircraft company and certain other individuals. The defendants filed a demurrer to the first amended complaint which was sustained without leave to amend. The plaintiffs appealed from the ensuing judgment dismissing the action. In their complaint, the plaintiffs had alleged that several directors of the aircraft company were also organizers, officers, and directors of another company which had conducted business with the aircraft company for many years and had profited at the expense of the aircraft company through methods which were a violation of the directors' fiduciary duties owed to the aircraft company. Plaintiffs further alleged that the whole board of directors had knowledge of the wrongs done to the company by a minority of the directors. It was also alleged that a demand had been made on the board of directors to take action against those directors alleged to have fraudulently breached their fiduciary duty, but the plaintiff's demand had been rejected. The plaintiffs had named the entire board in its complaint for its failure to pursue redress on behalf of the corporation. The court of appeal affirmed the decision of the trial court, holding that a refusal to sue on a fraud claim is not a ratification of fraud if the refusal is made in good faith and in the board's best business judgment (*109 Cal. App. 2d 166, 174, 177)* . The court reasoned that even though there might have been a recovery for the corporation after litigation, it was within the discretionary powers of the directors to weigh the advantages of a probable recovery against the cost in money, time, and disruption to the business which a probably formidable lawsuit would entail and decide that the disruption was unwarranted (*109 Cal. App. 2d 166, 177-178)* . The court stated that when the board has made a good-faith business judgment, astockholder may not usurp the discretionary powers of the managers of the corporation by commencing a derivative action (*109 Cal. App. 2d 166, 178)* .

Will v. Engebretson & Co. *(1989) 213 Cal. App. 3d 1033, 261 Cal. Rptr. 868* is discussed in *§ 52.163[3][b]*.

Gaillard v. Natomas Co. *(1989) 208 Cal. App. 3d 1250, 256 Cal. Rptr. 702 , disapproved on other grounds, Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119 n.16, 72 Cal. Rptr. 3d 129, 175 P.3d 1184* , is *discussed in § 52.140[3][a]*.

[e] Specific Allegations of Fraud or Bad Faith Required

In ***Starbird v. Lane*** *(1962) 203 Cal. App. 2d 247, 21 Cal. Rptr. 280* , the plaintiffs, who filed a derivative action against 16 individual defendants and a defendant corporation, appealed from a judgment entered in favor of 13 of the defendants after their general demurrer to a fifth amended and supplemental complaint had been sustained without leave to amend. The court of appeals affirmed the judgment, holding that plaintiffs had failed to state a cause of action. The court stated that in a derivative action, general charges of fraud, conspiracy, and bad faith on the part of the corporate directors are insufficient to maintain a cause of action in the absence of allegations of specific facts adequate to show the basis for the general charges (*203 Cal. App. 2d 247, 255)* . Because the complaint also sought removal of the directors, the court discussed former Corp. Code § 811 (*see now* Corp. Code § 811), which provides for the removal of a director in the case of fraudulent or dishonest acts or gross abuse of authority or discretion with respect to the corporation (*203 Cal. App. 2d 247, 257)* . This complaint failed to plead any acts or conduct on the part of the director defendants that could be said to constitute fraudulent or dishonest acts or gross abuse of authority or discretion with respect to the corporation (*203 Cal. App. 2d 247, 257)* . Here, plaintiffs had failed to allege specific facts because, of the 13 defendants, one was never a director, eight were directors for some unspecified period of time prior to the filing of the original complaint, and none of the 13 were directors at the time of the filing of the fifth amended complaint (*203 Cal. App. 2d 247, 259)* . Furthermore, the situation alleged did not spell out fraud or dishonesty. The fact that the corporation was operating at a loss instead of at a profit, that some obligations were not reflected on the books, and that the stock record did not show all of the outstanding shares, was insufficient to sustain a cause of action. Moreover, the complaint failed to show who the directors were during the period in which the alleged bookkeeping errors were made (*203 Cal. App. 2d 247, 259)* . Another allegation failed because its statement that there was a "great probability" that there were other, unregistered shares of stock outstanding, which were concealed by the directors, seemed without substance when the basis for the allegations was the "legends" of the available corporate records (*203 Cal. App. 2d 247, 259-260)* . The court further pointed out that the right to have stock registered belonged to the holders of the shares, and there had been no allegation that the shares were issued unlawfully or without authority (*203 Cal. App. 2d 247, 260)* .

Eldridge v. Tymshare, Inc. *(1986) 186 Cal. App. 3d 767, 230 Cal. Rptr. 815* was not a derivative action but an action by shareholders who sold their stock at a loss before announcement of a merger that would have yielded them a higher price per share. The complaint against the directors alleged that they had breached their fiduciary duties by not disclosing sooner that the merger negotiations were in progress and by negligently rejecting certain offers or improperly rejecting offers because of personal motivations to retain control. The court of appeal reversed the judgment with respect to the cause of action based on wrongful rejection of tender offers, to allow amendment of that cause of action. The court of appeal stated that the business judgment rule establishes a presumption that directors' decisions are based on sound business judgment and that this presumption is rebuttable only by a factual showing of fraud, bad faith, or gross overreaching (*186 Cal. App. 3d 767, 776)* .

[f] Acts Clearly Opposed to Corporation's Interest

In ***Fornaseri v. Cosmosart Realty etc. Corp*** *(1929) 96 Cal. App. 549, 274 P. 597* , plaintiffs appealed from a judgment rendered against them for failure to amend their pleading after a demurrer to their second amended complaint had been sustained. The plaintiffs had complained that the directors of the defendant corporation violated their fiduciary duty by employing two other individual defendants to market the only asset of the corporation, a lease on lots, on terms which were detrimental to the corporation.

The court of appeal, in affirming the judgment of the trial court, held that plaintiffs had failed to state a cause of action. The court stated the governing rule to be that in the absence of fraud, breach of trust, or ultra vires transactions, the conduct of directors in managing the affairs of the corporation cannot be attacked if the acts in question are discretionary and are performed in good faith with the reasonable belief that they are in the best interests of the corporation (*96 Cal. App. 549, 557)* . Here, it was doubtful that the directors had violated their discretion in adopting the safest and surest plan for marketing the property when it was unlikely that the debt-ridden corporation could have afforded the time and cash outlay necessary for any other method of sale (*96 Cal. App. 549, 557)* . The court further held that an agreement which stated that the profits from the sale of the leases would first go to the payment of the corporation's debts, secondly to the payment of fees incurred in connection with the sale of the property, and the balance to be divided in three parts, one of which would go to the corporation was not an abuse of discretion under the circumstances (*96 Cal. App. 549, 557)* . It held that for the court to interfere on behalf of minority shareholders, a case must be made out which showsthat the directors' action was so far opposed to the true interest of the corporation as to lead to the clear inference that no one thus acting could have been influenced by any honest desire to protect the interests of the corporation (*96 Cal. App. 549, 558)* .

[g] Decisions Regarding Litigation

Findley v. Garrett *(1952) 109 Cal. App. 2d 166, 174, 240 P.2d 421* is *discussed in § 52.140[3][d]*.

[h] Decisions Regarding Executive Compensation

The facts and procedural background of ***Gaillard v. Natomas Co.*** *(1989) 208 Cal. App. 3d 1250, 256 Cal. Rptr. 702* are *discussed in § 52.140[3][a]*. That portion of the opinion addressing the application of the business judgment rule to executive compensation agreements is discussed in *§ 52.163[3][g]*.

[i] Presumption Favors Board

For a discussion of the facts in ***Starbird v. Lane*** *(1962) 203 Cal. App. 2d 247, 255, 21 Cal. Rptr. 280* , see the *discussion under § 52.140[3][e]*. In discussing the sufficiency of the allegations, the court of appeal noted that the conduct of directors in the management of corporate affairs is not subject to attack by minority shareholders when the acts in question are discretionary and are performed in good faith by the directors, who reasonably believe them to be in the best interests of the corporation. Every presumption is in favor of the good faith of the directors. Interference with their discretion is not warranted in doubtful cases. The challenged action of corporate management must appear affirmatively to be in disregard of duty and not merely an error in judgment, that is, a nonperformance of a manifest official obligation amounting to a breach of trust (*203 Cal. App. 2d 247, 255)* .

In ***Fairchild v. Bank of America*** *(1961) 192 Cal. App. 2d 252, 13 Cal. Rptr. 491* , the first amended complaint alleged that in many instances in which the defendant bank had been appointed as executor, administrator, trustee, or personal representative of estates, or other matters probated or litigated in Los Angeles County, the bank, in its fiduciary capacity, appointed as its attorney in particular matters the same attorney who represented to the bank that he was the person who suggested or nominated the bank as the fiduciary. The complaint further alleged that the attorney usually had previous or current dealings or contracts of employment with the deceased, the creditors or heirs of the deceased, and other interested parties. The prior or current interest of the attorney, it was alleged, was inconsistent with the attorney's fiduciary duty of representing the interest of all parties in the proceeding at hand, and that such inconsistent interest could and did result in damages to the other parties in interest. The defendant bank demurred and its demurrer was sustained without leave to amend. The plaintiff appealed.

The court of appeal affirmed the order sustaining the demurrer, stating that the question of choice of counsel is a matter of the internal management of the corporation and that in the absence of fraud, illegal or ultra vires acts, a court will not

interfere, because there is a presumption in favor of the director's good faith (*192 Cal. App. 2d 252, 257)* . Here, the complaint contained no facts which indicated that the defendant bank had, in its choice of counsel, violated its articles of incorporation, transgressed general law, or violated public law, or violated public policy. The court held that the authority of the directors in the conduct of the business of the corporation must be regarded as absolute when they act within the law. The court cannot substitute its judgment for that of the directors (*192 Cal. App. 2d 252, 256-257)* .

[j] Reliance on Board Committee

Corp. Code § 309(a)* and *(b) are *set forth in § 52.140[3][b]*.

The facts and procedural background of ***Gaillard v. Natomas Co.*** *(1989) 208 Cal. App. 3d 1250, 256 Cal. Rptr. 702* are *discussed in § 52.140[3][a]*. That portion of the opinion addressing the right of other directors to rely on the recommendation of a committee of the board is discussed in *§ 52.163[3][d]*.

[k] Litigation Committee

Corp. Code § 309(a)* and *(b) is set forth under § 52.140[3][b].

Lewis v. Anderson *(9th Cir. 1979) 615 F.2d 778* was a derivative action by two minority shareholders of Walt Disney Productions (hereinafter "Disney") against certain directors of the company, claiming that a stock option plan for key executives and the manner in which it was approved violated federal securities law. After the action was commenced, the board appointed a special litigation committee to determine whether the derivative action should be maintained. The special litigation committee consisted of two outside directors appointed to the board after the challenged transactions and one director who was named as a defendant but who did not benefit from the challenged transactions. The committee, which met nine times and retained independent counsel, determined that the action was not in Disney's best interests. Through its counsel, the committee moved for partial summary judgment on the issue of the committee's authority to dismiss the action. The trial court ruled that if the committee had exercised its business judgment in determining that the action was not in the company's best interests, they had the authority to dismiss it, but reversed the factual question whether the committee actually madea good-faith decision. The only issue on appeal was whether a special litigation committee has authority to dismiss a derivative action.

The Court of Appeals affirmed the grant of partial summary judgment. The court first said that because Disney was a California corporation, California law applied to determine the issue (*615 F.2d 778, 781)* . However, the California Supreme Court had never addressed the issue, so the court relied on *Marsili v. Pacific Gas & Elec. Co. (1975) 51 Cal. App. 3d 313, 324, 124 Cal. Rptr. 313* , and *Findley v. Garrett (1952) 109 Cal. App. 2d 166, 174, 240 P.2d 421* . The court noted that the committee was composed of disinterested directors and considered cases from other jurisdictions. The court concluded that although the business judgment rule would not bar a derivative action when a special litigation committee of disinterested directors dismissed the action in bad faith, the good-faith exercise of business judgment by a special litigation committee of disinterested directors is immune from attack by shareholders or the courts (*615 F.2d 778, 781-783)* .

In ***Desaigoudar v. Meyercord*** *(2003) 108 Cal. App. 4th 173, 133 Cal. Rptr. 2d 408* , trustees of a charitable foundation brought a shareholders' derivative lawsuit alleging that the officers and directors of a publicly traded corporation, of which the foundation was a major shareholder, wasted corporate assets and breached their fiduciary duties. The board of directors of the corporation appointed a special litigation committee consisting of two directors who had joined the board after the alleged wrongdoing had occurred. This committee determined that the corporation should not pursue the claims. The superior court granted a defense motion for summary judgment based on the special litigation committee defense that a disinterested committee of the board of directors had determined in good faith not to pursue the claims. The plaintiffs appealed (*108 Cal. App. 4th 173, 180-182)* .

The appellate court affirmed, first holding that judicial review of acts of a special litigation committee is governed by the business judgment rule. The court then found that when asserted in connection with a motion for summary judgment, the material issues of fact relevant to the special litigation committee defense are independence and good faith in conducting the investigation. Neither the merits of the derivative claim nor the substance of the committee's decision to reject the claim is subject to judicial review at that stage (*108 Cal. App. 4th 173, 179)* .

Will v. Engebretson & Co. *(1989) 213 Cal. App. 3d 1033, 261 Cal. Rptr. 868* is discussed in *§ 52.163[3][b]*.

Finley v. Superior Court *(2000) 80 Cal. App. 4th 1152, 96 Cal. Rptr. 2d 128* was a derivative action by members of several related homeowners associations challenging contributions made from homeowner-paid assessments to a political action committee to support a local ballot measure. After the action was filed, each homeowners association formed a special litigation committee. These committees all concluded that the prosecution of the action was not in the best interests of the associations. Plaintiffs filed motions for summary judgment and filed a motion for a preliminary injunction. Defendants filed a motion to bifurcate and try first their affirmative defense that the action could not be maintained derivatively because disinterested special litigation committees had determined that it was not in the best interest of the associations. The superior court denied the motions for summary judgment, but granted the motion to bifurcate and try first defendants' special litigation committee defense. Plaintiffs petitioned for writ of mandate challenging the bifurcation and appealed the trial court's denial of a preliminary injunction (*80 Cal. App. 4th 1152, 1155-1157)* .

The court of appeal affirmed the order denying plaintiffs' motion for a preliminary injunction and denied plaintiffs' petition for a writ of mandate. The court first held that the special litigation committee defense is legally valid in California, citing *Will v. Engebretson & Co. (1989) 213 Cal. App. 3d 1033, 261 Cal. Rptr. 868* (*80 Cal. App. 4th 1152, 1160-1161)* . It next found that the defense can apply to a homeowners association. The court went on to hold that the defense is not limited to being asserted by pretrial motion. It must be allowed whenever a committee of disinterested directors acting in good faith has determined that the derivative action is not in the best interests of the corporation--if possible on motion, but if necessary, in full trial. The court finally held that the trial court did not abuse its discretion in bifurcating the trial on the litigation committee defense (*80 Cal. App. 4th 1152, 1161-1163)* .

[4] Additional Authorities

[a] Immunity Granted by Business Judgment Rule

The court of appeal, in *Barnes v. State Farm Mut. Auto. Ins. Co. (1993) 16 Cal. App. 4th 365, 20 Cal. Rptr. 2d 87* , affirmed a judgment sustaining a demurrer to causes of action for violation of plaintiffs' free speech rights, unfair and misleading business practices, breach of fiduciary duty, and declaratory relief. Plaintiff, a policyholder of a mutual insurance company, commenced a class action to enjoin the insurer from using profits/premium revenues to influence political activity. While the court of appeal acknowledged that a policyholder of a mutual insurance company has the same rights against the insured as a shareholder has with respect to an ordinary corporation, use of revenues was a management decision and within the sound discretion of the insurer's directors and officers (*16 Cal. App. 4th 365, 375-380)* .

See also *Fairchild v. Bank of America (1961) 192 Cal. App. 2d 252, 13 Cal. Rptr. 491 , discussed in § 52.140[3][i]*.

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Volume 5 Chapters 50-59 CONTRACTS---to---CORPORATIONS
CHAPTER 52 CORPORATIONS
PART II. FORMS
E. SHAREHOLDER DERIVATIVE ACTIONS

5-52 California Points & Authorities § 52.141

§ 52.141 Supporting Demurrer to Complaint--Suit Improperly Filed in an Individual Capacity

[1] FORM

[*Caption. See § 52.140.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION SINCE PLAINTIFF'S SUIT IS FILED IN AN INDIVIDUAL CAPACITY, WHEREAS HIS/HER CAUSE OF ACTION IN NOT INDIVIDUAL; THEREFORE, THE COMPLAINT IS IMPROPERLY FILED.

A. Objection by Demurrer. [*See § 52.60, Paragraph A.*]

B. Stockholder's Individual Suit Distinguished From a Derivative Suit. The stockholder's individual suit, as opposed to a derivative suit, is a suit to enforce a right against the corporation which the stockholder possesses as an individual (*Jones v. H.F. Ahmanson & Co. (1969) 1 Cal. 3d 93, 107, 81 Cal. Rptr. 592, 460 P.2d 464* ; *Pareto v. FDIC (9th Cir. 1998) 139 F.3d 696*).

C. Injury to Corporation Maintained in Representative Capacity Only. When the causes of action which a plaintiff has attempted to plead are derivative in nature in that the facts alleged indicate that the injury is to the corporation and to the whole body of its shareholders, plaintiff may not maintain the suit in any capacity other than in a representative capacity for and on behalf of the corporation (*Schuster v. Gardner (2005) 127 Cal. App. 4th 305, 309, 312-315, 25 Cal. Rptr. 3d 468* ; *Paclink Communications International, Inc. v. Superior Court (2001) 90 Cal. App. 4th 958, 964-966, 109 Cal. Rptr. 2d 436* ; *Nelson v. Anderson (1999) 72 Cal. App. 4th 111, 124-128, 84 Cal. Rptr. 2d 753*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in a derivative action in support of a demurrer which asserts that the gravamen of plaintiff's complaint states a cause of action on behalf of the corporation and the whole body of shareholders, and therefore plaintiff may not maintain the suit in an individual capacity but must maintain it in a derivative capacity.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law raised.

[3] Discussion of Authorities

[a] Stockholder's Individual Suit Distinguished from a Derivative Suit

In ***Jones v. H.F. Ahmanson & Co.*** *(1969) 1 Cal. 3d 93, 81 Cal. Rptr. 592, 460 P.2d 464* , plaintiff appealed from a judgment of dismissal entered after the trial court sustained the defendants' demurrer without leave to amend. The California Supreme Court reversed, holding that plaintiff's complaint stated an individual cause of action against the majority shareholders for alleged financial manipulations which diminished the value and marketability of plaintiff's shares. In making its decision, the Court reiterated that the distinction between a shareholder's individual suit, as opposed to a derivative suit, is that the individual suit is to enforce a right against the corporation which the stockholder possesses as an individual. In a derivative action the recovery benefits the corporation alone; the stockholders derive no benefits except the indirect benefit realized from the gain to the corporation (*1 Cal. 3d 93, 107)* .

The rule set forth in this case, and the distinction between derivative and non-derivative claims is discussed further in detail in *Jara v. Suprema Meats, Inc. (2004) 121 Cal. App. 4th 1238, 18 Cal. Rptr. 3d 187* (holding that plaintiff's action was not derivative), and *Denevi v. LGCC (2004) 121 Cal. App. 4th 1211, 18 Cal. Rptr. 3d 276* (holding that a plaintiff who had previously brought a successful derivative action against LLC was also entitled to bring an action in his individual capacity), discussed in *§ 52.141[4]*.

In ***Pareto v. FDIC*** *(1998) 139 F.3d 696* , a group of former stockholders of a bank brought suit in state court against certain of the bank's former directors, alleging violations of the duties of care and loyalty under *Corp. Code § 309* and seeking punitive damages under *Civ. Code § 3294*. The state trial court denied the directors' demurrer and the state court of appeal denied their petition for a writ of mandate. Plaintiffs then served the FDIC as a defendant. Once served, the FDIC removed the action to the United States District Court and moved to dismiss for lack of standing and failure to state a claim. The directors also moved to dismiss. The district court granted the motion and dismissed the complaint without leave to amend (*139 F.3d 696, 698)* .

The Ninth Circuit found that plaintiffs' claims were for injury to the corporation itself, which ultimately reduced the value of the stock. Citing *Jones v. H.F. Ahmanson & Co. (1969) 1 Cal. 3d 93, 81 Cal. Rptr. 592, 460 P.2d 464* , discussed *above*, the court held that action was derivative because the gravamen of the complaint was injury to the corporation or to the body of its stock or property, without any severance or distribution among individual holders. Plaintiffs' allegations that the directors breached their duties of care and loyalty by failing to safeguard the bank's assets and equity, mismanaging its operations, improperly placing it into voluntary receivership, and failing to exercise due diligence during merger attempts described a direct injury to the bank, not the individual stockholders. Plaintiffs did not allege injury to a right they possessed as individuals, separate and distinct from the injury to the value of the bank's stock and property due to its closure. The Ninth Circuit therefore held that the claim was derivative and affirmed the district court's dismissal (*139 F.3d 696, 699-700)* .

[b] Injury to Corporation Maintained in Representative Capacity Only

In ***Schuster v. Gardner*** *(2005) 127 Cal. App. 4th 305, 25 Cal. Rptr. 3d 468* , a shareholder brought a class action on behalf of all current and former stockholders of a Delaware corporation for the alleged breach of fiduciary duty, and the aiding and abetting the breach of fiduciary duties, by defendant officers and directors. Defendants removed the action to federal court on the grounds of preemption by the Securities Litigation Uniform Standards Act of 1998 (SLUSA) [*15 U.S.C. § 78bb(f)*]. Plaintiff amended the complaint to avoid SLUSA, and the federal court then granted his motion to remand the matter to state court. The first amended complaint stated that defendants breached or abetted breaches of fiduciary duties of good faith and loyalty, including the duty of disclosure owed to shareholders. It also alleged defendants sold large amounts of stock while deceiving shareholders into holding their shares. Defendants demurred to the complaint on the grounds that the claims were derivative, and thus plaintiff lacked standing to pursue them. Defendants asserted that the claims were common to all shareholders and the property of the corporation's bankruptcy estate, and that notably absent was the corporation, the nominal defendant in a derivative action. The court sustained the demurrers with leave to amend. Plaintiff filed a second amended complaint, the defendants again demurred on the ground that the claims were derivative, and the court sustained the demurrers without leave to amend, entering a judgment of dismissal (*127 Cal. App. 4th 305, 309-311)* .

The court of appeal discussed the distinction between a direct action by a shareholder for injury to his or her interest as a shareholder, and a derivative action filed on behalf of the corporation for injury to the corporation for which it failed or refused to sue. Plaintiff objected to application of Delaware law to resolve the issue of whether the complaint was derivative or direct, and contended that under California law, it was a direct action. The court concluded that the action was derivative under both Delaware and California law, and accordingly affirmed the judgment (*127 Cal. App. 4th 305, 312*). Under California law, a shareholder cannot bring a direct action for damages against management on the theory that their alleged wrongdoing decreased the value of his or her stock. The corporation itself must bring such an action, or a derivative suit may be brought on the corporation's behalf. Here, the gravamen of the second amended complaint was harm to the corporation (*127 Cal. App. 4th 305, 312*). The court likewise found that under Delaware law, this was a derivative suit. The corporation suffered the alleged harm, and it rather than the individual stockholders should receive the benefit of any recovery. The court held that plaintiff lacked standing to pursue the action under both California and Delaware law, and affirmed the judgment (*127 Cal. App. 4th 305, 318*).

In ***Paclink Communications International, Inc. v. Superior Court*** *(2001) 90 Cal. App. 4th 958, 109 Cal. Rptr. 2d 436* , members of an LLC brought a direct action against successor companies to the LLC, alleging fraudulent transfer of the company's assets. Defendants filed a demurrer, asserting that plaintiffs lacked standing to bring the claims because the real party in interest was the LLC. Plaintiffs opposed the demurrer, claiming the action was not derivative because defendants had acted with the intent to defraud plaintiffs and thus they were attempting to recover for their personal injury. The trial court concluded that the action was a personal, not derivative, action, and thus overruled the defendants' demurrer.

The court of appeal first stated that the principles of derivative lawsuits applicable to corporations likewise apply to an LLC. The court then reviewed the principles regarding derivative suits as set forth in Jones v. H.F. Ahmanson, discussed in *§ 52.141[3][a]*. The court found that the essence of plaintiffs' claim was that the company's assets were fraudulently transferred without any compensation being paid to the LLC. This constituted an injury to the company itself. Because members of the LLC hold no direct ownership in the company's assets, the members cannot be directly injured when the company is improperly deprived of those assets (*90 Cal. App. 4th 958, 964-965)* . The court noted that plaintiffs attempted to avoid this conclusion by claiming that they were suing as creditors of the company rather than as members of the LLC. The court noted that in determining whether an individual action as opposed to a derivative action lies, a court looks at the gravamen of the wrong alleged in the pleadings. Here, the wrong alleged was a fraudulent transfer of the company's assets which injured the LLC, with an incidental injury to plaintiffs in the form of diminution of the value of their ownership interest. Clearly, plaintiffs were not suing based on a claim that as members of the LLC they were entitled to a distribution which was not made, but for financial injury caused byfraudulent transfer of the company's assets. The court issued issuance of a writ of mandate compelling the trial court to set aside its order overruling the demurrer, and to enter a new and different order sustaining the demurrer without leave to amend on the

basis that plaintiffs had no standing to sue other than by a derivative action (*90 Cal. App. 4th 958, 965-966)* .

In ***Nelson v. Anderson*** *(1999) 72 Cal. App. 4th 111, 84 Cal. Rptr. 2d 753* , one of two shareholders in a corporation formed to market skin care products through infomercials brought an action against the other, a well-known actress, for breach of her fiduciary duties as the majority shareholder. A jury awarded plaintiff damages and the trial court entered judgment for plaintiff. Appellant contended that plaintiff had no standing to bring the action as an individual, but should have brought a derivative action on behalf of the corporation. The court of appeal agreed and reversed the judgment. It held that it is the gravamen of the wrong alleged in the pleadings, not simply the resulting injury, that determines whether an individual action lies. While in some cases the same facts regarding injury to the corporation may underlie a personal cause of action, such as intentional infliction of emotional distress, breach of contract, fraud, or defamation, plaintiff did not allege or prove the elements of any such cause of action. All of the acts alleged to have caused plaintiff's injury amounted to alleged misfeasance or negligence in managing the corporation's business, causing the business to be a total failure. Thus, any obligations violated were duties owed directly and immediately to the corporation. Because the gravamen of the complaint was injury to the whole body of its stockholders, it was for the corporation to institute and maintain a remedial action. A derivative action would have been appropriate if its responsible officials had refused or failed to act (*72 Cal. App. 4th 111, 124-126)* .

[4] Additional Authorities

[a] Stockholder's Individual Suit Distinguished from a Derivative Suit

In *Jara v. Suprema Meats, Inc. (2004) 121 Cal. App. 4th 1238, 18 Cal. Rptr. 3d 187* , the court acknowledged *Jones v. H.F. Ahmanson & Co. (1969) 1 Cal. 3d 93, 81 Cal. Rptr. 592* , discussed in *§ 52.141[3][a]*, as an authoritative starting point for analysis of whether a claim is derivative or non-derivative. However, the court went on to note that while claims for corporate mismanagement generally have been held derivative in nature, claims that minority shareholders were deprived of their proportionate share of profits or the value of corporate assets generally have been held to be non-derivative. Thus, the court held that the minority shareholder plaintiff's claim that majority stockholders paid themselves excessive compensation, thereby depriving him of his proportionate share of corporate profits, came "within the scope of allowable individual actions" (*121 Cal. App. 4th 1238, 1258)* .

Denevi v. LGCC (2004) 121 Cal. App. 4th 1211, 1221-1223, 18 Cal. Rptr. 3d 276 involved a complaint brought by a shareholder in his individual capacity following his successful prosecution of a derivative suit arising out of interrelated claims. The court cited *Jones v. H.F. Ahmanson & Co.* for the settled principle that "a single course of action by a majority shareholder may give rise to derivative claims, individual claims, or both," and therefore that "one who has suffered injury both as an owner of a corporate entity and in an individual capacity is entitled to pursue remedies in both capacities." There was "no doubt" that the plaintiff alleged both derivative and individual claims when he sued for fraud that caused him to transfer rights to purchase real estate to a newly formed limited liability company, and also for harm subsequently occurring to that company when the majority interests failed to exercise those purchase rights.

In *Vega v. Jones, Day Reavis & Pogue (2004) 121 Cal. App. 4th 282, 296-297 17 Cal. Rptr. 3d 26* , plaintiff, a former shareholder in an acquired corporation, sued the attorneys for the acquiring corporation for fraud based on a material non-disclosure after he discovered that the shares in the acquiring corporation he had received as consideration were worthless. The defendant contended that the gravamen of the complaint was for diminution of the acquiring corporation's stock, and that the claim was therefore a derivative claim. Citing *Jones v. H.F. Ahmanson & Co. (1969) 1 Cal. 3d 93, 81 Cal. Rptr. 592* , discussed in *§ 52.141[3][a]*, the court held that the action was individual, not derivative, because plaintiff's allegation was that the defendant had deceived him into exchanging his valuable stock in the acquired corporation for worthless stock in the acquiring corporation, and that plaintiff therefore sought recovery for injury to himself (*121 Cal. App. 4th 282, 296-297)* .

[b] Injury to Corporation Maintained in Representative Capacity Only

In *Avikian v. WTC Financial Corp. (2002) 98 Cal. App. 4th 1108, 120 Cal. Rptr. 2d 243* , a group of shareholders filed suit against officers and directors of a corporation, claiming that they had negligently mismanaged it or looted its assets, culminating in its involuntary liquidation. The corporation previously had been placed into liquidation by the California Insurance Commissioner. The order imposing the liquidation included provisions specifying that the Insurance Commissioner held title to all corporate assets, including all rights of action, and enjoined all other persons from prosecuting any action against the corporation without consent of the court. The defendants moved to dismiss the complaints based on the pendency of the liquidation proceeding and the fact that assertion of the derivative claims violated the terms of the restraining order in that proceeding. The trial court granted the motion to dismiss and granted defendants' motion for fees pursuant to *Corp. Code § 800* (*98 Cal. App. 4th 1108,1112-1114*). The shareholders appealed and the court of appeal affirmed. The court initially stated that the real problem in the case was that appellants' claims were all derivative in nature. Citing *Paclink Communications International Inc. v. Superior Court (2001) 90 Cal. App. 4th 958, 109 Cal. Rptr. 2d 436* , discussed in *§ 52.141[3]*, the court reviewed the nature of shareholders' derivative and individual suits. It then found that appellants' core claim was that defendants' mismanaged the corporation and entered into self-serving deals to sell its assets to third parties. The assertions of improper selling and purchasing of assets amounted to a claim of injury to the corporation itself. The court stated that appellants' own damages--the loss in value of their investments in the corporation--were merely incidental to the alleged harm inflicted upon the corporation and all of its shareholders. Because appellants were purporting to assert claims belonging to the corporate entity, the trial court properly dismissed their complaints (*98 Cal. App. 4th 1108, 1115-1117)* .

In *Campbell v. Clark (1958) 159 Cal. App. 2d 432, 324 P.2d 51* , the plaintiff appealed from a judgment of dismissal entered after the defendants' motion for judgment on the pleadings was granted. The plaintiff had alleged that the officers and directors of the corporation wrongfully appropriated and paid to themselves the earnings and profits of the corporation. It was further alleged that all these acts by the officers and directors were done maliciously with the intent of injuring plaintiff, and asked that all earnings and profits wrongfully appropriated be returned, and the sum of $60,000 be paid to plaintiff as her share of the dividends withheld from her as a shareholder. The court of appeal held that since the complaint alleged the misappropriation of corporate funds the action should be brought as a derivative suit. Since the gravamen of the complaint was injury to the whole corporation and the body of its shareholders, the causes of action were derivative in nature and could not be maintained in an individual capacity. For this same reason, plaintiff could not maintain the action without fulfilling the requirement of Corp. Code § 834(a) [*see now Corp. Code § 800(b)*] of being a registered shareholder at the time the transactions complained of occurred and of having made a formal demand on the board of directors for action.

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Volume 5 Chapters 50-59 CONTRACTS---to---CORPORATIONS
CHAPTER 52 CORPORATIONS
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E. SHAREHOLDER DERIVATIVE ACTIONS

5-52 California Points & Authorities § 52.142

§ 52.142 Supporting Demurrer to Complaint--Failure to Allege Plaintiff Is Registered or Beneficial Shareholder or Holder of a Voting Trust Certificate [Corp. Code § 800(b)(1)]

[1] FORM

[*Caption. See § 52.140.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT PLAINTIFF FAILS TO ALLEGE THAT HE/SHE IS A REGISTERED OR BENEFICIAL SHAREHOLDER OR HOLDER OF VOTING TRUST CERTIFICATES IN THE CORPORATION AT THE TIME THE TRANSACTION(S) COMPLAINED OF OCCURRED.

A. Objection by Demurrer. [*See § 52.60, Paragraph A.*]

B. Registered Shareholder or Holder of Voting Trust Certificates Condition. No derivative action may be maintained unless plaintiff alleges in the complaint that plaintiff was a shareholder, of record or beneficially, or the holder of voting trust certificates at the time of the transaction or any part thereof complained of occurred (*Corp. Code § 800(b)(1)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in a derivative action to support a demurrer to a complaint which asserts that plaintiffs complaint for a derivative action fails to state a cause of action since the plaintiff has failed to comply with the statutory requirement that he or she was a registered shareholder or beneficial shareholder or holder of voting trust certificates at the time the transactions complained of occurred.

If appropriate to the facts of a particular case, counsel may wish to include authority from Paragraph F of § 52.182 regarding a shareholder's lack of standing after constructive transfer or surrender of his or her shares. Although the authority cited in § 52.182 arose from an action seeking involuntary dissolution, it appears to be applicable to any situation in which shareholder status is required for standing.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law raised.

[3] Additional Authorities

[a] Objection by Demurrer

In *Patrick v. Alacer Corp. (2008) 167 Cal. App. 4th 995, 1005, 84 Cal. Rptr. 3d 642* , the court stated that although the nominal defendant corporation, being actually interested as a reluctant plaintiff, generally may not defend a derivative action which is filed on its behalf, the corporation may assert defenses contesting the plaintiff's right or decision to bring suit. For example, the corporation may file a demurrer on the ground that the plaintiff has not alleged facts showing standing to sue derivatively. For additional discussion of this decision, see *§ 52.158[4][a]*.

[b] Registered Shareholder or Holder of Voting Trust Certificates Condition

In *Daly v. Yessne (2005) 131 Cal. App. 4th 52, 31 Cal. Rptr. 3d 420* , the plaintiff in a derivative action was not a shareholder but did hold an option(under an incentive stock option plan for employees) to buy shares of the corporation's stock, at the time the events alleged in the complaint occurred. The court of appeal held that although equitable ownership may sometimes confer standing on a plaintiff to sue derivatively, a holder of an option to buy stock is not an equitable shareholder of the corporation for purposes of *Corp. Code § 800(b)(1)* and does not have standing to sue derivatively on a cause of action arising before the option is converted into actual ownership of stock.

In *Fairchild v. Bank of America (1961) 192 Cal. App. 2d 252, 13 Cal. Rptr. 491* , the court of appeal affirmed a decision of the trial court sustaining the defendant's demurrer to the complaint for a derivative action without leave to amend. One of the grounds on which the demurrer was sustained was plaintiff's failure to allege that he was a registered shareholder at the time the transactions complained of occurred or during any part of the period during which they occurred. Plaintiff had only alleged that he was an owner of shares in the corporation. The court held that no suit could be maintained unless the statutory prerequisites of Corp. Code § 834 [now *Corp. Code § 800(b)*] requiring that the plaintiff in a derivative action be a registered shareholder at the time the transactions complained of occurred had been met.

In *Campbell v. Clark (1958) 159 Cal. App. 2d 432, 324 P.2d 51* , the plaintiff appealed from a judgment rendered after the defendant's objection to the introduction of any evidence was sustained and plaintiff's motion for leave to amend her complaint was denied. Plaintiff alleged that she had purchased her shares from two former shareholders of the corporation. She alleged that the officers and directors had conspired to wrong plaintiff's assignors by voting themselves excessive salaries, bonuses, royalties, and commissions, and that defendants had used the funds of the corporation for their own benefit. It was further alleged that the officers and directors had withheld correct information about the profits and gains of the corporation from the shareholders. It was alleged that all these acts were done maliciously with the intent of injuring plaintiff. The prayer asked that all sums, profits, and earnings wrongfully appropriated and concealed be returned to the corporation, that the directors and officers be restrained from taking excessive bonuses and salaries,

for an accounting, and for the sum of $60,000 to be paid to plaintiff as her share of the monies withheld from her as a shareholder. The trial court ordered the dismissal on the grounds that plaintiff's complaint failed to state a cause of action. The appellate court affirmed, holding that plaintiff had couched the complaint in an individual capacity, whereas her allegations that officers and directors misused earnings and profits affected all shareholders and the corporation, and, thus, the causes of actions were derivative in nature. Plaintiff could not maintain the causes of action pleaded in any other capacity but as a representative of the corporation. For this reason, plaintiff's suit failed in that she did not allege that she was a registered shareholder of the corporation as required by former Corp. Code § 834(a) [*see now Corp. Code § 800(b)*], nor did she contend on appeal that she could amend her complaint to allege compliance with the statute.

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5-52 California Points & Authorities § 52.143

§ 52.143 Supporting Demurrer to Complaint--Failure to Allege That Plaintiff Has Informed Board of Directors or Corporation of Lawsuit [Corp. Code § 800(b)(2)]

[1] FORM

[*Caption. See § 52.140.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT FAILS TO ALLEGE THAT PLAINTIFF HAS INFORMED THE BOARD OF DIRECTORS OR CORPORATION OF THE LAWSUIT.

A. Objection by Demurrer. [*See § 52.60, Paragraph A.*]

B. Failure to Inform Board of Directors or Corporation. A derivative action may not be maintained by a plaintiff who fails to allege in the complaint that he/she has informed the corporation or the board of directors in writing of the ultimate facts of each cause of action alleged against each defendant or delivered to the board or corporation a true copy of the complaint which the plaintiff proposes to file (*Corp. Code § 800(b)(2)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted to support a general demurrer to a complaint for a derivative action if the demurrer asserts that the complaint fails to allege that the plaintiff informed the board of directors or corporation in

writing of the ultimate facts of each cause of action alleged against each defendant or delivered to the board or corporation a true copy of the complaint which plaintiff proposed to file [Corp. Code§ 800(b)]. Counsel should note that the statutory requirement that the plaintiff inform the board of the proposed action [*Corp. Code § 800(b)*] is one of two steps which must be undertaken by a plaintiff before a derivative action may be maintained. The other step, as set forth in *Corp. Code § 800(b)*, is that the plaintiff has made efforts to secure action by the board of directors [*see § 52.144*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law raised.

[3] Additional Authorities

[a] Failure to Inform Board of Directors or Corporation

In *Bader v. Anderson (2009) 179 Cal. App. 4th 775, 101 Cal. Rptr. 3d 821*, the plaintiff shareholder, appealing from a judgment of dismissal after the trial court sustained a demurrer without leave to amend, argued that the demand requirement does not apply in instances in which the underlying wrong concerns alleged misrepresentations or omissions in a proxy statement. The court of appeal rejected that argument. The court concluded, "Such an exception would unnecessarily divest directors of the customary power they hold in the initiation and management of litigation in any instance where the alleged wrong to the corporation resulted from the issuance of a proxy statement. Just as the demand requirement would be substantially diluted if prior board approval of the challenged action standing alone established futility, creating a proxy statement exemption would permit a large group of derivative cases to proceed without either prior submission of the matter to the corporate board or a showing of demand futility. We do not view the circumstance--i.e., the fact that the underlying dispute concerns the issuance of an allegedly misleading proxy statement--to constitute an extraordinary condition constituting an excuse for a demand. In light of the significant policy considerations for the demand requirement, there is in our opinion no basis for the creation of such a hair trigger demand excusal when the underlying suit involves the distribution of a proxy statement" (179 Cal. App. 4th 775, 796) (citations and internal quotation marks omitted).

In *Fairchild v. Bank of America (1961) 192 Cal. App. 2d 252, 13 Cal. Rptr. 491* , the court of appeal affirmed the trial court's order sustaining a demurrer to a shareholder's derivative action. One of the grounds on which the demurrer was sustained was plaintiff's failure to fulfill the requirements set forth in Corp. Code § 834 [*now see Corp. Code § 800(b)*] for maintaining a derivative action. Plaintiff had alleged that he had made a demand upon the defendant to cease and desist from certain activities; however, he had failed to allege with particularity his efforts to secure action from the board, or that he had either informed the corporation or the board in writing of each of the ultimate facts of each cause of action against each defendant director, or that he had delivered to the corporation or its board a copy of the complaint, or the reasons for his failure to undertake any of these actions. The failure to allege that these steps required by the statute had been taken was fatal to the complaint.

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5-52 California Points & Authorities § 52.144

§ 52.144 Supporting Demurrer to Complaint--Failure to Allege With Particularity Efforts to Secure Action by Board of Directors [Corp. Code § 800(b)(2)]--By Director

[1] FORM

[*Caption. See § 52.140.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT FAILS TO ALLEGE WITH PARTICULARITY THAT PLAINTIFF MADE EFFORTS TO SECURE ACTION BY THE BOARD OF DIRECTORS.

A. Objection by Demurrer. [*See § 52.60, Paragraph A.*]

B. Failure to Make Demand. A derivative action may not be maintained by a plaintiff who fails to allege with particularity his/her efforts to secure from the board such action as the plaintiff desires (*Corp. Code § 800(b)(2)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted to support a general demurrer to a complaint for a derivative action when the demurrer asserts that a complaint fails to allege with particularity that a demand was made on the board of directors to take the action the plaintiff desired [*Corp. Code § 800(b)(2)*]. The requirement that plaintiff make efforts to secure

action by the board is one of two statutory requirements which must be met before a derivative action may be maintained by a plaintiff [*see Corp. Code § 800(b)*; *see also § 52.142*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law raised.

[3] Additional Authorities

[a] Failure to Make Demand

In *Fairchild v. Bank of America (1961) 192 Cal. App. 2d 252, 13 Cal. Rptr. 491* , the court of appeal affirmed the trial court's order sustaining a demurrer to a shareholder's derivative action. One of the grounds on which the demurrer was sustained was plaintiff's failure to fulfill the demand requirements as set forth in Corp. Code § 834 [*now Corp. Code § 800(b)*]. While plaintiff had alleged that a demand had been made upon the defendant corporation to cease and desist the activities complained of, plaintiff had failed to allege with particularity his efforts to secure from the board of directors the action he desired.

In *Starbird v. Lane (1962) 203 Cal. App. 2d 247, 21 Cal. Rptr. 280* , the plaintiffs, who had filed a derivative action against a corporation and 16 individual defendants, appealed from a judgment in favor of three defendants which had been entered when a demurrer had been sustained with leave to amend their fifth amended complaint and the plaintiffs had failed to file the amendment. The court of appeal affirmed the judgment holding that the plaintiffs had failed to show compliance with former Corp. Code § 834(a) [*now Corp. Code § 800(b)*]. The complaint alleged that the three defendant directors knew that demands had been made upon them and their predecessors to ascertain the true financial condition of the corporation; however, the complaint failed to allege that the plaintiffs' demands were made in writing as required by the statute, the dates or contents of those demands, or upon whom the demands had been made. Further, there was no allegation that the demands had been made directly to the three directors or to the board of directors.

In *Campbell v. Clark (1958) 159 Cal. App. 2d 432, 324 P.2d 51* , the plaintiff appealed from a judgment rendered after the defendant's objection to the introduction of any evidence was sustained and plaintiff's motion for leave to amend her complaint was denied. Plaintiff alleged that she had purchased her shares from two former shareholders of the corporation. She alleged that the officers and directors had conspired to wrong plaintiff's assignors by voting themselves excessive salaries, bonuses, royalties, and commissions, and that defendants had used the funds of the corporation for their own benefit. It was further alleged that the officers and directors had withheld correct information about the profits and gains of the corporation from the shareholders. It was alleged that all these acts were done maliciously with the intent of injuring plaintiff. The prayer asked that all sums, profits, and earnings wrongfully appropriated and concealed be returned to the corporation, that the directors and officers be restrained from taking excessive bonuses and salaries, for an accounting, and for the sum of $60,000 to be paid to plaintiff as her share of the monies withheld from her as a shareholder. The trial court ordered the dismissal on the grounds that plaintiff's complaint failed to state a cause of action. The court of appeal affirmed, holding that plaintiff had filed the complaint in an individual capacity, whereas her allegations that officers and directors misused earnings and profits affected all shareholders and the corporation and, thus, the causes of actions were derivative in nature. Plaintiff could not maintain the causes of action pleaded in any other capacity but as a representative of the corporation. For this reason, plaintiff's suit failed since she had failed to meet the requirements of Corp. Code § 834(a) [*now see Corp. Code § 800(b)*] failing to allege that she had made a written demand upon the board of directors to take action or delivered a copy of the complaint to the corporation or the board of directors.

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5-52 California Points & Authorities § 52.145

§ 52.145 Supporting Demurrer to Complaint--Failure to Allege With Particularity Facts to Establish Futility of Demanding Action by Board of Directors [Corp. Code § 800(b)(2)]

[1] FORM

[*Caption. See § 52.140.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT FAILS TO ALLEGE WITH PARTICULARITY FACTS THAT WOULD ESTABLISH WHY IT WAS FUTILE TO DEMAND ACTION BY THE BOARD OF DIRECTORS.

A. Objection by Demurrer. [*See § 52.60, Paragraph A.*]

B. Failure to Allege Reasons for Futility. Broad conclusionary allegations that directors participated in, conspired in, aided, abetted, or benefitted from the activities alleged to have harmed the corporation are insufficient to establish that it would have been futile for plaintiff to demand action by the board of directors prior to filing a derivative action. The complaint must allege facts that show directors had knowledge of, participated in, or benefitted from the wrongdoing, or were otherwise disabled from exercising independent business judgment; it must allege facts specific to each director from which the court can conclude that that particular director could or could not be expected to fairly evaluate the claims of the shareholder plaintiff (*Corp. Code § 800(b)(2)*; *Shields v. Singleton (1993) 15 Cal. App. 4th 1611, 1621-1622, 19 Cal. Rptr. 2d 459*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a demurrer to a complaint in a derivative action when plaintiff did not make or allege any prefiling demand on the board of directors to take action on the issue that gave rise to the derivative action. The points and authorities in thisform challenge the sufficiency of allegations designed to establish why prefiling demand would have been futile [*see Corp. Code § 800(b)(2)*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. The conclusionary and insufficient allegations should be quoted or referred to.

[3] Discussion of Authorities

[a] Failure to Allege Reasons for Futility

Corp. Code § 800(b)(2) provides in part that a derivative action cannot be maintained unless the complaint alleges with particularity plaintiff's efforts to secure from the board the action plaintiff desires, or the reasons for not making such an effort.

Shields v. Singleton *(1993) 15 Cal. App. 4th 1611, 19 Cal. Rptr. 2d 459* was a stockholders' derivative action against three classes of defendants arising out of unlawful activities of employees of a subsidiary. These activities came to light as part of a criminal investigations of fraud and corruption in the procurement of military defense contracts. The injuries alleged to the corporation were criminal and civil penalties, settlement payments and legal fees, as well as the loss of future business as a consequence of the company's being disqualified from bidding on government contracts. The three classes of defendants were (1) directors of the parent corporation; (2) officers of the parent corporation; and (3) individual employees of and consultants to the subsidiary. The officer and director defendants (hereinafter collectively referred to as "the director defendants") demurred on the ground that plaintiff had not met the prefiling demand requirements of *Corp. Code § 800(b)(2)* and that the complaint failed to allege a cause of action against them.

Plaintiff's counsel wrote to the board of directors of the parent company and stated that certain senior executives seemed to be implicated in the procurement scandal revealed by the government investigation and demanded that the company sue the directors for breach of fiduciary duty for failing to hold the implicated executives accountable for the company's plight. The defendant responded by asking plaintiff to provide whatever information he had that "causes you to believe that particular senior executives or directors have engaged in wrongdoing." Two months later, and without further communications from either party, plaintiff filed the derivative action. The first demurrer was sustained with leave to amend. Plaintiff posted $50,000 bond as provided by *Corp. Code § 800(e)*. When the prefiling demand allegations were challenged a second time, plaintiff argued that the bond posted under subdivision (e) satisfied the requirements of (b), (c), and (d). The trial court rejected that argument, and again sustained the demurrer with leave to amend. At the hearing on the third demurrer, the trial court held that the "group" allegations against directors, were insufficient to establish the futility of any demand in that they failed to specify the acts engaged in by each director (*15 Cal. App. 4th 1611, 1617-1618)* . Plaintiff appealed. The court of appeal affirmed.

With respect to the allegations regarding the futility of prefiling demand, the court first determined that it need not apply Delaware law, because the result would be the same under either (*15 Cal. App. 4th 1611, 1620-1621)* .

The complaint alleged that virtually all of the subsidiary's 1988 revenues of $75 million were derived from the defense industry; that three of the subsidiary's executives paid $160,000 to two consultants to obtain inside information from a civilian employee of the navy to aid the subsidiary in its procurement of contracts. Specifically, the subsidiary received a $24 million Army contract that it would not have received but for the illegal bribes. All of those officers were named defendants. Two of them were convicted of federal criminal charges. The allegations against the parent company officers and directors were that they caused the company to maintain an inadequate system of internal financial and

accounting controls such that the corporation's assets have not been reasonably safeguarded against misuse. Their conduct allowed (1) both the parent and the subsidiary to use funds to pay improper bribes or gratuities in violation of law; and (2) the subsidiary's employees to falsely certify that no consultants were hired during the procurement process. The complaint alleged that all of the directors were "interested" in and direct beneficiaries of, the underlying wrongdoing because they received compensation and awards based on the company's consolidated earnings, which were inflated by reason of the illegal defense procurement activities (*15 Cal. App. 4th 1611, 1615-1616)* .

The court characterized plaintiff's argument as basically that the officers and directors are responsible for the wrongdoing of the employees of the subsidiary, and personally benefitted from those acts. Plaintiff relied on cases holding that no demand is necessary when conspiracy, fraud, or criminal conduct of defendants is charged. While the court of appeal agreed that was a sound principle, it did not apply in this case because the director defendants were not charged with any criminal conduct. As to the director defendants, the broad conclusionary allegations that each "participated in, conspired in, or aided and abetted the criminal and fraudulent activities at issue" were insufficient. The complaint did not contain a single fact that would indicate that the directors had any knowledge of, much less participated in, any criminal or fraudulent activities, nor that they benefitted directly from the wrongdoing or were otherwise disabled form exercising independent business judgment. The allegations were too conclusionary to establish the futility of a prefiling demand (*15 Cal. App. 4th 1611, 1621-1622)* .

In order to evaluate a demand futility claim, the court must be apprised of facts specific to each director from which it can conclude that particular director could or could not be expected to fairly evaluate the claims of the shareholder plaintiff (*15 Cal. App. 4th 1611, 1622)* .

[4] Additional Authorities

[a] Failure to Allege Reasons for Futility

In *Oakland Raiders v. National Football League (2001) 93 Cal. App. 4th 572, 113 Cal. Rptr. 2d 255* , a professional football team sued the National Football League and others, alleging mismanagement and abuse of power by the NFL. The defendants made several successful motions for summary adjudication. Because the orders disposed of all causes of action against certain defendants, the trial court entered judgment as to those defendants. The club appealed and the court of appeal affirmed the judgment. Regarding the derivative causes of action, the club alleged that making a demand on the derivative entities to sue individuals would have been futile because the entities were dominated by those individuals and thus lacked independent business judgment. The trial court found against the club because it determined that defendants had presented sufficient evidence to show that demand would not have been futile, and the club had failed to produce evidence that demand would have been futile. The test for proving demand futility is whether the facts show a reasonable doubt that (1) the directors are disinterested and independent, and (2) the challenged transaction was otherwise the product of a valid exercise of business judgment (*93 Cal. App. 4th 572, 579-580)* .

With respect to demand futility, the club contended that the demand futility rule is a mere pleading requirement that drops out of the case once a derivative suit survives a demurrer. The court found, however, that the issue is not foreclosed simply because the complaint is sufficient. It therefore rejected the club's contention that the trial court erred by considering demand futility as an element of the derivative claims that is subject to proof (*93 Cal. App. 4th 572, 584-586)* . The court stated that the test for proving demand futility is whether the facts show a reasonable doubt that (1) the directors are disinterested and independent, and (2) the challenged transaction was otherwise the product of a valid exercise of business judgment (*93 Cal. App. 4th 572, 587)* . It found that demand futility cannot be shown by evidence of a structural bias in lieu of facts, specific to each director, from which the trier of fact could conclude that a particular director could or could not be expected to fairly evaluate the claims of the shareholder plaintiff (citing *Shields v. Singleton (1993) 15 Cal. App. 4th 1611, 1622, 19 Cal. Rptr. 2d 459* , discussed in *§ 52.145[3][a]*). It also held that a board's failure to appoint a special litigation committee to investigate the claims made in a derivative suit cannot raise an inference of demand futility because there is no necessity to appoint a special litigation committee if the board itself

is disinterested (*93 Cal. App. 4th 572, 590)* .

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5-52 California Points & Authorities § 52.146

§ 52.146 Supporting Demurrer to Complaint--Posting Bond [Corp. Code § 800(e)] Is Not Substitute for Prefiling Demand or Sufficient Allegation of Futility of Demand [Corp. Code § 800(b)(2)]

[1] FORM

[*Caption. See § 52.140.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT POSTING BOND IS NO SUBSTITUTE FOR PREFILING DEMAND OR FOR SUFFICIENTLY ALLEGING THAT SUCH DEMAND WOULD HAVE BEEN FUTILE.

A. Objection by Demurrer. [*See § 52.60, Paragraph A.*]

B. Posting Bond No Substitute for Demand. The statement in Subdivision (e) of *Section 800 of the Corporations Code* that a plaintiff who has posted a $50,000 bond "has complied with the requirements of this section," means that such a plaintiff has complied with the voluntary posting provisions in subdivisions (c) and (d). Posting bond voluntarily is no substitute for meeting the standing requirement of subdivision (b)(1) or the prefiling demand requirement of subdivision (b)(2) of that section (*Shields v. Singleton (1993) 15 Cal. App. 4th 1611, 1618-1620, 19 Cal. Rptr. 2d 459*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a demurrer to a complaint in a derivative action when plaintiff did not allege any prefiling demand on the board of directors or the futility of such a demand, but claims instead that voluntarily posting the $50,000 bond is a proper substitute [*see Corp. Code § 800(e)*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Posting Bond No Substitute for Demand

The facts and procedural background of ***Shields v. Singleton*** *(1993) 15 Cal. App. 4th 1611, 19 Cal. Rptr. 2d 459* are discussed in *§ 52.145[3][a]*. Plaintiff also argued that by posting $50,000 pursuant to *Corp. Code § 800(e),* which plaintiff did before the filing of the second amended complaint, was sufficient alternative compliance with the demand requirement of *Corp. Code § 800(b)(2)*. The court of appealed disagreed and affirmed the judgment based on the sustaining of the demurrer to the second amended complaint (*15 Cal. App. 4th 1611, 1618)* . The court of appeal said there were three requirements imposed by *Corp. Code § 800* (*15 Cal. App. 4th 1611, 1618-1619)* :

- Plaintiff must be a shareholder [*Corp. Code § 800(b)(1)*];

- Plaintiff must have notified the board of directors of the proposed defendant corporation concerning the "ultimate facts of each cause of action" and the action plaintiff wants the board to take to remedy the alleged wrongdoing. Alternatively, plaintiff may demonstrate that any demand on the board would have been futile [*Corp. Code § 800(b)(2)*]; and

- Plaintiff must demonstrate that there is a reasonable probability that the action will benefit the corporation or its shareholders. If plaintiff cannot demonstrate this reasonable probability, he or she must post bond not to exceed $50,000 [*Corp. Code § 800(c)*].

Corp. Code § 800(e) provides in part that either before or after a motion is made pursuant to *Corp. Code § 800(c)*, plaintiff may post bond, in the aggregate amount of $50,000, to secure the reasonable expenses of the parties entitled to make the motion. If plaintiff furnishes the bond, plaintiff "has complied with this section, and with any order for bond theretofore made thereunder, and any such motion then pending shall be dismissed and no further or additional bond shall be required."

As originally, the quoted language was part of Corp. Code § 834 and provided that in the event plaintiff voluntarily posted a $25,000 bond, plaintiff "shall be deemed to have fully complied with the requirements of this subdivision ..."

The provision was the subject of a Legislative study in 1974 and 1975, part of a joint effort by the Legislature and the State Bar to revise the Corporations Code. Originally, the only change suggested was to increase the amount of the bond to $50,000. However, later, as the draft went through the State Bar review process, other changes were added, and discussed at length in the select committee's report. When it left the Assembly, the draft retained the term "section." The first draft circulated by the State Bar had substituted the word "subdivision," but the change was not discussed in the accompanying report. The court of appeal thus concluded that the change did not reflect a Legislative intent to change the purpose or effect of the voluntary bond: to provide security for defendants' reasonable expenses in defending the suit when there is no reasonable probability that the suit will benefit the corporation or its shareholders (*15 Cal. App. 4th 1611, 1619, 1620)* . The statement in *Corp. Code § 800(e)* that "the plaintiff has complied with the requirements of this section" means the voluntary posting section: *Corp. Code § 800(c)* and *(d)*. The court of appeal said that plaintiff's reading of this language to include satisfaction of the standing and demand requirements of *Corp. Code § 800(b)(1)* and

(b)(2) was untenable, as the voluntary posting of bond does nothing to effect the purposes of those subdivisions. Indeed, plaintiff's interpretation would eliminate the standing and demand requirements, both of which have always been essential elements of a derivative suit. The requirement that plaintiff be a shareholder is at the very heart of this type of action. The court states that there is not the slightest indication in all of the legislative history of *Corp. Code § 800* that the Legislature had any such intention when it revised Subdivision (e) in connection with the 1975 overhaul of the Corporations Law (*15 Cal. App. 4th 1611, 1620)* . The court summarized that in its view, the quoted sentence of *Corp. Code § 800(e)* clearly refers to the bonding provisions of *Corp. Code § 800(c)* and *(d)* and not to the whole of the shareholder derivative statute. This interpretation avoids the absurd consequences of the literal abstract reading (*15 Cal. App. 4th 1611, 1620)* .

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5-52 California Points & Authorities § 52.147

§ 52.147 Supporting Motion for Summary Judgment--Good-Faith Business Judgment by Board of Directors [Corp. Code § 309]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name(s)*],	)	NO. _____
Plaintiff(s), vs.	)	MEMORANDUM IN SUPPORT OF MOTION FOR
_____ [*name(s)*],	)	SUMMARY JUDGMENT
Defendant(s),	)	Date: _____
_____ [*name*],	)	Time: _____
Corporation.	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

SUMMARY JUDGMENT FOR DEFENDANT(S) IS PROPER BECAUSE PLAINTIFF HAS FAILED TO SHOW THAT BUSINESS JUDGMENT OF THE [_____ (*specify board committee, if any, e.g.,* LITIGATION) COMMITTEE OF THE] BOARD OF DIRECTORS WAS NOT EXERCISED IN GOOD FAITH.

A. Summary Judgment. [*See § 52.31, Paragraph A.*]

B. Business Judgment Rule Under Common Law. [*See § 52.140, Paragraph B.*]

C. Business Judgment Rule Codified Under *Section 309 of the Corporations Code*. [*See § 52.140, Paragraph C.*]

D. Immunity Granted by Business Judgment Rule. [*See § 52.140, Paragraph E.*]

[*Optional*] **E. Procedural Alternatives Available to Corporation.** If the board of directors of a corporation [or a committee of the board] makes a good-faith determination that the derivative action should be dismissed, the corporation may demur, move for judgment on the pleadings, make a motion in the trial court to dismiss the suit, or seek summary judgment (*Desaigoudar v. Meyercord (2003) 108 Cal. App. 4th 173, 179, 133 Cal. Rptr. 2d 408* ; *Will v. Engebretson & Co. (1989) 213 Cal. App. 3d 1033, 1040-1041, 261 Cal. Rptr. 868* ; *Finley v. Superior Court (2000) 80 Cal. App. 4th 1152, 1161-1163, 96 Cal. Rptr. 2d 128*).

[*Optional*] **F. Adoption of Means Not Limited by Law.** With respect to the means which the corporation may adopt to further its objects and promote its businesses, its managers are not limited in law to the use of such means as are usual or necessary to the objects contemplated by their organization; instead, if not restricted by law, the managers may choose any means that are convenient and adapted to the end, though they be neither the usual means, nor absolutely necessary for the purpose intended (*Marsili v. Pacific Gas & Elec. Co. (1975) 51 Cal. App. 3d 313, 324, 124 Cal. Rptr. 313*).

[*Optional*] **G. Hindsight Not Relevant.** A court's assessment of a director's alleged oversight or mistake in judgment must be based on the facts and factors existing at the time of action or nonaction. Hindsight is irrelevant. Thus, for instance, whether a consultant actually rendered services worth the consideration paid by the corporation is irrelevant under the business judgment rule (*Gaillard v. Natomas Co. (1989) 208 Cal. App. 3d 1250, 1265, 1271, 256 Cal. Rptr. 702* , *disapproved on other grounds,* *Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119 n.16, 72 Cal. Rptr. 3d 129, 175 P.3d 1184*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for summary judgment in a derivative action based on the ground that defendant is entitled to a judgment as a matter of law because, in the absence of fraud, breach of trust, or ultra vires transactions, neither a court nor minority shareholder may interfere with the good faith business judgments of the board of directors. Counsel may wish to include other authorities from § 52.147 or 52.163 that address particular aspects of the business judgment rule as applied to particular fact situations.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law raised. In addition, counsel should attach affidavits or declarations which support the motion [*Code Civ. Proc. § 437c*].

[b] Related Uses

With appropriate modifications, these points and authorities may be used in support of a demurrer to a complaint based on the plaintiff's failure to allege bad faith, fraud, breach of trust, or ultra vires actions.

[c] Related Memoranda

For points and authorities addressing the limitation period that governs an action against a director for negligence or breach of his or her fiduciary duty to the corporation, see *§ 52.110*.

[3] Discussion of Authorities

[a] Procedural Alternatives Available to Corporation

Desaigoudar v. Meyercord *(2003) 108 Cal. App. 4th 173, 133 Cal. Rptr. 2d 408* is discussed in *§ 52.140[3][k]*.

Will v. Engebretson & Co. *(1989) 213 Cal. App. 3d 1033, 261 Cal. Rptr. 868* is discussed in *§ 52.163[3][b]*.

Finley v. Superior Court *(2000) 80 Cal. App. 4th 1152, 96 Cal. Rptr. 2d 128* is discussed in *§ 52.140[3][k]*.

[b] Adoption of Means Not Limited by Law

In ***Marsili v. Pacific Gas & Elec. Co.*** *(1975) 51 Cal. App. 3d 313, 124 Cal. Rptr. 313* , the plaintiff shareholders filed a derivative action challenging the propriety of a $10,000 contribution made by the corporation to a group opposing a proposition appearing on the election ballot of the City and County of San Francisco. The defendants moved for summary judgment, which was granted by the trial court. The single issue on appeal was whether a California corporation has the power and right to make political contributions. The plaintiffs did not contend that the contribution had been made in bad faith, but contended that (1) the contribution was ultra vires since neither the corporation's articles of incorporation nor the laws of the state permit the corporation to make political contributions; (2) the contribution was illegal because the directors may not give away shareholders' money in violation of the rights of shareholders; and (3) there is a common-law rule against corporate political contributions.

The court of appeal affirmed the judgment of the trial court, stating that there was no restriction appearing in the articles of the corporation which would prevent the board from acting on initiative and referendum proposals or in any other legislative or political matter in which the corporation has a legitimate concern (*51 Cal. App. 3d 313, 323)* . It held that if the board of directors reasonably concludes that the adoption of a ballot proposition would have a direct, adverse effect on the business of the corporation, the board of directors, exercising its business judgment on behalf of the corporation, had both statutory and charter authority to oppose the measure. The law is clear, the court said, that those to whom the management of a corporation has been entrusted are primarily responsible for judging whether a particular act or transaction is one that is helpful to the conduct of corporate affairs or expedient for the attainment of corporate purposes. Neither the court nor the minority shareholders can substitute their judgment for that of the corporation when the board has acted in good faith and used its best business judgment in behalf of the corporation. Corporate managers are not limited in law to the use of usual or necessary means in deciding how to further the corporate objects and promote its business. Unless restricted by law, they may choose any means that are convenient and adapted to the desired end, even those that are neither usual or absolutely necessary. Here, there was no allegation that the individual defendants acted in bad faith, unreasonably, or for an improper purpose. Thus, the board's judgment could not be interfered with (*51 Cal. App. 3d 313, 324)* . The court further added that public policy had not prohibited corporate contributions but instead had adopted a scheme of regulation which simply required the reporting of such contributions. Thus, citizens and corporations were permitted by the Legislature to make expenditures in support of, or in opposition to, any ballot proposition that affected their interests (*51 Cal. App. 3d 313, 327)* .

[c] Hindsight Not Relevant

The facts and procedural background of ***Gaillard v. Natomas Co.*** *(1989) 208 Cal. App. 3d 1250, 256 Cal. Rptr. 702* , *disapproved on other grounds*, *Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119 n.16, 72 Cal. Rptr. 3d 129, 175 P.3d 1184* , are discussed in *§ 52.140[3][a]*. The court of appeal held that the business judgment rule applied to immunize the outside directors from any liability for approving the consulting agreement, and affirmed the summary judgment in favor of the outside directors with respect to claims based on the consulting agreement (*208 Cal. App. 3d 1250, 1271,*

1274) . The record disclosed that the compensation committee had itself raised the issue of the need for the consulting agreement and perceived that the agreement would serve a valid and necessary purpose for the company. The court said that whether the consultant actually rendered $250,000 worth of services per year is irrelevant under the business judgment rule and under *Corp. Code § 309*, and held that as a matter of law, the members of the compensation committee were not liable for their recommendation to approve the consulting agreement (*208 Cal. App. 3d 1250, 1271)* .

See also that portion of the court's opinion discussed in *§ 52.163[3][c]*.

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5-52 California Points & Authorities § 52.148

§ 52.148 Supporting Motion for Judgment on the Pleadings--Shareholder's Derivative Action Against Corporation's Outside Counsel Cannot Proceed in Absence of Corporation's Waiver of Attorney-Client Privilege

[1] FORM

[*The following may be included in a memorandum in support of a motion for summary judgment, or in a trial or appellate brief if appropriate.*]

JUDGMENT FOR DEFENDANT ATTORNEY(S) ON THE PLEADINGS IS PROPER BECAUSE A DERIVATIVE LAWSUIT FOR MALPRACTICE AGAINST CORPORATE OUTSIDE COUNSEL CANNOT PROCEED IN THE ABSENCE OF A WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE BY THE CORPORATE CLIENT, AND DEFENDANT'S CLIENT IN THIS CASE HAS NOT GIVEN SUCH A WAIVER.

A. Judgment on the Pleadings. A defendant may move for judgment on the pleadings if it is contended that the complaint does not state facts sufficient to constitute a cause of action against that defendant (*Code Civ. Proc. § 438*).

B. Derivative Lawsuit for Malpractice Against Corporate Outside Counsel Raises Unique Attorney-Client Issues. A derivative action against a corporation's outside counsel cannot proceed in the absence of a waiver by the corporate client, because the third party attorney is effectively foreclosed from mounting any meaningful defense to the shareholder derivative action (*McDermott, Will & Emery v. Superior Court (2000) 83 Cal. App. 4th 378, 383-385, 99 Cal. Rptr. 2d 622*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for judgment on the pleadings in favor of the defendants in a shareholder's derivative action against the corporation's outside counsel. The ground asserted is that in the absence of a waiver of the attorney-client privilege by the corporate client, the attorney is effectively foreclosed from mounting any meaningful defense to the action. The language can be adapted for other procedural contexts in which this contention

might also arise.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law raised. Specifically, counsel should insert argument showing that (1) the corporate client has not waived the attorney-client privilege, and (2) under the facts presented, defendant attorney(s) inability to disclose privileged material effectively forecloses defendant(s) from mounting any meaningful defense to the action. In addition, counsel should attach affidavits or declarations that support the motion [*Code Civ. Proc. § 438*].

[3] Discussion of Authorities

[a] Derivative Lawsuit for Malpractice Against Corporate Outside Counsel Raises Unique Attorney-Client Issues

In ***McDermott, Will & Emery v. Superior Court*** *(2000) 83 Cal. App. 4th 378, 99 Cal. Rptr. 2d 622* , five shareholders of a nonprofit company brought an equitable derivative action against the corporation's outside counsel, alleging that the defendant committed malpractice with respect to an underlying business transaction. The outside counsel filed a motion for judgment on the pleadings, arguing among other things that the action was contrary to public policy because it required counsel to defend a malpractice action without an ability to disclose privileged information in connection with such a defense. The trial court denied the motion.

The court of appeal ordered issuance of a writ of mandate directing the trial court to vacate its order denying defendant's motion for judgment on the pleadings and to enter a new motion granting defendant's motion. The appellate court stated that although shareholders, upon meeting certain prerequisites, may proceed in a derivative action against a third party to recover for harm done to the corporation, a derivative lawsuit for malpractice against corporate outside counsel raises unique attorney-client privilege issues. The corporation, rather than the shareholders, is the holder of the attorney-client privilege. Because the shareholders are not the holder of the privilege, they do not effect a waiver of that privilege merely by filing their action on the corporation's behalf. As a result, in the absence of a waiver by the corporate client, the third party is effectively foreclosed from mounting any meaningful defense to the shareholder derivative action. The court stated that it could not conceive how an attorney could mount a defense in such an action alleging a breach of duty to the corporate client when, by the very nature of the an action, the attorney is foreclosed in the absence of any waiver by the corporation from disclosing the very communications that are alleged to constitute a breach of that duty. Accordingly, the court held that such a derivative action against the corporation's outside counsel cannot proceed (*83 Cal. App. 4th 378, 380-381, 385)* .

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5-52 California Points & Authorities § 52.149

§ 52.149 Supporting Motion for Security [Corp. Code §§ 800(c)-(f)]--In a Derivative Action [Corp. Code §§ 800(a), (b)]--By Defendant

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name(s)*],	)	NO. _____
Plaintiff(s),	)	MEMORANDUM IN SUPPORT OF MOTION FOR
vs.	)	SECURITY
_____ [*name*],	)	Date: _____
Corporation, and	)	Time: _____
_____ [*name(s)*],	)	Location: _____
Defendant(s).	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

IT IS PROPER FOR PLAINTIFF(S) TO BE REQUIRED TO FURNISH SECURITY, BECAUSE THERE IS NO REASONABLE POSSIBILITY THAT THE LAWSUIT WILL BENEFIT THE CORPORATION OR ITS SHAREHOLDERS.

[*EITHER*]

A. No Benefit to Corporation. The trial court must order the plaintiff[s] to furnish a security when there is no reasonable possibility that the prosecution of the cause of action alleged in the complaint against the defendant will

benefit the corporation or its shareholders (*Corp. Code § 800(c)(1)*).

[*OR*]

A. No Participation in Transaction. The trial court must require plaintiff[s] to furnish a security if a defendant, other than the corporation, did not participate in the transaction complained of in any capacity (*Corp. Code § 800(c)(2)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted to support a motion for a security made by a defendant or defendants in a derivative action [*Corp. Code § 800(c)-(f)*]. The motion requests that the court order the plaintiff to furnish a bond to cover the reasonable expenses including attorney's fees of the corporation and the moving party [*see Corp. Code § 800(d)*]. The motion is made on the ground either that there is not reasonable possibility that the prosecution of the cause of action alleged in the complaint will benefit that corporation or shareholders [*see Corp. Code § 800(c)(1)*] or that the moving party did not participate in the transaction complained of in any capacity [*see Corp. Code § 800(c)(2)*]. The latter ground may not be used by the defendant corporation [*see Corp. Code § 800(c)(2)*].

Counsel should provide factual support explaining the grounds upon which the motion is made. The factual explanation may be made either by affidavits accompanying the memorandum or by witnesses presenting oral testimony at a hearing on the motion [*see Corp. Code § 800(d)*].

When appropriate, counsel should insert argument in the form showing the relationship between the facts of the case and the points of law raised.

[b] Related Pleading and Practice Forms

For forms for making a motion for security in a derivative action, see California Forms of Pleading and Practice, Ch. 168, *Corporations: Derivative Actions* (Matthew Bender).

[c] Aggregate Amount of Security Limited

A California appellate court has held that the aggregate amount of security that a plaintiff may be required to provide pursuant to *Corp. Code § 800* is limited to $50,000 as to all moving parties [*Hale v. Southern California IPA Medical Group (2001) 86 Cal. App. 4th 919, 927-928, 103 Cal. Rptr. 2d 773* , discussed in *§ 52.167*)].

[3] Additional Authorities

[a] No Benefit to Corporation

In *Marble v. Latchford Glass Co. (1962) 205 Cal. App. 2d 171, 22 Cal. Rptr. 789* , the plaintiffs appealed from an order by the trial court requiringthem to file a security pursuant to former Corp. Code § 834 [*now see Corp. Code §*

800(c)-(f)] in a derivative action filed by them. The plaintiffs argued that the trial judge had abused his discretion in determining that there was no reasonable possibility that the prosecution of the derivative action would benefit the corporation. Upon reviewing the defendants affidavits and exhibits, the court of appeal affirmed the trial court's order. The court noted that the defendants' evidence prima facie indicated that the corporation had the right to issue the preferred stock which was the subject of the suit. The court stated that it was the role of the trial court to weigh conflicting evidence and decide which evidence would be believed. Therefore, the trial court's decision was binding on the court. However, the court also went on to consider the merits of two of four defenses raised by defendants which the defendants argued would also negate the possible success of the derivative action. First, the court noted that the plaintiffs' suit was premature since it appeared that the stock issuance was still only under discussion. Second, the court noted that the issuance of preferred stock as a dividend is a managerial decision to be made by the board of directors and the court should not substitute its judgment for that of the board of directors if the business judgment was made in good faith (*205 Cal. App. 2d 171*).

In *Suburban Water Sys. v. Superior Court (1968) 264 Cal. App. 2d 956, 71 Cal. Rptr. 45* , petitioners, who were defendants in a derivative action filed in the trial court, sought a writ of mandate to compel the court to exercise its jurisdiction and consider a motion for security made by the petitioners pursuant to former Corp. Code § 834 [*now see Corp. Code § 800(c)-(f)*]. The trial court refused to consider the motion because of its belief that Corp. Code § 834 was not intended to be applicable to a derivative shareholder's action in which plaintiff is the holder of more than five percent of the shares of the corporation. The court of appeal issued the writ, stating that the trial court was erroneous in its belief that former Corp. Code § 834 excluded plaintiffs holding 5 percent of the shares. The court held that the value or percentage of plaintiffs' holding in the corporation have no bearing on whether a motion for a security should be required or not. The trial court should consider the motion by the moving parties to determine whether the moving parties have established that there is no probability that the prosecution of the case will benefit the corporation or its security holders, as required by the statute, and no other factor can be considered or added (*264 Cal. App. 2d 956*).

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5-52 California Points & Authorities § 52.150

§ 52.150 Supporting Motion for Attorney's Fees--By Plaintiff(s) in Shareholders' Derivative Suit

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name(s)*],	)	
Plaintiff(s),	)	NO. _____
vs.	)	MEMORANDUM IN SUPPORT OF MOTION FOR ATTORNEY'S FEES
_____ [*name*],	)	Date: _____
a Corporation, and	)	Time: _____
_____ [*name(s)*],	)	Location: _____
Defendant(s).	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

SUCCESSFUL PLAINTIFF(S) IN A DERIVATIVE ACTION _____ [IS *or* ARE] ENTITLED TO REIMBURSEMENT FOR ATTORNEY'S FEES AND COSTS FROM THE CORPORATION WHEN THERE IS _____ [A COMMON FUND *or* SUBSTANTIAL BENEFIT] TO THE CORPORATION AS A RESULT OF THE LAWSUIT.

[*EITHER*]

A. Substantial Benefit Rule. Under the "substantial benefit" rule, a variant of the common fund doctrine as applied more recently in other jurisdictions, the successful plaintiff in a stockholder's derivative action may be awarded attorney's fees against the corporation if the latter received "substantial benefits" from the litigation, although the benefits were not "pecuniary" and the action had not produced a fund from which they might be paid (*Fletcher v. A. J. Industries, Inc. (1968) 266 Cal. App. 2d 313, 320, 72 Cal. Rptr. 146*).

[*OR*]

A. Beneficiaries Must Share Litigation Expenses. It is a well-established doctrine of equity jurisprudence that where a common fund exists to which a number of persons are entitled, and in their interest successful litigation is maintained for its preservation and

protection, an allowance of counsel fees may properly be made from such fund. By this means, all of the beneficiaries of the fund pay their share of the expense necessary to make it available to them (*see* *Fletcher v. A. J. Industries, Inc. (1968) 266 Cal. App. 2d 313, 320, 72 Cal. Rptr. 146*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted to support a motion for an order for the payment of the attorney's fees and costs of plaintiffs successful in a derivative action by the defendant corporation. It appears that the motion may be made after the conclusion of a derivative action in a court proceeding or after a compromise and settlement of an action prior to trial [*see* *Fletcher v. A. J. Industries, Inc. (1968) 266 Cal. App. 2d 313, 72 Cal. Rptr. 146]* .

When appropriate, counsel should insert a statement of the benefits to the corporation which have been derived from the shareholders' derivative action which would merit payment of the plaintiffs' attorney's fees and costs.

[3] Discussion of Authorities

[a] Substantial Benefit Rule

In ***Fletcher v. A. J. Industries, Inc.*** *(1968) 266 Cal. App. 2d 313, 72 Cal. Rptr. 146* , the plaintiffs applied for an order requiring the defendant corporation to pay the attorney's fees and costs incurred in connection with a shareholders' derivative action. The suit was settled before the trial and resulted in a reorganization of the board of directors and the management, the ouster of one director-officer, the modification of the contract of another officer, and the submission of numerous disputed matters to arbitration. Although no monetary benefit had been received by the corporation, there was the possibility that the arbitration would result in monetary awards being made to the corporation. The trial court issued the order giving the plaintiffs attorney's fees and costs as requested. The defendant corporation appealed from the order, arguing that since there had been no "pecuniary" benefit to the corporation, and, therefore, no "common fund" from which attorney's fees had traditionally been paid to the successful shareholders of a derivative action, the corporation should not be required to pay the fees and costs of the plaintiff shareholders. The court of appeal affirmed the order of the trial court, holding that under the "substantial benefit" rule, a variant of the "common fund" rule, the

successful plaintiff in a (stockholder's) derivative action may be awarded attorney's fees against the corporation if the latter received "substantial benefits" from the litigation, although the benefits were not "pecuniary" and the action had not produced a fund from which they might be paid. The court stated that the stockholder's derivative suit was an effective means of policing corporate management that should not be inhibited by a doctrine that limits the compensation of successful attorneys to only those cases which produce monetary recoveries; the realization of substantial, if nonpecuniary, benefits to the corporation should be the criterion. In this situation, the substantial benefits to the corporation were the savings of enormous litigation costs by the use of arbitration rather than a lawsuit to settle the suit and the immediate changes in the corporate management (*266 Cal. App. 2d 313, 320)* .

[b] Beneficiaries Must Share Litigation Expenses

For a discussion of the facts in ***Fletcher v. A. J. Industries, Inc.*** *(1968) 266 Cal. App. 2d 313, 72 Cal. Rptr. 146* , see *§ 52.150[3][a]*. In its discussion of the substantial benefit rule, the court stated that the common fund rule, that when there is a pecuniary benefit rule to the corporation in the form of a common fund, all the beneficiaries of the fund must share the litigation expenses, applied to derivative actions. The substantial benefit rule was a more sophisticated version of the common fund rule.

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5-52 California Points & Authorities § 52.150A

§ 52.150A Supporting Motion for Attorney's Fees--By Successful Defendants in Derivative Action--Security Posted by Plaintiff [Corp. Code § 800]

[1] FORM

[*Caption. See § 52.150.*]

WHEN THE PLAINTIFF HAS POSTED SECURITY FOR ATTORNEY'S FEES IN A SHAREHOLDER'S DERIVATIVE ACTION, AND THE DEFENDANT IS THE PREVAILING PARTY, THE DEFENDANT MAY RECOVER ATTORNEY'S FEES, TO THE EXTENT OF THAT SECURITY.

A. Defendant Has Recourse to Security. When the plaintiff in a shareholder's derivative action has posted security for attorney's fees pursuant to *Corporations Code Section 800*, a defendant who is the prevailing party may recover attorney's fees, in the discretion of the court, to the extent of that security (*Code Civ. Proc. §§ 996.440(a), 996.460(a),(b)*; *West Hills Farms, Inc. v. RCO Ag Credit, Inc. (2009) 170 Cal. App. 4th 710, 719, 88 Cal. Rptr. 3d 458*).

[*Optional*] **B. Absence of Benefit to Corporation Need Not Be Shown.** When the plaintiff voluntarily posted security pursuant to *Corporations Code Section 800(e)*, the defendant may seek to enforce the security as the prevailing party at the conclusion of the case without having to meet retrospectively the normal statutory requirement of *Corp. Code § 800(c)(1)*, which provides that to force the posting of security, a defendant must show that the derivative suit has no reasonable possibility of benefitting the corporation or shareholders (*Donner Management Co. v. Schaffer (2006) 142 Cal. App. 4th 1296, 1305-1306, 48 Cal. Rptr. 3d 534*).
Dated: _____

_____ [*firm name, if any*]
_____ [*signature*]
_____ [*typed name*]
_____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be used by a successful defendant in a derivative action to support a motion for attorney's fees when the plaintiff, either pursuant to a court order or voluntarily, has posted security for attorney's fees pursuant to *Corp. Code § 800*. The form may be adapted for use in another procedural setting, such as a trial or appellate brief.

Counsel should insert argument in this form noting the relationship between the fact of the case and the substantive law.

[3] Discussion of Authorities

[a] Defendant Has Recourse to Security

Code Civ. Proc. § 996.440(a) provides that if a bond is given in an action or proceeding, the liability on the bond may be enforced on motion made in the court without the necessity of an independent action. ***Code Civ. Proc. § 996.460(a)*** provides that a judgment of liability on a bond will be in favor of the beneficiary and against the principal and sureties and will obligate each of them jointly and severally. ***Code Civ. Proc. § 996.460(b)*** provides that the judgment will be in an amount determined by the court.

West Hills Farms, Inc. v. RCO Ag Credit, Inc. *(2009) 170 Cal. App. 4th 710, 88 Cal. Rptr. 3d 458* , is discussed in *§ 52.168[3][a]*.

[b] Absence of Benefit to Corporation Need Not Be Shown

In ***Donner Management Co. v. Schaffer*** *(2006) 142 Cal. App. 4th 1296, 1305-1306, 48 Cal. Rptr. 3d 534* , a shareholder's derivative action, the plaintiff had voluntarily posted security pursuant to *Corp. Code § 800(e)*, after the defendant had moved for the posting of security; therefore, no hearing on the motion was held, and the defendant was not called on to show that there was no reasonable possibility that the derivative action would benefit the corporation [*see Corp. Code § 800(c)(1)*]. Subsequently a board-appointed litigation committee concluded that maintaining the action would not be in the corporation's interest, and so the plaintiff dismissed the action without prejudice. The defendant then moved for attorney's fees and costs based on the security posted by the plaintiff. The court ruled that the defendant was the prevailing party and was entitled to attorney's fees. On appeal, the plaintiff contended that attorney's fees could not be awarded under *Corp. Code § 800* without a determination that there was no reasonable possibility that the derivative action would benefit the corporation.

The court of appeal affirmed. The court concluded that since security was voluntarily posted, the defendant could seek to enforce the security as the prevailing party at the conclusion of the case without having to meet retrospectively the normal statutory requirement [*see Corp. Code § 800(c)(1)*] that, to force the posting of security, a defendant must show that the derivative suit has no reasonable possibility of benefitting the corporation or shareholders (*142 Cal. App. 4th 1296, 1305-1306)* . The court also determined that the defendant was the prevailing party after the plaintiff dismissed the action without prejudice, in view of the board-appointed litigation committee's conclusion that maintaining suit was not in the corporation's interest. As a practical matter, that decision by the litigation committee brought an end to the action (*142 Cal. App. 4th 1296, 1310-1311)* .

[4] Additional Authorities

[a] Defendant Has Recourse to Security

In *Alcott v. M.E.V. Corp. (1987) 193 Cal. App. 3d 797, 238 Cal. Rptr. 520* , a shareholder's derivative action, all defendants prevailed in pretrial proceedings. Thereafter the defendants filed cost bills containing demands for attorney's

fees. The trial court awarded the defendants their attorney's fees, and the plaintiff appealed. The court of appeal reversed because no security was ever sought or posted pursuant to *Corp. Code § 800*. The court observed that unless the plaintiff has posted security, there is no statutory basis for an award of attorney's fees to a successful defendant in a derivative action. The court further observed that, under *Corp. Code § 800* and *Code Civ. Proc. §§ 996.440* and *996.460*, if security had been posted, then the defendant would have had recourse to the security in such amount as the court determined on the termination of the action (*193 Cal. App. 3d 797, 799-800)* .

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5-52 California Points & Authorities § 52.151

§ 52.151 Supporting Motion for Attorney's Fees--By Successful Defendants in Derivative Action [Civ. Code § 1717]

[1] FORM

[*Caption. See § 52.150.*]

SUCCESSFUL DEFENDANTS IN A DERIVATIVE ACTION BASED ON CAUSES OF ACTION FOR BREACH OF CONTRACTMAY RECOVER ATTORNEY'S FEES UNDER SECTION 1717 OF THE CIVIL CODE IF THE CONTRACTS SO PROVIDE.

A. Attorney's Fees Provided by Contract. When the gravamen of a derivative action is breach of contract, and the contract contains an attorney's fee provision, *Civil Code Section 1717* governs the rights of parties to attorney's fees, and the bond provided for in *Corporations Code Section 800* need not be applied (*Brusso v. Running Springs Country Club, Inc. (1991) 228 Cal. App. 3d 92, 103-108, 278 Cal. Rptr. 758*).

[*Optional*] **B. Nonsignatories May Be Liable for Attorney's Fees.** In a derivative action for breach of contract, when the contract contains an attorney's fee provision, even the nonsignatory plaintiffs can be liable for the payment of attorney's fees to signing defendants if they would have been entitled to attorney's fees under the substantial benefit doctrine had they prevailed (*Brusso v. Running Springs Country Club, Inc. (1991) 228 Cal. App. 3d 92, 109-111, 278 Cal. Rptr. 758*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be used by a successful defendant in a derivative action to support a motion for attorney's fees when the action alleged breach of contracts that have attorney's fee provision. The authority is especially useful when defendant's motions for security [*see § 52.149*] were denied, and there is no bond to ensure payment of attorney's fees.

Counsel should insert argument in this form noting the relationship between the fact of the case and the substantive law.

The foregoing form may also be adapted for use in another procedural setting, such as a trial or appellate brief.

[3] Discussion of Authorities

[a] Attorney's Fees Provided by Contract

Brusso v. Running Springs Country Club, Inc. *(1991) 228 Cal. App. 3d 92, 278 Cal. Rptr. 758* was a derivative action by minority shareholders against the majority. The majority ran a county club under a lease and a management agreement and had acquired their interests under a purchase and sale agreement. All three agreements contained attorney's fees provisions. Two of the minority plaintiffs had signed the purchase agreement as sellers. The minority contended that majority had breached those agreements and sought in the derivative action to obtain an accounting, back rent, and control of the premises and day-to-day operations, among other things. The majority cross complained. In a bifurcated trial there was an accounting, but the final judgment was for defendants on the complaint and for plaintiffs on the cross complaint. Defendants had twice moved for an order requiring plaintiffs to post security [*see Corp. Code § 800*], but it was denied on both occasions. The final judgment awarded defendants attorney's fees from plaintiffs pursuant to the purchase contract and *Civ. Code § 1717*. Defendants (as cross complainants) were not awarded attorney's fees. Plaintiffs appealed.

The court of appeal affirmed and awarded defendants their costs and attorney's fees on appeal. Plaintiffs contended that defendants only right to attorney's fees was under *Corp. Code § 800* on the ground that *Corp. Code § 800* was the exclusive remedy. The court said that *Corp. Code § 800* was not exclusive or mandatory. The decision to require a bond under *Corp. Code § 800* is discretionary, and if, as here, no bond is required, then there is no fund out of which a successful defendant can be awarded attorney's fees. Thus, *Civ. Code § 1717* fills an important gap and provides that attorney's fees must be awarded to a successful defendant in a derivative action when an alleged breach of a contract with an attorney's fees provision is the basis of the action (*228 Cal. App. 3d 92, 102)* .

The court also discussed the relationship between *Corp. Code §§ 317* and *800*. *Corp. Code § 317(c)* and *(d)* require a corporation to indemnify a defendant for costs in defending a shareholder derivative suit in his or her capacity as an agent of the corporation. Normally, however, the defense costs are actually paid out of the bond required under *Corp. Code § 800*. Plaintiffs contended that when no security was required, defendants' only recourse to recover defense costs was *Corp. Code § 317(d)* and *(g)* (*228 Cal. App. 3d 92, 102-103)* . Although *Corp. Code § 317(d)* is mandatory in that it requires the corporation to pay defendants' attorney's fees, the court stated that *Corp. Code § 317(d)* inures to the benefit of defendants, and there is no logic or authority for requiring successful defendants to seek their indemnity from the corporation or for holding that *Corp. Code § 317(d)* and *(g)* provide their exclusive remedy (*228 Cal. App. 3d 92, 104)* . Here, defendants constituted 53 percent of the shareholders. To force them to seek indemnity from the corporation, which everyone agreed was already insolvent, would force them to pay 53 percent of their own attorney's fees. That would not be in accord with the equities of the case and would bemanifestly unfair (*228 Cal. App. 3d 92, 104-105)* . Thus, when the gravamen of a derivative action is breach of contract, *Civ. Code § 1717* governs the rights of parties to attorney's fees, and the bond provided for in *Corp. Code § 800* need not be applied. *Corp. Code § 800* does not prescribe the exclusive statutory ground for granting attorney's fees when the shareholder derivative suit is premised on caus of action for breach of contract, which contracts contain attorney's fees provisions, and requests for security under *Corp. Code § 800* have been denied (*228 Cal. App. 3d 92, 107-108)* .

Plaintiffs also argued that the court erred in finding that defendant prevailed in the litigation because that finding was contrary to the standards set forth in *Corp. Code § 317*. The court stated that the standards of *Corp. Code § 317* did not apply and were not relevant because the fees were awarded under *Civ. Code § 1717* (*228 Cal. App. 3d 92, 108)* .

[b] Nonsignatories May Be Liable for Attorney's Fees

The facts and procedural background of ***Brusso v. Running Springs Country Club, Inc.*** *(1991) 228 Cal. App. 3d 92, 278 Cal. Rptr. 758* are *discussed in § 52.151[3][a]*. Although several of the plaintiffs had signed the three contracts, most had not, and they objected to being held liable for attorney's fees under *Civ. Code § 1717*. The court said that although the nonsignatory plaintiffs did not claim a right to attorney's fees under the contract, they would have had a right to attorney's fees under the substantial benefit doctrine had they prevailed (*228 Cal. App. 3d 92, 110)* . That is, had defendants lost, they would have been liable to plaintiffs for damages and fees under the contract, thereby creating a benefit to the corporation in the form of a common fund from which plaintiffs could have received their fees. Therefore, under the theory of *Reynolds Metals Co. v. Alperson (1979) 25 Cal. 3d 124, 128-129, 158 Cal. Rptr. 1, 599 P.2d 83* , it was proper to award attorney's fees to the signatory defendants from the nonsignatory plaintiffs under the mutuality theory of *Civ. Code § 1717*, on the grounds that had plaintiffs prevailed, they would have been entitled to attorney's fees under the substantial benefit doctrine (*228 Cal. App. 3d 92, 111)* .

[4] Additional Authorities

[a] Attorney's Fees Provided by Contract

In *Scott Co. of California v. Blount, Inc. (1999) 20 Cal. 4th 1103, 86 Cal. Rptr. 2d 614, 979 P.2d 974* , plaintiff subcontractor sued defendant general contractor for contract and tort claims. After recovering damages at trial, plaintiff sought its costs, including attorney fees. The parties' contract included a unilateral attorney fees provision permitting defendant to recover its attorney fees if it sued to enforce the contract or to recover damages for its breach, but not authorizing plaintiff to recover its fees. The court construed *Civ. Code § 1717(a)*, holding that the section rendered the attorney fees provision mutual, giving the prevailing party the right to attorney fees on any claims based on contract (*20 Cal. 4th 1103, 1108-1109)* . The court further held that a plaintiff who rejects a *Code Civ. Proc. § 998* settlement offer that is greater than its ultimate recovery may nonetheless recover preoffer costs to which it otherwise would be entitled, including preoffer attorney fees when those fees are an authorized category of recoverable costs under *Code Civ. Proc. §§ 1032, 1033.5* (*20 Cal. 4th 1103, 1111-1112)* . Also, a defendant who is not the prevailing party but whose *Code Civ. Proc. § 998* settlement offer was greater than plaintiff's recovery is entitled under *Code Civ. Proc. § 998* to those costs incurred after the settlement offer to which a prevailing party would be entitled under *Code Civ. Proc. § 1032* (*20 Cal. 4th 1103, 1112-1114)* .

[b] Nonsignatories May Be Liable for Attorney's Fees

The California Supreme Court in *Hsu v. Abbara (1995) 9 Cal. 4th 863, 39 Cal. Rptr. 2d 824, 891 P.2d 804* , reversed and remanded a judgment denying attorney's fees incurred by defendant sellers an action seeking specific performance of a purported real estate sales contract. The trial court ruled that no contract had been formed, but without explanation denied defendant any recovery of attorney's fees (*9 Cal. 4th 863, 869)* . The court of appeal construed the trial court's finding as an implied finding that there was no prevailing party on the complaint for purposes of *Civ. Code § 1717* because no contract of sale was ever formed (*9 Cal. 4th 863, 870)* . Sellers appealed denial of fees and buyers cross-appealed. In construing *Civ. Code § 1717*, the Supreme Court affirmed the mutuality of remedy theory (*9 Cal. 4th 863, 870-871)* . Relying on *Reynolds Metals Co. v. Alperson (1979), 25 Cal. 3d 124, 158 Cal. Rptr. 1, 599 P.2d 83* (*discussed in § 52.151[3][b]*), the court held that the statute would fall short of its goal of mutuality of remedy if its benefits were denied to parties who defeat contract actions by proving that they were not parties to the original contract or that it was never formed. To achieve its goal, the court concluded that the statute must generally apply in favor of the prevailing party on a contract claim whenever that party would have been liable under the contract for attorney's fees

had the other party prevailed (*9 Cal. 4th 863, 870-871)* . As a matter of law, defendants, who had defeated the only contract claim in the action, were the parties prevailing on the contract, and therefore were entitled to recover reasonable fees incurred in the defense of the action. Under the facts presented the trial court had no discretion to deny the award of attorney's fees (*9 Cal. 4th 863, 877)* .

In *Sears v. Baccaglio (1998) 60 Cal. App. 4th 1136, 70 Cal. Rptr. 2d 769* , plaintiff guarantor brought an action for breach of contract, declaratory relief, and bad faith denial of existence of contract against defendantassignee, who filed a cross-complaint. The trial court found the guarantor liable on the guaranty but, finding that the assignee already had received more than the amount of his damages from various sources, entered judgment in favor of the guarantor and denied the assignee any recovery on his cross-complaint. Pursuant to the guaranty's fee provision, the court then awarded the assignee his attorney fees after finding that he prevailed on the contract issue (*60 Cal. App. 4th 1136, 1141-1142)* . The guarantor appealed. The court of appeal extensively reviewed the legislative history of *Civ. Code § 1717* (*60 Cal. App. 4th 1136, 1142-1150)* . Citing *Hsu v. Abbara (1995) 9 Cal. 4th 863, 39 Cal. Rptr. 2d 824, 891 P.2d 804* (discussed *above*), it held that a party can fail to recover a net monetary judgment and still prevail for purposes of collecting fees in an action founded on contract. It concluded that the party recovering "greater relief in the action on the contract" under *Civ. Code § 1717(b)(2)* does not necessarily mean the party receiving the greater monetary judgment. If one party has received earlier payments, settlements, insurance proceeds, or other recovery, the court has the discretion to determine whether the party required to pay a nominal net judgment is nevertheless the prevailing party entitled to attorney's fees pursuant to *Civ. Code § 1717* (*60 Cal. App. 4th 1136, 1154-1155)* .

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5-52 California Points & Authorities § 52.152

§ 52.152 Supporting Motion to Permit Plaintiff in a Derivative Action to Waive Requirement of Being Shareholder, Registered or Beneficial, or Holder of Voting Trust Certificates at Time of Wrongdoing to the Corporation [Corp. Code § 800(b)(1)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name(s)*], Plaintiff(s),	)	NO. _____
vs.	)	MEMORANDUM IN SUPPORT OF MOTION TO PERMIT PLAINTIFF IN DERIVATIVE ACTION TO WAIVE REQUIREMENT OF BEING REGISTERED SHAREHOLDER AT THE TIME OF WRONGDOING TO THE CORPORATION
_____ [*name*], a Corporation,	)	
and	)	
_____ [*name(s)*], Defendant(s).	)	
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

PLAINTIFF HAS MET ALL THE STATUTORY PREREQUISITES NECESSARY FOR A SHAREHOLDER WHO WAS NOT A HOLDER OF RECORD AT THE TIME OF THE TRANSACTION COMPLAINED OF TO MAINTAIN A DERIVATIVE ACTION ON BEHALF OF THE CORPORATION.

Prerequisites for Waiving Registered Shareholder Requirement. A derivative action may be maintained by a

shareholder who was not a holder, of record or beneficially, or a holder of voting trust certificates at the time the transaction complained of occurred or during any part thereof in the discretion of the court after a preliminary showing to, and determination by the court, by a motion and after hearing, that: (1) there is a strong prima facie case in favor of the claim asserted on behalf of the corporation (Corp. Code§ 800(b)(1)(i)); (2) no other action has been, or is likely to be instituted (*Corp. Code § 800(b)(1)(ii)*); (3) the plaintiff acquired the shares before there was disclosure to the public or to the plaintiff of the wrongdoing of which plaintiff complains (*Corp. Code § 800(b)(1)(iii)*); (4) unless the action can be maintained, the defendant may retain a gain derived from defendant's willful breach of a fiduciary duty (*Corp. Code § 800(b)(1)(iv)*); and (5) the requested relief will not result in unjust enrichment of the corporation or any shareholder of the corporation (*Corp. Code § 800(b)(1)(v)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion made under *Corp. Code § 800(b)(1)* by a shareholder who wishes to maintain a derivative action on behalf of the corporation, even though he or she was not a shareholder, of record or beneficially, or a holder of voting trust certificates at the time the wrongdoing or transaction complained of occurred. *Corp. Code § 800(b)(1)* was enacted as part of the General Corporation Law. It is within the discretion of the trial court, after weighing the evidence presented in light of the five provisions set forth in *Corp. Code § 800(b)(1)*, to decide if the requirement that a shareholder be a holder of record or beneficially, or a holder of voting trust certificates at the time of the wrongdoing should be waived [*Corp. Code § 800(b)(1)*].

It is unclear from the statute at what point in the prosecution of the derivative action the motion should be brought. As a practical matter, it would appear that the motion should be part of the pretrial proceedings since the failure to allege that a plaintiff was a registered shareholder or holder of voting trust certificates at the time the transaction complained of occurred would be fatal to the suit unless the requirement has been waived [*see Campbell v. Clark (1958) 159 Cal. App. 2d 432, 324 P.2d 51]* . A motion based on the foregoing provision might accompany a motion opposing a demurrer to the complaint made by the defendant who asserts that the shareholder has failed to fulfill the statutory prerequisites of being a shareholder, registered or beneficial, or a holder of voting trust certificates at the time the wrongdoing occurred.

Counsel should provide argument showing the relationship between the facts of the case and each of the five grounds, all of which must be met in order for the registered shareholder requirement to be waived. The factual explanation may be made either by affidavits accompanying the memorandum, or by witnesses presenting oral testimony at a hearing on the motion, or both [*Corp. Code § 800(b)(1)*].

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5-52 California Points & Authorities § 52.153

§ 52.153 Supporting Motion for Order Approving Compromise Settlement Between Plaintiff Shareholder and Defendant in Shareholder's Derivative Suit and for Judgment Entered Thereon

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*(*s*)], Plaintiff(s),	)	MEMORANDUM IN SUPPORT OF MOTION FOR
vs.	)	ORDER APPROVING COMPROMISE SETTLE-
_____ [*name*], a Corporation,	)	MENT AND FOR JUDGMENT ENTERED THERE-
and	)	ON
_____ [*name*(*s*)], Defendant(s).	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

A COURT SHOULD GRANT A MOTION FOR AN ORDER APPROVING A COMPROMISE SETTLEMENT BETWEEN [A] PLAINTIFF SHAREHOLDER(S) AND DEFENDANT(S) IN A SHAREHOLDER DERIVATIVE SUIT AND FOR THE ENTRY OF JUDGMENT ON THAT SETTLEMENT IF THE SETTLEMENT FULLY PROTECTS THE RIGHTS OF THE CORPORATION ON WHOSE BEHALF THE DERIVATIVE SUIT WAS BROUGHT.

Compromise Settlement as Permitted if Corporation's Rights Fully Protected. A settlement of all the claims made

against [a] defendant(s) in a shareholder's derivative suit may be effected by the plaintiff(s) and defendant(s) in the suit if the court approves the settlement and finds that the rights of the corporation on whose behalf the derivative was brought are fully protected in the settlement (*Whitten v. Dabney (1915) 171 Cal. 621, 630-632, 154 P. 312*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for an order approving a compromise settlement between a plaintiff shareholder and defendant in a shareholder's derivative suit and for a judgment entered on that settlement.

Counsel should include argument in the form showing the relationship between the facts of the case and the point of law stated.

[3] Discussion of Authorities

[a] Compromise Settlement as Permitted if Corporation's Rights Fully Protected

In ***Whitten v. Dabney*** *(1915) 171 Cal. 621, 154 P. 312* , plaintiffs as stockholders of a corporation sued three defendants alleging their fraudulent impositions on the corporation which resulted in great loss to the corporation. A general demurrer was interposed to plaintiffs' complaint as well as a demurrer raising the bar of the statute of limitations. Both demurrers were sustained. Following the entry of judgment against plaintiffs, plaintiffs and two of the defendants entered into an agreement by which plaintiffs purported to reach a complete settlement and adjustment of all their claims against the defendants. When plaintiffs appealed the judgment entered against them, the two defendants moved to dismiss the appeal as to them based on the compromise settlement. In reversing the judgment entered against plaintiffs, the Supreme Court denied the motion to dismiss the appeal. The Court found that both plaintiffs and defendants had completely misconstrued the nature of the litigation and the rights of the plaintiffs under it. The Court stressed that the plaintiff in a shareholder's derivative suit has no personal wrong for which he or she is entitled to seek redress; rather, the plaintiff is permitted to sue simply in order to set in motion the judicial machinery of the court. The Court explained that the plaintiff in the litigation is in every legal sense the precise equivalent of a guardian ad litem who stands as the representative of some person incompetent to sue or be sued directly. Not only should a plaintiff in such a fiduciary capacity be willing to take no act that did not first receive the sanction of the court but, moreover, the plaintiff may not take any act without that sanction. Therefore, because the motion to dismiss was based on the compromise agreement, it could not be granted since that agreement was cognizable by the trial court alone and could not be given the slightesteffect, until, after scrutiny and examination, the trial court determined that the corporation's rights were fully protected (*171 Cal. 621, 630-632)* .

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5-52 California Points & Authorities § 52.154

§ 52.154 Supporting Motion for Order Modifying Amount of Bond Plaintiff Must Post in Shareholder's Derivative Suit [Code Civ. Proc. § 996.010]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*], Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION TO
vs.	)	MODIFY AMOUNT OF BOND
_____ [*name*], a Corporation,	)	Date: _____
and	)	Time: _____
_____ [*name*(*s*)] Defendant(s).	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THE AMOUNT OF THE BOND A PLAINTIFF MUST POST IN A SHAREHOLDER'S DERIVATIVE SUIT MAY BE INCREASED IF THE COURT DETERMINES THAT THE BOND IS OR HAS FROM ANY CAUSE BECOME INSUFFICIENT BECAUSE THE SURETIES ARE INSUFFICIENT OR BECAUSE THE AMOUNT OF THE BOND IS INSUFFICIENT.

A. Determination of Trial Court That Bond Insufficient. The amount of the bond which a plaintiff in a shareholder's derivative suit, pursuant to *Corporations Code Section 800*, must furnish for reasonable expenses, including attorney's fees, incurred by a defendant or defendants and the corporation in the action, may be increased if the court determines that the bond given is or has from any cause become insufficient because the sureties are insufficient or because the

amount of the bond is insufficient (*Code Civ. Proc. § 996.010(a)*).

B. Sufficient Bond Must be Given Within Time Ordered by Court. If a sufficient bond is not given within the time required by the court order, all rights obtained by giving the original bond immediately cease, and the court must so order on ex parte motion (*Code Civ. Proc. § 996.010(d)*).

[*Optional*] **C. Expenses to Be Incurred on Appeal.** Defendants' rights in a shareholder's derivative suit to security when the court has determined that there is no reasonable possibility that the prosecution of the cause of action alleged in plaintiff's complaint will benefit the corporation or its shareholders is a right to full indemnification for the probable reasonable expenses incurred by the corporation and the moving party in the defense of the action, and includes expenses which will be incurred on appeal. The party entitled to security may move the trial court for modification of the amount of security to include the probable reasonable expenses to be incurred on appeal either before or after the plaintiff has taken an appeal from the judgment (*Kaiser v. Easton (1957) 151 Cal. App. 2d 307, 311 P.2d 108*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be used in support of a motion for an order modifying the amount of the bond a plaintiff must furnish in a shareholder's derivative action when the bond is or has from any cause become insufficient.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. The notice of motion must specify precisely the grounds for the motion, and if it is contended that the amount of the bond is insufficient, the reason for the insufficiency must be stated, and an estimate of the amount that would be sufficient must be included [*see Code Civ. Proc. § 995.930(a)*].

[b] Limitation on Aggregate Amount of Security

The aggregate amount of security that a plaintiff may be required to provide pursuant to *Corp. Code § 800* is limited to $50,000 as to all moving parties [*Hale v. Southern California IPA Medical Group (2001) 86 Cal. App. 4th 919, 927-928, 103 Cal. Rptr. 2d 773* , discussed in *§ 52.167*].

[3] Discussion of Authorities

[a] Expenses to Be Incurred on Appeal

In ***Kaiser v. Easton*** *(1957) 151 Cal. App. 2d 307, 311 P.2d 108* , plaintiff sued a corporation in which plaintiff was a shareholder and the corporation's officers and directors for general and punitive damages, an accounting of corporate funds, removal from office of the defendants, the appointment of a receiver, and other equitable relief. Defendants answered and, after a trial, findings and judgment were entered in their favor. Before the trial, plaintiff had been required to furnish security to all defendants in the action in the amount of $2,500. After the trial and after plaintiff had given notice of appeal, defendants gave notice of a motion for an order increasing the amount of security to be furnished by plaintiff in the sum of $2,250, which the court ordered. Plaintiff appealed from this order and from the judgment entered against him. In affirming the judgment, the court of appeal considered plaintiff's contention that the trial court

had been without jurisdiction to order the posting of additional security after plaintiff had taken an appeal from the judgment. The court held that the trial court did have jurisdiction to make the order. The court observed that the purpose of the remedy afforded by former Corp. Code § 834 (*see now Corp. Code § 800*) was to provide full indemnity for expenses of the defense, incurred throughout the litigation, and no distinction could thus be made between the expenses incident to the trial and those incurred in defending the judgment on appeal. Because a trial court does not lose jurisdiction over collateral matters in which the rights of the parties require action, if they do not affect the judgment, and a trial court has authority to modify the amount of security furnished by a plaintiff before the plaintiff has noticed his or her appeal, the fact that no application had been made by defendants before the notice of appeal did not divest the court of jurisdiction to entertain an application after judgment had been entered and an appeal taken (*151 Cal. App. 2d 307, 314)* .

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5-52 California Points & Authorities § 52.155

§ 52.155 Supporting Motion for Order and Judgment Dismissing Shareholder's Derivative Suit for Failure to Post Security [Corp. Code § 800(d)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION FOR
vs.	)	ORDER AND JUDGMENT DISMISSING SHARE-
_____ [*name*],	)	HOLDER'S DERIVATIVE ACTION
a Corporation, and	)	Date: _____
_____ [*name(s)*],	)	Time: _____
Defendant(s).	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

A SHAREHOLDER'S DERIVATIVE ACTION MUST BE DISMISSED AS TO THOSE DEFENDANT(S) FOR WHOM THE PLAINTIFF MUST FURNISH SECURITY WHEN REQUIRED BY THE COURT IF THE PLAINTIFF HAS NOT FURNISHED THAT SECURITY WITHIN THE TIME FIXED BY THE COURT.

A. Dismissal for Failure to Furnish Security. When the court, on the motion of defendant(s) as provided in *Corporations Code Section 800(d)*, has made a determination that security must be furnished by the plaintiff as to one or more defendants in plaintiff's shareholder's derivative action, the action must be dismissed as to that defendant or defendants if the security required by the court has not been furnished within the time fixed by the court (*Corp. Code §*

800(d)).

[*Optional*] **B. Dismissal of Action for Failure to Furnish Security for Corporate Defendant.** Regardless of the propriety of an order of the trial court requiring deposit of security for the individual defendants in a shareholder's derivative action, a judgment of dismissal must be entered if the plaintiff fails to furnish the security for the corporate defendant when required since the corporation is an indispensable party, and the court has no jurisdiction to adjudicate the corporation's rights in its absence as a party (*Beyerbach v. Juno Oil Co. (1954) 42 Cal. 2d 11, 27-28, 265 P.2d 1*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a defendant's motion for an order and judgment dismissing a plaintiff's shareholder's derivative action as to the moving defendant when the plaintiff has failed to furnish the security for the defendant within the time fixed by the court under *Corp. Code § 800(c)*.

Counsel should include argument in the form showing the relationship between the facts of the case and points of law stated.

[b] Related Pleading and Practice Forms

For a notice of motion for order and judgment dismissing a shareholder's derivative action for failure to post security and an order and judgment thereon, see California Forms of Pleading and Practice, Ch. 168, *Corporations: Derivative Actions* (Matthew Bender).

[c] Related Memoranda

For a memorandum opposing a defendant's motion for order dismissing a derivative suit for failure to post security when the plaintiff already has provided an aggregate of $50,000 as to all moving parties, see *§ 52.167*.

[3] Discussion of Authorities

[a] Dismissal of Action for Failure to Furnish Security for Corporation

In ***Beyerbach v. Juno Oil Co.*** *(1954) 42 Cal. 2d 11, 265 P.2d 1* , plaintiff shareholder instituted a stockholder's deriative suit to compel two individual defendants to transfer a certain oil lease to defendant company andto account for and pay to the company sums received under the lease as rents and royalties. Defendants moved, under former Corp. Code § 834 (*see now Corp. Code § 800(c)*), for an order requiring plaintiff to furnish security for reasonable expenses which might be incurred by defendant in connection with the action. Plaintiff failed to deposit security as ordered by the trial court and, on defendants' motions to dismiss the action on the ground that plaintiff had failed to deposit the security, the trial court dismissed the action. Plaintiff appealed, arguing in part that the law governing the posting of security in a shareholder's derivative action was unconstitutional and that, if the law were constitutional, the trial court had abused its discretion by ordering an excessive amount of security for the individual defendants in an improper form. In holding that the law was constitutional, and that the trial court had not abused its discretion with respect to the

amount of security it had required plaintiff to post, the court further held, that, regardless of the propriety of the trial court's order requiring deposit of security for the individual defendants, the judgment of dismissal was the only proper judgment in plaintiff's action. The court observed that because plaintiff had failed and refused to furnish the security for the corporation as ordered, the trial court had no jurisdiction to proceed with the action. The court explained that the corporation is an indispensable party to a representative action brought on its behalf; its rights, not those of the nominal plaintiff, are to be litigated, and the court had no jurisdiction to adjudicate its rights in its absence as a party. Thus, when plaintiff had refused to deposit the security required for the corporation, the action could not continue against the corporation, or in its absence against any other party, and the trial court had no alternative but to dismiss as to all defendants (*42 Cal. 2d 11, 27-28)* .

[4] Additional Authorities

[a] Dismissal for Failure to Furnish Security

In *Ensher v. Ensher, Alexander & Barsoom (1960) 187 Cal. App. 2d 407, 9 Cal. Rptr. 732* , three of plaintiff's four causes of action were in the nature of a shareholder's derivative suit in which plaintiff sought to recover damages from the individual defendant directors on behalf of the defendant corporation. Defendants moved the trial court for an order requiring plaintiff to post security, which order the trial court granted. When plaintiff failed to post the security as required by the trial court's order, defendants moved for a motion to dismiss the three causes of action with prejudice. Plaintiff then filed a voluntary dismissal of these causes of action with the clerk of the court. However, defendants' motion to dismiss was subsequently heard and the court dismissed the causes of action in question with prejudice. Thereafter, it also denied plaintiff's subsequent motion to set aside the judgment of dismissal. Plaintiff appealed and the court of appeal reversed. Plaintiff contended that her voluntary dismissal rendered the trial court without power to dismiss plaintiff's causes of action. However, the court held that, because a stockholder who brings a derivative suit is a trustee for the corporation's cause of action, plaintiff could not dismiss the action without the consent of the trial court. However, the court did find that the trial court's subsequent dismissal of plaintiff's causes of action with prejudice was error since a determination as to the furnishing of security is not a determination of the merits of any issue of the action. Therefore, the dismissal of the causes of action did not operate as a bar to another action on the same causes of action (*187 Cal. App. 2d 407*).

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2-52 California Points & Authorities § 52.155A

§ 52.155A Supporting Motion for Order and Judgment Dismissing Shareholder's Derivative Suit--Plaintiff Is No Longer Shareholder [Corp. Code § 800(b)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff, vs. _____ [*name*],	)	MEMORANDUM IN SUPPORT OF MOTION FOR ORDER AND JUDGMENT DISMISSING SHAREHOLDER'S DERIVATIVE ACTION
a Corporation, and	)	
_____ [*name*],	)	Date: _____
Defendants.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

A SHAREHOLDER'S DERIVATIVE ACTION MUST BE DISMISSED IF THE PLAINTIFF IS NO LONGER A SHAREHOLDER OF THE CORPORATION.

A. Dismissal Is Required When Plaintiff Is No Longer Shareholder. California law generally requires a plaintiff in a shareholder's derivative action to maintain continuous stock ownership throughout the pendency of the litigation. A derivative-action plaintiff who ceases to be a shareholder, whether voluntarily or involuntarily, ordinarily loses standing to continue the litigation. In that event, dismissal is required (*Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1115, 1119, 72 Cal. Rptr. 3d 129, 175 P.3d 1184*).

Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a defendant's motion for an order and judgment dismissing a shareholder's derivative action on the ground that the plaintiff is no longer a shareholder of the corporation.

Counsel should include argument in the form showing the relationship between the facts of the case and points of law stated; in other words, that the plaintiff failed to maintain continuous stock ownership during the pendency of the litigation.

[b] Related Pleading and Practice Forms

For a form for a notice of motion for dismissal of a derivative action, together with a form for a judgment of dismissal, based on the plaintiff's loss of shareholder status, see *California Forms of Pleading and Practice, Ch. 168, Corporations: Derivative Actions, §§ 168.74, 168.75* (Matthew Bender).

[3] Discussion of Authorities

[a] Dismissal Is Required When Plaintiff Is No Longer Shareholder

Grosset v. Wenaas *(2008) 42 Cal. 4th 1100, 72 Cal. Rptr. 3d 129, 175 P.3d 1184* , was a shareholder's derivative action for the benefit of JNI Corporation. On the corporation's motion, the trial court dismissed the action with prejudice, based on the court's finding that the action was not in the corporation's best interest. While the plaintiff's appeal was pending, JNI Corporation was merged with another corporation, which thus became the sole shareholder of JNI Corporation. The plaintiff was required to sell his JNI shares to the surviving corporation. Thereafter the defendants moved to dismiss the appeal on the ground that the plaintiff had no standing to pursue the litigation after selling his JNI stock in the merger. The court of appeal granted that motion.

The Supreme Court affirmed. Although *Corp. Code § 800(b)* does not explicitly deal with the question, the court elected to follow the majority rule and, applying the basic principles that govern corporation law and shareholder litigation, held that subsection (b) is properly construed as containing a continuous-ownership requirement. That is, California law generally requires a plaintiff in a shareholder's derivative action to maintain continuous stock ownership throughout the pendency of the litigation. Consequently, when the shareholder relationship is terminated, whether voluntarily or involuntarily, the derivative-action plaintiff loses standing (*42 Cal. 4th 1100, 1115, 1119)* . The court concluded: "Under this rule, a derivative plaintiff who ceases to be a stockholder by reason of a merger ordinarily loses standing to continue the litigation. Although equitable considerations may warrant an exception to the continuous ownership requirement if the merger itself is used to wrongfully deprive the plaintiff of standing, or if the merger is merely a reorganization that does not affect the plaintiff's ownership interest, we need not address such matters definitively in this case, where no such circumstances appear. [P] Because dismissal of... [the] appeal is required ... [California] law, we end the analysis here" (*42 Cal. 4th 1100, 1119)* .

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5-52 California Points & Authorities § 52.156

§ 52.156 Opposing Demurrer to Complaint--Plaintiff-Shareholder Has Satisfied the Requirements to File Derivative Action on Behalf of Corporation [Corp. Code § 800]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name(s)*],	)	NO. _____
Plaintiff(s), vs. _____ [*name*],	)	MEMORANDUM OPPOSING DEMURRER TO COMPLAINT
a Corporation, and	)	Date: _____
_____ [*name(s)*],	)	Time: _____
Defendant(s),	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

PLAINTIFF-SHAREHOLDER HAS SATISFIED THE REQUIREMENTS TO BRING A DERIVATIVE ACTION ON BEHALF OF THE CORPORATION WHEN THE CORPORATION AND ITS BOARD OF DIRECTORS REFUSE TO TAKE ACTION.

A. Shareholder's Right to Maintain Derivative Action. A registered shareholder may institute or maintain an action on behalf of any domestic or foreign corporation after efforts to secure such action from the board of directors has failed (*Corp. Code § 800*).

B. Necessary Elements for Derivative Action. Two elements must exist to provide a basis for a representative suit on behalf of a corporation: (1) the gravamen of the complaint, which is injury to the corporation or to the whole body of its stockholders (as distinguished from alleged wrongs affecting only certain of the individual stockholders), such as the dissipation or threatened dissipation of its assets; and (2) the derivative aspect of the cause of action which arises from the fact that the responsible officials fail or refuse to act. Both elements are essential (*Starbird v. Lane (1962) 203 Cal. App. 2d 247, 255, 21 Cal. Rptr. 280*).

[*Optional*] **C. Derivative Action as Equitable Remedy.** Although a corporation holds all the title, legal and equitable, to the corporate property and is theoretically the only proper party to sue for wrongful dealing with that property, the courts of equity recognize the truth that the stockholders are ultimately the only beneficiaries, and that the final object of suits by the corporation is to maintain the interests of the stockholders. Whenever a cause of action exists primarily on behalf of the corporation against the directors, officers, and others, for wrongful dealing with corporate property, so that the remedy should regularly be obtained through a suit by and in the name of the corporation, and the corporation either actually or virtually refuses to institute or prosecute such a suit, then in order to prevent a failure of justice, courts have allowed an action to be brought by a stockholder or stockholders, either individually or suing on behalf of themselves and all others similarly situated, against the wrong-doing directors, officers, and other persons (*Weingand v. Atlantic Sav. & L. Ass'n (1970) 1 Cal. 3d 806, 818, 83 Cal. Rptr. 650, 464 P.2d 106*).

[*Optional*] **D. Directors Required to be Diligent.** Directors are not merely bound to be honest; they must also be diligent and careful in performing the duties they have undertaken. They cannot excuse imprudence on the ground of their ignorance or inexperience, or the honesty of their intentions; and, if they commit an error of judgment through mere recklessness, or want of ordinary prudence and skill, the corporation may hold them responsible for the consequences (*Burt v. Irvine Co. (1965) 237 Cal. App. 2d 828, 852, 47 Cal. Rptr. 392*).

[*Optional*] **E. Plaintiff's Right to Amend Complaint to Include Particulars.** A plaintiff who had pleaded the general set of facts upon which his cause of action is based should be given an opportunity to amend his complaint and should not be deprived of his right to maintain his action on the ground that his pleadings were defective for lack of particulars (*Reed v. Norman (1957) 152 Cal. App. 2d 892, 900, 314 P.2d 204*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in a memorandum opposing a demurrer to a complaint in a derivative action, when the demurrer is based on the ground that plaintiff has not shown an injury to the corporation, or on the ground that the board of directors has made a good faith business judgment with which the court may not interfere [*see Starbird v. Lane (1962) 203 Cal. App. 2d 247, 21 Cal. Rptr. 280* (lack of injury; good faith judgment)]. The memorandum in opposition asserts that when a board of directors refuses to pursue an action to redress an injury suffered by the corporation, a shareholder may institute a derivative action on behalf of the corporation [*Corp. Code § 800*].

Counsel should insert argument in this form showing the relationship of the facts of the case and the points of law raised.

[3] Discussion of Authorities

[a] Necessary Elements for Derivative Action

In ***Starbird v. Lane*** *(1962) 203 Cal. App. 2d 247, 21 Cal. Rptr. 280* , the plaintiff's appealed from a judgment entered in favor of 13 defendants after their generaldemurrer to a fifth amended and supplemental complaint had been sustained without leave to amend and from an order dismissing the action as to the defendant corporation and three other defendants after the demurrer of the four had been sustained with leave to amend and plaintiffs failed to amend within the time allowed. The court of appeal affirmed the decisions of the trial court, holding, among other grounds, that plaintiffs' complaint failed to state specific allegations of wrongdoing on the part of the directors, and, therefore, no injury to the corporation was shown. In its discussion, the court stated that the two elements which must exist for a derivative action are: (1) an injury to the corporation or to the whole body of its shareholders; and (2) the derivative aspect of the cause of action which arises from the board of directors failure or refusal to act.

[b] Derivative Action as Equitable Remedy

In ***Weingand v. Atlantic Sav. & L. Ass'n*** *(1970) 1 Cal. 3d 806, 83 Cal. Rptr. 650, 464 P.2d 106* , the defendants appealed from an order granting the plaintiffs in a derivative action a preliminary injunction to prevent foreclosure of a ranch by defendants who held a deed of trust on the property. The defendants argued that the plaintiffs lacked standing to sue since they were not registered shareholders of the corporation. The Supreme Court held that plaintiffs, who were pledgees of stock in the corporation, could maintain the derivative action on behalf of the corporation. Plaintiffs had alleged that the defendant savings and loan association, along with other defendants, had contributed to the financial deterioration of the corporation owning the ranch by milking the corporation in order to salvage the savings and loan association's operations in other areas. The Court held that since the shareholders are the ultimate beneficiaries of the corporation and the financial object of the corporation is to maintain the interests of the corporation, when the corporation actually or virtually refuses to take action, the courts permit the shareholders to sue on behalf of the corporation. In the instant situation, plaintiffs, as pledgees of stock had the same interest as an owner of stock in being heard in a court of equity concerning the protection and preservation of the assets and property of the corporation since the loss of corporate assets resulted in a depreciation of the value of the stock and, in the case of the pledgee, endangered his or her security interest.

[c] Directors Required to Be Diligent

In ***Burt v. Irvine Co.*** *(1965) 237 Cal. App. 2d 828, 47 Cal. Rptr. 392* , the court of appeal reversed the trial court's judgment of dismissal, which was entered after demurrer by several defendants to the amended complaint was sustained without leave to amend. The demurring defendants were directors of a real estate corporation who were accused of having wasted corporate assets and, in some instances, making secret profits for themselves by selling a large land holding at less than fair market value to a preferred seller even though allegedly there were other buyers available who would have purchased the land at a higher price. The directors demurred in part on the grounds that the sale had been a business judgment of the board within the boundaries of its discretion. In reversing, the court of appeal held that directors are scrutinized severely. They are not bound merely to be honest; they also had to be diligent and careful in performing their duties. If they committed an error of judgment through mere recklessness or want of ordinary prudence and skill, the corporation could hold them responsible for the consequences. The court held that plaintiffs' allegations that directors disregarded the bids of several possible purchasers without giving them serious consideration in order to favor another purchaser, and that several directors were negligent in not discovering the fraudulent maneuverings of three directors who sought to make a secret profit for themselves, constituted a cause of action. The dismissal was affirmed, however, on the grounds that the statute of limitations applicable to negligent breach of fiduciary duty had run as to those directors accused of negligence.

[d] Plaintiff's Right to Amend Complaint to Include Particulars

In ***Reed v. Norman*** *(1957) 152 Cal. App. 2d 892, 314 P.2d 204* , the plaintiff appealed from a judgment in favor of the

defendant after his offer to file a second amended complaint was denied. In his amended complaint plaintiff alleged that he and the defendant were the two directors and only shareholders of a small corporation, that the defendant had been acting as president of the corporation and had full control of the corporation, its finances, its accounts, and had controlled the corporation to the exclusion of plaintiff. Plaintiff alleged numerous instances of mismanagement by the defendant. The trial court had sustained the defendant's demurrer on the grounds that plaintiff had failed to allege that a demand had been made on the corporation as required by the statute [former Corp. Code § 834, now *Corp. Code § 800(b)*]. The court of appeal reversed the trial court's decision, one of the grounds being that the proposed second amended complaint showed facts indicating that an effort to make a demand had been made. The court maintained that, where the general set of facts indicated an injury, the plaintiff should be permitted to amend a complaint which was only defective for lack of particulars.

[4] Additional Authorities

[a] Plaintiff's Right to Amend Complaint to Include Particulars

For a discussion of the facts in *Burt v. Irvine Co. (1965) 237 Cal. App. 2d 828, 47 Cal. Rptr. 392* , see *§ 52.156[3][d]*. The trial court had also sustained the demurrer to the plaintiff's complaint without leave to amend because of the failure of the complaint to plead specific language descriptive of the acts of fraud and conspiracy. In its reversal, the court of appeal stated that, since the complaint disclosed a justiciable cause of action, the lower court had not been justified in sustaining the demurrer without leave to amend but should have permitted the plaintiff to amend the complaint to show specific facts.

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5-52 California Points & Authorities § 52.157

§ 52.157 Opposing Demurrer to Complaint--Plaintiff Suing as Representative of Shareholder's Estate [Corp. Code § 800(b)(1)]

[1] FORM

[*Caption. See § 52.156.*]

PLAINTIFF HAS THE POWER TO BRING A DERIVATIVE ACTION IN HIS/HER CAPACITY AS THE REPRESENTATIVE OF A DECEASED SHAREHOLDER'S ESTATE.

A. Powers of Representative of Estate. A cause of action for or against a person is not lost by reason of that person's death, but survives subject to the applicable limitations period and may be commenced by the decedent's personal representative[, or if none, by the decedent's successor in interest] (*Code Civ. Proc. §§ 377.20(a), 377.30*).

B. Representative of Estate as Bringing Derivative Action. If the stockholder dies, the legal representative of his or her estate obtains the authority and powers of the stockholder during the time of the administration and may sue in his or her stead on causes of action, including a corporate derivative action, which the deceased may have had at the time of death (*Klopstock v. Superior Court (1941) 17 Cal. 2d 13, 17, 108 P.2d 906*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in a derivative action in opposition to a demurrer which asserts that the plaintiff has no right to maintain a derivative action since he or she was not a registered shareholder at the time the alleged wrongdoing occurred. The memorandum states that the plaintiff, as a personal representative of the estate of a deceased shareholder, is entitled to bring any causes of actions which the shareholder might have been able to bring at the time of his or her death, and in this capacity the personal representative exercises the deceased's right to bring a derivative action.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law raised.

[3] Discussion of Authorities

[a] Powers of Representative of Estate

Former Prob. Code § 573 was repealed and replaced effective January 1, 1993, by ***Code Civ. Proc. § 377.10 et seq.*** , which applies to the commencement of an action or proceeding the decedent was entitled to commence, and to the continuation of an action or proceeding by the decedent, regardless of whether the decedent died before, on, or after January 1, 1993 [*Code Civ. Proc. § 377.35*].

[b] Representative of Estate as Bringing Derivative Action

In ***Klopstock v. Superior Court*** *(1941) 17 Cal. 2d 13, 108 P.2d 906* , the defendants in a derivative action petitioned for a writ of mandate ordering the trial court to dismiss an action after a general reversal of the judgment rendered in the previous trial by the court of appeal [*see Samter v. Klopstock Realty Co. (1939) 31 Cal. App. 2d 532, 88 P.2d 250* , discussed in *§ 52.157[4][a]*]. The trial court permitted the substitution of the administratrix of a deceased shareholder's estate after the court of appeal had ruled that the action had been brought by a party who was not the proper party to sue and reversed the judgment in the first trial. The Supreme Court affirmed the substitution of the administratrix, holding that if a stockholder dies, the legal representative obtains the authority and power of the stockholder and could bring a derivative action if the right existed at the time of the deceased's death. The Court stated that the defendants were not prejudiced by the substitution since the nature of the action remained unchanged.

[4] Additional Authorities

[a] Representative of Estate as Bringing Derivative Action

In *Samter v. Klopstock Realty Co. (1939) 31 Cal. App. 2d 532, 88 P.2d 250* , the court of appeal reversed the judgment obtained after trial in a derivative action which had been brought by the executor of the estate of the heir of a deceased shareholder while the estate was still in probate. The court ruled that the heir of a deceased could not bring a derivative action while the estate of the deceased was in probate, and the stock undistributed. The correct party to bring the suit was the executor or administrator of the estate of the deceased shareholder.

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5-52 California Points & Authorities § 52.158

§ 52.158 Opposing Demurrer to Complaint--Plaintiff as Beneficial Owner of Shares in Corporation [Corp. Code § 800(b)(1)]

[1] FORM

[*Caption. See § 52.156.*]

PLAINTIFF HAS COMPLIED WITH THE STATUTORY PREREQUISITES OF CORPORATIONS CODE SECTION 800(b)(1) SINCE PLAINTIFF WAS AND IS THE BENEFICIAL OWNER OF STOCK IN THE CORPORATION AT THE TIME THE TRANSACTION(S) COMPLAINED OF OCCURRED.

Beneficial Ownership of Shares. A derivative action may be maintained by a plaintiff who alleges in the complaint that he or she was the beneficial owner of shares in the corporation at the time of the transaction complained of or any part thereof (*Corp. Code § 800(b)(1)*; *see Reed v. Norman (1957) 48 Cal. 2d 338, 342, 309 P.2d 809* ; *Pearce v. Superior Court (1983) 149 Cal. App. 3d 1058, 1062-1064, 197 Cal. Rptr. 238*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in a derivative action to oppose a demurrer which asserts that a complaint fails to state a cause of action since the plaintiff had failed to allege that he or she was a shareholder of record or the holder of voting trust certificates at the time the transaction complained of occurred.

Counsel should include argument in this form showing the relationship between the facts of the case and the points of law raised.

[3] Discussion of Authorities

[a] Beneficial Ownership of Shares

In ***Reed v. Norman*** *(1957) 48 Cal. 2d 338, 309 P.2d 809* , the trial court granted the defendant's motion to dismiss the appeal of plaintiff's derivative suit on the grounds that, since plaintiff no longer owned stock in the corporation, he had no right to recover for the corporation. Plaintiff's stock had been sold at an execution sale to a third party. Plaintiff, however, submitted an uncontradicted affidavit stating that the purchaser at the execution sale had bought the stock on plaintiff's behalf, and that plaintiff was the beneficial owner of any rights and interest in the stock. The court of appeal reversed the trial court, stating that since plaintiff had not lost his title to the stock the motion to dismiss could not be sustained on that ground (*48 Cal. 2d 338, 342)* .

In ***Pearce v. Superior Court*** *(1983) 149 Cal. App. 3d 1058, 197 Cal. Rptr. 238* , the beneficiary of a trust, the corpus of which was composed of stock registered in the name of the testamentary trustees, filed a derivative action on behalf of the corporation whose stock was the major asset of the trust. Defendants demurred to the complaint and the trial court sustained the demurrers of all defendants without leave to amend on the ground that the beneficiary did not have standing to bring the derivative action. Plaintiff appealed and the court of appeal reversed. The court found that plaintiff had sufficient standing as a beneficial owner of shares (*149 Cal. App. 3d 1058, 1060)* . The court agreed with plaintiff's contention that the statutory language of *Corp. Code § 800(b)*, "shareholder, of record or beneficially," was a shorter way of saying "holder of a beneficial interest in such shares" (*149 Cal. App. 3d 1058, 1062-1064)* .

[4] Additional Authorities

[a] Beneficial Ownership of Shares

In *Patrick v. Alacer Corp. (2008) 167 Cal. App. 4th 995, 84 Cal. Rptr. 3d 642* , the plaintiff in a derivative action was the widow of the corporation's founder. She held no shares directly or through a nominee, but she did have a community property interest in an undetermined number of shares that were held in a trust created by her husband, and her complaint alleged the necessary facts to rely on that interest in meeting the standing requirement to allege the beneficial ownership of shares. The trial court sustained a demurrer that asserted her failure to meet that requirement. The court of appeal reversed and directed the trial court to overrule the demurrer. The court stated that "[f]or purposes of the demurrer, assuming as we must the truth of the allegations, plaintiff's alleged community property interest in Alacer potentially renders her a beneficial shareholder ... . While the Trust may be the only record shareholder, plaintiff's alleged community property interest in Alacer, if true, essentially makes her an unregistered Alacer shareholder. Plaintiff's community property interest in Alacer satisfies the 'liberal' standing requirement of beneficial ownership" (*167 Cal. App. 4th 995, 1011-1012)* .

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5-52 California Points & Authorities § 52.159

§ 52.159 Opposing Demurrer to Complaint--Plaintiff Suing in a Derivative Action as Shareholder by Operation of Law [Corp. Code § 800(b)(1)]

[1] FORM

[*Caption. See § 52.156.*]

Plaintiff by Operation of Law. A derivative action may be brought by a plaintiff who acquired his/her shares by operation of law from a shareholder who would have had the right to bring such action (*Corp. Code § 800(b)(1)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in a derivative action in opposition to a demurrer to the complaint which states that plaintiff fails to state a cause of action since he or she fails to allege that he or she was a shareholder, registered or beneficial, or holder of a voting trust certificate at the time the wrongdoing complained of occurred [*see Corp. Code § 800(b)(1)*]. The memorandum asserts that the plaintiff is a shareholder who meets these requirements by operation of law [*Corp. Code § 800(b)(1)*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law raised.

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5-52 California Points & Authorities § 52.160

§ 52.160 Opposing Demurrer to Complaint--Plaintiff as Pledgee of Stock of Corporation

[1] FORM

[*Caption. See § 52.156.*]

PLAINTIFF HAS THE POWER TO BRING A DERIVATIVE ACTION IN HIS/HER CAPACITY AS PLEDGEE OF THE STOCK OF THE CORPORATION.

A. Pledgee of Stock as Plaintiff. A pledgee of corporation stock has such an interest in the stock to entitle him or her to be heard in a court of equity concerning the preservation and protection of the assets and property of the corporation, his or her rights in this respect being essentially the same as those of an owner of stock for the loss of corporate assets, since the loss of corporate assets results in a depreciation of the value of the stock and a consequent impairment of his or her security (*Weingand v. Atlantic Sav. & L. Ass'n (1970) 1 Cal. 3d 806, 818, 83 Cal. Rptr. 650, 464 P.2d 106*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a demurrer to a complaint for a derivative action which states that the plaintiff lacks standing to sue since he or she was not a registered or beneficial shareholder or a holder of voting trust certificates at the time the wrongdoing complained of occurred [*Corp. Code § 800(b)(1)*]. The memorandum asserts that a pledgee of the stock of a corporation has standing to sue.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law raised.

[3] Discussion of Authorities

[a] Pledgee of Stock as Plaintiff

In ***Weingand v. Atlantic Sav. & L. Ass'n*** *(1970) 1 Cal. 3d 806, 83 Cal. Rptr. 650, 464 P.2d 106, 83 Cal. Rptr. 650* , the defendants appealed from an order granting the plaintiffs in a derivative action a preliminary injunction to prevent foreclosure of a ranch by defendants who held a deed of trust on the property. The defendants argued that the plaintiffs lacked standing to sue since they were not registered shareholders of the corporation. The Supreme Court held that plaintiffs, who were pledgees of stock in the corporation, could maintain the derivative action on behalf of the corporation. Plaintiffs had alleged that the defendant savings and loan association, along with other defendants, had contributed to the financial deterioration of the corporation owning the ranch by milking the corporation in order to salvage the savings and loan association's operation in other areas. The Court held that since the shareholders are the ultimate beneficiaries of the corporation and the financial object of the corporation is to maintain the interests of the corporation, when the corporation is to maintain the interests of the corporation and the corporation actually or virtually refuses to take action, the courts permit the shareholders to sue on behalf of the corporation. In the instant situation, plaintiffs, as pledgees of the stock had the same interest as an owner of stock in being heard in a court of equity concerning the protection and preservation of the assets and property of the corporation, since the loss of corporate assets resulted in a depreciation of the value of the stock and, in the case of the pledgee, endangered his or her security interest (*1 Cal. 3d 806, 818)* .

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5-52 California Points & Authorities § 52.161

§ 52.161 Opposing Demurrer to Complaint--Demand for Action by Board of Directors Would Be Futile [Corp. Code § 800(b)(2)]

[1] FORM

[*Caption. See § 52.156.*]

PLAINTIFF NEED NOT ALLEGE THAT A DEMAND FOR ACTION WAS MADE ON THE BOARD OF DIRECTORS WHERE THE FACTS DEMONSTRATE THAT SUCH A DEMAND WOULD HAVE BEEN FUTILE.

A. Demand for Action Not Required When It Would Have Been Futile. While it is the general rule that in a derivative action the plaintiff must plead a demand upon, and refusal by, the directors to act, it is equally well settled that such demand and refusal need not be alleged if the facts pleaded demonstrate that such a demand would have been futile (*Reed v. Norman (1957) 152 Cal. App. 2d 892, 898, 314 P.2d 204*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be used to oppose a demurrer which argues that a complaint for a derivative action fails to state a cause of action because no demand was made upon a corporation or its board of directors to take the action sought in the derivative suit [*see Corp. Code § 800(b)(2)*]. The opposition is on the grounds that the facts alleged in the complaint demonstrate that a demand would have been futile.

When appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law raised.

[3] Discussion of Authorities

[a] Demand for Action Not Required When It Would Have Been Futile

In ***Reed v. Norman*** *(1957) 152 Cal. App. 2d 892, 314 P.2d 204* , the plaintiff appealed from a judgment in favor of the defendant after his offer to file a second amended complaint was denied. In his amended complaint plaintiff alleged that he and the defendant were the two directors and only shareholders of a small corporation, that the defendant had been acting as president of the corporation and had full control of the corporation, its finances, its accounts, and had controlled the corporation to the exclusion of plaintiff. The plaintiff then alleged numerous instances in which the defendant had excluded the plaintiff from the management of corporate affairs and from access to corporate books and accounts, instances of misappropriation of funds by the defendant for the personal use of himself and his family, and other misdeeds of the defendant against the corporation, all to the detriment of the corporation. The trial court had ordered judgment for the defendant on the grounds that appellant's complaint did not state a cause of action since there was no allegation of a demand upon the board of directors to take action or their refusal to do so. The court of appeal reversed the trial court, stating that, while it is the general rule that in a derivative action a demand must be pleaded, where the facts show such a demand would have been futile, a demand need not have been made. The court stated that it was clear from the facts that the defendant was bent on depriving the plaintiff of his corporate rights, and had the sole voice in the affairs of the corporation, and that, therefore, the facts demonstrated that a demand would have been useless.

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5-52 California Points & Authorities § 52.161A

§ 52.161A Opposing Demurrer to Complaint--Equitable Considerations Warrant Exception to Continuous Ownership Requirement

[1] FORM

[*Caption. See § 52.156.*]

PLAINTIFF MAY MAINTAIN A DERIVATIVE ACTION IN SPITE OF BEING NO LONGER A SHAREHOLDER, WHEN EQUITABLE CONSIDERATIONS WARRANT AN EXCEPTION TO THE CONTINUOUS OWNERSHIP REQUIREMENT.

A. Equitable Considerations May Warrant Exception to Continuous-Ownership Requirement. Although California law generally requires a plaintiff in a shareholder's derivative suit to maintain continuous stock ownership throughout the pendency of the litigation, equitable considerations may warrant an exception to the continuous ownership requirement (*Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119, 72 Cal. Rptr. 3d 129, 175 P.3d 1184*).

B. Equitable Considerations Might Apply If Plaintiff Was Wrongfully Deprived of Standing. The language of the holding in *Grosset v. Wenaas, above,* indicates that the court was careful to leave open the possibility that equitable considerations might apply if the plaintiff was wrongfully deprived of standing (*Haro v. Ibarra (2009) 180 Cal. App. 4th 823, 836, 103 Cal. Rptr. 3d 340*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be used to oppose a demurrer which argues that a complaint for a derivative action fails to state a cause of action because the complaint shows that the plaintiff is no longer a shareholder of the corporation. The ground of opposition is that, under case law, equitable considerations may warrant an exception to the continuous ownership requirement.

When appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law raised.

[3] Discussion of Authorities

[a] Equitable Considerations May Warrant Exception to Continuous Ownership Requirement

Grosset v. Wenaas *(2008) 42 Cal. 4th 1100, 72 Cal. Rptr. 3d 129, 175 P.3d 1184* , is discussed in *§ 52.155A[3][a]*.

[b] Equitable Considerations Might Apply If Plaintiff Was Wrongfully Deprived of Standing

In ***Haro v. Ibarra*** *(2009) 180 Cal. App. 4th 823, 103 Cal. Rptr. 3d 340* , the plaintiffs were former shareholders of a medical corporation. The defendants were officers and shareholders of the corporation, who allegedly schemed to squeeze out the plaintiffs. The defendants and the corporation imposed a substantial assessment on the plaintiffs' shares and subsequently declared those shares to be forfeited after the plaintiffs refused to pay the assessment. The plaintiffs sued, seeking a declaratory judgment that the stock forfeiture was improper and, in the alternative, damages for conversion; and they also alleged derivative causes of action for harm to the corporation resulting from the defendants' improper self-dealing. The trial court sustained the defendants' demurrer to the derivative causes of action on the ground that the plaintiffs lacked standing because they were no longer shareholders. The plaintiffs appealed.

The court of appeal reversed, citing the statement in *Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 72 Cal. Rptr. 3d 129, 175 P.3d 1184* [*see § 52.161A[3][a]*], that "equitable considerations may warrant an exception to the continuous ownership requirement if the ... [act depriving the plaintiff of shareholder status] is used to wrongfully deprive the plaintiff of standing" (*42 Cal. 4th 1100, 1119)* . However, the court in *Grosset* declined to address the question because no such circumstances were present. In analyzing that case, the court of appeal observed, "The language of the *Grosset* court's holding indicates that the court was careful to leave open the possibility that equitable considerations might apply if the plaintiff was deprived wrongfully of standing." Therefore, the court concluded, "In light of *Grosset's* express reservation of the question of whether an equitable exception may apply, and in light of the policy of deciding cases on their merits, we reverse. Appellants have alleged equitable considerations that warrant an exception to the continuous ownership requirement, such as the allegations in the ... [complaint] that other shareholders were not required to pay the assessment and yet did not have their shares forfeited" (*180 Cal. App. 4th 823, 837)* (internal quotation marks and citation omitted).

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5-52 California Points & Authorities § 52.162

§ 52.162 Opposing Demurrer to Complaint--Plaintiff's Cause of Action Is in Individual Capacity

[1] FORM

[*Caption. See § 52.156.*]

PLAINTIFF IS ENTITLED TO MAINTAIN A CAUSE OF ACTION FOR INJURIES SUFFERED IN HIS/HER INDIVIDUAL CAPACITY.

A. Individual Suit to Enforce Shareholder's Individual Right. The stockholder's individual suit is a suit to enforce a right which the stockholder possesses as an individual. The individual wrong, necessary to support a suit by a shareholder, need not be unique to the plaintiff. The same injury may affect a substantial number of shareholders (*Jones v. H. F. Ahmanson & Co. (1969) 1 Cal. 3d 93, 107, 81 Cal. Rptr. 592, 460 P.2d 464* ; *Jara v. Suprema Meats, Inc. (2004) 121 Cal. App. 4th 1238, 1254, 18 Cal. Rptr. 3d 187*).

[*Optional*] **B. Minority Shareholder May Maintain an Individual Action Against Majority Shareholders for Diminution in Value of Stock.** When the minority shareholder of a close corporation, instead of alleging that the actions of the majority shareholderin breaching its fiduciary duty towards the minority shareholders had diminished the value of the stock so as to reflect an injury to the corporation, alleges that the breach has diminished the value of the stock held by the minority, the gravamen of the action is injury to the individual stockholders, and the action is, therefore, properly brought as an individual or class action rather than a derivative suit (*Jones v. H. F. Ahmanson & Co. (1969) 1 Cal. 3d 93, 107, 81 Cal. Rptr. 592, 460 P.2d 464* ; *Smith v. Tele-Communication, Inc. (1982) 134 Cal. App. 3d 338, 184 Cal. Rptr. 571*).

[*Optional*] **C. Minority Shareholder May Maintain Individual Action for Deprivation of Proportional Share of Corporate Profits or Value of Corporate Assets.** A minority shareholder is entitled to sue in an individual capacity when the actions of the majority shareholders have deprived the minority shareholder of his or her proportional share of corporate profits or the value of corporate assets (*Jara v. Suprema Meats, Inc. (2004) 121 Cal. App. 4th 1238, 1254, 18 Cal. Rptr. 3d 187*).

[*Optional*] **D. Person Injured Both As Individual and As Owner.** A stockholder who has suffered injury both as an owner of a corporate entity and in an individual capacity is entitled to pursue remedies in either or both capacities (*Denevi v. LGCC (2004) 121 Cal. App. 4th 1211, 1221-1222, 18 Cal. Rptr. 3d 276*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a demurrer to a complaint brought by a plaintiff in his or her individual capacity against a corporation and its directors or officers when the demurrer states that the plaintiff's suit is derivative in nature and thus may not be brought by the plaintiff in an individual capacity. The memorandum asserts that when the plaintiff has suffered his or her injuries in an individual capacity, he or she has a right to maintain the suit in an individual capacity.

Optional Paragraph D may be used if the stockholder was injured in both ownership and individual capacities and has elected to pursue the action in an individual capacity, either alone or in addition to derivative claims.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law raised.

[3] Discussion of Authorities

[a] Individual Suit to Enforce Shareholder's Individual Right

In ***Jones v. H. F. Ahmanson & Co.*** *(1969) 1 Cal. 3d 93, 81 Cal. Rptr. 592, 460 P.2d 464* , plaintiff appealed from the trial court's judgment of dismissal after a decision sustaining certain of the defendants' general and special demurrers to her complaint. The Supreme Court reversed the trial court's judgment, stating that the plaintiff, as a minority shareholder, had an individual cause of action against the majority shareholders of a savings and loan association for breach of the fiduciary duties owed to the minority shareholders (*1 Cal. 3d 93, 115, 121)* . Plaintiff alleged that through use of a holding corporation, and various other manipulations, the majority stockholders created large profits for themselves in a favorable stock market; however, their manipulations had the effect of diminishing the value and marketability of the shares of the minority shareholders who had not been invited to participate in the financial scheme and who had suffered damages as a consequence of the actions of the majority. The Supreme Court held that the distinction between a shareholder's individual suit, as opposed to a derivative suit, is that the individual suit is to enforce a right against the corporation that the shareholder possesses as an individual (*1 Cal. 3d 93, 107)* . The individual wrong, necessary to support a suit by a shareholder need not be unique to the plaintiff. The same injury may affect a substantial number of shareholders. If the injury is not incidental to an injury to the corporation, an individual cause of action exists. Because, in the instant case, the plaintiff did not allege an injury to the corporation, only to herself as a minority shareholder, the Court held that she had an individual cause of action (*1 Cal. 3d 93, 107)* .

[b] Minority Shareholder May Maintain an Individual Action Against Majority Shareholders for Diminution in Value of Stock

For a discussion of ***Jones v. H. F. Ahmanson & Co.*** *(1969) 1 Cal. 3d 93, 81 Cal. Rptr. 592, 460 P.2d 464* , see *§*

52.162[3][a].

In ***Smith v. Tele-Communication, Inc.*** *(1982) 134 Cal. App. 3d 338, 184 Cal. Rptr. 571* , plaintiff, a sole minority shareholder in a subsidiary corporation, brought suit against the majority shareholders of the subsidiary corporation and parent corporation for breach of fiduciary duty,accounting, and fraud arising out of an allocation to the parent corporation of savings resulting from filing of a consolidated tax return by the parent and subsidiary corporations. Plaintiff contended that the failure to allocate to the subsidiary its proportionate share of tax savings reduced his distributive share in the sale of the subsidiary. The trial court sustained general and special demurrers without leave to amend and entered judgment of dismissal (*134 Cal. App. 3d 338, 342-343)* . Plaintiff appealed.

The court of appeal reversed the trial court's dismissal, holding that plaintiff could assert the stated causes of action in an individual capacity rather than in a derivative capacity, because the redress being sought was for injuries to plaintiff as the sole minority shareholder rather than for an injury to the subsidiary (*134 Cal. App. 3d 338, 342-343)* .

[c] Minority Shareholder May Maintain Individual Action for Deprivation of Proportional Share of Corporate Profits or Value of Corporate Assets

In ***Jara v. Suprema Meats, Inc****. (2004) 121 Cal. App. 4th 1238, 18 Cal. Rptr. 3d 187* plaintiff alleged he had been deprived of his proportionate share of corporate profits because the majority shareholders had paid themselves excessive compensation for their work as officers of the company. Defendant majority shareholders asserted that this claim could be brought only in a derivative capacity, and the trial court dismissed the claim. Based on a thorough review of *Jones v. H. F. Ahmanson & Co.* (discussed in *§ 52.162[3][a]*) and both pre- and post-*Jones* decisions, the appellate court noted a distinction between claims for damage to the corporation as a whole, or the value of its shares as a whole, and claims in which the minority shareholder suffered loss of value to his or her own shares (as distinct from all of the corporation's shares), or loss of his or her share of corporate profits or assets. Citing *Smith v. Tele-Communication, Inc. (1982) 134 Cal. App. 3d 338, 184 Cal. Rptr. 571* (discussed *above*), *Crain v. Electronic Memories & Magnetics Corp. (1975) 50 Cal. App. 3d 509, 123 Cal. Rptr. 419* , *De Martini v. Scavenger's Protec. Assn. (1935) 3 Cal. App. 2d 691, 40 P.2d 317* and *Low v. Wheeler (1962) 207 Cal. App. 2d 477, 24 Cal. Rptr. 538* , the court held that the minority shareholder plaintiff's claim, while presenting "a closer case than *Jones*," came "within the scope of allowable individual actions" (*121 Cal. App. 4th 1238, 1252-1258)* .

[d] Person Injured Both As Individual and As Owner

Denevi v. LGCC *(2004) 121 Cal. App. 4th 1211, 1221-1223, 18 Cal. Rptr. 3d 276* involved a complaint brought by a shareholder in his individual capacity following his successful prosecution of a derivative suit arising out of interrelated claims. The court cited *Jones v. H.F. Ahmanson & Co. (1969) 1 Cal. 3d 93, 81 Cal. Rptr. 592, 460 P.2d 464* , *discussed in § 52.162[3][a]*, for the settled principle that "a single course of action by a majority shareholder may give rise to derivative claims, individual claims, or both," and therefore that "one who has suffered injury both as an owner of a corporate entity and in an individual capacity is entitled to pursue remedies in both capacities." There was "no doubt" that the plaintiff alleged both derivative and individual claims when he sued for fraud that caused him to transfer rights to purchase real estate to a newly formed limited liability company, and also for harm subsequently occurring to that company when the majority interests failed to exercise those purchase rights.

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5-52 California Points & Authorities § 52.163

§ 52.163 Opposing Motion for Summary Judgment--Questions of Fact Presented Regarding Application of Business Judgment Rule [Corp. Code § 309]

[1] FORM

[*Caption. See § 52.40.*]

REGULAR RULES REGARDING DENIAL OF SUMMARY JUDGMENT APPLY TO DERIVATIVE ACTIONS TO REQUIRE DENIAL OF THE MOTION WHEN TRIABLE ISSUES OF FACT ARE PRESENTED REGARDING THE APPLICATION OF THE BUSINESS JUDGMENT RULE.

A. Denial of Motion for Summary Judgment. A motion for summary judgment must be denied if the papers in support of and in opposition to the motion show that there is a triable issue as to any material fact (*Code Civ. Proc. § 437c*).

B. Business Judgment Rule Under Common Law. [*See § 52.140, Paragraph B.*]

C. Business Judgment Rule Codified Under *Corporations Code Section 309*. [*See § 52.140, Paragraph C.*]

D. Prerequisites for Application of Business Judgment Rule. In order to be immunized by application of the business judgment rule, a director must perform the duties of a director, including duties as a member of any committee of the board on which the director may serve, in good faith, in a manner that the director believes to be in the best interests of the corporation and its shareholders, and with such care, including reasonable inquiry as an ordinarily prudent person in a like position would use under similar circumstances (*Corp. Code § 309(a), (c)*; *Gaillard v. Natomas Co. (1989) 208 Cal. App. 3d 1250, 1267-1269, 256 Cal. Rptr. 702 , disapproved on other grounds*, *Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119 n.16, 72 Cal. Rptr. 3d 129, 175 P.3d 1184*).

E. Regular Rules Governing Summary Judgment Apply. Judicial review of the independence, good faith, and investigative techniques of [a special litigation committee of] the board of directors is governed by traditional summary judgment standards. The business judgment rule was not designed to insulate the actions of the board of directors [or a

committee of the board] committed in bad faith, and thus, the board [or committee of the board] should not receive the benefit of the presumption when a court seeks to judge the board's [or committee's] independence and good faith. The function of the trial court in ruling on a motion for summary judgment is merely to determine whether such issues of fact exist, and not to decide the merits of the issues themselves (*Desaigoudar v. Meyercord (2003) 108 Cal. App. 4th 173, 179, 189-190, 133 Cal. Rptr. 2d 408* ; *Will v. Engebretson & Co. (1989) 213 Cal. App. 3d 1033, 1041, 1043, 261 Cal. Rptr. 868* ; *Gaillard v. Natomas Co. (1989) 208 Cal. App. 3d 1250, 1268, 256 Cal. Rptr. 702 , disapproved on other grounds, Grosset v. Wenaas (2008) 42Cal. 4th 1100, 1119 n.16, 72 Cal. Rptr. 3d 129, 175 P.3d 1184*).

[*Optional*] **F. "Similar Circumstances" Within Meaning of *Corporations Code Section 309(a)*.** "Under similar circumstances" in *Corporations Code Section 309(a)* requires that a court consider the nature and extent of a director's alleged oversight or mistake in judgment in the context of such factors as the size, complexity, and location of the activities involved. It also limits the critical assessment of a director's performance to the time of action or nonaction, and thereby avoids harsher judgments that may be made with benefit of hindsight (*Gaillard v. Natomas Co. (1989) 208 Cal. App. 3d 1250, 1265, 256 Cal. Rptr. 702 , disapproved on other grounds, Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119 n.16, 72 Cal. Rptr. 3d 129, 175 P.3d 1184*).

[*Optional*] **G. Right to Rely on Committee's Recommendation.** Under *Corporations Code Section 309(a)* and *(b)*, a director's right to rely on a recommendation or work product of a committee of the board is conditioned on the duty of reasonable inquiry that requires a director who intends to rely on the recommendation of the committee, in appropriate circumstances, to make such reasonable inquiry as an ordinarily prudent person would make under similar circumstances (*Gaillard v. Natomas Co. (1989) 208 Cal. App. 3d 1250, 1264-1265, 256 Cal. Rptr. 702 , disapproved on other grounds, Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119 n.16, 72 Cal. Rptr. 3d 129, 175 P.3d 1184*).

[*Optional*] **H. "Golden Parachute" Defined.** Golden parachutes are special termination agreements that shelter executives from the effects of a corporate takeover (*Gaillard v. Natomas Co. (1989) 208 Cal. App. 3d 1250, 1256, 256 Cal. Rptr. 702 , disapproved on other grounds, Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119 n.16, 72 Cal. Rptr. 3d 129, 175 P.3d 1184*).

[*Optional*] **I. Purpose of "Golden Parachutes."** The recognized functions of golden parachutes are (1) to foster executive objectivity toward merger and tender offers and (2) to allow corporations that are likely takeover targets to attract top executives. Those functions are best accomplished if the golden parachute is negotiated before the corporation becomes a takeover target (*Gaillard v. Natomas Co. (1989) 208 Cal. App. 3d 1250, 1266, 1266-1267, 256 Cal. Rptr. 702 , disapproved on other grounds, Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119 n.16, 72 Cal. Rptr. 3d 129, 175 P.3d 1184*).

[*Optional*] **J. Application of Business Judgment Rule to Approval of "Golden Parachutes."** For purposes of evaluating golden parachutes alleged to have been made in breach of fiduciary duty, *Corporations Code Section 309* is applicable only to "outside directors," not to "inside directors" who were officers of the corporation and beneficiaries of the golden parachutes and who thus abstained from voting on their approval by other directors (*Gaillard v. Natomas Co. (1989) 208 Cal. App. 3d 1250, 1265-1266, 1268-1269, 256 Cal. Rptr. 702 , disapproved on other grounds, Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119 n.16, 72 Cal. Rptr. 3d 129, 175 P.3d 1184*).

[*Optional*] **K. Business Judgment Rule Is Not Applicable to Conduct of "Inside Director" in Obtaining Agreement From Which He or She Benefits.** *Corporations Code Section 309* is not applicable to examine the conduct of a director, who is also an officer of the corporation, in obtaining approval from the disinterested directors of an agreement from which he or she benefits personally, such as one providing for his or her compensation (*Gaillard v. Natomas Co. (1989) 208 Cal. App. 3d 1250, 1265-1266, 1268-1269, 256 Cal. Rptr. 702 , disapproved on other grounds, Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119 n.16, 72 Cal. Rptr. 3d 129, 175 P.3d 1184*).

[*Optional*] **L. Questions of Fact Presented Regarding Whether Board Committee Members Exercised Their Best**

Business Judgment. Triable issues of fact are presented regarding whether the _____ [*specify, e.g.,* compensation] committee members acted in a manner that they believed to be in the best interests of the corporation and exercised reasonable care, including sufficient inquiry as was warranted by the circumstances, in approving [for recommendation to the full board] a transaction costing the corporation _____ [*specify, e.g.,* $11 million] after having met for only _____ [*specify, e.g.,* two hours] when they _____ [*specify, e.g.,* (1) relied entirely on the recommendation of outside counsel without asking outside counsel or analyzing for themselves how the transaction achieved the stated corporate purposes, (2) should have been aware that this type of transaction was controversial and that the consideration the corporation was to pay under the agreements would be presumptively excessive under newly enacted tax law, and (3) were aware, or should have been aware, that the agreements were initiated at the request of the chairman and chief executive officer, who would personally benefit from it] (*Will v. Engebretson & Co. (1989) 213 Cal. App. 3d 1033, 1044, 261 Cal. Rptr. 868* ; *Gaillard v. Natomas Co. (1989) 208 Cal. App. 3d 1250, 1269-1271, 256 Cal. Rptr. 702* , *disapproved on other grounds,* *Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119 n.16, 72 Cal. Rptr. 3d 129, 175 P.3d 1184*).

[*Optional*] **M. Questions of Fact Presented Regarding Whether Board Members Exercised Their Best Business Judgment in Relying on Recommendation of Board Committee.** While in most cases directors should be allowed to rely on the recommendations of a board committee on a matter delegated to that committee, a triable issue of fact exists regarding whether the directors' general knowledge of the questionable nature of _____ [*specify, e.g.,* golden parachutes within the context of takeovers] would render unwarranted their total reliance on the committee's recommendation (*Gaillard v. Natomas Co. (1989) 208 Cal. App. 3d 1250, 1272, 256 Cal. Rptr. 702* , *disapproved on other grounds,* *Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119 n.16, 72 Cal. Rptr. 3d 129, 175 P.3d 1184*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion forsummary judgment in a shareholder derivation action when triable issues of fact are presented concerning application of the business judgment rule. Triable issues regarding the application of the business judgment rule usually relate to the directors' independence, good faith, or their depth of inquiry regarding a particular transaction [*see Corp. Code § 309*]. A number of optional paragraphs are included for use if applicable in the particular situation. Counsel may also wish to include other authorities from § 52.140 or 52.147 that address additional aspects of the business judgment rule as applied to particular fact situations.

With appropriate modifications, these points and authorities may be used in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Prerequisites for Application of Business Judgment Rule

Corp. Code § 309 is *set forth in § 52.140[3][b]*.

The facts and procedural background of *Gaillard v. Natomas Co. (1989) 208 Cal. App. 3d 1250, 256 Cal. Rptr. 702* , *disapproved on other grounds*, *Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119 n.16, 72 Cal. Rptr. 3d 129, 175 P.3d 1184* , are discussed in *§ 52.140[3][a]*. The court of appeal said that the application of *Corp. Code § 309* to the judicial review of a director's actions raises various issues of fact, such as whether the director acted as an ordinarily prudent person in a like position would under similar circumstances, and in the best interests of the corporation, and whether he or she made a reasonable inquiry as indicated by the circumstances (*208 Cal. App. 3d 1250, 1267*). Those questions ordinarily should be left to the trier of fact. However, on a motion for summary judgment, if the evidence establishes that there is no controverted material fact, the question becomes one of law (*208 Cal. App. 3d 1250, 1268*). The function of the trial court in ruling on a motion for summary judgment is merely to determine whether such issues of fact exist, and not to decide the merits of the issues themselves (*208 Cal. App. 3d 1250, 1268*).

See also that portion of the court's opinion *discussed in § 52.163[3][g]* relating to the court's analysis of the liability of the outside directors.

[b] Regular Rules Governing Summary Judgment Apply

Desaigoudar v. Meyercord *(2003) 108 Cal. App. 4th 173, 133 Cal. Rptr. 2d 408* is discussed in *§ 52.140[3][k]*. In that case, the court stated that the summary procedures utilized in California protect legitimate shareholder suits while permitting exclusion of meritless claims. When the special litigation committee defense reaches the trial court on summary judgment, traditional summary judgment rules apply (citing *Will v. Engebretson & Co*., discussed *below*) (*108 Cal. App. 4th 173, 189-190)* .

Will v. Engebretson & Co. *(1989) 213 Cal. App. 3d 1033, 261 Cal. Rptr. 868* was a derivative action brought by the corporation's 20-percent shareholder to contest the salary and compensation package of the company's president, who owned the remaining 80 percent of the stock. When the action was commenced, the board of directors consisted of only three people: plaintiff, the president, and the president's brother-in-law. Two months later, two additional directors were appointed. Then, the brother-in-law and the two new directors were appointed as a compensation committee of the board. The compensation committee was charged with reviewing the history of the president's compensation, establishing an appropriate compensation package for the president, evaluating the allegations of the derivative action, and determining whether continuation of the derivative action was in the best interests of the corporation. They engaged the services of an outside accounting firm. The corporation answered, denying the allegations of the complaint and cross complained against the plaintiff for breach of fiduciary duty, negligence, and abuse of process, alleging that the sole purpose of the derivative action was to force the president to buy plaintiff's shares at an inflated price. After reviewing the two-page report of the accounting firm, the compensation committee determined that the continuation of the derivative action was not in the company's best interests and recommended to the board that plaintiff be asked to voluntarily abandon the lawsuit. Plaintiff refused, and the corporation moved for summary judgment, contending that the compensation committee was a disinterested committee and that its good-faith decision to dismiss the derivative action was immune from judicial scrutiny under the business judgment rule. Plaintiff contended that triable issues of fact existed regarding the formation and independence of the committee and the good faith of the committee's decisions. The trial court's interim ruling held that the substantive aspects of the committee's decision were beyond judicial scrutiny because of the business judgment rule but agreed that the matter of the committee's good faith had to be determined. The trial court held several "good-faith hearings," after discovery. It considered those hearings a "hybrid dismissal" motion and made findings of fact that the compensation committee acted with "disinterested independence" and that its decision was made in good faith. On the basis of those findings, the trial court dismissed the derivative action, severed it from the cross complaint, and entered judgment against plaintiff on the complaint. Plaintiff appealed.

The court of appeal reversed. The court first discussed the business judgment rule, saying that the rule is premised on the notion that those to whom the management of the corporation has been entrusted, and not the courts, are best able to judge whether a particular action or transaction is one that is helpful to the conduct of the corporate affairs or expedient for the attainment of corporate purposes. The rule establishes a presumption that directors' decisions are based on sound

business judgment. In short, neither a court nor minority shareholders can substitute their business judgment for that of a corporation when its board of directors has acted in good faith and with a view to the best interests of the corporation and all its shareholders (*213 Cal. App. 3d 1033, 1040*).

The business judgment rule permits a corporation to appoint a special litigation committee to decide whether the maintenance of a shareholders' derivative suit is in the corporation's best interests (*213 Cal. App. 3d. 1040*). The committee may decide that the suit should be dismissed, and if it does, the corporation may make a motion in the trial court to dismiss the suit. The corporation may demur, move for judgmenton the pleadings, or seek summary judgment (*213 Cal. App. 3d 1040-1041)* . However, judicial review of the independence, good faith, and investigative techniques of a special litigation committee is governed by traditional summary judgment standards (*213 Cal. App. 3d 1041*). The business judgment rule was not designed to insulate the actions of the committee performed in bad faith, and thus the committee should not receive the benefit of the presumption when the court seeks to judge the committee's independence and good faith (*213 Cal. App. 3d 1043*). Here, plaintiff's evidence tended to show that the disinterested directors were not interested in determining the merits of the derivative action but simply followed the advice of corporate counsel, who, according to plaintiff, was working on behalf of the president, and that the committee never reviewed the complaint of the corporation's financial records and never made any investigation of the matter at all (*213 Cal. App. 3d 1044*).

The facts and procedural background of ***Gaillard v. Natomas Co.*** *(1989) 208 Cal. App. 3d 1250, 256 Cal. Rptr. 702* are discussed in *§ 52.140[3][a]*. See also discussion of that opinion under § 52.163[3][a].

[c] "Similar Circumstances" Within Meaning of Corporations Code Section 309(a)

The facts and procedural background of ***Gaillard v. Natomas Co.*** *(1989) 208 Cal. App. 3d 1250, 256 Cal. Rptr. 702* , *disapproved on other grounds*, *Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119 n.16, 72 Cal. Rptr. 3d 129, 175 P.3d 1184* , are discussed in *§ 52.140[3][a]*. While discussing the codification of the business judgment rule in California in *Corp. Code § 309* (discussed in *§ 52.140[3][b]*), the court of appeal cited legislative committee comments for the proposition that the term "under similar circumstances" as used in *Corp. Code § 309(a)* requires a court to consider the nature and extent of a director's alleged oversight or mistake in judgment in the context of such factors as the size, complexity, and location of the activities involved. It also limits the critical assessment of a director's performance to the time of the action or nonaction, and thereby avoids harsher judgments that may be made with benefit of hindsight (*208 Cal. App. 3d 1250, 1265)* .

[d] Right to Rely on Committee's Recommendation

The facts and procedural background of ***Gaillard v. Natomas Co.*** *(1989) 208 Cal. App. 3d 1250, 256 Cal. Rptr. 702* , *disapproved on other grounds*, *Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119 n.16, 72 Cal. Rptr. 3d 129, 175 P.3d 1184* , are discussed in *§ 52.140[3][a]*. Citing legislative committee comments, the court said that the provisions of a director's right to rely in *Corp. Code § 309(a)* and *(b)* enlarged the right of reliance that existed under former Corp. Code § 829. By the provision permitting reliance on a committee of the board, the drafters of *Corp. Code § 309* intended to permit reliance on the work product of a board committee resulting from a more detailed investigation undertaken by that committee and forming the basis for action taken by the board (*208 Cal. App. 3d 1250, 1264)* . However, the duty of reasonable inquiry in *Corp. Code § 309(b)* constitutes a condition to the right of reliance, so that directors may not close their eyes to what is going on about them in corporate business and must in appropriate circumstances make such reasonable inquiry as an ordinarily prudent person would make under similar circumstance (*208 Cal. App. 3d 1250, 1264-1265)* .

[e] "Golden Parachute" Defined

The facts and procedural background of ***Gaillard v. Natomas Co.*** *(1989) 208 Cal. App. 3d 1250, 256 Cal. Rptr. 702* ,

disapproved on other grounds, *Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119 n.16, 72 Cal. Rptr. 3d 129, 175 P.3d 1184* , are discussed in *§ 52.140[3][a]*. The court of appeal first defined golden parachutes as special termination agreements that shelter executives from the effects of a corporate takeover, saying that the emergence of golden parachutes has been attributed to the dramatic increase in the size of corporate takeovers and the volume of hostile takeovers (*208 Cal. App. 3d 1250, 1256)* . Typically, golden parachutes provide senior executives who are dismissed or who resign as a result of a takeover with either continued compensation for a specified period following the executive's departure or with a lump-sum payment. The legality and desirability of this form of executive compensation, which some view as a form of corporate looting, have been the subject of increasing controversy faced by the courts and addressed by legal commentators (*208 Cal. App. 3d 1250, 1256)* .

[f] Purpose of "Golden Parachutes"

The facts and procedural background of ***Gaillard v. Natomas Co.*** *(1989) 208 Cal. App. 3d 1250, 256 Cal. Rptr. 702* , *disapproved on other grounds*, *Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119 n.16, 72 Cal. Rptr. 3d 129, 175 P.3d 1184* , are discussed in *§ 52.140[3][a]* [*see also § 52.163[3][e]*]. The court of appeal noted that valid corporate functions were served by golden parachutes, but also said there existed the potential for executive self-dealing. Corporate takeovers often threaten the financial and professional security of the managers of target companies. The theoretical purpose of golden parachutes is to shelter senior executives from those threats (*208 Cal. App. 3d 1250, 1266)* . The two principal recognized functions of golden parachutes are (1) to foster executive objectivity toward merger and tender offers and (2) to allow corporations that are likely takeover targets to attract top executives. With respect to the first function the court noted that a threatened takeover gives rise to the potential for conflict between executives' personal interests and the interests of the shareholders. Golden parachutes align more closely with the interests of management than with those of the shareholders by insuring executives against those possible pecuniary and nonpecuniary losses that may result from a change of control. Most commentators agree, the court continued, that in view of the functions of golden parachutes, they should be negotiated as part of an overall compensation package, and that parachutes enacted in the midst of takeover negotiations should be discouraged (*208 Cal. App. 3d 1250, 1266)* . A parachute that is conferred following a tender offer will likely have little value in creating executive objectivity because the executives generally already will have taken an initial position on the takeover before the golden parachutes are adopted and may not be able to take a credible different stance at a later time (*208 Cal. App. 3d 1250, 1266-1267)* . Further, during a takeover battle, the target corporation h no need for the parachute's executive recruiting functions. For these reasons,parachutes that are adopted in response to actual takeover overtures have been viewed as last-minute appropriations of corporate assets or, alternatively, as attempts to discourage potential acquirers (*208 Cal. App. 3d 1250, 1267)* .

In addition to the timing of the implementation of golden parachutes, their amounts have been challenged as excessive to any possible benefit conferred on the corporation, the court said, noting that *I.R.C. §§ 280G, 4999* provide that parachutes that are greater than or equal to three times an executive's annual compensation are presumed excessive for tax purposes, resulting in the corporation's losing its deduction for the parachutes payments as well as in the imposition of a 20 percent excise tax on the beneficiaries of the payments (*208 Cal. App. 3d 1250, 1267)* .

[g] Application of Business Judgment Rule to Approval of "Golden Parachutes"

The facts and procedural background of ***Gaillard v. Natomas Co.*** *(1989) 208 Cal. App. 3d 1250, 256 Cal. Rptr. 702* , *disapproved on other grounds*, *Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119 n.16, 72 Cal. Rptr. 3d 129, 175 P.3d 1184* , are discussed in *§ 52.140[3][a]*. After discussing the codification of the business judgment rule in California in *Corp. Code § 309* (discussed in *§ 52.140[3][b]*), the court of appeal turned its consideration to application of the business judgment rule to the golden parachutes and consulting agreement at issue. The court said that because the form and amount of executive compensation are fundamentally corporate business decisions, and because golden parachutes often serve a valid corporate function (*see* discussion in *§ 52.163[3][f]*), *Corp. Code § 309* governs a court's review of the conduct of outside directors in approving the golden parachutes and consulting agreement (*208 Cal. App. 3d 1250,*

1265) .

However, the court concluded that as a matter of law, the review of the conduct of the inside directors is not governed by *Corp. Code § 309*. They did not vote on the approval of the golden parachute agreements or the consulting agreement. In securing payment of those benefits to themselves, they were not "performing the duties of a director" as specified in *Corp. Code § 309*, but were acting as officer-employees of the corporation (*208 Cal. App. 3d 1250, 1265, 1268)* . Thus, the business judgment rule as codified in *Corp. Code § 309* and the judicial deference afforded under it do not apply to determine the liability of the inside directors in seeking approval of the agreements or accepting benefits under them. It was error for the trial court to apply the business judgment rule in granting summary judgment in favor of the inside directors, and therefore the summary judgment was reversed with respect to the five inside directors (*208 Cal. App. 3d 1250, 1265, 1268)* .

Turning its consideration to the liability of the "outside" directors for approving the golden parachutes and consulting agreement, the court first noted that the record before it did not disclose that the outside directors had any personal interest in the benefits conferred by those agreements and did not show any conflict of interest or evidence of bad faith or their part in approving the benefits (*208 Cal. App. 3d 1250, 1269)* . Thus, the court had only to determine whether the record disclosed controverted issues of fact regarding whether the outside directors (1) acted in a manner they believed to be in the best interests of Natomas; (2) exercised such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances [*see Corp. Code § 309(a)*]; and (3) in relying on various sources made reasonable inquiry if the need for inquiry was indicated by the circumstances [*see Corp. Code § 309(b)*]. The court separated its further analysis to consider the golden parachutes separately from the consulting agreement and to consider the liability of the outside directors on the compensation committee separately from that of the outside directors who were not on the compensation committee (*208 Cal. App. 3d 1250, 1269)* .

The court's consideration of the liability of the outside directors for approving and recommending the golden parachutes is further *discussed in § 52.163[3][i]* and *[j]*. The court's consideration of any liability based on approval or recommendation of the consulting agreement is discussed in *§ 52.147[3][c]*.

[h] Business Judgment Rule Is Not Applicable to Conduct of "Inside Director" in Obtaining Agreement From Which He or She Benefits

The facts and procedural background of ***Gaillard v. Natomas Co.*** *(1989) 208 Cal. App. 3d 1250, 256 Cal. Rptr. 702* are discussed in *§ 52.140[3][a]*. For discussion of that portion of the court's opinion addressing application of the business judgment rule to inside directors, see *discussion under § 52.163[3][g]*.

[i] Questions of Fact Presented Regarding Whether Board Committee Members Exercised Their Best Business Judgment

Will v. Engebretson & Co. *(1989) 213 Cal. App. 3d 1033, 261 Cal. Rptr. 868* is *discussed in § 52.163[3][b]*.

The facts and procedural background of ***Gaillard v. Natomas Co.*** *(1989) 208 Cal. App. 3d 1250, 256 Cal. Rptr. 702* , *disapproved on other grounds*, *Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119 n.16, 72 Cal. Rptr. 3d 129, 175 P.3d 1184* , are discussed in *§ 52.140[3][a]*. The court's initial discussion of the application of the business judgment rule to the golden parachutes and consulting agreement is set forth under § 52.163[3][g]. With respect to the golden parachutes, the court noted that the compensation committee approved agreements for 17 key executives after a two-hour meeting, and that the agreements for the five inside directors cost the corporation $11 million. The director who chaired the committee indicated that the committee relied entirely on outside counsel's recommendation in approving the agreements. Although outside counsel represented that the agreements were necessary to insure continuity of management, the members of the committee did not ask outside counsel or analyze for themselves how the agreements would accomplish that purpose (*208 Cal. App. 3d 1250, 1269)* . The court also said the agreements at issue did not

serve the recognized functions of golden parachutes [*see § 52.163[3][f]*]. The objectivity function was not served, because the parachutes were negotiated after the tender offer had already been made (*208 Cal. App. 3d 1250, 1269)* . Because the golden parachutes were for existing executives, they did not serve the executive recruitment function either (*208 Cal. App. 3d 1250, 1270)* . Further, the court said, the fact that the parachute agreements required their beneficiaries to stay for only six months, together with the fact that these agreements also included very broad "good reason" provisions allowing the beneficiaries to depart before expiration of the six-month period, would support an inference that the golden parachute agreements did not serve to insure continuity of management. This presented a triable issue fact (*208 Cal. App. 3d 1250, 1270)* . The court aid that although *I.R.C. §§ 280G, 4999* were not effective until after these parachute agreements were adopted, the compensation committee arguably should have been aware of the pendency of legislation affecting matters within their purview and that the lump-sum payments provided by the agreements would be excessive under the new tax laws (*208 Cal. App. 3d 1250, 1271)* . Finally, the members of the compensation committee should have been aware that the agreements were proposed by the chairman and CEO and that outside counsel was acting in accordance with the chairman and CEO's instructions in drafting the proposed agreements. Evidence of the close connection between the CEO and outside counsel in formulating the terms of the agreements would support the inference of self-dealing, which should have been investigated further by the committee. The trier of fact could reasonably conclude that the foregoing facts warranted further inquiry and review by the compensation committee to determine whether the golden parachutes were in the company's best interests (*208 Cal. App. 3d 1250, 1271)* . Thus, as a matter of law, summary judgment based on the application of the business judgment rule was not proper regarding the outside directors on the compensation committee with respect to their consideration and recommendation of the golden parachutes (*208 Cal. App. 3d 1250, 1269, 1271)* .

[j] Questions of Fact Presented Regarding Whether Board Members Exercised Their Best Business Judgment in Relying on Recommendation of Board Committee

The facts and procedural background of ***Gaillard v. Natomas Co.*** *(1989) 208 Cal. App. 3d 1250, 256 Cal. Rptr. 702* , *disapproved on other grounds,* *Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119 n.16, 72 Cal. Rptr. 3d 129, 175 P.3d 1184* , are discussed in *§ 52.140[3][a]*. The court's initial discussion of the application of the business judgment rule to the golden parachutes and consulting agreement is set forth under § 52.163[3][g]. With respect to the liability of the outside directors who were not on the compensation committee for approving the golden parachutes, the court noted that under *Corp. Code § 309(b)(3)*, those directors were entitled to rely on the recommendations of the compensation committee that they believed "to merit confidence" and would not be required to initiate their own investigation (*208 Cal. App. 3d 1250, 1271)* . The court noted that articles in two business magazines had addressed the highly controversial nature of golden parachutes in general shortly before the time the directors considered the agreements at issue here and said that the board members had or should have had some knowledge of this controversy. The court concluded that while in most cases directors should be allowed to rely on the recommendations of a board committee on matter delegated to that committee, in this case, a triable issue of fact existed regarding whether the directors' general knowledge of the questionable nature of golden parachutes within the context of takeovers would cause total reliance on the committee's recommendation to be unwarranted (*208 Cal. App. 3d 1250, 1272)* .

[4] Additional Authorities

[a] Regular Rules Governing Summary Judgment Apply

In Everest Investors 8 v. McNeil Partners (2003) 114 Cal. App. 4th 411, 8 Cal. Rptr. 3d 31 , a real estate limited partnership merged into a new entity, becoming a wholly owned subsidiary of the new entity. The interests of the limited partners were liquidated or cashed out. The general partner, however, retained an equity interest in the post-merger entity, which then sold the assets of the limited partnership to third parties for more than the assets were valued for purposes of the cash-out and merger. The limited partners brought an action against the general partner for breach of fiduciary duty, unfair competition, and constructive fraud, claiming that the merger transaction harmed the limited partners by undervaluing their partnership interests or by depriving them of the future earnings and growth

generated by the assets of the limited partnership. The defendant moved for summary judgment on two grounds, one of which was that plaintiffs' claims were barred by application of the business judgment rule. The trial court granted summary judgment for defendants. The court of appeal reversed. As to the application of the business judgment rule, the court of appeal states that the rule does not shield actions taken without reasonable inquiry, with improper motives, or as a result of a conflict of interest. It agreed with plaintiffs that triable issues of fact as to the existence of defendant's improper motives and a conflict of interest precluded summary judgment based on the business judgment rule. Furthermore, triable issues of fact existed regarding whether the merger transaction was preceded by a good faith and reasonable investigation into whether the merger transaction was in the best interests of the limited partners (*114 Cal. App. 4th 411, 429-432)* .

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California Points & Authorities

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Volume 5 Chapters 50-59 CONTRACTS---to---CORPORATIONS
CHAPTER 52 CORPORATIONS
PART II. FORMS
E. SHAREHOLDER DERIVATIVE ACTIONS

5-52 California Points & Authorities § 52.164

§ 52.164 Opposing Motion for Summary Judgment--Compliance With Corp. Code § 310 Does Not Bar Derivative Action Regarding Same Transaction

[1] FORM

[*Caption. See § 52.40.*]

SUMMARY JUDGMENT MAY BE DENIED BECAUSE COMPLIANCE WITH CORPORATIONS CODE SECTION 310 IS NOT SUFFICIENT TO BAR A DERIVATIVE ACTION BASED ON THE TRANSACTION.

A. Denial of Motion for Summary Judgment. [*See § 52.163, Paragraph A.*]

B. Compliance With *Corp. Code § 310* Does Not Bar Derivative Action. The fact that a transaction between a director and a corporation was approved in a manner that satisfied the requirements of *Corporations Code Section 310* relates only to the voidness or voidability of the transaction. It does not render the contract immune from attack on other grounds, such as corporate waste. Nor does compliance with the requirements of *Corporations Code Section 310* render the directors who approved it immune from liability for breach of fiduciary duty as a result of their approval of the contract (*Gaillard v. Natomas Co. (1989) 208 Cal. App. 3d 1250, 1273, 256 Cal. Rptr. 702* , *disapproved on other grounds,* *Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119n.16, 72 Cal. Rptr. 3d 129, 175 P.3d 1184*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion for summary judgment in a share holder derivation action when the corporation or its directors contend that a particular transaction between the corporation and a director cannot be the basis of the derivative action because it was approved in one of the ways specified by *Corp. Code § 310*.

With appropriate modifications, these points and authorities may be used in a trial or appellate brief.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Compliance With Corp. Code § 310 Does Not Bar Derivative Action

The facts and procedural background of ***Gaillard v. Natomas Co.*** *(1989) 208 Cal. App. 3d 1250, 256 Cal. Rptr. 702* , *disapproved on other grounds*, *Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119 n.16, 72 Cal. Rptr. 3d 129, 175 P.3d 1184* , are discussed in *§ 52.140[3][a]*. Although the trial court granted summary judgment in favor of the defendants by applying the business judgment rule, the issues of shareholder approval under *Corp. Code § 310(a)(1)* and corporate ratification were raised in the trial court and considered by the court of appeal (*208 Cal. App. 3d 1250, 1272)* . The court of appeal noted that *Corp. Code § 310(a)* provides in part, with regard to a contract between a corporation and one of its directors, that the contract is not void or voidable on the ground that the director was a party to the contract or was present at the meeting of the board that authorized, approved, or ratified the contract if either of the following occurs:

- The material facts of the transaction are fully disclosed to the shareholders and then the contract is approved by them; or

- The material facts of the transaction are fully disclosed to the board, which then ratifies the contract by a vote that is sufficient without counting the vote of the interested director, and the contract is just and reasonable as to the corporation at the time it is authorized, approved, or ratified (*208 Cal. App. 3d 1250, 1272-1273)* .

If the contract is not approved in one of these methods, then the person asserting the validity of the contract has the burden of proving that the contract was just and reasonable as to the corporation at the time it is authorized, approved, or ratified [*Corp. Code § 310(a)(3)*] (*208 Cal. App. 3d 1250, 1273)* . Defendants contended that the material facts of the golden parachutes and consulting agreement were disclosed to the shareholders in the proxy statements used to solicit approval of the merger, and that the agreements were thus immunized under *Corp. Code § 310(a)(1)*. The court of appeal disagreed and said that the requirements of *Corp. Code § 310(a)* address the voidness or voidability of a contract but do not render the contract immune from attack on other grounds, such as corporate waste. Nor does compliance with the requirements of *Corp. Code § 310(a)* render the directors who approved it immune from liability for breach of fiduciary duty as a result of their approval of the contract (*208 Cal. App. 3d 1250, 1273)* .

[4] Additional Authorities

[a] Compliance With Corp. Code § 3310 Does not Bar Derivative Action

In *Walczak v. EPL Prolong, Inc. (9th Cir. 2000) 198 F.3d 725* , a minority shareholder brought a class action derivative action alleging RICO violations, fraudulent conveyance, and breach of fiduciary duty. The shareholder sought to prevent consummation of the sale of the company's assets and liabilities pursuant to an agreement of sale with a subsidiary, and its dissolution. The district court granted a preliminary injunction, concluding that with regard to the fraudulent conveyance and breach of fiduciary duty claims, the shareholder had demonstrated a threat of irreparable harm and likelihood of success on the merits (*198 F.3d 725, 728)* .

The court of appeals held that the district court properly issued the preliminary injunction based on the breach of fiduciary duty claim, which was governed by *Corp. Code § 310*. Appellants did not challenge the legal standard applied, but argued that the factual findings on which the court based its decision were clearly erroneous. The court of appeals found that the district court did not abuse its discretion in issuing the preliminary injunction because its factual findings on which it based its decision--that the agreement to license the company's patent was inherently unfair and that the appellants engaged in a pattern of improperly dispersing and transferring corporate assets--were not clearly erroneous (*198 F.3d 725, 732-733)* .

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5-52 California Points & Authorities § 52.165

§ 52.165 Opposing Motion for Summary Judgment--Doctrine of Corporate Ratification Not Applicable to Bar Derivative Action Regarding Ratified Transaction

[1] FORM

[*Caption. See § 52.40.*]

SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE THE DOCTRINE OF CORPORATE RATIFICATION DOES NOT APPLY TO BAR A DERIVATIVE ACTION BASED ON THE TRANSACTION.

A. Denial of Motion for Summary Judgment. [*See § 52.163, Paragraph A.*]

B. Corporate Ratification Does Not Bar Derivative Action. The doctrine ofcorporate ratification does not apply to a shareholder derivative action in which the shareholders, not the corporation directly, claim a wrong perpetrated on the corporation by its directors. The corporation is only a nominal party to the derivative action, and thus the doctrine of corporate ratification is no bar to the action (*Gaillard v. Natomas Co. (1989) 208 Cal. App. 3d 1250, 1274, 256 Cal. Rptr. 702 , disapproved on other grounds, Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119 n.16, 72 Cal. Rptr. 3d 129, 175 P.3d 1184*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion for summary judgment in a shareholder derivative action when the corporation or its directors contend that a particular transaction cannot be the basis of the derivative action because it was ratified by the corporation.

With appropriate modifications, these points and authorities may be used in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Corporate Ratification Does Not Bar Derivative Action

The facts and procedural background of ***Gaillard v. Natomas Co.*** *(1989) 208 Cal. App. 3d 1250, 256 Cal. Rptr. 702* , *disapproved on other grounds*, *Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119 n.16, 72 Cal. Rptr. 3d 129, 175 P.3d 1184* , are discussed in *§ 52.140[3][a]*. Although the trial court granted summary judgment in favor of the defendants on the basis of the business judgment rule, for guidance to the trial court on remand, the court of appeal also considered defendants' contention that Diamond's ratification of the new employment agreements after the merger amounted to a corporate ratification that estopped the corporation from denying the validity or enforceability of the agreements after it had accepted performance and made payments under them (*208 Cal. App. 3d 1250, 1273-1274)* . The court said that the doctrine of corporate ratification did not apply to this shareholder derivative action in which the shareholders, not the corporation directly, claim a wrong perpetrated on the corporation by its directors. As with any other shareholder derivative action, the corporation is only a nominal party. Thus, the derivative action was not barred by the doctrine of corporate ratification (*208 Cal. App. 3d 1250, 1274)* .

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5-52 California Points & Authorities § 52.166

§ 52.166 Opposing Motion for Security Requested Pursuant to Corp. Code § 800(c)-(f)--Action Not a Derivative Suit--By Plaintiff

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF_____

_____ [*name(s)*],	)	NO. _____
Plaintiff(s), vs.	)	MEMORANDUM OPPOSING MOTION FOR SE-
_____ [*name*],	)	CURITY
a Corporation, and	)	Date: _____
_____ [*name(s)*],	)	Time: _____
Defendant(s)	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

NO SECURITY IS REQUIRED OF A PLAINTIFF WHO FILES IN AN INDIVIDUAL CAPACITY.

A. Motion for Security Applicable to Derivative Actions. A motion for a security made pursuant to *Corporations Code Section 800(c)-(f)* may only be made in connection with a derivative action (*Corp. Code § 800(c)*).

B. Provision Requiring Security Improperly Applied. When a cause of action is properly before it to which the provision requiring a security (*Corp. Code § 800(c)-(f)*) does not apply, a court acts in excess of its jurisdiction if it dismisses an action for failure to comply with the statutory provisions for a security (*Hagan v. Superior Court (1960) 53 Cal. 2d 498, 502-503, 2 Cal. Rptr. 288, 348 P.2d 896*).

Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be used to oppose a motion for a security requested pursuant to *Corp. Code § 800(c)-(f)* when the plaintiff is not suing in a derivative capacity, but in some other capacity [*see Corp. Code § 800(c)*].

When appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law raised.

[3] Discussion of Authorities

[a] Provision Requiring Security Improperly Applied

In ***Hagan v. Superior Court*** *(1960) 53 Cal. 2d 498, 2 Cal. Rptr. 288, 348 P.2d 896* , the plaintiffs sought a writ of prohibition to order a trial court to desist from entering judgment in the involuntary dissolution proceedings of a corporation and to desist from its order requiring petitioners to post security pursuant to former Corp. Code § 834 [*now Corp. Code § 800(c)-(f)*]. The plaintiffs had filed a complaint in intervention in a dissolution proceeding for a corporation. The plaintiffs alleged that they were shareholders in the corporation and that defendants, by refusing to recognize them as shareholders, had prevented them from participating in the affairs of the corporation. The complaint requested an order compelling defendants in intervention to register the shares of the plaintiffs on the register and to issue certificates. The trial court had conditioned pursuit of the suit on the posting of a security for the suit. The Supreme Court issued the writ of prohibition, holding that the trial court had exceeded its jurisdiction in requiring the plaintiffs to post a bond. The Court held that the requirements of Corp. Code § 834 applied to derivative actions. The rights asserted by the plaintiffs were personal rights, and they could not be required to post a bond under the circumstances, even though they alleged facts which would also give rise to a corporate cause of action (*53 Cal. 2d 498, 502-504)* .

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5-52 California Points & Authorities § 52.167

§ 52.167 Opposing Motion for Security Requested Pursuant to Corp. Code § 800--Aggregate Amount of Security Is Limited to $50,000

[1] FORM

[*The following points and authorities may be included in a memorandum, or in a trial or appellate brief.*]

THE AGGREGATE AMOUNT OF SECURITY THAT PLAINTIFF[S] MAY BE REQUIRED TO FURNISH PURSUANT TO CORPORATIONS CODE SECTION 800 IS $50,000 AS TO ALL MOVING PARTIES.

Aggregate Amount of Security Is Limited. The aggregate amount of security that a plaintiff may be required to provide pursuant to *Corp. Code § 800* is limited to $50,000 as to all moving parties (*Hale v. Southern California IPA Medical Group (2001) 86 Cal. App. 4th 919, 927-928, 103 Cal. Rptr. 2d 773*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion for security requested pursuant to *Corp. Code § 800* when the plaintiff already has provided an aggregate of $50,000 as to all moving parties.

When appropriate, counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law raised.

[3] Discussion of Authorities

[a] Aggregate Amount of Security Is Limited

In ***Hale v. Southern California IPA Medical Group*** *(2001) 86 Cal. App. 4th 919, 103 Cal. Rptr. 2d 773* , the plaintiff filed a shareholders derivative action against a corporation and five individual directors. The defendants each filed

motions under *Corp. Code § 800(c), (d)* to require plaintiff to post security, arguing that the court could require plaintiff to post a bond of up to $50,000 for each of the moving defendants. The trial court agreed and ordered plaintiff to post six bonds, for a total of $250,000. After plaintiff failed to post the bonds as ordered, the trial court entered a judgment of dismissal. Plaintiff appealed, claiming that the $50,000 statutory limit on security was the aggregate for all the moving parties (*86 Cal. App. 4th 919, 922)* . The court of appeal reversed. It found that although *Corp. Code § 800(d)* is ambiguous with respect to the maximum amount of bond that may be ordered, the language of *Corp. Code § 800(e)* states that once the plaintiff has posted a $50,000 bond, the plaintiff has satisfied the requirements of that section and no additional bond may be required (*86 Cal. App. 4th 919, 923-924)* . The court examined the legislative history of the section, determining that an amendment to the section was not intended to effect any substantive change to the $50,000 aggregate limit. The court concluded that in ruling on a motion pursuant to *Corp. Code § 800(d)*, the trial court's discretion is limited to requiring plaintiff to furnish security in the aggregate amount of $50,000 as to all moving parties. Therefore, the trial court erred in requiring plaintiff to furnish $250,000 in security (*86 Cal. App. 4th 919, 927-928)* .

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5-52 California Points & Authorities § 52.168

§ 52.168 Opposing Motion for Attorney's Fees by Successful Defendant in Derivative Action--Recovery Is Limited to Security Posted by Plaintiff [Corp. Code § 800]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name(s)*]	)	MEMORANDUM OPPOSING MOTION FOR AT-
Plaintiff(s),	)	TORNEY'S FEES
vs.	)	Date: _____
_____[*name*],	)	Time: _____
a Corporation, and	)	Location: _____
_____[*name(s)*],	)	[Judge: _____]
Defendant(s).	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

WHEN THE DEFENDANT IS THE PREVAILING PARTY IN A SHAREHOLDER'S DERIVATIVE ACTION AND MOVES FOR AN AWARD OF ATTORNEY'S FEES PURSUANT TO CORPORATIONS CODE SECTION 800, THE DEFENDANT MAY NOT RECOVER ATTORNEY'S FEES _____ [IN EXCESS OF THE SECURITY *or* WHEN NO SECURITY WAS] POSTED BY THE PLAINTIFF.

Attorney's Fees Limited by Posted Security. *Corporations Code Section 800* merely allows a prevailing defendant in a derivative action to recover attorney's fees and costs by recourse to the bond, if any, that was posted pursuant to that statute, until the full amount of the bond has been exhausted. If a prevailing defendant desires to recover attorney's fees or costs independently of the bond, or beyond the amount of the bond, the defendant must look to legal or statutory

authority other than *Corporations Code Section 800* (*West Hills Farms, Inc. v. RCO Ag Credit, Inc. (2009) 170 Cal. App. 4th 710, 719, 88 Cal. Rptr. 3d 458*).
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be used by the plaintiff in a derivative action to oppose a motion for attorney's fees when the plaintiff, either pursuant to a court order or voluntarily, posted security for attorney's fees pursuant to *Corp. Code § 800*, or when the plaintiff did not post security. The form may be adapted for use in another procedural setting, such as a trial or appellate brief.

Counsel should insert argument in this form noting the relationship between the facts of the case and the substantive law.

[3] Discussion of Authorities

[a] Attorney's Fees Limited by Posted Security

In ***West Hills Farms, Inc. v. RCO Ag Credit, Inc.*** *(2009) 170 Cal. App. 4th 710, 88 Cal. Rptr. 3d 458* , the defendant corporation was sued by two of its shareholders. The trial court granted the defendant's motion under *Corp. Code § 800* to require the plaintiffs to furnish a bond in the amount of $50,000 as security for defendant's anticipated litigation expenses to defend the action. The plaintiffs furnished the required bond. The defendant ultimately prevailed in the action and, following entry of judgment, moved for an award of all of its attorney's fees and costs incurred, totaling over $350,000. The trial court's order limited the award of attorney's fees and costs to $50,000, the amount of the bond. The defendant appealed from that order, contending that under *Corp. Code § 800*, it was entitled to recover all of its attorney's fees and costs, regardless of the amount of the bond.

The court of appeal affirmed the trial court's order. The court concluded that *Corp. Code § 800* "is a *bond or security* statute. And contrary to defendant's contentions, the statute does not provide for recovery of attorney fees and costs independent of the bond. Thus, section 800 merely allows the prevailing defendant in the derivative action to recover its attorney fees and costs by recourse to the bond, if one is posted, until the full amount of the bond has been exhausted" (*170 Cal. App. 4th 710, 719)* (original emphasis; citation omitted). Moreover, the court noted, "If a prevailing defendant desires to recover attorney fees or costs independent of the bond, or beyond the amount of the bond, it would have to look to legal or statutory authority other than section 800" (*170 Cal. App. 4th 710, 719 n.11*).

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5-52 California Points & Authorities §§ 52.169-52.179

[Reserved]

§§ 52.169[Reserved]

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F. DISSOLUTION OF CORPORATIONS

5-52 California Points & Authorities § 52.180

§ 52.180 Supporting Petition for Judicial Supervision of Voluntary Winding Up of Corporation [Corp. Code § 1904]--Corporation Dissolved at Election of Shareholders [Corp. Code § 1900(a)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM IN SUPPORT OF PETITION
	)	FOR JUDICIAL SUPERVISION OF VOLUNTARY
	)	WINDING UP OF CORPORATION
In the matter of _____	)	[*Corp. Code § 1904*]
[*name*] a Corporation, In the Process of Voluntary	)	Date: _____
Winding Up and Dissolution.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

JUDICIAL SUPERVISION OF THE DISSOLUTION OF A CORPORATION IN THE PROCESS OF VOLUNTARY WINDING UP IS AUTHORIZED ON PETITION OF _____ [THE CORPORATION *or* A SHAREHOLDER OR SHAREHOLDERS WHO HOLD SHARES REPRESENTING FIVE PERCENT OR MORE OF THE TOTAL NUMBER OF ANY CLASS OF ITS OUTSTANDING SHARES *or* ANY SHAREHOLDER OR SHAREHOLDERS OF A CLOSE CORPORATION *or* THREE OR MORE CREDITORS OF THE CORPORATION]

IF IT APPEARS NECESSARY FOR THE PROTECTION OF ANY PARTIES IN INTEREST.

A. Jurisdiction of Court. If a corporation is in the process of voluntary winding up, the superior court of the proper county, upon petition of _____ [the corporation *or* a shareholder or shareholders who hold shares representing five percent or more of the total number of any class of outstanding shares *or* any shareholder or shareholders of a close corporation *or* three or more creditors] and upon such notice to the corporation and to other persons interested in the corporation as shareholders and creditors as the court may order, may take jurisdiction over such voluntary winding-up proceeding if that appears necessary for the protection of any parties in interest (*Corp. Code § 1904*).

B. Commencement of Voluntary Dissolution Proceedings. Voluntary proceedings for winding up the corporation commence _____ [upon the adoption of the resolution of shareholders electing to wind up and dissolve *or* upon the filing with the corporation of a written consent of shareholders to winding up and dissolution] (*Corp. Code § 1903(a)*).

C. Corporation in Process of Winding Up. A corporation is in the process of voluntary winding up if a valid election to wind up has been made (*In re Security Fin. Co. (1957) 49 Cal. 2d 370, 376, 317 P.2d 1*).

D. Validity of Election An election by [a] shareholder[s] with the requisite voting power to voluntarily wind up a corporation is valid if made in accordance with statutory provisions and in good faith (*In re Security Fin. Co. (1957) 49 Cal. 2d 370, 376-377, 317 P.2d 1*).

E. Statutory Provisions. Any corporation may elect voluntarily to wind up and dissolve by the vote of shareholders holding shares representing 50 percent or more of the voting power (*Corp. Code § 1900(a)*).

[*Optional*] **F. "Vote" As Including Written Consent.** As used in the Corporations Code, "vote" includes authorization by written consent (*Corp. Code § 194*).

G. "Voting Power." "Voting power" means the power to vote for the election of directors at the time the determination of voting power is made. It does not include conditional voting power. If individual members of the board are elected by separate classes of shares, voting power is determined on the basis of the percentage of the total number of authorized directors which the shares in question have the power to elect (*Corp. Code § 194.5*).

H. Determination of Good Faith. Shareholders electing to dissolve are acting in good faith where they act to protect their investment, alternative methods of doing so are foreclosed, no advantage is secured over other shareholders, and no rights of third partieswill be adversely affected (*In re Security Fin. Co. (1957) 49 Cal. 2d 370, 378, 317 P.2d 1*).

[*Optional*] **I. Jurisdiction Over Dissolution of Foreign Corporation.** If all the assets, books, and records of a foreign corporation are within California, and no assets, records, or officers of the corporation are in the jurisdiction where it was organized, the California courts may undertake to dissolve the corporation and distribute its assets (*In re Mercantile Guar. Co. (1965) 238 Cal. App. 2d 426, 430-433, 48 Cal. Rptr. 589*).

[*Optional*] **J. "Parties in Interest."** A party in interest is a person with some definite legal right which is threatened, or whose welfare could be directly and adversely affected by the action, proceeding, or transaction under consideration (see *Western Pac. Cal. R.R. Co. v. Southern Pac. Co. (1931) 284 U.S. 47, 51-52, 52 S. Ct. 56, 76 L. Ed. 160*).

[*Optional*] **K. Judicial Supervision Necessary If Board Is Deadlocked.** Judicial supervision of a voluntary dissolution proceeding is necessary if the shareholders are divided into factions and the board of directors is deadlocked so that business cannot be conducted with advantage to the stockholders (see *In re O'Brien Mach., Inc. (1964) 224 Cal. App. 2d 563, 565, 36 Cal. Rptr. 782*).

[*Optional*] **L. Judicial Supervision Necessary If Board Is Unable to Agree on Dissolution Plan.** Judicial supervision of a voluntary dissolution proceeding is necessary if the board of directors cannot agree on a plan of dissolution or liquidation (see *In re O'Brien Mach., Inc. (1964) 224 Cal. App. 2d 563, 565, 36 Cal. Rptr. 782*).

[*Optional*] **M. Judicial Supervision Necessary If Dissension Causes Substantial Delay in Dissolution.** Judicial supervision of a voluntary dissolution proceeding is necessary if there is evidence that internal dissension within the corporation would cause substantial delay in completing the dissolution proceedings (*In re Security Fin. Co. (1957) 49 Cal. 2d 370, 380-381, 317 P.2d 1*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for voluntary winding up under court supervision where the decision to dissolve was made at the election of shareholders by vote or written consent. Caution is recommended with respect to the use of Paragraph I, Jurisdiction Over Dissolution of Foreign Corporation. As discussed more fully in § 52.180[3][e], it is not certain whether, under current law [*see Corp. Code § 2115(a),(b)*], California courts have jurisdiction to supervise the dissolution of a foreign corporation, even if all of its assets, books, and records are located in this state. While there is no requirement that a memorandum accompany the petition, it may be advisable for counsel to submit one.

When appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law raised.

[b] Related Pleading and Practice Forms

For a form for a certificate of election to wind up and dissolve a corporation, and for a form for a petition for voluntary winding up under court supervision, see California Forms of Pleading and Practice, Ch. 170, *Corporations: Dissolution and Winding Up* (Matthew Bender).

[3] Discussion of Authorities

[a] Corporation in Process of Winding Up

In re Security Fin. Co. *(1957) 49 Cal. 2d 370, 317 P.2d 1* was a proceeding for judicial supervision of the voluntary dissolution of a close corporation. The trial court granted the petition for judicial supervision, and the Supreme Court affirmed the order. The owner of 50 percent of the voting stock in the corporation executed and filed with the corporation his consent to voluntary dissolution. The Supreme Court stated that, in granting his petition for judicial supervision of the winding up and dissolution, the superior court necessarily determined that the election to dissolve by written consent was valid. The Supreme Court further stated that a valid election to dissolve puts the corporation in the position of being in the process of voluntary winding up.

[b] Validity of Election

In re Security Fin. Co. *(1957) 49 Cal. 2d 370, 317 P.2d 1* was a proceeding on a petition for judicial supervision of the voluntary dissolution of a close corporation pursuant to former Corp. Code § 4607 [*now see Corp. Code § 1904*]. The trial court granted the petition for judicial supervision and the Supreme Court affirmed the order. The voting stock in the corporation was divided equally between Rouda, who actively managed the business, and two brothers, the Crockers, who contributed the initial capital and agreed to procure bank credit. The incorporation agreement provided for unanimity for all acts of the boards of directors and voting shareholders. Because of serious disagreements between Rouda and the Crockers, Rouda wished to withdraw from the corporation. However, the Crockers would not buy Rouda's stock or sell him theirs. They would not consent to a sale of the business unless Rouda paid them $100,000 to be released from what they claimed was his contractual obligation to serve the corporation indefinitely. The Crockers, as directors, refused to increase Rouda's salary as his responsibilities grew. He received $1,456 per month for devoting full time to the business, while the Crockers received $500 per month solely for attending four directors' meetings a year. They also refused to increase dividends on the stock. Because of restrictions placed on the tranfer of stock, Rouda could not sell his stock to persons outside the corporation for a price fairly representing his investment. Against this factual background, Rouda, as owner of 50 percent of the voting stock in the corporation, executed and filed with the corporation his consent to voluntary dissolution. He then executed for the corporation, and filed with the Secretary of State, a certificate of election to wind up and dissolve. On appeal from an order granting Rouda's petition for judicial supervision of the process of voluntary dissolution, a primary issue was the validity of his election to wind up and dissolve the corporation. The Supreme Court stated that the validity of an election by shareholders for voluntary dissolution of a corporation was dependent on statutory compliance and good faith of the voting shareholders. Because both elements were present in Rouda's election to dissolve, the election was valid (*49 Cal. 2d 370, 376-377)* .

[c] "Vote" as Including Written Consent

Corp. Code § 194 was repealed and reenacted in 1993 to end confusion regarding use of written consents to approve actions requiring approval of outstanding shares under *Corp. Code § 152*. The Legislative declaration provides that it is and has been the intent of *Corp. Code § 194* to permit the use of written consents in connection with approvals by the outstanding shares, as well as the other sections of the General Corporation Law where the term "vote" is used. This reenactment is intended to be declarative of the Legislature's original intent in enacting Section 194 [Stats. 1993, Ch. 128, § 1]. Use of written consents remains subject to *Corp. Code § 307(b)* (written consent by Board as required to be filed with minutes of meeting) and *Corp. Code 603(d)* (written consents used to elect directors must include consent of all shares entitled to vote for election of director, except election of director to fill vacancy not created by removal) [*Corp. Code § 194*].

[d] Determination of Good Faith

The factual background of ***In re Security Fin. Co.*** *(1957) 49 Cal. 2d 370, 317 P.2d 1* is *discussed in § 52.180[3][b]*. In that case, the Supreme Court stated that the statutory power of holders of 50 percent or more of voting stock to dissolve a corporation is subject to the equitable limitation of good faith. Implicitly, if bad faith is shown, there is no right to dissolve. Good faith is shown when shareholders act to dissolve a corporation to protect their investment if all other alternatives to dissolution are foreclosed, the effects of dissolution would affect all shareholders equally, and no rights of third parties are affected. Good faith is absent if the majority shareholders attempt to dissolve a corporation to defraud other shareholders, freeze out minority shareholders, or sell the assets of the dissolved corporation at an inadequate price. Under the facts of the *Security Finance* case, it was found that the shareholder seeking dissolution was acting in good faith, since he had tried all possible ways to get a fair return on his investment, but was thwarted by his fellow stockholders and directors in the close corporation. The court expressly declined to rule whether the burden of pleading and proving good faith was on the shareholders voting to dissolve or whether the burden of proving lack of good faith was on the shareholders opposing dissolution (*49 Cal. 2d 370, 380-381)* .

The *Security Finance* case was decided under pre-1977 law. The imposition of a duty of fairness and good faith in

dissolving a corporation was due, at least in part, to the fact that under pre-1977 law, there was no requirement of shareholder approval for the cash sale of assets to a majority-controlled buyer in the course of winding up a corporation [*see In re Mayellen Apts., Inc. (1955) 134 Cal. App. 2d 298, 307, 285 P.2d 943]* . In other cases, pre-1977 law required only majority approval of a sale, even of all or substantially all assets, for a noncash consideration [*see* former Corp. Code § 4801]. Under present law, approval of at least 90 percent of the voting power of the disposing corporation is required if the buyer of corporate assets is in control of or under common control with disposing corporation, unless the consideration for the sale is nonredeemable common shares or nonredeemable equity securities of the acquiring party or its parent [*Corp. Code §§ 1001(d), 2001*]. However, it does not appear that the reasons for the imposition of an equitable requirement of good faith on majority shareholders in initiating dissolution are any less compelling under current law. Breach of fiduciary duty owed by majority shareholders to minority shareholders [*see Jones v. H.F. Ahmanson & Co. (1969) 1 Cal. 3d 93, 109, 81 Cal. Rptr. 592, 460 P.2d 464]* can be accomplished during a dissolution by other means than a sale of corporate assets for less than their fair value. For example, in *Thrasher v. Thrasher (1972) 27 Cal. App. 3d 23, 103 Cal. Rptr. 618* , bad faith on the part of a majority shareholder was shown by the timing of enforced collection of demand notes against a close corporation, the practical effect of which was destruction of the corporation.

The inclusion of authority on the good faith of the consenting shareholders in this memorandum was based on the assumption that the requirement of good faith in initiating dissolution still exists under current law and that the burden of proof is on the petitioner.

[e] Jurisdiction Over Dissolution of Foreign Corporation

In re Mercantile Guar. Co. *(1965) 238 Cal. App. 2d 426, 48 Cal. Rptr. 589* was an action by the State of California to intervene in the voluntary dissolution proceeding of a foreign corporation doing business in California. Mercantile was a Delaware corporation with its principal place of business in San Francisco. It had 4000 outstanding shares of preferred stock, all of which was entitled to vote, and 4000 outstanding shares of common stock. A majority of the preferred stock was owned by an inactive Delaware corporation (Western) of which only three percent of the shareholders could be located. Mercantile petitioned the superior court for an order appointing a trustee to vote the shares in Mercantile held by Western so that Mercantile could dissolve. Its plan of liquidation proposed that Mercantile assets, unclaimed by Mercantile or Western shareholders after a reasonable time, be used to pay the arrearages of cumulative dividends to Mercantile preferred shareholders who tendered their shares in a timely manner. Any surplus would be distributed pro rata to Mercantile's common stockholders. The state moved to intervene on the ground that the assets of Mercantile, to which Western was entitled on dissolution, should be turned over to the state in accordance with the California Unclaimed Property Law [*Code Civ. Proc. §§ 1500-1582*]. The court granted Mercantile's motion for summary judgment on the state's complaint in intervention and the state appealed. Two questions were presented on appeal: (1) Do the California courts have jurisdiction to wind up the affairs of a foreign corporation as to its property within California? (2) Did the state have an interest in the proceeding so as to make its intervention proper? The court of appeal answered both questions in the affirmative. As to the first issue, the court concluded that where all the assets, books, and records of a corporation are within California and no assets, records, and officers of the corporation are in the jurisdiction where it was organized, the California courts may undertake to dissolve the corporation and distribute its assets. The question then is not whether jurisdiction exists, but whether assumption of jurisdiction is justified by considerations of public policy, efficiency, expedience, and justice to all interested parties. On the second issue, the court concluded that the state was an interested party and entitled to intervene, in light of the fact that a portion of Mercantile's assets on dissolution would go to Western, and on the (at that point hypothetical) dissolution of Western, and a continued failure to locate Western's stockholders, their share of Western's assets would eventually escheat to the Ste of California if their last known addresses were in California. Therefore, the state had a right to intervene in Mercantile's dissolution proceeding to protect its future escheat rights in unclaimed Western assets (*238 Cal. App. 2d 426, 430-433)* .

Caution is recommended with respect to the use of the *Mercantile Guaranty* case as authority for the assumption of

jurisdiction by the California courts over the dissolution of a foreign corporation under current law. *Corp. Code § 2115(b)* lists the chapters and sections of the General Corporation Law which apply to foreign corporations having the requisite connections with this state [*see now Corp. Code § 2115(a)*]. The provisions of *Corp. Code §§ 1800-2011* relating to the dissolution of corporations are not mentioned in *Corp. Code § 2115(b)*. It is, therefore, open to question whether the *Mercantile Guaranty* case remains good authority for the assumption of jurisdiction by a California court over the dissolution of a foreign corporation, even if all of its assets, books, and records are located within California, and no assets, records, or officers of the corporation are in the jurisdiction in which it was organized.

[f] Parties in Interest

The meaning of the term "parties in interest" as used in current law [*Corp. Code § 1904*] has not been judicially defined. ***Western Pac. Cal. R.R. Co. v. Southern Pac. Co.*** *(1931) 284 U.S. 47, 52 S. Ct. 56, 76 L. Ed. 160* was an action for injunction by one railroad company to prevent another railroad company from constructing an extension of its line until permission was obtained from the Interstate Commerce Commission, as required by federal law. The trial court granted an injunction. The court of appeal for the Ninth Circuit reversed, holding that the petitioner for the injunction was not a "party in interest" within the meaning of Section 1, paragraph 20, of the Interstate Commerce Act [former 49 U.S.C. § 1, P 20]. The Supreme Court reversed the court of appeal, holding that the railroad seeking the injunction qualified as a party in interest. To meet that definition, the court said, it was not necessary that the petitioner possess some clear, legal right for which it might ask protection under the rules commonly accepted by courts of equity. It was sufficient that the bill disclosed that the unauthorized and, therefore, unlawful action of the defendant railroad in constructing a competing rail line might directly and adversely affect the complainant's welfare (*284 U.S. 47, 51-52)* .

[g] Judicial Supervision Necessary Where Board Deadlocked

In re O'Brien Mach., Inc. *(1964) 224 Cal. App. 2d 563, 36 Cal. Rptr. 782* was a proceeding for court supervision over the voluntary dissolution of a close corporation. After assuming jurisdiction over the dissolution proceeding, the court ordered the appointment of a provisional director to break a deadlock on the corporation's board of directors and also issuedan order restraining corporate personnel from selling or otherwise disposing of the corporate assets. The corporation had only two stockholders, each of whom owned 50 percent of the stock. There were only two directors. Both the shareholders and the directors were divided into two factions with the result that the board was deadlocked and business could not be conducted with advantage to the stockholders. Meetings of the board of directors had ceased, and money received from sales of corporate assets was held by the director making the sale to the exclusion of the other director. One of the two shareholders had allegedly made sales of corporate assets without notifying the other shareholder or the board of directors. No plan of dissolution could be agreed upon because of the dissension between the parties. This was considered an appropriate case for the assumption of judicial supervision over the voluntary dissolution of the corporation.

[h] Judicial Supervision Necessary Where Board Unable to Agree on Dissolution Plan

In re O'Brien Mach., Inc. *(1964) 224 Cal. App. 2d 563, 36 Cal. Rptr. 782* is *discussed in § 52.180[3][g]*.

[i] Judicial Supervision Necessary Where Dissension Causes Substantial Delay in Dissolution

The factual background of ***In re Security Fin. Co.*** *(1957) 49 Cal. 2d 370, 317 P.2d 1* is *discussed in § 52.180[3][b]*. In that case, stockholders appealing the order granting a petition for judicial supervision of voluntary dissolution of a close corporation alleged that no showing was made which would justify judicial supervision of the voluntary dissolution, even if the petitioner had a right to dissolve the corporation. The Supreme Court stated that the history of disputes between the parties indicated that it was unlikely that they would agree on a course of action during dissolution that would be in their common interest. It pointed in particular to evidence of threats by the dissenting shareholder-directors to delay dissolution for 10 to 15 years unless the petitioner for dissolution paid them $100,000. Thus, the trial court could reasonably conclude that it was in the best interests of all the parties to have court supervision

of the winding up of the corporation.

[4] Additional Authorities

[a] Determination of Good Faith

Jones v. H. F. Ahmanson & Co. (1969) 1 Cal. 3d 93, 81 Cal. Rptr. 592, 460 P.2d 464 was a class action for breach of fiduciary responsibility by a minority stockholder on behalf of herself and others against present and former owners of stock in a savings and loan association and against a holding company to which the majority of stockholders in the association had transferred their shares. It is discussed here because it is a landmark case on the duty of good faith owed by majority to minority shareholders. The trial court sustained a demurrer to the complaint for failure to state a cause of action. The plaintiff appealed. Because the shares in the savings and loan association were not readily marketable, a majority of shareholders in the association transferred their shares to a holding company, receiving for each association share 250 shares in the holding company. The holding company shares were readily marketable and the value of the blocks of holding company shares derived from the exchange of association stock increased dramatically. The majority of association shareholders did not allow the minority shareholders to participate in the exchange. A subsequent offer to buy their shares was made at a price far below the value which the derived blocks of shares had attained. The plaintiff contended that the majority shareholders had thus breached the fiduciary duty owed by majority to minority shareholders, that they had used corporate control for their own advantage by creating the holding company, making a public market for its shares, rendering the association's shares completely unmarketable, and then refusing to purchase the plaintiff's association stock at a fair price, or exchange the stock on the same basis afforded the majority. The defendants contended on appeal that the majority shareholders owed no fiduciary obligation to other shareholders absent reliance on inside information, misuse of corporate assets, or fraud. The Supreme Court disagreed, and reversed the judgment of the trial court, holding that a cause of action had been stated for breach of fiduciary responsibility. The Court ruled that majority shareholders may not use their power to control corporate activities to benefit themselves alone or in a manner detrimental to the minority. In this regard, by way of illustration, the Court stated that the statutory power of the majority to dissolve a corporation is subject to equitable limitations in favor of the minority. This means that the majority has the right to dissolve the corporation to protect it investment only if no alternative means are available and no advantage is secured over other shareholders.

Crain v. Electronic Memories & Magnetics Corp. (1975) 50 Cal. App. 3d 509, 123 Cal. Rptr. 419 was an action by minority shareholders in a computer corporation (DSC) against the majority shareholder (EMM), the board of directors and the purchaser of DSC's assets. The complaint alleged breach of fiduciary duty by EMM, breach of a financing agreement between EMM and DSC, tortious interference with contract, and fraud. The trial court granted judgment on the pleadings in favor of the defendants on the ground that the only possible causes of action were derivative and could not be prosecuted by the plaintiffs in their individual capacities. The court of appeal reversed, holding that individual causes of action werestated. The plaintiff minority shareholders had incorporated DSC to develop, manufacture, and market a data-processing system. Being in need of capital, DSC entered into a financing agreement with EMM whereby EMM would lend DSC money in exchange for promissory notes. The notes could be exchanged at EMM's option for both outstanding and authorized but unissued stock in DSC. EMM also received the right to appoint two of DSC's five directors. DSC was apparently doing well, but EMM had cash flow problems. Accordingly, EMM exchanged its promissory notes for 80 percent of DSC's outstanding shares and then negotiated and consummated a sale of DSC's assets over the objections of the minority shareholders. The only asset of DSC after the transaction was an unsecured promissory note for $981,200 resulting from a loan to EMM of the proceeds of the DSC sale. In the subsequent lawsuit, the minority shareholders alleged that EMM, as majority shareholder, had disposed of DSC's assets so that EMM received the largest possible financial benefit without regard to the consequences to minority shareholders. Because of the sale of DSC's assets, the minority shareholders were deprived of their ownership interests in an ongoing and potentially profitable business without any compensation. Further, they were locked into a shell corporation which possessed no real assets and engaged in no business activity, thus assuring that the minority shares would be forever valueless and unsaleable. The court of appeal characterized this as an "effective dissolution" of DSC and held that in

order to do what it did without breach of fiduciary duty, EMM would be required to demonstrate that there was no alternative to dissolution available, and that in dissolving the corporation, the majority stockholder secured no benefit over the other stockholders. This showing would be required to be made at a trial, rather than in a judgment on the pleadings.

It should be noted that although the court in the *Crain* case characterized the majority's actions as an "effective dissolution," this does not mean that, when such transactions take place, it is appropriate to petition the court for judicial supervision pursuant to *Corp. Code § 1904*. Courts have jurisdiction to supervise the dissolution of a corporation pursuant to *Corp. Code § 1904* only when the corporation is in the process of voluntary winding up after there has been a valid election to do so pursuant to statute [*In re Security Fin. Co. (1957) 49 Cal. 2d 370, 376, 317 P.2d 1* ; see *Corp. Code § 1900(a),(b)*].

Thrasher v. Thrasher (1972) 27 Cal. App. 3d 23, 103 Cal. Rptr. 618, 56 A.L.R.3d 204 was a derivative action by a wife against her husband on behalf of a close corporation (Elk) in which both were shareholders. The complaint alleged that the husband had breached his fiduciary duty to the corporation by enforcing collection of demand notes owing to him from the corporation for the purpose of destroying the corporation after his wife filed an action for divorce. The trial court entered judgment for the wife on behalf of the corporation for recovery of the monies paid by the corporation to her husband. The court of appeal affirmed. The husband had advanced more than $240,000 to Elk and had taken demand notes bearing interest at six percent. He then proceeded to collect $145,000 of the debt in less than a year. This left the corporation with a cash deficit of $102,000 and liabilities of $98,900. The husband then filed a notice of election to wind up and dissolve the corporation. In spite of the technical propriety of the loan and repayment transactions, the court found that the husband breached his fiduciary duty to the corporation, and that the timing, manner, and results of his compelled repayment of the loans to the corporation was impelled by a motive to destroy the corporation with the secondary motive of depriving his wife of her interest therein. This course of action was inconsistent with the duty of a corporate director and majority shareholder to demonstrate, in his or her transactions with the corporation, inherent fairness from the viewpoint of the corporation and those interested in it. The court stated that holders of half the voting shares of a corporation may elect to wind up and dissolve the corporation, but that right is not absolute. It cannot be exercised to defraud other shareholders or for other improper purposes. Majority shareholders, as fiduciaries, are restricted in the use of their powers. Any use to which they put the corporation must benefit all shareholders proportionately, and must not conflict with the proper conduct of the corporation's business.

[b] Parties in Interest

Associated Boat Indus. v. Marshall (1951) 104 Cal. App. 2d 21, 230 P.2d 379 , provides additional guidelines for identification of "parties in interest," as used in *Corp. Code § 1904*, a term not yet judicially defined. It was an action for declaratory relief by a nonprofit corporation whose membership consisted of builders and distributors of, and dealers in boats, ships, and yachts. The action sought to have certain regulations, adopted by the Yacht and Ship Broker Commissioner and applicable to the membership of the association, declared invalid. The trial court sustained a demurrer to the complaint on the ground that the corporation was not an "interested person" within the meaning of the statute conferring standing to challenge regulations. The question on appeal was whether an incorporated trade association whose members were subject to certain regulations had standing as an "interested person" to challenge the regulations. The court of appeal agreed with the trial court that it did not. Relying on the long-established interpretation of the phrase "interested person" as one with a direct, and not merely consequential interest in litigation, and on the interpretations of *Code Civ. Proc. § 387* as to who may intervene in a civil action, the court concluded that to have standing as an interested person, a person must be in such a position that he will either gain or lose by the direct legal operation and effect of the judgment.

Shareholders and creditors who are required to be given notice of a petition for judicial supervision of a voluntary dissolution proceeding [*Corp. Code § 1904*] certainly have the status of parties in interest whose welfare must be considered by the court in determining whether the assumption of jurisdiction over the corporate dissolution is

necessary. It remains for further judicial interpretation to define the exact meaning of the phrase "parties in interest" in the context of the current General Corporation Law and to further define the parameters of necessity to prompt the court to assume jurisdiction over a voluntary dissolution proceeding.

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Volume 5 Chapters 50-59 CONTRACTS---to---CORPORATIONS
CHAPTER 52 CORPORATIONS
PART II. FORMS
F. DISSOLUTION OF CORPORATIONS

5-52 California Points & Authorities § 52.181

§ 52.181 Supporting Petition for Judicial Supervision of Voluntary Winding Up of Corporation [Corp. Code § 1904]--Corporation Dissolved at Election of Board of Directors [Corp. Code § 1900(b)]

[1] FORM

[*Caption. See § 52.180.*]

JUDICIAL SUPERVISION OF THE DISSOLUTION OF A CORPORATION IN THE PROCESS OF VOLUNTARY WINDING UP IS AUTHORIZED ON PETITION OF _____ [THE CORPORATION *OR* A SHAREHOLDER OR SHAREHOLDERS WHO HOLD SHARES REPRESENTING FIVE PERCENT OR MORE OF THE TOTAL NUMBER OF ANY CLASS OF ITS OUTSTANDING SHARES *OR* ANY SHAREHOLDER OR SHAREHOLDERS OF A CLOSE CORPORATION *or* THREE OR MORE CREDITORS OF THE CORPORATION] IF IT APPEARS NECESSARY FOR THE PROTECTION OF ANY PARTIES IN INTEREST.

A. Jurisdiction of Court. If a corporation is in the process of voluntary winding up, the superior court of the proper county, upon petition of _____ [the corporation *or* a shareholder or shareholders who hold shares representing five percent or more of the total number of any class of outstanding shares *or* any shareholder or shareholders of a close corporation *or* three or more creditors] and upon such notice to the corporation and to other persons interested in the corporation as shareholders and creditors as the court may order, may take jurisdiction over the voluntary winding up proceeding if that appears necessary for the protection of any parties in interest (*Corp. Code § 1904*).

B. Corporation in Process of Winding Up. A corporation is in the process of voluntary winding up if a valid election to wind up has been made (*In re Security Fin. Co. (1957) 49 Cal. 2d 370, 376, 317 P.2d 1*).

C. Commencement of Voluntary Dissolution Proceedings. Voluntary proceedings for winding up the corporation commence upon the adoption of the resolution of the directors of the corporation electing to wind up and dissolve (*Corp. Code § 1903(a)*).

D. Election to Dissolve by Directors. A corporation which has _____ [been adjudicated a bankrupt

or disposed of all its assets and has not conducted any business for a period of five years immediately preceding the adoption of the resolution electing to dissolve the corporation *or* issued no shares] may elect by approval of its board of directors to wind up and dissolve (*Corp. Code § 1900(b)*).

E. "Approval by the Board." "Approved by (or approval of) the board" means approved or ratified by the vote of the board of directors or by the vote of a committee authorized to exercise the powers of the board, except as to matters not within the competence of the committee under *Corp. Code § 311* (*Corp. Code § 151*).

[*Optional*] **F. Jurisdiction Over Dissolution of Foreign Corporation.** Where all the assets, books, and records of a foreign corporation are within California, and no assets, records, or officers of the corporation are in the jurisdiction where it was organized, the California courts may undertake to dissolve the corporation and distribute its assets (*In re Mercantile Guar. Co. (1965) 238 Cal. App. 2d 426, 430-433, 48 Cal. Rptr. 589*).

[*Optional*] **G. "Parties in Interest."** A party in interest is a person with some definite legal right which is threatened, or whose welfare could be directly and adversely affected by the action, proceeding, or transaction under consideration (see *Western Pac. Cal. R.R. Co. v. Southern Pac. Co. (1931) 284 U.S. 47, 51-52, 52 S. Ct. 56, 76 L. Ed. 160*).

[*Optional*] **H. Judicial Supervision Necessary Where Board Unable to Agree on Dissolution Plan.** Judicial supervision of a voluntary dissolution proceeding is necessary where the board of directors cannot agree on a plan of dissolution or liquidation (see *In re O'Brien Mach., Inc. (1964) 224 Cal. App. 2d 563, 565, 36 Cal. Rptr. 782*).

[*Optional*] **I. Judicial Supervision Necessary Where Dissension Causes Substantial Delay in Dissolution.** Judicial supervision of a voluntary dissolution proceeding is necessary where there is evidence that internal dissension within the corporation would cause substantial delay in completing the dissolution proceedings(*In re Security Fin. Co. (1957) 49 Cal. 2d 370, 380-381, 317 P.2d 1*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for voluntary winding up under court supervision when the decision to dissolve was made at the election of the board of directors. Caution is recommended with respect to the use of Paragraph F, Jurisdiction Over Dissolution of Foreign Corporation. As discussed more fully in § 52.181[3][b], it is not certain whether, under current law [*see Corp. Code § 2115(a),(b)*]. California courts have jurisdiction to supervise the dissolution of a foreign corporation, even if all of its assets, books, and records are located in California. While there is no requirement that a memorandum accompany the petition, it may be advisable for counsel to submit one.

When appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law raised.

[b] Related Pleading and Practice Forms

For a form for a certificate of election to wind up and dissolve a corporation, and for a form for a petition for voluntary winding up under court supervision, see California Forms of Pleading and Practice, Ch. 170, *Corporations: Dissolution*

and Winding Up (Matthew Bender).

[3] Discussion of Authorities

[a] Corporation in Process of Winding Up

In re Security Fin. Co. *(1957) 49 Cal. 2d 370, 317 P.2d 1* was a proceeding for judicial supervision of the voluntary dissolution of a closely held corporation. The trial court granted the petition for judicial supervision, and the Supreme Court affirmed the order. The owner of 50 percent of the voting stock in the corporation executed and filed with the corporation his consent to voluntary dissolution. The Supreme Court stated that, in granting his petition for judicial supervision of the winding up and dissolution, the superior court necessarily determined that the election to dissolve by written consent was valid. The Supreme Court further stated that a valid election to dissolve puts the corporation in the position of being in the process of voluntary winding up.

Although the *Security Finance* case dealt with the election to dissolve by a shareholder, it seems clear that election to dissolve by directors, where permitted [*see Corp. Code § 1900(b)*], also has the effect of putting the corporation "in the process of voluntary winding up."

[b] Jurisdiction Over Dissolution of Foreign Corporation

In re Mercantile Guar. Co. *(1965) 238 Cal. App. 2d 426, 48 Cal. Rptr. 589* was an action by the State of California to intervene in the voluntary dissolution proceeding of a foreign corporation doing business in California. Mercantile was a Delaware corporation with its principal place of business in San Francisco. It had 4000 outstanding shares of preferred stock, all of which was entitled to vote, and 4000 outstanding shares of common stock. A majority of the preferred stock was owned by an inactive Delaware corporation (Western) of which only three percent of the shareholders could be located. Mercantile petitioned the superior court for an order appointing a trustee to vote the shares in Mercantile held by Western so that Mercantile could dissolve. Its plan of liquidation proposed that Mercantile assets unclaimed by Mercantile or Western shareholders after a reasonable time be used to pay the arrearages of cumulative dividends to Mercantile preferred shareholders who tendered their shares in a timely manner. Any surplus would be distributed pro rata to Mercantile's common stockholders. The state moved to intervene on the ground that the assets of Mercantile to which Western was entitled on dissolution, should be turned over to the state in accordance with the California Unclaimed Property Law [*Code Civ. Proc. §§ 1500-1582*]. The court granted Mercantile's motion for summary judgment on the state's complaint in intervention and the state appealed. Two questions were presented on appeal: (1) Do the California courts have jurisdiction to wind up the affairs of a foreign corporation as to its property within California? (2) Did the state have an interest in the proceeding so as to make its intervention proper? The court of appeal answered both questions in the affirmative. As to the first issue, the court concluded that where all the assets, books, and records of a corporation are within California and no assets, records, and officers of the corporation are in the jurisdiction where it was organized, the California courts may undertake to dissolve the corporation and distribute its assets. The question then is not whether jurisdiction exists, but whether assumption of jurisdiction is justified by considerations of public policy, efficiency, expedience, and justice to all interested parties. On the second issue, the court concluded that the state was an interested party and entitled to intervene, in light of the fact that a portion of Mercantile's assetson dissolution would go to Western, and on the (at that point hypothetical) dissolution of Western, and a continued failure to locate Western's stockholders, their share of Western's assets would eventually escheat to the State of California if their last known addresses were in California. Therefore, the state had a right to intervene in Mercantile's dissolution proceeding to protect its future escheat rights in unclaimed Western assets.

Caution is recommended with respect to the use of the *Mercantile Guaranty* case as authority for the assumption of jurisdiction by the California courts over the dissolution of a foreign corporation under current law. *Corp. Code § 2115(b)* lists the chapters and sections of the General Corporation Law which apply to foreign corporations having the requisite connections with this state [*see Corp. Code § 2115(a)*]. The provisions of *Corp. Code §§ 1800-2011* relating to

the dissolution of corporations are not mentioned in *Corp. Code § 2115(b)*. It is, therefore, open to question whether the *Mercantile Guaranty* case remains good authority for the assumption of jurisdiction by a California court over the dissolution of a foreign corporation, even if all of its assets, books, and records are located within California, and no assets, records, or officers of the corporation are in the jurisdiction in which it was organized.

[c] Parties in Interest

The meaning of the term "parties in interest" as used in current law [*Corp. Code § 1904*] has not been judicially defined. ***Western Pac. Cal. R.R. Co. v. Southern Pac. Co.*** *(1931) 284 U.S. 47, 52 S. Ct. 56, 76 L. Ed. 160* , was an action for injunction by one railroad company to prevent another railroad company from constructing an extension of its line until permission was obtained from the Interstate Commerce Commission, as required by federal law. The trial court granted an injunction. The court of appeal for the Ninth Circuit reversed, holding that the petitioner for the injunction was not a "party in interest" within the meaning of the Transportation Act. The Supreme Court reversed the court of appeal, holding that the railroad seeking the injunction qualified as a party in interest. To meet that definition, the court said, it was not necessary that the petitioner possess some clear, legal right for which it might ask protection under the rules commonly accepted by courts of equity. It was sufficient that the bill disclosed that the unauthorized and, therefore, unlawful action of the defendant railroad in constructing a competing rail line might directly and adversely affect the complainant's welfare.

[d] Judicial Supervision Necessary Where Board Unable to Agree on Dissolution Plan

In re O'Brien Mach., Inc. *(1964) 224 Cal. App. 2d 563, 36 Cal. Rptr. 782* was a proceeding for court supervision over the voluntary dissolution of a close corporation. After assuming jurisdiction over the dissolution proceeding, the court ordered the appointment of a provisional director to break a deadlock on the corporation's board of directors and also issued an order restraining corporate personnel from selling or otherwise disposing of the corporate assets. The corporation had only two stockholders, each of whom owned 50 percent of the stock. There were only two directors. Both the shareholders and the directors were divided into two factions with the result that the board was deadlocked and business could not be conducted with advantage to the stockholders. Meetings of the board of directors had ceased, and money received from sales of corporate assets was held by the director making the sale to the exclusion of the other director. One of the two stockholders had allegedly made sales of corporate assets without notifying the other stockholder or the board of directors. No plan of dissolution could be agreed upon because of the dissension between the parties. This was considered an appropriate case for the assumption of judicial supervision over the voluntary dissolution of the corporation.

[e] Judicial Supervision Necessary Where Discussion Causes Substantial Delay in Dissolution

In re Security Fin. Co. *(1957) 49 Cal. 2d 370, 317 P.2d 1* is discussed in *§§ 52.180[3][a]* and *52.181[3][a]*. In that case, stockholders appealing the order of the trial court granting a petition for judicial supervision of the voluntary dissolution of a corporation alleged that no showing was made which justified judicial supervision. The Supreme Court affirmed the order of the trial court. It stated that the history of disputes between the parties indicated that it was unlikely that they would agree on a course of action during dissolution that would be in their common interest. The court pointed in particular to evidence of threats by dissenting shareholder-directors to delay dissolution for 10 to 15 years unless the petitioner for dissolution paid them $100,000. Thus, the trial court could reasonably conclude that it was in the best interests of all the parties to have court supervision of the winding up of the corporation.

[4] Additional Authorities

[a] Parties in Interest

Associated Boat Indus. v. Marshall (1951) 104 Cal. App. 2d 21, 230 P.2d 379 , provides additional guidelines for identification of "parties in interest," as used in *Corp. Code § 1904*, a term not yet judicially defined. It was an action

for declaratory relief by a nonprofit corporation whose membership consisted of builders and distributors of, and dealers in boats, ships, and yachts. The action sought to have certain regulations, adopted by the Yacht and Ship Broker Commissioner and applicable to the membership of the association, declared invalid. The trial court sustained a demurrer to the complaint on the ground that the corporation was not an "interested person" within the meaning of the statute conferring standing to challenge regulations. The question on appeal was whether an incorporated trade association whose members were subject to certain regulations had standing as an "interested person" to challenge the regulations. The court of appeal agreed with the trial court that it did not. Relying on the long-established interpretation of the phrase "interested person" as one with a direct, and not merely consequential interest in litigation, and on the interpretations of *Code Civ. Proc. § 387* as to who may intervene in a civil action, the court concluded that to have standing as an interested person, a person must be in such a position that he will either gain or lose by the direct legal operation and effect of the judgment.

Shareholders and creditors who are required to be given notice of a petition for judicial supervision of a voluntary dissolution proceeding [*Corp. Code § 1904*] certainly have the status of parties in interest whose welfare must be considered by the court in determining whether the assumption of jurisdiction over the corporate dissolution is necessary. It remains for further judicial interpretation to define the exact meaning of the phrase "parties in interest" in the context of the current General Corporation Law and to further define the parameters of necessity to prompt the court to assume jurisdiction over a voluntary dissolution proceeding.

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Volume 5 Chapters 50-59 CONTRACTS---to---CORPORATIONS
CHAPTER 52 CORPORATIONS
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F. DISSOLUTION OF CORPORATIONS

5-52 California Points & Authorities § 52.182

§ 52.182 Supporting Motion to Dismiss Complaint Seeking Involuntary Dissolution of Corporation [Corp. Code § 1800]--No Jurisdiction of Subject Matter If Filed by Unauthorized Person

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF MOTION TO
Plaintiff, vs.	)	DISMISS COMPLAINT
_____ [*name*],	)	Date: _____
a Corporation,	)	Time: _____
Defendant	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

DEFENDANT'S MOTION TO DISMISS SHOULD BE GRANTED BECAUSE PLAINTIFF IS NOT A PERSON AUTHORIZED BY CORPORATIONS CODE SECTION 1800 TO FILE AN ACTION FOR INVOLUNTARY WINDING UP AND DISSOLUTION OF THE CORPORATION.

A. Special Appearance. A defendant in an action may make a special appearance by way of a motion to dismiss for lack of subject matter jurisdiction (*Goodwine v. Superior Court (1965) 63 Cal. 2d 481, 484-485, 47 Cal. Rptr. 201, 407 P.2d 1*).

B. Plaintiffs Authorized by Statute. The only persons authorized by statute to file an action for involuntary winding up and dissolution of a corporation that is subject to the provisions of the General Corporation Law are: (1) one-half or more of the directors in office; (2) a shareholder or shareholders holding shares representing not less than one-third of the total number of outstanding shares, or of the outstanding common shares, or of the equity of the corporation, exclusive in each case of shares owned by persons who have participated in the wrongful acts specified in *Corporations Code Section 1800(b)(4)*; (3) any shareholder or shareholders of a close corporation; (4) any shareholder seeking to dissolve the corporation because the period for which it was formed has terminated without being extended; and (5) any other person expressly authorized to do so in the articles (*Corp. Code § 1800(a)*).

[*Optional*] **C. Wrongful Acts Excluding Shares of Owner From Computation.** In determining whether a shareholder holds shares representing one-third of the total outstanding shares, or of the outstanding common shares, or of the equity of a corporation so as to give him or her standing to bring an action for involuntary dissolution of a corporation, the shares owned by persons who have participated in the wrongful acts specified in *Corporations Code Section 1800(b)(4)* are excluded from the total number of outstanding shares before the computation of percentage of ownership is made. The wrongful acts in question are persistent and pervasive fraud, mismanagement, or abuse of authority; persistent unfairness toward any shareholders; or waste or misapplication of corporation property (*Corp. Code §§ 1800(a)(2), 1800(b)(4)*.

D. Strict Construction of Statute Authorizing Action. Statutes permitting persons other than the state to institute an action for involuntary dissolution are in derogation of the common law and must be strictly construed. Only persons enumerated in the statute can bring an action for involuntary dissolution (*Cardoza v. Millington (1956) 142 Cal. App. 2d 26, 34, 297 P.2d 778*).

E. Court Without Jurisdiction. The courts are without jurisdiction to wind up the affairs of a corporation on the suit of an unauthorized person (*Wiseman v. Sierra Highland Mining Co. (1941) 17 Cal. 2d 690, 697, 111 P.2d 646*).

[*Optional*] **F. Constructive Transfer or Surrender of Shares.** An instruction [to the corporation's attorney] that one wishes to be removed from the corporate records as a shareholder immediately amounts to a constructive surrender or abandonment of one's shares [and thus deprives one of standing to maintain an action for involuntary dissolution]. Neither endorsement of the stock certificate nor an actual delivery of the stock is necessary to accomplish the reacquisition of the shares by the corporation (*Simon v. Steelman (1990) 224 Cal. App. 3d 1002, 1006-1007, 274 Cal. Rptr. 218*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion to dismiss a complaint seeking involuntary dissolution of a corporation if the court lacks subject matter jurisdiction because the action was brought by a person other than those set forth in the statute [*Corp. Code § 1800(a)*] as authorized to do so. In legal effect, a motion to dismiss for lack of subject matter jurisdiction is equivalent to a demurrer to the complaint [*Egan v. McCray (1934) 220 Cal. 546, 547, 31 P.2d 1041]* . The advantage of the motion to dismiss is that it may be used when lack of subject matter jurisdiction is not

apparent on the face of the complaint.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law raised.

[b] Related Uses

With appropriate modifications, these points and authorities may also be used in support of a demurrer to the complaint on the ground of no jurisdiction of the subject matter of the action [*Code Civ. Proc. § 430.10(a)*], if lack of jurisdiction of the subject matter appears on the face of the complaint [*see Code Civ. Proc. § 430.30(a)*], or a demurrer on the ground of failure to state a cause of action [*Code Civ. Proc. § 430.10(e)*].

[c] Related Pleading and Practice Forms

For a form for a complaint for involuntary dissolution of a corporation, see California Forms of Pleading and Practice, Ch. 170, *Corporations: Dissolution and Winding Up*, § 170.53.

For a notice of motion to dismiss proceedings for lack of jurisdiction of the subject matter, see *California Forms of Pleading and Practice, Ch. 324, Jurisdiction: Subject Matter Jurisdiction, § 324.100*.

[3] Discussion of Authorities

[a] Special Appearance

Goodwine v. Superior Court *(1965) 63 Cal. 2d 481, 47 Cal. Rptr. 201, 407 P.2d 1* was a proceeding for a writ of mandate to compel the superior court to vacate an order dismissing a separate maintenance action and to compel the court to take jurisdiction of the action. The separate maintenance action was commenced in a California court by Mrs. Goodwineagainst Mr. Goodwine who was domiciled in Mexico. Quasi-in-rem jurisdiction was obtained over Mr. Goodwine by the levy of a writ of attachment on property owned by him in California, by service by publication, and by personal service on Mr. Goodwine in Mexico. Mr. Goodwine made an appearance and moved to quash the writ of attachment, the service of summons and complaint, and to dismiss the action on the ground that the California court lacked jurisdiction. His theory was that, as in the case of divorce, subject matter jurisdiction of a separate maintenance action required domicile of at least one party in the forum state. Since, he alleged, neither he nor Mrs. Goodwine was a California domiciliary, the California court lacked subject matter jurisdiction of the action. The trial court granted Goodwine's motion, and dismissed the action. Mrs. Goodwine then filed a petition for a writ of mandate to compel the trial court to vacate its order dismissing the action. She claimed that by moving to dismiss the action, her husband had made a personal appearance, giving the trial court personal jurisdiction over him. The Supreme Court stated that a separate maintenance action, being essentially an action for a money judgment, can be brought where neither party is domiciled, if personal jurisdiction or quasi-in-rem jurisdiction over the defendant is obtained. However, a defendant should be allowed to make a special appearance to challenge subject matter jurisdiction, even if his or her challenge is found to be invalid, without making a general appearance, and, thus, giving the court personal jurisdiction over him or her. The Supreme Cot granted the writ of mandate and remanded to the trial court for consideration of the application of forum non conveniens, with the alternative of proceeding on the basis of quasi-in-rem jurisdiction (*63 Cal. 2d 481, 484-485)* .

[b] Strict Construction of Statute Authorizing Action

Cardoza v. Millington *(1956) 142 Cal. App. 2d 26, 297 P.2d 778* was an action to reform a preincorporation agreement and to dissolve a corporation. The corporation was a close corporation, and its stock was owned by Cardoza and Millington. Cardoza, Millington, and Payne were directors. The business of the corporation was a sport shop, which had previously been run by Cardoza and Millington as a partnership. During the period of the partnership, both partners

had an equal say in running the business. When the partners decided to incorporate, wording of a "preincorporation agreement," which governed the issuance of stock, gave Millington slightly more stock than Cardoza. Millington and Payne, over Cardoza's objections, voted to install Millington as general manager of the sport shop and Cardoza was, thereafter, treated as an employee rather than a co-owner. He brought an action to reform the wording of the preincorporation agreement on the alternative grounds of fraud and mistake. He also sought to dissolve the corporation. The trial court gave judgment for Cardoza on both the reformation count and the dissolution count. The court of appeal affirmed as to reformation of the agreement, but reversed the judgment as to dissolution of the corporation. The court stated that prior to the enactment of former Civ. Code § 404 [the predecessor to former Corp. Code § 4650 and current *Corp. Code § 1800(a)*], only the state and not individual stockholders could maintain an action for involuntary dissolution of a corporation. When the right to institute involuntary dissolution proceedings was created in shareholders by former Civ. Code § 404, it was in derogation of the common law, and that section and its successors must be strictly construed. Under the statute in effect at that time, former Corp. Code § 4650, Cardoza was eligible to bring an action for involuntary dissolution only if he had been a record holder of his shares for at least six months. Since he had only owned his shares for five months when the action was commenced, he was ineligible to seek involuntary dissolution, and that count of his complaint was required to be dismissed (34).

It should be noted that under current law [*Corp. Code § 1800(a)*], the six-month ownership requirement has been abrogated. Further, any shareholder of a close corporation [*see Corp. Code § 158*] can bring an action for involuntary dissolution without regard to percentage of shares owned or duration of ownership.

[c] Court Without Jurisdiction

Wiseman v. Sierra Highland Mining Co. *(1941) 17 Cal. 2d 690, 111 P.2d 646* was an action brought by persons claiming to be minority stockholders in certain corporations, to quiet title to mining claims, declare a trust, obtain an accounting, injunctive relief and the appointment of a receiver, and to wind up corporate affairs. The plaintiffs had advanced money for small amounts of stock in a California corporation, the principal assets of which were certain mining claims, not fully paid for. To facilitate the financing and operation of the mining claims, the corporation leased the claims to one of its directors who in turn assigned the lease to a Nevada corporation in exchange for shares of its stock. The Nevada corporation also acquired shares of the California corporation, paying for them with shares of its stock. None of the plaintiffs owned stock in the Nevada corporation. The plaintiffs were apparently disgruntled because the California corporation failed to show a profit and had its corporate franchise suspended for tax delinquency. After examining the transactions between the California and Nevada corporations and the actions of the directors, the court concluded that no fraud had been perpetrated, that the directors of both corporations had been free to act independently, and had not been dominated by the director to whom the mining claims had been leased, and that all the dealings in question had been for the benefit of the corporations and the mining enterprise. In denying the plaintiffs the relief they sought, the court pointed out that the general rule is that courts have no jurisdiction to wind up the affairs of a corporation on the suit of a private person. The plaintiffs, who owned no stock in the Nevada corporation, andapparently did not come within the statutory categories of those entitled to dissolve the California corporation, were impliedly in the posture of private persons vis-a-vis both corporations (*17 Cal. 2d 690, 697)* .

[d] Constructive Transfer or Surrender of Shares

In ***Simon v. Steelman*** *(1990) 224 Cal. App. 3d 1002, 274 Cal. Rptr. 218* , plaintiff and defendant had formed a corporation in 1979, each owning 50 percent of the shares. In April, 1986, plaintiff was named in a paternity suit. The corporation's attorney testified to a telephone conversation with plaintiff in which plaintiff indicated he did not want to appear on the records of the corporation as a shareholder and that he wanted to transfer his shares to defendant, and asked the attorney to backdate the documents a couple of months. The attorney prepared a new stock certificate (certificate No. 3) naming defendant as sole shareholder. The attorney drew a line across plaintiff's original stock certificate and wrote "canceled" on it. The transfer papers were forwarded to plaintiff for both plaintiff's and defendant's signatures. Plaintiff received certificate No. 3 but neither signed it nor showed it to defendant. In June, 1986, the

attorney wrote to plaintiff inquiring about the certificate, but received no reply. In December, 1986, plaintiff testified in the child support phase of the paternity suit that he did not own any interest in the corporation, was no longer an owner or partner, but was vice president. Defendant testified that plaintiff said it would be better for defendant to have the stock rather than the plaintiff in the paternity action. In June, 1987, defendant terminated plaintiff's employment with the corporation and had a set of corporate minutes prepared declaring himself the sole shareholder. Plaintiff brought an action for involuntary dissolution. The trial court concluded that plaintiff had canceled his shares and did not have standing under *Corp. Code § 1800(a)* to maintain the action, and entered judgment accordingly. Plaintiff appealed.

In a three-to-two decision, the court of appeal affirmed the judgment on the ground that plaintiff did not have standing to maintain an action for involuntary dissolution because plaintiff had constructively transferred his shares, creating, in the dissent's view, the doctrine of transfer by perjury (*224 Cal. App. 3d 1002, 1005-1006, 1008)* . Plaintiff argued that the fact that he did not sign the corporate documents indicated he was only considering divesting himself of his interest and did not actually do so. The court said substantial evidence supported the trial court's conclusion that plaintiff no longer wished to be a shareholder and intended for that change to be effective immediately (*224 Cal. App. 3d 1002, 1005-1006)* .

Plaintiff also argued that under former Com. Code § 8309 (which provided that endorsement of a certificated security is not effective until the certificate is delivered; *now see* Corp. Code § 8304), the transfer could not be complete until the certificate had been endorsed and delivered to defendant. The court disagreed, agreeing with the trial court that plaintiff had abandoned his interest in the stock at the time of the phone conversation with the corporation's attorney. An actual delivery of the stock to defendant was not necessary because plaintiff did not transfer the stock to defendant but surrendered it to the corporation. *Corp. Code § 510(a)* provides that when a corporation purchases, redeems, acquires by way of conversion to another class or series, or otherwise acquires its own shares, those shares are restored to the status of authorized by unissued shares, unless the articles prohibit reissuance thereof (*224 Cal. App. 3d 1002, 1006)* . The court said the phrase "otherwise acquires its own shares" recognizes a corporation's reacquisition of its outstanding shares through surrender by a stockholder. Plaintiff's instruction to the corporation's attorney constructively surrendered the stock (*224 Cal. App. 3d 1002, 1006-1007)* .

The court also said that *Civ. Code § 3529* (maxim that that which ought to have been done is to be regarded as done in favor of him or her to whom, and against him or her from whom, performance is due) provided another reason to affirm the trial court's judgment. Plaintiff surrendered his stock, as confirmed by his testimony in the paternity action. Equity thus provides that that which should have been done to accomplish that end is deemed to have been done. Plaintiff surrendered his stock so that it would not be considered by the court in determining his child support obligation and cannot be heard to complain (*224 Cal. App. 3d 1002, 1007)* .

[4] Additional Authorities

[a] Plaintiffs Authorized by Statute

In *Kline Hawkes California v. Superior Court (2004) 117 Cal. App. 4th 183, 11 Cal. Rptr. 3d 581* , preferred shareholders filed an action against a corporation for involuntary dissolution and liquidation. They claimed that their status as owners of preferred stock gave them standing under *Corp. Code § 1800(a)(2)(iii)* to file the petition. The trial court found that they did not have standing and sustained the corporation's demurrer without leave to amend.

The court of appeal issued an alternative writ to address the question of whether plaintiffs alleged facts sufficient to satisfy the statutory standing requirement. It concluded that, although they failed to correctly describe the equity of the corporation for purposes of *Corp. Code § 1800(a)(2)(iii)*, they might be able to do so, and remanded with directions to sustain the demurrer with leave to amend. The court reviewed the history of *Corp. Code § 1800* and its predecessor, former Corp. Code § 4650. Reviewing the nature of the corporation's equity and of preferred stock with a liquidation preference, it noted that although the trial court had correctly concluded that equity equals net assets, plaintiffs'

percentage ownership of thecorporation's net assets could not be shown by the amount that they had paid for their shares because one paying more for the "same share" was not entitled to a greater ownership interest than one who had paid less for the same share. The court of appeal held that the trial court's ruling did not take the facts of plaintiffs' liquidation preference into account. Those shares had a liquidation price of $100 per share and were preferred over common shares in the distribution of the corporation's assets. It concluded that a proper interpretation of *Corp. Code § 1800(a)(2)(iii)* gave plaintiffs the right to file a petition for dissolution if their preferred shares represented 331/3 percent of the corporation's equity (*117 Cal. App. 4th 183, 196)* .

Buss v. J. O. Martin Co. (1966) 241 Cal. App. 2d 123, 50 Cal. Rptr. 206 was a proceeding for the involuntary dissolution of a corporation. The two original plaintiffs owned more than one-third of the outstanding shares, but the majority of those shares were preferred shares without voting rights. A judgment of dismissal was entered after a demurrer to the first amended complaint was sustained without leave to amend. The plaintiffs appealed the judgment of dismissal. Pending appeal, the corporation redeemed all of its outstanding preferred shares, including those owned by one of the plaintiffs, which had been counted to make up the requisite one-third percent stock ownership for prosecuting the involuntary dissolution action. The defendants moved to dismiss the appeal. Two questions were presented: (1) In order to file a complaint for involuntary dissolution under former Corp. Code § 4650 [*now see Corp. Code § 1800(a)*] on the basis of ownership of one-third of the outstanding shares, was it necessary that the plaintiffs' shares be voting shares? (2) Was the appeal moot following the retirement of the preferred shares which had gone toward making up the jurisdictional number of shares? The court of appeal answered both questions in the negative. It stated that a fair and reasonable construction of former Corp. Code § 4650 gave the holder or holders of one-third of the outstanding stock, with or without voting rights, the right to bring an action for involuntary dissolution (*241 Cal. App. 2d 123, 130)* . On the second question, the court pointed out that the plaintiffs had sufficient stock to file the complaint and invoke the jurisdiction of the superior court to order a dissolution. Jurisdiction having attached, it was not defeated by subsequent events that might have prevented jurisdiction had they occurred prior to the commencement of the action. Although former Corp. Code § 4650 required that the plaintiffs be holders of one-third of the outstanding shares to file the complaint, there was no statutory requirement that they remain holders of one-third of the shares throughout the maintenance of the suit. Finding the sustaining of the general demurrer to the complaint to have been error, the court refused to dismiss the appeal, except as to the plaintiff who had withdrawn from the action, and remanded to the trial court with directions to overrule the general demurrer (*241 Cal. App. 2d 123, 136-137)* .

It should be noted that under current law, if a corporation qualifies as a close corporation [*see Corp. Code § 158*], any shareholder may bring an action for involuntary dissolution without regard to the number of shares he or she owns [*Corp. Code § 1800(a)(2)*].

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5-52 California Points & Authorities § 52.183

§ 52.183 Supporting Motion for Summary Judgment--Involuntary Dissolution Not Reasonably Necessary to Protect Shareholder Rights or Interests [Corp. Code § 1800(b)(5)]

[1] FORM

[*The following may be included in a memorandum in support of a motion for summary judgment, or in a trial or appellate brief if appropriate.*]

SUMMARY JUDGMENT FOR _____ [DEFENDANT(S) *or* PLAINTIFF(S)] IS PROPER BECAUSE _____ [PLAINTIFF(S) *or* DEFENDANT(S)] FAILED TO RAISE A TRIABLE ISSUE OF MATERIAL FACT REGARDING THEIR CLAIM THAT INVOLUNTARY DISSOLUTION IS APPROPRIATE UNDER CORPORATIONS CODE SECTION 1800(b)(5) AS REASONABLY NECESSARY FOR THE PROTECTION OF THEIR RIGHTS OR INTERESTS.

A. Summary Judgment. Any party may move for summary judgment in any action or proceeding if it is contended that _____ [the action has no merit *or* there is no defense to the action] (*Code Civ. Proc. § 437c*).

B. Liquidation Must be Reasonably Necessary to Protect Shareholder Rights or Interests. Involuntary dissolution under *Corp. Code § 1800(b)(5)* is appropriate only when liquidation is reasonably necessary for the protection of the rights or interests of the complaining shareholder(s) (*Stuparich v. Harbor Furniture Manufacturing, Inc. (2000) 83 Cal. App. 4th 1268, 1279, 100 Cal. Rptr. 2d 313*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for summary judgment in an action brought for involuntary dissolution of a corporation with 35 or fewer shareholders pursuant to *Corp. Code § 1800(b)(5)*. The ground for the motion is that involuntary dissolution isinappropriate because the opposing party has not raised a triable issue of material fact as to whether involuntary dissolution is reasonably necessary for the protection of the rights or interests of

the complaining shareholders. This memorandum may be modified as necessary for use in any other context in which this issue may arise.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law raised. In addition, counsel should attach affidavits or declarations that support the motion [*Code Civ. Proc. § 438*].

[3] Discussion of Authorities

[a] Liquidation Must be Reasonably Necessary to Protect Shareholder Rights or Interests.

In ***Stuparich v. Harbor Furniture Manufacturing, Inc.*** *(2000) 83 Cal. App. 4th 1268, 100 Cal. Rptr. 2d 313* , two sisters who were minority shareholders of a closely held family corporation filed a verified complaint against the corporation and other family member shareholders, seeking involuntary dissolution pursuant to *Corp. Code § 1800(b)(5)*. The corporation moved for summary judgment, arguing that dissolution is a drastic remedy which was inappropriate because the only factual basis for the action was plaintiffs' desire to cease involvement with the corporation. Plaintiffs opposed the motion, arguing that dissolution was necessary because the relationship between the shareholder siblings had deteriorated to the point of violence and made it impossible for them to work together as a family or corporate entity. Further, plaintiffs claimed that their brother (who owned the majority of voting shares) and his wife and son drew salaries from the money-losing furniture manufacturing operations of the corporation, and for that reason had a vested interest in continuing its operation despite plaintiffs' wishes. The trial court granted the motion for summary judgment, finding that plaintiffs' rights were not in need of protection because plaintiffs had consistently received the dividends owned them as shareholders.

The court of appeal affirmed, holding that the trial court did not err in finding that the drastic remedy of liquidation was not reasonably necessary for the protection of plaintiff shareholders. It first stated that the distribution of voting shares in the corporation was consistent with California law and did not in itself present a "reasonable" necessity for dissolution. It also stated that plaintiffs' other arguments regarding their treatment as "second class" shareholders were related. As holders of a minority of the voting shares, they were not entitled to substitute their business judgment for their brother's. They did continue to receive benefits from the corporation in the form of dividends until they instituted the litigation. Although the family animosity was unfortunate, the situation was not unique to this close corporation, and due to the extreme family hostility plaintiffs had removed themselves from participation in board meetings. There is nothing in the statutory language, and plaintiffs cited no authority, that requires either the board of directors or the majority shareholders to buy the shares of the minority to avoid dissolution (*Stuparich v. Harbor Furniture Manufacturing, Inc. (2000) 83 Cal. App. 4th 1268, 1277-1279, 100 Cal. Rptr. 2d 313*).

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5-52 California Points & Authorities § 52.184

§ 52.184 Supporting Motion by Shareholder or Creditor to Intervene [Code Civ. Proc. § 387; Corp. Code § 1800(c)]--In Action for Involuntary Dissolution of Corporation [Corp. Code § 1800(a)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF MOTION TO
Plaintiff,	)	INTERVENE IN ACTION FOR INVOLUNTARY
vs.	)	DISSOLUTION OF CORPORATION
_____ [*name*], a Corporation,	)	Date: _____
Defendant, _____ [*name*],	)	Time: _____
Intervener.	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

A _____ [SHAREHOLDER *or* CREDITOR] HAS AN UNQUALIFIED RIGHT TO INTERVENE IN AN ACTION FOR INVOLUNTARY DISSOLUTION OF A CORPORATION AT ANY TIME BEFORE THE HEARING ON WINDING UP AND DISSOLUTION.

A. Statutory Authority At any time prior to the trial of an action for involuntary dissolution of a corporation any _____ [shareholder *or* creditor] may intervene therein (*Corp. Code § 1800(c)*).

B. Right to Intervene Unqualified. The provision of the Corporations Code permitting _____

[shareholders *or* creditors] to intervene in an action for involuntary dissolution of a corporation gives any _____ [shareholder *or* creditor] the unqualified right to intervene (*Hagan v. Superior Court (1960) 53 Cal. 2d 498, 503, 2 Cal. Rptr. 288, 348 P.2d 896*).

C. Intervention Takes Place When Order Is Made. An intervention takes place when the order is made permitting the intervenor to become a party (*Ah Goon v. Superior Court (1882) 61 Cal. 555, 556)* .

D. Intervention Before Hearing Is Timely. Intervention by a _____ [shareholder *or* creditor] in an involuntary dissolution proceeding before the hearing is held is timely (*Rosner v. Benedict Heights, Inc. (1963) 219 Cal. App. 2d 1, 5-6, 32 Cal. Rptr. 764*).

[*Optional*] **E. Right of Shareholder Not of Record to Intervene.** A shareholder whose shares are not of record because the corporate directors refuse to register them may intervene in an action to dissolve the corporation (*Rosner v. Benedict Heights, Inc. (1963) 219 Cal. App. 2d 1, 4-5, 32 Cal. Rptr. 764*).

[*Optional*] **F. Intervention After Default But Before Hearing Is Timely.** A _____ [shareholder *or* creditor] may intervene in a proceeding for involuntary dissolution of a corporation even after the corporation has defaulted to the complaint. At that point, it is still necessary that a hearing be held to determine whether or not the corporation should be wound up and dissolved. Intervention by a _____ [shareholder *or* creditor] before that hearing is timely (*Rosner v. Benedict Heights, Inc. (1963) 219 Cal. App. 2d 1, 5-6, 32 Cal. Rptr. 764*).

[*Optional*] **G. Security for Costs Not Required.** A _____ [shareholder *or* creditor] cannot be required to post security for costs as a condition for intervening in proceedings for involuntary dissolution of a corporation (*Hagan v. Superior Court (1960) 53 Cal. 2d 498, 502-504, 2 Cal. Rptr. 288, 348 P.2d 896*).

[*Optional*] **H. Ex Parte Motion Permissible.** A motion for leave to intervene in a pending action may be made ex parte (*Marc Bellaire, Inc. v. Fleischman (1960) 185 Cal. App. 2d 591, 595, 8 Cal. Rptr. 650*).

[*Optional*] **I. Right to Bring Separate Does Not Preclude Intervention.** The fact that the intervenor may protect his/her interest by bringing a separate action does not defeat his/her right to intervene (*Elms v. Elms (1935) 4 Cal. 2d 681, 685, 52 P.2d 223*).

[*Optional*] **J. Timely Intervention Does Not Depend on Service of Complaint.** An intervention takes place when the order is made permitting the intervenor to become a party, not when the complaint in intervention is served (Ah Goon v. Superior Court (1882 *61 Cal. 555, 556)* .
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion by a shareholder or creditor for leave to intervene in an action for involuntary dissolution of a corporation. Caution is recommended with respect to the use of Paragraph E, Right of Shareholder Not of Record to Intervene. As discussed more fully in § 52.184[3][d], the current definition of

"shareholder" [*Corp. Code § 185*] may preclude intervention pursuant to *Corp. Code § 1800(c)* by one who is not a holder of record of shares.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law raised. In addition, counsel must have on file a complaint in intervention or file the complaint in intervention with the notice of motion for leave to intervene.

[b] Related Pleading and Practice Forms

For a notice of motion for order granting leave to intervene in pending action, see California Forms of Pleading and Practice, Ch. 395, *Parties* (Matthew Bender).

[3] Discussion of Authorities

[a] Right to Intervene Unqualified

Hagan v. Superior Court *(1960) 53 Cal. 2d 498, 2 Cal. Rptr. 288, 348 P.2d 896* was a proceeding for a writ of prohibition to restrain the superior court from entering judgment in involuntary dissolution proceedings and to prevent the court from enforcing its order requiring the petitioners to post security. The involuntary dissolution proceedings were commenced by four of five directors of Benedict Heights, Inc., a California corporation. The corporation defaulted. Over a year after entry of the default, alleged shareholders in the corporation learned of the proceedings and sought and were granted leave to intervene. In their complaint in intervention, plaintiffs sought the following relief; an order compelling the defendants to register their shares on the corporation's books and issue new certificates evidencing the shares; an order setting aside the default of Benedict Heights, Inc., and permitting the plaintiffs to answer in its behalf; an injunction restraining further expenditure of corporate assets pending trial; and an order requiring the posting of bond pendente lite in the amount of the corporation's assets. On motion by the defendants, the trial court ordered the plaintiffs in intervention to post $3,500 as security for costs. They refused to do so and commenced the proceeding for a writ of prohibition. The Supreme Court granted the writ. The Court stated that the statutory requirement of posting costs applied only to shareholders' derivative suits. Former Corp. Code § 4653 [*see now Corp. Code § 1800(c)*] gave shareholders and creditors an unqualified right to intervene in dissolution proceedings unburdened by any statutory requirement of posting security for costs. The special protection of the security for costs statute in a shareholders' derivative suit is not needed in a dissolution proceeding. In such a proceeding, the court has broad supervisory powers and can make such protective orders as justice and equity require. However, in requiring the plaintiffs to pot security, the trial court exceeded its jurisdiction (*53 Cal. 2d 498, 502-504)* .

[b] Intervention Takes Place When Order Is Made

Ah Goon v. Superior Court *(1882) 61 Cal. 555* was a proceeding for a writ of prohibition to restrain the superior court from proceeding further with an intervention in a civil action. The motion to intervene was made and the order permitting intervention was entered before the trial began. However, before the complaint in intervention could be served, the plaintiff and defendant proceeded to trial. It was contended that failure to serve the complaint in intervention before trial voided the intervention. The Supreme Court disagreed, and refused to grant the writ. It stated that an intervention takes place when the order is made permitting the intervenor to become a party. This can take place at any time before trial. A trial before service of the complaint in intervention may be irregular, but it does not have a jurisdictional effect, and does not void the intervention (*61 Cal. 555, 556)* .

[c] Intervention Before Hearing Is Timely

Rosner v. Benedict Heights, Inc. *(1963) 219 Cal. App. 2d 1, 32 Cal. Rptr. 764* was a proceeding for the involuntary dissolution of a corporation. Certain shareholders were granted leave to intervene and judgment was entered in their favor. The directors of the corporation who had initiated the involuntary dissolution proceedings appealed. The court of

appeal affirmed the judgment of the trial court. Prior to the intervention, the corporation had defaulted to the complaint seeking involuntary dissolution. On appeal, the appellants contended that corporate default to a complaint seeking involuntary dissolution was equivalent to a trial, and that because the intervenors had moved to intervene after the default, the order permitting intervention was a nullity and the complaint in intervention was void. The court of appeal rejected this contention. It stated that in spite of corporate default, a hearing is still necessary to determinewhether the corporation should be wound up and dissolved. The issues inherent in a proceeding for involuntary dissolution cannot be adjudicated merely on the entry of the default of the corporation. Any shareholder intervention before that mandatory hearing is timely in spite of the previous corporate default. At most, the corporate default in the *Rosner* case could be construed as admitting that a ground for the winding up and dissolution of the corporation existed (*219 Cal. App. 2d 1, 5-6)* .

[d] Right of Shareholder Not of Record to Intervene

Rosner v. Benedict Heights, Inc. *(1963) 219 Cal. App. 2d 1, 32 Cal. Rptr. 764* was a proceeding for the involuntary dissolution of a corporation. Certain persons, allegedly the owners of shares, although not shareholders of record, sought and were granted leave to intervene. In their complaint in intervention they alleged that the directors of the corporation, who had initiated the involuntary dissolution proceeding, had refused to recognize them as shareholders and thus prevented them from participating in corporate affairs. The intervenors sought determination of the ownership of the disputed shares and the record transfer of the shares to them. The trial court entered a judgment determining that the intervenors were the owners of the shares, and ordering the transfer of the shares and the reissuance of stock certificates in accordance with its determination of ownership. The court of appeal affirmed. On appeal, the directors of the corporation contended that the intervenors were not entitled to intervene because they were not shareholders of record. The court of appeal disagreed, holding that ownership of shares, whether or not of record, gives a person sufficient interest in the subject matter to intervene in an action for involuntary dissolution of a corporation. It stated that the intervenors' claims were appropriately raised in the involuntary dissolution proceedings to ensure recognition of their rights during the pending distribution of the corporate assets (*219 Cal. App. 2d 1, 4-5)* .

Caution is recommended with respect to the use of the *Rosner* case as authority for the right of a shareholder not of record to intervene in a proceeding for involuntary dissolution of a corporation. The *Rosner* case was decided under pre-1977 law. Current law continues to permit intervention in involuntary dissolution proceedings by "any shareholder or creditor" [*Corp. Code § 1800(c)*; *see* former Corp. Code § 4653]. However, under current law, the definition of "shareholder" is limited to a holder of record of shares [*Corp. Code § 185*]. It is not clear, therefore, that a nonrecord shareholder in the position of the *Rosner* intervenors would be permitted under current law to intervene in a proceeding for involuntary dissolution. It might be possible for such a person to invoke the general intervention provisions of *Code Civ. Proc. § 387*, which provides that at any time before trial, any person who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both, may intervene in an action or proceeding. For points and authorities in support of an application to intervene pursuant to *Code Civ. Proc. § 387*, see Ch. 124, *Intervention* . However, counsel should bear in mind that *Code Civ. Proc. § 387* may not apply to a dissolution proceeding because of the general rule of statutory construction that when general and particular statutory provisions are inconsistent, the particular provision prevails over the general [*Code Civ. Proc. § 1859*].

[e] Intervention After Default But Before Hearing Is Timely

Rosner v. Benedict Heights, Inc. *(1963) 219 Cal. App. 2d 1, 32 Cal. Rptr. 764* is *discussed in § 52.184[3][c]*.

[f] Security for Costs Not Required

Hagan v. Superior Court *(1960) 53 Cal. 2d 498, 2 Cal. Rptr. 288, 348 P.2d 896* is *discussed in § 52.184[3][a]*.

[g] Ex Parte Motion Permissible

Marc Bellaire, Inc. v. Fleischman *(1960) 185 Cal. App. 2d 591, 8 Cal. Rptr. 650* was an action for declaratory relief by Marc Bellaire, Inc., seeking judicial construction of a written contract of employment between the corporation and one Fleischman, and of an alleged oral modification of the contract. Previous to the institution of the declaratory relief action, the Division of Labor Law Enforcement, as assignee of certain employees of Fleischman in another venture, had obtained a judgment against Fleischman. In order to satisfy the judgment in favor of the Division, Fleischman assigned to it all unpaid wages due him from Marc Bellaire, Inc., under the contract. The corporation had notice that Fleischman had assigned his right to wages to the Division. Then the corporation commenced the declaratory relief action against Fleischman. It alleged that the written contract of employment between it and Fleischman had been orally modified with the effect that no wages were owing to Fleischman for the period of his work for the corporation. The Division made an ex parte request to intervene in the action, which was granted. It then filed an answer in intervention and a cross complaint against the corporation. Fleischman then defaulted. At trial, the court found that there had been no oral modification of the employment contract and that Fleischman had performed all his duties under the contract. It ordered that the intervenor (the Division, as assignee of Fleischman's wage claims) recover from the corporation the amount of unpaid wages plus interest. The corporation appealed on several grounds. The court of appeal upheld the judgment, holding that the application for leave to intervene was properly made ex parte, and that under the circumstances, Fleischman's default did not preclude theDivision from obtaining the relief it sought as intervenor on the side of defendant Fleischman (*185 Cal. App. 2d 591, 595)* .

[h] Right to Bring Separate Action Does Not Preclude Intervention

Elms v. Elms *(1935) 4 Cal. 2d 681, 52 P.2d 223, 102 ALR 811* was a divorce action in which the adult children of the parties filed a complaint in intervention. They alleged that they had an interest in certain real property standing in the names of their parents because of contributions toward the purchase price and the satisfaction of liens on the property. The wife alleged the property to be community property. A demurrer to the complaint in intervention was sustained and the children (intervenors) appealed. The Supreme Court reversed. It held that if neither party to a divorce action brings in a third party claimant to property of the spouses, that claimant should be permitted to intervene. Furthermore, the Court stated that the fact the intervenors had the option of bringing a separate action to protect their interests did not defeat their right to intervene in the divorce action (*4 Cal. 2d 681, 685)* .

[i] Timely Intervention Does Not Depend on Service of Complaint

Ah Goon v. Superior Court *(1882) 61 Cal. 555* is *discussed in § 52.184[3][b].*

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Volume 5 Chapters 50-59 CONTRACTS---to---CORPORATIONS
CHAPTER 52 CORPORATIONS
PART II. FORMS
F. DISSOLUTION OF CORPORATIONS

5-52 California Points & Authorities § 52.185

§ 52.185 Supporting Petition for Determination of Identity of Directors or for Appointment of Directors to Wind up Affairs of Corporation [Corp. Code § 2003]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM IN SUPPORT OF PETITION
In the Matter of	)	FOR _____ [DETERMINATION
_____,	)	OF IDENTITY OF DIRECTORS *or* APPOINT-
a Corporation,	)	MENT OF DIRECTORS TO WIND UP AFFAIRS]
In the Process of Winding	)	OF CORPORATION
Up and Dissolution	)	Date: _____
	)	Time: _____
	)	Location: _____
		[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

WHEN A CORPORATION IS IN THE PROCESS OF DISSOLUTION AND _____ [THE IDENTITY OF THE DIRECTORS IS IN DOUBT *or* THE RIGHT OF THE DIRECTORS TO HOLD OFFICE IS IN DOUBT *or* THE DIRECTORS ARE DEAD *or* THE DIRECTORS ARE UNABLE TO ACT *or* THE DIRECTORS FAIL OR REFUSE TO ACT *or* THE WHEREABOUTS OF THE DIRECTORS CANNOT BE ASCERTAINED], THE SUPERIOR COURT HAS JURISDICTION TO [DETERMINE THE IDENTITY OF THE DIRECTORS *or* APPOINT DIRECTORS TO WIND UP THE AFFAIRS] OF THE CORPORATION.

A. Statutory Authority. When a corporation is in the process of dissolution and _____ [the identity of the directors is in doubt *or* the right of the directors to hold office is in doubt *or* the directors are dead *or* the directors are unable to act *or* the directors fail or refuse to act *or* the whereabouts of the directors cannot be ascertained] any interested person may petition the superior court of the proper county to _____ [determine the identity of the directors *or* appoint directors to wind up the affairs of the corporation], after hearing upon notice to those persons as the court may direct (*Corp. Code § 2003*).

[*Optional*] **B. "Interested Person."** An "interested person" is one who has a direct and not merely consequential interest in the proceeding. An interested person is one who has a real interest in the ultimate adjudication of the matter being considered (*see Associated Boat Indus. v. Marshall (1951) 104 Cal. App. 2d 21, 22, 230 P.2d 379*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be used in support of a petition for determination of the identity of directors during a dissolution proceeding, or for the appointment of directors to wind up the affairs of the corporation, in case they are missing, or unable to act. While there is no requirement that a memorandum accompany the petition, it may be advisable for counsel to submit one.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law raised.

[b] Related Pleading and Practice Forms

For a petition for appointment of directors to wind up corporation, an order fixing the time and notice of the hearing of petition, and an order appointing directors to wind up the affairs of a corporation, see California Forms of Pleading and Practice, Ch. 160, *Corporations* (Matthew Bender).

[3] Discussion of Authorities

[a] Interested Person

Associated Boat Indus. v. Marshall *(1951) 104 Cal. App. 2d 21, 230 P.2d 379* was an action for declaratory relief by a nonprofit corporation whose membership consisted of builders and distributors of, and dealers in, boats, ships, and yachts. The action sought to have certain regulations, adopted by the Yacht and Ship Broker Commissioner and applicable to the membership of the association, declared invalid. The trial court sustained a demurrer to the complaint on the ground that the corporation was not an "interested person" within the meaning of the statute conferring standing to challenge regulations. The court of appeal affirmed. The question on appeal was whether an incorporated trade association whose members were subject to certain regulations had standing as an "interested person" to challenge the regulations. The court of appeal agreed with the trial court that it did not. Relying on the long-established interpretation of the phrase "interested person" as one with a direct, and not merely consequential interest in litigation, the court concluded that to have standing as an interested person, a person must be in such a position that he will either gain or

lose by the direct legal operation and effect of the judgment.

It appears clear that the definition of "interested person" as one with a direct, and not merely consequential interest in the litigation transcends the fact situation of the *Associated Boat Indus.* case. The phrase "interested person" has been similarly construed in widely varying statutory contexts [*see In re Eugene W. (1972) 29 Cal. App. 3d 623, 630, 105 Cal. Rptr. 736* (same interpretation given to words used in statute permitting "any interested person" to petition court for judgment declaring minor free from parental control)].

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5-52 California Points & Authorities § 52.186

§ 52.186 Supporting Motion [Code Civ. Proc. § 1003] to Approve Intermediate Accounts of Directors [Corp. Code § 1806(d)] and to Determine Claims Against Corporation [Corp. Code § 1806(b)] and Rights of Shareholders to Assets [Corp. Code § 1806(c)]

[1] FORM

[*EITHER*]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF MOTION TO
Plaintiff,	)	APPROVE INTERMEDIATE ACCOUNTS OF DIR-
vs.	)	ECTORS AND TO DETERMINE CLAIMS
_____ [*name*],	)	AGAINST CORPORATION AND RIGHTS OF
a Corporation, Defendant.	)	SHAREHOLDERS TO ASSETS
	)	Date: _____
	)	Time: _____
	)	Location: _____
		[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

[*OR*]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
In the Matter of	)	MEMORANDUM IN SUPPORT OF MOTION TO
_____ _____,	)	APPROVE INTERMEDIATE ACCOUNTS OF DIR-
a Corporation,	)	ECTORS AND TO DETERMINE CLAIMS
In the Process of	)	AGAINST CORPORATION AND RIGHTS OF
Winding Up and	)	SHAREHOLDERS TO ASSETS
Dissolution	)	Date: _____
	)	Time: _____
	)	Location: _____
		[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

[*CONTINUE*]

_____ [DURING THE COURSE OF AN INVOLUNTARY DISSOLUTION PROCEEDINGS *or* IF A COURT HAS ASSUMED JURISDICTION OVER THE VOLUNTARY DISSOLUTION OF A CORPORATION] THE COURT IS AUTHORIZED TO APPROVE THE INTERMEDIATE ACCOUNTS OF DIRECTORS, TO DETERMINE CLAIMS AGAINST THE CORPORATION, AND TO DETERMINE THE RIGHTS OF SHAREHOLDERS TO THE ASSETS.

A. Statutory Authority. _____ [When an involuntary proceeding for winding up has been commenced *or* When the court has assumed jurisdiction over a voluntary winding up proceeding], the jurisdiction of the court includes the determination or compromise of all claims of every nature against the corporation or any of its property, and the determination of the amount of money or assets required to be retained to pay or provide for the payment of claims; the determination of the rights of shareholders and of all classes of shareholders in and to the assets of the corporation; and the presentation and filing of intermediate accounts of the directors and hearing thereon, and the allowance, disallowance, or settlement thereof (*Corp. Code § 1806(b)-(d)*).

[*Optional*] **B. Application of Authority.** The provisions of Chapter 18 of the Corporations Code (*Corporations Code Sections 1800-1809*) governing the powers of the court during an action forinvoluntary dissolution of a corporation, except Corporations Code *Sections 1800-1801*, apply in court supervised proceedings for voluntary dissolution (*Corp. Code § 1904*).

C. Right of Shareholders to Assets. After determining that all the known debts and liabilities of a corporation in the process of winding up have been paid or adequately provided for, the board must distribute all the remaining corporate assets among the shareholders according to their respective rights and preferences. If the winding up is by court proceeding or subject to court supervision, the distribution shall not be made until after the expiration of any period for the presentation of claims which has been prescribed by order of the court (*Corp. Code § 2004*).

D. Speedy Distribution Required. Distribution of corporate assets to shareholders must be made as soon as

reasonably consistent with the beneficial liquidation of the corporate assets (*Corp. Code § 2006*).

E. Mode of Distribution to Shareholders. Distribution may be made either in money, or in property, or securities and either in installments from time to time or as a whole, if this can be done fairly, ratably, and in conformity with the provisions of the articles and the rights of the shareholders, and must be made as soon as reasonably consistent with the beneficial liquidation of the corporate assets (*Corp. Code § 2006*).

[*Optional*] **F. Jurisdiction of Court to Determine Creditors' Rights.** The court supervising the winding up of a corporation has the power to determine whether or not a valid debt exists and whether or not it has been properly substantiated. The court also has jurisdiction to determine who are the secured creditors and who among the corporation's creditors are entitled to claim priority (*In re Trinity Tractor Co. (1970) 3 Cal. App. 3d 428, 83 Cal. Rptr. 783*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be used in supporting a motion for approval of the intermediate accounts of directors, determination of claims against the corporation, and the rights of shareholders to corporate assets in a proceeding for involuntary dissolution of a corporation, or in a proceeding for voluntary dissolution under court supervision. It should be noted that in one case, approval of the accounts of directors and determination of claims against the corporation and the rights of shareholders to corporate assets was sought by means of a "petition," rather than a motion [*In re Trinity Tractor Co. (1970) 3 Cal. App. 3d 428, 432, 83 Cal. Rptr. 783]* . However, it would appear that a motion is the more appropriate procedure for making application to the court for such approval and determination in light of the provisions of the Code of Civil Procedure to the effect that an application for an order made in a pending action [*Code Civ. Proc. § 1004*] is made by motion [*Code Civ. Proc. § 1003*].

When appropriate, counsel should insert argument in this from showing the relationship between the facts of the case and the points of law raised.

[3] Discussion of Authorities

[a] Jurisdiction of Court to Determine Creditors' Rights

In re Trinity Tractor Co. *(1970) 3 Cal. App. 3d 428, 83 Cal. Rptr. 783* was a proceeding for voluntary dissolution of a corporation under court supervision. One of the corporation's major creditors filed objections to the preliminary accounting submitted by the board of directors and to the claims of an alleged secured creditor. The county in which corporate property was located filed unsecured property tax claims and contended that it was a priority creditor. Both creditors and the county appealed from the trial court's determination of the validity and priority of claims. The trial court found, and the court of appeal affirmed, that failure of the alleged secured creditor to comply with the inventory financing laws then in effect deprived it of its claimed priority status. The court of appeal stated that the jurisdiction of the trial court was not limited to determination of whether or not a valid and substantiated debt existed against the corporation, but also included the power to decide the relationship and priorityof a given claim as to other claims submitted. The court of appeal also ruled that a secured creditor is entitled to assert an alleged fraudulent conveyance of

general assets of the corporation inasmuch as a secured creditor is entitled to prove the whole debt owed and to look to the general assets of the corporation to realize a deficiency over the value of the security. As to the claimed tax liens alleged to give the county the status of a priority creditor, the court of appeal held that if the court fails to stay the perfecting of a tax lien after the commencement of proceedings for winding up and dissolution of a corporation, the lien becomes effective and the claim for taxes which is supported by lien has priority over unsecured creditors of the corporation. Finally, the court of appeal held that it was within the sound discretion of the trial court to deny attorney's fees to the creditor who successfully challenged another creditor's claim to priory. Attorney's fees are sometimes allowable where the parties prosecuting an action recover, protect, preserve, or increase a fund for the benefit of themselves and others. However, it was not an abuse of discretion to deny such fees to a creditor which was the primary beneficiary of a successful challenge to the claim of another creditor to priority.

[4] Additional Authorities

[a] Rights of Shareholders to Assets

In re San Joaquin Light & Power Corp. (1942) 52 Cal. App. 2d 814, 127 P.2d 29 was a proceeding on a petition under former Civ. Code § 403 [now see *Corp. Code § 1904*] for judicial supervision of the winding up and dissolution of a public utilities corporation (San Joaquin). The majority shareholder in San Joaquin was Pacific Gas and Electric Company (Pacific). As majority shareholder, Pacific elected to dissolve San Joaquin. Pursuant to the plan of liquidation, Pacific, the majority common stockholder, would receive the assets of San Joaquin which consisted of plants, equipment and properties, while the minority common stockholders would receive cash. San Joaquin petitioned the court for judicial supervision of the corporate dissolution, primarily for the purpose of arriving at an adjudication of the fair market value of the stock held by minority stockholders who objected to the dissolution plan. The trial court sustained demurrers to the petition and dismissed the proceeding. The court of appeal reversed. The basis of the trial court's action was that a distribution plan whereby the majority stockholder gets the corporate assets and minority stockholders are required to accept cash as their distributive share was unlawful and, therefore, the trial court felt that the petition did not state a cause of action for which relief could be granted. The court of appeal agreed with the trial court's holding that a distribution of corporate assets to the majority stockholder, while compelling minority stockholders to take the cash value of their proportionate share of the assets, is not possible absent statutory authorization. However, the mere fact that the plan of liquidation was unlawful did not mean that the trial court had no jurisdiction to supervise the voluntary dissolution. It merely meant that another liquidation plan which was fairer to minority shareholders would have to be devised.

It should be noted that the holding of the *San Joaquin* case does not mean that on dissolution the corporate assets cannot be sold and a distribution made to corporate shareholders in the form of cash. This is perfectly permissible, if done in compliance with statutory provisions [*see Corp. Code §§ 2001(g), 2006*]. The *San Joaquin* case merely stands for the proposition that minority shareholders cannot be forced to accept cash while majority shareholders receive the corporate assets as their distributive share on dissolution [*see* also *Zimmerman v. Tide Water Associated Oil Co. (1943) 61 Cal. App. 2d 585, 143 P.2d 409]* .

In re Los Angeles County Pioneer Soc'y (1953) 40 Cal. 2d 852, 257 P.2d 1 was a proceeding on a petition for judicial supervision of the voluntary dissolution of a corporation. The corporation was an organization of early Los Angeles County pioneers and existed for social purposes, preservation of historical data and artifacts from early California, and commemoration of early California settlers. A former member had bequeathed substantial assets to the corporation. A majority of the members of the corporation wished to dissolve it and distribute its assets to the members. A petition for judicial supervision was filed and granted. The attorney general intervened, alleging that the corporation was a charitable corporation holding its assets in trust. He sought the appointment of a new trustee on the ground that Pioneer had abandoned its trust. The trial court determined that Pioneer held its property for charitable purposes and that Pioneer had repudiated its trust, and ordered the appointment of a new trustee to carry out the purposes of the trust. Pioneer and an individual member of Pioneer appealed. The court of appeal affirmed. It found substantial evidence to

support the finding of the trial court that Pioneer was a charitable corporation holding its assets in trust. This being the case, the general rule applied that a charitable corporation cannot dissolve and distribute its assets among its members. Furthermore, a revocation of the election to dissolve did not limit the power of the attorney general to seek the appointment of a successor trustee on the ground that Pioneer had repudiated its trust. As a further ruling, the court held that where a charitable corporation fails through dissolution or other disqualification, the proper procedure is the appointment of a successor trustee to carry out the terms of the trust rather than a distribution of the assets to the donor or his heirs.

The court also distinguished cases involving nonprofit corporations existing for the private benefit of their members. In those cases, where the assets are not held for charitable purposes, the assets are properly distributable among the members on dissolution.

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5-52 California Points & Authorities § 52.187

§ 52.187 Supporting Motion for Order Staying Dissolution Proceedings and Appointing Appraisers to Ascertain Value of Stock [Corp. Code §§ 2000(a)-(c)]

[1] FORM

[*EITHER*]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff, vs. _____ [*name*], a Corporation, and _____ [*name*(*s*), of shareholder(s)], Defendants.	))))))))))	NO. _____ MEMORANDUM IN SUPPORT OF MOTION FOR ORDER STAYING INVOLUNTARY DISSOLUTION PROCEEDINGS AND APPOINTING APPRAISERS TO ASCERTAIN VALUE OF STOCK Date: _____ Time: _____ Location: _____ [Judge: _____] Date Action Filed: _____ [Trial Date: _____]

_____

[*OR*]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____	)	
	)	NO. _____
In the Matter of	)	MEMORANDUM IN SUPPORT OF APPLICA-
_____ [*name*],	)	TION TO STAY VOLUNTARY DISSOLUTION
a Corporation,	)	PROCEEDINGS AND APPOINTING APPRAISERS
In the Process of	)	TO ASCERTAIN VALUE OF STOCK
Voluntary Winding Up	)	Date: _____
and Dissolution	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

[*CONTINUE*]

IN ANY PROCEEDING FOR _____ [INVOLUNTARY DISSOLUTION OF A CORPORATION *or* VOLUNTARY DISSOLUTION OF A CORPORATION INITIATED BY THE VOTE OF SHAREHOLDERS REPRESENTING ONLY 50 PERCENT OF THE VOTING POWER], ON MOTION OF _____ [THE CORPORATION *or* SHAREHOLDERS REPRESENTING 50 PERCENT OR MORE OF THE VOTING POWER] ("PURCHASING PARTIES"), THE SUPERIOR COURT MUST STAY THE PROCEEDING FOR THE PURPOSE OF ASCERTAINING AND FIXING THE VALUE OF THE SHARES OWNED BY THE _____ [PLAINTIFFS *or* SHAREHOLDERS INITIATING THE PROCEEDING] ("MOVING PARTIES") WHEN THE PURCHASING PARTIES ELECT TO PURCHASE THE SHARES OWNED BY THE MOVING PARTIES, ARE UNABLE TO AGREE WITH THE MOVING PARTIES ON THE FAIR VALUE OF THOSE SHARES, AND GIVE BOND WITH SUFFICIENT SECURITY TO PAY THE EXPENSES (INCLUDING ATTORNEY'S FEES) OF THE MOVING PARTIES IF THOSE EXPENSES ARE RECOVERABLE UNDER CORPORATIONS CODE SECTION 2000(c).

A. Statutory Authority for Purchase. Subject to any contrary provision in the articles, _____ [in any suit for involuntary dissolution *or* in any proceeding for voluntary dissolution initiated by the vote of shareholders representing only 50 percent of the voting power], _____ [the corporation *or* holders of 50 percentor more of the voting power of the corporation] (the "purchasing parties") may avoid the dissolution of the corporation and the appointment of any receiver by purchasing for cash the shares owned by _____ [the plaintiffs *or* the shareholders so initiating the proceeding] (the "moving parties") at their fair value (*Corp. Code § 2000(a)*).

[*Optional*] **B. Election to Purchase by Corporation.** The election of the corporation to purchase may be made by the approval of the outstanding shares, excluding shares held by the moving parties (*Corp. Code § 2000(a)*).

[*Optional*] **C. "Approval of the Outstanding Shares."** "Approval of the outstanding shares" means approval by the affirmative vote of a majority of the outstanding shares entitled to vote. The required approval must include the affirmative vote of a majority of the outstanding shares of each class of series entitled, by any provision of the articles or of the General Corporation Law to vote as a class or series on the subject matter being voted upon, and must also include the affirmative vote of a greater proportion (including all) of the outstanding shares of any class or series if a greater proportion is required by the articles or the General Corporation Law (*Corp. Code § 152*).

D. Stay of Proceeding. The court, on application of the purchasing parties in the pending action, must stay the winding up and dissolution proceeding and proceed to ascertain and fix the fair value of the shares owned by the moving parties if the purchasing parties: (1) elect to purchase the shares owned by the moving parties; (2) are unable to agree with the moving parties upon the fair value of the shares; and (3) give bond with sufficient security to pay the expense (including attorney's fees) of the moving parties if those expenses are recoverable under *Corporations Code Section 2000(c)* (*Corp. Code § 2000(b)*).

E. Stay of Proceedings Mandatory. The requirement that the dissolution proceedings be stayed is mandatory when the purchasing parties elect to purchase the moving parties' shares at their fair value, are unable to agree with the moving parties upon the fair value of the shares, and give bond with sufficient security to pay the expenses, including attorney's fees, of the moving parties (*see Merlino v. Fresno Macaroni Mfg. Co. (1944) 64 Cal. App. 2d 462, 464, 148 P.2d 884*).

F. Appointment of Appraisers. The court must appoint three disinterested appraisers to appraise the fair value of the shares owned by the moving parties and must make an order referring the matter to the appraisers so appointed for the purpose of ascertaining that value. The order must prescribe the time and manner of producing evidence, if evidence is required (*Corp. Code § 2000(c)*).

G. Determination of Fair Value. The fair value must be determined on the basis of the liquidation value but taking into account the possibility, if any, of sale of the entire business as a going concern in a liquidation (*Corp. Code § 2000(a)*; *Trahan v. Trahan (2002) 99 Cal. App. 4th 62, 76-78, 120 Cal. Rptr. 2d 814* ; *Mart v. Severson (2002) 95 Cal. App. 4th 521, 535-536, 115 Cal. Rptr. 2d 717*).

[*Optional*] **H. Court May Choose Between Discordant Appraisals.** When a trial court becomes convinced that one of two highly discordant appraisal reports accurately reflects the value of the shares in question, it may confirm that report without investigating the matter again (*Brown v. Allied Corrugated Box Co. (1979) 91 Cal. App. 3d 477, 491, 154 Cal. Rptr. 170*).

[*Optional*] **I. Purchase by Majority Shareholders Does Not Justify Devaluation of Minority Shares in Closely Held Corporation.** The rule justifying devaluation of minority shares in a closely held corporation for their lack of control has little validity when the shares are to be purchased by someone who is already in control of the corporation; in that situation, the shares are not worth less to the purchaser be cause they are noncontrolling (*Brown v. Allied Corrugated Box Co. (1979) 91 Cal. App. 3d 477, 486, 154 Cal. Rptr. 170*).

[*Optional*] **J. Majority's Personal Control Over Sales Does Not Justify Reduction in Value of Minority Shares.** The goodwill of a business conducted by a corporation is the property of the corporation alone, and a majority shareholder's personal control over a large portion of the corporation's sales should not reduce the value of shares of the minority shareholders (*see Brown v. Allied Corrugated Box Co. (1979) 91 Cal. App. 3d 477, 488, 154 Cal. Rptr. 170*).

[*Optional*] **K. Fair Value of Shares Includes Value and Effect of Pending Derivative Action.** A determination of the fair value of the shares of the corporation must include an assessment of the value, if any, of a pending derivative action and the effect of the action on the fair value of the shares (*Cotton v. Expo Power Sys., Inc. (2009) 170 Cal. App. 4th 1371, 1374, 1380-1381, 89 Cal. Rptr. 3d 112*).

[*Optional*] **L. Deduction of Damages for Breach.** In fixing the value of the shares, the amount of any damages resulting if the initiation of the dissolution is a breach by _____ [any moving party *or* the moving parties] of an agreement with the purchasing _____ [party *or* parties] may be deducted from the amount payable to the moving _____ [party *or* parties] unless the ground for dissolution is _____ [persistent and pervasive fraud, mismanagement, or abuse of authority *or* persistent unfairness

towardany shareholders *or* the misapplication or waste of corporate property by its directors or officers] as specified in *Corporations Code Section 1800(b)(4)* (*Corp. Code § 2000(a)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for stay of involuntary dissolution proceedings, either when the purchasing party is the corporation, or when the shareholder or shareholders seeking to stay the proceedings have been named as defendants in the proceedings, or in support of an application for stay of court-supervised dissolution proceedings, and for appointment of appraisers to ascertain the value of stock belonging to the parties initiating the dissolution. Although there is no requirement that a memorandum accompany an application for stay of court-supervised voluntary dissolution proceedings, it may be advisable for counsel to submit one.

Counsel should insert argument in the from showing the relationship between the facts of the case and the points of law raised.

[b] Related Pleading and Practice Forms

For a notice of motion to stay proceedings and ascertain value of plaintiffs' shares in a dissolution proceeding, a declaration to accompany the motion, and an order staying proceedings see California Forms of Pleading and Practice, Ch. 160, *Corporations* (Matthew Bender).

[3] Discussion of Authorities

[a] Statutory Authority for Purchase

Avoidance of dissolution by appraisal and sale of stock was not available in a voluntary dissolution proceeding under pre-1977 law [*see* former Corp. Code § 4658 (buy-out procedure as available only in proceeding for involuntary dissolution of corporation)].

[b] Election to Purchase by Corporation

Under pre-1977 law, the corporation did not have a statutory right to avoid dissolution by purchasing the shares of the party initiating dissolution proceedings [*see* former Corp. Code § 4658].

[c] Stay of Proceedings Mandatory

Merlino v. Fresno Macaroni Mfg. Co. *(1944) 64 Cal. App. 2d 462, 148 P.2d 884* was a proceeding for involuntary dissolution of a corporation under former Corp. Code § 4650 [*now see Corp. Code § 1800 (a)*] because of deadlock and dissension. On the motion of the plaintiffs, the court ordered the appointment of a receiver, and the individual defendants in the proceeding, owners of 50 percent of the corporate stock, appealed. The court of appeal affirmed. The appellants contended that they desired to purchase the plaintiffs' shares and avoid dissolution of the corporation. They argued that the statutory provisions for a stay of proceedings and appraisal of the plaintiffs' stock were mandatory and

that, therefore, the trial court erred in appointing a receiver. The court of appeal agreed that the defendants had a clear right under former Corp. Code § 4658 [*now see Corp. Code § 2000(a)*] to avoid the appointment of a receiver and dissolution of the corporation by purchasing the shares owned by the plaintiffs at their fair value. However, the court of appeal affirmed the order appointing the receiver. The defendants had not made the showing required under former Corp. Code § 4658 [*now see Corp. Code § 2000(b)*] that they were unable to agree with the plaintiffs on the fair value of the shares. Although the trial court might have continued the matter and permitted such a showing, it was under no obligation to do so, and was neither authorized nor required to stay the appointment of the receiver based on the insufficient showing made by the would-be purchasers. However, the court of appeal noted, the appointment of the receiver did not deprive the defendants of the statutory buy-out option, provided they proceeded to make the required showing before the trial court (*64 Cal. App. 2d 462*).

[d] Determination of Fair Value

In ***Trahan v. Trahan*** *(2002) 99 Cal. App. 4th 62, 120 Cal. Rptr. 2d 814* , two brothers ("appellants") owning 50 percent of the shares of a closely held corporation in the business of providing general contracting and maintenance services sought to dissolve the corporation. As of that date, May 30, 2000, the corporation had a backlog of outstanding construction contracts. Two other brothers ("respondents") exercised their statutory right under *Corp. Code § 2000* to prevent dissolution by electing to purchase the appellants' shares at their fair market value. After the parties failed to agree on the fair value of appellants' shares, respondents petitioned the court to stay dissolution and fix the value. The court ordered that the appraisalbe made by a single appraiser consistent with the parties' agreement. The appraiser determined that the corporation could not be sold as a going concern. She determined the fair value of the corporation on the basis of its liquidation value on the liquidation date, finding that the corporation had a negative value and thus appellants' shares had a negative fair value. In response to questions from the court, the appraiser stated that although the contract backlogs amounted to an estimated gross profit of $924,767, there was no market value for partially completed contracts and that for public works, assignability was generally not allowed. The court also had asked for the liquidation value of May 30, 2000, which necessarily implied that the contracts in progress would not be completed. Appellants refused to transfer their shares and the trial court ordered respondents to file a motion to confirm the award. Appellants opposed confirmation, arguing that the appraisal erroneously omitted valuation of the corporation's primary assets, the construction and maintenance contracts outstanding as of the valuation date. The trial court confirmed the appraiser's award (*99 Cal. App. 4th 62, 67-70)* .

The court of appeal concluded that substantial evidence supported the court's confirmation of the appraiser's determination of the fair value of the corporate shares as of the value upon piecemeal sale of the assets as of May 30, 2000. The court noted that appellants never argued that there was any possibility of sale of the business as a going concern. Thus, the court rejected their first contention that the appraiser should have determined the fair value using methods set forth in a revenue ruling normally used for federal estate tax purposes, as done in a case which valued a corporation as a going concern (*99 Cal. App. 4th 62, 71-72)* . The court next dismissed appellants' argument that the appraisal was flawed because the valuation of their shares was less then they would have received upon actual dissolution. When there is no possible sale of the corporation as a going concern in liquidation, the liquidation value necessarily anticipates the piecemeal valuation as of the valuation date, without consideration of any winding up period (*99 Cal. App. 4th 62, 72-74)* . The court noted that appellants could have challenged the appraiser's failure to value the corporation as a going concern in liquidation. Moreover, pursuant to *Corp. Code § 2000(f)*, appellants could have requested the court to set the valuation date to allow for a hypothetical winding up period, during which the unperformed contracts would be completed and the profits realized. However, they failed to do so (*99 Cal. App. 4th 62, 76-78)* .

Mart v. Severson *(2002) 95 Cal. App. 4th 521, 115 Cal. Rptr. 2d 717* was a voluntary dissolution proceeding conducted pursuant to *Corp. Code § 2000*. After one of the 50 percent shareholders delivered to the other a written consent of shareholders to the election to wind up and dissolve, the other shareholder exercised his right to have the corporation purchase the first shareholder's shares at their "fair value" to avoid dissolution. Three appraisers worked

together to determine the fair value of the shares, which they defined pursuant to *Corp. Code § 2000(a)*. Because they expressly stated that they believed the company would be sold as a going concern, they employed two alternative valuation methods rather than a cost approach valuation method, which would focus exclusively on assets and liabilities. Their final report concluded that the fair value was $5,600,000. The superior court instructed the appraisers to file a supplemental letter explaining whether they calculated the liquidation value or the sale value of the corporation as a going concern. They unanimously repeated that the corporation would be sold as a going concern in liquidation. They also explained that they assumed hypothetical covenants not to complete would be executed. The superior court then expressed the view that the corporation could be valued as a going concern business only if the first shareholder executed a valid covenant not to compete. The superior court remanded the appraisers' first report and instructed them to calculate the piecemeal liquidation value of the corporation, which they found to be $1,480,000. The court concluded that the liquidation value was to be used rather than the higher figure, and found that it was too late for the submission of a noncompetition agreement. The superior court filed a decree and judgment winding up and dissolving the corporation, stating that the piecemeal liquidation value was final and conclusive, and that the appraisers' higher value was premised on the execution of an effective covenant not to compete which had not been submitted (*95 Cal. App. 4th 521, 527-529)* .

The court of appeal held that the trial court erred in finding that fair value was the piecemeal liquidation value of $1.48 million, when the appraisers unanimously had concluded that the corporation could have been sold as an ongoing concern for $5.6 million. The superior court had rejected the higher appraisal value, finding that determination was premised on the execution of an effective covenant not to complete, and that no such covenant had been or could be executed. However, the appraisers had correctly applied *Corp. Code § 2000* by assuming that a hypothetical willing seller would execute a covenant not to complete with the corporation after the sale (*95 Cal. App. 4th 521, 530)* . The superior court had misinterpreted *Corp. Code § 2000*, which merely contains a procedure for establishing a fair value price for the moving party's stock. It does not govern or even address covenants not to compete, nor does it authorize the trial court to dictate any of the terms of sale other than price (*95 Cal. App. 4th 521, 532)* . Therefore, the court of appeal held that the superior court's conclusion that the fair value of the corporation was $1.48 million was not supported by substantial evidence and was based on an erroneous application of *Corp. Code § 2000*. It reversed that ruling and instructed the superior court to confirm the fair value determination set forth in the appraisers' original report (*95 Cal. App. 4th 521, 536)* .

[e] Court May Choose Between Discordant Appraisals

In ***Brown v. Allied Corrugated Box Co.*** *(1979) 91 Cal. App. 3d 477, 154 Cal. Rptr. 170* , plaintiffs filed a complaint for the involuntary dissolution of defendant corporation. The majority shareholder filed a complaint in intervention and then noticed a motion to stay the proceedings and to have the court ascertain the value of the minority shares. The motion was granted. Three commissioners were appointed, but they could not reach a consensus as to the value of plaintiffs' shares. Two reports were filed, and the court affirmed the majority commissioner's report and denied plaintiffs' request for a valuation de novo by the court. Plaintiffs appealed, and the court of appeal reversed, remanding the cause to the trial court.

On appeal, plaintiffs contended, inter alia, that the majority commissioners erred in devaluing plaintiffs' shares because of their noncontrolling status; that the majority commissioners improperly considered the intervener's personal responsibility for a large bulk of the corporation's sales; and that the trial court erred by not hearing the matter de novo. The court found plaintiffs' first two contentions to have substantial merit and therefore returned the cause to the trial court for further consideration not inconsistent with their views (*91 Cal. App. 3d 477, 485)* . In its discussion, the court stated that it found absolutely no merit in plaintiffs' contention that a trial court faced with highly conflicting appraisal reports is obligated to make a de novo determination of value. The court held that when a trial court becomes convinced that one of two highly discordant appraisal reports accurately reflects the value of the shares in question, it may confirm that report without investigating the matter again (*91 Cal. App. 3d 477, 491)* .

[f] Purchase by Majority Shareholders Does Not Justify Devaluation of Minority Shares in Closely Held Corporation

The facts and procedural background of ***Brown v. Allied Corrugated Box Co.*** *(1979) 91 Cal. App. 3d 477, 154 Cal. Rptr. 170* are *discussed in § 52.187[3][e]*. In reversing the trial court's judgment and remanding for further proceedings, the court of appeal noted that lack of control inherent in plaintiffs' minority shares would substantially decrease their value if they were placed on the open market. However, the court held that the rule justifying the devaluation of minority shares in closely held corporation for their lack of control has little validity when the shares are to be purchased by someone who is already in control of the corporation because, in such a situation, it could hardly be said that the shares are worth less to the purchaser because they are noncontrolling (*91 Cal. App. 3d 477, 486)* . The court found that former Corp. Code § 4651 (now *Corp. Code § 1800*) suggested that a minority shareholder who brings an action for the involuntary dissolution of a corporation should not receive less than he or she would have received had the dissolution been allowed to proceed by virtue of the controlling shareholder's invocation of the buy-out remedy (*91 Cal. App. 3d 477, 487)* .

[g] Majority's Personal Control Over Sales Does Not Justify Reduction in Value of Minority Shares

The facts and procedural background of ***Brown v. Allied Corrugated Box Co.*** *(1979) 91 Cal. App. 3d 477, 154 Cal. Rptr. 170* are *discussed in § 52.187[3][e]*. In *Brown,* the court of appeal reversed the trial court's judgment confirming the report of the majority commissioners and ordering transfer of plaintiffs' shares to the intervener and remanded the cause for further proceedings consistent with the views expressed by the court of appeal. In its discussion, the court found that plaintiffs were correct in asserting that the intervener's personal control over a large portion of defendant corporation's sales was improperly considered by the majority commissioners, because by doing so the commissioners attributed the corporation's goodwill directly to the intervener in his individual capacity. The court stated that it has been established that the goodwill of a business conducted by a corporation is the property of the corporation alone (*91 Cal. App. 3d 477, 488)* .

[h] Fair Value of Shares Includes Value and Effect of Pending Derivative Action

In ***Cotton v. Expo Power Sys., Inc.*** *(2009) 170 Cal. App. 4th 1371, 89 Cal. Rptr. 3d 112* , a minority shareholder sought dissolution of the corporation and other relief. The majority shareholders invoked their statutory right to buy the minority shareholder's interest. The trial court obtained an appraisal of the fair value of the shares. The appraisers did not attempt to value the minority shareholder's derivative claims and did not take those claims into account in determining the fair value of his shares, because they believed that the sale of his shares could be conditioned on the corporation's assignment of its derivative claims to the minority shareholder. The trial court confirmed the appraisal and postponed the date of the buyout until after the resolution of the related derivative action.

The court of appeal reversed, citing three errors. First, conditioning the sale of the minority shareholder's shares on the corporation's assignment of its derivative claims to the minority shareholder would have been unworkable because once the minority shareholder's shares were taken from him, he could no longer meet the standing requirement of *Corp. Code § 800(b),* which requires that the plaintiff in a derivative action must be a shareholder continuously throughout the pendency of the action (*170 Cal. App. 4th 1371, 1382)* . Second, postponing the buyout of the minority shares until resolution of the derivative action contravened the purpose of *Corp. Code § 2000,* which contemplates a summary procedure. The trial court is required either to obtain a complete appraisal of the fair value of the shares from the appraisers, without delay, or to conduct a hearing forthwith to resolve the matter (*170 Cal. App. 4th 1371, 1381-1382)* . Third, it was error, therefore, for the court to confirm the appraisal when the appraisers did not attempt to value the minority shareholder's derivative claims and did not take those claims into account in determining the fair value of his shares (*170 Cal. App. 4th 1371, 1380-1381*). The court stated, "We conclude that a determination of the fair value of the shares of a corporation under section 2000 [of the Corporations Code] includes an assessment of the value, if any, of pending derivative actions and their effect on the fair value of the shares" (*170 Cal. App. 4th 1371, 1374)* .

[4] Additional Authorities

[a] Statutory Authority for Purchase

Alvak Enterprises v. Phillips (1959) 167 Cal. App. 2d 69, 334 P.2d 148, 338 P.2d 582 , originally was an action by a corporation to enjoin two of its directors from interfering with the operation of a hotel owned by the corporation. The defendants, the Phillipses, as directors, cross complained seeking dissolution of the corporation, naming the corporation and its president, Spivak, as cross defendants. Spivak, as alleged owner of 50 percent of the shares in the corporation, sought by motion to avoid the dissolution of the corporation by purchasing the other 50 percent of the stock, allegedly owned by the Phillipses. At the time of the motion, no stock had actually been issued, but before the court ruled on the motion, stock had been issued, 50 percent to Spivak, and 50 percent to Mr. Phillips. This fact was presented to the court by affidavit. The court eventually granted the motion for a stay of the proceedings and appraisal of the value of the Phillipses' stock. The Phillipses appealed, contending that the statutory buy-out procedures under former Corp. Code §§ 4658-4659 [*now see Corp. Code § 2000*] could only be invoked if the stock were actually issued at the time the motion for stay and appraisal were made. They also alleged certain irregularities in the affidavit describing the belated stock issuance to the court. The court of appeal affirmed the order of the trial court ordering a stay and appraisal. The court found no prejudicial error associated with the affidavits in question. It stated that the sections of the Corporations Code providing for a stay of proceedings to dissolve a corporation, and the purchase of the shares held by those seeking its dissolution, are mandatory and that when the prescribed conditions are met, the court must recognize the right clearly given and must stay the proceeding and proceed to ascertain and fix the value of the shares. Finding no error in the trial court's actions that resulted in a miscarriage of justice, the court of appeal refused to reverse the trial court (*167 Cal. App. 2d 69*).

Note that under pre-1977 law, the definition of "holder of shares" included a subscriber to shares in cases in which no certificates of stock were outstanding [former Corp. Code § 103]. Thus, although former Corp. Code § 4658 purported to grant statutory buy-out rights only to holders of 50 percent or more of the "outstanding shares" of the corporation, the court of appeal, a few years after the *Alvak* decision, was persuaded to grant statutory buy-out rights to the subscriber to 50 percent of the unissued stock of a corporation [*see Brodsky v. Seaboard Realty Co. (1962) 206 Cal. App. 2d 504, 514-516, 24 Cal. Rptr. 61]* . Under current law [*Corp. Code § 2000(a)*], the persons given statutory buy-out rights are described as holders of 50 percent or more of the "voting power" [*Corp. Code § 2000(a)*]. Given the statutory definition of voting power [*see Corp. Code § 194.5*], it seems clear that under current law only holders of the requisite number of issued and outstanding shares with voting rights are entitled to invoke statutory buy-out rights.

[b] Stay of Proceedings Mandatory

Cubalevic v. Superior Court (1966) 240 Cal. App. 2d 557, 49 Cal. Rptr. 698 was a proceeding on a petition for writ of prohibition to restrain the superior court from proceeding to determine the fair value of stock under the statutory buy-out provisions relating to involuntary dissolution of a corporation [former Corp. Code §§ 4658, 4659; *now see Corp. Code § 2000*]. The court of appeal granted the writ of prohibition. The plaintiff in the dissolution action was a minority stockholder in the corporation. He filed a complaint with several causes of action seeking varied relief, including an injunction, an accounting, and damages. One cause of action sought involuntary dissolution of the corporation. The majority stockholders elected to buy plaintiff's stock and moved for a stay of the proceeding for involuntary dissolution, and for an appraisal. However, before argument or ruling on the motion, the plaintiff filed a written dismissal with prejudice of his cause of action seeking involuntary dissolution. Nevertheless, the trial court stated its intention of proceeding with the appraisal of the plaintiff's shares. In granting the writ of prohibition, the court of appeal acknowledged that dismissal of a cause of action with prejudice does not have the effect of dismissing a counterclaim or cross complaint filed in an action. However, this rule applies only to an independent cause of action stated by the defendant in his counterclaim or cross complaint. One stockholder does not have an independent right to compel another stockholder to sell his or her shares. There being no such independent right, it followed that the cause of action to compel such a sale could not survive dismissal of the action for involuntary dissolution in which the remedy of

purchase was given. The statutory buy-out provisions [former Corp. Code §§ 4658, 4659; *now see Corp. Code § 2000*] are ancillary to and dependent on the existence of the action to compel involuntary dissolution. On the dismissal of that action, there was nothing left against which the ancillary remedy could be asserted. Therefore, the trial court exceeded its jurisdiction in continuing with the appraisal of the plaintiff's shares after dismissal of the cause of action for involuntary dissolution (*240 Cal. App. 2d 557*).

[c] Determination of Fair Value

Ronald's v. 4-C's Electronic Packaging, Inc. (1985) 168 Cal. App. 3d 290, 214 Cal. Rptr. 225 was an involuntary dissolution proceeding by minority shareholders of a closely held corporation. The majority shareholder had sought to buy out plaintiffs, and three appraisers were appointed to value the minority shares. Two of the appraisers used the price-earnings method; the third appraiser used the asset method. A special master confirmed the valuation arrived at by consideration of only the price-earnings method and after applying a discount factor reflecting defendant's controlling interest. The court of appeal reversed. In reversing the court reviewed cases and scholarly articles on the various valuation methods for minority interests in closely held corporations that are not publicly traded. The court reiterated the rule of law that consideration of only the price-earnings method in valuing a minority interest in a closely held corporation under *Corp. Code § 2000(a)* is error. Although the price-earnings method is a proper method, its use as the only method is improper. Minority interests are not to be devalued to reflect the fact that they are minority or noncontrolling interests (*168 Cal. App. 3d 290, 297-301)* .

Venables v. Credential Ins. Agency, Inc. (1956) 140 Cal. App. 2d 724, 295 P.2d 547 was an action by a director and minority stockholder of a corporation seeking an involuntary dissolution pursuant to former Corp. Code §§ 4650, 4651 [*now see Corp. Code § 1800(a),(b)*]. His complaint was based on dissension, deadlock, and wrongful acts by majority stockholders. He was a former corporate employee who had resigned a year before bringing the action. The majority stockholders sought a stay of the proceeding and an appraisal of the plaintiff's stock pursuant to former Corp. Code §§ 4658, 4659 [*now see Corp. Code § 2000*]. The court ordered that the shares be appraised at their going concern value, rather than at their liquidation value. The appointed commissioners (called "appraisers" under current law [*Corp. Code § 2000(c)*]) valued the plaintiff's stock at $22.56 per share. They relied on the facts that the plaintiff was not bound by a covenant not to compete with his former employer (the corporation), and that dividends were rarely paid on the stock. The plaintiff moved to have the court strike the award and make its own valuation. The court did so, valuing the stock at $62.50 per share. The court's award was based in part on the price paid by members of the majority for other shares a few years before. The majority stockholders appealed, contending that the trial court had no authority to disregard the valuation made by the commissioners. The court of appeal affirmed the award of the trial court. It noted that the award of the Commissioners was not final and conclusive until confirmed by the trial court. Further, the ultimate authority to ascertain and fix the values of the shares is vested in the trial court rather than the commissioners. It went on to say that the determination by the trial court of the value of the shares was largely a factual function and that the trial court's award was amply supported by the record (*140 Cal. App. 2d 724*).

The duty of the trial court to examine matters de novo and fix the proper value of the shares when convinced that the award of the appraisers is erroneous, which the *Venables* court found inherent in former Corp. Code § 4659, probably continues under current *Corp. Code § 2000(b)*.

[d] Purchase by Majority Shareholders Does Not Justify Devaluation of Minority Shares in Closely Held Corporation

In *Ronald's v. 4-C's Electronic Packaging, Inc. (1985) 168 Cal. App. 3d 290, 214 Cal. Rptr. 225 , discussed in § 52.187[4][c]*, the court based its holding in part on the legal ground that minority interests are not to be discounted merely to reflect that they are minority or noncontrolling interests.

California Points & Authorities

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Volume 5 Chapters 50-59 CONTRACTS---to---CORPORATIONS
CHAPTER 52 CORPORATIONS
PART II. FORMS
F. DISSOLUTION OF CORPORATIONS

5-52 California Points & Authorities § 52.188

§ 52.188 Supporting Petition for Order Declaring Corporation Duly Wound Up and Dissolved [Corp. Code § 1907]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM IN SUPPORT OF PETITION
	)	FOR ORDER DECLARING CORPORATION
In the Matter of _____ [*name*],	)	DULY WOUND UP AND DISSOLVED
a Corporation,	)	Date: _____
In the Process of Voluntary Winding Up and Dissolu-	)	Time: _____
tion.	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

AFTER ALL TAXES, PENALTIES, KNOWN DEBTS, AND OTHER LIABILITIES HAVE BEEN PAID, SECURED, OR OTHERWISE ADEQUATELY PROVIDED FOR, AND ALL KNOWN ASSETS HAVE BEEN DISTRIBUTED TO SHAREHOLDERS, OR WHOLLY APPLIED ON ACCOUNT OF THE CORPORATION'S DEBTS AND LIABILITIES, THE SUPERIOR COURT, ON PETITION BY THE CORPORATION, MAY DECLARE THE CORPORATION DULY WOUND UP AND DISSOLVED.

A. Statutory Authority. The board of directors of a corporation which has been dissolved, in lieu of filing a certificate of dissolution, may petition the superior court of the proper county for an order declaring the corporation wound up and dissolved. Such a petition must be filed in the name of the corporation [*Corp. Code § 1907(a)*].

B. Duties of Court on Filing of Petition. Upon the filing of the petition, the court must make an order requiring all persons interested to show cause why an order should not be made declaring the corporation duly wound up and dissolved and must direct that the order be served by notice to all creditors, claimants, and

shareholders in the same manner as the notice given under *Corporations Code Section 1807(b)* (*Corp. Code § 1907(b)*).

C. Order. After the period of time for contesting the petition has expired, and if the court determines that the corporation's affairs are in condition for it to be dissolved, the court may make an order declaring the corporation duly wound up and dissolved. The order must declare: (1) that the corporation has been duly wound up, that a final franchise tax return, as described by *Rev. & Tax. Code § 23332*, has been filed with the Franchise Tax Board, and that its known debts and liabilities have been paid or adequately provided for, or that those taxes, penalties, debts, and liabilities have been paid as far as its assets permitted, as the case may be. If there are known debts or liabilities for payment of which adequate provision has been made, the order must state what provision has been made, setting forth the name and address of the corporation, person, or governmental agency that has assumed or guaranteed the payment, or the name and address of the depositary with which deposit has been made or such other information as may be necessary to enable the creditor or other person to whom payment is to be made to appear and claim payment of the debt or liability; (2) that all known assets have been distributed to the persons entitled to them or that it acquired no known assets, as the case may be; (3) that the accounts of directors or such other persons have been settled and that they are discharged from their duties and liabilities to creditors and shareholders; and (4) that the corporation is dissolved (*Corp. Code §§ 1808(a), 1907(d)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be used in support of a petition for an order declaring a corporation duly wound up and dissolved in cases in which the winding up has taken place without court supervision, and the directors seek a court order declaring the corporation duly wound up and dissolved in lieu of filing the certificate of dissolution specified in *Corp. Code § 1905* [*see Corp. Code § 1907*]. The advantage of the court order procedure is the finality of a court order with respect to claims against the corporation [*see Corp. Code § 1907(c)*]. While there is no requirement that a memorandum accompany the petition, it may be advisable for counsel to submit one. If there will be a hearing on the order to show cause, as a law and motion matter, the first page must specify, immediately below the number of the case, (1) if ascertainable, the date, time, and location of any scheduled hearing and the name of the hearing judge, (2) the nature or title of any attached document other than an exhibit, (3) the date of filing the action, and (4) the trial date, if set [*see Cal. Rules of Ct., Rule 3.1110(b)*; *Cal. Rules of Ct., Rule 3.1103(a)* (construing law and motion)].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law raised.

[b] Related Pleading and Practice Forms

For forms for a petition and order to declare a corporation wound up and dissolved, see California Forms of Pleading and Practice, Ch. 170, *Corporations: Dissolution and Winding Up* (Matthew Bender).

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CHAPTER 52 CORPORATIONS
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F. DISSOLUTION OF CORPORATIONS

5-52 California Points & Authorities § 52.189

§ 52.189 Supporting Motion for Summary Judgment--By Defendant--In Action by Creditor Against Dissolved Corporation--Failure to Present Claim in Timely Manner Bars Claim

[1] FORM

[*Caption. See § 52.31.*]

SUMMARY JUDGMENT FOR DEFENDANT IS PROPER WHEN A PLAINTIFF SUING A DISSOLVED CORPORATION HAS FAILED TO PRESENT CLAIMS AND PROOFS WITHIN THE TIME DIRECTED BY THE COURT IN _____ [AN INVOLUNTARY DISSOLUTION PROCEEDING *or* A COURT-SUPERVISED VOLUNTARY DISSOLUTION PROCEEDING] AFTER HAVING RECEIVED NOTICE OF SUCH DISSOLUTION PROCEEDING.

A. Summary Judgment. [*See § 52.31, Paragraph A.*]

B. Failure to Present Claim Bars Claim. All creditors and claimants may be barred from participation in any distribution of the general assets of a corporation in _____ [an involuntary dissolution proceeding *or* a court-supervised voluntary dissolution proceeding] if they fail to make and present claims and proofs within such time as the court may direct, which must not be less than four nor more than six months after the first publication of notice to creditors, unless it appears by affidavit that there are no claims, in which case the time limit may be three months (*Corp. Code § 1807(a)*).

[*Optional*] **C. Application of Involuntary Dissolution Provision to Court-Supervised Voluntary Dissolutions.** If a court assumes jurisdiction over the voluntary dissolution of a corporation, the provisions of *Corporations Code Section 1807*, relating to the presentation and proof of creditors' claims apply to that proceeding (*Corp. Code § 1904*).

D. Form of Notice to Creditors. Notice to creditors shall be published not less than once a week for three consecutive weeks in _____ [a newspaper of general circulation published in the county in which the proceeding is pending *or if there is no newspaper of general circulation published in the county where the proceeding is pending* the newspaper designated by the court] directing creditors and claimants to make and present claims and proofs to the

person at the place, and within the time specified in the notice. A copy of the notice shall be mailed to each person shown as a creditor or claimant on the books of the corporation, at such person's last known address (*Corp. Code § 1807*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for summary judgment when the motion asserts that defendant-dissolved corporation is entitled to a judgment as a matter of law since plaintiff claimant against defendant-dissolved corporation failed to present claims and proofs of claims during dissolution proceeding within the time limits specified by the court in the notice mailed to creditors and claimants.

When appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law raised. In addition, counsel should attach affidavits or declarations which support the motion [*Code Civ. Proc. § 437c*].

[b] Related Pleading and Practice Forms

For forms for a notice of motion for summary judgment, and a declaration supporting a motion for summary judgment, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

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Volume 5 Chapters 50-59 CONTRACTS---to---CORPORATIONS
CHAPTER 52 CORPORATIONS
PART II. FORMS
F. DISSOLUTION OF CORPORATIONS

5-52 California Points & Authorities § 52.190

§ 52.190 Opposing Petition for Judicial Supervision of Voluntary Dissolution of Corporation [Corp. Code § 1904]--No Valid Election to Dissolve

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM IN OPPOSITION TO PETITION
In the Matter of	)	FOR JUDICIAL SUPERVISION OF VOLUNTARY
_____ [*name*],	)	WINDING UP OF CORPORATION
a Corporation,	)	Date: _____
In the Process of Voluntary Winding Up and Dissolu-	)	Time: _____
tion.	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURTS HAVE NO JURISDICTION TO SUPERVISE THE VOLUNTARY WINDING UP OF A CORPORATION WHERE THE CORPORATION HAS NOT MADE A VALID ELECTION TO DISSOLVE.

A. Statutory Authority. If a corporation is in the process of voluntary winding up, the superior court may take jurisdiction over the voluntary winding up proceeding (*Corp. Code § 1904*).

B. Limits on Jurisdiction. If a corporation is not in the process of voluntary winding up, the court has no jurisdiction to entertain a petition for judicial supervision of the voluntary winding up (*In re Security Fin. Co. (1957) 49 Cal. 2d 370, 376, 317 P.2d 1*).

C. Requirement of Statutory Compliance. A corporation cannot be dissolved except in the manner and under the conditions prescribed in the Corporations Code (*Keeler v. Schulte (1957) 47 Cal. 2d 801, 803, 306 P.2d 430*).

D. Requirement of Election to Dissolve. A corporation is not in the process of voluntary winding up if no valid election to wind up and dissolve has been made pursuant to statute (*In re Security Fin. Co. (1957) 49 Cal. 2d 370, 376, 317 P.2d 1*).

E. Valid Election Not Accomplished. There has been no valid election to wind up and dissolve pursuant to statute if there has been no _____ [vote of shareholders holding shares representing 50 percent or more of the voting power *or, in the case of a corporation as to which an order for relief has been entered under Chapter 7 of the Bankruptcy Code, or a corporation which has disposed of all its assets and has not conducted any business for a period of five years immediately preceding the adoption of the resolution electing to dissolve the corporation, or a corporation which has issued no shares* approval by the board of directors to wind up and dissolve] (*Corp. Code § 1900(a),(b)*).

[*Optional*] **F. "Shareholder."** "Shareholder" means one who is a holder of record of shares (*Corp. Code § 185*).

[*Optional*] **G. "Shares."** "Shares" means the units into which the proprietary interests in a corporation are divided in the articles (*Corp. Code § 184*).

[*Optional*] **H. "Voting Power."** "Voting power" means the power to vote for the election of directors at the time the determination of voting power is made. It does not include conditional voting power. Where individual members of the board are elected by separate classes of shares, voting power is determined based on the percentage of the total number of authorized directors which the shares in question have the power to elect (*Corp. Code § 194.5*).

[*Optional*] **I. Court Without Jurisdiction In Futuro.** If there has been no valid election to dissolve a corporation pursuant to *Corporations Code Section 1900*, the court is without jurisdiction to declare terms and conditions of dissolution, or to direct and control dissolution which may take place at some future time (*Escondido Mut. Water Co. v. George A. Hillebrecht, Inc. (1966) 241 Cal. App. 2d 410, 415-416, 50 Cal. Rptr. 495*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Respondent _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a petition for voluntary winding up under court supervision on the ground that there has been no valid election by shareholders or by the board of directors to wind up and dissolve. It appears that, after a petition for judicial supervision is filed, the customary procedure followed in giving notice to the corporation, shareholders, and creditors is the issuance by the superior court of an order to show cause setting forth the time and place of hearing of the petition for court supervision [*see* *In re Security Fin. Co. (1957) 49 Cal. 2d 370, 375, 317 P.2d 1* (court refers to order to show cause procedure without discussion)]. The order to show cause may serve both

as a form of notice and also as a citation giving the court personal jurisdiction over the parties served [*see Sturm v. Sturm (1955) 138 Cal. App. 2d 25, 28, 291 P.2d 527]* . It would appear that any party so served who opposes the granting of the petition may do so by way of answer, demurrer, or "motion in opposition." This memorandum is designed to accompany such a motion in opposition.

When appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law raised.

[b] Related Pleading and Practice Forms

For forms for a petition for winding up under court supervision and an order to show cause see California Forms of Pleading and Practice, Ch. 170, *Corporations: Dissolution and Winding Up* (Matthew Bender).

[3] Discussion of Authorities

[a] Limits on Jurisdiction

In re Security Fin. Co. *(1957) 49 Cal. 2d 370, 317 P.2d 1* was a proceeding on a petition for judicial supervision of the voluntary dissolution of a corporation. The trial court issued orders granting the petition and assuming jurisdiction over the proceeding. Shareholders opposing the dissolution appealed, alleging that the trial court had no jurisdiction to undertake supervision of the proceedings. Although the Supreme Court affirmed the orders of the trial court, it stated that the superior court had jurisdiction by virtue of former Corp. Code § 4607 [now see *Corp. Code § 1904*] only if the corporation was "in the process of voluntary winding up" and that a corporation was in the process of voluntary winding up only if a valid election to wind up had been made pursuant to former Corp. Code § 4600 [now see *Corp. Code §§ 1900(a), (b)*].

[b] Requirement of Statutory Compliance

Keeler v. Schulte *(1957) 47 Cal. 2d 801, 306 P.2d 430* was a representative suit brought by a stockholder on behalf of the San Diego Lodge Number 1, American Section of the Theosophical Society, a California corporation, in which the plaintiff sought to set aside a deed of the lodge property and enjoin the attempted dissolution of the lodge. The action was tried and judgment was entered for defendants. Plaintiff moved for a new trial on the ground of insufficiency of the evidence and it was granted. In his amended complaint, the plaintiff alleged the same general facts and sought additional declaratory relief by way of an accounting and the appointment of a receiver to take charge of the property of the lodge pending disposition of the action. The defendants demurred to the amended complaint on the ground that it failed to state a cause of action because of the plaintiff's failure to join the lodge as a party. The plaintiff refused to join the lodge, apparently on the ground that the lodge had been dissolved as a corporation according to theosophical law. The trial court then granted a motion to dismiss the complaint for failure to state a cause of action because of failure to join the lodge as a party with the result that no judgment could be entered declaring its rights or setting aside the deed. A judgment of dismissal was entered and the plaintiff appealed. The Supreme Court affirmed. It held that a California corporation can only be dissolved in the manner and under the conditions prescribed in the Corporations Code [former Corp. Code §§ 4600-4692; *now see Corp. Code §§ 1800-2011*] and that the withdrawal of a corporation's charter under ecclesiastical rules of law and order would not work a corporate dissolution in disregard of state law.

[c] Requirement of Election to Dissolve

In re Security Fin. Co. *(1957) 49 Cal. 2d 370, 317 P.2d 1* is *discussed in § 52.190[3][a]*.

[d] Court Without Jurisdiction In Futuro

Escondido Mut. Water Co. v. George A. Hillebrecht, Inc. *(1966) 241 Cal. App. 2d 410, 50 Cal. Rptr. 495* was an

action for declaratory relief by a mutual water company seeking, in part, a judicial declaration of an amendment to its articles of incorporation governing the distribution of corporate assets on dissolution. At the time the action for declaratory relief was brought, the amendment had not been approved by the requisite percentage of corporate shareholders. the trial court entered a judgment declaring the proposed amendment valid if and when it received the required shareholder approval. The court of appeal reversed. It stated that a court cannot direct or control dissolution of a corporation in futuro. A court has jurisdiction over the voluntary winding up and dissolution of acorporation only if the corporation is in the process of voluntary winding up. A corporation is in the process of voluntary winding up only if a valid election to wind up has been made. In effect, the court of appeal held that a court cannot enter judgments having res judicata effect governing the distribution of corporate assets on dissolution before the corporation is in the process of dissolution.

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Volume 5 Chapters 50-59 CONTRACTS---to---CORPORATIONS
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5-52 California Points & Authorities § 52.191

§ 52.191 Opposing Petition for Judicial Supervision of Voluntary Dissolution of Corporation [Corp. Code § 1904]--Election to Dissolve Revoked

[1] FORM

[*Caption. See § 52.190.*]

THE COURTS HAVE NO JURISDICTION TO SUPERVISE THE VOLUNTARY WINDING UP OF A CORPORATION WHERE THE ELECTION TO DISSOLVE THE CORPORATION HAS BEEN REVOKED.

A. Statutory Authority. [*See § 52.190, Paragraph A.*]

B. Limits of Jurisdiction. If a corporation is not in the process of voluntary winding up, the court has no jurisdiction to entertain a petition for judicial supervision of the voluntary winding up (*In re Security Fin. Co. (1957) 49 Cal. 2d 370, 376, 317 P.2d 1*).

C. Revocation Terminates Dissolution Process. A corporation is not in the process of voluntary winding up if the election to wind up and dissolve has been revoked (see *Herschfelt v. Knowles-Raymond Granite Co., Inc. (1955) 130 Cal. App. 2d 347, 350, 279 P.2d 104*).

D. Requirements for Revocations. A voluntary election to wind up and dissolve a corporation may be revoked prior to distribution of any assets by _____ [the vote of shareholders holding shares representing a majority of the voting power *or* by approval by the board if the election to dissolve was by the board pursuant to *Corporations Code Section 1900(b)*] (*Corp. Code § 1902(a)*).

[*Optional*] **E. Failure to File with Secretary of State as Not Affecting Validity of Revocation.** Failure to file a certificate of revocation of election to dissolve with the Secretary of State as required by statute does not affect the validity of the revocation of the election to dissolve (*Herschfelt v. Knowles-Raymond Granite Co., Inc. (1955) 130 Cal. App. 2d 347, 351, 279 P.2d 104*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Respondent _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a petition for voluntary winding up under court supervision on the ground that the election to dissolve by shareholders or by the board of directors has been revoked. It would appear that after a petition for judicial supervision is filed, the customary procedure followed in giving notice to the corporation, shareholders, and creditors is the issuance by the superior court of an order to show cause setting forth the time and place of hearing of the petition for court supervision [*see In re Security Fin. Co. (1957) 49 Cal. 2d 370, 375, 317 P.2d 1* (court refers to order to show cause procedure without discussion)]. The order to show cause may serve both as a form of notice and also a citation giving the court personal jurisdiction over the parties served [*see Sturm v. Sturm (1955) 138 Cal. App. 2d 25, 28, 291 P.2d 527]* . It would appear that any party so served who opposes the granting of the petition may do so by way of answer, demurrer, or "motion in opposition." These points and authorities are designed to accompany such a motion in opposition.

When appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law raised.

[b] Related Pleading and Practice Forms

For forms for petition for voluntary winding up under court supervision, an order to show cause, and an affirmative defense that the election to wind up was revoked, see California Forms of Pleading and Practice, Ch. 170, *Corporations: Dissolution and Winding Up* (Matthew Bender).

[3] Discussion of Authorities

[a] Limits on Jurisdiction

In re Security Fin. Co. *(1957) 49 Cal. 2d 370, 317 P.2d 1* was a proceeding on a petition for judicial supervision of the voluntary dissolution of a corporation. The trial court issued orders granting the petition and assuming jurisdiction over the proceeding. Shareholders opposing the dissolution appealed, alleging that the trial court had no jurisdiction to undertake supervision of the proceedings. Although the Supreme Court affirmed the orders of the trial court, it stated that the superior court had jurisdiction by virtue of former Corp. Code § 4607 [*now see Corp. Code § 1904*] only if the corporation was "in the process of voluntary winding up."

[b] Revocation Terminates Dissolution Process

Herschfelt v. Knowles-Raymond Granite Co., Inc. *(1955) 130 Cal. App. 2d 347, 279 P.2d 104* was an action to quiet title to a promissory note and shares of stock. The defendants moved for a change of venue. The superior court denied the motion. The court of appeal reversed. The action had been brought in Madera County. Prior to commencement of the action, the corporate shareholders adopted a resolution ordering the dissolution of the corporation. A few days later, a majority of the shareholders gave their written consent to a revocation of the election to dissolve. No certificate of election to dissolve was filed as required by former Corp. Code § 4606 [*now see Corp. Code § 1906(b)*]. Subsequently, the articles of incorporation were amended to state that the corporation's principal place of business was in San Mateo, rather than Madera County. After the action was commenced, the defendants moved for a change of venue from Madera

to San Mateo County. The plaintiff contended that the election to rescind the dissolution of the corporation was invalid. He also argued that the change of principal place of business was a "mere paper transaction" for the purpose of avoiding jurisdiction in Madera County. The court of appeal disagreed. It stated that there can be no question that, under the terms of former Corp. Code § 4606 [*now see Corp. Code § 1902(a)*], a majority of the voting power may rescind a resolution of dissolution.

The failure of the corporation to file the certificate of revocation of election to dissolve with the Secretary of State as required by former Corp. Code § 4606 *[now see Corp. Code § 1902(b)*], did not affect the validity of the revocation of the election to dissolve. The filing provision was enacted for the convenience of the Secretary of State and the public and for the protection of the directors and trustees. Strict compliance with that requirement is not necessary for the valid revocation of an election to dissolve. This is particularly true when there is no showing of injury resulting from failure to comply with the filing requirements. The court of appeal also held that the change of principal place of business of the corporation was properly accomplished. That fact, together with the fact that all other necessary defendants were residents of San Mateo County made that county the proper venue for trial.

[c] Failure to File with Secretary of State as Not Affecting Validity of Revocation.

Herschfelt v. Knowles-Raymond Granite Co., Inc. *(1955) 130 Cal. App. 2d 347, 279 P.2d 104* is discussed in *§ 52.191[3][b]*.

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5-52 California Points & Authorities § 52.192

§ 52.192 Opposing Motion to Approve Intermediate Accounts of Directors [Corp. Code § 1806(d)] and to Determine Claims Against Corporation [Corp. Code § 1806(b)] and Rights of Shareholders to Assets [Corp. Code § 1806(c)]--Objection by Creditor to Claim of Competing Creditor

[1] FORM

[*EITHER*]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN OPPOSITION TO MOTION
vs.	)	TO APPROVE INTERMEDIATE ACCOUNTS OF
_____ [*name*],	)	DIRECTORS, AND TO DETERMINE CLAIMS
a Corporation,	)	AGAINST CORPORATION AND RIGHTS OF
Defendant.	)	SHAREHOLDERS TO ASSETS
	)	Date: _____
	)	Time: _____
	)	Location: _____
		[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

[*OR*]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM IN OPPOSITION TO MOTION
	)	TO APPROVE INTERMEDIATE ACCOUNTS OF
In the Matter of	)	DIRECTORS, AND TO DETERMINE CLAIMS
_____ [*name*],	)	AGAINST CORPORATION AND RIGHTS OF
a Corporation in the Process of Voluntary Winding	)	SHAREHOLDERS TO ASSETS
Up and Dissolution	)	Date: _____
	)	Time: _____
	)	Location: _____
		[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

[*CONTINUE*]

WHEN A CORPORATION IS IN THE PROCESS OF _____ [INVOLUNTARY DISSOLUTION *or* VOLUNTARY DISSOLUTION UNDER COURT SUPERVISION], A CREDITOR WHO OBJECTS TO THE CLAIMS OF ANOTHER CREDITOR TO THE CORPORATE ASSETS ON THE GROUND OF _____ [FAILURE TO PRESENT CLAIM WITHIN THE TIME SPECIFIED BY THE COURT *or* FAILURE OF A SECURED CREDITOR CLAIMING DEFICIENCY FROM GENERAL ASSETS TO PROVE ENTIRE DEBT WITHIN TIME SPECIFIED BY THE COURT *or* FAILURE BY A COUNTY CLAIMING PRIORITY STATUS FOR PROPERTY TAX CLAIMS TO PERFECT TAX LIENS TO SUPPORT CLAIM OF PRIORITY *or state other grounds barring the other creditor's claim*] MAY PRESENT THAT OBJECTION TO THE COURT.

A. Standing of Creditor to Object to Another Creditor's Claim. When a corporation is in the process of dissolution under court supervision, a creditor who objects to the claim of another creditor to the corporate assets may present those objections to the court (*In re Trinity Tractor Co. (1970) 3 Cal. App. 3d 428, 434-435, 83 Cal. Rptr. 783*).

[*Optional*] **B. Failure to File Claims Bars Claims.** All creditors and claimants may be barred from participation in any distribution of the general assets of a corporation in the process of dissolutionif they fail to make and present claims and proofs within such time as the court may direct (*Corp. Code § 1807(a)*).

[*Optional*] **C. Failure of Secured Creditor to Prove Whole Debt Bars Claim for Deficiency.** A secured creditor who fails to present a claim against the corporation for the whole debt owing him/her/it within the time limits set by the court in a dissolution proceeding is barred from any right to claim against the general assets for any deficiency in the amount realized on his security (*Corp. Code § 1807(c)*).

[*Optional*] **D. Failure to Perfect Personal Property Tax Lien Bars Priority Claim.** The claim of a county for unpaid personal property taxes which was not made a lien pursuant to the provisions of Revenue and Taxation Code *Sections 2191.3* and 2191.4 prior to the institution of dissolution proceedings, and which is not made a lien during dissolution

proceedings through _____ [failure of the county to file a certificate with the county recorder pursuant to *Revenue and Taxation Code Section 2191.3 or* stay of the perfection of the lien by the court in the dissolution proceeding] has no priority over the claims of unsecured creditors of the corporation which is being dissolved (see *In re Trinity Tractor Co. (1970) 3 Cal. App. 3d 428, 442-444, 83 Cal. Rptr. 783*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be used in support of a motion in opposition by a creditor claiming against the general assets of a corporation in the process of involuntary dissolution or voluntary dissolution under court supervision. Use of such a motion would be appropriate when: (1) the corporate directors have moved for approval of intermediate accounts of directors, and determination of claims against the corporation and the rights of shareholders to assets; and (2) a general creditor or claimant who failed to present and prove his claim within the time limits set by the court is seeking to participate in the distribution of the corporation's general assets [Paragraph B]; or (3) the corporation is seeking to distribute some of its general assets to a creditor or claimant who failed to present and prove his claims within the time limits set by the court [Paragraph B]; or (4) a secured creditor who failed to prove the whole debt owed by the corporation within the time limits set by the court is seeking to recover from the corporation's general assets the deficiency in the amount realized on his security [Paragraph C]; or (5) a county claims priority for unpaid personal property taxes on corporate assets, but has not perfected a tax lien pursuant to *Rev. & Tax. Code §§ 2191.3-2191.4* [Paragraph D]. Of course, the circumstances under which one creditor might object to the claims of other creditors to corporate assets are numerous. The above circumstances in which a motion in opposition would be appropriate are intended to be illustrative, rather than definitive.

When appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Standing of Creditor to Object to Another Creditor's Claim

In re Trinity Tractor Co. *(1970) 3 Cal. App. 3d 428, 83 Cal. Rptr. 783* was a proceeding for voluntary dissolution of a corporation under court supervision. The corporation sought court approval of a preliminary accounting and of the board of directors' action in approving the claims of creditors. One of the firm's major creditors (CIT) filed objections to the preliminary accounting, challenging the claim of another major creditor (A-C) to priority. A hearing was held and the trial court issued an order determining the validity and priority of claims against the corporation. The court of appeal modified the order in part and affirmed it in part. In reaching its determination regarding claims against the corporation, the trial court ruled in accordance with CIT's argument that A-C's failure to comply with inventory financing laws deprived it of its alleged priority status. On appeal, A-C contended in part that the trial court exceeded its jurisdiction by entertaining and accepting the objections of CIT to A-C's claim. The court of appeal disagreed. The court stated that former Corp. Code § 4608 [*now see Corp. Code § 1807*] conferred on the court authority to require the presentation and proof of all claims and demands against the corporation and that former Corp. Code § 4607 [*now see Corp. Code § 1904*] gave the court authority to make orders as to any and all matters concerning the winding up of the affairs of the corporation. The court of appeal stated that the trial court would be unable to perform these functions if it could not

determine the validity of a claim and its relationship or priority as to other claims. Therefore, the trial court had jurisdiction to entertain the objections of one creditor to the claims made by another.

[b] Failure to Perfect Personal Property Tax Lien Bars Priority Claim

In re Trinity Tractor Co. *(1970) 3 Cal. App. 3d 428, 83 Cal. Rptr. 783* is discussed in *§ 52.192[3][a]*. In that case, the corporation which was in the process of dissolution owed several years arrearages of personal property taxes to Humboldt County where the corporate business premises were located. The county had not acquired liens on the corporate assets for all of the back taxes at the time the dissolution proceeding commenced. However, it acquired such liens by filing certificates with the county recorder pursuant to *Rev. & Tax. Code § 2191.3* during the pendency of the dissolution proceeding. The trial court's order accorded the county priority status as to only a small portion of the total taxes due. The county appealed. The court of appeal modified the order of the trial court so as to give the county priority for its entire claim for back taxes. The court stated that no statute prohibits the attachment of a tax lien by the filing of a certificate pursuant to *Rev. & Tax. Code § 2191.3* after dissolution proceedings have commenced. Although it was probably within the power of the trial court to stay the perfection of the liens pursuant to former Corp. Code § 4616 [*now see Corp. Code § 1806(h)*], the court failed to do so. Therefore, the liens were perfected and the claim of the county had priority over the unsecured creditors.

The court of appeal therefore found it unnecessary to rule on the county's claim that taxes are not ordinary debts and are therefore inherently entitled to priority. However, it did state that unpaid taxes which are not a lien when dissolution proceedings commence are generally not a priority, and, further, that personal property tax claims do not have priority as "costs of administration" of a dissolution. Therefore, it would appear that the *Trinity Tractor* case is authority for the proposition that if personal property tax liens are not perfected before or during dissolution proceedings, then the underlying tax claims have only the priority of any other unsecured claim against the corporation.

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Chapters 53through 59 RESERVED

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Chapters 53RESERVED

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Volume 6 Chapters 60-69 COSTS---to---DECLARATORY RELIEF
CHAPTER 60 COSTS

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§ 60.syn Synopsis to Chapter 60: COSTS

§ 60.01 Scope of Chapter

§ 60.02 Governing Law

§ 60.03 How to Use the Forms in This Chapter

[1] Page Limits on Memoranda

[2] Using the Forms to Build a Draft Memorandum

§ 60.04 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

[2] Related Points And Authorities Chapters

§§ 60.05-60.09 [Reserved]

§ 60.10 Supporting Motion to Strike Memorandum of Costs--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Motion to Strike

§ 60.11 Supporting Motion to Strike Memorandum of Costs--Judgment Does Not Carry Costs

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Judgment Does Not Carry Costs

§ 60.12 Supporting Motion to Strike Memorandum of Costs--No Judgment in Favor of Party Filing Memorandum of Costs

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Memo Must Be Stricken If No Judgment Has Been Entered

[b] Defendant Who Was Voluntarily Dismissed Must Secure Entry of Order or Judgment of Dismissal In Order to Qualify as Prevailing Party

[c] Party Whose Recovery Was Completely Offset by Settlement Is Not "Prevailing Party."

§ 60.13 Supporting Motion to Strike Memorandum of Costs--Memorandum of Costs Untimely Filed

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Costs Memorandum Filed Late

§ 60.14 Supporting Motion to Strike Memorandum of Costs--Memorandum of Costs Not Verified

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Memorandum of Costs Not Verified

§ 60.15 Supporting Motion to Strike Memorandum of Costs--Arbitrator's Award Does Not Include Costs

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Arbitrator's Award Does Not Include Costs

§ 60.16 Supporting Motion to Strike Memorandum of Costs--Prevailing Party Not Entitled to Costs Under Code Civ. Proc. § 998 Due to Settlement Offer More Favorable Than Judgment

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Settlement Offer More Favorable Than Judgment

[b] Postoffer Costs and Attorney's Fees Are Excluded From Judgment

§ 60.17 Supporting Motion to Strike Memorandum of Costs--Code Civ. Proc. § 998 Offer Was Unilaterally Withdrawn Before Expiration of Statutory Period for Acceptance or Rejection

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Unilateral Withdrawal of § 998 Offer Before Expiration of Period for Acceptance or Rejection

[b] Withdrawn Offer Under Code Civ. Proc. § 998 Revives Last Rejected Offer

§§ 60.18-60.39 [Reserved]

§ 60.40 Supporting Motion to Tax Costs by Striking or Reducing Specific Items--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Motion to Tax Costs

[b] Right to Costs Are Statutory

[c] Strict Construction of Costs Statutes

§ 60.41 Supporting Motion to Tax Costs by Striking or Reducing Specific Items--To Reduce Amount as Excessive

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Amounts Claimed Are Required to Be Reasonable

[b] Motion to Reduce Amount of Item

§ 60.42 Supporting Motion to Tax Costs by Striking or Reducing Specific Items--To Strike or Reduce Amount Claimed for Fee of Expert Witness

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Prevailing Party Is Not Entitled to Recover Fee of Expert Witness Who Was Not Ordered by Court

[4] Additional Authorities

§ 60.43 Supporting Motion to Tax Costs by Striking or Reducing Specific Items--To Strike Claim for Cost of Daily Transcripts Not Ordered by Court

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Costs of Non-Court-Ordered Transcript Not Allowable

[b] Daily Transcripts

§ 60.44 Supporting Motion to Tax Costs by Striking or Reducing Specific Items--To Strike Items Not Allowable as Costs Except When Expressly Authorized by Law

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Item Claimed Not Allowable as Costs

§ 60.45 Supporting Motion to Tax Costs by Striking or Reducing Specific Items--To Strike Items Not Reasonably Necessary to Conduct of Litigation

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Items of Cost Must Have Been Reasonably Necessary

[b] Necessity of Costs Is Question of Fact

[c] Burden When Item Appears Improper on Its Face

[d] Burden When Objecting to Item Proper on Its Face

§ 60.46 Supporting Motion to Tax Costs by Striking or Reducing Specific Items--To Strike Claim for Cost of Unnecessary Deposition

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Prevailing Party Is Not Entitled to Recover Cost of Unnecessary Deposition

[b] Deponent's Testimony Relevant But Not Necessary

§ 60.47 Supporting Motion to Tax Costs by Striking or Reducing Specific Items--To Strike Unnecessary Surety Bond Premium

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Premium on Unnecessary Surety Bond

§ 60.48 Supporting Motion to Tax Costs by Striking or Reducing Specific Items--To Strike Claim for Interest Paid on Amount Borrowed to Post Cash Deposit in Lieu of Surety Bond

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Interest on Cash Deposited in Lieu of Surety Bond

§ 60.49 Supporting Motion to Tax Costs by Striking or Reducing Specific Items--To Strike Costs of Prior Trial That Resulted in Mistrial

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Costs of Prior Trial

§ 60.50 Supporting Motion to Tax Costs by Striking or Reducing Specific Items--To Strike Cost of Exhibits Prepared by Party Introducing Them

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Exhibits Prepared for Trial

§ 60.51 Supporting Motion to Tax Costs by Striking or Reducing Specific Items--To Strike Claim for Attorney's Fee Not Authorized by Contract or Statute

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] General Rule Regarding Attorney's Fees

[b] Attorney's Fees Are Not Generally Recoverable as Costs

[c] Striking Claim for Attorney's Fees

§ 60.52 Supporting Motion to Tax Costs by Striking or Reducing Specific Items--To Strike Local Travel Expenses Not Incurred to Attend Depositions

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Local Travel Expenses Not Needed for Deposition Attendance Are Not Allowable Costs

§ 60.53 Supporting Motion to Tax Costs by Striking or Reducing Specific Items--To Strike Deposition-Related Attorney Meal Expenses

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Deposition-Related Attorney Meals Are Not Allowable Costs

§ 60.54 Supporting Motion to Tax Costs by Striking or Reducing Specific Items--To Strike Costs of Exhibits Not Used at Trial

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Exhibits Not Used at Trial Are Not Allowable Costs

[b] Exhibits Not Reasonably Necessary to Conduct of Litigation

§ 60.55 Supporting Motion to Tax Costs by Striking or Reducing Specific Items--To Strike Fax Charges

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Fax Charges Are Not Allowable Costs

§ 60.56 Supporting Motion to Tax Costs by Striking or Reducing Specific Items--To Strike Computer Legal Research Charges

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Computer Legal Research Charges Are Not Allowable Costs

§§ 60.57-60.69 [Reserved]

§ 60.70 Opposing Motion to Tax Costs by Striking or Reducing Specific Items--Motion Untimely

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Time for Filing Motion to Tax

[b] Untimely Filing of Motion to Tax Costs as Waiver of Objections

§§ 60.71-60.79 [Reserved]

§ 60.80 Opposing Motion to Strike Costs Memorandum or Tax Costs--Costs Allowed to Prevailing Party as Matter of Right

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Prevailing Party's Right to Costs

[b] "Prevailing Party" Defined

[c] "Complaint," "Defendant," and "Plaintiff" Defined

[d] Costs Not Available Only if Expressly Disallowed by Statute

[4] Additional Authorities

[a] "Prevailing Party" Defined

[b] Costs Not Available Only If Expressly Disallowed by Statute

§ 60.81 Opposing Motion to Strike Costs Memorandum or Tax Costs--Express Award of Costs Not Required

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Express Award of Costs Not Required

§ 60.82 Opposing Motion to Strike Costs Memorandum or Tax Costs--Dismissal of Complaint in Intervention

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Dismissal of Complaint in Intervention

§ 60.83 Opposing Motion to Strike Costs Memorandum or Tax Costs--Code Civ. Proc. § 998 Does Not Preclude Plaintiff From Recovering Preoffer Costs

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Plaintiff Who Reject More Favorable Settlement Offer Remains Entitled to Preoffer Costs

§ 60.84 Opposing Motion to Strike Costs Memorandum or Tax Costs--Code Civ. Proc. § 998 Does Not Preclude Plaintiff's Costs When Judgment Plus Plaintiff's Preoffer Costs and Fees Exceed Defendant's Settlement Offer

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Plaintiff's Preoffer Costs and Attorney's Fees Are Added to Judgment When Determining Whether Judgment Is More Favorable Than Defendant's Settlement Offer

§ 60.84A Opposing Motion to Strike Costs Memorandum or Tax Costs--Plaintiff Recovered More Than Amount Offered by Defendant for Purposes of Code Civ. Proc. § 998 by Taking Into Account Other Settlements Entered as of Time § 998 Offer Was Outstanding, But Not Considering Settlements Not Yet Reached

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Plaintiff's Recovery for the Purposes of Determining Whether the Cost-Shifting Provisions of Code Civ. Proc. § 998 Apply Takes Into Account Other Settlements Entered as of the Time of Defendant's Offer, But Not Other Settlements Not Yet Reached

§ 60.85 Opposing Motion to Strike Costs Memorandum or Tax Costs--Defendant Is Entitled to Postoffer Costs Under Code Civ. Proc. § 998, Including Postoffer Attorney's Fees

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] When Defendant Is Treated as Prevailing Party for Purposes of Postoffer Costs

[b] Judgment More Favorable Than Offer Is Prima Facie Evidence of Reasonableness

[c] Defendant's Postoffer Costs Include Postoffer Attorney's Fees

§ 60.86 Opposing Motion to Strike Costs Memorandum or Tax Costs--Defendant's Code Civ. Proc. § 998 Offer Not Effective to Shift Costs to Plaintiff

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

§§ 60.87-60.89 [Reserved]

§ 60.90 Opposing Motion to Strike Costs Memorandum or Tax Costs--All Claimed Items Are Expressly Authorized by Law

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Prevailing Party's Right to Costs

[b] Allowable Costs

[i] Filing Fees

[ii] Motion Fees

[iii] Jury Fees

[iv] Juror Food and Lodging

[v] Deposition Costs

[vi] Service of Process Costs

[vii] Attachment Costs

[viii] Premiums on Bonds

[ix] Witness Fees

[x] Expert Witness Fees

[xi] Transcripts

[xii] Attorney's Fees

[xiii] Reporter Fees

[xiv] Models and Blowups of Exhibits

[xv] Photocopies of Exhibits

[xvi] Items Required by Statute

§§ 60.91-60.99 [Reserved]

§ 60.100 Opposing Motion to Strike Costs Memorandum or Tax Costs--Allowance of Items Is Discretionary With Court--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Verified Memorandum Is Prima Facie Evidence of Necessity

[b] Discretion of Court to Allow Items as Costs

[c] Reason for Court's Discretion

[4] Additional Authorities

[a] Discretion of Court to Allow Items as Costs

§ 60.101 Opposing Motion to Strike Costs Memorandum or Tax Costs--Allowance of Items Is Discretionary With Court--Referee Fees

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Referee Fees

§ 60.102 Opposing Motion to Strike Costs Memorandum or Tax Costs--Allowance of Items Is Discretionary With Court--Costs of Prior Trials

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Costs of Prior Trials

§ 60.103 Opposing Motion to Strike Costs Memorandum or Tax Costs--Allowance of Items Is Discretionary With Court--Special Master Fees

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Special Master Fees

§ 60.104 Opposing Motion to Strike Costs Memorandum or Tax Costs--Allowance of Items Is Discretionary With Court--Arbitrator's Award

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Arbitrator's Award

§ 60.105 Opposing Motion to Strike Costs Memorandum or Tax Costs--Allowance of Items Is Discretionary With Court--Costs of Unsuccessful Court-Ordered Mediation

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Costs of Unsuccessful Court-Ordered Mediation

§§ 60.106-60.119 [Reserved]

§ 60.120 Supporting Motion for Relief for Untimely Filing of Memorandum of Costs--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Time to File Cost Bill

[b] Time Requirement Not Jurisdictional

[c] Relief on Ground of Mistake, Inadvertence, Surprise, or Excusable Neglect

[d] Applicability of Code Civ. Proc. § 473(b) to Failure to File Cost Bill

[e] Broad Discretion of Court in Absence of Prejudice to Adverse Party

[4] Additional Authorities

[a] Time Requirement Not Jurisdictional

[b] Applicability of Code Civ. Proc. § 473(b) to Failure to File Cost Bill

[c] Broad Discretion of Court in Absence of Prejudice to Adverse Party

§ 60.121 Supporting Motion for Relief for Untimely Filing of Memorandum of Costs--Relief Based on Attorney's Affidavit of Fault

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Relief Based on Attorney's Affidavit of Fault

§ 60.122 Supporting Motion for Relief for Untimely Filing of Memorandum of Costs--Timely Deposit in Mail

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Timely Deposit in Mail

§ 60.123 Supporting Motion for Relief for Untimely Filing of Memorandum of Costs--Press of Business

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Press of Business

§ 60.124 Supporting Motion for Relief for Untimely Filing of Memorandum of Costs--Lack of Knowledge of Entry of Judgment

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Lack of Knowledge of Entry of Judgment

§§ 60.125-60.139 [Reserved]

§ 60.140 Supporting Motion for Relief for Untimely Filing of Motion to Tax Costs--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Time to File Notice of Motion to Tax Costs

[b] Relief on Ground of Mistake, Inadvertence, Surprise, or Excusable Neglect

[c] Relief From Failure to Timely File Motion to Tax Costs

[d] Relief Based on Attorney's Affidavit of Fault

[4] Additional Authorities

[a] Relief From Failure to Timely File Motion to Tax Costs

§§ 60.141-60.149 [Reserved]

§ 60.150 Opposing Motion for Relief for Untimely Filing of Memorandum of Costs or Motion to Tax Costs--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Burden of Proof

[b] Showing Required

§ 60.151 Opposing Motion for Relief for Untimely Filing of Memorandum of Costs or Motion to Tax Costs--Press of Business

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Press of Business

§ 60.152 Opposing Motion for Relief for Untimely Filing of Memorandum of Costs or Motion to Tax Costs--Denial for Prejudice

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Denial for Prejudice

§§ 60.153-60.159 [Reserved]

§ 60.160 Supporting Motion to Amend Memorandum of Costs

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[3] Discussion of Authorities

[a] Discretion of Court to Allow Amendment

[b] Amending Cost Bill

§§ 60.161-60.299 [Reserved]

§ 60.300 Supporting Motion for Award of Attorney's Fees Under Common Fund Exception--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] General Rule

[b] Equitable Exceptions

[c] Common Fund Theory

[d] Rationale for Common Fund Exception

[e] Amount of Fees

§ 60.301 Supporting Motion for Award of Attorney's Fees Under Common Fund Exception--Award in Class Action

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Award in Class Action

§ 60.302 Supporting Motion for Award of Attorney's Fees Under Common Fund Exception--Apportioning Fees When Benefit Received

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Apportioning Fees When Benefit Received

[4] Additional Authorities

[a] Apportioning Fees When Benefit Received

§ 60.303 Supporting Motion for Award of Attorney's Fees Under Common Fund Exception--Equitable Action Protecting Contract Rights of Members of Association

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Equitable Action Protecting Contract Rights of Members of Association

§ 60.304 Supporting Motion for Award of Attorney's Fees Under Common Fund Exception--Award Directly to Attorney

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Award Directly to Attorney

§§ 60.305-60.319 [Reserved]

§ 60.320 Opposing Motion for Award of Attorney's Fees Under Common Fund Exception--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] General Rule

[b] Rationale for Common Fund Exception

§ 60.321 Opposing Motion for Award of Attorney's Fees Under Common Fund Exception--Identifiable Fund Required

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Identifiable Fund Required

§ 60.322 Opposing Motion for Award of Attorney's Fees Under Common Fund Exception--Litigation Success Required

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Litigation Success Required

[4] Additional Authorities

[a] Litigation Success Required

§ 60.323 Opposing Motion for Award of Attorney's Fees Under Common Fund Exception--Interests Adverse to Fund

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Interests Adverse to Fund

§ 60.324 Opposing Motion for Award of Attorney's Fees Under Common Fund Exception--Primary Beneficiary

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Primary Beneficiary

[4] Additional Authorities

[a] Primary Beneficiary

§ 60.325 Opposing Motion for Award of Attorney's Fees Under Common Fund Exception--Other Beneficiaries of Fund Represented by Counsel

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Other Beneficiaries of Fund Represented by Counsel

§ 60.326 Opposing Motion for Award of Attorney's Fees Under Common Fund Exception--Lien Claimant Is Plaintiff 's Creditor

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Lien Claimant Is Plaintiff 's Creditor

§§ 60.327-60.339 [Reserved]

§ 60.340 Supporting Motion for Award of Attorney's Fees Under Substantial Benefit Exception--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] General Rule

[b] Equitable Exceptions

[c] Substantial Benefit Theory

[d] Requirements for Application of Doctrine

[e] Amount of Fees

[f] Award Directly to Attorney

[4] Additional Authorities

[a] Substantial Benefit Theory

§ 60.341 Supporting Motion for Award of Attorney's Fees Under Substantial Benefit Exception--Benefit to Defendant Not Required

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Benefit to Defendant Not Required

§ 60.342 Supporting Motion for Award of Attorney's Fees Under Substantial Benefit Exception--Action Saving Public Funds

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Action Saving Public Funds

§ 60.343 Supporting Motion for Award of Attorney's Fees Under Substantial Benefit Exception--Environmental Litigation

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Environmental Litigation

§§ 60.344-60.359 [Reserved]

§ 60.360 Opposing Motion for Award of Attorney's Fees Under Substantial Benefit Exception--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] General Rule

[b] Substantial Benefit Exception

[c] Actual and Concrete Benefits Necessary

[d] Litigation Success Required

[e] No Award Where Interest Adverse

§ 60.361 Opposing Motion for Award of Attorney's Fees Under Substantial Benefit Exception--Stare Decisis Not a Substantial Benefit

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Stare Decisis Not a Substantial Benefit

§ 60.362 Opposing Motion for Award of Attorney's Fees Under Substantial Benefit Theory--In Catalyst Case, Plaintiff Must Have Made Reasonable Attempt to Settle Matter Short of Litigation

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Party Must Have Made Reasonable Attempt to Settle Matter

§§ 60.363-60.369 [Reserved]

§ 60.370 Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] General Rule

[b] Code Civ. Proc. § 1021.5

[c] Private Attorney General Theory

[d] Federal Law as Guide to Interpretation

[e] Significant Benefit

[f] Necessity and Financial Burden

[4] Additional Authorities

[a] Private Attorney General Theory

[b] Significant Benefit

[c] Necessity and Financial Burden

§ 60.371 Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--Enforcement of Existing Right

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Enforcement of Existing Rights

§ 60.372 Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--Suits Between Private Parties

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Suits Between Private Parties

§ 60.373 Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--Fees Sought Against Court

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Fees Sought Against Court

§ 60.374 Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--No Good-Faith Exception

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] No Good-Faith Exception

§ 60.375 Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--Party Not Required to Prevail on Every Claim

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Party Not Required to Prevail on Every Claim

[4] Additional Authorities

[a] Party Not Required to Prevail on Every Claim

§ 60.376 Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--Successful Party Need Not Be Prevailing Party

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Successful Party Need Not Be Prevailing Party

§ 60.377 Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--Right to Seek Fees Not Affected by Type of Proceedings Brought

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Right to Seek Fees Not Affected by Type of Proceedings Brought

§ 60.378 Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--Defendant Is Private Party

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Defendant Is Private Party

§ 60.379 Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--Right to Seek Fees Not Affected by Dismissal of Action for Lack of Prosecution

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Right to Seek Fees Not Affected by Dismissal of Action for Lack of Prosecution

§ 60.380 Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--Appellate Court May Award Fees Under Code Civ. Proc. § 1021.5

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Appellate Court May Award Fees Under Code Civ. Proc. § 1021.5

§ 60.381 Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--Defendant Is Public Entity

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Defendant Is Public Entity

§ 60.382 Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--General Entitlement to Amount Requested

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Fees to Establish Fee Claim

[b] Fee Is Based on Application of Multiplier to Lodestar Figure

[c] Factors on Which Multiplier Is Based

[d] Trial Court's Discretion in Applying Multiplier

[4] Additional Authorities

[a] Trial Court's Discretion in Applying Multiplier

§ 60.383 Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--Application of Multiplier to Fee-Related Portion of Lodestar

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Application of Multiplier to Fee-Related Portion of Lodestar

[4] Additional Authorities

§ 60.384 Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--Time Reasonably Spent in Related Proceedings

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Time Reasonably Spent in Related Proceedings

[4] Additional Authorities

[a] Time Reasonably Spent in Related Proceedings

§ 60.385 Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--Determining Fee When Unsuccessful Claims Related to Successful Claims

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Determining Fee When Unsuccessful Claims Related to Successful Claims

§ 60.386 Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--Fees and Penalties May Be Awarded in Same Action

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Private Attorney General Fees and Penalties May Be Awarded in Same Action

§ 60.387 Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--No Reduction in Amount for Pursuit of Unsuccessful Claims

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] No Reduction in Amount for Pursuit of Unsuccessful Claims

§ 60.388 Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--Prevailing Private Party Suing With Public Entities Is Also Entitled to Fees

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Prevailing Private Party Suing With Public Entities Is Also Entitled to Fees

§ 60.389 Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--Party Need Not Have Attempted to Enforce Right Without Litigation

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

§§ 60.390-60.399 [Reserved]

§ 60.400 Opposing Motion for Award of Attorney's Fees Under Private Attorney General Theory--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] General Rule

[b] Factors Necessary for Right to Fees

[c] Causal Connection Between Lawsuit and Relief Required

[d] Under Catalyst Theory, Plaintiff Must Show Reasonable Attempt to Settle Matter Short of Litigation

[4] Additional Authorities

[a] Factors Necessary for Right to Fees

[b] Causal Connection Between Lawsuit and Relief Required

§ 60.401 Opposing Motion for Award of Attorney's Fees Under Private Attorney General Theory--Apportionment of Fees

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Apportionment of Fees

§ 60.402 Opposing Motion for Award of Attorney's Fees Under Private Attorney General Theory--Private Attorney General Exception Not Applicable to Criminal Actions

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Private Attorney General Exception Not Applicable to Criminal Actions

§ 60.403 Opposing Motion for Award of Attorney's Fees Under Private Attorney General Theory--Party Seeking Fees in "Catalyst Theory" Case Must Have Attempted to Enforce Right Without Litigation

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Party Seeking Fees in "Catalyst Theory" Case Must Have Attempted to Enforce Right Without Litigation

§ 60.404 Opposing Motion for Award of Attorney's Fees Under Private Attorney General Theory--No Right to Fees When Litigation Primarily Intended to Advance Plaintiff 's Economic Interest and Conferral of Public Benefit Was Simply Fortuitous

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] No Right to Fees When Litigation Primarily Intended to Advance Plaintiff 's Economic Interest and Conferral of Public Benefit Was Simply Fortuitous

[b] Measure of Personal Stake

[4] Additional Authorities

[a] No Right to Fees When Litigation Primarily Intended to Advance Plaintiff 's Economic Interest and Conferral of Public Benefit Was Simply Fortuitous

§ 60.405 Opposing Motion for Award of Attorney's Fees Under Private Attorney General Theory--First Amendment Issue Is Only Marginal and Result Is Equivocal

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] First Amendment Issue Is Only Marginal and Result Is Equivocal

§ 60.406 Opposing Motion for Award of Attorney's Fees Under Private Attorney General Theory--Public Entity Has No Right to Fees When Defendant Is Private Party

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Public Entity Has No Right to Fees When Defendant Is Private Party

§ 60.406A Opposing Motion for Award of Attorney's Fees Under Private Attorney General Theory-Attorney General Cannot Recover Fees When Acting on Behalf of State

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Attorney General Cannot Recover Attorney's Fees Under Code Civ. Proc. § 1021.5 When Acting on Behalf of State

§ 60.407 Opposing Motion for Award of Attorney's Fees Under Private Attorney General Theory--Party Seeking Fees Must Be Successful

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Party Seeking Fees Must Be Successful

§ 60.408 Opposing Motion for Award of Attorney's Fees Under Private Attorney General Theory--Party Against Whom Fees Sought Was Not Opposing Party

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Party Against Whom Fees Are Sought Must Be Opposing Party Within Meaning of Statute

[4] Additional Authorities

[a] Party Against Whom Fees Are Sought Must Be Opposing Party Within Meaning of Statute

§ 60.409 Opposing Motion for Award of Attorney's Fees Under Private Attorney General Theory--Party Against Whom Fee Award Sought Is Not Type of Party on Whom Private Attorney General Fees Intended to Be Imposed

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Party Against Whom Fees Are Sought Must Be Type of Party on Whom Private Attorney General Fees Are Intended to Be Imposed Under Code of Civil Procedure § 1021.5

§ 60.410 Opposing Motion for Award of Attorney's Fees Under Private Attorney General Theory--No Fee Award When Party Recovers Judgment That Could Have Been Rendered in Limited Civil Case

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Party Seeking Fees Must Not Have Recovered Judgment That Could Have Been Rendered in Limited Civil Case

§§ 60.411-60.439 [Reserved]

§ 60.440 Supporting Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Recovery of Reasonable Attorney's Fees in Action on Contract

[b] Party Obtaining Unqualified Favorable Decision Has Right to Attorney's Fees as a Matter of Law

[c] Party Prevailing on Contract Is Determined by Court

[d] Party Prevailing on Contract Generally Is Party Who Recovered Greater Relief

[e] Employer of In-House Counsel May Recover Fees as Prevailing Party

[f] Attorney Represented by Other Members of Law Firm May Recover Attorney Fees

[4] Additional Authorities

[a] Recovery of Reasonable Attorney's Fees in Action on Contract

[b] Party Prevailing on Contract Determined by Court

§ 60.441 Supporting Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Attorney's Fees Provision Applies to Entire Contract

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Attorney's Fees Provision Applies to Entire Contract

§ 60.442 Supporting Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--No Waiver of Fees Allowed

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] No Waiver of Fees Allowed

§ 60.443 Supporting Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Party Prevailing on Contract After Tender and Deposit

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Party Prevailing on Contract After Tender and Deposit

§ 60.444 Supporting Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Party Prevailing on Contract After Compromise Under Code Civ. Proc. § 998

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Party Prevailing on Contract After Compromise Under Code Civ. Proc. § 998

[4] Additional Authorities

§ 60.445 Supporting Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Party Prevailing on Contract After Involuntary Dismissal Pursuant to Code Civ. Proc. § 583.360

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Party Prevailing on Contract After Involuntary Dismissal Pursuant to Code Civ. Proc. § 583.360

§ 60.446 Supporting Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Prevailing Party Not Signatory to Contract

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Prevailing Party Not Signatory to Contract

[4] Additional Authorities

[a] Prevailing Party Not Signatory to Contract

[b] Losing Party Not Signatory to Contract

§ 60.447 Supporting Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Contract Unenforceable

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Fees Recoverable Although Contract Unenforceable

§ 60.448 Supporting Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Contract Rescinded or Canceled

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Rescission or Cancellation

[4] Additional Authorities

[a] Rescission or Cancellation

§ 60.449 Supporting Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Enforcement of Rescission of Contract

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Specific Performance of Rescission Agreement

§ 60.450 Supporting Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Voluntary Dismissal After Determination on the Merits

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Attorney's Fees After Determination Made on the Merits

§ 60.451 Supporting Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Voluntary Dismissal of Noncontractual Claims

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Voluntary Dismissal Does Not Preclude Recovery of Attorney's Fees Incurred in Defending Noncontractual Claims

§ 60.452 Supporting Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Court Has Discretion to Declare Prevailing Party

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Court Has Discretion to Declare Prevailing Party

§ 60.453 Supporting Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Pro Se Attorney Entitled to Reimbursement for Attorney's Fees Incurred for Assistance by Other Counsel

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[3] Discussion of Authorities

§ 60.454 Supporting Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Party Prevailing on Contract After Determination of Arbitration Under Contract

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Party Prevailing on Contract After Tender and Deposit

§§ 60.455-60.459 [Reserved]

§ 60.460 Opposing Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Not Entitled to Fees Under Civ. Code § 1717

§ 60.461 Opposing Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Prevailing Parties Not Necessarily Determined by Final Judgment

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Prevailing Parties Not Necessarily Determined by Final Judgment

§ 60.462 Opposing Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Final Disposition Required Before Party Can Prevail

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Final Disposition Required Before Party Can Prevail

§ 60.463 Opposing Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--No Prevailing Party After Dismissal

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] No Prevailing Party After Dismissal

§ 60.464 Opposing Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--No Recovery of Attorney's Fees When Contract Void Because It Violates Public Policy

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] No Recovery of Attorney's Fees When Contract Void Because It Violates Public Policy

§ 60.465 Opposing Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Failure to File Timely, Noticed Motion

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Time to File Motion for Attorney's Fees

[b] Timely Motion for Attorney's Fees Required

[c] Disregard of Procedural Deficiency Inconsistent With Legislative Intent

[4] Additional Authorities

[a] Timely Motion for Attorney's Fees Required

§ 60.466 Opposing Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Discretion of Trial Court Not to Declare a Prevailing Party

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Discretion of Trial Court Not to Declare Prevailing Party

[b] Court May Consider Evidence at Trial

§ 60.467 Opposing Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Attorney or Party Acting in Propria Persona Is Not Entitled to Award of Fees

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Attorney or Other Party Acting in Propria Persona Is Not Entitled to an Award of Attorney's Fees

§ 60.468 Opposing Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Attorney's Fees Provision in Indemnification Clause Cannot Be Basis for Fee Award Under Civ. Code § 1717

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Indemnification Clause Cannot Be Basis for Attorney's Fees Award Under Civ. Code § 1717

§ 60.469 Opposing Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Attorney's Fee Provision Not Enforceable Against Nonsignatory

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

§ 60.470 Opposing Motion to Establish Entitlement to Fees in Action on Contract Under Civil Code § 1717--Condition Precedent to Recovery of Fees Not Performed

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

§§ 60.471-60.479 [Reserved]

§ 60.480 Supporting Motion to Fix Amount of Fees Recoverable in Action on Contract Under Civ. Code § 1717--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Recovery of Reasonable Attorney's Fees in Action on Contract

[b] When Attorney's Fees Are Fixed

[c] Discretion of Trial Court in Determining Reasonable Attorney's Fees

[d] Discretion of Trial Court to Fix Fees Is Not Limited by Local Court Rule

[e] Discretion of Trial Court to Fix Fees Is Not Limited by Amount of Damages Awarded

§ 60.481 Supporting Motion to Fix Amount of Fees Recoverable in Action on Contract Under Civ. Code § 1717--When Fees Need Not Be Apportioned Between Contract Cause of Action and Other Causes of Action

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] When Fees Need Not Be Apportioned Between Contract Cause of Action and Other Causes of Action

§ 60.481A Supporting Motion to Fix Amount of Fees Recoverable in Action on Contract Under Civ. Code § 1717--Fees Need Not Be Allocated When Representing Multiple Parties If Liability of Parties Is So Factually Interrelated That Allocation Would Be Impossible

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Fees Need Not Be Allocated Between Multiple Parties When Allocation Is Impossible

§ 60.482 Supporting Motion to Fix Amount of Fees Recoverable in Action on Contract Under Civ. Code § 1717--Lodestar Method of Computing Attorney's Fees Applies

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Lodestar Method of Computing Attorney's Fees Applies

§ 60.483 Supporting Motion to Fix Amount of Fees Recoverable in Action on Contract Under Civ. Code § 1717--Reimbursement of Attorney's Out-of-Pocket Costs

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Reimbursement of Attorney's Out-of-Pocket Costs

§ 60.484 Supporting Motion to Fix Amount of Fees Recoverable in Action on Contract Under Civ. Code § 1717--Interest on Attorney's Fees Is Available

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Interest on Attorney's Fees Is Available

§ 60.485 Supporting Motion to Fix Amount of Fees Recoverable in Action on Contract Under Civ. Code § 1717--Deduction of Award of Fees From Damages Awarded in Favor of Party Not Prevailing on Contract

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Deduction of Award of Fees From Damages Awarded in Favor of Party Not Prevailing on Contract

§ 60.486 Supporting Motion to Fix Amount of Fees Recoverable in Action on Contract Under Civ. Code § 1717--Interaction Between Fees Recoverable Pursuant to Code Civ. Proc. § 998 and Civ. Code § 1717

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] Court May Fix and Award Attorney's Fees Incurred After More Favorable Settlement Offer Was Made

§§ 60.487-60.549 [Reserved]

§ 60.550 Opposing Motion for Award of Attorney's Fees Due to Excessive Amount Requested--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Discretion of Trial Court

[b] Fundamental Determination in Setting Fee

[c] Other Factors

[4] Additional Authorities

[a] Discretion of Trial Court

§ 60.551 Opposing Motion for Award of Attorney's Fees Due to Excessive Amount Requested--Amount Requested for Attorney's Fees Must Be Supported by Evidence

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Award of Attorney's Fees Must Be Supported by Evidence

§ 60.552 Opposing Motion for Award of Attorney's Fees Based on Attorney's Fees as Loss in Indemnity Agreement

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Award of Attorney's Fees Not Available If Based on a Loss Subject to an Indemnity Agreement

§§ 60.553-60.599 [Reserved]

§ 60.600 Supporting Motion for Security for Costs Alleging Plaintiff Is Vexatious Litigant--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Motion for Security

[b] Order for Security

[c] "Security" Defined

§ 60.601 Supporting Motion for Security for Costs Alleging Plaintiff Is Vexatious Litigant--Vexatious Litigant Who Has Filed Five Suits in Propria Persona

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Vexatious Litigant Under Code Civ. Proc. § 391(b)(1)

§ 60.602 Supporting Motion for Security for Costs Alleging Plaintiff Is Vexatious Litigant--Vexatious Litigant Who Repeatedly Relitigates in Propria Persona

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Vexatious Litigant Under Code Civ. Proc. § 391(b)(2)

[4] Additional Authorities

[a] Vexatious Litigant Under Code Civ. Proc. § 391(b)(2)

§ 60.603 Supporting Motion for Security for Costs Alleging Plaintiff Is Vexatious Litigant--Vexatious Litigant Who Repeatedly Files Unmeritorious Moving Papers, Discovery, or Other Tactics in Propria Persona

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Vexatious Litigant Under Code Civ. Proc. § 391(b)(3)

§ 60.604 Supporting Motion for Security for Costs Alleging Plaintiff Is Vexatious Litigant--Vexatious Litigant Who Was Previously Declared to Be a Vexatious Litigant

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Vexatious Litigant Under Code Civ. Proc. § 391(b)(4)

§ 60.605 Supporting Motion for Security for Costs Alleging Plaintiff Is Vexatious Litigant--Application of Vexatious Litigant Statutes When Plaintiff Is Currently Represented by Counsel

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Application of Vexatious Litigant Statutes When Plaintiff Is Currently Represented by Counsel

§ 60.606 Supporting Motion for Security for Costs Alleging Plaintiff Is Vexatious Litigant--Judicial Notice of Prior Proceedings

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Judicial Notice of Prior Proceedings

§§ 60.607-60.619 [Reserved]

§ 60.620 Supporting Motion for Security for Costs Alleging Plaintiff Is Nonresident Individual or Foreign Corporation--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Plaintiff Is Nonresident Individual or Foreign Corporation and Defendant Will Likely Prevail in Action

[b] Code Civ. Proc. § 1030 Is Constitutional as Applied to Nonresident Individuals and Foreign Corporations

§ 60.621 Supporting Motion for Security for Costs Alleging Plaintiff Is Nonresident Individual or Foreign Corporation--Uncontroverted Declaration of Nonresidency as Sufficient Evidence

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Uncontroverted Declaration of Nonresidency as Sufficient Evidence

§§ 60.622-60.629 [Reserved]

§ 60.630 Opposing Motion for Security for Costs Alleging Plaintiff Is Vexatious Litigant--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Burden on Motion

[b] Showing Required

§ 60.631 Opposing Motion for Security for Costs Alleging Plaintiff Is Vexatious Litigant--Conclusory Affidavit Insufficient

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Conclusory Affidavit Insufficient

§ 60.632 Opposing Motion for Security for Costs Alleging Plaintiff Is Vexatious Litigant--Previous Litigation Not Finally Determined

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Previous Litigation Not Finally Determined

§§ 60.633-60.639 [Reserved]

§ 60.640 Opposing Motion for Security for Costs When Plaintiff Is Indigent--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Burden on Motion

[b] Relief for Indigent Plaintiffs

[4] Additional Authorities

[a] Relief for Indigent Plaintiffs

§ 60.641 Opposing Motion for Security for Costs When Cross-Complainant Is Non-Resident Individual or Foreign Corporation

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Burden on Motion

[b] Non-Resident Individual or Foreign Corporation Cross-Complainants

§§ 60.642-60.649 [Reserved]

§ 60.650 Supporting Motion for Dismissal for Failure to Post Security When Plaintiff Is Nonresident Individual or

Foreign Corporation--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Action or Proceeding Should Be Dismissed for Failure to Post Security

§ 60.651 Supporting Motion for Dismissal for Failure to Post Security When Plaintiff Is Nonresident Individual or Foreign Corporation--Code Civ. Proc. § 1030 Is Constitutional as Applied to Nonresident Individuals and Foreign Corporations

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Code Civ. Proc. § 1030 Is Constitutional as Applied to Nonresident Individuals and Foreign Corporations

§ 60.652 Supporting Motion for Dismissal for Failure to Post Security When Plaintiff Is Nonresident Individual or Foreign Corporation--Court May Shorten Time for Compliance With Order for Security on Showing of Good Cause

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Court May Shorten Time for Compliance With Order for Security on Showing of Good Cause

California Points & Authorities

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Volume 6 Chapters 60-69 COSTS---to---DECLARATORY RELIEF
CHAPTER 60 COSTS
PART I. INTRODUCTION

6-60 California Points & Authorities § 60.01

§ 60.01 Scope of Chapter

This chapter contains memoranda relating to the recovery of costs in a civil action, or the imposition of security for costs.

Part II, Subpart A, relating to the recovery of costs generally, includes the following types of forms:

- Supporting motions to strike a memorandum of costs (§ 60.10 et seq.).
- Supporting motions to tax costs by striking or reducing specific items (§ 60.40 et seq.).
- Opposing motions to strike a memorandum of costs or to tax costs by striking or reducing specific items (§ 60.80 et seq.).
- Supporting and opposing motions for relief from failure to file a timely memorandum of costs or motion relating to costs, based on mistake, inadvertence, surprise, or excusable neglect (§ 60.120 et seq.).
- Supporting and opposing motions to amend a memorandum of costs (§ 60.160 et seq.).

Part II, Subpart B, relating to the recovery of attorney's fees as an item of costs when expressly permitted by statute, law, or contract, includes the following types of forms:

- Supporting and opposing an award of attorney's fees under the common fund exception (§ 60.300 et seq.).
- Supporting and opposing an award of attorney's fees under the substantial benefit exception (§ 60.340 et seq.)
- Supporting and opposing an award of attorney's fees under the private attorney general exception (§ 60.370 et seq.).

- Supporting and opposing an award of attorney's fees under *Civ. Code § 1717*, as the prevailing party in an action on a contract providing for the recovery of attorney's fees (§ 60.440 et seq.).

- Opposing any of these types of awards of attorney's fees on the ground that the fees are excessive (§ 60.550 et seq.).

Part II, Subpart C, relates to the imposition of security for costs when a plaintiff is a vexatious litigant or a nonresident individual or alien corporation, and includes the following types of forms:

- Supporting and opposing motions for the imposition of security for costs and motions to dismiss for failure to post security for costs (§ 60.600 et seq.).

For memoranda that may be submitted when a party is seeking to recover reasonable expenses, including attorney's fees, as a sanction, see Ch. 207, *Sanctions* . For memoranda relating to the recovery of attorney's fees from a client under an agreement for such fees, as distinguished from their recovery from an opposing party as an item of costs, see Ch. 25, *Attorney's Fees* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureClass ActionsClass CounselFeesCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral Overview

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6-60 California Points & Authorities § 60.02

§ 60.02 Governing Law

Prejudgment costs in civil actions and proceedings are governed generally by *Code Civ. Proc. §§ 1021-1038* and *Cal. Rules of Ct., Rules 3.1700 et seq.*

In addition, there are many other statutes relating to the grant or denial of costs in specific actions or proceedings or under specific circumstances [*see, e.g., Code Civ. Proc. §§ 998* (failure to obtain more favorable judgment or award after rejection of pretrial or pre-arbitration settlement offer), *1141.21* (award of costs and fees on failure to secure more favorable judgment on trial de novo after arbitration award), and *1268.710*, 1268.720 (costs in eminent domain proceedings); *Prob. Code § 1002* (costs in probate proceedings)].

Memoranda of costs and motions to tax costs are governed by *Cal. Rules of Ct., Rule 3.1700*. Extensions of time within which to serve and file a memorandum of costs or motion to tax costs are governed by *Code Civ. Proc. § 1054* and *Cal. Rules of Ct., Rule 3.1700(b)(3)* [*see Cardinal Health 301, Inc. v. Tyco Electronics Corp. (2008) 169 Cal. App. 4th 116, 155, 87 Cal. Rptr. 3d 5* (party need not expressly request extension); *Davis Lumber Co. v. Hubbell (1955) 137 Cal. App. 2d 148, 151, 290 P.2d 33*].

Motions to amend proceedings (which would include a memorandum of costs) and relief from proceedings taken by mistake, inadvertence, surprise, or excusable neglect (which would include a failure to timely file a memorandum of costs or a notice of motion to strike or tax costs) are governed by *Code Civ. Proc. § 473(a)(1), (b)*, respectively.

Costs on appeal are governed by *Cal. Rules of Ct., Rule 8.278*.

Costs of enforcing judgments are governed generally by *Code Civ. Proc. §§ 685.040-685.110*.

Attorney's fees recoverable from an opposing party are generally governed by *Code Civ. Proc. § 1021* and *Code Civ. Proc. § 1033.5(a)(10), (c)(5)*. Motions under the private attorney general theory for attorney's fees in actions resulting in the enforcement of an important right affecting the public interest are provided for in *Code Civ. Proc. § 1021.5*. The award of attorney's fees to a prevailing party in an action based on a contract is governed by *Civ. Code § 1717*. The award of attorney's fees to a prevailing party in a contract action based on a book account, as defined by Code *Civ.*

Proc. § 337a, and entered into on or after January 1, 1987, is governed by *Civ. Code § 1717.5*. Courts have the power to award reasonable expenses and attorney's fees in contempt proceedings [*Code Civ. Proc. § 1218*].

A number of other statutes require attorneys to pay reasonable expenses, including attorney's fees, of the opposing party as a sanction for frivolous actions, delaying tactics, or other misconduct in litigation [*see, e.g., Code Civ. Proc. §§ 128.5, 128.7*]. For memoranda that may be submitted when a party is seeking to recover reasonable expenses, including attorney's fees, as a sanction, see Ch. 207, *Sanctions* .

The procedure for obtaining an award of attorney's fees authorized by statute, as therefore allowable as an item of costs of suit, is governed by *Code Civ. Proc. §§ 1032-1034* and *Cal. Rules of Ct., Rule 3.1700*. The time for filing a notice of motion for an award of attorney's fees as costs under *Civ. Code § 1717* is governed by *Cal. Rules of Ct., Rule 3.1702*.

NOTE:

Decisions Under Prior Law Persuasive Rather Than Controlling. Extensive amendments in statutes and adoption of rules affecting costs were made effective January 1, 1987 [*Code Civ. Proc. §§ 1021-1038*; former Cal. Rules of Ct., Rules 26(d), 135, 870-870.4 (*now see Cal. Rules of Ct., Rules 8.278(c), 8.764, 3.1700 et seq.*)]. In many instances these changes continued or codified existing law. Decisions construing prior law thus are sometimes cited as persuasive, rather than controlling, authority to the extent that they are consistent with current provisions.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory AwardsCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureAppealsCosts & Attorney Fees

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6-60 California Points & Authorities § 60.03

§ 60.03 How to Use the Forms in This Chapter

[1] Page Limits on Memoranda

One of the more significant drafting requirements to keep in mind are page limits: supporting memoranda (other than those in a summary judgment proceeding) must not exceed 15 pages. Exhibits, declarations, attachments, tables of contents or authorities, or the proof of service are not included in the page limitation. A reply or closing memorandum may not exceed 10 pages [*Cal. Rules of Ct., Rule 3.1113(d)*]. Any party desiring to file a longer memorandum must obtain leave of courts or authorities, or the proof of service [*see Cal. Rules of Ct., Rule 3.1113(e)*]. These and other drafting requirements are discussed in *further detail in Ch. 1, Writing Legal Memoranda and Briefs, § 1.05*.

[2] Using the Forms to Build a Draft Memorandum

The forms included in this chapter are designed to be combined with others to form a complete memorandum. For a detailed discussion on how to select and use the forms in the publication to build a draft memorandum and complete the draft, with detailed discussion of all drafting requirements and strategic or stylistic considerations, see *Ch. 1, Writing Legal Memoranda and Briefs, §§ 1.03 -1.06*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing Memoranda

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6-60 California Points & Authorities § 60.04

§ 60.04 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

For detailed legal background discussion, research guides, procedural checklists, and practice forms of motions and other papers relating to the recovery of costs and attorney's fees in the trial court and to obtaining security for costs and attorney's fees, see California Forms of Pleading and Practice, Ch. 174, *Costs and Attorney's Fees* (Matthew Bender).

Other related chapters in California Forms of Pleading and Practice include the following:

- Ch. 53, *Appeal: Remittitur and Costs on Appeal* (recovery of costs on appeal).
- Ch. 72, *Attorney Practice and Ethics* (recovery of attorney's fees from client as distinguished form recovery from opposing party as item of costs).
- Ch. 510, *Sanctions* (recovery of reasonable expenses including attorney's fees under statutes providing for the imposition of sanctions).

[2] Related Points And Authorities Chapters

- For recovery of reasonable expenses, including attorney's fees, as a sanction, see Ch. 207, *Sanctions* .
- For recovery of attorney's fees in a shareholder's derivative action, see Ch. 52, *Corporations* .
- For recovery of attorney's fees from a client under a fee agreement (as distinguished from recovery from an opposing party as an item of costs), see Ch. 25, *Attorney's Fees* .

Legal Topics:

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

Civil ProcedureClass ActionsClass CounselFeesCivil ProcedureJudgmentsRelief From JudgmentAdditurs & RemittitursRemittitursCivil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral OverviewCivil ProcedureAppealsCosts & Attorney FeesLegal EthicsClient RelationsAttorney FeesFee Agreements

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[Reserved]

§§ 60.05[Reserved]

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1. Motion to Strike Memorandum of Costs

6-60 California Points & Authorities § 60.10

§ 60.10 Supporting Motion to Strike Memorandum of Costs--General Form

[1] FORM Supporting Motion to Strike Memorandum of Costs--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION TO
vs.	)	STRIKE MEMORANDUM OF COSTS
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Date Action Filed: _____

_____

THE MEMORANDUM OF COSTS HEREIN FILED BY _____ [*specify party, e.g.*, PLAINTIFF] SHOULD BE STRICKEN ON THIS TIMELY MOTION TO STRIKE.

Motion to Strike. A motion to strike a memorandum of costs may be served and filed 15 days after the memorandum was served, or, if the memorandum was served by mail, within the extended time authorized by *Section 1013 of the Code of Civil Procedure* (*Cal. Rules of Ct., Rule 3.1700(b)(1)*).

[*Insert other memoranda, as appropriate; see, e.g., § 60.11 et seq.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to strike [*see Cal. Rules of Ct., Rule 3.1700(b)(1)*] the entire cost bill on the ground its filing was not authorized by law. It should be combined with any of the forms *set forth in §§ 60.11* -60.29 that are applicable to the particular case.

A moving party who is also dissatisfied with particular items of costs should combine the motion to strike the entire cost bill with a motion either to strike specific items of cost or to reduce the amounts claimed for specific items or both to strike specific items and reduce the amount of costs claimed for other items [*see Cal. Rules of Ct., Rule 3.1700(b)(1), (2)*]. Then, if the motion to strike the entire cost bill is denied, the moving party will have preserved his or her objections to the particular items by having filed them within the prescribed time. Memoranda in support of motions to strike particular cost items or to tax costs by reducing particular items are *set out in § 60.40* et seq.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case.

It is advisable for counsel also to submit cognizable evidence in support of factual statements, by request for judicial notice (e.g., when a court must order the event for which costs are claimed and no order was issued) [*see Evid. Code § 450 et seq.*], or otherwise by affidavits or declarations. Although some cases hold that affidavits or declarations are not required, counsel must make some type of factual showing supporting the motion to strike the entire memorandum of costs [*see Senior v. Anderson (1900) 130 Cal. 290, 300, 62 P. 563* ; *Melnyk v. Robledo (1976) 64 Cal. App. 3d 618, 624, 134 Cal. Rptr. 602]* . Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For related legal background, research and procedural guides, and forms of notices of motion to strike a cost bill or to tax costs by striking or reducing specific items, with forms of supporting declarations and orders granting the motion, see California Forms of Pleading and Practice, Ch. 174, *Costs and Attorney's Fees* (Matthew Bender).

[d] Related Memoranda

For additional memoranda to combine with this form, see *§ 60.11 et seq. and § 60.40* et seq.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of

this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The memoranda *in § 60.80* et seq. may be used in an appropriate case to oppose the memoranda set out in this general form (as well as the memoranda designed to be combined with this form, *set out in § 60.11* et seq.).

If the notice of motion to strike or tax costs supported by this form is not filed within the time prescribed by *Cal. Rules of Ct., Rule 3.1700(b)(1),* the memoranda *set out in § 60.70* may be used to oppose the motion. When the ground of objection to the memorandum of costs is that it was not timely filed, counsel may be met by a countermotion for relief under *Code Civ. Proc. § 473(b)* [*see §§ 60.120* -60.139]. In this event, counsel may use the memorandum *set out in §§ 60.150* -60.159 to oppose the countermotion.

[3] Discussion of Authorities

[a] Motion to Strike

Cal. Rules of Ct., Rule 3.1700(b)(1), provides that a motion to strike a memorandum of costs may be served and filed 15 days after the memorandum was served, or, if the memorandum was served by mail, within the extended time authorized by *Code Civ. Proc. § 1013*.

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6-60 California Points & Authorities § 60.11

§ 60.11 Supporting Motion to Strike Memorandum of Costs--Judgment Does Not Carry Costs

[1] FORM Supporting Motion to Strike Memorandum of Costs--Judgment Does Not Carry Costs

[*For caption, see § 60.10, with which this form should be combined.*]

THE MEMORANDUM OF COSTS HEREIN FILED BY _____ [*specify party, e.g.,* PLAINTIFF] SHOULD BE STRICKEN BECAUSE THE JUDGMENT ENTERED DOES NOT CARRY COSTS.

Judgment Does Not Carry Costs. A memorandum of costs filed against a party on a judgment which does not carry costs is to be stricken on motion as a matter of course (*Kaufman v. Pacific Indem. Co. (1936) 5 Cal. 2d 761, 769, 56 P.2d 504* (decided under former Code Civ. Proc. § 1032(d); *now see Code Civ. Proc. § 1033*); *Estate of McCormack (1969) 2 Cal. App. 3d 492, 499-500, 82 Cal. Rptr. 651*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to strike [*see Cal. Rules of Ct., Rule 3.1700(b)(1)*] the entire cost bill on the ground that the judgment entered does not carry costs. It should be combined with the general form *set out in § 60.10*, and any other applicable *forms in § 60.12* et seq. See also *§ 60.10[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.10[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Judgment Does Not Carry Costs

In ***Kaufman v. Pacific Indem. Co.*** *(1936) 5 Cal. 2d 761, 56 P.2d 504* , plaintiff sued a realty company and its president for damages for fraud, and sued the surety on the real estate broker's statutory bond. Judgment was rendered against the surety. The judgment was for $2,000 and expressly provided that it should be without costs under former Code Civ. Proc. § 1032 (*now see Code Civ. Proc. § 1033*), which at that time provided that plaintiff may not recover costs when the judgment is one which could be rendered by a municipal or inferior court. The surety appealed from both the judgment and an order denying its motion to strike plaintiff 's memorandum of costs. The Supreme Court affirmed the judgment against the surety but reversed the order denying the motion to strike the memorandum of costs. Citing *Gould v. Moss (1910) 158 Cal. 548, 549, 111 P. 925* , the Court held that when a court "may" award costs and the judgment which does not carry costs has become final, a defendant cannot be held for costs, and a memorandum of costs filed against such a defendant will be ordered stricken on motion (*5 Cal. 2d, 761, 769)* .

Estate of McCormack *(1969) 2 Cal. App. 3d 492, 82 Cal. Rptr. 651* , involved an appeal from an order instructing a trustee to distribute or deliver the corpus of a trust to respondent. One of the grounds of the appeal was that the probate court's order that appellant pay respondent's costs was erroneous because the probate court did not include costs in its Memorandum of Decision or Order Instructing Trustee. The court of appeal stated that costs in a probate proceeding are not awarded to the prevailing party as a matter of right but are within the discretion of the court and must be provided for in the judgment or order [*see Prob. Code § 1002*]. Citing *Kaufman v. Pacific Indem. Co. (1936) 5 Cal. 2d 761, 769, 56 P.2d 504* (discussed *above*), and *Gould v. Moss (1910) 158 Cal. 548, 549, 111 P. 925* , the court said that if a judgment (which does not carry costs automatically) does not contain a provision for costs, it is futile to file a memorandum of costs (*2 Cal. App. 3d 492, 499)* . Quoting *Kaufman*, the court added that when a judgment which does not carry costs has become final, whether correct or not, a defendant cannot be held for costs. A memorandum of costs filed against such defendant will be ordered stricken on motion, and even though no proper motion to strike is made, it must be disregarded. Because the court's order instructing the trustee did not provide for costs, and the court's order denying the motion to strike the memorandum of costs and ordering appellant to pay costs was rendered after the notice of appeal was filed, the order was in excess of the probate court's jurisdiction and was void (*2 Cal. App. 3d 492, 500)* .

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6-60 California Points & Authorities § 60.12

§ 60.12 Supporting Motion to Strike Memorandum of Costs--No Judgment in Favor of Party Filing Memorandum of Costs

[1] FORM Supporting Motion to Strike Memorandum of Costs--No Judgment in Favor of Party Filing Memorandum of Costs

[*For caption, see § 60.10, with which this form should be combined.*]

THE MEMORANDUM OF COSTS HEREIN FILED BY _____ [*specify party, e.g.*, PLAINTIFF] SHOULD BE STRICKEN BECAUSE NO JUDGMENT HAS BEEN ENTERED CARRYING COSTS.

A. Memo Must Be Stricken If No Judgment Has Been Entered. A memorandum of costs and disbursements should be stricken when no judgment has ever been entered in favor of the party who filed the memorandum (*Gonzalez v. Derrington (1961) 56 Cal. 2d 130, 134, 14 Cal. Rptr. 1, 363 P.2d 1* (decided under former Code Civ. Proc. § 1033; *now see Cal. Rules of Ct., Rule 3.1700(a)(1)*).

B. Defendant Who Was Voluntarily Dismissed Must Secure Entry of Order or Judgment of Dismissal In Order to Qualify as Prevailing Party. To be a prevailing party under *Code Civ. Proc. § 1032(a)(4)*, which provides that a "prevailing party" includes "defendant in whose favor a dismissal is entered," a defendant who has been voluntarily dismissed from the plaintiff's complaint must secure entry of the order or judgment of dismissal (*Boonyarit v. Payless Shoesource, Inc. (2006) 145 Cal. App. 4th 1188, 1192-1193, 52 Cal. Rptr. 3d 241* ; *see Code Civ. Proc. § 1032(a)(4)*).

C. Party Whose Recovery Was Completely Offset by Settlement Is Not "Prevailing Party." A plaintiff who obtains a verdict against a defendant that is offset to zero by settlements with other defendants is not a prevailing party under *Code Civ. Proc. § 1032(a)(4)* (*Goodman v. Lozano (2010) 47 Cal. 4th 1327, 1334-1335, 104 Cal. Rptr. 3d 219, 223 P.3d 77*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to strike [*see Cal. Rules of Ct., Rule 3.1700(b)(1)*] the entire cost bill on the ground that no judgment was entered carrying costs. It should be combined with the general form *set out in § 60.10*, and any other applicable forms *set out in § 60.11* et seq. See also *§ 60.10[2][c]* for reference to related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.10[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Memo Must Be Stricken If No Judgment Has Been Entered

In ***Gonzalez v. Derrington*** *(1961) 56 Cal. 2d 130, 14 Cal. Rptr. 1, 363 P.2d 1* , the Supreme Court affirmed judgments for defendant oil company notwithstanding the verdict in consolidated actions for damages for personal injuries and wrongful death arising from an explosion and fire. Two of the plaintiffs appealed from the trial court's order granting the motions of three of the defendants to strike the memorandum of costs filed by plaintiffs. The trial court had set aside the verdict in favor of the plaintiffs as to one defendant and had granted motions for new trials brought by two other defendants. Because no judgment was ever entered in favor of the plaintiffs who appealed, the court of appeal held that the trial court properly granted the motion to strike plaintiffs' memorandum of costs (*56 Cal. 2d 130, 134)* .

[b] Defendant Who Was Voluntarily Dismissed Must Secure Entry of Order or Judgment of Dismissal In Order to Qualify as Prevailing Party

In ***Boonyarit v. Payless Shoesource, Inc.*** *(2006) 145 Cal. App. 4th 1188, 52 Cal. Rptr. 3d 241* , plaintiff filed a slip and fall case against the owner of the shopping center parking lot where the accident occurred, and 16 tenants whose businesses used the lot. Plaintiff subsequently filed an amended complaint that deleted six of the tenants, and thereafter attempted to file a request for voluntary dismissal without prejudice as to those defendants under *Code Civ. Proc. § 581*. Plaintiff used the applicable Judicial Council form, but neglected to indicate on the form that she was dismissing the complaint as to these defendants. Therefore, the superior court clerk rejected the request for dismissal and no dismissal was entered in the clerk's registry. Having been served with the request for dismissal, and without waiting for notice of entry of dismissal, one of the six "dismissed" defendants filed and served a memorandum of costs as a prevailing party under *Code Civ. Proc. § 1032*. Plaintiff moved to quash the costs memorandum, or, in the alternative, to tax costs, arguing that although she had attempted to have the defendant in question dismissed without prejudice, the court had rejected the form, no dismissal was entered, and there was no judgment under which the defendant was a prevailing party entitled to costs. The defendant contended that filing of the first amended complaint deleting it as a defendant constituted a dismissal without prejudice, and that as a dismissed defendant it was a prevailing party under *Code Civ. Proc. § 1032* and therefore was entitled to recover costs. The superior court ruled that the defendant was a prevailing party, and the plaintiff appealed (*145 Cal. App. 4th 1188, 1191)* .

The appellate court agreed with plaintiff that the defendant was not a prevailing party under *Code Civ. Proc. § 1032* and therefore was not entitled to recover costs. *Code Civ. Proc. § 1032(a)(4)*, the term "prevailing party" includes "a defendant in whose favor a *dismissal is entered*" (court's emphasis). Under *Code Civ. Proc. § 581(d)*, a dismissal is entered when it is entered in the clerk's register. In this case, no order of judgment of dismissal was ever entered; plaintiff's formal request for voluntary dismissal under *Code Civ. Proc. § 581* was rejected by the superior court clerk because it was not properly completed. Thus, the dismissal was never entered by the clerk, and was not effective. The court also noted that although the filing of an amended complaint omitting a specific defendant operates in substance as a dismissal, the statutory right to costs cannot be invoked until the dismissal has been perfected through entry of an

order or judgment of dismissal. Since defendant never obtained an order of dismissal, it did not qualify as a prevailing party, and the superior court erred in awarding costs (*145 Cal. App. 4th 1188, 1191-1193)* .

The court suggested that when the defendant did not receive notice of entry of dismissal, it should have contacted the court to determine whether voluntary dismissal had been entered. Upon learning that dismissal had not been entered, and wishing to perfect its dismissal based on being omitted from the first amended complaint, the defendant could have submitted a proposed judgment of dismissal with its memorandum of costs (*145 Cal. App. 4th 1188, 1193, 1194)* .

[c] Party Whose Recovery Was Completely Offset by Settlement Is Not "Prevailing Party."

In ***Goodman v. Lozano*** *(2010) 47 Cal. 4th 1327, 1334-1335, 104 Cal. Rptr. 3d 219, 223 P.3d 77* , the plaintiffs bought a newly constructed home from the defendants. After the plaintiffs sued the defendants for construction defects, the plaintiffs settled with all the defendants except the Lozanos for $230,000. After a bench trial, the trial court found in the plaintiffs' favor and awarded them $146,000. Because the settlement amount was greater than the award to the plaintiffs, the trial judge determined that the Lozanos were the prevailing parties because they paid nothing under the judgment. The judge awarded the Lozanos attorney's fees and costs. The plaintiffs appealed from both the net zero judgment and the order finding the Lozanos to be the prevailing parties. The court of appeal affirmed.

The California Supreme Court looked at the language and history of *Code Civ. Proc. § 1032(a)(4)*, which defines "prevailing party," and *Code Civ. Proc. § 877*, which provides that a good faith settlement reduces a plaintiff's claims against nonsettling defendants by the amount of consideration paid for the settlement. The Court concluded that a plaintiff who obtains a verdict against a defendant that is offset to zero by settlements with other defendants does not have a "net monetary recovery" and is not a prevailing party under *Code Civ. Proc. § 1032(a)(4)* [*47 Cal. 4th 1327, 1334-1335]* .

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6-60 California Points & Authorities § 60.13

§ 60.13 Supporting Motion to Strike Memorandum of Costs--Memorandum of Costs Untimely Filed

[1] FORM Supporting Motion to Strike Memorandum of Costs--Memorandum of Costs Untimely Filed

[*For caption, see § 60.10, with which this form should be combined.*]

THE MEMORANDUM OF COSTS FILED BY _____ [*specify party, e.g.,* PLAINTIFF] SHOULD BE STRICKEN BECAUSE THE COST BILL WAS FILED TOO LATE.

Costs Memorandum Filed Late. A prevailing party who claims costs is required to serve and file a memorandum of costs (1) within 15 days after (a) the date of mailing of the notice of entry of judgment or dismissal by the court clerk under *Section 664.5 of the Code of Civil Procedure* or *(b)* the date of service of written notice of entry of judgment or dismissal, or (2) within 180 days after entry of judgment, whichever is first (*Cal. Rules of Ct., Rule 3.1700(a)(1)*). Time provisions relating to filing of memorandum of costs, while not jurisdictional, are mandatory, and apply whether or not the judgment or order is appealable (*Sanabria v. Embrey (2001) 92 Cal. App. 4th 422, 425-426, 111 Cal. Rptr. 2d 837*). The failure to file a cost bill within the prescribed time can be attacked by a motion to strike (*Davis Lumber Co. v. Hubbell (1955) 137 Cal. App. 2d 148, 151, 290 P.2d 33* (involving cost bill not filed within time limits prescribed by former Code Civ. Proc. § 1033), and the cost bill should be stricken if it is filed after that time (*Coast Electric Service, Inc. v. Jensen (1931) 111 Cal. App. 124, 126, 295 P. 346*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to strike [*see Cal. Rules of Ct., Rule 3.1700(b)(1)*] the entire cost bill on the ground that it was filed too late. It should be combined with the general form *set out in § 60.10*, and any other applicable *forms in § 60.11* et seq. See also *§ 60.10[2][c]* for reference to related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 60.10[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Costs Memorandum Filed Late

In ***Sanabria v. Embrey*** *(2001) 92 Cal. App. 4th 422, 111 Cal. Rptr. 2d 837* , the plaintiff voluntarily dismissed his action without prejudice against the defendants. The plaintiff served the dismissal on the defendants on December 1, 1999. At that time, there was still outstanding a complaint in intervention and a cross-complaint that did not involve the defendants, which was resolved and judgment entered on March 16, 2000 and notice of entry of judgment served on May 3, 2000. The defendants filed a memorandum of costs on May 19, 2000. The trial court held that the memorandum was timely filed and awarded the defendants costs and attorney fees. The court of appeal held first that the fact that the complaint-in-intervention and cross complaint were still pending did not make the voluntary dismissal ineffective, citing *Code Civ. Proc. 581(c)*, allowing a plaintiff to dismiss the complaint before trial regardless of the pendency of other pleadings (*92 Cal. App. 4th 422, 425)* . The court then held that the memorandum of costs was untimely because it was not filed with 15 days of service of notice of entry of dismissal as required by former Cal. Rules of Ct., Rule 870(a) [*now see Cal. Rules of Ct., Rule 3.1700(a)*] (*92 Cal. App. 4th 422, 425-426)* .

Davis Lumber Co. v. Hubbell *(1955) 137 Cal. App. 2d 148, 290 P.2d 33* , involved consolidated appeals from orders, made after judgment, striking cost bills. Quoting *S. F. etc. Sch. Dist. v. Bd. of Nat. Missions (1954) 129 Cal. App. 2d 236, 243, 276 P.2d 829* , the court said that the method prescribed by law for attacking an untimely filed cost bill is a motion to tax (or strike) made within the period prescribed by former Code Civ. Proc. § 1033 (*now see Cal. Rules of Ct., Rule 3.1700(b)(1)*) (*137 Cal. App. 2d 148, 151)* . However, the court reversed the order striking the cost bill on the ground that the cost bill had in fact been timely filed within the meaning of former Code Civ. Proc. § 1033 (*now see Cal. Rules of Ct., Rule 3.1700(a)(1)*) (*137 Cal. App. 2d 148, 152-153)* .

In ***Coast Electric Service, Inc. v. Jensen*** *(1931) 111 Cal. App. 124, 295 P. 346* , plaintiff did not serve its memorandum of costs within the time allowed by former Code Civ. Proc. § 1033 (*now see Cal. Rules of Ct., Rule 3.1700(a)(1)*). Three days after the time for service had expired the court made an order on ex parte application purporting to grant plaintiff an additional 15 days in which to serve its memorandum, which plaintiff did. Defendant filed a motion to strike the memorandum, and the motion was granted when plaintiff failed to appear at the hearing. Then, on plaintiff 's motion, the memorandum was restored to the file and defendant renewed his motion to strike, which the trial court denied. Defendant appealed from the order denying his motion to strike plaintiff 's memorandum of costs. On concluding that the motion to strike the memorandum should have been granted and reversing the order (*111 Cal. App. 124, 127)* , the court of appeal stated that failure to file and serve a memorandum of costs within the time required by former Code Civ. Proc. § 1033 extinguishes the remedy of recovering costs and operates as a forfeiture of the right to recover costs (*111 Cal. App. 124, 126)* . Citing *Dow v. Ross (1891) 90 Cal. 562, 563, 27 P. 409* , the court stated that when the memorandum is served or filed beyond the statutory time, it will be stricken from the files on motion. Because the trial court's order under *Code Civ. Proc. § 1054* extending time for service of the memorandum of costs was made three days after the existing statutory time for serving the memorandum had expired, the order was void (*111 Cal. App. 124, 126)* .

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A. Costs
1. Motion to Strike Memorandum of Costs

6-60 California Points & Authorities § 60.14

§ 60.14 Supporting Motion to Strike Memorandum of Costs--Memorandum of Costs Not Verified

[1] FORM Supporting Motion to Strike Memorandum of Costs--Memorandum of Costs Not Verified

[*For caption, see § 60.10, with which this form should be combined.*]

THE MEMORANDUM OF COSTS FILED BY _____ [*specify party, e.g.,* PLAINTIFF] SHOULD BE STRICKEN BECAUSE THE COST BILL WAS NOT VERIFIED.

Memorandum of Costs Not Verified. The memorandum of costs is required to be verified by a statement of the party, attorney, or agent that to the best of his or her knowledge the items of cost are correct and were necessarily incurred (*Cal. Rules of Ct., Rule 3.1700(a)(1)*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to strike [*see Cal. Rules of Ct., Rule 3.1700(b)(1)*] the entire cost bill on the ground that it was not verified. It should be combined with the general form *set out in § 60.10*, and any other applicable *forms in § 60.11* et seq. See also *§ 60.10[2][c]* for reference to related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 60.10[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Memorandum of Costs Not Verified

Cal. Rules of Ct., Rule 3.1700(a)(1), provides that the memorandum of costs is required to be verified by a statement of the party, attorney, or agent that to the best of his or her knowledge the items of cost are correct and were necessarily incurred.

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6-60 California Points & Authorities § 60.15

§ 60.15 Supporting Motion to Strike Memorandum of Costs--Arbitrator's Award Does Not Include Costs

[1] FORM Supporting Motion to Strike Memorandum of Costs--Arbitrator's Award Does Not Include Costs

[*For caption, see § 60.10, with which this form should be combined.*]

THE MEMORANDUM OF COSTS FILED BY _____ [*specify party, e.g.,* PLAINTIFF] SHOULD BE STRICKEN BECAUSE COSTS WERE NOT AWARDED BY THE ARBITRATOR.

Arbitrator's Award Does Not Include Costs. A bill of costs should be stricken when the prevailing party files a memorandum of costs after entry of judgment on a judicial arbitration award when costs were not awarded by the arbitrator (*Wagy v. Brown (1994) 24 Cal. App. 4th 1, 7-9, 29 Cal. Rptr. 2d 48*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to strike [*see Cal. Rules of Ct., Rule 3.1700(b)(1)*] the entire cost bill on the ground that the judicial arbitration award did not award costs. It should be combined with the general form *set out in § 60.10*, and any other applicable *forms in § 60.11* et seq. See also *§ 60.10[2][c]* for reference to related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 60.10[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Arbitrator's Award Does Not Include Costs

In ***Wagy v. Brown*** *(1994) 24 Cal. App. 4th 1, 29 Cal. Rptr. 2d 48* , neither party requested a trial de novo after judicial arbitration. After entry of judgment on the arbitration award, the prevailing party (the plaintiff) filed a memorandum of costs in the trial court. The defendant moved to strike the memorandum, contending costs could be awarded only in the judicial arbitration proceeding. The court denied costs, and the plaintiff appealed.

The Third District Court of Appeal affirmed. The arbitrator has authority to award costs. In this case, the arbitrator's award did not award costs to the prevailing party, and that award, in effect, denied costs to each party by ordering each side to bear its own costs. Therefore, the only way for the prevailing party to obtain costs is to reject the entire award by requesting a trial de novo (*24 Cal. App. 4th 1, 7-9)* .

Unlike *Wagy,* however, the Sixth District Court of Appeal has allowed a prevailing party to claim costs in the trial court after judgment when the arbitrator fails to include costs in the award, even though, ideally, the arbitrator should make that determination [*see* *Guevara v. Brand (1992) 8 Cal. App. 4th 995, 997-998, 10 Cal. Rptr. 2d 780* , discussed as an authority to § 60.104]. *Wagy* does not cite *Guevara,* even though decided afterwards.

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1. Motion to Strike Memorandum of Costs

6-60 California Points & Authorities § 60.16

§ 60.16 Supporting Motion to Strike Memorandum of Costs--Prevailing Party Not Entitled to Costs Under Code Civ. Proc. § 998 Due to Settlement Offer More Favorable Than Judgment

[1] FORM Supporting Motion to Strike Memorandum of Costs--Prevailing Party Not Entitled to Costs Under Code Civ. Proc. § 998 Due to Settlement Offer More Favorable Than Judgment

[*For caption, see § 60.10, with which this form should be combined.*]

THE MEMORANDUM OF COSTS FILED BY PLAINTIFF SHOULD BE STRICKEN BECAUSE DEFENDANT'S SETTLEMENT OFFER WAS MORE FAVORABLE THAN THE JUDGMENT FOR PLAINTIFF.

A. Settlement Offer More Favorable Than Judgment. If an offer made by a defendant not less than 10 days prior to commencement of trial is not accepted and the plaintiff fails to obtain a more favorable judgment, the plaintiff cannot recover preoffer costs and must pay the defendant's costs from the time of the offer (*Code Civ. Proc. § 998(b), (c)(1)*; *Linthicum v. Butterfield (2009) 175 Cal. App. 4th 259, 270-273, 95 Cal. Rptr. 3d 538*).

B. Postoffer Costs and Attorney's Fees Are Excluded From Judgment. The plaintiff's postoffer costs may not be added to the judgment obtained by plaintiff for the purpose of determining whether that judgment is more favorable than defendant's settlement offer (*Code Civ. Proc. § 998(c)(2)(A)*). The postoffer costs to be excluded for this purpose include postoffer attorney's fees (*see Heritage Engineering Const., Inc. v. City of Industry (1998) 65 Cal. App. 4th 1435, 1440-1442, 77 Cal. Rptr. 2d 459*).

[2] Comments

[a] Use of Form

This memorandum may be submitted by a defendant in support of a motion to strike [*see Cal. Rules of Ct., Rule 3.1700(b)(1)*] the entire cost bill on the ground that the plaintiff did not obtain a judgment more favorable than the defendant's pretrial settlement offer. It should be combined with the general form *set out in § 60.10*, and any other

applicable *forms in § 60.11* et seq. See also *§ 60.10[2][c]*.

[b] Argument

Counsel should add argument linking the points in the form with the facts of the case. See also *§ 60.12[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Memoranda

The memorandum *set out in § 60.83* et seq. may be used in an appropriate case to oppose a motion supported by this form.

[3] Discussion of Authorities

[a] Settlement Offer More Favorable Than Judgment

Code Civ. Proc. § 998 provides that if an offer made by a defendant not less than 10 days prior to commencement of trial is not accepted and the plaintiff fails to obtain a more favorable judgment, the plaintiff cannot recover costs and must pay the defendant's costs from the time of the offer.

Linthicum v. Butterfield *(2009) 175 Cal. App. 4th 259, 270-273, 95 Cal. Rptr. 3d 538* , involved adjacent landowners disputing an easement over property. The defendants made a *Code Civ. Proc. § 998* offer that required the plaintiff to grant them a right-of-way easement for ingress and egress and for utility purposes. In exchange, the defendants agreed they would (1) recognize a U.S. Forest Service line as an agreed boundary line between the parties' properties; (2) not seek an easement by necessity over other property owned by the plaintiff; and (3) not oppose the plaintiff's effort to split his lot. Further, the offer provided that the parties would bear their own costs with a mutual release of all current claims and a mutual dismissal with prejudice of the parties' lawsuits against one another. The plaintiff rejected this offer and the case went to trial. After trial, the court granted the defendants continued use of the easement and did not award any damages. The trial court denied the plaintiff's motion to tax costs and awarded the defendants their expert witness fees.

On appeal, the court of appeal noted that *Code Civ. Proc. § 998* provides a sanction against a rejecting offeree unless the offeree obtains a judgment more favorable than the offer. Therefore, the issue was whether the plaintiff as the rejecting offeree obtained a judgment more favorable than the offer. Examining the facts, the court held that the judgment was not more favorable to the plaintiff than the defendants' *Code Civ. Proc. § 998* offer. The offer required the plaintiff to grant the defendants an easement for ingress and egress. The plaintiff lost on that point. The offer demanded an easement for utility lines. The trial court did grant the plaintiff the right to move the utility lines, but at his own expense. In addition, the plaintiff lost on the defendants' offer that the parties bear their own costs [*175 Cal. App. 4th 259, 270-271*].

The plaintiff also argued that the offer's demand for a mutual release of all current claims between the parties made the offer unenforceable as a matter of law. The court disagreed, holding that a *Code Civ. Proc. § 998* offer is not effective to shift costs when it includes a release only of claims not at issue in the action [*175 Cal. App. 4th 259, 271-272*].

[b] Postoffer Costs and Attorney's Fees Are Excluded From Judgment

Code Civ. Proc. § 998(c)(2)(A) provides that, "[i]n determining whether the plaintiff obtains a more favorable judgment, the court or arbitrator shall exclude the postoffer costs."

In ***Heritage Engineering Const., Inc. v. City of Industry*** *(1998) 65 Cal. App. 4th 1435, 77 Cal. Rptr. 2d 459* , the defendant made a pretrial settlement offer under *Code Civ. Proc. § 998* of $65,000. The plaintiff rejected the offer and, after trial, was awarded $48,000 by the jury. Applying *Code Civ. Proc. § 998*, the trial court denied all costs to the

plaintiff as the prevailing party, even though the plaintiff was entitled to more than $100,000 in contractual attorney fees that were incurred before the settlement offer.

The court of appeal reversed. It concluded that contractual attorney fees incurred before a settlement offer is made are to be included in the amount a plaintiff recovers for the purpose of determining whether the plaintiff obtained a "more favorable judgment" (*65 Cal. App. 4th 1435, 1440-1442)* .

In reaching this conclusion, the court examined the prior history of *Code Civ. Proc. § 998(c)(2)(A)*. The court first noted that, before 1994, there was no statutory guidance on the meaning of what constituted a "more favorable judgment" under *Code Civ. Proc. § 998*. Case law, however, had developed a rule that, when determining whether a judgment was more favorable, courts were to include in the judgment the plaintiff's preoffer costs, at least when the settlement offer was intended to cover both damages and costs incurred up to time of the offer (*65 Cal. App. 4th 1435, 1440)* . In 1989, the court of appeal in *Encinitas Plaza Real v. Knight (1989) 209 Cal. App. 3d 996, 257 Cal. Rptr. 646* recognized this case law rule, but held that the rule did not apply to attorney's fees recoverable on the basis of a contract provision; such fees were not costs but special damages. Thus, in considering whether the plaintiff's judgment exceeded the defendant's offer, the *Encinitas* court added to that judgment all of the plaintiff's attorney's fees, rather than only those fees incurred before the defendant's offer [*see Encinitas Plaza Real v. Knight (1989) 209 Cal. App. 3d 996, 1000-1003, 257 Cal. Rptr. 646]* (*65 Cal. App. 4th 1435, 1440)* .

Soon afterwards, in 1990, *Code Civ. Proc. § 1033.5* was amended to provide, contrary to the holding in *Encinitas*, that attorney's fees recoverable by contract, like those recoverable by statute, are an element of costs rather than special damages [*see Code Civ. Proc. § 1033.5(b)(10), (c)(5)*]. The court in *Heritage* noted that *Code Civ. Proc. § 998* was also amended, in 1994 and 1997, to supersede *expressly* the holding in *Encinitas* [*see Code Civ. Proc. § 998(c)(2)(B)* (*Code Civ. Proc. § 998(c)(2)(A)* is intended "to supersede the holding in *Encinitas Plaza Real v. Knight, 209 Cal. App. 3d 996* , that attorney's fees awarded to the prevailing party are not costs for purposes of this section but part of the judgment")]. As explained by the court in *Heritage*, these amendments adding the language in *Code Civ. Proc. § 998(c)(2)* were designed not only to abrogate *Encinitas* on the issue of attorney's fees as damages, but were intended also to return the "more favorable judgment" determination to its pre-*Encinitas* formulation: when a defendant's settlement offer includes costs, it is to be compared with the plaintiff's judgment plus *pre-offer* costs, including *pre-offer* attorney's fees otherwise recoverable as costs pursuant to *Code Civ. Proc. § 1033.5* (*65 Cal. App. 4th 1435, 1440-1442)* . By extension, of course, the *post-offer* costs that must be excluded from the judgment pursuant to *Code Civ. Proc. § 998(c)(2)* include any *post-offer* attorney's fees that might otherwise be recoverable as costs.

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6-60 California Points & Authorities § 60.17

§ 60.17 Supporting Motion to Strike Memorandum of Costs--Code Civ. Proc. § 998 Offer Was Unilaterally Withdrawn Before Expiration of Statutory Period for Acceptance or Rejection

[1] FORM Supporting Motion to Strike Memorandum of Costs--Code Civ. Proc. § 998 Offer Was Unilaterally Withdrawn Before Expiration of Statutory Period for Acceptance or Rejection

[*For caption, see § 60.10, with which this form should be combined.*]

THE MEMORANDUM OF COSTS FILED BY _____ [PLAINTIFF *or* DEFENDANT] SHOULD BE STRICKEN BECAUSE _____ [PLAINTIFF *or* DEFENDANT] WITHDREW HIS/HER/ITS OFFER UNDER CODE CIV. PROC. § 998 BEFORE THE EXPIRATION OF THE STATUTORY PERIOD FOR ACCEPTANCE OR REJECTION OF THAT OFFER BY _____ [*opposing party, i.e.,* DEFENDANT *or* PLAINTIFF].

A. Unilateral Withdrawal of Settlement Offer Made Under *Code Civ. Proc. § 998* Makes Offer a Nullity for Cost-Shifting Purposes. A settlement offer made under *Code Civ. Proc. § 998* that is unilaterally revoked by the offeror before the expiration of the period specified in *Code Civ. Proc. § 998* for acceptance or rejection of the offer forfeits its status as an offer under the remaining provisions of *Code Civ. Proc. § 998*, including the cost shifting provisions of that section (*Marcey v. Romero (2007) 148 Cal. App. 4th 1211, 1215-1217, 56 Cal. Rptr. 3d 402*).

B. Withdrawn Offer Under *Code Civ. Proc. § 998* Revives Last Rejected Offer. If an offer made under *Code Civ. Proc. § 998* is withdrawn by a party before its statutory expiration (i.e., by start of trial or 30 days after the offer is made), the withdrawing party's right to cost shifting under *Code Civ. Proc. § 998* is determined by the last rejected *Code Civ. Proc. § 998* offer [*One Star, Inc. v. STAAR Surgical Co. (2009) 179 Cal. App. 4th 1082, 1093-1095, 102 Cal. Rptr. 3d 195]* .

[2] Comments

[a] Use of Form

This form may be submitted by a plaintiff or defendant in support of a motion to strike [*see Cal. Rules of Ct., Rule 3.1700(b)(1)*] the entire cost bill on the ground that the opposing party unilaterally withdrew a settlement offer made under *Code Civ. Proc. § 998* before the statutory period for acceptance or rejection of the offer had expired. It should be combined with the general form *set out in § 60.10*, and any other applicable *forms in § 60.11* et seq. In addition, the offer must remain open for the statutorily designated period set forth in *Code Civ. Proc. § 998(b)(2)* ("prior to trial or ... within 30 days after it is made, whichever occurs first") [*Marina Glencoe, L.P. v. Neue Sentimental Film AG (2008) 168 Cal. App. 4th 874, 880, 85 Cal. Rptr. 3d 800]* . See also *§ 60.10[2][c]*.

[b] Argument

Counsel should add argument linking the points in the form with the facts of the case, including facts regarding when and under what circumstances the offer was made and withdrawn. See also *§ 60.12[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Memoranda

The memoranda *set out in § 60.83* et seq. may be used in an appropriate case to oppose a motion supported by this form.

[3] Discussion of Authorities

[a] Unilateral Withdrawal of § 998 Offer Before Expiration of Period for Acceptance or Rejection

In ***Marcey v. Romero*** *(2007) 148 Cal. App. 4th 1211, 56 Cal. Rptr. 3d 402* , plaintiff filed a personal injury action against defendant. Plaintiff then made a series of offers to compromise her claim under *Code Civ. Proc. § 998* to defendant, with each offer becoming progressively lower. Approximately one month before the trial call, plaintiff made her final offer under *Code Civ. Proc. § 998*, but plaintiff's counsel orally informed defendant's counsel the offer was premised on plaintiff being able to avoid the costs associated with deposing defendant's experts and paying plaintiff's experts to prepare for and appear at trial. Before the period specified in *Code Civ. Proc. § 998* for lapse of an offer had expired, defendant's counsel attempted orally to accept the offer, but plaintiff's counsel rejected the attempted oral acceptance, orally withdrew the offer, and immediately faxed a written "Notice of Withdrawal" to defendant's counsel. At trial, plaintiff recovered a judgment against defendant. Plaintiff's cost bill included expert witness fees under *Code Civ. Proc. § 998(d)*. Defendant moved to tax these costs, asserting plaintiff's withdrawal of the *Code Civ. Proc. § 998* offer before it expiration of the statutory period made that offer a nullity. The trial court granted defendant's motion and denied plaintiff's request for expert witness fees (*148 Cal. App. 4th 1211, 1213-1214)* . The court of appeal affirmed and held that when plaintiff revoked the *Code Civ. Proc. § 998* offer before the expiration of the statutory period, the offer lost its status as an offer under *Code Civ. Proc. § 998*, including the cost-shifting provisions of that section (*148 Cal. App. 4th 1211, 1214-1217)* .

[b] Withdrawn Offer Under Code Civ. Proc. § 998 Revives Last Rejected Offer

In ***One Star, Inc. v. STAAR Surgical Co.*** *(2009) 179 Cal. App. 4th 1082, 1093-1095, 102 Cal. Rptr. 3d 195* , the plaintiff was a regional representative of medical supplies, including those manufactured by the defendant. The plaintiff sued the defendant for breach of contract and common counts alleging that the defendant improperly withheld commissions. The defendant filed a cross-complaint for breach of contract. The defendant made a *Code Civ. Proc. § 998* offer to settle the complaint for $65,000. The plaintiff did not respond, and the offer lapsed after 30 days. The defendant made a second offer to settle the complaint for $65,000, including interest from a certain date. While that offer was pending, the defendant made a third offer allowing judgment to be taken against it for $65,000 plus interest on the cross-complaint. The plaintiff did not accept the second or third offers. The defendant withdrew the second offer. At trial, the court awarded the plaintiff $41,400 on the common counts, and held that neither party had proved its breach of contract claims.

The defendant filed a motion for post-settlement offer costs pursuant to *Code Civ. Proc. § 998*. The plaintiff opposed the motion, arguing that the defendant's *Code Civ. Proc. § 998* offers were irrelevant because the first offer was extinguished by the withdrawn second offer. The plaintiff also filed a motion for fees, arguing that it was the prevailing party. The court granted the plaintiff's motion for fees and costs and denied the defendant's. The defendant appealed, arguing that its first *Code Civ. Proc. § 998* offer exceeded the plaintiff's recovery at trial.

The court of appeal held that if a *Code Civ. Proc. § 998* offer is withdrawn by a party before its statutory expiration (i.e., by start of trial or 30 days after the offer is made), the withdrawing party's right to cost shifting under *Code Civ. Proc. § 998* is determined by the last rejected *Code Civ. Proc. § 998* offer [*179 Cal. App. 4th 1082, 1093-1094]* . Therefore, the court held that the defendant's withdrawal of its second offer to compromise revived its first offer for purposes of cost shifting under *Code Civ. Proc. § 998*.

The court based its ruling on two factors. First, it held that its ruling would uphold the policy of encouraging settlement; if a party knows that it will not be penalized for withdrawing a settlement offer, it will be more likely to make an offer in the first instance [*179 Cal. App. 4th 1082, 1094]* . Next, it held that this bright-line rule would best serve the policy of encouraging settlement and avoiding gamesmanship [*179 Cal. App. 4th 1082, 1094-1095]* .

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[Reserved]

§§ 60.18[Reserved]

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2. Motion to Tax Costs by Striking or Reducing Specific Items

6-60 California Points & Authorities § 60.40

§ 60.40 Supporting Motion to Tax Costs by Striking or Reducing Specific Items--General Form

[1] FORM Supporting Motion to Tax Costs by Striking or Reducing Specific Items--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff, vs.	)	MEMORANDUM IN SUPPORT OF MOTION TO
_____ [*name*],	)	TAX COSTS
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Date Action Filed: _____

_____

THE MOTION TO TAX COSTS BY _____ [STRIKING *or* REDUCING THE AMOUNT CLAIMED FOR] ITEM(S) _____ [*number(s)*] SHOULD BE GRANTED BECAUSE _____ [*specify ground(s)*].

A. Motion to Tax Costs. A motion to tax costs in a memorandum of costs may be served and filed 15 days after the memorandum was served, or, if the memorandum was served by mail, within the extended time authorized by *Code of Civil Procedure Section 1013* (*Cal. Rules of Ct., Rule 3.1700(b)(1)*).

B. Right to Costs Are Statutory. The right to recover costs is entirely statutory, with the measure of the statute as the measure of the right (*Moss v. Underwriters' Report, Inc. (1938) 12 Cal. 2d 266, 274, 83 P.2d 503* ; *Posey v. State of California (1986) 180 Cal. App. 3d 836, 852, 225 Cal. Rptr. 830*).

C. Strict Construction of Costs Statutes. The statutes permitting costs are strictly construed (*Sequoia Vacuum Systems v. Stransky (1964) 229 Cal. App. 2d 281, 289, 40 Cal. Rptr. 203*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be used as a general form for submission in support of a motion to tax costs by striking, or reducing the amounts claimed for, specific items in the memorandum of costs filed by the prevailing party in the action. This form should be combined with other memoranda establishing the precise ground of the motion, as *set out in § 60.41* et seq.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case.

It is advisable for counsel to also submit cognizable evidence in supports of factual statements, by request for judicial notice (e.g., when a court must order the event for which costs are claimed and no order was issued) [*see Evid. Code § 450 et seq.*, or otherwise by affidavits or declarations. Although some cases hold that affidavits or declarations are not required, counsel must make some type of factual showing supporting a motion to strike [*see Senior v. Anderson (1900) 130 Cal. 290, 300, 62 P. 563* ; *Melnyk v. Robledo (1976) 64 Cal. App. 3d 618, 624, 134 Cal. Rptr. 602]* . Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For legal background, research and procedural guides, and forms for notices of motion to strike a cost bill or to tax costs by striking or reducing specific items, with forms for supporting declarations and orders granting the motion, see California Forms of Pleading and Practice, Ch. 174, *Costs and Attorney's Fees* (Matthew Bender).

[d] Related Memoranda

Additional memoranda designed to be combined with this general form, as appropriate, are *set out in § 60.41* et seq.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing*

Legal Memoranda and Briefs .

[e] Opposing Memoranda

In an appropriate case, the memoranda *set out in § 60.70* et seq. may be used in opposition to this memorandum. If the notice of motion to strike or tax costs supported by this form is not filed within the time prescribed by *Cal. Rules of Ct., Rule 3.1700(b)(1)*, the memoranda *set out in § 60.70* may be used to oppose the motion.

When the ground of objection to the memorandum of costs is that it was not timely filed, counsel may be met by a countermotion for relief under *Code Civ. Proc. § 473(b)* [*see § 60.120* et seq.]. In this event, counsel may use the memoranda *set out in § 60.150* et seq. to oppose the countermotion.

[3] Discussion of Authorities

[a] Motion to Tax Costs

Cal. Rules of Ct., Rule 3.1700(b)(1), provides that a motion to tax costs in a memorandum of costs may be served and filed 15 days after the memorandum was served, or, if the memorandum was served by mail, within the extended time authorized by *Code Civ. Proc. § 1013*.

[b] Right to Costs Are Statutory

Moss v. Underwriters' Report, Inc. *(1938) 12 Cal. 2d 266, 83 P.2d 503* , involved an action to recover the balance due on a book account for services rendered to defendant over a period of years. Defendant appealed from an order denying its motion to tax various items of costs. Defendant had sought to have various items stricken from the cost bill. In modifying the order, the Supreme Court said that the right to recover costs is entirely statutory, and the measure of the statute is the measure of the right (*12 Cal. 2d 266, 274)* . Since *Moss* was decided, the Legislature has added statutes governing recovery of the costs of items held improper in that case. However, *Moss* has frequently been cited for the proposition that the right to costs is entirely statutory.

Posey v. State of California *(1986) 180 Cal. App. 3d 836, 225 Cal. Rptr. 830* , was a personal injury action against the State involving government tort liability. The State's demurrer was sustained without leave to amend and plaintiff 's motion to tax costs was granted. In affirming, the court of appeal said that the right to an award of costs is governed wholly by statute (*180 Cal. App. 3d 836, 852)* .

[c] Strict Construction of Costs Statutes

Sequoia Vacuum Systems v. Stransky *(1964) 229 Cal. App. 2d 281, 40 Cal. Rptr. 203* , was an action for damages for breach of fiduciary duty and for an injunction restraining unfair competition. On appeal from a judgment for plaintiffs, the court of appeal reversed the judgment as to one cost item (expenses incurred in borrowing money to deposit cash bond in lieu of surety bond on issuance of preliminary injunction) and otherwise affirmed. The court pointed out that former Code Civ. Proc. § 1035 (*now see Code Civ. Proc. § 995.250*) allows as costs only premiums on necessary surety bonds and not the expenses incurred in borrowing money to deposit a cash bond in lieu of a surety bond. In disallowing this item, the court rejected the argument that because former Code Civ. Proc. § 1054a (*now see Code Civ. Proc. § 995.710*) permits a cash deposit in lieu of a surety bond, interest is allowable. Courts have strictly construed the statutes permitting costs, and only those items specifically enumerated are recoverable (*229 Cal. App. 2d 281, 289)* .

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6-60 California Points & Authorities § 60.41

§ 60.41 Supporting Motion to Tax Costs by Striking or Reducing Specific Items--To Reduce Amount as Excessive

[1] FORM Supporting Motion to Tax Costs by Striking or Reducing Specific Items--To Reduce Amount as Excessive

[*For caption, see § 60.40, with which this form should be combined.*]

THE AMOUNT CLAIMED FOR _____ [*specify, e.g.,* ATTORNEY'S FEES] IS UNREASONABLE.

A. Amounts Claimed Are Required to Be Reasonable. Any award of costs is subject to the requirement that allowable costs be reasonable in amount (*Code Civ. Proc. § 1033.5(c)(3)*).

B. Motion to Reduce Amount of Item. A party objecting that a charge in a cost bill is unreasonable should make a motion to reduce the amount of the item (*see Costello v. Roer (1946) 77 Cal. App. 2d 174, 180, 175 P.2d 65* (dictum)).

[*Set forth in subsequent paragraphs any memoranda that support a reduction of the amount claimed for a specific item. For example, if the item claimed as costs is attorney's fees, see the forms set out in § 60.650 et seq.*]

[2] Comments

[a] Use of Form

This form is for use in combination with those set out in the general form in support of a motion to tax cost, § 60.40, when certain items claims as costs are demonstrably excessive or unreasonable [*see Code Civ. Proc. § 1033.5(a)(10), (c)(3), (5)*]. When the item or one of the items claimed to be excessive is a claim for an award of attorney's fees, counsel should use the additional memoranda set out § 60.650 et seq.

See also *§ 60.40[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.40[2][b]* regarding evidentiary support for facts stated.

[c] Related Memoranda

The memoranda *set out in § 60.650* et seq. may be used when the item or item claimed to be excessive is a claim for an award of attorney's fees. Other related memoranda include § 60.42 (excessive witness fees), and, less directly related, those *set out in § 60.43* et seq.

[d] Opposing Memoranda

The memoranda *set out in §§ 60.370* -60.399 and *§§ 60.480* -60.499 may be used in an appropriate case to oppose a motion supported by this form.

[3] Discussion of Authorities

[a] Amounts Claimed Are Required to Be Reasonable

Code Civ. Proc. § 1033.5(c)(3) provides that any award of costs is subject to the requirement that allowable costs be reasonable in amount.

[b] Motion to Reduce Amount of Item

In ***Costello v. Roer*** *(1946) 77 Cal. App. 2d 174, 175 P.2d 65* , the court of appeal affirmed a judgment for plaintiffs in an action for rescission of a contract. Defendant also appealed from an order denying a motion to tax costs by striking an item from plaintiff 's cost bill, claimed as a commissioner's fee for taking depositions. In the motion to tax, defendant had not claimed that the amount was unreasonable. On appeal, defendant appeared to concede that the item was proper, but claimed that the amount was not reasonable. In affirming the order, the court of appeal stated that Code Civ. Proc. § 1032a (renumbered by Stats. 1982, ch 1354, as *Code Civ. Proc. § 1032.7*, which was repealed by Stats. 1986, ch. 377; *now see Code Civ. Proc. § 1033.5(a)(3), (c)(3)*) provided that a party is allowed the reasonable costs of taking and transcribing a deposition. The court stated that if defendant's objection was that the charge was unreasonable, he should have made a motion to reduce the amount, with a proper showing in that regard. In any case, the court assumed that in ruling on the motion the trial court gave consideration to both the propriety of the item and the amount charged (*77 Cal. App. 2d 174, 180)* .

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6-60 California Points & Authorities § 60.42

§ 60.42 Supporting Motion to Tax Costs by Striking or Reducing Specific Items--To Strike or Reduce Amount Claimed for Fee of Expert Witness

[1] FORM Supporting Motion to Tax Costs by Striking or Reducing Specific Items--To Strike or Reduce Amount Claimed for Fee of Expert Witness

[*For caption, see § 60.40, with which this form should be combined.*]

_____ [*Name*], [ONE OF] THE EXPERT WITNESS(ES), WAS NOT ORDERED BY THE COURT AND HIS/HER FEE [TO THE EXTENT IT EXCEEDS THE AMOUNT ALLOWED ORDINARY WITNESSES] IS THEREFORE NOT ALLOWABLE AS COSTS.

Prevailing Party Is Not Entitled to Recover Fee of Expert Witness Who Was Not Ordered by Court. Although entitled as a matter of right to recover costs (*see Code Civ. Proc. § 1032(b)*), which includes ordinary witness fees pursuant to *Government Code Section 68093* (daily court attendance fees and mileage) and fees of expert witnesses ordered by the court (*Code Civ. Proc. § 1033.5(a)(7), (8)*), a prevailing party is not entitled to recover as costs the fee of an expert witness not ordered by the court, except when otherwise expressly authorized by law (*Code Civ. Proc. § 1033.5(b)(1)*; *Davis v. KGO-T.V., Inc. (1998) 17 Cal. 4th 436, 439, 441-442, 446-447, 71 Cal. Rptr. 2d 452, 950 P.2d 567* ; *Gorman v. Tassajara Development Corporation (2009) 178 Cal. App. 4th 44, 73-74, 100 Cal. Rptr. 3d 152* ; *see McGarity v. Department of Transportation (1992) 8 Cal. App. 4th 677, 686, 10 Cal. Rptr. 2d 344*).

[2] Comments

[a] Use of Form

This form is for use in combination with those *set out in § 60.40* in support of a motion to tax costs by striking or reducing the amount claimed for fees of an expert witness not appointed by the court [*see Code Civ. Proc. § 1033.5(b)(1)*].

For an exception to the rule set forth in this form with respect to nonallowance of expert witness fees, see *Code Civ. Proc. § 998(c)* and *(d)*, which comes into operation when a pretrial offer to settle is not accepted and the party failing to accept it fails to obtain a more favorable judgment [*see Lafayette v. County of Los Angeles (1984) 162 Cal. App. 3d 547, 556-557, 208 Cal. Rptr. 668]* .

For memoranda involving other items not allowed as costs under *Code Civ. Proc. § 1033.5(b)(5)* and *Code Civ. Proc. § 1033.5(b)(2)-(4)*, except when expressly authorized by law, see *§§ 60.43* and *60.44*.

See also *§ 60.40[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.40[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Prevailing Party Is Not Entitled to Recover Fee of Expert Witness Who Was Not Ordered by Court

Code Civ. Proc. § 1032(b) provides that except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs. *Code Civ. Proc. § 1033.5(a)* lists the items allowable as costs under *Code Civ. Proc. § 1032*. These items include ordinary witness fees pursuant to *Gov. Code § 68093* (daily court attendance fees and mileage) and fees of expert witnesses ordered by the court [*Code Civ. Proc. § 1033.5(a)(7), (8)*]. *Code Civ. Proc. § 1033.5(b)* lists items not allowable as costs except when expressly authorized by law. Such items include fees of experts not ordered by the court [*see Code Civ. Proc. § 1033.5(b)(1)*].

In ***Davis v. KGO-T.V., Inc.*** *(1998) 17 Cal. 4th 436, 71 Cal. Rptr. 2d 452, 950 P.2d 567* , plaintiff brought an action for wrongful termination under the Fair Employment and Housing Act (FEHA; *Gov. Code § 12900 et seq.*). Plaintiff was awarded damages, and the trial court further awarded costs and fees under Gov. Code. Code § 12965, which allows the court in an FEHA action to award the prevailing party reasonable attorney fees and costs in its discretion. The award of costs included approximately $45,000 for the fees of several experts not ordered by the court. On appeal by defendant, the court of appeal reversed and remanded on this issue, holding that the expert fees were not a recoverable item of costs. The Supreme Court granted review on this point.

An unanimous Supreme Court affirmed the court of appeal decision. The Court emphasized that no costs may be recovered by any party in the absence of statutory authority (*17 Cal. 4th 436, 439)* . The court noted that, under *Code Civ. Proc. § 1033.5(b)(1)*, the general rule is that the fees of experts are not recoverable as costs unless the expert testimony is ordered by the court, except when otherwise authorized by law (*17 Cal. 4th 436, 441)* .

Plaintiff in this case argued that Gov. Code. Code § 12965 granted sufficient statutory authority to the trial court in this FEHA action to award expert fees, because of court's "discretion" to make an award under that section is not limited by *Code Civ. Proc. § 1033.5*. The Supreme Court disagreed. Decisional law in effect both before after the enactment of Gov. Code. Code § 12965 did not allow expert fees to be awarded as costs unless the expert testimony had been ordered by the court, and the subsequent enactment of *Code Civ. Proc. § 1033.5* simply codified that prior law (*17 Cal. 4th 436, 439-442)* .

The Court also noted that expert fees were recoverable contrary to the general rule in *Code Civ. Proc. § 1033.5* in only two situations, neither of which applied to recovery of costs in a FEHA action under Gov. Code. Code § 12965. One situation is when another statute explicitly provides for the recovery of expert fees not ordered by the court, citing, together with other examples, *Bus. & Prof. Code § 8768.5* (proceeding by surveyor or engineer to compel filing of

record of survey) (*17 Cal. 4th 436, 442)* . The second situation is exemplified by *Health & Safety Code § 51205(f)*, which allows an award of costs and fees in the trial court's discretion, "[n]otwithstanding any other provision of law." In the latter situation, any other provision of law, including *Code Civ. Proc. § 1033.5*, is made subordinate by the qualifying language (*17 Cal. 4th 436, 445)* .

The Court concluded that because Gov. Code. Code § 12965 did not define "costs" or otherwise expressly allow the recovery of expert fees not ordered by the court, *Code Civ. Proc. § 1033.5(b)(1)* applied to supplement that statute, and precluded an award of fees of experts as an item of costs in a FEHA action (*17 Cal. 4th 436, 446-447)* . The Court qualified its decision by noting that it did not reach the question of whether fees of experts are recoverable under a private attorney general theory (under *Code Civ. Proc. § 1021.5*), or under a contract provision providing for the recovery costs and fees (*17 Cal. 4th 436, 446-447 n.5*).

In ***Gorman v. Tassajara Development Corporation*** *(2009) 178 Cal. App. 4th 44, 73-74, 100 Cal. Rptr. 3d 152* , plaintiff homeowners sued the defendant contractor for defective construction. The parties settled, agreeing that the plaintiffs were the prevailing parties for purposes of recovering attorney's fees and costs. The plaintiffs filed a motion for costs, including "expert fees" for compensation they paid the defense experts for their time while being deposed. The defendant argued that these fees were unrecoverable pursuant to *Code Civ. Proc. § 1033.5(a)*. The court of appeal agreed, holding that the fees of experts not ordered by the court are not an allowable item of costs and, more specifically, that expert deposition fees are not recoverable under the costs statute [*178 Cal. App. 4th 44, 73-74*].

In ***McGarity v. Department of Transportation*** *(1992) 8 Cal. App. 4th 677, 10 Cal. Rptr. 2d 344* , the prevailing defendant appealed from the trial court's order granting plaintiff 's motion to tax costs as to expert witness fees paid by defendant in order to depose plaintiff 's designated experts. Defendant argued that since the costs of taking depositions are recoverable under *Code Civ. Proc. § 1033.5(a)(3)*, and since a party deposing an opposing party's expert must pay the expert's witness fees under *Code Civ. Proc. § 2034.210 et seq.*, the expert's fees are recoverable costs. Defendant also argued that the Legislature's 1988 amendment of *Gov. Code § 68092.5* expressed a legislative intent to allow recovery of expert deposition fees as costs; the statute, which provides for the compensation of expert witnesses for their appearances at depositions, was amended in 1988 to delete language providing that "such fees shall not be allowable costs."

The court of appeal affirmed the order taxing costs (*8 Cal. App. 4th 677, 687)* . It held that the defendant's recovery of expert witness fees was precluded by the plain language of *Code Civ. Proc. § 1033.5(b)(1)*. The court noted that no legislative history or other authority supported defendant's position concerning the amendment of *Gov. Code § 68092.5*; the court speculated that the wording may have been deleted as unnecessary, in light of *Code Civ. Proc. § 1033.5(b)(1)*, which expressly provides that fees of experts not ordered by the court are not allowable as costs (*8 Cal. App. 4th 677, 686)* .

[4] Additional Authorities

Hsu v. Semiconductor Systems, Inc. (2005) 126 Cal. App. 4th 1330, 25 Cal. Rptr. 3d 82 involved the transfer by employee shareholders of a closely held corporation of ownership of the shares of a former employee to themselves just before a merger that significantly increased the value of the corporate shares. After the jury awarded the former employee compensatory damages, the court awarded the former employee costs, including an award for expert witness fees and general photocopying expenses. The court of appeal reversed. Although the parties had an agreement under which the prevailing party was entitled to "all fees, costs and expenses," recovery of costs provided by contract must be specially pleaded and proven at trial, and not awarded posttrial as was done here. The court also held that the disputed costs could not be awarded to plaintiff as an element of attorney fees under the rationale that the expenses were disbursed by the attorneys in the course of litigation. Finally, the court held that the trial court erred in awarding costs for expedited preparation of deposition transcripts because expedited deposition costs were not allowed by statute (*126 Cal. App. 4th 1330, 1340-1342)* .

Steiny and Co. v. California Elec. Supply Co. (2000) 79 Cal. App. 4th 285, 93 Cal. Rptr. 2d 920 involved litigation among an owner, general contractor, subcontract, supplier and manufacturer based on the fact that a recently installed electric switchboard exploded. In the course of the litigation, the trial court awarded the subcontractor expert fees as an item of costs. The court of appeal reversed the award, holding that *Code Civ. Proc. § 1033.5(b)(1)* specifies that witness fees of experts not ordered by the court are not recoverable as costs except when expressly authorized by law, and the subcontractor cited no provision of law supporting the award. The court found further that the contract did not expressly mention expert witness fees, and, even if it did, would not supply the express authorization by law required by § 1033.5(b)(1) (*79 Cal. App. 4th 285, 293-294)* .

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6-60 California Points & Authorities § 60.43

§ 60.43 Supporting Motion to Tax Costs by Striking or Reducing Specific Items--To Strike Claim for Cost of Daily Transcripts Not Ordered by Court

[1] FORM Supporting Motion to Tax Costs by Striking or Reducing Specific Items--To Strike Claim for Cost of Daily Transcripts Not Ordered by Court

[*For caption, see § 60.40, with which this form should be combined.*]

FEES OF TRANSCRIPTS OF COURT PROCEEDINGS ORDERED BY THE PARTIES ARE PAID BY THE PARTY ORDERING THEM AND, EXCEPT WHEN EXPRESSLY AUTHORIZED BY LAW, COSTS OF TRANSCRIPTS NOT ORDERED BY THE COURT ARE NOT ALLOWABLE AS COSTS.

A. Costs of Non-Court-Ordered Transcript Not Allowable. Transcripts of court proceedings not ordered by the court are not allowable as costs, except when expressly authorized by law (*Code Civ. Proc. § 1033.5(b)(5)*).

B. Daily Transcripts. The fees for daily transcripts ordered by the parties are paid by the party ordering them (*see Gov. Code § 69953*; *Sunny Slope Water Co. v. City of Pasadena (1934) 1 Cal. 2d 87, 99-100, 33 P.2d 672* ; *Moore v. City & County of San Francisco (1970) 5 Cal. App. 3d 728, 739-740, 85 Cal. Rptr. 281*).

[2] Comments

[a] Use of Form

This form is for use in combination with those *set out in § 60.40* in support of a motion to tax costs by striking the amount claimed by the prevailing party for the fee paid for a daily transcript ordered by that party and not by the court [*see Code Civ. Proc. § 1033.5(b)(5)*; *Gov. Code § 69953*].

Under *Code Civ. Proc. § 1033.5(a)(9)* and *Gov. Code § 69953*, costs of transcripts ordered by the court that are paid by the party to whom costs are awarded are allowable costs. For an exception to this rule, see *Code Civ. Proc. § 998(c)* and

(d), which comes into operation when a pretrial offer to settle is not accepted and the party failing to accept it fails to obtain a more favorable judgment [*see Lafayette v. County of Los Angeles (1984) 162 Cal. App. 3d 547, 557, 208 Cal. Rptr. 668]* .

For memoranda involving other items not allowed as costs under *Code Civ. Proc. § 1033.5(b)(1)* and *Code Civ. Proc. § 1033.5(b)(2)-(4)*, except when expressly authorized by law, see *§§ 60.42* and *60.44*.

See also *§ 60.40[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.40[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Costs of Non-Court-Ordered Transcript Not Allowable

Code Civ. Proc. § 1033.5(b)(5) provides that transcripts of court proceedings not ordered by the court are not allowable as costs, except when expressly authorized by law.

[b] Daily Transcripts

Gov. Code § 69953 was added, and its predecessor, *Code Civ. Proc. § 274* (referred to in *Sunny Slope Water Co. v. City of Pasadena (1934) 1 Cal. 2d 87, 33 P.2d 672* , discussed *below*), was repealed, in 1953. From the time of its enactment until its 1986 amendment, *Gov. Code § 69953* provided in relevant part that "[i]n civil cases the fees for reporting and for all other transcriptions ordered by the court to be made" shall be paid by the parties in equal proportion; and either party at his option may pay the whole. In either case, all amounts so paid by the party to whom costs are awarded shall be taxed as costs in the case. The fees for transcripts and copies ordered by the parties shall be paid by the party ordering them. The section was amended in 1986 to substitute for the language above in quotes the following: "In any case where a verbatim record is not made at public expense pursuant to Section 69952 [of the Government Code, authorizing court to specifically direct making of verbatim record and payment therefor from county treasury in criminal matters, juvenile proceedings, proceedings to declare minor free from custody, proceedings under Lanterman-Petris-Short Act, and "as otherwise provided by law'] or other provisions of law, the cost of making any verbatim record ... ." However, *Code Civ. Proc. § 1033.5*, which contains the provision set forth in Paragraph A of the foregoing form, was also enacted in 1986.

In ***Sunny Slope Water Co. v. City of Pasadena*** *(1934) 1 Cal. 2d 87, 33 P.2d 672* , the City of Pasadena and some of its officials appealed from a judgment determining that certain ordinances were inapplicable to plaintiff, and from an order taxing costs which allowed the costs of daily transcripts. The Supreme Court reversed the judgment and order. The parties had stipulated to the preparation of a daily transcript, but the stipulation did not specify who should pay for the transcript or whether the amount could be included in the cost bill by the prevailing party. Though the record did not show any remark by the trial court about the stipulation, plaintiff contended that the trial judge stated, "Very well." Plaintiff did not contend that any order was made by the trial judge as to the transcript other than this observation. The Court stated that this statement fell far short of an order by the court requiring the preparation of a daily transcript, and that the cost of the transcript may only be allowed under *Code Civ. Proc. § 274* (*now see Gov. Code § 69953* and *Code Civ. Proc. § 1033.5(b)(5)*) when the trial court orders the preparation of the transcript (*1 Cal. 2d 87, 99-100)* .

Moore v. City & County of San Francisco *(1970) 5 Cal. App. 3d 728, 85 Cal. Rptr. 281* , involved an action for false arrest and imprisonment arising out of plaintiff 's arrest on a misdemeanor charge. A daily transcript had been prepared at the city and county's request (*5 Cal. App. 3d 728, 740)* . The jury's verdict was for all the defendants. Plaintiff 's

motion for judgment notwithstanding the verdict was granted as to the city and county only on the issue of liability only, and her motion for new trial was granted as to the city and county on the issue of damages only. The city and county appealed from the orders and plaintiff appealed from the jury verdict. The court of appeal reversed the judgment notwithstanding the verdict and the partial judgment for the individual defendants and affirmed the order granting plaintiff a new trial, extending it to the entire cause (*5 Cal. App. 3d 728, 740-741)* . With respect to the daily transcript, the court of appeal said that no abuse of discretion by the trial court was shown in disallowing as costs expenditures for a daily transcript since no formal order for the transcript had been made (*5 Cal. App. 3d 728, 739-740)* . The court explained that in a civil case, unless there is an express order by the court directing the preparation of a daily transcript of the proceedings, chargeable to both parties, the general rule of *Gov. Code § 69953* that fees for transcripts are to be paid by the party ordering them prevails. The court, however, added that since a daily transcript involves the use of more than one reporter, and sometimes certain inconvenience and distraction in their frequent changeovers or relief, such an arrangement when unilateral should have the approval of the trial court. But the appellate court was unable to state as a matter of law that the trial judge's verbal acquiescence to the city and county's request for daily transcripts constituted the order required to place the costs of the transcripts equally on both parties under *Gov. Code § 69953* (then providing that costs of transcripts ordered by the court are to be paid by parties in equal proportions with prevailing party awarded as costs amount paid) (*5 Cal. App. 3d 728, 740)* .

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6-60 California Points & Authorities § 60.44

§ 60.44 Supporting Motion to Tax Costs by Striking or Reducing Specific Items--To Strike Items Not Allowable as Costs Except When Expressly Authorized by Law

[1] FORM Supporting Motion to Tax Costs by Striking or Reducing Specific Items--To Strike Items Not Allowable as Costs Except When Expressly Authorized by Law

[*For caption, see § 60.40, with which this form should be combined.*]

THE ITEM(S) SOUGHT TO BE TAXED _____ [IS *or* ARE] NOT ALLOWABLE AS COSTS, EXCEPT WHEN EXPRESSLY AUTHORIZED BY LAW, AND NO LAW AUTHORIZES THEIR ALLOWANCE IN THIS CASE.

Item Claimed Not Allowable as Costs. Except when expressly authorized by law, the following item(s) _____ [is *or* are] not

allowable as costs: _____ [investigation expenses in preparing the case for trial (*Code Civ. Proc. § 1033.5(b)(2)*) *or* postage charges (*Code Civ. Proc. § 1033.5(b)(3)*) *or* telephone charges (*Code Civ. Proc. § 1033.5(b)(3)*) *or* photocopying charges, except for exhibits (*Code Civ. Proc. § 1033.5(b)(3)*) *or* costs in investigation of jurors (*Code Civ. Proc. § 1033.5(b)(4)*) *or* costs in preparation for voir dire (*Code Civ. Proc. § 1033.5(b)(4)*) *or all or any combination of the foregoing*].

[2] Comments

[a] Use of Form

This form is for use in combination with those *set out in § 60.40* in support of a motion to tax costs by striking from the cost bill items that (1) are declared by statute not to be allowable as costs except when expressly authorized by law [*see Code Civ. Proc. § 1033.5(b)*], and (2) are not expressly authorized by law.

For memoranda relating to the nonallowance of fees of experts not ordered by the court [*Code Civ. Proc. § 1033.5(b)(1)*] or costs of transcripts not ordered by the court [*Code Civ. Proc. § 1033.5(b)(5)*], which may be combined with the memoranda set forth above, see *§§ 60.42* and *60.43*.

See also *§ 60.40[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.40[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Item Claimed Not Allowable as Costs

Code Civ. Proc. § 1033.5(b) provides that except when expressly authorized by law, investigation expenses in preparing the case for trial, postage charges, telephone charges, photocopying charges other than for exhibits, costs in investigation of jurors, and costs in preparation for voir dire are not allowable as costs.

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6-60 California Points & Authorities § 60.45

§ 60.45 Supporting Motion to Tax Costs by Striking or Reducing Specific Items--To Strike Items Not Reasonably Necessary to Conduct of Litigation

[1] FORM Supporting Motion to Tax Costs by Striking or Reducing Specific Items--To Strike Items Not Reasonably Necessary to Conduct of Litigation

[*For caption, see § 60.40, with which this form should be combined.*]

THE ITEMS SOUGHT TO BE STRICKEN WERE NOT REASONABLY NECESSARY TO THE CONDUCT OF THE LITIGATION AND THEREFORE ARE NOT ALLOWABLE AS COSTS.

A. Items of Cost Must Have Been Reasonably Necessary. Any award of costs is subject to the rule that allowable costs must be reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation (*Code Civ. Proc. § 1033.5(c)(2)*; *see also Cal. Rules of Ct., Rule 3.1700(a)(1)*).

B. Necessity of Costs Is Question of Fact. The necessity for any expenditures sought to be recovered as costs is a question of fact for the trial judge (*Moss v. Underwriters' Report, Inc. (1938) 12 Cal. 2d 266, 276, 83 P.2d 503*).

[*EITHER*]

C. Burden When Item Appears Improper on Its Face. When items claimed as costs do not appear on their face to be proper and necessary and the items are properly challenged by a motion to tax costs, the burden of establishing the necessity of the items is on the party claiming them as costs (*Whitney v. Whitney (1958) 164 Cal. App. 2d 577, 585, 330 P.2d 947* ; *Stenzor v. Leon (1955) 130 Cal. App. 2d 729, 735, 279 P.2d 802*).

[*OR*]

D. Burden When Objecting to Item Proper on Its Face. Although items in a verified cost bill which appear as proper charges are prima facie evidence that the costs were necessarily incurred, when such items are properly objected to, they are put in issue, and the burden of proof is on the party claiming them as costs (*Hadley v. Krepel (1985) 167 Cal. App. 3d 677, 682, 214 Cal. Rptr. 461* ; *Melnyk v. Robledo (1976) 64 Cal. App. 3d 618, 624, 134 Cal. Rptr. 602*).

[2] Comments

[a] Use of Form

This form is for use in combination with those *set out in § 60.40* in support of a motion to tax costs by striking from the cost bill specific items which were not reasonably necessary to the conduct of the litigation [*see Code Civ. Proc. § 1033.5(c)(2)*].

See also *§ 60.40[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.40[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Items of Cost Must Have Been Reasonably Necessary

Code Civ. Proc. § 1033.5(c) provides: "Any award of costs shall be subject to the following: ... (2) Allowable costs shall be reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation." (Other statutory provisions relating to specific items of cost, however, use the term "necessary" or "unnecessary" rather than "reasonably necessary" [*see, e.g., Code Civ. Proc. § 1033.5(a)(3)* ("necessary depositions"); *Code Civ. Proc. § 1033.5(a)(6)* ("necessary" surety bonds) and *Code Civ. Proc. § 995.250(b)* (premium not allowed as costs on "unnecessary" bond); see *§ 60.47*.)

Cal. Rules of Ct., Rule 3.1700(a)(1), provides: "The memorandum of costs must be verified by a statement of the party, attorney, or agent that to the best of his or her knowledge the items of cost are correct and were necessarily incurred in the case." The rule perpetuates the language of former Code Civ. Proc. § 1033 (repealed by Stats. 1986, ch. 377), and, as required by the rule, that language also appears in the verification contained in the Memorandum of Costs approved for optional use by the Judicial Council.

Except where a statute expressly requires that the cost be necessary, as opposed to reasonably necessary, the Judicial Council rule, by omitting "reasonably" and perpetuating the language of the repealed statute, appears to impose a stricter standard on allowable costs than that imposed by the statute. If so, whether this is permissible under *Cal. Const., Art. VI, § 6*, empowering the Judicial Council to adopt rules for court practice and procedure not inconsistent with statute, is unclear.

[b] Necessity of Costs Is Question of Fact

The facts and procedural background of ***Moss v. Underwriters' Report, Inc.*** *(1938) 12 Cal. 2d 266, 83 P.2d 503* , are discussed in *§ 60.40[3][b]*. In discussing the necessity for certain depositions, a factor incorporated in former Code Civ. Proc. § 1032a, which at the time governed the allowance of costs of depositions, the Supreme Court stated that the necessity for such expenditures is always a question for the trial judge (*12 Cal. 2d 266, 276)* . (Code Civ. Proc. § 1032a was renumbered in 1982 to *Code Civ. Proc. § 1032.7*, which, in turn, was repealed in 1986 and replaced by *Code*

Civ. Proc. § 1033.5(a)(3), (c)(2).)

[c] Burden When Item Appears Improper on Its Face

In ***Whitney v. Whitney*** *(1958) 164 Cal. App. 2d 577, 330 P.2d 947* , a wife appealed from portions of an interlocutory decree granting her a divorce. Her husband had moved the trial court to tax costs, and the court disallowed all items in the cost bill, including psychiatric and investigation fees. The court of appeal found no abuse of discretion by the trial court. The court stated that the items in question did not appear on their face to be necessary disbursements, and appellant, the party claiming the items, had the burden of proving the element of necessity (*164 Cal. App. 2d 577, 585)* .

Stenzor v. Leon *(1955) 130 Cal. App. 2d 729, 279 P.2d 802* , involved consolidated appeals arising out of a superior court proceeding by a labor union to confirm an arbitrator's awards and by the employer to vacate the awards. The superior court denied confirmation and vacated the awards. Stenzor, a member and manager of the labor union involved, appealed on behalf of the union. The employer appealed from an order taxing costs which denied him costs claimed for a reporter's transcript of the proceedings before the arbitrator. At that time arbitration was governed by *Code Civ. Proc. §§ 1280-1293* (*now see Code Civ. Proc. §§ 1280-1294.2*), which contained no provisions respecting costs.

In affirming the judgment denying confirmation and the order disallowing costs, the court of appeal pointed out that the code sections relating to arbitration are contained in Part 3 of the Code of Civil Procedure, which is devoted to special proceedings, and that former Code Civ. Proc. § 1032 (*now see* new *Code Civ. Proc. § 1032*, which applies to actions and special proceedings in all trial courts), authorizing recovery of costs, by its own terms applied to both actions and special proceedings in superior court, but that it did not specify the costs allowable. The court further pointed out that (1) former Code Civ. Proc. § 1033 (*now see Cal. Rules of Ct., Rule 3.1700(a)(1)*) required the party claiming costs to verify the memorandum of costs stating that to the best of his or her knowledge and belief the items are correct and that the disbursements have been necessarily incurred in the action or proceeding; and (2) Code Civ. Proc. § 1032a (renumbered in 1982 to *Code Civ. Proc. § 1032.7*, which, in turn, was repealed in 1986 and replaced by *Code Civ. Proc. § 1033.5(a)(3), (c)(2)*) authorized recovery of the cost of depositions unless the court determined that their taking was unnecessary (*130 Cal. App. 2d 729, 734-735)* . The court explained that the question before the trial court was whether the cost of the reporter's transcript was necessarily incurred by the employer for the purpose of presenting to the court his grounds for seeking annulment of the awards and concluded that under the facts of the case the transcript was of doubtful necessity. The court said it is well settled that when a claim is made for disbursement of doubtful necessity and the item is properly challenged by a motion to tax costs, the burden is on the claimant to establish the necessity for the disbursement; its allowance is within the discretion of the trial court and, if no abuse of discretion is shown, the action of the trial court will not be disturbed (*130 Cal. App. 2d 729, 735)* . The court found it clear that a party to an arbitration who has the proceedings reported for his exclusive use in court and prevails there cannot claim reimbursement as a matter of course, and that therefore it was not an abuse of discretion for the trial court to disallow the item (*130 Cal. App. 2d 729, 736)* .

[d] Burden When Objecting to Item Proper on Its Face

Hadley v. Krepel *(1985) 167 Cal. App. 3d 677, 214 Cal. Rptr. 461* , was an action on contract for an unpaid broker's commission during the course of which defendant was represented by three different attorneys. The contract provided that, in any action between Broker and Seller arising out of the agreement, the prevailing party shall be entitled to reasonable attorney's fees and costs. Defendant prevailed and submitted a memorandum of costs and fees. Plaintiffs moved to tax costs and to determine the reasonableness of attorney's fees. The trial court granted the motion and awarded attorney's fees and costs totaling less than 20 percent of defendant's actual expenses. Defendant appealed, contending the award was unreasonable and an abuse of discretion.

The court of appeal reversed the judgment with directions to the trial court to conduct a new hearing to fix the reasonable amount of fees and costs to which the defendant was entitled. The court, agreeing with defendant's assertion, said that the items on a verified cost bill are prima facie evidence that the costs, expenses, and services listed were necessarily incurred, and when they are properly challenged the burden of proof shifts to the party claiming them as costs (*167 Cal. App. 3d 677, 682, 687)* .

The facts and procedural background of ***Melnyk v. Robledo*** *(1976) 64 Cal. App. 3d 618, 134 Cal. Rptr. 602* , are discussed in *§ 60.650[3]*. In affirming the judgment and order, the court of appeal stated that if the items on a verified cost bill appear to be proper charges they are prima facie evidence that the items listed were necessarily incurred, but that when the items are properly objected to, they are put in issue and the burden of proof is on the party claiming them as costs. The court rejected defendant's contention that, because plaintiff challenged the reasonableness of defendant's claim for attorney's fees by way of a memorandum rather than by affidavit or testimony, the prima facie case in favor of the amount claimed for the fees was not rebutted (*64 Cal. App. 3d 618, 624)* . Since the trial judge had before it pleadings, depositions, and other work performed by counsel, it had evidence on which it had discretion to set the fee (*64 Cal. App. 3d 618, 624-625)* .

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6-60 California Points & Authorities § 60.46

§ 60.46 Supporting Motion to Tax Costs by Striking or Reducing Specific Items--To Strike Claim for Cost of Unnecessary Deposition

[1] FORM Supporting Motion to Tax Costs by Striking or Reducing Specific Items--To Strike Claim for Cost of Unnecessary Deposition

[*For caption, see § 60.40, with which this form should be combined.*]

THE DEPOSITION OF _____ [*name*] WAS NOT NECESSARY AND THE CLAIM FOR RECOVERY OF ITS COST SHOULD BE DISALLOWED.

A. Prevailing Party Is Not Entitled to Recover Cost of Unnecessary Deposition. Although entitled as a matter of right to recover costs (*see Code Civ. Proc. § 1032(b)*), a prevailing party is not entitled to recover the cost of a deposition that was not necessary (*see Code Civ. Proc. § 1033.5(a)(3)*).

[*Optional*] **B. Deponent's Testimony Relevant But Not Necessary.** In ruling on allowance of the cost of a deposition taken because it was believed that the deposed witness would not be available at trial, the trial court may reasonably determine that the deponent's testimony, although relevant, was unnecessary and disallow the item of cost (*Fellowship of Humanity v. Co. Alameda (1957) 153 Cal. App. 2d 673, 702, 315 P.2d 394*).

[2] Comments

[a] Use of Form

This form is for use in combination with those *set out in § 60.40* in support of a motion to tax costs by striking from the cost bill the item of cost claimed for the taking of a deposition that was not necessary [*see Code Civ. Proc. § 1033.5(a)(3), (c)(3)*].

See also *§ 60.40[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.40[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Prevailing Party Is Not Entitled to Recover Cost of Unnecessary Deposition

Code Civ. Proc. § 1032(b) provides that, except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in an action or proceeding. *Code Civ. Proc. § 1033.5(a)* sets forth the items allowable as costs under *Code Civ. Proc. § 1032*. ***Code Civ. Proc. § 1033.5(a)(3)*** allows as costs taking, video recording, and transcribing necessary depositions.

[b] Deponent's Testimony Relevant But Not Necessary

In ***Fellowship of Humanity v. Co. Alameda*** *(1957) 153 Cal. App. 2d 673, 315 P.2d 394* , defendant appealed from a judgment for plaintiff in an action to recover real property taxes paid under protest and plaintiff appealed from an order taxing costs. The trial court had taxed costs by disallowing the cost of taking the deposition of a minister who expected to be absent from the county at the time of the trial. The deposition was accepted in evidence at the trial, although the deponent was in the county. The court of appeal affirmed the order and held that the trial court had not abused its discretion in disallowing the item. The trial court knew that many other ministers were available to testify as to the tax-exempt status of churches which used exempt property for purposes other than "worship," and could reasonably and within its discretion have determined that the testimony while relevant was not necessary under former Code Civ. Proc. § 1032a (renumbered in 1982 to *Code Civ. Proc. § 1032.7*, which, in turn, was repealed in 1986 and replaced by *Code Civ. Proc. § 1033.5(a)(3), (c)(2)*). The court stated that "necessity" and "relevancy" are not the same (*153 Cal. App. 2d 673, 702)* .

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6-60 California Points & Authorities § 60.47

§ 60.47 Supporting Motion to Tax Costs by Striking or Reducing Specific Items--To Strike Unnecessary Surety Bond Premium

[1] FORM Supporting Motion to Tax Costs by Striking or Reducing Specific Items--To Strike Unnecessary Surety Bond Premium

[*For caption, see § 60.40, with which this form should be combined.*]

THE SURETY BOND GIVEN BY _____ [*specify party filing memorandum of costs*] FOR _____ [*specify*] WAS NOT NECESSARY AND THE ITEM IS THEREFORE NOT AN ALLOWABLE COST.

Premium on Unnecessary Surety Bond. A party may recover as costs premiums on necessary surety bonds (*Code Civ. Proc. § 1033.5(a)(6)*). That is, he or she may recover the premium on a bond reasonably paid by the party pursuant to a statute that provides for the bond in the action or proceeding (*Code Civ. Proc. § 995.250(a)*) or the premium on a bond reasonably paid by the party in connection with the action or proceeding, unless the court determines that the bond was unnecessary (*Code Civ. Proc. § 995.250(b)*). Conversely, a party may not recover as costs the premium paid for a surety bond that was not required and not necessary (*Code Civ. Proc. §§ 1033.5(a)(6), 995.250*).

[2] Comments

[a] Use of Form

This form is for use in combination with those *set out in § 60.40* in support of a motion to tax costs by striking the amount claimed for the premium paid on a surety bond that was neither required nor necessary [*see Code Civ. Proc. § 1033.5(a)(6)*].

See also *§ 60.40[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.40[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Premium on Unnecessary Surety Bond

Code Civ. Proc. § 1033.5(a)(6) provides that a party may recover as costs premiums on necessary surety bonds.

Code Civ. Proc. § 995.250(a) provides that a party may recover the premium on a bond reasonably paid by the party pursuant to a statute that provides for the bond in the action or proceeding.

Code Civ. Proc. § 995.250(b) provides that a party may recover the premium on a bond reasonably paid by the party in connection with the action or proceeding, unless the court determines that the bond was unnecessary.

Code Civ. Proc. §§ 1033.5(a)(6)* and *995.250 provide that a party may not recover as costs the premium paid for a surety bond that was not required and not necessary.

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6-60 California Points & Authorities § 60.48

§ 60.48 Supporting Motion to Tax Costs by Striking or Reducing Specific Items--To Strike Claim for Interest Paid on Amount Borrowed to Post Cash Deposit in Lieu of Surety Bond

[1] FORM Supporting Motion to Tax Costs by Striking or Reducing Specific Items--To Strike Claim for Interest Paid on Amount Borrowed to Post Cash Deposit in Lieu of Surety Bond

[*For caption, see § 60.40, with which this form should be combined.*]

INTEREST PAID ON MONEY BORROWED TO POST A CASH DEPOSIT IN LIEU OF A SURETY BOND IS NOT AN ALLOWABLE ITEM OF COSTS.

Interest on Cash Deposited in Lieu of Surety Bond. A party may not recover as an item of costs the interest paid on cash borrowed and deposited in lieu of a surety bond (*Sequoia Vacuum Systems v. Stransky (1964) 229 Cal. App. 2d 281, 289, 40 Cal. Rptr. 203*).

[2] Comments

[a] Use of Form

This form is for use in combination with those *set out in § 60.40* in support of a motion to tax costs by striking the amount claimed for the interest paid on money borrowed in order to post a cash deposit in lieu of a surety bond [*see Code Civ. Proc. § 995.710(a)(1)* (authorization for cash deposit)].

See also *§ 60.40[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.40[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Interest on Cash Deposited in Lieu of Surety Bond

Sequoia Vacuum Systems v. Stransky *(1964) 229 Cal. App. 2d 281, 40 Cal. Rptr. 203* , is discussed in *§ 60.40[3][c]*.

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6-60 California Points & Authorities § 60.49

§ 60.49 Supporting Motion to Tax Costs by Striking or Reducing Specific Items--To Strike Costs of Prior Trial That Resulted in Mistrial

[1] FORM Supporting Motion to Tax Costs by Striking or Reducing Specific Items--To Strike Costs of Prior Trial That Resulted in Mistrial

[*For caption, see § 60.40, with which this form should be combined.*]

THE ITEM CLAIMED AS COSTS OF A PRIOR TRIAL THAT RESULTED IN A MISTRIAL IS NOT AN ALLOWABLE COST UNDER THE FACTS OF THIS CASE.

Costs of Prior Trial. A party prevailing on a second trial after mistrial may not recover costs of the first trial when the mistrial resulted from the misconduct of the prevailing party's counsel and the court on declaring the mistrial charged the costs of the trial to the prevailing party (*Mullin v. Rousseau (1931) 112 Cal. App. 719, 730-731, 297 P. 944*).

[2] Comments

[a] Use of Form

This form is for use in combination with those *set out in § 60.40* in support of a motion to tax costs by striking the amount claimed as costs of a prior trial that resulted in a mistrial caused by the misconduct of the prevailing party's attorney.

See also *§ 60.40[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.40[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Costs of Prior Trial

Mullin v. Rousseau *(1931) 112 Cal. App. 719, 297 P. 944* , involved an action for fraud in the exchange of apartment houses. Defendants appealed from the judgment in favor of plaintiff and from the trial court's orders denying defendants' motions for judgment notwithstanding the verdict and to tax costs by eliminating the amount claimed by plaintiff for the first trial. That trial had ended in a mistrial due to the misconduct of plaintiff 's counsel. Although ordinarily a prevailing party is entitled to recover the costs of a mistrial, the judge at the first trial had apparently ordered plaintiff to pay the costs of the first trial as a penalty for the misconduct of her attorneys. The court of appeal held that the second trial judge improperly reviewed the prior order for costs on the motion to tax costs made after the second trial, and that the second trial judge should not have allowed plaintiff the costs of the first trial (*112 Cal. App. 719, 730-731)* . The court modified the judgment by deducting the amount taxed as costs of the first trial and affirmed the judgment and orders as modified (*112 Cal. App. 719, 731)* .

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6-60 California Points & Authorities § 60.50

§ 60.50 Supporting Motion to Tax Costs by Striking or Reducing Specific Items--To Strike Cost of Exhibits Prepared by Party Introducing Them

[1] FORM Supporting Motion to Tax Costs by Striking or Reducing Specific Items--To Strike Cost of Exhibits Prepared by Party Introducing Them

[*For caption, see § 60.40, with which this form should be combined.*]

THE COST OF EXHIBITS PREPARED AT THE SOLE INSTANCE OF THE PARTY INTRODUCING THEM AT TRIAL ARE NOT A PROPER ITEM OF COSTS.

Exhibits Prepared for Trial. The cost of exhibits, such as maps and photographs, prepared at the sole instance of the party introducing them at trial is not a proper item of costs (*Simms v. County of Los Angeles (1950) 35 Cal. 2d 303, 319, 217 P.2d 936 , cert. denied, (1950) 340 U.S. 891, 71 S. Ct. 207, 95 L. Ed. 646 , reh'g denied, (1951) 340 U.S. 916, 71 S. Ct. 291, 95 L. Ed. 662* ; *Crabtree v. Houghton (1923) 191 Cal. 33, 34, 214 P. 846* ; *City of Downey v. Gonzales (1968) 262 Cal. App. 2d 563, 570, 69 Cal. Rptr. 34*).

[2] Comments

[a] Use of Form

This form is for use in combination with those *set out in § 60.40* in support of a motion to tax costs by striking the amount claimed for the cost of exhibits, such as maps and photographs, that were prepared at the sole instance of the party who introduced them at trial. In an appropriate case it may be combined with other forms relating to disallowance or reduction of various attorney-related charges [*see § 60.51[2][c]*].

See also *§ 60.40[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.40[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Exhibits Prepared for Trial

In ***Simms v. County of Los Angeles*** *(1950) 35 Cal. 2d 303, 217 P.2d 936 , cert. denied, (1950) 340 U.S. 891, 71 S. Ct. 207, 95 L. Ed. 646 , reh'g denied, (1951) 340 U.S. 916, 71 S. Ct. 291, 95 L. Ed. 662* , the Supreme Court reversed, with directions, judgments for plaintiffs in actions to recover taxes on certain buildings which were paid under protest. Defendants complained of the trial court's action in allowing certain items as costs to plaintiffs over defendants' objections. One of these items was the cost of photographs which plaintiffs introduced as exhibits at trial and which were apparently obtained at the sole instance of plaintiffs to assist them in proving their case. The Court relied in part on *Crabtree v. Houghton (1923) 191 Cal. 33, 214 P. 846* (discussed *below*) to support its opinion that this expense is not a proper item of costs (*35 Cal. 2d 303, 319)* .

Crabtree v. Houghton *(1923) 191 Cal. 33, 214 P. 846* , involved an appeal from a trial court's order refusing to strike from plaintiff 's cost bill an item claiming plaintiff 's costs for making a map which plaintiff introduced as an exhibit at trial. The map was not prepared at the request or direction of the court or by stipulation of the parties. It was made at the sole instance of plaintiff. The Supreme Court stated that the trial court should have granted defendant's motion to strike this item on the authority of *Bathgate v. Irvine (1899) 126 Cal. 135, 149-150, 58 P. 442* (costs of surveys and maps not ordered by court as not allowable), and directed the trial court to modify the judgment by striking this item (*191 Cal. 33, 34)* .

In ***City of Downey v. Gonzales*** *(1968) 262 Cal. App. 2d 563, 69 Cal. Rptr. 34* , defendants appealed from an order granting a motion to retax costs after judgment in an eminent domain proceeding. One of defendants' objections was that the expenses incurred in the preparation of certain photographs introduced at trial were improperly stricken from their cost bill. The court of appeal pointed out that under former Code Civ. Proc. § 1255 (*now see Code Civ. Proc. § 1268.710*), the trial court had discretion to tax costs in eminent domain proceedings (*262 Cal. App. 2d 563, 567)* , and, relying on *Simms v. County of Los Angeles,* discussed *above,* held that the expenses incurred in the preparation of the photographs were not properly allowable costs and that the trial court was correct in its ruling (*262 Cal. App. 2d 563, 570)* .

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6-60 California Points & Authorities § 60.51

§ 60.51 Supporting Motion to Tax Costs by Striking or Reducing Specific Items--To Strike Claim for Attorney's Fee Not Authorized by Contract or Statute

[1] FORM Supporting Motion to Tax Costs by Striking or Reducing Specific Items--To Strike Claim for Attorney's Fee Not Authorized by Contract or Statute

[*For caption, see § 60.40, with which this form should be combined.*]

ATTORNEY'S FEES ARE NOT AN ALLOWABLE ITEM OF COSTS IN THIS CASE.

A. General Rule Regarding Attorney's Fees. Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys is left to the agreement, express or implied, of the parties (*Code Civ. Proc. § 1021*).

B. Attorney's Fees Are Not Generally Recoverable as Costs. *Section 1021 of the Code of Civil Procedure* is a codification of the general or "American" rule that attorney's fees are not taxable as costs against the losing party (*Steele v. Gold (1984) 150 Cal. App. 3d 928, 931, 198 Cal. Rptr. 257* ; *Young v. Redman (1976) 55 Cal. App. 3d 827, 834-835, 128 Cal. Rptr. 86*).

C. Striking Claim for Attorney's Fees. Attorney's fees claimed in a memorandum of costs which are not provided for by statute or contract are properly stricken on a motion to tax costs (*Freeman v. Goldberg (1961) 55 Cal. 2d 622, 625-626, 12 Cal. Rptr. 668, 361 P.2d 244*).

[2] Comments

[a] Use of Form

This form is for use in combination with those *set out in § 60.40* in support of a motion to tax costs by striking from the cost bill the claim for attorney's fees which are not authorized by either statute or any contract between the parties.

For discussion of when attorney's fee are recoverable from an opposing party as an item of costs, because they are, contrary to the general American rule, expressly authorized by statute, law, or contract, see California Forms of Pleading and Practice, Ch. 174, *Costs and Attorney's Fees* (Matthew Bender); *see also § 60.90*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.40[2][b]* regarding evidentiary support for facts stated.

[c] Related Memoranda

For extensive memoranda relating to the instances in which attorney's fees are recoverable from an opposing party as an item of costs, see Subpart B, § 60.300 et seq. For memoranda relating to the reduction of an award of attorney's fees on the ground that they are excessive, see *§§ 60.41* and *60.650* et seq. For memoranda relating to the reduction of an award of attorney's fees on the ground that part of the services charged were not reasonably related to the litigation, see *§§ 60.45* and *60.52 -60.56*.

For memoranda supporting and opposing a motion for an award of expenses, including attorney's fees, as a sanction, see § 60.180 et seq.

[3] Discussion of Authorities

[a] General Rule Regarding Attorney's Fees

Code Civ. Proc. § 1021 provides that except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys is left to the agreement, express or implied, of the parties.

[b] Attorney's Fees Are Not Generally Recoverable as Costs

In ***Steele v. Gold*** *(1984) 150 Cal. App. 3d 928, 198 Cal. Rptr. 257* , plaintiffs had requested attorney's fees under *Code Civ. Proc. § 128.5* (sanctions for dilatory tactics). The trial court expressly declined to make a finding of bad faith, as would be required for an award pursuant to *Code Civ. Proc. § 128.5*. However, the trial court opined that it had the authority to award the fees as part of an award of costs pursuant to the former version of *Code Civ. Proc. § 1032* (repealed and reenacted in 1986), relating to an award of costs in superior court cases, and made the requested award on this basis. On petition for writ of mandate, the court of appeal reversed the award. The court stated that the trial court's rationale was at odds with the settled principle, as codified in *Code Civ. Proc. § 1021*, that a court may generally award attorney's fees only pursuant to an agreement of the parties or statutory authority. The court noted that in the case before it there was no agreement as to fees between the parties, and that the trial court had not relied on any statutory authority that would have permitted an award of attorney fees. The court also declined to hold that the award was proper despite its having been erroneously arrived at, since the trial court could have made the award pursuant to *Code Civ. Proc. § 128.5*. Such a holding would require the court to find as a matter of law that an award was required under the cited statutory authority, and the court concluded that it could not make such a finding on the record before it (*150 Cal. App. 3d 928, 931)* .

In ***Young v. Redman*** *(1976) 55 Cal. App. 3d 827, 128 Cal. Rptr. 86* , defendant appealed in part from an award of attorney's fees to the other parties as sanctions for defendant's failure to appear at trial and his vexatious conduct in maintaining unfounded defenses and cross actions in bad faith. In discussing the general power of the trial court to award attorney's fees, the court of appeal stated that *Code Civ. Proc. § 1021* (providing that except as specifically provided by statute, compensation for attorney's fees is left to the agreement of the parties) is a codification of the general "American" rule that attorney's fees are not taxable as costs against the losing party (*55 Cal. App. 3d 827,*

834-835) . The court then discussed the California and federal court exceptions to the general rule, including the rule allowing imposition of fees in federal court when an unfounded action or defense is maintained in bad faith, vexatiously, wantonly, or for oppressive reasons (*55 Cal. App. 3d 827, 835-838)* . The court held that the trial court abused its discretion in awarding the fees by way of sanctions on the grounds stated, since at the time the case was decided *Code Civ. Proc. § 1992* (witness disobeying subpoena) was the only relevant statute providing for such sanctions (*55 Cal. App. 3d 827, 839)* . The court said that any power of the trial court to impose attorney's fees in exceptional cases when an action is maintained in bad faith must be created by the Legislature with appropriate safeguards and guidelines, and remanded the matter to the trial court for reconsideration of sanctions in accordance with *Code Civ. Proc. § 1992* (*55 Cal. App. 3d 827, 839)* .

[c] Striking Claim for Attorney's Fees

Freeman v. Goldberg *(1961) 55 Cal. 2d 622, 12 Cal. Rptr. 668, 361 P.2d 244* , involved an appeal by defendants from an order under *Code Civ. Proc. § 473(b)* vacating a previous order denying plaintiff 's motion to tax costs in an action dismissed pursuant to former Corp. Code § 834 (*now see Corp. Code § 800(c)-(f)*), requiring the posting of security for expenses, including attorney's fees, in shareholder's derivative action. Defendants timely served on plaintiff a memorandum of costs, which included an item for attorney's fees. Plaintiff 's motion to tax costs on the ground that there was no authority for the award of attorney's fees was not filed within the time allowed by former Code Civ. Proc. § 1033 (repealed in 1986; *now see Cal. Rules of Ct., Rule 3.1700(a)(1)*), and the trial court denied the motion. Plaintiff then filed a notice of motion based on *Code Civ. Proc. § 473(b)* (relief from order made through party's mistake, inadvertence, surprise, or excusable neglect), requesting that the judgment and order denying the motion to tax costs be vacated and that a corrected judgment which did not include attorney's fees be entered. The trial court granted the motion to vacate the order denying the motion to tax costs and defendant appealed.

In affirming the order, the Supreme Court considered the question of whether attorney's fees could properly be taxed as costs on the dismissal of an action pursuant to former Corp. Code § 834 (*now see Corp. Code § 800(d)*) for failure to provide security, since the trial court would now have to consider the motion to strike on the merits. The Court stated that under *Code Civ. Proc. § 1021*, a successful litigant is not ordinarily entitled to attorney's fees as costs in the absence of special statutory authorization (*55 Cal. 2d 622, 625)* . Former Code Civ. Proc. § 834 (*now see Corp. Code § 800(d)*) did not contain a provision for an award of attorney's fees when an action was dismissed on the ground that no security was furnished (as opposed to an award of fees incurred in the defense of the action which was to be paid out of the security) and there could therefore be no recovery of attorney's fees as there was no statutory authority for such recovery (*55 Cal. 2d 622, 626)* .

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6-60 California Points & Authorities § 60.52

§ 60.52 Supporting Motion to Tax Costs by Striking or Reducing Specific Items--To Strike Local Travel Expenses Not Incurred to Attend Depositions

[1] FORM Supporting Motion to Tax Costs by Striking or Reducing Specific Items--To Strike Local Travel Expenses Not Incurred to Attend Depositions

[*For caption, see § 60.40, with which this form should be combined.*]

LOCAL TRAVEL EXPENSES NOT INCURRED TO ATTEND DEPOSITIONS SHOULD BE STRICKEN BECAUSE THEY ARE NEITHER EXPRESSLY ALLOWED NOR REASONABLY NECESSARY TO THE CONDUCT OF THE LITIGATION.

Local Travel Expenses Not Needed for Deposition Attendance Are Not Allowable Costs. Local travel expenses are expressly allowed only when incurred to attend depositions (*Code Civ. Proc. § 1033.5(a)(3)*). Furthermore, routine expenses for local travel by attorneys and others are not reasonably necessary to the conduct of the litigation (*Ladas v. California State Auto. Assn. (1993) 19 Cal. App. 4th 761, 775, 23 Cal. Rptr. 2d 810*). Accordingly, these expenses are not recoverable as costs (*Code Civ. Proc. § 1033.5(c)(2)*).

[2] Comments

[a] Use of Form

This form should be combined with the general form *set out in § 60.40* and the memoranda *set out in §§ 60.44, 60.45,* in support of a motion to reduce costs by disallowing local travel expenses incurred in attending a deposition. In an appropriate case it may be combined with other forms relating to disallowance or reduction of various attorney-related charges [*see § 60.51[2][c]*].

See also *§ 60.40[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.40[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Local Travel Expenses Not Needed for Deposition Attendance Are Not Allowable Costs

In ***Ladas v. California State Auto. Assn.*** *(1993) 19 Cal. App. 4th 761, 23 Cal. Rptr. 2d 810* , the defendant prevailed without a trial and filed a memorandum of costs including claims for deposition-related attorney meals; trial exhibits, binders and tabs; faxes; local travel expenses; computer legal research; and investigative expenses. The plaintiffs filed a motion to tax costs, but the trial court denied the motion in its entirety.

The court of appeal reversed in part. It noted the only local travel expenses expressly allowed by ***Code of Civ. Proc. § 1033.5*** are those to attend depositions under subdivision (a)(3). The court declared that local travel by attorneys and staff is not reasonably necessary to the conduct of the litigation. In dicta, the court went on to observe counsel had failed to demonstrate how any of the charges claimed as local travel expenses were reasonably necessary to the conduct of the litigation under *Code Civ. Proc. § 1033.5(c)(2)* (*19 Cal. App. 4th 761, 775-776)* .

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6-60 California Points & Authorities § 60.53

§ 60.53 Supporting Motion to Tax Costs by Striking or Reducing Specific Items--To Strike Deposition-Related Attorney Meal Expenses

[1] FORM Supporting Motion to Tax Costs by Striking or Reducing Specific Items--To Strike Deposition-Related Attorney Meal Expenses

[*For caption, see § 60.40, with which this form should be combined.*]

THE DEPOSITION-RELATED MEALS OF ATTORNEYS SHOULD BE STRICKEN BECAUSE THEY ARE NEITHER EXPRESSLY ALLOWED AS COSTS NOR REASONABLY NECESSARY TO THE CONDUCT OF THE LITIGATION.

Deposition-Related Attorney Meals Are Not Allowable Costs. Although the costs of taking and transcribing depositions and deposition-related travel expenses are allowed as costs by *Code Civ. Proc. § 1033.5(a)(3)*, deposition-related attorney meals are not similarly allowed. In addition, the court does not have discretion to award these meals as costs because the meals are not reasonably necessary to the conduct of the litigation (*Code Civ. Proc. § 1033.5(c)(2)*). "[A]ttorneys have to eat, whether they are conducting litigation or not" (*Ladas v. California State Auto. Assn. (1993) 19 Cal. App. 4th 761, 774, 23 Cal. Rptr. 2d 810*).

[2] Comments

[a] Use of Form

This form should be combined with the general form *set out in § 60.40* and the memoranda *set out in §§ 60.44, 60.45* in support of a motion to reduce costs by disallowing deposition-related attorney meals. In an appropriate case it may be combined with other forms relating to disallowance or reduction of various attorney-related charges [*see § 60.51[2][c]*].

This form may also be adapted when any meals are claimed as costs, except meals for jurors which are allowed under *Code Civ. Proc. § 1033.5(a)(2)*.

See also *§ 60.40[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.40[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Deposition-Related Attorney Meals Are Not Allowable Costs

In ***Ladas v. California State Auto. Assn.*** *(1993) 19 Cal. App. 4th 761, 23 Cal. Rptr. 2d 810* , the defendant prevailed and filed a memorandum of costs including claims for deposition-related attorney meals; trial exhibits, binders and tabs; faxes; local travel expenses; computer legal research; and investigative expenses. The plaintiffs filed a motion to tax costs, but the trial court denied the motion in its entirety.

The court of appeal reversed in part. It noted the only meals specifically allowed by *Code Civ. Proc. § 1033.5* are juror meals under subdivision (a)(2). The cost of taking and transcribing depositions and travel expenses to attend depositions are allowed under *Code Civ. Proc. § 1033.5(a)(3)*, but not the cost of deposition-related attorney meals. Concluding attorneys must eat, whether or not litigating, the court of appeal held these meals are not allowed as costs because they are not reasonably necessary to the conduct of the litigation (*19 Cal. App. 4th 761, 774-775)* .

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6-60 California Points & Authorities § 60.54

§ 60.54 Supporting Motion to Tax Costs by Striking or Reducing Specific Items--To Strike Costs of Exhibits Not Used at Trial

[1] FORM Supporting Motion to Tax Costs by Striking or Reducing Specific Items--To Strike Costs of Exhibits Not Used at Trial

[*For caption, see § 60.40, with which this form should be combined.*]

THE COST OF EXHIBITS NOT USED AT TRIAL SHOULD BE STRICKEN BECAUSE THEY WERE NEITHER HELPFUL TO THE TRIER OF FACT NOR REASONABLY NECESSARY TO THE CONDUCT OF THE LITIGATION.

A. Exhibits Not Used at Trial Are Not Allowable Costs. The cost of trial exhibits is allowable only if the exhibits were reasonably helpful to the trier of fact (*Code Civ. Proc. § 1033.5(a)(12)*). It follows that costs for exhibits not used at trial are not allowable because they are not helpful to the trier of fact (*Ladas v. California State Auto. Assn. (1993) 19 Cal. App. 4th 761, 775, 23 Cal. Rptr. 2d 810*).

B. Exhibits Not Reasonably Necessary to Conduct of Litigation. Exhibits not reasonably necessary to the conduct of litigation are not allowable (*Code Civ. Proc. § 1033.5(c)(2), (4)*; *Applegate v. St. Francis Lutheran Church (1994) 23 Cal. App. 4th 361, 364, 28 Cal. Rptr. 2d 436*).

[2] Comments

[a] Use of Form

This form should be combined with the general form *set out in § 60.40* and the memoranda *set out in § 60.45* (amounts not reasonably necessary to conduct of litigation), in support of a motion to tax costs by striking or reducing the amount claimed for exhibits not used at trial [*see Code of Civ. Proc. § 1033.5(a)(12)*]. In an appropriate case it may be combined with other forms relating to disallowance or reduction of various attorney-related charges [*see § 60.51[2][c]*].

See also *§ 60.40[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.40[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Exhibits Not Used at Trial Are Not Allowable Costs

In ***Ladas v. California State Auto. Assn.*** *(1993) 19 Cal. App. 4th 761, 23 Cal. Rptr. 2d 810* , the defendant prevailed without a trial and filed a memorandum of costs including claims for deposition-related attorney meals; trial exhibits, binders and tabs; faxes; local travel expenses; computer legal research; and investigative expenses. The plaintiffs filed a motion to tax costs, but the trial court denied the motion in its entirety.

The court of appeal reversed in part. It held that the exhibits prepared for trial were not helpful to the trier of fact under *Code of Civ. Proc. § 1033.5(a)(12)* because the case was dismissed before trial. The court concluded the costs for the exhibits were not allowable. Therefore, the costs were also not reasonably necessary to the conduct of the litigation under *Code Civ. Proc. § 1033.5(c)(2)* (*19 Cal. App. 4th 761, 775)* .

[b] Exhibits Not Reasonably Necessary to Conduct of Litigation

In ***Applegate v. St. Francis Lutheran Church*** *(1994) 23 Cal. App. 4th 361, 28 Cal. Rptr. 2d 436* , the plaintiff dismissed the action without prejudice on the day of trial because the trial judge would not grant a continuance. The court granted costs to the defendants, including the cost of preparing trial exhibits. The court of appeal affirmed. The cost of trial exhibits was not allowable under *Code Civ. Proc. § 1033.5(a)(12)* because they were not helpful to the trier of fact; however, the court still had discretion to grant the costs under *Code Civ. Proc. § 1033.5(c)(2)* because they were reasonably necessary to the conduct of the litigation. The defendants had to prepare for trial because they did not know the plaintiff would dismiss on the date set for trial (*23 Cal. App. 4th 361, 364)* .

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6-60 California Points & Authorities § 60.55

§ 60.55 Supporting Motion to Tax Costs by Striking or Reducing Specific Items--To Strike Fax Charges

[1] FORM Supporting Motion to Tax Costs by Striking or Reducing Specific Items--To Strike Fax Charges

[*For caption, see § 60.40, with which this form should be combined.*]

THE FAX CHARGES SHOULD BE STRICKEN BECAUSE THEY ARE NOT EXPRESSLY AUTHORIZED BY LAW AND SHOULD BE TREATED IN THE SAME MANNER AS NONREIMBURSEABLE POSTAGE, TELEPHONE, AND PHOTOCOPYING EXPENSES.

Fax Charges Are Not Allowable Costs. *Code Civ. Proc. § 1033.5(b)(3)* expressly forbids reimbursement of postage, telephone, and photocopying expenses. While the statute makes no reference to fax charges, it is unlikely the Legislature intended to allow this cost while disallowing postage, telephone, and photocopying expenses because a party would be able to circumvent the express prohibitions by using the fax machine. Thus, fax charges are also not allowed (*Ladas v. California State Auto. Assn. (1993) 19 Cal. App. 4th 761, 775, 23 Cal. Rptr. 2d 810*).

[2] Comments

[a] Use of Form

This form should be combined with the general form *set out in § 60.40* and the memoranda *set out in § 60.44* (amounts not expressly authorized by law), in support of a motion to tax costs by disallowing fax charges [*see Code of Civ. Proc. § 1033.5(b)(3)*]. In an appropriate case it may be combined with other forms relating to disallowance or reduction of various attorney-related charges [*see § 60.51[2][c]*].

See also *§ 60.40[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.40[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Fax Charges Are Not Allowable Costs

In ***Ladas v. California State Auto. Assn.*** *(1993) 19 Cal. App. 4th 761, 23 Cal. Rptr. 2d 810* , the defendant prevailed and filed a memorandum of costs including claims for deposition-related attorney meals; trial exhibits, binders and tabs; faxes; local travel expenses; computer legal research; and investigative expenses. The plaintiffs filed a motion to tax costs, but the trial court denied the motion in its entirety.

The court of appeal reversed in part. It noted *Code Civ. Proc. § 1033.5(b)(3)* expressly forbids reimbursement of postage, telephone and photocopying expenses. Implying the statute was written when fax machines were not as pervasive, the court reasoned it was unlikely the Legislature intended to allow fax charges as costs while prohibiting postage, telephone and photocopying expenses. The court concluded fax charges are also prohibited under *Code Civ. Proc. § 1033.5(b)(3)* because the contrary conclusion would allow parties to circumvent the express prohibitions by using the fax machine instead of the mail, the telephone or a photocopier (*19 Cal. App. 4th 761, 775)* .

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6-60 California Points & Authorities § 60.56

§ 60.56 Supporting Motion to Tax Costs by Striking or Reducing Specific Items--To Strike Computer Legal Research Charges

[1] FORM Supporting Motion to Tax Costs by Striking or Reducing Specific Items--To Strike Computer Legal Research Charges

[*For caption, see § 60.40, with which this form should be combined.*]

THE COMPUTER LEGAL RESEARCH CHARGES SHOULD BE STRICKEN BECAUSE THEY ARE NONREIMBURSEABLE AS INVESTIGATIVE EXPENSES AND/OR ATTORNEY FEES NOT AUTHORIZED BY CONTRACT OR STATUTE.

Computer Legal Research Charges Are Not Allowable Costs. *Code Civ. Proc. § 1033.5(b)(2)* expressly forbids reimbursement of investigative expenses and *Code Civ. Proc. § 1021* prohibits recovery of attorney's fees except by agreement of the parties or statutory authority. Thus, whether characterized as investigative expenses or attorney's fees, computer legal research charges are not allowed as costs (*Ladas v. California State Auto. Assn. (1993) 19 Cal. App. 4th 761, 776, 23 Cal. Rptr. 2d 810*).

[2] Comments

[a] Use of Form

This form should be combined with the general form *set out in § 60.40* and the memoranda *set out in § 60.44* (amounts not expressly authorized by law), and § 60.51 (attorney's fees not expressly authorized by contract, statute, or law), in support of a motion to tax costs by disallowing computer or electronic legal research charges because they are nonreimburseable either as investigative costs or as attorney fees [*see Code of Civ. Proc. § 1033.5(b)(2)*]. In an appropriate case it may be combined with other forms relating to disallowance or reduction of various attorney-related charges [*see § 60.51[2][c]*].

This form is not suited for a case in which attorney's fees are recoverable by agreement of the parties or statutory authority. In this event, counsel should argue that computer legal research fees cannot be characterized as attorney's fees because the payment is for the cost of using the research service, rather than compensation for the attorney's time spent.

See also *§ 60.40[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.40[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Computer Legal Research Charges Are Not Allowable Costs

In ***Ladas v. California State Auto. Assn.*** *(1993) 19 Cal. App. 4th 761, 23 Cal. Rptr. 2d 810* , the defendant prevailed and filed a memorandum of costs including claims for deposition-related attorney meals; trial exhibits, binders and tabs; faxes; local travel expenses; computer legal research; and investigative expenses. The plaintiffs filed a motion to tax costs, but the trial court denied the motion in its entirety.

The court of appeal reversed in part. It noted *Code Civ. Proc. § 1033.5(b)(2)* expressly forbids reimbursement of investigative expenses and *Code Civ. Proc. § 1021* prohibits recovery of attorney's fees except by agreement of the parties or statutory authority. Implying computer legal research fees can be characterized as attorney fees, the court concluded fees for legal research, whether by computer or otherwise, may not be recovered (*19 Cal. App. 4th 761, 776)* .

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6-60 California Points & Authorities §§ 60.57-60.69

[Reserved]

§§ 60.57[Reserved]

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6-60 California Points & Authorities § 60.70

§ 60.70 Opposing Motion to Tax Costs by Striking or Reducing Specific Items--Motion Untimely

[1] FORM Opposing Motion to Tax Costs by Striking or Reducing Specific Items--Motion Untimely

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN OPPOSITION TO MOTION
vs.	)	TO TAX COSTS
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Date Action Filed: _____

_____

THE MOTION TO TAX COSTS SHOULD BE DENIED BECAUSE THE NOTICE OF MOTION WAS NOT SERVED AND FILED WITHIN THE TIME PRESCRIBED BY *RULE 3.1700(b)(1) OF THE CALIFORNIA RULES OF COURT*, AND THUS ALL OBJECTIONS TO THE COST BILL ARE WAIVED.

A. Time for Filing Motion to Tax. A notice of motion to strike or tax costs shall be filed 15 days, or within the extended period provided in *Code Civ. Proc. § 1013* if service was by mail, after service of the cost memorandum (*Cal. Rules of Ct., Rule 3.1700(b)(1)*).

B. Untimely Filing of Motion to Tax Costs as Waiver of Objections. A party who fails to file a motion to tax costs within the time specified in *Rule 3.1700(b)(1) of the California Rules of Court* is deemed to have assented to the correctness and lawfulness of the items claimed in the verified memorandum of costs and to have waived his or her

right to object (*see S.F. etc. Sch. Dist. v. Bd. of Nat. Missions (1954) 129 Cal. App. 2d 236, 242-243, 276 P.2d 829* (involving former Code Civ. Proc. § 1033, the predecessor to *Cal. Rules of Ct., Rule 3.1700*).

[*Insert other memoranda, as appropriate.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion to strike the memorandum of costs or to tax costs by striking or reducing specific items when the motion to tax was filed after the time specified in *Cal. Rules of Ct., Rule 3.1700(b)(1)*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case.

It is advisable for counsel to also submit cognizable evidence in supports of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], or otherwise by affidavits or declarations. Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For legal background, research and procedural guides relating to notices of motion to strike a cost bill or to tax costs by striking or reducing specific items, see California Forms of Pleading and Practice, Ch. 174, *Costs and Attorney's Fees* (Matthew Bender).

[d] Related Memoranda

For a memorandum supporting a motion to strike the memorandum of costs on the ground the memorandum was not timely filed, *see § 60.13*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

If a motion to tax costs is filed late and is opposed by this memorandum, the party who filed the late motion to strike or tax may file a motion for relief under *Code Civ. Proc. § 473(b)*, supported by the memorandum *set out in § 60.140* et seq. The motion for relief may be accompanied by memoranda supporting a motion to tax costs, *set out in § 60.40* et seq.

[3] Discussion of Authorities

[a] Time for Filing Motion to Tax

Cal. Rules of Ct., Rule 3.1700(b)(1), provides that a notice of motion to strike or tax costs is to be filed 15 days, or within the extended period provided in *Code Civ. Proc. § 1013* if service was by mail, after service of the cost memorandum.

[b] Untimely Filing of Motion to Tax Costs as Waiver of Objections

S.F. etc. Sch. Dist. v. Bd. of Nat. Missions *(1954) 129 Cal. App. 2d 236, 276 P.2d 829* , arose out of a condemnation proceeding. Defendant appealed from the judgment in his favor contending that the award was grossly inadequate and unsupported. Plaintiff appealed from the trial court's order denying plaintiff 's motion to strike the whole cost bill on the ground the motion had been filed late. Plaintiff filed this motion 26 days after the cost bill was served, and therefore after expiration of the time specified in former Code Civ. Proc. § 1033 (repealed in 1986; *now see Cal. Rules of Ct., Rule 3.1700(b)(1)*). In affirming the judgment and order, the court of appeal stated that former Code Civ. Proc. § 1033 has been held to be mandatory in regard to the time to file the cost bill and that, given that fact, it would seem that the requirement in the same section in regard to the time to tax would also be mandatory (*129 Cal. App. 2d 236, 242)* . The court relied on the discussion in *Mojave & B. R. Co. v. Cuddeback (1915) 28 Cal. App. 439, 441-442, 152 P. 943* , in which the court held that a party failing to move to tax costs within the then statutory time is deemed to have assented to the correctness of the items claimed and to have waived any and all objections to the claim for costs. The court also relied on *Griffith v. Welbanks & Co. (1915) 26 Cal. App. 477, 480, 147 P. 986* , in which the court stated that if a cost bill is filed and served within the time prescribed, the adverse party is conclusively deemed to have waived any and all objections to the cost bill if he or she fails to file a notice of motion to have the costs taxed within the specified time (*129 Cal. App. 2d 236, 242-243)* . The court in San Francisco then held that since no motion to tax was filed within the time limit prescribed by former Code Civ. Proc. § 1033, and since relief from the failure to timely file the motion was not sought under *Code Civ. Proc. § 473(b)* (mistake, inadvertence, surprise, or excusable neglect), the trial court properly refused to strike the cost bill (*129 Cal. App. 2d 236, 243)* .

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[Reserved]

§§ 60.71[Reserved]

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6-60 California Points & Authorities § 60.80

§ 60.80 Opposing Motion to Strike Costs Memorandum or Tax Costs--Costs Allowed to Prevailing Party as Matter of Right

[1] FORM Opposing Motion to Strike Costs Memorandum or Tax Costs--Costs Allowed to Prevailing Party as Matter of Right

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN OPPOSITION TO MOTION
vs.	)	TO _____ [STRIKE MEMOR-
_____ [*name*],	)	ANDUM OF *or* TAX] COSTS
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
		Date Action Filed: _____

_____

THE MOTION TO _____ [STRIKE THE MEMORANDUM OF COST *or* TAX COSTS] SHOULD BE DENIED BECAUSE THE _____ [*identify party claiming costs, e.g.,* PLAINTIFF] WAS THE PREVAILING PARTY IN THIS _____ [ACTION *or* PROCEEDING] AND IS ENTITLED TO COSTS AS A MATTER OF RIGHT.

A. Prevailing Party's Right to Costs. Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding (*Code Civ. Proc. § 1032(b)*; *Murillo v. Fleetwood Enterprises, Inc. (1998) 17 Cal. 4th 985, 991, 73 Cal. Rptr. 2d 682, 953 P.2d 858*).

B. "Prevailing Party" Defined. The term "prevailing party," as used in *Section 1032 of the Code of Civil Procedure*, includes _____[the party with a net monetary recovery *or* a defendant in whose favor a dismissal is entered *or* a defendant when neither plaintiff nor defendant obtains any relief *or* a defendant as against those plaintiffs who do not recover any relief against that defendant] (*Code Civ. Proc. § 1032(a)(4)*).

[*Optional*] **C. "Complaint," "Defendant," and "Plaintiff" Defined.** As used in *Section 1032 of the Code of Civil Procedure*, "complaint" includes a cross complaint, "defendant" includes a cross defendant or a person against whom a complaint is filed, and "plaintiff" includes a cross complainant or a party who files a complaint in intervention (*Code Civ. Proc. § 1032(a)(1)-(3)*).

[*Optional*] **D. Costs Not Available Only if Expressly Disallowed by Statute.** Since the rule that a prevailing party is entitled to recover costs applies "[e]xcept as otherwise expressly provided by statute" (Code Civ. Proc. s 1032(b)), there are no implied exceptions to the rule. Costs to the prevailing party are disallowed only if a statute expressly disallows them (*Murillo v. Fleetwood Enterprises, Inc. (1998) 17 Cal. 4th 985, 991, 73 Cal. Rptr. 2d 682, 953 P.2d 858*).

[*Insert other memoranda, as appropriate; see, e.g., § 60.81 et seq.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion to strike the memorandum of costs [*see § 60.10* et seq.] or to tax costs by striking or reducing specific items [*see § 60.40* et seq.], on the general ground that party seeking costs is the prevailing party in the action or proceeding, and is therefore entitled generally to costs as a matter of right.

This form should be combined with additional memoranda, as applicable, *set out in § 60.81* et seq.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

See also *§ 60.70[2][b]* regarding evidentiary support for facts stated.

[c] Related Pleading and Practice Chapters

For detailed discussion of when a party is deemed to be a "prevailing party" in the action or proceedings, and discussion and forms relating to the procedure for the court to determine who is prevailing when necessary, see California Forms of Pleading and Practice, Ch. 174, *Costs and Attorney's Fees* .

[d] Related Memoranda

For additional memoranda to combine with this form, see *§ 60.81* et seq.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

Memoranda that may be used in opposition to the general memoranda in this form, are *set out in § 60.10* et seq. (supporting motion to strike memorandum) and § 60.40 et seq. (supporting motion to tax costs).

[3] Discussion of Authorities

[a] Prevailing Party's Right to Costs

Code Civ. Proc. § 1032(b) provides that except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding.

For discussion of ***Murillo v. Fleetwood Enterprises, Inc.*** *(1998) 17 Cal. 4th 985, 73 Cal. Rptr. 2d 682, 953 P.2d 858* , see *§ 60.80[3][d]*.

[b] "Prevailing Party" Defined

Code Civ. Proc. § 1032(a)(4) provides that the term "prevailing party," as used in *Section 1032 of the Code of Civil Procedure*, includes the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant when neither plaintiff nor defendant obtains any relief, and defendant as against those plaintiffs who do not recover any relief against that defendant.

In addition to this definition of the prevailing party, *Code Civ. Proc. § 1032(a)(4)* further provides that when any party recovers other than monetary relief and in situations other than as specified, the "prevailing party" shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not and, if allowed, may apportion costs between the parties on the same or adverse sides pursuant to rules adopted by the Judicial Council under *Code Civ. Proc. § 1034*.

Nothing in *Code Civ. Proc. § 1032* prohibits parties from stipulating to alternative procedures for awarding costs in the litigation pursuant to rules adopted by the Judicial Council under *Code Civ. Proc. § 1034* [*Code Civ. Proc. § 1032(c)*].

[c] "Complaint," "Defendant," and "Plaintiff" Defined

Code Civ. Proc. § 1032(a)(1)-(3) provides that as used in *Code Civ. Proc. § 1032*, "complaint" includes a cross complaint, "defendant" includes a cross defendant or a person against whom a complaint is filed, and "plaintiff" includes a cross complainant or a party who files a complaint in intervention.

[d] Costs Not Available Only if Expressly Disallowed by Statute

In ***Murillo v. Fleetwood Enterprises, Inc.*** *(1998) 17 Cal. 4th 985, 73 Cal. Rptr. 2d 682, 953 P.2d 858* , the defendant sellers prevailed in an action under the Song-Beverly Consumer Warranty Act and sought to recover costs and expert witness fees under *Code Civ. Proc. §§ 1032(b)* and *998*. Even though Code Civ. Proc. § 1794(d), which is part of the Song-Beverly Consumer Warranty Act provides for recovery of costs by buyers, the trial court granted the defendant

sellers their costs, and the court of appeal affirmed.

The California Supreme Court affirmed. It held that because *Code Civ. Proc. § 1032(b)* provides for recovery of costs by the prevailing party "[e]xcept as otherwise expressly provided by statute," there are no implied statutory exceptions to the rule. Costs to the prevailing party are disallowed only if a statute expressly disallows them. Code Civ. Proc. § 1794(d), at most, only implies the defendant sellers should not recover costs. Accordingly, the general statute providing for costs, *Code Civ. Proc. § 1032(b)*, allows recovery (*17 Cal. 4th 985, 989-999)* .

[4] Additional Authorities

[a] "Prevailing Party" Defined

In *Agnew v. State Bd. of Equalization (2005) 134 Cal. App. 4th 899, 36 Cal. Rptr. 3d 464* , a taxpayer sued to recover sales tax and interest paid to the State Board of Equalization on the sale of shareholder interests in a racing horse. After the taxpayer made an offer to settle under *Code. Civ. Proc. § 998*, which the Board did accept, the taxpayer and the Board settled before trial at a sum higher than that offered by the taxpayer. The Court of Appeal held that the taxpayer was entitled to recover costs under *Code Civ. Proc. § 1032(b)*, even though he could not recover costs or attorney's fees under *Rev. & Tax Code § 7156* because he did not come within definition of "prevailing party" under that section. The taxpayer was the party with a net monetary recovery and thus a "prevailing party" for an award of costs and expert witness fees under *Code Civil Proc. §§ 1032, 1028* and *998*, and *Rev. & Tax. Code § 7156* contains no express exception to the general rule permitting a taxpayer as a prevailing party to recover costs under *Code Civ. Proc. § 1032(b)*, as possibly augmented by *Code Civ. Proc. § 998*. However, the taxpayer was not entitled to attorney's fees as costs as authorized by *Rev. & Tax. Code § 7156*, because the taxpayer failed to make the required showing under § 7156 that the Board's litigation position was not substantially justified as a condition precedent to qualify for an award of fees as costs (*134 Cal. App. 4th 899, 911-916)* .

In *Arntz Contracting Co. v. St. Paul Fire and Marine Ins. Co. (1996) 47 Cal. App. 4th 464, 54 Cal. Rptr. 2d 888* , a party prevailed on a cause of action based on a contract which included a unilateral provision allowing the other party to recover costs in excess of statutory costs should it prevail. The nonprevailing party argued the prevailing party could not recover costs in excess of statutory costs as a reciprocal right under *Civ. Code § 1717*. The court of appeal, however, held that *Civ. Code § 1717* may give a party a reciprocal right to recover costs in excess of statutory costs, even though the contract does not provide for an award of costs to that party (*47 Cal. App. 4th 464, 492)* .

[b] Costs Not Available Only If Expressly Disallowed by Statute

In *El Dorado Meat Co. v. Yosemite Meat & Locker Service, Inc. (2007) 150 Cal. App. 4th 612, 58 Cal. Rptr. 3d 590* , a complex business tort action, plaintiff alleged that defendant engaged in actions that made plaintiff uncompetitive and drove it out of business. Some claims were dismissed before trial. Others were tried to a jury, which found for defendant. Still others were tried to the court, which also found for defendant. The court entered judgment for defendant on all claims. Defendant filed a memorandum of costs seeking, *inter alia*, to recover for models, blowups, and photocopies of exhibits under *Code Civ. Proc. § 1033.5(a)(12)* for a trial exhibit that summarized voluminous business records produced in discovery by both parties and was projected on a screen during trial. Defendant broke the cost down into three categories: The cost of personnel who compiled the data from the business records upon which the charts and graphs were based; charges for photocopying the source documents that supported the exhibit; and the cost of equipment to project documents on a screen at trial. Defendant argued in the alternative that the portion paid for personnel who processed the data was also awardable under *Code Civ. Proc. § 1033.5(c)(4)* in the court's discretion. The trial court's award of costs to defendant reflected the court's deduction for trial transcripts claimed to be but never actually ordered prepared by the court (*150 Cal. App. 4th 612, 614-616)* .

The appellate court held that the trial court properly allowed defendant to recover costs for hourly billings for personnel

employed by defendant's consultant and counsel to process the raw data that went into a trial exhibit that summarized voluminous business records produced in discovery by both parties, even assuming the costs were not recoverable as a matter of right under *Code Civ. Proc. § 1033.5(a)(12)*. Those expenses were properly awarded as discretionary cost items under *Code Civ. Proc. § 1033.5(c)(4)*. Given the nature of the case, defendant could not mount its defense without presenting years' worth of its own and plaintiff's business data, and given the volume of data, defendant could not present it without summaries. Costs awarded for the photocopying of exhibits were allowable as of right under *Code Civ. Proc. § 1033.5(a)(12), (b)(3),* because the copying was of 160,000 pages of business documents produced by the parties in discovery and admitted into evidence. Costs for equipment to project documents on a screen were allowable under *Code Civ. Proc. § 1033.5(a)(12)* as an award for blowups of exhibits helpful to aid the trier of fact, because the trial court had discretion both to interpret "blowups" as including blowing up documents by projecting them on a screen and to find the projection equipment reasonably helpful (*150 Cal. App. 4th 612, 616-620)* .

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6-60 California Points & Authorities § 60.81

§ 60.81 Opposing Motion to Strike Costs Memorandum or Tax Costs--Express Award of Costs Not Required

[1] FORM Opposing Motion to Strike Costs Memorandum or Tax Costs--Express Award of Costs Not Required

[*For caption, see § 60.80.*]

THE MOTION TO _____ [STRIKE THE MEMORANDUM OF *or* TAX] COSTS SHOULD BE DENIED BECAUSE AN EXPRESS AWARD OF COSTS IS NOT REQUIRED WHEN STATUTE SO PROVIDES.

Express Award of Costs Not Required. When there is express statutory authority for an allowance of costs as a matter of course, the costs are allowed as a matter of right and an express award of costs in the judgment or order is not necessary; the costs may be claimed by filing a memorandum of costs (*Miles California Co. v. Hawkins (1959) 175 Cal. App. 2d 162, 163-165, 345 P.2d 492* (involving former Code Civ. Proc. § 1032, which was repealed in 1986 and replaced by a new *Code Civ. Proc. § 1032*).

[2] Comments

[a] Use of Form

This form is for use is combination with the general memorandum *set out in § 60.80*, when a ground for an opposition to a motion to strike the memorandum of costs or to tax costs by striking or reducing specific items is that an express award is not required in order to recover costs as the prevailing party.

See also *§ 60.70[2][c]* for references to related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 60.70[2][b]* regarding

evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Express Award of Costs Not Required

In ***Miles California Co. v. Hawkins*** *(1959) 175 Cal. App. 2d 162, 345 P.2d 492* , defendants were adjudged in contempt for violation of a permanent injunction. The formal order did not contain a provision for costs, but plaintiff filed a timely memorandum of costs. Defendants moved to strike the memorandum, contending that the contempt order made no provision for costs and that the trial court therefore had no jurisdiction to award costs.

The trial court denied the motion and ordered the costs entered in the margin of the contempt order. The court of appeal affirmed the trial court's order awarding costs. The court stated that contempt is a special proceeding, that plaintiff as the successful party was entitled to costs as a matter of course under former Code Civ. Proc. § 1032(a) (repealed in 1986; *now see* new *Code Civ. Proc. § 1032(a)(4), (b)*), and that it was not necessary for the court to award costs in its order adjudging defendants guilty of contempt (*175 Cal. App. 2d 162, 163-164)* . The court distinguished *Gould v. Moss (1910) 158 Cal. 548, 549, 111 P. 925* , and *Kaufman v. Pacific Indem. Co. (1936) 5 Cal. 2d 761, 769, 56 P.2d 504* , as cases which dealt with the effect of the omission of a provision for costs in judgments that do not carry costs as a matter of course but are within the court's discretion (*175 Cal. App. 2d 162, 164-165)* .

Under the definition of "prevailing party" set forth in *Code Civ. Proc. § 1032(a)(4)* (*see § 60.80*), it would appear that the plaintiff in *Miles*, under current law (*Code Civ. Proc. § 1032(b)*), would no longer be entitled to costs as a matter of right. The court could, of course, under the provisions of *Code Civ. Proc. § 1032(a)(4)*, determine that the plaintiff is the prevailing party, and in that event the court could in its discretion allow or deny costs or apportion costs between the parties.

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6-60 California Points & Authorities § 60.82

§ 60.82 Opposing Motion to Strike Costs Memorandum or Tax Costs--Dismissal of Complaint in Intervention

[1] FORM Opposing Motion to Strike Costs Memorandum or Tax Costs--Dismissal of Complaint in Intervention

[*For caption, see § 60.80.*]

THE MOTION TO _____ [STRIKE THE MEMORANDUM OF *or* TAX] COSTS SHOULD BE DENIED BECAUSE A DEFENDANT IS ENTITLED TO COSTS ON DISMISSAL OF A COMPLAINT IN INTERVENTION.

Dismissal of Complaint in Intervention. On dismissal of a complaint in intervention, the defendant is entitled to those costs attributable to the period of time when the plaintiff in intervention was a party to the principal action (*Catello v. I.T.T. General Controls (1984) 152 Cal. App. 3d 1009, 1012, 1015, 200 Cal. Rptr. 4*).

[2] Comments

[a] Use of Form

This form may be combined with the form *set out in § 60.80*, for an opposition to a motion to strike the memorandum of costs or to tax costs by striking or reducing specific items, on the ground that a defendant is entitled to costs when a complaint in intervention is dismissed.

See also *§ 60.70[2][c]* for references to related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 60.70[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Dismissal of Complaint in Intervention

In ***Catello v. I.T.T. General Controls*** *(1984) 152 Cal. App. 3d 1009, 200 Cal. Rptr. 4* , a worker's compensation insurance carrier intervened in an action by an employee against defendant for benefits paid to the employee. The insurance carrier voluntarily dismissed its complaint against defendant on the first day of trial. A verdict was ultimately given in favor of defendant. Defendant submitted its cost bill against the intervener regarding those costs incurred while the intervener was in the case. The intervener moved to strike the entire cost bill. The trial court granted the motion and defendant appealed.

The court of appeal reversed. The court held that dismissal of a complaint in intervention was a dismissal of "the action" within the meaning of former Code Civ. Proc. § 1032 (repealed in 1986; *now see Code Civ. Proc. § 1032(a)(4)*). Therefore, defendant was entitled to costs as a matter of course when plaintiff in intervention voluntarily dismissed its complaint (*152 Cal. App. 3d 1009, 1012-1013)* . The court held that since the intervener becomes a party to the action, with all the same procedural rights and remedies of the original parties, for purposes of allocating costs pursuant to former Code Civ. Proc. § 1032, parties in intervention are either entitled to an award of costs or may be held liable for costs in the same manner as the original parties (*152 Cal. App. 3d 1009, 1013-1014, 1015)* . However, the intervener's liability for costs would be fixed by determining the intervener's alignment with the original parties and would be limited to those costs incurred while the intervener was a party to the action (*152 Cal. App. 3d 1009, 1012, 1015)* .

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6-60 California Points & Authorities § 60.83

§ 60.83 Opposing Motion to Strike Costs Memorandum or Tax Costs--Code Civ. Proc. § 998 Does Not Preclude Plaintiff From Recovering Preoffer Costs

[1] FORM Opposing Motion to Strike Costs Memorandum or Tax Costs--Code Civ. Proc. § 998 Does Not Preclude Plaintiff From Recovering Preoffer Costs

[*For caption, see § 60.80.*]

THE MOTION TO _____ [STRIKE THE MEMORANDUM OF *or* TAX] COSTS SHOULD BE DENIED BECAUSE PLAINTIFF IS ENTITLED TO THOSE COSTS INCURRED BEFORE DEFENDANT MADE THE SETTLEMENT OFFER THAT PROVED TO BE MORE FAVORABLE THAN THE JUDGMENT AWARDED TO PLAINTIFF.

Plaintiff Who Reject More Favorable Settlement Offer Remains Entitled to Preoffer Costs. Under *Code of Civil Procedure Section 998*, a plaintiff who rejects a settlement offer that is greater than the recovery that he or she ultimately obtains may nonetheless recover preoffer costs to which he or she would otherwise be entitled[, including preoffer attorney's fees when attorney's fees are an authorized category of recoverable costs under *Code of Civil Procedure Sections 1032* and *1033.5*] (*Scott Co. of California v. Blount, Inc. (1999) 20 Cal. 4th 1103, 1112, 86 Cal. Rptr. 2d 614, 979 P.2d 974*).

[2] Comments

[a] Use of Form

This form is for use in combination with the form *set out in § 60.80*, to oppose a motion that seeks to strike or tax plaintiff's costs incurred before, rather than after, a settlement offer made under *Code Civ. Proc. § 998* that proved to be more favorable the judgment ultimately awarded. The ground for opposition is that the plaintiff is nevertheless entitled to recover preoffer costs and fees.

See also *§ 60.70[2][c]* for references to related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 60.70[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Memoranda

This form may be used in an appropriate case to oppose a motion to strike a cost memorandum or to tax costs that is supported by the memoranda *set out in § 60.16*.

[3] Discussion of Authorities

[a] Plaintiff Who Reject More Favorable Settlement Offer Remains Entitled to Preoffer Costs

In ***Scott Co. of California v. Blount, Inc.*** *(1999) 20 Cal. 4th 1103, 86 Cal. Rptr. 2d 614, 979 P.2d 974* , the defendant, the general contractor of a construction project, subcontracted with plaintiff to perform mechanical work on the project. The subcontract included a provision for attorney's fees. Plaintiff incurred large costs overruns in performing its work on the project, and brought an action against defendant alleging that these overruns were the result of defendant's breach of the subcontract due to negligent management. Plaintiff prayed for damages of over $2 million. Before trial, plaintiff rejected a settlement offer made by defendant under *Code Civ. Proc. § 998* in the amount of $900,000. After a court trial, the court found that defendant breached the subcontract as alleged by plaintiff, but, since the court disallowed many of the items of plaintiff's alleged damages, plaintiff obtained a judgment of only $442,054. The trial court also awarded plaintiff its preoffer costs, including attorney's fees, amounting to $226,812, and awarded defendant its postoffer costs, including attorney's fees, totaling $881,635 (*20 Cal. 4th 1103, 1107-1108)* .

The Supreme Court granted review to decide (1) whether plaintiff was entitled to its preoffer attorney's fees and other costs and (2) whether defendant was entitled to its postoffer attorney's fees (*20 Cal. 4th 1103, 1108)* . With respect to the first issue, *Code Civ. Proc. § 998*, at the time relevant to this decision, provided that a plaintiff who rejects a settlement offer but fails to obtain a more favorable judgment "shall not recover his or her costs and shall pay the defendant's costs from the time of the offer." Defendant interpreted the final phrase of this clause, "from the time of the offer," to modify only "the defendant's costs" to be paid by plaintiff. Thus, defendant argued, plaintiff "shall not recover" any costs whatsoever when this clause applies.

The Court rejected this contention, noting that it was also grammatically plausible to construe the clause so that "from the time of the offer" describes not only the costs that recoverable by defendant but also those no longer available to plaintiff. This was the interpretation adopted over a century ago, in *Douthitt v. Finch (1890) 84 Cal. 214, 215, 24 P. 929* , when the Court interpreted the predecessor statute to *Code Civ. Proc. § 998* to permit a plaintiff to recover *preoffer* costs after failing to obtain a judgment in excess of the defendant's settlement offer. The Legislature implicitly accepted this interpretation by retaining substantially the same language in the later enactment of, and later amendments to, *Code Civ. Proc. § 998*. Moreover, the Legislature amended the language in 1997, so that *Code Civ. Proc. § 998(c)(1)* currently provides that a plaintiff may not recover "postoffer costs" after rejecting a settlement offer more favorable than the ultimate judgment. The Court noted that legislative history showed that this amendment was intended to clarify and confirm, not change, existing law. The Court concluded that a plaintiff who rejects a settlement offer that is greater than the recovery which the he or she ultimately obtains may nonetheless recover preoffer costs to which he or she would otherwise be entitled, including preoffer attorney's fees when attorney's fees are an authorized category of recoverable costs under *Code of Civil Procedure Sections 1032* and *1033.5* (*20 Cal. 4th 1103, 1110-1112)* .

For discussion of the second issue decided by the Court, that is, defendant's entitlement to recover postoffer attorney's

fees as costs, see *§ 60.85[3][a]*.

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6-60 California Points & Authorities § 60.84

§ 60.84 Opposing Motion to Strike Costs Memorandum or Tax Costs--Code Civ. Proc. § 998 Does Not Preclude Plaintiff's Costs When Judgment Plus Plaintiff's Preoffer Costs and Fees Exceed Defendant's Settlement Offer

[1] FORM Opposing Motion to Strike Costs Memorandum or Tax Costs--Code Civ. Proc. § 998 Does Not Preclude Plaintiff's Costs When Judgment Plus Plaintiff's Preoffer Costs and Fees Exceed Defendant's Settlement Offer

[*For caption, see § 60.80.*]

THE MOTION TO _____ [STRIKE THE MEMORANDUM OF *or* TAX] COSTS SHOULD BE DENIED BECAUSE DEFENDANT'S SETTLEMENT OFFER UNDER CODE OF CIVIL PROCEDURE SECTION 998 DOES NOT EXCEED THE SUM OF THE JUDGMENT OBTAINED BY PLAINTIFF AND PLAINTIFF'S PREOFFER COSTS AND ATTORNEY'S FEES.

Plaintiff's Preoffer Costs and Attorney's Fees Are Added to Judgment When Determining Whether Judgment Is More Favorable Than Defendant's Settlement Offer. When determining whether plaintiff obtained a judgment "more favorable" than the defendant's settlement offer, for purposes of applying the cost-shifting provision of *Code of Civil Procedure Section 998*, the court is to compare the defendant's settlement offer with the judgment plus plaintiff's preoffer costs, including preoffer attorney's fees (*Heritage Engineering Const., Inc. v. City of Industry (1998) 65 Cal. App. 4th 1435, 1440-1442, 77 Cal. Rptr. 2d 459*).

[2] Comments

[a] Use of Form

This form is for use in combination with the form *set out in § 60.80* to oppose a motion that seeks to strike plaintiff's costs under *Code Civ. Proc. § 998* because plaintiff rejected a settlement offer more favorable than the judgment. The ground for opposition is that the settlement offer is not more favorable when compared to the judgment plus plaintiff's preoffer costs and attorney's fees.

See also *§ 60.70[2][c]* for references to related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 60.70[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Memoranda

This memoranda that may be used in an appropriate case to oppose a motion to strike a cost memorandum or to tax costs that is supported by the memoranda *set out in § 60.16*.

[3] Discussion of Authorities

[a] Plaintiff's Preoffer Costs and Attorney's Fees Are Added to Judgment When Determining Whether Judgment Is More Favorable Than Defendant's Settlement Offer

Heritage Engineering Const., Inc. v. City of Industry *(1998) 65 Cal. App. 4th 1435, 77 Cal. Rptr. 2d 459* is discussed in *§ 60.16[3][b]*.

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6-60 California Points & Authorities § 60.84A

§ 60.84A Opposing Motion to Strike Costs Memorandum or Tax Costs--Plaintiff Recovered More Than Amount Offered by Defendant for Purposes of Code Civ. Proc. § 998 by Taking Into Account Other Settlements Entered as of Time § 998 Offer Was Outstanding, But Not Considering Settlements Not Yet Reached

[1] FORM Opposing Motion to Strike Costs Memorandum or Tax Costs--Plaintiff Recovered More Than Amount Offered by Defendant for Purposes of Code Civ. Proc. § 998 by Taking Into Account Other Settlements Entered as of Time § 998 Offer Was Outstanding, But Not Considering Settlements Not Yet Reached

[*For caption, see § 60.80.*]

THE MOTION TO _____ [STRIKE THE MEMORANDUM OF *or* TAX] COSTS SHOULD BE DENIED BECAUSE DEFENDANT'S SETTLEMENT OFFER UNDER CODE OF CIVIL PROCEDURE SECTION 998 DOES NOT EXCEED THE SUM OF THE RECOVERY OBTAINED BY PLAINTIFF TAKING INTO ACCOUNT OTHER SETTLEMENTS ENTERED AS OF THE TIME DEFENDANT'S § 998 OFFER WAS OUTSTANDING, BUT NOT CONSIDERING SETTLEMENTS NOT YET REACHED.

Plaintiff's Recovery for the Purposes of Determining Whether the Cost-Shifting Provisions of *Code Civ. Proc. § 998* Apply Takes Into Account Other Settlements Entered as of the Time of Defendant's Offer, But Not Other Settlements Not Yet Reached. Plaintiff is the prevailing party for the purposes of *Code Civ. Proc. § 998*, even though plaintiff's judgment was reduced to zero by the operation of *Code Civ. Proc. § 877*, offsetting plaintiff's recovery by the amount of a settlement reached with a codefendant, because plaintiff's recovery for the purposes of *Code Civ. Proc. § 998* does not take into account settlements not reached as of the time of defendant's *Code Civ. Proc. § 998* offer (*Guerrero v. Rodan Termite Control, Inc. (2008) 163 Cal. App. 4th 1435, 1439-1445)* .

[2] Comments

[a] Use of Form

This form is for use in combination with the form *set out in § 60.80* to oppose a motion that seeks to strike plaintiff's costs under *Code Civ. Proc. § 998* because plaintiff's recovery would have been less than defendant's offer when taking into consideration not only settlements entered as of the time of defendant's offer, but also other settlements pending to offset the recovery obtained by plaintiff against defendant. The ground for opposition is that plaintiff's recovery is determined only by taking into consideration the settlements that were entered at the time of defendant's offer, not those not yet reached.

See also *§ 60.70[2][c]* for references to related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 60.70[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Memoranda

This memoranda that may be used in an appropriate case to oppose a motion to strike a cost memorandum or to tax costs that is supported by the memoranda *set out in § 60.16*.

[3] Discussion of Authorities

[a] Plaintiff's Recovery for the Purposes of Determining Whether the Cost-Shifting Provisions of Code Civ. Proc. § 998 Apply Takes Into Account Other Settlements Entered as of the Time of Defendant's Offer, But Not Other Settlements Not Yet Reached

In ***Guerrero v. Rodan Termite Control, Inc.*** *(2008) 163 Cal. App. 4th 1435* , plaintiff purchased a home from a private party, and both parties were represented in the transaction by the same real estate agent. Prior to the close of escrow, the home was inspected by defendants and its agent. Shortly after the close of escrow, plaintiff discovered dry rot in the bathroom and kitchen and evidence of unpermitted and undisclosed repairs to the home. Plaintiff filed suit against the seller, the realtor, and defendants. Defendants served on plaintiff a *Code Civ. Proc. § 998* offer to compromise for $5,000, each side to bear its own costs. Plaintiff did not accept the offer. Approximately three years later, shortly before the start of trial, plaintiff entered a judicially approved good faith settlement with the realtor for $34,000. The seller was dismissed at the start of trial, and the case proceeded to trial against defendants, and the jury returned a special verdict for plaintiff in the amount of $15,600. The court subsequently granted defendant's motion pursuant to *Code Civ. Proc. § 877* to offset the settlement proceeds against the verdict and reduce the judgment to zero, and judgment was entered in favor of plaintiff for zero dollars. After the entry of judgment, the parties both filed cost memoranda. Defendants moved to tax the costs plaintiff incurred subsequent to the filing of the § 998 offer to compromise, arguing that plaintiff's zero judgment was not more favorable than the $5,000 settlement offer. At the same time, plaintiff filed a motion to strike defendants' memorandum of costs, contending he was nonetheless the prevailing party. The trial court granted plaintiff's motion to strike defendants' memorandum of costs and denied defendants' motion, on the ground that the court was on the verge of finding that the § 998 offer was not even a good faith offer, that defendants got the benefit of a pretrial settlement with another defendant, and that the purpose of § 998 is to encourage reasonable prejudgment or pretrial settlements. Defendants filed a timely notice of appeal (*163 Cal. App. 4th 1435, 1438-1439)* .

The Court of Appeal affirmed. The court held that, for the purpose of allocating costs under *Code Civ. Proc. § 998*, a plaintiff whose judgment is reduced to zero by operation of *Code Civ. Proc. § 877* could be deemed to have obtained a more favorable judgment or award than a rejected § 998 offer to pay $5,000. In determining whether plaintiff obtained a more favorable judgment or award than a § 998 offer, the objective of encouraging settlement requires consideration of the status of the litigation when the § 998 offer was submitted. When defendants submitted their $5,000 offer early in the litigation, plaintiff had recovered nothing by way of settlement or otherwise and had a valid claim against

defendants that the jury later determined to be worth substantially more than the $5,000 that defendants offered. Plaintiff thus did not reject an offer that the outcome of trial indicated should have been accepted. Even if defendants' offer was not so low as to have been in bad faith, there was still no reason why defendants should have been rewarded for having submitted the offer, nor was there any reason to penalize plaintiff for having rejected it. Plaintiff incurred costs subsequent to rejecting the offer in pursuit of a claim with a value of at least $15,600. Regardless of the offset based on subsequent developments in the litigation, plaintiff was justified in rejecting the offer when he rejected it. The situation would have been different if defendants had submitted a § 998 offer for $5,000 after plaintiff had accepted $34,000 in settlement from the realtor. In that event, plaintiff would have been required to evaluate the likelihood of recovering at least $39,000 from defendants. Had he rejected the offer at that time, it would have been entirely consistent with the objectives of § 998 to shift the burden of subsequently incurred costs to him. However, because there was no settlement when defendants made their offer, plaintiff had occasion to evaluate only the prospects of recovering more than $5,000. Since plaintiff did in fact recover more than that amount and obtained a verdict against defendants for more than that amount, there was no reason to give defendants a windfall benefit because other defendants later decided to settle for an amount that offset plaintiff's verdict against them. Although in the present case no issue arose as to whether the date on which the § 998 offer was submitted or the date on which it was rejected or deemed withdrawn by expiration of the period for acceptance should control, the court opined that it should be the latter. Should the plaintiff settle with other defendants after receiving a § 998 offer that is still outstanding, there is no reason why the plaintiff should not be required to take that settlement into account in deciding whether to accept the § 998 offer (*163 Cal. App. 4th 1435, 1439-1445)* .

California Points & Authorities

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Volume 6 Chapters 60-69 COSTS---to---DECLARATORY RELIEF
CHAPTER 60 COSTS
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2. Motion to Tax Costs by Striking or Reducing Specific Items

6-60 California Points & Authorities § 60.85

§ 60.85 Opposing Motion to Strike Costs Memorandum or Tax Costs--Defendant Is Entitled to Postoffer Costs Under Code Civ. Proc. § 998, Including Postoffer Attorney's Fees

[1] FORM Opposing Motion to Strike Costs Memorandum or Tax Costs--Defendant Is Entitled to Postoffer Costs Under Code Civ. Proc. § 998, Including Postoffer Attorney's Fees

[*For caption, see § 60.80.*]

THE MOTION TO _____ [STRIKE THE MEMORANDUM OF *or* TAX] COSTS SHOULD BE DENIED BECAUSE DEFENDANT, PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 998(c), IS DEEMED A PREVAILING PARTY FOR PURPOSES OF RECOVERING COSTS INCURRED AFTER MAKING A SETTLEMENT OFFER. DEFENDANT IS ENTITLED UNDER THAT SECTION TO RECOVER THOSE COSTS[, WHICH INCLUDE ATTORNEY'S FEES INCURRED AFTER MAKING THE OFFER].

A. When Defendant Is Treated as Prevailing Party for Purposes of Postoffer Costs. While the general rule under *Code of Civil Procedure Section 1032* provides that only a prevailing party recovers its costs, the provisions of *Code of Civil Procedure Section 998* modify this general rule (*see Code Civ. Proc. § 998(a)*). Thus, under *Code of Civil Procedure Section 998(c)*, a defendant is treated as the prevailing party for the purposes of recovering postoffer costs, when that defendant's pretrial offer proves to be greater than the judgment received by the plaintiff (*Scott Co. v. Blount, Inc. (1999) 20 Cal. 4th 1103, 1112, 86 Cal. Rptr. 2d 614, 979 P.2d 974*).

B. Judgment More Favorable Than Offer Is Prima Facie Evidence of Reasonableness. Where a defendant obtains a judgment more favorable than its offer, the judgment constitutes prima facie evidence showing the offer was reasonable and the offeror is eligible for costs under *Code of Civil Procedure Section 998*. The burden is on the plaintiff to prove otherwise (*Barba v. Perez (2008) 166 Cal. App. 4th 444, 450-451, 82 Cal. Rptr. 3d 715* ; *Carver v. Chevron U.S.A., Inc. (2002) 97 Cal. App. 4th 132, 152, 118 Cal. Rptr. 2d 569*).

[*Optional*] **C. Defendant's Postoffer Costs Include Postoffer Attorney's Fees.** When a defendant is entitled to recover postoffer costs under *Code of Civil Procedure Section 998(c)*, these costs include postoffer attorney's fees incurred by the defendant to the extent that the defendant, treated as the prevailing party for this purpose, would otherwise be entitled to recover such fees as an element of costs under *Code of Civil Procedure Sections 1032* and *1033.5* (*Scott Co. v. Blount, Inc. (1999) 20 Cal. 4th 1103, 1112-1113, 86 Cal. Rptr. 2d 614, 979 P.2d 974*).

[2] Comments

[a] Use of Form

This form is for use in combination with the form *set out in § 60.80*, to oppose a motion to strike or tax a defendant's memorandum of costs seeking postoffer costs, when the defendant has made a pretrial settlement offer under *Code Civ. Proc. § 998* that subsequently proved to be greater than the amount recovered by plaintiff in the judgment. Optional Paragraph B is for use when a defendant is entitled to postoffer attorney's fees as an element of postoffer costs. The ground for opposition is that, while the plaintiff received a net recovery under the judgment and is therefore technically the prevailing party under *Code Civ. Proc. § 1032*, defendant is nevertheless to be treated as a prevailing party for the purposes of recovering postoffer costs due to the operation of *Code Civ. Proc. § 998(a)* and *(c)*. Further, these postoffer costs include postoffer attorney's fees incurred by the defendant, when defendant, treated as prevailing party for this purpose, would otherwise be entitled to recover attorney's fees as an element of costs under *Code Civ. Proc. §§ 1032* and *1033.5*.

See also *§ 60.70[2][c]* for references to related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 60.70[2][b]* regarding evidentiary support for facts stated.

[c] Related Memoranda

For memoranda supporting an award of attorney's fees as costs under pursuant to statute or contract, see *§ 60.300* et seq.

[3] Discussion of Authorities

[a] When Defendant Is Treated as Prevailing Party for Purposes of Postoffer Costs

The facts and procedural background of ***Scott Co. of California v. Blount, Inc.*** *(1999) 20 Cal. 4th 1103, 86 Cal. Rptr. 2d 614, 979 P.2d 974* , are discussed in *§ 60.83[3][a]*. The Supreme Court granted review in this case to decide (1) whether plaintiff was entitled to its preoffer attorney's fees and other costs and (2) whether defendant was entitled to its postoffer attorney's fees (*20 Cal. 4th 1103, 1108)* . With respect to the second issue, the Court noted that the general rule under *Code Civ. Proc. § 1032* is that only a prevailing party may recover its costs. The Court held, however, that the provisions of *Code Civ. Proc. § 998* modify this general rule, pursuant to the language of *Code Civ. Proc. § 998(a)*. Under *Code Civ. Proc. § 998(c)*, a defendant is therefore treated as the prevailing party for the purposes of recovering postoffer costs, when that defendant made a pretrial settlement offer that plaintiff rejected, but which proved to be greater than the judgment plaintiff ultimately received. In other words, the postoffer costs to which a defendant is entitled in this situation consist of the costs a prevailing party would be entitled to recover under *Code Civ. Proc. § 1032* (*20 Cal. 4th 1103, 1112)* .

The Court noted that the categories of postoffer costs to which a defendant is entitled under *Code Civ. Proc. § 998(c)* are ordinarily the same as the categories of preoffer costs to which the plaintiff is entitled as prevailing party (*20 Cal.*

4th 1103, 1115 n.3). For example, attorney's fees are recoverable by a prevailing party as an element of costs when their recovery is authorized by contract or statute [*see Code Civ. Proc. § 1033.5(a)(10), (b)*]. Accordingly, when attorney's fees are otherwise recoverable by a prevailing party as an element of costs, a defendant, treated as the prevailing party for purposes of postoffer costs, is ordinarily entitled likewise to recover postoffer attorney's fees as an element of these costs, by operation of *Code Civ. Proc. § 998* in combination with *Code Civ. Proc. §§ 1032, 1033.5*, and any other applicable statute, such as *Civ. Code § 1717* (attorney's fees recoverable under contract provision) (*20 Cal. 4th 1103, 1112-1116)* .

The Court cautioned in dictum, however, that some statutes authorizing the recovery of attorney's fees make a distinction between prevailing plaintiffs and prevailing defendants. While *Code Civ. Proc. § 998* applies to all such statutes for purposes of postoffer costs as if the defendant were the prevailing party, it neither expands nor contracts the categories of costs to which a prevailing defendant would be entitled. Thus, if the case is governed by a statute under which a prevailing plaintiff, but not a prevailing defendant, is entitled to attorney's fees, then a defendant who does not prevail but is nonetheless entitled to its postoffer costs under *Code Civ. Proc. § 998* is not entitled to its postoffer attorney's fees as part of those costs, even though the prevailing plaintiff may obtain its preoffer attorney's fees as part of its preoffer costs. (citing *Murillo v. Fleetwood Enterprises, Inc. (1998) 17 Cal. 4th 985, 994, 73 Cal. Rptr. 2d 682, 953 P.2d 858* , discussed in *§ 60.80[3][d]*) (*20 Cal. 4th 1103, 1115 n.3*).

For discussion of the first issue decided by the Court, regarding the plaintiff's entitlement to preoffer costs under *Code Civ. Proc. § 998(c)*, see *§ 60.83[3][a]*.

[b] Judgment More Favorable Than Offer Is Prima Facie Evidence of Reasonableness

In ***Barba v. Perez*** *(2008) 166 Cal. App. 4th 444, 82 Cal. Rptr. 3d 715* , the plaintiff was injured at the defendant's business premises when a refrigerator rolled onto the plaintiff's foot. The plaintiff served the defendant with a settlement offer under *Code Civ. Proc. § 998* along with the summons and complaint. The defendant answered the complaint but did not respond to the settlement offer. Following entry of judgment in the plaintiff's favor, the plaintiff filed a memorandum of costs, including prejudgment interest and expert witness fees, pursuant to *Code Civ. Proc. § 998*. The defendant filed a motion to tax costs, arguing that the fees and costs were not recoverable. The trial court allowed the plaintiff to recover the costs.

On appeal, the defendant argued that it was unreasonable to expect that when first faced with the service of summons and a complaint, he would have a reasonable basis to determine whether the plaintiff's offer to compromise was fair. The defendant argued that the trial court abused its discretion in denying his motion because at the time the plaintiff served him with the offer, he had no basis to determine if the offer was reasonable. The court of appeal rejected this argument. It held that one factor to be considered by the trial court as to the reasonableness of an offer under *Code Civ. Proc. § 998* is the amount offered as compared to the judgment ultimately recovered (*166 Cal. App. 4th 444, 450*). If an offeror obtains a judgment more favorable than its offer, the judgment constitutes prima facie evidence showing the offer was reasonable (*166 Cal. App. 4th 444, 450*). The court held that this is exactly what *Code Civ. Proc. § 998* was designed to do: encourage the parties to consider the option of settlement seriously, before significant fees are incurred and they become entrenched in their positions (*166 Cal. App. 4th 444, 451*).

In ***Carver v. Chevron U.S.A., Inc.*** *(2002) 97 Cal. App. 4th 132, 118 Cal. Rptr. 2d 569* , petroleum product dealers sued a refiner and retailer of petroleum products in a dispute arising from a variable rent program the refiner introduced for all lease renewals executed after a certain date. The dealers alleged 18 causes of action, including intentional misrepresentation, negligent misrepresentation, concealment, breach of contract, breach of implied covenant of good faith and fair dealing, and unlawful horizontal and vertical restraints of trade. Individual defendants, who were management employee's of the corporate defendant, were named in causes of action for intentional misrepresentation, negligent misrepresentation, concealment, negligence and unfair trade practices. Many of the causes of action were disposed of in the defendant's favor in pretrial motion proceedings. In the course of the litigation, the refiner made a

settlement offer under *Code Civ. Proc. § 998* of $100 per dealer, plus a waiver of attorney's fees and costs, which the dealers refused. At trial, the jury returned verdicts against the refiner on the causes of action for intentional misrepresentation, negligent misrepresentation, and concealment, but the refiner prevailed on claims for breach of contract, breach of implied covenant of good faith and fair dealing and unlawful vertical restraint of trade. On appeal, the appellate court reversed the judgment against the refiner and directed the trial court to enter judgment in its favor on those causes of action, and affirmed the judgment in its favor on the other causes of action. On remand, judgment was entered in the refiner's favor on the case as a whole. The refiner moved for an award of attorney's fees and costs based on the attorney's fees clause in the leases, its status as prevailing party, and the Section 998 offer refused by the dealers. The trial court granted the motion in part, based on *Civ. Code § 1717*. The trial court also awarded expert witness fees based on the Section 998 offer (*97 Cal. App. 4th 132, 137-139)* .

The Court of Appeal affirmed the award of expert witness fees. The court held that the dealers failed to prove that the judgment, which was more favorable than the Section 998 offer which waived attorney's fees and costs, was not reasonable. The court found that there is no difficulty reading the requirements for recovery of costs and fees under *Code Civ. Proc. § 998* in conjunction with *Code Civ. Proc. § 1032(b)* and that the Cartwright Act's attorney's fees provision did not disable a prevailing defendant from recovering costs and fees in general (*97 Cal. App. 4th 132, 153-154)* . The court held that the offer could reasonably have been deemed by the trial court to be reasonable and good faith in light of the circumstances at the time the offer was made. It was no secret that the defendant had hired expensive lawyers who were expected to pursue all avenues of defense, and that they might eventually be successful was reasonably foreseeable at the time the offer was made. Further, the trial court limited the recoverable expert witness fees from the requested amount in the exercise of its discretion. The court held further than the fact that the expert fees were largely attributable to the Cartwright Act defense did not make any difference, and the reduction showed an additional effort to achieve an equitable result in light of the policies of *Code Civ. Proc. § 998* (*97 Cal. App. 4th 132, 154)* . The court held that, as to the individual defendants, it was not dispositive that they did not make any settlement offers on their own behalf, since the allegations about them were that they were acting in the course and scope of their employment, so that they trial court had an adequate factual basis on which to conclude that the defenses rendered to the corporation and the individual defendants were well integrated and involved the same issues for purposes of expert fees (*97 Cal. App. 4th 132, 155)* .

[c] Defendant's Postoffer Costs Include Postoffer Attorney's Fees

For discussion of ***Scott Co. v. Blount, Inc.*** *(1999) 20 Cal. 4th 1103, 86 Cal. Rptr. 2d 614, 979 P.2d 974* , see *§ 60.85[3][a]*.

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6-60 California Points & Authorities § 60.86

§ 60.86 Opposing Motion to Strike Costs Memorandum or Tax Costs--Defendant's Code Civ. Proc. § 998 Offer Not Effective to Shift Costs to Plaintiff

[1] FORM Opposing Motion to Strike Costs Memorandum or Tax Costs--Defendant's Code Civ. Proc. § 998 Offer Not Effective to Shift Costs to Plaintiff

[*For caption, see § 60.80.*]

THE MOTION TO _____ [STRIKE THE MEMORANDUM OF *or* TAX] COSTS SHOULD BE DENIED BECAUSE DEFENDANT'S OFFER PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 998(c) IS NOT EFFECTIVE TO SHIFT COSTS TO PLAINTIFF UNDER SECTION 998.

A. Settlement Offer Under *Code Civ. Proc. § 998* Is Ineffective to Shift Costs to Plaintiff If It Includes a Nonmonetary Component. Under *Code of Civil Procedure Section 998(c)*, a defendant is treated as the prevailing party for the purposes of recovering postoffer costs, when that defendant's pretrial offer proves to be greater than the judgment received by the plaintiff (*Scott Co. v. Blount, Inc. (1999) 20 Cal. 4th 1103, 1112, 86 Cal. Rptr. 2d 614, 979 P.2d 974*). However, the defendant's offer will not be effective to shift costs to plaintiff when it includes a nonmonetary component, such as a release of claims not at issue in the action (*Valentino v. Elliott Sav-On Gas, Inc. (1988) 201 Cal. App. 3d 692, 247 Cal. Rptr. 483*) or, in a defamation case, an agreement to maintain the confidentiality of the settlement and/or the settlement amount (*Barella v. Exchange Bank (2000) 84 Cal. App. 4th 793, 101 Cal. Rptr. 2d 167*). Further, an offer made under *Code Civ. Proc. § 998* to multiple parties is not valid if it is not expressly apportioned among the parties to whom the offer is made and is not conditioned on acceptance by all of them, so that a single, lump sum offer to multiple plaintiffs which requires them to agree to apportionment among themselves is not valid (*Weinberg v. Safeco Ins. Co. of America (2004) 114 Cal. App. 4th 1075, 1086, 8 Cal. Rptr. 3d 224*).

[2] Comments

[a] Use of Form

This form is for use in combination with the form *set out in § 60.80* to oppose a motion to strike or tax a plaintiff's memorandum of costs when the defendant has made a pretrial settlement offer under *Code Civ. Proc. § 998* which contained a nonmonetary component in addition to a monetary offer that subsequently proved to be greater than the amount recovered by plaintiff in the judgment. The ground for opposition is that while *Code Civ. Proc. § 998(c)* normally allows defendant to recover costs when plaintiff recovers less than the amount proposed by defendant in a Section 998 offer, a Section 998 offer is ineffective to shift costs to plaintiff when the offer also contains a nonmonetary component, such as a release of claims not at issue in the action or an agreement in a defamation action to maintain the confidentiality of the settlement and/or settlement amount.

See also California Forms of Pleading and Practice, Ch. 174, *Costs and Attorney's Fees* (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 60.70[2][b]* regarding evidentiary support for facts stated.

[c] Related Memoranda

For memoranda supporting an award of attorney's fees as costs under pursuant to statute or contract, see *§ 60.300* et seq.

[3] Discussion of Authorities

The facts and procedural background of ***Scott Co. v. Blount, Inc.*** *(1999) 20 Cal. 4th 1103, 1112, 86 Cal. Rptr. 2d 614, 979 P.2d 974* are discussed in *§ 60.83[3][a]*.

In ***Valentino v. Elliott Sav-On Gas, Inc.*** *(1988) 201 Cal. App. 3d 692, 247 Cal. Rptr. 483* , plaintiff slipped and fell at a gasoline station and sued for damages for physical injuries. She rejected an offer under *Code Civ. Proc. § 998* submitted by the gas station's attorney which included a condition that she release the gas station, its attorneys and its insurance carrier from all claims and causes of action arising out of her claims, including insurance bad faith and violation of *Ins. Code § 790.03* in order to receive the proposed settlement amount of $15,000. At trial, the jury awarded her a net verdict of $9,750. The trial court then denied her request for costs and granted the gas station's motion for its costs on the ground that her damage award was less than the statutory offer.

The court of appeal reversed. The court held that costs cannot be shifted under *Code Civ. Proc. § 998* when the offer requires relinquishment of claims in addition to those contained in the complaint that is the basis of the litigation being settled (*201 Cal. App. 3d 692, 696-701)* . The court found that an "offer" under Section 998 includes all its terms and conditions and must be evaluated in the light of all those terms and conditions in determining whether plaintiff obtained a judgment "more favorable" than defendant's statutory offer (*201 Cal. App. 3d 692, 697)* . The court held that the term and condition of the offer in the instant case, which required the plaintiff to surrender other causes of action not included in the complaint, reduced the value of the monetary term so much that the damage award the jury returned may well have been more favorable than the monetary term of the offer (*201 Cal. App. 3d 692, 698-699)* . The court also held that the same term and condition made it extraordinarily difficult to accurately and fairly evaluate the monetary term to decide whether the damage award did or did not exceed the amount offered in settlement (*201 Cal. App. 3d 692, 698-701)* .

In ***Barella v. Exchange Bank*** *(2000) 84 Cal. App. 4th 793, 101 Cal. Rptr. 2d 167* , a real estate developer sued a bank for defamation. The bank made an offer to compromise under *Code Civ. Proc. § 998* to pay the developer $25,000 in consideration for dismissal and an agreement to strictly maintain the confidentiality of the settlement and the settlement amount, which the developer did not accept. The parties tried to settle again, but were unsuccessful because of the

developer's demand for a public apology. The jury awarded the developer $10,000. The trial court granted the developer's motion to strike the bank's cost bill and denied the bank's motion to tax the developer's cost bill on the ground that the bank's Section 998 offer was invalid to shift costs (*84 Cal. App. 4th 793, 796-797)* .

The court of appeal affirmed, holding that in a defamation action, a settlement offer that by its terms cannot be made public cannot be effective to shift costs under Section 998 (*84 Cal. App. 4th 793, 800-803)* . The court concluded that the task of valuing a confidentiality clause attached to a settlement offer in a defamation action is too subjective and therefore cannot be done so that it renders the offer invalid for purposes of shifting costs to the plaintiff (*84 Cal. App. 4th 793, 803)* .

In ***Weinberg v. Safeco Ins. Co. of America*** *(2004) 114 Cal. App. 4th 1075, 8 Cal. Rptr. 3d 224* , a husband and wife who were insured under an underinsured motorist policy sued the insurer for bad faith, based on an automobile accident involving the husband and the insurer's handling of the husband's claim. The insurer made an offer under *Code Civ. Proc. § 998* to the plaintiffs, which they allowed to lapse. After judgment was entered in the insurer's favor, it sought to recover its expert witness fees under *Code Civ. Proc. § 998*. The trial court denied recovery on the ground that the joint offer to the plaintiffs was invalid (*114 Cal. App. 4th 1075, 1086)* . The court of appeal affirmed, holding that even though the wife's claim was based on the insurer's alleged mishandling of the husband's claim, hers was a separate, not derivative claim. Thus, the plaintiffs did not have a single, indivisible injury and the insurer's joint Section 998 offer was not valid because it was not apportioned among the plaintiffs (*114 Cal. App. 4th 1075, 1086-1087)* .

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[Reserved]

§§ 60.87[Reserved]

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6-60 California Points & Authorities § 60.90

§ 60.90 Opposing Motion to Strike Costs Memorandum or Tax Costs--All Claimed Items Are Expressly Authorized by Law

[1] FORM Opposing Motion to Strike Costs Memorandum or Tax Costs--All Claimed Items Are Expressly Authorized by Law

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN OPPOSITION TO MOTION
vs.	)	TO _____ [STRIKE MEMOR-
_____ [*name*],	)	ANDUM OF *or* TAX] COSTS
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
		Date Action Filed: _____

_____

THE MOTION OF _____ [*party, e.g.,* DEFENDANT] TO TAX COSTS BY STRIKING SPECIFIC ITEMS SHOULD BE DENIED BECAUSE THE ITEM(S) SOUGHT TO BE STRICKEN ARE EXPRESSLY AUTHORIZED BY LAW.

A. Prevailing Party's Right to Costs. [*See § 60.80, Paragraph A.*]

B. Allowable Costs. The following item(s) _____ [is *or* are] allowable to the prevailing party under *Code of Civil Procedure Section 1032* as costs:

[*EITHER, filing fees*]

Filing fees (*Code Civ. Proc. § 1033.5(a)(1)*; *see generally Gov. Code §§ 70600 et seq.*).

[*AND/OR, motion fees*]

Motion fees (*Code Civ. Proc. § 1033.5(a)(1)*).

[*AND/OR, jury fees*]

Jury fees (*Code Civ. Proc. § 1033.5(a)(1)*; *see Code Civ. Proc. § 215*).

[*AND/OR, juror food and lodging*]

Juror food and lodging while they are kept together during trial and after the jury retires for deliberation (*Code Civ. Proc. § 1033.5(a)(2)*).

[*AND/OR, deposition costs*]

_____ [Taking *or* Video recording *or* Transcribing] necessary depositions, including an original and one copy of those taken by the claimant and one copy of depositions taken by the party against whom costs are allowed, and travel expenses to attend depositions (*Code Civ. Proc. § 1033.5(a)(3)*).

[*AND/OR, service of process costs*]

Service of process (*see Gov. Code § 22*; *see also Code Civ. Proc. §§ 525, 1985(a)*, defining process) as provided in *Section 1033.5(a)(4) of the Code of Civil Procedure* (*Code Civ. Proc. § 1033.5(a)(4)*).

[*AND/OR, attachment costs*]

Expenses of attachment, including keeper's fees (*Code Civ. Proc. § 1033.5(a)(5)*).

[*AND/OR, premiums on bonds*]

Premiums on necessary surety bonds (*Code Civ. Proc. § 1033.5(a)(6)*; *see Code Civ. Proc. § 995.250*; *Cal. Rules of Ct., Rule 8.278(d)*; *Jewell v. Bank of America (1990) 220 Cal. App. 3d 934, 941, 269 Cal. Rptr. 671* ; *Crag Lumber Co., Inc. v. Crofoot (1958) 156 Cal. App. 2d 568, 570, 319 P.2d 668*).

[*AND/OR, witness fees*]

Ordinary witness fees pursuant to *Section 68093 of the Government Code* (*Code Civ. Proc. § 1033.5(a)(7)*).

[*AND/OR, expert witness fees*]

Fees of expert witnesses ordered by the court (*Code Civ. Proc. § 1033.5(a)(8)*; *see Evid. Code §§ 730, 731*).

[*AND/OR, transcripts*]

Transcripts of court proceedings ordered by the court (*Code Civ. Proc. § 1033.5(a)(9)*).

[*AND/OR, attorney's fees*]

Attorney's fees authorized by contract or statute or law (*Code Civ. Proc. § 1033.5(a)(10)*; *see Code Civ. Proc. § 1033.5(c)(5)*). [Section _____ of the _____ Code authorizes an award of costs and attorney's fees to the prevailing party].

[*AND/OR, reporter fees*]

Court reporters fees as established by statute (*Code Civ. Proc. § 1033.5(a)(11)*; *see generally Gov. Code §§ 69947-69951, 69953-69955, 69990-70139*).

[*AND/OR, models and blowups of exhibits*]

_____ [Models *or* Blowups *or* Models and blowups] of exhibits may be allowed if they were reasonably helpful to aid the trier of fact (*Code Civ. Proc. § 1033.5(a)(12)*).

[*AND/OR, photocopies of exhibits*]

Photocopies of exhibits if they were reasonably helpful to the trier of fact (*Code Civ. Proc. § 1033.5(a)(12)*).

[*AND/OR, items required by statute*]

Any item that is required to be awarded to the prevailing party pursuant to statute as an incident to prevailing in the action _____ [at trial *or* on appeal] (*Code Civ. Proc. § 1033.5(a)(13)*). Recovery of the cost of the item sought to be taxed is authorized by _____ [Section _____ of the _____ Code *or* Rule _____ (26 *or* 135) of the California Rules of Court].

[*Insert other memoranda, as appropriate.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form sets forth the items expressly declared by *Code Civ. Proc. § 1033.5(a)* to be allowable as costs and may, when appropriate, be submitted in opposition to a motion to strike a memorandum of costs or a motion to tax costs by striking any of the specified items.

See also *§ 60.70[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.70[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Memoranda

For memoranda in opposition, to support a motion to tax costs by reducing the amount claimed for attorney's fees on the ground the amount claimed is unreasonable, see *§ 60.41*.

[3] Discussion of Authorities

[a] Prevailing Party's Right to Costs

For discussion, see *§ 60.80*.

[b] Allowable Costs

[i] Filing Fees

Code Civ. Proc. § 1033.5(a)(1) allows filing fees as items of costs. The fees for filing papers in various courts are governed by a variety of different statutes, the applicability of which depends on the nature of the paper filed. The total fee for filing the first paper in a civil action or proceeding varies from county to county and court to court. Generally, the total fee for filing a first paper pursuant to ***Gov. Code §§ 70611, 70612,* and *70650*** (unlimited civil cases) and ***Gov. Code §§ 70613* and *70614*** (limited civil cases) is fixed by statute [*see Gov. Code §§ 70611, 70612, 70613, 70614*].

[ii] Motion Fees

Code Civ. Proc. § 1033.5(a)(1) allows as filing fees items of cost.

[iii] Jury Fees

Code Civ. Proc. § 1033.5(a)(1) allows jury fees as items of cost. ***Code Civ. Proc. § 215*** specifies the fee and mileage

payable to jurors, unless a higher mileage rate is provided by statute or local ordinance.

[iv] Juror Food and Lodging

Code Civ. Proc. § 1033.5(a)(2) provides for costs for juror food and lodging while they are kept together during trial and after the jury retires for deliberation.

[v] Deposition Costs

Code Civ. Proc. § 1033.5(a)(3) provides for costs for taking, video recording, or transcribing necessary depositions, including an original and one copy of those taken by the claimant and one copy of depositions taken by the party against whom costs are allowed, and travel expenses to attend depositions.

[vi] Service of Process Costs

Code Civ. Proc. § 1033.5(a)(4) allows as items of cost service of process by a public officer, registered process server, or other means as follows:

- When service is by a public officer, the recoverable cost is the fee authorized by law at the time of service. Sheriffs' fees for service of process are set forth in *Gov. Code § 26721*. Marshals and constables are required to charge and collect for their services the same fees allowed by law to sheriffs [*Gov. Code § 71266*].

- If service is by a registered process server, the recoverable cost is the amount actually incurred in effecting service, including, but not limited to, a stake-out or other means employed in locating the person to be served, unless such charges are successfully challenged by a party to the action.

- When service is by publication, the recoverable cost is the sum actually incurred in effecting service.

- When service is by a means other than that set forth in the three preceding categories, the recoverable cost is the lesser of the sum actually incurred, or the amount allowed to a public officer in this state for such service, except that the court may allow the sum actually incurred in effecting service on application pursuant to *Code Civ. Proc. § 1033.5(c)(4)* (providing that items not mentioned in *Code Civ. Proc. § 1033.5* and items assessed on application may be allowed or denied in court's discretion).

Gov. Code § 22 defines "process" as including a writ or summons issued in the course of a judicial proceeding. In addition to a number of writs expressly so designated (e.g., writ of attachment, writ of execution, writ of possession), ***Code Civ. Proc. § 525*** defines an injunction as a "writ or order," and ***Code Civ. Proc. § 1985(a)*** expressly refers to a subpoena as process.

[vii] Attachment Costs

Code Civ. Proc. § 1033.5(a)(5) provides for costs for expenses of attachment, including keeper's fees.

[viii] Premiums on Bonds

Code Civ. Proc. § 1033.5(a)(6) allows premiums on necessary surety bonds as items of cost. ***Code Civ. Proc. § 995.250*** provides that if a statute allows costs to a party in an action or proceeding, the costs shall include (a) the premium on a bond reasonably paid by the party pursuant to a statute that provides for the bond in the action or proceeding, and (b) the premium on a bond reasonably paid by the party in connection with the action or proceeding, unless the court determines that the bond was unnecessary. ***Cal. Rules of Ct., Rule 8.278(d)*** , relating to costs on appeal

in civil cases other than limited civil cases, expressly includes as an item recoverable as costs on appeal the cost to procure a surety bond, including the premium and the cost to obtain a letter of credit as collateral, unless the trial court determines the bond was unnecessary [*Cal. Rules of Ct., Rule 8.278(d)(1)(F)*]. Although *Cal. Rules of Ct., Rule 8.764*, relating to appeals from municipal and justice courts, does not contain a similar provision, it would nevertheless appear that recovery by the prevailing party of premiums on necessary surety bonds on appeal would nevertheless be proper under the authority of the foregoing statutes and *Crag Lumber Co.*, discussed *below*.

In ***Jewell v. Bank of America*** *(1990) 220 Cal. App. 3d 934, 269 Cal. Rptr. 671* , the plaintiffs received multimillion-dollar judgments against defendant. These judgments were reversed on appeal. After the appellate court reversed judgments in favor of plaintiffs, the defendant filed memoranda of costs on appeal seeking, among other costs, appeal bond costs. The plaintiffs filed a motion to tax costs, arguing that the appeal bond costs should be taxed in their entirety because it was not necessary for defendant to post the bond. After a hearing, the court granted in part and denied in part the motion to tax costs, ruling that the appeal bond costs were necessary and therefore chargeable in their entirety to plaintiffs. Plaintiffs appealed this ruling.

The court of appeal affirmed. Finding that substantial evidence supported the trial court's decision that the appeal bond was necessary, the court concluded that the trial court's exercise of discretion should not be disturbed. The court of appeal noted that although the defendant, as a bank, had an alternative to posting an appeal bond (a stay of execution without the requirement of a bond under *12 U.S.C. § 91*), this alternative did not make the appeal bond "unnecessary," because the alternative was comparatively burdensome and potentially risky (*220 Cal. App. 3d 934, 941)* .

In ***Crag Lumber Co., Inc. v. Crofoot*** *(1958) 156 Cal. App. 2d 568, 319 P.2d 668* , plaintiff appealed from that portion of the trial court's order denying plaintiff 's motion to retax costs on a prior appeal by striking the item for the premium on the undertaking to stay execution. The court of appeal affirmed the order, stating that former Code Civ. Proc. § 1035 (*now see Code Civ. Proc. §§ 995.250, 1033.5(a)(6)*), which allows the premium on surety bonds to be included as costs, applies to costs on appeal (*156 Cal. App. 2d 568, 569-570)* . The section provided that premiums on any surety bond may be recovered as costs unless the trial court determines as a matter of fact that the bond was unnecessary. The burden of proof on this issue is on the party who opposed the allowance of the item. Since the trial court made the determination that the bond was not unnecessary and that the premium paid on the bond was a reasonable and necessary cost, its refusal to strike the item for the premium on the bond was proper (*156 Cal. App. 2d 568, 570)* .

[ix] Witness Fees

Code Civ. Proc. § 1033.5(a)(7) provides for costs for ordinary witness fees pursuant to *Gov. Code § 68093*.

[x] Expert Witness Fees

Code Civ. Proc. § 1033.5(a)(8) allows fees of expert witnesses ordered by the court as items of costs. ***Evid. Code § 730*** authorizes the court at any time before or during trial on its own motion or the motion of a party to appoint one or more experts to investigate, render a report, and testify as an expert at the trial of the action when it appears that expert evidence may be required and to fix the expert's compensation. *Evid. Code § 731(c)* provides that, except as otherwise provided in ***Evid. Code § 731,*** the compensation fixed shall in the first instance be apportioned and charged to the several parties in such proportion as the court may determine and may thereafter be taxed and allowed in like manner as other costs.

[xi] Transcripts

Code Civ. Proc. § 1033.5(a)(9) provides for costs for transcripts of court proceedings ordered by the court.

[xii] Attorney's Fees

Code Civ. Proc. § 1033.5(a)(10) allows attorney's fees as items of costs when authorized by either contract or statute or law. ***Code Civ. Proc. § 1033.5(c)(5)*** provides that when any California statute refers to the award of "costs and attorney's fees," attorney's fees are an item and component of the costs to be awarded and are within the ambit of Code *Civ. Proc. § 1033.5(a)(10)*. Any claim not based on the court's established schedule of attorney's fees for actions on a contract must bear the burden of proof [*Code Civ. Proc. § 1033.5(c)(5)*].

The procedure for claiming attorney's fees as costs depends on whether the fees sought are authorized by "statute," "law," or "contract." Fees authorized by statute or law must be fixed on a noticed motion, at the time a statement of decision is rendered, on application supported by an affidavit made concurrently with a claim for other costs, or on entry of default judgment [*Code Civ. Proc. § 1033.5(c)(5)*]. Fees authorized by contract (including contractual attorney's fees awarded pursuant to *Civ. Code § 1717*) must be fixed on a noticed motion or on entry of a default judgment, unless otherwise provided by stipulation of the parties [*Code Civ. Proc. § 1033.5(c)(5)*].

Fees are authorized "by statute" in numerous types of actions. Examples of statutes authorizing an award of attorney's fees include the following: *Code Civ. Proc. §§ 685.040* and *685.070(a)(6)* (award of attorney's fees incurred in enforcing judgment under *Code Civ. Proc. § 680.010 et seq.* when underlying judgment includes award of attorney's fees to judgment creditor); *Code Civ. Proc. § 1021.4* (award of attorney's fees to prevailing plaintiff on motion in action for damages based on defendant's commission of felony for which defendant has been convicted); *Code Civ. Proc. § 1021.5* (award of attorney's fees to successful party on motion in action resulting in enforcement of important right affecting public interest); *Code Civ. Proc. § 1021.6* (award of attorney's fees to person who prevails on claim for implied indemnity on finding that (a) indemnitee through tort of indemnitor has been required to act in protection of indemnitee's interest by bringing action against or defending action by third person, and (b) if indemnitor was properly notified of demand to bring action or provide defense and did not do so, and (c) trier of fact determined that indemnitee was without fault in principal case that is basis of action in indemnity or that indemnitee had final judgment entered in his or her favor granting summary judgment, nonsuit, or directed verdict); *Code Civ. Proc. § 1021.7* (award as part of costs made to defendant on finding that action against peace officer, or public entity employing peace officer, for damages arising out of performance of peace officer's duties, or action for libel or slander, was not filed or maintained in good faith and with reasonable cause); *Code Civ. Proc. § 1021.9* (attorney's fees awarded to prevailing plaintiff in addition to other costs in action for damages for trespass on cultivated lands or lands intended or used for raising livestock); *Code Civ. Proc. § 1028.5* (award of litigation expenses in addition to other costs to prevailing small business or licensee in action between small business or licensee and state regulatory agency on determination that agency action was undertaken without substantial justification); *Code Civ. Proc. § 1029.8* (award of treble damages and all costs and attorney's fees to prevailing plaintiff in action by injured person against unlicensed person for damages resulting from providing goods or performing services for which license is required); and *Code Civ. Proc. § 1031* (award to prevailing plaintiff of attorney's fees as part of cost in action for wages not exceeding $300). For further, detailed memoranda supporting and opposing notices of motion for an award of attorney's fees, see *§ 60.300* et seq.

In ***City of Santa Paula v. Narula*** *(2003) 114 Cal. App. 4th 485, 8 Cal. Rptr. 3d 75* , the court held that an ordinance is a statute for purposes of *Code Civ. Proc. § 1033.5(a)(10)* when it permits recovery of attorney fees. That case, for example, was an action by a city against property owners foreclosing a lien against their real property based on the owners' refusal to remedy the violation of numerous building and safety codes and to pay administrative costs and penalties. The court held that the trial court properly awarded the city attorney's fees under a city ordinance providing for an award of attorney's fees when a lien may be foreclosed and property sold by the filing of a complaint for foreclosure in a court of competent jurisdiction and the issuance of a judgment to foreclose. Under *Code Civ. Proc. § 1033.5(a)(10)*, the ordinance was a law and the award of fees furthered the purposes underlying *Gov. Code § 53069.4*, authorizing the city to enact ordinances to enforce its administrative orders by imposing fines and penalties, and the state's policy to maintain habitable housing (*114 Cal. App. 4th 485, 492-493)* .

Attorney's fees are authorized by contract when a sued-on contract specifically provides that attorney's fees and costs incurred to enforce the provisions of the contract are to be awarded either to one of the parties or to the prevailing party.

Civ. Code § 1717 authorizes an award of this type of fee, but it is important to note that contractual attorney's fees are not considered fees "authorized by statute" for purposes of *Code Civ. Proc. § 1033.5* [*see Code Civ. Proc. § 1033.5(c)(5)*]. In the absence of a stipulation to the contrary, contractual attorney's fees may not be fixed at the time a statement of decision is rendered and may not be fixed on an application supported by affidavit made concurrently with a claim for other costs. Typically, the party seeking fees must use the noticed motion procedure [*see Code Civ. Proc. § 1033.5(c)(5)*]. The time for serving and filing a notice of motion to claim attorney fees is specified in *Cal. Rules of Ct., Rule 3.1702*. For memoranda supporting and opposing a motion for attorney's fees under *Civ. Code § 1717*, see Subpart B, § 60.440 et seq.

[xiii] Reporter Fees

Code Civ. Proc. § 1033.5(a)(11) allows court reporters' fees as established by statute as items of cost. Reporter fees vary from county to county and court to court [*see generally Gov. Code §§ 69947-69951, 69953-69955, 69990 et seq.*].

Gov. Code § 69953 provides in relevant part that in any case when a verbatim record is not made at public expense pursuant to *Gov. Code § 69952* (criminal matters, juvenile proceedings, proceedings to declare a minor free from custody, proceedings under the Lanterman-Petris-Short Act, and as otherwise provided by law) or other provision of law, the cost of making any verbatim record shall be paid by the parties in equal proportion; and either party at his or her option may pay the whole. In either case, all amounts so paid by the party to whom costs are awarded shall be taxed as costs in the case. The fees for transcripts and copies ordered by the parties shall be paid by the party ordering them.

[xiv] Models and Blowups of Exhibits

Code Civ. Proc. § 1033.5(a)(12) provides for costs for models and/or blowups of exhibits, if they were reasonably helpful to aid the trier of fact.

[xv] Photocopies of Exhibits

Code Civ. Proc. § 1033.5(a)(12) provides for costs for photocopies of exhibits, if they were reasonably helpful to the trier of fact.

[xvi] Items Required by Statute

Code Civ. Proc. § 1033.5(a)(13) provides for costs of any item that is required to be awarded to the prevailing party pursuant to statute as an incident to prevailing in the action at trial or on appeal.

Recovery of the cost of an item sought to be taxed may be authorized by statute or by *Cal. Rules of Ct., Rule 8.278* or *8.764*.

California Points & Authorities

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Volume 6 Chapters 60-69 COSTS---to---DECLARATORY RELIEF
CHAPTER 60 COSTS
PART II. FORMS
A. Costs
2. Motion to Tax Costs by Striking or Reducing Specific Items

6-60 California Points & Authorities §§ 60.91-60.99

[Reserved]

§§ 60.91[Reserved]

California Points & Authorities

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Volume 6 Chapters 60-69 COSTS---to---DECLARATORY RELIEF
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2. Motion to Tax Costs by Striking or Reducing Specific Items

6-60 California Points & Authorities § 60.100

§ 60.100 Opposing Motion to Strike Costs Memorandum or Tax Costs--Allowance of Items Is Discretionary With Court--General Form

[1] FORM Opposing Motion to Strike Costs Memorandum or Tax Costs--Allowance of Items Is Discretionary With Court--General Form
[*For caption, see § 60.80.*]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN OPPOSITION TO MOTION
vs.	)	TO _____ [STRIKE MEMOR-
_____ [*name*],	)	ANDUM OF *or* TAX] COSTS
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
		Date Action Filed: _____

_____

THE MOTION OF _____ [*party, e.g.,* DEFENDANT] TO TAX COSTS BY STRIKING SPECIFIC ITEMS SHOULD BE DENIED BECAUSE THE COURT HAS DISCRETION TO ALLOW THE ITEM(S) SOUGHT TO BE STRICKEN AND THESE ITEMS WERE NECESSARY AND PROPER.

A. Verified Memorandum Is Prima Facie Evidence of Necessity. Items on a verified memorandum of costs that appear to be proper and necessary are prima facie evidence that the costs, expenses, and services listed were necessarily incurred and, unless controverted, should control the decision of the trial court on a motion to tax costs (*see Tulare*

Irrigation Dist. v. Lindsay-Strathmore I. Dist. (1928) 205 Cal. 6, 10, 269 P. 525 ; *Hadley v. Krepel (1985) 167 Cal. App. 3d 677, 682, 214 Cal. Rptr. 461*).

B. Discretion of Court to Allow Item as Costs. *Section 1032(b) of the Code of Civil Procedure* provides that except as otherwise expressly provided by statute, a prevailing party, as defined in that section, is entitled to costs as a matter of right. *Section 1033.5(a) of the Code of Civil Procedure* lists a number of items specifically allowable as costs to the prevailing party under *Section 1032 of the Code of Civil Procedure.* Items not mentioned in *Section 1033.5 of the Code of Civil Procedure* and items assessed on application may be allowed or denied in the court's discretion (*Code Civ. Proc. § 1033.5(c)(4)*).

C. Reason for Court's Discretion. Although the right to costs is said to be statutory, it is not possible for the Legislature to foresee all the various items of costs that arise in litigation, and the allowance of items of costs must be left in nearly every instance to the discretion of the trial judge (*People ex rel. Mosk v. Barenfeld (1962) 203 Cal. App. 2d 166, 185, 21 Cal. Rptr. 501* (decided prior to 1986 enactment of *Code Civ. Proc. § 1033.5*, cited in Paragraph B, *above*); *Maguire v. Corbett (1953) 119 Cal. App. 2d 244, 252, 259 P.2d 507* (same)).

[*Insert other memoranda, as appropriate.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion to tax costs by striking specific items when the moving party contends that the items were not necessary or not properly claimed as costs.

See also *§ 60.70[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.70[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Memoranda

For opposing memoranda, see *§§ 60.40* and *60.45*.

[3] Discussion of Authorities

[a] Verified Memorandum Is Prima Facie Evidence of Necessity

Tulare Irrigation Dist. v. Lindsay-Strathmore I. Dist. *(1928) 205 Cal. 6, 269 P. 525* , was an action to determine conflicting claims to water rights. During the first trial, the parties stipulated that the official reporter should transcribe three copies of the testimony and proceedings taken and to be taken during the trial (one copy for each side and one copy for the court), that each party was to pay one-half the cost thereof, and that the prevailing party was to recover as costs the amount so paid by it. Following that trial, defendant obtained a writ prohibiting the trial judge from making any further orders on the ground that he was disqualified because of an interest in the subject matter of the litigation. Following the second trial, findings of fact and conclusions of law were entered in favor of plaintiffs, who were also awarded their costs. On motion of the defendant, the trial court taxed costs by striking from plaintiffs' cost bill the costs claimed by plaintiffs on the first trial, and plaintiffs appealed.

In reversing the order with directions to enter a judgment for costs in favor of plaintiffs in the amount claimed in their cost bill, the Supreme Court stated that it appeared from the record that the costs on the former trial were necessarily incurred and that they were legally chargeable pursuant to stipulation. The Court stated that the verified cost bill constituted a prima facie showing that the items therein were necessarily expended or incurred and, unless controverted, should control the decision of the trial court when the charges on the face of the cost bill appeared to be for proper and necessary disbursements (*205 Cal. 6, 9-10)* .

The facts and procedural background of ***Hadley v. Krepel*** *(1985) 167 Cal. App. 3d 677, 682, 214 Cal. Rptr. 461* , are discussed in *§ 60.45[3][d]*. In reversing the judgment with directions to the trial court to conduct a new hearing to fix the reasonable amount of attorney's fees and costs to which the defendant is entitled, the court of appeal, agreeing with defendant's assertion, said that the items on a verified cost bill are prima facie evidence that the costs, expenses, and services listed were necessarily incurred (*167 Cal. App. 3d 677, 682)* .

[b] Discretion of Court to Allow Items as Costs

Code Civ. Proc. § 1032(b) provides that except as otherwise expressly provided by statute, a prevailing party, as defined in that section, is entitled to costs as a matter of right.

Code Civ. Proc. § 1033.5(a) lists a number of items specifically allowable as costs to the prevailing party under *Code Civ. Proc. § 1032*.

Code Civ. Proc. § 1033.5(c)(4) provides that items not mentioned in *Code Civ. Proc. § 1033.5* and items assessed on application may be allowed or denied in the court's discretion.

[c] Reason for Court's Discretion

People ex rel. Mosk v. Barenfeld *(1962) 203 Cal. App. 2d 166, 21 Cal. Rptr. 501* , was an action by the State to recover rents and the purchase price paid by it for a building first leased and then sold to it by defendants. The parties took several depositions during which plaintiff had marked for identification numerous exhibits, including letters, memoranda, and reports. The exhibits were not attached to or copied into the depositions but, by stipulation of the parties, were retained in the files of the office of the Attorney General to facilitate that office's taking of further depositions at which it intended to use the same exhibits again, and to aid it in reading and understanding the depositions already taken. Because of this, defendants had the exhibits photostatted and claimed the item as costs. Judgment was for defendants and plaintiff 's motion to tax costs by disallowing the cost of the photocopies was denied. Plaintiff appealed from the judgment and the order denying the motion to tax costs.

In affirming the judgment and order, the court, quoting *Maguire v. Corbett (1953) 119 Cal. App. 2d 244, 252, 259 P.2d 507* (discussed *below*), said that it is not possible for the Legislature to foresee all the various items of costs that arise in litigation and that the allowance or disallowance of items incurred on the trial of an action must be left in nearly every instance to the discretion of the trial judge (*203 Cal. App. 2d 166, 185)* .

It should be noted that in 1986, on a substantial revision of the costs statutes (Stats. 1986, ch. 377), a number of items are now expressly declared by statute to be allowable items of cost [*see Code Civ. Proc. § 1033.5(a)*; *see also § 60.90*].

Maguire v. Corbett *(1953) 119 Cal. App. 2d 244, 259 P.2d 507* , involved a third-party claim that the trial court denied. Plaintiffs (judgment creditors) had obtained a judgment against defendant husband. Thereafter, defendant husband married third-party claimant. An execution issued and was levied on an automobile that was in the possession of the third-party claimant, who filed a third-party claim alleging her absolute ownership. The trial court entered a formal order determining that the automobile was community property and subject to execution for satisfaction of the judgment. The trial court taxed against the third-party claimant the cost of storage of the automobile during the time the third-party claim was pending. Claimant appealed from both the order that the automobile was community property and from the order taxing costs.

In affirming both orders, the court of appeal stated that when the third-party claimant entered the litigation with her claim, she became an adversary to the judgment creditors and assumed the burdens of the litigation (*119 Cal. App. 2d 244, 252)* . The only question was whether storage of the car during the dispute was a reasonable action and within the discretion of the trial court under former Code Civ. Proc. § 1032.6 (repealed in 1982; *now see Code Civ. Proc. § 685.040*; *see also Code Civ. Proc. § 680.150* (defining "costs" on enforcement of judgment as including but not limited to statutory fees, charges, commissions, and expenses)), providing that the judgment creditor was entitled to the costs and necessary disbursements of proceedings taken by him in aid of an execution on any judgment (*119 Cal. App. 2d 244, 251-252)* . The court said that it was not practicable for the Legislature to foresee all the various items of costs that arise in litigation and, as the Supreme Court stated in *Miller v. Highland Ditch Co. (1891) 91 Cal. 103, 105, 27 P. 536* , the allowance or disallowance of items incurred in trial of an action must be left in nearly every instance to the discretion of the trial judge (*119 Cal. App. 2d 244, 252)* . The court held that since the storage bill would have been taxable against the judgment creditors had the third-party claimant prevailed, the reverse is also true (*119 Cal. App. 2d 244, 252)* .

[4] Additional Authorities

[a] Discretion of Court to Allow Items as Costs

The facts and procedural background of *People ex rel. Mosk v. Barenfeld (1962) 203 Cal. App. 2d 166, 21 Cal. Rptr. 501* , are discussed in *§ 60.100[3][c]*. In affirming the judgment and order, the court of appeal pointed out that under former Code Civ. Proc. § 1032a (renumbered in 1982 to *Code Civ. Proc. § 1032.7*, which was repealed in 1986; *now see Code Civ. Proc. § 1033.5(a)(3), (c)(3)*), defendants were entitled to the reasonable cost of taking and transcribing depositions, together with the reasonable cost of one copy of each such deposition, unless it appeared to the court that the taking of the deposition was unnecessary, and to the reasonable cost of one copy of all depositions taken by the party or parties against whom costs are allowed (*203 Cal. App. 2d 166, 183-184)* . The court said that to all intents and purposes the photocopies became a part of the deposition. The court pointed out that defendants, who were entitled to tax the reasonable cost of a copy of the depositions, could properly have insisted on the documents being copied into the deposition or attached to it, so that the testimony of the witnesses and the effect of the potential exhibits could be used by defense attorneys in their preparation for and during trial of the action. Instead, they cooperated with the Attorney General and procured photostats, which answered the full purpose of their being transcribed in the deposition. Although plaintiff had not claimed that the documents were not necessary or that the cost was excessive, the court of appeal said that the verified cost bill made a prima facie case of such necessity (*203 Cal. App. 2d 166, 184)* . The court held that the allowance of a challenged item is within the discretion of the trial court when the necessity is debatable, and that the trial judge exercised reasonable discretion in denying the motion to tax costs (*203 Cal. App. 2d 166, 185)* .

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6-60 California Points & Authorities § 60.101

§ 60.101 Opposing Motion to Strike Costs Memorandum or Tax Costs--Allowance of Items Is Discretionary With Court--Referee Fees

[1] FORM Opposing Motion to Strike Costs Memorandum or Tax Costs--Allowance of Items Is Discretionary With Court--Referee Fees

[*For caption, see § 60.80.*]

THE MOTION OF _____ [*party, e.g.,* DEFENDANT] TO TAX COSTS BY STRIKING SPECIFIC ITEMS SHOULD BE DENIED BECAUSE THE TRIAL COURT MAY ORDER REFEREE FEES PAID BY THE PARTY WHO SOUGHT THE REFERENCE.

Referee Fees. The trial court has power to order that referee fees be paid initially by the party who sought the reference (*now see Code Civ. Proc. §§ 645.1, 1023*), and the party who is ultimately successful may include this sum in his or her costs against the losing party (*Most Worshipful Lodge v. Sons etc. Lodge (1956) 140 Cal. App. 2d 833, 834, 295 P.2d 912*).

[2] Comments

[a] Use of Form

This form may be combined with the form *set out in § 60.100,* for an opposition to a motion to tax costs by striking or reducing specific items, on the ground that the trial court may order referee fees paid by the party who sought the reference.

See also *§ 60.70[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.70[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Referee Fees

In ***Most Worshipful Lodge v. Sons etc. Lodge*** *(1956) 140 Cal. App. 2d 833, 295 P.2d 912* , plaintiff appealed from the trial court's order that plaintiffs pay a referee an $800 fee for his services. After the referee presented his report to the trial court, a judgment was entered against plaintiffs, including an item for costs that included an $800 fee for the referee. The judgment was reversed. The referee then filed a petition for an order fixing his fee at $800 and for payment of the fee. The trial court again fixed the fee at $800, which it ordered plaintiffs to pay. The court of appeal affirmed the order, stating that the trial court has power to order that referee fees be paid initially by the party who sought the reference and that the party who is ultimately successful may include the amount of the fees in his or her costs against the losing party. The fact that the original judgment was reversed did not deprive the court of its power to order the payment of the referee fees (*140 Cal. App. 2d 833, 835)* .

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6-60 California Points & Authorities § 60.102

§ 60.102 Opposing Motion to Strike Costs Memorandum or Tax Costs--Allowance of Items Is Discretionary With Court--Costs of Prior Trials

[1] FORM Opposing Motion to Strike Costs Memorandum or Tax Costs--Allowance of Items Is Discretionary With Court--Costs of Prior Trials

[*For caption, see § 60.80.*]

THE MOTION OF _____ [*party, e.g.,* DEFENDANT] TO TAX COSTS BY STRIKING SPECIFIC ITEMS SHOULD BE DENIED BECAUSE A SUCCESSFUL PARTY IS ENTITLED TO COSTS OF PREVIOUS TRIALS FROM THE PARTY ULTIMATELY DEFEATED.

Costs of Prior Trials. A party ultimately successful is entitled to recover the costs of previous trials from the party ultimately defeated (*Senior v. Anderson (1900) 130 Cal. 290, 299, 62 P. 563*).

[2] Comments

[a] Use of Form

This form may be combined with the form *set out in § 60.100*, for an opposition to a motion to tax costs by striking or reducing specific items, on the ground that a successful party is entitled to recover the costs of previous trials from the party ultimately defeated.

See also *§ 60.70[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.70[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Costs of Prior Trials

In ***Senior v. Anderson*** *(1900) 130 Cal. 290, 62 P. 563* , plaintiffs appealed from a judgment for defendants and from orders denying a new trial and a motion to retax costs in an action to quiet title to a water right. A former judgment for defendants had been reversed on appeal and a new trial granted. Plaintiffs objected to various items in the cost bill that defendant filed after retrial, including the costs of the former trial. The Supreme Court held that the party ultimately defeated is liable for the costs of previous trials so far as they are legitimate and properly taxed (*130 Cal. 290, 299)* . Since this item appeared to be for proper or necessary disbursements, and since there was no evidence showing it to be false, excessive, or erroneous, it was properly allowed (*130 Cal. 290, 301)* . The court did, however, order that other items of costs be stricken (*130 Cal. 290, 300-301)* .

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6-60 California Points & Authorities § 60.103

§ 60.103 Opposing Motion to Strike Costs Memorandum or Tax Costs--Allowance of Items Is Discretionary With Court--Special Master Fees

[1] FORM Opposing Motion to Strike Costs Memorandum or Tax Costs--Allowance of Items Is Discretionary With Court--Special Master Fees

[*For caption, see § 60.80.*]

THE MOTION OF _____ [*party, e.g.,* DEFENDANT] TO TAX COSTS BY STRIKING SPECIFIC ITEMS SHOULD BE DENIED BECAUSE THE COURT HAS DISCRETION TO ALLOW SPECIAL MASTER FEES AS COSTS.

Special Master Fees. A trial court has discretion to allow special master fees as an item of costs (*Winston Square Homeowner's Assn. v. Centex West, Inc. (1989) 213 Cal. App. 3d 282, 293, 261 Cal. Rptr. 605*).

[2] Comments

[a] Use of Form

This form may be combined with the form *set out in § 60.100*, for an opposition to a motion to tax costs by striking or reducing specific items, on the ground that a trial court has discretion to allow special master fees as costs.

See also *§ 60.70[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.70[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Special Master Fees

Winston Square Homeowner's Assn. v. Centex West, Inc. *(1989) 213 Cal. App. 3d 282, 261 Cal. Rptr. 605* , was an action by a homeowners' association against a developer and subcontractors for various alleged defects in a townhouse development. In this action, the trial court appointed a special master to control discovery and to conduct settlement conferences, and charged the special master's fees to the parties. One of the defendants, who was dismissed after successfully asserting the defense of the statute of limitations, sought special master's fees as an element of costs from the plaintiff. The trial court allowed special master's fees as an element of costs, and the plaintiff challenged this allowance on appeal.

The court of appeal upheld the trial court's allowance of special master's fees as an item of costs. The court noted that under *Code Civ. Proc. § 1033.5(c)(4)*, items not mentioned in *Code Civ. Proc. § 1033.5* and items assessed on application may be allowed or denied in the court's discretion. The plaintiff conceded that *Code Civ. Proc. § 1033.5(c)* grants the trial court discretion to award an item of costs not specifically disallowed, but contended that the Legislature did not mean entirely new "categories" of costs would be left to the discretion of the trial court. The court of appeal could find no authority for this contention, and determined that when a special master is appointed by the court, his or her fee is analogous to the award of fees of expert witnesses ordered by the court; thus, the expense is first apportioned and charged to the parties, and then the prevailing party's share is allowed as an item of costs (*213 Cal. App. 3d 282, 292-293)* .

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6-60 California Points & Authorities § 60.104

§ 60.104 Opposing Motion to Strike Costs Memorandum or Tax Costs--Allowance of Items Is Discretionary With Court--Arbitrator's Award

[1] FORM Opposing Motion to Strike Costs Memorandum or Tax Costs--Allowance of Items Is Discretionary With Court--Arbitrator's Award

[*For caption, see § 60.80.*]

THE MOTION OF _____ [*party, e.g.,* DEFENDANT] TO TAX COSTS BY STRIKING SPECIFIC ITEMS SHOULD BE DENIED BECAUSE A TRIAL COURT HAS DISCRETION TO ALLOW COSTS FOR AN ARBITRATOR'S AWARD THAT DOES NOT INCLUDE COSTS.

Arbitrator's Award. A trial court has discretion to allow costs when entering judgment on a judicial arbitration award even though the arbitrator's award does not include costs (*Guevara v. Brand (1992) 8 Cal. App. 4th 995, 997-998, 10 Cal. Rptr. 2d 780*).

[2] Comments

[a] Use of Form

This form may be combined with the form *set out in § 60.100,* for an opposition to a motion to tax costs by striking or reducing specific items, on the ground that a trial court has discretion to allow costs for an arbitrator's award that does not include costs.

See also *§ 60.70[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.70[2][b]*

regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Arbitrator's Award

In ***Guevara v. Brand*** *(1992) 8 Cal. App. 4th 995, 997-998, 10 Cal. Rptr. 2d 780* , a personal injury case was resolved by judicial arbitration. The arbitrator found the defendant responsible for the underlying accident, and awarded the plaintiff an amount for medical expenses, lost wages, and pain and suffering. The award did not mention costs. The plaintiff filed a memorandum of costs in trial court, and the defendant moved to strike the memorandum. The court denied the defendant's motion, and awarded costs to the plaintiff as a matter of law.

The Sixth District Court of Appeal affirmed. Although, the arbitrator has authority to award costs, there is no statutory or judicial authority requiring that the arbitrator make this determination at the time of the arbitration award. Therefore, the procedure for obtaining costs for judgments implementing a judicial arbitration award should be no different from the procedure for claiming costs for ordinary civil judgments (*8 Cal. App. 4th 995, 997-998)* .

Unlike *Guevara*, however, the Third District Court of Appeal subsequently ruled that a prevailing party to cannot claim costs in the trial court on entry of judgment when the arbitrator fails to include costs in the award [*see* *Wagy v. Brown (1994) 24 Cal. App. 4th 1, 7-9, 29 Cal. Rptr. 2d 48* , discussed as an authority to § 60.15].

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6-60 California Points & Authorities § 60.105

§ 60.105 Opposing Motion to Strike Costs Memorandum or Tax Costs--Allowance of Items Is Discretionary With Court--Costs of Unsuccessful Court-Ordered Mediation

[1] FORM Opposing Motion to Strike Costs Memorandum or Tax Costs--Allowance of Items Is Discretionary With Court--Costs of Unsuccessful Court-Ordered Mediation

[*For caption, see § 60.80.*]

THE MOTION OF _____ [*party, e.g.,* DEFENDANT] TO TAX COSTS BY STRIKING SPECIFIC ITEMS SHOULD BE DENIED BECAUSE A TRIAL COURT HAS DISCRETION TO ALLOW COSTS AFTER AN UNSUCCESSFUL COURT-ORDERED MEDIATION.

Costs of Unsuccessful Court-Ordered Mediation. When an unsuccessful mediation has been court-ordered, reasonably necessary expenses incident thereto may, in the sound discretion of the trial court, be awarded after trial to a prevailing party (*Gibson v. Bobroff (1996) 49 Cal. App. 4th 1202, 1209, 57 Cal. Rptr. 2d 235*).

[2] Comments

[a] Use of Form

This form may be combined with the form *set out in § 60.100,* for an opposition to a motion to tax costs by striking or reducing specific items, on the ground that a trial court has discretion to allow costs of an unsuccessful court-ordered mediation.

See also *§ 60.70[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.70[2][b]*

regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Costs of Unsuccessful Court-Ordered Mediation

In ***Gibson v. Bobroff*** *(1996) 49 Cal. App. 4th 1202, 57 Cal. Rptr. 2d 235* , prior to a trial de novo after the defendant rejected an arbitration award, the parties attended a court-ordered mediation before a private mediator. The mediation was unsuccessful and the parties filed statutory offers to compromise under *Code Civ. Proc. § 998*. Both offers were rejected and the case proceeded to jury trial. After the jury returned a verdict for the plaintiff in excess of the offers to compromise, the plaintiff filed a memorandum of costs which included costs of the court-ordered mediation. Defendants filed their motion to strike or tax this cost as being excessive and not properly recoverable, contending that there was no statutory authority to allow mediation costs. The trial court denied the motion to tax.

The court of appeal affirmed. The court stated that an aware of costs for mediation expenses is not statutorily proscribed under Code Civ. § 1033.5(b). Despite the defendant's argument that, because the mediation statutory scheme does not expressly provide those expenses may be awarded as costs, as is the case with respect to arbitration, the Legislature must have determined such expenses cannot be awarded as costs. The court did not agree with this argument. Rather, stated the court, had the Legislature intended to exclude mediation expenses from items allowable as costs, it would have been a simple matter to have listed them in section 1033.5(b), as an item which could not be awarded. In the light of the general authority to award as costs "items not mentioned in this section ... in the court's discretion," it is far more reasonable to conclude that, if the Legislature meant to exclude mediation expenses as costs, it would have done so explicitly in subdivision (b) (*49 Cal. App. 4th 1202, 1207-1208)* . Thus, the court held that when an unsuccessful mediation has been court-ordered, reasonably necessary expenses incident thereto may, in the sound discretion of the trial court, be awarded after a trial to a prevailing party (*49 Cal. App. 4th 1202, 1209)* .

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[Reserved]

§§ 60.106[Reserved]

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6-60 California Points & Authorities § 60.120

§ 60.120 Supporting Motion for Relief for Untimely Filing of Memorandum of Costs--General Form

[1] FORM Supporting Motion for Relief for Untimely Filing of Memorandum of Costs--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION FOR
vs.	)	RELIEF FROM FAILURE TO TIMELY FILE
_____ [*name*],	)	MEMORANDUM OF COSTS
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
		Date Action Filed: _____

_____

THE MOTION FOR AN ORDER GRANTING LEAVE TO FILE A LATE MEMORANDUM OF COSTS SHOULD BE GRANTED BECAUSE THE FAILURE TO FILE IT ON TIME WAS THE RESULT OF _____ [MISTAKE *or* INADVERTENCE *or* SURPRISE *or* EXCUSABLE NEGLECT].

A. Time to File Cost Bill. A prevailing party who claims costs shall serve and file a memorandum of costs within 15 days after the date of mailing of the notice of entry of judgment or dismissal by the clerk under *Section 664.5 of the Code of Civil Procedure* or the date of service of written notice of entry of judgment or dismissal, or within 180 days after entry of judgment, whichever is first (*Cal. Rules of Ct., Rule 3.1700(a)(1)*).

B. Time Requirement Not Jurisdictional. The time prescribed for filing a memorandum of costs is not jurisdictional (

Wilson v. Hinkle (1977) 67 Cal. App. 3d 506, 512, 136 Cal. Rptr. 731 (involving former Code Civ. Proc. § 1033, the predecessor to *Cal. Rules of Ct., Rule 3.1700(a)(1)*); *Reese v. Borghi (1963) 216 Cal. App. 2d 324, 334, 30 Cal. Rptr. 868* (same)).

C. Relief on Ground of Mistake, Inadvertence, Surprise, or Excusable Neglect. A court may, on any terms as may be just, relieve a party or the party's legal representative from a judgment, order, or other proceeding taken against him or her through mistake, inadvertence, surprise, or excusable neglect (*Code Civ. Proc. § 473(b)*).

D. Applicability of *Code Civ. Proc. § 473(b)* to Failure to File Cost Bill. A party entitled to recover costs in an action or proceeding may be granted relief under *Section 473(b) of the Code of Civil Procedure* for failure to file a memorandum of costs within the time prescribed (*Reese v. Borghi (1963) 216 Cal. App. 2d 324, 334, 30 Cal. Rptr. 868* ; *Rio Vista Gas Assn. v. State of California (1961) 188 Cal. App. 2d 555, 565, 10 Cal. Rptr. 559*).

E. Broad Discretion of Court in Absence of Prejudice to Adverse Party. In the absence of prejudice to the adverse party, the trial court has broad discretion in allowing relief from failure to timely file a memorandum of costs (*Pollard v. Saxe & Yolles Dev. Co. (1974) 12 Cal. 3d 374, 381, 115 Cal. Rptr. 648, 525 P.2d 88* ; *Wilson v. Hinkle (1977) 67 Cal. App. 3d 506, 513, 136 Cal. Rptr. 731*).

[*Insert other memoranda, as appropriate*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion by the party entitled to recover costs in an action or proceeding for relief under *Code Civ. Proc. § 473(b)* from the party's failure to file a memorandum of costs within the time prescribed in Cal. Rules of Ct., Rule 870(a)(1). The form should be combined, as appropriate, with the memoranda *set out in § 60.121* et seq.

The statute requires that the motion be made within a reasonable time, not exceeding six months. Consequently, the notice of motion and its supporting papers should be served and filed promptly on learning that the memorandum of costs was not timely filed; any delay between that time and the filing of the notice of motion for relief should be explained in the supporting papers [*see Nutting v. Herman Timber Co. (1963) 214 Cal. App. 2d 650, 659, 29 Cal. Rptr. 754* (discussed in *§ 60.150[3][b]*); *see also Freeman v. Goldberg (1961) 55 Cal. 2d 622, 625, 12 Cal. Rptr. 668, 361 P.2d 244]* . In addition, the notice of motion should be accompanied by a copy of the cost bill proposed to be filed [*see Code Civ. Proc. § 473(b)*].

This form may also be used in support of a countermotion for relief when the memorandum of costs was filed after the time prescribed in *Cal. Rules of Ct., Rule 3.1700(a)(1)*, and the opposing party has filed a motion to strike it [*see* § 60.

13]. Because in this situation the memorandum of costs has already been filed, there is no need to attach a copy of it to the notice of motion for relief [*see Freeman v. Goldberg (1961) 55 Cal. 2d 622, 625, 12 Cal. Rptr. 668, 361 P.2d 244* (involving relief from delay in filing motion to tax costs)]. Counsel may, however, need to secure an order shortening time for service of the notice of countermotion in order that both the motion to strike and the countermotion for relief may be heard at the same time.

Code Civ. Proc. § 473 generally permits the trial court to relieve a party from a judgment, dismissal, or order against him or her on the grounds specified and on "any terms as may be just." Courts have long construed this phrase to allow payment of costs or attorney's fees to the adverse party to compensate that party for any losses or expenses suffered by the *Code Civ. Proc. § 473* motion [*Hearst v. Ferrante (1987) 189 Cal. App. 3d 201, 204, 234 Cal. Rptr. 385]* . In addition, courts granting relief from default or dismissal under *Code Civ. Proc. § 473* are expressly authorized to impose a penalty of up to $1,000 on an offending attorney or defaulting party, and to direct that an offending attorney pay up to $1,000 to the State Bar Client Security Fund [*Code Civ. Proc. § 473(c)(1)*]. For discussion of legal background, research and procedural guides, and forms relating to relief from orders generally, see California Forms of Pleading and Practice, Ch. 489, *Relief From Judgments and Orders* (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case.

Counsel should submit cognizable evidence in supports of factual statements regarding specific items of costs, by request for judicial notice [*see Evid. Code § 450 et seq.*, or otherwise by affidavits or declarations. Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For a form of notice of motion for relief under Code Civ. Proc. § 473(b), from failure to have filed a cost bill within the prescribed time with a form of supporting declaration and a form of order granting the motion, see California Forms of Pleading and Practice, Ch. 174, *Costs and Attorney's Fees* (Matthew Bender). For discussion of legal background, research and procedural guides, and forms relating to relief from orders generally, see California Forms of Pleading and Practice, Ch. 489, *Relief From Judgments and Orders* (Matthew Bender).

[d] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

For memoranda opposing a motion for relief from untimely filing of memorandum, see *§ 60.150* et seq.

[3] Discussion of Authorities

[a] Time to File Cost Bill

Cal. Rules of Ct., Rule 3.1700(a)(1), provides that a prevailing party who claims costs is to serve and file a memorandum of costs within 15 days after the date of mailing of the notice of entry of judgment or dismissal by the clerk under *Code Civ. Proc. § 664.5* or the date of service of written notice of entry of judgment or dismissal, or within 180 days after entry of judgment, whichever is first.

[b] Time Requirement Not Jurisdictional

In ***Wilson v. Hinkle*** *(1977) 67 Cal. App. 3d 506, 136 Cal. Rptr. 731* , the trial court sustained defendants' demurrers, and orders of dismissal were filed on December 20 and 23, 1974. Plaintiffs filed a motion to reconsider and the court vacated its orders of dismissal nunc pro tunc. On reconsideration, the court again sustained the demurrers, and the order of dismissal was signed January 13, 1975. The court received defendants' memorandum of costs on January 23, 1975, although the memorandum was stamped filed on January 30, 1975. At that time, former Code Civ. Proc. § 1033 (repealed in 1986; *now see Cal. Rules of Ct., Rule 3.1700(a)(1)*) provided that the party claiming costs must serve on the adverse party, and file at any time after the verdict or decision of the court, and not later than 10 days after the entry of the judgment, a memorandum of costs. Plaintiff 's motion to strike the memorandum of costs on the ground it was untimely filed was denied, and plaintiffs appealed. In affirming the order, the court of appeal stated that the time requirement for filing a memorandum of costs is not jurisdictional (*67 Cal. App. 3d 506, 512)* .

Reese v. Borghi *(1963) 216 Cal. App. 2d 324, 30 Cal. Rptr. 868* , involved an action to declare a right of way of necessity over a parcel of land. Judgment was entered on May 25, 1961, and plaintiffs filed their cost bill on June 19, 1961, after the 10-day period prescribed in former Code Civ. Proc. § 1033 (repealed in 1986; *now see Cal. Rules of Ct., Rule 3.1700(a)(1)*) had run. Defendants' motion to strike the cost bill on the ground that it was filed late was denied and plaintiffs' request for relief from their late filing under *Code Civ. Proc. § 473(b)* was granted. Defendants appealed. In affirming the judgment and order denying the motion to strike the cost bill, the court of appeal stated that the time limit of former Code Civ. Proc. § 1033 is not jurisdictional, but is directed to the sound discretion of the court (*216 Cal. App. 2d 324, 334)* .

It would appear that the holding of the above two cases, that the time requirement for filing a cost bill is not jurisdictional, would apply equally to the time limit specified in *Cal. Rules of Ct., Rule 3.1700(a)(1),* for filing the memorandum of costs. There is nothing in the language of *Cal. Rules of Ct., Rule 3.1700(a)(1),* that would suggest that the Judicial Council, in adopting the rule, intended to change existing case law construing former Code Civ. Proc. § 1033.

[c] Relief on Ground of Mistake, Inadvertence, Surprise, or Excusable Neglect

Code Civ. Proc. § 473(b) provides that a court may, on any terms as may be just, relieve a party or the party's legal representative from a judgment, order, or other proceeding taken against him or her through mistake, inadvertence, surprise, or excusable neglect.

[d] Applicability of Code Civ. Proc. § 473(b) to Failure to File Cost Bill

The facts and procedural background of ***Reese v. Borghi*** *(1963) 216 Cal. App. 2d 324, 30 Cal. Rptr. 868* , are discussed in *§ 60.120[3][b]*. In affirming the judgment and order denying the motion to strike the cost bill, the court of appeal thought it clear from the affidavit in opposition to the motion to strike that it also contained an application for relief under *Code Civ. Proc. § 473(b),* and that the affidavit itself was supportive of such an application. The court said that while it would have been better procedure for plaintiffs to have filed the usual notice of motion with a supporting affidavit, plaintiffs' affidavit served the same purpose (*216 Cal. App. 2d 324, 334-335)* .

Rio Vista Gas Assn. v. State of California *(1961) 188 Cal. App. 2d 555, 10 Cal. Rptr. 559* , involved an action in

inverse condemnation against the State. Plaintiff appealed from a judgment of dismissal following the trial court's order sustaining a demurrer without leave to amend, and from the order permitting defendant to file a cost bill after the then statutory time had expired (former *Code Civ. Proc. § 1033*; *now see Cal. Rules of Ct., Rule 3.1700(a)(1)*). In affirming the judgment and order, the court stated that it is well established that under *Code Civ. Proc. § 473* a superior court may grant relief to a party who through mistake, inadvertence, or excusable neglect does not file a memorandum of costs within the statutory [*now* rule] period (*188 Cal. App. 2d 555, 565)* .

[e] Broad Discretion of Court in Absence of Prejudice to Adverse Party

In ***Pollard v. Saxe & Yolles Dev. Co.*** *(1974) 12 Cal. 3d 374, 115 Cal. Rptr. 648, 525 P.2d 88* , the trial court granted defendants' motion on the ground of inadvertence for permission to file a late memorandum of costs and plaintiffs appealed. In affirming the order allowing the late filing of the cost bill, the Supreme Court stated that in the absence of prejudice, the trial court has broad discretion in allowing relief on the grounds of inadvertence from failure to timely file a cost bill. The Court pointed out that there was no showing of prejudice and held that the trial court, therefore, did not abuse its discretion (*12 Cal. 3d 374, 381)* .

The facts and procedural background of ***Wilson v. Hinkle*** *(1977) 67 Cal. App. 3d 506, 136 Cal. Rptr. 731* , are discussed in *§ 60.120[3][b]*. In affirming the order denying the motion to strike the cost bill on the ground it was untimely filed, the court of appeal, quoting *Pollard v. Saxe & Yolles Dev. Co. (1974) 12 Cal. 3d 374, 381, 115 Cal. Rptr. 648, 525 P.2d 88* (discussed *above*), stated that in the absence of prejudice, the trial court has broad discretion in allowing relief on the ground of inadvertence from a failure to file a timely cost bill. Although it is not clear from the opinion whether a motion for relief under *Code Civ. Proc. § 473(b)* was actually filed, the court of appeal concluded that, given the confused procedural circumstances following the initial orders of dismissal and plaintiffs' attempts to have the ruling on the demurrer reconsidered, there was good cause for the trial court's denying plaintiffs' motion to strike and allowing defendants relief from the late filing (*67 Cal. App. 3d 506, 513)* . The court noted in addition that there was some question about whether the memorandum was in fact filed late (*67 Cal. App. 3d 506, 513 n.7*).

[4] Additional Authorities

[a] Time Requirement Not Jurisdictional

The facts and procedural background of *LeDeit v. Ehlert (1962) 205 Cal. App. 2d 154, 22 Cal. Rptr. 747* , are discussed in *§ 60.123*. In ruling that the trial court did not abuse its discretion in denying the motion to strike the memorandum of costs and granting the motion for relief and for leave to file the memorandum after the then statutory period had expired, the court said that the time limitation [of former Code Civ. Proc. § 1033; *now see Cal. Rules of Ct., Rule 3.1700(a)(1)*] is not a matter of jurisdiction but is directed to the sound discretion of the court (*205 Cal. App. 2d 154, 170)* .

[b] Applicability of Code Civ. Proc. § 473(b) to Failure to File Cost Bill

In *Ganey v. Doran (1987) 191 Cal. App. 3d 901, 236 Cal. Rptr. 787* , the prevailing party filed a cost memorandum, but failed to serve it on the opposing party, then successfully petitioned the court for permission to refile it pursuant to *Code Civ. Proc. § 473* on the ground of inadvertence. The court of appeal affirmed, holding that *Code Civ. Proc. § 473* has long been considered a proper mechanism to seek relief for failing to file timely a cost memorandum (*191 Cal. App. 3d 901, 910)* .

[c] Broad Discretion of Court in Absence of Prejudice to Adverse Party

The facts and procedural background of *LeDeit v. Ehlert (1962) 205 Cal. App. 2d 154, 22 Cal. Rptr. 747* , are discussed in *§ 60.123*. In ruling that the trial court did not abuse its discretion in denying the motion to strike the memorandum of costs and granting the motion for relief and for leave to file the memorandum after the then statutory

period had expired, the court said that defendants did not offer any showing that the 22-day delay in filing the cost bill had caused them prejudice (*205 Cal. App. 2d 154, 170)* .

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6-60 California Points & Authorities § 60.121

§ 60.121 Supporting Motion for Relief for Untimely Filing of Memorandum of Costs--Relief Based on Attorney's Affidavit of Fault

[1] FORM Supporting Motion for Relief for Untimely Filing of Memorandum of Costs--Relief Based on Attorney's Affidavit of Fault

[*For caption, see § 60.120.*]

THE MOTION FOR AN ORDER GRANTING LEAVE TO FILE A LATE MEMORANDUM OF COSTS SHOULD BE GRANTED BECAUSE COUNSEL HAS FILED A SWORN AFFIDAVIT OF FAULT.

Relief Based on Attorney's Affidavit of Fault. Whenever an application for relief under *Code of Civil Procedure Section 473* is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, the court must vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect (*Code Civ. Proc. § 473(b)*).

[2] Comments

[a] Use of Form

This form may be used in combination with those *set out in § 60.120*, in support of a motion by the party entitled to recover costs in an action or proceeding for relief under *Code Civ. Proc. § 473(b)* when the party's attorney has filed an affidavit of fault.

When relief from default is based on a sworn declaration of fault by the defaulting party's attorney, the court is required to order that attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties [*Code Civ. Proc. § 473(b)*]. However, if the court grants relief from a default judgment based on an attorney's affidavit of fault, the

relief must not be made conditional on the attorney's payment of compensatory legal fees or costs or monetary penalties imposed by the court or on compliance with other sanctions ordered by the court [*Code Civ. Proc. § 473(c)(2)*].

See also *§ 60.120[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.120[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Relief Based on Attorney's Affidavit of Fault

Code Civ. Proc. § 473(b) provides that whenever an application for relief under *Code Civ. Proc. § 473* is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, the court must vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect.

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6-60 California Points & Authorities § 60.122

§ 60.122 Supporting Motion for Relief for Untimely Filing of Memorandum of Costs--Timely Deposit in Mail

[1] FORM Supporting Motion for Relief for Untimely Filing of Memorandum of Costs--Timely Deposit in Mail

[*For caption, see § 60.120.*]

THE MOTION FOR AN ORDER GRANTING LEAVE TO FILE A LATE MEMORANDUM OF COSTS SHOULD BE GRANTED BECAUSE THE MEMORANDUM WAS TIMELY MAILED BUT DELAYED IN THE MAIL.

Timely Deposit in Mail. A trial court may properly grant relief under *Section 473(b) of the Code of Civil Procedure* from the failure to timely file a memorandum of costs when it is shown that the memorandum was timely mailed but was delayed or went astray in the mail and relief from the late filing is promptly sought (*Rio Vista Gas Assn. v. State of California (1961) 188 Cal. App. 2d 555, 565, 10 Cal. Rptr. 559* ; *see also Freeman v. Goldberg (1961) 55 Cal. 2d 622, 624-625, 12 Cal. Rptr. 668, 361 P.2d 244*).

[2] Comments

[a] Use of Form

This form may be used in combination with those *set out in § 60.120,* in support of a motion by the party entitled to recover costs in an action or proceeding for relief under *Code Civ. Proc. § 473(b),* when the party's attorney had timely mailed the memorandum of costs but it was delayed in the mail.

See also *§ 60.120[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.10[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Timely Deposit in Mail

The facts and procedural background of ***Rio Vista Gas Assn. v. State of California*** *(1961) 188 Cal. App. 2d 555, 10 Cal. Rptr. 559* , are discussed in *§ 60.120[3][d]*. In affirming the order permitting defendant to file a cost bill after the then statutory time had expired (former *Code Civ. Proc. § 1033*; *now see Cal. Rules of Ct., Rule 3.1700(a)(1)*), the court pointed out that (1) the memorandum of costs was timely prepared and placed in the mail; (2) a copy was received by plaintiff 's counsel within the time allowed for filing, but the original was apparently lost in the mail and never reached the superior court clerk's office; and (3) the failure of the original to be filed was discovered 11 days after mailing, and the attorney general immediately moved to be relieved of the late filing. The court held that, under these circumstances, whether the late filing of the cost bill should have been permitted was within the trial court's discretion and that it could not hold that that discretion was abused (*188 Cal. App. 2d 555, 565)* .

In ***Freeman v. Goldberg*** *(1961) 55 Cal. 2d 622, 12 Cal. Rptr. 668, 361 P.2d 244* , a shareholder's derivative action was dismissed pursuant to former Corp. Code § 834 (*now see Corp. Code § 800(c)-(f)*) for failure to post security. Defendants served a timely memorandum of costs on plaintiff who moved to tax costs by striking an item claimed for attorney's fees. The trial court denied the motion to strike that was filed beyond the time allowed in former Code Civ. Proc. § 1033 (repealed in 1986; *now see Cal. Rules of Ct., Rule 3.1700(b)(1)*). Two and one-half months after plaintiff learned that his motion to tax costs had been denied, plaintiff filed a motion for relief under *Code Civ. Proc. § 473(b)*. In support of the motion, plaintiff 's attorney submitted affidavits showing that the notice of motion had been deposited in a mailbox four days after the memorandum of costs had been served on plaintiff, and that under normal circumstances, this would have been sufficient time for the motion to have been received by the court and filed within the time allowed by former Code Civ. Proc. § 1033. However, the day of mailing was the Friday before a long holiday weekend. The motion was deposited in a mailbox prior to the hour designated for the last collection on Friday, and several mail collections were designated for Saturdays. After being informed that the notice had not been timely received by the court, the attorney ascertained from postal employees that, although Fridays and Saturdays were designated as days for collection at the mailbox, collections were frequently not made on those days. In addition, a letter from the postmaster stated that mail was customarily collected at the mailbox in question on Saturdays but that it was possible that mail deposited at the beginning of the holiday weekend remained in the box until the morning of the following Tuesday. The trial court granted the motion for relief and vacated the order denying the motion to strike. Defendants appealed from the order vacating the prior order.

In affirming the order, the Supreme Court held that while it would have been preferable if plaintiff had given a clearer explanation for his delay in making the motion to vacate, it was within the trial court's discretion to conclude that under the circumstances the motion for relief should have been granted and was made within a reasonable time. The Court also held that since the motion to tax costs had already been filed, it was proper for the trial court to grant the motion for relief even though the motion was not accompanied by a copy of the motion to tax costs (*55 Cal. 2d 622, 625)* .

Note that the above case involved relief from the untimely filing of a motion to tax costs, rather than from the late filing of a memorandum of costs. However, it has been held that there is no distinction between granting relief from default in filing a memorandum of costs and a motion to tax costs [*Lane v. Pacific Greyhound Lines (1947) 30 Cal. 2d 914, 916, 187 P.2d 9* ; *see § 60.140*].

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6-60 California Points & Authorities § 60.123

§ 60.123 Supporting Motion for Relief for Untimely Filing of Memorandum of Costs--Press of Business

[1] FORM Supporting Motion for Relief for Untimely Filing of Memorandum of Costs--Press of Business

[*For caption, see § 60.120.*]

THE MOTION FOR AN ORDER GRANTING LEAVE TO FILE A LATE MEMORANDUM OF COSTS SHOULD BE GRANTED BECAUSE COUNSEL'S FAILURE WAS INADVERTENT AND DUE TO THE PRESS OF OTHER MATTERS.

Press of Business. A trial court may properly grant relief under *Section 473(b) of the Code of Civil Procedure* from the failure to timely file a memorandum of costs when counsel's failure was inadvertent and due to the press of other matters (*Pollard v. Saxe & Yolles Dev. Co. (1974) 12 Cal. 3d 374, 380-381, 115 Cal. Rptr. 648, 525 P.2d 88* ; *LeDeit v. Ehlert (1962) 205 Cal. App. 2d 154, 169-170, 22 Cal. Rptr. 747*).

[2] Comments

[a] Use of Form

This form may be used in combination with those *set out in § 60.120,* in support of a motion by the party entitled to recover costs in an action or proceeding for relief under *Code Civ. Proc. § 473(b),* when the party's attorney failed to file the memorandum of costs through inadvertence from the press of business.

See also *§ 60.120[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.120[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Memoranda

For opposing memoranda see *§ 60.151*.

[3] Discussion of Authorities

[a] Press of Business

The facts and procedural background of ***Pollard v. Saxe & Yolles Dev. Co.*** *(1974) 12 Cal. 3d 374, 115 Cal. Rptr. 648, 525 P.2d 88* , are discussed in *§ 60.120[3][e]*. The ground of defendants' motion for permission to file a late memorandum of costs was that counsel had inadvertently failed to file a timely memorandum due to the press of other matters (*12 Cal. 3d 374, 380-381)* . Without discussing what the other matters were, the Supreme Court upheld the trial court's discretion in granting the motion, but the Court did not specifically discuss the validity of the excuse of the press of other matters (*12 Cal. 3d 374, 381)* .

Note that because the Court in *Pollard* did not discuss the matters constituting the press of business or other cases discussing this ground and affirmed the trial court's order granting relief, it is not clear whether the intent was to impliedly overrule prior Supreme Court cases and disapprove prior court of appeal cases holding to the contrary [*see, e.g.,* *Dow v. Ross (1891) 90 Cal. 562, 563-564, 27 P. 409* , and *Fairfield v. Ahlstrom (1962) 206 Cal. App. 2d 590, 592, 24 Cal. Rptr. 70* , both discussed in *§ 60.151*].

In ***LeDeit v. Ehlert*** *(1962) 205 Cal. App. 2d 154, 22 Cal. Rptr. 747* , plaintiffs filed their cost bill 22 days beyond the time allowed by former Code Civ. Proc. § 1033 (repealed in 1986; *now see Cal. Rules of Ct., Rule 3.1700(a)(1)*). Defendants moved to strike the cost bill, and plaintiffs moved for relief from their default. Plaintiffs' grounds for relief were that their attorney mistakenly believed that the notice of appeal would stay the running of the time for filing the memorandum of costs and also that he was involved in specified activities that put him under "a tremendous work load fourteen to sixteen hours a day ... ." The trial court denied defendants' motion to strike and granted plaintiffs' motion for relief. In affirming the judgment, the court of appeal found no abuse of discretion in the trial court's rulings on the motions (*205 Cal. App. 2d 154, 169-170)* .

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6-60 California Points & Authorities § 60.124

§ 60.124 Supporting Motion for Relief for Untimely Filing of Memorandum of Costs--Lack of Knowledge of Entry of Judgment

[1] FORM Supporting Motion for Relief for Untimely Filing of Memorandum of Costs--Lack of Knowledge of Entry of Judgment

[*For caption, see § 60.120.*]

THE MOTION FOR AN ORDER GRANTING LEAVE TO FILE A LATE MEMORANDUM OF COSTS SHOULD BE GRANTED BECAUSE COUNSEL REASONABLY BELIEVED THAT JUDGMENT HAD NOT BEEN ENTERED.

Lack of Knowledge of Entry of Judgment. A trial court has discretion to grant a motion for relief when counsel's failure to timely file a memorandum of costs was due to his or her reasonable belief that judgment had not been entered (*Reese v. Borghi (1963) 216 Cal. App. 2d 324, 333-334, 30 Cal. Rptr. 868*).

[2] Comments

[a] Use of Form

This form may be used in combination with those *set out in § 60.120*, in support of a motion by the party entitled to recover costs in an action or proceeding for relief under *Code Civ. Proc. § 473(b)*, when the party's attorney failed to file the memorandum of costs because of his or her reasonable belief that judgment had not been entered.

See also *§ 60.120[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.120[2][b]*

regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Lack of Knowledge of Entry of Judgment

The facts and procedural background of ***Reese v. Borghi*** *(1963) 216 Cal. App. 2d 324, 30 Cal. Rptr. 868* , are discussed in *§ 60.120[3][b]*. In opposition to defendants' motion to strike the cost bill on the ground that it was filed late, an associate of plaintiffs' counsel filed an affidavit stating in substance that he had left the proposed judgment, approved and signed by counsel for both parties, with the trial judge's clerk with instructions to endorse, file, and return the copies after the judge had signed the judgment, and that plaintiffs' counsel had instructed him to file the cost bill when the copies of the judgment were returned. After the time for filing the cost bill had run, the associate learned by telephone that the judgment had been entered, and that the clerk disclaimed any knowledge of the copies of the judgment. The cost bill was thereupon mailed to defendants' counsel and endorsed and filed three days later. Plaintiffs' counsel claimed that he was justified in assuming that judgment had not been entered and requested relief from the untimely filing under *Code Civ. Proc. § 473(b)*. The trial court denied the motion to strike the cost bill, and defendants appealed. In affirming the order denying the motion, the court of appeal stated that the trial judge could properly infer that plaintiffs' counsel was justified in relying on the clerk to return endorsed filed copies of the judgment promptly on entry and that the late filing of the cost bill was due to the clerk's failure to do so (*216 Cal. App. 2d 324, 334)* .

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6-60 California Points & Authorities §§ 60.125-60.139

[Reserved]

§§ 60.125[Reserved]

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6-60 California Points & Authorities § 60.140

§ 60.140 Supporting Motion for Relief for Untimely Filing of Motion to Tax Costs--General Form

[1] FORM Supporting Motion for Relief for Untimely Filing of Motion to Tax Costs--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF MOTION FOR
Plaintiff,	)	RELIEF FROM FAILURE TO TIMELY FILE MO-
vs.	)	TION TO TAX COSTS
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Discovery Cut-Off: _____
	)	Motion Cut-Off: _____
		Trial Date: _____

_____

THE MOTION FOR AN ORDER GRANTING LEAVE TO FILE A LATE MOTION TO TAX COSTS SHOULD BE GRANTED BECAUSE THE FAILURE TO FILE THE NOTICE OF MOTION ON TIME WAS THE RESULT OF _____ [MISTAKE *or* INADVERTENCE *or* SURPRISE *or* EXCUSABLE NEGLECT].

A. Time to File Notice of Motion to Tax Costs. A notice of motion to strike or to tax costs must be served and filed 15 days after service of the cost memorandum, but if the cost memorandum was served by mail, the period is extended as provided in *Code of Civil Procedure Section 1013* (*Cal. Rules of Ct., Rule 3.1700(b)(1)*).

B. Relief on Ground of Mistake, Inadvertence, Surprise, or Excusable Neglect. [*See § 60.120, Paragraph C.*]

C. Relief From Failure to Timely File Motion to Tax Costs. The court has broad discretion under the provisions of *Code of Civil Procedure Section 473* to grant relief from failure to timely file a motion to tax costs (*Freeman v. Goldberg (1961) 55 Cal. 2d 622, 625, 12 Cal. Rptr. 668, 361 P.2d 244* ; *Lane v. Pacific Greyhound Lines (1947) 30 Cal. 2d 914, 916-917, 187 P.2d 9*).

[*Optional*] **D. Relief Based on Attorney's Affidavit of Fault.** [*See § 60.121.*]

[*Insert other memoranda, as appropriate.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion for relief from failure to file a motion to tax costs within the time allowed by *Cal. Rules of Ct., Rule 3.1700(b)(1).*

In view of the holding in *Lane v. Pacific Greyhound Lines (1947) 30 Cal. 2d 914, 916-917, 187 P.2d 9 (Paragraph C of this form)* , any of the paragraphs *set forth in §§ 60.120* -60.139 may, when appropriate, be incorporated in this form. The notice of motion must be filed within a reasonable time, not exceeding six months, from the time the period for filing the notice of motion to tax costs expired, and be accompanied by a copy of the notice of motion to tax costs proposed to be filed [*see Code Civ. Proc. § 473(b)*]. Notwithstanding the time limit in § 473(b), the notice of motion for relief should be served and filed promptly, together with the notice of motion to tax costs, on learning of the failure to have timely filed the motion to tax costs [*see, e.g., Bennett v. California Custom Coach, Inc. (1991) 234 Cal. App. 3d 333, 336, 285 Cal. Rptr. 649]* . Any delay between that time and the filing of the notice of motion for relief should be explained in the supporting papers.

This memorandum may also be used in support of a countermotion for relief when the notice of motion to tax costs was filed after the time prescribed in *Cal. Rules of Ct., Rule 3.1700(b)(1),* and the opposing party has filed a motion to strike it. Because in this situation the notice of motion to tax costs has already been filed, there is no need to attach a copy of it to the notice of motion for relief [*see Freeman v. Goldberg (1961) 55 Cal. 2d 622, 625, 12 Cal. Rptr. 668, 361 P.2d 244]* . Counsel may, however, need to secure an order shortening time for service of the notice of countermotion in order that both the motion to strike and the countermotion for relief may be heard at the same time.

For discussion concerning conditions of relief based on an attorney's affidavit of fault (§ 60.121), and other conditions of relief under *Code Civ. Proc. § 473* in general, see *§§ 60.120* and *60.121*.

See also *§ 60.120[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.120[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Memoranda

For memoranda that may be used to oppose a motion for relief from filing an untimely motion to tax costs, see *§ 60.150* et seq.

[3] Discussion of Authorities

[a] Time to File Notice of Motion to Tax Costs

Cal. Rules of Ct., Rule 3.1700(b)(1), provides that a notice of motion to strike or to tax costs must be served and filed 15 days after service of the cost memorandum, but if the cost memorandum was served by mail, the period is extended as provided in *Code Civ. Proc, § 1013*.

[b] Relief on Ground of Mistake, Inadvertence, Surprise, or Excusable Neglect

See discussion in *§ 60.120[3][c]*.

[c] Relief From Failure to Timely File Motion to Tax Costs

In ***Freeman v. Goldberg*** *(1961) 55 Cal. 2d 622, 12 Cal. Rptr. 668, 361 P.2d 244* , a blank space for the amount of costs to be awarded was left in the judgment dismissing a shareholder's derivative action under former Corp. Code § 834 (repealed effective January 1, 1977; *now see Corp. Code § 800*). Within ten days after entry of the judgment, defendants served plaintiff with a memorandum of costs. Plaintiff did not file a motion to tax costs within the time allowed under former Code Civ. Proc. § 1033 (repealed in 1986; *now see Cal. Rules of Ct., Rule 3.1700(b)(1)*), and at the expiration of that time period the clerk filled in the blank space in the judgment with the amount of costs from defendants' memorandum. Subsequently, plaintiff served and filed the motion, but the trial court denied it as untimely filed. Two and a half months later, plaintiff filed a notice of motion based on *Code Civ. Proc. § 473* for vacation of the judgment of dismissal and the order denying the motion to tax costs, and for entry of a corrected judgment reflecting a cost award comporting with his unsuccessful motion to tax. Plaintiff supported the motion with an affidavit setting forth, in detail, his timely deposit in the mail of the motion to tax costs and the ensuing problems with mail pick-up and delivery that resulted in the court's tardy receipt of the motion. The trial court granted plaintiff 's motion to vacate the judgment and the previous order denying his motion to tax costs, and defendant appealed from the order.

The Supreme Court affirmed, ruling that the question of whether plaintiff made a sufficient showing to warrant the granting of relief under *Code Civ. Proc. § 473* must be determined in light of the established rule that a trial court has broad discretion in deciding such a motion, and that its ruling will not be disturbed on appeal unless an abuse of discretion clearly appears. The Court then held that the trial court did not abuse its discretion in concluding that under all the circumstances, defendant's *Code Civ. Proc. § 473* motion was made within a reasonable time (*55 Cal. 2d 622, 625)* .

In ***Lane v. Pacific Greyhound Lines*** *(1947) 30 Cal. 2d 914, 187 P.2d 9* , defendants filed their motion to tax costs on appeal beyond the time allowed by former Code Civ. Proc. § 1034 (repealed in 1986; *now see Cal. Rules of Ct., Rules 8.278, 8.764, 3.1700(b)(1)*), relating to costs on appeal. They then made a motion under *Code Civ. Proc. § 473(b)* for relief from their failure to file their motion to tax costs on time; and plaintiffs moved to strike the motion to tax on the ground it was not timely filed. In ruling on the merits of defendants' motion to tax costs, the trial court granted defendants' motion for relief, denied plaintiffs' motion to strike, and struck three items in the cost bill. Plaintiffs

appealed from all three orders. The court of appeal held that the appeal from the order refusing to strike the motion to tax was moot because the motion had been withdrawn and that the order granting the motion for relief under *Code Civ. Proc. § 473(b)* contemplated a further order on the merits and was not appealable. The Court therefore dismissed the appeal, but reviewed the propriety of the order on the appeal from the final order taxing costs (*30 Cal. 2d 914, 916)* .

The Court stated that under *Code Civ. Proc. § 473(b)* the court may relieve a party from the effect of a delay in taking procedural steps that do not involve pleadings, and pointed out that such relief has been allowed when parties failed to file cost bills under the provisions of former Code Civ. Proc. § 1033 (repealed in 1986; *now see Cal. Rules of Ct., Rule 3.1700(a)(1)*; *see also § 60.120*, or former Code Civ. Proc. § 1034. The Court concluded that insofar as granting relief from default in filing is concerned, there appeared to be no reason for making a distinction between a cost bill and a motion to tax costs (*30 Cal. 2d 914, 916)* . The Court therefore held that in the absence of any express provision to the contrary, the trial court has power to grant relief from such a default (failure to timely file a notice of motion to tax costs) under the broad provisions of *Code Civ. Proc. § 473(b)*, and that the granting of such relief rests primarily within the discretion of the trial court (*30 Cal. 2d 914, 917)* . The Court further affirmed the order taxing costs (*30 Cal. 2d 914, 918)* .

[d] Relief Based on Attorney's Affidavit of Fault

See discussion in *§ 60.121[3]*.

[4] Additional Authorities

[a] Relief From Failure to Timely File Motion to Tax Costs

In *Bennett v. California Custom Coach, Inc. (1991) 234 Cal. App. 3d 333, 285 Cal. Rptr. 649* , plaintiff prevailing party filed a memorandum of costs. One month later, defendant filed a motion under *Code Civ. Proc. § 473* for relief from default for its failure to file a timely motion to tax costs. The trial court granted the motion for default relief and the court of appeal affirmed the trial court's order granting the motion to tax costs (*234 Cal. App. 3d 333, 337, 338, 340)* . The issue on appeal was plaintiff 's entitlement to attorney's fees in the action, rather than the propriety of using *Code Civ. Proc. § 473* to obtain relief from failure to timely file the motion to tax costs. However, neither the plaintiff nor the trial and appellate courts objected or took exception to this use of the *Code Civ. Proc. § 473* procedure.

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6-60 California Points & Authorities §§ 60.141-60.149

[Reserved]

§§ 60.141[Reserved]

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6-60 California Points & Authorities § 60.150

§ 60.150 Opposing Motion for Relief for Untimely Filing of Memorandum of Costs or Motion to Tax Costs--General Form

[1] FORM Opposing Motion for Relief for Untimely Filing of Memorandum of Costs or Motion to Tax Costs--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN OPPOSITION TO MOTION
vs.	)	FOR RELIEF FROM FAILURE TO TIMELY FILE
_____ [*name*],	)	_____ [MEMORANDUM OF
Defendant.	)	COSTS *or* MOTION TO TAX COSTS]
	)	Date: _____
	)	Time: _____
		Location: _____
		Date Action Filed: _____

_____

THE MOTION FOR RELIEF FROM FAILURE TO FILE A _____ [MEMORANDUM OF COSTS *or* MOTION TO STRIKE/TAX COSTS] WITHIN THE TIME PRESCRIBED BY *RULE 3.1700 OF THE CALIFORNIA RULES OF COURT* SHOULD BE DENIED BECAUSE NO SHOWING OF _____ [MISTAKE *or* INADVERTENCE *or* SURPRISE *or* EXCUSABLE NEGLECT] HAS BEEN MADE.

A. Burden of Proof. The burden of proof is on the party seeking relief under *Section 473(b) of the Code of Civil Procedure* to show that the failure to act within the prescribed time was due to mistake, inadvertence, surprise, or

excusable neglect (*Fairfield v. Ahlstrom (1962) 206 Cal. App. 2d 590, 592, 24 Cal. Rptr. 70*).

B. Showing Required. The party seeking relief under *Section 473(b) of the Code of Civil Procedure* is required to show a reasonable excuse for the delay as well as diligence in giving notice of the motion for relief (*Nutting v. Herman Timber Co. (1963) 214 Cal. App. 2d 650, 659, 29 Cal. Rptr. 754*).

[*Insert other memoranda, as appropriate.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion for relief from failure to file a timely memorandum of costs under *Cal. Rules of Ct., Rule 3.1700(a)(1)*, by the party seeking costs, or in opposition to a motion for relief from failure to file a timely motion to strike or tax costs, under *Cal. Rules of Ct., Rule 3.1700(b)(1)*, by the party opposing the costs bill.

This form should be combined, as appropriate, with memoranda *in § 60.151* et seq.

See also *§ 60.120[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.120[2][b]* regarding evidentiary support for facts

[c] Opposing Memoranda

For opposing memoranda, see *§ 60.120 et seq. and § 60.140* et seq.

[3] Discussion of Authorities

[a] Burden of Proof

In ***Fairfield v. Ahlstrom*** *(1962) 206 Cal. App. 2d 590, 24 Cal. Rptr. 70* , the court granted a motion for nonsuit in an action for libel and malicious abuse of process. Defendant filed his memorandum of costs late, and plaintiff moved to strike the memorandum on that ground. Defendant then filed a motion for relief under *Code Civ. Proc. § 473(b)*. The trial court granted the motion to strike the memorandum and denied the motion for relief, and defendant appealed from the order denying relief. In his affidavit in support of the motion for relief, defendant's attorney had stated that his failure to file the memorandum within the statutory time [former *Code Civ. Proc. § 1033*; *now see Cal. Rules of Ct.,*

Rule 3.1700(a)(1)] was due to his work load and to his difficulty in verifying the amounts of the items of taxable costs. The court of appeal affirmed the trial court's order and stated that the burden of proving that the failure to act within the time allowed by statute [former *Code Civ. Proc. § 1033*] was due to mistake, inadvertence, surprise, or excusable neglect was on the party seeking relief, and that plaintiff had made a very weak case (*206 Cal. App. 2d 590, 592)* .

[b] Showing Required

In ***Nutting v. Herman Timber Co.*** *(1963) 214 Cal. App. 2d 650, 29 Cal. Rptr. 754* , an action to quiet title, counsel for both plaintiff and defendant had been unaware that the trial court had signed findings submitted by plaintiff and entered judgment before receiving defendant's objections to the findings. Plaintiff 's counsel learned of the judgment 24 days after it was entered and did not submit his memorandum of costs until eight days after that. He filed his notice of motion for relief under *Code Civ. Proc. § 473(b)* from his late filing at the same time he submitted his cost memorandum. Defendant's counsel filed opposition to the motion in which he pointed out that plaintiff 's delay in filing the memorandum of costs had prevented defendant from learning of the entry of judgment and thereby prevented him from filing a notice of intention to move for a new trial within the time prescribed by law. The trial court denied plaintiff 's motion for relief. Defendant appealed from the judgment for plaintiff and plaintiff cross appealed from the order denying his motion for relief. In affirming the order, the court of appeal stated that relief from failure to file a memorandum of costs within the time prescribed by former Code Civ. Proc. § 1033 (repealed in 1986; *now see Cal. Rules of Ct., Rule 3.1700(a)(1)*) may be given under *Code Civ. Proc. § 473* and that denial or allowance of relief rests in the exercise of a sound discretion by the trial court. The court said that the moving party seeking relief must have a reasonable excuse for the original delay and must also make a showing of diligence in giving notice of a motion for relief after discovery of the default. If the trial court believed that the eight days that plaintiff had allowed to elapse before filing his notice of motion was a delay designed to prevent defendant from becoming aware of the judgment until the time to move for a new trial had expired, then the delay was neither reasonable nor inadvertent. The court held that the trial court was entitled to so believe and that denial of the motion was not an abuse of discretion (*214 Cal. App. 2d 650, 659)* .

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6-60 California Points & Authorities § 60.151

§ 60.151 Opposing Motion for Relief for Untimely Filing of Memorandum of Costs or Motion to Tax Costs--Press of Business

[1] FORM Opposing Motion for Relief for Untimely Filing of Memorandum of Costs or Motion to Tax Costs--Press of Business

[*For caption, see § 60.150.*]

THE MOTION FOR RELIEF FROM FAILURE TO FILE A MEMORANDUM OF COSTS WITHIN THE TIME PRESCRIBED BY *RULE 3.1700(a)(1) OF THE CALIFORNIA RULES OF COURT* SHOULD BE DENIED BECAUSE "PRESS OF BUSINESS" IS AN INSUFFICIENT GROUND FOR RELIEF.

Press of Business. Although the Supreme Court has found that a trial court's granting of a motion under *Section 473(b) of the Code of Civil Procedure* on the ground of "press of business" was not an abuse of discretion (*Pollard v. Saxe & Yolles Dev. Co. (1974) 12 Cal. 3d 374, 381, 115 Cal. Rptr. 648, 525 P.2d 88*), "press of business" has been held to be an insufficient ground to warrant relief under *Section 473(b) of the Code of Civil Procedure* (*Dow v. Ross (1891) 90 Cal. 562, 563-564, 27 P. 409* ; *Fairfield v. Ahlstrom (1962) 206 Cal. App. 2d 590, 592, 24 Cal. Rptr. 70*).

[2] Comments

[a] Use of Form

This form may be combined with those in § 60.151, in opposition to a motion for relief from failure to file a memorandum of costs within the time prescribed by *Cal. Rules of Ct., Rule 3.1700(a)(1)*, on the ground that the press of business is insufficient to warrant relief.

See also *§ 60.120[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.120[2][b]* regarding evidentiary support for facts

[c] Opposing Memoranda

For opposing memoranda, see *§ 60.123*.

[3] Discussion of Authorities

[a] Press of Business

In ***Dow v. Ross*** *(1891) 90 Cal. 562, 27 P. 409* , defendant filed his memorandum of costs beyond the statutory time, but the clerk entered the costs in the judgment. Plaintiff moved to strike the costs from the judgment on the ground that the memorandum was filed late. Defendant's attorney apparently requested relief under *Code Civ. Proc. § 473* on the ground that his failure to timely file the memorandum was due to what would amount to "press of business." The trial court granted the motion to strike the costs and denied defendant's request for relief. Defendant appealed. In affirming, the Supreme Court held that, conceding without deciding that relief can be granted under *Code Civ. Proc. § 473* on a proper showing, such relief was properly denied on an affidavit showing mere forgetfulness on the part of the attorney to file the memorandum in time owing to the press of other business, and said that the showing made was insufficient to authorize the relief asked for (*90 Cal. 562, 564)* .

The facts and procedural background of ***Fairfield v. Ahlstrom*** *(1962) 206 Cal. App. 2d 590, 24 Cal. Rptr. 70* , are discussed in *§ 60.150[3][a]*. In affirming the order denying the motion for permission to file a late memorandum of costs, the court of appeal said that it is settled that an attorney's occupation with other matters affords insufficient grounds to warrant relief under *Code Civ. Proc. § 473*. Quoting *Willett v. Schmeister Mfg. Co. (1926) 80 Cal. App. 337, 340, 251 P. 932* , the court added that unusual press of business is not a legal excuse, and that to accept this as legal justification for the failure to comply with the statute [former *Code Civ. Proc. § 1033*; *now see Cal. Rules of Ct., Rule 3.1700(a)(1)*] would be to discourage diligence in the prosecution of appeals and establish a precedent that might lead to vexatious delays (*206 Cal. App. 2d 590, 592)* .

The status of the above two cases is uncertain in view of the holding in ***Pollard v. Saxe & Yolles Dev. Co.*** *(1974) 12 Cal. 3d 374, 115 Cal. Rptr. 648, 525 P.2d 88* , which is discussed in *§ 60.123*. In *Pollard*, the Supreme Court affirmed the order granting relief from a failure to timely file a costs bill because of the press of other matters. As pointed out in the discussion of that case in § 60.123, the Supreme Court did not identify what the matters were or discuss the elements necessary to establish this excuse. It is, therefore, not clear whether the intent of the Supreme Court was to overrule prior Supreme Court cases, such as *Dow, above*, or disapprove prior court of appeal cases, such as *Fairfield, above*. Because in each of the three cases the appellate court was affirming the order of the trial court, the true rule might be no more than that the granting of relief on the ground of press of business depends on the facts of the case and lies within the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of a showing of abuse of that discretion.

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6-60 California Points & Authorities § 60.152

§ 60.152 Opposing Motion for Relief for Untimely Filing of Memorandum of Costs or Motion to Tax Costs--Denial for Prejudice

[1] FORM Opposing Motion for Relief for Untimely Filing of Memorandum of Costs or Motion to Tax Costs--Denial for Prejudice

[*For caption, see § 60.150.*]

THE MOTION FOR RELIEF FROM FAILURE TO FILE A MEMORANDUM OF COSTS WITHIN THE TIME PRESCRIBED BY *RULE 3.1700(a)(1) OF THE CALIFORNIA RULES OF COURT* SHOULD BE DENIED BECAUSE GRANTING THE MOTION WOULD RESULT IN PREJUDICE TO _____ [*opposing party, e.g.,* DEFENDANT].

Denial for Prejudice. Relief may be granted on any terms as may be just (*Code Civ. Proc. § 473(b)*). A motion for relief from failure to file a memorandum of costs within the time prescribed by law should not be granted if the opposing party will be prejudiced (*see Pollard v. Saxe & Yolles Dev. Co. (1974) 12 Cal. 3d 374, 381, 115 Cal. Rptr. 648, 525 P.2d 88*).

[2] Comments

[a] Use of Form

This form may be combined with those in § 60.151, in opposition to a motion for relief from failure to file a memorandum of costs within the time prescribed by *Cal. Rules of Ct., Rule 3.1700(a)(1),* on the ground that counsel's client will be prejudiced by a grant of relief.

See also *§ 60.120[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.120[2][b]* regarding evidentiary support for facts.

[3] Discussion of Authorities

[a] Denial for Prejudice

The facts and background of ***Pollard v. Saxe & Yolles Dev. Co.*** *(1974) 12 Cal. 3d 374, 115 Cal. Rptr. 648, 525 P.2d 88* , are discussed in *§ 60.120[3][e]*. In affirming the order granting relief from the late filing of the cost bill, the Supreme Court, citing *Reese v. Borghi (1963) 216 Cal. App. 2d 324, 333-334, 30 Cal. Rptr. 868* , and *LeDeit v. Ehlert (1962) 205 Cal. App. 2d 154, 169-170, 22 Cal. Rptr. 747* , stated that in the absence of prejudice, the trial court has broad discretion in allowing relief on the grounds of inadvertence from failure to timely file a cost bill (*12 Cal. 3d 374, 381)* .

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6-60 California Points & Authorities §§ 60.153-60.159

[Reserved]

§§ 60.153[Reserved]

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6-60 California Points & Authorities § 60.160

§ 60.160 Supporting Motion to Amend Memorandum of Costs

[1] FORM Supporting Motion to Amend Memorandum of Costs
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION TO
vs.	)	AMEND MEMORANDUM OF COSTS
_____ [*name*], Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Date Action Filed: _____

_____

THE MOTION FOR AN ORDER GRANTING LEAVE TO AMEND THE MEMORANDUM OF COSTS SHOULD BE GRANTED BECAUSE THE AMENDMENT IS JUST AND NECESSARY.

A. Discretion of Court to Allow Amendment. The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any proceeding by correcting a mistake in any respect and may likewise, in its discretion, after notice to the adverse party, allow on such terms as may be just, an amendment to any proceeding (*Code Civ. Proc. § 473(a)(1)*).

B. Amending Cost Bill. The trial court has the right under *Section 473 of the Code of Civil Procedure* to allow such amendments to a cost bill as appear just and necessary when a party to the action has moved to tax the costs claimed by the other party (*Puppo v. Larosa (1924) 194 Cal. 721, 724, 230 P. 440* ; *see also Ferry v. O'Brien (1923) 63 Cal.*

App. 620, 625, 219 P. 467).

[*Insert other memoranda, as appropriate.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion requesting leave to amend a cost bill or to file an amended cost bill.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case.

Counsel should submit cognizable evidence in supports of factual statements, by request for judicial notice (*e.g.*, when a court must order the event for which costs are claimed and no order was issued) [*see Evid. Code § 450 et seq.*, or otherwise by affidavits or declarations. Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

In addition to submitting affidavits or declarations in support of the motion, counsel should attach a copy of the proposed amended cost bill.

[c] Related Pleading and Practice Chapters

For a form of notice of motion for an order striking a memorandum of costs and allowing the filing of an amended memorandum, along with a form of supporting declaration and a form of order granting the motion, see California Forms of Pleading and Practice, Ch. 174, *Costs and Attorney's Fees* (Matthew Bender).

[3] Discussion of Authorities

[a] Discretion of Court to Allow Amendment

Code Civ. Proc. § 473(a)(1) provides that the court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any proceeding by correcting a mistake in any respect and may likewise, in its discretion, after notice to the adverse party, allow on such terms as may be just, an amendment to any proceeding.

[b] Amending Cost Bill

In ***Puppo v. Larosa*** *(1924) 194 Cal. 721, 230 P. 440* , defendant filed a motion to tax costs claimed in plaintiff 's cost bill. Before the final hearing on the motion to tax, plaintiff was permitted to file an amended cost bill that was the same as the original cost bill except for more detail explaining the nature of and reasons for certain expenditures. Defendant then filed another motion to tax costs as well as a motion to strike the amended cost bill. The trial court denied both motions and defendant appealed from those orders. The Supreme Court affirmed and, citing *Code Civ. Proc. § 473*, said that the right of a trial court, when a party to the action has moved for taxation of the other's costs, to allow such amendments to a cost bill as appear just and necessary has always been recognized in this state (*194 Cal. 721, 724)* .

Ferry v. O'Brien *(1923) 63 Cal. App. 620, 219 P. 467* , involved appeals from an order granting motions to strike out a cost bill, file a new one, and vacate the judgment entered on the first cost bill, and from an order refusing to vacate the order granting the motions. Respondent had filed a memorandum of costs on appeal in a prior appeal. Respondent's motion to file a new cost bill was made on the ground that the former one was not correct due to inadvertence and mistake. Respondent also made a motion to vacate the judgment for costs on appeal that had already been entered, on the ground that it was for a smaller amount than it should have been because of respondent's inadvertence and mistake. The court of appeal affirmed, stating that while a motion to amend might have been the better practice, no authority has been cited holding that proceeding by a motion to strike out the first cost bill and for leave to file a new one was not permissible. The court stated that the facts presented to the trial court entitled respondent to relief under *Code Civ. Proc. § 473* (*63 Cal. App. 620, 625-626)* .

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6-60 California Points & Authorities §§ 60.161-60.299

[Reserved]

§§ 60.161[Reserved]

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B. Award of Attorney's Fees
1. Motion for Award of Attorney's Fees Under Common Fund Exception

6-60 California Points & Authorities § 60.300

§ 60.300 Supporting Motion for Award of Attorney's Fees Under Common Fund Exception--General Form

[1] FORM Supporting Motion for Award of Attorney's Fees Under Common Fund Exception--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM IN SUPPORT OF MOTION FOR
_____ [*name*], Defendant.	)	AWARD OF ATTORNEY'S FEES
	)	
	)	

IT IS PROPER FOR THE COURT TO AWARD ATTORNEY'S FEES IN THIS ACTION TO _____ [*specify party, e.g.,* PLAINTIFF] _____ [*name*] ON THE BASIS OF THE COMMON FUND THEORY, AND SUCH FEES SHOULD BE AWARDED IN THE INTERESTS OF JUSTICE.

A. General Rule. Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys is left to the express or implied agreement of the parties (*Code Civ. Proc. § 1021*).

B. Equitable Exceptions. The courts have fashioned equitable exceptions to the general rule of *Section 1021 of the Code of Civil Procedure.* Three such exceptions are the common fund theory, the substantial benefit theory, and the private attorney general theory (*Serrano v. Priest (1977) 20 Cal. 3d 25, 34, 43, 141 Cal. Rptr. 315, 569 P.2d 1303*).

C. Common Fund Theory. One who expends attorney's fees in winning a suit which creates a fund from which others derive benefits may require the passive beneficiaries to bear a fair share of the litigation costs, including attorney's fees (

Serrano v. Priest (1977) 20 Cal. 3d 25, 35, 141 Cal. Rptr. 315, 569 P.2d 1303 ; *Melendres v. Los Angeles (1975) 45 Cal. App. 3d 267, 272-273, 119 Cal. Rptr. 713*).

D. Rationale for Common Fund Exception. The bases of the common fund exception are: (1) fairness to the successful litigant, who might otherwise receive no benefit because his or her recovery might be consumed by the expenses; (2) correlative prevention of an unfair advantage to the others who are entitled to share in the fund and who should bear their share of the burden of its recovery; (3) encouragement of the attorney for the successful litigant to undertake and diligently prosecute proper litigation for the protection or recovery of the fund by assurances of prompt and direct compensation upon success in the litigation (*Melendres v. Los Angeles (1975) 45 Cal. App. 3d 267, 273-274, 119 Cal. Rptr. 713*).

E. Amount of Fees. The amount of attorney's fees in such cases rests within the trial court's discretion (*Mandel v. Hodges (1976) 54 Cal. App. 3d 596, 623, 127 Cal. Rptr. 244*), after the court has made certain preliminary determinations (*Mandel v. Lackner (1979) 92 Cal. App. 3d 747, 758, 155 Cal. Rptr. 269*).

[*Insert other memoranda, as appropriate.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion for an award of attorney's fees based on the common fund exception to the general rule against awarding attorney's fees not expressly authorized by statute [*Code Civ. Proc. § 1021*]. It should be combined with other memoranda, as appropriate, *set out in § 60.301* et seq.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Evidence cognizable by the court in such a motion proceeding should be submitted with the memorandum to support its factual statements. A request for judicial notice will support facts subject to such notice [*Evid. Code § 450 et seq.*]. Otherwise supporting affidavits or declarations under penalty of perjury should be submitted [*see Code Civ. Proc. §§ 2009* (affidavits), 2015.5 (declarations)], averring to such facts within the personal knowledge of the affiant or declarant as may be necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For forms of notices of motions for attorney's fees with supporting declarations and orders, see California Forms of

Pleading and Practice, Ch. 174, *Costs and Attorney's Fees* (Matthew Bender).

[d] Related Memoranda

Additional memoranda based on the common fund exception are *set out in § 60.301* et seq. Memoranda based on other equitable exceptions and statutory bases for an award of attorney's fees are *set out in § 60.340* et seq. (substantial benefit exception), § 60.370 et seq. (award based on private attorney general theory under *Code Civ. Proc. § 1021.5*), and § 60.440 et seq. (award based on contract pursuant to *Civ. Code § 1717*).

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

For opposing memoranda, see *§ 60.320* et seq.

[3] Discussion of Authorities

[a] General Rule

Code Civ. Proc. § 1021 provides that except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys is left to the express or implied agreement of the parties.

[b] Equitable Exceptions

In ***Serrano v. Priest*** *(1977) 20 Cal. 3d 25, 141 Cal. Rptr. 315, 569 P.2d 1303* , plaintiffs had brought an action which resulted in a prior Supreme Court decision declaring that the existing school finance system was unconstitutional insofar as it operates to deny equality of educational opportunity to the school children of the state. Plaintiff 's attorneys moved the trial court for an award of attorney's fees against defendants. The motions were addressed to the equitable powers of the court and based on three theories: the private attorney general theory, the common fund theory, and the substantial benefit theory. The trial court's award of attorney's fees was based on the private attorney general theory only. Defendants appealed from the order granting fees, and plaintiffs appealed from the denial of fees on the other two theories and also objected to the amount awarded. The Supreme Court affirmed the order awarding fees on the basis of the private attorney general theory, but also discussed the other two equitable theories set out in Paragraph B of this form. For a discussion of the substantial benefit and private attorney general theories, see *§§ 60.340* -60.349 and *§§ 60.370* -60.399.

[c] Common Fund Theory

The facts and procedural background of ***Serrano v. Priest*** *(1977) 20 Cal. 3d 25, 141 Cal. Rptr. 315, 569 P.2d 1303* , are *discussed under § 60.300[3][b]*. In affirming the trials court's order, the Court analyzed the common fund theory. The Court stated that the common fund theory is based on the equitable powers of the court and provides that one who expends attorney's fees in winning a suit which creates a fund from which others derive benefits may require the passive beneficiaries to bear a fair share of the litigation. However, the trial court properly declined to award attorney's fees under this theory as no common fund was created or preserved by the litigation.

In ***Melendres v. Los Angeles*** *(1975) 45 Cal. App. 3d 267, 119 Cal. Rptr. 713* , plaintiff filed a class action on behalf of all police officers and firefighters employed by the City of Los Angeles. Subsequently, the Los Angeles Fire & Police Protective League filed a similar action. The cases were consolidated and judgment was entered in favor of the entire class. Plaintiff and the league had separate attorneys, and the league had a written fee agreement with its attorneys

providing for an hourly fee. Attorney's fees were requested by both sets of counsel for plaintiffs and the trial court granted the request, awarding the attorneys different percentages of the common fund recovered on behalf of the class. Plaintiffs appealed from the order awarding the fees, objecting to the distribution of the fees. Though the court of appeal modified the amounts awarded in the order, it approved the common fund theory as the basis of the award stating that California is in accord with the rule that the attorney whose client is the plaintiff in a class action suit is entitled to attorney's fees from all members of the class benefited if a fund is obtained or protected and brought into court.

[d] Rationale for Common Fund Exception

Melendres v. Los Angeles *(1975) 45 Cal. App. 3d 267, 119 Cal. Rptr. 713* , is discussed in *§ 60.300[3][c]*. In reviewing the development of the common fund exception, the court of appeal set out the bases of the rule, citing *Estate of Stauffer (1959) 53 Cal. 2d 124, 132, 346 P.2d 748* . These bases are: (1) fairness to the successful litigant, who might otherwise receive no benefit because the recovery would be consumed by the expenses; (2) correlative prevention of an unfair advantage to the others who are entitled to share in the fund and who should bear their share of the burden of its recovery; and (3) encouragement of the attorney for the successful litigant to undertake and diligently prosecute proper litigation for protection or recovery of the fund by assurances of prompt and direct compensation upon success in the litigation.

[e] Amount of Fees

Mandel v. Hodges *(1976) 54 Cal. App. 3d 596, 127 Cal. Rptr. 244* , is discussed in *§ 60.340[3][c]*. In holding that the amount of attorney's fees which was granted by the trial court was not excessive, the court of appeal stated that the amount of an award of attorney's fees rests within the sound discretion of the trial court.

Mandel v. Lackner *(1979) 92 Cal. App. 3d 747, 155 Cal. Rptr. 269* , is discussed in § 60.430[3][b].

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6-60 California Points & Authorities § 60.301

§ 60.301 Supporting Motion for Award of Attorney's Fees Under Common Fund Exception--Award in Class Action

[1] FORM Supporting Motion for Award of Attorney's Fees Under Common Fund Exception--Award in Class Action

[*For caption, see § 60.300, with which this form should be combined.*]

IT IS PROPER FOR THE COURT TO AWARD ATTORNEY'S FEES IN THIS ACTION TO _____ [*specify party, e.g.,* PLAINTIFF] _____ [*name*] ON THE BASIS OF THE COMMON FUND THEORY, WHEN THE ACTION IS A CLASS ACTION.

Award in Class Action. An attorney whose client is the plaintiff in a class action suit is entitled to attorney's fees from all members of the class benefitted if a fund is obtained or protected and brought into court (*Melendres v. Los Angeles (1975) 45 Cal. App. 3d 267, 272, 119 Cal. Rptr. 713*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.300,* in support of a motion for an award of attorney's fees based on the common fund exception to the general rule, on the ground that the award may be made in a class action suit in which the members have benefited.

See also *§ 60.300[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.300[2][b]*

for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Award in Class Action

Melendres v. Los Angeles *(1975) 45 Cal. App. 3d 267, 119 Cal. Rptr. 713* , is discussed in *§§ 60.300[3][c]* and *60.300[3][d]*.

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6-60 California Points & Authorities § 60.302

§ 60.302 Supporting Motion for Award of Attorney's Fees Under Common Fund Exception--Apportioning Fees When Benefit Received

[1] FORM Supporting Motion for Award of Attorney's Fees Under Common Fund Exception--Apportioning Fees When Benefit Received

[*For caption, see § 60.300, with which this form should be combined.*]

IT IS PROPER FOR THE COURT TO AWARD ATTORNEY'S FEES IN THIS ACTION TO _____ [*specify party, e.g.,* PLAINTIFF] _____ [*name*] ON THE BASIS OF THE COMMON FUND THEORY, WHEN AN INSURER OR OTHER THIRD PERSON IS THE PASSIVE BENEFICIARY OF THE INJURED PARTY'S EFFORTS.

Apportioning Fees When Benefit Received. Where an injured party recovers a judgment from a third party and an insurer or other person recoups payments made to the injured party, the insurer or other person is the passive beneficiary of the injured party's efforts and may be required to contribute toward payment to the litigant's attorney for the services which produced the recovery (*Quinn v. California (1975) 15 Cal. 3d 162, 164-166, 124 Cal. Rptr. 1, 539 P.2d 761* ; *Lee v. State Farm Mut. Auto. Ins. Co. (1976) 57 Cal. App. 3d 458, 466-469, 129 Cal. Rptr. 271*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.300*, in support of a motion for an award of attorney's fees based on the common fund exception to the general rule, when an insurer or other third person is the passive beneficiary of the injured party's efforts.

See also *§ 60.300[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.300[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Apportioning Fees When Benefit Received

Plaintiff in ***Quinn v. California*** *(1975) 15 Cal. 3d 162, 124 Cal. Rptr. 1, 539 P.2d 761* , sustained injuries in the course of his work on the construction of a dam. Plaintiff received worker's compensation benefits for his injury. He then sued the state, which owned the construction site, for its negligence as the proximate cause of his injuries. On the first day of the trial the insurance carrier which had paid workers' compensation benefits to plaintiff filed a lien pursuant to *Lab. Code § 3856* against any judgment that might result. The carrier did not otherwise participate in the litigation. After a judgment in his favor, plaintiff moved for an order apportioning his attorney's fees between himself and his employer since plaintiff 's attorney had performed all the work leading to the recovery. The trial court denied the motion and plaintiff appealed. In reversing the trial court's order, the Supreme Court noted that the Legislature had incorporated the equitable principle of apportionment of attorney's fees under the common fund theory into *Lab. Code § 3856* which includes provisions for attorney's fees in actions where an employee recovers against a third party. The Court stated that by incorporating into the words of the statute the precepts of equity which requires a passive beneficiary to recompense his or her actively litigating benefactor, the Legislature has directed our courts to apportion fees in relation to benefits. The Court directed the court on remand to first calculate a reasonable attorney's fee reflecting the total services rendered to both beneficiaries of the recovery, and then to make a reasonable apportionment of the fee between the parties benefited by the recovery. The Court stated that an employer which receives its fair share of the recovery must bear its fair share of the cost of the recovery.

In ***Lee v. State Farm Mut. Auto Ins. Co.*** *(1976) 57 Cal. App. 3d 458, 129 Cal. Rptr. 271* , plaintiffs appealed from the portion of a summary judgment which declared as valid provisions in automobile insurance policies issued by defendant requiring plaintiffs to reimburse defendant for certain medical payments received by plaintiffs pursuant to the insurance agreement. Defendant appealed from the portion of the judgment which required it to pay a pro rata share of attorney's fees incurred by plaintiffs in securing a settlement or recovery from a third party, out of which the reimbursement was required. The court of appeal held that the trial court had properly held valid the so-called "subrogation provisions" of defendant's insurance policy. The court of appeal also held that the lower court had properly ordered defendant to pay a pro rata share of attorney's fees. The court stated that the application of the equitable common fund doctrine for an award of attorney's fees had been extended by the Supreme Court in *Quinn v. California (1975) 15 Cal. 3d 162, 124 Cal. Rptr. 1, 539 P.2d 761* , discussed *above*, and that the common fund doctrine also must apply to the case before the court. Unless defendant was ordered to pay a pro rata share of plaintiffs' attorney's fees and costs, defendant as a passive beneficiary would be unjustly enriched by reimbursement of medical payments as required by the provisions of the insurance contract.

[4] Additional Authorities

[a] Apportioning Fees When Benefit Received

In *Steinberg v. Allstate Ins. Co. (1990) 226 Cal. App. 3d 216, 277 Cal. Rptr. 32* , the court of appeal affirmed an award directing a insurer to pay attorney's fees to two law firms from its subrogation recovery. It noted that the insurer's subrogation recovery was a benefit received almost entirely through the efforts of the two firms, and that the role of the insurer's own attorneys in obtaining the recovery was only minimal (*226 Cal. App. 3d 216, 221-223)* .

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1. Motion for Award of Attorney's Fees Under Common Fund Exception

6-60 California Points & Authorities § 60.303

§ 60.303 Supporting Motion for Award of Attorney's Fees Under Common Fund Exception--Equitable Action Protecting Contract Rights of Members of Association

[1] FORM Supporting Motion for Award of Attorney's Fees Under Common Fund Exception--Equitable Action Protecting Contract Rights of Members of Association

[*For caption, see § 60.300, with which this form should be combined.*]

IT IS PROPER FOR THE COURT TO AWARD ATTORNEY'S FEES IN THIS ACTION TO _____ [*specify party, e.g.,* PLAINTIFF] _____ [*name*] ON THE BASIS OF THE COMMON FUND THEORY, WHEN MEMBERS OF AN ASSOCIATION HAVE MAINTAINED A SUCCESSFUL EQUITABLE ACTION RESULTING IN THE PROTECTION OF RIGHTS.

Equitable Action Protecting Contract Rights of Members of Association. When some members of an association maintain a successful equitable action resulting in the protection of rights in a common fund of members of the association under a contract between the members and the association, those who brought the action are entitled to recover attorney's fees (*Weber v. Marine Cooks' & Stewards' Ass'n. (1949) 93 Cal. App. 2d 327, 340-341, 208 P.2d 1009*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.300*, in support of a motion for an award of attorney's fees based on the common fund exception to the general rule, when members of an association have maintained a successful equitable action resulting in the protection of rights.

See also *§ 60.300[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.300[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Equitable Action Protecting Contract Rights of Members of Association

In ***Weber v. Marine Cooks' & Stewards' Ass'n*** *(1949) 93 Cal. App. 2d 327, 208 P.2d 1009* , plaintiffs brought an action for declaratory relief involving the status of the constitution and bylaws of defendant labor union. The trial court found that the labor union had not complied with the provisions of the original and controlling constitution in its attempted adoption of a new constitution. In affirming the judgment for plaintiffs, the court of appeal stated that attorney's fees should be paid to plaintiffs' attorneys. The court stated that when a common fund is maintained for the benefit of a number of persons bound together by an association, and a contract exists between the association and its members directing the course of action for changing the rights of the members, and an effort is made to break the contract and substitute another which impairs and injures the right of the members, then attorney's fees may be recovered in the successful maintenance of an equitable action by some of the members which results in the protection of the original contract rights. The court stated that the fees could be recovered even though no actual court order to return the erroneously spent funds had been made.

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6-60 California Points & Authorities § 60.304

§ 60.304 Supporting Motion for Award of Attorney's Fees Under Common Fund Exception--Award Directly to Attorney

[1] FORM Supporting Motion for Award of Attorney's Fees Under Common Fund Exception--Award Directly to Attorney

[*For caption, see § 60.300, with which this form should be combined.*]

IT IS PROPER FOR THE COURT TO AWARD ATTORNEY'S FEES IN THIS ACTION TO _____ [*specify party, e.g.,* PLAINTIFF] _____ [*name*] ON THE BASIS OF THE COMMON FUND THEORY, DIRECTLY TO THE ATTORNEY.

Award Directly to Attorney. A court awarding attorney's fees in the exercise of its equitable powers may award them directly to the attorney (*Serrano v. Priest (1977) 20 Cal. 3d 25, 47 n.21, 141 Cal. Rptr. 315, 569 P.2d 1303*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.300,* in support of a motion for an award of attorney's fees based on the common fund exception to the general rule, on the ground that the award may be made directly to the attorney.

See also *§ 60.300[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.300[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Award Directly to Attorney

The facts and procedural background of ***Serrano v. Priest*** *(1977) 20 Cal. 3d 25, 141 Cal. Rptr. 315, 569 P.2d 1303* , are discussed in *§ 60.300[3][b]*. In affirming the order awarding attorney's fees to plaintiffs' attorneys, the Supreme Court stated that California courts may in the exercise of their equitable powers award attorney's fees directly to a party's attorney.

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[Reserved]

§§ 60.305[Reserved]

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6-60 California Points & Authorities § 60.320

§ 60.320 Opposing Motion for Award of Attorney's Fees Under Common Fund Exception--General Form

[1] FORM Opposing Motion for Award of Attorney's Fees Under Common Fund Exception--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM IN OPPOSITION TO MOTION
_____ [*name*], Defendant.	)	TO AWARD ATTORNEY'S FEES
	)	
	)	

IT IS NOT PROPER FOR THE COURT TO AWARD ATTORNEY'S FEES TO _____ [*specify party, e.g.,* PLAINTIFF] _____ [*name*] ON THE BASIS OF THE COMMON FUND THEORY [BECAUSE _____ (*state applicable grounds*)].

A. General Rule. Except when attorney's fees are specifically provided for by statute, the measure and mode of compensation is left to the express or implied agreement of the parties (*Code Civ. Proc. § 1021*). Such fees are generally not recoverable from the opposing party unless there is an express statutory or contractual provision providing for them (*Russell v. Carleson (1973) 36 Cal. App. 3d 334, 348, 111 Cal. Rptr. 497*).

B. Rationale for Common Fund Exception. An equitable exception to the general rule permits surcharging a common fund with the expenses, including attorney's fees, of its protection or recovery. This rule, however, should be applied only if the following criteria will be satisfied: (1) fairness to the successful litigant who might otherwise receive no benefit because his or her recovery would be consumed by the expenses; (2) correlative prevention of an unfair

advantage to those who are entitled to share in the fund and should bear their share of the burden of its recovery; and (3) encouragement of the attorney for the successful litigant who will be more willing to undertake and diligently prosecute the litigation if assured of prompt and direct compensation for successful efforts (*Estate of Korthe (1970) 9 Cal. App. 3d 572, 575, 88 Cal. Rptr. 465*).

[*Insert other memoranda, as appropriate.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion for attorney's fees based on the common fund exception to the general rule of *Code Civ. Proc. § 1021*. It should be combined with additional memoranda, as appropriate, *set out in § 60.321* et seq.

See also *§ 60.300[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.300[2][b]* for discussion of evidentiary support.

[c] Related Memoranda

Additional memoranda based on the common fund exception are *set out in § 60.321* et seq. If the motion being opposed presents other grounds for an award of attorney's fees, memoranda appropriate to opposing those grounds should be added [*see § 60.340* et seq. (substantial benefit exception), § 60.370 et seq. (award based on private attorney general theory under *Code Civ. Proc. § 1021.5*), and § 60.440 et seq. (award based on contract pursuant to *Civ. Code § 1717*)]. For memoranda for opposing the motion on the ground that the award of attorney's fees sought is excessive, see *§ 60.550*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Memoranda

For opposing memoranda, see *§§ 60.300* -60.319.

[3] Discussion of Authorities

[a] General Rule

In ***Russell v. Carleson*** *(1973) 36 Cal. App. 3d 334, 111 Cal. Rptr. 497* , plaintiffs appealed from a judgment denying them a writ of mandate and injunctive relief in their class action challenging the constitutionality of Welf. & Inst. Code § 11351.1 (financial contribution by unrelated adult male living with family applying for aid under Aid to Families with Dependent Children). The court of appeal affirmed the judgment. On appeal, plaintiffs also contended that the trial court erred in denying their request for statutory attorney's fees under their fourth cause of action and on equitable grounds in their first three causes of action. In upholding the trial court's rulings, the court of appeal stated that the general rule is that attorney's fees are not recoverable from the opposing party in the absence of an express statutory provision or contractual agreement. The court then set out the common fund and "common benefit" (substantial benefit) exceptions to the general rule, stating that litigation success is a necessary predicate to invoking these doctrines. Except in one respect involving the third cause of action, plaintiffs were unsuccessful. The court added that even if a case comes within the doctrine, plaintiff may not be entitled to recover attorney's fees under all circumstances, and the allowance of the fees rests largely in the discretion of the trial court (*36 Cal. App. 3d 334, 348)* .

[b] Rationale for Common Fund Exception

In ***Estate of Korthe*** *(1970) 9 Cal. App. 3d 572, 88 Cal. Rptr. 465* , a settlement was reached in a will contest. The executor appealed from the probate court's order that the executor of the estate pay attorney's fees out of the assets of the estate to the attorney for five of the residuary legatees on the basis that the attorney had rendered services in preservation of a common fund. Most of the beneficiaries had joined in the will contest and were represented by various counsel on a contingent fee basis. In reversing the order, the court of appeal stated that although a court may award attorney's fees from a common fund to an attorney who has succeeded in preserving that fund when equity requires the award, the court may not do so when there are multiple beneficiaries and all, or substantially all, are represented by counsel.

The court examined the rationale for the equitable rule as set out by the Supreme Court in *Estate of Stauffer (1959) 53 Cal. 2d 124, 132, 346 P.2d 748* , and stated that it only applies where a single beneficiary takes the risk and expense of litigation while the others do nothing. In this case the benefit of the recovery would not be consumed by the litigation expenses because the clients whose lawyer was awarded the fees had contingent fee agreements as did the other beneficiaries with their counsel. No unfair advantage would flow to the other beneficiaries as they participated in the contest. The aim of encouraging diligence of counsel was also satisfied by the contingent fee arrangements (*9 Cal. App. 3d 572, 575)* .

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6-60 California Points & Authorities § 60.321

§ 60.321 Opposing Motion for Award of Attorney's Fees Under Common Fund Exception--Identifiable Fund Required

[1] FORM Opposing Motion for Award of Attorney's Fees Under Common Fund Exception--Identifiable Fund Required

[*For caption, see § 60.320, with which this form should be combined.*]

IT IS NOT PROPER FOR THE COURT TO AWARD ATTORNEY'S FEES TO _____ [*specify party, e.g.,* PLAINTIFF] _____ [*name*] ON THE BASIS OF THE COMMON FUND THEORY BECAUSE THAT PARTY'S EFFORTS HAVE NOT EFFECTED THE CREATION OR PRESERVATION OF AN IDENTIFIABLE FUND OF MONEY.

Identifiable Fund Required. If plaintiff 's efforts have not effected the creation or preservation of an identifiable fund of money out of which the attorney's fees are to be paid, the common fund exception is not applicable (*Serrano v. Priest (1977) 20 Cal. 3d 25, 35, 37-38, 141 Cal. Rptr. 315, 569 P.2d 1303*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.320*, in opposition to a motion for attorney's fees based on the common fund exception to the general rule of *Code Civ. Proc. § 1021*, when the moving party's efforts have not effected the creation or preservation of an identifiable fund of money.

See also *§ 60.300[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.300[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Identifiable Fund Required

In ***Serrano v. Priest*** *(1977) 20 Cal. 3d 25, 141 Cal. Rptr. 315, 569 P.2d 1303* , plaintiffs had brought an action which resulted in a prior Supreme Court decision declaring that the existing school finance system was unconstitutional insofar as it operates to deny equality of educational opportunity to the schoolchildren of the state. Plaintiff 's counsel made a motion for an award of attorney's fees to be paid by defendants. The motions were addressed to the equitable powers of the court and based on three theories: the private attorney general theory, the common fund theory, and the substantial benefit theory. The trial court's award was based on the private attorney general theory, only. Defendants appealed from the order granting fees, and plaintiffs appealed from the denial of fees on the other two theories and also objected to the amount awarded. The Supreme Court affirmed the order. In agreeing with the trial court's decision that plaintiffs were not entitled to attorney's fees under the common fund theory, an equitable exception to the general rule, the Court stated that plaintiff 's efforts had not effected the creation or preservation of an identifiable fund of money out of which the fees they had requested could be paid and the exception, therefore, did not apply (*20 Cal. 3d 25, 35-38)* .

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6-60 California Points & Authorities § 60.322

§ 60.322 Opposing Motion for Award of Attorney's Fees Under Common Fund Exception--Litigation Success Required

[1] FORM Opposing Motion for Award of Attorney's Fees Under Common Fund Exception--Litigation Success Required

[*For caption, see § 60.320, with which this form should be combined.*]

IT IS NOT PROPER FOR THE COURT TO AWARD ATTORNEY'S FEES TO _____ [*specify party, e.g.,* PLAINTIFF] _____ [*name*] ON THE BASIS OF THE COMMON FUND THEORY BECAUSE THAT PARTY HAS NOT BEEN SUCCESSFUL IN THE LITIGATION.

Litigation Success Required. The party seeking attorney's fees under the "common fund" or "common benefit" (substantial benefit) theory, must have been successful in the litigation (*Russell v. Carleson (1973) 36 Cal. App. 3d 334, 348, 111 Cal. Rptr. 497*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.320,* in opposition to a motion for attorney's fees based on the common fund exception to the general rule of *Code Civ. Proc. § 1021,* when the moving party has not been successful in the litigation.

See also *§ 60.300[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.300[2][b]*

for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Litigation Success Required

Russell v. Carleson *(1973) 36 Cal. App. 3d 334, 111 Cal. Rptr. 497* , is discussed in *§ 60.320[3][a]*.

[4] Additional Authorities

[a] Litigation Success Required

In *Johnson v. Tago, Inc. (1986) 188 Cal. App. 3d 507, 233 Cal. Rptr. 503* , the court of appeal reversed that portion of an order for a preliminary injunction ordering proxy expenses and attorney's fees of shareholder/officers to be paid from the corporate treasury. The court said that even if the award of attorney's fees in connection with a proxy fight and election or ouster of officers could be sustained under the substantial benefit theory, such an award at the preliminary injunction stage was premature (*188 Cal. App. 3d 507, 518)* .

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6-60 California Points & Authorities § 60.323

§ 60.323 Opposing Motion for Award of Attorney's Fees Under Common Fund Exception--Interests Adverse to Fund

[1] FORM Opposing Motion for Award of Attorney's Fees Under Common Fund Exception--Interests Adverse to Fund

[*For caption, see § 60.320, with which this form should be combined.*]

IT IS NOT PROPER FOR THE COURT TO AWARD ATTORNEY'S FEES TO _____ [*specify party, e.g.,* PLAINTIFF] _____ [*name*] ON THE BASIS OF THE COMMON FUND THEORY, BECAUSE THAT PARTY'S ULTIMATE OBJECTIVE IS TO ESTABLISH PERSONAL ADVERSE INTERESTS IN THE FUND.

Interests Adverse to Fund. Attorney's fees may not be awarded under the common fund theory if the ultimate objective of the client and the attorney is not to recover or preserve a common fund but to establish personal adverse interests in the fund (*Gabrielson v. Long Beach (1961) 56 Cal. 2d 224, 229, 14 Cal. Rptr. 651, 363 P.2d 883*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.320*, in opposition to a motion for attorney's fees based on the common fund exception to the general rule of *Code Civ. Proc. § 1021*, when the moving party's ultimate objective is to establish personal adverse interests in the fund.

See also *§ 60.300[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.300[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Interests Adverse to Fund

In ***Gabrielson v. Long Beach*** *(1961) 56 Cal. 2d 224, 14 Cal. Rptr. 651, 363 P.2d 883* , petitioner contended that his legal efforts on behalf of his client (a taxpayer) had secured oil and gas revenues for the state and that he was entitled to reasonable attorney's fees from that fund. The trial court entered judgment denying an award of attorney's fees based on its decision that the ultimate objective of petitioner and his client had been to deprive the city and state of all title and interest in the oil and gas contained in the land in question and to prevent the city's expenditure of the revenues from the oil and gas until a mineral leasing application of the corporations in which petitioner and his client had interests was granted and the mineral leases were issued to them. The court of appeal found that this inference from the evidence was reasonable and affirmed the judgment. The court stated that attorney's fees may not be awarded on the basis of the common fund doctrine if the ultimate objective of the attorney and the client is not to secure or preserve a common fund but to establish personal adverse interests in the fund. Such litigation does not call for the added incentive of fees from the common fund if the ultimate objective fails (*56 Cal. 2d 224, 229)* .

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6-60 California Points & Authorities § 60.324

§ 60.324 Opposing Motion for Award of Attorney's Fees Under Common Fund Exception--Primary Beneficiary

[1] FORM Opposing Motion for Award of Attorney's Fees Under Common Fund Exception--Primary Beneficiary

[*For caption, see § 60.320, with which this form should be combined.*]

IT IS NOT PROPER FOR THE COURT TO AWARD ATTORNEY'S FEES TO _____ [*specify party, e.g.,* PLAINTIFF] _____ [*name*] ON THE BASIS OF THE COMMON FUND THEORY, BECAUSE THAT PARTY IS THE PRIMARY BENEFICIARY OF THE FUND.

Primary Beneficiary. The court may properly deny recovery of attorney's fees under the common fund theory if the successful litigant is the primary beneficiary of the fund recovered or preserved (*In re Trinity Tractor Co. (1970) 3 Cal. App. 3d 428, 445, 83 Cal. Rptr. 783* ; *Baker v. Pratt (1986) 176 Cal. App. 3d 370, 222 Cal. Rptr. 253*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.320,* in opposition to a motion for attorney's fees based on the common fund exception to the general rule of *Code Civ. Proc. § 1021,* when the moving party is the primary beneficiary of the fund.

See also *§ 60.300[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.300[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Primary Beneficiary

In re Trinity Tractor Co. *(1970) 3 Cal. App. 3d 428, 83 Cal. Rptr. 783* , involved the winding up and dissolution of a corporation under court supervision. CIT Corporation filed objections to the preliminary accounting and to the claims of two creditors. CIT claimed that it was entitled to attorney's fees for presenting and prosecuting its objections to the claims because the result was to increase the fund for all unsecured creditors. The court denied this request, and CIT appealed from the portion of the court's order denying attorney's fees, asserting its right to attorney's fees under the common fund exception to the general rule. The court of appeal affirmed the order, stating that the allowance of attorney's fees under such circumstances rests largely in the discretion of the trial court and should not be reversed unless there was a clear abuse of discretion. CIT was the primary beneficiary of its efforts as the only creditor with a substantial claim, except for the creditors whose claims it objected to, and it was proper that CIT should bear its own attorney's fees (*3 Cal. App. 3d 428, 445)* .

In ***Baker v. Pratt*** *(1986) 176 Cal. App. 3d 370, 222 Cal. Rptr. 253* , plaintiff sole minority shareholder sought attorney's fees under the common fund theory following a successful shareholder's derivative action against the sole majority shareholder for breach of fiduciary duty of the corporation for misappropriation of corporate funds and property. The trial court found that the litigation had resulted in substantial benefit to the corporation in that it corrected or prevented an abuse that would be prejudicial to the rights and interests of the corporation or affect the enjoyment of an essential right to the stockholder's interests. Accordingly, it awarded the plaintiff attorney's fees. However, the court of appeal ruled that the plaintiff was not entitled to the award, noting that the plaintiff, being the only affected shareholder, could not claim that his action extended a substantial benefit to a clearly identifiable class of passive beneficiaries who had not had to bear the cost of litigation on his or her own (*176 Cal. App. 3d 370, 377-380)* .

[4] Additional Authorities

[a] Primary Beneficiary

In *Baker v. Pratt (1986) 176 Cal. App. 3d 370, 222 Cal. Rptr. 253* , plaintiff sole minority shareholder sought attorney's fees under the common-fund theory following a successful shareholder's derivative action against the sole majority shareholder for breach of fiduciary duty to the corporation for misappropriation of corporate funds and property. The trial court found that a common fund had been created as a result of the plaintiff 's action, awarding the plaintiff attorney's fees. However, the court of appeal ruled that the plaintiff was not entitled to the award, noting that it was clear that the plaintiff 's ultimate objective was not to secure or preserve a common fund, but rather to establish personal adverse interests in the fund. Plaintiff, being the only affected shareholder, could not claim that there were other passive beneficiaries of his action that should be made to bear their fair share of the litigation costs (*176 Cal. App. 3d 370, 377-379)* .

In *Avikian v. WTC Financial Corp. (2002) 98 Cal. App. 4th 1108, 120 Cal. Rptr. 2d 243* , shareholders alleged that defendants, one of which was the corporation of which they were shareholders, mismanaged or looted the assets of the corporation, culminating in its involuntary liquidation. The California Insurance Commissioner had placed the corporation into liquidation. The order specified that the Insurance Commissioner held title to all of the corporation's assets, including all "rights of action," and enjoined all persons from instituting or prosecuting actions or proceedings against the corporation without the court's consent. After the shareholders filed suit, the trial court granted the Commissioner's motion for an order enjoining the further prosecution of the case and denied the shareholders' motion for an order allowing their further prosecution. The court dismissed the shareholders' action with prejudice and granted defendants' motion for attorney's fees pursuant to *Corp. Code § 800*, awarding defendants the full bond for $50,000 which the court had ordered plaintiffs to post to furnish security to cover the reasonable attorney's fees defendants would incur defending a shareholders' derivative action (*98 Cal. App. 4th 1108, 1110-1114)* .

The Court of Appeal affirmed. The shareholders argued that they were entitled to an award of attorney's fees under *Baker v. Pratt*, discussed *above*. The court found that *Baker v. Pratt* makes clear that if corporate shareholders seek to advance their individual interests, rather than the interests of the corporation generally, no fees should be awarded on a common fund or substantial benefit theory. Consequently, to the extent the shareholders were seeking to vindicate individual as opposed to derivative rights, which was an intention they maintained even through appeal, they could not recover fees as a matter of law. Further, although the court rejected their assertion that any of their claims were individual and concluded that all their claims were derivative, the court could not conclude the trial court abused its discretion in refusing to award them fees on those claims. Their attempt to pursue derivative claims on behalf of the corporation was a clear, even if not subjectively intentional, violation of the liquidation restraining order. To the extent they believed the claims to be of value, they were required to proceed in cooperation with the Insurance Commissioner and the liquidation proceeding. Their failure to do so resulted in substantial additional litigation by the Commissioner (*98 Cal. App. 4th 1108, 1117-1118)* .

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6-60 California Points & Authorities § 60.325

§ 60.325 Opposing Motion for Award of Attorney's Fees Under Common Fund Exception--Other Beneficiaries of Fund Represented by Counsel

[1] FORM Opposing Motion for Award of Attorney's Fees Under Common Fund Exception--Other Beneficiaries of Fund Represented by Counsel

[*For caption, see § 60.320, with which this form should be combined.*]

IT IS NOT PROPER FOR THE COURT TO AWARD ATTORNEY'S FEES TO _____ [*specify party, e.g.,* PLAINTIFF] _____ [*name*] ON THE BASIS OF THE COMMON FUND THEORY, BECAUSE SUBSTANTIALLY ALL OF THE INTERESTED PARTIES ARE REPRESENTED BY THEIR OWN ATTORNEYS.

Other Beneficiaries of Fund Represented by Counsel. The court may not award attorney's fees to one party out of a common fund when substantially all of the interested parties are represented by their own attorneys in the same litigation (*Estate of Korthe (1970) 9 Cal. App. 3d 572, 575-576, 88 Cal. Rptr. 465*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.320*, in opposition to a motion for attorney's fees based on the common fund exception to the general rule of *Code Civ. Proc. § 1021*, when substantially all of the interested parties are represented by their own attorneys.

See also *§ 60.300[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.300[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Other Beneficiaries of Fund Represented by Counsel

Estate of Korthe *(1970) 9 Cal. App. 3d 572, 88 Cal. Rptr. 465* , is discussed in *§ 60.320[3][b]*.

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6-60 California Points & Authorities § 60.326

§ 60.326 Opposing Motion for Award of Attorney's Fees Under Common Fund Exception--Lien Claimant Is Plaintiff 's Creditor

[1] FORM Opposing Motion for Award of Attorney's Fees Under Common Fund Exception--Lien Claimant Is Plaintiff 's Creditor

[*For caption, see § 60.320, with which this form should be combined.*]

IT IS NOT PROPER FOR THE COURT TO AWARD ATTORNEY'S FEES TO _____ [*specify party, e.g.,* PLAINTIFF] _____ [*name*] ON THE BASIS OF THE COMMON FUND THEORY, BECAUSE THAT PARTY HAS A DEBTOR-CREDITOR RELATIONSHIP TO THE LIEN CLAIMANT.

Lien Claimant Is Plaintiff 's Creditor. The common fund doctrine does not apply when the relationship of the litigation plaintiff and the lien claimant is that of debtor and creditor; in this instance the amount of the lien may not be reduced or diminished by apportioning attorney fees (City and County of San Francisco v. Sweet (1995) *12 Cal. 4th, 105, 118* , *48 Cal. Rptr. 2d 42, 906 P.2d 1196*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.320*, in opposition to a motion for attorney's fees based on the common fund exception to the general rule of *Code Civ. Proc. § 1021*, when the moving party has a debtor-creditor relationship to the lien claimant.

See also *§ 60.300[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.300[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Lien Claimant Is Plaintiff 's Creditor

In ***City and County of San Francisco v. Sweet*** *(1995) 12 Cal. 4th 105, 48 Cal. Rptr. 2d 42, 906 P.2d 1196* , a pedestrian brought an action against the driver of an automobile that struck and injured plaintiff. The pedestrian then settled with the driver. Plaintiff county, whose hospital facility had treated the injured pedestrian, then brought a separate action against the pedestrian and the attorney who had represented the pedestrian in the prior action, to enforce its lien for services provided by the hospital. Plaintiff sought attorney's fees and a constructive trust, in the amount of its lien, to be placed upon the funds obtained by defendant in the settlement of the prior action. Defendant argued that the amount of attorney's fees sought by plaintiff county should be proportionately reduced under the common fund theory, because defendant had incurred attorney's fees in pursuing recovery against the driver and obtaining the settlement funds that ultimately benefitted plaintiff by providing a fund against which plaintiff could enforce its lien. The trial court ruled on this issue on behalf of the defendant, and the court of appeal affirmed the judgment.

The Supreme Court reversed the judgment, citing with approval Lindsey v. County of Los Angeles (1980) 167 Cal. Rptr. 527 . The court of appeal in *Lindsey* had held that the common fund principle does not apply to a debt owed to a county for medical care provided at public expense. The Supreme Court stated that in common fund cases, three common elements appeared: there would have been no recovery without the litigation; (2) the beneficiaries of the litigation would be paid out of the fund made available by the litigation; (3) the attorney's fees were sought by the sole "active litigant" whose recovery created the fund. In this case, plaintiff county's rights were not contingent on the defendant's successful litigation against a third party; defendant was primarily liable to plaintiff county for the medical treatment he had received (*12 Cal. 4th 105, 114-115)* . Defendant made no effort to explain why equitable principles support apportionment when plaintiff county obtains a lien under *Gov. Code § 23004.1* during the pendency of the injured party's action, when no apportionment is available if the same fund is attached or levied on after payment of the judgment (*12 Cal. 4th 105, 117)* . Therefore, the Court held that the common fund doctrine has no applicability when the relationship of a plaintiff in a prior action for injuries suffered, and a plaintiff county in a subsequent action seeking to enforce a lien for reimbursement for medical services rendered, is that of debtor and creditor; in this situation the amount of the lien may not be reduced or diminished by apportioning attorney's fees. The conclusion, stated the Court, accords with the almost unanimous view of the sister state courts that have considered the question (*12 Cal. 4th 105, 118, 124)* .

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6-60 California Points & Authorities §§ 60.327-60.339

[Reserved]

§§ 60.327[Reserved]

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2. Motion for Award of Attorney's Fees Under Substantial Benefit Exception

6-60 California Points & Authorities § 60.340

§ 60.340 Supporting Motion for Award of Attorney's Fees Under Substantial Benefit Exception--General Form

[1] FORM Supporting Motion for Award of Attorney's Fees Under Substantial Benefit Exception--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM IN SUPPORT OF MOTION FOR
_____ [*name*], Defendant.	)	AWARD OF ATTORNEY'S FEES
	)	
	)	

IT IS PROPER FOR THE COURT TO AWARD ATTORNEY'S FEES IN THIS ACTION TO _____[*specify party, e.g.,* PLAINTIFF] _____ [*name*] ON THE BASIS OF THE SUBSTANTIAL BENEFIT THEORY, AND SUCH FEES SHOULD BE AWARDED IN THE INTERESTS OF JUSTICE.

A. General Rule. [*See § 60.300, Paragraph A.*]

B. Equitable Exceptions. [*See § 60.300, Paragraph B.*]

C. Substantial Benefit Theory. The substantial benefit theory is an outgrowth of the common fund doctrine and permits the award of attorney's fees when the litigant, proceeding in a representative capacity, obtains a decision resulting in a substantial benefit of a pecuniary or nonpecuniary nature (*Serrano v. Priest (1977) 20 Cal. 3d 25, 38, 141 Cal. Rptr. 315, 569 P.2d 1303* ; *Mandel v. Hodges (1976) 54 Cal. App. 3d 596, 620-623, 127 Cal. Rptr. 244*).

D. Requirements for Application of Doctrine. The substantial benefit principle may be a basis for an award of attorney's fees in an action (1) in which the court's equitable powers come into play; (2) which is commenced and maintained as a representative action; and (3) which results in a disposition that confers substantial benefits either pecuniary or nonpecuniary on the persons represented (*Coalition for Los Angeles County Planning in the Public Interest v. Board of Supervisors (1977) 76 Cal. App. 3d 241, 249, 142 Cal. Rptr. 766*).

E. Amount of Fees. [*See § 60.300, Paragraph E.*]

F. Award Directly to Attorney. [*See § 60.304.*]

[*Insert other memoranda, as appropriate.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion for an award of attorney's fees based on the substantial benefit exception to the general rule against awarding attorney's fees unless expressly authorized by statute [*Code Civ. Proc. § 1021*]. It should be combined with other memoranda, as appropriate, *set out in § 60.341* et seq.

Note that this and following forms supporting a motion under the substantial benefit exception may be combined with, or modified to conform with, the memoranda supporting a motion under *Code Civ. Proc. § 1021.5*, which is commonly referred to as the "public interest" or "private attorney general" statute expressly authorizing an award of attorney's fees. These memoranda are *set out in § 60.370* et seq. For all practical purposes, the equitable exception to the general rule against attorney fee awards based on substantial benefit has been, like the private attorney general exception, codified and subsumed under *Code Civ. Proc. § 1021.5*. That statute allows an award when, among other conditions, "a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons" [*Code Civ. Proc. § 1021.5*]. Counsel is advised, in any event, to insure that any motion for an award under the substantial benefit exception also conform to the requirements of *Code Civ. Proc. § 1021.5* [*see § 60.370*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case.

Evidence cognizable by the court in such a motion proceeding should be submitted with the memorandum to support its factual statements. A request for judicial notice will support facts subject to such notice [*Evid. Code § 450 et seq.*]. Otherwise supporting affidavits or declarations under penalty of perjury should be submitted [*see Code Civ. Proc. §§ 2009* (affidavits), 2015.5 (declarations)], averring to such facts within the personal knowledge of the affiant or declarant as may be necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid.*

Code § 702]. For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For forms of notices of motions for attorney's fees with supporting declarations and orders, see California Forms of Pleading and Practice, Ch. 174, *Costs and Attorney's Fees* (Matthew Bender).

[d] Related Memoranda

Additional memoranda based on the substantial benefit exception are *set out in § 60.341* et seq. Points and authorities based on other equitable exceptions and statutory bases for an award of attorney's fees are *set out in § 60.300* et seq. (common fund exception), § 60.370 et seq. (award based on private attorney general theory under *Code Civ. Proc. § 1021.5*), and § 60.440 et seq. based on contract pursuant to *Civ. Code § 1717*). See also the comments regarding *Code Civ. Proc. § 1021.5* in § 60.340[2][a].

For memoranda for use when the action is a shareholder's derivative action, see Ch. 52, *Corporations* , in this set, instead of or in combination with this form.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

For opposing memoranda, see *§ 60.361* et seq.

[3] Discussion of Authorities

[a] General Rule

For discussion, see *§ 60.300[3][a]*.

[b] Equitable Exceptions

For discussion, see *§ 60.300[3][b]*.

[c] Substantial Benefit Theory

The facts and procedural background of ***Serrano v. Priest*** *(1977) 20 Cal. 3d 25, 141 Cal. Rptr. 315, 569 P.2d 1303* , are discussed in § 30.300[3][b]. Though the Supreme Court held that the substantial benefit theory was not applicable under the facts of the case, the Court analyzed the theory. The Court stated that the theory is an outgrowth of the common fund doctrine and permits an award of attorney's fees when the litigant, proceeding in a representative capacity, obtains a decision resulting in the conferral of a "substantial benefit" of a pecuniary or nonpecuniary nature. The Court also stated that an award of attorney's fees under this theory does not depend on a substantial benefit to defendant; there need only be a substantial benefit to the members of an ascertainable class.

In ***Mandel v. Hodges*** *(1976) 54 Cal. App. 3d 596, 127 Cal. Rptr. 244* , a judgment was awarded against the state which enjoined the state from closing its offices during Good Friday afternoon and from paying its employees for time they might take off during that period. The judgment also awarded plaintiff 's counsel attorney's fees to be paid by the

state. On rehearing, the court of appeal again affirmed the judgment including the award of attorney's fees. The court stated that all of the criteria for an award of attorney's fees under the substantial benefit exception to the general rule of *Code Civ. Proc. § 1021* were met. The suit was one in which the court's equitable powers came into play, it was commenced and maintained as a representative action, and it resulted in a disposition that conferred substantial benefits, pecuniary or otherwise, on the persons represented.

[d] Requirements for Application of Doctrine

Plaintiffs in ***Coalition for Los Angeles County Planning in the Public Interest v. Board of Supervisors*** *(1977) 76 Cal. App. 3d 241, 142 Cal. Rptr. 766* , sought a writ of mandate and declaratory and injunctive relief testing amendments to the Los Angeles County General Plan and certain implementing ordinances. The trial court granted the relief sought and reserved jurisdiction to determine the matter of attorney's fees. The court awarded plaintiffs $170,000 as reasonable attorney's fees and defendants appealed challenging the propriety of this postjudgment award, as well as the amount awarded.

The court of appeal affirmed the trial court's award of attorney's fees which was based on the substantial benefit theory. The court of appeal discussed the development of the substantial benefit theory and stated that the fact that the action is not a corporate derivative or class action does not prevent application of the theory. The court then set out the following requirements for use of the substantial benefit theory as a basis for awarding attorney's fees: (1) the suit must be one in which the court's equitable powers come into play, (2) the suit must be commenced and maintained as a representative action, and (3) the suit must result in a disposition that confers substantial pecuniary or nonpecuniary benefits on the persons represented. The court of appeal stated that the trial court had found the elements of the theory to be present and had properly exercised its discretion to award the attorney's fees. The court also approved the trial court's method of determining what was a reasonable fee.

[e] Amount of Fees

For discussion, see *§ 60.300[3][e]*.

[f] Award Directly to Attorney

For discussion, see *§ 60.304*.

[4] Additional Authorities

[a] Substantial Benefit Theory

In *Rich v. Benicia (1979) 98 Cal. App. 3d 428, 159 Cal. Rptr. 473* , the court of appeal upheld the award of attorney's fees on both the "private attorney general" theory and the "substantial benefit" theory. The court held that, in bringing an action to require the city to prepare an environmental impact report prior to permitting the conversion of an old residential house to commercial and residential property, plaintiff benefitted not only himself (in that he lived across the street from the property in question), but the other residents of Benicia as well (*98 Cal. App. 3d 428, 432, 436)* .

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6-60 California Points & Authorities § 60.341

§ 60.341 Supporting Motion for Award of Attorney's Fees Under Substantial Benefit Exception--Benefit to Defendant Not Required

[1] FORM Supporting Motion for Award of Attorney's Fees Under Substantial Benefit Exception--Benefit to Defendant Not Required

[*For caption, see § 60.340, with which this form should be combined.*]

IT IS PROPER FOR THE COURT TO AWARD ATTORNEY'S FEES IN THIS ACTION TO THE DEFENDANT _____ [*name*] ON THE BASIS OF THE SUBSTANTIAL BENEFIT THEORY, WHICH DOES NOT REQUIRE THE BENEFIT TO BE TO THE DEFENDANT.

Benefit to Defendant Not Required. This theory does not require that the benefit be to the defendant (*Serrano v. Priest (1977) 20 Cal. 3d 25, 40 n.10, 141 Cal. Rptr. 315, 569 P.2d 1303* ; *Coalition for Los Angeles County Planning in the Public Interest v. Board of Supervisors (1977) 76 Cal. App. 3d 241, 247 n.6, 142 Cal. Rptr. 766*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.340*, in support of a motion for an award of attorney's fees based on the substantial benefit exception to the general rule, on the ground that there need not be benefit to the defendant.

See also *§ 60.340[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.340[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Benefit to Defendant Not Required

This portion of ***Serrano v. Priest*** *(1977) 20 Cal. 3d 25, 141 Cal. Rptr. 315, 569 P.2d 1303* , is discussed in *§ 60.340[3][c]*.

Coalition for Los Angeles County Planning in the Public Interest v. Board of Supervisors *(1977) 76 Cal. App. 3d 241, 142 Cal. Rptr. 766* , is discussed in *§ 60.340[3][d]*. In discussing the development of the substantial benefit theory for awarding attorney's fees, the court relied on *Serrano* (discussed in *§ 60.340[3][c]*) for the statement that despite earlier confusion, it is now clear that the benefit must be to those represented, not the defendant.

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6-60 California Points & Authorities § 60.342

§ 60.342 Supporting Motion for Award of Attorney's Fees Under Substantial Benefit Exception--Action Saving Public Funds

[1] FORM Supporting Motion for Award of Attorney's Fees Under Substantial Benefit Exception--Action Saving Public Funds

[*For caption, see § 60.340, with which this form should be combined.*]

IT IS PROPER FOR THE COURT TO AWARD ATTORNEY'S FEES IN THIS ACTION TO _____[*specify party, e.g.,* PLAINTIFF] _____ [*name*] ON THE BASIS OF THE SUBSTANTIAL BENEFIT THEORY, WHEN THE SUBSTANTIAL BENEFIT IS TO THE CITIZENS AND TAXPAYERS.

Action Saving Public Funds. Where the proper criteria are met, attorney's fees may be awarded on the basis of the substantial benefit theory where the "substantial benefit" is to the citizens and taxpayers of this state in the form of savings of public funds (*Mandel v. Hodges (1976) 54 Cal. App. 3d 596, 623, 127 Cal. Rptr. 244*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.340*, in support of a motion for an award of attorney's fees based on the substantial benefit exception to the general rule, when there is a substantial benefit to the citizens and taxpayers.

See also *§ 60.340[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.340[2][b]*

for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Action Saving Public Funds

The facts of ***Mandel v. Hodges*** *(1976) 54 Cal. App. 3d 596, 127 Cal. Rptr. 244* , are discussed in *§ 60.340[3][c]*. In upholding the award of attorney's fees, the court of appeal stated that plaintiff rendered a substantial benefit to the citizens and taxpayers of the state by saving them the public funds expended for work not performed by state employees during the three-hour holiday period of Good Friday.

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6-60 California Points & Authorities § 60.343

§ 60.343 Supporting Motion for Award of Attorney's Fees Under Substantial Benefit Exception--Environmental Litigation

[1] FORM Supporting Motion for Award of Attorney's Fees Under Substantial Benefit Exception--Environmental Litigation

[*For caption, see § 60.340, with which this form should be combined.*]

IT IS PROPER FOR THE COURT TO AWARD ATTORNEY'S FEES IN THIS ACTION TO _____ [*specify party, e.g.,* PLAINTIFF] _____ [*name*] ON THE BASIS OF THE SUBSTANTIAL BENEFIT THEORY, WHEN THE LITIGATION RESULTS IN ENVIRONMENTAL BENEFITS.

Environmental Litigation. Where the proper criteria are met, attorney's fees may be awarded on the basis of the substantial benefit theory where the litigation results in environmental benefits (*Coalition for Los Angeles County Planning in the Public Interest v. Board of Supervisors (1977) 76 Cal. App. 3d 241, 248-251, 248-249, 142 Cal. Rptr. 766*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.340*, in support of a motion for an award of attorney's fees based on the substantial benefit exception to the general rule, when the litigation results in environmental benefits.

See also *§ 60.340[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.340[2][b]*

for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Environmental Litigation

The facts of ***Coalition for Los Angeles County Planning in the Public Interest v. Board of Supervisors*** *(1977) 76 Cal. App. 3d 241, 142 Cal. Rptr. 766* , are discussed in *§ 60.340[3][d]*. In upholding the award of fees the court of appeal found that the trial court had properly decided that the class of persons benefited was the residents of the County of Los Angeles and that this is an ascertainable class under the substantial benefit doctrine. The court of appeal stated that the benefits in the case flowed directly and immediately from the decision of the trial court in that defendants were prevented from undertaking or permitting ill-considered intrusions on sensitive areas of the environment.

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6-60 California Points & Authorities §§ 60.344-60.359

[Reserved]

§§ 60.344[Reserved]

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6-60 California Points & Authorities § 60.360

§ 60.360 Opposing Motion for Award of Attorney's Fees Under Substantial Benefit Exception--General Form

[1] FORM Opposing Motion for Award of Attorney's Fees Under Substantial Benefit Exception--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN OPPOSITION TO MOTION
vs.	)	FOR AWARD OF ATTORNEY'S FEES
_____ [*name*], Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Date Action Filed: _____

_____

IT IS IMPROPER FOR THE COURT TO GRANT ATTORNEY'S FEES TO _____ [*specify party, e.g.,* PLAINTIFF] _____ [*name*] ON THE BASIS OF THE SUBSTANTIAL BENEFIT THEORY BECAUSE _____ [*state grounds, e.g.,* THERE WERE _____ (NO BENEFITS BESTOWED *or* NO CONCRETE BENEFITS) *or* IT WOULD NOT BE IN INTEREST OF JUSTICE].

A. General Rule. [*See § 60.320, Paragraph A.*]

B. Substantial Benefit Exception. A court may, in the exercise of its equitable discretion, decree that those receiving a substantial benefit as a result of litigation by one proceeding in a representative capacity must contribute in the interests of justice to the costs of the production of the benefit, including attorney's fees (*Serrano v. Priest (1977) 20 Cal. 3d 25, 38, 141 Cal. Rptr. 315, 569 P.2d 1303*).

C. Actual and Concrete Benefits Necessary. An award of attorney's fees under the substantial benefit theory must be based on concrete benefits actually bestowed as a result of the litigation and not on benefits of a "conceptual or doctrinal" nature (*Serrano v. Priest (1977) 20 Cal. 3d 25, 41-42, 141 Cal. Rptr. 315, 569 P.2d 1303* ; *Ciani v. San Diego Trust & Savings Bank (1994) 25 Cal. App. 4th 563, 30 Cal. Rptr. 2d 581*).

D. Litigation Success Required. [*See § 60.320, Paragraph D.*]

E. No Award Where Adverse Interest. Where the interest of the party seeking attorney's fees in pursuing the lawsuit are adverse to the interests of the party from whom the fees are sought, attorney's fees may not be properly awarded on the basis of the substantial benefit theory (*Inyo County v. Los Angeles (1978) 78 Cal. App. 3d 82, 91, 144 Cal. Rptr. 71*).

[*Insert other memoranda, as appropriate.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion for an award of attorney's fees based on the substantial benefit theory. It should be combined with additional memoranda, as appropriate, *set out in § 60.361* et seq.

See also *§ 60.340[2][a]*, regarding the connection between the significant benefit exception and the requirements of *Code Civ. Proc. § 1021.5*, and § 60.340[2][c] for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.340[2][b]* for discussion of evidentiary support.

[c] Related Memoranda

Additional memoranda based on the common fund exception are *set out in § 60.361* et seq. If the motion being opposed presents other grounds for an award of attorney's fees, memoranda appropriate to opposing those grounds should be added [*see § 60.300* et seq. (common fund exception), § 60.370 et seq. (award based on private attorney general theory under *Code Civ. Proc. § 1021.5*), and § 60.440 et seq. (award based on contract pursuant to *Civ. Code § 1717*)]. For memoranda for opposing the motion on the ground that the award of attorney's fees sought is excessive, see *§ 60.550*. If the motion for attorney's fees is based on more than one ground, this form may be combined with those *set out in §§ 60.320* -60.339 and *§§ 60.400* -60.419, as appropriate.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Memoranda

For opposing memoranda, see *§ 60.340* et seq.

[3] Discussion of Authorities

[a] General Rule

For discussion, see *§ 60.320[3][a]*.

[b] Substantial Benefit Exception

The facts and procedural background of ***Serrano v. Priest*** *(1977) 20 Cal. 3d 25, 141 Cal. Rptr. 315, 569 P.2d 1303* , are discussed in *§ 60.320[3][c]*. The Court described the substantial benefit doctrine as an outgrowth of the common fund theory, and as allowing an award of attorney's fees when a litigant, proceeding in a representative capacity, obtains a decision which results in a substantial benefit of a pecuniary or non-pecuniary nature. A court may then, under the "dictates of justice" exercise its equitable discretion by ordering those receiving the benefit to contribute to the costs of its production. The Court held, for the reasons set out in § 60.36[3][c], that the trial court correctly denied an award of attorney's fees based on this theory (*20 Cal. 3d 25, 38)* .

[c] Actual and Concrete Benefits Necessary

The facts and procedural background of ***Serrano v. Priest*** *(1977) 20 Cal. 3d 25, 141 Cal. Rptr. 315, 569 P.2d 1303* , are discussed in *§ 60.320[3][c]*. *Serrano* is also discussed in *§ 60.360[3][b]*. In approving the lower court's denial of attorney's fees based on the substantial benefit theory, the Court stated that the litigation did nothing in and of itself to assure that concrete benefits will accrue to anyone. Concrete benefits would accrue to the state or its citizens only insofar as the Legislature, in implementing the command of equality of the Court's prior opinion in *Serrano II* [*Serrano v. Priest (1976) 18 Cal. 3d 728, 135 Cal. Rptr. 345, 557 P.2d 929]* , chooses to bestow them. Plaintiffs also contended that while *Serrano II* may not have had the direct effect of producing increased educational opportunity or tax savings, it did produce benefits of a "conceptual or doctrinal character." The court rejected this contention, holding that the substantial benefit theory requires that actual and concrete benefits be bestowed (*20 Cal. 3d 25, 41-42)* .

In ***Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc.*** *(2005) 127 Cal. App. 4th 387, 25 Cal. Rptr. 3d 514* , the plaintiff and defendants negotiated a settlement that included a putative class of the general public and an opt-out provision for class members not wishing to be included in the settlement. An unnamed member of the putative class objected to the class certification and proposed settlement. The court denied the motion for class certification and final settlement approval. Thereafter, plaintiff dismissed the action. The objector moved for attorney's fees asserting that, by providing an "adversarial context" to the court's review of the proposed class action and settlement and persuading the court to deny class certification and final approval of the settlement, he had vindicated important rights for the benefit of the provisionally certified class, entitling him to attorney fees under *Code Civ. Proc. § 1021.5* and general equitable principles including the substantial benefit doctrine. The trial court denied the motion on the ground that it had no authority to award attorney fees under section 1021.5 because the objector was not a party in the action, and there was no basis for a fee award under equitable principles. The trial court also denied the objector's subsequent motion to intervene in the action. The court of appeal affirmed. The court held first that because of the opt-out provision, disapproval of the proposed settlement was unnecessary to accomplish a preservation and vindication of statutory rights intended to protect the health and safety of consumers. The court then held that even assuming the right

to assert statutory claims was preserved, the objector did not establish there was any value to those potential claims, since although the proposed general release swept more broadly than the claims asserted by plaintiff in the litigation, the voluntary dismissal of the lawsuit once the defendant moved for summary judgment suggested the core claims lacked substantial merit. Finally, even if the court were to assume the objector's efforts in preventing class certification and approval of the proposed settlement conferred a benefit on an identifiable class, the beneficiaries--the members of the putative class consisting of the general public in California--were no longer before the court (*127 Cal. App. 4th 387, 396-400)* .

In ***Ciani v. San Diego Trust & Savings Bank*** *(1994) 25 Cal. App. 4th 563, 30 Cal. Rptr. 2d 581* , plaintiff brought an action to enjoin the demolition of buildings he claimed were part of the city's heritage. His efforts resulted only in de minimis conditions being placed on the demolition permits. The trial court denied plaintiff 's request for attorney's fees under the substantial benefit theory, because plaintiff did not contribute actual and concrete benefits. The court of appeal affirmed, holding plaintiff was not entitled to fees under this theory, in that any benefits bestowed by his action were ephemeral, and that it would be difficult to identify any class of persons benefited (*25 Cal. App. 4th 563, 578-579)* .

[d] Litigation Success Required

For discussion, see *§ 60.320[3][d]*.

[e] No Award Where Interest Adverse

In ***Inyo County v. Los Angeles*** *(1978) 78 Cal. App. 3d 82, 144 Cal. Rptr. 71* , petitioner County of Inyo brought an original mandate action in the court of appeal, and the court issued a peremptory writ directing the City of Los Angeles to prepare an environmental impact report covering the city's increased extraction and use of certain groundwater. The court found that the report prepared and filed by the city did not comply with the writ and directed the city to take action to comply. The county filed a motion for attorney's fees against the city. The court of appeal denied the motion for attorney's fees. In rejecting an award of fees based on the substantial benefit theory, the court stated that although the litigation might have brought some water conservation benefits to the City of Los Angeles, those benefits were a byproduct of a lawsuit whose object was hostile to the city's interest in the unrestricted utilization of its groundwater resources. The court stated that this adversity of interest required rejection of the substantial common benefit theory for awarding attorney's fees (*78 Cal. App. 3d 82, 91)* .

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2. Motion for Award of Attorney's Fees Under Substantial Benefit Exception

6-60 California Points & Authorities § 60.361

§ 60.361 Opposing Motion for Award of Attorney's Fees Under Substantial Benefit Exception--Stare Decisis Not a Substantial Benefit

[1] FORM Opposing Motion for Award of Attorney's Fees Under Substantial Benefit Exception--Stare Decisis Not a Substantial Benefit

[*For caption, see § 60.360, with which this form should be combined.*]

IT IS IMPROPER FOR THE COURT TO GRANT ATTORNEY'S FEES TO _____ [*specify party, e.g.,* PLAINTIFF] _____ [*name*] ON THE BASIS OF THE SUBSTANTIAL BENEFIT THEORY BECAUSE THE GENERAL BENEFIT FLOWS FROM STARE DECISIS.

Stare Decisis Not a Substantial Benefit. The general benefit flowing from stare decisis is not a benefit justifying an award of attorney's fees under the substantial benefit doctrine (*Northington v. Davis (1979) 23 Cal. 3d 955, 961, 154 Cal. Rptr. 524, 593 P.2d 221* ; *Serrano v. Stefan Merli Plastering Co. (2010) 184 Cal. App. 4th 178, 186-190, 108 Cal. Rptr. 3d 777*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.360*, in opposition to a motion for an award of attorney's fees based on the substantial benefit theory, when the benefit has flowed only from stare decisis.

See also *§ 60.340[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.340[2][b]*

for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Stare Decisis Not a Substantial Benefit

In ***Northington v. Davis*** *(1979) 23 Cal. 3d 955, 154 Cal. Rptr. 524, 593 P.2d 221* , plaintiffs instituted a taxpayers' suit against various employees and agencies of the City of Los Angeles challenging the legality of construction of a helipad on the roof of a proposed police station. The trial court granted a summary judgment in favor of plaintiffs on the ground that the city had failed to obtain certain required approval, and awarded attorney's fees on the basis of the substantial benefit theory. The court of appeal reversed the award of attorney's fees and remanded the matter to the trial court. The court of appeal stated that the fact that litigation establishes a legal principle that may effect future litigation does not entitle an attorney who obtained the initial victory to collect attorney's fees under the substantial benefit doctrine from those who may, by virtue of stare decisis, obtain a so-called benefit of those labors in future cases, and this factor had played a dominant role in the trial court's award (*23 Cal. 3d 955, 961)* .

Serrano v. Stefan Merli Plastering Co. *(2010) 184 Cal. App. 4th 178, 186-190, 108 Cal. Rptr. 3d 777* , involved a prior published appeal in which the appellate court held that a trial court had the authority to require a deposition reporter to provide a copy of a transcript to a non-noticing party for a reasonable fee and to determine the amount of the reasonable fee in the event of a dispute. After that ruling, the plaintiffs sought attorney's fees under *Code Civ. Proc. § 1021.5*.The trial court denied the fees, holding that the plaintiffs had not done anything to further the public interest other than raise an issue in the course of private litigation that could establish legal precedent adverse to a portion of the public.

The court of appeal affirmed. It held that *Adoption of Joshua S. (2008) 42 Cal. 4th 945, 70 Cal. Rptr. 3d 372, 174 P.3d 192* established the applicable criteria under *Code Civ. Proc. § 1021.5* for determining whether litigation has resulted in the enforcement of an important right affecting the public interest [*184 Cal. App. 4th 178, 186-188]* . The court held that *Code Civ. Proc. § 1021.5* was not intended to impose fees on an individual seeking a judgment that determines only his or her private rights, but who has done nothing to adversely affect the public interest other than being on the losing side of an important appellate case [*184 Cal. App. 4th 178, 188]* . The court held that the fact that the prior appellate decision was published did not make it of public interest. The court held that although stare decisis provides that a legal doctrine established in a case involving a single litigant benefits all others similarly situated, stare decisis has never been viewed as sufficient justification for permitting an attorney to obtain fees from all those who may, in future cases, use a precedent he or she has helped to secure [*184 Cal. App. 4th 178, 188]* .

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6-60 California Points & Authorities § 60.362

§ 60.362 Opposing Motion for Award of Attorney's Fees Under Substantial Benefit Theory--In Catalyst Case, Plaintiff Must Have Made Reasonable Attempt to Settle Matter Short of Litigation

[1] FORM

[*For caption, see § 60.360, with which this form should be combined*.]

IT IS IMPROPER FOR THE COURT TO GRANT ATTORNEY'S FEES TO _____ [*specify party, e.g.,* PLAINTIFF] _____ [*name*] ON THE BASIS OF THE SUBSTANTIAL BENEFIT THEORY BECAUSE UNDER CATALYST THEORY, PLAINTIFF MUST HAVE MADE REASONABLE ATTEMPT TO SETTLE MATTER SHORT OF LITIGATION.

Party Must Have Made Reasonable Attempt to Settle Matter. In a catalyst case, under the substantial benefit theory, to be entitled to attorney's fees a party must first have made a reasonable attempt to settle the matter short of litigation (*Pipefitters Local No. 636 Defined Benefit Plan v. Oakley, Inc. (2010) 180 Cal. App. 4th 1542, 1548-1551, 104 Cal. Rptr. 3d 78*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.360*, in opposition to a motion for an award of attorney's fees based on the substantial benefit theory when the moving party failed to make a reasonable attempt to settle the matter short of litigation.

See also *§ 60.340[2][c]* for references to related chapters in California Forms Of Pleading And Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 60.340[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Party Must Have Made Reasonable Attempt to Settle Matter

In ***Pipefitters Local No. 636 Defined Benefit Plan v. Oakley, Inc.*** *(2010) 180 Cal. App. 4th 1542, 1548-1551, 104 Cal. Rptr. 3d 78* , the plaintiff was a shareholder in the defendant, a publicly traded company. The defendant announced that it was being sold to another company, at a premium over the defendant's average trading price. The plaintiff filed an action to enjoin the sale, alleging that the directors breached their fiduciary duty by failing to maximize shareholder value and by failing to disclose all material facts. The defendant then filed a preliminary proxy statement with the SEC. The plaintiff filed an amended complaint citing alleged omissions in the proxy statement. The defendant demurred to the amended complaint. The plaintiff wrote the defendant's board of directors a letter pointing out problems with the proxy statement. In an effort to moot the plaintiff's claims, the defendant slightly revised the proxy statement. The plaintiff did not oppose the defendant's demurrer and did not pursue the lawsuit. Instead, the plaintiff filed a motion for attorney's fees, arguing that it produced a substantial benefit to the defendant's shareholders by obtaining disclosure of additional material information related to the acquisition. The trial court denied the motion.

On appeal, the court first held that because there was no settlement or judgment in the action, plaintiff's fee claim arose under the catalyst theory, which allows for attorney's fees if the defendant changes its behavior substantially because of, and in the manner sought by, the litigation [*180 Cal. App. 4th 1542, 1548]* . The court held that *Graham v. DaimlerChrysler Corp. (2004) 34 Cal. 4th 553, 21 Cal. Rptr. 3d 331, 101 P.3d 140* [discussed at *§ 60.400*], applied to the case. Under *Graham*, in a catalyst case the plaintiff must have engaged in a reasonable attempt to settle its dispute with the defendant before litigation. The court held that *Graham* applied even though *Graham* involved recovery of attorney's fees under the private attorney general theory, rather than the substantial benefit theory [*180 Cal. App. 4th 1542, 1549]* .

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6-60 California Points & Authorities §§ 60.363-60.369

[Reserved]

§§ 60.363[Reserved]

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6-60 California Points & Authorities § 60.370

§ 60.370 Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--General Form

[1] FORM Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION FOR
vs.	)	AWARD OF ATTORNEY'S FEES
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Date Action Filed: _____

_____

IT IS PROPER FOR THIS COURT TO AWARD ATTORNEY'S FEES TO _____ [*specify party, e.g.,* PLAINTIFF], _____ [*name*], AGAINST _____ [*specify party, e.g.,* DEFENDANT], _____ [*name*], UNDER CODE OF CIVIL PROCEDURE SECTION 1021.5.

A. General Rule. [*See § 60.300, Paragraph A.*]

B. *Code Civ. Proc. § 1021.5*. On motion, a court may award attorney's fees to a successful party against one or more opposing parties in any action that has resulted in the enforcement of an important right affecting the public interest if:

(1) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons; (2) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate; and (3) such fees should not in the interest of justice be paid out of the recovery. [No claim for fees is required to be filed when one or more of successful parties and one or more opposing parties are public entities] (*Code Civ. Proc. § 1021.5*).

C. Private Attorney General Theory. *Code of Civil Procedure Section 1021.5* constitutes a legislative declaration of policy on attorney's fees and provides explicit statutory authority for court-awarded attorney's fees under the private attorney general theory (*Woodland Hills Residents Ass'n v. City Council of Los Angeles (1979) 23 Cal. 3d 917, 925, 154 Cal. Rptr. 503, 593 P.2d 200*).

D. Federal Law as Guide to Interpretation. Since the Legislature drew heavily on federal decisions relating to the private attorney general theory in framing *Code of Civil Procedure Section 1021.5*, such federal decisions are useful as guides in interpreting the California statute (*Woodland Hills Residents Ass'n v. City Council of Los Angeles (1979) 23 Cal. 3d 917, 934-938, 154 Cal. Rptr. 503, 593 P.2d 200*).

E. Significant Benefit. The significant benefit that will justify an attorney fee award under the private attorney general doctrine does not need to represent a tangible asset or concrete gain; in some cases it may be recognized simply from the effectuation of a fundamental constitutional or statutory policy (*Woodland Hills Residents Ass'n v. City Council of Los Angeles (1979) 23 Cal. 3d 917, 939, 154 Cal. Rptr. 503, 593 P.2d 200* ; *see* *Bouvia v. County of Los Angeles (1987) 195 Cal. App. 3d 1075, 1083-1086, 241 Cal. Rptr. 239* ; *Braude v. Automobile Club of Southern Cal. (1986) 178 Cal. App. 3d 994, 1013, 223 Cal. Rptr. 914*).

F. Necessity and Financial Burden. The necessity and financial burden of private enforcement that make an award of attorney's fees appropriate exist when the cost of the claimant's legal victory transcends his or her personal interest and places a burden on the plaintiff out of proportion to his or her individual stake in the matter (*Mejia v. City of Los Angeles (2007) 156 Cal. App. 4th 151, 157, 67 Cal. Rptr. 3d 228* ; *Families Unafraid to Uphold Rural El Dorado County v. El Dorado County Board of Supervisors (2000) 79 Cal. App. 4th 505, 94 Cal. Rptr. 2d 205* ; *Schmid v. Lovette (1984) 154 Cal. App. 3d 466, 475, 201 Cal. Rptr. 424* ; *see* *Bouvia v. County of Los Angeles (1987) 195 Cal. App. 3d 1075, 1083, 241 Cal. Rptr. 239*).

[*Insert other memoranda, as appropriate.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion for attorney's fees under the private attorney general exception, formerly an equitable exception to the general rule against attorney's fees under *Code Civ. Proc. § 1021.5*, but now long

since codified and expressly authorized under *Code Civ. Proc. § 1021.5*. It should be combined with additional memoranda, as appropriate, *set out in § 60.371* et seq.

Counsel may wish to include in this form those federal cases relating to the private attorney general theory that support the particular request for attorney's fees [*see § 60.370[3][d]*].

See also *§ 60.340[2][a]*, regarding the connection between *Code Civ. Proc. § 1021.5* and the significant benefit exception.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Evidence cognizable by the court in such a motion proceeding should be submitted with the memorandum to support its factual statements. A request for judicial notice will support facts subject to such notice [*Evid. Code § 450 et seq.*]. Otherwise supporting affidavits or declarations under penalty of perjury should be submitted [*see Code Civ. Proc. §§ 2009* (affidavits), 2015.5 (declarations)], averring to such facts within the personal knowledge of the affiant or declarant as may be necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For forms for notices of motions for attorney's fees with supporting declarations and orders, see California Forms of Pleading and Practice, Ch. 174, *Costs and Attorney's Fees* (Matthew Bender).

[d] Related Memoranda

Additional memoranda based on the private attorney general exception under *Code Civ. Proc. § 1021.5* are *set out in § 60.371* et seq. Points and authorities based on other equitable exceptions and statutory bases for an award of attorney's fees are *set out in § 60.300* et seq. (common fund exception), § 60.340 et seq. (substantial benefit exception), and § 60.440 et seq. (award based on contract pursuant to *Civ. Code § 1717*).

With appropriate modifications, this form also may be used to oppose a motion to tax costs that is supported by the memoranda *set out in § 60.40* et seq.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

For opposing memoranda, see *§ 60.400* et seq.

[3] Discussion of Authorities

[a] General Rule

For discussion, see *§ 60.300[3][a]*.

[b] Code Civ. Proc. § 1021.5

Code Civ. Proc. § 1021.5 provides that on motion, a court may award attorney's fees to a successful party against one or more opposing parties in any action that has resulted in the enforcement of an important right affecting the public interest if: (1) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons; (2) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate; and (3) such fees should not in the interest of justice be paid out of the recovery. No claim for fees is required to be filed when one or more of successful parties and one or more opposing parties are public entities.

[c] Private Attorney General Theory

In ***Woodland Hills Residents Ass'n v. City Council of Los Angeles*** *(1979) 23 Cal. 3d 917, 154 Cal. Rptr. 503, 593 P.2d 200* , plaintiffs had instituted an underlying mandate action against three governmental entities of the City of Los Angeles challenging the entities' approval of a subdivision map. Initially, the trial court rejected all of plaintiffs' contentions and entered judgment in favor of defendant city agencies. On appeal, however, the court of appeal reversed, concluding that the city agencies had erred in approving the subdivision map without making specific findings that the proposed subdivision was in fact consistent with the city's general plan. The court of appeal directed the trial court to set aside the city's approval of the subdivision map and to remand the matter to the city council to proceed in the manner required by law, and the trial court did so.

Plaintiffs, as prevailing parties, then moved the trial court for an award of attorney's fees against the city under either the substantial benefit or private attorney general theories. The trial court denied the fee motion and plaintiffs appealed the judgment insofar as it failed to provide for an award of fees to their counsel. The Supreme Court reversed the trial court's denial of attorney's fees on the private attorney general theory and remanded the case to the trial court in light of the enactment, while the case was pending on appeal, of *Code Civ. Proc. § 1021.5* which specifically authorizes attorney fee awards under the private attorney general theory. The Court stated that although it had concluded in *Serrano v. Priest (1977) 20 Cal. 3d 25, 141 Cal. Rptr. 315, 569 P.2d 1303* , that a court may, under its equitable powers, award attorney's fees under the private attorney general theory when a constitutional right has been vindicated, *Code Civ. Proc. § 1021.5* now gives the court explicit statutory authority to award attorney's fees under the private attorney general theory without regard to whether the public policy vindicated rests on constitution or statute (*23 Cal. 3d 917, 925)* .

[d] Federal Law as Guide to Interpretation

Woodland Hills Residents Ass'n v. City Council of Los Angeles *(1979) 23 Cal. 3d 917, 154 Cal. Rptr. 503, 593 P.2d 200* , is discussed in *§ 60.370[3][c]*. In discussing the criteria enumerated in *Code Civ. Proc. § 1021.5*, the Court stated that it was clear from both the statutory framework and language that in drafting *Code Civ. Proc. § 1021.5* the Legislature relied heavily on federal private attorney general authorities prior to *Alyeska Pipeline Co. v. Wilderness Soc'y (1975) 421 U.S. 240, 95 S. Ct. 1612, 44 L. Ed. 2d 141* (holding that in the absence of statutory authorization, federal courts under federal law could not properly award attorney's fees on a private attorney general theory). The Court also stated that since the Legislature drew heavily on the pre-*Alyeska* federal decisions in framing *Code Civ. Proc. § 1021.5*, such authorities, while no longer viable in the federal realm, often will be helpful and reliable guides in interpreting the various provisions of *Code Civ. Proc. § 1021.5* (*23 Cal. 3d 917, 934-938)* .

[e] Significant Benefit

Woodland Hills Residents Ass'n v. City Council of Los Angeles *(1979) 23 Cal. 3d 917, 154 Cal. Rptr. 503, 593 P.2d 200* , is discussed in *§ 60.370[3][c]*. In discussing the requirement of *Code Civ. Proc. § 1021.5*, that a significant benefit be conferred on the general public or a large class of persons, the Court pointed out that the statute itself provides that the significant benefit conferred by the litigation may be either pecuniary or nonpecuniary in nature. The

Court also stated that under the private attorney general doctrine, the significant benefit that will justify an attorney fee award does not have to represent a tangible asset or a concrete gain, but in some cases may be recognized simply from the effectuation of a fundamental constitutional or statutory policy, such as the fundamental constitutional principles involved in *Serrano v. Priest (1977) 20 Cal. 3d 25, 141 Cal. Rptr. 315, 569 P.2d 1303* [*see § 60.340[3][c]*] (*23 Cal. 3d 917, 939)* .

In ***Bouvia v. County of Los Angeles*** *(1987) 195 Cal. App. 3d 1075, 241 Cal. Rptr. 239* , the court of appeal reversed an order denying attorney's fees in a prior action that had resulted in an appellate opinion emphasizing the unconditional right of a competent adult patient to refuse any medical treatment. The court said that to obtain an award of fees under *Code Civ. Proc. § 1021.5*, a significant benefit, whether pecuniary or nonpecuniary, must have been conferred on the general public or a broad class of persons, and pointed out that those cases upholding or allowing an award under *Code Civ. Proc. § 1021.5* consistently emphasize that the benefits provided by the protagonist's action must accrue primarily to the public and be substantial in a doctrinal if not a material sense (*195 Cal. App. 3d 1075, 1083)* . The court explained that *Code Civ. Proc. § 1021.5* itself provides no concrete standard by which a court may determine whether the right sought to be vindicated is sufficiently important to justify an award of fees; ultimately the inquiry is an intensely pragmatic one requiring a realistic assessment of the gains resulting in a particular action (*195 Cal. App. 3d 1075, 1083)* . The court held that in the present case, the prior appellate opinion, declaring the unconditional right of a competent adult patient to decide his or her own fate and emphasizing that the right to forego medical treatment ultimately belongs to the one whose life is in issue, effectuated important legal principles that potentially impact on a large segment of society (*195 Cal. App. 3d 1075, 1085)* , and that, based on this, the plaintiff was entitled to an award of attorney's fees under *Code Civ. Proc. § 1021.5* (*195 Cal. App. 3d 1075, 1086)* , including reasonable compensation for the time spent prosecuting the fee issue at both the trial and pell levels (*195 Cal. App. 3d 1075, 1086 n.9*).

Braude v. Automobile Club of Southern Cal. *(1986) 178 Cal. App. 3d 994, 223 Cal. Rptr. 914* , was an action by members of a nonprofit mutual benefit corporation (which paid no dividends and in which members had no financial interest and membership could not be transferred), to set aside an election of directors on the ground the election procedures, which involved the use of misleading techniques in the solicitation of general proxies, were unfair. The trial court invalidated the corporation's use of general proxies in contested directors' elections, but declined to award plaintiffs any attorney's fees under either the substantial benefit theory [*see § 60.340*] or the private attorney general theory of *Code Civ. Proc. § 1021.5*.

The court of appeal affirmed the judgment, as well as the denial of attorney's fees under the substantial benefit theory on the ground the benefit conferred was not actual and concrete, but potential, conceptual, intangible, and doctrinal in nature (*178 Cal. App. 3d 994, 999, 1005-1010)* . It reversed the denial of attorney's fees under the private attorney general doctrine, however, on the ground the judgment benefitted a large class of persons (the corporation's 1.8 million members) regarding their rights to participate in fair elections, and that these are important rights affecting the public interest (*178 Cal. App. 3d 994, 1010, 1012-1012)* . The court pointed out that most of the limitations imposed on the application of the substantial benefit doctrine do not apply to the private attorney general concept and that under this latter concept the benefit conferred may be conceptual or doctrinal and need not be actual and concrete, and, further, that the effectuation of a statutory or constitutional purpose may be sufficient (*178 Cal. App. 3d 994, 1011)* . Quoting *Rich v. City of Benicia (1979) 98 Cal. App. 3d 428, 433, 159 Cal. Rptr. 473* , the court said that the private attorney general theory is predicated on achievement of benefits substantial from the viewpoint of the general public but too ephemeral from the standpoint of individual beneficiaries to warrant application of the substantial benefit theory and that, while the substantial benefit theory is based in concepts of unjust enrichment, the private attorney general theory seeks, without regard to material gain, to encourage vindication of strong public policies by private lawsuit (*178 Cal. App. 3d 994, 1011)* . The court further said that the benefit must accrue primarily to the public (*178 Cal. App. 3d 994, 1011)* . The court added that the important right being vindicated was doctrinal and conceptual in nature and not necessarily actual and concrete, and that whether actual or concrete benefits were in fact conferred, whether the members of the corporate management were indifferent to the doctrinal benefits to the club and its membership, and whether the board or club members opposed or supported the change is of no importance. Accordingly, the court held

that the trial court erred in denying an award of attorney's fees under the private attorney general principle (*178 Cal. App. 3d 994, 1013)* .

[f] Necessity and Financial Burden

In ***Mejia v. City of Los Angeles*** *(2007) 156 Cal. App. 4th 151, 67 Cal. Rptr. 3d 228* , a homeowner filed a petition for writ of mandate in superior court challenging the city's approval of a development project adjoining her land under CEQA and on other grounds. The developer opposed the petition as the real party in interest. The superior court denied the petition, but the court of appeal concluded that substantial evidence supported a fair argument that the project would have significant, unmitigated environmental impacts on animal wildlife and traffic and that a mitigated negative declaration was improper. The court of appeal reversed the judgment with directions to the superior court to grant the petition and issue a peremptory writ of mandate ordering the city to vacate its approval of the project and cause an environmental impact report to be prepared prior to any project approval. The superior court then entered a judgment pursuant to the appellate court's directions and the homeowner moved for an award of attorney's fees under *Code Civ. Proc. § 1021.5*.

The developer and the city each opposed the motion for attorney's fees. The trial court awarded attorney's fees to the homeowner, which it apportioned between the developer and the city. The developer appealed the order; the city did not appeal (*156 Cal. App. 4th 151, 156)* .

The court of appeal affirmed. The court found that the homeowner's personal interest as a homeowner and resident in opposing the proposed development based on an inadequate environmental review was substantial. However, her substantial personal interest did not preclude a finding that the financial burden of the litigation was out of proportion to her personal stake in this matter. The demands of the litigation caused her to deplete her retirement savings and she was forced to refinance her home to support the litigation (*156 Cal. App. 4th 151, 157-159)* .

In ***Families Unafraid to Uphold Rural El Dorado County v. El Dorado County Board of Supervisors*** *(2000) 79 Cal. App. 4th 505, 94 Cal. Rptr. 2d 205* , plaintiffs, who were private individuals and nonprofit corporations, sued a county and its board of supervisors for failure to comply with the county's draft general plan and the California Environmental Quality Act (CEQA) in approving a residential subdivision project. Although the trial court ruled in the county's favor, on appeal, the plaintiffs prevailed. The trial court then denied plaintiff's motions for attorney's fees for the trial and original appeal pursuant to *Code Civ. Proc. § 1021.5*, finding that plaintiffs failed to meet their burden of proof on the "financial burden" criterion. The court of appeal reversed. The court found that specific, concrete, nonfinancial interests, including environmental or aesthetic interests can satisfy the "personal interest" aspect of the financial burden criterion (*79 Cal. App. 4th 505, 514)* , that a "nimby" (not in my backyard) personal interest does not automatically disqualify a party from meeting the financial burden criterion of § 1021.5(b) (*79 Cal. App. 4th 505, 516-517)* , and that plaintiffs had no financial interests in the trial or appeal (*79 Cal. App. 4th 505, 518-521)* , and remanded to the trial court to consider whether the costs of the trial and appeal were out of proportion to the plaintiffs' nonfinancial interests in the trial and appeal, and, if so, to award attorney's fees (*79 Cal. App. 4th 505, 520, 521)* .

Schmid v. Lovette *(1984) 154 Cal. App. 3d 466, 201 Cal. Rptr. 424* , was an action brought by plaintiff to enjoin a school district from requiring a loyalty oath from applicants for jobs with the district. The court held that the loyalty oath was unconstitutional and awarded attorney's fees to plaintiff under the federal attorney's fees statute (*42 U.S.C. § 1988*) and under California's private attorney general statute (*Code Civ. Proc. § 1021.5*).

The court of appeal affirmed the award of attorney's fees. The court stated that such loyalty oaths had been held unconstitutional in decisions rendered long ago by both state and federal authorities and that it was distressing to be required to reiterate it at this late date. The court held that an attorney's fee award under *Code Civ. Proc. § 1021.5* was a proper exercise of the trial court's equitable discretion. The court stated that the trial court had to evaluate whether plaintiff 's action (1) vindicated an important public right, (2) conferred a significant benefit on the general public or a

large class of persons, and (3) imposed a financial burden on plaintiffs that was out of proportion to their individual stake in the matter. The court held that the trial court had not abused its discretion because all of the requirements had been met. The first two requirements were met because loyalty oath requirements are threats to academic freedom, and the requirement that applicants for jobs with the district take such an oath had a detrimental affect on a sufficiently wide segment of the public (*154 Cal. App. 3d 466, 477-478)* . With regard to the requirement that the necessity and financial burden of private enforcement be shown, the court stated that an award under the private attorney general theory is appropriate when the cost of the claimant's legal victory transcends his or her personal interest, that is, when the necessity for pursuing the lawsuit places a burden on the plaintiff out of proportion to his or her individual stake in the matter (*154 Cal. App. 3d 466, 478-479)* . The plaintiff met this test because she had already signed the oath and been hired by the district, and the purpose of the action was to prevent the district from administering and enforcing the oath in the future. Further, the eligibility of plaintiff 's attorney for the award of fees granted is not affected under the private attorney general theory by the fact that plaintiffs are under no obligation to pay the attorney or that plaintiff 's attorney receives funding from charitable sources or the public (*154 Cal. App. 3d 466, 479)* .

The facts and procedural background of ***Bouvia v. County of Los Angeles*** *(1987) 195 Cal. App. 3d 1075, 241 Cal. Rptr. 239* , are discussed in *§ 60.370[3][e]*. In reversing the order denying attorney's fees under the private attorney general doctrine, the court said that to obtain an award of fees under *Code Civ. Proc. § 1021.5* the necessity and financial burden of private enforcement must transcend the litigant's personal interest in the controversy and that such fees should not, in the interest of justice, be paid out of any recovery (*195 Cal. App. 3d 1075, 1083)* .

[4] Additional Authorities

[a] Private Attorney General Theory

In *Daniels v. McKinney (1983) 146 Cal. App. 3d 42, 193 Cal. Rptr. 842* , the court of appeal reversed a decision denying an award of attorney's fees under *Code Civ. Proc. § 1021.5* to jail inmates who prevailed in two lawsuits brought regarding conditions in the county jail. The court stated that *Code Civ. Proc. § 1021.5* expands and codifies the private attorney general theory and that the fundamental objective of the theory as codified in *Code Civ. Proc. § 1021.5* is to encourage suits that effectuate a strong public policy by awarding substantial attorney's fees to those who successfully bring the suits, and thereby bring about benefits to a large number of citizens (*146 Cal. App. 3d 42, 49)* . The court found that petitioners had fulfilled the statutory requirements and were entitled to an award of attorney's fees (*146 Cal. App. 3d 42, 50-54)* .

In *State of California v. County of Santa Clara (1983) 142 Cal. App. 3d 608, 191 Cal. Rptr. 204* , owners of timberland brought an action for declaratory relief to require the county to adopt proper procedures for designating land as being within a timberland preserve zone and to declare invalid a county ordinance requiring a use permit as a prerequisite to obtaining that status. The court of appeal upheld the trial court's award of attorney's fees to the landowners based on the private attorney general theory (*Code Civ. Proc. § 1021.5*) because the landowners were the moving force in securing benefits that the county had a statutory duty to provide for the general public (*142 Cal. App. 3d 608, 615)* . Plaintiffs had met the criteria that a significant benefit had been made to the public, the financial burdens of private enforcement made the award appropriate, and the fees should not have been paid out of the recovery (*142 Cal. App. 3d 608, 614)* .

In *Starbird v. County of San Benito (1981) 122 Cal. App. 3d 657, 176 Cal. Rptr. 149* , a landowner brought an action for a writ of mandate and an injunction against a county seeking to vacate a conditional permit issued for manufacturing use in a combined industrial and scenic highway zoning district. In issuing the permit, the county had failed to comply with regulations requiring the submission of landscaping plans and preparation of an environmental impact report under the California Environmental Quality Act (*Pub. Res. Code §§ 21000-21177*). The trial court held for defendant and the court of appeal reversed, finding that plaintiff was entitled to attorney's fees under the "private attorney general" provision of *Code Civ. Proc. § 1021.5*. The court held that the conditions for such an award were met because plaintiff

's action had defended county citizens' environmental rights otherwise ignored by the officials charged with their enforcement (*122 Cal. App. 3d 657, 665)* .

Save El Toro Ass'n v. Days (1979) 98 Cal. App. 3d 544, 159 Cal. Rptr. 577 , arose out of an action by a private association against the mayor and other city officials to prevent defendants from acquiring and regulating certain lands in the absence of an open space plan. Plaintiff won on appeal, and thereupon sought attorney's fees, which the trial court denied on the ground that the "substantial benefit" exception did not apply. The court of appeal reversed. Although agreeing on the substantial benefit ground, the court of appeal remanded with directions to the trial court to consider the private attorney general ground. The court noted that if the trial court determined that the litigation had culminated in the vindication of an important public policy, the costs of securing this result required subsidization, and a substantial number of people stood to benefit, the private attorney general theory might apply. The court also noted that the private attorney general doctrine contains no requirement that a party establish that its opponent was guilty of obdurate behavior.

[b] Significant Benefit

In *Friends of the Trails v. Blasius (2000) 78 Cal. App. 4th 810, 93 Cal. Rptr. 2d 193* , plaintiffs sued landowners and an irrigation district in a quiet title action to declare a public easement for use of a road along the side of an irrigation canal that had been used by the public from the 1940's through 1971. The trial court concluded that the public acquired an easement for passage and recreational purposes before March 4, 1972, because the public use was sufficient to convey to the landowner at the pertinent time that it was "adverse." The trial court also awarded attorney's fees to plaintiffs under *Code Civ. Proc. § 1021.5*. The court of appeal affirmed the award on the ground that the right in issue was sufficiently important to warrant an award of fees, and that there was no abuse of discretion in the determination that the benefit conferred was significant enough to warrant an award under § 1021.5 (*78 Cal. App. 4th 810, 832-835)* .

In *Planned Parenthood v. Aakhus (1993) 14 Cal. App. 4th 162, 17 Cal. Rptr. 2d 510* , a pro-abortion organization brought an action against an anti-abortion organization resulting in a stipulated judgment issuing an injunction preventing the defendant from obstructing access to an abortion clinic. The court of appeal upheld the award of attorney's fees under *Code Civ. Proc. § 1021.5*, stating that the benefit of the litigation to the public was "conceptual and overriding" (*14 Cal. App. 4th 162, 171-172)* .

Hull v. Rossi (1993) 13 Cal. App. 4th 1763, 17 Cal. Rptr. 2d 457 , two persons who authored a ballot statement in support of a city water-supply measure were challenged by petition of writ of mandate in which the petitioners alleged the ballot argument contained false and misleading statements. The trial court ordered minor wording changes. Both parties sought attorney's fees under Civ. Code § 1021.5, which the trial court refused on the ground that no important public policy was vindicated by the proceeding. The court of appeal reversed, holding that the respondent, in defending the action, achieved substantial victory within the meaning of § 1021.5 in staving off censorship of a ballot statement; noting that the right to seek deletion of false and misleading ballot arguments should not be used as a weapon against differing--as opposed to misleading--opinions (*13 Cal. App. 4th 1763, 1768-1769)* .

In *Citizens Against Rent Control v. City of Berkeley (1986) 181 Cal. App. 3d 213, 226 Cal. Rptr. 265* , the court of appeal affirmed the award of attorney's fees under *Code Civ. Proc. § 1021.5* to a citizen's action group who successfully challenged the constitutionality of a city ordinance that placed a $250 limit on contributions to campaign committees for or against municipal ballot measures. The court held that the "important right" and "public benefit" criteria were established since the litigation established the unconstitutionality of an ordinance that infringed on *First Amendment* rights and thus indirectly benefited society as a whole (*181 Cal. App. 3d 213, 229-230)* .

[c] Necessity and Financial Burden

In *Committee to Defend Reproductive Rights v. A Free Pregnancy Center (1991) 229 Cal. App. 3d 633, 280 Cal. Rptr.*

329 , after private litigants filed a public-interest action against a family planning clinic that had engaged in allegedly unfair business practices, the Attorney General brought a similar action on behalf of the people of California. The two actions were consolidated, and the plaintiffs prevailed. The private plaintiffs moved for fees under *Code Civ. Proc. § 1021.5*. The trial court held that the plaintiffs were automatically barred from recovering attorney's fees, because of the Attorney General's participation as colitigant; the court deemed the private plaintiffs' action as being "unnecessary" under *Code Civ. Proc. § 1021.5*. The court of appeal reversed, holding that the private parties were not automatically barred from recovering fees, and that their recovery would depend on an evaluation of whether the private plaintiffs' participation contributed significantly to the result in the case (*229 Cal. App. 3d 633, 641-644)* .

In *Citizens Against Rent Control v. City of Berkeley (1986) 181 Cal. App. 3d 213, 226 Cal. Rptr. 265* (discussed in *§ 60.370[4][b]*), the court rejected the contention of the party appealing the award of attorney's fees that the financial burden of private enforcement was not so great as to justify an award of attorney's fees. Noting that the issue is whether a claimant has an individual stake that is out of proportion to the cost of the action, not whether the claimant is financially able to bear the costs of litigation, the court found that "financial burden" criterion was satisfied in light of the fact that the claimants gained no direct pecuniary benefit from the litigation. The court additionally relied on the fact that the claimants pursued the litigation on appeal even after they had apparently lost all indirect pecuniary benefit (*181 Cal. App. 3d 213, 230-231)* .

In *Henneberque v. City of Culver City (1985) 172 Cal. App. 3d 837, 218 Cal. Rptr. 704* , the court of appeals reversed an order denying back pay and attorney's fees in a second writ proceeding brought by a police officer who was attempting to enforce his rights under the Public Safety Officers Procedural *Bill of Rights* Act (*Gov. Code §§ 3300-3311*). The police officer had originally initiated a writ proceeding to direct defendants to provide him with an administrative appeal of his demotion, which he claimed had resulted from his active participation as a labor leader in the local police officers' association, and to reinstate him with back pay. The trial court denied a writ of mandate, but the court of appeal reversed and ordered that the officer be given an administrative appeal [*see Henneberque v. City of Culver City (1983) 147 Cal. App. 3d 250, 194 Cal. Rptr. 869*]. The officer then moved in the trial court for a peremptory writ directing defendants to provide him with an administrative appeal, and moved for back pay for the time period in which he was unlawfully demoted and for an award of attorney's fees under *Code Civ. Proc. § 1021.5*. The trial court granted the writ relief with regard to the administrative appeal, which the officer was given and which resulted in affirmance of his demotion and reduction of future salary. However, the trial court issued an order denying the motion for back pay and attorney's fees, which the court of appeal in the instant case reversed, holding that the officer was entitled to the back pay for the period in which he had been unlawfully demoted, and that the trial court had abused its discretion in denying the award of attorney's fees. Specifically, the court noted that even though the officer was entitled to a modest amount of back pay during the time he was unlawfully demoted, he nevertheless sustained a financial burden of prosecuting two writ proceedings and two appeals to enforce his rights. Furthermore, he had been given an administrative appeal that had resulted in affirmance of his demotion and reduction of future salary. The court concluded that the financial burden that the litigation placed on the officer was out of proportion to his personal stake in the case, and that in the interest of justice his attorney's fees should not be paid out of the recovery. Because the trial court had abused its discretion in denying an award of attorney's fees under *Code Civ. Proc. § 1021.5*, the order was reversed.

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6-60 California Points & Authorities § 60.371

§ 60.371 Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--Enforcement of Existing Right

[1] FORM Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--Enforcement of Existing Right

[*For caption, see § 60.370, with which this form should be combined.*]

IT IS PROPER FOR THIS COURT TO AWARD ATTORNEY'S FEES TO _____ [*specify party, e.g.,* PLAINTIFF], _____ [*name*], AGAINST _____ [*specify party, e.g.,* DEFENDANT], _____ [*name*], UNDER CODE CIV. PROC. § 1021.5, TO ENFORCE EXISTING RIGHTS.

Enforcement of Existing Rights. The enforcement of existing rights, as well as the creation of new rights, may serve as a basis for awarding fees under the private attorney general doctrine (*Bouvia v. County of Los Angeles (1987) 195 Cal. App. 3d 1075, 1084, 241 Cal. Rptr. 239*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.370*, in support of a motion for attorney's fees under *Code Civ. Proc. § 1021.5*, when the party has obtained enforcement of existing rights.

See also *§ 60.370[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.370[2][b]*

for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Enforcement of Existing Rights

The facts and procedural background of ***Bouvia v. County of Los Angeles*** *(1987) 195 Cal. App. 3d 1075, 241 Cal. Rptr. 239* , are discussed in *§ 60.370[3][e]*. On appeal defendant argued that no significant benefit was conferred on the public by the litigation because the prior opinion in *Bouvia* was merely reiterating principles articulated in earlier cases. The court rejected the argument. The court said that the enforcement of existing rights, as well as the creation of new rights, may serve as a basis for awarding fees under the private attorney general doctrine (*195 Cal. App. 3d 1075, 1084)* . The court added that the declaration of rights in so-called landmark cases would have little, if any, importance if those rights could not be enforced in subsequent litigation, and that defendant's interpretation of *Code Civ. Proc. § 1021.5* would allow vital constitutional principles to become mere theoretical pronouncements of little practical value to ordinary citizens who cannot afford the price of vindicating those rights (*195 Cal. App. 3d 1075, 1084)* . The court nevertheless held that the prior decision did more than simply apply well-settled legal principles to a particular factual setting (*195 Cal. App. 3d 1075, 1084)* . In the prior decision, the court stated that it found "nothing new in the law to suggest the right to refuse medical treatment may be exercised only if the patient's motives meet with someone else's approval" and that it "certainly is not illegal or immoral to prefer a natural, albeit sooner, death than a drugged life attached to a mechanical device." The court said that its independent research had revealed no other prior decision, either within or without California, that expresses the same view, and that the court's earlier emphasis on the unconditional right of a competent adult patient to decide his or her own fate appears unique among cases that have considered the issue (*195 Cal. App. 3d 1075, 1085)* .

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6-60 California Points & Authorities § 60.372

§ 60.372 Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--Suits Between Private Parties

[1] FORM Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--Suits Between Private Parties

[*For caption, see § 60.370, with which this form should be combined.*]

IT IS PROPER FOR THIS COURT TO AWARD ATTORNEY'S FEES TO _____ [*specify party, e.g.,* PLAINTIFF], _____ [*name*], AGAINST _____ [*specify party, e.g.,* DEFENDANT], _____ [*name*], UNDER SECTION 1021.5 OF THE CODE OF CIVIL PROCEDURE, EVEN THOUGH IT IS A SUIT BETWEEN PRIVATE PARTIES.

Suits Between Private Parties. When the criteria of *Section 1021.5 of the Code of Civil Procedure* are otherwise met, attorney's fees may be awarded in suits between private parties (*Franzblau v. Monardo (1980) 108 Cal. App. 3d 522, 529, 166 Cal. Rptr. 610*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.370*, in support of a motion for attorney's fees under *Code Civ. Proc. § 1021.5*, in a suit between private parties.

See also *§ 60.370[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.370[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Suits Between Private Parties

Franzblau v. Monardo *(1980) 108 Cal. App. 3d 522, 166 Cal. Rptr. 610* , was an action brought by respondent electors in the Marin Hospital District to contest the election of appellant to the hospital's board of directors. Under a conflict of interest statute [former *Health & Safety Code § 32110*], appellant could not serve on the board of a public hospital if he were currently president of a private hospital and both hospitals served the same area. The trial court set aside the election, but denied respondents' claim for attorney's fees under the private attorney general theory of *Code Civ. Proc. § 1021.5*.

The court of appeal affirmed the annulment of the election, but reversed the trial court's order denying attorney's fees. Although appellant contended that attorney's fees were proper under *Code Civ. Proc. § 1021.5* only in suits against public agencies, the court held that they were allowable in suits between private parties as well (*108 Cal. App. 3d 522, 529)* .

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6-60 California Points & Authorities § 60.373

§ 60.373 Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--Fees Sought Against Court

[1] FORM Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--Fees Sought Against Court

[*For caption, see § 60.370, with which this form should be combined.*]

IT IS PROPER FOR THIS COURT TO AWARD ATTORNEY'S FEES TO _____ [*specify party, e.g.,* PLAINTIFF], _____ [*name*], AGAINST _____ [*specify party, e.g.,* DEFENDANT], _____ [*name*], UNDER SECTION 1021.5 OF THE CODE OF CIVIL PROCEDURE, EVEN THOUGH THAT PARTY IS A COURT.

Fees Sought Against Court. A court is a public entity, and when it is a real party in interest that does not prevail in a lawsuit, it is not excluded from the legislatively-imposed obligation for attorney's fees under the private attorney general doctrine (*Rhyne v. Municipal Court (1980) 113 Cal. App. 3d 807, 826-827, 170 Cal. Rptr. 312*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.370*, in support of a motion for attorney's fees under *Code Civ. Proc. § 1021.5*, when the other party is a court.

See also *§ 60.370[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.370[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Fees Sought Against Court

In ***Rhyne v. Municipal Court*** *(1980) 113 Cal. App. 3d 807, 170 Cal. Rptr. 312* , Rhyne appeared in municipal court, without counsel, for a misdemeanor arraignment session, and was jailed after pleading guilty to petty theft. Rhyne obtained an attorney, and in superior court sought a writ of habeas corpus and a writ of mandate on behalf of herself and others similarly situated regarding the municipal court's denial of her constitutional rights. The superior court issued a writ of mandate compelling the municipal court to furnish counsel to any persons charged with crimes which could result in confinement; however, the superior court denied Rhyne's request for attorney's fees. The municipal court and Rhyne appealed from the rulings against them, respectively.

The court of appeal, following a discussion of various procedural issues, affirmed the superior court's mandate requiring appointed counsel. However, it reversed the lower court's denial of attorney's fees, and held that the private attorney general doctrine should apply against the municipal court. The court noted that the objectives of the private attorney general doctrine are to give citizens access to the judicial process to enforce important rights, and to encourage suits effectuating strong public policy, which otherwise might be economically infeasible to initiate. These objectives would be substantially frustrated if judicial public entities were to be excluded from the "public entities" obligated to pay attorney's fees pursuant to *Code Civ. Proc. § 1021.5* (*113 Cal. App. 3d 807, 825)* . The court held that since the municipal court was a real party in interest, did not prevail in the suit, and otherwise met the preconditions of Code Civ. Proc. § 1021.5, it should be required to pay attorney's fees (*113 Cal. App. 3d 807, 826-827)* .

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6-60 California Points & Authorities § 60.374

§ 60.374 Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--No Good-Faith Exception

[1] FORM Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--No Good-Faith Exception

[*For caption, see § 60.370, with which this form should be combined.*]

IT IS PROPER FOR THIS COURT TO AWARD ATTORNEY'S FEES TO _____ [*specify party, e.g.,* PLAINTIFF], _____ [*name*], AGAINST _____ [*specify party, e.g.,* DEFENDANT], _____ [*name*], UNDER SECTION 1021.5 OF THE CODE OF CIVIL PROCEDURE, EVEN THOUGH THAT PARTY ACTED IN GOOD FAITH.

No Good-Faith Exception. There is no exception to the granting of fees under *Section 1021.5 of the Code of Civil Procedure* because a defendant may have obeyed a statute or otherwise acted in good faith (*Schmid v. Lovette (1984) 154 Cal. App. 3d 466, 474-475, 201 Cal. Rptr. 424*).

[2] Comments

[A] Use of Form

This form is for use with the form *set out in § 60.370*, in support of a motion for attorney's fees under *Code Civ. Proc. § 1021.5*, when the other party has acted in good faith.

See also *§ 60.370[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.370[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] No Good-Faith Exception

The factual and legal background of ***Schmid v. Lovette*** *(1984) 154 Cal. App. 3d 466, 201 Cal. Rptr. 424* , are discussed in *§ 60.370[3][f]*. In affirming the award of attorney's fees under the private attorney general theory of *Code Civ. Proc. § 1021.5*, the court of appeal stated that there is no good faith exception to the statute. Thus, the school district's argument that it had merely obeyed a statute that it thought was valid, requiring it to administer loyalty oaths to job applicants, was not a sufficient reason to deny attorney's fees because the purpose of *Code Civ. Proc. § 1021.5* is not to punish the defendant but to encourage plaintiffs to enforce their civil rights (*154 Cal. App. 3d 466, 475)* .

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6-60 California Points & Authorities § 60.375

§ 60.375 Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--Party Not Required to Prevail on Every Claim

[1] FORM Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--Party Not Required to Prevail on Every Claim

[*For caption, see § 60.370, with which this form should be combined.*]

IT IS PROPER FOR THIS COURT TO AWARD ATTORNEY'S FEES TO _____ [*specify party, e.g.,* PLAINTIFF], _____ [*name*], AGAINST _____ [*specify party, e.g.,* DEFENDANT], _____ [*name*], UNDER SECTION 1021.5 OF THE CODE OF CIVIL PROCEDURE, EVEN THOUGH HE/SHE/IT/THEY DID NOT PREVAIL ON EVERY CLAIM.

Party Not Required to Prevail on Every Claim. A party need not prevail on every claim presented in the action to be considered a successful party within the meaning of *Section 1021.5 of the Code of Civil Procedure.* Rather, the fact that he or she has prevailed on some claims but not on others, or the fact that not all grounds alleged were relied on by the trial court in reaching its decision, is merely one factor to be considered in determining the amount of the award (*Wallace v. Consumers Cooperative of Berkeley, Inc. (1985) 170 Cal. App. 3d 836, 846-847, 216 Cal. Rptr. 649*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.370,* in support of a motion for attorney's fees under *Code Civ. Proc. § 1021.5,* when the moving party has not prevailed on every claim.

See also *§ 60.370[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.370[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Party Not Required to Prevail on Every Claim

Wallace v. Consumers Cooperative of Berkeley, Inc. *(1985) 170 Cal. App. 3d 836, 216 Cal. Rptr. 649* , is discussed in *§ 60.384*.

[4] Additional Authorities

[a] Party Not Required to Prevail on Every Claim

In Lyons v. Chinese Hospital Ass'. (2006) 136 Cal. App. 45th 1331, *39 Cal. Rptr. 3d 550* , a building contractor and a hospital contracted for the contractor to remodel certain portions of the first floor of the hospital building. The remodeling required some demolition work, including removal of floor tile. In response to questions by contractor about the presence of asbestos-containing material in the construction area, the hospital informed him that an asbestos survey of the hospital was performed and the construction area was free of asbestos-containing material. After work started, the contractor discovered the presence of asbestos present throughout the construction site. In their work, the contractor and his brother were personally exposed to the airborne asbestos. Plaintiff produced evidence that the release of asbestos occurred directly adjacent to the hospital lobby, in employees worked and members of the general public congregated, and through which patients, employees and members of the public walked on a daily basis. However there was no finding that employees, patients or the public were actually exposed to asbestos. After two or three asbestos lawyers refused to take the case because plaintiff would not know for at least 20 years whether he would become sick as a result of the exposure, plaintiff found a lawyer to represent him on a contingency fee, with the main focus of the representation being an effort to encourage the government to prosecute the hospital. Counsel and plaintiff contacted federal and state authorities, and the district attorney's office eventually brought an action which resulted in a stipulated judgment and injunction. Plaintiff also filed a civil complaint seeking tort damages for exposure to asbestos, declaratory relief for indemnity against future liability the plaintiff might incur related to the asbestos-containing material from the hospital, and seeking injunctive relief to require the hospital to comply with asbestos laws and regulations, and for attorney fees pursuant to *Code Civ. Proc. § 1021.5*. In the criminal action, the defendants did not admit liability and the stipulated injunction provided it was not to be used as evidence or admission of liability, and the injunction permanently enjoined the hospital from violating any asbestos-related provisions and imposed a $10,000 civil penalty for violations involving false statements and illegal disposal of hazardous waste. The tort claims went to arbitration, in which the arbitrator found negligent misrepresentation by the hospital, but no fraud or any type of intentional tort, including intentional infliction of emotional distress. Plaintiff also failed to prove tort damages. The arbitrator determined that plaintiff should recover nothing from defendants and awarded neither plaintiff nor defendants indemnity against either of the others. After conclusion of the arbitration, the parties agreed to entry of a stipulated judgment and permanent injunction in he civil action, in which neither party was named the prevailing party and defendants did not admit fault. The injunction permanently enjoined defendants from violating asbestos-related provisions and required the hospital to hire someone to monitor its compliance with asbestos laws and report to the court regarding compliance. The trial court then denied plaintiff's motion for an award of attorney's fees under section 1021.5 on the ground that plaintiff was not a successful party within the meaning of section 1021.5 because the case was not primarily directed at achieving a public benefit by forcing defendant to comply with laws regulating asbestos; the plaintiff's limited success was outweighed by the lack of success on other scores (*136 Cal. App. 4th 1331, 1336-1343)* . However, the Court of Appeal held that the trial court abused its discretion in finding that the plaintiff was not a successful party. The appellate court held that although plaintiff prevailed on only one of six causes of action, and the significance of the issue resolved by the injunction, *i.e.,* defendant's compliance with asbestos laws and regulations, was a matter for the trial court's judgment,

the trial court agreed that the relief resulted in the enforcement of an important right affecting the public interest and conferred a significant benefit on the general public or a large class of persons. The plaintiff obtained, through the final judgment entered by the court, injunctive relief consisting of employee, tenant and contractor notification about the presence of asbestos, employee training, and asbestos testing and monitoring for three years for the hospital and an adjacent medical building, as well as other buildings owned by the defendant. Further, the plaintiff succeeded in obtaining relief on a significant issue in the action (*136 Cal. App. 4th 1331, 1345-1348)* .

In *Bowman v. City of Berkeley (2005) 131 Cal. App. 4th 173, 31 Cal. Rptr. 3d 447* , a group of neighbors petitioned for writ of mandate seeking, among other things, to overturn a city's approval of a housing project for senior citizens, and the petition was successful in vacating the original approval of the project. The court found that as a matter of due process, the neighbors did not receive a fair hearing when the project was first approved. The court granted the petition in part, ordered the approval voided, remanded to the city for a further hearing, and reserved other issues for determination after return of the writ. The city again approved the project at a new city council meeting. The matter was returned to the trial court, which denied the balance of the petition and entered judgment against the neighbors, which the appellate court affirmed. Following return of the writ, the neighbors moved for attorney fees under the private attorney general statute [*Code Civ. Proc. § 1021.5*], supported by invoices showing that the neighbors had been billed $96,592, and had paid $89,696.50, for legal services. The City opposed the motion. The trial court determined that the neighbors were entitled to fees and costs incurred in connection with the due process issue litigated at the outset of the case, and awarded them $17,314.35 in fees and $979.00 in costs (*131 Cal. App. 4th 173, 175-176)* . The Court of Appeal affirmed, holding that even though the neighbors prevailed on only one of the six causes of action in their mandate petition, the neighbors' early due process victory was not undermined by the failure to prevail on the remaining issues. The trial court had regarded the due process problem as significant because removal of the due process infirmity was key to the court being able to fully consider the remaining issues raised, and the significance of the due process issue was a matter for the trial court's judgment (*131 Cal. App. 4th 173, 177-179)* .

In *City of Sacramento v. Drew (1989) 207 Cal. App. 3d 1287, 255 Cal. Rptr. 704* , plaintiff city brought a validation action under *Code Civ. Proc. § 860* to declare the validity of a special tax assessment. Defendant initially asserted in the validation action that the assessment was invalid under Cal. Const. Art. XIIIA (Proposition 13), but later, in its closing brief, challenged the assessment on statutory grounds. Defendant prevailed on summary judgment in the action, obtaining a ruling that the assessment was statutorily invalid. The trial court, however, denied the defendant's request for fees under *Code Civ. Proc. § 1021.5*, asserting that the defendant "belatedly" raised the prevailing statutory legal theory. On appeal, the court of appeal reversed. It noted that litigation often involves a succession of attacks on an opponent's case, and that the final ground of resolution may only become clear after a series of unsuccessful attacks. The court concluded that the defendant should not be penalized for failure to make the winning statutory argument at the outset of the litigation, in the absence of a finding that the defendant's unsuccessful arguments addressed discrete unrelated claims, were pursued in bad faith, or were pursued incompetently (*207 Cal. App. 3d 1287, 1303-1304)* .

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6-60 California Points & Authorities § 60.376

§ 60.376 Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--Successful Party Need Not Be Prevailing Party

[1] FORM Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--Successful Party Need Not Be Prevailing Party

[*For caption, see § 60.370, with which this form should be combined.*]

IT IS PROPER FOR THIS COURT TO AWARD ATTORNEY'S FEES TO _____ [*specify party, e.g.,* PLAINTIFF], _____ [*name*], AGAINST _____ [*specify party, e.g.,* DEFENDANT], _____ [*name*], UNDER SECTION 1021.5 OF THE CODE OF CIVIL PROCEDURE, EVEN THOUGH HE/SHE/IT/THEY IS/ARE NOT THE PREVAILING PARTY, BECAUSE THIS ACTION RESULTED IN THE ENFORCEMENT OF AN IMPORTANT RIGHT AFFECTING THE PUBLIC INTEREST.

Successful Party Need Not Be Prevailing Party. A party who does not prevail in an action may be entitled to attorney's fees under *Section 1021.5 of the Code of Civil Procedure* on the theory that the party's filing of the action resulted in the enforcement of an important right affecting the public interest by conferring a significant benefit on the general public or a large class of persons (*see Stevens v. Geduldig (1986) 42 Cal. 3d 24, 38, 227 Cal. Rptr. 405, 719 P.2d 1001* ; *County of Colusa v. California Wildlife Conservation Bd. (2006) 145 Cal. App. 4th 637, 648-651, 52 Cal. Rptr. 3d 1*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.370,* in support of a motion for attorney's fees under *Code Civ. Proc. § 1021.5,* when the moving party is not the prevailing party but has obtained the enforcement of an important right.

See also *§ 60.370[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.370[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Successful Party Need Not Be Prevailing Party

In ***Stevens v. Geduldig*** *(1986) 42 Cal. 3d 24, 227 Cal. Rptr. 405, 719 P.2d 1001* , plaintiff brought a taxpayer's representative action against a member of a governor's tax-reduction task force, a director of a state health care services department, and a state contractor. Plaintiff sought to hold the first two defendants personally liable to the State of California for their negligence in failing to exercise due care in authorizing the expenditure of funds from various state department budgets for expenses incurred by the task force. Plaintiff sought to hold the third defendant personally liable to the state, on a strict liability theory, for obtaining money from the state under an illegal contract. Plaintiff alleged that the funds expended under the contract were improperly allocated from a state department budget to cover expenses incurred by the task force. Subsequent to the filing of the suit, the governor's office reimbursed all departments involved for all funds authorized, expended, and received by all defendants. The trial court entered judgment against all defendants, ruling that the reimbursement of the funds by the governor's office was improper and thus did not mitigate defendants' liability. Defendants appealed from the trial court's judgment.

The Supreme Court reversed the trial court's judgment. The Court found that the first two defendants were indeed negligent in failing to exercise due care in authorizing the expenditure of public funds, and that the third defendant in fact obtained funds from an illegal contract. However, the Court also held that reimbursement of the funds by the governor's office eliminated all damages attributable to the first two defendants' negligence (*42 Cal. 3d 24, 35)* . The Court also held that reimbursement by the governor's office of the funds spent under the illegal contract mitigated the third defendant's duty to repay the funds (*42 Cal. 3d 24, 36)* . The Court then remanded the case to the trial court to determine whether, and in what amount, plaintiff was entitled to attorney fees under *Code Civ. Proc. § 1021.5*. The Court noted that *Code Civ. Proc. § 1021.5* authorizes an award to a successful party in an action that has resulted in the enforcement of an important right affecting the public interest, if the award confers a significant benefit on the general public or a large class of persons. The Court ruled that, even though plaintiff had not prevailed in the case, it was possible he might be entitled to fees on the theory that the filing of his suit caused the governor's office to reimburse the funds improperly spent from the state departments' budgets (*42 Cal. 3d 24, 38)* .

In ***County of Colusa v. California Wildlife Conservation Bd.*** *(2006) 145 Cal. App. 4th 637, 52 Cal. Rptr. 3d 1* , a county sued state agencies to challenge a proposed conversion of agricultural land into wildlife habitat. The county and the landowner entered into Williamson Act (*Gov. Code § 51200 et seq.*) contracts limiting use of the landowner's property to agriculture and compatible uses. The state agencies then purchased a conservation easement from the owner for a managed wildlife habitat and wetlands, which prohibited cultivation of agricultural crops. The county challenged the validity of the purchase without compliance with Williamson Act procedural requirements, which the state agencies maintained was not necessary. After the county obtained a preliminary injunction, the state agencies and the landowner modified the conservation easement to allow agricultural use, and the county voluntarily dismissed its Williamson Act claims. Over the opposition of the state agencies, the trial court granted the county's motion for an award of attorney's fees against the state agencies under *Code Civ. Proc. § 1021.5* (*145 Cal. App. 4th 637, 642-646)* .

The court of appeal affirmed, holding that the county was a successful party entitled to attorney's fees under *Code Civ. Proc. § 1021.5*, because the modification of the conservation easement was a result of the lawsuit. The court found that the trial court did not abuse its discretion in finding the county was a successful party against the state agencies on its

second cause of action alleging that the state agencies failed to follow the notice procedures of the Williamson Act and failed to make the findings required by *Gov. Code § 51292* before approving the acquisition of the conservation easement on the property for public use. In ruling on the motion for a preliminary injunction, the trial court found that the county had demonstrated a reasonable probability of success on the merits of its claims. Further, in addition to ruling against the state agencies on the second cause of action, the preliminary injunction also found a reasonable probability of success in the county's substantive claims of incompatibility of the easement with the property owner's Super Williamson Act contract, which was the county's first cause of action for breach of contract against the property owner. After the granting of the preliminary injunction, the state agencies actively and directly negotiated a contract amendment satisfactory to the county, and the trial court could reasonably have found that the state agencies were acting under the compulsion of the preliminary injunction. Although the state agencies were never ultimately compelled to renotice the action to the county or make findings under *Gov. Code § 51292* because of the county's dismissal of the second cause of action, the practical result of the county's lawsuit was an agreement regarding the easement, which excused the findings requirement of *Gov. Code § 51292* and apparently satisfied the county's notice concerns (*145 Cal. App. 4th 637, 648-651)* . Further, the trial court did not abuse its discretion in finding that the county's action enforced the important public interest set forth in the Williamson Act (*Gov. Code § 51220*) of preserving agricultural land, because similar future actions of the state agencies were affected; that the county's action conferred a significant benefit on the public; and that the county's action was necessary, because the record could reasonably be read to find that the state agencies would not have followed through with the contract amendment without the pressure of the county's action (*145 Cal. App. 4th 637, 651-657)* .

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6-60 California Points & Authorities § 60.377

§ 60.377 Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--Right to Seek Fees Not Affected by Type of Proceedings Brought

[1] FORM Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--Right to Seek Fees Not Affected by Type of Proceedings Brought

[*For caption, see § 60.370, with which this form should be combined.*]

IT IS PROPER FOR THIS COURT TO AWARD ATTORNEY'S FEES TO _____ [*specify party, e.g.,* PLAINTIFF], _____ [*name*], AGAINST _____ [*specify party, e.g.,* DEFENDANT], _____ [*name*], UNDER SECTION 1021.5 OF THE CODE OF CIVIL PROCEDURE, REGARDLESS OF THE NATURE OF THE RELIEF SOUGHT IN THIS PROCEEDING.

Right to Seek Fees Not Affected by Type of Proceedings Brought. The nature of the relief sought, not the label or procedural device by which the action is brought, is determinative of the right to seek fees under *Section 1021.5 of the Code of Civil Procedure* (*In re Head (1986) 42 Cal. 3d 223, 230, 227, 228 Cal. Rptr. 184, 721 P.2d 65* ; *National Parks & Conservation Assn. v. County of Riverside (2000) 81 Cal. App. 4th 234, 242, 96 Cal. Rptr. 2d 576* (administrative proceedings)).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.370,* in support of a motion for attorney's fees under *Code Civ. Proc. § 1021.5,* regardless of the nature of the relief sought in the proceeding.

See also *§ 60.370[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.370[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Right to Seek Fees Not Affected by Type of Proceedings Brought

In re Head *(1986) 42 Cal. 3d 223, 230, 227, 228 Cal. Rptr. 184, 721 P.2d 65* , was a habeas corpus proceeding brought by prison inmates challenging the procedures under which the Department of Corrections implemented the work furlough program authorized by *Penal Code §§ 6260-6265*. The inmates were represented by the Prison Law Office, a privately supported group of attorneys who provide free legal services to prisoners. After prevailing on the merits, the Prison Law Office was awarded attorney's fees pursuant to *Code Civ. Proc. § 1021.5*. On appeal by the Director of Corrections, the court of appeal reversed the order awarding attorney's fees, holding that *Code Civ. Proc. § 1021.5* applies only to civil cases, and that because habeas corpus is a special proceeding of a criminal nature, an award of attorney's fees was not authorized.

On review, the Supreme Court of California reversed, and held that the award of attorney's fees to the Prison Law Office was proper under *Code Civ. Proc. § 1021.5*. The Court observed that although *Code Civ. Proc. § 1021.5* has been held inapplicable to attorney's fees incurred in the defense of criminal cases, in which the primary effect is vindication of the litigant's personal rights, the same is not true of habeas corpus proceedings brought to vindicate prisoners' rights, which may be utilized as a speedier and more expeditious alternative to the purely civil procedures of mandamus or actions for declaratory or injunctive relief (*42 Cal. 3d 223, 227-228)* . The Court found nothing in the legislative history of *Code Civ. Proc. § 1021.5* to support a conclusion that the Legislature intended that fee awards be denied in actions in which an important right affecting the public interest has been enforced simply because enforcement was by means of habeas corpus (*42 Cal. 3d 223, 231-232)* . The Court concluded that the nature of the relief sought, not the label or procedural device by which the action is brought, is determinative of the right to seek fees under *Code Civ. Proc. § 1021.5* (*42 Cal. 3d 223, 227)* .

In ***National Parks & Conservation Assn. v. County of Riverside*** *(2000) 81 Cal. App. 4th 234, 96 Cal. Rptr. 2d 576* , an association petitioned for writs of mandate to force a county to obtain an adequate environmental impact report for a proposed landfill project. The trial court granted the petitions and ordered the county to take specific steps to bring the report into compliance with the California Environmental Quality Act and awarded attorney's fees to the association as the prevailing party. The court of appeal affirmed the trial court's orders (*see National Parks & Conservation Assn. (1996) 42 Cal. App. 4th 1505, 50 Cal. Rptr. 2d 339*).

The county then certified a new environmental impact report and submitted it to the trial court as its return on the prior writs. The trial court found that the county failed to comply with two of the writ requirements and awarded attorney's fees to the association based solely on the return report, but the court of appeal reversed the trial court's substantive order, determining that the return report was proper (*see National Parks & Conservation Assn. v. County of Riverside (1999) 71 Cal. App. 4th 1341, 84 Cal. Rptr. 2d 563*). The attorney's fees awarded on the return report included approximately $13,902 in fees reflecting work performed during the administrative process leading to the certification of the return report (*81 Cal. App. 4th 234, 242)* .

The court of appeal reversed the award of attorney's fees, finding that an appellate court's reversal of the substantive judgment required reversal of the attorney's fee award as well (*81 Cal. App. 4th 234, 239-242)* . However, the court remanded to the trial court to exercise its discretion with regard to the fees awarded for work performed during the administrative process. The court held that a party may be awarded fees for services performed in connection with an administrative proceeding if the activities were "useful and necessary and directly contributed to the resolution of the

action" (*81 Cal. App. 4th 234, 242)* . The court found that there was an arguable basis for the trial court to find that the services performed before the county filed the return report had the effect of ensuring the return report would address the specific deficiencies found in the original report, and that the trial court could find that these services contributed to the county's compliance with the trial court's initial writ order and therefore resulted in a public benefit (*81 Cal. App. 4th 234, 243)* .

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6-60 California Points & Authorities § 60.378

§ 60.378 Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--Defendant Is Private Party

[1] FORM Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--Defendant Is Private Party

[*For caption, see § 60.370, with which this form should be combined.*]

IT IS PROPER FOR THIS COURT TO AWARD ATTORNEY'S FEES TO _____ [*specify party, e.g.,* PLAINTIFF], _____ [*name*], AGAINST _____ [*specify party, e.g.,* DEFENDANT], _____ [*name*], UNDER SECTION 1021.5 OF THE CODE OF CIVIL PROCEDURE, EVEN THOUGH THAT PARTY IS A PRIVATE PARTY.

Defendant Is Private Party. *Section 1021.5 of the Code of Civil Procedure* allows a private party to receive an award of attorney's fees when a private party is a defendant (*Bartling v. Glendale Adventist Medical Center (1986) 184 Cal. App. 3d 97, 103, 228 Cal. Rptr. 847*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.370*, in support of a motion for attorney's fees under *Code Civ. Proc. § 1021.5*, even though the defendant is a private party.

See also *§ 60.370[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.370[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Defendant Is Private Party

Bartling v. Glendale Adventist Medical Center *(1986) 184 Cal. App. 3d 97, 228 Cal. Rptr. 847* , was an appeal from an order denying attorney's fees under *Code Civ. Proc. § 1021.5* following the court of appeal's prior remand of the case to the trial court for a determination of that issue. In the prior proceeding, the court of appeal had held that the trial court erred in denying an injunction ordering the real party in interest to disconnect life-preserving equipment from a patient who wished it disconnected, on the ground that a competent, nonterminally ill adult patient has a constitutionally based right to refuse or to terminate medical treatment [*see Bartling v. Superior Court (1984) 163 Cal. App. 3d 186, 193-194, 195-196, 209 Cal. Rptr. 220]* . In reversing the order denying attorney's fees, the court of appeal, after pointing out that practically all private attorney general and *Code Civ. Proc. § 1021.5* cases have involved a public entity and vindication of recognized public policy and that the case before it concerned two private civil litigants, held that *Code Civ. Proc. § 1021.5* allows for an award of attorney's fees when the defendant is a private party (*184 Cal. App. 3d 97, 103)* .

Note that in *Bouvia v. County of Los Angeles (1987) 195 Cal. App. 3d 1075, 241 Cal. Rptr. 239* , discussed in *§ 60.370[3][e]*, the court of appeal said that while it is true that the court in both *Bartling v. Superior Court (1984) 163 Cal. App. 3d 186, 209 Cal. Rptr. 220* , and *Bouvia v. Superior Court (1986) 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297* , alluded to a constitutional basis for the right vindicated, it seems clear that the right primarily is a development of the common law (citing *Cobbs v. Grant (1972) 8 Cal. 3d 229, 104 Cal. Rptr. 505, 502 P.2d 1*), and for that reason applies to patients in private as well as governmental facilities and to patients being treated by private as well as publicly employed medical practitioners (*195 Cal. App. 3d 1075, 1088)* .

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6-60 California Points & Authorities § 60.379

§ 60.379 Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--Right to Seek Fees Not Affected by Dismissal of Action for Lack of Prosecution

[1] FORM Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--Right to Seek Fees Not Affected by Dismissal of Action for Lack of Prosecution

[*For caption, see § 60.370, with which this form should be combined.*]

IT IS PROPER FOR THIS COURT TO AWARD ATTORNEY'S FEES TO _____ [*specify party, e.g.,* PLAINTIFF], _____ [*name*], AGAINST _____ [*specify party, e.g.,* DEFENDANT], _____ [*name*], UNDER SECTION 1021.5 OF THE CODE OF CIVIL PROCEDURE, EVEN THOUGH THE ACTION WAS DISMISSED FOR LACK OF PROSECUTION.

Right to Seek Fees Not Affected by Dismissal of Action for Lack of Prosecution. A party whose action was dismissed for lack of prosecution is not precluded from seeking fees under *Section 1021.5 of the Code of Civil Procedure* because the dismissal does not divest the trial court of jurisdiction to consider matters ancillary to the underlying action (*see Maria P. v. Riles (1987) 43 Cal. 3d 1281, 1290, 240 Cal. Rptr. 872, 743 P.2d 932*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.370*, in support of a motion for attorney's fees under *Code Civ. Proc. § 1021.5*, when the action has been dismissed for lack of prosecution.

See also *§ 60.370[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.370[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Right to Seek Fees Not Affected by Dismissal of Action for Lack of Prosecution

In ***Maria P. v. Riles*** *(1987) 43 Cal. 3d 1281, 240 Cal. Rptr. 872, 743 P.2d 932* , plaintiffs sought a preliminary injunction to halt implementation of former Educ. Code § 6957, which required school districts to report the names of illegal alien students to federal immigration authorities. Plaintiffs filed suit in April 1975, and obtained a preliminary injunction in September 1975 that remained in effect for almost three years. As of July 1978, the plaintiff 's litigation was moot, because the legislature had renumbered and amended former Educ. Code § 6957 and deleted the reporting requirements. In September 1980, defendants moved to dismiss the action under former Code Civ. Proc. § 583 [*now see Code Civ. Proc. §§ 583.310, 583.360*] for failure to bring it to trial within five years of its filing. The trial court granted the defendant's motion. After the order dismissing the action, plaintiffs moved for attorney fees under *Code Civ. Proc. § 1021.5*. The trial court found that plaintiffs were entitled to reasonable attorney fees for obtaining the preliminary injunction, and it awarded fees to the plaintiffs. The court of appeal reversed, determining that the trial court had no jurisdiction to make the fee award after it had dismissed the underlying action. In addition, the court of appeal held that the plaintiffs were not "successful litigants" within the meaning of *Code Civ. Proc. § 1021.5*.

The Supreme Court reversed, concluding that plaintiffs were successful litigants and that the dismissal did not divest the trial court of jurisdiction to award fees. The court noted that, under the federal Constitution, a dismissal for mootness deprives a federal court of jurisdiction to hear the underlying cause; nevertheless the federal court still retains jurisdiction to address the issue of attorney fees for a prevailing party under *42 U.S.C. § 1988* (Civil Rights Attorney's Fees Awards Act of 1976). Following this federal precedent, the Court stated that a dismissal for failure to prosecute would not divest a trial court of jurisdiction to consider matters ancillary to the underlying action, such as an application for attorney fees under *Code Civ. Proc. § 1021.5* (*43 Cal. 3d 1281, 1290)* .

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6-60 California Points & Authorities § 60.380

§ 60.380 Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--Appellate Court May Award Fees Under Code Civ. Proc. § 1021.5

[1] FORM Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--Appellate Court May Award Fees Under Code Civ. Proc. § 1021.5

[*For caption, see § 60.370, with which this form should be combined.*]

IT IS PROPER FOR THIS COURT TO AWARD ATTORNEY'S FEES TO _____ [*specify party, e.g.,* PLAINTIFF], _____ [*name*], AGAINST _____ [*specify party, e.g.,* DEFENDANT], _____ [*name*], UNDER SECTION 1021.5 OF THE CODE OF CIVIL PROCEDURE, WITHOUT NEEDING TO REMAND THE QUESTION TO THE TRIAL COURT.

Appellate Court May Award Fees Under *Code Civ. Proc. § 1021.5*. An appellate court may make an initial determination of whether a party is entitled to fees under *Section 1021.5 of the Code of Civil Procedure*; the appellate court is not required to remand the question of fee entitlement to the trial court (*Laurel Heights Improvement Assn. v. Regents of University of California (1988) 47 Cal. 3d 376, 427, 253 Cal. Rptr. 426, 764 P.2d 278*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.370*, in support of a motion for attorney's fees under *Code Civ. Proc. § 1021.5*, when the motion is made in an appellate court.

See also *§ 60.370[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.370[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Appellate Court May Award Fees Under Code Civ. Proc. § 1021.5

In ***Laurel Heights Improvement Assn. v. Regents of University of California*** *(1988) 47 Cal. 3d 376, 253 Cal. Rptr. 426, 764 P.2d 278* , a neighborhood association challenged an environmental impact report concerning the proposed relocation of University of California biomedical research facilities. The association petitioned in the superior court for a writ of mandate setting aside the report. The superior court denied the petition. The court of appeal reversed and granted a request by the neighborhood association for attorney's fees under *Code Civ. Proc. § 1021.5*. The regents of the university petitioned to the Supreme Court for review of the court of appeal's decision on the merits contending, inter alia, that the court of appeal should have remanded the action to the trial court to determine in the first instance whether the association was entitled to a fee award under *Code Civ. Proc. § 1021.5*.

The Supreme Court affirmed the court of appeal's decision concerning attorney's fees, holding that a court of appeal is not required to remand to the trial court the question of whether to award fees under *Code Civ. Proc. § 1021.5*. The Court stated that the decision as to which court is better equipped to make the initial determination is a matter within the discretion of the court of appeal. Citing *Wilkerson v. City of Placentia (1981) 118 Cal. App. 3d 435, 173 Cal. Rptr. 294* , as authority, the Court indicated that a court of appeal is particularly qualified to make the fee determination when it is the court of appeal's decision, rather than the trial court's, that provides a basis for fees in the first instance (*47 Cal. 3d 376, 427)* . The Court noted that in many cases, the trial court is better equipped to decide whether fees should be awarded under *Code Civ. Proc. § 1021.5*, and that it is proper in such cases for a reviewing court to defer to the trial court in making the fee determination. That a procedure is normal or customary, however, does not make it mandatory (*47 Cal. 3d 376, 426)* .

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6-60 California Points & Authorities § 60.381

§ 60.381 Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--Defendant Is Public Entity

[1] FORM Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--Defendant Is Public Entity

[*For caption, see § 60.370, with which this form should be combined.*]

IT IS PROPER FOR THIS COURT TO AWARD ATTORNEY'S FEES TO _____ [*specify party, e.g.,* PLAINTIFF], _____ [*name*], AGAINST _____ [*specify party, e.g.,* DEFENDANT], _____ [*name*], UNDER SECTION 1021.5 OF THE CODE OF CIVIL PROCEDURE, EVEN THOUGH THAT PARTY IS A PUBLIC ENTITY.

Defendant Is Public Entity. _____ [A private party *or* A public entity] may receive an award of attorney's fees when a public entity is a defendant (*Code Civ. Proc. § 1021.5*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.370*, in support of a motion for attorney's fees under *Code Civ. Proc. § 1021.5*, when the defendant is a public entity.

See also *§ 60.370[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.370[2][b]*

for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Defendant Is Public Entity

Code of Civ. Proc. § 1021.5 allows a private party or a public entity to receive an award of attorney's fees when a public entity is a defendant.

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6-60 California Points & Authorities § 60.382

§ 60.382 Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--General Entitlement to Amount Requested

[1] FORM Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--General Entitlement to Amount Requested

[*For caption, see § 60.370, with which this form should be combined.*]

UNDER THE CIRCUMSTANCES OF THIS CASE, IT IS PROPER FOR THIS COURT TO AWARD ATTORNEY'S FEES IN THE AMOUNT OF _____ [*specify dollar amount*], TO _____ [*specify party, e.g.,* plaintiff], AGAINST _____ [*specify party, e.g.,* DEFENDANT], _____, UNDER SECTION 1021.5 OF THE CODE OF CIVIL PROCEDURE.

A. Fees to Establish Fee Claim. The type of fees recoverable under *Section 1021.5 of the Code of Civil Procedure* include compensation for the hours reasonably spent to establish and defend the fee claim, including time spent preparing fee motions and defending the fee award on appeal (*Serrano v. Unruh (1982) 32 Cal. 3d 621, 626-627, 636-639, 186 Cal. Rptr. 754, 652 P.2d 985*).

B. Fee Is Based on Application of Multiplier to Lodestar Figure. In determining the amount of attorney's fees to be awarded, the trial court must first determine a "lodestar" figure based on a careful compilation of the time spent and reasonable hourly compensation for each attorney involved in the representation of the case. That figure may then be increased or reduced by the application of a "multiplier" after the trial court has considered other factors concerning the lawsuit (*Press v. Lucky Stores, Inc. (1983) 34 Cal. 3d 311, 322, 193 Cal. Rptr. 900, 667 P.2d 704*).

C. Factors on Which Multiplier Is Based. The factors that should be considered by the trial court in determining what "multiplier" should be used to increase or reduce the "lodestar" figure include the following: (1) the novelty and difficulty of the questions involved, and the skill displayed in presenting them; (2) the extent to which the nature of the

litigation precluded other employment by the attorneys; (3) the contingent nature of the fee award, both from the point of view of eventual victory on the merits and the point of view of establishing eligibility for the award; (4) the fact that an award against the state would ultimately fall on taxpayers; (5) the fact that the attorneys in question received public and charitable funding for the purposes of bringing lawsuits of the character involved; and (6) the fact that the monies awarded would inure not to the benefit of the attorneys involved but to the organizations that employ them (*Press v. Lucky Stores, Inc. (1983) 34 Cal. 3d 311, 322 n.12, 193 Cal. Rptr. 900, 667 P.2d 704*).

D. Trial Court's Discretion in Applying Multiplier. The trial court's multiplier will not be disturbed on appeal unless it represents an abuse of discretion (*Serrano v. Priest (1977) 20 Cal. 3d 25, 49, 141 Cal. Rptr. 315, 569 P.2d 1303*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.370,* in support of a motion for attorney's fees under *Code Civ. Proc. § 1021.5,* to set forth the methods and factors properly employed to determine the amount of the award of fees. It should also be combined with additional memoranda, as appropriate, *set out in §§ 60.383 -60.385*.

See also *§ 60.370[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.370[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Fees to Establish Fee Claim

In ***Serrano v. Unruh*** *(1982) 32 Cal. 3d 621, 186 Cal. Rptr. 754, 652 P.2d 985* , plaintiffs successfully challenged the financing of public schools on equal protection grounds and were awarded attorney's fees under the private attorney general theory of *Code Civ. Proc. § 1021.5*. The fee award included services for defending the fee award on appeal, but excluded services for preparing the fee motions.

The Supreme Court affirmed the principal fee award on appeal, but remanded that portion of the order denying compensation for services on the fee motions. The Court held that the fees recoverable under *Code Civ. Proc. § 1021.5* ordinarily include compensation for hours reasonably spent, including those necessary to establish and defend the fee claim, unless circumstances render the award unjust (*32 Cal. 3d 621, 639)* .

[b] Fee Is Based on Application of Multiplier to Lodestar Figure

In ***Press v. Lucky Stores, Inc.*** *(1983) 34 Cal. 3d 311, 193 Cal. Rptr. 900, 667 P.2d 704* , in order to qualify an initiative measure for a statewide election, plaintiffs sought voter signatures. Plaintiffs circulated signature petitions outside the entrance to defendant grocery store. After defendant threatened plaintiffs with arrest if they did not abandon their endeavor, plaintiffs filed an action for injunctive relief. The trial court granted the requested the relief. Plaintiffs were able to obtain a sufficient number of signatures to qualify for the ballot. After the election, plaintiffs sought an award of attorney's fees pursuant to *Code Civ. Proc. § 1021.5*. Plaintiffs' representative was a nonprofit corporation that provides legal services without charge in cases that raise issues of broad public interest. The trial court granted plaintiffs' motion for fees. Plaintiffs appealed the award, claiming that the court abused its discretion in failing to follow the lodestar adjustment method, and in using an arbitrary method of calculation.

The California Supreme Court affirmed the judgment insofar as it found that plaintiffs were entitled to an award of attorney's fees, but reversed and remanded the judgment regarding the amount of fees awarded (*34 Cal. 3d 311, 324-325)* . Citing *Serrano v. Priest (1977) 20 Cal. 3d 25, 141 Cal. Rptr. 315, 569 P.2d 1303* (*Serrano III*), as authority, the Court explained that in determining the amount of attorney's fees that should be awarded under *Code Civ. Proc. § 1021.5*, the trial court must first determine a "touchstone" or "lodestar" figure based on a careful compilation of the time spent and reasonable hourly compensation for each attorney involved in the representation of the case. That figure may then be increased or reduced by the application of a "multiplier" after the trial court has considered other factors concerning the lawsuit. The proper determination and use of the lodestar figure is extremely important. Anchoring the award analysis to the lodestar concept is the only way of approaching the problem that can claim objectivity. Ultimately, the trial judge has discretion to determine the value of professional services rendered in his or her court. However, since determination of the lodestar figures is so fundamental to calculating the amount of the award, the exercise of that discretion must be based on the lodestar adjustment method (*34 Cal. 3d 311, 322)* . The court said that the trial court failed to follow the proper method of determining the fee award. Its calculation never even referred to the lodestar figure. Also, the trial court improperly intertwined the determination of the litigation's importance with the question of the amount to be awarded. The amount to be awarded should arise only after it has been concluded that an award is proper. The amount of the award requires the court to consider a wide range of factors. The trial court had devised a fraction that did not take into account those factors, but reflected only the trial judge's view of the results achieved by the litigation. It was not a proper adjustment mechanism or multiplier (*34 Cal. 3d 311, 323)* . While a trial court has discretion to determine the proper amount of an award, the resulting fee must bear some reasonable relationship to the lodestar figure and to the purpose of the private attorney general doctrine (*34 Cal. 3d 311, 324)* .

[c] Factors on Which Multiplier Is Based

The facts and procedural background of ***Press v. Lucky Stores, Inc.*** *(1983) 34 Cal. 3d 311, 193 Cal. Rptr. 900, 667 P.2d 704* , are discussed in *§ 60.382[3][b]*. In *Press*, the Supreme Court articulated the factors that should be considered by the trial court in determining what "multiplier" should be used to increase or reduce the "lodestar" figure. The factors the trial court may consider in adjusting the lodestar figure include the following: (1) the novelty and difficulty of the questions involved, and the skill displayed in presenting them; (2) the extent to which the nature of the litigation precluded other employment by the attorneys; (3) the contingent nature of the fee award, both from the point of view of eventual victory on the merits and the point of view of establishing eligibility for the award; (4) the fact that an award against the state would ultimately fall on taxpayers; (5) the fact that the attorneys in question received public and charitable funding for the purposes of bringing lawsuits of the character involved; and (6) the fact that the monies awarded would inure not to the benefit of the attorneys involved but to the organizations that employ them (*34 Cal. 3d 311, 322, 322 n.12*).

[d] Trial Court's Discretion in Applying Multiplier

Serrano v. Priest *(1977) 20 Cal. 3d 25, 141 Cal. Rptr. 315, 569 P.2d 1303* , is discussed in *§ 60.320[3][c]*.

[4] Additional Authorities

[a] Trial Court's Discretion in Applying Multiplier

In *Californians for Responsible Toxics Management v. Kizer (1989) 211 Cal. App. 3d 961, 259 Cal. Rptr. 599* , the court of appeal held that the California Supreme Court's list of six factors for determining the multiplier to be used to increase or reduce the loadstar figure is not an exhaustive list. The court found that the trial court did not err in looking to the relative lack of success of the plaintiff 's suit as a factor justifying reduction of the amount of the lodestar (*211 Cal. App. 3d 961, 973-975)* .

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6-60 California Points & Authorities § 60.383

§ 60.383 Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--Application of Multiplier to Fee-Related Portion of Lodestar

[1] FORM Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--Application of Multiplier to Fee-Related Portion of Lodestar

[*For caption, see § 60.370, with which this form should be combined.*]

UNDER THE CIRCUMSTANCES OF THIS CASE, IT IS PROPER FOR THIS COURT TO AWARD ATTORNEY'S FEES IN THE AMOUNT OF _____ [*specify dollar amount*], TO _____ [*specify party, e.g.,* plaintiff], AGAINST _____ [*specify party, e.g.,* DEFENDANT], _____, UNDER SECTION 1021.5 OF THE CODE OF CIVIL PROCEDURE, APPLYING THE MULTIPLIER TO THE FEE-RELATED PORTION OF THE LODESTAR.

Application of Multiplier to Fee-Related Portion of Lodestar. The court may apply the same multiplier to the fee-related portion of the lodestar that it applies to the other portions (*Serrano v. Unruh (1982) 32 Cal. 3d 621, 626-627, 636-639, 186 Cal. Rptr. 754, 652 P.2d 985*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in §§ 60.370* and *60.382*, in support of a motion for attorney's fees under *Code Civ. Proc. § 1021.5*, to set forth the methods and factors properly employed to determine the amount of the award of fees, to assert the application of the multiplier to the fee-related portion of the lodestar.

See also *§ 60.370[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.370[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Application of Multiplier to Fee-Related Portion of Lodestar

Serrano v. Unruh *(1982) 32 Cal. 3d 621, 626-627, 636-639, 186 Cal. Rptr. 754, 652 P.2d 985* , is discussed in *§ 60.382[3][a]*.

[4] Additional Authorities

In *Thayer v. Wells Fargo Bank (2001) 92 Cal. App. 4th 819, 112 Cal. Rptr. 2d 284* , five class actions against a bank were coordinated and resolved by a settlement agreement. Subsequently, the court awarded attorney's fees to nine law firms that represented plaintiffs in the coordinated actions under *Code Civ. Proc. § 1021.5*. After an appeal was filed, the defendant entered settlement agreements regarding all individual attorney's fee awards except that to one of the attorneys, who was co-counsel in one of the actions; his co-counsel's fee was among those compromised by the settlement. The trial court made the award by dividing the history of the litigation into four periods, determined the attorney's lodestar based on an hourly fee lower than the one he sought, determined the amounts for each of the four periods, and then applied a multiplier to two of those periods (*92 Cal. App. 4th 819, 823-832)* . The trial court based the multiplier on the contingent nature of the case, the novelty and complexity of the litigation, the skill displayed in fashioning an appropriate remedy, the results obtained, and the continuing obligations of counsel. The sole issue on the defendant's appeal and the attorney's cross-appeal was the amount of fees awarded. The defendant did not challenge the number of hours claimed by the attorney or the reasonableness of the hourly fee used by the court in calculating the lodestar.

The Court of Appeal reversed and remanded to the trial court. The court held that the factors justifying use of a multiplier to enhance the lodestar figures were wholly missing. The court found that the case was not genuinely questionable or contingent, since the defendant never contested plaintiffs' legal claims or their right to reasonable attorney's fees and communicated a desire to settle the cases and pay fees almost immediately after the complaints were filed (*92 Cal. App. 4th 819, 835)* . The court then held that the litigation was neither novel nor complicated, but was based on simple anticipatory breach of contract, and that neither a problem posed by a provision in the settlement agreement nor the remedy was so complex as to seriously tax the ingenuity or resources of any of the attorneys involved (*92 Cal. App. 4th 819, 835-837)* . The court also held that enhancement of the lodestar was not justified by the attorney's role in persuading the trial court to initiate coordinated proceedings, since the defendant, after initially opposing coordination because it justifiably expected the cases would settle promptly, dropped its opposition when the cases did not promptly settle and counsel for the plaintiffs in the four other cases neither supported nor opposed coordination (*92 Cal. App. 4th 819, 837-838)* . Enhancement on the basis of results obtained based on the high dollar value of the settlement was also not justified, where the trial court concluded it was unnecessary to determine the dollar value by refusing to award percentage fees as sought by counsel and so could not use the results obtained factor to enhance the lodestar simply because the settlement conferred a significant benefit on a large group of people as this is a factor under Section 1021.5 relevant only to the entitlement to fees, not the amount (*92 Cal. App. 4th 819, 838-839)* . The court then held that based on the unjustified duplication of work so that the hours were not reasonably spent, the trial court should apply a negative multiplier decreasing the lodestar (*92 Cal. App. 4th 819, 840-845)* . The court then held that there was no reason to apply a positive multiplier to ensure that the fee awarded was within the range of fees freely negotiated in the legal marketplace for comparable litigation. The court held that the holding in *Lealao* does not mandate that fee awards calculated under the lodestar methodology be measured by a percentage-of-the-benefit yardstick whenever a class recovery can be monetized with a reasonable degree of certainty, but is limited to cases in

which a lodestar award would not produce a fee within that range and it is not otherwise inappropriate to increase the basic lodestar. In this case, a percentage-of-the benefit approach would have been inappropriate since the court did increase the lodestar, and counsel had not shown that the lodestar would not produce a fee within the range of fees freely negotiated in the marketplace (*92 Cal. App. 4th 819, 845-846)* .

Lealao v. Beneficial California, Inc. (2000) 82 Cal. App. 4th 19, 97 Cal. Rptr. 2d 797 , was a class action against a major lender for allegedly wrongfully charging a prepayment penalty for prepayment of open-end loans on certain credit line account agreements, in which an attorney's fee award was sought after a settlement providing that the lender would pay members of the class who filed claims 77 percent of the amount paid as prepayment penalties, and pay class counsel reasonable fees determined by the court. The trial court granted fees solely on the basis of the hours counsel expended on the case, declining to utilize a multiplier to enhance fees under a lodestar calculation and declining to award a percentage fee. The court of appeal held that the trial court properly rejected a pure percentage fee since there was no conventional common fund in this case (*82 Cal. App. 4th 19, 37-39)* . However, the court remanded to the trial court for reconsideration of evaluating the lodestar as a percentage of the actual class recovery for the following reasons (*82 Cal. App. 4th 19, 50-53)* :

- Although the settlement did not create a common fund out of which attorney's fees were to be paid, the monetary value of the benefit to the class was much less speculative than that of some traditional common funds, since the settlement exposed the lender to claims in the collective amount of $14,748,000 if all class members filed valid claims, and class counsel provided the court the exact number of valid claims submitted at the time of the fee application and the collective value of those claims ($7.35 million) was undisputed, so that the value of the class recovery could be monetized within a reasonable degree.

- The amount of claims actually paid and the basis for the percentage analysis urged by class counsel was approximately $7.4 million less than the amount the lender agreed to pay class members, so that if the lodestar amount were reasonably adjusted upward to reflect an appropriate percentage of the claims paid, the total amount of the lender's out-of-pocket expense would still be considerably less than that to which it exposed itself in the settlement agreement, and the fee would be less than that which the court could award as a pure percentage in a traditional common fund case.

- Adjusting the lodestar to reflect the monetary value of the class benefit was justified by the fact that the class was notified that counsel would seek a fee representing approximately 24 percent of the recovery and no members objected and only two opted out.

- Class counsel rejected any offer including a specific amount of fees to avoid any conflict of interest with the class, and a fee award that fails to take into account commendable conduct by counsel, which subordinates counsel's economic interests to that of the class, encourages attorneys to accept settlement proposals more favorable to them than to the class.

- The prompt settlement of the case accounted for the relatively small of time spent on the case and was the major reason the basic lodestar was so low relative to the monetary amount of the recovery, and using the promptness of settlement to justify the refusal to apply a multiplier to reflect the size of the class recovery would exacerbate the disincentive to settle promptly inherent in the lodestar methodology.

- Permitting the amount of recovery to influence the fee is most justified where the amount of the recovery is not due primarily to the size of the class, and this case was not one in which the individual recoveries of class members were de minimis.

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6-60 California Points & Authorities § 60.384

§ 60.384 Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--Time Reasonably Spent in Related Proceedings

[1] FORM Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--Time Reasonably Spent in Related Proceedings

[*For caption, see § 60.370, with which this form should be combined.*]

UNDER THE CIRCUMSTANCES OF THIS CASE, IT IS PROPER FOR THIS COURT TO AWARD ATTORNEY'S FEES IN THE AMOUNT OF _____ [*specify dollar amount*], TO _____ [*specify party, e.g.,* plaintiff], AGAINST _____ [*specify party, e.g.,* DEFENDANT], _____, UNDER SECTION 1021.5 OF THE CODE OF CIVIL PROCEDURE, TO INCLUDE TIME SPENT ON CLOSELY RELATED PROCEEDINGS.

Time Reasonably Spent in Related Proceedings. An award of attorney's fees under *Section 1021.5 of the Code of Civil Procedure* includes compensation for time reasonably spent on other separate but closely related court proceedings (*Wallace v. Consumers Cooperative of Berkeley, Inc. (1985) 170 Cal. App. 3d 836, 849, 216 Cal. Rptr. 649*). [The award may also include compensation for time reasonably spent on administrative proceedings that follow and result from the commencement of the action (*Wallace v. Consumers Cooperative of Berkeley, Inc. (1985) 170 Cal. App. 3d 836, 849 n.5, 216 Cal. Rptr. 649*)].

[2] Comments

[a] Use of Form

This form of memorandum is for use with the general memorandum *set out in §§ 60.370* and *60.382,* in support of a motion for attorney's fees under *Code Civ. Proc. § 1021.5,* to set forth the methods and factors properly employed to determine the amount of the award of fees, when the attorney spent time in related proceedings.

See also *§ 60.370[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 60.370[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Time Reasonably Spent in Related Proceedings

In ***Wallace v. Consumers Cooperative of Berkeley, Inc.*** *(1985) 170 Cal. App. 3d 836, 216 Cal. Rptr. 649* , defendant decided to challenge the legality of minimum milk retail price regulations by selling milk below the minimum price. Plaintiff director of the state Department of Food and Agriculture obtained both a temporary restraining order and a preliminary injunction against defendant, who then cross complained against plaintiff. The parties entered into settlement negotiations, and agreed to a memorandum of understanding. Subsequently, plaintiff issued orders suspending the minimum milk price regulations throughout the state. Defendant moved for an award of attorney's fees under *Code Civ. Proc. § 1021.5*, and the trial court awarded the fees. Plaintiff appealed.

The court of appeal affirmed the award, with a modification deleting provisions directing the award to be paid out of certain sources. The court held that the award of fees for services performed in conjunction with administrative proceedings against defendant was proper. The court first explained that a party need not prevail on every claim presented in an action to be considered a successful party within the meaning of *Code Civ. Proc. § 1021.5* (*170 Cal. App. 3d 836, 846)* . Rather, the fact that the party prevailed on some claims but not on others is a factor to be considered in determining the amount of the fee award (*170 Cal. App. 3d 836, 846-847)* . The court next explained that, in considering the factors to determine the amount of the fee, the trial court must first calculate a "touchstone" figure of the attorney's services in terms of the time expended on the case (*170 Cal. App. 3d 836, 847)* . The hours reasonably expended on an action may include services performed in closely related administrative proceedings that follow and result from the commencement of an action (*170 Cal. App. 3d 836, 847, 849 n.5*). The hours reasonably expended may also include time spent on other separate but closely related court proceedings (*170 Cal. App. 3d 836, 849)* . Finally, the court explained that the trial court may adjust the touchstone figure upward or downward in light of the results obtained, among other factors. If the unsuccessful claims were unrelated to the successful ones, the figure would be adjusted downward. However, when the unsuccessful and successful claims involve a common core of facts or are based on related legal theories, the trial court focuses on the significance of the overall relief obtained in relation to the hours reasonably expended. If the successful party has obtained excellent results, his or her attorney recovers a fully compensatory fee (*170 Cal. App. 3d 836, 849-850)* .

[4] Additional Authorities

[a] Time Reasonably Spent in Related Proceedings

In *Best v. California Apprenticeship Council (1987) 193 Cal. App. 3d 1448, 240 Cal. Rptr. 1* , the court of appeal held that fees may be awarded under *Code Civ. Proc. § 1021.5* for services provided in conjunction with administrative proceedings that took place prior to a court action, when such administrative proceedings were useful and necessary to the public interest litigation (*193 Cal. App. 3d 1448, 1461-1462)* .

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6-60 California Points & Authorities § 60.385

§ 60.385 Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--Determining Fee When Unsuccessful Claims Related to Successful Claims

[1] FORM Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--Determining Fee When Unsuccessful Claims Related to Successful Claims

[*For caption, see § 60.370, with which this form should be combined.*]

UNDER THE CIRCUMSTANCES OF THIS CASE, IT IS PROPER FOR THIS COURT TO AWARD ATTORNEY'S FEES IN THE AMOUNT OF _____ [*specify dollar amount*], TO _____ [*specify party, e.g.,* plaintiff], AGAINST _____ [*specify party, e.g.,* DEFENDANT], _____, UNDER SECTION 1021.5 OF THE CODE OF CIVIL PROCEDURE, TO REFLECT TIME SPENT ON UNSUCCESSFUL CLAIMS RELATED TO SUCCESSFUL CLAIMS.

Determining Fee When Unsuccessful Claims Related to Successful Claims. In determining the amount of an award of attorney's fees under *Section 1021.5 of the Code of Civil Procedure*, when a successful party's successful and unsuccessful claims for relief involve a common core of facts or are based on related legal theories, the trial court focuses on the significance of the overall relief obtained in relation to the hours reasonably expended. [When the successful party has obtained excellent results, his or her attorney recovers a fully compensatory fee] (*Wallace v. Consumers Cooperative of Berkeley, Inc. (1985) 170 Cal. App. 3d 836, 850, 216 Cal. Rptr. 649*).

[2] Comments

[a] Use of Form

This form of memorandum is for use with the general memorandum *set out in §§ 60.370* and *60.382*, in support of a motion for attorney's fees under *Code Civ. Proc. § 1021.5*, to set forth the methods and factors properly employed to determine the amount of the award of fees, when the attorney spent time on unsuccessful claims related to successful

claims.

See also *§ 60.370[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 60.370[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Determining Fee When Unsuccessful Claims Related to Successful Claims

Wallace v. Consumers Cooperative of Berkeley, Inc. *(1985) 170 Cal. App. 3d 836, 216 Cal. Rptr. 649* , is discussed in *§ 60.384*.

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6-60 California Points & Authorities § 60.386

§ 60.386 Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--Fees and Penalties May Be Awarded in Same Action

[1] FORM Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--Fees and Penalties May Be Awarded in Same Action

[*For caption, see § 60.370, with which this form should be combined.*]

UNDER THE CIRCUMSTANCES OF THIS CASE, IT IS PROPER FOR THIS COURT TO AWARD ATTORNEY'S FEES IN THE AMOUNT OF _____ [*specify dollar amount*], TO _____ [*specify party, e.g.,* plaintiff], AGAINST _____ [*specify party, e.g.,* defendant], UNDER CODE OF CIVIL PROCEDURE SECTION 1021.5, DESPITE FACT THAT THE COURT HAS ALSO AWARDED PENALTIES FOR _____ [*identify, e.g.,* VIOLATIONS OF THE UNFAIR COMPETITION STATUTE].

Private Attorney General Fees and Penalties May Be Awarded in Same Action. Both fees under *Code of Civil Procedure section 1021.5* and penalties can, as a matter of law, be awarded in the same action when such penalties and fees are appropriate in the particular instance (*Hewlett v. Squaw Valley Ski Corp. (1997) 54 Cal. App. 4th 499, 544, 63 Cal. Rptr. 2d 118*).

[2] Comments

[a] Use of Form

This form of memorandum is for use with the general memorandum *set out in §§ 60.370* and *60.382*, in support of a motion for attorney's fees under *Code Civ. Proc. § 1021.5*, when penalties have also been awarded in the action. Counsel may choose to use this form in a reply brief to respond to an opposing party's contention that both fees and penalties are not proper as a matter of law.

See also *§ 60.370[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 60.370[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Private Attorney General Fees and Penalties May Be Awarded in Same Action

In ***Hewlett v. Squaw Valley Ski Corp.*** *(1997) 54 Cal. App. 4th 499, 544, 63 Cal. Rptr. 2d 118* , a private individual and a private organization brought a lawsuit against the operator of a ski resort alleging unlawful business practices in cutting down more than 1,800 trees to develop ski runs. The county district attorney had brought a separate action, but dismissed his action and joined as a plaintiff in the action brought by the private individual and organization. The trial court found that the ski resort had engaged in unfair competition by committing unlawful business practice by violating provisions of the Public Resources Code, terms of a conditional use permit, and a temporary restraining order. The trial court awarded mandatory and prohibitory injunctive relief, imposed fines, and attorneys fees to the private individual and organization. The ski resort appealed, challenging among other things, the remedies imposed and the award of attorney fees.

The court of appeal affirmed. The ski resort contended that the trial court could not award attorneys fees under *Code Civ. Proc. § 1021.5* if it has also awarded penalties for violations of the unfair competition statute. The ski resort posited that it was the county district attorney who initially brought the action, thereby making the monetary penalties possibility. The ski resort argued that outside counsel in this case was merely doing the work on behalf of the district attorney and that the public benefit fee doctrine has never been applied as a "subterfuge by which public bodies make private defendants pay for legal work done on behalf of the public body." In the alternative, the ski resort argued that if the case was truly brought by private parties and not the district attorney, the penalties imposed were inappropriate.

The court concluded that the ski resort's analysis was faulty. It observed that numerous cases have awarded both penalties and attorney's fees. The court stated that the question is not whether both fees and penalties can, as a matter of law, be awarded in the same action. Instead, it is whether penalties and fees are appropriate in a particular instance (*54 Cal. App. 4th 499, 544)* . After considering those circumstances, the court held that the trial court did not abuse its discretion in awarding attorney's fees under *Code Civ. Proc. § 1021.5* (*54 Cal. App. 4th 499, 546)* .

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2-60 California Points & Authorities § 60.387

§ 60.387 Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--No Reduction in Amount for Pursuit of Unsuccessful Claims

[1] FORM Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--No Reduction in Amount for Pursuit of Unsuccessful Claims

[*Caption, see § 60.370, with which this form should be combined.*]

UNDER THE CIRCUMSTANCES OF THIS CASE, IT IS PROPER FOR THIS COURT TO AWARD ATTORNEY'S FEES IN THE AMOUNT OF _____ [*specify dollar amount*], TO _____ [*specify party, e.g.,* plaintiff], AGAINST _____ [*specify party, e.g.,* defendant], UNDER CODE OF CIVIL PROCEDURE SECTION 1021.5 WITHOUT REDUCING THE AWARD BASED ON _____ [*e.g.,* plaintiff's] PURSUIT OF UNSUCCESSFUL CLAIMS.

Attorney's Fees Award Need Not Be Reduced Under *Code Civ. Proc. § 1021.5* Because Successful Party Pursued Unsuccessful Claims. The court is not required to reduce an attorney's fees award under *Code of Civil Procedure § 1021.5* because the successful party pursued unsuccessful as well as successful claims (*Hogar Dulce Hogar v. Community Development Com. (2007) 157 Cal. App. 4th 1358, 1368-1369, 69 Cal. Rptr. 3d 250*).

[2] Comments

[a] Use of Form

This form of memorandum is for use with the general memorandum *set out in § 60.370*, in support of a motion for attorney's fees under *Code Civ. Proc. § 1021.5*, when the successful party to whom fees are being awarded has pursued both successful and unsuccessful claims. Counsel may choose to use this form in a reply brief to respond to an opposing party's contention that the fee award should be reduced based on the pursuit of both successful and unsuccessful claims.

See also *§ 60.370[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 60.370[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] No Reduction in Amount for Pursuit of Unsuccessful Claims

The facts and proceedings in ***Hogar Dulce Hogar v. Community Development Com.*** *(2007) 157 Cal. App. 4th 1358, 69 Cal. Rptr. 3d 250* , are *set forth in § 60.387*. In that case, after the trial court awarded the plaintiff attorney's fees under *Code Civ. Proc. § 1021.5*, defendant on appeal argued the trial court erred in not reducing the award to account for the fact that plaintiff pursued a number of claims which were not successful and its reimbursement claim was only partially successful. Defendant argued the trial court should have applied a negative multiplier to the lodestar amount and, in any event, should have excluded hours spent on unsuccessful matters (*157 Cal. App. 4th 1358*).

The court of appeal found no abuse of discretion. The court held that an attorney's fee award need not be reduced simply because the successful party failed to prevail on every contention raised in the lawsuit (*157 Cal. App. 4th 1358, 1369* ; *see also Hensley v. Eckerhart (1983) 461 U.S. 424, 435, 103 S. Ct. 1933, 76 L. Ed. 2d 40*). The court found that only when a successful party achieved limited success, or failed with respect to distinct and unrelated claims, should the court reduce the lodestar (*157 Cal. App. 4th 1358, 1369* ; *see also Sokolow v. County of San Mateo (1989) 213 Cal. App. 3d 231, 250, 261 Cal. Rptr. 520*). When a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have the attorney's fee reduced simply because the trial court did not adopt each contention raised (*157 Cal. App. 4th 1358, 1369* ; *see also Hensley v. Eckerhart (1983) 461 U.S. 424, 440*). In *Hogar*, given the long-term impact of defendant's amendment to a tax-sharing agreement with the county and the significant amount of reimbursement plaintiff obtained, the trial court could reasonably have found plaintiff had achieved excellent results. Moreover, because all of plaintiff's claims were related to its contention the Housing Fund had not been properly reimbursed, it had standing to assert those claims, and the statute of limitations had not expired, the trial court was not required to segregate the claims between those upon which plaintiff was successful and those on which defendant prevailed. Finally, given the overall results achieved and the relationship between the claims asserted, the trial court was not required to reduce the lodestar amount (*157 Cal. App. 4th 1358, 1369)* .

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6-60 California Points & Authorities § 60.388

§ 60.388 Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--Prevailing Private Party Suing With Public Entities Is Also Entitled to Fees

[1] FORM Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--Prevailing Private Party Suing With Public Entities Is Also Entitled to Fees

[*For caption, see § 60.370, with which this form should be combined.*]

PRIVATE PARTIES WHO SUE WITH PUBLIC ENTITIES AND PREVAIL ARE ENTITLED TO ATTORNEY'S FEES UNDER THE PRIVATE ATTORNEY GENERAL THEORY WHEN THEY PREVAIL AND MEET THE OTHER CRITERIA.

Prevailing Private Party Suing With Public Entities Is Also Entitled to Fees. When two parties achieve the same relief acting essentially as private attorneys general, even though one of the parties is a public entity, there is no rational basis to conclude that the public entity is entitled to be rewarded for its success under *Code Civ. Proc. § 1021.5*, but the private party is not (*State Water Resources Control Bd. Cases (2008) 161 Cal. App. 4th 304, 311-318, 73 Cal. Rptr. 3d 842*).

[2] Comments

[a] Use of Form

This form of memorandum is for use with the form *set out in § 60.370* in support of a motion for attorney's fees under *Code Civ. Proc. § 1021.5*, when private parties and public entities sue together and prevail. Counsel may choose to use this form in a reply brief to respond to an opposing party's contention that there was no necessity for the private party to sue, given the public entities' action.

See also *§ 60.370[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 60.370[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Prevailing Private Party Suing With Public Entities Is Also Entitled to Fees

In ***State Water Resources Control Bd. Cases*** *(2008) 161 Cal. App. 4th 304, 73 Cal. Rptr. 3d 842* , in an earlier opinion, the Court of Appeal decided eight appeals and three cross-appeals in seven coordinated cases that arose out of an omnibus water rights proceeding before the State Water Resources Control Board. One of the seven coordinated cases was a mandamus proceeding brought by five nonprofit organizations. Another one was a mandamus proceeding brought by six public agencies. Ultimately, the court determined the nonprofit organizations and the public agencies were entitled to essentially the same mandamus relief. On remand, after the trial court entered judgment in favor of the nonprofit organizations in compliance with the appellate court's directive, they sought attorney's fees under the private attorney general doctrine embodied in *Code Civ. Proc. § 1021.5*. The trial court denied their motion, concluding they had not shown that the necessity of private enforcement made a fee award appropriate based on the fact that the relief they obtained directed the Board to do nothing more than provide the relief the public agencies had already obtained (*161 Cal. App. 4th 304, 305-306)* .

The Court of Appeal reversed, concluding that the trial court erred in denying the nonprofit organizations' motion for attorney's fees under § 1021.5. That the success they achieved was the same success the public agencies parties achieved did not justify a denial of a fee award under the private attorney general theory, especially since the trial court granted the motion by two of the public agencies for fees under § 1021.5. The public agencies received an award of attorney's fees under § 1021.5 for their efforts in the coordinated cases. There was no public attorney general available to pursue litigation against the defendant because the Attorney General represented the defendant. Thus, it fell to other public and private parties to pursue the litigation, with the prospect of obtaining fees under § 1021.5 in the event they succeeded. The services of the public agencies could not be deemed unnecessary because the success they achieved was largely mirrored by the success achieved by the nonprofit organizations, and likewise the services of the nonprofit organizations could not be deemed unnecessary because the success they achieved was mirrored by that of the public agencies. To require the nonprofit organizations to make the necessity showing would have effectively elevated the public agencies to the role of a public attorney general, whose job it is to litigate the important public issues at stake, while relegating the nonprofit organizations to the subordinate role of private attorneys general, who were required to show that their services, which supplemented those of the public attorney general, were necessary and valuable to the ultimate outcome of the case. There was no rational basis for doing so, however, when the public agencies were rewarded for their efforts under § 1021.5 and therefore clearly were not acting like a true public attorney general, who is not entitled to fees under § 1021.5 because it is his or her job to pursue litigation in the general interest of the state's population. It also did not matter that the nonprofit organizations achieved their success after the public agencies had already obtained relief from the trial court (*161 Cal. App. 4th 304, 310-317)* .

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6-60 California Points & Authorities § 60.389

§ 60.389 Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--Party Need Not Have Attempted to Enforce Right Without Litigation

[1] FORM Supporting Motion for Award of Attorney's Fees Under Private Attorney General Theory--Party Need Not Have Attempted to Enforce Right Without Litigation

IT IS PROPER FOR THE COURT TO GRANT ATTORNEY'S FEES TO _____ [*specify party, e.g.,* PLAINTIFF] _____ [*name*] ON THE BASIS OF THE PRIVATE ATTORNEY GENERAL THEORY, EVEN IF THAT PARTY DID NOT SEEK TO ENFORCE THE RIGHT WITHOUT LITIGATION.

Party Need Not Have Attempted to Enforce Right Without Litigation. Attorney's fees under *Code of Civil Procedure Section 1021.5* may be awarded even if the plaintiff seeking such fees had not reasonably endeavored to enforce the important right affecting the public interest without litigation and its attendant expense (*Vasquez v. California (2008) 45 Cal. 4th 243, 251-261, 85 Cal. Rptr. 3d 466, 195 P.3d 1049*).

[2] Comments

[a] Use of Form

This form of memorandum is for use with the general memoradum *set out in § 60.370* in support of a motion for attorney's fees under *Code Civ. Proc. § 1021.5*. Counsel may choose to use this form in a reply brief to respond to an opposing party's contention that a party seeking fees must have attempted to enforce the right without litigation.

See also *§ 60.370[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 60.370[2][b]* for

discussion of evidentiary support.

[3] Discussion of Authorities

Vasquez v. California *(2008) 45 Cal. 4th 243, 251-261, 85 Cal. Rptr. 3d 466, 195 P.3d 1049* , is discussed in greater length in § 60.403. In brief, a taxpayer sued the state for waste, alleging that the state had failed to collect and disburse payments due from employers engaged in joint ventures with prison facilities. The plaintiff argued that the state permitted employers to pay less than comparable wages to prison inmates. The trial ended when the parties agreed to a stipulated injunction. The plaintiff moved for attorney's fees pursuant to *Code Civ. Proc. § 1021.5*, which the trial court granted. Soon thereafter, the California Supreme Court decided *Graham v. DaimlerChrysler Corp. (2004) 34 Cal. 4th 553, 560, 21 Cal. Rptr. 3d 331, 101 P.3d 140* , holding that, to recover attorney's fees under *Code Civ. Proc. § 1021.5*, a plaintiff in a catalyst case must have engaged in a reasonable attempt to settle its dispute with the defendant prior to litigation.

As a result of *Graham*, the defendant argued that the plaintiff was not entitled to recover attorney's fees because, among other reasons, the taxpayer had not engaged in a reasonable attempt to settle before resorting to litigation. The court of appeal affirmed the award of attorney's fees.

On appeal to the California Supreme Court, the Court first looked at the language of *Code Civ. Proc. § 1021.5*. It held that the statute's language provides the court may award attorney's fees if, among other things, "the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate." The Court held that this language did not expressly require that a plaintiff have attempted to settle the dispute (*45 Cal. 4th 243, 251)* . The Court further held that its holding in *Graham* was limited to catalyst cases (*i.e.*, cases after which the defendant changes its behavior substantially because of, and in the manner sought by, the litigation) (*45 Cal. 4th 243, 253)* .

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[Reserved]

§§ 60.390[Reserved]

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6-60 California Points & Authorities § 60.400

§ 60.400 Opposing Motion for Award of Attorney's Fees Under Private Attorney General Theory--General Form

[1] FORM Opposing Motion for Award of Attorney's Fees Under Private Attorney General Theory--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN OPPOSITION TO MOTION
Defendant.	)	FOR AWARD OF ATTORNEY'S FEES
	)	
	)	

_____

IT IS NOT PROPER FOR THE COURT TO GRANT ATTORNEY'S FEES TO _____ [*specify party, e.g.,* PLAINTIFF] _____ [*name*] ON THE BASIS OF THE PRIVATE ATTORNEY GENERAL THEORY BECAUSE _____ [*state grounds for denial of fees*].

A. General Rule. [*See § 60.320, Paragraph A.*]

B. Factors Necessary for Right to Fees. A court may award attorney's fees to a successful party against one or more opposing parties on the basis of the private attorney general theory in any action which has resulted in the enforcement of an important right affecting the public interest only if: (1) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons; (2) the necessity and financial burden of private endorsement, or of enforcement by one public entity against another public entity, are such as to make the award

appropriate; and (3) such fees should not in the interest of justice be paid out of the recovery (*Code Civ. Proc. § 1021.5*; *Woodland Hills Residents Ass'n v. City Council of Los Angeles (1979) 23 Cal. 3d 917, 934, 154 Cal. Rptr. 503, 593 P.2d 200* ; *Karuk Tribe of Northern California v. Cal. Regl Water Quality Control Board (2010) 183 Cal. App. 4th 330, 364-369, 108 Cal. Rtpr. 3d 40)* .

C. Causal Connection Between Lawsuit and Relief Required. Attorney's fees under the private attorney general doctrine (*Code Civ. Proc. § 1021.5*) are properly awarded when plaintiff s lawsuit is the catalyst motivating defendant to provide the primary relief that is sought; there must be a causal connection between the lawsuit and the relief obtained (*Graham v. DaimlerChrysler Corp. (2004) 34 Cal. 4th 553, 565-577, 21 Cal. Rptr. 3d 331, 101 P.3d 140* ; *Tipton-Whittingham v. City of Los Angeles (2004) 34 Cal. 4th 604, 21 Cal. Rptr. 3d 371, 101 P.3d 174* ; *Westside Community for Independent Living, Inc. v. Obledo (1983) 33 Cal. 3d 348, 353, 188 Cal. Rptr. 873, 657 P.2d 365*).

D. Under Catalyst Theory, Plaintiff Must Show Reasonable Attempt to Settle Matter Short of Litigation. A plaintiff seeking attorney's fees under a catalyst theory must first reasonably attempt to settle the matter short of litigation (*Graham v. DaimlerChrysler Corp. (2004) 34 Cal. 4th 553, 577, 21 Cal. Rptr. 3d 331, 101 P.3d 140* ; *Tipton-Whittingham v. City of Los Angeles (2004) 34 Cal. 4th 604, 21 Cal. Rptr. 3d 371, 101 P.3d 174*).

[*Insert other memoranda, as appropriate.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form of memorandum may be submitted in opposition to a motion for an award of attorney's fees based on the private attorney general theory [*Code Civ. Proc. § 1021.5*]. It should be combined with other memoranda, as appropriate, *set out in § 60.401* et seq.

See also *§ 60.340[2][a]*, regarding the connection between *Code Civ. Proc. § 1021.5* and the significant benefit exception, and § 60.370[2][c] for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 60.370[2][b]* for discussion of evidentiary support.

[c] Related Memoranda

Additional memoranda based on the common fund exception are *set out in § 60.401* et seq. If the motion being opposed presents other grounds for an award of attorney's fees, memoranda appropriate to opposing those grounds should be added [*see § 60.300* et seq. (common fund exception), § 60.340 et seq. (substantial benefit exception), and § 60.440 et

seq. (award based on contract pursuant to *Civ. Code § 1717*)]. For memoranda for opposing the motion on the ground that the award of attorney's fees sought is excessive, see *§ 60.550*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Memoranda

For opposing memoranda, see *§ 60.370* et seq.

[3] Discussion of Authorities

[a] General Rule

For discussion, see *§ 60.320[3][a]*.

[b] Factors Necessary for Right to Fees

Woodland Hills Residents Ass'n v. City Council of Los Angeles *(1979) 23 Cal. 3d 917, 154 Cal. Rptr. 503, 593 P.2d 200* , is discussed in *§ 60.370[3][c]*.

In *Karuk Tribe of Northern California v. Cal. Regl Water Quality Control Board (2010) 183 Cal. App. 4th 330, 364-369, 108 Cal. Rptr. 3d 40* , a number of plaintiffs filed a petition with the defendant water board to order the owner of a dam project to submit a Report of Waste Discharge for its discharges of pollutants in the Klamath River. The defendant denied the petition based on two US Supreme Court rulings that federal law preempted state law on the subject. The plaintiffs filed a mandate action in superior court seeking a ruling that federal law did not preempt state law, and that the defendant had power to act. The plaintiffs also sought attorney's fees under *Code Civ. Proc. § 1021.5*. Rather than granting or denying the petition, the trial court sent the matter back to the defendant to give a more complete response to the preemption issue in light of certain cases brought up in the mandate action. The defendant submitted a supplemental report reiterating that it was powerless to act. The trial court discharged the writ petition and granted the plaintiffs attorney's fees under *Code Civ. Proc. § 1021.5*. The trial court held that the litigation had resulted in an important public benefit, in that the defendant submitted a more complete, well-reasoned determination as to whether California or federal law should apply to the water project.

On appeal, the court concluded that the defendant did not have power to order the relief the plaintiffs sought. With respect to the attorney's fees, the court first held that to determine whether the plaintiffs were prevailing parties, it should look at the situation immediately before commencement of suit, and the situation today, and the role, if any, played by the litigation in effecting any changes between the two [*183 Cal. App. 4th 330, 364]* . The court held that the plaintiffs sought a determination by the trial court that the defendant was legally wrong as to the enforceability of state law and a peremptory writ of mandate compelling the defendant to enforce state law. The court held that the plaintiffs achieved neither objective. The only result was the limited remand of the issues to the defendant, which the plaintiffs had not even sought [*183 Cal. App. 4th 330, 365]* .

[c] Causal Connection Between Lawsuit and Relief Required

The facts and procedure in ***Graham v. DaimlerChrysler Corp.*** *(2004) 34 Cal. 4th 553, 21 Cal. Rptr. 3d 331, 101 P.3d 140* are *set forth in § 60.400[3][d]*. After the trial court awarded plaintiffs attorney's fees under *Code Civ. Proc. § 1021.5*, and the Court of Appeal affirmed (*34 Cal. 4th 553, 561-564)* , the California Supreme Court first refused to follow the lead of the United States Supreme Court in *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources (2001) 532 U.S. 598, 121 S. Ct. 1835, 149 L. Ed. 2d 855* , in which the United States

Supreme Court abolished the catalyst theory as a basis for attorney's fee awards under various federal statutes (*34 Cal. 4th 553, 565-575)* . The California Supreme Court, however, adopted limitations on the catalyst theory. The Court explicitly adopted a two-prong test for the determination of whether to award attorney's fees under § 1021.5 under a catalyst theory: The requirement that there be a causal connection between the lawsuit and the relief obtained, and a determination that defendant's conduct was required by law, *i.e.*, that the lawsuit was not frivolous, unreasonable, or groundless (*34 Cal. 4th 553, 575-577)* . The Court then placed another limitation on recovery under the catalyst theory, that a plaintiff seeking attorney's fees must first reasonably attempt to settle the matter short of litigation (*34 Cal. 4th 553, 577* ; *see § 60.400[3][d]*). Applying the catalyst rule with the limitations imposed in the opinion, the Court concluded that the trial court applied the first prong of the rule to conclude that the lawsuit was in fact a substantial causal factor in the defendant's change in policy with respect to its willingness to repurchase or replace the truck or to offer consumers substantial discounts. However, it was unclear whether the trial court considered the merits of the suit, and the trial court did not consider whether plaintiffs attempted to reasonably settle the matter short of litigation, requiring remand (*34 Cal. 4th 553, 577)* .

In ***Tipton-Whittingham v. City of Los Angeles*** *(2004) 34 Cal. 4th 604, 21 Cal. Rptr. 3d 371, 101 P.3d 174* , the California Supreme Court granted the request of the federal Ninth Circuit Court of Appeals to answer two certified questions of law: (1) May attorney fees as provided for in *Code Civ. Proc. § 1021.5* be awarded when the plaintiff has been the "catalyst" in bringing about the relief sought by the litigation? and (2) If the catalyst theory is viable under California law, will that theory support an award of attorney's fees when the plaintiff "activates" the defendant to modify its behavior, or does California law require a judicially recognized change in the legal relationship between the parties, such as a judgment on the merits, a consent decree, or a judicially ordered settlement? The federal district court had awarded attorney's fees to the plaintiff in a class action on behalf of women officers and women civil employees of a city's police department who alleged they were subjected to discrimination on the basis of sex and/or race. After the case was filed, the parties entered into settlement discussions leading to a consent decree that later was revoked by the district court. Thereafter, plaintiffs began new settlement discussions with the newly appointed police chief, which did not result in a contractual or court-ordered agreement. Instead, the police department voluntarily instituted several changes directed toward antidiscrimination. The district court noted that the changes were very similar to the original consent decree and on the joint motion of the parties, dismissed the litigation. The court then granted the plaintiffs attorney fees under both § 1021.5 and the FEHA (*34 Cal. 4th 604, 607-608)* . The California Supreme Court, based on its holding in *Graham v. DaimlerChrysler*, answered the certified questions as follows: California law continues to recognize the catalyst theory and does not require a judicially recognized change in the legal relationship between the parties as a prerequisite for attorney fees under *Code Civ. Proc. § 1021.5*, and that in order to obtain attorney fees without a judicially recognized change in the legal relationship between the parties, a plaintiff must establish that (1) the lawsuit was a catalyst motivating the defendants to provide the primary relief sought; (2) the lawsuit had merit and achieved its catalytic effect by threat of victory, not by dint of nuisance and threat of expense, as elaborated in *Graham;* and (3) the plaintiffs reasonably attempted to settle the litigation prior to filing the lawsuit (*34 Cal. 4th 604, 608)* . With regard to a public entity defendant, the Court reiterated its earlier holding in *Westside Community for Independent Living*, that attorney fees may not be obtained, generally speaking, by merely causing the acceleration of the issuance of government regulations or remedial measures, when the process of issuing those regulations or undertaking those measures was ongoing at the time the litigation was filed. When a government agency is given discretion as to the timing of performing some action, the fact that a lawsuit may accelerate that performance does not by itself establish eligibility for attorney fees (*34 Cal. 4th 604, 608-609)* .

In ***Westside Community for Independent Living, Inc. v. Obledo*** *(1983) 33 Cal. 3d 348, 188 Cal. Rptr. 873, 657 P.2d 365* , plaintiffs filed a petition for writ of mandate asking the court to order defendant to issue final regulations implementing *Gov. Code § 11135* (barring any program or activity funded by the state from unlawfully discriminating against any person on the basis of ethnic group, religion, age, sex, color, or physical or mental disability). Prior to filing of the lawsuit, defendant issued proposed regulations that plaintiff approved, giving authorization to proceed with the finalization and adoption. At the first scheduled hearing on the petition, defendant revealed that the procedures mandated by the Administrative Procedure Act were underway, and the trial court continued the hearing until January

30, 1980. Prior to the hearing scheduled in January, defendants informed the court that the regulations had been released to the public and would be issued in early June. The court rescheduled the hearing for June 2, 1980. On February 7, 1980, plaintiffs filed a notice of motion for attorney fees under *Code Civ. Proc. § 1021.5*, and the trial court ordered defendant to pay attorney fees of $10,870. Prior to the June 2 hearing, defendant informed the court that the regulations would be issued by the end of June, and the court issued an alternative writ of mandate ordering defendant to issue regulations by June 30, 1980. Defendant issued the regulations on June 24, 1980. Plaintiffs then requested supplemental attorney fees, which the trial court awarded. Defendant appealed from this and the previous award of attorney fees. The Supreme Court reversed.

On appeal, defendant contended that there was no evidence in the record to support the trial court's conclusion that plaintiffs were a "successful party" in the action, or that the lawsuit "resulted in" the enforcement of a right. The Court held that a plaintiff would be considered a "successful party" when an important right was vindicated by activating defendants to modify their behavior. The Court further held that an award of attorney fees would be appropriate when plaintiffs' lawsuit was a catalyst motivating defendant to provide the primary relief sought, but only when there was a causal connection between the lawsuit and the relief obtained. The Court stated that no award was required if the court determined that plaintiffs' suit was completely superfluous in achieving the improvements undertaken by defendants on plaintiffs' behalf. In this case, the Court found that plaintiffs' lawsuit was completely superfluous with no causal connection to defendant's action, the issuance of final regulations implementing *Gov. Code § 11139.5* (*33 Cal. 3d 348, 353)* .

[d] Under Catalyst Theory, Plaintiff Must Show Reasonable Attempt to Settle Matter Short of Litigation

In ***Graham v. DaimlerChrysler Corp.*** *(2004) 34 Cal. 4th 553, 21 Cal. Rptr. 3d 331, 101 P.3d 140* , defendant car-manufacturer offered to repurchase a truck that had been marketed with false statements about its towing capacity after a lawsuit plaintiffs filed against defendant seeking the repurchase remedy, but before any kind of court judgment was rendered. The trial court awarded plaintiffs attorney fees under *Code Civ. Proc. § 1021.5*, finding after its review of declarations and documentary evidence presented that defendant's position that the lawsuit was not a catalyst was largely a transparent fabrication. The Court of Appeal affirmed (*34 Cal. 4th 553, 561-564)* .

The California Supreme Court remanded for reconsideration of the attorney fees award, based on limitations it imposed on the catalyst theory. After refusing to abolish the catalyst theory as a basis for attorney fee awards under § 1021.5, and after adopting a two-prong test for the determination of whether to award attorney fees under § 1021.5 under a catalyst theory, the Court placed another limitation on recovery under the catalyst theory, that a plaintiff seeking attorney fees must first reasonably attempt to settle the matter short of litigation (*34 Cal. 4th 553, 577)* . Applying the catalyst rule with the new limitations imposed in the opinion, the Court concluded that the trial court properly applied the first two prongs of the rule to conclude that the lawsuit was in fact a substantial causal factor in the defendant's change in policy, but it was unclear whether the trial court considered the merits of the suit, and the trial court did not consider whether plaintiffs reasonably attempted to settle the matter short of litigation, requiring remand for a determination of whether plaintiffs were eligible for attorney fees under the catalyst rule (*34 Cal. 4th 553, 577)* .

The facts and procedure in ***Tipton-Whittingham v. City of Los Angeles*** *(2004) 34 Cal. 4th 604, 21 Cal. Rptr. 3d 371, 101 P.3d 174* are discussed in *§ 60.400[3][c]*. In *Tipton-Whittingham*, the California Supreme Court, in response to certified questions of law from the federal Ninth Circuit Court of Appeals, reiterated its holding in *Graham* that as part of its consideration of whether to award attorney fees under *Code Civ. Proc. § 1021.5*, the trial court must consider whether plaintiffs reasonably attempted to settle the matter short of litigation (*34 Cal. 4th 604, 608)* .

[4] Additional Authorities

[a] Factors Necessary for Right to Fees

In *Fresno Fire Fighters v. Jernagan (1986) 177 Cal. App. 3d 403, 222 Cal. Rptr. 886* , a firefighters association had been refused interest on a $25,000 undertaking deposited with the county in connection with an action for injunction brought by the association. It filed a class action on behalf of all public and private cash depositers in both civil and criminal court proceedings to compel the county treasurer to remit all interest earned on the deposits. The trial court ruled that the owners of all cash court deposits are entitled to the interest earned on the money and awarded the association attorney's fees under the private attorney general doctrine. On appeal, the court of appeal affirmed the trial court's ruling concerning cash deposits in civil actions, reversed the ruling concerning cash bail deposits in criminal actions, and, because of the partial reversal, remanded the case for reconsideration of the question of entitlement to attorney's fees. The court noted that "[w]hether the financial burden of private enforcement makes an award appropriate depends on whether the cost of plaintiffs' victory transcends their personal interest, i.e., whether the litigation expenses would place a disproportionate burden on the plaintiffs" (*177 Cal. App. 3d 403, 413)* . The court directed the trial court to determine whether the association sustained a financial burden out of proportion to its personal stake in the litigation by ascertaining the amount of plaintiffs' attorney's fees in recovering the interest on its $25,000 deposit, and then balancing the fee against the plaintiffs' personal stake in the litigation (*177 Cal. App. 3d 403, 414)* .

In *Miller v. California Com. on Status of Women (1985) 176 Cal. App. 3d 454, 222 Cal. Rptr. 225* , plaintiff sought an award of attorney's fees under *Code Civ. Proc. § 1021.5* after having successfully obtained a trial court ruling that the California Commission on the Status of Women (Commission) acted without express authority in expending public funds for the promotion of the Equal Rights Amendment to the United States Constitution. Following this ruling, the trial court awarded the plaintiff attorney's fees. Subsequently, the Legislature enacted *Gov. Code § 8246*, expressly authorizing the Commission to state its views on issues developed during the performance of its duties and responsibilities. Thereafter, the court of appeal reversed, based on the Legislature's action. On remand, the trial court denied the plaintiff attorney's fees. The court of appeal upheld the ruling, noting that the Legislature's action in reversing the trial court's ruling negated the plaintiff 's success in effecting a fundamental constitutional or statutory policy (*176 Cal. App. 3d 454, 457-459)* .

In *Beach Colony II Limited v. California Coastal Com. (1985) 166 Cal. App. 3d 106, 212 Cal. Rptr. 485* , plaintiff was a real estate developer who successfully challenged the Coastal Commission's requirement that land owners transfer a portion of property to the public in exchange for the right to restore a parcel to its original contours after avulsion had swept away a portion of the land. Evidence showed that plaintiff 's financial stake in the outcome was substantial. On appeal from an award of attorney's fees to the developer under *Code Civ. Proc. § 1021.5*, the court of appeal reversed. The court acknowledged that the litigation established the rights of all land owners similarly situated, but held that the plaintiff had failed to meet the burden of establishing that its litigation costs transcended its personal interest, and pointed out that only plaintiff reaped substantial, present economic benefit as a result of the litigation (*166 Cal. App. 3d 106, 113)* . The court observed that the private attorney general theory was meant to encourage suits that do not involve any individual's financial interests to the extent necessary to encourage private litigation to enforce a right of significant societal importance, and that *Code Civ. Proc. § 1021.5* was not designed as a method for rewarding litigants motivated by their own pecuniary interests who only coincidentally protect the public interest (*166 Cal. App. 3d 106, 114)* .

In *Schwartz v. City of Rosemead (1984) 155 Cal. App. 3d 547, 202 Cal. Rptr. 400* , petitioner successfully obtained a writ of mandate to compel respondent city to conduct an environmental assessment of a construction project adjacent to petitioner's residence. However, the trial court denied petitioner's request for attorney's fees under *Code Civ. Proc. § 1021.5*, and petitioner appealed. The court of appeal affirmed. The court first noted that attorney's fees may be awarded under *Code Civ. Proc. § 1021.5* if three requirements are satisfied: (1) the action resulted in enforcement of an important right affecting the public interest; (2) a significant benefit has been conferred on the public or a large class of persons; and (3) the necessity and financial burden of private enforcement so as to make the award appropriate. The court held that in the present case, the trial court did not abuse its discretion in denying attorney's fees, because petitioner had shown satisfaction of only the first two requirements but not the third. Specifically, petitioner brought the action purely to protect his private property interest; his expenses were not disproportionate to protect that interest, and

the resulting advancement of public rights and public benefits were incidental only. The court also upheld the denial on the ground that petitioner had failed to comply with certain service requirements (*155 Cal. App. 3d 547, 555-561)* .

[b] Causal Connection Between Lawsuit and Relief Required

Marine Forests Society v. Cal. Coastal Commission (2008) 160 Cal. App. 4th 867, 74 Cal. Rptr. 3d 32 , was the third appeal stemming from litigation between plaintiff, a nonprofit corporation whose purpose is the development of experimental research programs for the creation of marine forests to replace lost marine habitat, and defendant, the state coastal zone planning and management agency with primary responsibility for implementing the provisions of the California Coastal Act of 1976. In the first appeal, Court of Appeal affirmed the trial court's judgment enjoining defendant from granting, denying, or conditioning permits, or from issuing cease and desist orders regarding an experimental marine forest planted by plaintiff on a sandy plain and made of various materials, including used tires, plastic jugs, and concrete blocks. In its suit, among other things, plaintiff claimed that because members of defendant served two-year terms at the pleasure of their appointing authority, defendant should be enjoined from issuing cease and desist orders or from granting or denying permits for coastal development because the scheme for appointment of its voting members gave the legislative branch control over defendant, thereby impermissibly interfering with defendant's executive branch responsibility to execute the laws. The trial court ruled in favor of plaintiff, but stayed its decision pending defendant's appeal. The Court of Appeal affirmed, concluding that defendant's interpretation and implementation of the California Coastal Act was an executive function and the appointment structure giving the state Senate Committee on Rules and the Speaker of the Assembly the power to appoint the majority of defendant's voting members and to remove them at will contravened the separation of powers clause of California's Constitution. Defendant then appealed from the trial court's order awarding § 1021.5 attorney's fees to plaintiff. Defendant argued that plaintiff failed to establish that the financial burden of litigation was outweighed by its personal stake in the matter, because plaintiff had a strong personal and pecuniary motive to pursue the requested relief since its primary objective was to prevent defendant from ordering it to remove its artificial reef, which would have been very costly, or to pay penalties of up to $6,000 a day if it failed to remove the artificial reef. The Court of Appeal reversed the fee award on the ground that, although the trial court's decision resolved a constitutional issue involving the separation of powers doctrine, the public's interest in the outcome was incidental to plaintiff's primary objective of preventing defendant from ordering it to remove its artificial reef or to pay monetary penalties for its failure to do so. The California Supreme Court granted defendant's petition for review concerning the separation of powers issue. And in response to the first appellate decision, the Legislature amended *Pub. Res. Code § 30312* to eliminate the provision concerning the ability of the Speaker of the Assembly and the Senate Committee on Rules to remove their appointees to defendant at will. The Supreme Court reversed the Court of Appeal's affirming of the trial court's granting of injunctive relief, holding that injunctive relief was not warranted because the current statutory provisions governing the composition of defendant did not violate the separation of powers clause of the California Constitution. The court concluded that even if the statutory scheme had violated the separation of powers clause, defendant's actions prior to the statutory amendment were valid because of the de facto officer doctrine. Hence, the circumstance that the statutory provisions governing the appointment and tenure of the members of defendant who acted on a particular matter might have been vulnerable to constitutional challenge provided no independent basis for overturning the action taken by defendant. After the remittitur was filed in the trial court, plaintiff renewed its motion for attorney's fees in the trial court, asserting that even though it did not obtain a favorable judgment, it was entitled to attorney's fees under a catalyst theory of recovery because its action triggered a legislative change in the manner of appointment of defendant's members, bestowing a significant benefit upon the public. To fill the evidentiary void left in the earlier proceedings as to whether the financial burden of bringing the litigation was out of proportion to its individual stake in the matter, plaintiff provided estimates indicating that it would cost $8,000 to have volunteers remove the artificial reef over a period of approximately six months, or cost $26,300 to have a contractor remove the reef over four days, whereas plaintiff had incurred $500,000 in attorney fees in pursuing the litigation, demonstrating that the financial burden of private enforcement outweighed its personal gain. Defendant opposed the motion, contending that the doctrine of law of the case precluded an award and asserting that plaintiff was not entitled to fees because it was not the successful party and had not achieved its litigation objectives. Ruling the doctrine of law of the case barred only an award of trial attorney's fees, not appellate attorney's

fees, the trial court found the lawsuit triggered, and was a catalyst for, the amendment of a statute that violated the California Constitution, which showed plaintiff had achieved a significant goal of its litigation even if it did not obtain a favorable judgment. The court further found that the resulting legislative amendment also satisfied the first and second requirements of § 1021.5, the vindication of an important right affecting the public interest, which conferred a significant benefit on the general public. In addition, the court found that the financial burden of litigation was out of proportion to plaintiff's individual stake in the matter because the cost of removing the reef was outweighed by the cost of litigation (*160 Cal. App. 4th 867, 871-875)* . The Court of Appeal reversed, holding that plaintiff was not a successful party under the catalyst theory for attorney's fees pursuant to *Code Civ. Proc. § 1021.5*. Plaintiff did not ultimately achieve judicially sanctioned relief because the California Supreme Court reversed the Court of Appeal decision that affirmed the trial court's judgment in favor of plaintiff. Further, in catalyst cases, the defendant must have provided the plaintiff with the primary relief sought. The allegations of plaintiff's complaint disclosed that its primary goal was to save its reef, not to have *Pub. Res. Code § 30312* declared unconstitutional or to change the composition of defendant. Plaintiff did not achieve its objective. Defendant continued to issue cease and desist orders, and its preamendment orders, including the order for plaintiff to either remove its reef or face substantial penalties, was not invalidated. Defendant did not change its behavior substantially because of, and in the manner sought by, the litigation. The Legislature's amendment of § 30312 to alter the appointment structure for defendant's members was not a change in the defendant's behavior (*160 Cal. App. 4th 867, 875-880)* .

In *Hogar Dulce Hogar v. Community Development Com. (2007) 157 Cal. App. 4th 1358, 69 Cal. Rptr. 3d 250* , plaintiff sued under the Community Redevelopment Law (*Health & Saf. Code § 33000 et seq.*), challenging the manner in which defendant calculated its required payments to the Low and Moderate Income Housing Fund. The trial court found that defendant miscalculated its payments and ordered that defendant reimburse the amounts which it should have paid into the Fund from the time the fund was established in 1985 until the date of the judgment. On appeal, the appellate court reversed the trial court's judgment in part, finding that under the applicable statute of limitations, the trial court could only order reimbursement of the Housing Fund for a period commencing three years before the complaint was filed. On remand the parties entered into a stipulation with respect to costs and plaintiff's expected motion for attorney's fees. The stipulation stated the time for making a motion for attorney's fees and serving a memorandum of costs would be extended to the time permitted for filing a memorandum of costs following entry of judgment on remand. On remand also, defendant argued it should not be ordered to reimburse the Housing Fund for any period before the date the complaint was filed. The trial court rejected this defense, and defendant did not challenge the judgment. Plaintiff failed to file its motion for attorney's fees within the time limit set forth in the stipulation, and on that basis the trial court denied the initial motion for attorney's fees. However, plaintiff applied for relief from its failure to timely file its motion, which the trial court granted. The trial court then heard the motion on the merits, and found that, although plaintiff did not achieve all of its goals, it was successful in attaining its primary goals. In particular, the court found that by virtue of its litigation, plaintiff not only obtained the judgment which required defendant to transfer $1.35 million to the Housing Fund, it caused defendant to reach an agreement with the county under which, in future years, 20 percent of the agency's gross taxes, plus interest, would be paid into the Housing Fund. Based on its determination that plaintiff had been successful, the trial court found plaintiff was entitled to a total of $643,056.50 in attorney's fees, representing attorney time spent after plaintiff filed its complaint. The trial court did not make any award for fees incurred before the complaint was filed or any additional award based on the difficulty or complexity of the case (*157 Cal. App. 4th 1358, 1362-1363)* . In its principal argument on appeal defendant contended plaintiff was not a successful party within the meaning of *Code Civ. Proc. § 1021.5*, because it had agreed to most of the relief plaintiff sought when defendant amended its agreement with the county so that in future years the Housing Fund would receive 20 percent of the agency's gross tax receipts, and that plaintiff's complaint, which was not filed until after the agency had made its agreement with the county, did not cause it to alter its allocation to the Housing Fund (*157 Cal. App. 4th 1358, 1364*). The Court of Appeal affirmed the award of attorney's fees. The court held that the record fully supported the trial court's conclusion the litigation was the catalyst for defendant's agreement with the county and that plaintiff was also successful in obtaining a reimbursement to the Housing Fund. Although this was only a portion of the $5.6 million reimbursement plaintiff sought, it was a substantial amount that would not have been recovered in the absence of the litigation (*157 Cal. App. 4th 1358, 1365-1368)* .

In *Godinez v. Schwarzenegger (2005) 132 Cal. App. 4th 73, 33 Cal. Rptr. 3d 270* , a group of public schoolchildren, and their parents and community groups, sued a variety of defendants, challenging regulations and practices in distributing school bond monies for new construction on a first-come-first-served basis, rather than based on a school district's need or priority. The litigation settled after the state board of education adopted a time-regulated priority point regulation, enabling the plaintiffs' school district to apply for and share in remaining bond funds. The trial court awarded the plaintiffs attorney's fees, finding that the litigation was a catalyst leading the defendants to modify their regulation even though the litigation did not result in judicial relief. However, the trial court ruled on the attorney fee motion before the California Supreme Court issued its opinions in *Graham v. DaimlerChrysler Corp. (2004) 34 Cal. 4th 553, 21 Cal. Rptr. 3d 331, 101 P.3d 140* and *Tipton-Whittingham v. City of Los Angeles (2004) 34 Cal. 4th 604, 21 Cal. Rptr. 3d 371, 101 P.3d 174* , which imposed relevant new limitations on the catalyst theory and which applied retroactively. Although substantial evidence supported the trial court's finding that the litigation was a catalyst to the defendants' changed behavior, remand was required to determine whether the plaintiffs engaged in a reasonable attempt to settle the dispute prior to litigation (*132 Cal. App. 4th 73, 89-95)* .

In *Crawford v. Board of Education (1988) 200 Cal. App. 3d 1397, 246 Cal. Rptr. 806* , five separate intervenors in a school desegregation case sought an award of fees and costs pursuant to *Code Civ. Proc. § 1021.5* for their participation in the remedial phase of the case. The trial court denied the award and four of the intervenors appealed. The court of appeal affirmed, concluding that the record supported the trial court's finding that the intervenors failed to demonstrate a causal relationship between their participation in the remedial phase of the litigation and its practical result (*200 Cal. App. 3d 1397, 1408)* .

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Volume 6 Chapters 60-69 COSTS---to---DECLARATORY RELIEF
CHAPTER 60 COSTS
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3. Motion for Award of Attorney's Fees Under Code Civ. Proc. § 1021.5; Public Interest or Private Attorney General Theory

6-60 California Points & Authorities § 60.401

§ 60.401 Opposing Motion for Award of Attorney's Fees Under Private Attorney General Theory--Apportionment of Fees

[1] FORM Opposing Motion for Award of Attorney's Fees Under Private Attorney General Theory--Apportionment of Fees

[*For caption, see § 60.400, with which this form should be combined.*]

IT IS NOT PROPER FOR THE COURT TO GRANT ATTORNEY'S FEES TO _____ [*specify party, e.g.,* PLAINTIFF] _____ [*name*] ON THE BASIS OF THE PRIVATE ATTORNEY GENERAL THEORY IN TOTAL, BECAUSE PLACING AT LEAST A PARTIAL PORTION OF THE FEE BURN ON THAT PARTY IS PROPER UNDER THE CIRCUMSTANCES.

Apportionment of Fees. Although *Section 1021.5 of the Code of Civil Procedure* does not specifically address the question of the propriety of a partial award of attorney's fees, if the moving party's potential financial gain warrants placing on them a portion of the attorney fee burden, the broad language of Section 1021.5 and the theory underlying the private attorney general concept permit the court to shift only an appropriate portion of the fees to the losing party or parties (*Woodland Hills Residents Ass'n v. City Council of Los Angeles (1979) 23 Cal. 3d 917, 942, 154 Cal. Rptr. 503, 593 P.2d 200*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.400*, in opposition to a motion for an award of attorney's fees based on the private attorney general theory [*Code Civ. Proc. § 1021.5*], when at least part of the fee should be borne by the moving party.

See also *§ 60.370[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.370[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Apportionment of Fees

The Court in ***Woodland Hills Residents Ass'n v. City Council of Los Angeles*** *(1979) 23 Cal. 3d 917, 154 Cal. Rptr. 503, 593 P.2d 200* (discussed in *§ 60.370[3][c]*), in remanding the case to the trial court so that it might decide the motion pursuant to *Code Civ. Proc. § 1021.5*, stated that it believed that if the trial court concluded that plaintiffs' potential financial gain was such as to warrant placing on them a portion of the attorney fee burden, the broad language of *Code Civ. Proc. § 1021.5* and the theory underlying the private attorney general concept would permit the court to shift only an appropriate portion of the fees to the losing parties. The Court gave an example of a finding by the trial court that plaintiffs' potential benefit was such that individuals in their position could reasonably have been expected to incur attorney's fee if the amount of the fee bore a more reasonable relation to such benefit. In such a case, the trial court, in awarding fees under *Code Civ. Proc. § 1021.5*, may deduct from the total fee an amount reflecting the fee that plaintiffs could reasonably have been expected to bear themselves (*23 Cal. 3d 917, 942)* .

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6-60 California Points & Authorities § 60.402

§ 60.402 Opposing Motion for Award of Attorney's Fees Under Private Attorney General Theory--Private Attorney General Exception Not Applicable to Criminal Actions

[1] FORM Opposing Motion for Award of Attorney's Fees Under Private Attorney General Theory--Private Attorney General Exception Not Applicable to Criminal Actions

[*For caption, see § 60.400, with which this form should be combined.*]

IT IS NOT PROPER FOR THE COURT TO GRANT ATTORNEY'S FEES TO
_____ [*specify party, e.g.,* PLAINTIFF]
_____ [*name*]
ON THE BASIS OF THE PRIVATE ATTORNEY GENERAL THEORY, BECAUSE THIS IS A CRIMINAL ACTION.

Private Attorney General Exception Not Applicable to Criminal Actions. *Section 1021.5 of the Code of Civil Procedure* does not provide a basis for awarding attorney's fees incurred by a defendant in successfully defending a criminal action (*Fogelson v. Municipal Court (1981) 120 Cal. App. 3d 858, 861, 175 Cal. Rptr. 64*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.400*, in opposition to a motion for an award of attorney's fees based on the private attorney general theory [*Code Civ. Proc. § 1021.5*], when the action is criminal in nature.

See also *§ 60.370[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.370[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Private Attorney General Exception Not Applicable to Criminal Actions

In ***Fogelson v. Municipal Court*** *(1981) 120 Cal. App. 3d 858, 175 Cal. Rptr. 64* , petitioner was convicted in municipal court of violating certain provisions of a municipal code relating to solicitation on city property. The conviction was reversed by the appellate department of the superior court, but another division of the court of appeal transferred the case to itself and affirmed the conviction. The Supreme Court granted a hearing and reversed, holding that the municipal code provision on which the conviction was based was invalid [*see People v. Fogelson (1978) 21 Cal. 3d 158, 161-167, 145 Cal. Rptr. 542, 577 P.2d 677]* . Thereafter, the criminal proceeding was dismissed, and petitioner filed a motion for attorney's fees and memorandum of costs with the municipal court. The municipal court denied the motion and the appellate department affirmed. Petitioner then petitioned the superior court for a writ of mandate to compel the municipal court to determine whether petitioner was entitled to attorney's fees under *Code Civ. Proc. § 1021.5* (attorney's fees awarded where action results in enforcement of important right affecting public interest). The superior court denied the relief on procedural grounds, ruling that petitioner had an adequate alternative remedy at law. Petitioner appealed.

The court of appeal affirmed. The court stated that although it had serious doubts concerning the procedural grounds on which the superior court denied relief, it was nevertheless convinced that the Legislature never intended *Code Civ. Proc. § 1021.5* to apply to attorney's fees incurred in the defense of a criminal prosecution. The court observed that none of the legislative materials indicated that the section might be applied to criminal cases and that no criminal cases were to be found among those which apparently triggered the legislation (*120 Cal. App. 3d 858, 861)* . Moreover, the court noted that *Code Civ. Proc. § 1021.5* is contained in Title 14 of Part 2 of the Code of Civil Procedure, which is entitled "of Civil Actions." The court stated that nothing could be clearer than that chapter 6 of that title, in which *Code Civ. Proc. § 1021.5* appears, addresses only the question of costs and attorney's fees in civil actions. In this context, the court held, it would be a highly imaginative exercise of judicial legislation to apply *Code Civ. Proc. § 1021.5* to criminal cases (*120 Cal. App. 3d 858, 862)* .

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6-60 California Points & Authorities § 60.403

§ 60.403 Opposing Motion for Award of Attorney's Fees Under Private Attorney General Theory--Party Seeking Fees in "Catalyst Theory" Case Must Have Attempted to Enforce Right Without Litigation

[1] FORM Opposing Motion for Award of Attorney's Fees Under Private Attorney General Theory--Party Seeking Fees in "Catalyst Theory" Case Must Have Attempted to Enforce Right Without Litigation

[*For caption, see § 60.400, with which this form should be combined.*]

IT IS NOT PROPER FOR THE COURT TO GRANT ATTORNEY'S FEES IN THIS CASE TO _____ [*specify party, e.g.,* PLAINTIFF] _____ [*name*] ON THE BASIS OF THE PRIVATE ATTORNEY GENERAL THEORY, BECAUSE THAT PARTY DID NOT SEEK TO ENFORCE THE RIGHT WITHOUT LITIGATION.

Party Seeking Fees in "Catalyst Theory" Case Must Have Attempted to Enforce Right Without Litigation. Attorney's fees under *Section 1021.5 of the Code of Civil Procedure* will not be awarded unless the plaintiff seeking such fees in a "catalyst theory" case had reasonably endeavored to enforce the important right affecting the public interest without litigation and its attendant expense (*Vasquez v. California (2008) 45 Cal. 4th 243, 251-261, 85 Cal. Rptr. 3d 466, 195 P.3d 1049* ; *Graham v. DaimlerChrysler Corp. (2004) 34 Cal. 4th 553, 560, 21 Cal. Rptr. 3d 331, 101 P.3d 140*).

[2] Comments

[a] Use of Form

This form is for use with the general memorandum *set out in § 60.400*, in opposition to a motion for an award of attorney's fees based on the private attorney general theory [*Code Civ. Proc. § 1021.5*], when the moving party in a "catalyst theory" case did not seek to enforce the right without litigation.

In a change from preexisting law, in 2008 the California Supreme Court held that a plaintiff need not first attempt to settle a matter short of litigation to recover attorney's fees under *Code Civ. Proc. § 1021.5* [*Vasquez v. California (2008) 45 Cal. 4th 243, 251-261, 85 Cal. Rptr. 3d 466, 195 P.3d 1049]* . The Court held that an attempt to settle is required only in "catalyst theory" cases [*Vasquez v. California (2008) 45 Cal. 4th 243, 251-261, 85 Cal. Rptr. 3d 466, 195 P.3d 1049 , citing Graham v. DaimlerChrysler Corp. (2004) 34 Cal. 4th 553, 560, 21 Cal. Rptr. 3d 331, 101 P.3d 140]* .

Although the Court did not expressly define "catalyst theory case" in *Graham*, a definition is implicit. The Court described the "catalyst theory" as permitting attorney's fees to be awarded even when litigation does not result in a judicial resolution if the defendant changes its behavior substantially because of, and in the manner sought by, the litigation [*Graham v. DaimlerChrysler Corp. (2004) 34 Cal. 4th 553, 560, 21 Cal. Rptr. 3d 331, 101 P.3d 140]* . Similarly, in *Tipton-Whittingham*, the Court held that *Graham*'s limitations on the catalyst theory set out the factual prerequisites that a plaintiff must establish to obtain attorney's fees without a judicially recognized change in the legal relationship between the parties [*Tipton-Whittingham v. City of Los Angeles (2004) 34 Cal. 4th 604, 608, 21 Cal. Rptr. 3d 371, 101 P.3d 174]* . A plaintiff who has not succeeded in obtaining a "judicial resolution" or a "judicially recognized change in the legal relationship between the parties" must obtain attorney's fees under the catalyst theory or not at all [*Vasquez v. California (2008) 45 Cal. 4th 243, 259-260, 85 Cal. Rptr. 3d 466, 195 P.3d 1049* ; *see California Forms of Pleading and Practice, Ch. 174, Costs and Attorney's Fees, § 174.56[8]* (Matthew Bender)].

To the extent *Grimsley v. Board of Supervisors (1985) 169 Cal. App. 3d 960, 966, 213 Cal. Rptr. 108* might be read to interpret *Code Civ. Proc. § 1021.5* differently, the Court held that the decision is incorrect [*Vasquez v. California (2008) 45 Cal. 4th 243, 256-257, 85 Cal. Rptr. 3d 466, 195 P.3d 1049]* .

See also *§ 60.370[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.370[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Party Seeking Fees in "Catalyst Theory" Case Must Have Attempted to Enforce Right Without Litigation

In ***Vasquez v. California*** *(2008) 45 Cal. 4th 243, 85 Cal. Rptr. 3d 466, 195 P.3d 1049* , Vasquez, a taxpayer alleging standing due to waste of State property, sued, claiming that the State had failed to collect and disburse payments due from prison joint-venture employers. According to the plaintiff, the State had permitted employers to pay less than comparable wages to prison inmates in violation of Proposition 139, a prison inmate labor initiative. Trial of the taxpayer's claim ended when the parties agreed to a stipulated injunction. The plaintiff afterward moved for attorney's fees under *Code Civ. Proc. § 1021.5*, which the trial court awarded, entering judgment on the stipulation and award of fees (*45 Cal. 4th 243, 248-249)* .

Soon after entry of the California Supreme Court's decision in *Graham v. DaimlerChrysler Corp. ((2004) 34 Cal. 4th 553, 21 Cal. Rptr. 3d 331, 101 P.3d 140*), the State appealed the award of attorney's fees under Section 1021.5 because the plaintiff had not engaged in a reasonable attempt to settle before resorting to litigation. The Court of Appeal affirmed, stating that Graham required a reasonable attempt to settle the action only in catalyst cases. The State petitioned for review of the judgment to the extent it awarded attorney's fees, and the California Supreme Court granted review (*45 Cal. 4th 243, 249)* .

The California Supreme Court concluded that the taxpayer was not required first to attempt to settle the matter short of litigation to recover attorney's fees under *Code Civ. Proc. § 1021.5*. Although the State argued that the Court should have treated *Vasquez* as a catalyst theory case and thus hold that the prelitigation settlement demand requirement applied, this argument lacked merit. The case was not a catalyst case because the taxpayer successfully obtained a stipulated injunction that was entered as a judgment and thus brought about a judicially recognized change in the parties' legal relationship. Because this was not a catalyst case, limitations on the catalyst theory adopted to discourage meritless suits motivated by the hope of fees did not apply (*45 Cal. 4th 243, 249)* .

In ***Graham v. DaimlerChrysler Corp.*** *(2004) 34 Cal. 4th 553, 21 Cal. Rptr. 3d 331, 101 P.3d 140* , a vehicle manufacturer offered to repurchase a truck that had been marketed with false statements about its towing capacity. This offer came after a class action suit had been filed against the manufacturer, seeking among others this repurchase remedy, but before any court judgment was rendered. The trial court awarded attorney's fees under *Code Civ. Proc. § 1021.5* to encourage consumers to bring meritorious claims of this type, and applied a lodestar fee amount and a multiplier (*34 Cal. 4th 553, 564)* .

The Court of Appeal affirmed, holding that to be eligible for attorney's fees under *Code Civ. Proc. § 1021.5*, a plaintiff not only had to be a catalyst to the defendant's changed behavior, but the lawsuit had to have some merit, and the plaintiff had to have engaged in a reasonable attempt to settle its dispute with the defendant before litigation. The trial court did not abuse its discretion in finding the substantial benefit and public interest prongs of *Code Civ. Proc. § 1021.5* were met. The problem addressed by the lawsuit implicated an issue of public safety, and the lawsuit benefited consumers by acting as a deterrent, to discourage lax responses to known safety hazards (*34 Cal. 4th 553, 565)* .

The California Supreme Court found that under the first prong of the catalyst theory, the suit was a substantial causal factor in the defendant's decision to change its policies as to marketing and consumer relations. But because it was unclear whether the trial court considered the merits of the suit and the trial court did not consider whether plaintiffs attempted to reasonably settle the matter short of litigation (the second prong of the catalyst theory), the Court reversed the judgment of the Court of Appeal affirming the award of attorney's fees and remanded the cause for further proceedings (*34 Cal. 4th 553, 565)* .

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6-60 California Points & Authorities § 60.404

§ 60.404 Opposing Motion for Award of Attorney's Fees Under Private Attorney General Theory--No Right to Fees When Litigation Primarily Intended to Advance Plaintiff 's Economic Interest and Conferral of Public Benefit Was Simply Fortuitous

[1] FORM Opposing Motion for Award of Attorney's Fees Under Private Attorney General Theory--No Right to Fees When Litigation Primarily Intended to Advance Plaintiff 's Economic Interest and Conferral of Public Benefit Was Simply Fortuitous

[*For caption, see § 60.400, with which this form should be combined.*]

IT IS NOT PROPER FOR THE COURT TO GRANT ATTORNEY'S FEES TO _____ [*specify party, e.g.,* PLAINTIFF] _____ [*name*] ON THE BASIS OF THE PRIVATE ATTORNEY GENERAL THEORY, BECAUSE THE LITIGATION WAS INSTITUTED SOLELY TO PROMOTE THAT PARTY'S ECONOMIC INTERESTS AND THE PUBLIC BENEFIT WAS MERELY FORTUITOUS.

A. No Right to Fees When Litigation Primarily Intended to Advance Plaintiff 's Economic Interest and Conferral of Public Benefit Was Simply Fortuitous. An award of attorney's fees under *Code of Civil Procedure section 1021.5* is not warranted when the plaintiff 's litigation was instituted solely to promote plaintiff 's economic interests and the public benefit conferred by the litigation was merely fortuitous (*see Leiserson v. City of San Diego (1988) 202 Cal. App. 3d 725, 738, 249 Cal. Rptr. 28*).

B. Measure of Personal Stake. The proper measure of the plaintiff 's personal stake in the outcome is not the amount the jury actually awarded measured against the actual attorney's fees incurred. Rather, the objective of the private attorney general doctrine is to provide incentive for prosecuting a lawsuit that enforces an important public right and confers a significant benefit, despite the fact that the plaintiff 's own financial stake in the outcome would not be itself constitute an adequate incentive to litigate (*Satrap v. Pacific Gas & Electric Co. (1996) 42 Cal. App. 4th 72, 79-80, 49 Cal. Rptr. 2d 348*).

[2] Comments

[a] Use of Form

This memorandum is for use with the general memorandum *set out in § 60.400*, in opposition to a motion for an award of attorney's fees based on the private attorney general theory [*Code Civ. Proc. § 1021.5*], when the litigation was instituted solely to benefit the moving party's economic interests and the public benefit was merely fortuitous.

See also *§ 60.370[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.370[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] No Right to Fees When Litigation Primarily Intended to Advance Plaintiff 's Economic Interest and Conferral of Public Benefit Was Simply Fortuitous

The plaintiff in ***Leiserson v. City of San Diego*** *(1988) 202 Cal. App. 3d 725, 249 Cal. Rptr. 28* , a news cameraman who had been arrested while photographing the site of a jetliner crash, brought a tort action against the City of San Diego and other defendants based on injuries allegedly arising from the arrest. The trial court found for defendants and plaintiff appealed. Although the appellate court affirmed in favor of the defendants, it set out in its published opinion a clarification of the rights of newsgatherers at disaster sites. Plaintiff contended that because of this judicial clarification of rights, he was a "successful party" for purposes of *Code Civ. Proc. § 1021.5*, the private attorney general statute. The trial court disagreed, and denied plaintiff 's motion for fees.

The court of appeal affirmed. It noted that, notwithstanding any public benefit potentially derived from the published opinion, the precise nature of the tort litigation plaintiff elected to pursue and plaintiff 's failure to prevail in any manner within the context of the litigation precluded an award of attorney's fees under *Code Civ. Proc. § 1021.5*. The court stated that although the procedural device by which a plaintiff seeks to enforce an important right does not always determine entitlement to attorney's fees under *Code Civ. Proc. § 1021.5*, the relief sought is probative of such entitlement. When only a litigant's personal economic interests are advanced by a lawsuit, fees may not be awarded because the litigation does not significantly benefit a large class of persons. In the instant case, noted the court, plaintiff confined his tort action prayer to civil damages for himself, never requesting a declaration of the access rights of the press at disaster cites; the plaintiff 's primary intent for pursuing the litigation was to advance his own personal economic interest. The court stated that, in light of the narrow focus of plaintiff 's tort pleadings, the published appellate opinion was simply fortuitous (*202 Cal. App. 3d 725, 738)* .

[b] Measure of Personal Stake

In ***Satrap v. Pacific Gas & Electric Co.*** *(1996) 42 Cal. App. 4th 72, 49 Cal. Rptr. 2d 348* , plaintiff brought suit against defendant for wrongful termination in violation of public policy and retaliation in violation of *Lab. Code § 1102.5* (the "whistleblower" statute), based on allegations that defendant interfered with and retaliated against plaintiff for disclosing violations of the law by defendant, and other causes of action. Several causes of action were voluntarily dismissed and nonsuit granted on others, but the case went to trial on the main issue and a jury verdict was rendered in plaintiff 's favor. Shortly before the verdict was rendered, the Utilities Commission ruled that defendant's operations were not violative of law but were prudent. Plaintiff sought an award of attorney's fees under *Code Civ. Proc. § 1021.5*, and the motion was denied.

The court of appeal affirmed, holding that the trial court did not err in finding that the plaintiff 's sole motivation for the lawsuit was his own personal stake in it and his personal financial gain, and that this was not so disproportionate to the burden of private enforcement that the lawsuit would not have been brought (*42 Cal. App. 4th 72, 78)* . The court rejected plaintiff 's contention that the proper measure of his personal stake in the outcome should be the amount the jury actually awarded measured against the actual attorney's fees incurred (*42 Cal. App. 4th 72, 79-80)* . Rather, the objective of the private attorney general doctrine is to provide incentive for prosecuting a lawsuit that enforces an important public right and confers a significant benefit, despite the fact that his or her own financial stake in the outcome would not by itself constitute an adequate incentive to litigate (*42 Cal. App. 4th 72, 80)* . Nor did the trial court err in not making findings concerning all the statutory criteria of *Code Civ. Proc. § 1021.5* and then engage in a balancing test, because the court found that at least one of the statutory criteria was not met. It is unnecessary to make findings concerning the remaining once one criteria is found not to be met (*42 Cal. App. 4th 72, 80-81)* .

[4] Additional Authorities

[a] No Right to Fees When Litigation Primarily Intended to Advance Plaintiff 's Economic Interest and Conferral of Public Benefit Was Simply Fortuitous

In *Christward Ministry v. County of San Diego (1993) 13 Cal. App. 4th 31, 16 Cal. Rptr. 2d 435* , a nonprofit corporation filed a petition for writ of mandate challenging the adequacy of an environmental impact report prepared by the county regarding landfill property adjacent to petitioner's land. Petitioner appealed certain portions of the judgment, including denial of attorney's fees pursuant to *Code Civ. Proc. § 1021.5*. The court of appeal affirmed, holding with respect to the attorney's fees, that any public benefit was not sufficiently significant to justify application of the statute (*13 Cal. App. 4th 31, 49-50)* .

In *Planned Parenthood v. City of Santa Maria (1993) 16 Cal. App. 4th 685, 20 Cal. Rptr. 2d 391* , a city approved a grant for the construction of a new health-care clinic on the condition that no abortions be performed there. The organization that applied for the grant brought an action seeking an order declaring that the grant condition was unconstitutional. The trial court granted summary judgment in favor of the organization but denied the organization's motion for attorney fees under *Code Civ. Proc. § 1021.5*. The appellate court affirmed. *Code Civ. Proc. § 1021.5* is not designed to reward litigants motivated by their own pecuniary interests who only coincidentally protect the public interest. In this case, the interests of the public were incidental to the organization's primary objective of obtaining grant money (*16 Cal. App. 4th 685, 691)* .

In *Weeks v. Baker & McKenzie (1998) 63 Cal. App. 4th 1128, 74 Cal. Rptr. 2d 510* , a former employee brought a sexual harassment action against a partner in a law firm and the law firm itself and the trial court awarded attorney's fees under the private attorney general statute. The court of appeal reversed. It held that attorney's fees were not available under the private attorney general statute because the action had the primary effect of vindicating the plaintiff's personal economic interest. Nonetheless, the Court of Appeal concluded fees were available under the Fair Employment and Housing Act (*63 Cal. App. 4th 1128, 1169-1171)* .

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6-60 California Points & Authorities § 60.405

§ 60.405 Opposing Motion for Award of Attorney's Fees Under Private Attorney General Theory--First Amendment Issue Is Only Marginal and Result Is Equivocal

[1] FORM Opposing Motion for Award of Attorney's Fees Under Private Attorney General Theory--First Amendment Issue Is Only Marginal and Result Is Equivocal

[*For caption, see § 60.400, with which this form should be combined.*]

IT IS NOT PROPER FOR THE COURT TO GRANT ATTORNEY'S FEES TO _____ [*specify party, e.g.,* PLAINTIFF] _____ [*name*] ON THE BASIS OF THE PRIVATE ATTORNEY GENERAL THEORY, BECAUSE _____ [THIS CASE ONLY MARGINALLY INVOLVED [A] *FIRST AMENDMENT* ISSUE[S] *and/or* THE *FIRST AMENDMENT* WAS RAISED ONLY AS A DEFENSE AND AN EQUIVOCAL RESULT WAS OBTAINED].

***First Amendment* Issue Is Only Marginal and Result Is Equivocal.** The Legislature did not intend to authorize an award of attorney fees in every case in which *first amendment* issues are only marginally involved, or when the moving party merely raises *first amendment* defenses and then obtains an equivocal result (*Family Planning Specialists Medical Group, Inc. v. Powers (1995) 39 Cal. App. 4th 1561, 1570, 46 Cal. Rptr. 2d 667*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.400*, in opposition to a motion for an award of attorney's fees based on the private attorney general theory [*Code Civ. Proc. § 1021.5*], when the case only marginally involved a *First Amendment* issue and/or the *First Amendment* was raised only as a defense and an equivocal result was obtained.

See also *§ 60.370[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.370[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] First Amendment Issue Is Only Marginal and Result Is Equivocal

In ***Family Planning Specialists Medical Group, Inc. v. Powers*** *(1995) 39 Cal. App. 4th 1561, 46 Cal. Rptr. 2d 667* , a defendant in a defamation action moved for an award of attorney's fees under *Code Civ. Proc. § 1021.5* on the ground he was a successful party within the meaning of that section, and that he had enforced an important right affecting the public interest. The motion was made after the plaintiffs voluntarily dismissed their complaint. The trial court denied the motion, and the defendant appealed arguing that the trial court abused its discretion by denying his request.

The court of appeal affirmed. The court stated that although free speech rights are included among those recognized as important rights affecting the public interest, in defendant's case he failed to show that his defense of the libel action actually resulted in the enforcement of his or anyone else's free speech rights. Defendant, according to the court, was free to distribute nonlibelous leaflets and to stage peaceful protests (the court pointed out that defendant did not prevail on a motion to strike the complaint under *Code Civ. Proc. § 425.16*, the "anti-SLAPP suit" statute) (*39 Cal. App. 4th 1561, 1568)* . The court also concluded that the trial court was justified in finding that the defendant's success in that litigation was very narrow (*39 Cal. App. 4th 1561, 1570)* .

The court, citing the Supreme Court's comment that "not all lawsuits enforcing constitutional guarantees will warrant an award of fees" [*see* *Woodland Hills Residents Assn., Inc. v. City Council (1979) 23 Cal. 3d 917, 933, 154 Cal. Rptr. 503, 593 P.2d 200]* , reasoned that the Legislature did not intend to authorize an award of attorney fees in every case in which *first amendment* issues are only marginally involved, or when the moving party merely raises *first amendment* defenses and then obtains an equivocal result (*39 Cal. App. 4th 1561, 1570)* .

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6-60 California Points & Authorities § 60.406

§ 60.406 Opposing Motion for Award of Attorney's Fees Under Private Attorney General Theory--Public Entity Has No Right to Fees When Defendant Is Private Party

[1] FORM Opposing Motion for Award of Attorney's Fees Under Private Attorney General Theory--Public Entity Has No Right to Fees When Defendant Is Private Party

[*For caption, see § 60.400, with which this form should be combined.*]

IT IS NOT PROPER FOR THE COURT TO GRANT ATTORNEY'S FEES TO _____ [*specify party, e.g.,* PLAINTIFF] _____ [*name*] ON THE BASIS OF THE PRIVATE ATTORNEY GENERAL THEORY, BECAUSE THAT PARTY IS A PUBLIC ENTITY.

Public Entity Has No Right to Fees When Defendant Is Private Party. A public entity is not entitled to attorney fees against a private party (*Code of Civ. Proc. § 1021.5*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.400*, in opposition to a motion for an award of attorney's fees based on the private attorney general theory [*Code Civ. Proc. § 1021.5*], when the moving party is a public entity.

See also *§ 60.370[2][c]* for references to related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.370[2][b]*

for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Public Entity Has No Right to Fees When Defendant Is Private Party

Under ***Code of Civ. Proc. § 1021.5,*** a public entity is not entitled to attorney fees against a private party.

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6-60 California Points & Authorities § 60.406A

§ 60.406A Opposing Motion for Award of Attorney's Fees Under Private Attorney General Theory-Attorney General Cannot Recover Fees When Acting on Behalf of State

[1] FORM Opposing Motion for Award of Attorney's Fees Under Private Attorney General Theory-Attorney General Cannot Recover Fees When Acting on Behalf of State
[*For caption, see § 60.400.*]

IT IS NOT PROPER FOR THE COURT TO GRANT ATTORNEY'S FEES TO THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA ON THE BASIS OF THE PRIVATE ATTORNEY GENERAL THEORY, BECAUSE THE ATTORNEY GENERAL IS ACTING ON BEHALF OF THE STATE.

Attorney General Cannot Recover Attorney's Fees Under *Code Civ. Proc. § 1021.5* When Acting on Behalf of State. The State itself, acting through the Attorney General, can never be awarded attorney's fees under *Code Civ. Proc. § 1021.5* (*People ex rel. Brown v. Tehama County Bd. of Supervisors (2007) 149 Cal. App. 4th 422, 450-456, 56 Cal. Rptr. 3d 558*).

[2] Comments

[a] Use of Form

This form is for use in combination with the form *set out in § 60.400*, in opposition to a motion for an award of attorney's fees based on the private attorney general theory [*Code Civ. Proc. § 1021.5*], when the moving party is the Attorney General in an action brought on behalf of the State of California.

See also *§ 60.370[2][c]* for references to related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.370[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Attorney General Cannot Recover Attorney's Fees Under Code Civ. Proc. § 1021.5 When Acting on Behalf of State

In ***People ex rel. Brown v. Tehama County Bd. of Supervisors*** *(2007) 149 Cal. App. 4th 422, 56 Cal. Rptr. 3d 558* , the People of the State of California, acting through the Attorney General, sued the Tehama County Board of Supervisors to obtain an injunction forcing them to apply the provisions of the Subdivision Map Act (*Gov. Code § 66410 et seq.*) to a lot line adjustment on property owned by another defendant. The trial court granted the People's motion for summary adjudication as to one cause of action and the county defendants' motion for judgment on the pleadings as to another cause of action and later entered judgment consistent with its earlier rulings. The judgment required the county defendants to make findings required under the Williamson Act and Subdivision Map Act in regard to specified subdivisions and prohibited the private defendant from offering for sale any of lots until the Williamson Act and Subdivision Map Act were met. The People filed a motion for attorney fees under *Code Civ. Proc. § 1021.5*, which the trial court granted (*149 Cal. App. 4th 422, 427-430)* .

After affirming the substantive judgment, the court of appeal reversed the attorney's fees award. The court held that applying the traditional financial burden criterion to public entity litigants would not always preclude a fee award under *Code Civ. Proc. § 1021.5*. However, it does when the public entity litigant is the state itself, acting through the Attorney General. Those cases are always self-serving, in that the People will always be pursuing their own interests through their chief attorney, whose very *raison d'etre* is to enforce the laws of the state and serve the public interests of the state's population as a whole. To reward the Attorney General with attorney's fees for pursuing litigation it is his or her duty to pursue would stand the private attorney general doctrine on its head (*149 Cal. App. 4th 422, 450-456)* .

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6-60 California Points & Authorities § 60.407

§ 60.407 Opposing Motion for Award of Attorney's Fees Under Private Attorney General Theory--Party Seeking Fees Must Be Successful

[1] FORM Opposing Motion for Award of Attorney's Fees Under Private Attorney General Theory--Party Seeking Fees Must Be Successful

[*For caption, see § 60.400, with which this form should be combined.*]

IT IS NOT PROPER FOR THE COURT TO GRANT ATTORNEY'S FEES TO _____ [*specify party, e.g.,* PLAINTIFF] _____ [*name*] ON THE BASIS OF THE PRIVATE ATTORNEY GENERAL THEORY, BECAUSE THAT PARTY WAS NOT A SUCCESSFUL PARTY.

Party Seeking Fees Must Be Successful. An award for attorney's fees under *Code of Civil Procedure Section 1021.5* may only be made to a successful party (*Urbaniak v. Newton (1993) 19 Cal. App. 4th 1837, 1844, 24 Cal. Rptr. 2d 333*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.400*, in opposition to a motion for an award of attorney's fees based on the private attorney general theory [*Code Civ. Proc. § 1021.5*], when the moving party was not a successful party.

See also *§ 60.370[2][c]* for references to related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 60.370[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Party Seeking Fees Must Be Successful

In ***Urbaniak v. Newton*** *(1993) 19 Cal. App. 4th 1837, 24 Cal. Rptr. 2d 333* , the plaintiff filed suit (represented by his estate after his death) alleging violation of his right to privacy against a doctor, an insurance company, and two attorneys for revealing his HIV-positive status. The trial court granted summary judgment to all defendants, but the judgment was reversed as to the doctor. On remand, the trial court awarded attorney's fees under *Code Civ. Proc. § 1021.5* against all defendants.

The appellate court reversed the award because the plaintiff was not a successful party entitled to an award under *Code Civ. Proc. § 1021.5*. The plaintiff was not entitled to fees as to the defendants other than the doctor because the plaintiff did not prevail against them and the action did not motivate a change in their behavior. As to the doctor, the court held that an award of fees was premature because, although the case need not be completely final prior to an award, success against the doctor was not secure. Reversal of the summary judgment merely put the parties in the position they would have been in if the trial court had originally denied the doctor's summary judgment motion (*19 Cal. App. 4th 1837, 1842-1844)* .

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6-60 California Points & Authorities § 60.408

§ 60.408 Opposing Motion for Award of Attorney's Fees Under Private Attorney General Theory--Party Against Whom Fees Sought Was Not Opposing Party

[1] FORM Opposing Motion for Award of Attorney's Fees Under Private Attorney General Theory--Party Against Whom Fees Sought Was Not Opposing Party

[*For caption, see § 60.400, with which this form should be combined.*]

IT IS NOT PROPER FOR THE COURT TO GRANT ATTORNEY'S FEES TO _____ [*specify party, e.g.,* PLAINTIFF] _____ [*name*] AGAINST _____ [*specify party, e.g.,* REAL PARTY IN INTEREST]
_____ ON THE BASIS OF THE PRIVATE ATTORNEY GENERAL THEORY, BECAUSE THE PARTY AGAINST WHOM FEES ARE SOUGHT WAS NOT AN OPPOSING PARTY WITHIN THE MEANING OF CODE OF CIVIL PROCEDURE SECTION 1021.5.

Party Against Whom Fees Are Sought Must Be "Opposing Party" With in Meaning of *Code of Civil Procedure § 1021.5*. An award of attorney's fees under *Code of Civil Procedure Section 1021.5* may be made only for against an opposing party (*Code Civ. Proc. § 1021.5*; *Connerly v. State Personnel Bd. (2006) 37 Cal. 4th 1169, 1176-1184, 39 Cal. Rptr. 3d 788* ; *McGuigan v. City of San Diego (2010) 183 Cal. App. 4th 610, 624-629, 107 Cal. Rptr. 3d 554*).

[2] Comments

[a] Use of Form

This form is for use with the general memoranda *set out in § 60.400*, in opposition to a motion for an award of attorney's fees based on the private attorney general theory [*Code Civ. Proc. § 1021.5*], when the party against whom fees are sought was not an opposing party within the meaning of *Code Civ. Proc. § 1021.5*.

See also *§ 60.370[2][c]* for references to related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 60.370[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Party Against Whom Fees Are Sought Must Be Opposing Party Within Meaning of Statute

In ***Connerly v. State Personnel Bd.*** *(2006) 37 Cal. 4th 1169, 39 Cal. Rptr. 3d 788* , plaintiff successfully pursued litigation to invalidate state statutes as unconstitutional under *Cal. Const., Art. I, section 31,* which outlawed governmental preferential treatment by race, sex, and other categories. State agencies that were the respondents in the writ of mandate action for the most part opted not to defend the statutes, or to litigate only issues of standing and justiciability. Various amici curiae advocacy groups in favor of affirmative action opted defend the state programs and statutes on the merits. Those advocacy groups were redesignated from amici curiae to real parties in interest. The groups actively participated in the litigation, unsuccessfully seeking to remove the case to federal court, which was rejected because of the state defendants' lack of concurrence. The groups filed a motion to peremptorily challenge the trial judge, which ultimately was successful, sought discovery regarding the affirmative action policies and practices of the various state agencies named in the litigation, and filed a successful motion to compel discovery when the Governor was not forthcoming. After the litigation concluded, the trial court awarded plaintiff attorney's fees under *Code Civ. Proc. § 1021.5,* to be paid by the state agencies and the advocacy groups as real parties in interest. The award against the advocacy groups as well as the state agencies was upheld by the Court of Appeal. The Court of Appeal reviewed various Court of Appeal cases holding that real parties in interest actively participating in litigation may be assessed attorney's fees, even though they were not responsible for initiating or enforcing the policies that were the subject of the underlying litigation. The Court of Appeal focused on the trial court's finding that the advocacy groups participated in the litigation as full-fledged parties, distinguishing themselves from the typical amicus curiae (*37 Cal. 4th 1169, 1172-1175)* .

The California Supreme Court reversed the award against the advocacy groups on the ground that they were not "opposing parties" within the meaning of *Code Civ. Proc. § 1021.5*. The Court held first that under the language of *Code Civ. Proc. § 1021.5,* only an opposing party can be liable for attorney's fees. Because the term "opposing parties" is not defined in *Code Civ. Proc. § 1021.5,* the Court assumed that the Legislature was referring to the conventional definition of that term, and found that the opposing party liable for attorney fees under *Code Civ. Proc. § 1021.5* is generally the defendant person or agency sued, which is responsible for initiating and maintaining actions or policies that are deemed harmful to the public interest and that gave rise to the litigation. By this standard, the advocacy groups clearly were not an opposing party, because they were responsible neither for enacting nor enforcing the statutes found to be unconstitutional in the underlying litigation (*37 Cal. 4th 1169, 1176-1177)* . Moreover, amici curiae traditionally have not been considered parties liable for attorney fees, and the advocacy groups initially appearing as amici curiae were groups generally interested in the protection of minority and civil rights (*37 Cal. 4th 1169, 1177-1178)* . Further, although they were designated as real parties in interest and actively litigated, attorney's fees could not be awarded against them as opposing parties because they did not have interest to be directly affected by the proceeding. Their policy interest in the case in maintaining affirmative action programs was no different in kind from that of the typical amicus curiae and no different in substance from like-minded members of the general public (*37 Cal. 4th 1169, 1178-1182)* . Finally, the groups' active litigation and participation in the litigation did not by itself convert them into a real party in interest liable for attorney's fees. They played an active role at plaintiff's invitation and with the encouragement of the trial court, in order to conduct litigation that would otherwise not have been adversarial, and there was no indication the Legislature contemplated that someone in that circumstance, who was neither a defendant nor an

authentic real party in interest, could be considered an opposing party within the meaning of *Code Civ. Proc. § 1021.5*, and construing *Code Civ. Proc. § 1021.5* to allow liability against the advocacy groups would have been contrary to the judicial policy of welcoming amici curiae in order to facilitate informed judicial consideration of a wide variety of information and points of view that could bear on important legal questions (*37 Cal. 4th 1169, 1182-1183)* .

In ***McGuigan v. City of San Diego*** *(2010) 183 Cal. App. 4th 610, 624-629, 107 Cal. Rptr. 3d 554* , the plaintiff as a class representative sued the defendant, claiming that the defendant underfunded various retirement plans. The parties entered into a settlement agreement that required the plaintiff to continue to act as a class representative for purposes of approving and enforcing the agreement. Other parties contested the settlement, arguing that it would limit their ability to pursue existing federal lawsuits. The trial court approved the settlement and certified the class. The settlement agreement provided that the plaintiff class was entitled to recover attorney's fees from the defendant pursuant to *Code Civ. Proc. § 1021.5*. After mediation, the defendant was ordered to pay the plaintiffs $1.6 million in fees. Meanwhile, the objectors to the class pursued an appeal of the order approving the settlement and certifying the class. The plaintiff and the defendant filed extensive briefs and motions defending the order. The court of appeal upheld the settlement and certification.

The plaintiff then sought approximately $300,000 in additional attorney's fees against the defendant for work conducted for the appeal. The defendant argued that it need not pay these fees because, under *Code Civ. Proc. § 1021.5*, it was not an opposing party to the plaintiff in the appeal. The trial court denied the motion for fees.

On appeal, the court relied heavily on *Connerly v. State Personnel Bd. (2006) 37 Cal. 4th 1169, 39 Cal. Rptr. 3d 788* . The court held that the term "opposing party" as used in *Code Civ. Proc. § 1021.5* means a party whose position in the litigation was adverse to that of the prevailing party [*183 Cal. App. 4th 610, 626]* . The court held that in the appeal, the plaintiff and the defendant both defended the settlement, for their own reasons, against their common opponents, the objectors. Looking at the case law, the court noted that courts use a "practical and pragmatic approach" to evaluate the parties' relationships to one another in interpreting *Code Civ. Proc. § 1021.5* [*183 Cal. App. 4th 610, 626]* . The court concluded that as a settling party and respondent in the objectors' appeal, the defendant was not an "opposing party" to the plaintiff, but was allied in defending the settlement [*183 Cal. App. 4th 610, 628-629]* .

[4] Additional Authorities

[a] Party Against Whom Fees Are Sought Must Be Opposing Party Within Meaning of Statute

The procedure and facts in *Mejia v. City of Los Angeles (2007) 156 Cal. App. 4th 151, 67 Cal. Rptr. 3d 228* , are discussed at *§ 60.370[3][f]*. In that case, the developer, who had appeared as real party in interest, contested the award of attorney's fees to the homeowner on the grounds that it was not an opposing party and that it was not at fault because of the city's failure to secure compliance with CEQA. However, the court of appeal held that a real party in interest in a mandamus proceeding that has a direct interest in the litigation, more than merely an ideological or policy interest, and actively participates in the litigation, is an opposing party within the meaning of *Code Civ. Proc. § 1021.5* and can be liable for attorney's fees under the statute. The court held further that an award of attorney's fees under *Code Civ. Proc. § 1021.5* does not require a finding of fault or misconduct by the opposing party. Thus, the developer was an opposing party under *Code Civ. Proc. § 1021.5* and its purported absence of fault or misconduct could not relieve it of liability for fees under the statute (*156 Cal. App. 4th 151, 159-162)* .

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6-60 California Points & Authorities § 60.409

§ 60.409 Opposing Motion for Award of Attorney's Fees Under Private Attorney General Theory--Party Against Whom Fee Award Sought Is Not Type of Party on Whom Private Attorney General Fees Intended to Be Imposed

[1] FORM Opposing Motion for Award of Attorney's Fees Under Private Attorney General Theory--Party Against Whom Fee Award Sought Is Not Type of Party on Whom Private Attorney General Fees Intended to Be Imposed

[*Caption, see § 60.400, with which this form should be combined.*]

IT IS NOT PROPER FOR THE COURT TO GRANT ATTORNEY'S FEES TO _____ [*specify party, e.g.,* PLAINTIFF] _____ [*name*] AGAINST _____ [*specify party, e.g.,* DEFENDANT] _____ ON THE BASIS OF THE PRIVATE ATTORNEY GENERAL THEORY, BECAUSE THE PARTY AGAINST WHOM FEES ARE SOUGHT IS NOT THE TYPE OF PARTY ON WHOM PRIVATE ATTORNEY GENERAL FEES IS INTENDED TO BE IMPOSED UNDER CODE OF CIVIL PROCEDURE SECTION 1021.5.

Party Against Whom Fees Are Sought Must Be Type of Party on Whom Private Attorney General Fees Are Intended to Be Imposed Under *Code of Civil Procedure § 1021.5*. An award of attorney's fees under *Code of Civil Procedure Section 1021.5* may be made only against a party against whom private attorney general fees are intended to be imposed (*Adoption of Joshua S. (2008) 42 Cal. 4th 945, 951-958, 174 P.3d 192*).

[2] Comments

[a] Use of Form

This form of memorandum is for use with the general memorandum *set out in § 60.400*, in opposition to a motion for an award of attorney's fees based on the private attorney general theory [*Code Civ. Proc. § 1021.5*], when the party against whom fees are sought is not a party against whom private attorney general fees are intended to be imposed.

See also *§ 60.370[2][c]* for references to related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 60.370[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Party Against Whom Fees Are Sought Must Be Type of Party on Whom Private Attorney General Fees Are Intended to Be Imposed Under Code of Civil Procedure § 1021.5

In ***Adoption of Joshua S.*** *(2008) 42 Cal. 4th 945, 174 P.3d 192* , two women were in a relationship. One of the women was artificially inseminated by the same sperm donor two different times and gave birth to two children. While retaining her parental rights, the birth mother consented to her partner's adoption of the children. After the relationship deteriorated, her partner filed a motion for an order of adoption. The birth mother moved for court approval to withdraw her consent to adopt and to dismiss the partner's petition, relying on several arguments, including that the form of second parent adoption sought was unlawful. The trial court denied the motion to dismiss the adoption, the Court of Appeal granted a petition for writ of mandate and reversed, holding that the form of second parent adoption sought by the partner was without statutory basis. The California Supreme Court reversed the Court of Appeal, finding that these second parent adoptions were lawful. Before the resolution of other issues, the partner moved for an award of attorney's fees pursuant to *Code Civ. Proc. § 1021.5* for legal services provided in the Court of Appeal and California Supreme Court. The trial court awarded attorney's fees to the partner. The court found the California Supreme Court's decision conferred a significant nonpecuniary benefit on a large class of persons and resolved an important issue of law. The trial court also concluded that, notwithstanding the fact that the partner had a personal stake in the outcome of the litigation, the cost of the litigation was out of proportion to that stake. The Court of Appeal reversed, concluding that the partner's personal stake in the litigation, *i.e.*, vindication of her rights as an adoptive parent, were so large that a private attorney general award under § 1021.5 was not justified and rejecting her argument that nonpecuniary interests such as hers were not to be counted among the personal interests that could defeat a § 1021.5 award (*42 Cal. 4th 945, 949-951)* .

The California Supreme Court reversed. The Court found first that there was no question the litigation yielded a substantial and widespread public benefit (*42 Cal. 4th 945, 951-952)* . However, the Court also held that even if the trial court was within its discretion in holding that the costs of the litigation transcended the partner's personal interests, the birth mother was not the type of party on whom private attorney general fees were intended to be imposed, because she only engaged in litigation to adjudicate private rights from which important appellate precedent happened to emerge but otherwise did nothing to compromise the rights of the public or a significant class of people. A party may be held liable for § 1021.5 attorney's fees for engaging in litigation when the party initiates litigation that is determined to be detrimental to the public interest, or for defending against suits by public entities, or those purporting to represent the public, that seek to expand the government's power to curtail important public rights. However, in *Adoption of Joshua S.*, the mother was a private litigant with no institutional interest in the litigation, and the judgment she sought would have settled only her private rights and those of her children and her partner. She simply raised an issue in the course of that litigation that gave rise to important appellate precedent decided adversely to her (*42 Cal. 4th 945, 954-958)* .

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6-60 California Points & Authorities § 60.410

§ 60.410 Opposing Motion for Award of Attorney's Fees Under Private Attorney General Theory--No Fee Award When Party Recovers Judgment That Could Have Been Rendered in Limited Civil Case

[1] FORM

[*For caption, see § 60.400, with which this form should be combined.*]

IT IS NOT PROPER FOR THE COURT TO GRANT ATTORNEY'S FEES TO _____ [*specify party, e.g.,* PLAINTIFF] _____ [*name*] ON THE BASIS OF THE PRIVATE ATTORNEY GENERAL THEORY, BECAUSE THAT PARTY RECOVERED A JUDGMENT THAT COULD HAVE BEEN RENDERED IN A LIMITED CIVIL CASE.

Party Seeking Fees May Not Recover Judgment That Could Have Been Rendered in a Limited Civil Case. An award of attorney's fees under *Code Civ. Proc. § 1021.5* may not be made to a party who recovered a judgment that could have been rendered in a limited civil case pursuant to *Code Civ. Proc. § 1033(a)* (*Chavez v. City of Los Angeles (2010) 47 Cal. 4th 970, 989, 104 Cal. Rptr. 3d 710, 224 P.3d 41*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.400*, in opposition to a motion for an award of attorney's fees based on the private attorney general theory [*Code Civ. Proc. § 1021.5*] when the moving party recovered a judgment that could have been rendered in a limited civil case pursuant to *Code Civ. Proc. § 1033(a)*.

See also *§ 60.370[2][c]* for references to related chapters in California Forms Of Pleading And Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 60.370[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Party Seeking Fees Must Not Have Recovered Judgment That Could Have Been Rendered in Limited Civil Case

In ***Chavez v. City of Los Angeles*** *(2010) 47 Cal. 4th 970, 989, 104 Cal. Rptr. 3d 710, 224 P.3d 41* , the plaintiff sued the defendant under the California Fair Employment and Housing Act (FEHA) for various incidents of employment discrimination and retaliation over the course of several years. After a jury trial, he received a judgment for a single retaliation claim for $11,500. The plaintiff submitted a motion stating he incurred attorney's fees of about $436,602 for 1,851 attorney hours. The plaintiff sought a lodestar multiplier of two, thereby requesting about $870,935 in fees. The trial court denied the plaintiff's request for attorney's fees based on its discretion pursuant to *Code Civ. Proc. § 1033(a)*. The court of appeal reversed, holding that *Code Civ. Proc. § 1033(a)* does not apply to FEHA actions.

The California Supreme Court first held that, under that *Code Civ. Proc. § 1033(a)*, a court has discretion to award fees when a plaintiff has obtained a judgment for money damages in an amount (currently $25,000 or less) that could have been recovered in a limited civil case, but the plaintiff did not bring the action as a limited civil case and thus did not take advantage of the cost- and time-saving advantages of limited civil case procedures [*47 Cal. 4th 970, 982]* . Further, the Court held that there was no conflict between FEHA and *Code Civ. Proc. § 1033(a)*, and that court should use their discretion under *Code Civ. Proc. § 1033(a)* when determining recoverable fees under FEHA [*47 Cal. 4th 970, 986]* . With respect to the amount of fees the plaintiff requested, the Court held that a reduced fee award is appropriate when a claimant achieves only limited success [*47 Cal. 4th 970, 989]* . The Court noted that the plaintiff was unsuccessful on most of his claims. The Court held that whether the plaintiff was entitled to an award of attorney's fees for time spent litigating the single successful claim required consideration of whether the request appeared unreasonably inflated [*47 Cal. 4th 970, 990]* . The Court held that the plaintiff's attorney's fee request in the amount of $870,935 for 1,851 attorney hours was grossly inflated when considered in light of the single claim on which the plaintiff succeeded, the amount of damages awarded on that claim, and the amount of time an attorney might reasonably expect to spend in litigating such a claim [*47 Cal. 4th 970, 991]* .

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[Reserved]

§§ 60.411[Reserved]

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6-60 California Points & Authorities § 60.440

§ 60.440 Supporting Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--General Form

[1] FORM Supporting Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION TO
vs.	)	DETERMINE ENTITLEMENT TO RECOVER AT-
_____ [*name*],	)	TORNEY'S FEES IN ACTION ON CONTRACT
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

_____ [PLAINTIFF *or* DEFENDANT] IS ENTITLED TO RECOVER THE REASONABLE AMOUNT OF HIS/HER/ITS ATTORNEY'S FEES BECAUSE THE ACTION WAS BASED ON A CONTRACT PROVIDING FOR SUCH RECOVERY, AND HE/SHE/IT IS THE PARTY PREVAILING ON THAT CONTRACT.

A. Recovery of Reasonable Attorney's Fees in Action on Contract. In any action on a contract, when the contract specifically provides that attorney's fees and costs that are incurred to enforce that contract must be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract,

whether he or she is the party specified in the contract or not, is entitled to reasonable attorney's fees in addition to other costs (*Civ. Code § 1717(a)*).

B. Party Obtaining Unqualified Favorable Decision Has Right to Attorney's Fees as a Matter of Law. A trial court has no discretion to deny attorney's fees to a party who obtains an unqualified, favorable victory. Thus, for example, if the defendant has defeated recovery by the plaintiff on the only contract claim, or if the plaintiff has obtained all relief requested on the only contract claim, that successful litigant is entitled to attorney's fees as a matter of law (*Hsu v. Abbara (1995) 9 Cal. 4th 863, 876-877, 39 Cal. Rptr. 2d 824, 891 P.2d 804*).

C. Party Prevailing on Contract Is Determined by Court. The court, on notice and motion by a party, shall determine who is the prevailing party on the contract for purposes of *Civil Code Section 1717*, whether or not the suit proceeds to final judgment. [The court may also determine that there is no prevailing party on the contract for purposes of this section] (*Civ. Code § 1717(b)(1)*).

D. Party Prevailing on Contract Generally Is Party Who Recovered Greater Relief. Except as provided in *Civil Code Section 1717(b)(2)*, the prevailing party on the contract is the party who recovered greater relief in the action on the contract (*Civ. Code § 1717(b)(1)*; *see Public Employees' Retirement System v. Winston (1989) 209 Cal. App. 3d 205, 211, 258 Cal. Rptr. 612*).

[*Optional*] **E. Employer of In-House Counsel May Recover Attorney Fees as Prevailing Party.** *Civil Code Section 1717* allows the trial court to award reasonable attorney's fees to a prevailing party in an action to enforce a contract who was represented by in-house counsel [*PLCM v. Drexler (2000) 22 Cal. 4th 1084, 1091-1094, 95 Cal. Rptr. 2d 198, 997 P.2d 511]* .

[*Optional*] **F. Attorney Represented by Other Members of Law Firm May Recover Attorney Fees.** An attorney represented by other members of his or her law firm, who is a prevailing party when sued in a personal capacity in an action on a contract, may recover attorney fees under *Civil Code Section 1717* [*Gilbert v. Master Washer & Stamping Co. (2001) 87 Cal. App. 4th 212, 216-223, 104 Cal. Rptr. 2d 461]* .
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted, in an action on a contract, in support of a motion under *Civ. Code § 1717(b)* to determine the party prevailing on the contract for purposes of determining which party is entitled to an award of attorney's fees pursuant to a provision in the contract providing for recovery of those fees. It should be combined with other memoranda, as appropriate, *set out in § 60.441* et seq.

This form may also be adapted for use in support of a motion for an award of attorney's fees under *Civ. Code § 1717.5* in contract actions based on a book account, as defined in *Code Civ. Proc. § 337a* [*see Civ. Code § 1717.5*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Evidence cognizable by the court in such a motion proceeding should be submitted with the memorandum to support its factual statements. A request for judicial notice will support facts subject to such notice [*Evid. Code § 450 et seq.*]. Otherwise supporting affidavits or declarations under penalty of perjury should be submitted [*see Code Civ. Proc. §§ 2009* (affidavits), 2015.5 (declarations)], averring to such facts within the personal knowledge of the affiant or declarant as may be necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For detailed legal background, research guides, and forms for notices of motions, supporting declarations, and orders relating to the recovery of attorney's fees under Civ. Code § 1717, see California Forms of Pleading and Practice, Ch. 174, *Costs and Attorney's Fees* (Matthew Bender).

For related forms in seeking attorney's fees in contract actions based on a book account, see California Forms of Pleading and Practice, Ch. 8, *Accounts Stated and Open Accounts* , and Ch. 174, *Costs and Attorney's Fees* .

[d] Related Memoranda

Additional memoranda based on recovery of fees pursuant to a contract provision under *Civ. Code § 1717* are *set out in § 60.441* et seq.

This form may also be combined, in an appropriate case, with the memoranda *set out in § 60.480* et seq., when a motion to determine the party prevailing on the contract is combined with a motion to fix the reasonable amount of fees to be awarded as an element of costs [*see Civ. Code § 1717(a)*; *Code Civ. Proc. § 1033.5(c)(5)*].

If there are other theories upon which the moving party may recovery an award of attorney's fees, memoranda based on these theories may be combined with this form in the alternative [*see § 60.300* et seq. (common fund exception), § 60.340 et seq. (substantial benefit exception), and § 60.370 et seq. (award based on private attorney general theory under *Code Civ. Proc. § 1021.5*).

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

For opposing memoranda generally, see *§ 60.460* et seq.

[3] Discussion of Authorities

[a] Recovery of Reasonable Attorney's Fees in Action on Contract

Civ. Code § 1717(a) provides that in any action on a contract, when the contract specifically provides that attorney's fees and costs that are incurred to enforce that contract must be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, will be entitled to reasonable attorney's fees in addition to other costs.

[b] Party Obtaining Unqualified Favorable Decision Has Right to Attorney's Fees as a Matter of Law

Plaintiffs in ***Hsu v. Abbara*** *(1995) 9 Cal. 4th 863, 39 Cal. Rptr. 2d 824, 891 P.2d 804* , were a married couple interested in buying the defendants' house. The plaintiffs made a written offer to purchase the home, and the defendants responded with a written counteroffer. There was an attorney's fee provision in both the offer and counteroffer. The plaintiffs commenced this action after the sale fell through because the defendants failed to find a replacement home.

The plaintiffs' complaint alleged the formation of a contract of sale and requested specific performance of that contract. The defendants answer was a general denial, and they also cross-complained against their agent seeking indemnity and damages on various theories. The trial court granted the defendant sellers' motion for judgment on the complaint against them on the ground that no contract was ever formed between the parties because they failed to agree on the price for the home. The defendants then sought attorney's fees under *Civ. Code § 1717* as the parties prevailing on the contract cause of action (*9 Cal. 4th 863, 868-869)* .

The court awarded the defendants their costs of suit, but denied them attorney fees. The court also ruled that the defendants would recover nothing on their cross-complaint. The defendants appealed the portion of the judgment denying them attorney fees. The court of appeal affirmed the judgment, construing the lower court judgment as making an implied finding "that there was no prevailing party on the complaint" for purposes of *Civ. Code § 1717* (*9 Cal. 4th 863, 870)* .

The California Supreme Court reversed the judgment of the court of appeal. The Court interpreted *Civ. Code § 1717* as giving a "prevailing party" an entitlement to attorney's fees as a matter of right (*9 Cal. 4th 863, 872)* . Therefore, the issue in this case was whether the trial court abused its discretion when it determined that there was no prevailing party.

The Court concluded that the trial court lacked discretion to determine that there is "no prevailing party" in cases in which a party's victory is unqualified; such as when a defendant defeats recovery by a plaintiff on all contract claims in an action (as in this case), or when a plaintiff obtains all relief requested on the contract claims in an action (*9 Cal. 4th 863, 875-876)* . Statutory language in *Civ. Code § 1717* that gives a court discretion to determine that there is no prevailing party only applies when the results of litigation are equivocal, or mixed (*9 Cal. 4th 863, 876)* . In this case, the defendants obtained an unqualified victory in the only contract claim in their litigation. Accordingly, the court erred in denying them attorney's fees under *Civ. Code § 1717* (*9 Cal. 4th 863, 876-877)* .

[c] Party Prevailing on Contract Is Determined by Court

Civ. Code § 1717(b)(1) provides that the court, on notice and motion by a party, must determine who is the prevailing party on the contract for purposes of *Civil Code Section 1717*, whether or not the suit proceeds to final judgment. The court may also determine that there is no prevailing party on the contract for purposes of this section.

For discussion of who is a "prevailing party," see *§ 60.440[3][d]*.

[d] Party Prevailing on Contract Generally Is Party Who Recovered Greater Relief

Civ. Code § 1717(b)(1) provides that the party prevailing on the contract is the party who recovered a greater relief in action on the contract, except as provided in *Civ. Code § 1717(b)(2)*. This section also provides that the court, in the alternative, may find that there is no party prevailing on the contract for purposes of *Civ. Code § 1717* [*Civ. Code § 1717(b)(1)*; *see § 60.461*].

The exceptions to the general rule set out in *Civ. Code § 1717(b)(2)* are as follows: (1) there will be no party prevailing on the contract when an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case [*see § 60.462*; *compare* discussion in *§ 60.444*]; and (2) a defendant is deemed to be the party prevailing on the contract when

he or she alleges and proves a tender of the amount to which plaintiff was entitled and deposits that amount with the court.

The definition of "party prevailing on the contract" under *Civ. Code § 1717(b)(1)* differs from the definition of a "prevailing party" who is entitled to recover costs of suit generally [*see Code Civ. Proc. § 1032(a)(4)*]. Although an award of attorney's fees under *Civ. Code § 1717* is an element of costs [*Civ. Code § 1717(a)*; *see also Code Civ. Proc. § 1033.5(a)(10)* (attorney's fees authorized by contract is an item of allowable costs); *Code Civ. Proc. § 1033.5(c)(5)* (attorney's fees awarded pursuant to *Civ. Code § 1717* are allowable costs under *Code Civ. Proc. § 1032*)], a prevailing party entitled to costs generally may not necessarily be the party prevailing on the contract who is entitled to attorney's fees as an element of those costs. For example, a defendant in whose favor a dismissal is entered is a prevailing party entitled to costs [*see Code Civ. Proc. § 1032(a)(4), (b)*], but if this dismissal is voluntary, there is no party prevailing on the contract under *Civ. Code § 1717* [*Civ. Code § 1717(b)(2)*].

In this situation, if the contract clause for recovery of attorney's fees permits recovery of attorney's fee incurred in defending noncontractual claims arising from the contract, for example, a tort claim for deceit, a defendant may recover such fees as costs as a "prevailing party" under *Code Civ. Proc. § 1032*. However, because that defendant is not a "prevailing party" under *Civ. Code § 1717*, he or she is barred by that section from recovering any attorney's fees as costs which were incurred in defending contract claims that fall within the scope of *Civ. Code § 1717* [*Santisas v. Goodin (1998) 17 Cal. 4th 599, 622-623, 71 Cal. Rptr. 2d 830, 951 P.2d 399]* .

In ***Public Employees' Retirement System v. Winston*** *(1989) 209 Cal. App. 3d 205, 258 Cal. Rptr. 612* , plaintiff lessor brought an action against defendant lessee for the recovery of unpaid rent. The trial court found that defendant owed plaintiff $5,281.57 for unpaid rent and interest, and ordered the defendant to pay plaintiff 's attorney's fees under *Civil Code § 1717*. Defendant appealed, contending, inter alia, that plaintiff should have debited any unpaid rent against defendant's $5,115 security deposit when defendant vacated the building.

The court of appeal reversed the judgment, finding that plaintiff had a statutory obligation to credit the security deposit against the unpaid rent within two weeks after termination of plaintiff 's lease. The court found that, at the time defendant's lease terminated, defendant actually owed plaintiff only $4,185 in rent, which was less than the $5,115 deposit. Therefore, defendant was entitled to a partial refund of his security deposit. The court of appeal noted that *Civ. Code § 1717(b)(1)* provides, with certain exceptions, that the party prevailing on the contract must be the party who recovered a greater relief in the action on the contract. Furthermore, noted the court, the statute provides that the court may determine that there is no party prevailing on the contract. The court directed the trial court to reassess on remand the issue of whether defendant was the prevailing party in the action or whether neither party was the prevailing party. It stated that as a matter of law, plaintiff was not the party who recovered "a greater relief" in the action, and that plaintiff could not be deemed the prevailing party, since defendant, not plaintiff, was entitled to a net money judgment in his favor (*209 Cal. App. 3d 205, 210-212)* .

[e] Employer of In-House Counsel May Recover Fees as Prevailing Party

In ***PLCM v. Drexler*** *(2000) 22 Cal. 4th 1084, 95 Cal. Rptr. 2d 198, 997 P.2d 511* , an attorney had a malpractice insurance policy with a deductible amount per claim for both indemnity and expense payments and an attorney's fees provision. On being sued for malpractice, the attorney tendered his claim to his insurer, which hired outside counsel selected by the attorney, to defend him. Fees claimed by the law firm for the defense were within the deductible amount. The insurer paid the entire amount and then sued the attorney to collect the deductible amount; in this action, the insurer was represented by in-house counsel. A jury verdict was entered in the insurer's favor, and the insurer sought attorney's fees. The trial court entered judgment including an award of attorney's fees to the insurer in the requested amount.

The California Supreme Court affirmed, concluding that the superior court had authority under *Civ. Code § 1717* to

award attorney fees to in-house counsel. The Court that although attorney's fees may not be awarded to attorneys who represent themselves in actions on a contract, in-house attorneys, like private counsel but unlike pro se litigants, do not represent their own personal interests and are not seeking remuneration simply for lost opportunity costs that could not be recouped by a nonlawyer. A corporation represented by in-house counsel is in an agency relationship, that is, it has hired an attorney to provide professional legal services on its behalf. The Court found further that there is no impediment to the effective and successful prosecution of meritorious claims because of possible ethical conflict or emotional investment in the outcome. The fact that in-house counsel is employed by the corporation does not alter the fact of representation by an independent third party. Instead, the payment of a salary to in-house attorneys is analogous to hiring a private firm on a retainer (*22 Cal. 4th 1084, 1091-1094)* .

As discussed further in § 60.480[3][c], the Court went on to hold that the trial court properly determined the award of reasonable attorney's fees in this case by multiplying the reasonable in-house attorney hours by the prevailing hourly rate in the community for comparable legal services (*22 Cal. 4th 1084, 1094-1098)* .

[f] Attorney Represented by Other Members of Law Firm May Recover Attorney Fees

Gilbert v. Master Washer & Stamping Co. *(2001) 87 Cal. App. 4th 212, 104 Cal. Rptr. 2d 461* , was an action in which a tenant sued the landlord and the landlord's attorney for breach of the lease. The attorney was represented by his own law firm. After sustaining the attorney's demurrer without leave to amend, the trial court denied the attorney's motion to fix his attorney fees as costs on the ground that because he was represented by his own law firm, he was not entitled to fees under *Civ. Code § 1717* based on the California Supreme Court's holding in *Trope v. Katz (1995) 11 Cal. 4th 274, 45 Cal. Rptr. 2d 241, 902 P.2d 259* (discussed in *§ 60.467[3][a]*) that an attorney who litigates in propria persona may not recover attorney fees pursuant to § 1717 (*87 Cal. App. 4th 212, 216)* .

The Court of Appeal reversed the order denying the motion to fix attorney fees as costs and remanded to the trial court to determine whether the attorney was a prevailing party and the amount of attorney fees, if any, he was entitled to recover (*87 Cal. App. 4th 212, 224)* . The court found that an attorney represented by members of his or her own law firm incurs fees within the meaning of *Civ. Code § 1717*, since the attorney will experience a reduced draw from the partnership (or a reduced salary from the professional corporation to account for the amount of time his or her partners or colleagues specifically devoted to the representation, or absorb a share of the reduction in other income the firm experiences because of the time spent on the case (*87 Cal. App. 4th 212, 220-221)* . The court also found that an attorney represented by members of his or her own law firm is a party to an attorney-client relationship, since the members of the law firm represented the separate and distinct interests of the attorney himself rather than their personal interests or even those of the firm (*87 Cal. App. 4th 212, 222)* . Finally, the court found that permitting an attorney represented by members of his or her own law firm to recover attorney fees under § 1717 would not lead to an inequitable application of § 1717, because the consideration expressed in *Trope* that it would be inequitable to permit attorneys but not other litigants to recover fees when they litigate in propria persona is absent when the attorney-litigant is represented by members of his or her own firm because the represented attorney seeks to recover fees for work done by others on his or her behalf (*87 Cal. App. 4th 212, 223)* .

[4] Additional Authorities

[a] Recovery of Reasonable Attorney's Fees in Action on Contract

In *Circle Star Center Associates, LP v. Liberate Technologies (2007) 147 Cal. App. 4th 1203, 55 Cal. Rptr. 3d 232* , a commercial tenant moved out of the leased premises and filed for bankruptcy. The landlord successfully moved to dismiss the bankruptcy case on the grounds that it was filed in bad faith. The landlord then sued for the breach of the lease and other causes of action and claimed attorney's fees incurred in the bankruptcy proceeding under the attorney's fees provision in the lease, which provided that if the landlord or tenant brought any action for any relief against the other party arising out of the lease, the losing party would pay attorney's fees to the prevailing party. The trial court

granted the tenant's motion to strike the attorney's fees claim, on the ground that fees were not recoverable as a matter of law because fees are not obtainable under federal bankruptcy law when bankruptcy litigation involves primarily federal issues (*147 Cal. App. 4th 1203, 1206-1208)* . The court of appeal held that the trial court erred in granting the tenant's motion to strike the landlord's request for attorney's fees in a postbankruptcy state court action on the lease. Permitting the landlord to seek fees did not interfere with the uniformity required by federal bankruptcy law, risk conflating federal procedural remedies with state tort lawsuits, or interfere with the bankruptcy court's control of its proceedings. Further, extrinsic evidence showed that the parties intended the phrase "any action" in the attorney's fees provision in the lease to encompass any case filed in court, including bankruptcy proceedings, and the trial court could not resolve whether the contract was ambiguous on this point without considering the extrinsic evidence offered in opposition to the motion to strike (*147 Cal. App. 4th 1203, 1208-1211)* .

In *Anmaco, Inc. v. Bohlken (1993) 13 Cal. App. 4th 891, 16 Cal. Rptr. 2d 675* , an action between corporate directors, defendant was awarded attorney's fees pursuant to *Civ. Code § 1717* following dismissal. The court of appeal affirmed, rejecting plaintiff 's unsupported argument that the trial court failed to examine the record and determine whether the fees were incurred solely on the contract cause of action (*13 Cal. App. 4th 891, 901)* . The court held that so long as an action involves a contract, and one of the parties would be entitled to recover attorney's fees under the contract if that party prevails, the other party should also be entitled to attorney's fees it if prevails, even if it does so by successfully arguing the inapplicability, invalidity, unenforceability, or nonexistence of the same contract (*13 Cal. App. 4th 891, 902)* .

[b] Party Prevailing on Contract Determined by Court

In *First Security Bank of Cal. v. Paquet (2002) 98 Cal. App. 4th 468, 119 Cal. Rptr. 2d 787* , a bank that was a defendant in a shareholders' derivative action filed a cross-complaint against the shareholders in their individual capacities. The trial court sustained the shareholders' demurrer without leave to amend and dismissed the cross-complaint as to them. The shareholders moved for an award of attorney's fees under *Civ. Code § 1717*, and the trial court granted the motion and awarded fees. The bank appealed from that order on the ground that the determination that the shareholders had prevailed was premature because the shareholder derivative action was not resolved. The Court of Appeal affirmed, holding that because the shareholders are parties to the derivative complaint in name only, the action on the cross-complaint was final as to them and the trial court properly determined that they had prevailed. The possibility they might be individually liable for fees or other costs if the derivative action is unsuccessful did not change the conclusion that the judgment on the cross-complaint was final (*98 Cal. App. 4th 468, 475-476)* .

In *Pacific Custom Pools, Inc. v. Turner Construction Co. (2000) 79 Cal. App. 4th 1254, 94 Cal. Rptr. 2d 756* , the trial court granted summary judgment to a general contractor who cross complained against the subcontractor that had sued it on the ground that the subcontractor was unlicensed during the period of the contract, so that under *Bus. & Prof. Code § 7031*, the unlicensed subcontractor cold not maintain an action for work performed. The trial court denied attorney's fees to the general contractor under *Civ. Code § 1717*, on the ground that it believed the attorney's fees clause in the contract pertained only to pleadings against the subcontractor, not to pleadings by the subcontractor or pleadings in an action in which the subcontractor was sued, so that there was no prevailing party entitled to fees under *Civ. Code § 1717* (*79 Cal. App. 4th 1254, 1268-1269)* . The court of appeal reversed the denial of attorney's fees as an abuse of discretion, finding that the trial court's interpretation of the attorney's fees clause would undermine the bilateral nature and required liberal construction of *Civ. Code § 1717*, and that the general contractor greatly succeeded in achieving its litigation objectives of defeating the subcontractor's claims while the subcontractor clearly failed to accomplish its desired goals, so that the general contractor should have been declared the prevailing party under *Civ. Code § 1717* (*79 Cal. App. 4th 1254, 1270-1273)* .

In *Deane Gardenhome Assn. v. Denktas (1993) 13 Cal. App. 4th 1394, 16 Cal. Rptr. 2d 816* , homeowner successfully defended a suit by the homeowners' association for injunctive relief, damages, costs, and attorney's fees (based on the attorney's fees provision in the CC & R's). The court of appeal reversed the trial court's denial of attorney's fees to

defendants. The court rejected plaintiff 's assertion that defendants were not the prevailing parties within the meaning of *Civ. Code § 1717*, holding that their successful defense of the suit constituted a "simple, unqualified win" (*13 Cal. App. 4th 1394, 1397-1400)* .

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6-60 California Points & Authorities § 60.441

§ 60.441 Supporting Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Attorney's Fees Provision Applies to Entire Contract

[1] FORM Supporting Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Attorney's Fees Provision Applies to Entire Contract

[*For caption, see § 60.440.*]

_____ [PLAINTIFF *or* DEFENDANT] IS ENTITLED TO RECOVER THE REASONABLE AMOUNT OF HIS/HER/ITS ATTORNEY'S FEES BECAUSE A CONTRACT PROVIDING FOR SUCH RECOVERY IS ENFORCEABLE ON THE ENTIRE CONTRACT.

Attorney's Fees Provision Applies to Entire Contract. When a contract provides that attorney's fees and costs that are incurred to enforce that contract shall be awarded either to one of the parties or to the prevailing party, that provision shall be construed as applying to the entire contract, unless each party was represented by counsel in the negotiation and execution of the contract, and the fact of that representation is specified in the contract (*Civ. Code § 1717(a)*). When more than one document comprises the agreement between the parties, attorney's fees can be awarded on the basis of a provision in any one of the documents (*Kachlon v. Markowitz (2008) 168 Cal. App. 4th 316, 345-348, 85 Cal. Rptr. 3d 532* ; *Neptune Society Corp. v. Longanecker (1987) 194 Cal. App. 3d 1233, 1249-1250, 240 Cal. Rptr. 117* ; *Ganey v. Doran (1987) 191 Cal. App. 3d 901, 912, 236 Cal. Rptr. 787*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.440*, in support of a motion under *Civ. Code § 1717* to determine the party prevailing on the contract for purposes of determining which party is entitled to an award of attorney's fees under that section, to allege that recovery should be had on the entire contract.

See also *§ 60.440[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.440[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Attorney's Fees Provision Applies to Entire Contract

In ***Kachlon v. Markowitz*** *(2008) 168 Cal. App. 4th 316, 345-348, 85 Cal. Rptr. 3d 532* , the plaintiffs purchased a home from the defendants. The plaintiffs executed a promissory note in favor of the defendants, secured by a second deed of trust on the residence. The note and deed of trust contained attorney's fees provisions requiring the plaintiffs to pay the defendants' attorney's fees if litigation arose from the note or deed of trust. Ultimately, the defendants initiated a foreclosure and caused a notice of default to be recorded. The plaintiffs sued the defendants challenging the nonjudicial foreclosure, arguing that the foreclosure was wrongful because the promissory note to the defendants had been fully satisfied. The plaintiffs sought damages against the defendants for breach of duty to secure a reconveyance of the deed of trust and for slander of title. The plaintiffs sought damages against the trustee for slander of title and negligence. The plaintiffs also sought equitable remedies against the defendants for declaratory relief (seeking cancellation of the note and a reconveyance of the deed of trust), an injunction against the foreclosure, and quiet title in favor of the plaintiffs. The jury found for the plaintiffs on the legal claims. The trial court found for the plaintiffs on the equitable claims. Relying on the attorney's fee clauses in the note and deed of trust, the plaintiffs sought attorney's fees against the defendants on their equitable claims. The trial court ruled that the plaintiffs were the prevailing parties and entitled to attorney's fees under *Civ. Code § 1717*.

On appeal, the defendants argued that *Civ. Code § 1717* did not apply because the plaintiffs' claims for declaratory and injunctive relief and quiet title were not based on contract. The court of appeal held that the plaintiffs agreed to pay attorney's fees in any action instituted on the promissory note, and in any action affecting the security of the deed of trust and that *Civ. Code § 1717* made these unilateral attorney's fee clauses reciprocal, and entitled the plaintiffs to attorney's fees if they prevailed in an action on the note or deed of trust (*168 Cal. App. 4th 316, 347)* . In determining whether an action is "on the contract" under *Civ. Code § 1717*, the court held that the focus is on the basis of the cause of action, not on the nature of the remedy. Here, the court held, although the remedy sought was equitable, the claims were actions "on the contract," i.e., the note and deed of trust (*168 Cal. App. 4th 316, 347)* .

Plaintiff in ***Neptune Society Corp. v. Longanecker*** *(1987) 194 Cal. App. 3d 1233, 240 Cal. Rptr. 117* , was a franchisor who sued the franchisees for breach of their contract. The franchisees cross complained for rescission and restitution. There was no attorney's fee provision in the agreement between the parties, but the notes that defendants signed to finance their performance under the agreement contained attorney's fee provisions. Judgment was for defendants and cross complainants for rescission, restitution, dissolution of the partnership between the parties, and attorney's fees. Plaintiff appealed.

The court of appeal affirmed. One of plaintiff 's contentions on appeal was that defendants were not entitled to their attorney's fees. Although the provision in the notes said "in case suit is instituted to collect this note ..., I promise to pay such additional sum as the court may adjudge reasonable attorney's fees in said suit," that provision was reciprocal, and applied to defendants as the prevailing parties (*194 Cal. App. 3d 1233, 1249-1250)* . The court noted that neither party was represented by counsel in the negotiation and execution of the agreement and said that because the notes were an inherent part of the partnership-franchise agreement that was the subject matter of the litigation, the attorney's fee provisions were properly construed under *Civ. Code § 1717(a)* as applying to the entire agreement (*194 Cal. App. 3d 1233, 1250)* .

Ganey v. Doran *(1987) 191 Cal. App. 3d 901, 236 Cal. Rptr. 787* , involved cross actions between buyers, seller, and their agents after a real estate sale was not completed, in part because defendants' check in payment of a note given to plaintiff as reimbursement for loan origination fees was dishonored. Plaintiff-seller sued to foreclose a vendor's lien, for money due on a dishonored check, and for breach of contract. Buyers cross complained for fraud and misrepresentation. Judgment was for plaintiff and included an award of attorney's fees. Defendants appealed.

The court of appeal affirmed. One of defendants' contentions on appeal was that because plaintiff had sued on the dishonored check and to collect on the note, not on the real estate sales agreement itself, the attorney's fee provision in the agreement would not support the award of attorney's fees. The court of appeal said that under *Civ. Code § 1642*, it is a general rule that several papers relating to the same subject matter and executed as parts of substantially one transaction are to be construed together as one contract. Thus, the note, mortgage, and agreement of sale constituted one contract, and the attorney's fee award was proper (*191 Cal. App. 3d 901, 912)* .

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6-60 California Points & Authorities § 60.442

§ 60.442 Supporting Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--No Waiver of Fees Allowed

[1] FORM Supporting Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--No Waiver of Fees Allowed

[*For caption, see § 60.440, with which this form should be combined.*]

_____ [PLAINTIFF *or* DEFENDANT] IS ENTITLED TO RECOVER THE REASONABLE AMOUNT OF HIS/HER/ITS ATTORNEY'S FEES, WHICH ARE NOT SUBJECT TO WAIVER.

No Waiver of Fees Allowed. Attorney's fees provided for by *Civil Code Section 1717* shall not be subject to waiver by the parties to any contract entered into after November 13, 1968, the effective date of this section. Any provision in any such contract that provides for a waiver of attorney's fees is void (*Civ. Code § 1717(a)*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.440*, in support of a motion under *Civ. Code § 1717* to determine the party prevailing on the contract for purposes of determining which party is entitled to an award of attorney's fees under that section, to allege that the fees provision is not subject to waiver.

See also *§ 60.440[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.440[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] No Waiver of Fees Allowed

Civ. Code § 1717(a) provides that attorney's fees provided for by *Civ. Code § 1717* shall not be subject to waiver by the parties to any contract entered into after November 13, 1968, the effective date of this section. Any provision in any such contract that provides for a waiver of attorney's fees is void.

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6-60 California Points & Authorities § 60.443

§ 60.443 Supporting Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Party Prevailing on Contract After Tender and Deposit

[1] FORM Supporting Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Party Prevailing on Contract After Tender and Deposit

[*For caption, see § 60.440, with which this form should be combined.*]

_____ [PLAINTIFF *or* DEFENDANT] IS ENTITLED TO RECOVER THE REASONABLE AMOUNT OF HIS/HER/ITS ATTORNEY'S FEES, BECAUSE HE/SHE/IT HAS TENDERED THE FULL AMOUNT TO THE OTHER PARTY AND DEPOSITED THAT AMOUNT IN COURT, AND IS THEREFORE DEEMED TO BE A PREVAILING PARTY ON THE CONTRACT.

Party Prevailing on Contract After Tender and Deposit. When the defendant alleges in his or her answer that he or she tendered to the plaintiff the full amount to which he or she was entitled, and then deposits that amount in court for the plaintiff, the defendant is deemed to be a party prevailing on the contract within the meaning of *Civil Code Section 1717* if that allegation is found to be true (*Civ. Code § 1717(b)(2)*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.440*, in support of a motion under *Civ. Code § 1717* to determine the party prevailing on the contract for purposes of determining which party is entitled to an award of attorney's fees under that section, when the party has tendered and deposited the full amount in court.

See also *§ 60.440[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.440[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Party Prevailing on Contract After Tender and Deposit

Civ. Code § 1717(b)(2) provides that when the defendant alleges in his or her answer that he or she tendered to the plaintiff the full amount to which he or she was entitled, and then deposits that amount in court for the plaintiff, the defendant is deemed to be a party prevailing on the contract within the meaning of *Civ. Code § 1717* if that allegation is found to be true.

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6-60 California Points & Authorities § 60.444

§ 60.444 Supporting Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Party Prevailing on Contract After Compromise Under Code Civ. Proc. § 998

[1] FORM Supporting Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Party Prevailing on Contract After Compromise Under Code Civ. Proc. § 998

[*For caption, see § 60.440, with which this form should be combined.*]

_____ [PLAINTIFF *or* DEFENDANT] IS ENTITLED TO RECOVER THE REASONABLE AMOUNT OF HIS/HER/ITS ATTORNEY'S FEES, BECAUSE THE JUDGMENT HAS BEEN ENTERED IN HIS/HER/ITS FAVOR PURSUANT TO A COMPROMISE AGREEMENT.

Party Prevailing on Contract After Compromise Under *Code Civ. Proc. § 998*. Attorney's fees authorized by a contract provision are available to the party in whose favor a judgment is entered pursuant to a compromise agreement under *Code of Civil Procedure Section 998*, even if the compromise agreement is silent about attorney's fees and costs (*Lanyi v. Goldblum (1986) 177 Cal. App. 3d 181, 187-191, 223 Cal. Rptr. 32*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.440*, in support of a motion under *Civ. Code § 1717* to determine the party prevailing on the contract for purposes of determining which party is entitled to an award of attorney's fees under that section, when judgment has been had in the party's favor pursuant to a compromise agreement.

See also *§ 60.440[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.440[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Party Prevailing on Contract After Compromise Under Code Civ. Proc. § 998

Lanyi v. Goldblum *(1986) 177 Cal. App. 3d 181, 223 Cal. Rptr. 32* , arose out of a real property contract with an attorney's fee provision. After the litigation was commenced, defendants made an offer to compromise under *Code Civ. Proc. § 998*. The offer was accepted in 1981, after which plaintiffs moved for entry of judgment and for an award of costs and attorney's fees. *Civ. Code § 1717(b)(2)*, providing that there is no prevailing party for purposes of *Civ. Code § 1717* when there is a voluntary dismissal or a dismissal pursuant to a settlement, became effective on January 1, 1982. On January 22, 1982, judgment was entered on the compromise agreement. Plaintiffs were awarded costs, but not attorney's fees. Plaintiffs appealed the denial of attorney's fees.

The court of appeal reversed the denial of attorney's fees. The court of appeal first determined that attorney's fees pursuant to a contract provision are available to a party who prevails by a *Code Civ. Proc. § 998* agreement that is silent about costs and fees (*177 Cal. App. 3d 181, 187)* . The court concluded that an award of attorney's fees was proper under *Civ. Code § 1717*, notwithstanding the language of *Civ. Code § 1717(b)(2)*, because that language refers only to dismissals, whereas a settlement reached under *Code Civ. Proc. § 998* results not in a dismissal but a judgment (*177 Cal. App. 3d 181, 189)* . Defendants argued that there is no rational distinction between a dismissal following a settlement and a judgment entered on a settlement. The court of appeal disagreed, saying that *Civ. Code § 1717(b)(2)* appeared to codify preexisting case law, including *International Industries, Inc. v. Olen (1978) 21 Cal. 3d 218, 145 Cal. Rptr. 691, 577 P.2d 1031* . The court of appeal cited *International Industries* for the proposition that equitable principles require rejection of any rule that automatically permits recovery of attorney's fees when the plaintiff voluntarily dismisses before trial. Such a rule would undermine the policy in favor of settlement and encourage plaintiffs to maintain pointless litigation in moot cases or against insolvent defendant to avoid liability for attorney's fees. Such a rule would also be too burdensome on trail courts, forcing them to determine who was the prevailing party in such cases (*177 Cal. App. 3d 181, 190)* . The court of appeal noted that *Civ. Code § 1717(b)(2)* is broader than the holding in *International Industries*, but not broad enough to bar recovery of attorney's fees following a *Code Civ. Proc. § 998* compromise judgment. The equitable and judicial efficiency considerations are different with respect to settlements under *Code Civ. Proc. § 998* than they are with voluntary dismissals (*177 Cal. App. 3d 181, 191)* . Resulting judgments under *Code Civ. Proc. § 998*, unlike voluntary dismissals, finally determine the rights of the parties (*177 Cal. App. 3d 181, 190-191)* . There is no burden on the trial court, because the *Code Civ. Proc. § 998* agreement itself will determine who is the prevailing party. Nor does allowance of an award of attorney's fees after a *Code Civ. Proc. § 998* agreement encourage pointless litigation because the plaintiff can always eschew a *Code Civ. Proc. § 998* compromise and instead voluntarily dismiss, thus avoiding liability for attorney's fees (*177 Cal. App. 3d 181, 192)* .

[4] Additional Authorities

In *Wong v. Thrifty Corp. (2002) 97 Cal. App. 4th 261, 118 Cal. Rptr. 2d 276* , a lessor of commercial real property sued a lessee for breach of contract and breach of statutory duty based on damage caused by the lessee. The lease provided for payment of reasonable attorney's fees to the lessor in a enforcement action in which it was "determined" that the lessees were in default. The lessor accepted the lessee's offer to compromise under *Code Civ. Proc. § 998*, which was silent as to fees and costs. The trial court then denied the lessor's motion for attorney's fees. The Court of Appeal reversed. The court held that a party who accepts a section 998 offer may recover attorney's fees under *Civ. Code § 1717*, as an item of costs after judgment, where the compromise agreement is silent on costs and fees (*97 Cal. App. 4th 261, 263-264)* . The court then held that the conditions of section 1717 had been met: there was an action on a contract, the contract provided that fees incurred to enforce the contract be awarded to one of the parties, and the lessor

clearly was the prevailing party on the contract. The court found that language in the attorney's fee provision conflicting with the prevailing party definition in section 1717 was void, since to give it effect would thwart the statutory purpose (*97 Cal. App. 4th 261, 264-265)* .

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6-60 California Points & Authorities § 60.445

§ 60.445 Supporting Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Party Prevailing on Contract After Involuntary Dismissal Pursuant to Code Civ. Proc. § 583.360

[1] FORM Supporting Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Party Prevailing on Contract After Involuntary Dismissal Pursuant to Code Civ. Proc. § 583.360

[*For caption, see § 60.440, with which this form should be combined.*]

_____ [PLAINTIFF *or* DEFENDANT] IS ENTITLED TO RECOVER THE REASONABLE AMOUNT OF HIS/HER/ITS ATTORNEY'S FEES, BECAUSE THE ACTION WAS INVOLUNTARILY DISMISSED IN HIS/HER/ITS FAVOR.

Party Prevailing on Contract After Involuntary Dismissal Pursuant to *Code Civ. Proc. § 583.360*. Attorney's fees authorized by a contract provision are available to the defendant in whose favor an involuntary dismissal is entered under *Code of Civil Procedure Section 583.360(a)* due to failure by the plaintiff to bring the case to trial within five years (*Elms v. Builders Disbursements, Inc. (1991) 232 Cal. App. 3d 671, 675, 283 Cal. Rptr. 515*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.440*, in support of a motion under *Civ. Code § 1717* to determine the party prevailing on the contract for purposes of determining which party is entitled to an award of attorney's fees under that section, when the action has been involuntarily dismissed in the party's favor.

See also *§ 60.440[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.440[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Party Prevailing on Contract After Involuntary Dismissal Pursuant to Code Civ. Proc. § 583.360

In ***Elms v. Builders Disbursements, Inc.*** *(1991) 232 Cal. App. 3d 671, 283 Cal. Rptr. 515* , plaintiffs sued defendant on a contract entitling the successful litigant to attorney's fees. Five years after the filing of the complaint, the trial court dismissed the plaintiffs' action under *Code Civ. Proc. § 583.360(a)*. Defendant moved for attorney's fees pursuant to *Civ. Code § 1717*. After hearing, the trial court concluded that there was no prevailing party within the provisions of *Civ. Code § 1717(b)* and denied defendant's motion for fees and costs.

The court of appeal reversed, stating that pragmatically and legally, defendant was the prevailing party under *Civ. Code § 1717* and was entitled to benefits of its provisions (*232 Cal. App. 3d 671, 675)* .

California Points & Authorities

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Volume 6 Chapters 60-69 COSTS---to---DECLARATORY RELIEF
CHAPTER 60 COSTS
PART II. FORMS
B. Award of Attorney's Fees
4. Motion for Award of Attorney's Fees Under Civ. Code § 1717; Contract Provision

6-60 California Points & Authorities § 60.446

§ 60.446 Supporting Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Prevailing Party Not Signatory to Contract

[1] FORM Supporting Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Prevailing Party Not Signatory to Contract

[*For caption, see § 60.440, with which this form should be combined.*]

_____ [PLAINTIFF *or* DEFENDANT] IS ENTITLED TO RECOVER THE REASONABLE AMOUNT OF HIS/HER/ITS ATTORNEY'S FEES PURSUANT TO SECTION 1717 OF THE CIVIL CODE, EVEN THOUGH HE/SHE/IT WAS NOT A SIGNATORY TO THAT CONTRACT.

Prevailing Party Not Signatory to Contract. A prevailing party, who would have been liable for attorney's fees pursuant to the fee provision of a contract had the other party prevailed, may recover attorney's fees pursuant to *Section 1717 of the Civil Code* even though the prevailing party was not a signatory to the underlying contract (*Reynolds Metals Co. v. Alperson (1979) 25 Cal. 3d 124, 129, 158 Cal. Rptr. 1, 599 P.2d 83*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.440*, in support of a motion under *Civ. Code § 1717* to determine the party prevailing on the contract for purposes of determining which party is entitled to an award of attorney's fees under that section, when the party is not a signatory to the underlying contract.

See also *§ 60.440[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.440[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Prevailing Party Not Signatory to Contract

Reynolds Metals Co. v. Alperson *(1979) 25 Cal. 3d 124, 158 Cal. Rptr. 1, 599 P.2d 83* , was an action to hold defendants personally liable for corporate debts under the alter ego theory. Plaintiff supplied goods to a subsidiary company owned and operated by defendants. The parent corporation, of which defendants were shareholders and directors, guaranteed payments pursuant to an agreement that did not provide for recovery of attorney's fees. Subsequently, the subsidiary executed and delivered to plaintiff two promissory notes, which provided for recovery of collection costs, including attorney's fees, in the event of default. Both companies became insolvent and initiated bankruptcy proceedings. Plaintiff filed a creditor's claim, and also brought an action seeking to hold defendants personally liable for the debts owed, claiming they were alter egos of the companies. The trial court held for defendants, and granted defendants attorney's fees in excess of the 15 percent limitation set forth in the promissory notes. Plaintiff appealed from the judgment awarding defendants attorney's fees.

The Supreme Court reversed for redetermination of attorney's fees, but upheld the recovery of fees per se. The Court noted that unless authorized by either statute or agreement, attorney's fees ordinarily are not recoverable as costs (*25 Cal. 3d 124, 127)* . *Civ. Code § 1717* is unclear with respect to whether litigants who have not signed the contract may recover fees. *Civ. Code § 1717* was enacted to establish mutuality of remedy when a contract provides recovery of attorney's fees for only one party. Its purposes require a reciprocal remedy for a nonsignatory defendant, sued on a contract as if a party to it, when a plaintiff would be entitled to attorney's fees if it prevailed in enforcing the contractual obligation against the defendant (*25 Cal. 3d 124, 128)* . Had plaintiff prevailed on its cause of action claiming defendants were the alter egos of the corporation, defendants would have been liable on the notes. Because defendants would have been liable for attorney's fees pursuant to the fee provision had plaintiff prevailed, they were entitled to attorney's fees incurred in successfully defending the cause of action based on the notes. Attorney's fees incurred solely for defending the other causes of action were not recoverable (*25 Cal. 3d 124, 129)* . Furthermore, defendants' attorney's fee award was subject to the same 15 percent limitation that would have applied had plaintiff been the prevailing party (*25 Cal. 3d 124, 130)* .

The portion of the opinion in *Reynolds* that discusses attorney's fees incurred for issues common to more than one cause of action is discussed in *§ 60.481*.

[4] Additional Authorities

[a] Prevailing Party Not Signatory to Contract

In *Loduca v. Polyzos (2007) 153 Cal. App. 4th 334, 62 Cal. Rptr. 3d 780* , a property owner, as a third party beneficiary, sued a subcontractor in contract and tort for breach of the contract between the subcontractor and the general contractor. The trial court granted judgment in favor of the owner on breach of contract, but against the owner on negligent misrepresentation (tort). The trial court granted the owner's motion for attorney's fees pursuant to an attorney fee clause in the contract (*153 Cal. App. 4th 334, 337-340)* , and the appellate court affirmed. The court found that the subcontractor did not dispute that the property owner was a third party beneficiary to the contract, and the contract contained an attorney's fees clause that did not impose any limitation on third party rights. Thus, it was apparent the subcontractor and the general contractor intended the property owner's enforcement right to include a right to attorney's fees. There was mutuality of remedies, because the subcontractor could have sued on the contract instead of filing a lien, and in so doing, availed himself of the attorney's fee provision. Further, a formal assignment was not required before the property owner, as an intended third party beneficiary, could recover attorney's fees on the underlying contract. The contract contained no limitation by the subcontractor on any rights that the property owner

could derive from the contract, and the attorney's fee clause's broad language extended to any court action on the contract without reference to whom might bring it. Since the owner had paid the subcontractor directly, the subcontractor likely understood that the party most likely to bring such a claim was the property owner. The absence of an attorney's fee provision in a side agreement between the owner and the subcontractor did not demonstrate the parties did not intend for the property owner to be able to recover fees, because that agreement did not state it superseded the agreement between the general contractor and the subcontractor. It simply changed the terms of payment and imposed an additional penalty if delivery continued to be late (*153 Cal. App.4th 334, 341-345)* .

In *Dell Merk v. Franzia (2005) 132 Cal. App. 4th 443, 33 Cal. Rptr. 3d 694* , a bank intervened into an action on a construction contract between the project owner and the contractor. The contractor had obtained a line of credit from the bank by executing a promissory note, commercial security agreement and business loan agreement. Although neither of the original construction contracts contained an attorney's fees clause, both the note and security agreement included clauses which entitled the bank to attorney's fees in any action to enforce the agreement or to collect on the note. The bank informed the project owner to make payments directly to the bank. However, the owner made the first progress payment under the construction contract to the contractor. The project owner later terminated the contractor and the contractor defaulted on its payment obligation to the bank and sued the project owner. The bank intervened, alleging that it was entitled to the proceeds of the first progress payment and to any proceeds the project owner still owed the contractor. The bank stipulated its potential right to damages was limited to any rights it had in the first progress payment. The trial court then granted the project owner's motion in limine to exclude evidence of the bank's first cause of action regarding the progress payment. After entering judgment against the bank on its complaint in intervention, the trial court granted the project owner's motion for attorney's fees under the reciprocity provision of *Civ. Code § 1717* based on the security agreement (*132 Cal. App. 4th 443, 445-449)* . The Court of Appeal held that trial court properly awarded attorney's fees to the project owner against the bank on the bank's unsuccessful intervention to claim a breach of obligation to pay for the owner's failure to make the first progress payment jointly payable to the bank and the contractor. Even though the construction contract between the contractor and the owner did not contain an attorney's fees clause, both the note and the security agreement contained fees clauses requiring the contractor to pay fees incurred by the bank in connection with the enforcement of agreement. The bank was only entitled to require the joint payment of the progress payment because of the security agreement containing a contractual agreement for that collection right, so that its action necessarily involved the security agreement containing that right (*132 Cal. App. 4th 443, 454-456)* . However, since the bank would not have been entitled to attorney's fees on the portion of its complaint in intervention as an assignee of the construction contract seeking payment of any remaining proceeds due to the contractor from the owner, the owner was not entitled under the reciprocity provision of § 1717 to its fees in defending the claim on the contract between the contractor and the owner (*132 Cal. App. 4th 443, 451-454)* .

In *Sessions Payroll Management, Inc. v. Noble Construction Co. (2000) 84 Cal. App. 4th 671, 101 Cal. Rptr. 2d 127* , the trial court awarded attorney's fees to a general contractor that had been sued by a payroll management company that provided payroll services to a subcontractor. The subcontractor had breached its promise to pay the payroll management company employee wages, taxes, union fringe benefits and workers' compensation insurance premiums which the payroll management company paid to and on behalf of the subcontractor's employees in reliance on the subcontractor's promise to pay those amounts and in reliance on assurances that the general contractor had issued checks to the subcontractor to cover payment to the subcontractor's employees. The general contractor and subcontractor had entered into a subcontract which provided the general contractor with the option of issuing joint checks to the subcontractor and its subcontractors whenever the general contractor so elected, but explicitly stating that so electing conferred no enforceable rights on any third party, and an attorney's fees provision. The trial court sustained the general contractor's demurrer to the payroll management company's complaint, which had alleged that the general contractor recognized and agreed that the payroll management company was a beneficiary under the subcontract, and dismissed the action as to the general contractor and awarded the general contractor attorney's fees as a prevailing party under *Civ. Code § 1717* (*84 Cal. App. 4th 671, 675-677)* .

The court of appeal reversed. The court held that the payroll management company did not qualify as a third party

beneficiary of the general contractor's and subcontractor's contractual attorney's fees clause, since there was no indication that the general contractor and subcontractor intended to benefit the payroll management company by including it within their attorney's fees clause (*84 Cal. App. 4th 671, 680)* . Thus, since the payroll management company could not have recovered attorney's fees even if it had prevailed on its third party beneficiary breach of contract cause of action, it should not have had attorney's imposed against it (*84 Cal. App. 4th 671, 681)* .

In *Abdallah v. United Savings Bank (1996) 43 Cal. App. 4th 1101, 51 Cal. Rptr. 2d 286* , plaintiff claimed he was not liable for attorney's fees under *Civ. Code § 1717*, because he was not a signatory to the contracts on which the fee award was based. The court of appeal rejected the contention, holding that he was not relieved from liability from the fees merely because he did not sign the note or deed of trust. He had sued defendants for breach of these contracts, and sought attorney's fees for the action. Since he would have been entitled to fees if he had been a prevailing party, he was liable for fees as a losing party (*43 Cal. App. 4th 1101, 1112)* .

In *Milman v. Shukhat (1994) 22 Cal. App. 4th 538, 27 Cal. Rptr. 2d 526* , the plaintiffs filed a declaratory relief action against the defendants to determine the rights of the parties concerning two promissory notes containing attorney's fees provisions. The defendants prevailed by proving their signatures were forged on the notes, but the trial court denied their motion for attorney fees under *Civ. Code § 1717* because they were not signatories to the contract. On the defendants' appeal, the court of appeal reversed the denial of attorney fees. It held that even though the action was for declaratory relief and the defense was nonexistence of the contract based on forgery, the defendants were entitled to recover attorney fees under the mutuality doctrine because the plaintiffs would have recovered attorney fees had they prevailed (*22 Cal. App. 4th 538, 545)* .

In Super 7 Motel Associates v. Wang (1993) 20 Cal. Rptr. 2d 193 , a buyer of real estate sued the seller and its broker in an action for rescission based on fraud. The buyer recovered damages against the seller but not against the broker, and the trial court awarded the broker attorney fees under a fee provision in the buy-sell agreement. The appellate court held that the broker was not entitled to the award because the broker was a nonsignatory to the buy-sell agreement even though he signed a commission contract that was part of the same document. When different parts of a document represent distinct contracts between different parties, then an attorney fee provision in one part does not cover parties who are nonsignatories to that part. Moreover, the broker was not a third-party beneficiary to the buy-sell agreement since it contained no promise to pay the broker (*16 Cal. App. 4th 541, 546-547)* .

Steve Schmidt & Co. v. Berry (1986) 183 Cal. App. 3d 1299, 228 Cal. Rptr. 689 , was an action by a real estate broker against a real estate seller to recover its share of a commission. A summary judgment and an award of attorney's fees pursuant to the listing agreement to which the broker was not a party, authorizing attorney's fees to the prevailing party, was entered in the action for plaintiff. In affirming the judgment, the court of appeal held that the broker was entitled to the fees under *Civ. Code § 1717* (providing that in any action on a contract that specifically provides that attorney's fees and costs that are incurred to enforce the provisions of that contract shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the prevailing party, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements) as the prevailing party in the litigation, although it was not a signatory to the original listing contract between the seller and the seller's broker (*183 Cal. App. 3d 1299, 1314-1317)* .

Montgomery v. Bio-Med Specialties, Inc. (1986) 183 Cal. App. 3d 1292, 228 Cal. Rptr. 709 , was an action against a corporation and two of its officers on a promissory note in which two of the principal shareholders intervened to insure a good-faith defense of the corporation. The interveners prevailed in the action and were awarded attorney's fees under the terms of the note and *Civ. Code § 1717*. Plaintiffs appealed, contending that interveners were not entitled to attorney's fees because they were not signatories to the promissory note. They argued that the rule in *Reynolds Metals Co. v. Alperson (1979) 25 Cal. 3d 124, 158 Cal. Rptr. 1, 599 P.2d 83* (discussed in *§ 60.446[3][a]*), did not apply because in that case the nonsignatory was alleged to be the alter ego of the signatory. Rejecting this argument and affirming the judgment, the appellate court said that the relevant consideration in awarding attorney's fees under *Civ.*

Code § 1717 is whether the plaintiff has forced the defendant to wage a defense against liability for attorney's fees and that, because plaintiffs would have been entitled to attorney's fees from interveners had plaintiffs prevailed against the corporation, the interveners were entitled to recover their fees incurred in successfully defending against that claim (*183 Cal. App. 3d 1292, 1295-1296)* .

[b] Losing Party Not Signatory to Contract

In *Exarhos v. Exarhos (2008) 159 Cal. App. 4th 898* , a grandson filed a complaint against a bank, alleging that before her death, his grandmother maintained savings and checking accounts with the bank, that she created a revocable living trust pursuant to the terms of which he was the named beneficiary of the savings account, and that he was pursuing the action against the bank as her successor in interest. He claimed the bank mishandled the accounts, which had originally been opened pursuant to a written deposit agreement. Along with the complaint, the grandson filed a declaration pursuant to *Code Civ. Proc. § 377.32* asserting that he was his grandmother's successor in interest to the causes of action asserted in the complaint and that a proceeding was pending in California for administration of her estate, although no personal representative had yet been appointed for the estate. The trial court granted the bank's demurrer on the ground that the grandson was precluded from pursuing the action as her successor in interest because there was a pending probate proceeding. The court then granted the bank's motion for attorney's fees under *Civ. Code § 1717* pursuant to the agreement, which included a signature card with an attorney's fee provision (*159 Cal. App. 4th 898, 900-902)* . The Court of Appeal affirmed, holding that the grandson was liable to bank for attorney's fees under *Civ. Code § 1717*. By acting as his deceased grandmother's successor in interest, he stepped into her position. His action was premised on the agreement between the bank and his grandmother, which contained an attorney's fees provision, and, if the bank had prevailed in an action brought by his grandmother decedent premised on the agreement, the bank would have been entitled to an award of attorney's fees (*159 Cal. App. 4th 898, 903-907)* . The grandmother's estate, rather than the grandson, was not liable for fees, because there was no basis on which to conclude that any judgment the grandson might obtain in the action against the bank would become the property of the estate, rather than of the grandson (*159 Cal. App. 4th 898, 908-909)* .

In *California Wholesale Material Supply, Inc. v. Norm Wilson & Sons, Inc. (2002) 96 Cal. App. 4th 598, 117 Cal. Rptr. 2d 390* , a drywall subcontractor executed a financing statement in favor of its supplier granting the supplier a security interest in its accounts receivable. The subcontractor had previously given its accounts receivable as security for a bank loan. The subcontractor entered into contracts with the general contractor, and the general contractor became indebted to the subcontractor so that its accounts receivable included money the subcontractor was owed by the general contractor. After the subcontractor defaulted on its obligation to its supplier, the supplier sought to have the general contractor pay directly to it the money owed to the subcontractor. The general contractor advised the supplier that its demand letter was insufficient to constitute notice under the Commercial Code and it also appeared that the bank had a senior position. The general contractor then paid the bank's assignee the money owed to the subcontractor on the assignee's demand. The supplier filed a collection action against the general contractor, alleging breach of former Commercial Code § 9502, setting forth the collection rights of a secured party. Judgment was entered in favor of the general contractor because it had properly paid the full amount it owed the subcontractor to the bank's assignee. The general contractor then moved to recover attorney's fees incurred in defending the action as the prevailing party in a collection action and as the prevailing party in the litigation pursuant to the underlying subcontract, which contained an attorney's fees provision, and that the supplier stood in the subcontractor's shoes as its assignee relative to its claim for the money due. The trial court denied the motion, finding that the action did not arise out of the subcontract, but out of the security agreement between the supplier and the subcontractor (*96 Cal. App. 4th 598, 601-604)* .

The Court of Appeal reversed and remanded for a determination of the amount of fees to be awarded to the general contractor. The court held that the action arose out of the subcontract between the general contractor and subcontractor, which had been assigned to the supplier pursuant to the security agreement (*96 Cal. App. 4th 598, 605-606)* . The court then held that the supplier was liable for attorney's fees pursuant to the subcontract even though it was not a signatory to it. The court held that when a nonsignatory plaintiff sues a signatory defendant, the defendant is entitled to attorney's

fees only if the plaintiff would have been entitled to attorney's fees had it prevailed, and that in this case, the general contractor would have been liable to the supplier for attorney's fees pursuant to the subcontract had the supplier prevailed (*96 Cal. App. 4th 598, 608)* . The court then held that there was no merit to the contention that as a mere holder of a security interest the supplier could not be liable for attorney's fees, and that in denying the motion, the trial court overlooked the relationship between the security agreement and the underlying subcontract (*96 Cal. App. 4th 598, 609-610)* .

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6-60 California Points & Authorities § 60.447

§ 60.447 Supporting Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Contract Unenforceable

[1] FORM Supporting Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Contract Unenforceable

[*For caption, see § 60.440, with which this form should be combined.*]

_____ [PLAINTIFF *or* DEFENDANT] IS ENTITLED TO RECOVER THE REASONABLE AMOUNT OF HIS/HER/ITS ATTORNEY'S FEES PURSUANT TO SECTION 1717 OF THE CIVIL CODE, EVEN THOUGH THE CONTRACT ON WHICH THE ACTION WAS BASED IS UNENFORCEABLE.

Fees Recoverable Although Contract Unenforceable. In an action based on a contract, the prevailing party who seeks attorney's fees under the agreement is entitled to recover his or her own fees pursuant to *Section 1717 of the Civil Code* whether or not the contract is enforceable (*Manier v. Anaheim Business Center Co. (1984) 161 Cal. App. 3d 503, 507, 207 Cal. Rptr. 508* ; *Jones v. Drain (1983) 149 Cal. App. 3d 484, 490, 196 Cal. Rptr. 827*).

[2] Comments

[a] Use of Form

This form is for use with the general memorandum *set out in § 60.440*, in support of a motion under *Civ. Code § 1717* to determine the party prevailing on the contract for purposes of determining which party is entitled to an award of attorney's fees under that section, when the contract is unenforceable.

See also *§ 60.440[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 60.440[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Fees Recoverable Although Contract Unenforceable

Manier v. Anaheim Business Center Co. *(1984) 161 Cal. App. 3d 503, 207 Cal. Rptr. 508* , was an action to obtain specific performance of a contract to sell property. Plaintiff buyers and defendant sellers entered into a written agreement for the sale of commercial property. The signator for defendants added a handwritten note to the agreement that conditioned the defendants' acceptance on plaintiffs' execution of escrow instructions satisfactory to defendants. Plaintiffs did not initial the addition. Defendants canceled the agreement after plaintiffs failed to obtain financing, and plaintiffs brought suit, claiming the defendants agreed to assist them in obtaining financing. The trial court found in favor of defendants. Defendants sought to recover attorney's fees pursuant to *Civ. Code § 1717*. The court found that the handwritten changes constituted a counteroffer that plaintiffs never accepted. Therefore, there was no contract and, consequently, no right to attorney's fees. Defendants appealed.

The court of appeals reversed the order denying attorney's fees, and remanded the matter to the trial court for a determination of defendants' attorney's fees at trial and on appeal (*161 Cal. App. 3d 503, 509)* . Plaintiffs contended that *Civ. Code § 1717* does not apply because the court ruled that no enforceable contract existed between the parties, and mere allegations by a plaintiff of entitlement to attorney's fees are insufficient to invoke *Civ. Code § 1717* if the court determines that the contract never existed (*161 Cal. App. 3d 503, 505)* . However, the existence of an enforceable agreement is not a prerequisite to an award of attorney's fees under *Civ. Code § 1717*. Relief under that section is available even if the prevailing party succeeds on the theory that there was never an enforceable contract (*161 Cal. App. 3d 503, 505-506)* . The court discussed conflicting rulings in various districts and panels of the court of appeal. It said that the better rule holds that, in an action based on a contract, the prevailing party is entitled to recover fees pursuant to *Civ. Code § 1717* if the opposing party seeks attorney's fees under an agreement even if the contract is not enforceable (*161 Cal. App. 3d 503, 507)* . Alternatively, plaintiffs contended that *Civ. Code § 1717* does not apply because they would not have been entitled to attorney's fees had they prevailed. Citing *Jones v. Drain (1983) 149 Cal. App. 3d 484, 489, 196 Cal. Rptr. 827* (discussed *below*), the court held that the pleadings, and not the evidence adduced at trial, determine whether a party is entitled to attorney's fees for the purpose of invoking *Civ. Code § 1717* (*161 Cal. App. 3d 503, 508)* .

Jones v. Drain *(1983) 149 Cal. App. 3d 484, 196 Cal. Rptr. 827* , was an action brought by a real estate broker and its purchaser against sellers of property and another broker, to obtain relief from defendants' refusal to sell the property. Sellers entered into an exclusive listing contract with defendant broker to sell their home. Plaintiff broker orally agreed with defendant broker to act as a cooperative broker and find a purchaser for the property. Sellers accepted an oral offer from a purchaser, and agreed to reduce the agreement to writing at a later time. Meanwhile, a purchaser obtained by plaintiff broker made written offers to sellers to buy the property, which sellers rejected because of their prior agreement to sell. Plaintiff broker and its purchaser filed suit against sellers and defendant broker, alleging housing discrimination, misrepresentation, and breach of contract, and requesting declaratory relief. The trial court found in favor of defendants on the first two causes of action, and granted summary judgment in favor of defendants on the third and fourth causes of action. Plaintiffs appealed the fourth cause of action, and the court of appeal affirmed. Defendant sellers appealed the trial court's order taxing the attorney's fees request from its memorandum of costs.

The court of appeal reversed and remanded the matter to the trial court for determination of attorney's fees and costs (*149 Cal. App. 3d 484, 490)* . Defendants contended that since plaintiffs brought suit for breach of a contract that contained an attorney's fee provision, defendants were entitled to fees as the prevailing party, pursuant to *Civ. Code § 1717*. Plaintiffs asserted that defendants should not be allowed to recover their costs because the trial court found, as a matter of law, that no contract existed between plaintiff broker and defendant sellers (*149 Cal. App. 3d 484, 486)* . The

court noted that if plaintiffs had prevailed in their cause of action, they would have been entitled to attorney's fees. However, even though plaintiffs possessed no evidence to support their contract cause of action, they alleged sufficient facts in their pleadings to force defendants to defend the action (*149 Cal. App. 3d 484, 489)* . It is inequitable to deny the recovery of attorney's fees and costs to a party that successfully defends an action on a contract that allows attorney's fees, simply because the plaintiff filed a frivolous lawsuit (*149 Cal. App. 3d 484, 489-490)* . Consequently, a prevailing defendant sued for breach of a contract that allows for attorney's fees is entitled to recover its own attorney's fees and costs therefor, even though the trial court finds no contract existed (*149 Cal. App. 3d 484, 490)* .

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6-60 California Points & Authorities § 60.448

§ 60.448 Supporting Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Contract Rescinded or Canceled

[1] FORM Supporting Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Contract Rescinded or Canceled

[*For caption, see § 60.440, with which this form should be combined.*]

_____ [PLAINTIFF *or* DEFENDANT] IS ENTITLED TO RECOVER THE REASONABLE AMOUNT OF HIS/HER/ITS ATTORNEY'S FEES PURSUANT TO SECTION 1717 OF THE CIVIL CODE, BECAUSE THE ACTION IS DEEMED TO BE AN ACTION ON THE CONTRACT FOR THE PURPOSES OF THAT SECTION, EVEN THOUGH IT WAS AN ACTION FOR _____ [RESCISSION OF *or* CANCELLATION] OF THE CONTRACT.

Rescission or Cancellation. An action _____ [based on rescission *or* for cancellation] of an agreement[, even on the ground that the contract was induced by fraud], is an action "on the contract" for purposes of determining entitlement to attorney's fees under *Section 1717 of the Civil Code*. Thus, if the _____ [rescinded *or* canceled] agreement contains an attorney's fee provision that does not limit the recovery of attorney's fees to particular types of action on the contract, the prevailing party is entitled to an award of attorney's fees (*Star Pacific Investments, Inc. v. Oro Hills Ranch, Inc. (1981) 121 Cal. App. 3d 447, 459-463, 176 Cal. Rptr. 546*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.440*, in support of a motion under *Civ. Code § 1717* to determine the party prevailing on the contract for purposes of determining which party is entitled to an award of attorney's fees under that section, when the action was to rescind or cancel the contract.

See also *§ 60.440[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.440[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Rescission or Cancellation

Star Pacific Investments, Inc. v. Oro Hills Ranch, Inc. *(1981) 121 Cal. App. 3d 447, 176 Cal. Rptr. 546* , was an action for cancellation of an "override" agreement made in connection with the assignment of an option to purchase real property. Although the action was labeled "for cancellation," the court of appeal said in a footnote that it was actually for rescission (*121 Cal. App. 3d 447, 461 n.11*). Plaintiff also sought to cancel or rescind the note and deed of trust given in payment of the agreement. The agreement did not contain an attorney fee provision, but the note and deed of trust did. On the basis of intentional misrepresentations that it owned an interest in the option, defendant negotiated the override that obligated plaintiff to pay defendant a fee for each acre that was purchased through the exercise of the option. Plaintiff brought the action when it learned that defendant had no interest in the option at the time it negotiated the override. Judgment for plaintiff was based on both the intentional misrepresentations and on failure of consideration, and included an award of attorney's fees. Defendant appealed.

The court of appeal affirmed the judgment. The court first disposed of defendant's claim that the action was a tort action grounded in fraud. The court said it was well known that a defrauded party has an election to pursue a contract remedy, consisting of restitution based on rescission, or a tort remedy by affirming the contract and seeking damages. Plaintiff here had not elected the tort remedy (*121 Cal. App. 3d 447, 460-461)* . The court next considered the attorney fee provision in the note, which limited recovery of fees to suits for collection of the note. Such a limitation is valid (*121 Cal. App. 3d 447, 462-463)* . The attorney fee provision in the deed of trust, however, applied to "any action in which the beneficiary of the deed appears." The court concluded that the provision in the deed of trust provided the basis for recovery of plaintiff 's attorney's fees under *Civ. Code § 1717* (*121 Cal. App. 3d 447, 463)* .

[4] Additional Authorities

[a] Rescission or Cancellation

In Super 7 Motel Associates v. Wang (1993) 20 Cal. Rptr. 2d 193 , a buyer of real estate sued the seller and its broker in an action for rescission based on fraud. The buyer recovered damages against the seller but not against the broker, and the trial court awarded the broker attorney fees under a fee provision in the buy-sell agreement. The appellate court found that the broker was not entitled to attorney fees because the broker was a nonsignatory to the buy-sell agreement, and therefore the broker's liability in the rescission claim was premised on a tort (his own fraud) and not on the contract (*16 Cal. App. 4th 541, 549-550)* .

The trial court in *Leaf v. Phil Rauch, Inc. (1975) 47 Cal. App. 3d 371, 120 Cal. Rptr. 749* , awarded plaintiff/purchaser restitution and rescission of a motor vehicle conditional sales contract based on major defects and malfunctions and breach of warranties but declined to award plaintiff attorney's fees. The contract at issue was governed by *Civ. Code §§ 2981-2984.4*, and in particular *Civ. Code § 2983.4*, which provides for an award of reasonable attorney's fees to the prevailing party in any action on a conditional sales contract subject to the provisions of *Civ. Code §§ 2981-2984.4*. In reversing the judgment to provide for plaintiff 's recovery of attorney's fees, the court of appeal noted that *Civ. Code §§ 1717, 1811.1*, and *2983.4* all contain the same language. The court cited *Morgan v. Reasor Corp. (1968) 69 Cal. 2d 881, 896-897, 73 Cal. Rptr. 398, 447 P.2d 638* , which held that *Civ. Code § 1811.1* supports an award of attorney's fees to the prevailing party in an action for declaratory relief, for the proposition that no limitation on the type of action

covered by *Civ. Code § 1811.1* was intended so long as the subject matter involved a contract subject to the provisions of *Civ. Code §§ 1801-1812.20*. Since identical language should be given the same meaning in statutes intended to accomplish the same purpose, the court concluded that *Civ. Code § 2983.4* supports an award of attorney's fees to the prevailing party in an action based on rescission of contract (*47 Cal. App. 3d 371, 377-379)* .

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6-60 California Points & Authorities § 60.449

§ 60.449 Supporting Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Enforcement of Rescission of Contract

[1] FORM Supporting Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Enforcement of Rescission of Contract

[*For caption, see § 60.440, with which this form should be combined.*]

_____ [PLAINTIFF *or* DEFENDANT] IS ENTITLED TO RECOVER THE REASONABLE AMOUNT OF HIS/HER/ITS ATTORNEY'S FEES PURSUANT TO SECTION 1717 OF THE CIVIL CODE, BECAUSE THE ACTION IS DEEMED TO BE AN ACTION ON THE CONTRACT FOR THE PURPOSES OF THAT SECTION, EVEN THOUGH IT WAS AN ACTION FOR SPECIFIC ENFORCEMENT OF AN AGREEMENT TO RESCIND THE CONTRACT.

Specific Performance of Rescission Agreement. In an action to enforce the rescission of an agreement containing a provision for attorney's fees which does not limit the recovery of such fees to any particular form of action involving the contract, the prevailing party is entitled to an award of attorney's fees under to *Section 1717 of the Civil Code* (*Hastings v. Matlock (1985) 171 Cal. App. 3d 826, 840-842, 217 Cal. Rptr. 856*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.440*, in support of a motion under *Civ. Code § 1717* to determine the party prevailing on the contract for purposes of determining which party is entitled to an award of attorney's fees under that section, when the action was to enforce a rescission of the contract.

See also *§ 60.440[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.440[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Specific Performance of Rescission Agreement

Plaintiffs in ***Hastings v. Matlock*** *(1985) 171 Cal. App. 3d 826, 217 Cal. Rptr. 856* , agreed to sell to defendants land and a home to be built by husband/contractor. Both the contract of sale and a rental agreement under which defendants went into possession contained provisions for recovery of attorney's fees. The provision in the contract of sale applied if any party to the agreement instituted legal action against any other party. The provision in the rental agreement applied if plaintiffs were required to obtain the services of an attorney to enforce the terms of the agreement or to recover possession of the premises. Disputes arose between the parties prior to the close of escrow and litigation was commenced by plaintiffs. During the course of that litigation, the parties negotiated a settlement rescinding the transaction and restoring possession to plaintiffs. When it came time to sign the settlement agreement, defendants refused. Plaintiffs' motion to enforce the settlement agreement was granted, but judgment based on that motion was reversed on appeal for error in enforcing an out-of-court settlement by means of a nonstatutory "speaking motion." On remittitur, the pleadings were amended to add a cause of action for specific performance of the settlement agreement. Pursuant to stipulation of the parties, trial was bifurcated, and the issue of the oral settlement agreement was tried first. Judgment was for plaintiffs for specific performance of the oral settlement agreement attorney's fees. Defendants appealed.

The court of appeal affirmed the judgment. Defendants first contended that the subject of attorney's fees was never discussed during the settlement negotiations. The court of appeal found evidence to the contrary. Plaintiffs' attorney said he had directed that the attorney fee provision be inserted in the written settlement agreement because they were settling disputes under agreements containing attorney's fee provisions. Defendants' attorney was present when that direction was given (*171 Cal. App. 3d 826, 840)* . The court, citing *Leaf v. Phil Rauch, Inc. (1975) 47 Cal. App. 3d 371, 377-379, 120 Cal. Rptr. 749* (discussed in *§ 60.448[4]*), noted that *Civ. Code § 2983.4*, which governs contracts under the Automobile Sales Finance Act (*Civ. Code §§ 2981-2984.4*) and applies to actions "on the contract" similar to *Civ. Code § 1717*, has been held to support an award of attorney's fees to the prevailing party in an action for rescission of the contract. Also citing *Star Pacific Investments, Inc. v. Oro Hills Ranch, Inc. (1981) 121 Cal. App. 3d 447, 463, 176 Cal. Rptr. 546* (discussed in *§ 60.448[3]*), the court concluded that an action to enforce rescission of an agreement containing a provision for attorney's fees that does not limit the recovery of such fees to any particular form of action involving the contract is an action "on the contract" within the meaning of *Civ. Code § 1717* and therefore supports the award of attorney's fees to the prevailing party (*171 Cal. App. 3d 826, 840-842)* . Furthermore, the court said, the provision in the rental agreement allowing attorney's fees in an action to recover possession of the premises provided an additional basis for the award of attorney's fees (*171 Cal. App. 3d 826, 842)* .

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6-60 California Points & Authorities § 60.450

§ 60.450 Supporting Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Voluntary Dismissal After Determination on the Merits

[1] FORM Supporting Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Voluntary Dismissal After Determination on the Merits

[*For caption, see § 60.440, with which this form should be combined.*]

DEFENDANT IS ENTITLED TO RECOVER THE REASONABLE AMOUNT OF HIS/HER/ITS ATTORNEY'S FEES PURSUANT TO SECTION 1717 OF THE CIVIL CODE BECAUSE, EVEN THOUGH PLAINTIFF VOLUNTARILY DISMISSED THE ACTION, A DETERMINATION WAS MADE ON THE MERITS.

Attorney's Fees After Determination Made on the Merits. As a general rule, when the plaintiff voluntarily dismisses an action on a contract with an attorney's fees provision, there is no prevailing party for the purpose of recovery of attorney's fees (*Civ. Code § 1717(b)(2)*). However, when a determination is made on the merits of the case before the action is dismissed on the plaintiff's motion, the plaintiff forfeits the unlimited right to dismiss without bearing attorney's fees under *Civ. Code § 1717(a)* (*Kelley v. Bredelis (1996) 45 Cal. App. 4th 1819, 1830-1831, 53 Cal. Rptr. 2d 536*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.440*, in support of a motion under *Civ. Code § 1717* to determine the party prevailing on the contract for purposes of determining which party is entitled to an award of attorney's fees under that section, when the action was voluntarily dismissed after a determination on the merits.

See also *§ 60.440[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 60.440[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Attorney's Fees After Determination Made on the Merits

After a judicial arbitration award in the defendant's favor in ***Kelley v. Bredelis*** *(1996) 45 Cal. App. 4th 1819, 53 Cal. Rptr. 2d 536* , the plaintiff voluntarily dismissed the action. The defendant moved for attorney's fees, and the trial court found the defendant was a prevailing party on a contract with an attorney's fees provision for the purpose of *Civ. Code § 1717*. It awarded attorney's fees even though *Civ. Code § 1717(b)(2)* provides that there is no prevailing party for the purpose of awarding attorney's fees when the plaintiff voluntarily dismisses the action. The plaintiff appealed.

The court of appeal affirmed. It held that if a party chooses to wait until after there has been a determination of the issues on the merits, then the party has forfeited the unlimited right to dismiss without consequences. *Civ. Code § 1717* is triggered when there is a determination of the issues on the merits in the defendant's favor, and the defendant becomes the prevailing party for the purpose of attorney's fees under *Civ. Code § 1717* (*45 Cal. App. 4th 1819, 1830-1831)* . The court also held the defendant could recover attorney's fees under the broader provisions of *Code Civ. Proc. §§ 1032, 1033.5* (*45 Cal. App. 4th 1819, 1832-1833)* .

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6-60 California Points & Authorities § 60.451

§ 60.451 Supporting Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Voluntary Dismissal of Noncontractual Claims

[1] FORM Supporting Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Voluntary Dismissal of Noncontractual Claims

[*For caption, see § 60.440, with which this form should be combined.*]

DEFENDANT IS ENTITLED TO RECOVER THE REASONABLE AMOUNT OF HIS/HER/ITS ATTORNEY'S FEES, NOTWITHSTANDING PLAINTIFF'S VOLUNTARY DISMISSAL OF THE ACTION, BECAUSE THE ACTION WAS A NONCONTRACTUAL CLAIM ARISING FROM A CONTRACT PROVIDING FOR SUCH RECOVERY, AND HE/SHE/IT IS THE PARTY PREVAILING ON SUCH NONCONTRACTUAL CLAIM.

Voluntary Dismissal Does Not Preclude Recovery of Attorney's Fees Incurred in Defending Noncontractual Claims. Contractual attorney fee provisions are generally enforceable in voluntary pretrial dismissal cases except as barred by *Civil Code Section 1717*. A defendants in such a case may recover attorney's fees as costs to the extent the fees were incurred defending noncontractual claims asserted in the action, and *Civil Code Section 1717* does not bar recovery of these fees because that section applies only to bar, in the case of a voluntary dismissal, fees incurred defending contractual claims (*Gogri v. Jack in the Box Inc. (2008) 166 Cal. App. 4th 255, 82 Cal. Rptr. 3d 629*).

[2] Comments

[a] Use of Form

This form may be submitted, in an action on a contract, in support of a motion under *Code Civ. Proc. § 1033.5(c)(5)* to determine the party prevailing on the contract for purposes of determining which party is entitled to an award of attorney's fees pursuant to a provision in the contract providing for recovery of such fees. It is for use by a defendant when the plaintiff has voluntarily dismissed the action, for the recovery of attorney's fees incurred in defending tort or other noncontractual claims in that action that are covered under the contractual provision for fees.

[b] Argument

The basis for argument in this case is that, in the case of a voluntary dismissal, defendant is the prevailing party under *Code Civ. Proc. § 1032(a)(4)*, and may recover attorney's fees allowable under a contract provisions for fees except as barred by *Civ. Code § 1717(b)(2)*. The latter section applies only to contractual claims, and hence does not bar recovery in the case of attorney's fees incurred in defending noncontractual claims that are ultimately dismissed voluntarily, so long as the contract provision for fees otherwise permits the recovery of such fees [*Santisas v. Goodin (1998) 17 Cal. 4th 599, 622-623, 71 Cal. Rptr. 2d 830, 951 P.2d 399* , discussed in *§ 60.451[3][a]*].

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.440[2][b]* for discussion of evidentiary support.

[c] Related Pleading and Practice Chapters

For detailed legal background, research guides, and forms of notices of motions, supporting declarations, and orders relating to the recovery of attorney's fees under Civ. Code § 1717, see California Forms of Pleading and Practice, Ch. 174, *Costs and Attorney's Fees* (Matthew Bender).

[d] Related Memoranda

This form may also be combined, in an appropriate case, with the memoranda *set out in § 60.480* et seq., when a motion to determine the party prevailing on the contract is combined with a motion to fix the reasonable amount of fees to be awarded as an element of costs [*see Code Civ. Proc. § 1033.5(c)(5)*].

If there are other theories upon which the moving party may recovery an award of attorney's fees, memoranda based on these theories may be combined with this form in the alternative [*see* § 60. 300 et seq. (common fund exception), § 60.340 et seq. (substantial benefit exception), and § 60.370 et seq. (award based on private attorney general theory under *Code Civ. Proc. § 1021.5*)].

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

For opposing memoranda, see *§ 60.463*.

[3] Discussion of Authorities

[a] Voluntary Dismissal Does Not Preclude Recovery of Attorney's Fees Incurred in Defending Noncontractual Claims

In ***Santisas v. Goodin*** *(1998) 17 Cal. 4th 599, 71 Cal. Rptr. 2d 830, 951 P.2d 399* , plaintiff home buyers sued sellers for defects in the home, alleging both a claim for breach of contract and various tort causes of action. After discovery, plaintiff's voluntarily dismissed their action with prejudice. Defendants moved to recover attorney's fees as costs under *Code Civ. Proc. §§ 1021, 1032, 1033.5* and the attorney fee provision of the purchase contract, and this motion was granted by the trial court, awarding over $16,000 in attorney's fees as costs. On appeal by plaintiffs, the court of appeal affirmed.

A majority of the Supreme Court reversed, holding that contractual attorney fee provisions are generally enforceable in voluntary pretrial dismissal cases, except as barred by Civ. Code *Civ. § 1717*. The application of this rule in this case

meant that defendant's were entitled to recover as costs attorney's fees incurred to defend tort claims, but Civ. Code *Civ. § 1717* barred their recovery as costs of attorney's fees incurred in defense of the breach of contract claim (*17 Cal. 4th 599, 622-623)* .

Defendants' initial argument was that the attorney fees were recoverable as litigation costs. The Court thus addressed the threshold issue, whether defendants' were entitled to recover costs, and concluded that they were, in fact, entitled to recover costs as a matter of right. Plaintiff's voluntarily dismissed the action, and defendants' are therefore "prevailing" parties entitled to costs under *Code Civ. Proc. § 1032(a)(4), (b)* (*17 Cal. 4th 599, 606)* .

The Court then addressed whether attorney's fees were recoverable by defendants' as an item costs because such recovery was authorized by contract (citing *Code Civ. Proc. § 1033.5(a)(10)*. The Court first noted, that, on the record before it, it was undisputed that the parties entered into a purchase contract that included a provision for attorney's fees in the following terms: "[i]n the event legal action is instituted by ... any party to this agreement, or arising out of the execution of this agreement or the sale ... the prevailing party shall be entitled to receive from the other party a reasonable attorney fee to be determined by the court in which such action is brought" (*17 Cal. 4th 599, 606-607)* . This provision, the Court noted, was phrased in broad enough language to include both contract and tort causes of action *17 Cal. 4th 599, 608)* .

The contract did not, however, define "prevailing party," nor was any extrinsic evidence offered on the issue. This term has more than one meaning under California law. Under *Code Civ. Proc. § 1032(a)(4)* For purposes of recovering costs, a "prevailing party" includes a party in whose favor a judgment of dismissal has been entered. Under *Civ. Code § 1717(b)(2)*, however, there is no "prevailing party" when the action has been voluntarily dismissed (*17 Cal. 4th 599, 609)* . The Court concluded that, because the term has no settled technical meaning as including or excluding a party in whose favor a dismissal has been entered, it would assume the parties understood the term in its ordinary or popular sense, disapproving *Sweat v. Hollister (1995) 37 Cal. App. 4th 603, 611 n.7, 43 Cal. Rptr. 2d 399* to the extent it is inconsistent with this analysis (*17 Cal. 4th 599, 609, 609 n.5*). Giving the term its popular meaning, the Court concluded that the defendants' were prevailing parties under their agreement based on plaintiffs' voluntary dismissal, with prejudice of their action against defendant. Thus, in light of *Code Civ. Proc. § 1032(a)(4)* and the contract itself, defendants' were entitled to recover attorney's fees as an item of costs (*17 Cal. 4th 599, 609)* .

The Court then turned to the central question of the case, whether *Civ. Code § 1717* operated to bar recovery of attorney's fees as costs notwithstanding *Code Civ. Proc. § 1032(a)(4)* and the contract provision allowing their recovery (*17 Cal. 4th 599, 609)* .

The Court held that *Civ. Code § 1717* applied to contract provisions for the recovery of attorney's fees, whether such provisions are unilateral, that is, allowing only one party to recover, or reciprocal, such as one allowing recovery by a "prevailing party," disapproving *Honey Baked Hams, Inc. v. Dickens (1995) 37 Cal. App. 4th 421, 426, 43 Cal. Rptr. 2d 595* to the extent it is inconsistent with this conclusion (*17 Cal. 4th 599, 614)* .

The Court then noted that, by its terms, *Civ. Code § 1717* applies in an action on a contract to enforce that contract. Thus, *Civ. Code § 1717* only applies in an action that includes at least one contract claim, and if tort claims are also included, it applies only to attorney's fees incurred to litigate the contract claims (*17 Cal. 4th 599, 615)* . The Court disagreed, however, with the court of appeal's conclusion in this case that plaintiffs' contract claim was misnamed as actually sounded in tort. *Civ. Code § 1717* therefore applied to the action, and, under *Civ. Code § 1717(b)(2)*, defendants' were not "prevailing parties" and could not recover attorney's fees incurred in the defense of the contract claim (*17 Cal. 4th 599, 615)* .

Further, when *Civ. Code § 1717(b)(2)* applies, as in this case, it overrides with any conflicting language of the contract provision, based on the policy reasons underlying the enactment of *Civ. Code § 1717*. In other words, when plaintiff voluntarily dismisses a contract claim, defendant is barred from recovering attorney's fees as costs under *Civ. Code §*

1717(b)(2), even though the contract on its own terms authorizes recovery of those fees (*17 Cal. 4th 599, 617* , emphasis original).

This bar applies, however, only to contract claims. If a plaintiff voluntarily dismisses an action that also asserts causes of action that do not sound in contract, those causes of action are not covered by *Civ. Code § 1717*, and attorney's fees may be recovered as costs under an attorney fee provision that permits recovery in litigating those non-contract causes of action. Similarly, if the action involves only tort claims, and a contract provision permits recovery under those circumstances, *Civ. Code § 1717* does not apply to bar their recovery (*17 Cal. 4th 599, 617)* .

The Court rejected plaintiffs' argument that language in *Code Civ. Proc. § 1033.5(c)(5)* meant that attorney's fees could only be recovered as costs when *Civ. Code § 1717* applies, and thus that no fees incurred to litigate tort or noncontractual claims are recoverable under a contract provision that is outside the scope of *Civ. Code § 1717*. The Court held that *Code Civ. Proc. § 1033.5(c)(5)* merely specifies the procedural methods by which a court may fix attorney's fees to be awarded as costs, and that this statute's reference to *Civ. Code § 1717* is solely to specify that, for purposes of determining which procedures may be used to recover fees under *Civ. Code § 1717*, the methods applicable to contractual, not statutory, claims, apply (*17 Cal. 4th 599, 617-619)* .

Thus, with respect to *Civ. Code § 1717*, the court concluded that it applied to contract causes of action, and that *Civ. Code § 1717(b)(2)* precluded defendants from recovery any attorney's fees incurred in defense of contract claims, because under that provision they were not "prevailing" parties due to plaintiffs' voluntary dismissal of the action. *Civ. Code § 1717* does not apply, however, to tort causes of action, and thus did not preclude recovery of attorney's fees by defendants incurred in defending tort (or other noncontractual) claims, when those fees are otherwise recoverable pursuant to the contract provision for fees and *Code Civ. Proc. § 1032(a)(4)* (*17 Cal. 4th 599, 619)* .

The Court then examined the effect of its holding in *International Industries, Inc. v. Olen (1978) 21 Cal. 3d 218, 145 Cal. Rptr. 691, 577 P.2d 1031* . Plaintiffs argued that this earlier case established a rule that, in any claim for fees based on a contractual attorney fee provision, the fees are not recoverable if the action is terminated by pretrial dismissal, whether incurred defending contract or noncontract claims. The Court disagreed, holding that *Olen* applied only to situations within the scope of *Civ. Code § 1717*; a holding effectively superseded and codified by the 1981 amendment resulting in *Civ. Code § 1717(b)(2)* (*17 Cal. 4th 599, 619-622)* . The Court disapproved *Jue v. Patton (1995) 33 Cal. App. 4th 456, 39 Cal. Rptr. 2d 364* and *Ryder v. Peterson (1996) 51 Cal. App. 4th 1056, 59 Cal. Rptr. 2d 562* , to the extent these cases are inconsistent with this holding (*17 Cal. 4th 599, 622 n.9*).

In conclusion, the Court held that contractual attorney fee provisions are generally enforceable in voluntary pretrial dismissal cases except as barred by *Civ. Code § 1717*. Thus, in the present case, the Court held that defendants were entitled under the attorney fee provision to recover attorney's fees as costs to the extent the fees were incurred defending tort claims asserted in the action, and that *Civ. Code § 1717* did not bar recovery of those fees. But defendants were barred by *Civ. Code § 1717* from recovering any attorney's fees incurred defending the breach of contract claim (*17 Cal. 4th 599, 622-623)* .

In ***Gogri v. Jack in the Box Inc.*** *(2008) 166 Cal. App. 4th 255, 82 Cal. Rptr. 3d 629* , the plaintiff and two other people were franchisees of the defendant. When the term of the franchise agreement was about to expire, the defendant offered to renew the franchise agreement on the condition that each franchisee execute a general release in the defendant's favor. When the plaintiff chose not to execute the general release, the defendant entered into a new franchise agreement with the two other people. The plaintiff sued the defendant for contract and tort causes of action. Each party filed motions for summary judgment. The plaintiff then filed a request for dismissal with prejudice. The defendant then filed an ex parte application requesting the voluntary dismissal be vacated, arguing it was untimely filed, and that the court grant the defendant's motion for summary judgment. The trial court vacated the voluntary dismissal of the complaint and granted the defendant's motion for summary judgment. The court granted the defendant's request for an award of reasonable attorney's fees and costs.

On appeal, the plaintiff argued that the trial court erred by awarding attorney's fees to the defendant because it had no jurisdiction to do so after he filed his voluntary dismissal of his complaint without prejudice. To the extent the trial court awarded the defendant attorney's fees incurred in defending against the contract causes of action, the court of appeal agreed (*166 Cal. App. 4th 255, 274*). Citing *Santisas v. Goodin (1998) 17 Cal. 4th 599, 617, 71 Cal. Rptr. 2d 830, 951 P.2d 399* , the court held that the trial court had no authority to award attorney's fees under *Civ. Code § 1717* on the plaintiff's contract causes of action. However, the court held, this conclusion does not affect the defendants' right to recover as costs the attorney's fees it incurred in defense of the tort claims. The court of appeal therefore remanded the case to the trial court to determine the attorney's fees the defendant incurred to defend the tort causes of action.

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6-60 California Points & Authorities § 60.452

§ 60.452 Supporting Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Court Has Discretion to Declare Prevailing Party

[1] FORM Supporting Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Court Has Discretion to Declare Prevailing Party

[*For caption, see § 60.440, with which this form should be combined.*]

WHEN, AS HERE, THERE IS NO UNQUALIFIED VICTORY BY EITHER PARTY, THE COURT HAS DISCRETION TO DECLARE THE PREVAILING PARTY. THE COURT SHOULD DECLARE _____ [*specify party, e.g.,* PLAINTIFF] _____ [*name*] AS PREVAILING PARTY IN THIS CASE BECAUSE _____ [*specify*].

Court Has Discretion to Declare Prevailing Party. If neither party achieves a complete victory on all the contract claims, the trial court has discretion to determine which party prevailed on the contract pursuant to *Civ. Code § 1717*. In making this determination, the trial court compares the relief awarded on the contract claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources (*Acree v. General Motors Acceptance Corp. (2001) 92 Cal. App. 4th 385, 399, 112 Cal. Rptr. 2d 99* ; *Scott Co. of California v. Blount, Inc. (1999) 20 Cal. 4th 1103, 1109, 86 Cal. Rptr. 2d 614, 979 P.2d 974*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.440*, in support of a motion under *Civ. Code § 1717* to determine the party prevailing on the contract for purposes of determining which party is entitled to an award of attorney's fees under that section. It calls for the court to exercise its discretion to declare a prevailing party when neither party has achieved an unqualified victory on all contract claims.

See also *§ 60.440[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 60.440[2][b]* for discussion of evidentiary support.

[c] Opposing Memoranda

The memoranda *set out in § 60.466* may be used in an appropriate case to oppose a motion supported by this form.

[3] Discussion of Authorities

[a] Court Has Discretion to Declare Prevailing Party

The facts and procedural background of ***Scott Co. of California v. Blount, Inc.*** *(1999) 20 Cal. 4th 1103, 86 Cal. Rptr. 2d 614, 979 P.2d 974* , are discussed in *§ 60.83[3][a]*. In that case, the Supreme Court, citing *Hsu v. Abbara (1995) 9 Cal. 4th 863, 39 Cal. Rptr. 2d 824, 891 P.2d 804* (discussed in *§ 60.440[3][b]*), stated that, when neither party achieves a complete victory on all the contract claims, it is within the discretion of the trial court to determine which party prevailed on the contract or to determine, alternatively, that neither party prevailed sufficiently for purposes of an award of attorney's fees under *Civ. Code § 1717*. In deciding whether there is a party prevailing on the contract, the trial court is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources (*20 Cal. 4th 1103, 1109)* .

In the case before it, the plaintiff sought to prove more than $2 million in damages but succeeded in establishing only about $440,000 of those damages. The Court held that, although the plaintiff did not achieve all of its litigation objectives, and thus was not automatically a party prevailing on the contract for purposes of *Civ. Code § 1717*, the trial court did not abuse its discretion in implicitly concluding that, on balance, plaintiff prevailed on the contract for purposes of *Civ. Code § 1717*. Thus, plaintiff ordinarily would be entitled to recover its attorney fees, in addition to its other costs, by virtue of the combined operation of the contractual attorney fees provision, *Civ. Code § 1717*, and *Code Civ. Proc. §§ 1032* and *1033.5* (*20 Cal. 4th 1103, 1109)* . The Court then went on to discuss the extent to which this right to recover was cut off by operation of *Code Civ. Proc. § 998*.

In ***Acree v. General Motors Acceptance Corp.*** *(2001) 92 Cal. App. 4th 385, 112 Cal. Rptr. 2d 99* , customers of an automobile finance company who had executed its standard conditional sales agreement, filed a class action for breach of contract and unfair business practices. The action was based on the defendant's purchase of collateral protection insurance, claiming that defendant charged exorbitantly for the insurance. The trial court certified the class. The defendant cross complained seeking to collect amounts members of the plaintiff class owed it under their sales agreements. The trial court denied defendant's motion to certify a cross-defendant class (*92 Cal. App. 4th 385, 391)* . After trial of the contract claims by jury and the claims for unfair competition, unjust enrichment and declaratory relief before the court as equitable, the jury found that the defendant breached the standard sales agreement and awarded actual damages; the trial court found the defendant had engaged in two unfair business practices and enjoined the defendant from engaging in them, which was later reversed on appeal. The trial court added prejudgment interest to the jury's award of damages, denied plaintiffs' equitable claims and denied the defendant relief on its cross-complaint. The trial court then found plaintiffs to be the prevailing party and awarded attorney's fees and costs (*92 Cal. App. 4th 385, 392)* .

The Court of Appeal affirmed, including the award of attorney's fees, finding that the trial court did not abuse its discretion in finding the plaintiff class to be the prevailing party. The court first held that the trial court properly determined that the plaintiff class was the prevailing party using the comparative approach as set forth in *Hsu v.*

Abbara (1995) 9 Cal. 4th 863, 39 Cal. Rptr. 2d 824, 891 P.2d 804 (discussed in *§ 60.440[3][b]*) (*92 Cal. App. 4th 385, 400)* . The court next found that although only 14,000 of the 116,000 class members were awarded damages, including only one of the four named plaintiffs, the trial court properly refused to assess prevailing party status on an individual basis since liability was determined on a classwide basis because the class had a standard sales agreement with the defendant and the action did not involve multiple, independent contracts (*92 Cal. App. 4th 385, 400-401)* . Finally, the court held that under the comparative approach, there was substantial evidence to support a finding that the plaintiffs had obtained greater relief on the contract action (*92 Cal. App. 4th 385, 402-403)* .

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6-60 California Points & Authorities § 60.453

§ 60.453 Supporting Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Pro Se Attorney Entitled to Reimbursement for Attorney's Fees Incurred for Assistance by Other Counsel

[1] FORM Supporting Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Pro Se Attorney Entitled to Reimbursement for Attorney's Fees Incurred for Assistance by Other Counsel

[*For caption, see § 60.440, with which this form should be combined.*]

ATTORNEY WHO REPRESENTS HIMSELF OR HERSELF PRO SE IS ENTITLED TO ATTORNEY'S FEES INCURRED FOR ASSISTANCE BY OTHER COUNSEL.

Prevailing Pro Se Attorney Is Entitled to Reimbursement of Cost of Assistance of Other Counsel. When an attorney represents himself or herself in litigation on a contract containing an attorney's fees provision and is the prevailing party, the attorney is entitled to an award of fees under *Civ. Code § 1717* for the cost of hiring counsel to assist that attorney in the litigation even if the other counsel is not of record (*Mix v. Tumanjan Development Corp. (2002) 102 Cal. App. 4th 1318, 126 Cal. Rptr. 2d 267*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.440*, in support of a motion under Civ. Code § 1717 for an award of attorney's fees in litigation under a contract, to an attorney who represented himself or herself and incurred attorney's fees for the assistance of other counsel in the litigation.

See also *§ 60.440[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 60.440[2][b]* for discussion of evidentiary support.

[c] Opposing Memoranda

The memoranda *set out in § 60.467* may be used in an appropriate case to oppose a motion supported by this form.

[3] Discussion of Authorities

In ***Mix v. Tumanjan Development Corp.*** *(2002) 102 Cal. App. 4th 1318, 126 Cal. Rptr. 2d 267* , an attorney sued his landlord in pro per under a lease agreement that contained an attorney's fees provision. In the course of the litigation, the attorney hired a law firm to analyze legal and factual issues, help with trial strategy, and assist the attorney Mix in all aspects of the litigation, including trial preparation, but did not associate the law firm of record, except once for the limited purpose of filing a reply brief and presenting oral argument on a summary judgment motion. During trial, the attorney conducted the courtroom proceedings and attorneys from the law firm drafted motions in limine, researched legal issues, drafted jury instructions and a special verdict form, helped with trial strategy, conducted the examination of the attorney, and received the jury verdict. The jury found in favor of the attorney and awarded him damages. The attorney moved for an award of fees and costs. The trial court granted defendant's motion for a new trial on the ground of juror misconduct, and the attorney appealed. An appellate specialist represented the attorney on appeal. The appellate court reversed and remanded to the trial court with directions to reinstate the judgment in favor of the attorney and to rule on fees and costs, and the trial court awarded the attorney attorney's fees and costs (*102 Cal. App. 4th 1318, 1321-1322)* .

The Court of Appeal affirmed the award. The court found that an attorney who chooses to represent himself or herself, and does not pay or become liable to pay any sum out of pocket for legal services, may not recover reasonable attorney fees as compensation for the time and effort expended by the attorney and the professional business opportunities lost as a result. However, if an attorney is in fact retained by the pro se litigant and renders legal services assisting in the lawsuit, the attorney need not be an attorney of record in order for the reasonable fees of the attorney to be awarded to a prevailing party. Further, there is no authority or reason to require a formal association on the record in order for attorney fees to be recoverable (*102 Cal. App. 4th 1318, 1322-1325)* .

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2-60 California Points & Authorities § 60.454

§ 60.454 Supporting Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Party Prevailing on Contract After Determination of Arbitration Under Contract

[1] FORM Supporting Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Party Prevailing on Contract After Determination of Arbitration Under Contract

[*Caption, see § 60.440, with which this form should be combined.*]

_____ [PLAINTIFF ***or*** DEFENDANT] IS ENTITLED TO RECOVER THE REASONABLE AMOUNT OF HIS/HER/ITS ATTORNEY'S FEES, BECAUSE HE/SHE/IT WAS THE PREVAILING PARTY ON A PETITION TO COMPEL ARBITRATION UNDER A CONTRACT.

Party Prevailing on Determination of Arbitration Under Contract Is Entitled to Attorney's Fees Award Under *Civ. Code § 1717*. When an action is brought solely to compel arbitration of contractual disputes between the parties, the party who succeeds in obtaining an order either granting or denying the petition to compel arbitration is a prevailing party in the action on the contract for purposes of *Civ. Code § 1717* when the contract provides for attorney's fees, even though the merits of the parties' underlying contractual disputes have not yet been resolved (*Otay River Constructors v. San Diego Expressway (2008) 158 Cal. App. 4th 796, 805-808, 70 Cal. Rptr. 3d 434* [denying petition]).

[2] Comments

[a] Use of Form

This form of memorandum is for use with the general memorandum *set out in § 60.440*, in support of a motion under *Civ. Code § 1717* to determine the party prevailing on the contract for purposes of determining which party is entitled to an award of attorney's fees under that section, when the party has prevailed in an action to compel arbitration under the contract.

See also *§ 60.440[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 60.440[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Party Prevailing on Contract After Tender and Deposit

In ***Otay River Constructors v. San Diego Expressway*** *(2008) 158 Cal. App. 4th 796, 70 Cal. Rptr. 3d 434* , in connection with its development of two related highway projects in San Diego County, San Diego Expressway (Expressway), entered into two design-build contracts with general contractor Otay River Constructors (Otay) referred to as the "Gap/Connector Contract" and the "Toll Road Contract," together referred to as the "Design-Build Contracts." The parties also entered into a third agreement, the "Coordination Agreement," to ensure that the Design-Build Contracts complemented and supplemented one another and operated in a coordinated manner to allow completion of the projects. Each contract contained a dispute resolution provision governing disputes arising out of it. The Gap/Connector Contract provided that disputes would be resolved by project and executive level negotiations and then by a nonbinding dispute resolution board and, if necessary, litigation. The Toll Road Contract contained similar dispute resolution procedures, except that it did not allow litigation and required binding arbitration. Disputes under the Coordination Agreement would be governed by the dispute resolution provision of the Toll Road Contract, *i.e.*, binding arbitration. Otay initiated two arbitration proceedings against Expressway, claiming that the disputes arose under the Coordination Agreement and that Expressway breached that contract by demanding changes to certain drawings and refusing to execute a change order adjusting the contract price to reflect necessary retaining walls. In its arbitration demands, Otay admitted that the claims arose under the Gap/Connector Contract, but argued that the claims presented a dispute under the Coordination Agreement and under the Coordination Agreement binding arbitration was proper because the dispute procedures of the Toll Road Contract applied. After Expressway denied the claims, Otay filed a petition in superior court to compel arbitration under the Coordination Agreement, arguing that the disputes arose under the Coordination Agreement and must be arbitrated. Expressway opposed the petition, arguing that it never agreed to submit Gap/Connector Contract disputes unrelated to the Coordination Agreement to binding arbitration.

The trial court rejected Otay's argument that the Coordination Agreement modified or superseded the terms of the Gap/Connector Contract and found no ambiguities and inconsistencies between the Coordination Agreement and the Gap/Connector Contract. It noted that the parties were very sophisticated and could easily have stated that the Coordination Agreement overrode the dispute resolution provisions of the Gap/Connector Contract, but that the parties intended to leave the dispute resolution procedures contained in the Gap/Connector Contract as is. Accordingly, it denied the petition to compel arbitration because the claims arose out of the Gap/Connector Contract, which allowed for litigation of the disputes. Otay did not appeal the order denying its petition to compel arbitration. Expressway filed a motion for attorney's fees and costs, claiming it was the prevailing party on the contract because it obtained a final order denying Otay's petition to compel arbitration. After bifurcating the issue of entitlement to attorney fees and costs from the issue of the amount of any award, the trial court denied Expressway's motion on the ground it was not a prevailing party because the parties contemplated additional litigation (*158 Cal. App. 4th 796, 800-801)* .

The Court of Appeal reversed the denial of the attorney's fees, finding that the trial court erred in denying attorney's fees under *Civil Code § 1717*. The petition to compel arbitration under the Coordination Agreement was an action on the contract for purposes of *Civ. Code § 1717*. Expressway obtained a simple, unqualified win on the only contract claim at issue in the action, *i.e.*, whether to compel arbitration under the Coordination Agreement. Accordingly, Expressway was the prevailing party as a matter of law because it defeated the only contract claim before the trial court in a discrete special proceeding (*158 Cal. App. 4th 796, 805-808)* .

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6-60 California Points & Authorities §§ 60.455-60.459

[Reserved]

§§ 60.455[Reserved]

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6-60 California Points & Authorities § 60.460

§ 60.460 Opposing Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--General Form

[1] FORM Opposing Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN OPPOSITION TO MOTION
Plaintiff, vs.	)	FOR AWARD OF ATTORNEY'S FEES
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

_____ [PLAINTIFF *or* DEFENDANT] IS NOT ENTITLED UNDER *CIVIL CODE SECTION 1717* TO RECOVERY OF ALL ATTORNEY'S FEES EXPENDED.

Not Entitled to Fees Under *Civ. Code § 1717*. Only when the conditions of *Civil Code Section 1717* have been met may a court award attorney's fees to a party in an action on a contract pursuant to that statute (*see Civ. Code § 1717*).

[*Insert other memoranda, as appropriate.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form of memorandum may be submitted in opposition to a motion to establish entitlement to an award of attorney's fees under *Civ. Code § 1717*. It is a general form to which additional memoranda should be inserted, as appropriate, *set out in § 60.461* et seq.

See also *§ 60.440[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 60.440[2][b]* for discussion of evidentiary support.

[c] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Memoranda

For opposing memoranda generally, see *§ 60.440* et seq.

[3] Discussion of Authorities

[a] Not Entitled to Fees Under Civ. Code § 1717

Civ. Code § 1717 is the general statute under which attorney's fees may or may not be awarded in an action on a contract.

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6-60 California Points & Authorities § 60.461

§ 60.461 Opposing Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Prevailing Parties Not Necessarily Determined by Final Judgment

[1] FORM Opposing Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Prevailing Parties Not Necessarily Determined by Final Judgment

[*For caption, see § 60.460, with which this form should be combined.*]

_____ [PLAINTIFF *or* DEFENDANT] IS NOT ENTITLED TO RECOVERY OF ALL ATTORNEY'S FEES EXPENDED BECAUSE HE/SHE DID NOT PREVAIL ON ALL THE LITIGATED ISSUES, AND THE AWARD FOR ATTORNEY'S FEES SHOULD THEREFORE BE APPORTIONED BETWEEN THE PARTIES PROSECUTING AND DEFENDING THE ACTION.

Prevailing Parties Not Necessarily Determined by Final Judgment. The party in whose favor the final judgment is entered is not necessarily deemed the prevailing party. When different parties prevail on different issues, the award for attorney's fees must be apportioned between the parties prosecuting and defending the action both at trial and on appeal (*Epstein v. Frank (1981) 125 Cal. App. 3d 111, 124, 125, 177 Cal. Rptr. 831*).

[2] Comments

[a] Use of Form

This form of memorandum is for use with the general memorandum *set out in § 60.460*, in opposition to a motion to establish entitlement to an award of attorney's fees under *Civ. Code § 1717*, when the party seeking fees did not prevail on all the litigated issues, and counsel seeks to have the award of fees apportioned between the parties that prosecuted and defended the action [*see Epstein v. Frank (1981) 125 Cal. App. 3d 111, 124-125, 177 Cal. Rptr. 831]* .

See also *§ 60.440[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 60.440[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Prevailing Parties Not Necessarily Determined by Final Judgment

Epstein v. Frank *(1981) 125 Cal. App. 3d 111, 177 Cal. Rptr. 831* , was an action brought by various payees under promissory notes against a limited partnership and its sole general partner to recover money due on the notes. The notes all contained provisions for attorney's fees. The trial court allowed recovery on some of the notes, but held that recovery on other notes was barred by the statute of limitations. The court denied recovery of interest on certain other notes because the notes were usurious. The court also determined that plaintiffs prevailed and awarded them attorney's fees. Plaintiffs appealed from the judgment insofar as it denied recovery. Defendants appealed from that portion of the judgment permitting recovery, and awarding plaintiffs attorney's fees.

The court of appeal reversed and remanded the matter to the trial court for determinations consistent with its ruling. The court upheld the trial court's ruling with regard to the statute of limitations provisions, but held that plaintiffs were entitled to receive interest on usurious notes at the legal rate from the date of maturity to the date of judgment (*125 Cal. App. 3d 111, 118-124)* . The court noted that each party contends that it was the prevailing party for purposes of recovering attorney's fees pursuant to *Civ. Code § 1717*. As a general rule, when claims and counterclaims arise in connection with a contract containing an attorney's fees provision, the party who obtains a favorable judgment is deemed to be the prevailing party, even though not obtaining all the relief sought in the action. However, the party in whose favor the final judgment is entered is not always deemed to be the prevailing party (*125 Cal. App. 3d 111, 124)* . The joinder of various plaintiffs in one action should not impose a different obligation for the payment of attorney's fees than would be incurred if each matter had been litigated separately. It would be contrary to the expressed provision of the promissory notes, and contrary to the intention of *Civ. Code § 1717*, to hold that a plaintiff or a group of plaintiffs who filed suit on several separate promissory notes is the prevailing party if it prevails on any one of the notes. In order to apportion attorney's fees appropriately between the litigants, the trial court must determine the amount of attorney's fees reasonably attributable to the prosecution and defense of the various notes involved in the proceedings both at trial and on appeal (*125 Cal. App. 3d 111, 125)* .

Counsel should note that the decision in *Epstein* was decided before the 1987 amendment to *Civ. Code § 1717(b)(1)* defining "party prevailing on the contract." Prior to this amendment, *Civ. Code § 1717(b)(1)* provided that the prevailing party for purposes of that section was generally the party entitled to recover costs of suit [*see* Stats. 1983, ch. 1073]. *Civ. Code § 1717(b)(1)* now provides that, except as provided in *Civ. Code § 1717(b)(2)*, the party prevailing on the contract shall be the party who recovered a greater relief in action on the contract. The effect of this language on the holding in *Epstein* is unclear. For further discussion of this provision, see *§ 60.440[3][d]*.

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6-60 California Points & Authorities § 60.462

§ 60.462 Opposing Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Final Disposition Required Before Party Can Prevail

[1] FORM Opposing Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Final Disposition Required Before Party Can Prevail

[*For caption, see § 60.460, with which this form should be combined.*]

_____ [PLAINTIFF *or* DEFENDANT] IS NOT ENTITLED TO RECOVER ATTORNEY'S FEES UNDER *CIVIL CODE SECTION 1717* BECAUSE THERE WAS NO FINAL DISPOSITION OF THE RIGHTS OF THE PARTIES AND THEREFORE NO PARTY PREVAILING ON THE CONTRACT FOR PURPOSES OF THAT SECTION.

Final Disposition Required Before Party Can Prevail. In order to have a prevailing party there must be some final disposition of the rights of the parties, some reckoning of the net success of the respective parties. That net success cannot be ascertained until the final termination of the suit (*580 Folsom Associates v. Prometheus Development Co. (1990) 223 Cal. App. 3d 1, 272 Cal. Rptr. 227* ; *Lachkar v. Lachkar (1986) 182 Cal. App. 3d 641, 648-649, 227 Cal. Rptr. 501*).

[2] Comments

[a] Use of Form

This form of memorandum is for use with the general memorandum *set out in § 60.460*, in opposition to a motion to establish entitlement to an award of attorney's fees under *Civ. Code § 1717*, when the party seeking fees did not prevail because there was no final disposition of the rights of the parties [*see* *Lachkar v. Lachkar (1986) 182 Cal. App. 3d 641, 648-649, 227 Cal. Rptr. 501]* .

See also *§ 60.440[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 60.440[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Final Disposition Required Before Party Can Prevail

In ***580 Folsom Associates v. Prometheus Development Co.*** *(1990) 223 Cal. App. 3d 1, 272 Cal. Rptr. 227* , a defendant in a contractual dispute petitioned in the court of appeal for a writ of mandate to set aside certain trial court rulings against it. The court of appeal denied the petition without stating any reason and without issuing an alternative writ or an order to show cause. The trial court denied plaintiffs' subsequent motion under *Civ. Code § 1717* for attorney's fees expended in opposing the writ proceeding. The court of appeal affirmed, noting that the denial of a writ petition without opinion is neither res judicata nor law of the case, and that a party opposing such a petition is not a prevailing party; the matter is clearly subject to later review should a party seek such review. The court concluded that the order of the trial court denying attorney's fees in the writ proceedings was correct on grounds the motion was prematurely filed. The court of appeal modified the trial court's order, however, to provide that the motion would be denied without prejudice to renewal if and when plaintiff became the prevailing party in the litigation (*223 Cal. App. 3d 1, 29-30)* .

In ***Lachkar v. Lachkar*** *(1986) 182 Cal. App. 3d 641, 227 Cal. Rptr. 501* , plaintiffs, sole shareholders of a corporation that operated a restaurant and cocktail lounge, contracted to sell their business to defendants. During escrow, while they were operating the establishment as provided in the sale contract, defendants assigned the contract to a limited partnership, in which they were the limited partners. Plaintiffs contracted to become consultants for that limited partnership. Both the sale and consulting contracts contained arbitration clauses. Later, the parties had a disagreement, and plaintiffs gave notice and written demand for submission to arbitration. Plaintiffs then filed a petition to compel arbitration. Defendants denied they had refused to arbitrate and argued that plaintiffs were seeking to arbitrate matters under agreements that did not contain arbitration provisions. The trial court granted the petition to compel arbitration and awarded plaintiffs costs and attorney's fees. Defendants appealed the award of costs and attorney's fees.

The court of appeal reversed the order awarding costs and attorney's fees (*182 Cal. App. 3d 641, 649)* . The court said that an award under *Civ. Code § 1717* could not stand because there was no prevailing party. *Civ. Code § 1717* requires that there be some final disposition of the rights of the parties (*182 Cal. App. 3d 641, 648)* . The court analyzed the language of *Civ. Code § 1717*, saying that the language authorizing determination of who is the prevailing party, whether or not the suit proceeds to final judgment, does not imply that there need not be a final disposition. By providing that the prevailing party is the party who is entitled to recover costs of suit, the statute requires that there be some reckoning of the net success of the respective parties. That net success cannot be ascertained until the final termination of the suit. In ordering arbitration pursuant to *Code Civ. Proc. § 1281.2*, the court was not determining the substantive rights of the parties. Because there was no reckoning of the net success of the parties, there was no prevailing party under the parties' agreements nor pursuant to *Civ. Code § 1717* (*182 Cal. App. 3d 641, 649)* .

Counsel should note that *Lachkar* was decided before the 1987 amendment to *Civ. Code § 1717(b)(1)* defining "party prevailing on the contract." Prior to this amendment, *Civ. Code § 1717(b)(1)* provided that the prevailing party for purposes of that section was generally the party entitled to recover costs of suit [*see* Stats. 1983, ch. 1073]. For discussion of the new definition of party prevailing on the contract, see *§ 60.440[3][d]*.

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6-60 California Points & Authorities § 60.463

§ 60.463 Opposing Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--No Prevailing Party After Dismissal

[1] FORM Opposing Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--No Prevailing Party After Dismissal

[*For caption, see § 60.460, with which this form should be combined.*]

DEFENDANT IS NOT ENTITLED TO RECOVER ATTORNEY'S FEES UNDER *CIVIL CODE SECTION 1717* BECAUSE THE ACTION WAS DISMISSED _____ [VOLUNTARILY *or* PURSUANT TO A SETTLEMENT OF THE CASE] AND THEREFORE THERE IS NO PARTY PREVAILING ON THE CONTRACT FOR THE PURPOSES OF THAT SECTION.

No Prevailing Party After Dismissal. When an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no party prevailing on the contract for purposes of this section (*Civ. Code § 1717(b)(2)*; *Santisas v. Goodin (1998) 17 Cal. 4th 599, 617, 71 Cal. Rptr. 2d 830, 951 P.2d 399* ; *Mitchell Land & Improvement Co. v. Ristorante Ferrantelli, Inc. (2007) 158 Cal. App. 4th 479, 484-490, 70 Cal. Rptr. 3d 9* ; *D & J, Inc. v. Ferro Corp. (1986) 176 Cal. App. 3d 1191, 1194, 222 Cal. Rptr. 656*).

[2] Comments

[a] Use of Form

This form of memorandum is for use with the general memorandum *set out in § 60.460*, in opposition to a motion to establish entitlement to an award of attorney's fees under *Civ. Code § 1717*, when the case was voluntarily dismissed or dismissed pursuant to settlement [*Civ. Code § 1717(b)(2)*].

Note that this prohibition does not apply to judgments entered pursuant to a settlement under *Code Civ. Proc. § 998* [*see Lanyi v. Goldblum (1986) 177 Cal. App. 3d 181, 187-191, 223 Cal. Rptr. 32* , discussed in *§ 60.444*].

Note also that *Civ. Code § 1717* applies only to contract claims. If an action is dismissed voluntarily, and it includes tort or other noncontractual claims, *Civ. Code § 1717(b)(2)* does not apply to these noncontractual claims. When a voluntary dismissal occurs, a defendant is a "prevailing party under *Code Civ. Proc. § 1032(a)(4)*, and is entitled to costs, including attorney's fees when these are recoverable as costs, *except* as barred by *Civ. Code § 1717(b)(2)*. Thus, a defendant may be able to recover attorney's fees incurred defending noncontractual claims, if the contract provision for attorney's fees permits recovery in defending such claims [*see Santisas v. Goodin (1998) 17 Cal. 4th 599, 622-623, 71 Cal. Rptr. 2d 830, 951 P.2d 399* , discussed in *§ 60.463[3][a]*].

See also *§ 60.440[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 60.440[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] No Prevailing Party After Dismissal

In ***Santisas v. Goodin*** *(1998) 17 Cal. 4th 599, 71 Cal. Rptr. 2d 830, 951 P.2d 399* , plaintiff home buyers sued sellers for defects in the home, alleging both a claim for breach of contract and various tort causes of action. After discovery, plaintiff's voluntarily dismissed their action with prejudice. Defendants moved to recover attorney's fees as costs under *Code Civ. Proc. §§ 1021, 1032, 1033.5* and the attorney fee provision of the purchase contract, and this motion was granted by the trial court, awarding over $16,000 in attorney's fees as costs. On appeal by plaintiffs, the court of appeal affirmed.

A majority of the Supreme Court reversed. Defendants' initial argument was that the attorney fees were recoverable as litigation costs. The Court thus addressed the threshold issue, whether defendants' were entitled to recover costs, and concluded that they were, in fact, entitled to recover costs as a matter of right. Plaintiff's voluntarily dismissed the action, and defendants' are therefore "prevailing" parties entitled to costs under *Code Civ. Proc. § 1032(a)(4), (b)* (*17 Cal. 4th 599, 606)* .

The Court noted, that, on the record before it, it was undisputed that the parties entered into a purchase contract that included a provision for attorney's fees in the following terms: "[i]n the event legal action is instituted by ... any party to this agreement, or arising out of the execution of this agreement or the sale ... the prevailing party shall be entitled to receive from the other party a reasonable attorney fee to be determined by the court in which such action is brought" (*17 Cal. 4th 599, 606-607)* . The contract did not, however, define "prevailing party," nor was any extrinsic evidence offered on the issue. This term has more than one meaning under California law. Under *Code Civ. Proc. § 1032(a)(4)* For purposes of recovering costs, a "prevailing party" includes a party in whose favor a judgment of dismissal has been entered. Under *Civ. Code § 1717(b)(2)*, however, there is no "prevailing party" when the action has been voluntarily dismissed *17 Cal. 4th 599, 609)* . The Court concluded that, because the term has not settled technical meaning as including or excluding a party in whose favor a dismissal has been entered, it would assume the parties understood the term in its ordinary or popular sense, disapproving *Sweat v. Hollister (1995) 37 Cal. App. 4th 603, 611 n.7, 43 Cal. Rptr. 2d 399* to the extent it is inconsistent with this analysis (*17 Cal. 4th 599, 609, 609 n.5*). Giving the term its popular meaning, the Court concluded that the defendants' were prevailing parties under their agreement based on plaintiffs' voluntary dismissal, with prejudice of their action against defendant. Thus, in light of *Code Civ. Proc. § 1032(a)(4)* and the contract itself, defendants' were entitled to recover attorney's fees as an item of costs (*17 Cal. 4th 599, 609)* .

The Court then turned to the central question of the case, whether *Civ. Code § 1717* operated to bar recovery of attorney's fees as costs, notwithstanding *Code Civ. Proc. § 1032(a)(4)* and the contract provision allowing their recovery (*17 Cal. 4th 599, 609)* .

The Court held that *Civ. Code § 1717* applied to contract provisions for the recovery of attorney's fees, whether such provisions are unilateral, that is, allowing only one party to recover, or reciprocal, such as one allowing recovery by a "prevailing party," disapproving *Honey Baked Hams, Inc. v. Dickens (1995) 37 Cal. App. 4th 421, 426, 43 Cal. Rptr. 2d 595* to the extent it is inconsistent with this conclusion (*17 Cal. 4th 599, 614)* .

The Court then noted that, by its terms, *Civ. Code § 1717* applies in an action on a contract to enforce that contract. Thus, *Civ. Code § 1717* only applies in an action that includes at least one contract claim, and if tort claims are also included, it applies only to attorney's fees incurred to litigate the contract claims (*17 Cal. 4th 599, 615)* . The Court disagreed, however, with the court of appeal's conclusion in this case that plaintiffs' contract claim was misnamed as actually sounded in tort. *Civ. Code § 1717* therefore applied to the action, and, under *Civ. Code § 1717(b)(2),* defendants' were not "prevailing parties" and could not recover attorney's fees incurred in the defense of the contract claim (*17 Cal. 4th 599, 615)* .

Further, when *Civ. Code § 1717(b)(2)* applies, as in this case, it overrides with any conflicting language of the contract provision, based on the policy reasons underlying the enactment of *Civ. Code § 1717*. In other words, when plaintiff voluntarily dismisses a contract claim, defendant is barred from recovering attorney's fees as costs under *Civ. Code § 1717(b)(2), even though the contract on its own terms authorizes recovery of those fees* (*17 Cal. 4th 599, 617* , emphasis original).

The Court concluded, however, that, because *Civ. Code § 1717(b)(2)*, it does not bar recovery of fees incurred defending noncontract claims that would otherwise be recoverable under *Code Civ. Proc. § 1032(a)(4)* and the contract provision for fees. Thus, in the case of a voluntary dismissal, a defendant might recovery attorney's fees incurred defending tort claims arising from the contract, but not fees incurred defending any contract claims (*17 Cal. 4th 599, 622-623)* .

In ***Mitchell Land & Improvement Co. v. Ristorante Ferrantelli, Inc.*** *(2007) 158 Cal. App. 4th 479, 70 Cal. Rptr. 3d 9* , a landlord brought an unlawful detainer action against a commercial lessee based on alleged violations of a lease provision requiring the premises only be used for lawful purposes. Specifically, the landlord claimed the tenant had unlawfully erected a tent-like covering over an open firepit in an outdoor seating area. After the tenant filed a motion for summary judgment, the landlord voluntarily dismissed the action. After the landlord's dismissal was entered, the lessee filed a motion seeking to be declared the prevailing party under *Code Civ. Proc. § 1032* and sought attorney's fees under a lease provision providing that in an action or proceeding involving the premises, whether founded in tort, contract, or equity, the prevailing party would be entitled to reasonable attorney's fees, whether or not the action was pursued to judgment. Although the landlord did not dispute that the lessee was the prevailing party for purposes of its costs under *Code Civ. Proc. § 1032*, the landlord opposed an award of attorney's fees as prohibited by *Civ. Code § 1717(b)(2)*. The trial court concluded § 1717 did not apply because the unlawful detainer action was not an action on a contract; rather, it was a basis for relief created by statute. The trial court awarded the lessee costs and attorney's fees (*158 Cal. App. 4th 479, 482-483)* .

The Court of Appeal reversed the attorney's fee award. Despite the fact the lessee was otherwise the prevailing party and otherwise entitled to its attorney's fees as costs pursuant to the terms of the lease, the court concluded that § 1717(b)(2) precluded the award. The court found this unlawful detainer proceeding in this case to be an action on a contract within the meaning of § 1717(b)(2), because the unlawful detainer action was based on an alleged breach of the lease during an unexpired term rather than an action to oust a holdover tenant following expiration of a lease, which would be an action is premised on tortious conduct (*e.g.*, trespass), sounding in tort (*158 Cal. App. 4th 479, 484-490)* .

D & J, Inc. v. Ferro Corp. *(1986) 176 Cal. App. 3d 1191, 222 Cal. Rptr. 656* , was a breach of contract action. After trial commenced and one witness had been examined, plaintiff moved to dismiss the action with prejudice under former Code Civ. Proc. § 581(5) [*now see Code Civ. Proc. § 581(e)* (dismissal at plaintiff 's request after commencement of trial)]. The motion was granted. Defendant claimed attorney's fees as the prevailing party on the contract. The trial court determined that under *Civ. Code § 1717(b)(2)* there was no prevailing party and denied defendant's attorney's fee claim. Defendant appealed the denial of attorney's fees.

The court of appeal affirmed. Defendant contended that the dismissal after the commencement of the trial was an involuntary dismissal and therefore not within the purview of *Civ. Code § 1717(b)(2)*. The court of appeal disagreed, saying that it is not the stage of the proceedings that distinguishes a voluntary dismissal from an involuntary one, but the plaintiff 's role in the dismissal (*176 Cal. App. 3d 1191, 1194)* .

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Volume 6 Chapters 60-69 COSTS---to---DECLARATORY RELIEF
CHAPTER 60 COSTS
PART II. FORMS
B. Award of Attorney's Fees
4. Motion for Award of Attorney's Fees Under Civ. Code § 1717; Contract Provision

6-60 California Points & Authorities § 60.464

§ 60.464 Opposing Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--No Recovery of Attorney's Fees When Contract Void Because It Violates Public Policy

[1] FORM Opposing Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--No Recovery of Attorney's Fees When Contract Void Because It Violates Public Policy

[*For caption, see § 60.460, with which this form should be combined.*]

_____ [PLAINTIFF *or* DEFENDANT] IS NOT ENTITLED TO RECOVER ATTORNEY'S FEES UNDER *CIVIL CODE SECTION 1717* BECAUSE THE ACTION WAS BASED ON AN ILLEGAL CONTRACT.

No Recovery of Attorney's Fees When Contract Void Because It Violates Public Policy. A party may not recover attorney's fees when it successfully defends an action on a contract on the ground the contract is void because it violates public policy (*Bovard v. American Horse Enterprises, Inc. (1988) 201 Cal. App. 3d 832, 843, 247 Cal. Rptr. 340*).

[2] Comments

[a] Use of Form

This form of memorandum is for use with the general memorandum *set out in § 60.460*, in opposition to a motion to establish entitlement to an award of attorney's fees under *Civ. Code § 1717*, when the contract that is the purported basis for fees is contrary to public policy and therefore void and unenforceable [*see Bovard v. American Horse Enterprises, Inc. (1988) 201 Cal. App. 3d 832, 843, 247 Cal. Rptr. 340]* .

See also *§ 60.440[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 60.440[2][b]* for

discussion of evidentiary support.

[c] Related Memoranda

For memoranda in support of the contention that a contract is void and illegal, see Ch. 50, *Contracts* .

[3] Discussion of Authorities

[a] No Recovery of Attorney's Fees When Contract Void Because It Violates Public Policy

Bovard v. American Horse Enterprises, Inc. *(1988) 201 Cal. App. 3d 832, 247 Cal. Rptr. 340* , began an action by the seller of a business to enforce promissory notes that were executed in connection with the sale of the business to defendant buyer. The promissory notes contained provisions for the award of attorney's fees. A stipulated judgment was entered against defendant. Defendant never signed the stipulation, claimed his attorney did not have authority to make it, and had that judgment vacated. Then, plaintiff filed a second amended complaint, including a cause of action for enforcement of the alleged settlement agreement. That cause of action was tried first. In the course of that trial, it became clear that the company was primarily engaged in the production of drug paraphernalia. The trial court dismissed the action on the ground that the contract was contrary to public policy, and struck a memorandum of costs and attorney fees filed by the buyer.

The court of appeal affirmed. The court concluded the trial court correctly declared the contract contrary to the policy of express law and therefore illegal and void (*201 Cal. App. 3d 832, 841)* . Concerning the attorney's fees sought by the buyer, the court followed *Geffen v. Moss (1975) 53 Cal. App. 3d 215, 227, 125 Cal. Rptr. 687* , in which it was held that a party may not recover attorney's fees when it successfully defends an action on a contract on the ground the contract violated public policy. The court noted that a party to a contract who successfully argues its illegality stands on different ground than a party who prevails in an action on a contract by convincing the court the contract is inapplicable, invalid, nonexistent, or unenforceable for reasons other than illegality. Consistent with its decision that the sales contract was illegal and void, the court affirmed the trial court's order denying the buyer's claim for attorney's fees (*201 Cal. App. 3d 832, 843)* .

However, in ***Yuba Cypress Housing Partners, Ltd. v. Area Developers*** *(2002) 98 Cal. App. 4th 1077, 120 Cal. Rptr. 2d 273* , the court distinguished *Bovard* because it involved a contract that was entirely unenforceable by either party due to its illegal object and enforced the attorney's fees clause. In *Yuba Cypress,* on learning that defendant had violated the Subdivided Lands Act (*Bus. & Prof. Code § 11000 et seq.*), plaintiff sought to rescind his real estate contract with defendant and recover moneys he had paid to defendant on the contract. After losing in the trial court, he prevailed on appeal. The appellate court reversed the judgment against him and remanded the case to the trial court with directions to calculate the reimbursement to which plaintiff was entitled and enter judgment in his favor. On remand, plaintiff moved for an award of attorney's fees and costs as the prevailing party under *Civ. Code § 1717*, pursuant to an attorney fee clause in the real estate contract. He sought to recover the fees and costs incurred at trial and on appeal. Defendant opposed the request and moved to tax fees and costs. Defendant argued that having obtained rescission of the contract on the ground that it violated the Subdivided Lands Act, plaintiff could not rely on the attorney's fee clause because the entire contract was void due to its illegality. The trial court ruled that the attorney's fee clause of the contract was enforceable, but denied the request for fees on appeal on the ground that the request was untimely (*98 Cal. App. 4th 1077, 1080)* .

The Court of Appeal affirmed the judgment to the extent it held the attorney's fees clause enforceable, and reversed the judgment to the extent that it denied plaintiff recovery for the attorney's fees incurred on appeal. The court held that the defendant was estopped from asserting that its violation of the Subdivided Land Act voided the entire contract, including the attorney's fees clause; otherwise, defendant would benefit from its own wrong. The court found that ordinarily, in an action on a contract providing for an award of attorney's fees, *Civil Code section 1717* entitles the

prevailing party to attorney's fees, even when the party prevails on the ground that the contract is inapplicable, invalid, unenforceable, or nonexistent, if the other party would have been entitled to attorney's fees had it prevailed (*98 Cal. App. 4th 1077, 1081)* . The court then noted that in *Bovard v. American Horse Enterprises, Inc. (1988) 201 Cal. App. 3d 832, 247 Cal. Rptr. 340* (hereafter Bovard) and *Geffen v. Moss (1975) 53 Cal. App. 3d 215, 125 Cal. Rptr. 687* , a different rule applies when a contract is held unenforceable because of illegality, because a party to the contract who successfully argues its illegality stands on different ground than a party who prevails in an action on a contract by convincing the court the contract is inapplicable, invalid, nonexistent or unenforceable for reasons other than illegality. Because courts generally will not enforce an illegal contract, there is no need for a mutual right to attorney's fees since neither party can enforce the agreement (*98 Cal. App. 4th 1077, 1081-1082)* . The court then found that in some cases effective deterrence of an illegal contract is best realized by enforcing the plaintiff's claim or allowing some other remedy because the forfeiture resulting from unenforceability of the contract is disproportionately harsh considering the nature of the illegality. In this case, the purpose of the Subdivided Lands Act is to protect members of the public who purchase lots or houses from developers. When a plaintiff purchases land under a contract that does not comply with the Act, courts will allow the plaintiff to enforce the contract against the seller or disaffirm the contract. Thus, the contract is voidable not void; since it does not have an illegal object, it is not one which neither party may enforce such that an attorney's fee clause contained therein also is unenforceable (*98 Cal. App. 4th 1077, 1082-1083)* . Plaintiff's choosing to void the contract did not preclude him from recovering attorney's fees under the contract clause; rather, defendant, who violated the Subdivided Lands Act, was estopped from asserting the invalidity of the contract (*98 Cal. App. 4th 1077, 1083)* .

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6-60 California Points & Authorities § 60.465

§ 60.465 Opposing Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Failure to File Timely, Noticed Motion

[1] FORM Opposing Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Failure to File Timely, Noticed Motion

[*For caption, see § 60.460, with which this form should be combined.*]

THE COURT SHOULD STRIKE _____ [PLAINTIFF'S or DEFENDANT'S] MOTION TO ESTABLISH ENTITLEMENT TO OR FIX ATTORNEY'S FEES IN ACTION ON CONTRACT BECAUSE IT WAS NOT NOTICED AND TIMELY FILED.

A. Applicable Procedure for Seeking Attorney's Fees Pursuant to Contract. Except as otherwise provided by statute, claims in civil cases for attorney's fees pursuant to a contract provision are subject to *Rule 3.1702(b)* or *(c)* of the California Rules of Court. The provisions of Rule 3.1702(b) or (c) apply whether a claim seeks a determination of entitlement to the fees, the amount of the fees, or both, and whether its seeks a determination because the contract provision refers to "reasonable" fees, requires a determination of the prevailing party, or for other reasons (*Cal. Rules of Ct., Rule 3.1702(a)*).

[*EITHER*]

B. Time to File Motion for Attorney's Fees. A notice of motion to claim attorney's fees for services up to and including the rendition of judgment in the trial court, including attorney's fees incurred on an appeal decided before the rendition of trial court judgment, must be served and filed within the time for filing a notice of appeal (*Cal. Rules of Ct., Rule 3.1702(b)(1)*). The parties may, by means of a stipulation filed before the expiration of the time allowed under Rule 3.1702(b)(1), extend the time for filing a motion for attorney's fees either (i) up to 60 days after the expiration of the time for filing a notice of appeal, or (ii) if a notice of appeal is filed, until the time within which a memorandum of

costs on appeal must be served and filed under *Rule 8.278(c) of the California Rules of Court* (*Cal. Rules of Ct., Rule 3.1702(b)(2)*). For good cause, the trial judge may extend the time for filing the motion in the absence of a stipulation or for a longer period than allowed by stipulation (*Cal. Rules of Ct., Rule 3.1702(d)*).

[*OR*]

B. Time to File Motion for Attorney's Fees. A notice of motion to claim pursuant to a contract provision attorney's fees incurred on appeal, other than those claimed under *Rule 3.1702(b) of the California Rules of Court*, must be served and filed within the time for serving and filing the memorandum of costs on appeal under *Rule 8.276(d) of the California Rules of Court* (*Cal. Rules of Ct., Rule 3.1702(c)(1)*). The parties may, by means of a stipulation filed before the expiration of the time allowed under Rule 3.1702(c)(1), extend the time for filing a motion for attorney's fees up to an additional 60 days (*Cal. Rules of Ct., Rule 3.1702(c)(2)*). For good cause, the trial judge may extend the time for filing the motion in the absence of a stipulation or for a longer period than allowed by stipulation (*Cal. Rules of Ct., Rule 3.1702(d)*).

[*CONTINUE*]

C. Timely Motion for Attorney's Fees Required. The time for filing a motion for attorney fees is mandatory, and the court does not have discretion to disregard noncompliance (*Russell v. Trans Pacific Group (1993) 19 Cal. App. 4th 1717, 1725, 24 Cal. Rptr. 2d 274*).

D. Disregard of Procedural Deficiency Inconsistent With Legislative Intent. Authority stating a court, in its discretion, may ignore noncompliance with *California Rules of Court, Rule 3.1702*, does not conform to the intent of the Legislature in amending *Code of Civil Procedure Section 1033.5* (*see Gunlock Corp. v. Walk on Water, Inc. (1993) 15 Cal. App. 4th 1301, 19 Cal. Rptr. 2d 197*). In amending *Code of Civil Procedure Section 1033.5*, the Legislature intended to make mandatory the requirement that attorney's fees be awarded only upon a noticed motion consistent with California Rules of Court, Rule 870.2 (*Russell v. Trans Pacific Group (1993) 19 Cal. App. 4th 1717, 1724, 24 Cal. Rptr. 2d 274*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.460*, in opposition to a motion to establish entitlement to an award of attorney's fees under *Civ. Code § 1717*, when the motion was not served and filed within the mandatory time allowed by *Cal. Rules of Ct., Rule 3.1702*.

See also *§ 60.440[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.440[2][b]* for discussion of evidentiary support.

Argument should include a discussion of the relevant dates, such as the date of mailing of the notice of entry of judgment or dismissal by the clerk or the date of the judgment, whichever is the relevant date for the start of the period during which the notice of appeal can be filed. Counsel should show why the motion for attorney's fees is not timely.

[c] Related Pleading and Practice Chapters

For a form for a notice of motion for relief from default in filing a motion for attorney's fees under Code Civ. Proc. § 473, see California Forms of Pleading and Practice, Ch. 174, *Costs and Attorney's Fees* (Matthew Bender).

[d] Related Memoranda

This form may be combined with the form *set out in § 60.13*.

[e] Opposing Memoranda

This form may be opposed by a countermotion for relief for untimely filing, supported by the memoranda *set out in § 60.120* et seq.

[3] Discussion of Authorities

[a] Time to File Motion for Attorney's Fees

Cal. Rules of Ct., Rule 3.1702(b) sets the deadline for seeking attorney's fees up through the rendition of trial court judgment, including any fees incurred on an appeal that was decided prior to the trial court judgment. This deadline is determined by reference to the applicable periods for filing a notice of appeal under *Cal. Rules of Ct., Rules 8.104, 8.108*.

Cal. Rules of Ct., Rule 3.1702(c) sets the deadline for claiming attorney's fees incurred on appeal, when there is no further litigation in the trial court. This deadline is determined by reference to the applicable period for filing the memorandum of costs on appeal under *Cal. Rules of Ct., Rules 8.278(c)*.

Note that when a party is entitled to contractual attorney's fees that may be fixed pursuant to a formula without the necessity of any determination by the trial court, the claim for attorney's fees must be made the memorandum of costs rather than by a noticed motion [*Cal. Rules of Ct., Rules 3.1702(e)*].

[b] Timely Motion for Attorney's Fees Required

In ***Russell v. Trans Pacific Group*** *(1993) 19 Cal. App. 4th 1717, 24 Cal. Rptr. 2d 274* , the defendants, the prevailing parties in an action on a contract with an attorney's fees provision, filed a memorandum of costs, including amounts claimed as attorney's fees, before entry of judgment. The plaintiff filed a motion to tax costs, challenging the attorney's fees because the cost memorandum was not filed during the time allowed under former Cal. Rules of Ct., Rules 870(a)(1), 870.2 [*now see Cal. Rules of Ct., Rules 3.1700(a)(1), 3.1702*]. The trial court granted the motion to tax costs as to the attorney's fees. The defendants filed a motion for relief under *Code Civ. Proc. § 473*, which the court denied.

The court of appeal affirmed. It held the defendants were required to file a noticed motion for attorney's fees, pursuant to *Code Civ. Proc. § 1033.5*, during the time provided by former Cal. Rules of Ct., Rules 870(a)(1) and 870.2 [*now see Cal. Rules of Ct., Rules 3.1700(a)(1), 3.1702*] (*19 Cal. App. 4th 1717, 1723-1725)* . The trial court did not have discretion to disregard the procedural deficiency (*19 Cal. App. 4th 1717, 1725-1726)* . While a motion for relief under *Code Civ. Proc. § 473* is available to remedy the procedural deficiency, the court of appeal held the trial court did not err by denying the motion for relief (*19 Cal. App. 4th 1717, 1728-1731)* .

[c] Disregard of Procedural Deficiency Inconsistent With Legislative Intent

The court of appeal in ***Russell v. Trans Pacific Group*** *(1993) 19 Cal. App. 4th 1717, 24 Cal. Rptr. 2d 274* , acknowledged contrary authority in ***Gunlock Corp. v. Walk on Water, Inc.*** *(1993) 15 Cal. App. 4th 1301, 19 Cal. Rptr. 2d 197* .

In *Gunlock,* the defendant prevailed in an action on a contract with an attorney's fees provision but failed to file a motion for attorney's fees together with the cost memorandum, although the amount of attorney's fees was included in the cost memorandum. The trial court held it did not have discretion to disregard this procedural deficiency and was compelled by *Code Civ. Proc. § 1033.5* and former Cal. Rules of Ct., Rule 870.2 [*now see Cal. Rules of Ct., Rule 3.1702*] to deny the attorney's fees. The court also denied the defendant's motion for relief under *Code Civ. Proc. § 473* because counsel's ignorance--the reason for the procedural deficiency--was inexcusable.

The court of appeal reversed. It held the procedural requirements for filing a noticed motion for attorney's fees were not jurisdictional and, therefore, the trial court was not compelled to deny the attorney's fees (*15 Cal. App. 4th 1301, 1304)* . It concluded courts enjoy "substantial latitude in allowing fees to be awarded without strict compliance with statutory temporal and procedural limitations" (*15 Cal. App. 4th 1301, 1305)* .

The court of appeal in *Russell* disagreed with the holding in *Gunlock.* It found the Legislature, by amendment of *Code Civ. Proc. § 1033.5* and the accompanying declaration of legislative intent, showed an intent to dispel uncertainty in the procedure required for obtaining attorney's fees (*19 Cal. App. 4th 1717, 1728)* . It therefore concluded the procedural requirements are mandatory, though not jurisdictional, and must be enforced (*19 Cal. App. 4th 1717, 1728)* .

[4] Additional Authorities

[a] Timely Motion for Attorney's Fees Required

In *Bankes v. Lucas (1992) 9 Cal. App. 4th 365, 11 Cal. Rptr. 2d 723* , the trial court awarded attorney's fees to the defendants, the prevailing parties in an action on a contract with an attorney's fees provision, even though the defendants did not make a motion for attorney's fees at the same time the cost memorandum was filed. The court of appeal, however, concluded neither party prevailed under the contract because the judgment was reversed in an earlier appeal; therefore, it reversed the award of attorney's fees (*9 Cal. App. 4th 365, 367)* . As an alternative basis for the reversal, the court of appeal held the trial court could not award attorney's fees because the defendants did not file a motion for attorney's fees at the same time they filed the cost memorandum as required by Cal. Rules of Ct., Rule 870.2 (*9 Cal. App. 4th 365, 371-372)* .

In *Nazemi v. Tseng (1992) 5 Cal. App. 4th 1633, 7 Cal. Rptr. 2d 762* , the defendant prevailed in the trial court on a contract containing an attorney's fees provision, and the judgment was affirmed in an earlier appeal. Before remittitur from the court of appeal, the defendant filed a memorandum of costs on appeal and moved for attorney's fees for both trial and appeal. The trial court awarded appeal costs and attorney's fees for both trial and appeal, and the plaintiffs appealed. The court of appeal reversed the award of attorney's fees for trial and affirmed the award of attorney's fees for appeal. It concluded the motion for attorney's fees was untimely as to trial fees but timely as to appeal fees under former Cal. Rules of Ct., Rule 870.2 [*now see Cal. Rules of Ct., Rule 3.1702*] (*5 Cal. App. 4th 1633, 1638, 1640)* . The court of appeal further held the notice of appeal from the original judgment did not toll the time for filing the cost memorandum and motion for attorney's fees incurred at trial (*5 Cal. App. 4th 1633, 1638-1640)* .

The facts and procedural background of *Yuba Cypress Housing Partners, Ltd. v. Area Developers (2002) 98 Cal. App. 4th 1077, 120 Cal. Rptr. 2d 273* are discussed in *§ 60.464[3][a]*. In that case, after the plaintiff prevailed on appeal and the appellate court remanded the case to the trial court to enter judgment in his favor, plaintiff moved for an award of attorney's fees as costs. The trial court, relying on former Cal. Rules Ct., Rule 870.2(c)(1) [*now see Cal. Rules of Ct., Rule 3.1702(c)(1)*], concluded the motion was untimely with respect to fees incurred on appeal and taxed the costs by deducting that amount. The notice of issuance of the remittitur was mailed to the plaintiff on September 14, 1998, but plaintiff did not file his motion for appellate attorney's fees until June 25, 1999. The parties executed a stipulated judgment in favor of plaintiff in May 1999, and plaintiff filed his motion for attorney's fees on June 25, 1999. The judgment was entered on August 17, 1999, and notice of entry of judgment was mailed on August 26, 1999. Because

the motion was filed after expiration of the 40-day time period specified in former Cal. Rules Ct., Rule 870.2(c)(1) [*now see Cal. Rules of Ct., Rule 3.1702(c)(1)*], the trial court denied it as untimely (*98 Cal. App. 4th 1077, 1083-1084)* .

The Court of Appeal reversed. The court found that the trial court overlooked that former Cal. Rules Ct., Rule 870.2(c)(1) [*now see Cal. Rules of Ct., Rule 3.1702(c)(1)*] explicitly specifies that it does not apply to attorney's fees on appeal claimed under former Cal. Rules Ct., Rule 870.2(b) [*now see Cal. Rules of Ct., Rule 3.1702(b)*], which makes a notice of motion to claim attorney's fees for services up to and including the rendition of judgment in the trial court, including attorney's fees on an appeal before the rendition of judgment in the trial court, timely if served and filed within the time for filing a notice of appeal under former Cal. Rules Ct., Rules 2, 3 [*now see Cal. Rules of Ct., Rules 8.104, 8.108*]. Although plaintiff's appellate attorney's fees were incurred after rendition of an initial judgment in favor of defendants, that judgment was reversed and the case was remanded with directions for the trial court to enter a new judgment in favor of plaintiff. As a result, his appellate attorney's fees were incurred before the trial court's ultimate rendition of judgment in his favor. Former Cal. Rules Ct., Rule 870.2(b)(1) [*now see Cal. Rules of Ct., Rule 3.1702(b)(1)*] applied. Plaintiff's motion for attorney's fees was filed prematurely, prior to the entry of judgment. Because the time frame in *Cal. Rules Ct., Rule 8.104* governs the filing of a motion for attorney's fees as cost under former Cal. Rules Ct., Rule 870.2(b)(1) [*now see Cal. Rules of Ct., Rule 3.1702(b)(1)*], a request for fees incurred before rendition of the judgment in the trial court may be timely even if it is filed prematurely prior to the entry of judgment (*98 Cal. App. 4th 1077, 1085-1086)* .

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6-60 California Points & Authorities § 60.466

§ 60.466 Opposing Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Discretion of Trial Court Not to Declare a Prevailing Party

[1] FORM Opposing Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Discretion of Trial Court Not to Declare a Prevailing Party

[*For caption, see § 60.460, with which this form should be combined.*]

THE COURT SHOULD EXERCISE ITS DISCRETION AND FIND THERE WAS NO PREVAILING PARTY IN THIS ACTION AND THEREFORE STRIKE _____ [PLAINTIFF'S *or* DEFENDANT'S] MOTION TO ESTABLISH ENTITLEMENT TO OR FIX ATTORNEY'S FEES IN THIS ACTION ON A CONTRACT.

A. Discretion of Trial Court Not to Declare Prevailing Party. In an action on a contract with an attorney's fees provision, the trial court may exercise its discretion and find there is no prevailing party under some circumstances. This discretion is founded in *Civil Code Section 1717(b)(1)*. The trial court's exercise of discretion will be disturbed on appeal only if there is a clear showing of abuse of that discretion resulting in a miscarriage of justice (*McLarand, Vasquez & Partners, Inc. v. Downey Savings & Loan Assn. (1991) 231 Cal. App. 3d 1450, 1456, 282 Cal. Rptr. 828*).

B. Court May Consider Evidence at Trial. In making the determination that there is no prevailing party, the trial court is not limited to the pleadings. It may consider the evidence received at trial (*Hilltop Investment Associates v. Leon (1994) 28 Cal. App. 4th 462, 466-468, 33 Cal. Rptr. 2d 552*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.460*, in opposition to a motion to establish entitlement to an award of attorney's fees under *Civ. Code § 1717*, when the party opposing the motion requests the trial court to exercise its discretion and find that there is no prevailing party in the action under the particular circumstances of the case.

See also *§ 60.440[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.440[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Discretion of Trial Court Not to Declare Prevailing Party

In ***McLarand, Vasquez & Partners, Inc. v. Downey Savings & Loan Assn.*** *(1991) 231 Cal. App. 3d 1450, 1456, 282 Cal. Rptr. 828* , an architectural firm brought an action against the property owner for breach of contract and the owner cross complained against the firm. Neither prevailed on their complaints. The trial court found, even though the owner was entitled to costs, it was not entitled to attorney's fees.

The court of appeal affirmed. It held the trial court had the discretion to determine that neither party was the prevailing party for the purpose of awarding attorney's fees under *Civ. Code § 1717*. Fairness supported the trial court's exercise of discretion, so it would not be disturbed (*231 Cal. App. 3d 1450, 1456)* .

[b] Court May Consider Evidence at Trial

In ***Hilltop Investment Associates v. Leon*** *(1994) 28 Cal. App. 4th 462, 33 Cal. Rptr. 2d 552* , a dispute arose over the right to a film. Cinema Force filed a complaint against Hilltop, claiming the rights. In response, Hilltop cross-complained against Cinema Force and Leon, the person who verified Cinema Force's original complaint, alleging Leon was the alter ego of Cinema Force. The trial court found in favor of Hilltop against Cinema Force but denied Hilltop's alter ego theory as to Leon, thus ruling in favor of Leon. Although Leon was technically a prevailing party eligible for an award of attorney's fees under the contract upon which the action was based, the trial court found there was no prevailing party, citing evidence presented at trial that Leon was the person who caused the difficulties.

The court of appeal affirmed. It sustained the trial court's discretion in finding there was no prevailing party. It held the trial court is not limited to the pleadings when determining whether there is a prevailing party, but may look to the evidence presented at trial (*28 Cal. App. 4th 462, 466-467)* .

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6-60 California Points & Authorities § 60.467

§ 60.467 Opposing Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Attorney or Party Acting in Propria Persona Is Not Entitled to Award of Fees

[1] FORM Opposing Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Attorney or Party Acting in Propria Persona Is Not Entitled to Award of Fees

[*For caption, see § 60.460, with which this form should be combined.*]

THE COURT SHOULD STRIKE _____ [PLAINTIFF'S *or* DEFENDANT'S] MOTION TO ESTABLISH ENTITLEMENT TO OR FIX ATTORNEY'S FEES IN THIS ACTION BECAUSE HE/SHE/IT ACTED IN PROPRIA PERSONA AND AS SUCH A PARTY IS NOT ENTITLED TO AN AWARD OF ATTORNEY'S FEES UNDER *CIVIL CODE SECTION 1717*.

Attorney or Other Party Acting in Propria Persona Is Not Entitled to an Award of Attorney's Fees. In an action on a contract with an attorney's fees provision, an attorney, or any other party, who chooses to represent himself or herself in the action does not "incur" or become liable for attorney's fees and therefore is not entitled to an award of such fees under *Civil Code Section 1717* (*Trope v. Katz (1995) 11 Cal. 4th 274, 282, 292-293, 45 Cal. Rptr. 2d 241, 902 P.2d 259*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.460*, in opposition to a motion to establish entitlement to an award of attorney's fees under *Civ. Code § 1717*, when the party making the motion is an attorney (or a nonattorney) who represented himself or herself in the action.

See also *§ 60.440[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.440[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Attorney or Other Party Acting in Propria Persona Is Not Entitled to an Award of Attorney's Fees

In ***Trope v. Katz*** *(1995) 11 Cal. 4th 274, 45 Cal. Rptr. 2d 241, 902 P.2d 259* , defendant contracted with plaintiff law firm to represent him in a marital dissolution proceeding. After later withdrawing as counsel in that action, plaintiff sought to recover $163,000 in fees from defendant, who refused to pay. Plaintiff brought an action to recover the fees pursuant to their contract with defendant. Defendant cross complained, alleging malpractice. The jury awarded plaintiff $163,000 under the fee agreement, but also found in favor of defendant's cross complaint, awarding the defendant $118,500 in damages. After entry of judgment, plaintiff moved for an award of attorney fees amounting to some $223,000 under the attorney fee provision of the contract. The trial court denied the motion on the ground that plaintiff law firm had represented itself throughout the litigation.

The Supreme Court affirmed, holding that an attorney who chooses to litigate in propria persona cannot recover "reasonable attorney's fees" under *Civ. Code § 1717* as compensation for the time and effort expended on his or her own behalf or for resulting lost business opportunities (*11 Cal. 4th 274, 292-293)* . To the extent that they conflict with this holding, the Court disapproved the court of appeal decisions in *Dameshghi v. Texaco Refining & Marketing, Inc. (1992) 3 Cal. App. 4th 1262, 6 Cal. Rptr. 2d 515* ; *Garfield Bank v. Folb (1994) 25 Cal. App. 4th 1804, 31 Cal. Rptr. 2d 239* ; *Jacobson v. Simmons Real Estate (1994) 23 Cal. App. 4th 1285, 28 Cal. Rptr. 2d 699* ; *Hambrose Reserve, Ltd. v. Faitz (1992) 9 Cal. App. 4th 129, 11 Cal. Rptr. 2d 638* ; *Renfrew v. Loysen (1985) 175 Cal. App. 3d 1105, 222 Cal. Rptr. 413* ; and *Leaf v. City of San Mateo (1984) 150 Cal. App. 3d 1184, 198 Cal. Rptr. 447* (*11 Cal. 4th 274, 292)* .

The Court first noted that *Civ. Code § 1717(a)*, by its terms, applies only to contracts specifically providing for the recovery of attorney fees that are "incurred to enforce that contract." To "incur" a fee is to become liable for or obligated to pay that fee. It follows that an attorney litigating in propria persona cannot be said to "incur" compensation for his or her time and lost business opportunities. Further, in both legal and general usage, a "fee" denotes a charge or consideration actually paid in exchange for legal representation, and an attorney litigating in propria persona pays no such compensation (*11 Cal. 4th 274, 280)* .

The Court found state case law deciding the issue before 1968 to be consistent with this view. This supported its conclusion that at the time *Civ. Code § 1717* was enacted in 1968, the usual and ordinary meaning of the words "reasonable attorney's fees" was understood to be the consideration that a litigant pays or becomes liable to pay in exchange for legal representation, and that "attorney's fees" had such an established legal meaning. Absent any expression of different intent, the Legislature, in enacting the statute, intended these words to have their usual and established meaning (*11 Cal. 4th 274, 282)* .

The Court further concluded that *Civ. Code § 1717* may not be construed to permit an attorney acting in propria persona to recover fees based on the value of the time spent on his or her own case. Other, nonattorney, parties acting in propria persona are clearly not entitled to recover attorney's fees under *Civ. Code § 1717*, and there is no basis for allowing disparate treatment of pro se litigants on the basis of their occupations. To permit disparate treatment would undermine the statute's purpose of providing a mutual remedy to both parties to a contract (*11 Cal. 4th 274, 285-286)* .

The Court finally rejected plaintiff 's arguments that attorney's fees should be recoverable by a pro se attorney litigant on public policy grounds; it expressly declined to decide the issue whether a party represented by in-house is a pro se

litigant for the purposes of *Civ. Code § 1717* (*11 Cal. 4th 274, 288-292)* .

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6-60 California Points & Authorities § 60.468

§ 60.468 Opposing Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Attorney's Fees Provision in Indemnification Clause Cannot Be Basis for Fee Award Under Civ. Code § 1717

[1] FORM Opposing Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Attorney's Fees Provision in Indemnification Clause Cannot Be Basis for Fee Award Under Civ. Code § 1717

[*For caption, see § 60.460, with which this form should be combined*].

THE COURT SHOULD STRIKE _____ [PLAINTIFF'S *or* DEFENDANT'S] MOTION TO ESTABLISH ENTITLEMENT TO ATTORNEY'S FEES IN THIS ACTION BECAUSE HE/SHE/IT BASES ENTITLEMENT TO FEES ON THE ATTORNEY'S FEES PROVISION IN AN INDEMNIFICATION CLAUSE, WHICH CANNOT BE THE BASIS FOR AN ATTORNEY'S FEE AWARD UNDER *CIV. CODE § 1717*.

Indemnification Clause Cannot Be Basis for Attorney's Fees Award Under *Civ. Code § 1717*. Inclusion of attorney's fees as an item of loss in a third party indemnification provision does not constitute a provision for the award of attorney's fees in an action on contract as is required to trigger the operation of *Civ. Code § 1717* (*Campbell v. Scripps Bank (2000) 78 Cal. App. 4th 1328, 1337, 93 Cal. Rptr. 2d 635* ; *Myers Building Industries, Ltd. v. Interface Technology, Inc. (1993) 13 Cal. App. 4th 949, 968, 17 Cal. Rptr. 2d 242* ; *Meininger v. Larwin-Northern California, Inc. (1976) 63 Cal. App. 3d 82, 85)* .

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.460*, in opposition to a motion to establish entitlement to an award of attorney's fees under *Civ. Code § 1717*, when the asserted basis for the award is the attorney's fees provision as an item of loss in an indemnification clause.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.442[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Indemnification Clause Cannot Be Basis for Attorney's Fees Award Under Civ. Code § 1717

In ***Campbell v. Scripps Bank*** *(2000) 78 Cal. App. 4th 1328, 93 Cal. Rptr. 2d 635* , the sellers of real property sued the escrow holder for breach of contract for negligently causing escrow to close with loan terms not complying with terms of an agreement between the sellers and the buyer under which the sellers agreed to subordinate their position as the buyer's secured creditor in favor of other lenders, condition on acquisition and development loans complying with certain terms regarding maturity and points charged. A deed of trust of another secured lender, the sellers' deed of trust and the subordination agreement were recorded concurrently on close of the sale. The buyer's development plans then failed and the secured creditors foreclosed their security interests, leaving the sellers as sold-out junior lienholders whose security in the property was destroyed when the sale produced insufficient funds to pay the sellers (*78 Cal. App. 4th 1328, 1331)* . The trial court granted the escrow holder summary judgment (*78 Cal. App. 4th 1328, 1332)* , and awarded attorney's fees under an indemnification clause of the escrow instructions which included attorney's fees as an item of loss (*78 Cal. App. 4th 1328, 1336-1337)* .

The court of appeal affirmed the grant of summary judgment, but reversed the award of attorney's fees. The court held that inclusion of attorney's fees as an item of loss in a third-party claim indemnity provision does not constitute a provision for the award of attorney's fees in an action on contract as is required to trigger operation of *Civ. Code § 1717* (*78 Cal. App. 4th 1328, 1337)* . The court held further that the provision, read as a whole and in context, was an indemnification clause that did not clearly and unambiguously put the principals to the escrow on notice that is was an attorney's fees clause providing for an award of fees to a prevailing party in litigation to enforce the escrow instructions (*78 Cal. App. 4th 1328, 1337-1338)* .

Myers Building Industries, Ltd. v. Interface Technology, Inc. *(1993) 13 Cal. App. 4th 949, 17 Cal. Rptr. 2d 242* was an action by subcontractors against a company that had commissioned an office building and the company's general contractor to recover on mechanics' liens. The general contractor cross complained against the commissioning company, alleging breach of construction contract. The jury returned a special verdict in the general contractor's favor on its cross complaint, finding that the company had breached the contract, and the trial court thereafter awarded the contractor attorney's fees under the contract (*13 Cal. App. 4th 949, 955-956)* . The court of appeal reversed the fee award. The court found that the provisions containing attorney's fees applicable to the dispute between the general contractor and the company constituted third-party claims indemnity clauses not subject to the provisions of *Civ. Code § 1717* (*13 Cal. App. 4th 949, 968-975, 17 Cal. Rptr. 2d 242*).

In ***Meininger v. Larwin-Northern California, Inc.*** *(1976) 63 Cal. App. 3d 82, 135 Cal. Rptr. 1* , a painting subcontractor was awarded judgment in an action against the general contractor for breach of contract, but the trial court disallowed attorney's fees (*63 Cal. App. 3d 82, 83-84)* . The court of appeal affirmed, finding that the provision under which the subcontractor sought attorney's fees did not specifically provide for fees in an action on the contract, as required to trigger operation of *Civ. Code § 1717*, but, rather, provided for attorney's fees in third-party tort actions (*63 Cal. App. 3d 82, 85)* .

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6-60 California Points & Authorities § 60.469

§ 60.469 Opposing Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Attorney's Fee Provision Not Enforceable Against Nonsignatory

[1] FORM Opposing Motion to Establish Entitlement to Fees in Action on Contract Under Civ. Code § 1717--Attorney's Fee Provision Not Enforceable Against Nonsignatory

[*For caption, see § 60.460, with which this form should be combined.*]

THE COURT SHOULD STRIKE [PLAINTIFF'S *or* DEFENDANT'S] MOTION TO ESTABLISH ENTITLEMENT TO ATTORNEY'S FEES IN THIS ACTION BECAUSE [DEFENDANT *or* PLAINTIFF] WAS NOT A SIGNATORY TO THE CONTRACT ON WHICH [PLAINTIFF *or* DEFENDANT] BASES ENTITLEMENT TO ATTORNEY'S FEES AND WOULD NOT BE ENTITLED TO ENFORCE ATTORNEY'S FEES PROVISION.

Nonsignatory to Contract Containing Attorney's Fees Provision Is Not Liable for Attorney's Fees in Action on the Contract Unless Nonsignatory Would Be Entitled to Enforce Attorney's Fee Provision in Contract. In an action based on a contract brought by or against a nonsignatory, a signatory prevailing party is not entitled to an award of attorney's fees from a nonsignatory party unless there is a sufficient nexus between the parties such that the nonsignatory would be entitled to enforce, as a third party beneficiary, the attorney's fee provision in the contract (*Whiteside v. Tenet Healthcare Corp. (2002) 101 Cal. App. 4th 693, 707-709, 124 Cal. Rptr. 2d 580*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.460*, in opposition to a motion to establish entitlement to an award of attorney's fees under *Civ. Code § 1717*, when the asserted basis for the award is the attorney's fees provision in a contract to which the losing party was not a signatory.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.442[2][b]* for discussion of evidentiary support.

See also *§ 60.440[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

In ***Whiteside v. Tenet Healthcare Corp.*** *(2002) 101 Cal. App. 4th 693, 124 Cal. Rptr. 2d 580* , a patient sued a healthcare corporation that operated a hospital, claiming that the corporation breached its admissions agreement and its agreement with the patient's health insurance company by accepting an additional payment from another insurer with whom the patient held a group health insurance policy. The trial court granted summary judgment in favor of the healthcare corporation and awarded the healthcare corporation attorney's fees under the attorney's fees provision in the contract between the healthcare corporation and the insurer (*101 Cal. App. 4th 693, 698)* . After affirming the grant of summary judgment on the ground that the hospital was not precluded by its agreement with the patient's health insurer from seeking reimbursement from a third party payer, the court of appeal reversed the award of attorney's fees. The patient was not a signatory to the agreement between the hospital and the patient's health insurer. Further, the court found there was not a sufficient nexus between the hospital and the patient such that the patient would be entitled to enforce, as a third party beneficiary, the attorney's fee provision in the agreement because it was clear that the patient was a not third party beneficiary with regard to the entirety of the contract (*101 Cal. App. 4th 693, 706-709)* .

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6-60 California Points & Authorities § 60.470

§ 60.470 Opposing Motion to Establish Entitlement to Fees in Action on Contract Under Civil Code § 1717--Condition Precedent to Recovery of Fees Not Performed

[1] FORM Opposing Motion to Establish Entitlement to Fees in Action on Contract Under Civil Code § 1717--Condition Precedent to Recovery of Fees Not Performed

[*For caption, see § 60.460, with which this form should be combined.*]

THE COURT SHOULD STRIKE [PLAINTIFF'S *or* DEFENDANT'S] MOTION TO ESTABLISH ENTITLEMENT TO ATTORNEY'S FEES IN THIS ACTION BECAUSE HE/SHE/IT HAS NOT PERFORMED A CONDITION PRECEDENT TO THE RECOVERY OF FEES UNDER THE CONTRACT.

Prevailing Party Must Have Performed Conditions Precedent Under Contract to Be Entitled to Award of Attorney's Fees. In order to be entitled to an award of attorney's fees under a contract that provides for an award of fees to a party prevailing in an action to enforce the contract, the party must perform all other conditions precedent to an award of fees, such as initiating mediation to resolve the dispute prior to commencing litigation (*Leamon v. Krajkiewcz (2003) 107 Cal. App. 4th 424, 431-433, 132 Cal. Rptr. 2d 362*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.460,* in opposition to a motion to establish entitlement to an award of attorney's fees under *Civ. Code § 1717,* when the prevailing party has not satisfied other conditions precedent specified in the contract, such as initiating mediation to resolve the dispute before commencing litigation.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should

specify facts showing what the condition precedent in the contract was to an award of fees and how the prevailing party failed to satisfy it. See also *§ 60.442[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

Prevailing Party Must Have Performed Conditions Precedent Under Contract to Be Entitled to Award of Attorney's Fees

In ***Leamon v. Krajkiewcz*** *(2003) 107 Cal. App. 4th 424, 132 Cal. Rptr. 2d 362* , the owner of a single-family residence listed the property for sale. Her next door neighbors expressed an interested in purchasing it, and proposed that a single real estate agent, who was a friend of the neighbors, represent both sides, to which the owner agreed. In the interim, the owner's daughter told her mother that she wanted the property. After informing the agent that her daughter wanted the property, she did not intend to sell to the neighbors, and she would not make an appointment, the agent and the neighbors came to her home. The agent told her that a verbal agreement was the same as a written one and threatened litigation if she did not go through with the sale. The agent then presented a residential purchase agreement and a disclosure form regarding a real estate agent's representing both seller and buyer. The agreement contained both a provision for an award of attorney's fees to the prevailing party in any action, proceeding, or arbitration arising out of the agreement, and a provision requiring mediation before resorting to arbitration or court action, other than a small claims court action. The agreement provided that if a party commences litigation without first attempting to resolve the matter through mediation, that party is not entitled to attorney's fees. The owner signed the agreement and other papers under duress. The owner's attorney subsequently informed the agent and the neighbors that the owner decided to cancel the sale of the home, mentioned the litigation threats and stated that her signature was procured under duress. The neighbors filed a small claims action for breach of contract. The owner filed a complaint to quiet title in the property and for infliction of emotional distress, and moved to consolidate the small claims action with the quiet title action. The cases were not consolidated because the small claims action was dismissed without prejudice. Counsel for the neighbors sent counsel for the owner a letter requesting mediation of the dispute in accordance with the agreement, but the owner did not comply. The owner filed an amended complaint to quiet title and obtain a judicial declaration that the agreement was void, but did not include a request for attorney's fees. The neighbors filed an answer and cross-complained, alleging breach of contract, specific performance, fraudulent conveyance and intentional inference with economic relationship and requesting attorney's fees with respect to the causes of action for breach of contract and specific performance. The owner's answer to the cross-complaint requested attorneys' fees. After a jury trial, the jury found there was no valid contract. After entry of judgment, the owner filed a memorandum of costs including a request for attorney's fees. The neighbors filed a motion to tax costs that asserted, among other things, that the owner never offered mediation prior to filing their complaint and therefore failed to comply with the requirements of the agreement for an award of attorney's fees. The trial court disallowed the entire request for attorney fees (*107 Cal. App. 4th 424, 427-430)* .

The Court of Appeal affirmed the disallowance of attorney's fees. The court held contractual conditions precedent to an award of attorney fees apply to a litigant who prevails by establishing the contract is invalid. The court found that there was no conflict between the mutuality of remedy embodied in *Civ. Code § 1717* and the provision allowing a party who commences an action to recover attorney fees only if that party first sought to resolve the dispute through mediation (*107 Cal. App. 4th 424, 432-433)* . Requiring a party to mediate the question of the validity of contract does not necessarily mean that party concedes the contract is not voidable, because a request for mediation can clearly state the party's position that the contract is voidable or invalid and mediation is sought to preserve a claim for attorney's fees. The public policy of promoting mediation as a preferable alternative to judicial proceedings is served by requiring the party commencing litigation to seek mediation as a condition precedent to the recovery of attorney fees (*107 Cal. App. 4th 424, 433)* .

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6-60 California Points & Authorities §§ 60.471-60.479

[Reserved]

§§ 60.471[Reserved]

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6-60 California Points & Authorities § 60.480

§ 60.480 Supporting Motion to Fix Amount of Fees Recoverable in Action on Contract Under Civ. Code § 1717--General Form

[1] FORM Supporting Motion to Fix Amount of Fees Recoverable in Action on Contract Under Civ. Code § 1717--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF MOTION TO
Plaintiff, vs.	)	FIX AMOUNT OF ATTORNEY'S FEES RECOV-
_____ [*name*],	)	ERABLE AS COSTS
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

IN AN ACTION ON CONTRACT PROVIDING FOR THE RECOVERY OF ATTORNEY'S FEES, THE COURT SHALL FIX THE REASONABLE AMOUNT OF ATTORNEY'S FEES TO BE AWARDED AS AN ITEM OF COSTS TO THE PARTY PREVAILING ON THE CONTRACT.

A. Recovery of Reasonable Attorney's Fees in Action on Contract. When, in an action on a contract, the party prevailing on the contract is entitled to recover attorney's fees under *Civil Code Section 1717*, the court shall fix the

reasonable amount of attorney's fees as an element of the costs of suit (*Civ. Code § 1717(a)*; *Code Civ. Proc. § 1033.5(a)(10), (c)(3), (c)(5)*).

B. When Attorney's Fees Are Fixed. Attorney's fees, when awarded as an item of allowable costs, may be fixed either on a noticed motion or on entry of a default judgment, unless otherwise provided by stipulation of the parties (*see Code Civ. Proc. §§ 1033.5(a)(10)(A), (c)(5)*).

C. Discretion of Trial Court in Determining Reasonable Attorney's Fees. In determining reasonable attorney's fees pursuant to *Civil Code Section 1717*, the trial court has wide latitude in determining the amount of the award [*PLCM v. Drexler (2000) 22 Cal. 4th 1084, 1094-1095, 95 Cal. Rptr. 2d 198, 997 P.2d 511]* .

[*Optional*] **D. Discretion of Trial Court to Fix Fees Is Not Limited by Local Court Rule**. In determining reasonable attorney's fees pursuant to *Civil Code Section 1717*, the trial court is not limited by a local court rule providing a schedule of suggested fees for contested contract cases [*Cruz v. Ayromloo (2007) 155 Cal. App. 4th 1270, 1275-1276, 66 Cal. Rptr. 3d 725]* .

[*Optional*] **E. Discretion of Trial Court to Fix Fees Is Not Limited by Amount of Damages Awarded**. In determining reasonable attorney's fees pursuant to *Civil Code Section 1717*, the trial court is not limited by the amount of damages awarded [*Cruz v. Ayromloo (2007) 155 Cal. App. 4th 1270, 1276, 66 Cal. Rptr. 3d 725]* .

[*Insert other memoranda, as appropriate.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion or application to fix the reasonable amount of attorney's fees to be awarded as costs pursuant to *Civ. Code § 1717*. It should be combined with other memoranda, as appropriate, *set out in § 60.481* et seq.

Civ. Code § 1717 specifically provides that the attorney's fees awarded under that section are to be fixed by the court as an element of costs [*Civ. Code § 1717(a)*; *see also Code Civ. Proc. § 1033.5(a)(10)* (attorney's fees authorized by contract are allowable item of costs), (c)(3) (allowable costs must be reasonable in amount), (c)(5) (attorney's fees awarded pursuant to *Civ. Code § 1717* are allowable costs under *Code Civ. Proc. § 1032*)]. Attorney's fees authorized by contract, including fees awarded pursuant to *Civ. Code § 1717*, may be fixed either on a noticed motion or on entry of a default judgment, unless otherwise provided by stipulation of the parties [*see Code Civ. Proc. § 1033.5(a)(10)(A), (c)(5)*].

Typically, the court will fix the amount of attorney's fees to be awarded in accordance with an established schedule.

Any claim for fees that is not based on the court's established schedule of attorney's fees for actions on a contract shall bear the burden of proof [*Code Civ. Proc. § 1033.5(c)(5)*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Evidence cognizable by the court in such a motion proceeding should be submitted with the memorandum to support its factual statements. A request for judicial notice will support facts subject to such notice [*Evid. Code § 450 et seq.*]. Otherwise supporting affidavits or declarations under penalty of perjury should be submitted [*see Code Civ. Proc. §§ 2009* (affidavits), 2015.5 (declarations)], averring to such facts within the personal knowledge of the affiant or declarant as may be necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For legal background, research guides, and forms relating to proceedings to fix the amount of attorney's fees recoverable as a prevailing party in a contract action under Civ. Code § 1717, see California Forms of Pleading and Practice, Ch. 174, *Costs and Attorney's Fees* (Matthew Bender).

[d] Related Memoranda

Additional memoranda supporting a motion to fix attorney's fees are *set out in § 60.481* et seq.

This form may also be combined, in an appropriate case, with the memoranda *set out in § 60.440* et seq., when the motion to fix fees is combined with a motion to determine the party prevailing on the contract [*see Civ. Code § 1717(b)*].

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Recovery of Reasonable Attorney's Fees in Action on Contract

Under ***Civ. Code § 1717(a)*** and ***Code Civ. Proc. § 1033.5(a)(10), (c)(3), (c)(5),*** when, in an action on a contract, the party prevailing on the contract is entitled to recover attorney's fees under *Civ. Code § 1717*, the court is to fix the reasonable amount of attorney's fees as an element of the costs of suit.

[b] When Attorney's Fees Are Fixed

Under ***Code Civ. Proc. §§ 1033.5(a)(10)(A), (c)(5),*** attorney's fees, when awarded as an item of allowable costs, may be fixed either on a noticed motion or on entry of a default judgment, unless otherwise provided by stipulation of the parties.

[c] Discretion of Trial Court in Determining Reasonable Attorney's Fees

The facts and procedural background of ***PLCM v. Drexler*** *(2000) 22 Cal. 4th 1084, 95 Cal. Rptr. 2d 198, 997 P.2d 511* are discussed in *§ 60.440[3][e]*. In *PLCM*, the Supreme Court held that the trial court properly calculated attorney's

fees to be awarded to an insurer for the services of its in-house counsel, based on their market value, specifically, the reasonable in-house attorney hours multiplied by the prevailing hourly rate in the community for comparable legal services (*22 Cal. 4th 1084, 1094)* . The Court held that the trial court has broad authority and wide latitude to determine the amount of a reasonable fee and under *Civ. Code § 1717*. The trial court's award will not be disturbed unless the appellate court is convinced that it is clearly wrong, i.e., it abused its discretion (*22 Cal. 4th 1084, 1095)* .

The trial court may make its own determination of the value of the services contrary to, or without the necessity for, expert testimony. The trial court makes its determination after consideration of a number of factors, including the nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, the success or failure, and other circumstances in the case. Although the terms of the contract may be considered, they do not compel a particular award (*22 Cal. 4th 1084, 1096)* . In the instant case, the superior court based the award on the number of hours expended by in-house counsel multiplied by the prevailing market rate for comparable legal services in San Francisco, where counsel was located, which was a proper standard in calculating the fees. There was also sufficient evidence to support the amount of the award; in addition to the detailed documentation submitted by the insurer, the superior court was familiar with the quality of the services performed and the amount of time devoted to the case (*22 Cal. 4th 1084, 1096)* .

[d] Discretion of Trial Court to Fix Fees Is Not Limited by Local Court Rule

In ***Cruz v. Ayromloo*** *(2007) 155 Cal. App. 4th 1270, 66 Cal. Rptr. 3d 725* , 32 tenants sued their former landlord on multiple causes of action stemming from the landlord's wrongful refusal to allow the tenants to return to their apartments after the city evacuated them because the building was unsafe. All of the tenants prevailed on their claims for forcible detainer, wrongful eviction, and negligent infliction of emotional distress. The trial court found the landlord had not legally evicted the tenants. The court further found, because other low-income tenants had in the meantime moved into the building, the tenants could no longer move back into the units and concluded monetary damages constituted the tenants' only remedy. The court calculated the landlord's additional profit due to re-renting the units at higher rates to the new tenants and awarded damages per unit. The court also awarded individual damages, as applicable to each tenant, for lost security deposits, emotional distress, and loss of personal property (*155 Cal. App. 4th 1270, 1272-1273)* .

Four of tenants who prevailed against the landlord on their breach of contract and other claims had written leases. The written leases included a contractual provision allowing for the recovery of attorney's fees to the prevailing party in any civil action "in connection with" the lease. The four tenants moved for a fee award pursuant to their leases. They excluded from the amount of fees sought all work that applied exclusively to other families or units. The landlord conceded the tenants were entitled to attorney's fees under *Civ. Code § 1717*, but only for fees incurred litigating the contract causes of action. The landlord challenged the reasonableness of the requested fees, noting the amount sought was 131 times the superior court's guidelines for fee awards in contract cases. Moreover, the landlord argued the tenants could not recover fees incurred in representing the other tenants who did not have written leases containing the attorney's fee clause. The trial court awarded fees to the tenants. In evaluating the reasonableness of the fees, the trial court reduced the requested fees to half the amount requested, because the trial court thought counsel knew this was a "mildly pro bono" type of work, and because of the relatively small amount at stake. The court then reduced this amount by another 25 percent to account for noncontract issues. The court further reduced this figure by another 20 percent to account for legal fees incurred for work done specifically for the other tenants, but noted that issues relating to the city's rent stabilization ordinance and the general issues were the same as to all building tenants. This resulted in an attorney's fees award that was 39 times the superior court's guidelines for fee awards in contract cases (*155 Cal. App. 4th 1270, 1273-1274)* .

The court of appeal affirmed the attorney's fees award. The appellate court held that the trial court did not err in granting fees that were several times higher than the schedule of suggested fees for contested contract cases in Los Angeles Superior Court Rule 3.2. The court noted that the fee guidelines in that rule apply when a contract provides for

reasonable attorney fees "unless otherwise determined by the court." Thus, judges are free to depart from its provisions whenever the interests of justice require (*155 Cal. App. 4th 1270, 1275)* .

Moreover, to the extent a local rule conflicts with a state statute, the rule is invalid [*citing Contractors Labor Pool, Inc. v. Westway Contractors, Inc. (1997) 53 Cal. App. 4th 152, 169, 61 Cal. Rptr. 2d 715]* . *Civ. Code § 1717* authorizes the trial court to award attorney fees and mandates reasonable attorney fees to be "fixed by the court." Here, the trial court permissibly departed from the guidelines and based its fee award on the "lodestar" method of calculating attorney fees. The award of fees was consistent with *Civ. Code § 1717* (*155 Cal. App. 4th 1270, 1276)* .

[e] Discretion of Trial Court to Fix Fees Is Not Limited by Amount of Damages Awarded

Cruz v. Ayromloo *(2007) 155 Cal. App. 4th 1270, 66 Cal. Rptr. 3d 725* , is discussed in [d], *above*. In addition to their other arguments, appellants contended that the trial court abused its discretion because the fee award was higher than the overall damages awarded to respondents. The appellate court stated that this argument was without merit. The court noted that it is not uncommon to award attorney's fees in an amount higher than the total damages awarded to a plaintiff or plaintiffs in a particular case, and that there was no authority for the proposition an award of attorney's fees must always be less than the award of damages in a given case (*155 Cal. App. 4th 1270, 1276)* .

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6-60 California Points & Authorities § 60.481

§ 60.481 Supporting Motion to Fix Amount of Fees Recoverable in Action on Contract Under Civ. Code § 1717--When Fees Need Not Be Apportioned Between Contract Cause of Action and Other Causes of Action

[1] FORM Supporting Motion to Fix Amount of Fees Recoverable in Action on Contract Under Civ. Code § 1717--When Fees Need Not Be Apportioned Between Contract Cause of Action and Other Causes of Action

[*For caption, see § 60.480, with which this form should be combined.*]

IN AN ACTION ON CONTRACT PROVIDING FOR THE RECOVERY OF ATTORNEY'S FEES, THE COURT SHALL FIX THE REASONABLE AMOUNT OF ATTORNEY'S FEES TO BE AWARDED AS AN ITEM OF COSTS TO THE PARTY PREVAILING ON THE CONTRACT, WITHOUT APPORTIONMENT.

When Fees Need Not Be Apportioned Between Contract Cause of Action and Other Causes of Action. When a cause of action based on contract providing for attorney's fees is joined with other causes of action, the party prevailing on the contract may recover attorney's fees under *Civil Code Section 1717* only as they relate to the contract action. Attorney's fees need not be apportioned, however, when they are incurred for representation on an issue common to both a cause of action in which fees are proper and one in which they are not allowed (*Reynolds Metals Co. v. Alperson (1979) 25 Cal. 3d 124, 129, 158 Cal. Rptr. 1, 599 P.2d 83* ; *Cruz v. Ayromloo (2007) 155 Cal. App. 4th 1270, 1276-1277, 66 Cal. Rptr. 3d 725* ; *Abdallah v. United States Bank (1996) 43 Cal. App. 4th 1101, 1112, 51 Cal. Rptr. 2d 286*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.480*, in support of a motion or application to fix the reasonable amount of attorney's fees to be awarded as costs pursuant to *Civ. Code § 1717*, without any apportionment.

See also *§ 60.480[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 60.480[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] When Fees Need Not Be Apportioned Between Contract Cause of Action and Other Causes of Action

The facts and procedural background of ***Reynolds Metals Co. v. Alperson*** *(1979) 25 Cal. 3d 124, 158 Cal. Rptr. 1, 599 P.2d 83* , are discussed in *§ 60.446*. In *Reynolds,* the Supreme Court held that, when a cause of action based on a contract providing for attorney's fees is joined with other causes of action beyond the contract, the prevailing party may recover fees under *Civ. Code § 1717* only as they relate to the contract action. *Civ. Code § 1717* specifically refers to fees incurred to enforce the provisions of the contract. A litigant therefore, may not, increase recovery of attorney's fees by joining a cause of action in which attorney's fees are not recoverable to one in which an award is proper. Consequently, attorney's fees incurred solely for defending other causes of action are not recoverable (*25 Cal. 3d 124, 129)* . Attorney's fees need not, however, be apportioned when incurred for representation on an issue common to both a cause of action in which fees are proper and one in which they are not allowed (*25 Cal. 3d 124, 129-130)* . Therefore, all expenses incurred with respect to an issue that is common to the cause of action based on the contract and another cause of action qualify for an award of fees (*25 Cal. 3d 124, 130)* .

The facts and procedural background of ***Cruz v. Ayromloo*** *(2007) 155 Cal. App. 4th 1270, 66 Cal. Rptr. 3d 725* , are discussed in *§ 60.480[3][d]*. In *Cruz,* the Court of Appeal held that the trial court did not err in basing its attorney's fee award on more than solely the breach of contract claims, because the broad language of the attorney's fee clause in the lease agreement covered all fees in any civil action stemming from the lease. The attorney's fee clause provided that if civil action was instituted *in connection with* the lease, the prevailing party would be entitled to recover reasonable attorney's fees. The underlying civil action encompassed both breach of contract and tort causes of action arising from the tenants' leases with the landlord. The trial court did not have to base its award solely on breach of contract damages, because the lease contemplated recovery of attorney's fees for all claims in any civil action in connection with the lease. Apportionment of fees for the breach of contract and tort causes of action was unnecessary, because the broad language of the attorney's fee clause permitted recovery of attorney fees for breach of contract or any other claim asserted in connection with the lease (*155 Cal. App. 4th 1270, 1276-1277)* .

In ***Abdallah v. United States Bank*** *(1996) 43 Cal. App. 4th 1101, 51 Cal. Rptr. 2d 286* , defendants sought a two-thirds reduction of an attorney's fees award under *Civ. Code § 1717*, on the ground that plaintiffs were entitled only to fees on the contract cause of action and not on the tort or RICO causes of action. The court of appeal rejected the contention, holding that a trial court has discretion to award fees incurred on both a contract cause of action and other causes of action, when the issue is common to both and the fee for the contract cause of action is proper, and that the trial court in this case did not abuse that discretion (*43 Cal. App. 4th 1101, 1112)* .

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6-60 California Points & Authorities § 60.481A

§ 60.481A Supporting Motion to Fix Amount of Fees Recoverable in Action on Contract Under Civ. Code § 1717--Fees Need Not Be Allocated When Representing Multiple Parties If Liability of Parties Is So Factually Interrelated That Allocation Would Be Impossible

[1] FORM Supporting Motion to Fix Amount of Fees Recoverable in Action on Contract Under Civ. Code § 1717--Fees Need Not Be Allocated When Representing Multiple Parties If Liability of Parties Is So Factually Interrelated That Allocation Would Be Impossible

[*For caption, see § 60.480, with which this form should be combined.*]

IN AN ACTION ON CONTRACT PROVIDING FOR THE RECOVERY OF ATTORNEY'S FEES, THE COURT MUST FIX THE REASONABLE AMOUNT OF ATTORNEY'S FEES TO BE AWARDED AS AN ITEM OF COSTS WITHOUT ALLOCATION BETWEEN MULTIPLE PARTIES REPRESENTED IF THE LIABILITY OF THE PARTIES IS SO FACTUALLY INTERRELATED THAT ALLOCATION WOULD BE IMPOSSIBLE.

Fees Need Not Be Allocated Between Multiple Parties When Allocation Is Impossible. In awarding attorney's fees under *Civil Code Section 1717*, allocation of attorney's fees incurred in representing multiple parties is not required when the liability of the parties is so factually interrelated that it would have been impossible to separate the activities into compensable and noncompensable time units (*Cruz v. Ayromloo (2007) 155 Cal. App. 4th 1270, 1277, 66 Cal. Rptr. 3d 725*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.480*, in support of a motion or application to fix the reasonable amount of attorney's fees to be awarded as costs pursuant to *Civ. Code § 1717*, without allocation between multiple parties represented. The ground for not allocating the fees is that the liability of the parties is so factually interrelated that it

would be impossible to separate the activities into compensable and noncompensable time units.

See also *§ 60.480[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 60.480[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Fees Need Not Be Allocated Between Multiple Parties When Allocation Is Impossible

The facts and procedural background of ***Cruz v. Ayromloo*** *(2007) 155 Cal. App. 4th 1270, 66 Cal. Rptr. 3d 725* , are discussed in *§ 60.480[3][c]*. In *Cruz,* the Court of Appeal held that the trial court did not err in not apportioning the attorney's fee award because the tenants sought fees for legal work performed on their behalf, even though other tenants who did not have written leases containing the attorney's fee clause were incidental beneficiaries. Allocation of fees incurred in representing multiple parties was not required, because the tenants' various claims were inextricably intertwined, making it impracticable if not impossible to separate the multitude of conjoined activities into compensable or noncompensable time units (*155 Cal. App. 4th 1270, 1277)* .

Further, the four tenants with the written leases sought fees for legal work performed solely on their behalf, and the fees were awarded only to them and not to the other tenants. The four tenants and the other 28 tenants all lived in the same building, were evacuated from the building, and were not allowed to return to the building by the landlord. All tenants asserted the same causes of action. The attorneys conducted legal research pertaining to the overarching legal issues common to all tenants, including the local rent stabilization ordinance and the claims for forcible detainer, wrongful eviction, and negligent infliction of emotional distress. The attorneys had to do the same legal research and analysis in preparing their case on behalf of the four tenants, irrespective of the number of potential tenants benefitting from the legal work performed. The four tenants claimed they took careful measure not to seek attorney's fees for any legal work done for the exclusive benefit of the tenants who did not have a right to recover fees. However, the trial court still reduced the fees to account for legal fees incurred for work done specifically for the tenants who did not have a contractual right to attorney's fees. The other tenants without contracts containing the attorney fee clause may have been third party beneficiaries of the legal services rendered to the four tenants who had attorney's fees provisions in their respective leases. However, the fact that the other tenants incidentally benefitted from the legal work performed on behalf of the four tenants did not diminish the four tenants' contractual right to recover attorney's fees litigating issues common to all (*155 Cal. App. 4th 1270, 1277-1278)* .

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6-60 California Points & Authorities § 60.482

§ 60.482 Supporting Motion to Fix Amount of Fees Recoverable in Action on Contract Under Civ. Code § 1717--Lodestar Method of Computing Attorney's Fees Applies

[1] FORM Supporting Motion to Fix Amount of Fees Recoverable in Action on Contract Under Civ. Code § 1717--Lodestar Method of Computing Attorney's Fees Applies

[*For caption, see § 60.480, with which this form should be combined.*]

IN AN ACTION ON CONTRACT PROVIDING FOR THE RECOVERY OF ATTORNEY'S FEES, THE COURT MUST FIX THE REASONABLE AMOUNT OF ATTORNEY'S FEES TO BE AWARDED AS AN ITEM OF COSTS TO THE PARTY PREVAILING ON THE CONTRACT, PURSUANT TO THE LODESTAR METHOD OF COMPUTING.

Lodestar Method of Computing Attorney's Fees Applies. The lodestar method of calculating attorney's fees, based on the hourly rate of attorneys in the area and the number of hours expended on the case, and on the application of a multiplier to either increase or reduce that figure, is applicable in determining an attorney's fee award under *Civil Code Section 1717* (***PLCM v. Drexler*** *(2000) 22 Cal. 4th 1084, 1095-1097, 95 Cal. Rptr. 2d 198, 997 P.2d 511* ; *Sternwest Corp. v. Ash (1986) 183 Cal. App. 3d 74, 76, 227 Cal. Rptr. 804*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.480*, in support of a motion or application to fix the reasonable amount of attorney's fees to be awarded as costs pursuant to *Civ. Code § 1717*, using the lodestar method of computation.

See also *§ 60.480[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 60.480[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Lodestar Method of Computing Attorney's Fees Applies

The facts and procedural background of ***PLCM v. Drexler*** *(2000) 22 Cal. 4th 1084, 95 Cal. Rptr. 2d 198, 997 P.2d 511* are discussed in *§ 60.440[3][e]*. In *PLCM*, the Supreme Court held that for an award of attorney's fees pursuant to *Civ. Code § 1717*, the fee setting inquiry ordinarily begins with the "lodestar," i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate, and the reasonable hourly rate is that prevailing in the community for similar work. The lodestar figure may then be adjusted, based on consideration of factors specific to the case, to fix the fee at the fair market value for the legal services provided. This approach anchors the trial court's analysis to an objective determination of the value of the attorney's services, ensuring that the amount awarded is not arbitrary (*22 Cal. 4th 1084, 1095)* .

In this case, the trial court awarded fees to an insurer using the lodestar method for representation by its in-house counsel. The party against whom fees were awarded contended that the court erred because it did not use a so-called "cost-plus" approach, based on a precise calculation of the actual salary, costs, and overhead of in-house counsel. The Court held that nothing in *Civ. Code § 1717* compelled such an approach. The Court found that the cost-plus approach, in addition to being cumbersome, intrusive, and costly to apply, may distort the incentives for settlement and reward inefficiency, and that the lodestar method, as applied to the calculation of attorney fees for in-house counsel is presumably reasonable, although in exceptional circumstances, the trial court is not precluded from using other methodologies (*22 Cal. 4th 1084, 1096-1097)* .

In ***Sternwest Corp. v. Ash*** *(1986) 183 Cal. App. 3d 74, 227 Cal. Rptr. 804* , plaintiff originally sued defendant who was found liable. An additional defendant was joined on the theory that he was a partner of the principal defendant and equally liable with him. The joined defendant was found not liable, was dismissed from the action, and was found entitled to attorney's fees under *Civ. Code § 1717*. The trial court determined the normal attorney's fees in the area, and awarded the joined defendant a recovery based on that fee and the hours expended on the case. It denied the joined defendant's request that the recovery for hours expended, the "lodestar recovery," should be enhanced because of the novelty and difficulty of the case, and because of the long delay in calculating and paying the amount of recovery. The joined defendant appealed.

The court of appeal reversed (*183 Cal. App. 3d 74, 76)* . The court observed that the trial court denied enhancement of lodestar fees because it felt that such enhancement could be awarded only in cases involving a private attorney general when the attorney's services were devoted to maintaining a public interest. The court said the trial court was wrong because it did have the discretion to grant that type of enhancement. Although the trial court has a wide discretion in making an award under *Civ. Code § 1717*, in the instant case the enhancement was not denied because of an exercise of discretion, but because of the trial court's erroneous view of its power. Thus, the court of appeal remanded the case to the trial court and directed it to enhance the lodestar award by the factor that the court, in its discretion, deems proper (*183 Cal. App. 3d 74, 76)* . After the trial court has performed all the necessary calculations, it must consider whether the total award is more than a reasonable amount and, if so, must reduce the *Civ. Code § 1717* award so that it is a reasonable figure (*183 Cal. App. 3d 74, 77)* .

Note that after the *Sternwest* decision, *Code Civ. Proc. § 1033.5(c)(5)* was amended to provide that "[a]ny claim not based on the court's established schedule of attorney's fees for actions on a contract shall bear the burden of proof." Thus, any claim for fees that is based on the "lodestar" method of calculation must be supported by facts that support the use of that basis of computation in lieu of the court's established schedule for contract actions.

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6-60 California Points & Authorities § 60.483

§ 60.483 Supporting Motion to Fix Amount of Fees Recoverable in Action on Contract Under Civ. Code § 1717--Reimbursement of Attorney's Out-of-Pocket Costs

[1] FORM Supporting Motion to Fix Amount of Fees Recoverable in Action on Contract Under Civ. Code § 1717--Reimbursement of Attorney's Out-of-Pocket Costs

[*For caption, see § 60.480, with which this form should be combined.*]

IN AN ACTION ON CONTRACT PROVIDING FOR THE RECOVERY OF ATTORNEY'S FEES, THE COURT SHALL FIX THE REASONABLE AMOUNT OF ATTORNEY'S FEES TO BE AWARDED AS AN ITEM OF COSTS TO THE PARTY PREVAILING ON THE CONTRACT, INCLUDING REIMBURSEMENT OF OUT-OF-POCKET COSTS.

Reimbursement of Attorney's Out-of-Pocket Costs. When a contract provides for payment of costs and attorney's fees, the court may allow disbursements of counsel as attorney's fees under *Code of Civil Procedure Section 1033.5(a)(10)* if they represent expenses ordinarily billed to a client and are not included in the overhead component of counsel's hourly rate (*Bussey v. Affleck (1990) 225 Cal. App. 3d 1162, 1166, 275 Cal. Rptr. 646*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.480*, in support of a motion or application to fix the reasonable amount of attorney's fees to be awarded as costs pursuant to *Civ. Code § 1717*, including out-of-pocket expenses.

See also *§ 60.480[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 60.480[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Reimbursement of Attorney's Out-of-Pocket Costs

Bussey v. Affleck *(1990) 225 Cal. App. 3d 1162, 275 Cal. Rptr. 646* , was an action for collection on a promissory note that contained an attorney's fee provision. The plaintiff prevailed in the action, but the trial court's postjudgment order for attorney's fees and costs made virtually no allowance for any of the disbursements of plaintiff 's counsel in connection with the case. Disallowed expenses included expert witness fees, photocopying charges, messenger and express mail charges, telephone bills, and travel expenses, all of which were claimed as attorney's fees under *Code Civ. Proc. § 1033.5*, on the basis of defendants' agreement under the note to "pay all costs and expenses of collection including reasonable attorney's fees." Plaintiff appealed from the postjudgment order.

The court of appeal (a panel of Division Four, First District) reversed the postjudgment order for attorney's fees and costs insofar as it disallowed the disbursements of plaintiff 's counsel, and remanded the case for redetermination of the costs (*225 Cal. App. 3d 1162, 1167)* . The court held that when a contract provides for payment of costs and attorney's fees, the court may allow disbursements of counsel as attorney's fees under *Code Civ. Proc. § 1033.5(a)(10)* if they represent expenses ordinarily billed to a client and are not included in the overhead component of counsel's hourly rate (*225 Cal. App. 3d 1162, 1166)* . The court noted that the provisions of *Code Civ. Proc. § 1033.5* do not dictate a contrary result. Insofar as counsel's disbursements are for expenses not included in the list of allowable costs in *Code Civ. Proc. § 1033.5(a)*, the court has discretion to award them under *Code Civ. Proc. § 1033.5(c)(4)*. Insofar as the disbursements are for costs that are not allowable under *Code Civ. Proc. § 1033.5(b)*, unless "expressly authorized by law," the requisite authority is found in *Code Civ. Proc. § 1021* and *Civ. Code § 1717*, which authorize contracting parties to stipulate for the payment of attorney's fees and costs. The court noted that disbursements of counsel that are "not reasonably necessary" to the conduct of litigation are disallowable, pursuant to *Code Civ. Proc. § 1033.5(c)(2)*, but that there was little dispute about the propriety of the outlay for expert witness's fees in the instant case; although the trial judge did not expressly order the parties to present expert testimony, he openly invited such testimony and suggested on at least five separate occasions prior to trial that such testimony would be helpful in connection with calculations under the note (*225 Cal. App. 3d 1162, 1167)* .

Unlike *Bussey*, however, the Third District Court of Appeal has not allowed a prevailing party to claim an attorney's out-of-pocket expenses under a contract allowing the recovery of attorney's fees regardless of whether independently allowed by statute, and has found that *Bussey* was wrongly decided [*see Ripley v. Pappadopoulos (1994) 23 Cal. App. 4th 1616, 1622, 28 Cal. Rptr. 2d 878* , discussed in *§ 60.41*]. In *Robert L. Cloud & Associates, Inc. v. Mikesell (1999) 69 Cal. App. 4th 1141, 1154, 82 Cal. Rptr. 2d 143* , Division Five of the First Appellate District rejected *Bussey* and adopted *Ripley*. In *Carwash of America-PO v. Windswept Ventures No. I (2002) 97 Cal. App. 4th 540, 541-544, 118 Cal. Rptr. 2d 536* , the Third District applied the rule in *Ripley* to prevailing defendants as well as prevailing plaintiffs, and held that when judgment is entered for a party on a claim for breach of a contract containing a provision permitting the prevailing party to recover expert witness fees, the fees may not be awarded as an item of costs but must be pleaded and proven separately.

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6-60 California Points & Authorities § 60.484

§ 60.484 Supporting Motion to Fix Amount of Fees Recoverable in Action on Contract Under Civ. Code § 1717--Interest on Attorney's Fees Is Available

[1] FORM Supporting Motion to Fix Amount of Fees Recoverable in Action on Contract Under Civ. Code § 1717--Interest on Attorney's Fees Is Available

[*For caption, see § 60.480, with which this form should be combined.*]

IN AN ACTION ON CONTRACT PROVIDING FOR THE RECOVERY OF ATTORNEY'S FEES, THE COURT MUST FIX THE REASONABLE AMOUNT OF ATTORNEY'S FEES TO BE AWARDED AS AN ITEM OF COSTS TO THE PARTY PREVAILING ON THE CONTRACT, WHICH MAY INCLUDE INTEREST.

Interest on Attorney's Fees Is Available. When there is a long delay in calculating and paying the amount of attorney's fees, interest on those attorney's fees should be awarded. The trial court will determine a rate of interest, and apply that rate to the period of delay, which is the period from the filing of the claim for attorney's fees and the date of computation of the award (*Sternwest Corp. v. Ash (1986) 183 Cal. App. 3d 74, 76, 227 Cal. Rptr. 804*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.480*, in support of a motion or application to fix the reasonable amount of attorney's fees to be awarded as costs pursuant to *Civ. Code § 1717*, including interest.

See also *§ 60.480[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 60.480[2][b]* for

discussion of evidentiary support.

[3] Discussion of Authorities

[a] Interest on Attorney's Fees Is Available

The facts and procedural background of ***Sternwest Corp. v. Ash*** *(1986) 183 Cal. App. 3d 74, 277 Cal. Rptr. 804* , are discussed in *§ 60.482*. In *Sternwest*, the joined defendant sought interest on the attorney's fees due to the long delay in calculating and paying the amount of recovery. The trial court said that interest would be difficult, if not impossible, to calculate since the fees were incurred over a period of several years in varying amounts. The court of appeal found that statement to be a finding by the trial court that interest should be awarded. The appellate court said that the computation of interest on attorney's fees involves only simple arithmetic; the trial court must determine a rate of interest, and apply that rate to the period of delay. The court said the fairest period to chose in selecting the period of delay would be the period from the filing of the joined defendant's claim for attorney's fees to the date of computation of the award. A litigant cannot be expected to pay *Civ. Code § 1717* fees until an appropriate demand is made on him or her. Moreover, if a claimant is delayed in filing a claim due to the conduct of the obligor, that amount of delay should be considered in determining the enhancement of the lodestar (*183 Cal. App. 3d 74, 76)* . The court concluded that the interest, computed at the rate of interest selected by the trial court, should be awarded in addition to the enhanced lodestar fees. Then the total judgment, including attorney's fees, will bear interest at the rate of 10 percent until paid, as provided by *Code Civ. Proc. § 685.010* (*183 Cal. App. 3d 74, 77)* .

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6-60 California Points & Authorities § 60.485

§ 60.485 Supporting Motion to Fix Amount of Fees Recoverable in Action on Contract Under Civ. Code § 1717--Deduction of Award of Fees From Damages Awarded in Favor of Party Not Prevailing on Contract

[1] FORM Supporting Motion to Fix Amount of Fees Recoverable in Action on Contract Under Civ. Code § 1717--Deduction of Award of Fees From Damages Awarded in Favor of Party Not Prevailing on Contract

[*For caption, see § 60.480, with which this form should be combined.*]

ATTORNEY'S FEES AWARDED UNDER *CIVIL CODE SECTION 1717* TO _____ [PLAINTIFF *or* DEFENDANT], AS THE PARTY PREVAILING ON THE CONTRACT, SHALL BE DEDUCTED FROM ANY DAMAGES AWARDED AGAINST HIM/HER/IT ON A CAUSE OF ACTION NOT BASED ON CONTRACT.

Deduction of Award of Fees From Damages Awarded in Favor of Party Not Prevailing on Contract. In an action that seeks relief in addition to that based on a contract, if the party prevailing on the contract has damages awarded against it on causes of action not on the contract, the amounts awarded to the party prevailing on the contract under *Civil Code Section 1717* shall be deducted from any damages awarded in favor of the party who did not prevail on the contract. If the amount awarded under *Civil Code Section 1717* exceeds the amount awarded the party not prevailing on the contract, the net amount shall be awarded the party prevailing on the contract and judgment may be entered in favor of the party prevailing on the contract for that net amount (*Civ. Code § 1717(c)*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.480*, in support of a motion or application to fix the reasonable amount of attorney's fees to be awarded as costs pursuant to *Civ. Code § 1717*, when the award of attorney's fees should be deducted from an award of damages in favor of another party on a cause of action not based on contract.

See also *§ 60.480[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.480[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Deduction of Award of Fees From Damages Awarded in Favor of Party Not Prevailing on Contract

Civ. Code § 1717(c) provides that in an action that seeks relief in addition to that based on a contract, if the party prevailing on the contract has damages awarded against it on causes of action not on the contract, the amounts awarded to the party prevailing on the contract under *Civ. Code § 1717* are to be deducted from any damages awarded in favor of the party who did not prevail on the contract. If the amount awarded under *Civ. Code § 1717* exceeds the amount awarded the party not prevailing on the contract, the net amount is to be awarded the party prevailing on the contract and judgment may be entered in favor of the party prevailing on the contract for that net amount.

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6-60 California Points & Authorities § 60.486

§ 60.486 Supporting Motion to Fix Amount of Fees Recoverable in Action on Contract Under Civ. Code § 1717--Interaction Between Fees Recoverable Pursuant to Code Civ. Proc. § 998 and Civ. Code § 1717

[1] FORM Supporting Motion to Fix Amount of Fees Recoverable in Action on Contract Under Civ. Code § 1717--Interaction Between Fees Recoverable Pursuant to Code Civ. Proc. § 998 and Civ. Code § 1717

[*For caption, see § 60.480, with which this form should be combined.*]

THE AMOUNT OF POSTOFFER ATTORNEY'S FEES REQUESTED BY DEFENDANT _____ [*name*] IS RECOVERABLE UNDER *CIVIL CODE SECTION 1717* AND CODE CIV. PROC. § 998 BECAUSE THE JUDGMENT IN FAVOR OF PLAINTIFF WAS NOT AS FAVORABLE AS DEFENDANT'S OFFER.

Court May Fix and Award Attorney's Fees Incurred After More Favorable Settlement Offer Was Made. When a plaintiff prevails on the contract, but the judgment in plaintiff's favor is less favorable than the defendant's prior settlement offer under *Code Civ. Proc. § 998*, the post-offer costs that the defendant is entitled to recover pursuant to *Code Civ. Proc. § 998* includes post-offer attorney's fees when such fees are otherwise recoverable as an element of costs pursuant to *Code Civ. Proc. §§ 1032, 1033.5* (*Scott Co. of California v. Blount, Inc. (1999) 20 Cal. 4th 1103, 1112-1116, 86 Cal. Rptr. 2d 614, 979 P.2d 974*). For example, when an attorney's fees provision subject to *Civ. Code § 1717* gives the prevailing party the right to recover attorney's fees, those fees are recoverable as an element of costs pursuant to *Code Civ. Proc. §§ 1032, 1033.5* and, therefore, may be recovered by the defendant as post-offer costs under *Code Civ. Proc. § 998* when the plaintiff does not obtain a judgment more favorable than the defendant's offer (*Scott Co. of California v. Blount, Inc. (1999) 20 Cal. 4th 1103, 1112-1116, 86 Cal. Rptr. 2d 614, 979 P.2d 974*).

[2] Comments

[a] Use of Form

This form is for use by a defendant with the form *set out in § 60.480*, in support of a motion for attorney's fees when the plaintiff does not obtain a judgment more favorable than the defendant's *Code Civ. Proc. § 998* offer.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case.

[c] Related Memoranda

For additional memoranda concerning the interaction of the costs-shifting provisions of *Code Civ. Proc. § 998* with the attorney's fees provisions of *Civ. Code § 1717* and *Code Civ. Proc. §§ 1033, 1033.5,* which in an appropriate case may be adapted and combined with this form, see *§ 60.83* et seq.

[3] Discussion of Authorities

[a] Court May Fix and Award Attorney's Fees Incurred After More Favorable Settlement Offer Was Made

In ***Scott Co. of California v. Blount, Inc.*** *(1999) 20 Cal. 4th 1103, 86 Cal. Rptr. 2d 614, 979 P.2d 974* , the defendant made a *Code Civ. Proc. § 998* offer to the plaintiff of $900,000, which the plaintiff rejected. The contract upon which the action was based contained an attorney's fees provision. After a court trial, the court awarded the plaintiff $442,054 in damages. Pursuant to *Civ. Code § 1717* and *Code Civ. Proc. § 998*, the court awarded the defendant $568,925 in postoffer attorney's fees as an element of postoffer costs. The court of appeal reversed the award of attorney's fees. It held the defendant was not entitled to postoffer attorney's fees.

The Supreme Court reversed the court of appeal's determination that the defendant could not recover its postoffer attorney's fees. It held that, since contractual attorney's fees are an element of costs under *Code Civ. Proc. §§ 1032, 1033.5* and the defendant was entitled to postoffer costs under *Code Civ. Proc. § 998* because the offer was more favorable to the plaintiff than the judgment, the defendant was entitled to recover its postoffer attorney's fees (*20 Cal. 4th 1103, 1112-1116)* .

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6-60 California Points & Authorities §§ 60.487-60.549

[Reserved]

§§ 60.487[Reserved]

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6-60 California Points & Authorities § 60.550

§ 60.550 Opposing Motion for Award of Attorney's Fees Due to Excessive Amount Requested--General Form

[1] FORM Opposing Motion for Award of Attorney's Fees Due to Excessive Amount Requested--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM IN OPPOSITION TO MOTION
_____ [*name*], Defendant.	)	FOR AWARD OF ATTORNEY'S FEES
	)	
	)	

_____

THE AMOUNT OF ATTORNEY'S FEES REQUESTED BY _____ [*specify party, e.g.,* PLAINTIFF] _____ [*name*] IS UNREASONABLE AND EXCESSIVE AND THE AMOUNT OF FEES AWARDED, IF ANY, SHOULD NOT EXCEED $_____.

A. Discretion of Trial Court. The determination of what constitutes reasonable attorney's fees is within the discretion of the trial court (*Serrano v. Priest (1977) 20 Cal. 3d 25, 49, 141 Cal. Rptr. 315, 569 P.2d 1303*).

B. Fundamental Determination in Setting Fee. The fundamental determination which the trial court should make is a calculation of the attorney's services in terms of the time he or she has spent on the case (*Serrano v. Priest (1977) 20 Cal. 3d 25, 48 fn. 23, 141 Cal. Rptr. 315, 569 P.2d 1303*). The court must first make a finding on this factor as well as the value of these services, and after calculating the amount of fees on this basis, may then use its discretion in augmenting or diminishing this figure (*Mandel v. Lackner (1979) 92 Cal. App. 3d 747, 758, 155 Cal. Rptr. 269*).

C. Other Factors. Other factors to be considered by the trial court in setting a reasonable attorney's fee should include the nature of the litigation, its difficulty, the amount involved, the skill required, the skill employed, the attention given, the success or failure, and other circumstances in the case, [such as the prevailing party's failure to accept an early, reasonable settlement offer] (*Meister v. Regents of University of California (1998) 67 Cal. App. 4th 437, 449-455, 78 Cal. Rptr. 2d 913* ; *Melnyk v. Robledo (1976) 64 Cal. App. 3d 618, 624, 134 Cal. Rptr. 602*).

[*Insert other memoranda, as appropriate.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion for an award of attorney's fees based on an equitable exception to the general rule against such awards, or where there is otherwise no express procedure for fixing the amount of the award. Thus, this form may be used to oppose a motion made under the common fund exception (§ 60.300 et seq.) or the substantial benefit exception (§ 60.340 et seq.) [*but see § 60.340[2][a]* on the arguable codification of the substantial benefit exception within the procedures of *Code Civ. Proc. § 1021.5*].

It may be combined with other memoranda, as appropriate, *set out in § 60.551* et seq.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Evidence cognizable by the court in such a motion proceeding should be submitted with the memorandum to support its factual statements. A request for judicial notice will support facts subject to such notice [*Evid. Code § 450 et seq.*]. Otherwise supporting affidavits or declarations under penalty of perjury should be submitted [*see Code Civ. Proc. §§ 2009* (affidavits), 2015.5 (declarations)], averring to such facts within the personal knowledge of the affiant or declarant as may be necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For legal background and forms relating to awards for attorney's fees the methods for fixing a reasonable amount, see California Forms of Pleading and Practice, Ch. 174, *Costs and Attorney's Fees* (Matthew Bender).

[d] Related Memoranda

Additional memoranda supporting a motion to fix attorney's fees are *set out in § 60.551* et seq.

This form may also be combined, in an appropriate case, with other memoranda opposing an award for attorney's fees, such as those *set out in § 60.320* et seq. (opposing common fund exception), § 60.360 et seq. (opposing substantial benefit exception).

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Discretion of Trial Court

The facts and procedural background of ***Serrano v. Priest*** *(1977) 20 Cal. 3d 25, 141 Cal. Rptr. 315, 569 P.2d 1303* , are discussed in *§ 60.320[3][c]*. One of the firms representing plaintiffs contended that it was awarded inadequate fees. The Supreme Court found that the trial court did not abuse its discretion in the amount of fees which it awarded to plaintiffs' attorneys and stated that the experienced trial judge is the best judge of the value of professional services rendered in his or her court. The Court found that the trial court had made a careful compilation of the time spent and reasonable hourly compensation of each attorney and law student, and stated that compilation is properly fundamental to a trial court's determination of reasonable attorney's fees.

[b] Fundamental Determination in Setting Fee

The facts and procedural background of ***Serrano v. Priest*** *(1977) 20 Cal. 3d 25, 141 Cal. Rptr. 315, 569 P.2d 1303* , are discussed in *§ 60.320[3][c]*. This case is also discussed in *§ 60.550[3][a]*.

In ***Mandel v. Lackner*** *(1979) 92 Cal. App. 3d 747, 155 Cal. Rptr. 269* (*Mandel II*), plaintiffs had obtained a judgment enjoining the Governor from closing state offices on Good Friday, enjoining the state controller from paying state employees for time taken off on that day, and awarding pre-judgment attorney's fees to plaintiff. The judgment was affirmed on a prior appeal, with the award of attorney's fees being affirmed on the basis of the substantial benefit theory, and the court of appeal remanded the matter for the trial court to hear a motion for attorney's fees for that appeal. The trial court granted the motion and entered a judgment for $75,000 payable by the state which appealed from the judgment. Only the amount of attorney's fees, and not the trial court's determination that plaintiff was entitled to such fees, was disputed in *Mandel II.*

The court of appeal applied the formulation for determining the amount of fees set out by the Supreme Court in *Serrano v. Priest (1977) 20 Cal. 3d 25, 141 Cal. Rptr. 315, 569 P.2d 1303* (*Serrano III*), since the award in *Serrano III* was based on the equitable powers of the court, as was the award in *Mandel II* which was based on the substantial benefit theory. The formulation set out in *Serrano III* requires the trial court to first determine the essential factors of time spent by the attorney and the value of these services on a per-hour or other unit-of-time basis. Once the court makes its calculation, it may then use its discretion to make further calculations augmenting or diminishing the base figure by considering other factors. In *Mandel II*, these included: (1) the novelty and difficulty of the questions involved and the skill displayed in presenting them; (2) the extent to which the nature of the litigation precluded other employment by the attorneys; (3) the contingent nature of the fee award, (4) the fact that no award against the state would ultimately fall on the taxpayers; (5) the fact that the attorneys in question received public and charitable funding for the purpose of bringing law suits of the character of the lawsuit in question; and (6) the fact that the monies awarded would inure not to the individual benefit of the attorneys involved, but to the organizations by which they were employed. The court of appeal in *Mandel II* reversed the amount of fees awarded for the prior appeal, finding that the lower court had abused its discretion by failing to make the essential preliminary determinations as set out above.

[c] Other Factors

In ***Meister v. Regents of University of California*** *(1998) 67 Cal. App. 4th 437, 78 Cal. Rptr. 2d 913* , the plaintiff sued the University of California Regents and a university dean for violation of the Information Practices Act of 1977 after the dean made public a confidential letter concerning the plaintiff's employment. After the plaintiff prevailed in the action, he sought an award of attorney's fees in excess of $500,000 under *Civ. Code § 1798.48(b)*, which mandates an award of reasonable attorney's fees in a successful action under the Information Practices Act of 1977. The trial court, however, awarded only about $75,000 because the plaintiff had refused a favorable settlement offer early in the litigation and the litigation had achieved only limited success.

The court of appeal affirmed. It held the low amount of attorney's fees awarded was within the broad discretion of the trial court in determining the amount of a reasonable attorney's fee award. Since the evidence supported a conclusion the offer would have afforded the plaintiff as good or better relief than did the ultimate judgment, a reduction of fees to those earned before the offer was within the trial court's discretion (*67 Cal. App. 4th 437, 449-455)* .

In ***Melnyk v. Robledo*** *(1976) 64 Cal. App. 3d 618, 134 Cal. Rptr. 602* , defendant claimed attorney's fees in her memorandum of costs and disbursements pursuant to the provisions of a note and trust deed. Plaintiff moved to tax costs and the trial court reduced the amount awarded for attorney's fees. Defendant appealed from the portion of the judgment in her favor awarding reduced attorney's fees. In affirming, the court of appeal stated that a trial court should make its determination of what constitutes reasonable attorney's fees after considering a number of factors including the nature of the litigation, its difficulty, the amount involved, the skill required and employed, the attention given, the success or failure and other circumstances in the case.

[4] Additional Authorities

[a] Discretion of Trial Court

In *White v. Moriarty (1993) 15 Cal. App. 4th 1290, 19 Cal. Rptr. 2d 200* , the trial court awarded the plaintiff a judgment on a promissory note that included an award for attorney fees and costs. On appeal, the defendant claimed that the trial court erred in failing to reduce the award by striking portion's of the plaintiff 's attorney's billing for certain telephone conversations. The appellate court determined that the record on appeal indicated that at least some of the disputed telephone calls related to the plaintiff. The defendant did not explain why the other unexplained calls were improperly charged, and the trial court had already heard these arguments and made some deductions for time billed when it calculated the award of attorney fees. On this record, the appellate court upheld the award because the defendant failed to show that the trial court had abused its discretion (*15 Cal. App. 4th 1290, 1296-1297)* .

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6-60 California Points & Authorities § 60.551

§ 60.551 Opposing Motion for Award of Attorney's Fees Due to Excessive Amount Requested--Amount Requested for Attorney's Fees Must Be Supported by Evidence

[1] FORM Opposing Motion for Award of Attorney's Fees Due to Excessive Amount Requested--Amount Requested for Attorney's Fees Must Be Supported by Evidence

[*For caption, see § 60.550, with which this form should be combined.*]

THE AMOUNT OF ATTORNEY'S FEES REQUESTED BY _____ [*specify party, e.g.,* PLAINTIFF] _____ [*name*] IS UNREASONABLE AND EXCESSIVE, IN THAT IT IS NOT SUPPORTED BY THE EVIDENCE.

Award of Attorney's Fees Must Be Supported by Evidence. In the absence of such crucial information as the number of hours worked, billing rates, the types of issues dealt with, and appearances made on the client's behalf, the trial court must guess at the actual value of the attorney's services. Such guessing is unacceptable and cannot be the basis for an award of fees. To petition successfully for attorney's fees an attorney must present evidence, documentary and oral, of the services actually performed, and expert opinion regarding what would be a reasonable fee for such services (*Martino v. Denevi (1986) 182 Cal. App. 3d 553, 558-559, 227 Cal. Rptr. 354*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.550*, in opposition to a motion for attorney's fees when the fees requested are unreasonable, if the fees are not supported by substantial evidence.

See also *§ 60.550[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.550[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Award of Attorney's Fees Must Be Supported by Evidence

In ***Martino v. Denevi*** *(1986) 182 Cal. App. 3d 553, 227 Cal. Rptr. 354* , plaintiff sought dissolution of his partnership with defendant, and an accounting and damages. Defendant cross complained, alleging plaintiff 's breach of the partnership agreement, and fraud. The trial court ordered a reference, which was conducted with the cooperation of both parties. Later, over plaintiff 's objections, the reference report was adopted by the court to be used in determining the parties' respective interests in the partnership. The trial court also awarded defendant attorney's fees. Plaintiff appealed.

The court of appeal affirmed, except the award of attorney's fees, which it remanded for a rehearing (*182 Cal. App. 3d 553, 560)* . In its discussion of attorney's fee the court said that to enable the trial court to determine whether attorney fees should be awarded and in what amount, an attorney should present evidence, documentary and oral, of the services actually performed; and expert opinion regarding what would be a reasonable fee for such services (*182 Cal. App. 3d 553, 558-559)* . In many cases the trial court will be aware of the nature and extent of the attorney's services from its observation of the trial proceedings and the pretrial and discovery proceedings. However, in the absence of such crucial information as the number of hours worked, billing rates, the types of issues dealt with, and appearances made on the client's behalf, the trial court is placed in the position of simply guessing at the actual value of the attorney's services. That practice is unacceptable and cannot be the basis for an award of fees. Testimony of an attorney regarding the number of hours worked on a particular case is sufficient evidence to support an award of attorney's fees, even in the absence of detailed time records (*182 Cal. App. 3d 553, 559)* . The only evidence presented in support of the motion for attorney's fees was the request for a flat fee for "services rendered." No documents, such as billing or time records, were submitted, nor was an attempt made to explain, in more than general terms, the extent of services rendered to the client. That evidence was not sufficient to support the award (*182 Cal. App. 3d 553, 559-560)* .

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6-60 California Points & Authorities § 60.552

§ 60.552 Opposing Motion for Award of Attorney's Fees Based on Attorney's Fees as Loss in Indemnity Agreement

[1] FORM Opposing Motion for Award of Attorney's Fees Based on Attorney's Fees as Loss in Indemnity Agreement

[*For caption, see § 60.550, with which this form should be combined.*]

THE AMOUNT OF ATTORNEY'S FEES REQUESTED BY _____ [*specify party, e.g.,* PLAINTIFF] _____ [*name*] IS NOT RECOVERABLE UNDER *CIVIL CODE SECTION 1717* BECAUSE THE INCLUSION OF ATTORNEY'S FEES AS AN ITEM OF LOSS IN AN INDEMNITY CLAUSE DOES NOT PROVIDE FOR FEES.

Award of Attorney's Fees Not Available if Based on a Loss Subject to an Indemnity Agreement. A provision including attorney's fees as an item of loss recoverable in an indemnity clause is not a provision for attorney's fees in an action to enforce the contract and therefore is not made reciprocal and applicable to the entire contract by *Civ. Code § 1717* (*Southern Pacific Thrift & Loan Assn. v. Savings Assn. Mortgage Co. (1999) 70 Cal. App. 4th 634, 642-643, 82 Cal. Rptr. 2d 874*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.550*, in opposition to a motion for attorney's fees when those fees have been requested pursuant to a provision for fees as an item of loss included in an indemnity agreement.

See also *§ 60.550[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case.

[3] Discussion of Authorities

[a] Award of Attorney's Fees Not Available If Based on a Loss Subject to an Indemnity Agreement

In *Southern Pacific Thrift & Loan Assn. v. Savings Assn. Mortgage Co. (1999) 70 Cal. App. 4th 634, 82 Cal. Rptr. 2d 874* , a contract at issue in the litigation contained an indemnity agreement, which was not the source of recovery in the litigation. The indemnity agreement included attorney's fees as an item of loss that could be recovered in an indemnity action. The trial court denied the prevailing party's request for attorney's fees.

The court of appeal affirmed. It held the provision including attorney's fees as an item of loss in the indemnity agreement did not provide for attorney's fees in an action to enforce the contract. Therefore, attorney's fees were not made reciprocal and applicable to the entire contract by *Civ. Code § 1717* (*70 Cal. App. 4th 634, 642-643)* .

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6-60 California Points & Authorities §§ 60.553-60.599

[Reserved]

§§ 60.553[Reserved]

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C. Security for Costs
1. Motion for Security for Costs

6-60 California Points & Authorities § 60.600

§ 60.600 Supporting Motion for Security for Costs Alleging Plaintiff Is Vexatious Litigant--General Form

[1] FORM Supporting Motion for Security for Costs Alleging Plaintiff Is Vexatious Litigant--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF MOTION FOR
Plaintiff,	)	SECURITY
vs.	)	Date: _____
_____ [*name(s)*], Defendant(s).	)	Time: _____
	)	Location: _____
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THE COURT SHOULD ORDER PLAINTIFF TO FURNISH SECURITY BECAUSE PLAINTIFF IS A VEXATIOUS LITIGANT AND THERE IS NO REASONABLE PROBABILITY THAT PLAINTIFF WILL PREVAIL IN THE LAWSUIT.

A. Motion for Security. At any time until final judgment is entered, a defendant in any litigation pending in any California court may make a noticed motion to be heard before the court for an order requiring the plaintiff to furnish security based on a showing that the plaintiff is a vexatious litigant and that there is not a reasonable probability that plaintiff will prevail in the litigation against the moving defendant (*Code Civ. Proc. § 391.1*).

B. Order for Security. If after hearing evidence on a motion for security the court determines that the plaintiff is a

vexatious litigant and that there is no reasonable probability that plaintiff will prevail in the litigation against the moving defendant, the court shall order the plaintiff to furnish, for the benefit of the moving defendant, security of such nature in such amount and within such time as the court fixes (*see Code Civ. Proc. § 391.3*).

C. "Security" Defined. "Security" means an undertaking to assure payment to the party for whose benefit the undertaking is required to be furnished, of the party's reasonable expenses, including attorney's fees and not limited to taxable costs, incurred in or in connection with a litigation instituted, caused to be instituted, or maintained or caused to be maintained by a vexatious litigant (*Code Civ. Proc. § 391.1(c)*).

[*Insert other memoranda, as appropriate.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form may be used in support of a motion brought under *Code Civ. Proc. § 391.1* for an order requiring plaintiff to furnish security on the grounds that plaintiff is a vexatious litigant as defined by *Code Civ. Proc. § 391(b)*. It should be combined with other memoranda, as appropriate, *set out in § 60.601* et seq.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case, showing that plaintiff is a vexatious litigant in *Code Civ. Proc. § 391(b).*

Evidence cognizable by the court in such a proceeding should be submitted with the memorandum to support its factual statements. A request for judicial notice will support facts subject to such notice [*Evid. Code § 450 et seq.*]. Otherwise supporting affidavits or declarations under penalty of perjury should be submitted [*see Code Civ. Proc. §§ 2009* (affidavits), 2015.5 (declarations)], averring to such facts within the personal knowledge of the affiant or declarant as may be necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

The court may also consider oral evidence of witnesses at the hearing on a motion to determine whether a plaintiff comes within the statutory definition of a vexatious litigant [*see Code Civ. Proc. § 391.1*; *Taliaferro v. Hoogs (1965) 237 Cal. App. 2d 73, 75, 46 Cal. Rptr. 643]* .

[c] Related Pleading and Practice Chapters

For general forms of a notice of motion for an order requiring a plaintiff to furnish security, a declaration under penalty

of perjury in support of motion for an order requiring plaintiff to furnish security, an order requiring plaintiff to furnish security, an undertaking by individual sureties and a notice of filing security, see California Forms of Pleading and Practice, Ch. 174, *Costs and Attorney's Fees* (Matthew Bender).

[d] Related Memoranda

This form may be combined with other memoranda related to motions for security, as appropriate, *set out in § 60.620* et seq. (when plaintiff is nonresident individual or alien corporation).

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

For opposing memoranda, see *§ 60.630* et seq.

[3] Discussion of Authorities

[a] Motion for Security

Code Civ. Proc. § 391.1 provides that at any time until final judgment is entered, a defendant in any litigation pending in any California court may make a noticed motion to be heard before the court for an order requiring the plaintiff to furnish security based on a showing that the plaintiff is a vexatious litigant and that there is not a reasonable probability that plaintiff will prevail in the litigation against the moving defendant.

[b] Order for Security

Code Civ. Proc. § 391.3 provides that if after hearing evidence on a motion for security the court determines that the plaintiff is a vexatious litigant and that there is no reasonable probability that plaintiff will prevail in the litigation against the moving defendant, the court shall order the plaintiff to furnish, for the benefit of the moving defendant, security of such nature in such amount and within such time as the court fixes.

[c] "Security" Defined

Code Civ. Proc. § 391.1(c) defines security, for purposes of the vexatious litigant, as an undertaking to assure payment to the party for whose benefit the undertaking is required to be furnished, of the party's reasonable expenses, including attorney's fees and not limited to taxable costs, incurred in or in connection with a litigation instituted, caused to be instituted, or maintained or caused to be maintained by a vexatious litigant.

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6-60 California Points & Authorities § 60.601

§ 60.601 Supporting Motion for Security for Costs Alleging Plaintiff Is Vexatious Litigant--Vexatious Litigant Who Has Filed Five Suits in Propria Persona

[1] FORM Supporting Motion for Security for Costs Alleging Plaintiff Is Vexatious Litigant--Vexatious Litigant Who Has Filed Five Suits in Propria Persona

[*For caption, see § 60.600, with which this form should be combined.*]

THE COURT SHOULD ORDER PLAINTIFF TO FURNISH SECURITY BECAUSE PLAINTIFF IS A VEXATIOUS LITIGANT WHO HAS COMMENCED AT LEAST FIVE LAW SUITS IN PROPRIA PERSONA IN THE PAST SEVEN YEARS.

Vexatious Litigant Under *Code Civ. Proc. § 391(b)(1)*. Any person who in the immediately preceding seven-year period has commenced, prosecuted or maintained in propria persona at least five law suits other than in a small claims court that have been finally adversely determined or unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing is a vexatious litigant (*Code Civ. Proc. § 391(b)(1)*; *see also Stolz v. Bank of America (1993) 15 Cal. App. 4th 217, 19 Cal. Rptr. 2d 19*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.600*, in support of a motion brought under Code *Civ. Proc. § 391.1* for an order requiring plaintiff to furnish security as a vexatious litigant under *Code Civ. Proc. § 391(b)*, in that plaintiff commenced at least five law suits in propria persona in the past seven years.

See also *§ 60.600[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.600[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Vexatious Litigant Under Code Civ. Proc. § 391(b)(1)

Code Civ. Proc. § 391(b)(1) provides that any person who in the immediately preceding seven-year period has commenced, prosecuted or maintained in propria persona at least five law suits other than in a small claims court that have been finally adversely determined or unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing is a vexatious litigant.

In ***Stolz v. Bank of America*** *(1993) 15 Cal. App. 4th 217, 19 Cal. Rptr. 2d 19* , the trial court dismissed the plaintiff 's action against a bank for failing to furnish security as required by vexatious litigation statutes. In affirming the judgment, the appellate court interpreted the limitations period under *Code Civ. Proc. § 391(b)(1)*, which includes in the definition of vexatious litigant a person who "in the immediately preceding seven-year period has commenced, prosecuted or maintained in propria persona at least five law suits" meeting specified criteria. The appellate court determined that the seven-year period is measured retroactively from the date a party files a motion for security under *Code Civ. Proc. § 391*. In addition, litigation commenced outside the seven-year period counts against a litigant if the litigation is prosecuted or maintained during that period (*15 Cal. App. 4th 217, 224-225)* .

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6-60 California Points & Authorities § 60.602

§ 60.602 Supporting Motion for Security for Costs Alleging Plaintiff Is Vexatious Litigant--Vexatious Litigant Who Repeatedly Relitigates in Propria Persona

[1] FORM Supporting Motion for Security for Costs Alleging Plaintiff Is Vexatious Litigant--Vexatious Litigant Who Repeatedly Relitigates in Propria Persona

[*For caption, see § 60.600, with which this form should be combined.*]

THE COURT SHOULD ORDER PLAINTIFF TO FURNISH SECURITY BECAUSE PLAINTIFF IS A VEXATIOUS LITIGANT WHO REPEATEDLY RELITIGATES IN PROPRIA PERSONA.

Vexatious Litigant Under *Code Civ. Proc. § 391(b)(2)*. A person against whom a lawsuit has been finally determined who repeatedly relitigates or attempts to relitigate in propria persona either the validity of such determination against the same defendant or defendants as to whom the litigation was finally determined or the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by such final determination against the same defendant or defendants as to whom the litigation was finally determined is a vexatious litigant (*Code Civ. Proc. § 391(b)(2)*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.600*, in support of a motion brought under *Code Civ. Proc. § 391.1* for an order requiring plaintiff to furnish security as a vexatious litigant under *Code Civ. Proc. § 391(b)*, in that plaintiff repeatedly litigates in propria persona.

See also *§ 60.600[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.600[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Vexatious Litigant Under Code Civ. Proc. § 391(b)(2)

Code Civ. Proc. § 391(b)(2) provides that a person against whom a lawsuit has been finally determined who repeatedly relitigates or attempts to relitigate in propria persona either the validity of such determination against the same defendant or defendants as to whom the litigation was finally determined or the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by such final determination against the same defendant or defendants as to whom the litigation was finally determined is a vexatious litigant.

[4] Additional Authorities

[a] Vexatious Litigant Under Code Civ. Proc. § 391(b)(2)

In *First Western Development Corp. v. Superior Court (1989) 212 Cal. App. 3d 860, 261 Cal. Rptr. 116* , the trial court denied as "premature" a motion for an order to have plaintiff furnish security as a vexatious litigant. The defendants filed a petition for writ of mandate in the court of appeal, and the court issued the writ, directing plaintiff to post a security bond. The court of appeal determined that plaintiff was a vexatious litigant pursuant to *Code Civ. Proc. § 391(b)(2),* because of plaintiff 's repeated attempts to relitigate issues that had been finally determined, his filing of a multiplicity of new actions based on the same facts and issues, and his filing of writ petitions and appeals from practically every order of the trial court (*212 Cal. App. 3d 860, 869)* .

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6-60 California Points & Authorities § 60.603

§ 60.603 Supporting Motion for Security for Costs Alleging Plaintiff Is Vexatious Litigant--Vexatious Litigant Who Repeatedly Files Unmeritorious Moving Papers, Discovery, or Other Tactics in Propria Persona

[1] FORM Supporting Motion for Security for Costs Alleging Plaintiff Is Vexatious Litigant--Vexatious Litigant Who Repeatedly Files Unmeritorious Moving Papers, Discovery, or Other Tactics in Propria Persona

[*For caption, see § 60.600, with which this form should be combined.*]

THE COURT SHOULD ORDER PLAINTIFF TO FURNISH SECURITY BECAUSE PLAINTIFF IS A VEXATIOUS LITIGANT WHO REPEATEDLY _____ [FILES UNMERITORIOUS PAPERS *and/or* CONDUCTS UNNECESSARY DISCOVERY *and/or* ENGAGES IN FRIVOLOUS TACTICS TO CAUSE UNNECESSARY DELAY] IN PROPRIA PERSONA.

Vexatious Litigant Under *Code Civ. Proc. § 391(b)(3)*. A person who in any litigation while acting in propria persona repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay is a vexatious litigant (*Code Civ. Proc. § 391(b)(3)*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.600*, in support of a motion brought under *Code Civ. Proc. § 391.1* for an order requiring plaintiff to furnish security as a vexatious litigant under *Code Civ. Proc. § 391(b)*, in that plaintiff repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay.

See also *§ 60.600[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.600[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Vexatious Litigant Under Code Civ. Proc. § 391(b)(3)

Code Civ. Proc. § 391(b)(3) provides that a person who in any litigation while acting in propria persona repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay is a vexatious litigant.

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6-60 California Points & Authorities § 60.604

§ 60.604 Supporting Motion for Security for Costs Alleging Plaintiff Is Vexatious Litigant--Vexatious Litigant Who Was Previously Declared to Be a Vexatious Litigant

[1] FORM Supporting Motion for Security for Costs Alleging Plaintiff Is Vexatious Litigant--Vexatious Litigant Who Was Previously Declared to Be a Vexatious Litigant

[*For caption, see § 60.600, with which this form should be combined.*]

THE COURT SHOULD ORDER PLAINTIFF TO FURNISH SECURITY BECAUSE PLAINTIFF IS A VEXATIOUS LITIGANT WHO WAS PREVIOUSLY DECLARED A VEXATIOUS LITIGANT.

Vexatious Litigant Under *Code Civ. Proc. § 391(b)(4)*. A person who has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding based on the same or substantially similar facts, transaction, or occurrence is a vexatious litigant (*Code Civ. Proc. § 391(b)(4)*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.600*, in support of a motion brought under *Code Civ. Proc. § 391.1* for an order requiring plaintiff to furnish security as a vexatious litigant under *Code Civ. Proc. § 391(b)*, in that plaintiff has been previously declared to be a vexatious litigant.

See also *§ 60.600[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.600[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Vexatious Litigant Under Code Civ. Proc. § 391(b)(4)

Code Civ. Proc. § 391(b)(4) provides that a person who has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding based on the same or substantially similar facts, transaction, or occurrence is a vexatious litigant.

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6-60 California Points & Authorities § 60.605

§ 60.605 Supporting Motion for Security for Costs Alleging Plaintiff Is Vexatious Litigant--Application of Vexatious Litigant Statutes When Plaintiff Is Currently Represented by Counsel

[1] FORM Supporting Motion for Security for Costs Alleging Plaintiff Is Vexatious Litigant--Application of Vexatious Litigant Statutes When Plaintiff Is Currently Represented by Counsel

[*For caption, see § 60.600, with which this form should be combined.*]

THE COURT SHOULD ORDER PLAINTIFF TO FURNISH SECURITY BECAUSE PLAINTIFF IS A PAST VEXATIOUS LITIGANT WHO IS NOW REPRESENTED BY COUNSEL.

Application of Vexatious Litigant Statutes When Plaintiff Is Currently Represented by Counsel. *Code of Civil Procedure Section 391(b)(1)* and *(b)(4)* apply to persons currently represented by counsel whose conduct was vexatious when they represented themselves in the past (*Camerado Ins. Agency, Inc. v. Superior Court (1993) 12 Cal. App. 4th 838, 842, 16 Cal. Rptr. 2d 42*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.600*, in support of a motion brought under *Code Civ. Proc. § 391.1* for an order requiring plaintiff to furnish security as a vexatious litigant under *Code Civ. Proc. § 391(b)*, in that plaintiff has been previously declared to be a vexatious litigant and is now represented by counsel.

See also *§ 60.600[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.600[2][b]*

for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Application of Vexatious Litigant Statutes When Plaintiff Is Currently Represented by Counsel

In ***Camerado Ins. Agency, Inc. v. Superior Court*** *(1993) 12 Cal. App. 4th 838, 16 Cal. Rptr. 2d 42* , plaintiff, while represented by counsel, sued defendant, alleging causes of action sounding in contract and tort. The defendant moved for an order requiring plaintiff to furnish security, asserting that the plaintiff had, among other things, commenced at least five litigations in propria persona during the past seven years, and that plaintiff met the criteria for a vexatious litigant under *Code Civ. Proc. § 391(b)(1)*. The trial court, however, concluded that when read as a whole, *Code Civ. Proc. § 391* applies only to litigants acting in propria persona in the civil action in which the vexatious litigant motion is brought. Accordingly, because plaintiff had at all times been represented by counsel in the underlying litigation, the court denied defendant's motion for security without considering evidence on the question whether plaintiff met the other statutory criteria of a vexatious litigant. The defendant sought a writ of mandate from the court of appeal directing the superior court to set aside its order denying defendant's motion.

The court of appeal issued a peremptory writ of mandate directing the superior court to vacate its order denying defendant's motion for security and directing the court to consider the merits of the motion. The court examined the four subdivisions of *Code Civ. Proc. § 391(b)* setting forth defining acts that transform a plaintiff into a vexatious litigant. The court noted that although *Code Civ. Proc. § 391(b)(2)* and *(b)(3)* refer to a person acting in propria persona in the very proceeding in which a defendant attempts to obtain an order requiring the plaintiff to furnish security, *Code Civ. Proc. § 391(b)(1)* and *(b)(4)* do not. The court concluded that the Legislature intended the vexatious litigant statutes to apply, at least as to the acts described in subsections (b)(1) and (b)(4), to persons currently represented by counsel whose conduct was vexatious when they represented themselves in the past (*12 Cal. App. 4th 838, 842)* .

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6-60 California Points & Authorities § 60.606

§ 60.606 Supporting Motion for Security for Costs Alleging Plaintiff Is Vexatious Litigant--Judicial Notice of Prior Proceedings

[1] FORM Supporting Motion for Security for Costs Alleging Plaintiff Is Vexatious Litigant--Judicial Notice of Prior Proceedings

[*For caption, see § 60.600, with which this form should be combined.*]

THE COURT SHOULD ORDER PLAINTIFF TO FURNISH SECURITY BECAUSE PLAINTIFF IS A PAST VEXATIOUS LITIGANT AS EVIDENCED BY PRIOR PROCEEDINGS OF WHICH THE COURT MAY TAKE JUDICIAL NOTICE.

Judicial Notice of Prior Proceedings. At a hearing on a motion for security based on the ground that plaintiff is a vexatious litigant, the trial court can take judicial notice of prior proceedings had before the trial court and before the appellate courts of this state (*Taliaferro v. Hoogs (1965) 236 Cal. App. 2d 521, 529 n.5, 46 Cal. Rptr. 147*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.600*, in support of a motion brought under *Code Civ. Proc. § 391.1* for an order requiring plaintiff to furnish security as a vexatious litigant under *Code Civ. Proc. § 391(b)*, in that plaintiff has been previously declared to be a vexatious litigant and that the court should take judicial notice of those proceedings.

See also *§ 60.600[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.600[2][b]*

for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Judicial Notice of Prior Proceedings

In ***Taliaferro v. Hoogs*** *(1965) 236 Cal. App. 2d 521, 46 Cal. Rptr. 147* , cross complainant appealed from a judgment dismissing his action against cross defendant Hoogs. The action was dismissed for cross complainant's failure to provide security pursuant to the vexatious litigant statutes [*Code Civ. Proc. § 391 et seq.*]. Cross complainant contended on appeal that these sections were unconstitutional and that even if they were constitutional, there was no evidence that he was a vexatious litigant as defined by the statute. The court of appeal affirmed the judgment, as it found that the statute is constitutional and that sufficient evidence was produced at the hearing on the motion. The court stated that cross defendant's lengthy and detailed affidavit related more than enough of the required litigations to bring appellant within the definition of a vexatious litigant under *Code Civ. Proc. § 391(b)(1), (2).* The court stated that cross complainant had failed to present any counter affidavits or to include the transcript of the proceedings as part of the record on appeal. The court noted that the trial court could also take judicial notice of the many prior proceedings had before it and before the appellate courts of this state.

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[Reserved]

§§ 60.607[Reserved]

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6-60 California Points & Authorities § 60.620

§ 60.620 Supporting Motion for Security for Costs Alleging Plaintiff Is Nonresident Individual or Foreign Corporation--General Form

[1] FORM Supporting Motion for Security for Costs Alleging Plaintiff Is Nonresident Individual or Foreign Corporation--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF DEFEND-
Plaintiff,	)	ANT'S MOTION FOR SECURITY
vs.	)	[*Code Civ. Proc. § 1030(a), (b)*]
_____ [*name*], Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

PLAINTIFF SHOULD BE REQUIRED TO POST SECURITY FOR COSTS AND ATTORNEY'S FEES IN THIS _____ [ACTION *or* SPECIAL PROCEEDING] BECAUSE PLAINTIFF IS A _____ [NONRESIDENT INDIVIDUAL *or* FOREIGN CORPORATION] AND THERE IS A REASONABLE POSSIBILITY THAT DEFENDANT WILL OBTAIN JUDGMENT.

A. Plaintiff Is Nonresident Individual or Foreign Corporation and Defendant Will Likely Prevail in Action. If the plaintiff in an action or special proceeding _____ [resides out of state *or* is a foreign corporation],

the defendant may at any time apply by noticed motion for an order requiring the plaintiff to file an undertaking to secure an award of costs and attorney's fees which may be awarded in the action or proceeding, on the grounds that the plaintiff _____ [resides out of state *or* is a foreign corporation] and that there is a reasonable possibility that defendant will obtain judgment in the action or proceeding (*Code Civ. Proc. § 1030(a), (b)*).

B. *Code Civ. Proc. § 1030* Is Constitutional as Applied to Nonresident Individuals and Foreign Corporations. *Section 1030 of the Code of Civil Procedure* meets constitutional standards contained in *Amendment V* and *XIV of the United States Constitution* and Sections 7 and 15 of Article I of the California Constitution for due process protection to nonresident individuals and foreign corporations, and does not unfairly discriminate against them (*Shannon v. Sims Service Center, Inc. (1985) 164 Cal. App. 3d 907, 913-914, 210 Cal. Rptr. 861*).

[*Insert other memoranda, as appropriate.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form may be used in support of a motion by defendant to require plaintiff who is a nonresident individual or foreign corporation to post security for costs and attorney's fees in an action or special proceeding in which there is a reasonable possibility that defendant will obtain judgment. The motion is based on *Code Civ. Proc. § 1030(a), (b)*. It may be combined with additional memoranda, as appropriate, *set out in § 60.621* et seq.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case.

Counsel also must attach an affidavit (or declaration; *see Code Civ. Proc. § 2015.5*) to the motion for security supporting the grounds for the motion and setting forth the nature and amount of the costs and attorney's fees defendant has incurred and expects to incur by the conclusion of the action or special proceeding, along with a memorandum [*Code Civ. Proc. § 1030(b)*]. See also *§ 60.600[2][b]*.

[c] Related Pleading and Practice Chapters

For a form of a notice of motion pursuant to Code Civ. Proc. § 1030(a), (b), supporting declaration, and an order requiring a plaintiff who is a nonresident individual or foreign corporation to post security, see California Forms of Pleading and Practice, Ch. 174, *Costs and Attorney's Fees* (Matthew Bender).

[d] Related Memoranda

If appropriate, this form may be combined with memoranda alleging that plaintiff is also a vexatious litigant, *set out in §*

60.600 et seq.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

For opposing memoranda, see *§ 60.630* et seq.

[3] Discussion of Authorities

[a] Plaintiff Is Nonresident Individual or Foreign Corporation and Defendant Will Likely Prevail in Action

Code Civ. Proc. § 1030(a)* and *(b) provide that if the plaintiff in an action or special proceeding resides out of state or is a foreign corporation], the defendant may at any time apply by noticed motion for an order requiring the plaintiff to file an undertaking to secure an award of costs and attorney's fees which may be awarded in the action or proceeding, on the grounds that the plaintiff resides out of state or is a foreign corporation and that there is a reasonable possibility that defendant will obtain judgment in the action or proceeding.

[b] Code Civ. Proc. § 1030 Is Constitutional as Applied to Nonresident Individuals and Foreign Corporations

Shannon v. Sims Service Center, Inc. *(1985) 164 Cal. App. 3d 907, 210 Cal. Rptr. 861* , was an action for personal injuries brought by an Oklahoma resident. Plaintiff requested a trial de novo following mandatory arbitration in which the arbitrator found for defendant. After the trial date was set, defendant moved for and was granted an order that plaintiff post security for costs and attorney's fees under *Code Civ. Proc. § 1030*. Plaintiff was ordered to post a $1,000 undertaking by the date of trial, which was 13 days after the order was made. On the date of trial defendant moved to dismiss the action on the ground that plaintiff had failed to post the undertaking. The trial court granted the motion and plaintiff appealed, contending, in part, that *Code Civ. Proc. § 1030* is unconstitutional.

The court of appeal affirmed the dismissal. It held that *Code Civ. Proc. § 1030* provides constitutional due process protection since it does not unfairly discriminate against nonresidents. Moreover, it was not unconstitutionally applied here. The 1980 amendment to the statute corrected prior constitutional infirmities. The statutory hearing process is now the same as for pretrial motions and meets the minimum standards for due process enunciated in *Beaudreau v. Superior Court (1975) 14 Cal. 3d 448, 121 Cal. Rptr. 585, 535 P.2d 713* , as stated in *Gonzales v. Fox (1977) 68 Cal. App. 3d Supp. 16, 137 Cal. Rptr. 312* . *Gonzales*, which held the former version of *Code Civ. Proc. § 1030* unconstitutional, stated that *Beaudreau* requires a meaningful pretrial hearing that allows an inquiry into the validity of the claim, the reasonableness of the amount of the bond to be posted (and, inferentially, the reasonableness of not requiring any bond), and the ability of a person to furnish a bond. Here, evidence as to the validity of the claim was presented by both parties, the undertaking ordered was substantially less than costs prospectively awardable to defendant, and defendant showed, by declaration, a reasonable possibility of prevailing on the merits by proper reference to the results of the earlier arbitration hearing. It was plaintiff 's burden to prove inability to furnish an undertaking and he had not done so (*164 Cal. App. 3d 907, 912-914)* .

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6-60 California Points & Authorities § 60.621

§ 60.621 Supporting Motion for Security for Costs Alleging Plaintiff Is Nonresident Individual or Foreign Corporation--Uncontroverted Declaration of Nonresidency as Sufficient Evidence

[1] FORM Supporting Motion for Security for Costs Alleging Plaintiff Is Nonresident Individual or Foreign Corporation--Uncontroverted Declaration of Nonresidency as Sufficient Evidence

[*For caption, see § 60.620, with which this form should be combined.*]

THE COURT MAY FIND THAT THE PLAINTIFF IS A NONRESIDENT, FOR PURPOSES OF ORDERING PLAINTIFF TO POST SECURITY, BASED ON THE DEFENDANT'S DECLARATION.

Uncontroverted Declaration of Nonresidency as Sufficient Evidence. A defendant's declaration filed in support of a motion made pursuant to Section 1030(a) and (b) of the Code of Civil Procedure requesting that a nonresident plaintiff be ordered to post security, which alleges that the plaintiff is a nonresident and is based on the plaintiff 's uncontroverted sworn answers to interrogatories admitting nonresidency, is sufficient evidence to sustain a trial court's finding that the plaintiff is a nonresident (*Shannon v. Sims Service Center, Inc. (1985) 164 Cal. App. 3d 907, 915-916, 210 Cal. Rptr. 861*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.620*, in support of a motion by defendant to require plaintiff who is a nonresident individual or foreign corporation to post security for costs and attorney's fees in an action or special proceeding in which there is a reasonable possibility that defendant will obtain judgment (*Code Civ. Proc. § 1030(a), (b)*), to state that a declaration may constitute evidence of nonresidency.

Counsel must attach an affidavit (or declaration; *see Code Civ. Proc. § 2015.5*) to the motion for security supporting the grounds for the motion and setting forth the nature and amount of the costs and attorney's fees defendant has incurred

and expects to incur by the conclusion of the action or special proceeding, along with a memorandum [*Code Civ. Proc. § 1030(b)*].

See also *§ 60.620[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.620[2][b]* for discussion of evidentiary support.

[3] Discussion of Authorities

[a] Uncontroverted Declaration of Nonresidency as Sufficient Evidence

The facts and procedural background of ***Shannon v. Sims Service Center, Inc.*** *(1985) 164 Cal. App. 3d 907, 210 Cal. Rptr. 861* , are discussed in *§ 60.620[3][b]*. In *Shannon*, plaintiff contended on appeal, in part, that insufficient evidence supported the finding of his nonresidency. However, the court of appeal held that sufficient evidence supported the finding of nonresidency since plaintiff admitted his Oklahoma residency in sworn answers to interrogatories, which were uncontroverted by plaintiff, and an appellate court will uphold the trial court's findings if any substantial evidence supports them (*164 Cal. App. 3d 907, 911)* .

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6-60 California Points & Authorities §§ 60.622-60.629

[Reserved]

§§ 60.622[Reserved]

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6-60 California Points & Authorities § 60.630

§ 60.630 Opposing Motion for Security for Costs Alleging Plaintiff Is Vexatious Litigant--General Form

[1] FORM Opposing Motion for Security for Costs Alleging Plaintiff Is Vexatious Litigant--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN OPPOSITION TO MOTION
Plaintiff,	)	FOR SECURITY
vs.	)	Date: _____
_____ [*name(s)*], Defendant(s).	)	Time: _____
	)	Location: _____
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THE COURT MAY NOT PROPERLY ORDER PLAINTIFF TO FURNISH SECURITY BECAUSE DEFENDANT HAS NOT MADE A SUFFICIENT SHOWING THAT _____ [PLAINTIFF IS A VEXATIOUS LITIGANT WITHIN THE MEANING OF SECTION 391(b) OF THE CODE OF CIVIL PROCEDURE *and/or* THERE IS NO REASONABLE PROBABILITY THAT PLAINTIFF WILL PREVAIL IN THIS LITIGATION].

A. Burden on Motion. The burden of establishing the statutory conditions on a motion for security is on the moving party (*Muller v. Tanner (1969) 2 Cal. App. 3d 445, 464, 82 Cal. Rptr. 738*).

B. Showing Required. A showing that plaintiff is a vexatious litigant and that there is no reasonable probability that plaintiff will prevail against the moving defendant is required before the court may order security on a motion under

Section 391.1 of the Code of Civil Procedure (*see Code Civ. Proc. §§ 391.1, 391.3*; *Roston v. Edwards (1982) 127 Cal. App. 3d 842, 846, 179 Cal. Rptr. 830*).

[*Insert other memoranda, as appropriate.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion by defendant under *Code Civ. Proc. § 391.1* to require plaintiff to furnish security for costs on the ground that plaintiff is a vexatious litigant within the meaning of *Code Civ. Proc. § 391(b)*. This form is for use when defendant has not made a sufficient showing that plaintiff is a vexatious litigant within the meaning of the statute or when defendant has failed to show adequately the lack of a reasonable probability that plaintiff will prevail in the litigation [*see Code Civ. Proc. §§ 391.1, 391.3*]. It should be combined with additional memoranda, as appropriate, *set out in § 60.631* et seq.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also the Comment to § 60.600[2][b] regarding evidentiary support.

[c] Related Pleading and Practice Chapters

For legal background and forms motion and declarations relating to motions regarding vexatious litigants under Code Civ. Proc. § 391.1 et seq., see California Forms of Pleading and Practice, Ch. 174, *Costs and Attorney's Fees* (Matthew Bender).

[d] Related Memoranda

This form may be combined with other memoranda that relate to opposing a motion for security, as appropriate, *set out in § 60.640* et seq.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

For opposing memoranda, see *§ 60.600* et seq.

[3] Discussion of Authorities

[a] Burden on Motion

In ***Muller v. Tanner*** *(1969) 2 Cal. App. 3d 445, 82 Cal. Rptr. 738* , plaintiff appealed from a judgment of dismissal signed, filed, and entered after his failure to post security as required by an order which determined he was a vexatious litigant and ordered him to post $5,000 in cash or bond within 10 days of the order. The trial court found the vexatious litigant statutes [*Code Civ. Proc. § 391 et seq.*] to be constitutional, but held that there had been irregularities which prevented plaintiff from having an adequate hearing on the issues raised by defendant's motion for security. The court of appeal reversed the judgment because defendant's showing was inadequate to support the order for security on which the judgment was based.

Plaintiff had filed a request for entry of default in his action in propria persona for legal malpractice on the same day as defendant filed a notice of motion to declare plaintiff a vexatious litigant and for security under the provisions of *Code Civ. Proc. § 391 et seq.* Defendant then filed a notice of a motion to set aside the default to be heard on the same day as his motion for security. Plaintiff moved to continue the motions to another day as he was required to appear before the court in another county on other matters on the day on which the motions were set to be heard. The court denied plaintiff 's motion for a continuance because plaintiff refused to accept the court's condition for granting the continuance. Plaintiff filed a motion to reconsider and vacate the order denying his motion for a continuance. He also filed motions to set aside the minute orders, made in his absence, granting defendant's motions to set aside the default and for security. Plaintiff then made a motion, apparently under *Code Civ. Proc. § 170.6*, to disqualify the judge who had heard all of the matters. A second judge ruled that the previous orders for security and setting aside the entry of default were valid. Several months later, the disqualified judge signed a judgment of dismissal under *Code Civ. Proc. § 391.4* for failure to furnish security.

The court of appeal stated that the record failed to sustain the order requiring security and that a further hearing on the merits was required. The court assumed that the record supported a finding that plaintiff was a vexatious litigant under *Code Civ. Proc. § 391(b)(1)*. However, the second prerequisite for granting the motion is that there is no reasonable probability that the plaintiff would prevail in the litigation against the defendant. The only evidence on this point was the complaint itself and the conclusion expressed in the statutory language in defendant's affidavit. Under the general rules applying to proceedings on motions for security as set out in *Burt v. Irvine Co. (1965) 237 Cal. App. 2d 828, 47 Cal. Rptr. 392* , the burden of establishing the statutory condition is on the party moving for security. The court reversed the judgment of dismissal since the affidavit was conclusory, and, therefore, there was no evidence to sustain one of the two bases on which the order for security depended.

[b] Showing Required

In ***Roston v. Edwards*** *(1982) 127 Cal. App. 3d 842, 179 Cal. Rptr. 830* , plaintiffs brought two separate civil actions, and defendants in both actions moved for orders requiring plaintiffs to furnish security as vexatious litigants under *Code Civ. Proc. § 391 et seq.* Both motions were granted, as were subsequent motions to dismiss when plaintiffs failed to post the required securities. On appeal, plaintiffs contended that the evidence considered by the two trial court judges was insufficient to show that plaintiffs were vexatious litigants.

In reversing the trial court's decision, the court of appeal noted that under ***Code Civ. Proc. § 391.1,*** a motion for an order requiring a plaintiff to furnish security must be based on a showing that plaintiff is a vexatious litigant as defined by statute and that there is no reasonable probability that plaintiff will prevail in the litigation (*127 Cal. App. 3d 842, 846)* . The court concluded that the evidence considered by the trial court in both actions was insufficient to show that plaintiffs were vexatious litigants as defined in *Code Civ. Proc. § 391(b)* (*127 Cal. App. 3d 842, 848)* .

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6-60 California Points & Authorities § 60.631

§ 60.631 Opposing Motion for Security for Costs Alleging Plaintiff Is Vexatious Litigant--Conclusory Affidavit Insufficient

[1] FORM Opposing Motion for Security for Costs Alleging Plaintiff Is Vexatious Litigant--Conclusory Affidavit Insufficient

[*For caption, see § 60.630, with which this form should be combined.*]

THE COURT MAY NOT PROPERLY ORDER PLAINTIFF TO FURNISH SECURITY BECAUSE DEFENDANT HAS NOT MADE A SUFFICIENT SHOWING THAT _____ [PLAINTIFF IS A VEXATIOUS LITIGANT WITHIN THE MEANING OF SECTION 391(b) OF THE CODE OF CIVIL PROCEDURE *and/or* THERE IS NO REASONABLE PROBABILITY THAT PLAINTIFF WILL PREVAIL IN THIS LITIGATION], IN THAT DEFENDANT'S AFFIDAVIT CONSISTS SOLELY OF A CONCLUSORY STATEMENT.

Conclusory Affidavit Insufficient. A conclusory statement in defendant's affidavit that there is no reasonable probability that the plaintiff will prevail in the litigation is not a sufficient basis for granting a motion requiring security under *Section 391.3 of the Code of Civil Procedure* (*Muller v. Tanner (1969) 2 Cal. App. 3d 445, 464, 82 Cal. Rptr. 738*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.630*, in opposition to a motion by defendant under *Code Civ. Proc. § 391.1* to require plaintiff to furnish security for costs on the ground that plaintiff is a vexatious litigant within the meaning of *Code Civ. Proc. § 391(b)*, when the defendant's declaration consists solely of a conclusory statement.

See also *§ 60.630[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.600[2][b]* regarding evidentiary support.

[3] Discussion of Authorities

[a] Conclusory Affidavit Insufficient

The facts and procedural background of ***Muller v. Tanner*** *(1969) 2 Cal. App. 3d 445, 82 Cal. Rptr. 738* , are discussed in *§ 60.630[3][a]*. In that case, the court of appeal stated that the record failed to sustain the order requiring security and that a further hearing on the merits was required. The court assumed that the record supported a finding that plaintiff was a vexatious litigant under *Code Civ. Proc. § 391(b)(1)*. However, the second prerequisite for granting the motion is that there is no reasonable probability that the plaintiff would prevail in the litigation against the defendant. The only evidence on this point was the complaint itself and the conclusion expressed in the statutory language in defendant's affidavit. Under the general rules applying to proceedings on motions for security as set out in *Burt v. Irvine Co. (1965) 237 Cal. App. 2d 828, 47 Cal. Rptr. 392* , the burden of establishing the statutory condition is on the party moving for security. The court reversed the judgment of dismissal since the affidavit was conclusory, and therefore there was no evidence to sustain one of the two bases on which the order for security depended (*2 Cal. App. 3d 445, 464-465)* .

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6-60 California Points & Authorities § 60.632

§ 60.632 Opposing Motion for Security for Costs Alleging Plaintiff Is Vexatious Litigant--Previous Litigation Not Finally Determined

[1] FORM Opposing Motion for Security for Costs Alleging Plaintiff Is Vexatious Litigant--Previous Litigation Not Finally Determined

[*For caption, see § 60.630, with which this form should be combined.*]

THE COURT MAY NOT PROPERLY ORDER PLAINTIFF TO FURNISH SECURITY BECAUSE DEFENDANT HAS NOT MADE A SUFFICIENT SHOWING THAT PLAINTIFF IS A VEXATIOUS LITIGANT, IN THAT PLAINTIFF'S PREVIOUS LAWSUITS HAVE NOT BEEN FINALLY DETERMINED.

Previous Litigation Not Finally Determined. A plaintiff is not a vexatious litigant as defined in *Section 391(b) of the Code of Civil Procedure* when plaintiff 's previous lawsuits, which form the bases for defendant's motion for security, have not been finally determined (*Finn v. Drag (1982) 135 Cal. App. 3d 360, 368-369, 185 Cal. Rptr. 357*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.630*, in opposition to a motion by defendant under *Code Civ. Proc. § 391.1* to require plaintiff to furnish security for costs on the ground that plaintiff is a vexatious litigant within the meaning of *Code Civ. Proc. § 391(b)*, when the plaintiff is not a vexatious litigant because the prior lawsuits have not been finally determined.

See also *§ 60.630[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.600[2][b]* regarding evidentiary support.

[3] Discussion of Authorities

[a] Previous Litigation Not Finally Determined

In ***Finn v. Drag*** *(1982) 135 Cal. App. 3d 360, 185 Cal. Rptr. 357* , plaintiff brought an action in propria persona seeking damages and injunctive relief. Defendant moved for an order requiring plaintiff to furnish security as a vexatious litigant pursuant to *Code Civ. Proc. § 391*. Defendant based her motion on plaintiff 's filing of her action, and her motions to disqualify the trial judge pursuant to *Code Civ. Proc. § 170.6*, to vacate the order sustaining defendant's demurrer, and to set aside the judgment of dismissal on grounds of extrinsic fraud pursuant to *Code Civ. Proc. § 473*, as well as her petition for a writ of prohibition and mandate in the court of appeal seeking to set aside the trial court's order sustaining the demurrer. The trial court, in addition to denying plaintiff 's motion to vacate, granted defendant's motion for security. Plaintiff appealed, contending among other things, that the evidence was insufficient to show that she was a vexatious litigant.

The court of appeal, although dismissing plaintiff 's appeal as untimely, nonetheless reversed that portion of the trial court's order requiring plaintiff to post security as a vexatious litigant pursuant to *Code Civ. Proc. § 391*. The court noted that a vexatious litigant was any person who, in the immediately preceding seven-year period, had commenced, prosecuted, or maintained in propria persona at least five litigations, other than in a small claims court, that had been finally determined, or who, after a litigation had been finally determined against him or her, repeatedly relitigated or attempted to relitigate in propria persona against the same defendant as to whom the litigation was finally determined [*Code Civ. Proc. § 391(b)*]. The term "finally determined," the court observed, was not defined in the statute, nor had it been previously construed in reported decisions. The court of appeal stated that by applying an equally broad definition to "finally determined," the trial court could have concluded that the litigation in question was final against plaintiff on expiration of the 30-day period for the amendment of her complaint following the trial court's granting of defendant's demurrer. However, the court, citing prior California law as to the test for finality of a judgment, held that the same standards applied, and that for purposes of *Code Civ. Proc. § 391(b)*, a litigation is final when all avenues for direct review have been exhausted or the time to initiate direct review or petition for certiorari in the United States Supreme Court has expired. Consequently, the court concluded that the evidence was insufficient to show that plaintiff was a vexatious litigant (*135 Cal. App. 3d 360, 368-369)* .

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6-60 California Points & Authorities §§ 60.633-60.639

[Reserved]

§§ 60.633[Reserved]

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6-60 California Points & Authorities § 60.640

§ 60.640 Opposing Motion for Security for Costs When Plaintiff Is Indigent--General Form

[1] FORM Opposing Motion for Security for Costs When Plaintiff Is Indigent--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN OPPOSITION TO MOTION
Plaintiff,	)	FOR SECURITY
vs.	)	Date: _____
_____ [*name(s)*], Defendant(s).	)	Time: _____
	)	Location: _____
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THE COURT MAY NOT PROPERLY ORDER PLAINTIFF TO FURNISH SECURITY BECAUSE PLAINTIFF IS INDIGENT AND UNABLE TO FURNISH SECURITY.

A. Burden on Motion. [*See § 60.630, Paragraph A.*]

B. Relief for Indigent Plaintiffs. The courts have the power to relieve indigent plaintiffs from requirements for furnishing security for costs (*Code Civ. Proc. § 995.240*; *Conover v. Hall (1974) 11 Cal. 3d 842, 851-852, 114 Cal. Rptr. 642, 523 P.2d 682* ; *Muller v. Tanner (1969) 2 Cal. App. 3d 445, 454, 82 Cal. Rptr. 738* ; *Sutter County v. Superior Court (1966) 244 Cal. App. 2d 770, 774, 775, 53 Cal. Rptr. 424*).

[*Insert other memoranda, as appropriate.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion by defendant to require plaintiff to furnish security for costs. The form may be used to oppose a motion for security under *Code Civ. Proc. § 391.1* (pertaining to vexatious litigants) or any other statute requiring security for costs. This form is for use when plaintiff is indigent and therefore unable to furnish security [*Code Civ. Proc. § 995.240*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case.

An affidavit showing plaintiff 's indigence should also be included. Counsel should also consider attaching an affidavit showing that plaintiff is unable to obtain sureties [*see Fuller v. California (1969) 1 Cal. App. 3d 664, 668-671, 82 Cal. Rptr. 78]* .

[c] Related Pleading and Practice Chapters

For forms relating to motions pursuant to Code Civ. Proc. § 1030(a), (b), see California Forms of Pleading and Practice, Ch. 174, *Costs and Attorney's Fees* (Matthew Bender).

[d] Related Memoranda

This form may be combined with other memoranda that relate to opposing a motion for security, as appropriate, *set out in § 60.630* et seq.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

For opposing memoranda, see *§ 60.600* et seq.

[3] Discussion of Authorities

[a] Burden on Motion

For discussion, see *§ 60.630[3][a]*.

[b] Relief for Indigent Plaintiffs

In ***Conover v. Hall*** *(1974) 11 Cal. 3d 842, 114 Cal. Rptr. 642, 523 P.2d 682* , plaintiffs were recipients of Aid to Families With Dependent Children (AFDC) and had monthly work-related expenses which regularly exceeded $50. They initiated an action challenging the $50 per month standard work expense allowance of former Welf. & Inst. Code § 11451.6. The trial court issued a preliminary injunction without requiring plaintiffs to post an injunction bond under *Code Civ. Proc. § 539* to cover defendants' potential damages. On appeal, defendants contended that the injunction was improper on several grounds, including the ground that the court lacked authority to waive the bond requirement of *Code Civ. Proc. § 539* which they claimed was mandatory. In upholding the trial court, the Supreme Court reviewed the common law authority of California courts to dispense with litigation fees in the case of poor litigants. The Court stated that several courts of appeal have concluded that under proper circumstances California courts have the power to dispense with bond requirements intended to protect an adversary's financial interest. They stated that in *Sutter County v. Superior Court (1966) 244 Cal. App. 2d 770, 53 Cal. Rptr. 424* (discussed *below*), the court of appeal held that a trial court had authority, despite the seemingly mandatory language of *Gov. Code § 947* [repealed by Stats. 1980, ch. 114], to waive a bond requirement intended to secure defendant county's costs of suit. The court also discussed *Bank of America v. Superior Court (1967) 255 Cal. App. 2d 575, 63 Cal. Rptr. 366* (trial court properly waived security for costs requirement of *Code Civ. Proc. § 1030* for nonresident plaintiffs) and *Roberts v. Superior Court (1968) 264 Cal. App. 2d 235, 70 Cal. Rptr. 226* (poor litigant permitted to file appeal without appeal bond required under *Code Civ. Proc. § 985.5*). Although these cases concerned cost bonds rather than a damage bond such as the one before the Court, the Court stated that the function of both is to protect the monetary interests of adversary parties and since courts have authority to waive security in the case of cost bonds, then the courts retain a similar authority to dispense with the damage bond requirement of *Code Civ. Proc. § 539*. Relying on *Sutter County*, the Court stated that a formal in forma pauperis petition is not required for this relief. The Court found that although the trial court apparently had not conducted any formal inquiry into the total assets of the plaintiffs, the court could reasonably have concluded from the facts before it that plaintiffs were poor and could not afford to post an injunction bond. The pleadings established that plaintiffs were welfare recipients and that none had a gross monthly income of more than $540. The court stated that the trial court had not abused its discretion in permitting the preliminary injunction to issue without an undertaking, since plaintiffs, in view of their meager resources, could not afford to post the significant undertaking that would have been necessary under the statute.

Muller v. Tanner *(1969) 2 Cal. App. 3d 445, 82 Cal. Rptr. 738* , is discussed in *§ 60.630[3][a]*. Plaintiff contended that the vexatious litigant statute [*Code Civ. Proc. § 391 et seq.*] conflicts with the right to sue in forma pauperis. The court stated that plaintiff 's standing to raise this issue as an indigent was not revealed by the record. Nevertheless, the court added that if there were a conflict between the vexatious litigant statute and the right to proceed in forma pauperis, the statutory restriction under *Code Civ. Proc. § 391 et seq.* would have to yield to the right to proceed in forma pauperis.

In ***Sutter County v. Superior Court*** *(1966) 244 Cal. App. 2d 770, 53 Cal. Rptr. 424* , plaintiff brought a personal injury action against defendant Sutter County. The county served a demand under *Gov. Code § 947* (declared unconstitutional in *Beaudreau v. Superior Court (1975) 14 Cal. 3d 448, 121 Cal. Rptr. 585, 535 P.2d 713* , and subsequently repealed by Stats. 1980, ch. 114) for an undertaking as security for costs. Plaintiff moved the court for an order permitting her to proceed without the bond, asserting her financial inability to obtain the bond. The court had plaintiff 's declaration which disclosed her assets and income before it and granted her motion on the ground that she had inadequate means to furnish security for costs. Defendant sought a writ of mandamus compelling the Superior Court to vacate its order. The court of appeal discharged its alternative writ and denied defendant's petition. The court of appeal stated that there is a significant distinction between an indigent litigant's fees and the opposing party's costs. The court found, however, that subjection of cost bond requirements to the common-law power of the court to permit a litigant to proceed in forma pauperis is consistent with, and perhaps required by, the California doctrine, and that that

power includes allowing waiver of security for costs as well as suspension of fees.

[4] Additional Authorities

[a] Relief for Indigent Plaintiffs

In *Fuller v. California (1969) 1 Cal. App. 3d 664, 82 Cal. Rptr. 78* , the state filed a demand for an undertaking under *Gov. Code § 947* (declared unconstitutional in *Beaudreau v. Superior Court (1975) 14 Cal. 3d 448, 121 Cal. Rptr. 585, 535 P.2d 713*). Defendant filed a motion to dismiss the action as to the state since the undertaking was not filed within the statutory time. Plaintiff filed an affidavit in opposition to the motion, stating that she did not have any funds to care for herself or to prosecute the action, that her attorneys were handling the case on a contingent fee basis, and that she was receiving county aid and medical attention. The trial court granted the motion to dismiss, and the court of appeal held that the trial court had not abused its discretion in dismissing the action. The court of appeal made a distinction between personal inability to pay costs and inability to obtain sureties on an undertaking, and stated that it seems that a poor plaintiff should make a prima facie showing that he or she has unsuccessfully sought to obtain such an undertaking or is unable to furnish an undertaking. The court stated that generally, in jurisdictions which have passed on the question of the sufficiency of such an affidavit, a statement in the affidavit that plaintiff is unable to give security for costs is sufficient. The court stated that in *Sutter County v. Superior Court (1966) 244 Cal. App. 2d 770, 53 Cal. Rptr. 424* , and in *Bank of America v. Superior Court (1967) 255 Cal. App. 2d 575, 63 Cal. Rptr. 366* , the courts granted relief although the plaintiffs' declarations did not contain specific statements of inability to obtain an undertaking. *Plaintiff in Roberts v. Superior Court (1968) 264 Cal. App. 2d 235, 70 Cal. Rptr. 226* , in which the court of appeal held that the trial court's refusal to dispense with an undertaking was error, had presented declarations showing that he was indigent and could not obtain an undertaking. The court concluded that although *Sutter County* and *Bank of America* held that it was not an abuse of discretion to dispense with an undertaking on a showing that did not specify inability to obtain sureties, it does not follow that the trial judge abused his discretion in refusing to dispense with an undertaking on a showing that contained no reference to any attempt to obtain sureties or to inability to do so. The court concluded that the trial court had discretion to deny plaintiff 's motion on the sole ground that while plaintiff showed her present inability to make any payment, she made no showing of her inability to obtain sureties against a future contingency.

Note that in *Conover v. Hall (1974) 11 Cal. 3d 842, 114 Cal. Rptr. 642, 523 P.2d 682* (discussed in *§ 60.640[3][b]*), the Supreme Court did not mention *Fuller*, and the Court inferred plaintiffs' inability to post the injunction bond from their indigence. The bond in *Conover* would probably have been for several million dollars [*see Conover v. Hall (1974) 11 Cal. 3d 842, 852 n.7, 114 Cal. Rptr. 642, 523 P.2d 682]* .

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Volume 6 Chapters 60-69 COSTS---to---DECLARATORY RELIEF
CHAPTER 60 COSTS
PART II. FORMS
C. Security for Costs
1. Motion for Security for Costs

6-60 California Points & Authorities § 60.641

§ 60.641 Opposing Motion for Security for Costs When Cross-Complainant Is Non-Resident Individual or Foreign Corporation

[1] FORM Opposing Motion for Security for Costs When Cross-Complainant Is Non-Resident Individual or Foreign Corporation

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN OPPOSITION TO MOTION
Plaintiff,	)	FOR SECURITY
vs.	)	Date: _____
_____ [*name(s)*],	)	Time: _____
Defendant(s).	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THE COURT MAY NOT PROPERLY ORDER CROSS-COMPLAINANT TO FURNISH SECURITY BECAUSE CODE OF CIVIL PROCEDURE SECTION 1030 DOES NOT APPLY TO NON-RESIDENT INDIVIDUALS OR FOREIGN CORPORATIONS WHEN THEY ARE CROSS-COMPLAINANTS.

A. Burden on Motion. [*See § 60.630, Paragraph A.*]

B. Non-Resident Individual or Foreign Corporation Cross-Complainants. *Code of Civil Procedure Section 1030,*

which provides that upon a defendant's motion, the trial court must order an out-of-state plaintiff to file an undertaking to secure recoverable costs and attorney's fees if the defendant shows a reasonable possibility that it will obtain judgment in the action, does not apply to require an out-of-state defendant who has filed a cross-complaint against a California resident to post an undertaking in order to continue prosecution of the cross-complaint (*Yao v. Superior Court (2002) 104 Cal. App. 4th 327, 329-334, 127 Cal. Rptr. 2d 912*).

[*Insert other memoranda, as appropriate.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion by cross-defendant to require cross-complainant to furnish security for costs under *Code Civ. Proc. § 1030*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case.

[c] Related Pleading and Practice Chapters

For forms relating to motions pursuant to Code Civ. Proc. § 1030(a), (b), see California Forms of Pleading and Practice, Ch. 174, *Costs and Attorney's Fees* (Matthew Bender).

[d] Related Memoranda

This form may be combined with other memoranda that relate to opposing a motion for security, as appropriate, *set out in § 60.630* et seq.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

For opposing memoranda, see *§ 60.600* et seq.

[3] Discussion of Authorities

[a] Burden on Motion

For discussion, see *§ 60.630[3][a]*.

[b] Non-Resident Individual or Foreign Corporation Cross-Complainants

In ***Yao v. Superior Court*** *(2002) 104 Cal. App. 4th 327, 127 Cal. Rptr. 2d 912* , Lovell sued Yao on a variety of causes of action based on an agreement to form a production company and develop a film project. Yao cross-complained against Lovell, alleging causes of action arising out of the same factual matrix alleged in the original complaint. Citing *Code Civ. Proc. § 1030*, Lovell filed a motion for an order requiring Yao to post security to continue to prosecute her cross-complaint. Lovell offered evidence Yao was not a California resident but instead a citizen of Hong Kong residing in Canada. Yao's opposed the motion. She did not contest that she was not a California resident, but she contended Section 1030's requirement of posting a bond did not embrace a "cross-complainant" but applied only to a "plaintiff." The trial court granted Lovell's motion for security and required Yao to post $10,000 security within 20 days of its order. Yao filed a petition for a writ of mandate to overturn the trial court's order, and the Court of Appeal stayed the trial court's order requiring Yao to post security and later, after receiving preliminary opposition to Yao's petition and copies of the court's minute order and the reporter's transcript of the hearing held on the motion, issued an alternative writ of mandate (*104 Cal. App. 4th 327, 329-330)* .

The Court of Appeal granted a peremptory writ of mandate compelling the trial court to set aside its order granting the motion to require Yao to post security and to enter an order denying the motion. The court held that when a California resident sues an out-of-state defendant and the defendant responds, in part, by filing a cross-complaint against the plaintiff, the plaintiff/cross-defendant cannot move the court to require the defendant/cross-complainant to post security in order to prosecute the cross-complaint under *Code Civ. Proc. § 1030* for two reasons. The court held first that § 1030 unambiguously refers only to a "plaintiff," and when the Legislature intends for a specific statutory provision to apply to both a plaintiff and cross-complainant, it expressly indicates that intent (*104 Cal. App. 4th 327, 332-333)* . The second reason is that to construe § 1030 to include an out-of-state cross-complainant would not promote the policy served by the statute (*104 Cal. App. 4th 327, 333-334)* .

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6-60 California Points & Authorities §§ 60.642-60.649

[Reserved]

§§ 60.642[Reserved]

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2. Motion for Dismissal for Failure to Post Security for Costs

6-60 California Points & Authorities § 60.650

§ 60.650 Supporting Motion for Dismissal for Failure to Post Security When Plaintiff Is Nonresident Individual or Foreign Corporation--General Form

[1] FORM Supporting Motion for Dismissal for Failure to Post Security When Plaintiff Is Nonresident Individual or Foreign Corporation--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF DEFEND-
Plaintiff,	)	ANT'S MOTION FOR DISMISSAL FOR FAILURE
vs.	)	TO POST SECURITY
_____ [*name*], Defendant.	)	[*Code Civ. Proc. § 1030(d)*]
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE ACTION _____ [ACTION *or* SPECIAL PROCEEDING] SHOULD BE DISMISSED BECAUSE PLAINTIFF IS A _____ [NONRESIDENT INDIVIDUAL *or* FOREIGN CORPORATION] WHO HAS FAILED TO POST SECURITY AS ORDERED PURSUANT TO SECTION 1030 OF THE CODE OF CIVIL PROCEDURE.

Action or Proceeding Should Be Dismissed for Failure to Post Security. If the plaintiff is a _____

[nonresident individual *or* foreign corporation] and fails to file an undertaking ordered pursuant to *Section 1030 of the Code of Civil Procedure* within the time allowed by the court, the plaintiff 's action or special proceeding must be dismissed as to the defendant in whose favor the order requiring the undertaking was made (*Code Civ. Proc. § 1030(d)*).

[*Insert other memoranda, as appropriate.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form may be used by defendant in support of a motion for dismissal of an action or special proceeding on the ground that plaintiff, who is a nonresident individual or foreign corporation, failed to post security for costs and attorney's fees within the time period previously ordered by the court pursuant to *Code Civ. Proc. § 1030*. The motion is based on *Code Civ. Proc. § 1030(d)*. It should be combined with additional memoranda, as appropriate, *set out in § 60.651* et seq.

It should be noted that unlike a motion for security pursuant to *Code Civ. Proc. § 1030(a), (b)*, there is no express requirement of a noticed motion for dismissal pursuant to *Code Civ. Proc. § 1030(d)* if plaintiff fails to post security within the time previously ordered by the court [*see, e.g., Shannon v. Sims Service Center, Inc. (1985) 164 Cal. App. 3d 907, 911, 210 Cal. Rptr. 861* (trial court dismissed oral motion at date set for trial, which was also date for compliance with order for security)]. However, in the event that no further court appearance for the parties has been scheduled that coincides in time to the date for compliance with the court's order for security, counsel may wish to use a noticed motion.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Evidence cognizable by the court in such a motion proceeding should be submitted with the memorandum to support its factual statements. A request for judicial notice will support facts subject to such notice [*Evid. Code § 450 et seq.*]. Otherwise supporting affidavits or declarations under penalty of perjury should be submitted [*see Code Civ. Proc. §§ 2009* (affidavits), 2015.5 (declarations)], averring to such facts within the personal knowledge of the affiant or declarant as may be necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For forms of a notice of motion, declaration, and order for dismissal pursuant to Code Civ. Proc. § 1030(d) for the plaintiff 's failure to post security, see California Forms of Pleading and Practice, Ch. 174, *Costs and Attorney's Fees*

(Matthew Bender).

[d] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

For opposing memoranda, see § 60.660 et seq.

[3] Discussion of Authorities

[a] Action or Proceeding Should Be Dismissed for Failure to Post Security

Code Civ. Proc. § 1030(d) provides that if the plaintiff is a nonresident individual or foreign corporation and fails to file an undertaking ordered pursuant to *Code Civ. Proc. § 1030* within the time allowed by the court, the plaintiff 's action or special proceeding must be dismissed as to the defendant in whose favor the order requiring the undertaking was made.

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6-60 California Points & Authorities § 60.651

§ 60.651 Supporting Motion for Dismissal for Failure to Post Security When Plaintiff Is Nonresident Individual or Foreign Corporation--Code Civ. Proc. § 1030 Is Constitutional as Applied to Nonresident Individuals and Foreign Corporations

[1] FORM Supporting Motion for Dismissal for Failure to Post Security When Plaintiff Is Nonresident Individual or Foreign Corporation--Code Civ. Proc. § 1030 Is Constitutional as Applied to Nonresident Individuals and Foreign Corporations

[*For caption, see § 60.650, with which this form should be combined.*]

THE ACTION _____ [ACTION *or* SPECIAL PROCEEDING] SHOULD BE DISMISSED BECAUSE PLAINTIFF IS A _____ [NONRESIDENT INDIVIDUAL *or* FOREIGN CORPORATION] WHO HAS FAILED TO POST SECURITY AS ORDERED PURSUANT TO SECTION 1030 OF THE CODE OF CIVIL PROCEDURE, A REQUIREMENT THAT IS NOT UNCONSTITUTIONAL.

***Code Civ. Proc. § 1030* Is Constitutional as Applied to Nonresident Individuals and Foreign Corporations.** *Section 1030 of the Code of Civil Procedure* meets constitutional standards contained in *Amendment V* and *XIV of the United States Constitution* and Sections 7 and 15 of Article I of the California Constitution for due process protection to nonresident individuals and foreign corporations, and does not unfairly discriminate against them (*Shannon v. Sims Service Center, Inc. (1985) 164 Cal. App. 3d 907, 913-914, 210 Cal. Rptr. 861*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.650,* in support of a motion for dismissal of an action or special proceeding on the ground that plaintiff, who is a nonresident individual or foreign corporation, failed to post security for costs and attorney's fees within the time period previously ordered by the court pursuant to *Code Civ. Proc. § 1030,* when the plaintiff claims that the posting requirement is unconstitutional.

See also *§ 60.650[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.650[2][b]* regarding evidentiary support.

[3] Discussion of Authorities

[a] Code Civ. Proc. § 1030 Is Constitutional as Applied to Nonresident Individuals and Foreign Corporations

Shannon v. Sims Service Center, Inc. *(1985) 164 Cal. App. 3d 907, 210 Cal. Rptr. 861* , was an action for personal injuries brought by an Oklahoma resident. Plaintiff requested a trial de novo following mandatory arbitration in which the arbitrator found for defendant. After the trial date was set, defendant moved for and was granted an order that plaintiff post security for costs and attorney's fees under *Code Civ. Proc. § 1030*. Plaintiff was ordered to post a $1,000 undertaking by the date of trial, which was 13 days after the order was made. On the date of trial defendant moved to dismiss the action on the ground that plaintiff had failed to post the undertaking. The trial court granted the motion and plaintiff appealed, contending, in part, that *Code Civ. Proc. § 1030* is unconstitutional.

The court of appeal affirmed the dismissal. It held that *Code Civ. Proc. § 1030* provides constitutional due process protection since it does not unfairly discriminate against nonresidents. Moreover, it was not unconstitutionally applied here. The 1980 amendment to the statute corrected prior constitutional infirmities. The statutory hearing process is now the same as for pretrial motions and meets the minimum standards for due process enunciated in *Beaudreau v. Superior Court (1975) 14 Cal. 3d 448, 121 Cal. Rptr. 585, 535 P.2d 713* , as stated in *Gonzales v. Fox (1977) 68 Cal. App. 3d Supp. 16, 137 Cal. Rptr. 312* . *Gonzales,* which held the former version of Code Civ. Proc. § 1030 unconstitutional, stated that *Beaudreau* requires a meaningful pretrial hearing that allows an inquiry into the validity of the claim, the reasonableness of the amount of the bond to be posted (and, inferentially, the reasonableness of not requiring any bond), and the ability of a person to furnish a bond. Here, evidence as to the validity of the claim was presented by both parties, the undertaking ordered was substantially less than costs prospectively awardable to defendant, and defendant showed, by declaration, a reasonable possibility of prevailing on the merits by proper reference to the results of the earlier arbitration hearing. It was plaintiff 's burden to prove inability to furnish an undertaking and he had not done so (*164 Cal. App. 3d 907, 912-914)* .

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6-60 California Points & Authorities § 60.652

§ 60.652 Supporting Motion for Dismissal for Failure to Post Security When Plaintiff Is Nonresident Individual or Foreign Corporation--Court May Shorten Time for Compliance With Order for Security on Showing of Good Cause

[1] FORM Supporting Motion for Dismissal for Failure to Post Security When Plaintiff Is Nonresident Individual or Foreign Corporation--Court May Shorten Time for Compliance With Order for Security on Showing of Good Cause

[*For caption, see § 60.650, with which this form should be combined.*]

THE ACTION _____ [ACTION *or* SPECIAL PROCEEDING] SHOULD BE DISMISSED BECAUSE PLAINTIFF IS A _____ [NONRESIDENT INDIVIDUAL *or* FOREIGN CORPORATION] WHO HAS FAILED TO POST SECURITY AS ORDERED PURSUANT TO SECTION 1030 OF THE CODE OF CIVIL PROCEDURE, PURSUANT TO AN ORDER TO SHORTEN TIME.

Court May Shorten Time for Compliance With Order for Security on Showing of Good Cause. The provision of *Section 1030(d) of the Code of Civil Procedure* that a plaintiff who has been ordered to file an undertaking do so not later than 30 days after service of the court's order requiring it or within a greater time allowed by the court is directory, not jurisdictional and mandatory, and the court may shorten the time for compliance on a showing of good cause (*Shannon v. Sims Service Center, Inc. (1985) 164 Cal. App. 3d 907, 915-916, 210 Cal. Rptr. 861*).

[2] Comments

[a] Use of Form

This form is for use with the form *set out in § 60.650,* in support of a motion for dismissal of an action or special proceeding on the ground that plaintiff, who is a nonresident individual or foreign corporation, failed to post security for costs and attorney's fees within the time period previously ordered by the court pursuant to *Code Civ. Proc. § 1030,* when there has been noncompliance with an order shortening time for posting the security.

See also *§ 60.650[2][c]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also *§ 60.650[2][b]* regarding evidentiary support.

[3] Discussion of Authorities

[a] Court May Shorten Time for Compliance With Order for Security on Showing of Good Cause

The facts and procedural background of ***Shannon v. Sims Service Center, Inc.*** *(1985) 164 Cal. App. 3d 907, 210 Cal. Rptr. 861* , are discussed in *§ 60.651*. In *Shannon*, plaintiff contended on appeal, in part, that *Code Civ. Proc. § 1030(d)* requires the court to give a plaintiff at least 30 days within which to post security for attorney's fees and costs, and that the trial court's action of shortening that time period divested the court of jurisdiction to dismiss the action. However, the court of appeal held that the provision of *Code Civ. Proc. § 1030(d)* requiring a plaintiff to file an undertaking "not later than 30 days after service of the court's order requiring it or within a greater time allowed by the court" does not prohibit the court from ordering a shorter compliance time on a showing of good cause, as was the case here. The Legislature could have placed jurisdictional parameters had it desired to do so, but no statutory prohibition against a lesser period exists. Therefore, the 30-day provision is directory, not mandatory, and does not divest the court of jurisdiction if, for good cause, it exercises its discretion to reduce the time for compliance (*164 Cal. App. 3d 907, 915-917)* .

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CHAPTER 61 CROSS COMPLAINTS

6-61 California Points & Authorities 61.syn

§ 61.syn Synopsis to Chapter 61: CROSS COMPLAINTS

§ 61.01 Scope of Chapter

§ 61.02 Governing Law

§ 61.03 Definitions Relating to Compulsory Cross Complaint

§ 61.04 Use of Cases Interpreting Former Statutes

§ 61.05 Page Limits on Memoranda

§ 61.06 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

[2] Related Points and Authorities Chapters

§§ 61.07-61.19 [Reserved]

§ 61.20 Supporting Motion for Leave to File Permissive Cross Complaint [Code Civ. Proc. § 428.50(c)]--By Party Against Party Filing Complaint or Cross Complaint [Code Civ. Proc. § 428.10(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[c] Related Pleading and Practice Forms

§ 61.21 Supporting Motion for Leave to File Permissive Cross Complaint [Code Civ. Proc. § 428.50(c)]--By Party Against Any Person Alleged to Be Liable [Code Civ. Proc. § 428.10(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] "Transaction" Relates to Facts and Not to Type of Relief Sought

[b] Cross Complaint Not Barred in Eminent Domain Proceeding When Asserted Under Code Civ. Proc. § 428.10(b)

§ 61.22 Opposing Motion for Leave to File Permissive Cross Complaint [Code Civ. Proc. § 428.50(c)]--Cause of Action Asserted in Cross Complaint Lacks Subject Matter Connection With Cause of Action Asserted Against Cross Complainant [Code Civ. Proc. § 428.10(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Matter Alleged in Cross Complaint Must Bear Necessary and Proper Relation to Matter Constituting Cause of Action in Complaint

§ 61.23 Opposing Motion for Leave to File Permissive Cross Complaint [Code Civ. Proc. § 428.50(c)]--Leave to File Not in Interests of Justice

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Leave to File Cross Complaint Is Within Discretion of Court

§ 61.24 Opposing Motion for Leave to File Permissive Cross Complaint [Code Civ. Proc. § 428.50(c)]--Cross Complaint Subject to Demurrer

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

[3] Discussion of Authorities

[a] Leave to File Permissive Cross Complaint Properly Denied When Subject to Demurrer

§ 61.25 Opposing Motion for Leave to File Permissive Cross Complaint [Code Civ. Proc. § 428.50(c)]--Suit Involving Same Matters Pending

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Denial of Leave to File Permissive Cross Complaint Proper When Another Suit Pending on Same Matter

§ 61.26 Opposing Motion for Leave to File Permissive Cross Complaint [Code Civ. Proc. § 428.50(c)]--Unnecessary Delay in Seeking Leave to File

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Denial of Leave to File Permissive Cross Complaint Proper When Unnecessary Delay in Filing Cross Complaint

§ 61.27 Opposing Motion for Leave to File Permissive Cross Complaint [Code Civ. Proc. § 428.50(c)]--Judgment Already Entered on Underlying Action

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Denial of Leave to File Permissive Cross Complaint When Judgment Already Entered

§ 61.28 Opposing Motion for Leave to File Permissive Cross Complaint [Code Civ. Proc. § 428.50(c)] Against Plaintiff--Eminent Domain Proceeding [Code Civ. Proc. § 428.10(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

§ 61.29 Opposing Motion for Leave to File Cross Complaint [Code Civ. Proc. § 428.50(c)]--Cross Complaint Not Authorized in Special Proceedings

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Cross Complaint Not Specifically Authorized in Special Proceedings

§§ 61.30-61.49 [Reserved]

§ 61.50 Supporting Motion to Strike Cross Complaint [Code Civ. Proc. § 435]--Cross Complaint Against Party Filed After Answer Without Permission of Court [Code Civ. Proc. § 428.50(a), (c)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

[3] Discussion of Authorities

[a] Cross Complaint Against Party Must Be Filed Before or With Answer, Not Amended Answer

§ 61.51 Supporting Motion to Strike Cross Complaint [Code Civ. Proc. § 435]--Cross Complaint Filed After Trial Date Set Without Permission of Court [Code Civ. Proc. § 428.50(b), (c)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

[3] Discussion of Authorities

[a] Leave of Court Required to File Third-Party Cross Complaint Even if Original Trial Date Vacated

§ 61.52 Supporting Motion to Strike Cross Complaint [Code Civ. Proc. § 435]--Cause of Action Not Asserted Against Cross Complainant

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

[3] Discussion of Authorities

[a] Cause of Action Not Asserted Against Party Seeking Leave to File Cross Complaint

§ 61.53 Opposing Motion to Strike Cross Complaint [Code Civ. Proc. § 435]--Court's Discretion to Strike Cross Complaint Limited

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Court's Discretion to Strike Cross Complaint Limited

§§ 61.54-61.69 [Reserved]

§ 61.70 Supporting Motion for Leave to Amend Cross Complaint or to File Compulsory Cross Complaint to Assert Related Cause of Action Against Plaintiff [Code Civ. Proc. § 426.30(a)]--Failure to Assert Related Cause Due to Oversight, Inadvertence, Mistake, Neglect, or Other Cause [Code Civ. Proc. § 426.50]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Granting of Permission Mandatory if Moving Party Acted in Good Faith

[b] Good Faith Must Be Given Liberal Construction

[c] Strong Showing of Bad Faith Required to Deny Right to Amend Pleading or File Cross Complaint

[4] Additional Authorities

[a] Granting of Permission Mandatory if Moving Party Acted in Good Faith

[b] Good Faith Must Be Given Liberal Construction

[c] Strong Showing of Bad Faith Required to Deny Right to Amend Pleading or File Cross Complaint

§ 61.71 Opposing Motion for Leave to Amend Cross Complaint or to File Compulsory Cross Complaint to Assert Related Cause of Action Against Plaintiff [Code Civ. Proc. § 426.30(a)]--Absence of Good Faith [Code Civ. Proc. § 426.50]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Substantial Injustice and Prejudice to Opposing Party Constitutes Bad Faith

§§ 61.72-61.89 [Reserved]

§ 61.90 Supporting Objection to Action on Ground That It Is Barred for Plaintiff's Failure to Plead It as Compulsory Cross Complaint in Prior Action Between Parties [Code Civ. Proc. § 426.30(a)]--Motion for Summary Judgment by Defendant [Code Civ. Proc. § 437c]

[1] FORM

[2] Comments

[a] Use of Form

[b] Judicial Notice

[c] Exceptions to Compulsory Cross Complaint Statute

[d] Related Pleading and Practice Forms

[e] Related Memoranda

[f] Opposing Memoranda

[3] Discussion of Authorities

[a] Party Is Barred From Asserting Action Which Should Have Been Pleaded as Cross Complaint in Prior Related Action

[b] Determining Whether Cause of Action Arose Out of Same Transaction

[c] Applicability of Rule Whether Prior Action Sounded in Contract or Tort

[d] Applicability of Rule Despite Plaintiff's Voluntary Dismissal of Defendant Without Prejudice

[e] Applicability of Rule to Assignee of Defendant Despite Plaintiff's Voluntary Dismissal of Defendant Without Prejudice

[f] Applicability of Rule When Prior Action Was in Federal Court

[g] Compulsory Cross Complaint to Cross Complaint Required

[h] Bar Is Aspect of Doctrine of Res Judicata

[i] Raising Defense of Res Judicata by Motion for Summary Judgment

§ 61.91 Supporting Objection to Action on Ground That It Is Barred for Plaintiff's Failure to Plead It as Compulsory Cross Complaint in Prior Action Between Parties [Code Civ. Proc. § 426.30(a)]--Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Raising Defense by Demurrer That Action Is Barred for Failure to Plead It in Prior Related Action

§ 61.92 Supporting Objection to Action on Ground That It Is Barred for Plaintiff's Failure to Plead It as Compulsory Cross Complaint in Prior Action Between Parties [Code Civ. Proc. § 426.30(a)]--Motion for Separate Trial of Affirmative Defense [Code Civ. Proc. § 597]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

[d] Opposing Memoranda

§ 61.93 Supporting Objection to Action on Ground That It Is Barred for Plaintiff's Failure to Plead It as Compulsory Cross Complaint in Prior Action Between Parties [Code Civ. Proc. § 426.30(a)]--Code Civ. Proc. § 426.30(a) Applies in Eminent Domain Proceedings [Code Civ. Proc. §§ 426.30(a), 426.70]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Compulsory Cross Complaint Rules Applicable in Eminent Domain Proceeding

§ 61.94 Supporting Objection to Action on Ground That It Is Barred for Plaintiff's Failure to Plead It as Compulsory Cross Complaint in Pending Action Between Parties [Code Civ. Proc. § 426.30(a)]--Plaintiff Who Voluntarily Dismisses Complaint When Cross Complaint Has Been Filed Must Refile Case as Cross Complaint in

Original Action

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Compulsory Cross Complaint Requirements Apply to Complaint Filed After Voluntary Dismissal Without Prejudice

§ 61.95 Opposing Objection to Action on Ground That It Is Barred for Plaintiff's Failure to Plead It as Compulsory Cross Complaint in Prior Action Between Parties [Code Civ. Proc. § 426.30(a)]--Defendant Was Not a Party in Prior Action or Cause of Action Is Not Related [Code Civ. Proc. §§ 426.10(c), 426.30(a)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Defendant Was Not a Party to the Former Action

[b] Cause of Action Not Related

§ 61.96 Opposing Objection to Action on Ground That It Is Barred for Plaintiff's Failure to Plead It as Compulsory Cross Complaint in Prior Action Between Parties [Code Civ. Proc. § 426.30(a)]--Court in Which Prior Action Was Filed Lacked Jurisdiction [Code Civ. Proc. §§ 426.30(b)(1), 426.40(a), (b)] or Unpleaded Cause of Action Was Subject of Another Pending Action [Code Civ. Proc. § 426.40(e)]

[1] FORM

[2] Comments

[a] Use of Form

§ 61.97 Opposing Objection to Action on Ground That It Is Barred for Plaintiff's Failure to Plead It as Compulsory Cross Complaint in Prior Action Between Parties [Code Civ. Proc. § 426.30(a)]--Answer Was Not Filed in Prior Action [Code Civ. Proc. § 426.30(b)(2)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Cross Complaint Not Required When Answer Not Filed

§ 61.98 Opposing Objection to Action on Ground That It Is Barred for Plaintiff's Failure to Plead It as Compulsory Cross Complaint in Prior Action Between Parties [Code Civ. Proc. § 426.30(a)]--Rule Does Not Apply When Prior Action Was Special Proceeding or Declaratory Relief Action [Code Civ. Proc. § 426.60(a), (c)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Cross Complaint Not Required in Special Proceedings

[b] Civil Actions and Special Proceedings Distinguished

[c] Cross Complaint Not Required When Action Solely for Declaratory Relief

§ 61.99 Opposing Objection to Action on Ground That It Is Barred for Plaintiff's Failure to Plead It as Compulsory Cross Complaint in Prior Action Between Parties [Code Civ. Proc. § 426.30(a)]--Cause of Action Arose After Answer in Prior Action Was Served [Code Civ. Proc. § 426.30(a)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Cause of Action Arose After Answer Was Served

§ 61.100 Opposing Objection to Action on Ground That It Is Barred for Plaintiff's Failure to Plead It as Compulsory Cross Complaint in Prior Action Between Parties [Code Civ. Proc. § 426.30(a)]--Prior and Present Actions Were Consolidated

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Consolidation of Actions Cures Noncompliance With Code Civ. Proc. § 426.30

§ 61.101 Opposing Objection to Action on Ground That It Is Barred for Plaintiff's Failure to Plead It as

Compulsory Cross Complaint in Prior Action Between Parties [Code Civ. Proc. § 426.30(a)]--Failure to Plead Bar Under Code Civ. Proc. § 426.30(a) as Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] Constitutes Waiver of That Defense

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Defense That Action Is Barred by Code Civ. Proc. § 426.30 Is Waived If It Is Not Specially Pleaded

[b] Defense That Action Is Barred Is Not Included in Defense That Complaint Fails to State Cause of Action

§§ 61.102-61.119 [Reserved]

§ 61.120 Supporting Motion to Dismiss Appeal [Cal Rules of Ct, Rules 8.54(a), 8.57(a)]--Order Denying Motion to File Cross Complaint or Striking or Dismissing Cross Complaint Filed Against Plaintiff Is Not Appealable Order [Code Civ. Proc. § 904.1]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Appeal Only From Final Judgment

[b] Review on Appeal From Summary Judgment Not Appropriate Except in Specified Circumstances

§ 61.121 Opposing Motion to Dismiss Appeal [Cal Rules of Ct, Rules 8.54(a), 8.57(a)]--Order Striking or Dismissing Cross Complaint Constitutes Final Judgment and Is Appealable Because (1) New Parties or Codefendant Named as Cross Defendants; (2) Order Finally Disposes of Action as to Appellant; or (3) Case Transferred From Municipal to Superior Court Because of Cross Complaint [Code Civ. Proc. § 904.1]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Order Final and Appealable

[4] Additional Authorities

[a] Order Final and Appealable

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CHAPTER 61 CROSS COMPLAINTS
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6-61 California Points & Authorities § 61.01

§ 61.01 Scope of Chapter

This chapter contains the following memoranda:

- Supporting [*see §§ 61.20, 61.21*] and opposing [*see §§ 61.22 -61.29*] motions for leave to file a permissive cross complaint.

- Supporting [*see §§ 61.50 -61.52*] and opposing [*see § 61.53*] motions to strike a permissive cross complaint.

- Supporting [*see § 61.70*] and opposing [*see § 61.71*] motions for leave to amend a cross complaint or to file a compulsory cross complaint.

- Supporting [*see §§ 61.90 -61.94*] and opposing [*see §§ 61.95 -61.101*] demurrers to or other motions concerning complaints based on failure to file a compulsory cross complaint in a prior or pending action.

- Supporting [*see § 61.120*] and opposing [*see § 61.121*] motions to dismiss an appeal based on whether or not the order striking or dismissing a cross complaint is appealable.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProceduresPleading & PracticePleadingsComplaintsCross-Complaints

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6-61 California Points & Authorities § 61.02

§ 61.02 Governing Law

Cross complaints are governed generally by *Code Civ. Proc. §§ 425.10, 426.10-428.80*. Permissive cross complaints are governed by *Code Civ. Proc. §§ 428.10-428.30*. Compulsory cross complaints are governed by *Code Civ. Proc. §§ 426.10-426.70*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsCross-Complaints

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6-61 California Points & Authorities § 61.03

§ 61.03 Definitions Relating to Compulsory Cross Complaint

"Complaint" means a complaint or cross complaint [*Code Civ. Proc. § 426.10(a)*]. "Plaintiff" means a person who files a complaint or cross complaint [*Code Civ. Proc. § 426.10(b)*]. "Related cause of action" means a cause of action that arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause of action that the plaintiff alleges in his or her complaint [*Code Civ. Proc. § 426.10(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsCross-Complaints

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6-61 California Points & Authorities § 61.04

§ 61.04 Use of Cases Interpreting Former Statutes

Code Civ. Proc. § 428.10(a), pertaining to permissive cross complaints by a party against any of the parties who filed a complaint or cross complaint against him or her, is similar to former Code Civ. Proc. § 438, which provided for a counterclaim. However, under prior law, some causes that a party had against an opposing party did not qualify as counterclaims because they did not satisfy the "diminish or defeat" or "several judgment" requirements. These requirements are not continued, and the new section permits unlimited scope to a cross complaint against an opposing party [*see* Legislative Committee Comment to *Code Civ. Proc. § 428.10*].

Code Civ. Proc. § 428.10(b) pertains to cross complaints by a party against any person, whether or not that person is already a party to the action, if the cause of action asserted in the cross complaint arises out of the same transaction or occurrence or involves the same property or controversy. This section generally continues the rule under former Code Civ. Proc. § 442 that a cross complaint may be asserted against any person, whether or not a party to the action, if the cause of action asserted in the cross complaint arises out of the same transaction or occurrence or involves the same property or controversy [*see* Legislative Committee Comment to *Code Civ. Proc. § 428.10*].

Code Civ. Proc. § 426.30, pertaining to compulsory cross complaints, continues the substance of the former compulsory counterclaim rule, former Code Civ. Proc. § 439. However, since the scope of a cross complaint is expanded to include claims that would not have met the "defeat or diminish" or "several judgment" requirements of former Code Civ. Proc. § 439, the scope of the former rule is expanded by *Code Civ. Proc. § 426.30* to include some causes of action that formerly were not compulsory [*see* Legislative Committee Comment to *Code Civ. Proc. § 426.30*].

Code Civ. Proc. § 426.50, pertaining to leave to amend a pleading or to file a cross complaint to assert an unpleaded cause of action, continues the similar provisions that had been contained in former Code Civ. Proc. § 439. The new section simply reiterates the long standing rule favoring the allowance of amended pleadings [*see Foot's Transfer & Storage Co. v. Superior Court (1981) 114 Cal. App. 3d 897, 900-901, 171 Cal. Rptr. 1]* .

The current versions of the statutes discussed in the paragraphs above became operative in 1972. This chapter does contain some cases that were decided under the former statutes, but only if the provisions of the former statutes being applied by the court were continued without significant change in the current statutes.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsAmended PleadingsLeave of CourtCivil ProceduresPleading & PracticePleadingsComplaintsCross-ComplaintsCivil ProceduresPleading & PracticePleadingsCounterclaimsCompulsory CounterclaimsCivil ProceduresPleading & PracticePleadingsCounterclaimsPermissive Counterclaims

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6-61 California Points & Authorities § 61.05

§ 61.05 Page Limits on Memoranda

Generally, a memorandum must not exceed 15 pages in length, or in the case of a motion for summary judgment or summary adjudication, 20 pages in length. A reply or closing memorandum may not exceed 10 pages in length [*see Cal. Rules of Ct., Rule 3.1113(d)*]. The page limit does not include exhibits, declarations, attachments, the table of contents, the table of authorities, or the proof of service [*see Cal. Rules of Ct., Rule 3.1113(d)*]. Any party desiring to file a longer memorandum must obtain leave of the court [*see Cal. Rules of Ct., Rule 3.1113(e)*]. For further discussion of the page limitations under *Cal. Rules of Ct., Rule 3.1113*, and of other basic format requirements of memoranda, see *Ch. 1, Writing Legal Memoranda and Briefs, § 1.01[4]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPleading & PracticeMotion PracticeSupporting MemorandaCivil ProceduresSummary JudgmentOppositionMemoranda in OppositionCivil ProceduresSummary JudgmentSupporting MaterialsMemoranda of Law

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6-61 California Points & Authorities § 61.06

§ 61.06 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

For discussion and forms relating to cross complaints and applications for leave to file cross complaints, see Ch. 123, *Complaints and Cross Complaints* , in California Forms of Pleading and Practice (Matthew Bender). For discussion, a procedural guide, and forms relating to motions to strike, see California Forms of Pleading and Practice, Ch. 375, *Motions to Strike* . For discussion and forms regarding the scope of review generally, see California Forms of Pleading and Practice, Ch. 40, *Appeal: An Overview* .

[2] Related Points and Authorities Chapters

For memoranda relating to motions to strike generally, see Ch. 160, *Motions to Strike* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsCross-Complaints

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6-61 California Points & Authorities §§ 61.07-61.19

[Reserved]

§§ 61.07[Reserved]

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PART II. FORMS
A. Permissive Cross Complaints
1. Motions to File Permissive Cross Complaints

6-61 California Points & Authorities § 61.20

§ 61.20 Supporting Motion for Leave to File Permissive Cross Complaint [Code Civ. Proc. § 428.50(c)]--By Party Against Party Filing Complaint or Cross Complaint [Code Civ. Proc. § 428.10(a)]

[1] FORM Supporting Motion for Leave to File Permissive Cross Complaint [Code Civ. Proc. § 428.50(c)]--By Party Against Party Filing Complaint or Cross Complaint [Code Civ. Proc. § 428.10(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____ _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF MOTION FOR
Plaintiff,	)	LEAVE TO FILE PERMISSIVE CROSS COM-
vs.	)	PLAINT
_____ [*name*],	)	[*Code Civ. Proc. §§ 428.10(a), 428.50(c)*]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE MOTION BY _____ [*specify moving party, e.g.,* DEFENDANT] FOR LEAVE TO FILE A PERMISSIVE CROSS COMPLAINT SHOULD BE GRANTED BECAUSE _____ [*specify moving party, e.g.,* DEFENDANT] HAS A CAUSE OF ACTION AGAINST _____ [*specify party, e.g.,*

PLAINTIFF] WHO HAS FILED THE _____ [COMPLAINT *or* CROSS COMPLAINT] AGAINST _____ [*specify moving party, e.g.,* DEFENDANT].

A. Filing of Cross Complaint Against Party Filing Complaint or Cross Complaint Permitted. A party against whom a cause of action has been asserted in a complaint or cross complaint may file a cross complaint setting forth any cause of action he or she has against any of the parties who filed the complaint or cross complaint against him or her (*Code Civ. Proc. § 428.10(a)*).

B. Leave May Be Granted. Leave to file a permissive cross complaint may be granted in the interest of justice at any time during the course of the action (*Code Civ. Proc. § 428.50(c)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in support of a motion for leave to file a permissive cross complaint against the party who filed the complaint or cross complaint [*Code Civ. Proc. §§ 428.10(a), 428.50(c)*]. This form should be used when the moving party has not filed a cross complaint before or at the same time as his or her answer to the complaint or cross complaint filed against him or her pursuant to *Code Civ. Proc. § 428.50(a)* [*Code Civ. Proc. § 428.50(c)*].

Code Civ. Proc. § 428.10(a) governs cross complaints against another party, while *Code Civ. Proc. § 428.10(b)* governs cross complaints against any person. It should be noted that these provisions are independent of each other, and it is necessary only that the party seeking to file a cross complaint come within one of the subdivisions [*see § 61.21,* based on *Code Civ. Proc. § 428.10(b)*].

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should state facts showing that the cross complaint states a cause of action, and that the cause of action is against the person or persons who filed the original complaint or cross complaint. The cause of action in the cross complaint may be wholly unrelated to the claim in cross defendant's complaint or cross complaint [*see Code Civ. Proc. § 428.10(a)*]. Additionally, counsel should state facts showing why granting leave to file the cross complaint is in the interests of justice [*see Code Civ. Proc. § 428.50(c)*].

Cal. Rules of Ct., Rule 3.110(c) requires that a cross complaint against a party who has appeared in the action be accompanied by proof of service of the cross complaint at the time it is filed.

[b] Opposing Memoranda

In an appropriate case, the points and authorities *set out in §§ 61.23 -61.29* may be used to oppose the motion supported by the foregoing points and authorities.

[c] Related Pleading and Practice Forms

For discussion and forms relating to motions for leave to file permissive cross complaints, see Ch. 123, *Complaints and*

Cross Complaints in California Forms of Pleading and Practice.

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A. Permissive Cross Complaints
1. Motions to File Permissive Cross Complaints

6-61 California Points & Authorities § 61.21

§ 61.21 Supporting Motion for Leave to File Permissive Cross Complaint [Code Civ. Proc. § 428.50(c)]--By Party Against Any Person Alleged to Be Liable [Code Civ. Proc. § 428.10(b)]

[1] FORM Supporting Motion for Leave to File Permissive Cross Complaint [Code Civ. Proc. § 428.50(c)]--By Party Against Any Person Alleged to Be Liable [Code Civ. Proc. § 428.10(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____ _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE PERMISSIVE CROSS COMPLAINT
vs.	)	[*Code Civ. Proc. §§ 428.10(b), 428.50(c)*]
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THE MOTION BY _____ [*specify moving party, e.g.*, DEFENDANT] FOR LEAVE TO FILE A PERMISSIVE CROSS COMPLAINT SHOULD BE GRANTED BECAUSE _____ [*specify moving party, e.g.*, DEFENDANT] HAS A CAUSE OF ACTION AGAINST _____ [*name(s*)] WHO _____ [IS *or* ARE] ALLEGED TO BE LIABLE ON THE ACTION AND THE CAUSE OF ACTION _____ [ARISES OUT OF THE SAME TRANSACTION, OCCURRENCE, OR SERIES OF TRANSACTIONS OR OCCURRENCES AS THE CAUSE BROUGHT AGAINST _____ (*specify*

moving party, e.g., DEFENDANT) *and/or* ASSERTS A CLAIM, RIGHT, OR INTEREST IN THE PROPERTY OR CONTROVERSY THAT IS THE SUBJECT OF THE CAUSE BROUGHT AGAINST _____ (*specify moving party, e.g.,* DEFENDANT)].

A. Filing of Permissive Cross Complaint Against Any Person Alleged to Be Liable. A party against whom a cause of action has been asserted in a complaint or cross complaint may file a cross complaint setting forth any cause of action he or she has against a person alleged to be liable thereon, whether or not that person is already a party to the action, if the cause of action asserted in his or her cross complaint _____ [arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause brought against him or her *and/or* asserts a claim, right or interest in the property or controversy that is the subject of the cause brought against him or her] (*Code Civ. Proc. § 428.10(b)*).

B. Leave May Be Granted. [*See § 61.20, Paragraph B.*]

[*Optional*] **C. "Transaction" Relates to Facts and Not to Type of Relief Sought.** Under *Section 428.10(b) of the Code of Civil Procedure* the facts surrounding the cause of action, not the form of the complaint, are determinative of what constitutes the "transaction" for the purpose of filing a cross complaint. Thus, if a party's pleading sets forth matter inextricably related to the matter forming the basis of the complaint, it meets the statutory requirements of a cross complaint and it is immaterial that the relief sought thereby is independent of that prayed for in the complaint (*see American Motorcycle Assn. v. Superior Court (1978) 20 Cal. 3d 578, 605, 146 Cal. Rptr. 182, 578 P.2d 899* ; *Roylance v. Doelger (1962) 57 Cal. 2d 255, 261, 262, 19 Cal. Rptr. 7, 368 P.2d 535* ; *Kent v. Clark (1942) 20 Cal. 2d 779, 786, 128 P.2d 868*).

[*Optional*] **D. Cross Complaint Not Barred in Eminent Domain Proceeding When Asserted Under *Code Civ. Proc. § 428.10(b)*.** Although *Section 428.10(a) of the Code of Civil Procedure* bars the filing of a cross complaint against the plaintiff when the action was commenced under the eminent domain statutes (*Code Civ. Proc. §§ 1230.010-1273.050*), cross complainant may assert a claim under *Section 428.10(b) of the Code of Civil Procedure* against any person other than the plaintiff if the cause of action asserted in the cross complaint arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause of action stated against the cross complainant in the condemning entity's complaint (*Code Civ. Proc. § 428.10(b)*; *City of Mountain View v. Superior Court (1975) 54 Cal. App. 3d 72, 83, 126 Cal. Rptr. 358*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in support of a motion for leave to file a permissive cross complaint by a party against any person alleged to be liable, whether or not the person is already a party to the action [*Code Civ. Proc. § 428.10(b)*]. This form should be used when the party has not filed a cross complaint before the court has set a date for trial pursuant to the requirements of *Code Civ. Proc. § 428.50(b)* [*Code Civ. Proc. § 428.50(c)*].

Code Civ. Proc. § 428.10(a) governs cross complaints against another party, while *Code Civ. Proc. § 428.10(b)* governs cross complaints against any person. It should be noted that these provisions are independent of each other, and

it is necessary only that the party seeking to file a cross complaint come within one of the subdivisions [*see § 61.20*, based on *Code Civ. Proc. § 428.10(a)*].

The grounds for the motion are that the cause of action asserted in the cross complaint (1) arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause brought against the party filing the cross complaint; or (2) asserts a claim, right, or interest in the property or controversy that is the subject of the cause brought against the party filing the cross complaint [*Code Civ. Proc. § 428.10(b)*]. The filing of the cross complaint must also be in the interest of justice [*Code Civ. Proc. § 428.50(c)*].

Optional Paragraph C should be used when it is anticipated that the person opposing the motion will argue that the cause of action in the cross complaint does not arise out of the same transaction as the complaint. For example, the paragraph could be used when the plaintiff sought legal relief and the cross complainant seeks equitable relief, or vice versa [*see Roylance v. Doelger (1962) 57 Cal. 2d 255, 261, 262, 19 Cal. Rptr. 7, 368 P.2d 535* ; *Kent v. Clark (1942) 20 Cal. 2d 779, 786, 128 P.2d 868]* .

Optional Paragraph D should be used when a party to an eminent domain proceeding has a cause of action against any person, other than plaintiff, who is alleged to be liable on the cause of action which arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause of action stated against the party in the condemning entity's complaint.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show that the party requesting leave to file the cross complaint has a cause of action against a person who is alleged to be liable on the complaint or cross complaint filed against the party. Counsel should also show that the cause of action either arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause in the complaint or cross complaint against the filing party, or asserts a claim, right, or interest in the property or controversy that is the subject of the cause in the complaint or cross complaint against the filing party.

Cal. Rules of Ct., Rule 201.7(c) requires that a cross complaint against a party who has appeared in the action be accompanied by proof of service of the cross complaint at the time it is filed; if the cross complaint adds new parties, the cross complaint must be served on all parties and proofs of service on the new parties must be filed within thirty days of the filing of the cross-complaint.

[b] Opposing Memoranda

In an appropriate case, the points and authorities *set out in §§ 61.22 -61.29* may be used to oppose the motion supported by the foregoing points and authorities.

[c] Related Pleading and Practice Forms

For discussion and forms relating to motions for leave to file permissive cross complaints, see Ch. 123, *Complaints and Cross Complaints* in California Forms of Pleading and Practice.

[3] Discussion of Authorities

[a] "Transaction" Relates to Facts and Not to Type of Relief Sought

American Motorcycle Assn. v. Superior Court *(1978) 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899* , was an action to recover damages for injuries incurred while participating in a cross country motorcycle race for novices. Defendant American Motorcycle Assn. (AMA) sought leave of court to file a cross complaint after filing its answer. The trial court denied defendant's motion. Defendants sought a writ of mandate and the court of appeal issued an

alternative writ. The Supreme Court ordered a hearing of the case on its own motion.

The Court held that when concurrent tortfeasors are sued for damages for negligence, a defendant may cross complain for partial indemnity against another alleged concurrent tortfeasor who was not joined as a defendant (*20 Cal. 3d 578, 606)* . In making its decision the Court stated that the *Roylance* rule, discussed *below*, had been specifically codified in *Code Civ. Proc. §§ 428.10-428.80* (*20 Cal. 3d 578, 605)* .

Roylance v. Doelger *(1962) 57 Cal. 2d 255, 19 Cal. Rptr. 7, 368 P.2d 535* , involved a controversy between an insured, its alleged liability insurer, and third parties whom defendant insurer by cross complaint claimed were the real tortfeasors ultimately liable to the injured persons. Plaintiff corporation paid a judgment of property damages to owners and then instituted an action against the insurer for indemnity. Defendant insurer in turn filed a cross complaint for declaratory relief naming new third-party defendants. The purpose of the cross complaint was to establish a right to indemnity from the cross defendants, who were not parties to the original action. Cross defendants moved to strike the cross complaint on the ground that it was incompetent, irrelevant, and immaterial, and constituted an attempt to collaterally attack a final judgment. The trial court granted the motion, and defendant appealed.

The Supreme Court reversed. Defendant asserted that the trial court abused its discretion in striking the cross complaint. The Court identified the question at issue in the case to be whether or not under the circumstances defendant was entitled to seek declaratory relief through the medium of a cross complaint (*57 Cal. 2d 255, 258)* . The Court held that striking of the cross complaint was erroneous under the circumstances involved in this case, as discussed above, and that the proper procedure was to permit and sustain the filing of the cross complaint under circumstances falling within the language of former Code Civ. Proc. § 442 (*now see Code Civ. Proc. § 428.10*) (*57 Cal. 2d 255, 262)* . The Court stated that the fact that the original complaint may seek equitable relief while the cross complaint pleads an action legal in nature has been held not to bar the filing of the latter and the converse appears to be equally permissible (*57 Cal. 2d 255, 261)* .

Kent v. Clark *(1942) 20 Cal. 2d 779, 128 P.2d 868* , was an action of ejectment brought by vendors of realty against a vendee in default under an executory contract of sale. The vendee set up fraud in the inception of the contract by way of cross complaint, praying for a decree declaring the contract to be rescinded and for damages. Plaintiffs objected to the cross complaint. The trial court sustained the objection and gave judgment for plaintiffs, and the vendee appealed.

The Supreme Court reversed. The Court held that the facts relied on by the vendee furnished a proper basis for her cross complaint and that the facts surrounding the cause of action and not the form of the complaint are determinative of what constitutes the "transaction." If defendant's pleading sets forth matter inextricably related to the matter forming the basis of the plaintiffs' complaint, it meets the statutory requirements of a cross complaint, and it is immaterial that the relief sought thereby is independent of that prayed for in the complaint (*20 Cal. 2d 779, 786)* .

[b] Cross Complaint Not Barred in Eminent Domain Proceeding When Asserted Under Code Civ. Proc. § 428.10(b)

City of Mountain View v. Superior Court *(1975) 54 Cal. App. 3d 72, 126 Cal. Rptr. 358* , was an action by plaintiff for condemnation of certain described and enumerated parcels of land for street and related purposes. Defendant Barnes was named as one of 60 condemnees in the action. Defendant filed an answer, plaintiff demurred and moved to strike a portion of the answer regarding relocation expenses, and the trial court granted the motion. Defendant filed an amended answer, to which plaintiff filed a general demurrer and moved to strike the relocation expense paragraph. The trial court overruled the demurrer and denied the motion. Plaintiff then commenced proceedings for a writ of mandate to direct the court to set aside its holding.

The court of appeal held that defendant could seek to recover the "fixed relocation payment" in the condemnation action by way of cross complaint but not by answer. Thus, the court granted peremptory relief as prayed, but qualified it by

requiring the trial court to grant defendant leave to perfect its statement in a cross complaint (*54 Cal. App. 3d 72, 77, 83)* . The court concluded that in an action brought under the eminent domain law for acquisition of real property for a public use, a condemnee defendant may only allege in his or her answer the amount of "just compensation" which he or she claims, but may allege a cause of action for affirmative relief against the city, if he has one, in a cross complaint filed with--but separate from--his answer in the action (*54 Cal. App. 3d 72, 82)* . The court held that although *Code Civ. Proc. § 428.10(a)* does not authorize the filing of a cross complaint in an action in eminent domain, *Code Civ. Proc. § 428.10(b)* does if the cause of action asserted in the cross complaint arises out of the same transaction as the cause of action stated in the condemning entity's complaint. The court determined that defendant could file a cross complaint because his constitutional entitlement to just compensation as a condemnee and his claim to a fixed relocation payment under the relocation assistance law arose from the same transaction (*54 Cal. App. 3d 72, 83)* .

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6-61 California Points & Authorities § 61.22

§ 61.22 Opposing Motion for Leave to File Permissive Cross Complaint [Code Civ. Proc. § 428.50(c)]--Cause of Action Asserted in Cross Complaint Lacks Subject Matter Connection With Cause of Action Asserted Against Cross Complainant [Code Civ. Proc. § 428.10(b)]

[1] FORM Opposing Motion for Leave to File Permissive Cross Complaint [Code Civ. Proc. § 428.50(c)]--Cause of Action Asserted in Cross Complaint Lacks Subject Matter Connection With Cause of Action Asserted Against Cross Complainant [Code Civ. Proc. § 428.10(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____ _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN OPPOSITION TO MOTION
Plaintiff,	)	FOR LEAVE TO FILE PERMISSIVE CROSS COM-
vs.	)	PLAINT
_____ [*name*],	)	[*Code Civ. Proc. §§ 428.10(b), 428.50(c)*]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

_____ [*specify moving party, e.g.*, DEFENDANT]'S MOTION FOR LEAVE TO FILE A PERMISSIVE CROSS COMPLAINT SHOULD BE DENIED BECAUSE THE CAUSE OF ACTION ALLEGED IN THE PROPOSED CROSS COMPLAINT DOES NOT HAVE ANY SUBJECT MATTER CONNECTION WITH THE CAUSE OF ACTION ALREADY ASSERTED IN THE ACTION, IN THAT IT NEITHER ARISES OUT OF THE

SAME TRANSACTION, OCCURRENCE, OR SERIES OF TRANSACTIONS OR OCCURRENCES AS THE CAUSE BROUGHT AGAINST _____ [*specify moving party, e.g.*, DEFENDANT], NOR DOES IT ASSERT A CLAIM, RIGHT, OR INTEREST IN THE PROPERTY OR CONTROVERSY THAT IS THE SUBJECT OF THE CAUSE BROUGHT AGAINST _____ [*specify moving party, e.g.*, DEFENDANT].

[*EITHER*]

A. Cause of Action Does Not Arise Out of Same Transaction. A cause of action against a person alleged to be liable thereon other than the party filing the complaint or cross complaint must arise out of the same transaction, occurrence, or series of transactions or occurrences as the cause brought against the cross complainant (*see Code Civ. Proc. § 428.10(b)(1)*).

B. Matter Alleged in Cross Complaint Must Bear Necessary and Proper Relation to Matter Constituting Cause of Action in Complaint. The test for whether or not a proposed cross complaint meets the requirements of *Section 428.10(b)(1) of the Code of Civil Procedure* is whether or not the matter alleged in the cross complaint bears the necessary and proper relation to the matter constituting the cause of action (*see Bracey v. Gray (1944) 65 Cal. App. 2d 282, 286, 150 P.2d 564*).

[*AND/OR*]

C. Cause of Action Does Not Assert Claim, Right, or Interest in Property or Controversy. A cause of action against a person other than the party filing the complaint or cross complaint must assert a claim, right, or interest in the property or controversy that is the subject of the cause brought against the cross complainant (*see Code Civ. Proc. § 428.10(b)(2)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in opposition to a motion for leave to file a permissive cross complaint when the cause of action in the proposed cross complaint does not arise out of the same transaction, occurrence, or series of transactions or occurrences as the cause brought against the moving party, or does not assert a claim, right, or interest in the property or controversy that is the subject of the cause brought against the moving party [*see Code Civ. Proc. § 428.10(b)*; *Bracey v. Gray (1944) 65 Cal. App. 2d 282, 286, 150 P.2d 564]* .

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show that the matter alleged in the cross complaint neither arises out of the same transaction, occurrence, or series of transactions or occurrences that is the basis of the complaint, nor asserts a claim, right, or interest in the property or controversy that is the subject of the cause brought against the cross complainant.

In an appropriate case, the foregoing memorandum may be submitted in opposition to a motion for leave to file a permissive cross complaint supported by the points and authorities *set out in § 61.21*.

[b] Related Pleading and Practice Forms

For discussion and forms relating to motions for leave to file permissive cross complaints and to the suggested practice of submitting proposed cross complaints with motions for leave to file a cross complaint, see Ch. 123, *Complaints and Cross Complaints* in California Forms of Pleading and Practice.

[3] Discussion of Authorities

[a] Matter Alleged in Cross Complaint Must Bear Necessary and Proper Relation to Matter Constituting Cause of Action in Complaint

Bracey v. Gray *(1944) 65 Cal. App. 2d 282, 150 P.2d 564* , arose out of an action for possession of property held by defendants as a joint homestead which was lost by foreclosure on the trust deed and acquired at a foreclosure sale by plaintiff. One defendant had signed a quit claim deed to the purchasers at the foreclosure sale. There was a previous action against the other defendant for possession in which judgment was given for plaintiffs. Both defendants moved for a new trial and to vacate and set aside the judgment. The motion was denied by the trial court. Defendants appealed and the court of appeal affirmed. This action was brought against defendants for damages due to their possession. Defendants in their answer admitted the previous judgment but alleged that the judgment was ineffectual and void because of reversible error in the two previous cases. When the case was placed on the trial calendar for the purpose of setting a date for hearing, defendants moved for permission to file a cross complaint. The motion was denied and defendants appealed.

The court of appeal affirmed the order denying permission to file a cross complaint. The court found that defendants' cross complaint was predicated solely on defendants' alleged right of possession of the real property in question, which was the subject matter of the original actions, and had been decided adversely to them. These judgments had become final and were complete answers to defendants' allegations in the cross complaint. The court held that the cross complaint was purely an attempt to try again the issues previously decided against them in both of the former cases. The sole purpose of the present action was for a money judgment against the persons signing the undertaking as principals and as sureties and had nothing to do with nor was any issue made therein in regard to the title or possession of the real property which was in controversy in the previous cases (*65 Cal. App. 2d 282* ,. 285). It is not the purpose of a cross complaint to allow persons having independent claims against each other to settle them all in one action on the sole ground that as they have been brought into court to contend against each other with respect to one case or dispute, they should at the same time and place settle all matters of controversy existing between them. The test is whether or not the matter alleged in the cross complaint bears the necessary and proper relation to the matter constituting the cause of action. It is true that if this relation is present it is immaterial that the relief sought by the cross complaint is independent of and different from that prayed for in the complaint. The court held that the proposed cross complaint did not meet the requirement of former Code Civ. Proc. § 442 (*now see Code Civ. Proc. § 428.10*) because the present cause of action was merely a request for a money judgment against the persons signing the undertaking on appeal, and the purported claim of defendants as set forth in the cross complaint had no connection with the liability of either the principals or sureties therein (*65 Cal. App. 2d 282, 286)* .

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6-61 California Points & Authorities § 61.23

§ 61.23 Opposing Motion for Leave to File Permissive Cross Complaint [Code Civ. Proc. § 428.50(c)]--Leave to File Not in Interests of Justice

[1] FORM Opposing Motion for Leave to File Permissive Cross Complaint [Code Civ. Proc. § 428.50(c)]--Leave to File Not in Interests of Justice

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____ _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN OPPOSITION TO MOTION
Plaintiff,	)	FOR LEAVE TO FILE PERMISSIVE CROSS COM-
vs.	)	PLAINT
_____ [*name*],	)	[*Code Civ. Proc. § 428.50(c)*]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

_____ [*specify moving party, e.g.*, DEFENDANT]'S MOTION FOR LEAVE TO FILE A PERMISSIVE CROSS COMPLAINT SHOULD BE DENIED IN THE DISCRETION OF THE COURT BECAUSE IT IS NOT IN THE INTEREST OF JUSTICE.

A. Leave Not in Interest of Justice. Leave to file a cross complaint may be granted in the interest of justice (*Code Civ. Proc. § 428.50(c)*).

B. Leave to File Cross Complaint Is Within Discretion of Court. Granting or denying of permission to file a cross complaint after an answer has been filed is committed to the discretion of the trial court (*Slankard v. Wagnon (1919) 181 Cal. 135, 145, 183 P 562* ; *People v. City of Los Angeles (1960) 179 Cal. App. 2d 558, 567, 4 Cal. Rptr. 531*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in opposition to a motion for leave to file a permissive cross complaint on the ground that leave to file is not in the interests of justice [*see Code Civ. Proc. § 428.50(c)*; *Slankard v. Wagnon (1919) 181 Cal. 135, 145, 183 P 562]* .

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show that the filing of the cross complaint would not be in the interest of justice, for example, that defendant was guilty of protracted delay and the facts relied on in the cross complaint existed when the answer was filed [*see, e.g.*, *People v. City of Los Angeles (1960) 179 Cal. App. 2d 558, 567-568, 4 Cal. Rptr. 531]* .

In an appropriate case, the foregoing memorandum may be submitted in opposition to a motion for leave to file a permissive cross complaint supported by the points and authorities *set out in §§ 61.20* and *61.21*.

[b] Related Pleading and Practice Forms

For discussion and forms relating to motions for leave to file permissive cross complaints, see Ch. 123, *Complaints and Cross Complaints* in California Forms of Pleading and Practice.

[3] Discussion of Authorities

[a] Leave to File Cross Complaint Is Within Discretion of Court

Slankard v. Wagnon *(1919) 181 Cal. 135, 183 P. 562* , was an action for damages on account of a breach of contract whereby defendant promised to indemnify plaintiff for a shortage in acreage of a tract of land sold by a third party to defendant and conveyed on defendant's account to plaintiff. After testimony and during argument, defendant's counsel requested leave to file a cross complaint for rescinding the contract. Plaintiff's counsel objected, and the trial court expressed doubt as to whether or not it would grant the request. Defendant's counsel stated it would be considered denied. The trial court gave judgment for plaintiff and defendant appealed.

The Supreme Court affirmed. Defendant insisted that he was refused permission to file a cross complaint and that such refusal was error necessitating reversal of the judgment. The Court held that amendments to pleadings and the filing of new pleadings are so thoroughly within the discretion of the superior court that an appellate court is slow to hold as serious error a refusal to permit a change in the theory of a defense or a case for plaintiff at the eleventh hour. The Court stated that this discretion of the trial court either in granting or refusing permission to file new pleadings will not be disturbed except in case of evident abuse thereof. In this instance the Court found no abuse since defendant knew, long

before he went to trial, that the deed to plaintiff, by its terms, included 215 acres. He knew all of the circumstances surrounding and preceding the execution of the last agreement with plaintiff, yet he did not ask for a rescission of the contract until after he had put in all of his evidence and rested (*181 Cal. 135, 145)* .

People v. City of Los Angeles *(1960) 179 Cal. App. 2d 558, 4 Cal. Rptr. 531* , was an action for condemnation of land owned by the city of Los Angeles for the construction of a state highway. The action was brought by the state against the city and a private individual, Griffith, whose ancestors donated the land to the city. Griffith's answer to the complaint asserted no reversionary right and sought no damages for the taking of the land. Three years and five months after filing his answer, Griffith moved for leave to file a cross complaint against plaintiff and the city, alleging a reversionary right and damages for its taking, as well as other causes of action. The motion was denied. The trial court gave judgment for plaintiff condemning the land. The city was granted compensation but Griffith was denied any compensation. Griffith appealed.

The court of appeal affirmed. The court held that a defendant has the right to file a cross complaint at the time of filing his or her answer under former Code Civ. Proc. § 442 (*now see Code Civ. Proc. § 428.10*) but thereafter leave to file such a pleading becomes a matter of discretion for the trial court (*179 Cal. App. 2d 558, 567)* . The court found neither abuse of discretion nor error of law in the denial, stating that in addition to the questions of law involved, the trial court had no doubt considered the delay, the pretrial proceedings, the explanation for the delay, and information disclosing that the facts relied on by defendant existed when the answer was filed (*179 Cal. App. 2d 558, 567-568)* .

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6-61 California Points & Authorities § 61.24

§ 61.24 Opposing Motion for Leave to File Permissive Cross Complaint [Code Civ. Proc. § 428.50(c)]--Cross Complaint Subject to Demurrer

[1] FORM Opposing Motion for Leave to File Permissive Cross Complaint [Code Civ. Proc. § 428.50(c)]--Cross Complaint Subject to Demurrer

[*Caption. See § 61.23.*]

_____ [*specify moving party, e.g.*, DEFENDANT]'S MOTION FOR LEAVE TO FILE A PERMISSIVE CROSS COMPLAINT SHOULD BE DENIED BECAUSE THE PROPOSED CROSS COMPLAINT IS SUBJECT TO A DEMURRER.

Leave to File Permissive Cross Complaint Properly Denied When Subject to Demurrer. If the cross complaint is subject to a demurrer it is within the trial court's discretion to deny leave to file it (*see Glogau v. Hagan (1951) 107 Cal. App. 2d 313, 320, 237 P.2d 329*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in opposition to a motion for leave to file a permissive cross complaint when the proposed cross complaint is demurrable [*see Glogau v. Hagan (1951) 107 Cal. App. 2d 313, 320, 237 P.2d*

329] .

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show that the proposed cross complaint attached to the motion for leave to file a permissive cross complaint is subject to a demurrer [*see Code Civ. Proc. §§ 430.10, 430.30*].

In an appropriate case, the foregoing memorandum may be submitted in opposition to a motion for leave to file a permissive cross complaint supported by the points and authorities *set out in §§ 61.20* and *61.21*.

[b] Related Pleading and Practice Forms

For discussion and forms relating to motions for leave to file permissive cross complaints and to the suggested practice of submitting proposed cross complaints with motions for leave to file a cross complaint, see Ch. 123, *Complaints and Cross Complaints* in California Forms of Pleading and Practice. For discussion, a procedural guide, and forms relating to demurrers, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

[c] Related Memoranda

For memoranda relating to demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Leave to File Permissive Cross Complaint Properly Denied When Subject to Demurrer

In ***Glogau v. Hagan*** *(1951) 107 Cal. App. 2d 313, 237 P.2d 329* , plaintiff as an assignee sued for damages for legal services alleged to have been rendered to defendants. Judgment was entered against defendants J.A. Hagan and Evert L. Hagan, and defendants appealed.

The court of appeal affirmed the judgment. Defendants argued to the appellate court that they were prejudiced by the trial court's refusal to allow defendant J.A. Hagan to file a cross complaint. The court found that there was no abuse of discretion in the trial court's refusal to allow J.A. Hagan to file his cross complaint. The court stated that a defendant may file a cross complaint at the time of answering, but if he or she seeks to file it at a later time he or she may do so only by permission of the court. The court held that in order to defeat the trial court's ruling it must be shown that it abused its discretion. In this case, the court found that the trial court had wisely exercised it's discretion. In discussing the reasons for the trial court's sound exercise of discretion, the court found that the cross complaint was demurrable, and held that this alone provided ample ground for rejecting it (*107 Cal. App. 2d 313, 320)* .

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6-61 California Points & Authorities § 61.25

§ 61.25 Opposing Motion for Leave to File Permissive Cross Complaint [Code Civ. Proc. § 428.50(c)]--Suit Involving Same Matters Pending

[1] FORM Opposing Motion for Leave to File Permissive Cross Complaint [Code Civ. Proc. § 428.50(c)]--Suit Involving Same Matters Pending

[*Caption. See § 61.23.*]

_____ [*specify moving party, e.g.*, DEFENDANT]'S MOTION FOR LEAVE TO FILE A PERMISSIVE CROSS COMPLAINT SHOULD BE DENIED BECAUSE HE/SHE/IT HAS ANOTHER SUIT PENDING THAT INVOLVES THE SAME MATTERS AS THOSE IN THE PROPOSED CROSS COMPLAINT.

Denial of Leave to File Permissive Cross Complaint Proper When Another Suit Pending on Same Matter. If another suit involving the same matters as the cross complaint is pending, it is within the trial court's discretion to deny leave to file the cross complaint (*see Glogau v. Hagan (1951) 107 Cal. App. 2d 313, 320, 237 P.2d 329*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in opposition to a motion for leave to file a permissive cross complaint when another suit is already pending that involves the same matters as those in the proposed cross complaint [*see*

Glogau v. Hagan (1951) 107 Cal. App. 2d 313, 320, 237 P.2d 329] .

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show that a suit is pending on the same matters as those asserted in the cross complaint.

In an appropriate case, the foregoing memorandum may be submitted in opposition to a motion for leave to file a permissive cross complaint supported by the points and authorities *set out in §§ 61.20* and *61.21*.

[b] Related Pleading and Practice Forms

For discussion and forms relating to motions for leave to file permissive cross complaints, see Ch. 123, *Complaints and Cross Complaints* in California Forms of Pleading and Practice.

[3] Discussion of Authorities

[a] Denial of Leave to File Permissive Cross Complaint Proper When Another Suit Pending on Same Matter

The facts and procedural background of ***Glogau v. Hagan*** *(1951) 107 Cal. App. 2d 313, 237 P.2d 329* , are discussed in *§ 61.24[3][a]*. The court of appeal, in affirming the trial court's refusal to permit the filing of a cross complaint, found that the trial court had not abused its discretion by denying defendant's motion for leave to file his cross complaint. In evaluating the trial court's exercise of discretion, the court of appeal found that a prior action based on the causes alleged in the cross complaint was still pending and held that the pendency of a suit involving the same matters alleged in a proposed cross complaint is justification for rejecting leave to file the cross complaint (*107 Cal. App. 2d 313, 320)* .

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6-61 California Points & Authorities § 61.26

§ 61.26 Opposing Motion for Leave to File Permissive Cross Complaint [Code Civ. Proc. § 428.50(c)]--Unnecessary Delay in Seeking Leave to File

[1] FORM Opposing Motion for Leave to File Permissive Cross Complaint [Code Civ. Proc. § 428.50(c)]--Unnecessary Delay in Seeking Leave to File

[*Caption. See § 61.23.*]

_____ [*specify moving party, e.g.*, DEFENDANT]'S MOTION FOR LEAVE TO FILE A PERMISSIVE CROSS COMPLAINT SHOULD BE DENIED BECAUSE _____ [*specify moving party, e.g.*, DEFENDANT] UNNECESSARILY DELAYED IN SEEKING LEAVE TO FILE THE CROSS COMPLAINT.

Denial of Leave to File Permissive Cross Complaint Proper When Unnecessary Delay in Filing Cross Complaint. The dereliction of a party in filing an untimely cross complaint, as well as the confusion that may result in the action from the late filing, are sufficient causes for denying leave to file a cross complaint (*see Nels E. Nelson, Inc. v. Tarman (1958) 163 Cal. App. 2d 714, 730, 329 P.2d 953* ; *Glogau v. Hagan (1951) 107 Cal. App. 2d 313, 320, 237 P.2d 329*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in opposition to a motion for leave to file a permissive cross complaint when a party has unnecessarily delayed seeking permission to file it.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show there was a delay in filing the cross complaint and that the delay was not excused or necessary.

In an appropriate case, the foregoing memorandum may be submitted in opposition to a motion for leave to file a permissive cross complaint supported by the points and authorities *set out in §§ 61.20* and *61.21*.

[b] Related Pleading and Practice Forms

For discussion and forms relating to motions for leave to file permissive cross complaints, see Ch. 123, *Complaints and Cross Complaints* in California Forms of Pleading and Practice.

[3] Discussion of Authorities

[a] Denial of Leave to File Permissive Cross Complaint Proper When Unnecessary Delay in Filing Cross Complaint

Nels E. Nelson, Inc. v. Tarman *(1958) 163 Cal. App. 2d 714, 329 P.2d 953* , was an action for materials and services furnished with knowledge and consent and at the request of defendant Tarman. Defendant Tarman filed an answer, and then asked for leave to file a cross complaint against his codefendant for damages in lieu of specific performance on a contract for the sale of a house. The trial court denied the motion, and defendant appealed.

The court of appeal affirmed. The court found that the record did not show a reason for the trial court's denial of the motion to file the cross complaint. The court stated that a defendant may file a cross complaint at time of answering, but thereafter, it may be done only by permission of the court. The ruling of the trial court was within its discretion and would be reversed only on a showing that the court abused its discretion. Here, the court found that the motion had not been made until seven months after the answer was filed, and that the case referred to in the proposed cross complaint involved other persons. The court held that to inject the cross complaint into the case would have made for confusion, therefore the trial court did not abuse its discretion (*163 Cal. App. 2d 714, 730)* .

The facts and procedural background of ***Glogau v. Hagan*** *(1951) 107 Cal. App. 2d 313, 237 P.2d 329* , are discussed in *§ 61.24[3][a]*. The court of appeal, in affirming the trial court's decision, found that the trial court had not abused its discretion by denying defendant's motion for leave to file his cross complaint. In evaluating the trial court's exercise of its discretion, the court of appeal stated that when the motion was made the answers had been on file for 11 months. The court held that such dereliction of defendants was sufficient cause for denying the motion (*107 Cal. App. 2d 313, 320)* .

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6-61 California Points & Authorities § 61.27

§ 61.27 Opposing Motion for Leave to File Permissive Cross Complaint [Code Civ. Proc. § 428.50(c)]--Judgment Already Entered on Underlying Action

[1] FORM Opposing Motion for Leave to File Permissive Cross Complaint [Code Civ. Proc. § 428.50(c)]--Judgment Already Entered on Underlying Action

[*Caption. See § 61.23.*]

THE MOTION BY _____ [*specify moving party, e.g.,* DEFENDANT] FOR LEAVE TO FILE THE CROSS COMPLAINT SHOULD BE DENIED BECAUSE JUDGMENT HAS ALREADY BEEN ENTERED ON THE UNDERLYING COMPLAINT.

Denial of Leave to File Permissive Cross Complaint When Judgment Already Entered. A cross complaint cannot be filed after judgment has been entered in the trial court on the underlying complaint (*City of Hanford v. Superior Court (1989) 208 Cal. App. 3d 580, 584, 586, 256 Cal. Rptr. 274*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in opposition to a motion for leave to file a permissive cross complaint under *Code Civ. Proc. § 428.50(c)* when the motion to file is not made until after judgment has been entered on the

underlying complaint.

Counsel should insert argument in the foregoing form showing the date the judgment on the complaint was entered and requesting the court to take judicial notice under *Evid. Code § 452(d)* of its records and files in the case [*see Evid. Code § 453*].

In an appropriate case, the foregoing memorandum may be submitted in opposition to a motion for leave to file a permissive cross complaint supported by the points and authorities *set out in §§ 61.20* and *61.21*.

[b] Related Pleading and Practice Forms

For discussion and forms relating to motions for leave to file permissive cross complaints, see Ch. 123, *Complaints and Cross Complaints* in California Forms of Pleading and Practice.

[3] Discussion of Authorities

[a] Denial of Leave to File Permissive Cross Complaint When Judgment Already Entered

City of Hanford v. Superior Court *(1989) 208 Cal. App. 3d 580, 256 Cal. Rptr. 274* , was a proceeding in mandate to compel the trial court, among other things, to vacate its order granting leave to file a cross complaint after judgment had been entered on the underlying complaint, from which judgment an appeal had been taken and was pending. In granting the writ, the court said a cross complaint cannot be filed after judgment has been entered in the trial court on the underlying complaint (*208 Cal. App. 3d 580, 584)* . The court quoted the provisions of *Code Civ. Proc. § 428.50* and said that *Code Civ. Proc. § 428.50(c)* addresses all cross complaints other than those mentioned in *Code Civ. Proc. § 428.50(a)* and *(b)* (which specify the time within which the cross complaint under those subdivisions may be filed) and provides that they can only be filed with leave of court, which may be granted in the interest of justice at any time "during the course of the action" (*208 Cal. App. 3d 580, 586-587)* . The court accepted petitioners' argument that the quoted phrase means any time from the commencement of the action until judgment is entered, and rejected the argument that the cross complaint could be filed at any time during the pendency of the action as defined in *Code Civ. Proc. § 1049* (an action is deemed to be pending from the time of its commencement until its final determination on appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied) (*208 Cal. App. 3d 580, 587)* . The court reasoned that to allow a party to assert a cross complaint while a case is pending on appeal could create chaos in the appellate process. The court said that the purpose of the rule depriving the trial court of jurisdiction pending appeal in civil actions is to protect the jurisdiction of the appellate court, that the rule prevents the trial court frm rendering the appeal futile by changing the judgment into something different from the judgment appealed, and that if the cross complaint share identity with the issues in the complaint, further litigation on those issues is necessary to resolve the controversy, and the entered judgment is, in effect, interlocutory and nonappealable. The court said the cross complainant should not be permitted to circumvent the appellate rights of other parties by injecting additional claims into the lawsuit while the case is pending on appeal (*208 Cal. App. 3d 580, 588)* .

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6-61 California Points & Authorities § 61.28

§ 61.28 Opposing Motion for Leave to File Permissive Cross Complaint [Code Civ. Proc. § 428.50(c)] Against Plaintiff--Eminent Domain Proceeding [Code Civ. Proc. § 428.10(a)]

[1] FORM Opposing Motion for Leave to File Permissive Cross Complaint [Code Civ. Proc. § 428.50(c)] Against Plaintiff--Eminent Domain Proceeding [Code Civ. Proc. § 428.10(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____ _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN OPPOSITION TO MOTION
Plaintiff,	)	FOR LEAVE TO FILE PERMISSIVE CROSS COM-
vs.	)	PLAINT AGAINST PLAINTIFF
_____ [*name*],	)	[*Code Civ. Proc. §§ 428.10(a), 428.50(c)*]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

_____ [*specify moving party, e.g.*, DEFENDANT]'S MOTION FOR LEAVE TO FILE A PERMISSIVE CROSS COMPLAINT AGAINST _____ [*name(s) of plaintiff(s)*] SHOULD BE DENIED BECAUSE THE PROCEEDING WAS COMMENCED UNDER THE EMINENT DOMAIN STATUTES.

Permissive Cross Complaint Not Authorized in Eminent Domain Proceeding. Nothing in *Section 428.10 of the Code of Civil Procedure* authorizes the filing of a cross complaint against the plaintiff in eminent domain proceedings commenced under *Sections 1230.010-1273.050 of the Code of Civil Procedure* (*Code Civ. Proc. § 428.10(a)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in opposition to a motion for leave to file a permissive cross complaint against plaintiff when the action involves an eminent domain proceeding [*Code Civ. Proc. § 428.10(a)*].

Code Civ. Proc. § 428.10(a) and *(b)* are completely independent provisions, and it is necessary only that the person seeking to file the cross complaint come within the provisions of one of the subdivisions. Although *Code Civ. Proc. § 428.10(a)* bars the filing of a cross complaint against plaintiff when the action is commenced under the eminent domain statutes, a person seeking to file a cross complaint could assert a claim under *Code Civ. Proc. § 428.10(b)* if the cause of action in the cross complaint either arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause brought against him or her or asserts a claim, right, or interest in the property or controversy that is the subject of the cause brought against him or her [*see Code Civ. Proc. § 428.10(b)*; *City of Mountain View v. Superior Court (1975) 54 Cal. App. 3d 72, 82, 126 Cal. Rptr. 358]* .

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show that the cause of action in the cross complaint is against plaintiff and that proceeding involved is one for eminent domain.

[b] Related Pleading and Practice Forms

For discussion and forms relating to motions for leave to file permissive cross complaints, see Ch. 123, *Complaints and Cross Complaints* in California Forms of Pleading and Practice. For discussion and forms relating to eminent domain proceedings generally, see Ch. 247, *Eminent Domain* in that set.

[c] Related Memoranda

For forms of memoranda for use in eminent domain proceedings generally, see Ch. 95, *Eminent Domain* in this set.

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6-61 California Points & Authorities § 61.29

§ 61.29 Opposing Motion for Leave to File Cross Complaint [Code Civ. Proc. § 428.50(c)]--Cross Complaint Not Authorized in Special Proceedings

[1] FORM Opposing Motion for Leave to File Cross Complaint [Code Civ. Proc. § 428.50(c)]--Cross Complaint Not Authorized in Special Proceedings

[*Caption. See § 61.23.*]

_____ [*specify moving party, e.g.*, DEFENDANT]'S MOTION FOR LEAVE TO FILE A PERMISSIVE CROSS COMPLAINT AGAINST _____ [*name(s)*] SHOULD BE DENIED BECAUSE A CROSS COMPLAINT IS NOT AUTHORIZED IN SPECIAL PROCEEDINGS.

A. Cross Complaint Is Pleading Designed for Use in Civil Actions. The Code of Civil Procedure prescribes the forms of pleadings allowed in civil actions, which include cross complaints (*see Code Civ. Proc. §§ 421, 422.10*).

B. Cross Complaint Not Specifically Authorized in Special Proceedings. *Section 428.10 of the Code of Civil Procedure* applies to civil actions, which are ordinary proceedings in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. It does not on its face authorize the use of a cross complaint in a special proceeding (*Code Civ. Proc. §§ 22, 23*; *see Tide Water Assoc. Oil Co. v. Superior Court (1955) 43 Cal. 2d 815, 821, 279 P.2d 35*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion for leave to file a permissive cross complaint in a special proceeding [*see Code Civ. Proc. § 1063 et seq.*; *Fam. Code §§ 1800 et seq., 4900 et seq.*] when there is no specific statutory authority for filing a cross complaint.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show that the matter which is the subject of the complaint is a special proceeding and that there is no specific statute authorizing the use of cross complaints in the proceeding. Counsel should also show that application of *Code Civ. Proc. § 428.10* would not be in harmony with the purposes of the particular type of suit.

[b] Related Pleading and Practice Forms

For discussion and forms relating to motions for leave to file permissive cross complaints, see Ch. 123, *Complaints and Cross Complaints* , in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Cross Complaint Not Specifically Authorized in Special Proceedings

In ***Tide Water Assoc. Oil Co. v. Superior Court*** *(1955) 43 Cal. 2d 815, 279 P.2d 35* , the state brought suit to enjoin unreasonable waste of gas. Certain defendants filed a cross complaint seeking to enjoin other defendants from wasting gas and to recover damages from all but one of them for past waste. Demurrers to the cross complaint were overruled, and motions to strike it were denied. Defendants then sought a writ of prohibition, claiming that the trial court had no power to consider a cross complaint in that type of suit.

The Supreme Court denied the writ. The Court stated that former Code Civ. Proc. § 442 (*now see Code Civ. Proc. § 428.10*) was a general provision which, in the absence of a specific statute to the contrary, was sufficiently broad to permit the use of a cross complaint in any "action" but that it did not on its face authorize the use of a cross complaint in a "special proceeding" (*43 Cal. 2d 815, 821)* . The Court eventually found this case to involve an "action" and not a "special proceeding," and held that a cross complaint could be filed (*43 Cal. 2d 815, 822-823)* .

It should be noted that although the Supreme Court in *Tide Water* determined that the cross complaint was permissible because the suit was an action within the meaning of former Code Civ. Proc. § 442 (*now see Code Civ. Proc. § 428.10*), in dictum the Court pointed out that even if the suit were held to be a special proceeding, it would not necessarily follow that a trial of the issues raised by the cross complaint would be in excess of the court's jurisdiction. If the provisions of the Code of Civil Procedure are harmonious with the objects and purposes of the proceeding although those provisions are not specifically made applicable by the statute that creates the proceeding, the court by its inherent power and by its power under *Code Civ. Proc. § 187* may adopt any suitable method of practice, both in ordinary actions and special proceedings, if the procedure is not specified by statutes or by rules adopted by the Judicial Council. Thus, even if a suit is held to be a special proceeding, it is within the power of the court to pass on the question of whether or not application of *Code Civ. Proc. § 428.10* would be in harmony with the purposes of the particular type of suit (*43 Cal. 2d 815, 825-826)* .

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6-61 California Points & Authorities §§ 61.30-61.49

[Reserved]

§§ 61.30[Reserved]

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6-61 California Points & Authorities § 61.50

§ 61.50 Supporting Motion to Strike Cross Complaint [Code Civ. Proc. § 435]--Cross Complaint Against Party Filed After Answer Without Permission of Court [Code Civ. Proc. § 428.50(a), (c)]

[1] FORM Supporting Motion to Strike Cross Complaint [Code Civ. Proc. § 435]--Cross Complaint Against Party Filed After Answer Without Permission of Court [Code Civ. Proc. § 428.50(a),(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____ _____

_____ [*name*],	)	NO. _____
Plaintiff and _____	)	MEMORANDUM IN SUPPORT OF MOTION TO
[*specify, e.g.*, Cross Defendant],	)	STRIKE CROSS COMPLAINT FILED AFTER AN-
vs.	)	SWER WITHOUT PERMISSION OF COURT
_____ [*name*],	)	[*Code Civ. Proc. §§ 428.50(a),(c), 435*]
Defendant and _____	)	Date: _____
[*specify, e.g.*, Cross Complainant].	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE MOTION OF _____ [*specify moving party, e.g.*, PLAINTIFF AND CROSS DEFENDANT] TO STRIKE THE CROSS COMPLAINT FILED BY _____ [*specify cross complainant, e.g.*, DEFENDANT AND CROSS COMPLAINANT] SHOULD BE GRANTED BECAUSE _____ [*specify cross complainant, e.g.*, DEFENDANT] FILED THE CROSS COMPLAINT AFTER THE ANSWER TO _____ [*specify moving party, e.g.*, PLAINTIFF]'S _____ [COMPLAINT *or* CROSS

COMPLAINT] WAS FILED WITHOUT PERMISSION OF THE COURT.

A. Timely Motion to Strike Is Proper. Any party, within the time allowed to respond to a pleading, may serve and file a notice of motion to strike the whole or any part thereof (*Code Civ. Proc. § 435(b)(1)*).

B. Cross Complaint Subject to Motion to Strike. The pleadings at which a motion to strike may be directed include cross complaints (*see Code Civ. Proc. § 435(a)*).

C. Cross Complaint Against Party Must Be Filed Before or With Answer or With Leave of Court. A party must file a cross complaint against any of the parties who filed the complaint or cross complaint against him or her before or at the same time as the answer to the complaint or cross complaint or obtain leave of court to file the cross complaint (*Code Civ. Proc. § 428.50(a), (c)*).

[*Optional*] **D. Cross Complaint Against Party Must Be Filed Before or With Answer, Not Amended Answer.** A cross complaint may be filed without court order before or at the time the defendant files an answer but not at time of filing an amended answer (*see Code Civ. Proc. § 428.50(a)*; *United States Nat. Bank v. Bank of America (1963) 214 Cal. App. 2d 74, 76, 29 Cal. Rptr. 277*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion to strike a cross complaint when the cross complaint has been filed by a party against any of the parties who filed the complaint or cross complaint after the answer has been filed and that party has not obtained leave of the court to file the cross complaint [*see Code Civ. Proc. §§ 428.50(a), (c), 435*]. The form may be adapted for use to support a motion for summary judgment by cross defendant.

It should be noted that motions to strike are not available in limited civil cases court except on the ground that the damages or relief sought are not supported by the allegations of the complaint [*Code Civ. Proc. §§ 91(a), 92(d)*]. As the specific ground for the form is not expressly prohibited from being raised by *Code Civ. Proc. § 92*, it appears that the points and authorities may be adapted for use in a motion for summary judgment by cross defendant in a limited civil case.

Optional Paragraph D should be used when the cross complaint has been filed before an amended answer, but after the original answer [*see United States Nat. Bank v. Bank of America (1963) 214 Cal. App. 2d 74, 76, 29 Cal. Rptr. 277]* .

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show that the cross complaint was filed against the party who filed the complaint or cross complaint but after the answer, and that permission to file it was not obtained.

[b] Related Pleading and Practice Forms

For discussion and forms relating to motions for leave to file permissive cross complaints, see California Forms of Pleading and Practice, Ch. 123, *Complaints and Cross Complaints* .

For discussion, a procedural guide, and forms relating to motions to strike, see California Forms of Pleading and Practice, Ch. 375, *Motions to Strike* .

[c] Related Memoranda

For forms of memoranda supporting motions to strike pleadings generally, see Ch. 160, *Motions to Strike* .

[3] Discussion of Authorities

[a] Cross Complaint Against Party Must Be Filed Before or With Answer, Not Amended Answer

In ***United States Nat. Bank v. Bank of America*** *(1963) 214 Cal. App. 2d 74, 29 Cal. Rptr. 277* , plaintiffs brought an action against defendant United States National Bank alleging improper payment of a check which was charged against plaintiffs' account. Defendant filed a cross complaint against the Bank of America praying for a judgment against that bank in the event a judgment should be entered against it on plaintiffs' cause of action. Cross defendant attacked the cross complaint by general demurrer and motion to strike, the latter based on the ground that the pleading came too late and without leave of court. The trial court granted both the motion and the demurrer and entered a judgment striking the cross complaint and decreeing that cross complainant take nothing by reason of it. Cross complainant appealed.

The court of appeal modified and affirmed. Cross complainant contended that the cross complaint was not filed late since it was filed at the same time as the amended answer, therefore leave of court was not required. The court held that the statute did not authorize the filing of a cross complaint at the same time that an amended answer was filed but only when the original answer was filed (*214 Cal. App. 2d 74, 76)* .

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6-61 California Points & Authorities § 61.51

§ 61.51 Supporting Motion to Strike Cross Complaint [Code Civ. Proc. § 435]--Cross Complaint Filed After Trial Date Set Without Permission of Court [Code Civ. Proc. § 428.50(b), (c)]

[1] FORM Supporting Motion to Strike Cross Complaint [Code Civ. Proc. § 435]--Cross Complaint Filed After Trial Date Set Without Permission of Court [Code Civ. Proc. § 428.50(b), (c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____ _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION TO
vs.	)	STRIKE CROSS COMPLAINT FILED AFTER TRI-
_____ [*name*],	)	AL DATE SET WITHOUT PERMISSION OF
Defendant and Cross Complainant, vs.	)	COURT
_____ [*name*],	)	Date: _____
Cross Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE MOTION OF _____ [*specify name of moving party*], CROSS DEFENDANT, TO STRIKE THE CROSS COMPLAINT FILED BY _____ [*specify cross complainant, e.g.,* DEFENDANT] AND CROSS COMPLAINANT SHOULD BE GRANTED BECAUSE THE CROSS COMPLAINT WAS FILED WITHOUT PERMISSION OF THE COURT AFTER THE TRIAL DATE WAS SET [AND THEN VACATED].

A. Timely Motion to Strike Is Proper. [*See § 61.50, Paragraph A*].

B. Cross Complaint Subject to Motion to Strike. [*See § 61.50, Paragraph B*].

C. Time for Filing Cross Complaint. A cross complaint against anyone other than a party who filed the complaint or prior cross complaint against the cross complainant may only be filed before the court has set a date for trial (*see Code Civ. Proc. § 428.50(a),(b)*).

D. Leave of Court Required. A party must obtain leave of court to file any cross complaint against anyone other than a party who filed the complaint or prior cross complaint against him or her except if the cross complaint is filed within the time specified in *Section 428.50(b) of the Code of Civil Procedure* (*Code Civ. Proc. § 428.50(c)*).

[*Optional*] **E. Leave of Court Required to File Third-Party Cross Complaint Even if Original Trial Date Vacated.** Leave of the court is required to file a cross complaint against a third party anytime after the first trial date is set, regardless of whether or not that date is later vacated (*Loney v. Superior Court (1984) 160 Cal. App. 3d 719, 722-724, 206 Cal. Rptr. 769*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion to strike any cross complaint, other than one filed by a party against a party who filed the complaint or cross complaint against him or her, when the cross complaint was filed after the trial date was set without the permission of the court [*Code Civ. Proc. § 428.50(b), (c)*]. The foregoing form may be adapted for use to support a motion for summary judgment by cross defendant.

It should be noted that motions to strike are not available in limited civil cases except on the ground that the damages or relief sought are not supported by the allegations of the complaint [*Code Civ. Proc. §§ 91(a), 92(d)*]. As the specific ground for the form is not expressly prohibited from being raised by *Code Civ. Proc. § 92*, it appears that the points and authorities may be adapted for use in a motion for summary judgment by cross defendant in a limited civil case.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show that the cross complaint, filed subject to *Code Civ. Proc. § 428.10(b)* and desired to be struck, was filed after the trial date was set and without the court's permission.

[b] Related Pleading and Practice Forms

For discussion and forms relating to motions for leave to file permissive cross complaints, see California Forms of Pleading and Practice, Ch. 123, *Complaints and Cross Complaints* .

For discussion, procedural guide, and forms relating to motions to strike, see California Forms of Pleading and Practice, Ch. 375, *Motions to Strike* .

[c] Related Memoranda

For forms of memoranda supporting motions to strike pleadings generally, see Ch. 160, *Motions to Strike* .

[3] Discussion of Authorities

[a] Leave of Court Required to File Third-Party Cross Complaint Even if Original Trial Date Vacated

In ***Loney v. Superior Court*** *(1984) 160 Cal. App. 3d 719, 206 Cal. Rptr. 769* , an action had been set for trial three times after defendants had answered the complaint, but the last trial date was vacated by stipulation of the parties. When no trial date was pending, defendants filed a cross complaint against a third party. The cross complaint alleged that the facts underlying the claim were discovered in early 1981, the same year the amended complaint in the original action was filed. Cross defendant requested the court to strike the cross complaint because it was not timely filed, and the court ordered it stricken. Defendants sought an extraordinary writ directing the trial court to vacate its order, arguing that since no trial date was set when they filed their cross complaint, they were entitled to do so as a matter of right under *Code Civ. Proc. § 428.50(b)*.

The court of appeal denied the writ. The court approved of cross defendant's argument that *Code Civ. Proc. § 428.50(b)* requires leave of court to file a third-party cross complaint anytime after the first trial date is set, regardless of whether or not that date is later vacated (*160 Cal. App. 3d 719, 722)* . The court stated that defendants' construction of the statute would significantly alter the effect of the statute (*160 Cal. App. 3d 719, 722-723)* . Looking to practical considerations, the court pointed out that at the time of trial setting, it may be assumed that the original parties have engaged in discovery and investigated the applicable law and facts, and have learned of any additional causes of action or new parties that should be included in the litigation. Thus, the assignment of the first trial date becomes a logical point at which to cut off the right to file cross complaints bringing in new parties without permission of court. The court also noted that the legislative history of the statute lent indirect support to its interpretation (*160 Cal. App. 3d 719, 723)* .

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6-61 California Points & Authorities § 61.52

§ 61.52 Supporting Motion to Strike Cross Complaint [Code Civ. Proc. § 435]--Cause of Action Not Asserted Against Cross Complainant

[1] FORM Supporting Motion to Strike Cross Complaint [Code Civ. Proc. § 435]--Cause of Action Not Asserted Against Cross Complainant

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____ _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION TO
vs.	)	STRIKE CROSS COMPLAINT WHEN CAUSE OF
_____ [*name*],	)	ACTION NOT ASSERTED AGAINST CROSS
Defendant and Cross Complainant, vs.	)	COMPLAINANT
_____ [*name*],	)	[*Code Civ. Proc. § 435*]
Defendant and Cross Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE MOTION OF _____ [*specify name of moving party*], DEFENDANT AND CROSS DEFENDANT, TO STRIKE THE CROSS COMPLAINT FILED BY CROSS COMPLAINANT SHOULD BE GRANTED BECAUSE A CAUSE OF ACTION HAS NOT BEEN ASSERTED AGAINST CROSS COMPLAINANT.

A. Timely Motion to Strike Is Proper. [*See § 61.50, Paragraph A*].

B. Cross Complaint Subject to Motion to Strike. [*See § 61.50, Paragraph B*].

C. Cause of Action Not Asserted Against Party Seeking Leave to File Cross Complaint. Persons mentioned in a complaint, when the reference does not amount to a cause of action, cannot successfully assert that they are parties "against whom a cause of action has been asserted" within meaning of *Section 428.10 of the Code of Civil Procedure* so as to entitle them to file a cross complaint (*Dabney v. Shippey (1974) 40 Cal. App. 3d 990, 993, 115 Cal. Rptr. 526*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion to strike a cross complaint when a cause of action was not asserted in a complaint or cross complaint against the party filing the cross complaint [*see Dabney v. Shippey (1974) 40 Cal. App. 3d 990, 993, 115 Cal. Rptr. 526]* . The foregoing form may be adapted for use to support a motion for summary judgment by cross defendant.

It should be noted that motions to strike are not available in limited civil cases except on the ground that the damages or relief sought are not supported by the allegations of the complaint [*Code Civ. Proc. §§ 91(a), 92(d)*]. As the specific ground for the form is not expressly prohibited from being raised by *Code Civ. Proc. § 92*, it appears that the points and authorities may be adapted for use in a motion for summary judgment by cross defendant in a limited civil case.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show that the cause of action asserted in the complaint was not asserted against the person filing the cross complaint.

[b] Related Pleading and Practice Forms

For discussion and forms relating to motions for leave to file permissive cross complaints, see California Forms of Pleading and Practice, Ch. 123, *Complaints and Cross Complaints* (Matthew Bender).

[c] Related Memoranda

For forms of memoranda supporting motions to strike pleadings generally, see Ch. 160, *Motions to Strike* .

[3] Discussion of Authorities

[a] Cause of Action Not Asserted Against Party Seeking Leave to File Cross Complaint

Dabney v. Shippey *(1974) 40 Cal. App. 3d 990, 115 Cal. Rptr. 526* , was an appeal from an order striking cross complainants' cross complaint by which they sought to intervene in an action alleging fraud in connection with transfer of corporate stock. Although the action was not against cross complainants, in their complaint plaintiffs mentioned them in their allegation that defendants had induced, through fraud, the sale of stock to one of its subsidiaries in order to

effect a merger. Cross complainants tried to enter the case by accepting service as fictitiously named defendants. They answered and at the same time filed a cross complaint naming defendants as cross defendants. Defendants moved to strike the cross complaint. The trial court granted the motion and cross complainants appealed.

The court of appeal affirmed the decision. Cross complainants contended that they were entitled under *Code Civ. Proc. § 428.10* to file a cross complaint because they were parties "against whom a cause of action has been asserted in a complaint or cross complaint." The court held that although plaintiffs did allege that, after the sale, defendants and cross complainants made numerous changes in the operations and management of the company to plaintiffs' detriment, the mere fact that cross complainants were mentioned by name in the complaint did not establish that a cause of action was asserted against them. The court found that the references did not amount to a cause of action for fraud, but on the contrary, the fact that they were mentioned in the complaint but not as a joined as defendants supported the conclusion that plaintiffs did not assert a cause of action against them (*40 Cal. App. 3d 990, 992-993)* . As to the contention that cross complainants were parties in that they were two of the fictitious defendants mentioned in the complaint as participants and co-conspirators in the fraud, deceit and misrepresentations, the court held that plaintiff knew their names and all facts at the time of filing the complaint. Thus, *Code Civ. Proc. § 474*, governing fictitious defendants, did not apply to them so as to make them defendants (*40 Cal. App. 3d 990, 993)* .

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6-61 California Points & Authorities § 61.53

§ 61.53 Opposing Motion to Strike Cross Complaint [Code Civ. Proc. § 435]--Court's Discretion to Strike Cross Complaint Limited

[1] FORM Opposing Motion to Strike Cross Complaint [Code Civ. Proc. § 435]--Court's Discretion to Strike Cross Complaint Limited

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____ _____

_____ [*name*],	)	
Plaintiff [and _____	)	NO. _____
(*specify, e.g.*, Cross Defendant)],	)	MEMORANDUM IN OPPOSITION TO MOTION
vs.	)	TO STRIKE CROSS COMPLAINT
_____ [*name*],	)	[*Code Civ. Proc. § 435*]
Defendant [and _____	)	Date: _____
(*specify, e.g.*, Cross Complainant)]	)	Time: _____
_____ (*name*), vs.	)	Location: _____
_____ (*specify, e.g.*,	)	[Judge: _____]
Cross Defendant)].	)	Date Action Filed: _____
	)	[Trial Date: _____]
	)	

_____

THE MOTION OF _____ [*specify moving party, e.g.*, PLAINTIFF] AND CROSS DEFENDANT TO STRIKE THE CROSS COMPLAINT FILED BY _____ [*specify party, e.g.*, DEFENDANT] AND CROSS COMPLAINANT SHOULD BE DENIED BECAUSE THE CROSS COMPLAINT FULFILLS THE REQUIREMENTS OF SECTION 428.10 OF THE CODE OF CIVIL PROCEDURE AND THE TRIAL COURT DOES NOT HAVE ABSOLUTE DISCRETION TO STRIKE A CROSS COMPLAINT WHEN THE

REQUIREMENTS ARE SATISFIED.

Court's Discretion to Strike Cross Complaint Limited. The trial court does not have absolute discretion to strike a cross complaint that fulfills the requirements of *Section 428.10 of the Code of Civil Procedure* (*see Roylance v. Doelger (1962) 57 Cal. 2d 255, 262, 19 Cal. Rptr. 7, 368 P.2d 535* ; *Linday v. American President Lines, Ltd. (1963) 214 Cal. App. 2d 146, 149, 29 Cal. Rptr. 465*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion to strike a cross complaint when the cross complaint fulfills the requirements of *Code Civ. Proc. § 428.10* [*see Roylance v. Doelger (1962) 57 Cal. 2d 255, 262, 19 Cal. Rptr. 7, 368 P.2d 535* ; *Linday v. American President Lines, Ltd. (1963) 214 Cal. App. 2d 146, 149, 29 Cal. Rptr. 465]* . *Code Civ. Proc. § 428.10(a)* governs cross complaints against any parties who filed the complaint or cross complaint against cross complainant, while *Code Civ. Proc. § 428.10(b)* governs cross complaints against any person alleged to be liable thereon if the cause of action satisfies the transaction or occurrence test or asserts a claim in the property or controversy that is the subject of the original action.

It should be noted that motions to strike are not available in limited civil cases except on the ground that the damages or relief sought are not supported by the allegations of the complaint [*Code Civ. Proc. §§ 91(a), 92(d)*].

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show that the cross complaint fulfills all the requirements of *Code Civ. Proc. § 428.10(a)* or *(b)* and that to strike the cross complaint would be erroneous.

[b] Related Pleading and Practice Forms

For discussion and forms relating to motions for leave to file permissive cross complaints, see California Forms of Pleading and Practice, Ch. 123, *Complaints and Cross Complaints* (Matthew Bender).

For discussion, a procedural guide, and forms relating to motions to strike, see California Forms of Pleading and Practice, Ch. 375, *Motions to Strike* .

[3] Discussion of Authorities

[a] Court's Discretion to Strike Cross Complaint Limited

The facts and procedural background of ***Roylance v. Doelger*** *(1962) 57 Cal. 2d 255, 19 Cal. Rptr. 7, 368 P.2d 535* , are discussed in *§ 61.21[3][a]*. In *Roylance*, the trial court granted a motion to strike the cross complaint, but this order was reversed by the Supreme Court on appeal. The Court expressly rejected the argument that the trial court was entitled to strike a cross complaint that raised much more complicated issues than those raised by the complaint and answer. The Court concluded that the cross complaint fulfilled all of the requirements of former Code Civ. Proc. § 442 (*now see Code Civ. Proc. § 428.10*) and accordingly should not have been stricken, pointing out that in the event the

trial court determined that the issues raised by the cross complaint should be tried separately from those raised by the complaint and answer, the proper procedure is to sever the action pursuant to *Code Civ. Proc. § 1048* (*57 Cal. 2d 255, 262)* .

Linday v. American President Lines, Ltd. *(1963) 214 Cal. App. 2d 146, 29 Cal. Rptr. 465* , was an action against an employer to recover for injuries sustained when plaintiff was assaulted by a fellow crew member. Defendant filed a cross complaint against his assailant seeking indemnity against cross defendant for any damages which it might ultimately sustain as a result of plaintiff's injury. Plaintiff moved to strike the cross complaint on the grounds that it was not asserted in good faith and that it was asserted for the purpose of prejudicing plaintiff's action. The trial court granted the motion and ordered the cross complaint stricken. Defendant and cross complainant appealed.

The court of appeal reversed. Plaintiff's sole argument on appeal in support of the order striking the cross complaint was that a cross complaint, even though fulfilling the requirements of former Code Civ. Proc. § 442 (*now see Code Civ. Proc. § 428.10*), may be disallowed if the trial court in the exercise of its discretion concludes that prejudice will otherwise result to the plaintiff. In reversing the trial court's decision, the court of appeal found that California cases construing former Code Civ. Proc. § 442 (*now see Code Civ. Proc. § 428.10*) clearly establish that a trial court has no absolute discretion to strike a cross complaint that fulfills the requirements of that section (*214 Cal. App. 2d 146, 148-149)* .

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6-61 California Points & Authorities §§ 61.54-61.69

[Reserved]

§§ 61.54[Reserved]

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B. Compulsory Cross Complaints
1. Motions to Amend Cross Complaint or File Compulsory Cross Complaints

6-61 California Points & Authorities § 61.70

§ 61.70 Supporting Motion for Leave to Amend Cross Complaint or to File Compulsory Cross Complaint to Assert Related Cause of Action Against Plaintiff [Code Civ. Proc. § 426.30(a)]--Failure to Assert Related Cause Due to Oversight, Inadvertence, Mistake, Neglect, or Other Cause [Code Civ. Proc. § 426.50]

[1] FORM Supporting Motion for Leave to Amend Cross Complaint or to File Compulsory Cross Complaint to Assert Related Cause of Action Against Plaintiff [Code Civ. Proc. § 426.30(a)]--Failure to Assert Related Cause Due to Oversight, Inadvertence, Mistake, Neglect, or Other Cause [Code Civ. Proc. § 426.50]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____ _____

_____ [*name*],	)	NO. _____
Plaintiff [and Cross Defendant],	)	MEMORANDUM IN SUPPORT OF MOTION TO
vs.	)	_____ [AMEND CROSS COM-
_____ [*name*],	)	PLAINT *or* FILE COMPULSORY CROSS COM-
Defendant [and Cross Complainant].	)	PLAINT]
	)	[*Code Civ. Proc. §§ 426.30(a), 426.50*]
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

_____ [*specify moving party, e.g.*, DEFENDANT]'S MOTION FOR LEAVE TO
_____ [AMEND THE CROSS COMPLAINT *or* TO FILE A COMPULSORY CROSS

COMPLAINT] TO ASSERT A RELATED CAUSE OF ACTION AGAINST PLAINTIFF [AND CROSS DEFENDANT] SHOULD BE GRANTED BECAUSE FAILURE TO ASSERT THE RELATED CAUSE OF ACTION WAS DUE TO _____ [OVERSIGHT *and/or* INADVERTENCE *and/or* MISTAKE *and/or* NEGLECT *or specify other cause*], AND _____ [*specify moving party, e.g.,* DEFENDANT] ACTED IN GOOD FAITH.

A. Failure to Plead Related Cause of Action Was Due to Oversight, Inadvertence, Mistake, Neglect, or Other Cause. A party who fails to plead a related cause of action subject to the requirements of *Sections 426.10-426.70 of the Code of Civil Procedure* through oversight, inadvertence, mistake, neglect, or other cause may apply to the court for leave to amend his or her pleading or file a cross complaint to assert the cause at any time during the course of the action (*Code Civ. Proc. § 426.50*; *see also Code Civ. Proc. § 426.30* (requirement for alleging related cause of action)).

B. Related Cause of Action Defined. A "related cause of action" for purposes of compulsory cross complaints means a cause of action that arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause of action that the plaintiff or cross complainant alleges in his or her complaint or cross complaint (*Code Civ. Proc. § 426.10(c)*; *see Code Civ. Proc. § 426.10(a), (b)*).

C. Granting of Permission Mandatory if Moving Party Acted in Good Faith. The court, after notice to the adverse party, shall grant, on such terms as may be just to the parties, leave to amend the pleading or file the cross complaint to assert a related cause of action if the party who failed to plead the cause acted in good faith (*Code Civ. Proc. § 426.50*; *see Foot's Transfer & Storage Co. v. Superior Court (1981) 114 Cal. App. 3d 897, 900-901, 171 Cal. Rptr. 1*).

D. Good Faith Must Be Given Liberal Construction. *Section 426.50 of the Code of Civil Procedure* shall be liberally construed to avoid forfeiture of causes of action, and what constitutes good faith or the lack of it must be determined in light of and in conformity with the liberality conferred on the trial courts by the section and by prior law (*Code Civ. Proc. § 426.50*; *Foot's Transfer & Storage Co. v. Superior Court (1981) 114 Cal. App. 3d 897, 902, 171 Cal. Rptr. 1*).

E. Strong Showing of Bad Faith Required to Deny Right to Amend Pleading or File Cross Complaint. In order to support a finding that a party has not acted in good faith in amending his or her pleading or filing a cross complaint, there must be a strong showing of bad faith; mere delay is generally insufficient to constitute bad faith, absent a showing that the amendment of the pleading or filing of the cross complaint would work a substantial injustice to the opposing party and would prejudice that party's position in some way (*see Foot's Transfer & Storage Co. v. Superior Court (1981) 114 Cal. App. 3d 897, 902-903, 171 Cal. Rptr. 1*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in support of a motion for leave to amend a cross complaint or to file a compulsory cross complaint to assert a related cause of action against plaintiff when failure to assert the related cause of action was due to oversight, inadvertence, mistake, neglect, or other cause and the party who failed to plead the cause acted in good faith [*see Code Civ. Proc. § 426.50*; *see Code Civ. Proc. § 426.10(c)* (definition of "related cause of action")]. As the term "plaintiff" also means cross complainant for purposes of the requirements of *Code Civ. Proc. §*

426.30(a) [*see* Code *Civ. Proc. § 426.10(b)*], the form may be adapted for use by a cross defendant seeking to amend a permissive cross complaint or to file a compulsory cross complaint against the cross complainant.

The grounds for relief in *Code Civ. Proc. § 426.50* are similar to those set forth in the general discretionary relief statute, *Code Civ. Proc. § 473* (mistake, inadvertence, surprise, or excusable neglect). *Code Civ. Proc. § 426.50* supplements the authority provided generally to amend pleadings, and does not preclude relief from a judgment or order under *Code Civ. Proc. § 473* [*see* Legislative Committee Comments to *Code Civ. Proc. § 426.50*]. For memoranda or points and authority regarding relief under *Code Civ. Proc. § 473*, see Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders* .

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should state facts showing oversight, inadvertence, mistake, neglect, or other reason for failing to assert the compulsory related cause of action against plaintiff or cross complainant, and showing that any delays in asserting the cause of action would not work a substantial injustice on the opposing party or prejudice that party's position in any way. For example, counsel may show that defendant failed to assert the cause of action because he or she was in settlement negotiations [*see* *Dunzweiler v. Superior Court (1968) 267 Cal. App. 2d 569, 579, 73 Cal. Rptr. 331]* .

[b] Related Pleading and Practice Forms

For discussion and forms relating to motions for leave to amend a cross complaint or file a compulsory cross complaint to assert a related cause of action, see Ch. 123, *Complaints and Cross Complaints* in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Granting of Permission Mandatory if Moving Party Acted in Good Faith

In ***Foot's Transfer & Storage Co. v. Superior Court*** *(1981) 114 Cal. App. 3d 897, 171 Cal. Rptr. 1* , plaintiff filed a complaint for breach of contract against defendant in March 1978, to which defendant did not respond and a default was taken but was subsequently vacated. Defendant filed an answer in November 1978, but the answer did not allege any affirmative defenses or counterclaims. After the answer was filed in April 1979, defendant requested plaintiff's counsel to stipulate to entry of a cross complaint in the action. Plaintiff rejected the stipulation in November 1979. Defendant then moved for permission to file a cross complaint. The motion was heard and denied and a motion for reconsideration was also heard and denied. Defendant petitioned for a writ of mandate to compel the trial court to grant defendant the right to file a cross complaint.

The court of appeal granted the writ. The court noted that the word "shall" in *Code Civ. Proc. § 426.50* is mandatory with respect to allowing an amendment of a pleading or the filing of a cross complaint. However, since *Code Civ. Proc. § 426.50* also provides that the court shall grant leave to a party to amend his pleading or to file a cross complaint "if the party who failed to plead the cause acted in good faith," the trial court is allowed some "modicum of discretion" in determining whether or not a defendant has acted in good faith (*114 Cal. App. 3d 897, 900-901)* . The court nevertheless held that the evidence to support the trial court's denial of the motion to file the compulsory cross complaint was insufficient as a matter of law, and granted a writ of mandate to compel the trial court to allow its filing (*114 Cal. App. 3d 897, 904)* .

For further discussion regarding the court's "modicum of discretion," see *Gherman v. Colburn (1977) 72 Cal. App. 3d 544, 559, 140 Cal. Rptr. 330* (discussed in *§ 61.71[3][a]*), and *Silver Organizations Ltd. v. Frank (1990) 217 Cal. App. 3d 94, 99, 265 Cal. Rptr. 681* (discussed in *§§ 61.70[3][a]* and *61.70[3][c]*).

[b] Good Faith Must Be Given Liberal Construction

The facts and procedural background of ***Foot's Transfer & Storage Co. v. Superior Court*** *(1981) 114 Cal. App. 3d 897, 171 Cal. Rptr. 1* , are discussed in *§ 61.70[3][a]*. In deciding that defendant had acted in good faith in filing the cross complaint, the court stated that since the court's objective is to encourage trial on the merits whenever possible, the granting of leave to file a cross complaint is of particular importance in avoiding forfeiture of causes of action because of the principle expressed in *Code Civ. Proc. § 426.30* that cross complaints relating to the subject of the action must be filed therein or are deemed lost (*114 Cal. App. 3d 897, 900-901)* . The court noted that the trial court's denial of defendant's motion implied a finding that defendant had not acted in good faith. The court stated that such a finding would be affirmed if there was substantial evidence to support it. The court held that what constitutes "good faith" or lack of it under *Code Civ. Proc. § 426.50* must be determined in light of and in conformity with the liberality conferred on the trial courts by the section and by prior law. The court concluded that this principle of liberality requires that a strong showing of bad faith be made in order to support a denial of the right to file a cross complaint under this section (*114 Cal. App. 3d 897, 902)* .

[c] Strong Showing of Bad Faith Required to Deny Right to Amend Pleading or File Cross Complaint

The facts and procedural background of ***Foot's Transfer & Storage Co. v. Superior Court*** *(1981) 114 Cal. App. 3d 897, 171 Cal. Rptr. 1* , are discussed in *§ 61.70[3][a]*. In holding that defendant had acted in good faith in filing the cross complaint, the court concluded that the principle of liberality in construing "good faith" requires a strong showing of bad faith be made in order to support a denial of the right to file a compulsory cross complaint (*114 Cal. App. 3d 897, 902)* . The court stated that bad faith would be found when it appears that a delayed cross complaint, if allowed, would work a substantial injustice to the opposing party and would prejudice that party's position in some way. Plaintiff contended that defendant had acted in bad faith because it waited 23 months after service of the complaint and 16 months after it had filed its answer to the complaint before asserting the right to file a cross complaint. The court stated that *Code Civ. Proc. § 426.50* expressly mentioned a party's neglect as one circumstance under which relief may be given and found nothing in the record to suggest that defendant was unusually reprehensible in this regard. In addition, the court found that plaintiff had waited for two years to file his action and that his counsel had equivocated concerning the stipulation for a considerable length of time while conducting discovery concerning defendant's claims. Therefore, the court found no substantial injustice or prejudice to plaintiff by the filing of defendant's cross complaint (*114 Cal. App. 3d 897, 903)* .

[4] Additional Authorities

[a] Granting of Permission Mandatory if Moving Party Acted in Good Faith

Silver Organizations Ltd. v. Frank (1990) 217 Cal. App. 3d 94, 265 Cal. Rptr. 681 , was an action on a promissory note in which the defendants filed answers in propria persona, delaying the retention of an attorney while they attempted to settle the case. After the case was set for trial and the settlement efforts proved unsuccessful, defendants secured an attorney willing to take the case. The attorney pursued investigation and formal discovery, uncovered grounds for a compulsory cross complaint, and filed a motion to file a cross complaint pursuant to *Code Civ. Proc. § 426.50*. The trial court denied the motion. The case was tried by the court, and judgment was entered for plaintiffs. Defendants appealed, contending that under *Code Civ. Proc. § 426.50* the trial court was mandated to grant the motion unless there was a strong showing of bad faith, and no such showing had been made. The court of appeal reversed because there was no substantial evidence to support a finding that defendants were acting in bad faith (*217 Cal. App. 3d 94, 97)* . The court rejected the view that the trial court may exercise discretion in the denial of a motion to file a compulsory cross complaint (*217 Cal. App. 3d 94, 98)* , and held that a motion to file a cross complaint at any time during the course of an action must be granted when forfeiture would otherwise result, unless bad faith of the moving party is demonstrated. Factors such as oversight, inadvertence, neglect, mistake, or other cause are insufficient grounds to deny the motion unless accompanied by bad faith (*217 Cal. App. 3d 94, 99)* .

[b] Good Faith Must Be Given Liberal Construction

Dunzweiler v. Superior Court (1968) 267 Cal. App. 2d 569, 73 Cal. Rptr. 331 , was an action for damages for personal injuries resulting from an automobile collision. Defendant delayed for ten months after plaintiff had filed the complaint before requesting his attorneys to file a cross complaint for his injuries. After plaintiff's attorneys withdrew their consent to stipulate to the filing of a cross complaint, defendant moved for permission to file the cross complaint. The trial court denied the motion, but on appeal by defendant, the court of appeal reversed. The court found that defendant's delay in seeking the cross complaint was neither unexplained nor unexcused because all but two months of the delay were reasonably accounted for and excused by settlement negotiations (*267 Cal. App. 2d 569, 579)* . Thus, this delay could not be held to amount to a lack of due diligence (*267 Cal. App. 2d 569, 580)* . The court held that in view of the policy in favor of allowing issues to be fully litigated, and because the trial court's order, if upheld, would deny petitioner his day in court, the order tended to impede or defeat the ends of substantial justice (*267 Cal. App. 2d 569, 580-581)* .

[c] Strong Showing of Bad Faith Required to Deny Right to Amend Pleading or File Cross Complaint

The facts and procedural background of *Silver Organizations Ltd. v. Frank (1990) 217 Cal. App. 3d 94, 265 Cal. Rptr. 681* , are discussed in *§ 61.70[3][a]*. In reversing judgment for plaintiffs after the trial court's denial of defendants' motion for leave to file a compulsory cross complaint, the court of appeal noted the holding in *Gherman v. Colburn (1977) 72 Cal. App. 3d 544, 559, 140 Cal. Rptr. 330* (discussed in *§ 61.71[3][a]*), in which the court had stated that *Code Civ. Proc. § 426.50* allows the trial court some "modicum of discretion" in determining whether a defendant acted in good faith. The court in *Silver* held that despite this "modicum of discretion," substantial evidence must support the trial court's decision (*217 Cal. App. 3d 94, 99)* . Substantial evidence of bad faith will obviously negate the good faith that is required for granting a motion under *Code Civ. Proc. § 426.50* (*217 Cal. App. 3d 94, 100)* . "Bad faith" is defined as the opposite of "good faith," generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake, but by some interested or sinister motive, not simply bad judgment or negligence, but rather the conscious doing of a wrong because of dishonest purpose or moral obliquity; it contemplates a state of mind affirmatively operating with furtive design or ill will (*217 Cal. App. 3d 94, 100)* . The court concluded that its review of the entire record failed to reveal, directly or inferentially, any substantial evidence of bad faith by the defendants, and that looking at the entire period between the filing of the complaint and the denial of the motion, a time frame of less than six months, it found nothing in defendants' words or conduct remotely suggesting dishonest purpose, moral obliquity, sinister motive, furtive design, or ill will (*217 Cal. App. 3d 94, 100)* .

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6-61 California Points & Authorities § 61.71

§ 61.71 Opposing Motion for Leave to Amend Cross Complaint or to File Compulsory Cross Complaint to Assert Related Cause of Action Against Plaintiff [Code Civ. Proc. § 426.30(a)]--Absence of Good Faith [Code Civ. Proc. § 426.50]

[1] FORM Opposing Motion for Leave to Amend Cross Complaint or to File Compulsory Cross Complaint to Assert Related Cause of Action Against Plaintiff [Code Civ. Proc. § 426.30(a)]--Absence of Good Faith [Code Civ. Proc. § 426.50]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____ _____

_____ [*name*], Plaintiff [and Cross Defendant], vs. _____ [*name*], Defendant [and Cross Complainant].	)))))))))	NO. _____ MEMORANDUM IN OPPOSITION TO MOTION TO _____ [AMEND CROSS COMPLAINT *or* FILE COMPULSORY CROSS COMPLAINT] [*Code Civ. Proc. §§ 426.30(a), 426.50*] Date: _____ Time: _____ Location: _____ Date Action Filed: _____ [Trial Date: _____]

_____

_____ [*specify moving party, e.g.*, DEFENDANT]'S MOTION FOR LEAVE TO _____ [AMEND THE CROSS COMPLAINT *or* FILE A COMPULSORY CROSS COMPLAINT] TO ASSERT A RELATED CAUSE OF ACTION AGAINST PLAINTIFF [AND CROSS DEFENDANT] SHOULD

BE DENIED BECAUSE _____ [*specify moving party, e.g.*, DEFENDANT] DID NOT ACT IN GOOD FAITH.

A. Good Faith Required for Leave to File Related Cause of Action. Leave to assert a related cause of action by amending or filing a cross complaint should not be granted if the party who failed to plead the related cause of action did not act in good faith (*Code Civ. Proc. § 426.50*).

[*Optional*] **B. Substantial Injustice and Prejudice to Opposing Party Constitutes Bad Faith.** If the filing of a delayed cross complaint will work a substantial injustice to the opposing party and will prejudice that party's position in some way, this constitutes bad faith and the requirements of *Section 426.50 of the Code of Civil Procedure* regarding "good faith" will not be satisfied (*Gherman v. Colburn (1977) 72 Cal. App. 3d 544, 559-560, 140 Cal. Rptr. 330* ; *see Foot's Transfer & Storage Co. v. Superior Court (1981) 114 Cal. App. 3d 897, 903, 171 Cal. Rptr. 10*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted to oppose a motion for leave to amend a cross complaint or to file a compulsory cross complaint to assert a related cause of action against plaintiff [*see Code Civ. Proc. §§ 426.30(a), 426.50*]. As the term "plaintiff" also means cross complainant for purposes of the requirements of *Code Civ. Proc. § 426.30(a)* [*see Code Civ. Proc. § 426.10(b)*], the form may be adapted for use by a cross defendant seeking to amend a permissive cross complaint or to file a compulsory cross complaint against the cross complainant.

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated. For example, counsel should show that the moving party delayed filing a cross complaint asserting a related cause of action for 30 days or more after service of the summons [*see Code Civ. Proc. §§ 412.20(a), 432.10*]. Counsel should also show that this delay was not excused, for example, by settlement negotiations, and that to allow the moving party to file the cross complaint now would work a substantial injustice to the opposing party and would prejudice his or her position in some way.

[b] Related Pleading and Practice Forms

For discussion and forms relating to motions for leave to amend a cross complaint or file a compulsory cross complaint to assert a related cause of action, see Ch. 123, *Complaints and Cross Complaints* in California Forms of Pleading and Practice.

[3] Discussion of Authorities

[a] Substantial Injustice and Prejudice to Opposing Party Constitutes Bad Faith

In ***Gherman v. Colburn*** *(1977) 72 Cal. App. 3d 544, 140 Cal. Rptr. 330* , plaintiff sought to establish the existence of a joint venture and its breach. Plaintiff requested an accounting but dismissed this cause of action before trial. In their answer, defendants denied that a joint venture had ever existed. However, on the day of trial, defendants shifted their position to demand, by a proposed cross complaint, an accounting with respect to the joint venture they had claimed did

not exist. The trial court denied defendants the right to file the cross complaint. The case went to trial and the jury found in favor of plaintiff. Defendants appealed.

The court of appeal affirmed. The court dismissed defendant's contention that there could be but one form of action here, thus making their proposed cross complaint for an accounting a compulsory cross complaint under *Code Civ. Proc. § 426.30(a)*, the filing of which is mandatory, and giving the trial court no choice or discretion but to grant their motion. The court found that an action for judicial dissolution and accounting was not the only permissible action here and that the law did not deprive the court of choice or discretion when a defendant seeks to file a so-called compulsory cross complaint that is not timely and which is not filed in good faith (*72 Cal. App. 3d 544, 558)* . The court stated the it was true that *Code Civ. Proc. § 426.50* requires the court to grant a defendant's application for permission to file a cross complaint at any time during the course of the action if the party who failed to plead the cause acted in good faith, but that the statutory terminology allows the court some modicum of discretion in determining whether or not a defendant has acted in good faith. The court held that when the defendant fails to act for a period of over 30 days and waits until the first day of trial, such conduct may be interpreted as evidence of a lack of good faith, especially when coupled with the long history of litigation between the parties, which demonstrates that both sides were jockeying for position over the right to a jury trial (*72 Cal. App. 3d 544, 559)* . The court concluded that the trial court impliedly found that by attempting to file a cross complaint on the first day of trial, defendants were not acting in good faith but that the motion for leave to file a cross complaint was merely a tactical maneuver to deprive plaintiffs of a right to a jury trial (*72 Cal. App. 3d 544, 559-560)* .

The facts and procedural background of ***Foot's Transfer & Storage Co. v. Superior Court*** *(1981) 114 Cal. App. 3d 897, 171 Cal. Rptr. 1* , are discussed in *§ 61.70[3][a]*. In *Foot's*, the court of appeal held that defendant had acted in good faith in filing the cross complaint. In making this decision the court held that a strong showing of bad faith is required to support an order to deny defendant the right to file a compulsory cross complaint (*114 Cal. App. 3d 897, 902)* . The court held that bad faith would be found when it appeared that a delayed cross complaint, if allowed, would work a substantial injustice to the opposing party and would prejudice that party's position in some way. In this case, the court found that no substantial injustice or prejudice to plaintiff would result from the filing of defendant's cross complaint (*114 Cal. App. 3d 897, 903)* .

The rule regarding the court's "modicum of discretion," first stated in *Gherman* and repeated in *Foot's Transfer, supra* , was criticized in *Silver Organizations Ltd. v. Frank (1990) 217 Cal. App. 3d 94, 99, 265 Cal. Rptr. 681* (discussed in *§ 61.70[3][a]*).

California Points & Authorities

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Volume 6 Chapters 60-69 COSTS---to---DECLARATORY RELIEF
CHAPTER 61 CROSS COMPLAINTS
PART II. FORMS
B. Compulsory Cross Complaints
1. Motions to Amend Cross Complaint or File Compulsory Cross Complaints

6-61 California Points & Authorities §§ 61.72-61.89

[Reserved]

§§ 61.72[Reserved]

California Points & Authorities

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Volume 6 Chapters 60-69 COSTS---to---DECLARATORY RELIEF
CHAPTER 61 CROSS COMPLAINTS
PART II. FORMS
B. Compulsory Cross Complaints
2. Objections to Action Based on Plaintiff's Failure to Plead by Cross Complaint in Prior Action

6-61 California Points & Authorities § 61.90

§ 61.90 Supporting Objection to Action on Ground That It Is Barred for Plaintiff's Failure to Plead It as Compulsory Cross Complaint in Prior Action Between Parties [Code Civ. Proc. § 426.30(a)]--Motion for Summary Judgment by Defendant [Code Civ. Proc. § 437c]

[1] FORM Supporting Objection to Action on Ground That It Is Barred for Plaintiff's Failure to Plead It as Compulsory Cross Complaint in Prior Action Between Parties [Code Civ. Proc. § 426.30(a)]--Motion for Summary Judgment by Defendant [Code Civ. Proc. § 437c]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____ _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF MOTION FOR
Plaintiff,	)	SUMMARY JUDGMENT
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD BE GRANTED BECAUSE THE ACTION SUED ON IS BARRED FOR FAILURE TO HAVE PLEADED IT AS A COMPULSORY CROSS COMPLAINT IN A PRIOR ACTION BETWEEN THE PARTIES.

A. Summary Judgment for Defendant. A defendant may move for summary judgment if it is contended that the

action has no merit, and the motion shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that defendant is entitled to judgment as a matter of law (*Code Civ. Proc. § 437c(a), (c)*).

B. Judicial Notice. A motion for summary judgment shall be supported by, among other matters, matters of which judicial notice must or may be taken (*Code Civ. Proc. § 437c(b)(1)*).

C. Court May Take Judicial Notice of Court Records. The court is expressly authorized to take judicial notice of the records of any court of California or any court of record of the United States or of any state of the United States (*Evid. Code § 452(d)*) and is required to take such judicial notice on the request of any party if notice of the request is given and the party furnishes the court with sufficient information to enable it to take judicial notice of the matter (*Evid. Code § 453*; *see Evid. Code § 11* (defining "shall" as mandatory)).

[*ADD, if not already included in the Notice of Motion*]

D. Specification of Matter to Be Judicially Noticed. The court is hereby expressly requested to take judicial notice of that certain action in _____ (this court *or specify other court*), entitled _____ vs. _____, No. _____, and specifically of the following pleadings and papers in that action, copies of which are attached hereto as Exhibits _____ [*specify, e.g.*, A and B]: _____ (*list and attach copies of all papers necessary to show that the present action should have been filed in the prior action as a compulsory cross complaint within the meaning of Code Civ. Proc. §§ 426.10(c) and 426.30, above [see Evid. Code § 453(b)], e.g.*, the complaint, the answer, the court's statement of decision, and the judgment)].

[*CONTINUE*]

E. Party Is Barred From Asserting Action Which Should Have Been Pleaded as Cross Complaint in Prior Related Action. With exceptions not here applicable, if a party against whom a complaint has been filed and served fails to allege in a cross complaint any related cause of action which at the time of serving his or her answer to the complaint he or she has against the plaintiff, such party may not thereafter in any other action assert against the plaintiff the related cause of action not pleaded (*Code Civ. Proc. § 426.30(a)*). Thus, claims that could have been raised by cross complaint in a prior action between the parties are barred by *Code Civ. Proc. § 426.30(a)* (*Hulsey v. Koehler (1990) 218 Cal. App. 3d 1150, 1153, 267 Cal. Rptr. 523* ; *Saunders v. New Capital for Small Businesses, Inc. (1964) 231 Cal. App. 2d 324, 333, 41 Cal. Rptr. 703* (decided under former Code Civ. Proc. § 439 [*now see Code Civ. Proc. § 426.30*])).

F. Related Cause of Action Defined. "Related cause of action" means a cause of action that arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause of action which the plaintiff alleges in the complaint (*Code Civ. Proc. § 426.10(c)*).

[*Optional*] **G. Determining Whether Cause of Action Arose Out of Same Transaction.** In determining whether a cause of action arose out of the same transaction, occurrence, or series of transactions or occurrences as the cause of action alleged in the prior action as the foundation of the plaintiff's claim in that action, the term "transaction" is not limited to a single, isolated act or occurrence, but may embrace a series of acts or occurrences logically interrelated (*Currie Medical Specialties, Inc. v. Bowen (1982) 136 Cal. App. 3d 774, 777, 186 Cal. Rptr. 543* ; *Sylvester v. Soulsburg (1967) 252 Cal. App. 2d 185, 190-191, 60 Cal. Rptr. 218* (decided under former Code Civ. Proc. § 439 [*now see Code Civ. Proc. § 426.30*]); *Align Technology, Inc. v. Tran (2009) 179 Cal. App. 4th 949, 967, 102 Cal. Rptr. 3d 343* ; *Saunders v. New Capital for Small Businesses, Inc. (1964) 231 Cal. App. 2d 324, 336, 41 Cal. Rptr. 703* (same)).

[*Optional*] **H. Applicability of Rule Whether Prior Action Sounded in Contract or Tort.** *Code of Civil Procedure Section 426.50(b)* applies whether the complaint is in contract and the cross complaint is in tort, or vice versa (

Sylvester v. Soulsburg (1967) 252 Cal. App. 2d 185, 191, 60 Cal. Rptr. 218 (decided under former Code Civ. Proc. § 439 [*now see Code Civ. Proc. § 426.30*])).

[*Optional*] **I. Applicability of Rule Despite Plaintiff's Voluntary Dismissal of Defendant Without Prejudice.** The critical time period to which *Code Civ. Proc. § 426.30* looks is that point in time when the complaint has been filed and served against a defendant and the defendant fails to allege in a cross complaint any related cause of action which at the time of serving his or her answer to the complaint he or she has against the plaintiff [*AL Holding Co. v. O'Brien & Hicks, Inc. (1999) 75 Cal. App. 4th 1310, 1313-1314, 89 Cal. Rptr. 2d 918]* . Thus, when the plaintiff voluntarily dismisses plaintiff's complaint as to the defendant without prejudice after the defendant has answered without having filed a cross complaint against the plaintiff on a related cause of action, the defendant is thereafter barred from proceeding against the former plaintiff on that related cause of action (*see AL Holding Co. v. O'Brien & Hicks, Inc. (1999) 75 Cal. App. 4th 1310, 1313-1314, 89 Cal. Rptr. 2d 918*).

[*Optional*] **J. Applicability of Rule to Assignee of Defendant Despite Plaintiff's Voluntary Dismissal of Defendant Without Prejudice**. The critical time period to which *Code Civ. Proc. § 426.30* looks is that point in time when the complaint has been filed and served against a defendant and the defendant fails to allege in a cross complaint any related cause of action which at the time of serving his or her answer to the complaint he or she has against the plaintiff [*AL Holding Co. v. O'Brien & Hicks, Inc. (1999) 75 Cal. App. 4th 1310, 1313-1314, 89 Cal. Rptr. 2d 918]* . Thus, when the plaintiff voluntarily dismisses plaintiff's complaint as to the defendant without prejudice after the defendant has answered without having filed a cross complaint against the plaintiff on a related cause of action, and the defendant thereafter assigns its rights to the related cause of action, the assignee is barred from proceeding against the former plaintiff on that related cause of action in a later action (*AL Holding Co. v. O'Brien & Hicks, Inc. (1999) 75 Cal. App. 4th 1310, 1313-1314, 89 Cal. Rptr. 2d 918*).

[*Optional*] **K. Applicability of Rule When Prior Action Was in Federal Court.** The rule that the present action is barred when it should have been raised as a compulsory cross complaint in a prior action between the parties but was not applies when the prior action between the parties was in a federal court and plaintiff's claim in the present action was within the federal court's jurisdiction in the earlier action and was thus a compulsory counterclaim (*Currie Medical Specialties, Inc. v. Bowen (1982) 136 Cal. App. 3d 774, 776-777, 186 Cal. Rptr. 543*).

[*Optional*] **L. Compulsory Cross Complaint to Cross Complaint Required.** *Code of Civil Procedure Section 426.30* requires the filing of a compulsory cross complaint when a party has a cause of action related to the cause of action asserted in a cross complaint filed against him or her (*Code Civ. Proc. §§ 426.10(a)* ("complaint" includes cross complaint), (b) ("plaintiff" includes cross complainant), 426.30(a); *Ranchers Bank v. Pressman (1971) 19 Cal. App. 3d 612, 619, 97 Cal. Rptr. 78* (decided under former Code Civ. Proc. § 439 [*now see Code Civ. Proc. § 426.30*])).

M. Bar Is Aspect of Doctrine of Res Judicata. *Code Civ. Proc. § 428.30(b)* embodies a special aspect of the doctrine of res judicata (*Hulsey v. Koehler (1990) 218 Cal. App. 3d 1150, 1157, 267 Cal. Rptr. 523*).

N. Raising Defense of Res Judicata by Motion for Summary Judgment. The defense of res judicata may be properly raised on a motion for summary judgment (*Saunders v. New Capital for Small Businesses, Inc. (1964) 231 Cal. App. 2d 324, 331, 41 Cal. Rptr. 703*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memoranda may be submitted in support of a motion for summary judgment on the ground that plaintiff's cause of action is barred because it was not pleaded as a compulsory cross complaint in a prior related action by the defendant against the plaintiff [*see Code Civ. Proc. §§ 426.10(c), 426.30(a)*].

Optional Paragraph G should be included if necessary to show that the present action is a related cause of action.

Optional Paragraph H may be included if the prior action was based on tort and plaintiff's present claim is based on contract, or vice versa.

Optional Paragraph I should be used if in the former action defendant answered plaintiff's complaint, but did not serve plaintiff with a cross complaint alleging a related cause of action against plaintiff, and plaintiff thereafter voluntary dismissed the complaint as to the defendant without prejudice.

Optional Paragraph J should be used instead of Optional Paragraph I if, in addition to those circumstances, defendant assigned its rights to the related cause of action after having been voluntarily dismissed.

Optional Paragraph K should be included if the prior action was in a federal court.

Optional Paragraph L should be used when the plaintiff in the present action was a cross defendant in the prior action and could have asserted his or her present claim by way of cross complaint against the cross complainant in that action (if this is the fact situation, the terms "plaintiff" and "defendant" in this form should be changed to "cross complainant" and "cross defendant," accordingly).

This form may be modified to include, when appropriate, the additional points set in § 61.94.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. For example, defendant should show (1) the existence of a prior action between the parties in which the present defendant sued the present plaintiff; (2) that the present action, if it exists at all, existed at the time the present plaintiff filed his or her answer to the complaint in the prior action (*see § 61.99*); and (3) that the present plaintiff failed to assert the present claim by cross complaint in the prior action.

[b] Judicial Notice

In making his or her proof, the defendant should request that the court take judicial notice of the prior action (*see* Paragraphs B-D) [*Evid. Code § 452(d)*] and furnish the court with sufficient information to enable it to take judicial notice of the matter [*Evid. Code § 453(b)*]. For example, if the prior action was in another court, defendant should furnish the court with certified copies of the pleadings, statement of decision if any, judgment, and any other relevant records in the prior action necessary to enable the court to determine the motion [*see Evid. Code § 453*]. If the prior action was in the same court, counsel should specifically identify the pleadings and papers in the court's file and records relating to that case on which he or she relies and submit copies of the relevant papers with the notice of motion and memorandum. However, practice varies from court to court and counsel should, if unfamiliar with the practice of the court in which the action is pending, check with the judge's courtroom clerk or the court clerk's office to ascertain the specific procedure for having the court's file and records in the prior case presented to the judge in the present case.

[c] Exceptions to Compulsory Cross Complaint Statute

Code Civ. Proc. § 426.30 does not apply if either (1) the court in which the action is pending has no jurisdiction to render a personal judgment against the person who failed to plead the related cause of action (*see § 61.96*), or (2) the person who failed to plead the related cause of action did not file an answer to the complaint (*see § 61.97*) [*Code Civ. Proc. § 426.30(b)*].

In addition, *Code Civ. Proc. §§ 426.10-426.70* do not apply if either of the following are established: (1) the cause of action not pleaded requires for its adjudication the presence of additional parties over whom the court cannot acquire jurisdiction (*see § 61.96*); or (2) at the time the action was commenced, the cause of action not pleaded was the subject of another pending action (*see § 61.96*) [*Code Civ. Proc. § 426.40*].

Moreover, *Code Civ. Proc. §§ 426.10-426.70* do not apply: (1) to special proceedings, as distinguished from civil actions (*see § 61.98*), with the exception of eminent domain proceedings (*see § 61.94*) [*Code Civ. Proc. § 426.70*]; (2) to actions in small claims court; and to actions brought solely for declaratory relief under *Code Civ. Proc. §§ 1060-1062.5* (*see § 61.98*) [Prob. Code § 426.60].

[d] Related Pleading and Practice Forms

For a discussion of the doctrines of res judicata and collateral estoppel and forms for use in raising the objection that an action is barred by res judicata or for separate trial of this defense, see Ch. 491, *Res Judicata* in California Forms of Pleading and Practice (Matthew Bender).

For a discussion, a procedural guide, and forms for use in moving for summary judgment, see Ch. 537, *Summary Judgment* in that publication.

[e] Related Memoranda

For general forms of memoranda supporting motions for summary judgment see Ch. 221, *Summary Judgments* in this publication.

[f] Opposing Memoranda

The points and authorities *set out in §§ 61.95 -61.100* may in an appropriate case be used to oppose a motion for summary judgment supported by this memorandum.

[3] Discussion of Authorities

[a] Party Is Barred From Asserting Action Which Should Have Been Pleaded as Cross Complaint in Prior Related Action

In ***Hulsey v. Koehler*** *(1990) 218 Cal. App. 3d 1150, 267 Cal. Rptr. 523* , discussed in *§ 61.90[3][h]*; (and discussed more fully in § 61.101[3][a]), the court of appeal said that *Code Civ. Proc. § 426.30* is California's compulsory cross complaint statute which bars claims that could have been raised by cross complaint in a prior action between the parties (*218 Cal. App. 3d 1150, 1153)* .

Saunders v. New Capital for Small Businesses, Inc. *(1964) 231 Cal. App. 3d 324,* , is more fully discussed in *§ 61.90[3][b]*. In *Saunders*, the court of appeal said that if a claim arising out of the same transaction on which the complaint is based and which tends to diminish or defeat plaintiff's recovery is not pleaded as a counterclaim (now a cross complaint [*see Code Civ. Proc. § 428.80*]), it is forever barred under the provisions of former Code Civ. Proc. § 439 [*now see Code Civ. Proc. § 426.30(a)*] (*231 Cal. App. 3d 324, 333)* .

[b] Determining Whether Cause of Action Arose Out of Same Transaction

The facts and procedural background of ***Currie Medical Specialties, Inc. v. Bowen*** *(1982) 136 Cal. App. 3d 774, 186 Cal. Rptr. 543* , are discussed in *§ 61.90[3][f]*. In affirming the summary judgment for defendant, the court of appeal said that the transaction or occurrence test does not require an absolute identity of factual backgrounds for the two claims, but only a logical relationship between them (*136 Cal. App. 3d 774, 777)* . The court found that the claims of defendant and plaintiff involved common issues of law and fact and held that overlap of issues satisfied the logical relation approach to the transaction or occurrence test. The court held that the logical relation test was not improperly broad when it is used to bar a claim because the waiver provision of *Code Civ. Proc. § 426.30* is mandatory and the policy in favor of hearing all related claims in a single action controls (*136 Cal. App. 3d 774, 777)* .

Sylvester v. Soulsburg *(1967) 252 Cal. App. 2d 185, 60 Cal. Rptr. 218* , was an action for damages for trespass to real and personal property and for conspiracy to trespass. In a prior action the present defendants had sued the present plaintiffs to terminate a contract for the purchase of the real and personal property, the parties stipulated to a judgment of dismissal for which consideration was given, and the action was dismissed. The trial court dismissed the present action on the ground the former action was a bar to any claim which the plaintiffs could have, as defendants, asserted against the present defendants as plaintiffs in the prior action.

The court of appeal affirmed the judgment of dismissal, stating that the issue was whether the subject matter of the potential counterclaim (now cross complaint [*see Code Civ. Proc. § 428.80*]) arose from the same "transaction" which formed the basis of the complaint, since former Code Civ. Proc. § 439 [*now see Code Civ. Proc. §§ 426.10(c), 428.30(a)*] bars a subsequent action only when it arises from the same transaction. The purpose of former Code Civ. Proc. § 439 is to provide for settlement in a single action of all conflicting claims between parties arising out of the same transaction and thus avoid multiplicity of actions and judgments. To achieve this purpose, the statute has been liberally construed. The term "transaction" is not limited to a single, isolated act or occurrence, but may embrace a series of acts or occurrences logically interrelated (*252 Cal. App. 2d 185, 190-191)* . It embraces almost any activity by a person which affects another's right and out of which a cause of action may arise (*252 Cal. App. 2d 185, 191)* .

In ***Align Technology, Inc. v. Tran*** *(2009) 179 Cal. App. 4th 949, 102 Cal. Rptr. 3d 343* , plaintiff employer brought a suit against a former employee alleging breach of contract and conversion of patents. The employee demurred on the grounds that the employer's claims were barred under *Code Civ. Proc. § 426.30*, because they should have been raised in a prior suit, in which the employee had cross-complained for wrongful termination in an action brought against him by the employer. The trial court sustained the demurrer without leave to amend.

On appeal, the court held that the employer's claims for breach of contract and conversion of patents were logically related to the former employee's cross-complaint for wrongful termination in the prior action because they arose from the parties' employment relationship and because the employer's claims were of such a nature as might be raised in responding to a wrongful termination claim. Thus, the claims were related causes of action as defined in *Code Civ. Proc. § 426.10(c)* (*179 Cal. App. 4th 949, 967)* . Moreover, the allegations of the complaint did not clearly show that any of the claims arose after the employer answered the cross-complaint; thus, the demurrer was properly sustained. However, the trial court erred in denying leave to amend because the employer made a sufficient showing that its complaint could be amended to allege that the claims at issue arose after the employer had filed its answer to the cross-complaint in the prior action (*179 Cal. App. 4th 949, 970)* .

Saunders v. New Capital for Small Businesses, Inc. (1964) 41 Cal. Rptr. 703 , was an action to recover for services rendered. Defendant's motion for summary judgment was granted on the ground the action was barred because plaintiff had failed to file his claim as a compulsory cross complaint in defendant's prior action against plaintiff to recover money plaintiff was alleged to have secretly taken from defendant for services provided.

The court of appeal affirmed, holding that the action was barred because the present cause of action arose out of the same transaction that was involved in the prior suit (*231 Cal. App. 2d 324, 337-339*). The court stated that the obvious

intent of the Legislature in enacting former Code Civ. Proc. § 439 [*now see Code Civ. Proc. § 426.30(a)*] was to provide for the settlement in a single action of all conflicting claims between the parties arising out of the same transaction and thus to avoid multiplicity of actions and conflicting judgments. While the case by case treatment may not have developed a definitive and crystal clear concept of the term "transaction" as used in former Code Civ. Proc. § 439, there is every indication that the term has been liberally construed to the end of achieving the above legislative purpose (*231 Cal. App. 2d 324, 334*). The term "transaction" is not confined to a single, isolated act or occurrence such as, for example, a contract, a lease, or an automobile collision but may embrace a series of acts or occurrences logically interrelated (*231 Cal. App. 2d 324, 336*).

Note that in *Sylvester v. Soulsburg (1967) 252 Cal. App. 2d 185, 60 Cal. Rptr. 218* , *above*, both the trial court and the appellate court characterized the bar of former Code Civ. Proc. § 439 [*now see Code Civ. Proc. § 426.30(a)*] as a form of "collateral estoppel." In Saunders v. New Capital for Small Businesses, Inc. (1964) 41 Cal. Rptr. 703 , *above*, the appellate court, although it recognized that the doctrine of res judicata, in its secondary aspect as a collateral estoppel, applies only to issues in the second action which were actually litigated in the first action (*231 Cal. App. 2d 324, 331)* , nevertheless characterized the bar of former Code Civ. Proc. § 439 as a statutory extension of "collateral estoppel" (*231 Cal. App. 2d 324, 333)* . Each of these cases applied former Code Civ. Proc. § 439 to preclude issues which had not been previously litigated, and in each case former Code Civ. Proc. § 439 was raised as a defense at the outset of the proceedings. This use of the term "collateral estoppel" to describe the effect of former Code Civ. Proc. § 439 was criticized by the court of appeal in *Hulsey v. Koehler (1990) 218 Cal. App. 3d 1150, 267 Cal. Rptr. 523* (discussed in *§ 61.90[3][h]*), as a "misapplication of terminology," since it is clear that the doctrine of collateral estoppel operates to bar only those issues which have been actually litigated and decided. *Hulsey* held that the bar of *Code Civ. Proc. § 426.30(a)* serves the same purpose as, and is a special aspect of, the doctrine of res judicata, and not collateral estoppel. The distinction between the two is twofold: (1) res judicata bars issues that were or could have been raised in the prior action, whereas collateral estoppel applies only to issues actually litigated in the prior action; and (2) res judicata must be pleaded as an affirmative defense (*see § 61.101*), whereas collateral estoppel need not be specially pleaded (*218 Cal. App. 2d 1150, 1156-1157)* .

[c] Applicability of Rule Whether Prior Action Sounded in Contract or Tort

In ***Sylvester v. Soulsburg*** *(1967) 252 Cal. App. 2d 185, 60 Cal. Rptr. 218* , which is more fully discussed in *§ 61.90[3][i]*, the plaintiffs contended that the potential counterclaim (now cross complaint [*see Code Civ. Proc. § 428.80*]) which they could have urged in the first case would not have been sufficient because the complaint in the first case was based on contract and the counterclaim, if any, would have been based on tort, and, also, in somewhat similar vein, that the plaintiffs in the first case were acting in the capacity of a person claiming under contract, and the potential counterclaimants would have been acting in the capacity of a person injured by tort.

The court of appeal said that the attempted distinction is not sound, that the complaint may be in contract and the counterclaim in tort, or vice versa, and that many cases which have applied former Code Civ. Proc. § 439 [*now see Code Civ. Proc. § 426.30(b)*] involved both contract and tort (*252 Cal. App. 2d 185, 191)* .

[d] Applicability of Rule Despite Plaintiff's Voluntary Dismissal of Defendant Without Prejudice

In ***AL Holding Co. v. O'Brien & Hicks, Inc.*** *(1999) 75 Cal. App. 4th 1310, 89 Cal. Rptr. 2d 918* , in a former action after plaintiff reached a settlement with one of the defendants, plaintiff voluntarily dismissed its complaint without prejudice as to a remaining defendant. That defendant had answered plaintiff's first amended complaint, but had not file a cross complaint against plaintiff. Thereafter, that defendant assigned its rights to a related cause of action that it had against the plaintiff in the former action. The assignee then brought suit on the related cause of action, i.e., a claim on an amount due on an open book account, against the former plaintiff. The former plaintiff, now defendant in the current action, filed a demurrer to the complaint and sought judicial notice of its 1995 complaint, of plaintiff's assignor's answer to the 1995 complaint, and of plaintiff's assignor's 1996 settlement conference statement. The trial court took judicial

notice of them and sustained the demurrer without leave to amend. The plaintiff assignee appealed (*75 Cal. App. 4th 1310, 1312)* .

The court of appeal affirmed. Plaintiff argued that its complaint could not be barred by its assignor's failure to file a cross complaint in the former action because once plaintiff (now defendant) voluntarily dismissed its complaint against plaintiff's assignor there was no longer any lawsuit in which plaintiff's assignor was required to bring its transactionally related claim. Plaintiff did not contest that its claim was not transactionally related, but rather contended that once the former plaintiff voluntarily dismissed there was no "related cause of action" nor was plaintiff's assignor any longer a "party against whom a complaint has been filed or served" within the provisions of *Code Civ. Proc. § 426.30* (*75 Cal. App. 4th 1310, 1313)* . In addressing this argument the court stated that the critical time period to which *Code Civ. Proc. § 426.30* looks is that point in time when the complaint has been filed and served against a defendant and the defendant fails to allege in a cross complaint any related cause of action which at the time of serving his or her answer to the complaint he or she has against the plaintiff. The court noted that the judicially noticed documents demonstrated that plaintiff assignor's answer to the first amended complaint was dated March 30, 1995. Neither then nor at any point up to the settlement conference statement dated June 27, 1996, had plaintiff's assignor either filed or sought leave to file a cross complaint on its open book account claim. Accordingly that claim was barred when plaintiff attempted to assert it in 1997. Such is the clear import of the statutory language (*75 Cal. App. 4th 1310, 1313-1314)* .

[e] Applicability of Rule to Assignee of Defendant Despite Plaintiff's Voluntary Dismissal of Defendant Without Prejudice

AL Holding Co. v. O'Brien & Hicks, Inc. *(1999) 75 Cal. App. 4th 1310, 89 Cal. Rptr. 2d 918* , is discussed in *§ 61.90[3][d]*.

[f] Applicability of Rule When Prior Action Was in Federal Court

Currie Medical Specialties, Inc. v. Bowen *(1982) 136 Cal. App. 3d 774, 186 Cal. Rptr. 543* , was an action between two suppliers of labels to hospitals for breach of contract, fraud, negligent misrepresentation, intentional interference with prospective business advantage, and unfair competition. In a prior action, defendant had sued plaintiff in federal court for violating the Lanham Act (*15 U.S.C. §§ 1051-1127*) and for unfair competition. In the federal action, plaintiff answered but filed no counterclaim, and the suit was dismissed with prejudice by stipulation of the parties. In the present action, defendant moved for summary judgment on the ground that plaintiff's action was barred under *Code Civ. Proc. § 426.30(b)* for failure to assert it as a mandatory counterclaim in the federal action. The trial court granted the motion, having found that plaintiff's claim in the current action was a compulsory counterclaim in the earlier case and barred by *Code Civ. Proc. § 426.30*. Plaintiff appealed.

The court of appeal affirmed. The court stated that the sole issue was whether plaintiff's claim based on termination of the contract was a compulsory counterclaim in the federal action under *Code Civ. Proc. § 426.30(a)*. The court said the dispute focused on whether the federal court could have heard the claim under its ancillary jurisdiction, and that if plaintiff's claim arose out of the same transaction or occurrence which was the basis of the defendant's complaint in the federal action, it was covered by ancillary jurisdiction and was a compulsory counterclaim (*136 Cal. App. 3d 774, 776)* . The court said that the transaction or occurrence test was dispositive of the entire action because it settled the ancillary jurisdiction question and defined "related cause of action" [*see Code Civ. Proc. § 426.10(c)*] as the term is used in *Code Civ. Proc. § 426.30* (*136 Cal. App. 3d 774, 776)* . The court concluded that the overlap of issues satisfied the logical relation approach to the transaction or occurrence test, that this common transaction, in turn, created ancillary jurisdiction, that the exception to *Code Civ. Proc. § 426.30* found in *Code Civ. Proc. § 426.40* (relating to actions in which a cross complaint is prohibited by state or federal law) did not apply to plaintiff's claim, and that the federal action was the proper time and place for the adjudication of plaintiff's claim (*136 Cal. App. 3d 774, 777)* .

[g] Compulsory Cross Complaint to Cross Complaint Required

In ***Ranchers Bank v. Pressman*** *(1971) 19 Cal. App. 3d 612, 97 Cal. Rptr. 78* , defendant agreed to purchase an automobile agency from Knoll and made arrangements to finance the purchase through plaintiff. Defendant defaulted on the loan and attempted to rescind the purchase agreement. Plaintiff brought suit against defendant to recover the balances due on conditional sale contracts assigned by defendant and more than 90 days delinquent, and the amount of the difference between the money loaned defendant on trust receipts and the proceeds of the bank's liquidation of the pledged automobiles. In this suit, defendant cross complained against plaintiff for rescission and damages, naming Knoll as cross defendant. Subsequently, Knoll brought an independent suit against defendant on the promissory note that was the consideration for the sale of the automobile agency. Defendant demurred to Knoll's complaint on the ground the obligation sued on should have been pleaded as a counterclaim (now cross complaint [*see Code Civ. Proc. § 428.80*]) to defendant's cross complaint against him, and that an independent suit on the obligation was barred by former Code Civ. Proc. § 439 [*now see Code Civ. Proc. § 426.30(a)*]. The demurrer was overruled and the defendant pleaded the bar of the statute as an affirmative defense. By stipulation of the parties, the two suits were consolidated for the purposes of trial. The trial court found for plaintiff on each of its claims and on the cross complaint, and found in favor of Knoll on the promissory note. Defendant appealed from the two judgments.

The court of appeal affirmed. The court held that a compulsory counterclaim (now cross complaint [*see Code Civ. Proc. § 428.80*]) is required to a cross complaint when the tests for a compulsory counterclaim are met (*19 Cal. App. 3d 612, 620)* . The court found that a compulsory counterclaim was required in this case, but held the error of noncompliance was cured by consolidation of the cases (*see § 61.100*) (*19 Cal. App. 3d 612, 621-622)* .

[h] Bar Is Aspect of Doctrine of Res Judicata

In ***Hulsey v. Koehler*** *(1990) 218 Cal. App. 3d 1150, 267 Cal. Rptr. 523* (discussed more fully in § 61.101[3][a]), the court of appeal said that since *Code Civ. Proc. § 426.30* bars claims which the party failed to assert by cross complaint in a prior action arising from the same occurrence, it necessarily bars issues which were never litigated and never actually decided, and, hence, the scope and effect of *Code Civ. Proc. § 426.30* is analogous to that of res judicata rather than collateral estoppel (*218 Cal. App. 3d 1150, 1157)* . *Code Civ. Proc. § 426.30* serves the same purpose as the doctrine of res judicata by requiring the settlement in a single action of all conflicting claims between the parties arising from the same transaction (*218 Cal. App. 3d 1150, 1157)* . The court could discern no difference between the operation of *Code Civ. Proc. § 426.30* and the doctrine of res judicata and said that, in fact, the California Supreme Court (citing *Clark v. Lesher (1956) 46 Cal. 2d 874, 881-882, 299 P.2d 865*) has recognized that the statutory predecessor to *Code Civ. Proc. § 426.30* (former *Code Civ. Proc. § 439*) constitutes a special aspect of res judicata (*218 Cal. App. 3d 1150, 1157)* .

[i] Raising Defense of Res Judicata by Motion for Summary Judgment

In ***Saunders v. New Capital for Small Businesses, Inc.*** *(1964) 231 Cal. App. 2d 324* , discussed in *§ 61.90[3][b]*, the court of appeal said the defense of res judicata may be properly raised on a motion for summary judgment (*231 Cal. App. 2d 324, 331*).

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6-61 California Points & Authorities § 61.91

§ 61.91 Supporting Objection to Action on Ground That It Is Barred for Plaintiff's Failure to Plead It as Compulsory Cross Complaint in Prior Action Between Parties [Code Civ. Proc. § 426.30(a)]--Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]

[1] FORM Supporting Objection to Action on Ground That It Is Barred for Plaintiff's Failure to Plead It as Compulsory Cross Complaint in Prior Action Between Parties [Code Civ. Proc. § 426.30(a)]--Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____ _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF DEMURRER
Plaintiff,	)	TO COMPLAINT
vs.	)	[*Code Civ. Proc. §§ 430.10(e), 426.30(a)*]
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

DEFENDANT'S DEMURRER TO THE COMPLAINT SHOULD BE SUSTAINED [WITHOUT LEAVE TO AMEND AND THE ACTION DISMISSED] BECAUSE THE ACTION SUED ON IS BARRED FOR FAILURE TO HAVE PLEADED IT IN A COMPULSORY CROSS COMPLAINT IN A PRIOR ACTION BETWEEN THE PARTIES, AND THE COMPLAINT THEREFORE FAILS TO STATE FACTS CONSTITUTING A CAUSE OF ACTION.

A. Objection by General Demurrer. The party against whom a complaint has been filed may object to it by demurrer on the ground it fails to state facts sufficient to constitute a cause of action (*Code Civ. Proc. § 430.10(e)*) when the ground of objection appears on the face of the complaint or from any matter of which the court must or may take judicial notice (*Code Civ. Proc. § 430.30(a)*).

B. Court May Take Judicial Notice of Court Records. [*See § 61.90, Paragraph C.*]

[*ADD, if not already included in the Demurrer*]

C. Specification of Matter to Be Judicially Noticed. [*See § 61.90, Paragraph D.*]

[*CONTINUE*]

D. Party Is Barred From Asserting Action Which Should Have Been Pleaded as Cross Complaint in Prior Related Action. [*See § 61.90, Paragraph E.*]

E. Related Cause of Action Defined. [*See § 61.90, Paragraph F.*]

[*Optional*] **F. Applicability of Rule Despite Plaintiff's Voluntary Dismissal of Defendant Without Prejudice.** [*See § 61.90, Paragraph I.*]

[*Optional*] **G. Applicability of Rule to Assignee of Defendant Despite Plaintiff's Voluntary Dismissal of Defendant Without Prejudice**. [*See § 61.90, Paragraph J.*]

H. Raising Defense by Demurrer That Action Is Barred for Failure to Plead It in Prior Related Action. The objection that plaintiff's claim should have been pleaded as a compulsory cross complaint in a prior action by the defendant against the plaintiff and that an independent action on the claim is barred by *Code of Civil Procedure Section 426.30(b)* is properly raised by demurrer (*see Ranchers Bank v. Pressman (1971) 19 Cal. App. 3d 612, 616, 622 n.4, 97 Cal. Rptr. 78* (decided under former Code Civ. Proc. § 439 [*now see Code Civ. Proc. § 426.30(b)*])).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memoranda may be submitted in support of a demurrer to the complaint on the ground that the complaint fails to state facts sufficient to constitute a cause of action because it appears from matters of which the court may take judicial notice that the action is barred because it was not pleaded as a compulsory cross complaint in a prior related action by the defendant against the plaintiff [*see Code Civ. Proc. §§ 426.10(c), 426.30(b)*].

This form may be modified to include, when appropriate, additional points and authorities set in §§ 61.90 and 61.94.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

See also *§ 61.90[2]*.

[b] Related Pleading and Practice Forms

For a discussion and forms for use in demurring to a complaint, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* in California Forms of Pleading and Practice (Matthew Bender).

[c] Related Memoranda

For general forms of memoranda supporting demurrers to a complaint, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[d] Opposing Memoranda

The points and authorities *set out in §§ 61.95 -61.100* may in an appropriate case be used to oppose a demurrer to the complaint supported by this memorandum.

[3] Discussion of Authorities

[a] Raising Defense by Demurrer That Action Is Barred for Failure to Plead It in Prior Related Action

The facts and procedural background of ***Ranchers Bank v. Pressman*** *(1971) 19 Cal. App. 3d 612, 97 Cal. Rptr. 78* , are discussed in *§ 61.90[3][g]*. As pointed out there, defendant's demurrer to Knoll's complaint on the ground the obligation sued on should have been pleaded as a counterclaim (now cross complaint [*see Code Civ. Proc. § 428.80*]) to defendant's cross complaint against him, and that an independent suit on the obligation was barred by former Code Civ. Proc. § 439 [*now see Code Civ. Proc. § 426.30(a)*], was overruled, and the defendant then pleaded the bar of the statute as an affirmative defense (*19 Cal. App. 3d 612, 616*). The court of appeal found that, under former Code Civ. Proc. § 439, a compulsory counterclaim was required, but it held the error of noncompliance was cured by the consolidation of the cases (*see § 61.100*) (*19 Cal. App. 3d 612, 621-622*). The court nevertheless noted that the overruling of the demurrer was error and that had the defendant sought extraordinary relief prior to trial, he might have prevailed, that by answering he may be regarded as having waived the objection, and that, in any event, he appeared to have waived the error by stipulating to the consolidation of the actions for trial (*19 Cal. App. 3d 612, 622 n.4*).

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6-61 California Points & Authorities § 61.92

§ 61.92 Supporting Objection to Action on Ground That It Is Barred for Plaintiff's Failure to Plead It as Compulsory Cross Complaint in Prior Action Between Parties [Code Civ. Proc. § 426.30(a)]--Motion for Separate Trial of Affirmative Defense [Code Civ. Proc. § 597]

[1] FORM Supporting Objection to Action on Ground That It Is Barred for Plaintiff's Failure to Plead It as Compulsory Cross Complaint in Prior Action Between Parties [Code Civ. Proc. § 426.30(a)]--Motion for Separate Trial of Affirmative Defense [Code Civ. Proc. § 597]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____ _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF MOTION FOR
Plaintiff,	)	SEPARATE TRIAL OF AFFIRMATIVE DEFENSE
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

DEFENDANT'S MOTION FOR SEPARATE TRIAL OF HIS/HER AFFIRMATIVE DEFENSE, THAT THE ACTION IS BARRED FOR FAILURE TO PLEAD IT AS A COMPULSORY CROSS COMPLAINT IN A PRIOR RELATED ACTION BROUGHT BY THE DEFENDANT AGAINST THE PLAINTIFF, SHOULD BE GRANTED BECAUSE A DETERMINATION IN FAVOR OF THE DEFENDANT ON THAT ISSUE WILL TERMINATE THIS ACTION AND RENDER THE OTHER ISSUES IN THIS CASE MOOT.

A. Separate Trial of Affirmative Defense Authorized. When the answer pleads that the action is barred by a prior judgment, or sets up any other defense not involving the merits of plaintiff's cause of action but constituting a bar to its prosecution, the court may, either on its own motion or on the motion of any party, proceed to the trial of the special defense before the trial of any other issue in the case, and if the decision is for the defendant, judgment for defendant shall be entered, and no trial of other issues shall be had (*Code Civ. Proc. § 597*).

B. Party Is Barred From Asserting Action Which Should Have Been Pleaded as Cross Complaint in Prior Related Action. [*See § 61.90, Paragraph E.*]

C. Related Cause of Action Defined. [*See § 61.90, Paragraph F.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted to support a motion by the defendant for a separate trial of the affirmative defense alleged in his or her answer to the complaint that plaintiff's claim is barred for failure to have asserted it as a cross complaint in a prior related action by the defendant against the plaintiff [*see Code Civ. Proc. § 426.30(a)*].

The foregoing form may be modified to include, when appropriate, additional points and authorities set in §§ 61.90 and 61.94.

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

See also *§ 61.90[2]*.

[b] Related Pleading and Practice Forms

For discussion and forms relating to motions for separate trial of affirmative defenses, see Ch. 3, *Abatement of Actions* , in California Forms of Pleading and Practice.

[c] Related Memoranda

For discussion and general forms for use in moving for a separate trial of a special defense not going to the merits of the action, see Ch. 10, *Abatement and Survival of Actions* in this set.

[d] Opposing Memoranda

The points and authorities *set out in §§ 61.95 -61.100* may in an appropriate case be used to oppose a demurrer to the complaint supported by the foregoing memorandum.

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6-61 California Points & Authorities § 61.93

§ 61.93 Supporting Objection to Action on Ground That It Is Barred for Plaintiff's Failure to Plead It as Compulsory Cross Complaint in Prior Action Between Parties [Code Civ. Proc. § 426.30(a)]--Code Civ. Proc. § 426.30(a) Applies in Eminent Domain Proceedings [Code Civ. Proc. §§ 426.30(a), 426.70]

[1] FORM Supporting Objection to Action on Ground That It Is Barred for Plaintiff's Failure to Plead It as Compulsory Cross Complaint in Prior Action Between Parties [Code Civ. Proc. § 426.30(a)]--Code Civ. Proc. § 426.30(a) Applies in Eminent Domain Proceedings [Code Civ. Proc. §§ 426.30(a), 426.70]

[*The following may be included in a general memorandum supporting a motion or demurrer that objects to an action on the ground that it is barred under Code Civ. Proc. § 426.30(a) (see, e.g., §§ 61.90 -61.92).*]

THE RULE RELATING TO COMPULSORY CROSS COMPLAINTS UNDER SECTION 426.30(a) OF THE CODE OF CIVIL PROCEDURE APPLIES TO PROCEEDINGS IN EMINENT DOMAIN.

Compulsory Cross Complaint Rules Applicable in Eminent Domain Proceeding. Notwithstanding *Section 426.60(a) of the Code of Civil Procedure*, *Sections 426.10-426.70 of the Code of Civil Procedure* apply to eminent domain proceedings, and a related cause of action may be asserted by cross complaint whether or not the party asserting such cause of action has presented a claim in compliance with *Sections 900-935.6 of the Government Code* to the plaintiff in the original eminent domain proceeding (*Code Civ. Proc. § 426.70*; *see Klopping v. City of Whittier (1972) 8 Cal. 3d 39, 58, 104 Cal. Rptr. 1, 500 P.2d 1345*).

[2] Comments

[a] Use of Form

This memoranda may be submitted in support of the contention that *Code Civ. Proc. § 426.30(a)* (barring subsequent suits on related causes of action that should have been pleaded in a compulsory cross complaint in a prior action between the parties) applies in eminent domain proceedings.

This form does not provide a complete memorandum, but is designed to be combined with a general form of memorandum supporting or a motion or demurrer that raises the objection that an action is barred because of the plaintiff's failure to plead it as a compulsory cross complaint in a prior action between the same parties [*Code Civ. Proc. § 426.30(a)*; *see, e.g., §§ 61.90 -61.92*]. It may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. For example, if the present action is for inverse condemnation, counsel should show that there was a prior eminent domain proceeding to which plaintiff and defendant were parties, that defendant had asserted a cause of action against plaintiff in that proceeding, that plaintiff had a cause of action against defendant for inverse condemnation at the time plaintiff filed his or her answer to that complaint, that plaintiff failed to assert that cause in the previous proceeding, and that the bar of *Code Civ. Proc. § 426.30(a)* is applicable to eminent domain proceedings.

[3] Discussion of Authorities

[a] Compulsory Cross Complaint Rules Applicable in Eminent Domain Proceeding

Klopping v. City of Whittier *(1972) 8 Cal. 3d 39, 104 Cal. Rptr. 1, 500 P.2d 1345* , involved actions in eminent domain and inverse condemnation. In November 1965, defendant instituted condemnation proceedings against plaintiff and others. In November 1966, the condemnation suits were dismissed. On July 6, 1967, plaintiff sued the city for damages caused by defendant prior to condemnation of property owned by plaintiff. On August 21, 1969, defendant brought a second condemnation suit against plaintiff in which plaintiff's land was taken. Thereafter, the trial court sustained demurrers to plaintiff's complaint and dismissed the action. Plaintiff appealed.

The Supreme Court affirmed. The Court held that since plaintiff's land was taken in a second condemnation proceeding that proceeded to judgment, plaintiff should have claimed the damages now sought as part of the eminent domain award. Although plaintiff brought the inverse condemnation suit before the city instituted its second condemnation proceeding, the eminent domain proceeding proceeded to final judgment first. The Court held that since the loss could have been claimed in the eminent domain suit, plaintiff was barred from seeking those damages in inverse condemnation once the condemnation proceeding became final (*8 Cal. 3d 39, 58)* .

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6-61 California Points & Authorities § 61.94

§ 61.94 Supporting Objection to Action on Ground That It Is Barred for Plaintiff's Failure to Plead It as Compulsory Cross Complaint in Pending Action Between Parties [Code Civ. Proc. § 426.30(a)]--Plaintiff Who Voluntarily Dismisses Complaint When Cross Complaint Has Been Filed Must Refile Case as Cross Complaint in Original Action

[1] FORM Supporting Objection to Action on Ground That It Is Barred for Plaintiff's Failure to Plead It as Compulsory Cross Complaint in Pending Action Between Parties [Code Civ. Proc. § 426.30(a)]--Plaintiff Who Voluntarily Dismisses Complaint When Cross Complaint Has Been Filed Must Refile Case as Cross Complaint in Original Action

[*The following may be included in a general memorandum supporting a motion or demurrer that objects to an action on the ground that it is barred under Code Civ. Proc. § 426.30(a) (see, e.g., §§ 61.90 -61.92).*]

A PLAINTIFF WHO VOLUNTARILY DISMISSES A COMPLAINT WITHOUT PREJUDICE CANNOT, AS A MATTER OF RIGHT, COMMENCE A NEW ACTION ALLEGING RELATED CAUSES OF ACTION THAT ARE ALSO RELATED TO CLAIMS STILL PENDING IN A CROSS COMPLAINT IN THE ORIGINAL ACTION.

Compulsory Cross Complaint Requirements Apply to Complaint Filed After Voluntary Dismissal Without Prejudice. *Code of Civil Procedure Section 426.30* precludes a plaintiff who voluntarily dismissed his or her complaint without prejudice from bringing a new action based on claims arising from the same transaction that served as the basis for the defendant's cross complaint in the first action. To permit the dismissal and refiling of an action to function as an automatic exception to the compulsory cross complaint requirement would encourage just the kind of piecemeal litigation *Code of Civil Procedure Section 426.30* is intended to prohibit. The claims plaintiff attempted to assert as a new action should have been filed as a compulsory cross complaint in the first action (*Carroll v. Import Motors, Inc. (1995) 33 Cal. App. 4th 1429, 1435-1436, 39 Cal. Rptr. 2d 791*).

[2] Comments

[a] Use of Form

This memoranda may be submitted in support of the contention that *Code Civ. Proc. § 426.30(a)* (barring subsequent suits on related causes of action that should have been pleaded in a compulsory cross complaint in a prior action between the parties) applies to the refiling of a voluntarily dismissed complaint when a cross complaint to the dismissed complaint remains pending.

This form does not provide a complete memorandum, but is designed to be combined with a general form of memorandum supporting a motion or demurrer that raises the objection that an action is barred because of the plaintiff's failure to plead it as a compulsory cross complaint in a prior action between the parties [*Code Civ. Proc. § 426.30(a)*; *see, e.g., §§ 61.90 -61.92*]. The case on which the form is based addressed the issue on a motion to strike [*see Carroll v. Import Motors, Inc. (1995) 33 Cal. App. 4th 1429, 1432, 39 Cal. Rptr. 2d 791]* . For general forms of memoranda supporting motions to strike, see Ch. 160, *Motions to Strike* in this set. The form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Compulsory Cross Complaint Requirements Apply to Complaint Filed After Voluntary Dismissal Without Prejudice

Carroll v. Import Motors, Inc. *(1995) 33 Cal. App. 4th 1429, 39 Cal. Rptr. 2d 791* , involved a dispute over the amount plaintiff owed when he traded in a leased automobile. Plaintiff filed an action for rescission, fraud, cancellation of written instrument, declaratory and injunctive relief, and punitive damages. One defendant answered and filed a cross complaint for breach of contract, another defendant filed a cross complaint requesting a deficiency judgment against the plaintiff. The plaintiff voluntarily dismissed the complaint without prejudice the day before the hearing on a summary judgment motion. Shortly thereafter, the plaintiff filed a new complaint against the same parties, similar to the first complaint, but adding a cause of action for negligent misrepresentation. Plaintiff subsequently moved to consolidate the second action with the remainder of the first action, that is, the still-pending cross complaints. The defendants in the second action moved to strike the complaint on the ground that the claims in it were related to those asserted in the pending action and were required to be filed as a compulsory cross complaint in that action. The trial court granted the motion to strike without leave to amend and dismissed the action. An order conditionally granting the motion to consolidate was vacated nunc pro tunc and the motion denied based on the dismissal. Plaintiff appealed from the judgment dismissing the action.

The court of appeal affirmed. The court found no prior cases that addressed whether a plaintiff who voluntarily dismisses a complaint without prejudice may bring a new action on the same matter when there is a related cross complaint pending in the original action (*33 Cal. App. 4th 1429, 1435)* . The court looked to the strict policy against multiplicity of actions in concluding that *Code Civ. Proc. § 426.30* precludes a plaintiff who voluntarily dismisses his or her complaint without prejudice from bringing a new action based on claims arising from the same transaction that served as the basis for the defendant's cross complaint in the first action (*33 Cal. App. 4th 1429, 1435-1436)* .

The court rejected the plaintiff's contention that the absolute right to bring a new action after voluntary dismissal without prejudice rendered *Code Civ. Proc. § 426.30* inapplicable. The court indicated that the plaintiff's proper recourse was to request leave of court to file a late compulsory cross complaint in the original action (*33 Cal. App. 4th 1429, 1434-1436)* . The plaintiff also argued that had his motion to consolidate been granted, the result would have been the same as if he had filed a cross complaint in the original action and the purposes of Section 426.30 would have been fulfilled, and that therefore equity mandated the granting of the motion to consolidate. The court rejected this contention, again pointing to plaintiff's recourse in moving to file a compulsory cross complaint in the original action

and observing that equity's abhorrence of a forfeiture does not excuse compliance with the law (*33 Cal. App. 4th 1429, 1436-1437)* . The court did note however, that they were not inquiring into whether there might be situations in which equitable considerations not present in this case might come into play to require exceptions to the mandatory cross complaint requirement (*33 Cal. App. 4th 1429, 1437 n.13*).

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§ 61.95 Opposing Objection to Action on Ground That It Is Barred for Plaintiff's Failure to Plead It as Compulsory Cross Complaint in Prior Action Between Parties [Code Civ. Proc. § 426.30(a)]--Defendant Was Not a Party in Prior Action or Cause of Action Is Not Related [Code Civ. Proc. §§ 426.10(c), 426.30(a)]

[1] FORM Opposing Objection to Action on Ground That It Is Barred for Plaintiff's Failure to Plead It as Compulsory Cross Complaint in Prior Action Between Parties [Code Civ. Proc. § 426.30(a)]--Defendant Was Not a Party in Prior Action or Cause of Action Is Not Related [Code Civ. Proc. §§ 426.10(c), 426.30(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____ _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN OPPOSITION TO
vs.	)	_____ [MOTION FOR SUM-
_____ [*name*],	)	MARY JUDGMENT *or* GENERAL DEMURRER
Defendant.	)	TO COMPLAINT *or* MOTION FOR SEPARATE
	)	TRIAL OF AFFIRMATIVE DEFENSE]
	)	Date: _____
	)	Time: _____
		Location: _____
		Date Action Filed: _____
		[Trial Date: _____]

_____

DEFENDANT'S _____ [MOTION FOR _____ (SUMMARY JUDGMENT ON

THE GROUND *or* SEPARATE TRIAL OF THE AFFIRMATIVE DEFENSE) *or* DEMURRER TO THE COMPLAINT ON THE GROUND] THAT THE ACTION HEREIN IS BARRED BECAUSE OF PLAINTIFF'S ALLEGED FAILURE TO HAVE ASSERTED HIS/HER CAUSE OF ACTION IN A CROSS COMPLAINT IN A PRIOR ACTION BY THE DEFENDANT AGAINST THE PLAINTIFF SHOULD BE _____ [DENIED *or* OVERRULED] BECAUSE _____ [PLAINTIFF WAS NOT A PARTY TO THE PRIOR ACTION *and/or* THE CAUSE OF ACTION ASSERTED IN THE COMPLAINT HEREIN IS NOT RELATED TO THE CAUSE OF ACTION ASSERTED IN THE PRIOR LAWSUIT].

[*EITHER*]

A. Defendant Was Not a Party to the Former Action. When the defendant was not a party to the former action, there is no requirement that a compulsory cross complaint be filed in that action as to any claim the defendant in that action might have against him or her (*see Insurance Co. of North America v. Liberty Mut. Ins. Co. (1982) 128 Cal. App. 3d 297, 301-303, 180 Cal. Rptr. 244*).

[*AND/OR*]

B. Cause of Action Not Related. When a cause of action does not arise out of the same transaction, occurrence, or series of transactions or occurrences as the cause of action which the plaintiff alleges in his or her complaint, it is not a "related cause of action" (*Code Civ. Proc. § 426.10(c)*; *Jones v. Mortimer (1946) 28 Cal. 2d 627, 630, 170 P.2d 893* ; *Carey v. Cusack (1966) 245 Cal. App. 2d 57, 65-66, 54 Cal. Rptr. 244*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in opposition to a defendant's motion for summary judgment [*Code Civ. Proc. § 437c*], or general demurrer to the complaint [*Code Civ. Proc. § 430.10(e)*], on the ground that plaintiff's action is barred because the plaintiff failed to plead it in a compulsory cross complaint in a prior related action by the defendant against the plaintiff [*Code Civ. Proc. § 426.30(a)*], or in opposition to a motion for separate trial of the affirmative defense that the action is barred on the foregoing ground [*see Code Civ. Proc. § 597*]. The ground of opposition is that the defendant was not a party to the prior action, or the cause of action asserted against the defendant does not relate to the cause of action asserted in the prior action, or both. "Related cause of action" means a cause of action which arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause of action which the plaintiff alleges in his or her complaint [*Code Civ. Proc. § 426.10(c)*].

With appropriate modifications, the foregoing form may also be adapted for use if the present plaintiff was a cross defendant and the present defendant a cross complainant in the prior action [*see Code Civ. Proc. § 426.10(a)* (defining "complaint" as meaning a complaint or cross complaint) and (b) (defining "plaintiff" as meaning a person who files a complaint or cross complaint); *see also § 61.90*, Optional Paragraph J].

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show either that defendant in this action was not a party to the previous action or that the cause of action asserted in this action does not relate, that is, does not arise out of the same transaction, occurrence, or series of transactions or occurrences, as the cause of action asserted in the previous action [*see Code Civ. Proc. §§ 426.10(c), 426.30(a)*; *see also* cases discussed in *§ 61.90[3][b]*].

In an appropriate case, the foregoing memorandum may be submitted in opposition to a motion or demurrer supported by the points and authorities *set out in §§ 61.90 -61.93*.

For related forms, see *§§ 61.90[2][d], [e], 61.91[2][b], [c],* and *61.92[2][b], [c]*.

[3] Discussion of Authorities

[a] Defendant Was Not a Party to the Former Action

Insurance Co. of North America v. Liberty Mut. Ins. Co *(1982) 128 Cal. App. 3d 297, 180 Cal. Rptr. 244* , was an action by plaintiff, an insurance company, against defendant, another insurance company, for declaratory relief. In a previous action, Her Majesty Industries (HMI), a party insured by defendant, sued plaintiff for declaratory relief and damages. The trial court in the present action found that the judgment entered in the earlier action determined the issues involved in this case, and sustained a demurrer to the complaint. Plaintiff appealed.

The court of appeal reversed. Defendant alleged, inter alia, that because the former action brought by HMI was for both declaratory relief and for damages and therefore related to the cause of action in this action, plaintiff had a duty to file a compulsory cross complaint. The court held that because defendant was not a party in the previous action there was no requirement that a compulsory cross complaint be filed in the former action as to any claim plaintiff might have against defendant, although plaintiff could have filed a permissive cross complaint against defendant in the former action. The court stated that by taking the latter course, plaintiff could have asserted any claims it might have against defendant based on the respective policies issued by both companies but held that plaintiff's failure to file a permissive cross complaint has no effect on its present ability to pursue its rights against defendant (*128 Cal. App. 3d 297, 303)* .

[b] Cause of Action Not Related

In ***Jones v. Mortimer*** *(1946) 28 Cal. 2d 627, 170 P.2d 893* , plaintiff was a creditor and shareholder of an association that was in the process of liquidation. The Building and Loan Commissioner that was handling the liquidation assessed plaintiff $400 for his liability as a shareholder. Plaintiff failed to pay the sum assessed against him. Plaintiff instituted a suit against the association and the commissioner to recover for the services rendered to the association and obtained a judgment in his favor. The assessment of the levy against plaintiff was not pleaded as a counterclaim (now cross complaint [*see Code Civ. Proc. §§ 426.30(a), 428.80*]) by the commissioner in that action. Since the commissioner was paying creditors' claims to the extent of 50 percent of the amount proved against the association, he reduced the judgment by one-half and then set off the assessment of $400 against that amount. On being notified of the setoff, plaintiff refused to accept it. Plaintiff filed for a writ of execution or other relief to obtain enforcement of his judgment. Plaintiff contended that the commissioner had lost the right to setoff by not filing a compulsory cross complaint in plaintiff's action. The superior court denied plaintiff's petition and plaintiff appealed.

The Supreme Court affirmed the lower court's decision. The Court held that the transaction involved in plaintiff's action was for services rendered to the association, whereas the assessment against plaintiff was based on his liability as a stockholder of the corporation. In interpreting the word "transaction" in former Code Civ. Proc. § 439 [*now see Code Civ. Proc. §§ 426.10(c), 426.30(a)*] the Court gave the word its broadest meaning and held that the two claims involved here could not be brought within its meaning. They arose out of two separate and wholly independent transactions (*28 Cal. 2d 627, 630)* .

Carey v. Cusack *(1966) 245 Cal. App. 2d 57, 54 Cal. Rptr. 244* , was an action in quantum meruit to recover for brokers' services in subdividing defendants' property. Defendants moved to dismiss the complaint as the action was barred by the compulsory counterclaim statute, former Code Civ. Proc. § 439 (now compulsory cross complaint statute [*Code Civ. Proc. § 426.30(a)*]). The trial court denied the motion and gave judgment for plaintiff. Defendant appealed and the court of appeal affirmed. The court applied the test established in *Saunders v. New Capital for Small Businesses, Inc. (1964) 231 Cal. App. 2d 324, 336, 41 Cal. Rptr. 703* (discussed in *§ 61.90[3][b]*), for whether or not claims arise out of the same transaction, which is whether or not there is a continuous, subsisting relationship between the plaintiff and defendant. Applying that test to the case at hand, the court found that the brokers' action against defendant could not be held to come out of the same relationship as the previous action, since that action was based on a different agreement than the one involved here and that they were two separate and distinct transactions, devoid of any logical interrelation. Thus, the instant action did not meet the "same transaction" requirement of former Code Civ. Proc. § 439 [*now see Code Civ. Proc. § 426.30(a)*] (*245 Cal. App. 2d 57, 65-66)* .

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6-61 California Points & Authorities § 61.96

§ 61.96 Opposing Objection to Action on Ground That It Is Barred for Plaintiff's Failure to Plead It as Compulsory Cross Complaint in Prior Action Between Parties [Code Civ. Proc. § 426.30(a)]--Court in Which Prior Action Was Filed Lacked Jurisdiction [Code Civ. Proc. §§ 426.30(b)(1), 426.40(a), (b)] or Unpleaded Cause of Action Was Subject of Another Pending Action [Code Civ. Proc. § 426.40(e)]

[1] FORM Opposing Objection to Action on Ground That It Is Barred for Plaintiff's Failure to Plead It as Compulsory Cross Complaint in Prior Action Between Parties [Code Civ. Proc. § 426.30(a)]--Court in Which Prior Action Was Filed Lacked Jurisdiction [Code Civ. Proc. §§ 426.30(b)(1), 426.40(a), (b)] or Unpleaded Cause of Action Was Subject of Another Pending Action [Code Civ. Proc. § 426.40(e)]

[*Caption. See § 61.95.*]

DEFENDANT'S _____ [MOTION FOR _____ (SUMMARY JUDGMENT ON THE GROUND *or* SEPARATE TRIAL OF THE AFFIRMATIVE DEFENSE) *or* DEMURRER TO THE COMPLAINT ON THE GROUND] THAT THE ACTION HEREIN IS BARRED BECAUSE OF PLAINTIFF'S ALLEGED FAILURE TO HAVE ASSERTED HIS/HER CAUSE OF ACTION IN A CROSS COMPLAINT IN A PRIOR ACTION BY THE DEFENDANT AGAINST THE PLAINTIFF SHOULD BE _____ [DENIED *or* OVERRULED] BECAUSE _____ [THE COURT WAS WITHOUT JURISDICTION IN THE PRIOR ACTION *and/or* AT THE TIME THE PRIOR ACTION WAS COMMENCED THE CAUSE OF ACTION NOT PLEADED WAS THE SUBJECT OF ANOTHER ACTION PENDING].

[*EITHER*]

Cross Complaint Not Required in Previous Action When Court Did Not Have Jurisdiction to Render Personal Judgment. *Section 426.30(a) of the Code of Civil Procedure* does not apply when the court in which the action was pending did not have jurisdiction to render a personal judgment against the person who failed to plead the related cause of action (*Code Civ. Proc. § 426.30(b)(1)*).

[*AND/OR*]

Cross Complaint Not Required in Previous Action When Court Did Not Have Jurisdiction Over Additional Parties. *Section 426.30(a) of the Code of Civil Procedure* does not apply when the cause of action not pleaded in the previous suit required for its adjudication the presence of additional parties over whom the court could not acquire jurisdiction (*Code Civ. Proc. § 426.40(a)*).

[*AND/OR*]

Cross Complaint Not Required in Previous Action When Court Prohibited From Entertaining Action. *Section 426.30(a) of the Code of Civil Procedure* does not apply when both the court in which the action was pending and any other court to which the action was transferable pursuant to *Section 396 of the Code of Civil Procedure* were prohibited by the federal or state constitution or by a statute from entertaining the cause of action not pleaded (*Code Civ. Proc. § 426.40(b)*).

[*AND/OR*]

Cross Complaint Not Required in Previous Action When Cause Not Pleaded Is Subject of Pending Action. *Section 426.30(a) of the Code of Civil Procedure* does not apply when at the time the previous action was commenced, the cause of action not pleaded was the subject of another pending action (*Code Civ. Proc. § 426.40(c)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in opposition to a defendant's motion for summary judgment [*Code Civ. Proc. § 437c*], or a general demurrer to the complaint [*Code Civ. Proc. § 430.10(e)*], on the ground that plaintiff's action is barred because the plaintiff failed to plead it in a compulsory cross complaint in a prior related action by the defendant against the plaintiff [*Code Civ. Proc. § 426.30(a)*], or in opposition to a motion for separate trial of the affirmative defense that the action is barred on the foregoing ground [*see Code Civ. Proc. § 597*]. The ground of opposition is that (1) the court in which the prior action was filed did not have jurisdiction to render a personal judgment against the person who failed to file the related cause of action [*Code Civ. Proc. § 426.10(b)(1)*], or (2) the cause of action not pleaded required for its adjudication the presence of additional parties over whom the court could not acquire jurisdiction [*Code Civ. Proc. § 426.40(a)*], or (3) both the court in which the action was pending and any other court to which the action was transferable pursuant to *Code Civ. Proc. § 396* (transfer from court lacking to court having subject matter jurisdiction) were prohibited by the federal or state constitution or by a statute from entertaining the cause of action not pleaded [*Code Civ. Proc. § 426.40(b)*], or (4) at the time the prior action was commenced, the cause of action not pleaded was the subject of another pending action [*Code Civ. Proc. § 426.40(c)*].

With appropriate modifications, the foregoing form may also be adapted for use if the present plaintiff was a cross

defendant and the present defendant a cross complainant in the prior action [*see Code Civ. Proc. § 426.10(a)* (defining "complaint" as meaning a complaint or cross complaint) and (b) (defining "plaintiff" as meaning a person who files a complaint or cross complaint); *see also § 61.90*, Optional Paragraph J].

Code Civ. Proc. § 426.40(b) is designed to meet problems that may arise when the federal courts have jurisdiction to enforce a cause of action created by federal statute. In cases where the state and federal courts have concurrent jurisdiction, if the cause of action created by the federal statute arises out of the same transaction or occurrence, *Code Civ. Proc. § 426.30* requires joinder in the state court proceeding, and *Code Civ. Proc. § 426.40(b)* is not applicable. When the federal court has exclusive jurisdiction over the federal cause of action, *Code Civ. Proc. § 426.40*, recognizing that the federal cause of action is not permitted to be brought in the state court, provides an exception to the compulsory joinder or compulsory cross complaint requirements [*see* Assembly Legislative Committee Comment to *Code Civ. Proc. § 426.40*].

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show that the court was unable to hear the case for one of the reasons set forth in *Code Civ. Proc. § 426.30(b)* or *426.40*.

In an appropriate case, the foregoing memorandum may be submitted in opposition to a motion or demurrer supported by the points and authorities *set out in §§ 61.90 -61.93*.

For related forms, see *§§ 61.90[2][d], [e], 61.91[2][b], [c]*, and *61.92[2][b], [c]*.

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6-61 California Points & Authorities § 61.97

§ 61.97 Opposing Objection to Action on Ground That It Is Barred for Plaintiff's Failure to Plead It as Compulsory Cross Complaint in Prior Action Between Parties [Code Civ. Proc. § 426.30(a)]--Answer Was Not Filed in Prior Action [Code Civ. Proc. § 426.30(b)(2)]

[1] FORM Opposing Objection to Action on Ground That It Is Barred for Plaintiff's Failure to Plead It as Compulsory Cross Complaint in Prior Action Between Parties [Code Civ. Proc. § 426.30(a)]--Answer Was Not Filed in Prior Action [Code Civ. Proc. § 426.30(b)(2)]

[*Caption. See § 61.95.*]

DEFENDANT'S _____ [MOTION FOR _____ (SUMMARY JUDGMENT ON THE GROUND *or* SEPARATE TRIAL OF THE AFFIRMATIVE DEFENSE) *or* DEMURRER TO THE COMPLAINT ON THE GROUND] THAT THE ACTION HEREIN IS BARRED BECAUSE OF PLAINTIFF'S ALLEGED FAILURE TO HAVE ASSERTED HIS/HER CAUSE OF ACTION IN A CROSS COMPLAINT IN A PRIOR ACTION BY THE DEFENDANT AGAINST THE PLAINTIFF SHOULD BE _____ [DENIED *or* OVERRULED] BECAUSE PLAINTIFF IN THIS ACTION DID NOT FILE AN ANSWER IN THE PRIOR ACTION.

Cross Complaint Not Required When Answer Not Filed. *Code of Civil Procedure Section 426.30(a)* does not apply if it is established that the person who failed in the prior action to plead the related cause of action did not file an answer to the complaint against him or her in that action (*see Code Civ. Proc. § 426.30(b)(2)*; *see Manning v. Wymer (1969) 273 Cal. App. 2d 519, 525, 78 Cal. Rptr. 600*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in opposition to a defendant's motion for summary judgment [*Code Civ. Proc. § 437c*], or a general demurrer to the complaint [*Code Civ. Proc. § 430.10(e)*], on the ground that plaintiff's action is barred because the plaintiff failed to plead it in a compulsory cross complaint in a prior related action by the defendant against the plaintiff [*Code Civ. Proc. § 426.30(a)*], or in opposition to a motion for separate trial of the affirmative defense that the action is barred on the foregoing ground [*see Code Civ. Proc. § 597*]. The ground of opposition is that Code Civ. Proc. § 426.30(a) does not apply when the person who failed to plead the related cause of action did not file an answer to the complaint against him or her in the prior related action [*Code Civ. Proc. § 426.30(b)(2)*].

With appropriate modifications, the foregoing form may also be adapted for use if the present plaintiff was a cross defendant and the present defendant a cross complainant in the prior action [*see Code Civ. Proc. § 426.10(a)* (defining "complaint" as meaning a complaint or cross complaint) and (b) (defining "plaintiff" as meaning a person who files a complaint or cross complaint); *see also § 61.90*, Optional Paragraph J].

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show that an answer was not filed in the previous action by the party bringing the present action.

In an appropriate case, the foregoing memorandum may be submitted in opposition to a motion or demurrer supported by the points and authorities *set out in §§ 61.90 -61.93*.

For related forms, see *§§ 61.90[2][d], [e], 61.91[2][b], [c]*, and *61.92[2][b], [c]*.

[3] Discussion of Authorities

[a] Cross Complaint Not Required When Answer Not Filed

Manning v. Wymer *(1969) 273 Cal. App. 2d 519, 78 Cal. Rptr. 600* , was an action for damages arising out of automobile accident. In a previous action defendant had sued plaintiff and a settlement was effected whereby $800 was paid to defendant in exchange for a dismissal of the action. No answer to the complaint was filed in that action. The parties had agreed that the settlement would not be prejudicial to plaintiff's action. However, the trial court did not know of this agreement and dismissed the action with prejudice. In the present action, defendant moved for a summary judgment on the ground that the dismissal with prejudice of the previous action was a bar to proceeding further in this action. The trial court granted summary judgment to defendant and refused to set aside its order after additional facts were made a matter of record. Plaintiff appealed.

The court of appeal reversed. The court held that the failure of plaintiff to file a counterclaim, as required by former Code Civ. Proc. § 439 (now a cross complaint [*see Code Civ. Proc. §§ 426.30(a), 428.80*]), to defendant's complaint in the former action was not a bar to proceeding with the present action. The court held that since plaintiff was not required to file an answer in that action he was not required to file a counterclaim (*273 Cal. App. 2d 519, 525)* . In order to invoke an estoppel for failure to file a counterclaim, the issues must be joined (*273 Cal. App. 2d 519, 525-526)* .

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§ 61.98 Opposing Objection to Action on Ground That It Is Barred for Plaintiff's Failure to Plead It as Compulsory Cross Complaint in Prior Action Between Parties [Code Civ. Proc. § 426.30(a)]--Rule Does Not Apply When Prior Action Was Special Proceeding or Declaratory Relief Action [Code Civ. Proc. § 426.60(a), (c)]

[1] FORM Opposing Objection to Action on Ground That It Is Barred for Plaintiff's Failure to Plead It as Compulsory Cross Complaint in Prior Action Between Parties [Code Civ. Proc. § 426.30(a)]--Rule Does Not Apply When Prior Action Was Special Proceeding or Declaratory Relief Action [Code Civ. Proc. § 426.60(a), (c)]

[*Caption. See § 61.95.*]

DEFENDANT'S _____ [MOTION FOR _____ (SUMMARY JUDGMENT ON THE GROUND *or* SEPARATE TRIAL OF THE AFFIRMATIVE DEFENSE) *or* DEMURRER TO THE COMPLAINT ON THE GROUND] THAT THE ACTION HEREIN IS BARRED BECAUSE OF PLAINTIFF'S ALLEGED FAILURE TO HAVE ASSERTED HIS/HER CAUSE OF ACTION IN A CROSS COMPLAINT IN A PRIOR ACTION BY THE DEFENDANT AGAINST THE PLAINTIFF SHOULD BE _____ [DENIED *or* OVERRULED] BECAUSE THE PRIOR _____ [LAWSUIT *or* ACTION] WAS _____ [A SPECIAL PROCEEDING AND NOT A CIVIL ACTION *or* SOLELY FOR DECLARATORY RELIEF].

[*EITHER*]

A. Cross Complaint Not Required in Special Proceedings. *Sections 426.10-426.70 of the Code of Civil Procedure* apply only to civil actions and do not apply to special proceedings (*Code Civ. Proc. § 426.60(a)*; *see Tide Water Assoc. Oil Co. v. Superior Court (1955) 43 Cal. 2d 815, 821, 279 P.2d 35*).

[*Optional*] **B. Civil Actions and Special Proceedings Distinguished.** An action is an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, or the redress or prevention of a wrong (*Code Civ. Proc. § 22*; *see also Code Civ. Proc. §§ 24* (kinds of actions), 30 (object of civil

action)). Every other remedy is a special proceeding (*Code Civ. Proc. § 23*). As a general rule, a special proceeding is confined to the type of case which was not, under the common law or equity practice, either an action at law or a suit in equity (*Tide Water Assoc. Oil. Co. v. Superior Court (1955) 43 Cal. 2d 815, 822, 279 P.2d 35*).

[*OR*]

A. Cross Complaint Not Required When Action Solely for Declaratory Relief. *Sections 426.10-426.70 of the Code of Civil Procedure* do not apply when the only relief sought is a declaration of the rights and duties of the respective parties in an action for declaratory relief under *Sections 1060-1062.5 of the Code of Civil Procedure* (*Code Civ. Proc. § 426.60(c)*; *see* *Russo v. Scrambler Motorcycles (1976) 56 Cal. App. 3d 112, 117, 127 Cal. Rptr. 913*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in opposition to a defendant's motion for summary judgment [*Code Civ. Proc. § 437c*], or a general demurrer to the complaint [*Code Civ. Proc. § 430.10(e)*], on the ground that plaintiff's action is barred because the plaintiff failed to plead it in a compulsory cross complaint in a prior related action by the defendant against the plaintiff [*Code Civ. Proc. § 426.30(a)*], or in opposition to a motion for separate trial of the affirmative defense that the action is barred on the foregoing ground [*see Code Civ. Proc. § 597*]. The ground of opposition is that *Code Civ. Proc. § 426.30(a)* does not apply to special proceedings [*see Code Civ. Proc. § 426.60(a)*]. For an exception in the case of proceedings in eminent domain, see *Code Civ. Proc. § 426.70* and § 61.93. An alternative ground is that *Code Civ. Proc. § 426.30(a)* does not apply to an action solely for declaratory relief [*Code Civ. Proc. § 426.60(c)*].

With appropriate modifications, the foregoing form may also be adapted for use if the present plaintiff was a cross defendant and the present defendant a cross complainant in the prior action [*see Code Civ. Proc. § 426.10(a)* (defining "complaint" as meaning a complaint or cross complaint) and (b) (defining "plaintiff" as meaning a person who files a complaint or cross complaint); *see also § 61.90*, Optional Paragraph J].

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show that the previous action was either a special proceeding or the sole relief sought in the previous action was declaratory relief.

In an appropriate case, the foregoing memorandum may be submitted in opposition to a motion or demurrer supported by the points and authorities *set out in §§ 61.90 -61.93*.

For related forms, see *§§ 61.90[2][d], [e], 61.91[2][b], [c],* and *61.92[2][b], [c]*.

[3] Discussion of Authorities

[a] Cross Complaint Not Required in Special Proceedings

Tide Water Assoc. Oil Co. v. Superior Court *(1955) 43 Cal. 2d 815, 279 P.2d 35* , was a proceeding in prohibition to prevent the trial court from trying issues raised by a cross complaint in a suit brought by the state to enjoin unreasonable waste of gas.

The Supreme Court denied the writ. The Court stated that former Code Civ. Proc. § 442 [*now see Code Civ. Proc. §§ 422.10* (defining pleadings allowed in "civil actions" as including cross complaints), 428.10 (permissive cross complaint statute); *see also Code Civ. Proc. § 426.60(a)* (set forth in Paragraph A)] was a general provision that, in the absence of a specific statute to the contrary, is sufficiently broad to permit the use of a cross complaint in any "action," but does not on its face authorize the use of a cross complaint in a "special proceeding" (*43 Cal. 2d 815, 821)* .

[b] Civil Actions and Special Proceedings Distinguished

In ***Tide Water Assoc. Oil. Co. v. Superior Court*** *(1955) 43 Cal. 2d 815, 279 P.2d 35* (discussed in *§ 61.98[3][a]*), the Supreme Court quoted *Code Civ. Proc. §§ 22* and *23* (*43 Cal. 2d 815, 821)* , and said that, as a general rule, a special proceeding is confined to the type of case which was not, under the common law or equity practice, either an action at law or a suit in equity (*43 Cal. 2d 815, 822)* . The Court found the present case to be one to enjoin the unreasonable waste of gas and stated that an injunction is an equitable remedy (*43 Cal. 2d 815, 822)* . Accordingly, the Court held this to be an action and not a special proceeding (*43 Cal. 2d 815, 823)* .

[c] Cross Complaint Not Required When Action Solely for Declaratory Relief

In ***Russo v. Scrambler Motorcycles*** *(1976) 56 Cal. App. 3d 112, 127 Cal. Rptr. 913* , plaintiff filed a complaint for money against defendants after one defendant had filed an action for declaratory relief, dissolution of partnership, accounting, appointment of receiver, quiet title to partnership real property, and damages. In the previous action, the cause of action for declaratory relief expressly named plaintiff herein. Defendants in the present action answered the complaint with a general denial and added as an affirmative defense that each cause of action was barred by the provisions of *Code Civ. Proc. §§ 426.10-426.70* because plaintiff had failed to file a cross complaint in the other action. Defendants moved for summary judgment relying on *Code Civ. Proc. §§ 426.10-426.70*. The trial court granted the motion and plaintiff appealed.

The court of appeal reversed. The court found that the trial court had made no express reference to *Code Civ. Proc. § 426.30* or to any of its concomitant sections in its decision, but in light of defendants' express reliance on these statutes in their motion and the fact that no other grounds were raised, stated that it was a reasonable assumption that the trial court based its determination thereon. The court stated that *Code Civ. Proc. § 426.60(c)* expressly provides that Code *Civ. Proc. §§ 426.10-426.70* do not apply when the only relief sought is a declaration of the rights and duties of the respective parties in an action for declaratory relief. The court concluded that the trial court erred in granting summary judgment because the only cause of action naming plaintiff herein was based on averments of declaratory relief (*56 Cal. App. 3d 112, 116-117)* . Although the complaint in the previous suit contained causes of action other than that for declaratory relief, these were clearly not directed against plaintiff herein, and thus "the only remedy" sought by defendants against plaintiff herein was a declaration of the rights and duties of the parties (*56 Cal. App. 3d 112, 117)* .

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§ 61.99 Opposing Objection to Action on Ground That It Is Barred for Plaintiff's Failure to Plead It as Compulsory Cross Complaint in Prior Action Between Parties [Code Civ. Proc. § 426.30(a)]--Cause of Action Arose After Answer in Prior Action Was Served [Code Civ. Proc. § 426.30(a)]

[1] FORM Opposing Objection to Action on Ground That It Is Barred for Plaintiff's Failure to Plead It as Compulsory Cross Complaint in Prior Action Between Parties [Code Civ. Proc. § 426.30(a)]--Cause of Action Arose After Answer in Prior Action Was Served [Code Civ. Proc. § 426.30(a)]

[*Caption. See § 61.95.*]

DEFENDANT'S _____ [MOTION FOR _____ (SUMMARY JUDGMENT ON THE GROUND *or* SEPARATE TRIAL OF THE AFFIRMATIVE DEFENSE) *or* DEMURRER TO THE COMPLAINT ON THE GROUND] THAT THE ACTION HEREIN IS BARRED BECAUSE OF PLAINTIFF'S ALLEGED FAILURE TO HAVE ASSERTED HIS/HER CAUSE OF ACTION IN A CROSS COMPLAINT IN A PRIOR ACTION BY THE DEFENDANT AGAINST THE PLAINTIFF SHOULD BE _____ [DENIED *or* OVERRULED] BECAUSE THE CAUSE OF ACTION ALLEGED IN THE COMPLAINT HEREIN AROSE AFTER PLAINTIFF'S ANSWER WAS SERVED ON THE DEFENDANT, AS PLAINTIFF, IN THE PRIOR ACTION.

Cause of Action Arose After Answer Was Served. When a related cause of action accrued after the service of the plaintiff's answer in a previous action brought by the defendant, then the plaintiff is not prevented from pursuing his or her rights in a present action (*see Code Civ. Proc. § 426.30(a)*; *E.L. White, Inc. v. City of Huntington Beach (1978) 21 Cal. 3d 497, 506, 146 Cal. Rptr. 614, 579 P.2d 505* ; *Russo v. Scrambler Motorcycles (1976) 56 Cal. App. 3d 112, 117-118, 127 Cal. Rptr. 913*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted by plaintiff in opposition to a defendant's motion for summary judgment [*Code Civ. Proc. § 437c*], or a general demurrer to the complaint [*Code Civ. Proc. § 430.10(e)*], on the ground that plaintiff's action is barred because the plaintiff failed to plead it in a compulsory cross complaint in a prior related action by the defendant against the plaintiff [*Code Civ. Proc. § 426.30(a)*], or in opposition to a motion for separate trial of the affirmative defense that the action is barred on the foregoing ground [*see Code Civ. Proc. § 597*]. The ground of opposition is that the bar of *Code Civ. Proc. § 426.30(a)* does not apply because the cause of action sued on did not exist at the time plaintiff's answer in the prior action was served, as required by *Code Civ. Proc. § 426.30(a)*.

With appropriate modifications, the foregoing form may also be adapted for use if the present plaintiff was a cross defendant and the present defendant a cross complainant in the prior action [*see Code Civ. Proc. § 426.10(a)* (defining "complaint" as meaning a complaint or cross complaint) and (b) (defining "plaintiff" as meaning a person who files a complaint or cross complaint); *see also § 61.90*, Optional Paragraph J].

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show that the cause of action asserted in the complaint arose after plaintiff's answer to the complaint in the prior action had been served.

In an appropriate case, the foregoing memorandum may be submitted in opposition to a motion or demurrer supported by the points and authorities *set out in §§ 61.90 -61.93*.

For related forms, see *§§ 61.90[2][d], [e], 61.91[2][b], [c],* and *61.92[2][b], [c]*.

[3] Discussion of Authorities

[a] Cause of Action Arose After Answer Was Served

E.L. White, Inc. v. City of Huntington Beach *(1978) 21 Cal. 3d 497, 146 Cal. Rptr. 614, 579 P.2d 505* , was an action for indemnity and equitable contribution. Defendant contended that plaintiff's action was barred in its entirety by reason of *Code Civ. Proc. § 426.30* dealing with compulsory cross complaints. The trial court entered a judgment of dismissal following an order sustaining, without leave to amend, a demurrer to plaintiff's first amended complaint. Plaintiff appealed.

The Supreme Court reversed the judgment of dismissal. Plaintiff contended that the bar of *Code Civ. Proc. § 426.30* was not applicable, both by its own terms and by specific statutory exemption. The Court stated that it was well settled that a cause of action for implied indemnity does not accrue or come into existence until the indemnitee has suffered actual loss through payment. The Court found that the causes of action against defendant did not arise until more than two years after the filing of their answer to defendant's complaint, when they made payment following affirmance of a casualty judgment on appeal. The Court held that the causes of action they now seek to assert, even if related to any of those stated in defendant's prior action, were not causes that at the time of serving their answer to the complaint they had against plaintiff (*21 Cal. 3d 497, 505-506)* .

The facts and procedural background of ***Russo v. Scrambler Motorcycles*** *(1976) 56 Cal. App. 3d 112, 127 Cal. Rptr. 913* , are discussed in *§ 61.98[3][c]*. The court of appeal reversed the trial court's decision granting summary judgment to defendants. Quoting *Code Civ. Proc. § 426.30(a)*, the court said that "[I]f a party against whom a complaint has been

filed and served fails to allege in a cross complaint any related cause of action which (*at the time of serving his answer to the complaint*) he has against the plaintiff" (court's italics), he or she may not thereafter assert it against plaintiff in any other action; and the averments of all three causes of action of the within complaint reasonably can be construed as intending to seek relief in relation to events which occurred subsequent to the time plaintiff filed his answer to the complaint in the prior case (*56 Cal. App. 3d 112, 117)* . Regarding the first cause of action in the present cases, the court found that plaintiff was discharged after the answer was filed and the money sued for was owed at that time. Regarding the cause of action for recovery of a penalty under the Labor Code, the court found that this could be filed at any time before the expiration of the statute of limitations on an action for wages from which the penalties arise, and that since defendants did not contend that the statute had run, it could reasonably be assumed that plaintiff was entitled to initiate suit on this case after his answer was filed (*56 Cal. App. 3d 112, 117)* . The court found the third cause of action to in part expressly aver that defendants' acts were fraudulent and deceitful in that defendants and each of them did induce plaintiff to enter into and perform the oral contract of employment, and noted that the averments could properly be interpreted as seeking some recovery for events occurring prior to the filing of the answer. However, the court held that since neither defendants' motion for summary judgment nor the judgment itself attempted to segregate such events from those pleaded which occurred subsequent to that date, the summary judgment, which indiscriminately struck down the entire complaint, could not stand (*56 Cal. App. 3d 112, 118)* .

Note that *Code Civ. Proc. § 426.30(a)* bars related causes of action not pleaded as compulsory cross complaints only if the cause of action existed at the time the answer to the complaint in the prior action was "served." An answer is served before it is filed, and the proof of service normally accompanies the original of the answer filed [*see, e.g., Code Civ. Proc. § 1013a* (relating to proof of service by mail, requiring that the proof set forth the exact title of the document "served and filed" in the cause)]. Since the causes of action in each of the foregoing cases did not exist at the time the answer to the complaint in the prior action was filed, but did exist at the time of the present lawsuit, they necessarily did not exist at the time the answer in the prior action was served.

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6-61 California Points & Authorities § 61.100

§ 61.100 Opposing Objection to Action on Ground That It Is Barred for Plaintiff's Failure to Plead It as Compulsory Cross Complaint in Prior Action Between Parties [Code Civ. Proc. § 426.30(a)]--Prior and Present Actions Were Consolidated

[1] FORM Opposing Objection to Action on Ground That It Is Barred for Plaintiff's Failure to Plead It as Compulsory Cross Complaint in Prior Action Between Parties [Code Civ. Proc. § 426.30(a)]--Prior and Present Actions Were Consolidated

[*Caption. See § 61.95.*]

DEFENDANT'S _____ [MOTION FOR _____ (SUMMARY JUDGMENT ON THE GROUND *or* SEPARATE TRIAL OF THE AFFIRMATIVE DEFENSE) *or* DEMURRER TO THE COMPLAINT ON THE GROUND] THAT THE ACTION HEREIN IS BARRED BECAUSE OF PLAINTIFF'S ALLEGED FAILURE TO HAVE ASSERTED HIS/HER CAUSE OF ACTION IN A CROSS COMPLAINT IN A PRIOR ACTION BY THE DEFENDANT AGAINST THE PLAINTIFF SHOULD BE _____ [DENIED *or* OVERRULED] BECAUSE THE PRIOR AND PRESENT ACTIONS WERE CONSOLIDATED FOR TRIAL.

Consolidation of Actions Cures Noncompliance With *Code Civ. Proc. § 426.30*. Counteractions growing out of the same transaction may be consolidated in lieu of filing a compulsory cross complaint; since consolidation of counteractions accomplishes the basic policy of *Section 426.30 of the Code of Civil Procedure*, it cures the error of noncompliance with these requirements for filing compulsory cross complaints (*see Ranchers Bank v. Pressman (1971) 19 Cal. App. 3d 612, 621-622, 97 Cal. Rptr. 78*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in opposition to a defendant's motion for summary judgment [*Code Civ. Proc. § 437c*], or a general demurrer to the complaint [*Code Civ. Proc. § 430.10(e)*], on the ground that plaintiff's action is barred because the plaintiff failed to plead it in a compulsory cross complaint in a prior related action by the defendant against the plaintiff [*Code Civ. Proc. § 426.30(a)*], or in opposition to a motion for separate trial of the affirmative defense that the action is barred on the foregoing ground [*see Code Civ. Proc. § 597*]. The ground of opposition is that the bar of *Code Civ. Proc. § 426.30(a)* does not apply because the present and the prior actions have been consolidated for trial.

With appropriate modifications, the foregoing form may also be adapted for use if the present plaintiff was a cross defendant and the present defendant a cross complainant in the first action [*see Code Civ. Proc. § 426.10(a)* (defining "complaint" as meaning a complaint or cross complaint) and (b) (defining "plaintiff" as meaning a person who files a complaint or cross complaint); *see also § 61.90*, Optional Paragraph J].

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show that the present action was consolidated with the action which required filing of a cross complaint.

In an appropriate case, the foregoing memorandum may be submitted in opposition to a motion or demurrer supported by the points and authorities *set out in §§ 61.90 -61.93*.

For related forms, see *§§ 61.90[2][d], [e], 61.91[2][b], [c]*, and *61.92[2][b], [c]*.

[3] Discussion of Authorities

[a] Consolidation of Actions Cures Noncompliance With Code Civ. Proc. § 426.30

The facts and procedural background of ***Ranchers Bank v. Pressman*** *(1971) 19 Cal. App. 3d 612, 97 Cal. Rptr. 78* , are discussed in *§ 61.90[3][g]*. The court of appeal affirmed judgments against defendant resulting from two actions that were consolidated for purposes of trial. The court stated that a compulsory counterclaim (now cross complaint) is required to a cross complaint when the tests for a compulsory counterclaim are met. The court found that a compulsory cross complaint was required in the first action because all of the claims at issue in the two actions arose out of the same transaction (*19 Cal. App. 3d 612, 620-621)* . However, the court held that since the consolidation of the two actions for trial accomplished the purpose of former Code Civ. Proc. § 439 [*now see Code Civ. Proc. § 426.30*], that of avoiding the forfeiture of one plaintiff's claim on the note, the consolidation cured the error of noncompliance with former Code Civ. Proc. § 439 [*now see Code Civ. Proc. § 426.30*] (*19 Cal. App. 3d 612, 621-622)* .

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6-61 California Points & Authorities § 61.101

§ 61.101 Opposing Objection to Action on Ground That It Is Barred for Plaintiff's Failure to Plead It as Compulsory Cross Complaint in Prior Action Between Parties [Code Civ. Proc. § 426.30(a)]--Failure to Plead Bar Under Code Civ. Proc. § 426.30(a) as Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] Constitutes Waiver of That Defense

[1] FORM Opposing Objection to Action on Ground That It Is Barred for Plaintiff's Failure to Plead It as Compulsory Cross Complaint in Prior Action Between Parties [Code Civ. Proc. § 426.30(a)]--Failure to Plead Bar Under Code Civ. Proc. § 426.30(a) as Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] Constitutes Waiver of That Defense

[*Caption. See § 61.95.*]

THE DEFENDANT'S FAILURE TO PLEAD AS AN AFFIRMATIVE DEFENSE THAT THE ACTION IS BARRED FOR FAILURE TO PLEAD IT AS A CROSS COMPLAINT IN A PRIOR RELATED ACTION BETWEEN THE PARTIES CONSTITUTES A WAIVER OF THE DEFENSE.

A. Defense That Action Is Barred by *Code Civ. Proc. § 426.30* Is Waived If It Is Not Specially Pleaded. *Code of Civil Procedure Section 426.30,* which bars any claim on a related cause of action which a party failed to assert by compulsory cross complaint in a prior action between the parties, is analogous to the doctrine of res judicata and must be specially pleaded as an affirmative defense in the subsequent action on the related claim. Failure to so plead it constitutes a waiver of this defense (*Hulsey v. Koehler (1990) 218 Cal. App. 3d 1150, 1153, 267 Cal. Rptr. 523*).

[*Optional*] **B. Defense That Action Is Barred Is Not Included in Defense That Complaint Fails to State Cause of Action.** The affirmative defense that the complaint fails to state facts sufficient to constitute a cause of action does not incorporate the defense that the action is barred under *Code of Civil Procedure Section 426.30* and is not sufficient to raise that defense (*Hulsey v. Koehler (1990) 218 Cal. App. 3d 1150, 1158, 267 Cal. Rptr. 523*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a defendant's motion for summary judgment [*Code Civ. Proc. § 437c*] on the ground that plaintiff's action is barred because the plaintiff failed to plead it in a compulsory cross complaint in a prior related action by the defendant against the plaintiff [*Code Civ. Proc. § 426.30(a)*]. The ground for opposition is that defendant waived the defense of the bar of *Code Civ. Proc. § 426.30(b)* by failing to plead it as an affirmative defense.

With appropriate modifications, the foregoing form may also be adapted for use if the present plaintiff was a cross defendant and the present defendant a cross complainant in the prior action [*see Code Civ. Proc. § 426.10(a)* (defining "complaint" as meaning a complaint or cross complaint) and (b) (defining "plaintiff" as meaning a person who files a complaint or cross complaint); *see also § 61.90*, Optional Paragraph J].

This memoranda may also be combined with a form of memorandum relating to another specific procedural context in which counsel wishes to raise the issue that the defense was waived by the defendant's failure to plead it as an affirmative defense. For example, they may be included in a memorandum in opposition to a motion to amend the answer under *Code Civ. Proc. § 473(a)*, to allege the defense. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, this memorandum may be submitted in opposition to a motion supported by the points and authorities *set out in §§ 61.90* and *61.93*.

For related forms, see *§ 61.90[d][e]*.

[3] Discussion of Authorities

[a] Defense That Action Is Barred by Code Civ. Proc. § 426.30 Is Waived If It Is Not Specially Pleaded

Hulsey v. Koehler *(1990) 218 Cal. App. 3d 1150, 267 Cal. Rptr. 523* , was an action for declaratory relief and reformation of a promissory note executed in connection with the plaintiffs' sale of a mobilehome park to the defendant. Although defendant had pleaded, as an affirmative defense, that the complaint did not state facts sufficiently to constitute a cause of action, she did not specifically plead that the action was barred under the provisions of *Code Civ. Proc. § 426.30(a)*. At trial, defendant moved to amend her answer to assert *Code Civ. Proc. § 426.30(a)* as an affirmative defense, alleging that the cause of action for reformation was barred because plaintiffs had failed to seek reformation by cross complaint in an earlier lawsuit filed by defendant against the plaintiffs for claims arising from the sale of the mobilehome park. The trial court denied the motion as untimely, and defendant appealed from the subsequent judgment for plaintiffs. She contended that (1) the trial court had abused its discretion in denying her motion to amend, and (2) defendant was entitled to assert *Code Civ. Proc. § 426.30(a)* as a defense even without amending her answer, because, like the doctrine of collateral estoppel, it did not have to be specially pleaded as an affirmative defense (*218 Cal. App. 3d 1150, 1153, 1156)* .

The court of appeal disagreed with both contentions and affirmed the judgment (*218 Cal. App. 3d 1150, 1153, 1160)* . Although the court agreed that a party is not required specially to allege collateral estoppel as a defense, the court held that the compulsory cross complaint rule of *Code Civ. Proc. § 426.30* is not an extension of the collateral estoppel doctrine, that the application of this doctrine to foreclose the subsequent litigation of an issue requires that the issue must have, in fact, been litigated and decided in the prior action (*218 Cal. App. 3d 1150, 1156)* . The court held that, because *Code Civ. Proc. § 426.30* bars claims which the party failed to assert by cross complaint in a prior action

arising out of the same occurrence, it necessarily bars issues that were never litigated and never actually decided (*218 Cal. App. 3d 1150, 1156)* , and that the scope and effect of *Code Civ. Proc. § 426.30(a)* is analogous to that of res judicata rather than collateral estoppel (*218 Cal. App. 3d 1150, 1157)* . The court held that the defense under *Code Civ. Proc. § 426.30(a)*, being analogous to the doctrine of res judicata, must be specially pleaded, and that failure to plead it constitutes a waiver of the defense (*218 Cal. App. 3d 1150, 1157)* . The court further held that the trial court did not abuse its discretion in denying as untimely defendant's motion at trial to amend (*218 Cal. App. 3d 1150, 1153, 1158-1159)* .

Note that the court in *Hulsey* characterized as a misapplication of terminology (*218 Cal. App. 3d 1150, 1158)* the statements in *Sylvester v. Soulsburg (1967) 252 Cal. App. 2d 185, 193, 60 Cal. Rptr. 218* , and *Saunders v. New Capital for Small Businesses, Inc. (1964) 231 Cal. App. 2d 324, 332-333* , that the defense authorized by former Code Civ. Proc. § 439 [*now see Code Civ. Proc. § 426.30(a)*] is a form or extension of collateral estoppel [*see also* discussion of these cases in § 61.90[3][b]].

[b] Defense That Action Is Barred Is Not Included in Defense That Complaint Fails to State Cause of Action

The facts and procedural background of ***Hulsey v. Koehler*** *(1990) 218 Cal. App. 3d 1150, 267 Cal. Rptr. 523* , are discussed in *§ 61.101[3][a]*. In affirming the judgment for the plaintiffs, the court of appeal said that since a defense based on *Code Civ. Proc. § 426.30* must be specially pleaded, it rejected defendant's contention that her affirmative defense of failure to state facts sufficient to constitute a cause of action effectively incorporated the *Code Civ. Proc. § 426.30* defense and was sufficient to raise it (*218 Cal. App. 3d 1150, 1158)* .

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[Reserved]

§§ 61.102[Reserved]

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6-61 California Points & Authorities § 61.120

§ 61.120 Supporting Motion to Dismiss Appeal [Cal Rules of Ct, Rules 8.54(a), 8.57(a)]--Order Denying Motion to File Cross Complaint or Striking or Dismissing Cross Complaint Filed Against Plaintiff Is Not Appealable Order [Code Civ. Proc. § 904.1]

[1] FORM Supporting Motion to Dismiss Appeal [Cal Rules of Ct, Rules 8.54(a), 8.57(a)]--Order Denying Motion to File Cross Complaint or Striking or Dismissing Cross Complaint Filed Against Plaintiff Is Not Appealable Order [Code Civ. Proc. § 904.1]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
_____ APPELLATE DISTRICT[, DIVISION _____]

_____ [*name*],	)	
Plaintiff, Cross Defendant, and Respondent	)	CIVIL NO. _____
vs.	)	MEMORANDUM IN SUPPORT OF MOTION TO
_____ [*name*],	)	DISMISS APPEAL
Defendant, Cross Complainant, and Appellant	)	[*Code Civ. Proc. § 904.1*; *Cal. Rules of Ct., Rules*
	)	*8.54(a), 8.57(a)*]
	)	

THE MOTION OF _____ [*specify moving party*, *e.g.*, PLAINTIFF AND RESPONDENT] TO DISMISS THE APPEAL SHOULD BE GRANTED BECAUSE THE ORDER _____ [DENYING THE MOTION BY _____ (*specify person seeking to appeal order*, *e.g.*, DEFENDANT AND APPELLANT) TO FILE *or* DISMISSING *or* STRIKING] THE CROSS COMPLAINT IS NOT A FINAL DISPOSITION OF THE MATTERS.

A. Appeal Only From Final Judgment. An order denying a motion to file a cross complaint or dismissing or striking a cross complaint is not appealable unless there is a final disposition of the matters that are sought to be raised in the cross complaint. The judgment or order must be final (*Evans v. Dabney (1951) 37 Cal. 2d 758, 760, 235 P.2d 604* ;

see People ex rel. Dept. Pub. Wks. v. Clausen (1967) 248 Cal. App. 2d 770, 774, 57 Cal. Rptr. 227). Where a complaint and cross-complaint involving the same parties have been filed, there is no final, appealable judgment until both have been resolved (*ECC Construction, Inc. v. Oakpark Calabasas Homeowners Ass'n (2004) 122 Cal. App. 4th 994, 1002, 19 Cal. Rptr. 3d 340*).

[*Optional*] **B. Review on Appeal From Summary Judgment Not Appropriate Except in Specified Circumstances.** The court will only review a denial of leave to file a cross complaint on an appeal from a summary judgment if it necessarily affects that judgment, involves the merits of the action, or substantially affects the rights of appellant (Security Pacific National Bank v. Adamo *(1983) 142 Cal. App. 3d 492, 496, 191 Cal. Rptr. 134*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Respondent _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in support of a motion to dismiss an appeal from an order denying a motion for leave to file a cross complaint when the parties involved in the cross complaint were the same as those involved with the original complaint. The foregoing form is for use in a proceeding involving an appeal from a superior court order. It may be adapted for use in a proceeding in the appellate department of the superior court.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show, for example, that defendant filed the cross complaint against persons who were not parties to the action, that those persons did not appear at the hearing on the motion, and that the rights as between defendant and the new parties were not adjudicated.

[b] Related Pleading and Practice Forms

For discussion and forms relating to motions for leave to file cross complaints see Ch. 123, *Complaints and Cross Complaints* in California Forms of Pleading and Practice (Matthew Bender).

For discussion, a procedural guide, and forms relating to appeal of denial of motion for leave to file a cross complaint, see Ch. 51, *Appeal: Hearing and Decision* in that set.

[c] Opposing Memoranda

In an appropriate case, the points and authorities *set out in § 61.121* may be used to oppose the motion supported by the foregoing points and authorities.

[3] Discussion of Authorities

[a] Appeal Only From Final Judgment

In ***Evans v. Dabney*** *(1951) 37 Cal. 2d 758, 235 P.2d 604* , the trustees of an inter vivos trust brought an action for declaratory relief against defendants, trustors, and beneficiaries under the trust. Defendants answered, cross complained, and moved to add other parties as cross defendants. Plaintiffs demurred to the cross complaint. The trial court by minute

order denied the motion to add parties and sustained the demurrer to the cross complaint without leave to amend. A judgment on issues raised by the complaint and the answer was not entered. Defendants noticed an appeal from the minute order insofar as it denied leave to bring in new parties as cross defendants and the ensuing judgment decreeing solely that cross complainants take nothing by this action against cross defendants.

The Supreme Court affirmed. The Court held that the orders and judgment are not appealable and the purported appeals must be dismissed. The Court stated that it was settled that an order sustaining a demurrer is not appealable. Defendants argued that the order denying their motion and the judgment that they take nothing by their cross complaint should be appealable because the controversy as to which plaintiffs seek declaratory relief and the matters which defendants wish tried in their cross action all concern administration of the same trust and should be tried together. The Court stated that this was nothing more than an argument that when an interlocutory ruling of the trial court is wrong it should be appealable (*37 Cal. 2d 78, 759)* . The Court found the judgment here not to be a final disposition of the matters that defendants seek to raise by their cross complaint and that the questions which defendants have attempted to present on this appeal could properly be determined only on the appeal from the final judgment (*37 Cal. 2d 758, 760)* .

In ***People ex rel. Dept. Pub. Wks. v. Clausen*** *(1967) 248 Cal. App. 2d 770, 57 Cal. Rptr. 227* , defendant property owner cross complained against plaintiff state in an eminent domain action for trespass. Plaintiff demurred generally to the cross complaint and moved to strike it. The trial court denied the motion to strike but sustained the demurrer with leave to amend. Defendant then filed an amended cross complaint naming as cross defendants plaintiff and a new cross defendant. Plaintiff demurred generally and specially to the amended cross complaint and moved to strike it on the grounds that defendant had not obtained permission of the court to file the amended cross complaint and that the cross complaint did not have the required subject matter relationship to the complaint. The trial court sustained the demurrer without leave to amend and granted the motion to strike. Defendant appealed from both the order sustaining the demurrer and the judgment dismissing the cross complaint.

The court of appeal dismissed the appeal from the order sustaining plaintiff's demurrer to the amended cross complaint because a demurrer is not appealable, and it reversed the order striking the amended cross complaint as to plaintiff. In considering the appealability of the order and dismissal, the court stated that it is the general rule that when parties to a cross complaint are identical to the parties to the original action, an order striking a cross complaint is not appealable because it does not constitute a final judgment. The propriety of such an order is reviewable on appeal from the final judgment. If, on the other hand, the cross complaint names new parties or codefendants, the order striking a cross complaint may constitute a final and appealable judgment, provided it adjudicates rights as between the cross complainant and the new parties or the codefendant cross defendant (*248 Cal. App. 2d 770, 776)* . However, when the new parties or the codefendant cross defendants have not been served and have not appeared, an order striking the cross complaint on motion of the plaintiff adjudicates nothing between the cross complaint and the new parties or codefendant cross defendants, but only adjudicates rights as between the plaintiff and the cross complainant. In such a case the order striking out the cross complaint is not appealable (*248 Cal. App. 2d 770, 776-777)* . In the present case the court found that the new cross defendant had been served but did not formally appear in the action or at the hearing on the motion to strike the cross complaint, which would normally preclude defendant from appealing the order granting the motion to strike the cross complaint. However, the order purported to strike the amended cross complaint as to plaintiff and new cross defendants, and the new cross defendants deemed that the motion to strike was made on its behalf in view of the fact that it obtained a judgment of dismissal predicated on the order granting plaintiff's motion. Thus, the court held that there was an appearance by the new cross defendants and an adjudication of rights as between it and defendant sufficient to make the order a final adjudication of the validity of the cross complaint as to the new cross defendants. The order striking the amended cross complaint was appealable, as was the judgment of dismissal as to the new parties (*248 Cal. App. 2d 770, 778)* .

[b] Review on Appeal From Summary Judgment Not Appropriate Except in Specified Circumstances

Security Pacific National Bank v. Adamo *(1983) 142 Cal. App. 3d 492, 191 Cal. Rptr. 134* , was an action on a

promissory note made by a corporation and guaranteed by several shareholders. The guarantors moved for leave to file an amended cross complaint. The trial court denied the motion. Plaintiff moved for summary judgment on the complaint. The trial court granted summary judgment against defendants in favor of plaintiff and six defendants appealed.

The court of appeal affirmed. The court found defendants' primary purpose in appealing to be to secure review of the order denying the motion to file the cross complaint (*142 Cal. App. 492, 494)* . The court held that an order denying a motion for leave to file an amended cross complaint is not appealable. However, orders denying leave to file a cross complaint will be reviewable on appeal from summary judgment if it necessarily affects that judgment, involves the merits of the action, or substantially affects the rights of appellants. Here the court found none of these requirement were met (*142 Cal. App. 492, 496)* . The court found that the proposed fourth amended cross complaint was irrelevant on plaintiff's motion and could not expand the issues of which the summary judgment disposed. The court held that the order denying leave to file the cross complaint did not involve the merits of the main action to which the summary judgment notion was addressed; it affected neither the summary judgment entered in that action nor the substantial rights of appellants as defendants therein. Therefore the order was not reviewable (*142 Cal. App. 492, 496)* .

In ***ECC Construction, Inc. v. Oakpark Calabasas Homeowners Ass'n*** *(2004) 122 Cal. App. 4th 994, 19 Cal. Rptr. 3d 340* , the court considered whether defendant's notice of appeal was timely as to claims raised in its cross-complaint where the original judgment as to the cross-complaint was entered on August 5, and the appeal was filed November 18. The court held that where a complaint and cross-complaint involving the same parties have been filed, there is no final, appealable judgment until both have been resolved (*122 Cal. App. 4th 994, 1002)* . Under the one final judgment rule, a defendant could not appeal from a judgment as to its cross-complaint while proceedings remained pending as to the complaint; defendant could appeal only from a final judgment which resolved both the complaint and the cross-complaint. Here, the judgment was not final and appealable as to plaintiff's complaint until October 18, and notice of ruling was served on October 24, giving defendant until November 25 to file its appeal (*122 Cal. App. 4th 994, 1002, 1003)* .

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6-61 California Points & Authorities § 61.121

§ 61.121 Opposing Motion to Dismiss Appeal [Cal Rules of Ct, Rules 8.54(a), 8.57(a)]--Order Striking or Dismissing Cross Complaint Constitutes Final Judgment and Is Appealable Because (1) New Parties or Codefendant Named as Cross Defendants; (2) Order Finally Disposes of Action as to Appellant; or (3) Case Transferred From Municipal to Superior Court Because of Cross Complaint [Code Civ. Proc. § 904.1]

[1] FORM Opposing Motion to Dismiss Appeal [Cal Rules of Ct, Rules 8.54(a), 8.57(a)]--Order Striking or Dismissing Cross Complaint Constitutes Final Judgment and Is Appealable Because (1) New Parties or Codefendant Named as Cross Defendants; (2) Order Finally Disposes of Action as to Appellant; or (3) Case Transferred From Municipal to Superior Court Because of Cross Complaint [Code Civ. Proc. § 904.1]

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
_____ APPELLATE DISTRICT[, DIVISION _____]

_____ [*name*],	)	
Plaintiff, Cross Defendant, and Respondent	)	
vs.	)	CIVIL NO. _____
_____ [*name*],	)	MEMORANDUM IN OPPOSITION TO MOTION
Defendant, Cross Complainant, and Appellant	)	TO DISMISS APPEAL
	)	
	)	

_____

THE MOTION OF _____ [*specify moving party, e.g.,* PLAINTIFF AND RESPONDENT] TO DISMISS THE APPEAL SHOULD BE DENIED BECAUSE THE ORDER STRIKING OR DISMISSING THE CROSS COMPLAINT IS A FINAL JUDGMENT AND APPEALABLE SINCE _____ [NEW PARTIES OR CODEFENDANTS WERE NAMED AS CROSS DEFENDANTS *or* THE ORDER FINALLY DISPOSES OF THE ACTION AS TO PLAINTIFF AND APPELLANT *or* THE CASE WAS TRANSFERRED FROM MUNICIPAL TO SUPERIOR COURT DUE TO THE CROSS COMPLAINT].

Order Final and Appealable. An order striking or dismissing the cross complaint is a final judgment and therefore appealable if (1) new parties or codefendants were named as cross defendants; (2) the order finally disposes of the action as to the appellant; or (3) the case was transferred from municipal to superior court because of the cross complaint, and the superior court orders the matter retransferred to the municipal court after ordering the cross complaint stricken (*Code Civ. Proc. § 904.1*; *Herrscher v. Herrscher (1953) 41 Cal. 2d 300, 303, 259 P.2d 901* ; *Atherley v. MacDonald, Young & Nelson (1955) 135 Cal. App. 2d 383, 385, 287 P.2d 529* ; *Keenan v. Dean (1955) 134 Cal. App. 2d 189, 192, 285 P.2d 300*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum can be used to oppose a motion to dismiss an appeal from an order denying a motion for leave to file a cross complaint when the parties to the cross complaint are not the same as the parties to the complaint or the order finally disposes of the action as to appellants due to jurisdictional requirements of the cross complaint.

The third ground for this motion, that the superior court ordered the matter retransferred to municipal court, may or may not apply when the superior and municipal courts have been unified. In that situation, the issue would be that the superior court reclassified a case from a limited civil case to a case of unlimited jurisdiction because of a cross complaint and, based on striking the cross complaint, reclassified it back to being a limited civil case [*see Code Civ. Proc. §§ 403.030, 403.040*]. Counsel may wish to use this form as the starting point in an argument that the rule of appealability that applies when a case is retransferred back to municipal court should apply by analogy when a case is reclassified as a limited civil case. As yet, however, there is no authority to directly support this argument.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show, for example, that defendant filed the cross complaint against a codefendant or third party and the order denying leave to file the cross complaint is dispositive of the issues between these parties, or that defendant was allowed to file a cross complaint in a municipal court action and because the issues raised in the cross complaint were beyond the jurisdiction of the court, the case was transferred to superior court.

In an appropriate case, the memorandum may be submitted in opposition to a motion to dismiss an appeal supported by the memorandum *set out in § 61.120*.

[b] Related Pleading and Practice Forms

For discussion and forms relating to motions for leave to file a cross complaint, see California Forms of Pleading and Practice, Ch. 123, *Complaints and Cross Complaints* (Matthew Bender).

For discussion, a procedural guide, and forms relating to appeal generally, see Ch. 40, *Appeal: An Overview* et seq. in that publication.

[3] Discussion of Authorities

[a] Order Final and Appealable

Herrscher v. Herrscher *(1953) 41 Cal. 2d 300, 259 P.2d 901* , was an action brought on behalf of an unborn child by its guardian ad litem, the mother, for determination that defendant was the father and for support costs, attorney's fees, and medical care of plaintiff's mother during pregnancy and pending birth of plaintiff. Defendant filed an answer and a cross complaint. The cross complaint prayed that the complaint be dismissed; that judgment be rendered declaring the nonexistence of the relationship of parent and child between cross complainant and purported plaintiff; for damages for injury to his credit and reputation; and for other relief. Cross defendant filed a demurrer to the cross complaint and also filed notice of motion to strike the cross complaint on the ground that it was not filed in good faith and that it was sham, irrelevant, and frivolous. The trial court ordered the demurrer off calendar and granted the motion to strike the cross complaint. Defendant appealed the trial court's decision granting plaintiff's motion to strike defendant's cross complaint.

The Supreme Court dismissed the appeal. On appeal, plaintiff contended that an order dismissing a cross complaint or striking it is not an appealable order and that the order from which this appeal is taken is not a final order and therefore is not appealable. The Court held that an order granting a motion to strike a cross complaint is equivalent to an order dismissing the cross complaint. When the parties to the cross complaint are not identical with the parties to the original action, the order amounts to a final adjudication between the cross complainants and cross defendants and is appealable (*41 Cal. 2d 300, 303)* . The Court stated that it has long been the rule in California that an order of dismissal is to be treated as a judgment for the purposes of taking an appeal when it finally disposes of the particular action and prevents further proceedings as effectually as would any formal judgment (*41 Cal. 2d 300, 303-304)* . However, in this case, since no written order was filed, there was no final order on file and the minute order was not appealable (*41 Cal. 2d 300, 306)* .

In ***Atherley v. MacDonald, Young & Nelson*** *(1955) 135 Cal. App. 2d 383, 287 P.2d 529* , appellants and respondent were joined as codefendants in an action for personal injuries received by plaintiff in a fall. Appellants filed a cross complaint against their codefendant, the respondent, alleging that respondent had agreed to construct the stairway on which plaintiff fell and had agreed to hold appellants harmless from any liability caused by the act, omission, or negligence of respondent. The cross complaint asked for declaratory judgment establishing the rights and liabilities of the parties under the contract. The trial court granted a motion by respondent to strike the cross complaint and sustained a demurrer to it without leave to amend. Appellants appealed.

The court of appeal reversed. The court held that when one defendant's cross complaint is aimed at another defendant, an order striking it is treated as a final judgment from which the cross complainant may appeal (*135 Cal. App. 2d 383, 385)* .

In ***Keenan v. Dean*** *(1955) 134 Cal. App. 2d 189, 285 P.2d 300* , an unlawful detainer action, the premises were surrendered prior to commencement. Defendant cross complained to recover damages for alleged libel. Because the cross complaint sought damages in excess of the municipal court's jurisdictional limits, the matter was transferred to the superior court. On plaintiff's motion, the superior court ordered the cross complaint stricken. Defendant appealed.

The court of appeal found that the cross complaint was in fact a counterclaim and affirmed the order striking it on the ground that it did not and could not be amended to state a cause of action. However, the court held that the order was appealable on the ground that the superior court would have to return the case for trial to the municipal court under *Code Civ. Proc. § 396*. Thus the order would not otherwise be subject to review (*134 Cal. App. 2d 189, 192)* .

It should be noted that the same appellate court in *Wexler v. Goldstein (1956) 146 Cal. App. 2d 410, 414, 304 P.2d 41* , disapproved of the dictum in *Keenan* that the provision for retransfer to the municipal court in former Code Civ. Proc. § 396 are mandatory. The court in *Wexler* stated that under former Code Civ. Proc. § 396 a court is given the discretion to either transfer back to the municipal courts or retain jurisdiction when what otherwise would be a lack of jurisdiction is determined at the trial or hearing (*146 Cal. App. 2d 410, 414)* .

[4] Additional Authorities

[a] Order Final and Appealable

Linnick v. Sedelmeier (1968) 262 Cal. App. 2d 12, 68 Cal. Rptr. 334 , was an action in municipal court to recover an amount allegedly due on two promissory notes in which defendant cross complained to rescind an agreement for the purchase of stock beyond the jurisdictional limit of the municipal court. The action was transferred to the superior court. The parties then stipulated to dismissing the cross complaint and adding special defenses to the answer. On appeal from the ensuing judgment, the court of held that the superior court lacked jurisdiction as a result of the stipulation, and thus reversed the judgment and order the matter retransferred to the municipal court for retrial (*262 Cal. App. 2d 12, 15-16)* .

California Points & Authorities

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Chapters 62through 63 RESERVED

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California Points & Authorities

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Volume 6 Chapters 60-69 COSTS---to---DECLARATORY RELIEF
CHAPTER 64 DAMAGES: TORT

6-64 California Points & Authorities 64.syn

§ 64.syn Synopsis to Chapter 64: DAMAGES: TORT

§ 64.01 Scope of Chapter

§ 64.02 Governing Statutes

§ 64.03 Related Pleading and Practice Chapters

§ 64.04 Related Points and Authorities

§ 64.05 Related California Torts Chapters

§§ 64.06-64.19 [Reserved]

§ 64.20 Supporting Demurrer to Complaint for Negligence [Civ. Code § 1714]--Failure to Allege Resulting Damage

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Resulting Damage as Necessary to Cause of Action in Negligence

[b] Demurrer Properly Sustained Where No Compensable Injuries Result From Negligence

§ 64.21 Supporting Demurrer to Complaint for Exemplary Damages [Civ. Code § 3294] in Tort Actions--Basis of Damages Pleaded in Conclusionary Terms

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Definitions of Punitive and Exemplary

[d] Malice as Conscious Disregard of Rights or Safety of Others

[3] Discussion of Authorities

[a] Ultimate Facts as Required to Be Alleged

[b] Conclusory Allegations of Fraud Not Saved by Liberal Construction

[c] Pleading Fraud Without Adequate Specificity

[d] Pleading Malice in Conclusionary Terms

[e] Malice Not Alleged Without Allegation of Intent or Conscious Disregard of Safety

[f] Allegations Not Charging Malice in Nondeliberate Injury Cases

[4] Additional Authorities

[a] Ultimate Facts as Required to Be Alleged

§ 64.22 Supporting Demurrer to Complaint for Exemplary Damages [Civ. Code § 3294] in Tort Actions--Conscious Disregard of Safety as Required to Be Alleged Where Injury to Person Not Deliberately Inflicted

[1] FORM

[2] Comments

[a] Use of Form

[b] Malice as Willful and Conscious Disregard of Rights or Safety of Others

[3] Discussion of Authorities

[a] Conscious Disregard of Safety as Required Where Injury Not Deliberate

§ 64.23 Supporting Demurrer to Complaint for Exemplary Damages [Civ. Code § 3294] in Tort Actions--Battery Committed Under Good Faith Mistake of Fact

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Good Faith Mistake of Fact

§ 64.24 Supporting Demurrer to Complaint for Exemplary Damages [Civ. Code § 3294] in Tort Actions--Employer Not Liable for Exemplary Damages Under Circumstances of Case

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Exemplary Damages Not Awardable Against Employer for Employee's Act Unless Certain Circumstances Present

[b] Persons Who May Cause Corporation to Be Liable for Punitive Damages

[c] Clear and Convincing Evidence Required

[4] Additional Authorities

[a] Persons Who May Cause Corporation to Be Liable for Punitive Damages

§ 64.25 Supporting Demurrer to Complaint for Damages in Tort Action--Damages for Loss of Consortium Unavailable

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Loss of Consortium Not Actionable by Unmarried Cohabitant

[b] Loss of Consortium Not Actionable by Children

[c] Loss of Consortium Not Actionable by Parents

[4] Additional Authorities

[a] Loss of Consortium Not Actionable by Children

§ 64.26 Supporting Demurrer to Complaint for Damages in Tort Action--Damages for Economic Losses Unavailable

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Economic Damages Not Available in Negligence Action Absent Special Relationship Between Parties

[b] Failure to Prove That Transaction Was Intended to Affect Plaintiff Precludes Finding of Special Relationship

[c] Failure to Prove Forseeability of Harm to Plaintiff Precludes Finding of Special Relationship

§ 64.27 Supporting Contention That Plaintiff Unable to Prove Damages--Evidence of Lost Profits Too Speculative

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Evidence of Lost Profits Too Uncertain to Support Recovery

[4] Additional Authorities

[a] Evidence of Lost Profits Too Uncertain to Support Recovery

§ 64.28 Supporting Contention That Shareholder May Not Recover Lost Future Corporate Profits

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Shareholder Cannot Recover for Lost Future Profits of Corporation

§§ 64.29-64.39 [Reserved]

§ 64.40 Opposing Demurrer to Complaint for Exemplary Damages [Civ. Code § 3294] in Tort Action--General Allegation of Malicious Intent as Sufficient in Intentional Tort Cases

[1] FORM

[2] Comments

[a] Use of Form

[b] Statutory Definition of Malice

[3] Discussion of Authorities

[a] General Allegation of Intent as Sufficient

[b] Pleading Malice Where Intentional Wrong Alleged

§ 64.41 Opposing Demurrer to Complaint for Exemplary Damages [Civ. Code § 3294] in Tort Action--Conscious Disregard of Safety as Malice

[1] FORM

[2] Comments

[a] Use of Form

[b] Statutory Definition of Malice

[3] Discussion of Authorities

[a] Willful and Conscious Disregard of Safety as Malice

[b] Driving While Intoxicated as Malicious Act When Driver Disregards Dangerous Consequences

[c] Wanton and Reckless Misconduct as Conscious Disregard of Safety

[d] Disregard of Public Safety by Manufacturer of Defectively Designed Product as Malice

[4] Additional Authorities

[a] Willful and Conscious Disregard of Safety as Malice

[b] Driving While Intoxicated as Malicious Act When Driver Disregards Dangerous Consequences

§ 64.42 Opposing Demurrer to Complaint for Exemplary Damages [Civ. Code § 3294] in Tort Action--Allegation Sufficient to Support Exemplary Damages Claim Against Corporation

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Allegation That Person Acted With Corporation's Permission and Consent as Sufficient for Exemplary Damage Purposes

§ 64.43 Opposing Demurrer to Complaint for Exemplary Damages [Civ. Code § 3294] in Tort Action--Exemplary Damages Award Can Be Based on Conduct in Employment Capacity by Employee Having Discretion to Make Important Decisions as Acting in Managerial Capacity

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Conduct in Employment Capacity Supports Award

[b] Employee With Decision-Making Discretion as Acting in Managerial Capacity

[c] Policymaking Authority Defines Managing Agent

§ 64.44 Opposing Demurrer to Complaint for Damages in Tort Action--Damages for Loss of Consortium Available

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Loss of Consortium Is Actionable

[b] Damages for Loss Sustained After Anticipated Death of Spouse Recoverable

§§ 64.45-64.59 [Reserved]

§ 64.60 Supporting Motion to Strike [Code Civ. Proc. §§ 435-437] Exemplary Damage [Civ. Code § 3294(a)] Allegation Exemplary Damages Not Available Under Market Share Theory of Liability

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Exemplary Damages Not Available When Liability Based Solely on Participation in Market

§ 64.61 Supporting Motion to Strike [Code Civ. Proc. §§ 435-437] Exemplary Damages [Civ. Code § 3294(a)] Allegation--Exemplary Damages Not Recoverable by Public Entity

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Exemplary Damages Not Recoverable by Public Entity

§§ 64.62-64.79 [Reserved]

§ 64.80 Opposing Motion to Strike [Code Civ. Proc. §§ 435-437] Exemplary Damages [Civ. Code § 3294(a)] Allegation--Exemplary Damages Recoverable by Public Entity Plaintiff

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Civil Code Section 3294 Does Not Limit Recovery of Exemplary Damages to Private Plaintiffs

[b] Purpose of Exemplary Damages Is Advanced Although Plaintiff Is Public Entity

[c] Legislative Scheme That Allows Municipality to Recover Exemplary Damages While Denying Recovery of Exemplary Damages Against Municipality Is Not Denial of Equal Protection

[d] California Supreme Court Would Not Follow City of Los Angeles

[4] Additional Authorities

[a] Civil Code Section 3294 Does Not Limit Recovery of Exemplary Damages to Private Plaintiffs

[b] Purpose of Exemplary Damages Is Advanced Although Plaintiff Is Public Entity

[c] Legislative Scheme That Allows Municipality to Recover Exemplary Damages While Denying Recovery of Exemplary Damages Against Municipality Is Not Denial of Equal Protection

§§ 64.81-64.99 [Reserved]

§ 64.100 Supporting Defendant's Motion for Nonsuit [Code Civ. Proc. § 581c(b)]--Plaintiff Has Not Established Oppression, Fraud, or Malice by Clear and Convincing Evidence

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Nonsuit on Punitive Damages Claim

§§ 64.101-64.119 [Reserved]

§ 64.120 Opposing Defendant's Motion for Nonsuit [Code Civ. Proc. § 581c(b)]--Plaintiff Has Produced Evidence That Reasonable Jury Could Find Sufficient for Punitive Damages Award

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Showing Insufficient for Nonsuit on Punitive Damages Claim

§§ 64.121-64.139 [Reserved]

§ 64.140 Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 659]--Excessive Damages [Code Civ. Proc. § 657(5)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Trial Court's Power to Determine Excessiveness of Damages

[b] When Damages Excessive

[c] New Trial Limited to Damages and Conditioned on Failure to Consent to Remittitur

[4] Additional Authorities

[a] When Damages Excessive

§ 64.141 Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 659]--Excessive Damages [Code Civ. Proc. § 657(5)]--No Reasonable Relationship Between Punitive Damages and Compensatory Damages or Defendant's Net Assets

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Punitive Damages Exceeding and Bearing No Reasonable Relationship to Compensatory Damages as Excessive

[b] Punitive Damages Not Reasonably Related to Defendant's Wealth as Excessive

[c] Punitive Damages Disproportionate to Defendant's Culpability as Excessive

[d] Prejudgment Interest Not Included When Comparing Compensatory Damages to Punitive Damages

[4] Additional Authorities

[a] Punitive Damages Exceeding and Bearing No Reasonable Relationship to Compensatory Damages as Excessive

[b] Punitive Damages Not Reasonably Related to Defendant's Wealth as Excessive

§ 64.142 Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 659]--Excessive Damages [Code Civ. Proc. § 657(5)]--Punitive Damages Award Improper Because Plaintiff Did Not Meet Burden of Establishing Defendant's Wealth

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Plaintiff Has Burden of Establishing Defendant's Financial Condition

[b] Failure to Establish Financial Condition Not Subject to Waiver

[c] Financial Condition Evidence Must Relate Specifically to Defendant

[d] Evidence Must Show Defendant's Current Worth

[e] Evidence Must Show Defendant's Financial Liabilities

§ 64.143 Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 659]--Excessive Damages [Code Civ. Proc. § 657(5)]--Excessive Compensatory Damages Award Due to Erroneous Submission of Exemplary Damages Issue to Jury

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Excessive Compensatory Damages Based on Erroneously Presented Exemplary Damages Issue

§ 64.144 Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 659]--Excessive Damages [Code Civ. Proc. § 657(5)]--Exemplary Damages Award Improper If Not Accompanied by Award of Compensatory Damages

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Jury Determination of Fraud Does Not Override Requirement That Exemplary Damage Award Be Accompanied by Compensatory Damages Award

[4] Additional Authorities

[a] Jury Determination of Fraud Does Not Override Requirement That Exemplary Damage Award Be Accompanied by Compensatory Damages Award

§ 64.144A Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 659]--Excessive Damages--Exemplary Damages Awarded for Harm to Nonparties

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Punitive Damages for Harm to Nonparties Unconstitutional

[b] Evidence of Dissimilar Misconduct Committed Against Nonparties Inadmissible

[4] Additional Authorities

[a] Punitive Damages for Harm to Nonparties Unconstitutional

§ 64.145 Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 659]--Plaintiff's Presentation of Certain Damages as Surprise [Code Civ. Proc. § 657(3)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] New Trial on Issue of Damages Where Defendant Surprised by Damages Presented at Trial

§ 64.146 Supporting Plaintiff's Motion for New Trial [Code Civ. Proc. § 659]--Inadequate Damages [Code Civ. Proc. § 657(5)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] New Trial as Proper if Plaintiff Clearly Entitled to Larger Recovery

[b] Discretion to Grant New Trial Limited to Damages

[4] Additional Authorities

[a] New Trial Is Proper if Plaintiff Clearly Entitled to Larger Recovery

[b] Discretion to Grant New Trial Limited to Damages

§ 64.147 Supporting Plaintiff's Motion for New Trial [Code Civ. Proc. § 659]--Inadequate Damages [Code Civ. Proc. § 657(5)]--Verdict Limited to Special Damages and No Allowance for General Damages

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Verdict Limited to Special Damages and No Allowance for General Damages

[b] Such Verdict as Inadequate as Matter of Law in Personal Injury Action

[4] Additional Authorities

[a] Verdict Limited to Special Damages and No Allowance for General Damages

§ 64.148 Supporting Plaintiff's Motion for New Trial [Code Civ. Proc. § 659]--Inadequate Damages [Code Civ. Proc. § 657(5)]--Pecuniary Loss in Excess of Verdict and Insufficient Allowance for General Damages

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Pecuniary Loss in Excess of Verdict and Insufficient Allowance for Pain and Suffering

[b] Such Award Inadequate as Matter of Law in Personal Injury Action

§ 64.149 Supporting Motion for New Trial [Code Civ. Proc. § 657] in Tort Action Seeking Exemplary Damages--By Defendant--Insufficiency of Evidence to Support Exemplary Damage Claim

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[3] Discussion of Authorities

[a] Motion for New Trial

[b] Exemplary Damage Award as Erroneous When Evidence Does Not Show Required Grounds

[c] Oppression Defined

[d] Fraud Defined

[e] Establishing Conscious Disregard of Others' Safety

[f] Breach of Duty of Good Faith and Fair Dealing as Not Sufficient for Exemplary Damage Award

[g] No Malice Where Insurer Interpreted Contract in Good Faith

[4] Additional Authorities

[a] Exemplary Damage Award as Erroneous Where Evidence Does Not Show Required Grounds

[b] Establishing Conscious Disregard of Other's Safety

[c] Breach of Duty of Good Faith and Fair Dealing as Not Sufficient for Exemplary Damage Award

§ 64.150 Supporting Defendants' Motion for New Trial on Damages [Code Civ. Proc. § 659]--Personal Injury Action--Admission of Expert Testimony on Hedonic Damages Was Prejudicial

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Double Damages Prohibited

[b] Computation Method Not Matter For Expert Testimony

[c] Prejudicial Effect of Testimony

§§ 64.151-64.169 [Reserved]

§ 64.170 Opposing Motion for New Trial Made on Ground of Excessive or Inadequate Damages [Code Civ. Proc. § 659]--Conflicting Evidence Resolved by Jury in Awarding Damages

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Motion for New Trial Properly Denied if Jury Resolved Conflicting Evidence

[4] Additional Authorities

[a] Motion for New Trial Properly Denied if Jury Resolved Conflicting Evidence

§ 64.171 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 659] Made on Ground of Excessive Damages [Code Civ. Proc. § 657(5)]--Failure to Show Plaintiff's Duty and Ability to Mitigate Damages

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] No Reduction of Damages Where Party Fails to Show Matters With Respect to Mitigation

§ 64.172 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 659] Made on Ground of Excessive Damages [Code Civ. Proc. § 657(5)]--Financial Inability to Mitigate

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Person Financially Unable to Mitigate Not Required to Mitigate Damages

[4] Additional Authorities

[a] Person Financially Unable to Mitigate Not Required to Mitigate Damages

§ 64.173 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 659] Made on Ground of Excessive Damages [Code Civ. Proc. § 657(5)]--Awards in Similar Cases Not Determinative

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Awards for Similar Injuries Not Determinative

[4] Additional Authorities

[a] Awards for Similar Injuries Not Determinative

§ 64.174 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 659] Made on Ground of Excessive Damages [Code Civ. Proc. § 657(5)]--Disparate Ratio of Punitive and Compensatory Damages Not Conclusive

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Disparate Ratio as Not Establishing Excessiveness of Award of Punitive Damages

[4] Additional Authorities

[a] Disparate Ratio as Not Establishing Excessiveness of Award of Punitive Damages

§ 64.175 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 659] Made on Ground of Excessive Damages [Code Civ. Proc. § 657(5)]--Record Contains Sufficient Evidence of Defendant's Financial Condition to Support Exemplary Damages Award

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Exemplary Damages Award Must Be Supported by Sufficient Evidence of Defendant's Financial Condition

[b] Evidence of Defendant's Financial Condition Sufficient to Support Award of Exemplary Damages May Be Based on Either Defendant's Net Worth, or Profits Gained by Defendant's Misconduct

[c] Federal Rule, Which Imposes Burden of Proof on Defendant, Applies to Recovery Under Federal Law

[d] Mitigating Evidence of Punitive Damages Awards Imposed in Other Cases Must Have Been Presented to Jury

[e] Future Earning Capacity May Be Considered in Determining Present Net Worth

[f] Negative Net Worth Does Not Necessarily Preclude Award of Punitive Damages

[g] Defendant's Worth Not Limited to Worth Derived From Activities in California

[4] Additional Authorities

[a] Exemplary Damages Award Must Be Supported by Sufficient Evidence of Defendant's Financial Condition

[b] Evidence of Defendant's Financial Condition Sufficient to Support Award of Exemplary Damages May Be Based on Either Defendant's Net Worth, or Profits Gained by Defendant's Misconduct

§ 64.176 Supporting Contention That Punitive Damages May Be Awarded Despite Lack of Evidence of Defendant's Financial Condition--Defendant Disobeyed Lawful Court Order to Produce Financial Records

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Punitive Damages May Be Awarded if Defendant Disobeys Court Order to Provide Financial Records

§ 64.177 Opposing Plaintiff's Motion for New Trial [Code Civ. Proc. § 659] Made on Sole Ground of Inadequate Damages--New Trial Limited to Issue of Damages Improper Because Compromise on Issue of Liability Resulted in Inadequate Damages [Code Civ. Proc. § 657(5)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] New Trial Limited to Damages Improper Where Close Liability Question and Grossly Inadequate Damages

[b] Compromise on Issues of Liability and Damages in Personal Injury Action as Precluding Limited New Trial on Damages

[4] Additional Authorities

[a] New Trial Limited to Damages Improper Where Close Liability Question and Grossly Inadequate Damages

§§ 64.178-64.189 [Reserved]

§ 64.190 Supporting Contention That Collateral Source Rule Precludes Reduction in Damages Awarded to Plaintiff by Amount Received From Source Wholly Independent of Defendant as Compensation for Plaintiff's Injuries

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Payments From Collateral Source May Not Reduce Defendant's Liability

[b] Employee Benefits Are Collateral Source

[c] Collateral Source Rule Applies to Governmental Entities

[d] Payment by Codefendant for Separate Tort Is Within Collateral Source Rule

[e] Collateral Source Rule Applies to Gratuitous Salary Continuation

[f] Collateral Source Rule Applies to Social Security and Similar Pension Benefits

[4] Additional Authorities

[a] Payments From Collateral Source May Not Reduce Defendant's Liability

[b] Collateral Source Rule Applies to Gratuitous Salary Continuation

§ 64.191 Supporting Contention That Plaintiff Is Entitled to Recover as Item of Special Damages Reasonable Value of Nursing Services Rendered by Member of Plaintiff's Family

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Right to Recover for Nursing Services Rendered

[b] Amount Recoverable

[c] Lack of Professional Skill

[d] Services by Person Legally Obligated to Provide

§ 64.192 Supporting Contention That Plaintiff May Introduce Evidence That Plaintiff Personally Paid for Medical Expenses Incurred as Result of Injury

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Evidence of Plaintiff's Payment of Medical Expenses Admissible

§§ 64.193-64.209 [Reserved]

§ 64.210 Opposing Contention That Collateral Source Rule Precludes Evidence of Collateral Source Payment--Collateral Source Rule Not Applicable in Action Against Health Care Provider for Personal Injury Based on Professional Negligence

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Payments From Collateral Source May Be Introduced in Action for Professional Negligence Against Health Care Provider

§ 64.211 Opposing Contention That Collateral Source Rule Precludes Evidence of Collateral Source Payment--Evidence of Collateral Source Payments May Be Admitted in Discretion of Court to Show Plaintiff's Motive for Malingering

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Payments From Collateral Source May Be Introduced to Prove Plaintiff's Motive for Malingering

§ 64.212 Opposing Contention That Collateral Source Rule Precludes Evidence of Collateral Source Payment--Evidence of Receipt of Disability Pension May Be Admitted If Plaintiff Seeks Recovery for Loss of Regular Pension

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Evidence of Disability Pension May Be Admitted If Plaintiff Seeks Recovery for Lost Regular Pension

§ 64.213 Opposing Contention That Punitive Damages Precluded as Matter of Law--Asbestos Litigation

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Market Share Rule Inapplicable to Asbestos Litigation

[b] Fraud-On-The-Market Doctrine Inapplicable to Asbestos Litigation

§ 64.214 Opposing Contention That Defendant Is Entitled to New Trial on Liability and Compensatory Damages

Following Reversal of Punitive Damages Award [Civ. Code § 3295(d)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] No New Trial on Liability and Compensatory Damages Required

§ 64.215 Opposing Contention That Defendant Is Entitled to New Trial on Liability and Compensatory Damages Following Deadlock of Original Jury on Liability for Punitive Damages [Civ. Code § 3295(d)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Trial Court Authorized to Order Retrial of Only Punitive Damages

[4] Additional Authorities

[a] Trial Court Authorized to Order Retrial of Only Punitive Damages

§ 64.216 Opposing Contention That Award of Punitive Damages Must be Reduced When Compensatory Damage Award is Reduced

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Reduction of Punitive Damages Not Mandated When Compensatory Damages Reduced

§ 64.217 Opposing Contention That Plaintiff May Recover as Compensatory Damage Amount Plaintiff Has Not Yet Paid to Third Party to Settle Related Claim

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Defendant Not Liable for Unpaid Obligation to Third Party

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6-64 California Points & Authorities § 64.01

§ 64.01 Scope of Chapter

This chapter contains memoranda of points and authorities which may be submitted in actions and proceedings involving tort damages. It includes memoranda of points and authorities for use in supporting [*see §§ 64.20 -64.25*] and opposing [*see §§ 64.40 -64.44*] demurrers to a complaint for tort damages, supporting [*see §§ 64.60, 64.61*] and opposing [*see § 64.80*] a motion to strike exemplary damage allegations, and supporting [*see §§ 64.140 -64.149*] and opposing [*see §§ 64.170 -64.177*] motions for a new trial on the issue of damages in tort actions. It also includes forms of contentions supporting [*see § 64.190*] and opposing [*see §§ 64.210, 64.213*] the exclusion of evidence of collateral source payments made to the plaintiff, and supporting the recovery of the reasonable value of nursing services performed by members of plaintiff's family [*see § 64.191*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsTortsDamagesCollateral Source RuleGeneral OverviewTortsDamagesCollateral Source RuleGratuitous BenefitsTortsDamagesPunitive DamagesGeneral Overview

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6-64 California Points & Authorities § 64.02

§ 64.02 Governing Statutes

The measure of damages for torts is governed by *Civ. Code §§ 3333-3344*.

Legal Topics:

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

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6-64 California Points & Authorities § 64.03

§ 64.03 Related Pleading and Practice Chapters

For discussion and forms relating to damages issues in tort actions, see California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender).

Legal Topics:

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

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6-64 California Points & Authorities § 64.04

§ 64.04 Related Points and Authorities

Memoranda of points and authorities relating to damages issues in contract actions, see Ch. 65, *Damages: Contracts* .

For memoranda of points and authorities relating to recovery of attorney's fees as damages in insurance bad-faith actions, see Ch. 120, *Insurance* .

Related memoranda of points and authorities that may be useful in particular cases involving damages issues may be found in the following chapters:

- Ch. 60, *Costs*.
- Ch. 71, *Demurrers and Motions for Judgment on the Pleadings*.
- Ch. 115, *Indemnity and Contribution*.
- Ch. 155, *Motions After Trial*.
- Ch. 221, *Summary Judgments*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsJudgment on the PleadingsCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewContracts LawRemediesCompensatory DamagesGeneral OverviewContracts LawRemediesPunitive DamagesInsurance LawBad Faith & Extracontractual LiabilityRemediesGeneral OverviewInsurance LawClaims & ContractsCosts & Attorney FeesGeneral Overview

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6-64 California Points & Authorities § 64.05

§ 64.05 Related California Torts Chapters

For discussion relating to the general damages issues likely to be encountered in tort actions, see Levy, Golden & Sacks, California Torts, Chs. 50- 59 (Matthew Bender).

Legal Topics:

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

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6-64 California Points & Authorities §§ 64.06-64.19

[Reserved]

§§ 64.06[Reserved]

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CHAPTER 64 DAMAGES: TORT
PART II. FORMS
A. Supporting Demurrer to Complaint

6-64 California Points & Authorities § 64.20

§ 64.20 Supporting Demurrer to Complaint for Negligence [Civ. Code § 1714]--Failure to Allege Resulting Damage

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*]	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN SUPPORT OF DEMURRER TO COM-
vs.	)	PLAINT
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT FAILS TO ALLEGE DETRIMENT OR DAMAGE RESULTING FROM DEFENDANT'S ALLEGED NEGLIGENCE.

A. Objection by Demurrer. The party against whom a complaint has been filed may object to the complaint by demurrer on the ground that it does not state facts sufficient to constitute a cause of action where such ground appears on the face of the complaint [or from any matter of which the court is required to or may take judicial notice] (*Code Civ. Proc. §§ 430.10(e), 430.30(a)*).

B. Resulting Damage as Necessary to Cause of Action in Negligence. A negligent act which does not result in detriment or damage does not constitute a cause of action for damages, and in the absence of a compensable injury, a plaintiff must be denied damages in a negligence action (*Fields v. Napa Milling Co. (1958) 164 Cal. App. 2d 442, 447-448, 330 P.2d 459*).

C. Demurrer Properly Sustained Where No Compensable Injuries Result From Negligence. A defendant's demurrer on the ground that a complaint alleging negligence fails to state a cause of action is properly sustained when no compensable injuries are alleged to have resulted from the negligent act (*Anthony v. Kelsey-Hayes Co. (1972) 25 Cal. App. 3d 442, 447, 102 Cal. Rptr. 113*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a general demurrer to a complaint alleging negligence when the demurrer asserts that the complaint fails to state facts sufficient to constitute a cause of action in negligence in that it appears on the face of the complaint, or from any matter of which the court is required or may take judicial notice, that the plaintiff failed to suffer any detriment or damage as a result of the alleged negligence.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms relating to pleading a cause of action in negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender). For general allegations for use in pleading resulting detriment or damage, see California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For forms of memoranda of points and authorities supporting and opposing demurrers to negligence complaints, see Ch. 165, *Negligence* .

[3] Discussion of Authorities

[a] Resulting Damage as Necessary to Cause of Action in Negligence

In ***Fields v. Napa Milling Co.*** *(1958) 164 Cal. App. 2d 442, 330 P.2d 459* , a mother and her two daughters brought a negligence action against defendants, the owner of a truck and the employee who was driving, for personal injuries sustained in a collision between the mother's automobile and the truck. At the conclusion of a trial without jury, the trial court rendered judgment for one of the daughters and denied recovery to the second daughter and the mother. Plaintiffs appealed from the part of the judgment denying the second daughter recovery, contending that the second daughter was entitled to recover nominal damages. The court of appeal affirmed that part of the judgment appealed from, holding that

no cause of action arises in negligence unless the negligence results in an injury. Thus, proof of resulting damage is essential to a plaintiff's cause of action in negligence. Accordingly, a plaintiff cannot recover damages in a negligence action where there is no actual loss. The court of appeal found that plaintiffs' counsel had stated several times during the course of the trial that the second daughter was not injured in the accident. In addition, the girl's mother had testified to the same fact. Therefore, the trial court did not err in finding that the second daughter suffered no compensable injury or in denying her damages (*164 Cal. App. 2d 442, 447-448)* .

[b] Demurrer Properly Sustained Where No Compensable Injuries Result From Negligence

In ***Anthony v. Kelsey-Hayes Co.*** *(1972) 25 Cal. App. 3d 442, 102 Cal. Rptr. 113* , plaintiffs brought an action in negligence, strict liability, and breach of implied warranty for damages allegedly suffered from defective wheels manufactured by one defendant and used as a component in trucks manufactured by the other defendant. In their complaint, plaintiffs failed to allege that any damages arising from either personal injuries or property damage to their vehicles was attributable to the wheels they claimed to be defective. However, in their amended and supplemental complaint, plaintiffs did seek compensatory damages for the general depreciation in the value of their vehicles once the safety risk became known and for indefinite possible loss flowing from the loss of commercial use of their vehicles. Defendants' general demurrers to the complaint and to the amended and supplemental complaint were sustained. The action was dismissed following the sustaining of the demurrer to plaintiff's amended and supplemental complaint without leave to amend. Plaintiffs appealed from the order of dismissal, and the court of appeal affirmed holding that the only damages recoverable in a negligence action against a defendant not in privity with a plaintiff are damages for personal injuries and property damage. Because the depreciation claimed by plaintiffs was not alleged to be due to any physical property damage, plaintiffs could not recover for it in their negligence action against the two manufacturers. The plaintiffs had thus failed to allege any compensable damages resulting from defendants' negligence, and the trial court had properly sustained defendants' demurrer on the ground that the complaint did not state a cause of action in negligence (*25 Cal. App. 3d 442, 447)* .

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A. Supporting Demurrer to Complaint

6-64 California Points & Authorities § 64.21

§ 64.21 Supporting Demurrer to Complaint for Exemplary Damages [Civ. Code § 3294] in Tort Actions--Basis of Damages Pleaded in Conclusionary Terms

[1] FORM

[*Caption. See § 64.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION FOR EXEMPLARY DAMAGES SINCE IT ALLEGES _____ [OPPRESSION, *or* FRAUD, *or* MALICE *or combination of these*] IN CONCLUSIONARY TERMS AND DOES NOT ALLEGE ULTIMATE FACTS.

A. Objection by Demurrer. [*See § 64.20, Paragraph A.*]

B. Ultimate Facts as Required to Be Alleged. To support exemplary damages, the complaint must allege ultimate facts of the defendant's oppression, fraud, or malice (*Cyrus v. Haveson (1976) 65 Cal. App. 3d 306, 316-317, 135 Cal. Rptr. 246* ; *Civ. Code § 3294*).

[*Optional*] **C. Conclusory Allegations of Fraud Not Saved by Liberal Construction.** Vague, conclusory allegations of fraud or falsity may not be rescued by the rule of liberal construction (*G.D. Searle & Co. v. Superior Court (1975) 49 Cal. App. 3d 22, 29, 122 Cal. Rptr. 218*).

[*Optional*] **D. Pleading Fraud Without Adequate Specificity.** An allegation that defendant acted fraudulently is without adequate specificity to support an award of exemplary damages (*Lehto v. Underground Constr. Co. (1977) 69 Cal. App. 3d 933, 944, 138 Cal. Rptr. 419*).

[*Optional*] **E. Pleading Malice in Conclusionary Terms.** An allegation that defendant acted maliciously and in wanton disregard of plaintiff's rights pleads malice in conclusionary terms (*Cyrus v. Haveson (1976) 65 Cal. App. 3d 306, 317, 135 Cal. Rptr. 246*).

[*Optional*] **F. Malice Not Alleged Without Allegation of Intent or Conscious Disregard of Safety.** A complaint fails

to plead malice as a ground for an award of exemplary damages where it fails to allege, directly or in equivalent terms, that defendant either intended to injure plaintiff or acted despicably in willful and conscious disregard of plaintiff's safety or rights (*G.D. Searle & Co. v. Superior Court (1975) 49 Cal. App. 3d 22, 32-33, 122 Cal. Rptr. 218*); *see also Civ. Code § 3294(c)(1)*).

[*Optional*] **G. Allegations Not Charging Malice in Nondeliberate Injury Cases.** When nondeliberate injury is charged, allegations that the defendant's conduct was wrongful, willful, wanton, reckless, or unlawful do not support a claim for exemplary damages and do not support a claim for exemplary damages and do not charge malice (*G.D. Searle & Co. v. Superior Court (1975) 49 Cal. App. 3d 22, 29, 122 Cal. Rptr. 218*); *see also Civ. Code § 3294(c)(1)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be used in an action for tort damages where plaintiff seeks exemplary or punitive damages but alleges the ground of fraud, malice, or oppression in conclusionary terms. Optional Paragraph D may be used when plaintiff attempts to plead fraud as a basis for exemplary damages. Optional Paragraphs E-G may be used in various situations when plaintiff attempts to plead malice as the ground for the exemplary damage claim.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, these points and authorities may be used to support a motion for judgment on the pleadings [*Cohen v. Groman Mortuary, Inc. (1964) 231 Cal. App. 2d 1, 3, 8, 41 Cal. Rptr. 481 , disapproved on other grounds, Christensen v. Superior Court (1991) 54 Cal. 3d 868, 889]* .

[c] Definitions of Punitive and Exemplary

The word "punitive" is used to describe damages awarded for the purpose of punishing the wrongdoer. The word "exemplary" is used to describe damages awarded for the purpose of setting an example for other potential wrongdoers. However, these words are used interchangeably by the courts since the prerequisites for recovery of punitive or exemplary damages are the same. In this chapter, the term "exemplary damages" is used in the forms for the purpose of consistency.

[d] Malice as Conscious Disregard of Rights or Safety of Others

Civ. Code § 3294(c), defines malice, oppression, and fraud. In particular, "malice" is defined as despicable conduct which is intended by the defendant to cause injury to the plaintiff, or which is carried on by the defendant with willful and conscious disregard of the safety or rights of others [*Civ. Code § 3294(c)(1)*]. This definition is for use in *Civ. Code § 3294(a)*, which provides for punitive damages in any action other than one for breach of contract, where it is proven by clear and convincing evidence that the defendant has been guilty of malice, oppression, or fraud [*Civ. Code § 3294(c)*].

G.D. Searle & Co. v. Superior Court (1975) 49 Cal. App. 3d 22, 122 Cal. Rptr. 218 , which was cited as authority for the points in Paragraphs F and G, contains the suggestion that "conscious disregard of safety" may be an appropriate definition of malice, which might justify a punitive damages award when nondeliberate injury is alleged [*G.D. Searle & Co. v. Superior Court (1975) 49 Cal. App. 3d 22, 32, 122 Cal. Rptr. 218]* . Therefore, although *Searle* predated the enactment of the statutory definition of malice contained in *Civ. Code § 3294(c)*, its discussion of what must be alleged to state a cause of action for punitive damages (conscious disregard of safety) has been codified in *Civ. Code § 3294(c)*, and thus *Searle* remains viable authority.

However, under the 1987 amendment to *Civ. Code § 3294*, the plaintiff must show that the defendant's conduct was in willful, as well as conscious, disregard of the rights or safety of others [*Civ. Code § 3294(c)(1)*].

[3] Discussion of Authorities

[a] Ultimate Facts as Required to Be Alleged

Cyrus v. Haveson *(1976) 65 Cal. App. 3d 306, 135 Cal. Rptr. 246* , involved, in part, five causes of action arising from defendants' eviction of plaintiff from her apartment, and plaintiff's loss of personal property. Plaintiff sought compensatory and punitive damages. Following a default judgment, defendants appealed contending, in part, that the complaint failed to allege facts sufficient to support exemplary damages. Plaintiff's first cause of action was for breach of contract and her second cause of action alleged forcible entry and detainer and that defendants acted maliciously and were guilty of wanton disregard of the rights of plaintiff in that plaintiff had lawful possession of the premises and had not received notice to quit or consented to defendants' entering and taking possession. The third cause of action alleged conversion of personal property and that defendants acted willfully, wantonly, and maliciously. Plaintiff's fourth cause of action asserting trespass alleged that defendants' conduct in placing another tenant in her apartment was malicious and in wanton disregard of her rights. The fifth cause of action, captioned one for intentional infliction of emotional distress, alleged that defendants' acts of ejection were willful, malicious, deliberate, and without probable cause.

The court of appeal held that to support punitive damages, the complaint asserting a cause of action under which punitive damages can be obtained must allege ultimate facts of the defendants' oppression, fraud, or malice. The court noted that malice is properly pleaded by alleging the wrongful motive, intent, or purpose and a general allegation of that intent is sufficient. Since the first cause of action was for breach of contract, the court concluded that it did not support a claim for punitive damages. According to the court, the allegations in plaintiff's second cause of action pleaded malice only in conclusionary terms. There was no allegation that defendants intentionally, as opposed to negligently or mistakenly, disregarded plaintiff's right to possession or were aware that she had not received notice to quit. The court concluded that no wrongful motive or purpose was stated in the complaint. The court further held that the third and fourth causes of action alleged malice in general terms and omitted factual allegations of wrongful motive, intent, or purpose thus also failing to allege facts supporting exemplary damages. In the fifth cause of action, the court concluded that when plaintiff's allegations that defendants' acts of ejection were willful, malicious, deliberate and without probable cause were read in conjunction with those in the second, third, and fourth causes of action, there still was no general or specific allegation of wrongful motive, intent, or purpose. Consequently, the court held that the allegations of the complaint did not state a cause of action for punitive damages and it struck the punitive damages award from the judgment (*65 Cal. App. 3d 306, 316-317)* .

[b] Conclusory Allegations of Fraud Not Saved by Liberal Construction

G.D. Searle & Co. v. Superior Court *(1975) 49 Cal. App. 3d 22, 122 Cal. Rptr. 218* , was a personal injury action in which plaintiff sought general and exemplary damages for pathological effects to plaintiff caused by oral contraceptives manufactured and sold by defendant. Defendant filed a general and special demurrer aimed in part at the sufficiency of the exemplary damage allegations. The trial court overruled the demurrer and defendant sought review by writ of

mandate. In support of plaintiff's claim for exemplary damages, she alleged that at the time plaintiff used defendant's product, the product was defective since defendant failed to give directions and warning as to the use of the product to prevent it from being dangerous and unsafe for its intended purpose. Plaintiff further alleged that defendant knew that the product was defective and that defendant willfully and knowingly placed it on the market and knew that it would be sold to, prescribed for, and used by members of the general public without knowledge of the hazards to the users, that defendant knew and implicitly represented by the defective product's presence on the market that it could safely do the job for which it was developed, and that defendants wrongfully, knowingly, and willfully acted in complete disregard of plaintiff's implicit reliance on defendants' implicit representations of safety. In the trial court plaintiff argued that fraud was the gravamen of her punitive damages claim but on appeal she shifted position contending that the complaint sufficiently pleaded malice as a basis for the award.

In examining the allegations supporting the exemplary damage claim, the court of appeal stated that a preliminary inquiry was whether a pleading of malice as a basis for exemplary damages should be judged by the relatively strict standards governing an inquiry into jury instructions or evidentiary support for a jury award. According to the court, notwithstanding relaxed pleading criteria, certain tortious injuries demand firm allegations. Vague, conclusory allegations of fraud or falsity may not be rescued by the rule of liberal construction. Since plaintiff had changed positions from alleging fraud as a basis for the punitive damages to alleging malice, the court examined plaintiff's allegations to determine whether the elements of malice were adequately pleaded. The court concluded that plaintiff's allegation of wrongful, knowing, and willful conduct was conclusory and that the complaint failed to plead malice as a ground for the exemplary award. Consequently, the court issued the writ of mandate directing the trial court to vacate its order overruling defendant's demurrer and to sustain the demurrer with leave to amend (*49 Cal. App. 3d 22, 29)* .

[c] Pleading Fraud Without Adequate Specificity

Lehto v. Underground Constr. Co. *(1977) 69 Cal. App. 3d 933, 138 Cal. Rptr. 419* , was an action in which plaintiff sought to recover special and exemplary damages for fraud and the breach of a collective bargaining contract. The trial court sustained defendants' demurrer on the ground that the statute of limitations had run. Plaintiff's complaint involved three causes of action involving grievances arising out of defendant employer's dismissals of plaintiff from his job. These disputes were submitted to arbitration with results unfavorable to plaintiff. The complaint further alleged that defendants conspired with the union to deprive plaintiff of his rights under the collective bargaining agreements, and that defendants acted maliciously and fraudulently. On appeal, the court of appeal concluded that plaintiff's allegations supporting the punitive damages claim were without adequate specificity. The court held that it is essential that the facts and circumstances which constitute the fraud should be set out clearly, concisely, and with sufficient particularity to notify the opposite party of what he or she is called on to answer and to enable the court to determine whether, on the facts pleaded, there is a foundation for the charge of fraud. According to the court, an allegation that defendants acted maliciously and fraudulently is not sufficient. The court reversed the trial court's judgment since it found that a longer statute of limitations was applicable and directed the court to give plaintiff leave to amend his complaint as to the allegations giving rise to punitive damages (*69 Cal. App. 3d 933, 944)* .

[d] Pleading Malice in Conclusionary Terms

Cyrus v. Haveson *(1976) 65 Cal. App. 3d 306, 135 Cal. Rptr. 246* , is discussed in *§ 64.21[3][a]*.

[e] Malice Not Alleged Without Allegation of Intent or Conscious Disregard of Safety

The factual background of ***G.D. Searle & Co. v. Superior Court*** *(1975) 49 Cal. App. 3d 22, 122 Cal. Rptr. 218* , is discussed in *§ 64.21[3][b]*.

In reviewing the allegations of plaintiff's complaint, the court noted that the complaint did not charge defendant with knowledge of the dangerous potential of its product, but only with awareness that unspecified products of that type

might cause injury. Additionally, it did not allege that defendant knew its implicit representations of safety were false, but instead alleged that defendant knew that its products could safely do the job. Consequently, the court found that plaintiff's allegation of wrongful, knowing, and willful conduct was conclusory. The court further held that it failed to allege directly or in equivalent terms, that defendant either intended to injure consumers of its product or acted in conscious disregard of their safety. As a result it failed to plead malice as a ground for the exemplary damages award (*49 Cal. App. 3d 22, 32-33)* .

[f] Allegations Not Charging Malice in Nondeliberate Injury Cases

The factual background of ***G.D. Searle & Co. v. Superior Court*** *(1975) 49 Cal. App. 3d 22, 122 Cal. Rptr. 218* , is discussed in *§ 64.21[3][b]*. The court of appeal, in determining whether plaintiff adequately pleaded a basis for exemplary damages, noted that when a plaintiff alleges an intentional wrong, a prayer for exemplary damage may be supported by pleading that the wrong was committed willfully or with a design to injure. However, when nondeliberate injury is charged, allegations that the defendant's conduct was wrongful, willful, wanton, reckless, or unlawful do not support a claim for exemplary damages. Such allegations do not charge malice (*49 Cal. App. 3d 22, 29)* .

[4] Additional Authorities

[a] Ultimate Facts as Required to Be Alleged

In *Smith v. Superior Court (1992) 10 Cal. App. 4th 1033, 13 Cal. Rptr. 2d 133* , the plaintiff sued her lawyers for malpractice in representing her in connection with the dissolution of her marriage. She alleged that she suffered various economic injuries and emotional distress, and sought to recover punitive damages. The trial court denied the lawyers' motion to strike the allegations regarding punitive damages. On the lawyers' petition for an extraordinary writ, the court of appeal directed the trial court to vacate its order and grant the motion to strike (*10 Cal. App. 4th 1033, 1035, 1042)* .

In reaching its decision, the court of appeal noted that the plaintiff sought punitive damages for the alleged failure of the defendants to adequately represent her and her property interests. Relying on *G.D. Searle & Co. v. Superior Court (1975) 49 Cal. App. 3d 22, 122 Cal. Rptr. 218* , and *Brousseau v. Jarrett, 73 Cal. App. 3d 864, 141 Cal. Rptr. 200* , the court held that the plaintiff's conclusory allegations of fraud, oppression, and malice did not support a prayer for punitive damages because they were not supported by specific factual allegations (*10 Cal. App. 4th 1033, 1041-1042)* .

Brousseau v. Jarrett (1977) 73 Cal. App. 3d 864, 141 Cal. Rptr. 200 , was a medical malpractice action in which plaintiff sought compensatory and exemplary damages from defendant. The trial court sustained defendant's general demurrer which was brought in part on the ground that the complaint did not state facts sufficient to constitute a cause of action for the recovery of punitive damages. The court of appeal affirmed as to this ground but reversed on other grounds. According to the complaint, plaintiff, who had suffered injuries when struck by an uninsured motorist, was entitled to compensation for damages up to a certain amount under the terms of his father's insurance policy. Plaintiff alleged that he had consulted defendant, a physician and surgeon, to treat his injuries. He further alleged that defendant's medical reports to plaintiff's insurance company concerning plaintiff's prognosis stated that defendant believed plaintiff would have no residual disability from the accident although defendant knew or should have known that plaintiff's injuries were of a potentially more serious nature and although he knew such reports were used as a basis for settlement of claims against the insurance company. According to plaintiff, as a proximate result of defendant's conduct, plaintiff suffered damages in the form of attorney's fees and litigation costs reasonably incurred in order to secure a more advantageous resolution of plaintiff's claim against his insurance company. Plaintiff further alleged that defendant's conduct was intentional, willful, fraudulent, and done with a wanton, reckless disregard of the possible injurious consequences and consequently, plaintiff was entitled to exemplary damages. The court of appeal held that the count seeking punitive damages did not state a cause of action for the recovery of punitive damages because its conclusory characterization of defendant's conduct as intentional, willful, and fraudulent was a patently insufficient statement of oppression, fraud, or malice, express or implied, within the meaning of former Civ. Code § 3294 [*now see Civ. Code §*

3294(a)], which no longer contains the phrase, "express or implied").

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6-64 California Points & Authorities § 64.22

§ 64.22 Supporting Demurrer to Complaint for Exemplary Damages [Civ. Code § 3294] in Tort Actions--Conscious Disregard of Safety as Required to Be Alleged Where Injury to Person Not Deliberately Inflicted

[1] FORM

[*Caption. See § 64.20.*]

WHEN DEFENDANT DID NOT DELIBERATELY INFLICT THE INJURY ON PLAINTIFF, PLAINTIFF MUST PLEAD AND PROVE BY CLEAR AND CONVINCING EVIDENCE THAT DEFENDANT ACTED DESPICABLY WITH WILLFUL AND CONSCIOUS DISREGARD OF PLAINTIFF'S SAFETY IN ORDER TO SUPPORT AN AWARD OF EXEMPLARY DAMAGES.

A. Objection by Demurrer. [*See § 64.20, Paragraph A.*]

B. Conscious Disregard of Safety as Required Where Injury Not Deliberate. If the defendant did not deliberately inflict the injury to plaintiff, the plaintiff must plead and prove by clear and convincing evidence that the defendant acted despicably with willful and conscious disregard of the plaintiff's safety (*O'Hara v. Western Seven Trees Corp. (1977) 75 Cal. App. 3d 798, 806, 142 Cal. Rptr. 487* ; *G.D. Searle & Co. v. Superior Court (1975) 49 Cal. App. 3d 22, 32-33, 122 Cal. Rptr. 218*); *see also Civ. Code § 3294(a), (c)(1)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in an action for tort damages for personal injuries where defendant's injury to plaintiff was nondeliberate but plaintiff did not allege that defendant acted in conscious disregard of plaintiff's safety.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Malice as Willful and Conscious Disregard of Rights or Safety of Others

Civ. Code § 3294(c)(1) defines "malice" under *Civ. Code § 3294(a)*, which provides for punitive damages, as conduct which is intended by the defendant to cause injury to the plaintiff, or despicable conduct which is carried on by the defendant with willful and conscious disregard of the safety or rights of others [*see Civ. Code § 3294(c)*].

Prior to 1987 legislation amending *Civ. Code § 3294(c)(1)*, "malice," as applicable when a defendant's conduct was not intended to cause injury to the plaintiff, was defined as conduct that is carried on by the defendant with conscious disregard of the safety or rights of others. There was no requirement that the defendant's conduct be "despicable" or that the conduct be carried out with a "willful" disregard of the safety or rights of others. This prior definition of malice applies in any action in which the trial commenced prior to January 1, 1988 [*see Civ. Code § 3294(e)*].

Both *Searle* and *O'Hara*, which are authority for the point in Paragraph B, were decided prior to the enactment of *Civ. Code § 3294(c)*. Nevertheless, both cases retain their validity in that they stand for the proposition that where there is nondeliberate injury, plaintiff must plead and prove that the defendant acted with conscious disregard for the plaintiff's safety [*see Civ. Code § 3294(c)(1)*]. Under the 1987 amendment to *Civ. Code § 3294*, however, plaintiff must also allege that the defendant's conduct was in willful, as well as in conscious, disregard of safety [*Civ. Code § 3294(c)(1)*].

In actions in which the initial trial has not commenced prior to January 1, 1988, malice must be established by "clear and convincing" evidence [*see Civ. Code § 3294(a), (e)*].

[3] Discussion of Authorities

[a] Conscious Disregard of Safety as Required Where Injury Not Deliberate

O'Hara v. Western Seven Trees Corp. *(1977) 75 Cal. App. 3d 798, 142 Cal. Rptr. 487* , was an action in which plaintiff sought damages from the owners and operators of the apartment complex where plaintiff resided to compensate her for being raped in her apartment. In one of plaintiff's causes of action, she alleged that defendants knowingly misrepresented the safety and security of the apartment complex with the intent to induce plaintiff to rent an apartment and she sought punitive damages on the basis that the misrepresentations were fraudulent. The trial court sustained defendants' general demurrer. Before plaintiff rented an apartment from defendants, a man had raped several tenants of the apartment complex. Plaintiff alleged in her complaint that defendants knew of the crimes, were aware of the conditions indicating a likelihood that the rapist would repeat his attacks, and had been supplied by the local police with composite drawings of the suspect and a general description of his modus operandi. Plaintiff further alleged that defendants assured plaintiff that the premises were safe and were patrolled at all times by professional guards although they knew the statements were false. Defendants disclosed no information concerning the assaults. Plaintiff pleaded that, believing and relying on defendants' representations, she was induced to rent an apartment. Several months later she was raped in her apartment by a man she subsequently identified as being the same person depicted in the composite drawings which had been supplied to defendants and which were still in their possession. The court of appeal reversed the trial court's decision stating that the complaint stated causes of action against the defendants. In determining whether the facts alleged in the deceit cause of action could support punitive damages under *Civ. Code § 3294*, the court noted

that evil motive is the central element of the malice which justifies an exemplary damages award. The court stated that where the injury is no deliberately inflicted by the defendant, as was true in this case, the plaintiff must prove that the defendant acted with conscious disregard of the plaintiff's safety. Since defendants allegedly knew of the serious potential danger to plaintiff as a female tenant yet they intentionally misled her in order to advance their pecuniary interest in renting an apartment, conscious disregard of plaintiff's safety was sufficiently alleged.

The factual background of ***G.D. Searle & Co. v. Superior Court*** *(1975) 49 Cal. App. 3d 22, 122 Cal. Rptr. 218* , is discussed in *§ 64.21[3][b]*. The court noted that when nondeliberate injury is charged, allegations that defendant's conduct was wrongful, willful, wanton, reckless, or unlawful do not support a claim for exemplary damages and do not charge malice. However, the phrase conscious disregard has been used to describe the highly culpable state of mind which justifies an exemplary damages award. The court suggested conscious disregard of safety as an appropriate description of the animus malus which may justify an exemplary damage award when nondeliberate injury is alleged. In examining plaintiff's complaint, the court noted that it did not charge defendant with knowledge of the dangerous potential of its product, but only with awareness that unspecified products of that type might cause injury. The allegation of wrongful, knowing, and willful conduct was conclusory. The complaint failed to allege, directly or in equivalent terms, that defendant either intended to injure consumers of its product or acted in conscious disregard of their safety and consequently, the court held that the complaint failed to plead malice as a ground for exemplary damages.

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6-64 California Points & Authorities § 64.23

§ 64.23 Supporting Demurrer to Complaint for Exemplary Damages [Civ. Code § 3294] in Tort Actions--Battery Committed Under Good Faith Mistake of Fact

[1] FORM

[*Caption. See § 64.20.*]

PUNITIVE DAMAGES ARE NOT RECOVERABLE WHEN A PERSON COMMITS A TECHNICAL BATTERY UNDER A GOOD FAITH MISTAKE OF FACT.

Good Faith Mistake of Fact. A person who commits the tort of battery while acting under a good faith mistake of fact is not liable for punitive damages (*Ebaugh v. Rabkin (1972) 22 Cal. App. 3d 891, 895, 99 Cal. Rptr. 706*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a demurrer to a complaint for exemplary damages based on battery when defendant committed the alleged battery under a good faith mistake of fact.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Good Faith Mistake of Fact

In ***Ebaugh v. Rabkin*** *(1972) 22 Cal. App. 3d 891, 99 Cal. Rptr. 706* , a medical malpractice suit for unauthorized surgery performed when plaintiff's identity was confused with that of another patient, the jury awarded plaintiff compensatory and punitive damages. The court of appeal reversed the portion of the verdict awarding punitive damages

for lack of the requisite element of malice on the part of defendant. The malice required for recovery of punitive damages in a tort action, held the court, implies an act conceived with criminal indifference towards the obligations owed to others. In the instant case, defendant had committed the technical battery of unauthorized surgery due to an inadvertent mistake as to the identity of his patient, and had ceased surgery as soon as the error was discovered. There was no finding of an intent to injure plaintiff, stated the court, and negligence alone, even gross negligence, does not justify an award of punitive damages (*22 Cal. App. 3d 891, 894)* . Such damages are not recoverable when a person, acting in good faith, commits the tort of battery under a mistake of fact (*22 Cal. App. 3d 891, 895)* .

NOTE:

For the purposes of obtaining punitive damages pursuant to *Civ. Code § 3294(a)*, malice is defined as conduct intended by the defendant to cause injury to the plaintiff, or despicable conduct which is carried on by the defendant with willful and conscious disregard of the safety or rights of others [*Civ. Code § 3294(c)(1)*]. The statutory definition of malice is thus consistent with the rule in the *Ebaugh* case.

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6-64 California Points & Authorities § 64.24

§ 64.24 Supporting Demurrer to Complaint for Exemplary Damages [Civ. Code § 3294] in Tort Actions--Employer Not Liable for Exemplary Damages Under Circumstances of Case

[1] FORM

[*Caption. See § 64.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION FOR EXEMPLARY DAMAGES AGAINST DEFENDANT FOR AN ACT OF ITS EMPLOYEE, SINCE IT DOES NOT ALLEGE THAT THE EMPLOYEE WAS UNFIT AND THE EMPLOYER HAD ADVANCE KNOWLEDGE OF THE EMPLOYEE'S UNFITNESS AND EMPLOYED HIM/HER WITH CONSCIOUS DISREGARD OF THE RIGHTS AND SAFETY OF OTHERS; THAT THE EMPLOYER AUTHORIZED OR RATIFIED THE WRONGFUL CONDUCT; OR THAT THE EMPLOYER WAS PERSONALLY GUILTY OF FRAUD, OPPRESSION, OR MALICE.

A. Exemplary Damages Not Awardable Against Employer for Employee's Act Unless Certain Circumstance Present. Exemplary damages may not properly be awarded against an employer for the conduct of an employee unless the employer (1) had advance knowledge of the unfitness of the employee, and employed him or her with conscious disregard of the rights or safety of others, (2) authorized or ratified the wrongful conduct, or (3) was personally guilty of fraud, oppression, or malice (*Civ. Code § 3294(b)*).

[*Optional*] **B. Persons Who May Cause Corporation to Be Liable for Punitive Damages.** A corporate employer is only liable for punitive damages for the conduct of its employee when an officer, director, or managing agent has advance knowledge of an employee's unfitness, but nevertheless employs him or her with conscious disregard of the rights or safety of others, or when such a person ratifies an employee's wrongful conduct, or when such person is personally guilty of fraud, oppression, or malice (*Civ. Code § 3294(b)*; *see White v. Ultramar, Inc. (1999) 21 Cal. 4th 563, 566-567, 573-577, 88 Cal. Rptr. 2d 19, 981 P.2d 944*).

[*Optional*] **C. Clear and Convincing Evidence Required.** The evidentiary showing required by *Civil Code Section 3294(b)* must be made with clear and convincing evidence (*Barton v. Alexander Hamilton Life Ins. Co. of Am. (2003) 110 Cal. App. 4th 1640, 1644, 3 Cal. Rptr. 3d 258*).

Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a demurrer to a complaint in a tort action in which exemplary damages are sought where the wrongful act was committed by defendant's employee and the complaint does not allege any of the circumstances under which an employer may be liable for exemplary damages for its employee's act. Paragraph B is for use by a defendant which is a corporation.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Exemplary Damages Not Awardable Against Employer for Employee's Act Unless Certain Circumstances Present

Civ. Code § 3294(b), enacted in 1980, provides rules for holding employers liable for punitive damages for the torts of their employees. The statute provides for a number of situations in which an employer will be so liable, including authorization or ratification of the wrongful act, hiring an unfit employee with advance knowledge of his or her unfitness in conscious disregard of the rights or safety of others, or being personally guilty of fraud, malice, or oppression as defined in *Civ. Code § 3294(c)*. In addition, *Civ. Code § 3294(b)* sets forth the persons whose acts will give rise to liability for punitive damages on the part of a corporate employer for the wrongful conduct of an employee.

[b] Persons Who May Cause Corporation to Be Liable for Punitive Damages

In ***White v. Ultramar, Inc.*** *(1999) 21 Cal. 4th 563, 88 Cal. Rptr. 2d 19, 981 P.2d 944* , the plaintiff, the former employee of a convenience store, brought an action for wrongful termination against his former corporate employer based on the actions of the supervisory employee who was primarily responsible for his termination. The defendant argued that the plaintiff was terminated for taking soda in a store cup without paying for it, in violation of company policy, while plaintiff alleged that he was terminated in retaliation for testifying at the unemployment hearing of another former employee. At trial, the jury found for the plaintiff and awarded compensatory and punitive damages, and the trial court added an award of attorney's fees. The court of appeal reversed the award of attorney's fees, but otherwise affirmed. The court of appeal held that the punitive damages award was appropriate under *Civ. Code § 3294(b)*, concluding that the ability to hire and fire employees renders a supervisory employee a "managing agent" under that statute. The Supreme Court granted review limited to the question of the entitlement to punitive damages.

The Supreme Court affirmed the award of punitive damages, but disagreed with the court of appeal's conclusion that the ability to hire and fire employees is sufficient to render a supervisory employee a "managing agent." Instead, the Supreme Court held that the "managing agent" of a corporation for purposes of establishing an entitlement to exemplary damages under *Civ. Code § 3294(b)* includes only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy (*21 Cal. 4th 563, 566-567)* . The Court concluded that when the legislature amended *Civ. Code § 3294* in 1980, they

intended to limit the liability of corporate employers for punitive damages in that fashion, in accordance with the Supreme Court's construction of the statute as it existed at the time of the amendment. The Court also noted that the legislature placed the term "managing agent" next to the terms "officer" and "director," suggesting that a managing agent must be more than a mere supervisory employee (*21 Cal. 4th 563, 572-573)* . As the Court noted, equating a managing agent with a supervisor would effectively render a corporate employer liable for punitive damages in most employment cases (*21 Cal. 4th 563, 575)* . The Supreme Court then applied the standard to the case before it and held that the supervisory employee who fired the plaintiff was a managing agent, because she had responsibility for managing eight stores and at least 65 employees, which was a significant amount of the employing corporation's business (*21 Cal. 4th 563, 577)* .

[c] Clear and Convincing Evidence Required

In ***Barton v. Alexander Hamilton Life Ins. Co. of Am.*** *(2003) 110 Cal. App. 4th 1640, 3 Cal. Rptr. 3d 258* , the plaintiff sued his insurer and insurance agent for fraud and negligent misrepresentations in connection with the purchase of a life insurance policy. The jury found for the plaintiff and awarded compensatory damages, although the trial court had granted nonsuit on the plaintiff's claim for punitive damages. The trial court then granted the defendants' motion for a new trial on the issue of damages alone, but still did not allow the plaintiff to present his punitive damages claim to the jury. The plaintiff appealed.

The court of appeal affirmed and in the process rejected the plaintiff's argument that the evidentiary showing of *Civ. Code § 3294(b)*, required to hold the insurer liable for punitive damages for the act of the insurance agent, was satisfied by a preponderance of the evidence. The court held that the correct standard was one of clear and convincing evidence. Because the standard for proving oppression, fraud, or malice required to recover punitive damages under *Civ. Code § 3294(a)* was clear and convincing evidence, the court concluded that the same standard applied to the showing required by *Civ. Code § 3294(b)*. The court then held that the trial court applied the correct standard of proof to the plaintiff's punitive damages claim and that, in any event, the trial court did not err because the plaintiff failed to provide any evidence to show that the insurance agent was a managing agent of the insurer or that the insurer company ratified the agent's conduct (*110 Cal. App. 4th 1640, 1644)* .

[4] Additional Authorities

[a] Persons Who May Cause Corporation to Be Liable for Punitive Damages

In *Roby v. McKesson Corp. (2009) 47 Cal. 4th 686, 101 Cal. Rptr. 3d 773, 219 P.3d 749* , plaintiff brought an action for wrongful termination, discrimination, and harassment against her former employer and, with regard to the harassment claim, against her former supervisor. After a jury trial, plaintiff was awarded almost $3 million in compensatory damages and $15 million in punitive damages. The Court of Appeal reduced the compensatory damages award to $1.4 million and the punitive damages award to $2 million. The California Supreme Court reinstated part of the compensatory damages award disallowed by the court of appeal, bringing the total amount of compensatory damages to $1.9 million, and modified the punitive damages award to that same amount. In analyzing the plaintiff's entitlement to punitive damages, the Court concluded that the employer could not be held liable for punitive damages based merely on the conduct of the plaintiff's former supervisor. The Court noted that this supervisory employee worked at a local distribution center and supervised only four employees, although the company employed over 20,000. In those circumstances, the supervisor who was sued was not a managing agent for purposes of establishing a claim to punitive damages against the employer (*47 Cal. 4th 686, 714)* .

In *Cruz v. HomeBase (2000) 83 Cal. App. 4th 160, 99 Cal. Rptr. 2d 435* , the plaintiff sued a chain store company, a security guard at one of its stores, and the guard's supervisor, based on an incident at the store during which the plaintiff was accused of stealing, handcuffed, physically and verbally attacked, and sent to jail. The plaintiff sought compensatory and punitive damages for battery, false imprisonment, and malicious prosecution. After prevailing on the

battery cause of action in the first trial, the trial court declared a mistrial as to the other actions, which were subsequently retried. At retrial, the plaintiff prevailed and was awarded both compensatory and punitive damages. The court of appeal affirmed the compensatory damages award but reversed the award of punitive damages that had been rendered against the chain store company. The court of appeal concluded, first, that the security guard's supervisor was not a managing agent, because he was supervisor of only one aspect of the operations of a single store in a chain of stores (*83 Cal. App. 4th 160, 168)* . The court also rejected the argument that by not firing employees after receiving reports casting doubt on their fitness, the corporation effectively ratified their misconduct. The court noted that a punitive damages award based on ratification by a corporate employer requires that the corporate employer have actual knowledge of the misconduct. Because the internal corporate reports of the incident submitted by the guard and his supervisor did not mention the misconduct alleged by the plaintiff, there was no evidence that an officer, director, or managing agent of the corporation during the relevant time period had actual knowledge of the misconduct alleged by the plaintiff (*83 Cal. App. 4th 160, 168)* .

In *Kelly-Zurian v. Wohl Shoe Co. (1994) 22 Cal. App. 4th 397, 27 Cal. Rptr. 2d 457* , the plaintiff had sued her former employer, alleging that it was liable for the sexual harassment committed by the plaintiff's supervisor. The trial was bifurcated, with the punitive damages to be tried separately from the issues of liability and compensatory damages. The jury entered a verdict in favor of the plaintiff against the supervisor, but found in favor of the employer. The trial court granted the plaintiff's motion for judgment notwithstanding the verdict against the employer, awarding plaintiff compensatory damages, but denied the motion as to punitive damages. Both parties appealed.

The court of appeal held that the trial court acted properly in denying the motion as to punitive damages. Although the trial court apparently believed that even conduct of a managing agent must be ratified, which is not required by *Civ. Code § 3294(b)*, the court of appeal held that the evidence did not establish that the supervisor was in fact a "managing agent" under *Civ. Code § 3294(b)* (*22 Cal. App. 4th 397, 421-422)* . Although the supervisor had the power to terminate plaintiff's employment, the court noted that plaintiff had presented no evidence that the supervisor was in a policymaking position. The employer had introduced substantial evidence that the supervisor did not have the power to change or establish business policy, or even to change plaintiff's salary without corporate approval. The court held that the evidence therefore established that the supervisor was not a managing agent, and that the employer could not be liable for punitive damages based on the supervisor's conduct (*22 Cal. App. 4th 397, 422)* .

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6-64 California Points & Authorities § 64.25

§ 64.25 Supporting Demurrer to Complaint for Damages in Tort Action--Damages for Loss of Consortium Unavailable

[1] FORM

[*Caption. See § 64.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION FOR DAMAGES FOR LOSS OF CONSORTIUM BECAUSE PLAINTIFF, AS THE _____ [UNMARRIED COHABITANT *or* CHILD *or* PARENT] OF THE PERSON WHOSE COMFORT, SUPPORT, AND SERVICES PLAINTIFF HAS BEEN DENIED, HAS NO STANDING TO BRING SUCH AN ACTION.

[*EITHER*]

A. Loss of Consortium Not Actionable by Unmarried Cohabitant. The right to recover for loss of consortium is founded on the relationship of marriage, and absent such a relationship, the right does not exist, even among unmarried cohabiting couples with a stable and significant relationship parallel to a marital relationship (*Elden v. Sheldon (1988) 46 Cal. 3d 267, 277, 250 Cal. Rptr. 254, 758 P.2d 582*).

[*AND/OR*]

B. Loss of Consortium Not Actionable by Children. A child has no cause of action for loss of parental consortium (*Borer v. American Airlines, Inc. (1977) 19 Cal. 3d 441, 451, 138 Cal. Rptr. 302, 563 P.2d 858* ; *see Nix v. Preformed Line Prods. Co. (1985) 170 Cal. App. 3d 975, 977-981, 216 Cal. Rptr. 581*).

[*AND/OR*]

C. Loss of Consortium Not Actionable by Parents. A parent has no cause of action for loss of filial consortium (*Baxter v. Superior Court (1977) 19 Cal. 3d 461, 466, 138 Cal. Rptr. 315, 563 P.2d 871*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form of memorandum of points and authorities may be submitted in support of a general demurrer to a complaint alleging damages for loss of consortium when the demurrer asserts that the complaint fails to state a cause of action in that the plaintiff has no standing to bring such a cause of action. The alternative paragraphs are for use depending on the plaintiff's relationship to the person whose society and comfort the plaintiff is allegedly denied.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 64.44* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Loss of Consortium Not Actionable by Unmarried Cohabitant

In ***Elden v. Sheldon*** *(1988) 46 Cal. 3d 267, 250 Cal. Rptr. 254, 758 P.2d 582* , plaintiff sustained serious personal injuries when the car in which he was a passenger was hit by another car. Plaintiff sued defendants, driver and owner of the other car, for damages for personal injuries, negligent infliction of emotional distress, and loss of consortium. The last two causes of action were based on plaintiff's witnessing the injury and death (in the accident) of the woman with whom he shared a cohabitant relationship allegedly akin to a marital relationship. Defendants demurred to these causes of action, on the ground that plaintiff and the decedent were not married. The trial court sustained the demurrer and dismissed those causes of action. Plaintiff appealed.

The California Supreme Court affirmed. It decided not to extend the ability to recover for loss of consortium to unmarried cohabiting couples with a stable and significant relationship parallel to a marital relationship (*46 Cal. 3d 267, 277)* . Citing *Borer v. American Airlines, Inc. (1977) 19 Cal. 3d 441, 138 Cal. Rptr. 302, 563 P.2d 858* [*see § 64.25[3][b]*], the Court said judicial recognition of a cause of action for loss of consortium must be narrowly circumscribed because of the intangible nature of the loss, the difficulty of measuring damages, and the possibility of an unreasonable increase in the number of persons who would be entitled to sue for the loss of a loved one. The Court observed that case law holds that the right to recover for loss of consortium is founded on the relationship of marriage, and absent such a relationship the right does not exist. The Court specifically disapproved *Butcher v. Superior Court (1983) 139 Cal. App. 3d 58, 188 Cal. Rptr. 503* , in which the court of appeal allowed a woman in a de facto spousal relationship to recover damages for loss of consortium (*46 Cal. 3d 267, 278-279)* . The Court explained that its decision was also influenced by the state's interest in promoting the responsibilities of marriage and the difficulty of assessing the emotional, sexual, and financial relationship of cohabiting parties to determine whether their arrangement

was the equivalent of a marriage (*46 Cal. 3d 267, 279)* . In its discussion of negligent infliction of emotional distress, the Court elaborated on the importance of these factors. The state has a strong interest in the marriage relationship; to the extent unmarried cohabitants are granted the same rights as married persons, the state's interest in promoting marriage is inhibited. The policy favoring marriage is rooted in the necessity of providing an institutional basis for defining the fundamental relational rights and responsibilities of persons in organized society. Formally married couples are granted significant rights and bear important responsibilities toward one another that are not shared by those who cohabit without marriage. Moreover, allowance of such a cause of action would impose a difficult burden on the courts. It would require them to inquire into the relationship of the partners to determine whether the emotional attachment of the family relationship existed between the parties and whether the relationship was stable and significant. A determination of whether cohabitants may recover damages based on such matters as the sexual fidelity of the parties and their emotional and economic ties would require a court to undertake a massive intrusion into the private life of the partners. Further, application of these factors would not provide a sufficiently definite and predictable test to allow or consistent application from case to case (*46 Cal. 3d 267, 274-276)* . Finally, the Court distinguished *Marvin v. Marvin (1976) 134 Cal. Rptr. 815, 18 Cal. 3d 660, 557 P.2d 106* , as essentially a contract case (*46 Cal. 3d 267, 279)* .

[b] Loss of Consortium Not Actionable by Children

Borer v. American Airlines, Inc. *(1977) 19 Cal. 3d 441, 138 Cal. Rptr. 302, 563 P.2d 858* , was an action for damages for loss of consortium brought by the nine children of a woman who sustained serious injuries when the cover on a lighting fixture at the terminal of defendant airline fell and struck her. Plaintiffs claimed that as a result of their mother's physical injuries, each of them was deprived of the services, society, companionship, affection, tutelage, direction, guidance, instruction and aid in personality development, all with its accompanying psychological, educational and emotional detriment, by reason of their mother being unable to carry on the usual duties of a mother. Defendant demurred to the complaint for failure to state a cause of action. The trial court sustained the demurrer and dismissed the suit. Plaintiffs appealed.

The California Supreme Court affirmed. The Court said there are strong policy reasons against extension of liability to loss of consortium of the parent-child relationship. Loss of consortium is an intangible, nonpecuniary loss; monetary compensation will not compensate plaintiffs for the loss of companionship and guidance of their mother. The Court summarized that plaintiffs suffered a loss for which there is no compensation; monetary compensation is essentially unrelated to that loss. The Court said the social burden of providing damages for loss of parental consortium could not be ignored merely because such money initially comes from the negligent defendant or his or her insurer. The burden would be borne by the general public in increased insurance premiums or in the enhanced danger that accrues from the greater number of people who do without any insurance. It said the cost of administration of a system to determine and pay consortium awards also had to be considered; since virtually every serious injury to a parent would engender a claim for loss of consortium on behalf of each of his or her children, the expense of settling or litigating such claims would be sizable. The Court said that the inadequacy of monetary damages to make whole the loss suffered, considered in light of the social cost of paying such awards, constitutes a strong reason for refusing to recognize the asserted claim (*19 Cal. 3d 441, 447)* . The Court articulated a second reason for rejecting a cause of action for loss of parental consortium: the difficulty of measuring damages. Because of its intangible character, damages for such a loss are difficult to define and quantify. Such difficulty leads to the risk of double recovery, since it is difficult to distinguish the loss to the mother from her inability to care for her children from the loss to the children from the mother's inability to care for them. The Court said *Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal. 3d 382, 115 Cal. Rptr. 765, 525 P.2d 669* [*see § 64.44*], did not disregard the intangible character of damages and the difficulty of measuring such damages, but held that in the context of a spousal relationship, the policy arguments against liability do not suffice to justify a holding denying a cause of action (*19 Cal. 3d 441, 448)* .

The Court rejected plaintiffs' contention that no adequate ground exists to distinguish a cause of action for loss of spousal consortium from one for loss of parental consortium and articulated three reasons for its position: (1) the spousal action for loss of consortium rests in large part on the impairment or destruction of the sexual life of the couple,

and no similar element of damage appears in a child's suit for loss of consortium; (2) actions by children for loss of parental consortium create problems of multiplication of actions and damages not present in the spousal context; and (3) the proposition that a spouse has a cause of action for loss of consortium, but that a child does not, finds overwhelming approval in the decisions of other jurisdictions (*19 Cal. 3d 441, 448-449)* .

Plaintiffs also contended that not allowing a child to recover for loss of parental consortium would distinguish between the rights of the child of a seriously disabled parent and those of a deceased parent, without any rational basis for that distinction in contravention of the equal protection of the laws. Plaintiffs pointed out that under a *Code Civ. Proc. § 377* wrongful death action, a child may recover the value of the deceased parent's affection and society (*19 Cal. 3d 441, 451)* . The Court said there are two significant distinctions between the child whose parent is killed and one whose parent is disabled, both of which flow from the fact that in the latter case the living victim retains his or her own cause of action. The first distinction relates to the historical purpose of the wrongful death statutes. Common law did not permit the heirs of a deceased victim to bring a cause of action against the tortfeasor, thus making it more profitable to kill than to scratch a victim. The wrongful death statutes eliminated this inequity. Additionally, recovery for the loss of the affection and society of the deceased is allowed in recognition that if damages were limited to pecuniary loss, recovery frequently would be barred by the heirs' inability to prove such loss in the case of nonworking family members, even though their death represents a substantial injury to the family. Recovery for loss of affection and society also fulfills a deeply felt social belief that a tortfeasor who kills someone should not escape liability completely, no matter how unproductive the victim. By contrast, when a parent is disabled, the tortfeasor cannot escape with impunity, for the immediate victim of the tort retains a cause of action for the injuries inflicted. A claim by the child is not essential to prevent the tortfeasor from escaping liability. The second distinction is that the wrongful death action serves as the only means by which the family unit can recover compensation for the loss of parental care and services in the case of the wrongful death of the parent. While the parents live, however, the tangible aspects of the child's loss can be compensated in the parent's own cause of action (*19 Cal. 3d 441, 451-452)* . The Court concluded that the distinction between damages for loss of affection and society to a child whose parent has been tortiously killed, and the denial of such damages to a child whose parent has been disabled, rests on a rational basis (*19 Cal. 3d 441, 452-453)* .

In ***Nix v. Preformed Line Prods. Co.*** *(1985) 170 Cal. App. 3d 975, 216 Cal. Rptr. 581* , after her husband was severely injured from a fall on his job site and rendered unable to speak or care for himself, plaintiff filed a complaint against defendant, her husband's employer. The complaint alleged several causes of action, and included one for loss of parental consortium, brought on behalf of the couple's two sons. Defendant demurred to that cause of action. The trial court granted the demurrer and dismissed that cause of action. Plaintiff appealed.

The court of appeal affirmed. Plaintiff urged that *Borer v. American Airlines, Inc. (1977) 19 Cal. 3d 441, 138 Cal. Rptr. 302, 563 P.2d 858* , in which the California Supreme Court refused to create a cause of action for loss of parental consortium, should be reevaluated in light of society's increased recognition of the need to protect the rights of children. The court reviewed the *Borer* holding and reasoning, particularly the way it distinguished itself from *Rodriguez*. It quoted from Justice Mosk's dissent in which he severely criticized the *Borer* majority, and although clearly not in agreement with *Borer*, the court concluded that it was forced to follow that case (*170 Cal. App. 3d 975, 977-981)* . The court noted that *Borer* observed that no other state recognized a claim for loss of parental consortium. The court pointed out that since then several states have recognized such a cause of action (*170 Cal. App. 3d 975, 981-984)* . The court concluded that these developments, plus the many discussions criticizing the *Borer* result, prompted it to point to the inconsistency in the law between husband and wife on the one hand, and parent and child on the other, and suggested that *Borer* should be reconsidered (*170 Cal. App. 3d 975, 986)* .

[c] Loss of Consortium Not Actionable by Parents

In ***Baxter v. Superior Court*** *(1977) 19 Cal. 3d 461, 138 Cal. Rptr. 315, 563 P.2d 871* , plaintiffs' 16-year-old son was given a general anesthetic in preparation for diagnostic procedures and possible surgery. As a result of the anesthetic, he was rendered unconscious and remained comatose for four months. When he awoke, he had been reduced to the mental

age of three, suffered total blindness, severe impairment of his hearing, and partial paralysis of his right side. Plaintiffs and their son filed suit against defendant hospital and attending physicians. In addition to other causes of action, plaintiff parents sought damages for their loss of their son's support, comfort, protection, society, and pleasure. Defendants demurred to those causes of action, asserting that California law does not recognize a parent's right to recover for loss of filial consortium. The trial court sustained the demurrer. Plaintiffs petitioned the court of appeal for a writ of mandate to require the trial court to order defendants to answer. The court of appeal issued an alternative writ, but after argument discharged that writ and denied relief.

The California Supreme Court discharged the alternative writ and denied the petition for a peremptory writ. The Court framed the question presented as whether the parents of an injured child can state a cause of action for the loss of the affection and society of their child. The Court said those reasons explained in *Borer v. American Airlines, Inc. (1977) 19 Cal. 3d 441, 138 Cal. Rptr. 302, 563 P.2d 858* , in particular the intangible nature of the injury and the danger of multiplication of claims and liability, applied to the issue of a parental claim for loss of filial consortium. The intangible character of the loss, which can never really be compensated by money damages, the difficulty of measuring damages, and the dangers of double recovery of multiple claims and of extensive liability all apply similarly to both cases. The Court concluded that while the risk of multiple claims and disproportionate awards is slightly less, since an injured child has only two parents who can sue for loss of consortium, while an injured parent may have many children, that minor difference does not suffice to justify allowing a parental cause of action while denying a child's claim (*19 Cal. 3d 461, 464)* . The Court observed that although some other jurisdictions recognize a distinction between the rights of parents and children, the majority of them sustain the parental cause of action merely by citing the common-law right of a parent to recover for loss of a child's services and by treating the child's affection and companionship as among the services to which the parent is entitled. The Court opined that the absence of any comparable common-law right of action for the child accounts for the dearth of decisions permitting the child to recover for loss of parental affection and society. It found that the existence of a common-law right to recover for the loss of a child's earnings and services is not a sufficient basis to distinguish a parent's suit for loss of consortium from the child' claim denied in *Borer*. The common-law right dates from the period when the child's labor served as an important economic resource of the family. Today the parent's right to a child's earnings and services is rarely of economic value; it exists less as a significant legal right than as an historical curiosity. Although the parents' right to their child's earnings and services is established by statute in California, the few decisions enforcing that right grant recovery only for loss of earnings or services of economic value (*19 Cal. 3d 461, 465)* . The court concluded that a parent has no cause of action in negligence to recover damages for loss of filial consortium (*19 Cal. 3d 461, 466)* .

[4] Additional Authorities

[a] Loss of Consortium Not Actionable by Children

In *Tullai v. Homan (1987) 195 Cal. App. 3d 1184, 241 Cal. Rptr. 255* , plaintiffs' son was severely injured and rendered a quadriplegic when the car in which he was a passenger was involved in an accident. In addition to several causes of action brought on behalf of their son against a variety of defendants, including the driver, the owner, and the manufacturer of the car, plaintiffs brought a cause of action on their own behalf for loss of parent-child consortium. Defendants demurred, on the ground that no cause of action was stated. The trial court severed that cause of action and dismissed it. The court of appeal affirmed. The court reviewed plaintiffs' contentions, and noted that they had been addressed by the *California Supreme Court in Borer v. American Airlines, Inc. (1977) 19 Cal. 3d 441, 138 Cal. Rptr. 302, 563 P.2d 858* . The court said it was bound to follow that Court's clear expressions on the subject, and suggested to plaintiffs that their argument that *Borer* should be reconsidered must be addressed to that court (*195 Cal. App. 3d 1184, 1186-1187)* . The court rejected defendants' contention that sanctions should be imposed against plaintiffs for a frivolous appeal, citing *Nix* as indication that plaintiffs were not alone in desiring a reconsideration of *Borer* (*195 Cal. App. 3d 1184, 1187-1188)* .

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A. Supporting Demurrer to Complaint

6-64 California Points & Authorities § 64.26

§ 64.26 Supporting Demurrer to Complaint for Damages in Tort Action--Damages for Economic Losses Unavailable

[1] FORM

[*Caption. See § 64.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION FOR THE RECOVERY OF ECONOMIC DAMAGES BECAUSE ECONOMIC DAMAGES ARE NOT AVAILABLE IN A NEGLIGENCE ACTION UNLESS THERE IS A SPECIAL RELATIONSHIP BETWEEN THE PARTIES.

A. Economic Damages Not Available in Negligence Action Absent Special Relationship Between Parties. Economic damages are recoverable in a negligence action only if the parties have a special relationship (*Ott v. Alfa-Laval Agri, Inc. (1995) 31 Cal. App. 4th 1439, 1448, 37 Cal. Rptr. 2d 790*).

[*Optional*] **B. Failure to Prove That Transaction Was Intended to Affect Plaintiff Precludes Finding of Special Relationship.** Plaintiff's failure to prove that the transaction that was the basis of the allegation of negligence was intended to affect plaintiff precludes a finding of a special relationship (*Ott v. Alfa-Laval Agri, Inc. (1995) 31 Cal. App. 4th 1439, 1455, 37 Cal. Rptr. 2d 790*).

[*Optional*] **C. Failure to Prove Foreseeability of Harm to Plaintiff Precludes Finding of Special Relationship.** Plaintiff's failure to prove foreseeability of harm to plaintiff precludes a finding of a special relationship (*Ott v. Alfa-Laval Agri, Inc. (1995) 31 Cal. App. 4th 1439, 1456, 37 Cal. Rptr. 2d 790*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a defendant's general demurrer to a complaint that seeks damages for economic damages based on allegations of defendant's negligence, when the demurrer asserts that economic damages are not available in a negligence action because there is no special relationship between the parties. The optional paragraphs are for use in setting forth the absence of any allegations in the complaint that establish the existence of any special relationship between the parties.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the relationship of the parties, and should show that there was no "special relationship" between the parties, as defined by case law [*see Ott v. Alfa-Laval Agri, Inc. (1995) 31 Cal. App. 4th 1439, 1455, 37 Cal. Rptr. 2d 790]* .

[3] Discussion of Authorities

[a] Economic Damages Not Available in Negligence Action Absent Special Relationship Between Parties

In ***Ott v. Alfa-Laval Agri, Inc.*** *(1995) 31 Cal. App. 4th 1439, 1455, 37 Cal. Rptr. 2d 790* , plaintiffs, owners of a dairy farm, sued defendants, milking machine manufacturers, for lost profits. The negligence count of the complaint alleged that defendant negligently designed and manufactured milking systems which plaintiff used, and also negligently trained and directed plaintiff in the installation of these milking systems. At the beginning of the trial, defendants obtained a ruling by way of a motion for judgment on the pleadings that economic losses were not a compensable element of damages in an action for negligence. After trial, the jury returned a special verdict that granted an award of general damages on the negligence count. The defendants then moved for judgment notwithstanding the verdict on this count, and the motion was granted by the trial court. Plaintiffs appealed, claiming that economic damages are recoverable in tort actions.

The court of appeal disagreed with the trial court's reasons for its ruling, but affirmed the grant of judgment on the pleadings with regard to the negligence-based claims for economic damages. The court held that, contrary to the trial court's conclusion, economic damages can be recovered under some circumstances in an action for negligence. However, for such a cause of action to arise there must be a "special relationship" between the parties that gives rise to a duty on the part of the defendant to use due care to avoid economic injury to the plaintiff (*31 Cal. App. 4th 1439, 1448)* .

[b] Failure to Prove That Transaction Was Intended to Affect Plaintiff Precludes Finding of Special Relationship

The facts and procedural background of ***Ott v. Alfa-Laval Agri, Inc.*** *(1995) 31 Cal. App. 4th 1439, 37 Cal. Rptr. 2d 790* , are discussed in *§ 64.26[3][a]*. Whether such a special relationship exists is determined by a six-part test, including an examination of the extent to which the transaction was intended to affect the plaintiff (*31 Cal. App. 4th 1439, 1449)* . In this case, the court concluded that there was no evidence suggesting that defendant's milking system was intended to affect the plaintiffs in any way particular to them, as opposed to all potential purchasers of the equipment (*31 Cal. App. 4th 1439, 1455)* . The absence of this foundation precluded a finding of special relationship necessary to the recovery of economic damages for negligence.

[c] Failure to Prove Forseeability of Harm to Plaintiff Precludes Finding of Special Relationship

The facts and procedural background of ***Ott v. Alfa-Laval Agri, Inc.*** *(1995) 31 Cal. App. 4th 1439, 37 Cal. Rptr. 2d 790* , are discussed in *§ 64.26[3][a]*. One of the six aspects of the test used by the court in determining whether a special relationship exists between the parties sufficient to justify recovery of economic damages in a tort action, is the foreseeability of harm to the plaintiff (*31 Cal. App. 4th 1439, 1449)* . In this case, the plaintiffs used the defendant's first milking machine for 15 years without noticing the decline in the milk production alleged in the complaint. The defects in the system did not produce a noticeable result until the system was merged with a new generation of technology. The court concluded that this demonstrated that the deficiencies in the system were not reasonably foreseeable when the system was installed (*31 Cal. App. 4th 1439, 1456)* . Since the injury was not foreseeable, there was no special relationship as required for a recovery of economic damages for negligence.

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6-64 California Points & Authorities § 64.27

§ 64.27 Supporting Contention That Plaintiff Unable to Prove Damages--Evidence of Lost Profits Too Speculative

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF CANNOT PROVE DAMAGES IN THE FORM OF LOST BUSINESS PROFITS BECAUSE PLAINTIFF'S EVIDENCE SUPPORTING THE CLAIM FOR LOST PROFITS IS TOO SPECULATIVE AND UNCERTAIN.

Evidence of Lost Profits Too Uncertain to Support Recovery. A plaintiff cannot recover in tort for lost profits caused by a defendant's negligence if the evidence supporting the claim for lost profits does not show to a reasonable certainty that the interrupted business would actually have made a profit (Kids' Universe v. In2Labs *(2002) 95 Cal. App. 4th 870, 887-888, 116 Cal. Rptr. 2d 158*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the plaintiff cannot recover damages for lost profits because the plaintiff's evidence in support of those damages is insufficient to prove any amount of lost profits to a reasonable certainty.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which these points are raised, such as a motion for summary judgment. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should discuss the evidence offered by the plaintiff and argue that this evidence is too uncertain or speculative to support a claim for lost profits.

[3] Discussion of Authorities

[a] Evidence of Lost Profits Too Uncertain to Support Recovery

In **Kids' Universe v. In2Labs** *(2002) 95 Cal. App. 4th 870, 116 Cal. Rptr. 2d 158* , the plaintiffs were the owners of a children's retail store that sold toys, educational products, and computer training services for children. The defendants leased office space above the plaintiffs' store. In mid-November 1997, one of the defendants' employees left water running in a sink overnight, which caused damage to the plaintiffs' store. Although the defendants' insurer paid $200,000 to the plaintiffs to cover those damages, the plaintiffs brought a negligence action two years later to recover for the lost profits they allege they would have made had they been able to launch their planned Internet web site in late November 1997 as they had planned, rather than spend the time repairing the store. At the time of the accident, the plaintiffs had only five employees, and although they had operated a modest web site since 1995, they had averaged only about $500 in annual revenue from sales over the Internet. However, they argued that they had business deals in place to greatly increase their Internet retailing, including deals with other Internet sites that would have greatly increased the exposure of their own web site without an expensive upfront outlay of capital on their part. They also presented the declaration of an economics expert who offered the opinion, based on researching the experience of another Internet toy seller with similar deals made during the relevant time period, that the plaintiffs' business plans, if completed, could have attracted significant investment capital and led to a substantial increase in the valuation of the plaintiffs' business. However, by the time the plaintiffs' store repairs were completed in early 1998, because of changes in Internet business opportunities, the plaintiffs' opportunities for substantially increasing the exposure of their Internet web site without large capital outlays had vanished. The plaintiffs were financially unable to proceed with their plans and filed suit against the defendants. The defendants moved for summary judgment on the grounds that the plaintiffs' evidence of lost profits, the only type of damages claimed in the suit, was too speculative to raise a triable issue of fact as to any damages. The trial court agreed and rendered judgment for defendants, and the plaintiffs appealed.

The court of appeal affirmed. The court reviewed relevant case law establishing that although the loss of prospective profits is recoverable if the evidence makes reasonably certain the occurrence and amount of the loss, when the operation of an unestablished business is prevented or interrupted, damages for prospective profits may not be recovered if their occurrence is uncertain, contingent, or speculative. In the absence of operating experience sufficient to permit a reasonable estimate of probable income and expense, damages for lost profits may be denied (*95 Cal. App. 4th 870, 883-884)* . Applying these general principles to the case before it, the court of appeal concluded that the plaintiffs could not recover for lost profits, because they had no evidence from which a reasonable trier of fact could conclude with reasonable certainty that the plaintiffs would have actually made a profit from replacing their existing web site with a greater Internet presence. Although the plaintiffs had five years experience as toy retailers, their web site had not previously been operated as a profit-making venture because it had generated only modest revenues. Furthermore, the on-line market for toys was not an established market, and the scenario described by the plaintiffs was rife with speculation. The plaintiffs presented no evidence of how their business would have been affected by competing Internet retailers, how many of the viewers of their web site would have actually made purchases, the level of purchases that would have been necessary to make the enterprise profitable, or how much venture capital their enterprise might have attracted. Finally, the court noted that the plaintiffs' expert's comparison of their lost opportunity to that of another Internet toy retailer was based on news articles, rather than any actual data, and on an assumption without analysis that the plaintiffs' business would have been roughly equal to this competitor, and that his analysis provided no way to determine what actual profits were lost (*95 Cal. App. 4th 870, 887-888)* .

[4] Additional Authorities

[a] Evidence of Lost Profits Too Uncertain to Support Recovery

In *Parlour Enterprises, Inc. v. Kirin Group, Inc. (2007) 152 Cal. App. 4th 281, 61 Cal. Rptr. 3d 243* , plaintiffs were ice cream parlor franchisees and related partnerships who sued franchisors for unilaterally terminating a subfranchise agreement. Plaintiffs sought damages for lost anticipated profits from multiple franchises, although only one franchise had been built and in operation when the agreement was terminated. At trial, the jury awarded over $6,000,000 in damages to plaintiffs based on lost profits from all of the projected franchises, but the court of appeal reversed most of the award. The court of appeal held that plaintiffs' evidence of lost anticipated profits, most of which was presented in the form of testimony from an expert witness, was too speculative and lacked factual detail. The court recognized that if lost anticipated profits are from a business not yet in operation when the actionable conduct occurred, damages may be established with reasonable certainty using expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, and the like (*152 Cal. App. 4th 281, 288)* . However, plaintiffs failed to explain the factual underpinnings for the projections used and justify why the projections constituted reliable indicators of future anticipated profits. Some of the projections used by plaintiffs' expert were generated by one of the plaintiffs for purposes of attracting investors, based on optimistic assumptions, and contained disclaimers stating that they were not based on actual operations and were not assured to reflect actual results. Moreover, no factual details were provided as to how the numbers in these projections were created (*152 Cal. App. 4th 281, 289-290)* .

In addition, while the expert based his testimony in part on market data on other ice cream parlors and a restaurant chain that serves both food and ice cream, as did the franchises at issue here, the court noted that plaintiffs failed to provide details of these other businesses and explain how they were sufficiently similar to the franchises here. Without such factual background, plaintiffs' evidence was too speculative to support damages for lost anticipated profits from the restaurants that were not yet in existence (*152 Cal. App. 4th 281, 290)* .

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6-64 California Points & Authorities § 64.28

§ 64.28 Supporting Contention That Shareholder May Not Recover Lost Future Corporate Profits

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE PLAINTIFF, AS A SHAREHOLDER IN A CORPORATION, MAY NOT RECOVER ON THE PLAINTIFF'S OWN BEHALF FOR THE LOST FUTURE PROFITS THAT MAY HAVE BEEN SUFFERED BY THAT CORPORATION.

Shareholder Cannot Recover for Lost Future Profits of Corporation. A corporate shareholder does not have an ownership interest in corporate profits and cannot recover individually for lost future profits suffered by the corporation (*Sole Energy Co. v. Petrominerals Corp. (2005) 128 Cal. App. 4th 212, 232, 26 Cal. Rptr. 3d 798*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that a plaintiff who is a shareholder or putative shareholder in a corporation may not recover as damages in the plaintiff's individual capacity for the lost future profits sustained by the corporation.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which these points are raised, such as in a motion for summary judgment. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form showing the relationship between the facts of the case and the point of law stated. Thus, for example, counsel should include facts showing that the plaintiff was a shareholder in a corporation,

that the damages sought by the plaintiff are damages for lost profits that would have been earned by the corporation, and that the plaintiff, suing in the plaintiff's individual capacity, has no right to recover these lost corporate profits.

[3] Discussion of Authorities

[a] Shareholder Cannot Recover for Lost Future Profits of Corporation

In ***Sole Energy Co. v. Petrominerals Corp.*** *(2005) 128 Cal. App. 4th 212, 26 Cal. Rptr. 3d 798* , the plaintiffs were two businessmen and their companies who combined to form a corporation, although the corporation never issued any stock. The plaintiffs engaged in negotiations in which their corporation would purchase the oil and gas assets of another company. Prior to actual incorporation, the plaintiffs submitted a non-binding letter of intent proposing their purchase, which was signed by principals of the selling company. However, a few months later, when the plaintiffs received a formal commitment for financing of their proposed purchase, there were differences between the parties on the terms of the sale that could have prevented the deal from being finalized, but during a phone call a few days later, one of the plaintiffs reached an oral agreement with one of the principals of the selling company to finalize the sale, although no purchase price or other details were included. Three days later, the selling company terminated the deal and ended up selling to another company. Alleging that they had a contractual agreement to purchase the assets at issue, the plaintiffs brought suit for interference with contract and prospective economic advantage against the eventual purchasing company and a financial consultant who had provided services to the selling and buying companies that were instrumental in facilitating the sale. After a jury trial, the plaintiffs were awarded over $20 million in damages, which included damages for profits that their corporation allegedly would have earned if their purchase transaction had been completed. However, the trial court granted the defendants' JNOV motions on some of the causes of action, although it denied JNOV motions on other causes of action. Both the plaintiffs and the defendants appealed.

The court of appeal affirmed in part and reversed in part. Addressing the issue of damages awarded to the plaintiffs for the lost profits that would have been earned by the plaintiffs' corporation, had it been able to purchase the oil and gas assets it sought, the court noted the established rule that corporate shareholders do not have an ownership interest in corporate profits. Because corporate profits belong to the corporation and not to the shareholders individually, lost profits are an injury to the corporation and therefore derivative in nature. If lost corporate profits are sought as damages, the gravamen of the complaint is injury to the corporation, rather than injury to an individual shareholder. Although the individual plaintiffs may have been able to recover for the loss or diminution in value of the shares they would have received in the purchasing corporation they formed, they presented no evidence of these damages, but only evidence of lost corporate profits. Because they sued in their individual capacities and did not bring a derivative suit on behalf of the corporation, the plaintiffs were not entitled to recover for lost corporate profits (*128 Cal. App. 4th 212, 232-233)* . The result was not altered merely because the plaintiffs' corporation never actually went into business and never actually issued any stock. The evidence presented at trial on the issue of damages assumed that the corporation would have done so if the proposed purchase had not been thwarted (*128 Cal. App. 4th 212, 214)* .

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[Reserved]

§§ 64.29[Reserved]

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B. Opposing Demurrer to Complaint

6-64 California Points & Authorities § 64.40

§ 64.40 Opposing Demurrer to Complaint for Exemplary Damages [Civ. Code § 3294] in Tort Action--General Allegation of Malicious Intent as Sufficient in Intentional Tort Cases

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN OPPOSITION TO DEMURRER TO COM-
vs.	)	PLAINT
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

WHEN AN INTENTIONAL WRONG IS ALLEGED, A GENERAL ALLEGATION OF MALICIOUS INTENT IS SUFFICIENT TO SUPPORT A CLAIM FOR EXEMPLARY DAMAGES.

A. General Allegation of Intent as Sufficient. In cases of intentional torts, malice is properly pleaded by alleging the wrongful motive, intent, or purpose and a general allegation of intent is sufficient to support a claim for exemplary damages (*Unruh v. Truck Ins. Exch. (1972) 7 Cal. 3d 616, 632, 102 Cal. Rptr. 815, 498 P.2d 1063* ; *see also Civ. Code § 3294(c)(1)*).

[*Optional*] **B. Pleading Malice Where Intentional Wrong Alleged.** When the plaintiff alleges an intentional wrong, a prayer for exemplary damage may be supported by pleading that the wrong was committed willfully or with a design to injure (*G.D. Searle & Co. v. Superior Court (1975) 49 Cal. App. 3d 22, 29, 122 Cal. Rptr. 218* ; *see also Civ. Code § 3294(c)(1)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to a demurrer to a complaint in a tort action seeking exemplary damages where plaintiff has alleged an intentional wrong and also has alleged generally defendant's wrongful malicious intent, motive, or purpose.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Statutory Definition of Malice

Civ. Code § 3294(c)(1), defines "malice" as conduct which is intended by the defendant to cause injury to the plaintiff, or despicable conduct which is carried on by the defendant with willful and conscious disregard of the safety or rights of others. This definition is for use in *Civ. Code § 3294(a)*, which provides for punitive damages in any action other than one for breach of contract, where it has been proven by clear and convincing evidence that the defendant has been guilty of malice, fraud, or oppression [*Civ. Code § 3294(c)*].

Both *Unruh* and *Searle*, cited as authority for the points in Paragraphs A and B, were decided before the enactment of this statutory definition of malice. However, since malice is defined in the intentional tort context as conduct intended to cause injury, then a general allegation of wrongful intent as in *Unruh* or a design to injure as in *Searle* will be sufficient an allegation of malice within *Civ. Code § 3294(c)(1)* to support a claim for punitive damages.

[3] Discussion of Authorities

[a] General Allegation of Intent as Sufficient

Unruh v. Truck Ins. Exch. *(1972) 7 Cal. 3d 616, 102 Cal. Rptr. 815, 498 P.2d 1063* , was an action by an industrially injured employee against her employer's worker's compensation insurance carrier for damages for the negligent and intentional acts of the carrier. In one count of the complaint, plaintiff incorporated by reference the preceding four counts which stated causes of action on theories of negligence, assault, conspiracy, and intentional infliction of emotional distress and alleged that the acts of defendants were willful and malicious whereby plaintiff sought punitive damages. The trial court sustained defendants' demurrers to the complaint brought on the ground that each count failed to state facts sufficient to constitute a cause of action in that it appeared on the face of the complaint that the court had no jurisdiction over the subject matter of the action since the Workmen's Compensation Appeals Board had exclusive jurisdiction. The Supreme Court affirmed as to the negligence counts and reversed as to the counts alleging intentional torts. With respect to the count setting forth a claim of punitive damages, the Court noted that malice is properly pleaded by alleging the wrongful motive, intent, or purpose. A general allegation of such intent is

sufficient to support a claim for exemplary damages. The Court held that plaintiff's exemplary damage claim was properly assertable in conjunction with the counts asserting causes of action for assault and intentional infliction of emotional distress, but not with the counts alleging mere negligence. Consequently, the Court concluded that the trial court erred in sustaining defendant's demurrer to the punitive damages count.

[b] Pleading Malice Where Intentional Wrong Alleged

The factual background of ***G.D. Searle & Co. v. Superior Court*** *(1975) 49 Cal. App. 3d 22, 122 Cal. Rptr. 218* , is discussed in *§ 64.21[3][b]*. The court of appeal, in determining whether plaintiff adequately pleaded a basis for exemplary damages, stated that when a plaintiff alleges an intentional wrong, a prayer for exemplary damage may be supported by pleading that the wrong was committed willfully or with a design to injure.

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Volume 6 Chapters 60-69 COSTS---to---DECLARATORY RELIEF
CHAPTER 64 DAMAGES: TORT
PART II. FORMS
B. Opposing Demurrer to Complaint

6-64 California Points & Authorities § 64.41

§ 64.41 Opposing Demurrer to Complaint for Exemplary Damages [Civ. Code § 3294] in Tort Action--Conscious Disregard of Safety as Malice

[1] FORM

[*Caption. See § 64.40.*]

PLAINTIFF'S COMPLAINT PLEADS A CAUSE OF ACTION FOR PUNITIVE DAMAGES SINCE CONSCIOUS DISREGARD OF THE SAFETY OF OTHERS MAY CONSTITUTE MALICE WITHIN THE MEANING OF *CIVIL CODE SECTION 3294* AND PLAINTIFF'S COMPLAINT ALLEGES THAT DEFENDANT WILLFULLY AND CONSCIOUSLY DISREGARDED PLAINTIFF'S SAFETY.

A. Willful and Conscious Disregard of Safety as Malice. Willful and conscious disregard of the safety of others constitutes malice under *Section 3294 of the Civil Code*, which authorizes exemplary damages (*Civ. Code § 3294(c)(1)*; *see Taylor v. Superior Court (1979) 24 Cal. 3d 890, 895, 157 Cal. Rptr. 693, 598 P.2d 854* ; *G.D. Searle & Co. v. Superior Court (1975) 49 Cal. App. 3d 22, 32, 122 Cal. Rptr. 218*).

[*Optional*] **B. Driving While Intoxicated as Malicious Act When Driver Disregards Dangerous Consequences.** The act of operating a motor vehicle while intoxicated may constitute an act of malice authorizing exemplary damages if performed under circumstances which disclose a conscious disregard of the probable dangerous consequences (*Taylor v. Superior Court (1979) 24 Cal. 3d 890, 892, 157 Cal. Rptr. 693, 598 P.2d 854*).

[*Optional*] **C. Wanton and Reckless Misconduct Described as Conscious Disregard of Safety.** Wanton and reckless misconduct, which has been described as a defendant's conduct which constitutes a conscious disregard of the safety of others, may justify an award of exemplary damages (*Nolin v. National Convenience Stores, Inc. (1979) 95 Cal. App. 3d 279, 286, 157 Cal. Rptr. 32*).

[*Optional*] **D. Disregard of Public Safety by Manufacturer of Defectively Designed Product as Malice.** The term "malice," as used in *Section 3294 of the Civil Code*, includes the callous and conscious disregard of public safety by the manufacturer of defectively designed, mass-produced articles (*Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d*

757, 810, 174 Cal. Rptr. 348).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a demurrer to a complaint in a tort action where defendant claims that plaintiff's complaint does not state a cause of action for exemplary damages because it does not allege oppression, fraud, or malice but the complaint alleges that defendant consciously disregarded plaintiff's safety.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Statutory Definition of Malice

Civ. Code § 3294(c) defines "malice" as conduct that is intended by the defendant to cause injury to the plaintiff, or despicable conduct that is carried on by the defendant with reckless and conscious disregard of the safety or rights of others [*Civ. Code § 3294(c)(1)*]. This definition is for use in *Civ. Code § 3294(a)*, which provides for punitive damages in any action other than one for breach of contract, when it is proven by clear and convincing evidence that the defendant has been guilty of malice, fraud, or oppression [*Civ. Code § 3294(c)*].

Prior to 1987 legislation amending *Civ. Code § 3294(c)*, "malice," as applicable when a defendant's conduct was not intended to cause injury to the plaintiff, was defined as conduct that is carried on by the defendant with conscious disregard of the safety or rights of others. There was no requirement that the defendant's conduct be "despicable" or that the conduct be carried out with a "willful," as well as a conscious, disregard of the safety or rights of others. The earlier definition of malice applies in any action in which the trial commenced prior to January 1, 1988 [*see Civ. Code § 3294(c)(1), (e)*]. In actions in which the trial is commenced on or after January 1, 1988, malice must be established by "clear and convincing evidence" [*see Civ. Code § 3294(a), (e)*].

Both *Taylor* and *Searle*, cited as authority for the points in Paragraphs A and B, were decided prior to the 1980 enactment of *Civ. Code § 3294(c)*. However, since the "conscious disregard" component of malice has been codified in *Civ. Code § 3294(c)*, *Taylor* and *Searle* are still valid, insofar as they hold that a punitive damages claim can be pleaded by alleging conscious disregard of the safety of others. Under the 1987 amendment to *Civ. Code § 3294*, however, the plaintiff must also allege that the defendant's conduct was in willful, as well as in conscious, disregard of safety [*Civ. Code § 3294(c)(1)*].

[3] Discussion of Authorities

[a] Willful and Conscious Disregard of Safety as Malice

Taylor v. Superior Court *(1979) 24 Cal. 3d 890, 157 Cal. Rptr. 693, 598 P.2d 854* , decided prior to the 1980 addition of *Civ. Code § 3294(c)*, was a personal injury action brought against an intoxicated driver in which punitive damages were sought. Defendant demurred contending that punitive damages could not be assessed against a negligent,

intoxicated driver, at least in the absence of allegations to the effect that the driver actually intended to cause an accident or injury. The trial court sustained the demurrer insofar as it sought recovery of punitive damages and plaintiff filed mandate proceedings. Plaintiff's complaint alleged, in pertinent part, that the car driven by defendant collided with plaintiff's car, causing plaintiff serious injuries, that defendant is and for a substantial period of time had been an alcoholic well aware of the serious nature of his alcoholism and of his inclination to drive a motor vehicle while under the influence of alcohol, and that defendant was aware of the dangerousness of his driving while intoxicated. The complaint further alleged that defendant had previously caused a serious accident while driving under the influence of alcohol and that defendant had been arrested and convicted for drunken driving on numerous prior occasions. Based on these allegations, plaintiff asserted that defendant acted with a conscious disregard of plaintiff's safety.

In reversing the trial court's decision, the Supreme Court noted that defendant's successful demurrer was based on plaintiff's failure to allege any actual intent of defendant to harm plaintiff or others. The Court stated that in order to justify the imposition of punitive damages, defendant must act with the intent to vex, injure, or annoy, or with a conscious disregard of the plaintiff's rights. Additionally, the Court expressed its concurrence with the *Searle* court's observation that a conscious disregard of the safety of others may constitute malice within the meaning of former Civ. Code § 3294 (now see *Civ. Code § 3294(c)*) [*see* discussion in *§ 64.22[3][a]*]. In order to justify an award of punitive damages on this basis, the Court noted that plaintiff must establish that the defendant was aware of the probable dangerous consequences of his conduct and that he willfully and deliberately failed to avoid the consequences. The Court held that plaintiff's complaint contained sufficient allegations from which it could reasonably be concluded that defendant consciously disregarded the safety of others.

The factual background of ***G.D. Searle & Co. v. Superior Court*** *(1975) 49 Cal. App. 3d 22, 122 Cal. Rptr. 218* , is discussed in *§ 64.21[3][b]*. In reviewing the allegations of the complaint, the court noted that the phrase a "conscious disregard" has been used to describe the highly culpable state of mind which justifies an exemplary award. The court suggested that conscious disregard of safety was an appropriate description of the animus malus which may justify an exemplary damage award when nondeliberate injury is alleged. Since plaintiff's complaint failed to allege, directly or in equivalent terms, that defendant either intended to injure consumers of its product or acted in conscious disregard of their safety, it failed to plead malice as a ground for exemplary damages.

[b] Driving While Intoxicated as Malicious Act When Driver Disregards Dangerous Consequences

The factual background of ***Taylor v. Superior Court*** *(1979) 24 Cal. 3d 890, 157 Cal. Rptr. 693, 598 P.2d 854* , is discussed in *§ 64.41[3][a]*. The Court concluded that the act of operating a motor vehicle while intoxicated may constitute an act of malice under former Civ. Code § 3294 [*now see Civ. Code § 3294(c)*] if performed under circumstances which disclose a conscious disregard of the probable dangerous consequences and held that plaintiff's complaint alleged a cause of action for punitive damages.

[c] Wanton and Reckless Misconduct as Conscious Disregard of Safety

In ***Nolin v. National Convenience Stores, Inc.*** *(1979) 95 Cal. App. 3d 279, 157 Cal. Rptr. 32* , plaintiff sued for damages for injuries sustained in a slip and fall accident on defendant's premises. One of plaintiff's causes of action requested punitive damages on the basis that defendant's reckless, wanton, and intentional misconduct and its callous and conscious disregard for her safety had caused plaintiff injury. The jury awarded plaintiff punitive damages. On appeal, defendant contended that there was insufficient evidence to support the giving of an instruction on punitive damages to the jury since, as a matter of law, defendant's conduct did not meet the criteria set forth in former Civ. Code § 3294 [*now see Civ. Code § 3294(a)*] of oppression, fraud, or malice. Plaintiff claimed that she fell because of the presence of foreign substances consisting mainly of oil and gasoline near the self-service gasoline pumps on defendant's premises. According to the evidence, defendant was interested in a minimum-expense operation. It employed no maintenance personnel, did not have the necessary equipment for handling oil sold to customers, and operated the store with only one clerk at a time. The employees who observed the danger around the pump area communicated it to

supervisory personnel who did not take any steps to remedy the situation.

Affirming the judgment, the court of appeal noted that the case involved an unintentional tort in which malice was the basis for the exemplary damage award. According to the court, conduct classified only as unintentional carelessness, while it may constitute negligence or even gross negligence will not support an award of punitive damages. However, the court pointed out that in *Donnelly v. Southern Pac. Co. (1941) 18 Cal. 2d 863, 869-870, 118 P.2d 465* , the Court stated that a nonintentional tort can have the characteristics of an intentional tort to the extent of embracing the concept of malice as used in former Civ. Code § 3294 [*now see Civ. Code § 3294(a)*] when the person, with no intent to cause harm intentionally performs an act so unreasonable and dangerous that he knows or should know that it is highly probable that harm will result. Such a tort is most accurately designated as wanton and reckless misconduct. The court stated that *Donnelly's* wanton and reckless misconduct standard for justifying an award of punitive damages in the case of an unintentional tort does not do violence to the requirement of evil motive nor does it authorize an award of punitive damages for recklessness alone. The evil motive for malice is found in an intention to perform an act that the actor knows or should know will very probably cause harm. The court noted that the *Donnelly* concept of wanton and reckless misconduct has also been described as a defendant's conduct which constitutes a conscious disregard of the plaintiff's rights or a conscious disregard of the safety of others. According to the court, all of these phrases used to define malice for an unintentional tort have the same meaning in announcing a rule of law that authorizes an award of punitive damages for a nonintentional tort if defendant's conduct that causes injury is of such severe or shocking character that it warrants the same treatment as that accorded to willful misconduct.

The court concluded that the evidence was amply sufficient to justify the jury's determination of malice and an award of punitive damages, since it showed that a dangerous condition existed around defendant's gas pumps causing a peril to both customers and employees of fire and slipping and falling. Defendant's established inattention to the danger showed a complete lack of concern regarding the harmful potential of the probability and likelihood of injury.

NOTE:

Whether wanton and reckless conduct will support an award of punitive damages is still an unresolved issue. First, the 1987 amendments to *Civ. Code § 3294(c)(1)*, in which the definition of malice was changed from simply "conscious disregard" to "willful and conscious disregard," must be considered. Further, the cases construing the prior definition are not fully in harmony.

In ***G.D. Searle & Co. v. Superior Court*** *(1975) 49 Cal. App. 3d 22, 31, 122 Cal. Rptr. 218* , the court surveyed the numerous terms used to describe malice in the case law, and noted that in dictum the Court in *Donnelly v. Southern Pac. Co. (1941) 18 Cal. 2d 863, 869-870, 118 P.2d 465* , described wanton and reckless misconduct as synonymous with the malice justifying an exemplary damage award. The court in *Searle* stated that the term "reckless disregard" and "reckless misconduct," used in isolation, distort the spirit of *Civ. Code § 3294*. The *Searle* court did not indicate whether combining the term "reckless misconduct" with the term "wanton" adequately describes the state of mind justifying exemplary damages. However, in formulating a new phrase, "conscious disregard of safety," [*now see Civ. Code § 3294(c)(1)*] as an appropriate description of the malice which may justify punitive damages when nondeliberate injury is alleged, it impliedly rejects the *Donnelly* Court's term "wanton and reckless misconduct" as a sufficient description of malice.

NOTE:

In *Peterson v. Superior Court (1982) 31 Cal. 3d 147, 158, 181 Cal. Rptr. 784, 642 P.2d 1305* , the California Supreme Court cited *Nolin* for its language that nonintentional conduct may support an award of punitive damages if the defendant intentionally performs an act for which he or she knows *or should know* that it is highly probable that harm will result (emphasis added). *Subsequently, in Bell v. Sharp Cabrillo Hosp. (1989) 212 Cal. App. 3d 1034, 260 Cal. Rptr. 886* , the court of appeal noted a conflict between this language in *Peterson* and *Nolin* and the language in other cases, first used in *Taylor v. Superior Court (1979) 24 Cal. 3d 890, 895-896, 157 Cal. Rptr. 693, 598 P.2d 854* [*see § 64.41[3][a*]],

that conscious disregard requires that the defendant be aware of the probable dangerous consequences of the conduct and willfully and deliberately fail to avoid those consequences [*see also* *Hasson v. Ford Motor Co. (1982) 32 Cal. 3d 388, 402, 185 Cal. Rptr. 654, 650 P.2d 1171* ; *Penner v. Falk (1984) 153 Cal. App. 3d 858, 867, 200 Cal. Rptr. 661]* . The standard enunciated in the *Taylor* line was labeled "subjective awareness," or a requirement that the defendant actually know of the risk involved. The standard of *Peterson* and *Nolin* was labeled as "constructive awareness," it being sufficient if the defendant should have known of the risk associated with wanton and reckless misconduct [*Bell v. Sharp Cabrillo Hosp. (1989) 212 Cal. App. 3d 1034, 1043-1046, 260 Cal. Rptr. 886]* . The court found in unnecessary to resolve the apparent conflict, finding on the facts of the case that allegations that a hospital acted in conscious disregard of a patient's safety by granting staff privileges to a negligent surgeon to be insufficient under either standard [*Bell v. Sharp Cabrillo Hosp. (1989) 212 Cal. App. 3d 1034, 1046-1048, 260 Cal. Rptr. 886]* .

There is one path by which, perhaps, subjective and constructive awareness may be harmonized. Under the subjective-awareness standard, malice and oppression based on conscious disregard may be inferred from the circumstances of the defendant's conduct [*see* J.R. Norton Co. v. General Teamsters, Warehousemen & Helpers Union, Local 890 *(1989) 208 Cal. App. 3d 430, 444, 256 Cal. Rptr. 246]* . If the defendant's conduct is so wanton and reckless as to suggest the application of the constructive-awareness standard, it might be inferred from the nature of the conduct that the defendant actually knew of the risk involved.

This approach finds support in the facts and circumstances of *Taylor*. In holding that an intoxicated person acts in conscious disregard of the rights and safety of others by operating a motor vehicle while in such a state, the Court was not concerned with whether the driver was actually aware (as required by the subjective-awareness standard) or merely should have been aware (as is sufficient under the constructive-awareness standard) of the risk. Rather, the court viewed it as a "commonly understood risk" [*Taylor v. Superior Court (1979) 24 Cal. 3d 890, 895-897, 157 Cal. Rptr. 693, 598 P.2d 854]* . In other words, it was applying common sense to infer actual knowledge from the circumstances of the case. Thus the constructive-awareness standard might be viewed as an extension of the subjective-awareness standard, that one may be presumed to have actual knowledge of the probable injurious consequences of wanton and reckless conduct.

[d] Disregard of Public Safety by Manufacturer of Defectively Designed Product as Malice

Grimshaw v. Ford Motor Co. *(1981) 119 Cal. App. 3d 757, 174 Cal. Rptr. 348* , arose out of an accident in which the driver of an automobile (the "Pinto") manufactured by defendant was killed, and a passenger was seriously injured. The passenger and the heirs of the driver brought an action against defendant manufacturer based on a theory of strict liability for design defect. The driver and passenger were injured when the automobile caught fire after being hit from behind. The evidence at trial showed that defendant's top management had been aware, by conducting safety engineering tests, that several design features of the Pinto would expose consumers to serious injury or death in 20 or 30 mile-per-hour collisions. Defendant's top management was also aware of the ease and low cost with which improvements in the design could be made, but on the basis of a cost-benefit analysis, and because the Pinto was a rush project, defendant made a conscious decision to defer improvements on the defective design.

The trial court held that since plaintiff heirs had brought an action for wrongful death, they could not recover punitive damages. Plaintiff passenger, however, was awarded punitive damages of $125 million, following a jury trial. On defendant's motion for new trial, the trial court reduced the punitive damages award to $3.5 million, with plaintiff's consent, as a condition of denying the motion. Defendant appealed from the judgment and from the trial court's denial of its motion for judgment notwithstanding the verdict.

The court of appeal affirmed the judgment. Defendant argued that punitive damages are inappropriate to an unintentional tort such as strict products liability because "malice," as used in *Civ. Code § 3294*, requires an intent to injure the person harmed. The court rejected defendant's argument and held that malice also includes a conscious disregard of the probability that the actor's conduct will result in injury to others (*119 Cal. App. 3d 757, 808)* . The court stated that this definition of malice includes conduct showing callous and conscious disregard of public safety by the manufacturer of a defectively designed, mass-produced product. The court held that punitive damages are particularly appropriate in such cases because they are the most effective remedy for consumer protection against defective products (*119 Cal. App. 3d 757, 810)* . The court also held that there was substantial evidence in the instant case to support a finding of malice and corporate responsibility for malicious conduct (*119 Cal. App. 3d 757, 812, 814)* .

[4] Additional Authorities

[a] Willful and Conscious Disregard of Safety as Malice

In *Penner v. Falk (1984) 153 Cal. App. 3d 858, 200 Cal. Rptr. 661* , a tenant brought a negligence action against his landlords for personal injuries sustained in a common area of the premises. The court of appeal reversed a judgment dismissing his complaint after a demurrer was sustained without leave to amend, holding, inter alia, that the complaint pleaded facts sufficient to support an award of punitive damages for malice. The court cited *Civ. Code § 3294(c)(1)* as defining malice to include conscious disregard for the safety of others, and stated that, to support an award on this basis, a plaintiff must establish that the defendant was aware of the probable dangerous consequences of his or her conduct, yet willfully and deliberately failed to avoid those consequences. In the case at bench, this standard was sufficiently met by alleging that the landlords knew of the dangerous condition of the premises for two years, were capable of taking curative measures, yet failed to do so (*153 Cal. App. 3d 858, 867)* .

In *Hilliard v. A.H. Robins Co. (1983) 148 Cal. App. 3d 374, 196 Cal. Rptr. 117* , plaintiff sought an award of punitive damages from defendant based on her claim that in manufacturing and marketing an intrauterine device, defendant had acted with conscious disregard of the safety of users of the device by inadequately testing the device, and by failing to make the devices visible under X rays. The trial court directed a verdict for defendant on the punitive damages claim after the jury returned a verdict for plaintiff in the compensatory damage part of the bifurcated trial. The court of appeal reversed, holding that the jury could have concluded from plaintiff's substantial, competent, admissible, and relevant evidence that all of the factual elements necessary for punitive damages were proved to their satisfaction by a preponderance of the evidence: that defendant acted with conscious disregard for the rights or safety of others, that it was aware of the probable dangerous consequences of its conduct, and that defendant willfully and deliberately failed to avoid these consequences (*148 Cal. App. 3d 374, 398)* .

Seimon v. Southern Pac. Transp. Co. (1977) 67 Cal. App. 3d 600, 136 Cal. Rptr. 787 , was an action for damages for personal injuries to a truck driver received when his truck was struck by a train at defendant's railroad crossing. At the conclusion of plaintiff's case, the trial court granted defendant's motion for nonsuit as to the willful misconduct count. On appeal, plaintiff charged that it was error for the trial court to grant a nonsuit so as to remove the issue of punitive damages from the jury's consideration.

The court of appeal noted that animus malus or evil motive is the central element of the malice which justifies an award of punitive damages. Using the *Searle* court's description of conscious disregard of safety as an appropriate description of the animus malus requisite to a punitive damages award, the court examined plaintiff's allegation that defendant failed to provide adequate crossing protection. It noted that the record was filled with evidence illustrating the peculiarly dangerous character of the railroad crossing at which plaintiff was injured. The train traffic was light but the automobile traffic was much heavier. The crossing in the direction from which plaintiff approached was a blind one with two buildings on either side of the street but there were no visual warnings of oncoming trains. This danger was increased by the 59 degree angle at which the tracks intersected the street, and by the somewhat confusing street pattern at the

crossing. The crossing angle made it more difficult for the motorist to check for train traffic and to judge the speed of approaching trains and the street pattern at the crossing tended to divert the motorist's attention from the tracks. Finally, the buildings before the crossing reduced both audible and visual signals from oncoming trains. Prior to plaintiff's accident, two other motorists approaching from the same direction as plaintiff had been hit by trains at the crossing. The court noted that plaintiff also established that defendant for some time had been aware of the highly dangerous nature of the crossing but, in spite of this knowledge, had failed to take any corrective action.

The court concluded that this evidence added up to more than benign neglect by defendant, and that the jury could have decided from this evidence that defendant had displayed a conscious and callous indifference to, or disregard of, probable harm to motorists at the crossing. The court held that it could not say, as a matter of law, that there was such a paucity of evidence on the issue of malice as to preclude the jury from considering the propriety of an award of punitive damages against defendant. Consequently, the court reversed the trial court's decision and concluded that a retrial should be had on the issue of punitive damages.

[b] Driving While Intoxicated as Malicious Act When Driver Disregards Dangerous Consequences

Peterson v. Superior Court (1982) 31 Cal. 3d 147, 181 Cal. Rptr. 784, 642 P.2d 1305 , was a proceeding for a writ of mandate commanding the trial court to grant petitioner/plaintiff's motion for leave to file an amended complaint to allege facts justifying an award of punitive damages in an action by the passenger of a vehicle against its drunk driver. In granting the writ, the Supreme Court held that the rule establishing that punitive damages are recoverable from an intoxicated driver, set forth in *Taylor v. Superior Court (1979) 24 Cal. 3d 890, 892, 157 Cal. Rptr. 693, 598 P.2d 854* [*see § 64.41[3][b]*], applied retroactively to accidents that occurred and complaints that were filed prior to the judicial decision establishing the rule, and disapproved, to the extent of any inconsistency, *Mau v. Superior Court (1980) 101 Cal. App. 3d 875, 877-882, 161 Cal. Rptr. 895* .

The proposed amended complaint alleged that after consuming alcohol, defendant drove with plaintiff in the vehicle at speeds in excess of 100 miles per hour, that plaintiff objected to the high speed and demanded that defendant properly control the vehicle, that the parties stopped at a restaurant where defendant consumed additional alcoholic beverages, that they returned to the car and that defendant then drove at a speed well in excess of 75 miles per hour, lost control of the vehicle, and injured plaintiff, and that defendant drove the vehicle with knowledge that probable serious injury to other persons would result and in conscious disregard of the safety of plaintiff (*31 Cal. 3d 147, 162)* . The Court stated that the gravamen of the proposed complaint was that defendant became intoxicated and thereafter drove a car while in that condition, despite his knowledge of the safety hazard he created thereby, and that the proposed complaint stated facts sufficient to support an award of punitive damages (*31 Cal. 3d 147, 163)* .

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6-64 California Points & Authorities § 64.42

§ 64.42 Opposing Demurrer to Complaint for Exemplary Damages [Civ. Code § 3294] in Tort Action--Allegation Sufficient to Support Exemplary Damages Claim Against Corporation

[1] FORM

[*Caption. See § 64.40.*]

AN ALLEGATION THAT A PERSON ACTED WITH THE PERMISSION AND CONSENT OF DEFENDANT CORPORATION IS A SUFFICIENT ALLEGATION, FOR THE PURPOSE OF MEETING A GENERAL DEMURRER, THAT DEFENDANT HAD AUTHORIZED ITS AGENT'S ACTS.

Allegation That Person Acted With Corporation's Permission and Consent as Sufficient for Exemplary Damage Purposes. For the purpose of meeting a general demurrer, an allegation that a person acted with the permission and consent of defendant is a sufficient allegation that defendant authorized its agent's acts (*O'Hara v. Western Seven Trees Corp. (1977) 75 Cal. App. 3d 798, 806, 142 Cal. Rptr. 487*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a demurrer to a complaint for exemplary damages in a tort action where defendant claims that plaintiff has not alleged sufficiently the grounds for defendant employer being held liable for its agent's acts but plaintiff alleged that a defendant had authorized its agent's acts.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, these points and authorities may be used in opposition to a demurrer supported by the points and *authorities in § 64.24*.

[3] Discussion of Authorities

[a] Allegation That Person Acted With Corporation's Permission and Consent as Sufficient for Exemplary Damage Purposes

The factual background of ***O'Hara v. Western Seven Trees Corp.*** *(1977) 75 Cal. App. 3d 798, 142 Cal. Rptr. 487* , is discussed in *§ 64.22[3][a]*. On appeal, the corporate defendants contended that no facts were alleged to support punitive damages against them. However, plaintiff alleged that the misrepresentations were made by persons who acted with the permission and consent of all the defendants. According to the court of appeal, for the purpose of meeting a general demurrer, this was a sufficient allegation that the corporations had authorized their agent's acts. Since a corporation is liable for punitive damages when it authorizes the wrongful act, the court reversed the trial court's judgment sustaining defendant's general demurrer.

NOTE:

O'Hara was decided before the enactment of *Civ. Code § 3294(c)* in 1980. However, one of the bases of an employer's liability for punitive damages for acts of an employee of the employer is that the employer authorized or ratified the wrongful conduct for which the damages are awarded. Because *O'Hara* gives an example of allegations which show authorization, it is still good authority for the point in this form.

California Points & Authorities

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Volume 6 Chapters 60-69 COSTS---to---DECLARATORY RELIEF
CHAPTER 64 DAMAGES: TORT
PART II. FORMS
B. Opposing Demurrer to Complaint

6-64 California Points & Authorities § 64.43

§ 64.43 Opposing Demurrer to Complaint for Exemplary Damages [Civ. Code § 3294] in Tort Action--Exemplary Damages Award Can Be Based on Conduct in Employment Capacity by Employee Having Discretion to Make Important Decisions as Acting in Managerial Capacity

[1] FORM

[*Caption. See § 64.40.*]

DEFENDANT EMPLOYER'S DEMURRER SHOULD BE OVERRULED BECAUSE EXEMPLARY DAMAGES CAN BE ASSESSED AGAINST AN EMPLOYER BASED ON CONDUCT BY AN EMPLOYEE WHO HAS SUFFICIENT DISCRETION TO MAKE DECISIONS THAT WILL DETERMINE EMPLOYER'S POLICY, AS LONG AS THE EMPLOYEE WAS ACTING IN EMPLOYMENT CAPACITY WHEN CONDUCT OCCURRED.

A. Conduct in Employment Capacity Supports Award. In performing, ratifying, or approving malicious conduct, the conduct of one acting in a managerial capacity, while acting as the organization's representative, can be the basis for an award of exemplary damages against the employer (*College Hosp., Inc. v. Superior Court (1994) 8 Cal. 4th 704, 723, 34 Cal. Rptr. 2d 898, 882 P.2d 894*).

B. Employee With Decision Making Discretion as Acting in Managerial Capacity. The determination of whether or not an employee acts in a managerial capacity does not hinge necessarily on his or her level in the hierarchy of the employer's organization, but rather on the degree of discretion the employee possesses in making decisions that will ultimately determine the employer's policy (Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 822-823, 157 Cal. Rptr. 482, 598 P.2d 452).

[*Optional*] **C. Policymaking Authority Defines Managing Agent.** A corporate employer may be liable for punitive damages under *Civil Code Section 3294(b)* based on the conduct of a managing agent, defined as a corporate employee who exercises substantial independent authority and judgment in his or her corporate decisionmaking so that the decisions ultimately determine corporate policy (*White v. Ultramar, Inc. (1999) 21 Cal. 4th 563, 566-567, 88 Cal. Rptr. 2d 19, 981 P.2d 944* ; *see also Kelly-Zurian v. Wohl Shoe Co. (1994) 22 Cal. App. 4th 397, 421-422, 27 Cal. Rptr. 2d 457*).

Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted by a plaintiff in opposition to a demurrer to a complaint seeking punitive damages in a tort action, when the defendant was the employer of the tortfeasor and claims it is not liable for punitive damages based on the employee's conduct. The defendant's contention opposed by this form is that the tortfeasor was not in a position exercising policymaking authority, and therefore is not a person whose conduct can be the basis of a punitive damages award against the employer.

Paragraph A argues that the employee's conduct in ratifying, performing, or approving the alleged malicious conduct was done in his or capacity as the employer's representative, and so may be the basis for a punitive damages award [*see College Hosp., Inc. v. Superior Court (1994) 8 Cal. 4th 704, 723, 34 Cal. Rptr. 2d 898, 882 P.2d 894]* . Paragraph B may be used to argue that the tortfeasor acted in a "managerial capacity" and that therefore the employer can be liable for punitive damages based on the tortfeasor's conduct.

Optional Paragraph C may be used if the employer is a corporation, in which case plaintiff must establish that the tortfeasor (or the person who hired the tortfeasor with advance knowledge of the employee's unfitness, and with conscious disregard of the rights and safety of others, or who authorized or ratified the wrongful conduct) was an officer, director, or managing agent of the corporation [*Civ. Code § 3294(b)*].

Because of the difference between "managerial capacity" and "managing agent," counsel should be sure to use the latter phrase when the defendant is a corporation [*compare* Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 822-823, 157 Cal. Rptr. 482, 598 P.2d 452 (under law before 1980 amendment to *Civ. Code § 3294*, employer could be liable based on conduct of employee who had authority to decide disposition of insurance claims without supervision); *with White v. Ultramar, Inc. (1999) 21 Cal. 4th 563, 566-567, 88 Cal. Rptr. 2d 19, 981 P.2d 944* (under 1980 amendment to *Civ. Code § 3294(b)*, corporate employee who exercises substantial independent authority and judgment in his or her corporate decisionmaking so that decisions ultimately determine corporate policy is "managing agent" whose actions may support corporation's liability for punitive damages)].

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts supporting the conclusion that the employer's liability is based on conduct by a person who had the authority to make policy for the defendant employer, at least to an extent sufficient to survive a demurrer.

[c] Opposing Points and Authorities

In an appropriate case, this form of points and authorities may be used in opposition to a demurrer supported by the points and *authorities in § 64.24*.

[3] Discussion of Authorities

[a] Conduct in Employment Capacity Supports Award

In ***College Hosp., Inc. v. Superior Court*** *(1994) 8 Cal. 4th 704, 34 Cal. Rptr. 2d 898, 882 P.2d 894* , plaintiff's complaint had alleged that College Hospital (hospital) was liable for injuries resulting from plaintiff's seduction by a member of the hospital staff while plaintiff was a patient. Plaintiff moved to amend the complaint (pursuant to *Code Civ. Proc. § 425.13(a)*) to allege a claim for punitive damages. The trial court permitted the amendment, and hospital petitioned for a writ of mandate to set aside that ruling. The court of appeal denied the writ, primarily on the ground that the motion under § 425.13(a) required only a prima facie showing regarding the punitive damages claim, without any weighing of the evidence. The Supreme Court granted review, and reversed.

The Court agreed with plaintiff's contention regarding the requisite showing under § 425.13(a), but held that plaintiff had not made that showing based on the allegations of seduction by a member of the hospital staff. The Court held that, in order to hold an employer liable for punitive damages based on conduct of an employee, that conduct (either performing, approving, or ratifying the malicious conduct) must have been as the organization's representative, not in some other capacity (*8 Cal. 4th 704, 723)* . Because plaintiff could not allege that the staff member's conduct was within the scope of his employment, hospital could not be liable for punitive damages even if he did qualify as a "managing agent" under *Civ. Code § 3294(b)* (*8 Cal. 4th 704, 724)* .

[b] Employee With Decision-Making Discretion as Acting in Managerial Capacity

In **Egan v. Mutual of Omaha Ins. Co.** (1979) 24 Cal. 3d 809, 157 Cal. Rptr. 482, 598 P.2d 452 , plaintiff sued an insurance company and two of its employees, Segal and McEachen for compensatory and punitive damages for breach of a health and disability insurance policy. The policy provided for lifetime benefits if plaintiff became totally disabled as a result of an accidental injury or sickness sufficiently severe to cause confinement to insured's residence. Benefits for a nonconfining illness were payable for three months only. After a work-related injury, plaintiff received payments under the policy for a three-month period. Later plaintiff filed a supplemental claim stating he was unable to return to work. McEachen, an agency claims manager, reviewed plaintiff's records and later visited plaintiff at home. McEachen testified he merely discussed contradictions in the claim form but plaintiff testified that McEachen informed him no further benefits were due because he was not disabled but merely unable to find work. Plaintiff submitted another claim to defendant insurance agency after surgery on his back. The physician's portion of the claim form included an estimate by the surgeon that plaintiff might be able to return to work in three to six months. The claim was assigned to defendant Segal. Segal never attempted to contact plaintiff's physicians although such efforts would ordinarily have been made by a claim adjuster. Based on Segal's review of medical records, plaintiff's condition was reclassified from injury to nonconfining illness. Segal visited plaintiff telling him he was suffering from an illness not an injury and giving him a check for the three months maximum disability payments for a nonconfining illness. Segal testified that he acted at the direction of a higher authority although he could not recall who directed him and the defendant insurance company's files contained no written directive to him. The trial court in directing a verdict against defendants, ruled as a matter of law that defendants' failure to have plaintiff examined by a doctor of their choice or to consult with plaintiff's treating physicians violated the covenant of good faith and fair dealing. The jury awarded plaintiff general and punitive damages against all three defendants. On appeal, defendant insurance company asserted that the actions of McEachen and Segal could not be imputed to the company for the purpose of exemplary damages since neither could be considered managerial employees because neither was involved in high-level policy making. The Supreme Court stated that the determination of whether employees act in a managerial capacity does not hinge necessarily on their level in the corporate hierarchy. According to the Court, the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy. The Court stated that when employees dispose of insureds' claims with little, if any, supervision, they possess sufficient discretion for the law to impute their actions concerning those claims to the corporation. The Court held that the authority vested in McEachen and Segal was sufficient to justify the imposition of punitive damages against the insurance company. The record demonstrated that they exercised broad discretion in the disposition of plaintiff's claim and the authority exercised by McEachen and Segal necessarily resulted in the ad hoc formulation of policy. The Court also noted that it was concerned with an insurance

company dealing with disability insurance, not just any corporation, and that to plaintiff, the claims representatives' actions were actions of defendant. Defendant insurance company should not be allowed to insulate itself from liability by giving an employee a nonmanagerial title and relegating to him crucial policy decisions [quoting concurring and dissenting opinion in prior case]. The Supreme Court reversed as to the individual defendants since they were the insurance company's agents and not parties to the insurance contract and hence not subject to the implied covenant of good faith and fair dealing. The Court affirmed as to the compensatory damage award against the company but reversed as to the punitive damages award on the ground that it was excessive as a matter of law (*24 Cal. 3d 809, 822-823)* .

NOTE:

Under *Civ. Code § 3294(b)*, enacted by 1980 legislation, an employer cannot be liable for punitive damages unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice [*Civ. Code § 3294(b)*]. In addition, with respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification, or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation [*Civ. Code § 3294(b)*]. These statutory limitations should not affect the viability of *Egan* in cases involving non-corporate employers, but in cases involving corporate employers the use of the term "managing agent" is now governed by the standard established by the California Supreme Court in 1999 in *White v. Ultramar, Inc. (1999) 21 Cal. 4th 563, 566-567, 88 Cal. Rptr. 2d 19, 981 P.2d 944* [*see § 64.43[3][c*]].

[c] Policymaking Authority Defines Managing Agent

In ***White v. Ultramar, Inc.*** *(1999) 21 Cal. 4th 563, 88 Cal. Rptr. 2d 19, 981 P.2d 944* , the plaintiff, the former employee of a convenience store, brought an action for wrongful termination against his former corporate employer based on the actions of the supervisory employee who was primarily responsible for his termination. The defendant argued that the plaintiff was terminated for taking soda in a store cup without paying for it, in violation of company policy, while plaintiff alleged that he was terminated in retaliation for testifying at the unemployment hearing of another former employee. At trial, the jury found for the plaintiff and awarded compensatory and punitive damages, and the trial court added an award of attorney's fees. The court of appeal reversed the award of attorney's fees, but otherwise affirmed. The court of appeal held that the punitive damages award was appropriate under *Civ. Code § 3294(b)*, concluding that the ability to hire and fire employees renders a supervisory employee a "managing agent" under that statute. The Supreme Court granted review limited to the question of the entitlement to punitive damages.

The Supreme Court affirmed the award of punitive damages, but disagreed with the court of appeal's conclusion that the ability to hire and fire employees is sufficient to render a supervisory employee a "managing agent." Instead, the Supreme Court held that the "managing agent" of a corporation for purposes of establishing an entitlement to exemplary damages under *Civ. Code § 3294(b)* includes only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy (*21 Cal. 4th 563, 566-567)* . The Court concluded that when the legislature amended *Civ. Code § 3294* in 1980, they intended to limit the liability of corporate employers for punitive damages in that fashion, in accordance with the Supreme Court's construction of the statute as it existed at the time of the amendment. The Court also noted that the legislature placed the term "managing agent" next to the terms "officer" and "director," suggesting that a managing agent must be more than a mere supervisory employee (*21 Cal. 4th 563, 572-573)* . As the Court noted, equating a managing agent with a supervisor would effectively render a corporate employer liable for punitive damages in most employment cases (*21 Cal. 4th 563, 575)* . The Supreme Court then applied the standard to the case before it and held that the supervisory employee who fired the plaintiff was a managing agent, because she had responsibility for managing eight stores and at least 65 employees, which was a significant amount of the employing corporation's business (*21 Cal. 4th 563, 577)* .

In ***Kelly-Zurian v. Wohl Shoe Co.*** *(1994) 22 Cal. App. 4th 397, 27 Cal. Rptr. 2d 457* , plaintiff alleged that she had been sexually harassed by her supervisor, and sought to recover damages both from the supervisor and from his corporate employer. The jury found the supervisor liable and awarded plaintiff $125,000 in compensatory damages, and found that the supervisor had acted with oppression and malice, but exonerated the employer. The trial court granted plaintiff's motion for judgment notwithstanding the verdict against the employer for compensatory damages, but denied her motion for a new trial against the employer on the issue of punitive damages. All parties appealed, and the court of appeal affirmed the trial court's denial of the new trial motion concerning punitive damages against the employer (*22 Cal. App. 4th 397, 422)* .

The court of appeal noted that the trial court had mistakenly believed that authorization or ratification was required before punitive damages could be awarded against a corporation, even if the wrongful conduct was by an officer, director, or managing agent (*22 Cal. App. 4th 397, 420-421)* . Although this is not true--*Civ. Code § 3294(b)* does not require additional authorization or ratification in such a situation--the court held that there was no evidence that could have been the basis for a jury finding that the supervisor was a managing agent of the employer (*22 Cal. App. 4th 397, 421)* . The evidence that the supervisor was the highest-ranking employee in southern California, and had the power to control plaintiff's employment with the power to fire her, was held insufficient to establish that the supervisor was a managing agent. The court characterized that evidence as merely establishing his status as supervisor. Instead, the court relied on the evidence that the supervisor could not change or establish corporate policy in southern California to conclude that he was not a "managing agent," and therefore that his conduct could not be the basis of a punitive damages award against the corporate employer (*22 Cal. App. 4th 397, 421-422)* .

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B. Opposing Demurrer to Complaint

6-64 California Points & Authorities § 64.44

§ 64.44 Opposing Demurrer to Complaint for Damages in Tort Action--Damages for Loss of Consortium Available

[1] FORM

[*Caption. See § 64.40.*]

PLAINTIFF'S COMPLAINT FOR DAMAGES FOR LOSS OF CONSORTIUM SURVIVES A DEMURRER BASED ON LACK OF STANDING BECAUSE PLAINTIFF, AS THE SPOUSE OF _____ [*name*], THE PERSON WHOSE COMFORT, SUPPORT, AND SERVICES PLAINTIFF HAS BEEN DENIED, IS THE ONLY PERSON ENTITLED TO BRING SUCH AN ACTION.

A. Loss of Consortium Is Actionable. A married person has a cause of action for loss of consortium caused by a negligent or intentional injury to the other spouse by a third party. "Consortium" includes not only loss of support or services, but also such elements as love, companionship, affection, society, sexual relations, solace, and more (*Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal. 3d 382, 405, 408, 115 Cal. Rptr. 765, 525 P.2d 669*).

[*Optional*] **B. Damages for Loss Sustained After Anticipated Death of Spouse Recoverable.** A plaintiff spouse may recover damages for lost companionship and affection resulting from the anticipated premature death of the other spouse, if that premature death is sufficiently certain to occur and is caused by the injuries sustained due to the defendant's wrongful conduct (*Boeken v. Philip Morris USA, Inc. (2010) 48 Cal. 4th 788, 800, 108 Cal. Rptr. 3d 806, 230 P.3d 342*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a demurrer to a complaint when the defendant claims that the plaintiff's complaint does not state a cause of action for damages for loss of consortium because the plaintiff was not entitled to bring such an action, but the complaint alleges that the plaintiff was married to the person whose society and comfort the plaintiff has been deprived of.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 64.25*.

[3] Discussion of Authorities

[a] Loss of Consortium Is Actionable

In ***Rodriguez v. Bethlehem Steel Corp.*** *(1974) 12 Cal. 3d 382, 115 Cal. Rptr. 765, 525 P.2d 669* , plaintiffs, husband and wife, sued defendant, husband's employer, for damages. Plaintiff wife's cause of action was loss of consortium. As a result of an accident he sustained at work, husband was totally paralyzed in both legs and in his body below the mid-point of the chest, and partially paralyzed in one of his arms. Because he needed assistance in every activity of daily living, wife gave up her job to care for him around the clock. Plaintiff wife alleged that she was under physical and psychological strain, and that both their lives had been ruined by the accident, in that the injuries were permanent, and the couple, in their early twenties, were unable to have children. Defendant demurred to plaintiff wife's cause of action, on the ground that no recovery for any such loss is permitted in California. The trial court severed plaintiff wife's cause of action, sustained the demurrer, and dismissed that cause of action. The court of appeal affirmed the dismissal. Plaintiff wife appealed.

The California Supreme Court reversed. The Court overruled previous case law and held that each spouse has a cause of action for loss of consortium caused by a negligent or intentional injury to the other spouse by a third party (*12 Cal. 3d 382, 408)* . In its lengthy and compassionate analysis the Court explained that although loss of consortium may have physical consequences, it is principally a form of mental suffering (*12 Cal. 3d 382, 401)* . The concept of consortium includes not only loss of support or services, but also such elements as love, companionship, affection, society, sexual relations, solace, and more. The Court explained that with regard to each of these elements, the interest sought to be protected is personal to plaintiff wife, so that to compensate her for damage to that interest cannot result in double recovery if plaintiff husband is awarded damages for his own losses relating to those elements (*12 Cal. 3d 382, 405)* .

[b] Damages for Loss Sustained After Anticipated Death of Spouse Recoverable

In ***Boeken v. Philip Morris USA, Inc.*** *(2010) 48 Cal. 4th 788, 108 Cal. Rptr. 3d 806, 230 P.3d 342* , plaintiff was the widow of a man who died from lung cancer in 2002 after smoking cigarettes since 1957. In 2000, plaintiff's husband sued a tobacco company for wrongfully causing his cancer and won a substantial damages award, although he died while an appeal of that award was pending. Also in 2000, plaintiff filed a separate action against the tobacco company for loss of consortium in which she sought damages for the "permanent deprivation" of her husband's loss of companionship and affection. About four months after filing, for reasons not disclosed in the record, plaintiff dismissed that action with prejudice. After her husband's death, plaintiff filed a wrongful death action against the tobacco company, again seeking compensation for the loss of her husband's companionship and affection. The trial court sustained defendant's demurrer on the grounds that plaintiff's wrongful death claim was barred by the doctrine of res judicata because plaintiff's previous loss of consortium action had involved the same primary right. The court of appeal

affirmed, concluding that because plaintiff's potential damages in the loss of consortium included future loss of companionship and affection between the time of her husband's death and the time when he would have died of natural causes, and these were the same damages plaintiff sought in the wrongful death action, the dismissal with prejudice of the loss of consortium action constituted a res judicata that precluded plaintiff from relitigating the same injury. Plaintiff appealed.

The California Supreme Court affirmed. The Court concluded that because the complaint in the loss of consortium action alleged that defendant's wrongful conduct "permanently deprived" plaintiff of her husband's companionship and affection, the primary right not to be wrongfully deprived of spousal companionship and affection, and the corresponding duty not to wrongfully deprive a person of such, were the same as in plaintiff's wrongful death action. Given that plaintiff had dismissed the earlier action with prejudice, plaintiff was precluded from relitigating the same cause of action under the wrongful death statute (*48 Cal. 4th 788, 798-799)* . The Court also rejected plaintiff's argument that she could not have recovered damages in the loss of consortium action for loss of companionship and affection suffered after her husband's death. Noting the general rule that tort damages may include prospective damages that are sufficiently certain to occur, the Court held that a plaintiff spouse may recover damages for lost companionship and affection resulting from the anticipated premature death of the other spouse, if that premature death is sufficiently certain to occur and is caused by the injuries sustained due to the defendant's wrongful conduct. These prospective damages for the period after the injured spouse's death are to be based on the life expectancy that the injured spouse would have had if the injury had never occurred (*48 Cal. 4th 788, 800)* . The Court noted that plaintiff had specifically alleged in the loss of consortium action that she would be deprived of her husband's services and companionship in the future and that she had been "permanently deprived" of his consortium, presumably on the basis of the incurable nature of her husband's disease and the great likelihood of his premature death. These allegations were sufficient to bar plaintiff from seeking post-death loss of consortium damages in a subsequent wrongful death action (*48 Cal. 4th 788, 800-801)* .

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[Reserved]

§§ 64.45[Reserved]

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C. Supporting Motion to Strike

6-64 California Points & Authorities § 64.60

§ 64.60 Supporting Motion to Strike [Code Civ. Proc. §§ 435-437] Exemplary Damage [Civ. Code § 3294(a)] Allegation Exemplary Damages Not Available Under Market Share Theory of Liability

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN SUPPORT OF MOTION TO STRIKE EX-
vs.	)	EMPLARY DAMAGE ALLEGATION
_____ [*name*],	)	[*Code Civ. Proc. §§ 435-437*]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE EXEMPLARY DAMAGE ALLEGATION CONTAINED IN THE _____ [*specify pleading, e.g.,* COMPLAINT] SHOULD BE STRICKEN BECAUSE THE SOLE BASIS FOR THE ALLEGED LIABILITY OF _____ [*name*], DEFENDANT, IS HIS/HER/ITS PARTICIPATION IN THE MARKET AND EXEMPLARY DAMAGES ARE NOT AVAILABLE UNDER THE MARKET SHARE THEORY OF LIABILITY.

A. Improperly Drawn or Irrelevant Matter Subject to Motion to Strike. The court may, on a motion to strike pursuant to *Section 435 of the Code of Civil Procedure* (statutory authority for motion to strike) or at any time in its discretion, strike any pleading or part thereof not drawn or filed in conformity with state law, or strike out any irrelevant false, or improper matter inserted in a pleading (*Code Civ. Proc. § 436*; *see also Code Civ. Proc. §§ 435* (grounds for motion), 437 (statement of grounds for motion)).

B. Exemplary Damages Not Available When Liability Based Solely on Participation in Market. Exemplary damages cannot be awarded in a case in which liability is based solely on the defendant's participation in the market (*Magallanes v. Superior Court (1985) 167 Cal. App. 3d 878, 884-890, 213 Cal. Rptr. 547*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion to strike exemplary damage allegations in a case involving liability based solely on the defendant's participation in the market.

Counsel should insert facts and arguments into this form and any form that is used in combination with it to show the relationship between the facts of the case and the points of law stated. For example, counsel might include facts highlighting plaintiff's inability to pinpoint defendant as the manufacturer of the DES which her mother ingested, necessarily basing any liability of defendant solely on the participation in the market theory.

[b] Related Pleading and Practice Forms

For forms and discussion relating to motions to strike, see California Forms of Pleading and Practice, Ch. 375, *Motions to Strike* (Matthew Bender). For forms and discussion relating to products liability generally, see California Forms of Pleading and Practice, Ch. 460, *Products Liability* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities supporting and opposing a motion to strike, see Ch. 160, *Motions to Strike* . For a memorandum of points and authorities supporting liability based on participation in the market, see Ch. 165, *Negligence* .

[3] Discussion of Authorities

[a] Exemplary Damages Not Available When Liability Based Solely on Participation in Market

In ***Magallanes v. Superior Court*** *(1985) 167 Cal. App. 3d 878, 213 Cal. Rptr. 547* , plaintiff, suffering from cancer, brought an action to recover damages for injuries allegedly sustained by reason of her mother's ingestion of the drug diethylstilbestrol (DES) while plaintiff was in utero. Defendants were the alleged manufacturers and distributors of a substantial share of the DES available to plaintiff's mother. In addition to compensatory damages, plaintiff sought exemplary damages, alleging defendants acted with conscious disregard of the rights and safety of the general public. The trial court granted defendants' motions to strike the exemplary damage allegations. It granted plaintiff leave to

move to amend to allege exemplary damages and suggested further discovery. After plaintiff's subsequent motion for reconsideration was heard and denied, she petitioned the court of appeal for writ of mandate to compel the trial court to vacate its order granting the motions to strike and to enter a new order denying the motions to strike.

After issuing an alternative writ of mandate, the court of appeal discharged it and denied the petition for peremptory writ of mandate. Plaintiff based defendants' liability on the market share theory articulated in *Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 163 Cal. Rptr. 132, 607 P.2d 924* . Under that theory, if plaintiff joins in the action the manufacturers of a substantial share of the DES that her mother might have taken, the burden of proof is shifted to defendants to demonstrate that they could not have made the substance that injured plaintiff. Compensatory damages are apportioned among defendants in accordance with the share each had of the appropriate market, unless any of them prove they could not have made the product which caused plaintiff's injuries. The court framed the issue as whether the rationale of *Sindell* for shifting the burden of proof of causation to the defendants, based on their share of the market, for the purpose of compensatory damages, should be applied to permit plaintiff to seek exemplary damages as well (*167 Cal. App. 3d 878, 884)* . Plaintiff relied on *Morris v. Parke, Davis & Co. (C.D. Cal. 1983) 573 F. Supp. 1324* , which held that exemplary damages may be sought in a market share liability case controlled by California law. The court was not persuaded by *Morris* and its reliance on the doctrine of respondeat superior. While the market share rule of *Sindell* provides a logical and reasonable basis for awarding and apportioning compensatory damages, notwithstanding the inability of a plaintiff to identify the producer who supplied the injury-causing substance, the court said that significantly different considerations govern the imposition of exemplary damages. Exemplary damages are an individualized punishment and deterrent imposed on a particular and identified defendant whose malicious or oppressive acts are the proximate cause of the injury sustained by the plaintiff. The court discussed the many public policy considerations pertinent to awarding exemplary damages under a market share theory of liability, among them, the preservation of the rights of future claimants to compensatory damages, the potential for overkill, the punitive effect of numerous and substantial compensatory awards to present and future claimants, the attenuated deterrent effect of long belated awards, and the inherent unfairness of exemplary damages in the market share scheme. It concluded that these considerations precluded exemplary damages in market share liability cases. The court held that in order to impose exemplary damages, plaintiff must first identify the defendant who supplied the DES that was ingested by plaintiff's mother and caused the damages complained of, and also prove that that defendant acted with malice or oppression (*167 Cal. App. 3d 878, 887-889)* .

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C. Supporting Motion to Strike

6-64 California Points & Authorities § 64.61

§ 64.61 Supporting Motion to Strike [Code Civ. Proc. §§ 435-437] Exemplary Damages [Civ. Code § 3294(a)] Allegation--Exemplary Damages Not Recoverable by Public Entity

[1] FORM

[*Caption. See § 64.60.*]

THE EXEMPLARY DAMAGES ALLEGATION CONTAINED IN THE _____ [*specify pleading, e.g.,* COMPLAINT] SHOULD BE STRICKEN BECAUSE EXEMPLARY DAMAGES ARE NOT RECOVERABLE FROM A PRIVATE TORTFEASOR BY A PUBLIC ENTITY.

A. Improperly Drawn or Irrelevant Matter Subject to Motion to Strike. [*See § 64.60, Paragraph A.*]

B. Exemplary Damages Not Recoverable by Public Entity. There is no statutory authority allowing recovery of exemplary or punitive damages by a public entity and, in the absence of such authority, public policy does not permit their recovery (*City of Los Angeles v. Shpegel-Dimsey, Inc. (1988) 198 Cal. App. 3d 1009, 1023-1026, 244 Cal. Rptr. 507*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

CAUTION:
Counsel should use this memorandum of points and authorities with caution. Subsequent court opinions have declined to follow *City of Los Angeles*. A panel of the Ninth Circuit Court of Appeals

refused to apply its rationale to a public water district in *Westlands Water Dist. v. Amoco Chem. Co. (9th Cir. 1991) 953 F.2d 1109, 1111-1113* . The panel found a rational basis for the distinction between allowing public entities to recover punitive damages while denying recovery of punitive damages from public entities [*Westlands Water Dist. v. Amoco Chem. Co. (9th Cir. 1991) 953 F.2d 1109, 1113]* . A court of appeal panel from Division 4 of the First Appellate District rejected its reasoning in all regards in *City of Sanger v. Superior Court (1992) 8 Cal. App. 4th 444, 448-451, 10 Cal. Rptr. 2d 436* , and a panel from Division 7 of the Second Appellate District agreed with *City of Sanger* in *City of Glendale v. Superior Court (2002) 95 Cal. App. 4th 1266, 1270-1272, 116 Cal. Rptr. 2d 16* .

[a] Use of Form

These points and authorities may be submitted in support of a motion to strike the exemplary damages allegation in an action by a public entity.

Counsel should insert facts and arguments into this form and any form that is used in combination with it to show the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Exemplary Damages Not Recoverable by Public Entity

City of Los Angeles v. Shpegel-Dimsey, Inc. *(1988) 198 Cal. App. 3d 1009, 244 Cal. Rptr. 507* , was an action by a city against a plastics company to recover firefighting costs and damages for injury to its property from a fire originating on the defendant's premises. The defendant had openly stored scrap plastics on its property in violation of the local fire code and had been cited numerous times for the violations, but failed to correct them. The fire escaped from the premises and as a result utility poles, conductors, and fixtures, owned and maintained by plaintiff, were damaged. Judgment was for the defendant, and the city appealed.

The court of appeal reversed on the ground that, although the city could not recover its costs for abating a public nuisance, as such costs are not authorized by the nuisance statutes, or, under the then existing law, for suppressing a fire, it was entitled to bring an action for negligence based on the defendant's fire code violations (*198 Cal. App. 3d 1009, 1020-1023)* . The court, however, rejected the city's claim that it was entitled to punitive damages (*198 Cal. App. 3d 1009, 1023)* . The court said that there is no California authority whatsoever expressly permitting a public entity to seek the recovery of punitive damages and that there are sound bases for refusing to permit such recovery in the absence of express statutory authorization (*198 Cal. App. 3d 1009, 1023)* . After pointing out that, as *Civ. Code § 3294(a)* clearly states, punitive damages are recoverable "for the sake of example and by way of punishing the defendant," the court explained: (1) a private party has no means of punishing a tortfeasor other than an award of exemplary damages, whereas, in contrast, a municipality has at its command the full force of its police power, and, by ordinance, may impose fines or other penal remedies; and (2) *Gov. Code § 818* bars any award of punitive damages against a public entity. Consequently, although there is symmetry in the law governing maintenance of an action for negligence, there would be asymmetry in the type of damages recoverable were a public entity permitted to seek an award of punitive damages. Thus, permitting a governmental entity to seek recovery of punitive damages would raise serious questions of equal protection of the laws (*198 Cal. App. 3d 1009, 1023)* . The court quoted extensively from *McAllister v. South Coast Air Quality Mgmt. Dist. (1986) 183 Cal. App. 3d 653, 228 Cal. Rptr. 351* , which upheld the constitutionality of *Gov. Code § 818*, and concluded that the public considerations quoted from that case do not support permitting a public entity to recover punitive damages from a private tortfeasor (*198 Cal. App. 3d 1009, 1023-1025)* . The court concluded that to permit a public entity to recover punitive damages for public injury from private tortfeasors while prohibiting a private party's recovery of those damages from a public entity clearly raises the spectre of a denial of equal protection of the laws (*198 Cal. App. 3d 1009, 1026)* .

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C. Supporting Motion to Strike

6-64 California Points & Authorities §§ 64.62-64.79

[Reserved]

§§ 64.62[Reserved]

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D. Opposing Motion to Strike

6-64 California Points & Authorities § 64.80

§ 64.80 Opposing Motion to Strike [Code Civ. Proc. §§ 435-437] Exemplary Damages [Civ. Code § 3294(a)] Allegation--Exemplary Damages Recoverable by Public Entity Plaintiff

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN OPPOSITION TO MOTION TO STRIKE
vs.	)	EXEMPLARY DAMAGE ALLEGATION
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

DEFENDANT'S MOTION TO STRIKE THE EXEMPLARY DAMAGES ALLEGATIONS AND PRAYER SHOULD BE DENIED BECAUSE *CIVIL CODE SECTION 3294(a)* ALLOWS BOTH PRIVATE AND PUBLIC PLAINTIFFS TO RECOVER EXEMPLARY DAMAGES.

A. *Civil Code Section 3294* Does Not Limit Recovery of Exemplary Damages to Private Plaintiffs. The language of *Civil Code Section 3294(a)* is unambiguous; it may not be read to limit recovery of exemplary damages to private

plaintiffs (*City of Sanger v. Superior Court (1992) 8 Cal. App. 4th 444, 449, 10 Cal. Rptr. 2d 436* ; *Westlands Water Dist. v. Amoco Chem. Co. (9th Cir. 1991) 953 F.2d 1109, 1111* (applying California law)).

B. Purpose of Exemplary Damages Is Advanced Although Plaintiff Is Public Entity. *Civil Code Section 3294(a)* allows plaintiffs to recover exemplary damages "for the sake of example and by way of punishing the defendant." These purposes are advanced even if the party seeking exemplary damages is a public entity who has or could have punished the defendant through the exercise of its police power (*City of Sanger v. Superior Court (1992) 8 Cal. App. 4th 444, 449, 10 Cal. Rptr. 2d 436*).

C. Legislative Scheme That Allows Municipality to Recover Exemplary Damages While Denying Recovery of Exemplary Damages Against Municipality Is Not Denial of Equal Protection. A legislative scheme that allows both private and public parties to recover exemplary damages (*see Civ. Code § 3294(a)*) but protects public entities from liability for exemplary damages (*see Gov. Code § 818*) is not an unconstitutional denial of equal protection, because a rational basis exists for the distinction (*City of Sanger v. Superior Court (1992) 8 Cal. App. 4th 444, 449-450, 10 Cal. Rptr. 2d 436* ; *Westlands Water Dist. v. Amoco Chem. Co. (9th Cir. 1991) 953 F.2d 1109, 1111* (applying California law)).

D. California Supreme Court Would Not Follow *City of Los Angeles.* The decision in *City of Los Angeles v. Shpegel-Dimsey, Inc. (1988) 198 Cal. App. 3d 1009, 244 Cal. Rptr. 507* , limiting *Civil Code Section 3294(a)* to private plaintiffs, should not be followed, because it is contrary to statutory language and public policy and would not be followed by the California Supreme Court *(Westlands Water Dist. v. Amoco Chem. Co. (9th Cir. 1991) 953 F.2d 1109, 1111* (applying California law)).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

CAUTION:

City of Los Angeles v. Shpegel-Dimsey, Inc. (1988) 198 Cal. App. 3d 1009, 244 Cal. Rptr. 507 , held that *Civ. Code § 3294* does not allow a municipality to recover punitive damages. For a memorandum of points and authorities supporting a motion to strike an exemplary damages allegation from a public entity's complaint on the grounds of this decision, see *§ 64.61*.

[a] Use of Form

These points and authorities may be submitted in opposition to a motion to strike a claim for exemplary damages in an action brought by a public entity. This form cites points and authorities in direct conflict with the arguments presented in support of the motion to strike in § 64.61.

Counsel should insert facts and arguments into the form and any form that is used in combination with it to show the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Civil Code Section 3294 Does Not Limit Recovery of Exemplary Damages to Private Plaintiffs

In ***City of Sanger v. Superior Court*** *(1992) 8 Cal. App. 4th 444, 10 Cal. Rptr. 2d 436* , the City of Sanger sued several chemical and oil companies for negligence, nuisance, trespass, and product defect. The complaint included a claim for exemplary damages, on the grounds that the defendants had used or sold chemicals that contaminated the city's water system with knowledge, or reckless disregard, of the fact that the chemicals were toxic and dangerous to humans and would contaminate or destroy the city's property. Defendants moved for, and the trial court granted, judgment on the pleadings as to the exemplary damages claim, relying on the holding in *City of Los Angeles v. Shpegel-Dimsey, Inc. (1988) 198 Cal. App. 3d 1009, 244 Cal. Rptr. 507* (discussed in *§ 64.61[3][a]*), that a municipality cannot recover exemplary damages. The trial court denied the city's motion for reconsideration and the city appealed. The court of appeal refused to follow *City of Los Angeles* and issued a writ of mandate directing the trial court to vacate its order granting the motion for judgment on the pleadings and to issue a new order denying the motion.

Civ. Code § 3294(a) provides that a plaintiff in an action for the breach of an obligation that does not arise in contract may recover, in addition to actual damages, "damages for the sake of example and by way of punishing the defendant." A plaintiff may recover exemplary damages when the defendant has been guilty of oppression, fraud, or malice. The court held that the language of *Civ. Code § 3294* unambiguously allows all plaintiffs, both public and private, to recover exemplary damages. It may not be read to limit recovery of exemplary damages to private parties (*8 Cal. App. 4th 444, 449)* .

The court articulated several reasons that it attached no significance to the legislature's failure to amend Civ. Code. § 3294 following the *City of Los Angeles* decision. *City of Los Angeles* was recently decided and no petition for review was filed. Furthermore, it was not clear whether the case based its holding on statutory construction or equal protection grounds. Therefore, no presumption arose that the legislature agreed with statutory construction at odds with unambiguous statutory language (*8 Cal. App. 4th 444, 449)* .

In ***Westlands Water Dist. v. Amoco Chem. Co.*** *(9th Cir. 1991) 953 F.2d 1109* , a California water district sued a chemical company and other defendants for strict products liability, negligence, breach of express warranty, breach of implied warranty, and fraud arising out of the sale of an allegedly defective pipe sold to the water district and used in a pipeline distribution system. The U.S. District Court for the Northern District of California granted a motion to strike an exemplary damages claim. The Ninth Circuit Court of Appeals reversed.

The court refused to apply the rationale of *City of Los Angeles* to water districts, holding that the plain language of *Civ. Code § 3294* would allow all plaintiffs, both public and private, to recover exemplary damages. It refused to adopt the defendant's argument that because *Civ. Code § 3294* does not specifically address and include public entities, the conclusion of *City of Los Angeles* is not contrary to statutory language and must be followed (*953 F.2d 1109, 1111)* . The court distinguished *City of Los Angeles* to the extent that that decision in that case was based on the authority of the municipal plaintiff to use its police power to punish the defendant for its actions. The authority of the water district in this case--to make rules and regulations regarding the distribution of water--is not comparable to the greater authority of a municipality to impose criminal sanctions (*953 F.2d 1109, 1112)* .

[b] Purpose of Exemplary Damages Is Advanced Although Plaintiff Is Public Entity

The factual and procedural background of ***City of Sanger v. Superior Court*** *(1992) 8 Cal. App. 4th 444, 10 Cal. Rptr. 2d 436* , is discussed in *§ 64.80[3][a]*. In discussing the case, the court of appeal noted that the purpose of *Civ. Code § 3294(a)* is to allow a plaintiff to recover damages "for the sake of example and by way of punishing the defendant" (*8 Cal. App. 4th 444, 449)* . The court stated that the purpose of *Civ. Code § 3294(a)* is advanced even if the party seeking exemplary damages is a public entity who has or could have punished the defendant through the exercise of its police power (*8 Cal. App. 4th 444, 449)* .

[c] Legislative Scheme That Allows Municipality to Recover Exemplary Damages While Denying Recovery of Exemplary Damages Against Municipality Is Not Denial of Equal Protection

The facts and procedural background of ***City of Sanger v. Superior Court*** *(1992) 8 Cal. App. 4th 444, 10 Cal. Rptr. 2d 436* , are discussed in *§ 64.80[3][a]*. In reversing the trial court's judgment on the pleadings as to the exemplary damages claim, the court of appeal addressed the constitutionality of a legislative scheme that allows both private and public parties to recover exemplary damages (*Civ. Code § 3294(a)*) but protects public entities from liability for exemplary damages (*Gov. Code § 818*). The court held that this scheme was not an unconstitutional denial of equal protection, because there was a rational basis for the distinction (*8 Cal. App. 4th 444, 449-450)* .

Under California law, private parties may recover exemplary damages and may be liable for exemplary damages, while public entities may recover exemplary damages, but are not liable for exemplary damages. The court recognized that this scheme might lack symmetry, but held that it did not deny equal protection, because a rational basis for the distinction existed. That is, requiring a public entity to pay exemplary damages would punish the very group that the imposition of exemplary damages was intended to benefit. The court cited *McAllister v. South Coast Air Quality Mgmt. Dist. (1986) 183 Cal. App. 3d 653, 228 Cal. Rptr. 351* , for the proposition that this distinction is constitutional. Furthermore, requiring private parties to pay exemplary damages to both public and private defendants has a rational basis: it furthers the goal of punishment and deterrence of wrongdoing (*8 Cal. App. 4th 444, 450)* .

The court did not address the municipality's arguments that the present case differed from *City of Los Angeles* with regard to the power of the *City of Sanger* to regulate the conduct of the defendants, because it concluded that *City of Los Angeles* was wrongly decided (*8 Cal. App. 4th 444, 450)* .

The facts and procedural background of ***Westlands Water Dist. v. Amoco Chem. Co.*** *(9th Cir. 1991) 953 F.2d 1109* , are discussed in *§ 64.80[3][a]*. The court held that the treatment of public and private parties with regard to exemplary damage awards and liability under California law is not a denial of equal protection. *Gov. Code § 818*, which bars an award of exemplary damages against a public entity, has been upheld as constitutional in *McAllister v. South Coast Air Quality Mgmt. Dist. (1986) 183 Cal. App. 3d 653, 656-661, 228 Cal. Rptr. 351* . Preventing punishment of the general public through the imposition of exemplary damages against a public entity and allowing a public entity that lacks traditional police powers to punish wrongdoers that injure the general public are both legitimate state objectives that would withstand an equal protection claim (953, F.2d 1109, 1113).

[d] California Supreme Court Would Not Follow *City of Los Angeles*

The facts and procedural background of ***Westlands Water Dist. v. Amoco Chem. Co.*** *(9th Cir. 1991) 953 F.2d 1109* , are discussed in *§ 64.80[3][a]*. In discussing the case, the court refused to apply the rationale of *City of Los Angeles* to water districts, noting that the task of a federal court in a diversity case, when the issue presented has not yet been decided by the state's highest court, is to predict how the state high court would resolve it. The court relied on *State Farm Fire & Cas. Co. v. Abraio (9th Cir. 1989) 874 F.2d 619, 621* , for the proposition that when an intermediate appellate court has ruled on the issue, a federal court is not required to follow that decision if there is convincing evidence that the state supreme court would decide differently (*953 F.2d 1109, 1111)* . The court distinguished *City of Los Angeles* to the extent that the decision in that case was based on the authority of the municipal plaintiff to use its police power to punish the defendant for its actions. The authority of the water district in this case to make rules and regulations regarding the distribution of water is not comparable to the greater authority of a municipality to impose criminal sanctions (*953 F.2d 1109, 1112)* .

[4] Additional Authorities

[a] Civil Code Section 3294 Does Not Limit Recovery of Exemplary Damages to Private Plaintiffs

In *City of Glendale v. Superior Court (2002) 95 Cal. App. 4th 1266, 116 Cal. Rptr. 2d 16* , an attorney sued a city to recover a contingency fee that the city allegedly owed him. The city filed a cross-complaint for fraud against the

attorney in which the city sought to recover compensatory and punitive damages. The attorney moved to strike the city's request for punitive damages, and the trial court granted the motion under the authority of *City of Los Angeles v. Shpegel-Dimsey, Inc. (1988) 198 Cal. App. 3d 1009, 244 Cal. Rptr. 507* , discussed in *§ 64.61[3][a]*, which held that a public entity may not recover punitive damages. The court of appeal issued a writ of mandate directing the trial court to strike the order granting the motion. Recognizing that the trial court's order was consistent with *City of Los Angeles*, the court of appeal refused to follow that opinion and instead agreed with the analysis of *City of Sanger v. Superior Court (1992) 8 Cal. App. 4th 444, 10 Cal. Rptr. 2d 436* , described in § 64.80[3][a], which held that a public entity may recover punitive damages from a private plaintiff. In reaching its conclusion, the court of appeal agreed with *City of Sanger* that the holding in *City of Los Angeles* is inconsistent with the plain language of *Civ. Code § 3294* (*95 Cal. App. 4th 1266, 1270)* .

[b] Purpose of Exemplary Damages Is Advanced Although Plaintiff Is Public Entity

The factual and procedural background of *City of Glendale v. Superior Court (2002) 95 Cal. App. 4th 1266, 116 Cal. Rptr. 2d 16* , is described in § 64.80[4][a]. The court of appeal also agreed with *City of Sanger* that the public purpose advanced by the imposition of punitive damages would be furthered by allowing a city to recover punitive damages. The court noted that unlike the plaintiff in *City of Los Angeles*, the municipality seeking punitive damages in this case lacked the police power to impose fines or criminal sanctions on individual tortfeasors, making the ability to seek punitive damages even more valuable to punish tortfeasors (*95 Cal. App. 4th 1266, 1270-1271)* .

[c] Legislative Scheme That Allows Municipality to Recover Exemplary Damages While Denying Recovery of Exemplary Damages Against Municipality Is Not Denial of Equal Protection

The factual and procedural background of *City of Glendale v. Superior Court (2002) 95 Cal. App. 4th 1266, 116 Cal. Rptr. 2d 16* , is described in § 64.80[4][a]. The court of appeal also agreed with *City of Sanger* that allowing a public entity to recover punitive damages from a private party, even though a public entity may not be held liable for punitive damages to a private plaintiff, does not result in a denial of equal protection. This apparent asymmetry is rationally related to a legitimate governmental goal. Requiring a public entity to pay punitive damages would ultimately punish the group intended to benefit from the punishment, while requiring private parties to pay punitive damages regardless of whether the plaintiff is a private or public party furthers the punitive and deterrent goals of punitive damages (*95 Cal. App. 4th 1266, 1271-1272)* .

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[Reserved]

§§ 64.81[Reserved]

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6-64 California Points & Authorities § 64.100

§ 64.100 Supporting Defendant's Motion for Nonsuit [Code Civ. Proc. § 581c(b)]--Plaintiff Has Not Established Oppression, Fraud, or Malice by Clear and Convincing Evidence

[1] FORM

	)	
SUPERIOR COURT OF CALIFORNIA,	)	NO. _____
COUNTY OF _____	)	MEMORANDUM OF POINTS
_____ [*name*]	)	AND AUTHORITIES IN
Plaintiff,	)	SUPPORT OF MOTION FOR NONSUIT
vs.	)	Date: _____
	)	Time: _____
_____ [*name*],	)	Dept: _____
Defendant.	)	Trial Date: _____
	)	

_____

NONSUIT IS PROPER ON THE CLAIM FOR PUNITIVE DAMAGES BECAUSE NO REASONABLE JURY COULD FIND PLAINTIFF'S EVIDENCE TO BE CLEAR AND CONVINCING PROOF OF OPPRESSION, FRAUD, OR MALICE.

Nonsuit on Punitive Damages Claim. A nonsuit on the issue of punitive damages is proper if no reasonable jury could find the plaintiff's evidence to be clear and convincing proof of malice, fraud or oppression (*Hoch v. Allied-Signal, Inc. (1994) 24 Cal. App. 4th 48, 60-61, 29 Cal. Rptr. 2d 615*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for nonsuit on the plaintiff's claim for punitive damages, when the motion is made on the ground that plaintiff has not introduced evidence that a reasonable jury could find to be clear and convincing proof of malice, fraud or oppression.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should point out the disparities between the plaintiff's proffered proof and the statutory definitions of oppression, fraud and malice in *Civ. Code § 3294(c)*, as well as the existence of factual disputes involving the alleged conduct and the difficulty in establishing oppression, fraud, or malice by clear and convincing evidence.

[c] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 64.120* may be used to oppose the motion supported by these points and authorities.

[3] Discussion of Authorities

[a] Nonsuit on Punitive Damages Claim

In ***Hoch v. Allied-Signal, Inc.*** *(1994) 24 Cal. App. 4th 48, 29 Cal. Rptr. 2d 615* , plaintiffs sued Allied-Signal, the manufacturer of seat belts used in their daughter's automobile, for the wrongful death of the daughter, who had been killed when her car rolled over. The action was based on negligence and strict product liability theories, and plaintiff also sought punitive damages from Allied-Signal in a survival action, alleging that Allied-Signal acted with conscious disregard of the rights and safety of others by permitting its seat belts to be installed without adequate testing to ensure that the seat belts could not open during an accident. At the close of plaintiffs' case, Allied-Signal moved for nonsuit as to the punitive damages claim, and the trial court granted the motion. Plaintiffs appealed, and the court of appeal affirmed.

The court initially rejected plaintiffs' argument that a nonsuit could not be granted as to a punitive damages claim, noting that *Code Civ. Proc. § 581c(b)* authorizes nonsuit "as to some but not all of the issues involved in the action" (*24 Cal. App. 4th 48, 58)* . Turning to the proper standard for motions for nonsuit concerning punitive damages claims, the court noted the high standard applicable to motions for nonsuit generally: only if, after indulging in every legitimate inference favorable to plaintiffs, the court finds there is no evidence of sufficient substantiality to support a verdict in plaintiffs' favor, is a judgment of nonsuit proper (*24 Cal. App. 4th 48, 58-59)* . To establish a claim for punitive damages, plaintiffs have the additional burden of establishing oppression, fraud, or malice by clear and convincing evidence pursuant to *Civ. Code § 3294* (*24 Cal. App. 4th 48, 59)* . The court rejected the argument that a nonsuit is therefore proper whenever the court deems the plaintiff's evidence less than clear and convincing (*24 Cal. App. 4th 48, 59)* . Instead, the court held that the issue is still one of fact for the jury if reasonable minds could differ over whether the evidence supports a punitive damages award (*24 Cal. App. 4th 48, 59)* . A nonsuit is therefore proper only if the trial court determines that no reasonable jury could find the plaintiff's evidence to be clear and convincing proof of

malice, fraud, or oppression (*24 Cal. App. 4th 48, 60-61)* . Applying this standard to the case before it, the court of appeal found that the evidence did not support a conclusion that Allied-Signal acted with conscious disregard of the safety of others, and that the nonsuit was therefore properly granted (*24 Cal. App. 4th 48, 61-62)* .

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[Reserved]

§§ 64.101[Reserved]

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6-64 California Points & Authorities § 64.120

§ 64.120 Opposing Defendant's Motion for Nonsuit [Code Civ. Proc. § 581c(b)]--Plaintiff Has Produced Evidence That Reasonable Jury Could Find Sufficient for Punitive Damages Award

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*]	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS
vs.	)	AND AUTHORITIES IN
	)	OPPOSITION TO MOTION FOR NONSUIT
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Dept.: _____
	)	Trial Date: _____
	)	

_____

THE MOTION FOR NONSUIT SHOULD BE DENIED BECAUSE PLAINTIFF HAS INTRODUCED EVIDENCE THAT A REASONABLE JURY COULD FIND SUFFICIENT TO BE CLEAR AND CONVINCING PROOF OF DEFENDANT'S OPPRESSION, FRAUD, OR MALICE.

Showing Insufficient for Nonsuit on Punitive Damages Claim. A nonsuit on the issue of punitive damages is improper if a reasonable jury could find the plaintiff's evidence to be clear and convincing proof of malice, fraud or oppression (*cf. Hoch v. Allied-Signal, Inc. (1994) 24 Cal. App. 4th 48, 60-61, 29 Cal. Rptr. 2d 615*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion for nonsuit on the plaintiff's claim for punitive damages, when the motion is made on the ground that plaintiff has not introduced evidence that a reasonable jury could find to be clear and convincing proof of malice, fraud or oppression. The opposition asserts that a reasonable jury could find the proof sufficient under that standard.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the evidence of oppression, fraud, or malice on the defendant's part that could be the basis of a reasonable jury's conclusion that clear and convincing evidence justifies an award of punitive damages.

[c] Opposing Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposition to the motion supported by the points and *authorities in § 64.100*.

[3] Discussion of Authorities

[a] Showing Insufficient for Nonsuit on Punitive Damages Claim

The facts and procedural background of ***Hoch v. Allied-Signal, Inc.*** *(1994) 24 Cal. App. 4th 48, 29 Cal. Rptr. 2d 615* , are discussed in *§ 64.100[3][a]*. Although the court of appeal affirmed the nonsuit granted by the trial court, the court stated that nonsuit is not proper merely because the trial court deems plaintiff's evidence to be less than clear and convincing (*24 Cal. App. 4th 48, 59)* . Rather, nonsuit is proper only if no reasonable jury could find the plaintiff's evidence to be clear and convincing proof of oppression, fraud, or malice (*24 Cal. App. 4th 48, 60-61)* . Thus, a showing that a reasonable jury *could* find the plaintiff's evidence sufficient would require the court to deny the motion for nonsuit.

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6-64 California Points & Authorities §§ 64.121-64.139

[Reserved]

§§ 64.121[Reserved]

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G. Supporting Motion for New Trial

6-64 California Points & Authorities § 64.140

§ 64.140 Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 659]--Excessive Damages [Code Civ. Proc. § 657(5)]

[1] FORM

	)	
SUPERIOR COURT OF CALIFORNIA,	)	NO. _____
COUNTY OF _____	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*],	)	IES IN SUPPORT OF MOTION FOR NEW TRIAL
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Dept.: _____
Defendant.	)	Trial Date: _____
	)	

_____

IT IS PROPER TO GRANT A MOTION FOR A NEW TRIAL IF THE DAMAGES AWARDED ARE EXCESSIVE.

A. Motion for New Trial. On the application of the party aggrieved, the _____ [verdict *or* decision] may be vacated, in whole or in part, and a new trial granted, on all or some of the issues on the ground that the damages are excessive, if substantial rights of the aggrieved party are materially affected thereby (*Code Civ. Proc. § 657(5)*).

B. Trial Court's Power to Determine Excessiveness of Damages. The proper procedure for determining whether the damages awarded are excessive is to bring the question before the trial court on a motion for a new trial (*Schroeder v. Auto Driveaway Co. (1974) 11 Cal. 3d 908, 918, 114 Cal. Rptr. 622, 523 P.2d 662*). In ruling on the motion, the trial judge sits as a thirteenth juror with the power to weigh the evidence and judge the credibility of witnesses, and a judge

who believes that the damages awarded by the jury are excessive has the duty to reduce the damages (*Bazzoli v. Nance's Sanitarium, Inc. (1952) 109 Cal. App. 2d 232, 243, 240 P.2d 672*).

C. When Damages Excessive. If the jury's award does not meet the test of reasonableness, the trial court has the duty to reduce it (*Neumann v. Bishop (1976) 59 Cal. App. 3d 451, 490, 130 Cal. Rptr. 786*).

[*Optional*] **D. New Trial Limited to Damages and Conditioned on Failure to Consent to Remittitur.** If the ground for granting a new trial limited to the issue of damages after a trial by jury is excessive damages, the court may in its discretion grant the new trial subject to the condition that the motion for a new trial is denied if the party in whose favor the verdict has been rendered consents to a reduction of so much thereof as the court in its independent judgment determines from the evidence to be fair and reasonable [*Code Civ. Proc. § 662.5(b)*; *see Teitel v. First L.A. Bank (1991) 231 Cal. App. 3d 1593, 1602-1606, 282 Cal. Rptr. 916]* .
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for a new trial on the ground of excessive damages. Optional Paragraph D may be used if the ground of excessive damages is the only one being raised, and moving party wants to request the court to give the plaintiff the opportunity to consent to a reduction in damages in lieu of having the court grant a new trial.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms for use in making a motion for a new trial, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender). For a form for use in making a motion for a new trial on the ground of excessive or inadequate damages, see California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing motions for a new trial, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] Trial Court's Power to Determine Excessiveness of Damages

In ***Schroeder v. Auto Driveaway Co.*** *(1974) 11 Cal. 3d 908, 114 Cal. Rptr. 622, 523 P.2d 662* , defendant, a common carrier furnishing drivers for hire, contracted with plaintiffs, an elderly Arizona couple who wanted to carry a large quantity of second-hand goods to California for a new store, for a driver to drive the couple's loaded van. The shipping order and freight bill provided in small print on the back of the form for defendant's limited liability. On a detour for

sight-seeing purposes, the van was destroyed and its contents either lost or damaged. Defendant did not attempt to complete transportation of the goods to their destination but removed them to another location where they were damaged. Plaintiffs brought an action for breach of contract, fraudulent misrepresentation, and conversion against defendant. At the conclusion of trial, the jury awarded plaintiffs compensatory and punitive damages. Defendant did not move for a new trial but, rather appealed from the adverse judgment contending, in part, that the award of compensatory and punitive damages was excessive. The Supreme Court affirmed the judgment on the issues of liability and damages. It held, in part, that the point that damages are excessive cannot be raised for the first time on appeal but must be presented to the lower court on a motion for a new trial. Consequently, a defendant who had failed to move for a new trial was precluded from arguing on appeal that the award of damages was excessive. The Supreme Court reasoned that the trial court is in a better position to determine whether a damage award is influenced by passion or prejudice and, unlike an appellate court, is vested with the power to weigh the evidence and resolve its credibility. Thus, a defendant who first challenges a damage award on appeal without a motion for a new trial unnecessarily burdens the appellate court with issues that can and should be resolved at the trial level.

In ***Bazzoli v. Nance's Sanitarium, Inc.*** *(1952) 109 Cal. App. 2d 232, 240 P.2d 672* , the jury rendered a verdict for plaintiff in the amount of $15,000 for injuries he sustained while on premises owned and operated by defendant. Defendant, who appealed from the judgment, had raised the issue of excessive damages on a motion for a new trial which the trial court denied. In affirming the judgment, the court of appeal relied on earlier cases and pointed out that the standards to be applied by trial and appellate courts in determining whether damages are excessive are very different. The trial judge sits as a thirteenth juror with the power to weigh the evidence and judge the credibility of witnesses. A trial judge who has been presented with the question and believes that the damages awarded by the jury are excessive has the duty of reducing the damages. However, an appellate court cannot weigh the evidence and judge credibility of witnesses and an award of damages must be so large as to indicate passion or prejudice on the part of the jurors before an appellate court may hold it to be excessive. Counsel should not that in *Schroeder,* the Supreme Court referred to the trial court's superior position for determining whether a damage award is influenced by passion and prejudice, citing *Code Civ. Proc. § 657*. At the time that *Schroeder* was decided, however, the legislature had already removed the reference to "passion and prejudice" from *Code Civ. Proc. § 657*. Furthermore, the Legislative Committee Comment to this section states that the former language purporting to limit the ground of excessive damages to an award influenced by "passion or prejudice" was eliminated as unnecessary, and that the trial judge is able to grant a new trial when, after weighing the evidence, he or she is convinced from the entire record that the award of damages is clearly excessive.

[b] When Damages Excessive

Plaintiff in ***Neumann v. Bishop*** *(1976) 59 Cal. App. 3d 451, 130 Cal. Rptr. 786* , accepted, in conformance with the trial court's order on defendant's motion for a new trial, a reduction to $280,000 from the $362,389 awarded plaintiff by the jury's verdict. Defendant appealed from the judgment on several grounds including the ground that the amount of the judgment, as reduced, was excessive. In affirming the judgment, the court of appeal pointed out that the trial court had determined that plaintiff's special damages, presented and projected, were about $111,000, and that the trial court reduced the sum awarded to $280,000 on the ground that the maximum reasonable general damages for plaintiff's primary injury (to her femur) was $165,000 with a maximum total compensation of $275,000. The court of appeal then quoted from *Beagle v. Vasold (1966) 65 Cal. 2d 166, 179-180, 53 Cal. Rptr. 129, 417 P.2d 673* , to the effect that no matter what manner of calculation is proposed by counsel or used by the jury, the verdict must meet the test of reasonableness, and if it does not, the trial court has the duty to reduce the verdict. The court of appeal noted that the power of an appellate court differs materially from that of a trial court, in that the appellate court may interfere on the ground that the judgment is excessive only if the verdict is so large that, at first blush, it shocks the conscience and suggests passion, prejudice, or corruption on the part of the jury. Since the award as reduced was not excessive under this standard, the court affirmed the judgment.

[c] New Trial Limited to Damages and Conditioned on Failure to Consent to Remittitur

In ***Teitel v. First L.A. Bank*** *(1992) 231 Cal. App. 3d 1593, 282 Cal. Rptr. 916* , the jury awarded plaintiff $500,000 in punitive damages. The defendant bank made posttrial motions for new trial and also for judgment notwithstanding the verdict (JNOV) The motion for new trial was made on a number of grounds, including that the award of punitive damages was excessive and remittitur was appropriate. The motion for JNOV was made on the ground that the award of punitive damages was not supported by substantial evidence or, in the alternative, that the amount of punitive damages awarded was excessive as a matter of law. The trial court denied the motion for new trial, but granted the motion for JNOV only for the purpose of reducing the award of punitive damages to $50,000 (*231 Cal. App. 3d 1593, 1601)* .

The court of appeal held that the procedure followed by the trial court to reduce the award of punitive damages was improper. The record contained substantial evidence in support of some award of punitive damages; only the amount might be deemed excessive. JNOV may not be used in lieu of remittitur simply to reduce the amount. In dicta, in a footnote, the court stated that JNOV for an amount less than the jury verdict would seem appropriate if there can be no dispute over the amount. Such an order might have been appropriate, for example, if the plaintiff were entitled to no punitive damages at all, and the trial court had reduced the judgment to the adjudicated amount of compensatory damages (*231 Cal. App. 3d 1593, 1605 n.6*). The new trial and remittitur procedure is the exclusive remedy for a trial court to employ if some damages are properly awarded, but the amount is excessive. If JNOV were an appropriate means to reduce damages, there would be no need for the new-trial remittitur statute (*231 Cal. App. 3d 1593, 1605)* .

[4] Additional Authorities

[a] When Damages Excessive

In *Mokler v. County of Orange (2007) 157 Cal. App. 4th 121, 68 Cal. Rptr. 3d 568* , a former employee brought an action for retaliatory discharge against a county. While plaintiff prevailed at trial on her claim and was awarded $1.6 million in noneconomic damages, the trial court granted a new trial on damages when plaintiff rejected a remitted noneconomic damages amount of $125,000. The court of appeal held the order for a new trial was supported by substantial evidence. The court noted that plaintiff did not require medical or professional attention after her termination, suffered no apparent damage to her reputation, suffered no apparent scorn or ridicule by the public, and needed only two weeks to find new employment. In addition, given her ability to find new employment quickly, plaintiff did not suffer the economic worries that typically exacerbate the emotional distress suffered by persons who are wrongfully terminated and are unable to find comparable new employment quickly (*157 Cal. App. 4th 121, 146-147)* .

In *Tramell v. McDonnell Douglas Corp. (1984) 163 Cal. App. 3d 157, 209 Cal. Rptr. 427* , the court of appeal affirmed the order granting a new trial in a wrongful death action on the ground of excessive damages [*see Civ. Code § 657(5)*]. The trial court found that there was extensive discussion among jurors to inflate their verdict to compensate for attorneys' fees and taxes. The declaration of the foreperson submitted by the defendant, which the trial court found to be true, showed that the jurors discussed attorneys' fees. Furthermore, the jurors commented that both governments could use the money and that individual jurors would benefit thereby. Because the trial court's finding was based on competent, although contradictory, evidence, the court of appeal concluded that the finding should not be disturbed on appeal (*163 Cal. App. 3d 157, 172-173)* .

In *Drust v. Drust (1980) 113 Cal. App. 3d 1, 169 Cal. Rptr. 750* , after a jury in a personal injury action determined that plaintiff would not earn income in the future and compensated him for this loss, it also awarded him an item of expense necessary to earn income in the future. The court of appeal found this patently inconsistent, reversed that portion of the judgment relative to damages, and remanded the case for retrial on the issue of damages only (*113 Cal. App. 3d 1, 11)* .

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Volume 6 Chapters 60-69 COSTS---to---DECLARATORY RELIEF
CHAPTER 64 DAMAGES: TORT
PART II. FORMS
G. Supporting Motion for New Trial

6-64 California Points & Authorities § 64.141

§ 64.141 Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 659]--Excessive Damages [Code Civ. Proc. § 657(5)]--No Reasonable Relationship Between Punitive Damages and Compensatory Damages or Defendant's Net Assets

[1] FORM

[*Caption. See § 64.140.*]

IT IS PROPER TO GRANT A MOTION FOR A NEW TRIAL ON THE GROUND OF EXCESSIVE DAMAGES IF THERE IS NO REASONABLE RELATIONSHIP BETWEEN THE AWARD OF PUNITIVE DAMAGES AND DEFENDANT'S NET ASSETS, IF THE AWARD OF PUNITIVE DAMAGES IS LARGER THAN AND BEARS NO REASONABLE RELATIONSHIP TO THE AWARD OF COMPENSATORY DAMAGES, IF THE PUNITIVE DAMAGES AWARDED ARE DISPROPORTIONATE TO DEFENDANT'S CULPABILITY, OR IF THE PUNITIVE DAMAGES AWARDED ARE DESIGNED TO PUNISH DEFENDANT FOR HARM DONE TO OTHER HYPOTHETICAL POTENTIAL PLAINTIFFS AND NOT LIMITED TO AN AMOUNT APPROPRIATE TO PUNISH FOR THE HARM DONE TO THE ACTUAL PLAINTIFFS.

A. Motion for New Trial. [*See § 64.140, Paragraph A.*]

B. Trial Court's Power to Determine Excessiveness of Damages. [*See § 64.140, Paragraph B.*]

C. When Damages Excessive. [*See § 64.140, Paragraph C.*]

D. New Trial Limited to Damages and Conditioned on Failure to Consent to Remittitur. [*See § 64.140, Paragraph D.*]

[*EITHER*]

E. Punitive Damages Exceeding and Bearing No Reasonable Relationship to Compensatory Damages as

Excessive. In cases in which an award of punitive damages exceeds the award of compensatory damages, the award of punitive damages is excessive if it bears no reasonable relationship to the amount of compensatory damages awarded (*Simon v. San Paolo U.S. Holding Co., Inc. (2005) 35 Cal. 4th 1159, 1181-1183, 29 Cal. Rptr. 3d 379, 113 P.3d 63* ; *Schroeder v. Auto Driveaway Co. (1974) 11 Cal. 3d 908, 922, 114 Cal. Rptr. 622, 523 P.2d 662* ; *Little v. Stuyvesant Life Ins. Co. (1977) 67 Cal. App. 3d 451, 469, 136 Cal. Rptr. 653*).

[*AND/OR*]

F. Punitive Damages Not Reasonably Related to Defendant's Wealth as Excessive. Punitive damages which do not bear a reasonable relationship to defendant's net assets are excessive (*Little v. Stuyvesant Life Ins. Co. (1977) 67 Cal. App. 3d 451, 469, 136 Cal. Rptr. 653*).

[*AND/OR*]

G. Punitive Damages Disproportionate to Defendant's Culpability as Excessive. The particular nature of defendant's acts should be considered in determining whether an award of punitive damages is excessive since the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal (*Roby v. McKesson Corp. (2009) 47 Cal. 4th 686, 713-717, 101 Cal. Rptr. 3d 773, 219 P.3d 749* ; *Neal v. Farmers Ins. Exch. (1978) 21 Cal. 3d 910, 928, 933, 148 Cal. Rptr. 389, 582 P.2d 980*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[*Optional*] **H. Prejudgment Interest Not Included When Comparing Compensatory Damages to Punitive Damages.** Prejudgment interest should not be included when comparing compensatory damages to punitive damages (*Amerigraphics, Inc. v. Mercury Casualty Co. (2010) 182 Cal. App. 4th 1538, 1565, 107 Cal. Rptr. 3d 307*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a motion for a new trial on the ground of excessive damages when the larger amount of punitive damages awarded bears no reasonable relationship to the compensatory damages awarded.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

For a chart analyzing the relationship between the amount of punitive damages and the wealth of the defendant and the relationship between punitive and compensatory damages in 16 California cases, see *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc. (1984) 155 Cal. App. 3d 381, 393-396, 202 Cal. Rptr. 204* .

[b] Related Pleading and Practice Forms

For forms for use in making a motion for a new trial, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender). For a form for use in making a motion for a new trial on the ground of excessive or inadequate damages, see California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing motions for a new trial, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] Punitive Damages Exceeding and Bearing No Reasonable Relationship to Compensatory Damages as Excessive

In ***Simon v. San Paolo U.S. Holding Co., Inc.*** *(2005) 35 Cal. 4th 1159, 29 Cal. Rptr. 3d 379, 113 P.3d 63* , the plaintiff had attempted to purchase a commercial building at a price of $1.1 million and, during the course of negotiations, had entered into a letter of intent with the seller's agent to negotiate exclusively while they completed the transaction. However, the seller's agent, for reasons undisclosed by the record, decided that it would be more advantageous to sell to another buyer and cancelled the transaction with the plaintiff, allegedly because the plaintiff would not agree to a shortened period for completing inspections and releasing his deposit. The very next morning, the agent completed an agreement to sell the building to the alternate buyer, although he denied that he had been negotiating with this buyer while the plaintiff was still actively negotiating to buy the building. The plaintiff sued for breach of contract and promissory fraud. The jury found that no enforceable contract existed, but found for the plaintiff on the promissory fraud action and awarded $5,000 in compensatory damages, which was the amount that the plaintiff lost in reliance on the false promise to sell when he hired an attorney to help complete the transaction. The jury also awarded $2.5 million in punitive damages, reduced on retrial to $1.7 million. The defendant appealed the amount of punitive damages. The court of appeal eventually affirmed the award, concluding that $1.7 million was not excessive in light of the "continuous and intricate" deceit perpetrated by the seller's agent and in light of the fact that the actual harm to the plaintiff was $400,000, which represented the amount of profit that the plaintiff would have made by purchasing the building for $1.1 million when its actual market value was estimated at $1.5 million. The defendant appealed again.

Relying solely on federal constitutional standards, the California Supreme Court reduced the amount of punitive damages to $50,000 and affirmed the judgment as modified. The Court noted that in some rare circumstances, it may be appropriate to proportion punitive damages to some measure of harm other than the actual amount of compensatory damages awarded, such as to uncompensated harm or to the potential harm that was actually intended by the tortfeasor or was reasonably likely to occur from the tortfeasor's conduct. However, proportioning the punitive damages award to the lost $400,000 in profit experienced by the plaintiff was improper, because there was no causal connection between the defendant's false promises and the plaintiff's lost profit. The Court concluded that if the seller's agent had not made the false promises on which the plaintiff relied, the plaintiff still would not have acquired the building, given the lack of a binding contract to sell to the plaintiff. Thus, the only damage actually caused by the defendant's fraud was the $5,000 out-of-pocket loss that the plaintiff suffered (*35 Cal. 4th 1159, 1173-1175)* . With this as the proper measure of compensatory damages, the Court then considered the amount of punitive damages that would be permissible under federal constitutional standards. The California Supreme Court interpreted statements by the United States Supreme Court to mean that absent special justification, ratios between punitive damages and a plaintiff's actual or potential compensatory damages that are greater than nine or 10 to one are constitutionally suspect and cannot survive appellate scrutiny under the due process clause (*35 Cal. 4th 1159, 1182)* . After evaluating the record, the Court concluded that the reprehensibility of the defendant's conduct was relatively low, given that only a modest amount of economic harm was caused and there was no evidence of a repeated pattern of fraudulent conduct towards other potential buyers (*35 Cal. 4th 1159, 1180-1181)* . Although the award of compensatory damages was also relatively small, the Court held that a 10-to-1 ratio between compensatory and punitive damages would be appropriate in this case (*35 Cal. 4th 1159,*

1188-1189) .

Schroeder v. Auto Driveaway Co. *(1974) 11 Cal. 3d 908, 114 Cal. Rptr. 622, 523 P.2d 662* , is discussed in *§ 64.140[3][a]*. The plaintiffs were awarded punitive damages in a sum less than one-half the amount of compensatory damages awarded. Defendants contended on appeal that the amount of punitive damages awarded to plaintiffs was excessive in relationship to the actual injury suffered by plaintiffs. The Supreme Court affirmed the judgment on the ground that defendants' failure to move for a new trial precluded them from contending on appeal that the award of damages was excessive. Nevertheless, the Supreme Court enunciated the principle that an award of punitive damages must bear a reasonable relationship to actual damages but found that this rule had no application where, as in the case before it, the amount of punitive damages did not exceed the amount of compensatory damages awarded (*11 Cal. 3d 908, 922)* .

In ***Little v. Stuyvesant Life Ins. Co.*** *(1977) 67 Cal. App. 3d 451, 136 Cal. Rptr. 653* , plaintiff was a draftsperson who was insured under a group program of life, hospitalization, and disability insurance sponsored, in part, by her employer. At the time the insurer undertook to insure her, she had a lengthy medical history. After the insurance went into effect, she suffered a total disability. The insurer paid plaintiff disability payments under the policy for a time and then terminated payments on the advice of its own physician. As a result of the termination of payments, plaintiff lost her house, was unable to meet her other financial obligations, and, depressed by her financial problems, attempted suicide. She subsequently brought an action against the insurer for declaratory relief and for compensatory and punitive damages for intentional infliction of emotional distress. At the trial, the jury found plaintiff to be totally disabled and entitled to payments under the policy. The jury also awarded plaintiff substantial compensatory and punitive damages. The insurer's motion for a new trial on the issue of damages was denied and the insurer appealed. The insurer contended, in part, that the punitive damages award was excessive as a matter of law. The court of appeal agreed and, affirming the remainder of the judgment, reversed and remanded for a new trial on the issue of punitive damages. The court of appeal noted that because the primary purpose of punitive damages is to punish the defendant and make an example of him or her, the punitive damages awarded should bear a reasonable relationship to defendant's net assets. Additionally, an award of punitive damages should bear a reasonable relationship to the compensatory damages awarded. Although there is no fixed ratio by which to determine the propriety of such an award, the court of appeal found that the award in a ratio of 14-to-1 of punitive to compensatory damages was excessive and grossly disproportionate to the insurer's wealth and to the compensatory damages awarded (*67 Cal. App. 3d 451, 469)* .

NOTE:

Recognizing that there is no bright-line ratio between compensatory and punitive damages that meets federal constitutional due process requirements, the United States Supreme Court has suggested that single-digit ratios, such as 4-to-1 or 5-to-1, are more likely to comport with due process than will larger ratios [*State Farm Mut. Auto. Ins. Co. v. Campbell (2003) 538 U.S. 408, 425, 123 S. Ct. 1513, 155 L. Ed. 2d 585]* . The Court admitted, however, that larger ratios may be acceptable in cases involving especially egregious conduct that results in a relatively small amount of economic damage. Conversely, a smaller ratio may be all that will be constitutionally tolerated when the defendant's conduct has resulted in a substantial award of compensatory damages [*State Farm Mut. Auto. Ins. Co. v. Campbell (2003) 538 U.S. 408, 425-426, 123 S. Ct. 1513, 155 L. Ed. 2d 585* (award with ratio of 145-to-1 reversed because substantial compensatory damage award of $1 million fully compensated plaintiffs for emotional distress caused by failure of insurance company to settle third-party claim)].

Applying the U.S. Supreme Court's guidelines, the California Supreme Court held in *Roby v. McKesson Corp.*, discussed in [c], *below*, that a 1-to-1 ratio was the appropriate maximum when the plaintiff was awarded almost $2 million in compensatory damages, which included an award of $1.3 million in non-economic damages that may have included a punitive component reflecting the jury's indignation at the defendant's conduct [*Roby v. McKesson Corp. (2009) 47 Cal. 4th 686, 718-719, 101 Cal. Rptr. 3d 773, 219 P.3d 749]* .

[b] Punitive Damages Not Reasonably Related to Defendant's Wealth as Excessive

Little v. Stuyvesant Life Ins. Co. *(1977) 67 Cal. App. 3d 451, 469, 136 Cal. Rptr. 653* , is discussed in *§ 64.141[3][a]*.

NOTE:

The plaintiff has the burden of establishing the defendant's financial condition to support an award of punitive damages [*Adams v. Murakami (1991) 54 Cal. 3d 105, 123, 284 Cal. Rptr. 318, 813 P.2d 1348]* . Therefore, a plaintiff's inadequate showing concerning the defendant's wealth would also be a basis for opposing an award of punitive damages. For discussion of *Adams*, see *§ 64.175[3][a]*.

[c] Punitive Damages Disproportionate to Defendant's Culpability as Excessive

In ***Roby v. McKesson Corp.*** *(2009) 47 Cal. 4th 686, 101 Cal. Rptr. 3d 773, 219 P.3d 749* , plaintiff brought an action for wrongful termination, discrimination, and harassment against her former employer and, with regard to the harassment claim, against her former supervisor. Plaintiff suffered from panic attacks that caused her to miss time from work and scratch at her arms, causing open sores, and her medication produced unpleasant body odor. Plaintiff's physical problems and absences from work resulted in tension between her and her immediate supervisor, who often made negative comments about plaintiff in front of other workers and ostracized plaintiff in the office by ignoring her, refusing to respond to her greetings and questions, and making disapproving facial expressions when plaintiff took breaks because of her panic attacks. Plaintiff's employment was eventually terminated because her absences violated the employer's attendance policy. After a jury trial, plaintiff was awarded almost $3 million in compensatory damages and $15 million in punitive damages. The court of appeal reduced the compensatory damages award to $1.4 million and the punitive damages award to $2 million. Plaintiff appealed.

The California Supreme Court reinstated part of the compensatory damages award disallowed by the court of appeal, bringing the total amount of compensatory damages to $1.9 million, and modified the punitive damages award to that same amount. In analyzing the plaintiff's entitlement to punitive damages, the Court first analyzed the reprehensibility of the defendant's conduct as required by recent U.S. Supreme Court decisions. The Court concluded that the employer could not be held liable for punitive damages based merely on the conduct of the plaintiff's supervisor, as she was not a managing agent for purposes of establishing a claim to punitive damages against the employer (*47 Cal. 4th 686, 714)* . Thus, the right to recover punitive damages from the employer depended on the conduct of the employer's more senior managers. The Court concluded that the evidence only weakly supported the jury's finding that a managing agent of the employer was informed of the harassing conduct of plaintiff's supervisor and ratified it, either expressly or by inaction. While plaintiff had complained more than once to her distribution center manager about her ongoing conflict with her supervisor, these complaints did not link her conflict with her medical condition and thus did not put the employer on notice that statutory anti-discrimination and harassment rights might be implicated. The Court noted that at only one meeting attended by mid-level managers did plaintiff make a statement that might have notified the employer of the nature of the problem, although no action was taken based on plaintiff's complaint at that meeting. However, even if the employer may have been on notice based on this one meeting and the failure to act against plaintiff's supervisor might have constituted managerial malfeasance, the Court noted that there was no evidence of any repeated corporate misconduct. Moreover, the Court found no evidence that the adoption of the attendance policy that resulted in plaintiff's termination was motivated by a desire to discriminate, even though it may have had that impact. Taking into account all of these factors, the Court concluded that while civil penalties were warranted, the reprehensibility of the employer's conduct was at the low end of the range of wrongdoing that could support an award of punitive damages (*47 Cal. 4th 686, 715-717)* .

The Court went on to hold that 1-to-1 ratio between punitive and compensatory damages was the constitutionally appropriate maximum under the facts, as most of the actionable conduct was committed by a low-level supervisor and the conduct of the corporate employer in not responding to a single complaint brought by the employee was not very

reprehensible. The Supreme Court also noted that the plaintiff was awarded almost $2 million in compensatory damages, which included an award of $1.3 million in non-economic damages that may have included a punitive component reflecting the jury's indignation at the way the plaintiff was treated by her employer (*47 Cal. 4th 686, 718-719)* .

In ***Neal v. Farmers Ins. Exch.*** *(1978) 21 Cal. 3d 910, 148 Cal. Rptr. 389, 582 P.2d 980* , plaintiff brought an action for compensatory and punitive damages for the bad-faith failure of her insurance company to pay uninsured motorist's benefits to her in accordance with the terms of a policy under which she was an insured. Plaintiff died during the pendency of the action, and her husband was substituted as plaintiff, as the administrator of her estate. The jury returned a verdict for plaintiff in the total amount of $1,548,211.35. Defendant moved for a new trial, and the trial court granted a new trial on the sole issue of damages unless plaintiff consented to a reduction of the verdict to $749,011.48. Plaintiff filed a consent and defendant appealed on the judgment entered accordingly. Defendant contended on appeal that the reduced verdict was excessive as a matter of law, and plaintiff filed a cross appeal on the ground that the trial court did not comply with *Code Civ. Proc. § 657* because it did not state the reasons for its order. Plaintiff also contended that the record did not provide substantial support for the trial court's ruling that the damages awarded by the jury were excessive. The court of appeal upheld the trial court's order including the trial court's determination that the amount of the original verdict awarded for punitive damages was excessive. The court of appeal also stated that the verdict, as reduced by the trial judge on plaintiff's consent to the remittitur, was not excessive as a matter of law. In supporting the trial court's determinations relating to the punitive damages as awarded and reduced, the court of appeal discussed the factors relating to punitive damages which were properly considered by the trial court. The court of appeal stated that one factor is the particular nature of defendant's acts in light of the whole record since the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. The court stated that the jury and the trial court could properly have concluded that defendant's conduct was reprehensible, involving a calculated attempt to take advantage of a series of family tragedies (serous illness of the original plaintiff and her son) to effect a low settlement and thereby retain monies rightfully due to the insured. Other factors properly considered by the trial court were the amount of compensatory damages awarded and defendant's wealth (*21 Cal. 3d 910, 928, 933)* .

NOTE:

The United States Supreme Court has provided similar guidelines for reviewing courts to use to ensure that an award of punitive damages meets federal constitutional due process requirements. Those guidelines include the reprehensibility of the conduct, the disparity between the harm or potential harm suffered by the plaintiff and the punitive damages award, and the difference between the punitive damages award and any civil penalties that are authorized or imposed in comparable cases [*State Farm Mut. Auto. Ins. Co. v. Campbell (2003) 538 U.S. 408, 418, 123 S. Ct. 1513, 155 L. Ed. 2d 585* ; *BMW of N. Am., Inc. v. Gore (1996) 517 U.S. 559, 574-585, 116 S. Ct. 1589, 134 L. Ed. 2d 809]* .

[d] Prejudgment Interest Not Included When Comparing Compensatory Damages to Punitive Damages

In ***Amerigraphics, Inc. v. Mercury Casualty Co.*** *(2010) 182 Cal. App. 4th 1538, 107 Cal. Rptr. 3d 307* , plaintiff company sued its insurer for breach of contract and bad faith after the insurer denied plaintiff's claim for flood damage coverage. Defendant insurer's failure to pay plaintiff's claim in a timely manner effectively caused plaintiff to go out of business. After a jury trial, judgment was rendered in favor of plaintiff and compensatory damages awarded of $130,000, prejudgment interest of $40,000, and punitive damages of $1,700,000. Defendant appealed.

The court of appeal affirmed in part, but reduced the amount of punitive damages to $500,000. The court concluded that the evidence was sufficient to support a punitive damages award, as it showed that the insurer was intentionally dishonest and consciously disregarded plaintiff's rights in the following manner: the insurer never advised plaintiff about the available coverage, told the plaintiff there was no coverage for business income and tenant improvements, denied plaintiff's tenant-improvements claim based on an investigation that never took place, and allowed the claim to languish for months (*182 Cal. App. 4th 1538, 1559)* . The court then held, however, that under these facts, a punitive

damages award that was 10 times the amount of compensatory damages and prejudgment interest combined was excessive pursuant to relevant constitutional guidelines. In so holding, the court rejected the claim that prejudgment interest could be considered when comparing the ratio of punitive damages to compensatory damages. Instead, the correct base figure is the amount of actual damages as determined by the jury (*182 Cal. App. 4th 1538, 1565)* .

[4] Additional Authorities

[a] Punitive Damages Exceeding and Bearing No Reasonable Relationship to Compensatory Damages as Excessive

In *Walker v. Farmers Ins. Exchange (2007) 153 Cal. App. 4th 965, 63 Cal. Rptr. 3d 507* , plaintiffs, who shared a condominium, brought suit against the insurer of their homeowners association after the insurer refused to provide a defense to plaintiffs. The underlying insurance claim arose after one of the plaintiffs accidentally injured another person when utilizing an automatic garage door opener. The garages in the condominium unit were detached from the individual units and located in a common area and thus arguably covered under the association's policy. Plaintiffs' suit alleged breach of contract and bad-faith refusal to defend. The jury awarded plaintiffs nearly $1,700,000 in compensatory damages, most of which was for emotional distress, and $8,338,255 in punitive damages. Plaintiffs accepted a reduction in punitive damages to $1,500,000 to avoid a retrial on punitive damages. The court of appeal affirmed the punitive damage award. The court held that because the plaintiffs received a substantial amount of compensatory damages, including $750,000 each for emotional distress, that a 1-to-1 ratio between punitive and compensatory damages was appropriate under the circumstances. The court noted that the large emotional distress awards contained a punitive element, given that plaintiffs' economic losses were relatively small and no physical harm was involved. The court also noted that defendant's conduct was not overly reprehensible, as it consisted primarily of a single decision to deny plaintiffs' tender of defense in the underlying claim (*153 Cal. App. 4th 965, 974-975)* .

In *Jet Source Charter, Inc. v. Doherty (2007) 148 Cal. App. 4th 1, 55 Cal. Rptr. 3d 176* , plaintiff was a private aircraft chartering business that sued another company that had been hired by plaintiff to find and broker the purchase and sale of aircraft. The suit was based in part on defendant's practice of misrepresenting to plaintiff the cost of aircraft purchased for plaintiff. Defendant would report to plaintiff that an aircraft cost a particular amount, when in fact the actual purchase price was lower, and when plaintiff paid the reported purchase price, defendant would retain the difference. Plaintiff prevailed at trial and was awarded $6.5 million in compensatory damages, and $26 million in punitive damages. The court of appeal reduced the amount of punitive damages to no more than $6.5 million. The court held that a 1-to-1 ratio was appropriate because the harm was entirely economic in nature and involved business fraud perpetrated by a fiduciary against an experienced business, rather than against a vulnerable victim. The court also noted that the substantial compensatory damages award was largely restitutionary in nature (*148 Cal. App. 4th 1, 11)* .

In *Boeken v. Philip Morris, Inc. (2005) 127 Cal. App. 4th 1640, 26 Cal. Rptr. 3d 638* , a fraud and products liability action against a large tobacco company, the trial court awarded compensatory and punitive damages to the survivors of a decedent who died from cancer caused by years of cigarette smoking. At trial, the plaintiffs had argued that the defendant's cigarette advertising and public statements in the 1950s and 1960s, which presented false images of health, sophistication, and machismo, had enticed the decedent to begin smoking and to continue to smoke despite mounting evidence from the scientific community that smoking was unhealthy and caused cancer. The jury awarded $5.5 million in compensatory damages and $3 billion in punitive damages, although the trial court reduced the punitive damages to $100 million. To keep the punitive damages award within the constitutional parameters set by the United States Supreme Court, the court of appeal further reduced the punitive damages award to $50 million. The court of appeal concluded that a ratio between punitive and compensatory damages that was greater than a single digit was not justified in light of another substantial punitive damages award against the defendant in a different case for the same conduct and other incentives in place for the defendant to change its past practices. However, the court concluded that a 9-to-1 ratio was warranted, given the extreme reprehensibility of the defendant's longstanding conduct in adding substances to its cigarettes to increase their addictiveness, in gaining smokers by fraud and through its long denial of the dangers of

smoking, and in marketing a product that was more dangerous than consumers expected (*127 Cal. App. 4th 1640, 1703)* .

In *Bardis v. Oates (2004) 119 Cal. App. 4th 1, 14 Cal. Rptr. 3d 89* , the plaintiffs sued a former business partner and his corporation for fraud and breach of fiduciary duties after the defendants' self-dealing and deceptive business practices resulted in the enrichment of the defendants at the expense of the partnership and in violation of the partnership agreement. After a trial verdict for the plaintiffs, the court of appeal reduced a punitive damages award from $7 million to $1.5 million on a compensatory damages award of $165,000. Applying the principles provided by the *United States Supreme Court in State Farm Mut. Auto. Ins. Co. v. Campbell (2003) 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585* , the court concluded that the amount of punitive damages awarded by the jury did not meet constitutional due process requirements. Although the defendants' conduct was highly reprehensible, the conduct caused only economic harm to other experienced business persons, and there was no threat of physical harm. Moreover, the award had to be based on the harm done only to these plaintiffs and could not properly be inflated to reflect that the defendants may have engaged in similar deceptive conduct in business dealings with other partners. The court also noted that civil penalties for similar types of fraudulent conduct usually reflect a three-to-one ratio between actual and punitive damages (*119 Cal. App. 4th 1, 21-24)* . However, the court concluded that a punitive damages-to-compensatory damages ratio of just over 9-to-1 was justified in this case because the defendants' conduct was highly reprehensible and the amount of compensatory damages did not fully reflect the outrageousness of the conduct. The court also noted that given the defendants' estimated worth of between $600 million and $800 million, a lesser amount would not be sufficiently punitive (*119 Cal. App. 4th 1, 26-27)* .

In *Textron Fin. Corp. v. Nat'l Union Fire Ins. Co. (2004) 118 Cal. App. 4th 1061, 13 Cal. Rptr. 3d 586* , the plaintiff was a financial corporation that loaned funds to a tour bus company for purchasing a bus and received a security interest in the bus. As required by the plaintiff, the tour bus company purchased insurance for the bus. The plaintiff was listed as a payee on the policy and was required to be notified in advance if the insurer canceled the policy. Because of a downturn in business, the tour bus company failed to keep up with the insurance premium payments, and the policy was terminated. However, the insurer failed to send notice of the cancellation to the plaintiff. An agreement was worked out with the insurer that allowed the tour bus company to keep its insurance coverage, although the tour bus company had to agree to keep certain buses out of use, which included the bus in which the plaintiff had its security interest. A few months later, this bus was extensively damaged in an accident. The insurer denied the claim submitted by the tour bus company and prepared an endorsement deleting the bus from the policy retroactively to a date before the accident. The tour bus company then defaulted on the plaintiff's loan and declared bankruptcy. The plaintiff filed a claim with the insurer for the damage to the bus, but the claim was denied on the grounds that the bus had been deleted from the policy before the accident, even though the plaintiff had a copy of the endorsement deleting coverage on that bus reflecting a preparation date that was a month after the accident. The plaintiff sued the insurer on various tort and contract theories and prevailed at trial. The plaintiff was awarded approximately $90,000 in compensatory damages on the tort actions and $75,000 on a contract claim, as well as $10,000,000 in punitive damages, which the trial court reduced to $1,700,000.

On appeal, the court of appeal reversed the award of punitive damages unless the plaintiff agreed to a reduction to $360,000. In applying the United States Supreme Court decision in *State Farm Mut. Auto. Ins. Co. v. Campbell (2003) 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585* , the court of appeal concluded that although the insurer's conduct in trying to cover up its potential liability under the policy was sufficiently reprehensible to warrant an award of punitive damages, the compensatory damages awarded provided the plaintiff with a full recovery for the harm done. Therefore, although the insurer's wealth was great enough to support a much higher award, the court held that due process would allow an award of only $360,000, an amount that was approximately four times the amount of compensatory damages awarded on the tort claims (*118 Cal. App. 4th 1061, 1081-1085)* .

In *Rosener v. Sears, Roebuck & Co. (1980) 110 Cal. App. 3d 740, 168 Cal. Rptr. 237* , plaintiffs brought an action against defendant for damages for breach of contract and fraud and deceit in connection with defendant's breach of

home improvement contracts. After a jury trial, the trial court entered judgment in favor of plaintiffs for $158,000 in compensatory damages and $10 million in punitive damages.

On appeal, defendant contended that even though the evidence justified some award of punitive damages, the amount fixed by the jury was excessive as a matter of law. The court of appeal concluded, after reviewing the evidence and prior case law, that the $10 million punitive damages verdict was clearly excessive, not reasonably related to either the compensatory damages or the nature of defendant's conduct, and so grossly disproportionate as to be indicative of passion and prejudice on the part of the jury. The court relied, in part, on *Neal v. Farmers Ins. Exch. (1978) 21 Cal. 3d 910, 928, 148 Cal. Rptr. 389, 582 P.2d 980* [*see § 64.41[3][c]*] and on *Little v. Stuyvesant Life Ins. Co. (1977) 67 Cal. App. 3d 451, 469-470, 136 Cal. Rptr. 653* [*see § 64.141[3][a]*] (*110 Cal. App. 3d 740, 754)* . The court therefore vacated the amount of the punitive damages award and remanded the case for a new trial on the issue of punitive damages only, unless plaintiffs filed a written consent to reduction of the punitive damages award to $2.5 million within 30 days, in which case the judgment would be modified to award plaintiffs punitive damages in that amount and, as modified, affirmed in its entirety (*110 Cal. App. 3d 740, 757)* .

[b] Punitive Damages Not Reasonably Related to Defendant's Wealth as Excessive

In *Gerard v. Ross (1988) 204 Cal. App. 3d 968, 251 Cal. Rptr. 604* , the plaintiff brought an action for malicious prosecution against several parties, including the defendant, an attorney. The jury awarded punitive damages of $50,000 against the defendant, but no compensatory damages. The trial court conditionally granted the defendant's motion for a new trial unless the plaintiff would accept a remittitur of the punitive damages to $25,000. The plaintiff accepted the remittitur, but appealed. The court of appeal held that the trial court's action was not an abuse of discretion under the circumstances, because there was evidence supporting the trial court's determination that the $50,000 award did not bear a reasonable relationship to the defendant's assets or annual income (*204 Cal. App. 3d 968, 979)* .

In *Delos v. Farmers Ins. Group (1979) 93 Cal. App. 3d 642, 155 Cal. Rptr. 843* , the insured and her husband brought an action for compensatory and punitive damages against their insurer and insurance group for bad-faith refusal of uninsured motorist coverage. The jury awarded compensatory damages and punitive damages of $4 million. The trial court granted defendants' motion for a new trial on the issue of punitive damages, unless plaintiffs consented to a reduced award of $350,000. Plaintiffs filed a cross appeal on the remittitur.

The court of appeal, affirming the trial court, held that the $4 million punitive damages award was excessive in relation to defendants' wealth, in view of the likelihood of other lawsuits and multiple punitive awards, each of which would be sufficient to punish defendants completely for the misconduct involved (*93 Cal. App. 3d 642, 667)* .

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6-64 California Points & Authorities § 64.142

§ 64.142 Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 659]--Excessive Damages [Code Civ. Proc. § 657(5)]--Punitive Damages Award Improper Because Plaintiff Did Not Meet Burden of Establishing Defendant's Wealth

[1] FORM

[*Caption. See § 64.140.*]

PUNITIVE DAMAGES CANNOT BE AWARDED UNLESS THE PLAINTIFF HAS CARRIED THE BURDEN OF PROOF TO ESTABLISH EVIDENCE OF DEFENDANT'S FINANCIAL CONDITION.

A. Motion for New Trial. [*See § 64.140, Paragraph A.*]

B. Trial Court's Power to Determine Excessiveness of Damages. [*See § 64.140, Paragraph B.*]

C. When Damages Excessive. [*See § 64.140, Paragraph C.*]

D. New Trial Limited to Damages and Conditioned on Failure to Consent to Remittitur. [*See § 64.140, Paragraph D.*]

E. Plaintiff Has Burden of Establishing Defendant's Financial Condition. A plaintiff who seeks to recover punitive damages must bear the burden of establishing the defendant's financial condition (*Adams v. Murakami (1991) 54 Cal. 3d 105, 123, 284 Cal. Rptr. 318, 813 P.2d 1348*).

[*Optional*] **F. Failure to Establish Financial Condition Not Subject to Waiver.** Plaintiff's burden of establishing defendant's financial condition in order to support an award of punitive damages is imposed as a matter of public policy and is not subject to waiver by defendant's failure to object to the inadequacy of plaintiff's proof (*Tomaselli v. Transamerica Ins. Co. (1994) 25 Cal. App. 4th 1269, 1282-1284, 31 Cal. Rptr. 2d 433*).

[*Optional*] **G. Financial Condition Evidence Must Relate Specifically to Defendant.** Evidence of the financial

condition of defendant's corporate parent, without separate information on defendant's financial status, is not sufficient to support an award of punitive damages (*Tomaselli v. Transamerica Ins. Co. (1994) 25 Cal. App. 4th 1269, 1283, 31 Cal. Rptr. 2d 433*).

[*Optional*] **H. Evidence Must Show Defendant's Current Worth.** To support an award of punitive damages, plaintiff must present evidence showing the value of defendant's assets at the time of trial, and evidence of defendant's worth at some point in the past is insufficient (*Kelly v. Haag (2006) 145 Cal. App. 4th 910, 915-917, 52 Cal. Rptr. 3d 126*).

[*Optional*] **I. Evidence Must Show Defendant's Financial Liabilities.** In order to support an award of punitive damages, plaintiff must present evidence showing not just the defendant's financial assets, but financial liabilities as well (*Baxter v. Peterson (2007) 150 Cal. App. 4th 673, 680-681, 58 Cal. Rptr. 3d 686*).

Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be used in support of a motion for new trial on the ground that plaintiff did not introduce sufficient evidence of defendant's financial condition to support the award of punitive damages against defendant. Paragraph E sets forth the basic principle that plaintiff has the burden of establishing defendant's financial condition. Optional Paragraph F may be used if defendant did not object to the plaintiff's failure to introduce evidence of defendant's financial condition or to the inadequacy of evidence presented. Optional Paragraph G is for use if the evidence of financial condition does not establish the financial condition of the defendant specifically, but refers to some other corporate entity. Optional Paragraph H is for use if the plaintiff's evidence of defendant's wealth is evidence of past wealth, rather than of the defendant's current worth. Optional Paragraph I is for use if the plaintiff's evidence of defendant's wealth fails to include evidence of defendant's financial liabilities. If evidence of financial condition has been introduced but the sufficiency of the evidence is disputed, counsel may wish to argue in the alternative that the award is disproportionate to the financial condition established by the evidence [*see § 64.141*].

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, defendant should discuss any evidence introduced by plaintiff that relates to defendant's financial condition, and the ways in which the evidence falls short of plaintiff's burden of proof.

[c] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 64.175* may be used to oppose the motion supported by these points and authorities.

[3] Discussion of Authorities

[a] Plaintiff Has Burden of Establishing Defendant's Financial Condition

The facts and procedural background of ***Adams v. Murakami*** *(1991) 54 Cal. 3d 105, 284 Cal. Rptr. 318, 813 P.2d 1348* , are discussed in *§ 64.175[3][a]*. To support its holding that plaintiff rather than defendant should bear the burden of establishing defendant's financial condition, the Court noted that *Evid. Code § 500* requires the party asserting a claim to bear the burden of establishing any fact essential to that claim (*54 Cal. 3d 105, 119)* . The Court also found its conclusion supported by what it perceived to be the fundamental unfairness of requiring a defendant to argue both that punitive damages should not be awarded, and that its financial condition justifies a relatively small award; the latter argument can easily be seen as a tacit admission that some punitive damages are justified (*54 Cal. 3d 105, 120-121)* . The Court therefore held that a plaintiff seeking to recover punitive damages must bear the burden of establishing the defendant's financial condition (*54 Cal. 3d 105, 123)* .

[b] Failure to Establish Financial Condition Not Subject to Waiver

In ***Tomaselli v. Transamerica Ins. Co.*** *(1994) 25 Cal. App. 4th 1269, 31 Cal. Rptr. 2d 433* , plaintiffs sued to recover compensatory and punitive damages based on allegations of bad-faith insurance practices. The jury found for plaintiffs, and awarded damages for breach of contract, emotional distress damages based on the tort of unreasonable claims practices, and punitive damages. Defendant appealed, arguing with respect to the punitive damages award that the award was not supported by sufficient evidence, and the court of appeal reversed the punitive damages award.

The court stated that the award could be reversed on either of two grounds: that plaintiff failed to establish defendant's financial condition, and that the evidence was insufficient to establish malice, fraud, or oppression. In discussing the financial condition evidence, the court rejected plaintiff's argument that defendant's failure to object to the evidence introduced--an annual report of "Transamerica Corporation" that included data on "Transamerica Insurance Group"--waived any later attack on the sufficiency of the evidence. The requirement that plaintiff produce evidence of defendant's financial condition is imposed as a matter of public policy, and therefore is not subject to waiver (*25 Cal. App. 4th 1269, 1282)* . Because of the public's interest in meaningful scrutiny of punitive damages awards, a private litigant cannot by inaction waive the requirement (*25 Cal. App. 4th 1269, 1284)* .

[c] Financial Condition Evidence Must Relate Specifically to Defendant

The facts and procedural background of ***Tomaselli v. Transamerica Ins. Co.*** *(1994) 25 Cal. App. 4th 1269, 31 Cal. Rptr. 2d 433* , are discussed in *§ 64.142[3][b]*. The court held that the Transamerica Corporation annual report, which set out financial data for "Transamerica Insurance Group," did not establish the financial condition of defendant, Transamerica Insurance Company. Although defendant may be within the group, the group was not the issuer of the insurance policy involved in the litigation; the court held that there was no evidence regarding the financial condition of defendant (*25 Cal. App. 4th 1269, 1283)* .

The court also rejected the contention that application of the alter ego doctrine could make the evidence sufficient if plaintiff can show that defendant and Transamerica Insurance Group were alter egos. The court declined to follow the reasoning of *Downey Sav. & Loan Ass'n v. Ohio Cas. Ins. Co. (1987) 189 Cal. App. 3d 1072, 1100, 234 Cal. Rptr. 835* , finding that the case was substantively flawed due to the court's failure to discuss the apparent lack of notice and opportunity to litigate the alter ego question afforded to the parent company, and its failure to apply all of the tests (such as commingling of assets and inadequate capitalization) that must be met to establish the alter ego doctrine (*25 Cal. App. 4th 1269, 1285)* . The court also noted that the alter ego doctrine is equitable in nature, and depends on a showing that an inequitable result would follow if corporate separateness is respected, and that plaintiff did not show that an injustice would result if the punitive damages award was limited by the defendant's financial condition rather than by the condition of the parent company (*25 Cal. App. 4th 1269, 1285-1286)* .

[d] Evidence Must Show Defendant's Current Worth

In *Kelly v. Haag (2006) 145 Cal. App. 4th 910, 52 Cal. Rptr. 3d 126* , plaintiff, the owner of a condominium,

successfully sued a contractor for fraud and negligence and was awarded $75,000 in punitive damages by the trial court. At trial, however, the plaintiff had presented no evidence of the contractor's net worth. Instead, plaintiff had relied on admissions that defendant had made to plaintiff's sister two years before trial about the purchase of a large home, for which defendant paid approximately $800,000, as well as knowledge of defendant's ownership of another home. The trial court took judicial notice of the fact that property values had generally appreciated in the two years since defendant's admissions and concluded that defendant had a minimum net worth of $750,000. Defendant appealed the punitive damages award as being unsupported by the evidence.

The court of appeal reversed the award of punitive damages, concluding that plaintiff had failed to carry his burden to provide evidence of defendant's worth at the time of trial. The court noted that plaintiff had presented no evidence that defendant still owned either property at the time of trial. Even assuming that defendant may still have owned the properties, plaintiff presented no evidence regarding encumbrances on the properties or of any other liabilities defendant may have had at the time of trial. Defendant had expressed an intent two years before trial to take a second mortgage, yet no evidence was provided at trial concerning that loan (*145 Cal. App. 4th 910, 917)* . Although plaintiff noted that the defendant was free to appear at trial to present evidence of different assets or liabilities, but failed to do so, the court rejected this argument, noting that plaintiff bore the burden of proving that defendant had sufficient worth at the time of trial to support the award of punitive damages (*145 Cal. App. 4th 910, 918)* .

[e] Evidence Must Show Defendant's Financial Liabilities

In *Baxter v. Peterson (2007) 150 Cal. App. 4th 673, 58 Cal. Rptr. 3d 686* , plaintiff tenant sued his landlord for fraud, alleging that defendant promised plaintiff an option to buy his house upon expiration of his lease after using his own money to renovate it, but that defendant did not honor this promise and never had any intention of doing so. Plaintiff was awarded compensatory damages of $250,000 and punitive damages of $75,000. Defendant appealed.

The court of appeal affirmed in part and reversed in part. The court of appeal reversed the award of punitive damages on the grounds that plaintiff had failed to provide sufficient evidence of the defendant's financial condition and ability to pay. Plaintiff presented evidence of defendant's job, but no salary information. Plaintiff also presented evidence of defendant's ownership of several properties and their value, but failed to present complete evidence of the amount of income or profit these properties generate. In fact, plaintiff failed to present any evidence of defendant's financial liabilities or whether any of the defendant's properties were mortgaged or otherwise encumbered. In the absence of such evidence, plaintiff failed to present a complete picture of defendant's actual wealth sufficient to support an award of punitive damages. Because plaintiff had been given a full and fair opportunity to present his case for punitive damages at trial, the court held that the issue was not subject to retrial (*150 Cal. App. 4th 673, 680-681)* .

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6-64 California Points & Authorities § 64.143

§ 64.143 Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 659]--Excessive Damages [Code Civ. Proc. § 657(5)]--Excessive Compensatory Damages Award Due to Erroneous Submission of Exemplary Damages Issue to Jury

[1] FORM

[*Caption. See § 64.140.*]

THE AWARD FOR COMPENSATORY DAMAGES WAS EXCESSIVE AS A MATTER OF LAW BECAUSE IT WAS DUE TO THE IMPROPER SUBMISSION OF AN EXEMPLARY DAMAGES ISSUE TO THE JURY.

A. Motion for New Trial. [*See § 64.140, Paragraph A.*]

B. Trial Court's Power to Determine Excessiveness of Damages. [*See § 64.140, Paragraph B.*]

C. When Damages Excessive. [*See § 64.140, Paragraph C.*]

D. New Trial Limited to Damages and Conditioned on Failure to Consent to Remittitur. [*See § 64.140, Paragraph D.*]

E. Excessive Compensatory Damages Based on Erroneously Presented Exemplary Damages Issue. If the erroneous presentation of an exemplary damages issue to a jury results in the jury awarding a high amount of compensatory damages, then the compensatory damage award derives from passion or prejudice and is excessive as a matter of law (*California Shoppers, Inc. v. Royal Globe Ins. Co. (1985) 175 Cal. App. 3d 1, 67-68, 221 Cal. Rptr. 171*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be used in support of a motion for new trial on the ground that an award for compensatory damages is excessive as a matter of law, if the issue of exemplary damages was erroneously presented, and the jury consequently awarded a high amount of compensatory damages [*see California Shoppers, Inc. v. Royal Globe Ins. Co. (1985) 175 Cal. App. 3d 1, 67-68, 221 Cal. Rptr. 171]* .

[B] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should discuss facts showing that the issue of exemplary damages was erroneously presented to the jury, and that the jury awarded an excessive amount of compensatory damages in order to punish defendant rather than to compensate plaintiff for damages actually suffered.

[c] Related Pleading and Practice Forms

For forms relating to motions for new trial and motions to vacate judgment generally, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[d] Related Points and Authorities

For points and authorities for use in motions for new trial and motions to vacate judgment, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] Excessive Compensatory Damages Based on Erroneously Presented Exemplary Damages Issue

In ***California Shoppers, Inc. v. Royal Globe Ins. Co.*** *(1985) 175 Cal. App. 3d 1, 221 Cal. Rptr. 171* , an insured brought an action against its insurer to recover damages for causes of action concerning the insurance contract. Plaintiff alleged that defendant (1) refused to indemnify plaintiff for a judgment awarded against it in a third-party action, (2) failed to defend that action, (3) breached the implied covenant of good faith and fair dealing with regard to the failure to defend, and (4) committed fraud at the time the insurance was purchased. The trial court allowed the issue of exemplary damages to go to the jury, and plaintiff's counsel urged the jury to return a large compensatory damage award in order to justify and uphold a substantial punitive damages award. Plaintiff's counsel also argued that defendant was a large and wealthy company, and should be punished by a large compensatory damage award. The jury verdict awarded plaintiff, inter alia, punitive damages and a high compensatory damages award for economic or business loss. Defendant moved for a new trial and for judgment notwithstanding the verdict. The trial court denied the former, and granted the latter only in regard to the exemplary damages. Defendant appealed from the judgment, and plaintiff cross-appealed from the postjudgment order striking the exemplary damages award.

The court of appeal affirmed with regard to the exemplary damages, and reversed with regard to other issues, including the award of compensatory damages for economic or business loss. The court held that the injection of the exemplary damage issue into the trial could not help but have prejudiced the jury against defendant (*175 Cal. App. 3d 1, 67)* . The basis for awarding compensatory damages is not to support an award of exemplary damages, but rather to compensate a plaintiff for the actual damages suffered. Because the improper injection of the exemplary damages issue into the case

permitted plaintiff's counsel to appeal to the passions of the jury, the court held that defendant was prejudiced and reversed the award of compensatory damages for economic and business loss (*175 Cal. App. 3d 1, 68)* .

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6-64 California Points & Authorities § 64.144

§ 64.144 Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 659]--Excessive Damages [Code Civ. Proc. § 657(5)]--Exemplary Damages Award Improper If Not Accompanied by Award of Compensatory Damages

[1] FORM

[*Caption. See § 64.140.*]

THE AWARD FOR EXEMPLARY DAMAGES WAS EXCESSIVE AS A MATTER OF LAW BECAUSE AN AWARD OF EXEMPLARY DAMAGES, EVEN IF BASED ON A JURY FINDING OF FRAUD, MUST BE ACCOMPANIED BY AN EXPRESS AWARD OF COMPENSATORY DAMAGES.

Jury Determination of Fraud Does Not Override Requirement That Exemplary Damage Award Be Accompanied by Compensatory Damages Award. Even though it specifically finds that the defendant acted with fraud, oppression, or malice, a jury cannot award exemplary damages if it does not award compensatory damages (*Cheung v. Daley (1995) 35 Cal. App. 4th 1673, 1677, 42 Cal. Rptr. 2d 164*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a defendant's motion for a new trial on the ground of excessive damages, based on the contention that a jury award of punitive damages is improper if there is no

accompanying award of compensatory damages.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the absence of compensatory damages, and, if appropriate, attach the jury form showing the lack of compensatory damages [*see Cheung v. Daley (1995) 35 Cal. App. 4th 1673, 1677, 42 Cal. Rptr. 2d 164]* .

[3] Discussion of Authorities

[a] Jury Determination of Fraud Does Not Override Requirement That Exemplary Damage Award Be Accompanied by Compensatory Damages Award

In ***Cheung v. Daley*** *(1995) 35 Cal. App. 4th 1673, 42 Cal. Rptr. 2d 164* , the jury found by a special verdict that the total amount of compensatory damages to which the plaintiff's were entitled was "0.00." The jury further found that the defendant had acted with fraud, oppression, or malice, for which they awarded plaintiffs exemplary damages of $92,000. Plaintiffs accepted remittitur to a lesser amount, and judgment was entered. Defendant then appealed.

The court of appeal ruled that an award of exemplary damages must be accompanied by an award of compensatory damages, and reversed the judgment (*35 Cal. App. 4th 1673, 1678)* . The court noted that the Supreme Court has stated that the foundation for the recovery of exemplary damages rests upon the fact that substantial damages have been sustained, and that exemplary damages cannot be made the basis of recovery independent of a showing that would entitle the plaintiff to an award of actual damages (*35 Cal. App. 4th 1673, 1675)* . Whether the plaintiff acted with fraud, oppression, or malice was thus irrelevant in light of the finding that plaintiffs suffered no compensable damages (*35 Cal. App. 4th 1673, 1677)* .

[4] Additional Authorities

[a] Jury Determination of Fraud Does Not Override Requirement That Exemplary Damage Award Be Accompanied by Compensatory Damages Award

In *California v. Altus Finances S.A. (9th Cir. 2008) 540 F.3d 992* , a jury specifically found that defendant committed intentional misrepresentations and concealed material facts. However, the jury also found that plaintiff was entitled to "$ 0" in compensatory damages, although it went on to award punitive damages of $700 million. The trial court vacated the award of punitive damages and the Ninth Circuit Court of Appeals affirmed. The Court of Appeals, relying on *Cheung v. Daley,* which is discussed in [3][a], *above,* held that no punitive damages are allowed under California law if compensatory damages, even nominal damages, are available to be awarded to and sought by a plaintiff, but a jury expressly decides to award no compensatory damages (*540 F.3d 992, 1002)* .

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G. Supporting Motion for New Trial

6-64 California Points & Authorities § 64.144A

§ 64.144A Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 659]--Excessive Damages--Exemplary Damages Awarded for Harm to Nonparties

[1] FORM

[*Caption. See § 64.140.*]

THE AWARD FOR EXEMPLARY DAMAGES WAS EXCESSIVE BECAUSE IT WAS INTENDED AT LEAST IN PART TO PUNISH THE DEFENDANT FOR HARM ALLEGEDLY DONE TO PERSONS WHO WERE NOT PARTIES TO THE SUIT.

A. Punitive Damages for Harm to Nonparties Unconstitutional. While harm caused to nonparties may be considered when evaluating the reprehensibility of a defendant's conduct, an award of punitive damages specifically intended to punish for harm allegedly caused to nonparties violates federal due process (*Philip Morris USA v. Williams (2007) 549 U.S. 346, 127 S. Ct. 1057, 166 L. Ed. 2d 940, 949-950)* .

[*Optional*] **B. Evidence of Dissimilar Misconduct Committed Against Nonparties Inadmissible.** Evidence of other misconduct by the defendant is inadmissible to prove either a right to or amount of punitive damages if that other misconduct is not sufficiently similar to the misconduct that allegedly damaged the plaintiff (*Holdgrafer v. Unocal Corp. (2008) 160 Cal. App. 4th 907, 928-932, 73 Cal. Rptr. 3d 216*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a defendant's motion for a new trial on the ground of excessive damages, based on the contention that the jury award of punitive damages improperly attempts to punish defendant for harm caused to nonparties.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law stated. Thus, counsel should discuss the evidence and argument presented at trial dealing with the harm defendant's conduct allegedly caused to nonparties to the suit and attempt to show how the jury used that evidence and argument to inflate the amount of punitive damages awarded. Counsel should also provide evidence that the trial court failed to take steps to prevent the jury from improperly using evidence of the harm or potential harm caused to nonparties.

[3] Discussion of Authorities

[a] Punitive Damages for Harm to Nonparties Unconstitutional

In *Philip Morris USA v. Williams (2007) 549 U.S.346, 127 S. Ct. 1057, 166 L. Ed. 2d 940* , plaintiff was the widow of a smoker who sued a large tobacco company on behalf of her husband's estate, alleging that the defendant knowingly and falsely represented that smoking was safe. An Oregon jury awarded plaintiff about $821,000 in compensatory damages, as well as $79.5 million in punitive damages. The Oregon Supreme Court eventually upheld the damage awards, specifically finding that the punitive damages award was not "grossly excessive." In reaching this conclusion, the Court rejected the defendant's argument that the U.S. Constitution prohibits a state jury from using punitive damages to punish a defendant for harm to nonparties. Defendant had argued that because plaintiff's attorney had argued to the jury the potential damage that defendant's conduct had on other smokers who were not parties to the lawsuit, the trial court erred in refusing to instruct the jury that they were not to impose punitive damages for harm caused to nonparties.

The United States Supreme Court granted defendant's writ of certiorari and reversed. The Supreme Court agreed that harm caused to nonparties may be considered when evaluating the reprehensibility of a defendant's conduct, such as when the evidence shows that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public. Beyond that limited use of evidence of harm caused to nonparties, however, the Court held that an award of punitive damages specifically intended to punish for harm allegedly caused to nonparties is unconstitutional, as it amounts to a taking of property without due process. The Court noted that a defendant threatened with punishment for injury to nonparties has no opportunity to defend against the charges. In addition, permitting such punishment, according to the Court, would add a near standardless dimension to the punitive damages equation and magnify the due process concerns with preventing arbitrariness, uncertainty, and lack of notice. The Court also could find no authority to support the use of punitive damages to punish a defendant for harming others (*579 U.S. 346, 127 S. Ct. 1057, 1062-1064)* . The Court concluded that if there exists in a particular case a significant risk that the jury may be confused as to how evidence of harm to nonparties may be used, a court must, upon request, take steps to alleviate the confusion, although it left to the states the fashioning of appropriate protections (*549 U.S. 346, 127 S. Ct 1057, 1065)* . Because the Oregon Supreme Court's opinion focussed on more than reprehensibility and indicated that it considered it to be appropriate to actually punish for harm to nonparties, the United States Supreme Court remanded for reconsideration, and perhaps retrial, of the punitive damages award, without addressing itself whether the initial $79.5 million award was grossly excessive (*549 U.S. 346, 127 S. Ct. 1057, 1064-1065)* .

[b] Evidence of Dissimilar Misconduct Committed Against Nonparties Inadmissible

In ***Holdgrafer v. Unocal Corp.*** *(2008) 160 Cal. App. 4th 907, 73 Cal. Rptr. 3d 216* , plaintiffs were owners of commercial property damaged by subsurface contamination caused by leakage from oil pipelines owned by defendant. Defendant acknowledged the contamination and assured plaintiffs for over a decade that the company would work with plaintiffs to ensure that they would not suffer a loss in property value from the contamination. During the lengthy time

period that the parties negotiated, defendant took steps to prevent further contamination and assisted in protecting plaintiffs from negative financial impact by, among other things, making and guaranteeing loans to plaintiffs. However, defendant contended that the contamination would not require an expensive excavation but would dissipate over time on its own. When plaintiffs concluded that they were not satisfied with the steps taken by defendant, plaintiffs sued defendant for negligence, nuisance, and trespass. The jury awarded over $2.5 million in compensatory damages and $10 million in punitive damages, although the trial court reduced the punitive damage award to $5 million. The punitive damage award was predicated largely on substantial evidence admitted at trial showing that employees of defendant had committed extensive acts of denial and concealment in relation to other spills and leaks associated with other facilities. Defendant appealed.

The court of appeal affirmed the compensatory damage award, but reversed the award of punitive damages. Relying on the United States Supreme Court's due process jurisprudence restricting the use of evidence of other acts of misconduct when awarding punitive damages, the court of appeal concluded that the trial court committed reversible error in admitting evidence of other misconduct that was dissimilar to the misconduct alleged by plaintiffs. In seeking punitive damages, plaintiffs had argued that defendant's corporate policy was to deny and cover up leaks and spills, relying almost exclusively on evidence that defendant had concealed other spills and leaks from the public and government agencies, denied responsibility for resulting contamination, and misrepresented the magnitude of environmental damage sustained. The harm alleged by plaintiffs, however, had nothing to do with such denials and misrepresentations. Defendant had reported the relevant contamination to the state and affected property owners. After defendant's voluntary revelation, state and private entities continuously monitored the contamination and defendant continued to disclose relevant information. They also continued to negotiate with plaintiffs over the best ways to contain the damage and provided plaintiffs with financial assistance to protect the value of plaintiffs' investment. Only when plaintiffs determined that they were not satisfied with the result did they bring suit. The court of appeal concluded that the trial court's admission of dissimilar evidence of defendant's conduct in response to other spills and leaks, especially when no limiting instruction was given, invited the jury to punish defendant for unrelated misconduct that had no effect on plaintiffs, in violation of federal due process concerns (*160 Cal. App. 4th 907, 928-932)* .

[4] Additional Authorities

[a] Punitive Damages for Harm to Nonparties Unconstitutional

In *Bullock v. Philip Morris USA, Inc. (2008) 159 Cal. App. 4th 655, 71 Cal. Rptr. 3d 775* , plaintiff was a cigarette smoker who sued a tobacco company for products liability and fraud based on the company's long-term efforts to hide the harmful health effects of cigarette smoking from their customers and the general public. A jury awarded plaintiff compensatory damages and $28 billion dollars in punitive damages, although the trial court reduced the amount of punitive damages to $28 million dollars. The court of appeal, after reviewing the United States Supreme Court decision in *Philip Morris USA v. Williams,* described in [3][a], *above,* held that it was prejudicial error for the trial court to refuse the defendant's request to instruct the jury that they were not permitted to impose punishment for harm suffered by persons other than the plaintiff. The court noted that at trial, plaintiff's counsel had argued that for every trial brought by a smoker against the defendant, 28,000 persons had died from the harmful effects of smoking, and the $28 billion in punitive damages awarded by the jury amounted to $1 million for each of these purported deaths. In light of this record, the court concluded that failure to give defendant's requested instruction was prejudicial error (*159 Cal. App. 4th 655, 693-695)* .

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6-64 California Points & Authorities § 64.145

§ 64.145 Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 659]--Plaintiff's Presentation of Certain Damages as Surprise [Code Civ. Proc. § 657(3)]

[1] FORM

[*Caption. See § 64.140.*]

IT IS PROPER TO GRANT A MOTION FOR A NEW TRIAL IF THE DEFENDANT IS SURPRISED BY PLAINTIFF'S PRESENTATION OF DAMAGES AT TRIAL AFTER RELYING ON PLAINTIFF'S DENIAL OF ANY CLAIM FOR THOSE DAMAGES BEFORE TRIAL.

A. Motion for New Trial. On the application of the party aggrieved, the _____ [verdict *or* decision] may be vacated, in whole or in part, and a new trial may be granted, on all or some of the issues, on the ground of accident or surprise that ordinary prudence could not have guarded against, if substantial rights of the aggrieved party are materially affected thereby (*Code Civ. Proc. § 657(3)*).

B. New Trial on Issue of Damages Where Defendant Surprised by Damages Presented at Trial. A new trial limited to the issue of damages is proper when a defendant is surprised and consequently unprepared to meet a claim for damages by a plaintiff who asserts items of damage at trial for which he or she had denied having any claim during pretrial discovery (*Campain v. Safeway Stores, Inc. (1972) 29 Cal. App. 3d 362, 366, 104 Cal. Rptr. 752*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a defendant's motion for a new trial on the ground of surprise which ordinary prudence could not have guarded against when a plaintiff asserts items of damage at trial which he or she denied during pretrial discovery.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms for use in making a motion for a new trial, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing motions for a new trial, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] New Trial on Issue of Damages Where Defendant Surprised by Damages Presented at Trial

In ***Campain v. Safeway Stores, Inc.*** *(1972) 29 Cal. App. 3d 362, 104 Cal. Rptr. 752* , plaintiff brought a personal injury action against defendant. In her complaint, plaintiff prayed for damages for pain and suffering, medical expenses, and loss of earnings. At her deposition prior to trial, plaintiff stated that she was not employed at the time of the accident and did not lose any immediate employment as a result of her slip and fall in defendant's store. Plaintiff subsequently indicated through her answers to interrogatories that she was not making any claim for lost wages, earnings, or earning capacity resulting from the accident in her answers to defendant's interrogatories. Thereafter, plaintiff moved, and was granted permission, to amend her complaint to pray for increased damages. However, neither the papers submitted nor the argument on the motion to amend the complaint referred to a loss of earnings or to future earnings. At the trial, plaintiff sought to introduce evidence of her prospective employment at the time of the accident and her plans for future employment. This evidence was admitted over defendant's objection. The jury awarded plaintiff compensatory damages in an amount reduced on defendant's motion for a new trial. Both parties appealed. The court of appeal granted defendant a new trial solely on the issue of damages on the ground that defendant was genuinely surprised by the introduction of evidence of loss of earnings and was thereby prejudiced in its defense. The court of appeal reasoned that defendant was entitled to rely on pretrial discovery in preparing its case for trial. Thus, defendant was denied a fair opportunity to prepare to meet the issue of lost earnings and future earnings by plaintiff's assertions that she was not claiming them as damages.

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6-64 California Points & Authorities § 64.146

§ 64.146 Supporting Plaintiff's Motion for New Trial [Code Civ. Proc. § 659]--Inadequate Damages [Code Civ. Proc. § 657(5)]

[1] FORM

[*Caption. See § 64.140.*]

IT IS PROPER TO GRANT A MOTION FOR A NEW TRIAL IF PLAINTIFF IS ENTITLED TO A LARGER RECOVERY THAN THAT AWARDED BY THE JURY.

A. Motion for New Trial. On the application of the party aggrieved, the _____ [verdict *or* decision] may be vacated, in whole or in part, and a new trial granted, on all or some of the issues on the ground that the damages are inadequate, if substantial rights of the aggrieved party are materially affected thereby (*Code Civ. Proc. § 657*).

B. New Trial as Proper if Plaintiff Clearly Entitled to Larger Recovery. A trial judge may set aside a verdict on a motion for a new trial if a plaintiff, who is entitled to a recovery, is clearly entitled to a larger amount of damages than allowed by the jury (*Crowe v. Sacks (1955) 44 Cal. 2d 590, 599, 283 P.2d 689*).

[*Optional*] **C. Discretion to Grant New Trial Limited to Damages.** The trial judge may limit an order for a new trial to the issue of damages if the issue of liability has been determined by the jury (*Myers v. King (1969) 272 Cal. App. 2d 571, 581, 77 Cal. Rptr. 625*).

[*Optional*] **D. New Trial Limited to Damages and Conditioned on Failure to Consent to Additur.** If the ground for granting a new trial limited to the issue of damages after a trial by jury is inadequate damages, the court may, in its discretion, grant the new trial subject to the condition that the motion for a new trial is denied if the party against whom the verdict has been rendered consents to an addition of so much thereto as the court in its independent judgment determines from the evidence to be fair and reasonable (*Code Civ. Proc. § 662.5(a)*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for a new trial on the ground of inadequate damages. Optional Paragraph C may be used if the motion is being limited to the issue of inadequate damages and the jury determined the issue of liability. Optional Paragraph D may be used if the ground of inadequate damages is the only one being raised and the moving party wants to request the court to give the defendant the opportunity to consent to an addition to damages instead of having the court grant a new trial.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms for use in making a motion for a new trial, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender). For a form for use in making a motion for a new trial on the ground of excessive or inadequate damages, see California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing motions for a new trial, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] New Trial as Proper if Plaintiff Clearly Entitled to Larger Recovery

In ***Crowe v. Sacks*** *(1955) 44 Cal. 2d 590, 599, 283 P.2d 689* , two plaintiffs brought an action against defendant for personal injuries sustained by them in an automobile collision. At the conclusion of the trial, the jury returned a verdict in favor of each of the plaintiffs which the judge found to be inadequate and the result of the jury's compromise of the issues of negligence and damages. The trial judge then returned the jury for further deliberations to reconsider its verdict. The jury subsequently returned a verdict in favor of both of the plaintiffs which awarded each of them an amount commensurate with their actual damage. Defendant's motions to enter the original verdict and for a new trial were denied and defendant appealed, arguing that the trial court committed prejudicial error in returning the jury for further deliberations. The Supreme Court held, in part, that the trial court could have granted a motion for a new trial if it was dissatisfied with the amount of the jury's verdict. It stated that a trial judge may set aside a verdict on a motion for a new trial when a plaintiff, who is entitled to a recovery, is clearly entitled to a larger amount than that allowed by the jury. Thus, in the absence of an insufficient or defective verdict, the trial court erred procedurally to defendant's prejudice when it sent the jury back for further deliberations with the statement that the damages awarded in its original verdict were grossly inadequate (*44 Cal. 2d 590, 599)* .

[b] Discretion to Grant New Trial Limited to Damages

In ***Myers v. King*** *(1969) 272 Cal. App. 2d 571, 77 Cal. Rptr. 625* , plaintiff brought an action against defendant for personal injuries sustained when plaintiff was struck from behind by defendant's automobile as he walked down a

roadway facing on-coming traffic. At the conclusion of the trial, the jury awarded plaintiff both special damages and general damages. The trial court thereafter granted plaintiff's motion for a new trial limited to the issue of damages subject to the condition that the motion would be denied if defendant consented to an additur specified by the trial court. Defendant did not consent and appealed from the judgment and order granting a new trial. Defendant contended, in part, that the trial court abused its discretion in granting a new trial limited to the issue of damages. The court of appeal affirmed the order granting the new trial limited to damages, noting that the decision to limit a new trial to the issue of damages rests in the discretion of the trial court and that such a decision is proper when it can be reasonably said that the liability issue has been determined by the jury. The court of appeal found that the liability issue was not close in the case before it in that there was uncontradicted evidence that defendant was attempting to pass another vehicle when he negligently struck plaintiff. The court of appeal then concluded that the low amount awarded as general damages resulted from the jury's difficulty in assessing damages rather than from its inability to decide the liability issue (*272 Cal. App. 2d 571, 581)* .

[4] Additional Authorities

[a] New Trial Is Proper if Plaintiff Clearly Entitled to Larger Recovery

In *Katiuzhinsky v. Perry (2007) 152 Cal. App. 4th 1288* , plaintiffs were injured in an automobile accident and filed a personal injury lawsuit. Medical providers who treated plaintiffs filed liens in this lawsuit to recover for medical services they provided, but sold these liens to a financial services company for approximately 50 percent of the billed amounts. While plaintiffs remained liable to the financial services company for the full billed amount for the medical services, the trial court limited plaintiffs' evidence of past medical expenses to the reduced amount that the financial services company paid for the liens. The jury returned a verdict awarding this reduced amount as damages for medical expenses. The court of appeal reversed and remanded for a new trial on damages. The court of appeal held that the amount billed by the medical care providers was admissible as evidence of the nature and extent of plaintiffs' injuries and relevant to assessment of an overall damage award (*152 Cal. App. 4th 1288, 1295-1296)* . The court also held that the trial court erred in limiting the amount of damages for medical expenses to the amount paid by the financial services company. The court noted that plaintiffs remained liable to that company for the full amount billed by the medical care providers, and as such, the jury's award did not fully compensate plaintiffs for their expenses. The court also noted that while the medical care providers sold their liens to the financial services company at a discount, and in return received the convenience of immediate payment without the trouble of having to pursue recovery from plaintiffs, they were under no obligation to do so, and the amounts originally billed still reflected on the reasonable value of the services plaintiffs received at the time the services were rendered (*152 Cal. App. 4th 1288, 1296-1298*).

[b] Discretion to Grant New Trial Limited to Damages

In ***Tan Jay Int'l, Ltd. v. Canadian Indem. Co.*** *(1988) 198 Cal. App. 3d 695, 243 Cal. Rptr. 907* , an action by an insured against its insurer based on the insurer's refusal to defend and settle a third-party suit, the jury awarded the plaintiff compensatory damages of $5,300,000 and punitive damages of $35,000,000. The court of appeal affirmed the trial court's granting of a motion for new trial limited to the issue of damages, on the ground that the punitive damages were excessive. The court held that the factors in assessing the choice of a limited new trial versus an entire new trial are the following: (1) whether liability was clearly established at the first trial; (2) whether evidence concerning damages was insufficient or entirely nonexistent; and (3) whether prejudice to a party would result from the choice of one disposition over the other (*198 Cal. App. 3d 695, 705)* .

In ***Liodas v. Sahadi*** *(1977) 19 Cal. 3d 278, 137 Cal. Rptr. 635, 562 P.2d 316* , plaintiff, the trustee of a bankrupt estate, brought an action against defendant for damages for fraud and breach of fiduciary obligation. At the conclusion of the trial, the jury awarded plaintiff substantial compensatory and punitive damages. Defendant's motion for a new trial was granted by the trial court but was limited to the issue of damages. Both plaintiff and defendant appealed from the order, defendant appealing insofar as the order restricted the new trial to the issue of damages. The Supreme Court

held, in part, that the decision to limit a new trial to the issue of damages rests in the discretion of the trial judge who may order the new trial limited to damages when the issue of liability has been determined by the jury. However, the Supreme Court found that, as a result of erroneous damages instructions, it was impossible to determine the basis on which liability was predicated in the case before it. A new trial limited to damages would have been prejudicial to defendant since defendant's liability would have been assumed in such a trial, and the Supreme Court therefore, ordered a new trial on all issues.

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6-64 California Points & Authorities § 64.147

§ 64.147 Supporting Plaintiff's Motion for New Trial [Code Civ. Proc. § 659]--Inadequate Damages [Code Civ. Proc. § 657(5)]--Verdict Limited to Special Damages and No Allowance for General Damages

[1] FORM

[*Caption. See § 64.140.*]

IT IS PROPER TO GRANT A MOTION FOR A NEW TRIAL ON THE GROUND OF INADEQUATE DAMAGES IF THE VERDICT IS EQUAL TO PLAINTIFF'S SPECIAL DAMAGES AND THERE IS NO ALLOWANCE FOR PAIN, SUFFERING, INCONVENIENCE, SHOCK, OR MENTAL SUFFERING.

A. Motion for New Trial. [*See § 64.140, Paragraph A.*]

B. New Trial as Proper if Plaintiff Clearly Entitled to Larger Recovery. [*See § 64.140, Paragraph B.*]

[*Optional*] **C. Discretion to Grant New Trial Limited to Damages.** [*See § 64.140, Paragraph C.*]

[*Optional*] **D. New Trial Limited to Damages and Conditioned on Failure to Consent to Additur.** [*See § 64.140, Paragraph D.*]

E. Verdict Limited to Special Damages and No Allowance for General Damages. A motion for a new trial should be granted in a case in which a strong showing of negligence was made and a verdict has been returned which is strictly limited to the exact amount of special damages incurred and which makes no award for general damages for the pain and suffering obviously incurred (*Gallentine v. Richardson (1967) 248 Cal. App. 2d 152, 155, 56 Cal. Rptr. 237*).

F. Such Verdict as Inadequate as Matter of Law in Personal Injury Action. An award of damages in a personal injury action is inadequate as a matter of law when it is strictly limited to the special damages incurred by the plaintiff and makes no allowance for the plaintiff's pain, suffering, inconvenience, shock, or mental suffering in an action in which substantial general damages were obviously incurred, and a strong case of negligence was made (*Gallentine v. Richardson (1967) 248 Cal. App. 2d 152, 155, 56 Cal. Rptr. 237*). [This rule also applies where an award of general

damages is so small compared to the nature and extent of the injuries sustained that it falls within the category of no damages at all (*Haskins v. Holmes (1967) 252 Cal. App. 2d 580, 586-587, 60 Cal. Rptr. 659*)].
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for a new trial on the ground of inadequate damages in a tort action when a verdict is limited to a plaintiff's special damages and no allowance is made for the plaintiff's pain and suffering. If the argument is being made that the award of general damages is so small, compared to the nature and extent of the injuries sustained, that it is essentially no award at all, the bracketed language in Point F should be included.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms for use in making a motion for a new trial, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender). For a form for use in making a motion for a new trial on the ground of excessive or inadequate damages, see California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing motions for a new trial, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] Verdict Limited to Special Damages and No Allowance for General Damages

In ***Gallentine v. Richardson*** *(1967) 248 Cal. App. 2d 152, 56 Cal. Rptr. 237* , plaintiff brought a negligence action against defendant for personal injuries sustained in a hunting accident. At the conclusion of the trial, the jury awarded plaintiff the exact amount of special damages for medical expenses and lost earnings stipulated to by the parties, and nothing for plaintiff's pain, suffering, inconvenience, shock, or mental suffering. Plaintiff sought a new trial confined to the issue of damages, maintaining that the award was inadequate. Plaintiff's motion was denied and plaintiff appealed. The court of appeal reversed the judgment, holding that an award limited strictly to special damages was inadequate as a matter of law in a case where substantial general damages were obviously incurred and where a strong case of negligence had been made. Therefore, the trial court's denial of plaintiff's motion for a new trial was an abuse of its discretion. However, the court of appeal granted a new trial on all of the issues rather than one limited to the issue of damages because the court believed that the small award to plaintiff resulted from the jurors' compromise on the issue of defendant's liability.

[b] Such Verdict as Inadequate as Matter of Law in Personal Injury Action

Gallentine v. Richardson *(1967) 248 Cal. App. 2d 152, 56 Cal. Rptr. 237* , is discussed in *§ 64.147[3][a]*. The court of appeal reversed the judgment after finding the damages to be inadequate as a matter of law.

NOTE:

Because the standard used by the trial court is not as strict [*see, e.g.,* *Bazzoli v. Nance's Sanitarium, Inc. (1952) 109 Cal. App. 2d 232, 243, 240 P.2d 672]* , it does not appear necessary for a plaintiff to show that the damages were inadequate as a matter of law for the trial court to grant a new trial. However, counsel may wish to use the *Gallentine* case as authority where the damages do appear to be so inadequate that they are inadequate as a matter of law.

In ***Haskins v. Holmes*** *(1967) 252 Cal. App. 2d 580, 60 Cal. Rptr. 659* , plaintiff brought an action against defendant for severe personal injuries arising from an assault and battery. In a trial by court, the judge did not make any express finding that plaintiff suffered pain, physical discomfort, shock, or inconvenience as a result of his injuries but specifically concluded that plaintiff suffered personal injuries and general damages as a result of the assault and battery by defendant. However, the trial judge awarded plaintiff general damages of only a few dollars over the amount of his special damages for medical, surgical, and hospital expenses. Plaintiff's motion for a new trial on the ground that the damages awarded were grossly inadequate as a matter of law was denied. Plaintiff then appealed, and the court of appeal reversed and remanded the action for a new trial solely on the issue of the amount of damages. The court of appeal inferred that the insignificant amount awarded over the sum of plaintiff's special damages was the amount intended to be awarded as general damages. Since the trial judge had also found that plaintiff's injuries were severe, it was obvious to the court of appeal that substantial pain, suffering, shock, and inconvenience necessarily and inevitably accompanied the injuries, surgery, and medical and hospital care. Thus, the general damages awarded were so small compared to the nature and extent of the injuries sustained by plaintiff that the case fell within the category of cases in which no general damages at all were awarded despite a plaintiff's pain and suffering. Therefore, the award of general damages was inadequate as a matter of law and the denial of a new trial on the issue of damages was an abuse of the trial court's discretion.

[4] Additional Authorities

[a] Verdict Limited to Special Damages and No Allowance for General Damages

In *Dodson v. J. Pacific, Inc. (2007) 154 Cal. App. 4th 931, 64 Cal. Rptr. 3d 920* , plaintiff suffered an injury to his back and neck while attempting to avoid a large metal cylinder that had slipped from a forklift on defendant's premises. While plaintiff did not seek immediate medical care, he eventually required back surgery and underwent several months of physical therapy. Plaintiff sued defendant for general negligence and premises liability. The jury found that defendant had been negligent and this negligence was a cause of plaintiff's injury. Because plaintiff was found by the jury to have been 50 percent at fault, the jury awarded plaintiff an amount that compensated plaintiff for half his costs of surgery and part of his physical therapy. However, the award apparently included no amount for plaintiff's pain and suffering. The court of appeal reversed the judgement and remanded for a new trial on damages. The jury had specifically found that defendant's negligence was partly responsible for plaintiff's injury, requiring surgery and physical therapy. The court concluded that under those circumstances, the plaintiff must necessarily have suffered at least some pain and suffering, and the damage award was inadequate as a matter of law for failing to include compensation for that pain and suffering (*154 Cal. App. 4th 931, 938)* .

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6-64 California Points & Authorities § 64.148

§ 64.148 Supporting Plaintiff's Motion for New Trial [Code Civ. Proc. § 659]--Inadequate Damages [Code Civ. Proc. § 657(5)]--Pecuniary Loss in Excess of Verdict and Insufficient Allowance for General Damages

[1] FORM

[*Caption. See § 64.140.*]

IT IS PROPER TO GRANT A MOTION FOR A NEW TRIAL ON THE GROUND OF INADEQUATE DAMAGES IF PLAINTIFF'S PECUNIARY LOSS IS IN EXCESS OF THE VERDICT AND THERE IS AN INSUFFICIENT ALLOWANCE FOR GENERAL DAMAGES.

A. Motion for New Trial. [*See § 64.140, Paragraph A.*]

B. New Trial as Proper if Plaintiff Clearly Entitled to Larger Recovery. [*See § 64.140, Paragraph B.*]

[*Optional*] **C. Discretion to Grant New Trial Limited to Damages.** [*See § 64.140, Paragraph C.*]

[*Optional*] **D. New Trial Limited to Damages and Conditioned on Failure to Consent to Additur.** [*See § 64.140, Paragraph D.*]

E. Pecuniary Loss in Excess of Verdict and Insufficient Allowance for Pain and Suffering. When a trial court reasonably concludes that a plaintiff's pecuniary losses alone exceed the amount of the verdict and that a substantial additional amount should be allowed for pain and suffering, the trial court properly exercises its discretion in granting a new trial on the ground of inadequate damages (*Jehl v. Southern Pac. Co. (1967) 66 Cal. 2d 821, 826, 59 Cal. Rptr. 276, 427 P.2d 988*).

[*Optional*] **F. Such Award Inadequate as Matter of Law in Personal Injury Action.** An award of damages in a personal injury action is inadequate as a matter of law when it does not cover the amount of hospital and medical expenses necessarily incurred or allow anything for the pain and suffering inevitably accompanying the type of injury sustained (*Thompson v. Mattucci (1963) 223 Cal. App. 2d 208, 210-211, 35 Cal. Rptr. 741*).

Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for a new trial on the ground of inadequate damages in a tort action when a plaintiff's pecuniary loss exceeds the amount of the verdict and an insufficient allowance is made for the plaintiff's pain and suffering.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms for use in making a motion for a new trial, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender). For a form for use in making a motion for a new trial on the ground of excessive or inadequate damages, see California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing motions for a new trial, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] Pecuniary Loss in Excess of Verdict and Insufficient Allowance for Pain and Suffering

In ***Jehl v. Southern Pac. Co.*** *(1967) 66 Cal. 2d 821, 59 Cal. Rptr. 276, 427 P.2d 988* , plaintiff suffered personal injuries while employed in defendant's railroad yard. Plaintiff brought an action against defendant, and, at the conclusion of the trial, the jury returned a verdict in favor of plaintiff. Plaintiff successfully moved for a new trial on the issue of damages on the ground that the damages awarded were inadequate. Defendant then appealed from the order granting a new trial on the issue of damages, contending that the trial court abused its discretion in concluding that the damages awarded were inadequate. The Supreme Court held, in part, that the trial court did not abuse its discretion in granting a new trial on the ground of inadequate damages because it did not appear from the record that the verdict was adequate as a matter of law. The trial court could have reasonably concluded from the evidence presented that plaintiff's pecuniary losses alone would have exceeded the amount of the verdict and that a substantial additional amount should have been allowed for pain and suffering. Defendant also contended that the trial court should have given defendant the option to consent to an additur before granting plaintiff's motion for a new trial. At the time of plaintiff's motion, California case law did not permit additur. The Supreme Court adopted the principle of additur thus disposing of defendant's appeal by ruling that the order granting plaintiff's motion for a new trial be affirmed unless the trial court in its discretion ordered an additur.

[b] Such Award Inadequate as Matter of Law in Personal Injury Action

In ***Thompson v. Mattucci*** *(1963) 223 Cal. App. 2d 208, 35 Cal. Rptr. 741* , plaintiff brought an action against defendant for personal injuries sustained when defendant's automobile was involved in a rear-end collision with the automobile in which plaintiff was a passenger. At the trial, plaintiff's medical bills were admitted as evidence. However, at the conclusion of the trial, the jury returned a verdict in favor of plaintiff that constituted less than the amount shown by plaintiff's medical expenses. Plaintiff appealed on the ground that the award was inadequate as a matter of law. The court of appeal agreed, reversing and remanding the action for a new trial solely on the issue of damages. The court of appeal held that an award in a personal injury action which neither covered the amount of hospital and medical expenses necessarily incurred, nor allowed anything for pain and suffering invariably accompanying the injuries sustained, was inadequate as a matter of law.

NOTE:

In *Thompson*, the court of appeal reversed the judgment after finding the damages to be inadequate as a matter of law, since the standard used by the trial court is not as strict [*see, e.g., Bazzoli v. Nance's Sanitarium, Inc. (1952) 109 Cal. App. 2d 232, 243, 240 P.2d 672]* , it does not appear necessary for a plaintiff to show that the damages were inadequate as a matter of law for the trial court to grant a new trial on the ground of inadequate damages. However, counsel may wish to use *Thompson* as authority where the damages do appear to be so inadequate that they are inadequate as a matter of law.

California Points & Authorities

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Volume 6 Chapters 60-69 COSTS---to---DECLARATORY RELIEF
CHAPTER 64 DAMAGES: TORT
PART II. FORMS
G. Supporting Motion for New Trial

6-64 California Points & Authorities § 64.149

§ 64.149 Supporting Motion for New Trial [Code Civ. Proc. § 657] in Tort Action Seeking Exemplary Damages--By Defendant--Insufficiency of Evidence to Support Exemplary Damage Claim

[1] FORM

[*Caption. See § 64.140.*]

IT IS PROPER TO GRANT A NEW TRIAL IF PLAINTIFF'S EVIDENCE IS INSUFFICIENT TO SUPPORT AN AWARD OF EXEMPLARY DAMAGES.

A. Motion for New Trial. On the application of the party aggrieved, the _____ [verdict *or* decision] may be vacated, in whole or in part, and a new trial may be granted, on the ground that the evidence is insufficient to justify the _____ [verdict *or* decision], if substantial rights of the aggrieved party are materially affected thereby (*Code Civ. Proc. § 657(6)*).

B. Exemplary Damage Award as Erroneous When Evidence Does Not Show Required Grounds. In order to justify an award of exemplary damages, it must be proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice (see *Civ. Code § 3294(a)*), and insufficient evidence thereof will not support an award of punitive damages (see *Civ. Code § 3294(a), Code Civ. Proc. § 657(6)*).

[*EITHER, if plaintiff based his or her exemplary damage claim on oppression.*]

C. Oppression Defined. Oppression, as used in *Civ. Code § 3294(a)*, is despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of his or her rights (*Civ. Code § 3294(c)(2)*; *see also Roth v. Shell Oil Co. (1960) 185 Cal. App. 2d 676, 681-682, 8 Cal. Rptr. 514 , disapproved on other grounds, Templeton Feed & Grain v. Ralston Purina Co. (1968) 69 Cal. 2d 461, 471, 72 Cal. Rptr. 344, 446 P.2d 152* ; *Trammell v. Western Union Tel. Co. (1976) 57 Cal. App. 3d 538, 557, 129 Cal. Rptr. 361*).

[*OR, if plaintiff based his or her exemplary damages claim on malice.*]

C. Malice Defined. Malice, as used in *Civ. Code § 3294(a)*, is conduct that is intended by the defendant to cause injury to the plaintiff, or despicable conduct that is carried on by the defendant in willful and conscious disregard of the safety or rights of others (*Civ. Code § 3294(c)(1)*).

[*OR, if plaintiff based his or her exemplary damages claim on fraud.*]

C. Fraud Defined. Fraud, as used in *Civ. Code § 3294(a)*, is an intentional misrepresentation, deceit, or concealment of a material fact known to defendant with an intention on the part of defendant to thereby deprive a person of legal rights or property, or otherwise to cause injury (*Civ. Code § 3294(c)(3)*; *see also Fletcher v. Western Nat'l Life Ins. Co. (1970) 10 Cal. App. 3d 376, 405, 89 Cal. Rptr. 78*).

[*Optional*] **D. Establishing Conscious Disregard of Other's Safety.** In order to justify an award of exemplary damages on the basis of conscious disregard of the safety of others, plaintiff must establish that defendant was aware of the probable dangerous consequences of his or her conduct, and that he or she willfully and deliberately failed to avoid those consequences (*Taylor v. Superior Court (1979) 24 Cal. 3d 890, 895-896, 157 Cal. Rptr. 693, 598 P.2d 854*).

[*Optional*] **E. Breach of Duty of Good Faith and Fair Dealing as Not Sufficient for Exemplary Damage Award.** Defendant's violation of its duty of good faith and fair dealing does not alone necessarily establish that defendant acted with the requisite intent to injure plaintiff which is necessary for an award of exemplary damages (*Silberg v. California Life Ins. Co. (1974) 11 Cal. 3d 452, 462-463, 113 Cal. Rptr. 711, 521 P.2d 1103*).

[*Optional*] **F. No Malice Where Insurer Interpreted Contract in Good Faith.** Although an insurance policy that is reasonably susceptible of two interpretations should be construed in favor of the insured, a finding of malice cannot be predicated on the fact of a divergent interpretation of the contract as long as the insurer's interpretation was rendered in good faith. In order to support an exemplary damage award, there must be evidence that the insurer's contract interpretation was unreasonable or undertaken in bad faith (*Mason v. Mercury Cas. Co. (1976) 64 Cal. App. 3d 471, 475, 134 Cal. Rptr. 545*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for a new trial in a tort action in which plaintiff was awarded exemplary damages but the evidence was insufficient to support the award in that plaintiff did not prove that defendant was guilty of malice, oppression, or fraud. Optional Paragraph E is for use when the evidence showed that defendant insurance company violated its duty of good faith and fair dealing but there was no evidence that defendant also was guilty of oppression, fraud, or malice. Optional Paragraph F is for use when the exemplary damages award apparently was based on the fact that defendant insurance company's interpretation of an insurance policy differed from plaintiff's interpretation.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

In an appropriate case, the defendant could bring a motion for judgment notwithstanding the verdict [*see Code Civ. Proc. § 629*] on the issue of exemplary damages on the ground that there was no substantial evidence in the record sufficient to support exemplary damages award.

[3] Discussion of Authorities

[a] Motion for New Trial

Insufficiency of evidence to justify a verdict or decision is a ground for granting a new trial [*Code Civ. Proc. § 657(6)*]. Accordingly, if in a tort action plaintiff was awarded exemplary damages, and the evidence is insufficient to support the award in that plaintiff did not show by clear and convincing evidence that defendant was guilty of oppression, malice, or fraud, a motion for new trial on the ground of insufficiency of the evidence would be appropriate.

A party seeking a new trial must file a notice of intention to move for a new trial [*Code Civ. Proc. § 659*] supported by a memorandum of points and authorities [Cal. Rules of Ct., Rule 203], and a motion on the ground of insufficiency of the evidence to justify the verdict or other decision must be made on the minutes of the court [*Code Civ. Proc. § 658*]. Where the motion is made on the minutes, reference may be made to any depositions or documentary evidence offered at trial, and to the court reporter's report of the proceedings or any certified transcript of the report [*Code Civ. Proc. § 660*]. For more complete analysis of motions for new trial, see Ch. 155, *Motions After Trial* in this publication.

[b] Exemplary Damage Award as Erroneous When Evidence Does Not Show Required Grounds

As amended in 1987, *Civ. Code § 3294(a)* requires that, before punitive damages can be awarded, the defendant must be proven guilty of oppression, fraud, or malice by clear and convincing evidence [*Civ. Code § 3294(a)*]. Clear and convincing evidence has been defined as "clear, explicit, and unequivocal," "so clear as to leave no substantial doubt," and "sufficiently strong to demand the unhesitating assent of every reasonable mind" [*People v. Martin (1970) 2 Cal. 3d 822, 833 fn. 14, 87 Cal. Rptr. 709, 471 P.2d 29]* . A motion for a new trial may be granted when the evidence supporting the plaintiff's punitive damages claim has failed to meet the "clear and convincing" standard [*Civ. Code § 3294(a*); *Code Civ. Proc. 657(6)*]. The "clear and convincing" standard of proof applies only to actions in which the trial is commenced on or after January 1, 1988 [*Civ. Code § 3294(e)*]. In actions in which the initial trial commenced prior to January 1, 1988, it would appear that malice, oppression, and fraud could be proven by a preponderance of the evidence.

[c] Oppression Defined

In ***Roth v. Shell Oil Co.*** *(1960) 185 Cal. App. 2d 676, 8 Cal. Rptr. 514 , disapproved on other grounds, Templeton Feed & Grain v. Ralston Purina Co. (1968) 69 Cal. 2d 461, 72 Cal. Rptr. 344, 446 P.2d 152* , an action for damages for trespasses, the jury rendered a verdict in favor of plaintiffs for compensatory and punitive damages. The trial court granted defendant's motion for a new trial on the grounds of insufficiency of the evidence and excessiveness of the verdict unless plaintiffs filed a written consent to a reduction of the punitive damages award. Plaintiffs filed a consent and a new trial was denied. Defendant appealed and the court of appeal affirmed the judgment. Plaintiffs operated a service station and sold defendant's products under a dealer sales contract with defendant. They lived on the same premises. One of defendant's employees observed plaintiffs' station for a certain period of time and concluded that it was no longer in operation because he found it closed on occasions during normal business hours and at one time saw a closed sign posted on it. He recommended to his superior that the account with plaintiffs be closed, the contract terminated, and defendant's identifying signs removed. On this recommendation and without checking with the district

office, making any further inquiry, or giving written notice of the contract's termination, defendant's employee ordered an independent contractor to remove defendant's sign and pole and paint out defendant's colors on the gasoline pumps and building, and discontinued service to the station. This was done on two separate occasions. Defendant later discovered there had been no termination of the contract and no actual cessation of service and offered to restore plaintiffs' premises to their former condition. At trial, defendant's distributor testified that he had insisted on written instructions concerning the cancelling of the contract to keep himself clear of any after-effects.

The court of appeal noted that punitive damages may be recovered where defendant has been guilty of oppression, fraud, or malice, express or implied. According to the court, as between oppression and malice, there must be some evidence of one or the other of these elements to justify the jury in making the award. The court stated that the question was whether or not a jury might draw an inference from the evidence produced that there was a conscious disregard for the rights of others which constituted an act of subjecting plaintiffs to cruel and unjust hardship. The court also noted that oppression has been defined as an act of subjecting someone to cruel and unjust hardship, and the jury was instructed according to these definitions.

In ***Trammell v. Western Union Tel. Co.*** *(1976) 57 Cal. App. 3d 538, 129 Cal. Rptr. 361* , plaintiff sued defendant, in part, for punitive damages, alleging that defendant was motivated by malice, ill will, oppression, and fraud in misrepresenting to plaintiff's former employer that defendant had delivered a telegram to plaintiff knowing that plaintiff would lose his job if his employer thought he had received the message. After a jury awarded plaintiff punitive damages, the trial court granted defendant's motion for judgment notwithstanding the verdict on the issue of punitive damages. When plaintiff's employer was able to rehire him after a lay-off period, it sent a message to defendant to telegram plaintiff regarding a return to work, and to report to the employer that the message was received and signed for by the party to whom it was sent. Defendant notified the employer that plaintiff had received its telegram although, in fact, he had not. When plaintiff did not contact his employer as instructed in the telegram, he was terminated. When plaintiff learned that a telegram had been sent to him, and that he had been terminated for not responding, he contacted defendant. He testified that he told one of defendant's employees that the only way he could regain his job was if one of defendant's officials admitted that a mistake had been made and that he had not received the telegram. One of defendant's employees made a customer inquiry, handling it to the extent of his authority. The matter was later referred to another office where another employee handled the inquiry. In determining whether there was substantial evidence for the jury to have made a finding of malice or oppression, the court of appeal stated that oppression means subjecting a person to cruel and unjust hardship in conscious disregard of his rights. The court noted that the conduct which plaintiff asserted as the basis of his punitive damages claim was the failure of defendant to act speedily to admit or correct the mistake made in the delivery of the telegram. Assuming that defendant did have a duty to plaintiff to admit or correct a mistake made in the delivery, the record still failed to show substantial evidence that defendant's employees acted with either malice or oppression in not providing information to correct or show the mistake at an earlier date. Since one employee took all the action that he was allowed to take on plaintiff's complaint, the court held that it cannot be said that his conduct was improper or motivated by oppression or malice. Similarly, there was no evidence that the other employee had any knowledge that processing plaintiff's complaint more quickly would affect plaintiff's ability to regain his job nor was there any evidence from which it could be inferred that in not responding more quickly, the employee acted with malice or oppression towards plaintiff. Consequently, the court affirmed the trial court's decision.

NOTE:

Civ. Code § 3294, as amended in 1987, defines "oppression" as despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. Unlike the definition used in the original version of *Civ. Code § 3294*, the amended definition requires that the defendant's conduct be "despicable" [*Civ. Code § 3294(c)(2)*]. The amended statute applies in all actions in which the initial trial has not commenced before January 1, 1988 [*Civ. Code § 3294(e)*]. The holdings in the cases discussed above are still valid inasmuch as they appear to be consistent with *Civ. Code § 3294* as amended in 1987.

[d] Fraud Defined

In ***Fletcher v. Western Nat'l Life Ins. Co.*** *(1970) 10 Cal. App. 3d 376, 89 Cal. Rptr. 78* , the plaintiff sought damages, in part, for intentional infliction of emotional distress. The jury returned a verdict in favor of the plaintiff, awarding compensatory and punitive damages against the defendant insurance company and its claims supervisor, Amason. Defendants moved for judgment notwithstanding the verdict and for a new trial. The trial court denied the motion for judgment notwithstanding the verdict and defendant Amason's motion for new trial. After the plaintiff accepted a remission of the punitive damages award against the insurance company, the company's motion for new trial was denied.

The plaintiff had purchased a disability insurance policy from defendant insurance company which provided for monthly payments to plaintiff should he become totally disabled. Payments were limited to a maximum period of two years in the event of sickness and 30 years in the event of injury. The plaintiff thereafter had an accident at work which caused various injuries, and was eventually terminated by his employer. There was virtually unanimous agreement by the physicians connected with the case that the plaintiff was disabled because of an injury to his back resulting from the accident. The defendant insurance company had knowledge of almost all of the doctors' reports. More than a year after the accident, defendant Amason concluded that the claim should be paid under the sickness provision of the policy which exposed the company to liability for only two years. The plaintiff was informed of this. Then the defendants informed plaintiff that they regarded his condition as one of a congenital nature, and contested the validity of the policy because the plaintiff had not informed them of any such defect. After plaintiff retained an attorney, the defendant company dropped the contest and resumed some payments. The court of appeal affirmed the judgment, holding that the plaintiff had stated a case for intentional infliction of mental distress. Defendants contended on appeal that *Civ. Code § 3294* providing for the imposition of punitive damages is unconstitutional because of the vagueness of the words "guilty of oppression, fraud, or malice" as used in the statute. In rejecting this contention, the court of appeal noted that a statute is sufficiently certain if it employs words of long usage or with a common law meaning notwithstanding an element of degree in the definition as to which estimates might differ. The court held that oppression and malice have well established meanings. It further noted that although fraud may technically refer to a number of different legal problems, it is a work of common usage and has a commonly accepted meaning: an instance or an act of trickery or deceit especially when involving misrepresentation; an intentional misrepresentation, concealment, or nondisclosure for the purpose of inducing another in reliance on it to part with some valuable thing or to surrender a legal right. Consequently, the court held that *Civ. Code § 3294* is not unconstitutionally vague (*10 Cal. App. 3d 376, 405)* .

[e] Establishing Conscious Disregard of Others' Safety

The factual background of ***Taylor v. Superior Court*** *(1979) 24 Cal. 3d 890, 157 Cal. Rptr. 693, 598 P.2d 854* , is discussed in *§ 64.41[3][a]*. In discussing the case, the Supreme Court stated that in order to justify an award of punitive damages on the basis of conscious disregard of the safety of others, plaintiff must establish that the defendant was aware of the probable dangerous consequences of his conduct and that he willfully and deliberately failed to avoid the consequences. The Court held that plaintiff's complaint contained sufficient allegations from which it could reasonably be concluded that defendant consciously disregarded the safety of others (*24 Cal. 3d 890, 895-896)* .

[f] Breach of Duty of Good Faith and Fair Dealing as Not Sufficient for Exemplary Damage Award

In ***Silberg v. California Life Ins. Co.*** *(1974) 11 Cal. 3d 452, 113 Cal. Rptr. 711, 521 P.2d 1103* , plaintiff sought a declaration that defendant was liable under an insurance policy issued to plaintiff by defendant insurance company and sought damages for physical and mental distress. Plaintiff alleged in part, that defendant was guilty of fraud, bad faith, and malicious and oppressive conduct, and that plaintiff was entitled to both compensatory and punitive damages. The jury found for plaintiff but after judgment on the verdict was rendered, the trial court granted defendant's motion for a new trial on the grounds of insufficiency of the evidence to support the verdict, error in law, and excessive damages. The insurance policy issued to plaintiff by defendant provided that defendant would pay for hospital care up to a certain

limit with an exclusion for losses caused by injuries for which compensation was payable under worker's compensation law. Plaintiff was injured while performing incidental services for the landlord of his business premises. He filed a claim with defendant and also instituted proceedings to obtain worker's compensation benefits. The worker's compensation carrier denied coverage on the ground plaintiff was not an employee at the time of injury. A hearing was later held by the Worker's Compensation Appeals Board and the proceeding was settled by compromise and release because the evidence was in conflict as to whether plaintiff's injury occurred in the course of employment. Plaintiff underwent four operations for his injuries and was compelled to change hospitals and surgeons for the operations because of defendant's failure to pay his claims. Ultimately, he lost his business, was compelled to change his residence five times for inability to pay rent, and had difficulty in affording medication to ease his constant pain. His utilities were turned off several times for nonpayment, and his wheelchair was repossessed. Plaintiff also suffered two nervous breakdowns. At trial the manager of defendant's claims department testified that defendant refused to pay plaintiff's claims because it was waiting for the outcome of the worker compensation proceeding to determine if there was liability under the policy. The evidence conflicted as to the insurance industry custom regarding the payment of hospital benefit claims in these circumstances. Several witnesses for defendant testified that during pendency of a worker's compensation proceeding, it was customary to deny benefits or to suspend judgment on an insured's claim until the worker's compensation coverage question was decided. A witness for plaintiff testified that the custom was to pay the claim if the worker's compensation carrier denied liability and the insured had suffered severe injuries, and that if benefits were awarded, the insurer could impose a lien on the sums paid under worker's compensation.

The Supreme Court stated that a plaintiff who is entitled to compensatory damages is not therefore also entitled to exemplary damages. In order to justify exemplary damages, the defendant must be guilty of oppression, fraud, or malice. He must act with the intent to vex, injure or annoy, or with a conscious disregard of the plaintiffs' rights. The Court stated that, although it had concluded that defendant violated its duty of good faith and fair dealing, this alone did not necessarily establish that defendant acted with the requisite intent to injure plaintiff. The Court found that the trial court properly held that the evidence was insufficient to support a finding of exemplary damages and affirmed the trial court's judgment in that respect, although it reversed the order granting a new trial on the issue of defendant's liability for compensatory damages.

[g] No Malice Where Insurer Interpreted Contract in Good Faith

Mason v. Mercury Cas. Co. *(1976) 64 Cal. App. 3d 471, 134 Cal. Rptr. 545* , involved an action against defendant insurance company for damages for defendant's denial of liability under plaintiff's insurance policy on the grounds the policy had lapsed. Plaintiff prayed for punitive damages on the ground that defendant had willfully and wantonly breached its fiduciary relationship with plaintiff by refusing payment. Plaintiff's insurance policy was in effect from December 31, 1970 to December 31, 1971. On December 31, 1971, but after 12:01 a.m. on December 30, 1971, plaintiff's mother mailed to defendant a check and a renewal notice plaintiff had received earlier. The check and notice were received by defendant on January 3, 1972. On the same day, but after receipt of the check, plaintiff made a claim. Defendant denied the claim because the policy period ran to, but not through, December 31, 1971. The jury awarded plaintiff actual and punitive damages and the trial court granted a motion for a judgment notwithstanding the verdict on the punitive damages cause of action and granted a motion for new trial to take effect only if the order granting the judgment notwithstanding the verdict was reversed on appeal. On appeal, plaintiff contended that oppression or wanton disregard of its rights was shown when defendant chose to interpret the terms of the policy concerning the expiration date in an unfavorable manner to plaintiff. The court of appeal noted that when an insurance policy is reasonable susceptible of two interpretations, it should be construed in favor of the insured. However, the crux of the matter is that a finding of malice cannot be predicated on the mere fact of a divergent interpretation of an insurance contract as long as the insurer's interpretation was rendered in good faith. The court noted that there was testimony that it was custom and practice in the industry that a policy expired a minute after midnight on the anniversary date of the policy. However, the court stated that, even without such testimony, plaintiff failed to meet his burden of proof regarding malice in that he did not adduce any evidence to show that the interpretation of the contract as to its expiration time was unreasonable or undertaken in bad faith. Although the jury by its verdict ignored the policy terms and disagreed with

defendant's claim that it was in accordance with insurance industry policy at the time that the policy ran to rather than up to and including December 31, the court concluded that there simply was no evidence that defendant's interpretation of the contract was unreasonable or undertaken in bad faith and, according to the court, such evidence was necessary for the award of punitive damages.

[4] Additional Authorities

[a] Exemplary Damage Award as Erroneous Where Evidence Does Not Show Required Grounds

The factual background of *Silberg v. California Life Ins. Co. (1974) 11 Cal. 3d 452, 113 Cal. Rptr. 711, 521 P.2d 1103* , is discussed in *§ 64.149[3][f]*. In affirming the trial court's judgment regarding the exemplary damage awards, the Supreme Court held that the evidence demonstrated as a matter of law that defendant's failure to pay benefits under the policy constituted bad faith, but that the trial court did not abuse its discretion in ruling that the evidence was insufficient to support an award of exemplary damages. The Court noted that in granting a new trial, the trial court had stated that the evidence was insufficient to justify the punitive damages award because defendant was not put on notice by cases previously decided that its interpretation of the policy was incorrect and because there was insufficient evidence of a practice in the insurance industry to pay a disputed claim and then file a lien in the worker's compensation proceeding to recover the payments made. The Court held that the trial court's conclusion that defendant was not guilty of oppressive conduct did not constitute a manifest and unmistakable abuse of discretion.

[b] Establishing Conscious Disregard of Other's Safety

The court of appeal in *Da Silva v. Pacific King, Inc. (1987) 195 Cal. App. 3d 1, 240 Cal. Rptr. 395* , affirmed a judgment for an injured seaman. The judgment did not include an award of punitive damages, and the plaintiff claimed an error in the jury instructions. The court held that violation of a National Marine Fisheries Service regulation (hereinafter "NMFS"), enforcement of which had been suspended by NMFS pending reconsideration of its appropriateness, would not support a finding of conscious disregard of the safety of others (*195 Cal. App. 3d 1, 7)* .

[c] Breach of Duty of Good Faith and Fair Dealing as Not Sufficient for Exemplary Damage Award

In *Travelers Ins. Co. v. Lesher (1986) 187 Cal. App. 3d 169, 231 Cal. Rptr. 791* , *overruled on other grounds, Buss v. Superior Court (1997) 16 Cal. 4th 35, 50, 65 Cal. Rptr. 2d 366, 939 P.2d 766*), the insurer undertook defense of several anti-trust actions against the insured, reserving its rights, then brought an action for declaratory relief against insured to determine its duty to defend and indemnify, and to recover its fees and costs. Both parties filed affidavits in the declaratory relief action that compromised defendant's position in the anti-trust actions, as a result of which defendant's counsel withdrew from those cases. The insurer and insured disagreed concerning which of them should choose substitute counsel, and the insurer hired one shortly before the trial of one of the anti-trust cases. The insured filed a cross-complaint against the insurer alleging, inter alia, insurance bad faith, and the jury awarded $1.5 million compensatory and $1.5 million punitive damages, partly on the ground that the insurer's delay in appointing new counsel damaged the insured's negotiation position in settling the anti-trust cases. The court of appeal reversed only the punitive damages award, holding that evidence that the insurer is liable for bad faith does not, by itself, necessarily establish that it has acted with the requisite intent to justify an award of punitive damages (*187 Cal. App. 3d 169, 199-202, 204)* .

In *Patrick v. Maryland Cas. Co. (1990) 217 Cal. App. 3d 1566, 267 Cal. Rptr. 24* , plaintiff sued his insurer on a bad-faith theory, alleging that the insurer's delay in paying his claim for wind damage to his roof had led to his injury when he attempted to repair the roof himself. The court of appeal reversed the judgment in plaintiff's favor on the ground that the jury had not been instructed on comparative fault principles. The court noted that comparative negligence is not a complete defense to a claim for punitive damages, and so determined whether or not there was sufficient evidence to support the jury's award of punitive damages to plaintiff. The court characterized the insurer's claims-handling as "shoddy," "witless," and "infected with symptoms of bureaucratic inertia and inefficiency."

Nevertheless, it denied punitive damages under the view that inept and negligent claim handling may be bad faith, but it is not malice (*217 Cal. App. 3d 1566, 1575-1576)* .

The factual and procedural background of *Delos v. Farmers Ins. Group (1979) 93 Cal. App. 3d 642, 155 Cal. Rptr. 843* , is discussed in *§ 64.141[4][b]*. The court of appeal noted in dictum that breach of fiduciary duty alone without malice, fraud, or oppression does not permit an award of punitive damages (*93 Cal. App. 3d 642, 656-657)* .

California Points & Authorities

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Volume 6 Chapters 60-69 COSTS---to---DECLARATORY RELIEF
CHAPTER 64 DAMAGES: TORT
PART II. FORMS
G. Supporting Motion for New Trial

6-64 California Points & Authorities § 64.150

§ 64.150 Supporting Defendants' Motion for New Trial on Damages [Code Civ. Proc. § 659]--Personal Injury Action--Admission of Expert Testimony on Hedonic Damages Was Prejudicial

[1] FORM

[*Caption. See § 64.140*].

THE COURT SHOULD GRANT DEFENDANTS' MOTION FOR NEW TRIAL ON THE ISSUE OF DAMAGES BECAUSE EXPERT TESTIMONY ON HEDONIC DAMAGES WAS INADMISSIBLE AS A MATTER OF LAW AND ITS ADMISSION WAS PREJUDICIAL.

A. Motion for New Trial. [*See § 64.140, Paragraph A*].

B. Double Damages Prohibited. Expert testimony on hedonic damages, or damages to compensate for the loss of enjoyment of life, is inadmissible as a matter of law because of its potential for misleading the jury to award double damages (*Loth v. Truck-A-Way Corp. (1998) 60 Cal. App. 4th 757, 766, 70 Cal. Rptr. 2d 571*).

C. Computation Method Not Matter For Expert Testimony. The method of computing hedonic damages, or damages to compensate for the loss of enjoyment of life, is not a matter for which expert testimony is admissible (*Loth v. Truck-A-Way Corp. (1998) 60 Cal. App. 4th 757, 767, 70 Cal. Rptr. 2d 571*).

D. Prejudicial Effect of Testimony. If it is reasonably probable that the jury awarded plaintiff a double recovery on the basis of the expert testimony on hedonic damages, the admission of the testimony is prejudicial (*Loth v. Truck-A-Way Corp. (1998) 60 Cal. App. 4th 757, 769, 70 Cal. Rptr. 2d 571*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a defendants' motion for new trial on damages on the ground that expert testimony on hedonic damages was inadmissible as a matter of law, and that such admission was prejudicial because it most likely resulted in a double recovery for the plaintiff.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should provide facts showing that over defendants' objection at trial plaintiff's expert testified regarding hedonic damages, or damages to compensate for the loss of enjoyment of life. Counsel should then argue that this testimony was inadmissible as a matter of law, and that its admission resulted in prejudice because it most likely resulted in a double recovery for plaintiff.

[c] Related Pleading and Practice Forms

For discussion regarding the bar against double recoveries generally, see California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender). For discussion, and forms relating to motions for new trial, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[d] Related Points and Authorities

For memoranda of points and authorities relating to motions for new trial generally, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] Double Damages Prohibited

Loth v. Truck-A-Way Corp. *(1998) 60 Cal. App. 4th 757, 70 Cal. Rptr. 2d 571* , involved an issue of first impression; whether expert testimony on the value of life and how to compute hedonic damages, or damages to compensate for the loss of life, was admissible in a personal injury trial. The lawsuit arose from an automobile accident, defendants conceded liability at trial and the only issue for the jury was damages. At trial over defendants' objection, plaintiff's expert economist testified that he had computed the basic economic value of life. He told the jury the baseline value of an average person's remaining 44-year life expectancy was $2.3 million. He also explained that after adjusting the baseline value to account for the plaintiff's expected lifespan, the jury could calculate the plaintiff's hedonic damages by multiplying the percentage of the plaintiff's disability by the adjusted baseline figure. After listening to this testimony the jury awarded the plaintiff substantial general damages. The trial court denied defendants' motion for new trial or remittitur, defendants appealed.

The court of appeal reversed and remanded for a new trial on damages. It held that the expert's testimony on hedonic damages was inadmissible as a matter of law and that its admission was prejudicial (*60 Cal. App. 4th 757, 760)* . Defendants objected to the expert's testimony on several grounds. The first was that the expert's testimony was inadmissible because of its potential for misleading the jury to award double damages. This objection was based on the prohibition against separately instructing the jury on general damages for pain and suffering and damages for loss of enjoyment of life. Separate instructions on pain and suffering and loss of enjoyment of life are prohibited because they could mislead a jury to award double damages for the same injury. The court ruled that this objection was valid and that as a matter of law the expert's testimony should have been excluded on this ground (*60 Cal. App. 4th 757, 766)* .

[b] Computation Method Not Matter For Expert Testimony

The facts and procedural background of ***Loth v. Truck-A-Way Corp.*** *(1998) 60 Cal. App. 4th 757, 70 Cal. Rptr. 2d 571* , is discussed in *§ 64.150[3][a]*. At trial defendants also objected on the ground that the method of computing hedonic damages was not a matter for which expert testimony was admissible under *Evid. Code § 801*. The court of appeal held that this objection was sound and that the expert's testimony should have been excluded on this ground (*60 Cal. App. 4th 757, 767)* . According to the court, a plaintiff's loss of enjoyment of life was not a subject that was sufficiently beyond common experience that the opinion of an expert would assist the trier of fact. Moreover, no amount of expert testimony on the value of life could possibly help a jury decide that difficult question. The court acknowledged that our present system of requiring a jury to determine, without the benefit of a mathematical formula, the amount of a general damage award was not without its faults. However, it reasoned that unless and until the legislature devised a method for computing pain and suffering damages, a plaintiff could not supply, through expert testimony or otherwise, his or her own formula for computing these damages. Finally, the court noted that its decision was consistent with other jurisdictions which have also excluded hedonic damages expert testimony (*60 Cal. App. 4th 757, 768)* .

[c] Prejudicial Effect of Testimony

The facts and procedural background of ***Loth v. Truck-A-Way Corp.*** *(1998) 60 Cal. App. 4th 757, 70 Cal. Rptr. 2d 571* , is discussed in *§ 64.150[3][a]*. Having determined that the expert testimony on hedonic damages was inadmissible as a matter of law, the court next addressed the issue of whether the admission of this testimony resulted in prejudice to the defendants; whether it was reasonably probable that a different result would have been reached absent the error. According to the court loss of enjoyment of life was simply one component of pain and suffering damages; and presenting the jury with a formula for separately calculating hedonic damages created a risk of double recovery for pain and suffering and loss of enjoyment of life. The jury heard plaintiff's testimony regarding the drastic lifestyle changes she had made because of her injuries and was told it could award "reasonable compensation for any pain, discomfort, fears, anxiety and other mental and emotional distress suffered by the plaintiff and of which injury was a cause and for similar suffering reasonably certain to be experienced in the future from the same cause." This testimony alone was sufficient to support a general damages award that included compensation for loss of enjoyment of life, said the court. In addition, the jury heard the expert's testimony on how much a life was worth and how to calculate hedonic damages by multiplying that figure by the percentage of plaintiff's disability. While the judge correctly instructed the jury that there was no single mathematical formula for computing pain and suffering damages, the instruction was, according to the court, insufficient to cure the error of admitting the expert's testimony. Therefore, because it was reasonably probable and almost a certainty that the jury awarded a double recovery to plaintiff, the court ultimately held that admission of the expert's testimony was prejudicial in this case (*60 Cal. App. 4th 757, 769)* .

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G. Supporting Motion for New Trial

6-64 California Points & Authorities §§ 64.151-64.169

[Reserved]

§§ 64.151[Reserved]

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H. Opposing Motion for New Trial

6-64 California Points & Authorities § 64.170

§ 64.170 Opposing Motion for New Trial Made on Ground of Excessive or Inadequate Damages [Code Civ. Proc. § 659]--Conflicting Evidence Resolved by Jury in Awarding Damages

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO._____
vs.	)	MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR NEW TRIAL
_____ [*name*],	)	
Defendant	)	
	)	[*Code Civ. Proc. § 659*]
	)	

_____

CAUTION:

The first page of each paper must specify the date, time, and location, if ascertainable, of any scheduled hearing; the name of the hearing judge, if ascertainable; the nature or title of any attached document other than an exhibit; the date of filing of the action; and the trial date, if set, immediately below the number of the case [*Cal. Rules of Ct., Rule 3.1110(b)*].

IT IS IMPROPER TO GRANT A MOTION FOR A NEW TRIAL ON THE GROUND OF _____ [EXCESSIVE *or* INADEQUATE] DAMAGES IF THE JURY RESOLVED CONFLICTING EVIDENCE IN ARRIVING AT THE AWARD OF DAMAGES.

A. New Trial Precluded Unless Court Convinced That Court or Jury Clearly Should Have Reached Different

Result. A new trial should not be granted on the ground of _____ [excessive *or* inadequate] damages unless, after weighing the evidence, the court is convinced from the entire record, including reasonable inferences therefrom, that the _____ [court *or* jury] clearly should have reached a different _____ [decision *or* verdict] (*Code Civ. Proc. § 657*).

B. Motion for New Trial Properly Denied if Jury Resolved Conflicting Evidence. A trial court may deny a motion for a new trial and may refuse to reassess damages in an action when it is apparent that the jury resolved conflicting evidence in making its award of damages (*Torres v. Los Angeles (1962) 58 Cal. 2d 35, 53-54, 22 Cal. Rptr. 866, 372 P.2d 906*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for a new trial on the ground of excessive or inadequate damages by a party asserting that the jury resolved conflicting evidence in making its award of damages.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing motions for a new trial, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] Motion for New Trial Properly Denied if Jury Resolved Conflicting Evidence

In ***Torres v. Los Angeles*** *(1962) 58 Cal. 2d 35, 22 Cal. Rptr. 866, 372 P.2d 906* , plaintiff sued a municipality for personal injuries sustained when two of the municipality's fire engines collided with each other and thereafter collided with a stopped vehicle in which plaintiff was a passenger. The jury awarded plaintiff substantial compensatory damages for her personal injuries after hearing the conflicting testimony of several medical experts at the trial of the action. The trial court denied defendant's motion for a new trial. Defendant then appealed from the judgment, in part, on the ground that the damages awarded to plaintiff were excessive and not supported by the evidence. The Supreme Court affirmed the judgment, holding, in part, that a trial court may deny a motion for a new trial and may refuse to reassess damages in an action when it is apparent that the jury resolved conflicting evidence in making its award of damages. Because the extent of damages suffered for any injury and the amount of pain and suffering resulting from that injury cannot be measured by any absolute monetary standard, the determination of the jury and trial court were entitled to great weight. An appellate court, the Supreme Court stated, should decide only whether the verdict is so out of line with reason that it shocked the conscience of the court and necessarily implied that the verdict resulted from the jury's passion and prejudice. Thus, where a jury resolved conflicting evidence in plaintiff's favor, a verdict was not excessive as a matter of law, and the trial court acted properly in refusing to grant a new trial or to reassess the damages.

[4] Additional Authorities

[a] Motion for New Trial Properly Denied if Jury Resolved Conflicting Evidence

In *Ray v. Jackson (1963) 219 Cal. App. 2d 445, 33 Cal. Rptr. 339* , plaintiff brought an action against defendant for personal injuries sustained when defendant's automobile pulled out of a line of blocked cars and struck plaintiff. The jury returned a verdict in plaintiff's favor at the conclusion of the trial of the action. The trial court then denied defendant's motions for a new trial on the ground of excessive damages and for a reduction of the damages awarded to plaintiff. On appeal by defendant, the court of appeal affirmed the judgment, ruling, in part, that the trial court did not err in denying defendant's motions for a new trial and for a reduction of damages. The court of appeal, noting the conflicting medical testimony presented at the trial, concluded that the jury, and later the trial judge, were in the best position to see and hear the witnesses and to see the injury and the impairments resulting from the injury and, thus, better able to evaluate them. Therefore, the damages awarded were not excessive, as a matter of law, as being out of line with reason so as to shock the conscience of the appellate court or to imply that the verdict had resulted from passion and prejudice.

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6-64 California Points & Authorities § 64.171

§ 64.171 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 659] Made on Ground of Excessive Damages [Code Civ. Proc. § 657(5)]--Failure to Show Plaintiff's Duty and Ability to Mitigate Damages

[1] FORM

[*Caption. See § 64.170.*]

IT IS IMPROPER TO GRANT A MOTION FOR A NEW TRIAL ON THE GROUND OF EXCESSIVE DAMAGES IF THE DEFENDANT IS CLAIMING PLAINTIFF'S DUTY TO MITIGATE DAMAGES BUT FAILED TO SHOW THE PLAINTIFF'S DUTY AND ABILITY TO MINIMIZE DAMAGES TO THE TRIER OF FACT.

A. New Trial Precluded Unless Court Convinced That Court or Clearly Jury Should Have Reached Different Result. [*See § 64.170, Paragraph A.*]

B. No Reduction of Damages Where Party Fails to Show Matters With Respect to Mitigation. A wrongdoer who fails to make any showing that damages might and should have been minimized by taking steps to reduce the resulting damage or prevent the accrual of damages cannot complain of an award of excessive damages (*Barber v. LeRoy (1974) 40 Cal. App. 3d 336, 345, 115 Cal. Rptr. 272*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for a new trial brought on the ground of excessive damages due to plaintiff's failure to minimize damages when the moving party has failed to show the plaintiff's duty and ability to mitigate damages.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing motions for a new trial, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] No Reduction of Damages Where Party Fails to Show Matters With Respect to Mitigation

In ***Barber v. LeRoy*** *(1974) 40 Cal. App. 3d 336, 115 Cal. Rptr. 272* , plaintiff was the holder of a promissory note secured by a security agreement on certain restaurant fixtures. On defendants' default of the promissory note, plaintiff foreclosed on the fixtures, purchasing them at a subsequent private sale. Crediting defendants with the purchase price of the fixtures, plaintiff sought a deficiency judgment against defendants for the balance due under the promissory note. Defendants sought damages against plaintiff for breach of the lease agreement, which was part of the transaction, claiming that plaintiff acted in bad faith in demanding a larger rental figure than was reasonable when defendants exercised their option to renew the lease on the restaurant premises. The trial court found in favor of defendants, holding that plaintiff was precluded from obtaining a deficiency judgment against defendants because plaintiff failed to comply with statutes governing the recovery and disposition of collateral by a secured party. The trial court also awarded defendants the reasonable value of their restaurant business at the time plaintiff took over, less the balance due on the promissory note. After plaintiff's motion for a new trial was denied, plaintiff appealed, contending, in part, that defendants had a duty to minimize their damages after the lease was breached. The court of appeal affirmed the judgment. It held that, although plaintiff claimed that defendants had a duty to minimize their damages and that their damages should be reduced by the amount by which their personal services could have been employed elsewhere after the breach, plaintiff made no effort to prove these matters at trial. The court of appeal held that the burden of proof with respect to showing matters in mitigation of damages as a result of a wrongdoer's act is on the wrongdoer. Thus, a wrongdoer, like plaintiff, who fails to make any showing in reduction of damages, does not have the right to complain thereafter of a court's failure to apply the principle of mitigation of damages.

NOTE:

Although *Barber* is a contract action, the rule regarding the burden of showing matters in mitigation of damages also is applied in tort actions [*see, e.g., Baruh v. Kuhl (1963) 213 Cal. App. 2d 266, 273-274, 28 Cal. Rptr. 573]* .

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6-64 California Points & Authorities § 64.172

§ 64.172 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 659] Made on Ground of Excessive Damages [Code Civ. Proc. § 657(5)]--Financial Inability to Mitigate

[1] FORM

[*Caption. See § 64.170.*]

DEFENDANT'S MOTION FOR NEW TRIAL ON THE GROUND OF EXCESSIVE DAMAGES SHOULD BE DENIED SINCE PLAINTIFF WAS FINANCIALLY UNABLE TO MAKE THE EXPENDITURES NECESSARY FOR MITIGATION OF DAMAGES AND CONSEQUENTLY, THE DUTY TO MITIGATE DID NOT APPLY.

A. New Trial Precluded Unless Court Convinced That Court or Jury Clearly Should Have Reached Different Result. [*See § 64.170, Paragraph A.*]

B. Person Financially Unable to Mitigate Not Required to Mitigate Damages. Since the duty to minimize damages does not require plaintiff to do what is unreasonable or impracticable, when expenditures are necessary for mitigation of damages, the duty does not apply to plaintiff who is financially unable to make such expenditures (*Valencia v. Shell Oil Co. (1944) 23 Cal. 2d 840, 846, 147 P.2d 558*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted by a plaintiff in opposition to a motion for new trial on the ground of excessive damages where defendant has asserted that plaintiff failed to mitigate damages but the evidence at trial showed that plaintiff was financially unable to make the expenditures necessary to mitigate damages.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Person Financially Unable to Mitigate Not Required to Mitigate Damages

Valencia v. Shell Oil Co. *(1944) 23 Cal. 2d 840, 147 P.2d 558* , was an action for damages resulting from the loss of use of plaintiff's truck which was injured by a tank falling from a truck owned by defendant. Defendant ordered that repairs be made to plaintiff's truck and agreed to pay for them and for renting a truck while plaintiff's truck was being repaired. However, defendant refused to pay the repair bill because plaintiff declined to sign a release of all claims arising out of the accident and the repair garage refused to deliver the truck until the bill was paid. Before trial, defendant paid both the repair and rental bills. The trial was concerned solely with the issue of damages since defendant stipulated to liability for the damage to plaintiff's truck, and the trial court entered judgment for plaintiff for damages for loss of use of the truck. Affirming, the court of appeal stated that where a vehicle is damaged by the wrongful act of another, the owner is entitled to recover for the damage done to the vehicle and for the loss sustained by being deprived of its use. However, the injured party must exercise reasonable care and diligence to avoid loss or minimize the resulting damages and cannot recover for losses which might have been prevented by reasonable efforts or expenditures on his part, and thus an owner's recovery for being deprived of the use of a damaged vehicle is generally determined with reference to the period of time reasonably required for the repairs. In reviewing whether plaintiff had the duty to minimize damages, the court pointed out that this duty does not require an injured person to do what is unreasonable or impracticable so that when expenditures are necessary for minimization of damages, the duty does not run to a person who is financially unable to make such expenditures. Although the trial court did not make an express finding regarding plaintiff's ability or inability to pay the repair bill, it did find that plaintiff was, by reason of defendant's negligence and the wrongful failure of defendant to pay the repair bill, deprived of the use of his truck. The court held that a necessary implication of this finding was that plaintiff was unable to pay the repair bill and pointed out that there was ample evidence presented at trial to support this implied finding.

[4] Additional Authorities

[a] Person Financially Unable to Mitigate Not Required to Mitigate Damages

Jordan v. Talbot (1961) 55 Cal. 2d 597, 12 Cal. Rptr. 488, 361 P.2d 20 , was an action involving forcible entry and detainer, and conversion of personal property. After plaintiff failed to pay her rent for two months, defendant entered her apartment without her consent, removed and stored her furniture, and refused to allow her to reoccupy the apartment. A jury returned a verdict for plaintiff, but the trial court granted defendant's motion for a new trial. Affirming, the court of appeal held that defendant was not guilty of conversion and therefore plaintiff was entitled only to actual damages in an amount sufficient to compensate her for any impairment of the property or loss of its use. The court additionally stated that plaintiff had a duty to minimize damages. Since plaintiff knew that her property was being held in storage in her name, she was under a duty to recover her goods as soon as possible and was entitled only to storage costs for whatever time was reasonable to make new arrangements. However, the court pointed out that on retrial, plaintiff could show that she was without funds or means of obtaining them to pay the storage costs and in that case she would not be under a duty to recover the furniture to minimize damages. Quoting from *Valencia v. Shell Oil Co. (1944) 23 Cal. 2d 840, 147 P.2d 558* [*see § 64.172[3][a]*], the court held that the duty to minimize damages does not require an injured person to do what is unreasonable or impracticable and consequently, when expenditures are necessary for minimization of damages, the duty does not run to a person who is financially unable to make such expenditures.

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6-64 California Points & Authorities § 64.173

§ 64.173 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 659] Made on Ground of Excessive Damages [Code Civ. Proc. § 657(5)]--Awards in Similar Cases Not Determinative

[1] FORM

[*Caption. See § 64.170.*]

IT IS IMPROPER TO GRANT A MOTION FOR A NEW TRIAL ON THE GROUND OF EXCESSIVE DAMAGES MERELY BECAUSE THE AMOUNT AWARDED EXCEEDS THE AMOUNT AWARDED IN CASES INVOLVING SIMILAR INJURIES.

A. New Trial Precluded Unless Court Convinced That Court or Jury Clearly Should Have Reached Different Result. [*See § 64.170, Paragraph A.*]

B. Awards for Similar Injuries Not Determinative. A verdict is not excessive merely because the amount awarded as damages exceeds the amount ordinarily awarded in cases involving similar injuries (*Bigboy v. County of San Diego (1984) 154 Cal. App. 3d 397, 406, 201 Cal. Rptr. 226* ; *Henninger v. Southern Pac. Co. (1967) 250 Cal. App. 2d 872, 883, 59 Cal. Rptr. 76*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for a new trial which is based on the ground of excessive damages when the moving party asserts that the damages awarded are excessive because they exceed the damages ordinarily awarded in cases of a similar type.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing motions for a new trial, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] Awards for Similar Injuries Not Determinative

In ***Bigboy v. County of San Diego*** *(1984) 154 Cal. App. 3d 397, 201 Cal. Rptr. 226* , plaintiff was a young man who had been severely injured and rendered paraplegic in an automobile accident when the car in which he was a passenger went off the road at a dangerous curve. Plaintiff's action against the county had been severed from the action against the automobile driver. At trial, plaintiff had shown that there had been many accidents at that spot, that the curve was known to be dangerous, and that the county could have corrected the dangerous condition by posting a warning sign which would have cost less than $200. The jury brought in a verdict of $2.25 million for plaintiff. The trial court denied defendant's motion for new trial contingent on plaintiff's acceptance of a remittitur of the award to $1.75 million. When plaintiff refused the remittitur, the court granted the motion for new trial. The judge based his opinion on the fact that the award of damages was excessive, which he determined in part by his comparison of the award with awards in similar cases.

The court of appeal reversed, holding that the judge was not allowed to substitute his judgment for that of the jury on the question of damages unless it appeared from the record that the jury verdict was improper. The court stated that evidence of the range of awards in other cases would not have been proper for the jury's consideration, because of the vast variety of and disparity between awards in other cases, which demonstrates that injuries can seldom be measured on one scale. The measure of damages suffered is a factual question that is within the province of the trier of fact. The court stated that the trial judge's personal opinion based on the ranges of awards in other cases did not show that the jury should have reached a different conclusion and was therefore an irrelevant consideration, not a lawful basis, for granting the new trial order and issuing the remittitur (*154 Cal. App. 3d 397, 406-407)* .

In ***Henninger v. Southern Pac. Co.*** *(1967) 250 Cal. App. 2d 872, 59 Cal. Rptr. 76* , plaintiff was a conductor-brakeman who brought an action for damages for personal injuries he sustained in the course of his work for defendant. Defendant admitted its liability so that the sole issue to be determined at trial was the issue of damages. At the conclusion of the trial, the jury awarded plaintiff a sizeable amount of damages. Defendant appealed from the judgment entered on this verdict alleging, in part, that the judgment was excessive as a matter of law and, therefore, should be either reduced or reversed and a new trial ordered. In their appellate briefs, both plaintiff and defendant referred to cases involving damages awarded for similar injuries. In affirming the judgment, the court of appeal stated, in part, that the question of whether or not damages are excessive must be determined in each case on that case's own peculiar facts and circumstances. Thus, a verdict is not excessive as a matter of law merely because the amount awarded is larger than the damages ordinarily awarded in cases involving similar injuries. The court of appeal held that, in light of the catastrophic injuries to plaintiff, his medical expenses, accrued wage loss, cost of rehabilitation, future wage loss, and future cost of a paid attendant, the verdict was not so large as to suggest any element of passion or prejudice on the part of the jury (*250 Cal. App. 2d 872, 883)* .

NOTE:

The standard applied by an appellate court in deciding whether damages are excessive is stricter than the standard applied by the trial court [*see § 64.140[3][a], [b]*]].

[4] Additional Authorities

[a] Awards for Similar Injuries Not Determinative

In *Fortman v. Hemco, Inc. (1989) 211 Cal. App. 3d 241, 259 Cal. Rptr. 311* , a court again rejected an argument that damages were excessive because the amount was "precedent shattering" (*211 Cal. App. 3d 241, 261)* . The court also found that the damages were not excessive merely because they were disproportionate to the aggregate sum of good-faith pretrial settlements (*211 Cal. App. 3d 241, 260-261)* .

Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 , is discussed in *§ 64.41[3][d]*. The defendant appealed a judgment awarding one plaintiff $3.5 million in punitive damages. Defendant argued, among other things, that $3.5 million was an excessive amount, because defendant's conduct was less reprehensible than that for which punitive damages had been awarded in California in the past, and because it was the highest such award ever upheld in California. The court of appeal determined that the amount was reasonable and not excessive (*119 Cal. App. 3d 757, 819)* . It held that in determining whether or not a punitive damages award is excessive, comparison of the award with other awards in other cases is inappropriate (*119 Cal. App. 3d 757, 818-819)* . In addition, the fact that the award may set a precedent by its size does not of itself render the award suspect (*119 Cal. App. 3d 757, 819)* .

In *Rodriguez v. McDonnell Douglas Corp. (1978) 87 Cal. App. 3d 626, 151 Cal. Rptr. 399* , plaintiff, a construction worker rendered triplegic in a job-site accident, was awarded over $4 million in damages by a jury. Defendant's motion for new trial was denied, and defendant appealed the denial and the judgment, contending that damages were excessive. Defendant argued that in a more serious case, a plaintiff was rendered quadriplegic, yet received a smaller award. Plaintiff pointed to similar cases with higher awards. The court of appeal sustained plaintiff's award, stating that to measure the validity of an award of damages by making a comparison with other cases would constitute a prohibitive invasion into the realm of factfinding (*87 Cal. App. 3d 626, 655)* .

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6-64 California Points & Authorities § 64.174

§ 64.174 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 659] Made on Ground of Excessive Damages [Code Civ. Proc. § 657(5)]--Disparate Ratio of Punitive and Compensatory Damages Not Conclusive

[1] FORM

[*Caption. See § 64.170.*]

IT IS IMPROPER TO GRANT A MOTION FOR A NEW TRIAL ON THE GROUND OF EXCESSIVE DAMAGES MERELY BECAUSE THERE IS A DISPARATE RATIO BETWEEN THE AWARD OF PUNITIVE DAMAGES AND THE AWARD OF COMPENSATORY DAMAGES.

A. New Trial Precluded Unless Court Convinced That Court or Jury Clearly Should Have Reached Different Result. [*See § 64.170, Paragraph A.*]

B. Disparate Ratio as Not Establishing Excessiveness of Award of Punitive Damages. The excessiveness of an award of punitive damages is not established solely by the disparate ratio between the award of punitive damages and the award of compensatory damages (*Zhadan v. Downtown L.A. Motors (1976) 66 Cal. App. 3d 481, 499, 136 Cal. Rptr. 132* ; *Wetherbee v. United Ins. Co. of Am. (1971) 18 Cal. App. 3d 266, 271, 95 Cal. Rptr. 678*).

[*Optional*] **C. Reasonability of Ratio Between Punitive and Compensatory Damages Influenced by Reprehensibility of Defendant's Conduct.** The reprehensibility of the defendant's conduct, including whether the conduct was an isolated incident or part of a larger pattern of similar wrongdoing, will influence the determination of what ratio between punitive damages and compensatory damages is reasonable under the facts of the case (*Johnson v. Ford Motor Co. (2005) 35 Cal. 4th 1191, 1207* , *29 Cal. Rptr. 3d 401* , *113 P.3d 82*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to a motion for a new trial made on the ground of excessive damages when the moving party claims that the excessiveness of the damages arises solely from the disparate ratio between punitive and compensatory damages.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

For a chart analyzing the relationship between punitive and compensatory damages in 16 California cases, see *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc. (1984) 155 Cal. App. 3d 381, 393-396, 202 Cal. Rptr. 204* .

[b] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing motions for a new trial, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] Disparate Ratio as Not Establishing Excessiveness of Award of Punitive Damages

In ***Zhadan v. Downtown L.A. Motors*** *(1976) 66 Cal. App. 3d 481, 136 Cal. Rptr. 132* , plaintiff brought an action for conversion seeking both compensatory and punitive damages against an automotive repair dealer who took plaintiff's car from her garage after plaintiff refused to pay certain repair bills. Defendant cross complained for the value of goods and services rendered and sought both compensatory and punitive damages for plaintiff's interference with its garagemen's lien. At the conclusion of the trial, the jury found in plaintiff's favor and awarded her substantial compensatory and punitive damages. Without stating its reason, the trial court granted defendant's motion for a new trial on the ground of excessive damages conditional on plaintiff's remittitur of punitive damages to a specified amount. When plaintiff did not consent to the reduction of punitive damages, the order for a new trial took effect and both parties appealed. Defendant contended, in part, that the award of punitive damages was so excessive as to indicate passion and prejudice on the part of the jury. The court of appeal held, in part, that the evidence that defendant had violated the statutory provisions designed to protect consumers from unscrupulous automotive repair dealers justified the imposition of substantial punitive damages. However, the amount of an award of punitive damages could vary widely, depending on such additional factors as the importance of the policy violated by defendant's conduct, the degree and extent, both qualitatively and quantitatively, of the violation, and the financial circumstances of defendant. The court of appeal found that the punitive damages awarded in this case exceeded one-third of defendant's net worth. In the absence of clear evidence showing a continuing course of conduct involving large-scale, flagrant violations of state statutory policy, the award of punitive damages was excessive because its effect was to deter defendant's conduct to the point of putting defendant out of business. The court of appeal reasoned that when an award of punitive damages is so grossly disproportionate to a defendant's net worth as to put the defendant out of business, the award is presumptively based on a jury's passion and prejudice. The court of appeal reversed the conditional order for a new trial on the issue of damages and reinstated the judgment because the trial court had failed to make an adequate specification of reasons. However, since the court of appeal concluded that the punitive damages award was excessive, it remanded the case for a new trial on all of the issues.

NOTE:

In distinguishing *Wetherbee v. United Ins. Co. of Am. (1971) 18 Cal. App. 3d 266, 95 Cal. Rptr. 678* ,

the court in *Zhadan* cites the rule that the excessiveness of a punitive damages award cannot be established by reference alone to the disparate ratio between it and the compensatory award. The court in *Zhadan* went on to find that the punitive damages awarded by the jury were excessive, but counsel using this form will be arguing the opposite point--that is, that the punitive damages awarded were not excessive. *Zhadan* is still useful authority, however, because it arose in the context of a motion for a new trial.

In ***Wetherbee v. United Ins. Co. of Am.*** *(1971) 18 Cal. App. 3d 266, 95 Cal. Rptr. 678* , the court found that the punitive damages were not excessive, but the court determined this issue on an appeal from the judgment, and did not apply the same standard as would be used by the trial court. Defendant claimed that the punitive damages were excessive, after the trial court had refused to upset the award on a motion for a new trial. Counsel should note that under such circumstances, the appellate court will hesitate to declare the amount excessive unless, on a consideration of the entire record, it must be said that the award was excessive, a stricter standard than the one used on a motion for a new trial. *Wetherbee* was an action by plaintiff insured against defendant insurer for declaratory relief, breach of contract, and misrepresentation. The jury awarded $1,050 in actual damages, and $200,000 in punitive damages. Defendant pointed to the disparate ratio of these awards, and the court of appeal, relying on *Finney v. Lockhart (1950) 35 Cal. 2d 161, 164, 217 P.2d 19* , stated that there is no fixed ratio by which to determine a proper proportion between the two classes of damages.

Reasonability of Ratio Between Punitive and Compensatory Damages Influenced by Reprehensibility of Defendant's Conduct

In ***Johnson v. Ford Motor Co.*** *(2005) 35 Cal. 4th 1191* , *29 Cal. Rptr. 3d 401* , *113 P.3d 82* , the plaintiffs were the buyers of a previously owned automobile that was only a year old at the time of their purchase. The plaintiffs had been told at the time by the Ford dealership from which they bought the car that the previous owner had traded the car in for a newer model, and when they asked about the car's repair history, they were shown a computer print-out indicating no significant prior repairs. They were not told that the previous owner had in fact had numerous problems with the car's transmission, resulting in one complete transmission replacement, and that the problems apparently escaped the dealer's attempts at repair. The plaintiffs were also not informed that the previous owner had sought to have the car repurchased by the dealer under the California "lemon law," *Civ. Code § 1790 et seq.*, but the Ford district customer service manager determined that the car did not qualify as a "lemon" under the statute. Instead, the previous owner was given a $1,500 credit toward a trade-in on a new car. The plaintiffs experienced similar problems with the car after their purchase, and after two transmission replacements of their own, they learned of the problems that the previous owner had experienced. The plaintiffs sued Ford Motor Co. and the dealership for intentional and negligent misrepresentation and concealment, as well as for numerous statutory violations, including a violation of the lemon law. The plaintiffs settled with the dealership and went to trial against Ford Motor Co. The plaintiffs introduced evidence at trial that the misconduct described above was merely part of a corporate-wide attempt by Ford to avoid the mandatory buy-back provisions of state lemon laws through a program of trade-in credits and a corporate policy specifically engineered to undercount the number of attempted repairs on a vehicle for purposes of applying these lemon laws. The jury found for the plaintiffs, awarded $17,811 in compensatory damages, and assessed $10 million in punitive damages. The amount of punitive damages was based on an estimate of how much money Ford had saved over a two-year period by issuing trade-in credits rather than repurchasing vehicles that should have been classified as lemons. The court of appeal affirmed, but reduced the amount of punitive damages to $53,435, representing roughly three times the amount of compensatory damages. The court of appeal relied on its earlier analysis in *Romo v. Ford Motor Co. (2003) 113 Cal. App. 4th 738, 6 Cal. Rptr. 3d 793* , which held that under the United States Supreme Court's decision in *State Farm Mut. Auto Ins. Co. v. Campbell (2003) 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585* , federal due process considerations required that the amount of punitive damages awarded must punish only for the specific conduct that harmed the plaintiff in the particular case and prevented a state from imposing an amount of punitive damages designed to punish a defendant for an overall course of conduct. The plaintiff appealed.

The California Supreme Court reversed. The Court rejected the conclusion of the court of appeal in *Romo v. Ford Motor Co.* that states were no longer permitted, after *State Farm*, to consider an overall course of misconduct by the defendant in determining the amount of punitive damages that is constitutionally permissible in a particular case. The Court reviewed the relevant United States Supreme Court decisions, including *State Farm*, and concluded that these cases did not prohibit a state court, in awarding or reviewing punitive damages, from considering the defendant's illegal or wrongful conduct toward others, if this conduct was similar to the misconduct that injured the plaintiffs (*35 Cal. 4th 1191, 1204)* . To the contrary, the United States Supreme Court had made clear that the most important consideration in determining an appropriate amount of punitive damages was the reprehensibility of the defendant's conduct, and that the frequency and profitability of the defendant's misconduct were relevant to evaluating the reprehensibility of the misconduct. Therefore, although the Court recognized that due process requires a reasonable proportionality between punitive damages and the amount of compensatory damages awarded to the particular plaintiff, the determination of what constitutes a reasonable proportionality under the particular facts depends on the reprehensibility of the conduct, which requires evidence of whether the misconduct was an isolated instance or part of a wider pattern of similar misconduct perpetrated against other parties. The Court did caution, however, that scale and profitability of a course of misconduct cannot justify an award of punitive damages that is grossly excessive in relation to the harm done or threatened (*35 Cal. 4th 1191, 1207)* .

The Court then rejected the plaintiffs' argument, accepted at trial, that the defendant in this case could be forced to disgorge, as punitive damages, the amount of profit that the defendant allegedly made by attempting to avoid application of state lemon laws. Although stopping short of deciding whether a plaintiff could ever justify an award of punitive damages on the basis of total profits earned from a course of misconduct, the Court concluded that the plaintiffs failed to offer sufficient justification in this case. The plaintiffs failed to explain why a two-year period was selected to estimate Ford's profits, they offered no evidence to show that all vehicles given trade-in credits would have been subject to the California lemon law, and they failed to show that other consumers buying traded-in vehicles were kept in the dark about the repair history of their cars (*35 Cal. 4th 1191, 1211-1212)* . Although the Court agreed with the court of appeal that the $10 million award of punitive damages was excessive, the Court remanded to the court of appeal to reevaluate its determination of an appropriate amount, taking into consideration that evidence of Ford's broader pattern of misconduct was relevant to determining reprehensibility and could be considered in setting an appropriate award (*35 Cal. 4th 1191, 1213)* .

[4] Additional Authorities

[a] Disparate Ratio as Not Establishing Excessiveness of Award of Punitive Damages

In *Wyatt v. Union Mortgage Co. (1979) 24 Cal. 3d 773, 157 Cal. Rptr. 392, 598 P.2d 45* , plaintiffs brought an action against a mortgage loan broker for breach of its fiduciary duty, alleging a fraudulent conspiracy as well. The jury assessed a total of $25,000 compensatory damages and $200,000 punitive damages. On appeal, defendants urged, among other grounds, that the punitive damages were excessive as a matter of law. In rejecting this contention, the Supreme Court stated that the purpose of punitive damages is to penalize wrongdoers in a way that will deter them and others from repeating the wrongful conduct in the future, and that the amount of punitive damages sufficient to accomplish this purpose in a particular case is not susceptible of mathematical definition.

In *Sommer v. Gabor (1995) 40 Cal. App. 4th 1455, 48 Cal. Rptr. 2d 235* , plaintiff recovered damages for defamation based on defendant's defamatory statements printed in a magazine about plaintiff. Defendant appealed, contending since there were no special damages, the award of general damages was excessive, and that the punitive damages award would fail if the compensatory damage award were vacated. Furthermore, defendant asserted that punitive damages awards in defamation cases are routinely reduced on appeal where the actual damage is small. The court of appeal recognized that damages are excessive where the recovery is so grossly disproportionate to the injury that the award may be presumed to have been the result of passion or prejudice. However, the court rejected defendant's attacks on the substantiality of the evidence to support the damage award as nothing more than challenges to the credibility of the

witnesses. The court concluded that there was no indication that the jury award was grossly disproportionate to the injury or the result of passion or prejudice (*40 Cal. App. 4th 1455, 1470-1471)* . The court thus affirmed the judgment in favor of plaintiff.

In *Downey Sav. & Loan Ass'n v. Ohio Cas. Ins. Co. (1987) 189 Cal. App. 3d 1072, 234 Cal. Rptr. 835* , a bad-faith insurance action brought by a financial institution regarding indemnification resulting from an employee's dishonest acts, the jury returned a verdict for plaintiff awarding approximately $150,000 in compensatory damages, and $5 million in punitive damages. Defendant appealed on the ground, inter alia, that the punitive damages award was excessive. The court of appeal affirmed, holding that an award of punitive damages will be reversed as excessive only when the entire record viewed most favorably to the judgment indicates the award was the result of passion and prejudice. Inasmuch as the plaintiff was a solvent corporation with substantial assets, it is unlikely that the jury was motivated by passion and prejudice; and based on the evidence presented, the punitive damages award equal to 32 times the compensatory damages award is not unreasonable as a matter of law (*189 Cal. App. 3d 1072, 1097-1100)* .

In *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc. (1984) 155 Cal. App. 3d 381, 202 Cal. Rptr. 204* , the court of appeal upheld the trial court's award of punitive damages 27 times the amount of compensatory damages, finding the award not excessive as a matter of law. After discussing the factors to be considered in assessing a punitive damages award, the court said that punitive damages should bear a reasonable relationship to compensatory damages, and that there is no fixed ratio to determine what is reasonable; instead, a fluid process that varies with the parties and the facts is employed (*155 Cal. App. 3d 381, 390)* .

In *Betts v. Allstate Ins. Co. (1984) 154 Cal. App. 3d 688, 201 Cal. Rptr. 528* , an insured sued her insurer for bad-faith refusal to accept a third-party claimant's settlement offer within policy limits, eventually obtaining an award of $1,000,000 compensatory and $3,000,000 punitive damages. The trial court denied the insurer's motion for a new trial after the insured consented to a reduction in the compensatory award to $550,000. The insurer appealed and the court of appeal affirmed. Insurer contended that the award of punitive damages was excessive as a matter of law, since it bore a much higher ratio to the compensatory award than that originally assigned by the jury. The court rejected this argument, noting that courts do not evaluate the reasonableness of the relation between punitive and compensatory damages by any rigid formula but rather by a fluid process of adding and subtracting different considerations: if the defendant's conduct is sufficiently reprehensible, the ratio between compensatory and punitive damages is less important, while the ratio carries more weight if the ratio is extremely high and the conduct is somewhat less reprehensible. The proper consideration is whether the punitive damages award bears a reasonable relationship to its principal purpose of punishment and deterrence (*154 Cal. App. 3d 688, 712)* . The court held that the award was proper in view of the insurer's highly reprehensible conduct and the reasonable relation of the amount of the award to the insurer's wealth (*154 Cal. App. 3d 688, 711-713)* .

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Volume 6 Chapters 60-69 COSTS---to---DECLARATORY RELIEF
CHAPTER 64 DAMAGES: TORT
PART II. FORMS
H. Opposing Motion for New Trial

6-64 California Points & Authorities § 64.175

§ 64.175 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 659] Made on Ground of Excessive Damages [Code Civ. Proc. § 657(5)]--Record Contains Sufficient Evidence of Defendant's Financial Condition to Support Exemplary Damages Award

[1] FORM

[*Caption. See § 64.170.*]

DEFENDANT'S MOTION FOR NEW TRIAL SHOULD BE DENIED BECAUSE SUFFICIENT EVIDENCE OF DEFENDANT'S FINANCIAL CONDITION, BASED ON _____ [DEFENDANT'S NET WORTH *or* THE PROFIT DEFENDANT REALIZED FROM THE MISCONDUCT THAT WAS THE BASIS OF THE ACTION], EXISTS ON THE RECORD TO SUPPORT THE EXEMPLARY DAMAGES AWARDED.

A. New Trial Precluded Unless Court Convinced That Court or Jury Clearly Should Have Reached Different Result. [*See § 64.170, Paragraph A.*]

B. Exemplary Damages Award Must Be Supported by Sufficient Evidence of Defendant's Financial Condition. An award of exemplary damages must be based on evidence of the defendant's financial condition sufficient to provide a reviewing court with a basis for determining whether the award is excessive (*Adams v. Murakami (1991) 54 Cal. 3d 105, 108-110, 116, 284 Cal. Rptr. 318, 813 P.2d 1348*).

C. Evidence of Defendant's Financial Condition Sufficient to Support Award of Exemplary Damages May Be Based on Either Defendant's Net Worth, or Profits Gained by Defendant's Misconduct. Although a defendant's net worth is generally considered to be the best measure of a defendant's financial condition for the purpose of assessing punitive damages, evidence of the amount of monetary gain that the defendant realized from the misconduct is sufficient to support an award that does not exceed that amount (*Cummings Med. Corp. v. Occupational Med. Corp. (1992) 10 Cal. App. 4th 1291, 1299-1300, 13 Cal. Rptr. 2d 585* ; *see Adams v. Murakami (1991) 54 Cal. 3d 105, 116 n.7, 284 Cal. Rptr. 318, 813 P.2d 1348* (declining to adopt either method)).

[*Optional*] **D. Federal Rule, Which Imposes Burden of Proof on Defendant, Applies to Recovery Under Federal**

Law. The federal rule regarding whether or not a punitive damages award is excessive applies to a recovery based on federal law. Because, under federal law, the defendant has the burden of proving that punitive damages are excessive in light of the defendant's financial condition, the plaintiff's failure to introduce evidence regarding the financial condition of the defendant does not render a punitive damages award improper (*Chavez v. Keat (1995) 34 Cal. App. 4th 1406, 1410-1411, 1416, 41 Cal. Rptr. 2d 72*).

[*Optional*] **E. Mitigating Evidence of Punitive Damages Awards Imposed in Other Cases Must Have Been Presented to Jury.** If a defendant wishes to attack a punitive damages award on the ground that other such awards have already sufficiently punished it for the same conduct, evidence of the other awards must be presented to the jury (*Stevens v. Owens-Corning Fiberglas Corp. (1996) 49 Cal. App. 4th 1645, 1665, 57 Cal. Rptr. 2d 525*).

[*Optional*] **F. Future Earning Capacity May Be Considered in Determining Present Net Worth.** A jury may consider the future earning capacity of the defendant in determining the appropriate amount for an award of punitive damages (*Rufo v. Simpson (2001) 86 Cal. App. 4th 573, 620-622, 103 Cal. Rptr. 2d 492*).

[*Optional*] **G. Negative Net Worth Does Not Necessarily Preclude Award of Punitive Damages.** A negative net worth does not preclude an award of punitive damages as a matter of law if other evidence indicates an ability to pay (*see* *Zaxis Wireless Commc'ns, Inc. v. Motor Sound Corp. (2001) 89 Cal. App. 4th 577, 582-583, 107 Cal. Rptr. 2d 308*).

[*Optional*] **H. Defendant's Worth Not Limited to Worth Derived From Activities in California.** Evidence of the financial condition of the defendant is not limited to the defendant's financial condition as it relates to its business activities in California, but properly includes the defendant's overall worth (*Buell-Wilson v. Ford Motor Co. (2006) 141 Cal. App. 4th 525, 566, 46 Cal. Rptr. 3d 147*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion for a new trial based on the assertion that the damages are excessive because an award of exemplary damages is not supported by evidence of the defendant's financial condition, when the moving party claims that the record contains sufficient evidence of defendant's financial condition. The plaintiff's claim can be supported by either evidence of the defendant's net worth, or by evidence of the monetary gain that the defendant realized from the misconduct proven in the action.

Optional Paragraph D may be used in an action in which the right to recovery of punitive damages is based on federal law if the jury awarded punitive damages despite plaintiff's not having introduced any evidence of the defendant's financial condition.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should refer to the evidence in the record that either establishes the defendant's net worth, or shows the gain defendant realized from the misconduct; and counsel should argue that the award of exemplary damages

is not excessive in light of that evidence. If Optional Paragraph C is included, counsel should point out that plaintiff's failure to introduce evidence on defendant's financial worth does not preclude an award of punitive damages under federal law, since the federal rule places on defendant the burden of proving that punitive damages are excessive in light of the defendant's financial condition.

[c] Related Points and Authorities

For memoranda of points and authorities supporting and opposing motions for a new trial, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] Exemplary Damages Award Must Be Supported by Sufficient Evidence of Defendant's Financial Condition

In ***Adams v. Murakami*** *(1991) 54 Cal. 3d 105, 284 Cal. Rptr. 318, 813 P.2d 1348* , a convalescent hospital patient who was a diagnosed chronic schizophrenic of low intelligence sued, through her conservator, the hospital and her attending physician for medical malpractice, battery, and intentional infliction of emotional distress. She alleged that, as a result of the wrongful acts and omissions of the defendants, she became pregnant by another patient and gave birth to a son who was diagnosed as mentally retarded and autistic. Her claims against the hospital were settled and her claims against the doctor proceeded to jury trial. Neither the plaintiff nor the doctor introduced evidence at trial regarding the doctor's financial condition. The jury returned a verdict for the patient and the trial court awarded damages, including $750,000 in punitive damages. The doctor appealed the punitive damages award on the ground that the patient had not introduced evidence of the doctor's financial condition. The court of appeal rejected the argument and affirmed the award without discussion of the financial condition issue.

The Supreme Court reversed and remanded the punitive damages award, holding that evidence of a defendant's financial condition is a prerequisite to a punitive damages award. The purpose of a punitive damages award is to punish and deter the defendant. A reviewing court cannot make a fully informed determination of whether a punitive damages award is appropriate or excessive in light of this purpose, without evidence of the defendant's financial condition (*54 Cal. 3d 105, 110-112)* . Moreover, the Court held that the plaintiff who seeks to recover punitive damages has the burden of establishing the defendant's financial condition (*54 Cal. 3d 105, 123)* .

[b] Evidence of Defendant's Financial Condition Sufficient to Support Award of Exemplary Damages May Be Based on Either Defendant's Net Worth, or Profits Gained by Defendant's Misconduct

The factual and procedural background of ***Adams v. Murakami*** *(1991) 54 Cal. 3d 105, 284 Cal. Rptr. 318, 813 P.2d 1348* , is discussed in *§ 64.175[3][a]*. The Court declined to address what would constitute sufficient evidence of a defendant's financial condition, because no evidence at all regarding defendant's financial condition had been presented in the case. However, the Court noted both the defendant's contention that the best measure of its financial condition would be evidence of net worth, and the contention in an amicus brief that the profitability of the defendant's misconduct would be the proper measure; the Court stated that it could not conclude that any particular method is superior to all others, or that a single standard is appropriate in all cases (*54 Cal. 3d 105, 116 n.7*).

In ***Cummings Med. Corp. v. Occupational Med. Corp.*** *(1992) 10 Cal. App. 4th 1291, 13 Cal. Rptr. 2d 585* , the trial court, as a sanction for discovery abuse, entered a default judgment in favor of the purchaser of a medical center on its cross-complaint against the seller and struck the seller's complaint and cross complaint. The judgment included an award of punitive damages as well as compensatory damages, based on evidence that the seller had profited from its fraudulent conduct in the amount of $1,598,300; the judgment was for $1 million in compensatory damages (the amount sought in the complaint), and $1 million in exemplary damages. The seller appealed, arguing that no evidence of its net worth was presented at the damages hearing.

The court of appeals upheld the punitive damages award, but reduced the amount of the award. Relying on *Adams v. Murakami (1991) 54 Cal. 3d 105, 284 Cal. Rptr. 318, 813 P.2d 1348* , the court held that the fact that no evidence was offered regarding the seller's net worth did not make the punitive damages award improper. Evidence of the profitability of the defendant's misconduct satisfies the requirement that the trier of fact consider the financial condition of the particular defendant, and an award that does not exceed the amount of that gain cannot be excessive. However, because no other evidence of the seller's financial condition was presented, the court of appeal reduced the punitive damages award so that the total amount of compensatory and punitive damages did not exceed the amount of the illegal gain the seller realized from its misconduct (*10 Cal. App. 4th 1291, 1299-1301)* .

[c] Federal Rule, Which Imposes Burden of Proof on Defendant, Applies to Recovery Under Federal Law

In ***Chavez v. Keat*** *(1995) 34 Cal. App. 4th 1406, 41 Cal. Rptr. 2d 72* , plaintiff sued for damages under both state and federal law. At trial, neither plaintiff nor defendant introduced any evidence of the defendant's financial condition. The jury rejected all claims based on state law, but awarded compensatory and punitive damages based on the federal claim. Defendant appealed on the grounds that, first, the punitive damages award was excessive, arguing that a punitive damages award violates federal due process unless evidence of the defendant's financial condition is introduced and the burden of producing that evidence is on the plaintiff, and second, that California law should apply to the question of whether the punitive damages award was excessive.

The court of appeal rejected the defendant's arguments, and affirmed the judgment granting punitive damages (*34 Cal. App. 4th 1406, 1416)* . The court initially recognized that a punitive damages award is excessive if it is disproportionate to the defendant's ability to pay (*34 Cal. App. 4th 1406, 1410)* . The court also noted that the rule in California is that if there is no evidence in the record regarding the defendant's ability to pay, the award of punitive damages is excessive as a matter of law, and that the burden of producing that evidence is on plaintiffs. However, under federal law it is the defendant who carries the burden of introducing financial evidence, and if a defendant makes no effort to satisfy that burden, then punitive damages may be awarded despite incomplete knowledge of defendant's financial position (*34 Cal. App. 4th 1406, 1410-1411)* . The defendant's contention that due process requires evidence of a defendant's finances as a basis for a punitive damages award was premised on the claim that the California rule rested on due process principles. However, in establishing the California rules for review of punitive damages, the Supreme Court expressly based those rules on state common law (*34 Cal. App. 4th 1406, 1411)* . The defendant's second contention, that the California rule regarding review of punitive damages is a procedural rule that applies when determining rights under federal law, was also incorrect. Generally, when an action founded on a federal statute is brought in a state court, the law of the state controls in matters of practice and procedure (*34 Cal. App. 4th 1406, 1413)* . However, the court held that the California rule requiring the introduction of evidence of financial condition to support a punitive damages award is a rule of substantive law (*34 Cal. App. 4th 1406, 1415)* . Since a state court cannot apply its own substantive law when adjudicating federal claims, the trial court properly applied the federal rule, imposing on the defendant the obligation to introduce any evidence of financial condition if that evidence was to be considered.

[d] Mitigating Evidence of Punitive Damages Awards Imposed in Other Cases Must Have Been Presented to Jury

In ***Stevens v. Owens-Corning Fiberglas Corp.*** *(1996) 49 Cal. App. 4th 1645, 57 Cal. Rptr. 2d 525* , a plaintiff sued defendant alleging that it had manufactured, distributed and marketed asbestos products that caused his asbestosis and cancer. During jury selection, plaintiff died and his estate was substituted as plaintiff. At trial defendant moved in limine to strike plaintiff's demand for punitive damages contending prior punitive and compensatory damages awarded against it had fulfilled the purposes of punitive damages and precluded any further awards as a matter of law. The trial court denied the motion. At the punitive damages phase of the trial defendant did not present evidence of the punitive damages awarded against it in other cases, which it had cited to the trial court on its motion in limine. The jury assessed punitive damages of two million dollars. Defendant moved for a new trial, or for a reduction in the punitive damages

award. Alternately, it moved for judgment notwithstanding the verdict. The trial court again denied the motions. Defendant appealed, arguing that the punitive damages award was excessive.

The court of appeal rejected defendant's argument and affirmed the punitive damages award. The court ruled that it would not consider evidence of awards in other asbestos cases that was not presented to the jury, and concluded that the evidence defendant did present in this case was insufficient to establish that the point of "overkill" had been reached (*49 Cal. App. 4th 1645, 1659)* . The court rejected defendant's arguments that they should not be required to give the jury "highly inflammatory evidence" of other punitive damages awards, and that the court could take judicial notice of other cases in which punitive damages were awarded against defendant. As to the first argument, the court stated that it believed juries were capable of properly evaluating the impact of other awards against the defendant when weighing the deterrent effect of a punitive damages award and suggested that a jury instruction could be given to ensure that evidence of other awards was not used to increase punitive damages, but only to decrease them if the jury concluded the level of deterrence and punishment already imposed justified a lesser award, or no award at all. As to the judicial notice argument, the court found that even if it took judicial notice of the cases cited by defendant, it would not have enough information to gauge the actual impact of the awards in those cases because it had no evidence that defendant had actually paid the awards, nor could it tell whether those awards arose from the same conduct for which defendant was punished in this case. The court said that in order for evidence of other awards to have probative value, it must be tested in an adversary setting, giving the plaintiff a chance to probe the underlying facts. The court noted that courts in other jurisdictions have held that evidence of other punitive damages awards must be presented to the jury before the argument is raised in a reviewing court. The court also noted that it was not the first appellate court to make this point to defendants, stating that it appeared that defendant deliberately withheld the evidence, reserving it for attacks on the award of punitive damages on motion for new trial and on appeal, a strategy which improperly curtailed the jury's fact-finding prerogative. Lastly, the court ruled that its decision did not give the plaintiff the right to introduce evidence of other punitive damages awards (*49 Cal. App. 4th 1645, 1665)* .

[e] Future Earning Capacity May Be Considered in Determining Present Net Worth

In ***Rufo v. Simpson*** *(2001) 86 Cal. App. 4th 573, 103 Cal. Rptr. 2d 492* , the defendant was sports celebrity O.J. Simpson, who was found civilly liable for killing his former wife and her friend, despite being acquitted of criminal murder charges. The jury found that the homicides were committed willfully and wrongfully, with oppression and malice, and awarded $8.5 million in compensatory damages on the wrongful death claim brought by the parents and heirs of the slain friend, minor compensatory damages and $12.5 million in punitive damages on the survival action brought by the friend's father, and minor compensatory damages and $12.5 million in punitive damages on the survival action brought by the representative of the estate of Simpson's former wife. The defendant appealed, seeking a new trial on the basis of numerous alleged errors in the admission and exclusion of evidence and alleged juror misconduct. He also argued on appeal that the compensatory and punitive damages awards were excessive as a matter of law.

The court of appeal affirmed. As part of the challenge to the punitive damages awards, which exceeded the defendant's current net asset worth, the defendant argued that the trial court erred in allowing the plaintiffs' expert, who marketed and licensed sports and entertainment personalities, to testify as to the defendant's capacity to earn income in the future by exploiting his name and likeness. The court of appeal disagreed. The court noted uncontradicted testimony by an accounting expert that it was proper under accounting principles to reflect the present value of future earning capacity in a statement of net worth (*86 Cal. App. 4th 573, 620-621)* . Moreover, although net worth is the most common measure of wealth used in assessing punitive damages, the court noted that it is not the exclusive measure. The court rejected the defendant's contention that the evidence of his future financial prospects was legally irrelevant or improper. Because the proper level of punitive damages is an amount high enough that the defendant cannot absorb it with little or no discomfort, but not so high that it destroys the defendant financially, the defendant's future financial prospects were relevant to the issue of the defendant's ability to absorb the punitive damages award (*86 Cal. App. 4th 573, 621-622)* . The court also held that determining the credibility of plaintiffs' expert on the issue of the defendant's prospects for exploiting his name and likeness, as well as evaluating the conflicting testimony from the defendant's experts, was an

issue of fact for the jury (*86 Cal. App. 4th 573, 622-623)* . Finally, the court of appeal concluded that the amount of the award was not excessive, under the unusual circumstances of the case, even though it may have exceeded the value of the defendant's current assets. In addition to the heinousness of the defendant's conduct, the court noted that the defendant was a wealthy man with prospects to gain more wealth in the future and that the defendant had pension funds worth $4.1 million that were exempt from execution to pay a damages award, which guaranteed that the defendant would continue to enjoy a comfortable living (*86 Cal. App. 4th 573, 624-625)* .

[f] Negative Net Worth Does Not Necessarily Preclude Award of Punitive Damages

In ***Zaxis Wireless Commc'ns, Inc. v. Motor Sound Corp.*** *(2001) 89 Cal. App. 4th 577, 107 Cal. Rptr. 2d 308* , the plaintiff sued the defendant for false representations that the defendant allegedly made to the plaintiff to induce the plaintiff to continue as a subagent for the defendant in the business of selling phones and related services to the public. The jury found for the plaintiff and awarded compensatory damages for fraud and breach of contract. After a separate trial on punitive damages, the jury awarded $300,000. Based on evidence that the defendant currently had a net worth of negative $6.3 million, the defendant moved for nonsuit and judgment notwithstanding the verdict, arguing that an award of punitive damages was precluded as a matter of law. The trial court denied the motions, and the defendant appealed.

The court of appeal affirmed. The court concluded that net worth is too easily manipulated to be the sole standard for measuring a defendant's ability to pay, and in this case, the negative net worth was calculated only on the strength of accumulated depreciation of $4.9 million and a note to the corporation's sole shareholder of $6 million. Because the defendant had annual revenues well in excess of $200 million, had cash on hand and a checking account balance of $19 million, and had a line of credit of $50 million, of which over $5 million was still available, the plaintiff had demonstrated the defendant's ability to pay, and the $300,000 punitive damages award was not excessive as a matter of law (*89 Cal. App. 4th 577, 582-583)* .

[g] Defendant's Worth Not Limited to Worth Derived From Activities in California

In *Buell-Wilson v. Ford Motor Co. (2006) 141 Cal. App. 4th 525, 46 Cal. Rptr. 3d 147* , plaintiffs were a wife, who was rendered a paraplegic because of injuries sustained when her sport utility vehicle (SUV) rolled over, and her husband. They filed suit against the vehicle manufacturer for products liability and loss of consortium. Plaintiff's evidence showed that defendant released the SUV to market even though defendant knew its design was prone to rollovers, and even though it failed to reinforce the vehicle's roof although the cost to do so amounted to approximately $20 per vehicle. The jury awarded $110,000,000 in compensatory damages to the wife, $13,000,000 on the husband's loss of consortium claim, and $246,000,000 in punitive damages. The trial court reduced the wife's compensatory damages to $70,000,000, reduced the husband's award to $5,000,000, and reduced the punitive damages to $75,000,000. Defendant appealed.

The court of appeal reversed in part, but otherwise affirmed the judgment. The court reduced the wife's award of noneconomic compensatory damages from $65,000,000 to $18,000,000, after determining that the jury's award, even after reduction by the trial judge, was the result of passion or prejudice. In making that reduction, the court noted that the plaintiff's own attorney had only argued to the jury that a noneconomic damage award of approximately $18,000,000 would be reasonable (*Alvis v. County of Ventura (2009) 178 Cal. App. 4th 536, 547-550, 100 Cal. Rptr. 3d 494* . In reviewing the punitive damage award, the court rejected defendant's argument that evidence of defendant's net worth should have been limited to evidence of its worth derived from its sales in California. The court noted that while it may be inappropriate at times to consider out-of-state wrongful conduct when imposing punitive damages, consideration of the defendant's overall wealth was permissible to ensure that the amount of punitive damages awarded sufficiently deterred future wrongful conduct (*141 Cal. App. 4th 525, 565-566)* . The court nonetheless reduced the punitive damages award to $55,000,000, which reflected roughly a 2-to-1 ratio with the total compensatory damages award, after concluding that the previous amount was unconstitutionally large given the large compensatory damage award (***Alvis v. County of Ventura*** *(2009) 178 Cal. App. 4th 536, 100 Cal. Rptr. 3d 494* .

[4] Additional Authorities

[a] Exemplary Damages Award Must Be Supported by Sufficient Evidence of Defendant's Financial Condition

In *County of San Bernardino v. Walsh (2007) 158 Cal. App. 4th 533, 69 Cal. Rptr. 3d 848* , plaintiff county sued multiple defendants to recover damages suffered as a result of defendants' bribery of county officials in order to win public contracts. The county obtained a money judgment, which included disgorgement of profits and punitive damage awards of $1,000,000 and $500,000 against two defendants, and the court of appeal affirmed. In upholding the punitive damage awards, the court of appeal rejected the claim of those defendants that the awards were not supported by sufficient evidence of defendants' financial condition and they lacked the resources to pay the awards. The court of appeal agreed with the trial court's conclusion that these defendants had systematically and deceitfully manipulated and concealed assets and net worth and had provided evasive or knowingly false testimony on the issue at trial, which provided the trial court with wide latitude to make inferences unfavorable to the defendant when setting an amount of punitive damages. The court noted evidence indicating that one defendant had hidden at least $3.7 million in an account in the Cayman Islands, had deposited $600,000 into a private retirement account, put $450,000 toward the purchase of two houses, transferred $340,000 to his spouse upon their divorce, although he continued to live with her, and gave his ex-wife their residence, which was subsequently sold for $825,000. Evidence also indicated that this defendant continued to use assets transferred to his wife after their stipulated divorce. Evidence on the financial condition of the other defendant showed that he had transferred two investment properties to his wife, he was working for his wife as an employee at the time of trial, and he and his wife owned more than $2,000,000 in assets, as well as equity in real property of $369,000. In addition, this defendant received over $11,000 a month in retirement benefits, much of which was exempt from execution by creditors, and owned a $388,942 interest in an exempt private retirement plan (*158 Cal. App. 4th 533, 546-547)* .

[b] Evidence of Defendant's Financial Condition Sufficient to Support Award of Exemplary Damages May Be Based on Either Defendant's Net Worth, or Profits Gained by Defendant's Misconduct

In *Stevens v. Owens-Corning Fiberglas Corp. (1996) 49 Cal. App. 4th 1645, 57 Cal. Rptr. 2d 525* , plaintiff sued defendant alleging that it had manufactured, distributed and marketed asbestos products that caused his asbestosis and cancer. During jury selection, plaintiff died and his estate was substituted as plaintiff. The jury awarded plaintiff both economic and punitive damages. Defendant appealed, arguing among other things, that the punitive damages award was excessive as a matter of law because it exceeded the profits defendant realized on the sale of the asbestos insulation product to which decedent was exposed. The court of appeal rejected this argument and affirmed the punitive damages award. This decision was based on three rules: that the amount of a defendant's profits did not limit a punitive damages award [*Cummings Med. Corp. v. Occupational Med. Corp. (1992) 10 Cal. App. 4th 1291, 13 Cal. Rptr. 2d 585]* ; that profits might not accurately reflect a defendant's financial condition [*Kenly v. Ukegawa (1993) 16 Cal. App. 4th 49, 19 Cal. Rptr. 2d 771]* ; and that a fully informed determination required evidence of the defendant's overall financial condition [*Adams v. Murakami (1991) 54 Cal. 3d 105, 284 Cal. Rptr. 318]* . Since in this case sales of the asbestos insulation product to which decedent was exposed approximated only two percent of defendant's total sales, and an even smaller percentage of its total profits, the court ruled that defendants profits did not proved an accurate indication of its financial condition or the likely punitive and deterrent impacts of a punitive damages award (*49 Cal. App. 4th 1645, 1660)* .

In *Lara v. Cadag (1993) 13 Cal. App. 4th 1061, 16 Cal. Rptr. 2d 811* , a nursing intern sued a doctor for sexual assault. The trial court found in favor of the plaintiff, awarding her compensatory damages and punitive damages in the amount of $70,000. The defendant appealed, arguing that the punitive damages award was improper because the plaintiff had failed to meet her obligation to present evidence of the defendant's financial condition. The only evidence relating to defendant's financial condition was adduced during cross examination of defendant, and indicated that defendant had an income of approximately $100,000 per year. The court of appeal reversed, holding that this was insufficient to support

an award of punitive damages. The court relied on the reasoning in *Adams v. Murakami (1991) 54 Cal. 3d 105, 284 Cal. Rptr. 318, 813 P.2d 1348* , to find that the trial record contained no meaningful evidence of the defendant's financial condition. Absent evidence of the defendant's assets and liabilities, there is no basis for determining whether the award is large enough to deter future misconduct (it may not be if defendant had millions of dollars in assets and no liabilities), or excessive (as it could be if the award would force defendant into bankruptcy (*13 Cal. App. 4th 1061, 1064)* . The court recognized that *Cummings Med. Corp. v. Occupational Med. Corp. (1992) 10 Cal. App. 4th 1291, 1299-1300, 13 Cal. Rptr. 2d 585* , held that net profits could be an appropriate measure of punitive damages. However, it held that, in this case, net profits were not an appropriate measure of punitive damages because no monetary gain flowed from the defendant's misconduct (*13 Cal. App. 4th 1061, 1065)* .

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6-64 California Points & Authorities § 64.176

§ 64.176 Supporting Contention That Punitive Damages May Be Awarded Despite Lack of Evidence of Defendant's Financial Condition--Defendant Disobeyed Lawful Court Order to Produce Financial Records

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PUNITIVE DAMAGES MAY BE AWARDED AGAINST A DEFENDANT DESPITE THE PLAINTIFF'S LACK OF EVIDENCE OF THE DEFENDANT'S FINANCIAL CONDITION IF THE DEFENDANT HAS DISOBEYED A LAWFUL COURT ORDER TO PROVIDE FINANCIAL RECORDS AND THESE RECORDS WERE THE ONLY MEANS BY WHICH THE PLAINTIFF COULD PROVE THE DEFENDANT'S FINANCIAL CONDITION.

Punitive Damages May Be Awarded if Defendant Disobeys Court Order to Provide Financial Records. If punitive damages have been awarded, a defendant waives the right to complain about the plaintiff's lack of evidence of the defendant's financial condition if the defendant disobeys a lawful court order to provide financial records and these records are the only means by which the plaintiff could meet the burden of proving the defendant's financial condition (*Mike Davidov Co. v. Issod (2000) 78 Cal. App. 4th 597, 608-609, 92 Cal. Rptr. 2d 897*).

[2] Comments

[a] Use of Form

This form may be submitted to support a claim that punitive damages may be awarded despite the plaintiff's failure to meet his or her burden of proving the defendant's financial condition, if the defendant disobeyed a lawful court order to provide financial records and those records were the only means by which the plaintiff could prove the defendant's financial condition.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law

stated. Counsel should show that the court ordered the defendant to provide financial records and that the defendant failed to do so, and counsel should argue that the plaintiff could not prove the defendant's financial condition without these records.

[3] Discussion of Authorities

[a] Punitive Damages May Be Awarded if Defendant Disobeys Court Order to Provide Financial Records

In ***Mike Davidov Co. v. Issod*** *(2000) 78 Cal. App. 4th 597, 92 Cal. Rptr. 2d 897* , the plaintiff was a diamond dealer who loaned two diamonds to another dealer on the condition that the diamonds would be returned the same day after they were shown to a prospective customer. The stones were not returned as promised on that day, and after the plaintiff's repeated attempts to retrieve the stones, the defendant finally admitted that he could only return one of the stones and that the other had been sent out of the office and had not been returned. The plaintiff sued the other dealer for fraud, breach of contract, and other causes of action. The defendant then filed for bankruptcy, which stayed the action for breach of contract, and the matter went to bench trial on the other causes of actions. The trial court found for the plaintiff on the fraud action, awarding compensatory damages of $20,000, plus interest. The plaintiff also sought punitive damages, and the court scheduled a hearing for the next day at which time the plaintiff would have the opportunity to provide evidence of the defendant's financial condition to support a punitive damages award. The trial court also ordered the defendant to produce all records regarding his net worth by the next day and turn over all such records to the plaintiff's counsel. The defendant's counsel objected to the requirement that his client turn over the records, because they had not been requested during discovery or subpoenaed, but after the plaintiff pointed out that he had been precluded from seeking discovery of the defendant's financial records until liability for punitive damages had been established, the court declined to withdraw its order to produce the records. However, the defendant did not bring in his financial records as ordered. The trial court nonetheless awarded $96,000 in punitive damages, even without evidence of the defendant's financial condition, by selecting an amount that was slightly more than four times the amount of compensatory damages. The defendant appealed.

The court of appeal affirmed. On the issue of punitive damages, the court of appeal rejected the defendant's argument that the award of punitive damages was improper because the plaintiff presented no evidence of the defendant's financial condition. Although noting the established principle that a plaintiff must present such evidence to support an award of punitive damages, the court also noted that the defendant was ordered to produce his financial records, that this order was never rescinded, and that the defendant did not argue on appeal that the order was improper. Because the defendant was under a lawful order to produce his financial records and failed to do so, the court held that the defendant waived the right to complain that the plaintiff failed to present evidence of the defendant's financial condition (*78 Cal. App. 4th 597, 608-609)* . The court of appeal then affirmed the award of punitive damages, because the financial records were the only source of information regarding the defendant's financial condition available to the plaintiff, the defendant improperly deprived the plaintiff of the opportunity to meet his burden of proof on the issue, and the defendant did not point to any evidence in the record to suggest that the amount of punitive damages awarded was excessive (*78 Cal. App. 4th 597, 609)* .

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6-64 California Points & Authorities § 64.177

§ 64.177 Opposing Plaintiff's Motion for New Trial [Code Civ. Proc. § 659] Made on Sole Ground of Inadequate Damages--New Trial Limited to Issue of Damages Improper Because Compromise on Issue of Liability Resulted in Inadequate Damages [Code Civ. Proc. § 657(5)]

[1] FORM

[*Caption. See § 64.170.*]

PLAINTIFF'S MOTION FOR A NEW TRIAL LIMITED TO DAMAGES ON THE GROUND OF INADEQUATE DAMAGES SHOULD BE DENIED BECAUSE THE QUESTION OF LIABILITY WAS CLOSE, THE DAMAGES AWARDED WERE GROSSLY INADEQUATE, AND CIRCUMSTANCES INDICATE THE JURY'S PREJUDICE OR IMPROPER COMPROMISE.

A. New Trial Limited to Damages Improper Where Close Liability Question and Grossly Inadequate Damages. The granting of a new trial limited to the issue of damages is improper when the question of liability is close, the damages are grossly inadequate for the injuries claimed, and there are other circumstances that indicate that the verdict resulted from prejudice or an improper compromise (*Rose v. Melody Lane (1952) 39 Cal. 2d 481, 488, 247 P.2d 335*).

[*Optional*] **B. Compromise on Issues of Liability and Damages in Personal Injury Action as Precluding Limited New Trial on Damages.** A new trial limited to the issue of damages is improper when a jury fails to compensate a plaintiff for special damages indicated by the evidence and, despite the fact that plaintiff's injuries have been painful, allows only a trifling sum for general damages so that it is clear the jurors compromised the issues of liability and damages (*Rose v. Melody Lane (1952) 39 Cal. 2d 481, 489, 247 P.2d 335* ; *Malcomson v. Pool (1969) 276 Cal. App. 2d 378, 379, 81 Cal. Rptr. 58*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for a new trial limited to the issue of damages on the ground of inadequate damages when the question of liability was close, the damages awarded appear grossly inadequate, and other circumstances indicate prejudice or an improper compromise of the issues of liability or damages by the jury.

Counsel should carefully consider the implications of this form before submitting a memorandum of points and authorities on this ground. Defendant, in order to avoid a new trial to determine the issue of damages alone, is placed in the position of arguing that the damages awarded to plaintiff are grossly inadequate. Under the cases cited, it appears that in order to avoid a new trial on all of the issues, including liability, and to avoid a new trial on the issue of damages alone, counsel for defendant must present this argument. However, counsel for defendant might not wish to make this argument unless the damages are so grossly inadequate that a retrial on at least the damages issue appears likely.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing motions for a new trial, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] New Trial Limited to Damages Improper Where Close Liability Question and Grossly Inadequate Damages

In ***Rose v. Melody Lane*** *(1952) 39 Cal. 2d 481, 247 P.2d 335* , plaintiff brought a negligence action for damages for personal injuries sustained by him when a bar stool on which he was sitting collapsed. At the conclusion of the trial, the jury returned a verdict awarding plaintiff $1 for pain and suffering and an amount constituting less than the amount of special damages he was shown to have incurred as special damages. Thereafter, plaintiff's motion for new trial on the issue of damages was granted and defendant appealed. The Supreme Court reversed the judgment and order for a limited new trial when it determined that the issue of liability had not been properly determined at trial. It stated that the granting of a new trial limited to the issue of damages was improper when the question of liability was close, the damages were grossly inadequate, and there were other circumstances which indicated that the verdict resulted from prejudice or an improper compromise. It found that the issue of liability had been sharply contested at trial and that the jury had had difficulty in determining whether or not defendant was negligent. It also found that the jury failed to compensate for special damages indicated by the evidence or for pain and suffering established by the testimony of a medical witness. It held that a jury's failure to compensate plaintiff for special damages indicated by the evidence, and failure to award plaintiff more than a trifling sum as general damages where plaintiff's injuries have been painful, established the fact that the jurors compromised the issue of liability. In such a case, a new trial limited to damages was improper in the absence of overwhelming evidence of defendant's negligence.

[b] Compromise on Issues of Liability and Damages in Personal Injury Action as Precluding Limited New Trial on Damages

Rose v. Melody Lane *(1952) 39 Cal. 2d 481, 247 P.2d 335* , is discussed in *§ 64.177[3][a]*.

In ***Malcomson v. Pool*** *(1969) 276 Cal. App. 2d 378, 81 Cal. Rptr. 58* , plaintiff suffered severe back injuries in an automobile collision with defendant. At the conclusion of the personal injury action brought by plaintiff, the jury awarded plaintiff damages in an amount which exceeded plaintiff's established medical specials by only a few dollars and made no allowance for plaintiff's significant loss of wages. The trial court granted plaintiff's motion for a new trial on the issue of damages, and defendant appealed. The court of appeal stated that, when a jury fails to compensate a plaintiff for the special damages indicated by the evidence, the only reasonable conclusion is that the jurors compromised the issues of liability and damages. Here, the jurors' failure to award the damages indicated by the evidence showed a compromise on the issues of liability and damages. Here, the jurors' failure to award the damages indicated by the evidence showed a compromise on the issues of liability and damages because the total amount of undisputed and readily measured damages in the event of defendant's negligence clearly exceeded the amount the jury awarded. Thus, a new trial limited to the issue of damages was improper in the absence of overwhelming evidence of defendant's negligence.

[4] Additional Authorities

[a] New Trial Limited to Damages Improper Where Close Liability Question and Grossly Inadequate Damages

In *Wilson v. R.D. Werner Co. (1980) 108 Cal. App. 3d 878, 166 Cal. Rptr. 797* , plaintiff brought an action for damages for personal injuries sustained when he fell from a ladder manufactured by defendant. The jury awarded plaintiff damages in the sum of $10,000. The trial court granted a new trial limited to the damages issue, on the ground that the jury's damages award was inadequate. Defendant appealed from the order insofar as it limited the new trial to the issue of damages. The court of appeal reversed the order and remanded the case for a new trial on all issues. The court noted that the record contained evidence demonstrating that, given the finding of liability, the damages awarded to plaintiff were inadequate as a matter of law, since plaintiff's uncontradicted medical expenses and damages from loss of earning capacity for the period during which he was unable to engage in any gainful employment totaled $10,300. The jury's award of $10,000, which approximately compensated plaintiff for his medical expenses and temporary loss of income due to inability to engage in gainful employment, failed to compensate him at all for his undisputed pain and suffering, and was thus inadequate as a matter of law. The court concluded, however, that the judgment had to be reversed in its entirety. Although a retrial may be limited to damages when the evidence of liability is overwhelming, a case must be remanded for retrial on all issues when the evidence on liability is in sharp conflict and the award is manifestly so inadequate as to suggest a compromise verdict (*108 Cal. App. 3d 878, 883)* . In this case, the parties' expert witnesses offered sharply conflicting testimony about whether the ladder manufactured by defendant was defective. The conflicting evidence of liability, the clear inadequacy of the damages award, and the additional fact that the jury returned a 9 to 3 verdict all indicated that the jury verdict was probably the result of a compromise on the liability issue. Thus, the court stated, a new trial on all issues was required (*108 Cal. App. 3d 878, 884)* .

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[Reserved]

§§ 64.178[Reserved]

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I. MISCELLANEOUS SUPPORTING FORMS

6-64 California Points & Authorities § 64.190

§ 64.190 Supporting Contention That Collateral Source Rule Precludes Reduction in Damages Awarded to Plaintiff by Amount Received From Source Wholly Independent of Defendant as Compensation for Plaintiff's Injuries

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE COLLATERAL SOURCE RULE PRECLUDES ANY REDUCTION OF PLAINTIFF'S DAMAGES BASED ON AMOUNTS PLAINTIFF RECEIVED FROM A SOURCE WHOLLY INDEPENDENT FROM THE DEFENDANT AS COMPENSATION FOR PLAINTIFF'S INJURIES.

A. Payments From Collateral Source May Not Reduce Defendant's Liability. If an injured party receives compensation for his or her injuries from a source that is wholly independent of the tortfeasor, such compensation may not be deducted from the amount of damages that the plaintiff would otherwise have been entitled to (*Helfend v. Southern Cal. Rapid Transit Dist. (1970) 2 Cal. 3d 1, 6, 84 Cal. Rptr. 173, 465 P.2d 61*).

[*Optional*] **B. Employee Benefits Are Collateral Source.** If an injured party receives compensation through an employee benefit program for injuries caused by a tortfeasor, the compensation is a collateral source and may not be used to reduce the tortfeasor's liability (*Helfend v. Southern Cal. Rapid Transit Dist. (1970) 2 Cal. 3d 1, 13-14, 84 Cal. Rptr. 173, 465 P.2d 61* ; *McQuillan v. Southern Pac. Co. (1974) 40 Cal. App. 3d 802, 807-808, 115 Cal. Rptr. 418*).

[*Optional*] **C. Collateral Source Rule Applies to Governmental Entities.** The collateral source rule applies to governmental entities in the same manner that it applies to all other tortfeasors (*Helfend v. Southern Cal. Rapid Transit Dist. (1970) 2 Cal. 3d 1, 14, 84 Cal. Rptr. 173, 465 P.2d 61*).

[*Optional*] **D. Payment by Codefendant for Separate Tort Is Within Collateral Source Rule.** Payment made by a codefendant who is not a joint tortfeasor, but whose liability is based on a separate tort, is within the collateral source

rule and does not require that a subsequent judgment be offset by the amount of the payment by the codefendant (*Kardly v. State Farm Mut. Auto Ins. Co. (1989) 207 Cal. App. 3d 479, 485-487, 255 Cal. Rptr. 40*).

[*Optional*] **E. Collateral Source Rule Applies to Gratuitous Salary Continuation.** The collateral source rule applies to gratuitous salary continuation payments made for a period during which the plaintiff was unable to continue working because of the injury, regardless of whether the plaintiff has promised to repay the salary payments (*Arambula v. Wells (1999) 72 Cal. App. 4th 1006, 1008, 1010-1014, 85 Cal. Rptr. 2d 584*).

[*Optional*] **F. Collateral Source Rule Applies to Social Security and Similar Pension Benefits.** If Social Security or similar pension benefits are paid to a retiree prior to his or her death, and are replaced after death by death benefits paid to a surviving beneficiary, the collateral source rule applies, and these payments may not be used to reduce a tortfeasor's liability for the decedent's death (*McKinney v. California Portland Cement Co. (2002) 96 Cal. App. 4th 1214, 1224-1227, 117 Cal. Rptr. 2d 849*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that the collateral source rule precludes the deduction from the damages awarded to plaintiff of the amount of compensation received by the plaintiff from a source that is wholly independent of the tortfeasor as compensation for his or her injuries [*Helfend v. Southern Cal. Rapid Transit Dist. (1970) 2 Cal. 3d 1, 6, 84 Cal. Rptr. 173, 465 P.2d 61]* . However, an important exception to the collateral source rule applies in cases involving health care providers [*see Civ. Code § 3333.1*; *see also § 64.210*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the collateral source rule was violated. They may be used, for example, in a motion for a new trial on the issue of damages. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include facts that specifically show that the damage award contained a reduction based on compensation received by the plaintiff from a collateral source.

[c] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 64.210* or *§ 64.211* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Payments From Collateral Source May Not Reduce Defendant's Liability

In ***Helfend v. Southern Cal. Rapid Transit Dist.*** *(1970) 2 Cal. 3d 1, 84 Cal. Rptr. 173, 465 P.2d 61* , plaintiff brought suit against the transit district, a public entity, for injuries sustained in a traffic accident. At trial, the court refused to admit evidence that the plaintiff received compensation for some of his medical expenses from a Blue Cross plan, and entered judgment after a jury verdict against defendant without reducing the jury's damage award.

The Supreme Court affirmed. While noting inroads in the doctrine, it held that the collateral source rule was still valid in California in cases in which the plaintiff has been compensated by an independent collateral source, such as

insurance, pension, continued wages, or disability payments, for which he or she had actually or constructively paid, or in cases in which the collateral source would be recompensed from the tort recovery through subrogation, refund of benefits, or some other arrangement (*2 Cal. 3d 1, 13-14)* .

[b] Employee Benefits Are Collateral Source

Helfend v. Southern Cal. Rapid Transit Dist. *(1970) 2 Cal. 3d 1, 84 Cal. Rptr. 173, 465 P.2d 61* , is discussed in *§ 64.190[3][a]*. In addition to its general reaffirmation of the collateral source rule, the Court held that plaintiff's recovery of medical insurance benefits constituted a collateral source, and that the amount recovered from that source could not be deducted from plaintiff's compensatory damages award (*2 Cal. 3d 1, 14)* .

In ***McQuillan v. Southern Pac. Co.*** *(1974) 40 Cal. App. 3d 802, 115 Cal. Rptr. 418* , the survivors of a public employee who was killed by a train owned by Southern Pacific brought a wrongful death action. The decedent's employer, the State of California, and Southern Pacific were both at fault in causing the death. At trial, the court rejected the argument of Southern Pacific that death benefits that plaintiffs received through the Public Employee's Retirement System (PERS) should reduce its liability. The court of appeal affirmed. It held that the collateral source rule prohibited a reduction in damages by the amount of the death benefits paid since the contributions made by the State to PERS were made not as a tortfeasor but rather pursuant to its contractual and statutory obligation (*40 Cal. App. 3d 802, 808)* .

[c] Collateral Source Rule Applies to Governmental Entities

Helfend v. Southern Cal. Rapid Transit Dist. *(1970) 2 Cal. 3d 1, 84 Cal. Rptr. 173, 465 P.2d 61* , is discussed in *§ 64.190[3][a]*. In addition to its general holding reaffirming the validity of the collateral source rule, the Court held that the collateral source rule applies to governmental entities in the same manner that it applies to all other tortfeasors (*2 Cal. 3d 1, 16)* .

[d] Payment by Codefendant for Separate Tort Is Within Collateral Source Rule

In ***Kardly v. State Farm Mut. Auto Ins. Co.*** *(1989) 207 Cal. App. 3d 479, 255 Cal. Rptr. 40* , plaintiff sued his insurance company for damages allegedly suffered by the insurer's bad-faith handling of first-party claims arising from an automobile accident. The plaintiff had already recovered damages in a personal injury action against the negligent driver. The trial court in the second action found that the rule against double recovery barred recovery by plaintiff, granted the insurer's motion for nonsuit, and plaintiff appealed.

The court of appeal reversed. The court noted the exception to the collateral source rule under which collateral recovery is not allowed from a joint tortfeasor, because the source of recovery is not wholly independent (*207 Cal. App. 3d 479, 485)* . However, the court held that this exception does not apply merely because both tortfeasors' conduct related to the same incident (here, the automobile accident). The court rejected the insurer's claim that it was a joint tortfeasor with the other driver, and merely aggravated the mental distress suffered in the accident; the insurer's malfeasance arose from the breach of duties arising from the insurance contract, and was not a foreseeable risk of the automobile accident in the way that subsequent medical malpractice can be. The plaintiff's recovery from the negligent driver is not related to the potential liability of the insurer, so the joint tortfeasor exception does not apply to offset any recovery against the insurer (*207 Cal. App. 3d 479, 485-487)* .

[e] Collateral Source Rule Applies to Gratuitous Salary Continuation

In ***Arambula v. Wells*** *(1999) 72 Cal. App. 4th 1006, 85 Cal. Rptr. 2d 584* , the plaintiff was injured in an automobile accident with the defendant, who admitted fault for the accident. The plaintiff had been employed by a family-owned business in which his brother owned 70 percent of the stock, and his brother chose to continue paying the plaintiff his full salary when the plaintiff was unable to work, without exacting a promise of repayment. The negligence suit filed

against the defendant went to trial on causation and damages, and the judge instructed the jury not to award damages for lost earnings because his employer had paid the plaintiff's salary without a requirement or agreement of repayment. The jury returned a damages award for the plaintiff, but without damages for lost earnings. The plaintiff appealed.

The court of appeal reversed, holding that the collateral source rule applied to the gratuitous salary continuation payments and that the plaintiff should have been allowed to recover for lost earnings if the evidence otherwise supported such an award. The court rejected the argument that *Helfend v. Southern Cal. Rapid Transit Dist.* [*see § 64.190[3][a]*] established an exception to the collateral source rule for gratuitous benefits if the injured party has incurred no expense, obligation, or liability (*72 Cal. App. 4th 1006, 1010)* . The court, noting that the plaintiff had not promised to repay the gratuitous salary (*72 Cal. App. 4th 1006, 1008)* , cited Supreme Court statements that preceded the decision in *Helfend* that indicated that the collateral source rule could be applied even if the collateral payments were gratuitous. The court concluded that the dicta from *Helfend* relied on by the defendant could not be used to overrule those statements. The court also noted that appellate court opinions subsequent to *Helfend* had not read the pertinent language so expansively and that a majority of other jurisdictions and commentators would apply the rule to gratuitous payments. Finally, the court concluded that the same public policy concerns that support application of the collateral source rule if insurance benefits have been received, support application of the doctrine if gratuitous charitable assistance is received, especially if the assistance is received from a family member. The court concluded that a tortfeasor should not be entitled to reap a benefit merely because a family member of the victim chose to provide monetary assistance (*72 Cal. App. 4th 1006, 1012-1014)* .

[f] Collateral Source Rule Applies to Social Security and Similar Pension Benefits

In ***McKinney v. California Portland Cement Co.*** *(2002) 96 Cal. App. 4th 1214, 117 Cal. Rptr. 2d 849* , the plaintiffs were the wife and children of a retired decedent whose death was caused by lung cancer. Although cigarette smoking probably played at least some role in causing the cancer, the plaintiffs filed a wrongful death suit against asbestos manufacturers who provided asbestos-containing products used by the decedent during his working career. At trial, the jury found that the two remaining defendants were partially liable for the death and awarded both economic and noneconomic damages. The defendants appealed, arguing that the trial court erred in denying a motion to suppress all evidence of the decedent's pension and Social Security income.

The court of appeal affirmed the judgment, rejecting the defendants' argument that if the collateral source rule precludes an offset of damages in the amount of the pension benefits, then it should also preclude a plaintiff from referring to a deceased spouse's pension when proving lost financial contributions to the household. The court held that the Social Security retirement benefits paid to the decedent in this case prior to his death could not be used to diminish the defendants' tort liability, even though the spouse became eligible for Social Security death benefits in her own name, based on the decedent's earnings, after the decedent's death. The court concluded that the death benefit paid to the surviving spouse did not exist before the death and was a separate benefit from the pre-death benefit paid to the decedent. Therefore, as a classic collateral source, evidence of the plaintiff's receipt of death benefits could not be used as proof that the plaintiff did not suffer economic loss when the pre-death benefits paid to her husband were discontinued (*96 Cal. App. 4th 1214, 1224-1226)* . Similarly, the court held that union pension benefits paid to the decedent before his death were in the nature of salary continuation payments that ended with his death and were properly considered when calculating the spouse's claim of loss of support, even though the decedent's spouse received separate death benefit payments from the same source after the decedent's death (*96 Cal. App. 4th 1214, 1226-1227)* .

[4] Additional Authorities

[a] Payments From Collateral Source May Not Reduce Defendant's Liability

Hanif v. Housing Auth. (1988) 200 Cal. App. 3d 635, 246 Cal. Rptr. 192 , was a personal injury action by a child struck by a car, in which a judgment for plaintiff was modified to reduce the amount awarded for past medical expenses

to the actual amount paid by Medi-Cal. on plaintiff's behalf, and affirmed as modified. The court of appeal held that plaintiff's recovery of special damages of the amount paid for injury-related medical care and services was not affected by the fact that payments were made by Medi-Cal. on plaintiff's behalf (*200 Cal. App. 3d 635, 639)* . The court said that, under the collateral source rule, plaintiff is deemed to have personally paid or incurred liability for these services and is entitled to recompense accordingly (*200 Cal. App. 3d 635, 640)* . The court added that the result was not unreasonable or unfair in light of Medi-Cal's subrogation and judgment lien rights (*200 Cal. App. 3d 635, 640)* .

[b] Collateral Source Rule Applies to Gratuitous Salary Continuation

In *Smock v. State of California (2006) 138 Cal. App. 4th 883, 41 Cal. Rptr. 3d 857* , the plaintiff, a partner in a law firm, was involved in a motorcycle accident and recovered a judgment against the driver of the car that hit him and against the state, based on a dangerous condition of public property. During the period of the plaintiff's convalescence, the plaintiff was paid his full salary by his law firm. At trial, the court applied the collateral source rule and refused to allow evidence that the plaintiff had continued to receive his full salary while he was hurt, and the jury awarded damages for lost wages. On appeal, the state argued that the trial court erred by applying the collateral source rule to what were essentially gratuitous salary payments made to the plaintiff by the law firm. The court of appeal affirmed the trial court's ruling. The court held that it was established law that the collateral source rule applied to payments made by third parties regardless of whether the payments were made gratuitously or under some other obligation (*138 Cal. App. 4th 883, 887-888)* .

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6-64 California Points & Authorities § 64.191

§ 64.191 Supporting Contention That Plaintiff Is Entitled to Recover as Item of Special Damages Reasonable Value of Nursing Services Rendered by Member of Plaintiff's Family

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF IS ENTITLED TO RECOVER FROM THE DEFENDANT THE REASONABLE VALUE OF NURSING SERVICES REQUIRED BY DEFENDANT'S TORTIOUS CONDUCT; THE FACT THAT SUCH SERVICES WERE RENDERED BY A MEMBER OF PLAINTIFF'S FAMILY WITHOUT AN AGREEMENT FOR OR EXPECTATION OF PAYMENT IS IRRELEVANT.

A. Right to Recover for Nursing Services Rendered. The reasonable value of nursing services required by a defendant's tortious conduct may be recovered from the defendant even though the services were rendered by members of the injured person's family and without an agreement or expectation of payment (*Hanif v. Housing Auth. (1988) 200 Cal. App. 3d 635, 644, 246 Cal. Rptr. 192*).

B. Amount Recoverable. Where services in the way of attendance and nursing are rendered by a member of the plaintiff's family, the amount for which the defendant is liable is the amount for which reasonably competent nursing and attendance by others could have been obtained (*Hanif v. Housing Auth. (1988) 200 Cal. App. 3d 635, 644, 246 Cal. Rptr. 192*).

[*Optional*] **C. Lack of Professional Skill.** The recognized measure for attendant care is the prevailing market rate for those who perform such services, and the family member's relative lack of skill in professional home nursing is irrelevant on this issue (*Hanif v. Housing Auth. (1988) 200 Cal. App. 3d 635, 645-646, 246 Cal. Rptr. 192*).

[*Optional*] **D. Services by Person Legally Obligated to Provide Them.** The fact that the injured party is a spouse or child and had a legal right to the nursing services provided by the other spouse or parent does not as a general rule prevent recovery of their value (*Hanif v. Housing Aut. (1988) 200 Cal. App. 3d 635, 644-645, 246 Cal. Rptr. 192*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the party's contention that the plaintiff is entitled to recover the reasonable value of nursing services required by the defendant's tortious conduct, even though those services were rendered by a family member.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue of the right to recover from a tortfeasor the value of attendant and nursing services performed by a family member without an agreement or expectation of payment. For example, they may be submitted in opposition to a motion by the defendant to strike from the complaint the allegations relating to such damages or in opposition to a motion for summary adjudication of that issue. They might also be submitted in support of a motion for a new trial where these damages were not allowed on the erroneous ground they are not authorized. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include facts that specifically show what attendant and nursing services were performed, the time required to perform them, and the going commercial rate for such services.

[3] Discussion of Authorities

[a] Right to Recover for Nursing Services Rendered

Hanif v. Housing Auth. *(1988) 200 Cal. App. 3d 635, 246 Cal. Rptr. 192* , was a personal injury action by a child struck by a car in which judgment was rendered for the plaintiff, and defendant appealed. The trial court had found that immediately following plaintiff's initial hospitalization, and excluding an intervening 10-day second hospitalization, plaintiff's parents provided the following home attendant care: helping plaintiff get into and out of bed, helping him to and from the bathroom, changing his bandages, exercising his limbs, feeding him, administering prescribed medications, applying creams and lotions to his body, attending him while he was in pain (nighttime as well as daytime), assisting him in the use of a wheelchair, assisting him in learning to walk again, assisting him in the use of crutches, and generally acting as a practical nurse (*200 Cal. App. 3d 635, 644)* . The trial court found that 24-hour home attendant care was reasonably necessary and actually provided by plaintiff's parents, that plaintiff's parents had insufficient resources to hire a home nurse, that Medi-Cal. disapproved home nursing care for plaintiff, and that the reasonable value of such home nursing care, could it have been obtained, was $8 per hour (*200 Cal. App. 3d 635, 644)* . Damages were awarded for the reasonable value of this home attendant care in the amount of $21,696, calculated by multiplying the hourly rate by 2,712 hours (*200 Cal. App. 3d 635, 644)* . On appeal, defendant contended that the reasonable value of the home-care attendant services performed by plaintiff's parents was an improper item of damages and that, even assuming it was recoverable, the amount awarded was excessive.

In modifying the judgment on another issue and affirming it as modified, the court of appeal rejected both of defendant's contentions. The court said that a person injured by another's tortious conduct is entitled to recover the reasonable value of medical care and services required and attributable to the tort (*200 Cal. App. 3d 635, 640)* and that the rule is established that the reasonable value of nursing services required by a defendant's tortious conduct may be recovered from the defendant even though the services were rendered by members of the injured person's family and without an agreement or expectation of payment (*200 Cal. App. 3d 635, 644)* .

[b] Amount Recoverable

The facts and procedural background of ***Hanif v. Housing Auth.*** *(1988) 200 Cal. App. 3d 635, 246 Cal. Rptr. 192* , are discussed in *§ 64.191[3][a]*. In affirming the judgment as modified, the court of appeal said that where services in the way of attendance and nursing are rendered by a member of the plaintiff's family, the amount for which the defendant is liable is the amount for which reasonably competent nursing and attendance by others could have been obtained (*200 Cal. App. 3d 635, 644)* .

[c] Lack of Professional Skill

The facts and procedural background of ***Hanif v. Housing Auth.*** *(1988) 200 Cal. App. 3d 635, 246 Cal. Rptr. 192* , are discussed in *§ 64.191[3][a]*. In affirming the judgment as modified, the court of appeal held meritless defendant's argument that plaintiff's parents, being unskilled, were not worth the hourly rate that it would have cost to hire a trained home nurse (*200 Cal. App. 3d 635, 645)* . The court said that the recognized measure for attendant care is the prevailing market rate for those who perform such services, and the family member's relative lack of skill in professional home nursing is irrelevant on this issue (*200 Cal. App. 3d 635, 645-646)* .

[d] Services by Person Legally Obligated to Provide

The facts and procedural background of ***Hanif v. Housing Auth.*** *(1988) 200 Cal. App. 3d 635, 246 Cal. Rptr. 192* , are discussed in *§ 64.191[3][a]*. In affirming the judgment as modified, the court of appeal said the fact that the injured party had a legal right to the nursing services (as in the case of a spouse) does not as a general rule prevent recovery of their value (*200 Cal. App. 3d 635, 644-645)* .

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6-64 California Points & Authorities § 64.192

§ 64.192 Supporting Contention That Plaintiff May Introduce Evidence That Plaintiff Personally Paid for Medical Expenses Incurred as Result of Injury

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

EVIDENCE THAT THE PLAINTIFF PAID FOR PAST MEDICAL EXPENSES PERSONALLY IS ADMISSIBLE AT TRIAL TO PROVE THE DAMAGES INCURRED BY THE PLAINTIFF.

Evidence of Plaintiff's Payment of Medical Expenses Admissible. If the plaintiff has paid for past medical services out of his or her own pocket, evidence of this payment is admissible to prove damages (*Smalley v. Baty (2005) 128 Cal. App. 4th 977, 984-987, 27 Cal. Rptr. 3d 575*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that a plaintiff who has paid his or her own medical expenses incurred as a result of the injury caused by the defendant may introduce evidence of that payment at trial.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which these points are raised. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form showing the relationship between the facts of the case and the point of law stated. Thus, for example, counsel should include facts showing that the plaintiff paid his or her own medical expenses related to the injury at issue.

[3] Discussion of Authorities

[a] Evidence of Plaintiff's Payment of Medical Expenses Admissible

In ***Smalley v. Baty*** *(2005) 128 Cal. App. 4th 977, 27 Cal. Rptr. 3d 575* , the plaintiff's car was rear-ended by another vehicle. The plaintiff complained of pain and stiffness to his neck and back and was also diagnosed with a hernia, which required surgery. The plaintiff underwent extensive physical therapy for spasms, which he paid for out of his own pocket. The plaintiff sued the driver of the other car and that driver's employer. The defendants admitted liability, but contested damages. The defendants filed a motion with the trial court to exclude evidence that the plaintiff paid his own medical expenses, and the trial court granted the motion. Therefore, the plaintiff was allowed to show that medical expenses had been incurred and paid, but not that he had paid them personally. The jury then returned a verdict for the plaintiff, but awarded an amount for past economic damages that was less than half the amount that the plaintiff had already paid for medical expenses. The plaintiff filed a motion for new trial, which was denied, and the plaintiff appealed.

The court of appeal reversed. The court held that evidence that the plaintiff had paid for past medical services out of his own pocket was admissible to prove his damages. On the issue of relevancy of the evidence to prove damages, the court noted that whether a medical bill had been paid or not paid was relevant and admissible on the issue of the reasonableness of the expense. The court also noted that there was no more reliable evidence that a bill had been paid than evidence that the plaintiff, in fact, paid it. The court also concluded that the considerations justifying the collateral source rule could not be relied on to exclude the evidence. To the contrary, because the goal of the collateral source rule was to make it appear that the plaintiff, rather than an insurer, bore the financial burden of incurred medical expenses, evidence that the plaintiff actually paid those expenses personally was consistent with the collateral source rule. In addition, the court noted that the defendants at trial had been permitted to introduce expert opinion testimony suggesting that the plaintiff may have been malingering in order to boost his potential damages at trial. According to the court, this suggestion of malingering may have explained why the jury awarded less in economic damages than the amount of medical bills incurred. Therefore, the plaintiff was clearly prejudiced by not being allowed to refute this suggestion of malingering with evidence that he had been paying for his own medical expenses without any guarantee that he would recover these expenses in his suit against the defendants (*128 Cal. App. 4th 977, 984-987)* .

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[Reserved]

§§ 64.193[Reserved]

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6-64 California Points & Authorities § 64.210

§ 64.210 Opposing Contention That Collateral Source Rule Precludes Evidence of Collateral Source Payment--Collateral Source Rule Not Applicable in Action Against Health Care Provider for Personal Injury Based on Professional Negligence

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INTRODUCTION OF EVIDENCE THAT THE PLAINTIFF RECEIVED COMPENSATION FROM A SOURCE WHOLLY INDEPENDENT FROM THE DEFENDANT IS PROPER IN THIS CASE, BECAUSE SUCH EVIDENCE IS EXPRESSLY ADMISSIBLE IN ACTIONS FOR PERSONAL INJURY AGAINST A HEALTH CARE PROVIDER BASED ON PROFESSIONAL NEGLIGENCE.

Payments From Collateral Source May Be Introduced in Action for Professional Negligence Against Health Care Provider. In an action for personal injury against a health care provider based on professional negligence, the defendant may introduce evidence of any amount payable to the plaintiff as a result of the injury pursuant to certain types of collateral sources, including health and accident insurance (*Civ. Code § 3333.1*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that the collateral source rule precludes introduction of evidence of payments made to plaintiff by collateral sources. It should be noted that even when the collateral source rule applies, admission of evidence that plaintiff was compensated by a collateral source may be deemed harmless error [*see Lewis v. County of Contra Costa (1955) 130 Cal. App. 2d 176, 179, 278 P.2d 756]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the collateral source rule was violated. They may be used, for example, in opposing a motion for a new trial on the issue of damages. They may also be adapted for use in a trial or

appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include facts that specifically show that the requirements of *Civ. Code § 3333.1* have been satisfied.

[c] Opposing Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 64.190*.

[3] Discussion of Authorities

[a] Payments From Collateral Source May Be Introduced in Action for Professional Negligence Against Health Care Provider

Civ. Code § 3333.1 provides that in an action for personal injury against a health care provider based on professional negligence, the defendant may introduce evidence of any amount payable to the plaintiff as a result of the injury pursuant to (1) the Social Security Act, (2) any state or federal income disability or workers' compensation act, (3) any health, sickness or income-disability insurance, (4) accident insurance that provides health benefits or income-disability coverage, and (5) any other contract or agreement of any group, organization, partnership or corporation to provide, pay for, or reimburse the cost of medical, hospital, dental, or other health care services. However, *Civ. Code § 3333.1* also provides that the plaintiff is entitled to introduce the amount paid to secure the right to the collateral source, and it further provides that the collateral source shall not be subrogated to the rights of the plaintiff against the defendant.

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6-64 California Points & Authorities § 64.211

§ 64.211 Opposing Contention That Collateral Source Rule Precludes Evidence of Collateral Source Payment--Evidence of Collateral Source Payments May Be Admitted in Discretion of Court to Show Plaintiff's Motive for Malingering

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INTRODUCTION OF EVIDENCE THAT PLAINTIFF RECEIVED COMPENSATION FROM A SOURCE WHOLLY INDEPENDENT FROM THE DEFENDANT IS PROPER IN THIS CASE, BECAUSE SUCH EVIDENCE IS ADMISSIBLE SUBJECT TO THE DISCRETION OF THE COURT TO SHOW PLAINTIFF'S MOTIVE FOR MALINGERING.

Payments From Collateral Source May Be Introduced to Prove Plaintiff's Motive for Malingering. When evidence that plaintiff's receipt of compensation for his or her injuries from a collateral source has substantial probative value as proof that plaintiff is a malingerer, the evidence is admissible within the discretion of the trial court notwithstanding the collateral source rule (*see Hrnjak v. Graymar, Inc. (1971) 4 Cal. 3d 725, 733, 94 Cal. Rptr. 623, 484 P.2d 599*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that the collateral source rule precludes introduction of evidence of payments made to plaintiff by collateral sources. It should be noted that even when the collateral source rule applies, admission of evidence that plaintiff was compensated by a collateral source may be deemed harmless error [*see Lewis v. County of Contra Costa (1955) 130 Cal. App. 2d 176, 179, 278 P.2d 756]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the collateral source rule was violated. They may be used, for

example, in opposing a motion for a new trial on the issue of damages. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include facts that specifically show that the evidence offered is relevant to show that plaintiff had a motive to malinger, and that the probative effect of the evidence would outweigh any substantial danger of undue prejudice, confusion of the issues, or misleading the jury [*see Evid. Code § 352*].

[c] Opposing Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 64.190*.

[3] Discussion of Authorities

[a] Payments From Collateral Source May Be Introduced to Prove Plaintiff's Motive for Malingering

In ***Hrnjak v. Graymar, Inc.*** *(1971) 4 Cal. 3d 725, 94 Cal. Rptr. 623, 484 P.2d 599* , the plaintiff brought a personal injury suit after being injured when defendant's truck collided with his vehicle. The trial court allowed the defendant to introduce evidence of the fact that plaintiff received insurance benefits from two collateral sources. The evidence was admitted to show that plaintiff had a motive for malingering, that is, that the collateral receipts made it financially beneficial to the plaintiff to feign injury and to maintain the appearance of disability. The Supreme Court reversed, but in so doing, it established a rule by which such evidence may be introduced in a proper case. It held that the introduction of evidence of a collateral source to show a plaintiff's motive to malinger is within the discretion of the trial court under *Evid. Code § 352*. Such evidence may be admitted if the trial court examines all the relevant facts in the case, such as the amount of plaintiff's out-of-pocket medical expenses, past and future earning capacity, and the seriousness of plaintiff's injuries, and then is satisfied that the evidence of the collateral source receipts establishes that the plaintiff was motivated by the insurance receipts rather than by the disabling extent of his or her injuries (*4 Cal. 3d 725, 733)* . The Court then found that the decision of the trial judge to allow introduction of the evidence of plaintiff's collateral sources was an abuse of discretion in light of its marginal relevance on the issue of malingering and its highly prejudicial impact (*4 Cal. 3d 725, 732-734)* .

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6-64 California Points & Authorities § 64.212

§ 64.212 Opposing Contention That Collateral Source Rule Precludes Evidence of Collateral Source Payment--Evidence of Receipt of Disability Pension May Be Admitted If Plaintiff Seeks Recovery for Loss of Regular Pension

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INTRODUCTION OF EVIDENCE THAT PLAINTIFF RECEIVED A DISABILITY PENSION IS APPROPRIATE IN THIS CASE BECAUSE PLAINTIFF SEEKS TO RECOVER DAMAGES FOR LOSS OF REGULAR PENSION BENEFITS, AND IT WOULD BE INEQUITABLE TO ALLOW PLAINTIFF TO RECOVER FOR LOST REGULAR PENSION BENEFITS AND CONCEAL EVIDENCE OF THE DISABILITY PENSION BENEFITS THAT WERE PAID IN LIEU OF THE REGULAR PENSION.

Evidence of Disability Pension May Be Admitted If Plaintiff Seeks Recovery for Lost Regular Pension. If a plaintiff seeks to recover damages for the loss of a regular pension, the collateral source rule should not prevent a defendant from introducing evidence that the plaintiff, because of the injury, is receiving disability pension benefits in lieu of that regular pension (*Rotolo Chevrolet v. Superior Court (2003) 105 Cal. App. 4th 242, 246-247, 129 Cal. Rptr. 2d 283*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the collateral source rule precludes the introduction of evidence that the plaintiff is receiving a disability pension because of the injury. The basis for opposition is that if a plaintiff seeks to recover for the loss of a regular pension, it would be inequitable for the plaintiff to conceal the fact that the plaintiff is receiving a disability pension in lieu of the regular pension.

These points and authorities should be combined with others pertaining to the procedural context in which they are to be

raised. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of the case. Thus, counsel should include facts showing that the plaintiff is seeking to recover damages for the loss of a regular pension, but is receiving a disability pension instead of that regular pension.

[c] Opposing Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 64.190*.

[3] Discussion of Authorities

[a] Evidence of Disability Pension May Be Admitted If Plaintiff Seeks Recovery for Lost Regular Pension

In ***Rotolo Chevrolet v. Superior Court*** *(2003) 105 Cal. App. 4th 242, 129 Cal. Rptr. 2d 283* , the plaintiff was injured due to a defective vehicle provided to his employer by the defendant, a car dealer, and this injury allegedly compelled the plaintiff's retirement. Because his retirement was caused by an on-the-job injury, the plaintiff received a disability pension instead of the regular pension he would otherwise have received. The plaintiff's suit against the defendant sought damages for lost income and for the loss of his regular pension, and the plaintiff filed a pre-trial motion in limine seeking to prevent the defendant from introducing evidence at trial that the plaintiff was receiving a disability pension because of the injury. The trial court granted the motion based on the collateral source rule, and the defendant filed a petition for writ of mandate.

The court of appeal granted the defendant's petition. The court recognized that although employee benefits are generally considered a collateral source, the collateral source rule should not prevent the defendant in this case from introducing evidence that the plaintiff would receive disability pension benefits because of his injury. The court of appeal concluded that it would be inequitable for the plaintiff to claim that he lost his retirement pension because of the injury, if in fact the injury merely caused him to receive a disability pension instead. The court also noted that allowing the plaintiff to prevent introduction of evidence of his disability pension would effectively allow the plaintiff to receive triple compensation for the injury, in the form of damages for lost income, damages for the lost regular pension, and benefits actually paid under the disability pension (*105 Cal. App. 4th 242, 246-247)* . The court did recognize, however, that the plaintiff might be able to recover for the amount that his regular pension would have exceeded his disability pension (*105 Cal. App. 4th 242, 248)* .

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6-64 California Points & Authorities § 64.213

§ 64.213 Opposing Contention That Punitive Damages Precluded as Matter of Law--Asbestos Litigation

[1] FORM

[*Caption. See § 64.170.*]

PUNITIVE DAMAGES ARE NOT PRECLUDED AS A MATTER OF LAW IN ASBESTOS LITIGATION.

A. Market Share Rule Inapplicable to Asbestos Litigation. The market share rule which bars punitive damages against manufacturers of fungible goods who prove that they could not have made the product causing the plaintiff's injuries, does not apply in asbestos personal injury litigation (*Stevens v. Owens-Corning Fiberglas Corp. (1996) 49 Cal. App. 4th 1645, 1668-1669, 57 Cal. Rptr. 2d 525*).

B. Fraud-On-The-Market Doctrine Inapplicable to Asbestos Litigation. The fraud-on-the-market doctrine, which provides a presumption of reliance to plaintiffs alleging misrepresentations in the sale of securities, does not apply in asbestos personal injury litigation (*Stevens v. Owens-Corning Fiberglas Corp. (1996) 49 Cal. App. 4th 1645, 1668, 57 Cal. Rptr. 2d 525*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to defendant's contention that punitive damages are precluded as a matter of law in asbestos litigation.

These points and authorities should be combined with others pertaining to the procedural context in which they are to be raised. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should include specific facts showing that the nature of the asbestos personal injury litigation, and point to the record's failure to indicate the potentially crushing liability presented by other damage awards against defendant.

[c] Related Pleading and Practice Forms

For discussion and forms relating to punitive damages generally, see California Forms of Pleading and Practice, Ch.177, *Damages* (Matthew Bender).

[3] Discussion of Authorities

[a] Market Share Rule Inapplicable to Asbestos Litigation

In ***Stevens v. Owens-Corning Fiberglas Corp.*** *(1996) 49 Cal. App. 4th 1645, 57 Cal. Rptr. 2d 525* , plaintiff sued defendant alleging that it had manufactured, distributed and marketed asbestos products that caused his asbestosis and cancer. During jury selection, plaintiff died and his estate was substituted as plaintiff. The jury awarded plaintiff both economic and punitive damages. Defendant appealed, arguing among other things, that punitive damages were precluded as a matter of law in asbestos litigation.

The court of appeal affirmed the punitive damages award, stating that while there was a danger of "overkill" by repeated awards of punitive damages in asbestos cases, that danger had to be established by an adequate record before an appellate court could do something about it. In this case the court ruled that defendant's legal arguments were not supported by such a record and thus, did not persuade it to ban punitive damages in asbestos litigation as a matter of law (*49 Cal. App. 4th 1645, 1668)* . Defendant argued that the market share rule, which bars punitive damages against manufacturers of fungible goods who prove that they could not have made the product causing the plaintiff's injuries, also barred punitive damages against it in this case. Specifically, defendant's argued that this ban was supported by *Magallanes v. Superior Court (1985) 167 Cal. App. 3d 878, 213 Cal. Rptr. 547* , in which the court held that punitive damages were not recoverable in actions brought under the market share rule because a plaintiff could not identify the defendant who supplied the injury causing product or prove that defendant acted with malice and oppression. The court found that because of the diversity of asbestos products, the market share rule did not apply to asbestos personal injury litigation, and that *Magallanes* was inapplicable to this case because plaintiff was able to identify defendant as the supplier of products which exposed decedent to asbestos, and proved causation, malice and oppression (*49 Cal. App. 4th 1645, 1668-1669)* .

[b] Fraud-On-The-Market Doctrine Inapplicable to Asbestos Litigation

The factual and procedural history of ***Stevens v. Owens-Corning Fiberglas Corp.*** *(1996) 49 Cal. App. 4th 1645, 1668-1669, 57 Cal. Rptr. 2d 525* is discussed in *§ 64.213[3][a]*. Defendant argued that the fraud-on-the-market doctrine, which provides a presumption of reliance to plaintiffs alleging misrepresentations in the sale of securities applied to ban the punitive damages award in this case. Defendant, citing *Mirkin v. Wasserman (1993) 5 Cal. 4th 1082, 23 Cal. Rptr. 2d 101* as authority, contended that two policy reasons supported the application of this doctrine to asbestos litigation: the potentially crushing liability presented by actual damages, and the danger of overkill if juries in several lawsuits were able to assess punitive damages for the same transaction. The court found defendant's reliance on *Mirkin* to be misplaced because: (1) the record in this case did not indicate that defendant was likely to be crushed by other damage awards; (2) the fundamental considerations underlying the ban on punitive damages in securities litigation, that the burden on the securities business from punitive damages outweighs their contribution to the enforcement of securities laws, did not apply in asbestos litigation; and (3) the other policy reasons cited by the *Mirkin* court were not pertinent or persuasive in asbestos litigation (*49 Cal. App. 4th 1645, 1671)* .

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6-64 California Points & Authorities § 64.214

§ 64.214 Opposing Contention That Defendant Is Entitled to New Trial on Liability and Compensatory Damages Following Reversal of Punitive Damages Award [Civ. Code § 3295(d)]

[1] FORM

[*Caption. See § 64.170.*]

CIVIL CODE SECTION 3295(d) DOES NOT ENTITLE DEFENDANT TO A NEW TRIAL ON LIABILITY AND COMPENSATORY DAMAGES FOLLOWING THE REVERSAL OF AN AWARD OF PUNITIVE DAMAGES.

A. Same Trier of Fact Provision. On application of any defendant, a court must preclude the admission of evidence of that defendant's profit or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with *Civil Code Section 3294*. Evidence of profit and financial condition must be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud (*Civ. Code § 3295(d)*).

B. No New Trial on Liability and Compensatory Damages Required. The same-trier-of-fact restriction, *Civil Code Section 3295(d)*, does not entitle a defendant to a new trial on liability and compensatory damages following a reversal of a punitive damages award (*Torres v. Automobile Club of S. Cal. (1997) 15 Cal. 4th 771, 778, 782, 63 Cal. Rptr. 2d 859, 937 P.2d 290*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that under *Civil Code Section 3295(d)* defendant is entitled to a new trial on liability and compensatory damages following reversal of a punitive damages award.

These points and authorities should be combined with others pertaining to the procedural context in which they are to be

raised. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should provide facts showing a prior reversal of a punitive damages award and argue that this ruling does not entitle defendant to a new trial on liability and compensatory damages under *Civil Code Section 3295(d)*.

[c] Related Pleading and Practice Forms

For discussion and forms relating to punitive damages generally, see California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender).

[3] Discussion of Authorities

[a] No New Trial on Liability and Compensatory Damages Required

Torres v. Automobile Club of S. Cal. *(1997) 15 Cal. 4th 771, 63 Cal. Rptr. 2d 859, 937 P.2d 290* , was the third in a series of lawsuits arising out of an auto accident in which plaintiff and his son were injured. In the first action plaintiff and his son obtained a default judgment against the driver of the vehicle that collided with them. In the second lawsuit plaintiff and his son prevailed against the insurer of the vehicle that collided with them. In the third action, plaintiff was awarded economic and noneconomic damages against the insurer for violations of *Ins. Code § 790.03* and his son was awarded noneconomic damages only. The jury also found the insurer guilty of malice, fraud and oppression, and in a subsequent hearing awarded punitive damages. The trial court granted the insurer's motion for judgment notwithstanding the verdict as to the son, finding no evidence to support the award, but denied the balance of the motion, thus affirming the judgment in plaintiff's favor as well as the punitive damages award. The insurer appealed. The court of appeal reversed, holding that (1) plaintiff had not made a sufficient showing for the recovery of noneconomic damages, and (2) that the punitive damages award was excessive. Even though there was no question of error regarding the issue of liability or the amount of economic damages, the court nevertheless remanded the entire action for a complete retrial. While recognizing that a reversal of only a portion of a judgment ordinarily does not require a full retrial, the court of appeal believed that *Civ. Code § 3295(d)*, did not allow for a retrial of only the amount of punitive damages. The California Supreme Court granted review to address this limited issue.

The Supreme Court reversed the judgment of the court of appeal insofar as it ordered a complete retrial of all issues and directed the court of appeal to remand the action to the trial court for a retrial limited to punitive damages. The Court held that based upon the application of firmly established rules of statutory construction, the same-trier-of-fact restriction, *Civ. Code § 3295(d)*, does not entitle a defendant to a new trial on liability and compensatory damages following a reversal of a punitive damages award (*15 Cal. 4th 771, 782)* . Defendants had interpreted the statutory provision to mean that the issues of liability, compensatory and punitive damages must always be decided by the same trier of fact, and that therefore these issues may never be decided by different juries. Construed in this manner, *Civ. Code § 3295(d)* effectively granted defendants the unqualified right to a complete retrial whenever the punitive damages portion of a judgment was reversed. The Supreme Court rejected this interpretation. Initially, the Court examined the same-trier-of-fact restriction in light of the nature and purpose of the enactment, as well as the overall statutory context. It stated that requiring bifurcated issues to be submitted to a single trier of fact promoted judicial economy and avoided delay, and that the purpose of the restriction was to safeguard defendants against the premature disclosure, of their profits and financial condition. The Court went on to find that disclosing these matters threatened no prejudice once a bifurcated trial had been held and the issues of liability, compensatory damages and malice, oppression and fraud had been resolved against the defense by both the trier of fact and the court of appeal. Therefore, the Court determined that it was unnecessary to construe the provision to apply to retrials in order to give full effect to the statute's protective purpose, since the statute itself was silent as to whether the provision precluded retrials limited to the issue of punitive damages, the Court reviewed the legislative history for clues as to the legislature's intent in enacting the restriction. It

found nothing from which to infer a legislative intent to afford defendants a right to a complete retrial whenever punitive damages were reversed on appeal. The Court said that, if anything, the legislative history confirmed the view that the provision was intended simply as a restriction on a defendant's right to a bifurcation of the issues (*15 Cal. 4th 771, 779)* . The Court then applied the following rule of statutory construction: that courts should not presume the legislature in the enactment of statutes intended to overthrow long-established principles of law unless that intention is made clear either by express declaration or by necessary implication and determined that *Civ. Code § 3295(d)* did not evince a clear expression of intent to strip the appellate courts of their authority to order retrials limited to the issue of punitive damages. Moreover, the Court found it unnecessary to construe the statute in this manner in order to give it effect. Accordingly, it concluded that the statute did not compel a complete retrial on the reversal of a punitive damages award (*15 Cal. 4th 771, 780)* .

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6-64 California Points & Authorities § 64.215

§ 64.215 Opposing Contention That Defendant Is Entitled to New Trial on Liability and Compensatory Damages Following Deadlock of Original Jury on Liability for Punitive Damages [Civ. Code § 3295(d)]

[1] FORM

[*Caption. See § 64.170.*]

CIVIL CODE SECTION 3295(d) DOES NOT ENTITLE DEFENDANT TO A NEW TRIAL ON LIABILITY AND COMPENSATORY DAMAGES IF THE ORIGINAL JURY DEADLOCKS ON THE ISSUE OF LIABILITY FOR PUNITIVE DAMAGES AND THE TRIAL COURT ORDERS A RETRIAL LIMITED TO THAT ISSUE.

A. Same Trier of Fact Provision. [*See § 64.214, Paragraph A*].

B. Trial Court Authorized to Order Retrial of Only Punitive Damages. Despite *Civil Code Section 3295(d)*, a trial court has the authority to order a retrial limited to the issues of malice and, if necessary, punitive damages, without a retrial of all issues relating to liability and compensatory damages, if the original jury deadlocks on the issue of malice (*Barmas, Inc. v. Superior Court (2001) 92 Cal. App. 4th 372, 374-377, 112 Cal. Rptr. 2d 71*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that under *Civ. Code § 3295(d)* the defendant is entitled to a retrial on liability and compensatory damages if the trial court orders a new trial because the original jury deadlocked on the issue of punitive damages.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should include facts showing that a retrial has been ordered on the issue of punitive damages and

argue that this order does not entitle the defendant to a new trial on liability and compensatory damages under *Civ. Code § 3295(d)*.

[c] Related Pleading and Practice Forms

For discussion and forms relating to punitive damages generally, see California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender).

[3] Discussion of Authorities

[a] Trial Court Authorized to Order Retrial of Only Punitive Damages

In ***Barmas, Inc. v. Superior Court*** *(2001) 92 Cal. App. 4th 372, 112 Cal. Rptr. 2d 71* , the plaintiffs filed suit alleging various tort and contract claims against the defendant. Before trial, the court granted the plaintiff's motion to bifurcate the liability and punitive damages phases of trial. At the conclusion of the first phase, the jury found for the plaintiffs and awarded compensatory damages. On trial of the punitive damages claim, the jury deadlocked eight to four against the defendant on the issue of whether the defendant was guilty of malice. After concluding further deliberations would not be fruitful, the trial court discharged the jury. The plaintiffs moved the trial court for an order granting retrial of the issue of malice and, if appropriate, punitive damages. In opposition, the defendant argued that under *Civ. Code § 3295(d)*, the plaintiffs must either agree to a retrial of all issues or accept the jury's compensatory damages award and allow a judgment for that amount to be entered. The trial court granted the plaintiffs' motion and ordered a retrial limited to issues of malice and, if appropriate, punitive damages. The defendant petitioned for writ of mandate or prohibition.

The court of appeal denied the defendant's writ petition. The court held that a trial court has the authority to order a retrial limited to the issues of malice and, if necessary, punitive damages, without a retrial of all issues relating to liability and compensatory damages, if the original jury deadlocks on the issue of malice. The court noted that *Code Civ. Proc. § 616* authorizes a trial court to order a retrial if a jury is discharged without having rendered a verdict, and retrials may be limited to only certain issues (*92 Cal. App. 4th 372, 375)* . The court then reviewed the holding and rationale of the *California Supreme Court in Torres v. Automobile Club of S. Cal. (1997) 15 Cal. 4th 771, 63 Cal. Rptr. 2d 859, 937 P.2d 290* [*see § 64.214[3][a]*], which held that a retrial limited to the issue of liability for punitive damages was permissible if an award of excessive punitive damages is reversed on appeal. The court of appeal concluded that the Supreme Court's rationale was just as applicable under the facts of the case before it. The requirement that the same trier of fact decide the punitive damages issue as decided the compensatory damages issue was intended to promote judicial economy when a case is bifurcated. The legislature did not intend to abrogate the power of the trial courts to authorize retrials or partial retrials if otherwise appropriate (*92 Cal. App. 4th 372, 375-376)* . In addition, in contrast to *Torres*, in which the original jury determined the issue of malice, the defendant in this case would receive an additional safeguard in that the new jury would be required to decide in the first instance whether the defendant's conduct was malicious, and any award of punitive damages would then be made in light of the specific conduct that the new jury found to be malicious (*92 Cal. App. 4th 372, 376-377)* .

[4] Additional Authorities

[a] Trial Court Authorized to Order Retrial of Only Punitive Damages

In *Bullock v. Philip Morris USA, Inc. (2008) 159 Cal. App. 4th 655, 71 Cal. Rptr. 3d 775* , plaintiff was a cigarette smoker who sued a tobacco company for products liability and fraud based on the company's long-term efforts to hide the harmful health effects of cigarette smoking from their customers and the general public. A jury awarded plaintiff compensatory damages and $28 billion dollars in punitive damages, although the trial court reduced the amount of punitive damages to $28 million dollars. The court of appeal held that it was prejudicial error for the trial court to refuse the defendant's request to instruct the jury that they were not permitted to impose punishment for harm suffered by

persons other than the plaintiff (*159 Cal. App. 4th 655, 693-695*). The court remanded for retrial limited to the amount of punitive damages, however, and rejected defendant's contention that the retrial had to encompass determination of liability and compensatory damages as well. The court noted that defendant's liability, the amount of compensatory damages, and oppression, fraud, or malice were determined in the original trial without prejudicial error. As such, the court held that it was proper to order a retrial limited to the amount of punitive damages, even though the evidence presented to the new jury on retrial would likely be much of the same evidence presented in the earlier trial. The court concluded that requiring the jury to consider the degree of reprehensibility of defendant's conduct that harmed this specific plaintiff would provide sufficient assurance that the new jury would based its award of punitive damages on the same course of conduct that the first jury used to support a finding of oppression, fraud, or malice (*159 Cal. App. 4th 655, 696-701)* .

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6-64 California Points & Authorities § 64.216

§ 64.216 Opposing Contention That Award of Punitive Damages Must be Reduced When Compensatory Damage Award is Reduced

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S AWARD OF PUNITIVE DAMAGES NEED NOT BE REDUCED MERELY BECAUSE THE JURY'S AWARD OF COMPENSATORY DAMAGES WAS REDUCED, IF THE PUNITIVE DAMAGES AWARD IS NOT OTHERWISE EXCESSIVE.

Reduction of Punitive Damages Not Mandated When Compensatory Damages Reduced. A trial court may issue a remittitur as to compensatory damages, but refuse to grant a reduction in punitive damages, so long as the punitive damage award still bears a reasonable relation to the reduced compensatory damage award and the award is not otherwise excessive (*McGee v. Tucoemas Federal Credit Union (2007) 153 Cal. App. 4th 1351, 1362, 63 Cal. Rptr. 3d 808*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a trial court's reduction in the jury's compensatory damages award mandates a corresponding reduction in punitive damages.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should describe the defendant's conduct justifying the award of punitive damages and argue that the current punitive damages award is appropriate, taking into consideration the new amount of compensatory damages, the reprehensibility of the defendant's conduct, and the deterrent effect of the award in light of defendant's financial resources.

[3] Discussion of Authorities

[a] Reduction of Punitive Damages Not Mandated When Compensatory Damages Reduced

In *McGee v. Tucoemas Federal Credit Union (2007) 153 Cal. App. 4th 1351, 63 Cal. Rptr. 3d 808* , plaintiff was the former employee of a federal credit union who sued her former employer for employment discrimination. Plaintiff alleged that following her cancer surgery and chemotherapy, the credit union engaged in a pattern of conduct designed to humiliate her and force her to quit, refused to provide reasonable medical accommodation, threatened to fire her if she did not return to work after four months, and when she did return within that period, the credit union demoted her, cut her pay, and canceled her medical coverage. The jury awarded plaintiff $2 million in compensatory damages and $1.2 million in punitive damages, but plaintiff agreed to a $750,000 reduction in compensatory damages in order to avoid a new trial. Defendant appealed, arguing that as a federal credit union, it was immune from liability for punitive damages. Alternatively, defendant argued that the punitive damages award should have been reduced when the compensatory damages were reduced.

The court of appeal affirmed the judgment. The court first held that, unlike the federal government, a federal instrumentality such as a federal credit union is not entitled to immunity from punitive damages merely by virtue of its status as a federal instrumentality. If Congress has provided that the instrumentality may sue and be sued, as was the case with the credit union, immunity from punitive damages is generally deemed to have been waived as an incident of suit (*153 Cal. App. 4th 1351, 1359)* . The court of appeal then held that the reduction in compensatory damages did not necessarily mandate a corresponding reduction in punitive damages. The court noted that a trial court may issue a remittitur as to compensatory damages, but refuse to grant a reduction in punitive damages, so long as the punitive damage award still bears a reasonable relation to the reduced compensatory damage award and the award is not otherwise excessive. In the instant case, the court concluded that the existing punitive damages award was not excessive as a matter of law. The evidence demonstrated the reprehensibility of defendant's conduct, and the punitive damages award bore a reasonable relation to the reduced compensatory damages award, with an approximate 1-to-1 ratio between the two. Moreover, there was no evidence that the award would constitute an undue financial burden on the credit union (*153 Cal. App. 4th 1351, 1362).*

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6-64 California Points & Authorities § 64.217

§ 64.217 Opposing Contention That Plaintiff May Recover as Compensatory Damage Amount Plaintiff Has Not Yet Paid to Third Party to Settle Related Claim

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF MAY NOT RECOVER AS COMPENSATORY DAMAGES AN AMOUNT PLAINTIFF HAS NOT YET PAID TO SETTLE A THIRD-PARTY CLAIM ALLEGEDLY CAUSED BY DEFENDANT'S CONDUCT, ABSENT EVIDENCE DEMONSTRATING TO A REASONABLE CERTAINTY THAT PLAINTIFF WILL ACTUALLY PAY THAT CLAIM.

Defendant Not Liable for Unpaid Obligation to Third Party. If a plaintiff seeks damages to compensate for a liability owed to a third party caused by defendant's actionable conduct, but plaintiff has not yet paid that third-party liability, plaintiff must provide more than just evidence of an obligation to pay, but must prove to a reasonable certainty that plaintiff could and would pay the liability (*Green Wood Industrial Co. v. Forceman Internat. Development Group, Inc. (2007) 156 Cal. App. 4th 766, 777-778, 67 Cal. Rptr. 3d 624*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a plaintiff may recover as compensatory damages an amount that plaintiff has not yet paid, but may have agreed to pay, to settle a claim with a third party allegedly caused by defendant's conduct.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include facts showing that plaintiff has not paid the amount allegedly owed to the third party and any facts calling into question the certainty that plaintiff will actually pay the third party in the future.

[3] Discussion of Authorities

[a] Defendant Not Liable for Unpaid Obligation to Third Party

In *Green Wood Industrial Co. v. Forceman Internat. Development Group, Inc. (2007) 156 Cal. App. 4th 766, 67 Cal. Rptr. 3d 624* , plaintiff company agreed to purchase scrap metal from a scrap metal business in order to resell the metal to a Chinese company at a profit. Plaintiff paid $1,074,548 for the metal, with $862,500 of that amount coming from the Chinese buyer. However, the scrap metal plaintiff paid for never existed. Plaintiff sued the seller and other defendants involved in the fraud. The jury returned a verdict in favor of plaintiff and awarded $1,508,416 in compensatory damages, which included damages for plaintiff's lost profits and $274,868 plaintiff allegedly owed the Chinese buyer for nondelivery of goods. One defendant appealed.

The court of appeal reduced the compensatory damage award to eliminate recovery of the amount plaintiff allegedly owed the Chinese buyer, but otherwise affirmed. The court of appeal held that if a plaintiff seeks damages to compensate for a liability owed to a third party caused by defendant's actionable conduct, but plaintiff has not yet paid that third-party liability, plaintiff must provide more than just evidence of an obligation to pay. As with other types of prospective damage, a plaintiff must prove to a reasonable certainty that plaintiff could and would pay the liability, and a statement by plaintiff that he or she agreed to pay the third party a certain amount is insufficient (*156 Cal. App. 4th 766, 777-778)* . In the instant case, plaintiff had not yet paid any portion of the amount it claimed it agreed to pay the Chinese buyer to settle its claim. In addition, plaintiff presented no evidence that any such agreement would be enforceable in China, or that the liability could and would be enforced by the buyer in the United States or elsewhere or would otherwise be paid. The court noted that no other evidence was presented to the jury from which it could conclude that it was reasonably certain that plaintiff would ever have to pay the money. The court also noted that while the Chinese buyer's claim against plaintiff was for its own lost profits, plaintiff presented no evidence to establish the fact or amount of these lost profits other than the Chinese buyer's mere claim. Under these circumstances, the court concluded that the evidence was insufficient to support recovery by the plaintiff of the $274,868 plaintiff allegedly owed the Chinese buyer (*156 Cal. App. 4th 766, 778)* .

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§ 65.syn Synopsis to Chapter 65: DAMAGES: CONTRACT

§ 65.01 Scope of Chapter

§ 65.02 Governing Statutes

§ 65.03 Related Pleading and Practice Chapters

§ 65.04 Related Points and Authorities

§§ 65.05-65.19 [Reserved]

§ 65.20 Supporting Demurrer to Complaint--For Damages for Breach of Contract [Civ. Code § 3300]--Conclusion Plaintiff Injured as Required to Follow From Pleading

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Proximate Cause Required

[b] Injury as Required to Follow From Defendant's Act

[4] Additional Authorities

[a] Proximate Cause Required

§ 65.21 Supporting Defendant's Demurrer to Complaint in Action Seeking Damages for Breach of Agreement to Negotiate--Damages for Lost Profits Cannot be Proven With Reasonable Certainty [Civ. Code § 3301]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Damages Sought Cannot Be Proven With Reasonable Certainty

§ 65.22 Supporting Defendant's Motion for Summary Judgment in Action Seeking Damages for Breach of Agreement to Negotiate [Code Civ. Proc. § 437c(o)(2)]--Plaintiff Cannot Establish Reliance Damages

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Plaintiff Cannot Establish Reliance Damages, Which Are the Only Form of Recovery Available in an Action on a Contract to Negotiate an Agreement

[b] Damages for Lost Profits Not Recoverable

§§ 65.23-65.39 [Reserved]

§ 65.40 Opposing Demurrer to Complaint for Damages for Breach of Contract [Civ. Code § 3300]--Alleging Incorrect Rule of Damages Is Not Fatal

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Alleging Incorrect Rule Is Not Fatal

[4] Additional Authorities

[a] Alleging Incorrect Rule Is Not Fatal

§ 65.41 Opposing Demurrer to Complaint for Damages for Breach of Contract [Civ. Code § 3300]--Defendant Asserted Damages Claimed Not Contemplated--Benefits Reasonably Certain to Have Occurred

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Benefits Reasonably Certain to Have Occurred

[4] Additional Authorities

[a] Benefits Reasonably Certain to Have Occurred

§§ 65.42-65.59 [Reserved]

§ 65.60 Supporting Motion to Strike Part of Complaint [Code Civ. Proc. §§ 435-437] for Damages for Breach of Contract [Civ. Code § 3300]--Punitive Damages Not Recoverable

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[3] Discussion of Authorities

[a] Punitive Damages Not Recoverable

[4] Additional Authorities

[a] Punitive Damages Not Recoverable

§ 65.61 Supporting Motion to Strike Part of Complaint for Damages for Breach of Contract [Civ. Code § 3300]--Damages for Physical and Mental Suffering Not Recoverable

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[3] Discussion of Authorities

[a] Damages for Physical Injury and Mental Distress Not Recoverable in Breach of Contract Action

[b] Damages for Mental Distress Not Recoverable in Action for Fraud and Rescission

[c] Damages for Mental Distress Barred by Medical Standard of Care

§ 65.62 Supporting Motion to Strike Part of Complaint [Code Civ. Proc. §§ 435-437] for Damages for Breach of Contract [Civ. Code § 3300]--Tort Damages for Breach of Implied Covenant of Good Faith and Fair Dealing Not Recoverable Outside Insurance Context

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[3] Discussion of Authorities

[a] Tort Damages for Breach of Implied Covenant of Good Faith and Fair Dealing Not Recoverable Outside Insurance Context

[4] Additional Authorities

[a] Tort Damages for Breach of Implied Covenant of Good Faith and Fair Dealing Not Recoverable Outside Insurance Context

§ 65.63 Supporting Motion to Strike Part of Complaint [Code Civ. Proc. §§ 435-437] for Damages for Breach of Contract [Civ. Code § 3300]--Tort Damages for Breach of Contract in Violation of Public Policy Not Recoverable Outside Employment Relationship

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Form

[3] Discussion of Authorities

[a] Tort Damages for Breach of Commercial Contract in Violation of Public Policy Not Recoverable

§§ 65.64-65.79 [Reserved]

§ 65.80 Opposing Motion to Strike Part of Complaint [Code Civ. Proc. §§ 435-437] for Damages for Breach of Contract [Civ. Code § 3300]--Punitive Damages Recoverable If Plaintiff Fraudulently Induced to Enter Contract

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[3] Discussion of Authorities

[a] Punitive Damages Recoverable Although Tort Involved Breach of Contract

[b] Punitive Damages as Recoverable by Party Fraudulently Induced to Enter Contract

[c] Punitive Damages Recoverable When Rescission Is Awarded

[4] Additional Authorities

[a] Punitive Damages Recoverable When Rescission Is Awarded

§ 65.81 Opposing Motion to Strike Part of Complaint [Code Civ. Proc. §§ 435-437] for Damages for Breach of Contract [Civ. Code § 3300]--Punitive Damages Recoverable if Insurance Company Breaches Implied Covenant of Good Faith and Fair Dealing

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Measure of Assessing Punitive Damages Against Insurer

[3] Discussion of Authorities

[a] Punitive Damages Recoverable for Tortious Breach of Insurance Obligation

[b] Purpose of Punitive Damages Award

[4] Additional Authorities

[a] Punitive Damages Recoverable for Tortious Breach of Insurance Obligation

§ 65.82 Opposing Motion to Strike Part of Complaint [Code Civ. Proc. §§ 435-437] for Damages for Breach of Contract [Civil Code. § 3300]--Tort Damages Available if Breach of Implied Covenant of Good Faith and Fair Dealing Occurs in Contract Between Parties With Special Relationship

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[3] Discussion of Authorities

[a] Remedy in Tort Available for Breach of Implied Covenant of Good Faith and Fair Dealing When Parties Have Special Relationship

§ 65.83 Opposing Motion to Strike Part of Complaint [Code Civ. Proc. §§ 435-437] for Damages for Breach of Contract [Civ. Code § 3300]--Damages for Physical Injury Recoverable Where Contract Relates to Comfort, Happiness, or Personal Welfare

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[3] Discussion of Authorities

[a] Damages for Physical Injury Are Recoverable Where Contract Relates to Comfort, Happiness, or Personal Welfare

[b] Insurance Contract Involves Party's Comfort

§ 65.84 Opposing Motion to Strike Part of Complaint [Code Civ. Proc. §§ 435-437] for Damages for Breach of Contract [Civ. Code § 3300]--Damages for Mental Suffering Recoverable When Contract Relates to Comfort, Happiness, or Personal Welfare

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[3] Discussion of Authorities

[a] Damages for Mental Suffering Is Recoverable When Contract Relates to Comfort, Happiness, or Personal Welfare

[b] Contemplated and Foreseeable Result of Breach

[4] Additional Authorities

[a] Contemplated and Foreseeable Result of Breach

§ 65.85 Opposing Motion to Strike Part of Complaint [Code Civ. Proc. §§ 435-437] for Damages for Breach of Contract [Civ. Code § 3300] and Tortious Conduct [Civ. Code § 3333]--Damages for Mental Suffering Are Recoverable if Plaintiff Suffered Serious Emotional Distress or Defendant's Conduct Was Intentional

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Propriety of Recovery for Mental Distress if Substantial Damage Occurred

[3] Discussion of Authorities

[a] Tortious Breach of Contract

[b] Mental Distress Compensable if Conduct Tortious

[c] Mental Distress Damages Recoveable in Cases Involving Serious Emotional Distress or Outrageous Intentional Conduct

[4] Additional Authorities

[a] Mental Distress Damages Recoverable in Cases Involving Serious Emotional Distress, or Outrageous Intentional Conduct

§ 65.86 Opposing Motion to Strike Part of Complaint [Code Civ. Proc. §§ 435-437] for Damages for Breach of Contract [Civ. Code § 3300] and Tortious Conduct [Civ. Code § 3333]--Mental Distress Damages Recoverable When Insurance Company Breaches Duty of Good Faith and Fair Dealing

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[3] Discussion of Authorities

[a] Breach of Covenant of Good Faith and Fair Dealing Is Tort

[b] Mental Distress Damages Recoverable

[c] Showing Required

[d] Duty to Act Fairly in Handling Insured's Claims

[e] Duty to Accept Reasonable Settlement Offers

[4] Additional Authorities

[a] Breach of Covenant of Good Faith and Fair Dealing as Tort

[b] Mental Distress Damages Recoverable

§ 65.87 Supporting Motion for New Trial [Code Civ. Proc. § 659] on Ground of Excessive or Inadequate Damages [Code Civ. Proc. § 657(5)]--By Plaintiff or Defendant

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Trial Court's Power to Determine Excessiveness of Damages

[b] Trial Court's Power to Determine Inadequacy of Damages

[c] Applicability of Code Civ. Proc. § 657(5) to Contract Actions

[d] Judge Is Permitted to Reweigh Evidence

[e] Purpose of Damage Award

[f] When Damages Are Excessive

[g] Discretion to Grant New Trial Is Limited to Damages

[4] Additional Authorities

[a] Trial Court's Power to Determine Excessiveness of Damages

§§ 65.88-65.99 [Reserved]

§ 65.100 Supporting Motion for New Trial [Code Civ. Proc. § 659] on Ground of Excessive or Inadequate Damages [Code Civ. Proc. § 657(5)]--By Plaintiff or Defendant--Improvements on Real Property Owned or Not Owned by Plaintiff

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Improvements Made on Real Property Owned By Plaintiff

[b] Improvements Made on Real Property Not Owned by Plaintiff

§ 65.101 Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 659] on Ground of Excessive Damages [Code Civ. Proc. § 657(5)]--Measure of Damages When Cost of Repairs Exceeds Value of Land

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Value of Land as Measure of Damages

§ 65.102 Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 659] on Ground of Excessive Damages [Code Civ. Proc. § 657(5)]--Damages Measured by Diminution in Market Value Where Economic Waste Would Occur From Repairing Defects

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Diminution in Market Value as Measure of Damages

§ 65.103 Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 659] on Ground of Excessive Damages [Code Civ. Proc. § 657(5)]--Damage Award Does Not Reflect Mitigation Requirement

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Duty to Mitigate Damages

[b] No Recovery for Avoidable Loss

[c] Measure of Recovery by Discharged Employee

[4] Additional Authorities

[a] No Recovery for Avoidable Loss

§ 65.104 Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 659] on Ground of Excessive Damages [Code Civ. Proc. § 657(5)]--Damages Limited to Those That Could Accrue During Period of Notice Required Under Termination Provision [Civ. Code § 3358]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Damages Limited to Those Accruing During Notice Period

§ 65.105 Supporting Defendant's Motion for New Trial on Ground of Excessive Damages--Award of Damages for Lost Profits on Unidentified and Unrelated Future Contracts Was Error

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Lost Profits on Future Contracts Ordinarily Are Not Recoverable as General Damages

[b] Lost Profits on Future Contracts Ordinarily Are Not Recoverable as Special Damages

§§ 65.106-65.119 [Reserved]

§ 65.120 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 659] Made on Ground of Excessive Damages [Code Civ. Proc. § 657(5)]--Cost Theory as Measure of Damages if Intentional Major Deviations From Contract But No Economic Waste

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Cost of Conforming as Measure of Damages

§ 65.121 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 659] Made on Ground of Excessive Damages [Code Civ. Proc. § 657(5)]--Mitigation Not Applicable to Certain Contracts

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Mitigation Not Applicable to Certain Contracts

[4] Additional Authorities

[a] Mitigation Not Applicable to Certain Contracts

§ 65.122 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 659] Made on Ground of Excessive Damages [Code Civ. Proc. § 657(5)]--Accepting Employment Not Substantially Similar Not Required

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Burden of Proof

[b] Accepting Employment Not Substantially Similar Not Required

§§ 65.123-65.139 [Reserved]

§ 65.140 Supporting Contention That Damages for Breach of Contract Should Not Be Offset by Plaintiff's Collateral Benefit--Plaintiff's Tax Benefits Are Not Mitigating Factor in Compensatory Damage Calculation

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Determination Whether to Grant Defendant Collateral Source Credit Is Within Discretion of Court

[b] Plaintiff's Tax Benefits Should Not Be Considered as Mitigating Factor in Calculating Compensatory Damages for Breach of Contract

[c] Civ. Code § 3358 Does Not Require Collateral Source Credit for Tax Benefits

[d] Evidence of Tax Consequences to Plaintiff Resulting From Contract Excludable in Breach of Contract Action Pursuant to Evid. Code § 352

[e] Federal Tax Benefit Rules Makes Overall Benefit to Plaintiff Unlikely

[f] Attempt to Factor in Tax Consequences Would Be Speculative and Complicated

[g] Public Policy Considerations Prohibit Crediting Breaching Party With Tax Benefits

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6-65 California Points & Authorities § 65.01

§ 65.01 Scope of Chapter

This chapter contains memoranda of points and authorities that may be submitted in actions and proceedings involving contract damages. It includes memoranda of points and authorities for use in supporting [*see §§ 65.20 -65.21*] and opposing [*see §§ 65.40, 65.41*] demurrers to a complaint for damages for breach of contract; supporting [*see §§ 65.60 -65.63*] and opposing [*see §§ 65.80 -65.86*] motions to strike certain damage allegations; supporting [*see §§ 65.87 -65.105*] and opposing [*see §§ 65.120 -65.122*] motions for a new trial on the issue of damages in contract actions; and a form supporting the contention that a party that has breached a contract is not entitled to collateral source credit for any tax benefits that the other party may have derived from the contract [*see § 65.140*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsContracts LawRemediesCompensatory DamagesGeneral OverviewContracts LawRemediesLiquidated DamagesContracts LawRemediesPunitive Damages

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6-65 California Points & Authorities § 65.02

§ 65.02 Governing Statutes

The measure of damages for breach of an obligation arising from a contract is governed by *Civ. Code §§ 3300-3318*. *Civ. Code §§ 3353-3360* govern damages generally. Liquidated damages are governed by *Civ. Code § 1671*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesCompensatory DamagesGeneral OverviewContracts LawRemediesLiquidated Damages

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6-65 California Points & Authorities § 65.03

§ 65.03 Related Pleading and Practice Chapters

For discussion and forms relating to damages issues in contract actions, see California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender).

For a discussion and forms relating to breach of contract actions, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesCompensatory DamagesGeneral OverviewContracts LawRemediesLiquidated DamagesContracts LawRemediesNominal DamagesContracts LawRemediesPunitive Damages

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6-65 California Points & Authorities § 65.04

§ 65.04 Related Points and Authorities

Related memoranda of points and authorities that may be useful in breach of contract cases may be found in Ch. 50, *Contracts* .

Related memoranda of points and authorities that may be useful when damages are sought as an alternative to specific performance may be found in Ch. 214, *Specific Performance* .

Memoranda of points and authorities relating to damages issues in tort actions, see Ch. 64, *Damages: Tort* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachCauses of ActionGeneral OverviewContracts LawRemediesCompensatory DamagesGeneral OverviewContracts LawRemediesSpecific PerformanceTortsDamagesGeneral Overview

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6-65 California Points & Authorities §§ 65.05-65.19

[Reserved]

§§ 65.05[Reserved]

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A. Supporting Demurrer to Complaint

6-65 California Points & Authorities § 65.20

§ 65.20 Supporting Demurrer to Complaint--For Damages for Breach of Contract [Civ. Code § 3300]--Conclusion Plaintiff Injured as Required to Follow From Pleading

[1] FORM Supporting Demurrer to Complaint--For Damages for Breach of Contract [Civ. Code § 3300]--Conclusion Plaintiff Injured as Required to Follow From Pleading

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER TO COMPLAINT
vs.	)	
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION FOR BREACH OF CONTRACT SINCE THE CONCLUSION THAT PLAINTIFF WAS INJURED BY DEFENDANT'S ACT OR OMISSION DOES NOT FOLLOW FROM THE COMPLAINT.

A. Objection by Demurrer. The party against whom a complaint has been filed may object to the complaint by demurrer on the ground that it does not state facts sufficient to constitute a cause of action when that ground appears on the face of the complaint [or from any matter of which the court is required to or may take judicial notice] (*Code Civ.*

Proc. § 430.10(e), 430.30(a)).

B. Proximate Cause Required. Damages that are not causally connected with the breach of contract are not recoverable (*Patent Scaffolding Co. v. William Simpson Constr. Co. (1967) 256 Cal. App. 2d 506, 511, 64 Cal. Rptr. 187* ; *see Civil Code § 3300*).

C. Injury as Required to Follow From Defendant's Act. Plaintiff's complaint does not state a cause of action for breach of contract if the conclusion that plaintiff was injured by an act or omission of defendant does not follow from plaintiff's pleading (*Southall v. Security Title Ins. & Guar. Co. (1952) 112 Cal. App. 2d 321, 323, 246 P.2d 74*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a demurrer to a complaint for damages for breach of contract when it does not appear from the allegations in plaintiff's complaint that plaintiff suffered an injury or was damaged in any way by defendant's action or inaction.

Counsel should note that in addition to causation, foreseeability of the damage to plaintiff is necessary in an action for damages for breach of contract. However, whether or not the parties foresaw or contemplated certain damages at the time of contracting is ordinarily not an issue which can be resolved on demurrer (*Weaver v. Bank of America (1963) 59 Cal. 2d 428, 434, 30 Cal. Rptr. 4, 380 P.2d 644*).

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Opposing Points and Authorities

The points and authorities *set out in § 65.41* may be used in an appropriate case to oppose a demurrer to a complaint supported by this form.

[3] Discussion of Authorities

[a] Proximate Cause Required

Patent Scaffolding Co. v. William Simpson Constr. Co. *(1967) 256 Cal. App. 2d 506, 64 Cal. Rptr. 187* , was an action by three insurance companies in the name of their insured to recover damages for breach of contracts involving construction. Defendant contractor entered into a subcontract with plaintiff's insured whereby the latter was to furnish scaffolding and other equipment for use during construction and, according to the contract, the insured's work and materials at the project site were to be protected from fire loss and damage by insurance procured by defendant contractor or defendant owner. Both defendants failed to procure such insurance. During construction a fire destroyed some of the insured'sequipment but defendants refused to compensate it for the loss. Plaintiffs paid their insured for the damage under an insurance policy the latter had taken out on the equipment prior to contracting with defendants. The trial court entered judgment in favor of the insured as nominal plaintiff against defendant contractor and in favor of

defendant owner against plaintiffs concluding that the insurers were not entitled to recover the amounts they had paid to insured from the owner because the insured was not a third-party beneficiary of the contract between defendant owner and defendant contractor. The court of appeal reversed noting that if the insured had had no insurance, it could have recovered damages from defendant contractor for all detriment proximately caused by the contractor's breach of its contractual duty to procure insurance. But once the insured was fully compensated for its fire loss, it could not have successfully sued the contractor for breach of contract. Furthermore, the insured suffered no uncompensated detriment caused by the contractors breach of contract. It could not recover the cost of premiums it had paid to the insurers because it did not incur that expense as a consequence of its contract with the contractor or as a result of the contractor's breach of contract. Recording to the court a breach of contract without damage is not actionable and damages are not recoverable which are not causally connected with the breach.

[b] Injury as Required to Follow From Defendant's Act

Southall v. Security Title Ins. & Guar. Co. *(1952) 112 Cal. App. 2d 321, 246 P.2d 74* , was an action against an escrow agent for costs and attorney's fees expended by plaintiff in an action for specific performance of a real estate purchase agreement. Plaintiff alleged that defendant failed to inform plaintiff that deeds necessary for the vesting of title in plaintiff had not been delivered to defendant and that the title search was completed. The trial court sustained defendant's demurrer on the grounds that the statute of limitations had run. The court of appeal affirmed holding that the demurrer could properly have been sustained on the ground that the complaint did not state facts sufficient to constitute a cause of action against defendant since the conclusion that plaintiff was injured by an omission of defendant did not follow from plaintiff's pleading. The court found that plaintiff's loss or damage, attorney's fees and costs in the specific performance suit, were caused solely and proximately by the sellers' failure to perform their agreement and not by defendant's action or lack of action. Even assuming that defendant's failure to advise plaintiff that the necessary deeds had not been deposited resulted in a delay in securing title to the property, it was not alleged that any damage resulted from such delay. The court concluded that defendant was under no duty to secure the necessary documents and that its asserted breach of contract in the matter of advising plaintiff that the deeds had not been deposited with it could not be held to have any causal connection with the fact that plaintiff was obliged to bring a suit for specific performance against the sellers.

[4] Additional Authorities

[a] Proximate Cause Required

In *McDonald v. John P. Scripps Newspaper (1989) 210 Cal. App. 3d 100, 257 Cal. Rptr. 473* , the court of appeal affirmed a judgment for the defendant that was entered after the trial court sustained a demurrer without leave to amend. The plaintiff alleged that he lost a spelling bee sponsored by the defendant because the defendant had advanced another contestant in violation of the rules. The other contestant correctly spelled a word that the plaintiff misspelled. The court of appeal said that the complaint did not show any harm to the plaintiff resulting from the defendant's breach. Whether the action is in tort or contract, compensatory damages cannot be recovered unless there is a causal connection between the act or omission complained of and an injury sustained by the plaintiff (*210 Cal. App. 3d 100, 104)* . The plaintiff lost the spelling bee because he misspelled a word, and it was irrelevant that the winning contestant had no right to advance in the contest (*210 Cal. App. 3d 100, 104)* .

In *Metzenbaum v. R.O.S. Associates (1986) 188 Cal. App. 3d 202, 232 Cal. Rptr. 741* , the court of appeal affirmed a directed verdict for the defendant in a real estate loan broker's action for a commission based on the defendant's having obtained a loan elsewhere during the term of their contract. The facts established that the plaintiff's performance was impossible; therefore, the plaintiff's injury, if any, did not flow from the defendant's breach (*188 Cal. App. 3d 202, 211-214)* .

In *Postal Instant Press, Inc. v. Sealy (1996) 43 Cal. App. 4th 1704, 51 Cal. Rptr. 2d 365* , the court of appeal held that

a franchisee's failure to make past royalty payments was not a proximate or "natural and direct" cause of the franchisor's failure to receive future royalty payments (*43 Cal. App. 4th 1704, 1713)* . Therefore, an award of future lost royalties and advertising fees violated *Civ. Code § 3359*, prohibiting damages that are unreasonable, unconscionable, or grossly oppressive (*43 Cal. App. 4th 1704, 1717-1718)* .

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A. Supporting Demurrer to Complaint

6-65 California Points & Authorities § 65.21

§ 65.21 Supporting Defendant's Demurrer to Complaint in Action Seeking Damages for Breach of Agreement to Negotiate--Damages for Lost Profits Cannot be Proven With Reasonable Certainty [Civ. Code § 3301]

[1] FORM Supporting Defendant's Demurrer to Complaint in Action Seeking Damages for Breach of Agreement to Negotiate--Damages for Lost Profits Cannot be Proven With Reasonable Certainty [Civ. Code § 3301]

[*Caption. See § 65.20.*]

PLAINTIFF'S COMPLAINT MUST BE DISMISSED BECAUSE IT FAILS TO STATE A CAUSE OF ACTION FOR BREACH OF AN AGREEMENT TO NEGOTIATE, SINCE THE ONLY DAMAGES SOUGHT ARE LOST PROFITS, WHICH CANNOT BE PROVEN WITH REASONABLE CERTAINTY.

A. Objection by Demurrer. [*See § 65.20, Paragraph A.*]

B. Damages Sought Cannot Be Proven With Reasonable Certainty. An action for breach of agreement to negotiate may be properly dismissed when the only damages sought are lost profits, which cannot be proven with reasonable certainty as required by *Civ. Code § 3301* (*Vestar Development v. General Dynamics Corporation (9th Cir. 2001) 249 F.3d 958, 961-962)* .
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a demurrer seeking dismissal an action for breach of an agreement to negotiate, on the grounds that the only damages sought are lost profits, which cannot not be proven with reasonable certainty as required by *Civ. Code § 3301*. The form can be modified for use in other situations in which defendant contends that the damages sought by the plaintiff cannot be proven with reasonable certainty.

When appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law raised.

For detailed discussion of the use of and requirements for demurrers, and general forms for points and authorities relating to demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For forms for general and special demurrers, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender).

[3] Discussion of Authorities

[a] Damages Sought Cannot Be Proven With Reasonable Certainty

Vestar Development v. General Dynamics Corporation *(9th Cir. 2001) 249 F.3d 958* , was an action by a prospective buyer of property against the prospective seller for breach of an agreement to negotiate. Plaintiff had sent defendant a letter of understanding, which "set forth the proposed business terms and conditions which will provide the basis for completing a formal Purchase & Sale Agreement" and provided that defendant would negotiate exclusively with plaintiff for 90 days. The parties both signed the letter. Subsequently, defendant sold the property to a third party. Plaintiff expressly did not seek reliance damages, but sought only lost profits it expected to make by constructing a shopping center on the parcel it sought to buy and leasing space to merchants. Plaintiff originally filed suit in California Superior Court and the defendant removed the diversity case to federal district court.

The first amended complaint alleged that plaintiff had been damaged by "the inability to purchase and develop" the property and sought damages of $48 million. The district court granted defendant's motion to dismiss because the only damages sought were lost profits. The court reasoned that the amount was too speculative and that causation was too attenuated. Plaintiff moved for clarification or reconsideration, and the district court denied the motion. It stated that plaintiff could not prove damages with reasonable certainty as required by California law, and that damages for breach of an agreement to negotiate are usually confined to reliance damages. Because plaintiff was seeking only lost profits, it requested that if its motion was denied, the complaint be dismissed in its entirety. The district court dismissed the complaint and plaintiff appealed (*249 F.3d 958, 959-960)* .

The Ninth Circuit affirmed. It stated that because the parties never reached an agreement of sale, the terms of which would be necessary to determine lost profits, the only damages sought could not be proven with reasonable certainty, as required by California law. *Civ. Code § 3301* requires damages to be certain, and no damages may be recovered for a breach of contract which are not clearly ascertainable in both nature and origin. Plaintiff could satisfy that standard only with respect to reliance damages. However, it sought only lost profits. There was no way to evaluate, other than through speculation, the profits that plaintiff might have made. The letter of understanding between the parties did not set forth any terms, and was not even binding except as to the duty to negotiate. There was no way to know what the terms of the eventual sale would have been, or even if a deal would have been reached. Accordingly, on those facts, assessing lost profits by the hypothetical terms of a never-formed deal would require impermissible speculation (*249 F.3d 958, 961-962)* .

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A. Supporting Demurrer to Complaint

6-65 California Points & Authorities § 65.22

§ 65.22 Supporting Defendant's Motion for Summary Judgment in Action Seeking Damages for Breach of Agreement to Negotiate [Code Civ. Proc. § 437c(o)(2)]--Plaintiff Cannot Establish Reliance Damages

[1] FORM Supporting Defendant's Motion for Summary Judgment in Action Seeking Damages for Breach of Agreement to Negotiate [Code Civ. Proc. § 437c(o)(2)]--Plaintiff Cannot Establish Reliance Damages

[*Caption. See § 65.20.*]

DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT BECAUSE IT HAS SHOWN THAT PLAINTIFF CANNOT ESTABLISH RELIANCE DAMAGES, WHICH ARE THE ONLY FORM OF RECOVERY AVAILABLE IN AN ACTION ON A CONTRACT TO NEGOTIATE AN AGREEMENT.

A. Summary Judgment for Defendant. [*See Ch. 221*].

B. Plaintiff Cannot Establish Reliance Damages, Which Are the Only Form of Recovery Available in an Action on a Contract to Negotiate an Agreement. Defendant is entitled to summary judgment when it has shown that plaintiff cannot establish reliance damages, which are the only form of recovery available in an action on a contract to negotiate an agreement (*Copeland v. Baskin Robbins U.S.A. (2002) 96 Cal. App. 4th 1251, 1260-1263, 117 Cal. Rptr. 2d 875*).

C. Damages for Lost Profits Not Recoverable. In an action for breach of a contract to negotiate an agreement, damages for lost profits under the prospective agreement are not recoverable. (*Copeland v. Baskin Robbins U.S.A. (2002) 96 Cal. App. 4th 1251, 1260-1263, 117 Cal. Rptr. 2d 875*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for summary judgment in an action for breach of an agreement to negotiate, on the grounds that the plaintiff cannot establish reliance damages, pursuant to *Code Civ.*

Proc. § 437c(o)(2). Subparagraph (c) can be added if the plaintiff is attempting to assert recovery of damages for lost profits under the prospective agreement.

When appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law raised.

[b] Related Pleading and Practice Chapters

For detailed discussion relating to contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender). For discussion and forms relating to damages issues in contract actions, see California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender). For discussion and forms relating to motions for summary judgment, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[c] Related Points and Authorities

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a memorandum of points and authorities, see Ch. 1, *Writing Legal Memoranda and Briefs* . For discussion of contracts to negotiate an agreement, see *Ch. 50, Contracts, § 50.360*. For discussion of motions for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Plaintiff Cannot Establish Reliance Damages, Which Are the Only Form of Recovery Available in an Action on a Contract to Negotiate an Agreement

In ***Copeland v. Baskin Robbins U.S.A.*** *(2002) 96 Cal. App. 4th 1251, 117 Cal. Rptr. 2d 875* , the individual purchaser of an ice cream manufacturing plant brought an action for breach of contract against the seller. When the parties were negotiating for the sale, plaintiff purchaser made it clear that plaintiff's agreement to purchase the plant was contingent on defendant seller's agreement to purchase the ice cream plaintiff manufactured there. This ice cream purchase arrangement, known as "co-packing," was critical to the deal. Defendant sent plaintiff a letter setting forth the terms for the sale of the plant, in which it stated it would agree, subject to a separate co-packing agreement and negotiated pricing, to provide plaintiff with a three-year co-packing agreement. Plaintiff accepted the terms of the letter by signing the statement and returning it along with a $3,000 non-refundable deposit check. The parties then continued negotiating over the terms of the co-packing agreement. The issues to be settled included the price defendant would pay for the ice cream, the flavors that plaintiff would produce, and who would bear loss from spoilage. Defendant thereafter wrote to plaintiff breaking off negotiations over the co-packing arrangement, and returned the deposit. Plaintiff brought an action for breach of contract, claiming he suffered expectation damages in the form of lost profits. His discovery responses did not provide or allege that he could provide evidence of damages he suffered as a result of his reliance on defendant's promise to negotiate a co-packing agreement.

The trial court granted defendant's motion for summary judgment, concluding that the letter failed as a contract because the essential terms of the co-packing deal were never agreed upon and there was no reasonable basis upon which to determine them. The court of appeal affirmed on a different ground. The court first noted that plaintiff, rather than insisting that the parties had formed a co-packing contract which defendant had breached, claimed that the letter between the parties constituted a contract to negotiate the remaining terms of the co-packing agreement. Plaintiff claimed that defendant breached this contract by refusingwithout excuse to continue negotiations, or alternatively, by failing to negotiate in good faith. Although noting that no reported California case has held that breach of a contract to negotiate an agreement gives rise to a cause of action for damages, the court held that a contract to negotiate an agreement is distinguishable from a so-called "agreement to agree," and can be formed and breached just like any other contract. The court first stated that it found no reason why in principle the parties could not enter into a valid, enforceable contract to negotiate the terms of a co-packing agreement. The contract to negotiate the terms of a second

agreement was neither illegal or immoral pursuant to *Civ. Code § 1667*. The court further found that a contract to negotiate the terms of an agreement differs from a mere agreement to agree because failure to agree is not itself a breach of a contract to negotiate. A party will be liable only if a failure to reach ultimate agreement resulted from a breach of that party's obligation to negotiate or to negotiate in good faith (*96 Cal. App. 4th 1251, 1256-1257)* .

The court ultimately held, however, that the appropriate remedy for breach of a contract to negotiate is damages caused by the injured party's reliance on the agreement to negotiate, as opposed to damages for the injured party's lost profits under the prospective contact. Reliance damages include plaintiff's out-of pocket costs in conducting the negotiations, and any lost opportunity costs (*96 Cal. App. 4th 1251, 1260-1263)* .

A defendant is entitled to summary judgment if it shows that one or more elements of the cause of action cannot be established by the plaintiff (*Code Civ. Proc. § 437c(o)(2)*). A defendant may make this showing through argument as well as through the plaintiff's discovery responses if they demonstrate that plaintiff does not possess and cannot obtain needed evidence to establish the cause of action. In *Copeland*, defendant showed through plaintiff's complaint and discovery responses that plaintiff could not establish reliance damages. In the complaint, plaintiff disavowed reliance damages, *e.g.*, time spent, expenses incurred, and opportunities missed while negotiating with defendant. The court therefore concluded that the allegations in plaintiffs' complaint, together with his discovery responses, constituted a sufficient showing that plaintiff did not possess, and could not reasonably obtain, needed evidence to establish reliance damages, and thus defendant was entitled to summary judgment (*96 Cal. App. 4th 1251, 1263-1264)* .

[b] Damages for Lost Profits Not Recoverable

The facts and procedural context of ***Copeland v. Baskin Robbins U.S.A.*** *(2002) 96 Cal. App. 4th 1251, 117 Cal. Rptr. 2d 875* , are *discussed under § 65.22[3][a]*. In *Copeland*, the court ruled that the appropriate remedy for breach of a contract to negotiate is not damages for the injured party's lost profits under the prospective contact, but rather damages caused by the injured party's reliance on the agreement to negotiate (*96 Cal. App. 4th 1251, 1260-1263)* . In the complaint, plaintiff had sought only damages derived from what he would have received if the underlying contract had been consummated, *i.e.*, lost profits. Satisfactory proof of such damages was impossible because there was no way to know what the eventual terms of the co-packing agreement would have been, or even if the parties would have reached an agreement (*96 Cal. App. 4th 1251, 1263-1264)* .

California Points & Authorities

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Volume 6 Chapters 60-69 COSTS---to---DECLARATORY RELIEF
CHAPTER 65 DAMAGES: CONTRACT
PART II. FORMS
A. Supporting Demurrer to Complaint

6-65 California Points & Authorities §§ 65.23-65.39

[Reserved]

§§ 65.23[Reserved]

California Points & Authorities

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CHAPTER 65 DAMAGES: CONTRACT
PART II. FORMS
B. Opposing Demurrer to Complaint

6-65 California Points & Authorities § 65.40

§ 65.40 Opposing Demurrer to Complaint for Damages for Breach of Contract [Civ. Code § 3300]--Alleging Incorrect Rule of Damages Is Not Fatal

[1] FORM Opposing Demurrer to Complaint for Damages for Breach of Contract [Civ. Code § 3300]--Alleging Incorrect Rule of Damages Is Not Fatal

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEMURRER TO COMPLAINT
vs.	)	
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

WHEN THE FACTS STATED IN A COMPLAINT SHOW THAT PLAINTIFF IS ENTITLED TO DAMAGES OF SOME SORT, IT IS NOT A FATAL ERROR THAT PLAINTIFF HAS MISTAKEN THE RULE BY WHICH THOSE DAMAGES SHOULD BE DETERMINED.

Alleging Incorrect Rule Is Not Fatal. When the facts stated in the complaint show that plaintiff is entitled to damages of some sort, it is not fatal that plaintiff has mistaken the rule by which those damages should be determined and anamendment should be allowed (*Warfield v. Basso (1923) 62 Cal. App. 47, 49, 216 P. 48*).

Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a demurrer to a complaint for damages for breach of contract when the defendant asserts that the complaint fails to state a cause of action and the only grounds on which the demurrer is brought is that plaintiff alleged the wrong rule by which damages should be determined.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Alleging Incorrect Rule Is Not Fatal

Warfield v. Basso *(1923) 62 Cal. App. 47, 216 P. 48* , as an action for damages for breach of an agreement by defendant to sell a truck to plaintiff. Plaintiff alleged that the truck was bought for use in his business and that plaintiff was damaged in the sum of $400 by the inability to use the truck. Plaintiff further alleged that defendant had not paid the damage of $658.80 (the price plaintiff was to pay defendant for the truck) or $400 (the amount plaintiff was damaged by not being able to use the truck) or any part thereof. Plaintiff prayed for judgment in the amount of $1,058.80 (the total of the two amounts mentioned above) and costs of suit. The trial court sustained defendant's demurrer on the ground that the complaint did not state facts sufficient to constitute a cause of action. The court of appeal reversed noting that when the facts stated in the complaint show that plaintiff is entitled to damages of some sort, it is not a fatal error that the pleader has mistaken the rule by which such damages should be determined [citing and discussing out of state decisions]. Consequently, the court found that the complaint stated a cause of action (*62 Cal. App. 47, 49)* .

[4] Additional Authorities

[a] Alleging Incorrect Rule Is Not Fatal

Daum v. Superior Court (1964) 228 Cal. App. 2d 283, 39 Cal. Rptr. 443 , involved a proceeding in mandamus to compel a court to permit petitioners to file a second amended complaint in an action on a contract. Petitioners had entered into a contract whereby they were to act as exclusive agents in the negotiation and procurement of long term leases of commercial sites in a shopping center and whereby their payment was conditioned on the accrual of the shopping center's right to payment of the first rental payment under each lease and the procurement of a construction loan and long term loan to cover on-site construction costs. Petitioners filed a complaint against the shopping center for the amount owing as a result of their negotiating long term leases and obtaining a commitment for a long term lease. The trial court sustained defendant's demurrer without leave to amend until such time as the conditions precedent in the contract had occurred and later denied petitioners' motion to vacate this order and to file a second amended complaint based on anticipatory breach. Reversing the trial court, the court of appeal noted that courts should be liberal in allowing amendments to a complaint. Although the right to amend should be denied if a change is made in the liability sought to be enforced against defendant, or if it appears to a certainty that no basic right of action can possibly exist or

no relief can possibly be granted, where the facts stated in the complaint show that plaintiff is entitled to damages of some sort, it is not a fatal error that the pleader has mistaken the rule by which those damages should be determined and an amendment should be allowed (dicta). The court concluded that petitioners should have been allowed to amend their complaint since they were not attempting to introduce an entirely new cause of action but were merely proposing a change in the theory of their action.

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B. Opposing Demurrer to Complaint

6-65 California Points & Authorities § 65.41

§ 65.41 Opposing Demurrer to Complaint for Damages for Breach of Contract [Civ. Code § 3300]--Defendant Asserted Damages Claimed Not Contemplated--Benefits Reasonably Certain to Have Occurred

[1] FORM Opposing Demurrer to Complaint for Damages for Breach of Contract [Civ. Code § 3300]--Defendant Asserted Damages Claimed Not Contemplated--Benefits Reasonably Certain to Have Occurred

[*Caption. See § 65.40.*]

PLAINTIFF MAY RECOVER DAMAGES WHEN THE BENEFITS CLAIMED IN THE COMPLAINT WERE REASONABLY CERTAIN TO HAVE BEEN REALIZED BUT FOR THE WRONGFUL ACT OF DEFENDANT.

Benefits Reasonably Certain to Have Occurred. Plaintiff may recover damages for breach of a contract when the benefits claimed in the complaint were reasonably certain to have been realized but for the wrongful act of the defendant (*Williams v. Krumsiek (1952) 109 Cal. App. 2d 456, 459, 241 P.2d 40*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be used in opposition to a general demurrer to a complaint for damages for breach of contract when the defendant asserted that the damages claimed by plaintiff were not in the contemplation of the parties at the time of contracting, but it was reasonably certain that plaintiff would have received the benefits of the contract if defendant had not breached it. As noted in § 65.20, whether or not the parties contemplated certain damages at the time

of contracting is not ordinarily an issue that can be resolved on demurrer [*Weaver v. Bank of America (1963) 59 Cal. 2d 428, 434, 30 Cal. Rptr. 4, 380 P.2d 644]* .

This form may also be used in opposition to a demurrer supported by the points and authorities of § 65.20, which states that plaintiff's complaint fails to state a cause of action since the conclusion that plaintiff was injured does not follow from the pleading.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Benefits Reasonably Certain to Have Occurred

Williams v. Krumsiek *(1952) 109 Cal. App. 2d 456, 241 P.2d 40* , was an action for damages arising out of defendant's breach of a property exchange agreement resulting in plaintiffs' loss of a broker's commission. Defendant entered into an agreement arranged by plaintiffs with two other parties for the exchange of real properties. The other parties to the agreement were to pay their share of plaintiffs' commission from the first crops grown on the property they were to receive from defendant but defendant refused to perform the agreement causing plaintiffs to lose this commission since the other parties never received possession of the property on which they were to produce crops. The trial court sustained defendant's general demurrer. The court of appeal reversed, holding that defendant's contention that plaintiffs did not state a cause of action because the damages set forth were not within the contemplation of the parties at the time of contracting was without merit. The court noted that although damages which are purely speculative, fanciful, and imaginative cannot be recovered, if the benefits claimed were reasonably certain to have been realized but for the wrongful act of the opposing party, recovery should be allowed. Since defendant was a party to the agreement by which plaintiffs were to receive a commission from the other parties to the agreement, defendant must have known that if she was not willing to complete the contract but the other parties were, she should be obligated to pay plaintiffs all of the commission provided for in the exchange agreement and consequently, it was contemplated that she would pay the other parties' commission in the event that she breached the contract (*109 Cal. App. 2d 456, 459)* .

[4] Additional Authorities

[a] Benefits Reasonably Certain to Have Occurred

In *Resort Video, Ltd v. Laser Video, Inc. (1995) 35 Cal. App. 4th 1679, 42 Cal. Rptr. 136* , the court of appeal affirmed the trial court's order granting a new trial on the ground of excessive damages. The court held that the evidence failed to provide the degree of reasonable certainty necessary to support the $975,000 damage award to appellant, a resort promotional video company, for anticipated lost profits resulting from the breach of contract for the purchase and sale of replicated video discs. Although unestablished businesses have been permitted to claim lost profit damages when the owners have experience in the business they are seeking to establish and when the business is in an established market, the owner in this case was unable to produce any evidence of either an operating history of the venture or of operating histories of comparable businesses. Therefore, it was speculative whether appellant, who lacked prior experience inthe resort promotional business, would have generated sufficient business to lay claim to any lost profits (*35 Cal. App. 4th 1679, 1698-1700)* . Further, the evidence was insufficient to prove the value of the company, which closed as a result of the breach of contract for purchase and sale of the replicated discs, when the only evidence proffered by appellant was of a third party's investment in the business and of expenses incurred in operating the business (*35 Cal. App. 4th 1679, 1700-1701)* .

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B. Opposing Demurrer to Complaint

6-65 California Points & Authorities §§ 65.42-65.59

[Reserved]

§§ 65.42[Reserved]

California Points & Authorities

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CHAPTER 65 DAMAGES: CONTRACT
PART II. FORMS
C. Supporting Motion to Strike

6-65 California Points & Authorities § 65.60

§ 65.60 Supporting Motion to Strike Part of Complaint [Code Civ. Proc. §§ 435-437] for Damages for Breach of Contract [Civ. Code § 3300]--Punitive Damages Not Recoverable

[1] FORM Supporting Motion to Strike Part of Complaint [Code Civ. Proc. §§ 435-437] for Damages for Breach of Contract [Civ. Code § 3300]--Punitive Damages Not Recoverable

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN SUPPORT OF MOTION TO STRIKE PART
vs.	)	OF COMPLAINT REQUESTING PUNITIVE DAM-
_____ [*name*],	)	AGES
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

THE COURT, ON MOTION, SHOULD STRIKE A CLAIM FOR PUNITIVE DAMAGES IN A COMPLAINT FOR DAMAGES FOR BREACH OF CONTRACT SINCE PUNITIVE DAMAGES ARE NOT RECOVERABLE IN SUCH AN ACTION.

A. Motion to Strike. Within the time that a party is allowed to answer a complaint or cross complaint, that party may serve and file a notice of motion to strike the whole or any part of the complaint or cross complaint (*Code Civ. Proc. §*

435(b)).

B. Punitive Damages Not Recoverable. Punitive damages are not recoverable in an action based on a breach of contract even though the defendant's breach was willful or fraudulent (*Contractor's Safety Ass'n v. California Compensation Ins. Co. (1957) 48 Cal. 2d 71, 77, 307 P.2d 626*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion to strike the part of a complaint for damages for breach of contract seeking punitive damages. There apparently is no California case directly authorizing the use of a motion to strike improper damage allegations. However, some California attorneys have used motions to strike under this circumstance. The ground for the motion is apparently surplusage [*see Barr v. Southern Cal. Edison Co. (1914) 24 Cal. App. 22, 25, 140 P. 47]* .

If the claim for punitive damages is set up as a separate count, it appears that the count could be attacked by a general demurrer or a motion for judgment on the pleadings [*see Tarasoff v. Regents of University of California (1976) 17 Cal. 3d 425, 433, 131 Cal. Rptr. 14, 551 P.2d 334* (general demurrer sustained as to count seeking punitive damages); *Stencel Aero Eng'r Corp. v. Superior Court (1976) 56 Cal. App. 3d 978, 984, 987, 128 Cal. Rptr. 691* (motion for judgment on pleadings made against count claiming punitive damages)]. Since a motion to strike may not be used when a demurrer lies [*see Warren v. Atchison, Topeka & Santa Fe Ry. Co. (1971) 19 Cal. App. 3d 24, 41, 96 Cal. Rptr. 317* (ground for demurrer as not proper ground for motion to strike)] and research has not revealed a case specifically authorizing a motion to strike improper damage claims, counsel may want to alternatively bring a motion to strike and a general demurrer.

It appears that a motion for summary judgment would be improper when punitive damages have been incorrectly requested since the issue is not whether a triable issue of fact exists. Instead the defect appears on the face of the complaint, and a motion for judgment on the pleadings would be a properprocedure [*see Mulkey v. Reitman (1966) 64 Cal. 2d 529, 531-532, 50 Cal. Rptr. 881, 413 P.2d 825]* . However, under some circumstances, such as when the breach of contract also involves a tort, a triable issue of fact might exist and counsel might want to bring a motion for summary judgment. In such a case, counsel may obtain a protective order protecting defendant from questions concerning his or her financial affairs and net worth [*see Cobb v. Superior Court (1979) 99 Cal. App. 3d 543, 548-551, 160 Cal. Rptr. 561]* .

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, these points and authorities may be used to support a motion for new trial on the ground of excessive damages or a motion to vacate judgment and enter a new judgment.

[3] Discussion of Authorities

[a] Punitive Damages Not Recoverable

Contractor's Safety Ass'n v. California Compensation Ins. Co. *(1957) 48 Cal. 2d 71, 307 P.2d 626* , was an action to recover dividends on an agreement made in conjunction with the purchase of a policy of worker's compensation insurance by which defendant was to pay plaintiff a dividend if the latter's loss-premium ratio was at or below a certain percentage, provided that a surplus was available to pay the dividend. Plaintiff alleged that defendant failed to pay dividend although all the requirements were satisfied. Additionally, plaintiff prayed for punitive damages alleging that defendant acted maliciously and oppressively when, without notifying plaintiff, it resolved that no dividend would be paid except by resolution of defendant's board of directors and reduced plaintiff's dividend because plaintiff ceased to do business with defendant approximately nine months after plaintiff accepted defendant's offer concerning the dividend. The trial court sustained defendant's oral demurrer to the introduction of evidence by plaintiff, apparently on the ground the dividend agreement was illegal. In affirming, the Supreme Court noted that the count of the complaint in which plaintiff prayed for punitive damages was based on breach of contract and punitive damages may not be awarded in an action based on breach of contract even though the defendant's breach was willful or fraudulent [relying on prior case law] (*48 Cal. 2d 71, 77)* .

[4] Additional Authorities

[a] Punitive Damages Not Recoverable

Miller v. Fairchild Industries (9th Cir. 1989) 885 F.2d 498 , was a wrongful termination action in which the court of appeals, applying California law, upheld the rule that under *Civ. Code § 3294(a)* punitive damages are not recoverable for breach of contract (*885 F.2d 498, 510)* .

In *Myers Bldg. Industries, Ltd. v. Interface Technology, Inc. (1993) 17 Cal. Rptr. 2d 242* , the jury returned a special verdict in favor of cross plaintiff finding that cross defendant had breached its contract with cross plaintiff. The jury found that cross defendant had acted with "oppression, fraud, or malice" toward cross plaintiff, but it did not make any factual findings for a fraud or other tort cause of action. A trial on punitive damages followed. The jury returned a verdict awarding punitive damages. On the cross defendant's appeal, the court of appeal modified the judgment to strike the punitive damage award. It held that the special verdict rendered by the jury could not support a punitive damage award in the absence of a tort finding. The court stated that an award of punitive damages is not supported by a verdict based merely on breach of contract, even where the defendant's conduct in breaching the contract was willful, fraudulent, or malicious (*13 Cal. App. 3d 949, 959-961)* .

Dryden v. Tri-Valley Growers (1977) 65 Cal. App. 3d 990, 135 Cal. Rptr. 720 , was an action based in part on the tort theory of intentional interference with contractual relationships. Following the execution of a contract providing for the sale of waste products from olive oil production, a legal dispute arose between the contractual parties. The parties owning the olive oil processing plant advised plaintiffs that they intended to rescind and cancel the contracts. Plaintiffs brought suit against defendant, who had subsequently bought the plant from the original party to the contract, alleging that by buying the plant, defendant interfered with and induced the breach of the contract. The trial court sustained defendant's general demurrer. Affirming, the court of appeal noted that the record showed that defendant was actually a party to the contract since the agreement provided that the provisions were binding on the seller and its successors. The court held that if an action is brought for interference with a contractual relationship by one party to a contract against another who is also a party to that same contract, the plaintiff's complaint is, in essence, based on breach of contract and to allow plaintiff to sue under the tort theory of wrongful interference with contractual rights would be superfluous and would also enable plaintiff to recover tort damages to which plaintiff is not entitled. The court noted that punitive damages may not be awarded in an action based on breach of contract even though defendant's breach was willful or fraudulent and consequently, plaintiff should not be allowed to recover punitive damages.

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CHAPTER 65 DAMAGES: CONTRACT
PART II. FORMS
C. Supporting Motion to Strike

6-65 California Points & Authorities § 65.61

§ 65.61 Supporting Motion to Strike Part of Complaint for Damages for Breach of Contract [Civ. Code § 3300]--Damages for Physical and Mental Suffering Not Recoverable

[1] FORM Supporting Motion to Strike Part of Complaint for Damages for Breach of Contract [Civ. Code § 3300]--Damages for Physical and Mental Suffering Not Recoverable

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN SUPPORT OF MOTION TO STRIKE PART
vs.	)	OF COMPLAINT REQUESTING DAMAGES FOR
_____ [*name*],	)	PHYSICAL INJURY OR MENTAL DISTRESS
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

THE COURT, ON MOTION, SHOULD STRIKE A CLAIM FOR DAMAGES FOR _____ [PHYSICAL INJURY *or* MENTAL DISTRESS] IN AN ACTION BASED ON _____ [BREACH OF CONTRACT *or* FRAUD AND RESCISSION IN THE TRANSFER OF REAL PROPERTY] SINCE SUCH DAMAGES ARE NOT RECOVERABLE IN _____ [A BREACH OF CONTRACT ACTION *or* ACTION FOR FRAUD AND RESCISSION IN THE TRANSFER OF REAL PROPERTY].

A. Motion to Strike. [*See § 65.60, Paragraph A.*]

B. Damages for Physical Injury and Mental Distress Not Recoverable in Breach of Contract Action. In an action for breach of contract, the defendant cannot be held liable for damages to plaintiff's health or feelings (*Erlich v. Menezes (1999) 21 Cal. 4th 543, 561, 87 Cal. Rptr. 2d 886, 981 P.2d 978* ; *Westwater v. Grace Church (1903) 140 Cal. 339, 341-342, 73 P. 1055* ; *Sawyer v. Bank of America (1978) 83 Cal. App. 3d 135, 139, 145 Cal. Rptr. 623*).

[*Optional*] **C. Damages for Mental Distress Not Recoverable in Action for Fraud and Rescission.** In an action for fraud in the purchase, sale, or exchange of real property or for rescission based on the fraud, no damages may be awarded for mental suffering (*In re Marriage of McNeill (1984) 160 Cal. App. 3d 548, 559, 206 Cal. Rptr. 641* , disapproved on another ground in *In re Marriage of Fabian (1986) 41 Cal. 3d 440, 448-451, 224 Cal. Rptr. 333, 715 P.2d 253*).

[*Optional*] **D. Damages for Mental Distress Barred by Medical Standard of Care.** Damages for emotional suffering as an element of a breach of contract claim arising from a physician's failure to provide promised medical services are not recoverable if the physician's failure to perform those services was consistent with his or her obligation to meet the professional standard of care in treating the plaintiff (*Selden v. Dinner (1993) 17 Cal. App. 4th 166, 173, 21 Cal. Rptr. 2d 153*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion to strike the part of a complaint for damages for breach of contract seeking damages for physical injury and/or mental suffering, Paragraph B states the general rule. Paragraphs C and D are for use in particular situations, namely rescission based on fraud in sales or exchanges of real property and breach of contracts for medical services. For further discussion of the use of a motion to strike when plaintiff seeks damages which he or she may not obtain in a breach of contract action, see *§ 65.60[2]*.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, these points and authorities may be used to support a motion for new trial on the ground of excessive damages or a motion to vacate judgment and enter a new judgment.

[3] Discussion of Authorities

[a] Damages for Physical Injury and Mental Distress Not Recoverable in Breach of Contract Action

In ***Erlich v. Menezes*** *(1999) 21 Cal. 4th 543, 87 Cal. Rptr. 2d 886, 981* P.2d978, plaintiff homeowners sued the contractor who built their new house for breach of contract, fraud, negligent misrepresentation, and negligent construction, claiming emotional distress resulting from the condition of the house and defendant's unsuccessful repair

attempts. The jury found that defendant breached the construction contract by negligently constructing the house, but was not guilty of fraud or negligent misrepresentation. The jury awarded the homeowners the full cost necessary to repair their home as well as damages for emotional distress caused by the contractor's negligent performance. The court of appeal affirmed. The supreme court reversed and remanded, holding that since the contractor's negligence directly caused only economic injury and property damage, and breached no duty independent of the contract, the homeowners could not recover damages for emotional distress based upon breach of a contract to build a house (*21 Cal. 4th 543, 548)* .

The court initially stated the rule set forth in *Civ. Code § 3300* that in an action for breach of contract, the measure of damages is the amount that will compensate the aggrieved party for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom. Contract damages generally are limited to those within the contemplation of the parties when the contract was entered into or at least reasonably foreseeable by them at that time; consequential damages beyond the expectation of the parties are not recoverable. The court articulated the issue in this case as whether a negligent breach of a contract will support an award of damages for emotional distress--either as tort damages for negligence, or as consequential or special contract damages (*21 Cal. 4th 543, 550-551)* .

The court first noted that the court of appeal permitted plaintiffs to recover both full repair costs as normal contract damages and emotional distress damages as a tort remedy. However, conduct amounting to a breach of contract becomes tortious only when it also violates a duty independent of the contract arising from principles of tort law. For example, tort damages have been permitted in contract cases in which the duty that gives rise to tort liability is either completely independent of the contract or arises from conduct which is both intentional and intended to harm. Under the facts of this case, the court concluded that tort damages were not available (*21 Cal. 4th 543, 552-558)* . Next, the court considered whether damages for emotional distress should be included as consequential or special damages in a contract claim. It noted that damages for mental suffering and emotional distress are generally not recoverable in an action for breach of an ordinary commercial contract in California. Courts have carved out a narrow range of exceptions to the general rule of exclusion only when emotional tranquillity is the contract's essence. The court held that the balance of policy considerations--the potential for significant increases in liability in amounts disproportionate to culpability, the court's inability to formulate appropriate limits on the availability of claims, and the magnitude of the impact on stability and predictability in commercial affairs--counseled against expanding contract damages to include mental distress claims in negligent construction cases (*21 Cal. 4th 543, 558-561)* .

Westwater v. Grace Church *(1903) 140 Cal. 339, 73 P. 1055* , was an action by plaintiff for damages for humiliation, mental agony, and physical sickness suffered as a result of being intentionally dismissed without notice from position as vocalist in defendant's choir. The trial court sustained defendant's demurrer (unclear as to ground). Affirming, the Supreme Court held that in an action on a breach of contract, defendant cannot be held liable for damages to plaintiff's health nor for injury to her feelings or reputation since those damages are not proximately caused by defendant's breach in wrongfully discharging plaintiff nor would they be likely to result in the ordinary course of things as required by *Civ. Code § 3300* (providing for damages in breach of contract actions) (*140 Cal. 339, 341-342)* .

Sawyer v. Bank of America *(1978) 83 Cal. App. 3d 135, 145 Cal. Rptr. 623* , was an action against a bank to recover damages for fire damage to plaintiff's truck on which insurance coverage had lapsed because of defendant's breach of an oral agreement to obtain and maintain insurance. Plaintiff introduced evidence that the financial strain imposed on him by being required to pay for repairs to his truck caused him to be nervous, upset, and to lose sleep. The jury awarded plaintiff general damages in addition to actual damages and punitive damages. Reversing as to the general damages, the court of appeal found that there was no possible support in the evidence for this award except on the basis of compensation for insomnia and emotional distress. The court held that those damages may not be awarded in an action for breach of contract. It rejected plaintiff's claim that the award was based on a tort cause of action by finding that it is not a tort for a contractual obligor to dispute his liability under a contract and by concluding that the case did not involve the tort of breaching an implied covenant of good faith and fair dealing since such a tort consists of bad faith

action, extraneous to the contract, with the intention to frustrate the obligee's enjoyment of contract rights (*83 Cal. App. 3d 135, 139)* .

[b] Damages for Mental Distress Not Recoverable in Action for Fraud and Rescission

In re Marriage of McNeill *(1984) 160 Cal. App. 3d 548, 206 Cal. Rptr. 641* , was a dissolution action consolidated with husband's action for fraud, for cancellation of a marital settlement agreement and a deed, and to quiet title. The trial court awarded husband rescission of the deed and damages based on fraud, including $30,000 for emotional distress. Citing *O'Neil v. Spillane (1975) 45 Cal. App. 3d 147, 159, 119 Cal. Rptr. 254* , the court of appeal reversed the award, saying regardless of whether they were based on *Civ. Code § 1692* (rescission) or *Civ. Code § 3343* (damages for fraud in the purchase, sale, or exchange ofproperty) the award of damages for emotional distress as an element of consequential damages could not be upheld (*160 Cal. App. 3d 548, 559)* .

Counsel should note that *In re Marriage of McNeill (1984) 160 Cal. App. 3d 548, 206 Cal. Rptr. 641* , was disapproved on another ground in *In re Marriage of Fabian (1986) 41 Cal. 3d 440, 448-451, 224 Cal. Rptr. 333, 715 P.2d 253* .

[c] Damages for Mental Distress Barred by Medical Standard of Care

Defendant in ***Selden v. Dinner*** *(1993) 17 Cal. App. 4th 166, 21 Cal. Rptr. 2d 153* , promised to perform a preventative mastectomy and reconstructive surgery on plaintiff's right breast before plaintiff's medical coverage expired. Plaintiff's mother and grandmother had died of breast cancer. Plaintiff had previously undergone a mastectomy when cancer was found in her left breast. On the day that surgery was scheduled, in a hospital where defendant's application for surgical privileges had not yet been approved, there was disagreement over whether the hospital would allow defendant to proceed. It was finally agreed that defendant could perform the surgery with another surgeon to monitor the operation, but by the time that agreement was reached, defendant felt too upset to properly perform the surgery, and postponed it for that reason. Plaintiff's medical coverage expired without defendant's having performed the surgery. This caused plaintiff to experience feelings of helplessness, fear, and depression. Plaintiff shook constantly, could not stop crying, and began taking tranquilizers and later antidepressants. Beginning seven months later and over a ten-month period, plaintiff had another physician perform five surgical procedures to accomplish similar results, except that reconstruction was by way of implant instead of the abdominal island flap procedure, for which defendant was noted and that defendant had agreed to perform. Plaintiff sued defendant for breach of contract, detrimental reliance, intentional and negligent infliction of emotional distress, and medical nonfeasance.

At trial, plaintiff was not prepared to present any expert medical testimony, so the trial court did not allow the professional negligence claim to be tried. The trial court also ruled that plaintiff could not recover damages for emotional distress as an element of the breach of contract claim and granted nonsuit with respect to the claim for intentional infliction of emotional distress. Plaintiff was awarded $400,000 in damages. The verdict form used did not separate damages, but evidence of economic damages supported at most $30,000, so the remainder of $370,000 must have been awarded for emotional distress. Defendant appealed.

The court of appeal reversed as to the emotional distress damages, and remanded for determination of plaintiff's contract damages. Plaintiff argued that since it was clear that she desired the surgery for emotional reasons, defendant should have expected that failure to perform the surgery would have a devastating emotional impact on her, and that this brought her within the exception allowing recovery of damages for emotional distress caused by breach of a contract that, by its nature, puts defendant on notice that breach will cause emotional suffering (*17 Cal. App. 4th 166, 172-173)* . The court considered defendant's obligation to meet the standard of professional care critical, and was unwilling to create a substantial incentive that conflicts with that obligation. If the standard of care, which can only be established by way of expert medical testimony, required defendant to cancel the surgery because of defendant's emotional state, imposing liability for emotional distress damages on a breach of contract theory would create a powerful financial

incentive for the physician to act below the standard of care. In refusing to create such an incentive, the court of appeal noted that the California Supreme Court has consistently found that when there is a conflict, the public concerns articulated in our system of tort law must prevail over private interests embodied in contracts (*17 Cal. App. 4th 166, 173)* . The court also noted that none of the cases that permitted recovery of emotional distress damages involved a defendant who was subject to potentially conflicting tort and contract obligations (*17 Cal. App. 4th 166, 173-174)* .

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6-65 California Points & Authorities § 65.62

§ 65.62 Supporting Motion to Strike Part of Complaint [Code Civ. Proc. §§ 435-437] for Damages for Breach of Contract [Civ. Code § 3300]--Tort Damages for Breach of Implied Covenant of Good Faith and Fair Dealing Not Recoverable Outside Insurance Context

[1] FORM Supporting Motion to Strike Part of Complaint [Code Civ. Proc. §§ 435-437] for Damages for Breach of Contract [Civ. Code § 3300]--Tort Damages for Breach of Implied Covenant of Good Faith and Fair Dealing Not Recoverable Outside Insurance Context

[*Caption. See § 65.60.*]

THE COURT SHOULD STRIKE THE CLAIM FOR TORT DAMAGES FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING BECAUSE THOSE DAMAGES ARE NOT RECOVERABLE OUTSIDE THE INSURANCE CONTEXT.

A. Motion to Strike. [*See § 65.60, Paragraph A.*]

B. Tort Damages for Breach of Implied Covenant of Good Faith and Fair Dealing Not Recoverable Outside Insurance Context. Breach of the implied covenant of good faith and fair dealing may give rise to a cause of action in tort only in the insurance context, absent an independent duty arising from principles of tort law. The bad faith denial of the existence of, or liability under, a breached contract does not in itself give rise to a cause of action for tort damages (*Freeman & Mills v. Belcher Oil Co. (1995) 11 Cal. 4th 85, 102-103, 44 Cal. Rptr. 2d 420, 900 P.2d 669* ; *see Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 683-693, 254 Cal. Rptr. 211, 765 P.2d 373*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion to strike the part of a complaint for tort damages for breach of the implied covenant of good faith and fair dealing. For further discussion of the use of a motion to strike when plaintiff seeks damages which he or she may not obtain in a breach of contract action, see *§ 65.60[2]*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, these points and authorities may be used to support a motion for new trial on the ground of excessive damages or a motion to vacate judgment and enter a new judgment.

[3] Discussion of Authorities

[a] Tort Damages for Breach of Implied Covenant of Good Faith and Fair Dealing Not Recoverable Outside Insurance Context

Freeman & Mills v. Belcher Oil Co. *(1995) 11 Cal. 4th 85, 44 Cal. Rptr. 2d 420, 900 P.2d 669* , involved an action seeking tort and contract damages arising from defendant's failure to pay for plaintiff's accounting services rendered to a law firm acting on plaintiff's behalf. Defendant oil company had retained a law firm with the understanding that defendant was to pay for costs the law firm incurred on defendant's behalf, including accountants' fees. Defendant eventually terminated the law firm, and plaintiffs billed the firm for its services and costs. When the law firm did not pay the bill, plaintiff sought payment from defendant. Defendant did not pay, and plaintiff sued defendant, alleging breach of contract, bad faith denial of contract, and quantum meruit. The jury entered a special verdict in favor of plaintiff, finding that defendant had breached the contract and acted in bad faith, and awarded compensatory and punitive damages. The trial court granted plaintiff's post-trial motions to correct the jury's verdict and to reflect different amounts for compensatory and punitive damages, as well as to award attorney's fees as sanctions and prejudgment interest. Defendant appealed from the corrected judgment, and plaintiff appealed from a mid-trial order denying its motion to amend the complaint to add a cause of action for fraud. However, the court of appeal, finding no "special relationship" sufficient to justify a tort recovery under *Seaman's Direct Buying Service, Inc. v. Standard Oil Co. (1984) 36 Cal. 3d 752, 206 Cal. Rptr. 354, 686 P.2d 1158* , reversed the judgment and remanded the case to the trial court for a retrial limited to the issue of damages under the breach of contract cause of action.

The California Supreme Court affirmed the judgment of the court of appeal (*11 Cal. 4th 85, 103)* . The Supreme Court explained that developments occurring subsequent to the *Seaman's* decision, in which the Court had recognized the tort of "bad faith denial of contract," had convinced the Court that *Seaman's* was incorrectly decided and should be overruled (*11 Cal. 4th 85, 93)* . These developments included (1) subsequent California Supreme Court decisions indicating a continuing reluctance, originally reflected in *Seaman's* itself, to authorize tort recovery for noninsurance contract breaches [*see* *Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 683-693, 254 Cal. Rptr. 211, 765 P.2d 373* , discussed *below* *Hunter v. Up-Right, Inc. (1993) 6 Cal. 4th 1174, 1180-1182* , discussed in Ch. 105, *Fraud and Deceit* ; *Applied Equipment Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 515-516, 28 Cal. Rptr. 2d 475, 869 P.2d 454* , discussed in Ch. 46, *Conspiracy*] (*11 Cal. 4th 85, 93-95)* ; (2) subsequent decisions of the courts of appeal, reaching varying, and often inconsistent, conclusions in response to *Seaman's* [*see, e.g.,* *Quigley v. Pet, Inc. (1984) 162 Cal. App. 3d 877, 208 Cal. Rptr. 394* ; *Okun v. Morton (1988) 203 Cal. App. 3d 805, 250 Cal. Rptr. 220]* (*11 Cal. 4th 85, 95-97)* ; (3) compelling policy reasons recognized by many of the pertinent court of appeal decisions, focusing on the different objectives underlying the remedies for tort and contract breach (*11 Cal. 4th 85, 97-98)* ; (4) criticism by courts in other jurisdictions, observing generally that *Seaman's* ambiguous holding had caused widespread

confusion among lower courts, generated substantial litigation costs, and interfered with contractual relationships (*11 Cal. 4th 85, 98-100)* ; and (5) scholarly commentary critical of the *Seaman's* holding and its underlying analysis, observing generally that *Seaman's* decision has generated widespread confusion among judges and juries, excessive damage awards, and overcrowded court dockets (*11 Cal. 4th 85, 100-102)* .

For the reasons noted above, the Court concluded that the former rule enunciated in *Seaman's* --that a party to a contract may incur tort remedies when, in addition to breaching the contract, it seeks to shield itself from liability by denying, in bad faith and without probable cause, that the contract exists--is no longer viable (*11 Cal. 4th 85, 102-103)* . The applicable general rule now precludes tort recovery for noninsurance contract breach, at least in the absence of violation of an independent duty arising from principles of tort law, other than the bad faith denial of the existence of, or liability under, the breached contract (*11 Cal. 4th 85, 102)* .

The Court's opinion contained no statement regarding the effect of its decision on pending actions. Thus, it appears that the decision is fully retroactive and bars and pending claims based on the abrogated cause of action [*see Moradi-Shalal v. Fireman's Fund Ins. Companies (1988) 46 Cal. 3d 287, 305, 240 Cal. Rptr. 116, 758 P.2d 58* ; *Peterson v. Superior Court (1982) 31 Cal. 3d 147, 151-152, 181 Cal. Rptr. 784, 642 P.2d 1305]* .

In ***Foley v. Interactive Data Corp.*** *(1988) 47 Cal. 3d 654, 254 Cal. Rptr. 211, 765 P.2d 373* , the California Supreme Court affirmed the dismissal of an at-will employee's cause of action for tortious breach of the covenant of good faith and fair dealing. The Court held that the employer-employee relationship was *not* a special relationship, that is, was not sufficiently similar to that of insurer and insured to warrant judicial extension of the proposed additional tort remedies in view of countervailing concerns about economic policy and stability, the traditional separation of contract and tort law, and the numerous protections against improper terminations already afforded to employees (*47 Cal. 3d 654, 693)* . The Court criticized lower court opinions that extended tort remedies to wrongful termination actions without comprehensive consideration of the implications of doing so (*47 Cal. 3d 654, 688)* . For additional discussion of *Foley*, see Ch. 100, *Employer and Employee: Wrongful Termination and Discipline* . For discussion and forms relating to tort liability in an insurance contract setting, see Ch. 120, *Insurance* .

The Court did not address in *Foley* whether its holding was retroactive or prospective, but said it would deal with that matter in later cases when it had the benefit of briefs and argument on the subject (*47 Cal. 3d 654, 700 n.42*). In *Newman v. Emerson Radio Corp. (1989) 48 Cal. 3d 973, 993, 258 Cal. Rptr. 592, 772 P.2d 1059* , the Court determined that *Foley* applied retroactively to all cases not yet final on January 30, 1989.

[4] Additional Authorities

[a] Tort Damages for Breach of Implied Covenant of Good Faith and Fair Dealing Not Recoverable Outside Insurance Context

In *Cates Construction, Inc. v. Talbot Partners (1999) 21 Cal. 4th 28, 86 Cal. Rptr. 2d 855, 980 P.2d 407* , the contractor on a condominium project and its performance surety sued the developer and the developer's lender for breach of construction contract and to foreclose on a mechanic's lien. The developer and lender asserted cross-complaints, including one by the developer as obligee against the surety for bad faith. The trial court ruled against the contractor and surety on all of their claims. It also awarded compensatory damages to the developer and lender on their contract claims, and awarded punitive damages to the developer against the surety on the bad faith claim. The surety and contractor appealed. The court of appeal affirmed in part, modified in part, and remanded.

The Supreme Court granted review and held that, as a matter of law, a developer may not recover in tort for a surety's breach of the covenant of good faith and fair dealing implied in a performance bond. It thus reversed the judgment of the court of appeal to the extent it affirmed the underlying award of tort damages for breach of the implied covenant and permitted an award of punitive damages.

The court initially noted that because the covenant of good faith and fair dealing essentially is a contract term that aims to effectuate the contractual intentions of the parties, compensation for its breach has almost always been limited to contract rather than tort remedies. There is only one exception to that general rule: tort remedies are available for a breach of the covenant in cases involving insurance policies, for a variety of policy reasons. Significantly, the Supreme Court has never recognized the availability of tort remedies for breaches occurring in the context of a construction performance bond or any other so-called "contract of suretyship" (*21 Cal. 4th 28, 43-44)* . The question in this case waswhether the exceptional approach thus far reserved for breaches in the insurance policy setting should be extended to breaches in the context of a surety bond given to assure performance on a construction contract. The developer argued in essence that a performance bond is a form of insurance and that breaches in the performance bond context justify the same extraordinary remedies that are available in insurance policy cases. The surety argued that performance bonds are fundamentally different from insurance policies and fail to warrant similar treatment. The court first determined that the mere inclusion of surety arrangements in the Insurance Code was not determinative of the issue (*21 Cal. 4th 28, 47-52)* . It next found that tort recovery is considered appropriate in the insurance policy setting because those contracts are characterized by elements of adhesion and unequal bargaining power, public interest, and fiduciary responsibility, but that construction performance bonds are not marked by such elements (*21 Cal. 4th 28, 52-59)* . The court then reviewed authorities from other states but was unpersuaded by the decisions that allow tort recovery, as they failed to give appropriate consideration to the material differences between insurance policies and performance bonds and the differing relations between the parties thereto (*21 Cal. 4th 28, 59-60)* . Finally, considering that contract law exists to enforce legally binding agreements between parties and tort law is designed to vindicate social policy, the court held that tort recovery was not appropriate for a breach of the implied covenant of good faith and fair dealing in the context of a construction performance bond. Recovery for a surety's breach of the implied covenant of good faith and fair dealing is properly limited to those damages within the contemplation of the parties at the time the performance bond is given or at least reasonably foreseeable by them at that time (*21 Cal. 4th 28, 60-61)* .

In *Norager v. Nakamura (1996) 42 Cal. App. 4th 1817, 50 Cal. Rptr. 2d 481* , plaintiff moved on the last day of trial to amend his complaint to allege bad faith denial of the existence of a contract, relying on *Seaman's Direct Buying Service, Inc. v. Standard Oil Co. (1984) 36 Cal. 3d 752, 206 Cal. Rptr. 354, 686 P.2d 1158* . The court granted the motion and subsequently found in favor of plaintiff. The defendant appealed, contending that the trial court erred in allowing the amendment to the complaint. While the appeal was pending, the Supreme Court issued the decision in *Freeman & Mills, Inc. v. Belcher Oil Co. (1995) 11 Cal. 4th 85, 44 Cal. Rptr. 420, 900 P.2d 669* , overruling *Seaman's.* Finding neither any unfairness nor any public policy reason why *Freeman* should not be given retroactive effect, the court concluded that it should disapprove that portion of the judgment that was based on the bad faith denial of contract cause of action (*42 Cal. App. 4th 1817, 1821)* .

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6-65 California Points & Authorities § 65.63

§ 65.63 Supporting Motion to Strike Part of Complaint [Code Civ. Proc. §§ 435-437] for Damages for Breach of Contract [Civ. Code § 3300]--Tort Damages for Breach of Contract in Violation of Public Policy Not Recoverable Outside Employment Relationship

[1] FORM Supporting Motion to Strike Part of Complaint [Code Civ. Proc. §§ 435-437] for Damages for Breach of Contract [Civ. Code § 3300]--Tort Damages for Breach of Contract in Violation of Public Policy Not Recoverable Outside Employment Relationship

[*Caption. See § 65.60.*]

THE COURT SHOULD STRIKE THE CLAIM FOR TORT DAMAGES FOR BREACH OF A CONTRACT IN VIOLATION OF PUBLIC POLICY BECAUSE SUCH DAMAGES ARE NOT AVAILABLE OUTSIDE OF THE EMPLOYMENT RELATIONSHIP.

A. Motion to Strike. [*See § 65.60, Paragraph A.*]

B. Tort Damages for Breach of Commercial Contract in Violation of Public Policy Not Recoverable. There is no independent cause of action for breach of a commercial contract in violation of public policy; a cause of action for breach of contract in violation of public policy, for which tort damages may be recovered, can only lie in the context of an employment relationship (*Harris v. Atlantic Richfield Co. (1993) 14 Cal. App. 4th 70, 75-77, 82, 17 Cal. Rptr. 2d 649*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion to strike the part of a complaint seeking tort damages for breach of a commercial contract that is allegedly in violation of public policy. For further discussion of the use of a motion to strike when plaintiff seeks damages that he or she may not obtain in a breach of contract action, see § 65.50[3][a].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

With appropriate modifications, this memorandum may be used to support a motion for new trial on the ground of excessive damages or a motion to vacatejudgment or enter a new judgment.

[b] Related Form

This form asserts the specific argument that breach of a contract *in violation of public policy* will not support a tort recovery outside the employment context. In *Freeman & Mills v. Belcher Oil (1995) 11 Cal. 4th 85, 102-103, 44 Cal. Rptr. 2d 420, 900 P.2d 669* , the California Supreme Court held that *breach of the covenant of good faith and fair dealing* outside the insurance context will not give give rise to a tort cause of action, absent an independent duty arising from principles of tort law, and the Court further held that there was no tort liability for bad faith denial of the existence of, or liability under, the breached contract. While the *Harris* case cited as authority in this comment [*see Harris v. Atlantic Richfield Co. (1993) 14 Cal. App. 4th 70, 17 Cal. Rptr. 2d 649]* is consistent with *Freeman & Mills* in limiting tort recovery for breach of contract, and therefore remains good law, counsel should be aware that the holdings in *Freeman & Mills and Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 669, 254 Cal. Rptr. 211, 765 P.2d 373* , may also be relevant in the type of fact context in which this form might be used. For points and authorities based on *Freeman & Mills* and *Foley*, and discussion of these decisions, see *§ 65.62*.

[3] Discussion of Authorities

[a] Tort Damages for Breach of Commercial Contract in Violation of Public Policy Not Recoverable

Harris v. Atlantic Richfield Co. *(1993) 14 Cal. App. 4th 70, 17 Cal. Rptr. 2d 649* , involved a dispute between a minimart franchisor and a franchise operator. Plaintiff, the franchise operator, claimed that defendant franchisor mistreated him by failing to repair and refurbish his unit as promised, in retaliation for his failure to comply with defendant's pricing dictates and his report to authorities of an underground gasoline leak. Plaintiff filed a complaint against defendant setting forth, inter alia, a cause of action for tortious breach of written contract in violation of public policy. The jury awarded compensatory and punitive damages on this cause of action. Defendant moved for judgment notwithstanding the verdict, and the trial court granted the motion. Plaintiff appealed.

The court of appeal concluded that the trial court properly granted judgment notwithstanding the verdict on the tortious breach of contract claim (*14 Cal. App. 4th 70, 73, 82)* . The court stated that case law does not support the broad proposition that breach of a commercial contract in violation of public policy entitles the injured party to tort damages (*14 Cal. App. 4th 70, 77)* . *Under Tameny v. Atlantic Richfield Co. (1980) 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330* , and later cases, there is a "*Tameny*" cause of action, sounding in tort, for breach of an employment contract if the basis of the employee's discharge contravenes a fundamental public policy grounded in constitutional or statutory provisions (*14 Cal. App. 4th 70, 74-75)* . A *Tameny* cause of action, however, has not been recognized outside of the employment context (*14 Cal. App. 4th 70, 75)* . Under California law, tort liability has been imposed for essentially contract-based claims only if (1) the defendant's conduct constitutes a tort as well as a breach of the contract, (2) the parties to the contract have a "special relationship" characterized by elements of public interest, adhesion, and fiduciary responsibility, or (3) the breach is accompanied by bad-faith denial of the contract. (Note that *Freeman & Mills v.*

Belcher Oil (1995) 11 Cal. 4th 85, 102-103, 44 Cal. Rptr. 2d 420, 900 P.2d 669 , decided after *Harris* and discussed in *§ 65.62*, has since abrogated this third cause of action.) The court noted that plaintiff's claim for breach of commercial contract in violation of public policy fit within none of these situations (*14 Cal. App. 4th 70, 80)* .

The court considered the possibility of extending the breadth of the *Tameny* principle, but declined to do so. It remarked that compelling public policy reasons would militate against recognition of a new tort for breach of contract in violation of public policy (*14 Cal. App. 4th 70, 82)* . A broad extension of tort remedies to commercial contracts would create the potential of turning many breach of contract disputes into punitive damages claims, thus undermining commercial stability (*14 Cal. App. 4th 70, 81)* . Additionally, the California Supreme Court has cautioned against judicial activism when an extension of tort remedies is sought for a duty whose breach previously has been compensable by contract remedies (*14 Cal. App. 4th 70, 81-82)* . Lastly, when significant policy judgments affecting commercial relationships are implicated, the determination is best suited for legislative decision making; legislatures, in making such policy decisions, have the ability to gather empirical evidence, solicit the advice of experts, and hold hearings at which all interested parties may present evidence and express their views (*14 Cal. App. 4th 70, 82)* .

NOTE:

For additional discussion of limitations on the cause of action permitted in *Tameny*, in which an employee was terminated for refusal to violate a penal statute, see *Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 669, 254 Cal. Rptr. 211, 765 P.2d 373* , noted in § 65.62 and discussed in greater detail in Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*.

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[Reserved]

§§ 65.64[Reserved]

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6-65 California Points & Authorities § 65.80

§ 65.80 Opposing Motion to Strike Part of Complaint [Code Civ. Proc. §§ 435-437] for Damages for Breach of Contract [Civ. Code § 3300]--Punitive Damages Recoverable If Plaintiff Fraudulently Induced to Enter Contract

[1] FORM Opposing Motion to Strike Part of Complaint [Code Civ. Proc. §§ 435-437] for Damages for Breach of Contract [Civ. Code § 3300]--Punitive Damages Recoverable If Plaintiff Fraudulently Induced to Enter Contract

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORIT-
vs.	)	IES IN OPPOSITION TO MOTION TO STRIKE
_____ [*name*],	)	PART OF COMPLAINT REGARDING DAMAGES
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
		Trial Date: _____

_____

ALTHOUGH PUNITIVE DAMAGES ARE NOT RECOVERABLE IN AN ACTION FOR BREACH OF CONTRACT, THEY MAY BE AWARDED WHEN A DEFENDANT FRAUDULENTLY INDUCES PLAINTIFF TO ENTER INTO A CONTRACT [EVEN WHEN RESCISSION IS AWARDED].

A. Punitive Damages Recoverable Although Tort Involved Breach of Contract. If an action is in tort, punitive damages may be recovered on a proper showing of malice, fraud, or oppression, even though the tort incidentally involved a breach of contract (*Miller v. National American Life Ins. Co. (1976) 54 Cal. App. 3d 331, 336, 126 Cal. Rptr. 731*).

B. Punitive Damages as Recoverable by Party Fraudulently Induced to Enter Contract. Although punitive damages are not recoverable in an action for breach of contract no matter how willful, malicious, or fraudulent the breach, punitive damages may be awarded when a defendant fraudulently induces the plaintiff to enter into a contract (*Walker v. Signal Co., Inc. (1978) 84 Cal. App. 3d 982, 996, 149 Cal. Rptr. 119* ; *Glendale Fed. Sav. & Loan Assoc v. Marina View Heights Dev. Co. (1977) 66 Cal. App. 3d 101, 135 Cal. Rptr. 802*).

[*Optional*] **C. Punitive Damages Recoverable When Rescission Is Awarded.** Punitive damages may be awarded along with rescission to a party fraudulently induced to enter a contract (*In re Marriage of McNeill (1984) 160 Cal. App. 3d 548, 561, 206 Cal. Rptr. 641 , disapproved on another ground in In re Marriage of Fabian (1986) 41 Cal. 3d 440, 448-451, 224 Cal. Rptr. 333, 715 P.2d 253* ; *Millar v. James (1967) 254 Cal. App. 2d 530, 62 Cal. Rptr. 335*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion to strike part of a complaint for damages for breach of contract and fraud or fraud and rescission when defendant asserts that punitive damages may not be awarded because the action is based on breach of contract, but plaintiff alleged that he or she was fraudulently induced to enter the contract.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

In an appropriate case these points and authorities may be used in opposition to a motion to strike part of a complaint supported by the points and authorities *set out in § 65.60*.

[b] Related Uses

With appropriate modifications these points and authorities may be used to oppose a demurrer or motion for judgment on the pleadings.

[3] Discussion of Authorities

[a] Punitive Damages Recoverable Although Tort Involved Breach of Contract

In *Miller v. National American Life Ins. Co. (1976) 54 Cal. App. 3d 331, 126 Cal. Rptr. 731* , plaintiff brought suit against defendant for breach of a contract of disability insurance and fraud in inducing plaintiff to enter the contract. After a jury trial, judgment was entered for plaintiff for both general and punitive damages. The court denied defendant's motion for judgment notwithstanding the verdict but conditionally granted its motion for new trial on the issue of punitive damages unless plaintiff would remit part of the punitive damage award. Plaintiff filed the remittitur. However, defendant appealed from the judgment and the orderdenying the motion for judgment notwithstanding the verdict limiting its appeal to the issues of fraud and punitive damages. Affirming, the court of appeal stated that punitive damages are not available in an action based solely on breach of a contractual obligation even where the breach is intentional, willful, or in bad faith. However, if the action is also in tort, exemplary damages may be recovered on a

proper showing of malice, fraud, or oppression even though the tort incidentally involves a breach of contract. The court held that plaintiff's claim of fraud, although incident to the contract, was in tort, and supported a punitive damage award on proper proof. The court noted that the trial court had correctly instructed that, in order to award punitive damages, the jury first would have to find for plaintiff on the fraud cause of action and that a finding for plaintiff on the breach of contract cause alone would only support compensatory damages.

[b] Punitive Damages as Recoverable by Party Fraudulently Induced to Enter Contract

Walker v. Signal Co., Inc. (1978) 84 Cal. App. 3d 982, 149 Cal. Rptr. 119 , was an action by plaintiffs against defendants for breach of a construction contract and fraud. After a jury trial, a judgment was entered for plaintiffs which included judgment against two of the defendants for punitive damages. Plaintiffs had entered into a contract with the defendants against whom the punitive damages judgment was rendered to buy a residential home and had obtained a specific date in the contract for completion of the home in order to avoid the capital gains tax from the sale of their previous residence. Plaintiffs signed a second contract approximately one month after signing the first one under which they agreed to pay a certain sum for the construction of the house previously described in the real estate purchase agreement. A month later they received a letter from the vice president of one of the defendants guaranteeing completion of the house three months after the original date stated. Later one of the defendants' superintendent of construction stated that the project would be given priority but inexplicable delays in actual construction occurred. The home was finally completed almost five months after the last day for the beneficial income tax consequence. On appeal, defendants contended that plaintiffs were not entitled to punitive damages because their action was for breach of contract and not for fraud. Affirming the judgment for punitive damages, the court of appeal stated that punitive damages are not recoverable in an action for breach of contract no matter how willful, malicious, or fraudulent the breach but they may be awarded where a defendant fraudulently induces the plaintiff to enter the contract. Since the jury and trial judge found that the conduct of defendants fraudulently induced the contractual relationship, the award of punitive damages was proper.

Glendale Fed. Sav. & Loan Assoc v. Marina View Heights Dev. Co. (1977) 66 Cal. App. 3d 101, 135 Cal. Rptr. 802 , involved a dispute between a lending institution and a corportate land developer and its principals over their respective rights and obligations under certain loan and guarantee agreements. The developers defaulted and the lending institution commenced nonjudicial foreclosure proceedings. The loan agreement provided that plaintiff would advance to the developer funds for the purpose of completing some offsite improvements on a parcel of land and that the developer would complete the improvement and development of the property within a certain number of months. Based on the agreement terms and extrinsic evidence, the trial court found that, at the time the agreement was executed, the developer and its principals intended to use certain sums for purposes other than the one provided for in the written agreement and that these parties fraudulently and in bad faith diverted a portion of plaintiff's loan proceeds earmarked for use on the property to other uses and purposes. The trial court concluded that the promise to use the loan proceeds to improve the property with no intention of doing so constituted promissory fraud and entered judgment for plaintiff against the principals for damages including an amount for exemplary damages. Affirming, the court of appeal held that the principals committed a fraud on plaintiff in inducing it to make the loan based on a false promise as to the use of the loan funds. The court noted that, although punitive damages may not ordinarily be awarded for breach of contract, whether the breach is intentional, willful, or in bad faith, those damages may be awarded where the defendant fraudulently induces the plaintiff to enter a contract. Consequently, plaintiff could recover punitive damages.

[c] Punitive Damages Recoverable When Rescission Is Awarded

In re Marriage of McNeill *(1984) 160 Cal. App. 3d 548, 206 Cal. Rptr. 641* , was a dissolution action consolidated with husband's action for fraud, for cancellation of a marital settlement agreement and a deed, and to quiet title. Wife lied to husband, telling him she was an attorney, had a master's degree in accounting, and had cancer. Husband moved out of the family residence at wife's urging and because he believed she needed complete rest and quiet as she was undergoing chemotherapy. Telling husband she had 90 days to live, wife induced him to sign papers he believed were

documents transferring their property to a trust. What he in fact signed were a property settlement agreement and a deed to her of his interest in the community property residence. Upon discovering the truth one year later, he brought the action to set aside the agreement and deed and for fraud. The trial court awarded husband rescission of marital settlement agreement and the deed, consequential damages based on fraud of $10,000 for loss of use of the property, and $32,000 as exemplary damages. Relying on *Millar v. James (1967) 254 Cal. App. 2d 530, 62 Cal. Rptr. 335* (discussed *below*), the court of appeal upheld the award of punitive damages (*160 Cal. App. 3d 548, 561)* . Counsel should note that *In re Marriage of McNeill (1984) 160 Cal. App. 3d 548, 206 Cal. Rptr. 641* , was disapproved on another ground in *In re Marriage of Fabian (1986) 41 Cal. 3d 440, 448-451, 224 Cal. Rptr. 333, 715 P.2d 253* .

In ***Millar v. James*** *(1967) 254 Cal. App. 2d 530, 62 Cal. Rptr. 335* , plaintiff had been tricked into signing a subordination agreement subordinating the purchase money trust deed, of which she was beneficiary, to a first trust deed securing a loan from two defendants to another defendant. The case was tried by the court sitting without a jury. She was awarded cancellation of the deed to James and quieting of her title against the trust deed on payment of certain sums, but the trial court did not award punitive damages. The court of appeal reversed and remanded to require findings on the issue of exemplary damages, saying that *Civ. Code § 1692* authorized full relief in cases of rescission and that included exemplary damages when appropriate (*254 Cal. App. 2d 530, 533)* .

[4] Additional Authorities

[a] Punitive Damages Recoverable When Rescission Is Awarded

In *Douglas v. Ostermeier (1991) 1 Cal. App. 4th 729, 2 Cal. Rptr. 2d 594* , the court of appeal affirmed a judgment awarding plaintiff rescission of a $24,000 contract, $10,000 compensatory damages for fraud, and $187,000 in punitive damages. Plaintiffs purchased a car from defendant for $24,354. They believed the car was an 1978 450 SLC Mercedes, but in fact it was a composite of a 1978 Mercedes that had been in an accident and the frame of a 1973 Mercedes that had been gutted by fire. The primary issue on appeal was the amount of punitive damages. The court said that while rescission and restitution are equitable remedies and generally not considered part of an award of compensatory damages, equitable remedies are properly considered in assessing entitlement to and the proper amount of punitive damages (*1 Cal. App. 4th 729, 750 n.3*). Plaintiffs had to return the car, which was worth half of the amount that they had paid for it, so some portion of the money they received back through rescission represented a net monetary award to them (*1 Cal. App. 4th 729, 750)* .

California Points & Authorities

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Volume 6 Chapters 60-69 COSTS---to---DECLARATORY RELIEF
CHAPTER 65 DAMAGES: CONTRACT
PART II. FORMS
D. Opposing Motion to Strike

6-65 California Points & Authorities § 65.81

§ 65.81 Opposing Motion to Strike Part of Complaint [Code Civ. Proc. §§ 435-437] for Damages for Breach of Contract [Civ. Code § 3300]--Punitive Damages Recoverable if Insurance Company Breaches Implied Covenant of Good Faith and Fair Dealing

[1] FORM Opposing Motion to Strike Part of Complaint [Code Civ. Proc. §§ 435-437] for Damages for Breach of Contract [Civ. Code § 3300]--Punitive Damages Recoverable if Insurance Company Breaches Implied Covenant of Good Faith and Fair Dealing

[*Caption. See § 65.80.*]

PLAINTIFF MAY RECOVER PUNITIVE DAMAGES IN AN ACTION AGAINST AN INSURANCE COMPANY WHEN THE SUIT IS BASED ON THE TORTIOUS BREACH BY THE INSURER OF THE IMPLIED OBLIGATION TO DEAL FAIRLY AND IN GOOD FAITH WITH ITS INSURED, IF THE INSURANCE COMPANY ACTED OPPRESSIVELY, FRAUDULENTLY, OR MALICIOUSLY.

A. Punitive Damages Recoverable Although Tort Involved Breach of Contract. [*See § 65.80, Paragraph A.*]

B. Punitive Damages Recoverable for Tortious Breach of Insurance Obligation. Punitive damages may properly be awarded in an action against an insurer for breach of its covenant of good faith and fair dealing when the conditions of *Section 3294 of the Civil Code* are met, that is, when it is proven by clear and convincing evidence that the insurer has been guilty of oppression, fraud, or malice (*Civ. Code § 3294(a)*; *see Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 819-820, 157 Cal. Rptr. 482, 598 P.2d 452* ; *Neal v. Farmers Ins. Exchange (1978) 21 Cal. 3d 910, 922-923, 148 Cal. Rptr. 389, 582 P.2d 980*).

[*EITHER*]

C. Oppression Defined. As used in *Section 3294(a) of the Civil Code*, "oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights (*Civ. Code § 3294(c)(2)*).

[*AND/OR*]

C. Fraud Defined. As used in *Section 3294(a) of the Civil Code*, "fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury (*Civ. Code § 3294(c)(3)*).

[*AND/OR*]

C. Malice Defined. As used in *Section 3294(a) of the Civil Code*, "malice" means despicable conduct that is intended by the defendant to cause injury to theplaintiff or conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others (*Civ. Code § 3294(c)(1)*).

D. Purpose of Punitive Damages Award. The principal purpose of *Section 3294 of the Civil Code*, with respect to insurers, is to deter acts deemed socially unacceptable and, consequently, to discourage the perpetuation of objectionable corporate policies (Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 820, 157 Cal. Rptr. 482, 598 P.2d 452).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion to strike part of a complaint for damages for breach of an insurance contract if the defendant asserted that punitive damages are not recoverable because the action is based on contract but the suit is actually based on the tortious breach by the insurer of its implied obligation to deal fairly and in good faith with its insured and the insurer acted oppressively, fraudulently, or maliciously. The breach of the obligation of good faith and fair dealing is not enough in itself to allow recovery of punitive damages. Plaintiff must comply with *Civ. Code § 3294* (allowing recovery of punitive damages) by showing that defendant also was guilty of oppression, fraud, or malice [*Neal v. Farmers Ins. Exchange (1978) 21 Cal. 3d 910, 922, 148 Cal. Rptr. 389, 582 P.2d 980* ; *Silberg v. California Life Ins. Co. (1974) 11 Cal. 3d 452, 462, 113 Cal. Rptr. 711, 521 P.2d 1103]* .

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, these points and authorities may be used in opposition to a motion to strike part of a complaint supported by the points and authorities *set out in § 65.60*.

[b] Related Uses

With appropriate modifications, these points and authorities may be used to oppose a demurrer or motion for judgment on the pleadings.

[c] Measure of Assessing Punitive Damages Against Insurer

In assessing the amount of punitive damages to be awarded against an insurer, the following factors are considered [*Neal v. Farmers Ins. Exchange (1978) 21 Cal. 3d 910, 928, 148 Cal. Rptr. 389, 582 P.2d 980]* :

(1) The particular nature of defendant's acts (different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal);

(2) The amount of compensatory damages awarded (in general, even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered from it is small); and

(3) The defendant's wealth (the function of deterrence will not be served if the wealth of the defendant allows him or her to absorb the award with little or no discomfort; by the same token, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter).

[3] Discussion of Authorities

[a] Punitive Damages Recoverable for Tortious Breach of Insurance Obligation

Counsel should note that *Civ. Code § 3294* was substantially amended in 1987. In actions in which the initial trial had not commenced before January 1, 1988, an insurer's malice, fraud, or oppression must be proven by "clear and convincing" evidence before punitive damages may be awarded [*see Civ. Code § 3294(a), (e)*]. This evidentiary standard was not applicable when the cases cited above were decided. Nevertheless, these cases (and the cases cited in § 65.81[4][a]) may be cited for the general proposition that punitive damages may be recoverable under *Civ. Code § 3294* for the tortious breach of an insurance obligation by an insurer.

Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 157 Cal. Rptr. 482, 598 P.2d 452 , was an action against an insurance company and others for compensatory and punitive damages arising out of a breach of the covenant of good faith and fair dealing implied in a health and disability insurance policy. The trial court directed a verdict against defendants, ruling, as a matter of law, that defendants' failure to have had plaintiff examined by a doctor of their choice or to have consulted with the physician and surgeon who were treating plaintiff violated the covenant of good faith and fair dealing. The trial court submitted to the jury the issues of causation and compensatory and punitive damages. The jury returned verdicts against all defendants, assessing compensatory and punitive damages against each in specified amounts. It assessed general damages of $45,600, damages for emotional distress of $78,000, and punitive damages of $5million against the insurance company. Defendants appealed.

The Supreme Court affirmed the judgment insofar as it awarded compensatory damages against the insurance company, but reversed the judgment in all other respects. The punitive damages award against the insurance company was reversed solely on the ground that the amount awarded was excessive as a matter of law (*24 Cal. 3d 809, 824)* . The Court nevertheless upheld the propriety of a punitive damages award. After a "brief analysis" of the record, the Court was "convinced" that substantial evidence supported the jury's decision to assess punitive damages and that the record as a whole contained substantial evidence from which the jury might reasonably find that defendant had acted maliciously, with an intent to oppress, and in conscious disregard of the rights of the insured (*24 Cal. 3d 809, 821-822)* .

Neal v. Farmers Ins. Exchange *(1978) 21 Cal. 3d 910, 148 Cal. Rptr. 389, 582 P.2d 980* , was an action by an insured for compensatory and punitive damages against an insurer for bad-faith failure to pay uninsured motorist

benefits under an automobile insurance policy in which plaintiff was the named insured. Plaintiff was seriously injured in an intersection accident when the car in which she was riding and which was being driven by her husband was, while making a left turn, hit broadside by an uninsured motorist. Plaintiff's policy included a medical payment provision with a $5,000 limit and an uninsured motorist provision with a $15,000 limit. Some three months after the accident, defendant paid $5,000 pursuant to the medical payment coverage but declined to pay the policy limit of $15,000 under the uninsured motorist coverage. Its position was that the uninsured motorist coverage was to be decreased by the amount paid under the medical coverage. Almost three years after the accident, an arbitrator rendered a decision in plaintiff's favor on the issue of liability and reserved his decision on the question of offset. At the request of plaintiff's attorney, defendant then paid the first $10,000 under the uninsured motorist provision and six months later, when the arbitrator issued his decision on the question of offset in favor of plaintiff, it paid the final $5,000. Plaintiff then sued the insurer for damages for its prior bad faith in failing to pay the benefits. Plaintiff died from cancer during the pendency of the action and her husband, as administrator of her estate, was substituted as plaintiff. At trial, plaintiff proved compensatory damages of about $10,000 and that the insurer had gross assets of some $765 million, net assets of approximately $211 million, and a net income of nearly $45 million. The jury returned an undifferentiated verdict in plaintiff's favor for $1,548,211.35. The insurer's motion for new trial was denied on plaintiff's agreeing to remit all but $749011.48, and judgment was entered accordingly. Defendant appealed from the judgment, and plaintiff filed a cross appeal.

The Supreme Court affirmed. Citing *Civ. Code § 3294*, the Court held that an award of punitive damages is justified where a defendant has been guilty of oppression, fraud, or malice, that is, where the defendant had acted with the intent to vex, injure, or annoy, or with a conscious disregard of the plaintiff's rights (*21 Cal. 3d 910, 922)* . The Court was satisfied, after an examination of the whole record in a light most favorable to the judgment, that the award of punitive damages was proper. There was substantial evidence before the jury from which it might reasonably have concluded that defendant acted maliciously, with an intent to oppress, and in conscious disregard of the rights of its insured. That evidence, in brief, indicated that defendant's actions in the matter were all part of a conscious course of conduct, firmly grounded in established company policy, designed to utilize the lamentable circumstances in which the insured and her family found themselves, and the exigent financial situation resulting from it, as a lever to force a settlement more favorable to the company than the facts would otherwise have warranted (*21 Cal. 3d 910, 922-923)* . The Court concluded that the record clearly supported an award of punitive damages against defendant insurer (*21 Cal. 3d 910, 923)* .

The Court noted that while the record contained no direct evidence that, in pursuing the course of conduct that it did, the insurer acted with the indicated motivation and intent, the requisite state of mind, often referred to as "malice in fact," may be proved either expressly (by direct evidence probative on the existence of hatred or ill will) or by implication (by indirect evidence from which the jury may draw inferences (*21 Cal. 3d 910, 923 n.6*).

[b] Purpose of Punitive Damages Award

The factual background of **Egan v. Mutual of Omaha Ins. Co.** (1979) 24 Cal. 3d 809, 157 Cal. Rptr. 482, 598 P.2d 452 , is *discussed under § 65.81[3][a]*. In affirming the judgment against the insurer for compensatory damages and reversing it as to the punitive damages solely on the ground that the amount of the award ($5 million) was excessive, the Supreme Court said that in the present context, the principal purpose of *Civil Code § 3294* is to deter acts deemed socially unacceptable and, consequently, to discourage the perpetuation of objectionable corporate policies and that the special relationship between the insurer and the insured illustrates the public policy considerations that may support exemplary damages in cases such as this (*24 Cal. 3d 809, 820)* .

Quoting from Goodman and Seaton, *Foreword: Ripe for Decision, Internal Workings and Current Concerns of the California Supreme Court, 62 Cal. L. Rev. 309, 346*-347 (1974), the Court said that the insurers' obligations are rooted in their status as purveyors of a vital service labeled quasi-public in nature; that suppliers of services affected with a public interest must take the public's interest seriously, where necessary placing it before their interest in maximizing

gains and limiting disbursements; that as a supplier of a public service rather than a manufactured product, the obligations of insurers go beyond meeting reasonable expectations of coverage; that the obligations of good faith and fair dealingencompass qualities of decency and humanity inherent in the responsibilities of a fiduciary; that insurers hold themselves out as fiduciaries; and that with the public's trust must go private responsibility consonant with that trust (*24 Cal. 3d 809, 820)* . The Court added that, furthermore, the relationship of insurer and insured is inherently unbalanced, that the adhesive nature of insurance contracts places the insurer in a superior bargaining position, and that the availability of punitive damages is thus compatible with recognition of insurers' underlying public obligations and reflects an attempt to restore balance in the contractual relationship (*24 Cal. 3d 809, 820)* .

[4] Additional Authorities

[a] Punitive Damages Recoverable for Tortious Breach of Insurance Obligation

In *Pistorius v. Prudential Insurance Co. (1981) 123 Cal. App. 3d 541, 176 Cal. Rptr. 660* , the court of appeal upheld a $1 million punitive damage award against an insurer in an action for breach of the implied covenant of good faith and fair dealing based on insurer's unreasonable withholding of disability insurance benefits. The court stated that it was convinced from the whole record, and in particular from the facts that it had summarized in its opinion (*123 Cal. App. 3d 541, 544-550)* , that defendant insurer acted at the very least with a conscious disregard of plaintiff's rights (*123 Cal. App. 3d 541, 553)* . The court also held that the amount of the award was not excessive as a matter of law, noting that defendant's net income after taxes and dividends was $270 million, its gross assets were in excess of $50 billion, and its net worth was $2 billion (*123 Cal. App. 3d 541, 554-555)* .

Miller v. Elite Ins. Co. (1980) 100 Cal. App. 3d 739, 161 Cal. Rptr. 322 , was an appeal from a directed verdict in favor of plaintiff for compensatory damages and from a jury award of $150,000 in punitive damages arising from a breach of the insurer's implied covenant of good faith and fair dealing. The court of appeal affirmed both the compensatory and the punitive damages award. Regarding the latter, the court held that because the insurer never informed the insured of the settlement offer within policy limits, never allowed the insured to contribute toward a possible settlement, and knowingly exposed the insured to damages of $11,000 when his claim could have been compromised for half that amount, the award was proper (*100 Cal. App. 3d 739, 758)* .

Richardson v. Employers Liab. Assur. Corp. (1972) 25 Cal. App. 3d 232, 102 Cal. Rptr. 547 , disapproved on other grounds by *Gruenberg v. Aetna Ins. Co. (1973) 9 Cal. 3d 566, 108 Cal. Rptr. 480, 510 P.2d 1032* , was an action involving defendant's failure to settle promptly and in good faith plaintiffs' claims arising from an automobile accident with an uninsured motorist. Judgment was entered for plaintiffs after trial by jury. Reversing on the ground of attorney misconduct, the court of appeal discussed defendant's contention that punitive damages were not authorized. The court noted that there is an implied covenant of good faith and fair dealing in every insurance policy which requires an insurer to deal fairly and in good faith with an insured in handling the insured's claim against it. Defendant deliberately, willfully, and in bad faith withheld payment of the plaintiffs' claim months after it knew the claim to be valid, forced an arbitration hearing on the claim against which it knew it had no defense, and, even after the arbitration award was made, instructed its local office to try to make the best possible settlement and forced plaintiffs to resort to litigation to have the award judicially confirmed. According to the court this conduct was unconscionable and constituted a tortious breach of contract. Consequently, defendant's contention that the action was for damages for breach of contract, making punitive damages nonrecoverable, was incorrect. The fact that the conduct constituting the tort also involved a breach of a covenant implied by law in the insurance policy did not prevent the recovery of punitive damages under *Civil Code § 3294* by the insured. The court held that defendant's further argument that the punitive damages award was not justified because there was no evidence of fraud, malice, or oppression was also without merit since plaintiff established malice and oppression on the part of the insurance company because they showed a motive and willingnss by the home office of defendant to vex and annoy plaintiffs and because defendant subjected plaintiffs to cruel and unjust hardship in conscious disregard of their rights.

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6-65 California Points & Authorities § 65.82

§ 65.82 Opposing Motion to Strike Part of Complaint [Code Civ. Proc. §§ 435-437] for Damages for Breach of Contract [Civil Code. § 3300]--Tort Damages Available if Breach of Implied Covenant of Good Faith and Fair Dealing Occurs in Contract Between Parties With Special Relationship

[1] FORM Opposing Motion to Strike Part of Complaint [Code Civ. Proc. §§ 435-437] for Damages for Breach of Contract [Civil Code. § 3300]--Tort Damages Available if Breach of Implied Covenant of Good Faith and Fair Dealing Occurs in Contract Between Parties With Special Relationship

[*Caption. See § 65.80.*]

PLAINTIFF MAY RECOVER TORT DAMAGES FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING BECAUSE THE CONTRACTING PARTIES HAVE A SPECIAL RELATIONSHIP.

A. Punitive Damages Recoverable Although Tort Involved Breach of Contract. [*See § 65.80, Paragraph A*].

B. Remedy in Tort Available for Breach of Implied Covenant of Good Faith and Fair Dealing When Parties Have Special Relationship. The tort of breach of the covenant of good faith and faith dealing is not limited to insurance contract cases, but is applicable to cases involving a special relationship between the parties characterized by elements of public interest, adhesion, and fiduciary responsibility (*see Wallis v. Superior Court (1984) 160 Cal. App. 3d 1109, 1116-1117, 207 Cal. Rptr. 123* (retirement contract between employer and employee)).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

CAUTION:
The authorities cited in this form appear to have limited validity, as *discussed under § 65.82[2][a]*.

[a] Use of Form

These points and authorities may be used in opposition to a motion to strike part of a complaint for damages for breach of contract when defendant asserted that tortious damages are not recoverable because the action is based on contract. The ground for opposition is that breach of the implied covenant of good faith and fair dealing gives rise to an action in tort.

The decisional authority cited in this form is of questionable validity in light of the Supreme Court's decision in *Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 254 Cal. Rptr. 211, 765 P.2d 373* . [*see also* *Newman v. Emerson Radio Corp. (1989) 48 Cal. 3d 973, 993, 258 Cal. Rptr. 592, 772 P.2d 1059* (holding that decision in *Foley* applies to all cases not yet final on January 30, 1989)]. In *Foley,* the Court held that the employer-employee relationship was not sufficiently similar to that of insurer and insured to warrant judicial extension of the proposed additional tort remedies, in view of countervailing concerns about economic policy and stability, the traditional separation of contract and tort law, and the numerous protections against improper terminations already afforded employees. the Court in *Foley* criticized lower-court opinions that extended tort remedies without comprehensive consideration of the implications of doing so [*Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 693, 698, 254 Cal. Rptr. 211, 765 P.2d 373* ; for further discussion of the *Foley* decision with regard to the employer-employee relationship, *see* Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*].

Consequently, it appears that tort liability for breach of the implied covenant of good faith and fair dealing may well be limited to cases involving insurance contracts [for further discussion and forms relating to tort liability in an insurance contract setting, *see* Ch. 120, *Insurance* , in this set]. The *Wallis* criteria appear still to be valid [*see* *Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 691 n.29, 254 Cal. Rptr. 211, 765 P.2d 373]* , Thus, the authority cited in this form may be used in support of an argument that tort damages should be extended in a contractual setting involving a special relationship other than that of employer-employee.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, these points and authorities may be used in opposition to a motion to strike part of a complaint supported by the points and authorities *set out in §§ 65.60* and *65.62*.

[b] Related Uses

With appropriate modifications, these points and authorities may be used to oppose a demurrer or motion for judgment on the pleadings.

[3] Discussion of Authorities

[a] Remedy in Tort Available for Breach of Implied Covenant of Good Faith and Fair Dealing When Parties Have Special Relationship

In ***Wallis v. Superior Court*** ***(1984)*** *160 Cal. App. 3d 1109, 207 Cal. Rptr. 123* ,plaintiff was a 55-year-old man who had worked for defendant furniture manufacturer for 32 years. Plaintiff was laid off due to defendant's closing one of its plants. Before plaintiff was discharged, the parties entered a contract whereby defendant would pay plaintiff money each month until he was 65 and eligible for his accrued pension benefits and plaintiff would not compete with defendant. Prior to plaintiff's reaching age 65, defendant stopped the payments, claiming that it was under no legal obligation to pay plaintiff. An unskilled laborer dependent on the money for his survival, plaintiff filed a complaint

against defendant on four causes of action, among them bad-faith breach of the implied covenant of good faith and fair dealing. The trial court granted plaintiff partial summary judgment on the breach of contract action, and sustained defendant's demurrer to the bad-faith breach action without leave to amend. Plaintiff petitioned for a writ of mandate to compel the trial court to vacate its order sustaining the demurrer.

The court of appeal issued a peremptory writ of mandate directing the trial court to vacate its order sustaining the demurrer. The court cited *Seaman's Direct Buying Service, Inc. v. Standard Oil Co. (1984) 36 Cal. 3d 752, 206 Cal. Rptr. 354, 686 P.2d 1158* (discussed in *§ 65.62[3][a]*), as authority for the extension of the tort of bad-faith breach to contracts other than insurance. It suggested that the extension should be to cases involving relationships with similar characteristics to those found in insurance contracts (*160 Cal. App. 3d 1109, 1116)* . The court analyzed the special characteristics of insurance contracts at length, noting that other contracts possess similar characteristics. The court found that for purposes of serving as a predicate to tort liability the following similar characteristics must be present in a contract: (1) the contract must be such that the parties are in inherently unequal bargaining positions; (2) the motivation for entering the contract must be a nonprofit motivation, e.g., to secure peace of mind, security, future protection; (3) ordinary contract damages are not adequate because (a) they do not require the party in the superior position to account for its actions, and (b) they do not make the inferior party whole; (4) one party is especially vulnerable because of the type of harm it may suffer and of necessity places trust in the other party to perform; and (5) the other party is aware of this vulnerability. Once these criteria are met the party in the stronger position has a heightened duty not to act unreasonably in breaching the contract, and to consider the interest of the other party as tantamount to its own. The precise nature and extent of the duty imposed by the implied covenant of good faith and fair dealing will depend on the contractual purposes and must be defined in light of the parties' justified expectations (*160 Cal. App. 3d 1109, 1118-1119)* .

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6-65 California Points & Authorities § 65.83

§ 65.83 Opposing Motion to Strike Part of Complaint [Code Civ. Proc. §§ 435-437] for Damages for Breach of Contract [Civ. Code § 3300]--Damages for Physical Injury Recoverable Where Contract Relates to Comfort, Happiness, or Personal Welfare

[1] FORM Opposing Motion to Strike Part of Complaint [Code Civ. Proc. §§ 435-437] for Damages for Breach of Contract [Civ. Code § 3300]--Damages for Physical Injury Recoverable Where Contract Relates to Comfort, Happiness, or Personal Welfare

[*Caption. See § 65.80.*]

PLAINTIFF MAY RECOVER DAMAGES FOR PHYSICAL INJURY IN AN ACTION FOR BREACH OF CONTRACT WHEN THE TERMS OF THE CONTRACT RELATE TO MATTERS WHICH CONCERN DIRECTLY THE COMFORT, HAPPINESS, OR PERSONAL WELFARE OF ONE OF THE PARTIES OR WHEN THE SUBJECT MATTER OF THE CONTRACT DIRECTLY AFFECTS OR MOVES THE AFFECTION, SELF-ESTEEM, OR TENDER FEELINGS OF A PARTY.

A. Damages for Physical Injury Are Recoverable Where Contract Relates to Comfort, Happiness, or Personal Welfare. Whenever the terms of a contract relate to matters which concern directly the comfort, happiness, or personal welfare of one of the parties, or the subject matter of the contract is such as directly affects or moves the affection, self-esteem, or tender feelings of that party, he or she may recover damages for physical suffering or illness proximately caused by its breach (*Chelini v. Nieri (1948) 32 Cal. 2d 480, 482, 196 P.2d 915* ; *Westervelt v. McCullough (1924) 68 Cal. App. 198, 208-209, 228 P. 734*).

[*Optional*] **B. Insurance Contract Involves Party's Comfort.** A liability insurance policy is a contract the terms of which relate to matters which concern directly the comfort, happiness, or personal welfare of one of the parties (*State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co. (1970) 9 Cal. App. 3d 508, 527-528, 88 Cal. Rptr. 246*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]

By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion to strike part of a complaint for damages for breach of contract when the defendant claims that damages for physical illness are not recoverable since the action is forbreach of contract, but when the contract related to matters directly concerning the comfort, happiness, or personal welfare of the plaintiff or the subject matter of the contract directly affected or moved plaintiff's affection, self-esteem, or tender feelings.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, these points and authorities may be used in opposition to a motion to strike part of a complaint supported by the points and authorities *set out in § 65.61*.

[b] Related Uses

With appropriate modifications, these points and authorities may be used to oppose a demurrer or motion for judgment on the pleadings.

[3] Discussion of Authorities

[a] Damages for Physical Injury Are Recoverable Where Contract Relates to Comfort, Happiness, or Personal Welfare

Chelini v. Nieri *(1948) 32 Cal. 2d 480, 196 P.2d 915* , was an action for damages for breach of a contract to preserve the body of plaintiff's mother. Defendant orally agreed to embalm the body so that it would keep almost forever and to provide a hermetically sealed casket. Plaintiff repeatedly informed defendant that he wanted his mother's body preserved because she had a horror of bugs and water and defendant repeatedly assured plaintiff that the body would last almost forever. Defendant knew at or about the time he agreed to preserve the body that at some indefinite future date plaintiff intended to move the casket and expected the body to be in such a state of preservation that defendant could place a ring and slippers on it. Eight months after the embalming, plaintiff requested that the casket be opened since plaintiff was disturbed by the ants and bugs crawling around the burial vault. When the casket was opened, it was discovered that plaintiff's mother's body had disintegrated and the skeleton was covered with insects. The jury awarded plaintiff general damages for his physical illness, suffering, and disability resulting from his discovery of the body's decomposed condition. Affirming as to the general damage award, the Supreme Court held that recovery of the damages for physical illness and suffering was proper under the rule laid down in *Westervelt v. McCullough (1924) 68 Cal. App. 198, 208-209, 228 P. 734* [*see* discussion, *below*] which stated that whenever the terms of a contract relate to matters which concern directly the comfort, happiness, or personal welfare of one of the parties, or the subject matter of which is such as directly affects or moves the affection, self-esteem, or tender feelings of that party, he or she may recover damages for physical suffering or illness proximately caused by its breach (*32 Cal. 2d 480, 482)* .

Westervelt v. McCullough *(1924) 68 Cal. App. 198, 228 P. 734* , was an action for damages for breach of an agreement whereby defendant promised plaintiff that if the latter permitted defendant to obtain a sheriff's deed to a house belonging to plaintiff, plaintiff and her husband could continue to live in the house as long as they wished. About six months after procuring the deed, defendant ousted plaintiff and her husband from the house. Plaintiff's complaint for

breach of the agreement included a prayer for damages for the impairment of her health. The trial court found that defendant's acts caused great shock to plaintiff's nerves and caused plaintiff to become sick and impaired her health for a number of months. Affirming as to the damages for impairment for plaintiff's health, the court of appeal noted that the practical effect of the arrangement was to provide a home for plaintiff and her husband and to secure their maintenance for the remainder of their lives whereas its breach forced them to resort to the charity of friends and relatives for subsistence and shelter. After reviewing the law of other states specifically applicable to the situation, the court formulated the rule that whenever the terms of a contract relate to matters which concern directly the comfort, happiness, or personal welfare of one of the parties, or the subject matter of which is such as directly affects or moves the affection, self-esteem, or tender feelings of that party he or she may recover damages for physical suffering or illness proximately caused by its breach. In stating this rule, the court relied on authority relating to mental anguish since cases showing physical disability as the result of breach of contracts are unusual. Applying the rule, the court concluded that plaintiff could recover for impairment to her health under *Civ. Code § 3300* since such damage was a detriment proximately caused by the breach because damage to her health was in the parties' contemplation when they contracted (*68 Cal. App. 198, 208-209)* .

[b] Insurance Contract Involves Party's Comfort

State Farm Mut. Auto Ins. Co. v. Allstate Ins. Co. *(1970) 9 Cal. App. 3d 508, 88 Cal. Rptr. 246* , involved in part an award of damages for breach of an insurer's obligation to defend. A business employee was driving a truck insured by defendant when he collided with an automobile injuring two occupants. The injured parties sued the employee and the owner of the business and were awarded damages. At the time of the accident, the owner of the business had an insurance policy specifically covering another truck and a temporary substitute automobile. Defendant failed to defend the employee claiming that the truck involved in the accident was not a temporary substitute automobile and thus the truck was not covered by the policy and the company had no duty to defend. The trial court found that defendant's refusal to defend was improper and unjustified and awarded the employee damages including a sum for physical pain and emotional distress. Affirming as to the damages for refusal to defend, the court of appeal held that the award for pain and distress was proper whether it was under a tort orbreach of contract theory. The court noted that when the terms of a contract related to matters which directly concern the comfort, happiness, or personal welfare of one of the parties, that part may recover damages for physical suffering caused by the breach. The court found that a liability insurance policy is such a contract (*9 Cal. App. 3d 508, 527-528)* .

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6-65 California Points & Authorities § 65.84

§ 65.84 Opposing Motion to Strike Part of Complaint [Code Civ. Proc. §§ 435-437] for Damages for Breach of Contract [Civ. Code § 3300]--Damages for Mental Suffering Recoverable When Contract Relates to Comfort, Happiness, or Personal Welfare

[1] FORM Opposing Motion to Strike Part of Complaint [Code Civ. Proc. §§ 435-437] for Damages for Breach of Contract [Civ. Code § 3300]--Damages for Mental Suffering Recoverable When Contract Relates to Comfort, Happiness, or Personal Welfare

[*Caption. See § 65.80.*]

PLAINTIFF MAY RECOVER DAMAGES FOR MENTAL SUFFERING IN AN ACTION FOR BREACH OF CONTRACT WHEN THE TERMS OF THE CONTRACT RELATE TO MATTERS WHICH CONCERN DIRECTLY THE COMFORT, HAPPINESS, OR PERSONAL WELFARE OF ONE OF THE PARTIES OR WHEN THE SUBJECT MATTER OF THE CONTRACT DIRECTLY AFFECTS OR MOVES THE AFFECTION, SELF-ESTEEM, OR TENDER FEELINGS OF A PARTY.

A. Damages for Mental Suffering Is Recoverable When Contract Relates to Comfort, Happiness, or Personal Welfare. Recovery of damages or mental suffering is permitted by the application of the rule that plaintiff may recover damages for physical suffering when the terms of a contract relate to matters directly concerning the comfort, happiness, or personal welfare of one of the parties or the subject matter of which is suuch as directly affects or moves the affection, self-esteem, or tender feelings of that party (*Windeler v. Scheers Jewelers (1970) 8 Cal. App. 3d 844, 851-852, 88 Cal. Rptr. 39*).

[*Optional*] **B. Insurance Contract Involves Party's Comfort.** [*See § 65.83, Paragraph B.*]

[*Optional*] **C. Contemplated and Foreseeable Result of Breach.** Damages for emotional distress may be recovered in an action for breach of contract if, given the nature of the particular contract, mental suffering or emotional distress was a foreseeable and contemplated result of its breach (*Rogoff v. Grabowski (1988) 200 Cal. App. 3d 624, 633, 246 Cal. Rptr. 185* ; *Wynn v. Monterey Club (1980) 111 Cal. App. 3d 789, 799-801, 168 Cal. Rptr. 789*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion tostrike part of a complaint for damages for breach of contract when the defendant claims that damages for mental distress are not recoverable since the action is for breach of contract, but when the contract related to matters directly concerning the comfort, happiness, or personal welfare of the plaintiff or the subject matter of the contract directly affected or moved plaintiff's affection, self-esteem, or tender feelings. If physical injury did occur or if some element of intentional wrongdoing was present, counsel probably will want to include this fact in his or her memorandum.

For a memorandum of points and authorities opposing a motion to strike part of a complaint for damages for breach of contract on the ground that damages for physical injury are recoverable if the contract relates to comfort, happiness, or personal welfare [*see § 65.83*]. For a memorandum of points and authorities for use in opposing a motion to strike claims for damages for emotional distress when defendant's conduct was tortious, outrageous, or intentional or when the emotional injury was serious, [*see § 65.85*]. For a memorandum of points and authorities for use in opposing a motion to strike claims for damages for emotional distress when an insurer has breached the covenant of good faith and fair dealing [*see § 65.86*].

For a memorandum of points and authorities opposing a demurrer to a complaint for negligent infliction of mental distress on the ground that physical injury need not be alleged if defendant's duty is based on a contract providing for plaintiff's comfort or happiness, see Ch. 153, *Mental Suffering and Emotional Distress* .

For a discussion of mental suffering, see California Forms of Pleading and Practice, Ch. 362, *Mental Suffering and Emotional Distress* .

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, these points and authorities may be used in opposition to a motion to strike part of a complaint supported by the points and authorities *set out in § 65.61*.

[b] Related Uses

With appropriate modifications, these points and authorities may be used to oppose a demurrer or motion for judgment on the pleadings.

[3] Discussion of Authorities

[a] Damages for Mental Suffering Is Recoverable When Contract Relates to Comfort, Happiness, or Personal Welfare

Windeler v. Scheers Jewelers *(1970) 8 Cal. App. 3d 844, 88 Cal. Rptr. 39* , was an action in part for injuries to plaintiff's nervous system resulting in headaches, loss of sleep, aches and pains in arms and shoulders, and general nervousness caused by defendant's negligent breach of a bailment contract. Plaintiff entrusted some rings to defendant

which she wanted made into an heirloom for her daughter emphasizing the sentimental value of the rings and stating that the rings were old family rings and were cherished mementos of her husband. Defendant mailed the rings by insured mail to a ring manufacturer, although he admitted at trial that registered mail was safer, but the rings never reached the destination and were never found. The jury awarded plaintiff damages including a sum for emotional distress. Affirming, the court of appeal noted that it is now well settled that there can be injury to one's nervous system as well as to one's body and addressed itself to the question of whether or not plaintiff could recover damages for mental suffering under the circumstances of the case. The court pointed out that the contract was one of bailment. Holding that mental suffering and emotional distress are elements of actual damages for breach of such a contract, the court stated the rule that whenever the terms of a contract relate to matters which directly concern the comfort, happiness, or personal welfare of one of the parties, or the subject matter of which is such as directly affects or moves the affection, self-esteem, or tender feelings of that party, she may recover damages for physical suffering or illness proximately caused by its breach. The court found that in its application this rule permits recovery for mental suffering. Since plaintiff made known to defendant at the time the bailment was created, the fact that the rings were cherished mementos of her husband which because of their sentimental value she wished to have made into an heirloom for her daughter, the contract related to matters directly concerning plaintiff's happiness and comfort and the jury was entitled to include in its award damages for physical suffering or illness (*8 Cal. App. 3d 844, 851-852)* .

[b] Contemplated and Foreseeable Result of Breach

Rogoff v. Grabowski *(1988) 200 Cal. App. 3d 624, 246 Cal. Rptr. 185* , is discussed in *§ 65.62[3][a]*.

The complaint in ***Wynn v. Monterey Club*** *(1980) 111 Cal. App. 3d 789, 168 Cal. Rptr. 789* was captioned "breach of contract, fraud, and negligence," and in it plaintiff sought to recover for defendants' breach of their agreement to bar plaintiff's spouse from their gambling clubs, which caused the disruption of the marriage and resulted in plaintiff's suffering physical and emotional distress. The spouse was a compulsive gambler, and plaintiff had agreed to pay gambling debts owed by the spouse to defendants if defendants would bar the spouse from the clubs and refuse to extend credit or check cashing privileges. The agreement was satisfactorily performed on both sides for about two years. Then the spouse began gambling again and cashing checks at defendants' clubs. The trial court entered summary judgment and judgment in defendants' favor, apparently in the beliefthat the agreement was illegal and unenforceable. Plaintiff appealed.

The court of appeal reversed. Regarding the issue of the type of damages that plaintiff could recover, the court said that plaintiff's right to damages was a matter of proof within the confines of the general rule requiring proof of damages that flow from breach of contract. As for compensating plaintiff for physical and emotional harm, it is clear under the circumstances that the harm was reasonably foreseeable and was, in contemplation of the contracting parties, likely to result from a breach of the contract. Defendants knew the spouse's propensities, the impact they were having on the marriage, and knew that plaintiff's motivation in entering into the contract was to preserve the tranquility of the marriage and plaintiff's emotional well-being (*111 Cal. App. 3d 789, 799)* . The court noted that *Molien v. Kaiser Foundation Hospitals (1980) 27 Cal. 3d 916, 920, 167 Cal. Rptr. 831, 616 P.2d 813* (discussed in *§ 65.85[3][c]*), albeit a tort action, discarded the rule that mental suffering was compensable only when accompanied by physical injury (*111 Cal. App. 3d 789, 800)* . As this case sounded in contract, not tort, the court said the only limitation was that imposed by *Civ. Code § 3300*, which provides that the measure of damages for breach of contract is the amount that will compensate the aggrieved party for all the detriment proximately caused by the breach, or which, in the ordinary course of things would be likely to result from the breach. The court noted that *Leavy v. Cooney (1963) 214 Cal. App. 2d 496, 29 Cal. Rptr. 580* had held pure mental and physical suffering compensable in a breach of contract action in which the parties had contemplated that a breach of the contract would result in humiliation and embarrassment to plaintiff. Here, the contract was one that by its nature put the defendants on notice that a breach would result in emotional and mental suffering by the plaintiff as well as other forms of compensable damage. In light of that conclusion, the court said, it was patent that defendants in moving for summary judgment did not negate triable issues of fact (*111 Cal. App. 3d 789, 801)* .

For discussion of the court's opinion relating to the enforceability of an agreement to bar another from a public place, see Ch. 35, *Civil Rights: Unruh Civil Rights Act* .

[4] Additional Authorities

[a] Contemplated and Foreseeable Result of Breach

Christensen v. Superior Court (1991) 54 Cal. 3d 868, 2 Cal. Rptr. 2d 79, 820 P.2d 101 , was a class action based on negligent mishandling of decedents' remains. The Supreme Court narrowed the class of third-party beneficiaries entitled to recover for damages for emotional distress to close family members who were aware that the funeral and/or crematory services were being performed and on whose behalf or for whose benefit the services were rendered (*54 Cal. 3d 868, 876)* . The Court said that tort recovery for breach of duty arising out of a third-party beneficiary contract is permitted, despite lack of privity, when the transaction was intended to benefit the third party and the harm to the third party was foreseeable (*54 Cal. 3d 868, 891)* .

The court of appeal in *Saari v. Jongordon Corp. (1992) 5 Cal. App. 4th 797, 7 Cal. Rptr. 2d 82* , affirmed a judgment for a decedent's mother, sister, and longtime companion arising out of breach of a contract between the decedent, the companion, and defendant crematorium. With respect to the companion's claim for damages for emotional distress, the court said that an unrelated person who contracts with a crematorium for services regarding a decedent is entitled to recover damages for emotional distress arising out of the breach of that contract because such contracts are a well established exception to the general rule (*5 Cal. App. 4th 797, 802-804)* . These contracts so affect vital concerns of the contracting parties that severe emotional distress is a foreseeable result of a breach (*5 Cal. App. 4th 797, 803-804)* .

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6-65 California Points & Authorities § 65.85

§ 65.85 Opposing Motion to Strike Part of Complaint [Code Civ. Proc. §§ 435-437] for Damages for Breach of Contract [Civ. Code § 3300] and Tortious Conduct [Civ. Code § 3333]--Damages for Mental Suffering Are Recoverable if Plaintiff Suffered Serious Emotional Distress or Defendant's Conduct Was Intentional

[1] FORM Opposing Motion to Strike Part of Complaint [Code Civ. Proc. §§ 435-437] for Damages for Breach of Contract [Civ. Code § 3300] and Tortious Conduct [Civ. Code § 3333]--Damages for Mental Suffering Are Recoverable if Plaintiff Suffered Serious Emotional Distress or Defendant's Conduct Was Intentional

[*Caption. See § 65.80.*]

PLAINTIFF MAY RECOVER DAMAGES FOR MENTAL SUFFERING IN AN ACTION FOR BREACH OF CONTRACT IF DEFENDANT'S CONDUCT WAS TORTIOUS AND IF _____ [PLAINTIFF SUFFERED SERIOUS EMOTIONAL DISTRESS *or* DEFENDANT ACTED INTENTIONALLY].

A. Tortious Breach of Contract. An act that constitutes a breach of contract may also be tortious (*Acadia, California, Ltd. v. Herbert (1960) 54 Cal. 2d 328, 336-337, 353 P.2d 294*).

B. Mental Distress Compensable if Conduct Tortious. If the conduct of defendant is tortious, damages for mental distress may be recovered despite the fact that the conduct also involves a breach of contract (*Fletcher v. Western National Life Ins. Co. (1970) 10 Cal. App. 3d 376, 400, 89 Cal. Rptr. 78*).

C. Mental Distress Damages Recoverable in Cases Involving Negligently Inflicted Serious Emotional Distress or Outrageous Intentional Conduct. Recovery of damages for emotional suffering is permitted in cases involving negligent infliction of serious emotional distress, or extreme and outrageous intentional conduct (*Molien v. Kaiser Found. Hosp. (1980) 27 Cal. 3d 916, 927, 930, 167 Cal. Rptr. 831, 616 P.2d 813*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion to strike part of a complaint for damages for breach of contract and tortious conduct when defendant asserts that damages for mental suffering are not recoverable because the action is based on contract but the action was also based on tortious conduct by defendant and plaintiff suffered serious emotional distress or defendant's conduct was intentional.

For further discussion of recovery of damages for emotional distress [*see § 65.84*], as well as Ch. 153, *Mental Suffering and Emotional Distress*. This conflict is also discussed in California Forms of Pleading and Practice, Ch. 362, *Mental Suffering and Emotional Distress* (Matthew Bender).

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, these points and authorities may be used to oppose a demurrer or motion for judgment on the pleadings.

In an appropriate case, these points and authorities may be used in opposition to a motion to strike part of a complaint supported by the points and authorities *set out in § 65.61*.

[c] Propriety of Recovery for Mental Distress if Substantial Damage Occurred

This form is for use when plaintiff suffered serious emotional distress or defendant's conduct was intentional. The cases discussing recovery of damages for mental distress when no physical injury occurred and when the conduct was not intentional seem to be in irreconcilable conflict. The Supreme Court has stated that if a plaintiff alleges substantial damages for loss of property apart from damages for mental distress, the complaint is sufficiently pleaded with respect to mental distress without alleging that defendant's conduct was extreme and outrageous [*Gruenberg v. Aetna Ins. Co. (1973) 9 Cal. 3d 566, 579-580, 108 Cal. Rptr. 480, 510 P.2d 1032]* . A court of appeal, however, has stated that California courts have limited emotional suffering damages to cases involving either physical impact and injury to plaintiff or intentional wrongdoing by defendant. The court interpreted *Gruenberg* as involving bad faith and therefore as being an intentional tort case despite the absence in *Gruenberg* of language describing the case as one involving intentional conduct [*Quezada v. Hart (1977) 67 Cal. App. 3d 754, 761-762, 136 Cal. Rptr. 815]* . The court in *Quezada* noted that the conduct of defendant may be negligent as a matter of law but if it contains elements of intentional malfeasance or bad faith, damages for mental distress may be recovered. It appears that since the Supreme Court has said that damages for mental distress may be recovered when accompanied only by substantial damage to property [*Gruenberg v. Aetna Ins. Co. (1973) 9 Cal. 3d 566, 579-580, 108 Cal. Rptr. 480, 510 P.2d 1032* ; *Crisci v. Security Ins. Co. (1967) 66 Cal. 2d 425, 433-434, 58 Cal. Rptr. 13, 426 P.2d 173]* without emphasizing any intentional conduct aspect, that mental distress damages could be recovered in such a situation even if defendant's conduct was not intentional or outrageous. However, the Supreme Court has not yet reconciled the court of appeal cases which hold differently.

Although the unreconciled cases have left the law unsettled as to when substantial damage to a property interest will support a claim for emotional distress, the importance of the conflict is diminished by the California Supreme Court's holding in *Molien v. Kaiser Foundation Hosp. (1980) 27 Cal. 3d 916, 928, 930, 167 Cal. Rptr. 831, 616 P.2d 813* , that

recovery for negligent infliction of serious emotional distress may be had even though plaintiff suffers no physical injury. The function of the physical injury requirement was to provide a guarantee of the genuineness of the claim of emotional distress, a function which, the court noted, has also been served by the presence of an independent cause of action apart from physical injury substantially invading a clearly protected interest, or by outrageous intentional conduct [*Molien v. Kaiser Foundation Hosp. (1980) 27 Cal. 3d 916, 926, 927, 167 Cal. Rptr. 831, 616 P.2d 813]* . In cases alleging negligent infliction of serious emotional distress, the guarantee of genuineness may now be provided by the general standard of proof as applied by the trier of fact in the circumstances of the case [*Molien v. Kaiser Foundation Hosp. (1980) 27 Cal. 3d 916, 930, 167 Cal. Rptr. 831, 616 P.2d 813]* . The presence of factors, such as physical injury or substantial damage to a property interest, which courts have heretofore recognized as guarantees of the genuineness of mental distress claims should strengthen plaintiff's case for such claims, but under *Molien*, allegation of those factors should not be necessary.

[3] Discussion of Authorities

[a] Tortious Breach of Contract

Acadia, California, Ltd. v. Herbert *(1960) 54 Cal. 2d 328, 353 P.2d 294* , was an action in part for damages for defendant's failure to comply with two agreements under which he was obligated to supply plaintiffs with water. The jury awarded plaintiffs damages including a sum for mental suffering. Affirming, the Supreme Court noted that plaintiffs could recover either in contract or in tort since defendant breached the agreement and his conduct in shutting off the water supply was tortious. According to the Court, an act that constitutes a breach of contract may also be tortious. The jury was properly instructed that it could not award damages under both contract and tort theories, but must select which theory, if either, was substantiated by the evidence. Since the jury awarded punitive damages it impliedly found that defendant had committed a tort and that he acted with malice or intent to oppress.

[b] Mental Distress Compensable if Conduct Tortious

Fletcher v. Western National Life Ins. Co. *(1970) 10 Cal. App. 3d 376, 89 Cal. Rptr. 78* , was an action arising out of the conduct of defendants with respect to a disability insurance policy issued by defendant insurance company to plaintiff under which defendants threatened to and did refuse to make payments. The case was submitted to the jury on the cause of action for intentional infliction of emotional distress and the jury returned a verdict in favor of plaintiff. On appeal, one of the issues was whether or not defendants threatened and actual bad faith refusals to make payments under the disability insurance policy, and false and threatening communications done for the purpose of causing the insured to surrender his policy or disadvantageously settle a nonexistent dispute, could legally give rise to a cause of action for intentional infliction of emotional distress or some other cause of action sounding in tort. Affirming the jury verdict, the court of appeal noted that damages generally are not recoverable for mental suffering resulting from breach of contract on the theory that such damages are too uncertain, speculative, and remote. However, if the conduct is tortious, damages for emotional distress may be recovered despite the fact that the conduct also involved a breach of contract. The court found that the duty of good faith and fair dealing implied by law in insurance policies imposes on a disability insurer a duty not to threaten to withhold or actually withhold payments, maliciously and without probable cause, for the purpose of injuring its insured by depriving him of the policy's benefits. The court held that a violation of this duty sounds in tort notwithstanding that it also constitutes a breach of contract. Consequently, the defendants' actions were essentially tortious in nature and their conduct could legally be the basis for an action for damages for intentional infliction of emotional distress and recovery by plaintiff was proper.

[c] Mental Distress Damages Recoveable in Cases Involving Serious Emotional Distress or Outrageous Intentional Conduct

Molien v. Kaiser Foundation Hosp. *(1980) 27 Cal. 3d 916* , 167 Cal. Rtpr 831, *616 P.2d 813* , involved an amended complaint for damages for negligently inflicted emotional distress unaccompanied by physical injury. Plaintiff appealed from the judgment entered after a demurrer to the complaint was sustained. Plaintiff had alleged that he and his wife

were members of defendant hospital's health plan, and that when his wife went to Kaiser for a routine physical examination, she was negligently examined and tested and informed by defendant physician that she had infectious syphilis, which was in fact false. Defendants knew plaintiff would learn of the diagnosis because they instructed his wife to so advise him. Thereafter, plaintiff had to undergo tests which revealed that he did not have syphilis. Nonetheless, his wife became upset and suspicious that plaintiff had engaged in extramarital activities, and the resulting tension and hostility caused the marriage to break up. Plaintiff further alleged that defendants knew or should have known that their diagnosis that his wife had and that he might have syphilis would cause him emotional distress, and that in fact he suffered extreme emotional distress and incurred medical expenses for counseling in an effort to save the marriage.

The Supreme Court reversed, recognizing negligent infliction of serious emotional distress as a tort independent of other injury. The primary issue beforethe Court on appeal was whether plaintiff was barred from recovery for negligent infliction of emotional distress because he did not suffer any physical injury. The Court noted that the primary justification for the physical injury requirement is to guard against false claims, but that this function is served by other guarantees in some instances, such as when substantial damages other than physical injury suffered by plaintiff serve to guarantee the genuineness of a claim for emotional distress damages, or when outrageous conduct serves as the guarantee of genuineness of a claim for intentional infliction of emotional distress. The Court condemned the physical injury requirement as allowing emotional distress damages when the distress is accompanied by the most trivial physical injury, while mechanically precluding recovery on potentially valid claims. The Court further criticized the rule because it encourages extravagant pleading and distorted testimony, and because the distinction between physical and emotional injury is unclear. The Court thus rejected the physical injury requirement, and held that, when the proof is not of a medically significant nature, the genuineness of the claim is guaranteed by the general standard of proof necessary to sustain a claim of serious emotional distress in the circumstances of the case. The Court quoted the standard adopted by the Hawaii Supreme Court: "serious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case" (*27 Cal. 3d 916, 927)* .

[4] Additional Authorities

[a] Mental Distress Damages Recoverable in Cases Involving Serious Emotional Distress, or Outrageous Intentional Conduct

Allen v. Jones (1980) 104 Cal. App. 3d 207, 163 Cal. Rptr. 445 , involved, in pertinent part, plaintiff's second amended complaint for damages for negligent performance of a contract. The only damages sought under the negligence cause of action were for emotional distress. Plaintiff appealed from a judgment entered after a demurrer to the second amended complaint was sustained. Plaintiff's second amended complaint alleged that he was the brother and nearest living relative of Ralph Allen and that on his brother's death, plaintiff entered into an oral contract with the defendant mortuary for the cremation and shipment of his brother's remains to Illinois. Plaintiff alleged that as a result of defendant's negligence in packaging the remains, they were lost, causing plaintiff great nervous shock, mental anguish, and humiliation. On appeal, the primary question was whether the action could be maintained when the only damage alleged was mental suffering. The court of appeal reversed the dismissal.

The court first recognized that severe mental distress was a foreseeable result of breach of the contract, notwithstanding the general rule that damages for mental suffering are not recoverable in an action for breach of contract. However, the court refused to base its decision on contract, stating that it is not clear whether mental distress without physical illness can ever support an action for breach of contract. (In this regard it is noteworthy that *Allen* was decided prior to the decision in *Molien v. Kaiser Foundation Hosp. (1980) 27 Cal. 3d 916, 167 Cal. Rptr. 831, 616 P.2d 813 , discussed under § 65.85[3][c]*, in which the physical injury requirement was discarded in actions for negligent infliction of serious emotional distress.) The court then found that plaintiff had pleaded an action in negligence as well as contract by alleging that the remains were lost due to defendant's negligent preparation of them for shipment, and held that damages

for emotional distress are recoverable in tort for a mortuary's negligent mishandling of a corpse even though the plaintiff suffers no physical injury. The court reasoned that the psychological devastation likely to result from a mortuary's mistake requires that mortuaries be held to a high standard of care, and that the nature of the wrongful conduct necessarily present in such a case provides a sufficient guarantee of the genuineness of the claim of mental distress.

Fuentes v. Perez (1977) 66 Cal. App. 3d 163, 136 Cal. Rptr. 275 , was an action for breach of contract and negligence in which plaintiffs sought compensation from a contractor for damage to their home and personal belongings and for mental and physical pain and suffering resulting from the failure to temporarily cover plaintiffs' roofless house when it was raining. The jury awarded plaintiffs damages for emotional distress, shock, and injury to their nervous systems. Modifying the jury verdict by striking this portion of the award, the court of appeal found that the evidence did not reveal disturbance to the nervous system or other physical injuries but rather a psychological mental anguish occasioned by the contractor's conduct making plaintiffs' cause of action one for recovery for emotional distress. The court noted that California courts have permitted the recovery of damages for emotional distress alone without consequent physical injuries in cases involving extreme and outrageous intentional invasions of one's mental and emotional tranquility [relying on prior case law]. The court reviewed several cases in which damages for emotional distress were allowed but the rule permitting recovery without physical injury in specific situations was not mentioned, and concluded that generally the emotional distress was accompanied by some degree of physical injury and that most of the factual contexts involved mental distress triggered by what would reasonably be deemed intentional or reckless conduct which was extreme and outrageous. The court found that *Windeler v. Scheers Jewelers (1970) 8 Cal. App. 3d 844, 88 Cal. Rptr. 39* [for a discussion of this case, *see § 65.84[3][a]*] was not contrary to the rule noting that in that case there was a special circumstance, known to the bailee, that the subject of the parties' bailment agreement had a sentimental value in excess of market value, and accordingly the court gave effect to the parties' agreement. After considering the evidence on which plaintiffs based their contention of emotional distress, the court concluded that it could not reasonably be deemed to discloseextreme and outrageous or reckless invasion of their mental and emotional tranquility and consequently the judgment was erroneously entered insofar as it awarded damages for emotional distress.

California Points & Authorities

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Volume 6 Chapters 60-69 COSTS---to---DECLARATORY RELIEF
CHAPTER 65 DAMAGES: CONTRACT
PART II. FORMS
D. Opposing Motion to Strike

6-65 California Points & Authorities § 65.86

§ 65.86 Opposing Motion to Strike Part of Complaint [Code Civ. Proc. §§ 435-437] for Damages for Breach of Contract [Civ. Code § 3300] and Tortious Conduct [Civ. Code § 3333]--Mental Distress Damages Recoverable When Insurance Company Breaches Duty of Good Faith and Fair Dealing

[1] FORM Opposing Motion to Strike Part of Complaint [Code Civ. Proc. §§ 435-437] for Damages for Breach of Contract [Civ. Code § 3300] and Tortious Conduct [Civ. Code § 3333]--Mental Distress Damages Recoverable When Insurance Company Breaches Duty of Good Faith and Fair Dealing

[*Caption. See § 65.80.*]

PLAINTIFF MAY RECOVER DAMAGES FOR MENTAL DISTRESS IN AN ACTION AGAINST AN INSURANCE COMPANY IF THE COMPANY HAS BREACHED ITS DUTY OF GOOD FAITH AND FAIR DEALING AND PLAINTIFF HAS ALSO SUFFERED SUBSTANTIAL DAMAGE.

A. Breach of Covenant of Good Faith and Fair Dealing Is Tort. Breach of the covenant of good faith and fair dealing implied in every insurance contract provides plaintiff with a tort action for bad faith notwithstanding that the acts complained of may also constitute a breach of contract (*Jarchow v. Transamerica Title Ins. Co. (1975) 48 Cal. App. 3d 917, 940, 122 Cal. Rptr. 470* ; *see* *Gruenberg v. Aetna Ins. Co. (1973) 9 Cal. 3d 566, 574, 108 Cal. Rptr. 480, 510 P.2d 1032*).

B. Mental Distress Damages Recoverable. If defendant has failed to meet its duty of good faith and fair dealing, plaintiff may recover damages for mental distress when plaintiff has suffered substantial damage apart from the mental distress (*Crisci v. Security Ins. Co. (1967) 66 Cal. 2d 425, 430, 434, 58 Cal. Rptr. 13, 426 P.2d 173* ; *Jarchow v. Transamerica Title Ins. Co. (1975) 48 Cal. App. 3d 917, 940, 945, 122 Cal. Rptr. 470*).

C. Showing Required. In order to recover damages for mental distress resulting from an insurer's breach of its covenant of good faith and fair dealing, it is necessary only to show that plaintiff suffered substantial economic losses apart from mental distress and not that the insurer's conduct was outrageous or that mental distress was severe (*Gruenberg v. Aetna Ins. Co. (1973) 9 Cal. 3d 566, 579-580, 108 Cal. Rptr. 480, 510 P.2d 1032* (at pp. 580-581, n.10, disapproving any contrary language in *Richardson v. Employers Liab. Assur. Corp. (1972) 25 Cal. App. 3d 232, 102*

Cal. Rptr. 547)).

[*EITHER*]

D. Duty to Act Fairly in Handling Insured's Claims. Included in the insurer's duty to act in good faith and fairly is the duty not to withholdunreasonably payments due under the policy (*Gruenberg v. Aetna Ins. Co. (1973) 9 Cal. 3d 566, 575, 108 Cal. Rptr. 480, 510 P.2d 1032*).

[*OR*]

D. Duty to Accept Reasonable Settlement Offers. The covenant of good faith and fair dealing implied in every liability insurance policy obligates the insurer to treat offers to settle claims against its insured within limits of the insurance coverage without regard to its own special interest existing because of policy limits (*Truestone, Inc. v. Travelers Ins. Co. (1976) 55 Cal. App. 3d 165, 169, 127 Cal. Rptr. 386*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion to strike part of a complaint for damages for breach of contract when defendant asserts that plaintiff may not recover damages for mental distress because the action is based on contract, but the action involved the bad faith breach of defendant insurance company's duty of good faith and fair dealing and plaintiff suffered substantial economic losses in addition to the mental distress.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, these points and authorities may be used in opposition to a motion to strike part of a complaint supported by the points and authorities *set out in § 65.61*.

NOTE:
In addition to the line of cases discussed in relation to this form which allow recovery of damages for emotional distress for breach of an insurer's duty of good faith and fair dealing, recovery may also be possible for negligent infliction of serious emotional distress. For further discussion, see *§ 65.85*, as well as Ch. 153, *Mental Suffering and Emotional Distress*. See also California Forms of Pleading and Practice, Ch. 362, *Mental Suffering and Emotional Distress* (Matthew Bender).

[b] Related Uses

With appropriate modifications, these points and authorities may be used to oppose a demurrer or motion for judgment on the pleadings.

[3] Discussion of Authorities

[a] Breach of Covenant of Good Faith and Fair Dealing Is Tort

Jarchow v. Transamerica Title Ins. Co. *(1975) 48 Cal. App. 3d 917, 122 Cal. Rptr. 470* , involved in part an action against a title company for damages for its tortious conduct in failing to discover, disclose, or eliminate an easement on land bought by plaintiffs for which defendant had prepared a preliminary title report. The report indicated that there was one easement on the property but it failed to disclose a second easement (the Perez easement). After plaintiffs learned of the Perez easement they notified defendant who refused to initiate any action on plaintiffs' behalf after which plaintiffs filed an action against the Perezes and against defendant for damages. The jury found for plaintiffs against defendant.

Defendant contended that plaintiffs' complaint failed to state a cause of action and that the trial court erred in denying its motion for judgment on the pleadings. Affirming judgment, the court of appeal noted that every contract contains an implied in law covenant of good faith and fair dealing which provides that neither party will interfere with the other's rights to receive the benefits of the agreement. Breach of the covenant provides the injured party with a tort action for bad faith notwithstanding that the acts complained of may also constitute a breach of contract. The court held that this cause of action is applicable to all insurance contracts including policies of title insurance and consequently, plaintiffs could state a cause of action for bad faith, breach of the covenant of good faith, and fair dealing.

Gruenberg v. Aetna Ins. Co. *(1973) 9 Cal. 3d 566, 108 Cal. Rptr. 480, 510 P.2d 1032* , in part, was an action against some insurance companies for failure to pay plaintiff benefits under several fire insurance policies. Plaintiff alleged that after a fire at his restaurant, a claims adjuster employed by one of the defendants informed an arson investigator that plaintiff had excessive fire coverage and thatplaintiff was later charged with arson and defrauding an insurer. He further alleged that defendants demanded that plaintiff appear for an examination relating to his claim for fire loss. Plaintiff's attorney requested that defendants waive the examination requirement until the criminal charges were concluded but defendants refused and warned that failure to appear would void coverage under the policies. Plaintiff alleged that defendants later informed plaintiff's attorney that they were denying liability under the policies because of plaintiff's failure to submit to the examination. After the criminal charges were dismissed, plaintiff's attorney told defendants that plaintiff was ready to submit to an examination but defendants reaffirmed that they were denying liability because of plaintiff's original failure to appear. Plaintiff further alleged that defendants were acting together to falsely imply that plaintiff had a motive to burn down his business in order to avoid paying the amounts due to plaintiff under the insurance policies. Plaintiff sought damages including damages for emotional distress resulting from defendants' outrageous conduct and bad faith. The trial court granted defendants' general demurrers. Reversing, the Supreme Court held that the complaint alleged a breach by defendants of the covenant of good faith and fair dealing implied in every insurance contract. In reaching this holding, the Court noted that breach of the duty of dealing fairly and in good faith is a tort.

[b] Mental Distress Damages Recoverable

Crisci v. Security Ins. Co. *(1967) 66 Cal. 2d 425, 58 Cal. Rptr. 13, 426 P.2d 173* , was an action against plaintiff's insurer for damages including mental distress resulting from defendant's refusal to settle a claim against plaintiff within policy limits after which a jury awarded the injured party an amount far in excess of the policy amount. As a result of the large judgment entered against her, plaintiff became indigent, hysterical, and suicidal and her physical health declined. The trial court awarded damages to plaintiff including a sum for mental distress. Affirming, the Supreme Court noted that an action for failure to accept reasonable settlements, a duty imposed by the obligation of good faith and fair dealing implied in all insurance policies, sounds in both contract and tort. In such a case, plaintiff has a freedom of election between an action in tort and one in contract. An exception to this rule is a suit for personal injury caused by negligence where the tort character of the action is considered to prevail but no exception is applied in cases which relate to financial damage. Since the action involved a tort, the Court applied the general rule of tort damages which holds that an injured party may recover for all detriment caused whether or not it could have been anticipated. In

accordance with this rule, mental suffering constitutes an aggravation of damages when it naturally ensues from the act complained of. The Court noted that the most common example of the award of damages for mental suffering is where the plaintiff suffers personal injuries in addition to mental distress as a result of either negligent or intentional misconduct by defendant. But, the Court continued, damages for mental distress have also been awarded in cases where the tortious conduct was an interference with property rights without any personal injuries apart from mental distress. Consequently, the Court concluded that a person who, as a result of defendant's tortious conduct, loses her property ad suffers mental distress may recover not only for the pecuniary loss but also for her mental distress, and plaintiff's recovery of damages for her mental distress was proper. The Court noted that this decision did not mean that in every case of breach of contract the injured party could recover such damages. In this case, the breach also constituted a tort. Moreover, plaintiff did not seek to obtain a commercial advantage by the contract but to protect herself against the risks of accidental losses including the mental distress which might follow from the losses. Among the considerations in purchasing liability insurance is the peace of mind and security it will provide in the event of an accidental loss and, the Court noted, recovery of damages for mental suffering has been permitted for breach of contracts which directly concern the comfort, happiness, or personal esteem of one of the parties.

The factual background of ***Jarchow v. Transamerica Title Ins. Co.*** *(1975) 48 Cal. App. 3d 917, 122 Cal. Rptr. 470* , is *discussed under § 65.86[3][a]*. In affirming the award of general damages to plaintiffs, the court of appeal noted that every contract contains an implied in law covenant of good faith and fair dealing, a breach of which provides the injured party with a tort action for bad faith notwithstanding that the acts complained of may also constitute a breach of contract. The court found that since a primary consideration in purchasing insurance is the peace of mind and security it will provide when the contingency insured against arises, an insured may recover for any emotional distress suffered as a result of an insurer's bad faith as well as any other detriment proximately caused by the breach. The court further noted, however, that a number of decisions have suggested that the bad faith breach of an insurance agreement must result in substantial damages apart from those due to mental distress before an award for the emotional injury may be made. The court concluded that defendant's refusals to provide clear title to their property as to the two easements were acts of bad faith which breached the title insurance policy's implied covenant of good faith and fair dealing and that, since one easement was inextricably tied to the other easement dispute, it constituted a substantial cloud on plaintiffs' property and thus did substantial damage until it was removed.

The court of appeal determined that plaintiffs were entitled to damages for negligent infliction of emotional distress by defendant despite the fact that the distress did not result directly from or manifest itself in physical injury as required by the impact or injury rule. The court concluded that the use of the impact or injury requirement has been a response to public policy concerns raised by the problems of proof inherent in mental distress cases but the court stated that the only valid objection against recovery for mental distress is the danger offraudulent claims and this problem should be resolved by rules of proof rather than by imposition of limits on the negligence action itself. The court found that the Supreme Court decisions on the subject have shown a desire to abandon the impact or injury barrier in cases involving the intentional infliction of emotional distress. For example, in *Crisci v. Security Ins. Co. (1967) 66 Cal. 2d 425, 58 Cal. Rptr. 13, 426 P.2d 173* (discussed *above*), the Supreme Court expressly rejected strict application of the impact or injury requirement reasoning that where an actionable claim has resulted in substantial damages apart from emotional distress, the danger of fictitious claims is greatly reduced. The Court noted that substantial damage constitutes actionable claims and substantial invasions of protected property interests. To ascertain the genuineness of a claim a court must determine whether plaintiff suffered an empirically verifiable injury: a detriment whose impact was readily observable and identifiable; an injury which could not be as easily fabricated as mental distress. Thus, if a complaint indicates that a plaintiff was deprived of the use of his real property or his financial resources, or suffered physical injury, or was deprived of the possession of a piece of personalty, he may reasonably have been said to have suffered substantial damages. The Court continued that substantial damage need not be compensable since such a requirement would not add to the guarantee of genuineness. Interference with one's legally protected interests is sufficient damage to satisfy the substantial damage test and to guard against potentially fraudulent emotional distress claims. Although *Crisci* was a tort action for breach of the implied covenant of good faith in an insurance contract, the Court noted that the *Crisci* court made no attempt to limit its comments to that particular cause of action. Consequently, the Court concluded

that the impact or injury rule is no longer strictly applied in California and courts may adjudicate negligence claims for mental distress when sufficient guarantees of genuineness are found in the facts of the case--for example, when plaintiff has suffered substantial damage apart from the alleged emotional injury. Applying the substantial damage standard, the court concluded that defendant's negligent failure to list the Perez easement on plaintiffs' preliminary title report substantially damaged plaintiffs' financial and property interests which provided sufficient guarantees of the genuineness of plaintiffs' emotional distress claim to entitle plaintiffs to recover damages for mental distress.

[c] Showing Required

The factual background of ***Gruenberg v. Aetna Ins. Co.*** *(1973) 9 Cal. 3d 566, 108 Cal. Rptr. 480, 510 P.2d 1032* , is *discussed under § 65.86[3][a]*. In reversing the judgment of dismissal as to defendant insurers, the Supreme Court rejected defendants' contention that plaintiff could not, as a matter of law, recover for emotional distress because plaintiff failed to allege conduct which was "extreme" and "outrageous"; that is, it rejected defendants' argument that the essential elements of a cause of action for the independent tort of intentional infliction of emotional distress was engrafted on a cause of action against an insurer for breach of its duty of good faith and fair dealing. The Court, after quoting from *Crisci v. Security Ins. Co. (1967) 66 Cal. 2d 425, 58 Cal. Rptr. 13, 426 P.2d 173* (*discussed under § 65.86[3][b]*) said that in *Crisci* it did not suggest that to warrant recovery for mental distress the conduct of the insurer had to be "outrageous" or that the mental distress must be "severe"; rather, the Court had explained that the principal reason for limiting recovery of damages for mental distress was that to permit recovery of such damages would open the door to fictitious claims, to recovery for mere bad manners, and to litigation in the field of trivialities and that, obviously, where the claim is actionable and has resulted in substantial damages apart from those due to mental distress, the danger of fictitious claims is reduced (*9 Cal. 3d 566, 579)* . The Court noted that plaintiff alleged that he had suffered substantial economic losses apart from the mental distress in that he alleged that he suffered loss of earnings, that he was compelled to go out of business and as a result was unable to pay his business creditors, that he incurred the costs of defending lawsuits brought against him by his creditors, and that he incurred medical expenses. The Court concluded that since plaintiff had alleged substantial damages for loss of property apart from damages for mental distress, the complaint was sufficiently pleaded with respect to the latter element of damages (*9 Cal. 3d 566, 580)* . The Court said that *Fletcher v. Western National Life Ins. Co. (1970) 10 Cal. App. 3d 376, 89 Cal. Rptr. 78* , did not express a different rule, that in *Fletcher* plaintiff's theory of recovery was predicated on the tort of intentional infliction of emotional distress alone, and that, quite naturally, the court there concluded that severe emotional distress was a requisite element of recovery. But the mere fact that the action there involved the liability of an insurer for its tortious conduct, measured by the elements of intentional infliction of emotional distress, does not mean that those same elements must be applied where, as here, recovery is sought on a totally distinct theory (*9 Cal. 3d 566, 580)* .

[d] Duty to Act Fairly in Handling Insured's Claims

The factual background of ***Gruenberg v. Aetna Ins. Co.*** *(1973) 9 Cal. 3d 566, 108 Cal. Rptr. 480, 510 P.2d 1032* , is *discussed under § 65.86[3][a]*. In holding that the complaint alleged a breach by defendants of the covenant of good faith and fair dealing, the Court noted that the duty of an insurer to act in good faith and fairly in handling the claim of an insured, that is, a duty not to withhold unreasonably payments due under a policy, is a duty included within the implied covenant of good faith and fair dealing.

[e] Duty to Accept Reasonable Settlement Offers

Truestone, Inc. v. Travelers Ins. Co. *(1976) 55 Cal. App. 3d 165, 127 Cal. Rptr. 386* , involved an action against a liability insurer by two individuals of aclosely held corporation for damages for the insurer's bad faith refusal to settle a claim covered by an insurance policy. The trial court granted defendant's demurrer to plaintiffs' cause of action which alleged that defendant's intentional and reckless conduct resulted in severe mental and emotional distress to plaintiffs. Reversing, the court of appeal held that plaintiffs had stated a cause of action for violation of defendant's obligation to act in good faith. The court noted that the covenant of good faith and fair dealing implied in every liability insurance

policy obligates the insurer to treat offers to settle claims against its insured within limits of the insurance coverage without regard to its own special interest existing because of policy limits. The covenant thus imposes a duty on the insurer to accept reasonable settlement offers within the scope of its policy and breach of this duty creates causes of action in both contract and tort [relying on prior case law]. The court continued that while the law recognizes a cause of action in tort, the duty breached by the tortious conduct of an insurer refusing to settle in good faith flows from the contractual relationship. The insured does not seek to obtain a commercial advantage from the contract but to protect himself against the risks of accidental losses including the mental distress which might follow from the losses. Since peace of mind and security are a consideration in purchasing liability insurance, damages for mental suffering are included within those recoverable for the insurer's breach of duty to settle in good faith [relying on prior case authority].

[4] Additional Authorities

[a] Breach of Covenant of Good Faith and Fair Dealing as Tort

In *Silberg v. California Life Ins. Co. (1974) 11 Cal. 3d 452, 460, 113 Cal. Rptr. 711, 521 P.2d 1103* , the Supreme Court stated that the insurer's breach of its covenant of good faith sounds in tort; *Crisci v. Security Ins. Co. (1967) 66 Cal. 2d 425, 432, 58 Cal. Rptr. 13, 426 P.2d 173* (*discussed under § 65.85[3][c]*) in which the Supreme Court stated that an action for breach of the covenant of good faith sounds in both contract and tort; *Comunale v. Traders & General Ins. Co. (1958) 50 Cal. 2d 654, 663, 328 P.2d 198* , in which the Supreme Court held that an action for breach of the covenant of good faith sounds in both contract and tort; and *Fletcher v. Western National Life Ins. Co. (1970) 10 Cal. App. 3d 376, 401, 89 Cal. Rptr. 78* , in which the court of appeal said that violation of the insurer's duty to act reasonably and in good faith to settle claims against the insured by a third person sounds in tort notwithstanding that it may also constitute a breach of contract and that, similarly, an insurer's breach of its implied-in-law duty not to threaten to withhold payments under a disability policy maliciously and without probable cause for the purpose of injuring the insured by depriving him of the benefits of the policy sounds in tort notwithstanding that it also constitutes a breach of contract.

[b] Mental Distress Damages Recoverable

In *Delos v. Farmers Insurance Group (1979) 93 Cal. App. 3d 642, 658, 155 Cal. Rptr. 843* , the court of appeal said that the unreasonable and bad-faith refusal of an insurer to pay a valid claim of its insured gives rise to the insurer's liability for all economic loss of the insured as well as consequential emotional distress.

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6-65 California Points & Authorities § 65.87

§ 65.87 Supporting Motion for New Trial [Code Civ. Proc. § 659] on Ground of Excessive or Inadequate Damages [Code Civ. Proc. § 657(5)]--By Plaintiff or Defendant

[1] FORM Supporting Motion for New Trial [Code Civ. Proc. § 659] on Ground of Excessive or Inadequate Damages [Code Civ. Proc. § 657(5)]--By Plaintiff or Defendant

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN SUPPORT OF MOTION FOR NEW TRIAL
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

IT IS PROPER TO GRANT A NEW TRIAL ON THE GROUND THAT THE DAMAGES ARE _____ [EXCESSIVE *or* INADEQUATE].

A. Motion for New Trial. On the application of the party aggrieved, the _____ [*either* verdict *or* decision] may be vacated, in whole or in part, and a new trial may be granted, on all or some of the issues, on the ground that the damages are _____ [*either* excessive *or* inadequate], if substantial rights of the aggrieved party are materially affected thereby (*Code Civ. Proc. § 657*).

[*EITHER*]

B. Trial Court's Power to Determine Excessiveness of Damages. The proper procedure for determining whether the damages awarded are excessive is to bring the question before the trial court on a motion for a new trial (*Schroeder v. Auto Driveaway Co. (1974) 11 Cal. 3d 908, 918, 114 Cal. Rptr. 622, 523 P.2d 662*).

[*OR*]

B. Trial Court's Power to Determine Inadequacy of Damages. The proper procedure for determining whether the damages awarded are inadequate is to bring the question before the trial court on a motion for a new trial (*Mendoyama, Inc. v. Mendocino County (1970) 8 Cal. App. 3d 873, 877, 87 Cal. Rptr. 740*).

C. Applicability of *Code Civ. Proc. § 657(5)* to Contract Actions. *Code of Civil Procedure Section 657(5)* providing that a new trial may be granted on the ground of excessive or inadequate damages applies to actions for damages arising from breach of contract (*Harp v. Pease (1921) 52 Cal. App. 744, 745-746, 199 P. 863*).

D. Judge Is Permitted to Reweigh Evidence. In passing on a motion for a new trial, the trial judge is entitled to reweigh the evidence and exercise his or her independent judgment and to grant a new trial if it clearly appears from the evidence believed by him or her that the damages were excessive or inadequate (*Patterson v. Rowe (1952) 113 Cal. App. 2d 119, 122, 247 P.2d 949* ; *see Code Civ. Proc. § 657*).

[*Defendant claiming excessive damages may add*]

E. Purpose of Damage Award. Damages awarded for breach of contract attempt to approximate the agreed-upon performance. The goal is only to put the injured party in as good a position as if the defendant had not breached the contract. The injured party's damages, however, cannot exceed what it would have received if the contract had been fully performed on both sides. This limitation of damages for breach of a contract serves to encourage contractual relations and commercial activity by enabling parties to estimate in advance the financial risks of their enterprise (*Lewis Jorge Construction Management, Inc. v. Pomona Unified School District (2004) 34 Cal. 4th 960, 967-968, 22 Cal. Rptr. 3d 340* ; *Glendale Fed. Sav. & Loan Assoc v. Marina View Heights Dev. Co. (1977) 66 Cal. App. 3d 101, 123, 135 Cal. Rptr. 802*).

[*Defendant claiming excessive damages may add*]

F. When Damages Are Excessive. If the jury's award does not meet the test of reasonableness, the trial court has the duty to reduce it (*Neumann v. Bishop (1976) 59 Cal. App. 3d 451, 490, 130 Cal. Rptr. 786*).

[*Optional*] **G. Discretion to Grant New Trial Is Limited to Damages.** The trial judge may limit an order for a new trial to the issue of damages if the issue of liability has been determined by the jury (*Myers v. King (1969) 272 Cal. App. 2d 571, 581, 77 Cal. Rptr. 625*).

[*Defendant claiming excessive damages may add*]

[*Optional*] **H. New Trial Limited to Damages and Conditioned on Failure to Consent to Remittitur.** If the ground for granting a new trial limited to the issue of damages after a trial by jury is excessive damages, the court may in its

discretion grant the new trial subject to the condition that the motion for a new trial is denied if the party in whose favor the verdict has been rendered consentsto a reduction of so much thereof as the court in its independent judgment determines from the evidence to be fair and reasonable (*Code Civ. Proc. § 662.5(b)*).

[*Plaintiff claiming inadequate damages may add*]

[*Optional*] **I. New Trial Limited to Damages and Conditioned on Failure to Consent to Additur.** If the ground for granting a new trial limited to the issue of damages after a trial by jury is inadequate damages, the court may in its discretion grant the new trial subject to the condition that the motion for a new trial is denied if the party against whom the verdict has been rendered consents to an addition of so much thereto as the court in its independent judgment determines from the evidence to be fair and reasonable (*Code Civ. Proc. § 662.5(a)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted by defendant or plaintiff in support of a motion for a new trial on the ground that the damages awarded were excessive or inadequate. A defendant will bring the motion on the ground that the damages were excessive and a plaintiff will base the motion on the ground the damages were inadequate.

Optional Paragraph G may be used if the motion is being limited to the issue of damages and the jury determined the issue of liability. Optional Paragraphs H and I may be used if the ground of excessive or inadequate damages is the only one being raised and the moving party wants to request the court to give the plaintiff or the defendant the opportunity to consent to a reduction in or addition to the damages instead of having the court grant a new trial.

Code Civ. Proc. § 657 was amended in 1967 to include inadequate damages as a ground for granting a new trial. Prior to this amendment, motions for new trial when the damages award was inadequate were made and granted on the grounds of insufficiency of the evidence to justify the verdict or other decision [*Code Civ. Proc. § 657(6)*]. The same rules discussed in cases prior to the amendment would apply to a motion made under *Code Civ. Proc. § 657(5)* based on inadequate damages [Legislative Comm. Comment to 1967 amendment of *Code Civ. Proc. § 657*].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Points and Authorities

For memoranda of points and authorities supporting and opposing motions for a new trial, see Ch. 155, *Motions After Trial* .

For memorandum of points and authorities supporting a motion for a new trial on the ground of inadequate damages on an action by a seller against a buyer for damages for breach of contract, see Ch. 206, *Sales* .

[c] Related Pleading and Practice Forms

For forms to use in making motions for new trial, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender). For a form to use in making a motion for a new trial on the ground of excessive or inadequate damages, see California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender).

[3] Discussion of Authorities

[a] Trial Court's Power to Determine Excessiveness of Damages

In ***Schroeder v. Auto Driveaway Co.*** *(1974) 11 Cal. 3d 908, 114 Cal. Rptr. 622, 523 P.2d 662* , defendant common carrier furnished a driver to take plaintiff's van filled with new and secondhand goods to a location where plaintiff was going to open a store for sale of the goods. According to the terms of the contract, defendant driver was to take the most expeditious and suitable route but, instead, the driver took a sightseeing detour during which the van skidded off a road, destroying it and many of its contents. Plaintiff brought action in part for breach of contract under which defendants undertook to deliver the van and its contents undamaged. The jury returned a verdict for plaintiff. On appeal, defendants contended that the damages award was excessive. Affirming the jury's verdict, the Supreme Court noted that defendants failed to raise the issue of excessive damages before the superior court by a motion for a new trial. According to the Court, the point that damages are excessive cannot be raised for the first time on appeal but must be presented to the lower court on a motion for new trial [relying on prior case law]. Consequently, defendants, having failed to move for a new trial, could not contend on appeal that the damages awarded were excessive. In explaining its decision, the Court noted that when a jury returns its verdict, the trial court cannot grant judgment notwithstanding the verdict on its own motion merely on the ground that damages were excessive or inadequate. That issue must be raised by a motion for new trial and, absent exceptional circumstances, a trial court cannot grant a new trial on its own motion. Thus, because of defendants' failure to move for a new trial, the issue of adequacy for damages was neverpresented for decision by the trial judge (*11 Cal. 3d 908, 918)* .

[b] Trial Court's Power to Determine Inadequacy of Damages

In ***Mendoyama, Inc. v. Mendocino County*** *(1970) 8 Cal. App. 3d 873, 87 Cal. Rptr. 740* , an action for damages for breach of a concession agreement, the trial court awarded plaintiff damages consisting of plaintiff's reasonable expenditures for performance made in faith on the contract excluding interest paid on loans on the basis that it was not reasonably necessary for performance. The trial court also refused plaintiff's claim for compensation for the hours devoted by plaintiff's president and secretary in endeavoring to carry out the agreement since they were acting for plaintiff in their performance of their duties as officers. Additionally, although finding that in attempting to perform, plaintiff transferred valuable subconcession rights to subconcessionaires in return for their performing some of plaintiff's obligations under the terms of the agreement between plaintiff and defendant, the trial court made no finding on the value of these transferred rights. On appeal, plaintiff claimed that it should have been allowed to cover for these items. Reversing the trial court, the court of appeal held that a motion for new trial is a condition precedent to urging inadequacy of damages on appeal. Since plaintiff did not make such a motion, it could not claim inadequate damages but, the court continued, this rule did not prevent plaintiff from urging errors in the instruction, even though those errors also resulted in an improper reduction of damages. After reviewing the points relating to erroneous rulings on the admission of evidence, the court concluded that plaintiff was entitled to recover for some of the items (*8 Cal. App. 3d 873, 877)* .

[c] Applicability of Code Civ. Proc. § 657(5) to Contract Actions

In ***Harp v. Pease*** *(1921) 52 Cal. App. 744, 199 P. 863* , an action in assumpsit for money had and received, the jury returned a verdict for plaintiff. The trial court granted defendant's motion for new trial on the grounds, among others, that the damages were excessive, appearing to have been given under the influence of passion or prejudice. Plaintiff contended that the action was not one to recover damages within the meaning of *Code Civ. Proc. § 657(5)* and that the trial court had no authority to grant the motion under that statute. Affirming the trial court's decision, the court of appeal

noted that an action in assumpsit is one to cover damages for breach of an implied contract and consequently the action was one for damages. The court noted that the statute permits a new trial to be granted on the ground of excessive damages. Although the great majority of cases that rely on this ground are actions in tort, the court held that in the absence of any language in the code section itself that could be construed as indicating such an intention on the part of the Legislature, the court itself should not exclude from the scope of the word "damages" all reference to damages arising from breach of contract. Consequently, the trial court had the right, in its discretion, to grant the order on the ground that the damages were excessive (*52 Cal. App. 744, 745-746)* .

Counsel should note that the court's discussion concerned only the ground of excessive damages. However, the case was decided before *Code Civ. Proc. § 657(5)* was amended to include inadequate damages as a ground for a new trial, and the court's holding should apply to cases involving inadequate as well as excessive damages.

[d] Judge Is Permitted to Reweigh Evidence

Patterson v. Rowe *(1952) 113 Cal. App. 2d 119, 247 P.2d 949* , was an action for personal injuries and property damage arising out of an automobile collision. The jury returned a verdict in plaintiff's favor after which plaintiff moved for new trial on the ground of inadequate damages. The trial court ordered a new trial on the issue of damages unless defendants agreed to an additur, and after defendants refused to so agree, the trial court ordered a new trial. Affirming, the court of appeal noted that a new trial may be granted or a judgment may be set aside on the ground of inadequacy of the compensation awarded. The court pointed out that it is the duty of the trial court in considering such a motion to weigh the evidence, to exercise its independent judgment and to grant a new trial if it clearly appears from the evidence believed by it that the damages were inadequate. On appeal the only question is whether the trial court abused its discretion in determining that the damages awarded were inadequate. Since there was a conflict in the evidence as to the extent and permanency of plaintiff's disability and the evidence would justify the award of increased general damages, the court held that it could not say as a matter of law that the trial court abused its discretion in granting a new trial (*113 Cal. App. 2d 119, 122)* .

[e] Purpose of Damage Award

In ***Lewis Jorge Construction Management, Inc. v. Pomona Unified School District*** *(2004) 34 Cal. 4th 960, 22 Cal. Rptr. 3d 340* , defendant school district canceled its contract with plaintiff construction contractor following numerous construction delays. As a result, plaintiff's bonding company reduced plaintiff's performance bonding limits, which plaintiff claimed prevented it from obtaining other unspecified construction contracts with high performance bond requirements. Plaintiff sought and recovered in the trial court damages for profits it claimed to have lost on those other construction contracts (*34 Cal. 4th 960, 965)* .

After extensively reviewing the purpose of contract damages and the distinction between general and special damages for breach of contract, the California Supreme Court held that while lost profits damages are proper in certain kinds of cases, lost profits on future construction contracts were not properly damages in this case. Any loss of profits on future contracts due to decrease in bonding resulting from cancellation of this contract was neither a natural result of thecancellation, nor a risk of which defendant either was actually aware or must have been aware. To the contrary, plaintiff's ability to obtain future contracts was not within the scope of benefits reasonably to be anticipated from full performance of this particular contract (*34 Cal. 4th 960, 975-978)* .

For additional discussion of this case, see *§ 65.105*.

The factual background of ***Glendale Fed. Sav. & Loan Assoc v. Marina View Heights Dev. Co.*** *(1977) 66 Cal. App. 3d 101, 135 Cal. Rptr. 802* , is discussed in *§ 65.80[4][a]*. In affirming the judgment for plaintiff, the court of appeal noted that the trial court had determined that since plaintiff was not fully secured on the date of the foreclosure sale, plaintiff was entitled to recover as damages the loss of security caused by the diversion of funds and the breach of the

guarantee agreement and the court awarded plaintiff $700,000 for that loss of security. Plaintiff contended that it should have received, as the proper measure of damages, the amount required to bring the property into the condition it would have been in had the contract been fully performed instead of the loss of enhancement in value resulting from the failure to perform. Despite plaintiff's failure to move for a new trial, the court of appeal held that the contention presented a reviewable legal issue since it concerned the proper measure of damages and failure to move for a new trial does not preclude a party from attacking the errors of law committed by the trial court in ascertaining the amount of damage. The court noted that the measure of damages for breach of contract is the amount which will compensate the party aggrieved for all the detriment approximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom [quoting *Civ. Code § 3300*]. The court held that damages awarded should, insofar as possible, place plaintiff in the same position he or she would have been in had the contract been performed, but he or she should not be awarded more than the benefit which he or she would have received had the promisor performed [relying on prior case law]. The proper measure of damages for breach of a contract to construct improvements on real property where the work is to be done on plaintiff's property is ordinarily the reasonable cost to plaintiff of completing the work. However, when improvements are to be made on property not owned by the injured party, the proper measure of damages is the difference in value of plaintiff's property with and without the promised performance since that is the contractual benefit of which the injured party is deprived. Since plaintiff did not own the property on which the improvements were to be made, the court held that plaintiff was entitled to damages only to the extent noncompletion of the improvements impaired its security interest and consequently, the trial court's judgment that plaintiff could recover as damages the loss of security was proper (*66 Cal. App. 3d 101, 123)* . See also the *discussion under § 65.87[3][f]*.

[f] When Damages Are Excessive

Plaintiff in ***Neumann v. Bishop*** *(1976) 59 Cal. App. 3d 451, 130 Cal. Rptr. 786* , accepted, in conformance with the trial court's order on defendant's motion for a new trial, a reduction to $280,000 from the $362,289 awarded plaintiff by the jury's verdict. Defendant appealed from the judgment on several grounds including the ground that the amount of the judgment, as reduced, was excessive. In affirming the judgment, the court of appeal pointed out that the trial court had determined that plaintiff's special damages, present and projected, were about $111,000, and that the trial court reduced the sum awarded to $280,000 on the ground that the maximum reasonable general damages for plaintiff's primary injury (to her femur) was $165,000 with a maximum total compensation of $275,000. The court of appeal then quoted from *Beagle v. Vasold (1966) 65 Cal. 2d 166, 179-180, 53 Cal. Rptr. 129, 417 P.2d 673* , to the effect that no matter what manner of calculation is proposed by counsel or used by the jury, the verdict must meet the test of reasonableness, and if it does not, the trial court has the duty to reduce the verdict. The court of appeal noted that the power of the appellate court differs materially from that of the trial court, in that the appellate court may interfere on the ground that the judgment is excessive only if the verdict is so large, that, at first blush, it shocks the conscience and suggests passion, prejudice, or corruption on the part of the jury. Since the award as reduced was not excessive under this standard, the court affirmed the judgment (*59 Cal. App. 3d 451, 490)* .

Counsel should note, however, that the *Supreme Court in Schroeder v. Auto Driveaway Co. (1974) 11 Cal. 3d 908, 919, 114 Cal. Rptr. 622, 523 P.2d 662* , stated that the trial court is in a far better position than an appellate court to determine whether a damage award was influenced by "passion and prejudice" and cited *Code Civ. Proc. § 657*. The Court did not indicate in any way that *Code Civ. Proc. § 657* was amended in 1967 to delete the language "passion and prejudice." Furthermore, the Legislative Committee comment to *Code Civ. Proc. § 657* states that the former language purporting to limit the ground of excessive damages to an award influenced by "passion or prejudice" was eliminated as unnecessary, and that the trial judge is able to grant a new trial when, after weighing the evidence, he or she is convinced from the entire record that the award of damages is clearly excessive.

[g] Discretion to Grant New Trial Is Limited to Damages

In ***Myers v. King*** *(1969) 272 Cal. App. 2d 571, 77 Cal. Rptr. 625* , plaintiff brought an action against defendant for personal injuries sustained when plaintiff was struck from behind by defendant's automobile as he walked down a

roadway facing on-coming traffic. At the conclusion of the trial, the jury awarded plaintiff both special damages and general damages. The trial court thereafter grantedplaintiff's motion for a new trial limited to the issue of damages subject to the condition that the motion would be denied if defendant consented to an additur specified by the trial court. Defendant did not consent and appealed from the judgment and order granting a new trial. Defendant contended, in part, that the trial court abused its discretion in granting a new trial limited to the issue of damages. The court of appeal affirmed the order granting the new trial limited to damages, noting that the decision to limit a new trial to the issue of damages rests in the discretion of the trial court and that such a decision is proper when it can be reasonably said that the liability issue has been determined by the jury. The court of appeal found that the liability issue was not close in the case before it in that there was uncontradicted evidence that defendant was attempting to pass another vehicle when he negligently struck plaintiff. The court of appeal then concluded that the low amount awarded as general damages resulted from the jury's difficulty in assessing damages rather than from its inability to decide the liability issue (*272 Cal. App. 2d 571, 581)* .

[4] Additional Authorities

[a] Trial Court's Power to Determine Excessiveness of Damages

In *Resort Video, Ltd v. Laser Video, Inc. (1995) 35 Cal. App. 4th 1679, 42 Cal. Rptr. 136* , the court of appeal affirmed the trial court's order granting a new trial on the ground of excessive damages. The court held that the trial court's reasons were adequately specified and were sufficient to apprise both the appellant resort promoter and the court of appeal why the trial court considered the jury award of $975,000 for damages for breach of contract for purchase and sale of replicated discs excessive, and to support an order granting a new trial (*35 Cal. App. 4th 1679, 1692-1696)* . The court noted that the trial court did not merely state that the damages were excessive, it directed the appellate court's (and the appellant's) attention to the aspects of the record that supported the order. Quoting from *Romero v. Riggs (1994) 24 Cal. App. 4th 117, 124, 29 Cal. Rptr. 2d 219* , the court concluded that "[n]o more is reasonably or sensibly to be required of the trial court" (*35 Cal. App. 4th 1679, 1696)* .

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6-65 California Points & Authorities §§ 65.88-65.99

[Reserved]

§§ 65.88[Reserved]

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6-65 California Points & Authorities § 65.100

§ 65.100 Supporting Motion for New Trial [Code Civ. Proc. § 659] on Ground of Excessive or Inadequate Damages [Code Civ. Proc. § 657(5)]--By Plaintiff or Defendant--Improvements on Real Property Owned or Not Owned by Plaintiff

[1] FORM Supporting Motion for New Trial [Code Civ. Proc. § 659] on Ground of Excessive or Inadequate Damages [Code Civ. Proc. § 657(5)]--By Plaintiff or Defendant--Improvements on Real Property Owned or Not Owned by Plaintiff

[*Caption. See § 65.87.*]

[*EITHER*]

IT IS PROPER TO GRANT A NEW TRIAL ON THE GROUND THAT THE DAMAGES ARE _____ [EXCESSIVE *or* INADEQUATE] SINCE THE CORRECT MEASURE OF DAMAGES FOR BREACH OF A CONTRACT TO CONSTRUCT IMPROVEMENTS ON PLAINTIFF'S PROPERTY IS THE REASONABLE COST TO PLAINTIFF OF COMPLETING THE WORK AND THAT MEASURE WAS NOT USED IN DETERMINING THE AMOUNT OF DAMAGES.

[*OR*]

IT IS PROPER TO GRANT A NEW TRIAL ON THE GROUND THAT THE DAMAGES ARE _____ [EXCESSIVE *or* INADEQUATE] SINCE THE CORRECT MEASURE OF DAMAGES FOR BREACH OF A CONTRACT TO CONSTRUCT IMPROVEMENTS ON REAL PROPERTY NOT OWNED BY PLAINTIFF IS THE DIFFERENCE IN VALUE OF THE PLAINTIFF'S PROPERTY WITH AND WITHOUT THE PROMISED PERFORMANCE, AND THAT MEASURE WAS NOT USED IN DETERMINING THE AMOUNT OF DAMAGES.

A-I. Rules Governing Motion for New Trial on Ground of Excessive or Inadequate Damages. [*See § 65.87,*

Paragraphs A-I.]

[*EITHER*]

J. Improvements Made on Real Property Owned by Plaintiff. The proper measure of damages for breach of a contract to construct improvements on real property where the work is to be done on plaintiff's property is the reasonable cost to plaintiff of completing the work (*Coughlin v. Blair (1953) 41 Cal. 2d 587, 600, 262 P.2d 305* ; *Glendale Fed. Sav. & Loan Assoc v. Marina View Heights Dev. Co. (1977) 66 Cal. App. 3d 101, 123, 135 Cal. Rptr. 802*).

[*OR*]

J. Improvements Made on Real Property Not Owned by Plaintiff. Although the proper measure of damages for breach of a contract to constructimprovements on real property where the work is to be done on plaintiff's property is ordinarily the reasonable cost to plaintiff of completing the work, where the improvements are made on property not owned by plaintiff, the proper measure of damages is the difference in value of plaintiff's property with and without the promised performance since that is the contractual benefit of which plaintiff has been deprived (*Coughlin v. Blair (1953) 41 Cal. 2d 587, 600, 262 P.2d 305* ; *Glendale Fed. Sav. & Loan Assoc v. Marina View Heights Dev. Co. (1977) 66 Cal. App. 3d 101, 124, 135 Cal. Rptr. 802*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted by defendant or plaintiff in support of a motion for new trial on the ground that the damages awarded were excessive or inadequate since an incorrect measure of damages was used to determine damages for breach of a contract to construct improvements on real property owned by plaintiff or on real property not owned by plaintiff.

When appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Improvements Made on Real Property Owned By Plaintiff

In ***Coughlin v. Blair*** *(1953) 41 Cal. 2d 587, 262 P.2d 305* , plaintiffs bought a lot from defendants who agreed to pave a road to the property and install electricity and gas within a certain time period. After the time period had passed and defendants had failed to perform, plaintiffs brought suit seeking damages for the difference in value of the property with and without the utilities and road and recovered judgment for general damages in that amount. On appeal, the Supreme Court, in considering whether the trial court had applied the proper measure of damages, noted that the contract called for the installation of improvements that would greatly increase the value of plaintiff's property and that the consideration was paid in advance. The Court pointed out that if the work were to be done on plaintiff's property, the proper measure of damages would ordinarily be the reasonable cost to plaintiffs of completing the work. However, a different rule applies when the improvements are to be made on property that is not owned by the injured party. In that event the injured party is unable to complete the work himself and the proper measure of damages is the difference in value of plaintiff's property with and without the promised performance since that is the contractual benefit of which the injured party is deprived. The Court noted that, in this case, the contract was to be performed on property not owned by plaintiff over which plaintiffs had a nonexclusive easement and found that plaintiffs proved their damages on the theory

that the proper measure was the difference in value of their lot with and without the promised performance. Since defendants never contended that plaintiffs had the right to pave the road and install the utilities or that they would be able to get the improvements independently of defendant, the Court affirmed the judgment.

Glendale Fed. Sav. & Loan Assoc v. Marina View Heights Dev. Co. (1977) 66 Cal. App. 3d 101, 135 Cal. Rptr. 802 , is discussed in *§ 65.87[3][e]*.

[b] Improvements Made on Real Property Not Owned by Plaintiff

Coughlin v. Blair *(1953) 41 Cal. 2d 587, 262 P.2d 305* , is *discussed under § 65.100[3][a]*.

Glendale Fed. Sav. & Loan Assoc v. Marina View Heights Dev. Co. *(1977) 66 Cal. App. 3d 101, 135 Cal. Rptr. 802* , is discussed in *§ 65.87[3][e]*.

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6-65 California Points & Authorities § 65.101

§ 65.101 Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 659] on Ground of Excessive Damages [Code Civ. Proc. § 657(5)]--Measure of Damages When Cost of Repairs Exceeds Value of Land

[1] FORM Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 659] on Ground of Excessive Damages [Code Civ. Proc. § 657(5)]--Measure of Damages When Cost of Repairs Exceeds Value of Land

[*Caption. See § 65.87.*]

IT IS PROPER TO GRANT A NEW TRIAL ON THE GROUNDS THAT THE DAMAGES ARE EXCESSIVE WHERE THE COST OF REPAIRING THE INJURY TO THE PROPERTY CAUSED BY THE BREACH OF CONTRACT IS GREATER THAN THE VALUE OF THE PROPERTY, SINCE UNDER THOSE CIRCUMSTANCES, THE CORRECT MEASURE OF DAMAGES FOR BREACH OF THE CONTRACT IS THE VALUE OF THE PROPERTY.

A-H. Rules Governing Motions for New Trial on Ground of Excessive Damages. [*See § 65.87, Paragraphs A-H.*]

I. Value of Land as Measure of Damages. If the cost of repairing an injury to property is less than the value of the property prior to the injury, such cost is the proper measure of damages but where the cost of restoration or repair exceeds such value, the proper measure of damages is the value of the property prior to the injury (*Avery v. Fredericksen & Westbrook (1944) 67 Cal. App. 2d 334, 339-340, 154 P.2d 41*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities is for use by defendant in support of a motion for a new trial on the ground that the damages awarded are excessive since the trial court awarded damages on the basis of the cost of repairs to the property but the value of the property itself was less than the cost of the repairs.

When appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Value of Land as Measure of Damages

Avery v. Fredericksen & Westbrook *(1944) 67 Cal. App. 2d 334, 154 P.2d 41* , was an action for damages for breach of a contract under which plaintiff agreed to allow defendant to remove sand from plaintiff's land and defendant agreed to level off any portion of the property from which the sand was removed and to replace the top soil. After removal of the sand, defendants failed to level the land or to replace the top soil and plaintiff sued for the cost of doing such work. The trial court awarded damages in a much smaller amount based on the value of the land prior to the sand removal. Affirming, the court of appeal noted that for the breach of an obligation arising from contract, the measure of damages is the amount which will compensate the aggrieved party for all the detriment proximately caused thereby or which, in the ordinary course of things, would be likely to result therefrom [quoting *Civ. Code § 3300*]. The court further noted that no person can recover a greater amount in damages than he or she could have gained by the full performance thereof on both sides except in certain instances [quoting *Civ. Code § 3358*]. If the cost of repairing an injury to property and restoring it to its original condition amounts to less than the value of the property prior to the injury, according to the court, such cost is the proper measure of damages, but if the cost of restoration exceeds such value, then the value of the property is the proper measure [quoting prior case law]. Since the evidence showed that the market value of plaintiff's land had not depreciated following the sand removal, plaintiff was allowed the full value of the land and still had the land. Consequently, the court held that he had not suffered any detriment for which he was not compensated.

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6-65 California Points & Authorities § 65.102

§ 65.102 Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 659] on Ground of Excessive Damages [Code Civ. Proc. § 657(5)]--Damages Measured by Diminution in Market Value Where Economic Waste Would Occur From Repairing Defects

[1] FORM Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 659] on Ground of Excessive Damages [Code Civ. Proc. § 657(5)]--Damages Measured by Diminution in Market Value Where Economic Waste Would Occur From Repairing Defects

[*Caption. See § 65.87.*]

IT IS PROPER TO GRANT A NEW TRIAL ON THE GROUND OF EXCESSIVE DAMAGES IF THE MEASURE OF DAMAGES USED WAS THE COST OF MAKING THE WORK DONE BY DEFENDANT CONFORM TO THE CONTRACT BUT DEFENDANT HAS PROVED THAT ECONOMIC WASTE WOULD RESULT FROM REQUIRING THE REPAIR OF THE DEFECTS.

A-H. Rules Governing Motions for New Trial on Ground of Excessive Damages. [*See § 65.87, Paragraphs A-H.*]

I. Diminution in Market Value as Measure of Damages. If economic waste would result from repairing defects in a building and making the building conform to contract specifications, the proper measure of damages is the diminution of market value due to the defects (*Bayuk v. Edson (1965) 236 Cal. App. 2d 309, 316, 46 Cal. Rptr. 49*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for a new trial based on the ground of excessive damages where defendant contractor has proved that economic waste would result if the terms of the contract were carried out and the defects were remedied, but the measure of damages used by the trial court was the cost of making the building conform to contract specifications.

When appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Diminution in Market Value as Measure of Damages

Bayuk v. Edson *(1965) 236 Cal. App. 2d 309, 46 Cal. Rptr. 49* , was an action for damages for the negligent performance of an oral contract for architectural services in connection with the construction of plaintiffs' home. Defects in the construction of the house included improper design of the floor, incorrect construction of a number of closets, inadequate outside doors for the climate, and improper laying of the kitchen tile and fitting of the outside sliding doors. The trial court awarded damages to plaintiffs based on the diminution in market value of the house due to the defects. On appeal, defendants contended that the amount of damages was unsupported by substantial evidence and that the method of measurement was improper. Affirming the trial court, the court of appeal noted that the trial judge had commented on the fact that neither party had responded to his suggestion to produce evidence of the cost to repair the damage. The trial judge in his findings stated however, that he believed, considering all the factors involved, that he had used the proper measure of damages on the evidence before him. The court of appeal also noted that a general building contractor testified at trial that the mistakes in design and construction were of such an extent that it would be economically unfeasible to repair the defects and that tearing out and repairing them would cost more than the cost of rebuilding the house in its entirety. Consequently, the method applied by plaintiffs to compute their damage, the diminution of market value due to the defects, was proper under the circumstances [noting prior case authority].

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6-65 California Points & Authorities § 65.103

§ 65.103 Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 659] on Ground of Excessive Damages [Code Civ. Proc. § 657(5)]--Damage Award Does Not Reflect Mitigation Requirement

[1] FORM Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 659] on Ground of Excessive Damages [Code Civ. Proc. § 657(5)]--Damage Award Does Not Reflect Mitigation Requirement

[*Caption. See § 65.87.*]

IT IS PROPER TO GRANT A NEW TRIAL ON THE GROUND OF EXCESSIVE DAMAGES WHERE DEFENDANT PROVED THAT PLAINTIFF HAD A DUTY TO MITIGATE BUT THE DAMAGE AWARD _____ [FAILS TO TAKE INTO ACCOUNT PLAINTIFF'S FAILURE TO DO SO *or* DOES NOT REFLECT THE AMOUNT OF DAMAGES PLAINTIFF AVOIDED BY MITIGATION].

A-H. Rules Governing Motions for New Trial on Excessive Damages Ground. [*See § 65.87, Paragraphs A-H.*]

I. Duty to Mitigate Damages. A party injured by a breach of contract is required to do everything reasonably possible to minimize his or her loss and thus reduce the damages for which the other party has become liable (*Sackett v. Spindler (1967) 248 Cal. App. 2d 220, 238, 56 Cal. Rptr. 435*).

J. No Recovery for Avoidable Loss. Plaintiff cannot recover damages for detriment which he or she could have avoided by reasonable effort and without undue expense (*Sackett v. Spindler (1967) 248 Cal. App. 2d 220, 238-239, 56 Cal. Rptr. 435*).

[*Optional*]**K. Measure of Recovery by Discharged Employee.** The measure of recovery by a wrongfully discharged employee is the amount of salary agreed on for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment (*Parker v. Twentieth Century-Fox Film Corp. (1970) 3 Cal. 3d 176, 181, 89 Cal. Rptr. 737, 474 P.2d 689*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be used in support of a motion for new trial on the ground of excessive damages where defendant proved at trial that plaintiff had a duty to mitigate but did not do so or that plaintiff did mitigate damages but this mitigation was not taken into account in computing the amount of damages.

When appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Duty to Mitigate Damages

Sackett v. Spindler *(1967) 248 Cal. App. 2d 220, 56 Cal. Rptr. 435* , involved an action for money had and received in which defendant was awarded damages on his cross complaint for breach of contract. Plaintiff contracted to buy newspaper stock from defendant for which he made several payments but was unable to make the final payment on time and subsequent attempts to make payment also failed. As a result the financial condition of the newspaper suffered due to a lack of working capital and defendant attempted to improve his condition by borrowing money and cutting costs. The trial court specifically found that defendant had made reasonable efforts in minimizing damages. On appeal, plaintiff argued, in part, that this finding was not supported by the evidence. Affirming the judgment, the court of appeal stated that a party injured by a breach of contract is required to do everything reasonably possible to minimize his own loss and thus reduce the damages for which the other party has become liable. From this rule it follows that a person injured by a breach of contract cannot recover damages for detriment which he could have avoided by reasonable effort and without undue expense. According to the court, the question of whether the injured party has acted reasonably in mitigating damages is one of fact so that where the trial court has made findings of fact to the effect that the injured party has acted reasonably in minimizing his damages, this finding must be upheld on appeal if the record contains any substantial evidence in support of such finding. The court held that the record contained ample evidence tending to show that defendant acted reasonably in minimizing damages and consequently the trial court's judgment was proper.

[b] No Recovery for Avoidable Loss

Sackett v. Spindler *(1967) 248 Cal. App. 2d 220, 56 Cal. Rptr. 435* , is *discussed under § 65.103[3][a]*.

[c] Measure of Recovery by Discharged Employee

Parker v. Twentieth Century-Fox Film Corp. *(1970) 3 Cal. 3d 176, 89 Cal. Rptr. 737, 474 P.2d 689* , was an action for the recovery of compensation under contract for plaintiff's services as an actress in a motion picture. Defendantdecided not to produce the musical review for which plaintiff was hired but offered to employ plaintiff as leading actress in a western. Plaintiff refused the part and defendant pleaded as an affirmative defense that plaintiff deliberately failed to mitigate damages by unreasonably refusing the offer. The trial court granted plaintiff's motion for summary judgment and entered judgment for plaintiff for the amount plaintiff was to receive under the contract. Affirming, the Supreme Court noted that generally the measure of recovery for a wrongfully discharged employee is the amount of salary agreed on for the period of service less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment. However, before projected

earnings from other employment opportunities not sought or accepted by the discharged employee can be applied in mitigation, the employer must show that the other employment was comparable or substantially similar to that of which the employee was deprived and an employee's rejection or failure to seek other employment of a different or inferior kind may not be used in order to mitigate damages. The Court noted that defendant raised no issue as to the reasonableness of plaintiff's efforts to obtain other employment so that the sole issue was whether plaintiff's refusal to accept defendant's substitute offer could be used in mitigation. The Court held that the trial court correctly ruled that plaintiff's refusal could not be applied in mitigation of damages because the offer of the lead in the western was one for different and inferior employment, and that the female lead as a dramatic actress in a western could not be considered the equivalent of or substantially similar to the lead in a song and dance production in which plaintiff's talents as a dancer as well as an actress would be used. Consequently, the trial court properly awarded plaintiff the amount of compensation provided for in the contract without taking into account any amount for mitigation.

[4] Additional Authorities

[a] No Recovery for Avoidable Loss

In ***Henrici v. South Feather Land & Water Co.*** *(1918) 177 Cal. 442, 170 P. 1135* , an action for damages for defendant's failure and refusal to furnish water to irrigate plaintiff's land, the trial court rendered judgment for plaintiff. Defendant, a water company, was the successor in interest to a corporation who made an agreement with plaintiff to furnish water to plaintiff for a specified fee. When defendant succeeded to the corporation's interest, it established a new system of rates which plaintiff refused to pay claiming that he should receive the water for the rate established in his agreement with defendant's predecessor. Defendant refused to furnish water to plaintiff and many of plaintiff's fruit trees and vines died. On appeal, defendant contended that the evidence did not support the finding with respect to damage. Agreeing with defendant, the Supreme Court noted that defendant never absolutely refused to furnish water but was always ready to supply plaintiff's land if plaintiff paid the rates demanded, and that if plaintiff had paid the increased rate without conceding its correctness, he could have saved his trees and vines, reducing his damage to a comparatively small amount. The Court held that it was plaintiff's duty to do so since the law imposed on a party injured by another's breach of contract the active duty of using all ordinary care and making all reasonable exertions to make the injury as small as possible. If by the plaintiff's negligence or willfulness the damages are unnecessarily increased, this increase falls on him. Consequently, the Court reversed the judgment holding that plaintiff could not recover from defendant for the damage caused by his own act in allowing the trees and vines to go without water when he knew he could, at a slight cost, have secured the water and reduced the damage.

Mayes v. Sturdy Northern Sales, Inc. *(1979) 91 Cal. App. 3d 69, 154 Cal. Rptr. 43* , involved an action for breach of a franchise agreement and conspiracy to destroy plaintiff's business. After a trial before the court, the court entered judgment for plaintiff for damages for lost profits. Plaintiff had entered into a franchise agreement with a dog food company to sell its products in a specified area. According to the agreement, defendant was required to provide all necessary merchandise to plaintiff. The company was later sold and the new owners (defendants in this action) began to cut back on plaintiff's orders and to sell directly to stores with which plaintiff had had accounts. Plaintiff eventually stopped distributing because he could not get any dog food from defendants. On appeal, defendants contended in part that plaintiff failed to mitigate damages since he made only one unsuccessful attempt to locate work and although he was 59 years old, he had not intended to retire by breaking the franchise agreement. The court of appeal noted that a plaintiff cannot recover damages that would have been avoidable by his or her ordinary care and reasonable exertions. Failure to mitigate damages is an affirmative defense that must be pleaded and proved by defendants. The court held that since defendants did not plead failure to mitigate and since they presented no evidence of employment opportunities for a man of plaintiff's age and skills, defendants' contentions were without merit and the trial court's judgment was affirmed.

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6-65 California Points & Authorities § 65.104

§ 65.104 Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 659] on Ground of Excessive Damages [Code Civ. Proc. § 657(5)]--Damages Limited to Those That Could Accrue During Period of Notice Required Under Termination Provision [Civ. Code § 3358]

[1] FORM Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 659] on Ground of Excessive Damages [Code Civ. Proc. § 657(5)]--Damages Limited to Those That Could Accrue During Period of Notice Required Under Termination Provision [Civ. Code § 3358]

[*Caption. See § 65.87.*]

IT IS PROPER TO GRANT A NEW TRIAL ON THE GROUND OF EXCESSIVE DAMAGES FOR BREACH OF A CONTRACT GIVING EITHER PARTY THE RIGHT TO TERMINATE THE CONTRACT ON NOTICE WHEN THE DAMAGES AWARDED EXCEED THOSE THAT COULD ACCRUE DURING THE PERIOD OF THE REQUIRED NOTICE.

A-H. Rules Governing Motions for New Trial on Ground of Excessive Damages. [*See § 65.87, Paragraphs A-H.*]

I. Damages Limited to Those Accruing During Notice Period. When a contract provides that it may be terminated by either party without cause by giving notice a certain number of days before the termination is to be effective, a party who breaches that contract[, by terminating it without notice or on shorter notice than required], is liable only for damages that could potentially accrue over a period equal to the term of the required notice (*see Martin v. U-Haul Co. Of Fresno (1988) 204 Cal. App. 3d 396, 409-411, 251 Cal. Rptr. 17*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be used in support of a motion for new trial on the ground of excessive damages when the contract that has been breached contained a provision allowing it to be terminated without cause by giving notice a specified time before the termination was to be effective and the damage award includes damages in excess of those that could accrue during a period equal to the length of the required notice.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For instance, the required notice period and facts regarding the breach should be set forth. The evidence from which damages were calculated, possibly net profit earned under the contract during the quarter or year prior to the breach, should be reviewed to show that the proper limitation was not applied in calculating damages.

[3] Discussion of Authorities

[a] Damages Limited to Those Accruing During Notice Period

Civ. Code § 3358 , which was cited by the court in *Martin v. U-Haul Co. Of Fresno (1988) 204 Cal. App. 3d 396, 251 Cal. Rptr. 17* (discussed *below*), provides that, except as expressly provided by statute, no person can recover a greater amount in damages for the breach of an obligation, than he or she could have gained by full performance of that obligation on both sides.

Plaintiff in ***Martin v. U-Haul Co. Of Fresno*** *(1988) 204 Cal. App. 3d 396, 251 Cal. Rptr. 17* had been an authorized rental dealer of defendant's equipment for about ten years. The dealership contract provided that it could be terminated by either party without cause on 30-days notice. Defendant had opened its own "moving center" in the same town as plaintiff's operation. Plaintiff intended to relocate to within one mile of that moving center. Plaintiff's field representative and other of defendant's officers knew of the planned move and had not voiced any objection. Some of defendant's officers claimed plaintiff was renting equipment, keeping the proceeds, and not reporting it to defendant. On August 31, 1981, defendant terminated the contract without notice by taking possession of all the rental equipment and removing it from plaintiff's business premises. Plaintiff earning approximately $9,400 in rental commissions during 1980. Plaintiff's 1981 earnings through August 8 amounted to approximately $5,800. Plaintiff sued for fraud, breach of contract, and tortious breach of the implied convenant of good faith and fair dealing. Judgment of nonsuit was entered for defendant on the first and third causes of action. The jury awarded plaintiff $29,000 plus costs, interest, and attorney's fees on the cause of action for breach of contract. Defendant moved for new trial on that cause of action. The motion was granted unless plaintiff agreed to reduction of damages to $725. Instead, plaintiff appealed.

The court of appeal affirmed the order conditionally granting the motion for new trial and remanded to allow plaintiff the election of accepting the $725 or requesting a new trial on the issue of damages. Judgment in favor of defendant on the first and third causes of action was affirmed. The court of appeal first discussed the general rule of foreseeability, citing *Coughlin v. Blair (1953) 41 Cal. 2d 587, 603, 262 P.2d 305* (discussed in *§ 65.100[3][b]*) and *Glendale Fed. Sav. & Loan Assn v. Marina View Heights Dev. Co. (1977) 66 Cal. App. 3d 101, 123, 135 Cal. Rptr. 802* (discussed in *§ 65.87[3][e]*). The court said that the specific rule that a termination clause limits recoverable damages to the notice period is consistent with the general requirement that contract damages are limited to those foreseeable by the parties at the time of contracting. Parties who agree that a contract may be terminated for any reason, or no reason, on the giving of specified notice could not reasonably anticipate that damages could exceed that notice period (*204 Cal. App. 3d 396, 409)* . The court then set forth *Civ. Code § 3358* and reasoned that if defendant followed the notice requirement, it could have terminated the contract after providing 30-days notice. Thus, full performance by defendant would only have resulted in an additional 30 days of dealership business for plaintiff. That 30-day period was all plaintiff could reasonably be assured of remaining in business (*204 Cal. App. 3d 396, 410)* . Further, awarding the wronged party

damages that exceed those attributable to the 30 days immediately following the breach would place that party in a better position than that resulting from full performance in accordance with the terms of the agreement (*204 Cal. App. 3d 396, 410-411)* . Therefore, the trial court was correct when it granted the motion for new trial conditioned on plaintiff's consent to a reduction in the damage award (*204 Cal. App. 3d 396, 411)* .

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6-65 California Points & Authorities § 65.105

§ 65.105 Supporting Defendant's Motion for New Trial on Ground of Excessive Damages--Award of Damages for Lost Profits on Unidentified and Unrelated Future Contracts Was Error

[1] FORM Supporting Defendant's Motion for New Trial on Ground of Excessive Damages--Award of Damages for Lost Profits on Unidentified and Unrelated Future Contracts Was Error

[*Caption. See § 65.87*].

PLAINTIFF IS NOT ENTITLED TO RECOVER DAMAGES FOR LOSS OF PROFITS ON UNIDENTIFIED AND UNRELATED FUTURE CONTRACTS THAT HAVE NOT YET BEEN EARNED OR AWARDED.

A. Lost Profits on Future Contracts Ordinarily Are Not Recoverable as General Damages. Lost profits on future unawarded and unrelated contracts ordinarily are not recoverable as general damages because ordinarily they do not flow directly and necessarily from a breach of contract, and are not part of the bargain of the parties (*Lewis Jorge Construction Management, Inc. v. Pomona Unified School District (2004) 34 Cal. 4th 960, 973, 975, 22 Cal. Rptr. 3d 340*).

B. Lost Profits on Future Contracts Ordinarily Are Not Recoverable as Special Damages. Lost profits on future contracts are not recoverable as special damages unless the special or particular circumstances from which they arise (1) were actually communicated to or known by the breaching party, or (2) were matters of which the breaching party should have been aware at the time of contracting. In addition, such damages must be pled with particularity, and must also be proven to be certain both as to their occurrence and their extent (albeit not with mathematical precision), whereas the damages sought by plaintiff in this case are necessarily uncertain and speculative (*Lewis Jorge Construction Management, Inc. v. Pomona Unified School District (2004) 34 Cal. 4th 960, 968-969, 977, 22 Cal. Rptr. 3d 340*).

[2] Comments

[a] Use of Form

These points and authorities may be used in opposition to a plaintiff's claim for damages based on an alleged loss of future profits on unidentified contracts that have not yet been awarded. For example, it can be used to refute allegations that a defendant's breach of a construction contract resulted in a reduction of the plaintiff's contractor's bond, resulting, in turn in a loss of future business [*see Lewis Jorge Construction Management, Inc. v. Pomona Unified School District (2004) 34 Cal. 4th 960, 22 Cal. Rptr. 3d 340]* . In order for the defendant to defeat a claim for such damages, the defendant must be able to show that:

- The lost profits are not recoverable as general damages because they did not flow directly and necessarily from the breach of contract, and that theywere not part of the bargain of the parties [*see Lewis Jorge Construction Management, Inc. v. Pomona Unified School District (2004) 34 Cal. 4th 960, 971-973, 22 Cal. Rptr. 3d 340]* ; and

- The lost profits are not recoverable as special damages because [*see Lewis Jorge Construction Management, Inc. v. Pomona Unified School District (2004) 34 Cal. 4th 960, 975-977, 22 Cal. Rptr. 3d 340]* :

  - Their likelihood was neither actually communicated to or known by the defendant, nor was a matter that the defendant should have been aware of at the time of contracting, and/or

  - The damages are uncertain or speculative as to both their occurrence and their extent.

Lost profits damages are proper in certain kinds of cases. Thus, for example, these points and authorities are not designed to be used when the lost profits involve collateral transactions such as contracts involving crops, goods intended for resale, or an agreement creating an exclusive sales agency. It has been stated that the likelihood of lost profits from related or derivative transactions is so obvious in these situations that the breaching party must be deemed to have contemplated them at the inception of the contract [*Lewis Jorge Construction Management, Inc. v. Pomona Unified School District (2004) 34 Cal. 4th 960, 968-969, 971-972, 22 Cal. Rptr. 3d 340* (citing cases)]. Rather, these points and authorities are intended to be used when the claimed future contracts are unrelated to the transaction involving the defendant's breach of contract.

Counsel should insert argument into the form showing the relationship between the facts of the case and the points of law stated. Specifically, counsel should assert facts showing that [*Lewis Jorge Construction Management, Inc. v. Pomona Unified School District (2004) 34 Cal. 4th 960, 973-977, 22 Cal. Rptr. 3d 340]* :

- Defendant's assumption of liability for this type of damages was not within the contemplation of the parties and was not part of their bargain;

- Plaintiff never communicated to defendant the potential for this type of liability;

- Defendant was unaware of the potential for such damages under the facts of the case and had no reason to be aware of that potential; and

- The alleged damages were speculative and uncertain since there was no guarantee that plaintiff would have been awarded any future contracts, the amount of any such contracts, or that the failure to defendant's acts were the cause of plaintiff not obtaining the contracts.

[3] Discussion of Authorities

[a] Lost Profits on Future Contracts Ordinarily Are Not Recoverable as General Damages

In ***Lewis Jorge Construction Management, Inc. v. Pomona Unified School District*** *(2004) 34 Cal. 4th 960, 22 Cal. Rptr. 3d 340* , a school district terminated a construction contract after the contractor failed to complete it in a timely manner. The contractor's bonding company then hired another construction company to complete the project, and first suspended and then later reduced the amount of bonding for the original contractor, which ultimately went out of business. The original contractor successfully sued the school district for breach of contract, recovering as damages approximately $3 million for potentially lost profits that the contractor claimed it would have earned on prospective construction contracts it never won because of its impaired bonding capacity. These lost profits were awarded as an element of general damages, and the court of appeal concluded that they were a proper item of general damages (*34 Cal. 4th 960, 965)* .

The California Supreme Court reversed, holding that it was improper to award lost profits from future construction contracts as an element of general damages. General damages are those that flow directly and necessarily from a breach of contract, or that are a natural result of a breach. Because general damages are a natural and necessary consequence of a contract breach, they are said to be within the contemplation of the parties, meaning that because their occurrence is sufficiently predictable, the parties at the time of contracting are deemed to have contemplated them (*34 Cal. 4th 960, 968)* . The Court observed that while unearned profits sometimes have been used as the measure of general damages for breach of a construction contract when the breaching party's conduct prevented the other side from undertaking performance, the profits involved were purely profits unearned on the very contract that was breached (*34 Cal. 4th 960, 971)* . In this case, the Court was unwilling to say that the parties' bargain included the contractor's potential profits on future construction projects it had not bid on or been awarded. Full performance by the school district would simply have provided the contractor with full payment of the contract price for the construction. Thus, award of lost profits as an element of general damages was improper (*34 Cal. 4th 960, 975)* .

[b] Lost Profits on Future Contracts Ordinarily Are Not Recoverable as Special Damages

The facts in ***Lewis Jorge Construction Management, Inc. v. Pomona Unified School District*** *(2004) 34 Cal. 4th 960, 22 Cal. Rptr. 3d 340* are discussed in *§ 65.105[3][a]*. In addition to holding that it was error to award lost profits on future construction contracts as an element of general damages, the CaliforniaSupreme Court also held that such an award also could not be sustained as an award of special damages. Although the construction company did not plead its lost future profits as special damages, the issue of their availability as special damages was presented to the jury, and the school district expressly stated that it was not relying on that pleading omission.

Special damages are those losses that do not arise directly and inevitably from any similar breach of any similar agreement, but rather are secondary or derivative losses arising from circumstances that are particular to the contract or to the parties. Under the rule of *Hadley v. Baxendale (1854) 156 Eng. Rep. 145* , as articulated in the California case law, special damages are recoverable if the special or particular circumstances from which they arise (1) were actually communicated to or known by the breaching party, or (2) were matters of which the breaching party should have been aware at the time of contracting (*34 Cal. 4th 960, 968-969)* . The Court noted that such damages must be pled with particularity, and must also be proven to be certain both as to their occurrence and their extent, albeit not with mathematical precision. In this case, when the school district signed the contract it did not know what the contractor's balance sheet showed, or what criteria its surety ordinarily used to evaluate a contractor's bonding limits. Absent such knowledge, the profits that the contractor claimed it would have made on future, unawarded contracts were not actually foreseen or reasonably foreseeable, and hence were unavailable as special damages (*34 Cal. 4th 960, 977)* . The Court observed that although the school district's termination of the contract was "the first event in a series of misfortunes" that culminated in the contractor closing down its construction business, those consequences are not the natural and necessary result of the breach of every construction contract involving bonding (*34 Cal. 4th 960, 978)* .

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[Reserved]

§§ 65.106[Reserved]

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6-65 California Points & Authorities § 65.120

§ 65.120 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 659] Made on Ground of Excessive Damages [Code Civ. Proc. § 657(5)]--Cost Theory as Measure of Damages if Intentional Major Deviations From Contract But No Economic Waste

[1] FORM Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 659] Made on Ground of Excessive Damages [Code Civ. Proc. § 657(5)]--Cost Theory as Measure of Damages if Intentional Major Deviations From Contract But No Economic Waste

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO._____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN OPPOSITION TO MOTION FOR NEW TRI-
vs.	)	AL
_____ [*name*],	)	[*Code Civ. Proc. § 659*]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

DEFENDANT'S MOTION FOR A NEW TRIAL ON THE GROUND OF EXCESSIVE DAMAGES SHOULD BE DENIED SINCE DEFENDANT MADE INTENTIONAL MAJOR DEVIATIONS FROM THE CONTRACT TERMS

AND DID NOT PROVE THAT ANY ECONOMIC WASTE WOULD RESULT FROM MAKING THE BUILDING CONFORM TO CONTRACT REQUIREMENTS AND CONSEQUENTLY IT WAS PROPER TO DETERMINE DAMAGES BY THE COST OF CONFORMING THE BUILDING TO CONTRACT SPECIFICATIONS.

A. No New Trial Unless Jury Clearly Should Have Reached Different Decision. A new trial cannot be granted on the ground of excessive damages unless, after weighing the evidence, the court is convinced from the entire record, including reasonable inferences therefrom, that the jury clearly should have reached a different decision (*Code Civ. Proc. § 657*).

B. Cost of Conforming as Measure of Damages. If defendant contractor has made intentional major deviations from the contract terms and has not affirmatively proved that economic waste would result from making the building conform to the contract in that a substantial part of what has been done must be undone, the measure of damages is the amount required to make the building conform to the contract plans and specifications (*Shell v. Schmidt (1958) 164 Cal. App. 2d 350, 360, 365-366, 330 P.2d 817*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be used by a plaintiff to oppose a motion for new trial on the ground of excessive damages in an action for breach of a construction contract when the measure of damages used was the cost of making the building conform to contract specifications but defendant claims that this measure provides for excessive damages and that the proper measure is the diminution in market value of the building due to the defects.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Cost of Conforming as Measure of Damages

Shell v. Schmidt *(1958) 164 Cal. App. 2d 350, 330 P.2d 817* , was an action to establish the amount of damages to be paid a contractor for breach of a building contract. A previous action had established that defendant had breached the contract. Plaintiffs were third-party beneficiaries of a contract between defendant and the federal government under which defendant was to build tract homes which plaintiffs bought. Defendant had difficulty getting materials required by the contract so it deviated from the contract specifications by not applying wood sheathing to the exterior walls and using construction paper covered with chicken wire instead, installing one floor furnace rather than two, and making the interior walls of sheet rock with taped joints instead of gypsum lath and plaster. One of defendant's expert witnesses testified at trial that the defects could be remedied easily by placing plywood over the exterior and stucco on that and placing wire netting on the interior walls and then plaster. At trial, plaintiffs claimed that the proper measure of damages for the contract breach was based on the cost theory or the cost of making the work done by defendant conform to the contract but defendant advanced the value theory or the difference between the value of the structure as planned and its value as built. The jury evidently agreed with plaintiffs and awarded damages based on making the work conform to the contract. Affirming, the court of appeal noted that the general measure of damages is the cost rule and

the court examined the circumstances which result in the use of the value rather than the cost method [relying on prior case law and noted authorities on contracts]. One of the circumstances is proof of good faith or lack of willfulness. The court held that such proof is impossible if there have been intentional major deviations from the terms of the contract, and consequently, defendant did not prove good faith since its deviations from the contract specifications were done intentionally. Additionally, the court noted that another circumstance to be considered in determining the measure of damages is proof by defendant that a substantial part of what had been done must be undone or proof that economic waste would result from the replacement of the omissions and defects. Defendant did not prove this since, according to its expert, the defects could be remedied rather easily. Consequently, judgment for plaintiffs was proper (*164 Cal. App. 2d 350, 360, 365-366)* .

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6-65 California Points & Authorities § 65.121

§ 65.121 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 659] Made on Ground of Excessive Damages [Code Civ. Proc. § 657(5)]--Mitigation Not Applicable to Certain Contracts

[1] FORM Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 659] Made on Ground of Excessive Damages [Code Civ. Proc. § 657(5)]--Mitigation Not Applicable to Certain Contracts

[*Caption. See § 65.120.*]

DEFENDANT'S MOTION FOR NEW TRIAL SHOULD BE DENIED SINCE THE CONTRACT INVOLVED IN THE ACTION DID NOT REQUIRE ALL OR A GREAT PORTION OF PLAINTIFF'S TIME NOR PRECLUDE PLAINTIFF FROM UNDERTAKING OTHER CONTRACTS CONTEMPORANEOUSLY AND CONSEQUENTLY THE DOCTRINE OF MITIGATION OF DAMAGES WAS NOT APPLICABLE.

A. No New Trial Unless Jury Clearly Should Have Reached Different Decision. [*See § 65.120, Paragraph A.*]

B. Mitigation Not Applicable to Certain Contracts. The doctrine of mitigation of damages does not apply to contracts not requiring all or a great portion of plaintiff's time or which do not preclude plaintiff from undertaking and being engaged in the performance contemporaneously of other contracts so that plaintiff may not be deprived of the benefit of subsequent contracts which would have been available despite the original breach (*Seaboard Music Co. v. Germano (1972) 24 Cal. App. 3d 618, 622-623, 101 Cal. Rptr. 255*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted by a plaintiff in opposition to a motion for new trial on the ground of excessive damages when defendant asserted that plaintiff did not mitigate damages when he or she should have and consequently the damage award should be reduced, but the contract involved in the action did not take all of plaintiff's time and plaintiff was able to perform other contracts at the same time.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Mitigation Not Applicable to Certain Contracts

Seaboard Music Co. v. Germano *(1972) 24 Cal. App. 3d 618, 101 Cal. Rptr. 255* , involved an action in part against defendants for inducing the breach of a lease. Plaintiff, lessor of coin-operated equipment, leased a jukebox and pool table to a bar owner who subsequently hired defendants to sell his business. Defendants, after arranging the sale of the bar to a purchaser who did not want to assume the lease of the equipment, advised both seller and purchaser that the lease was invalid. The trial court found that the seller's repudiation and breach of the agreement was induced by defendants and awarded plaintiff damages consisting of the profits plaintiff would have made under the contract. Defendants contended in part that the amount of damages awarded was excessive since the trial court should have required plaintiff to mitigate damages by releasing the equipment it received back from the seller. Affirming the trial court's judgment, the court of appeal agreed that ordinarily a person injured by the breach of an obligation has the duty to minimize damages and avoid or reduce the loss suffered by the other party. However, although this rule generally is applicable to contracts for the use of some specific equipment or instrumentality, it does not apply to contracts not requiring all or a great portion of plaintiff's time or that do not preclude plaintiff from undertaking and being engaged contemporaneously in the performance of other contracts. Since the evidence showed that plaintiff had a warehouse full of equipment similar to that leased to the bar owner from which it served its customers and from which it could service any additional leases whether or not the bar owner fulfilled or breached his obligation, the court reasoned that requiring plaintiff to re-lease the equipment would result in plaintiff's forgoing profits which it would otherwise make in the normal course of its business. The rule of mitigation of damages may not be imposed to deprive plaintiff of the benefit of subsequent contracts which would have been available irrespective of the original breach and consequently, the court concluded that the trial court's ruling that plaintiff was not required to mitigate damages because it had the opportunity to re-lease the repossessed equipment was correct (*24 Cal. App. 3d 618, 622-623)* .

[4] Additional Authorities

[a] Mitigation Not Applicable to Certain Contracts

In *Valle de Oro Bank v. Gamboa (1994) 26 Cal. App. 4th 1686, 32 Cal. Rptr. 2d 329* , the trial court entered judgment for the defendant in an action by a bank for the balance due on a promissory note executed by the defendant, who obtained the loan to purchase a vehicle, the vehicle having been destroyed by fire at a time when the unpaid balance of the loan exceeded the insurance coverage obtained bythe defendant. The court of appeal reversed, with directions to enter judgment for the bank for principal and accrued interest, holding that the trial court had committed reversible error in allowing the jury to consider the doctrine of mitigation of damages against the bank based on its failure to obtain insurance on the vehicle for the bank's direct benefit (*26 Cal. App. 4th 1686, 1694)* . The court noted that the doctrine of mitigation of damages holds that a plaintiff who suffers damage as a result of either a breach of contract or a tort has a duty to take reasonable steps to mitigate those damages and will not be able to recover for losses that could have been thus avoided (*26 Cal. App. 4th 1686, 1691)* (citing *Seaboard Music Co. v. Germano (1972) 24 Cal. App. 3d 618, 622-623, 101 Cal. Rptr. 255* , discussed in *§ 65.121[3][a]*). The court explained that the doctrine of mitigation of damages typically comes into play when the event producing injury or damage has already occurred, and the injured

person then has the obligation to avoid continuing or enhanced damages through reasonable efforts (*26 Cal. App. 4th 1686, 1691)* . The court noted that the doctrine is used sparingly in the contract or commercial context (*26 Cal. App. 4th 1686, 1691)* . The court further noted that the issue of mitigation of damages in this case arose in a unique context, in the application of the doctrine to a lender's action to collect on a contractual obligation for the repayment of a loan, the collateral having been destroyed, and the lender having not exercised a contractual option to insure against the loss (*26 Cal. App. 4th 1686, 1691)* . Holding that the doctrine of mitigation of damages did not apply in this case, the court reasoned that use of the doctrine in this case did not provide a shield against the unwarranted piling up of damages but, rather, constituted a sword against the bank's contractual right to recover damages resulting from defendant's breach of contract (*26 Cal. App. 4th 1686, 1694)* . The bank had fully performed under the contract by disbursing the loan proceeds to the defendant. Since the contractual obligation to obtain comprehensive insurance on the vehicle was the defendant's and not the bank's, there was no damage for the bank to mitigate (*26 Cal. App. 4th 1686, 1694)* .

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6-65 California Points & Authorities § 65.122

§ 65.122 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 659] Made on Ground of Excessive Damages [Code Civ. Proc. § 657(5)]--Accepting Employment Not Substantially Similar Not Required

[1] FORM Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 659] Made on Ground of Excessive Damages [Code Civ. Proc. § 657(5)]--Accepting Employment Not Substantially Similar Not Required

[*Caption. See § 65.121.*]

DEFENDANT'S MOTION FOR A NEW TRIAL ON THE GROUND OF EXCESSIVE DAMAGES DUE TO LACK OF MITIGATION SHOULD BE DENIED SINCE THE ONLY OTHER EMPLOYMENT AVAILABLE TO PLAINTIFF AFTER BEING WRONGFULLY DISCHARGED BY DEFENDANT WAS OF A DIFFERENT OR INFERIOR KIND TO PLAINTIFF'S EMPLOYMENT WITH DEFENDANT.

A. No New Trial Unless Jury Clearly Should Have Reached Different Decision. [*See § 65.120, Paragraph A.*]

B. Burden of Proof. The burden of proof is on the party whose breach caused the damage to establish matters relied on to mitigate damage (*Healdsburg Police Officers Ass'n v. Healdsburg (1976) 57 Cal. App. 3d 444, 456, 129 Cal. Rptr. 216*).

C. Accepting Employment Not Substantially Similar Not Required. Before earnings from other employment opportunities not sought or accepted by plaintiff can be applied in mitigation, defendant must show that the other employment was comparable or substantially similar to that of which plaintiff was deprived and plaintiff's rejection of or failure to seek other available employment of a different or inferior kind may not be resorted to in order to mitigate damages (*Parker v. Twentieth Century-Fox Film Corp. (1970) 3 Cal. 3d 176, 182, 89 Cal. Rptr. 737, 474 P.2d 689*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted by plaintiff in opposition to a motion for new trial on the ground of excessive damages if defendant contends that the damages were excessive because plaintiff should have accepted other employment in mitigation of damages but the only other employment available toplaintiff was of a different or inferior kind to that from which he or she had been discharged.

When appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Burden of Proof

Healdsburg Police Officers Ass'n v. Healdsburg *(1976) 57 Cal. App. 3d 444, 129 Cal. Rptr. 216* , involved an appeal from a peremptory writ of mandate issued by the trial court ordering respondent to reinstate petitioners with back pay in their employment as police officers with respondent. Respondent asserted that ordering reinstatement with back pay without offset compensation was erroneous. Affirming the trial court, the court of appeal noted that the burden of proof is on the party whose breach caused damage to establish matters relied on to mitigate damage. According to the court, respondent failed to carry this burden of proof by failing to show that during their absence petitioners made or could have made earnings which could have been considered in mitigation of damages.

[b] Accepting Employment Not Substantially Similar Not Required

The factual background of ***Parker v. Twentieth Century-Fox Film Corp.*** *(1970) 3 Cal. 3d 176, 89 Cal. Rptr. 737, 474 P.2d 689* , is discussed in *§ 65.103[3][c]*. In affirming the trial court's judgment, the Supreme Court held that plaintiff's refusal to accept defendant's offer of employment in a western could not be applied in mitigation of damages since that offer was for a different and inferior job. The mere circumstance that the original offer of employment was for a position in a musical review calling on plaintiff's talents as a dancer as well as an actress, and was to be produced in Los Angeles, whereas the offer of substitute employment was a straight dramatic role in a western type story taking place in an opal mine in Australia demonstrates the difference in kind between the two employments. The Court concluded that the female lead as a dramatic actress in a western style motion picture could not be considered the equivalent of or substantially similar to the lead in a song-and-dance production. The Court held that an employer must show that the other employment available to the employee was comparable or substantially similar to that of which the employee was deprived and an employee's rejection or failure to seek other employment of a different or inferior kind may not be used in order to mitigate damages.

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6-65 California Points & Authorities §§ 65.123-65.139

[Reserved]

§§ 65.123[Reserved]

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G. Miscellaneous Supporting Motions

6-65 California Points & Authorities § 65.140

§ 65.140 Supporting Contention That Damages for Breach of Contract Should Not Be Offset by Plaintiff's Collateral Benefit--Plaintiff's Tax Benefits Are Not Mitigating Factor in Compensatory Damage Calculation

[1] FORM Supporting Contention That Damages for Breach of Contract Should Not Be Offset by Plaintiff's Collateral Benefit--Plaintiff's Tax Benefits Are Not Mitigating Factor in Compensatory Damage Calculation

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

TAX BENEFITS PLAINTIFF RECEIVED FROM CONTRACT ARE NOT PROPERLY CONSIDERED AS MITIGATING FACTOR IN COMPENSATORY DAMAGE CALCULATIONS FOR BREACH OF CONTRACT. [THEREFORE, IT IS PROPER TO EXCLUDE EVIDENCE OF ANY TAX BENEFITS THAT PLAINTIFF MIGHT HAVE DERIVED FROM THE CONTRACT].

A. Determination Whether to Grant Defendant Collateral Source Credit Is Within Discretion of Court. A court's decision not to grant a defendant collateral source credit does not rely on the same legal basis as a decision to apply the collateral source rule; whether or not to grant a credit is within the court's discretion (*see DePalma v. Westland Software House (1990) 225 Cal. App. 3d 1534, 1539, 276 Cal. Rptr. 214*).

B. Plaintiff's Tax Benefits Should Not Be Considered as Mitigating Factor in Calculating Compensatory Damages for Breach of Contract. There is no statutory or common law precedent in a breach of contract action to give defendants collateral source credit for income tax benefits that plaintiffs may have received under the contract (*DePalma v. Westland Software House (1990) 225 Cal. App. 3d 1534, 1538-1546, 276 Cal. Rptr. 214*).

Civ. Code § 3358 Does Not Require Collateral Source Credit for Tax Benefits. *Section 3358 of the Civil Code* does not require any tax benefits, which a successful plaintiff might have derived from a breached contract, to be deducted in calculating compensatory damages (*DePalma v. Westland Software House (1990) 225 Cal. App. 3d 1534, 1541-1542, 276 Cal. Rptr. 214*).

[*Optional*] **D. Evidence of Tax Consequences to Plaintiff Resulting From Contract Excludable in Breach of**

Contract Action Pursuant to *Evid. Code § 352*. Evidence of contract's tax consequences to plaintiff is proper exercise of trial court's discretion under *Section 352 of the Evidence Code* given complicated, time consuming and confusing processes required to admit and consider such minimally relevant evidence (*DePalma v. Westland Software House (1990) 225 Cal. App. 3d 1534, 1544-1545, 276 Cal. Rptr. 214*).

[*Optional*] **E. Federal Tax Benefit Rules Makes Overall Benefit to Plaintiff Unlikely.** The federal "tax benefit rule," which allows the government to recapture past tax benefits awarded to a taxpayer if a subsequent event changes the basis or is fundamentally inconsistent with the premise on which a deduction was initially based, is likely to cancel out any tax benefits a successful plaintiff may have derived from a breached contract (*DePalma v. Westland Software House (1990) 225 Cal. App. 3d 1534, 1543-1544, 276 Cal. Rptr. 214*).

[*Optional*] **F. Attempt to Factor in Tax Consequences Would Be Speculative and Complicated.** It is very complicated and speculative to predict any actual tax savings a plaintiff might derive from a breached contract and resulting damage award. Even the most sophisticated attempts to do so would result only in guesswork. Thus, evidence relating to tax benefits derived by a plaintiff on account of a breached contract may be excluded under *Section 352 of the Evidence Code* as well as on grounds of irrelevancy (*DePalma v. Westland Software House (1990) 225 Cal. App. 3d 1534, 1544-1545, 276 Cal. Rptr. 214* (dicta as to *Evid. Code § 352*)

[*Optional*]**G. Public Policy Considerations Prohibit Crediting Breaching Party With Tax Benefits.** Several public policy considerations prevent deduction of plaintiff's tax benefits under a contract from being deducted from damages awarded in a breach of contract action. It serves as a deterrent to breach of contracts in general. It allows the tax benefits to be reaped by the party the government intended to benefit by them and thus allows the purpose of a particular tax policy, for example, to encourage investment in capital equipment, to be carried into effect. It favors the parties who honor their contracts, not those who breach them. To allow the breaching party credit for the tax benefits would be to transfer any windfall from the party who honored the contract to the party who breached it (*DePalma v. Westland Software House (1990) 225 Cal. App. 3d 1534, 1545-1546, 276 Cal. Rptr. 214*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that any income tax benefits derived by a plaintiff on account of a contract need not be deducted in calculating compensatory damages for the breach of that contract [*DePalma v. Westland Software House (1990) 225 Cal. App. 3d 1534, 1538-1546, 276 Cal. Rptr. 214* ; *see Civ. Code §§ 3300, 3358*]. Optional Paragraph D may be used if the contention is being used to support the argument that evidence of the tax benefits the plaintiff received from the contract should be excluded on the ground that the probative value of the evidence is outweighed by the time-consuming and confusing nature of the evidence [*see Evid. Code § 352*]. The subsequent optional paragraphs are all likely to be applicable in every situation, but are designated as optional so counsel can determine the depth of argument he or she wishes to use.

These points and authorities may be combined with points and authorities pertaining to the particular procedural context in which counsel wishes to raise the substantive issue that the collateral source rule is not applicable to deprive a successful plaintiff of tax benefits received under a breached contract. For instance, they may be used to support a motion for summary judgment, a motion for new trial, or if written authorities are submitted on a motion regarding exclusion of evidence. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the particular case and the point of law stated. For example, counsel may wish to discuss the specific tax benefits that plaintiff allegedly received from the contract, and the complexity of their determination.

[b] Related Points and Authorities

For memorandum of points and authorities addressing the application of the collateral source rule in the context of tort actions [*see §§ 64.190, 64.210, 64.211*].

[3] Discussion of Authorities

[a] Determination Whether to Grant Defendant Collateral Source Credit Is Within Discretion of Court

In ***DePalma v. Westland Software House*** *(1990) 225 Cal. App. 3d 1534, 276 Cal. Rptr. 214* , plaintiff, a physician, purchased and licensed computer hardware and software from defendant to use for billing purposes. The equipment did not function as promised, and plaintiff filed causes of action for breach of contract, failure of consideration, restitution, breach of warranty, and unlawful business practices. Defendant attempted to introduce plaintiff's tax returns to show that plaintiff had taken depreciation allowances and investment tax credits for the purchase of the computer system. Defendant contended that those tax benefits should be considered as an offset to any compensatory damages awarded to plaintiff. The evidence was refused as irrelevant. Defendant appealed.

The court of appeal affirmed. The court first noted that the question of whether tax benefits that may have been received by a plaintiff in a breach of contract action should be considered in determining compensatory damages was one of first impression in California (*225 Cal. App. 3d 1534, 1537)* . The court noted that, although the collateral source rule has been applied in tort actions in California since 1946 [*see §§ 64.210, 64.211*], it has never been extended to breach of contract actions (*225 Cal. App. 3d 1534, 1538)* . The court also noted that the trial court had not applied the collateral source rule as such, but had merely declinedto give defendants collateral source credit based on any tax benefit received by plaintiff (*225 Cal. App. 3d 1534, 1539)* . The court stated that in refusing to allow the credit, the trial court acted within its discretion given the absence of any statutory or common law precedent in a breach of contract action for giving defendants collateral source credit for income tax benefits that plaintiffs may have received (*225 Cal. App. 3d 1534, 1539-1540)* .

The court discussed *Civ. Code § 3300* (which provides that a plaintiff in a breach of contract action receive damages equivalent to the full detriment it has suffered) and *Civ. Code § 3358* (which limits the plaintiff's award to no more than "full compensation"), but said those statutes were of little help in determining the question before it (*225 Cal. App. 3d 1534, 1539)* . In fact, both of those sections were enacted in 1872, before the federal income tax was instituted (*225 Cal. App. 3d 1534, 1540 n.5*)

The court relied on Montana, Texas, and U.S. Supreme Court cases to establish three reasons why the collateral source rule should not apply to contract cases to require a defendant to receive credit for any income tax benefits a plaintiff may have obtained. First, the federal income tax "tax benefit rule" [*I.R.C. § 111*] allows the government to recapture past tax benefits awarded to a taxpayer if a subsequent event changes the basis or is fundamentally inconsistent with the premise on which a deduction was initially based (*225 Cal. App. 3d 1534, 1541)* . Most likely, this rule will cancel out any tax benefits a plaintiff may have received (*225 Cal. App. 3d 1534, 1542)* . Although the rule does not work with the same precision as the California scheme for calculating compensatory damages, in part because of changes in tax rates between the year in which the benefits were taken and the year of recapture, California courts do not require damage determinations to be made to the exact dollar (*225 Cal. App. 3d 1534, 1543)* . *Civ. Code § 3358* does not require the trier of fact to scrutinize a plaintiff's tax returns in order to determine the exact amount of compensatory damages (*225 Cal. App. 3d 1534, 1543-1544)* .

Second, it is very complicated and speculative to predict any actual tax savings a plaintiff might derive. Variables include (1) what portion of the damage award will actually be received; (2) the year or years in which the damage award will actually be received; (3) what the plaintiff's prevailing tax rate will be in the year(s) of receipt; and (4) how a damage award will be construed under the continuously changing Internal Revenue Code. Even the most sophisticated

attempts to predict the tax consequences of a damage award for breach of contract would result only in guesswork (*225 Cal. App. 3d 1534, 1544)* . Furthermore, the court said, although *Evid. Code § 352* is not controlling in this case, a fair application of it provides a ground for a reasonable judge to rule against the admission of evidence relating to tax benefits derived by a plaintiff on account of the breached contract. The court of appeal said it would have upheld such an exercise of the trial court's discretion if the trial court in this case had not ruled the evidence inadmissible on relevancy grounds (*225 Cal. App. 3d 1534, 1544-1545)* .

The third constellation of considerations relied on by the court of appeal in refusing to allow credit to the defendant for any tax benefits plaintiff may have derived from the contract were public policy considerations, including the policy of deterring breaches of contract. Such a deterrent is imposed if contracting parties know that they must compensate the other party in full, without being able to subtract any tax benefits the other party might receive. The court said that as interested participants in an already overloaded court system, they, as well as those who are counting on the performance of their contracts, have a vested stake in discouraging others from breaching their contracts (*225 Cal. App. 3d 1534, 1545)* . Even if there were no federal tax benefit rule, or the Internal Revenue Service decided against applying it in this case, and even if, for example, plaintiff's $40,000 damage award coupled with plaintiff's $40,000 tax benefits resulted in a windfall for the plaintiff, giving defendant credit for the tax benefits would result in a windfall for defendant (*225 Cal. App. 3d 1534, 1545)* . Not allowing the breaching party credit for the other party's tax benefits serves two purposes: it lets the tax benefits remain with the party for whom they were intended (e.g., here to implement the intended government purpose of encouraging investment in capital equipment) (*225 Cal. App. 3d 1534, 1545-1546)* , and it favors the parties who honor their contracts, not those who breach them (*225 Cal. App. 3d 1534, 1546)* .

[b] Plaintiff's Tax Benefits Should Not Be Considered as Mitigating Factor in Calculating Compensatory Damages for Breach of Contract

DePalma v. Westland Software House *(1990) 225 Cal. App. 3d 1534, 276 Cal. Rptr. 214* , is *discussed under § 65.140[3][a]*.

[c] Civ. Code § 3358 Does Not Require Collateral Source Credit for Tax Benefits

DePalma v. Westland Software House *(1990) 225 Cal. App. 3d 1534, 276 Cal. Rptr. 214* , is *discussed under § 65.140[3][a]*.

[d] Evidence of Tax Consequences to Plaintiff Resulting From Contract Excludable in Breach of Contract Action Pursuant to Evid. Code § 352

DePalma v. Westland Software House *(1990) 225 Cal. App. 3d 1534, 276* Cal. Rptr. 214, is *discussed under § 65.140[3][a]*.

[e] Federal Tax Benefit Rules Makes Overall Benefit to Plaintiff Unlikely

DePalma v. Westland Software House *(1990) 225 Cal. App. 3d 1534, 276 Cal. Rptr. 214* , is *discussed under § 65.140[3][a]*.

[f] Attempt to Factor in Tax Consequences Would Be Speculative and Complicated

DePalma v. Westland Software House *(1990) 225 Cal. App. 3d 1534, 276 Cal. Rptr. 214* , is *discussed under § 65.140[3][a]*.

[g] Public Policy Considerations Prohibit Crediting Breaching Party With Tax Benefits

DePalma v. Westland Software House *(1990) 225 Cal. App. 3d 1534, 276 Cal. Rptr. 214* , is *discussed under § 65.140[3][a]*.

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§ 66.syn Synopsis to Chapter 66: DEATH AND SURVIVAL ACTIONS

§ 66.01 Scope of Chapter

§ 66.02 Governing Statutes

§ 66.03 Effective Dates of New Provisions

§ 66.04 Related Pleadings and Practice Forms

§ 66.05 Related Points and Authorities

§§ 66.06-66.19 [Reserved]

§ 66.20 Supporting Contention That Plaintiff May Not Recover Damages for Wrongful Death--Plaintiff Is Not Person Entitled to Assert Wrongful Death Action [Code Civ. Proc. § 377.60]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities Chapters

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Court Bound by Statute

[b] Personal Representative Can Bring Action Only on Behalf of Entitled Person

[c] Potential Heirs May Not Bring Wrongful Death Action Unless They Are Entitled Persons

[d] Effect of Heir's Disclaimer of Interest

[e] Adopted Child Not Entitled Person

[f] Child Not Entitled Person if Court Order Terminated Parent-Child Relationship

[g] Laws of Intestate Succession Apply to Resolve Disputes as to Status of Child

[h] Subjective Good-Faith Belief in Validity of Marriage to Decedent Insufficient to Confer Standing to Bring Action

[i] Status as Survivor of Decedent Determined at Time of Decedent's Death

[j] Mexican "Concubine" Has No Standing to Bring Action

[k] Standing as Heir Determined Under California Law

[l] Opposite-Sex Domestic Partners Not Meeting Statutory Criteria Lack Standing to Sue

[4] Additional Authorities

[a] Entitled Plaintiffs Defined

§ 66.21 Supporting Contention That Plaintiff May Not Recover Damages for Wrongful Death--Death of Person Not Alleged [Code Civ. Proc. § 377.60]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Death of Fetus Cannot Be Basis of Action

§ 66.22 Supporting Contention That Plaintiff May Not Recover Damages for Wrongful Death--Damages Not Alleged [Code Civ. Proc. § 377.61]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Damages Are Required

[b] Equitable Relief Unavailable

§ 66.23 Supporting Contention That Plaintiff May Not Recover Damages for Wrongful Death--Wrongful Death Plaintiff Subject to Defenses That Could Have Been Asserted Against Decedent, and Complete Defense Exists

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Plaintiff Subject to Defenses Assertable Against Decedent

[b] Assumption of Risk Is Complete Defense to Wrongful Death Action

[4] Additional Authorities

[a] Assumption of Risk Is Complete Defense to Wrongful Death Action

§ 66.24 Supporting Contention That Plaintiff May Not Recover Damages for Wrongful Death--Proximate Cause Not Established [Code Civ. Proc. § 377.60]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Proximate Cause Is Required

[4] Additional Authorities

[a] Proximate Cause Is Required

§ 66.25 Supporting Contention That Plaintiff May Not Recover Damages for Wrongful Death--Statute of Limitations [Code Civ. Proc. § 335.1] Bars Action

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Period of Limitation Runs From Time of Decedent's Death

[b] Relation-Back Doctrine Does Not Apply When Adding New Plaintiff

§ 66.26 Supporting Contention That Plaintiff May Not Recover Damages for Wrongful Death--Statute of Limitations for Medical Malpractice Actions [Code Civ. Proc. § 340.5] Bars Action

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Statute of Limitations for Medical Malpractice

§ 66.27 Supporting Contention That Plaintiff May Not Recover Damages for Wrongful Death--Previous Judgment Bars Current Action [Code Civ. Proc. § 377.60]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Action Barred by Previous Action

[b] Previous Action Bars Action by Unborn Child Whose Existence Was Unknown to Defendant

[c] Prior Litigation of Spouse's Loss of Consortium Claim Can Bar Recovery of Same Damages in Wrongful Death Action

§ 66.28 Supporting Contention That Wrongful Death Cause of Action Is Improperly Pleaded--Entitled Person Not Joined as Party [Code Civ. Proc. § 377.60]

[1] FORM

[2] Comments

[a] Use of Form

[b] Procedural Nature of Contention

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Entitled Plaintiffs Are Required Parties in Wrongful Death Actions

[b] Wrongful Death Plaintiffs Have Duty to Join All Known Heirs

[c] Proper Joinder Requires Service of Summons and Complaint

[d] Wrongfully Omitted Heir May Sue Wrongful Death Plaintiffs for Failure to Join

[4] Additional Authorities

[a] Entitled Plaintiffs as Required Parties in Wrongful Death Actions

§ 66.29 Opposing Contention That Plaintiff May Not Recover Damages for Wrongful Death--Plaintiff Is Within Statute Due to Dependency [Code Civ. Proc. § 377.60(b), (c)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Specified Dependents Qualify as Entitled Person

[b] Dependent Minors May Qualify as Entitled Person

[c] Degree of Dependency Required

§ 66.30 Opposing Contention That Plaintiff May Not Recover Damages f or Wrongful Death--Minor Born After Death of Decedent May Prove Paternity of Decedent by Any Clear and Convincing Evidence

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Laws of Intestate Succession Apply to Resolve Disputes as to Status of Child

[b] Child Born After Death of Father May Establish Paternity by Any Clear and Convincing Evidence

§ 66.31 Opposing Contention That Plaintiff May Not Recover Damages for Wrongful Death--Statute of Limitations Is Suspended While Plaintiff Is Minor [Code Civ. Proc. § 352(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Tolling of Statute of Limitations During Minority

[b] Tolling of Statute During Minority Not Affected by Running of Statute for Adult Plaintiffs

§ 66.32 Opposing Contention That Plaintiff May Not Recover Damages for Wrongful Death--Statute of Limitations Did Not Begin to Run on Date of Death Due to Application of Discovery Rule

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] General Rule Deferring Commencement of Personal Injury Actions Applicable to Wrongful Death Actions

[b] Period Extended to Date Injury Discovered or Should Have Been Discovered

§ 66.33 Opposing Contention That Plaintiff May Not Recover Damages for Wrongful Death--Statute of Limitations [Gov. Code § 945.6(a)(1)] Runs From Time Public Entity Rejected Claim Filed by All Entitled Persons

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Limitation Runs From Rejection of Amended Claim by All Entitled Persons

§ 66.34 Opposing Contention That Plaintiff May Not Recover Damages for Wrongful Death--Plaintiff Is Not Subject to Every Defense That Might Have Been Asserted Against Decedent

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Wrongful Death Plaintiff Not Subject to Every Defense That Might Have Been Asserted Against Decedent

[b] Statutory Prohibition Against Recovery of Noneconomic Damages by Uninsured Motorist Injured in Motor Vehicle Accident Inapplicable to Wrongful Death Plaintiffs

[c] Wrongful Death Action Not Barred by Failure to Bring Decedent's Original Action to Trial Within Five Years

§ 66.35 Opposing Contention That Plaintiff May Not Recover Damages for Wrongful Death--Settled or Dismissed Action May Be Continued by Entitled Person Initially Joined as Defendant

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Subsequent Action by Entitled Person Joined as Defendant in Prior Action

[4] Additional Authorities

[a] Subsequent Action by Entitled Person Joined as Defendant in Prior Action

§ 66.36 Opposing Contention That Plaintiff May Not Recover Damages for Wrongful Death--Subsequent Action May Be Maintained Against Different Defendant

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Separate Wrongful Death Actions Against Different Defendants Permitted

[b] Release of One Defendant Does Not Preclude Action Against Another

§ 66.37 Opposing Contention That Plaintiff May Not Recover Damages for Wrongful Death--Unwed Parent Who Has Acknowledged Child and Contributed to Support Is Within Statute [Code Civ. Proc. § 377.60(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Acknowledgment of Child Need Not Be Either in Witnessed Writing or After Birth

§ 66.38 Opposing Contention That Plaintiff May Not Recover Damages for Wrongful Death--Grandparent of Decedent Has Standing to Bring Action Even Though Parental Rights of Decedent's Biological Parents Have Been Terminated

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Grandparent Has Standing Even if Parental Rights of Decedent's Biological Parents Have Been Terminated

§ 66.39 Opposing Contention That Wrongful Death Cause of Action Is Improperly Pleaded--Omitted Entitled Persons May Be Added as Parties [Code Civ. Proc. § 473]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Amendment Should Be Permitted if Failure to Add Omitted Entitled Plaintiffs Would Create Hardship

[b] Amendment of Complaint to Specify That Action Is on Behalf of Entitled Persons

[c] Entitled Persons Named as Defendants May Be Added as Plaintiffs if Cause of Action Against Them May Be Deleted

[d] Amendment Relates Back to Original Complaint

§ 66.40 Supporting Contention That Wrongful Death Action Is Subject to Collateral Estoppel--Previous Judgment Precludes Relitigation by Plaintiff of Issue Necessarily Determined by That Judgment

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Collateral Estoppel if Plaintiff Was Party to Prior Action

[b] Collateral Estoppel Based on Privity With Party to Prior Action

§ 66.40A Supporting Contention That Wrongful Death Action is Subject to Collateral Estoppel--Previous Judgment Precludes Relitigation by Defendant of Issue Necessarily Determined by That Judgment

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Collateral Estoppel Effect May Be Given to Determination of Intentional and Malicious Conduct Made by Bankruptcy Judge

§ 66.41 Opposing Contention That Wrongful Death Action Is Subject to Collateral Estoppel--Entitled Person Knowingly Omitted From Previous Action Not Precluded From Maintaining Subsequent Action

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Subsequent Action by Knowingly Omitted Entitled Plaintiffs

[b] Omitted Heir Named But Not Served May Maintain Subsequent Action

[4] Additional Authorities

[a] Subsequent Action by Knowingly Omitted Entitled Plaintiffs

§ 66.42 Opposing Contention That Wrongful Death Action Is Subject to Collateral Estoppel--Plaintiff in Prior Action Did Not Qualify as Entitled Person

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Unqualified Person's Recovery Does Not Bar Subsequent Action

§ 66.43 Supporting Contention That Punitive Damages Are Not Recoverable--Statute Generally Precludes Recovery [Code Civ. Proc. § 377.61]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Punitive Damages Barred

[b] Bar of Punitive Damages Is Constitutional

§ 66.44 Opposing Contention That Punitive Damages Are Not Recoverable--Punitive Damages Available Because Defendant Has Been Convicted of Felony for Homicide of Decedent [Civ. Code § 3294(d)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

§§ 66.45-66.59 [Reserved]

§ 66.60 Supporting Contention That Action Does Not Survive Death--Invasion of Privacy Action Does Not Survive

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Exceptions to Survival Statute

[b] Invasion of Privacy

[4] Additional Authorities

[a] Invasion of Privacy

§ 66.61 Supporting Contention That Cause of Action Does Not Survive Death--Property Damage Occurred Simultaneously With Death

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Damage Simultaneous With Death

§ 66.62 Supporting Contention That Cause of Action Does Not Survive Death--Death Before Rendering of Judgment Excludes Damages for Pain and Suffering [Code Civ. Proc. § 377.34]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Death Before Judgment

§ 66.62A Supporting Contention That Plaintiff May Not Recover Punitive Damages--No Compensatory Damages Recoverable [Code Civ. Proc. § 377.34]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] No Punitive Damages When Pain and Suffering are Only Alleged Injury

§ 66.63 Opposing Contention That Cause of Action Does Not Survive Death--Death Occurring After Judgment Does Not Exclude Damages for Pain and Suffering [Code Civ. Proc. § 377.34]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Death After Judgment Does Not Abate Right to Recover Damages for Pain and Suffering

[b] Judgment Entered Nunc Pro Tunc

§ 66.64 Opposing Contention That Cause of Action Does Not Survive Death--Decedent Need Not Have Commenced Punitive Damages Action Prior to Death

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Punitive Damages Action Prior to Death Is Not Required

§ 66.65 Opposing Contention That Cause of Action Does Not Survive Death--Complete Cause of Action Need Not Have Accrued Prior to Death

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Complete Cause of Action Prior to Death Is Not Required

§ 66.66 Opposing Contention That Damage Claim Is Not Recoverable in Survival Action--Property Damage Incurred Prior to Death of Plaintiff Is Recoverable

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Property Damage Prior to Death of Plaintiff

§ 66.67 Opposing Contention That Damage Claim Is Not Recoverable in Survival Action--Expense Not Incurred by Decedent Was Paid Under Contract or Gratuitously

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Expense Not Paid by Decedent

§ 66.68 Supporting Contention That Claim Does Not Survive Death of Defendant [Code Civ. Proc. § 377.42]--Punitive Damages Not Recoverable

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Punitive Damages Claim Does Not Survive Death of Defendant

§ 66.69 Opposing Contention That Claim Does Not Survive Death of Defendant [Code Civ. Proc. §

377.42]--Punitive Damages Available in Action Based on Homicide Committed by Defendant [Civ. Code § 3294(d)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Procedures for Multiple Recoveries of Punitive Damages

§ 66.70 Opposing Contention That Survival Action Was Timely Filed--Action Does Not Relate Back to Filing of Wrongful Death Action

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Survival Action Does Not Relate Back to Wrongful Death Action

§§ 66.71-66.89 [Reserved]

§ 66.90 Supporting Contention That Wrongful Death [Code Civ. Proc. § 377.60] and Survival [Code Civ. Proc. §§ 377.30, 377.31] Actions Arising From Same Wrongful Act or Neglect Should Be Joined or Consolidated [Code Civ. Proc. § 377.62]

[1] FORM

[2] Comments

[a] Use of Form

[b] Types of Survival Actions Distinguished

[c] Joinder and Consolidation Distinguished

[d] Related Pleading and Practice Forms

[e] Related Points and Authorities

[3] Discussion of Authorities

California Points & Authorities

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CHAPTER 66 DEATH AND SURVIVAL ACTIONS
PART I. INTRODUCTION

6-66 California Points & Authorities § 66.01

§ 66.01 Scope of Chapter

Subpart A of Part II contains points and authorities for use in supporting [*see §§ 66.20 -66.27*] and opposing [*see §§ 66.29 -66.36*] the contention that plaintiff may recover damages for wrongful death, and points and authorities supporting [*see § 66.28*] and opposing [*see § 66.39*] the contention that a wrongful death action is improperly pleaded because it omits a person entitled to bring the action. This subpart also includes points and authorities supporting [*see §§ 66.40*-66.40A] and opposing [*see §§ 66.41 -66.42*] the contention that collateral estoppel applies to a wrongful death action, and points and authorities supporting [*see § 66.43*] and opposing [*see § 66.44*] the contention that punitive damages are not recoverable in wrongful death actions.

Subpart B of Part II includes memoranda of points and authorities supporting [*see §§ 66.60* and *66.61*] and opposing [*see §§ 66.64* and *66.65*] the contention that a cause of action did not survive the death of the person who commenced, or would have been entitled to commence, the action or proceeding, and memoranda opposing contentions that specific elements of damages are not recoverable in a survival action [*see §§ 66.66* and *66.67*]. This subpart also includes points and authorities supporting [*see § 66.68*] and opposing [*see § 66.69*] the contention that punitive damages may not be recovered after the death of the defendant.

Subpart C of Part II contains points and authorities relating to the consolidation of a wrongful death action and survival action arising from the same wrongful act or neglect [*see § 66.90*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsEstoppelCollateral EstoppelTortsProcedureCommencement & ProsecutionSurvivalDeath of PlaintiffsTortsWrongful Death & Survival ActionsJoinder RequirementsTortsWrongful Death & Survival ActionsRemediesCompensatory DamagesGeneral OverviewTortsWrongful Death & Survival ActionsRemediesPunitive Damages

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6-66 California Points & Authorities § 66.02

§ 66.02 Governing Statutes

Wrongful death actions are governed by *Code Civ. Proc. § 376* and *Code Civ. Proc. §§ 377.60-377.62*.

General provisions governing survival actions are set forth in *Code Civ. Proc. §§ 377.10-377.22*. More specific provisions governing decedents' causes of actions are set forth in *Code Civ. Proc. §§ 377.30-377.35*, and the specific provisions governing causes of actions against decedents are set forth in *Code Civ. Proc. §§ 377.40-377.43*.

Prob. Code §§ 550-555 govern actions to establish a decedent's liability for which the decedent was protected by insurance [*see Code Civ. Proc. § 377.50*]. For discussion of these actions, see California Forms of Pleading and Practice, Ch. 440, *Probate* (Matthew Bender).

Consolidation of wrongful death and survival actions arising out of the same wrongful neglect or act is governed by *Code Civ. Proc. § 377.62*.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsWrongful Death & Survival ActionsGeneral OverviewTortsWrongful Death & Survival ActionsJoinder RequirementsTortsWrongful Death & Survival ActionsSurvival Actions

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6-66 California Points & Authorities § 66.03

§ 66.03 Effective Dates of New Provisions

On or after January 1, 1993, *Code Civ. Proc. §§ 377.30-377.35* (decedents' causes of action) apply to the commencement of an action or proceeding the decedent was entitled to commence, and to the continuation of an action or proceeding commenced by the decedent, regardless of whether the decedent died before, on, or after January 1, 1993 [*Code Civ. Proc. § 377.35*] *Code Civ. Proc. §§ 377.40-377.43* (causes of action against decedents) apply to the commencement on or after January 1, 1993, of an action or proceeding against the decedent's personal representative or successor in interest, or to the making of a motion on or after January 1, 1993, to continue a pending action or proceeding against the decedent's personal representative or successor in interest, regardless of whether the decedent died before, on, or after January 1, 1993 [*Code Civ. Proc. § 377.43*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsProcedureCommencement & ProsecutionSurvivalDeath of DefendantsTortsProcedureCommencement & ProsecutionSurvivalDeath of PlaintiffsTortsWrongful Death & Survival ActionsPotential Plaintiffs

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6-66 California Points & Authorities § 66.04

§ 66.04 Related Pleadings and Practice Forms

For discussion and forms relating to wrongful death and survival actions in general, see California Forms of Pleading and Practice, Ch. 181, *Death and Survival Actions* (Matthew Bender).

For forms for use in moving for consolidation generally, see California Forms of Pleading and Practice, Ch. 125, *Consolidation, Severance, and Coordination of Actions* (Matthew Bender).

For discussion of actions under *Prob. Code §§ 550-555* to establish a decedent's liability for which the decedent was protected by insurance, see California Forms of Pleading and Practice, Ch. 440, *Probate* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsWrongful Death & Survival ActionsGeneral OverviewTortsWrongful Death & Survival ActionsJoinder RequirementsTortsWrongful Death & Survival ActionsSurvival Actions

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6-66 California Points & Authorities § 66.05

§ 66.05 Related Points and Authorities

For memoranda of points and authorities supporting a demurrer on the ground that a complaint states a cause of action in one other than the plaintiff, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For memoranda of points and authorities supporting a motion to substitute a personal representative for a party who has died while an action is pending, see Ch. 10, *Abatement and Survival of Actions* .

For a discussion and sample forms showing how to use the forms in this chapter to draft a complete memorandum of points and authorities or brief, and for further discussion of law and motion procedure and strategy, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For forms of memoranda of points and authorities supporting and opposing motions for the consolidation of actions generally, see Ch. 45, *Consolidation, Severance, and Coordination of Actions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePartiesSubstitutionsDeath of PartyCivil ProcedurePretrial MattersConsolidation of ActionsTortsProcedureCommencement & ProsecutionSurvivalGeneral OverviewTortsWrongful Death & Survival ActionsPotential Plaintiffs

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6-66 California Points & Authorities §§ 66.06-66.19

[Reserved]

§§ 66.06[Reserved]

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PART II. FORMS
A. Wrongful Death Actions

6-66 California Points & Authorities § 66.20

§ 66.20 Supporting Contention That Plaintiff May Not Recover Damages for Wrongful Death--Plaintiff Is Not Person Entitled to Assert Wrongful Death Action [Code Civ. Proc. § 377.60]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF MAY NOT BRING THIS ACTION BECAUSE HE/SHE IS NOT A PERSON ENTITLED TO ASSERT A WRONGFUL DEATH CAUSE OF ACTION UNDER THE STATUTE.

A. Cause of Action Defined. If the death of a person was caused by the wrongful act or neglect of another, those persons designated by statute, or a personal representative on their behalf, may maintain an action for damages against the person causing the death (*Code Civ. Proc. § 377.60*).

B. Court Bound by Statute. Because the cause of action for wrongful death is wholly statutory in nature, the courts are bound by the legislature's declarations of how far it extends and in favor of whom it exists (*see Justus v. Atchison (1977) 19 Cal. 3d 564, 571, 575, 139 Cal. Rptr. 97, 565 P.2d 122 , disapproved on other grounds, Ochoa v. Superior Court (1985) 39 Cal. 3d 159, 171, 216 Cal. Rptr. 661, 703 P.2d 1* ; *Mayerhoff v. Kaiser Found. Health Plan, Inc. (1977) 71 Cal. App. 3d 803, 807, 138 Cal. Rptr. 319*).

C. Entitled Persons Defined. A wrongful death claim may be asserted only by or on behalf of: (1) a decedent's surviving spouse, domestic partner, children, and issue of deceased children, or, if there is no surviving issue of the decedent, any person who would be entitled to the property of the decedent by intestate succession, including the surviving spouse or domestic partner; (2) whether or not qualified under (1), if they were dependent on the decedent, the putative spouse, children of the putative spouse, stepchildren, or parents; or (3) a minor, whether or not qualified under (1) or (2), if, at the time of the decedent's death, the minor resided for the previous 180 days in the decedent's household and was dependent on the decedent for one-half or more of the minor's support (*Code Civ. Proc. § 377.60*).

[*Optional*] **D. Personal Representative Can Bring Action Only on Behalf of Entitled Person.** Decedent's personal

representative may bring an action for wrongful death only as the statutory trustee for persons designated by statute as entitled to a wrongful death cause of action, and cannot bring such an action if there is no person so entitled (*Webster v. Norwegian Mining Co. (1902) 137 Cal. 399, 400-401, 70 P. 276* ; *California State Auto. Ass'n, Inter-Ins. Bureau v. Jacobson (1972) 24 Cal. App. 3d 850, 852, 101 Cal. Rptr. 366*).

[*Optional*] **E. Putative Spouse Defined.** As used in *Code of Civil Procedure Section 377.60(b)*, a person is a "putative spouse" only if he/she is the surviving spouse of a void or voidable marriage who is found by the court to have believed in good faith that the marriage to the decedent was valid (*Code Civ. Proc. § 377.60(b)*).

[*Optional*] **F. Potential Heirs May Not Bring Wrongful Death Action Unless They Are Entitled Persons.** An action for wrongful death may not be maintained by or on behalf of persons who are potential heirs under the laws of intestate succession if those potential heirs are not entitled persons under the wrongful death statute (*Mayo v. White (1986) 178 Cal. App. 3d 1083, 1088, 224 Cal. Rptr. 373*).

[*Optional*] **G. Heir's Disclaimer of Interest Does Not Affect Entitled Person Determination.** An action for damages for wrongful death is personal and may not be assigned. Hence, an heir entitled to sue for wrongful death who files a disclaimer of interest in a decedent's estate, as authorized by *Probate Code Sections 275-288*, does not affect who may maintain an action for wrongful death (*Mayo v. White (1986) 178 Cal. App. 3d 1083, 1090-1091, 224 Cal. Rptr. 373*).

[*Optional*] **H. Proof of Dependence on Decedent Required of Some Potential Plaintiffs.** To be an entitled person under *Code of Civil Procedure Section 377.60(a)* or *(b)*, plaintiff must allege and prove that he/she was dependent on the decedent (*Code Civ. Proc. § 377.60(b), (c)*).

[*Optional*] **I. Adopted Child Not Entitled Person.** Because an adoption severs the parent-child relationship, an adopted child does not have standing under *Code of Civil Procedure Section 377.60* to bring an action for the wrongful death of his or her biological mother (*Phraner v. Cote Mart, Inc. (1997) 55 Cal. App. 4th 166, 171, 63 Cal. Rptr. 2d 740*).

[*Optional*] **J. Child Not Entitled Person if Court Order Terminated Parent-Child Relationship.** If a court order finally and conclusively terminates the relationship between a birth parent and his or her child, that child loses standing to sue for the wrongful death of that parent, regardless of whether the child has been adopted by another at the time of the death of the natural parent (*Jackson v. Fitzgibbons (2005) 127 Cal. App. 4th 329, 335, 25 Cal. Rptr. 3d 478*).

[*Optional*] **K. Laws of Intestate Succession Apply to Resolve Disputes as to Status of Child.** The laws of intestate succession apply when a question exists as to whether a party qualifies as a child of decedent with standing to bring a wrongful death action under *Code of Civil Procedure Section 377.60(a)* (Chey anna *M. v. A.C. Nielsen Co. (1998) 66 Cal. App. 4th 855, 864-865, 78 Cal. Rptr. 2d 335*).

[*Optional*] **L. Subjective Good-Faith Belief in Validity of Marriage to Decedent Insufficient to Confer Standing to Bring Action.** A plaintiff's good-faith belief in the validity of his or her marriage to the decedent does not confer standing to bring a wrongful death action if the belief that a lawful marriage existed is not objectively reasonable (*Welch v. State of California (2000) 83 Cal. App. 4th 1374, 1378-1379, 100 Cal. Rptr. 2d 430*).

[*Optional*] **M. Status as Survivor of Decedent Determined at Time of Decedent's Death.** A spouse, child, or issue of a decedent survives the decedent for purposes of establishing standing to sue for wrongful death if the spouse, child, or issue outlives the decedent, even if that person dies before actually filing a wrongful death action, in which case the proper plaintiff would be the personal representative or successor in interest of the surviving, but now deceased, spouse, child, or issue (*Chavez v. Carpenter (2001) 91 Cal. App. 4th 1433, 1441-1444, 111 Cal. Rptr. 2d 534*).

[*Optional*] **N. Mexican "Concubine" Has No Standing to Bring Action.** A "concubine" under Mexican law has no

standing to file a wrongful death action in California, because the relationship, although conferring some legal rights, does not confer all of the rights and duties of marriage (*Rosales v. Battle (2003) 113 Cal. App. 4th 1178, 1184, 7 Cal. Rptr. 3d 13*).

[*Optional*] **O. Standing as Heir Determined Under California Law.** California laws of intestate succession govern who may bring a wrongful death action in California, even if a foreign plaintiff is an heir under foreign law (*Rosales v. Battle (2003) 113 Cal. App. 4th 1178, 1184-1185, 7 Cal. Rptr. 3d 13*).

[*Optional*] **P. Opposite-Sex Domestic Partners Not Meeting Statutory Criteria Lack Standing to Sue.** Unmarried domestic cohabitants who do not meet the criteria for a domestic partnership as provided in *Family Code Section 297* do not have standing to sue for wrongful death (*Holguin v. Flores (2004) 122 Cal. App. 4th 428, 435-437, 18 Cal. Rptr. 3d 749*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a plaintiff may not recover damages for the wrongful death of a decedent because the plaintiff is not a person entitled to a wrongful death cause of action pursuant to *Code Civ. Proc. § 377.60*. If a plaintiff is a personal representative, counsel may use optional Paragraph D. If a plaintiff alleges the status of a putative spouse, counsel may use optional Paragraph E and optional Paragraph K to refute that status. If plaintiffs are potential heirs who are not entitled to a wrongful death action, counsel may use optional Paragraph F. If plaintiffs are substituted heirs following a disclaimer of decedent's estate by actual heirs, counsel may use optional Paragraph G. If the dependency of the plaintiff on the decedent is disputed, counsel may use optional Paragraph H. If the plaintiff is an adopted child of the decedent, counsel may use optional Paragraph I.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of statutory entitlement. For example, this form may be used to support a demurrer to a complaint that fails to allege facts sufficient to show that the plaintiff is a person entitled to a wrongful death cause of action [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*]. These points and authorities may also be used to support a defendant's motion for summary judgment [*see Code Civ. Proc. § 437c*]. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should assert facts tending to establish that the plaintiff does not have a relationship with the decedent that entitles him or her to a wrongful death cause of action. If optional Paragraph E is used, counsel should show that the plaintiff alleging a relationship as a putative spouse fails to meet the statutory definition of putative spouse. If optional Paragraph H is used, counsel should discuss facts tending to show that the requisite dependence on the decedent either was not alleged, or did not in fact exist.

[b] Related Pleading and Practice Chapters

For a form of demurrer to a wrongful death complaint asserting that the beneficiary of the action is not an entitled wrongful death plaintiff within the limitations of Code Civ. Proc. § 377.60, see California Forms of Pleading and Practice, Ch. 181, *Death and Survival Actions* (Matthew Bender).

[c] Related Points and Authorities Chapters

For a memorandum of points and authorities supporting a demurrer on the ground that a complaint states a cause of action in one other than the plaintiff, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[d] Opposing Points and Authorities

When appropriate, the points and *authorities in §§ 66.29* or *66.37* may be used to oppose these points and authorities.

[3] Discussion of Authorities

[a] Court Bound by Statute

Justus v. Atchison *(1977) 19 Cal. 3d 564, 139 Cal. Rptr. 97, 565 P.2d 122 , disapproved on other grounds, Ochoa v. Superior Court (1985) 39 Cal. 3d 159, 171, 216 Cal. Rptr. 661, 703 P.2d 1* , was a wrongful death action brought by a married couple, as heirs of their unborn child, against defendant hospital and physicians. The action arose out of the stillbirth of a fetus occurring in the course of delivery. The trial court sustained defendant's demurrer without leave to amend and entered a judgment of dismissal. Plaintiffs appealed to the Supreme Court, which affirmed on the ground that a fetus is not a "person" within the meaning of the wrongful death statute until there has been a live birth. In reaching its conclusion, the Court recognized that several of plaintiffs' contentions were supported by out-of-state decisions. Those decisions would be relevant if the cause of action was based on judge-made law, but in California the cause of action for wrongful death is a pure creature of statute. The Court repeated the oft-cited statement that the wrongful death action exists in California only so far and in favor of such person as the legislative power may declare (*19 Cal. 3d 564, 571, 575)* .

Mayerhoff v. Kaiser Found. Health Plan, Inc. *(1977) 71 Cal. App. 3d 803, 138 Cal. Rptr. 319* , was a wrongful death action filed by decedent's dependent parents, alleging that the decedent's death was caused by defendant's negligent care and medical malpractice. Defendants demurred on the ground that the lawsuit was barred by the earlier dismissal with prejudice of a wrongful death action against defendants brought by decedent's spouse and child. The trial court sustained the demurrer, stating that it had taken judicial notice of the prior dismissal with prejudice and that all persons otherwise entitled to sue defendants were foreclosed by the prior proceedings. Plaintiffs appealed and the court of appeal affirmed, holding that the wrongful death statute contemplated only one action or joint actions by the various classes of persons entitled to sue. The responsibility placed on plaintiffs to join their action with all other wrongful death plaintiffs is the same responsibility or burden which has faced all individual plaintiffs since the original enactment of the wrongful death statute. In reaching this conclusion, the court considered language in *Salmon v. Rathjens (1907) 152 Cal. 290, 294, 92 P. 733* [*see § 66.28[3][a]*], and *Cross v. Pacific Gas & Elec. Co. (1964) 60 Cal. 2d 690, 694, 36 Cal. Rptr. 321, 388 P.2d 353* [*see § 66.31[3][b]*], stating that the statute gave a single joint cause of action to all the entitled plaintiffs and did not permit a series of suits by plaintiffs against the tortfeasor for their individual damages. To plaintiffs' argument that such an interpretation of the statute would allow parties in one cause of action to bind parties in a separate cause of action and require an entitled plaintiff to search out all other entitled plaintiffs, the court responded with language from *Watkins v. Nutting (1941) 17 Cal. 2d 490, 498, 110 P.2d 384* , asserting that the suit must be brought in the name of the persons to whom the right is given. Finally, the court underlined the statutory language which states that the entitled plaintiffs may maintain an action for damages. The cause of action for wrongful death is wholly statutory in origin, so absent a constitutional basis for departure from a clear expression of legislative intent, the courts are bound thereby. Even though the statute was amended in 1968 to provide an action for dependent parents, there was no indication that the legislature intended to depart from the rule that only one action may be brought for wrongful death (*71 Cal. App. 3d 803, 807)* .

[b] Personal Representative Can Bring Action Only on Behalf of Entitled Person

Webster v. Norwegian Mining Co. *(1902) 137 Cal. 399, 70 P. 276* , was a wrongful death action brought by the administrator of decedent's estate to recover damages for the death of decedent. Apparently, the trial court granted a judgment in favor of defendant on the ground that the failure of the complaint to allege that decedent left any heirs rendered the pleading fatally defective. On appeal, the Supreme Court affirmed, holding that although the wrongful death statute authorizes the administrator of an estate to bring an action to recover damages for the death of a person, it

permits the administrator to do so only on behalf of the heirs entitled to bring the action. If the existence of heirs is not alleged in the complaint, the court must assume that there are none (*137 Cal. 399, 400-401)* .

NOTE:
In 1993, the legislature amended the wrongful death statute to eliminate the use of the term "heirs" to delineate persons entitled to a wrongful death cause of action. Entitled persons include, but are not limited to, certain heirs [*see Code Civ. Proc. § 377.60*]. The requirement that wrongful death plaintiffs are limited to those persons specifically enumerated by statute, as set out in Paragraph C of this memorandum, still applies. However, the 1993 amendment was not intended to adversely affect the standing of any party who had standing to bring a wrongful death action under the prior law [*see Code Civ. Proc. § 377.60(d), (e)*].

California State Auto. Ass'n, Inter-Ins. Bureau v. Jacobson *(1972) 24 Cal. App. 3d 850, 101 Cal. Rptr. 366* , was a wrongful death action brought by a stepfather in his capacity as special administrator for the wrongful death of his unadopted stepdaughter against the owner of the car she was driving at the time of the fatal collision. The owner's insurer then brought a declaratory relief action against the stepfather to determine the insurer's liability under the uninsured motorist provision of its policy. In the declaratory relief action, the trial court found that the stepfather was not an "heir" within the meaning of wrongful death statute as then written and the decedent had left no other heirs. Therefore, the decedent's stepfather could not recover for her wrongful death either individually as an heir or as the special administrator of her estate. The stepfather appealed, and the court of appeal affirmed. The decedent's stepfather was not entitled to maintain the action individually because he was not an "heir" as required by the statute. Furthermore, although the statute authorizes an action by a decedent's personal representative who acts as a statutory trustee for the decedent's heirs, a personal representative is not entitled to bring the action when, as here, there are no heirs (*24 Cal. App. 3d 850, 852)* .

NOTE:
In 1993, the legislature amended the wrongful death statute to eliminate the use of the term "heirs" to delineate persons entitled to a wrongful death cause of action. Entitled persons include, but are not limited to, certain heirs [*see Code Civ. Proc. § 377.60*]. The role of the personal representative as set out in optional Paragraph D of this memorandum remains the same.

[c] Potential Heirs May Not Bring Wrongful Death Action Unless They Are Entitled Persons

The facts and procedural background of ***Mayo v. White*** *(1986) 178 Cal. App. 3d 1083, 224 Cal. Rptr. 373* , are discussed in *§ 66.20[3][d]*. In reversing the judgment of dismissal with directions to allow the administrator to amend the complaint to add parents as plaintiffs, the court of appeal said that the decedent's brother and sisters, although potential heirs under former Prob. Code § 225 (now *Prob. Code § 6402(c)*), were not proper heirs at law and were ineligible to bring an action for wrongful death under former Code Civ. Proc. § 377 [*now see Code Civ. Proc. § 377.60*] (*178 Cal. App. 3d 1083, 1088)* .

NOTE:
In 1993, the legislature amended the wrongful death statute to eliminate the use of the term "heirs" to delineate persons entitled to a wrongful death cause of action. Entitled persons currently include persons who would be entitled to the decedent's property by intestate succession if there is no surviving spouse, domestic partner, child, or issue of deceased children [*Code Civ. Proc. § 377.60(a)*]. Thus, the determination of potential heirship can still be relevant under the revised statutory scheme. Moreover, the 1993 amendment was not intended to adversely affect the standing of any party who had standing to bring a wrongful death action under the prior law [*see Code Civ. Proc. § 377.60(d), (e)*]

[d] Effect of Heir's Disclaimer of Interest

Mayo v. White *(1986) 178 Cal. App. 3d 1083, 224 Cal. Rptr. 373* , was an action for damages for wrongful death brought by the administrator of a minor's estate against two corporations and the minor's parents on behalf of the deceased minor's siblings. The deceased minor was riding a mini-cycle around the swimming pool in the backyard of his home when the cycle overturned and he was thrown into the pool. He died the following day. The complaint alleged that the parents had renounced heirship and any interests in the decedent's estate, that they were no longer the decedent's heirs at law, and that the suit was therefore brought on behalf of the siblings as the decedent's heirs at law. The first cause of action alleged that the corporate defendants were liable for decedent's death because of a defect in the mini-cycle that made it unstable, with a propensity to overturn. The second and third causes of action alleged the parents were responsible for their son's death in negligently failing to supervise and care for the boy's safety and in negligently maintaining their premises in failing to fence the swimming pool or otherwise make the backyard safe for minor children. The mother demurred generally and specially to the complaint contending that (1) the siblings were not heirs of the decedent within the meaning of former Code Civ. Proc. § 377 [*now see Code Civ. Proc. § 377.60*], and (2) the complaint was uncertain because it failed to state whether the renunciation of heirship was written or oral or properly filed. The trial court sustained the special demurrer and sustained the general demurrer without leave to amend. Plaintiff appealed, contending that because the parents had renounced any interest in the decedent's estate as authorized by the Probate Code, they must be treated as though they had predeceased the decedent and hence the siblings were heirs within the meaning of former Code Civ. Proc. § 37 [*now see Code Civ. Proc. § 377.60*].

The court of appeal rejected this contention and held that the general demurrer was properly sustained, but reversed with orders to permit the plaintiff leave to amend. The court said that a cause of action for wrongful death is personal to those persons authorized to maintain the suit under the statute, and may not be assigned (*178 Cal. App. 3d 1083, 1090)* .

The court stated that (1) in creating a cause of action for wrongful death the legislature has defined as "heirs" those persons who would be entitled to succeed to the decedent's property under the laws of intestate succession as provided in the Probate Code; (2) under those laws, when the decedent leaves neither spouse nor issue, the estate goes to the decedent's parents, or to the decedent's brothers and sisters if the parents are dead; and (3) the parents are the only proper heirs at law for the purposes of maintaining a wrongful death action under former Code Civ. Proc. § 377 [*now see Code Civ. Proc. § 377.60*]. With respect to the effect of the disclaimer, the court explained that a cause of action for wrongful death is clearly not an asset in the decedent's estate, but, on the contrary, is vested in entitled persons, and that any recovery is solely for the benefit of those persons to compensate them for injuries actually suffered by reason of the decedent's death. In view of this and the fact that the cause of action is not assignable, the court concluded that when the heirs renounce their heirship by filing a disclaimer of their interest in the decedent's estate, the disclaimer does not encompass their cause of action for wrongful death (*178 Cal. App. 3d 1083, 1088-1091)* .

NOTE:

In 1993, the legislature amended the wrongful death statute to eliminate the use of the term "heirs" to delineate persons entitled to a wrongful death cause of action. "Entitled persons" include, but is not limited to, certain heirs. The effect of an heir's disclaimer as set out in optional Paragraph G of this memorandum remains the same.

[e] Adopted Child Not Entitled Person

In ***Phraner v. Cote Mart, Inc.*** *(1997) 55 Cal. App. 4th 166, 63 Cal. Rptr. 2d 740* an adopted child claimed that she was a child within the plain meaning of *Code Civ. Proc. § 377.60* and thus entitled to bring an action for the wrongful death of her biological mother. The trial court granted defendants' motion for summary judgment on the ground that plaintiff lacked standing to assert a wrongful death action.

The court of appeal affirmed, holding that plaintiff's adoption severed the parent-child relationship, thus she did not have standing under of *Code Civ. Proc. § 377.60* to bring an action for the wrongful death of her biological mother (*55*

Cal. App. 4th 166, 171) . Plaintiff made a number of arguments, all of which were rejected by the court. First, the plaintiff relied on the fact that when the former statute, Code of Civ. Proc. § 377 was repealed and reenacted in 1992, the term "heir" was replaced by the term "children." She argued that this change was indicative of legislative intent to include children previously adopted in the class of people permitted to bring a wrongful death action. The court found that legislative history and case law indicated otherwise; that the change was intended to allow the children of a decedent to maintain an action for the wrongful death of a parent even though the parent's entire estate was community property bequeathed to the surviving spouse. Second, the plaintiff claimed that she was entitled to bring this action because she was decedent's child under the plain meaning of the word. Since the statute did not define "children," the court looked to *Prob. Code § 6451,* which governs the effect of an adoption on the parent and child relationship. That statute provides that an adoption severs the relationship of parent and child between an adopted person and a natural parent of the adopted person unless the natural parent and the adopted person lived together at any time as parent and child, or the natural parent was married to or cohabitating with the other natural parent at the time the person was conceived and died before the person's birth, and the adoption was by the spouse of either of the natural parents or after the death of either of the natural parents. In this case because plaintiff was taken home by her adoptive parents two days after she was born, never lived with her biological mother, and in all other ways failed to fit within the exception delineated above, the court determined that her parental relationship with her biological mother was severed by the adoption. Third, the plaintiff argued that the court should judicially create standing in wrongful death actions for children who, like her, maintained a relationship with their biological parent after the adoption. The court declined, stating that granting standing to plaintiff would expand the category of people able to recover for the loss beyond that which was contemplated by the legislature in drafting the statute. Finally, the plaintiff claimed that the failure to give her standing violated equal protection. The court disagreed, finding that it was not irrational that the legislature prohibits a child adopted by others to recover for the wrongful death of his or her biological parent (*55 Cal. App. 4th 166, 171)* .

[f] Child Not Entitled Person if Court Order Terminated Parent-Child Relationship

In ***Jackson v. Fitzgibbons*** *(2005) 127 Cal. App. 4th 329, 25 Cal. Rptr. 3d 478* , the plaintiff was a minor child who brought a wrongful death action against a doctor accused of negligence in the death of the plaintiff's birth mother. However, a year and a half prior to the mother's death, the juvenile court had terminated the mother's parental rights over the plaintiff, and shortly after the mother's death, the plaintiff was adopted by her uncle, with whom she had been living for several years. The doctor filed a motion for summary judgment on the grounds that the plaintiff did not have standing to pursue a wrongful death action for the death of her birth mother because that parent-child relationship had been previously terminated by court order. The trial court granted the motion, and the plaintiff appealed.

The court of appeal affirmed. The court noted that an order terminating parental rights totally and irrevocably severs the parent-child relationship and extinguishes all rights and obligations between the parent and child, freeing the child for adoption by new parents (*127 Cal. App. 4th 329, 334)* . Because the termination order freed the plaintiff from her relationship with her birth mother, she had no standing to pursue a wrongful death action, and it made no difference that the plaintiff had not yet been formally adopted by her uncle at the time of the birth mother's death. The court noted that the wrongful death statute was intended to provide a mechanism to compensate for the loss of companionship and other losses associated with the death of a family member. If a parent-child relationship has been legally terminated, however, the child no longer has any expectation or right of recovery for the loss of comfort, companionship, or support of the parent (*127 Cal. App. 4th 329, 335)* . The court also rejected the plaintiff's claim that she had standing under *Prob. Code §§ 6450, 6451,* or *6402*. The court held that those statutes, which deal with a child's right to intestate succession, do not purport to deal with the situation in which there has been a court order conclusively terminating the parent-child relationship. As such, they were inapplicable (*127 Cal. App. 4th 329, 335-336* & n.4).

[g] Laws of Intestate Succession Apply to Resolve Disputes as to Status of Child

Cheyanna M. v. A.C. Nielsen Co. *(1998) 66 Cal. App. 4th 855, 78 Cal. Rptr. 2d 335* , is discussed in *§ 66.30[3][a]*.

[h] Subjective Good-Faith Belief in Validity of Marriage to Decedent Insufficient to Confer Standing to Bring Action

In ***Welch v. State of California*** *(2000) 83 Cal. App. 4th 1374, 100 Cal. Rptr. 2d 430* , the plaintiff brought a wrongful death action for the death of the man with whom she had been living for almost 30 years. Although the plaintiff and the decedent had conducted themselves as husband and wife, they never complied with the requirements for a valid marriage under California law. Although they had exchanged personal wedding vows and shared the benefits of their incomes and the burdens of their debts, filed joint tax returns as husband and wife, and held property as husband and wife, they never acquired a marriage license or engaged in a solemnization ceremony. The trial court granted the defendants' motion for summary adjudication of issues on the ground that the plaintiff did not have standing to sue for the wrongful death of the decedent, because she could not reasonably have believed she had a valid marriage with decedent and therefore she did not meet the statutory requirements for being considered a putative spouse. The plaintiff appealed, arguing that the facts sufficiently demonstrated that she believed in good faith that she had a valid marriage with the decedent, even in the absence of a marriage license or solemnization ceremony, and that in conjunction with the outward appearance of a marriage, summary adjudication of the issue of her good-faith belief was improper.

The court of appeal affirmed. The court held that a subjective good-faith belief in the validity of a marriage is not enough to confer status as a putative spouse under the wrongful death statute. Instead, the standard for determining whether the belief is held in good faith is an objective standard. Applying this objective standard to the plaintiff's situation, the court concluded that the plaintiff had no reasonable basis for believing that a valid marriage existed. The plaintiff and the decedent had made no attempt to comply with the procedural requirements for a lawful California marriage, even though the plaintiff must have known about these requirements because she had been legally married and divorced twice before living with the decedent. In addition, because California abolished common law marriage in 1895, the plaintiff's claim that their common law vows established a valid marriage was unreasonable as a matter of law (*83 Cal. App. 4th 1374, 1378-1379)* .

[i] Status as Survivor of Decedent Determined at Time of Decedent's Death

In ***Chavez v. Carpenter*** *(2001) 91 Cal. App. 4th 1433, 111 Cal. Rptr. 2d 534* , the decedent was a 24-year-old, unmarried man who was killed by a drunk driver. The parents of the decedent brought suit for negligence and wrongful death against the drunk driver, as did the mother of the decedent's minor daughter. Although the decedent's daughter was alive at the time of the decedent's death, she died one month later in an unrelated automobile accident, eight months before the wrongful death action was filed. The defendant moved for summary adjudication of the action brought by the decedent's parents on the grounds that they had no standing to sue for wrongful death. The trial court granted summary adjudication for the defendant, and after all remaining claims were settled, a stipulated judgment was entered to facilitate appeal. The plaintiffs then appealed.

The court of appeal reversed on the grounds that a triable issue of fact remained as to whether the decedent's parents had standing to sue as financial dependents of the decedent, but agreed with the trial court that the parents had no standing to sue as heirs of the decedent. Under *Code Civ. Proc. § 377.60(a)*, a wrongful death action may be brought by an heir other than a surviving spouse, child, or issue of the decedent only if there is no surviving issue of the decedent. Therefore, the parents had standing to sue as heirs only if the decedent's daughter was not a surviving issue of the decedent. Using the common dictionary definition of "surviving," the court of appeal concluded that surviving issue are those who outlive the decedent. Although the court relied on the dictionary definition, the court noted that this conclusion was bolstered by *Prob. Code § 6403(a)*, which indirectly defines a surviving intestate heir as one who outlives the decedent by 120 hours. Therefore, the decedent's minor daughter was a surviving issue and the parents had no standing to sue as heirs (*91 Cal. App. 4th 1433, 1440-1442)* . The court also rejected the plaintiffs' claim that survival must be determined as of the date that the wrongful death suit is filed. The court explained that a wrongful death cause of action arises when the decedent dies, the decedent's daughter was alive at the time of her father's death and therefore owned the cause of action, this wrongful death claim survived the daughter's subsequent death a month

later, and therefore the party with proper standing to bring the wrongful death suit was the daughter's successor in interest, rather than the decedent's parents (*91 Cal. App. 4th 1433, 1443-1444)* .

[j] Mexican "Concubine" Has No Standing to Bring Action

In ***Rosales v. Battle*** *(2003) 113 Cal. App. 4th 1178, 7 Cal. Rptr. 3d 13* , the plaintiffs were the four children of a man killed in a California car accident and the children's mother, all of whom were Mexican citizens living in Mexico. The plaintiffs brought a wrongful death action in California against the driver of the car that struck the decedent and that driver's employer. The defendants filed a motion for summary adjudication arguing that the children's mother did not have standing as a wrongful death plaintiff, because although the decedent and the woman lived together with the children when the decedent returned to Mexico on the weekends, the two were not married, and she did not otherwise qualify as a proper plaintiff under California law. The trial court granted the motion.

The court of appeal affirmed. The court noted that the decedent and the woman were not married under Mexican law, although the woman was formally recognized under Mexican law as the decedent's "concubine." Under Mexican law, that informal status, which is conferred in a formal judgment by a civil court, confers on the woman the right to inherit the man's estate on his death, the right to receive alimony from the man's estate under a valid will, and the right to collect the man's life insurance, funeral benefits, and retirement funds. However, the court also noted that the status does not confer all the rights and duties of a legal marriage, nor even the same rights of a common law marriage in the United States, pointing to the fact that either the "concubine" or her partner can end the relationship without the consent of the other. Because the relationship is not the equivalent of a marriage, or even a common law marriage, the court held that the status does not confer on the woman standing to bring a wrongful death action in California as a surviving spouse (*113 Cal. App. 4th 1178, 1183-1184)* .

[k] Standing as Heir Determined Under California Law

The factual and procedural background of ***Rosales v. Battle*** *(2003) 113 Cal. App. 4th 1178, 7 Cal. Rptr. 3d 13* , is described in § 66.20[3][j]. The plaintiff also argued that she had standing as a wrongful death plaintiff in California because, as a concubine, she was an heir of the decedent under the laws of intestate succession in Mexico. However, for purposes of determining standing to bring an action for wrongful death in California, the court of appeal held that status as an heir is determined under California law. The plaintiff would not be entitled to inherit under California law because she was not married to the decedent, and therefore she had no standing as a wrongful death plaintiff in California (*113 Cal. App. 4th 1178, 1184-1185)* . The court also noted that even if the woman were an heir under California law, that status would not confer on her standing as a wrongful death plaintiff because the decedent left four surviving children. Under *Code Civ. Proc. § 377.60*, status as an heir can confer standing as a wrongful death plaintiff only if there are no surviving issue of the decedent (*113 Cal. App. 4th 1178, 1185-1186)* .

[l] Opposite-Sex Domestic Partners Not Meeting Statutory Criteria Lack Standing to Sue

In ***Holguin v. Flores*** *(2004) 122 Cal. App. 4th 428, 18 Cal. Rptr. 3d 749* , the plaintiff had been living with his girlfriend in an intimate and caring relationship for three years at the time of her death in a car accident. The plaintiff brought an action for wrongful death against the driver and the owner of the truck that collided with the decedent's car. The defendants demurred to the complaint on the grounds that the plaintiff did not have standing to sue because he was not married to the decedent and did not otherwise meet the statutory criteria for a domestic partner under *Fam. Code § 297* as required to have standing to sue under the wrongful death statute, *Code Civ. Proc. § 377.60*. The plaintiff argued that he met all statutory requirements as a domestic partner of the decedent, except the requirement that he and his partner be of the same sex or that one of the partners be over the age of 62 and eligible for old-age social security benefits. The plaintiff further argued that extending the right to sue for wrongful death to some cohabiting couples but not to others solely on the basis of gender or age violated equal protection principles of both the United States and California Constitutions. The trial court disagreed and sustained the demurrer, and the plaintiff appealed.

The court of appeal affirmed. The court of appeal held that unmarried cohabitants who do not meet the criteria of *Fam. Code § 297(a)* and *(b)* do not have standing to sue for wrongful death. The court noted that *Fam. Code § 297* explicitly states that persons of opposite sex may not constitute a domestic partnership under that statute unless one or both of the partners is over the age of 62. Moreover, the statutory history made it clear that the legislature intended to provide rights for domestic partnerships that met the statutory requirements and were registered as such, not to provide new rights and benefits for unmarried cohabiting couples in general (*122 Cal. App. 4th 428, 435-437)* . The court also noted that the right to recover for wrongful death is a right created solely by statute and that the legislature is not required to extend this right to every conceivable class of persons. The court then held that the legislative decision--to extend the right to sue for wrongful death to same-sex couples, who are not permitted by law to marry, and to older opposite-sex couples, who would suffer adverse economic consequences in the form of a loss of social security benefits if they married, but not to provide the right to sue for wrongful death to other opposite-sex couples who cohabit, but could marry without generally suffering adverse social security consequences--was a rational distinction that did not violate constitutional principles of equal protection (*122 Cal. App. 4th 428, 437-443)* .

[4] Additional Authorities

[a] Entitled Plaintiffs Defined

Vogel v. Pan Am. World Airways, Inc. (S.D.N.Y. 1978) 450 F. Supp. 224 , was a wrongful death action brought by a decedent's meretricious spouse. A federal district court, applying the substantive law of California to a wrongful death action, held that a meretricious spouse did not qualify as an heir under former Code Civ. Proc. § 377(b)(2) (*450 F. Supp. 224, 225-227)* . The court stated that the rights accorded meretricious spouses in *Marvin v. Marvin (1976) 18 Cal. 3d 660, 684, 134 Cal. Rptr. 815, 557 P.2d 106* , did not extend to qualifying as wrongful death plaintiffs since wrongful death remains purely a creature of statute (*450 F. Supp. 224, 225-226)* . The court also held that former Code Civ. Proc. § 377 did not deny plaintiff equal protection or due process since there were at least three sets of facts that reasonably could be conceived to justify the distinction between putative and meretricious spouses in former Code Civ. Proc. § 377(b) [*now see Code Civ. Proc. § 377.60(b)*]. The legislature could reasonably have concluded that: (1) the absence of a formal marriage ceremony evidenced a lack of permanent commitment, and the pecuniary loss to plaintiff would thus be too speculative to calculate; (2) the lack of any documentary evidence of a marriage ceremony, unlike the case of a putative spouse, may lead to fraudulent claims and complicated proof at trial; and (3) the failure to provide statutory property rights would encourage the state's citizens to enter into the recognized state interest of formal marriage (*450 F. Supp. 224, 226)* .

California Points & Authorities

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PART II. FORMS
A. Wrongful Death Actions

6-66 California Points & Authorities § 66.21

§ 66.21 Supporting Contention That Plaintiff May Not Recover Damages for Wrongful Death--Death of Person Not Alleged [Code Civ. Proc. § 377.60]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF DOES NOT HAVE A WRONGFUL DEATH CAUSE OF ACTION BECAUSE THE ACTION IS NOT BASED ON THE DEATH OF A PERSON.

A. Wrongful Death Action Defined. [*See § 66.20, Paragraph A.*]

B. Court Bound by Statute. [*See § 66.20, Paragraph B.*]

C. Death of Person Is Required. A cause of action for wrongful death requires the death of a person (*see Code Civ. Proc. § 377.60*).

[*Optional*] **D. Death of Fetus Cannot Be Basis of Action.** The death of an unborn fetus does not meet the requirement that the action be based on the death of a person (*Justus v. Atchison (1977) 19 Cal. 3d 564, 577-580, 139 Cal. Rptr. 97, 565 P.2d 122*).

[2] Comments

[a] Use of Form

These points and authorities may be used to oppose a wrongful death action on the ground that the action does not allege the death of a person. The optional paragraph sets forth the specific argument supported by case law, that the action cannot seek damages based on the death of an unborn fetus, but the general point could also be made, for example, if the action was filed before the decedent has actually died.

These points and authorities may be combined, where appropriate, with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a wrongful death action requires the death of a person. For example, this form may be used to support an objection by demurrer to a complaint on the ground that it does not state facts sufficient to state a cause of action where such ground appears on the face of the complaint, or from any matter of which the court is required to or may take judicial notice [*Code Civ. Proc. §§ 430.10(e), 430.30(a)*]. These points and authorities may also be used to support a defendant's motion for summary judgment [*see Code Civ. Proc. § 437c*]. The points and authorities in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing how the facts establish that the action is based on the death of an unborn fetus.

[3] Discussion of Authorities

[a] Death of Fetus Cannot Be Basis of Action

The factual background of ***Justus v. Atchison*** *(1977) 19 Cal. 3d 564, 139 Cal. Rptr. 97, 565 P.2d 122* , is discussed in *§ 66.20[3][a]*. After determining that the question of whether or not a wrongful death action may be based on the death of an unborn fetus is one of legislative intent, the Court concluded that when the legislature determines to confer legal personality on unborn fetuses for certain limited purposes, it expresses that intent in specific and appropriate terms. Although the Court did not believe that the legislature originally considered the question of unborn fetuses when it enacted former Code Civ. Proc. § 377 [*now see Code Civ. Proc. § 377.60*], it reasoned that the legislature had the opportunity to amend the statute in the ensuing century to achieve this purpose. The Court also rejected plaintiffs' argument that the Court's interpretation of former Code Civ. Proc. § 377 [*now see Code Civ. Proc. § 377.60*] denied them equal protection of the laws. Quoting from earlier California Supreme Court decisions, the Court analyzed the issue in terms of the legislature's constitutional obligation when if confers new rights of action on particular classes of citizens for injuries not previously actionable. The test employed is that the legislature's decision is conclusive unless it appears beyond rational doubt that the classification arbitrarily discriminates against persons or classes similarly situated. The Court could find no such arbitrary discrimination since the only heirs of the fetus are its parents for whom there is no appreciable economic loss, but a loss of consortium. Such a loss does not equal that of parents who have experienced the actual companionship of a child.

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CHAPTER 66 DEATH AND SURVIVAL ACTIONS
PART II. FORMS
A. Wrongful Death Actions

6-66 California Points & Authorities § 66.22

§ 66.22 Supporting Contention That Plaintiff May Not Recover Damages for Wrongful Death--Damages Not Alleged [Code Civ. Proc. § 377.61]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S COMPLAINT FAILS [BECAUSE IT *or* TO THE EXTENT THAT IT] DOES NOT CLAIM DAMAGES, THE ONLY RELIEF PERMITTED UNDER THE PROVISIONS OF CODE OF CIVIL PROCEDURE SECTION 377.61.

A. Wrongful Death Action Defined. [*See § 66.20, Paragraph A.*]

B. Court Bound by Statutory Definition. [*See § 66.20, Paragraph B.*]

C. Damages Are Required. Damages are the only remedy available in a wrongful death action, and must be alleged for a cause of action to be stated (*Alvarez v. Wiley (1977) 71 Cal. App. 3d 599, 605-606, 139 Cal. Rptr. 550*).

[*Optional*] **D. Equitable Relief Unavailable.** A cause of action based on decedent's wrongful death and brought in a state court is governed by the provisions of *Code of Civil Procedure Section 377.60*, which authorizes an action at law for damages only. Therefore, a cause of action for declaratory and injunctive relief predicated on wrongful death is not available[, notwithstanding the fact that if the action were brought in federal court and stated a cause of action under the federal Civil Rights Act (*42 U.S.C.S. §§ 1983, 1988*), equitable relief in addition to or independent of damages may be available] (*Alvarez v. Wiley (1977) 71 Cal. App. 3d 599, 603-604, 139 Cal. Rptr. 550*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of the contention that no cause of action for

wrongful death is stated if the complaint does not allege damages. In addition, the memorandum includes an optional contention that other relief is not available in a wrongful death action.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue regarding the limitation of remedies available in a wrongful death action to damages. For example, these points and authorities may be used to support a general demurrer to a complaint for wrongful death asserting that the complaint fails to state facts sufficient to constitute a cause of action in that it appears on the face thereof that the complaint does not show a claim for damages (*Code Civ. Proc. §§ 430.10(e), 430.30(a)*). These points and authorities may also be used to support a defendant's motion for summary judgment [*see Code Civ. Proc. § 437c*].

If both damages and equitable relief are claimed, a motion to strike the allegations and prayer seeking equitable relief [*see Code Civ. Proc. § 435(b)*] or for summary adjudication of the issue of equitable relief [*see Code Civ. Proc. § 437c*] may also be proper.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion showing that the action seeks relief other than damages or relief in addition to damages.

[3] Discussion of Authorities

[a] Damages Are Required

Alvarez v. Wiley *(1977) 71 Cal. App. 3d 599, 139 Cal. Rptr. 550* , was a wrongful death action brought by the decedent's father. The only relief requested was declaratory and injunctive relief. The trial court sustained defendants' demurrers to the complaint with leave to amend and suggested that plaintiff might be able to state a cause of action for damages for the wrongful death of his son. Plaintiff elected to stand on his complaint and appealed from the resulting judgment of dismissal. On appeal, the court of appeal affirmed. The court noted that the remedy for wrongful death was purely a creature of statute, and a cause of action for wrongful death must stand or fall by the terms of the statute, which on its face authorizes only an action at law for damages and does not authorize equitable relief.

NOTE:

In 1993, the legislature revised, reorganized, and renumbered the wrongful death statute. The provisions regarding damages remain substantially the same and the requirement of damages as set out in Paragraph C of this memorandum still applies.

[b] Equitable Relief Unavailable

The facts and procedural background of ***Alvarez v. Wiley*** *(1977) 71 Cal. App. 3d 599, 139 Cal. Rptr. 550* , are discussed in *§ 66.22[3][a]*. In holding that the trial court properly sustained defendants' demurrer [*see § 66.22[3][a]*], the court of appeal considered what was evidently plaintiff's main contention on appeal: that his complaint stated a cause of action under the federal Civil Rights Act [*42 U.S.C.S. §§ 1983, 1988*] for the unconstitutional deprivation of plaintiff's right to his son's companionship. (The court held preliminarily that the complaint did not meet the requirements of a class action.) Plaintiff had likened his cause of action to that in *Mattis v. Schnarr (8th Cir. 1974) 502 F.2d 588, 593-596* , in which the federal court of appeals held that plaintiff had stated a cause of action for declaratory relief based on a violation of plaintiff's constitutionally protected right to raise his minor son, who had been shot by defendant police officers while attempting to escape arrest. However, whatever the merits of plaintiff's theory, the court followed a Colorado Supreme Court decision [*Jones v. Hildebrant (Colo. 1976) 191 Colo. 1,*] and stated that if plaintiff had brought the action in a federal court, equitable relief may have been available by virtue of the provisions of *42 U.S.C.S. § 1983*, which specifically permits an action in equity for unconstitutional deprivation of certain rights; but that whatever may be the theoretical basis for the action, the remedy for any cause of action based on wrongful death in

California is limited to damages under the wrongful death statute.

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6-66 California Points & Authorities § 66.23

§ 66.23 Supporting Contention That Plaintiff May Not Recover Damages for Wrongful Death--Wrongful Death Plaintiff Subject to Defenses That Could Have Been Asserted Against Decedent, and Complete Defense Exists

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

A PLAINTIFF IN A WRONGFUL DEATH ACTION IS SUBJECT TO DEFENSES THAT COULD HAVE BEEN ASSERTED AGAINST THE DECEDENT, INCLUDING THE COMPLETE DEFENSE BASED ON _____ [*specify basis of complete defense, e.g.,* DECEDENT'S EXPRESS ASSUMPTION OF ALL RISKS OF THE ACTIVITY AT ISSUE, AND EXPRESS RELEASE OF DEFENDANT FROM LIABILITY FOR FUTURE NEGLIGENCE RESULTING IN PERSONAL INJURY, PROPERTY DAMAGE, OR DEATH TO THE DECEDENT IN THE COURSE OF THAT ACTIVITY].

A. Plaintiff Subject to Defenses Assertable Against Decedent. A plaintiff in a wrongful death action is subject to defenses that could have been asserted against the decedent (*Madison v. Superior Court (1988) 203 Cal. App. 3d 589, 600, 250 Cal. Rptr. 299*).

[*Optional*] **B. Assumption of Risk Is Complete Defense to Wrongful Death Action.** A valid pre-injury agreement releasing the defendant from any and all liability for future negligence with respect to a given activity not affecting the public interest, and assuming all risks of that activity, executed by a decedent prior to his or her death, constitutes a complete defense to an action for the decedent's wrongful death, which occurred in the course of that activity (*Madison v. Superior Court (1988) 203 Cal. App. 3d 589, 600, 250 Cal. Rptr. 299*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of the contention that there is a defense to the action that could have been asserted against the decedent, and that the defense may be asserted in the wrongful death

action. The optional paragraph sets forth the specific defense that the decedent's assumption of the risk is a complete defense to a wrongful death action.

This form will be used to support a motion for summary judgment and should be combined with points and authorities relating to such a motion.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should point to facts showing the existence and terms of the agreement signed by decedent, as evidenced in the declaration supporting the motion [*see Code Civ. Proc. § 437c*], which should include a copy of the agreement itself attached to the declaration and incorporated by reference.

[b] Related Points and Authorities

For forms of memoranda supporting and opposing the existence of a valid express assumption of the risk that may be incorporated in this form, see Ch. 380, *Negligence* . For forms of memoranda relating to motions for summary judgment in general, see Ch. 537, *Summary Judgment* .

[3] Discussion of Authorities

[a] Plaintiff Subject to Defenses Assertable Against Decedent

In ***Madison v. Superior Court*** *(1988) 203 Cal. App. 3d 589, 250 Cal. Rptr. 299* , a wrongful death action, the decedent, plaintiffs' 19 year-old son, drowned while participating in a scuba diving training class make-up dive. During the dive, decedent had run low on air. The decedent's instructor accompanied him to the surface and directed him to swim toward a buoy that had been anchored prior to the commencement of the dive. The instructor then left decedent alone on the surface to continue the dive with another student, which was a violation of the "buddy-system" rule. About 10 minutes later, when the instructor and the other student surfaced, decedent was nowhere to be found. A search was commenced, and the decedent's body was located on the bottom. At the time he enrolled in the class, decedent had signed a written waiver and release by the terms of which he voluntarily released, discharged, waived, and relinquished any and all actions or causes of action for personal injury, property damage, or wrongful death arising from his participation in the class and its activities, and in which he had expressly stated his intent to exempt and relieve defendants from liability for personal injury, property damage, or wrongful death caused by negligence. Defendants' motion for summary judgment was denied, and defendants petitioned the court of appeal for a writ of mandate.

In ordering issuance of a peremptory writ of mandate directing the trial court to vacate its order denying defendants' motion for summary judgment and to enter an order granting the motion, the court of appeal relied on cases finding it axiomatic that a plaintiff in a wrongful death action is subject to defenses that could have been asserted against the decedent (*203 Cal. App. 3d 589, 600)* . Because the release supported a complete defense against the action, the court held that the trial court should have granted the defendants' summary judgment motion.

[b] Assumption of Risk Is Complete Defense to Wrongful Death Action

The facts and procedural background of ***Madison v. Superior Court*** *(1988) 203 Cal. App. 3d 589, 250 Cal. Rptr. 299* , are discussed in *§ 66.23[3][a]*. The court held that the particular waiver and release agreement was not affected with a public interest and was valid, and that the legal effect of the release and waiver provisions of the agreement provided the defendants a complete defense to the plaintiffs' action. The court concluded that, as a result, no triable issue of fact was raised with respect to the legal meaning or effect of the agreement and that summary resolution of this issue in defendants' favor was required (*203 Cal. App. 3d 589, 600)* .

[4] Additional Authorities

[a] Assumption of Risk Is Complete Defense to Wrongful Death Action

In *Paralift, Inc. v. Superior Court (1993) 23 Cal. App. 4th 748, 29 Cal. Rptr. 2d 177* , the decedent had executed a detailed release in order to be able to engage in skydiving on an ongoing basis. The appellate court found the release to be valid and a complete bar to any recovery by the decedent's heirs in a wrongful death action, repeating the rule that it is axiomatic that a plaintiff in a wrongful death action is subject to defenses that could have been asserted against the decedent (*23 Cal. App. 4th 748, 755)* .

In *Scroggs v. Coast Cmty. Coll. Dist. (1987) 193 Cal. App. 3d 1399, 239 Cal. Rptr. 916* , the plaintiff's decedent died while participating in a scuba diving class offered by the defendant community college. The decedent had signed a release agreement prior to participating in the class in which he had waived any claim on behalf of himself or his heirs against the college "by reason of any accidents, illness, injury or death, or other consequences arising or resulting directly or indirectly from participation in scuba diving under the auspices [of the college], occurring during said participation or any time subsequent thereto." On the basis of the release and waiver, the trial court granted defendant's motion for summary judgment.

Although the court of appeal reversed the summary judgment on the ground that there was no language in the release prepared by the college indicating the decedent intended to assume all risks of the activity and that the release did not encompass a waiver of defendant's negligence (*193 Cal. App. 3d 1399, 1404)* , the court said it was axiomatic that a plaintiff in a wrongful death action is subject to defenses that could have been asserted against the decedent and held that an express contractual assumption of the risk, combined with an express waiver of defendant's negligence, constitutes a complete defense to the surviving heirs's wrongful death action (*193 Cal. App. 3d 1399, 1402)* .

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6-66 California Points & Authorities § 66.24

§ 66.24 Supporting Contention That Plaintiff May Not Recover Damages for Wrongful Death--Proximate Cause Not Established [Code Civ. Proc. § 377.60]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S FAILURE TO ALLEGE FACTS SHOWING THAT DEFENDANT'S ACT OR NEGLECT WAS PROXIMATE CAUSE OF DECEDENT'S DEATH CONSTITUTES A FAILURE TO STATE A CAUSE OF ACTION FOR WRONGFUL DEATH.

A. Wrongful Death Action Defined. [*See § 66.20, Paragraph A.*]

B. Court Bound by Statutory Definition. [*See § 66.20, Paragraph B.*]

C. Proximate Cause Is Required. A wrongful death action must allege facts that show that the defendant's act or neglect was the proximate cause of decedent's death (*see Johnson v. Union Furniture Co. (1939) 31 Cal. App. 2d 234, 237, 87 P.2d 917*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted to oppose a wrongful death action that fails to allege facts supporting proximate cause between the defendant's act or neglect and the decedent's death.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of proximate cause. For example, these points and authorities may be used to support a general demurrer to a complaint for wrongful death asserting that the complaint fails to state facts sufficient to constitute a cause of action in that it appears on the face thereof that defendant's act or neglect was not the

proximate cause of decedent's death. These points and authorities may also be used to support a defendant's motion for summary judgment [*see Code Civ. Proc. § 437c*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing how other facts of the case do not establish that the defendant proximately caused the decedent's death.

[b] Related Pleading and Practice Forms

For forms of notices of motion under Code Civ. Proc. § 389, see California Forms of Pleading and Practice, Ch. 395, *Parties* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Proximate Cause Is Required

Johnson v. Union Furniture Co. *(1939) 31 Cal. App. 2d 234, 87 P.2d 917* , was a wrongful death action brought by a decedent's surviving spouse against defendant furniture company based on the theory that defendant's failure, as promised, to deliver a bed on schedule to plaintiff's home required the decedent to spend the night on a mattress spread on the floor, thus exposing him to cold and drafts, which exposure led to pneumonia causing his death two days later. The trial court sustained defendant's demurrer to the complaint without leave to amend and plaintiff appealed from the resulting judgment of dismissal. The court of appeal affirmed, holding that plaintiff had failed to allege that defendant's wrongful act was a direct and proximate cause of the injury. It was well settled that in order to maintain an action for damages based on the wrongful act or neglect of another, such an allegation and proof must be made.

[4] Additional Authorities

[a] Proximate Cause Is Required

Bromme v. Pavitt (1992) 5 Cal. App. 4th 1487, 7 Cal. Rptr. 2d 608 , was a wrongful death action arising from alleged medical malpractice for failure to diagnose decedent's colon cancer. The court held that the trial court properly granted a partial nonsuit for the defendant that precluded the jury from considering any alleged negligence by defendant after June 1981. After that date, the decedent would not have had a greater than 50 percent chance of survival, even if the defendant had properly diagnosed and treated the condition (*5 Cal. App. 4th 1487, 1499)* . To recover for wrongful death, the plaintiff must prove that the defendant's wrongful act or neglect was a cause in fact of the decedent's death. To be a cause in fact, the wrongful act must be a substantial factor in bringing about the death. An actor's negligent conduct is not ordinarily a substantial factor if the harm would have occurred without that negligence. However, the court noted that, if two forces are actively operating, one due to the actor's negligence, and each force is sufficient to bring about the harm by itself, the actor's negligence may be a substantial factor (*5 Cal. App. 4th 1487, 1498)* .

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6-66 California Points & Authorities § 66.25

§ 66.25 Supporting Contention That Plaintiff May Not Recover Damages for Wrongful Death--Statute of Limitations [Code Civ. Proc. § 335.1] Bars Action

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S WRONGFUL DEATH COMPLAINT IS BARRED BY THE TWO-YEAR PROVISION OF SECTION 335.1 OF THE CODE OF CIVIL PROCEDURE.

A. Two Years in Which to Commence Wrongful Death Action. Generally, a plaintiff must commence an action for wrongful death within two years (*Code Civ. Proc. § 335.1*; *see also* former Code Civ. Proc. § 340(3) (one year, prior to 2003)).

B. Period of Limitation Runs From Time of Decedent's Death. The two-year (one-year, prior to 2003, under former Code Civ. Proc. § 340(3)) limitations period runs from the date of the decedent's death (*Arizmendi v. System Leasing Corp. (1971) 15 Cal. App. 3d 730, 735, 93 Cal. Rptr. 411* ; *Walton v. Southern Pac. Co. (1935) 8 Cal. App. 2d 290, 304, 48 P.2d 108*).

[*Optional*] **C. Relation-Back Doctrine Does Not Apply When Adding New Plaintiff.** If an attempt is made to add a plaintiff to a timely-filed wrongful death action, the limitations period runs to the time of amendment or intervention for that plaintiff and the "relation back" doctrine does not apply (*San Diego Gas & Elec. Co. v. Superior Court (2007) 146 Cal. App. 4th 1545, 1552-1553, 53 Cal. Rptr. 3d 722*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be used to support a contention that an action for wrongful death is barred because it was commenced after the general statute of limitations period has run. If the wrongful death action

involves medical malpractice, a special statute of limitations provision applies [*see § 66.26*].

These points and authorities may be combined, where appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the limitations period. For example, these points and authorities may be used to support a demurrer to a wrongful death complaint when the complaint fails to state facts constituting a cause of action in that it appears on the face thereof, or from a matter of which the court is required to or may take judicial notice, that the action is barred by the applicable statute of limitations [*Baillargeon v. Department of Water & Power (1977) 69 Cal. App. 3d 670, 138 Cal. Rptr. 338* ; *Bell v. Bank of Cal. (1908) 153 Cal. 234, 94 P. 889]* . These points and authorities may also be used to support a defendant's motion for summary judgment [*see Code Civ. Proc. § 437c*]. The points and authorities in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing that the facts establish that the action was commenced after the applicable statute of limitations period expired.

[b] Related Pleading and Practice Forms

For a form of demurrer to a wrongful death complaint on the ground that the action is barred by the two-year (one-year, prior to 2003) statute of limitations, see California Forms of Pleading and Practice, Ch. 181, *Death and Survival Actions* .

[c] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing demurrers on the ground of the bar of a statute of limitations, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* , and Ch. 143, *Limitation of Actions* .

[d] Opposing Points and Authorities

The points and *authorities in §§ 66.31 -66.33* may be used in an appropriate case to oppose a contention supported by this memorandum.

[3] Discussion of Authorities

[a] Period of Limitation Runs From Time of Decedent's Death

Arizmenti v. System Leasing Corp. *(1971) 15 Cal. App. 3d 730, 93 Cal. Rptr. 411* , was a wrongful death action brought by the surviving spouse of a decedent. At the conclusion of the trial, the jury returned a verdict in favor of the surviving spouse, and judgment was entered accordingly. Meanwhile, the illegitimate minor children of the decedent, through their mother as guardian ad litem, and the half brother of the decedent brought a wrongful death action against defendant. The parties to the first action settled, stipulating to vacate the judgment and set aside the verdict in the action and dismiss it with prejudice to defendant. Subsequently, defendant moved for summary judgment in the second action on the ground that the settlement and dismissal of the wrongful death action brought by decedent's surviving spouse collaterally estopped these plaintiffs from asserting their claims insofar as the judgment in the prior action was res judicata. The trial court granted the motion and entered a judgment of dismissal. On plaintiffs' appeal, the court of appeal affirmed the dismissal of decedent's half brother on the grounds both that he was not an heir of the decedent and that the action had been filed more than a year after the decedent's death and was, therefore, barred by the statute of limitations in former Code Civ. Proc. § 340(3) [*now see Code Civ. Proc. § 335.1* (two-year limitations period)]. However, it reversed the judgment of dismissal as to decedent's minor children [*see § 66.31* for points and authorities regarding the tolling of the statute of limitations during a plaintiff's minority].

Walton v. Southern Pac. Co. *(1935) 8 Cal. App. 2d 290, 48 P.2d 108* , was a wrongful death action brought by the administrator of decedent's estate against defendant on her own behalf as decedent's widow and on behalf of decedent's minor children. At the conclusion of the trial, the jury found in plaintiff's favor and awarded damages. Defendant appealed, arguing that a prior action brought by decedent in federal court against defendant for his personal injuries in the accident constituted a bar to plaintiff's wrongful death action. The court of appeal affirmed the judgment in plaintiff's favor. It held that the judgment of nonsuit on decedent's motion for a directed verdict at the conclusion of his presentation in the prior action did not constitute a bar to plaintiff's wrongful death action because the record in the prior action did not establish what may have been adjudicated in that action. Moreover, the cause of action for personal injuries and for wrongful death were not identical because of the difference in measures of damages to be applied. Finally, the court held that plaintiff was not barred from maintaining the action by the one-year statute of limitations for wrongful death actions because it runs from the date of decedent's death, not from the date of decedent's accident.

[b] Relation-Back Doctrine Does Not Apply When Adding New Plaintiff

In *San Diego Gas & Electric Co. v. Superior Court (2007) 146 Cal. App. 4th 1545, 53 Cal. Rptr. 3d 722* , plaintiff was the widow of a Marine killed when a military helicopter struck utility lines. A timely wrongful death action was brought by some of the Marine's heirs against the utility company, although the widow was not originally listed as a plaintiff. On the eve of trial, plaintiffs sought leave to file an amended complaint adding the widow to the list of plaintiffs, even though the statute of limitations had already expired. The trial court allowed the amendment, concluding that the amended complaint related back to the original complaint. The court also noted that the defendant was not prejudiced by the amendment, as defendant already knew of the widow's existence and had received an economic analysis of her loss of support claim prior to expiration of the limitations period. Defendant sought writ relief.

The court of appeal issued a writ of mandate ordering the trial court to vacate its decision to allow the widow to be added as a plaintiff. The court noted the accepted principle that while wrongful death action is considered joint, single, and indivisible, each heir has a separate and personal cause of action. As such, the statute of limitations runs separately against each heir's cause of action (*146 Cal. App. 4th 1545, 1551)* . The court then reviewed *Andersen v. Barton Memorial Hospital, Inc. (1985) 166 Cal. App. 3d 678, 212 Cal. Rptr. 626* , in which the court held that the relation-back doctrine did not save the untimely claim of a possible omitted heir seeking to join a timely-filed wrongful death action, because the omitted heir was asserting a new cause of action. Agreeing with the rationale of that earlier decision, the court held that because all wrongful death claimants must show the nature of his or her loss as a result of the decedent's death, the addition of an omitted heir after expiration of the limitations period necessarily adds a new cause of action that seeks to enforce an independent right. Thus, the relation-back doctrine does not apply, regardless of whether the defendant would be prejudiced by the addition of the omitted plaintiff. Assuming the statute of limitations had expired on the widow's claim, the trial court erred when allowing the amendment to add the widow as a plaintiff. The court remanded, however, to allow plaintiffs to amend their complaint to allege that the statute of limitations had been tolled (*146 Cal. App. 4th 1545, 1552-1553)* .

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6-66 California Points & Authorities § 66.26

§ 66.26 Supporting Contention That Plaintiff May Not Recover Damages for Wrongful Death--Statute of Limitations for Medical Malpractice Actions [Code Civ. Proc. § 340.5] Bars Action

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S WRONGFUL DEATH COMPLAINT IS BARRED BY THE STATUTE OF LIMITATIONS GOVERNING MEDICAL MALPRACTICE ACTIONS.

Statute of Limitations for Medical Malpractice. In an action for injury or death against a health care provider based on such person's professional negligence, a plaintiff must file suit within three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first (*Code Civ. Proc. § 340.5*). This specific statute of limitations prevails over the more general statute of limitations applicable to wrongful death actions generally (*see Washington v. Nelson (1979) 100 Cal. App. 3d 47, 52-53, 160 Cal. Rptr. 644*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be used to oppose a medical malpractice action for wrongful death that is commenced after the applicable statute of limitations period has run.

The points and authorities may be combined, where appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the limitations period. For example, these points and authorities may be used to support a demurrer to a wrongful death complaint when the complaint fails to state facts constituting a cause of action in that it appears on the face thereof, or from a matter of which the court is required to or may take judicial notice, that the action is barred by the applicable statute of limitations [*Baillargeon v. Department of Water & Power (1977) 69 Cal. App. 3d 670, 138 Cal. Rptr. 338* ; *Bell v. Bank of Cal. (1908) 153 Cal. 234, 94 P. 889]*

These points and authorities may be used to support a defendant's motion for summary judgment [*see Code Civ. Proc. § 437c*]. The points and authorities in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing that the facts establish that the action is subject to the statute of limitations governing medical malpractice, and that the action was commenced after the applicable statute of limitations period had expired.

[b] Related Pleading and Practice Forms

For a form of demurrer to a wrongful death complaint on the ground that the action is barred by the applicable statute of limitations, see California Forms of Pleading and Practice., Ch. 181, *Death and Survival Actions* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities regarding the contention that the medical malpractice statute of limitations applies to a given action, and that actions are or are not timely under that statute, see Ch. 175, *Physicians and Surgeons: Medical Malpractice* . For forms of memoranda of points and authorities supporting and opposing demurrers on the ground of the bar of a statute of limitations, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* , and Ch. 143, *Limitation of Actions* .

[d] Opposing Points and Authorities

The points and *authorities in §§ 66.31* and *66.32* may be used in an appropriate case to oppose a contention supported by this memorandum.

[3] Discussion of Authorities

[a] Statute of Limitations for Medical Malpractice

In ***Washington v. Nelson*** *(1979) 100 Cal. App. 3d 47, 160 Cal. Rptr. 644* , over three years after decedent's death, plaintiff moved for leave to file an amended wrongful death complaint naming decedent's son as an additional heir. The trial court granted the motion over defendant's objection that the three-year period in *Code Civ. Proc. § 340.5*, governing actions against health care providers for professional negligence, barred the amended complaint. Defendant then moved to dismiss the cause as to the omitted heir under former Code Civ. Proc. § 581a [*now see Code Civ. Proc. §§ 583.210-583.250*] on the ground that the summons had not been served within three years after the commencement of the action. The court granted the motion, and plaintiff appealed.

The court of appeal affirmed, but on the ground that the action was barred by *Code Civ. Proc. § 340.5*. The court pointed out that plaintiff had convinced the trial court that if it held that *Code Civ. Proc. § 340.5* barred the filing of the amended complaint, the action would have to be dismissed as to plaintiff as well, since not all the heirs would have been named in the complaint. Relying on *Cross v. Pacific Gas & Elec. Co. (1964) 60 Cal. 2d 690, 692-694, 36 Cal. Rptr. 321, 388 P.2d 353* , the court corrected the trial court by stating that, as the claim of each heir is a personal and separate cause of action, the running of the statute as to the omitted heir could not affect plaintiff's complaint. The court then noted that in the ordinary wrongful death action the statute of limitations is tolled during the child's minority; but that as of 1975, if the wrongful death is due to medical malpractice, the more specific statute of limitations in *Code Civ. Proc. § 340.5* is controlling. Quoting from *Code Civ. Proc. § 340.5*, the court found that the action was barred because it had not been commenced within three years from the date of decedent's death and there had been no argument that any of the tolling provisions in *Code Civ. Proc. § 340.5* applied (*100 Cal. App. 3d 47, 52-53)* .

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6-66 California Points & Authorities § 66.27

§ 66.27 Supporting Contention That Plaintiff May Not Recover Damages for Wrongful Death--Previous Judgment Bars Current Action [Code Civ. Proc. § 377.60]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S COMPLAINT IS BARRED BY A PREVIOUS ACTION AGAINST THE SAME DEFENDANTS THAT WAS DISMISSED WITH PREJUDICE.

A. Wrongful Death Action Defined. [*See § 66.20, Paragraph A.*]

B. Court Bound by Statutory Definition. [*See § 66.20, Paragraph B.*]

C. Action Barred by Previous Action. A wrongful death action is barred by a previous wrongful death action against the same defendants, even though the plaintiffs in the previous action are different from the plaintiffs in the present action (*Mayerhoff v. Kaiser Found. Health Plan, Inc. (1977) 71 Cal. App. 3d 803, 806-807, 138 Cal. Rptr. 319*).

[*Optional*] **D. Previous Action Bars Action by Unborn Child Whose Existence Was Unknown to Defendant.** A child who was unborn and whose existence was unknown to defendant at the time a judgment in favor of other entitled plaintiffs is given in a wrongful death action may not maintain a second such action after its birth, notwithstanding the provisions of *Civil Code Section 43.1*, to the effect that an unborn child is deemed to be in existence so far as necessary for its interests, in the event of its subsequent birth (*Daubert v. Western Meat Co. (1903) 139 Cal. 480, 483, 69 P. 297, 73 P. 244* (construing former Civ. Code § 29).

[*Optional*] **E. Prior Litigation of Spouse's Loss of Consortium Claim Can Bar Recovery of Same Damages in Wrongful Death Action.** If a plaintiff brings a loss of consortium action based on injury to a spouse while the injured spouse is still living, an adjudication of the right to recover for the future loss of companionship and affection of the injured spouse can have a res judicata effect on any attempt to recover for the same damages in a subsequent wrongful

death action (*see Boeken v. Philip Morris USA, Inc. (2010) 48 Cal. 4th 788, 798-799, 108 Cal. Rptr. 3d 806, 230 P.3d 342*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted to support the contention that a plaintiff may not maintain an action for wrongful death if a previous wrongful death action against the same defendant was dismissed with prejudice. If the plaintiff is a child who was unborn and whose existence was unknown to the defendant in the prior action at the time a judgment in the prior action is given, counsel may use optional Paragraph D. Optional Paragraph E may be used to make the argument that a spouse who previously pursued a loss of consortium claim that included damages for post-death loss of affection and companionship is barred from seeking the same damages a second time in a wrongful death action.

These points and authorities may be combined, where appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue that the action is barred by a previous action. For example, these points and authorities may be used to support a general demurrer to a complaint for wrongful death asserting that the complaint fails to state facts sufficient to constitute a cause of action in that it appears on the face thereof, or from a matter of which the court is required to or may take judicial notice, that a previous wrongful death action against the same defendant was dismissed with prejudice. These points and authorities may also be used to support a defendant's motion for summary judgment [*see Code Civ. Proc. § 437c*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing that there are facts establishing that a previous wrongful death action against the same defendant was dismissed with prejudice.

[b] Opposing Points and Authorities

The points and *authorities in §§ 66.41* and *66.42* may be used in an appropriate case to oppose the contention supported by this memorandum.

[3] Discussion of Authorities

[a] Action Barred by Previous Action

Mayerhoff v. Kaiser Found. Health Plan, Inc. *(1977) 71 Cal. App. 3d 803, 138 Cal. Rptr. 319* , is discussed in *§ 66.20[3][a]*. In holding that the cause of action before it was barred because of the prior action against the same defendant, although brought by different plaintiffs, the court relied on the single and indivisible nature of the wrongful death cause of action, intended by the legislature to be brought on behalf of all persons entitled to bring the action. The court stated that the nature of the action therefore precluded a series of suits against the same defendant by individual plaintiffs (*71 Cal. App. 3d 803, 806)* .

[b] Previous Action Bars Action by Unborn Child Whose Existence Was Unknown to Defendant

Daubert v. Western Meat Co. *(1903) 139 Cal. 480, 69 P. 297, 73 P. 244* , was a wrongful death action brought against defendant meat company by a son who was born after his father's death. The trial court sustained defendant's demurrer to the complaint and entered judgment for the defendant. Plaintiff appealed to the Supreme Court, which affirmed. The Court held that the earlier action of plaintiff's mother, commenced and brought to judgment prior to plaintiff's birth, was a bar to plaintiff's action. Under the statute, only one action is permitted, and, at that time, plaintiff's mother was the only heir of the deceased. There was no other heir entitled to bring the action or to be joined with her as plaintiff. The

Court considered the possibility that the plaintiff might have accrued some form of action against defendant, if the defendant at the time of trial had known about its existence and not made him a party; but since defendant did not know about him, the Court concluded that it need not decide the question (*139 Cal. 480, 482-483)* .

NOTE:

Daubert should not be interpreted to mean that an unborn child is not an "heir." The case did not reach such a result, and it would appear that because an unborn child qualifies as an heir entitled to succeed to the estate of an intestate when born [*see Prob. Code § 6407* (relatives conceived before decedent's death but born thereafter inherit as if born during decedent's lifetime); *see also Prob. Code §§ 6570-6573* (children born after execution of will); *Estate of Kurtz (1922) 190 Cal. 146, 150, 210 P. 959]* , the child would also qualify as an heir under former Code Civ. Proc. § 377(b)(1). The remedies of the wrongfully excluded child after birth would thus appear to be that of any wrongfully excluded heir [*see Watkins v. Nutting (1941) 17 Cal. 2d 490, 499, 110 P.2d 384* ; *Helling v. Lew (1972) 28 Cal. App. 3d 434, 437 n.1, 104 Cal. Rptr. 789]* . In addition, the fact that defendant did not know of the existence of the unborn child was a clear condition of the court's holding in *Daubert.* The court's holding may then be qualified by *Arizmendi v. System Leasing Corp. (1971) 15 Cal. App. 3d 730, 739, 93 Cal. Rptr. 411* [*see § 66.25[3][a]*], in which the court of appeal held that certain heirs (illegitimate minors) who had not been joined in a wrongful death action were not collaterally estopped by a judgment in that action from bringing a second wrongful death action when their separate interests were not before the court in the earlier action and defendant knew of their existence but did not attempt to compel their joinder as parties to the action.

NOTE:

In 1993, the legislature amended the wrongful death statute to eliminate the use of the term "heirs" to delineate persons entitled to a wrongful death cause of action [*see Code Civ. Proc. § 377.60*]. Entitled persons include, but are not limited to, certain heirs. The application of the wrongful death statute to an unborn child whose existence is unknown to the defendant as set out in Paragraph D of this memorandum presumably still applies.

[c] Prior Litigation of Spouse's Loss of Consortium Claim Can Bar Recovery of Same Damages in Wrongful Death Action

In ***Boeken v. Philip Morris USA, Inc.*** *(2010) 48 Cal. 4th 788, 108 Cal. Rptr. 3d 806, 230 P.3d 342* , plaintiff was the widow of a man who died from lung cancer in 2002 after smoking cigarettes since 1957. In 2000, plaintiff's husband sued a tobacco company for wrongfully causing his cancer and won a substantial damages award, although he died while an appeal of that award was pending. Also in 2000, plaintiff filed a separate action against the tobacco company for loss of consortium in which she sought damages for the "permanent deprivation" of her husband's loss of companionship and affection. About four months after filing, for reasons not disclosed in the record, plaintiff dismissed that action with prejudice. After her husband's death, plaintiff filed a wrongful death action against the tobacco company, again seeking compensation for the loss of her husband's companionship and affection. The trial court sustained defendant's demurrer on the grounds that plaintiff's wrongful death claim was barred by the doctrine of res judicata because plaintiff's previous loss of consortium action had involved the same primary right. The court of appeal affirmed, concluding that because plaintiff's potential damages in the loss of consortium included future loss of companionship and affection between the time of her husband's death and the time when he would have died of natural causes, and these were the same damages plaintiff sought in the wrongful death action, the dismissal with prejudice of the loss of consortium action constituted a res judicata that precluded plaintiff from relitigating the same injury. Plaintiff appealed.

The California Supreme Court affirmed. The Court concluded that because the complaint in the loss of consortium action alleged that defendant's wrongful conduct "permanently deprived" plaintiff of her husband's companionship and

affection, the primary right not to be wrongfully deprived of spousal companionship and affection, and the corresponding duty not to wrongfully deprive a person of such, were the same as in plaintiff's wrongful death action. Given that plaintiff had dismissed the earlier action with prejudice, plaintiff was precluded from relitigating the same cause of action under the wrongful death statute (*48 Cal. 4th 788, 798-799)* . The Court also rejected plaintiff's argument that she could not have recovered damages in the loss of consortium action for loss of companionship and affection suffered after her husband's death. Noting the general rule that tort damages may include prospective damages that are sufficiently certain to occur, the Court held that a plaintiff spouse may recover damages for lost companionship and affection resulting from the anticipated premature death of the other spouse, if that premature death is sufficiently certain to occur and is caused by the injuries sustained due to the defendant's wrongful conduct. These prospective damages for the period after the injured spouse's death are to be based on the life expectancy that the injured spouse would have had if the injury had never occurred (*48 Cal. 4th 788, 800)* . The Court noted that plaintiff had specifically alleged in the loss of consortium action that she would be deprived of her husband's services and companionship in the future and that she had been "permanently deprived" of his consortium, presumably on the basis of the incurable nature of her husband's disease and the great likelihood of his premature death. These allegations were sufficient to bar plaintiff from seeking post-death loss of consortium damages in a subsequent wrongful death action (*48 Cal. 4th 788, 800-801)* .

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A. Wrongful Death Actions

6-66 California Points & Authorities § 66.28

§ 66.28 Supporting Contention That Wrongful Death Cause of Action Is Improperly Pleaded--Entitled Person Not Joined as Party [Code Civ. Proc. § 377.60]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S WRONGFUL DEATH COMPLAINT IS DEFECTIVE IN THAT THERE ARE OTHER ENTITLED PLAINTIFFS WHO HAVE NOT BEEN JOINED IN THE ACTION.

A. Wrongful Death Action Defined. [*See § 66.20, Paragraph A.*]

B. Court Bound by Statutory Definition. [*See § 66.20, Paragraph B.*]

C. Entitled Persons Are Required Parties in Wrongful Death Actions. Because *Code of Civil Procedure Section 377.60* authorizes a wrongful death action by all persons entitled to a wrongful death cause of action as a result of their relationship to the decedent and is a procedural statute establishing compulsory joinder, all entitled persons should be made parties to a wrongful death action as plaintiffs or, if their consent to be joined as plaintiffs cannot be obtained, as defendants (*see Salmon v. Rathjens (1907) 152 Cal. 290, 294-295, 92 P. 733*).

D. Wrongful Death Plaintiffs Have Duty to Join All Known Heirs. Omitted heirs are necessary parties and plaintiff heirs have a mandatory duty to join all known omitted heirs in a single action for wrongful death (*Ruttenberg v. Ruttenberg (1994) 53 Cal. App. 4th 801, 808, 62 Cal. Rptr. 2d 78*).

E. Proper Joinder Requires Service of Summons and Complaint. Wrongful death plaintiffs must properly join all appropriate defendants and proper joinder requires satisfying the statutory requirements for service. Neither "naming" a defendant as a nominal defendant in a wrongful death action, nor making sure that a named defendant has actual knowledge of the lawsuit is legally sufficient to accomplish joinder (*Ruttenberg v. Ruttenberg (1994) 53 Cal. App. 4th 801, 808-809, 62 Cal. Rptr. 2d 78*).

F. Wrongfully Omitted Heir May Sue Wrongful Death Plaintiffs for Failure to Join. An omitted heir has a remedy against the wrongful death plaintiffs who received the proceeds of a wrongful death suit; the heir is entitled to sue the plaintiffs who failed to join him or her for damages (*Ruttenberg v. Ruttenberg (1994) 53 Cal. App. 4th 801, 809, 62 Cal. Rptr. 2d 78*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to support the contention that a complaint in a wrongful death action is defective because it fails to join all entitled plaintiffs.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of compulsory joinder. For example, this form may be used in support of a general demurrer to a complaint for wrongful death, asserting that there is a defect or misjoinder of parties in that it appears on the face thereof, or from a matter of which the court is required to or may take judicial notice, that all the entitled plaintiffs have not been made parties to the wrongful death action [*see* *Knott v. McGilvray (1899) 124 Cal. 128, 129, 56 P. 789]* .

This form may also be used to support a defendant's motion under *Code Civ. Proc. § 389* to compel the plaintiff to join an omitted person as a party. If a defendant fails to object to nonjoinder in his or her answer, these points and authorities may be used to support a motion to amend an answer to a wrongful death complaint to allege the non-joinder of omitted entitled plaintiffs [*see* *Jolley v. Clemens (1938) 28 Cal. App. 2d 55, 75, 82 P.2d 51]* . For forms of points and authorities supporting the contention that joinder of omitted entitled plaintiffs should be permitted, see *§ 66.39*.

[b] Procedural Nature of Contention

The objection that a plaintiff has failed to join an omitted entitled person as a plaintiff, or a defendant if he or she refused to join in the action, is procedural and not jurisdictional [*Cross v. Pacific Gas & Elec. Co. (1964) 60 Cal. 2d 690, 692-694, 36 Cal. Rptr. 321, 388 P.2d 353* ; *Helling v. Lew (1972) 28 Cal. App. 3d 434, 437, 104 Cal. Rptr. 789]* . Although the action is considered joint, which is to say that all entitled plaintiffs should join or be joined in the action [*see* *Perkins v. Robertson (1956) 140 Cal. App. 2d 536, 543, 295 P.2d 972]* , *Code Civ. Proc. § 377.60* does not create a joint cause of action making the omitted entitled plaintiff an indispensable party and requiring dismissal of the action under *Code Civ. Proc. § 389* if the entitled plaintiff has not been joined [*see* *Cross v. Pacific Gas & Elec. Co. (1964) 60 Cal. 2d 690, 692-694, 36 Cal. Rptr. 321, 388 P.2d 353* (interpreting former Code Civ. Proc. § 377 (*now see Code Civ. Proc. § 377.60*)]. A demurrer is proper when a wrongful death complaint fails to join entitled persons [*see* *Knott v. McGilvray (1899) 124 Cal. 128, 129, 56 P. 789]* .

If the defendant timely objects that certain entitled plaintiffs have not been joined, the proper remedy is to abate the action or order the omitted entitled plaintiffs to join as parties [*see* *Salmon v. Rathjens (1907) 152 Cal. 290, 295, 92 P. 733]* . The fact that an entitled plaintiff was omitted in a complaint for wrongful death does not necessitate a reversal of a judgment for the named plaintiffs on appeal, unless the party complaining has been misled to his or her prejudice, or the error otherwise appears to have been injurious [*Walker v. Etcheverry (1941) 42 Cal. App. 2d 472, 475, 109 P.2d 385]* .

[c] Related Pleading and Practice Forms

For a form of demurrer to a wrongful death complaint asserting the failure to join all entitled plaintiffs as parties, see California Forms of Pleading and Practice, Ch. 181, *Death and Survival Actions* (Matthew Bender).

For forms of notices of motion under Code Civ. Proc. § 389, see California Forms of Pleading and Practice, Ch. 395, *Parties* (Matthew Bender). For forms of notice of motion to amend pleadings generally, see California Forms of Pleading and Practice, Ch. 21, *Amended and Supplemental Pleadings* (Matthew Bender).

[d] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing demurrers on the ground of defect or misjoinder of parties, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For points and authorities supporting a motion to compel plaintiff to join an omitted person as a party, see Ch. 10, *Abatement and Survival of Actions* , and Ch. 168, *Parties* .

For forms of memorandum of points and authorities supporting and opposing the amendment of pleadings generally, see Ch. 16, *Amended and Supplemental Pleadings* .

[3] Discussion of Authorities

[a] Entitled Plaintiffs Are Required Parties in Wrongful Death Actions

Salmon v. Rathjens *(1907) 152 Cal. 290, 92 P. 733* , was an action by two daughters against defendant for the wrongful death of their father. Defendant demurred to their complaint asserting a defect of parties in that there were heirs-at-law of the decedent [*see* former Code Civ. Proc. § 377 (*now see Code Civ. Proc. § 377.60*)] who had not been made parties to the action. The demurrer was overruled, and defendant subsequently filed his answer. The answer specifically denied the plaintiffs' allegations of relationship and heirship but did not raise the proposition that there were other heirs. During the course of the trial, defendant sought leave to amend his answer to allege on information and belief that plaintiffs were not the only heirs of the decedent and that there existed additional unknown heirs. Defendant's application for leave to amend the answer was opposed by plaintiffs and denied by the trial court. At the conclusion of the trial, the jury awarded plaintiffs damages for their father's wrongful death.

On the trial court's denial of his motion for a new trial, defendant appealed. The Supreme Court affirmed the judgment and order denying a new trial. It held, in part, that an action by only a portion of a decedent's heirs was not the action authorized by former Code Civ. Proc. § 377 [*now see Code Civ. Proc. § 377.60* (entitled persons include, but are not limited to, certain heirs)]. Therefore, all heirs should be joined in a wrongful death action as plaintiffs or, if their consent to be joined as plaintiffs cannot be obtained, as defendants. Whenever all of the heirs of a decedent are not joined in the action, a defendant may make a timely objection to their omission. The Supreme Court found that defendant failed to object to the omission of heirs in his answer and waited to make the objection until the trial had commenced and was in progress. Even then, the Court said, defendant failed to show any reasonable ground for supposing that there might be other heirs. Defendant waived his objection by failing to assert it in a timely manner in his answer and there were no compelling reasons for allowing that waiver to be withdrawn (*152 Cal. App. 290, 294-296)* .

NOTE:

In 1993, the legislature amended the wrongful death statute to eliminate the use of the term "heirs" to delineate persons entitled to a wrongful death cause of action [*see Code Civ. Proc. § 377.60*)]. Entitled persons include, but are not limited to, certain heirs. The requirement that all entitled plaintiffs be parties to a wrongful death action as set out in Paragraph C of this memorandum still applies.

[b] Wrongful Death Plaintiffs Have Duty to Join All Known Heirs

In ***Ruttenberg v. Ruttenberg*** *(1994) 53 Cal. App. 4th 801, 62 Cal. Rptr. 2d 78* ; a wrongful death complaint named an heir of the decedent as a nominal defendant, but plaintiffs failed either to serve the complaint on that heir or involve her in the subsequent settlement. Even though the omitted heir had knowledge that the wrongful death action existed,

plaintiffs' failure to serve the complaint resulted in the failure to join the omitted heir in plaintiffs' wrongful death suit. The omitted heir (plaintiff) sued the other heirs who had omitted her (defendants) for constructive trust, accounting and apportionment, interference with prospective economic advantage, fraud, abuse of process and for negligent and intentional infliction of emotional distress. The trial court granted the defendants motion for judgment on the pleadings and plaintiff appealed.

The court of appeal reversed, holding that omitted heirs are necessary parties and that wrongful death plaintiffs have a mandatory duty to join all known omitted heirs in a single action for wrongful death (*53 Cal. App. 4th 801, 808)* .

[c] Proper Joinder Requires Service of Summons and Complaint

The facts and procedural background of ***Ruttenberg v. Ruttenberg*** *(1994) 53 Cal. App. 4th 801, 62 Cal. Rptr. 2d 78* ; are discussed in *§ 66.28[3][b]*. In reversing the judgment on the pleadings, the court of appeal said that wrongful death plaintiffs cannot merely name a defendant who does not wish to participate in the action, and must do more than merely making sure that a named defendant has actual knowledge of the lawsuit. The wrongful death plaintiff must properly join all appropriate defendants and proper joinder requires satisfying the statutory requirements for service (*53 Cal. App. 4th 801, 809)* .

[d] Wrongfully Omitted Heir May Sue Wrongful Death Plaintiffs for Failure to Join

The facts and procedural background of ***Ruttenberg v. Ruttenberg*** *(1994) 53 Cal. App. 4th 801, 62 Cal. Rptr. 2d 78* , are discussed in *§ 66.28[3][b]*. The court of appeal reversed the judgment on the pleadings and remanded the matter for further proceedings. The court held that an omitted heir has a remedy against the wrongful death plaintiffs who received the proceeds of a wrongful death suit; the heir is entitled to sue the plaintiffs who failed to join him or her for damages. It said that plaintiffs may bring a wrongful death action without joining all known heirs, and the court may try that action, but in such a case plaintiffs proceed at their own peril. According to the court an omitted heir's right to a remedy in these circumstances supports the statutory purpose of limiting wrongful death actions to a single proceeding (*53 Cal. App. 4th 801, 809)* .

NOTE:

Although an omitted heir may have an action against a wrongful death plaintiff for failure to join the heir, as established in *Ruttenberg v. Ruttenberg* [*see § 66.28[3][b]*], the omitted heir does not have an action against the plaintiff's attorney for the omission, because the attorney owes no duty to a non-client under those circumstances [*Hall v. Superior Court (2003) 108 Cal. App. 4th 706, 714-715, 133 Cal. Rptr. 2d 806]* . However, if an omitted heir does recover from the wrongful death plaintiff for the omission, the wrongful death plaintiff may have an action for indemnity or contribution against his or her attorney for failing to advise the plaintiff about the need for joinder of an omitted heir [*see Hall v. Superior Court (2003) 108 Cal. App. 4th 706, 715, 133 Cal. Rptr. 2d 806]*

[4] Additional Authorities

[a] Entitled Plaintiffs as Required Parties in Wrongful Death Actions

Walker v. Etcheverry (1941) 42 Cal. App. 2d 472, 109 P.2d 385 , was a wrongful death action brought by a guardian ad litem on behalf of certain plaintiffs. The trial court permitted the defendant to amend his answer on the first day of trial, to allege for the first time that there had been a nonjoinder of certain heirs in plaintiffs' wrongful death action. The omitted heir was plaintiffs' mother, who had brought the action on behalf of plaintiffs as their guardian ad litem. After findings and judgment had been filed, and defendant had moved for a new trial, by leave of court plaintiffs filed an amended complaint alleging the existence of the omitted heir but explicitly refusing to claim any damages on her account by reason of the decedent's death. The trial court denied defendant's motion for a new trial, ordered the findings amended to conform to the added allegations in plaintiffs' complaint, and modified its judgment accordingly. Defendant

appealed from the modified judgment and the denial of his motion for a new trial. In affirming, the court of appeal stated that although there was a nonjoinder of parties plaintiff, this fact did not necessitate a reversal unless defendant had been misled to his prejudice or the error otherwise appeared to have been injurious. Having only the judgment roll before it, the court could neither find any evidence of prejudice or injury, nor see how such prejudice or injury could have arisen when defendant knew of the existence of the omitted heir from the date that the complaint had been served (*42 Cal. App. 2d 472, 475)* .

Knott v. McGilvray (1899) 124 Cal. 128, 56 P. 789 , was a wrongful death action brought by a wife for the wrongful death of her husband. In her complaint, plaintiff alleged that she was the wife of the decedent at the time of his injury and death and that she was the decedent's surviving widow. At the conclusion of the trial, judgment was entered against defendant. Defendant thereafter appealed from the adverse judgment and from the trial court's denial of his motion for a new trial, contending that plaintiff's complaint failed to state a cause of action inasmuch as the surviving wife had no cause of action for wrongful death and only the decedent's heirs had such a cause of action. The Supreme Court rejected defendant's contention and affirmed the judgment and order denying a new trial. It found that the surviving wife was an heir of the decedent under the laws of succession and that there was nothing in the record to show the existence of other heirs. In any event, the court stated, if it appeared on the face of the complaint that there were other heirs who were not joined, defendant should have objected in a demurrer. Similarly, if the existence of other heirs did not appear on the face of the complaint, defendant could have alleged their existence in an answer. Because the question of nonjoinder of heirs was not raised by defendant in either a demurrer or answer, the Supreme Court deemed that defendant had waived his objection. The Court also dismissed defendant's argument that the alleged nonjoinder of heirs made the cause of action as stated insufficient to support the judgment (*124 Cal. 128, 129-130)* .

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6-66 California Points & Authorities § 66.29

§ 66.29 Opposing Contention That Plaintiff May Not Recover Damages for Wrongful Death--Plaintiff Is Within Statute Due to Dependency [Code Civ. Proc. § 377.60(b), (c)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF IS AN ENTITLED PERSON WITHIN THE MEANING OF THE WRONGFUL DEATH STATUTE IN THAT HE/SHE IS THE _____ [*specify relationship*] OF THE DECEDENT AND WAS FINANCIALLY DEPENDENT ON THE DECEDENT AT THE TIME OF HIS/HER DEATH.

A. Specified Dependents Qualify as Entitled Person. Whether or not they qualify as a person entitled to a wrongful death cause of action under *Code of Civil Procedure Section 377.60(a)*, certain other persons may bring a wrongful death action if they were dependent on the decedent (*Code Civ. Proc. § 377.60(b)*).

B. Dependent Minors May Qualify as Entitled Person. A minor may bring an action for wrongful death if, at the time of decedent's death, the minor resided for the previous 180 days in the decedent's household and was dependent on the decedent for one-half or more of the minor's support (*Code Civ. Proc. § 377.60(c)*).

C. Degree of Dependency Required. One qualifies as a dependent if he/she was actually dependent to some extent on the decedent for the necessaries of life; thus, if a person received financial support from the deceased child which aided him/her in obtaining the things, such as shelter, clothing, food, and medical treatment, which one cannot and should not do without, the person is a dependent (*see Perry v. Medina (1987) 192 Cal. App. 3d 603, 610, 237 Cal. Rptr. 532*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a plaintiff is not a person entitled by statute to bring an action for wrongful death. The basis of the opposition is that plaintiff qualifies as a person entitled to

bring a wrongful death action, as one of the persons entitled due to his or her dependence on the decedent [*Code Civ. Proc. § 377.60(b), (c)*].

In an appropriate case, these points and authorities may be used to oppose a demurrer supported by the points and *authorities in § 66.20*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing the relationship of the plaintiff to the decedent, and facts demonstrating the plaintiff's dependence on the decedent.

[b] Related Pleading and Practice Forms

For forms of complaint for damages for wrongful death by a dependent parent, putative spouse, children of the putative spouse, or stepchildren, and by a dependent minor who resided in the decedent's household, see California Forms of Pleading and Practice, Ch. 181, *Death and Survival Actions* (Matthew Bender).

[3] Discussion of Authorities

[a] Specified Dependents Qualify as Entitled Person

Code Civ. Proc. § 377.60 provides that when the death of a person is caused by the wrongful act or neglect of another, certain entitled persons or personal representatives on their behalf may maintain an action for damages against the person causing the death. Whether or not qualified under *Code Civ. Proc. § 377.60(a)*, if they were dependent on the decedent, the putative spouse, children of the putative spouse, stepchildren, or parents may assert the cause of action [*Code Civ. Proc. § 377.60(b)*].

[b] Dependent Minors May Qualify as Entitled Person

Code Civ. Proc. § 377.60 provides that when the death of a person is caused by the wrongful act or neglect of another, certain entitled persons or personal representatives on their behalf may maintain an action for damages against the person causing the death. Whether or not qualified under *Code Civ. Proc. § 377.60(a)* or *(b)*, a minor who, at the time of decedent's death, resided for the previous 180 days in the decedent's household and was dependent on the decedent for one-half or more of the minor's support may assert a wrongful death action [*Code Civ. Proc. § 377.60(c)*].

[c] Degree of Dependency Required

Perry v. Medina *(1987) 192 Cal. App. 3d 603, 237 Cal. Rptr. 532* , was an action by the mother of decedent, claiming to be a dependent parent, for wrongful death of her son who was killed in an automobile accident. At the time of the accident, the decedent was in the process of divorcing his wife and had a minor daughter. When decedent left his wife he moved in with his mother for three or four months and paid her $100 a month for rent; he then got his own apartment but continued to buy his mother $100 worth of groceries a month, some of which he ate. He also gave his mother $50 a month to help her save for some surgery, but she spent the money and did not have the surgery. At the time of the son's death, the mother had an income of $400 per month (SSI and disability), and lived in a $200-per-month apartment with her other son, who did not pay rent but did pay the telephone bill and occasionally bought groceries. The defendants' motion for summary judgment was granted on the ground plaintiff was not a dependent parent within the meaning of former Code Civ. Proc. § 377 [*now see Code Civ. Proc. § 377.60*].

The court of appeal reversed. The court pointed out that the purpose of the legislation including dependent parents within the class of persons who can sue for wrongful death was to remedy the situation in which a parent, although not an heir under the law of intestate succession, depended for support and maintenance on the deceased child (*192 Cal. App. 3d 603, 609)* . After pointing out that dependency should be determined on a case-by-case basis, that no strict

formula can be applied, and that the legislature did not suggest a formula as it did for dependent minors [*see Code Civ. Proc. § 377.60(c)* (restating formula of former Code Civ. Proc. § 377(b)(3))], the court held that a parent qualifies as a dependent if he or she was actually dependent to some extent on the decedent for the necessaries of life. Thus, if a parent received financial support from the deceased child that aided the parent in obtaining the things that one cannot and should not do without, such as shelter, clothing, food, and medical treatment, the parent is a dependent, and the death of the child results in a distinct pecuniary loss to the parent requiring the parent to find aid elsewhere for the basic things we all need (*192 Cal. App. 3d 603, 610)* .

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6-66 California Points & Authorities § 66.30

§ 66.30 Opposing Contention That Plaintiff May Not Recover Damages f or Wrongful Death--Minor Born After Death of Decedent May Prove Paternity of Decedent by Any Clear and Convincing Evidence

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*]

PLAINTIFF IS ENTITLED TO PRESENT CLEAR AND CONVINCING EVIDENCE THAT PLAINTIFF IS THE CHILD OF DECEDENT IN ORDER TO ESTABLISH STANDING TO BRING A WRONGFUL DEATH ACTION SINCE PLAINTIFF WAS CONCEIVED BEFORE BUT BORN AFTER DEATH OF DECEDENT.

A. Laws of Intestate Succession Apply to Resolve Disputes as to Status of Child. The laws of intestate succession apply when a question exists as to whether a party qualifies as a child of decedent with standing to bring a wrongful death action under *Code of Civil Procedure Section 377.60(a)* (*Cheyanna M. v. A.C. Nielsen Co. (1998) 66 Cal. App. 4th 855, 864-865, 78 Cal. Rptr. 2d 335*).

B. Child Born After Death of Father May Establish Paternity by Any Clear and Convincing Evidence. When applying the laws of intestate succession for purposes of establishing the paternity of a child born after the death of the alleged father, it is deemed to be impossible for the decedent to have held the as-yet-unborn child out as his own, and thus, the child may subsequently attempt to prove paternity through any clear and convincing evidence (*Cheyanna M. v. A.C. Nielsen Co. (1998) 66 Cal. App. 4th 855, 874, 78 Cal. Rptr. 2d 335*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that a plaintiff is not a person entitled by statute to bring an action for wrongful death. The basis of the opposition is that plaintiff has clear and convincing evidence that plaintiff is the child of the decedent even though plaintiff was born after the death of decedent, entitling plaintiff to bring a wrongful death action under *Code Civ. Proc. § 377.60(a)*.

In an appropriate case, these points and authorities may be used to oppose a demurrer or summary judgment motion supported by the points and *authorities in § 66.20*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion of the facts that allegedly will demonstrate that decedent is the biological father of the plaintiff child.

[b] Related Pleading and Practice Forms

For forms of complaint for damages for wrongful death by a child, see California Forms of Pleading and Practice, Ch. 181, *Death and Survival Actions* (Matthew Bender).

[3] Discussion of Authorities

[a] Laws of Intestate Succession Apply to Resolve Disputes as to Status of Child

In ***Cheyanna M. v. A.C. Nielsen Co.*** *(1998) 66 Cal. App. 4th 855, 863-865, 78 Cal. Rptr. 2d 335* , plaintiff was a minor whose alleged unwed father died in a traffic accident before the plaintiff's birth. Plaintiff, along with the parents of decedent, brought suit for wrongful death against the driver who caused the accident and the driver's employers. Decedent's parents brought a motion for summary judgment alleging that plaintiff did not have standing to bring an action for wrongful death because decedent, before he died, did not openly hold her out as his own child prior to her birth, thus failing the test for establishing his paternity under the laws of intestate succession [*see Prob. Code § 6400 et seq.*]. Plaintiff countered by arguing that her standing should be determined not by the laws of intestate succession, but by the Uniform Act on Blood Tests to Determine Paternity [*see Fam. Code § 7550 et seq.*]. Plaintiff also argued that, even if the laws of intestate succession applied, it was impossible for decedent to have held her out as a "child" prior to her birth, and in light of such impossibility, the laws of intestate succession permit a child to establish paternity through any clear and convincing evidence [*see Prob. Code § 6453(b)(3)*]. The trial court ruled that the laws of intestate succession applied, but that since decedent, before his death, did not hold plaintiff out as his own child prior to her birth, plaintiff did not have standing to join as a plaintiff in the suit. Plaintiff child appealed.

The court of appeals affirmed the holding that the laws of intestate succession applied when resolving a question as to the standing of an alleged child of a decedent to bring a wrongful death action. The court noted that the relevant standing provision of the wrongful death statute, *Code Civ. Proc. § 377.60(a)*, provides that "children" have standing to join as plaintiffs, but it does not define "children." The court also noted that under the law existing prior to 1993, the relevant statute conferred standing on "heirs," as defined by the intestacy statute [*see* former Code Civ. Proc. § 377]. Looking to case law and the legislative history of the current statute, the court concluded that the purpose of the legislative changes enacted in 1992, which replaced reference to "heirs" with reference to the surviving spouse, children, and issue of deceased children, was only to clarify that a decedent's children and issue of deceased children may maintain a wrongful death action even if the decedent's entire estate passes to a surviving spouse under community property laws. Thus, as under the former statute, standing to bring a wrongful death action remained linked to the intestacy laws.

[b] Child Born After Death of Father May Establish Paternity by Any Clear and Convincing Evidence

The facts and procedural background of ***Cheyanna M. v. A.C. Nielsen Co.*** *(1998) 66 Cal. App. 4th 855, 868-877, 78 Cal. Rptr. 2d 335* , are discussed in *§ 66.30[3][a]*. After determining that the laws of intestate succession applied to the issue of whether plaintiff had standing to join as a plaintiff in the wrongful death action, the court determined that the proper test for determining that a person is a "natural parent" is found in *Prob. Code § 6453(b)*. Under that test, paternity may be established by clear and convincing evidence that the father has openly held out the child as his own; if it was impossible for the father to have held the child out as his own, the paternity of the biological father may be

established by any clear and convincing evidence [*see Prob. Code § 6453(b)(2)-(3)*]. The court noted that the laws of instate succession do not specify whether "child" includes an unborn child or fetus. The court rejected application of *Civ. Code § 43.1*, which provides that "a child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth .....," since by its own language that statute applies only to the extent it benefits the child. The court then resorted to general legal principles found in case law suggesting that legislative action is normally required to confer legal status on unborn children. In the absence of specific legislative provision applicable to the facts of the case, the court held that for purposes of establishing the paternity of a child born after the death of the alleged father, it is impossible for a decedent to have held an as-yet-unborn child out as his own. Thus, the child may subsequently attempt to prove paternity through any clear and convincing evidence. The court further supported its conclusion by reference to legislative history suggesting that the "impossibility" provision was intended to apply to situations in which the alleged father died before the birth of the child.

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6-66 California Points & Authorities § 66.31

§ 66.31 Opposing Contention That Plaintiff May Not Recover Damages for Wrongful Death--Statute of Limitations Is Suspended While Plaintiff Is Minor [Code Civ. Proc. § 352(a)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S WRONGFUL DEATH ACTION IS NOT BARRED BY THE STATUTE OF LIMITATIONS, BECAUSE THE STATUTE DID NOT RUN DURING THE TIME THAT PLAINTIFF WAS A MINOR.

A. Tolling of Statute of Limitations During Minority. If a person entitled to bring an action is under the age of majority at the time the cause of action accrues, the time of his or her disability is not a part of the time limited for the commencement of the action (*Code Civ. Proc. § 352(a)*; *Cross v. Pacific Gas & Elec. Co. (1964) 60 Cal. 2d 690, 692-693, 36 Cal. Rptr. 321, 388 P.2d 353*).

[*Optional*] **B. Tolling of Statute During Minority Not Affected by Running of Statute for Adult Plaintiffs.** The running of the statute of limitations against adult persons entitled to a wrongful death cause of action does not affect the suspension of the statute during other plaintiffs' minority (*Cross v. Pacific Gas & Elec. Co. (1964) 60 Cal. 2d 690, 692-693, 36 Cal. Rptr. 321, 388 P.2d 353* ; *Arizmendi v. System Leasing Corp. (1971) 15 Cal. App. 3d 730, 736, 93 Cal. Rptr. 411*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a contention that a minor plaintiff may not recover in a wrongful death cause of action because the statute of limitations period has run. These points and authorities may be used in an appropriate case to oppose a demurrer supported by the points and *authorities in § 66.25*. It should be noted that the general rule tolling the statute of limitations for the period of minority is subject to the exception in *Code Civ. Proc. § 340.5* for actions against health care providers based on professional negligence [*see*

Washington v. Nelson (1979) 100 Cal. App. 3d 47, 52, 160 Cal. Rptr. 644 ; *see also § 66.26[3][a]*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the statute of limitations was tolled while plaintiff was a minor. For example, these points and authorities may be used to oppose a demurrer to a wrongful death complaint when the demurrer asserts that the complaint fails to state facts constituting a cause of action in that it appears on the face thereof, or from a matter of which the court is required to or may take judicial notice, that the action is barred by the applicable statute of limitations [*Baillargeon v. Department of Water & Power (1977) 69 Cal. App. 3d 670, 138 Cal. Rptr. 338* ; *Bell v. Bank of Cal. (1908) 153 Cal. 234, 94 P. 889]* . These points and authorities may be used to oppose a defendant's motion for summary judgment [*see Code Civ. Proc. § 437c*]. The points and authorities in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing that the plaintiff was a minor during at least part of the time that the statute of limitations ran, and that the action was timely given the amount of time the running of the statute was suspended.

[b] Related Pleading and Practice Forms

For an allegation of the suspension of the period of limitation in an action on the ground of the plaintiff's disability or minority, see California Forms of Pleading and Practice, Ch. 143, *Limitation of Actions* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing demurrers on the ground of the bar of a statute of limitations, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* , and Ch. 143, *Limitation of Actions* .

[3] Discussion of Authorities

[a] Tolling of Statute of Limitations During Minority

The facts and procedural background of ***Cross v. Pacific Gas & Elec. Co.*** *(1964) 60 Cal. 2d 690, 36 Cal. Rptr. 321, 388 P.2d 353* , are discussed in *§ 66.31[3][b]*. In reversing the judgment of dismissal, the Court held that under *Code Civ. Proc. § 352*, the statute of limitations for wrongful death was suspended during the period of plaintiffs' minority (*60 Cal. 2d 690, 692)* .

[b] Tolling of Statute During Minority Not Affected by Running of Statute for Adult Plaintiffs

In ***Cross v. Pacific Gas & Elec. Co.*** *(1964) 60 Cal. 2d 690, 36 Cal. Rptr. 321, 388 P.2d 353* , the decedent was electrocuted as the result of contact with an electrical line maintained by defendant, and was survived by his wife and three minor children. Plaintiffs, who were decedent's minor children, brought a wrongful death action some years later through their mother as guardian ad litem. Defendant demurred to the complaint on the ground that the action was barred by the one-year limitation of former Code Civ. Proc. § 340(3) [*now see Code Civ. Proc. § 335.1* (two-year limitations period)]. The trial court sustained the demurrer with leave to amend, plaintiffs declined to amend, and the trial court entered a judgment of dismissal from which plaintiffs appealed.

The Supreme Court reversed, stating that former Code Civ. Proc. § 377 [*now see Code Civ. Proc. § 377.60*] was a procedural statute establishing compulsory joinder and not a statute creating a joint cause of action [*see Salmon v. Rathjens (1907) 152 Cal. 290, 294, 92 P. 733* ; *see also § 66.28[3][a]*]. Accordingly, each entitled person should be regarded as having a personal and separate cause of action. Therefore, the running of the statute of limitations against

adult plaintiffs did not affect the rights of minor plaintiffs for whom the running of the statute was suspended (*60 Cal. 2d 690, 692-693)* .

The factual background of ***Arizmendi v. System Leasing Corp.*** *(1971) 15 Cal. App. 3d 730* , *93 Cal. Rptr. 411* , is discussed in *§ 66.25[3][a]*. The court of appeal relied on *Cross* to hold that, although the wrongful death action on behalf of the minor entitled persons was not filed until over two years after the death of decedent, the action was not barred by former Code Civ. Proc. § 340(3) [*now see Code Civ. Proc. § 335.1*] because the statute was tolled during the minority of these plaintiffs.

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6-66 California Points & Authorities § 66.32

§ 66.32 Opposing Contention That Plaintiff May Not Recover Damages for Wrongful Death--Statute of Limitations Did Not Begin to Run on Date of Death Due to Application of Discovery Rule

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

IF A PLAINTIFF WAS "BLAMELESSLY IGNORANT" OF HIS/HER CAUSE OF ACTION FOR WRONGFUL DEATH, THE ONE-YEAR PERIOD TO FILE SUIT COMMENCES ON THE DATE ON WHICH THE PLAINTIFF DISCOVERS, OR SHOULD HAVE DISCOVERED, HIS/HER INJURY IN THE FORM OF THE DEATH OF THE DECEDENT AND ITS TORTIOUS CAUSE.

A. General Rule Deferring Commencement of Personal Injury Actions Applicable to Wrongful Death Actions. Any general rule deferring commencement of the two-year period of limitations specified in *Code of Civil Procedure Section 335.1* applicable to personal injury actions is also applicable to wrongful death actions (*see Frederick v. Calbio Pharms. (1979) 89 Cal. App. 3d 49, 55, 152 Cal. Rptr. 922* ; *see also* former Code Civ. Proc. § 340(3) (one-year period prior to 2003)).

B. Period Extended to Date Injury Discovered or Should Have Been Discovered. If the plaintiff in a wrongful death action was "blamelessly ignorant" of his or her cause of action because the death occurred without perceptible trauma, the statute of limitations does not begin to run until the plaintiff discovered, or should have discovered, his or her injury in the form of the death of his or her decedent and its tortious cause (*Frederick v. Calbio Pharms. (1979) 89 Cal. App. 3d 49, 53-54, 152 Cal. Rptr. 292*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to the contention that a wrongful death action is barred by the running of the two-year period of limitations set forth in *Code Civ. Proc. § 335.1* (*see* former

Code Civ. Proc. § 340(3) (one-year period, prior to 2003)). The ground of opposition is that the plaintiff was "blamelessly ignorant" of his or her cause of action at the time of the death of the decedent and commenced the action within two years (one year, prior to 2003) after the date he or she discovered, or should have discovered, the injury in the form of the death of the decedent and its tortious cause. Thus, this form may be used if plaintiff alleges that he or she was blamelessly ignorant of the fact of the decedent's death or its tortious cause. For professional negligence actions against health care providers, the form would require modification to reflect the rule permitting an action to be timely under the delayed discovery rule beyond three years after the date of death only if tolled further by proof of fraud, intentional concealment, or the presence of a foreign body that has no therapeutic or diagnostic purpose in the injured person [*see Code Civ. Proc. § 340.5*].

This form may also be used to oppose a motion for summary judgment which is based on the running of the two-year statute of limitations set forth in *Code Civ. Proc. § 335.1* (*see* former Code Civ. Proc. § 340(3) (one year, prior to 2003)). In this case, plaintiff should attach affidavits (or declarations [*Code Civ. Proc. § 2015.5*]) demonstrating that a triable issue of fact exists as to whether the delay in commencing the action was a result of plaintiff's blameless ignorance of the death or its tortious cause until a date no more than two years (one year, prior to 2003) after the action was commenced.

These points and authorities may be combined, where appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the discovery rule. For example, the point and authorities may be used to oppose a demurrer to a wrongful death complaint based on the running of the statute of limitations [*Frederick v. Calbio Pharms. (1979) 89 Cal. App. 3d 49, 59, 152 Cal. Rptr. 292]* .

This form must be combined with points and authorities supporting the plaintiff's allegations that his or her ignorance of the decedent's death or its tortious cause was blameless. In addition, the discovery rule requires that the complaint allege the time and manner of discovery, and the circumstances excusing delayed discovery [*G.D. Searle & Co. v. Superior Court (1975) 49 Cal. App. 3d 22, 25-26, 122 Cal. Rptr. 218]* . When applying the discovery rule, the date of accrual--that is, the date that triggers the running of the statute of limitations--is the date on which the plaintiff comes at least to suspect, or have reason to suspect, the factual basis for the elements of the cause of action [*Norgart v. Upjohn Co. (1999) 21 Cal. 4th 383, 397-398, 981 P.2d 79 . 87 Cal. Rptr. 2d 453]* . Therefore, the form should be combined with points and authorities that provide this general standard and support for the contention that the plaintiff's action was filed within two years (one year, prior to 2003) after that date [*see Code Civ. Proc. § 335.1*; *see also* former Code Civ. Proc. § 340(3); *California Forms of Pleading and Practice, Ch. 345, Limitation of Actions § 345.14*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should demonstrate that the complaint was timely given the reasonably delayed discovery of the facts.

[b] Related Pleading and Practice Forms

For discussion and forms of demurrers to complaints on the ground of the running of the statute of limitations, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , and Ch. 345, *Limitation of Actions* (Matthew Bender).

[c] Related Points and Authorities

For general forms of memoranda of points and authorities supporting and opposing demurrers to complaints based on the running of the statute of limitations, see Ch. 143, *Limitation of Actions* .

[3] Discussion of Authorities

[a] General Rule Deferring Commencement of Personal Injury Actions Applicable to Wrongful Death

Actions

In ***Frederick v. Calbio Pharms.*** *(1979) 89 Cal. App. 3d 49, 152 Cal. Rptr. 292* , the trial court entered judgment after it sustained defendants' demurrer to plaintiffs' wrongful death complaint on the ground of the running of the one-year statute of limitations. Plaintiffs had been given 30 days' leave to amend but had failed within that time to file an amended pleading. Plaintiffs had alleged that decedent had died as a result of being given doses of a drug defendants negligently, carelessly, and recklessly had caused to be distributed for experimental and investigational use without establishing the necessary safeguards and controls to prevent administering the drug to patients. Plaintiffs further alleged that they did not discover, nor could not have discovered by the exercise of reasonable diligence, the cause of death until the Food and Drug Administration recalled the drug one and a half years later because of certain side effects, one of which was the cause of decedent's death.

The court of appeal reversed, holding that a wrongful death action against a manufacturer based on negligence or products liability comes within the rule that a plaintiff who is blamelessly ignorant of his or her cause of action is not barred by a delay in bringing suit; therefore, the one-year period to file suit commences on the date on which the plaintiff discovers, or should have discovered, the injury in the form of the death of the decedent and its tortious cause. Relying on *Wohlgemuth v. Meyer (1956) 139 Cal. App. 2d 326, 328* , it reasoned first that any general rule deferring commencement of the one-year period applicable to personal injury actions is similarly applicable to wrongful death claims (*89 Cal. App. 3d 49, 55)* . The only noted exception to this rule is that found in *Code Civ. Proc. § 340.5* for actions against health care providers, and defendants did not qualify as health care providers (*89 Cal. App. 3d 49, 55 n.2*) [*see* *Washington v. Nelson (1979) 100 Cal. App. 3d 47, 52, 160 Cal. Rptr. 644* and § 66.26]. Reviewing a number of cases, including the "seminal" case of *Huysman v. Kirsch (1936) 6 Cal. 2d 302, 312, 57 P.2d 908* , the United States Supreme Court decision in *Urie v. Thompson (1949) 337 U.S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282* , and *G.D. Searle & Co. v. Superior Court (1975) 49 Cal. App. 3d 22, 25-26, 122 Cal. Rptr. 218* , cases that had applied the exception to personal injury actions based on medical malpractice, employers' liability, and products liability, respectively, the court concluded that because the exception had been applied in all these categories, as well as in a wrongful death action in one of these categories (*Wohlgemuth v. Meyer*, a medical malpractice action), it applied to any wrongful death action regardless of he categorical nature of the underlying cause of action (*89 Cal. App. 3d 49, 56-59)* .

[b] Period Extended to Date Injury Discovered or Should Have Been Discovered

The facts and procedural background of ***Frederick v. Calbio Pharms.*** *(1979) 89 Cal. App. 3d 49, 152 Cal. Rptr. 292* , are discussed in *§ 66.32[3][a]*. In applying the discovery rule to the case before it, the court considered whether plaintiffs' allegations were sufficient to come within the "blamelessly ignorant" plaintiff exception. Relying on *G.D. Searle & Co. v. Superior Court (1975) 49 Cal. App. 3d 22, 25-26, 122 Cal. Rptr. 218* , the court stated that plaintiffs must have alleged (1) the time and manner of discovery and (2) the circumstances excusing delayed discovery (*89 Cal. App. 3d 49, 59)* . Although plaintiffs alleged sufficient facts to meet the first requirement, the only allegation with respect to the second requirement, that plaintiffs by the exercise of reasonable diligence could not have become aware of the causal connection between defendants' drug and decedent's death, were considered insufficient to explain the circumstances excusing delayed discovery. The court pointed out that specific allegations, such as, that plaintiffs were not medical experts and were never told of the risk and that no general public information had been disseminated, were required. However, because plaintiffs were not given a meaningful opportunity to amend their complaint in this respect, it reversed the judgment but without prejudice to defendants' challenge to the sufficiency of the allegations of the circumstances purporting to excuse delayed discovery.

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6-66 California Points & Authorities § 66.33

§ 66.33 Opposing Contention That Plaintiff May Not Recover Damages for Wrongful Death--Statute of Limitations [Gov. Code § 945.6(a)(1)] Runs From Time Public Entity Rejected Claim Filed by All Entitled Persons

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE STATUTE OF LIMITATIONS FOR FILING SUIT AFTER A PUBLIC ENTITY DENIES A CLAIM DOES NOT BAR PLAINTIFF'S SUIT BECAUSE THE LIMITATIONS PERIOD IS CALCULATED FROM THE REJECTION OF A CLAIM BY ALL THE ENTITLED PLAINTIFFS.

A. Limitation on Court Actions Brought Against Public Entity. A person who has presented a claim for wrongful death to a public entity, as required by *Government Code Section 911.2*, generally has six months after the claim has been denied as provided in *Government Code Section 911.6* to file a court action (*Gov. Code § 945.6*).

B. Limitation Runs From Rejection of Amended Claim by All Entitled Persons. When one plaintiff's wrongful death claim was filed with a public entity and rejected, and an amended claim naming all entitled persons was subsequently timely filed and rejected, the statute of limitations of *Government Code Section 945.6* runs from the denial of the claim that included all entitled persons, not from the denial of the original claim by the single plaintiff (*Norwood v. Southern Cal. Rapid Transit Dist. (1985) 164 Cal. App. 3d 741, 744, 211 Cal. Rptr. 6*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted by plaintiffs in a wrongful death action in opposition to a contention by a public entity defendant that the limitation period of *Gov. Code § 945.6(a)(1)* commenced on the rejection of a claim by less than all entitled plaintiffs. The ground for opposition is that the limitation period only runs from the (later) rejection of a claim filed by all the entitled plaintiffs.

These points and authorities may be combined, where appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to address the issue of a claim barred by the statute of limitations for presenting a government claim. For example, the points and authorities may be used to oppose a motion for summary judgment that is made by a public entity defendant based on the limitations period of *Gov. Code § 945.6*. They may be included in a memorandum of points and authorities at any stage of the litigation or in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law stated. Thus, counsel should refer to facts supporting the claim that all entitled plaintiffs filed a claim after the claim filed by less than all of the entitled plaintiffs, and that the wrongful death action was filed within the applicable limitations period of *Gov. Code § 945.6* as calculated from the rejection of the claim filed by all the entitled persons.

[3] Discussion of Authorities

[a] Limitation Runs From Rejection of Amended Claim by All Entitled Persons

In ***Norwood v. Southern Cal. Rapid Transit Dist.*** *(1985) 164 Cal. App. 3d 741, 211 Cal. Rptr. 6* , decedent was injured on December 3, 1980, and died on December 11, 1980. The attorney for one of the persons entitled to bring a wrongful death action (Linda Norwood) submitted a claim against the defendant on January 7, 1981, which was rejected on February 2, 1981. Linda later discharged this attorney. The attorney for Linda's three brothers submitted a claim on behalf of one named brother and "all family members" of the deceased (hereinafter referred to as "the amended claim"). On April 23, 1981, the amended claim was denied by operation of law pursuant to *Gov. Code § 911.6*. Defendant sent notice of rejection of the amended claim on July 22, 1981. Suit by all siblings was filed on September 22, 1981. Defendant moved for, and was granted, summary judgment only against Linda on the ground that her action was barred because it had not been filed within six months after her claim was rejected. Linda appealed.

The court of appeal, noting that a wrongful death action is single, joint, and indivisible and cannot be maintained by less than all of the heirs, found that the amended claim was the proper claim and reversed the judgment for defendant (*164 Cal. App. 3d 741, 744)* .

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6-66 California Points & Authorities § 66.34

§ 66.34 Opposing Contention That Plaintiff May Not Recover Damages for Wrongful Death--Plaintiff Is Not Subject to Every Defense That Might Have Been Asserted Against Decedent

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE PLAINTIFF IN A WRONGFUL DEATH ACTION IS NOT SUBJECT TO EVERY DEFENSE THAT COULD HAVE BEEN ASSERTED AGAINST THE DECEDENT, AND THE PLAINTIFF IS NOT SUBJECT TO A DEFENSE BASED ON _____ [*specify inapplicable defense, e.g.,* THE STATUTORY PROHIBITION AGAINST THE RECOVERY OF NONECONOMIC DAMAGES BY AN UNINSURED PERSON INJURED THROUGH THE OPERATION OR USE OF A MOTOR VEHICLE], EVEN THOUGH THAT DEFENSE MIGHT HAVE BEEN ASSERTED AGAINST THE DECEDENT.

A. Wrongful Death Plaintiff Not Subject to Every Defense That Might Have Been Asserted Against Decedent. Not every defense that might have been asserted against a decedent had he or she lived may be asserted against a wrongful death plaintiff; instead, each case must be examined in its particular context. If a statutory defense is being asserted, the issue is one of statutory construction, and the defense will be allowed or not according to the express terms of the statute while respecting the independent status of a wrongful death action (*Horwich v. Superior Court (1999) 21 Cal. 4th 272, 283, 286, 87 Cal. Rptr. 2d 222, 980 P.2d 927*).

[*Optional*] **B. Statutory Prohibition Against Recovery of Noneconomic Damages by Uninsured Motorist Injured in Motor Vehicle Accident Inapplicable to Wrongful Death Plaintiffs.** Even though the defense might have been asserted successfully against the decedent, a wrongful death plaintiff whose decedent was the uninsured operator of a motor vehicle involved in a fatal accident is not precluded by *Civil Code Section 3333.4* from recovering nonpecuniary damages for loss of care, comfort, and society, because the statutory language suggests that the particular nonpecuniary damages limitation was intended to apply only to the actual uninsured owner or operator of the vehicle (*Horwich v. Superior Court (1999) 21 Cal. 4th 272, 276-283, 87 Cal. Rptr. 2d 222, 980 P.2d 927* ; *see Civ. Code § 3333.4*).

[*Optional*] C. **Wrongful Death Action Not Barred by Failure to Bring Decedent's Original Action to Trial Within Five Years.** As a wrongful death claim does not relate back to personal injury claims brought by a decedent before his or her death, the five-year limit for bringing the decedent's case to trial under *Code Civ. Proc. § 583.310* is inapplicable to a subsequent wrongful death claim (*Brumley v. FDCC California, Inc. (2007) 156 Cal. App. 4th 312, 326-327, 67 Cal. Rptr. 3d 292*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a particular defense that might have been asserted against a decedent had he or she lived may be asserted against a wrongful death plaintiff. Optional paragraph B may be used if the asserted defense is that *Civ. Code § 3333.4*, which would have prevented the decedent from recovering nonpecuniary damages, also prevents the wrongful death plaintiff from seeking such damages. Optional paragraph C may be used if the asserted defense is failure to bring the case to trial based on the running of the five-year period of *Code Civ. Proc. § 583.310*, as measured from the filing of a personal injury action by decedent before his or her death.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, if the asserted defense is based on *Civ. Code § 3333.4*, counsel should include discussion of the facts that show that only the decedent was the uninsured owner or operator of the motor vehicle involved in the accident, rather than the wrongful death plaintiff.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the asserted defense does not apply to the wrongful death plaintiff--for example, in opposition to a motion for summary judgment. They may also be adapted for use in a trial or appellate brief.

[b] Related Pleading and Practice Forms

For forms of complaint for damages for wrongful death, see California Forms of Pleading and Practice, Ch. 181, *Death and Survival Actions* (Matthew Bender).

[c] Opposing Points and Authorities

If appropriate, these points and authorities may be used to oppose the points and *authorities in § 66.23*.

[3] Discussion of Authorities

[a] Wrongful Death Plaintiff Not Subject to Every Defense That Might Have Been Asserted Against Decedent

In ***Horwich v. Superior Court*** *(1999) 21 Cal. 4th 272, 87 Cal. Rptr. 2d 222, 980 P.2d 927* , the decedent, who did not have personal automobile insurance or any insurance for the vehicle she was driving, was killed in an automobile accident. Her parents brought a wrongful death action against the driver of the other car. As an affirmative defense to the claim that the plaintiffs could seek damages for loss of care, comfort, and society, the defendant invoked *Civ. Code § 3333.4*, which prohibits the recovery of noneconomic damages by a person arising out of the operation or use of a motor vehicle if the injured person was an uninsured owner or operator of a vehicle involved in the accident. Although it was undisputed that the decedent was uninsured and would have been subject to the defense if she had lived, the plaintiffs argued that the statutory prohibition on damages of *Civ. Code § 3333.4* applied only to the uninsured owner or operator of the vehicle, and that they were neither. The trial court agreed with the plaintiffs and granted their motion for

judgment on the pleadings. The court of appeal affirmed, and defendant appealed to the Supreme Court.

The Supreme Court affirmed, holding first that the limitations on the recovery of nonpecuniary damages by uninsured owners or operators operate only against a plaintiff who is actually the uninsured owner or operator of the vehicle involved in the accident. Through reference to the literature and debate surrounding Proposition 213, through which *Civ. Code § 3333.4* was enacted, the Court determined that the primary purpose of the enactment, as pertinent to this case, was to prevent uninsured motorists from seeking unreasonable damages or suing insured drivers if the plaintiffs themselves were in violation of the state's financial responsibility laws. Because wrongful death plaintiffs are not themselves the uninsured motorists who were the targets of the statute, and are not expressly included in the statute's language, the Court concluded that the statute did not apply to such plaintiffs (*21 Cal. 4th 272, 276-283)* . However, the Court left open the possibility that the statutory defense could be invoked against a particular heir who may have been the uninsured owner or operator of the vehicle involved in the accident (*21 Cal. 4th 272, 278 n.5*).

The defendant alternatively contended that because the defense of *Civ. Code § 3333.4* could have been successfully asserted against the decedent if she had lived, the defense could also be asserted against the plaintiffs, invoking the rule that a defense that may be asserted against a decedent may also be asserted against heirs in a wrongful death action. The Supreme Court disagreed, noting that this general proposition was not an absolute rule and that each case must be examined in its particular context. In the context of wrongful death actions involving a statutory defense that might have been asserted against the decedent, the Court concluded that the issue has traditionally been one of statutory construction, with the defense applying or not in accordance with the language and intent of the provision at issue, while respecting the independent status of a wrongful death action (*21 Cal. 4th 272, 283-286)* .

[b] Statutory Prohibition Against Recovery of Noneconomic Damages by Uninsured Motorist Injured in Motor Vehicle Accident Inapplicable to Wrongful Death Plaintiffs

The factual and procedural background of ***Horwich v. Superior Court*** *(1999) 21 Cal. 4th 272, 87 Cal. Rptr. 2d 222, 980 P.2d 927* , is discussed in *§ 66.34[3][a]*. In affirming the judgment for the wrongful death plaintiffs, the Supreme Court first determined that *Civ. Code § 3333.4* was not intended to apply directly to wrongful death plaintiffs, given the statute's intended goal of preventing uninsured motorists from recovering large noneconomic damage awards if the plaintiffs themselves have failed to comply with the state's financial responsibility laws (*21 Cal. 4th 272, 276-283)* . The Court further concluded that a statutory defense that could have been asserted against a decedent if he or she had lived is not necessarily applicable to a wrongful death action, but that the issue has traditionally been one of statutory construction, with the defense applying or not in accordance with the language and intent of the provision at issue. Therefore, because the language and intent of *Civ. Code § 3333.4* precluded its direct application to the plaintiffs, the defendant could not invoke the defense merely because it may have been asserted against the decedent (*21 Cal. 4th 272, 287)* .

[c] Wrongful Death Action Not Barred by Failure to Bring Decedent's Original Action to Trial Within Five Years

In *Brumley v. FDCC California, Inc. (2007) 156 Cal. App. 4th 312, 67 Cal. Rptr. 3d 292* , plaintiffs were the wife and children of a decedent who several years earlier had filed asbestos-related injury claims against multiple defendants. After decedent's death, the wife was granted leave to file an amended complaint asserting wrongful death claims and a loss of consortium claim and substituting herself as personal representative for purposes of survivorship claims. When plaintiffs subsequently failed to bring the case to trial within five years of the filing of decedent's original complaint, the trial court dismissed all causes of action pursuant to *Code Civ. Proc. §§ 583.310* and *583.360*. Plaintiffs appealed, arguing that the trial court erred in dismissing the wrongful death claims and the wife's loss of consortium claim.

The court of appeal reversed. Based on Supreme Court precedent interpreting an earlier, but similar, statute, the court of appeal held that the relation-back doctrine applied to the five-year time period for bringing a case to trial imposed by

Code Civ. Proc. § 583.310 (*156 Cal. App. 4th 312, 321)* . Under that doctrine, a new cause of action in an amended complaint is held to relate back to earlier pleaded claims if the later cause of action rests on the same general set of facts, involves the same injury, and refers to the same instrumentality, as the earlier pleaded claims. The court then held that wrongful death and loss of consortium claims of heirs do not relate back to a decedent's personal injury claims arising from the fatal injury. The court noted that the new claims were the claims of different plaintiffs seeking different damages from those sought in decedent's original action. Because the new claims brought by the widow and children did not relate back to decedent's personal injury action, those claims should not have been dismissed under *Code Civ. Proc. § 583.310* as the five-year period on those claims had not yet expired (*156 Cal. App. 4th 312, 324-326)* .

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6-66 California Points & Authorities § 66.35

§ 66.35 Opposing Contention That Plaintiff May Not Recover Damages for Wrongful Death--Settled or Dismissed Action May Be Continued by Entitled Person Initially Joined as Defendant

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE WRONGFUL DEATH ACTION OF PLAINTIFF _____ [*name*] IS NOT BARRED BY THE SETTLEMENT AND DISMISSAL OF THE WRONGFUL DEATH ACTION OF PLAINTIFF _____ [*name*] BECAUSE PLAINTIFF _____ [*name*] WAS JOINED AS A DEFENDANT IN THE ACTION OF PLAINTIFF _____ [*name*], AND THE ACTION OF PLAINTIFF _____ [*name*] IS MERELY A CONTINUATION OF THE ACTION OF PLAINTIFF _____ [*name*].

Subsequent Action by Entitled Person Joined as Defendant in Prior Action. The settlement and subsequent dismissal with prejudice by a plaintiff of a wrongful death action does not bar another person, whose relationship to the decedent entitles him or her to a wrongful death cause of action, from continuing the action as a plaintiff if he or she was joined as a defendant in the prior action (*Estate of Kuebler v. Superior Court (1978) 81 Cal. App. 3d 500, 503-505, 146 Cal. Rptr. 481*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff may not recover damages for wrongful death because a separate wrongful death action has already been settled, dismissed, or otherwise disposed of [*see § 66.27*].

This form should be combined with points and authorities relating to the specific procedural context in which counsel wishes to refute the contention that the plaintiff's wrongful death action is barred by a separate action. For example, the form may be used to oppose a demurrer for failure to state a cause of action or a motion for judgment on the pleadings

asserting that the separate action has been settled and dismissed with prejudice, thus barring the plaintiff's action.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. For example, counsel may include discussion showing that plaintiff was joined as a defendant in a wrongful death action, that the action was settled and dismissed with prejudice as to another plaintiff (without litigating the rights of the plaintiff/defendant), and that the plaintiff/defendant continued the action in his or her own name.

[3] Discussion of Authorities

[a] Subsequent Action by Entitled Person Joined as Defendant in Prior Action

In ***Estate of Kuebler v. Superior Court*** *(1978) 81 Cal. App. 3d 500, 146 Cal. Rptr. 481* , a woman brought a wrongful death action on account of the death of her children. She named her former husband, who was the father of the children, as a defendant after he would not consent to be a plaintiff. Subsequently, the father filed a wrongful death action which was limited to the amount of insurance coverage available to the defendant estates [*see* former Prob. Code § 721 (*now see Prob. Code §§ 554, 9390*)]. Before the two actions could be consolidated, the woman settled her claim and dismissed the action with prejudice. Defendant estates then moved for summary judgment in both law suits, which were pending in the same county. The trial court denied the motion, and defendants petitioned for a writ of mandate to the court of appeal.

The court of appeal denied the writ on the ground that the father was not barred from proceeding with either action. The court reasoned that an heir who is joined to a wrongful death action as a defendant is only nominally a defendant. In reality, the heir is a plaintiff and the settlement by one party plaintiff does not ordinarily operate to bar the actions of other plaintiffs. Therefore, the father had standing to maintain the wrongful death action brought by his former wife. To the extent that the complaint in that action did not seek damages for him or request an apportionment of damages, these deficiencies were subject to amendment.

The court noted that *Mayerhoff v. Kaiser Found. Health Plan, Inc. (1977) 71 Cal. App. 3d 803, 807, 138 Cal. Rptr. 319* [*see § 66.27[3][a]*], held that the plaintiff in a subsequent wrongful death action was barred by the settlement and dismissal of a prior action against the same defendant. The court distinguished *Mayerhoff* because it did not appear that the plaintiffs in the first action had joined the plaintiffs in the subsequent action as defendants and, in any event, the court did not consider the effect that such joinder might have had.

[4] Additional Authorities

[a] Subsequent Action by Entitled Person Joined as Defendant in Prior Action

In *Smith v. Premier Alliance Ins. Co. (1995) 41 Cal. App. 4th 691, 48 Cal. Rptr. 2d 461* , plaintiffs, the children of a decedent, had been named as defendants pursuant to *Code Civ. Proc. § 382* in a wrongful death action brought by a surviving wife. The insurer for the defendant in the original action proposed a settlement for policy limits, with the requirement that the settlement must encompass the claims of both the wife and the children. The children did not sign the releases, and the settlement check was deposited in the trust account of wife's attorney. In a related action, another court denied a motion by the children to apportion the settlement, after which wife's attorney released the money from his trust account. The children then filed an action against the insurer of the original defendant, claiming that they had been deprived of the right to participate in the wrongful death settlement. The trial court granted summary judgment to the insurer, and the court of appeal affirmed. The court stated that the children had a right to share in the settlement between the insurer and the wife only if they were included in the settlement agreement. Since they did not sign the releases, they did not settle with the insurer. As a result, the children were entitled to continue to pursue an action against the original defendant (*41 Cal. App. 4th 691, 699)* . However, since the insurer did not deprive the children of any rights by settling with the wife, the children did not have a cause of action against the insurer. The court thus affirmed the summary judgment in favor of the insurer.

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6-66 California Points & Authorities § 66.36

§ 66.36 Opposing Contention That Plaintiff May Not Recover Damages for Wrongful Death--Subsequent Action May Be Maintained Against Different Defendant

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF MAY MAINTAIN A WRONGFUL DEATH ACTION AGAINST DEFENDANT _____ [*name*] EVEN THOUGH PLAINTIFF BROUGHT A PREVIOUS WRONGFUL DEATH ACTION AGAINST OTHER DEFENDANTS WHO ARE JOINTLY LIABLE WITH DEFENDANT _____ [*name*], OR WHO ARE LIABLE ON OTHER CAUSES OF ACTION ARISING FROM THE INCIDENT CAUSING THE DECEDENT'S DEATH.

A. Separate Wrongful Death Actions Against Different Defendants Permitted. Despite the rule that an action for wrongful death is joint, single, and indivisible, a plaintiff in a wrongful death action need not bring a single action against all joint tortfeasors or join actions against tortfeasors liable under different causes of action arising out of the same death (*Helling v. Lew (1972) 28 Cal. App. 3d 434, 438, 104 Cal. Rptr. 789*).

[*Optional*] **B. Release of One Defendant Does Not Preclude Action Against Another.** A release given to a malpractice defendant in a wrongful death action does not preclude plaintiff from maintaining a subsequent wrongful death action against another defendant if the release specifically provided that it did not discharge any other defendant (*Helling v. Lew (1972) 28 Cal. App. 3d 434, 439, 104 Cal. Rptr. 789*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted to oppose the contention that a plaintiff may not recover damages for wrongful death if a previous wrongful death action by the plaintiff involving the same incident was settled and dismissed, or otherwise resolved [*see § 66.27*]. Optional Paragraph B may be used if by settlement and dismissal

the plaintiff has specifically released another defendant in a previous action. Counsel may wish to combine this points and authorities with points and authorities regarding the issue of collateral estoppel [*see §§ 66.41* and *66.42*].

These points and authorities may be combined, where appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to refute the contention that plaintiff may not maintain a wrongful death action against a second defendant. For example, the form may be used to oppose a motion for summary judgment made on this ground.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that the defendant in the current action is different from the defendant in the prior action.

[3] Discussion of Authorities

[a] Separate Wrongful Death Actions Against Different Defendants Permitted

In ***Helling v. Lew*** *(1972) 28 Cal. App. 3d 434, 104 Cal. Rptr. 789* , the surviving spouse and minor children of a decedent brought a medical malpractice action against the doctor and hospital treating the decedent after an automobile accident. After this action was compromised, settled, and dismissed, plaintiffs brought a wrongful death action against the owner and operator of the automobile that struck the decedent. Defendants in the second action contended that the action was barred by the settlement and termination of the malpractice action, arguing that former Code Civ. Proc. § 377 [*now see Code Civ. Proc. § 377.60*] requires that all causes of action and all tortfeasors be joined in a single action. The trial court agreed with this argument and granted defendants' motion for summary judgment. The plaintiffs appealed.

The court of appeal rejected defendants' argument and reversed. It held that the common law characterization of a wrongful death action as joint, single, and indivisible does not mean, as argued by defendants, that plaintiffs must join all causes of action and all potential defendants in one action. Rather, it is a characterization which refers to the principles that: it is joint only insofar as all heirs join in the action and a lump sum awarded as damages; it is single only insofar as the action can be maintained only by one of the persons designated by former Code Civ. Proc. § 377 [*now see Code Civ. Proc. § 377.60*] (that is, the personal representative or the heirs); and it is indivisible only insofar as it precludes omitted heirs from later bringing individual actions for their individual damages. Because a wrongful death action arises in tort, the court of appeal applied the general rule that joint tortfeasors may be sued either jointly or severally (*28 Cal. App. 3d 434, 438)* . The court further held that plaintiffs were free to bring separate actions because there were two distinct causes of action involved--negligent conduct resulting in the accident and subsequent negligent medical treatment (*28 Cal. App. 3d 434, 439)* .

[b] Release of One Defendant Does Not Preclude Action Against Another

Helling v. Lew *(1972) 28 Cal. App. 3d 434, 104 Cal. Rptr. 789* , is discussed in *§ 66.36[3][a]*. The court held that the release by the medical malpractice defendants did not preclude the cause of action against the owner and operator of the automobile that struck the decedent because the release specifically provided that it did not discharge any other defendants from liability (*28 Cal. App. 3d 434, 439)* .

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6-66 California Points & Authorities § 66.37

§ 66.37 Opposing Contention That Plaintiff May Not Recover Damages for Wrongful Death--Unwed Parent Who Has Acknowledged Child and Contributed to Support Is Within Statute [Code Civ. Proc. § 377.60(a)]

[1] FORM

[*The following may be included in a memorandum or points and authorities, or in a trial or appellate brief.*]

PLAINTIFF MAY MAINTAIN A WRONGFUL DEATH ACTION AS THE PARENT OF DECEDENT, EVEN THOUGH DECEDENT WAS BORN OUT OF WEDLOCK, BECAUSE PLAINTIFF ACKNOWLEDGED THE CHILD AND CONTRIBUTED TO THE SUPPORT OR CARE OF THE CHILD.

A. Persons Entitled to Intestate Succession Qualify as Entitled Persons. When a decedent leaves no spouse, domestic partner, or child, the persons who would be entitled to the property of the decedent by intestate succession qualify as persons entitled to bring a wrongful death action (*Code Civ. Proc. § 377.60(a)*).

B. Unwed Parent Who Acknowledges Child and Contributes to Support Is Entitled to Intestate Succession. If a child is born out of wedlock, a natural parent may not inherit from or through the child on the basis of the parent and child relationship unless the parent acknowledged the child and contributed to the support or the care of the child (*Prob. Code § 6452*).

[*Optional*] **C. Acknowledgment of Child Need Not Be Either in Witnessed Writing or After Birth.** In order to bring a wrongful death action for a child born out of wedlock a father must have acknowledged the child, but that acknowledgment need not be after the child's birth or in a written and witnessed document (*Lozano v. Scalier (1996) 51 Cal. App. 4th 843, 844, 59 Cal. Rptr. 2d 346*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a plaintiff is not a person entitled by

statue to bring an action for wrongful death. The basis of the opposition is that plaintiff qualifies as a person entitled to bring a wrongful death action as a person entitled to inherit from the decedent through intestate succession [*Code Civ. Proc. § 377.60(a)*], and that the basis for inheriting through intestate succession is that, although decedent was born out of wedlock, plaintiff is the decedent's parent and acknowledged and contributed to the support or the care of the child [*Prob. Code § 6452*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue, for example in a motion for summary judgment. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should include specific facts showing plaintiff's acknowledgment of the decedent and plaintiff's contribution to the support or care of decedent.

[c] Related Pleading and Practice Forms

For forms of complaint for damages for wrongful death, see California Forms of Pleading and Practice, Ch. 181, *Death and Survival Actions* (Matthew Bender).

[d] Opposing Points and Authorities

When appropriate, the points and *authorities in § 66.20* may be used to oppose these points and authorities.

[3] Discussion of Authorities

[a] Acknowledgment of Child Need Not Be Either in Witnessed Writing or After Birth

In ***Lozano v. Scalier*** *(1996) 51 Cal. App. 4th 843, 59 Cal. Rptr. 2d 346* , the father of a child born out of wedlock brought a wrongful death action on behalf of the child against the child's mother after the child was killed in an automobile accident for which the mother was liable. Defendant mother moved for judgment on the ground that plaintiff had no standing to sue because he had not acknowledged the child as his in writing during the child's lifetime. Plaintiff had signed a medical form identifying himself as the child's father five months before the child's birth, and had orally represented himself as the child's father after the child's birth. The trial court found that plaintiff had acknowledged the child as his, and had contributed to his support and care, and concluded that plaintiff was entitled to maintain the wrongful death action. The trial court thus denied defendant's motion for judgment. By stipulation, a judgment was then entered for plaintiff.

The court of appeal noted that the wrongful death statute, *Code Civ. Proc. § 377.60(a)*, provided that when a decedent leaves no spouse or child an action may be brought by the persons who would be entitled to the property of the decedent by intestate succession. The Probate Code provides that a relationship between a child and its parents exists regardless of the parent's marital status *Prob. Code § 6450*, but if a child is born out of wedlock, a parent may not inherit from the child unless the parent acknowledged the child and contributed to the child's support or care *Prob. Code § 6452*. With regard to defendant's contention that an acknowledgment must be witnessed, and made after the child is born, the court concluded that there are no such requirements on the face of the statute. Furthermore, the court held that the history of the statute did not compel a conclusion that such requirements should be read into the statutory language, stating that if the legislature had intended these requirements it would have said so (*51 Cal. App. 4th 843, 848)* . The court thus affirmed the judgment for plaintiff.

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6-66 California Points & Authorities § 66.38

§ 66.38 Opposing Contention That Plaintiff May Not Recover Damages for Wrongful Death--Grandparent of Decedent Has Standing to Bring Action Even Though Parental Rights of Decedent's Biological Parents Have Been Terminated

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF MAY MAINTAIN A WRONGFUL DEATH ACTION AS THE BIOLOGICAL GRANDPARENT OF THE DECEDENT, EVEN THOUGH A COURT ORDER HAS TERMINATED THE PARENTAL RIGHTS OF THE DECEDENT'S BIOLOGICAL PARENTS.

Grandparent Has Standing Even if Parental Rights of Decedent's Biological Parents Have Been Terminated. If a court order has terminated the parental rights of a child's parents, a biological grandparent has standing to bring a wrongful death action after the death of the child, at least if the termination order had no effect on the legal rights of the grandparent with respect to the child and the child had not been adopted at the time of the child's death (*see Fraizer v. Velkura (2001) 91 Cal. App. 4th 942, 946-947, 110 Cal. Rptr. 2d 918*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to the contention that a biological grandparent has no standing to bring a wrongful death action because the parental rights of the decedent's biological parents have been terminated. The basis for the opposition is that because a grandparent may inherit under the laws of intestate succession [*see Code Civ. Proc. § 377.60(a)*; *Prob. Code § 6402(d)*], if the conditions for inheritance have been established by that grandparent, that grandparent has standing to bring a wrongful death action so long as the termination order did not affect the grandparent's rights and the child had not been adopted at the time of the child's death.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context

in which these points are raised--for example, in opposition to a motion for summary judgment. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should include facts showing that the termination order did not affect the grandparent's rights, that the child had not been adopted at the time of the child's death, and that the statutory conditions for inheritance by the grandparent existed.

[c] Related Pleading and Practice Forms

For forms of complaint for damages for wrongful death, see California Forms of Pleading and Practice, Ch. 181, *Death and Survival Actions* (Matthew Bender).

[d] Opposing Points and Authorities

If appropriate, the points and *authorities in § 66.20* may be used to oppose these points and authorities.

[3] Discussion of Authorities

[a] Grandparent Has Standing Even if Parental Rights of Decedent's Biological Parents Have Been Terminated

In ***Fraizer v. Velkura*** *(2001) 91 Cal. App. 4th 942, 110 Cal. Rptr. 2d 918* , the plaintiff was the biological grandmother of a child born with serious birth defects. Almost three years after her birth, the child was freed for adoption when the parental rights of the child's biological parents were terminated. When the child died a year later, the plaintiff was the child's guardian and was just weeks away from finalizing adoption proceedings. The plaintiff filed a wrongful death action against the child's doctor. The doctor filed a motion for summary judgment, asserting that the plaintiff had no standing to bring the action. The trial court granted the motion, and plaintiff appealed.

The court of appeal reversed. The court noted that under the statutory provisions governing standing to bring a wrongful death action, if there is no surviving issue of the decedent, the persons who would be entitled to property of the decedent by intestate succession have standing to bring a wrongful death action. Under the laws of intestate succession, if there is no surviving issue, parent, or issue of a parent, a surviving grandparent has a right to inherit (*91 Cal. App. 4th 942, 945-946)* . The court rejected the defendant's argument that the order terminating the parental rights of the child's biological parents terminated the plaintiff's relationship as a grandparent. The termination order made no mention of grandparents and on its face had no effect on the legal rights with respect to the child and her grandmother. Therefore, the plaintiff had standing to bring the action (*91 Cal. App. 4th 942, 946-947)* .

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6-66 California Points & Authorities § 66.39

§ 66.39 Opposing Contention That Wrongful Death Cause of Action Is Improperly Pleaded--Omitted Entitled Persons May Be Added as Parties [Code Civ. Proc. § 473]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

OMITTED ENTITLED PLAINTIFFS MAY BE ADDED AS PARTIES TO A WRONGFUL DEATH ACTION IF THE OMISSION WAS NOT IN BAD FAITH AND A NEW CAUSE OF ACTION IS NOT CREATED.

A. Amendment of Pleading. A court, in the furtherance of justice and on proper terms, may allow a party to amend any pleading or proceeding by adding or striking out the name of any party, correcting a mistake in the name of a party, or correcting a mistake in any other respect (*Code Civ. Proc. § 473*).

B. Amendment Should Be Permitted if Failure to Add Omitted Entitled Plaintiffs Would Create Hardship. Entitled plaintiffs omitted through accident, misfortune, or mistake should be added to a wrongful death action in order to promote justice, especially if failure to add them would create an exceptional hardship for the moving party and the omitted entitled plaintiffs and other parties will suffer no prejudice from the addition. The addition of omitted entitled plaintiffs does not create a new and distinct cause of action against the defendants but merely adds matters essential to make the original cause of action complete (*Rabe v. Western Union Tel. Co. (1926) 198 Cal. 290, 299-301, 244 P. 1077*).

[*Optional*] **C. Amendment of Complaint to Specify That Action Is on Behalf of Entitled Persons.** If the decedent's personal representative brings a wrongful death action and fails to allege that the action is on behalf of persons entitled to bring the action, the administrator should be allowed to amend the complaint to name the entitled person(s) (*see Mayo v. White (1986) 178 Cal. App. 3d 1083, 1092, 224 Cal. Rptr. 373*).

[*Optional*] **D. Entitled Persons Named as Defendants May Be Added as Plaintiffs if Cause of Action Against Them May Be Deleted.** Entitled persons named as defendants in a wrongful death action should be added as plaintiffs

if a wrongful death cause of action has been stated on behalf of these persons against third parties and if the complaint can be amended to delete the causes of action stated against the entitled person (*see Mayo v. White (1986) 178 Cal. App. 3d 1083, 1092-1093, 224 Cal. Rptr. 373*).

[*Optional*] **E. Amendment Relates Back to Original Complaint.** When there is no attempt to state a new cause of action in an amended complaint, but merely the addition of matters essential to make the original cause of action complete, the amendment relates back to the time of the commencement of the action, even if made after the expiration of the period of limitation (*Mayo v. White (1986) 178 Cal. App. 3d 1083, 1092, 224 Cal. Rptr. 373*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted to oppose the contention that a plaintiff may not recover in a wrongful death cause of action because of insufficient joinder of parties. If a plaintiff is a personal representative, counsel may use optional Paragraph C. If persons to be added were originally named as defendants, counsel may use optional Paragraph D. If the amendment is sought after expiration of the period of limitation, counsel may use optional Paragraph E.

These points and authorities may be combined, where appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of adding omitted entitled plaintiffs to an action. For example, these points and authorities may be used to support a motion to amend a wrongful death complaint by a plaintiff seeking to add the names of omitted entitled plaintiffs as parties to the action.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing how the failure to add omitted entitled plaintiffs to the action would create a hardship on the omitted entitled plaintiffs. If the proceeding seeks to name as plaintiff persons originally named as defendants, counsel should include discussion showing that the persons named as defendants are entitled to be named as plaintiffs and that the cause of action against them as defendant may be deleted.

[b] Related Pleading and Practice Forms

For forms of notice of motion to amend pleadings generally, see California Forms of Pleading and Practice, Ch. 21, *Amended and Supplemental Pleadings* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities supporting and opposing the amendment of pleadings generally, see Ch. 16, *Amended and Supplemental Pleadings* .

[3] Discussion of Authorities

[a] Amendment Should Be Permitted if Failure to Add Omitted Entitled Plaintiffs Would Create Hardship

In ***Rabe v. Western Union Tel. Co.*** *(1926) 198 Cal. 290, 244 P. 1077* , the husband and married daughter of a decedent brought a wrongful death action against defendant. In their complaint, plaintiffs alleged that they were the only heirs of decedent. During the course of the trial, the daughter revealed under cross-examination by defendant the existence of decedent's grandchildren, through a deceased son and daughter, who were also heirs of the decedent. Defendant neither took action nor objected to the nonjoinder revealed during the cross-examination. Plaintiffs, however, moved for leave to amend their complaint to name the grandchildren as parties to the action. After defendant objected, the trial court reserved its ruling on the question until all plaintiffs' evidence was presented. At the conclusion of

plaintiffs' presentation, the trial court denied plaintiffs' motion for leave to amend and granted defendant's motion for a nonsuit. On plaintiffs' appeal, the Supreme Court reversed the order granting a nonsuit and directed that plaintiffs be allowed to amend their complaint by making the omitted heirs parties to the action. The court noted the general rule that motions to amend pleadings are to be liberally granted to the end that justice may be promoted. In this case, the heirs were not omitted fraudulently or as the result of bad faith. Even if the omitted heirs did not suffer any pecuniary damage as a result of the decedent's death, the denial of plaintiffs' motion for leave to amend their complaint worked an exceptional hardship on both plaintiffs and the omitted heirs. Denial of the motion deprives a plaintiff who has moved diligently for leave to amend his or her complaint of the benefits of former Code Civ. Proc. § 377 [*now see Code Civ. Proc. § 377.60*]. In addition, the denial of such a motion after the tolling of the one-year statute of limitations on wrongful death actions bars any omitted heirs from hereafter commencing a wrongful death action in their own right. Moreover, the omitted entitled plaintiffs are barred by a judgment in a prior action from any recovery in a subsequent action. Because of these disastrous consequences, plaintiffs' motion should have been granted by the trial court. The Supreme Court summarily rejected defendant's argument that the amendment would substitute a new and distinct cause of action for the one pleaded, relying on a number of earlier California decisions.

NOTE:

In 1993, the legislature amended the wrongful death statute to eliminate the use of the term "heirs" to delineate persons entitled to a wrongful death cause of action. Entitled persons include, but are not limited to, certain heirs [*see Code Civ. Proc. § 377.60*]. However, the 1993 amendment was not intended to adversely affect the standing of any party who had standing to bring a wrongful death action under the prior law [*see Code Civ. Proc. § 377.60(d), (e)*]. The arguments in support of adding omitted entitled plaintiffs, set out in Paragraphs A and B of this memorandum, still apply.

[b] Amendment of Complaint to Specify That Action Is on Behalf of Entitled Persons

The facts and procedural background of ***Mayo v. White*** *(1986) 178 Cal. App. 3d 1083, 224 Cal. Rptr. 373* , are discussed in *§ 66.20[3][d]*. In reversing the judgment of dismissal with directions to allow plaintiff to amend the complaint, the court of appeal said several old, but still good, cases have held that when an administrator of a decedent's estate brings a wrongful death action and fails to bring such action on behalf of the heirs at law, the administrator should be allowed to amend the complaint to name the heirs at law (*178 Cal. App. 3d 1083, 1092)* .

[c] Entitled Persons Named as Defendants May Be Added as Plaintiffs if Cause of Action Against Them May Be Deleted

The facts and procedural background of ***Mayo v. White*** *(1986) 178 Cal. App. 3d 1083, 224 Cal. Rptr. 373* , are discussed in *§ 66.20[3][d]*. In reversing the judgment of dismissal with directions to allow plaintiff to amend the complaint, the court of appeal pointed out that (1) plaintiff's second and third causes of action allege that the minor's parents negligently failed to supervise the minor, which proximately caused his accident and death, and (2) defendant wife contended that plaintiff should not be allowed to amend the complaint to state the proper heirs at law, since the resulting complaint would consist of the parents of decedent as plaintiffs suing themselves as defendants. With respect to the negligent supervision cause of action, the court explained that under the facts of the case it was possible that only one parent was negligent. If this is so, the nonnegligent parent, as decedent's heir at law, could maintain a cause of action for wrongful death against the negligent parent and, under this theory, plaintiff could amend the complaint to state a proper cause of action on the theory of negligent supervision of the minor child. With respect to the premises liability cause of action, the court held that since both parents were owners and in control of the premises the complaint could not be amended so as to allow one parent to sue the other on this theory. The court said that each parent, being a co-owner and jointly in possession of the premises, would be equally responsible for the condition of the premises and could not be held legally liable for injury to the other (*178 Cal. App. 3d 1083, 1092-1093)* .

[d] Amendment Relates Back to Original Complaint

The facts and procedural background of ***Mayo v. White*** *(1986) 178 Cal. App. 3d 1083, 224 Cal. Rptr. 373* , are discussed in *§ 66.20[3][d]*. In reversing the judgment of dismissal with directions to allow plaintiff to amend the complaint, the court of appeal said that the running of the statute of limitations against the heirs (parents) was no bar to the suit because of the relation back doctrine. Quoting *Ruiz v. Santa Barbara Gas & Elec. Co. (1912) 164 Cal. 188, 194, 128 P. 330* , the court said that when there is no attempt to state a new cause of action in an amended complaint, but merely the addition of matters essential to make the original cause of action complete, the amendment, though made after the expiration of the period of limitation, relates back to the time of the commencement of the action (*178 Cal. App. 3d 1083, 1092)* .

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A. Wrongful Death Actions

6-66 California Points & Authorities § 66.40

§ 66.40 Supporting Contention That Wrongful Death Action Is Subject to Collateral Estoppel--Previous Judgment Precludes Relitigation by Plaintiff of Issue Necessarily Determined by That Judgment

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF MAY NOT RELITIGATE _____ [*specify issue*] IN THIS WRONGFUL DEATH ACTION BECAUSE THE IDENTICAL ISSUES ON WHICH LIABILITY DEPEND HAVE BEEN DETERMINED ADVERSELY TO PLAINTIFF IN A PRIOR PERSONAL INJURY ACTION AGAINST DEFENDANT.

A. Collateral Estoppel if Plaintiff Was Party to Prior Action. A judgment adverse to the plaintiffs in a personal injury action acts as a conclusive adjudication to them as to the issues litigated and determined in that action, so that they are collaterally estopped from bringing a subsequent wrongful death action against the defendant if the identical issues on which liability depends are joined in the pleadings in the wrongful death action (*Secrest v. Pacific Elec. Ry. Co. (1943) 60 Cal. App. 2d 746, 749, 751, 141 P.2d 747*).

B. Collateral Estoppel Based on Privity With Party to Prior Action. Plaintiffs in a wrongful death action may not relitigate the liability of a defendant who was determined not to be liable to decedent in a prior personal injury action, because they are deemed to have been in privity with the decedent in the prior action (*Brown v. Rahman (1991) 231 Cal. App. 3d 1458, 1461-1464, 282 Cal. Rptr. 815*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted to support the contention that a plaintiff's wrongful death action is subject to collateral estoppel because issues on which liability depend were determined adversely to plaintiff in a prior personal injury action against the same defendant. Paragraph A is for use if the plaintiff in the wrongful death action was a party to the prior action. For example, the spouse of decedent may have been a party to the decedent's

personal injury action on a cause of action for loss of consortium. Paragraph B is for use if the wrongful death plaintiff was not a party in the prior action.

These points and authorities may be combined, where appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of collateral estoppel. For example, the points and authorities may be used to support a defendant's motion for summary judgment if there has been a final judgment in a prior personal injury action that was adverse to the plaintiff and involved the identical issues on which liability depends. A defendant may move for summary judgment in any action or proceeding in contending that the action has no merit. The motion must be granted if all of the papers submitted show that there is no triable issue as to any material fact and that defendant is entitled to a judgment as a matter of law [*Code Civ. Proc. § 437c(c)*]. These points and authorities may also be used to support a demurrer to a wrongful death complaint or a motion for judgment on the pleadings if it appears on the face of the complaint, or from any matter of which the court may or must take judicial notice, that a prior determination of the same issues of liability that was adverse to plaintiffs had been made in an earlier action.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that the decedent, during his or her lifetime, brought a personal injury action seeking damages for the same injuries that ultimately caused his or her death. Further, it should be shown that the liability of the defendant for those injuries was fully litigated and determined in favor of the defendant. In addition, counsel must support the motion with affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice must or may be taken [*Code Civ. Proc. § 437c(b)*].

[b] Related Pleading and Practice Forms

For a form of answer to a wrongful death complaint that asserts a judgment estopping a plaintiff from maintaining the wrongful death action, see California Forms of Pleading and Practice, Ch. 181, *Death and Survival Actions* (Matthew Bender). For a form of answer in which the defense is raised that the basic issue between the same parties was determined in a prior action, see California Forms of Pleading and Practice, Ch. 491, *Res Judicata* (Matthew Bender).

[c] Related Points and Authorities

For a form of memorandum of points and authorities supporting a motion for summary judgment on the ground that an action is barred by res judicata, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Collateral Estoppel if Plaintiff Was Party to Prior Action

In ***Secrest v. Pacific Elec. Ry. Co.*** *(1943) 60 Cal. App. 2d 746, 141 P.2d 747* , the widow of a decedent brought a wrongful death action against defendants, the owner and operator of a bus that collided with an automobile in which the decedent was a passenger. Defendants denied their negligence in their answer and contended that plaintiff was collaterally estopped from bringing a wrongful death action against defendants because of the judgment adverse to plaintiff and her deceased husband that had been entered in an action brought by them against defendants for personal injuries sustained in the collision. The trial court proceeded to a separate trial on the issue of whether or not the wrongful death action was barred by the prior judgment, and found that the identical issues presented in the wrongful death action had been determined adversely to plaintiff in the prior personal injury action, therefore estopping plaintiff from relitigating those issues in the wrongful death action. Plaintiff appealed from this judgment, contending that she was not estopped from bringing the wrongful death action because it constituted a new cause of action in favor of a decedent's heirs based on their pecuniary loss resulting from the death. The court of appeal affirmed the trial court's judgment.

The court held that the rendering of a verdict in the earlier personal injury action in favor of defendants meant the jury

found either that defendants were not negligent, or that plaintiff was contributorily negligent. The court of appeal stated that a former judgment operated as an estoppel or conclusive adjudication as to those issues actually litigated and determined in the first action. Thus, if issues joined in the pleadings in the wrongful death action are identical to those that had been determined adversely to plaintiff in the prior personal injury action, plaintiff was collaterally estopped from bringing the wrongful death action.

[b] Collateral Estoppel Based on Privity With Party to Prior Action

In ***Brown v. Rahman*** *(1991) 231 Cal. App. 3d 1458, 282 Cal. Rptr. 815* , executors of decedent's estate brought a wrongful death action against two doctors alleged to have caused decedent's death. During her lifetime, the decedent had brought a personal injury action against the same doctors, based on the injuries that ultimately caused her death. In that action, the jury returned a defense verdict for one of the doctors, and that verdict was upheld on appeal. The trial court in the wrongful death action granted that doctor's motion for summary judgment, ruling that the prior judgment collaterally estopped the plaintiffs from relitigating his negligence.

The appellate court affirmed. The court noted the existence of older authority holding that wrongful death plaintiffs who were not parties to a prior personal injury action were not collaterally estopped from relitigating issues determined in that action, because a wrongful death cause of action is not derivative in character or a continuation or revival of the decedent's personal injury cause of action [*see Kaiser Found. Hosps. v. Superior Court (1967) 254 Cal. App. 2d 327, 333-335, 62 Cal. Rptr. 330]* . However, the court joined two other courts that had more recently rejected this view [*see Evans v. Celotex Corp. (1987) 194 Cal. App. 3d 741, 743-747, 238 Cal. Rptr. 259* ; *see also Aguilar v. Los Angeles County (9th Cir. 1985) 751 F.2d 1089, 1093]* .

The court held that there was privity between the decedent in the earlier action and the plaintiffs in the subsequent wrongful death action sufficient to invoke principles of collateral estoppel. The court found that privity requires that the party to be estopped have had an identity or community of interest with, and adequate representation by, the losing party in the first action. Further, the party to be estopped should reasonably have expected to be bound by the prior adjudication [*see Clemmer v. Hartford Ins. Co. (1978) 22 Cal. 3d 865, 875, 151 Cal. Rptr. 285, 587 P.2d 1098]* . The court found that the interests of wrongful death plaintiffs are inextricably linked to the determination of the deceased's rights in the prior action. The loss they suffer arises by virtue of the injury caused to the deceased. It would be anomalous to deny recovery to the deceased but to permit his or her heirs to recover damages based on the same set of facts and legal issues. Further, it can fairly be said that plaintiffs' legal interests were adequately represented in the personal injury action as if they had been parties thereto, because the decedent had every incentive to fully litigate the defendant's liability (*231 Cal. App. 3d 1458, 1462-1464)* .

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6-66 California Points & Authorities § 66.40A

§ 66.40A Supporting Contention That Wrongful Death Action is Subject to Collateral Estoppel--Previous Judgment Precludes Relitigation by Defendant of Issue Necessarily Determined by That Judgment

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT MAY NOT RELITIGATE DEFENDANT'S LIABILITY FOR WRONGFUL DEATH BECAUSE THE IDENTICAL ISSUES ON WHICH LIABILITY DEPEND HAVE BEEN DETERMINED ADVERSELY TO DEFENDANT IN A PRIOR COURT ACTION.

Collateral Estoppel Effect May Be Given to Determination of Intentional and Malicious Conduct Made by Bankruptcy Judge. If a bankruptcy court determines that a wrongful death judgment would not be dischargeable because the debtor's conduct in causing the death was intentional and malicious, the trial court in a wrongful death action may give collateral estoppel effect to this finding to preclude the defendant from relitigating the issue of his or her liability for the death (*Roos v. Red (2005) 130 Cal. App. 4th 870, 878-888, 30 Cal. Rpr. 3d 446*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted by the plaintiff in a wrongful death action to support the contention that the defendant is precluded from relitigating the issue of his or her liability because the identical issue was determined adversely to the defendant in a prior court proceeding, such as in a bankruptcy court proceeding in which it was determined that the defendant's conduct in causing the death was intentional and malicious.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which these points are raised. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form showing the relationship between the facts of the case and the point of law stated. Thus, for example, counsel should include facts showing that the issues establishing defendant's liability were determined against the defendant in a prior court proceeding, such as a bankruptcy proceeding, and that the defendant was given a full and fair opportunity to litigate the issue in the prior proceeding.

[3] Discussion of Authorities

[a] Collateral Estoppel Effect May Be Given to Determination of Intentional and Malicious Conduct Made by Bankruptcy Judge

In ***Roos v. Red*** *(2005) 130 Cal. App. 4th 870, 30 Cal. Rpr. 3d 446* , the plaintiffs were the surviving parents of two adult sons who were killed when the defendant drove his SUV into a pool hall. The plaintiffs filed separate suits for wrongful death against the defendant, and the actions were consolidated. The defendant moved to Texas and filed for bankruptcy, attempting to discharge all of his debts, including a potential judgment in the pending wrongful death action. After the bankruptcy court issued a stay of the wrongful death action, the plaintiffs sought removal of the stay, which the defendant opposed. The court denied the request to remove the stay, and the plaintiffs then filed complaints in the bankruptcy court seeking a determination that a wrongful death judgment in their lawsuit would not be dischargeable because the defendant's conduct in causing the deaths was willful and malicious. The defendant specifically requested that the bankruptcy court rule on the dischargeability of a wrongful death judgment, and after discovery and a bench trial, the bankruptcy judge held that the defendant's conduct in causing the deaths was willful and malicious and that any judgment would not be discharged in bankruptcy. After these proceedings, the wrongful death action was continued, at which point the plaintiffs filed a motion in limine requesting that the trial court give collateral estoppel effect to the findings of the bankruptcy court, effectively precluding the defendant from relitigating his liability for the deaths. The court granted the motion, and trial proceeded only on the issue of the amount of damages. The plaintiffs were awarded damages, and after the court denied the defendant's motion for a new trial, the defendant appealed.

The court of appeal affirmed. The court held that the doctrine of collateral estoppel may be used to prevent a wrongful death defendant from litigating his or her liability, if the identical issue was litigated and decided against the defendant in a prior proceeding. The defendant argued that collateral estoppel should not have been applied under the circumstances because he was not given a "full and fair" opportunity to litigate the issue in the bankruptcy court--specifically, he did not have the opportunity to present his case to a jury in that court. The court rejected this argument. The court concluded that a jury would probably have reached the same result, and more importantly, that the lack of the opportunity to present a case before a jury does not preclude application of the collateral estoppel doctrine (*130 Cal. App. 4th 870, 881)* . Moreover, the court rejected the defendant's argument that *28 U.S.C.S. § 1411(a)*, which states that the bankruptcy act does not affect any right to a trial by jury a person has under nonbankruptcy law with regard to personal injury or wrongful death claims, preserved his right to have a jury decide the issue of his liability in the wrongful death action. The court concluded that the statute was not designed to create any new right to a jury trial and thus nothing in that statute prevented application of collateral estoppel, which otherwise can be used to prevent relitigating before a jury an issue that has already been litigated (*130 Cal. App. 4th 870, 885-886)* . Therefore, although the defendant was not afforded a jury trial in the bankruptcy court, the court concluded that the defendant had a full and fair opportunity to litigate the question of whether his conduct in causing the deaths was willful and malicious. Because the bankruptcy court decided this question against him, the defendant could not relitigate the issue in the wrongful death action (*130 Cal. App. 4th 870, 888)* .

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6-66 California Points & Authorities § 66.41

§ 66.41 Opposing Contention That Wrongful Death Action Is Subject to Collateral Estoppel--Entitled Person Knowingly Omitted From Previous Action Not Precluded From Maintaining Subsequent Action

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF MAY MAINTAIN HIS/HER WRONGFUL DEATH ACTION BECAUSE HIS/HER INTERESTS WERE NOT REPRESENTED IN A PRIOR WRONGFUL DEATH ACTION AGAINST DEFENDANT AND DEFENDANT KNEW OF PLAINTIFF'S EXISTENCE BUT TOOK NO ACTION TO REQUIRE JOINDER OF PLAINTIFF IN THE PRIOR ACTION.

A. **Subsequent Action by Knowingly Omitted Entitled Plaintiffs.** The judgment rendered in the wrongful death action brought by the other entitled plaintiffs neither constitutes res judicata to the claims of the omitted entitled plaintiffs, nor collaterally estops them from asserting their claims in a subsequent wrongful death action, because their separate interests were not before the court, and because defendant knew of their existence, but did not attempt to require their joinder in the previous action (*Arizmendi v. System Leasing Corp. (1971) 15 Cal. App. 3d 730, 739, 93 Cal. Rptr. 411*).

[*Optional*] B. **Omitted Heir Named But Not Served May Maintain Subsequent Action.** If an actual plaintiff joins a potential plaintiff as a nominal defendant, but fails to serve that nominal party with a summons and complaint, that nominal defendant is not a party to the action and he or she is not barred from bringing a separate wrongful death action if the initial action is settled. The defendant has the burden of determining whether an heir apparently joined as defendant has been served (*Romero v. Pacific Gas & Elec. Co. (2007) 156 Cal. App. 4th 211, 218-219, 67 Cal. Rptr. 3d 236*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to the contention that a plaintiff's wrongful death action is subject to collateral estoppel.

These points and authorities may be combined, where appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to refute the issue of collateral estoppel. These points and authorities may be used in an appropriate case to oppose a motion for summary judgment [*Code Civ. Proc. § 437c*] supported by the points and *authorities in § 66.27*. Thus, these points and authorities may be used to oppose a motion for summary judgment made on the ground that plaintiff was collaterally estopped from bringing the action because plaintiff had not been joined nor adequately represented in the prior wrongful death action and defendant had known of plaintiff's existence but failed to require his or her joinder. These points and authorities may also be used to oppose a demurrer for failure to state a cause of action or a motion for judgment on the pleadings when the basis for the demurrer or motion is defendant's assertion that settlement and dismissal with prejudice in regard to a different plaintiff is a bar to the action.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing that the omission of the plaintiff from the prior action was knowing, that the interests of the omitted plaintiff were not represented, and that the defendant did not seek joinder of the omitted plaintiff.

[3] Discussion of Authorities

[a] Subsequent Action by Knowingly Omitted Entitled Plaintiffs

The factual background of ***Arizmendi v. System Leasing Corp.*** *(1971) 15 Cal. App. 3d 730, 93 Cal. Rptr. 411* , is discussed in *§ 66.25[3][a]*. Defendant had failed to make any effort to join the minor heirs of decedent in the prior action brought by the decedent's wife, even after discovering the existence of the heirs. In addition, decedent's surviving spouse brought that action solely on her own behalf and not in any representative capacity for the minor plaintiffs who brought the second action. Therefore, because the separate interests of the minor plaintiffs in the life of their natural parent and their loss resulting from his death were not before the trial court in the first action, the judgment rendered in the first action did not constitute res judicata as to the claims of the minor plaintiffs, and did not collaterally estop them from asserting their claims in a second wrongful death action against defendant.

NOTE:

The court in *Arizmendi* reached its conclusion by relying entirely on general principles governing the doctrines of res judicata and collateral estoppel. It did not consider any of the specific rules case law had developed with respect to the right to bring a second wrongful death action after either the first action had been dismissed with prejudice or a final judgment had been rendered in the first action. The general rule is that, because only one wrongful death action is permitted, the omitted heirs' remedy is an action against the plaintiffs who failed to name them in the action; the omitted heirs are considered collaterally estopped from bringing a second wrongful death action against the defendants [*see Mayerhoff v. Kaiser Found. Health Plan, Inc. (1977) 71 Cal. App. 3d 803, 806-807, 138 Cal. Rptr. 319* ; *see also Cross v. Pacific Gas & Elec. Co. (1964) 60 Cal. 2d 690, 694, 36 Cal. Rptr. 321, 388 P.2d 353* ; *Daubert v. Western Meat Co. (1903) 139 Cal. 480, 481, 69 P. 297, 73 P. 244* ; and Form 8]. However, it may be argued that the rule set forth in *Arizmendi* is justified by the public policy that does not permit one party to take advantage of another party's excusable failure to protect his or her own interests. In *Daubert*, defendant could not have been considered to have taken advantage of the omitted heir since he had not known of its existence. In *Arizmendi*, the defendant was aware of the other heirs' existence; the court also found that the omitted heirs' interests had not been adequately represented in the earlier action. Thus, although it is generally the plaintiffs' obligation in a wrongful death action to inform the trier of fact of the existence and relationship of all persons entitled to bring suit [*see Watkins v. Nutting (1941) 17 Cal. 2d 490, 499, 110 P.2d 384]* , if they fail to fulfill this obligation but the defendants are aware of the

failure, the defendants bear the burden of the failure, at least with respect to entitled persons whose interests are not adequately represented. By failing to bring all entitled persons into the action in such a case, they have unjustly enriched themselves to the detriment of those persons.

[b] Omitted Heir Named But Not Served May Maintain Subsequent Action

In *Romero v. Pacific Gas & Elec. Co. (2007) 156 Cal. App. 4th 211, 67 Cal. Rptr. 3d 236* , plaintiff filed a wrongful death action against a utility following the death of his son. An earlier wrongful death action had been brought by decedent's mother against the same defendant, and while plaintiff was listed as a nominal defendant in that earlier action pursuant to *Code Civ. Proc. § 382*, decedent's mother failed to serve plaintiff. The earlier action was settled and dismissed without participation by plaintiff. When plaintiff's action followed, defendant utility successfully demurred on the grounds that the action was barred under the one-action rule because plaintiff was made a nominal defendant in the earlier action and defendant utility was unaware that he had not been served. Plaintiff appealed.

The court of appeal reversed. The court noted the exception to the one-action rule established in *Valdez v. Smith (1985) 166 Cal. App. 3d 723, 212 Cal. Rptr. 638* , discussed in [4][a], *below*, under which a wrongful death plaintiff is not barred from bringing an action against a tortfeasor who has voluntarily elected to settle an earlier wrongful death action with less than all of the heirs, if the tortfeasor had knowledge of an heir omitted from the earlier action and failed to have that omitted heir made a party to that earlier action. The court concluded that merely naming a person as a nominal defendant under *Code Civ. Proc. § 382* was not the same as joining the person in the lawsuit, which requires serving the party with a summons and complaint. Defendant utility admitted that plaintiff had not been properly joined in the earlier action, but argued that the one-action rule still applied because defendant did not know that not all heirs were joined when it settled. The court rejected this argument. The court held that defendant could not properly infer that plaintiff had been properly joined merely because he had been named a defendant. Rather, a defendant wishing to protect itself under the one-action rule had the burden of ensuring that known heirs were actually joined in the original action. Defendant failed to do so (*156 Cal. App. 4th 211, 217-220)* .

[4] Additional Authorities

[a] Subsequent Action by Knowingly Omitted Entitled Plaintiffs

In *Gonzales v. Southern Cal. Edison Co. (1999) 77 Cal. App. 4th 485, 91 Cal. Rptr. 2d 530* , the plaintiffs, the parents and dependents of the decedent, appealed the trial court's summary judgment granted in favor of the defendants in the plaintiffs' wrongful death action. The trial court had ruled that the plaintiffs' action was barred by the "one-action" rule, because the defendants had settled a prior wrongful death action brought on behalf of the decedent's minor daughter. The court of appeal reversed, noting that in the course of deposing the mother of the decedent's minor daughter in preparation for the first action, the defendants had learned that the decedent had parents still living in Mexico, although the deposing attorneys failed to inquire as to whether the parents were dependent on the decedent. Relying on *Valdez v. Smith (1985) 166 Cal. App. 3d 723, 212 Cal. Rptr. 638* the court of appeal held that the defendants had waived the right to rely on the one-action rule because they failed to join the plaintiffs in the first wrongful death action despite knowing the plaintiffs' identity and that they were still alive in Mexico (*77 Cal. App. 4th 485, 489-490)* . In addition, the court of appeal ruled that if a defendant has knowledge that an additional potential plaintiff exists and could reasonably have discovered that this additional potential party was in fact a dependent of the decedent, knowledge of the potential plaintiff's status as a dependent of the decedent may be imputed to the defendant (*77 Cal. App. 4th 485, 490-491)* . Finally, the court rejected the argument that because the decedent's parents were aware of the first action when they commenced their action, it was their responsibility to join in the first action in order to recover. The court refused to allow that principle to control the outcome, because the defendants also had the right and opportunity to join the omitted heirs to the first action and had failed to do so (*77 Cal. App. 4th 485, 491)* .

In *Valdez v. Smith (1985) 166 Cal. App. 3d 723, 212 Cal. Rptr. 638* , the court of appeal held that if an action for

wrongful death is brought by only some of the decedent's heirs and the defendant voluntarily settles it with them while actually knowing of the existence, identity and status of an omitted heir, whom the defendant has not joined as a party to the action, the defendant waives his or her right to insist on a single action. Here, defendant actually knew, from deposition testimony of another heir, that plaintiff was a minor heir of the decedent residing in Mexico and that an action brought by the decedent's immediate family did not include plaintiff, yet defendant did not seek to join plaintiff. Therefore, the dismissal following settlement of the other heirs' action does not bar plaintiff from filing a subsequent action against defendant (*166 Cal. App. 3d 723, 731)* .

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6-66 California Points & Authorities § 66.42

§ 66.42 Opposing Contention That Wrongful Death Action Is Subject to Collateral Estoppel--Plaintiff in Prior Action Did Not Qualify as Entitled Person

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT'S FAILURE TO DEFEND THE CLAIM OF A PERSON WHO WAS NOT ENTITLED BY CODE OF CIVIL PROCEDURE SECTION 377.60 TO BRING A WRONGFUL DEATH ACTION DOES NOT OPERATE TO ESTOP ANOTHER WITH A RIGHTFUL CLAIM TO PROSECUTE HIS/HER CAUSE OF ACTION.

Unqualified Person's Recovery Does Not Bar Subsequent Action. The failure of the defendant to defend against the false claim of one who was not an entitled person for the purposes of determining who is a qualified plaintiff in a wrongful death action does not operate to estop another with a rightful claim to prosecute his or her cause of action (*Davis v. Robinson (1942) 50 Cal. App. 2d 700, 702, 123 P.2d 894*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted to oppose the contention that a plaintiff is barred by collateral estoppel from maintaining a wrongful death cause of action. The ground of opposition is that the earlier wrongful death action was brought by an unqualified person.

These points and authorities may be combined, where appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to refute collateral estoppel. For example, these points and authorities may be used to oppose a motion for summary judgment made on the ground that plaintiff is collaterally estopped from bringing a second wrongful death action against defendant where the plaintiff in the first wrongful death action was not a qualified plaintiff under *Code Civ. Proc. § 377.60*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing that the current plaintiff is entitled to a wrongful death cause of action and the prior plaintiff was not.

[3] Discussion of Authorities

[a] Unqualified Person's Recovery Does Not Bar Subsequent Action

In ***Davis v. Robinson*** *(1942) 50 Cal. App. 2d 700, 123 P.2d 894* , a minor, through a guardian ad litem, sued to recover damages as an entitled person under former Code Civ. Proc. § 377 [*now see Code Civ. Proc. § 377.60*] for the death of his mother. Prior to this suit, plaintiff's grandmother had also sued defendant for the wrongful death of her daughter, and had been awarded damages. Although the grandmother was caring for plaintiff, she did not disclose the child's existence in the earlier action. She was also not joined in plaintiff's action. The trial court entered judgment for plaintiff, and defendant appealed, in part, on the ground that plaintiff was collaterally estopped from bringing his action. Although the court of appeal reversed on other grounds, it stated that plaintiff was not estopped from maintaining the second action. The court distinguished other California decisions under which a judgment in, or dismissal with prejudice of, a wrongful death action had been held to operate as a bar to a subsequent wrongful death action. In none of those cases had the question been presented of the effect of a wrongful death action brought by a person who was not an entitled plaintiff under former Code Civ. Proc. § 377 [*now see Code Civ. Proc. § 377.60*]. In this case, because of plaintiff's existence, the grandmother was not an heir entitled to succeed to the decedent's estate; thus, the wrongful death action had arisen in the child's favor, not the grandmother's, on his mother's death. The court reasoned that when such a cause of action arises, it can only be defeated by a release, payment, or the receipt of something in satisfaction. The failure of a defendant to defend against the false claim of one who was not an entitled person did not operate to estop a rightful heir from prosecuting his cause of action.

NOTE:

In 1993, the legislature amended the wrongful death statute to eliminate the use of the term "heirs" to delineate persons entitled to a wrongful death cause of action. Entitled persons include, but are not limited to, certain heirs [*see Code Civ. Proc. § 377.60*]. The rule that collateral estoppel does not apply when prior action is brought by a plaintiff who does not qualify as a person entitled to a wrongful death cause of action as set out in this memorandum still applies.

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CHAPTER 66 DEATH AND SURVIVAL ACTIONS
PART II. FORMS
A. Wrongful Death Actions

6-66 California Points & Authorities § 66.43

§ 66.43 Supporting Contention That Punitive Damages Are Not Recoverable--Statute Generally Precludes Recovery [Code Civ. Proc. § 377.61]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF MAY NOT RECOVER PUNITIVE DAMAGES IN A WRONGFUL DEATH ACTION.

A. Punitive Damages Barred. A plaintiff may not recover punitive damages in a wrongful death action. California law since 1896 has been uniformly interpreted by California courts to bar the recovery of punitive damages in a wrongful death action (*see Tarasoff v. Regents of Univ. of Cal. (1976) 17 Cal. 3d 425, 450, 131 Cal. Rptr. 14, 551 P.2d 334* ; *Lange v. Schoettler (1896) 115 Cal. 388, 391, 47 P. 139*).

B. Bar of Punitive Damages Is Constitutional. California's long-established rule barring recovery of punitive damages in wrongful death actions is not unconstitutional (*see Ford Motor Co. v. Superior Court (1981) 120 Cal. App. 3d 748, 750-753, 175 Cal. Rptr. 39* ; *Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 835, 836, 174 Cal. Rptr. 348*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be used to support the contention that punitive damages are not available in a wrongful death action. The statutory authorization for punitive damages generally does provide a specific exception to this rule, permitting punitive damages in an action based on a death that resulted from a homicide for which the defendant has been convicted of a felony [*Civ. Code § 3294(d)*]. This provision is discussed in *§ 66.44*, which sets out a form of a memorandum of points and authorities supporting the contention that damages under that provision are proper.

These points and authorities may be combined, where appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the unavailability of punitive damages. For example, these points and authorities may be used to support a motion to strike [*see Code Civ. Proc. § 435(b)*] a claim for punitive damages that has been alleged in a wrongful death complaint. This form may also be used to support a general demurrer to a cause of action for punitive damages that has been separately alleged in a wrongful death complaint [*see Tarasoff v. Regents of Univ. of Cal. (1976) 17 Cal. 3d 425, 450, 131 Cal. Rptr. 14, 551 P.2d 334]* .

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing that the action seeks punitive damages in a wrongful death cause of action (rather than in a survival action, in which punitive damages may be recovered under some circumstances).

[b] Related Pleading and Practice Forms

For a discussion relating to and forms of general demurrers and motions to strike, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , and Ch. 375, *Motions to Strike* (Matthew Bender).

[c] Related Points and Authorities

For a general discussion of the alternative procedures available for eliminating an unauthorized claim for punitive damages in complaints generally, see Ch. 64, *Damages: Tort* .

[3] Discussion of Authorities

[a] Punitive Damages Barred

In ***Tarasoff v. Regents of Univ. of Cal.*** *(1976) 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334* , plaintiffs had alleged that defendant therapists had all participated in some way in failing to take reasonable care to protect their daughter, who was subsequently killed by a patient of one of the defendants. In plaintiffs' third cause of action, they sought punitive damages against the chief of the department of psychiatry who had countermanded the decision of the patient's therapist to confine the patient for observation, and who had directed that the staff take no action to confine the patient (*17 Cal. 3d 425, 430 n.2*). The court briefly disposed of this claim by affirming this part of the trial court's judgment of dismissal. It stated that California statutes and decisions have been interpreted to bar the recovery of punitive damages in a wrongful death action (*17 Cal. 3d 425, 450)* .

Lange v. Schoettler *(1896) 115 Cal. 388, 47 P. 139* , was a wrongful death action that sought to recover punitive damages. The Supreme Court reversed the trial court's judgment awarding wrongful death plaintiffs both compensatory and punitive damages. Holding that the trial court had erroneously instructed the jury that they could allow exemplary damages if the act causing death was wanton, cruel, and malicious, the Court turned to the history of former Code Civ. Proc. § 377 [*now see Code Civ. Proc. § 377.61*] to justify its result. It noted that the original wrongful death statute [Stats. 1862, ch. 330] had permitted the recovery of punitive damages, but that in 1874 this language had been deleted. The purpose of this amendment, the Court said, must have been to take away the right to exemplary damages and to make the rule accord with the general rule elsewhere.

NOTE:

In 1993, the legislature revised, reorganized, and renumbered the law regarding wrongful death and survival actions [*see Code Civ. Proc. §§ 377.10-377.50* (survival actions); *Code Civ. Proc. §§ 377.60-377.62* (wrongful death actions)]. The provisions regarding punitive damages remain substantially the same and the bar against punitive damages in a wrongful death action as set out in Paragraph A of this memorandum still applies.

[b] Bar of Punitive Damages Is Constitutional

In ***Ford Motor Co. v. Superior Court*** *(1981) 120 Cal. App. 3d 748, 175 Cal. Rptr. 39* , real parties in interest had sued petitioner for the wrongful death of their son, who was a passenger in an automobile manufactured by petitioner. In two causes of action, real parties sought compensatory damages based on theories of negligence and strict products liability. In a third cause of action, real parties sought punitive damages, alleging that petitioner had acted maliciously, oppressively, fraudulently, and in conscious disregard for the safety of others in marketing the automobile. Respondent trial court overruled petitioner's demurrer to the third cause of action. Thereafter, petitioner sought a writ of mandate requiring the trial court to sustain the demurrer.

In issuing the writ, the court of appeal rejected real parties' argument that the denial of punitive damages in wrongful death actions offends equal protection. The court first noted that although a wrongful death claimant receives less favorable treatment than all other tort plaintiffs in that punitive damages are unavailable to him or her, the constitutional guarantee of equal protection requires only that persons who are similarly situated receive similar treatment. The court observed that a plaintiff in a wrongful death action is not similarly situated to all other tort plaintiffs because he or she asserts a right that is specially created by statute, the right to recover on his or her own behalf for harm done to another, whereas the conventional tort plaintiff recovers for harm that is personal to him or her. The court held that equal protection is not violated when persons in different situations receive different treatment (*120 Cal. App. 3d 748, 751)* .

Real parties also contended that the punitive damages rule denied equal protection to heirs of an injured person who dies instantaneously because no heir can recover punitive damages on his or her behalf. However, if an injured person does not die immediately, his or her heirs will be able to recover damages indirectly; a cause of action for exemplary damages survives the decedent for all loss or damages sustained by him or her prior to his or her death [*see* former Prob. Code § 573 *now see Code Civ. Proc. § 377.34*)]. The court noted that this legislation appears to treat similarly-situated groups differently, but concluded that the classification does not offend equal protection. The court stated that under both federal and California law, the rational basis test was appropriate to determine the constitutional validity of the wrongful death statute; that is, the statute must be upheld if a rational relationship is found between the statute and a valid legislative object (*120 Cal. App. 3d 748, 751-752)* . The court concluded that the rule prohibiting punitive damages when the injured person dies instantaneously, but permitting them when he or she does not, is rationally related to the valid legislative objective of placing a reasonable limit on wrongful death recoveries and is based on a determination that the deterrence and retribution purposes of the punitive damages statute are best served when the tortfeasor must pay exemplary damages to the victim personally (*120 Cal. App. 3d 748, 752-753)* .

Grimshaw v. Ford Motor Co. *(1981) 119 Cal. App. 3d 757, 174 Cal. Rptr. 348* , was a products liability action, brought against Ford, as the manufacturer of the Pinto automobile, following an accident in which the driver of a Pinto was killed, and the passenger was seriously injured. There was substantial evidence at trial to show that Ford's top management had been aware of design defects in the Pinto, and had been aware that those defects would result in injury or death to consumers involved in collisions at 20 to 30 miles per hour. There was also substantial evidence to show that Ford's management knew that such defects could be easily corrected, at minimal cost, but that a conscious decision was made, on cost-benefit analysis, to defer making any corrections.

The passenger and the driver's heirs brought suit, and after a jury trial, both groups of plaintiffs were awarded compensatory damages. Plaintiff passenger was also awarded punitive damages, but because plaintiff heirs had sued for wrongful death, the trial court had, at the outset, refused to permit them to amend their complaint to include a punitive damages claim. Plaintiff heirs cross appealed from the judgment to the extent that they were precluded from claiming punitive damages. They argued, among other things, that because former Code Civ. Proc. § 377 [*now see Code Civ. Proc. § 377.61*] disallows punitive damages for wrongful death actions, while former Prob. Code § 573 [*now see Code Civ. Proc. § 377.34*] allows such damages in survival actions, the prohibition of punitive damages in wrongful death actions effects an arbitrary, unreasonable distinction that violates the *equal protection clauses* of the state and federal Constitutions.

The court of appeal upheld the constitutionality of the statutory prohibition against punitive damages in wrongful death actions. It held that there is a rational basis for the distinction between the wrongful death and survival statutes. When a claim for punitive damages exists at decedent's death (as it did here because the decedent did not die instantly in the accident), such a claim would be enforceable by the decedent's personal representative in a survival action, under former Prob. Code § 573 [*now see Code Civ. Proc. § 377.30*]. If plaintiffs in a wrongful death action had an independent right to recover punitive damages in that action, double recovery by those plaintiffs, and double punishment of the defendant, could occur (*119 Cal. App. 3d 757, 835)* . Therefore, the court held, with respect to the class of persons whose decedent had a claim for punitive damages at death, there is no violation of equal protection in precluding their recovery of punitive damages in a wrongful death action (*119 Cal. App. 3d 757, 836)* .

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6-66 California Points & Authorities § 66.44

§ 66.44 Opposing Contention That Punitive Damages Are Not Recoverable--Punitive Damages Available Because Defendant Has Been Convicted of Felony for Homicide of Decedent [Civ. Code § 3294(d)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF MAY RECOVER PUNITIVE DAMAGES IN THIS WRONGFUL DEATH ACTION BECAUSE IT IS BASED ON A DEATH THAT RESULTED FROM A HOMICIDE FOR WHICH THE DEFENDANT HAS BEEN CONVICTED OF A FELONY.

Punitive Damages Not Barred When Death Results From Felony Homicide. Plaintiff may recover punitive damages in a wrongful death action brought pursuant to *Code of Civil Procedure Section 377.60* if the action is based on a death that resulted from a homicide for which the defendant has been convicted of a felony, whether or not the decedent died instantly or survived the injury for some period of time (*Civ. Code § 3294(d)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose the contention that a wrongful death plaintiff may not recover punitive damages when the wrongful death action is based on a death that resulted from a homicide for which the defendant has been convicted of a felony.

These points and authorities may be combined, where appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to refute the general unavailability of punitive damages. For example, these points and authorities may be used to oppose a motion to strike made on the ground that punitive damages were improperly alleged in a wrongful death complaint. The ground of opposition set forth is that punitive damages may properly be awarded in the action because it is based on a death that resulted from a homicide for which defendant was convicted of a felony [*see Civ. Code § 3294(d)*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the point of law stated. Counsel should probably also attach a certified copy of the judgment of conviction entered against defendant in the felony homicide proceeding.

[b] Related Pleading and Practice Forms

For discussion and forms pertaining to motions to strike generally, see California Forms of Pleading and Practice, Ch. 375, *Motions to Strike* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda of points and authorities opposing motions to strike generally, see Ch. 160, *Motions to Strike* .

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[Reserved]

§§ 66.45[Reserved]

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6-66 California Points & Authorities § 66.60

§ 66.60 Supporting Contention That Action Does Not Survive Death--Invasion of Privacy Action Does Not Survive

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF DOES NOT HAVE A CAUSE OF ACTION FOR INVASION OF PRIVACY IN THAT THE PERSON WHOSE PRIVACY WAS ALLEGEDLY INVADED HAS DIED AND THE DECEASED IS NOT A "DECEASED PERSONALITY" AS USED IN *CIVIL CODE SECTION 3344.1*.

A. Exceptions to Survival Statute. Although *Code of Civil Procedure Sections 377.20, 377.30,* and *377.40* provide that a cause of action is not lost by reason of the death of any person but may be maintained by or against the person's personal representative or successor in interest, there are decisional exceptions to this rule of survival (*see Poon v. Poon (1966) 244 Cal. App. 2d 746, 751 n.3, 53 Cal. Rptr. 365*).

B. Invasion of Privacy. Except for "deceased personalities" within the meaning of *Civil Code Section 3344.1*, the right of privacy is a purely personal right and a cause of action based on invasion of the right of privacy does not survive but dies with the person (*see Lugosi v. Universal Pictures (1979) 25 Cal. 3d 813, 824, 160 Cal. Rptr. 323, 603 P.2d 425* ; *Flynn v. Higham (1983) 149 Cal. App. 3d 677, 683, 197 Cal. Rptr. 145*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted to support the contention that a cause of action for invasion of privacy does not survive the death of the person whose privacy has been invaded.

These points and authorities may be combined, where appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to raise the nonsurvival issue. Thus, these points and authorities may be

used to support a general demurrer to a complaint for invasion of privacy when the demurrer asserts that the complaint fails to state facts sufficient to constitute a cause of action in that it appears on the face thereof, or from a matter of which the court is required to or may take judicial notice, that the person whose privacy was allegedly invaded is deceased. If plaintiff is suing for the invasion of privacy rights involving the use of a deceased personality's name, voice, signature, photograph, or likeness under *Civ. Code § 3344.1*, defendant may still be able to demur to the complaint if the deceased was not a "personality" within the meaning of *Civ. Code § 3344.1*, or if plaintiff is not the proper person to exercise consent over such rights or has otherwise failed to comply with the requirements of *Civ. Code § 3344.1* to fix these rights. These points and authorities may also be used to support a defendant's motion for summary judgment [*see Code Civ. Proc. § 437c*]. A motion for summary judgment can be used if the plaintiff dies after commencement of the action.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing that the action is one for invasion of privacy, that the person whose privacy has been invaded has died, and that person is not a deceased personality.

[b] Related Points and Authorities

For forms of points and authorities supporting and opposing a plaintiff's standing to assert the rights of a deceased personality under *Civ. Code § 3344.1*, see Ch. 184, *Privacy: Invasion of Privacy* .

[3] Discussion of Authorities

[a] Exceptions to Survival Statute

In ***Poon v. Poon*** *(1966) 244 Cal. App. 2d 746, 53 Cal. Rptr. 365* , decedent's administrator moved to substitute himself as plaintiff in an action initiated by decedent for divorce, division of community property, and recovery of property. The trial court denied the motion and the administrator appealed. The court of appeal reversed as to the actions for recovery of property. In reaching this conclusion, the court noted that under *Code Civ. Proc. § 385*, if any cause of action survived decedent, the substitution of the administrator on those causes of action was mandatory. Although the statutory language broadly states that, except as provided by statute, no cause of action shall be lost by reason of the death of any person [*see Code Civ. Proc. § 377.20(a)* (restating language originally added to former Prob. Code § 573 in 1961)], and therefore appears to make all causes of action survivable, even after this language was added to the statute the Supreme Court has applied the rule that an action for divorce does not survive [*see McClenny v. Superior Court (1964) 62 Cal. 2d 140, 147, 41 Cal. Rptr. 460, 396 P.2d 916]* . Therefore, it is apparent that former *Prob. Code § 573* [*now see* Code Civ. Proc. § 377.20] does not merit such a broad interpretation (*244 Cal. App. 2d 746, 751 n.3*).

[b] Invasion of Privacy

In ***Lugosi v. Universal Pictures*** *(1979) 25 Cal. 3d 813, 160 Cal. Rptr. 323, 603 P.2d 425* , plaintiffs, the widow and surviving son, respectively, of the actor Bela Lugosi, brought an action to recover profits that defendant had allegedly appropriated and to enjoin defendant from continuing to appropriate property consisting of the unique individual likeness and appearance of Bela Lugosi in the role of Count Dracula. The trial court found that Lugosi had during his lifetime a protectable property or proprietary right in his facial characteristics and the individual manner of his appearance and likeness as Count Dracula; the property right did not terminate with Lugosi's death but descended to his heirs; and they acquired all right, title, and interest in the property under Lugosi's will. Accordingly, the trial court entered judgment for plaintiffs for damages and an injunction.

The Supreme Court reversed. The Court found that the interest in question was not one of property under Code Civ. Proc. § 654, but was instead a right of publicity that Lugosi had during his lifetime to market his likeness in the role of Count Dracula, a form of the fourth right of privacy Prosser had found in his analysis of the right of privacy [*see* Prosser, *Privacy, 48 Cal. L. Rev. 383, 389 (1960)*]. The Court pointed out that California courts have refused to extend

to the heirs of the potential plaintiff the right to recover for the invasion of the "right to be left alone." The Court extended this rule to that right of privacy considered the right of publicity, which the Court defined as the reaction of the public to name and likeness, which may be fortuitous or which may be managed or planned, and which endows the name and likeness of the person involved with commercially exploitable opportunities. The Court held that, if this right has not been exploited for commercial purposes during the lifetime of the artist (as Lugosi had not done during his lifetime), the opportunity to exploit that right does not survive the artist's death. It stated that the right to exploit name and likeness is personal to the artist and must be exercised, if at all, by the artist during his or her lifetime (*25 Cal. 3d 813, 824)* .

The 1984 enactment of former Civ. Code § 990 [*now see Civ. Code § 3344.1*] has abrogated the Court's holding to the extent that a plaintiff suing for the unauthorized use of a deceased personality's name, voice, signature, photograph, or likeness has satisfied all the requirements of former Civ. Code § 990 [*now see Civ. Code § 3344.1*] for obtaining and exercising those rights. For forms supporting and opposing the exercise of rights under former Civ. Code § 990 [*now see Civ. Code § 3344.1*], see Ch. 184, *Privacy: Invasion of Privacy* .

Flynn v. Higham *(1983) 149 Cal. App. 3d 677, 197 Cal. Rptr. 145* , concerned a book written and published by defendants that purported to give details of the life of plaintiff's deceased father. Plaintiff brought an action alleging invasion of privacy. The trial court sustained defendants' demurrer with leave to amend and entered judgment for defendants when plaintiff failed to amend the complaint. Plaintiff appealed.

The court of appeal upheld the judgment. With respect to the allegation of invasion of privacy, the court stated that the right to privacy does not survive, but dies with the person. The court further stated that it is well settled that the right to privacy is purely a personal one and cannot be asserted by anyone other than the person whose privacy has been invaded. Thus, the court stated, it is clear that the publication must contain some direct reference to the plaintiff. The court concluded that plaintiff cannot recover when his or her only relation to the wrong is that he or she is related to the victim of the invasion of privacy and was unwittingly brought into the limelight, or when the publication was directed at another and referred only incidentally to plaintiff (*149 Cal. App. 3d 677, 683)* .

[4] Additional Authorities

[a] Invasion of Privacy

In *Hendrickson v. California Newspapers, Inc. (1975) 48 Cal. App. 3d 59, 121 Cal. Rptr. 429* , a widow and child brought an action for invasion for their right to privacy against defendant newspaper, which published an obituary of decedent that revealed a prior criminal conviction. The trial court sustained defendant's demurrer without leave to amend, and plaintiffs appealed from the resulting judgment of dismissal. The court of appeal affirmed on the ground that no direct invasion of plaintiffs' right of privacy had occurred. In explaining its conclusion, the court noted that the right of privacy was purely a personal right which could not be asserted by anyone other than the person whose privacy was invaded. This meant that the victim must plead and prove that his or her privacy was invaded and the right does not survive but dies with the person.

In *Metter v. Los Angeles Examiner (1939) 35 Cal. App. 2d 304, 95 P.2d 491* , plaintiff filed a complaint seeking damages for violation of his right of privacy against a newspaper that had published a photograph of his wife, who had committed suicide. The court granted a directed verdict in favor of each defendant at the conclusion of plaintiff's case and plaintiff appealed. The court of appeal affirmed, holding that one cannot claim a right of privacy with regard to circumstances that, from the nature of things and by operation of law, cannot remain private. The court reviewed the fundamental aspects of the right of privacy, including the principle that invasion of the right of privacy is a purely personal action and does not survive, but dies with the person. The court added that because whatever right of privacy was possessed by plaintiff's deceased spouse died with her, plaintiff's case was based on his assertion of a relational right of privacy or a right to be spared unhappiness through publicity concerning another because of one's relationship

with that person. The court rejected this theory because, on the facts of the case, the decedent by her own conduct had waived any existing right of privacy, relational or otherwise, that might apply.

NOTE:

In the cases discussed in *§§ 66.60[3]* and *66.60[4]*, the courts were not asked to determine whether an action for invasion of privacy initiated by a decedent during lifetime survived his or her death [*see Code Civ. Proc. § 377.21* (pending action does not abate on death if cause of action survives)]. The statement in *Lugosi*, that the right to exploit name and likeness is personal and must be exercised by the decedent during his or her lifetime [*see Lugosi v. Universal Pictures (1979) 25 Cal. 3d 813, 824, 160 Cal. Rptr. 323, 603 P.2d 425]* , suggests that the rule of nonsurvival might not apply if it is so exercised, such as perhaps by filing suit to protect the right. However, if the decedent took no action whatsoever to assert the right during lifetime, the cases would appear to bar the personal representative from maintaining the suit as a survival action.

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6-66 California Points & Authorities § 66.61

§ 66.61 Supporting Contention That Cause of Action Does Not Survive Death--Property Damage Occurred Simultaneously With Death

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE CAUSE OF ACTION FOR DECEDENT'S PROPERTY DAMAGE DOES NOT SURVIVE THE DEATH OF THE PROPERTY OWNER BECAUSE THE DAMAGE OCCURRED SIMULTANEOUSLY WITH THE OWNER'S DEATH.

Damage Simultaneous With Death. A cause of action for damage to personal property does not survive the death of the property owner if the death and the damage occur simultaneously, because in that situation no cause of action arises during the property owner's lifetime and, thus, there is no cause of action to survive (*Pease v. Beech Aircraft Corp. (1974) 38 Cal. App. 3d 450, 459-460, 113 Cal. Rptr. 416*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted to support the contention that an action for property damage brought by the personal representative or the survivor in interest of a decedent does not survive the death of the decedent because the damage occurred simultaneously with the property owner's death.

These points and authorities may be combined, where appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to refute the survival of this type of action. For example, these points and authorities may be used to support a general demurrer to a complaint by a decedent's personal representative or successor in interest under *Code Civ. Proc. § 377.30* (survival action) for damage to the decedent's property. The demurrer asserts that the complaint fails to state facts sufficient to constitute a cause of action in that it appears on the face thereof that the property damage occurred simultaneously with the death of the property owner. These points and

authorities may also be used to support a defendant's motion for summary judgment [*see Code Civ. Proc. § 437c*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing that the property damage that is the basis for the action occurred simultaneously with the decedent's death.

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 66.66* may be used to oppose the contention supported by this points and authorities.

[3] Discussion of Authorities

[a] Damage Simultaneous With Death

In ***Pease v. Beech Aircraft Corp.*** *(1974) 38 Cal. App. 3d 450, 113 Cal. Rptr. 416* , the personal representatives and heirs of four men killed in an airplane crash and the owner of the airplane brought a cause of action that sought punitive damages from the airplane manufacturer. The jury returned a verdict for compensatory and punitive damages but the trial court granted defendant's motion for new trial as to each of the awards of punitive damages on the ground of erroneous jury instructions. On appeal, the court of appeal affirmed as to the owner of the airplane and held that the personal representatives and heirs did not have a cause of action for punitive damages. The court reasoned that the parties' stipulation that decedents died as a result of this accident and in this accident determined that death occurred simultaneously with the loss of or damage to the personal property. In view of this stipulation as to the cause and time of death, no cause of action arose during the lifetime of the decedents. Therefore, there was no cause of action to survive. The court noted that although former Prob. Code § 573 [*now see Code Civ. Proc. § 377.30*] provides for the survival of a cause of action against a tortfeasor who dies simultaneously with the loss or damage to property, there is no similar provision declaring a survivable cause of action if the injured party dies simultaneously with the property damage.

NOTE:

At least one court has held that if an interval of time, no matter how brief, elapses between injury to the property and death, the claim for property damage survives [Stencel v. *Aero Eng'g Corp. v. Superior Court (1976) 56 Cal. App. 3d 978, 987-988, 128 Cal. Rptr. 691* ; *see § 66.66*]. However, the constitutionality of such a distinction has been questioned. In one case, for example, the court stated in dicta that a statutory scheme that would punish a tortfeasor who inflicts death-causing injury that does not result in simultaneous death, but would not punish if death occurs instantaneously, is difficult to explain on the basis of any conceivable, realistic, rational purpose [*Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 834, 174 Cal. Rptr. 348]* . Also, there are cases in which tortious conduct precedes but does not cause death, and the cause of action is incomplete at death [*see § 66.65*]. In these cases, the courts have held that a survival action lies even if the cause of action accrues at or after death [*see Granquist v. Sandberg (1990) 219 Cal. App. 3d 181, 186-188, 268 Cal. Rptr. 109* (immature rights may ripen at death into valid survival action); *Carr v. Progressive Cas. Ins. Co. (1984) 152 Cal. App. 3d 881, 888-891, 199 Cal. Rptr. 835* (valid survival action for insurance bad faith even though cause of action did not accrue until after death)].

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6-66 California Points & Authorities § 66.62

§ 66.62 Supporting Contention That Cause of Action Does Not Survive Death--Death Before Rendering of Judgment Excludes Damages for Pain and Suffering [Code Civ. Proc. § 377.34]

[1] FORM

[*The following may be included in a memorandum or points and authorities, or in a trial or appellate brief.*]

THE CAUSE OF ACTION FOR DECEDENT'S PAIN AND SUFFERING DOES NOT SURVIVE THE DECEDENT.

Death Before Judgment. Although a court may still render judgment when a plaintiff dies after trial but before the judgment has been rendered, a cause of action for pain and suffering does not survive the death of the plaintiff (*Kellogg v. Asbestos Corp. Ltd. (1996) 41 Cal. App. 4th 1397, 1404, 49 Cal. Rptr. 2d 256*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a defendant's contention that since the plaintiff died before judgment was rendered, the judgment may not include damages for pain and suffering.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that damages for pain and suffering are not available because of the death of the person having the cause of action. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing how the requested damages can be identified as being for the pain and suffering of the deceased.

[3] Discussion of Authorities

[a] Death Before Judgment

In ***Kellogg v. Asbestos Corp. Ltd.*** *(1996) 41 Cal. App. 4th 1397, 49 Cal. Rptr. 2d 256* , plaintiff sued for personal injuries based on exposure to asbestos-related products. After trial, but before the court had rendered judgment, plaintiff died. The trial court subsequently rendered judgment in favor of plaintiff. Defendant appealed, contending that plaintiff's award was improper because it included damages for pain and suffering.

The court noted that *Code Civ. Proc. § 669* authorizes a court to render a judgment if a party dies after trial and submission of the case to a judge sitting without a jury. It was thus appropriate for the trial court to render judgment However, under former Prob. Code § 573(c) [*now see Code Civ. Proc. § 377.34*] where a person dies before judgment damages for pain and suffering are excluded (*41 Cal. App. 4th 1397, 1404)* . The trial court's statement of decision did not clarify whether its judgment included damages for pain and suffering, but based on the record and the amount of the judgment, the court of appeal concluded that a significant portion of the award was intended to be for pain and suffering. The court thus reversed the judgment, and remanded the cause for a determination of the amount of economic damages suffered by the deceased in his lifetime.

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-66 California Points & Authorities § 66.62A

§ 66.62A Supporting Contention That Plaintiff May Not Recover Punitive Damages--No Compensatory Damages Recoverable [Code Civ. Proc. § 377.34]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF MAY NOT RECOVER PUNITIVE DAMAGES BECAUSE THE ONLY ACTUAL INJURY TO DECEDENT ALLEGED WAS PAIN AND SUFFERING. AS NO COMPENSATORY DAMAGES MAY BE RECOVERED BY PLAINTIFF FOR THIS INJURY, THERE IS NO BASIS FOR AN AWARD OF PUNITIVE DAMAGES.

No Punitive Damages When Pain and Suffering are Only Alleged Injury. If the only injury alleged in a survival action is the decedent's emotional distress, there is no basis for an award of punitive damages because the decedent's representative is precluded by statute from recovering for the decedent's pain and suffering and punitive damages may be awarded only when there are compensatory damages (*Berkley v. Dowds (2007) 152 Cal. App. 4th 518, 530-532, 61 Cal. Rptr. 3d 304*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of defendant's contention that plaintiff in a survival action may not recover punitive damages when the only injury alleged to decedent was injury in the form of pain, suffering, or mental distress. Because compensatory damages are not recoverable for this type of injury in a survival action, punitive damages may not be awarded in the absence of another basis for compensatory damages.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that plaintiff's punitive damage claim is untenable, for example, in a motion for summary judgment. They may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the type of injury to decedent alleged by the plaintiff and argue that no compensatory damages may be awarded for such injury, thus precluding an award of punitive damages.

[3] Discussion of Authorities

[a] No Punitive Damages When Pain and Suffering are Only Alleged Injury

In *Berkley v. Dowds (2007) 152 Cal. App. 4th 518, 61 Cal. Rptr. 3d 304* , a medical corporation sued a widow as the personal representative of her husband's estate for unpaid medical bills incurred for services provided to the widow's husband before he died after sustaining injuries in an automobile accident. The widow filed a cross-complaint against the corporation and other individuals and entities, alleging that these parties were obligated by contract to provide decedent with proper referrals to health care providers and to obtain necessary testing and rehabilitative services in order to prevent deterioration of his condition and promote improvement following his accident. One of the parties sued by the widow included a physician who took part in providing decedent with care after the accident. This physician demurred to the complaint, and the trial court sustained the physician's demurrer without leave to amend. The widow appealed.

The court of appeal affirmed. The court first held that the widow failed to allege a cause of action for negligence or willful misconduct against the physician, because she failed to allege either an actionable duty of care or any specific conduct on the part of the physician that breached a duty of care to decedent or caused any injury to decedent (*152 Cal. App. 4th 518, 526-529)* . In the absence of a valid cause of action against the physician, the court also held that the widow could not recover against the physician under the Elder or Dependent Adult Abuse statute, *Welf. & Inst. Code § 15600 et seq.* (*152 Cal. App. 4th 518, 529)* . Addressing the widow's cause of action for intentional infliction of emotional distress, the court held that because the only actual injury alleged was the emotional distress of the decedent, she could not recover either compensatory damages or punitive damages. Compensatory damages were barred by *Code Civ. Proc. § 377.34*, which precludes recovery in a survival action for a decedent's pain, suffering, or disfigurement. In the absence of any recoverable compensatory damages, the court held that the widow could not recover punitive damages. The court noted that under established law, punitive damages must be accompanied by an award of compensatory damages in some amount, or its equivalent, such as restitution, an offset, damages presumed by law, or nominal damages (*152 Cal. App. 4th 518, 530-532)* . The court declined to follow the court of appeal in *Gagnon v. Continental Casualty Co. (1989) 211 Cal. App. 3d 1598, 260 Cal. Rptr. 305* , which held that punitive damages could be pursued in these circumstances, after concluding that the authorities cited in *Gagnon* were cases in which actual damages were presumed (*152 Cal. App. 4th 518, 532)* .

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6-66 California Points & Authorities § 66.63

§ 66.63 Opposing Contention That Cause of Action Does Not Survive Death--Death Occurring After Judgment Does Not Exclude Damages for Pain and Suffering [Code Civ. Proc. § 377.34]

[1] FORM

[*The following may be included in a memorandum or points and authorities, or in a trial or appellate brief*].

THE CAUSE OF ACTION FOR DECEDENT'S PAIN AND SUFFERING SURVIVES DECEDENT'S DEATH WHEN THAT DEATH OCCURRED AFTER ENTRY OF JUDGMENT IN THE ACTION.

A. Survival of Causes of Action for Personal Torts. In an action or proceeding by a decedent's personal representative or successor in interest on the decedent's cause of action, the damages recoverable are limited to the loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived, and do not include damages for pain, suffering, or disfigurement (*Code Civ. Proc. § 377.34*).

B. Death After Judgment Does Not Abate Right to Recover Damages for Pain and Suffering. *Code of Civil Procedure § 377.34* does not bar recovery for pain and suffering damages awarded in a judgment if the plaintiff dies after that judgment is rendered but while an appeal is pending (*Sullivan v. Delta Air Lines, Inc. (1997) 15 Cal. 4th 288, 305, 63 Cal. Rptr. 2d 74, 935 P.2d 781*).

[*Optional*] **C. Judgment Entered Nunc Pro Tunc.** When a court validly exercises its discretion to issue a judgment nunc pro tunc, the date of that retroactive judgment determines whether *Code of Civil Procedure Section 377.34* bars recovery of damages for pain and suffering (*Cadlo v. Metalclad Insulation Corp. (2007) 151 Cal. App. 4th 1311, 1321-1322, 61 Cal. Rptr. 3d 104*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to defendant's contention that plaintiff's damage claim does not survive his or her death. The basis of the opposition is that plaintiff's damage claim survives because his or her death occurred after judgment was rendered while the action was pending on appeal, therefore *Code Civ. Proc. § 377.34* does not bar recovery.

They may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that plaintiff's damage claim survives his death after judgment, for example in an opposition to a motion for summary judgment. They may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence of the date on which judgment was entered for plaintiff, and the date of plaintiff's death, and argue that plaintiff's damage claim survives because he or she died after judgment was entered and while the appeal was pending.

[c] Related Pleading and Practice Forms

For forms of complaint for damages for wrongful death, see California Forms of Pleading and Practice, Ch. 181, *Death and Survival Actions* (Matthew Bender).

[d] Opposing Points and Authorities

If appropriate, the points and *authorities in § 66.62* may be used to oppose these points and authorities.

[3] Discussion of Authorities

[a] Death After Judgment Does Not Abate Right to Recover Damages for Pain and Suffering

In ***Sullivan v. Delta Air Lines, Inc.*** *(1997) 15 Cal. 4th 288, 63 Cal. Rptr. 2d 74, 935 P.2d 781* , plaintiff filed an action alleging 14 causes of action against his former employer, arising from the termination of his employment. The trial court granted defense motions for summary judgment on seven of the causes of action, the jury returned special verdicts for defendant on three causes of action, and three special verdicts for plaintiff on three causes of action; on those causes of action the jury awarded plaintiff damages for emotional distress. The trial court rendered a purported judgment on the three verdicts in plaintiff's favor but did not render judgment on either the three defense verdicts or on its orders granting the defense motions for summary judgment. Defendant appealed and plaintiff died while the appeal was being briefed. Plaintiff's mother was appointed special administrator and substituted as plaintiff. The court of appeal requested supplemental briefing on the question of whether the judgment should be reversed on the ground that damages for pain and suffering were no longer recoverable because of plaintiff's death. In its decision the court of appeal construed, *Code Civ. Proc. § 377.34* to bar recovery of damages for pain and suffering awarded in a judgment if the plaintiff dies while an appeal is pending, stressing that the statute applied generally to "an action," and construed that word to include an appeal. Accordingly, the court of appeal concluded that no damages were recoverable on the three causes of action on which the jury found defendant liable. The Supreme Court granted review to determine the correct construction of *Code Civ. Proc. § 377.34*.

The Supreme Court concluded that *Code Civ. Proc. § 377.34*, like its predecessors former Civ. Code § 956 and former Prob. Code § 573, did not abolish the common law rule that death after judgment does not abate any aspect of personal tort actions, including the right to recover damages for pain and suffering. Therefore, it held that *Code of Civil Procedure § 377.34* did not bar recovery for pain and suffering damages awarded in a judgment if the plaintiff dies after that judgment is rendered but while an appeal is pending (*15 Cal. 4th 288, 305)* . The Court traced the statutory history

of survival law before determining that the current statute, *Code Civ. Proc. § 377.34*, did not apply where a judgment for damages is rendered while the decedent is alive but the decedent dies during the pendency of an appeal from that judgment. It disagreed with the appeal's court conclusion that the statutory phrase "[i]n an action" included "appeal," finding that the inference was not supported by the California Law Review Commission comments regarding the statute, nor by the legislature's common use of the phrase as a term of art. The Court also disagreed with defendant's primary contention which was based on an interpretation of language in former Prob. Code § 573, the predecessor statute to *Code Civ. Proc. § 377.34*. Defendant argued that the statute's reference to a plaintiff who dies "before judgment" meant before resolution of the appeal and reached this conclusion by reading before judgment to mean before "final judgment" and by taking the position that a judgment is not final until it has been affirmed on appeal or the time for appeal has passed. While acknowledging that this was one of the meanings of he phrase "final judgment," the Court instead interpreted the phrase to mean before rendition of a judgment that is final in the fundamental sense that it leaves no issue to be determined between the parties except the fact of compliance (*15 Cal. 4th 288, 305)* .

[b] Judgment Entered Nunc Pro Tunc

In *Cadlo v. Metalclad Insulation Corp. (2007) 151 Cal. App. 4th 1311, 61 Cal. Rptr. 3d 104* , plaintiffs were a former naval machinist mate and his wife who brought suit against suppliers of asbestos-containing products with which the machinist mate came into contact in the 1960s while serving in the U.S. Navy. The jury found for the plaintiffs and awarded damages, including noneconomic damages and future medical and economic damages. Two days after the jury rendered its verdict, the machinist mate died of diseases related to his asbestos exposure. The court originally entered its judgment 11 days after this plaintiff died, but on request from the remaining plaintiff, vacated the original judgment and issued a new judgment nunc pro tunc that was backdated to the day after the jury verdict was delivered, which was the day before the machinist mate died. Defendants appealed, arguing that because the machinist mate died before judgment was originally rendered, the trial court lacked the authority to award noneconomic or future damages.

The court of appeal affirmed the trial court. Relying on the analysis of the Supreme Court in *Sullivan v. Delta Air Lines, Inc.*, discussed in [a], *above*, and other court of appeal decisions, the court held that when a trial court validly exercises its discretion to issue a judgment nunc pro tunc, the date of that retroactive judgment determines whether *Code Civ. Proc. § 377.34* bars recovery of specified damages, including damages for pain and suffering (*151 Cal. App. 4th 1311, 1321-1322)* . The court then held that the trial court did not abuse its discretion in entering judgment nunc pro tunc in the instant case. At the time of the machinist mate's death, a special verdict had already been filed and the case was in a posture at which a final, appealable judgment could have been entered, even prior to resolution of any post-trial motions. The court rejected defendants' argument that the delay in entering the original judgment was caused by the plaintiffs. The court also held that the trial court properly concluded that the retroactive judgment was necessary "to avoid injustice," as a contrary conclusion would have provided defendants a windfall by avoiding liability for decedent's pre-death pain and suffering (*151 Cal. App. 4th 1311, 1322-1324)* .

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6-66 California Points & Authorities § 66.64

§ 66.64 Opposing Contention That Cause of Action Does Not Survive Death--Decedent Need Not Have Commenced Punitive Damages Action Prior to Death

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

A DECEDENT'S EXECUTOR OR ADMINISTRATOR MAY COMMENCE A SURVIVABLE CLAIM FOR PUNITIVE DAMAGES BASED ON A CAUSE OF ACTION FOR INTENTIONAL TORT WITHOUT SHOWING THAT THE DECEDENT INITIATED SUCH AN ACTION PRIOR TO HIS/HER DEATH.

A. No Cause of Action Lost by Death. As a general rule, no cause of action is lost by reason of the death of any person but may be maintained by the person's personal representative or, if none, by the person's successor in interest (*Code Civ. Proc. §§ 377.20(a), 377.30*).

B. Punitive Damages Action Prior to Death Is Not Required. A complaint by decedent's executor or administrator may sufficiently plead the existence of a survivable claim for punitive damages based on a cause of action for intentional tort without alleging that decedent initiated the action prior to his or her death (*Dunwoody v. Trapnell (1975) 47 Cal. App. 3d 367, 369-370, 120 Cal. Rptr. 859*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted to oppose the contention that a claim for punitive damages does not survive the death of the plaintiff because the plaintiff did not initiate the action before his or her death.

These points and authorities may be combined, where appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to address the issue of survivability of a punitive damages claim. For

example, these points and authorities may be used to oppose a demurrer to a complaint for punitive damages based on the commission of an intentional tort where the demurrer asserts that the complaint fails to state a cause of action in that it shows on its face that the action for punitive damages was initiated by decedent's personal representative and not by the decedent prior to his or her death.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing that the survival action is a claim for punitive damages based on the commission of an intentional tort.

[b] Related Pleading and Practice Forms

For a form of complaint for damages for a surviving cause of action, see California Forms of Pleading and Practice, Ch. 181, *Death and Survival Actions* (Matthew Bender).

[3] Discussion of Authorities

[a] Punitive Damages Action Prior to Death Is Not Required

In ***Dunwoody v. Trapnell*** *(1975) 47 Cal. App. 3d 367, 120 Cal. Rptr. 859* , decedent's executor sought punitive damages for various intentional torts allegedly committed by defendants. The trial court sustained defendants' demurrers without leave to amend and plaintiff appealed from the resulting judgment of dismissal. The court of appeal reversed, holding that a claim for punitive damages did, under former Prob. Code § 573 [*now see Code Civ. Proc. § 377.30*], survive and could be prosecuted after the injured person's death by the personal representative, even though the decedent had not commenced an action for punitive damages prior to death. Defendants, on appeal, emphasized *Herrero v. Atkinson (1964) 227 Cal. App. 2d 69, 72, 38 Cal. Rptr. 490* , which permitted the survival of a personal injury action commenced before the plaintiff's death, and language in former Prob. Code § 573 [*now see Code Civ. Proc. § 377.34*] that punitive damages may be recoverable by the executor when the person having a cause of action dies before judgment; they argued that former Prob. Code § 573 [*now see Code Civ. Proc. § 377.34*] expressed a legislative intention to allow a plaintiff's cause of action to survive only if it was pending at the time of plaintiff's death. The court pointed out, however, that the predecessor statute had disallowed recovery of punitive damages and that a law revision commission had recommended that nonsurvival of punitive damages be continued. The Legislature rejected this recommendation and explicitly allowed the survival of punitive damages in former Prob. Code § 573 [*now see Code Civ. Proc. § 377.34*]. The statute contains nothing to suggest that the action survives only if the decedent filed suit before death and thus it appears that the legislature intended to change the former rule.

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6-66 California Points & Authorities § 66.65

§ 66.65 Opposing Contention That Cause of Action Does Not Survive Death--Complete Cause of Action Need Not Have Accrued Prior to Death

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

A COMPLAINT BY DECEDENT'S PERSONAL REPRESENTATIVE OR SUCCESSOR IN INTEREST CAN SATISFY THE REQUIREMENTS FOR PLEADING THE EXISTENCE OF A SURVIVABLE CLAIM BASED ON A RIGHT OF DECEDENT THAT DID NOT MATURE INTO AN ACTIONABLE CLAIM UNTIL AFTER HIS/HER DEATH.

A. No Cause of Action Lost by Death. [*See § 66.64, Paragraph A.*]

B. Complete Cause of Action Prior to Death Is Not Required. A cause of action that survives the death of the potential plaintiff may be stated on the basis of a preexisiting right that does not mature into an actionable claim until after the decedent's death (*Granquist v. Sandberg (1990) 219 Cal. App. 3d 181, 186, 268 Cal. Rptr. 109* ; *Carr v. Progressive Cas. Ins. Co. (1984) 152 Cal. App. 3d 881, 888-891, 199 Cal. Rptr. 835*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted to oppose the contention that a cause of action does not survive the death of a decedent merely because it does not mature into an actionable claim until after the decedent's death.

These points and authorities may be combined, where appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the survivability of such an action. For example, these points and authorities may be used to oppose a demurrer to a complaint when the demurrer asserts that the complaint

fails to state a cause of action in that it shows on its face that the claim was not actionable during the decedent's lifetime.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion regarding the nature of the claim and when it became actionable in relationship to the death of the decedent.

[b] Related Pleading and Practice Forms

For a form of complaint for a surviving cause of action, see California Forms of Pleading and Practice, Ch. 181, *Death and Survival Actions* (Matthew Bender).

[3] Discussion of Authorities

[a] Complete Cause of Action Prior to Death Is Not Required

In ***Granquist v. Sandberg*** *(1990) 219 Cal. App. 3d 181, 268 Cal. Rptr. 109* , decedent's personal representative sued defendant attorney for legal malpractice. Decedent, who was over age 70 and in poor health, had been represented by defendant in a personal injury action. Decedent's action was entitled to preferential trial setting under *Code Civ. Proc. § 36(a)*, because of his age. Nevertheless, defendant failed to seek an expedited trial date under the statute, and decedent died before trial. Even though the action survived the death, general damages for emotional distress were no longer recoverable [*see Code Civ. Proc. § 377.34* (former *Prob. Code § 573(c)*)].

Although decedent suffered no harm due to the attorney's inaction until his death, the court found that the personal representative had a valid survival action. The court held that if immature rights can ripen into a cause of action following death [*see Carr v. Progressive Cas. Ins. Co. (1984) 152 Cal. App. 3d 881, 199 Cal. Rptr. 835]* , it must also be true that such rights can ripen into an action at death (*219 Cal. App. 3d 181, 187)* . The court noted that the substantive policy underlying *Code Civ. Proc. § 36(a)* is to have trial attorneys with clients at least 70 years old move those cases to trial before the client dies, and stated that it would make a mockery of this policy to hold that the death of the client insulates the attorney from liability for failure to use the statutory trial-setting preference (*219 Cal. App. 3d 181, 186)* .

In ***Carr v. Progressive Cas. Ins. Co.*** *(1984) 152 Cal. App. 3d 881, 199 Cal. Rptr. 835* , decedent's administrator brought a third-party action for damages against an insurer for an alleged breach of the insurer's duty to make a good-faith attempt to settle claims when liability is reasonably clear, as required by *Ins. Code § 790.03(h)(5)*. Defendant demurred on the ground that no cause of action against defendant had accrued during decedent's lifetime that was subject to survival under former Prob. Code § 573 [*now see Code Civ. Proc. § 377.34*]. Defendant argued that decedent's claim against it was not actionable before the conclusion of the action between decedent and the insured, and decedent had died before the conclusion of that action. The trial court sustained the demurrer without leave to amend, and decedent's administrator appealed (*152 Cal. App. 3d 881, 884-887)* .

The court of appeal reversed, holding that the administrator had stated a surviving cause of action. The court agreed that a statutory bad-faith cause of action does not accrue until it may be brought, and such an action cannot be brought until the action between the injured and insured is concluded, pursuant to the holding in *Royal Globe Ins. Co. v. Superior Court (1979) 23 Cal. 3d 880, 884, 891-892, 153 Cal. Rptr. 842, 592 P.2d 329* (overturned prospectively in *Moradi-Shalal v. Fireman's Fund Ins. Cos. (1988) 46 Cal. 3d 287, 297-305, 250 Cal. Rptr. 116, 758 P.2d 58*) (*152 Cal. App. 3d 881, 889-890)* . However, the court stated that it did not follow that none of decedent's rights survived because no cause of action arose during his lifetime (*152 Cal. App. 3d 881, 890)* . The court reasoned that a "cause of action" surviving under former Prob. Code § 573 [*now see Code Civ. Proc. § 377.34*] includes rights that have not yet ripened into an actionable claim, and concluded that a complete cause of action need not exist during the lifetime of the decedent in order for rights to survive that may later become actionable (*152 Cal. App. 3d 881, 890-891)* . In

overruling the demurrer, the court by implication held that the complaint's allegations of wrongful conduct on defendant's part, and resulting actual damage to decedent prior to his death, gave rise to a right to recover damages that survived decedent's death, although the right was not enforceable during decedent's lifetime (*152 Cal. App. 3d 881, 891-893)* .

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6-66 California Points & Authorities § 66.66

§ 66.66 Opposing Contention That Damage Claim Is Not Recoverable in Survival Action--Property Damage Incurred Prior to Death of Plaintiff Is Recoverable

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE COMPLAINT ON BEHALF OF A DECEDENT SURVIVES HIS/HER DEATH IF THE PROPERTY DAMAGE THAT IS THE BASIS FOR THE CAUSE OF ACTION OCCURRED PRIOR TO DECEDENT'S DEATH.

A. No Cause of Action Lost by Death. [*See § 66.64, Paragraph A.*]

B. Property Damage Prior to Death of Plaintiff. A complaint by decedent's executor or administrator sufficiently pleads the existence of a survivable cause of action for damage to property owned by decedent if it alleges that the damage occurred prior to decedent's death, even though the damage occurred in the same accident that caused death, and even though the interval between damage and death was only a few seconds (*Stencel Aero Eng'g Corp. v. Superior Court (1976) 56 Cal. App. 3d 978, 985-988, 987 n.6, 128 Cal. Rptr. 691*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted to oppose the contention that a property damage claim does not survive the death of the plaintiff.

These points and authorities may be combined, where appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to address the issue of survivability. For example, these points and authorities may be used to oppose a demurrer to a complaint for property damage, which demurrer asserts that the complaint fails to state a cause of action in that it shows on its face that the property damage and the death of the property owner occurred in the same accident, if facts are alleged that support the inference that the property damage

occurred prior to the death.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing that the facts demonstrate that the property damage occurred prior to the death of the decedent.

In an appropriate case, these points and authorities may be submitted in opposition to a demurrer supported by the points and *authorities in § 66.61*.

[b] Related Pleading and Practice Forms

For a form of complaint for damages for a surviving cause of action, see California Forms of Pleading and Practice, Ch. 181, *Death and Survival Actions* (Matthew Bender).

[3] Discussion of Authorities

[a] Property Damage Prior to Death of Plaintiff

In ***Stencel Aero Eng'g Corp. v. Superior Court*** *(1976) 56 Cal. App. 3d 978, 128 Cal. Rptr. 691* , decedent's heirs and the special administratrix of his estate brought an action to recover damages for wrongful death, $200 in compensatory damages for damage to decedent's property, and $10 million in punitive damages. Defendants challenged the count containing the allegation on punitive damages by a motion for judgment on the pleadings. The trial court denied the motion and defendants petitioned for a writ of mandate that would require the trial court to grant their motion. The court of appeal held that the decedent's special administratrix, but not his heirs, was entitled to plead punitive damages and to prove such damages if possible. The court of appeal construed the motion for judgment on the pleadings to be in the nature of a general demurrer on the issue of whether any party was entitled to claim punitive damages. Defendants first argued that the heirs could not plead or recover punitive damages for decedent's wrongful death and the court agreed. *Code Civ. Proc. § 377.61* excludes, from wrongful death actions, any damages recoverable under *Code Civ. Proc. § 377.34* and punitive damages are in this category. Second, defendants argued that the special administratrix could not recover punitive damages pursuant to *Code Civ. Proc. 377.30* because the underlying $200 property damage loss occurred in the same accident which caused death. On this point, the court of appeal distinguished *Pease v. Beech Aircraft Corp. (1974) 38 Cal. App. 3d 450, 459-460, 113 Cal. Rptr. 416* [*see § 66.61[3][a]*], because in this case, the administratrix alleged that the underlying loss of decedent's personal property occurred "prior to death" whereas in *Pease*, the parties had stipulated that the loss and death occurred simultaneously. The court viewed the allegation before it as one of ultimate fact tht established the following: a cause of action for the loss arose in favor of the decedent prior to his death; it survived decedent; his personal representative was entitled to plead it; and she was entitled to plead punitive damages, based on the loss, and to prove them if possible It noted that the special administrarix would still bear the burden of proving that an evidence-supported interval of time elapsed between the property damage loss and death. From the written responses in support of the motion, it could be inferred that decedent was killed in a matter of seconds--no more, but no less--after his personal effects were damaged.

NOTE:

The constitutionality of the distinction made in *Stencel*, that the availability of a survival action supporting punitive damages depends on whether the property was damaged an instant before or simultaneously with death, has been questioned. In a subsequent case, the court stated in dicta that a statutory scheme that would punish a tortfeasor who inflicts death-causing injury that does not result in simultaneous death but would not punish if death occurs instantaneously is difficult to explain on the basis of any conceivable, realistic, rational purpose [*Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 834, 174 Cal. Rptr. 348]* .

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6-66 California Points & Authorities § 66.67

§ 66.67 Opposing Contention That Damage Claim Is Not Recoverable in Survival Action--Expense Not Incurred by Decedent Was Paid Under Contract or Gratuitously

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DECEDENT'S PERSONAL REPRESENTATIVE OR SUCCESSOR IN INTEREST MAY BRING A SURVIVAL ACTION TO RECOVER DAMAGES BASED ON EXPENSES INCURRED BY ONE OTHER THAN THE DECEDENT IF THE EXPENSES WERE PAID UNDER CONTRACT OR GRATUITOUSLY.

Expense Not Paid by Decedent. The fact that an expense was not paid by a decedent prior to death does not defeat a cause of action brought by the decedent's personal representative or successor in interest pursuant to *Code of Civil Procedure Section 377.30* to recover the amount expended, if the expense was incurred by another either under contract or gratuitously (*Fifield Manor v. Finston (1960) 54 Cal. 2d 632, 635, 637, 7 Cal. Rptr. 377, 354 P.2d 1073*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted to oppose a contention that a claim does not survive the death of a plaintiff because it seeks damages for expenses incurred by someone other than the decedent.

These points and authorities may be combined, where appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to address the issue of the nature of the expenses claimed as damages. For example, these points and authorities may be used to oppose a motion for summary adjudication brought by a defendant seeking to dispose of a cause of action on the ground that the damages sought are expenses incurred by one other than the decedent, and thus may not be recovered by decedent's personal representative. The ground for opposition is that the expenses were incurred by another under contract or gratuitously. This form may be adapted for use in other procedural contexts, such as in opposing a motion for new trial based on an award of excessive damages, or in a trial or appellate

brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts tending to show the nature of the expenses that are the basis for the claim for damages. In addition, counsel should attach affidavits or declarations that support the memorandum [*see Code Civ. Proc. § 437c(b)* (support required to accompany motion for summary judgment)].

[3] Discussion of Authorities

[a] Expense Not Paid by Decedent

In ***Fifield Manor v. Finston*** *(1960) 54 Cal. 2d 632, 7 Cal. Rptr. 377, 354 P.2d 1073* , plaintiff corporation had brought an action to recover the medical expenses of decedent, which it had paid under a "life-care contract," from defendant who had allegedly caused decedent's injury and death. The trial court sustained defendant's general demurrer without leave to amend, and plaintiff appealed from the subsequent judgment of dismissal. The Supreme Court affirmed. Plaintiff had attempted to analogize its case to that of *Follansbee v. Benzenberg (1954) 122 Cal. App. 2d 466, 265 P.2d 183* , but the Court responded that unlike the plaintiff in *Follansbee,* whose recovery was permitted in her individual capacity because she had incurred the medical expenses in question as part of her common law and statutory obligation, plaintiff's claim was based solely on a contractual liability between itself and the decedent. The Court noted the general rule that the fact that either under contract or gratuitously treatment has been paid for by another does not defeat the cause of action of the injured party to recover the reasonable value of the treatment from the tortfeasor (*54 Cal. 2d 632, 637)* . Thus, in effect, the Court applied the collateral source rule, under which expenses paid for by another under its contractual obligation are nevertheless considered incurred by the person for whose benefit the contract was made.

NOTE:

In *Follansbee v. Benzenburg (1954) 122 Cal. App. 2d 466, 265 P.2d 183* , which the Court distinguished in *Fifield Manor,* the apparent basis for the holding that the medical expenses were not recoverable in the survival action (but rather were recoverable in an action by the surviving spouse who paid the expenses, based on the obligation to support one's spouse) was the fact that both actions were before the court. In most cases, expenses paid from community property will be considered to have been paid by the decedent, so the issue will not arise. If the spouse pays such expenses from his or her separate property, a court may follow the rule set forth in *Follansbee* and require the spouse to institute a separate action, but those cases would seem to be rare.

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CHAPTER 66 DEATH AND SURVIVAL ACTIONS
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B. Survival Actions

6-66 California Points & Authorities § 66.68

§ 66.68 Supporting Contention That Claim Does Not Survive Death of Defendant [Code Civ. Proc. § 377.42]--Punitive Damages Not Recoverable

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF MAY NOT RECOVER PUNITIVE DAMAGES BECAUSE DEFENDANT HAS DIED AND CODE OF CIVIL PROCEDURE SECTION 377.42 PROHIBITS THE RECOVERY OF PUNITIVE DAMAGES AGAINST DEFENDANT'S _____ [PERSONAL REPRESENTATIVE *or* SUCCESSOR IN INTEREST].

Punitive Damages Claim Does Not Survive Death of Defendant. In an action against a defendant's personal representative or successor in interest on a cause of action against the defendant, all damages are recoverable that might have been recovered against the defendant had he or she lived, except for punitive damages recoverable under *Civil Code Section 3294* or other punitive or exemplary damages (*Code Civ. Proc. § 377.42*; *see Bancroft-Whitney Co. v. Glen (1966) 64 Cal. 2d 327, 357, 49 Cal. Rptr. 825, 411 P.2d 921* (construing former Prob. Code § 573(c) (*now see Code Civ. Proc. § 377.34*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted to support the contention that a claim for punitive damages does not survive the death of the defendant [*see Code Civ. Proc. § 377.42*].

This form may be combined, where appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the nonsurvival of a punitive damages claim. For example, these points and authorities may be used to support a motion for summary adjudication of a claim for punitive damages, when the defendant has died either prior to or during the action [*see Code Civ. Proc. § 437c(f)* (summary adjudication)].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts, supported by affidavits or declarations [*see Code Civ. Proc. § 437c(b)*], that the defendant in a civil action requesting punitive damages died before the award of such damages or was the personal representative of the decedent.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 66.69*.

[b] Related Pleading and Practice Forms

For a form of notice of motion for summary adjudication with respect to a claim for punitive damages, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[c] Related Points and Authorities

For a general form of memorandum of points and authorities supporting a motion for summary adjudication, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Punitive Damages Claim Does Not Survive Death of Defendant

In ***Bancroft-Whitney Co. v. Glen*** *(1966) 64 Cal. 2d 327, 49 Cal. Rptr. 825, 411 P.2d 921* , the plaintiff, a book publisher, sued a former employee for breach of fiduciary duty. The trial court found for the defendants, and the plaintiff appealed. The Supreme Court reversed, holding that the conduct of the plaintiff's former employee amounted to a breach of his fiduciary duties to the plaintiff as a matter of law. The Court noted, however, that because the employee died after the trial was concluded, the claim for punitive damages did not survive his death under former Prob. Code § 573 [*now see Code Civ. Proc. § 377.42*].

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6-66 California Points & Authorities § 66.69

§ 66.69 Opposing Contention That Claim Does Not Survive Death of Defendant [Code Civ. Proc. § 377.42]--Punitive Damages Available in Action Based on Homicide Committed by Defendant [Civ. Code § 3294(d)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF MAY RECOVER PUNITIVE DAMAGES AGAINST DECEASED DEFENDANT'S _____ [PERSONAL REPRESENTATIVE *or* SUCCESSOR IN INTEREST] BECAUSE THE DEATH ON WHICH THIS ACTION IS BASED WAS A HOMICIDE FOR WHICH THE DEFENDANT WAS CONVICTED OF A FELONY.

Punitive Damages Are Recoverable Against Deceased Defendant Convicted of Homicide. Punitive damages may be recovered against a defendant's personal representative or successor in interest in a wrongful death or survival action based on a death that resulted from a homicide for which the defendant has been convicted of a felony, whether or not the decedent died instantly or survived the fatal injury for some period of time (*Civ. Code § 3294(d)*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted to oppose the contention that a claim for punitive damages does not survive the death of the defendant, specifically because the action is based on a homicide committed by the defendant [*see Civ. Code § 3294(d)*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that the deceased defendant was convicted of a homicide and the current wrongful death or survival action is based on that homicide.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 66.68*.

[b] Procedures for Multiple Recoveries of Punitive Damages

The procedures for joinder and consolidation contained in *Code Civ. Proc. § 377.62* applies to prevent multiple recoveries of punitive or exemplary damages based on the same wrongful act [*see § 66.90* et seq.].

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B. Survival Actions

6-66 California Points & Authorities § 66.70

§ 66.70 Opposing Contention That Survival Action Was Timely Filed--Action Does Not Relate Back to Filing of Wrongful Death Action

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S SURVIVAL ACTION BROUGHT ON BEHALF OF DECEDENT HAS NOT BEEN BROUGHT WITHIN THE STATUTE OF LIMITATIONS AND DOES NOT RELATE BACK TO A TIMELY-FILED WRONGFUL DEATH ACTION.

Survival Action Does Not Relate Back to Wrongful Death Action. Because a survival action only provides damages for injury to the decedent, while a wrongful death action provides damages for injury caused to the surviving heirs, a survival action does not "relate back" to a previously-filed cause of action for wrongful death and a plaintiff must state any survivor action within the applicable limitations period for it to be timely (*Quiroz v. Seventh Ave. Center (2006) 140 Cal. App. 4th 1256, 1278-1279, 45 Cal. Rptr. 3d 222*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be used to oppose a plaintiff's contention that a survival action has been filed in a timely manner. The basis for the opposition is that the survival action was not brought within the applicable statute of limitations, and the survival action does not relate back to the filing of a previously-filed and timely wrongful death action.

This form may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the untimeliness of the plaintiff's survival cause of action, such as with points and authorities supporting a motion for summary judgment.

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law stated. Thus, counsel should include facts showing that the survival action was not pleaded within the applicable statute of limitations and that any action, including a wrongful death action, that was filed in a timely manner did not seek relief for the decedent's own injuries.

[3] Discussion of Authorities

[a] Survival Action Does Not Relate Back to Wrongful Death Action

In *Quiroz v. Seventh Ave. Center (2006) 140 Cal. App. 4th 1256, 45 Cal. Rptr. 3d 222* , plaintiff was the mother of a developmentally disabled adult who died due to the alleged neglect of a skilled nursing facility. Plaintiff filed a timely action for wrongful death against the facility and related persons that sought damages only for her own injuries stemming from the death. After the applicable one-year limitations period for filing an action to recover for the decedent's own injuries passed, plaintiff filed an amended complaint adding a survival cause of action to recover for the decedent's injuries and sought remedies for those injuries under the elder and dependent adult abuse statute, *Welf. & Inst. Code § 15600 et seq.* Plaintiff argued that because it stemmed from the same operative facts as the wrongful death action, the survival action "related back" to the wrongful death and was thus timely filed. The trial court disagreed and entered judgment in favor of the defendants. Plaintiff appealed.

The court of appeal affirmed. The court noted that the relation-back doctrine deems a later-filed pleading to have been filed at the time of an earlier timely-filed complaint, thus avoiding the bar of an expired statute of limitations, when the later pleading rests on the same general set of facts, involves the same injury, and refers to the same instrumentality as the earlier pleading. The court then held that the plaintiff could not meet these requirements with respect to her untimely survival action because that cause of action sought relief for a completely different injury as did the timely-filed wrongful death action. A wrongful death action provides recovery for injury caused to the surviving heirs, not for injuries to the decedent, while a survival action is an action brought for injuries sustained by the decedent. Nowhere in the original complaint did plaintiff seek damages for injuries caused to the decedent. Thus, the court concluded that the survival action, whether brought as a claim for common-law negligence or as a claim under the elder abuse statute, did not relate back to the wrongful death action and was barred by the statute of limitations (*140 Cal. App. 4th 1256, 1278-1279)* .

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[Reserved]

§§ 66.71[Reserved]

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C. Consolidation of Wrongful Death and Survival Actions

6-66 California Points & Authorities § 66.90

§ 66.90 Supporting Contention That Wrongful Death [Code Civ. Proc. § 377.60] and Survival [Code Civ. Proc. §§ 377.30, 377.31] Actions Arising From Same Wrongful Act or Neglect Should Be Joined or Consolidated [Code Civ. Proc. § 377.62]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S ACTION FOR DAMAGES FOR THE DEATH OF THE DECEDENT MAY BE _____ [JOINED *or* CONSOLIDATED] WITH THE ACTION BY DECEDENT'S _____ [PERSONAL REPRESENTATIVE *or* SUCCESSOR IN INTEREST] FOR _____ [*specify cause of action or pending action that survives decedent's death, e.g.,* PERSONAL INJURIES SUSTAINED BY THE DECEDENT] BECAUSE BOTH ACTIONS ARISE FROM THE SAME WRONGFUL ACT OR NEGLECT OF DEFENDANT.

Court May Consolidate Wrongful Death and Survival Actions That Arise From Same Wrongful Act or Neglect. An action _____ [commenced *or* continued] by the decedent's _____ [personal representative *or* successor in interest] under _____ [*Code of Civil Procedure Section 377.30 or Code of Civil Procedure Section 377.31*] may be _____ [joined *or* consolidated] with any action arising out of the same wrongful act or neglect brought under *Code of Civil Procedure Section 377.60*. [A wrongful death action and a Section 377.31 action may be consolidated for trial as provided in *Code of Civil Procedure Section 1048*] (*Code Civ. Proc. § 377.62*; *see Johnson v. Western Air Express Corp. (1941) 45 Cal. App. 2d 614, 622, 114 P.2d 688* (construing *Code Civ. Proc. § 1048* (discretionary consolidation of personal injury action) and former Code Civ. Proc. § 377 (wrongful death action))).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of the contention that a wrongful death action

and a survival action arising out of the same wrongful act or neglect should be joined or consolidated [*see Code Civ. Proc. § 377.62*; *see also Code Civ. Proc. §§ 377.30* (survival actions commenced by decedent's personal representative or successor in interest), 377.31 (survival actions continued by decedent's personal representative or successor in interest), 377.60 (wrongful death actions)]. The optional language at the end of the form should be used in a case in which the decedent's personal representative or survivor in interest is continuing a pending action (as opposed to initiating an action based on a surviving cause of action) [*see Code Civ. Proc. § 377.62(b)*; *see also § 66.90[2][b]*].

This form may be combined, where appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of consolidation. For example, if the plaintiff's action is pending when he or she dies, these points and authorities may be used to support a motion for consolidation made under *Code Civ. Proc. § 1048*, the general statute governing consolidation of pending actions that have common questions of law or fact. These points and authorities may also be used to support a motion for consolidation of a wrongful death and a survival action when the decedent is a child or ward of the plaintiff [*see Code Civ. Proc. § 376*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that the causes of action or pending actions arise out of the same wrongful act or neglect.

[b] Types of Survival Actions Distinguished

This form contains alternative language that should be used as appropriate, depending on whether a survival action to which a wrongful death action is to be joined or consolidated is commenced by the decedent's personal representative or successor in interest or whether it is continued by the representative or successor. Specifically, an action commenced by a representative or successor based on a cause of action that survives the death of the decedent may be joined with a wrongful death action arising out of the same wrongful act or neglect [*Code Civ. Proc. § 377.62(a)*]. Permissive joinder of causes of action is governed by *Code Civ. Proc. § 427.10* [*see § 66.90[2][c]*]. By contrast, a wrongful death action and a pending survival action that does not abate and is continued by the decedent's representative or successor arising out of the same wrongful act or neglect may be consolidated for trial under *Code Civ. Proc. § 1048(a)*, the general procedural statute that governs the consolidation of actions [*Code Civ. Proc. § 377.62(b)*; *see § 66.90[2][c]*].

[c] Joinder and Consolidation Distinguished

As discussed in *§ 66.90[2][b]*, a decedent's surviving causes of action may be joined with a wrongful death action that is based on the same wrongful act or neglect [*Code Civ. Proc. § 377.62(a)*]. Generally, a plaintiff who alleges a cause of action against one or more defendants may unite the cause with any other causes that he has against any of the defendants [*Code Civ. Proc. § 427.10*; *see* California Forms of Pleading and Practice, Ch. 123, *Complaints and Cross Complaints* (Matthew Bender)].

A pending survival action, on the other hand, may be consolidated with a wrongful death action under *Code Civ. Proc. § 1048* [*Code Civ. Proc. § 377.62(a)*], which provides that a court may order a joint hearing or trial of pending actions involving a common question of law or fact.

[d] Related Pleading and Practice Forms

For forms for use in moving for consolidation generally, see California Forms of Pleading and Practice, Ch. 125, *Consolidation, Severance, and Coordination of Actions* (Matthew Bender). For forms for use in moving for consolidation of wrongful death and survival actions, see California Forms of Pleading and Practice, Ch. 181, *Death and Survival Actions* (Matthew Bender).

[e] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing motions for the consolidation of actions generally, see Ch. 45, *Consolidation, Severance, and Coordination of Actions* .

[3] Discussion of Authorities

Johnson v. Western Air Express Corp. *(1941) 45 Cal. App. 2d 614, 114 P.2d 688* , involved two lawsuits seeking damages arising out of an airplane crash in which plaintiff suffered serious injury and her husband was killed. The court ordered the consolidation for trial of the wrongful death action by plaintiff and the decedent's sister, and the plaintiff's personal injury action. The trial court dismissed both actions as to all individual defendants. Following the trial, the jury returned verdicts in each action in favor of the remaining defendants. The plaintiffs appealed, arguing, among other things, that the court committed prejudicial error in ordering consolidation of the two cases because specified evidence was admissible and relevant in the personal injury case, but inadmissible and prejudicial in the wrongful death action.

The court of appeal held that *Code Civ. Proc. § 1048* allows a trial court to consolidate actions whenever consolidation can be done without prejudice to a substantial right. In this case, the two lawsuits arose from the same accident, the witnesses were the same, and the testimony was the same, except with regard to the financial condition of the parties. However, the trial court's clear instructions to the jury alleviated any possible prejudice with regard to this issue (*45 Cal. App. 2d 614, 622-624)* .

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CHAPTER 67 DECLARATORY RELIEF

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§ 67.syn Synopsis to Chapter 67: DECLARATORY RELIEF

§ 67.01 Scope of Chapter

§ 67.02 Governing Statutes

§ 67.03 Page Limits on Memoranda

§ 67.04 Related Pleading and Practice Chapters

§§ 67.05-67.19 [Reserved]

§ 67.20 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10] for Declaratory Relief [Code Civ. Proc. § 1060]--Court Has No Jurisdiction of Subject of Cause of Action Alleged [Code Civ. Proc. § 430.10(a)]--Action Seeks to Prevent Collection of Tax

[1] FORM

[2] Comments

[a] Use of Form

[b] Raising Jurisdictional Objections

[c] Related Uses

[d] Nonwaiver of Objection

[e] Requirement of Memorandum and Format

[f] Notice of Hearing

[g] Related Memoranda

[h] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Statutory Prohibition

[b] Action to Enjoin Collection of Tax

§ 67.21 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10] for Declaratory Relief [Code Civ. Proc. § 1060]--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Failure to Exhaust Administrative Remedies

[1] FORM

[2] Comments

[a] Use of Form

[b] Nonwaiver of Objection

[c] Exclusive Jurisdiction in Agency or Another Tribunal

[d] Failure to Exhaust Administrative Remedies

[e] Jurisdiction in Declaratory Relief Actions

[f] Related Points and Authorities

[g] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Exhaustion of Administrative Remedies as Jurisdictional

[b] Mere Allegation of Exhaustion

[c] Challenge to Constitutional Application of Statute

[d] Class Action

[e] Administrative Remedy Couched in Permissive Language

[f] Jurisdiction to Determine Jurisdiction

[g] Adverse Decision of Administrative Agency in Similar Cases

[h] Dismissal of Action as Mandatory

[4] Additional Authorities

[a] Exhaustion of Administrative Remedies as Jurisdictional

[b] Challenge to Constitutional Application of Statute

[c] Class Action

§ 67.22 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10] for Declaratory Relief [Code Civ. Proc. § 1060]--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Fully Matured Claim

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[3] Discussion of Authorities

[a] Purpose of Declaratory Relief

[b] Fully Matured Claim

[4] Additional Authorities

[a] Fully Matured Claim

§ 67.23 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10] for Declaratory Relief [Code Civ. Proc. § 1060]--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Declaration Not Necessary or Proper at Time Under Circumstances [Code Civ. Proc. § 1061]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Alternative Relief

[d] Validity of Administrative Regulations

[3] Discussion of Authorities

[a] Raising Objection by Demurrer

[b] Available Alternative Remedies

[c] Another Action Pending

[d] Doctrine of Forum Non Conveniens

[e] Unclean Hands

[f] Little or No Practical Effect

[4] Additional Authorities

[a] Discretion of Court to Refuse Declaratory Relief

[b] Raising Objection by Demurrer

[c] Another Action Pending

§ 67.24 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10] for Declaratory Relief [Code Civ. Proc. § 1060]--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--No Actual Justiciable Controversy [Code Civ. Proc. § 1060] Is Alleged

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[3] Discussion of Authorities

[a] Actual, Legal Controversy as Required to Be Pleaded

[b] Requirement That Controversy Be Justiciable

[c] Failure to State Cause of Action

[d] Advisory Opinions

[e] No Affirmative Relief Sought or Possible

[f] Different Interpretation of Statute by Citizen and Governmental Agency

[g] Adoption of General Plan

[h] Jurisdiction Over Dissolution of Corporation Which Has Not Elected to Dissolve

[i] Mere Allegation That Controversy Exists

[j] Nonexistent Contract

[4] Additional Authorities

[a] Actual Legal Controversy as Required to Be Pleaded

[b] Requirement That Controversy Be Justiciable

[c] Failure to State Cause of Action

[d] Advisory Opinions

[e] Different Interpretation of Statute by Citizen and Governmental Agency

[f] Mere Allegation That Controversy Exists

§ 67.25 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10] for Declaratory Relief [Code Civ. Proc. § 1060]--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Plaintiff Lacks Standing to Sue

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Lack of Standing and Legal Incapacity Distinguished

[d] Relationship Between Standing, Justiciability, and Propriety of Relief

[e] Related Points and Authorities

[3] Discussion of Authorities

[a] Raising Objection by General Demurrer

[b] Exclusive Power to Sue Is Vested in Another

[c] Insufficient Interest

[d] Lack of Standing to Maintain Quo Warranto Proceeding

[e] Standing as Taxpayer

[4] Additional Authorities

[a] Raising Objection by General Demurrer

[b] Lack of Standing to Maintain Quo Warranto Proceeding

§ 67.26 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10] for Declaratory Relief [Code Civ. Proc. §

1060]--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Underlying Action Barred by Statute of Limitations

[1] FORM

[2] Comments

[a] Use of Form

[b] California Forms of Pleading and Practice

[3] Discussion of Authorities

[a] Raising Objection by Demurrer

[b] Bar of Statute of Limitations

[c] Action Attacking Zoning Ordinance Barred by Local Ordinance

[d] Period of Limitation When Mandate Viable, Alternative Remedy

[4] Additional Authorities

[a] Bar of Statute of Limitations

[b] Period of Limitation When Mandate Viable, Alternative Remedy

§ 67.27 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10] for Declaratory Relief [Code Civ. Proc. § 1060]--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Action Is Res Judicata

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Impropriety of Declaratory Relief

[b] Raising Objection by Demurrer

§§ 67.28-67.39 [Reserved]

§ 67.40 Supporting Motion for Judgment on the Pleadings [Code Civ. Proc. § 438]--By Defendant--Declaring the Rights and Duties of the Parties Adverse to Plaintiff and Favorable to Defendant

[1] FORM

[2] Comments

[a] Use of Form

[b] Requirement of Memorandum and Format

[c] Authority for Motion for Judgment on the Pleadings

[d] Availability of Motion for Judgment on the Pleadings

[e] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Judgment on the Pleadings on the Merits

[b] Leave to Amend Not Required

[c] Judgment on the Pleadings Proper to Determine Merits of Constitutionality of Statute

[d] Judgment on the Merits Proper in Cross Action if Issues Disposed in Defendant's Favor in Main Action

[4] Additional Authorities

[a] Judgment on the Pleadings on the Merits

§ 67.41 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action for Declaratory Relief [Code Civ. Proc. § 1060]--Propriety of Summary Judgment Procedure in Declaratory Relief Action When Defendant or Plaintiff Is Not Entitled to Favorable Declaration

[1] FORM

[2] Comments

[a] Use of Form

[b] Requirement of Memorandum and Format

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[3] Discussion of Authorities

[a] Propriety of Summary Judgment Procedure

[b] Defendant Not Entitled to Favorable Declaration

[c] Plaintiff Not Entitled to Favorable Declaration

[4] Additional Authorities

[a] Propriety of Summary Judgment Procedure

[b] Plaintiff Not Entitled to Favorable Declaration

§§ 67.42-67.49 [Reserved]

§ 67.50 Opposing Demurrer to Complaint [Code Civ. Proc. §§ 86(a)(7)(B), 430.10] for Declaratory Relief [Code Civ. Proc. § 1060]--Declaratory Relief Is Authorized

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[3] Discussion of Authorities

[a] Action Authorized in Superior Court

[b] Oral Contract

[c] To Test Constitutionality of Initiative Measure

[d] To Test Constitutionality of Statutes

[e] To Test Constitutionality or Validity of Ordinances

[f] To Interpret Charter Provision

[g] To Interpret Statutes and Ordinances

[h] To Test Enforceability of Covenants or Servitudes Asserted Against Property

[i] Actions to Test Policies of Administrative Agency

[j] Actions Against Public Entity

[4] Additional Authorities

[a] Oral Contract

[b] To Test Constitutionality of Statutes

[c] To Test Constitutionality or Validity of Ordinances

[d] To Interpret Charter Provision

[e] Actions Against Public Entity

§ 67.51 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10] for Declaratory Relief [Code Civ. Proc. § 1060]--Facts Alleged Show That Plaintiff Comes Within Exception to Rule That Administrative Remedies Must Be Exhausted Before Seeking Judicial Relief

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[3] Discussion of Authorities

[a] Exceptions to Exhaustion Doctrine

[b] Controversy Outside Jurisdiction of Administrative Agency

[c] Irreparable Harm

[d] Administrative Remedy Inadequate

[e] Administrative Decision Known

[f] Statute (or Ordinance) Unconstitutional on Its Face

[g] Action to Enforce Public Rights

[h] No Administrative Remedy

[4] Additional Authorities

[a] Exceptions to Exhaustion Doctrine

[b] Controversy Outside Jurisdiction of Administrative Agency

[c] Irreparable Harm

[d] Administrative Remedy Inadequate

[e] Administrative Decision Known

[f] Statute (or Ordinance) Unconstitutional on Its Face

[g] No Administrative Remedy

§ 67.52 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10] for Declaratory Relief [Code Civ. Proc. § 1060]--Complaint Sufficiently Alleges Action for Declaratory Relief

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Sufficiency of Complaint

[b] When Declaratory Relief Must Be Granted

[c] Applicability of Rule of Liberal Construction of Pleadings

[d] Remedies Cumulative

[e] Other Relief

[f] Completed Wrong

[4] Additional Authorities

[a] Sufficiency of Complaint

[b] When Declaratory Relief Must Be Granted

[c] Applicability of Rule of Liberal Construction of Pleadings

[d] Remedies Cumulative

[e] Other Relief

§ 67.53 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10] for Declaratory Relief [Code Civ. Proc. § 1060]--Complaint as Not Insufficient on Ground of Lack of Justiciable Controversy Because It Fails to Allege Breach or Violation of Obligation

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[3] Discussion of Authorities

[a] Breach Not Required

[b] Nonmatured Claim

[c] Statute

[d] Ordinance

[e] Administrative Regulation

[f] Contractual Rights and Duties

[g] Determination of Undisputed Preliminary Matter Is Proper

[4] Additional Authorities

[a] Breach Not Required

[b] Nonmatured Claim

[c] Ordinance

§ 67.54 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10] for Declaratory Relief [Code Civ. Proc. § 1060]--No Basis in Fact for Conclusion That Judicial Declaration Is Not Necessary or Proper

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[3] Discussion of Authorities

[a] Limitation on Court's Discretion

[b] Doubt as to Whether Judicial Declaration Is Necessary

[c] Alternative Remedy as Required to Be Adequate

[d] Action at Law for Breach of Contract as Inadequate

[e] Criminal Sanctions as Inadequate Remedy

[f] Unfavorable Declaration

[g] Plaintiff Entitled to Some Relief

[4] Additional Authorities

[a] Alternative Remedy as Required to Be Adequate

[b] Unfavorable Declaration

[c] Plaintiff Entitled to Some Relief

§ 67.55 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10] for Declaratory Relief [Code Civ. Proc. § 1060]--Plaintiff Has Standing to Challenge Law or Regulation

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Action by Interested Person

[b] What Constitutes Interest

[c] Criteria

[d] Action by Corporation

§ 67.56 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10] for Declaratory Relief [Code Civ. Proc. § 1060]--Complaint Not Barred by Statute of Limitations When Brought Before Any Actual Breach

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Complaint for Declaratory Relief Brought Before Any Actual Breach as Not Barred by Statute of Limitations

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6-67 California Points & Authorities § 67.01

§ 67.01 Scope of Chapter

This chapter contains forms of memoranda of points and authorities in support of general demurrers to complaints for declaratory relief on the grounds of lack jurisdiction [*see §§ 67.20*] and failure to state a cause of action [*see §§ 67.21 -67.27*], a motion for judgment on the pleadings § 67.40, and a motion for summary judgment § 67.41, as well as general forms of memoranda of points and authorities in opposition to the demurrers [*see §§ 67.50 -67.56*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsCivil ProceduresDeclaratory Judgment ActionsState JudgmentsGeneral OverviewCivil ProceduresPretrial JudgmentsJudgment on the PleadingsCivil ProceduresSummary JudgmentMotions for Summary JudgmentGeneral Overview

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6-67 California Points & Authorities § 67.02

§ 67.02 Governing Statutes

Declaratory relief is governed generally by *Code Civ. Proc. § 1060 et seq.* Declaratory relief actions to determine the validity of administrative regulations and of precedent decisions of the Unemployment Insurance Appeals Board is authorized by *Gov. Code § 11350* and *Unemp. Ins. Code § 409.2*, respectively. Declaratory relief actions to determine the validity of a regulation disapproved or ordered repealed by the Office of Administrative Law are authorized by *Gov. Code § 11350.3*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesDeclaratory JudgmentsCivil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral Overview

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6-67 California Points & Authorities § 67.03

§ 67.03 Page Limits on Memoranda

Generally, an opening or responding memorandum must not exceed 15 pages, or in the case of a motion for summary judgment or summary adjudication, 20 pages. A reply or closing memorandum may not exceed 10 pages [*Cal. Rules of Ct., Rule 3.1113(d)*]. Any party desiring to file a longer memorandum must obtain leave of court [*Cal. Rules of Ct., Rule 3.1113(e)*]. For further discussion of the page limitations under *Cal. Rules of Ct., Rule 3.1113*, and of other basic format requirements of memoranda of points and authorities, see *Ch. 1, Writing Legal Memoranda and Briefs, § 1.05*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureSummary JudgmentOppositionMemoranda in OppositionCivil ProcedureSummary JudgmentSupporting MaterialsMemoranda of Law

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6-67 California Points & Authorities § 67.04

§ 67.04 Related Pleading and Practice Chapters

For a discussion of declaratory relief generally and various related proceedings, as well as for forms of complaints for declaratory relief, see California Forms of Pleading and Practice, Ch. 182, *Declaratory Relief* (Matthew Bender).

For discussions and forms of complaints for declaratory relief for use in specific kinds of cases, see the following chapters in that publication:

- Ch. 33, *Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding.*
- Ch. 60, *Assignments.*
- Ch. 61, *Associations and Clubs.*
- Ch. 89, *Automobiles: Sales and Financing Under the Rees-Levering Act.*
- Ch. 95, *Banks, Deposits, and Checks.*
- Ch. 104, *Building Contracts.*
- Ch. 160, *Corporations.*
- Ch. 184, *Deeds.*
- Ch. 265, *Federal Courts: Jurisdiction and Removal.*
- Ch. 270, *Fraudulent Conveyances.*
- Ch. 278, *Gifts.*

- Ch. 300, *Indemnity and Contribution.*
- Ch. 307, *Insolvency.*
- Ch. 308, *Insurance.*
- Ch. 316, *Joint Tenancy and Tenancy in Common.*
- Ch. 334, *Landlord and Tenant: Claims for Damages.*
- Ch. 401, *Partnerships: Actions Between General Partners and Partnership.*
- Ch. 412, *Paternity.*
- Ch. 470B, *Public Agency Meetings.*
- Ch. 471B, *Licensing by Public Agencies.*
- Ch. 472B, *Review of Agency Rulemaking.*
- Ch. 503, *Sales: Secured Transactions.*
- Ch. 513, *Schools: Student Rights and Responsibilities.*
- Ch. 520, *Settlement and Release.*
- Ch. 527, *Social Services.*
- Ch. 531, *Statutes and Ordinances.*
- Ch. 536, *Subrogation.*
- Ch. 538, *Suretyship, Bonds, and Undertakings.*
- Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts.*
- Ch. 569, *Vendor and Purchaser.*
- Ch. 575, *Waters.*
- Ch. 579, *Zoning and Planning.*

For discussions and forms of cross complaints for declaratory relief in specific kinds of cases, see the following chapters in California Forms of Pleading and Practice (Matthew Bender):

- Ch. 244, *Elevators and Escalators.*
- Ch. 270, *Fraudulent Conveyances.*
- Ch. 300, *Indemnity and Contribution.*

- Ch. 308, *Insurance.*
- Ch. 460, *Products Liability.*
- Ch. 560, *Trusts.*

For discussion, procedural guides, forms of demurrers, forms of notices of motion for judgment on the pleadings, and related forms, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* in California Forms of Pleading and Practice (Matthew Bender). For discussion, forms of notices of motion for summary judgment, and related forms, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesDeclaratory JudgmentsCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewCivil ProcedurePretrial JudgmentsJudgment on the Pleadings

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[Reserved]

§§ 67.05[Reserved]

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6-67 California Points & Authorities § 67.20

§ 67.20 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10] for Declaratory Relief [Code Civ. Proc. § 1060]--Court Has No Jurisdiction of Subject of Cause of Action Alleged [Code Civ. Proc. § 430.10(a)]--Action Seeks to Prevent Collection of Tax

[1] FORM Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10] for Declaratory Relief [Code Civ. Proc. § 1060]--Court Has No Jurisdiction of Subject of Cause of Action Alleged [Code Civ. Proc. § 430.10(a)]--Action Seeks to Prevent Collection of Tax

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF DEMURRER
Plaintiff,	)	TO COMPLAINT
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THIS COURT LACKS JURISDICTION OF THE SUBJECT OF THE CAUSE OF ACTION ALLEGED IN THAT THE COMPLAINT SEEKS TO HAVE THIS COURT ENJOIN THE COLLECTION OF A TAX, A REMEDY PROHIBITED BY STATE LAW.

A. Objection by Demurrer. The objection that the court lacks jurisdiction of the subject of the cause of action alleged in the complaint may be taken by demurrer [*Code Civ. Proc. § 430.10(a)*] when the ground for the objection appears on the face of the complaint (or from any matter of which the court must or may take judicial notice [*Code Civ. Proc. §*

430.30(a)].

B. Statutory Prohibition. Statute expressly prohibits the issuance of any injunction, writ of mandate, or other legal or equitable process to prevent or enjoin the collection of _____ [*e.g.*, any sales or use tax (*Rev. & Tax. Code § 6931*)].

C. Action to Enjoin Collection of Tax. Declaratory relief is not available to determine the collectibility of a tax where the tax statute provides that no injunction, writ of mandate, or other legal or equitable process shall issue to prevent or enjoin collection of the tax (*Casey v. Bonelli (1949) 93 Cal. App. 2d 253, 254-255, 208 P.2d 723* ; *Honeywell, Inc. v. State Bd. of Equalization (1975) 48 Cal. App. 3d 907, 912, 122 Cal. Rptr. 243*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

CAUTION:
The above rule apparently does not prevent an action pursuant to *Gov. Code § 11350*, authorizing declaratory relief actions to determine the validity of administrative regulations, for a declaration as to the validity of a tax regulation even though the taxing event has already occurred and administrative remedies are available to the taxpayer [*see Honeywell, Inc. v. State Bd. of Equalization (1975) 48 Cal. App. 3d 907, 912-914, 122 Cal. Rptr. 243* ; *Pacific Motor Transp. Co. v. State Bd. of Equalization (1972) 28 Cal. App. 3d 230, 237, 104 Cal. Rptr. 558* ; *see also 67.23[2][d]*].

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a general demurrer to a complaint for declaratory relief seeking a determination as to the collectibility of a tax on the ground of lack of subject matter jurisdiction where a statute provides that no legal or equitable process shall issue to enjoin collection of the tax in question.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Raising Jurisdictional Objections

A jurisdictional objection in a case may arise from one or more of three bases: (1) lack of jurisdiction of the subject of the action; (2) lack of jurisdiction over the person of a party; and (3) an act in excess of the court's jurisdiction [*see Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 287-290, 109 P.2d 942]* .

The objection that the court lacks jurisdiction of the subject of the action alleged may be made by demurrer [*Code Civ. Proc. § 430.10(a)*] where the defect appears on the face of the complaint or from matter of which the court must or may take judicial notice [*Code Civ. Proc. § 430.30(a)*].

The objection that the court lacks jurisdiction over the person of the defendant must be made by a motion to quash service of summons [*Code Civ. Proc. § 418.10(a)(1)*]. The motion to quash may be combined with a demurrer, but if the motion to quash is denied, the filing of the demurrer will constitute a general appearance [*Code Civ. Proc. § 418.10(e)(1), (2)* (general appearance not deemed made until entry of order denying motion to quash or conclusion of mandamus review)]. A failure to make a motion to quash at the time of filing a demurrer constitutes a waiver of the issue of lack of personal jurisdiction [*Code Civ. Proc. §§ 418.10(e)(3), 1014*; *see* Ch. 132, *Jurisdiction: Personal Jurisdiction and Inconvenient Forum*].

The objection that the trial court threatens to act in excess of its jurisdiction, after the trial court has ruled in favor of its so acting, is raised by petitioning a higher court for a writ of prohibition [*see Code Civ. Proc. § 1102*]. The objection that the trial court has already acted in excess of its jurisdiction over the objection of a party is raised by petitioning a higher court for a writ of certiorari or, in certain cases, mandate [*see Code Civ. Proc. § 1085*]. Lack or excess of jurisdiction may also be raised on appeal from the judgment.

[c] Related Uses

This form may, with appropriate modifications, be used in support of a motion for separate trial of the affirmative defense of lack of subject matter jurisdiction [*see Code Civ. Proc. § 597*] if the court's lack of subject matter jurisdiction does not appear from the face of the complaint and is alleged as an affirmative defense in the answer.

With appropriate modifications, the form may also be used in support of a nonstatutory motion to dismiss the complaint if no court in California has jurisdiction of the subject or the action or, if such an objection does not appear from the face of the complaint, a motion for summary judgment under *Code Civ. Proc. § 437c*.

[d] Nonwaiver of Objection

Unlike the grounds of special demurrer [*see Code Civ. Proc. § 430.10(b), (c), (d), (f), (g)*], the objection that the court lacks jurisdiction of the subject of the cause of action alleged is not waived by failure to raise it by demurrer or answer [*Code Civ. Proc. § 430.80(a)*]. The objection can, therefore, be raised at a later time.

[e] Requirement of Memorandum and Format

A memorandum must accompany a demurrer to a complaint filed in a superior court [*Cal. Rules of Ct., Rule 3.1113(a)*]. The required format of papers filed in a superior court is set forth in *Cal. Rules of Ct., Rule 2.100 et seq.*

If the memorandum is appended at the end of the demurrer, it will not be separately captioned; rather, the demurrer will be captioned "DEMURRER TO COMPLAINT AND MEMORANDUM IN SUPPORT OF DEMURRER." The heading "Memorandum in Support of Demurrer" will, however, be centered on the page just above the first point of law stated.

Additional requirements with respect to the format and content of a memorandum are set forth in *Cal. Rules of Ct., Rules 3.1110* and *3.1113(b)-(n)*.

[f] Notice of Hearing

The defendant must serve and file with the demurrer a notice of hearing [*Cal. Rules of Ct., Rule 3.1320(c)*; *see Code Civ. Proc. § 1005*; *Cal. Rules of Ct., Rule 3.1320(d)*].

[g] Related Memoranda

For additional forms of memoranda supporting a demurrer for lack of subject matter jurisdiction, see Ch. 71, *Demurrers*

and Motions for Judgment on the Pleadings .

[h] Related Pleading and Practice Forms

For forms of demurrers for lack of subject matter jurisdiction and notice of hearing, as well as for a procedural guide, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Statutory Prohibition

Rev. & Tax. Code § 6931, cited by way of example, provides that no injunction or writ of mandate of other legal or equitable process shall issue in any suit, action, or proceeding in any court against this state or against any officer of the state to prevent or enjoin the collection "under this part" (sales and use taxes) of any tax or any amount of tax required to be collected.

[b] Action to Enjoin Collection of Tax

Casey v. Bonelli *(1949) 93 Cal. App. 2d 253, 208 P.2d 723* was a declaratory relief action against the State Board of Equalization and its members by the president and board member of a corporation which had been voluntarily dissolved. The complaint alleged in substance that several years after the dissolution, defendants issued a notice of determination under the state Sales and Use Tax Law directed to the corporation and purporting to determine that during a specified period prior to dissolution, the corporation had become liable for a sales and use tax in a specified amount. Plaintiff alleged on information and belief that the determination was in error, that plaintiff was unable to determine whether his fiduciary duty as a director and officer of the corporation required him to take steps to establish before defendants that the determination was in error or whether he could, consistent with such fiduciary duty, permit the determination to become final and rely on the fact that any judgment obtained by defendants against the dissolved corporation would be void. Statute [*Rev. & Tax. Code § 6931*] provided that no injunction, writ of mandate, or other legal or equitable process shall issue to prevent or enjoin the collection of any sales or use tax. Defendants' demurrer to the complaint was sustained without leave to amend, and plaintiff appealed. In affirming the judgment, the court of appeal (*93 Cal. App. 2d 253, 254-255)* said that the decisions are explicit that *Rev. & Tax. Code § 6931* and similar provisions prevent the resort to a declaratory judgment to determine that such tax should not be collected.

Honeywell, Inc. v. State Bd. of Equalization *(1975) 48 Cal. App. 3d 907, 122 Cal. Rptr. 243* was an action by corporate manufacturers and installers of elevators and temperature control systems pursuant to former Gov. Code § 11440 [*now see Gov. Code § 11350*], authorizing declaratory relief actions by interested persons to determine the validity of administrative regulations, for a declaration that an administrative regulation adopted by the defendant board was invalid. The regulation made a sale of fixtures a sale of tangible personal property subject to the Sales Tax Act. The trial court declared that the regulation was invalid and the board appealed. Although the court of appeal decided the case on the merits, held that the regulation was valid, reversed the judgment, and directed the trial court to enter a declaratory judgment in favor of the board declaring that the regulation as applied to plaintiffs was not invalid, the court (*48 Cal. App. 3d 907, 912)* stated that where a statute prohibits the granting of an injunction or writ of mandamus to prevent collection of a tax [*Rev. & Tax. Code § 6931*], an action for a declaration that the tax is not legally collectible would circumvent the law and, accordingly, declaratory relief will be refused.

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6-67 California Points & Authorities § 67.21

§ 67.21 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10] for Declaratory Relief [Code Civ. Proc. § 1060]--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Failure to Exhaust Administrative Remedies

[1] FORM Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10] for Declaratory Relief [Code Civ. Proc. § 1060]--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Failure to Exhaust Administrative Remedies

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER TO COMPLAINT
vs.	)	
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE COMPLAINT FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION FOR DECLARATORY RELIEF IN THAT IT _____ [SHOWS ON ITS FACE *or* APPEARS FROM JUDICIALLY NOTICED MATTER] THAT PLAINTIFF HAS FAILED TO EXHAUST HIS/HER/ITS ADMINISTRATIVE REMEDIES.

A. Objection by Demurrer. The objection that the complaint fails to state facts sufficient to constitute a cause of action may be taken by demurrer (*Code Civ. Proc. § 430.10(e)*) when the ground for the objection appears on the face

of the complaint (or from any matter of which the court must or may take judicial notice) (*Code Civ. Proc. § 430.30(a)*).

B. Exhaustion of Administrative Remedies as Jurisdictional. Exhaustion of an available administrative remedy is a condition precedent to obtaining judicial relief, and a court violating the rule acts in excess of its jurisdiction (*Morton v. Superior Court (1970) 9 Cal. App. 3d 977, 981, 88 Cal. Rptr. 533*).

[*Optional*] **C. Mere Allegation of Exhaustion.** A mere allegation that plaintiff has exhausted his or her or its administrative remedies is a conclusion of law not admitted by demurrer (*Pan Pac. Properties, Inc. v. Santa Cruz County (1978) 81 Cal. App. 3d 244, 251, 146 Cal. Rptr. 428*).

[*Optional*] **D. Challenge to Constitutional Application of Statute.** The fact that the action challenges the constitutionality of a statute as applied to plaintiff does not excuse a failure to exhaust administrative remedies (*see California v. Superior Court (1974) 12 Cal. 3d 237, 250-251, 115 Cal. Rptr. 497, 524 P.2d 1281* ; *Taylor v. Swanson (1982) 137 Cal. App. 3d 416, 418, 187 Cal. Rptr. 111*).

[*Optional*] **E. Class Action.** The fact that the action is prosecuted as a class action does not excuse a failure to exhaust administrative remedies (*Morton v. Superior Court (1970) 9 Cal. App. 3d 977, 983, 88 Cal. Rptr. 533*).

[*Optional*] **F. Administrative Remedy Couched in Permissive Language.** The fact that the administrative remedy provided is couched in permissive, as opposed to mandatory, language does not excuse a failure to exhaust the remedy before resorting to the courts (*Morton v. Superior Court (1970) 9 Cal. App. 3d 977, 982, 88 Cal. Rptr. 533*).

[*Optional*] **G. Jurisdiction to Determine Jurisdiction.** The fact that it is not clear whether or not the administrative agency has jurisdiction does not excuse a failure to exhaust administrative remedies. An administrative agency has power to determine in the first instance and before judicial relief may be obtained whether or not a given controversy falls within its granted jurisdiction (*Morton v. Superior Court (1970) 9 Cal. App. 3d 977, 982, 88 Cal. Rptr. 533*).

[*Optional*] **H. Adverse Decision of Administrative Agency in Similar Cases.** The fact that an administrative body has decided other cases on similar facts against plaintiff's position does not make an administrative appeal futile and does not excuse a litigant from exhausting his or her or its administrative remedies (*Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 301, 109 P.2d 942*).

I. Dismissal of Action as Mandatory. Dismissal of a complaint for declaratory relief is mandatory when plaintiff has failed to exhaust his or her or its administrative remedies (*Pan Pac. Properties, Inc. v. Santa Cruz County (1978) 81 Cal. App. 3d 244, 251, 146 Cal. Rptr. 428*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a general demurrer to a complaint for declaratory relief on the ground the complaint fails to state facts sufficient to constitute a cause of action where it appears from the face of the complaint or from matter of which the court must or may take judicial notice that plaintiff has failed to exhaust administrative remedies.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

For an opposing memorandum, see *§ 67.51*.

This form may, with appropriate modifications, also be submitted in support of a nonstatutory motion for judgment on the pleadings or, where the objection does not appear from the face of the complaint or from matter of which the court must or may take judicial notice, in support of a motion for summary judgment.

[b] Nonwaiver of Objection

Unlike the grounds of special demurrer [*see Code Civ. Proc. § 430.10(b)-(d), (f), (g)*] which are waived if not raised by demurrer or answer, the objection that the complaint fails to state facts sufficient to constitute a cause of action is not waived by failure to make the objection by demurrer or answer [*Code Civ. Proc. § 430.80*] and consequently, the objection can be made at a later time, for example, by a motion for judgment on the pleadings before or at trial, or by a defense objection to the introduction of any evidence at trial on the ground that the complaint fails to state facts sufficient to constitute a cause of action [*see § 67.40[2][c]*].

The better practice, in order to avoid unnecessary expense to the client and delay in the action, however, is to make the objection at the earliest possible time. The filing of a demurrer is normally the most expeditious procedure by which to do this.

[c] Exclusive Jurisdiction in Agency or Another Tribunal

Should an action be initially commenced in the superior court for the determination of issues exclusive jurisdiction of which is vested in an administrative agency or in another tribunal, the superior court would lack jurisdiction of the subject of the cause of action alleged and a demurrer on that ground would lie [*Code Civ. Proc. § 430.10(a)*]. However, where jurisdiction is in another state court as opposed to an administrative agency, such as in a court of appeal or in the Supreme Court, the superior court must, instead of dismissing the action, order it transferred to that court [*Code Civ. Proc. § 396*].

Should the superior court overrule the demurrer, defendant may serve and file in a higher court a petition for a writ of prohibition [*see Code Civ. Proc. § 1102*] to restrain the trial court from proceeding in the case on the ground that it lacks jurisdiction of the subject of the cause of action alleged and for a writ of mandate [*see Code Civ. Proc. § 1085*] to compel the trial court to dismiss the action or transfer it to the proper court as the case may be.

[d] Failure to Exhaust Administrative Remedies

Where judicial review of the order, decision, or ruling of an administrative agency by administrative mandate [*Code Civ. Proc. § 1094.5*] is sought and it appears that the petitioner for the writ has failed to exhaust his, her, or its administrative remedies, the court has been said to lack jurisdiction over the subject of the action [*see, e.g., Greenblatt v. Munro (1958) 161 Cal. App. 2d 596, 605, 326 P.2d 929]* , and, as in the case where exclusive jurisdiction is in an administrative agency, a demurrer on the ground of lack of subject matter jurisdiction will lie [*Code Civ. Proc. § 430.10(a)*]. Should the court overrule the demurrer, defendant may petition a higher court for a writ of prohibition [*see Code Civ. Proc. § 1102*] to restrain the trial court from acting on the ground that it lacks jurisdiction of the subject of

the cause of action alleged and for a writ of mandate [*see Code Civ. Proc. § 1085*] to compel the trial court to dismiss the action.

[e] Jurisdiction in Declaratory Relief Actions

Although superior courts have original jurisdiction of most declaratory relief actions [*Code Civ. Proc. §§ 86(a)(7), 1060*], such actions may not be used as a substitute to secure review of administrative actions subject to review by administrative mandate under *Code Civ. Proc. § 1094.5* [*see, e.g., California v. Superior Court (1974) 12 Cal. 3d 237, 249, 115 Cal. Rptr. 497, 524 P.2d 1281]* . The action is, however, authorized to determine the validity of rules and regulations adopted by administrative agencies [*see Gov. Code §§ 11350, 11350.3*; § 67.50]. Nevertheless, the objection that the plaintiff in a declaratory relief action has failed to exhaust administrative remedies does not, when exclusive jurisdiction is not vested in the administrative agency, go to the fundamental jurisdiction of the court and a demurrer on the ground of lack of subject matter jurisdiction would not properly lie. Rather, failure to exhaust administrative remedies is a matter of defense that may be raised as follows:

(1) Failure apparent. When the failure to have exhausted administrative remedies appears from the face of the complaint or from matter of which the court must or may take judicial notice [*see Evid. Code §§ 451, 452*], the complaint fails to state facts sufficient to constitute a cause of action and defendant may demur on that ground [*see Code Civ. Proc. §§ 430.10(e), 430.30(a), 430.70*]. Since there is no other court in California that would have jurisdiction to try the case [*see Code Civ. Proc. § 396*], defendant may also raise the objection by a nonstatutory motion to dismiss the complaint. The objection may also be raised at trial by an objection to the introduction by plaintiff of any evidence. This objection serves the same function as a general demurrer to the complaint or motion for judgment on the pleadings [*see § 67.40[2*][b], [c]].

(2) Failure not apparent. When the failure to have exhausted administrative remedies does not appear from the face of the complaint, whether or not it would appear from judicially noticed matter, the defendant may raise the objection by pleading the failure as an affirmative defense in the answer [*see Code Civ. Proc. §§ 430.30(b), 431.30(b)(2)*] and moving for separate trial of that issue [*see Code Civ. Proc. § 597*] or by a motion for summary judgment under *Code Civ. Proc. § 437c.*

If, in any of these situations, the court overrules the demurrer or objection or denies the motion and proceeds, or threatens to proceed with the case, it is acting in excess of its jurisdiction. In such case defendant may petition a higher court for a writ of prohibition [*see Code Civ. Proc. § 1102*] and mandate [*see Code Civ. Proc. § 1085*] to restrain the trial court from proceeding [*see Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 286-294, 109 P.2d 942* (granting of judicial relief to a party who failed to exhaust administrative remedies is an act in excess of the court's jurisdiction); *see also Mountain View Chamber of Commerce v. Mountain View (1978) 77 Cal. App. 3d 82, 88-89, 143 Cal. Rptr. 441* ; *Morton v. Superior Court (1970) 9 Cal. App. 3d 977, 981, 88 Cal. Rptr. 533]* and to compel court to dismiss the action, or defendant may raise the issue on appeal from the judgment.

Neither the objection that the court lacks jurisdiction of the subject of the cause of action alleged [*Code Civ. Proc. § 430.10(a)*] nor the objection that the complaint fails to state facts sufficient to constitute a cause of action [*Code Civ. Proc. § 430.10(e)*; *see § 67.21[2][b]*] is waived by defendant's failure to make it by demurrer or answer [*Code Civ. Proc. § 430.80*]. Hence, as indicated in the foregoing discussion, either objection may be made after expiration of the time in which to demur or answer.

[f] Related Points and Authorities

For alternative forms of memoranda supporting general demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[g] Related Pleading and Practice Forms

For forms of demurrers to complaints for failure to state a cause of action and notice of hearing, as well as for a procedural guide, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* in California Forms of Pleading and Practice (Matthew Bender).

See also § 67.20[2].

[3] Discussion of Authorities

[a] Exhaustion of Administrative Remedies as Jurisdictional

Morton v. Superior Court *(1970) 9 Cal. App. 3d 977, 88 Cal. Rptr. 533* was a proceeding in prohibition to restrain further proceedings in a pending superior court proceeding in mandate which had been combined with an action for declaratory relief. The action had been brought by city employees, on behalf of themselves and others similarly situated, to resolve a labor grievance without following the grievance procedure adopted by the city manager. In granting the writ, the court of appeal stated that it is settled that the exhaustion of an administrative remedy, when one is available, is a condition precedent to obtaining judicial relief and that a court violating the rule acts in excess of jurisdiction.

[b] Mere Allegation of Exhaustion

Pan Pac. Properties, Inc. v. Santa Cruz County *(1978) 81 Cal. App. 3d 244, 146 Cal. Rptr. 428* was an action by the owner and the trust deed holder of a parcel of land in defendant county against the county for inverse condemnation and declaratory relief. Prior to 1969, plaintiffs' land had been zoned for agricultural use. On September 16, 1969, the county rezoned this land Highway Commercial, but on March 30, 1976, rezoned it as agricultural with one-acre minimum building site. On September 24, 1976 the present action was commenced. Although plaintiffs filed a claim for damages with the county prior to instituting suit, they sought no variance from the ordinance nor did they apply to the county for any building or use permits, as authorized by county ordinance. The complaint alleged that the rezoning was arbitrary and discriminatory, that it prohibited any and all beneficial and reasonable use of plaintiffs' land and therefore constituted a taking without just compensation, and in a separately stated cause of action, plaintiffs contended that the rezoning was unconstitutional and void for stated reasons. The plaintiffs also alleged that they had exhausted their administrative remedies. Defendant's demurrer to the complaint on the grounds of lack of "subject matter" jurisdiction and bar of an ordinance of limitations was sustained "with prejudice," and plaintiffs appealed from the subsequent dismissal. With respect to the exhaustion allegation, the court of appeal, in affirming the judgment, characterized the allegation as "conclusionary" (*81 Cal. App. 3d 244, 251)* . It pointed out that while a demurrer admits all properly pleaded material facts, it does not admit conclusions of fact or law alleged therein. Therefore, appellants' mere allegation of exhaustion of their administrative remedies could not avail them. The court failed to discuss the ground of the demurrer that the trial court lacked jurisdiction of the subject matter, other than to say that failure to exhaust an administrative remedy is a jurisdictional defect (*81 Cal. App. 3d 244, 251)* . See discussion in *§ 67.21[2][e]*.

[c] Challenge to Constitutional Application of Statute

California v. Superior Court *(1974) 12 Cal. 3d 237, 115 Cal. Rptr. 497, 524 P.2d 1281* was an original writ proceeding in the Supreme Court arising out of a superior court action by developers against the California Coastal Zone Conservation Commission. The developers had originally been granted a permit to develop their coastal lands by a regional commission; but, on appeal, the permit was subsequently denied by the state commission. The developers then filed their superior court action for a writ of mandate (both traditional and administrative), for declaratory and injunctive relief, and for damages for inverse condemnation. They also attacked the constitutionality of the California Coastal Zone Conservation Act of 1972 [*Pub. Res. Code §§ 27000-27650*], both on its face and as applied. The commission's general and special demurrers were overruled, and the commission filed the present proceeding in the Supreme Court. In issuing a peremptory writ of mandate directing the trial court to vacate its orders and enter a new order in conformity

with the Supreme Court's opinion, the Supreme Court, insofar as the constitutional attack on the act was concerned, held that the trial court erred in overruling the demurrer to that part of the declaratory relief action challenging the constitutionality of the act as applied. (However, it held that the trial court had properly overruled the demurrer insofar as the challenge was to the unconstitutionality of the act on its face.) The Court agreed with the commission that in such a case the party is essentially seeking to review the validity of an administrative action. Such review is properly brought under Code Civ. Proc. § 1095.5 rather than by means of declaratory relief.

In ***Taylor v. Swanson*** *(1982) 137 Cal. App. 3d 416, 187 Cal. Rptr. 111* , plaintiff unsuccessfully sought a variance of zoning regulations; a proceeding in mandamus resulted in a judgment denying mandate. Plaintiff then brought an action for declaratory relief, in which the trial court entered judgment on res judicata grounds. The court of appeal affirmed, holding that declaratory relief is proper only when the over all constitutionality of a zoning ordinance is challenged. A challenge to the application of the ordinance must be made before the agency and can be reviewed only by administrative mandate (*137 Cal. App. 3d 416, 418)* .

[d] Class Action

The factual background of ***Morton v. Superior Court*** *(1970) 9 Cal. App. 3d 977, 88 Cal. Rptr. 533* is *set forth in § 67.21[3][a]*. In support of their failure to follow the city's grievance procedure, the employees contended they were not required to exhaust their administrative remedy because their lawsuit was a class action. In rejecting this contention, the court of appeal stated that it did not believe that a city employee could dispense with the grievance procedure merely because the grievance affects more than one employee or member of a class. If it were to permit an employee, on important policy questions which vitally affect the city, to bypass the office charged with the duty of managing the city's affairs solely because the grievance affects more than one employee, the court reasoned that it would be foisting on the judicial branch the arduous task of solving governmental policy questions without giving the responsible governmental policy questions without giving the responsible governmental branch the opportunity to solve its own problems at the administrative level (*9 Cal. App. 3d 977, 983)* .

[e] Administrative Remedy Couched in Permissive Language

The factual background of ***Morton v. Superior Court*** *(1970) 9 Cal. App. 3d 977, 88 Cal. Rptr. 533* is *set forth in § 67.21[3][a]*. The city employees took the position that since the grievance procedure by its term did not require an employee to file a written grievance, he or she could resort to the judicial process without first submitting to that procedure. The court rejected this contention, noting the basic purpose for the exhaustion doctrine to be in lightening the burden of overworked courts in cases where administrative remedies are available and are as likely as the judicial remedy to provide the wanted relief. Thus, relying on prior California decisions, the court applied the rule that if an administrative remedy is available, it must be exhausted before resorting to the judicial process even though the administrative remedy is couched in permissive language (*9 Cal. App. 3d 977, 982)* .

[f] Jurisdiction to Determine Jurisdiction

The factual background of ***Morton v. Superior Court*** *(1970) 9 Cal. App. 3d 977, 88 Cal. Rptr. 533* is *set forth in § 67.21[3][a]*. In that case, the city employees argued that the city's grievance procedure was for the purpose of solving minor personnel problems only and did not apply to their grievance relating to credit of overtime. The court of appeal held that if there was any question about the applicability of the grievance procedure, it was incumbent on the city employees to present the question to the city manager so that he could decide the issue in the first instance. Relying on the principle of a court or agency's power to determine if it has jurisdiction of a cause, the court described the power of the administrative agency (in this case the city manager) to include the power to determine, in the first instance and before judicial relief may be obtained, whether a given controversy falls within its granted jurisdiction (*9 Cal. App. 3d 977, 982)* .

[g] Adverse Decision of Administrative Agency in Similar Cases

Abelleira v. District Court of Appeal *(1941) 17 Cal. 2d 280, 109 P.2d 942* did not involve declaratory relief. Rather, it was an original proceeding in prohibition sought to restrain a court of appeal from enforcing both a writ of mandate and temporary restraining order issued by that court and directed against a state commission. Statute provided for a complete administrative procedure in such cases fulfilling every requisite of due process of law. The petitioners for the writ of mandate in the court of appeal had invoked the administrative remedy but failed to complete it after an initial ruling against their position. Rather, they applied directly to the court of appeal for a writ of mandate, which that court granted. In the prohibition proceeding, they contended, inter alia, that they were justified in disregarding the administrative remedy because the administrative agency had already decided cases on similar facts against their present position, and that an appeal to the agency in their case would have been fruitless. In rejecting this contention and issuing its writ of prohibition directed to the court of appeal, the Supreme Court characterized the contention as a "slender thread" on which their entire case hung. The Court found that their position was unsound in principle and unsupported by the better authorities, since it would lead to a breakdown of the rule of exhaustion of remedies. It reasoned that to permit petitioners to ignore the administrative board and treat its action as already taken, learning on hearsay or by analogy that the board may take a certain action, would be to permit the party applying to the court to assert, without any conclusive proof or possibility of successful challenge, the outcome of an appeal which the board has not even been permitted to decide (*17 Cal. 2d 280, 300-301)* . *See also* *Subriar v. Bakersfield (1976) 59 Cal. App. 3d 175, 192, 130 Cal. Rptr. 853* .

[h] Dismissal of Action as Mandatory

The factual background of ***Pan Pac. Properties, Inc. v. Santa Cruz County*** *(1978) 81 Cal. App. 3d 244, 146 Cal. Rptr. 428* is *set forth in § 67.21[3][b]*. In affirming the judgment of dismissal following the sustaining of defendant county's demurrer "with prejudice," the court of appeal stated that dismissal was mandatory because of the jurisdictional infirmities consisting of plaintiff's failure to exhaust their administrative remedy (*81 Cal. App. 3d 244, 251)* .

[4] Additional Authorities

[a] Exhaustion of Administrative Remedies as Jurisdictional

The procedural background of *Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 109 P.2d 942* is discussed in *§ 67.21[3][g]*. In that case the Supreme Court held that exhaustion of administrative remedies is a jurisdictional prerequisite to court action and not a matter of judicial discretion. The Court stated that the court of appeal's lack of jurisdiction was established and that until the administrative procedure authorized by statute had been invoked and completed, there was nothing for that court or any other court to review; thus, it could not interfere in the intermediate stages of the proceeding (*17 Cal. 2d 280, 291)* . The Supreme Court explained that this is the doctrine of "exhaustion of administrative remedies" and that under the doctrine where an administrative remedy is provided by statute, relief must be sought from the administrative body and the remedy exhausted before the courts will act (*17 Cal. 2d 280, 292)* . The Court added that it is not a matter of judicial discretion but a fundamental rule of procedure laid down by courts of last resort, followed under the doctrine of stare decisis, and binding on all courts (*17 Cal. 2d 280, 291)* .

Alta Loma School District v. San Bernardino County Committee on School District Reorganization (1981) 124 Cal. App. 3d 542, 177 Cal. Rptr. 506 involved certain school districts' opposition to a reorganization committee's proposal to abolish them. The districts sought a writ of mandate to set aside the proposal on grounds of procedural irregularities and to prohibit its consideration by the State Board of Education. Defendants demurred on numerous grounds, including plaintiff's failure to exhaust their administrative remedy of review of the proposal by the State Board of Education. Reversing the trial court's overruling of the demurrer, the court of appeal noted that the board had the power to order any modification of the proposal necessary to correct the procedural defects alleged by plaintiffs, probably obviating the need for judicial review of the proposal. Stating the rule that exhaustion of the administrative remedy was jurisdictional rather than discretionary, the court held that plaintiffs were precluded from judicial review until they had pursued the

review by the board and subsequent administrative processes (*124 Cal. App. 3d 542, 554-556)* .

Mountain View Chamber of Commerce v. Mountain View (1978) 77 Cal. App. 3d 82, 143 Cal. Rptr. 441 was an action by a chamber of commerce, four individual sign owners, a corporate sign owner, and a restaurant to enjoin enforcement of defendant's sign ordinance and for a declaration that the ordinance was unconstitutional as applied. The trial court denied plaintiffs' application for a preliminary injunction and sustained defendant's demurrer to the complaint without leave to amend on the ground plaintiffs had failed to exhaust their administrative remedies. In affirming the judgment, the court of appeal said that it is fundamental California law that before one is entitled to judicial review or relief, a litigant must exhaust whatever administrative remedies are provided. Quoting *Morton v. Superior Court (1970) 9 Cal. App. 3d 977, 981, 88 Cal. Rptr. 533* , the court stated the doctrine to be a condition precedent to obtaining judicial relief; a court that violates the rule acts in excess of jurisdiction (*77 Cal. App. 3d 82, 88)* .

Frisco Land & Mining Co. v. California (1977) 74 Cal. App. 3d 736, 141 Cal. Rptr. 820 was an action for damages for inverse condemnation rather than an action for declaratory relief. Plaintiff was the owner of a 650-acre subdivision, substantially all of which was embraced within the permit area of the coastal zone created by the California Coastal Zone Conservation Act of 1972 [*Pub. Res. Code §§ 27000-27650*]. Plaintiff claimed that its land had been taken by the state through passage of the act and the subsequent acts and omissions of the North Central Coast Regional Commission, a regulatory body created by the act, which deprived plaintiff of the only use it had for the land, which was to subdivide it into lots for single family residences. Plaintiff, among other things, had withdrawn its application to the regional commission for a blanket exemption to allow construction of a house on any lot in the subdivision by any person when the regional commission imposed unacceptable conditions. The trial court granted the state's motion for summary judgment, among other grounds, that passage of the coastal act did not constitute inverse condemnation and that plaintiff was barred from judicial relief because of a failure to exhaust its administrative remedies. In affirming the judgment, the court of appeal, with respect to the exhaustion doctrine, pointed out that by withdrawing its application for a blanket permit, plaintiff placed itself in the position of one who had failed to exhaust administrative remedies and that it not only failed to continue to assert its contentions at the initial hearing body, but it abandoned its right to seek review by the state commission and judicial review of the decision if still dissatisfied. The court explained that the doctrine of exhaustion of administrative remedies requires that when an administrative remedy is provided by statute, relief must be sought from the administrative body, and this remedy exhausted, before the courts will act (*74 Cal. App. 3d 736, 754)* .

McHugh v. Santa Cruz County (1973) 33 Cal. App. 3d 533, 109 Cal. Rptr. 149 was a taxpayer's action to recover property taxes assessed for specified years and paid under protest rather than for declaratory relief. The trial court sustained the county's demurrer without leave to amend, granted its motion to strike the complaint, and dismissed the action with prejudice on the ground that recovery for certain years was barred by the statute of limitations and with respect to recovery sought for the other years, plaintiff had failed to exhaust his administrative remedies. Although the court of appeal concluded that the complaint stated a cause of action with respect to a portion of the taxes paid under protest attributable to one of the taxable years and that plaintiff with respect to it had exhausted his administrative remedies and was not barred by the statute of limitations, the court said that the doctrine is jurisdictional, requiring a party to use all available agency administrative procedures before resorting to the courts for relief. It elaborated that the doctrine requires a party not only initially to raise the issue in the administrative forum, but proceed through the entire proceeding to a final decision on the merits of the entire controversy (*33 Cal. App. 3d 533, 538-539)* .

[b] Challenge to Constitutional Application of Statute

The factual background of *Frisco Land & Mining Co. v. California (1977) 74 Cal. App. 3d 736, 141 Cal. Rptr. 820* is discussed in *§ 67.21[4][a]*. The court held that while the subdivider was entitled to challenge the constitutionality of the coastal act on its face, even though it failed to make such a challenge before the regional commission at the time it applied for an exemption or in its subsequent application for a permit, it could not challenge the constitutionality of the manner in which the provisions of the act were applied to it by the regional commission without having raised the

constitutional objections before that body (*74 Cal. App. 3d 736, 744)* .

Subriar v. Bakersfield (1976) 59 Cal. App. 3d 175, 130 Cal. Rptr. 853 was an action by plaintiff operator of an ambulance service in defendant city without a certificate of convenience and necessity, as required by the city's municipal code, against the city for a declaration that the "convenience and necessity" clause of the ordinance was invalid and in violation of the federal and state Constitutions. While plaintiff had previously on two different occasions applied to the city for a certificate, he refused to provide any information to show that public convenience and necessity required issuing a certificate or license to him and failed to pursue the administrative remedies provided. Between plaintiff's first and second application, the city issued such a certificate to another ambulance operator who had provided information showing that public convenience and necessity required the additional service. The trial court declared the ordinance unconstitutional and granted a permanent injunction against its enforcement. Defendants appealed. After reviewing the facts, the court of appeal, in reversing the judgment, pointed out that plaintiff had not only failed to exhaust his administrative remedies but had even failed to test them by letting his application go to decision by the city manager (*59 Cal. App. 3d 175, 191)* . The court said that the mere fact that a statute is challenged on constitutional grounds does not excuse a failure to exhaust administrative remedies (*59 Cal. App. 3d 175, 193)* . The court, pointing out that plaintiff was attacking the constitutionality of the ordinance as it applied to his situation, concluded that when plaintiff submits to an agency's jurisdiction by applying for a license or permit under the act, the validity of which is not attacked in its entirety, the proper method of attacking the constitutionality of a specific subdivision of the act is by judicial review under the provisions of *Code Civ. Proc. § 1094.5* after exhausting the administrative remedy, rather than by declaratory relief (*59 Cal. App. 3d 175, 194)* .

In *Subriar* plaintiff's attorney also joined himself in a separately stated cause of action of the complaint as a taxpayer plaintiff under *Code Civ. Proc. § 526a* seeking both a declaratory judgment that the questioned provision in the city ordinance was unconstitutional and an injunction restraining its enforcement. The court held that such action was proper to determine the constitutional question and, on concluding that the ordinance was constitutional, reversed the judgment.

[c] Class Action

The factual background of *Mountain View Chamber of Commerce v. Mountain View (1978) 77 Cal. App. 3d 82, 143 Cal. Rptr. 441* is *set forth in § 67.21[4][a]*. The first cause of action alleged was a class action by the chamber of commerce as a representative of all members of the chamber of commerce who were or might have been adversely affected by the city's sign regulations. In affirming the judgment of dismissal on the ground that administrative remedies had not been exhausted, the court of appeal said that because some plaintiffs were proceeding via a class action did not per se make an exception to the exhaustion doctrine. The court explained that the doctrine applies to class actions which raise constitutional issues, adding that each of the second through sixth causes of action was in the names of individual plaintiffs who objected to specific provisions of the sign ordinance as it applied to or affected their particular properties and/or business (*77 Cal. App. 3d 82, 96)* .

The factual background of *Subriar v. Bakersfield (1976) 59 Cal. App. 3d 175, 130 Cal. Rptr. 853* is set forth § 67.21[4][b]. The court of appeal said that the requirement of exhausting administrative remedies applies to a class action raising constitutional issues (*59 Cal. App. 3d 175, 193)* .

The factual and procedural background of *Alta Loma School District v. San Bernardino County Committee on School District Reorganization (1981) 124 Cal. App. 3d 542, 177 Cal. Rptr. 506* is discussed in *§ 67.21[4][a]*. The plaintiffs had argued that they were entitled to judicial review under an exception to the exhaustion doctrine available when the administrative agency lacks jurisdiction over the subject matter of the action. The court of appeal held that the agency itself has the power to determine in the first instance and before judicial relief could be sought whether or not it has jurisdiction over the controversy (*124 Cal. App. 3d 542, 555-556)* .

California Points & Authorities

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Volume 6 Chapters 60-69 COSTS---to---DECLARATORY RELIEF
CHAPTER 67 DECLARATORY RELIEF
PART II. FORMS

6-67 California Points & Authorities § 67.22

§ 67.22 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10] for Declaratory Relief [Code Civ. Proc. § 1060]--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Fully Matured Claim

[1] FORM Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10] for Declaratory Relief [Code Civ. Proc. § 1060]--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Fully Matured Claim

[*Caption. See § 67.21.*]

THE COMPLAINT FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE CAUSE OF ACTION FOR DECLARATORY RELIEF IN THAT IT RELATES SOLELY TO A FULLY MATURED CLAIM AND NO DECLARATION OF FUTURE RIGHTS AND OBLIGATIONS OF THE PARTIES IS NECESSARY OR POSSIBLE.

A. Objection by Demurrer. [*See § 67.21, Paragraph A.*]

B. Purpose of Declaratory Relief. The declaratory procedure operates prospectively and not merely for the redress of past wrongs (*County of San Diego v. State (2008) 164 Cal. App. 4th 580, 606-608, 79 Cal. Rptr. 3d 489* ; *Travers v. Louden (1967) 254 Cal. App. 2d 926, 931, 62 Cal. Rptr. 654*)

C. Fully Matured Claim. An action for declaratory relief does not lie when the cause of action, if any, has already accrued and the only question for determination by the court is the liability of the defendant or the relief to which plaintiff is entitled (*Fritz v. Superior Court (1936) 18 Cal. App. 2d 232, 235, 63 P.2d 872*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in support of a general demurrer to a complaint for declaratory relief for failure to state a cause of action when it appears from the face of the complaint or from matter of which the court must or may take judicial notice that the only issue involved relates to a fully matured claim and no declaration as to the future rights and obligations of the parties is necessary or possible. For an opposing memorandum, see *§ 67.52*.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

It should be noted that because of the one form of civil action rule [*Code Civ. Proc. § 307*], the demurrer will be overruled if the complaint states a cause of action within the jurisdiction of the superior court on any theory [*see, e.g., Kessloff v. Pearson (1951) 37 Cal. 2d 609, 614, 233 P.2d 899* ; *Lord v. Garland (1946) 27 Cal. 2d 840, 853, 168 P.2d 5* ; *Tiburon v. Northwestern P. R. Co. (1970) 4 Cal. App. 3d 160, 170, 84 Cal. Rptr. 469]* .

[b] Related Uses

The foregoing memorandum may also, with appropriate modifications, be used in support of a nonstatutory motion for judgment on the pleadings, or, where the objection does not appear from the face of the complaint, a motion for summary judgment.

See also Comments to *see §§ 67.20* and *67.21*.

[3] Discussion of Authorities

[a] Purpose of Declaratory Relief

In ***County of San Diego v. State*** *(2008) 164 Cal. App. 4th 580, 79 Cal. Rptr. 3d 489* , San Diego County and Orange County sued the State of California and several state officials, seeking reimbursement under Cal. Const., art. XIIIB, § 6, and *Gov. Code § 17617* for the costs of providing state-mandated programs and services. The trial court entered judgment for the counties, including the following declaratory relief: "San Diego County is entitled to declaratory relief stating [it] is owed $41,652,974 by the State of California. Orange County is entitled to the same relief noting it is entitled to a sum of $72,755,977. These declarations are based on a prior declaratory relief order of this court, evidence at trial, and agreement by the State at trial that the sums are owed." The court of appeal reversed, holding that the judiciary lacked the power to remedy the legislature's failure to appropriate the funds necessary to reimburse the counties (*164 Cal. App. 4th 580, 612-614)* .

The court of appeal concluded, among other things, that the monetary award was improper as declaratory relief because there was no actual controversy at trial as to the state's constitutional and statutory obligation to pay the counties' reimbursement claims or as to the amount of the claims. Declaratory relief is available only in cases of actual controversy (including a probable future controversy) relating to the legal rights and duties of the parties (*Code Civ. Proc. § 1060*). The court emphasized that in their causes of action for declaratory relief, the counties had not sought a declaration of the amounts the state was obligated to pay them on their reimbursement claims; they sought a declaration that the state was constitutionally and statutorily required to *promptly and fully* pay them those amounts. Because there was no dispute at trial as to the amount of their claims, there was no present controversy on that point, let alone a probable future controversy, to be resolved by declaratory relief. Therefore, it was an idle and superfluous act for the trial court to issue a declaratory judgment that merely stated the state's undisputed obligation to pay the counties' reimbursement claims and the undisputed amounts of those claims (*164 Cal. App. 4th 580, 606-607)* .

The court of appeal also noted that the declaratory judgment in this case ran afoul of the principle that declaratory relief operates prospectively to declare future rights, rather than to redress past wrongs. The portion of the judgment awarding the counties the amount of their reimbursement claims as declaratory relief did not operate prospectively to declare future rights; rather, it redressed the state's past wrongs in failing to meet its constitutional obligations (*164 Cal. App. 4th 580, 607-608)* . The court acknowledged that a court can award monetary relief in a declaratory relief action relief under appropriate circumstances, such as when a court declares a contract to be valid and awards damages for its breach in the interest of disposing of the entire controversy between the parties and granting complete relief. However, the present case did not present appropriate circumstances for awarding damages in connection with declaratory relief, because there was no actual controversy as to the validity or the amounts of the counties' claims (*164 Cal. App. 4th 580, 608)* .

Travers v. Louden *(1967) 254 Cal. App. 2d 926, 62 Cal. Rptr. 654* was an action for declaratory relief to determine the rights of the parties to an agreement to purchase real property in which, if any breach of the agreement existed, it had already occurred. In affirming summary judgment for defendant and in holding that no cause of action for declaratory relief was stated, the court of appeal said that there is unanimity of authority that the declaratory procedure operates prospectively and not merely for the redress of past wrongs. It explained that the procedure serves to set controversies at rest before they lead to repudiation of obligations, invasion of rights, or commission of wrongs. Thus, the remedy is to be used in the interest of preventive justice, i.e., to declare rights rather than execute them (*254 Cal. App. 2d 926, 931)* .

[b] Fully Matured Claim

Fritz v. Superior Court *(1936) 18 Cal. App. 2d 232, 63 P.2d 872* was a proceeding in prohibition (treated as mandate) to prevent further prosecution of an action for declaratory and injunctive relief. The controversy involved the validity of the claims of the respective parties to act as officers and directors of a corporation. At the time, Civ. Code § 315 [repealed, *now see Corp. Code § 709*], the requirements of which had not been complied with by plaintiffs, provided a judicial remedy to resolve such disputes. In granting the writ directing the trial court to dismiss the proceeding, the court of appeal held that declaratory relief does not lie where the cause of action has already accrued and the only question presented for determination is the question of liability or of the relief to which the parties are entitled. The court explained that although declaratory relief may be available despite the existence of an available remedy in the ordinary action at law or in equity, nevertheless, the character of the action must be determined from an examination of the facts pleaded, rather than from the title or prayer for relief. The court noted that although the prayer asked for declaratory relief, the pleaded facts showed that the action was under former Civ. Code § 315. The court further held that an action for declaratory relief would not lie on the additional ground that the complaint showed there was no actual controversy between plaintiffs and defendants (*18 Cal. App. 2d 232, 235)* [*see § 67.24*].

[4] Additional Authorities

[a] Fully Matured Claim

Kessloff v. Pearson (1951) 37 Cal. 2d 609, 233 P.2d 899 involved in part an action for declaratory relief and an accounting. Defendants were engaged in the manufacture and sale of candy under the name Pearson Candy Company. On July 1, 1944, defendant Edward F. Pearson contracted in writing to employ plaintiff to make candy for which he was to receive a salary plus an increasing share each year of the company's profits. Plaintiff continued in employment under the contract until July 1, 1948, and thereafter, under different terms and conditions until February 26, 1949 when his employment terminated. At the end of each year, plaintiff received a sum represented to be his share of the profits and was told he was not entitled to an explanation as to how the sum was computed. Plaintiff alleged that (1) large sums of money had been expended before computation of net earnings in arriving at the amounts due plaintiff; (2) plaintiff had been denied access to the company books; (3) on termination of employment he attempted to obtain a statement of earnings and expenditures during the contract period but defendant refused to furnish any such statement; and (4) the

existence of an actual controversy between the parties as to the computation of net profits. He asked, among other things, for a declaration of the parties' rights and duties under the contract, and a full and complete accounting of the gross earnings and business expenditures of the company. The trial court sustained defendants' objection at trial to the introduction by plaintiff of any evidence, on the ground the complaint failed to state facts sufficient to constitute a cause of action since the only judgment that could be entered was one for money. The court entered judgment dismissing the complaint, and plaintiff appealed. The Supreme Court pointed out that under the facts alleged, a breach of contract had occurred, that plaintiff might be entitled to an accounting and to a money judgment, and that any judgment which plaintiff might recover could be afforded in an action for an accounting where questions as to the terms and construction of the contract would become triable issues. The Court concluded that the trial court was correct in holding that all the relief sought could be had in an action for an accounting (*37 Cal. 2d 609, 613)* . (The Supreme Court reversed the judgment, however, on the ground the complaint properly stated a cause of action for an accounting.)

Orloff v. Metropolitan Trust Co. (1941) 17 Cal. 2d 484, 110 P.2d 396 involved an order sustaining general demurrers to a third amended complaint followed by a judgment of dismissal. The complaint purported to set forth five causes of action: breach of an escrow agreement; civil conspiracy; money received in trust for plaintiff; money had and received; and declaratory relief. In affirming the judgment, the Supreme Court pointed out that in his fifth cause of action, plaintiff alleged that a controversy existed between him and the defendants as to their respective rights and obligations under the agreements which had been particularly pleaded. However, the Court explained that all of the acts of which plaintiff complained were concluded before his suit was commenced and that the relief he sought was for the court to review them and declare that he was entitled to a judgment for $2,500. These allegations, the Court found, did not measure up to the requirements of an action for declaratory relief. It concluded that the superior court properly refused to exercise its power to entertain the complaint upon that ground (*17 Cal. 2d 484, 489)* .

Baldwin v. Marina City Properties, Inc. (1978) 79 Cal. App. 3d 393, 145 Cal. Rptr. 406 involved a second amended six-count complaint, the fourth count of which was for declaratory relief. The complaint in substance sought recovery of damages for alleged wrongful impairment of the value of a security interest but omitted the essential allegation that the value of the security interest had been impaired. Defendants' demurrer was sustained without leave to amend, and plaintiffs appealed from the subsequent judgment of dismissal. With respect to the declaratory relief count, the court of appeal, quoting from Witkin [3 Witkin, California Procedure (2d ed), Pleading, § 722] stated that declaratory relief operates prospectively, serving to set controversies at rest. If there is a controversy which calls for a declaration of rights, it is no objection that past wrongs are also to be redressed; but there is no basis for declaratory relief where only past wrongs are involved. Hence, the court explained, if there is an accrued cause of action for an actual breach of contract or other wrongful act, declaratory relief may be denied (*79 Cal. App. 3d 393, 407)* . The court, after pointing out that plaintiffs have a present accrued right as a secured party to foreclose on the collateral or to sue for an alleged impairment of the value of the collateral, and that there were no claims by plaintiffs that an actual controversy existed between plaintiffs and defendants, concerning any future rights, held that the demurrer to count IV was properly sustained. The court nevertheless reversed the judgment of dismissal on the ground that there was a reasonable possibility that plaintiffs could cure the defects in their complaint to state a cause of action for damages and directed the trial court to grant plaintiffs leave to file a third amended complaint (*79 Cal. App. 3d 393, 408)* .

Travers v. Louden (1967) 254 Cal. App. 2d 926, 62 Cal. Rptr. 654 was an action for declaratory relief to determine the rights of the parties with respect to an agreement to purchase real property, where, if any breach of the agreement existed, it had already occurred. The amended complaint alleged, inter alia, that: (1) defendant Louden had agreed to sell plaintiff a described lot for a specified sum, for which plaintiff paid Louden $100 of the purchase price; (2) the agreement provided that if the seller was unable to deliver a good title within 90 days, seller would return the $100 and the agreement would terminate; (3) plaintiff and defendant Louden learned that defendant Highman had recorded an option to purchase the lot and agreed to file suit against Highman to quiet title; (4) plaintiff agreed to and did assist in the lawsuit and offered to pay half the costs; (5) the agreement between them was to remain in force pending the lawsuit; (6) Louden thereafter sent plaintiff a check for $100 and a notice that he was unable to convey title because of the Highman option; (7) despite plaintiff's refusal to consent to termination of the agreement Louden, who denied

plaintiff's right to acquire the property conveyed the lot without consideration to Highman who had full knowledge of plaintiff's agreement; and (8) Louden denied plaintiff's claim of a right to acquire the property under the agreement. In affirming summary judgment for defendant, the court of appeal, in holding that no action for declaratory relief was stated, held that the complaint showed that there was a controversy whether Louden breached his contract with Travers. If Louden had no right to terminate it, the court observed that Travers could bring a plenary action for damages or for equitable relief. After noting that no facts were alleged which would render a declaration with respect to the future conduct of the parties necessary or proper, the court concluded at it could find no authority for the proposition that declaratory relief is proper procedure when the rights of the complaining party have crystallized into a cause of action for past wrongs, all relationship between the parties has ceased to exist and there is no conduct of the parties subject to regulation by the court (*254 Cal. App. 2d 926, 928-929)* .

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California Points & Authorities

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Volume 6 Chapters 60-69 COSTS---to---DECLARATORY RELIEF
CHAPTER 67 DECLARATORY RELIEF
PART II. FORMS

6-67 California Points & Authorities § 67.23

§ 67.23 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10] for Declaratory Relief [Code Civ. Proc. § 1060]--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Declaration Not Necessary or Proper at Time Under Circumstances [Code Civ. Proc. § 1061]

[1] FORM Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10] for Declaratory Relief [Code Civ. Proc. § 1060]--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Declaration Not Necessary or Proper at Time Under Circumstances [Code Civ. Proc. § 1061]

[*Caption. See § 67.21.*]

THE COMPLAINT FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION IN THAT IT SHOWS ON ITS FACE OR IT APPEARS FROM JUDICIALLY NOTICED MATTER THAT A JUDICIAL DECLARATION OR DETERMINATION IS NOT NECESSARY OR PROPER AT THIS TIME UNDER ALL THE CIRCUMSTANCES.

A. Objection by Demurrer. [*See § 67.21, Paragraph A.*]

B. Discretion of Court to Refuse Declaratory Relief. The court may refuse declaratory relief in any case where its declaration or determination is not necessary or proper at the time under all the circumstances (*Code Civ. Proc. § 1061*).

C. Raising Objection by Demurrer. The objection that a declaratory judgment is not necessary or proper at the time under all the circumstances where this fact appears from the face of the complaint (or from matter of which the court must or may take judicial notice) may be made by demurrer to the complaint on the ground that it fails to state facts sufficient to constitute a cause of action (*Moss v. Moss (1942) 20 Cal. 2d 640, 642, 128 P.2d 526*).

[*Optional*] **D. Available Alternative Remedies.** The availability of other legal or equitable remedies which are as speedy and adequate and as well suited to plaintiff's needs as declaratory relief renders declaratory relief unnecessary (*Communist Party v. Peek (1942) 20 Cal. 2d 536, 540, 127 P.2d 889*). If the Legislature has specified an exclusive procedure for litigating particular disputes, it is an abuse of discretion for the superior court to bypass the statutory procedure and hear an ordinary declaratory relief action (*Filarsky v. Superior Court (2002) 28 Cal. 4th 419, 121 Cal. Rptr. 2d 844, 49 P.3d 194* ; *DeLaura v. Beckett (2006) 137 Cal. App. 4th 542, 545-547, 40 Cal. Rptr. 3d 253*).

[*Optional*] **E. Another Action Pending.** Where another action is pending between the same parties in which the issue sought to be adjudicated in the declaratory relief action can be finally adjudicated, declaratory relief is properly denied (*Hagan v. Fairfield (1965) 238 Cal. App. 2d 197, 202, 47 Cal. Rptr. 600*).

[*Optional*] **F. Unclean Hands.** The trial court is justified in concluding that its adjudication would not be proper where the party seeking declaratory relief has "unclean hands" (*Maguire v. Hibernia Sav. & L. Soc'y (1944) 23 Cal. 2d 719, 730-731, 146 P.2d 673* ; *Moss v. Moss (1942) 20 Cal. 2d 640, 643, 128 P.2d 526*).

[*Optional*] **G. Little or No Practical Effect.** If the resolution of a controversy over future contractual remedies would have little practical effect in terms of altering the parties' behavior--for example, if it is not alleged that the remedial provisions are about to come into play or that the continuation of the contractual relationship depends on the resolution of the current controversy--the court has considerable discretion to deny declaratory relief because it is not necessary or proper at the time under the circumstances (*Meyer v. Sprint Spectrum L.P. (2009) 45 Cal. 4th 634, 646-648, 88 Cal. Rptr. 3d 859, 200 P.3d 295*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a general demurrer to a complaint for declaratory relief for failure to state a cause of action where it appears from the face of the complaint or from matter of which the court must or may take judicial notice that a judicial declaration or determination is not necessary or proper at the time under all the circumstances [*see Code Civ. Proc. § 1061*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

If the demurrer is sustained without leave to amend, or with leave to amend and plaintiff fails to amend, rather than order dismissal of the action [*see Code Civ. Proc. § 581d*], the court should enter judgment declaring that a judicial declaration or determination is not necessary or proper at the time under all the circumstances in that, for example, another action is pending between the same parties in which the issue raised can be as adequately and speedily determined as in the declaratory relief action [*see* discussion of *Moss v. Moss (1942) 20 Cal. 2d 640, 128 P.2d 526* , under § 67.23[3][a]].

[b] Related Uses

This memorandum may also, with appropriate modifications, be used in support of either a nonstatutory motion for judgment on the pleadings or, where the ground for refusal of relief does not appear from the face of the complaint, a motion for summary judgment [*see § 67.40[2]*].

[c] Alternative Relief

Instead of dismissing, a court may issue a stay of a declaratory judgment action when it will require anticipating and determining an issue that necessarily will be resolved in the underlying action [*California Ins. Guarantee Assn. v. Superior Court (1991) 231 Cal. App. 3d 1617, 1621-1624, 283 Cal. Rptr. 104]* . For example, a court must stay a declaratory judgment action between an insurer and insured to adjudicate coverage issues under a liability policy, if factual issues presented in the declaratory judgment action will necessarily be resolved in an underlying action brought by a third party against the insured [*Great Am. Ins. Co. v. Superior Court (2009) 178 Cal. App. 4th 221, 235, 100 Cal. Rptr. 3d 258* ; *see California Ins. Guarantee Assn. v. Superior Court (1991) 231 Cal. App. 3d 1617, 1621-1622, 1628, 283 Cal. Rptr. 104* ; *cf.* [3][c], *below*]. But if the declaratory judgment action can be resolved on legal issues or factual issues unrelated to those in the underlying action, whether to stay the declaratory judgment action is a matter within the trial court's discretion. In exercising its discretion, the trial court should consider the possible prejudice to the insured if the declaratory judgment action is not stayed, as well as the possible prejudice to the insurer is the action is stayed [*Great Am. Ins. Co. v. Superior Court (2009) 178 Cal. App. 4th 221, 235-237, 100 Cal. Rptr. 3d 258]* .

[d] Validity of Administrative Regulations

It is not clear whether the trial court may properly refuse declaratory relief under *Code Civ. Proc. § 1061* on the ground that its declaration is not necessary or proper at the time under all the circumstances in an action brought under *Gov. Code § 11350*. This latter section authorizes any interested party to obtain a judicial declaration as to the validity of any administrative regulation. The doubt arises from dictum in the case of *Pacific Motor Transp. Co. v. State Bd. of Equalization (1972) 28 Cal. App. 3d 230, 104 Cal. Rptr. 558* . That case was an action by two trucking companies to determine the validity of a tax regulation adopted by the State Board of Equalization. The trial court sustained defendant's demurrer to the complaint on the ground the court lacked jurisdiction of the subject matter of the action under former Rev. & Tax. Code § 10276, prohibiting actions to prevent or enjoin the collection of a tax, and plaintiffs appealed from the ensuing judgment of dismissal. The court of appeal, distinguishing several earlier cases on the ground that they did not consider former Gov. Code § 11440 [*now see Gov. Code § 11350*], held that the trial court did have jurisdiction and that the validity of an administrative tax regulation may be determined by a declaratory relief action commenced under former Gov. Code § 11440 [*now see Gov. Code § 11350*], if the effect of the court's determination is not to enjoin directly the collection of the tax. The court, however, (*28 Cal. App. 3d 230, 237)* found meritless the board's contention that the trial court nevertheless had authority to dismiss the action under *Code Civ. Proc. § 1061* on the ground that the relief sought by plaintiffs was not necessary or proper at the time under all the circumstances. The court pointed out that the trial court did not pass on the question of the propriety of the relief but had erroneously found a lack of jurisdiction. The court then questioned the applicability of *Code Civ. Proc. § 1061* by adding: "Furthermore, the Supreme Court in *Chas. L. Harney, Inc. v. Contractors' Bd., supra [1952], 39 Cal.2d 561, 564, [247 P.2d 913]* , held that an interested party is *entitled* under *section 11440 of the Government Code* to obtain a judicial declaration as to the validity of an administrative regulation." (Italics added.) The court found significant that the Supreme Court had held that an interesting person was "entitled" under former Gov. Code § 11440 [*now see Gov. Code § 11350*] to obtain a judicial declaration, contrasting that language with that of *Code Civ. Proc. §§ 1060* and *1061*, which provide that one "may" bring an action [*Code Civ. Proc. § 1060*], subject to dismissal if the court determines that the relief sought is not necessary or proper at the time under all the circumstances [*Code Civ. Proc. § 1061*].

However, the Supreme Court in *Harney* was concerned with defendant's objection that the complaint failed to state a cause of action since plaintiff had not alleged that it had, in effect, violated the regulation involved and hence that there was no actual controversy between the parties [*see Code Civ. Proc. § 1060*]. The full passage in *Harney* only partially quoted by the court in *Pacific Motor, above*, reads: "The Legislature, by *Honeywell* was a declaratory relief action against the State Board of Equalization by corporate taxpayers engaged in the manufacture and installation of elevators and temperature control systems for a declaratory judgment that the board's rule 11 [*18 Cal. Code Reg. § 1521*], making a sale of fixtures a sale of tangible personal property subject to the Sales Tax Act notwithstanding that the fixture may be installed on real property and that the seller may provide incidental personal services in connection with its

installation, was invalid as applied to them. Defendant demurred to the complaint on the ground the superior court was without jurisdiction and that no cause of action for declaratory relief was stated because each taxpayer had engaged in business for several years, and its own tax liability, if any, had already been fixed by its own conduct and it had adequate administrative remedies by way of claims for refund. In fact, claims for refund had been made and were in the process of consideration and in some instances, actions for enactment of section 11440 [*now see Gov. Code § 11350*], must have intended to permit persons affected by an administrative regulation to test its validity without having to enter into contracts with third persons in violation of its terms or to subject themselves to prosecution or disciplinary proceedings." That is, *Harney* did not involve the issue as to whether a judicial declaration was or was not proper or necessary at the time under all the circumstances.

Insofar as it permitted a declaratory relief action to be brought under former Gov. Code § 11440 [*now see Gov. Code § 11350*] to obtain a judicial declaration concerning the validity of a tax regulation if the declaration does not have the effect of preventing or enjoining the collection of the tax in question, *Pacific Motor Transp. Inc.* was directly followed by the court of appeal in *Pacific Gas & Elec. Co. v. State Bd. of Equalization (1979) 97 Cal. App. 3d 687, 695-696, 159 Cal. Rptr. 60* .

Its reasoning was also applied in *Honeywell, Inc. v. State Bd. of Equalization (1975) 48 Cal. App. 3d 907, 122 Cal. Rptr. 243* . However *Honeywell* also contains dictum which may be interpreted to permit a trial court to consider the propriety under *Code Civ. Proc. § 1061* of a declaratory relief action under former Gov. Code § 11440 [*now see Gov. Code § 11350*]. In *Honeywell* defendant demurred to the complaint on the ground that plaintiffs had adequate administrative remedies and that plaintiffs had filed refunds which were pending in superior court. The demurrer was overruled, and the case tried on the merits, resulting in a judgment declaring the rule invalid. Defendant appealed. In considering the appeal on its merits and reversing the judgment, the court of appeal concluded that *Pacific Motor Transp. Co.* had cast some doubt on the applicability of older case law which had held that declaratory relief under former Gov. Code § 11440 [*now see Gov. Code § 11350*] was not available to determine the validity of a tax regulation of a statutory provision which barred the enjoining of the collection of a particular tax authorized by the regulation. Nevertheless, *Honeywell* reached this conclusion reluctantly. It noted that the action involved a relitigation of the same issues raised in prior actions, one of which had been adjudicated by final judgment. It stated that the trial court could well have refused jurisdiction of this case under the provisions of *Code Civ. Proc. § 1061* and that although it did not do so, the court of appeal "... might well [have] dispose[d] of this appeal on the ground that the court's failure to dismiss under the circumstances here presented an abuse of discretion. [Citation.] However, since *Pacific Motor Transport Co. v. State Bd. of Equalization, 28 Cal. App.3d 230 [104 Cal. Rptr. 558]* , casts some doubt on the applicability of *Casey v. Bonelli, supra [(1949) 93 Cal. App. 2d 253, 208 P.2d 723]* (and similar cases) ... ." the court proceeded to determine the case on its merits. *Casey* held that resort may not be had to a declaratory judgment to determine that a sales or use tax should not be collected if statute barred the enjoining of the collection of the tax. It is not clear if the doubt cast by *Pacific Motor Transp. Inc.* as to the question of whether or not a trial court may consider the propriety of relief under former Gov. Code § 11440 [*now see Gov. Code § 11350*], or the question of the right to a judicial declaration of the validity of a tax regulation when the collection of the tax in question may not be enjoined.

In none of the above cases was there a holding that *Code Civ. Proc. § 1061* does not apply to declaratory relief actions under former Gov. Code § 11440 [*now see Gov. Code § 11350*]. Until there is such an appellate court holding, counsel for defendant in an action under *Gov. Code § 11350* may, where the facts support such position, wish to argue the applicability of *Code Civ. Proc. § 1061* and that under that section the court should refuse to exercise its power to grant declaratory relief on the ground that its declaration or determination is not necessary or proper at the time under all the circumstances.

See also Comments to *§§ 67.20, 67.21* and *67.26*.

[3] Discussion of Authorities

[a] Raising Objection by Demurrer

Moss v. Moss *(1942) 20 Cal. 2d 640, 128 P.2d 526* was an action by a man against his former wife for declaratory relief seeking a determination of his obligations under a property settlement agreement and a subsequent modification of it. The trial court sustained a demurrer to the complaint without leave to amend and discussed the action. Plaintiff appealed. In affirming the judgment, the Supreme Court pointed out that the complaint was sufficient to state a cause of action for declaratory relief but that under the facts alleged the trial court was permitted in its discretion to deny declaratory relief under *Code Civ. Proc. § 1061*. The Court stated that when facts appear from the face of the complaint that would justify a trial court in concluding that its determination is not necessary or proper, it has been held that the court may sustain a general demurrer to the complaint for declaratory relief (*20 Cal. 2d 640, 642)* .

The Supreme Court added that it is true that an order sustaining a general demurrer to a complaint for declaratory relief does not indicate to the appellate court whether the trial court concluded that relief was inappropriate or that there was a failure to state a cause of action. While it might be better practice for the trial court to overrule the demurrer and exercise its discretion in denying declaratory relief by some other procedure, as, for example, upon a motion to dismiss the fact that it did so in ruling upon the general demurrer, the Supreme Court held, could not be reversible error in view of the decided cases in California (*20 Cal. 2d 640, 643)* . [For a case involving the trial court's denial of a motion for judgment on the pleadings (the equivalent of a general demurrer) and granting a motion to dismiss, *see Allstate Ins. Co. v. Fisher (1973) 31 Cal. App. 3d 391, 394, 107 Cal. Rptr. 251.]*

The objection cited by *Moss* to the sustaining of a general demurrer can, of course, be met by the trial court's specifying in its order sustaining the demurrer and in its subsequent judgment of dismissal that the complaint fails to state facts sufficient to constitute a cause of action in that it shows, for example, that another action is pending between the same parties in which the issues raised can be as adequately and speedily determined as in the declaratory relief action, and hence, that a judicial declaration or determination is not necessary or proper at the time under all the circumstances. The ground should be stated in both the order and judgment [*see Pacific Legal Foundation v. Unemployment Ins. Appeals Bd. (1977) 74 Cal. App. 3d 150, 157, 141 Cal. Rptr. 474* (declaratory relief action to determine the validity of a precedent decision of defendant board; illustrating the problem generated for the appellate court when the grounds for judgment on the pleadings stated in the trial court's order granting the motion differed from the grounds stated in the judgment itself)].

[b] Available Alternative Remedies

Communist Party v. Peek *(1942) 20 Cal. 2d 536, 127 P.2d 889* was an action by plaintiff (1) for declaratory relief seeking an adjudication of the invalidity of a statute, (2) for a writ of mandate to compel performance of duties necessary to qualify it to participate in a primary election, and (3) for an order directing correction of an error or omission in the conduct of a primary election. Defendants' demurrers to the complaint were sustained without leave to amend, and plaintiff appealed from the subsequent judgment of dismissal. Although reversing the judgment as to the third cause of action, the Supreme Court affirmed the judgment as to the first two. With respect to the declaratory relief action, the Court explained that under *Code Civ. Proc. § 1061* the court may refuse in its discretion to grant the relief sought in an action for a declaratory judgment, that it appeared from the face of the pleading that a speedy and adequate remedy for the purpose sought by the action was provided by former Elec. Code § 2900 [*now see Elec. Code § 13314*], and that under such circumstances it could not be said that the trial court abused its discretion in refusing to grant declaratory relief (*20 Cal. 2d 536, 540)* .

In ***Filarsky v. Superior Court*** *(2002) 28 Cal. 4th 419, 121 Cal. Rptr. 2d 844, 49 P.3d 194* , a citizen requested that a city government disclose certain documents under the California Public Records Act (CPRA) (*see Gov. Code § 6250 et seq.*). The city refused to disclose the requested documents, and the citizen stated his intent to file a judicial proceeding under the CPRA to compel disclosure. Before the citizen initiated such a proceeding, however, the city filed its own declaratory relief action pursuant to *Code of Civil Procedure Section 1060*, seeking a declaration that the city was not

required to disclose the records sought by the citizen. The superior court issued a declaratory judgment in favor of the city, and the court of appeal denied the citizen's request for a writ of mandate to overturn the trial court's decision. The Supreme Court, however, held that because the CPRA provided the exclusive method of litigating disputes arising under the CPRA, the superior court had abused its discretion in exercising jurisdiction over the city's action.

The Supreme Court found that the Legislature intended the litigation procedures under the CPRA to be the exclusive method of obtaining judicial declarations of rights under the CPRA, primarily because of four significant differences between the CPRA procedures and those applicable in regular declaratory relief actions. First, under the CPRA, only a person seeking disclosure--not the public agency in possession of the records--may seek a judicial declaration regarding the agency's obligation to disclose a document. In an ordinary declaratory relief action, however, either party to a controversy may initiate the action. Second, in a proceeding under the CPRA, the court must schedule the filing of responsive pleadings and hearings in order to reach a decision as soon as possible. Such a requirement is not imposed upon courts in an ordinary declaratory relief action. Third, if a person initiates a proceeding under the CPRA, he or she must be awarded attorney fees and costs if he or she prevails, and the defendant public agency cannot recover fees or costs unless the proceeding is frivolous. In contrast, in a declaratory relief action, a member of the public seeking disclosure cannot recover attorney fees if he or she prevails, and a prevailing public agency may recover costs even if the individual's request for disclosure is not frivolous. Fourth, appellate review of the superior court's ruling in a proceeding under the CPRA must be by a petition for writ of mandate filed no more than 40 days after notice of the ruling (*28 Cal. 4th 419, 428-429)* .

On the other hand, a public agency may appeal from a declaratory judgment requiring disclosure of the records, thus delaying disclosure for a significant period of time (*see Code Civ. Proc. § 1600*; *Gov. Code §§ 6258, 6259*). The Court found that these distinctions establish that permitting a public agency to file a preemptive declaratory relief action to determine its obligation to disclose records to a member of the public would undermine the purposes of the CPRA by eliminating important incentives and protections for individuals requesting public records. Therefore, the Court concluded that the CPRA does not authorize a public agency to initiate such an action (*28 Cal. 4th 419, 429-430)* .

The Supreme Court next considered whether *Code of Civil Procedure Section 1060* nevertheless authorizes a public agency to bring a declaratory relief action to determine whether it must disclose public records. Generally, a superior court may refuse to grant declaratory relief in any case where its declaration or determination is not necessary or proper at the time under all the circumstances (*Code Civ. Proc. § 1061*). Under the circumstances of this case, the Supreme Court concluded that the superior court had abused its discretion by issuing declaratory relief. The High Court explained that, since the Legislature has specified the exclusive procedure for litigating disputes regarding a person's right to obtain disclosure of public records under the CPRA, a superior court abuses its discretion in bypassing this statutory procedure and granting declaratory relief in an action initiated by a public agency pursuant to *Code of Civil Procedure Section 1060* (*28 Cal. 4th 419, 429-435)* .

In ***DeLaura v. Beckett*** *(2006) 137 Cal. App. 4th 542, 40 Cal. Rptr. 3d 253* , the plaintiff was a landlord who sought a declaratory judgment to establish that her tenant was not entitled to protected status under the applicable municipal rent ordinance. The trial court sustained the defendant's demurrer without leave to amend, and the court of appeal affirmed. The court pointed out that the municipal ordinance itself provided a simple and cost-effective procedure for determining whether the defendant qualified as a protected tenant. Citing *Filarsky v. Superior Court, (2002) 28 Cal. 4th 419, 121 Cal. Rptr. 2d 844, 49 P.3d 194* (discussed above), the court of appeal explained that the trial court properly may refuse to grant declaratory relief when an appropriate procedure has been provided by special statute (in this case, the rent ordinance) and the court believes that more effective relief can and should be obtained through that procedure (*137 Cal. App. 4th 542, 545-547)* .

[c] Another Action Pending

Hagan v. Fairfield *(1965) 238 Cal. App. 2d 197, 47 Cal. Rptr. 600* was an action for damages for breach of the right

of privacy and for declaratory relief with respect to the validity of a covenant by plaintiff not to sue defendant Whitman. The complaint showed on its face that defendant Fairfield was not a party to the covenant not to sue and that another action was pending between plaintiff and Fairfield, as plaintiff and defendant respectively, in which Fairfield had attached a copy of plaintiff's covenant not to sue to his pleading. Defendant Fairfield's demurrer to the complaint in the present action was sustained without leave to amend, and plaintiff appealed from the subsequent judgment. In affirming the judgment, the court of appeal said that insofar as the covenant to which defendant Fairfield was not a party was relevant in other pending litigation between plaintiff and defendant Fairfield, any pertinent question as to the validity and effect of the covenant could be appropriately resolved therein. The court concluded that facts would appear from the face of the complaint which would justify the trial court's conclusion that its determination was not necessary or proper (*238 Cal. App. 2d 197, 202)* .

[d] Doctrine of Forum Non Conveniens

The proper motion where another action is not pending at the time the declaratory relief action is filed, but the action may be more appropriately and justly tried elsewhere, is a motion under *Code Civ. Proc. § 410.30* on the ground of forum non conveniens to stay the declaratory relief action. However, such a motion should not be granted unless the balance is strongly in favor of the defendant, such as where plaintiff seeks to vex, harass, or oppress defendant [*see Price v. Atchison, Topeka & Santa Fe Ry. Co. (1954) 42 Cal. 2d 577, 584, 585, 268 P.2d 457]* . For example, the granting of the motion to stay a declaratory relief action, the proper commencement of which in California was not vexatious, oppressive, or harassing, is improper and an abuse of the trial court's discretion where the principal office (residence) of both plaintiff and defendant is in California; and this is true notwithstanding the fact that after commencement of the action, defendant filed an action in the court of the sister state in which the events giving rise to liability occurred for a declaration that it was not liable to plaintiff [*see Bechtel Corp. v. Industrial Indem. Co. (1978) 86 Cal. App. 3d 45, 50-53, 150 Cal. Rptr. 29]* .

[e] Unclean Hands

Maguire v. Hibernia Sav. & L. Soc'y *(1944) 23 Cal. 2d 719, 146 P.2d 673* involved four actions for declaratory relief by successors in interest to alleged members of and depositors in defendant savings and loan society. The trial court sustained general demurrers to the complaints and dismissed the actions. Plaintiffs appealed on a single set of briefs. Although holding that the trial court erred in sustaining the general demurrers, the Supreme Court, by way of dictum, said that the fact that a party seeking judicial aid has "unclean hands" may well justify a trial court in concluding that its adjudication would not be proper (*23 Cal. 2d 719, 730-731)* .

The procedural background in ***Moss v. Moss*** *(1942) 20 Cal. 2d 640, 128 P.2d 526* is discussed in *§ 67.24[3][a]*. In holding that the complaint for declaratory relief showed that the property settlement agreement involved was against public policy and so illegal, the Supreme Court, in holding that the complaint was sufficient to authorize a declaration of plaintiff's obligations under the contract, considered whether the trial court abused its discretion in denying declaratory relief. It stated that the fact that plaintiff was a party to the unlawful bargain of equal fault with defendant and was therefore in pari delicto, could properly be considered by the trial court as a sufficient reason for declining to grant declaratory relief (*20 Cal. 2d 640, 643)* . In answer to plaintiff's contentions that a declaratory relief action was not strictly an action in equity and, therefore, that the doctrine of in pari delicto should not be applied and that the defense of in pari delicto had no application to the executory portions of an illegal contract, the Court said that the defense is nevertheless an element which the trial court in its discretion could consider in deciding whether or not to grant declaratory relief (*20 Cal. 2d 640, 644)* .

[f] Little or No Practical Effect

Meyer v. Sprint Spectrum L.P. *(2009) 45 Cal. 4th 634, 88 Cal. Rptr. 3d 859, 200 P.3d 295* , involved an actual controversy regarding the enforceability of a contractual arbitration provision. The California Supreme Court affirmed

the trial court's order sustaining a demurrer to the complaint for declaratory relief. The Supreme Court explained that a trial court has considerable discretion to deny declaratory relief when such relief would have little practical effect in terms of altering the parties' behavior. The Supreme Court found it significant that the parties' current controversy was primarily over the enforceability of certain contractual remedies should a future dispute over substantive contractual rights arise. Because no dispute had arisen that would cause those remedial provisions to come into play, and the plaintiffs had not alleged that the continuation of the contractual relationship depended on the resolution of the current controversy, the denial of declaratory relief was within the trial court's discretion (*45 Cal. 4th 634, 646-648)* .

The Supreme Court did acknowledge, however, that under different circumstances the settlement of questions of the validity of contractual remedies may have practical consequences, such as when a party's decision to enter into a contract reasonably turns on the answer to those questions, or when a party alleges with sufficient particularity that the continuation of a contractual relationship plausibly hinges on the answers to those questions (*45 Cal. 4th 634, 648)* .

[4] Additional Authorities

[a] Discretion of Court to Refuse Declaratory Relief

In *Farmers Insurance Exchange v. Adams (1985) 170 Cal. App. 3d 712, 216 Cal. Rptr. 287* , an insurer brought an action against numerous insureds to seek declaratory relief regarding exclusion of coverage for rainstorm damage to dwellings, and the trial court sustained defendants' demurrers to the complaint. The court of appeal affirmed, holding that a trial court's refusal to grant declaratory relief will not be disturbed on appeal unless a clear abuse of discretion is shown. In the case before it, the court held that refusal was appropriate because, inter alia, the trial court's granting of declaratory relief may have led to greater, rather than less, confusion (*170 Cal. App. 3d 712, 724)* .

[b] Raising Objection by Demurrer

General of America Ins. Co. v. Lilly (1968) 258 Cal. App. 2d 465, 65 Cal. Rptr. 750 was an action by an insurance company both against the operator of a truck owned by its insured which was involved in an accident with a vehicle owned by third parties and against the third parties. These parties had previously filed an action against the operator and plaintiff's insured to recover damages for personal injuries and property damage sustained in the accident. The insured had filed an answer in that action denying that the operator of the truck was driving with its permission or within the scope of his employment at the time of the accident. The insurance company thereafter notified the operator that it denied any coverage under the insured's policy in favor of the operator as an additional insured on the ground the operator was not driving the truck within the course and scope of his employment or with the insured's permission at the time of the accident, but agreed to pay the operator's defense costs in the third parties' action, reserving the right to claim noncoverage. Pursuant to that agreement, the operator employed a firm recommended by the insurer which filed an answer denying the material allegations of the third parties' complaint, other than the allegation that the operator was driving with permission and acting within the course and scope of his employment. Plaintiff insurer thereupon commenced the present action for a declaration that the operator was not driving with permission or within the course and scope of his employment. The third parties demurred to the insurer's complaint and the demurrer was sustained without leave to amend. In affirming the subsequent judgment of dismissal, the court of appeal stated that the broad discretionary power of the trial court to deny declaratory relief under *Code Civ. Proc. § 1061* may be invoked by general demurrer (*258 Cal. App. 2d 465, 471)* . The court concluded that plaintiff's complaint fell short of the necessary allegations to entitle it, as matter of right, to maintain the action in declaratory relief, where the issues raised by the complaint would be properly and finally adjudicated in the personal injury action. Under these circumstances, the trial court did not abuse its discretion in sustaining the demurrer without leave to amend (*258 Cal. App. 2d 465, 472)* .

Hagan v. Fairfield (1965) 238 Cal. App. 2d 197, 47 Cal. Rptr. 600 , also discussed in *§ 67.23[3][c]*, involved a three-count complaint, the third count of which was for declaratory relief. Defendant's demurrer to the complaint was sustained without leave to amend and plaintiff appealed. In affirming the judgment of dismissal, the court of appeal,

with respect to the declaratory relief count and quoting from *Moss v. Moss (1942) 20 Cal. 2d 640, 642, 128 P.2d 526* , discussed in *§ 67.27[3][b]*, said that when facts appear from the face of the complaint which would justify a trial court in concluding that its determination is not necessary or proper, it has been held that the court may sustain a general demurrer to the complaint for declaratory relief (*238 Cal. App. 2d 197, 202)* .

The court also held, apart from whether a determination was necessary and proper at the time, that the demurrer to the complaint for declaratory relief was properly sustained because the complaint failed to plead facts, as opposed to conclusions of law, or show that a controversy of concrete actuality as opposed to one which is merely academic or hypothetical existed [*see § 67.24*].

Wilson v. Transit Auth. (1962) 199 Cal. App. 2d 716, 19 Cal. Rptr. 59 was an action by a union representing city bus drivers against a city transit authority for declaratory relief as to the inclusion of an arbitration clause in a collective bargaining agreement. The clause had been included in agreements executed prior to November 1956, but omitted in agreements executed after that time pursuant to the authority's position, based on an opinion of the city attorney, that inclusion of the clause would be illegal. Prior to the negotiation of the current contract, the union had obtained opinions from independent counsel and from the office of the Legislative Counsel of California advising that the clause might lawfully be included in the agreement, but the authority refused to include it on the ground it was bound to follow the opinion of the city attorney. Defendant's demurrer to the complaint was sustained without leave to amend on the ground that the authority had no duty to bargain collectively with the union. The court of appeal, in affirming the judgment of dismissal, pointed out that the trial court's decision must be considered either as the refusal to exercise the power of declaratory relief under *Code Civ. Proc. § 1061*, or a determination that the complaint failed to show an actual controversy involving a justiciable question (*199 Cal. App. 2d 716, 721)* . With respect to the first alternative, the court said that it has been suggested that it is better practice for a trial court to exercise its discretion in refusing declaratory relief under *Code Civ. Proc. § 1061* by some procedure other than by sustaining a general demurrer, such as, upon a motion to dismiss the complaint. Nevertheless, where the complaint is devoid of essential facts showing the necessity or propriety of a declaration, it is not reversible error per se to refuse declaratory relief by an order sustaining a general demurrer without leave to amend (*199 Cal. App. 2d 716, 721-722)* . The court of appeal also held that irrespective of the applicability of *Code Civ. Proc. § 1061*, the trial court was "clearly" correct in sustaining the demurrer without leave to amend on the second ground, namely, that the complaint failed to show an actual controversy between the parties [*see § 67.24*].

Simpson v. Security First Nat'l Bank (1945) 71 Cal. App. 2d 154, 162 P.2d 494 involved the propriety of a judgment dismissing a declaratory relief action after defendant's general demurrer to the complaint had been sustained without leave to amend where it appeared that a judicial declaration or determination was not necessary or proper at the time under all the circumstances. In affirming the judgment, the court of appeal quoted the statement from *Moss v. Moss (1942) 20 Cal. 2d 640, 642, 128 P.2d 526* , *set forth in § 67.23[3][a]*. However, the court also considered the Supreme Court's question of the propriety of a general demurrer under *Code Civ. Proc. § 1061*, which is noted as well in the discussion of *Moss* (*71 Cal. App. 2d 154, 157-158)* .

[c] Another Action Pending

Allstate Ins. Co. v. Fisher (1973) 31 Cal. App. 3d 391, 107 Cal. Rptr. 251 was an action by an automobile liability insurer seeking a declaration that an employee of the insured was not acting as the insured's agent or driving the insured vehicle with permission at the time he was involved in an accident. The action was against the employee and the third parties who had been injured in the accident and who had previously filed an action for damages against the employer and the employee alleging agency and permissive use, which allegations were denied in the insured's answer. The insurer's complaint for declaratory relief alleged among other things that the third parties were responsible for the accident, that a dispute existed in that plaintiff denied that the employee had the insured's consent or was his agent as was asserted by the third parties in their complaint, that the dispute should be resolved before trial of the personal injury action, and that plaintiff did not have a speedy or adequate remedy at law. The trial court granted defendant third parties'

motion to dismiss the complaint and on its own motion granted a dismissal in favor of the employee. Plaintiff appealed. The court of appeal, in affirming the judgment, held that the issue involved could be determined in the pending personal injury action and quoting from *General of America Ins. Co v. Lilly (1968) 258 Cal. App. 2d 465, 471, 65 Cal. Rptr. 750* , *below,* said that the availability of another form of relief that is adequate will usually justify refusal to grant declaratory relief (*31 Cal. App. 3d 391, 395)* .

Miller v. California (1970) 6 Cal. App. 3d 202, 85 Cal. Rptr. 801 was an action by a publishing corporation and one of its executives, Miller, for a declaration that a book was not obscene and for an injunction enjoining defendant and any of its agents from prosecuting plaintiffs for publishing, distributing, or selling the book. The complaint alleged that copies of the book had been forwarded to the corporate plaintiff's wholesalers and distributors throughout the United States for sale and distribution to the general public and that a warrant had been issued directing law enforcement officers and officials to seize any and all copies of the book. Although not alleged in the complaint, the record showed that plaintiff Miller had been twice charged in two separate courts in California with violating *Penal Code § 311.2* for distributing the book. Defendant's demurrer to the complaint was sustained, and plaintiffs appealed from the subsequent judgment of dismissal. The court of appeal affirmed the judgment on the ground that Miller had a speedy and adequate method in the criminal actions for determining whether the book was obscene and that since Miller was alleged to be responsible for the conduct and business activities of the corporate plaintiff, Miller's conviction would as a practical matter resolve the question for the corporate plaintiff. The court additionally held that declaratory relief was not needed because plaintiffs had distributed the book and subjected themselves to criminal liability without first seeking declaratory relief.

Holden v. Arnebergh (1968) 265 Cal. App. 2d 87, 71 Cal. Rptr. 401 , appeal dismissed, (1969) 394 U.S. 102, 89 S. Ct. 926, 22 L. Ed. 2d 112 , was an action to test the validity of the seizure of books and photos alleged to be obscene for a declaration that books and photos were not obscene, and for an injunction enjoining further prosecution of plaintiffs for selling and exhibiting the books and photos. The complaint alleged among other things that plaintiffs were in the book selling business, that in September 1966 they had been arrested for violating *Penal Code § 311.2,* that a month later certain of the plaintiffs were again arrested, and that the statute was unconstitutional as it applied to them. Defendants' demurrers to the complaint were sustained, and plain tiffs appealed from the subsequent judgment of dismissal. The court of appeal affirmed on the ground that the criminal proceedings afforded plaintiffs speedy and adequate relief and that the trial court had not abused its discretion in refusing to entertain the complaint.

The procedural background of *General of America Ins. Co. v. Lilly (1968) 258 Cal. App. 2d 465, 65 Cal. Rptr. 750* is discussed in *§ 67.27[3][b]*. In affirming the judgment of dismissal, the court of appeal said that the declaratory relief statute should not be used for the purpose of anticipating and determining an issue which can be determined in the main action. The object of the statute is to afford a new form of relief where needed and not to furnish a litigant with a second cause of action for the determination of identical issues. The court stated that the issue raised in the declaratory relief action was one raised and capable of determination in the main action (*258 Cal. App. 2d 465, 470)* . The court explained that under *Code Civ. Proc. § 1061* the trial court may refuse to exercise the power to grant declaratory relief where such relief is not necessary or proper at the time under all of the circumstances. The availability of another form of relief that is adequate will usually justify refusal to grant declaratory relief. The court found from the pleadings that the determination of issues that plaintiff sought in the action was readily available to it in the personal injury action; that such determination was speedy and adequate, and was as well suited to plaintiff's needs as declaratory relief (*258 Cal. App. 2d 465, 471)* .

Taliaferro v. Taliaferro (1960) 179 Cal. App. 2d 787, 4 Cal. Rptr. 689 involved three actions for declaratory relief consolidated for trial without a jury seeking a declaration of the rights and duties of the parties under a property settlement agreement executed by the parties prior to their divorce. Judgments were for defendant, and plaintiff appealed. The appeal as to one of the judgments was dismissed at plaintiff's request. As to the other two, the trial court, with respect to one, had found that the disputes alleged were the same as those pending in another action between the parties and determined that because of the pendency of the other action, it was not proper or necessary to render

declaratory relief in the present action. This judgment was affirmed on appeal. The court of appeal said that dispute that is the subject of another action pending between the same parties and arising out of the subject matter may not be the subject of an independent action for declaratory relief because the controversy will have been rendered moot by judgment in the former action (*179 Cal. App. 2d 787, 791)* .

California Points & Authorities

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Volume 6 Chapters 60-69 COSTS---to---DECLARATORY RELIEF
CHAPTER 67 DECLARATORY RELIEF
PART II. FORMS

6-67 California Points & Authorities § 67.24

§ 67.24 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10] for Declaratory Relief [Code Civ. Proc. § 1060]--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--No Actual Justiciable Controversy [Code Civ. Proc. § 1060] Is Alleged

[1] FORM Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10] for Declaratory Relief [Code Civ. Proc. § 1060]--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--No Actual Justiciable Controversy [Code Civ. Proc. § 1060] Is Alleged

[*Caption. See § 67.21.*]

THE COMPLAINT FOR DECLARATORY RELIEF FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION IN THAT IT APPEARS ON ITS FACE THAT THERE IS NO ACTUAL JUSTICIABLE CONTROVERSY RELATING TO THE LEGAL RIGHTS AND DUTIES OF THE RESPECTIVE PARTIES.

A. Objection by Demurrer. [*See § 67.21, Paragraph A.*]

B. Actual, Legal Controversy Must Be Alleged in Pleading. *Code of Civil Procedure Section 1060* authorizes declaratory relief only in cases of actual controversy relating to the legal rights and duties of the respective parties. Hence, to state a cause of action for declaratory relief under *Code of Civil Procedure Section 1060*, the complaint must allege facts from which the court may determine that an actual controversy relating to the legal rights and duties of the respective parties exists (*Alturas v. Gloster (1940) 16 Cal. 2d 46, 48, 104 P.2d 810*).

C. Requirement That Controversy Be Justiciable. For the court to exercise its discretion to declare the rights and duties of the parties, the controversy involved must be justiciable; that is, it must be a controversy which admits of specific and conclusive relief by judgment within the field of judicial determination (*Selby Realty Co. v. San Buenaventura (1973) 10 Cal. 3d 110, 117, 109 Cal. Rptr. 799, 514 P.2d 111*).

D. Failure to State Cause of Action. A complaint for declaratory relief that fails to allege the existence of an actual justiciable controversy between the parties fails to state facts sufficient to constitute a cause of action (*Wilson v. Transit Auth. (1962) 199 Cal. App. 2d 716, 722-724, 19 Cal. Rptr. 59*).

[*Optional*] **E. Advisory Opinions.** Courts do not give advisory opinions and declaratory relief actions are not available to secure judicial answers to questions that are merely theoretical, hypothetical, academic, or abstract in the sense that they are not related to a particular object or thing, or that they relate to contingent events that are not certain to occur (*Otay Land Co. v. Royal Indemnity Co. (2008) 169 Cal. App. 4th 556, 565-567, 86 Cal. Rptr. 3d 408* ; *Sanctity of Human Life Network v. California Highway Patrol (2003) 105 Cal. App. 4th 858, 871-873, 129 Cal. Rptr. 2d 708* ; *Wilson v. Transit Auth. (1962) 199 Cal. App. 2d 716, 722, 19 Cal. Rptr. 59*).

[*Optional*] **F. No Affirmative Relief Sought or Possible.** The element of a justiciable actual controversy is lacking when a complaint for declaratory relief seeks no affirmative relief against the defendant, and the defendant has no power to grant plaintiff any affirmative relief (*see* *Pinnacle Holdings, Inc. v. Simon (1995) 31 Cal. App. 4th 1430, 1436-1437, 37 Cal. Rptr. 2d 778*).

[*Optional*] **G. Different Interpretation of Statute by Citizen and Governmental Agency.** A difference of opinion as to the interpretation of a statute as between a citizen and a governmental agency does not give rise to a justiciable controversy and provides no compelling reason for a court to attempt to direct the manner by the agency shall administer the law since a citizen's mere dissatisfaction with the performance of either the legislative or executive branches, or disagreement with their policies does not constitute a justiciable controversy (*Zetterberg v. State Dept. of Public Health (1974) 43 Cal. App. 3d 657, 662, 663-664, 118 Cal. Rptr. 100*).

[*Optional*] **H. Adoption of General Plan.** The adoption of a general plan by a city or county under the provisions of *Government Code Section 65100* is a legislative act, and a landowner may not maintain an action in declaratory relief to probe the merits of the plan absent an allegation of a defect in the proceedings leading to its enactment (*Selby Realty Co. v. San Buenaventura (1973) 10 Cal. 3d 110, 118, 109 Cal. Rptr. 799, 514 P.2d 111* ; *Mills v. San Francisco Bay Area Rapid Transit Dist. (1968) 261 Cal. App. 2d 666, 667-668, 68 Cal. Rptr. 317*).

[*Optional*] **I. Jurisdiction Over Dissolution of Corporation Which Has Not Elected to Dissolve.** Where there has been no election pursuant to *Corporations Code Section 1800 et seq.* to dissolve a corporation (and the corporation is not in the process of involuntary dissolution), the court lacks jurisdiction to declare the terms and conditions of dissolution when and if it should occur at some future time (*Escondido Mut. Water Co. v. George A. Hillebrecht, Inc. (1966) 241 Cal. App. 2d 410, 415-416, 50 Cal. Rptr. 495*).

[*Optional*] **J. Mere Allegation That Controversy Exists.** The mere allegation that an actual controversy exists between the parties is a bare conclusion and insufficient to state a cause of action for declaratory relief under *Code of Civil Procedure Section 1060* if facts from which the court may determine that an actual controversy relating to the legal rights and duties of the parties exists are not alleged (*Alturas v. Gloster (1940) 16 Cal. 2d 46, 48, 104 P.2d 810*).

[*Optional*] **K. Nonexistent Contract.** For a declaratory relief action to be maintainable to determine the validity and construction of a contract, it is necessary that the contract be an existing one and not merely one in contemplation, since a contemplated contract cannot, in advance of agreement as to its terms, present a justiciable controversy (*Escondido Mut. Water Co. v. George A. Hillebrecht, Inc. (1966) 241 Cal. App. 2d 410, 412, 50 Cal. Rptr. 495*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a general demurrer to the complaint for declaratory relief for failure to state facts sufficient to constitute a cause of action if the complaint fails to allege facts showing the existence of a justiciable controversy between the parties regarding their legal rights and duties.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, this form may also be used in support of a nonstatutory motion for judgment on the pleadings [*see § 67.40[2]*] or, if the defect does not appear from the face of the complaint, a motion for summary judgment, provided defendant can show by affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice must or may be taken that there is in fact no justiciable controversy between the parties [*see Code Civ. Proc. § 437c*].

See also Comments to *see §§ 67.20[2], 67.21[2]* and *67.26[2]*.

[3] Discussion of Authorities

[a] Actual, Legal Controversy as Required to Be Pleaded

Alturas v. Gloster *(1940) 16 Cal. 2d 46, 104 P.2d 810* was an action by the city for declaratory relief as to the rights and duties of the parties under a contract entered into between the city and defendant landowner by the terms of which the city was entitled to take soil from, and regulate a dam on, defendant's property for the purposes of flood control in exchange for payment of a monthly fee. The complaint alleged (1) execution of the contract pursuant to a resolution adopted by the city council, (2) performance of the contract for a period of years, (3) subsequent adoption by the city council without notice to defendant of a resolution that no further compensation would be paid under the contract on the ground that the rights and benefits conferred by the contract were no longer required by the city, (4) subsequent recovery by defendant in the justice court of a judgment against the city for payment accruing under the contract after adoption of the resolution, and (5) pendency of another action in the justice court by defendant to secure payment of sums accruing under the contract since entry of the prior judgment. The complaint further alleged that defendant contended that the contract was valid and sought injunctive relief to restrain defendant from instituting any further actions against the city to recover under the contract. Defendant's demurrer to the complaint on the ground that it failed to state facts sufficient to constitute a cause of action was sustained.

On plaintiff's appeal from the subsequent judgment of dismissal, the judgment was affirmed. The Supreme Court pointed out that the city did not assert that the contract was void or that it had ever been modified or rescinded; no circumstance or condition of the contract to an actual controversy regarding the legal rights of the respective parties had been alleged. The court held that to state a cause of action for declaratory relief under *Code Civ. Proc. § 1060*, the complaint should allege appropriate facts from which the court may determine that an actual controversy relating to the legal rights and duties of the respective parties exists. If, for example, the city had sought to excuse its performance on grounds of waiver or acts of an adverse party or God, the waiver or acts must be alleged in the complaint (*16 Cal. 2d 46, 48)* .

[b] Requirement That Controversy Be Justiciable

In ***Selby Realty Co. v. San Buenaventura*** *(1973) 10 Cal. 3d 110, 109 Cal. Rptr. 799, 514 P.2d 111* , the first cause of

action of plaintiff's complaint sought a determination of the validity of a defendant county's general plan, which provided for the long-term physical development of the city, as it affected certain land of plaintiff, a declaration as to whether there had been a taking of its property for public use, and a judgment setting forth plaintiff's rights in the event a taking had occurred. After sustaining defendants' general demurrer and special demurrers to this cause of action, as well as plaintiff's other causes of action, the trial court entered a judgment of dismissal, and plaintiff appealed.

The Supreme Court affirmed, holding that plaintiff had failed to allege facts showing a concrete dispute between plaintiff and the county that allowed definitive and conclusive judicial relief. The Court stated that the actual controversy required under *Code Civ. Proc. § 1060* is one that allows definitive and conclusive relief by judgment within the field of judicial administration, as distinguished from an advisory opinion on a particular or hypothetical state of facts. The judgment must decree, not suggest, what the parties may or may not do (*10 Cal. 3d 110, 117)* . The Court pointed out that the county had taken no action concerning plaintiff's land except to enact the general plan. The fact that some of the streets proposed in the plan would cross plaintiff's land gave plaintiff no greater right to declaratory relief than that available to any other citizen whose property was included in the plan. Whether plaintiff's land would be taken under the plan moreover depended on unpredictable future events since the plan was subject to change. The Court also stated that plaintiff could not attack the plan itself since its wisdom was within the legislative sphere and was not open to judicial scrutiny in the absence of an alleged defect in the proceedings leading to its enactment (*10 Cal. 3d 110, 117-118)* .

[c] Failure to State Cause of Action

Wilson v. Transit Auth. *(1962) 199 Cal. App. 2d 716, 19 Cal. Rptr. 59* was an action by labor union officers against a city transit authority for declaratory relief as to whether a contract between the union and the authority might lawfully include a provision for compulsory arbitration of grievances in the event of an impasse between them. The complaint alleged that a prior agreement between the union and the authority contained such a provision, that the provision had been deleted from subsequent contracts, including the current one, and that there was a difference of opinion among counsel as to the legality of such a provision. The complaint alleged no unsettled grievance or other controversy pending under the existing contract relating to the rights and duties of the parties. Defendant's demurrer to the complaint for failure to state a cause of action was sustained. On plaintiff's appeal from the subsequent judgment of dismissal, the judgment was affirmed. The court of appeal concluded that no justiciable controversy had been alleged and held that failure of a complaint for declaratory relief to allege the existence of an actual justiciable controversy between the parties as to their rights and duties fails to state facts sufficient to constitute a cause of action and that the demurrer had been properly sustained on that ground (*199 Cal. App. 2d 716, 724)* .

[d] Advisory Opinions

The plaintiff in ***Otay Land Co. v. Royal Indemnity Co.*** *(2008) 169 Cal. App. 4th 556, 86 Cal. Rptr. 3d 408* , owned real property containing environmental contaminants, and in other pending actions the plaintiff sought to recover environmental cleanup costs from a former owner of the property. In a separate action, the former owner's liability insurer sued the former owner for declaratory relief to establish that the insurer should not be obligated to provide liability coverage for the claims asserted by the plaintiff. After the plaintiff was denied leave to intervene in the insurer's action against the former owner, the plaintiff brought the present action against the insurer, seeking declaratory relief to establish that the plaintiff's claim against the former owner was covered under the policy issued by the insurer.

The trial court sustained the insurer's demurrer to the plaintiff's complaint, applying the general rule that an injured third party is ordinarily prohibited from suing a tortfeasor's insurer for failing to defend or indemnify the tortfeasor against the third party's claim. The plaintiff had not claimed to fit within any of the three established exceptions to that general rule: when the third party has a judgment against the tortfeasor (*see Ins. Code § 11580(b)(2)*), when the insurer has sued the third party in its own declaratory relief action, and when the insured has assigned its policy rights to the third party (*169 Cal. App. 4th 556, 560-561)* .

The court of appeal affirmed, rejecting the plaintiff's argument that declaratory relief should be "expansively" allowed. The court noted that the statute that generally authorizes declaratory relief, *Code of Civil Procedure Section 1060*, has never been interpreted as allowing the issuance of any advisory orders about whether there should be potential insurance coverage for a policyholder's potential tort liability. The court emphasized that because the plaintiff's actions against the former owner were still pending, it remained unknown whether the plaintiff would ultimately be able to make a claim against the proceeds of the liability insurance policy as a judgment creditor. Declaratory relief was therefore inappropriate, since the plaintiff's interests in the policy were contingent upon its prevailing against the insured, and until such liability is settled, the court could not be certain that a controversy would arise between the plaintiff and the insurer. Accordingly, the trial court was correct in sustaining the insurer's demurrer to the complaint (*169 Cal. App. 4th 556, 565-567)* .

In ***Sanctity of Human Life Network v. California Highway Patrol*** *(2003) 105 Cal. App. 4th 858, 129 Cal. Rptr. 2d 708* , the plaintiffs had stood on sidewalks of freeway overpasses during rush hours and held signs, visible to motorists below on the freeways, communicating their views concerning abortion. Responding to reports of freeway congestion caused by the plaintiffs' activities, officers of the California Highway Patrol (CHP) ordered the plaintiffs to stop. The CHP also made known its intent to continue to issue such orders under the authority of *Veh. Code §§ 21465* and *21467*, which govern the display of traffic signs and declare every prohibited sign a public nuisance. The plaintiffs brought this action for injunctive and declaratory relief, seeking to prevent the CHP from interfering with their display of handheld signs on freeway overpasses during rush hours. The trial court entered judgment in favor of the CHP.

The court of appeal modified the trial court's judgment, holding that the CHP lacked authority to interfere with the plaintiffs' activities under *Veh. Code §§ 21465* and *21467* because the plaintiffs' signs could not be characterized as *traffic* signs subject to prohibition under those statutes (*105 Cal. App. 4th 858, 863-868)* .

The court of appeal went on to hold that, beyond the declaration that the CHP may not use *Veh. Code §§ 21465* and *21467* as authority to interfere with the plaintiffs' activities, this action did not present a proper case for declaratory relief. In general, a plaintiff may bring an action for declaratory relief before an actual invasion of rights has occurred. However, the action must be based on an actual controversy with known parameters (*see Code Civ. Proc. § 1060*). If the parameters are unknown, the controversy is not ripe for declaratory relief. The court of appeal concluded that in this case, the issue of whether the plaintiffs could hold their signs on freeway overpasses under circumstances other than those presented by the facts of this case was not ripe. The court explained that the issue of what the CHP can and cannot do in situations not substantially similar to the facts presented in this case could not be the subject of a declaration concerning the plaintiffs' rights, because the court could only speculate concerning what the conditions of future encounters between the plaintiffs and the CHP might be. Many variables, such as traffic congestion, safety, and the exercise of the CHP's statutory authority, could change whether CHP interference with the plaintiffs' activities would be appropriate in any given situation. Furthermore, CHP interference could occur in a manner that, unlike the circumstances in this case, would violate the plaintiffs' free speech rights. If such a situation were presented, the issue of whether the freeway overpass is a public forum would also be ripe. The court could not, however, make a declaration in this case that would be applicable in all scenarios. Such a declaration would amount to an impermissible advisory opinion. Accordingly, the court of appeal affirmed the trial court's judgment denying declaratory relief, except that the trial court's judgment was modified to specify that the CHP could not rely on *Veh. Code §§ 21465* and *21467* to interfere with the plaintiffs' standing on the sidewalks of freeway overpasses and holding non-traffic signs (*105 Cal. App. 4th 858, 871-874)* .

The factual background of ***Wilson v. Transit Auth.*** *(1962) 199 Cal. App. 2d 716, 19 Cal. Rptr. 59* is discussed in *§ 67.24[3][c]*. The court of appeal affirmed the judgment of dismissal on the ground that no justiciable controversy had been presented, that a mere difference of opinion does not give rise to such a controversy, that a controversy of concrete actuality is required as opposed to one which is merely academic or hypothetical, and that the declaratory judgment statutes do not authorize the courts to give advisory opinions (*199 Cal. App. 2d 716, 722)* .

[e] No Affirmative Relief Sought or Possible

In ***Pinnacle Holdings, Inc. v. Simon*** *(1995) 31 Cal. App. 4th 1430, 37 Cal. Rptr. 2d 778* , a landlord that had unsuccessfully sought authority for a rent increase from a county rent control board brought a proceeding for mandate and for declaratory relief against the rent control board. In the declaratory relief action, the plaintiff landlord also sought to join as defendants four tenants who had spoken in opposition to the proposed rent increase during a hearing before the board. The four tenants were named both as individual defendants and as representatives of a class consisting of all of the plaintiff's tenants. The trial court dismissed the declaratory relief action against the four tenants after sustaining their demurrers without leave to amend and denying plaintiff's motion for certification of the defendant class.

The court of appeal affirmed. The plaintiff had argued that because it had alleged an actual controversy between itself and all defendants, the tenants were properly joined in the declaratory relief action, even though they were only real parties in interest and not necessary parties. The court noted that a declaratory relief action requires the existence of an actual, present controversy over a proper subject and concluded that this requirement was lacking because the action sought no affirmative relief from the tenants and because the tenants had no power to grant plaintiff the relief it sought (i.e., approval for the rent increase) (*31 Cal. App. 4th 1430, 1436-1437)* .

[f] Different Interpretation of Statute by Citizen and Governmental Agency

Zetterberg v. State Dept. of Public Health *(1974) 43 Cal. App. 3d 657, 118 Cal. Rptr. 100* was an action by taxpayers and citizens of California against the State Department of Health (the department), members of the State Board of Public Health, the Governor, and the California Air Resources Board (CARB) for declaratory relief regarding the effect of the Mulford-Carrell Air Resources Act [former *Health & Safety Code § 39000 et seq.*, repealed by Stats. 1975, ch. 957, § 11] (the act), in which plaintiffs sought a declaration that the department had the authority and duty to act against air pollution resulting from the use of motor vehicles, particularly conventional internal combustion engines in motor vehicles. Before passage of the act, the department had acted in the area of air pollution control pursuant to its general statutory authority to deal with health problems and under a specific grant of authority, enacted in 1955, to deal with air pollution [former *Health & Safety Code § 425*, repealed by Stats. 1967, ch. 1545, § 1]. In 1967, the Legislature passed the act that established CARB, listed in detail the powers and duties of CARB, repealed *Health & Safety Code § 425* (replacing it with a new section), and gave a number of the former Health & Safety Code § 425 powers to CARB. Defendants' motion for summary judgment was granted on the ground that there was no triable issue of fact and that the scope of the department's powers was limited to those duties expressly conferred on it or reserved to it by the act. Plaintiffs appealed, asking that summary judgment be entered in their favor.

Although affirming the summary judgment, the court of appeal stated that the trial court should have dismissed the complaint because of the clear absence of a justiciable controversy (*43 Cal. App. 3d 657, 665)* . The court stated that the standard for the granting of declaratory relief is well established and added that the fact than an issue raised in a declaratory relief action is of broad general interest is not grounds for the courts to grant such relief in the absence of a true justiciable controversy (*43 Cal. App. 3d 657, 661-662)* . The court pointed out that a citizen's mere dissatisfaction with the performance of either the legislative or executive branches, or disagreement with their policies, does not constitute a justiciable controversy (*43 Cal. App. 3d 657, 662)* . The court also noted that a difference of opinion as to the interpretation of a statute between a citizen and a governmental agency does not give rise to a justiciable controversy. In reviewing the various authorities, the court explained the rationale for its ruling to be in the separation of powers doctrine. Courts have no power per se to review and annul legislative acts unless the party invoking such power has sustained some direct injury. Here the department had administratively interpreted its statutory powers and adopted policies for performance of its statutory duties. If the interpretation was erroneous, as plaintiffs had complained, and its policies unwise, the corrective mechanism was legislative clarification (*43 Cal. App. 3d 657, 663)* .

[g] Adoption of General Plan

Selby Realty Co. v. San Buenaventura *(1973) 10 Cal. 3d 110, 109 Cal. Rptr. 799, 514 P.2d 111* is discussed in *§ 67.24[3][b]*.

Mills v. San Francisco Bay Area Rapid Transit Dist. *(1968) 261 Cal. App. 2d 666, 68 Cal. Rptr. 317* was a declaratory and injunctive relief action which sought to compel the location of a particular station of defendant district at the point specified in a report that had preceded submission of the bond issue to the electorate, rather than the point the district had chosen after the bonds were voted. Plaintiffs had also named the county in which the station was located as a defendant since the county's board of supervisors had adopted a "traffic circulation plan," which had contemplated the "new" location of the station. (It was unclear which location this was.) Plaintiffs appealed from the judgments entered after the trial court had granted the district's motion for summary judgment and sustained the defendant county's general demurrer.

In affirming the judgment of the trial court, the court of appeal held that the demurrer of the county had been properly sustained. The court pointed out that the county board had statutory authority to adopt a general plan, including the traffic circulation report. No defect in the proceedings having been suggested, the wisdom of the plan was for the Legislature to determine and not the courts.

[h] Jurisdiction Over Dissolution of Corporation Which Has Not Elected to Dissolve

Escondido Mut. Water Co. v. George A. Hillebrecht, Inc. *(1966) 241 Cal. App. 2d 410, 50 Cal. Rptr. 495* was an action by a mutual water company for declaratory relief, seeking court approval of a proposed contract for the sale of its water rights and water distribution facilities to a city and for judicial approval of a proposed amendment to the corporation's articles of incorporation affecting the rights of the stockholders on dissolution, that is, affecting their rights with respect to the terms and conditions of the dissolution. The action was brought by the corporation and various stockholders were named defendants. The trial court entered judgment for plaintiff approving the contract and declaring that it would be valid when and if approved by the holders of a majority of the outstanding stock. The court also approved the proposed amendment of the articles. One of the defendant stockholders appealed. In reversing the judgment, the court of appeal, with respect to that portion of the judgment declaring the terms and conditions of any future dissolution of the corporation, held that since there had been no election to dissolve Mutual pursuant to Corp. Code § 4600 [repealed, now see *Corp. Code § 1900(a)*], it concluded that it was without jurisdiction to declare terms and conditions of dissolution when and if it occurred at some future time (*241 Cal. App. 2d 410, 415-416)* . Plaintiff argued on appeal that the case should be likened to a declaratory relief action brought by an insurance company to determine liability under a contract of insurance, even though no claim had been asserted under the contract. The court agreed that such cases may be maintained but none involved the additional step of a declaration of rights and duties under a proposed contract of insurance. The court also considered the existence of a public interest exception to this rule where, although the contract had been only proposed, the inconvenience to the public is sufficient to constitute a matter of public concern to warrant declaratory relief [see *Wilson v. Transit Auth. (1962) 199 Cal. App. 2d 716, 726, 19 Cal. Rptr. 59* (dissenting opinion)] (*241 Cal. App. 2d 410, 415-415)* . However, the court rejected the application of such an exception in plaintiff's case, since the only public interest claimed was private economic consideration (*241 Cal. App. 2d 410, 415-416)* .

[i] Mere Allegation That Controversy Exists

The factual background of ***Alturas v. Gloster*** *(1940) 16 Cal. 2d 46, 104 P.2d 810* is discussed in *§ 67.24[3][a]*. In that case, the complaint additionally alleged that an actual controversy existed between the parties as to their respective rights and duties. The Supreme Court held that the allegation was a bare conclusion and insufficient to show that an actual controversy existed (*16 Cal. 2d 46, 48)* .

[j] Nonexistent Contract

Escondido Mut. Water Co. v. George A. Hillebrecht, Inc. *(1966) 241 Cal. App. 2d 410, 50 Cal. Rptr. 495* was an action for declaratory relief by plaintiff water company seeking court approval of a proposed contract for the sale of its water rights and water distribution facilities to a city. The company's motive for seeking the declaration was to facilitate distribution of its assets in order to take advantage of certain federal income tax benefits. The contract, although apparently approved by the directors of the water company and by the city council, had never been executed, nor had it been approved by the company's shareholders, as required by former Corp. Code § 3901 [now *Corp. Code § 1001(a)*], governing a sale of all or substantially all of a corporation's assets. The stockholders had been notified of the pending declaratory relief action and certain of them had been made defendants. The trial court found that the consideration to be paid the company was fair and reasonable and that the terms of the contract were just and reasonable. It entered judgment declaring that the contract, when and if approved by the vote or written consent of the holders of a majority of the shares and executed by the water company and city, would in all respects be a valid, binding, and subsisting agreement in favor of and against the parties thereto and the shareholders. One shareholder defendant appealed. In reversing the judgment, the court of appeal, quoting from 2 Anderson, Actions for Declaratory Judgments (2d ed), ch 12, § 585, said that for a declaratory action to be maintained to determine the validity and construction of a contract, the contract must be an existing one, and not merely one in contemplation, since a contemplated contract cannot, in advance of an agreement as to its terms, present a justiciable controversy.

[4] Additional Authorities

[a] Actual Legal Controversy as Required to Be Pleaded

California v. Superior Court (1974) 12 Cal. 3d 237, 115 Cal. Rptr. 497, 524 P.2d 1281 was an original writ proceeding in the Supreme Court to review orders of the superior court in an action brought in that court by two California corporations and a partnership. Plaintiffs in that action originally had been granted a permit to develop their coastal lands by a regional commission, but the permit was subsequently denied on appeal to the California Coastal Zone Conservation Commission. Plaintiffs then filed in the superior court a petition for writ of mandate asserting six causes of action against the commission and others as follows: (1) administrative mandate [*Code Civ. Proc. § 1094.5*] to review the commission's denial of the permit and for damages; (2) traditional mandate [*Code Civ. Proc. § 1085*] to compel the commission to grant the permit; (3) declaratory relief determining the petitioners were entitled to the permit and that they had acquired a vested right to develop their property without a permit; (4) declaratory relief determining that the California Coastal Zone Conservation Act of 1972 was unconstitutional on its face and as applied; (5) injunctive relief enjoining the commission from administering the act; and (6) damages for inverse condemnation. The commission's demurrers were overruled, and petitioners' motion to compel answers to interrogatories was granted. It was from these orders that the commission sought relief in the Supreme Court.

The Supreme Court held that the first cause of action, except for the damages claim to which the commission was immune by virtue of *Gov. Code §§ 818.4, 821.2*, stated a cause of action, as did the fourth and fifth insofar as the fourth sought a declaration that the act was facially unconstitutional and the fifth sought to enjoin its enforcement if it was. The complaint otherwise was held to fail state a cause of action. With respect to the third cause of action, the Supreme Court held: (1) declaratory relief is not appropriate to review an administrative decision; (2) the pleading failed to allege an actual controversy between the parties with respect to whether plaintiffs had acquired a vested right, since it had neither sought from nor been denied by the commission a vested right's determination; and (3) the commission had to be afforded an opportunity to make that determination as a predicate to any declaratory relief action (*12 Cal. 3d 237, 249-250)* .

Lord v. Garland (1946) 27 Cal. 2d 840, 168 P.2d 5 was an action by an individual against the State Department of Motor Vehicles, its director, and other officers for declaratory and injunctive relief and recovery of a deposit. Defendants' demurrer to the multi-count complaint was sustained without leave to amend, and plaintiff appealed from the judgment of dismissal. With respect to the sufficiency of the count for declaratory relief to state a cause of action

pursuant to *Code Civ. Proc. § 1060,* the Supreme Court said that one invoking the remedy of declaratory relief must allege facts from which the court may determine that an actual controversy relating to legal rights and duties of the respective parties exists. The Court, however, held that the complaint complied with this requirement and that the allegations sufficiently stated a cause of action for such relief and would support a declaratory judgment (*27 Cal. 2d 840, 851)* .

In *Green v. Travelers Indemnity Co. (1986) 185 Cal. App. 3d 544, 230 Cal. Rptr. 13* initially involving separate wrongful death and personal injury actions against the victims' employer (the insured), the insured instituted bankruptcy proceedings, effecting a stay on all civil actions against it. Plaintiffs brought a third-party and a direct action, respectively, for declaratory relief and damages under *Ins. Code § 790.03(h)* (duty to settle insurance claim in good faith) against the various insurers, and defendants successfully filed demurrers to the complaint on the ground that there had been no final judgment between the insured and insurers, and thus no cause of action under *Ins. Code § 790.03(h)* had accrued. Plaintiffs appealed, and the court of appeal affirmed, holding that insofar as there was no final determination of the insured's liability, which is central to determining the culpability of the insurers, no actual controversy exists between the parties, and any eventual declaration of rights and duties would constitute mere advisory opinion based on hypothetical rather than actual, presently existing facts (*185 Cal. App. 3d 544, 550-557)* .

In *BKHN, Inc. v. Department of Health Services (1992) 3 Cal. App. 4th 301, 4 Cal. Rptr. 2d 188* , plaintiffs appealed the judgment dismissing their action for a declaratory judgment that their liability for clean-up costs under the Hazardous Substance Account Act (*Health & Safety Code § 25300 et seq.*) was not joint and several and that each responsible party's potential liability should be based on that party's acts. The court of appeal affirmed, holding that the "ripeness" and "actual controversy" issues were not satisfied because the plaintiff's action lacked the urgency and definiteness necessary to warrant declaratory relief. Thus, the plaintiffs sought a declaration that liability under the Hazardous Substances Account Act was never joint and several regardless of the circumstances. The court declined to enter into such a contrived controversy. In addition, the case was not ripe since, even if declaratory relief were granted, the plaintiff's ultimate liability would not be resolved because the defendant could proceed under federal law which permitted joint and several liability under the same circumstances (*3 Cal. App. 4th 301, 308-311)* .

Hagan v. Fairfield (1965) 238 Cal. App. 2d 197, 47 Cal. Rptr. 600 was an action by Hagan against Fairfield and others for damages for breach of the right of privacy and for declaratory relief with respect to the validity of a covenant not to sue defendant Whitman. With respect to the declaratory relief action, plaintiff, in his second amended complaint, alleged (*238 Cal. App. 2d 197, 200)* that a bona fide dispute existed between plaintiff and defendants Whitman and Fairfield as to the validity of the covenant, plaintiff contending that the covenant had no legal force or effect because he received no consideration. Therefore, defendants Whitman and Fairfield contended that the covenant was effective according to its terms. The complaint showed on its face that defendant Fairfield was not a party to the covenant not to sue, and his demurrer to the second amended complaint was sustained without leave to amend. Plaintiff appealed from the ensuing judgment. In affirming the judgment, the court of appeal, in discussing the declaratory relief action and quoting from *Auberry Union School Dist. v. Rafferty (1964) 226 Cal. App. 2d 599, 603, 38 Cal. Rptr. 223 , below*, said that a party seeking declaratory relief must plead facts rather than conclusions of law and must show a controversy of concrete actuality as opposed to one which is merely academic or hypothetical (*238 Cal. App. 2d 197, 202)* .

Auberry Union School Dist. v. Rafferty (1964) 226 Cal. App. 2d 599, 38 Cal. Rptr. 223 was a declaratory relief action brought by 41 California school districts against the State Superintendent of Public Instruction, the members of the State Board of Education, and the county committees on school district organization in which plaintiffs prayed for an adjudication of the constitutionality of certain sections of the Education Code and for a declaration of plaintiffs' rights and duties in relation to those statutes. The complaint broadly alleged a "controversy" between plaintiffs and defendants concerning the constitutionality and interpretation of the challenged statutes, but contained only a single reference to a specific point allegedly in dispute between the parties. Defendants moved to dismiss the complaint as sham [now, a motion for summary judgment under *Code Civ. Proc. § 437c*] and supported the motion with an affidavit denying any dispute between the parties on the specific point alleged, stating that defendants agreed with plaintiffs' interpretation,

and setting forth facts showing that agreement. Plaintiffs filed no opposition to the motion. Defendants also filed demurrers to the complaint on several grounds, including the ground that the complaint did not state facts sufficient to constitute a cause of action. After hearing, the trial court sustained the general demurrer and granted the motion to dismiss. On plaintiffs' appeal from the subsequent judgment of dismissal, judgment was affirmed. The court of appeal said that a party seeking declaratory relief must plead facts rather than conclusions of law and must show a controversy of concrete actuality as opposed to one which is merely academic or hypothetical. The court stated that the broad allegation that the parties could not agree on the interpretation of the various statutory provisions did not render declaratory relief necessary or proper (*226 Cal. App. 2d 599, 603)* .

American Mission Army v. Lynwood (1956) 138 Cal. App. 2d 817, 292 P.2d 533 was an action for declaratory relief by a religious organization seeking a determination of its right to solicit funds for religious purposes within defendant city with or without a city permit and as to whether the city had authority under the Constitution and statutes of the state to forbid such solicitation. Defendant's general and special demurrers to the complaint were sustained with leave to amend. On plaintiff's refusal to amend, the trial court dismissed the action, and plaintiff appealed. In affirming the judgment, the court of appeal pointed out that the purpose of the declaratory judgment is to serve some practical end in quieting a disputed jural relation and that unless all the allegations of a complaint show that an actual controversy does exist between the parties, there is no basis for declaratory relief. Applying this requirement, the court said that if plaintiff's purpose was to have its rights declared under California laws, it should have specified with particularity the details of the ordinance which it contended were invalid or the act of a city official which it contended was unlawful. Having failed to allege any such details, plaintiff was not entitled to declaratory relief. The court added that if a pleading fails to allege that an ordinance requiring a corporation to obtain a permit to solicit funds is invalid, then it is presumed to have been enacted in compliance with the organic law; that is, its vice should be designated with clarity. Although the complaint had much to say about free speech, free press, free religion, and that plaintiff was a religious corporation, it did not state such facts as would declare a justiciable controversy and warrant declaratory relief (*138 Cal. App. 2d 817, 819)* .

Fritz v. Superior Court (1936) 18 Cal. App. 2d 232, 63 P.2d 872 was a proceeding in prohibition to prevent further prosecution of an action for declaratory and injunctive relief. The controversy involved the validity of the claims of the respective parties to act as officers and directors of a corporation. In granting a writ of mandate directing the trial court to dismiss the proceeding, the court of appeal said that a prerequisite to the maintenance of an action for declaratory relief is an actual controversy relating to the legal rights and duties of the respective parties. The court added that the record showed that no such controversy existed or could have existed under the facts pleaded and concluded that no controversy existed which would justify an action for declaratory relief as between the parties to the proceeding (*18 Cal. App. 2d 232, 236)* . The court also held that declaratory relief would not lie because a special remedy was provided by statute to resolve such disputes [former Civ. Code § 315; *now Corp. Code § 709*].

[b] Requirement That Controversy Be Justiciable

Eye Dog Foundation v. State Bd. of Guide Dogs for the Blind (1967) 67 Cal. 2d 536, 63 Cal. Rptr. 21, 432 P.2d 717 was an action for declaratory relief as to the constitutionality of statutes [*Bus. & Prof. Code §§ 7200-7217*] concerning guide dogs for the blind and for an injunction prohibiting enforcement of the statutes and interference with the operation of plaintiff school which was engaged in the training of seeing eye dogs. The statutes required that such schools be licensed, and they have a licensed trainer in charge of training the dogs, and provided that the license of the school is automatically suspended if there is no licensed trainer in charge [*Bus. & Prof. Code § 7214*]. Plaintiff's license had been suspended under this latter provision. The trial court declared that all the statutes were valid except *Bus. & Prof. Code § 7210.5*, making the solicitation of funds by an unlicensed person unlawful. Both parties appealed. In reversing the judgment insofar as it held *Bus. & Prof. Code § 7210.5* unconstitutional and affirming the judgment in all other respects, the Supreme Court, although adjudicating the appeal on the merits, pointed out that plaintiff's license had been restored several months after the trial court's judgment had been entered since it had employed a new licensed trainer, and said that accordingly, the general rule immediately suggests itself that its duty as of every other judicial tribunal, is

to decide actual controversies by a judgment which can be carried into effect, and not to give opinions on moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it (*67 Cal. 2d 536, 541)* .

The Court nevertheless concluded that since the constitutionality of statutes was in issue and any judgment would affect the parties' rights in the future, the general rule governing mootness becomes subject to the case-recognized qualification that an appeal will not be dismissed where, despite the happening of the subsequent event, there remain material questions for the court's determination. This qualification or exception had been applied to actions for declaratory relief upon the ground that the court must do complete justice once jurisdiction has been assumed and the relief thus granted may encompass future and contingent legal rights.

In *Sherwyn v. Department of Social Services (1985) 173 Cal. App. 3d 52, 218 Cal. Rptr. 778* , attorneys specializing in the practice of reproductive technology brought an action against state and county agencies for declaratory relief regarding the presumption of paternity in surrogate parenting relationships; the trial court, after trial, found in favor of defendants, and plaintiffs appealed. The court of appeal vacated the judgment with directions to dismiss the action on the ground of no justiciable controversy, because plaintiffs, as attorneys representing parties to surrogate arrangements, lacked standing to sue; the concept of ripeness was designed in part to regulate the workload of courts by preventing judicial consideration of suits that seek only to obtain general guidance, rather than to resolve specific legal disputes (*173 Cal. App. 3d 52, 58-59)* .

Winter v. Gnaizda (1979) 90 Cal. App. 3d 750, 152 Cal. Rptr. 700 was an action for declaratory relief by a doctor who claimed that he was entitled to recover the difference between the amount he had been reimbursed under Medi-Cal. for medical treatment he had rendered a minor and what his fee would have been if the minor had been his private patient. The director of the State Department of Health was named as a defendant in the action because apparently it had been the department's position that plaintiff was not entitled to the difference he sought. However, plaintiff had submitted his bill for the costs of the medical treatment to defendant attorney since the attorney was holding insurance proceeds which he had recovered on behalf of the minor under an insured motorist claim and out of which plaintiff sought his extra costs. After defendant director's demurrer to the complaint had been overruled, the matter went to trial and the court entered judgment ordering the attorney to deliver the extra costs to plaintiff and declaring that the State of California had no further claim to assert in the matter. Defendant director appealed. The court of appeal dismissed the appeal and remanded the matter to the trial court with directions to dismiss the action as to the director. The court found, first, that the director was not an aggrieved party having a right to appeal under *Code Civ. Proc. § 902*. It also found on the alternative ground that no actual controversy between plaintiff and the director had been alleged. Quoting the statement set forth in *Selby Realty Co.* discussed in *§ 67.24[3][b],* the court found that the only actual controversy calling for definitive and conclusive relief existed between plaintiff and the attorney. Plaintiff did not claim that the department owed him the additional sum, that the Medi-Cal. rules were unreasonable or unconstitutional, that the department threatened to take legal action against plaintiff, or even that the department through its agent, Blue Shield, had any legal authority to prevent the attorney from paying plaintiff's bill (*90 Cal. App. 3d 750, 754-756)* .

Southern Cal. Edison Co. v. State Farm Mut. Auto. Ins. Co. (1969) 271 Cal. App. 2d 744, 76 Cal. Rptr. 909 was an action by Edison for declaratory and injunctive relief and damages against three insurance companies and a number of their insureds. The complaint alleged, inter alia, that: (1) the insured defendants at different times and places had damaged plaintiff's property (telephone poles) through the negligent operation of their respective motor vehicles, on some of which claims plaintiff had pending suits in municipal court; (2) plaintiff was entitled to recover as damages certain overhead expenses, namely, the costs of tools to make repairs, the costs of supervision, and administrative expenses; (3) although admitting liability defendant insurance companies rejected the claims on the sole ground that the tool, supervision, and administrative expenses were not proper elements of recoverable damages; (4) plaintiff had refused to settle if the claims did not include the overhead expenses; (5) in the majority of past actions, plaintiff had recovered at trial or on appeal the total amount of its claimed damages; (6) by conducting repeated discovery proceedings in which identical information was sought, continually questioning the method of proving disputed items of

damage, and refusing to pay the full amounts due, defendants were forcing plaintiff to litigate each claim notwithstanding adverse judicial decisions on previous cases involving similar items; and (7) this course of action by defendants' insurers was unjust and imposed an unconscionable burden on plaintiff, the courts, and the taxpayers. Defendant's general and special demurrers to the complaint were sustained, the general demurrers being sustained without leave to amend.

On plaintiff's appeal from the subsequent judgment of dismissal, the court of appeal, in affirming the judgment, citing, Monahan v. Department of Water & Power (1941) 48 C. App. 2d 746, 751, *120 P.2d 730* said that it is well established that courts do not give advisory opinions. There must be a justiciable controversy which admits of specific and conclusive relief by judgment within the field of judicial determination for the court to exercise its discretion to declare rights (*271 Cal. App. 2d 744, 747)* . The court pointed out that the declaration sought would not dispose of any of the actions against the insureds and that plaintiff would still have the burden in each case of proving what its damages were and that they were reasonable (*271 Cal. App. 2d 744, 748-749)* .

The factual background of *Hagan v. Fairfield (1965) 238 Cal. App. 2d 197, 47 Cal. Rptr. 600* is discussed in *§ 67.24[4][a]*. The court of appeal, in discussing the declaratory relief action and quoting from *Auberry Union School Dist. v. Rafferty (1964) 226 Cal. App. 2d 599, 602-603, 38 Cal. Rptr. 223 , below,* said that the decisions construing *Code Civ. Proc. §§ 1060, 1061*, have held declaratory relief to be proper only where there is a justiciable controversy, as distinguished from a difference or dispute of a hypothetical or abstract character, from one that is academic or moot (*238 Cal. App. 2d 197, 202)* .

The factual background of *Auberry Union School Dist. v. Rafferty (1964) 226 Cal. App. 2d 599, 38 Cal. Rptr. 223* is discussed in *§ 67.24[4][a]*. The court of appeal said that the decisions construing *Code Civ. Proc. §§ 1060, 1061* have held declaratory relief to be proper only where there is a justiciable controversy, as distinguished from a difference or dispute of a hypothetical or abstract character, from one that is academic or moot (*226 Cal. App. 2d 599, 602-603)* .

[c] Failure to State Cause of Action

Burke v. City & County of San Francisco (1968) 258 Cal. App. 2d 32, 65 Cal. Rptr. 539 was an action for declaratory relief to determine whether a tax was due under a reduced property assessment. Plaintiffs owned real property in San Francisco. Believing the property to have been assessed at too high a figure for the 1965-1966 tax year, they applied to the board of supervisors, sitting as a board of equalization, for a reduction. The assessment was reduced by 15 percent, and plaintiffs paid under protest. They then filed the declaratory relief action and also commenced a proceeding in mandate under *Code Civ. Proc. § 1094.5* to review the action of the board of equalization. The mandate proceeding, raising the same issue, was determined adversely to plaintiff and that judgment was final. The time for filing an action to recover taxes paid under protest had passed. The trial court sustained a general demurrer to the complaint without leave to amend, and plaintiffs appealed from the subsequent judgment of dismissal. On appeal plaintiffs urged that the true issue was not the 1965-1966 taxes, but whether the assessment practices of the city complied with the Constitution and laws of California. The complaint alleged that the former assessor was in office on May 28, 1966, but conceded that he had been removed from office on that date. A new assessor had been appointed. Changes had also been made in the state Constitution, statutes, and local law. The court of appeal concluded that there was no basis for an assumption that the practices or policies followed by the former assessor would be followed by the successor. In affirming the judgment, the court concluded that the only possible declaration of future rights under the complaint would but reiterate in generalities the already mandatory requirements of the statutes; no justiciable issue was thus presented by the complaint, and the demurrer for failure to state a cause of action was properly sustained (*258 Cal. App. 2d 32, 35)* .

[d] Advisory Opinions

National Audubon Society v. Superior Court (1983) 33 Cal. 3d 419, 189 Cal. Rptr. 346, 658 P.2d 709 was an action for declaratory relief filed after a federal court had abstained from deciding whether California water law applied the

public trust doctrine to diversions from Mono Lake. The Supreme Court held that the action presented a justiciable controversy notwithstanding the contention of the real party in interest that the action sought an advisory opinion, given the California courts' interest in cooperating with the federal courts' abstention doctrine, the public interest in the action, and the action's lack of any collusive or hypothetical nature (*33 Cal. 3d 419, 432-433 n.14*).

[e] Different Interpretation of Statute by Citizen and Governmental Agency

In *Winter v. Gnaizda (1979) 90 Cal. App. 3d 750, 152 Cal. Rptr. 700* , the background of which is discussed in *§ 67.24[4][b],* the court of appeal assumed arguendo that even if plaintiff's complaint for declaratory relief alleged an actual controversy between plaintiff and the director of the State Department of Health, the action would still be inappropriate since a difference of opinion as to the interpretation of a statute as between a citizen and a government agency does not give rise to justiciable controversy even if the subject of the action is of broad general interest (*90 Cal. App. 3d 750, 756)* .

[f] Mere Allegation That Controversy Exists

The factual background of *American Mission Army v. Lynwood (1956) 138 Cal. App. 2d 817, 292 P.2d 533* is discussed in *§ 67.24[4][a]*. The court of appeal said that to say that a controversy exists is a mere conclusion; it is not a statement of ultimate facts that are indispensable to a valid pleading (*138 Cal. App. 2d 817, 819)* .

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Volume 6 Chapters 60-69 COSTS---to---DECLARATORY RELIEF
CHAPTER 67 DECLARATORY RELIEF
PART II. FORMS

6-67 California Points & Authorities § 67.25

§ 67.25 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10] for Declaratory Relief [Code Civ. Proc. § 1060]--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Plaintiff Lacks Standing to Sue

[1] FORM Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10] for Declaratory Relief [Code Civ. Proc. § 1060]--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Plaintiff Lacks Standing to Sue

[*Caption. See § 67.21.*]

THE COMPLAINT FOR DECLARATORY RELIEF FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION IN THAT IT APPEARS ON ITS FACE THAT PLAINTIFF LACKS STANDING TO SUE.

A. Objection by Demurrer. [*See § 67.21, Paragraph A.*]

B. Raising Objection by General Demurrer. The objection that the complaint shows on its face (or that it appears from judicially noticed matter) that plaintiff does not have standing to maintain the action, that is, that the cause of action stated is not in plaintiff, is properly raised by a general demurrer to the complaint on the ground the complaint fails to state a cause of action (*Klopstock v. Superior Court (1941) 17 Cal. 2d 13, 19, 108 P.2d 906*) (leading case).

[*EITHER*]

C. Exclusive Power to Sue Is Vested in Another. Where the exclusive power to seek judicial relief is vested by statute or case law in a person other than the plaintiff, the plaintiff has no standing to maintain the action (*see Oakland Mun. Improvement League v. Oakland (1972) 23 Cal. App. 3d 165, 168-172, 100 Cal. Rptr. 29*).

[*OR*]

C. Insufficient Interest. A person who has no real interest in the ultimate adjudication because he, she, or it has neither suffered nor is about to suffer any injury of sufficient magnitude reasonably to assure that all relevant facts will be adequately presented lacks standing to sue for declaratory relief (*California Water & Tel. Co. v. Los Angeles*

County (1967) 253 Cal. App. 2d 16, 22-23, 61 Cal. Rptr. 618 (holding plaintiffs had standing to sue)).

[*Optional*] **D. Lack of Standing to Maintain Quo Warranto Proceeding.** Declaratory relief is not available to a party against any person who usurps, intrudes into, or unlawfully holds or exercises any civil or military public office, or any franchise, or against any de jure or de factor corporation which usurps, intrudes into, or unlawfully holds or exercises any franchise if the party could not maintain a quo warranto action in its own name (*Cooper v. Leslie Salt Co. (1969) 70 Cal. 2d 627, 632, 634, 75 Cal. Rptr. 766, 451 P.2d 406* (quoting *San Ysidro Irrigation Dist. v. Superior Court (1961) 56 Cal. 2d 708, 715, 16 Cal. Rptr. 609, 365 P.2d 753*); *see Code Civ. Proc. §§ 803, 811*).

[*Optional*] **E. Standing as Taxpayer.** Where plaintiff seeks declaratory relief against a public entity on the basis of his or her being a taxpayer, the complaint must set forth circumstances indicating that as taxpayers they have a greater or different interest in the subject than other members of the body politic (*Zetterberg v. State Dep't of Public Health (1974) 43 Cal. App. 3d 657, 662, 118 Cal. Rptr. 100*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a general demurrer to a complaint for declaratory relief for failure to state a cause of action where it appears on the face of the complaint or from matter of which the court must or may take judicial notice that plaintiff lacks standing to sue.

Where appropriate counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

The foregoing memorandum may also, with appropriate modifications, be used in support of a nonstatutory motion for judgment on the pleadings, or, where the lack of standing to sue does not appear from the face of the complaint, a motion for summary judgment pursuant to *Code Civ. Proc. § 437c*.

[c] Lack of Standing and Legal Incapacity Distinguished

Lack of standing to sue must be distinguished from lack of legal capacity to sue, which is a ground of special demurrer [*Code Civ. Proc. § 430.10(b)*] and is waived if not raised by demurrer or answer [*Code Civ. Proc. § 430.80*]. Lack of standing to sue indicates the cause of action lies in someone other than plaintiff. Lack of legal capacity to sue, on the other hand, raises only the question whether plaintiff, who has a cause of action, is free from general legal disabilities such as minority, insanity, or incompetency [*see Code Civ. Proc. § 372*], or if plaintiff sues in a representative capacity, whether he, she, or it actually possesses that capacity [*see Klopstock v. Superior Court (1941) 17 Cal. 2d 13, 17-19, 108 P.2d 906]* . Both of these situations should be distinguished from the case where the plaintiff or defendant is nonexistent, either because he or she was dead when the action was commenced or because the party was not an

existing legal entity at that time. In this situation the objection is that the court lacks in personam jurisdiction over that party [*see, e.g.,* *Walter v. National Indem. Co. (1970) 3 Cal. App. 3d 630, 634, 83 Cal. Rptr. 803* ; (individual); *Crossman v. Vivienda Water Co. (1907) 150 Cal. 575, 580, 89 P. 335* (dissolved corporation); and Ch. 132, *Jurisdiction: Personal Jurisdiction and Inconvenient Forum*], rather than that the party lacks standing or legal capacity to sue.

[d] Relationship Between Standing, Justiciability, and Propriety of Relief

The concept of justiciability is closely connected with the concepts of standing and a determination of the propriety of declaratory relief under *Code Civ. Proc. § 1061*. One court of appeal explained that the concept of justiciability involves the intertwined criteria of ripeness and standing. A controversy is ripe when it has reached, but has not passed, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made. One who invokes the judicial process does not have standing if he or she, or those whom he or she properly represents, does not have a real interest in the ultimate adjudication because the actor has neither suffered nor is about to suffer any injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented. When justiciability in a jurisdictional sense exists, the ripeness and standing concepts are metamorphosed in a declaratory relief action into guides for the exercise of judicial discretion in granting or withholding that remedy. That is, where the controversy is ripe and the plaintiff has standing to assert it, the court may nevertheless refuse declaratory relief under *Code Civ. Proc. § 1061* on the ground that its declaration is not necessary or proper at the time under all the circumstances [*California Water & Tel. Co. v. Los Angeles County (1967) 253 Cal. App. 2d 16, 22-23, 61 Cal. Rptr. 618* , quoted in part in *St. John v. Superior Court (1978) 87 Cal. App. 3d 30, 35-36, 150 Cal. Rptr. 697* (mandate); *see also § 67.24*].

Thus, lack of standing to sue is an element of justiciability. This is true whether the cause of action stated, if any, is in plaintiff, but plaintiff has no real interest in the ultimate adjudication because he, she, or it has neither suffered nor is about to suffer any injury of sufficient magnitude to reasonably assure that all of the relevant facts and issues will be adequately presented or whether the cause of action stated is in some person other than plaintiff.

However, since a showing that plaintiff lacks standing to maintain the action will defeat the action, the objection is normally made directly rather than through arguing the issue of justiciability.

[e] Related Points and Authorities

For alternative forms of memoranda of points and authorities supporting general demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . See also *§ 67.20[2]*.

[3] Discussion of Authorities

[a] Raising Objection by General Demurrer

Klopstock v. Superior Court *(1941) 17 Cal. 2d 13, 108 P.2d 906* did not involve a declaratory relief action. Rather, it was an original proceeding in mandate in the Supreme Court to compel respondent superior court to dismiss an action after a general reversal of the judgment rendered at a previous trial. The prior judgment for plaintiff as to two of the three named defendants in a corporate derivative suit, in which defendants' general demurrer had been overruled, had been reversed by the District Court of Appeal on the ground that plaintiff in the case lacked standing to maintain the action [*see* *Samter v. Klopstock Realty Co. (1939) 31 Cal. App. 2d 532, 536, 88 P.2d 250]* . The court there stated that the objection could be raised by general demurrer for failure to state a cause of action and was not waived by failure of the defendants to demur specially. At the retrial plaintiff's motion to amend the complaint to substitute in the correct party was granted over defendants' objection, and the mandate proceeding ensued. In denying the peremptory writ as to the two named defendants, as to whom the first judgment had not become final, on the ground that the trial court properly permitted the amendment, the Supreme Court stated that a special demurrer for want of capacity to sue raises only the question of whether any general legal disability exists, such as infancy or insanity, or want of title in the

plaintiff to the character in which he sues. It explained that there is a difference between capacity to sue, which is the right to come into court, and a cause of action, which is the right to relief in court, and that a general demurrer for failure to state a cause of action should be sustained where the complaint may state a cause of action in someone, but not in the plaintiff (*17 Cal. 2d 13, 18-19)* .

[b] Exclusive Power to Sue Is Vested in Another

Oakland Mun. Improvement League v. Oakland *(1972) 23 Cal. App. 3d 165, 100 Cal. Rptr. 29* was a mandate proceeding, rather than an action for declaratory relief, in which various private groups sought to have a city charter declared void because of alleged defects in the process of its enactment. Respondent city's motion to dismiss, on the ground that the exclusive remedy for attacking the charter was by a quo warranto proceeding brought by the California Attorney General and hence that petitioners lacked standing to sue, was granted and petitioners appealed. In affirming the judgment, the court of appeal held that the exclusive remedy for attacking the charter was quo warranto by the attorney general (*23 Cal. App. 3d 165, 169)* . The court explained that in a case in which quo warranto is the proper remedy, the cause of action is vested in the People and not in any individual or group, no matter how affected they may be, or how much more the subject matter may touch their interests than it does other members of the citizenry. They simply are not entitled to sue (*23 Cal. App. 3d 165, 170)* . [For memoranda of points and authorities for use in quo warranto proceedings, *see* Ch. 199, *Quo Warranto*].

[c] Insufficient Interest

California Water & Tel. Co. v. Los Angeles County *(1967) 253 Cal. App. 2d 16, 61 Cal. Rptr. 618* was an action by several public utilities serving water within the unincorporated area of Los Angeles County to test the constitutionality of a water ordinance adopted by the county as applied to them. The trial court held that the ordinance could not constitutionally apply to plaintiffs, and the county appealed. Although holding that the plaintiffs there had standing to sue and that declaratory relief was warranted, the court of appeal said that one who invokes the judicial process does not have standing if he, or those whom he properly represents, does not have a real interest in the ultimate adjudication because the actor has neither suffered nor is about to suffer any injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented (*253 Cal. App. 2d 16, 22-23)* .

[d] Lack of Standing to Maintain Quo Warranto Proceeding

The power to bring a quo warranto proceeding is set forth in *Code Civ. Proc. § 803*. It provides that an action may be brought by the attorney general, in the name of the people of this state, on his or her own information, or on a complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise, or against any corporation, either de jure or de facto, which usurps, intrudes into, or unlawfully holds or exercises any franchise within this state. The board of supervisors of any county, or city and county, or the legislative body of any municipal corporation may also maintain the action against any person who usurps, intrudes into, or unlawfully holds or exercises any franchise, or portion thereof, within the respective territorial limits of such county, city and county, or municipal corporation and which is of a kind that is within the jurisdiction of such board or body to grant or withhold [*Code Civ. Proc. § 811*].

Cooper v. Leslie Salt Co. *(1969) 70 Cal. 2d 627, 75 Cal. Rptr. 766, 451 P.2d 406* was an action attacking the manner in which the defendants caused municipal improvements and services to be financed by a municipal improvement district, of which plaintiff was a taxpayer. General demurrers to the complaint were sustained without leave to amend, and plaintiff appealed. In affirming the judgment, the Supreme Court pointed out that in *San Ysidro Irrigation Dist. v. Superior Court (1961) 56 Cal. 2d 708, 715, 16 Cal. Rptr. 609, 365 P.2d 753* it was held that because the declaratory judgment law was not designed to undermine the policy of the quo warranto statute, the existence of municipal corporations is not open to attack by private individuals, and quoting from that case said that the existing authorities in California support the view that declaratory relief would not be available to a party in these circumstances which could

not maintain a quo warranto action in its own name.

San Ysidro Irrigation Dist. v. Superior Court *(1961) 56 Cal. 2d 708, 16 Cal. Rptr. 609, 365 P.2d 753* was a proceeding in prohibition by the Irrigation District to restrain respondent court from taking any further proceedings in an action brought against it by the city of San Diego for declaratory and injunctive relief determining that the district had been dissolved by operation of law when it was annexed to plaintiff city and enjoining the district and its directors from entering into any contracts for the construction of any new water lines and facilities and from disposing of any of the district's assets. The district's motions for dismissal had been denied, and its demurrer to the complaint overruled. In denying the writ, the Supreme Court, held that the city under *Code Civ. Proc. § 811* had power to sue in quo warranto to prevent usurpation of a franchise (as opposed to usurpation of an office) and since the city was authorized to maintain quo warranto in its own name it could maintain an action for declaratory relief (*56 Cal. 2d 708, 713-717)* .

[e] Standing as Taxpayer

Zetterberg v. State Dept. of Public Health *(1974) 43 Cal. App. 3d 657, 118 Cal. Rptr. 100* was an action by alleged taxpayers and California citizens for declaratory relief to the effect that the Mulford-Carrell Air Resources Act [former *Health & Safety Code §§ 39000-39570*, repealed by Stats. 1975, ch. 957, § 11] did not vest all air pollution control responsibilities in the California Air Resources Board and that the State Department of Health and its members had both the authority and duty to act against air pollution, particularly that resulting from internal combustion engines in motor vehicles. Defendants' motion for summary judgment was granted on the ground that there was no triable issue and that the scope of the department's powers was limited to those duties expressly conferred on or reserved to it by the Mulford-Carrell Air Resources Act. Plaintiffs appealed. Although affirming the summary judgment, the court of appeal held that no justiciable controversy was presented and that the trial court should have dismissed the complaint (*43 Cal. App. 3d 657, 665)* . The court said that plaintiffs' allegation that they are taxpayers did nothing to establish their standing to seek declaratory relief and that the complaint failed to set forth any circumstances indicating that as citizens of the state, plaintiffs had any greater or different interest in the subject than any other member of the body politic (*43 Cal. App. 3d 657, 662)* . The court also quoted the statement from *California Water & Tel. Co. v. Los Angeles County (1967) 253 Cal. App. 2d 16, 23, 61 Cal. Rptr. 618 , set forth in § 67.25[3][c]*.

[4] Additional Authorities

[a] Raising Objection by General Demurrer

Parker v. Bowron (1953) 40 Cal. 2d 344, 254 P.2d 6 involved an appeal in a mandate proceeding rather than in a declaratory relief action. There the trial court had sustained respondents' objection at trial to the introduction of any evidence on the grounds that petitioner was neither a real party in interest nor a party beneficially interested, that is, that he lacked standing to maintain the action, and that the petition failed to state a cause of action. The trial court discharged the alternative writ and dismissed the petition, and petitioner appealed. In affirming the judgment, the Supreme Court distinguished lack of capacity to sue (a ground of special demurrer [*see Code Civ. Proc. § 430.10(b)*]) from lack of standing to sue. It noted that the question of capacity to sue is waived if not raised by demurrer or answer, and while the question of standing to sue, not being merely a legal disability, such as infancy or insanity, which deprives a party of the right to come into court, goes to the existence of a cause of action. Thus, standing is not a plea in abatement, as is lack of capacity to sue, but may be raised by a general demurrer for failure to state a cause of action or by other objection at any point in the proceedings, such as, by the objection to the introduction of any evidence (*40 Cal. 2d 344, 351)* .

The factual background of *Oakland Mun. Improvement League v. Oakland (1972) 23 Cal. App. 3d 165, 100 Cal. Rptr. 29* is discussed in *§ 67.25[3][b]*. Respondents' general demurrer to the petition had been overruled but respondent city's subsequent motion to dismiss on the ground that the exclusive remedy for attacking the charter was a quo warranto proceeding brought by the California Attorney General and that hence petitioners lacked standing to sue was granted;

and petitioners appealed. In affirming the judgment, the court of appeal stated that where the complaint states a cause of action in someone (here, in the People) but not in the plaintiff, a general demurrer for failure to state a cause of action will be sustained or the issue may be raised at any time in the proceedings, as by objection to the introduction of any evidence. Although respondents' demurrer on the ground that the petition does not state facts sufficient to constitute a cause of action was overruled, no waiver existed because the issue could be raised at any time, and this was done effectively by the motion to dismiss (*23 Cal. App. 3d 165, 170-171)* .

Rowland School Dist. v. State Bd. of Educ. (1968) 264 Cal. App. 2d 589, 70 Cal. Rptr. 504 was an action for declaratory and injunctive relief by which the district sought to have the state board and three county officers enjoined from holding an election for the purpose of unifying plaintiff and certain other school districts, also joined as parties defendant, pursuant to state law. Plaintiff contended that two of the statutes involved were unconstitutional and also sought judicial determinations respecting other matters. After the action was filed, an election was called and held, and a majority of the voters of the affected districts voted against unification. But since another election would be held in two years, plaintiff continued to be interested in the problems it foresaw. (It is not clear from the opinion if plaintiff alleged by amended complaint such continued interest or if it argued such interest on appeal.) The trial court sustained defendants' demurrers to the complaint without leave to amend, and plaintiff appealed. The court of appeal acknowledged the power of the Legislature to authorize a school district, or any other agency or person concerned with the public welfare, to bring an action to obtain a judicial declaration that some piece of legislation is unconstitutional and to stay any further steps the invalid legislation seems to authorize, even though the plaintiff has no interest in the question involved other than that of the public generally (*264 Cal. App. 2d 589, 593)* . However, the court found that it had not enacted such legislation. In other words, it explained, plaintiff has not stated a cause of action justifying either a declaratory judgment or an injunction unless it has alleged facts showing that it itself has an interest affected by the invalidity of the provisions it attacks. The court affirmed the judgment, however, on the ground that any attack on one of the statutes was premature and that plaintiff on appeal had abandoned its attack on the other statute, as well as it other objections.

[b] Lack of Standing to Maintain Quo Warranto Proceeding

In *International Assn. of Fire Fighters v. City of Oakland (1985) 174 Cal. App. 3d 687, 220 Cal. Rptr. 256* , two different actions (later consolidated) for declaratory and injunctive relief were brought against defendants to invalidate a resolution placing two propositions to amend the city charter on the ballot for a city election. The trial court denied injunctive relief, thus permitting the propositions to be placed on the ballot. Both measures passed. Plaintiffs in each case then sought injunctive relief to prevent the measures from becoming effective; this relief was also denied. The charter amendments were then filed with the Secretary of State and became effective, after which defendants moved to dismiss on the grounds that the validity of the amendments could now only be challenged in a quo warranto action brought by the Attorney General. The trial court granted the motion, and plaintiffs appealed.

The court of appeal affirmed the judgments of dismissal, holding that each action was one that may only be brought as a quo warranto action by the Attorney General. The court explained that equity, which encompasses declaratory and injunctive relief, will not intervene when the remedy at law, including an extraordinary legal remedy such as quo warranto, is adequate. Absent constitutional or statutory regulations providing otherwise, quo warranto is the only proper remedy when it is available. Because an action in the nature of quo warranto will lie to test the regularity of proceedings by which municipal charter provisions have been adopted, it follows that once those provisions have become effective, their procedural regularity may be attacked only in quo warranto proceedings. The court also recognized the dangers of resting the decision of whether to bring such an action in the arbitrary discretion of the Attorney General, and indicated that plaintiffs might be able to seek judicial review by way of mandamus, should the Attorney General fail to act on a petition by plaintiffs for leave to file a quo warranto action (*174 Cal. App. 3d 687, 693-699)* .

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Volume 6 Chapters 60-69 COSTS---to---DECLARATORY RELIEF
CHAPTER 67 DECLARATORY RELIEF
PART II. FORMS

6-67 California Points & Authorities § 67.26

§ 67.26 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10] for Declaratory Relief [Code Civ. Proc. § 1060]--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Underlying Action Barred by Statute of Limitations

[1] FORM Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10] for Declaratory Relief [Code Civ. Proc. § 1060]--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Underlying Action Barred by Statute of Limitations

[*Caption. See § 67.21.*]

THE COMPLAINT FOR DECLARATORY RELIEF FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION IN THAT IT APPEARS ON ITS FACE [OR FROM JUDICIALLY NOTICED MATTER] THAT THE UNDERLYING ACTION IS BARRED BY THE STATUTE OF LIMITATIONS.

A. Objection by Demurrer. [*See § 67.21, Paragraph A.*]

B. Raising Objection by Demurrer. The objection that the action is barred by the statute of limitations is properly made by general demurrer where the defense appears on the face of the complaint (or from matter of which the court must or may take judicial notice) (*Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 550, 305 P.2d 20*).

C. Bar of Statute of Limitations. An action for declaratory relief with reference to an obligation which has been breached is barred by the statute of limitations where an action on the breach for coercive relief is so barred (*Maguire v. Hibernia Sav. & L. Soc'y (1944) 23 Cal. 2d 719, 734, 146 P.2d 673* (leading case)).

[*Optional*] **D. Action Attacking Zoning Ordinance Barred by Local Ordinance.** An action challenging the validity of a local zoning ordinance if not commenced within the time prescribed by local ordinance is likewise barred (*Pan Pac. Properties, Inc. v. Santa Cruz County (1978) 81 Cal. App. 3d 244, 252-253, 146 Cal. Rptr. 428*). [For memoranda of points and authorities relating to the period of limitation for specific causes of action, see either the index to this set or Ch. 143, *Limitation of Actions*].

[*Optional*] **E. Period of Limitation When Mandate Viable, Alternative Remedy.** Where a party has the option of

seeking a declaratory judgment of his or her rights under *Section 1060 of the Code of Civil Procedure* or applying for a writ of mandate, in which, instead of obtaining a declaration that plaintiff is entitled to certain relief and it is the duty of defendant to do certain things, defendants would be commanded to perform the same duties which the court determined should be performed, the party cannot void the effect of the three-year statute of limitations relevant to mandamus proceedings (*see Code Civ. Proc. § 338(a)* by seeking declaratory relief only (*Leahey v. Department of Water & Power (1946) 76 Cal. App. 2d 281, 285, 173 P.2d 69*)).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a general demurrer to a complaint for declaratory relief for failure to state a cause of action where it appears on the face of the complaint or from matter of which the court must or may take judicial notice that the underlying action is barred by the applicable statute of limitations.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

This form may, with appropriate modifications, also be used in support of a nonstatutory motion for judgment on the pleadings on the same ground or, where the objection does not appear from the face of the complaint, a motion for summary judgment pursuant to *Code Civ. Proc. § 437c*. See also *see §§ 67.20[2]* and *67.21[2]*.

[b] California Forms of Pleading and Practice

For a general discussion of the statutes of limitations, a table listing periods of limitation for various causes of action, and forms for use in raising the objection that an action is barred by statute of limitations, see Ch. 345, *Limitation of Actions* in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Raising Objection by Demurrer

Bennett v. Hibernia Bank *(1956) 47 Cal. 2d 540, 305 P.2d 20* was an action for declaratory relief to determine plaintiffs' rights, if any, in defendant bank. The trial court sustained a general demurrer to the complaint without leave to amend and dismissed the action, and plaintiffs appealed. Although holding that the action was not barred by the statute of limitations and reversing the judgment of dismissal, the Supreme Court said that where a complaint shows on its face that all relief is barred by the statute of limitations, it is unnecessary for the court to make a declaration of rights, and a general demurrer may be sustained (*47 Cal. 2d 540, 550)* .

[b] Bar of Statute of Limitations

Maguire v. Hibernia Sav. & L. Soc'y *(1944) 23 Cal. 2d 719, 146 P.2d 673* involved four actions for declaratory relief by successors in interest to alleged members of and depositors in defendant savings and loan society. The trial court sustained general demurrers to the complaints without leave to amend on the ground that the actions were barred by the statute of limitations and dismissed the actions. Plaintiffs appealed on a single set of briefs. Although holding that none of the actions was barred by either the statute of limitations or laches, the Supreme Court nevertheless said that the period of limitation applicable to ordinary actions at law and suits in equity should be applied in like manner to actions for declaratory relief. It explained that thus, if declaratory relief is sought with reference to an obligation which has been breached and the right to commence an action for coercive relief on the cause of action arising therefrom is barred by the statute, the right to declaratory relief is likewise barred (*23 Cal. 2d 719, 734)* . Nevertheless, the Court added that if declaratory relief is sought before there has been a breach of the obligation in respect to which the declaration is sought, or within the statutory period after the breach, the right to such relief is not barred by lapse of time. As for laches, the Court explained that the policy of this state with respect to lapse of time is embodied in statutes applicable to both legal and equitable actions, and mere lapse of time, other than that prescribed by such statutes, does not bar relief. With respect to the defense of "stale claim," the Court held that this defense is nothing more than a particular application of the doctrine of laches and is based on estoppel (*23 Cal. 2d 719, 736)* .

[c] Action Attacking Zoning Ordinance Barred by Local Ordinance

Pan Pac. Properties, Inc. v. Santa Cruz County *(1978) 81 Cal. App. 3d 244, 146 Cal. Rptr. 428* was an action by owners of land in defendant county and a trust deed holder for inverse condemnation and declaratory relief. Prior to 1969 the area including plaintiffs' parcels had been zoned for agricultural use. On September 16, 1969, the county rezoned the area Highway Commercial. On March 30, 1976, the county rezoned the area as agricultural with one-acre minimum building site. On September 24, 1976, plaintiffs filed their complaint, praying for a declaration that the properties had been taken for public use with damage to the two parcels involved in the sums of $95,000 and $75,000 respectively, or in the alternative for a declaration that the zoning was illegal, unconstitutional, and void as applied to plaintiffs' parcels. The county demurred on the ground the action was barred by various statutes of limitation and that the court "lacked subject matter jurisdiction." The demurrer was sustained "with prejudice," and plaintiffs appealed. The court of appeal affirmed on the ground that plaintiffs had failed to exhaust their administrative remedies [*see § 67.21[2][d]*]. The court also held that plaintiffs were barred from attacking the validity or reasonableness of the zoning ordinance because they had failed to commence a judicial action within 90 days of its enactment as required by a local ordinance of limitations. In answer to plaintiffs' argument that the ordinance of limitations was invalid because preempted by state law, the court pointed out that the pertinent Government Code sections authorizing local governments to enact zoning ordinances contain no limitation periods within which such ordinances must be challenged and that the ordinance was valid under *Gov. Code § 65800*, declaring the legislative intent in enacting the provisions relating to local zoning ordinances to provide only a minimum of limitation in order that counties and cities may exercise the maximum degree of control over local zoning matters (*81 Cal. App. 3d 244, 252-253)* .

[d] Period of Limitation When Mandate Viable, Alternative Remedy

Leahey v. Department of Water & Power *(1946) 76 Cal. App. 2d 281, 173 P.2d 69* was a declaratory relief action by a municipal employee for a declaration that he was entitled to a certain civil service rating that had been denied him. Any right to such rating derived from the city charter effective July 1, 1925. The city employed plaintiff in 1921. He claimed that on the effective date of the charter, for six months before, and ever since, he had performed the duties of the position sought and no other, but that he had not been given that classification. He alleged that after a court of appeal decision on June 27, 1941, that persons employed by the city on the effective date of the charter were blanketed into the classified civil service of the city, the civil service commission began a survey for the purpose of determining which employees were entitled to rights under the charter which had not previously been recognized. He further alleged that on October 3, 1944, the commission made a finding that plaintiff was not entitled to hold or occupy the position he claimed he was entitled to. Defendant pleaded the statute of limitations [*now see Code Civ. Proc. § 338(a)*]. Judgment

was for plaintiff, and defendant appealed. In reversing, the court of appeal pointed out that plaintiff had three options: (1) to sue for declaratory relief under *Code Civ. Proc. § 1060*; (2) to apply for a writ of mandate; or (3) to seek both remedies. The court held that plaintiff's cause of action accrued on July 1, 1925 when the new charter became effective, that the statute of limitations applicable to a mandate proceeding was three years under former Code Civ. Proc. § 338(1) [*now see Code Civ. Proc. § 338(a)*], that a proceeding in mandate was therefore barred, and that the action for declaratory relief was governed by the same limitations applicable to other forms of relief and was likewise barred (*76 Cal. App. 2d 281, 285-286)* .

[4] Additional Authorities

[a] Bar of Statute of Limitations

Tostevin v. Douglas (1958) 160 Cal. App. 2d 321, 325 P.2d 130 was an action for declaratory relief and an accounting. Plaintiff alleged that under an oral agreement entered into in May 1954, defendants employed plaintiff to solicit and procure personnel and material for a series of travelog television shows at a fixed salary of $50 per week and that defendants repudiated the agreement and refused to be bound by it. The complaint was filed January 21, 1957. Demurrers to the original, first, and second amended complaints were sustained with leave to amend. The trial court then struck portions of the third amended complaint which varied from the second and entered its judgment of dismissal, and plaintiff appealed. In affirming the judgment, the court of appeal pointed out that an action on the contract was barred both by the statute of frauds and the statute of limitations (*160 Cal. App. 2d 321, 327)* . The court held that no action for accounting was stated and hence the four-year statute applicable to such actions did not apply. Rather, the court said that the action is really one to recover an amount due for breach of the terms of an oral agreement. The nature of the right sued on and not the form of the action, nor the relief demanded, determines the applicability of the statute of limitations (*160 Cal. App. 2d 321, 328)* . The court explained that until some conventional right of action has accrued, the statute of limitations does not operate independently to cut off the right to bring one for declaratory relief, and after a coercive right of action has accrued the alternative right to bring an action for the declaratory remedy continues concurrently with the coercive right of action. Citing the statement in *Maguire,* set out in Paragraph C. of this form, the court explained that after the coercive remedy is barred by the statute of limitations, a declaratory relief action may not be utilized to circumvent the purpose of the statute. Since the action for coercive relief in the case before it accrued in May 1954 and was barred by the two-year statute of limitations, the court held that the cause of action for declaratory relief was likewise barred, adding that without an available remedy to enforce the obligation sued on, there would be no real reason to have the rights of the parties declared (*160 Cal. App. 2d 321, 330)* .

[b] Period of Limitation When Mandate Viable, Alternative Remedy

Pena v. Los Angeles (1970) 8 Cal. App. 3d 257, 87 Cal. Rptr. 326 was an action for declaratory relief by city policemen who were first certified for appointment in the early 1940's but were refused appointment because of their draft classifications and were appointed on completion of military service. They sought a declaration that they were lawfully entitled, for retirement purposes, to be appointed at the various times when each was first certified for appointment. Defendants by their answer pleaded the statute of limitations as an affirmative defense. Plaintiffs amended their complaint to assert an estoppel against the defendants' pleading this defense. The case went to trial, and on defendants' motion pursuant to *Code Civ. Proc. § 631.8,* judgment was entered for defendants on the ground, among others, that plaintiffs were barred by the statute of limitations and that there was no evidence to support an estoppel to raise the statute as a defense. The court of appeal, in affirming the judgment, pointed out that, assuming that appellants had enforceable rights to demand appointment at the time they were first rejected following certification, they could have sought writs of mandate to enforce their rights at that time. The court stated that the statute of limitations applicable to a liability created by statute is three years under former Code Civ. Proc. § 338(a) [*now see Code Civ. Proc. § 338(a)*], that the section applies to proceedings in mandate, that more than three years had elapsed since the cause of action accrued, including the time the period was extended by virtue of the former Soldiers' and Sailors' Civil Relief Act of 1940 [*see now* Servicemembers Civil Relief Act, *50 U.S.C. App. § 501 et seq.*], and, quoting the statement set out in

Paragraph C. of the foregoing form, held that the actions were barred (*8 Cal. App. 3d 257, 261-262)* .

California Points & Authorities

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Volume 6 Chapters 60-69 COSTS---to---DECLARATORY RELIEF
CHAPTER 67 DECLARATORY RELIEF
PART II. FORMS

6-67 California Points & Authorities § 67.27

§ 67.27 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10] for Declaratory Relief [Code Civ. Proc. § 1060]--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Action Is Res Judicata

[1] FORM Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10] for Declaratory Relief [Code Civ. Proc. § 1060]--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Action Is Res Judicata

[*Caption. See § 67.21.*]

THE COMPLAINT FOR DECLARATORY RELIEF FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION IN THAT IT APPEARS ON ITS FACE [OR FROM JUDICIALLY NOTICED MATTER] THAT THE ACTION IS RES JUDICATA.

A. Objection by Demurrer. [*See § 67.21, Paragraph A.*]

B. Impropriety of Declaratory Relief. An action for declaratory relief is not proper where the subject of the action is res judicata (*see Taliaferro v. Taliaferro (1960) 179 Cal. App. 2d 787, 790, 791-792, 4 Cal. Rptr. 689*).

C. Raising Objection by Demurrer. Where it appears from the face of the complaint (or from judicially noticed matter) that the entire controversy has been settled by a prior judgment, a demurrer to the complaint for declaratory relief should be sustained (*Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 550, 305 P.2d 20*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a general demurrer to a complaint for declaratory relief for failure to state a cause of action where it appears from the face of the complaint or from matters of which the court must or may take judicial notice that the entire controversy has been settled by a prior judgment, that is, that the matter is res judicata.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

The foregoing form may, with appropriate modifications, also be used in support of a nonstatutory motion for judgment on the pleadings or, where the objection does not appear from the face of the complaint, a motion for summary judgment pursuant to *Code Civ. Proc. § 437c*.

See also *see §§ 67.20[2]* and *67.21[2]*.

[c] Related Pleading and Practice Forms

For discussion of the principles of res judicata and forms for raising the issues of res judicata, see Ch. 491, *Res Judicata* in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Impropriety of Declaratory Relief

Taliaferro v. Taliaferro *(1960) 179 Cal. App. 2d 787, 4 Cal. Rptr. 689* involved three actions for declaratory relief consolidated for trial without a jury, seeking a declaration of the rights and duties of the parties under a property settlement agreement executed by the parties prior to their divorce. Judgments were for defendant, and plaintiff appealed. The appeal as to one of the judgments was dismissed at plaintiff's request. As to the other two, the trial court, with respect to one, had found that the matter sought to be resolved had already been adjudicated by and between the parties in prior actions and that, therefore, it was not necessary or proper to render declaratory relief in the action. This judgment was affirmed on appeal. The court of appeal said that the prior case had disposed of the issue involved in the present case, that it was a valid and final judgment, and that the evidence plaintiff offered in the present case, even if it tended to prove otherwise, would not vest jurisdiction in the trial court to vacate, reverse, or otherwise set aside the previous final judgments (*179 Cal. App. 2d 787, 792)* .

[b] Raising Objection by Demurrer

Bennett v. Hibernia Bank *(1956) 47 Cal. 2d 540, 305 P.2d 20* was an action for declaratory relief to determine plaintiffs' rights, if any, in defendant bank. The trial court sustained a general demurrer to the complaint without leave to amend and dismissed the action. Plaintiffs appealed. Although holding that the action was not barred by res judicata, the Supreme Court nevertheless pointed out that where a complaint shows on its face that all relief is barred by the statute of limitations, a declaration of rights is unnecessary, and a general demurrer to the complaint may be sustained, and added that by analogy, the same rule should apply where the complaint shows that the entire controversy has been settled by a prior judgment (*47 Cal. 2d 540, 550)* .

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6-67 California Points & Authorities §§ 67.28-67.39

[Reserved]

§§ 67.28[Reserved]

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6-67 California Points & Authorities § 67.40

§ 67.40 Supporting Motion for Judgment on the Pleadings [Code Civ. Proc. § 438]--By Defendant--Declaring the Rights and Duties of the Parties Adverse to Plaintiff and Favorable to Defendant

[1] FORM Supporting Motion for Judgment on the Pleadings [Code Civ. Proc. § 438]--By Defendant--Declaring the Rights and Duties of the Parties Adverse to Plaintiff and Favorable to Defendant

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS AND DECLARATION OF RIGHTS AND DUTIES OF PARTIES
vs.	)	
_____ [*name*],	)	
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

A JUDGMENT ON THE PLEADINGS ON THE MERITS DECLARING THE RIGHTS AND DUTIES OF THE PARTIES OPPOSED TO PLAINTIFF AND IN FAVOR OF DEFENDANT IS PROPER BECAUSE THE COMPLAINT STATES A CAUSE OF ACTION FOR DECLARATORY RELIEF BUT PRESENTS NO TRIABLE ISSUE AND SHOWS ON ITS FACE[, OR IT APPEARS FROM JUDICIALLY NOTICED MATTER], THAT [PLAINTIFF IS NOT AND] DEFENDANT IS ENTITLED TO A FAVORABLE DECLARATION.

A. Judgment on the Pleadings on the Merits. The determination of a declaratory relief action and entry of judgment

on the merits declaring the rights and duties of the parties [opposed to plaintiff and] in favor of defendant are proper on a motion by defendant for judgment on the pleadings when the complaint states a cause of action for declaratory relief but presents no triable issue and shows on its face that plaintiff is not and defendant is entitled to a favorable declaration (*Dohrmann Co. v. Security Sav. & L. Ass'n (1970) 8 Cal. App. 3d 655, 661-662, 87 Cal. Rptr. 792* ; *Wilson v. Board of Retirement (1957) 156 Cal. App. 2d 195, 200-201, 319 P.2d 426*

Retirement (1957) 156 Cal. App. 2d 195, 200-201, 319 P.2d 426 ; *see Code Civ. Proc. § 438(c)(1)*).

B. Leave to Amend Not Required. In the absence of a showing that plaintiff can amend his or her or its complaint so as to state a cause of action that would result in a declaration in his or her or its favor, the trial court is not required to grant leave to amend before granting the motion (*see Code Civ. Proc. § 438(h)(1)*). The rule in the normal situation that a plaintiff should be given leave to amend when the complaint does not state facts sufficient to constitute a cause of action does not apply to a complaint that does state facts sufficient to constitute a cause of action but presents no triable issue and shows on its face that defendant is entitled to a declaration in his or her or its favor (*Wilson v. Board of Retirement (1957) 156 Cal. App. 2d 195, 203, 319 P.2d 426*).

[*Optional*] **C. Judgment on the Pleadings Proper to Determine Merits of Constitutionality of Statute.** A judgment entered on the merits in defendant's favor on the pleadings is proper to uphold the constitutionality of a particular statutory provision when plaintiff's complaint for declaratory relief seeks a judicial declaration that the provision is unconstitutional (*see Hetherington v. State Personnel Bd. (1978) 82 Cal. App. 3d 582, 586, 595, 147 Cal. Rptr. 300* ; *California Teachers Assn. v. Board of Trustees (1978) 82 Cal. App. 3d 249, 251, 252, 258, 146 Cal. Rptr. 850*).

[*Optional*] **D. Judgment on the Merits Proper in Cross Action if Issues Disposed in Defendant's Favor in Main Action.** A judgment on the merits in favor of a cross defendant in a cross action is proper when a judgment in the main action constitutes a declaration of the rights and duties in favor of the cross defendant (*International Ass'n of Fire Fighters v. Palo Alto (1963) 60 Cal. 2d 295, 301-302, 32 Cal. Rptr. 842, 384 P.2d 170*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be used to support a motion by defendant for judgment on the pleadings when the complaint states a cause of action but presents no triable issues and shows on its face, or it appears from judicially noticed matter, that defendant is entitled to a declaration in his, her, or its favor [*see Code Civ. Proc. § 438(c)*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Requirement of Memorandum and Format

A memorandum must accompany a motion for judgment on the pleadings [*Cal. Rules of Ct., Rule 3.1113(a)*]. The required format of papers filed in a superior court is set forth in *Cal. Rules of Ct., Rule 2.100 et seq.* Additional requirements with respect to the format and content of a memorandum are set forth in *Cal. Rules of Ct., Rules 3.1110* and *3.1113*.

If the memorandum is appended at the end of the notice of motion for judgment on the pleadings, the memorandum will not be separately captioned. Rather, the notice of motion will be captioned "NOTICE OF MOTION FOR JUDGMENT ON THE PLEADINGS AND MEMORANDUM IN SUPPORT OF MOTION." The heading "Memorandum in Support of Motion for Judgment on the Pleadings" will, however, be centered on the page just above the first point of law stated.

[c] Authority for Motion for Judgment on the Pleadings

The motion for judgment on the pleadings was codified in *Code Civ. Proc. § 438*, operative January 1, 1994 [*see* Stats. 1993, ch. 456, § 5]. The legislation apparently was attempting to codify existing common law governing the motion for judgment on the pleadings. Thus, existing case law, such as the cases included in this form, should still support use of the motion in declaratory relief actions, but counsel should exercise caution until published opinions provide further guidance. For points and authorities relating to *Code Civ. Proc. § 438* generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[d] Availability of Motion for Judgment on the Pleadings

When the moving party is a defendant, the motion is available if (a) the court has no jurisdiction of the subject of the cause of action alleged in the complaint, or (b) the complaint does not state facts sufficient to constitute a cause of action against that defendant [Code Civ. Proc. § 438(c)(1)(B)]. Common law also authorized relief in the following two situations:

(1) The complaint states a cause of action for declaratory relief, but it appears from the face of the complaint or from matters of which the court must or may take judicial notice [*Evid. Code §§ 451, 452*] that plaintiff is not entitled to a favorable declaration on that, depending on the nature of the action defendant is entitled as a matter of law to a declaration in his, her, or its favor [*see Dohrmann Co. v. Security Sav. & L. Ass'n (1970) 8 Cal. App. 3d 655, 661-662, 87 Cal. Rptr. 792* ; *Wilson v. Board of Retirement (1957) 156 Cal. App. 2d 195, 200-201, 319 P.2d 426]* . This is the situation illustrated by the foregoing form. (If the objection does not appear from the face of the complaint, it may be raised by a motion for summary judgment if it can be established by affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice must or may be taken that the action lacks merit [*see Code Civ. Proc. 437c(a), (b)*].)

(2) The complaint states a cause of action for declaratory relief, but it appears from the face of the complaint or from matters of which the court must or may take judicial notice [*Evid. Code §§ 451, 452*] that a judicial determination or declaration is not necessary or proper at the time under all the circumstances [*see Code Civ. Proc. § 1061*]. In such a case, the complaint is also subject to a general demurrer [*see § 67.24*].

Dismissals of complaints following the sustaining of a general demurrer based on the fact that a judicial declaration or determination was not necessary or proper at the time under all the circumstances have been affirmed on appeal on the ground that no prejudicial error was shown. But in such cases it might be better practice for the trial court to overrule the demurrer and exercise its discretion in denying declaratory relief by some other procedure, as, for example, on a motion to dismiss, since an order sustaining a general demurrer to a complaint for declaratory relief does not indicate to the appellate court whether the trial court concluded that relief was inappropriate or that there was a failure to state a cause of action [*Moss v. Moss (1942) 20 Cal. 2d 640, 643, 128 P.2d 526]* . However, apparently the order sustaining the demurrer and the judgment of dismissal could set forth the above stated ground as the reason for the sustaining of the general demurrer and of the dismissal, respectively. This would also be true of a judgment on the pleadings. The

judgment would declare that a judicial declaration or determination is not necessary or proper at the time under all the circumstances in that it appears, for example, that plaintiff has an adequate remedy at law [*cf. International Ass'n of Fire Fighters v. Palo Alto (1963) 60 Cal. 2d 295, 301-302, 32 Cal. Rptr. 842, 384 P.2d 170* ; *Essick v. Los Angeles (1950) 34 Cal. 2d 614, 624-625, 213 P.2d 492* ; *California Teachers Assn. v. Board of Trustees (1978) 82 Cal. App. 3d 249, 251, 146 Cal. Rptr. 850]* . However, in view of *Moss* and its progeny, a motion to dismiss in such case would be proper [*see, e.g., Allstate Ins. Co. v. Fisher (1973) 31 Cal. App. 3d 391, 394, 107 Cal. Rptr. 251* (motion for judgment on the pleadings denied and motion to dismiss granted and affirmed on appeal)].

[e] Related Pleading and Practice Forms

For further discussion of motions for judgment on the pleadings, forms of such motions, and a procedural guide, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Judgment on the Pleadings on the Merits

In ***Dohrmann Co. v. Security Sav. & L. Ass'n*** *(1970) 8 Cal. App. 3d 655, 87 Cal. Rptr. 792* , general demurrers were filed to a complaint for declaratory relief. The trial court entered a judgment on the pleadings for defendants that recited that counsel and the court had stipulated that defendants' demurrer should be considered as a motion for judgment on the pleadings since there were no disputed issues of facts for the purposes of the motion. The court accordingly found that as a matter of law, plaintiff was not entitled to the declaration that it sought and that a declaration should be entered settling the controversy in defendants' favor on the basis of the undisputed facts alleged in the complaint. The judgment then went on to declare the rights of the parties. Although the judgment was reversed, the court of appeal said that the procedure followed by the trial court was both proper and desirable in an action for declaratory relief (*8 Cal. App. 3d 655, 662)* [citing *Wilson v. Board of Retirement (1957) 156 Cal. App. 2d 195, 200-203, 319 P.2d 426* , discussed *below*].

Wilson v. Board of Retirement *(1957) 156 Cal. App. 2d 195, 319 P.2d 426* was a combined action for declaratory relief and petition for writ of mandate. Plaintiff was a permanent employee of the classified civil service of Los Angeles County. The complaint set forth 10 causes of action. The first seven sought a declaratory judgment as to the rights of plaintiffs and others under the state retirement law as adopted by the county; the eighth sought a declaratory judgment as to the rights of county employees to vacation benefits; the ninth sought issuance of a writ of mandate to compel defendant board of retirement to credit plaintiff's retirement for prior city service and for military service; and the 10th sought a writ of mandate to compel the board of supervisors to fix a prevailing wage providing vacation benefits for county employees in accord with the benefits allowed in private industry. The ninth and 10th causes of action were corollary to and dependent on the seventh and eighth for declaratory relief. Defendants filed a notice of motion for judgment on the pleadings and that the court make declarations for defendants as set forth in their notice of motion as to the eight declaratory relief causes of action and for judgment that plaintiff was not entitled to a writ of mandate. At the same time, they filed a general and special demurrer which was placed off calendar. The motion was granted and judgment was rendered, specifically declaring the rights of the parties in favor of defendants and against plaintiff as to the declaratory relief causes and, as to the mandate causes, adjudging that plaintiff was not entitled to the writ. Plaintiff appealed.

In affirming the judgment, the court of appeal distinguished the motion for judgment on the pleadings used when a complaint fails to state facts sufficient to constitute a cause of action from the present situation in which it was used to seek, as a matter of law, the particular declarations of the rights and duties of the parties as set forth in the notice of motion with respect to the admitted allegations of the amended complaint. The court explained that if the complaint shows a good ground on which the court will grant judgment on the subject matter of the controversy, the complaint is

good and will not be dismissed, even though plaintiff is wrong on the merits of his contention and the court might think that defendant would be entitled to the declaration in his favor. In the latter case when no triable issue is presented, the indicated procedure would be for defendant to move on the pleadings for judgment that the declaration be made, but that it be made in favor of defendant (*156 Cal. App. 2d 195, 200-201)* .

With respect to the judgment on the pleadings on the mandate counts, the court of appeal said that defendants' motion for a judgment on the pleadings was in the nature of a general demurrer and in granting the motion, the trial court in effect sustained a demurrer to each count without leave to amend (*156 Cal. App. 2d 195, 212)* . The court of appeal held that the trial court's ruling in this regard was correct since no mandatory duty on defendants' parts was shown to exist and that plaintiff on appeal did not suggest that he could amend his complaint to allege the existence of such duty (*156 Cal. App. 2d 195, 213)* .

[b] Leave to Amend Not Required

The procedural background of ***Wilson v. Board of Retirement*** *(1957) 156 Cal. App. 2d 195, 319 P.2d 426* is discussed in *§ 67.40[3][a]*. The court of appeal stated that plaintiff "is correct in his contention that a trial court should not deny leave to amend upon granting a motion for judgment on the pleadings directed to the insufficiency of a complaint to state a cause of action where the facts indicate that a party probably has a good cause of action, but that it has been pleaded imperfectly or defectively. [Citations.] However, the foregoing rule has no application to the instant case as to the causes of action for a declaratory judgment as none of them were found by the trial court to be insufficient to state a cause of action and [plaintiff's] argument is silent as to any respect in which he could have amended his various causes of action for declaratory relief so as to state a cause or causes of action which would result in a declaration in his favor" (*156 Cal. App. 2d 195, 203)* .

[c] Judgment on the Pleadings Proper to Determine Merits of Constitutionality of Statute

In ***Hetherington v. State Personnel Bd.*** *(1978) 82 Cal. App. 3d 582, 147 Cal. Rptr. 300* , plaintiff brought an action for declaratory and injunctive relief seeking a determination that *Gov. Code § 1029*, which prohibits the employment of an ex-felon in any governmental position classified as peace officers, is unconstitutional or, in the alternative, in conflict with certain state and federal statutes. On defendant's motion for a judgment on the pleadings, the trial court adjudged that the statute was constitutional and not in conflict with other state and federal statutes. On plaintiff's appeal, the court of appeal affirmed in a divided opinion (*82 Cal. App. 3d 582, 586)* . Although the majority opinion did not consider the propriety of the procedure for a motion for judgment on the pleadings, the dissenting opinion of Justice Reynoso took issue with the fact that the trial court and the majority opinion reached the merits of plaintiffs' complaint without any type of evidentiary hearing (*82 Cal. App. 3d 582, 595-596)* . In what may be a significant limitation on the power of the trial court to grant a motion for judgment on the pleadings declaring the constitutionality of a statutory provision, the justice argued, relying on earlier California decisions, that the constitutional issues should not be reviewed on the basis of a limited record since the production of evidence could well have made the answer to the issues more clear.

In ***California Teachers Assn. v. Board of Trustees*** *(1978) 82 Cal. App. 3d 249, 146 Cal. Rptr. 850* , plaintiffs appealed from a judgment on the pleadings in favor of defendant school district in an action which sought a judgment declaring former Educ. Code § 18256 (*now see Educ. Code § 41913*, which permits school districts to enter into contracts with driver training schools to provide eligible students driver training) to be unconstitutional, and enjoining defendant from entering into any driver training school contracts. The judgment upheld the constitutionality of former Educ. Code § 41913 and the validity of agreements executed pursuant to it. Without discussing the propriety of a motion for judgment on the pleadings, the court of appeal affirmed the judgment, finding on the merits that the trial court had correctly held that the section did not violate *Cal. Const., art. IX, § 6*, by authorizing a transfer of part of the school system, or *Cal. Const., art. IX, § 8*, by authorizing an appropriation of public money for the support of schools not under the exclusive control of public school officers. The court did point out (*82 Cal. App. 3d 249, 252, 258)* that plaintiffs had not pleaded the invalidity of any provision of the contracts the school district had entered into under

former Educ. Code § 41913 (even though the trial court's judgment upheld the validity of the contracts) and that, therefore, plaintiffs were barred from arguing on appeal the effect of certain terms of a contract entered into under the section. The court stated that the judgment appealed from was a judgment on the pleadings and that the effect and consequences of the various provisions of the contract were not before the court on appeal.

[d] Judgment on the Merits Proper in Cross Action if Issues Disposed in Defendant's Favor in Main Action

In ***International Ass'n of Fire Fighters v. Palo Alto*** *(1963) 60 Cal. 2d 295, 32 Cal. Rptr. 842, 384 P.2d 170* , defendants appealed from a judgment ordering issuance of a peremptory writ of mandate and dismissing their cross complaint for declaratory relief. The judgment ordered defendants to grant plaintiffs the rights of self-organization and to present grievances and recommendations concerning working conditions to the fire department of defendant city. The case had been tried solely on the issues presented in the mandate proceeding, the parties stipulating that the cross complaint be held in abeyance pending determination of the mandate proceedings. The trial court subsequently dismissed the cross complaint on its own motion, which the Supreme Court held was not error, although it questioned the particular form of relief. The Court stated that when the issues and evidence produced in the main case are substantially the same as would be produced under a cross complaint for declaratory relief, a trial court does not abuse its discretion in refusing to hear the cross complaint. However, the form of the trial court's relief was not proper. The Court pointed out that the discretionary power to dismiss a complaint under *Code Civ. Proc. § 1061* (evidently the basis for the trial court's dismissal) should not be exercised if a declaration of rights was clearly called for. Rather than dismissal, a judgment should have been entered stating that defendants (cross complainants) were not entitled to declarations in their favor which they sought in their cross complaint (*60 Cal. 2d 295, 301-302)* .

[4] Additional Authorities

[a] Judgment on the Pleadings on the Merits

In *Essick v. Los Angeles (1950) 34 Cal. 2d 614, 213 P.2d 492* , plaintiffs appealed from a judgment of dismissal of their declaratory relief action against defendant city, members of the city council, and Forest Lawn Company. Plaintiffs sought by their complaint to have ordinance provisions permitting the granting of certain conditional use permits to be declared void as violative of the city charter. The judgment had been entered after defendants had filed motions to dismiss on grounds both that the trial court did not have jurisdiction of the subject matter and that it was not necessary or proper to declare the parties' rights and duties under *Code Civ. Proc. § 1060.* After holding that granting of conditional use permits did not violate and was not prohibited by the city charter, the Supreme Court affirmed but modified the judgment to incorporate specifically its holding (*34 Cal. 2d 614, 624-625)* . It explained that rather than a judgment of dismissal, the trial court should have entered its judgment decreeing expressly (as was implied by the judgment) that the plaintiffs were not entitled to the declarations in their favor.

In *Pacific Legal Foundation v. Unemployment Ins. Appeals Bd. (1977) 74 Cal. App. 3d 150, 141 Cal. Rptr. 474* , plaintiff sought a declaratory judgment under *Unemp. Ins. Code § 409.2* concerning the validity of a particular precedent decision of defendant board. The trial court granted defendant's motion for a judgment on the pleadings on the ground set forth in its minute order that plaintiff was not an interested person under *Unemp. Ins. Code § 409.2* (permitting an interested person or organization to bring a declaratory relief action). In its formal judgment that plaintiff take nothing by its complaint, it stated the ground of dismissal to be that the complaint did not state facts sufficient to state a cause of action. Plaintiff appealed and the court of appeal affirmed. The court held that plaintiff had standing to maintain the action. Before it considered the sufficiency of the complaint, the court commented that the granting of a motion for judgment on the pleadings is in essence a decision on the merits, and when used in a declaratory relief proceeding, amounts to a declaratory judgment on the merits in favor of defendant (*74 Cal. App. 3d 150, 157)* [citing *Wilson v. Board of Retirement (1957) 156 Cal. App. 2d 195, 201, 319 P.2d 426]* . However, because of the ambiguity of the basis for the trial court's judgment, the court was also required to review the complaint's allegations. The court's statement is somewhat ambiguous since it is clear from its context that at issue was the jurisdiction of the court to hear

the case, not the merits of plaintiff's contentions.

In *Crees v. California State Bd. of Medical Examiners (1963) 213 Cal. App. 2d 195, 28 Cal. Rptr. 621* , after the trial court denied defendants' motion for judgment on the pleadings, it granted their motion at the opening of trial for a declaration of rights and duties of the parties based on the allegations of plaintiffs' complaint for declaratory relief and defendants' answer, the pretrial order and the issues set forth in the order, and the stipulation of certain parties concerning what their prospective testimony would be. The complaint sought a declaration of the rights, immunities, and privileges plaintiffs claimed as chiropractors under certain California acts. The court made findings of fact and conclusions of law and in its judgment listed in detail the respected rights and duties of the parties. On appeal, plaintiffs argued in part that the court had erred in declaring the rights and duties of the parties based on the pleadings, the pretrial order, and the stipulations. Evidently viewing defendant's motion as one for a judgment on the pleading (it did not consider the propriety of a motion for a declaration of the parties' rights and duties), the court of appeal rejected this contention (*213 Cal. App. 2d 195, 208)* by quoting from *Wilson v. Board of Retirement (1957) 156 Cal. App. 2d 195, 201, 319 P.2d 426* [discussed in *§ 67.40[3][a]*] that the propriety of adjudicating the respective contentions of the parties on the pleadings in an action for declaratory relief by means of a motion for judgment on the pleadings is recognized and established in California.

Case v. Los Angeles (1963) 218 Cal. App. 2d 36, 32 Cal. Rptr. 271 was an appeal from a judgment that among other things granted defendants' motions for a declaratory judgment on the pleadings and declared the validity and constitutionality of an approval of a conditional use permit by city authorities to the individual defendants named in plaintiffs' complaint. The trial court had previously overruled defendants' demurrers but without prejudice to the filing of a motion for judgment on the pleadings. After rejecting plaintiffs' theories for setting aside the approval of the permit, the court of appeal commented that the procedure of the trial court in overruling defendants' demurrers and thereafter, on motion of the defendants, granting declaratory relief on the pleadings was approved in *Essick, above,* and in *Wilson v. Board of Retirement (1957) 156 Cal. App. 2d 195, 201, 319 P.2d 426* [discussed in *§ 67.40[3][a]*]. Thus finding no merit in any of plaintiff's contentions, the court affirmed the judgment.

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Volume 6 Chapters 60-69 COSTS---to---DECLARATORY RELIEF
CHAPTER 67 DECLARATORY RELIEF
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6-67 California Points & Authorities § 67.41

§ 67.41 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action for Declaratory Relief [Code Civ. Proc. § 1060]--Propriety of Summary Judgment Procedure in Declaratory Relief Action When Defendant or Plaintiff Is Not Entitled to Favorable Declaration

[1] FORM Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action for Declaratory Relief [Code Civ. Proc. § 1060]--Propriety of Summary Judgment Procedure in Declaratory Relief Action When Defendant or Plaintiff Is Not Entitled to Favorable Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
vs.	)	
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

SUMMARY JUDGMENT FOR _____ [PLAINTIFF *or* DEFENDANT] SHOULD BE GRANTED BECAUSE _____ [DEFENDANT *or* PLAINTIFF] IS NOT ENTITLED TO A FAVORABLE DECLARATION.

A. Summary Judgment. A _____ [plaintiff *or* defendant] may move for summary judgment when it is contended that the action has no merit. The motion must be granted if all the papers submitted show that there

is no triable issue as to any material fact and that defendant is entitled to a judgment as a matter of law (*Code Civ. Proc. § 437c*).

B. Propriety of Summary Judgment Procedure. The summary judgment procedure is appropriate in declaratory relief actions since the propriety of the application of the relief lies in the trial court's function to render such a judgment when only legal issues are presented for its determination (*Exchequer Acceptance Corp. v. Alexander (1969) 271 Cal. App. 2d 1, 11-12, 76 Cal. Rptr. 328* ; *Spencer v. Hibernia Bank (1960) 186 Cal. App. 2d 702, 712, 9 Cal. Rptr. 867*).

[*EITHER*]

C. Defendant Not Entitled to Favorable Declaration. A summary judgment for plaintiff is proper in an action for declaratory relief when only legal issues are presented for determination and defendant is not entitled as a matter of law to a favorable declaration (*see Torrance v. Castner (1975) 46 Cal. App. 3d 76, 83 n.3, 120 Cal. Rptr. 23* ; *Exchequer Acceptance Corp. v. Alexander (1969) 271 Cal. App. 2d 1, 11-12, 14, 76 Cal. Rptr. 328*).

[*OR*]

C. Plaintiff Not Entitled to Favorable Declaration. A summary judgment for defendant is proper when (only legal issues are presented for determination and as a matter of law) plaintiff is not entitled to a declaration in his or her or its favor (*Siemon v. Russell (1961) 194 Cal. App. 2d 592, 595, 15 Cal. Rptr. 218*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion by plaintiff or defendant for summary judgment when it is contended plaintiff is entitled as a matter of law to a favorable declaration or that the action lacks merit in that any declaration of the court would be adverse to plaintiff. If the motion is granted in favor of defendant, the judgment entered should declare the rights and duties adversely to plaintiff rather than dismissing the action.

In addition, this form is for use in the case of a summary judgment for defendant when it does not appear from the face of the complaint or judicially noticed matter that plaintiff is entitled to a favorable declaration, or in proceedings on demurrer or motion for dismissal or judgment on the pleadings in which the issue arises on the face of the complaint or from judicially noticed matter [*see, e.g., O'Sullivan v. Salvation Army (1978) 85 Cal. App. 3d 58, 60, 65, 147 Cal. Rptr. 729* (judgment of dismissal following sustaining of demurrer affirmed on appeal); *Hetherington v. State Personnel Bd. (1978) 82 Cal. App. 3d 582, 595, 147 Cal. Rptr. 300* (defendant's motion for judgment on the pleadings granted and judgment affirmed on appeal); *Allstate Ins. Co. v. Fisher (1973) 31 Cal. App. 3d 391, 394, 107 Cal. Rptr. 251* (motion to dismiss)]. For further discussion, see *§ 67.40[2]*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Requirement of Memorandum and Format

A memorandum must accompany a motion for summary judgment [*Cal. Rules of Ct., Rule 3.1113(a)*]. The required format of papers filed in a superior court is set forth in *Cal. Rules of Ct., Rule 2.100 et seq.*, while requirements applicable more specifically to memoranda are set out in *Cal. Rules of Ct., Rules 3.1110* and *3.1113*. For detailed discussion of these requirements, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[c] Related Pleading and Practice Forms

For forms of notices of motion for summary judgment, supporting declarations, orders granting or denying summary judgment, summary judgments, notice of motion to set aside summary judgment, and forms for use in proceedings in mandate and prohibition to compel trial courts to grant motions for summary judgment, see Ch. 537, *Summary Judgment* in California Forms of Pleading and Practice (Matthew Bender).

[d] Related Memoranda

For additional forms of memoranda in support of and in opposition to a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Propriety of Summary Judgment Procedure

Exchequer Acceptance Corp. v. Alexander *(1969) 271 Cal. App. 2d 1, 76 Cal. Rptr. 328* involved in pertinent part a cross complaint by Exchequer Acceptance Corporation for a declaration that a trust deed and mortgage executed by cross defendants constituted valid and subsisting securities for the payment of a delinquent promissory note that the parties had executed in favor of Exchequer. Exchequer moved for summary judgment supported by the declaration of its vice president and principal shareholder. The declaration set forth the circumstances of (1) the execution of the note by which Exchequer had loaned cross defendants $20,000, (2) the depositing of this sum in escrow, (3) its use in violation of the terms of the escrow and the note, and (4) the escrow holder's refusal to turn over the instruments constituting the security for the note or otherwise foreclose on the note. In the only opposing declaration filed, the allegations of fact did not contradict or controvert the allegations of fact in the supporting declaration. The trial court granted the motion and judgment was entered in Exchequer's favor. The cross defendants appealed, and the court of appeal affirmed. In reviewing the propriety of the summary judgment procedure, the court noted that when no triable issues of fact exist and the moving party's affidavits set forth sufficient facts to sustain a judgment in that party's favor, a summary judgment may properly be granted. It added that the summary judgment procedure is appropriate in declaratory relief actions since its propriety lies in the trial court's function to render the judgment when only legal issues are presented for its determination [quoting *Spencer v. Hibernia Bank*, discussed *below*] (*271 Cal. App. 2d 1, 11-12)* .

Spencer v. Hibernia Bank *(1960) 186 Cal. App. 2d 702, 9 Cal. Rptr. 867* involved three declaratory relief actions by successors in interest of alleged depositors in defendant bank for a declaration of plaintiffs' rights in the bank. Defendants' motions for summary judgments were granted, and plaintiffs appealed. In affirming the judgments, the court of appeal responded to plaintiffs' contention that the summary judgment procedure does not apply to declaratory relief actions by stating that former Code Civ. Proc. § 437c [the predecessor to present *Code Civ. Proc. § 437c*] expressly applies to "all types of proceedings" and this was obviously intended to include declaratory relief actions in a proper case. It added that the propriety of the application of declaratory relief lies in the trial court's function to render such a judgment when only legal issues are presented for determination.

[b] Defendant Not Entitled to Favorable Declaration

In ***Torrance v. Castner*** *(1975) 46 Cal. App. 3d 76, 120 Cal. Rptr. 23* , plaintiffs, the City of Torrance and Mary Coulter, filed a complaint for declaratory relief, claim and delivery, conversion, and breach of contract against defendants Castner and Phillips. The dispute arose after Coulter had loaned certain paintings to the city which Castner then levied on by writ of execution. The paintings were sold to Castner in a marshall's sale. It was only at this time that Coulter learned of what happened, informed the city, which canceled payment on its check to Castner, and filed suit for a determination of the rights of the various parties to the paintings. The trial court granted plaintiffs' motion for summary judgment on the ground that there was no defense to the action and no triable issues of fact and entered judgment in favor of Coulter holding that she had title to the paintings and also holding the city harmless. The court of appeal affirmed, modifying the judgment to delete the trial court's award of attorney's fees. It concluded that as a matter of law Castner was not a bona fide purchaser and Coulter was not deprived of her ownership of the paintings. The court noted that summary judgment was appropriate in this case, being one for declaratory relief, since the propriety of the application of declaratory relief lies in the trial court's function to render such a judgment when only legal issues are presented for its determination [quoting *Spencer v. Hibernia Bank (1960) 186 Cal. App. 2d 702, 712, 9 Cal. Rptr. 867* , discussed in *§ 67.41[3][a]*] (*46 Cal. App. 3d 76, 83 fn. 3*).

Exchequer Acceptance Corp. v. Alexander (1969) 271 Cal. App. 2d 1, 76 Cal. Rptr. 328 is discussed in *§ 67.41[3][a]*.

[c] Plaintiff Not Entitled to Favorable Declaration

Siemon v. Russell *(1961) 194 Cal. App. 2d 592, 15 Cal. Rptr. 218* was an action for declaratory relief as to plaintiff owners' right to subdivide a four-acre tract of land subject to an oil and gas lease under which defendant occupied that portion of the land necessary to the operation of the single "stripper" well. Plaintiffs argued that the character of the neighborhood had substantially changed over the years from what it was when the lease was entered into. Defendant's motion for summary judgment under former Code Civ. Proc. § 437c [the predecessor to present *Code Civ. Proc. § 437c*] to which a copy of the oil and gas lease restricting use of the surface of the land to agricultural, horticultural, and grazing purposes, was attached, was granted. The summary judgment adjudged and decreed that under the lease defendant was lessee and plaintiffs' ownership was subject to the lease and that plaintiffs could not use or occupy any of the property for residential purposes during its term except as may be incidental to an agricultural, horticultural, or grazing use of the land. It further adjudged that defendant was not under any duty to quit claim to plaintiffs any surface rights to any portion of the property.

In affirming the judgment, the court of appeal said that it is not disputed that the summary judgment procedure is appropriate in declaratory relief actions. The propriety of the application for declaratory relief lies in the trial court's function to render such a judgment when only legal issues are presented for determination. It pointed out that the judgment comported with the requirement that in a declaratory relief action the court should decree that plaintiffs are not entitled to the declarations in their favor, rather than enter a judgment of dismissal. The court explained that the basin question on appeal was whether any triable questions of fact were presented which, if decided in plaintiffs' favor, would entitled them to use the property for subdivision purposes (*194 Cal. App. 2d 592, 595)* . The court held that the controversies asserted by plaintiffs were all immaterial and presented no questions of fact requiring determination in the action (*194 Cal. App. 2d 592, 596)* .

[4] Additional Authorities

[a] Propriety of Summary Judgment Procedure

Tiburon v. Northwestern P. R. Co. (1970) 4 Cal. App. 3d 160, 84 Cal. Rptr. 469 was an action by the city for declaratory relief as to whether the defendant railroad's leasing and conveyance of a single parcel of realty containing approximately 49 acres in such a manner as to divide it into separate parcels, violated state and local laws governing

subdivisions. Plaintiff also sought an injunction to restrain defendants from leasing, selling, or conveying the land until they complied with such laws. The trial court sustained defendants' demurrer to the complaint without leave to amend and denied plaintiff's motion to reconsider or for leave to file a supplementary and first amended complaint, and plaintiff appealed. In reversing the judgment on the ground that the allegations in the original complaint considered together with those in the proposed amended complaint stated a cause of action for declaratory relief, the court of appeal noted that if justiciable issues are presented which can be disposed of as a matter of law, they should be resolved by summary judgment with an express declaration of the rights of the parties (*4 Cal. App. 3d 160, 172 fn. 5*).

[b] Plaintiff Not Entitled to Favorable Declaration

Tijsseling v. General Acc. Fire & Life Assur. Corp. (1976) 55 Cal. App. 3d 623, 127 Cal. Rptr. 681 was an action for declaratory relief and breach of contract brought by insureds against several insurance companies and brokers arising out of a dispute concerning coverage under various insurance policies. Plaintiffs were the owners of real property, which they subdivided and sold. Some years prior to 1967, plaintiffs sold to separate buyers two parcels referred to as Lot 25 and Lot 26. It was later discovered that a house built by plaintiffs on Lot 25 encroached on Lot 26. This fact was learned by the respective buyers in 1967 and 1968. The buyers sued the plaintiffs for negligent misrepresentation, and judgment for the buyers was entered in those actions. Claiming that their liability arising from the actions was covered by one or more of various insurance policies, plaintiffs brought the present action for declaratory relief and breach of contract. Defendant moved for summary judgment on the ground that the encroachment and misrepresentations occurred prior to the time its comprehensive liability policy was issued and was therefore not covered by the policy, the terms of which limited coverage to bodily injury or property damage which occurs during the policy period. The motion was granted and plaintiffs appealed from the summary judgment entered. The court of appeal affirmed.

The procedural background of *Spencer v. Hibernia Bank (1960) 186 Cal. App. 2d 702, 9 Cal. Rptr. 867* is discussed in *§ 67.41[3][a]*. The trial court entered summary judgment declaring the rights of the parties to be that none of the plaintiffs had any interest in The Hibernia Bank, its assets, or capital stock; that each of plaintiffs' predecessors in interest had ceased to be depositors or members of Hibernia, that in any case a membership in Hibernia was not transferable or descendible, and therefore, any interests of plaintiffs' predecessors terminated with their death; and that no person had acquired any right or interest in Hibernia by virtue of having been an incorporator of Hibernia, or by having been a party to the preincorporation agreement. In affirming the judgments, the court of appeal stated that the judgments comported with the requirement in declaratory relief actions that the court should decree that plaintiffs are not entitled to the declarations in their favor rather than enter a judgment of dismissal. Therefore, the court found no merit in plaintiffs' claim that application of *Code Civ. Proc. § 437c* to declaratory relief actions was tantamount to a repeal of this latter section [*Code Civ. Proc. § 1060*] because it prevented a declaration of the parties' rights (*186 Cal. App. 2d 702, 712)* .

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6-67 California Points & Authorities §§ 67.42-67.49

[Reserved]

§§ 67.42[Reserved]

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6-67 California Points & Authorities § 67.50

§ 67.50 Opposing Demurrer to Complaint [Code Civ. Proc. §§ 86(a)(7)(B), 430.10] for Declaratory Relief [Code Civ. Proc. § 1060]--Declaratory Relief Is Authorized

[1] FORM Opposing Demurrer to Complaint [Code Civ. Proc. §§ 86(a)(7)(B), 430.10] for Declaratory Relief [Code Civ. Proc. § 1060]--Declaratory Relief Is Authorized

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN OPPOSITION TO DEMURRER TO COM-
vs.	)	PLAINT
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

DECLARATORY RELIEF IS PROPER TO _____ [*select appropriate purpose from authorities discussed below*] AND IS AUTHORIZED UNDER THE PROVISIONS OF CODE OF CIVIL PROCEDURE SECTION _____ [1060 *or* 86(a)(7)(B) and 1060].

A. Action Authorized in Superior Court. Any person _____ [*insert one of following:* interested under a written instrument, excluding a will or trust, *or* interested under a contract *or* who desires a declaration of his or her or its rights and duties with respect to another *or* who desires a declaration of his or her or its rights in respect to, in, over or on property *or* who desires a declaration of his or her or its rights with respect to the location of the natural

channel of a watercourse] may, in the case of an actual controversy relating to the legal rights and duties of the respective parties, bring an original action or cross complaint in the superior court for declaratory relief (*Code Civ. Proc. § 1060*).

[*Optional*] **B. Oral Contract.** *Code of Civil Procedure Section 1060*, authorizing an action for declaratory relief by any person interested under a written instrument, or under a contract, authorizes declaratory relief in case of a controversy relating to oral contracts and obligations (*Zimmer v. Gorelnik (1941) 42 Cal. App. 2d 440, 445, 109 P.2d 34*).

[*Optional*] **C. To Test Constitutionality of Initiative Measure.** Declaratory relief under *Code of Civil Procedure Section 1060* is a proper remedy to test the constitutionality of an initiative measure in the case of an actual controversy existing between the parties (*see* *Weaver v. Jordan (1966) 64 Cal. 2d 235, 237-238, 49 Cal. Rptr. 537, 411 P.2d 289*).

[*Optional*] **D. To Test Constitutionality of Statutes.** Declaratory relief under *Code of Civil Procedure Section 1060* is a proper remedy to test the constitutionality of statutes in the case of an actual controversy existing between the parties (*see* *Carmel-by-the-Sea v. Young (1970) 2 Cal. 3d 259, 261, 85 Cal. Rptr. 1, 466 P.2d 225*).

[*Optional*] **E. To Test Constitutionality or Validity of Ordinances.** Declaratory relief under *Code of Civil Procedure Section 1060* is a proper remedy to test the constitutionality or validity of ordinances in the case of an actual controversy existing between the parties (*see* *C. Dudley De Velbiss Co. v. Kraintz (1951) 101 Cal. App. 2d 612, 615, 225 P.2d 969*).

[*Optional*] **F. To Interpret Charter Provision.** The interpretation of a county or city charter provision is a proper matter for declaratory relief under *Code of Civil Procedure Section 1060* in the case of an actual controversy existing between the parties (*see* *Walker v. County of Los Angeles (1961) 55 Cal. 2d 626, 637, 12 Cal. Rptr. 671, 361 P.2d 247*).

[*Optional*] **G. To Interpret Statutes and Ordinances.** The interpretation of statutes and ordinances is a proper matter for declaratory relief under *Code of Civil Procedure Section 1060* in the case of an actual controversy existing between the parties (*see* *Walker v. County of Los Angeles (1961) 55 Cal. 2d 626, 637, 12 Cal. Rptr. 671, 361 P.2d 247*).

[*Optional*] **H. To Test Enforceability of Covenants or Servitudes Asserted Against Property.** A declaratory relief action is an appropriate means to test the enforceability of covenants or servitudes asserted against property, and one need not violate the restrictions in order to have his or her or its rights ascertained (*Ross v. Harootunian (1967) 257 Cal. App. 2d 292, 294, 64 Cal. Rptr. 537*).

[*Optional*] **I. To Test Policy of Administrative Agency.** An action for declaratory relief may be maintained to challenge an administrative agency's policy of ignoring or violating applicable laws and regulations, even though no specific agency decision is challenged (*Imperial County Dep't of Soc. Servs. v. J.E. (In re Claudia E.) (2008) 163 Cal. App. 4th 627, 634-637, 77 Cal. Rptr. 3d 722* ; *Californians for Native Salmon etc. Assn. v. Department of Forestry (1990) 221 Cal. App. 3d 1419, 1429-1431, 271 Cal. Rptr. 270*). [In such an action, the trial court may consider evidence of the agency's policies and practices beyond the record that would have been before an administrative agency if a particular administrative action had been challenged by administrative mandamus (*East Bay Mun. Utility Dist. v. Department of Forestry & Fire Protection (1996) 43 Cal. App. 4th 1113, 1129-1131, 51 Cal. Rptr. 2d 299*)].

[*Optional*] **J. Actions Against Public Entity.** An action for declaratory relief may be maintained against the state or any public entity authorized to sue and be sued when governmental immunity does not exist or is waived (*see* *Hoyt v. Board of Civil Serv. Commrs (1942) 21 Cal. 2d 399, 401-405, 132 P.2d 804*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a general demurrer to a complaint for declaratory relief when defendant contends that the action is not one for which declaratory relief is authorized [*see generally §§ 67.20* and *67.21*]. Although Paragraphs B through J are labeled as optional, one or more of them would be used if applicable. If none of them is applicable, but the case is one in which declaratory relief is nevertheless authorized, then a paragraph stating the point of law relied on and citing the authority for it would be inserted in lieu of the optional paragraphs listed.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

Note that, on and after January 1, 1995, *Code Civ. Proc. § 1060* no longer authorizes a declaratory relief action to determine rights under a will or trust, and this form excludes reference to these (*see* Paragraph A). A declaration of rights under a will or trust may be obtained, however, in proceedings under the Probate Code [*see generally Prob. Code §§ 11700 et seq.* (petitions to determine heirship), 17200 et seq. (proceedings concerning trusts), 21320 et seq. (proceedings to determine if act constitutes violation of no contest clause of will); *see also Prob. Code § 21101*]. For related memoranda in support of a will contest, see Ch. 186 *Probate of Wills*, § 18.20 et seq.

[b] Related Uses

The memorandum, with appropriate modifications, may be used in opposition to any other proceeding in which it is contended that declaratory relief does not lie. These other proceedings might include a motion for judgment on the pleadings, a separate trial of the issue set forth as an affirmative defense, a motion for summary judgment, and an objection to the introduction of any evidence at trial when it is contended that the complaint fails to state facts sufficient to constitute a cause of action and the pleadings have not been superseded by a pretrial order setting forth issues to be tried.

[3] Discussion of Authorities

[a] Action Authorized in Superior Court

In addition to the provisions of **Code Civ. Proc.** ***§ 1060***, *Code Civ. Proc.* § 17 provides that the word person includes a corporation as well as a natural person [*Code Civ. Proc. § 17*]. The words "person" and "another" as used in *Code Civ. Proc. § 1060* also include any entity authorized to sue or be sued [*see Code Civ. Proc. § 369.5* (actions by and against unincorporated associations); *Lord v. Garland (1946) 27 Cal. 2d 840, 852, 168 P.2d 5* (action against state); *Hoyt v. Board of Civil Serv. Commrs (1942) 21 Cal. 2d 399, 401, 403, 132 P.2d 804* (action available to or against state, political subdivision of state, municipal corporation)]. For points and authorities opposing a demurrer, which was supported on the ground that plaintiff had no standing to maintain a declaratory relief action, when plaintiff is an interested person under Code Civ. Proc. *§ 1060, Gov. Code* §§ 11350, 11350.3, or *Unemp. Ins. Code § 409.2*, see *§ 67.55*.

[b] Oral Contract

Zimmer v. Gorelnik *(1941) 42 Cal. App. 2d 440, 109 P.2d 34* was an action for declaratory relief regarding the respective rights of plaintiff and defendant concerning the division of profits in connection with business operations of the two based on the theory that they were operating as partners or joint venturers. The controversies between the parties arose out of a written contract under which they began their business associations in 1935. The plaintiff alleged that, while operating under that contract, the parties orally agreed to continue similar business connections in accordance with some of the terms of the contract relating to the division of profits. The trial court refused to let plaintiff prove these allegations on the theory that the court was without jurisdiction to determine a controversy involving a disputed oral contract. The trial resulted in a judgment that plaintiff was not entitled to any relief and plaintiff appealed.

In reversing the judgment, the court of appeal held that a declaratory relief action in the case of a controversy relating to an oral contract is authorized by *Code Civ. Proc. § 1060*. The court noted that the Legislature in *Code Civ. Proc. § 1060* used the word "or" after the word "instrument," and again after the word "contract"; that it did not use the word "written" before the word "contract"; that the clause reading: "or who desires a declaration of his rights or duties with respect to another, or in respect to, in, over or upon property" begins with the word "or"; and also that this clause is not tied in to any reference to a written instrument, or to a contract, or to any kind of a written document. The language of the statute was plain and did not call for judicial construction or interpretation. Notwithstanding the early rulings of the common law courts limiting the right of action to written instruments, the court held that *Code Civ. Proc. § 1060* clearly broadens the scope of the action to cover controversies relating to oral contracts and obligations (*42 Cal. App. 2d 440, 445)* .

[c] To Test Constitutionality of Initiative Measure

Weaver v. Jordan *(1966) 64 Cal. 2d 235, 49 Cal. Rptr. 537, 411 P.2d 289* was a declaratory relief action by proposed incorporators of a home subscription television business against the Secretary of State to determine the validity of the "Free Television Act," an initiative measure adopted by the electorate, and to compel the Secretary of State to accept the plaintiff's articles of incorporation for filing. The act banned subscription television businesses which would make any charge on reception of home television programs. Defendant had refused to file plaintiff's articles on the ground the proposed corporation was to engage in an unlawful business and that the corporation's purpose was unlawful. Plaintiffs contended that the act violated both the state and federal Constitutions. Defendant filed an answer and moved for judgment on the pleadings. Plaintiffs countered with a motion for summary judgment. The trial court concluded that the act violated the free speech guaranties of both the state and federal Constitutions, denied defendant's motion for judgment on the pleadings, granted plaintiffs' motion for summary judgment, and rendered judgment declaring the duty of defendant to accept and file the articles. On defendant's appeal, the Supreme Court concurred in the trial court's conclusion and affirmed the judgment.

NOTE:

For a case invoking the original jurisdiction of the Supreme Court to determine the validity under the state and federal Constitutions of an initiative measure amending the state Constitution relating to property taxation, see *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization (1978) 22 Cal. 3d 208, 149 Cal. Rptr. 239, 583 P.2d 1281* (validity of initiative upheld). The federal constitutionality of initiative measures may also be determined in other actions; for example, the invalidity of an initiative measure amending the state Constitution to allow discrimination in housing was declared unconstitutional under the federal Constitution in an action for damages under the Unruh Civil Rights Act in *Mulkey v. Reitman (1966) 64 Cal. 2d 529, 535-543, 50 Cal. Rptr. 881, 413 P.2d 825* (Supreme Court reversed summary judgment (treated as a judgment on the pleadings) for defendant owners and managers of an apartment building).

[d] To Test Constitutionality of Statutes

Carmel-by-the-Sea v. Young *(1970) 2 Cal. 3d 259, 85 Cal. Rptr. 1, 466 P.2d 225* was a declaratory relief action attacking the constitutionality of the 1969 financial disclosure law [former *Gov. Code §§ 3600-3704*]. The law generally required that every public officer and candidate for state or local public office, as those terms were defined in the act, file, as a public record, a statement describing the nature and extent of his or her investments and those owned by either spouse or by a minor child of the parties if such investment were in excess of $10,000 in value at the time of the statement. Certain property was exempted from the law. Violation of the law was declared to be a misdemeanor and a knowing violation a felony. The complaint alleged and defendant admitted that many of plaintiff city's officials would resign rather than make the required disclosure. The trial court declared that the law was constitutional, and plaintiff city appealed. The Supreme Court reversed, holding that the attempted regulation undertook an overbroad intrusion into the right of privacy.

NOTE:

The constitutionality of the successor act on the ground that it met the objections of Carmel-by-the-Sea and was valid on its face was declared by the Supreme Court in *Nevada County v. MacMillen (1974) 11 Cal. 3d 662, 666, 677, 114 Cal. Rptr. 345, 522 P.2d 1345* (reversing trial court's judgment that successor act was unconstitutional).

[e] To Test Constitutionality or Validity of Ordinances

Dudley De Velbiss Co. v. Kraintz *(1951) 101 Cal. App. 2d 612, 225 P.2d 969* was an action for declaratory relief by a building contractor against the county building inspector to determine the constitutionality of county ordinances relating to construction. Claiming that the ordinances were vague and indefinite and discriminatory in their application, plaintiff in its complaint alleged the capacities of the parties, facts showing that the ordinances applied to plaintiff's businesses, that the ordinances were written instruments, and that an actual controversy existed between the parties relating to their respective legal rights and duties. The complaint further set forth the conflicting contentions of the parties, and prayed that the court declare the ordinances void and for other relief. The defendant's demurrer to the complaint was sustained without leave to amend, and plaintiff appealed from the subsequent judgment. In reversing the judgment, the court of appeal said that the complaint alleges an existing actual controversy as to the ordinances attacked which entitled the plaintiff to declaratory relief (*101 Cal. App. 2d 612, 615)* .

[f] To Interpret Charter Provision

Walker v. County of Los Angeles *(1961) 55 Cal. 2d 626, 12 Cal. Rptr. 671, 361 P.2d 247* was a representative action by five county employees seeking declaratory relief (to have the court ascertain and declare the prevailing wage rate paid employees in private industry) and for a writ of mandate (to compel the county to adopt an ordinance providing at least equal salary payments to county civil service employees as required by county charter). It was claimed that in adopting a salary ordinance, the county board of supervisors did not comply with procedural requirements in the charter. The charter provided that in fixing compensation to be paid to persons under the classified civil service, the board of supervisors must provide a salary or wage at least equal to the prevailing salary or wage for the same quality of service rendered to private persons, firms, or corporations under similar employment if the prevailing salary or wage can be ascertained. For a number of years the county had participated with other political entities in a joint survey and held hearings to determine the prevailing wage for comparable work in private industry. But in the year in question, the board had declined to apply the annual survey in fixing salaries for the next fiscal year and, as shown by the record of their proceedings, after much disagreement among the supervisors, voted three to one to continue the preceding year's wage schedule. The trial court found that the board had not complied with charter requirements, rendered a declaratory judgment setting forth the rights and duties of the parties, and granted a peremptory writ of mandate requiring the board to comply. Defendants appealed. In reply to defendants' argument that the court should not undertake to guide the board in the exercise of its legislative discretion, the Supreme Court, in modifying the judgment to delete one of the several

paragraphs declaring the rights and duties of the parties and affirming the judgment as modified, said that plaintiff's action was not an attempt to interfere with a discretionary act of the board in the legislative process, but to obtain a clarification of the charter provision, regulating the board in the performance of its prescribed duty. That is, the interpretation of charter provisions is a proper matter for declaratory relief (*55 Cal. 2d 626, 637)* .

[g] To Interpret Statutes and Ordinances

The procedural background of ***Walker v. County of Los Angeles*** *(1961) 55 Cal. 2d 626, 12 Cal. Rptr. 671, 361 P.2d 247* is *set forth in § 67.50[3][f]*. The court observed that the interpretation of ordinances and statutes are proper matters for declaratory relief (*55 Cal. 2d 626, 637)* .

[h] To Test Enforceability of Covenants or Servitudes Asserted Against Property

Ross v. Harootunian *(1967) 257 Cal. App. 2d 292, 64 Cal. Rptr. 537* was an action to test the enforceability of a deed restriction. Defendants had originally sold one of their 700 lots in a subdivision at Lake Tahoe to the predecessor in interest, Geraldine Bull, who conveyed the lot to plaintiffs. The deed from defendants contained restrictions relating to use, but the deed from Bull to plaintiffs omitted the restrictive clause. Plaintiffs moved for summary judgment and the motion was granted. In affirming the judgment, the court of appeal said that a declaratory relief action is an appropriate means to test the enforceability of covenants or servitudes asserted against property. It added that it was unnecessary for the owner to violate the restrictions in order to ascertain his rights (*257 Cal. App. 2d 292, 294)* .

[i] Actions to Test Policies of Administrative Agency

Imperial County Dep't of Soc. Servs. v. J.E. (In re Claudia E.) *(2008) 163 Cal. App. 4th 627, 77 Cal. Rptr. 3d 722* , was a juvenile dependency proceeding instituted by a county department of social services after it took two children into protective custody. In the proceeding, the children filed a motion seeking a declaratory judgment that the department's procedure of filing a supplemental dependency petition more than 48 hours after removal of the subject child was illegal (*see Welf. & Inst. Code § 387*). The trial court denied the motion for declaratory relief, reasoning that before seeking declaratory relief, the children or their counsel should have sought a writ of habeas corpus. The court of appeal reversed.

The court of appeal rejected the trial court's rationale that declaratory relief was "not necessary or proper at the time under all the circumstances" (*see Code Civ. Proc. § 1061*). This rationale assumed that habeas corpus was a more "effective" vehicle for the sought-after relief. But the court of appeal emphasized that the children's counsel was not seeking release of the children to parental custody as a sanction for the department's untimely filing of the supplemental dependency petitions; rather, counsel was seeking a declaration that the department had misconstrued the statutory time requirements and had an ongoing policy of filing supplemental petitions on a tardy basis. Under those circumstances, a writ of habeas corpus to release the children from protective custody would not have been a more effective remedy than declaratory relief (*163 Cal. App. 4th 627, 634)* .

The court of appeal also rejected the department's argument that the juvenile court is not a proper forum for declaratory relief. The court of appeal acknowledged that juvenile dependency proceedings are governed, in general, by the Welfare and Institutions Code (*see Welf. & Inst. Code § 300 et seq.*); however, that Code does not expressly restrict the availability of declaratory relief. Moreover, given the claim asserted in this case (that the department allegedly had a lackadaisical or laissez faire practice of ignoring the time requirements for filing supplemental petitions, to the detriment of school-age dependent children), declaratory relief by the juvenile court would not only serve the purpose of expediting the dependency proceedings, but also further the best interests of dependent children, which is of paramount concern in dependency proceedings. The court thus concluded that the application of the general declaratory-relief statute (*Code Civ. Proc. § 1060*) was consistent with the overall purposes of the dependency system and was not made expressly made inapplicable by the Welfare and Institutions Code (*163 Cal. App. 4th 627, 635-636)* . In addition, the

court held that the juvenile court has inherent power to grant declaratory relief in dependency proceedings. In sum, the court of appeal found that the juvenile court may grant declaratory relief in a case such as this, in which it was alleged that the department had a policy of filing untimely supplemental petitions in contravention of statutory requirements (*163 Cal. App. 4th 627, 637)* .

Californians for Native Salmon etc. Assn. v. Department of Forestry *(1990) 221 Cal. App. 3d 1419, 271 Cal. Rptr. 270* was brought to test the legality of numerous timber harvest plans (THPs) approved by the California Department of Forestry (CDF) under the requirements of the Z'berg-Nejedly Forest Practice Act of 1973 (*Pub. Res. Code § 4511 et seq.*). The proceeding commenced when Eel River Sawmills filed THP 520, which proposed cutting old growth and second growth trees. CDF approved THP 520 and plaintiffs/appellants challenged the approval by a combined petition for administrative mandate and complaint for injunctive and declaratory relief regarding CDF policies outside the approval of THP 520. Because Eel River Sawmills withdrew THP 520 during the pendency of the motion for a preliminary injunction, CDF demurred to the complaint on the grounds of mootness and lack of justiciable controversy warranting declaratory relief. Plaintiffs declined to amend and the trial court dismissed.

The court of appeal reversed, finding that plaintiffs/appellants had alleged a justiciable controversy. The court noted that allegations of a CDF policy (1) to issue responses after the notice of THP approval and (2) to fail to assess cumulative impacts of THPs stated a controversy regarding whether CDF policies violated applicable statutes, regulations and judicial decisions. Accordingly, the court found declaratory relief to be an appropriate remedy "to obtain judicial clarification of the parties' rights and obligations under applicable law" (*221 Cal. App. 3d 1419, 1427)* . Although CDF disputed that a series of THPs constituted an agency policy, the court of appeal reasoned that appellants had properly alleged policies "impermissibly made in violation of statutory mandates by an administrative agency and concomitant conduct consistent with the policies, but in violation of law" (*221 Cal. App. 3d 1419, 1428)* . The court went on to distinguish the instant complaint from a challenge of an administrative decision, which should be made in an action for administrative mandamus, and said, "Appellants, however, challenge not a specific order or decision, or even a series thereof, but an overarching, quasi-legislative policy set by an administrative agency. Such a policy is subject to review in an action for declaratory relief" (*221 Cal. App. 3d 1419, 1429)* .

East Bay Mun. Utility Dist. v. Dept. of Forestry & Fire Protection *(1996) 43 Cal. App. 4th 1113, 51 Cal. Rptr. 2d 299 (EBMUD)* , was the first declaratory relief action challenging an administrative agency policy of ignoring or violating applicable laws and regulations brought after such actions were authorized in *Californians for Native Salmon etc. Assn. v. Department of Forestry (1990) 221 Cal. App. 3d 1419, 271 Cal. Rptr. 270* . In *EBMUD,* a municipal utility district's expert advised it that upstream logging had caused fish kills at a hatchery operated by the district. The district brought its action for declaratory relief alleging that the State Department of Forestry and Fire Protection (CDF) was following a pattern and practice of improperly assessing the cumulative impacts of logging and improperly approving timber harvest plans (THPs) submitted by logging companies. The district also filed an action for a writ of mandamus challenging one particular THP. At trial of the declaratory relief action, the court considered evidence of CDF's policies and practices beyond the 39 THP's submitted by the district and found that the district had not proved a pattern and practice of unlawful conduct in the assessment of cumulative impacts.

On appeal, the district challenged the admission of evidence beyond the 39 THPs and argued that all evidence outside the THP records was "post hoc rationalizations for agency action" (*43 Cal. App. 4th 1113, 1123)* . The court of appeal rejected this argument, reasoning that after the fact justification for an agency decision is prohibited only when an environmental impact report has been approved without essential findings or when a project has begun without adequate compliance with the California Environmental Quality Act (CEQA), *Pub. Res. Code § 21050 et seq.* (*43 Cal. App. 4th 1113, 1123)* . The court found that because EBMUD was seeking a declaration that present CDF practices were violative of CEQA, it was appropriate that the trial court took evidence beyond that contained in the THPs on how CDF analyzed impacts to the watershed area, including how the agency's practices and policies as of the time of trial had changed from those it had earlier employed (*43 Cal. App. 4th 1113, 1123-1124)* .

[j] Actions Against Public Entity

Hoyt v. Board of Civil Serv. Comm'r *(1942) 21 Cal. 2d 399, 132 P.2d 804* was an action against a city's civil service board and others for a declaration of rights under the city charter provision relating to the civil service reserve list. Judgment was for defendants and plaintiff appealed. In support of the trial court's judgment, defendants on appeal contended that an action for declaratory relief is not available against a municipal corporation in California. Although affirming the judgment on the merits, the Supreme Court rejected this contention. The Supreme Court, citing cases, pointed out that declaratory relief has been sanctioned with respect to municipal corporations and counties or their agencies (*21 Cal. 2d 399, 401)* . Noting that *Code Civ. Proc. § 1060* uses the word "person," the Court said that the general rule of statutory construction is that the word "person" should not be held to include any political subdivision of the state in the absence of an express indication that such was the legislative intent. The Court said that this rule is founded on the principle that statutory language should not be interpreted to apply to agencies of government, in the absence of a specific expression of legislative intent, where the result of such a construction would be to infringe sovereign governmental powers. The Court said, however, that if no impairment of sovereign powers would result, the reason underlying this rule of construction ceases to exist and the Legislature may properly be held to have intended that the statute apply to governmental bodies even though it used general statutory language only. The Court held that this "latter rule was the one which applied under the facts of plaintiff's case" (*21 Cal. 2d 399, 402)* .

[4] Additional Authorities

[a] Oral Contract

Columbia Pictures Corp. v. DeToth (1945) 26 Cal. 2d 753, 161 P.2d 217 was an action for declaratory relief under an oral contract employing defendant as a motion picture director. The complaint alleged an actual controversy between the parties and sought judgment fixing the rights and duties of the parties under the contract, declaring the contract to be a valid and subsisting obligation, and granting such further relief as may be just and proper. Defendant's general and special demurrers were sustained without leave to amend and plaintiff appealed from the subsequent judgment of dismissal. In reversing the judgment, the Supreme Court said that the trial court is empowered to determine disputed questions of fact in a declaratory relief action and hence the remedy is not limited to cases involving a written instrument. A disputed oral contract may properly be the subject of a declaratory judgment. It observed that the fact that the oral contract may be one of employment, involving personal services and hence, not specifically enforceable, does not necessarily render declaratory relief improper or unnecessary. This is merely a factor to be considered by the trial court in determining what declaration would be appropriate (*26 Cal. 2d 753, 760-761)* .

Howard v. Howard (1955) 131 Cal. App. 2d 308, 280 P.2d 802 was a declaratory relief action by plaintiff husband against his wife, who had been adjudicated an incompetent some 15 years after the parties had been married, and a bank as guardian of her estate, to secure a declaration of rights under an oral contract allegedly entered into between husband and wife prior to their marriage by the terms of which wife obligated herself to support husband for life in consideration of husband's quitting his then employment and devoting his time to wife's business affairs and property which husband alleged he did. The trial court determined that declaratory relief was not available to establish the existence of a contract but only to determine the rights of the parties under an existing contract and sustained the wife's demurrer to the amended complaint without leave to amend. The bank's demurrer to the original complaint had also been sustained without leave to amend. Judgment based on the two orders sustaining the demurrers without leave to amend was entered and plaintiff appealed. In reversing as to the wife and affirming as to the bank, the court said that it is well established that in declaratory relief actions the court may determine disputed questions of fact. In the instant case, plaintiff alleged that an oral contract was executed under which he claimed some legal rights which he asked the court to determine and declare. It stated that if the court may determine disputed questions of fact, it has [quoting *Zimmer v. Gorelnik, 42 Cal. App. 2d 440, 447, 109 P.2d 34]* , the power to take evidence of the existence of the contract on which the asserted rights are based, and that so far as *Code Civ. Proc. § 1060* is concerned, it makes no difference whether such contract be written or oral. It held, therefore, that the court was in error in deciding that it was without power to determine the

existence of the claimed and disputed contract between plaintiff and defendant (*131 Cal. App. 2d 308, 313)* .

[b] To Test Constitutionality of Statutes

Isbell v. Sonoma County (1978) 21 Cal. 3d 61, 145 Cal. Rptr. 368, 577 P.2d 188 was an action for a declaratory judgment that California's confession of judgment statutes [*Code Civ. Proc. §§ 1132-1134*] were unconstitutional. On the basis of stipulated facts, the trial court, without receiving additional evidence, entered a declaratory judgment holding that a confession of judgment rendered in conformity with the cited statutes did not violate due process, and plaintiffs appealed. The Supreme Court reversed and remanded the cause with directions to enter a declaratory judgment in favor of plaintiffs determining that the confession of judgment procedure of *Code Civ. Proc. §§ 1132(a), 1133, 1134* does not conform to the due process standards of the *Fourteenth Amendment to the United States Constitution* by failing to make provision for valid waiver of the debtor's due process rights.

California v. Superior Court (1974) 12 Cal. 3d 237, 115 Cal. Rptr. 497, 524 P.2d 1281 was an original proceeding in mandate in the Supreme Court to review orders of the superior court in an action brought by two California corporations and a partnership. Petitioners in that action originally had been granted a permit to develop their coastal lands by a regional commission, but the permit was subsequently denied on appeal to the California Coastal Zone Conservation Commission. Plaintiffs then filed in the superior court a petition for writ of mandate asserting six causes of action against the commission including declaratory relief determining that (1) petitioners were entitled to the permit and that they had acquired a vested right to develop their property without a permit, and (2) that the California Coastal Zone Conservation Act of 1972 was unconstitutional. The commission's demurrers were overruled and petitioners' motion to compel answer to interrogatories was granted, and it was from these orders that the commission sought relief in the Supreme Court. The holding that plaintiffs' first cause of action for administrative mandate stated a cause of action, as did the fourth for a determination of the unconstitutionality of the coastal zone act and the fifth for injunctive relief, but that the balance of the pleading did not. With respect to the fourth cause of action, the Supreme Court, although stating that the purpose of that action essentially was to review the administrative action of the commission and that such review is properly brought under the provisions of *Code Civ. Proc. § 1094.5* rather than by means of declaratory relief, nevertheless, stated that declaratory relief is an appropriate remedy to challenge the constitutionality of the act and held that the trial court properly overruled the demurrer insofar as that cause of action sought a declaration that the act was facially unconstitutional (*12 Cal. 3d 237, 251)* .

[c] To Test Constitutionality or Validity of Ordinances

The procedural background of *California v. Superior Court (1974) 12 Cal. 3d 237, 115 Cal. Rptr. 497, 524 P.2d 1281* is *set forth in § 67.50[4][b]*. In support of its holding that declaratory relief is appropriate to challenge the constitutionality of state laws, the Supreme Court observed with approval that a number of cases have held that declaratory relief is available to challenge the constitutionality of ordinances (*12 Cal. 3d 237, 251)* .

McCarthy v. Manhattan Beach (1953) 41 Cal. 2d 879, 264 P.2d 932 was an action by landowners seeking a declaration that a zoning ordinance restricting the use of their ocean front property to beach recreational purposes was null and void as applied to them. The complaint set forth two causes of action: (1) challenging the constitutionality of the ordinance insofar as it affected their land, claiming it violated the due process and *equal protection clauses* of both the state and federal Constitutions and that it resulted in a taking of their property for public use without compensation, and that the restrictive use was unreasonable, arbitrary, discriminatory, and an abuse of legislative discretion; and (2) challenging the validity of the ordinance on the ground that it was not passed in good faith, but, rather, pursuant to a scheme conceived by the mayor and city councilmen to depress the value of plaintiffs' property so that it could be acquired for public park purposes at the lowest possible price. Trial resulted in judgment for the defendant, and plaintiffs appealed. On appeal the Supreme Court, holding that the judgment was supported by the evidence and that the motive of the city officials in enacting the ordinance which was found to be reasonable, was immaterial, affirmed the judgment.

Los Angeles County v. Alhambra (1978) 87 Cal. App. 3d 469, 151 Cal. Rptr. 395 was an action by the county against the city for a declaration that certain portions of defendant's municipal ordinance relating to penalties for overtime parking were invalid and for an injunction to enjoin enforcement of the ordinance on the ground that the ordinance attempted to regulate an area of fines, bail, and citations for parked vehicles which area was completely regulated, and therefore preempted, by state law. The county's interest in the matter arose from the provisions of former Penal Code § 1463 entitling the county to 13 percent of the fines and forfeitures, which were to be deposited with the county, arising from arrests by city officers and employees. The fees collected under the challenged ordinance were deposited with the city treasurer. After a nonjury trial based on stipulated facts, the court entered judgment for plaintiff and defendant appealed. The court of appeal held that the trial court was correct in concluding that the matter was preempted by state law and affirmed the judgment.

Carty v. Ojai (1978) 77 Cal. App. 3d 329, 143 Cal. Rptr. 506 was an action by landowners for a declaration that two city ordinances changing the zoning on the property owned by them were void and that the prior zoning ordinances be restored. The subject ordinances proscribed use of the property as a shopping center and their adoption had the effect of nullifying a sale of five acres to a party on condition that it could be so used. The land originally was outside the city limits and was zoned commercial under a county ordinance. Under that zoning a shopping center was a permissible use. In 1965 defendant's city council sought to annex the property and other property in the same area, but consent of plaintiffs was required. Plaintiffs' consent was provisional on the zoning of the property C-1 which would have permitted use of the land for a shopping center. The city agreed and the property was annexed with a C-1 zoning. In 1971 (six years later) the city rezoned the property, which was still undeveloped, to CPD (service commercial), thereby prohibiting its use for a shopping center. The trial court entered judgment for plaintiffs declaring the two ordinances void, on two principal grounds: (1) the rezoning was arbitrary and discriminatory; and (2) the city was estopped. The court of appeal reversed, however, on the grounds that neither of the principal grounds relied on by the trial court was supported by law or fact, that the city properly exercised its legislative power in adopting the two ordinances, and that the city was not estopped from making the zone change.

Blue Star Line, Inc. v. City & County of San Francisco (1978) 77 Cal. App. 3d 429, 143 Cal. Rptr. 647 was an action by several steamship lines, steamship agents, and stevedore firms for a declaration that a city tax levied on payrolls of employers who conduct business within the city's territorial limits was void as applied to them, on various constitutional grounds. The matter was submitted on the pleadings, a written stipulation of facts, and selected depositions and documentary exhibits stipulated into evidence. The trial court entered a declaratory judgment denying the constitutional claims and the judgment was affirmed on appeal. [*See also Western States Bankcard Ass'n v. City & County of San Francisco (1977) 19 Cal. 3d 208, 137 Cal. Rptr. 183, 561 P.2d 273* (upholding validity and applicability of same tax ordinance to nonstock, nonprofit California corporation, formed by various state and national banks to administer credit card system, against corporation's contention that it was entitled to immunity from city's gross receipts and payroll expense taxes under bank exemption set forth in *Cal. Const., Art. XIII, § 27* and *Rev. & Tax. Code §§ 23181, 23182*); and *A.B.C. Distrib. Co. v. City & County of San Francisco (1975) 15 Cal. 3d 566, 125 Cal. Rptr. 465, 542 P.2d 625* (upholding validity and applicability of same tax ordinance against contention of wholesale liquor and beer distributors that (1) *Cal. Const., Art. XX, § 22* reserved to Department of Alcoholic Beverage Control exclusive power to collect license or occupation taxes on account of manufacture, importation, or sale of alcoholic beverages in state, (2) that *Rev. & Tax. Code § 32010* provided that taxes imposed under Alcoholic Beverage Tax Law were in lieu of all local taxes on sale of alcoholic beverages, and (3) *Rev. & Tax. Code § 17041.5* prohibited municipal corporations from levying or collecting any income tax)]..

Subriar v. Bakersfield (1976) 59 Cal. App. 3d 175, 130 Cal. Rptr. 853 was an action by the operator of an ambulance service seeking a declaration that a portion of a city ordinance requiring anyone desiring to operate an ambulance business within the city obtain a certificate of convenience and necessity from the city manager or city council, and a second action by the operator's attorney of record suing in his individual capacity as a citizen and taxpayer to have the same portion of the ordinance declared unconstitutional and to enjoin its enforcement under *Code Civ. Proc. § 526a*.

The operator had twice filed applications to obtain the certificate but each time refused to provide any information to show that public convenience and necessity required issuance of a certificate or license to another ambulance operator in the city. At the time of the first application, there was but a single such operator. Between the first and second application, another ambulance operator applied for the permit, provided information to show that the public convenience and necessity required another operator, and was issued a certificate. The trial court entered judgment declaring the ordinance unconstitutional and issued a permanent injunction enjoining its enforcement. The city appealed. With respect to the operator's action, the court of appeal held that declaratory relief did not lie because the operator had failed to exhaust his administrative remedies [*see § 67.21*]. The court held, however, that the constitutionality of the ordinance was properly raised by the attorney's cause of action. The court said that the constitutional question may be properly reached by an action for declaratory relief such as plaintiffs filed. But after rejecting various of plaintiffs' contentions, the court held that plaintiffs had failed at trial to produce any evidence that the ordinance, as applied to either of them, violated either the due process clauses or the *equal protection clauses* of the state and federal Constitutions and reversed the judgment (*59 Cal. App. 3d 175, 195)* .

Floresta, Inc. v. City Council of San Leandro (1961) 190 Cal. App. 2d 599, 12 Cal. Rptr. 182 was a proceeding in mandate to review the decision of a city council denying a zoning use permit pursuant to a zoning ordinance prohibiting the establishment of any business where liquor is served within 200 feet of the boundary of any residential district in the city and an action for declaratory relief seeking a judicial determination that the ordinance was unconstitutional. Judgment was entered denying the writ and declaring the ordinance constitutional, and petitioner appealed. In affirming the judgment and holding that petitioner had followed the proper procedure to present the constitutional question, the court of appeal observed that while mandamus is traditionally a procedure for reviewing the action of an administrative agency as to an alleged abuse of discretion, it may also be invoked to challenge the constitutionality of ordinances and regulations and that while declaratory relief is not an appropriate method to secure judicial review of administrative decisions, it is proper to test the constitutionality of a zoning ordinance. The court said that since mandamus and declaratory relief actions can be joined, appellant has properly sought a review of the agencies' decision in its petition for a writ of mandamus and a test of the constitutionality of the ordinance in its request for declaratory relief (*190 Cal. App. 2d 599, 612)* .

[d] To Interpret Charter Provision

LePage v. Oakland (1970) 13 Cal. App. 3d 689, 91 Cal. Rptr. 806 was a class action by a city police officer individually and on behalf of others similarly situated, and by the chairman of an association representing uniformed members of defendant city's police and fire departments. Plaintiff police officer had been refused credit by defendant city of time spent in service-connected disability retirement toward his years-in-service retirement eligibility and sought a declaratory judgment that he was entitled to such credit and a writ of mandate to compel the city to grant the credit. The determination of the issue depended on the interpretation to be given applicable provisions in the city charter and particularly on the meaning of the word "compensation," defined in the charter as monthly remuneration payable in cash, by the city, without deduction. The city contended that since the word meant only amounts paid without deduction, it was limited to salary since no deductions were made from disability retirement pay and as no salary was paid to a member in work-incurred disability retired status, the time so spent could not be counted and credited towards service retirement. The trial court rejected this contention and declared that plaintiff was entitled to the credit and issued a writ of mandate requiring the city to credit such time. On the city's appeal, the court of appeal agreed with the trial court's construction of the charter and affirmed the judgment.

[e] Actions Against Public Entity

California Physicians' Service v. Garrison (1946) 28 Cal. 2d 790, 172 P.2d 4 was an action by a nonprofit physicians' service corporation against the state Insurance Commissioner for a declaratory judgment that its activities in providing health service benefits did not render it engaged in the insurance business within the meaning of the state regulatory statutes. Judgment was for plaintiff and defendant Insurance Commissioner appealed, contending, among other things,

that in the absence of specific statutory authority for declaratory relief against the state or a state office, the action for declaratory relief could not be maintained. The Supreme Court in rejecting this argument and affirming the judgment, held that inasmuch as the Insurance Commissioner was authorized by statute to prosecute and defend all suits and legal proceedings, the action could be maintained. The Court stated that where a government body is subject to suit, *Code Civ. Proc. § 1060* does not interfere with rights of sovereignty (*28 Cal. 2d 790, 800)* .

Grier v. Alameda-Contra Costa Transit Dist. (1976) 55 Cal. App. 3d 325, 127 Cal. Rptr. 525 was an action by bus drivers on behalf of themselves and others similarly situated and their union against the district, a public entity, for declaratory relief and damages, alleging that the district's enforcement of a provision of a collective bargaining agreement requiring drivers who arrived late to work to work without pay for periods in excess of the time actually lost through tardiness, violated a state statute which did not on its face apply to public entities. The trial court ruled that the statute was not applicable to the district and entered judgment for defendant. Plaintiffs appealed. The court of appeal acknowledged the general rule that in the absence of express words to the contrary, public entities are not included within the general words of a statute. The court, however, added that this broad statement has received an application that excludes governmental agencies from the operation of general statutory provisions only if their inclusion would result in an infringement on sovereign governmental powers and that where no impairment of sovereign powers would result, the reason underlying the general rule of construction ceases to exist and the Legislature may properly be held to have intended that the statute apply to governmental bodies even though it used general statutory language only. Concluding that application of the statute in question to the transit district would not impinge on the district's sovereign powers, the court reversed the judgment.

Tehachapi-Cummings County Water Dist. v. Armstrong (1975) 49 Cal. App. 3d 992, 122 Cal. Rptr. 918 was an action by water district against certain landowners, including the State of California, for an adjudication of the rights of the parties in the underground waters of a particular basin and for other relief. Judgment was entered declaring the rights of the parties, but only the state appealed. The state's contention that it was exempt from suit under the doctrine of sovereign immunity was held by the court of appeal to be without merit. The court pointed out that under *Cal. Const., Art. III, § 5*, suits may be brought against the state in such manner and in such courts as shall be directed by law and that this provision provides for legislative consent to suit (*49 Cal. App. 3d 992, 999)* . The court said that general statutory provisions giving remedies to claimants but not expressly excluding governmental entities have been held to provide remedies against them, and that the declaratory relief statute comes within the rule that general statutory language is applicable to the state absent legislative intent to the contrary. The court, however, reversed the judgment in other parts and remanded with directions (*49 Cal. App. 3d 992, 1000)* .

Western Title Guar. Co. v. Sacramento & San Joaquin Drainage Dist. (1965) 235 Cal. App. 2d 815, 45 Cal. Rptr. 578 was an action by the title company to reform a deed given by its predecessor in interest to defendant district and defendant State Board of Reclamation, to remove a cloud on and quiet title to land contained in the deed, and for declaratory relief. The deed given to defendant district was for an easement and right-of-way for levee construction on the land and plaintiff's predecessor in interest was paid a specified sum in consideration. Judgment was rendered for plaintiff reforming the deed and quieting plaintiff's title. Defendants appealed. On appeal defendants contended, among other things, that the state may not be sued in declaratory relief. In rejecting this contention, the court said that the district is a state agency and as such has whatever immunity from suit the state itself has. It pointed out that by statute the district may sue and be sued, that the deed was a contract between the district and the grantor which inured to the benefit of the grantor's successors in interest, that the state when it makes a contract with an individual is liable for its breach in like manner as an individual, and that the doctrine of governmental immunity does not apply (*235 Cal. App. 2d 815, 820)* . The court explained that declaratory relief and quiet title are procedural devices and that if a person has entered into a contract with the state which results in the imposition of rights and duties on each side there is no reason why those rights and duties may not be enforced no matter what procedural device is selected. Quoting from *Hoyt v. Board of Civil Serv. Comm'rs (1942) 21 Cal. 2d 399, 403, 132 P.2d 804* , the court of appeal said that where governmental bodies are already subject to suit, procedural statutes may apply to such bodies without causing any interference with rights of sovereignty (*235 Cal. App. 2d 815, 823)* .

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Volume 6 Chapters 60-69 COSTS---to---DECLARATORY RELIEF
CHAPTER 67 DECLARATORY RELIEF
PART II. FORMS

6-67 California Points & Authorities § 67.51

§ 67.51 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10] for Declaratory Relief [Code Civ. Proc. § 1060]--Facts Alleged Show That Plaintiff Comes Within Exception to Rule That Administrative Remedies Must Be Exhausted Before Seeking Judicial Relief

[1] FORM Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10] for Declaratory Relief [Code Civ. Proc. § 1060]--Facts Alleged Show That Plaintiff Comes Within Exception to Rule That Administrative Remedies Must Be Exhausted Before Seeking Judicial Relief

[*Caption. See § 67.50.*]

A PLAINTIFF NEED NOT EXHAUST HIS/HER/ITS ADMINISTRATIVE REMEDIES BEFORE SEEKING JUDICIAL RELIEF IF _____ [*state exception set out in Paragraph B of form, e.g.,* TO PURSUE THE ADMINISTRATIVE REMEDY WOULD RESULT IN IRREPARABLE HARM].

A. Exceptions to Exhaustion Doctrine. The doctrine of exhaustion of administrative remedies has not hardened into inflexible dogma but contains its own exceptions (*Ogo Associates v. City of Torrance (1974) 37 Cal. App. 3d 830, 834, 112 Cal. Rptr. 761*).

[*EITHER*]

B. Controversy Outside Jurisdiction of Administrative Agency. The doctrine of exhaustion of administrative remedies does not apply where the controversy lies outside the jurisdiction of the

administrative agency (*Ogo Associates v. City of Torrance (1974) 37 Cal. App. 3d 830, 834, 112 Cal. Rptr. 761*).

[*OR*]

B. Irreparable Harm. The doctrine of exhaustion of administrative remedies does not apply where to pursue such remedies would result in irreparable harm (*Ogo Associates v. City of Torrance (1974) 37 Cal. App. 3d 830, 834, 112*

Cal. Rptr. 761).

[*OR*]

B. Administrative Remedy Inadequate. The doctrine of exhaustion of administrative remedies does not apply where the administrative agency cannot grant an adequate remedy (*Andal v. City of Stockton (2006) 137 Cal. App. 4th 86, 91-94, 40 Cal. Rptr. 3d 34* ; *see* *Ogo Associates v. City of Torrance (1974) 37 Cal. App. 3d 830, 834, 112 Cal. Rptr. 761*).

[*OR*]

B. Administrative Decision Known. The doctrine of exhaustion of administrative remedies does not apply where the aggrieved party can positively state that the administrative agency's decision in the particular matter would be adverse to him or her or it (*Ogo Associates v. City of Torrance (1974) 37 Cal. App. 3d 830, 834, 112 Cal. Rptr. 761*).

[*OR*]

B. Statute (or Ordinance) Unconstitutional on Its Face. The doctrine of exhaustion of administrative remedies does not apply to an action seeking a judicial declaration that a statute (or ordinance) is unconstitutional on its face, as opposed to unconstitutional in its application (*California v. Superior Court (1974) 12 Cal. 3d 237, 250-251, 115 Cal. Rptr. 497, 524 P.2d 1281*).

[*OR*]

B. Action to Enforce Public Rights. The doctrine of exhaustion of administrative remedies does not apply to a private person who was not a party to the administrative proceeding and who seeks judicial relief from the administrative action by way of enforcing rights which he or she or it holds as a member of the affected public (*Environmental Law Fund, Inc. v. Town of Corte Madera (1975) 49 Cal. App. 3d 105, 114, 122 Cal. Rptr. 282*).

[*OR*]

B. No Administrative Remedy. The doctrine of exhaustion of administrative remedies does not apply where there is no administrative remedy to exhaust (*Diaz v. Quitoriano (1969) 268 Cal. App. 2d 807, 812, 74 Cal. Rptr. 358*), and the doctrine does not require that a party exhaust all possible alternative remedies before seeking declaratory relief (*Imperial County Dep't of Soc. Servs. v. J.E. (In re Claudia E.) (2008) 163 Cal. App. 4th 627, 632-634, 77 Cal. Rptr. 3d 722*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in opposition to a general demurrer to a complaint for declaratory relief on the ground the complaint fails to state facts sufficient to constitute a cause of action in that plaintiff has failed to exhaust administrative remedies § 67.22 where plaintiff's case comes within an exception to that rule or where the administrative remedy is not available to plaintiff. The alternative exceptions set out in Paragraph B of the form list the major exceptions to the general jurisdictional rule requiring a litigant to have exhausted his or her administrative remedies. For a discussion of other exceptions to this rule, see California Forms of Pleading and Practice, Ch. 470, *Overview of Public Administrative Law* (Matthew Bender).

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

The form may also with appropriate modifications be used in opposition to a motion for judgment on the pleadings, a motion to dismiss, or a motion for summary judgment made on the ground that plaintiff has failed to exhaust administrative remedies, or in any other proceeding in which this objection is made.

[3] Discussion of Authorities

[a] Exceptions to Exhaustion Doctrine

Ogo Associates v. City of Torrance *(1974) 37 Cal. App. 3d 830, 112 Cal. Rptr. 761* was a proceeding in mandate, rather than a declaratory relief action, by which plaintiffs sought to compel defendant city to issue plaintiff Ogo Associates a permit to build a federally financed 86-unit apartment project for persons with low incomes. The property in question for eight years had been zoned R3 which would have allowed construction of the apartments. Ogo Associates obtained its financing and applied for a building permit, but before the permit could be issued the city council enacted an emergency ordinance imposing a moratorium on building permits in the area that included the proposed low income apartments. Evidence showed that the area was rezoned in order to prevent plaintiff's building project. The city council subsequently enacted a second moratorium on the issuance of building permits in that area, and shortly thereafter it adopted a permanent ordinance rezoning the area ML, a classification which limited land use to light manufacturing purposes only. From a judgment denying relief on grounds among others that plaintiff had failed to exhaust its administrative remedies by applying to the city council for a variance from the rezoning ordinance, plaintiffs appealed. In reversing the judgment on the ground the case came within an exception to the exhaustion of administrative remedies doctrine, the court of appeal said that the doctrine of exhaustion of administrative remedies has not hardened into inflexible dogma but contains its own exceptions citing prior California decisions. The court listed such exceptions as: (1) the subject matter of the controversy lies outside the administrative agency's jurisdiction; (2) when pursuit of an administrative remedy would result in irreparable harm; (3) when the administrative agency cannot grant an adequate remedy; and (4) when the aggrieved party can positively state what the administrative agency's decision in his particular case would be (*37 Cal. App. 3d 830, 834)* .

[b] Controversy Outside Jurisdiction of Administrative Agency

The factual background and statement of the court in ***Ogo Associates v. City of Torrance*** *(1974) 37 Cal. App. 3d 830, 112 Cal. Rptr. 761* are *set forth in § 67.51[3][a]*. The statement of the court in that case applicable to this point was dictum.

[c] Irreparable Harm

The factual background and statement of the court in ***Ogo Associates v. City of Torrance*** *(1974) 37 Cal. App. 3d 830, 112 Cal. Rptr. 761* are *set forth in § 67.51[3][a]*. The statement of the court in that case applicable to this point was dictum.

[d] Administrative Remedy Inadequate

Andal v. City of Stockton *(2006) 137 Cal. App. 4th 86, 40 Cal. Rptr. 3d 34* , involved a municipal ordinance that imposed a fee for use of the city's 911 emergency system. The plaintiffs were cell-phone companies and customers who sought a declaratory judgment invalidating the ordinance on constitutional grounds. The plaintiffs had paid the fees but did not pursue any administrative remedies before filing suit. The trial court sustained the defendant city's demurrer, holding that the plaintiffs had failed to exhaust their administrative remedies--specifically, the ordinance's administrative procedure for claiming refunds of fees paid.

The court of appeal reversed. The court held that the plaintiffs were not required to exhaust the refund procedure set up by the ordinance, because that procedure was inadequate to address the plaintiffs' constitutional challenge and request for a declaration that the entire ordinance was invalid. The ordinance provided only a procedure for obtaining refunds of fees incorrectly or illegally paid; it did not provide a mechanism for a comprehensive constitutional challenge to the entire structure under which the ordinance operated. Under the circumstances, the court of appeal concluded that the ordinance provided an inadequate administrative remedy, and therefore the exhaustion doctrine did not apply (*137 Cal. App. 4th 86, 91-94)* .

The factual background and statement of the court in ***Ogo Associates v. City of Torrance*** *(1974) 37 Cal. App. 3d 830, 112 Cal. Rptr. 761* are *set forth in § 67.51[3][a]*. The statement of the court in that case applicable to this point was dictum.

[e] Administrative Decision Known

The factual background of ***Ogo Associates v. City of Torrance*** *(1974) 37 Cal. App. 3d 830, 112 Cal. Rptr. 761* is *set forth in § 67.51[3][a]*. In reversing the judgment denying relief, the court of appeal pointed out that an exception to the exhaustion of administrative remedies exists where the aggrieved party can positively state what the administrative agency's decision in his particular case would be. Examining plaintiff's case, the court found that they could positively state that the city council would not have granted them a variance. The evidence was overwhelming that the city council rezoned the area because plaintiffs had planned to build their project there and that it was inconceivable the city council would grant a variance for the very project whose prospective existence brought about the enactment of rezoning. Not being a situation where the possibility of relief from a general policy exists because of the unusual circumstances of a particular case but instead a situation where the particular case gave birth to the ordinance's general policy, the court concluded that plaintiffs were not required to have pursued futile administrative remedies in order to invoke the jurisdiction of the courts.

[f] Statute (or Ordinance) Unconstitutional on Its Face

California v. Superior Court *(1974) 12 Cal. 3d 237, 115 Cal. Rptr. 497, 524 P.2d 1281* was an original writ proceeding in the Supreme Court arising out of a superior court action by developers against the California Coastal Zone Conservation Commission. The developers had originally been granted a permit to develop their coastal lands by a regional commission but the permit was subsequently denied by the state commission on appeal to it. The developers then filed their superior court action for a writ of mandate (both traditional and administrative), for declaratory and injunctive relief, and for damages for inverse condemnation. They also attacked the constitutionality of the California Coastal Zone Conservation Act of 1972 [*Pub. Res. Code §§ 27000-27650*], both on its face and as applied, pursuant to

which act the state commission had been formed. The state commission's general and special demurrers were overruled and the commission filed the present proceeding in the Supreme Court. In issuing a peremptory writ of mandate directing the trial court to vacate its order and enter a new order in conformity with the Supreme Court's opinion, the Supreme Court, insofar as the constitutional attack on the act was concerned, held that declaratory relief was an appropriate remedy by which to seek a judicial declaration that the act was facially unconstitutional. Although not ruling on the constitutionality of the act itself, the Court in rejecting the argument that the challenge should have been made before the commission said that it would be heroic to compel a party to appear before an administrative body to challenge its very existence and to expect a dispassionate hearing before its preponderantly lay membership on the constitutionality of the statute establishing its status and functions. It concluded that plaintiffs should have been permitted to challenge the constitutionality of the act at the proceeding even though it had failed to make the challenge before the commission at the time it applied for a permit (*12 Cal. 3d 237, 251)* .

[g] Action to Enforce Public Rights

Environmental Law Fund, Inc. v. Town of Corte Madera *(1975) 49 Cal. App. 3d 105, 122 Cal. Rptr. 282* was a combined proceeding in mandate and action for declaratory relief by a nonprofit corporation and two individual residents of defendant town against the town and real estate developers to determine the validity of both a conditional use permit issued to the developers by the town's planning commission to develop their 75 acres of land within the town limits and the commission's approval of the developers' tentative subdivision map of the area affected by the permit. The planning commission had granted the permit after at least two public hearings on the matter and after submission to it of a report of the potential impact of the proposed development prepared by a qualified firm of planning consultants employed by the town and paid for by the developers. However, plaintiffs did not take advantage of a municipal code provision authorizing appeal from the planning commission's action to the town council. The trial court in its judgment declared that the permit violated *Gov. Code § 65853*, establishing procedures for changes in zoning and that the municipal code provisions authorizing the permits conflicted with state law and, therefore, it ordered the town to rescind its action with respect to the permit and map. Defendants and real parties in interest appealed. In affirming the judgment the court of appeal, in answer to appellants' arguments that plaintiffs had failed to exhaust their administrative remedies by not appealing the decision of the planning commission to the town council, pointed out that plaintiffs, rather than suing to enforce privately held rights, were asserting rights they held as members of the public, or which the individual plaintiffs held as members of that substantial segment of the public which included the residents and property owners of the town, and that to apply the exhaustion doctrine would result in barring the public from redressing a public wrong in perpetuity and insulating the zoning action from judicial review. Since this result would be inconsistent with principles of waiver or res judicata and totally disserve the public interest, the court held that the failure of a private person to exhaust an administrative remedy against governmental action taken in an administrative proceeding to which he was not a party does not bar him from seeking judicial relief from such action by way of enforcing rights which he holds as a member of the affected public.

[h] No Administrative Remedy

Diaz v. Quitoriano *(1969) 268 Cal. App. 2d 807, 74 Cal. Rptr. 358* was a proceeding in mandate, rather than an action for declaratory relief. Petitioners Diaz, on behalf of themselves and the class they represented, sought issuance of a writ of mandate directed to a county welfare department and its director requiring them to advise all persons who had been denied benefits of their rights to apply for benefits under the categorical aid programs administered by the State Department of Social Welfare and to advise such persons of their right to request an administrative hearing and to appeal. The county department had not been giving this advice to applicants nor petitioners in denying their application for benefits, although the county department was required to do so by state law, which also gave the state department various powers, including legal action, to compel such compliance. The superior court, without issuing an alternative writ, dismissed the petition after it ordered a special hearing to determine the question of its jurisdiction and found that it lacked such jurisdiction because petitioners had failed to exhaust their administrative remedies by taking an administrative appeal from the denial of benefits. The court of appeal, in reversing the order denying the petition,

pointed out that no administrative remedy existed to secure the relief sought and that the order sought was mandated by statute. The court said that the rule that a party must exhaust his administrative remedies prior to seeking relief in the courts has no application in a situation where an administrative remedy is unavailable or inadequate (*268 Cal. App. 2d 807, 812)* . As to the power of the state department to compel the county department to comply with state law, the court explained that it is true that if the department determines there is a failure on the part of the county to comply with applicable provisions of the code or established regulations, *Welf. & Inst. Code § 10605* gives the department discretion to withhold state and federal funds from a county, or take over administration of the county social services program, or bring an action in mandamus or such other action in court as may be appropriate to compel compliance. However, this was not an administrative remedy within the exhaustion of remedies doctrine. It reasoned that California courts have repeatedly held that an official body's mere possession of a continuing supervisory or investigatory power does not itself suffice to afford an administrative remedy unless the statute or regulation under which that power is exercised establishes clearly defined machinery for the submission, evaluation, and resolution of complaints by aggrieved parties (*268 Cal. App. 2d 807, 812-813)* .

Imperial County Dep't of Soc. Servs. v. J.E. (In re Claudia E.) *(2008) 163 Cal. App. 4th 627, 77 Cal. Rptr. 3d 722* , was a juvenile dependency proceeding instituted by a county department of social services after it took two children into protective custody. In the proceeding, the children filed a motion seeking a declaratory judgment that the department's procedure of filing a supplemental dependency petition more than 48 hours after removal of the subject child was illegal (*see Welf. & Inst. Code § 387*). The trial court denied the motion for declaratory relief, reasoning that before seeking declaratory relief, the children or their counsel should have sought a writ of habeas corpus. The trial court said that to obtain declaratory relief, "you need to exhaust any possible remedies and that would have been the writ of habeas corpus" (*163 Cal. App. 4th 627, 632)* .

The court of appeal reversed, rejecting the trial court's holding that exhaustion of the possible remedy of habeas corpus was a prerequisite to declaratory relief. The court of appeal explained that the remedy of declarative relief is cumulative and does not restrict any other remedy (*Code Civ. Proc. § 1062*). Therefore, the mere circumstance that another remedy is available is an insufficient ground for refusing declaratory relief. Only when a trial court believes that *more* effective relief can and should be obtained by another procedure, and that for that reason declaratory relief will not serve a useful purpose, is the court justified in refusing declaratory relief because of the availability of another remedy (*163 Cal. App. 4th 627, 633-634)* .

[4] Additional Authorities

[a] Exceptions to Exhaustion Doctrine

Greener v. Workers' Comp. Appeals Bd. (1993) 6 Cal. 4th 1028, 25 Cal. Rptr. 2d 539 was a declaratory and injunctive relief action that challenged the constitutionality of legislation amending the Labor Code to terminate the power of the Workers' Compensation Appeals Board to award attorneys' fees and allow attorneys' fee liens for nonattorneys. The Board moved to quash service of the summons and to dismiss the action on the ground that, under *Labor Code § 5955*, only the Supreme Court and the court of appeal had personal and subject matter jurisdiction. The trial court granted plaintiffs' motion on the grounds of lack of subject matter jurisdiction. The court of appeal reversed, on the grounds that the action challenged no order of the Board and did not call for the superior court to interfere with the Board's duties.

The Supreme Court reversed the judgment of the court of appeal, concluding that, while *Labor Code § 5955* did not preclude plaintiffs from obtaining personal jurisdiction over the Board, it did prevent the superior court from having subject matter jurisdiction over the constitutional challenge. The Supreme Court noted in *dictum*, however, that such challenge could be brought by plaintiffs in the court of appeal under a petition for writ of mandate pursuant to *Code Civ. Proc. § 1085*, because it involved the constitutional validity of a statute (*6 Cal. 4th 1028, 1045-1046)* .

[b] Controversy Outside Jurisdiction of Administrative Agency

Los Angeles County v. Department of Social Welfare (1953) 41 Cal. 2d 455, 260 P.2d 41 was a proceeding in mandate, rather than an action for declaratory relief, by the county to compel the Department of Social Welfare to set aside orders with respect to the administration of county relief to indigents and to refrain from withholding state and federal funds due the county. Certain persons receiving monthly payments of old age security or needy blind aid complained to the State Social Welfare Board that the county was improperly treating such assistance as family income when computing the amount of county relief to be allowed to their indigent spouses. The board held a hearing after which it ordered the county to discontinue the practice and in the event of noncompliance directed the Department of Social Welfare to withhold from the county part of the state and federal funds to which the county would normally be entitled as reimbursement for the cost of aid to the aged and blind. The county had made a special appearance at the hearing for the sole purpose of contesting the jurisdiction of the board and did not apply for a rehearing, but commenced the mandate proceeding against the department and the board. The trial court granted the writ. In affirming the judgment, the Supreme Court said that it was not necessary for the county to apply for a rehearing before the board as a condition precedent to the maintenance of this proceeding since, as was contended by the county, the state board lacked jurisdiction over the subject matter of the proceedings (*41 Cal. 2d 455, 457, 459)* .

[c] Irreparable Harm

Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 109 P.2d 942 did not involve declaratory relief but was an original proceeding in prohibition sought to restrain the Court of Appeal of the Third Appellate District from enforcing a writ of mandate and temporary restraining order that court had issued against a state commission. The Supreme Court issued a writ of prohibition restraining the appellate court from taking any steps to enforce its writ of mandate and temporary restraining order on the ground that the court was acting in excess of its jurisdiction since the petitioners in that proceeding had not exhausted their administrative remedies prior to their seeking relief in the court of appeal. The Supreme Court, although acknowledging the exception to be irrelevant to the case before it, nevertheless found a right in California decisions to equitable relief to protect the property rights of a petitioner from irreparable injury immediately threatened by a void administrative act. It added that the soundness of this proposition could not be questioned (*17 Cal. 2d 280, 296-297)* .

Mountain View Chamber of Commerce v. Mountain View (1978) 77 Cal. App. 3d 82, 143 Cal. Rptr. 441 was an action by a chamber of commerce, four individual sign owners, a corporate sign owner, and a restaurant to enjoin enforcement of defendant's sign ordinance and for a declaration that the ordinance was unconstitutional as applied. The trial court denied the preliminary injunction and sustained defendant's demurrer to the complaint without leave to amend on the ground plaintiff's had failed to exhaust their administrative remedies. Although the court of appeal affirmed the judgment on the ground plaintiffs did not come within any of the exceptions to the exhaustion requirement, it nevertheless acknowledged that an exception to the exhaustion rule exists where the party would suffer irreparable injury were the administrative remedy required to be exhausted before the party could seek judicial relief. The court held plaintiffs did not, on the facts relied on, bring themselves within this exception since they had some nine and a half years in which to comply with the ordinance or pursue the administrative remedy (by applying for a variance) and had failed to do so (*77 Cal. App. 3d 82, 89-91)* .

Greenblatt v. Munro (1958) 161 Cal. App. 2d 596, 326 P.2d 929 was a proceeding in administrative mandate, rather than a declaratory relief action, to review an order suspending and revoking a liquor license. The licensee had been charged with and found by the administrative agency to have violated an administrative rule prohibiting licensees from knowingly permitting female employees to solicit alcoholic beverages and *Penal Code § 303a* prohibiting the loitering on the premises to beg for alcoholic drinks. The trial court denied the writ and the licensee appealed. On appeal the licensee argued, inter alia, that the evidence did not support the finding that he had violated the cited Penal Code section. Respondent contended that since the licensee had not raised this issue before the administrative agency or before the lower court, he had not exhausted his administrative remedies and was foreclosed from raising the objection in the appellate court. In rejecting this argument, the court of appeal said that the rule that questions not raised in the

trial court will not be considered on appeal is subject to exception where fundamental error or gross irregularity is involved and that the exhaustion of remedies rule likewise has its exceptions. One exception it noted was where irreparable injury will result if an administrative hearing is permitted to proceed and its orders made effective without prior judicial interference (*161 Cal. App. 2d 596, 605-606)* . In reversing the judgment with directions as to the count revoking the license on a dual finding of violation of the rule and the code section, which was patently inapplicable to the evidence presented, the court explained that the penalty applied for the count III violation was suspension of petitioner's license for 60 days while the penalty which had been applied to the court V violation of both the rule and Penal Code section for identically the same type of violation as that in count III was revocation of petitioner's license, the severest penalty that the department could impose. Thus, not to apply the exception to the exhaustion of remedy rule would cause petitioner to suffer the extreme penalty of losing his license, when if the true situation were known to the department, he might not have to do so (*161 Cal. App. 2d 596, 606-607)* .

[d] Administrative Remedy Inadequate

Endler v. Schutzbank (1968) 68 Cal. 2d 162, 65 Cal. Rptr. 297, 436 P.2d 297 was an action for declaratory, injunctive, and mandatory relief against the Commissioner of Corporations for interference with plaintiff's employment opportunities. After nearly 15 years in the finance business, plaintiff found himself unable to obtain employment in his chosen field because the commissioner having labeled him a criminal on the basis of unproved accusations, threatened disciplinary action against anyone who might employ him. The commissioner did initiate license revocation proceedings against plaintiff's most recent employer, who had refused to discharge plaintiff on request, and terminated those proceedings only after plaintiff had been discharged. Shortly thereafter, the commissioner offered to conduct an "informal hearing" on the charges against plaintiff with the understanding that the informal hearing was not undertaken pursuant to any specified statute, was not to be in accordance with administrative procedures applicable to formal hearings, and would be without prejudice to the rights of the parties to it. The commissioner indicated that unless he were favorably disposed after such a hearing, he would continue to threaten disciplinary action against any licensees who employed plaintiff. Plaintiff did not agree to subject himself to this proposed hearing, and the commissioner then embarked on a policy of directing its licensees not to employ plaintiff on threat of revocation or suspension of their personal property broker's license with the result that plaintiff was unable to obtain employment anywhere in the state with such a licensed broker or any other licensee of the Commissioner of Corporations. Plaintiff alleged that he would suffer irreparable injury if the commissioner were permitted to persist in directing others not to employ him. The commissioner demurred to the complaint on the ground it failed to state facts sufficient to constitute a cause of action. The demurrer was sustained without leave to amend and the action dismissed. On appeal, the Supreme Court held that the complaint stated a case for declaratory and injunctive relief. In answer to the argument that plaintiff had failed to exhaust administrative remedies, the court stated that administrative review does not constitute the sort of "remedy" which a party must exhaust before invoking the assistance of the courts unless the statute or regulation under which such review is offered establishes clearly defined machinery for the submission, evaluation, and resolution of complaints by aggrieved parties. The court added that the proffered hearing was a "heads-I-win, tails-you-lose procedure" in that if the hearing confirmed the commissioner's suspicions he would continue to induce brokers not to hire plaintiff and if the hearing vindicated the plaintiff the commissioner reserved the right to disregard it and proceed as though plaintiff had been found guilty. The court observed that it could not reconcile such a procedure with the *Fourteenth Amendment's* requirement of due process (*68 Cal. 2d 162, 168)* .

Eye Dog Foundation v. State Bd. of Guide Dogs for the Blind (1967) 67 Cal. 2d 536, 63 Cal. Rptr. 21, 432 P.2d 717 was an action for declaratory relief as to the constitutionality of statutes concerning guide dogs for the blind and for injunctive relief prohibiting enforcement of the statutes and interference with operation of plaintiff school which was engaged in training seeing eye dogs. It was contended that the subject statutes were unconstitutional both on their face and as applied to plaintiff school. The trial court found all the statutes constitutional, save a portion of one, and entered judgment accordingly, and both parties appealed. It appeared that an administrative investigation had been commenced into plaintiff's operations under the statutes before plaintiff filed its complaint but that no accusation had been filed against it until some two and one-half months after the action was commenced. Issues were thereafter joined in that

proceeding by plaintiff's filing a notice of defense. Although defendants suggested no administrative remedy which plaintiff could have initiated, it urged nevertheless that plaintiff had no standing to initiate the instant litigation because it had not exhausted its administrative remedies. In reply the Supreme Court stated that an investigation is not the equivalent of a formal accusation compelling plaintiff to seek relief from the administrative body before recourse to the courts, that since jurisdiction had not attached to the administrative body at the time plaintiff filed its complaint, plaintiff was not required to exhaust its remedies before that body. The Court found this to be particularly true since the legislation from which the board derives its existence was challenged in the proceeding and the trial court had properly taken jurisdiction of the controversy. The Court concluded, however, that all the statutes complied with constitutional requirements and were valid and reversed that portion of the judgment declaring a part of one statute unconstitutional (*67 Cal. 2d 536, 543-544)* .

[e] Administrative Decision Known

The factual background of *Mountain View Chamber of Commerce v. Mountain View (1978) 77 Cal. App. 3d 82, 143 Cal. Rptr. 441* is *set forth in § 67.51[4][c]*. In affirming the judgment of dismissal, the court of appeal, discussing *Ogo Associates v. City of Torrance (1974) 37 Cal. App. 3d 830, 112 Cal. Rptr. 761* , nevertheless acknowledged that an exception to the exhaustion rule exists where the pursuit of such remedy would be futile, that is, where it can be positively shown that the administrative agency's decision would be adverse to plaintiff (*77 Cal. App. 3d 82, 91-93)* .

Van Gammeren v. Fresno (1942) 51 Cal. App. 2d 235, 124 P.2d 621 was an action for injunctive, rather than for declaratory relief, to enjoin enforcement of a milk ordinance. The ordinance made it unlawful for any person to sell or deliver pasteurized milk or cream within defendant city unless it had been pasteurized within the city. The plaintiffs sold milk and cream within an area which was to be annexed to the city, but their pasteurization plant was located outside the city limits and outside the area to be annexed. The city's chief milk inspector notified plaintiffs that as soon as the annexation proceedings became final they would be required to discontinue delivery of milk to their customers within the annexed district for the sole reason that their pasteurization plants were not within the city limits. The area was annexed after commencement of the injunction action. Judgment was for plaintiffs, and defendants appealed arguing, inter alia, that the action had been premature because plaintiffs had failed to exhaust their administrative remedies under an ordinance giving them the right to apply for a permit and to appeal to the city authorities if their applications were denied. In reply to this argument, the court of appeal pointed out that the milk ordinance was prohibitive and prevented issuance of permits to plaintiffs and that since defendants had been enforcing the terms of the ordinance, had expressed the intention of enforcing them against plaintiffs, and were bound by them, if they were constitutional, the trial court was not required to assume that they would violate the terms of the ordinance before they were held void by the court. The court explained that when confronted by that ordinance which controlled the action of the city officials, it was apparent that applications for permits and appeals from adverse decisions would have been useless acts; the law does not require useless acts from litigants as prerequisites to seeking relief from the courts (*51 Cal. App. 2d 235, 239-240)* .

[f] Statute (or Ordinance) Unconstitutional on Its Face

The factual background of *Mountain View Chamber of Commerce v. Mountain View (1978) 77 Cal. App. 3d 82, 143 Cal. Rptr. 441* is *set forth in § 67.51[4][c]*. In affirming the judgment of dismissal, the court of appeal, although holding that the doctrine of exhaustion of administrative remedies applies to constitutional challenges of zoning ordinances, nevertheless, acknowledged the existence of an exception to this rule where the ordinance is challenged as being unconstitutional on its face as opposed to unconstitutional as applied (*77 Cal. App. 3d 82, 93-96)* .

[g] No Administrative Remedy

The factual background of *Environmental Law Fund, Inc. v. Corte Madera (1975) 49 Cal. App. 3d 105, 122 Cal. Rptr. 282* is *set forth in § 67.51[3][g]*. With respect to plaintiffs' attack on the planning commission's approval of the tentative

subdivision map, the developers on appeal argued that since the municipal code authorized appeal to the town council and plaintiffs had failed to appeal, they had failed to exhaust their administrative remedy barring judicial action as to that matter. The court of appeal responded by noting the trial courts' conclusion that respondents had done all that was required of them in pursuing their administrative remedies before attacking the subdivision map in court. It went on to hold that the municipal code authorizing the appeal by any interested party was preempted by former Gov. Code § 11552 [*now see Gov. Code § 66452.5*], which authorized local agencies to adopt ordinances permitting "any interested person adversely affected" to file a complaint with the governing body concerning any decision of the advisory agency, and since plaintiffs were not such persons, they had no administrative remedy available to them, and hence, the trial court properly considered the matter (*49 Cal. App. 3d 105, 114)* . [*See also Friends of Lake Arrowhead v. Board of Supervisors (1974) 38 Cal. App. 3d 497, 503-508, 113 Cal. Rptr. 539* (mandate proceeding)].

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Volume 6 Chapters 60-69 COSTS---to---DECLARATORY RELIEF
CHAPTER 67 DECLARATORY RELIEF
PART II. FORMS

6-67 California Points & Authorities § 67.52

§ 67.52 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10] for Declaratory Relief [Code Civ. Proc. § 1060]--Complaint Sufficiently Alleges Action for Declaratory Relief

[1] FORM Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10] for Declaratory Relief [Code Civ. Proc. § 1060]--Complaint Sufficiently Alleges Action for Declaratory Relief

[*Caption. See § 67.50.*]

THE COMPLAINT ALLEGES FACTS SHOWING THE EXISTENCE OF AN ACTUAL CONTROVERSY BETWEEN THE PARTIES RELATING TO THEIR RESPECTIVE LEGAL RIGHTS AND DUTIES AS AUTHORIZED BY SECTION 1060 OF THE CODE OF CIVIL PROCEDURE AND REQUESTS THAT THESE RIGHTS AND DUTIES BE ADJUDGED BY THE COURT. IT, THEREFORE, STATES FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION FOR DECLARATORY RELIEF.

A. Sufficiency of Complaint. A complaint for declaratory relief is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties in the situations provided in *Section 1060 of the Code of Civil Procedure* and requests that these rights and duties be adjudged by the court (*Maguire v. Hibernia Sav. & L. Soc'y (1944) 23 Cal. 2d 719, 728, 146 P.2d 673* ; *see Environmental Def. Project v. County of Sierra (2008) 158 Cal. App. 4th 877, 885-888, 70 Cal. Rptr. 3d 474*). If the complaint alleges sufficient facts to constitute an actual controversy, a general demurrer is not the appropriate means of testing the merits of the controversy, since the plaintiff is entitled to a declaration of the parties' rights, even if that declaration turns out to be adverse to the plaintiff (*Levi v. O'Connell (2006) 144 Cal. App. 4th 700, 706, 50 Cal. Rptr. 3d 691*).

B. When Declaratory Relief Must Be Granted. Declaratory relief must be granted when the facts justifying that course are sufficiently alleged in the complaint. That is, when a complaint sets forth facts and circumstances showing that a declaratory adjudication is entirely appropriate, the trial court may not properly refuse to assume jurisdiction, and, if it does enter a dismissal, it will be directed by an appellate court to entertain the action (*Columbia Pictures Corp. v. DeToth (1945) 26 Cal. 2d 753, 762, 161 P.2d 217*).

[*Optional*] **D. Applicability of Rule of Liberal Construction of Pleadings.** Declaratory relief is a broad remedy and the rule that pleadings are to be liberally construed, *Section 452 of the Code of Civil Procedure*, is particularly

applicable to one for declaratory relief (*Tiburon v. Northwestern P. R. Co. (1970) 4 Cal. App. 3d 160, 170, 84 Cal. Rptr. 469*).

[*Optional*] **E. Remedies Cumulative.** The remedies provided by the declaratory relief statute are cumulative (*Code Civ. Proc. § 1062*).

[*Optional*] **F. Other Relief.** A complaint for declaratory relief may seek other relief in the same action in addition to a declaration of rights and duties of the parties (*Code Civ. Proc. § 1060*).

[*Optional*] **G. Completed Wrong.** The fact that plaintiff is entitled to other relief for a completed wrong arising out of the same facts alleged in the complaint does not deprive the court of jurisdiction to grant declaratory relief where there is a reasonable expectation that the wrong will be repeated in the future; that is, declaratory relief will not be denied where all the issues involved in the declaratory relief action cannot be equally resolved in an action on the underlying claim (*Southern Counties Gas Co. v. Ventura Pipeline Constr. Co. (1971) 19 Cal. App. 3d 372, 380-381, 96 Cal. Rptr. 825*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be used to oppose a general demurrer either on the ground that the court lacks jurisdiction of the subject of the cause of action alleged in the complaint [*see § 67.20*] or on the ground that the complaint fails to state facts sufficient to constitute a cause of action [*see §§ 67.21 -67.26*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Sufficiency of Complaint

Maguire v. Hibernia Sav. & L. Soc'y *(1944) 23 Cal. 2d 719, 146 P.2d 673* involved four actions for declaratory relief by successors in interest to alleged members of and depositors in defendant savings and loan society. The trial court sustained general demurrers to the complaints and granted motions of some of the individual defendants to dismiss the action. Judgments were entered for defendants and plaintiffs appealed, submitting the appeal on a single set of briefs. In reversing the judgments, the Supreme Court said that complaint for declaratory relief is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties under a written instrument and requests that these rights and duties be adjudged by the court (*23 Cal. 2d 719, 728)* .

The plaintiff in ***Environmental Def. Project v. County of Sierra*** *(2008) 158 Cal. App. 4th 877, 70 Cal. Rptr. 3d 474* ,

was an environmental organization that sued a county, seeking a judicial declaration that the county's "streamlined" zoning procedure violated state law. Generally, California's Planning and Zoning Law, when a zoning ordinance or an amendment to a zoning ordinance is proposed, the local planning commission must hold a public hearing (*Gov. Code § 65854*). On receipt of the recommendation of the planning commission, the local legislative body must hold a public hearing (*Gov. Code § 65856*). Notice of the legislative body's public hearing must be given at least 10 days before the hearing (*Gov. Code §§ 65856(b), 65090*) and must contain a general explanation of the matter to be considered (*Gov. Code § 65094*). At issue in this case was whether the defendant county's so-called "streamlined" zoning process, in which the county gave notice of the legislative body's hearing before the planning commission had made its recommendation on the proposed zoning ordinance or amendment to the zoning ordinance, comported with the Planning and Zoning Law. The trial court entered summary judgment in favor of the plaintiff, holding that the Planning and Zoning Law requires a local legislative body to wait until it has received the planning commission's recommendation before issuing the 10-day notice of the legislative body's public hearing. The court of appeal affirmed (*158 Cal. App. 4th 877, 883-884)* .

As a threshold matter, the court of appeal considered whether declaratory relief was appropriate in this case. The defendant county contended that there was no "actual controversy" between the parties, which is a prerequisite to declaratory relief under *Code of Civil Procedure Section 1060*, because the parties' disagreement over the specific project that prompted this suit (a landowner's application to subdivide his property) had been settled before the trial court entered summary judgment on the legality of the streamlined zoning procedure. The court of appeal rejected this argument, noting that the "actual controversy" language in Section 1060 encompasses a probable future controversy relating to the legal rights and duties of the parties, so long as that probable future controversy is ripe for adjudication. The court explained that there was an actual controversy in this case, since the parties clearly disagreed over whether the local planning commission's recommendation had to be received before the 10-day notice of the legislative body's hearing could be issued. Moreover, the defendant county made it clear that it intended to continue with the streamlined zoning procedure in the future (*158 Cal. App. 4th 877, 885-886)* . Further, the controversy was ripe for adjudication, because the defendant's conduct in this case clearly delineated how the defendant would interpret and apply the notice provisions of the Planning and Zoning Law in the future (*158 Cal. App. 4th 877, 886-887)* . Accordingly, the court of appeal concluded that the plaintiff had established an "actual controversy" as a matter of law, and the trial court did not err in considering the request for declaratory relief (*158 Cal. App. 4th 877, 887-888)* .

In ***Levi v. O'Connell*** *(2006) 144 Cal. App. 4th 700, 50 Cal. Rptr. 3d 691* , the mother of an extremely gifted child filed suit, on behalf of herself and as guardian ad litem for the child, against the California Department of Education. The complaint sought a declaration that, pursuant to the California Constitution and the Compulsory Education Law (*see Cal. Const., art. IX, § 5*; *Educ. Code § 48200 et seq.*), the Department was obligated to pay for the child's college education until age 16. The trial court sustained the Department's demurrer without leave to amend, and the plaintiffs appealed.

The court of appeal held that the trial court erred in sustaining the demurrer. The court explained that the fundamental basis of declaratory relief is the existence of an actual, present controversy over a proper subject. In this case, the complaint alleged sufficient specific facts regarding the child's educational circumstances to establish an actual, current controversy over whether the Department's constitutional and statutory obligation to fund an appropriate education included a college education for an extremely gifted child. The court rejected the Department's argument that the plaintiff had not pled a cause of action for declaratory relief because the plaintiffs had no right to, and the Department had no duty to provide, the education sought. The court noted that, strictly speaking, a general demurrer is not an appropriate means of testing the merits of the controversy in a declaratory relief action, because the plaintiff is entitled to a declaration of the parties' rights "even if it be adverse" (*144 Cal. App. 4th 700, 706)* .

Although it concluded that the trial court had erred in sustaining the demurrer, the court of appeal did not remand the case. Instead, the appellate court found it appropriate to proceed directly to the merits of the case. The court of appeal explained that if the merits issue is purely one of law, and the appellate court agrees with the trial court's resolution of

the issue against the plaintiff, the appellate court need not reverse the trial court's dismissal and remand the case for a trial. Instead, the appellate court may consider the merits, and its judgment will constitute the declaration of the parties' rights concerning the matter in controversy (*144 Cal. App. 4th 700, 706)* . On the merits, the court of appeal concluded that the plaintiffs in this case did not have a constitutional or statutory right to a free college education. Accordingly, the court affirmed the lower court's judgment of dismissal (*144 Cal. App. 4th 700, 706-711)* .

[b] When Declaratory Relief Must Be Granted

Columbia Pictures Corp. v. DeToth *(1945) 26 Cal. 2d 753, 161 P.2d 217* was an action for a declaration of the rights and duties of the parties under an oral employment contract. The complaint alleged that on June 6, 1943, plaintiff orally engaged the services of the defendant as a motion picture director for a term of one year commencing June 7, 1943, at a specific salary with six successive renewal options for one year periods; that on June 7, 1943, defendant asked for a deferment of the commencement date to a date subsequent to July 19, 1943 because of certain business commitments he had and agreed that if plaintiff consented to the modification and would give him work on a temporary basis during the period of deferment, he would at any time after July 20th and after completion of the temporary employment enter a written contract with plaintiff evidencing the extension of time for commencement of his services under the oral contract; that plaintiff in reliance on defendant's representations agreed to the deferment, gave defendant temporary work of a higher caliber and at a higher rate of compensation than it would have done in the absence of a contract; and that on completion of the temporary work defendant refused to perform any further services for plaintiff or to reduce the oral contract to writing. The complaint alleged an actual controversy between the parties and sought judgment fixing the rights and duties of the parties under the contract and renewal options as modified and extended and declaring the contract to be a valid and subsisting obligation. Defendant's general and special demurrers to the complaint were sustained without leave to amend, and plaintiff appealed from the subsequent judgment of dismissal. After holding that, as pleaded, the statute of frauds [*Civ. Code § 1624(a)*] did not bar the action, the Supreme Court observed that the allegations of the complaint left no doubt of the asserted existence of an actual controversy between the parties and that at the time the complaint was filed, the period of the original contract had about three months to run (*26 Cal. 2d 753, 760)* . The Court said that when a case is properly before the trial court under a complaint which is legally sufficient and sets forth facts and circumstances showing that a declaratory adjudication is entirely appropriate, the trial court may not properly refuse to assume jurisdiction; if it does enter a dismissal, it will be directed by an appellate court to entertain the action. It emphasized that declaratory relief must be granted when the facts justifying that course are sufficiently alleged. Holding that the complaint was sufficient and therefore not subject to a general demurrer and that it was error to sustain a special demurrer without leave to amend when the complaint is good as against a general demurrer, the Court reversed the judgment (*26 Cal. 2d 753, 762)* .

[c] Applicability of Rule of Liberal Construction of Pleadings

Code Civ. Proc. § 452 provides that in the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties.

Tiburon v. Northwestern P. R. Co. *(1970) 4 Cal. App. 3d 160, 84 Cal. Rptr. 469* was an action for declaratory and injunctive relief by the city against the railroad and others with respect to the leasing and conveyance of a 49-acre parcel of the railroad's real property which the city alleged had been divided and subdivided in violation of state and local law. The trial court sustained defendant's demurrers without leave to amend and denied the city's motion to reconsider and for leave to file a supplementary and first amended complaint. Plaintiff appealed from the subsequent judgment of dismissal. In reversing the judgment, the court of appeal, quoting from *Burke v. City & County of San Francisco (1968) 258 Cal. App. 2d 32, 65 Cal. Rptr. 539* said that declaratory relief is a broad remedy, and the rule that a complaint is to be liberally construed is particularly applicable to one for declaratory relief (*4 Cal. App. 3d 160, 170)* .

[d] Remedies Cumulative

Code Civ. Proc. § 1062 in part provides that the remedies provided by *Code Civ. Proc. § 1060 et seq.*, are cumulative, and are not to be construed as restricting any remedy, provisional or otherwise, provided by law for the benefit of any party to the action.

Code Civ. Proc. § 1062 effectively carves out an exception to the bar of res judicata (claim preclusion), but this exception applies only if the plaintiff's initial action seeks purely declaratory relief. Thus, if the plaintiff decides to seek any additional, coercive relief in a declaratory relief action, the ordinary rules of res judicata apply, and the judgment will bar a subsequent action for any further coercive relief arising from the same cause of action (*Mycogen Corp. v. Monsanto Co. (2002) 28 Cal. 4th 888, 897-904, 123 Cal. Rptr. 2d 432, 51 P.3d 297* [applying exception to res judicata principles in case involving request for coercive relief would create uncertain preclusion rules and would threaten to swallow rule against claim splitting]). Moreover, even if the initial action seeks purely declaratory relief, a judgment in that action will have res judicata effect as to issues and claims expressly and unambiguously declared in the judgment (*Aerojet-General Corp. v. American Excess Ins. Co. (2002) 97 Cal. App. 4th 387, 401-414, 117 Cal. Rptr. 2d 427*).

The court's ability to combine otherwise appropriate declaratory relief with other forms of relief does not justify the issuance of a "declaratory" judgment that merely specifies the amount of money the defendant owes the plaintiff, when there is no actual controversy as to the amount owed (*County of San Diego v. State (2008) 164 Cal. App. 4th 580, 608, 79 Cal. Rptr. 3d 489*).

[e] Other Relief

Code Civ. Proc. § 1060 provides that a plaintiff in a declaratory relief action may ask for a declaration of rights or duties, either alone or with other relief, and that the court may make a binding declaration of such rights or duties, whether or not further relief is or could be claimed at the time.

[f] Completed Wrong

Southern Counties Gas Co. v. Ventura Pipeline Constr. Co. *(1971) 19 Cal. App. 3d 372, 96 Cal. Rptr. 825* was an action by the gas company to recover $1,026.30 as the cost of repairing underground utility pipelines installed by defendant and for a declaratory judgment determining the rights and duties of the parties under a series of contracts. Pursuant to these contracts, defendant had, over a period of years, installed the underground pipelines, including the ones for which costs of repair were sought, for use by plaintiff in the transmission of natural gas. Contrary to contract specifications, defendant had in several instances failed to apply the required protective wrapping, thus hastening corrosion of the pipes. Leaks subsequently developed and were repaired by plaintiff's employees. Claiming it was entitled under the contracts to be indemnified, plaintiff demanded reimbursement of these costs, but defendant refused to pay. Each party relied on a different provision in the contracts to support its position. The trial court awarded plaintiff the claimed costs and declared the rights and duties of the parties under the contracts. Defendant appealed, contending that the trial court did not have jurisdiction of the claim for reimbursement (amount of which was within jurisdiction of lower court) and that declaratory relief should not be granted where all the issues involved can be equally resolved in the plenary action (for damages for breach of contract). In rejecting the argument as applied to the facts of the case and distinguishing *Bachis v. State Farm Mut. Auto. Ins. Co. (1968) 265 Cal. App. 2d 722, 71 Cal. Rptr. 486* , and *Travers v. Louden (1967) 254 Cal. App. 2d 926, 62 Cal. Rptr. 654* , the court of appeal noted that a gas leak due to the causes alleged in the complaint would not become noticeable for from three to five years after installation of the pipes, at defendant had since 1961 installed thousands of feet of underground pipeline for plaintiff in connection with a multitude of jobs, that the leaks discovered through the time of trial related to installations made during the years 1962-1964, and that absent a physical examination and inspection of the underground lines, no way existed whereby it could be said that other deficiencies would not present problems in the future. The court observed that plaintiff not only had current claims for indemnification as to corrosion damage previously discovered, but also the prospect, if not the likelihood, that additional incidents would continue to reoccur and hence the matter presented a continuing controversy ripe for decision. The court concluded that where there is a reasonable expectation that the wrong, if any, will be repeated, the

controversy does not present mere academic questions resulting from mootness or other considerations and that declaratory relief in such a case should not be denied (*19 Cal. App. 3d 372, 381)* .

[4] Additional Authorities

[a] Sufficiency of Complaint

In *Longshore v. Ventura County (1979) 25 Cal. 3d 14, 157 Cal. Rptr. 706, 598 P.2d 866* , at issue in pertinent part was not whether plaintiffs had stated a cause of action for declaratory relief but whether the trial court had erred in sustaining defendant's special demurrer to the cause of action for declaratory relief on the ground that it was fatally uncertain. In their third cause of action, plaintiffs sought declaratory relief on behalf of themselves and all other Ventura County deputy sheriffs similarly situated who allegedly had acquired overtime credits prior to July 1961. They alleged that rights to compensation for these credits arose under ordinances then applicable, and that these rights were disputed. In support of the trial court's action, defendants argued that the specific ordinances applicable to each plaintiff were not identified, and the hours of overtime worked by each deputy sheriff under each of the numerous salary laws were not described with particularity. However, the Supreme Court reversed, commenting that a complaint for declaratory relief is sufficient if it alleges facts demonstrating the existence of an actual controversy between the parties about their legal rights and duties and requests adjudication of the controversy. The complaint, the Court said, need only apprise the defendant reasonably of the nature, source, and extent of plaintiff's complaint. The Court held that the complaint satisfied this requirement and pointed out that defendants could readily determine the specific ordinances and salary laws applicable to each plaintiff by reference to their own employment records, ruling that a demurrer for uncertainty will not lie for failure to particularize matters presumptively within the knowledge of the defendant.

Wellenkamp v. Bank of America (1978) 21 Cal. 3d 943, 148 Cal. Rptr. 379, 582 P.2d 970 was an action for declaratory and injunctive relief by a vendee of real property against the bank which was the holder of the vendors' note and beneficiary under the trust deed securing the note. The vendee sought to restrain enforcement of the "due-on" clause in the trust deed and for a declaration that exercise of the clause, without any showing that the beneficiary's security had been impaired as a result of the sale of the property to plaintiff, constituted an unreasonable restraint on alienation in violation of California law. The sellers had originally financed their purchase of the property by a loan from defendant bank at eight percent interest giving back their promissory note secured by a trust deed containing the "due-on" clause. When the sellers sold the property, plaintiff paid the sellers the amount of their equity in the property and agreed to assume the balance of their loan from the bank. Properly notified, the bank returned plaintiff's check for the payment then due, notifying plaintiff of its right to accelerate on transfer of the property but offering to waive this right in return for plaintiff's agreement to assume the sellers' loan at an increased rate of interest to nine and one-quarter percent. Plaintiff failed to accede to the bank's demand, and the bank filed a notice of default and election to sell under the trust deed. Plaintiff then filed for injunctive and declaratory relief. The trial court granted plaintiff's motion for a preliminary injunction but, subsequently after hearing, sustained defendant bank's general demurrer to the complaint without leave to amend and entered a judgment dismissing plaintiff's complaint. Plaintiff appealed. In reversing the judgment, the Supreme Court said that a complaint for declaratory relief is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the parties under a written instrument or with respect to property and requests that the rights and duties of the parties be adjudged by the court (*21 Cal. 3d 943, 947)* . The Court explained that the complaint alleged a controversy over the legal rights and duties of plaintiff and defendant under the deed of trust containing a "due-on" clause. Plaintiff contended that this clause was unenforceable absent a showing by the lender of impairment to its security; whereas defendant contended that it would automatically enforce the clause without any further showing. The Court found it clear that the complaint showed the existence of an actual controversy sufficient to state a cause of action for declaratory relief (*21 Cal. 3d 943, 947)* .

Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 305 P.2d 20 was an action by successors in interest to alleged members of defendant bank's predecessor for declaratory relief as to their rights if any in defendant bank. Defendant's general demurrer to the complaint was sustained without leave to amend, and plaintiffs appealed from the ensuing

judgment. In reversing the judgment, the Supreme Court said that it is the general rule that in an action for declaratory relief, the complaint is sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties under a contract and requests that the rights and duties be adjudged (*47 Cal. 2d 540, 549-550)* . This rule is also set forth in *Columbia Pictures Corp. v. DeToth (1945) 26 Cal. 2d 753, 161 P.2d 217* , the factual background of which is *set forth in § 67.52[3][b]*.

The factual background of *Southern Counties Gas Co. v. Ventura Pipeline Constr. Co. (1971) 19 Cal. App. 3d 372, 96 Cal. Rptr. 825* is *set forth in § 67.52[3][f]*. In affirming the judgment for plaintiff, the court of appeal quoted the statement set forth in quotes from *Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 305 P.2d 20 , above*.

The procedural background of *Tiburon v. Northwestern P. R. Co. (1970) 4 Cal. App. 3d 160, 84 Cal. Rptr. 469* is *set forth in § 67.52[3][c]*. The court of appeal, in reversing the judgment.

Howard v. Howard (1955) 131 Cal. App. 2d 308, 280 P.2d 802 was a declaratory relief action by plaintiff against his wife and a bank as guardian of her estate. The bank's demurrer to the complaint was sustained without leave to amend, and the wife's demurrer was sustained with leave to amend. Plaintiff filed an amended complaint in which it was alleged, inter alia, that prior to marriage he and his wife entered into an oral contract by the terms of which she agreed that if he gave up the employment in which he was then engaged and performed such services with respect to her business affairs and property and in attendance on her as she might call on him from time to time during their marriage to perform, she would provide for his care, support, and maintenance from the time he gave up his employment until his death. The complaint alleged that on marriage, plaintiff terminated his employment and duly carried out his obligations under the oral contract, and that he was ready, willing, and able to continue to perform his obligations under it; that some 15 years after marriage wife was adjudicated an incompetent and the bank was appointed guardian of her estate; that in the guardianship proceeding, and subsequently, orders were made directing the bank to pay him specified monthly sums from his wife's estate; that these sums were insufficient; that an actual controversy existed between the parties in that plaintiff contended that the oral contract was entered into by the parties, that it still exists, that under its provisions plaintiff was entitled during the rest of his lifetime to receive from his wife or her estate reasonable care, including medical and dental care, and support and maintenance in accordance with the standard of living maintained by himself and his wife during their marriage prior to the time she became incompetent. It alleged also that his wife disputed the existence of the oral contract and denied that she had any obligation or that plaintiff had any right whatsoever thereunder, and that bank also disputed the existence of the oral contract and denied any obligation by his wife or right by him thereunder. The wife's demurrer to this complaint was sustained without leave to amend, and judgment bed on the two orders sustaining the demurrers without leave to amend was entered. Plaintiff appealed from the judgment but on appeal sought only reversal as to wife. In reversing as to wife and affirming as to bank, the court of appeal quoted the statement set forth in *Columbia Pictures Corp. v. DeToth (1945) 26 Cal. 2d 753, 760, 161 P.2d 217* , in § 67.52[3][b].

Foster v. Masters Pontiac Co. (1958) 158 Cal. App. 2d 481, 322 P.2d 592 was an action by the buyer against the seller of a new car for declaratory relief as to the validity of the contract to purchase the car and for money had and received. The trial court sustained a special and general demurrer to the third amended complaint without leave to amend, and plaintiff appealed from the subsequent judgment of dismissal. In concluding that the complaint stated facts sufficient to constitute a cause of action for declaratory relief and reversing the judgment with directions to the trial court to overrule the demurrer, the court of appeal said that a complaint seeking declaratory relief must allege facts which justify the declaration of rights or obligations in respect of a matter of controversy, the controversy being actual within the purview of *Code Civ. Proc. § 1060* and involving justiciable rights, and that this requirement is met by allegations showing a controversy respecting the rights of the parties to a written instrument, accompanied by a request that these rights be determined and declared. The court found that the complaint presented the existence of an actual controversy as to which document ("Car Order" or "Conditional Sales Contract"), if either, was the contract, as to the validity of the alleged contract, and as to the justification of plaintiff's excuses for nonperformance (*158 Cal. App. 2d 481, 488-489)* .

[b] When Declaratory Relief Must Be Granted

The factual background of *Wellenkamp v. Bank of America (1978) 21 Cal. 3d 943, 148 Cal. Rptr. 379, 582 P.2d 970* is *set forth in § 67.52[4][a]*. In that case, the Supreme Court said that if the requirements as to what must be set forth in a declaratory relief complaint are met and no basis for declining declaratory relief appears, the court should declare the rights of the parties (*21 Cal. 3d 943, 947)* .

Walker v. County of Los Angeles (1961) 55 Cal. 2d 626, 12 Cal. Rptr. 671, 361 P.2d 247 was a representative action by five county employees seeking declaratory relief (to have the court ascertain and declare the prevailing wage rate paid employees in private industry) and for a writ of mandate (to compel the county to adopt an ordinance providing at least equal salary payments to county civil service employees as required by the county charter). It was contended that in adopting a salary ordinance the county board of supervisors did not comply with charter procedural requirements. The charter provided that in fixing compensation to be paid to persons under the classified civil service, the Board of Supervisors must provide a salary or wage at least equal to the prevailing salary or wage for the same quality of service rendered to private persons, firms, or corporations under similar employment if the prevailing salary or wage can be ascertained. For a number of years the county had participated with other political entities in a joint survey and held hearings to determine the prevailing wage for comparable work in private industry. But in the year in question, the board had declined to apply the annual survey in fixing salaries for the next fiscal year and, as shown by the record of their proceedings, after much disagreement among the supervisors, voted three to one to continue the preceding year's wage schedule. The trial court found that the board had not complied with charter requirements, rendered a declaratory judgment setting forth the rights and duties of the parties, and granted a peremptory writ of mandate requiring the board to comply. On appeal defendants argued that the case was not a proper one for declaratory relief because there was no justiciable controversy between the parties. The Supreme Court, in modifying the judgment to delete one of several paragraphs declaring the rights and duties of the parties, and affirming the judgment as modified said that the record showed that the parties were in fundamental disagreement as to whether the charter required the "ascertainment" of a prevailing wage minimum as a fact-finding premise for the enactment of the prescribed salary ordinance for civil service employees, that declaratory relief must be granted when facts justifying that course are sufficiently alleged, and that the purpose of declaratory relief is to liquidate uncertainties and controversies which might result in future litigation (*55 Cal. 2d 626, 636-637)* .

The factual background of *Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 305 P.2d 20* is *set forth in § 67.52[4][a]*. The Supreme Court said that when a complaint for declaratory relief is sufficient, the court must declare the rights of the parties (*47 Cal. 2d 540, 550)* .

LePage v. Oakland (1970) 13 Cal. App. 3d 689, 91 Cal. Rptr. 806 was a class action by a city police officer, individually and on behalf of others similarly situated, and by the chairman of an association representing uniformed members of the defendant city's police and fire departments for a declaratory judgment as to the right of such members under the city charter to have time spent in service-connected disability retirement credited towards years-in-service retirement eligibility and for a writ of mandate to compel the city to count all such time as a credit towards years-of-service retirement time. The trial court granted declaratory relief and a peremptory writ of mandate, and defendants appealed. Holding that the requirement had a justiciable controversy must be definite and concrete, and touch the legal relations of parties having adverse interests, was met and that declaratory relief must be granted when the facts justifying that course are sufficiently alleged, the court of appeal concluded that the trial court did not abuse its discretion in granting declaratory relief, and affirmed the judgment (*13 Cal. App. 3d 689, 693)* .

The procedural background of *Tiburon v. Northwestern P. R. Co. (1970) 4 Cal. App. 3d 160, 84 Cal. Rptr. 469* is *set forth in § 67.52[3][a]*. The court of appeal, quoting from *Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 550, 305 P.2d 20* , *above*, said that when the complaint states a cause of action for declaratory relief, the court must declare the rights of the parties (*4 Cal. App. 3d 160, 170)* . The court quoted the rule set out in Paragraph B from *Columbia Pictures Corp. v. DeToth (1945) 26 Cal. 2d 753, 762, 161 P.2d 217* , discussed in *§ 67.52[3][b]* (*4 Cal. App. 3d 160,*

173) .

The procedural background of *Foster v. Masters Pontiac Co. (1958) 158 Cal. App. 2d 481, 322 P.2d 592* is *set forth in § 67.52[4][a]*. In reversing the judgment of dismissal with directions to overrule the demurrer to the complaint, the court of appeal said that declaratory relief must be granted when the facts justifying that course are sufficiently alleged (*158 Cal. App. 2d 481, 486)* . The court quoted the rule set out in Paragraph B from *Columbia Pictures Corp. v. DeToth (1945) 26 Cal. 2d 753, 762 161 P.2d 217* , quoted and discussed in *§ 67.52[3][b]* (*158 Cal. App. 2d 481, 486-487)* .

[c] Applicability of Rule of Liberal Construction of Pleadings

The procedural background of *Foster v. Masters Pontiac Co. (1958) 158 Cal. App. 2d 481, 322 P.2d 592* is *set forth in § 67.52[4][a]*. In reversing the judgment of dismissal with directions to the trial court to overrule the demurrer, the court of appeal said that the rule that a complaint is to be liberally construed is particularly applicable to one for declaratory relief (*158 Cal. App. 2d 481, 486)* .

[d] Remedies Cumulative

The factual background of *Columbia Pictures Corp. v. DeToth (1945) 26 Cal. 2d 753, 161 P.2d 217* is *set forth in § 67.52[3][b]*. In that case, the Supreme Court pointed out that the remedies provided by the declaratory relief statute are cumulative (*26 Cal. 2d 753, 761)* .

[e] Other Relief

The factual background of *Columbia Pictures Corp. v. DeToth (1945) 26 Cal. 2d 753, 161 P.2d 217* is *set forth in § 67.52[3][b]*. In that case, the Supreme Court pointed out that declaratory relief may be asked alone or with other relief (*26 Cal. 2d 753, 761)* .

California Points & Authorities

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Volume 6 Chapters 60-69 COSTS---to---DECLARATORY RELIEF
CHAPTER 67 DECLARATORY RELIEF
PART II. FORMS

6-67 California Points & Authorities § 67.53

§ 67.53 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10] for Declaratory Relief [Code Civ. Proc. § 1060]--Complaint as Not Insufficient on Ground of Lack of Justiciable Controversy Because It Fails to Allege Breach or Violation of Obligation

[1] FORM Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10] for Declaratory Relief [Code Civ. Proc. § 1060]--Complaint as Not Insufficient on Ground of Lack of Justiciable Controversy Because It Fails to Allege Breach or Violation of Obligation

[*Caption. See § 67.50.*]

A COMPLAINT FOR DECLARATORY RELIEF DOES NOT FAIL TO STATE A CAUSE OF ACTION BECAUSE IT DOES NOT ALLEGE THAT THERE HAS BEEN A BREACH OR VIOLATION OF THE OBLIGATION WITH RESPECT TO WHICH A DECLARATION OF THE RIGHTS AND DUTIES OF THE PARTIES IS SOUGHT.

A. Breach Not Required. A declaratory relief action may be maintained before there has been any breach of the obligation in respect to which the declaration is sought (*Code Civ. Proc. § 1060*).

[*Optional*] **B. Nonmatured Claim.** An action for declaratory relief is proper in the case of an actual controversy between the parties with respect to a claim that has not yet matured is (*Mascarin Professional Pharmacy v. Hart (1970) 13 Cal. App. 3d 462, 465, 91 Cal. Rptr. 560*).

[*Optional*] **C. Statute.** A person is not required to risk criminal prosecution by violating a statute before seeking a judicial declaration of its constitutionality, meaning, or applicability (*Zeitlin v. Arnebergh (1963) 59 Cal. 2d 901, 905-906, 31 Cal. Rptr. 800, 383 P.2d 152*).

[*Optional*] **D. Ordinance.** A person is not required to risk criminal prosecution by violating an ordinance before seeking a judicial declaration of its constitutionality, meaning, or applicability (*Wollam v. Palm Springs (1963) 59 Cal. 2d 276, 279, 29 Cal. Rptr. 1, 379 P.2d 481*).

[*Optional*] **E. Administrative Regulation.** An "interested person" within the meaning of *Section 11350 of the Government Code* authorizing declaratory relief to test the validity of administrative regulations, is not required to first

violate the regulation in order to obtain a judicial declaration as to its validity (*Chas. L. Harney, Inc. v. Contractors' Bd. (1952) 39 Cal. 2d 561, 564, 247 P.2d 913* (construing former Gov. Code § 11440).

[*Optional*] **F. Contractual Rights and Duties.** A court may issue declaratory relief to resolve an actual controversy over the parties' rights and duties under their contract, even if the declaration judgment does not resolve any particular cause of action for a coercive remedy (*Supervalu, Inc. v. Wexford Underwriting Managers, Inc. (2009) 175 Cal. App. 4th 64, 81, 96 Cal. Rptr. 3d 316*).

[*Optional*] **G. Determination of Undisputed Preliminary Matter Is Proper.** A trial court may properly grant declaratory relief on a question that is not in dispute when it is necessary for the court to determine the question as a preliminary matter to an issue for which declaratory relief is proper (*see* *Application Group, Inc. v. Hunter Group (1998) 61 Cal. App. 4th 881, 893-894, 72 Cal. Rptr. 2d 73*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a general demurrer to a complaint for declaratory relief on the ground the complaint fails to state facts sufficient to constitute a cause of action in that no justiciable controversy is alleged [*see § 67.24*] when the alleged lack of justiciability results from plaintiff's failure to have alleged a breach or violation of the obligation by either party with respect to which the declaration is sought. Although Paragraphs B through F are labeled optional, one of them should be used if applicable. If none is applicable, then a paragraph stating the nonlisted rule and citing the authority for it should be inserted in lieu of the paragraphs listed.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

This form may, with appropriate modifications, be used in opposition to a nonstatutory motion for judgment on the pleadings, a nonstatutory motion to dismiss, or a motion for summary judgment predicated on the argument that declaratory relief does not lie absent a breach of the obligation with respect to which the declaration is sought.

[3] Discussion of Authorities

[a] Breach Not Required

Code Civ. Proc. § 1060 authorizes an action for declaratory relief in cases of actual controversy between the parties and provides that the declaration of the rights and duties of the parties may be had before there has been any breach of the obligation in respect to which the declaration is sought.

[b] Nonmatured Claim

Mascarin Professional Pharmacy v. Hart *(1970) 13 Cal. App. 3d 462, 91 Cal. Rptr. 560* was an action by a pharmacy for declaratory relief against its former employee for indemnification for a judgment taken against the pharmacy in an action by a third party to which the former employee was not a party for the negligent furnishing of a chemical compound. The pharmacy had appealed from the prior judgment and that appeal was pending. Defendant employee demurred to the pharmacy's complaint on the grounds that the pharmacy was barred from indemnity by its own negligence and that declaratory relief was improper because any cause of action the pharmacy might have against the employee had already matured. The trial court sustained the demurrer on both grounds without leave to amend and dismissed the complaint. Plaintiff appealed. In reversing the judgment the court of appeal held (1) plaintiff's action for indemnity against the employee had not matured since an appeal from the prior judgment had been taken and was pending, and (2) plaintiff was not barred from indemnity by its own negligence since that alleged negligence had not been established in the prior action (*13 Cal. App. 3d 462*).

[c] Statute

Zeitlin v. Arnebergh *(1963) 59 Cal. 2d 901, 31 Cal. Rptr. 800, 383 P.2d 152* was an action by a bookseller and prospective reader of a book, "Tropic of Cancer" by Henry Miller, against a city attorney for a declaratory judgment that the book was not obscene within the meaning of *Penal Code § 311* and that its sale would not violate *Penal Code § 311.2*. The trial court sustained defendant's demurrer to the complaint without leave to amend, and plaintiff appealed. In reversing the judgment, the court held that declaratory relief was proper and described: the gravamen of the plaintiffs' complaint to be that although the statute [*Penal Code § 311*] could not properly be interpreted to apply to "Tropic of Cancer," defendant was nevertheless contending that the book was "obscene matter" within the terms of the statute and intended to prosecute those who sold it (*59 Cal. 2d 901, 904-905)* .

Stating that the complaint alleged a genuine controversy involving the construction of particular legislation as to which it sought a judicial determination, and the court explained that plaintiff bookseller alleged that he was engaged in business as a bookseller and that he wished to sell "Tropic of Cancer," but that he was prevented from offering the book for fear that defendant would institute criminal proceedings against him. By denying plaintiff an opportunity for declaratory relief, the court found he was forced to choose between undesirable alternatives. If he continued to sell the book, he incurred the risk of criminal prosecution and faced the fine, jail sentence, or both, which may be imposed if he was found guilty, or he sustained the accompanying stigma which attached even though he could ultimately be found innocent. As an alternative he could have assumed the role of self-appointed censor, prodded by the city attorney, and discontinued the sale of any book which could possibly offend the latter (*59 Cal. 2d 901, 905)* .

The court considered plaintiff buyer's allegation that he desired to purchase a copy of "Tropic of Cancer" but was unable to do so because the bookseller, fearful of prosecution, refused to sell the publication. Reasoning that unless plaintiff was able to find a bookseller willing to face the possibility of criminal prosecution and the attendant described risks, he would be deprived of his basic constitutional right to read. The court stated that declaratory relief may offer the only method for vindication of this constitutional right and held that the complaint was legally sufficient (*59 Cal. 2d 901, 907)* .

[d] Ordinance

Wollam v. Palm Springs *(1963) 59 Cal. 2d 276, 29 Cal. Rptr. 1, 379 P.2d 481* was an action by an individual on behalf of himself and members of a labor union to determine the constitutionality of a municipal ordinance prohibiting the stationary use of sound trucks. There was no indication that plaintiffs had violated the ordinance. The trial court declared the ordinance unconstitutional, and defendant appealed. Although the propriety of declaratory relief was apparently not in issue, the Supreme Court held that the ordinance was unconstitutional and affirmed the judgment (*59 Cal. 2d 276, 279)* .

[e] Administrative Regulation

Chas. L. Harney, Inc. v. Contractors' Bd. *(1952) 39 Cal. 2d 561, 247 P.2d 913* was an action by a general engineering contractor against the State Contractors' License Board for a declaratory judgment as to the validity of a rule adopted by the board requiring that general contractors obtain additional licenses to undertake contracts involving specialty work alone. The board took the position that since plaintiff failed to allege that it had, in effect, violated the rule, there was no actual controversy between the parties, and its motion for judgment on the pleadings was granted. On plaintiff's appeal, the Supreme Court, in holding that the complaint was legally sufficient and reversing the judgment, said that plaintiff as an interested party was entitled under former Gov. Code § 11440 [*now see Gov. Code § 11350*] to obtain a judicial declaration as to the validity of rule 732 in accordance with the provisions of *Code Civ. Proc. § 1060* which specifically authorizes a declaration of rights or duties before there has been any breach of the obligation in respect to which the declaration is sought. The Court found that plaintiff, therefore, was not required to violate the administrative regulation and thereby subject itself to possible criminal prosecution or disciplinary action in order to obtain a declaration of its rights and duties (*39 Cal. 2d 561, 564)* .

[f] Contractual Rights and Duties

Supervalu, Inc. v. Wexford Underwriting Managers, Inc. *(2009) 175 Cal. App. 4th 64, 96 Cal. Rptr. 3d 316* , was an action between an insured and two insurers and an underwriting agent. The action included claims for declaratory relief regarding the interpretation of the insurance policies issued by the insurers. After the trial court entered judgment that included summary adjudication in favor of one of the insurers on its claim for declaratory relief, the insured appealed. The insured contended, among other things, that summary adjudication on the insurer's declaratory-relief claim was inappropriate because the insurer had not asked for declaratory relief on any particular coercive claim and, therefore, the summary adjudication did not resolve a cause of action.

The court of appeal rejected the insured's contention. The court noted that the summary adjudication in this case disposed of the entire declaratory-relief cause of action. The court emphasized that *Code Civ. Proc. § 1060*, which authorizes the issuance of declaratory relief, does not require that such relief resolve any particular claim, and the statute permits a declaration of the parties' rights and duties even if no other relief is requested, and even if there has been no breach of contract (*175 Cal. App. 4th 64, 82)* .

The court of appeal acknowledged that once the parties are engaged in litigation over claims for coercive remedies, a party cannot select issues (other than duty and punitive damages) implicated in one or more causes of action, amend its pleading to add a claim for declaratory relief as to those issues, and then obtain a summary adjudication of the declaratory-relief claim. This would subvert *Code Civ. Proc. § 437c(f)(1)*, which requires that a summary judgment dispose of an entire cause of action or affirmative defense (or the issues of duty or punitive damages) (*175 Cal. App. 4th 64, 82-83* (citing *Southern Cal. Edison Co. v. Superior Court (1995) 37 Cal. App. 4th 839, 846-847, 44 Cal. Rptr. 2d 227* ; *Hood v. Superior Court (1995) 33 Cal. App. 4th 319, 321-324, 39 Cal. Rptr. 2d 296*).

The present case, however, did not involve an attempt to misuse declaratory relief or to subvert the summary-adjudication procedure; the insurer merely requested contract interpretation in its cause of action for declaratory relief. That relief was not precluded merely because other claims were asserted in the same action, or because the issues subject to declaratory relief were present in other causes of action (*175 Cal. App. 4th 64, 83)* .

[g] Determination of Undisputed Preliminary Matter Is Proper

Application Group, Inc. v. Hunter Group *(1998) 61 Cal. App. 4th 881, 72 Cal. Rptr. 2d 73* involved a declaratory judgment that covenants not to compete contained in employment contracts of a Maryland firm's consultants who do not reside in California are illegal and cannot be enforced against a competing California firm. The Maryland firm was a "virtual employer," whose employees work out of their homes and other sites scattered throughout the country to

provide consulting services with respect to customers' computerized human resources systems. The Maryland firm appealed the judgment.

The court of appeal affirmed the judgment, with modifications to delete portions relating to claims for relief by an individual consultant who was a party in the case. The Maryland firm contended that any controversy over the use of covenants not to compete for its employees residing in California is purely "conjectural" because, as a matter of corporate policy, the Maryland firm never has and never will include a noncompetition clause in the employment agreements of its employees who reside in California. The court stated that ordinarily, declaratory relief would be inappropriate in such a situation. "However," stated the court, "in this case, it was *necessary* for the trial court to determine as a preliminary matter whether the particular noncompetition clause used by Hunter would be enforceable if required of California employees. If so, there would have been no need to decide the central issue raised by [the California firm's and individual consultant's] complaint ... " (emphasis in original) (*61 Cal. App. 4th 881, 893-894),* . The court concluded that under the circumstances, the fact that the trial court chose to articulate a logical premise of its declaratory judgment was not error (*61 Cal. App. 4th 881, 894*).

[4] Additional Authorities

[a] Breach Not Required

In *Kessloff v. Pearson (1951) 37 Cal. 2d 609, 233 P.2d 899* , the trial court had sustained an objection to the introduction of evidence by plaintiff at trial on the ground that the complaint for declaratory relief and an accounting failed to state facts sufficient to constitute a cause of action in that an action for declaratory relief under the circumstances was not proper. The Supreme Court, in reversing the judgment on the ground that a cause of action for an accounting was properly stated, by way of dictum, said that *Code Civ. Proc. §§ 1060-1062* provide for declaratory relief in advance of breach (*37 Cal. 2d 609, 613)* . It explained that this salutary relief is procurable so that parties may know their rights and obligations where a controversy arises before a breach or violation occurs (*37 Cal. 2d 609, 613)* .

[b] Nonmatured Claim

LePage v. Oakland (1970) 13 Cal. App. 3d 689, 91 Cal. Rptr. 806 was a class action by a city police officer, individually and on behalf of others similarly situated, and by the chairman of an association, representing uniformed members of defendant city's police and fire departments, for a declaratory judgment as to the right of such members under the city charter to have time spent in service-connected disability retirement credited towards years-in-service retirement eligibility and for a writ of mandate to compel the city to credit all such time towards years of service retirement time. The trial court granted the requested relief and defendants appealed. On appeal defendant city contended, inter alia, that the question presented by the declaratory relief action was academic or hypothetical since the complaint did not state that either plaintiff officer or any other member of the class represented had applied, or intended to apply, for inservice retirement and had been refused credit for time spent in work-incurred disability retirement. In reply, the court of appeal, in affirming the judgment, held that while respondents were not yet eligible for service retirement, they were entitled to a declaration of their rights under the charter (*13 Cal. App. 3d 689, 692)* .

General Ins. Co. of America v. Whitmore (1965) 235 Cal. App. 2d 670, 45 Cal. Rptr. 556 was a declaratory relief action by an insurer which had issued a public liability policy covering defendant Whitmores and their minor son for negligence. A passenger train had been derailed. One of the passengers sued the two carriers involved, the Whitmores' son, and two other minors for damages for personal injuries sustained in the train wreck. The theory on which liability was predicated was negligence. While that action was pending, the Whitmores' insurer brought the present declaratory relief action in which it named as defendants the Whitmores, their son, the other two boys and each member of their families and their insurance carriers, the two carriers involved in the train derailment, the tort plaintiff, and 200 (Does 1 to 200) other passengers on the train. The complaint (1) alleged that the train derailment was the sole and proximate result of the willful and intentional acts of the boys (which acts were not covered by plaintiff's policy), (2) set forth

plaintiff's contentions as to its potential liability under the policy, and the contentions of the defendants, and (3) sought a declaration of its rights and liabilities under the policy with respect to its insureds, the other insurers involved, and the other passengers on the train who might reduce their claims against the Whitmores' son to judgments. The trial court sustained the Whitmores' demurrer to the complaint without leave to amend on the ground that the potential claimants had no present legal interest in the policy, that the defendants, other than the Whitmores, would have no claim against plaintiff insurer until their claim against the Whitmores was reduced to judgment, and that since the defendants, other than the Whitmores, were not proper parties to the declaratory relief action, they would not be bound by any factual determination made by the court. The court of appeal held that the other defendants had an interest in the policy immediately on the happening of the derailment and that they were proper parties and reversed the judgment. In answering the Whitmores' contention that the declaratory relief action was premature, the court of appeal said that *Code Civ. Proc. § 1060* expressly provides that declaratory relief may be had before there has been any breach of the obligation in respect to which the declaration is sought (*235 Cal. App. 2d 670, 676)* .

[c] Ordinance

California Water & Tel. Co. v. Los Angeles (1967) 253 Cal. App. 2d 16, 61 Cal. Rptr. 618 was an action by private corporations which owned and operated plants and equipment for the production, transmission, and delivery of water within an unincorporated area of defendant county to determine whether a county water ordinance could constitutionally apply to them. They contended that because they were investor-owned public utilities, the state had fully occupied the field of public utilities regulation. The ordinance among other things required that all persons who supplied domestic water to more than one customer had to obtain a water utility certificate of registration or a water utility authorization as a condition precedent to the construction of any portion of a water system. The plaintiffs also sought to enjoin defendant county and its engineer from enforcing the ordinance against them. Plaintiffs had registered as required by the county engineer and at all times had complied with the provisions of the ordinance. Judgment was for plaintiffs and defendants appealed. In modifying the judgment and affirming it as modified, the court of appeal said that a person need not violate or plan to violate a penal ordinance before he can obtain a declaration construing it and deciding its application to him. To hold otherwise, the court felt, would be like telling the prospective victim that the only way to determine whether the suspect is a mushroom or a toadstool is to eat it. The court added that all that one seeking declaratory relief must demonstrate is the reality of his interest in a present adjudication of the matter (*253 Cal. App. 2d 16, 24-25)* .

California Points & Authorities

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Volume 6 Chapters 60-69 COSTS---to---DECLARATORY RELIEF
CHAPTER 67 DECLARATORY RELIEF
PART II. FORMS

6-67 California Points & Authorities § 67.54

§ 67.54 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10] for Declaratory Relief [Code Civ. Proc. § 1060]--No Basis in Fact for Conclusion That Judicial Declaration Is Not Necessary or Proper

[1] FORM Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10] for Declaratory Relief [Code Civ. Proc. § 1060]--No Basis in Fact for Conclusion That Judicial Declaration Is Not Necessary or Proper

[*Caption. See § 67.50.*]

A COURT MAY NOT PROPERLY DENY DECLARATORY RELIEF ON THE GROUND THAT ITS DETERMINATION OR DECLARATION IS NOT NECESSARY OR PROPER AT THE TIME UNDER ALL THE CIRCUMSTANCES WHEN THERE IS NO BASIS IN FACT FOR THAT CONCLUSION.

A. Limitation on Court's Discretion. The discretion of the trial court to refuse to entertain an action for declaratory relief vested in it by *Section 1061 of the Code of Civil Procedure* is not unlimited and such relief may not be refused when there is no basis in fact for the conclusion that the declaration is not necessary or proper (*Warren v. Kaiser Foundation Health Plan, Inc. (1975) 47 Cal. App. 3d 678, 683, 121 Cal. Rptr. 19*).

B. Doubt as to Whether Judicial Declaration Is Necessary. Any doubt as to whether a judicial declaration is necessary or proper at the time under all the circumstances should be resolved in favor of granting declaratory relief (*Warren v. Kaiser Foundation Health Plan, Inc. (1975) 47 Cal. App. 3d 678, 683, 121 Cal. Rptr. 19*).

[*Optional*] **C. Alternative Remedy as Required to Be Adequate.** The trial court may not exclude the action for declaratory relief on the ground an alternative remedy exists where the alternative remedy is not as speedy and adequate or as well suited to the plaintiff's needs as declaratory relief (*Maguire v. Hibernia Sav. & L. Soc'y (1944) 23 Cal. 2d 719, 732, 146 P.2d 673* , leading case).

[*Optional*] **D. Action at Law for Breach of Contract as Inadequate.** An action at law for breach of contract is neither as speedy and adequate nor as well suited as declaratory relief to a plaintiff's needs where, despite the breach, a relationship between the parties continues so that a declaration may guide their future conduct or where the use of declaratory relief will avoid a multiplicity of actions that may ensue if a different remedy is pursued (*Warren v. Kaiser Foundation Health Plan, Inc. (1975) 47 Cal. App. 3d 678, 683, 121 Cal. Rptr. 19*).

[*Optional*] **E. Criminal Sanctions as Inadequate Remedy.** The availability of penal sanctions against defendant does not justify a refusal by the court to grant declaratory relief where such sanctions are either not available to plaintiff, or if they are, they are not as speedy and adequate or as well suited to plaintiff's needs as declaratory relief (*Tiburon v. Northwestern P. R. Co. (1970) 4 Cal. App. 3d 160, 177, 84 Cal. Rptr. 469*).

[*Optional*] **F. Unfavorable Declaration.** The court may not refuse to exercise its discretion to grant declaratory relief on the ground that any declaration would be unfavorable to the plaintiff (*Maguire v. Hibernia Sav. & L. Soc'y (1944) 23 Cal. 2d 719, 728-730, 146 P.2d 673* ; *Levi v. O'Connell (2006) 144 Cal. App. 4th 700, 706, 50 Cal. Rptr. 3d 691*).

CAUTION:

The above rule would not necessarily prevent the sustaining of the demurrer, since the court may on sustaining the demurrer and dismissing the action declare the rights of the parties adversely to plaintiff [*see, e.g., O'Sullivan v. Salvation Army (1978) 85 Cal. App. 3d 58, 60, 65, 147 Cal. Rptr. 729* ; *Siegel v. Oakland (1978) 79 Cal. App. 3d 351, 359, 145 Cal. Rptr. 62* ; for further discussion and the power of the court to grant a nonstatutory motion for judgment on the pleadings or motion to dismiss, *see § 67.40[2]*]. Moreover, an improper judgment of dismissal following the sustaining of a general demurrer will not be reversed on appeal where the complaint shows on its face that the judgment sought must decide the controversy adversely to plaintiff and a reversal would result inevitably as a matter of law in such judgment [*Pylon, Inc. v. Olympic Ins. Co. (1969) 271 Cal. App. 2d 643, 657, 77 Cal. Rptr. 72* ; *see also Jones v. Daly (1981) 122 Cal. App. 3d 500, 511, 176 Cal. Rptr. 130]* .

[*Optional*] **G. Plaintiff Entitled to Some Relief.** A court may not refuse declaratory relief where on the facts alleged plaintiff is entitled to some relief in connection with the matter which occasioned the controversy (*Lord v. Garland (1946) 27 Cal. 2d 840, 852, 168 P.2d 5*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in opposition to a general demurrer to a complaint for declaratory relief on the ground the complaint fails to state facts sufficient to constitute a cause of action in that it shows on its face or appears from judicially noticed matter that a judicial declaration or determination is not necessary or proper at the time under all the circumstances [*see § 67.24*].

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

The foregoing form may, with appropriate modifications, be used in opposition to a nonstatutory motion for judgment

on the pleadings, a nonstatutory motion to dismiss, or a motion for summary judgment predicated on the argument that a judicial declaration or determination is not necessary or proper at the time under all the circumstances.

[3] Discussion of Authorities

[a] Limitation on Court's Discretion

Warren v. Kaiser Foundation Health Plan, Inc. *(1975) 47 Cal. App. 3d 678, 121 Cal. Rptr. 19* was an action for declaratory relief arising out of defendant's refusal to pay for treatment of plaintiff's wife in a facility that had not contracted with defendant. Plaintiff's wife had been badly burned in an automobile accident and was taken in an unconscious condition to the most accessible hospital equipped to render medical care to critical burn victims. The hospital was not one which had contracted with defendant. The wife's condition precluded moving her to another hospital and she died there 20 days after the accident. Plaintiff incurred medical and hospital expenses incident to the wife's treatment in excess of $19,000. Plaintiff paid $2,000 of these expenses. At the time of the accident plaintiff and his wife were covered by the Kaiser Plan which provided for care in contracting facilities by contracting physicians and, by provisions, found by the court of appeal to be ambiguous, for limited cash reimbursement for emergency expenses and payment of expenses for certain follow-up treatment incurred outside the "service area." Plaintiff demanded that defendant reimburse him for the $2,000 he had paid and that defendant pay the remainder of the expenses incurred. Kaiser denied coverage and refused payment. Plaintiff alleged that his suit to secure an interpretation of the Kaiser contract was to obtain a speedy resolution of the controversy between the parties in order to avoid a multiplicity of actions that would otherwise result, since the persons and entities that had rendered medical and hospital services to plaintiff's wife had sued plaintiff and plaintiff had cross complained against Kaiser. Kaiser demurred to the complaint, asserting it did not state a cause of action in declaratory relief because: (1) the cause of action asserted was on a matured claim which should be adjudicated in another form of action; and (2) plaintiff's claim for reimbursement was not covered by the plan. The trial court sustained the demurrer with 30 days leave to amend. Plaintiff did not amend and the action was dismissed. Plaintiff appealed. In reversing the judgment, the court of appeal concluded that the complaint adequately alleged that a declaratory judgment was appropriate to avoid multiplicity of litigation and to construe a contract creating a continuing relationship (plaintiff remained insured under the plan), despite Kaiser's alleged breach of the contract, and that the contract could, at trial, properly be construed as one of adhesion, in which case ambiguities could be resolved against the defendant (*47 Cal. App. 3d 678, 680)* . The court said that the discretion to refuse to entertain an action in declaratory relief vested in the trial court by *Code Civ. Proc. § 1061* is not unlimited but may be exercised only when there is a basis in fact for the conclusion that the declaration is not necessary or proper (*47 Cal. App. 3d 678, 683)* .

[b] Doubt as to Whether Judicial Declaration Is Necessary

The factual background of ***Warren v. Kaiser Foundation Health Plan, Inc.*** *(1975) 47 Cal. App. 3d 678, 121 Cal. Rptr. 19* is *set forth in § 67.54[3][a]*. In holding that the trial court under the facts alleged erred in refusing to grant declaratory relief, the court of appeal said that any doubt should be resolved in favor of granting declaratory relief (*47 Cal. App. 3d 678, 683)* .

[c] Alternative Remedy as Required to Be Adequate

Maguire v. Hibernia Sav. & L. Soc'y *(1944) 23 Cal. 2d 719, 146 P.2d 673* involved four actions for declaratory relief by successors in interest to alleged members of and depositors in defendant savings and loan society. The trial court sustained demurrers to the complaints without leave to amend on the ground that no cause of action was stated and specifically that relief was barred by the statute of limitations and laches. It also granted motions of some of the individual defendants to dismiss the actions on the ground that declaratory relief was not necessary or proper under *Code Civ. Proc. § 1061*. Judgments in the four actions were entered in favor of defendants, and plaintiffs appealed, submitting the appeal on a single set of briefs. In holding that the actions were barred neither by the statute of limitations nor by laches and that the complaints stated causes of action for declaratory relief, the court acknowledged

that the availability of another adequate remedy may condition the necessity for declaratory relief specifically noting defendants' contention that mandamus, quo warranto, and injunctive relief were available to plaintiffs for the protection of their rights and that the trial court had discretion to deny declaratory relief on the ground that it was not necessary or proper because of the existence of other remedies. However, the court pointed out that defendants failed to show on what theory the suggested alternative remedies would have been available to plaintiffs, or, if available, that they would have been speedy or adequate or have served as well as or better than the remedy plaintiffs had involved. The court stated that while some authorities limit a trial court's discretion to refuse to make a declaration on the ground that other remedies are available, all agree that before a court may properly exercise its discretion to refuse relief on that ground, it must clearly appear that the asserted alternative remedies are available to the plaintiff and that they are speedy and adequate or as well suited to the plaintiff's needs as declaratory relief (*23 Cal. 2d 719, 731)* .

[d] Action at Law for Breach of Contract as Inadequate

The factual background of ***Warren v. Kaiser Foundation Health Plan, Inc.*** *(1975) 47 Cal. App. 3d 678, 121 Cal. Rptr. 19* is discussed in *§ 67.54[3][a]*. In holding that the trial court under the facts alleged erred in refusing to grant declaratory relief on the ground that an action for breach of contract had matured, the court of appeal stated that a lawsuit for breach of contract is neither as speedy and adequate nor as well suited as declaratory relief to the plaintiff's needs where, despite the breach, a relationship between the parties continues so that a declaration may guide their future conduct, or where the use of declaratory relief will avoid a multiplicity of suits that may ensue if a different remedy is pursued (*47 Cal. App. 3d 678, 683-684)* . Applying the rule to the facts before it, the court said that although the complaint claimed that Kaiser breached its contract, it also showed on its fact that the relationship between plaintiff and Kaiser is a continuing one since plaintiff continued to be a member of the plan after the claimed breach. A declaration of the right of a member of the plan for reimbursement of medical expense incurred in an emergency so grave as to preclude access to Kaiser contract hospitals and physicians would guide the future conduct of the parties. It added that if nothing else, a declaration in Kaiser's favor would be the warning that the plan may not be adequate to the needs of its members, including appellant. The court also found that the remedy of declaratory relief would avoid multiplicity of litigation, noting that the substantial obligations plaintiff incurred for the care of his late wife, if reimbursed by Kaiser, would avoid threatened lawsuits against plaintiff by those who provided the medical and hospital care. The court concluded that the trial court had erred in refusing declaratory relief since plaintiff had pleaded a controversy concerning the construction of t contract creating the Kaiser plan and facts establishing the proposition that declaratory relief was faster, more adequate, and better suited than would be an action for breach of contract. The court further held that the trial court's error was prejudicial and, hence, required reversal of the judgment (*47 Cal. App. 3d 678, 689)* .

[e] Criminal Sanctions as Inadequate Remedy

Tiburon v. Northwestern P. R. Co. *(1970) 4 Cal. App. 3d 160, 84 Cal. Rptr. 469* was an action for declaratory and injunctive relief against the railroad and its lessee and vendee with respect to the leasing and conveyancing of a 49-acre parcel of the railroad's real property which the city alleged had been divided and subdivided in violation of state law and local ordinances. The trial court dismissed the action and plaintiff appealed. On appeal defendants urged, inter alia, that the dismissal could be upheld as an exercise of the trial court's discretionary power to refuse declaratory relief under *Code Civ. Proc. § 1061*, since violation of the Subdivision Map Act was made illegal by that act, the criminal sanctions were not illusory, and conspirators to violate the act could be liable to a fine of $5,000 and three years imprisonment under former Penal Code § 182. Rejecting the argument the court of appeal found it unnecessary to weigh the effect of the penalty against the costs of designing and improving a subdivision to the standards required by the local ordinances involved (*4 Cal. App. 3d 160, 175)* . It explained that the purpose of subdivision control is to provide for the general welfare of the purchasers of the divided lands and the community in general, and observed that to license the indiscriminate division of land by the imposition of criminal penalties would not serve to preserve the orderly development of the city (*4 Cal. App. 3d 160, 176)* . The court pointed out that the remedies suggested by the defendants did not justify a refusal of the trial court to exercise the power to grant declaratory relief under the discretion conferred by *Code Civ. Proc. § 1061* (*4 Cal. App. 3d 160, 177)* . In quoting from *Maguire v. Hibernia Sav. & L. Soc'y,*

discussed in *§ 67.54[3][c]*, it stated that it must clearly appear that the asserted alternative remedies are available to plaintiff and that they are speedy and adequate or as well suited to the plaintiff's needs as declaratory relief.

[f] Unfavorable Declaration

The factual background of ***Maguire v. Hibernia Sav. & L. Soc'y*** *(1944) 23 Cal. 2d 719, 146 P.2d 673* is *set forth in § 67.54[3][c]*. On appeal defendants contended that a complaint fails to state a cause of action for declaratory relief unless it appears therefrom that the plaintiff is entitled to a favorable declaration. In rejecting this argument, the court pointed out that *Code Civ. Proc. § 1060* provides that a party may bring an action for a declaration of his rights and duties in the premises and that the declaration may be either affirmative or negative in form and effect, but that the section contains no suggestion that the pleader must allege facts entitling him to a favorable declaration (*23 Cal. 2d 719, 730)* . The court added that where the plaintiff is not entitled to a favorable declaration, it has been held that the trial court should render a judgment embodying such determination and should not merely dismiss the action (*23 Cal. 2d 719, 729)* .

In ***Levi v. O'Connell*** *(2006) 144 Cal. App. 4th 700, 50 Cal. Rptr. 3d 691* , the mother of an extremely gifted child filed suit, on behalf of herself and as guardian ad litem for the child, against the California Department of Education. The complaint sought a declaration that, pursuant to the California Constitution and the Compulsory Education Law (*see Cal. Const., art. IX, § 5*; *Educ. Code § 48200 et seq.*), the Department was obligated to pay for the child's college education until age 16. The trial court sustained the Department's demurrer without leave to amend, and the plaintiffs appealed.

The court of appeal held that the trial court erred in sustaining the demurrer. The court explained that the fundamental basis of declaratory relief is the existence of an actual, present controversy over a proper subject. In this case, the complaint alleged sufficient specific facts regarding the child's educational circumstances to establish an actual, current controversy over whether the Department's constitutional and statutory obligation to fund an appropriate education included a college education for an extremely gifted child. The court rejected the Department's argument that the plaintiff had not pled a cause of action for declaratory relief because the plaintiffs had no right to, and the Department had no duty to provide, the education sought. The court noted that, strictly speaking, a general demurrer is not an appropriate means of testing the merits of the controversy in a declaratory relief action, because the plaintiff is entitled to a declaration of the parties' rights "even if it be adverse" (*144 Cal. App. 4th 700, 706)* .

Although it concluded that the trial court had erred in sustaining the demurrer, the court of appeal did not remand the case. Instead, the appellate court found it appropriate to proceed directly to the merits of the case. The court of appeal explained that if the merits issue is purely one of law, and the appellate court agrees with the trial court's resolution of the issue against the plaintiff, the appellate court need not reverse the trial court's dismissal and remand the case for a trial. Instead, the appellate court may consider the merits, and its judgment will constitute the declaration of the parties' rights concerning the matter in controversy (*144 Cal. App. 4th 700, 706)* . On the merits, the court of appeal concluded that the plaintiffs in this case did not have a constitutional or statutory right to a free college education. Accordingly, the court affirmed the lower court's judgment of dismissal (*144 Cal. App. 4th 700, 706-711)* .

[g] Plaintiff Entitled to Some Relief

Lord v. Garland *(1946) 27 Cal. 2d 840, 168 P.2d 5* was an action by an individual, engaged in the business of caravanning automobiles from eastern states into California, against the Department of Motor Vehicles and its director and officers for a determination of the constitutionality of a state law, for injunctive relief, and for recovery of a deposit. The defendants demurred to the complaint on both general and special grounds. The demurrer was sustained without leave to amend, and plaintiff appealed from the subsequent judgment of dismissal. The Supreme Court reversed the judgment. In the course of rejecting the various theories on which the trial court might have based its order sustaining the demurrer, the Court noted that declaratory relief may under *Code Civ. Proc. § 1061* be refused in the discretion of

the trial court if it appears that the determination is not necessary or proper at the time under all the circumstances and that where the facts pleaded by the plaintiff would justify a trial court in applying that rule, a demurrer to the complaint may be sustained. It added however, that it is equally true that *Code Civ. Proc. § 1061* does not apply if on the facts stated, plaintiff is entitled to some relief in connection with the matter which occasioned the controversy. The Court concluded that in considering all of the circumstances as they existed at the time the complaint was filed and in view of the fact that the action for declaratory relief may be invoked to test the constitutionality of a statute, the trial court would have abused its discretion if it had sustained the general demurrer on the ground that the remedy was not necessary or proper (*27 Cal. 2d 840, 852)* .

[4] Additional Authorities

[a] Alternative Remedy as Required to Be Adequate

The factual and procedural background of *Columbia Pictures Corp. v. DeToth (1945) 26 Cal. 2d 753, 161 P.2d 217* is discussed in *§ 67.52[3][c]*. In reversing the judgment of the trial court, entered after it had sustained defendants' general and special demurrers to plaintiff's complaint for declaratory relief, the Supreme Court, among other things, said that the fact that a cause of action otherwise may have accrued and that other adequate relief may have been available to the plaintiff at the time are factors to be considered by the trial court in determining if declaratory relief is necessary or proper under *Code Civ. Proc. § 1061*. The remedies provided by the statute are cumulative, and declaratory relief may be asked alone or with other relief. Hence, a plaintiff's right to proceed is not barred by the fact that the contract sued on may have already been breached and that traditional or statutory alternative remedies are available (*26 Cal. 2d 753, 761)* . Noting the rule the Court had stated in *Maguire*, that before declaratory relief may be denied on the ground of the existence of other remedies, it must clearly appear that the asserted alternative remedies are available to the plaintiff and that they are speedy and adequate or as well suited to the plaintiff's needs as declaratory relief, the Court found plaintiff's allegations did not necessarily show that the remedy of declaratory relief may not have been better suited to plaintiff's needs than the traditional remedies otherwise disclosed (*26 Cal. 2d 753, 762)* . The Court added that furthermore, as stated in *Ermolieff v. R.K.O. Radio Pictures (1942) 19 Cal. 2d 543, 547, 122 P.2d 3* , ordinarily, the alternative remedy, such as damages, injunctive relief, and the like would be more harsh, and if a plaintiff chooses the milder remedy, declaratory relief, the court is n required for that reason to compel the plaintiff to seek a more stringent one.

The factual background of *Warren v. Kaiser Foundation Health Plan, Inc. (1975) 47 Cal. App. 3d 678, 121 Cal. Rptr. 19* is *set forth in § 67.54[3][a]*. In holding that the trial court under the facts alleged erred in refusing to grant declaratory relief on the ground that an action at law for breach of contract had matured, the court of appeal said that while the court may refuse to entertain the action where the rights of the complaining party have crystallized into a cause of action for past wrongs, and all relationship between the parties has ceased to exist, it may not exclude the action where the alternative remedy of suing on the matured breach is not as speedy and adequate or as well suited to the plaintiff's needs as declaratory relief (*47 Cal. App. 3d 678, 683)* .

General Ins. Co. of America v. Whitmore (1965) 235 Cal. App. 2d 670, 45 Cal. Rptr. 556 was a declaratory relief action by an insurer which had issued a public liability policy covering defendant Whitmores and their minor son for negligence. A passenger train had been derailed. One of the passengers sued the two carriers involved, the Whitmores' son, and two other minors for damages for personal injuries sustained in the train wreck. The theory on which liability was predicated was negligence. While that action was pending, the insurer brought this declaratory relief action in which it named as defendants the Whitmores and their son, the other two boys and each member of their families and their insurance carriers, the two carriers involved in the train derailment, the tort plaintiff, and 200 (Does 1 to 200) other passengers on the train. The complaint alleged that the train derailment was the result of a carried out conspiracy among the three boys to willfully and intentionally tamper with and destroy switches and other railroad equipment to derail the train (an allegation not contained in the tort complaint), and set forth the various contentions of the parties with respect to plaintiff's rights and liabilities. The Whitmores' demurrer to the complaint was sustained without leave to amend and

plaintiff appealed from the subsequent judgment of dismissal. In reversing the judgment, the court of appeal observed that in California declaratory relief is frequently invoked to determine the question of policy coverage in light of the facts alleged (*235 Cal. App. 2d 670, 673)* , and in pointing out that the issues raised in the declaratory relief action were not capable of resolution in the tort action, held that any alternative remedy must be speedy and adequate or as well suited to plaintiff's needs as declaratory relief before a court may properly refuse to exercise its discretion to refuse relief on that ground. The court discussed as an example the fact that since coverage under the policy is denied by reason of the willful and intentional acts alleged in the complaint, plaintiff could not possibly advance that claim in the damage suit which would be wholly inconsistent with the interests of its assureds and render the latter liable as a matter of law (*235 Cal. App. 2d 670, 675)* .

It should be noted that in *Allstate Ins. Co. v. Fisher (1973) 31 Cal. App. 3d 391, 395, 107 Cal. Rptr. 251* (affirming a judgment dismissing the insurer's declaratory relief action), the court of appeal distinguished *Whitmore* and other declaratory relief cases which would have been adverse to the insured's interests in the tort action. In *Allstate* on the other hand, the declaration sought by the insurer that its insured's employee was not driving with permission and was not acting within the course and scope of his employment at the time of the accident would have benefitted the insured in the tort action.

London Assur. Co. v. Anderson (1961) 194 Cal. App. 2d 418, 15 Cal. Rptr. 13 was an action by several insurance companies against a number of defendants, including one Osborn, for declaratory relief with respect to plaintiffs' liability, if any, under fire insurance policies issued to defendant Anderson with loss payable to defendants Lange and Stoll covering a stock of tires damaged or destroyed by fire. Plaintiffs alleged that the fire was willfully set by defendants. The complaint also alleged that (1) the tires, both at the time the policies were issued and at the time of the fire, were owned by defendant Osborn, (2) knowing that plaintiffs would not have issued a policy to Osborn, defendants entered into a conspiracy to conceal Osborn's ownership from them, and (3) had plaintiffs known the true facts they would not have issued the policies. Osborn's general demurrer to the complaint was sustained without leave to amend, and plaintiffs appealed from the subsequent judgment. The court of appeal reversed the judgment with directions to allow plaintiffs to file an amended complaint against Osborn for declaratory relief concerning plaintiffs' right of indemnity from Osborn, who was one of the defendants alleged to have willfully set fire to the tires. Osborn contended that if he willfully set fire to the tires, plaintiffs could sue him in an independent action and hence, plaintiffs had an adequate remedy at law. In rejecting this argument, the court of appeal, quoted from *Maguire v. Hibernia Sav. & L. Soc'y (1944) 23 Cal. 2d 719, 732, 146 P.2d 673* , the statement set out in the discussion of this case in § 67.54[3][c]. The court added that if Osborn remained a defendant to the declaratory relief action, very little different or additional evidence would be required to be adduced at the trial and that if the evidence sustained plaintiffs' position, the trial court, in the declaratory relief action, could find a subrogated right and adjudge indemnification against Osborn. The court found the remedy of declaratory relief sought by plaintiffs to be a useful, speedy, and adequate remedy so fervidly desired in the processing of legal matters.

[b] Unfavorable Declaration

Wellenkamp v. Bank of America (1978) 21 Cal. 3d 943, 148 Cal. Rptr. 379, 582 P.2d 970 was an action by the purchaser of real property against the bank, which had loaned the sellers the money with which to buy the property some two years before, and had taken back their note for $19,100 at eight percent interest per annum secured by a trust deed containing a "due-on" clause, to enjoin enforcement of the due-on clause, and for a declaration that exercise of the clause without any showing that defendant's security had been impaired as a result of the sale of the property to plaintiff, constituted an unreasonable restraint on alienation. Defendant's general demurrer to the complaint was sustained without leave to amend, and a judgment dismissing the complaint was entered. Plaintiff appealed. In reversing the judgment, the Supreme Court stated that the complaint was legally sufficient for declaratory relief and that in such case where no basis for declining declaratory relief appears, the court should declare the rights of the parties whether or not the facts alleged establish that plaintiff is entitled to favorable declaration (*21 Cal. 3d 943, 947)* . The Court explained that since the complaint was legally sufficient, the trial court committed error when it tested the sufficiency of

the complaint by a determination of the merits and sustained the demurrer on the ground that no cause of action for declaratory relief had been stated. The Court further held that automatic exercise of the due-on clause cannot be enforced on the occurrence of an outright sale unless the lender can demonstrate that enforcement is reasonably necessary to protect against impairment to its security or the risk of default (*21 Cal. 3d 943, 947-948)* .

Salsbery v. Ritter (1957) 48 Cal. 2d 1, 306 P.2d 897 was an action for declaratory relief, to determine conflicting claims to realty, and to nullify a judgment and an execution sale of realty pursuant to it. The action was filed against the municipal court, its clerk, the county sheriff, plaintiffs' judgment creditors, and the purchasers of the property at the execution sale. It appeared from the complaint that a judgment in the amount of $150.09 and costs had been obtained by one of the insured defendants against plaintiffs pursuant to which a writ of execution was levied on plaintiffs' interest in certain realty, which was sold by the sheriff for $51.70 to three other named defendants; that thereafter, two of the other defendants obtained judgment in the amount of $1,500 against plaintiffs and recorded their judgment; that about 10 months later plaintiffs homesteaded their interest in the realty; that about a week thereafter the judgment creditors on the second judgment redeemed the property by paying the sheriff $51.70 plus interest and costs but did not record a notice of redemption; that on the next day plaintiffs served on the sheriff and recorded a notice of redemption and paid the sheriff $61.80 which was still on deposit with him; that the second judgment creditors and the sheriff demanded that plaintiffs pay the sheriff an additional sum equal to the amount of the judgment in favor of these creditors plus interest and costs; that the sheriff refused to issue a certificate of redemption to either plaintiffs or the judgment creditors on the ground he did not know who was legally entitled to it; and that approximately four weeks later plaintiffs filed petitions in bankruptcy discharging the judgments against them. Defendants' demurrers to the complaint were sustained without leave to amend and plaintiffs appealed. The Supreme Court held that the demurrers of the municipal court and its clerk were properly sustained. In reversing the judgments as to the other defendants, the Supreme Court said that in an action for declaratory relief, when the complaint shows the existence of an actual controversy among the parties, a general demurrer to the complaint should be overruled. The Court explained that the plaintiff is entitled to a declaration of his rights whether the declaration is favorable to him or not. With respect to the judgment creditors and execution purchasers, the Court held that the complaint showed the existence of an actual controversy (*48 Cal. 2d 1, 7)* . With respect to the sheriff, the Court pointed out that although the remedy against him might appropriately have been a petition for mandate, an action for declaratory relief is not inappropriate, since the controversy with respect to the redemptions revolved around the meaning of a statute and that, furthermore, as against a general demurrer, a complaint may be construed as an application for mandate.

Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 305 P.2d 20 was an action for declaratory relief to determine plaintiffs' rights, if any, in defendant bank. The trial court sustained a general demurrer of the complaint without leave to amend, and dismissed the action, and plaintiffs appealed. In holding that the trial court erred in sustaining the general demurrer and reversing the judgment, the Supreme Court said that where a complaint for declaratory relief is sufficient, the court must declare the rights of the parties whether the facts alleged establish that the plaintiff is entitled to a favorable declaration (*47 Cal. 2d 540, 550)* .

The factual background of *Columbia Pictures Corp. v. DeToth (1945) 26 Cal. 2d 753, 161 P.2d 217* is *set forth in § 67.52[3][c]*. In reversing the judgment of dismissal, the Supreme Court said that it is not essential, to entitle a plaintiff to seek declaratory relief, that he should establish his right to a favorable declaration. The purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation (*26 Cal. 2d 753, 760)* .

The factual background of *Tiburon v. Northwestern P. R. Co. (1970) 4 Cal. App. 3d 160, 84 Cal. Rptr. 469* is *set forth in § 67.52[3][c]*. The court of appeal pointed out that the purpose of a declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation and that to hold that a plaintiff on the wrong side of a controversy is not entitled to the security and relief against uncertainty which a declaratory judgment affords would require the court to read into *Code Civ. Proc. § 1060* a limitation not present there (*4 Cal. App. 3d 160, 173)* .

C. Dudley De Velbiss Co. v. Kraintz (1951) 101 Cal. App. 2d 612, 225 P.2d 969 was an action by a building contractor against the county building inspector for declaratory relief to determine the constitutionality of county ordinances relating to construction, which ordinances plaintiff claimed were discriminatory in their application and vague and indefinite. Defendant's demurrer to the complaint was sustained without leave to amend, and plaintiff appealed from the ensuing judgment. The court of appeal held that the trial court erred in sustaining the demurrer since the complaint stated a valid cause of action. Moreover, since it could not be said one way or the other on the basis of the record as a matter of law as to whether the ordinances were or were not constitutional, the error was prejudicial, and the court reversed the judgment. The court, quoting from *Columbia Pictures Corp. v. DeToth (1945) 26 Cal. 2d 753, 760, 161 P.2d 217* , *above*, said that it is not essential, to entitle a plaintiff to seek declaratory relief, that he should establish his right to a favorable declaration (*101 Cal. App. 2d 612, 615)* .

[c] Plaintiff Entitled to Some Relief

Foster v. Masters Pontiac Co. (1958) 158 Cal. App. 2d 481, 322 P.2d 592 was an action by the buyer of a new car against the seller for declaratory relief as to the validity of the contract to purchase the car and for money had and received. The trial court sustained a special and general demurrer to the third amended complaint without leave to amend, and plaintiff appealed from the subsequent judgment of dismissal. In reversing the judgment with directions to overrule the demurrer on the ground that an action for declaratory relief was sufficiently alleged (*158 Cal. App. 2d 481, 486)* .

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Volume 6 Chapters 60-69 COSTS---to---DECLARATORY RELIEF
CHAPTER 67 DECLARATORY RELIEF
PART II. FORMS

6-67 California Points & Authorities § 67.55

§ 67.55 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10] for Declaratory Relief [Code Civ. Proc. § 1060]--Plaintiff Has Standing to Challenge Law or Regulation

[1] FORM Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10] for Declaratory Relief [Code Civ. Proc. § 1060]--Plaintiff Has Standing to Challenge Law or Regulation

[*Caption. See § 67.50.*]

ANY INTERESTED PERSON SUBJECT TO THE CHALLENGED _____ [LAW *or* REGULATION] OR AFFECTED BY IT HAS STANDING TO SUE FOR DECLARATORY RELIEF IF THE PERSONAL STAKE OF THE PARTY IS SUCH AS TO ASSURE THAT THE DISPUTE WILL BE PRESENTED IN AN ADVERSARY MANNER.

A. Action by Interested Person. Any interested person may sue for declaratory relief _____ (*Section 1060 of the Code of Civil Procedure or Section 11350 of the Government Code or Section 11350.3 of the Government Code or Section 409.2 of the Unemployment Insurance Code*).

B. What Constitutes Interest. A person is interested within the meaning of Section _____ [1060 of the Code of Civil Procedure *or* _____ (11350 *or* 11350.3) of the Government Code *or 409.2 of the Unemployment Insurance Code*] if he or she or it is a person who is subject to the challenged regulation or law or is affected by it (*see Pacific Legal Foundation v. Unemployment Ins. Appeals Bd. (1977) 74 Cal. App. 3d 150, 154, 141 Cal. Rptr. 474* (involving *Unemp. Ins. Code § 409.2*).

C. Criteria. An interested person has standing to sue (even though such person is not specifically authorized by statute to maintain the action) if the party has such a personal stake in the outcome of the controversy as to ensure that the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution (*Residents of Beverly Glen, Inc. v. Los Angeles (1973) 34 Cal. App. 3d 117, 123, 109 Cal. Rptr. 724* , quoting from *Sierra Club v. Morton (1972) 405 U.S. 727, 732, 92 S. Ct. 1361, 31 L. Ed. 2d 636*).

[*Optional*] **D. Action by Corporation.** As used in the statute, the word "person" [or "organization"] includes a corporation (_____ [*if pursuant to Code Civ. Proc. § 1060 Code Civ. Proc.* § 17, *or if action*

under Gov. Code § 11350 see Chas. L. Harney, Inc. v. Contractors' Bd. (1952) 39 Cal. 2d 561, 564, 247 P.2d 913 , or if action under Unemp. Ins. Code § 409.2 see Pacific Legal Foundation v. Unemployment Ins. Appeals Bd. (1977) 74 Cal. App. 3d 150, 154, 141 Cal. Rptr. 474]).

NOTE:

The term "interested person" as used in *Code Civ. Proc. § 1060* and *Gov. Code §§ 11350* and 1350.3 would apparently include an unincorporated association as well as a corporation since an unincorporated association has power to sue and be sued in the name it has assumed or by which it is known [*Code Civ. Proc. § 369.5(a)*]. The term "interested ... organization" as used in *Unemp. Ins. Code § 409.2*, while not defined in the code, would appear to have been used generically to include both incorporated and unincorporated associations. [*See* Webster's Third International Dictionary defining "organization," among other things, as a group of people that has a more or less constant membership.] It also appears that the term "interested person" would include a limited liability company, although the above cited statutes have not been amended to reflect this [*see, e.g., Code Civ. Proc. §§ 680.280, 706.011(g)* (for purposes of enforcement of judgments and wage garnishment statutes, term "person" includes limited liability company)].

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a general demurrer to a complaint for declaratory relief on the ground the complaint fails to state facts sufficient to constitute a cause of action in that plaintiff lacks standing to sue [*see § 67.25*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Action by Interested Person

Code Civ. Proc. § 1060 provides, in pertinent part, that any person interested under a written instrument, excluding a will or a trust, or under a contract may, in cases of actual controversy, bring an original action in the superior court for a declaration of his or her rights and duties in premises.

Gov. Code § 11350 provides, in pertinent part, that any interested person may obtain a judicial declaration as to the validity of any regulation by bringing an action for declaratory relief in the superior court in accordance with the provisions of the Code of Civil Procedure.

Gov. Code § 11350.3 provides, in pertinent part, that any interested person may obtain a judicial declaration as to the validity of any regulation disapproved or ordered repealed by the Office of Administrative Law by bringing an action for declaratory relief in accordance with the provisions of the Code of Civil Procedure.

Unemp. Ins. Code § 409.2 provides, in pertinent part, that any interested person may bring an action for declaratory relief in the superior court in accordance with the provisions of the Code of Civil Procedure to obtain a judicial declaration as to the validity of any precedent decision of the Unemployment Insurance Appeals Board.

[b] What Constitutes Interest

Pacific Legal Foundation v. Unemployment Ins. Appeals Bd. *(1977) 74 Cal. App. 3d 150, 141 Cal. Rptr. 474* was an action to determine the validity of a precedent benefit decision of the Unemployment Insurance Appeals Board pursuant to the provisions of *Unemp. Ins. Code § 409.2*. Defendant's answer denied that plaintiff was an "interested organization" under the code section and moved for judgment on the pleadings on this ground and on the ground that the complaint did not state facts sufficient to constitute a cause of action. The motion was granted, and plaintiff appealed. In reversing the judgment after holding that plaintiff was an interested person and that the complaint did state a cause of action, the court of appeal said that the terms "interested person" or "interested organization" may be considered interchangeable and have been the subject of prior decisional interpretation under *Code Civ. Proc. § 1060*, the general declaratory relief statute referred to in *Unemp. Ins. Code § 409.2* and former Gov. Code § 11440 [*now see Gov. Code § 11350*], which allow any interested person to obtain a judicial declaration as to the validity of any regulation by bringing an action for declaratory relief in the superior court (*74 Cal. App. 3d 150, 154)* . The court added that it has been held that the term "interested person" as used in former Gov. Code § 11440 [*now see Gov. Code § 11350*] and *Code Civ. Proc. § 1060* are identical in use and should be so construed and that former Gov. Code § 11440 [*now see Gov. Code § 11350*] refers to the declaratory relief provision of the Code of Civil Procedure as does *Unemp. Ins. Code § 409.2*. The court acknowledged the fundamental principle that a person challenging a law must be a person or organization subject to it or affected by it and concluded that plaintiff corporation was a person both affected by the precedent decision in question ad interested in it and therefore had standing to maintain the action to determine its validity (*74 Cal. App. 3d 150, 155)* .

[c] Criteria

Residents of Beverly Glen, Inc. v. Los Angeles *(1973) 34 Cal. App. 3d 117, 109 Cal. Rptr. 724* was a proceeding in mandate and action for declaratory relief to have a conditional use permit granted to a real property developer by the city set aside and to declare that a specified section of the city's municipal code was unconstitutional. Plaintiff was a nonprofit corporation whose membership consisted of families resident in the area affected by the permit. The petition for writ of mandate was denied and defendant's subsequent motion for summary judgment on the declaratory relief actions was granted on the ground that plaintiff lacked standing to maintain the action since it owned no property in the affected area. In reversing the judgment, the court of appeal pointed out that the plaintiff had standing in view of the allegations of its complaint that (1) it was a corporation whose members lived in the affected area and (2) its members would suffer injury if the challenged project (a planned residential development), to be constructed under the permit pursuant to an allegedly unconstitutional ordinance, were allowed to proceed. The court noted that in recent years there has been a marked accommodation of formerly strict procedural requirements of standing to sue where matters relating to the social and economic realities of the present-day organization of society are concerned (*34 Cal. App. 3d 117, 122)* , and quoting from *Sierra Club v. Morton (1972) 405 U.S. 727, 732, 92 S. Ct. 1361, 31 L. Ed. 2d 636* , the court said that where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends on whether the party has alleged such a personal stake in the outcome of the controversy, as to ensure that the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution, and that where Congress has provided by statute for judicial review under certain circumstances, the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff (*34 Cal. App. 3d 117, 123)* .

[d] Action by Corporation

As already noted, *Code Civ. Proc. § 1060* authorizes any interested person to sue for declaratory relief. *Code Civ. Proc. § 17*, in part, provides that the word "person" as used in the code includes a corporation as well as a natural person.

Gov. Code § 11350 authorizes any interested person to obtain declaratory relief as to the validity of any regulation by bringing an action for declaratory relief in accordance with the provisions of the Code of Civil Procedure. The Government Code does not define the word "person" but by the reference to the Code of Civil Procedure if would appear that the definition of "person" in *Code Civ. Proc. § 17* would apply. In ***Chas. L. Harney, Inc. v. Contractors' Bd.*** *(1952) 39 Cal. 2d 561, 247 P.2d 913* , a corporation (a licensed general engineering contractor) sued the State Contractors' License Board under former Gov. Code § 11440 [*now see Gov. Code § 11350*] to obtain declaratory relief as to the validity of a regulation adopted by the board. The Supreme Court stated that the corporation, which was directly affected by the regulation, was an interested "party" within the meaning of *Code Civ. Proc. § 1060* and former Gov. Code § 11440 [*now see Gov. Code § 11350*] (*39 Cal. 2d 561, 564)* .

Unemp. Ins. Code § 409.2 authorizes a declaratory relief action by any interested person or organization in accordance with the provisions of the Code of Civil Procedure. The code defines neither "person" nor "organization," but it would appear that as in the case of former Gov. Code § 11440 [*now see Gov Code § 11350*], by the cross reference to the Code of Civil Procedure the definition of "person" set forth in *Code Civ. Proc. § 17* would apply to an action pursuant to *Unemp. Ins. Code § 409.2* [*see, e.g., Pacific Legal Foundation v. Unemployment Ins. Appeals Bd. (1977) 74 Cal. App. 3d 150, 141 Cal. Rptr. 474* (action by nonprofit corporation)].

California Points & Authorities

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Volume 6 Chapters 60-69 COSTS---to---DECLARATORY RELIEF
CHAPTER 67 DECLARATORY RELIEF
PART II. FORMS

6-67 California Points & Authorities § 67.56

§ 67.56 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10] for Declaratory Relief [Code Civ. Proc. § 1060]--Complaint Not Barred by Statute of Limitations When Brought Before Any Actual Breach

[1] FORM Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10] for Declaratory Relief [Code Civ. Proc. § 1060]--Complaint Not Barred by Statute of Limitations When Brought Before Any Actual Breach

[*Caption. See § 67.50.*]

A COMPLAINT FOR DECLARATORY RELIEF BROUGHT BEFORE ANY ACTUAL BREACH IS NOT BARRED BY STATUTE OF LIMITATIONS BECAUSE NO STATUTE OF LIMITATIONS HAS BEEN SET IN MOTION.

Complaint for Declaratory Relief Brought Before Any Actual Breach as Not Barred by Statute of Limitations. If declaratory relief is sought before there has been a breach of the obligation in respect to which the declaration is sought, the right to such relief is not barred by lapse of time. In the absence of any breach, no cause of action for a coercive remedy has accrued and no statute of limitations has been set in motion (*United Pacific/Reliance Ins. Co. v. DiDomencio (1985) 173 Cal. App. 3d 673, 676-677, 219 Cal. Rptr. 119*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in opposition to a demurrer to a complaint for declaratory relief when the demurrer is based on the ground that the complaint fails to state facts sufficient to constitute a cause of action in that it is barred by the applicable statute of limitations [*see § 67.26*]. The ground for opposition is that no breach giving rise to a coercive remedy has yet occurred, and therefore no statute of limitations has yet been set in motion.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include facts showing that there has been no actual breach of the obligation with respect to which the declaration is sought.

[3] Discussion of Authorities

[a] Complaint for Declaratory Relief Brought Before Any Actual Breach as Not Barred by Statute of Limitations

In ***United Pacific/Reliance Ins. Co. v. DiDomencio*** *(1985) 173 Cal. App. 3d 673, 219 Cal. Rptr. 119* , defendant had been sued in a tort action and plaintiff, his insurer, undertook the defense of the tort action pursuant to a reservation of rights. Plaintiff then filed an action seeking a declaration that it had no duty under the insurance policy to defend or indemnify defendant. Because defendant was also subject to criminal charges arising from the conduct that was the basis of the tort action, the trial court stayed proceedings in both the declaratory relief action and the tort action. After the criminal charges were dropped, the declaratory relief action was dismissed without prejudice, and a second declaratory relief action was instituted two days later. Defendant demurred on the ground that the action was barred by the statute of limitations, and the trial court sustained the demurrer without leave to amend. Plaintiff appealed the subsequent judgment of dismissal.

The court of appeal reversed (*173 Cal. App. 3d 673, 677)* . The court cited the leading case of *Maguire v. Hibernia Sav. & L. Soc'y (1944) 23 Cal. 2d 719, 734, 146 P.2d 673* , discussed in *§ 67.26[3][b]* for the principle that, if declaratory relief is sought before there has been any breach of the obligation with respect to which the declaration is sought, the right to such relief is not barred by the lapse of time. Until some conventional or coercive right of action has accrued, the statute of limitations does not operate to cut off the alternative right to bring an action for declaratory relief (*173 Cal. App. 3d 673, 676)* . The court noted that, in the present case, plaintiff had not breached its contract obligations with defendant but had assumed defendant's defense in the tort action pending a declaration of its rights and duties. It held that, in the absence of any breach, no cause of action for coercive relief had accrued and no statute of limitations had been set in motion (*173 Cal. App. 3d 673, 677)* .

California Points & Authorities

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Chapters 68through 69 RESERVED

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Chapters 68RESERVED

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Volume 7 Chapters 70 DEFAULTS
CHAPTER 70 DEFAULTS, DEFAULT JUDGMENTS, AND RELIEF FROM JUDGMENTS AND ORDERS

7-70 California Points & Authorities 70.syn

§ 70.syn Synopsis to Chapter 70: DEFAULTS, DEFAULT JUDGMENTS, AND RELIEF FROM JUDGMENTS AND ORDERS

§ 70.01 Scope of Chapter

§ 70.02 Governing Law

§ 70.03 How to Use the Forms in This Chapter

[1] Page Limits on Points and Authorities

[2] Using the Forms to Build a Draft Memorandum

§ 70.04 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

[2] Related Points and Authorities Chapters

§§ 70.05-70.09 [Reserved]

§ 70.10 Supporting Defendant's Motion to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. § 473(b)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Alternative Methods of Obtaining Relief

[d] Relief From Judgments, Orders and Proceedings Generally

[e] Showing of Meritorious Defense

[f] Relief From Default as Well as Default Judgment

[g] Multiple Grounds for Relief

[h] Conditions for Granting Relief

[i] Renewal of Motion

[j] Timely Filing of Motion

[k] Opposing Points and Authorities

[l] Related Pleading and Practice Chapters

[3] Discussion of Authorities

[a] Policy of Law Favors Trial on Merits

[b] Court Has Wide Discretion in Granting Relief

[c] Liberal Construction of Statute

[d] Timeliness of Motion

§ 70.11 Supporting Defendant's Motion to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. § 473(b)]--Slight Evidence Is Sufficient if Motion Is Timely or No Prejudice Is Shown

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Slight Evidence Sufficient if Motion Promptly Made

[b] Slight Evidence Sufficient if No Prejudice Shown

§ 70.12 Supporting Defendant's Motion to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. § 473(b)]--Attorney Affidavit of Fault

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Attorney Affidavit of Fault

[b] Attorney Affidavit Procedure Available After Default Entered by Judge

[c] Attorney Affidavit Procedure Available to Remedy Procedural Equivalent of Default

§§ 70.13-70.19 [Reserved]

§ 70.20 Supporting Contention That Motion for Relief Under Code Civ. Proc. § 473(b) in Conjunction With Motion to Quash Is Not General Appearance [Code Civ. Proc. § 418.10(d)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

§§ 70.21-70.29 [Reserved]

§ 70.30 Supporting Plaintiff's Motion to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. § 473(b)]--General Form--Plaintiff Is Entitled to Relief From Default

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Plaintiff Entitled to Relief From Default

[b] Relief Available to Party in Whose Favor Judgment Was Rendered

[c] Liberal Construction of Statute

[4] Additional Authorities

[a] Relief Available to Party in Whose Favor Judgment Was Rendered

§§ 70.31-70.39 [Reserved]

§ 70.40 Supporting Intervenor's Motion to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. §§ 387, 473(b)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Intervention Procedure

[d] Application for Intervention

[e] Related Pleading and Practice Chapters

[3] Discussion of Authorities

[a] Intervention to Set Aside Default

[4] Additional Authorities

[a] Intervention to Set Aside Default

§ 70.41 Supporting Intervenor's Motion to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. §§ 387, 473(b)]--Intervention Required When Interests Affected

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

§§ 70.42-70.49 [Reserved]

§ 70.50 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake of Fact [Code Civ. Proc. § 473(b)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Attorney Affidavit of Fault

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Mistake of Fact Defined

§ 70.51 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake of Fact [Code Civ. Proc. § 473(b)]--Mistake Regarding Fact of Service

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Mistake Regarding Fact of Service

§ 70.52 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake of Fact [Code Civ. Proc. § 473(b)]--Mistake Regarding Date of Service

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Mistake Regarding Date of Service

§ 70.53 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake of Fact [Code Civ. Proc. § 473(b)]--Mistake Caused by Incapacity

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Mistake Caused by Incapacity

§ 70.54 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake of Fact [Code Civ. Proc. § 473(b)]--Mistake of Attorney

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Attorney Affidavit of Fault

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Mistake of Attorney

[b] Attorney May be In-House Counsel

[4] Additional Authorities

[a] Mistake of Attorney

§§ 70.55-70.59 [Reserved]

§ 70.60 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake of Law [Code Civ. Proc. § 473(b)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Attorney Affidavit of Fault

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Mistake of Law Defined

[b] Relief for Reasonable Mistake of Law

[4] Additional Authorities

[a] Relief for Reasonable Mistake of Law

§ 70.61 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake of Law [Code Civ. Proc. § 473(b)]--Relief When Problem Is Complex and Debatable

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Relief When Problem Complex and Debatable

[4] Additional Authorities

[a] Relief When Problem Complex and Debatable

§ 70.62 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake of Law [Code Civ. Proc. § 473(b)]--Mistake of Law Regarding Validity of Summons or Complaint

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Mistake of Law Regarding Validity of Summons or Complaint

[4] Additional Authorities

[a] Mistake of Law Regarding Validity of Summons or Complaint

§ 70.63 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake of Law [Code Civ. Proc. § 473(b)]--Mistake of Law Regarding Validity of Court's Jurisdiction

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Mistake of Law Regarding Validity of Court's Jurisdiction

§ 70.64 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake of Law [Code Civ. Proc. § 473(b)]--Mistake of Law Regarding Meritorious Defense

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Mistake of Law Regarding Meritorious Defense

[4] Additional Authorities

[a] Mistake of Law Regarding Meritorious Defense

§§ 70.65-70.69 [Reserved]

§ 70.70 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Inadvertence [Code Civ. Proc. § 473(b)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Attorney Affidavit of Fault

[d] Notice of Request to Enter Default

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Excusable Inadvertence

[4] Additional Authorities

[a] Excusable Inadvertence

§ 70.71 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Inadvertence [Code Civ. Proc. § 473(b)]--Failure to Transmit Summons and Complaint

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Failure to Transmit Summons and Complaint to Attorney

[4] Additional Authorities

[a] Failure to Transmit Summons and Complaint to Attorney

§§ 70.72-70.79 [Reserved]

§ 70.80 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Surprise [Code Civ. Proc. § 473(b)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Surprise Defined

[4] Additional Authorities

[a] Surprise Defined

§ 70.81 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Surprise [Code Civ. Proc. § 473(b)]--Settlement Negotiations in Progress

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Settlement Negotiations in Progress

§§ 70.82-70.89 [Reserved]

§ 70.90 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Excusable Neglect [Code Civ. Proc. § 473(b)]--Reasonably Prudent Person Would Have Acted Similarly Under Same Circumstances

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Attorney Affidavit of Fault

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Policy Favors Relief if Excusable Neglect Shown

[b] Excusable Neglect Defined

[c] Relief for Excusable Neglect Based on Prudent Conduct

§ 70.91 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Excusable Neglect [Code Civ. Proc. § 473(b)]--Disability of Party--Party Unable to Arrange to Defend

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Disability of Party

[4] Additional Authorities

[a] Disability of Party

§ 70.92 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Excusable Neglect [Code Civ. Proc. § 473(b)]--Disability of Party--Moving Party Suffers From Mental Confusion or Illness

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Moving Party's Mental Confusion or Illness

§ 70.93 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Excusable Neglect [Code Civ. Proc. § 473(b)]--Disability of Party--Inability to Comprehend Legal Proceeding

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Inability to Comprehend Legal Proceeding

§ 70.94 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Excusable Neglect [Code Civ. Proc. § 473(b)]--Disability of Party's Attorney

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Attorney Affidavit of Fault

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Disability of Attorney

§ 70.95 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Excusable Neglect [Code Civ. Proc. § 473(b)]--Justifiable Reliance on Codefendant's Promise to Defend

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Reliance on Representation of Codefendant

§ 70.96 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Excusable Neglect [Code Civ. Proc. § 473(b)]--Justifiable Reliance on Third Party's Promise to Defend

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Reliance on Representation of Third Party

§ 70.97 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default

Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Excusable Neglect [Code Civ. Proc. § 473(b)]--Justifiable Reliance on Statements of Court Officers

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Reliance on Representations of Officers of Court

§ 70.98 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Excusable Neglect [Code Civ. Proc. § 473(b)]--Justifiable Reliance on Representations of Opposing Counsel

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Factors Supporting Entitlement to Relief

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Reliance on Representations of Opposing Counsel

[b] Conduct of Both Attorneys Evaluated

§ 70.99 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Excusable Neglect [Code Civ. Proc. § 473(b)]--Calendaring Error by Party's Attorney

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Calendaring Errors of Attorney or Attorney's Office Staff

[4] Additional Authorities

[a] Calendaring Errors of Attorney or Attorney's Office Staff

§ 70.100 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Excusable Neglect [Code Civ. Proc. § 473(b)]--Exception for Inexcusable Neglect of Attorney That Constitutes Positive Misconduct

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Attorney's Neglect Amounting to Positive Misconduct

[4] Additional Authorities

[a] Attorney's Neglect Amounting to Positive Misconduct

§§ 70.101-70.109 [Reserved]

§ 70.110 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Fraud of Opposing Party

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Relief Based on Opposing Party's Fraud

[i] Generally

[ii] Extrinsic and Intrinsic Fraud Distinguished

[iii] Alternate Relief Available When Fraud Is Extrinsic

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Statutory Relief Based on Fraud

[4] Additional Authorities

[a] Statutory Relief Based on Fraud

§§ 70.111-70.119 [Reserved]

§ 70.120 Opposing Motion to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. § 473(b)]--General Form--Relief Is Subject to Court's Sound Discretion

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Attorney Affidavit of Fault

[3] Discussion of Authorities

[a] Relief Pursuant to Trial Court's Discretion

[b] Court Has No Discretion to Grant Relief When Ground for Relief Not Shown

[c] Burden of Proof on Moving Party

[4] Additional Authorities

[a] Relief Pursuant to Trial Court's Discretion

[b] Court Has No Discretion to Grant Relief When Ground for Relief Not Shown

§ 70.121 Opposing Motion to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. § 473(b)]--General Form--Policy Favors Denial of Relief

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Policies Favoring Denial of Relief

§ 70.122 Opposing Motion to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. § 473(b)]--General Form--Mistake, Inadvertence, Surprise, or Excusable Neglect Not Reasonable

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Mistake, Inadvertence, or Surprise Must Be Reasonable to Justify Relief

§ 70.123 Opposing Motion to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. § 473(b)]--General Form--Party Failed to Exercise Reasonable Diligence in Arranging for Defense

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] No Relief for Lack of Reasonable Diligence

[4] Additional Authorities

[a] No Relief for Lack of Reasonable Diligence

§ 70.124 Opposing Motion to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. § 473(b)]--General Form--Attorney's Conduct Is Imputed to Client

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Attorney's Conduct Imputed to Client

§ 70.125 Opposing Motion to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. § 473(b)]--General Form--Existence of Meritorious Defense Is Irrelevant

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Existence of Meritorious Defense Is Irrelevant

§ 70.126 Opposing Motion to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. § 473(b)]--Attorney Affidavit of Fault--No Mandatory Relief for Failure to File Complaint Within Period of Limitation

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

§ 70.127 Opposing Motion to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. § 473(b)]--Court Lacks Jurisdiction Because of Pending Appeal [Code Civ. Proc. § 916(a)]--Further Proceedings Are In Excess of Court's Jurisdiction

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Trial Court's Power to Vacate Is Suspended

[b] Motion Is in Excess of Court's Jurisdiction

[c] Test to Determine Whether Stay Applies

[d] Order on Section 473 Motion Impacts Effectiveness of Pending Appeal

§ 70.128 Opposing Motion to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. § 473(b)]--Motion Constitutes Inadequate Motion for Reconsideration

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Second Bite at Apple Not Permitted

[b] Sanctions for Inappropriate Motion for Reconsideration

§ 70.129 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. § 473(b)]--No Relief for Failure to Take Jurisdictional Procedural Step--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

§ 70.130 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. § 473(b)]--No Relief for Failure to Take Jurisdictional Procedural Step--No Relief for

Untimely Motion to Vacate Judgment on Erroneous Legal Basis

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

§ 70.131 Opposing Motion to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. § 473(b)]--Code Civ. Proc. § 473(b) Does Not Provide Mandatory Relief From Judgment Entered on Arbitration Award Based on Attorney Affidavit of Fault Unless Client Was Denied Hearing

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

§ 70.132 Opposing Motion to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. § 473(b)]--Code Civ. Proc. § 473(b) Does Not Provide Mandatory Relief From Failure to Timely File Opposition to and Cross-Motion to Enforce Settlement

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

§ 70.133 Opposing Motion to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. § 473(b)]--Attorney Affidavit of Fault--No Mandatory Relief for Attorney Representing Self or Bringing Action in Representative Capacity

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

§§ 70.134-70.139 [Reserved]

§ 70.140 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground that Motion Is Untimely [Code Civ. Proc. § 473(b)]--Relief Not Based on Attorney Affidavit of Fault--Motion Brought After Six-Month Limitation

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Timeliness of Motion

[b] Six-Month Limitation Is Jurisdictional

[4] Additional Authorities

[a] Six-Month Limitation Is Jurisdictional

§ 70.141 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground that Motion Is Untimely [Code Civ. Proc. § 473(b)]--Relief Not Based on Attorney Affidavit of Fault--Motion Brought After Six-Month Limitation--Six-Month Limitation Period Runs From Date of Default

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Six-Month Limitation Period Runs From Date of Default

§ 70.142 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground that Motion Is Untimely [Code Civ. Proc. § 473(b)]--Relief Not Based on Attorney Affidavit of Fault--Motion Brought Within Six-Month Limitation But After

Reasonable Time

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Notice of Request to Enter Default

[3] Discussion of Authorities

[a] Extended Delay Must Be Sufficiently Explained

[b] Showing of Diligence Required

[c] Reasonable Time Test Is Independent Consideration

§ 70.143 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground that Motion Is Untimely [Code Civ. Proc. § 473(b)]--Relief Not Based on Attorney Affidavit of Fault--Motion Brought Within Six Months From Entry of Judgment But Beyond Six-Months After Entry of Default

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Court Has Jurisdiction to Set Aside Default Judgment, But Not Default

§ 70.144 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground that Motion Is Untimely [Code Civ. Proc. § 473(b)]--Relief Not Based on Attorney Affidavit of Fault--Attorney's Preoccupation With Other Matters Is Insufficient Reason for Delay

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Attorney's Preoccupation With Other Matters Is Insufficient Reason for Delay

§ 70.145 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground that Motion Is Untimely [Code Civ. Proc. § 473(b)]--Relief Based on Attorney Affidavit of Fault

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Attorney Affidavit of Fault Filed

§ 70.146 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground that Motion Is Untimely [Code Civ. Proc. § 473(b)]--Proposed Responsive Pleading Is Untimely

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Conflict in Court of Appeal Decisions on Viability of Substantial Compliance

[d] Reply Memorandum

[3] Discussion of Authorities

[a] Proposed Responsive Pleading Must Be Filed Within Six-Month Period

§ 70.147 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground that Motion Is Untimely [Code Civ. Proc. § 473(b)]--Alleged Fraud Is Intrinsic

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Alleged Fraud Is Intrinsic Not Extrinsic

[b] Motion Based on Intrinsic Fraud Must Be Brought Within Six-Month Limitation Period

§ 70.148 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground that Motion Is Untimely [Code Civ. Proc. § 473(b)]--Motion Not Filed Within Shortened Statutory Limitation Period Regarding Property Rights

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

§§ 70.149-70.159 [Reserved]

§ 70.160 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground That There Is Insufficient Showing of Mistake [Code Civ. Proc. § 473(b)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Attorney Affidavit of Fault

[3] Discussion of Authorities

[a] No Showing That Mistake Excusable

[4] Additional Authorities

[a] No Showing That Mistake Excusable

§ 70.161 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground That There Is Insufficient Showing of Mistake [Code Civ. Proc. § 473(b)]--No Showing of Mistake of Law

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] No Showing of Mistake of Law

§ 70.162 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground That There Is Insufficient Showing of Mistake [Code Civ. Proc. § 473(b)]--Attorney's Mistake of Law--Mistake Is Not Justifiable

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Attorney Affidavit of Fault

[3] Discussion of Authorities

[a] Justifiability of Mistake of Law Required for Relief

[4] Additional Authorities

[a] Justifiability of Mistake of Law Required for Relief

§ 70.163 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground That There Is Insufficient Showing of Mistake [Code Civ. Proc. § 473(b)]--Attorney's Mistake of Law Is Not Excusable--Ignorance and Negligence Compel Denial of Relief

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Attorney Affidavit of Fault

[3] Discussion of Authorities

[a] Ignorance and Negligence Compel Denial of Relief

§§ 70.164-70.169 [Reserved]

§ 70.170 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground That There Is Insufficient Showing of Excusable Inadvertence [Code Civ. Proc. § 473(b)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Attorney Affidavit of Fault

[3] Discussion of Authorities

[a] Inadvertence Inexcusable

[4] Additional Authorities

[a] Inadvertence Inexcusable

§ 70.171 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground That There Is Insufficient Showing of Excusable Inadvertence [Code Civ. Proc. § 473(b)]--Inadvertence In the Abstract Is Not Ground for Relief

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Attorney Affidavit of Fault

[3] Discussion of Authorities

[a] Inadvertence in the Abstract

[4] Additional Authorities

[a] Inadvertence in the Abstract

§§ 70.172-70.179 [Reserved]

§ 70.180 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground That There Is Insufficient Showing of Surprise [Code Civ. Proc. § 473(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Attorney Affidavit of Fault

[3] Discussion of Authorities

[a] No Showing of Surprise

§§ 70.181-70.189 [Reserved]

§ 70.190 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground of Inexcusable Neglect of Defendant [Code Civ. Proc. § 473(b)]--Deliberate Refusal to Act

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Attorney Affidavit of Fault

[3] Discussion of Authorities

[a] Burden of Proof on Moving Party to Show Excusable Neglect

[b] Deliberate Refusal to Act

[4] Additional Authorities

[a] Burden of Proof on Moving Party to Show Excusable Neglect

[b] Deliberate Refusal to Act

§ 70.191 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground of Inexcusable Neglect of Defendant [Code Civ. Proc. § 473(b)]--Failure to Act Despite Full Knowledge of Proceedings

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Attorney Affidavit of Fault

[3] Discussion of Authorities

[a] Failure to Act Despite Full Knowledge of Proceedings

[4] Additional Authorities

[a] Failure to Act Despite Full Knowledge of Proceedings

§ 70.192 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground of Inexcusable Neglect of Defendant [Code Civ. Proc. § 473(b)]--No Relief When Defendant's Conduct Is Not Reasonable

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Attorney Affidavit of Fault

[3] Discussion of Authorities

[a] No Relief When Defendant's Conduct Not That of Reasonably Prudent Person

§ 70.193 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground of Inexcusable Neglect of Defendant [Code Civ. Proc. § 473(b)]--Unreasonable Reliance on Third Party's Agreement to Defend

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Attorney Affidavit of Fault

[3] Discussion of Authorities

[a] Unreasonable Reliance on Third Party's Agreement to Defend

§ 70.194 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground of Inexcusable Neglect of Defendant [Code Civ. Proc. § 473(b)]--Disregard of Process

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Attorney Affidavit of Fault

[3] Discussion of Authorities

[a] Disregard of Process

§ 70.195 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground of Inexcusable Neglect of Defendant [Code Civ. Proc. § 473(b)]--Press of Business Is Inadequate Excuse

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Attorney Affidavit of Fault

[3] Discussion of Authorities

[a] Press of Business Inadequate Excuse

§§ 70.196-70.209 [Reserved]

§ 70.210 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground of Inexcusable Neglect of Counsel [Code Civ. Proc. § 473(b)]--Mere Neglect Is Not Sufficient Ground for Relief

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Attorney Affidavit of Fault

[3] Discussion of Authorities

[a] Mere Neglect or Negligence of Counsel

[b] Required Showing That Counsel's Neglect Was Excusable

[4] Additional Authorities

[a] Required Showing That Counsel's Neglect Was Excusable

§ 70.211 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground of Inexcusable Neglect of Counsel [Code Civ. Proc. § 473(b)]--No Showing of Causation Between Excusable Neglect and Default

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Attorney Affidavit of Fault

[3] Discussion of Authorities

[a] Causation Between Excusable Neglect and Default

§ 70.212 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground of Inexcusable Neglect of Counsel [Code Civ. Proc. § 473(b)]--Attorney's Press of Business, By Itself Is Not Ground for Relief

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Attorney Affidavit of Fault

[3] Discussion of Authorities

[a] Attorney's Press of Business, by Itself, Is Not Ground for Relief

[4] Additional Authorities

[a] Attorney's Press of Business, by Itself, Is Not Ground for Relief

§ 70.213 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground of Inexcusable Neglect of Counsel [Code Civ. Proc. § 473(b)]--Attorney's Illness When Substitute Counsel Was Obtainable

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Attorney Affidavit of Fault

[3] Discussion of Authorities

[a] Attorney's Illness When Substitute Counsel Obtainable

§ 70.214 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground of Inexcusable Neglect of Counsel [Code Civ. Proc. § 473(b)]--Attorney's Illness Occurred After Time for Response Expired

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Attorney Affidavit of Fault

[3] Discussion of Authorities

[a] Attorney's Illness Occurring After Time For Response Has Expired

§ 70.215 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground of Inexcusable Neglect of Counsel [Code Civ. Proc. § 473(b)]--Positive Misconduct Exception Does Not Apply When There Is No Abandonment of Attorney-Client Relationship

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Attorney Affidavit of Fault

[3] Discussion of Authorities

[a] Attorney's Negligence Imputed to Client

[b] No Abandonment of Attorney-Client Relationship

[c] Narrow Application of Positive Misconduct Exception

[4] Additional Authorities

[a] No Abandonment of Attorney-Client Relationship

§ 70.216 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground of Inexcusable Neglect of Counsel [Code Civ. Proc. § 473(b)]--Positive Misconduct Exception Does Not Apply When Moving Party Is Negligent

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Attorney Affidavit of Fault

[3] Discussion of Authorities

[a] Positive Misconduct Exception Inapplicable When Moving Party Also Negligent

§§ 70.217-70.229 [Reserved]

§ 70.230 Opposing Motion to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding [Code Civ. Proc. § 473(b)] With Alternative Request That Terms Be Imposed or Money Awarded in Event Relief Is Granted--Relief From Default May Be Granted on Terms as May Be Just

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Court's Statutory Authority to Award Costs

[d] Written Statement Supporting Sanctions Required

[e] Award of Attorney's Fees Must Be Just Condition

[f] Related Pleading and Practice Chapters

[g] Related Points and Authorities

[3] Discussion of Authorities

[a] Award of Attorney's Fees and Costs Allowed

[4] Additional Authorities

[a] Award of Attorney's Fees and Costs Allowed

§ 70.231 Opposing Motion to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding [Code Civ. Proc. § 473(b)] With Alternative Request That Terms Be Imposed or Money Awarded in Event Relief Is Granted--Award of Fees and Costs Is Mandatory on Attorney's Affidavit of Fault

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Relief Based on Attorney Affidavit of Fault

[d] Related Pleading and Practice Chapters

[e] Related Points and Authorities

§§ 70.232-70.235 [Reserved]

§ 70.236 Reply Memorandum Supporting Motion to Vacate and Set Aside Default and Default Judgment Based on Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. § 473(b)]--Substantial Compliance With Requirement for Filing of Proposed Answer

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Conflict in Court of Appeal Decisions on Viability of Substantial Compliance

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Substantial Compliance When Opposing Party Has Time to Prepare

§§ 70.237-70.239 [Reserved]

§ 70.240 Supporting Motion to Vacate and Set Aside Default and Default Judgment on Ground That Service of Summons Did Not Result in Actual Notice to Defendant in Time to Defend [Code Civ. Proc. § 473.5]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Alternative Methods of Obtaining Relief

[d] Timely Filing of Motion Under Code Civ. Proc. § 473.5

[e] Requirement of Showing of Meritorious Defense Unconstitutional

[f] Opposing Memoranda

[g] Related Pleading and Practice Chapters

[3] Discussion of Authorities

[a] Court May Grant Relief on Timely Motion if Defendant Not at Fault

[b] Granting of Relief Within Discretion of Trial Court

[c] Policy Favors Application for Relief

§ 70.241 Supporting Motion to Vacate and Set Aside Default and Default Judgment on Ground That Service of Summons Did Not Result in Actual Notice to Defendant in Time to Defend [Code Civ. Proc. § 473.5]--Service on Attorney Whose Failure to Inform Defendant Results From Positive Misconduct

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Positive Misconduct Exception

[3] Discussion of Authorities

[a] Service on Attorney Who Commits Positive Misconduct

§ 70.242 Supporting Motion to Vacate and Set Aside Default and Default Judgment on Ground That Service of Summons Did Not Result in Actual Notice to Defendant in Time to Defend [Code Civ. Proc. § 473.5]--Defendant Unaware of Nature of Documents Served

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Defendant Unaware of Nature of Documents

§§ 70.243-70.249 [Reserved]

§ 70.250 Supporting Motion to Vacate and Set Aside Default and Default Judgment on Ground of Improper Venue in Consumer Action [Code Civ. Proc. § 585.5]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Alternative Methods of Obtaining Relief

[d] Unruh Retail Installment Sales Act

[e] Automobile Sales Finance Act

[f] General Consumer Provision

[g] Opposing Memoranda

[h] Related Pleading and Practice Chapters

§ 70.251 Supporting Motion to Vacate and Set Aside Default and Default Judgment on Ground of Improper Venue in Consumer Action [Code Civ. Proc. § 585.5]--Damages and Costs May Be Awarded to Moving Party

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

§§ 70.252-70.259 [Reserved]

§ 70.260 Supporting Motion to Vacate and Set Aside Default and Default Judgment on Ground That Defendant's Military Service Prejudiced Defense [50 U.S.C. App. § 521(g)]--Application for Relief Is Proper

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Alternative Methods of Obtaining Relief

[d] Military Service Defined

[e] Timeliness of Application

[f] Showing of Prejudice to Defendant

[g] Showing of Meritorious or Legal Defense

[h] Opposing Memoranda

[i] Related Pleading and Practice Chapters

§ 70.261 Supporting Motion to Vacate and Set Aside Default and Default Judgment on Ground That Defendant's Military Service Prejudiced Defense [50 U.S.C. App. § 521(b)]--Relief Based on Failure to Appoint Attorney

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Failure to Appoint Attorney

[4] Additional Authorities

[a] Failure to Appoint Attorney

§ 70.262 Supporting Motion to Vacate and Set Aside Judgment Entered During Period of Military Service [Mil. & Vet. Code § 402(d)]--Defendant Was Prejudiced and Has Meritorious or Legal Defense

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

§§ 70.263-70.269 [Reserved]

§ 70.270 Supporting Motion to Vacate and Set Aside Default and Default Judgment on Ground of Court's Jurisdiction Over Law Practice of Defendant's Attorney [Code Civ. Proc. § 473.1]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Alternative Methods of Obtaining Relief

[d] Limitations Period

[e] No Declaration of Merits Required

§§ 70.271-70.279 [Reserved]

§ 70.280 Opposing Motion to Vacate and Set Aside Default and Default Judgment on Ground That Service of Summons Did Not Result in Actual Notice to Defendant in Time to Defend [Code Civ. Proc. § 473.5]--Motion Is Untimely--Notice of Motion Was Not Filed Within Statutory Period

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

§ 70.281 Opposing Motion to Vacate and Set Aside Default and Default Judgment on Ground That Service of Summons Did Not Result in Actual Notice to Defendant in Time to Defend [Code Civ. Proc. § 473.5]--Motion Is Untimely--Moving Party Failed to Act With Reasonable Diligence

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[3] Discussion of Authorities

[a] Diligence Required

§ 70.282 Opposing Motion to Vacate and Set Aside Default and Default Judgment on Ground That Service of Summons Did Not Result in Actual Notice to Defendant in Time to Defend [Code Civ. Proc. § 473.5]--Denial of Relief Is Proper Exercise of Court's Discretion

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[3] Discussion of Authorities

[a] Trial Court Has Discretion to Grant or Deny Relief

[4] Additional Authorities

[a] Trial Court Has Discretion to Grant or Deny Relief

§ 70.283 Opposing Motion to Vacate and Set Aside Default and Default Judgment on Ground That Service of Summons Did Not Result in Actual Notice to Defendant in Time to Defend [Code Civ. Proc. § 473.5]--Moving Party Had Actual Notice in Time to Defend

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[3] Discussion of Authorities

[a] Defendant Had Actual Notice in Time to Defend

§§ 70.284-70.289 [Reserved]

§ 70.290 Opposing Motion to Vacate and Set Aside Default and Default Judgment on Ground of Improper Venue in Consumer Action [Code Civ. Proc. § 585.5]--Motion Is Untimely

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

§§ 70.291-70.299 [Reserved]

§ 70.300 Opposing Motion to Vacate and Set Aside Default and Default Judgment on Ground That Defendant's Military Service Prejudiced Defense [50 U.S.C. App. § 521(g)]--No Relief Absent Showing of Prejudice

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[3] Discussion of Authorities

[a] No Relief Absent Showing of Prejudice

[b] No Relief Absent Showing of Material Effect on Defense

§ 70.301 Opposing Motion to Vacate and Set Aside Default and Default Judgment on Ground That Defendant's Military Service Prejudiced Defense [50 U.S.C. App. § 521(g)]--False Affidavit Does Not Render Judgment Void

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Filing of False Affidavit Does Not Render Judgment Void

§ 70.302 Opposing Motion to Vacate and Set Aside Default and Default Judgment on Ground That Defendant's Military Service Prejudiced Defense [50 U.S.C. App. § 521(g)]--Defendant Waived Rights

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Waiver of Rights

§ 70.303 Opposing Motion to Vacate and Set Aside Judgment Entered During Protected Period of Military Service [Mil. & Vet. Code § 402(d)]--Defendant Was Not Prejudiced by Reason of Military Service in Making Defense

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[3] Discussion of Authorities

§ 70.304 Opposing Motion to Vacate and Set Aside Judgment Entered During Protected Period of Military Service [Mil. & Vet. Code § 402(d)]--Defendant Has No Meritorious or Legal Defense

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

§§ 70.305-70.309 [Reserved]

§ 70.310 Supporting Motion to Set Aside Judgment or Order Void on Its Face [Code Civ. Proc. § 473(d)]--General

Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Alternative Methods of Obtaining Relief

[d] Void Judgment or Order

[i] In General

[ii] Invalidity Determined From Judgment Roll

[iii] What Constitutes the Judgment Roll

[iv] Distinguished From Judgment Valid on Its Face but Void in Fact

[e] Opposing Points and Authorities

[f] Related Pleading and Practice Chapters

[g] Related Points and Authorities

[3] Discussion of Authorities

[a] Relief From Void Judgment or Order

[b] Inherent Power to Set Aside Judgment Void on Its Face

[c] Test for Establishing That Judgment Is Void on Its Face

[4] Additional Authorities

[a] Inherent Power to Set Aside Judgment Void on Its Face

[b] Test for Establishing that Judgment Is Void on Its Face

§ 70.311 Supporting Motion to Set Aside Judgment or Order Void on Its Face [Code Civ. Proc. § 473(d)]--Judgment Is Void for Lack of Jurisdiction

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Judgment Void for Lack of Jurisdiction

[4] Additional Authorities

[a] Judgment Void for Lack of Jurisdiction

§ 70.312 Supporting Motion to Set Aside Judgment or Order Void on Its Face [Code Civ. Proc. § 473(d)]--Judgment May Be Attacked at Any Time

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Judgment May Be Attacked at Any Time

[4] Additional Authorities

[a] Judgment May Be Attacked at Any Time

§ 70.313 Supporting Motion to Set Aside Judgment or Order Void on Its Face [Code Civ. Proc. § 473(d)]--Intervention to Set Aside Void Judgment

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Intervention to Set Aside Void Judgment

§ 70.314 Supporting Motion to Set Aside Judgment or Order Void on Its Face [Code Civ. Proc. § 473(d)]--Motion in Conjunction With Motion to Quash Is Not General Appearance

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

§ 70.315 Supporting Motion to Set Aside Judgment or Order Void on Its Face [Code Civ. Proc. § 473(d)]--Pending Appeal Will Not Prevent Relief

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Pending Appeal Will Not Prevent Relief From Void Judgment or Order

§§ 70.316-70.329 [Reserved]

§ 70.330 Supporting Motion to Set Aside Judgment or Order Void on Its Face [Code Civ. Proc. § 473(d)] Based on Defective Summons or Manner of Service--General Form--Statutory Requirement for Service of Summons

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Methods of Service of Summons

[d] Absence of Proof of Service in Judgment Roll Not Definitive

[e] Alternative Relief When Improper Service Does Not Appear From Examination of Judgment Roll

[f] Opposing Points and Authorities

[g] Related Pleading and Practice Chapters

[3] Discussion of Authorities

[a] Statutory Requirement for Service of Summons

[b] Judgment Void on Its Face for Insufficient Service

[4] Additional Authorities

[a] Statutory Requirement for Service of Summons

§ 70.331 Supporting Motion to Set Aside Judgment or Order Void on Its Face [Code Civ. Proc. § 473(d)] Based on Defective Summons or Manner of Service--Entry of Default Is Proper Only if Defendant Was Served

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Entry of Default Proper Only if Defendant Was Served

§ 70.332 Supporting Motion to Set Aside Judgment or Order Void on Its Face [Code Civ. Proc. § 473(d)] Based on Defective Summons or Manner of Service--Personal Jurisdiction Is Not Conferred if Summons Is Substantially Defective

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Personal Jurisdiction Not Conferred if Summons Substantially Defective

§ 70.333 Supporting Motion to Set Aside Judgment or Order Void on Its Face [Code Civ. Proc. § 473(d)] Based on Defective Summons or Manner of Service--Personal Jurisdiction Is Not Conferred if Manner of Service Is Improper

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Personal Jurisdiction Not Conferred if Manner of Service Improper

§ 70.334 Supporting Motion to Set Aside Judgment or Order Void on Its Face [Code Civ. Proc. § 473(d) Based on Defective Summons or Manner of Service--Notice Without Substantial Compliance With Statute Is Inadequate

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Notice Without Substantial Compliance With Statute Inadequate

§ 70.335 Supporting Motion to Set Aside Judgment or Order Void on Its Face [Code Civ. Proc. § 473(d)] Based on Defective Summons or Manner of Service--Failure to Provide Statutory Notice to Person Served on Behalf of Corporation, Unincorporated Association, or Partnership [Code Civ. Proc. § 412.30]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Judgment Based on Service of Summons Lacking Corporate Notice Requirement Is Void

§ 70.336 Supporting Motion to Set Aside Judgment or Order Void on Its Face [Code Civ. Proc. § 473(d)] Based on Defective Summons or Manner of Service--Defective Affidavit for Publication of Summons [Code Civ. Proc. § 415.50]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Motion Under Code Civ. Proc. § 473.5 Distinguished

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Strict Construction of Service by Publication Statute

[b] Defective Affidavit for Service by Publication

§§ 70.337-70.349 [Reserved]

§ 70.350 Supporting Motion to Set Aside Judgment or Order Void on Its Face When Default Judgment Entered on Amended Complaint [Code Civ. Proc. § 473(d)]--Amended Complaint Was Not Served [Code Civ. Proc. § 471.5]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Judgment Void if Based on Unserved Amended Complaint

§ 70.351 Supporting Motion to Set Aside Judgment or Order Void on Its Face When Default Judgment Entered on Amended Complaint [Code Civ. Proc. § 473(d)]--Substantial Amendment After Entry of Default Opens Default

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Amendment of Complaint After Entry of Default

§ 70.352 Supporting Motion to Set Aside Judgment or Order Void on Its Face When Default Judgment Entered on Amended Complaint [Code Civ. Proc. § 473(d)]--Judgment Based on Failure to Answer Void When Amended Complaint Required No Answer

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Default Judgment Void When Based on Failure to Answer Immaterial Amendments

§§ 70.353-70.359 [Reserved]

§ 70.360 Supporting Motion to Set Aside Judgment or Order Void on Its Face Based on Unauthorized Entry of Default or Judgment by Clerk [Code Civ. Proc. § 585(a)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Judgment Void in Excess of Clerk's Authority

§ 70.361 Supporting Motion to Set Aside Judgment or Order Void on Its Face Based on Unauthorized Entry of Default or Judgment by Clerk [Code Civ. Proc. § 585(a)]--Premature Entry of Default

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Premature Entry of Default

[4] Additional Authorities

[a] Premature Entry of Default

§ 70.362 Supporting Motion to Set Aside Judgment or Order Void on Its Face Based on Unauthorized Entry of Default or Judgment by Clerk [Code Civ. Proc. § 585(a)]--Default Was Entered With Responsive Pleading on File

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Entry of Default When Responsive Pleading on File

§ 70.363 Supporting Motion to Set Aside Judgment or Order Void on Its Face Based on Unauthorized Entry of Default or Judgment by Clerk [Code Civ. Proc. § 585(a)]--Entry of Default in Action Remanded After Motion to Dismiss Is Granted in Federal Action

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Entry of Default in Action Remanded to State Court After Motion to Dismiss Filed in Federal Action

§ 70.364 Supporting Motion to Set Aside Judgment or Order Void on Its Face Based on Unauthorized Entry of Default or Judgment by Clerk [Code Civ. Proc. § 585(a)]--Entry of Default Judgment in Contract Action

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Judgment in Contract Actions

§ 70.365 Supporting Motion to Set Aside Judgment or Order Void on Its Face Based on Unauthorized Entry of Default or Judgment by Clerk [Code Civ. Proc. § 585(a)]--Entry of Default Judgment Against One of Several Defendants

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Judgment Against One of Several Defendants

§§ 70.366-70.379 [Reserved]

§ 70.380 Supporting Motion to Set Aside Judgment or Order Void on Its Face When Relief Awarded to Plaintiff Is in Excess of Demand of Complaint [Code Civ. Proc. §§ 425.10, 425.11, 425.115, 580]--Complaint Must Contain Demand for Judgment

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Demand for Judgment in Complaint

[b] Judgment Void When Relief Exceeds Demand of Complaint

§ 70.381 Supporting Motion to Set Aside Judgment or Order Void on Its Face When Relief Awarded to Plaintiff Is in Excess of Demand of Complaint [Code Civ. Proc. §§ 425.10, 425.11, 425.115, 580--Demand for Judgment in Section 425.11 Statement of Damages

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Demand for Judgment in Section 425.11 Statement of Damages

§ 70.382 Supporting Motion to Set Aside Judgment or Order Void on Its Face When Relief Awarded to Plaintiff Is in Excess of Demand of Complaint [Code Civ. Proc. §§ 425.10, 425.11, 425.115, 580]--Demand for Judgment in

Complaint and Section 425.115 Statement Reserving Punitive Damages

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Demand for Judgment in Complaint and in Section 425.115 Statement Reserving Punitive Damages

§ 70.383 Supporting Motion to Set Aside Judgment or Order Void on Its Face When Relief Awarded to Plaintiff Is in Excess of Demand of Complaint [Code Civ. Proc. §§ 425.10, 425.11, 425.115, 580]--Default Judgment Awarding Support Is Void When Not Requested in Petition for Marital Dissolution

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Default Judgment Awarding Child Support Void When Not Requested in Petition Marital Dissolution

§ 70.384 Supporting Motion to Set Aside Judgment or Order Void on Its Face When Relief Awarded to Plaintiff Is in Excess of Demand of Complaint [Code Civ. Proc. §§ 425.10, 425.11, 425.115, 580]--Demand for Damages in Excess of Specified Amount or According to Proof

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Demand for Damages in Excess of Specified Amount or According to Proof

§ 70.385 Supporting Motion to Set Aside Judgment or Order Void on Its Face When Relief Awarded to Plaintiff Is in Excess of Demand of Complaint [Code Civ. Proc. §§ 425.10, 425.11, 425.115, 580]--Demand Expressly Remits Damages in Excess of Court's Jurisdiction

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Demand Expressly Remitting Damages in Excess of Court's Jurisdiction

§ 70.386 Supporting Motion to Set Aside Judgment or Order Void on Its Face When Relief Awarded to Plaintiff Is in Excess of Demand of Complaint [Code Civ. Proc. §§ 425.10, 425.11, 425.115, 580]--Plaintiff in Action for Accounting Must Give Post-Complaint and Pre-Default Notice of Amount Sought

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Plaintiff in Action for Accounting Required to Give Post-Complaint and Pre-Default Notice of Amount Sought

§ 70.387 Supporting Motion to Set Aside Judgment or Order Void on Its Face When Relief Awarded to Plaintiff Is in Excess of Demand of Complaint [Code Civ. Proc. §§ 425.10, 425.11, 425.115, 580]--Amount of Punitive Damages Sought Is Irrelevant to Determination of Whether Compensatory Award Is Excessive

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Amount of Punitive Damages Sought Is Irrelevant to Determination of Whether Compensatory Damages Award Is Excessive

§ 70.388 Supporting Motion to Set Aside Judgment or Order Void on Its Face When Relief Awarded to Plaintiff Is in Excess of Demand of Complaint [Code Civ. Proc. §§ 425.10, 425.11, 425.115, 580]--General Allegation of Entitlement to Punitive Damages Is Insufficient

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] General Allegation of Entitlement to Punitive Damages Insufficient

§ 70.389 Supporting Motion to Set Aside Judgment or Order Void on Its Face When Relief Awarded to Plaintiff Is in Excess of Demand of Complaint [Code Civ. Proc. §§ 425.10, 425.11, 425.115, 580]--Attorney's Fees Award Is Improper Without Prayer

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Attorney's Fees Award Improper if Not Prayed for

§ 70.390 Supporting Motion to Set Aside Judgment or Order Void on Its Face When Relief Awarded to Plaintiff Is in Excess of Demand of Complaint [Code Civ. Proc. §§ 425.10, 425.11, 425.115, 580]--Limitation on Relief Applies When Answer Is Stricken as Discovery Sanction

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Limitation on Relief Applicable When Answer Stricken as Discovery Sanction

§§ 70.391-70.399 [Reserved]

§ 70.400 Supporting Motion to Set Aside Default Judgment Void on Its Face for Failure to Serve Statement of Damages on Cause of Action for Personal Injury or Wrongful Death [Code Civ. Proc. § 425.11]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Specification of Damages in Personal Injury and Wrongful Death Action

[i] Service of Statement of Damages Required

[ii] Manner of Service

[iii] Service by Publication

[iv] Time for Service

[v] Defective Proof of Service

[vi] Actual Notice of Special and General Damages Required

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Service of Statement of Damages Required in Personal Injury or Wrongful Death Action

[b] Defendant Must Be Given Actual Notice of Special and General Damages Claimed

[c] Failure to Serve Statement of Damages Renders Default Void on Its Face

[4] Additional Authorities

[a] Service of Statement of Damages Required in Personal Injury or Wrongful Death Action

[b] Failure to Serve Statement of Damages Renders Default Void on Its Face

§ 70.401 Supporting Motion to Set Aside Default Judgment Void on Its Face for Failure to Serve Statement of Damages on Cause of Action for Personal Injury or Wrongful Death [Code Civ. Proc. § 425.11]--Indication of Value During Settlement Conference Is Insufficient

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Indication of Value During Settlement Conference Is Insufficient

§ 70.402 Supporting Motion to Set Aside Default Judgment Void on Its Face for Failure to Serve Statement of Damages on Cause of Action for Personal Injury or Wrongful Death [Code Civ. Proc. § 425.11]--Service of Statement of Damages Did Not Precede Clerk's Entry of Default

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Service of Statement of Damages to Precede Clerk's Entry of Default

§ 70.403 Supporting Motion to Set Aside Default Judgment Void on Its Face for Failure to Serve Statement of Damages on Cause of Action for Personal Injury or Wrongful Death [Code Civ. Proc. § 425.11]--Unauthorized Method of Service--Defendant Has Not Appeared in Action [Code Civ. Proc. § 425.11(d)(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

§ 70.404 Supporting Motion to Set Aside Default Judgment Void on Its Face for Failure to Serve Statement of Damages on Cause of Action for Personal Injury or Wrongful Death [Code Civ. Proc. § 425.11]--Unauthorized Method of Service--Defendant Has Appeared in Action [Code Civ. Proc. § 425.11(d)(2)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

§§ 70.405-70.409 [Reserved]

§ 70.410 Supporting Motion to Set Aside Default Judgment Void on Its Face for Failure to Serve or Improper Service of Statement Reserving Right to Punitive Damages [Code Civ. Proc. § 425.115]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Reservation of Right to Punitive Damages

[3] Discussion of Authorities

[a] Failure to Serve Statement Reserving Punitive Damages Renders Default Void on Its Face

§ 70.411 Supporting Motion to Set Aside Default Judgment Void on Its Face for Failure to Serve or Improper Service of Statement Reserving Right to Punitive Damages [Code Civ. Proc. § 425.115]--Service to Precede Clerk's Entry of Default

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Service of Statement to Precede Clerk's Entry of Default

§ 70.412 Supporting Motion to Set Aside Default Judgment Void on Its Face for Failure to Serve or Improper Service of Statement Reserving Right to Punitive Damages [Code Civ. Proc. § 425.115]--Unauthorized Method of Service--Defendant Has Not Appeared in Action [Code Civ. Proc. § 425.115(g)(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

§ 70.413 Supporting Motion to Set Aside Default Judgment Void on Its Face for Failure to Serve or Improper Service of Statement Reserving Right to Punitive Damages [Code Civ. Proc. § 425.115]--Unauthorized Method of Service--Defendant Has Appeared in Action [Code Civ. Proc. § 425.115(g)(2)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

§§ 70.414-70.419 [Reserved]

§ 70.420 Supporting Motion to Set Aside Default Judgment Void on Its Face When Judgment in Family Law

Proceeding Involving Children Is Void for Lack of Subject Matter Jurisdiction--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Establishing That Judgment Is Void on Its Face in Family Law Proceeding Relating to Children

§ 70.421 Supporting Motion to Set Aside Default Judgment Void on Its Face When Judgment in Family Law Proceeding Involving Children Is Void for Lack of Subject Matter Jurisdiction--Lack of Jurisdiction Appears on Face of Domestic Relations Officer Report

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Lack of Subject Matter Jurisdiction Appears on Face of Domestic Relations Officer Report

§§ 70.422-70.429 [Reserved]

§ 70.430 Opposing Motion to Set Aside Judgment or Order Void on Its Face [Code Civ. Proc. § 473(d)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Alternative Methods of Obtaining Relief

[3] Discussion of Authorities

[a] Presumption Favoring Validity of Judgment

§ 70.431 Opposing Motion to Set Aside Judgment or Order Void on Its Face [Code Civ. Proc. § 473(d)]--Mere Erroneous Decision on Question of Law Does Not Make Judgment Void

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Mere Erroneous Decision Does Not Make Judgment Void

§ 70.432 Opposing Motion to Set Aside Judgment or Order Void on Its Face [Code Civ. Proc. § 473(d)]--Judgment Not Void Because of Failure of Complaint to State a Cause of Action

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Failure of Complaint to State Cause of Action Does Not Render Default Judgment Void

§§ 70.433-70.439 [Reserved]

§ 70.440 Opposing Motion to Set Aside Judgment or Order Void on Its Face [Code Civ. Proc. § 473(d)] on Ground That Service on Defendant Was Properly Made--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Liberal Construction of Service of Process Statutes

[b] Defect in Return of Service of Little Importance if Service Was Proper

§ 70.441 Opposing Motion to Set Aside Judgment or Order Void on Its Face [Code Civ. Proc. § 473(d)] on Ground That Service on Defendant Was Properly Made--Copies of Summons With Affidavits of Proof of Service Are Sufficient for Return

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Copies of Summons With Affidavits of Proof of Service Sufficient for Return

[4] Additional Authorities

[a] Copies of Summons With Affidavits of Proof of Service Sufficient for Return

§ 70.442 Opposing Motion to Set Aside Judgment or Order Void on Its Face [Code Civ. Proc. § 473(d)] on Ground That Service on Defendant Was Properly Made--Late Return of Summons Is Mere Irregularity

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Late Return of Summons Mere Irregularity

§ 70.443 Opposing Motion to Set Aside Judgment or Order Void on Its Face [Code Civ. Proc. § 473(d)] on Ground That Service on Defendant Was Properly Made--Proof of Service May Be Amended and Filed Nunc Pro Tunc as of Date of Judgment

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Proof of Service May Be Amended and Filed Nunc Pro Tunc as of Date of Judgment

§§ 70.444-70.449 [Reserved]

§ 70.450 Opposing Motion to Set Aside Judgment or Order Void on Its Face [Code Civ. Proc. § 473(d)] on Ground That Defendant Received Adequate Notice of Damages--Superior Court Personal Injury or Wrongful Death Action

[Code Civ. Proc. § 425.11]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Service of Statement of Damages Complied with Code Civ. Proc. § 425.11

§ 70.451 Opposing Motion to Set Aside Judgment or Order Void on Its Face [Code Civ. Proc. § 473(d)] on Ground That Defendant Received Adequate Notice of Damages--Action With Claim for Punitive Damages [Code Civ. Proc. § 425.115]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Reasonable Time Rule Pertaining to Statement of Damages May Apply by Analogy to Statement Reserving Right to Punitive Damages

[3] Discussion of Authorities

[a] Notice Satisfies Minimum Standards of Due Process

§ 70.452 Opposing Motion to Set Aside Judgment or Order Void on Its Face [Code Civ. Proc. § 473(d)] on Ground That Defendant Received Adequate Notice of Damages--Notice Requirement Was Satisfied by Complaint

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Notice Requirement Satisfied by Complaint

§ 70.453 Opposing Motion to Set Aside Judgment or Order Void on Its Face [Code Civ. Proc. § 473(d)] on Ground That Defendant Received Adequate Notice of Damages--Late Return of Proof of Service of Statement of Damages Is

Mere Irregularity

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Late Return of Proof of Service of Statement of Damages Mere Irregularity

§§ 70.454-70.459 [Reserved]

§ 70.460 Supporting Motion to Set Aside Judgment or Order Is Not Void on Its Face but Void in Fact [Code Civ. Proc. § 473(d)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Alternative Methods of Obtaining Relief

[d] Void Judgment or Order

[i] In General

[ii] Time Limitation for Motion to Set Aside Judgment Void in Fact

[e] Opposing Points and Authorities

[f] Related Pleading and Practice Chapters

[g] Related Points and Authorities

[3] Discussion of Authorities

[a] Inherent Power to Set Aside Judgment Not Void on Its Face but Void in Fact

[b] Court Has Duty to Set Aside Judgment

§ 70.461 Supporting Motion to Set Aside Judgment or Order Is Not Void on Its Face but Void in Fact [Code Civ. Proc. § 473(d)]--Judgment or Order Is Void for Lack of Personal Jurisdiction Because of Improper Service of Process--Evidence Admissible to Challenge Fact of Service

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Alternative Relief When Improper Service Appears on Examination of Judgment Roll

[d] Methods of Service of Summons

[e] Opposing Points and Authorities

[f] Related Pleading and Practice Chapters

[3] Discussion of Authorities

[a] Default Judgment Void in Fact Because of Improper Service

[b] Evidence Admissible to Challenge Fact of Service

§ 70.462 Supporting Motion to Set Aside Judgment or Order Is Not Void on Its Face but Void in Fact [Code Civ. Proc. § 473(d)]--Judgment or Order Is Void for Lack of Personal Jurisdiction Because of Improper Service of Process--Time Limitation on Default Judgment Is Void in Fact for Lack of Proper Service

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Time Limitation on Judgment Not Void on Its Face but Void in Fact for Lack of Proper Service

§ 70.463 Supporting Motion to Set Aside Judgment or Order Is Not Void on Its Face but Void in Fact [Code Civ. Proc. § 473(d)]--Judgment or Order Is Void for Lack of Authority of Attorney

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[3] Discussion of Authorities

[a] Void Judgment May Be Vacated if Attorney Acted Without Authorization of Client

[b] Attorney's Mistaken Dismissal With Prejudice Is Without Client's Authorization

§§ 70.464-70.469 [Reserved]

§ 70.470 Opposing Motion to Set Aside Judgment or Order Not Void on Its Face but Void in Fact [Code Civ. Proc. § 473(d)] on Ground That Motion Is Untimely--When Motion Asserts That Judgment Is Void in Fact Based on Defective Service--In General

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Alternative Methods of Obtaining Relief

[d] Time Limitation for Motion to Set Aside Judgment Void in Fact

[3] Discussion of Authorities

[a] Court's Power to Set Aside Judgment Not Void on Its Face Limited to Reasonable Time

[b] Application by Analogy of Code of Civil Procedure Section 473.5 Time Limitation

§ 70.471 Opposing Motion to Set Aside Judgment or Order Not Void on Its Face but Void in Fact [Code Civ. Proc. § 473(d)] on Ground That Motion Is Untimely--When Motion Asserts That Judgment Is Void in Fact Based on Defective Service--What Constitutes Reasonable Time

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] What Constitutes "Reasonable Time"

§ 70.472 Opposing Motion to Set Aside Judgment or Order Not Void on Its Face but Void in Fact [Code Civ. Proc. § 473(d)] on Ground That Motion Is Untimely--When Motion Asserts Reason Other Than Defective Service

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Motion Must Be Brought Within Six-Month Period in Code Civ. Proc. § 473(b)

§§ 70.473-70.479 [Reserved]

§ 70.480 Supporting Motion in Equity to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Alternative Methods of Obtaining Relief

[d] Motion for Equitable Relief From Default

[i] In General

[ii] Showing of Meritorious Defense

[iii] Motion in Probate Proceeding

[iv] Independent Suit in Equity

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Inherent Equitable Power of Superior Court to Set Aside Judgment

[b] Express Equitable Power of Municipal Court to Set Aside Judgment

[c] Motion Addressed to Discretion of Court

[d] Policy of Law

[4] Additional Authorities

[a] Inherent Equitable Power of Superior Court to Set Aside Judgment

§ 70.481 Supporting Motion in Equity to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress--Timeliness of Motion

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Timeliness of Motion

§ 70.482 Supporting Motion in Equity to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress--Showing of Meritorious Defense

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Showing of Meritorious Defense

§ 70.483 Supporting Motion in Equity to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress--Motion Based on Extrinsic Fraud

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Extrinsic Fraud Defined

[b] Broad Meaning Given to Grounds of "Extrinsic Fraud" and "Extrinsic Mistake"

§ 70.484 Supporting Motion in Equity to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress--Motion Based on Extrinsic Mistake

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Extrinsic Mistake Defined

§§ 70.485-70.489 [Reserved]

§ 70.490 Opposing Motion in Equity to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress--Motion Not Made Within Reasonable Time Is Untimely

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Alternative Methods of Obtaining Relief

[3] Discussion of Authorities

[a] Motion Is Not Timely

§ 70.491 Opposing Motion in Equity to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress--Extrinsic Fraud Not Shown

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Extrinsic Fraud Not Shown

§§ 70.492-70.499 [Reserved]

§ 70.500 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] in Equity to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress--Alleged Extrinsic Fraud or Mistake Not Pleaded With Particularity and Specificity

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[d] Related Pleading and Practice Chapters

[e] Related Points and Authorities

[3] Discussion of Authorities

[a] Pleading of Facts

[4] Additional Authorities

[a] Pleading of Facts

§ 70.501 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] in Equity to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress--Plaintiff Is Not Proper Party

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[d] Related Pleading and Practice Chapters

[e] Related Points and Authorities

[3] Discussion of Authorities

[a] Proper Parties Plaintiff

[b] Interest Necessary for Action

§ 70.502 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] in Equity to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress--Lapse of Statute of Limitations

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[d] Related Pleading and Practice Chapters

[e] Related Points and Authorities

[3] Discussion of Authorities

[a] Failure to State Cause of Action

[b] Pleading Facts Relating to Discovery of Fraud or Mistake

[c] Plaintiff Must Affirmatively Excuse Failure to Discover Fraud or Mistake

[4] Additional Authorities

[a] Failure to State Cause of Action

[b] Three-Year Limitation Period

[c] Pleading Facts Relating to Discovery of Fraud or Mistake

[d] Plaintiff Must Affirmatively Excuse Failure to Discover Fraud or Mistake

§ 70.503 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] in Equity to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress--Laches Precludes Relief

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[d] Related Pleading and Practice Chapters

[e] Related Points and Authorities

[3] Discussion of Authorities

[a] Laches Is Bar to Action

[b] Laches Shown on Face of Complaint

[c] Pleading Excuse for Delay

§§ 70.504-70.509 [Reserved]

§ 70.510 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] on Complaint in Equity to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress--Plaintiff Had Adequate Opportunity to Litigate Issues at Hearing on Prior Motion to Vacate

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[d] Related Pleading and Practice Chapters

[e] Related Points and Authorities

[3] Discussion of Authorities

[a] Opportunity to Litigate on Motion to Vacate

§ 70.511 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] on Complaint in Equity to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress--Exhaustive Adversarial Hearing or Presentation of Particular Type of Evidence Not Essential

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Exhaustive Adversarial Hearing or Presentation of Particular Type of Evidence Not Essential

§§ 70.512-70.519 [Reserved]

§ 70.520 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] in Equity to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Independent Action in Equity

[4] Additional Authorities

[a] Independent Action in Equity

§ 70.521 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] in Equity to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress--Municipal Court's Statutory Jurisdiction

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

§ 70.522 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] in Equity to Vacate and Set Aside

Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress--Review of Probate Court Decrees

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Review of Probate Court Decrees

§ 70.523 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] in Equity to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress--Action Not Barred by Statute of Limitations or Laches Due to Tolling of Three-Year Statute of Limitations Until Discovery of Facts Constituting Fraud or Mistake--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Investigation Which Would Have Revealed Facts

§ 70.524 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] in Equity to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress--Action Not Barred by Statute of Limitations or Laches Due to Tolling of Three-Year Statute of Limitations Until Discovery of Facts Constituting Fraud or Mistake--Improper Concealment Causing Lack of Investigation

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Improper Concealment Causing Lack of Investigation

§ 70.525 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] in Equity to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress--Action Not Barred by Statute of Limitations or Laches Due to Tolling of Three-Year Statute of Limitations Until Discovery of Facts Constituting Fraud or Mistake--Representations Dissuading Inquiry Precludes Constructive Notice of Public Records

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Representations Dissuading Inquiry Precludes Constructive Notice

§ 70.526 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] in Equity to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress--Action Not Barred by Statute of Limitations or Laches Due to Aggrieved Party's Disability

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Four-Year Period of Limitation Applicable

§ 70.527 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] in Equity to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress--Action Not Barred by Laches Due to Reasonable Diligence in Commencing Action--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Reasonable Diligence After Discovery of Facts

§ 70.528 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] in Equity to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress--Action Not Barred by Laches Due to Reasonable Diligence in Commencing Action--Minimal Prejudice to Opposing Party

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Minimal Prejudice to Opposing Party

§§ 70.529-70.539 [Reserved]

§ 70.540 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c] on Complaint in Equity to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress on Ground That Prior Motion to Vacate Does Not Bar Present Action--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] No Summary Judgment Unless There Are No Triable Issues

[b] Attack on Judgment by Motion to Vacate and Independent Equitable Action Distinct and Cumulative

[c] Test Is Whether Issues Were Fully Presented or Full Opportunity to Develop Issues by Oral Testimony Granted

§ 70.541 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437] on Complaint in Equity to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress on Ground That Prior Motion to Vacate Does Not Bar Present Action--Presentation of Issues Test Applies Whether Prior Motion Was in Equity or Under

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Presentation of Issues Test Applies Whether Prior Motion Was in Equity or Under Code Civ. Proc. § 473

§§ 70.542-70.549 [Reserved]

§ 70.550 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress--General Grounds for Grant of Equitable Relief

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Absence of Fair Adversary Trial in Prior Action

[b] Judgment Taken Under Circumstances of Unfairness and Injustice

[c] Extrinsic Fraud Which Prevents Fair Adversary Trial

[d] Extrinsic Mistake in Absence of Fair Adversary Trial

[4] Additional Authorities

[a] Absence of Fair Adversary Trial in Prior Action

[b] Extrinsic Fraud Which Prevents Fair Adversary Trial

[c] Extrinsic Mistake in Absence of Fair Adversary Trial

§§ 70.551-70.559 [Reserved]

§ 70.560 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Mistake of Fact--Generally

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Relief in Equity for Mistake of Fact

§ 70.561 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Mistake of Fact--Mistake Preventing Proper Notice or Appearance

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Mistake Preventing Proper Notice or Appearance

§ 70.562 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Mistake of Fact--Mistake of Prevailing Party in Original Action

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Extrinsic Mistake of Prevailing Party

[4] Additional Authorities

[a] Extrinsic Mistake of Prevailing Party

§ 70.563 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Mistake of Fact--Mistake of Aggrieved Party--Loss of Answer in Mail

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Extrinsic Mistake of Aggrieved Party

[b] Loss of Answer in Mail as Basis for Equitable Relief

§ 70.564 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Mistake of Fact--Mistake of Aggrieved Party--Reasonable Reliance on Representations of Opposing Party's Attorney

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Extrinsic Mistake of Aggrieved Party Induced by Prevailing Party

[b] Reliance on Representations of Opposing Counsel

[c] Deliberate Delay in Enforcing Default Judgment

[4] Additional Authorities

[a] Reliance on Representations of Opposing Counsel

§ 70.565 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Mistake of Fact--Mistake of Aggrieved Party--Disability of Aggrieved Party or Party's Attorney Rendered Aggrieved Party Unable to Defend

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Relief for Incompetent Defendant

[b] Relief in Equity for Disability of Attorney

§ 70.566 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Mistake of Fact--Mistake of Aggrieved Party--Inexcusable Neglect of Aggrieved Party's Attorney Rendered Aggrieved Party Unable to Defend

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Relief for Attorney's Inexcusable Neglect

[4] Additional Authorities

[a] Relief for Attorney's Inexcusable Neglect

§ 70.567 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Mistake of Fact--Mistake of Court or Referee

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Extrinsic Mistake of Court, Referee, or Commissioner

§§ 70.568-70.579 [Reserved]

§ 70.580 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud--Collusive Judgment--Generally

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Collusive Judgment

[b] Standing of Third Parties

[4] Additional Authorities

[a] Collusive Judgment

§ 70.581 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud--Collusive Judgment--Pecuniary or Other Interest

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Pecuniary or Other Interest

§ 70.582 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud--Fraudulent Change in Terms of Oral Settlement

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Effect of Parol Evidence Rule

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Change in Terms of Oral Settlement

§ 70.583 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud--Concealment of Legal Disability of Aggrieved Party

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Concealment of Disability

§ 70.584 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and

Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud--Concealment or Misrepresentation by Fiduciary--Generally

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Concealment or Misrepresentation by Fiduciary

[4] Additional Authorities

[a] Concealment or Misrepresentation by Fiduciary

§ 70.585 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud--Concealment or Misrepresentation by Fiduciary--Failure by Fiduciary to Make Disclosure

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Failure by Fiduciary to Make Disclosure

[4] Additional Authorities

[a] Failure by Fiduciary to Make Disclosure

§ 70.586 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud--Concealment or Misrepresentation by Fiduciary--False Conclusions of Fact or Law Equally Condemned

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] False Conclusions of Fact or Law Equally Condemned

§ 70.587 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud--Concealment or Misrepresentation by Fiduciary--Lack of Intent to Defraud Immaterial

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Lack of Intent to Defraud Immaterial

[4] Additional Authorities

[a] Lack of Intent to Defraud Immaterial

§ 70.588 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud--Concealment or Misrepresentation by Fiduciary--Good Faith Shields Personal Representative Only in Absence of Negligence

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Good Faith Shields Personal Representative Only in Absence of Negligence

§ 70.589 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud--Fraudulent or Negligent Failure to Give Notice of Original Action--Willful Failure to Give Required Service

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Willful Failure to Give Required Service

[4] Additional Authorities

[a] Willful Failure to Give Required Service

§ 70.590 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud--Fraudulent or Negligent Failure to Give Notice of Original Action--Lack of Diligence in Effecting Personal Service

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Lack of Diligence in Effecting Personal Service

[4] Additional Authorities

[a] Lack of Diligence in Effecting Personal Service

§ 70.591 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud--Fraudulent or Negligent Failure to Give Notice of Original Action--False Recitals Regarding Service

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] False Recitals Regarding Service

[4] Additional Authorities

[a] False Recitals Regarding Service

§§ 70.592-70.599 [Reserved]

§ 70.600 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Duress--Generally

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Duress Is Valid Ground to Set Aside Judgment or Order

[b] Duress Defined

[c] Determination of Duress Depends on Effect on Threatened Person's Mind

§ 70.601 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Duress--Determination of Whether Consent to Entry of Default Judgment Was Voluntary

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Determination of Whether Consent to Entry of Default Judgment Was Voluntary

§ 70.602 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Duress--Lack of Independent Advice Is a Fact to Be Weighed

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Lack of Independent Advice Is a Fact to Be Weighed

§ 70.603 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Duress--Lack of Independent Advice With Interference With Attempts to Obtain Advice Is Persuasive

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Lack of Independent Advice With Interference With Attempts to Obtain Advice Is Persuasive

§§ 70.604-70.609 [Reserved]

§ 70.610 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained When Moving Party's Negligence Does Not Prejudice Opposing Party

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Mistake of Fact by Somewhat Negligent Plaintiff

[4] Additional Authorities

[a] Mistake of Fact of Somewhat Negligent Plaintiff

§§ 70.611-70.619 [Reserved]

§ 70.620 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order on Ground That Requirement of Showing Meritorious Claim or Defense Is Satisfied--Meritorious Claim or Defense Sufficiently Shown--Generally

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Meritorious Claim or Defense Sufficiently Shown

[4] Additional Authorities

[a] Meritorious Claim or Defense Sufficiently Shown

§ 70.621 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order on Ground That Requirement of Showing Meritorious Claim or Defense Is Satisfied--Meritorious Claim or Defense Sufficiently Shown--Difficulty of Proof Is Not Determinative of Sufficiency of Allegation in Complaint

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Difficulty of Proof Not Determinative of Sufficiency of Allegation in Complaint

§ 70.622 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order on Ground That Requirement of Showing Meritorious Claim or Defense Is Satisfied--Showing of Meritorious Defense Not Required--Relief From Decree or Order in Marital Dissolution Proceeding

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Showing of Meritorious Defense Not Required in Marital Dissolution Action

§ 70.623 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order on Ground That Requirement of Showing Meritorious Claim or Defense Is Satisfied--Meritorious Claim or Defense Sufficiently Shown--Showing of Meritorious Defense Not Required--Relief From Void Judgment or Order

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Due Process Considerations

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Showing of Meritorious Defense Not Required When Judgment Is Void

§§ 70.624-70.629 [Reserved]

§ 70.630 Opposing Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress on Ground That There Is Insufficient Showing of Extrinsic Fraud, Mistake, or Duress Justifying Relief--Generally

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Circumstances of Case Do Not Overcome Strong Policy Favoring Finality of Judgments

§ 70.631 Opposing Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress on Ground That There Is Insufficient Showing of Extrinsic Fraud, Mistake, or Duress Justifying Relief--Relief Denied if Party Had Notice and Was Not Prevented From Participating

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Relief Is Denied if Party Has Been Given Notice and Not Prevented From Participating

§ 70.632 Opposing Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress on Ground That There Is Insufficient Showing of Extrinsic Fraud, Mistake, or Duress Justifying Relief--Relief Only When Fraud or Mistake Is Extrinsic

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Relief Only When Fraud or Mistake Is Extrinsic

[b] Intrinsic Fraud or Mistake Defined

[c] Extrinsic Fraud or Mistake Distinguished

§ 70.633 Opposing Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress on Ground That There Is Insufficient Showing of Extrinsic Fraud, Mistake, or Duress Justifying Relief--Perjured Testimony or Forged Instrument Intrinsic

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Perjured Testimony or Forged Instrument Intrinsic

§ 70.634 Opposing Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress on Ground That There Is Insufficient Showing of Extrinsic Fraud, Mistake, or Duress Justifying Relief--Excuse for Failure to Present Defense Required

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Excuse for Failure to Present Defense Required

§ 70.635 Opposing Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress on Ground That There Is Insufficient Showing of Extrinsic Fraud, Mistake, or Duress Justifying Relief--Issues Previously Litigated

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Issues Previously Litigated

§ 70.636 Opposing Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress on Ground That There Is Insufficient Showing of Extrinsic Fraud, Mistake, or Duress Justifying Relief--Attorney's Erroneous Legal Conclusion

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Attorney's Erroneous Legal Conclusion

§ 70.637 Opposing Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress on Ground That There Is Insufficient Showing of Extrinsic Fraud, Mistake, or Duress Justifying Relief--Attorney's Neglect

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Attorney's Neglect

§ 70.638 Opposing Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress on Ground That There Is Insufficient Showing of Extrinsic Fraud, Mistake, or Duress Justifying Relief--Mutual Mistake

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Mutual Mistake

§§ 70.639-70.649 [Reserved]

§ 70.650 Opposing Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress on Ground That There Is Insufficient Showing of Meritorious Defense

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Ability to Present Meritorious Claim or Defense

[b] Demonstration of Meritorious Claim or Defense Required

[4] Additional Authorities

[a] Ability to Present Meritorious Claim or Defense

§§ 70.651-70.659 [Reserved]

§ 70.660 Opposing Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress on Ground That Negligence or Fault of Party Seeking Relief Precludes Relief--Generally

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Fault on Part of Complaining Party

[b] Requirement of Diligence in Seeking Relief

[c] Pleading Diligence in Seeking Relief After Discovery

§ 70.661 Opposing Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress on Ground That

Negligence or Fault of Party Seeking Relief Precludes Relief--Complaining Party Contributed to Fraud or Mistake

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Complaining Party Contributed to Fraud or Mistake

§ 70.662 Opposing Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress on Ground That Negligence or Fault of Party Seeking Relief Precludes Relief--Complaining Party Guilty of Negligence

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Complaining Party Guilty of Negligence

[4] Additional Authorities

[a] Complaining Party Guilty of Negligence

§§ 70.663-70.669 [Reserved]

§ 70.670 Opposing Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress on Ground That Court Should Exercise Discretion to Deny Equitable Relief Under Particular Circumstances of Case

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Court Has Discretion to Deny Relief

[b] Discretion to Be Exercised With View Toward Accomplishment of Justice

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7-70 California Points & Authorities § 70.01

§ 70.01 Scope of Chapter

This chapter contains memoranda of points and authorities for use in proceedings for relief from a default and default judgment or from other judgments, dismissals, or orders generally.

Part II, Subpart A, covers the statutory relief from a valid default and default judgment or other judgment. Subpart 1, relating to relief based on mistake, inadvertence, surprise, or excusable neglect, generally includes the following types of forms:

- Supporting and opposing defendant's motions to vacate and set aside default and default judgment or other judgment, dismissal, order, or proceeding based on mistake, inadvertence, surprise, or excusable neglect generally (§ 70.10 et seq., § 70.120 et seq.).

- Supporting plaintiff's motions to vacate and set aside default and default judgment or other judgment, dismissal, order, or proceeding based on mistake, inadvertence, surprise, or excusable neglect generally (§ 70.30 et seq.).

- Supporting intervenor's motions to vacate and set aside default and default judgment or other judgment, dismissal, order, or proceeding based on mistake, inadvertence, surprise, or excusable neglect generally (§ 70.40 et seq.).

- Supporting and opposing motions to vacate and set aside default and default judgment or other judgment, dismissal, order, or proceeding based on mistake (§ 70.50 et seq., § 70.160 et seq.).

- Supporting and opposing motions to vacate and set aside default and default judgment or other judgment, dismissal, order, or proceeding based on inadvertence (§ 70.70 et seq., § 70.170 et seq.).

- Supporting and opposing motions to vacate and set aside default and default judgment or other judgment, dismissal, order, or proceeding based on surprise (§ 70.80 et seq., § 70.180 et seq.).

- Supporting and opposing motions to vacate and set aside default and default judgment or other judgment, dismissal, order, or proceeding based on excusable neglect (§ 70.90 et seq., § 70.190 et seq.).

- Supporting motions to vacate and set aside default and default judgment or other judgment, dismissal, order, or proceeding based on fraud (§ 70.110 et seq.).

- Opposing motion to vacate and set aside default and default judgment based on untimeliness of motion (§ 70.140 et seq.).

- Reply memorandum supporting motion to vacate and set aside default and default judgment based on substantial compliance with requirement that proposed pleading be filed with notice of motion (§ 70.236).

Subpart 2, relating to other statutory relief, generally includes the following types of forms:

- Supporting and opposing motions to vacate and set aside default and default judgment or other judgment, dismissal, order, or proceeding on grounds that summons did not result in actual notice in time to defend (§ 70.240 et seq., § 70.280 et seq.).

- Supporting and opposing motions to vacate and set aside default and default judgment or other judgment, dismissal, order, or proceeding on grounds of improper venue in consumer actions (§ 70.250 et seq., § 70.290 et seq.).

- Supporting and opposing motions to vacate and set aside default and default judgment or other judgment, dismissal, order, or proceeding under the Servicemembers Civil Relief Act (§ 70.260 et seq., § 70.300 et seq.).

- Supporting and opposing motions to vacate and set aside judgments entered during a period of military service as a member of the National Guard or reservist (§§ 70.262, 70.303).

- Supporting motions to vacate and set aside default and default judgment or other judgment, dismissal, order, or proceeding on grounds of court's jurisdiction over law practice of defendant's attorney (§ 70.270 et seq.).

Part II, Subpart B, covers statutory relief from void judgments or orders under *Code Civ. Proc. § 473(d)*. Subpart 1, relating to relief from a judgment or order that is void on its face, includes the following types of forms:

- Supporting and opposing motions to vacate and set aside judgment or order void on its face generally (§ 70.310 et seq., § 70.430 et seq.).

- Supporting and opposing motions to vacate and set aside judgment or order void on its face based on defective service (§ 70.330 et seq., § 70.440 et seq.).

- Supporting motions to vacate and set aside judgment or order void on its face based on unauthorized entry of default or default judgment by clerk (§ 70.360 et seq.).

- Supporting and opposing motions to vacate and set aside judgment or order void on its face based on relief in excess of demand (§ 70.380 et seq., § 70.450 et seq.).

Subpart 2, relating to relief from a judgment or order that is void in fact, includes the following types of forms:

- Supporting and opposing motions to vacate and set aside judgment or order void in fact generally (§ 70.460 et seq., § 70.470 et seq.).

Part II, Subpart C, covers equitable relief from default judgments or other judgments or orders based on extrinsic fraud, mistake, or duress. Subpart 1, relating to motions in equity, includes the following types of forms:

- Supporting and opposing motions in equity to vacate and set aside judgment or order based on extrinsic fraud, mistake or duress generally (§ 70.480 et seq., § 70.490 et seq.).

Subpart 2, relating to suits in equity, includes the following types of forms:

- Supporting and opposing demurrer to complaint (§ 70.500 et seq., § 70.520 et seq.).

- Supporting and opposing motion for summary judgment (§ 70.510 et seq., § 70.540 et seq.).

Subpart 3, relating to grounds for granting or denying equitable relief, includes the following types of forms:

- Supporting and opposing contention that equitable relief should be granted based on extrinsic mistake of fact (§ 70.560 et seq., § 70.630 et seq.).

- Supporting and opposing contention that equitable relief should be granted based on extrinsic fraud (§ 70.580 et seq., § 70.630 et seq.).

- Supporting and opposing contention that equitable relief should be granted based on duress (§ 70.600 et seq., § 70.630 et seq.).

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7-70 California Points & Authorities § 70.02

§ 70.02 Governing Law

Relief from a judgment, dismissal, order, or other proceeding based on mistake, inadvertence, surprise, or excusable neglect, is governed by *Code Civ. Proc. § 473(b)*. Relief from default and default judgment based on lack of actual notice after constructive service is governed by *Code Civ. Proc. § 473.5*. Relief from default based on improper venue under the Unruh Retail Installment Sales Act (*Civ. Code § 1801 et seq.*), the Automobile Sales Finance Act (*Civ. Code § 2981 et seq.*), or the general consumer venue statute (*Code Civ. Proc. § 395(b)*) is governed by *Code Civ. Proc. § 585.5*. Relief from default based on court jurisdiction over the law practice of defendant's attorney, is governed by *Code Civ. Proc. § 473.1*. Relief from default under the Servicemembers Civil Relief Act is governed by *50 U.S.C. App. § 521*. Relief from a judgment entered during a period of military service as a member of the National Guard or reservist to which the defendant has a meritorious or legal defense is governed by *Mil. & Vet. Code § 402(d)*.

Relief from void judgments and orders is governed generally by *Code Civ. Proc. § 473(d)*, and case law exercising the court's inherent power to set aside void judgments and orders [*see, e.g., Rogers v. Silverman (1989) 216 Cal. App. 3d 1114, 1121-1122, 265 Cal. Rptr. 286* (judgment void in fact); *Hendrix v. Hendrix (1955) 130 Cal. App. 2d 379, 383, 279 P.2d 58* (judgment void on its face)]. Note that the provision authorizing relief from void judgments and orders used to appear in the fifth paragraph of *Code Civ. Proc. § 473*, but 1991 amendments inserted a new paragraph immediately preceding it [*see* Stats. 1991, ch. 1003, operative January 1, 1992]. The contents of the "judgment roll," for purposes in determining whether a judgment is void on its face, is governed by *Code Civ. Proc. § 670*.

Relief under the trial court's equitable powers, from a judgment or order obtained by extrinsic fraud, mistake, or duress, is governed by case law [*see, e.g., Weitz v. Yankosky (1966) 63 Cal. 2d 849, 855, 48 Cal. Rptr. 620, 409 P.2d 700]* .

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7-70 California Points & Authorities § 70.03

§ 70.03 How to Use the Forms in This Chapter

[1] Page Limits on Points and Authorities

One of the more significant drafting requirements to keep in mind are page limits: supporting memoranda of points and authorities (other than those in a summary judgment proceeding) must not exceed 15 pages in length. Exhibits, declarations, attachments, tables of contents or authorities, or the proof of service are not included in the page limitation. A reply or closing memorandum may not exceed 10 pages in length [*Cal. Rules of Ct., Rule 3.1113(d)*]. Any party desiring to file a longer memorandum must obtain leave of court [*see Cal. Rules of Ct., Rule 3.1113(e)*]. These and other drafting requirements are discussed in *further detail in Ch. 1, Writing Legal Memoranda and Briefs, § 1.05*.

[2] Using the Forms to Build a Draft Memorandum

The forms included in this chapter are designed to be combined with other points and authorities to form a complete memorandum. For a detailed discussion on how to select and use the forms in the publication to build a draft memorandum and complete the draft, with detailed discussion of all drafting requirements and strategic or stylistic considerations, see *Ch. 1, Writing Legal Memoranda and Briefs, §§ 1.02 -1.06*.

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7-70 California Points & Authorities § 70.04

§ 70.04 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

For detailed legal background discussion, research guides, procedural checklists, and practice forms of motions and other papers relating to direct attacks on valid and void judgments, orders, and proceedings in the trial court by various statutory motions at law and by motions and actions in equity, see California Forms of Pleading and Practice, Ch. 489, *Relief From Judgments and Orders* (Matthew Bender).

Other related chapters in this publication include the following:

- Ch. 40, *Appeal: An Overview* through Ch. 54, *Appeal: California Supreme Court Review* (direct attack by appeal of unlimited civil case).
- Ch. 205, *Defaults and Default Judgments* (entry of default and default judgment).
- Ch. 367, *Minors: Disaffirmation of Judgments* (relief from judgment against a minor).
- Ch. 371, *Motions After Trial* (direct attack in trial court).
- Ch. 372, *Motions and Orders* (law and motion practice generally).
- Ch. 345A, *Limited Civil Cases* (direct attack by appeal of limited civil case).

See also related discussion and forms in the following chapters in that publication: Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake;* Ch. 269, *Fraud and Deceit;* Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances;* Ch. 324, *Jurisdiction: Subject Matter Jurisdiction;* and Ch. 518, *Service of Summons and Papers.*

[2] Related Points and Authorities Chapters

For additional related memoranda and points and authorities that may be useful in proceedings for relief from a default and default judgment or other judgment or order, see:

- Ch. 92, *Duress, Menace, Fraud, Undue Influence, and Mistake*.
- Ch. 105, *Fraud and Deceit*.
- Ch. 131, *Judgments*.
- Ch. 132, *Jurisdiction: Personal Jurisdiction and Inconvenient Forum*.
- Ch. 133, *Jurisdiction: Subject Matter Jurisdiction*.
- Ch. 158, *Motions to Reconsider and Renewed Motions*.

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7-70 California Points & Authorities §§ 70.05-70.09

[Reserved]

§§ 70.05[Reserved]

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PART II. FORMS
A. Statutory Relief From Valid Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding
1. Relief Based on Mistake, Inadvertence, Surprise, or Excusable Neglect

7-70 California Points & Authorities § 70.10

§ 70.10 Supporting Defendant's Motion to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. § 473(b)]--General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF DEFEND-
vs.	)	ANT'S MOTION TO SET ASIDE
_____ [*name*],	)	_____ [DEFAULT AND DE-
Defendant.	)	FAULT JUDGMENT *or* JUDGMENT *or* DIS-
	)	MISSAL *or* ORDER *or* _____
	)	(*identify other proceeding*)]
	)	Date: _____
	)	Time: _____
		Location: _____
		[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD GRANT THE MOTION TO SET ASIDE THE _____ [DEFAULT AND

DEFAULT JUDGMENT *or* JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other proceeding*)] UNDER CODE OF CIVIL PROCEDURE SECTION 473(b) BECAUSE THE _____ [*identify proceeding, e.g.,* DEFAULT AND DEFAULT JUDGMENT] WERE TAKEN AGAINST DEFENDANT THROUGH HIS/HER _____[MISTAKE *and/or* INADVERTENCE *and/or* SURPRISE *and/or* EXCUSABLE NEGLECT], AND JUSTICE REQUIRES DETERMINATION OF THE ISSUES AFTER A HEARING ON THE MERITS OF THE CASE.

A. Grounds for Relief From Judgment, Order, or Other Proceeding. On application, the court may, on any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect (*Code Civ. Proc. § 473(b)*).

B. Policy of Law Favors Trial on Merits. The policy of the law is that controversies should be heard and disposed of on their merits (*Fasuyi v. Permatex, Inc. (2008) 167 Cal. App. 4th 681, 694-703, 84 Cal. Rptr. 3d 351* ; *Berman v. Klassman (1971) 17 Cal. App. 3d 900, 909, 95 Cal. Rptr. 417*).

C. Court Has Wide Discretion in Granting Relief. A trial court has a wide discretion to grant relief under *Code of Civil Procedure Section 473* (*Berman v. Klassman (1971) 17 Cal. App. 3d 900, 909, 95 Cal. Rptr. 417*).

D. Liberal Construction of Statute. *Code of Civil Procedure Section 473(b),* is a remedial measure to be liberally construed, and any doubts existing as to the propriety of setting aside a default thereunder will be resolved in favor of a hearing on the merits (*Berman v. Klassman (1971) 17 Cal. App. 3d 900, 910, 95 Cal. Rptr. 417*).

[*Add supporting points and authorities for each particular ground of relief asserted (see, e.g., § 70.50 et seq.). In addition, when applicable, add additional points and authorities that generally support a defendant's motion for relief (see, e.g., § 70.11 et seq.)*]

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*moving party*]

[2] Comments

[a] Use of Form

This memorandum may be used in support of a motion to set aside a default and default judgment or judgment, dismissal, order, or other proceeding under *Code Civ. Proc. § 473(b)*. It is a general form that sets out the grounds for obtaining relief under *Code Civ. Proc. § 473(b)*; for example, the failure to file a responsive pleading within the statutory time was a result of the defendant's mistake, surprise, inadvertence, or excusable neglect.

For a memorandum supporting the contention that a section 473(b) motion for relief does not constitute general appearance when combined with a motion to quash, see *§ 70.20[1]*.

For a reply memorandum supporting motion to vacate and set aside default and default judgment based on substantial compliance with the requirement for filing of a proposed answer, see *§ 70.236[1]*.

The caption and form should be modified as necessary when relief is sought from the entry of default only, as distinguished from the entry of default and a resulting default judgment.

This form should be combined with additional points and authorities supporting a request for relief based on one or more of the specific grounds set out in *Code Civ. Proc. § 473(b)* [*see, e.g., § 70.50* et seq.; *see also* [f], *below*]. In addition, when applicable, this form should be combined with additional points and authorities that support relief generally [*see, e.g., § 70.11* et seq.]. This form may also be combined, in an appropriate case, with additional points and authorities supporting a grant of relief based on other statutory or decisional authority [*see* discussion under [c], *below*].

Although a party typically seeks relief under *Code Civ. Proc. § 473(b)*, from a default or default judgment, or both, a court may grant relief under that section from any "judgment, dismissal, order, or other proceeding." This form may used, when appropriate, for seeking relief in situations other than a default and default judgment.

This form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should argue that the facts of the case warrant discretion in favor of relief, or the mandatory granting of relief under the attorney affidavit of fault provision, in which case counsel should show that the default was caused by the conduct described in the affidavit.

In an appropriate case, counsel would refer to evidence set forth in:

- Declarations submitted in support of relief from the judgment, order, or dismissal [*see Cal. Rules of Court, Rule 3.1306(a)*].

- Discovery documents, such as deposition transcripts and answers to interrogatories and requests for admission.

- The opposing party's pleadings that constitute admissions.

- Other documentary evidence generally.

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*].

When counsel cites facts in his or her argument, counsel should refer to the particular page and line number of the declaration, deposition transcript, or other document, that contains the cited facts. In addition, the relevant portion of any testimony in a deposition should be marked in a manner that calls attention to the testimony [*see Cal. Rules of Court, Rule 3.1116(c)*].

For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Alternative Methods of Obtaining Relief

Various other statutes provide additional grounds for relief from a default judgment [*see, e.g., Code Civ. Proc. §§ 473.1, 473.5*]. For memoranda supporting a grant of relief from default judgment on other statutory grounds, which may be combined with this form, see *§§ 70.240 -70.242* and *§§ 70.250 -70.270*. A default judgment or other judgment or order may also be set aside under *Code Civ. Proc. § 473(d)*, on the ground that it is void. For memoranda supporting a grant of relief from a void default judgment or other void judgment or order, which may, in an appropriate case, be combined with this form, see *§ 70.310* et seq. Finally, a default judgment or other judgment or order may be attacked by a motion or separate action in equity, when the judgment was obtained through extrinsic fraud, mistake, or duress. For memoranda supporting a grant of relief from a default judgment or other judgment or order on such equitable grounds, which may be combined with this form, see *§ 70.480* et seq.

[d] Relief From Judgments, Orders and Proceedings Generally

Although a party typically seeks relief under *Code Civ. Proc. § 473(b)*, from a default or default judgment, or both, a court may grant relief under Section 473(b) from any "judgment, dismissal, order, or other proceeding" [*see, e.g., Brown v. Williams (2000) 78 Cal. App. 4th 182, 92 Cal. Rptr. 2d 634* (discussed in *§ 70.131*; party sought relief from judgment entered on arbitration award); *Fairfield v. Ahlstrom (1962) 206 Cal. App. 2d 590, 24 Cal. Rptr. 70* (discussed in *§ 70.212[3*]; party sought relief under *Code Civ. Proc. § 473* from an order striking untimely filed memorandum of costs)]. One court, however, has held that the mandatory provisions of § 473(b) do not apply to summary judgments [*see English v. IKON Business Solutions, Inc. (2001) 94 Cal. App. 4th 130, 136-149, 114 Cal. Rptr. 2d 93]* , or to a judgment entered after an uncontested trial held in a defendant's absence [*Vandermoon v. Sanwong (2006) 142 Cal. App. 4th 315, 319-321, 47 Cal. Rptr. 3d 772* (defendants whose attorney did not inform them of trial date were not entitled to have amended judgment issued after uncontested trial set aside under *Code Civ. Proc. § 473(b)*; reaffirming *English v. IKON Business Solutions, Inc.*, and expressing disagreeing with *In re Marriage of Hock & Gordon-Hock*)]. This form may be modified, as appropriate, for use in seeking relief in situations other than a default and default judgment.

[e] Showing of Meritorious Defense

Historically, before relieving a defendant from default, courts generally required some showing that the defendant had a meritorious defense to the action [*see, e.g., Beard v. Beard (1940) 16 Cal. 2d 645, 648, 107 P.2d 385* (discussed in *§ 70.81[3]*]. In 1981, however, former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), was amended to add the sentence, "No affidavit or declaration of merits shall be required of the moving party." It is unclear what practical effect this amendment has on the showing required by the moving party. A verified pleading has traditionally been equated with an affidavit of merits, with respect to its sufficiency constituting a meritorious defense [*see, e.g., First Small Business Inv. Co. v. Sistim, Inc. (1970) 12 Cal. App. 3d 645, 649-651, 90 Cal. Rptr. 798]* . Although *Code Civ. Proc. § 473(b)*, does require the moving party to file a "copy of the answer or other pleading proposed," is does, however, not expressly require that the responsive pleading be verified.

At least one commentator has suggested that the 1981 amendment abolishes the requirement of a showing of meritorious defense [*see* Witkin, California Procedure, vol. 8, Attack on Judgment in Trial Court, § 175 (3d ed. 1985)]. Some cases decided after that amendment have nevertheless continued to refer to the requirement of a showing of meritorious defense in conjunction with the filing of the proposed pleading [*see, e.g., Puryear v. Stanley (1985) 172 Cal. App. 3d 291, 293-294, 218 Cal. Rptr. 196* (discussed in *§ 70.146[3*])]. It may be arguable that such courts, in so doing, are erroneously applying the standard that still applies for obtaining equitable, as distinguished from statutory, relief [*see, e.g., Olivera v. Grace (1942) 19 Cal. 2d 570, 578-579, 122 P.2d 564* (requiring a showing a meritorious defense to obtain equitable relief from default judgment); *see also § 70.120* et seq.].

Until this issue is expressly decided, however, counsel may wish to verify the proposed responsive pleading filed in

connection with a motion for relief under *Code Civ. Proc. § 473(b)*, regardless of whether verification is otherwise required [*see Code Civ. Proc. § 446* (providing when responsive pleading must be verified generally)].

However courts construe the pleading requirements under *Code Civ. Proc. § 473(b)*, a court may not require a defendant to show that he or she has a meritorious defense before setting aside a default when that defendant did not receive proper notice of the judgment and the judgment had substantial adverse consequences for the defendant; to so require would violate the due process clause of *U.S. Const., amend. XIV* [*see Peralta v. Heights Medical Center, Inc. (1988) 485 U.S. 80, 84-87, 108 S. Ct. 896, 99 L. Ed. 2d 75, 80-82* (discussed in *§ 70.240[2*])]; for further discussion, see California Forms of Pleading and Practice, Ch. 489, *Relief From Judgments and Orders* (Matthew Bender).

[f] Relief From Default as Well as Default Judgment

Counsel should seek relief from the entry of default, as well as from any judgment taken based on the default, in that if only the judgment is vacated, the opposing party is entitled to obtain another judgment based on the default [*see, e.g., Howard Greer etc. Originals v. Capritti (1950) 35 Cal. 2d 886, 888-889, 221 P.2d 937]* . Except when the motion is accompanied by the moving party's attorney's affidavit of fault, this assumes, of course, that the motion has been filed within six months of the date of default, as distinguished from the date of the default judgment; otherwise, under the general rule, the motion would be untimely for all purposes, in that the court would lack jurisdiction to grant relief under *Code Civ. Proc. § 473(b)* [*see, e.g., Weiss v. Blumencranc (1976) 61 Cal. App. 3d 536, 541, 131 Cal. Rptr. 298* (discussed in *§ 70.141[3*]); *see also* [j], *below*]. If the motion for relief is accompanied by an attorney's sworn affidavit (declaration) of fault and is in proper form, it is timely if it is made within six months after the judgment has been entered [*see Code Civ. Proc. § 473(b)*; *see § 70.12[3]*].

[g] Multiple Grounds for Relief

Typically, relief under *Code Civ. Proc. § 473(b)*, is sought on several, if not all, the grounds available under the statute (that is, mistake, inadvertence, surprise, and excusable neglect, as well as fraud), based on the same conduct. For example, in *Dingwall v. Vangas, Inc. (1963) 218 Cal. App. 2d 108, 32 Cal. Rptr. 351* (discussed in *§ 70.54[3]*), the court of appeal granted relief based on the attorney's conduct in allowing a default to be taken while he was under the impression that negotiations were ongoing, and that the opposing party would not take a default although the time had elapsed in which to file a response. In doing so, the court discussed the attorney's conduct in terms of inadvertence, excusable neglect, and mistake [*see Dingwall v. Vangas, Inc. (1963) 218 Cal. App. 2d 108, 113, 32 Cal. Rptr. 351]* . Inasmuch as it is often difficult to categorize conduct definitively into one of the enumerated grounds for relief, counsel should consider combining as many of the grounds as is reasonable under the circumstances. Counsel therefore should carefully examine all the grounds available [*see § 70.50 -70.110*].

[h] Conditions for Granting Relief

Code Civ. Proc. § 473(b) generally permits the trial court to relieve a party from a judgment, dismissal, or order against him or her on the grounds specified and on "any terms as may be just." Courts have long construed this phrase to allow payment of costs or attorney's fees to the adverse party to compensate that party for any losses or expenses incurred because of the motion [*Hearst v. Ferrante (1987) 189 Cal. App. 3d 201, 204, 234 Cal. Rptr. 385* (discussed in *§ 70.230[4*])]. In addition, when relief from default is based on a sworn declaration of fault by the defaulting party's attorney, the court is required to order that attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties [*Code Civ. Proc. § 473(b)*]; however, the court cannot condition such relief on the attorney's payment of compensatory legal fees or costs or monetary penalties imposed by the court or on compliance with other sanctions ordered by the court [*Code Civ. Proc. § 473(c)(2)*]. Other specific penalties and sanctions are discretionary [*see Code Civ. Proc. § 473(c)(1)*]. For a memorandum seeking the imposition of these conditions, see *§ 70.230* et seq.

Any other condition dictated by fairness may also be imposed [*see, e.g., In re Marriage of Helsel (1988) 198 Cal. App.*

3d 332, 340, 340 n.7, 243 Cal. Rptr. 657 (noting that if trial court on remand granted moving party relief from certain parts of stipulation, court could consider whether opposing party was entitled to relief from other provisions of stipulation)].

[i] Renewal of Motion

Defendant may wish to seek a reconsideration of his or her motion under *Code Civ. Proc. § 473* if it is denied. Because there is no statutory authority for reconsideration, a motion requesting it will be treated as a renewal of the prior motion for relief and submitted to the discretion of the trial judge. The motion must be made within the six-month statutory limit and is subject to the same constraints as the original motion [*see Northridge Financial Corp. v. Hamblin (1975) 48 Cal. App. 3d 819, 825-826, 122 Cal. Rptr. 109* (discussed in *§ 70.191[3*])].

[j] Timely Filing of Motion

Pursuant to *Code Civ. Proc. § 473(b)*, application for relief from a judgment, dismissal, order, or other proceeding must be made within a reasonable time, not exceeding six months, after that judgment, dismissal, order, or proceeding was taken [*Code Civ. Proc. § 473(b)*; *Sugasawara v. Newland (1994) 27 Cal. App. 4th 294, 297, 32 Cal. Rptr. 2d 484]* . In the case of a motion seeking relief from a default and default judgment, other than a motion based on the defaulting party's attorney's affidavit of fault [*see § 70.12[3]*], this six-month period generally runs from the date of the default and not from the judgment taken afterwards [*see Weiss v. Blumencranc (1976) 61 Cal. App. 3d 536, 541, 131 Cal. Rptr. 298* (discussed in *§ 70.141[3*])]. Application includes service as well as filing; thus, an application or motion that is filed but not served within the six-month limitation is not timely [*Arambula v. Union Carbide Corp. (2005) 128 Cal. App. 4th 333, 340-342, 26 Cal. Rptr. 3d 854]* .

In the absence of extrinsic fraud, the six-month limitation is jurisdictional [*Jackson v. Bank of America (1983) 141 Cal. App. 3d 55, 59, 190 Cal. Rptr. 78]* . The court has no authority to consider an application or motion made after the six-month limit has expired [*Arambula v. Union Carbide Corp. (2005) 128 Cal. App. 4th 333, 344-345, 26 Cal. Rptr. 3d 854]* . Thus, for example, if more than six months has lapsed from the time of default, relief may be available from the entry of the default judgment, but not the default itself, if they represent discrete events [*see Rutan v. Summit Sports, Inc. (1985) 173 Cal. App. 3d 965, 970, 219 Cal. Rptr. 381* (discussed in *§ 70.143[3*])]. In such a case, however, relief may be available from both the default and default judgment under the court's equitable powers. For memoranda of points and authorities supporting a motion for equitable relief, see *§ 70.480* et seq.

The six-month period has been construed to mean a half year, or 182 days (as distinct from six "calendar" months). The first day is excluded, and the last day included, in the computation [*see Davis v. Thayer (1980) 113 Cal. App. 3d 892, 903, 170 Cal. Rptr. 328* (discussed in *§ 70.190[3*][b])].

Counsel should file a motion for relief as quickly as possible after notice of the default, dismissal, or other order, since the six month period is not analogous to a limitations period [*see Caldwell v. Methodist Hospital (1994) 24 Cal. App. 4th 1521, 1524-1525, 29 Cal. Rptr. 2d 894* (court rejected motion for relief based on attorney's affidavit of fault filed three months after action was dismissed)]. Furthermore, the sooner the motion is filed, the less prejudice is incurred by the opposing party, and the lesser the quantum of evidence will justify the granting of relief [*see, e.g., Buckert v. Briggs (1971) 15 Cal. App. 3d 296, 302-303, 93 Cal. Rptr. 61* (discussed in *§ 70.100[3*]); *Shamblin v. Brattain (1988) 44 Cal. 3d 474, 478, 243 Cal. Rptr. 902, 749 P.2d 339* (discussed in *§ 70.11[3][b]*)].

[k] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 70.120* et seq. may be used to oppose the contention supported by these points and authorities.

[l] Related Pleading and Practice Chapters

For further discussion and forms for use in proceedings to set aside a default, default judgment, or other judgment, dismissal, or order, see California Forms of Pleading and Practice, Ch. 489, *Relief From Judgments and Orders* (Matthew Bender). For further discussion and forms relating for use in motion proceedings to quash service of summons for lack of personal jurisdiction, see California Forms of Pleading and Practice, Ch. 323, *Jurisdiction: Personal Jurisdiction and Inconvenient Forum* (Matthew Bender).

[3] Discussion of Authorities

[a] Policy of Law Favors Trial on Merits

In ***Fasuyi v. Permatex, Inc.*** *(2008) 167 Cal. App. 4th 681, 694-703, 84 Cal. Rptr. 3d 351* , the plaintiff employee sued the defendant employer for personal injuries. The plaintiff's attorney was having trouble effecting service of the complaint, so he contacted the employer's parent corporation legal department who advised him how to serve the complaint. When the parent corporation received the complaint, it sent it to its insurance broker, who then sent it to the insurer. However, the insurer did not file a response to the complaint. Following expiration of the response period, the plaintiff sought and obtained a default judgment against the defendant. The file did not contain a proof of service on the defendant of a statement of damages. When the defendant learned of the default, it quickly filed a motion for relief from default pursuant to *Code Civ. Proc. § 473(b)*. The trial court denied the motion.

The court of appeal reversed. It first held that there is no opposing party in a default proceeding. Therefore, the trial court must be the gatekeeper and ensure that the plaintiff strictly follows all the rules and procedures [*167 Cal. App. 4th 681, 691]* . In this case, the plaintiff failed to serve the statement of damages, as required by *Code Civ. Proc. § 425.11*. The court further held that because the law strongly favors trial and disposition on the merits, any doubts in applying *Code Civ. Proc. § 473* must be resolved in favor of the party seeking relief from default. Therefore, the court held, a trial court order denying relief from default is scrutinized more carefully than an order permitting a trial on the merits [*167 Cal. App. 4th 681, 695]* . If a defendant promptly seeks relief and there is no showing of prejudice to the plaintiff, very slight evidence is required to justify setting aside a default [*167 Cal. App. 4th 681, 696]* . The court noted that in this case the plaintiff's counsel had been in contact with the defendant's legal department regarding service of process. However, the plaintiff took the default without a reminder, let alone a warning, about any responsive pleading. While a warning is not legally required before seeking a default, the court held that such a warning is at the least an ethical obligation of counsel [*167 Cal. App. 4th 681, 701]* .

In ***Berman v. Klassman*** *(1971) 17 Cal. App. 3d 900, 95 Cal. Rptr. 417* , two consolidated actions were set for trial. The actions arose from alleged nonpayment of monthly installments pursuant to written instruments. Defendants failed to appear for the trial, and the matter proceeded as an uncontested hearing on the same date. Therefore, no default was entered prior to entry of default judgment. Three months after one of the defendants became aware of the judgments, he filed, through substituted counsel, a motion to set aside the default judgments. The trial court granted the motion, and subsequently denied plaintiff's motion for reconsideration. Plaintiff appealed from both orders.

The court of appeal dismissed the appeal from the order denying plaintiff's motion for reconsideration, on the ground that the order is nonappealable (*17 Cal. App. 3d 900, 905)* . The court affirmed the granting of defendant's motion to set aside the default judgments (*17 Cal. App. 3d 900, 910)* . The court rejected plaintiff's contention that the trial court lacked jurisdiction to hear the motion because the application for relief was served and filed more than six months after the entry of judgment, based on the entry of a minute order in which the court directed the plaintiff to prepare a written order. The court held that the minute order is not an appealable order. Consequently, the date of entry of the judgment based on the formal written order starts the six-month period within which the defendant may seek relief pursuant to *Code Civ. Proc. § 473*. Inasmuch as defendant filed the motion within six months of that date, the motion was timely (*17 Cal. App. 3d 900, 908)* . The court also rejected plaintiff's contention that defendant's delay in filing the motion until some three months after knowledge of the entry of judgment precluded relief as a matter of law. The court noted that the

declarations submitted did not disclose whether the delay was caused by defendant or by his newly substituted counsel. The court also noted that although the written instruments on which the actions were based were arguably usurious, that issue remained for proper determination by the trier of fact (*17 Cal. App. 3d 900, 909)* .

The court stated that a trial court has a wide discretion to grant relief under *Code Civ. Proc. § 473*, and as a general rule, the action of the trial court in this respect will not be disturbed by an appellate court unless discretion has been manifestly abused. The policy of the law is that controversies should be heard and disposed of on their merits. Considering what is a reasonable time depends largely on the facts and circumstances of each case. The general rule is to favor, whenever possible, a hearing on the merits, and appellate courts are much more disposed to affirm an order when the result is to compel a trial on the merits than it is when a judgment by default is allowed to stand and it appears that a substantial defense could be made (*17 Cal. App. 3d 900, 909)* . Inasmuch as *Code Civ. Proc. § 473* is a remedial measure to be liberally construed, any doubts concerning the propriety of the trial court's action will be resolved in favor of a hearing on the merits. When, as in the instant case, the trial court is faced with a strong possibility that the judgment, if allowed to stand, would affirm transactions in violation of the usury law, it cannot be said as a matter of law, that the unexplained delay by defendant in seeking relief should compel the trial court in the exercise of its discretion to deprive the defendant of a trial of the actions on their merits (*17 Cal. App. 3d 900, 910)* .

Note that, with respect to the issue of timely filing within the maximum time period of six months, generally the six-month period runs from the date of entry of *default* and not from the judgment taken afterwards [*see Rutan v. Summit Sports, Inc. (1985) 173 Cal. App. 3d 965, 970, 219 Cal. Rptr. 381* (discussed in *§ 70.143[3*]); *see also § 70.140* et seq.]. The facts of *Berman* are unique in that no default per se was entered; the court of appeal noted that neither the minute order of the first courtroom (ordering the matter to be heard as a default), nor the minute order of the second courtroom (ordering judgment for plaintiff) constituted entry of default [*see Berman v. Klassman (1971) 17 Cal. App. 3d 900, 904 n.2, 95 Cal. Rptr. 417]* . Therefore, *Berman* considered the dates of only the minute orders and the final judgment, rather than entry of any default.

[b] Court Has Wide Discretion in Granting Relief

Berman v. Klassman *(1971) 17 Cal. App. 3d 900, 95 Cal. Rptr. 417* , is discussed in *§ 70.10[3][a]*.

[c] Liberal Construction of Statute

Berman v. Klassman *(1971) 17 Cal. App. 3d 900, 95 Cal. Rptr. 417* , is discussed in *§ 70.10[3][a]*.

[d] Timeliness of Motion

In ***Arambula v. Union Carbide Corp.*** *(2005) 128 Cal. App. 4th 333, 26 Cal. Rptr. 3d 854* , plaintiff filed a complaint against defendant and others alleging wrongful death and several counts for personal injury arising from her deceased husband's alleged exposure to asbestos. She timely filed a case report providing information on her husband's exposure and medical history as required by a general order governing asbestos cases in the Los Angeles Superior Court. Defendant moved for summary judgment in on the ground that the case report did not identify any of defendant's product to which the decedent allegedly was exposed. Plaintiff filed an opposition and a supplemental case report listing several witnesses who purportedly would testify that the decedent was exposed to products containing asbestos supplied by Union Carbide. Plaintiff acknowledged that she had failed to file the supplemental case report within the time required by the general order, and requested relief under *Code Civ. Proc. § 473(b)* to allow consideration of the supplemental case report. The court granted the summary judgment motion, stating that the supplemental case report was filed only seven days before the hearing, rather than ten days as required by the general order, and impliedly denying the request for relief under Section 473(b). The minute order also stated that plaintiff had failed to file a separate statement of disputed facts and therefore failed to show a triable issue of material fact. Within six months of the entry of judgment, plaintiff filed an ex parte application for an order shortening time to hear a motion for relief from

the summary judgment. Plaintiff and defendant, through counsel, both appeared before the court on the ex parte application. The court denied the application stating that shortened notice was unnecessary. Plaintiff filed a motion for relief from the summary judgment order and judgment again within six months of the entry of judgment. She argued that her failure to file the supplemental case report timely was due to her counsel's excusable neglect and that the court granted the summary judgment motion based solely on the absence of product identification information in her original case report. She served the motion on several parties, but did not serve the motion on defendant because defendant was no longer on her service list. Defendant first learned of the motion after the six-month period had expired on the date of the hearing, and defendant's counsel appeared at the hearing on the motion for relief and explained that defendant had not been served. The court took the motion off calendar. Plaintiff filed another motion for relief from the summary judgment order and judgment and served defendant the same day. The notice of motion stated that the motion was identical to the earlier motion except that the new motion requested additional relief under Section 473(b). Defendant opposed the motion on several grounds, including that it was untimely. The court granted the motion, stating in a minute order that relief was mandatory because the summary judgment was based on a procedural default and was not on the merits, that defendant waived any defect in the notice by appearing and contesting the motion, and that Section 473 provides that relief may not be given until after notice to the adverse party, but it does not provide that no application for the relief can be made to the court until after notice has been given and that plaintiff applied within six months.

The court of appeal reversed. The court held that plaintiff failed to apply for relief timely as required by Section 473(b) because she failed to serve the motion for relief within six months after entry of the summary judgment order or judgment; defendant did not waive the six-month limit by appearing at the hearing and contesting the motion on the merits; and the court had no authority to extend the six-month period to apply for relief (*128 Cal. App. 4th 333, 340-345)* .

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CHAPTER 70 DEFAULTS, DEFAULT JUDGMENTS, AND RELIEF FROM JUDGMENTS AND ORDERS
PART II. FORMS
A. Statutory Relief From Valid Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding
1. Relief Based on Mistake, Inadvertence, Surprise, or Excusable Neglect

7-70 California Points & Authorities § 70.11

§ 70.11 Supporting Defendant's Motion to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. § 473(b)]--Slight Evidence Is Sufficient if Motion Is Timely or No Prejudice Is Shown

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside under Code Civ. Proc. § 473(b) (see § 70.10[1]).*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION TO SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT BECAUSE ONLY VERY SLIGHT EVIDENCE IS REQUIRED TO JUSTIFY RELIEF IN THIS CASE.

[*EITHER*]

A. Slight Evidence Is Sufficient if Motion Promptly Made. When a party in default moves promptly to seek relief, very slight evidence is required to justify a trial court's order setting aside a default (*Shamblin v. Brattain (1988) 44 Cal. 3d 474, 478, 243 Cal. Rptr. 902, 749 P.2d 339*).

[*AND/OR*]

B. Slight Evidence Is Sufficient if No Prejudice Shown. When there is no showing that the party opposing the motion to vacate the judgment has suffered any prejudice or that injustice will result from the trial of the case on its merits, very slight evidence is required to justify a court in setting aside the default (*Buckert v. Briggs (1971) 15 Cal. App. 3d 296, 302-303, 93 Cal. Rptr. 61*).

[2] Comments

[a] Use of Form

This form may be used in support of a motion to set aside a default and default judgment under *Code Civ. Proc. § 473(b)* on the ground that only very slight evidence is necessary for relief because the motion is timely or there is no showing that prejudice has occurred or that injustice will result if the case is permitted to proceed to a trial on the merits. These points and authorities should be combined with a memorandum generally supporting relief under *Code Civ. Proc. § 473(b)* [*see § 70.10[1]*]. See also *§ 70.10[2][l]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

This form may also be adapted for use in a trial or appellate brief.

If the counsel is arguing that no showing has been made that the opposing party has suffered prejudice, or will suffer injustice by a permitting a trial on the merits, from a strategic standpoint counsel may not wish to raise the issue stated in Paragraph B in an initial memorandum. Rather, he or she may wish to raise this issue in a reply brief, pointing out that the opposing memorandum and attached declarations fail to show any prejudice or likelihood of injustice.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 70.10[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 70.120* et seq. may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Slight Evidence Sufficient if Motion Promptly Made

In ***Shamblin v. Brattain*** *(1988) 44 Cal. 3d 474, 243 Cal. Rptr. 902, 749 P.2d 339* , an action based on a real property dispute, defendants prevailed on most points following a six-week jury trial, and plaintiffs appealed. One defendant (the "defendant") filed a cross appeal contesting denial of the full amount of his requested attorney's fees, which the court of appeal eventually dismissed for failure to pay costs of preparing the transcript. On dismissal of this cross appeal, the clerk's office of the court of appeal erroneously deleted defendant (but not his codefendants) from the clerk's mailing, even though defendant was still a party to the initial appeal. After the time expired for all defendants to file their response briefs, the clerk's office sent notices to that effect to the codefendants, but not to the defendant. When no response was filed, the court of appeal issued a brief unpublished opinion in plaintiffs' favor, reversing the trial court judgment and remanding for a new trial. Copies of the opinion reversing the judgment were mailed to the codefendants, but not to the defendant. Plaintiffs filed a memorandum of costs on appeal and served it on the codefendants, and on the defendant's attorney. Shortly afterward, defendant's attorney withdrew as attorney of record, and informed the court of defendant's address. Plaintiffs reset the matter for trial, notifying all parties. Plaintiffs settled with codefendants, and obtained a default judgment against defendant, who eventually discovered the judgment against him, hired new counsel, and moved to set aside the default pursuant to former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*). His declaration stated that he was misled by his former attorney to believe plaintiffs' appeal had been unsuccessful on the merits. Plaintiffs countered that defendant had probably received mail regarding the pending retrial after his former attorney withdrew, and that defendant could have received notice by other means as well. The trial court determined that defendant's failure to appear at trial was excusable, and granted the motion to set aside the default.

The court of appeal reversed, holding that the trial court abused its discretion in setting aside the judgment by failing to consider the "overwhelming evidence of defendants' own inexcusable neglect."

The California Supreme Court reversed the judgment of the court of appeal, holding that it should not have substituted its own view of the facts for that of the trial court, which did not abuse its discretion in granting relief (*44 Cal. 3d 474, 479)* . The Court noted that it is the policy of the law to favor, whenever possible, a hearing on the merits. Appellate courts are much more disposed to affirm an order when the result is to compel a trial on the merits than when the default judgment is allowed to stand. The court held that when a party in default moves promptly to seek relief, very slight evidence is required to justify a trial court's order setting aside a default. The court noted that in the instant case, the defendant had promptly moved to have the default judgment set aside once he learned of it. It stated that the trial court's granting of relief was within its sound discretion and, in the absence of a clear showing of abuse of discretion, should not be disturbed (*44 Cal. 3d 474, 478)* .

The Court held further that the appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason; and that when two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court (*44 Cal. 3d 474, 478-479)* . The Court determined that substantial evidence supported the trial court's findings; for example, defendant declared that he received no notice of the new trial, and that, indisputably, his name was inadvertently removed from the clerk's mailing list through no fault of his own. Even though contrary findings could have been made, an appellate court should defer to the factual determinations made by the trial court when the evidence is in conflict (*44 Cal. 3d 474, 479)* .

[b] Slight Evidence Sufficient if No Prejudice Shown

Buckert v. Briggs *(1971) 15 Cal. App. 3d 296, 93 Cal. Rptr. 61* , is discussed in *§ 70.100[3]*.

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CHAPTER 70 DEFAULTS, DEFAULT JUDGMENTS, AND RELIEF FROM JUDGMENTS AND ORDERS
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7-70 California Points & Authorities § 70.12

§ 70.12 Supporting Defendant's Motion to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. § 473(b)]--Attorney Affidavit of Fault

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside under Code Civ. Proc. § 473(b) (see § 70.10[1]).*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION TO SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT UNDER SECTION 473(b) BECAUSE THE DEFAULT AND DEFAULT JUDGMENT WERE TAKEN AGAINST DEFENDANT THROUGH THE _____ [MISTAKE *and/or* INADVERTENCE *and/or* SURPRISE *and/or* EXCUSABLE NEGLECT], OF HIS/HER ATTORNEY, AND THE COURT HAS A MANDATORY DUTY TO GRANT RELIEF WHEN THE MOTION IS ACCOMPANIED BY AN ATTORNEY'S SWORN AFFIDAVIT OF FAULT, AND IS TIMELY AND IN PROPER FORM.

A. Attorney Affidavit of Fault. Whenever an application for relief under *Code of Civil Procedure Section 473(b)*, is made no more than six months after entry of judgment, and is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, the court is required to vacate any (1) resulting default entered by the clerk against his or her client and which will result in entry of a default judgment, or (2) resulting default judgment entered against his or her client, unless the court finds that the default was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect (*Code Civ. Proc. § 473(b)*).

[*Optional*] **B. Attorney Affidavit Procedure Available After Default Entered by Judge.** The attorney affidavit provision of *Code of Civil Procedure Section 473* may be used to set aside defaults that were entered by a judge, as well as defaults entered by a clerk (*Matera v. McLeod (2006) 145 Cal. App. 4th 44, 62-68, 51 Cal. Rptr. 3d 331* ; *Lorenz v. Commercial Acceptance Ins. Co. (1995) 40 Cal. App. 4th 981, 996, 47 Cal. Rptr. 2d 362*).

[*Optional*] **C. Attorney Affidavit Procedure Available to Remedy Procedural Equivalent of Default.** The attorney affidavit provision of *Code of Civil Procedure Section 473(b)* may be used to set aside judgments entered under circumstances similar or comparable to a default (*In re Marriage of Hock & Gordon-Hock (2000) 80 Cal. App. 4th 1438, 1443-1444, 96 Cal. Rptr. 2d 546*).

[2] Comments

[a] Use of Form

This form may be used in support of a motion to set aside a default and default judgment under *Code Civ. Proc. § 473(b)* if the application for relief is based on an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect. These points and authorities should be combined with a memorandum generally supporting relief under *Code Civ. Proc. § 473(b)* [*see § 70.10[1]*]. See also *§ 70.10[2][l]* for related chapters in California Forms of Pleading and Practice Matthew Bender.

Optional Paragraph B is for use if the application for relief is based on the attorney affidavit provision but the judge, rather than the clerk, entered the default that is to be set aside.

This form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 70.10[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 70.120* et seq. may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Attorney Affidavit of Fault

Notwithstanding any other requirements of *Code Civ. Proc. § 473*, and whenever an application for relief is made no more than six months after the entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, the court is required to vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect [*Code Civ. Proc. § 473(b)*].

Thus, an application for relief based on an attorney's mistake, inadvertence, surprise, or neglect must be:

- Made from either a default entered by the clerk, and which will result in entry of a default judgment, or resulting default judgment or dismissal;
- Filed no later than six months after entry of judgment;
- Prepared in proper form; and
- Accompanied by an attorney's sworn affidavit (or declaration under penalty of perjury [*Code Civ.*

Proc. § 2015.5]) attesting to his or her fault [*Code Civ. Proc. § 473(b)*; *see also Metropolitan Service Corp. v. Casa De Palms, Ltd. (1995) 31 Cal. App. 4th 1481, 1488, 37 Cal. Rptr. 2d 575* (reversing default judgment and order denying relief from default based on attorney affidavit establishing neglect due to busy schedule under mandatory provision of *Code Civ. Proc. § 473*); *Sugasawara v. Newland (1994) 27 Cal. App. 4th 294, 297, 32 Cal. Rptr. 2d 484* (same); *Billings v. Health Plan of America (1990) 225 Cal. App. 3d 250, 256-257, 275 Cal. Rptr. 80* (decided under prior version of *Code Civ. Proc. § 473(b)*)].

Assuming the conditions of *Code Civ. Proc. § 473(b)* are otherwise met, an affidavit of fault is sufficient to entitle the client to relief if it is filed by a person licensed to practice law in any jurisdiction. Thus, for example, in ***Rodrigues v. Superior Court*** *(2005) 127 Cal. App. 4th 1027, 26 Cal. Rptr. 3d 194* , defendants were sued by plaintiff, who claimed an undivided half interest in real property owned by defendants. Defendants were served with process in Portugal, where they reside. When they failed to answer the complaint, plaintiff took their default and obtained a default judgment. Defendants filed a motion to set aside the defaults and default judgment pursuant to *Code Civ. Proc. § 473(b)*, on the ground that their failure to answer the complaint properly was the fault of their Portuguese attorney. In support of the motion, defendants filed a declaration of fault in which the attorney declared that he is licensed to practice law in Portugal, and when defendants were served with process in this matter they brought the summons and complaint to his office and asked him to take care of the matter, which he agreed to do. He prepared a Portuguese legal response denying the allegations of the complaint, which he mailed to the superior court. He later obtained and mailed to the court a certified English translation of the response. He assumed the matter was taken care of and he would receive further instructions from the court. When he received no further instructions, he assumed he did not have to do anything further. He declared that entry of default was the result of his mistake, inadvertence and neglect. The trial court held that the declaration was a valid and effective affidavit of fault and granted the motion to set aside the default. The appellate court affirmed (*Rodrigues v. Superior Court (2005) 127 Cal. App. 4th 1027, 1033-1037, 26 Cal. Rptr. 3d 194*).

In addition, the court must find that the default or dismissal was actually caused by the attorney's mistake, inadvertence, surprise, or neglect [*see Code Civ. Proc. § 473(b)*; *Billings v. Health Plan of America (1990) 225 Cal. App. 3d 250, 256, 275 Cal. Rptr. 80* (decided under prior version of *Code Civ. Proc. § 473(b)*); *Beeman v. Burling (1990) 216 Cal. App. 3d 1586, 1605-1606, 265 Cal. Rptr. 719* (same)].

If it is determined that these requirements have been met, the court must vacate any (1) resulting default entered by the clerk against the attorney's client, and which would have resulted in the entry of a default judgment, or (2) resulting default judgment or dismissal entered against the client [*Code Civ. Proc. § 473(b)*; *but see Peltier v. McCloud River R.R. Co. (1995) 34 Cal. App. 4th 1809, 1815, 41 Cal. Rptr. 2d 182* and *Graham v. Beers (1994) 30 Cal. App. 4th 1656, 1661, 36 Cal. Rptr. 2d 765* (holding that mandatory relief provisions of *Code Civ. Proc. § 473* may not be used to reargue opposition to motion of dismissal)].

To the extent that *Billings v. Health Plan of America (1990) 225 Cal. App. 3d 250, 275 Cal. Rptr. 80* , held that the mandatory relief based on an attorney's affidavit of fault under former Code Civ. Proc. § 473, 3rd Paragraph [*now see Code Civ. Proc. § 473(b)*], is limited to relief from a default and default judgment and does not authorize relief from the dismissal of an action [*Billings v. Health Plan of America (1990) 225 Cal. App. 3d 250, 253-256, 275 Cal. Rptr. 80]* , it appears to have been abrogated by the 1992 amendment of *Code Civ. Proc. § 473(b)*, which specifically requires the court to vacate a resulting default judgment "or dismissal" entered against the attorney's client when the relief sought is based on the attorney's affidavit of fault [*Code Civ. Proc. § 473(b)*; *but see Peltier v. McCloud River R.R. Co. (1995) 34 Cal. App. 4th 1809, 1815, 41 Cal. Rptr. 2d 182* , and *Graham v. Beers (1994) 30 Cal. App. 4th 1656, 1661, 36 Cal. Rptr. 765* (holding that mandatory relief provisions of Section 473 may not be used to reargue opposition to motion of dismissal)]. In addition, the court of appeal in *Billings* held that the trial court could properly deny an application for relief made within the six month period if the defaulting party failed to exercise diligence in seeking relief [*Billings v. Health Plan of America (1990) 225 Cal. App. 3d 250, 257-258, 275 Cal. Rptr. 80* ; *Caldwell v. Methodist Hospital*

(1994) 24 Cal. App. 4th 1521, 1524-1525, 29 Cal. Rptr. 2d 894] .

The 1991 amendment of *Code Civ. Proc. § 473*, which replaced the word "timely" with the phrase "made no more than six months after entry of judgment" in the sentence dealing with relief based on an attorney affidavit, would appear to have nullified *Billings* insofar as that case held the diligence requirement applied to a motion for relief based on an attorney's affidavit of fault. Nonetheless, *Caldwell* relied on *Billings* in rejecting a motion for relief based on an attorney's affidavit of fault filed three months after the action was dismissed without discussing the change in the language of § 473.

If relief is granted, based on an attorney's affidavit of fault, the court shall direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties [*Code Civ. Proc. § 473(b)*]. However, the relief from default granted cannot be made conditional on the attorney's payment of compensatory legal fees or costs or monetary penalties imposed by the court or on compliance with other sanctions ordered by the court [*Code Civ. Proc. § 473(c)(2)*].

[b] Attorney Affidavit Procedure Available After Default Entered by Judge

In ***Matera v. McLeod*** *(2006) 145 Cal. App. 4th 44, 51 Cal. Rptr. 3d 331* , an action on a sublease, the defendants' attorney failed to file an opposition to plaintiffs' discovery motions, failed to attend the hearing on those motions, failed to inform the defendants of the subsequent discovery order against them, failed to file an opposition to the plaintiffs' motion for a terminating sanction, and failed to attend the hearing on that motion. The trial court struck defendants' answer to the complaint and entered a default judgment against them. The trial court also denied defendants' motion for relief from the judgment under *Code Civ. Proc. § 473(b)* on the grounds that defendants were not entitled to mandatory relief, despite the attorney's affidavit of fault (*145 Cal. App. 4th 44, 49-55)* .

The court of appeal reversed the judgment and the order denying the motion for relief from the defaults and default judgment with directions to the trial court to vacate the defaults and the order striking defendants' answer, reinstate defendants' answer, award reasonable compensatory legal fees and costs as required by *Code Civ. Proc. § 473(b)*, and conduct additional appropriate proceedings not inconsistent with the views expressed in its opinion. The court held that defendants were entitled under *Code Civ. Proc. § 473(b)* to mandatory relief based on their attorney's affidavit of fault, because the default judgment was a "default judgment" within meaning of the statute, and the attorney's neglect was the sole cause of defendants' failure to comply with the discovery order resulting in the terminating sanction. The court held that because of the attorney's neglect, plaintiffs or their counsel were entitled to recover from the attorney reasonable compensatory legal fees and costs necessitated by his neglect under *Code Civ. Proc. § 473(b)*, and that the trial court on remand could impose sanctions and grant other relief as provided by § 473(c)(1) (*145 Cal. App. 4th 44, 62-68)* .

In ***Lorenz v. Commercial Acceptance Ins. Co.*** *(1995) 40 Cal. App. 4th 981, 47 Cal. Rptr. 2d 362* , defendant insurer's attorney failed to oppose a motion to require the defendant to post a security bond, and the trial court ordered the defendant's answer stricken until posting of the bond. The attorney obtained two extensions of time for the posting of the bond, but did nothing to obtain a bond. After the extensions expired, plaintiff requested entry of default. Defendant's attorney misplaced the notice of the request for entry of default and did not appear. Default was then entered by the trial court. After default judgment was entered, defendant changed attorneys and filed a motion to vacate the default and default judgment under the attorney affidavit procedure of *Code Civ. Proc. § 473*. The trial court granted the motion, and the plaintiff appealed, arguing that the attorney affidavit provision only permits defaults entered by the clerk to be vacated, and thus does not apply to a default entered by the trial court.

The court of appeal affirmed the granting of the motion to vacate (*40 Cal. App. 4th 981, 1000)* . The court reasoned that the reference in the affidavit procedure of *Code Civ. Proc. § 473* to "the clerk" is a word of description rather than a word of limitation (*40 Cal. App. 4th 981, 990)* . The court noted that the legislative history of the provision confirms that the Legislature did not analyze, discuss, or even mention the fact that some defaults may be entered by the judge

rather than the clerk (*40 Cal. App. 4th 981, 992)* . Stating that what happened in this case was a procedural fortuity, the court concluded that there was no reason in this case to distinguish between a judge-entered default and a clerk-entered default (*40 Cal. App. 4th 981, 994)* .

[c] Attorney Affidavit Procedure Available to Remedy Procedural Equivalent of Default

In ***In re Marriage of Hock & Gordon-Hock*** *(2000) 80 Cal. App. 4th 1438, 96 Cal. Rptr. 2d 546* , after granting a judgment of dissolution of marriage, the trial court reserved jurisdiction over further issues. Trial was later had on the reserved issues, at which neither the former wife nor her attorney appeared, and the trial court entered further judgment. Eleven days later, the former wife filed a motion to set aside the judgment on the reserved issues pursuant to *Code Civ. Proc. § 473(b)*. In support of the motion, the wife's attorney filed an affidavit of fault, declaring that he was retained to represent the wife one week before the trial on reserved issues, and that he received the file from her former attorney the night before the trial, but was not informed by the former attorney that trial was scheduled for the next day. The trial court denied the motion to set aside the judgment.

The court of appeal reversed. The court held that § 473 applies under circumstances similar or comparable to a default, i.e., the procedural equivalent of a default, so that when there is no hearing on the merits, an attorney's neglect should not prevent the party from having his or her day in court (*80 Cal. App. 4th 1438, 1443)* . The court found that the circumstances of this case were more like the procedural equivalent of a default judgment than the situation in which a party has had an opportunity have his or her day in court and has contested the judgment or order. The court held further that the trial court erred in denying the motion, since her attorney's affidavit was sufficient to establish that his own conduct in failing to inquire of her former attorney as to the status of the case, as well as her former attorney's in causing the default, and there was nothing in the record to show that she contributed to the default (*80 Cal. App. 4th 1438, 1446-1447)* .

One appellate court has expressly disagreed with the application of *Code Civ. Proc. § 473* to the procedural equivalent of a default, holding that *Code Civ. Proc. § 473* did not apply to summary judgments [*see English v. IKON Business Solutions, Inc. (2001) 94 Cal. App. 4th 130, 136-149, 114 Cal. Rptr. 2d 93]* or to judgments entered after an uncontested trial held in a defendant's absence [*Vandermoon v. Sanwong (2006) 142 Cal. App. 4th 315, 319-321, 47 Cal. Rptr. 3d 772]* .

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7-70 California Points & Authorities §§ 70.13-70.19

[Reserved]

§§ 70.13[Reserved]

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7-70 California Points & Authorities § 70.20

§ 70.20 Supporting Contention That Motion for Relief Under Code Civ. Proc. § 473(b) in Conjunction With Motion to Quash Is Not General Appearance [Code Civ. Proc. § 418.10(d)]

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside under Code Civ. Proc. § 473(b) (see § 70.10[1]).*]

A MOTION UNDER CODE OF CIVIL PROCEDURE SECTION 473(b) DOES NOT CONSTITUTE A GENERAL APPEARANCE BY THE DEFENDANT WHEN JOINED WITH A MOTION TO QUASH UNDER CODE OF CIVIL PROCEDURE SECTION 418.10.

Motion in Conjunction With Motion to Quash Does Not Constitute General Appearance. A motion under *Code of Civil Procedure Section 473(b)*, when joined with a motion to quash under *Code of Civil Procedure Section 418.10*, does not constitute a general appearance by the defendant (*Code Civ. Proc. § 418.10(d)*).

[2] Comments

[a] Use of Form

This memorandum is for use if defendant files a motion under *Code Civ. Proc. § 473* in conjunction with a motion to quash service of summons for lack of jurisdiction [*see Code Civ. Proc. § 418.10*]. The memorandum supports the contention that a § 473(b) motion for relief in such a case does not constitute general appearance.

These points and authorities should be combined with a memorandum generally supporting relief under *Code Civ. Proc. § 473(b)* [*see § 70.10[1]*]. See also *§ 70.10[2][l]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

This form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 70.10[2][b]* regarding evidentiary support for facts stated.

[c] Related Pleading and Practice Chapters

For further discussion and forms relating for use in motion proceedings to quash service of summons for lack of personal jurisdiction, see California Forms of Pleading and Practice, Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances* (Matthew Bender).

[d] Related Memoranda

For forms of memoranda supporting a motion to quash under *Code Civ. Proc. § 418.10*, which may in such cases be combined with this form, see Ch. 132, *Jurisdiction: Personal Jurisdiction and Inconvenient Forum* .

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7-70 California Points & Authorities §§ 70.21-70.29

[Reserved]

§§ 70.21[Reserved]

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7-70 California Points & Authorities § 70.30

§ 70.30 Supporting Plaintiff's Motion to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. § 473(b)]--General Form--Plaintiff Is Entitled to Relief From Default

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF PLAINTIFF'S
vs.	)	MOTION TO SET ASIDE _____
_____ [*name*],	)	[DEFAULT AND DEFAULT JUDGMENT *or*
Defendant.	)	JUDGMENT *or* DISMISSAL *or* ORDER *or*
	)	_____ (*identify other proceeding*)]
	)	Date: _____
	)	Time: _____
	)	Location: _____
		[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD GRANT PLAINTIFF'S MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other*

proceeding)] UNDER CODE OF CIVIL PROCEDURE SECTION 473(b) ON THE GROUND OF HIS/HER _____ [MISTAKE *and/or* INADVERTENCE *and/or* SURPRISE *and/or* EXCUSABLE NEGLECT], AND JUSTICE REQUIRES DETERMINATION OF THE ISSUES AFTER A HEARING ON THE MERITS OF THE CASE.

A. Grounds for Relief From Judgment, Order, or Other Proceeding. [*See § 70.10[1], Paragraph A.*]

B. Plaintiff Entitled to Relief From Default. A plaintiff, as well as a defendant, may seek relief under Code of Civil Procedure Section 473 (*Olson v. Olson (1957) 148 Cal. App. 2d 479, 482, 306 P.2d 1036*).

C. Relief Available to Party in Whose Favor Judgment Was Rendered. A party in whose favor a judgment has been rendered, as well as the party against whom it was rendered, is entitled to relief under *Code of Civil Procedure Section 473(b)* (*Olson v. Olson (1957) 148 Cal. App. 2d 479, 482-483, 306 P.2d 1036*).

D. Relief Subject to Discretion of Court. It is primarily a question of fact for the trial court to determine whether or not justice requires that a judgment or order be set aside, and the granting of a motion to vacate a judgment or order under *Code of Civil Procedure Section 473(b)* rests largely in the discretion of the trial court (*Olson v. Olson (1957) 148 Cal. App. 2d 479, 483, 306 P.2d 1036*).

E. Liberal Construction of Statute. *Code of Civil Procedure Section 473(b)* is subject to liberal construction (*Olson v. Olson (1957) 148 Cal. App. 2d 479, 482, 306 P.2d 1036*).

[*Add supporting points and authorities for each particular ground of relief asserted (see, e.g., § 70.50 et seq.). In addition, when applicable, add additional points and authorities that generally support a plaintiff's motion for relief (see, e.g., § 70.30 et seq.)*]

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*moving party*]

[2] Comments

[a] Use of Form

This form of memorandum may be used by a plaintiff in support of his or her motion under *Code Civ. Proc. § 473* to set aside a default and default judgment or judgment, dismissal, or order entered in his or her favor against a defendant [*see Olson v. Olson (1957) 148 Cal. App. 2d 479, 482-483, 306 P.2d 1036]* . It is a general form that sets out the policy of law with respect to a prevailing plaintiff's right to seek relief from a judgment, dismissal, or order. The caption and form should be modified as necessary when relief is sought from the entry of default only, as distinguished from the entry of default and a resulting default judgment.

This form should be combined with additional points and authorities supporting a request for relief based on one or more of the specific grounds set out in *Code Civ. Proc. § 473(b)* [*see, e.g., § 70.50* et seq.; *see also* discussion in *§*

70.10[2][g], relating to multiple grounds for relief].

This form may be combined with points and authorities seeking relief based on an attorney's affidavit of fault [*see § 70.12[1]*]. It may also be combined, in an appropriate case, with additional points and authorities supporting a grant of relief based on other statutory or decisional authority [*see* discussion in *§ 70.10[2*][c], relating to alternative methods of obtaining relief].

Although a party typically seeks relief under *Code Civ. Proc. § 473(b)*, from a default or default judgment, or both, a court may grant relief under that section from any "judgment, dismissal, order, or other proceeding." This form may be used, when appropriate, for seeking relief in situations other than a default and default judgment.

This form may also be adapted for use in a trial or appellate brief.

See also *§ 70.10[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b)*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should argue that under the facts, the court in its proper exercise of discretion should grant relief. See also *§ 70.10[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 70.120* et seq. may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Plaintiff Entitled to Relief From Default

In ***Olson v. Olson*** *(1957) 148 Cal. App. 2d 479, 306 P.2d 1036* , the court entered an interlocutory decree of divorce in plaintiff wife's favor, incorporating in the decree a property settlement agreement. Shortly thereafter, the husband died. The wife moved to vacate the interlocutory decree on the ground that it was entered through her mistake and surprise in that she mistakenly believed that the property agreement was a necessary prerequisite to the decree, and that the agreement had divested her of property rights she had not intended to lose, all to her surprise. The trial court granted her motion to vacate the judgment and property agreement, and the executrix of husband's estate appealed.

The court of appeal affirmed the judgment with respect to vacation of the judgment, and reversed with respect to the property agreement (*148 Cal. App. 2d 479, 489)* . The court stated that *Code Civ. Proc. § 473* has been construed to be remedial, and is therefore given a liberal construction. Even though *Code Civ. Proc. § 473* provides that the party against whom a judgment or order has been taken may be relieved from it, it is well established that the statute entitles a plaintiff, as well as a defendant, to move for vacation of a judgment or order (*148 Cal. App. 2d 479, 482)* . A party in whose favor a judgment has been rendered, as well as the party against whom it was rendered, is entitled to relief under *Code Civ. Proc. § 473* (*148 Cal. App. 2d 479, 482-483)* . Inasmuch as appellant did not attack the sufficiency of the evidence, the court stated that the evidence was sufficient to support the trial court's order, noting that it is primarily a question of fact for the trial court to determine whether or not justice requires that a judgment or order be set aside. The trial court's ruling will not be disturbed on appeal absent an abuse of discretion (*148 Cal. App. 2d 479, 483)* . The court held that the trial court's power to rule on a motion under *Code Civ. Proc. § 473* was not curtailed by the husband's death, and that the lower court's refusal to join the executrix as a party was nonprejudicial error. It therefore affirmed that part of the order setting aside the interlocutory decree (*148 Cal. App. 2d 479, 486-487)* . However, the court held that the trial court did not have the power to vacate the property settlement agreement, and reversed that part of the

order setting aside the agreement (*148 Cal. App. 2d 479, 487-489)* .

[b] Relief Available to Party in Whose Favor Judgment Was Rendered

Olson v. Olson *(1957) 148 Cal. App. 2d 479, 306 P.2d 1036* , is discussed in *§ 70.30[3][a]*.

[c] Liberal Construction of Statute

Olson v. Olson *(1957) 148 Cal. App. 2d 479, 306 P.2d 1036* , is discussed in *§ 70.30[3][a]*.

[4] Additional Authorities

[a] Relief Available to Party in Whose Favor Judgment Was Rendered

In *Palace Hardware Co. v. Smith (1901) 134 Cal. 381, 66 P. 474* , plaintiff appealed from a trial court order under *Code Civ. Proc. § 473* setting aside a judgment of dismissal entered after plaintiff settled with defendant. Among other things, defendant argued that to qualify for relief under *Code Civ. Proc. § 473*, the proceeding must be one taken against the moving party. The Supreme Court held that this contention was without merit because a party in whose favor a judgment has been rendered is entitled to relief under *Code Civ. Proc. § 473*; that statute is remedial and is therefore subject to liberal construction (*134 Cal. 381, 384)* .

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7-70 California Points & Authorities §§ 70.31-70.39

[Reserved]

§§ 70.31[Reserved]

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7-70 California Points & Authorities § 70.40

§ 70.40 Supporting Intervenor's Motion to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. §§ 387, 473(b)]--General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE AND TO SET ASIDE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other proceeding*)]
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

_____ [*Name*] IS ENTITLED TO INTERVENE IN THE ACTION BECAUSE HE/SHE IS A

NONPARTY WHOSE RIGHTS ARE ADVERSELY AFFECTED BY THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other proceeding*)] THAT HE/SHE SEEKS TO SET ASIDE, AND THE _____ [*identify proceeding, e.g.,* DEFAULT AND DEFAULT JUDGMENT] OCCURRED BECAUSE OF _____ [MISTAKE *or* INADVERTENCE *or* SURPRISE *or* EXCUSABLE NEGLECT] OF THE [LEGAL REPRESENTATIVE OF THE] INTERVENING PARTY.

A. Grounds for Relief From Judgment, Order, or Other Proceeding. [*See § 70.10[1], Paragraph A.*]

B. Application for Intervention. On timely application, any person who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both parties, may intervene in the action or proceeding (*Code Civ. Proc. § 387(a)*).

C. Intervention to Set Aside Default. Intervention is allowed under *Code of Civil Procedure Section 473(b)* when, because of mistake, surprise, inadvertence, or excusable neglect, a default was entered to the detriment of the rights of the person seeking leave to intervene (*Morton Regent Enterprises, Inc. v. Leadtec California, Inc. (1977) 74 Cal. App. 3d 842, 846, 141 Cal. Rptr. 706* ; *Linder v. Vogue Investments, Inc. (1966) 239 Cal. App. 2d 338, 343-346, 48 Cal. Rptr. 633*).

[*Add supporting points and authorities for each particular ground of relief asserted (see, e.g., § 70.50 et seq.). In addition, when applicable, add additional points and authorities that generally support an intervenor's motion for relief (see, e.g., § 70.41)*]

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*moving party*]

[2] Comments

[a] Use of Form

This form of memorandum may be used to support a noticed motion by a nonparty seeking to intervene in an action for the purpose of setting aside a default and default judgment or judgment, dismissal, order, or other proceeding under *Code Civ. Proc. § 473(b)* [*see Code Civ. Proc. § 387*].

For a form of memorandum for use when a statute confers an unconditional right to intervene, or the proposed intervenor's ability to protect his or her interest in the property or transaction at issue may be impeded or impaired by disposition of the action, see *§ 70.41[1]*.

The caption and form should be modified as necessary when relief is sought from the entry of default only, as distinguished from the entry of default and a resulting default judgment.

This form should be combined with additional points and authorities supporting a request for relief based on one or

more of the specific grounds set out in *Code Civ. Proc. § 473(b)* [*see, e.g., § 70.50* et seq.; *see also* discussion in *§ 70.10[2*][g], relating to multiple grounds for relief].

This form may be combined, in an appropriate case, with additional points and authorities supporting a grant of relief based on other statutory or decisional authority [*see* discussion in *§ 70.10[2*][c], relating to alternative methods of obtaining relief].

Although a party typically seeks relief under *Code Civ. Proc. § 473(b)*, from a default or default judgment, or both, a court may grant relief under that section from any "judgment, dismissal, order, or other proceeding." This form may be used, when appropriate, in seeking relief in situations other than a default and default judgment.

This form may also be adapted for use in a trial or appellate brief.

See also *§ 70.10[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b)*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should demonstrate the client's standing to intervene with facts indicating the client's interest in the matter and any difficulty in protecting the client's rights with regard to the property or transaction that is the subject of the controversy. This may be done either by including particular facts in the memorandum or by reference to the accompanying declarations or complaint in intervention. For memoranda of points and authorities regarding intervention generally, see Ch. 124, *Intervention* .

[c] Intervention Procedure

In general, when the court grants leave to intervene, whether after hearing on a motion or on ex parte application of the proposed intervenor, counsel must file and serve a complaint in intervention setting forth the grounds for intervention [*see Code Civ. Proc. § 387(a)*]. However, when a nonparty is permitted to intervene in an action or proceeding for the purpose of setting aside a judgment, the nonparty is not required to file a complaint in intervention prior to obtaining relief from the default judgment. Thus, although the granting of a motion to intervene gives the moving party limited standing to set aside the default judgment, a complaint in intervention must then be filed, because the intervenor is not considered a party to the action until the complaint is filed [*see Klinghoffer v. Barasch (1970) 4 Cal. App. 3d 258, 261-262, 84 Cal. Rptr. 350]* .

[d] Application for Intervention

Code Civ. Proc. § 387 governs the right of nonparties to intervene in an action or proceeding for any purpose. Prior to its amendment in 1977, the statute required that a motion for intervention be made prior to trial, but by its present terms, it authorizes intervention on "timely application" of any person having an interest in the subject of litigation, or in the success of either party, or an interest against both [*see Code Civ. Proc. § 387(a)*]. Intervention takes place when a nonparty is permitted to become a party to an action or proceeding either by: joining plaintiff in claiming what is sought in the complaint; uniting with defendant in resisting plaintiff's claims; or demanding anything adverse to both parties. To accomplish intervention, the nonparty must obtain leave of the court to file a complaint that sets forth the grounds on which intervention is sought. The complaint is then served on parties to the action who have not appeared in the same manner as on commencement of the original action, on the attorneys of parties who have appeared, or on parties who have appeared without attorneys as provided by statute. The party thus served has 30 days to respond to the complaint in intervention in the same manner as to an original complaint [*see Code Civ. Proc. § 387(a)*].

[e] Related Pleading and Practice Chapters

For discussion and forms related to a notice of motion, complaint in intervention, declaration, and orders for use in applying for intervention, see California Forms of Pleading and Practice, Ch. 395, *Parties* (Matthew Bender).

[3] Discussion of Authorities

[a] Intervention to Set Aside Default

Morton Regent Enterprises, Inc. v. Leadtec California, Inc. *(1977) 74 Cal. App. 3d 842, 141 Cal. Rptr. 706* , involved an attempt by a surety to intervene in a contract action after judgment was rendered. Plaintiff had recovered materials from defendant in a claim and delivery proceeding for which the intervening insurance company provided the required surety bond. Settlement negotiations between plaintiff and defendant were unsuccessful, and the matter proceeded to trial. The insurance company was notified of plaintiff's intention to default at the trial, but the notification did not reach the company's counsel until after the trial date. Following entry of judgment against plaintiff, the insurance company moved to intervene and vacate the portion of the judgment for which it would be liable as surety, on the ground that the award was void, in that it was in excess of the prayer of the complaint and was based on facts not pleaded in the complaint. The company appealed from the trial court's denial of its motion.

Based on a consideration of the substantive issues involved in the action, the court found against defendant, and remanded the matter to the lower court for modification of the judgment (*74 Cal. App. 3d 842, 850-851)* . The court interpreted the version of *Code Civ. Proc. § 387* in effect at that time (amended in 1977 to allow intervention "on timely application"). Under that statute, the general rule was that intervention by third parties was not permitted after judgment. However, the court noted, when a default judgment is rendered due to mistake, inadvertence, surprise, or excusable neglect, intervention is allowed after judgment (*74 Cal. App. 3d 842, 846)* . The court also stated that an aggrieved person may intervene after judgment for the purpose of vacating a default judgment that is void (*74 Cal. App. 3d 842, 846-847)* . The court noted that the merits of the insurer's motions rest on an analysis of its reasons for not intervening prior to judgment, and the vulnerability of the judgment itself (*74 Cal. App. 3d 842, 847)* . The court concluded that, under the facts, the trial court abused its discretion in denying the insurer's motion to intervene and vacate the judgment (*74 Cal. App. 3d 842, 847-850)* .

In ***Linder v. Vogue Investments, Inc.*** *(1966) 239 Cal. App. 2d 338, 48 Cal. Rptr. 633* , plaintiff filed a complaint against a company that it designated as a limited partnership. Plaintiff alleged that a certain individual was the general partner, and that a named corporation was the limited partner. Summons was served on the individual general partner, who did nothing to cause the defendant company to appear, and a default was entered. When the corporate limited partner learned that the individual general partner would not defend the action, it immediately filed a motion to intervene and to vacate the default. That motion was denied, as was a subsequent motion for reconsideration. The limited partner appealed those rulings, as well as a subsequent ruling denying its motion to vacate a default judgment.

The court of appeal reversed (*239 Cal. App. 2d 338, 346)* . The court noted that the limited partner sought leave to intervene for a variety of reasons: (1) the limited partnership did not in fact owe the sum demanded by plaintiff, in that the sum was owed by the individual general partner, who had filed for bankruptcy, and failed to defend the action to the limited partner's detriment; (2) any judgment obtained against the limited partnership would be a fraud on the court; and (3) plaintiff's purpose in bringing the action against the limited partnership was fraudulent (*239 Cal. App. 2d 338, 339-340)* . The court also noted that plaintiff resisted the motion for leave to intervene, claiming, inter alia, that a limited partner was not a proper party in an action against a limited partnership. The trial court's minute order denying the motion for reconsideration stated that limited partners are not bound by the obligations of the partnership, and have no power to litigate or defend the partnership obligations. The court of appeal disagreed with that reasoning, stating that it was unaware of any rule that equates the right to intervene on behalf of a defendant with being a proper party that the plaintiff could have sued (*239 Cal. App. 2d 338, 340-341)* . The court discussed issues concerning whether the limited partner's rights were prejudiced by the default judgment, noting that the law is unclear in that respect (*239 Cal. App. 2d 338, 341-342)* . It therefore reversed the order denying intervention, permitting the trial court to exercise its discretion in

the matter of granting leave to intervene, and setting aside the default of any of the grounds enumerated in former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*) (*239 Cal. App. 2d 338, 342-343)* . The court rejected plaintiff's contention that intervention must be denied because the case has proceeded to judgment, holding that if the trial court was in error in denying the motion to intervene, the later judgment cannot make that error moot; and that in any event, the court would have vacated the default judgment if it felt that the limited partner had any standing before it (*239 Cal. App. 2d 338, 343)* . The court interpreted the version of *Code Civ. Proc. § 387* in effect at that time (amended in 1977 to allow intervention "on timely application"). It considered the propriety of seeking leave to intervene after judgment, holding that case law supported that right (*239 Cal. App. 2d 338, 343-345)* . The court considered the circumstances under which the default judgment was taken, concluding that the entire proceeding involving the judgment would not have taken place if the trial court had exercised discretion to permit intervention affirmatively. The court therefore set the judgment aside (*239 Cal. App. 2d 338, 345-346)* .

[4] Additional Authorities

[a] Intervention to Set Aside Default

The facts and procedural background of *Jade K. v. Viguri (1989) 210 Cal. App. 3d 1459, 258 Cal. Rptr. 907* , are discussed in *§ 70.230[3]*. In *Jade K.*, the court of appeal held that former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), permits the court to award costs or attorney fees to the adverse party as compensation for loss or expense occasioned by granting relief under the statute (*210 Cal. App. 3d 1459, 1474)* . The court in *Jade K.* also held that the trial court properly acted within its discretion in permitting the defendant's insurer to intervene (*210 Cal. App. 3d 1459, 1468)* . It also held that the court improperly denied the insurer's motion under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), for relief from the default entered against the defendant, because the insurer was unaware of the plaintiff's claim against the defendant prior to entry of the default, and was therefore unable to extend a defense (*210 Cal. App. 3d 1459, 1470)* .

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7-70 California Points & Authorities § 70.41

§ 70.41 Supporting Intervenor's Motion to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. §§ 387, 473(b)]--Intervention Required When Interests Affected

[1] FORM

[*This form should be combined with a memorandum generally supporting an intervenor's motion to set aside under Code Civ. Proc. § 473(b) (see § 70.40[1]).*]

[*EITHER*]

THE MOVING PARTY IS ENTITLED TO INTERVENE IN THE ACTION BECAUSE THE LAW CONFERS AN UNCONDITIONAL RIGHT TO INTERVENE.

[*OR*]

THE MOVING PARTY IS ENTITLED TO INTERVENE IN THE ACTION BECAUSE HE/SHE/IT CLAIMS AN INTEREST RELATING TO THE PROPERTY OR TRANSACTION THAT IS THE SUBJECT OF THE ACTION AND DISPOSITION OF THE ACTION MAY AS A PRACTICAL MATTER IMPAIR OR IMPEDE HIS/HER/IT ABILITY TO PROTECT THAT INTEREST AND HIS/HER/IT AND THE MOVING PARTY'S INTEREST IS NOT ADEQUATELY REPRESENTED BY EXISTING PARTIES.

[*CONTINUE*]

Intervention Required When Interests Affected. If any provision of law confers an unconditional right to intervene

or if the intervenor claims an interest relating to the property or transaction that is the subject of the action and that person is so situated that disposition of the action may as a practical matter impair or impede that person's ability to protect that interest, unless that person's interest is adequately represented by existing parties, the court shall, on timely application, permit that person to intervene (*Code Civ. Proc. § 387(b)*).

[2] Comments

[a] Use of Form

This form of memorandum may be used to support a noticed motion by a nonparty seeking to intervene in an action for the purpose of setting aside a default and/or default judgment under *Code Civ. Proc. § 473(b)* [*see Code Civ. Proc. § 387*]. The form is for use when a statute confers an unconditional right to intervene, or the proposed intervenor's ability to protect his or her interest in the property or transaction at issue may be impeded or impaired by disposition of the action [*see Code Civ. Proc. § 387(b)*].

These points and authorities should be combined with a memorandum generally supporting an intervenor's application for relief under *Code Civ. Proc. § 473(b)* [*see § 70.40[1]*]. See also *§ 70.40[2][e]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

This form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 70.10[2][b]* regarding evidentiary support for facts stated.

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[Reserved]

§§ 70.42[Reserved]

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7-70 California Points & Authorities § 70.50

§ 70.50 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake of Fact [Code Civ. Proc. § 473(b)]--General Form

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion for relief under Code Civ. Proc. § 473(b) (see, e.g., §§ 70.10, 70.30, 70.40).*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other proceeding*)] UNDER CODE OF CIVIL PROCEDURE SECTION 473(b) ON THE GROUND OF REASONABLE MISTAKE OF FACT ON THE PART OF THE [LEGAL REPRESENTATIVE OF THE] DEFENDANT.

Mistake of Fact Defined. A mistake of fact occurs when a person understands the facts to be other than they are (*Hodge Sheet Metal Products v. Palm Springs Riviera Hotel (1961) 189 Cal. App. 2d 653, 656, 11 Cal. Rptr. 435*).

[*Add supporting points and authorities for the particular ground of mistake of fact for which relief is sought (see, e.g., § 70.51 et seq.)*].

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that a default and default judgment, or judgment, dismissal, order, or other proceeding under *Code Civ. Proc. § 473(b)* should be set aside on the ground of mistake of fact [*see Code Civ. Proc. § 473(b)*].

This form should be combined with a general memorandum supporting a motion for relief under *Code Civ. Proc. § 473(b)* [*see, e.g., §§ 70.10, 70.30, 70.40*].

This form may be combined with points and authorities based on mistake of fact in the following circumstances:

- The mistake regards the fact of service [*see § 70.51[1]*].
- The mistake regards the date of service [*see § 70.52[1]*].
- The mistake was caused by incapacity [*see § 70.53[1]*].
- The mistake was committed by the moving party's attorney [*see § 70.54[1]*].

It may also be combined when appropriate, with points and authorities supporting relief on other grounds specified in *Code Civ. Proc. § 473(b)* [*see, e.g., § 70.60* et seq.; *see also* discussion in *§ 70.10[2][g]*].

This form may also be adapted for use in a trial or appellate brief.

See also *§ 70.10[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b)*, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should indicate the nature of the mistake and why it is one that a reasonably prudent person might make. If an error regarding the date of service is claimed, counsel should include facts to indicate the true date of service and why and how the mistake arose. If relief is sought for a mistake as to the fact of service, counsel should refer to facts that demonstrate that defendant reasonably believed that he or she was not served. See also *§ 70.10[2][b]* regarding evidentiary support for facts stated.

[c] Attorney Affidavit of Fault

If the request for relief is based on the mistake, inadvertence, surprise, or neglect of the moving party's attorney, the granting of the motion is mandatory if the attorney at fault files an affidavit to that effect, and certain other conditions are met. Specifically, if the application for relief under *Code Civ. Proc. § 473* is timely, in proper form, and accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, the court must grant relief unless it finds that the default was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect [*Code Civ. Proc. § 473*]. For further discussion, see *§ 70.12[3][a]*.

[d] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 70.160* et seq. may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Mistake of Fact Defined

In ***Hodge Sheet Metal Products v. Palm Springs Riviera Hotel*** *(1961) 189 Cal. App. 2d 653, 11 Cal. Rptr. 435* , plaintiff filed an action for foreclosure of a materialman's lien on real property against three named defendants. The only defendant who was served reasonably believed, as a result of a conversation with plaintiff's attorney, that the papers were a lien claim not requiring his immediate attention, and he put them away. When plaintiff's attorney took his

default, defendant moved to set it aside on the grounds of mistake, inadvertence, surprise, and excusable neglect. The trial court granted defendant's motion and plaintiff appealed, contending that defendant's affidavit in support of his motion was insufficient to justify granting relief under *Code Civ. Proc. § 473*.

The court of appeal affirmed. The court noted that a party will not be relieved of his or her default unless he or she shows that he or she acted in good faith and that his or her mistake, inadvertence, surprise, or neglect was the actual cause of the default; and that the policy of the courts favors trial on the merits (*189 Cal. App. 2d 653, 657)* . The court determined that defendant's affidavit supported the trial court's finding that defendant was, in good faith, mistaken regarding the nature of the papers he received; that defendant believed them to be a lien claim; that defendant was diligent in seeking relief; and that defendant throughout acted in good faith (*189 Cal. App. 2d 653, 657-658)* . The court concluded that "the weighing of the veracity of the affidavit was in the province of the trial court" (*189 Cal. App. 2d 653, 658)* .

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7-70 California Points & Authorities § 70.51

§ 70.51 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake of Fact [Code Civ. Proc. § 473(b)]--Mistake Regarding Fact of Service

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion for relief from default or default judgment based on mistake of fact (see, e.g.,§ 70.50).*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION TO SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT UNDER CODE OF CIVIL PROCEDURE SECTION 473(b) BECAUSE THE DEFAULT WAS TAKEN AS A RESULT OF DEFENDANT'S MISTAKEN BELIEF THAT A SUMMONS HAS NOT BEEN SERVED IN THE ACTION.

Mistake Regarding Fact of Service. When defendant's default is taken as a result of his or her mistaken belief that summons has not been served in the action, relief from default and the default judgment entered may be granted in the discretion of the trial court (*Riskin v. Towers (1944) 24 Cal. 2d 274, 276-277, 148 P.2d 611*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that a default and default judgment should be set aside on the ground of mistake of fact [*see Code Civ. Proc. § 473(b)*]. This form is for use if the mistake concerns the fact that service was made. For a form of memorandum seeking relief based on a mistake relating to the date of service, see *§ 70.52[1]*.

This form should be combined with a memorandum generally supporting a motion for relief from default or default judgment based on mistake of fact (see *§ 70.50*).

This form may also be adapted for use in a trial or appellate brief.

See also *§ 70.10[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b)*, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should indicate the nature of the mistake and why it is one that a reasonably prudent person might make. Specifically, counsel should refer to facts that demonstrate that defendant reasonably believed that he or she was not served. See also *§ 70.10[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 70.160* et seq. may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Mistake Regarding Fact of Service

In ***Riskin v. Towers*** *(1944) 24 Cal. 2d 274, 148 P.2d 611* , defendant denied that he had been served with summons, although plaintiff filed an affidavit of service showing personal service on defendant. After entry of default, defendant specially appeared to move for an order vacating the service and the entry of default; the motion was denied. Defendant's subsequent motion under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), to vacate the default judgment entered against him was also denied.

The Supreme Court reversed, holding that a defendant who claims that he or she has not been served or that service is legally insufficient may attempt to quash service and set aside the default. A defendant who follows those procedures should be relieved from a default judgment taken in the interim. In this case defendant proceeded diligently in seeking relief (*24 Cal. 2d 274, 277)* . It appeared that defendant and counsel were reasonably mistaken in their beliefs as to the fact of service (*24 Cal. 2d 274, 278)* . The Court stated that the fact that the trial court did not believe defendant's assertion that he was not served did not require the conclusion that he did not believe the court would believe him and quash service. From these circumstances, considered in light of the liberal construction of *Code Civ. Proc. § 473*, the Court concluded that it was clear that the default judgment should have been set aside (*24 Cal. 2d 274, 279)* .

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7-70 California Points & Authorities § 70.52

§ 70.52 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake of Fact [Code Civ. Proc. § 473(b)]--Mistake Regarding Date of Service

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion for relief from default or default judgment based on mistake of fact (see, e.g., § 70.50).*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION TO SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT UNDER CODE OF CIVIL PROCEDURE SECTION 473(b) BECAUSE THE DEFAULT WAS TAKEN AS A RESULT OF DEFENDANT'S MISTAKEN BUT GOOD FAITH BELIEF REGARDING THE DATE OF SERVICE OF PROCESS.

Mistake Regarding Date of Service. When defendant's default is taken as a result of his or her mistaken but good faith belief regarding the date of service of process, relief from default and the default judgment entered may be granted in the discretion of the trial court (*Miller v. Carr (1897) 116 Cal. 378, 381, 48 P. 324* ; *Gore v. Witt (1957) 149 Cal. App. 2d 681, 685, 308 P.2d 770*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that a default and default judgment should be set aside on the ground of mistake of fact [*see Code Civ. Proc. § 473(b)*]. This form is for use if the mistake concerns the date of service. For a form of memorandum seeking relief based on a mistake relating to the fact of service, see *§ 70.51[1]*.

This form should be combined with a memorandum generally supporting a motion for relief from default or default judgment based on mistake of fact (see *§ 70.50*).

This form may also be adapted for use in a trial or appellate brief.

See also *§ 70.10[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b)*, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should indicate the nature of the mistake and why it is one that a reasonably prudent person might make. Specifically, counsel should include facts to indicate the true date of service and why and how the mistake arose. See also *§ 70.10[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 70.160* et seq. may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Mistake Regarding Date of Service

In ***Miller v. Carr*** *(1897) 116 Cal. 378, 48 P. 324* , defendant moved to set aside a default and default judgment entered against him on the ground that they were taken against him through his mistake regarding the date of service, which led to his filing of a demurrer to the complaint one day late. The trial court denied the motion.

The Supreme Court reversed, noting that there was no question that defendant in good faith believed that the service was made one day later than it actually was made, and that he believed that his appearance was in time. The Court declared that the relief for the mistake was clearly within the provisions of *Code Civ. Proc. § 473* and was the type of relief "which the spirit of the code requires to be granted" (*116 Cal. 378, 380-381)* . In support of its position, the Court cited early California cases on the subject of the policy favoring trial on the merits and the liberal construction afforded *Code Civ. Proc. § 473* (*116 Cal. 378, 381-382)* .

In ***Gore v. Witt*** *(1957) 149 Cal. App. 2d 681, 308 P.2d 770* , defendant's default was taken and subsequent judgment entered on plaintiff's suit for foreclosure of a mechanic's lien. In support of his motion for relief from the default and judgment under *Code Civ. Proc. § 473(b)*, defendant alleged that he had misinformed his attorney of the true date of service of the summons because he believed that service had occurred nine days later than it actually did. Defendant's motion was denied and he appealed from the order denying relief and from the judgment.

The court of appeal reversed, noting, however, that defendant's showing of excuse was not strong (*149 Cal. App. 2d 681, 685)* . The court found the following circumstances significant: plaintiff did not deny defendant's allegations of mistake; defendant employed an attorney within 16 days of service; default was taken by plaintiff as soon as possible; defendant requested relief within four days after learning of the entry of the default; and that defendant alleged a meritorious defense by way of a proposed answer (*149 Cal. App. 2d 681, 685)* . The court declared that, in addition to these factors, plaintiff's complaint was insufficient for failure to include certain allegations required by *Bus. & Prof. Code §§ 7031* and *7049* (*149 Cal. App. 2d 681, 685-686)* . The court concluded that under all of these circumstances, it might well be held that the trial court had abused its discretion in denying defendant's motion for relief (*149 Cal. App. 2d 681, 686)* . The court determined that the failure to include the required allegations rendered the entry of the judgment improper and compelled the reversal of both the judgment and the order denying relief to defendant (*149 Cal. App. 2d 681, 686-687)* .

Note that reference in court opinions to the requirement of a showing of meritorious defense under *Code Civ. Proc. § 473* is arguably inaccurate. For further discussion, see *§ 70.10[2][e]*, regarding a meritorious defense showing.

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7-70 California Points & Authorities § 70.53

§ 70.53 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake of Fact [Code Civ. Proc. § 473(b)]--Mistake Caused by Incapacity

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion for relief from default or default judgment based on mistake of fact (see, e.g.,§ 70.50).*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other proceeding*)] UNDER CODE OF CIVIL PROCEDURE SECTION 473(b) BECAUSE THE DEFAULT WAS ENTERED BECAUSE OF DEFENDANT'S MISTAKE CAUSED BY HIS/HER INCAPACITY.

Mistake Caused by Incapacity. Relief under *Code of Civil Procedure Section 473(b)* is available if the default was entered because of the moving party's mistake caused by incapacity (*In re the Marriage of Kerry (1984) 158 Cal. App. 3d 456, 466, 204 Cal. Rptr. 660*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that a default and default judgment should be set aside on the ground of mistake of fact [*see Code Civ. Proc. § 473(b)*]. This form is for use if the mistake was caused by the moving party's incapacity.

This form should be combined with a memorandum generally supporting a motion for relief from default or default judgment based on mistake of fact (see *§ 70.50*).

Although a party typically seeks relief under *Code Civ. Proc. § 473(b)*, from a default or default judgment, or both, a court may grant relief under that section from any "judgment, dismissal, order, or other proceeding." This form may used, when appropriate, for seeking relief in situations other than a default and default judgment.

This form may also be adapted for use in a trial or appellate brief.

See also *§ 70.10[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b)*, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should indicate the nature of the mistake and why it is one that a reasonably prudent person might make. See also *§ 70.10[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 70.160* et seq. may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Mistake Caused by Incapacity

In re the Marriage of Kerry *(1984) 158 Cal. App. 3d 456, 204 Cal. Rptr. 660* , arose from a motion for modification of spousal support in a dissolution matter. The motion was filed by the former husband of the marriage (the husband), who sought termination of support on the grounds that his former wife (the wife) had willfully left her teaching job without justification, and was receiving money from her pension fund, which he claimed was sufficient for her support. After partial trial on the motion, the trial court ordered the wife to be examined by a psychiatrist, pursuant to stipulation by the parties. Approximately six months later, the parties and their attorneys signed a "Stipulation re Modification," which was approved and signed by the trial judge, and declared to be an order of the court. Under the stipulation, the wife agreed to sell a certain house to the husband, after warranting that no prior liens existed against the property. The stipulation also provided that the husband deliver to the wife a certain automobile and the proceeds of certain secured loans; that spousal support terminate immediately; that each party pay his or her own attorney's fees and costs; and that the husband is relieved of responsibility for any of the wife's attorney's fees and costs.

Almost two months later, the wife filed a motion under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), to vacate the stipulation order and return the case to the calendar for hearing on the merits. The supporting declaration of her attorney stated that at the time she signed the stipulation, the attorney believed that she still owned the house described in the stipulation, but later learned that she had previously conveyed title to someone else. He implied in the declaration that his client's psychiatric difficulties had probably prevented her from understanding the stipulation. A copy of the psychiatric report, resulting from the prior stipulation for her examination, was included in the moving papers. The report indicated that she suffered from certain forms of mental illness, and that her judgment and "impulse control" were poor. The report precluded her full-time employment as a teacher, and suggested that she might be capable of low-stress, part-time work. Neither party disputed that the wife was, at the time of the motion for relief, a 62-year-old woman with a history of psychiatric difficulties; nor that she had previously sold the house in question. At the hearing on the motion, the wife's attorney urged that to enforce the stipulated judgment would require her to permanently waive her right to spousal support, without the benefit of the bargained-for sale of the house to her husband at the stated (inflated) price. The trial court granted the motion to vacate the stipulated judgment on several conditions, including that she pay opposing counsel a certain sum within 10 days of the date of the order. On proof that the conditions were met, the matter was to be set for hearing. Both parties appealed. The wife asserted that

the condition of payment of attorney's fees was not "just" within the meaning of conditions for granting relief under *Code Civ. Proc. § 473*. The husband contended that the trial court abused its discretion in granting the motion.

The court of appeal affirmed, with respect to the vacation of the stipulation, and reversed with respect to the condition requiring payment of attorney's fees (*158 Cal. App. 3d 456, 468)* . With respect to the husband's appeal, the court noted that an order or decree incorporating a settlement agreement may properly be set aside under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), in that relief from a stipulation or a judgment pursuant to a stipulation may be granted when there is fraud, mistake of fact, or other special circumstances rendering it unjust to enforce the stipulation. Under *Code Civ. Proc. § 473*, the court noted, a mere mistake of fact on the part of a plaintiff or defendant, regarding the state of affairs beyond the court action, can support setting aside a judgment. Moreover, excusable neglect, whether or not it is the result of mistake, may also support relief under the statute; and the excusable neglect may be the result of a disability (*158 Cal. App. 3d 456, 465)* .

The court stated that the existence of some degree of mental confusion or illness of the party moving to set aside an order supports granting the motion, and the court may infer the existence of such problems from the whole record before it. The court held that, particularly when setting aside a judgment will compel a hearing on the merits, the trial court's determination of a motion to set aside a judgment under the statute will not be disturbed on appeal absent a clear showing of abuse of discretion. The court rejected the husband's contention that his wife wished to withdraw from the stipulation because of "seller's remorse." The court noted that that assertion implies that she merely changed her mind. However, the court stated, the facts show that she was never capable of carrying out the stipulation. Inasmuch as it was in her interest to carry out the stipulation, her entry into the impossible stipulation could only be reasonably explained by some kind or degree of mistake because of incapacity on her part. The court observed that the trial court must have inferred from the wife's behavior, and from expert opinion, that she entered into the stipulation as a result of her own mistake, excusable because of her own mental confusion (*158 Cal. App. 3d 456, 466)* .

With regard to the husband's appeal, the court stated that the condition requiring the wife to pay attorney's fees was not a just one within the meaning of former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*). The court noted a complete lack of evidence that the husband was in need of the award; it also observed that there is no statutory provision for an award of attorney's fees in family law proceedings, from a needy spouse to a nonneedy spouse, as a sanction or damages for inconveniencing the nonneedy party (*158 Cal. App. 3d 456, 464-465)* .

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7-70 California Points & Authorities § 70.54

§ 70.54 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake of Fact [Code Civ. Proc. § 473(b)]--Mistake of Attorney

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion for relief under Code Civ. Proc. § 473(b) based on mistake of fact (see, e.g., § 70.50).*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other proceeding*)] UNDER CODE OF CIVIL PROCEDURE SECTION 473(b) BECAUSE THE _____ [*identify proceeding, e.g.,* DEFAULT] WAS TAKEN AS A RESULT OF A MISTAKE OF THE DEFENDANT'S ATTORNEY, AND THE MISTAKE IS OF A TYPE THAT A REASONABLY PRUDENT ATTORNEY WOULD MAKE.

A. Mistake of Attorney. Relief under *Code of Civil Procedure section 473(b)* based on a mistake of the moving party's attorney is available if the mistake is of a type that a reasonably prudent attorney would make (*Dingwall v. Vangas, Inc. (1963) 218 Cal. App. 2d 108, 113, 32 Cal. Rptr. 351*).

[*Optional*] **B. Attorney May be In-House Counsel.** Relief under *Code of Civil Procedure section 473(b)* is available even if the party's attorney is a corporate officer or in-house counsel (*Gutierrez v. G & M Oil Co. (2010) 184 Cal. App. 4th 551, 557-565, 108 Cal. Rptr. 3d 864*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that a default and default judgment, or judgment, dismissal,

order, or other proceeding under *Code Civ. Proc. § 473(b)* should be set aside on the ground of mistake of fact [*see Code Civ. Proc. § 473(b)*]. This form is for use if the mistake was made by the moving party's attorney.

This form should be combined with a memorandum generally supporting a motion for relief based on mistake of fact (see *§ 70.50*).

This form may also be adapted for use in a trial or appellate brief.

See also *§ 70.10[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b)*, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should indicate the nature of the mistake and why it is one that a reasonably prudent person might make. See also *§ 70.10[2][b]* regarding evidentiary support for facts stated.

[c] Attorney Affidavit of Fault

If the request for relief is based on the mistake, inadvertence, surprise, or neglect of the moving party's attorney, the granting of the motion is mandatory if the attorney at fault files an affidavit to that effect, and certain other conditions are met. Specifically, if the application for relief under *Code Civ. Proc. § 473* is timely, in proper form, and accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, the court must grant relief unless it finds that the default was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect [*Code Civ. Proc. § 473*]. For further discussion, see *§ 70.12[3]*.

[d] Opposing Memoranda

In an appropriate case, the memorandum *set out in § 70.160* et seq. may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Mistake of Attorney

In ***Dingwall v. Vangas, Inc.*** *(1963) 218 Cal. App. 2d 108, 32 Cal. Rptr. 351* , an action involving a contract dispute, the defendant's default was entered and judgment taken against it as a result of a mistake by defendant's attorney. Defendant's original attorney turned the case over to his associate who, on the basis of a file copy of the summons in the action, mistakenly believed that service was defective and that no default could be taken. Following entry of the default, plaintiff's attorney did not proceed further, but apparently intended to wait for the six-month period under *Code Civ. Proc. § 473* to expire. Defendant's attorney, on discovering the default some four months after its entry, promptly filed a motion under *Code Civ. Proc. § 473* for relief, which was granted by the trial court in an order setting aside the default and judgment.

The court of appeal affirmed, finding the facts of the case sufficient to establish that the trial court did not abuse its discretion in granting the relief (*218 Cal. App. 2d 108, 112)* . Observing that the mistake involved was primarily due to a "regrettable but understandable failure of liaison" between an attorney familiar with the case and the associate to whom it was delegated, the court reasoned that the mistake was "of that type which reasonably prudent lawyers do make" (*218 Cal. App. 2d 108, 113)* . The court pointed out that there were "other tranquilizing circumstances to dull [the attorney's] astuteness" and enumerated several of them, noting the "courtesy-custom" at that time among attorneys not to take defaults without prior warning to their opponent [*now see Code Civ. Proc. § 587* (requiring notice to

defendant or defendant's attorney, if any, on application for entry of default)] (*218 Cal. App. 2d 108, 114)* . Moreover, there had been protracted settlement negotiations and the action had been filed only to toll the statute of limitations, and plaintiff's attorney had remained silent when defendant's attorney informed him that service of summons was defective, which could reasonably evidence assent to his claim. In addition, plaintiff's substituted attorney had failed to give notice of his substitution to defendant's attorney, and the inadvertence of plaintiff's attorney in furnishing an incomplete summons to defendant's attorney had itself brought about the mistake (*218 Cal. App. 2d 108, 114)* .

See also discussion in [2][c], *above*.

[b] Attorney May be In-House Counsel

Gutierrez v. G & M Oil Co. *(2010) 184 Cal. App. 4th 551, 557-565, 108 Cal. Rptr. 3d 864* , involved a class action suit for violation of wage and hour laws. The defendant's vice president and general counsel accepted service of the complaint, but kept the suit from the rest of the defendant's officers and directors. The defendant's counsel attended two case management conferences but did not defend the action. After many requests, the plaintiffs obtained a default judgment against the defendant for $4 million. When the defendant's CEO heard of the judgment, he immediately hired outside counsel, who filed a motion to vacate the default judgment. In the motion, the defendant's in-house counsel took full responsibility for the default. The trial court granted the motion, and the plaintiff appealed.

On appeal, the plaintiff argued that as a matter of law, the in-house counsel's conduct was his client's conduct, and therefore, the defendant was stuck with it, no matter how innocent the company was. Noting that the case was one of first impression in California, the court of appeal looked at two prior California Supreme Court decisions discussing in-house counsel. In *General Dynamics Corp. v. Superior Court (1994) 7 Cal. 4th 1164, 1169, 32 Cal. Rptr. 2d 1, 876 P. 2d 487* , the California Supreme Court held that in-house attorneys employed as attorneys for their employer do indeed have an attorney-client relationship with their employers. In *PLCM Group, Inc. v. Drexler (2000) 22 Cal. 4th 1084, 95 Cal. Rptr. 2d 198, 997 P. 2d 511* , the California Supreme Court held that in-house attorneys come within the rubric of the attorney's fee award provisions of *Civ. Code § 1717*. The court held that the defendant's in-house attorney was in an attorney-client relationship with the defendant, and that he was acting as an attorney in handling the suit. In addition, the court held that nothing in *Code Civ. Proc. § 473* suggested that business entities who elect to have an in-house lawyer represent them in litigation should be at some disadvantage regarding the negligence of their attorneys that would not apply when they elect to retain outside counsel. Finally, the court held that both in-house and outside attorneys have the same duties to their clients [*184 Cal. App. 4th 551, 561]* .

Further, the court held that the fact that the in-house attorney was an officer of the defendant was not relevant. The court looked at the language of *Code Civ. Proc. § 473* and refused to read into it a distinction between attorneys who are officers of their client and those who are not [*184 Cal. App. 4th 551, 562]* . The court noted that *Bus. & Prof. Code § 6125* provides that only attorneys may represent clients in court. Likewise, the court noted that a corporation must be represented in court by an attorney. Therefore, the court held, a person representing a corporate client had to be acting as an attorney, even if he or she was also an officer of the client [*184 Cal. App. 4th 551, 562-564]* .

[4] Additional Authorities

[a] Mistake of Attorney

In *Parker v. Dingman (1975) 48 Cal. App. 3d 1011, 122 Cal. Rptr. 309* , the court of appeal reversed a trial court order denying a motion under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), made by the defendant and cross complainant, seeking relief from a judgment in favor of a third-party claimant with respect to the cross complaint. The court noted that the moving party's attorney misunderstood the continuance date of the hearing on the third-party claim; and found an abuse of discretion in the trial court's resuming the trial without proper proof that all the parties had notice of the continuance date, compounded by the denial of the motion for relief (*48 Cal. App. 3d*

1011, 1017-1019) .

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[Reserved]

§§ 70.55[Reserved]

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7-70 California Points & Authorities § 70.60

§ 70.60 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake of Law [Code Civ. Proc. § 473(b)]--General Form

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion for relief under Code Civ. Proc. § 473(b) (see §§ 70.10, 70.30, 70.40).*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other proceeding*)] UNDER CODE OF CIVIL PROCEDURE SECTION 473(b) ON THE GROUND OF A REASONABLE MISTAKE OF LAW ON THE PART OF THE [LEGAL REPRESENTATIVE OF THE] DEFENDANT.

A. Mistake of Law Defined. A mistake of law occurs when a person knows the facts to be as they are but has a mistaken belief as to the legal consequences of those facts (*Hodge Sheet Metal Products v. Palm Springs Riviera Hotel (1961) 189 Cal. App. 2d 653, 656, 11 Cal. Rptr. 435*).

B. Relief for Reasonable Mistake of Law. An honest mistake of law is excusable and constitutes good cause for relief from default under *Code of Civil Procedure Section 473(b)* when the misconception is reasonable (*Viles v. State of California (1967) 66 Cal. 2d 24, 29, 56 Cal. Rptr. 666, 423 P.2d 818*). The controlling factors in determining whether a mistake is excusable are: (1) the reasonableness of the misconception; and (2) the justifiability of the failure to determine the correct law (*Ron Burns Construction Co. v. Moore (2010) 184 Cal. App. 4th 1406, 1414, 109 Cal. Rptr. 3d 417* ; *Miller v. City of Hermosa Beach (1993) 13 Cal. App. 4th 1118, 1136, 17 Cal. Rptr. 2d 408*).

[*Add supporting memoranda for the particular ground of mistake of law for which relief is sought (see, e.g., § 70.61 et seq.).*]

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that a default and default judgment, or judgment, dismissal, order, or other proceeding under *Code Civ. Proc. § 473(b)* should be set aside on the ground of mistake of law [*see Code Civ. Proc. § 473(b)*]. These points and authorities should be combined with a memorandum generally supporting relief under *Code Civ. Proc. § 473(b)* [*see §§ 70.10, 70.30, 70.40*].

This form may be combined with memoranda based on mistake of law in any of the following circumstances:

- The mistake involves an issue that is complex and debatable [*see § 70.61[1]*].
- The mistake regards the validity of summons or complaint [*see § 70.62[1]*].
- The mistake regards the validity of the court's jurisdiction in connection with a federal petition for removal [*see § 70.63[1]*].
- The mistake regards the existence of a meritorious defense [*see § 70.64[1]*].

This form may also be combined with additional points and authorities supporting a request for relief based on one or more of the specific grounds set out in *Code Civ. Proc. § 473(b)* [*see, e.g., § 70.50* et seq.; *see also* discussion in *§ 70.10[2*][g], relating to multiple grounds for relief].

See *§ 70.10[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b),* and alternative methods for obtaining relief. See also *§ 70.40[2][e]* for related chapters in California Forms of Pleading and Practice.

This form may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. To support a claim that the moving party or attorney was not negligent in failing to ascertain the correct law, counsel should refer to facts that show that he or she attempted to discover the law but was unable to because, for example, there was no prior case law on point.

Counsel may prefer to set out such facts in accompanying declarations or affidavits rather than including them in the memorandum.

See also *§ 70.10[2][b]* regarding evidentiary support for facts stated.

[c] Attorney Affidavit of Fault

If the request for relief is based on the mistake, inadvertence, surprise, or neglect of the moving party's attorney, the granting of the motion is mandatory if the attorney at fault files an affidavit to that effect, and certain other conditions are met. Specifically, if the application for relief under *Code Civ. Proc. § 473* is timely, in proper form, and accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, the court must grant relief unless it finds that the default was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect [*Code Civ. Proc. § 473*].

For further discussion, see *§ 70.12[3]*, relating to attorney affidavit of fault.

[d] Opposing Memoranda

In an appropriate case, the memoranda *set out in §§ 70.161 -70.163* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Mistake of Law Defined

Hodge Sheet Metal Products v. Palm Springs Riviera Hotel *(1961) 189 Cal. App. 2d 653, 11 Cal. Rptr. 435* , is discussed in *§ 70.50[3]*.

[b] Relief for Reasonable Mistake of Law

Viles v. State of California *(1967) 66 Cal. 2d 24, 56 Cal. Rptr. 666, 423 P.2d 818* , involved a petition for leave to file a late tort claim against a government entity. Petitioner's wife had died in an automobile accident, which petitioner alleged was caused by the defective condition of the public highway on which the collision occurred. Because petitioner's insurance company told him that he had one year to file a wrongful death action, petitioner did not consult an attorney for approximately nine months, long after expiration of the 100-day limitation under *Gov. Code § 911.2* for filing claims against a public entity. (Note that the claim presentation period was extended to six months for actions based on acts or omissions occurring after January 1, 1988.) Petitioner's application to the State Board of Control for permission to file his claim late was denied, as was his subsequent petition to the superior court under former Gov. Code § 912 (repealed, *now see Gov. Code § 946.6*).

The Supreme Court reversed the superior court order denying the relief requested, noting that the showing required of petitioner under former Gov. Code § 912 [*now see Gov. Code § 946.6*] is the same as that required under *Code Civ. Proc. § 473* for relief from default (*66 Cal. 2d 24, 29)* . The Court found that, although not every mistake of law is excusable, an honest mistake is excusable, the determining factor being the reasonableness of the misconception (*66 Cal. 2d 24, 29)* . The Court declined to state whether plaintiff's belief that he had one year to file a claim was reasonable, or that it was a belief the average prudent person in the conduct of important business affairs would have formed (*66 Cal. 2d 24, 29-30)* . The Court determined that petitioner's mistake was of the type foreseen by the Legislature when it amended the statutes to broaden the relief available (*66 Cal. 2d 24, 31)* . The Court concluded that, in light of the "well-recognized policy to liberally construe remedial statutes" and the "modern trend of judicial decisions in favor of granting relief unless absolutely forbidden by statute," the lower court's refusal to grant relief was an abuse of its discretion (*66 Cal. 2d 24, 32-33)* .

In ***Ron Burns Construction Co. v. Moore*** *(2010) 184 Cal. App. 4th 1406, 1413-1416, 109 Cal. Rptr. 3d 417* , the parties litigated and the court found in the plaintiff's favor. The court of appeal upheld the judgment and awarded the plaintiff costs and fees on appeal. Due to settlement negotiations, the parties entered into several stipulations extending the deadline by which the plaintiff was required to file a motion for fees on appeal. The parties did not file these stipulations with the court. In addition, just before the agreed October 31 deadline for filing the motion, a wildfire threatened the plaintiff's home and office. The defendant's counsel denied extending the deadline beyond October 29. The plaintiff subsequently made a motion for attorney's fees, which the court denied as untimely. The plaintiff filed a motion for relief from default under *Code Civ. Proc. § 473*, which the court denied.

On appeal, the court noted that the policy of the law was to have cases decided on their merits. The court held that althoughe a mistake in law is a ground for relief under *Code Civ. Proc. § 473*, the issue of which mistake in law constitutes excusable neglect presents a question of fact. The determining factors are the reasonableness of the

misconception and the justifiability of lack of determination of the correct law [*184 Cal. App. 4th 1406, 1414]* . The court held that the plaintiff's counsel was entitled to rely on the defendant's agreement. The reliance was not inexcusable neglect, even in the face of a rule requiring a written stipulation to be filed with the court [*184 Cal. App. 4th 1406, 1414]* . In addition, the court held, the defendant benefited by the extensions because it gained the opportunity to try to settle the attorney's fees claim [*184 Cal. App. 4th 1406, 1416]* .

Miller v. City of Hermosa Beach *(1993) 13 Cal. App. 4th 1118, 17 Cal. Rptr. 2d 408* , involved a dispute over construction of a beach-front hotel. An environmental impact report (EIR) was prepared, certified, and filed with the city in 1985. The plans underwent changes thereafter, and the city ultimately approved them, subject to specified conditions to reduce the project's impact on surrounding properties. Miller petitioned for a writ of mandate and sought to enjoin construction, claiming that the city violated the California Environmental Quality Act (CEQA) by issuing a building permit for the hotel without requiring preparation of an EIR on the changed project. The trial court dismissed the petition and denied the preliminary injunction for failure to comply with the statute of limitations in *Pub. Res. Code § 21167.4*, which imposes a 90-day limit within which a petitioner for a writ of mandate alleging noncompliance with CEQA must request a hearing. The court then denied the petitioner's request for relief under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), and the petitioner appealed.

The court of appeal first found that the trial court had correctly dismissed the petition, because although the petitioner had requested two hearings, on a temporary restraining order and on a preliminary injunction, petitioner had not requested a hearing on the merits of the petition (*13 Cal. App. 4th 1118, 1131-1135)* . The court next addressed the petitioner's claim that the motion for relief under former Section 473, 3rd Paragraph should have been granted on the ground of mistake of law. The basis for the motion was that the petitioner did not understand that the requests for hearing on injunctive relief did not satisfy the requirements of *Pub. Res. Code § 21167.4*. The court of appeal stated that the controlling factors in determining whether a mistake is excusable are: (1) the reasonableness of the misconception; and (2) the justifiability of the failure to determine the correct law (*13 Cal. App. 4th 1118, 1136)* . The court then found the petitioner's mistake to be excusable because no statute or reported decision spelled out the type of hearing required to be noticed within the 90-day period. In this respect, the court distinguished *McCormick v. Board of Supervisors (1988) 198 Cal. App. 3d 352, 243 Cal. Rptr. 617* , discussed in *§§ 70.61[3]* and *[c], below,* which also construed *Pub. Res. Code § 21167.4*. After finding that the petitioner's mistake of law was both justifiable and reasonable, the court noted that the petitioner had acted diligently in prosecuting the matter and concluded that the trial court abused its discretion in failing to grant relief (*13 Cal. App. 4th 1118, 1136-1138)* . The court ultimately reversed the dismissal of the petition and the denial of the preliminary injunctive relief (*13 Cal. App. 4th 1118, 1143)* .

[4] Additional Authorities

[a] Relief for Reasonable Mistake of Law

In *Brill v. Fox (1931) 211 Cal. 739, 297 P. 25* , the trial court denied defendants' motion for relief under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), from a default judgment entered against them in an action to foreclose a mortgage. Defendants ignored plaintiff's complaint because at the time copies of the summons and complaint were served on them, they: (1) believed that their successors in interest, who were also named as defendants in the action and were alleged to have assumed personal liability on the mortgage, would pay the note secured by the mortgage rather than risk a deficiency judgment entered against them; and (2) did not realize that they had a meritorious defense to the action because they were unaware of certain facts that would have given rise to the defense. In fact, defendants' successors in interest were not personally liable on the note and defendants did have a possible meritorious defense to the action based on facts that would have been revealed if a title search had been made of the property. The Supreme Court reversed, holding that although the relief was sought on grounds of inadvertence and excusable neglect, the allegations in the complaint reasonably misled the defendants in that both plaintiff and defendants were laboring under a mistake of fact and law as to the defendants' liability (*211 Cal. 739, 742-743)* .

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7-70 California Points & Authorities § 70.61

§ 70.61 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake of Law [Code Civ. Proc. § 473(b)]--Relief When Problem Is Complex and Debatable

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion for relief under Code Civ. Proc. § 473(b) based on mistake of law (see, e.g., § 70.60[1]).*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other proceeding*)] UNDER CODE OF CIVIL PROCEDURE SECTION 473(b) ON THE GROUND OF A REASONABLE MISTAKE OF LAW ON THE PART OF THE [LEGAL REPRESENTATIVE OF THE] DEFENDANT, BECAUSE THE MISTAKE WAS AN HONEST MISTAKE OF LAW REGARDING A COMPLEX AND DEBATABLE PROBLEM.

Relief When Problem Complex and Debatable. An honest mistake of law is a valid ground for relief when a problem is complex and debatable (*Miller v. City of Hermosa Beach (1993) 13 Cal. App. 4th 1118, 1136, 17 Cal. Rptr. 2d 408* ; *McCormick v. Board of Supervisors (1988) 198 Cal. App. 3d 352, 360, 243 Cal. Rptr. 617*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that a default and default judgment, or judgment, dismissal, order, or other proceeding should be set aside on the ground of mistake of law [*see Code Civ. Proc. § 473(b)*].

This form should be combined with a memorandum generally supporting a motion for relief based on mistake of law (see *§ 70.60[1]*).

This form may also be adapted for use in a trial or appellate brief.

For discussion regarding an attorney's affidavit of fault, see *§ 70.60[2][c]*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. To demonstrate why the mistake was reasonable, counsel should refer to facts that illustrate that the issue involved is "complex and debatable" [*see A & S Air Conditioning v. John J. Moore Co. (1960) 184 Cal. App. 2d 617, 620, 7 Cal. Rptr. 592]* . Thus, counsel might detail the confusion surrounding the particular point of law by reference either to conflicting decisional law or to ambiguity in the wording of applicable statutes. To support a claim that the moving party or attorney was not negligent in failing to ascertain the correct law, counsel should refer to facts that show that he or she attempted to discover the law but was unable to because, for example, there was no prior case law on point or counsel reasonably misinterpreted a complex or confusing case or statute. Counsel may prefer to set out such facts in accompanying declarations or affidavits rather than including them in the memorandum.

See also *§ 70.10[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 70.161 -70.163* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Relief When Problem Complex and Debatable

The facts and procedural background of ***Miller v. City of Hermosa Beach*** *(1993) 13 Cal. App. 4th 1118, 17 Cal. Rptr. 2d 408* , are discussed in *§ 70.60[3][b]*. In reversing the order denying relief under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), the court of appeal stated that an honest mistake of law is a valid ground for relief when a problem is complex and debatable, citing *McCormick v. Board of Supervisors (1988) 198 Cal. App. 3d 352, 360, 243 Cal. Rptr. 617* , discussed *below*.

In ***McCormick v. Board of Supervisors*** *(1988) 198 Cal. App. 3d 352, 243 Cal. Rptr. 617* , a petition for a writ of mandate under the California Environmental Quality Act was dismissed based on the petitioner's failure to request a hearing within 90 days of filing the petition, pursuant to *Pub. Res. Code § 21167.4*. The trial court denied petitioner's motion under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), to set aside the order. Petitioners appealed.

The court of appeal reversed (*198 Cal. App. 3d 352, 363)* . The court held that former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), permits relief from dismissal (*198 Cal. App. 3d 352, 359)* . The court noted that the statute is often applied liberally when the party in default moves promptly to seek relief, and the party opposing the motion will not suffer prejudice if relief is granted (*198 Cal. App. 3d 352, 360)* . Moreover, the court noted, because the law strongly favors trial and disposition on the merits, any doubts in applying the statute must be resolved in favor of the party seeking relief from default. In the instant case, relief was predicated on a mistake of law by counsel for petitioners. The court stated that it is well settled that relief may be granted for a mistake of law by a party's attorney; and that an honest mistake of law is a valid ground for relief when a problem is complex and debatable. The controlling factors in determining whether an attorney's mistake was excusable are the reasonableness of the misconception, and the justifiability of the failure to determine the correct law. The court observed that at the time the 90-day period under Pub. Res. Code § 21167.4 expired, the law was unsettled in at least two significant respects,

regarding the effect of failure to comply (i.e., mandatory dismissal) and construction of some of the statute's crucial terms (*198 Cal. App. 3d 352, 360)* . Moreover, local courts conflicted with regard to notice requirements under that statute (*198 Cal. App. 3d 352, 360-361)* . The court also noted that the moving party's counsel was otherwise reasonably diligent in pursuing the claim (*198 Cal. App. 3d 352, 361)* . It stated that although mere ignorance of the law coupled with a negligent failure to look it up does not constitute excusable neglect, reasonable errors in construing a statute should not result in the harsh sanction of depriving a party of his or her day in court. The court concluded that, in view of the lack of clear guidance in the law, the good faith though faulty attempt to comply with the statute, counsel's overall diligence in prosecuting the case and promptly moving for relief, and the absence of a clear showing of prejudice, relief from the dismissal and the subsequent judgment should be afforded (*198 Cal. App. 3d 352, 362)* .

Counsel should note that *McCormick* was decided under the version of former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), existing prior to the 1988 amendment, which mandates relief when the attorney who committed the conduct that is the basis for relief submits an affidavit to that effect. For further discussion, see *§ 70.60[2][c]*. *McCormick* is consistent with the 1992 amendment of *Code of Civ. Proc. § 473*, 3rd Paragraph, which specifically provides that relief under the Section applies to dismissals in addition to other judgments and orders [*Code of Civ. Proc. § 473(b)*].

[4] Additional Authorities

[a] Relief When Problem Complex and Debatable

In *Brochtrup v. INTEP (1987) 190 Cal. App. 3d 323, 235 Cal. Rptr. 390* , the court of appeal reversed the trial court's granting of summary judgment against defendants based on denial of defendants' motion for relief from default under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), arising from defective responses to requests for admissions, and denial of a subsequent motion for reconsideration. In support of their request for relief, defendants alleged that their former attorney misled them with respect to the need to file responses to requests for admissions, and the nature and effect of a default to request for admissions. The court of appeal held, inter alia, that it is well settled that relief may be granted for mistake of law by a party's attorney (*190 Cal. App. 3d 323, 329)* .

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7-70 California Points & Authorities § 70.62

§ 70.62 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake of Law [Code Civ. Proc. § 473(b)]--Mistake of Law Regarding Validity of Summons or Complaint

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion for relief under Code Civ. Proc. § 473(b) based on mistake of law (see, e.g., § 70.60[1]).*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION TO SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT UNDER CODE OF CIVIL PROCEDURE SECTION 473(b) ON THE GROUND OF A REASONABLE MISTAKE OF LAW ON THE PART OF THE [LEGAL REPRESENTATIVE OF THE] DEFENDANT, BECAUSE THE FAILURE TO FILE A RESPONSIVE PLEADING WAS DUE TO A REASONABLE MISTAKE REGARDING THE VALIDITY OF SERVICE OF THE SUMMONS.

Mistake of Law Regarding Validity of Summons or Complaint. If a mistake of law regarding the validity of the service of summons is reasonable, the neglect to file an answer because of the mistaken belief is excusable (*Roehl v. The Texas Co. (1930) 107 Cal. App. 708, 714, 291 P. 262*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that a default and default judgment should be set aside on the ground of mistake of law [*see Code Civ. Proc. § 473(b)*]. Specifically, this form is for use if the mistake regards the validity of summons or complaint.

This form should be combined with a memorandum generally supporting a motion for relief from default or default judgment based on mistake of law [*see § 70.60[1*])].

This form may also be adapted for use in a trial or appellate brief.

For discussion regarding an attorney's affidavit of fault, see *§ 70.60[2][c]*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 70.10[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 70.160 -70.163* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Mistake of Law Regarding Validity of Summons or Complaint

Roehl v. The Texas Co. *(1930) 107 Cal. App. 708, 291 P. 262* , involved an appeal from denial of defendant's motion to set aside a default and default judgment entered against it after it failed to answer plaintiff's summons and complaint. Defendant believed that the service of the summons and complaint was illegal because service was made on someone other than a managing agent. Believing that the service was invalid and that the return of service could not be made the basis of the entry of a default against it, defendant believed it was unnecessary to move to set aside the default, and moved to quash the summons instead. The motion to quash was denied, and the denial was affirmed on appeal. Defendant promptly moved to set aside the default and default judgment.

The court of appeal reversed, finding that the doubtfulness of the validity of the service supports the finding that the attorney's belief in its invalidity was reasonable. The court stated that if a mistake of law is reasonable, the neglect to file an answer because of the belief is excusable. In view both of the relatively short time that had elapsed between the service of the summons and the filing of the notice of motion to vacate, and of the pendency of the proceeding to obtain an order to quash, the Court concluded that the case was one in which the trial court order could not be sustained (*107 Cal. App. 708, 714)* .

[4] Additional Authorities

[a] Mistake of Law Regarding Validity of Summons or Complaint

Williams v. Thompson (1923) 60 Cal. App. 658, 213 P. 705 , was an appeal from an order granting defendants' motion to set aside the default and vacate the judgment on the grounds of mistake of law and surprise. Before the default and default judgment were entered, defendants noticed a motion to quash the service of summons because of certain alleged defects in the copies of the summons and complaint. Believing that any application for an extension of time to answer would constitute a general appearance, defendants permitted the default and default judgment to be entered before the hearing in their motion to quash, in which defendants specially appeared to argue that the copies of the summons were insufficient, and that the complaint was insufficient. The trial court denied the motion to quash and granted defendants' motion to set aside the default and default judgment based on their mistake of law. Affirming the trial court order, the court of appeal held that relief is proper based on a mistake of law that results in the defendant's default, and that the trial court did not abuse its discretionary power in granting relief (*60 Cal. App. 658, 660)* .

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7-70 California Points & Authorities § 70.63

§ 70.63 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake of Law [Code Civ. Proc. § 473(b)]--Mistake of Law Regarding Validity of Court's Jurisdiction

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion for relief from default or default judgment based on mistake of law (see, e.g., § 70.60[1]).*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION TO SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT UNDER CODE OF CIVIL PROCEDURE SECTION 473(b) ON THE GROUND OF A REASONABLE MISTAKE OF LAW ON THE PART OF THE [LEGAL REPRESENTATIVE OF THE] DEFENDANT, BECAUSE THE FAILURE TO FILE A RESPONSIVE PLEADING OCCURRED WHILE A PETITION FOR REMOVAL WAS PENDING, AND THE PETITION WAS BASED ON PLAUSIBLE GROUNDS FOR CONTENDING LACK OF STATE COURT JURISDICTION.

Mistake of Law Regarding Validity of Court's Jurisdiction. If defendant has plausible grounds for contending that the state court had no jurisdiction of the action and that the federal courts had exclusive jurisdiction, the neglect to file an answer while the federal court determines defendant's petition for removal because of the reasonable mistake of law is excusable (*Waite v. Southern Pacific Co. (1923) 192 Cal. 467, 469-471, 221 P. 204*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that a default and default judgment should be set aside on the ground of mistake of law [*see Code Civ. Proc. § 473(b)*]. Specifically, this form may be used when the mistake regards the validity of the court's jurisdiction in connection with a federal petition for removal.

This form should be combined with a memorandum generally supporting a motion for relief from default or default judgment based on mistake of law (see *§ 70.60[1]*).

This form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 70.10[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 70.160 -70.163* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Mistake of Law Regarding Validity of Court's Jurisdiction

In ***Waite v. Southern Pacific Co.*** *(1923) 192 Cal. 467, 221 P. 204* , defendant's default was taken for failure to answer the complaint because of its mistaken belief that the jurisdiction of the cause was in federal, rather than state, court.

The Supreme Court reversed the trial court order denying defendant's motion for relief from the default under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), holding that defendant had plausible grounds for its belief. The Court also held that the fact that the federal court had retained the case under advisement for several months on defendant's petition for removal to federal court was sufficient indication that the question of law involved was in doubt and was one on which an attorney might well be mistaken. Thus, defendant's neglect was "at least excusable" (*192 Cal. 467, 470)* . The Court stated that the legal principles involved were: (1) the impartial discretion in the trial court; (2) the policy of the law favoring trial on the merits; and (3) the availability of relief from default judgment entered by reason of defendant's mistake of law (*192 Cal. 467, 470-471)* .

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7-70 California Points & Authorities § 70.64

§ 70.64 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake of Law [Code Civ. Proc. § 473(b)]--Mistake of Law Regarding Meritorious Defense

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion for relief from default or default judgment based on mistake of law (see, e.g., § 70.60[1]).*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other proceeding*)] UNDER CODE OF CIVIL PROCEDURE SECTION 473(b) ON THE GROUND OF A REASONABLE MISTAKE OF LAW ON THE PART OF THE DEFENDANT, BECAUSE THE DEFENDANT RELIED IN GOOD FAITH ON HIS/HER ATTORNEY'S ERRONEOUS ADVICE THAT THERE WAS NO MERITORIOUS DEFENSE TO THE ACTION.

Mistake of Law Regarding Meritorious Defense. A party who relies in good faith on his or her attorney's advice that there was no meritorious defense to the action when in fact a meritorious defense could have been alleged may, when justice requires, be relieved from the attorney's mistake of law (*Douglass v. Todd (1892) 96 Cal. 655, 658-660, 31 P. 623*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that a default and default judgment, or judgment, dismissal, order, or other proceeding should be set aside on the ground of mistake of law [*see Code Civ. Proc. § 473(b)*]. Specifically, this form may be used when the mistake regards the existence of a meritorious defense.

This form should be combined with a memorandum generally supporting a motion for relief based on mistake of law (see *§ 70.60[1]*).

This form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 70.10[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 70.160 -70.163* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Mistake of Law Regarding Meritorious Defense

Douglass v. Todd *(1892) 96 Cal. 655, 31 P. 623* , was a case of first impression on the issue of relief under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), from default caused by a mistake of law made by the party's attorney. Defendant contacted an attorney as soon as he was served with the summons in the action, and the attorney advised him that he had no defense. Relying on that advice, defendant failed to answer the complaint; his default was taken and judgment entered against him. His subsequent motion to vacate the judgment was granted.

The Supreme Court affirmed, stating that former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), is broad enough to justify relieving a party from a mistake of law made by his or her attorney when, by reliance on it, the party is prevented from making a defense. Although defendant might have been guilty of negligence had he relied on his own judgment of the law, no negligence was shown, because defendant consulted a practicing attorney and was justified in acting on his advice (*96 Cal. 655, 658)* . The Court stated that refusal to grant relief is an abuse of discretion when default is caused by defendant's good-faith reliance on the advice of his or her attorney and a meritorious defense is alleged (*96 Cal. 655, 659)* . The Court cautioned that relief will not be granted from all mistakes of law. Rather, "sound discretion controlled by an enlightened judgment, keeping in view public interests and the due and orderly administration of the law, is to be exercised in granting that relief which justice between the parties to the cause seems to require" (*96 Cal. 655, 659-660)* .

Counsel should note that *Douglass* discussed two issues concerning meritorious defense. The primary issue involved in the holding is the attorney's initial misleading of the defendant regarding whether he could present a defense to the action, resulting in the defendant's failure to respond to the complaint. Although that issue is still likely to arise in the context of setting aside a default on the ground of mistake, under current law, if the application for relief is accompanied by an attorney affidavit of fault, the granting of relief is mandatory if certain conditions are met [*see* discussion in *§ 70.60[2*][c]. A more problematic issue discussed in *Douglass*, vis-a-vis current law, regards the requirement of a showing of meritorious defense under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*). For further discussion of this issue, see *§ 70.10[2][e]*.

[4] Additional Authorities

[a] Mistake of Law Regarding Meritorious Defense

In *Tuttle v. Scott (1898) 119 Cal. 586, 51 P. 849* , defendant failed to answer plaintiff's complaint because he believed that his discharge in insolvency did not require him to respond to the complaint. After his default and a default

judgment was entered, the trial court granted his motion to vacate under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*). The Supreme Court affirmed, holding that the sufficiency of defendant's excuse was well established under case law, and that discharge in insolvency or bankruptcy is a defense on the merits, rather than a technical defense (*119 Cal. 586, 588-589)* .

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[Reserved]

§§ 70.65[Reserved]

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7-70 California Points & Authorities § 70.70

§ 70.70 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Inadvertence [Code Civ. Proc. § 473(b)]--General Form

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion for relief from under Code Civ. Proc. § 473(b) (see, e.g., §§ 70.10, 70.30, 70.40).*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other proceeding*)] UNDER CODE OF CIVIL PROCEDURE SECTION 473(b) ON THE GROUND OF EXCUSABLE INADVERTENCE ON THE PART OF THE [LEGAL REPRESENTATIVE OF THE] DEFENDANT.

Excusable Inadvertence. Relief from default may be granted under *Code of Civil Procedure Section 473(b)* on the ground of inadvertence if it was caused by a misunderstanding or a failure to follow proper procedures without any culpable carelessness, rather than by mere forgetfulness (*Benjamin v. Dalmo Mfg. Co. (1948) 31 Cal. 2d 523, 527, 190 P.2d 593* ; *Pearson v. Continental Airlines (1970) 11 Cal. App. 3d 613, 618, 89 Cal. Rptr. 853*).

[*Add supporting points and authorities for the particular ground of inadvertence for which relief is sought (see, e.g., § 70.71[1]).*]

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that a default and default judgment, or judgment, dismissal, order, or other proceeding should be set aside on the ground of inadvertence [*see Code Civ. Proc. § 473(b)*]. For a form for use if the inadvertence consists of a party's excusable failure to transmit the summons and complaint to his or her

attorney, see *§ 70.71[1]*.

This form should be combined with a general memorandum supporting a motion for relief under *Code Civ. Proc. § 473(b)* [*see §§ 70.10, 70.30, 70.40*]. It may also be combined when appropriate, with points and authorities supporting relief on other grounds specified in *Code Civ. Proc. § 473(b)*[*see §§ 70.50 et seq., 70.60 et seq., 70.80* et seq.; *see also* discussion in *§ 70.10[2][g]*].

This form may also be adapted for use in a trial or appellate brief.

See also *§ 70.10[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b)*, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Counsel should show facts demonstrating that the moving party's inadvertence is excusable, for example, that it was due to a reasonable misunderstanding or connected with some action by the attorney or the party taking the default that reasonably misled or confused the moving party.

See also *§ 70.10[2][b]* regarding evidentiary support for facts stated.

[c] Attorney Affidavit of Fault

If the request for relief is based on the mistake, inadvertence, surprise, or neglect of the moving party's attorney, the granting of the motion is mandatory if the attorney at fault files an affidavit to that effect, and certain other conditions are met. Specifically, if the application for relief under *Code Civ. Proc. § 473* is timely, in proper form, and accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, the court must grant relief unless it finds that the default was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect [*Code Civ. Proc. § 473*]. For further discussion, see *§ 70.12[3]*.

[d] Notice of Request to Enter Default

Code Civ. Proc. § 587, enacted in 1969, requires that all applications for entry of default under *Code Civ. Proc. §§ 585(a)-(c)* or *586*, include an affidavit (or declaration [*Code Civ. Proc. § 2015.5*]) stating that a copy of the application has been mailed to defendant or his or her attorney of record, if any. Many of the cases that discuss the ground of inadvertence concern defendant's, or his or her attorney's, ignorance of any intention on the part of the plaintiff to take a default or obtain a default judgment. Some of these cases were decided prior to the enactment of *Code Civ. Proc. § 587*, and should be viewed in light of the current law requiring notice under that section (for example, some cases disapprovingly discuss opposing counsel's failure to give notice, or the lack of any statute requiring notice of default).

With the enactment of *Code Civ. Proc. § 587*, a moving party who has been given notice under that section should move promptly for relief, since with such notice it will be more difficult to justify delay in filing the motion. Even if the moving party adequately shows facts in support of a particular ground of relief, the motion will be denied if it is untimely [*see Kendall v. Barker (1988) 197 Cal. App. 3d 619, 625, 243 Cal. Rptr. 42* (moving party must show satisfactory excuse for default as well as diligence in making motion); § 70.140[1]].

For further discussion of requirements for entry of default (including the procedural distinction between actions in which service was made by publication and those in which service was effected by other means), see California Forms of Pleading and Practice, Ch. 205, *Defaults and Default Judgments* (Matthew Bender).

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 70.170[1]* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Excusable Inadvertence

In ***Benjamin v. Dalmo Mfg. Co.*** *(1948) 31 Cal. 2d 523, 190 P.2d 593* , plaintiff filed an action to recover the purchase price of goods sold and delivered to defendant corporation. Defendant's president, on receipt of the summons and complaint, directed his secretary to forward the papers to the corporation's attorney, but the secretary misunderstood the directions and placed the papers in the office files without sending a copy to the attorney. Her error was discovered when defendant was notified of the entry of its default. Some three months later, defendant moved for relief from the default on the ground of the mistake, inadvertence, surprise, and excusable neglect of the defendant and its officers. The trial court granted the motion and ordered the default and judgment set aside.

Although the Supreme Court reversed, it stated that the trial court had reasonable ground to excuse defendant's conduct leading to the entry of the default judgment. The Court noted that the inadvertence of defendant's officers in failing to contact the corporation's attorney rested not on mere forgetfulness, but on a misunderstanding in the execution of properly given instructions, a mistake that might easily be made without any "culpable carelessness" on their part (*31 Cal. 2d 523, 527)* . Despite this finding, however, the Court reversed the trial court's order and held that defendant, by delaying without explanation for more than three months before seeking relief from the default, failed to meet the requirement of former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), that application for relief be made within a reasonable time (*31 Cal. 2d 523, 528-532)* .

In ***Pearson v. Continental Airlines*** *(1970) 11 Cal. App. 3d 613, 89 Cal. Rptr. 853* , defendant airline failed to answer plaintiff's complaint in a personal injury action. The default occurred as a result of the inadvertent failure of a member of defendant's clerical staff to transmit copies of the summons and complaint in the action to the company's insurance department after having been instructed to do so by her supervisor. Plaintiff's attorney obtained a default judgment, indicating at the default hearing that entry of the judgment would encourage settlement negotiations. Defendant filed a motion to vacate the default on the grounds of mistake, inadvertence, and excusable neglect. At the hearing on the motion, the judge recalled the claim of plaintiff's attorney that judgment had been sought for the purpose of prompting settlement, and ordered that the default and ensuing judgment be set aside.

The court of appeal affirmed, holding that a defendant's inadvertence is excusable if it rests not on mere forgetfulness, but on a misunderstanding in the execution of properly given instructions, that is, a mistake that might be easily made without any culpable carelessness on the part of the parties concerned (*11 Cal. App. 3d 613, 618)* . The court noted that although defendant's erring employee did not submit a declaration that she misunderstood the orders given, or specifically failed to follow customary procedures (because the defendant could not remember which employee was involved), it was reasonably inferable that the clerk had either misunderstood her orders or specifically failed to follow customary procedures (*11 Cal. App. 3d 613, 618-619)* . Furthermore, there was no showing of any prejudice to plaintiff as a result of the trial court's order, because mere delay in securing satisfaction of his monetary demand was not sufficient ground for reversal of the order (*11 Cal. App. 3d 613, 619)* . Finally, plaintiff himself was not entirely blameless, in that he gave defendant no advance notice of his intention to enter the default and indicated to the trial judge that he sought entry of judgment on the default for settlement purposes. The court indicated that it was for the trial court to determine whether plaintiff's conduct was "advantage taking" meriting disfavor, and found no abuse of discretion by the trial court (*11 Cal. App. 3d 613, 619-620)* .

[4] Additional Authorities

[a] Excusable Inadvertence

In *Gorman v. California Transit Co. (1926) 199 Cal. 246, 248 P. 923* , the summons and complaint were served on the corporate defendant's secretary, who delivered them to a manager of the corporation for referral to the corporation's president on his return to the city. The file was inadvertently removed from the desk of the manager, who forgot about the matter until defendant learned that a default and default judgment had been entered against it. In affirming the trial court's order granting relief from the default and default judgment, the Supreme Court noted that in such cases it should appear that something more than mere inadvertence or neglect without reasonable excuse or justification existed, and that the inadvertence or neglect in question was not the result of mere forgetfulness on the part of the person charged with the duty of responding to the action (*199 Cal. 246, 248)* .

In *Bernards v. Grey (1950) 97 Cal. App. 2d 679, 218 P.2d 597* , defendant was served while he was in court talking with his attorney regarding a related matter. Unaware of the nature of the papers, defendant placed them in his briefcase and through inadvertence failed to call them to the attention of his attorney. Defendant's motion to vacate the default entered against him was granted and the matter proceeded to trial, which resulted in judgment for defendant. The court of appeal affirmed, holding that there was no abuse of discretion in the lower court's determination that defendant's neglect was excusable (*97 Cal. App. 2d 679, 684-686)* .

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7-70 California Points & Authorities § 70.71

§ 70.71 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Inadvertence [Code Civ. Proc. § 473(b)]--Failure to Transmit Summons and Complaint

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion for relief from default or default judgment based on inadvertence (see, e.g., § 70.70[1]).*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION TO SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT UNDER CODE OF CIVIL PROCEDURE SECTION 473(b) ON THE GROUND OF EXCUSABLE INADVERTENCE ON THE PART OF THE DEFENDANT, BECAUSE DEFENDANT INADVERTENTLY FAILED TO TRANSMIT THE SUMMONS AND COMPLAINT TO HIS/HER ATTORNEY AND THE INADVERTENCE WAS EXCUSABLE.

Failure to Transmit Summons and Complaint to Attorney. Relief may be granted for a default and default judgment based on a party's failure to inform an attorney of the service of the summons and complaint if that failure is the result of excusable inadvertence (*Benjamin v. Dalmo Mfg. Co. (1948) 31 Cal. 2d 523, 527, 190 P.2d 593*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that a default and/or default judgment should be set aside on the ground of inadvertence [*see Code Civ. Proc. § 473(b)*]. Specifically, this form may be used when the inadvertence consists of a party's excusable failure to transmit the summons and complaint to his or her attorney.

For further discussion relating to the ground of excusable inadvertence generally, see *§ 70.70[2]*. For discussion relating to an attorney's affidavit of fault, see *§§ 70.12[2], 70.70[2][c]*.

This form should be combined with a memorandum generally supporting a motion for relief from default or default judgment based on excusable inadvertence (see *§ 70.70[1]*).

This form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 70.10[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 70.170* et seq. may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Failure to Transmit Summons and Complaint to Attorney

The facts and procedural background of ***Benjamin v. Dalmo Mfg. Co.*** *(1948) 31 Cal. 2d 523, 190 P.2d 593* , are discussed in *§ 70.70[3]*. The Court noted that the inadvertence of defendant's officers in failing to contact the corporation's attorney rested not on mere forgetfulness, but on a misunderstanding in the execution of properly given instructions, a mistake that might easily be made without any "culpable carelessness" on their part (*31 Cal. 2d 523, 527)* . The Court reversed the trial court's order setting aside the default, however, because without explanation the defendant delayed seeking relief for more than three months and therefore failed to meet the reasonable time requirement of former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*).

[4] Additional Authorities

[a] Failure to Transmit Summons and Complaint to Attorney

The facts and procedural background of *Gorman v. California Transit Co. (1926) 199 Cal. 246, 248 P. 923* , are discussed in *§ 70.70[4]*. In affirming the trial court's order granting relief from the default and default judgment, the Supreme Court noted that it should appear that something more than mere inadvertence or neglect without reasonable excuse or justification existed, and that the inadvertence or neglect in question was not the result of mere forgetfulness on the part of the person charged with the duty of responding to the action (*199 Cal. 246, 248)* .

The facts and procedural background of *Pearson v. Continental Airlines (1970) 11 Cal. App. 3d 613, 89 Cal. Rptr. 853* , are discussed in *§ 70.70[3][a]*. The court of appeal held that a defendant's inadvertence in excusable if it rests not on mere forgetfulness, but on a misunderstanding in the execution of properly given instructions, that is, a mistake that might be easily made without any culpable carelessness on the part of the parties concerned (*11 Cal. App. 3d 613, 618)* .

The facts and procedural background of *Bernards v. Grey (1950) 97 Cal. App. 2d 679, 218 P.2d 597* , are discussed in *§ 70.70[4]*. The court of appeal affirmed the trial court's order vacating a motion to vacate a default, holding that there was no abuse of discretion in the lower court's determination that defendant's neglect was excusable when defendant was unaware of the nature of the papers served on him, placed them in his briefcase, and inadvertently failed to call them to his attorney's attention (*97 Cal. App. 2d 679, 684-686)* .

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7-70 California Points & Authorities §§ 70.72-70.79

[Reserved]

§§ 70.72[Reserved]

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7-70 California Points & Authorities § 70.80

§ 70.80 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Surprise [Code Civ. Proc. § 473(b)]--General Form

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion for relief under Code Civ. Proc. § 473(b) (see, e.g., § 70.10, 70.30, 70.40).*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other proceeding*)] UNDER CODE OF CIVIL PROCEDURE SECTION 473(b) ON THE GROUND OF EXCUSABLE SURPRISE ON THE PART OF THE [LEGAL REPRESENTATIVE OF THE] DEFENDANT.

Surprise Defined. Surprise, within the meaning of *Code of Civil Procedure Section 473(b)*, is defined to be some condition or situation in which a party to a cause is unexpectedly injured, when ordinary prudence could not have guarded against the injury, and that party was not negligent (*Credit Managers Assn. v. National Independent Business Alliance (1984) 162 Cal. App. 3d 1166, 1173, 209 Cal. Rptr. 119* ; *Hodge Sheet Metal Products v. Palm Springs Riviera Hotel (1961) 189 Cal. App. 2d 653, 656-657, 11 Cal. Rptr. 435*).

[*Add supporting points and authorities for the particular ground of surprise for which relief is sought (see, e.g., § 70.81).*]

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that a default and default judgment, or judgment, dismissal, order, or other proceeding should be set aside on the ground of surprise [*see Code Civ. Proc. § 473(b)*]. For a form of

points and authorities for use when the default was taken because settlement negotiations misled the defendant to believe a responsive pleading need not be filed, see *§ 70.81[1]*.

This form should be combined with a general memorandum supporting a motion for relief under *Code Civ. Proc. § 473(b)* [*see §§ 70.10, 70.30, 70.40*]. It may also be combined, when appropriate, with points and authorities supporting relief on other grounds specified in *Code Civ. Proc. § 473(b)* [*see, e.g., §§ 70.50 et seq., 70.90* et seq.; *see also* discussion in *§ 70.10[2][g]*].

This form may also be adapted for use in a trial or appellate brief.

See also *§ 70.10[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b)*, and alternative methods for obtaining relief.

For discussion relating to an attorney's affidavit of fault, see *§§ 70.12[2], 70.70[2][c]*.

For discussion of the *Code Civ. Proc. § 587* requirement that all applications for entry of default under *Code Civ. Proc. §§ 585(a)-(c)* or *586* include a declaration that a copy of the application has been mailed to defendant (or defendant's attorney, if any), see *§ 70.70[2][d]*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should describe the manner in which the moving party was surprised and how that surprise resulted in default. Counsel should also show that the moving party was not careless or negligent in his or her handling of the case.

See also *§ 70.10[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 70.180[1]* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Surprise Defined

Credit Managers Assn. v. National Independent Business Alliance *(1984) 162 Cal. App. 3d 1166, 209 Cal. Rptr. 119* , involved the trial court's denial of plaintiff's motion under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), for relief from a default and default judgment taken by defendant on its cross complaint against plaintiff's assignor. The assignor, a corporation, made an assignment for the benefit of creditors to plaintiff. Plaintiff-assignee brought an action for breach of contract against the defendant on one of the assets of the estate, a written agreement between the defendant and the assignor. Defendant contested the action, and filed a cross complaint against the assignor on the same agreement, naming plaintiff as one of the additional cross defendants in its capacity as assignee. Plaintiff, on its own behalf as assignee only, contested the cross complaint. Counsel for plaintiff and defendant had numerous communications concerning service of process on the assignor as a cross defendant. Defendant eventually effected service of process of its cross complaint on the assignor. Without notifying plaintiff, defendant obtained entry of the assignor's default, and took a default judgment against the assignor on the cross complaint. Defendant notified plaintiff of the default judgment a few days after its entry. Plaintiff immediately filed a motion under *Code Civ. Proc. § 473* to set aside the default and default judgment, and to be allowed to defend against the cross complaint on behalf of its assignor. Plaintiff appealed the adverse ruling on the motion.

The court of appeal reversed, ordering the trial court to set aside the entry of default and default judgment (and further ordering it to grant plaintiff's motion to be substituted in place of the assignor, and allow plaintiff to defend against the cross complaint in assignor's name for the benefit of the creditors) (*162 Cal. App. 3d 1166, 1173)* . With respect to the entitlement to relief under *Code Civ. Proc. § 473*, the court noted that the statute provides relief from judgment or order taken by mistake, inadvertence, surprise, or excusable neglect (*162 Cal. App. 3d 1166, 1172)* . The court stated that "surprise" within the meaning of the statute is some condition or situation in which a party to a cause is unexpectedly injured, when ordinary prudence could not have guarded against the injury, and that party was not negligent. The court held that plaintiff was not notified of the assignor's service of process or the entry of default, and was therefore taken by surprise. It observed that plaintiff sought relief immediately after receiving notice. Consequently, the court concluded that the trial court abused its discretion in denying relief (*162 Cal. App. 3d 1166, 1173)* .

The facts and procedural background of ***Hodge Sheet Metal Products v. Palm Springs Riviera Hotel*** *(1961) 189 Cal. App. 2d 653, 11 Cal. Rptr. 435* , are discussed in *70.50[3]*. In *Hodge*, the court of appeal held that defendant's motion to set aside a default under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), was proper on the ground of reasonable mistake in fact (*189 Cal. App. 2d 653, 657-658)* . The court in *Hodge* also briefly discussed the other applicable and related grounds for relief under *Code Civ. Proc. § 473*, noting that "surprise," within the meaning of the statute, is defined to be some condition or situation in which a party to a cause is unexpectedly injured, when ordinary prudence could not have guarded against the injury, and that party was not negligent (*189 Cal. App. 2d 653, 656-657)* .

[4] Additional Authorities

[a] Surprise Defined

Fennell v. Fennell (1962) 199 Cal. App. 2d 267, 18 Cal. Rptr. 743 , was a divorce action in which defendant husband's default was taken pursuant to stipulation between the parties and an interlocutory judgment granted to plaintiff wife. Defendant moved to set aside the default and judgment under *Code Civ. Proc. § 473*, alleging that plaintiff's attorney had advised defendant that the matter would not be put on calendar until the parties had worked out a settlement agreement. Negotiations between the parties failed, but plaintiff did not indicate that she intended to proceed with the divorce, and defendant was not notified of the judgment against him until he later consulted an attorney. The trial judge granted defendant's motion for relief despite a finding that defendant failed to show actual mistake or inadvertence. The court of appeal affirmed, noting that the reasoning of the trial judge must be disregarded as irrelevant, and stating that a trial court may find excusable neglect or surprise if settlement negotiations are occurring between counsel and if there is an oral or implied understanding that no default will be taken without notice (*199 Cal. App. 2d 267, 270)* .

In *Dahlin v. Moon (1956) 141 Cal. App. 2d 1, 296 P.2d 344* , the court of appeal affirmed a trial court order setting aside defendants' default. The default was taken during settlement negotiations and no showing of prejudice was made by plaintiff. The court noted that, although there was some lack of diligence by defendants, the close contact and protracted negotiations between the parties may have lulled defendants and their attorney into a sense of security, particularly because the default was taken without notice to defendants' attorney (*141 Cal. App. 2d 1, 5)* .

Miller v. Lee (1942) 52 Cal. App. 2d 10, 125 P.2d 627 , concerned an action for malicious prosecution in which defendant's motion for judgment on the pleadings was granted because the trial court believed that the plaintiff's complaint was inadequate under certain holdings of the court of appeal. When a Supreme Court opinion, which came down after the trial court's ruling, made clear that the case relied on by the trial court was not (and never had been) the law of California, plaintiff's motion to vacate the judgment was granted. Defendant's subsequent motion to vacate the order granting relief was denied and defendants appealed. The court of appeal affirmed. The court stated that surprise, under *Code Civ. Proc. § 473*, is "some condition or situation in which a party to a cause is unexpectedly placed to his injury, without any default or negligence of his own, which ordinary prudence could not have guarded against." The

court found that the plaintiff had clearly been placed in a situation to his injury, which was not brought about by either the negligence or the ignorance of his attorney. On the contrary, application of the Supreme Court opinion in question indicated that plaintiff's complaint was sufficient and that the motion for judgment on the pleadings should have been denied. Finally, the court observed that plaintiff's motion under *Code Civ. Proc. § 473* was procedurally proper, in that a motion for a new trial or an appeal are not exclusive methods of obtaining relief from a judgment and they do not displace the remedy afforded by *Code Civ. Proc. § 473* (*52 Cal. App. 2d 10, 16)* .

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7-70 California Points & Authorities § 70.81

§ 70.81 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Surprise [Code Civ. Proc. § 473(b)]--Settlement Negotiations in Progress

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion for relief from default or default judgment based on excusable surprise (see, e.g., § 70.80[1]).*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION TO SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT UNDER CODE OF CIVIL PROCEDURE SECTION 473(b) ON THE GROUND OF EXCUSABLE SURPRISE ON THE PART OF THE [LEGAL REPRESENTATIVE OF THE] DEFENDANT, BECAUSE THE DEFAULT WAS TAKEN DESPITE AN _____ [ORAL *or* IMPLIED] UNDERSTANDING THAT NO DEFAULT WOULD BE TAKEN WITHOUT PRIOR NOTICE WHILE THE PARTIES WERE ENGAGED IN SETTLEMENT NEGOTIATIONS.

Settlement Negotiations in Progress. Relief from default on the ground of surprise may be granted if settlement negotiations are occurring between counsel or the parties to litigation and default is taken despite an oral or implied understanding that no default will be taken without prior notice (*Beard v. Beard (1940) 16 Cal. 2d 645, 648, 107 P.2d 385* ; *Ochinero v. Wertz (1962) 200 Cal. App. 2d 533, 536-537, 19 Cal. Rptr. 466*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that a default and default judgment should be set aside on the ground of surprise [*see Code Civ. Proc. § 473(b)*]. Specifically, this form may be used when the default was taken because settlement negotiations misled the defendant to believe a responsive pleading need not be filed.

This form should be combined with a memorandum generally supporting a motion for relief from default or default judgment based on surprise (see *§ 70.80*).

Although a party typically seeks relief under *Code Civ. Proc. § 473(b)*, from a default or default judgment, or both, a court may grant relief under that section from any "judgment, dismissal, order, or other proceeding." This form may be modified for use, when appropriate, in seeking relief in situations other than a default and default judgment.

This form may also be adapted for use in a trial or appellate brief.

See also *§ 70.10[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b)*, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should describe the manner in which the moving party was surprised and how that surprise resulted in default. Counsel should also show that the moving party was not careless or negligent in his or her handling of the case. See also *§ 70.10[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 70.180[1]* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Settlement Negotiations in Progress

In ***Beard v. Beard*** *(1940) 16 Cal. 2d 645, 107 P.2d 385* , an action to recover alimony based on a foreign judgment, a default judgment was entered on a cross complaint seeking declaratory relief, in favor of the cross complainant. When plaintiff and cross defendant's original cause came on for trial, the cross complainant set up the default judgment in defense, and was sustained by the trial court. In explaining why he failed to answer the cross complaint, the attorney for plaintiff and cross defendant stated that he believed none was required in a declaratory relief action. The trial court granted the motion to set aside the default judgment under *Code Civ. Proc. § 473*. Cross complainant appealed.

The court of appeal affirmed, finding no abuse of discretion in the trial court's granting of the motion (*16 Cal. 2d 645, 648-649)* . The court noted that, in the instant case, the trial court found that there was a sufficiently reasonably excuse to justify the setting aside of the default judgment, apparently because the continued negotiations between the two attorneys allegedly lulled the defaulting attorney into a sense of security. Although as a general rule an attorney's ignorance of the law is not a sufficient ground for setting aside a default judgment under *Code Civ. Proc. § 473*, the mere fact that the defaulting attorney misstated the law with regard to the requirement of filing an answer does not bar him from asserting other grounds for setting aside the default that the court might have found sufficient (*16 Cal. 2d 645, 648)* .

Ochinero v. Wertz *(1962) 200 Cal. App. 2d 533, 19 Cal. Rptr. 466* , involved a contract action in which defendants' default was taken while settlement negotiations were in progress. At the outset of the litigation, one of the defendants, who was handling the matter for his codefendants, was told by plaintiff that there was no need to worry about the matter and that it would be straightened out shortly. With this assurance, defendant took no immediate action. When he later contacted plaintiff to settle the case, negotiations were commenced between the parties at plaintiff's suggestion. Because plaintiff was unable to contact his attorneys, they were unaware of the meeting between the parties, and they, in turn, took defendants' default without plaintiff's knowledge. Defendants moved under *Code Civ. Proc. § 473* for relief from

the default and ensuing judgment, and the trial court vacated the default and judgment as to two of them.

The court of appeal affirmed, finding it significant that the negotiations were carried on at the request of the plaintiff, which the court felt was evidence of a substantial nature to support the trial court's vacation of the defaults (*200 Cal. App. 2d 533, 536)* . The court concluded that a trial court may relieve a party from default on the ground of excusable neglect or surprise when settlement negotiations are occurring between counsel or the parties to litigation if there is an oral or implied understanding that no default will be taken without prior notice (*200 Cal. App. 2d 533, 536-537)* .

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7-70 California Points & Authorities §§ 70.82-70.89

[Reserved]

§§ 70.82[Reserved]

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7-70 California Points & Authorities § 70.90

§ 70.90 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Excusable Neglect [Code Civ. Proc. § 473(b)]--Reasonably Prudent Person Would Have Acted Similarly Under Same Circumstances

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion for relief under Code Civ. Proc. § 473(b) (see, e.g., §§ 70.10, 70.30, 70.40).*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other proceeding*)] UNDER CODE OF CIVIL PROCEDURE SECTION 473(b) ON THE GROUND OF EXCUSABLE NEGLECT ON THE PART OF THE [LEGAL REPRESENTATIVE OF THE] DEFENDANT, IN THAT A REASONABLY PRUDENT PERSON WOULD HAVE ACTED SIMILARLY UNDER THE SAME CIRCUMSTANCES.

A. Policy Favors Relief if Excusable Neglect Shown. A party is entitled to relief under *Code of Civil Procedure Section 473(b)* on the ground of excusable neglect, and doubts should be resolved in favor of an application to set aside a default judgment on that ground (*Karlein v. Karlein (1951) 103 Cal. App. 2d 496, 498, 229 P.2d 831*).

B. Excusable Neglect Defined. Excusable neglect, within the meaning of *Code of Civil Procedure Section 473(b)*, is that neglect which might have been the act of a reasonably prudent person under the same circumstances (*Hodge Sheet Metal Products v. Palm Springs Riviera Hotel (1961) 189 Cal. App. 2d 653, 657, 11 Cal. Rptr. 435*).

C. Relief for Excusable Neglect Based on Prudent Conduct. A default may be set aside and a default judgment vacated on the ground of the excusable neglect of the [legal representative of the] moving party if the default resulted from neglect that might have been the acts of a reasonably prudent person in the same circumstances (*Hodge Sheet Metal Products v. Palm Springs Riviera Hotel (1961) 189 Cal. App. 2d 653, 657, 11 Cal. Rptr. 435*).

[*Add supporting points and authorities for the particular ground of excusable for which relief is sought (see, e.g., § 70.91 et seq.).*]

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that a default and default judgment, or judgment, dismissal, order, or other proceeding under *Code Civ. Proc. § 473(b)* should be set aside on the ground of excusable neglect, in that the moving party acted as a reasonably prudent person would have under the circumstances [*see Code Civ. Proc. § 473(b)*; *see also Hodge Sheet Metal Products v. Palm Springs Riviera Hotel (1961) 189 Cal. App. 2d 653, 657, 11 Cal. Rptr. 435]* .

This form should be combined with a general memorandum supporting a motion for relief under *Code Civ. Proc. § 473(b)* [*see §§ 70.10, 70.30, 70.40*]. It may also be combined, when appropriate, with points and authorities supporting relief on other grounds specified in *Code Civ. Proc. § 473(b)* [*see, e.g., §§ 70.50 -70.81, 70.91 -70.110*; *see also* discussion in *§ 70.10[2*][g], regarding multiple grounds of relief].

This form may also be adapted for use in a trial or appellate brief.

See also *§ 70.10[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b)*, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Therefore, counsel should describe the defaulting party's actions and show how they were reasonable under the circumstances. Counsel should carefully explain the causal connection between the circumstances described and the moving party's failure to respond within the period of time allowed [*see, e.g., Bellm v. Bellia (1984) 150 Cal. App. 3d 1036, 1038, 198 Cal. Rptr. 389* (denial of relief upheld based on moving party's failure to explain why family illnesses and business pressures caused him to neglect complaint; discussed in § 70.196[3])].

[c] Attorney Affidavit of Fault

If the request for relief is based on the mistake, inadvertence, surprise, or neglect of the moving party's attorney, the granting of the motion is mandatory if the attorney at fault files an affidavit to that effect, and certain other conditions are met. Specifically, if the application for relief under *Code Civ. Proc. § 473* is timely, in proper form, and accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, the court must grant relief unless it finds that the default was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect [*Code Civ. Proc. § 473*]. For further discussion, see *§ 70.12[3]*.

[d] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 70.190* et seq. and *§ 70.210* et seq. may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Policy Favors Relief if Excusable Neglect Shown

In ***Karlein v. Karlein*** *(1951) 103 Cal. App. 2d 496, 229 P.2d 831* , an interlocutory judgment of divorce was entered on defendant husband's default. Defendant moved to set aside the default and judgment, alleging that he was unfamiliar with legal procedure, had difficulty with the English language, was not represented by counsel, and, at the time of the default hearing, had been in custody in the psychopathic ward of the county hospital, which plaintiff had known. The trial court denied the motion.

The court of appeal reversed, finding that, on the facts of the case, defendant should have had an opportunity to defend himself. The court noted that neither party should be deprived of a hearing except when guilty of inexcusable neglect, and doubts should be resolved in favor of an application to set aside a default judgment. The court concluded on the basis of the evidence before it that defendant was in a disturbed mental state at the relevant time (*103 Cal. App. 2d 496, 498)* . The court acknowledged that, as a general rule, reviewing courts will uphold the discretion of a trial court in granting or denying relief under *Code Civ. Proc. § 473*, but asserted that a reviewing court considers an appeal from an order denying relief more readily than one granting relief (*103 Cal. App. 2d 496, 498)* . The court concluded that the defendant made a sufficient showing of excusable neglect based on his disability, in support of relief under the statute (*103 Cal. App. 2d 496, 498-499)* .

[b] Excusable Neglect Defined

The facts and procedural background of ***Hodge Sheet Metal Products v. Palm Springs Riviera Hotel*** *(1961) 189 Cal. App. 2d 653, 11 Cal. Rptr. 435* , are discussed in *§ 70.50[3]*. In *Hodge,* the court of appeal held that defendant's motion to set aside a default under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), was proper on the ground of reasonable mistake in fact (*189 Cal. App. 2d 653, 657-658)* . The court in *Hodge* also briefly discussed the other applicable and related grounds for relief under *Code Civ. Proc. § 473*, noting that "excusable neglect" within the meaning of the statute, is that neglect which might have been the act of a reasonably prudent person under the same circumstances (*189 Cal. App. 2d 653, 657)* .

[c] Relief for Excusable Neglect Based on Prudent Conduct

The facts and procedural background of ***Hodge Sheet Metal Products v. Palm Springs Riviera Hotel*** *(1961) 189 Cal. App. 2d 653, 11 Cal. Rptr. 435* , are discussed in *§ 70.50[3]*. In *Hodge,* the court of appeal held that defendant's motion to set aside a default under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), was proper on the ground of reasonable mistake in fact (*189 Cal. App. 2d 653, 657-658)* . The court in *Hodge* also held that a default may be set aside and a default judgment vacated on the ground of excusable neglect if the default resulted from neglect that might have been the acts of a reasonably prudent person in the same circumstances (*189 Cal. App. 2d 653, 657)* .

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7-70 California Points & Authorities § 70.91

§ 70.91 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Excusable Neglect [Code Civ. Proc. § 473(b)]--Disability of Party--Party Unable to Arrange to Defend

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion for relief from default or default judgment (see, e.g., §§ 70.10, 70.30, 70.40).*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION TO SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT UNDER CODE OF CIVIL PROCEDURE SECTION 473(b) ON THE GROUND OF EXCUSABLE NEGLECT ON THE PART OF THE DEFENDANT, IN THAT THE DEFAULT RESULTED UNAVOIDABLY FROM THE DISABILITY OF THE DEFENDANT.

A. Policy Favors Relief if Excusable Neglect Shown. [*See 70.90[1], Paragraphs A and B.*]

B. Disability of Party. If a party suffers a disability that renders him or her unable to arrange to defend an action, and the party's default results, relief from the default and ensuing judgment is available on the ground of excusable neglect under *Code of Civil Procedure Section 473(b)* (*Karlein v. Karlein (1951) 103 Cal. App. 2d 496, 498-499, 229 P.2d 831*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that a default and default judgment should be set aside on the ground of excusable neglect, in that the party suffered from an unavoidable disability that prevented representation, resulting in a default taken against that party [*see Code Civ. Proc. § 473(b)*].

For forms of points and authorities supporting a motion for relief when the moving party suffers from mental confusion or illness, or is unable to comprehend the legal proceeding, see *§ 70.92[1]* and *§ 70.93[1]*, respectively.

This form should be combined with a general memorandum supporting a motion for relief under *Code Civ. Proc. § 473(b)* [*see §§ 70.10, 70.30, 70.40*]. It may also be combined when appropriate, with points and authorities supporting relief on other grounds specified in *Code Civ. Proc. § 473(b)* [*see, e.g., §§ 70.50 -70.90, 70.95 -70.110*; *see also* discussion in *70.10[3][g]*].

This form may also be adapted for use in a trial or appellate brief.

See also *70.10[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b)*, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should describe the disability of the party, and show that under the circumstances, the party's failure to act in time to prevent the default was reasonable and excusable [*see Weitz v. Yankosky (1966) 63 Cal. 2d 849, 855, 48 Cal. Rptr. 620, 409 P.2d 700* (reasonableness is essential element in support of relief)]. See also *§ 70.10[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in 70.190 et seq. and 70.210* et seq. may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Disability of Party

Karlein v. Karlein *(1951) 103 Cal. App. 2d 496, 229 P.2d 831* , is discussed in *70.90[3][a]*.

[4] Additional Authorities

[a] Disability of Party

In *Kesselman v. Kesselman (1963) 212 Cal. App. 2d 196, 27 Cal. Rptr. 769* , the court of appeal affirmed the trial court's order granting defendant's motion for relief under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), from entry of a default taken against him in a divorce action, on the ground that by reason of paralytic strokes, defendant was not capable of understanding the nature of the legal documents served on him. The court of appeal held that the trial court could reasonably conclude that the defendant's physical condition rendered him susceptible to plaintiff's undue influence, resulting in the default; and that the trial court did not abuse its discretion in affording defendant relief under the facts (*212 Cal. App. 2d 196, 207-208)* .

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7-70 California Points & Authorities § 70.92

§ 70.92 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Excusable Neglect [Code Civ. Proc. § 473(b)]--Disability of Party--Moving Party Suffers From Mental Confusion or Illness

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion for relief under Code Civ. Proc. § 473(b) (see, e.g., §§ 70.10, 70.30, 70.40, 70.90).*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other proceeding*)] UNDER CODE OF CIVIL PROCEDURE SECTION 473(b) ON THE GROUND OF EXCUSABLE NEGLECT ON THE PART OF THE DEFENDANT, IN THAT THE _____ [*identify proceedings, e.g.,* DEFAULT] RESULTED FROM SOME DEGREE OF MENTAL _____ [CONFUSION *or* ILLNESS] ON THE PART OF THE MOVING PARTY.

Moving Party's Mental Confusion or Illness. Relief may be granted under *Code of Civil Procedure Section 473(b)* based on the existence of some degree of mental confusion or illness on the part of the moving party, and the court may infer the existence of such problems from the whole record before it (*In re the Marriage of Kerry (1984) 158 Cal. App. 3d 456, 466, 204 Cal. Rptr. 660*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that a default and default judgment, or judgment, dismissal, order, or other proceeding under *Code Civ. Proc. § 473(b)* should be set aside on the ground of excusable neglect, in that the default was entered as a consequence of the moving party's mental confusion or illness.

For forms of points and authorities supporting a motion for relief when a party's disability prevented representation, see *§ 70.91[1]*; or when the moving party is unable to comprehend the legal proceeding, see *§ 70.93[1]*.

This form should be combined with a general memorandum supporting a motion for relief under *Code Civ. Proc. § 473(b)* [*see §§ 70.10, 70.30, 70.40*]. It may also be combined when appropriate, with points and authorities supporting relief on other grounds specified in *Code Civ. Proc. § 473(b)* [*see, e.g., §§ 70.50 -70.90, 70.95 -70.110*; *see also* discussion in *70.10[3][g]*].

This form may also be adapted for use in a trial or appellate brief.

See also *70.10[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b),* and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should describe the disability of the party, and show that under the circumstances, the party's failure to act in time to prevent the default was reasonable and excusable [*see Weitz v. Yankosky (1966) 63 Cal. 2d 849, 855, 48 Cal. Rptr. 620, 409 P.2d 700* (reasonableness is essential element in support of relief)]. See also *§ 70.10[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in 70.190 et seq. and 70.210* et seq. may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Moving Party's Mental Confusion or Illness

In re the Marriage of Kerry *(1984) 158 Cal. App. 3d 456, 204 Cal. Rptr. 660* , is discussed in *70.53[3]*.

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7-70 California Points & Authorities § 70.93

§ 70.93 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Excusable Neglect [Code Civ. Proc. § 473(b)]--Disability of Party--Inability to Comprehend Legal Proceeding

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion for relief under Code Civ. Proc. § 473(b) (see, e.g., §§ 70.10, 70.30, 70.40).*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other proceeding*)] UNDER CODE OF CIVIL PROCEDURE SECTION 473(b) ON THE GROUND OF DEFENDANT'S EXCUSABLE NEGLECT, IN THAT THE _____[*identify proceeding, e.g.,* DEFAULT AND DEFAULT JUDGMENT] RESULTED UNAVOIDABLY FROM THE DEFENDANT'S INABILITY TO COMPREHEND THE NATURE OF THE LEGAL PROCEEDING.

A. Policy Favors Relief if Excusable Neglect Shown. [*See 70.90[1], Paragraphs A and B.*]

B. Inability to Comprehend Legal Proceeding. Relief from default and default judgment may be granted if the default was caused by the defaulting party's reasonable and excusable failure to act based on his or her ignorance of the English language, or other factors preventing that party from comprehending the nature of the legal proceedings or the applicable procedural and substantive laws (*Berri v. Rogero (1914) 168 Cal. 736, 739-741, 145 P. 95* ; *Buck v. Buck (1954) 126 Cal. App. 2d 137, 138-140, 271 P.2d 628*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that a default and default judgment, or judgment, dismissal,

order, or other proceeding under *Code Civ. Proc. § 473(b)* should be set aside on the ground of excusable neglect, in that the party was unable, because of ignorance of the language or other factors, to comprehend the nature of the legal proceedings or applicable laws [*see Code Civ. Proc. § 473(b)*; *see also Berri v. Rogero (1914) 168 Cal. 736, 739-741, 145 P. 95]* .

This form should be combined with a general memorandum supporting a motion for relief under *Code Civ. Proc. § 473(b)* [*see §§ 70.10, 70.30, 70.40*]. It may also be combined when appropriate, with points and authorities supporting relief on other grounds specified in *Code Civ. Proc. § 473(b)* [*see, e.g., §§ 70.50 -70.92, 70.94 -70.110*; *see also* discussion in *70.10[3][g]*].

This form may also be adapted for use in a trial or appellate brief.

See also *70.10[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b)*, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Counsel should therefore describe the circumstances of the moving party's reasonable failure to act, and set forth facts concerning his or her lack of understanding, for example, his or her recent arrival in the United States and inability to speak English, as well as other related factors causing the party's confusion or misunderstanding [*see Weitz v. Yankosky (1966) 63 Cal. 2d 849, 855, 48 Cal. Rptr. 620, 409 P.2d 700* (reasonableness is essential element in support of relief)]. See also *§ 70.10[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Inability to Comprehend Legal Proceeding

In ***Berri v. Rogero*** *(1914) 168 Cal. 736, 145 P. 95* , the trial court granted a motion to set aside a default and default judgment taken against defendants in plaintiff's malicious prosecution action. Defendants' motion to set aside the default and default judgment was based on inadvertence, surprise, and excusable neglect, and was accompanied by affidavits averring that: defendants, who were Italian-Swiss, were unable to understand, read, or write the English language. They were unacquainted with legal procedure and judicial proceedings, and they did not know that after once consulting their attorney any further action was necessary on their part to defend against the proceedings (*168 Cal. 736, 739-740)* .

The Supreme Court affirmed. The Court reviewed the general rules of the remedial nature of motions to set aside defaults and default judgments, and noted that when plaintiff fails to show that he or she has suffered any prejudice or that injustice will result from a trial on the merits, very slight evidence is required to justify the setting aside of a default or default judgment (*168 Cal. 736, 740)* . The Court noted that it is required to presume that the oral testimony warranted the trial court to set aside the judgment, even if it finds that the affidavits submitted to the trial court were insufficient to sustain the order. The Court concluded that the trial court did not abuse its discretion in granting the motion (*168 Cal. 736, 741)* .

In ***Buck v. Buck*** *(1954) 126 Cal. App. 2d 137, 271 P.2d 628* , the cross defendant (wife) in an annulment proceeding, who was Argentinian and spoke no English, entered into a stipulation through her attorney, which ultimately resulted in a judgment of annulment, based on a default hearing in which the cross complainant (husband) testified. The judgment affected, inter alia, the legal status of the couple's child. After learning of the judgment, the wife obtained different counsel, who unsuccessfully moved to set aside the decree. The motion was based on the contention that the husband confused the wife, whose ignorance of the English language and lack of education prevented her from comprehending that an annulment decree could be entered against her based on the stipulation, and that she understood that by signing

the stipulation the lawsuit would be concluded.

The court of appeal reversed. The court noted that the granting of relief under *Code Civ. Proc. § 473* is primarily committed to the discretion of the trial court, but that the decision must be founded on a sound discretion, predicated on a fair consideration of the evidence in its entirety and the reasonable and logical inferences to be drawn from it. The court also noted that the burden of proving excusable neglect is on the defendant moving party, who must establish the thesis by a preponderance of the evidence (*126 Cal. App. 2d 137, 141)* . However, if from a scrutiny of all of the evidence in a proceeding under *Code Civ. Proc. § 473* to vacate a judgment of annulment, it is clear that the trial court abused its discretion in holding that there was excusable neglect on the part of the defendant, the order must be reversed (*126 Cal. App. 2d 137, 141-142)* . The court stated that the principles applicable when a motion is made under *Code Civ. Proc. § 473* to set aside a default judgment severing the marital status differ in many respects from those that govern other actions, in that very slight showing supports the granting of relief from the judgment (*126 Cal. App. 2d 137, 142)* . In addition, an appellate court "listens more readily to an appeal from an order denying relief than to one granting relief" because of the remedial character of the statute and the policy of liberal application to permit an opportunity to present a substantial defense (*126 Cal. App. 2d 137, 142)* . The court found the judgment a "harsh" one, in that it affected for all practical purposes the legitimacy of a child; and that sound public policy therefore favors the determination of the action on its merits. The court concluded that under the circumstances of the case, the trial court abused its discretion in denying relief to the cross defendant (*126 Cal. App. 2d 137, 143)* .

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7-70 California Points & Authorities § 70.94

§ 70.94 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Excusable Neglect [Code Civ. Proc. § 473(b)]--Disability of Party's Attorney

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion for relief under Code Civ. Proc. § 473(b) (see, e.g., §§ 70.10, 70.30, 70.40).*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other proceeding*)] UNDER CODE OF CIVIL PROCEDURE SECTION 473(b) ON THE GROUND OF EXCUSABLE NEGLECT ON THE PART OF THE LEGAL REPRESENTATIVE OF THE DEFENDANT, IN THAT THE _____ [*identify proceeding, e.g.,* DEFAULT] RESULTED UNAVOIDABLY FROM THE DISABILITY OF THE ATTORNEY FOR THE DEFENDANT.

A. Policy Favors Relief if Excusable Neglect Shown. [*See 70.90[1], Paragraphs A and B.*]

B. Disability of Attorney. Illness or disability of a party's counsel that is severe enough to prevent counsel from appearing in an action is good ground for vacating a default and default judgment if the party did not know of it in time to retain other counsel, or was prevented in some other way from doing so (*Van Dyke v. MacMillan (1958) 162 Cal. App. 2d 594, 599, 328 P.2d 215* ; *Stub v. Harrison (1939) 35 Cal. App. 2d 685, 690, 96 P.2d 979*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that a default and default judgment, or judgment, dismissal, order, or other proceeding should be set aside on the ground of excusable neglect, in that the party's counsel suffered

from an unavoidable disability that prevented representation, resulting in a default taken against that party [*see Code Civ. Proc. § 473(b)*].

This form should be combined with a general memorandum supporting a motion for relief under *Code Civ. Proc. § 473(b)* [*see §§ 70.10, 70.30, 70.40*]. It may also be combined when appropriate, with points and authorities supporting relief on other grounds specified in *Code Civ. Proc. § 473(b)* [*see, e.g., §§ 70.50 -70.93, 70.95 -70.110*; *see also* discussion in *70.10[3][g]*].

This form may also be adapted for use in a trial or appellate brief.

See also *70.10[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b),* and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should describe the disability of the party or the attorney, and show that under the circumstances, the party's failure to act in time to prevent the default was reasonable and excusable [*see Weitz v. Yankosky (1966) 63 Cal. 2d 849, 855, 48 Cal. Rptr. 620, 409 P.2d 700* (reasonableness is essential element in support of relief)]. See also *§ 70.10[2][b]* regarding evidentiary support for facts stated.

[c] Attorney Affidavit of Fault

If the request for relief is based on the mistake, inadvertence, surprise, or neglect of the moving party's attorney, the granting of the motion is mandatory if the attorney at fault files an affidavit to that effect, and certain other conditions are met. Specifically, if the application for relief under *Code Civ. Proc. § 473* is timely, in proper form, and accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, the court must grant relief unless it finds that the default was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect [*Code Civ. Proc. § 473*]. For further discussion, see *70.12[3]*.

[d] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in 70.190 et seq. and 70.210* et seq. may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Disability of Attorney

In ***Van Dyke v. MacMillan*** *(1958) 162 Cal. App. 2d 594, 328 P.2d 215* , defendant's attorney was advised by his physician a week before the appointed trial date in the action that his illness would preclude his participation in the trial, which was scheduled in another county. The attorney advised defendant by telephone that he would be unable to appear at the trial and that he would arrange for a continuance. Defendant was unable to obtain other counsel because of heavy snows in the area. The attorney wired the trial judge, informing the judge of his illness and stating that he would move for a continuance. He mailed his affidavit for continuance to the judge, but, because the affidavit was not received until after the time for trial, the matter was heard as scheduled and judgment was entered for plaintiff. The trial court denied defendant's motion to set aside the judgment.

The court of appeal reversed, holding that the illness of a party's counsel, so severe as to prevent him or her from appearing and trying a case, is good ground for vacating a judgment, provided the party did not know of the disability in time to retain other counsel or was prevented in some other way from doing so (*162 Cal. App. 2d 594, 599)* .

In ***Stub v. Harrison*** *(1939) 35 Cal. App. 2d 685, 96 P.2d 979* , defendant's default was taken when his attorney failed to respond to the complaint because of his preoccupation with his injured and hospitalized child. On discovering his error, the attorney prepared and filed an answer. Immediately after learning of the entry of default, he moved to set it aside. Defendant's motion to vacate was granted after entry of judgment against him, and plaintiff appealed.

The court of appeal affirmed. The court stressed the discretion residing in the trial judge in considering motions to vacate, noting that the courts, because of the remedial nature of *Code Civ. Proc. § 473*, are "somewhat loath to penalize a litigant on account of some omission on the part of his attorney, particularly when the litigant himself or herself has acted promptly and has relied upon the attorney to protect his rights" (*35 Cal. App. 2d 685, 689-690)* . Although acknowledging that the showing by defendant's attorney was not of the strongest character, the court considered certain relevant factors: defendant's diligence in obtaining legal assistance, his reliance on his attorney, the seriousness of the attorney's mental state, counsel's diligence in seeking relief from the default, and the penalty paid to and accepted by plaintiff as a condition for setting aside the default (*35 Cal. App. 2d 685, 690)* .

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7-70 California Points & Authorities § 70.95

§ 70.95 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Excusable Neglect [Code Civ. Proc. § 473(b)]--Justifiable Reliance on Codefendant's Promise to Defend

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion for relief under Code Civ. Proc. § 473(b) (see, e.g., §§ 70.10, 70.30, 70.40).*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION TO SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT UNDER CODE OF CIVIL PROCEDURE SECTION 473(b) ON THE GROUND OF DEFENDANT'S EXCUSABLE NEGLECT, IN THAT THE DEFAULT AND DEFAULT JUDGMENT RESULTED UNAVOIDABLY FROM HIS/HER JUSTIFIABLE RELIANCE ON A _____ CODEFENDANT'S PROMISE TO DEFEND HIS/HER INTERESTS IN THE DEFENDANT'S ABSENCE.

A. Policy Favors Relief if Excusable Neglect Shown. [*See 70.90[1], Paragraphs A and B.*]

B. Reliance on Representation of Codefendant. Excusable neglect sufficient to relieve a party of a default and default judgment may be found when the party fails to file an appearance because of his or her justifiable reliance on the commitment or undertaking of a codefendant to defend the action (*Stout v. Bakker (1963) 212 Cal. App. 2d 78, 83, 27 Cal. Rptr. 661*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that a default and default judgment should be set aside on the ground of excusable neglect, in that the party reasonably relied on a commitment made by a codefendant to defend the matter [*see Code Civ. Proc. § 473(b)*; *see also Ramsey Trucking Co. v. Mitchell (1961) 188 Cal. App. 2d Supp. 862,*

866 , 11 Cal. Rptr. 283] . For form of points and authorities supporting a motion to set aside based on reasonable reliance on the commitment by a third party, see *70.96[1]*.

Although a party typically seeks relief under *Code Civ. Proc. § 473(b)*, from a default or default judgment, or both, a court may grant relief under that section from any "judgment, dismissal, order, or other proceeding." This form may modified for use, when appropriate, in seeking relief in situations other than a default and default judgment.

This form should be combined with a general memorandum supporting a motion for relief under *Code Civ. Proc. § 473(b)* [*see §§ 70.10, 70.30, 70.40*]. It may also be combined when appropriate, with points and authorities supporting relief on other grounds specified in *Code Civ. Proc. § 473(b)* [*see, e.g., §§ 70.50 -70.94, 70.96 -70.110*; *see also* discussion in *70.10[3][g]*].

This form may also be adapted for use in a trial or appellate brief.

See also *70.10[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b)*, and alternative methods for obtaining relief. For discussion of the *Code Civ. Proc. § 587* requirement that all applications for entry of default under *Code Civ. Proc. §§ 585(a)-(c)* or *586* include a declaration that a copy of the application has been mailed to defendant (or defendant's attorney, if any), see *§ 70.70[2][d]*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Counsel should therefore set forth facts showing that the moving party's reliance on a commitment made by a codefendant to defend the matter on his or her behalf was reasonable. If the promise was made by a third party, counsel should describe that person's relationship to the defendant, such that the defendant's trust in that person to protect his or her interests was reasonable under the circumstances. See also *§ 70.10[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in 70.190* et seq. may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Reliance on Representation of Codefendant

In ***Stout v. Bakker*** *(1963) 212 Cal. App. 2d 78, 27 Cal. Rptr. 661* , the purchaser of real property sued several defendants, alleging conspiracy regarding the defendants' entry onto the property without their permission, in connection with a dispute over the real property contract payments. After being served with process, the defendants who were identified in the original complaint obtained a change a venue to a different county. Plaintiffs filed an amended complaint, naming additional defendants (named as Does in the original complaint). Two of those additional defendants, who were employees of a codefendant who had already filed an answer, were served with copies of the original complaint (which bore the caption of the first county, that is, before the change of venue). They approached the employer-codefendant, who assured them that his attorney would take care of the matter on their behalf. A default judgment was subsequently entered against the two defendant employees. On the motion to set aside the default and default judgment, the affidavits of the moving parties showed that after being served, they each relied on representations made in good faith by the codefendant that an attorney would represent them in the matter. The codefendant stated that because of his confusion regarding the two venues, he misjudged the time period in which he needed to notify his attorney regarding the service of the two defendants. The attorney stated that when he first learned of the situation, the default had already been taken. The trial court granted the motion to set aside the default judgments.

The court of appeal affirmed (*212 Cal. App. 2d 78, 84)* . The court noted that plaintiffs did not contend that the defendants were derelict in relying on the codefendant to provide an attorney, but did contend that their inaction for some three months following notification of the defaults requires reversal (*212 Cal. App. 2d 78, 82)* . The court stated that the determination of whether a time period is reasonable depends largely on the facts and circumstances of each case. The general rule is to favor, whenever possible, a hearing on the merits. Appellate courts are much more disposed to affirm an order compelling a trial on the merits than it is when a judgment by default is allowed to stand and it appears that a substantial defense could be made. The court noted that ordinarily, abuse of discretion must be shown before an appellate court reverses such an order. It stated that although the showing of defendants' diligence was not entirely satisfactory, it was not so fatally defective as to justify the conclusion that the court below abused its discretion in opening the default (*212 Cal. App. 2d 78, 83)* . The court also observed that if the default judgments in the instant case were allowed to stand, it would severely penalize the two defendants, who might well succeed in defending themselves in a trial on the merits, and that plaintiffs' rights would apparently not be unjustly affected by the granting of relief (*212 Cal. App. 2d 78, 84)* .

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7-70 California Points & Authorities § 70.96

§ 70.96 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Excusable Neglect [Code Civ. Proc. § 473(b)]--Justifiable Reliance on Third Party's Promise to Defend

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion for relief from default or default judgment (see, e.g., §§ 70.10, 70.30, 70.40).*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION TO SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT UNDER CODE OF CIVIL PROCEDURE SECTION 473(b) ON THE GROUND OF DEFENDANT'S EXCUSABLE NEGLECT, IN THAT THE DEFAULT AND DEFAULT JUDGMENT RESULTED UNAVOIDABLY FROM HIS/HER JUSTIFIABLE RELIANCE ON A _____ THIRD PARTY'S PROMISE TO DEFEND HIS/HER INTERESTS IN THE DEFENDANT'S ABSENCE.

A. Policy Favors Relief if Excusable Neglect Shown. [*See § 70.90[1], Paragraphs A and B.*]

B. Reliance on Representation of Third Party. Excusable neglect sufficient to relieve a party of a default and default judgment may be found when the party fails to file an appearance because of his or her justifiable reliance on the commitment or undertaking of a third party to defend the action (*Ramsey Trucking Co. v. Mitchell (1961) 188 Cal. App. 2d Supp. 862, 866 , 11 Cal. Rptr. 283*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that a default and default judgment should be set aside on the ground of excusable neglect, in that the party reasonably relied on a commitment made by a third party or codefendant to defend the matter [*see Code Civ. Proc. § 473(b)*; *see also Ramsey Trucking Co. v. Mitchell (1961) 188 Cal. App. 2d*

Supp. 862, 866 , 11 Cal. Rptr. 283] .

Although a party typically seeks relief under *Code Civ. Proc. § 473(b)*, from a default or default judgment, or both, a court may grant relief under that section from any "judgment, dismissal, order, or other proceeding." This form may modified for use, when appropriate, in seeking relief in situations other than a default and default judgment.

For form of points and authorities supporting a motion to set aside based on reasonable reliance on the commitment by a codefendant, see *70.95[1]*. This form should be combined with a general memorandum supporting a motion for relief under *Code Civ. Proc. § 473(b)* [*see §§ 70.10, 70.30, 70.40*]. It may also be combined when appropriate, with points and authorities supporting relief on other grounds specified in *Code Civ. Proc. § 473(b)* [*see, e.g., §§ 70.50 -70.95, 70.97 -70.110*; *see also* discussion in *70.10[3][g]*].

This form may also be adapted for use in a trial or appellate brief.

See also *70.10[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b)*, and alternative methods for obtaining relief. For discussion of the *Code Civ. Proc. § 587* requirement that all applications for entry of default under *Code Civ. Proc. §§ 585(a)-(c)* or *586* include a declaration that a copy of the application has been mailed to defendant (or defendant's attorney, if any), see *§ 70.70[2][d]*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Counsel should therefore set forth facts showing that the moving party's reliance on a commitment made by a third party or codefendant to defend the matter on his or her behalf was reasonable. If the promise was made by a third party, counsel should describe that person's relationship to the defendant, such that the defendant's trust in that person to protect his or her interests was reasonable under the circumstances. See also *§ 70.10[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 70.190* et seq. may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Reliance on Representation of Third Party

In ***Ramsey Trucking Co. v. Mitchell*** *(1961) 188 Cal. App. 2d Supp. 862 , 11 Cal. Rptr. 283* , plaintiff sued defendant service station, alleging that defendant negligently serviced plaintiff's truck. Defendant informed an employee of the oil company whose products he sold of plaintiff's claim, and the employee advised defendant that the claim was referred to an insurance company, whose policy insured defendant against any claims arising out of workmanship and materials and provided for defense against any claims made. An adjustor for the insurance company investigated the claim and indicated that it would handle the matter. Defendant, relying on the insurance company to take care of the claim and to appear in his behalf in the lawsuit, took no further action until his default was taken and judgment entered against him for failure to answer the complaint. His subsequent motion to set aside the default and judgment was granted on the ground of excusable neglect.

The court of appeal affirmed, asserting that California courts have approved as a legitimate excuse for failure to file an appearance the commitment or undertaking of a third person to take care of a claim and defend a suit (*188 Cal. App. 2d Supp. 862, 866)* . Although cases normally show that the summons and complaint were actually forwarded by defendant to the person who had given the commitment to defend, the court stated that it did not think such a showing must be made in all cases. It reasoned that anyone familiar with modern business practices of corporations and retailers,

and the handling of tort claims by insurance representatives, could well conclude that it is not fatally unreasonable for a busy local merchant to rely implicitly on the undertaking of authorized employees of a large corporation and an insurance company to take care of a claim (*188 Cal. App. 2d Supp. 862, 866)* . However, the court also noted that there was unquestionably serious neglect by defendant in this case in failing to turn the summons and complaint over to the insurance company and in not following up on the case; and cautioned that it was not establishing a general rule of excuse applicable to all similar cases. Rather, each case must be evaluated on its own facts (*188 Cal. App. 2d Supp. 862, 866)* .

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7-70 California Points & Authorities § 70.97

§ 70.97 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Excusable Neglect [Code Civ. Proc. § 473(b)]--Justifiable Reliance on Statements of Court Officers

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion for relief from default or default judgment (see, e.g., §§ 70.10, 70.30, 70.40).*]

THE COURT SHOULD GRANT THE MOTION TO SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT UNDER CODE OF CIVIL PROCEDURE SECTION 473(b) ON THE GROUND OF EXCUSABLE NEGLECT ON THE PART OF THE [LEGAL REPRESENTATIVE OF THE] DEFENDANT, BECAUSE THE DEFAULT AND DEFAULT JUDGMENT RESULTED UNAVOIDABLY FROM THE JUSTIFIABLE RELIANCE OF THE [ATTORNEY FOR THE] DEFENDANT ON STATEMENTS OF COURT OFFICERS IN THE ACTION.

A. Policy Favors Relief if Excusable Neglect Shown. [*See 70.90[1], Paragraphs A and B.*]

B. Reliance on Representations of Officers of Court. When judgment is taken as a result of the reliance of a party or his or her counsel on statements made by an officer of the court, relief from the judgment is available on the ground of excusable neglect (*Bodin v. Webb (1936) 17 Cal. App. 2d 422, 424-426, 62 P.2d 155* ; *Lynch v. de Boom (1915) 26 Cal. App. 311, 314, 146 P. 908*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that a default and default judgment should be set aside on the ground of excusable neglect, in that the party's failure to act in a timely manner resulted from reliance by the party or the party's attorney on a statement made by an officer of the court [*see Code Civ. Proc. § 473(b)*; *see also* *Bodin v.*

Webb (1936) 17 Cal. App. 2d 422, 424-426, 62 P.2d 155] .

Although a party typically seeks relief under *Code Civ. Proc. § 473(b)*, from a default or default judgment, or both, a court may grant relief under that section from any "judgment, dismissal, order, or other proceeding." This form may modified for use, when appropriate, in seeking relief in situations other than a default and default judgment.

This form should be combined with a general memorandum supporting a motion for relief under *Code Civ. Proc. § 473(b)* [*see §§ 70.10, 70.30, 70.40*]. It may also be combined when appropriate, with points and authorities supporting relief on other grounds specified in *Code Civ. Proc. § 473(b)* [*see, e.g., §§ 70.50 -70.96, 70.98 -70.110*; *see also* discussion in *70.10[3][g]*].

See also *70.10[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b)*, and alternative methods for obtaining relief.

For discussion relating to an attorney's affidavit of fault, see *§§ 70.12[2], 70.70[2][c]*. For discussion of the *Code Civ. Proc. § 587* requirement that all applications for entry of default under *Code Civ. Proc. §§ 585(a)-(c)* or *586* include a declaration that a copy of the application has been mailed to defendant (or defendant's attorney, if any), see *§ 70.70[2][d]*.

This form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Counsel should therefore set forth facts describing the erroneous representation made by an officer of the court to the party or his or her attorney, and the circumstances under which it was reasonable for the party or the attorney to rely on that representation (for example, that it was the custom in that particular courtroom for attorneys to rely on oral representations by the court clerk). For discussion of additional facts that should be described, if appropriate, see *§ 70.98[2][b]*. See also *§ 70.10[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 70.210* et seq. may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Reliance on Representations of Officers of Court

In ***Bodin v. Webb*** *(1936) 17 Cal. App. 2d 422, 62 P.2d 155* , a personal-injury action, default judgment was entered against defendant on the day of trial because neither defendant nor defense counsel appeared. The trial court granted defendant's motion to set aside the default judgment under *Code Civ. Proc. § 473*. Plaintiff appealed.

The court of appeal affirmed (*17 Cal. App. 2d 422, 426)* . The court rejected plaintiff's argument that although a motion under *Code Civ. Proc. § 473* is the proper remedy to vacate a default entered for failing to plead to a complaint, the only remedy to vacate a judgment for failure to appear at the trial is a motion for a new trial on the ground of unavoidable accident or surprise. The court noted that the statute provides relief from "a judgment, order, or other proceeding," and that it has been held applicable to judgments entered after trial for failure to appear (*17 Cal. App. 2d 422, 424)* . The court also rejected plaintiff's contention that the showing in support of the motion was insufficient. The evidence showed that the secretary of the court had assured defense counsel that, because of the congested court calendar, the case would not go to trial on the day set, and that he would reset the matter on a date convenient for the

attorney. It also appeared that practicing attorneys relied on the information conveyed to them by the secretary. Moreover, on the following day, the defense attorney telephoned the secretary to ascertain the new trial date, and was told that through inadvertence a default judgment had been entered. The court stated that the power vested in the trial courts by *Code Civ. Proc. § 473* should be freely and liberally exercised so that cases may be disposed of on their substantial merits, and to give a party claiming in good faith to have a substantial defense to an action an opportunity to present it. In the absence of a clear abuse of discretion, an appellate court will not disturb a trial court's ruling on a motion under the statute (*17 Cal. App. 2d 422, 425)* .

In ***Lynch v. de Boom*** *(1915) 26 Cal. App. 311, 146 P. 908* , plaintiff, an attorney at law, appeared in court without his attorney in response to a court order setting the action for trial on that date. When he called the clerk's attention to the fact that the case was omitted from the court calendar for that day, the clerk informed him that the action would not be tried that day but would be reset for a later date. After plaintiff left the courtroom believing that no action would be taken on that date, the matter was called for trial and, on plaintiff's failure to appear, defendant's motion to dismiss was granted and judgment entered for defendant. Plaintiff's motion to vacate the judgment was denied.

The court of appeal reversed, and stated that the facts concerning plaintiff's conversation with the clerk of the court constituted a prima facie showing of excusable neglect which, in the absence of a counter showing by defendant, should have impelled the lower court to set aside the judgment (*26 Cal. App. 311, 314)* . The court found that, even if plaintiff was guilty of neglect in not waiting for the judge to appear on the bench to ascertain with certainty that the action would not be tried, it was undisputed that he had in good faith endeavored to ascertain from the clerk the state of the case and was honestly misled by the information he received (*26 Cal. App. 311, 314)* . The court cited with approval a Montana Supreme Court case based on similar facts, which held that the clerk as a ministerial officer of the court "had the records of the court, and knew its business," and that reliance on statements of the clerk was therefore excusable (*26 Cal. App. 311, 315)* .

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7-70 California Points & Authorities § 70.98

§ 70.98 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Excusable Neglect [Code Civ. Proc. § 473(b)]--Justifiable Reliance on Representations of Opposing Counsel

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion for relief from under Code Civ. Proc. § 473(b) (see, e.g., §§ 70.10, 70.30, 70.40).*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other proceeding*)] UNDER CODE OF CIVIL PROCEDURE SECTION 473(b) ON THE GROUND OF EXCUSABLE NEGLECT ON THE PART OF THE [LEGAL REPRESENTATIVE OF THE] DEFENDANT, IN THAT THE _____ [*identify proceeding, e.g.,* DEFAULT AND DEFAULT JUDGMENT] RESULTED UNAVOIDABLY FROM THE JUSTIFIABLE RELIANCE OF THE [ATTORNEY FOR THE] DEFENDANT ON REPRESENTATIONS OF PLAINTIFF'S COUNSEL.

A. Policy Favors Relief if Excusable Neglect Shown. [*See 70.90[1], Paragraphs A and B.*]

B. Reliance on Representations of Opposing Counsel. When a defendant fails to file responsive pleadings in a timely manner because of opposing counsel's representations indicating a willingness to further communicate with defendant without obtaining a default or default judgment, he or she is entitled to relief under *Code of Civil Procedure Section 473(b)* on the ground of excusable neglect, if the opposing counsel obtains a default or default judgment without defendant's knowledge and while defendant believes none will be entered (*Beard v. Beard (1940) 16 Cal. 2d 645, 648, 107 P.2d 385* ; *Nelson v. Southerland (1960) 187 Cal. App. 2d 140, 141-142, 9 Cal. Rptr. 735*).

C. Conduct of Both Attorneys Evaluated. An evaluation of an attorney's neglect under *Code of Civil Procedure, Section 473(b),* involves a consideration of the reasonableness of the defaulting attorney's conduct and of the conduct of

the attorney taking the default (*Robinson v. Varela (1977) 67 Cal. App. 3d 611, 615-616, 136 Cal. Rptr. 783*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that a default and default judgment, or judgment, dismissal, order, or other proceeding should be set aside on the ground of excusable neglect, in that the opposing counsel's representations led defendant or defendant's attorney to believe that no default or default judgment (or other applicable court action) would be taken despite defendant's failure to file responsive pleadings in a timely manner, because opposing counsel desired to resolve the matter through negotiations [*see Code Civ. Proc. § 473(b)*; *see also Beard v. Beard (1940) 16 Cal. 2d 645, 648, 107 P.2d 385]* .

This form should be combined with a general memorandum supporting a motion for relief under *Code Civ. Proc. § 473(b)* [*see §§ 70.10, 70.30, 70.40*]. It may also be combined when appropriate, with points and authorities supporting relief on other grounds specified in *Code Civ. Proc. § 473(b)* [*see, e.g., §§ 70.50 -70.97, 70.99 -70.110*; *see also* discussion in *70.10[3][g]*].

This form may also be adapted for use in a trial or appellate brief.

See also *70.10[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b),* and alternative methods for obtaining relief. For discussion of the *Code Civ. Proc. § 587* requirement that all applications for entry of default under *Code Civ. Proc. §§ 585(a)-(c)* or *586* include a declaration that a copy of the application has been mailed to defendant (or defendant's attorney, if any), see *§ 70.70[2][d]*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Counsel should therefore set forth facts describing the substance of opposing counsel's representations, and the context in which they were made, to illustrate the reasonableness of the assumption that a default would not be taken. See also *§ 70.10[2][b]* regarding evidentiary support for facts stated.

[c] Related Factors Supporting Entitlement to Relief

An issue that sometimes arises in connection with neglect of the moving party's counsel vis-a-vis opposing counsel's conduct is that of the "quiet speed" of opposing counsel in taking the default (for example, the taking of default on the beginning of the first day on which the responsive pleading is delinquent). Some courts have held this conduct to be a valid ground for entitlement to relief under *Code Civ. Proc. § 473(b),* but in finding in favor of the moving party, have done so in the context of additional supporting facts [*see, e.g., Robinson v. Varela (1977) 67 Cal. App. 3d 611, 616, 136 Cal. Rptr. 783* (discussed in *§ 70.98[3*][b])]. Other courts have held that "quiet speed" does not, as a matter of law, require reversal of an order of the trial court refusing to set aside a default [*see, e.g., Carrasco v. Craft (1985) 164 Cal. App. 3d 796, 807, 210 Cal. Rptr. 599* ; *Bellm v. Bellia (1984) 150 Cal. App. 3d 1036, 1038, 198 Cal. Rptr. 389]* .

Another related issue with respect to the neglect of moving party's counsel is that of the press of other business, such that he or she was unable to attend adequately to that particular case. Courts have afforded relief on this ground within their discretion (in the absence of an attorney affidavit of fault) only when all the surrounding circumstances of the entry of default justify granting the motion. For example, the granting of relief was affirmed when defendants' attorney, engaged in trial on the date of hearing on plaintiff's motion for summary judgment, arranged for another attorney to appear in his stead to request a continuance; and the substitute attorney, occupied at an earlier hearing, was misinformed by the clerk regarding his ability to appear in time to prevent a default. In that case, defendants' motion to vacate the ensuing judgment was granted on the ground that the attorney's default at the hearing was due to his inadvertence and

excusable neglect [*see Lynch v. Spilman (1967) 67 Cal. 2d 251, 258, 62 Cal. Rptr. 12, 431 P.2d 636]* . However, the attorney's press of other business (in the absence of an attorney affidavit of fault), absent other compelling circumstances, is not a sufficient ground to warrant the granting of relief [*see, e.g., Transit Ads, Inc. v. Tanner Motor Livery, Ltd. (1969) 270 Cal. App. 2d 275, 281, 75 Cal. Rptr. 848* (discussed in *§ 70.212[3*])].

Whenever these issues arise, counsel should argue that, when viewed in the context of the primary ground or grounds for relief, they further justify the granting of relief from default.

[d] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 70.190 et seq. and 70.210* et seq. may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Reliance on Representations of Opposing Counsel

Beard v. Beard *(1940) 16 Cal. 2d 645, 107 P.2d 385* , is discussed in *§ 70.81[3]*.

In ***Nelson v. Southerland*** *(1960) 187 Cal. App. 2d 140, 9 Cal. Rptr. 735* , defendants' attorney sought an extension of time in which to answer the complaint but was informed that defendants' default had been taken prior to receipt of the request for extension. Defendants' attorney later learned that the default was actually entered at a later date, prior to which he had attempted several times to contact plaintiffs' attorney to negotiate a settlement of the case. Defendants' motion to set aside the default and ensuing judgment was granted. Plaintiff appealed.

The court of appeal affirmed, noting that plaintiffs had failed to show that prejudice resulted from the trial court's order, and that plaintiffs' attorney had failed to advise defendants' attorney that he intended to take defendants' default. The court also noted that, although there was no statutory rule at that time requiring plaintiffs' attorney to notify defendants' attorney that he intended to take a default [*now see Code Civ. Proc. § 587* (discussed in *§ 70.70[2*][d])], failure to do so would usually be sufficient ground for setting aside the default under *Code Civ. Proc. § 473* (*187 Cal. App. 2d 140, 142)* .

[b] Conduct of Both Attorneys Evaluated

In ***Robinson v. Varela*** *(1977) 67 Cal. App. 3d 611, 136 Cal. Rptr. 783* , plaintiff filed an action on a Friday against defendant for unlawful detainer and for damages for breach of a lease. The next day defendant was served with process, and on the following Monday (Christmas week), a copy of the summons and complaint was delivered to the law office representing defendant. On the Wednesday of that week, defendant's attorney contacted the law firm representing plaintiff to obtain an extension of time in which to answer. Plaintiff's attorney was not present, and no one else would grant the extension. On the following Monday, defense counsel again attempted to reach plaintiff's attorney, and discovered at that time that plaintiff had just filed for default. Less than two weeks later, following a hearing on default, a default judgment was entered against defendant. Eleven days later, defendant sought to have the judgment vacated, alleging by motion under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), that the judgment was taken as a result of attorney's mistake, inadvertence, surprise, or excusable neglect. The trial court granted the motion, and set aside the default. Plaintiff appealed, contending that there was no showing that the neglect of defendant's attorney in failing to file an answer was excusable.

The court of appeal affirmed, stating that an evaluation of an attorney's neglect under *Code Civ. Proc. § 473* involves a consideration of the reasonableness of the defaulting attorney's conduct and of the conduct of the attorney taking the default (*67 Cal. App. 3d 611, 615-616)* . The court noted that, because the law looks with disfavor on a party who attempts to take advantage of his or her adversary, the "quiet speed" of plaintiff's counsel in seeking a default has been

deemed a sufficient ground for setting aside a default under *Code Civ. Proc. § 473* (*67 Cal. App. 3d 611, 616)* . The court stated that whether it characterized the conduct of defendant's counsel as reasonable, or the conduct of plaintiff's counsel as unreasonable, the result is the same under the "peculiar factual context" of the case before it. The court held that given the short period of time in which an answer had to be filed (five days under *Code Civ. Proc. § 1167.3*), the press of business at defense counsel's office arising from the illness of the chief trial attorney, the limited office hours during Christmas week, and defense counsel's preoccupation with other litigated matters, it might be found that the failure to file a timely answer or a request for an extension to file an answer was excusable (*67 Cal. App. 3d 611, 616)* . On the other hand, it held, it might also have been found that reliance on opposing counsel to give notice prior to taking default was justifiable, or contrariwise, that the quiet taking of default on the beginning of the first day on which defendant's answer was delinquent was the sort of professional discourtesy that justifies vacating the default. In either case, the court stated, given the broad discretion with which the court was vested in making its determination under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), and the policy favoring orders that permit a hearing on the merits, it concluded that the trial court acted well within its discretion in setting aside the default judgment (*67 Cal. App. 3d 611, 616)* . The court also held that defendant did not unreasonably delay in applying for relief as a matter of law (*67 Cal. App. 3d 611, 617)* .

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7-70 California Points & Authorities § 70.99

§ 70.99 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Excusable Neglect [Code Civ. Proc. § 473(b)]--Calendaring Error by Party's Attorney

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion for relief under Code Civ. Proc. § 473(b) (see, e.g., §§ 70.10, 70.30, 70.40).*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other proceeding*)] UNDER CODE OF CIVIL PROCEDURE SECTION 473(b) ON THE GROUND THAT IT WAS ENTERED BECAUSE OF EXCUSABLE NEGLECT ON THE PART OF THE DEFENDANT'S ATTORNEY, IN THAT THE _____ [*identify proceeding, e.g.,* DEFAULT AND DEFAULT JUDGMENT] RESULTED FROM HIS/HER EXCUSABLE CALENDARING ERROR.

A. Policy Favors Relief if Excusable Neglect Shown. [*See 70.90[1], Paragraphs A and B.*]

B. Calendaring Error of Attorney or Attorney's Office Staff. Relief from default and default judgment may be granted when the default resulted from a calendaring error by the defaulting party's attorney or that attorney's office staff if the error is reasonable and sufficiently explained (*Flores v. Board of Supervisors (1970) 13 Cal. App. 3d 480, 483, 91 Cal. Rptr. 717*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that a default and default judgment, or judgment, dismissal, order, or other proceeding should be set aside on the ground of excusable neglect, in that it was caused by an excusable

calendaring error made by the moving party's attorney or the office staff of the moving party's attorney [*see Code Civ. Proc. § 473(b)*; *see also Flores v. Board of Supervisors (1970) 13 Cal. App. 3d 480, 483, 91 Cal. Rptr. 717]* .

This form should be combined with a general memorandum supporting a motion for relief under Code Civ. Proc. § 473(b) [*see §§ 70.10, 70.30, 70.40*]. It may also be combined when appropriate, with points and authorities supporting relief on other grounds specified in *Code Civ. Proc. § 473(b)* [*see, e.g., §§ 70.50 -70.98, 70.100 -70.110*; *see also* discussion in *§ 70.10[3][g]*].

This form may also be adapted for use in a trial or appellate brief.

For discussion relating to an attorney's affidavit of fault, see *§§ 70.12[2], 70.70[2][c]*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Counsel should therefore set forth facts describing the reasonableness of the attorney's calendaring error in light of the surrounding circumstances. For example, if appropriate, counsel should describe the complexity of the litigation and the proliferation of calendar dates, and the resulting confusion to the attorney for the moving party. For discussion of additional facts that should be described, if appropriate, see *§ 70.98[2][c]*. See also *§ 70.10[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 70.210* et seq. may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Calendaring Errors of Attorney or Attorney's Office Staff

In ***Flores v. Board of Supervisors*** *(1970) 13 Cal. App. 3d 480, 91 Cal. Rptr. 717* , the trial court denied a petition for relief under *Gov. Code § 946.6* from the tardy filing of a tort claim against a county under *Gov. Code § 911.2* (requiring at that time that claims against government entities for death or injury be presented within 100 days of the accrual of the case of action). Attorneys for petitioners admitted that the lateness of the claim was due to the failure of the attorneys to open a file in the action, which would have reminded them of the limitation for filing petitioners' claim against the county. Their oversight was compounded by difficulties they encountered in obtaining copies of relevant hospital records to aid in preparing petitioners' claim.

The court of appeal reversed, noting that the showing required of a petitioner seeking relief under *Gov. Code § 946.6* on the grounds of mistake, inadvertence, surprise, or excusable neglect is the same as that required under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), for relieving a party from a default or default judgment (*13 Cal. App. 3d 480, 483)* . The court cited an earlier appellate case that reviewed cases of attorney neglect under *Code Civ. Proc. § 473* and declared that, although not every mistake of an attorney constitutes excusable neglect, calendar errors by an attorney or his or her staff are, in appropriate circumstances, excusable (*13 Cal. App. 3d 480, 483-484)* . The court distinguished cases relied on by the county to oppose petitioners' motion, pointing out that relief was denied in those actions because allegations of inadvertence and neglect were insufficiently explained (*13 Cal. App. 3d 480, 484)* . Petitioners in the instant case had taken every action to present their claim within the time permitted and only a "relatively minor error" by their counsel prevented litigation of their claim. In view of the case law, and because the county made no showing of prejudice to it due to the late filing of the claim, the court reversed the order denying relief to petitioners, commenting that the fact that the delay involved in filing the claim was only 23 days deserved special emphasis (*13 Cal. App. 3d 480, 485)* .

Counsel should note that *Flores* was criticized in *Shank v. County of Los Angeles (1983) 139 Cal. App. 3d 152, 188 Cal. Rptr. 644* , regarding the relevance of the absence of prejudice to the county defendant. The court in *Shank* stated that *Flores* ignores the rule that a public entity has no burden to establish prejudice until the plaintiff has satisfied the trial court that the failure to file a timely claim was because of mistake, inadvertence, surprise, or excusable neglect (*139 Cal. App. 3d 152, 158-159)* . The conflict is not important in the context of a motion under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), as distinct from a proceeding for relief pursuant to the Government Code against a public entity (the case under both *Flores* and *Shank*). The holding under *Flores* regarding an attorney's calendaring error as a ground for relief because of excusable neglect is relevant to relief under *Code Civ. Proc. § 473* (*now see Code Civ. Proc. § 473(b)*), because the grounds for relief under that statute are the same as those under the relevant Government Code regarding actions against public entities, and courts look to authority under both codes in determining the appropriateness of particular grounds for relief [*see, e.g., Flores v. Board of Supervisors (1970) 13 Cal. App. 3d 480, 483, 91 Cal. Rptr. 717]* .

[4] Additional Authorities

[a] Calendaring Errors of Attorney or Attorney's Office Staff

In *Nilsson v. City of Los Angeles (1967) 249 Cal. App. 2d 976, 58 Cal. Rptr. 20* , the court of appeal reversed the trial court's denial of relief to a claimant under the Tort Claims Act (*Gov. Code § 900 et seq.*), based on a calendaring error made by the claimant's attorney (*249 Cal. App. 2d 976, 979-983)* . The court stated that the basis for relief under *Gov. Code § 912* is the same as that required under *Code Civ. Proc. § 473*, which has been applied with liberality in relieving parties from a default judgment (*249 Cal. App. 2d 976, 979)* .

In *Taliaferro v. Riddle (1960) 182 Cal. App. 2d 235, 5 Cal. Rptr. 874* , the court of appeal affirmed the trial court's granting of defendant's motion to set aside the default and default judgment, basing its decision on affidavits of defendant's attorneys, which described the attorneys' confusion because of the number and complexity of the proceedings between the parties. The court noted that the "litigious history" of plaintiff's disputes with defendant supported the claim that the confusion of defendant's attorneys was not unreasonable, particularly in light of earlier cases cited by the court in which relief was granted in "less complex" circumstances (*182 Cal. App. 2d 235, 236-237)* .

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CHAPTER 70 DEFAULTS, DEFAULT JUDGMENTS, AND RELIEF FROM JUDGMENTS AND ORDERS
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7-70 California Points & Authorities § 70.100

§ 70.100 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Excusable Neglect [Code Civ. Proc. § 473(b)]--Exception for Inexcusable Neglect of Attorney That Constitutes Positive Misconduct

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion for relief from under Code Civ. Proc. § 473(b) (see, e.g., §§ 70.10, 70.30, 70.40).*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other proceeding*)] UNDER CODE OF CIVIL PROCEDURE SECTION 473(b) BECAUSE THE NEGLECT ON THE PART OF THE DEFENDANT'S ATTORNEY AMOUNTED TO POSITIVE MISCONDUCT, THROUGH NO FAULT OF DEFENDANT.

A. Policy Favors Relief if Excusable Neglect Shown. [*See 70.90[1], Paragraphs A and B.*]

B. Attorney's Neglect Amounting to Positive Misconduct. Relief from default and default judgment may be granted when the default resulted from neglect of the moving party's attorney even though the neglect is inexcusable, if the neglect is of that extreme degree amounting to positive misconduct, and the person seeking relief is relatively free from negligence (*Buckert v. Briggs (1971) 15 Cal. App. 3d 296, 301, 93 Cal. Rptr. 61*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that a default and default judgment, or judgment, dismissal, order, or other proceeding should be set aside on the ground of excusable neglect. The ground of the contention is that although the moving party's attorney committed inexcusable neglect, his or her conduct was so extreme that it amounts

to positive misconduct, constituting an exception to the rule that excusable neglect must be shown, so long as the moving party is relatively free of negligence in causing the default to be taken [*see Code Civ. Proc. § 473(b)*; *see also Buckert v. Briggs (1971) 15 Cal. App. 3d 296, 301, 93 Cal. Rptr. 61]* .

This form should be combined with a general memorandum supporting a motion for relief under *Code Civ. Proc. § 473(b)* [*see §§ 70.10, 70.30, 70.40*]. It may also be combined when appropriate, with points and authorities supporting relief on other grounds specified in *Code Civ. Proc. § 473(b)* [*see, e.g., §§ 70.50 -70.99, 70.110*; *see also* discussion in *70.10[3][g]*].

This form may also be adapted for use in a trial or appellate brief.

For discussion relating to an attorney's affidavit of fault, see *§§ 70.12[2], 70.70[2][c]*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Counsel should therefore describe the conduct of the attorney whose neglect caused the default to be taken, and show that it is extreme enough to be classified as positive misconduct, and that it effected an obliteration of the attorney-client relationship. Counsel should also describe the moving party's conduct with respect to the default, and show why he or she was not negligent or blameworthy under the circumstances. See also *§ 70.10[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 70.215* et seq. may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Attorney's Neglect Amounting to Positive Misconduct

Buckert v. Briggs *(1971) 15 Cal. App. 3d 296, 93 Cal. Rptr. 61* , involved a complaint and cross complaint to quiet title to an easement over property owned by plaintiffs. The action was set for trial, but plaintiffs' attorney failed to appear or to notify plaintiffs of the trial date, and judgment was entered against the plaintiffs on defendant's cross complaint. Plaintiffs contacted the trial judge, who stated that *Code Civ. Proc. § 473* would provide a method for seeking relief from the default and that plaintiffs had six months in which to act. Plaintiffs sought to engage a new attorney, but had difficulty in raising funds with which to pay the attorney's retainer and in obtaining the cooperation of the original attorney. Consequently, they did not move for relief until some five months after the judgment was entered. Based on the appellate court's references to the six-month limit of *Code Civ. Proc. § 473*, it would appear that plaintiffs' motion was founded on that section, although the court indicated that "[r]elief may be given in the action in which the judgment was entered in the exercise of the court's equitable jurisdiction or under the authority statutorily conferred by *Code of Civil Procedure Section 473*" (*15 Cal. App. 3d 296, 301)* . The trial court granted the motion, and defendant and cross complainant appealed, arguing that there was no showing that plaintiffs' attorney's failure to give notice of the trial was excusable and that the application for relief was not made within a reasonable time.

The court of appeal affirmed, stating that the attorney's failure to advise the plaintiffs of the trial date constituted positive misconduct such that his negligence would not be imputed to plaintiffs; and plaintiffs' failure to attend the trial was therefore the product of extrinsic surprise and mistake without negligence on their part. The court noted that relief granted to a party for his or her attorney's extreme negligence is "premised on the concept that the attorney's conduct, in effect, obliterates the existence of the attorney-client relationship" and therefore the negligence should not be imputed to the client. Plaintiffs' attorney failed to appear on plaintiffs' behalf because he believed, without cause, that they had lost interest in the case. This, the court said, supported the inference that he regarded the attorney-client relationship to have

been discharged and that he did not intend to act on their behalf, despite the fact that plaintiffs had requested that the case be tried as soon as possible (*15 Cal. App. 3d 296* , 301-302). Further, the court held that the trial court did not abuse its discretion in finding that plaintiffs had acted with reasonable diligence under the circumstances, particularly because there was no showing that defendant had suffered prejudice by the delay other than that incident to a trial of the issues, which is not cause for denying relief from default (*15 Cal. App. 3d 296, 302)* . The court noted that when there is no showing that the party opposing the motion to vacate a judgment has suffered any prejudice or that injustice will result from a trial on the merits, very slight evidence is required to justify the court in setting a default aside (*15 Cal. App. 3d 296, 302-303)* .

Counsel should note that the court in *Mitchell v. Department of Transportation (1985) 163 Cal. App. 3d 1016, 210 Cal. Rptr. 266* , a case that distinguished itself from Buckert, and declined to allow a claimant under the Torts Claims Act (*Gov. Code § 900 et seq.*) to file a late claim, observed that the factual circumstances in cases that fall within the "positive misconduct" exception demonstrate a "total failure on the part of counsel to represent the client to the extent that each attorney had de facto substituted himself out of the case" (*163 Cal. App. 3d 1016, 1023)* .

[4] Additional Authorities

[a] Attorney's Neglect Amounting to Positive Misconduct

In *Daley v. County of Butte (1964) 227 Cal. App. 2d 380, 38 Cal. Rptr. 693* , the court of appeal reversed a trial court order denying plaintiff's motion to set aside a judgment of dismissal granted by the court for lack of prosecution of the action. Evidence showed gross negligence on the part of plaintiff's attorney in that he maintained almost complete silence and inactivity in the action for some two years, failing to make any appearance in numerous pretrial conferences, and failing to cooperate with the client's attempt to substitute in another attorney. The court held that under these circumstances, a client who was unknowingly deprived of effective representation will not be charged with responsibility for the misconduct of her nominal counsel of record (*227 Cal. App. 2d 380, 391-392)* .

In *Vartanian v. Croll (1953) 117 Cal. App. 2d 639, 256 P.2d 1022* , the trial court granted plaintiff's motion (on grounds of mistake, inadvertence, excusable neglect, and fraud) to set aside a judgment rendered after a trial on the merits in favor of defendant. The ground of excusable neglect was based on negligence of the moving party's first counsel to produce available evidence. The court noted that although that conduct alone would not usually warrant relief under *Code Civ. Proc. § 473*, the omission of that evidence constituted a miscarriage of justice, and together with other irregularities of the case, warranted relief as an exception to the general rule that a client is chargeable with his or her attorney's negligence (*117 Cal. App. 2d 639, 644-648)* .

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7-70 California Points & Authorities §§ 70.101-70.109

[Reserved]

§§ 70.101[Reserved]

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7-70 California Points & Authorities § 70.110

§ 70.110 Supporting Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Fraud of Opposing Party

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion for relief under Code Civ. Proc. § 473(b) (see, e.g., §§ 70.10, 70.30, 70.40).*]

THE COURT SHOULD GRANT THE MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other proceeding*)] UNDER CODE OF CIVIL PROCEDURE SECTION 473(b) BECAUSE THE _____ [*identify proceeding, e.g.,* DEFAULT] WAS CAUSED BY FRAUD ON THE PART OF THE OPPOSING PARTY.

Statutory Relief Based on Fraud. Relief from default and default judgment is available under *Code of Civil Procedure Section 473(b)* if the default was caused by the fraud of the opposing party, based on either extrinsic or intrinsic fraud, and relief is sought within the time limitations set forth in the statute (*Batchelor v. Finn (1959) 169 Cal. App. 2d 410, 417-418, 337 P.2d 545* ; *In re Johnson (1908) 7 Cal. App. 436, 439, 94 P. 592*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that a default and default judgment, or judgment, dismissal, order, or other proceeding should be set aside on the ground of fraud [*see Code Civ. Proc. § 473(b)*; *see also Batchelor v. Finn (1959) 169 Cal. App. 2d 410, 417, 337 P.2d 545]* .

This form should be combined with a general memorandum supporting a motion for relief under *Code Civ. Proc. § 473(b)* [*see §§ 70.10, 70.30, 70.40*]. It may also be combined when appropriate, with points and authorities supporting relief on other grounds specified in *Code Civ. Proc. § 473(b)* [*see, e.g., §§ 70.50 -70.100*; *see also* discussion in

70.10[3][g]].

This form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Counsel should therefore describe the circumstances under which the default was taken, for example, perjured testimony given at the default hearing on behalf of the opposing party, and show why the default or default judgment was the result of fraud on the part of the opposing party. See also *§ 70.10[2][b]* regarding evidentiary support for facts stated.

[c] Relief Based on Opposing Party's Fraud

[i] Generally

Although *Code Civ. Proc. § 473(b)*, does not specifically mention fraud as a basis for relief, case law has established that relief is available under the statute for fraud [*see, e.g., In re Johnson (1908) 7 Cal. App. 436, 439, 94 P. 592* ; *see also* Witkin, California Procedure, Vol. 8, *Attack on Judgment in Trial Court*, § 148 (3d ed. 1985)]. Relief is available under the statute for either extrinsic or intrinsic fraud, if the application for relief is brought within the time limitations of the statute [*In re Johnson (1908) 7 Cal. App. 436, 439, 94 P. 592* (discussed under [3], *below*)].

[ii] Extrinsic and Intrinsic Fraud Distinguished

Fraud is intrinsic when a party has been given proper notice of an action and has not been prevented from full participation, even though he or she does not take the opportunity to appear before the court [*Westphal v. Westphal (1942) 20 Cal. 2d 393, 397, 126 P.2d 105]* . Thus, use of perjured testimony or forged documents, or the withholding of evidence from the court constitute intrinsic fraud [*see Gale v. Witt (1948) 31 Cal. 2d 362, 366, 188 P.2d 755* ; *Buesa v. City of Los Angeles (2009) 177 Cal. App. 4th 1537, 1545-1548, 100 Cal. Rptr. 3d 86*].

Fraud is extrinsic when it deprives the unsuccessful party of an opportunity to present his or her case to the court, such as when a party is kept in ignorance of a proceeding or has been prevented by the adversary's actions from fully participating. Examples of extrinsic fraud are keeping one's opponent away from court with a false promise of compromise, or depriving defendant of knowledge of the suit [*see Caldwell v. Taylor (1933) 218 Cal. 471, 476-477, 23 P.2d 758]* .

[iii] Alternate Relief Available When Fraud Is Extrinsic

If the fraud is extrinsic, equitable relief is also available, in which case the restrictions set forth in *Code Civ. Proc. § 473* generally do not apply [*see, e.g., In re Marriage of Adkins (1982) 137 Cal. App. 3d 68, 76, 186 Cal. Rptr. 818]* . The availability of relief under the court's equitable powers is significant particularly because the statutory six-month time limitation does not apply. For memoranda of points and authorities supporting a motion for equitable relief based on extrinsic fraud, see *§ 70.480* et seq.

[d] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 70.147* and *70.148* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Statutory Relief Based on Fraud

Batchelor v. Finn *(1959) 169 Cal. App. 2d 410, 337 P.2d 545* , involved two consolidated actions based on the sale of an airplane. One of the actions resulted in a default judgment for plaintiff. At the default hearing in that case, plaintiff, who was the only witness, deliberately withheld information regarding the underlying written agreement. The trial court granted defendants' motion under *Code Civ. Proc. § 473* to vacate the default judgment, on the ground that the suppression of evidence was a fraud on the court and on the defendants. Plaintiff appealed.

The court of appeal affirmed, finding that the trial court's conclusion that plaintiff had committed a fraud on the court was reasonable, in that circumstances pointed to deliberate suppression. The court observed that the trial court would probably not have found for the plaintiff had it known the terms of the concealed agreement (*169 Cal. App. 2d 410, 416)* . The court noted that when a trial court in a proper proceeding vacates a judgment it has rendered in ignorance of material facts that it believes a party had a duty to disclose, and that, if known, would have precluded the judgment, the appellate court will not question the action. The court stated that the fact that the fraud perpetrated on the court was intrinsic rather than extrinsic is immaterial on a motion to vacate made within six months, as was the instant case (*169 Cal. App. 2d 410, 417)* .

In re Johnson *(1908) 7 Cal. App. 436, 94 P. 592* , involved an order confirming the sale of stocks by the executrix of an estate. The superior court vacated the order under *Code Civ. Proc. § 473* on the challenge of an heir of the estate that the sale at a disproportionately low price was a fraud on the estate of the heir. The prospective buyer of the stock brought a petition for writ of review, questioning whether the superior court had jurisdiction to grant the relief.

The court of appeal dismissed the writ of review, holding that the superior court did have jurisdiction and that it had properly exercised discretion in the case (*7 Cal. App. 436, 438-439)* . The court noted that equity will grant relief after the time limitation imposed by *Code Civ. Proc. § 473* has expired, if extrinsic fraud is alleged (*7 Cal. App. 436, 439)* . The court stated, however, that in applying for relief under *Code Civ. Proc. § 473* within the statutory time limits, no distinction will be made between extrinsic or other fraud. Fraud or "its equivalent," whether on the court or a party or "one so situated as to be held in law an adversary," is sufficient ground for relief (*7 Cal. App. 436, 439)* . On the facts of the case, however, the court held that the buyer had no standing to invoke a review of the order vacating the confirmation of sale, in that the executrix had earlier rescinded the contract of sale, leaving the buyer with no interest in the property at issue (*7 Cal. App. 436, 439)* .

[4] Additional Authorities

[a] Statutory Relief Based on Fraud

In *Peterson v. Peterson (1955) 135 Cal. App. 2d 812, 288 P.2d 171* , plaintiff husband had obtained, ex parte, a final decree of divorce. Defendant's motion to set aside that decree, made nearly six years later, was granted on the ground that plaintiff had committed fraud in concealing from the court the fact that the parties had reconciled prior to entry of the final decree. Plaintiff successfully moved under *Code Civ. Proc. § 473* to vacate the order setting aside the final decree on the ground of defendant's fraud in falsely testifying that the parties had reconciled, and plaintiff's excusable neglect in failing to produce certain evidence at the hearing on defendant's motion that would have demonstrated the fraud. The court of appeal affirmed, noting that it is a "well-recognized principle" that a court of general jurisdiction has inherent power to set aside a judgment obtained through fraud practiced on the court (*135 Cal. App. 2d 812, 816)* . If the fraud is intrinsic and time for appeal has expired, the party seeking relief must make application under *Code Civ. Proc. § 473* within six months after judgment (*135 Cal. App. 2d 812, 816)* . The court noted that when the motion for relief on the ground of fraud is made under the provisions of *Code Civ. Proc. § 473*, it is immaterial if the fraud is extrinsic or intrinsic (*135 Cal. App. 2d 812, 817)* .

In *Rice v. Rice (1949) 93 Cal. App. 2d 646, 209 P.2d 662* , the court of appeal affirmed the trial court's granting of plaintiff's motion under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), for relief, on

the ground of fraud, from an interlocutory decree of divorce. The court held that fraud is recognized as a ground for relief under the statute, and that the trial court properly found that the defendant committed fraud in connection with the classification of certain real property as separate, rather than community property (*93 Cal. App. 2d 646, 651-652)* .

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7-70 California Points & Authorities §§ 70.111-70.119

[Reserved]

§§ 70.111[Reserved]

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7-70 California Points & Authorities § 70.120

§ 70.120 Opposing Motion to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. § 473(b)]--General Form--Relief Is Subject to Court's Sound Discretion

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN OPPOSITION TO MOTION
vs.	)	TO SET ASIDE _____ [DEFAULT
_____ [*name*],	)	AND DEFAULT JUDGMENT *or* JUDGMENT *or*
Defendant.	)	DISMISSAL *or* ORDER *or* _____
	)	(*identify other proceeding*)]
	)	Date: _____
	)	Time: _____
	)	Location: _____
		[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD DENY THE MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other*

proceeding)] BECAUSE THE MOTION IS NOT SUPPORTED BY ANY SUFFICIENT GROUND UNDER CODE OF CIVIL PROCEDURE SECTION 473(b) AND THE COURT THEREFORE HAS NO DISCRETION TO GRANT RELIEF.

A. Relief Pursuant to Trial Court's Discretion. A motion under *Code of Civil Procedure Section 473(b)* is addressed to the sound discretion of the trial court (*Iott v. Franklin (1988) 206 Cal. App. 3d 521, 527, 253 Cal. Rptr. 635* ; *Gardner v. Superior Court (1986) 182 Cal. App. 3d 335, 338, 227 Cal. Rptr. 78*).

B. Court Has No Discretion to Grant Relief When Ground for Relief Not Shown. If a party fails to show that a judgment has been taken against him or her through mistake, inadvertence, surprise, or excusable neglect, the court may not grant relief; it has no discretion in the matter (*Iott v. Franklin (1988) 206 Cal. App. 3d 521, 528, 253 Cal. Rptr. 635*).

C. Burden of Proof on Moving Party. The burden of showing that the default was entered through mistake, inadvertence, surprise, or excusable neglect is on the moving party, and in the absence of that showing, the default may not be set aside (*Luz v. Lopes (1960) 55 Cal. 2d 54, 62, 10 Cal. Rptr. 161, 358 P.2d 289* ; *Moghaddam v. Bone (2006) 142 Cal. App. 4th 283, 289-292, 47 Cal. Rptr. 3d 602* ; *Price v. Hibbs (1964) 225 Cal. App. 2d 209, 216, 37 Cal. Rptr. 270*).

[*When appropriate, add points and authorities opposing the motion on additional, general grounds, for example, that the mistake was not reasonable (see, e.g., § 70.121 et seq.). In addition, when appropriate, add points and authorities opposing the motion on additional particular grounds, for example, that motion is not timely (see, e.g., § 70.140 et seq.), or that the moving party has not made a sufficient showing justifying relief on the specific ground or grounds asserted (see, e.g., §§ 70.160 -70.216). Additional points and authorities may be also be added, when appropriate, supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief (see, e.g., § 70.230 et seq.).*]

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*opposing party*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion to set aside a default and default judgment, or judgment, dismissal, order, or other proceeding under *Code Civ. Proc. § 473(b)*. It is a general form that asserts that the moving party has failed to set forth a ground of relief under the statute, and that the trial court therefore has no discretion to grant the relief requested [*see Code Civ. Proc. § 473(b)*; *see also Iott v. Franklin (1988) 206 Cal. App. 3d 521, 528, 253 Cal. Rptr. 635]* .

The caption and form should be modified as necessary when relief is sought from the entry of default only, as distinguished from the entry of default and a resulting default judgment. Although a party typically seeks relief under

Code Civ. Proc. § 473(b), from a default or default judgment, or both, a court may grant relief under that section from any "judgment, dismissal, order, or other proceeding." This form may be modified, as appropriate, for use in opposing the grant of relief in situations other than a default and default judgment.

In an appropriate case, this form may be submitted in opposition to the points and authorities *set out in §§ 70.10 -70.41*.

When appropriate, this form may be combined with the following points and authorities generally opposing the motion for relief, on the following grounds:

- The motion should be denied based on policy [*see, e.g., § 70.121[1]*].
- The mistake, inadvertence, surprise, or excusable neglect was not reasonable [*see, e.g., § 70.122[1]*].
- The moving party failed to exercise reasonable diligence in arranging for his or her defense [*see, e.g., § 70.123[1]*].
- An attorney's negligence is imputed to the client [*see, e.g., § 70.124[1]*].
- The moving party's argument that he or she has a meritorious defense is irrelevant [*see, e.g., § 70.125[1]*].

This form should be combined with additional points and authorities opposing relief on other particular grounds. For example, it may be combined with additional points and authorities showing that:

- The motion is not timely [*see §§ 70.140 -70.148*].
- The moving party has not made a sufficient showing justifying relief on the specific ground or grounds asserted [*see §§ 70.160 -70.216*; *see also* discussion in *70.10[2][g]*].

This form may also be combined, in an appropriate case, with additional points and authorities opposing a grant of relief based on other statutory or decisional authority, when the motion and supporting memorandum has asserted such additional authority as alternate bases for relief [*see* discussion in *§ 70.10[2][c]*]. This form may also be combined, when appropriate, with points and authorities supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief [*see §§ 70.230*, *70.231*].

This form may also be adapted for use in a trial or appellate brief.

See also *§ 70.10[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b)*, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should show that defendant had no reasonable excuse for the default, and that the circumstances surrounding the default indicate that the court has no discretion to grant relief.

In an appropriate case, counsel would refer to evidence set forth in:

- Declarations submitted in opposition to relief from the judgment, order, or dismissal [*see Cal. Rules of Court, Rule 3.1306(a)*].

- Discovery documents, such as deposition transcripts and answers to interrogatories and requests for admission.

- The opposing party's pleadings that constitute admissions.

- Other documentary evidence generally.

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*].

When counsel cites facts in his or her argument, counsel should refer to the particular page and line number of the declaration, deposition transcript, or other document, that contains the cited facts. In addition, the relevant portion of any testimony in a deposition should be marked in a manner that calls attention to the testimony [*see Cal. Rules of Court, Rule 3.1116(c)*].

For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Attorney Affidavit of Fault

The granting of relief is mandatory if based on an attorney affidavit of fault. Specifically, whenever an application for relief under *Code Civ. Proc. § 473* is timely, in proper form, and accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, the court must vacate any resulting default judgment or dismissal entered against his or her client unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect [*Code Civ. Proc. § 473*]. However, an attorney's affidavit of fault does not mandate relief under *Code Civ. Proc. § 473(b)* from judgments entered on an arbitration award [*Brown v. Williams (2000) 78 Cal. App. 4th 182, 188-189, 92 Cal. Rptr. 2d 634* ; *see § 70.131*].

Further, notwithstanding the mandatory nature of the provision, a court may deny relief on the ground of lack of causation between the attorney's conduct and the taking of the default [*see Billings v. Health Plan of America (1990) 225 Cal. App. 3d 250, 256, 275 Cal. Rptr. 80]* . A court may also deny relief based on lack of diligence when relief is sought within the six month period but beyond a date the court considers reasonable [*see Caldwell v. Methodist Hospital (1994) 24 Cal. App. 4th 1521, 1524-1525, 29 Cal. Rptr. 2d 894* (court rejected motion for relief based on attorney's affidavit of fault filed three months after action was dismissed)]. *Caldwell* relied on *Billings* in so holding, and did not discuss the possible effect of the amendment of Section 473 on *Billings*, as discussed in *§ 70.12[3][a]*.

[3] Discussion of Authorities

[a] Relief Pursuant to Trial Court's Discretion

In ***Iott v. Franklin*** *(1988) 206 Cal. App. 3d 521, 253 Cal. Rptr. 635* , defendants' attorney allegedly attempted by mail to contact plaintiff's attorney prior to the deadline for filing a responsive pleading. A letter allegedly sent to plaintiff's attorney was not accompanied by a declaration of mailing, and there was no showing that plaintiff's attorney received it prior to the deadline. Shortly after the time for filing responsive pleading had elapsed, plaintiff's attorney prepared a request to enter default, and mailed copies to all defendants. At approximately the same time that the plaintiff's attorney filed the request with the court clerk, the defendants' attorney telephoned the office of the plaintiff's attorney and left a

message requesting an extension; he also wrote a letter to that effect. At the default hearing, plaintiff presented evidence, and judgment was entered in his favor. Several weeks later, defendants filed a motion to set aside the default and default judgment under *Code Civ. Proc. § 473*, on the ground of excusable neglect. The trial court granted the motion, and plaintiff appealed.

The court of appeal reversed, holding that the trial court abused its discretion in granting the motion (*206 Cal. App. 3d 521, 531)* . The court initially noted that trial judges are presumed to be intelligent, honest, and fair-minded individuals. Within the limit of the power to grant relief from default under the statute, it must be exercised wisely, reasonably, and fairly, with the view of advancing the administration of justice. The court added that these policies favoring relief from default and deference to trial court discretion do not transform appellate courts into mere spectators. However strong the preference for a trial on the merits, there are limits to that preference, and however great is trial court discretion, there are bounds to that discretion (*206 Cal. App. 3d 521, 527)* . The court stated: "[I]f a party shows that a judgment has been taken against him through his mistake, inadvertence, surprise or excusable neglect the court may grant relief. Or it may not. It has discretion. But if a party fails to show that a judgment has been taken against him through his mistake, inadvertence, surprise or excusable neglect, the court may not grant relief. It has no discretion." The court further stated that "excusable" neglect means just that: inexcusable neglect prevents relief. Moreover, the burden of establishing excusable neglect is on the party seeking relief, who must prove it by a preponderance of the evidence (*206 Cal. App. 3d 521, 528)* . The court noted that, under the facts shown, the defendants' failure to respond in time was founded on his counsel's premise that he could unilaterally grant his own extension without any communication from opposing counsel (*206 Cal. App. 3d 521, 529)* . The court concluded that a litigant who fails to attend court on the day of trial for the simple reason that he or she believes the attorney will succeed in securing a continuance cannot claim either mistake or surprise, within the meaning of *Code Civ. Proc. § 473* if a continuance is refused. The court added that it would be absurd to countenance or encourage unilateral, self-created extensions of time. Consequently, an attorney who assumes that opposing counsel has granted extensions of time to file an answer because, in an effort to request the extensions, he has placed telephone calls to but not spoken with, and written letters to but not received answers from opposing counsel, is guilty of inexcusable neglect within the meaning of the statute. Under such circumstances, the court concluded, it is an abuse of discretion for a trial court to grant relief under *Code Civ. Proc. § 473*. The court further stated that to hold otherwise would permit the courts to become a sanctuary for chronic procrastination and irresponsibility on the part of either litigants or their attorneys. It would also thwart vital policies that favor getting cases to trial on time, avoiding unnecessary and prejudicial delay, and preventing litigants from "playing fast and loose" with the pertinent legal rules and procedures. The court concluded that when inexcusable neglect is condoned even tacitly by the courts, they themselves unwittingly become instruments undermining the orderly process of the law (*206 Cal. App. 3d 521, 531)* .

In ***Gardner v. Superior Court*** *(1986) 182 Cal. App. 3d 335, 227 Cal. Rptr. 78* , plaintiff brought suit in San Diego, California, against defendant residents of Montana for an unpaid principal balance on a promissory note. Defendants answered, but failed to appear for depositions or at the trial setting conference. Defendants claimed only that they did not wish to travel from Montana to San Diego, and that defendant wife was ill. At trial, defendants again did not appear; an attorney made a special appearance on their behalf, asking for a continuance, claiming only that defendant wife was ill. The trial court denied the continuance, and entered a default judgment in favor of plaintiff. A month later, defendants noticed a motion for relief from default pursuant to *Code Civ. Proc. § 473*. Defendants filed various declarations, claiming only that defendant wife had been ill with bronchitis, and that the roads in Montana at that time of year were usually icy and often closed by snow. The trial court granted the motion for default relief against its opinion that defendants "haven't got a prayer," only because it felt compelled to grant relief or be reversed by the appellate court. Plaintiff sought a writ of mandate to set aside the order vacating the default judgment.

The court of appeal ordered that a writ of mandate issue directing the trial court to vacate the judgment setting aside the default, and to exercise informed discretion in deciding the matter. The court of appeal viewed the trial court's comments as inappropriate to a determination of whether or not to set aside a default. The court of appeal noted that a policy of the law favors deciding cases on their merits. It further stated, however, that other policies favor getting cases to trial on time, avoiding unnecessary and prejudicial delay, and preventing litigants from "playing fast and loose" with

the pertinent legal rules and procedures. Inasmuch as relief has been denied when a party's neglect is truly inexcusable, it should not be assumed that relief will automatically be given. Rather, the task of the trial court is to use its discretion in determining whether or not relief from default should be given (*182 Cal. App. 3d 335, 338-341)* .

[b] Court Has No Discretion to Grant Relief When Ground for Relief Not Shown

Iott v. Franklin *(1988) 206 Cal. App. 3d 521, 253 Cal. Rptr. 635* , is discussed under [a], *above*.

[c] Burden of Proof on Moving Party

In ***Luz v. Lopes*** *(1960) 55 Cal. 2d 54, 10 Cal. Rptr. 161, 358 P.2d 289* , the trial court denied defendants' motion to set aside a default and default judgment. Immediately after serving the complaint on defendants, plaintiffs agreed to a settlement, stipulating that failure to comply with its terms would result in plaintiffs' proceeding for the relief demanded in their complaint. Defendants defaulted within a month of agreeing to the settlement, and plaintiffs demanded in writing that defendants answer within 10 days. Instead of answering, defendants asked plaintiffs to allow them more time, stating that they would soon have the necessary funds to pay plaintiffs. Plaintiffs responded that further cooperation was impossible and that they would pursue their legal remedies. Three weeks later, plaintiffs obtained entry of default; three days after that date, a default judgment was entered. Defendants appealed the denial of their motion for relief under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*).

The Supreme Court affirmed, finding that defendants had not been misled and that their default was not excusable. The Court stated that it is the duty of every party desiring to resist an action or to participate in a judicial proceeding to take timely and adequate steps to retain counsel or to act to avoid an undesirable judgment. The court also stated that unless in arranging for his or her defense the party exercises such reasonable diligence as a person of ordinary prudence usually bestows on important business, a motion for relief under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), will be denied; courts do not act as guardian for incompetent parties, or for those who are grossly careless of their own affairs. It added that the burden of proof on the motion for relief under *Code Civ. Proc. § 473* is on the moving party, who must establish his or her position by a preponderance of the evidence. The court noted that in the case before it, the affidavits and testimony show that immediately after serving the complaint on defendants, plaintiffs conditionally agreed to a settlement, but warned that failure to comply with its terms would result in their proceeding for the relief demanded (*55 Cal. 2d 54, 62)* . The Court found that the facts do not show any mistake, inadvertence, surprise, or excusable neglect under the statute, in that the defendants were aware of the facts regarding plaintiffs' intention to pursue their rights if necessary, and were not misled. Therefore, the trial court was justified in refusing to set aside the default or default judgment (*55 Cal. 2d 54, 63)* .

In ***Moghaddam v. Bone*** *(2006) 142 Cal. App. 4th 283, 47 Cal. Rptr. 3d 602* , plaintiff and defendants disputed their relative obligations under a car lease. After defendants did not answer the complaint, the trial court entered default judgment in favor of plaintiff. The defendants moved to set aside the default on the grounds of extrinsic fraud or mistake, claiming they were not served with the summons and complaint nor did they receive notice of the default prove up hearing. The court then set aside the default based on defendants' unopposed claim of extrinsic fraud/mistake. Plaintiff then moved the court to abandon its decision to vacate the default judgment on the grounds that he did not receive notice of the defendants' motion to set aside. The trial court revisited the motion to set aside and reaffirmed its previous ruling (*142 Cal. App. 4th, 283, 286)* .

The court of appeal reversed both the order setting aside the default and the trial court's affirmation of that ruling. The court held first that the order setting aside the default judgment was void, because service of papers to an incorrect address was not acceptable notice, and both of plaintiff's addresses to which defendants sent notice contained incorrect zip codes. Thus, plaintiff was never given proper notice of the motion to set aside the court's previous judgment (*142 Cal. App. 4th 283, 288-289* & n.4). The court then held that, although the burden of proof rested with the defendants as the moving party of the motion being reconsidered and the trial court properly placed the burden of proving a

meritorious defense on the defendants as the moving party, it later misplaced the burden of proof on plaintiff regarding the other elements required to set aside the default and concluded that plaintiff failed to meet his burden of proof (*142 Cal. App. 4th 283, 289-292)* .

In ***Price v. Hibbs*** *(1964) 225 Cal. App. 2d 209, 37 Cal. Rptr. 270* , service of summons and plaintiffs' complaint was made on defendant on March 25. Apparently, defendant did not believe he had been served on this date, and for some reason not explained in the supporting declarations, thought he had been served either two, three, or four weeks after this date. In any case his default was entered on April 25, one day after the expiration of the time to file a responsive pleading. On May 2, defendant's attorneys received the complaint, which defendant had forwarded to them. On May 28 the attorneys filed a motion to vacate the default, supported by responsive pleadings and declarations by the defendant and the attorneys concerning defendant's mistaken belief regarding the time of service. The trial court denied the motion, and defendant appealed.

The court of appeal affirmed (*225 Cal. App. 2d 209, 223)* . The court stated that the burden of showing that the default was entered through mistake, inadvertence, surprise, or excusable neglect is on the moving party, and in the absence of that showing, the default may not be set aside (*225 Cal. App. 2d 209, 216)* . The court noted that the trial court's order involves two aspects: a question of fact regarding the date of service; and the question whether, the facts being as impliedly found, the trial court abused its discretion in upholding the strict letter of the law with respect to the default (*225 Cal. App. 2d 209, 216-217)* . The court stated that the mislaying of process, forgetfulness, or intentional disregard of service does not constitute mistake, inadvertence, surprise, or excusable neglect within the meaning of *Code Civ. Proc. § 473* (*225 Cal. App. 2d 209, 217)* . The court concluded that under the facts, it is compelled to affirm the trial court's exercise of discretion (*225 Cal. App. 2d 209, 218)* .

[4] Additional Authorities

[a] Relief Pursuant to Trial Court's Discretion

Beeman v. Burling (1990) 216 Cal. App. 3d 1586, 265 Cal. Rptr. 719 , is discussed in *§ 70.210[3][b]*.

Martin v. Johnson (1979) 88 Cal. App. 3d 595, 151 Cal. Rptr. 816 , is discussed in *§ 70.162*.

In *A & B Metal Products v. MacArthur Properties, Inc. (1970) 11 Cal. App. 3d 642, 89 Cal. Rptr. 873* , the court of appeal affirmed the trial court's denial of defendant's motion seeking relief from a default and default judgment entered against it. The court held, inter alia, that the trial court did not abuse its discretion in denying the motion because no mistake, inadvertence, surprise, or excusable neglect was shown in support of the grant of relief (*11 Cal. App. 3d 642, 648-650)* .

In *Stevens v. Stevens (1968) 268 Cal. App. 2d 426, 74 Cal. Rptr. 54* , the court of appeal affirmed the trial court's denial of plaintiff's motion to set aside an entry of default and interlocutory judgment of divorce, which was entered at the plaintiff's request based on an incorporated property settlement agreement. The plaintiff contended in support of the motion that defendant's subsequent bankruptcy proceeding rendered the property settlement agreement fraudulent, and that her reliance on the defendant's representations constituted mistake and excusable neglect within the meaning of former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*). The court stated that it is a settled principle of law that motions for relief under the remedial provisions of the statute are addressed to the sound discretion of the trial court, and that the trial court had not abused its discretion in denying relief when the evidence did not sustain any ground for relief under the statute, in that the plaintiff was at all relevant times fully aware of the defendant's precarious financial condition (*268 Cal. App. 2d 426, 429-436)* .

In *Robinson v. Robinson (1962) 208 Cal. App. 2d 213, 25 Cal. Rptr. 143* , the court of appeal affirmed the trial court's denial of relief to the plaintiff in a motion under *Code Civ. Proc. § 473*, following a default judgment entered against

the plaintiff based on a cross complaint in a divorce action. The court stated that it is a settled principle of law that motions for relief under the remedial provisions of the statute are addressed to the sound discretion of the trial court, and that the trial court was fully justified in denying relief inasmuch as the affidavits supporting the motion were in conflict, and the court readily could draw the reasonable inference that there was no mistake, inadvertence, surprise, or excusable neglect on the plaintiff's part (*208 Cal. App. 2d 213, 221)* .

[b] Court Has No Discretion to Grant Relief When Ground for Relief Not Shown

In ***Schwab v. So. Calif. Gas Co.*** *(2004) 114 Cal. App. 4th 1308, 8 Cal. Rptr. 3d 627* , after being severely burned in an explosion and fire in a building in which the husband was working, the plaintiffs, husband and wife, sued the company that had installed a plastic water main under the alleyway behind the building that had caused a steel gas line to explode, the gas company, an electric company, a city and other defendants for personal injuries and loss of consortium. The gas company, electric company and city cross-complained against the company that had installed the water main. Before the lawsuits, that company had filed for bankruptcy and its corporate status had been suspended by the Franchise Tax Board. The company never responded to the complaint or cross-complaints and its insurers denied coverage and never intervened in the action. After plaintiffs settled their claims against the gas company, the electric company, the city, and other parties, plaintiffs and cross-complainants applied for default judgments against the company. The plaintiffs and the gas company personally served a statement of damages on the company. The plaintiffs' statement set forth the amounts of general and special damages each plaintiff sought. The court entered the default in favor of the plaintiffs 15 days after the statement was served and entered a default judgment more than three years later in an aggregate amount less than the amounts set forth in plaintiffs' statement of damages (*114 Cal. App. 4th 1308, 1313-1318, 1323)* . On the cross-complaints, the gas company personally served the company with a statement of damages more than six weeks before the default was entered against the company on the gas company's cross-complaint. The statement set forth specific dollar amounts in property damages and other damages. It included a detailed declaration stating that the amounts sought were paid in settlement of various claims in the action, including plaintiffs' claims, and it identified the persons to whom each amount was paid. The trial court entered the default and eventually the default judgment in favor of the gas company on its cross-complaint and against the company (*114 Cal. App. 4th 1308, 1313-1318, 1323)* . After applying for defaults on their cross-complaints but before the defaults were entered, on the court's suggestion the city and the electric company each filed and served a statement of damages on the company by mail, together with an application for default judgment and supporting documents, setting forth total damages, including costs. The trial court entered the company's defaults *nunc pro tunc* effective three days before the statements were properly served (*114 Cal. App. 4th 1308, 1313-1318, 1324)* . The court entered the defaults and eventually entered default judgments on the cross-complaints in favor of the cross-complainants and against the company.

The court of appeal affirmed the entry of the default judgments as to the plaintiffs and the gas company. The court held that the company had not explained why the default or judgment in favor of plaintiffs is invalid and the court could discern no reason. The 15 days the company had to respond to plaintiffs' statement of damages was a reasonable period of time, given that the company was properly served with the summons and complaint more than 30 days before the statement was served. The default judgment was also valid, because it did not exceed the amounts set forth in plaintiffs' statement of damages (*114 Cal. App. 4th 1308, 1323)* . As to the gas company, the court found first that it was unsettled whether *Code Civ. Proc. § 425.11*, governing the service of a statement of damages, applied to a cross-complaint for indemnity and contribution in a personal injury action, but that in any event, a valid default and judgment required formal notice in some form of the nature and amount of damages sought, within a reasonable time before default was entered and the gas company complied with these requirements because its statement was sufficiently specific to allow the company to make an informed decision whether to appear and defend the cross-complaint. Further, service of the statement more than six weeks before the entry of the default allowed the company a reasonable time to determine whether to appear and defend the action. The company had not offered any reason why the default or judgment in favor of the gas company are invalid, and the court could discern none (*114 Cal. App. 4th 1308, 1323-1324)* .

However, the court reversed the entry of default judgments against the company in favor of the city and electric company on their cross-complaints. The court held that neither statement of damages was served in the same manner as a summons as required by *Code Civ. Proc. § 425.11(d)*, and that even if the city's and electric company's cross-complaints were not subject to § 425.11, they failed to give formal notice in some form of the amount of money damages they sought within a reasonable time before the defaults were entered. The trial court's entry of the defaults effective three days before the statements were properly served gave the company no time to respond to the cross-complaints after it was finally given formal notice of the amount of damages the city and the electric company were seeking. Thus, the defaults and judgments in favor of the electric company and the city were invalid. The court also held that although the company may have had actual notice of the amount of damages the city sought, actual notice does not satisfy the formal notice requirements of *Code Civ. Proc. §§ 425.10 et seq., 585*. A plaintiff's or cross-complainant's failure to give formal notice of the amount of money damages it seeks constitutes a critical defect in the proceedings, so that the clerk or judge has no authority to enter a default unless and until formal notice is given and failure to give formal notice may deprive a defendant of due process. The electric company and the city could not rely on plaintiffs' statement of damages because their indemnity and contribution claims were not limited to the amounts they paid to plaintiffs, but encompassed substantial sums paid to other parties as well and plaintiffs' statement of damages did not encompass amounts paid to or claimed by other parties. Moreover, §§ 425.10 et seq. and 585 require formal notice of the amount of money damages or other relief sought by the party seeking relief. Further, although the electric company and the city were unable to give notice of the precise amount of damages they were seeking until after they settled the claims pending against them, the cross-complaints for indemnity and contribution ultimately sought money judgments and nothing prevented them from estimating and properly serving notice of the amount of money damages they were seeking at any time (*114 Cal. App. 4th 1308, 1324-1326)* .

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A. Statutory Relief From Valid Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding
1. Relief Based on Mistake, Inadvertence, Surprise, or Excusable Neglect

7-70 California Points & Authorities § 70.121

§ 70.121 Opposing Motion to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. § 473(b)]--General Form--Policy Favors Denial of Relief

[1] FORM

[*This form should be combined with a memorandum generally opposing a motion to set aside under Code Civ. Proc. § 473(b) (see § 70.120[1]).*]

THE COURT SHOULD DENY THE MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other proceeding*)] BECAUSE THE POLICY OF THE LAW FAVORS DENIAL OF THE MOTION ON THE FACTS OF THIS CASE.

Policies Favoring Denial of Relief. Although the policy of the law favors deciding cases on their merits, other policies favor getting cases to trial on time, avoiding unnecessary and prejudicial delay, and preventing litigants from abusing pertinent legal rules and procedures (*Gardner v. Superior Court (1986) 182 Cal. App. 3d 335, 339, 227 Cal. Rptr. 78*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion to set aside a default and default judgment, or judgment, dismissal, order, or other proceeding under *Code Civ. Proc. § 473(b)* when relief would be adverse to the policy of the law.

In an appropriate case, this form may be submitted in opposition to the points and authorities *set out in §§ 70.10 -70.41*.

This form should be combined with a memorandum generally opposing a motion to set aside under *Code Civ. Proc. § 473(b)* [*see § 70.120[1]*]. When appropriate, this form should be combined with other points and authorities opposing the motion on additional, general grounds [*see, e.g., §§ 70.122 -70.125*]. In addition, when appropriate, this form should be combined with points and authorities opposing the motion on additional particular grounds [*see, e.g., § 70.140* et seq.], or that the moving party has not made a sufficient showing justifying relief on the specific ground or grounds asserted [*see, e.g., §§ 70.160 -70.216*].

This form may be combined, in an appropriate case, with additional points and authorities opposing a grant of relief based on other statutory or decisional authority, when the motion and supporting memorandum has asserted such additional authority as alternate bases for relief [*see* discussion in *§ 70.10[2][c]*]. This form may also be combined, when appropriate, supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief [*see, e.g., § 70.230* et seq.].

This form may be adapted for use in a trial or appellate brief.

See also *§ 70.10[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b)*, and alternative methods for obtaining relief. For discussion of when a court may deny relief despite the mandatory nature of an application for relief based on an attorney's affidavit of fault, see *§ 70.120[2][c]*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 70.120[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Policies Favoring Denial of Relief

Gardner v. Superior Court *(1986) 182 Cal. App. 3d 335, 227 Cal. Rptr. 78* , is discussed in *§ 70.120[3][a]*.

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7-70 California Points & Authorities § 70.122

§ 70.122 Opposing Motion to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. § 473(b)]--General Form--Mistake, Inadvertence, Surprise, or Excusable Neglect Not Reasonable

[1] FORM

[*This form should be combined with a memorandum generally opposing a motion to set aside under Code Civ. Proc. § 473(b) (see § 70.120[1]).*]

THE COURT SHOULD DENY THE MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other proceeding*)] BECAUSE THE FACTS OF THIS CASE REVEAL THAT THE ALLEGED MISTAKE, INADVERTENCE, OR SURPRISE IS NOT REASONABLE.

Mistake, Inadvertence, or Surprise Must Be Reasonable to Justify Relief. The mistake, inadvertence, or surprise that justifies a court in setting aside a default under *Code of Civil Procedure Section 473(b)* must be reasonable (*Cyrus v. Haveson (1976) 65 Cal. App. 3d 306, 315, 135 Cal. Rptr. 246*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion to set aside a default and default judgment, or judgment, dismissal, order, or other proceeding under *Code Civ. Proc. § 473(b)* when the alleged mistake, inadvertence, or surprise is not reasonable.

In an appropriate case, this form may be submitted in opposition to the points and authorities *set out in §§ 70.10 -70.41*.

This form should be combined with a memorandum generally opposing a motion to set aside under *Code Civ. Proc. §*

473(b) [*see § 70.120[1]*]. When appropriate, this form should be combined with other points and authorities opposing the motion on additional, general grounds [*see, e.g., §§ 70.121* and *70.123 -70.125*]. In addition, when appropriate, this form should be combined with points and authorities opposing the motion on additional particular grounds [*see, e.g., § 70.140* et seq], or that the moving party has not made a sufficient showing justifying relief on the specific ground or grounds asserted [*see, e.g., §§ 70.160 -70.216*].

This form may be combined, in an appropriate case, with additional points and authorities opposing a grant of relief based on other statutory or decisional authority, when the motion and supporting memorandum has asserted such additional authority as alternate bases for relief [*see* discussion in *§ 70.10[2][c]*]. This form may also be combined, when appropriate, supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief [*see, e.g., § 70.230* et seq].

This form may be adapted for use in a trial or appellate brief.

See also *§ 70.10[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b)*, and alternative methods for obtaining relief. For discussion of when a court may deny relief despite the mandatory nature of an application for relief based on an attorney's affidavit of fault, see *§ 70.120[2][c]*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 70.120[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Mistake, Inadvertence, or Surprise Must Be Reasonable to Justify Relief

Cyrus v. Haveson *(1976) 65 Cal. App. 3d 306, 135 Cal. Rptr. 246*), is discussed in *§ 70.193[3]*.

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7-70 California Points & Authorities § 70.123

§ 70.123 Opposing Motion to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. § 473(b)]--General Form--Party Failed to Exercise Reasonable Diligence in Arranging for Defense

[1] FORM

[*This form should be combined with a memorandum generally opposing a motion to set aside under Code Civ. Proc. § 473(b) (see § 70.120[1]).*]

THE COURT SHOULD DENY THE MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other proceeding*)] BECAUSE THE MOVING PARTY HAS FAILED TO EXERCISE REASONABLE DILIGENCE IN ARRANGING FOR HIS/HER DEFENSE.

No Relief for Lack of Reasonable Diligence. Unless in arranging for his or her defense the party exercises such reasonable diligence as a person of ordinary prudence usually bestows on important business, a motion for relief under *Code of Civil Procedure Section 473(b)* will be denied (*Luz v. Lopes (1960) 55 Cal. 2d 54, 62, 10 Cal. Rptr. 161, 358 P.2d 289* ; *Caldwell v. Methodist Hospital (1994) 24 Cal. App. 4th 1521, 1525, 29 Cal. Rptr. 2d 894*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion to set aside a default and default judgment, or judgment, dismissal, order, or other proceeding under *Code Civ. Proc. § 473(b)* when the moving party failed to exercise reasonable diligence in arranging for his or her defense.

In an appropriate case, this form may be submitted in opposition to the points and authorities *set out in §§ 70.10 -70.41*.

When appropriate, this form should be combined with other points and authorities opposing the motion on additional, general grounds [*see, e.g., §§ 70.121, 70.122, 70.124, 70.125*]. In addition, when appropriate, this form should be combined with points and authorities opposing the motion on additional particular grounds [*see, e.g., § 70.140* et seq], or that the moving party has not made a sufficient showing justifying relief on the specific ground or grounds asserted [*see, e.g., §§ 70.160 -70.216*]. This form may also be combined, when appropriate, supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief [*see, e.g., § 70.230* et seq].

This form may be combined, in an appropriate case, with additional points and authorities opposing a grant of relief based on other statutory or decisional authority, when the motion and supporting memorandum has asserted such additional authority as alternate bases for relief [*see* discussion in *§ 70.10[2][c]*].

This form may be adapted for use in a trial or appellate brief.

See also *§ 70.10[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b)*, and alternative methods for obtaining relief. For discussion of when a court may deny relief despite the mandatory nature of an application for relief based on an attorney's affidavit of fault, see *§ 70.120[2][c]*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 70.120[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] No Relief for Lack of Reasonable Diligence

Luz v. Lopes *(1960) 55 Cal. 2d 54, 10 Cal. Rptr. 161, 358 P.2d 289* , is discussed in *§ 70.120[3][c]* under Burden of Proof on Moving Party, *above*.

In ***Caldwell v. Methodist Hospital*** *(1994) 24 Cal. App. 4th 1521, 29 Cal. Rptr. 2d 894* , the court of appeal affirmed the trial court's denial of plaintiff's motion to set aside an order of dismissal on the grounds of excusable neglect. The trial court dismissed the action under *Code Civ. Proc. § 583.410(a)*, following a hearing at which neither party appeared through counsel. Three months after plaintiff received a copy of the minute order of dismissal, he sought to set the order aside on the basis of his counsel's affidavit of fault in which counsel stated that he and the opposing counsel failed to appear at the court hearing because of their mutual erroneous belief that the hearing was scheduled on another day. Counsel also asserted that the intervening three-month period included the holiday season.

The court of appeal held that plaintiff failed to establish diligence in seeking relief from the dismissal order. It relied exclusively on *Billings v. Health Plan of America (1990) 225 Cal. App. 3d 250, 258, 275 Cal. Rptr. 80* , which held that the 1988 amendment to *Code Civ. Proc. § 473*, which added the provision for mandatory relief for attorney error, did not alter the diligence requirement and further noted that delays of three months or more routinely result in denial of relief when there is no explanation for the delay (*24 Cal. App. 4th 1521, 1525)* .

[4] Additional Authorities

[a] No Relief for Lack of Reasonable Diligence

In *Gillingham v. Lawrence (1909) 11 Cal. App. 231, 104 P. 584* , the court of appeal affirmed the trial court's denial of defendant's motion (apparently brought under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*) to vacate a default judgment. The court stated that defendant inexplicably let time pass once he was served with

the summons and complaint, concluding that he was guilty of such carelessness and lack of diligence as could not be imputed to a prudent businessperson in a matter of material concern to himself or herself. The court held that although courts are liberal in relieving parties of defaults caused by inadvertence or excusable neglect, and although they prefer that a case be heard on its merits, they do not act as guardians for incompetent parties or parties who are grossly careless with regard to their own affairs (*11 Cal. App. 231, 233)* . The court also stated that if a party "willfully slumbers" on his or her rights when he or she should be alert, and makes no effort to protect himself or herself, courts cannot "patiently listen to flimsy excuses and the claim of ignorance of the law" (*11 Cal. App. 231, 234)* .

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7-70 California Points & Authorities § 70.124

§ 70.124 Opposing Motion to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. § 473(b)]--General Form--Attorney's Conduct Is Imputed to Client

[1] FORM

[*This form should be combined with a memorandum generally opposing a motion to set aside under Code Civ. Proc. § 473(b) (see § 70.120[1]).*]

THE COURT SHOULD DENY THE MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other proceeding*)] BECAUSE THE MOVING PARTY IS BOUND BY THE ERRORS AND OMISSIONS OF HIS/HER ATTORNEY, AND THE MOVING PARTY HAS FAILED TO SHOW THAT THE CONDUCT ON WHICH HIS/HER MOTION IS BASED IS EXCUSABLE.

Attorney's Conduct Imputed to Client. When the claimed mistake or neglect in support of relief under *Code of Civil Procedure Section 473(b)*, arises from the conduct of the party's attorney, the general rule is that the conduct must be shown to be of the excusable variety; otherwise, the default will not be set aside, because the negligence of the attorney is imputed to the client, who is bound by the attorney's errors and omissions (*Conway v. Municipal Court (1980) 107 Cal. App. 3d 1009, 1018, 166 Cal. Rptr. 246*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion to set aside a default and default judgment, or judgment, dismissal, order, or other proceeding under *Code Civ. Proc. § 473(b)* on the ground that the conduct of the moving party's attorney is imputed to his or her client.

In an appropriate case, this form may be submitted in opposition to the points and authorities *set out in §§ 70.10 -70.41*, when the conduct is alleged to have been committed by the moving party's attorney. This form should be combined with a memorandum generally opposing a motion to set aside under *Code Civ. Proc. § 473(b)* [*see § 70.120[1]*].

When appropriate, this form should be combined with other points and authorities opposing the motion on additional, general grounds [*see, e.g., §§ 70.121 -70.123, 70.125*]. In addition, when appropriate, this form should be combined with points and authorities opposing the motion on additional particular grounds [*see, e.g., § 70.140* et seq], or that the moving party has not made a sufficient showing justifying relief on the specific ground or grounds asserted [*see, e.g., §§ 70.160 -70.216*]. This form may also be combined, when appropriate, supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief [*see, e.g., § 70.230* et seq.].

Although a party typically seeks relief under *Code Civ. Proc. § 473(b)*, from a default or default judgment, or both, a court may grant relief under that section from any "judgment, dismissal, order, or other proceeding." This form may be modified, as appropriate, for use in opposing the grant of relief in situations other than a default and default judgment.

This form may also be adapted for use in a trial or appellate brief.

See also *§ 70.10[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b)*, and alternative methods for obtaining relief. For discussion of when a court may deny relief despite the mandatory nature of an application for relief based on an attorney's affidavit of fault, see *§ 70.120[2][c]*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 70.120[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Attorney's Conduct Imputed to Client

Conway v. Municipal Court *(1980) 107 Cal. App. 3d 1009, 166 Cal. Rptr. 246* , is discussed in *§ 70.142[3][a]*.

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7-70 California Points & Authorities § 70.125

§ 70.125 Opposing Motion to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. § 473(b)]--General Form--Existence of Meritorious Defense Is Irrelevant

[1] FORM

[*This form should be combined with a memorandum generally opposing a motion to set aside under Code Civ. Proc. § 473(b) (see § 70.120[1]).*]

THE COURT SHOULD DENY THE MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other proceeding*)] BECAUSE THE MOTION IS NOT SUPPORTED BY ANY GROUND UNDER CODE OF CIVIL PROCEDURE SECTION 473(b), AND THE DEFENDANT'S ASSERTION THAT HE/SHE HAS A MERITORIOUS DEFENSE IS IRRELEVANT.

Existence of Meritorious Defense Is Irrelevant. The existence of a defense is irrelevant to the critical question of whether the moving party showed his or her failure to act was caused by mistake, inadvertence, surprise, or excusable neglect (*Lipson v. Jordache Enterprises, Inc. (1992) 9 Cal. App. 4th 151, 161, 11 Cal. Rptr. 2d 271* ; *Uva v. Evans (1978) 83 Cal. App. 3d 356, 362, 147 Cal. Rptr. 795*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion to set aside a default and default judgment, or judgment, dismissal, order, or other proceeding under *Code Civ. Proc. § 473(b)*, when defendant asserts a meritorious defense as a ground for relief, and the motion is not otherwise supported by a ground under section 473(b).

Although a party typically seeks relief under *Code Civ. Proc. § 473(b)*, from a default or default judgment, or both, a

court may grant relief under that section from any "judgment, dismissal, order, or other proceeding." Thus, this form may be modified, as appropriate, for use in opposing the grant of relief in situations other than a default and default judgment.

In an appropriate case, this form may be submitted in opposition to the points and authorities *set out in §§ 70.10 -70.41*.

This form should be combined with a memorandum generally opposing a motion to set aside under *Code Civ. Proc. § 473(b)* [*see § 70.120[1]*]. When appropriate, this form should be combined with other points and authorities opposing the motion on additional, general grounds [*see, e.g., §§ 70.121 -70.124*]. In addition, when appropriate, this form should be combined with points and authorities opposing the motion on additional particular grounds [*see, e.g., § 70.140* et seq], or that the moving party has not made a sufficient showing justifying relief on the specific ground or grounds asserted [*see, e.g., §§ 70.160 -70.216*].

This form may be combined, in an appropriate case, with additional points and authorities opposing a grant of relief based on other statutory or decisional authority, when the motion and supporting memorandum has asserted such additional authority as alternate bases for relief [*see* discussion in *§ 70.10[2][c]*]. This form may also be combined, when appropriate, supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief [*see, e.g., § 70.230* et seq].

This form may be adapted for use in a trial or appellate brief.

See also *§ 70.10[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b)*, and alternative methods for obtaining relief. For discussion of when a court may deny relief despite the mandatory nature of an application for relief based on an attorney's affidavit of fault, see *§ 70.120[2][c]*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 70.120[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Existence of Meritorious Defense Is Irrelevant

In ***Lipson v. Jordache Enterprises, Inc.*** *(1992) 9 Cal. App. 4th 151, 11 Cal. Rptr. 2d 271* , an insurer attempted to have a posttrial judgment against its insured set aside after it initially declined to undertake the defense. The trial court denied the motion and the insurer appealed.

The court of appeal reversed. Although the insurer prevailed on appeal, the court, citing *Uva v. Evans (1978) 83 Cal. App. 3d 356, 362, 147 Cal. Rptr. 795* , discussed *below*, stated that the existence of a defense is irrelevant to the critical question of whether the moving party showed his or her failure to act was caused by mistake, inadvertence, surprise, or excusable neglect (*9 Cal. App. 4th 151, 161)* .

In ***Uva v. Evans*** *(1978) 83 Cal. App. 3d 356, 147 Cal. Rptr. 795* , plaintiffs filed an action for damages arising from injuries sustained as a result of a dog bite. After the trial court ordered a default judgment for plaintiffs, defendant moved to set aside the default. The motion was denied and the trial court entered judgment for the plaintiffs. The defendant appealed.

The court of appeal reversed the judgment and ordered retrial on the issue of damages only, but affirmed the judgment in all other respects. One argument raised by the defendant was that the trial court abused its discretion in denying

defendant's motion to set aside the default, pointing out that he had proffered an arguably meritorious defense. The court stated that it was not persuaded that defendant's presentation of his answer could be a basis for a finding that the trial court abused its discretion. Although the existence of an arguably meritorious defense may reasonably lend support to a trial court's determination that a default should be vacated, it does so only because it aids the policy that appellate courts are more disposed to affirm an order when the result compels a trial on the merits. Former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), requires that a proposed answer be filed with the motion to set aside the default. The existence of a defense, however, is irrelevant to the critical question of whether the moving party showed that his failure to act was caused by mistake, inadvertence, surprise, or excusable neglect (*83 Cal. App. 3d 356, 362)* . Because the defendant failed to make that essential showing, the court held that the trial court was well within its discretion in denying defendant's motion to set aside the default (*83 Cal. App. 3d 356, 362)* .

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7-70 California Points & Authorities § 70.126

§ 70.126 Opposing Motion to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. § 473(b)]--Attorney Affidavit of Fault--No Mandatory Relief for Failure to File Complaint Within Period of Limitation

[1] FORM

[*Caption. See § 70.120[1].*]

THE COURT SHOULD DENY THE MOTION TO SET ASIDE THE DISMISSAL OF ACTION WITH PREJUDICE DESPITE THE ATTORNEY'S AFFIDAVIT OF FAULT BECAUSE THERE MAY BE NO MANDATORY RELIEF UNDER CODE OF CIVIL PROCEDURE SECTION 473(b) FROM DISMISSALS THAT ARE A RESULT OF COUNSEL'S ERROR IN FILING THE COMPLAINT BEYOND THE PERIOD OF LIMITATIONS.

No Mandatory Relief From Dismissal for Filing Complaint Beyond Period of Limitations. The extension of mandatory relief to dismissed plaintiffs does not include relief from dismissals that are a result of counsel's error in filing the complaint beyond the period of limitations (*Castro v. Sacramento County Fire Protection Dist. (1996) 47 Cal. App. 4th 927, 934, 55 Cal. Rptr. 2d 193*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion to set aside a dismissal when the moving party seeks to set aside a dismissal that results from counsel's error in filing the complaint beyond the period of limitations [*Castro v. Sacramento County Fire Protection Dist. (1996) 47 Cal. App. 4th 927, 929, 934, 55 Cal. Rptr. 2d 193]* .

In an appropriate case, this form may be submitted in opposition to the motion for relief supported by the points and authorities *set out in § 70.12*.

This form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 70.120[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

In ***Castro v. Sacramento County Fire Protection Dist.*** *(1996) 47 Cal. App. 4th 927, 55 Cal. Rptr. 2d 193* , plaintiff filed a motion under *Code Civ. Proc. § 473* for an order setting aside the trial court's order sustaining the defendants' demurrer to the first amended complaint. The defendant demurred on the ground that the complaint was filed 19 days after the expiration of the six months following the notice of claim of rejection. The trial court concluded that section 473 relief was unavailable to the plaintiff and dropped her motion from the calendar. The trial court entered judgment dismissing the complaint and the plaintiff appealed.

The court of appeal affirmed the judgment. The issue before the court was whether the extension of the mandatory relief to dismissed plaintiffs includes relief from dismissals the result of counsel's error in filing the complaint beyond the period of limitations. The court stated that prior to 1992 amendments to section 473, the section had been interpreted to exclude relief from default caused by failure to comply with the statute of limitations. The court reviewed decisions that followed the 1992 amendments to the section and concluded that the Legislature did not intend by its "noncontroversial" 1992 amendments to section 473 to overrule prior cases interpreting section 473 and create a loophole through which a plaintiff may escape the bar of the statute of limitations. The court also distinguished a late-filed claim, for which relief may be granted under the tort claims statute, and a late-filed complaint (*47 Cal. App. 4th 927, 933)* .

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7-70 California Points & Authorities § 70.127

§ 70.127 Opposing Motion to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. § 473(b)]--Court Lacks Jurisdiction Because of Pending Appeal [Code Civ. Proc. § 916(a)]--Further Proceedings Are In Excess of Court's Jurisdiction

[1] FORM

[*Caption. See § 70.120[1].*]

THE COURT SHOULD DENY THE MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other proceeding*)] ON THE GROUND THAT THE TRIAL COURT HAS BEEN DEPRIVED OF JURISDICTION TO HEAR THE MOTION BECAUSE AN APPEAL IS PENDING IN THE ACTION.

A. Trial Court's Power to Vacate Is Suspended. The trial court's power to enforce, vacate, or modify an appealed judgment or order is suspended while an appeal is pending (*Elsea v. Saberi (1992) 4 Cal. App. 4th 625, 629, 5 Cal. Rptr. 2d 742* ; see *Code Civ. Proc. § 916*).

B. Motion Is in Excess of Court's Jurisdiction. Further trial court proceedings in contravention of a stay pursuant to *Code of Civil Procedure Section 916* are in excess of the court's jurisdiction, including motions to vacate default judgments under *Code of Civil Procedure Section 473* (*Elsea v. Saberi (1992) 4 Cal. App. 4th 625, 629, 5 Cal. Rptr. 2d 742*).

C. Test to Determine Whether Stay Applies. Whether a matter is "embraced" in or "affected" by a judgment within the meaning of *Code of Civil Procedure Section 916* depends on whether postjudgment trial court proceedings on the particular matter would have any impact on the "effectiveness" of the appeal. If so, the proceedings are stayed (*Elsea v. Saberi (1992) 4 Cal. App. 4th 625, 629, 5 Cal. Rptr. 2d 742*).

D. Order on Section 473 Motion Impacts Effectiveness of Pending Appeal. Because a trial court's ruling on a

statutory motion to set aside a default judgment under *Code of Civil Procedure Section 473* affects enforcement of a default judgment, it impacts on the effectiveness of a pending appeal and therefore is in excess of the trial court's jurisdiction (see *Elsea v. Saberi (1992) 4 Cal. App. 4th 625, 629, 5 Cal. Rptr. 2d 742*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion to set aside a default and default judgment, or judgment, dismissal, order, or other proceeding under *Code Civ. Proc. § 473(b)*. The ground for opposition is that the trial court has been deprived of jurisdiction to hear the motion under *Code Civ. Proc. § 916(a)* because an appeal is pending in the action.

In an appropriate case, this form may be submitted in opposition to the motion to set aside supported by the points and authorities *set out in §§ 70.10 -70.110*.

This form may be combined, when appropriate, with additional points and authorities opposing the contention that relief should be granted to set aside a default and default judgment under *Code Civ. Proc. § 473(b)* on other grounds [*see, e.g., §§ 70.120 -70.125, 70.140 -70.231*].

This form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should refer to the notice of appeal filed on the judgment and the date of the filing to argue that the court has been deprived of jurisdiction to consider the motion. On proper request, the court is required to take judicial notice of its own records [*see Evid. Code §§ 452(d), 453*]. See also *§ 70.120[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Trial Court's Power to Vacate Is Suspended

Elsea v. Saberi *(1992) 4 Cal. App. 4th 625, 5 Cal. Rptr. 2d 742* , involved a personal injury action against the president of a corporation and the corporation. After defendants repeatedly ignored service of process and related notices, the trial court entered a default judgment against them in favor of the plaintiff. The defendants filed a motion under Code Civ. Proc. § 473 to vacate the judgment, made through counsel retained by defendants' liability insurer. The motion was denied by a different judge and the defendants appealed. While the defendants' appeal was pending, their liability insurer, through different counsel, moved the trial court for leave to intervene and vacate the judgment. The insurer's motion was assigned to yet a third judge, who allowed it to intervene and set aside the judgment as to the insurer. The plaintiff appealed the orders granting the insurer relief.

The court of appeal reversed. The plaintiff contended that the trial court lacked jurisdiction to vacate or modify the judgment because it was on appeal, and the insurer argued that the motions to vacate filed by it and defendants were separately appealable and therefore its own motion to vacate was a collateral matter residing within the trial court's jurisdiction. The court stated that, as a general rule, the perfecting of an appeal stays the proceedings in the trial court on the judgment or order appealed from, or on the matters embraced therein or affected thereby, including enforcement of the judgment or order [*see Code Civ. Proc. § 916(a)*]. In addition, citing *Gold v. Superior Court (1970) 3 Cal. 3d 275, 280, 90 Cal. Rptr. 161, 475 P.2d 193* , the court stated that the trial court's power to enforce, vacate, or modify an appealed judgment or order is suspended while an appeal is pending. The purpose of the rule depriving the trial court of jurisdiction during the pending appeal, noted the court, is to protect the appellate court's jurisdiction by preserving the

status quo until the appeal is decided. The rule prevents the trial court from rendering an appeal futile by altering the appealed judgment or order by conducting other proceedings that may affect it (*4 Cal. App. 4th 625, 629)* . Thus, the court held that the trial court's ruling was in excess of the trial court's jurisdiction (*4 Cal. App. 4th 625, 629)* . The court also noted that although three different judges presided over the issues relating to the judgment in the case, the superior court is but one tribunal (*4 Cal. App. 4th 625, 630-631)* .

[b] Motion Is in Excess of Court's Jurisdiction

The facts and procedural background of ***Elsea v. Saberi*** *(1992) 4 Cal. App. 4th 625, 5 Cal. Rptr. 2d 742* , are discussed under [a], *above*. In *Elsea*, the court of appeal reversed the trial court's judgment ordering that a default judgment be set aside under former Code Civ. Proc. § 473, 3rd Paragraph [*see Code Civ. Proc. § 473(b)* now]. The court stated that further trial court proceedings in contravention of a stay pursuant to *Code Civ. Proc. § 916(a)*are in excess of the court's jurisdiction, including motions to vacate default judgments under *Code Civ. Proc. § 473* (*4 Cal. App. 4th 625, 629)* .

[c] Test to Determine Whether Stay Applies

The facts and procedural background of ***Elsea v. Saberi*** *(1992) 4 Cal. App. 4th 625, 5 Cal. Rptr. 2d 742* , are discussed under [a], *above*. In *Elsea*, the court of appeal reversed the trial court's judgment ordering that a default judgment be set aside because an appeal was pending, pursuant to *Code Civ. Proc. § 916(a)*. The court stated that whether a matter is "embraced" in or "affected" by a judgment within the meaning of that section depends on whether postjudgment trial court proceedings on the particular matter would have any impact on the "effectiveness" of the appeal. If so, the proceedings are stayed (*4 Cal. App. 4th 625, 629)* .

[d] Order on Section 473 Motion Impacts Effectiveness of Pending Appeal

The facts and procedural background of ***Elsea v. Saberi*** *(1992) 4 Cal. App. 4th 625, 5 Cal. Rptr. 2d 742* , are discussed under [a], *above*. In *Elsea*, the court of appeal reversed the trial court's judgment ordering that a default judgment be set aside because an appeal was pending, pursuant to *Code Civ. Proc. § 916(a)*. The court stated that because the trial court's ruling on the statutory motion to set aside a default judgment under *Code Civ. Proc. § 473* affected enforcement of the default judgment, it impacted on the effectiveness of the pending appeal and therefore was in excess of the trial court's jurisdiction (*4 Cal. App. 4th 625, 629)* .

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7-70 California Points & Authorities § 70.128

§ 70.128 Opposing Motion to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. § 473(b)]--Motion Constitutes Inadequate Motion for Reconsideration

[1] FORM

[*Caption. See § 70.120[1].*]

THE COURT SHOULD DENY DEFENDANT'S MOTION TO VACATE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other proceeding*)] BECAUSE THE MOTION CONSTITUTES AN INAPPROPRIATE MOTION FOR RECONSIDERATION, IN THAT THE MOTION IS BASED ON THE SAME FACTS AND EXISTING LAW AS RAISED IN A PRIOR MOTION FOR RELIEF, WHICH WAS DENIED.

A. Second Bite at Apple Not Permitted. When a subsequent motion to set aside a default or default judgment is based on the same facts and existing law as determined in a prior motion to set aside, the subsequent motion may be denied as an inappropriate motion for reconsideration (see *Taylor v. Varga (1995) 37 Cal. App. 4th 750, 760-761, 43 Cal. Rptr. 2d 904* ; *see also Code Civ. Proc. § 1008*).

[*Optional*] **B. Sanctions for Inappropriate Motion for Reconsideration.** The duplicative nature for a request to set aside a default or default judgment is sufficient to justify sanctions. "Neither the court, litigants, nor opposing counsel should be subject to sequential efforts to challenge rulings. This type of duplicative proceeding is not to be encouraged" (*Taylor v. Varga (1995) 37 Cal. App. 4th 750, 762, 43 Cal. Rptr. 2d 904*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion to set aside a default and default judgment, or judgment,

dismissal, order, or other proceeding under *Code Civ. Proc. § 473(b)*. The ground for opposition is that the motion for relief is based on the same facts and law as a prior motion for relief that had been denied, and therefore constitutes an inappropriate motion for reconsideration [*see Taylor v. Varga (1995) 37 Cal. App. 4th 750, 760-761, 43 Cal. Rptr. 2d 904* ; *see also Code Civ. Proc. § 1008*].

In an appropriate case, this form may be submitted in opposition to the demurrer supported by the points and authorities *set out in §§ 70.10 -70.110*.

This form may be combined, when appropriate, with additional points and authorities opposing the contention that relief should be granted to set aside a default and default judgment under *Code Civ. Proc. § 473(b)* on other grounds [*see, e.g., §§ 70.120 -70.127, 70.140 -70.231*].

This form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should request the court to take judicial notice of the papers filed in support of the prior motion for relief, and point out the facts and rules of law common to both proceedings [*see Evid. Code §§ 452(d), 453*]. See also *§ 70.120[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Second Bite at Apple Not Permitted

In ***Taylor v. Varga*** *(1995) 37 Cal. App. 4th 750, 43 Cal. Rptr. 2d 904* , nearly six months after a default and default judgment was entered on the cross complaint in an action by the lessors of a restaurant against the lessees seeking indemnification for damages arising out of a fire on the premises, the cross defendant lessees moved to set aside the default based on *Code Civ. Proc. § 473*. Then, in their reply brief, the lessees for the first time raised the issue that the there was a lack of statutory authority for entering a default after service by publication under *Code Civ. Proc. § 585(c)*. The initial motion was denied and the lessees filed a subsequent motion to set aside in based on *Code Civ. Proc. § 585(c)*. The trial court denied the motion and imposed sanctions. The lessees appealed.

The court of appeal affirmed the judgment and sanctions order. The court observed that the lessees second motion to set aside was an "a second bite at the apple." Although conceding that the motion to set aside the entry of their default was not based on different facts than the first motion under section 473, the lessees contended that the second motion was based on a new legal argument and was not a motion for reconsideration. The court concluded that the trial court was well within its discretion in denying the second motion on the merits because the lessees waited until almost six months after the default was entered before filing their initial motion to set aside and then waited until that motion was denied before filing the second motion to set aside the default based on section 585. In addition, the motion could be denied as an inappropriate motion for reconsideration because the motion was based on the same facts and existing law (*37 Cal. App. 4th 750, 761)* .

[b] Sanctions for Inappropriate Motion for Reconsideration

The facts and procedural background of ***Taylor v. Varga*** *(1995) 37 Cal. App. 4th 750, 43 Cal. Rptr. 2d 904* , are discussed under [a], *above*. In *Taylor v. Varga*, the trial court ordered sanctions in denying cross defendant's second motion to set aside a judgment or order based on *Code Civ. Proc. § 585*. The court of appealed affirmed the sanctions order, stating that the duplicative nature of the request was sufficient to justify the sanctions imposed. Neither the court, litigants, nor opposing counsel should be subject to such sequential efforts to challenge rulings. This type of duplicative proceeding, according to the court, is not to be encouraged. Thus, the court concluded that the sanctions were properly

imposed (*37 Cal. App. 4th 750, 762)* .

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CHAPTER 70 DEFAULTS, DEFAULT JUDGMENTS, AND RELIEF FROM JUDGMENTS AND ORDERS
PART II. FORMS
A. Statutory Relief From Valid Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding
1. Relief Based on Mistake, Inadvertence, Surprise, or Excusable Neglect

7-70 California Points & Authorities § 70.129

§ 70.129 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. § 473(b)]--No Relief for Failure to Take Jurisdictional Procedural Step--General Form

[1] FORM

[*Caption. See § 70.120[1].*]

THE COURT SHOULD DENY THE MOTION TO SET ASIDE THE _____ [*identify proceeding*] BECAUSE THE _____ [JUDGMENT *or* ORDER] WAS THE RESULT OF THE MOVING PARTY'S FAILURE TO TAKE A JURISDICTIONAL PROCEDURAL STEP, AND THE COURT LACKS AUTHORITY TO GRANT RELIEF IN SUCH CASES.

Section 473 Does Not Apply to Failure to File Jurisdictional Motion. Although a court may grant relief under *Code of Civil Procedure section 473(b)* from a party's failure to take various kinds of nonjurisdictional procedural steps, it cannot grant relief from a failure to take to take a jurisdictional step (*Advanced Building Maintenance v. State Comp. Ins. Fund (1996) 49 Cal. App. 4th 1388, 1393, 57 Cal. Rptr. 2d 310*).

[*Combine with points and authorities relating to specific proceeding from which moving party is seeking relief, e.g., § 70.130.*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion to set aside a default and default judgment, or judgment, dismissal, order, or other proceeding under *Code Civ. Proc. § 473(b)*. The ground for opposition is that the motion for relief is based on the moving party's failure to take a jurisdictional step, and that the court lacks subject matter

jurisdiction to grant relief in such a case.

This form should be combined with points and authorities relating to the specific proceeding from which moving party is seeking relief [*see, e.g., § 70.130*].

This form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points and authorities in this form with the facts of the case. See *§ 70.120[2][d]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

In ***Advanced Building Maintenance v. State Comp. Ins. Fund*** *(1996) 49 Cal. App. 4th 1388, 1393, 57 Cal. Rptr. 2d 310* , a judgment of dismissal was entered against an employer who had brought an action against its workers' compensation insurer. The employer filed a motion to vacate the judgment under *Code Civ. Proc. § 663* (incorrect or erroneous legal basis), and a motion for relief under *Code Civ. Proc. § 473*. The trial court granted the motion, vacated the judgment of dismissal, and set the case for trial. The insurer appealed.

The court of appeal reversed. The court stated that under section 473, relief may be granted from failure to take various kinds of nonjurisdictional steps. Relief cannot be granted for failure to take a jurisdictional step, such as filing a timely notice for new trial. Although the court's research revealed no cases which decide whether section 473 applies to section 663, the court compared section 663 with the section governing the statutory requirements of a new trial, and concluded that the motion to vacate should also be considered a jurisdictional motion, and that section 473 similarly should not apply (*49 Cal. App. 4th 1388, 1393-1394)* .

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7-70 California Points & Authorities § 70.130

§ 70.130 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. § 473(b)]--No Relief for Failure to Take Jurisdictional Procedural Step--No Relief for Untimely Motion to Vacate Judgment on Erroneous Legal Basis

[1] FORM

[*This form should be combined with a general form providing that relief under Code Civ. Proc. § 473(b) is not available when party fails to take jurisdictional procedural step. See § 70.129[1].*]

Motion to Vacate Judgment on Erroneous Legal Basis Is Jurisdictional Step. A motion to vacate under *Code of Civil Procedure section 663*, based on an incorrect or erroneous legal basis for the decision, is considered a jurisdictional motion, to which relief under *Code of Civil Procedure section 473(b)* does not apply (*Advanced Building Maintenance v. State Comp. Ins. Fund (1996) 49 Cal. App. 4th 1388, 1393, 57 Cal. Rptr. 2d 310*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion to set aside a default and default judgment, or judgment, dismissal, order, or other proceeding under *Code Civ. Proc. § 473(b)*. The ground for opposition is that there may be no relief under section 473(b) for and untimely motion to set aside judgment on erroneous legal basis under *Code Civ. Proc. § 663*.

This form should be combined with a general form of points and authorities providing that relief under *Code Civ. Proc. § 473(b)* is not available when party fails to take jurisdictional procedural step [*see § 70.129[1]*].

This form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points and authorities in this form with the facts of the case. See *§ 70.120[2][d]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

The facts and procedural background of ***Advanced Building Maintenance v. State Comp. Ins. Fund*** *(1996) 49 Cal. App. 4th 1388, 57 Cal. Rptr. 2d 310* , are discussed in *§ 70.129[3]*. In *Advanced Building Maintenance*, the court compared a motion to vacate judgment on ground of an erroneous legal basis under *Code Civ. Proc. § 663*, with a motion for new trial, and concluded that relief under *Code Civ. Proc. § 473(b)* is not available when the motion to vacate was filed beyond 15 days after service of the written notice of entry of judgment (*49 Cal. App. 4th 1388, 1393-1394)* .

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7-70 California Points & Authorities § 70.131

§ 70.131 Opposing Motion to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. § 473(b)]--Code Civ. Proc. § 473(b) Does Not Provide Mandatory Relief From Judgment Entered on Arbitration Award Based on Attorney Affidavit of Fault Unless Client Was Denied Hearing

[1] FORM

[*Caption. See § 70.120[1].*]

THE COURT SHOULD DENY THE MOTION TO SET ASIDE THE _____ [JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other proceeding*)] BECAUSE THE RELIEF SOUGHT IS FROM A _____ [JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other proceeding*)] ENTERED ON AN ARBITRATION AWARD, AND THE PARTY SEEKING TO SET ASIDE THE _____ [JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other proceeding*)] WAS NOT DEPRIVED OF A HEARING.

***Code Civ. Proc. § 473(b)* Does Not Provide Mandatory Relief Based on Attorney Affidavit of Fault Where Relief Is Sought From Judgment Entered on Arbitration Award Unless Client Was Denied Hearing.** Although an attorney affidavit of fault makes relief mandatory under *Code Civ. Proc. § 473(b)* from a default judgment or dismissal, it does not mandate relief from a judgment entered on an arbitration award, unless the client was deprived of a hearing [*Brown v. Williams (2000) 78 Cal. App. 4th 182, 188-189, 92 Cal. Rptr. 2d 634]* .

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion to set aside a judgment or dismissal entered on an arbitration award, under *Code Civ. Proc. § 473(b)*. The ground for opposition is that section 473(b) does not provide mandatory relief based on an attorney affidavit of negligence where the relief sought is from a judgment entered on an arbitration

award, unless the attorney's negligence deprived the client of a hearing.

This form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should argument linking the points and authorities in this form with the facts of the case. Specifically, counsel should specify facts showing the following:

- The judgment from which relief is sought was entered on an arbitration award, not a default judgment or dismissal.

- The attorney's negligence consisted of something other than behavior that deprived the client of a hearing. For example, in *Brown v. Williams (2000) 78 Cal. App. 4th 182, 92 Cal. Rptr. 2d 634* , discussed in [3], *below*, the facts showed that the attorney and client actually participated in the arbitration hearing, and that the attorney's negligence consisted of failing to timely request a trial de novo.

See *§ 70.120[2][d]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

In ***Brown v. Williams*** *(2000) 78 Cal. App. 4th 182, 92 Cal. Rptr. 2d 634* , the plaintiff sued defendants for personal injuries allegedly suffered on defendants' premises. Defendants answered the complaint, and the action was ordered into judicial arbitration. Plaintiff and her attorney both attended the arbitration and presented testimony, documents, and argument. The arbitration award in favor of defendants was served by mail and filed shortly thereafter. Plaintiff did not file a request for trial de novo, and judgment was entered on the award after the time for the request had passed. Plaintiff's attorney then filed a motion for relief from his failure to request a trial de novo, seeking mandatory relief provided by *Code Civ. Proc. § 473(b)*, or, alternatively, for discretionary relief allows by section 473; defendants opposed the motion. The trial court denied the motion.

The court of appeal affirmed, holding that although an attorney's affidavit makes relief under *Code Civ. Proc. § 473(b)* mandatory from a default judgment or dismissal, it does not mandate relief from judgments entered on an arbitration award, unless the client was deprived of a hearing (*78 Cal. App. 4th 182, 188)* . The court found that there is no mandatory relief under § 473(b) for attorney negligence consisting of a failure to timely request a trial de novo after there was an arbitration hearing in which the plaintiff and her attorney actually participated (*78 Cal. App. 4th 182, 189)* . The court also found that the trial court did not abuse its discretion by denying plaintiff relief under the discretionary provisions of section 473 (*78 Cal. App. 4th 182, 190)* .

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2-70 California Points & Authorities § 70.132

§ 70.132 Opposing Motion to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. § 473(b)]--Code Civ. Proc. § 473(b) Does Not Provide Mandatory Relief From Failure to Timely File Opposition to and Cross-Motion to Enforce Settlement

[1] FORM

[*Caption. See § 70.120[1].*]

THE COURT SHOULD DENY THE MOTION TO SET ASIDE THE _____ [JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other proceeding*)] BECAUSE CODE OF CIVIL PROCEDURE SECTION 473(B) DOES NOT APPLY TO AN ATTORNEY'S FAILURE TO TIMELY FILE OPPOSITION TO AND A CROSS-MOTION TO ENFORCE A SETTLEMENT.

***Code Civ. Proc. § 473(b)* Does Not Provide Mandatory Relief Based on Attorney Affidavit of Fault Where Relief Is Sought From Attorney's Failure to Timely File Opposition to and Cross-Motion to Enforce Settlement.** Although an attorney affidavit of fault makes relief mandatory under *Code Civ. Proc. § 473(b)* from a default judgment or dismissal, it does not mandate relief from a judgment entered on a motion to enforce a settlement, because those circumstances do not constitute a default or default judgment within the meaning of *Code Civ. Proc. § 473(b)* (*Hossain v. Hossain (2007) 157 Cal. App. 4th 454, 457-459, 69 Cal. Rptr. 3d 356*).

[2] Comments

[a] Use of Form

This form of memorandum may be submitted in opposition to a motion to set aside a judgment entered on a motion to enforce a settlement under *Code Civ. Proc. § 473(b)*. The ground for opposition is that § 473(b) does not provide mandatory relief based on an attorney affidavit of negligence when the relief sought is from a judgment entered on a motion to enforce settlement based on the attorney's failure to timely file opposition and/or a cross-motion to enforce

settlement.

This form of memorandum may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should argument linking the points in this form with the facts of the case. Specifically, counsel should specify facts showing that the judgment from which relief is sought was entered on a motion to enforce settlement.

See *§ 70.120[2][d]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

Hossain v. Hossain *(2007) 157 Cal. App. 4th 454, 69 Cal. Rptr. 3d 356* , involved a dispute over the termination of a partnership for the operation of a hotel. Plaintiff failed to file timely opposition to the defendant's motion to enforce the settlement agreement, and also was late in filing his own motion to enforce. The trial court declined to consider plaintiff's late papers and denied relief sought by plaintiff under *Code Civ. Proc. § 473(b)*. The court of appeal affirmed, finding that the attorney fault provision in *Code Civ. Proc. § 473(b)* does not apply to an attorney's failure to timely file opposition and a cross-motion to a motion to enforce a settlement. The court found that the circumstances did not constitute a default or default judgment to bring the case within that provision of *Code Civ. Proc. § 473(b)* because no default was entered by the clerk, and there was no default judgment (*157 Cal. App. 4th 454, 456-458)* .

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2-70 California Points & Authorities § 70.133

§ 70.133 Opposing Motion to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding Based on Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. § 473(b)]--Attorney Affidavit of Fault--No Mandatory Relief for Attorney Representing Self or Bringing Action in Representative Capacity

[1] FORM

[*Caption. See § 70.120[1].*]

THE COURT SHOULD DENY THE MOTION TO SET ASIDE THE DISMISSAL OF ACTION WITH PREJUDICE DESPITE THE ATTORNEY'S AFFIDAVIT OF FAULT BECAUSE THERE CAN BE NO MANDATORY RELIEF UNDER CODE OF CIVIL PROCEDURE SECTION 473(b) FOR ATTORNEYS REPRESENTING THEMSELVES IN PROPRIA PERSONA OR BRINGING ACTION IN REPRESENTATIVE CAPACITY.

No Mandatory Relief For Attorney Representing Self in Propria Persona. The extension of mandatory relief does not include relief for attorneys who are representing themselves in propria persona (*Esther B. v. City of Los Angeles (2008) 158 Cal. App. 4th 1093, 1099-1100, 70 Cal. Rptr. 3d 596*).

No Mandatory Relief For Attorney Bringing Action in Representative Capacity. The extension of mandatory relief does not include relief for attorneys who bring an action in a representative capacity, such as a taxpayer representing other taxpayers (*Esther B. v. City of Los Angeles (2008) 158 Cal. App. 4th 1093, 1099-1100, 70 Cal. Rptr. 3d 596*).

[2] Comments

[a] Use of Form

This form of memorandum may be submitted in opposition to a motion to set aside a default or dismissal on the ground of an attorney affidavit of excusable neglect in an action brought by an attorney either in pro per or in a representative capacity, such as a taxpayers' action.

In an appropriate case, this memorandum may be submitted in opposition to the motion for relief supported by the memoranda *set out in § 70.120*.

This memorandum may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 70.120[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

In **Esther B. v. City of Los Angeles** (2008) *Esther B. v. City of Los Angeles (2008) 158 Cal. App. 4th 1093, 70 Cal. Rptr. 3d 596* , an attorney initiated an action against a city and other public agencies on behalf of herself and her minor daughter seeking damages and an order removing their names from California's Child Abuse Central Index (CACI). She also sued as a taxpayer seeking reforms of the CACI through injunctive and declaratory relief. She is licensed to practice in California, and appeared in propria persona along with cocounsel. She did not obtain the judicial relief she sought. However, during the pendency of the litigation the legislature amended the statutes governing the CACI to provide greater protections to persons listed in CACI. Claiming her lawsuit was the catalyst in bringing about these changes, she moved for attorney's fees under California's private attorney general statute (*Code Civ. Proc. § 1021.5*) and under other statutory and common-law theories.

The trial court stayed the attorney's fee motions for trial work pending her appeal on another aspect of the case. After the remittitur issued in the appeal, the court gave the attorney several deadlines to file the attorney's fees motion for fees incurred at trial and on appeal. In granting her ex parte request to further extend the filing deadline, the court stated that no further continuance would be granted. The attorney missed the final deadline. After the defendant filed a proposed order seeking to deem the fee requests abandoned because of the attorney's failure to timely file her attorney's fee documents as ordered by the court, the trial court issued an order directing the attorney to show cause why the court should not deem her request for attorney's fees abandoned for failure to file moving papers as requested. The attorney filed a response apologizing for the late filing and attributing the cause to illness and limited resources, compounded by the intricacy and breadth of the legal and factual matters the papers had to address. She also submitted the declaration of co-counsel, who was unwilling to work for free when plaintiff ran out of funds. After taking the matter under submission, the trial court issued an order that the attorney's untimely filings were not excused, and the requests for attorney's fees were deemed waived, which the appellate court affirmed. The attorney then moved to set aside default and/or dismissal of the motion for attorney's fees under both the mandatory and discretionary provisions of *Code Civ. Proc. § 473(b)*. The trial court denied plaintiff's motion for relief (*158 Cal. App. 4th 1093, 1095-1099)* .

The court of appeal affirmed. The court held that the mandatory relief provision of *Code Civ. Proc. § 473(b)* applies only in the case of an attorney representing a client. The discretionary relief provision of § 473(b) provides that the court may set aside a default or dismissal on the motion of a party or legal representative and thus applies to a party, including a party appearing in propria persona, and an attorney representing a party. However, the mandatory provision applies only to an attorney representing a party. The court held that the attorney did not qualify for relief under § 473(b) as an attorney who brought the action, in part, as a taxpayer on behalf of the other taxpayers. The court noted that if she bound other taxpayers by her action she did so as a fellow taxpayer, not as an attorney for the taxpayers (*158 Cal. App. 4th 1093, 1099-1100)* .

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7-70 California Points & Authorities §§ 70.134-70.139

[Reserved]

§§ 70.134[Reserved]

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7-70 California Points & Authorities § 70.140

§ 70.140 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground that Motion Is Untimely [Code Civ. Proc. § 473(b)]--Relief Not Based on Attorney Affidavit of Fault--Motion Brought After Six-Month Limitation

[1] FORM

[*Caption. See § 70.120[1]).*]

THE COURT SHOULD DENY THE MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other proceeding*)] BECAUSE IT IS UNTIMELY, IN THAT THE NOTICE OF MOTION WAS NOT FILED WITHIN SIX MONTHS AFTER THE ENTRY OF THE _____ [*identify proceeding, e.g.,* DEFAULT JUDGMENT].

A. Timeliness of Motion. Application for relief from a judgment, dismissal, order, or other proceeding taken against a party through his or her mistake, inadvertence, surprise, or excusable neglect must be made within a reasonable time, not exceeding six months, after the judgment, dismissal, order, or proceeding was taken (*Code Civ. Proc. § 473(b); Johnson v. E-Z Insurance Brokerage, Inc. (2009) 175 Cal. App. 4th 86, 98-99, 95 Cal. Rptr. 3d 782* ; *Title Insurance etc. Co. v. King etc. Co. (1912) 162 Cal. 44, 45-46, 120 P. 1066*).

B. Six-Month Limitation Is Jurisdictional. In the absence of extrinsic fraud, the six-month limitation under *Code of Civil Procedure Section 473(b)*, is jurisdictional (*Jackson v. Bank of America (1983) 141 Cal. App. 3d 55, 59, 190 Cal. Rptr. 78*).

[*When appropriate, add memoranda opposing the motion on additional particular grounds, for example, that motion is not timely (see, e.g., § 70.146 et seq.), or that the moving party has not made a sufficient showing justifying relief on the specific ground or grounds asserted (see, e.g., §§ 70.160 -70.216). Additional points and authorities may be also be added, when appropriate, supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief (see, e.g.,§ 70.230 et seq.).*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that a default and default judgment, or judgment, dismissal, order, or other proceeding should be set aside on the ground of mistake, inadvertence, surprise, or excusable neglect under *Code Civ. Proc. § 473(b)*. This form is for use when the relief sought is not based on an attorney affidavit of fault, and the ground of opposition is that the motion was not filed in a timely manner because the motion was brought after the six-month limitation period [*see Code Civ. Proc. § 473(b)*]. For points and authorities providing that the six-month limitation runs from the date of default, see *§ 70.141[1]*.

For a form for use when the motion was brought within the six-month limitation period but not within a reasonable time, see *§§ 70.142, 70.143*. For a form of points and authorities for use in opposing a motion for relief based on an attorney's affidavit of fault, see *§ 70.145[1]*.

In an appropriate case, this form may be submitted in opposition to the points and authorities *set out in §§ 70.10 -70.41*.

This form may be combined with a memorandum generally opposing a motion to set aside under *Code Civ. Proc. § 473(b)* [*see § 70.120[1]*]. When appropriate, this form may be combined with points and authorities for use in refuting a contention that the preoccupation of the moving party's attorney with other matters is sufficient ground to justify delay in seeking relief [*see § 70.144[1*]; *see also § 70.212[1]* (opposing the grant of relief on the ground of excusable neglect when showing in support of this ground in the moving party's attorney's assertion of the press of other business)].

This form may be combined with points and authorities opposing relief on other particular grounds. For example, it may be combined with:

- Additional points and authorities showing that the motion is not timely [*see §§ 70.140 -70.148*].

- Additional points and authorities showing that the moving party has not made a sufficient showing justifying relief on the specific ground or grounds asserted [*see §§ 70.160 -70.216*; *see also* discussion in *§ 70.10[2][g]*].

This form may also be combined, when appropriate, with points and authorities supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief [*see §§ 70.230, 70.231*].

This form may also be adapted for use in a trial or appellate brief.

See also *§ 70.10[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b),* and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Counsel should therefore set forth the relevant dates of entry of default and the date of the filing of the motion, and show that the motion was not made within six months after judgment had been entered [*see* discussion in *§ 70.146[2][c]*]. See also *§ 70.120[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Timeliness of Motion

Johnson v. E-Z Insurance Brokerage, Inc. *(2009) 175 Cal. App. 4th 86, 98-99, 95 Cal. Rptr. 3d 782* involved a default judgment entered against a defendant as a discovery sanction. Twelve years later, the defendant sought to have the default set aside on the ground it was wrongly entered on an ex parte basis as a terminating sanction for misuse of the discovery process. The trial court denied the defendant's motion.

The court of appeal affirmed. It held that the default judgment was voidable, not void, because the trial court had fundamental jurisdiction over the subject matter and the parties when it entered the default judgment 12 years earlier. By awarding terminating sanctions on an ex parte basis, the court of appeal held, the trial court at most failed to follow proper procedure. Accordingly, the court held that *Code Civ. Proc. § 473(d)*, which does not provide a time limit, did not apply. Instead, *Code Civ. Proc. § 473(b)* applied, and a motion to set the default aside had to be brought within six months of entry (*175 Cal. App. 4th 86, 98-99)* .

In ***Title Insurance etc. Co. v. King etc. Co.*** *(1912) 162 Cal. 44, 120 P. 1066* , the trial court denied several motions of defendants to set aside a judgment, and to relieve them from a default entered against them. One defendant filed the motion more than eleven months after the default was entered; the remaining defendants more than sixteen months afterward.

The Supreme Court affirmed, holding that under ***Code Civ. Proc. § 473*** , the motion must be filed within six months after entry of default (*162 Cal. 44, 45-46)* .

[b] Six-Month Limitation Is Jurisdictional

In ***Jackson v. Bank of America*** *(1983) 141 Cal. App. 3d 55, 190 Cal. Rptr. 78* , plaintiff filed a complaint against defendant bank seeking recovery of money due. The complaint alleged that plaintiff had signed a promissory note to the bank as guarantor for another, and had placed with the bank as security certain bonds; and that the bank fraudulently failed to inform plaintiff that the principal borrower had increased the original amount of the loan, and had defaulted in payments on that loan. Plaintiff sought judgment releasing him from liability as the guarantor of the note. The bank notified plaintiff that the bonds would be sold unless additional security was deposited. The bank apparently sold the bonds immediately prior to being served with process regarding a show-cause hearing and an amended complaint, seeking an injunction against the sale of the bonds and additional damages. The show-cause hearing was taken off calendar; defendant failed to file an answer to the amended complaint. Plaintiff obtained a default judgment, and filed a declaration of mailing to counsel for defendant. Six and one-half months later, defendant filed a notice of motion for relief from default. The trial court granted the motion. Plaintiff appealed.

The court of appeal reversed, holding that in the absence of extrinsic fraud, the six-month limitation of *Code Civ. Proc. § 473* is jurisdictional (*141 Cal. App. 3d 55, 59)* . The court noted that although the statute is to be liberally applied to grant relief (so that issues may be tried on their merits), nothing in the facts of the case before it justifies the grant of relief. Further, the bank did not timely qualify for the relief. The court rejected the bank's contention that it is entitled to relief on the ground of excusable neglect, holding that the bank's belief that the case was moot (because the bonds had been sold) does not constitute excusable neglect (*141 Cal. App. 3d 55, 58)* . The court stated that on a motion for relief from default, the moving party has the burden of showing that the neglect leading to default was excusable; and to entitle a party to relief, the acts that brought about the default must have been the acts of a reasonably prudent person under the same circumstances. The court concluded that the bank's assumption that the case was moot has its attendant risk; the bank was wrong in its assumption and its neglect was not of the excusable variety. Further, the court rejected the bank's argument that the notice of default was deficient, justifying relief, because it was not addressed to include the floor or suite number of the attorney's office, which was located in a large office building. The court found that argument "somewhat disingenuous," in that the mailing was addressed to the attorney, by name, as counsel for the bank, at the proper address, a building that served as principal headquarters for the bank (*141 Cal. App. 3d 55, 58)* . The court also noted that under *Code Civ. Proc. § 587*, nonreceipt of notice does not invalidate a default judgment. The court stated that the trial court abused its discretion because although it was not asked to grant relief on the basis of

extrinsic fraud, it nevertheless ordered relief after having expressly found the motion to be untimely (*141 Cal. App. 3d 55, 59)*

[4] Additional Authorities

[a] Six-Month Limitation Is Jurisdictional

In *Stevenson v. Turner (1979) 94 Cal. App. 3d 315, 156 Cal. Rptr. 499* , the court of appeal reversed the trial court's denial of defendant's motion for relief from default, on the ground that the judgment was void (*94 Cal. App. 3d 315, 318-320)* . In the course of its reasoning, the court noted that the six-month outside time limit for granting relief under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), is jurisdictional, and the court may not consider any motion made after that period has elapsed (*94 Cal. App. 3d 315, 318)* . The court concluded, however, that the time limitation did not apply in the instant case because of the fact that the default judgment was void on its face (*94 Cal. App. 3d 315, 318)* .

For forms of memoranda relating to void judgment or orders, see *§ 70.310* et seq.

The facts and procedural background of *Northridge Financial Corp. v. Hamblin (1975) 48 Cal. App. 3d 819, 122 Cal. Rptr. 109* , are discussed in *§ 70.191[3]*. In *Northridge*, the court of appeal held that defendants failed to show excusable neglect in support of their motion for relief under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), based on the defendants' inexcusable failure to file an answer despite receiving an extension of time from opposing counsel in which to do so (*48 Cal. App. 3d 819, 823-824)* . The court in *Northridge* also considered whether the trial court properly denied one defendant's motion for reconsideration, which was filed 24 days after the statutory six-month period under *Code Civ. Proc. § 473* had expired. The court initially noted that all applications for relief under the statute must be made within the six-month period. It also noted that defendant's motion was filed as a motion for reconsideration, although it was based on the identical statutory grounds as those contained in the first motion (that is, the motion under *Code Civ. Proc. § 473*); and that it was based on a new affidavit of the defense attorney, his secretary, and the moving party. The court determined that the motion for reconsideration in the case before it must be considered as a renewal of the prior motion for relief, and that, consequently, it is subject to the requirements of *Code Civ. Proc. § 473*. Therefore, it must be made within the six-month statutory limitations period (*48 Cal. App. 3d 819, 825)* . Inasmuch as the second motion was made after the prescribed period had expired, the court was without jurisdiction to act (*48 Cal. App. 3d 819, 826)* .

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A. Statutory Relief From Valid Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding
1. Relief Based on Mistake, Inadvertence, Surprise, or Excusable Neglect

7-70 California Points & Authorities § 70.141

§ 70.141 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground that Motion Is Untimely [Code Civ. Proc. § 473(b)]--Relief Not Based on Attorney Affidavit of Fault--Motion Brought After Six-Month Limitation--Six-Month Limitation Period Runs From Date of Default

[1] FORM

[*This form should be combined with a memorandum opposing a motion to set aside under Code Civ. Proc. § 473(b) on the ground that the motion was filed beyond the six-month limitation (see § 70.140[1]).*]

THE COURT SHOULD DENY THE MOTION TO SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT BECAUSE IT IS UNTIMELY, IN THAT THE SIX-MONTH LIMITATION PERIOD RUNS FROM THE DATE OF THE DEFAULT AND NOT FROM THE DEFAULT JUDGMENT.

Six-Month Limitation Period Runs From Date of Default. As a general rule, the six-month period within which to bring a motion to vacate under *Code of Civil Procedure Section 473(b)*, runs from the date of the default and not from the judgment taken afterwards (*Weiss v. Blumencranc (1976) 61 Cal. App. 3d 536, 541, 131 Cal. Rptr. 298*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that a default and default judgment should be set aside on the ground of mistake, inadvertence, surprise, or excusable neglect under *Code Civ. Proc. § 473(b)*. This form is for use when the moving party asserts that the six-month period runs from the date of the default judgment. The relief sought in this form is not based on an attorney affidavit of fault. For a form of points and authorities for use in opposing a motion for relief based on an attorney's affidavit of fault, see *§ 70.145[1]*.

In an appropriate case, this form may be submitted in opposition to the points and authorities *set out in §§ 70.10 -70.41*.

This form should be combined with a memorandum generally opposing a motion to set aside on the ground that the motion was filed beyond the six-month limitation period of section 473(b) [*see § 70.140[1]*].

This form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 70.120[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Six-Month Limitation Period Runs From Date of Default

In ***Weiss v. Blumencranc*** *(1976) 61 Cal. App. 3d 536, 131 Cal. Rptr. 298* , the trial court granted defendant's motion under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), to set aside two amended supplementary judgments awarding the plaintiff punitive damages in an action involving the dissolution of a partnership. Default and default judgment were entered, deferring determination of punitive damages (based on fraud) until completion of the accounting of the partnership assets. Several years later, after completion of the accounting, an ex parte hearing on punitive damages was held. The trial court entered the first supplementary judgment of damages, awarding general and punitive damages, and setting forth other provisions regarding sources and methods of payment. Subsequently, the court entered a first amended judgment, generally awarding punitive damages; and a second amended judgment, which specifically awarded punitive damages but otherwise was identical to the previous judgment. Shortly afterward, defendant filed a motion under *Code Civ. Proc. § 473* for relief from the first and second amended judgments. The trial court granted the motion, and plaintiff appealed.

The court of appeal reversed, with directions to re-enter the last amended judgment as the true judgment (*61 Cal. App. 3d 536, 544)* . Plaintiff contended that the trial court did not have jurisdiction to issue any order vacating the default judgment, pursuant to former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*). The court noted that according to the record, defendant did not file his application for relief within the requisite six-month period after the default was taken, and also failed to accompany his motion with an answer or proposed pleading, as further required by statute. The court stated that defendant had no right to notice of the hearing regarding an opportunity to be heard after default, because, as clearly indicated by the record the trial court's decision to vacate the amended judgments was not made on the basis of extrinsic fraud (*61 Cal. App. 3d 536, 540)* .

The record indicated that the trial court was concerned about the ex parte nature of the hearing on punitive damages, and carefully pointed out that only supplementary judgments awarding punitive damages were set aside under the motion for relief. Therefore, the default and the original default judgment dissolving the partnership requiring an accounting were never set aside or appealed, and thus became final. The record also indicated that the trial court was satisfied that the six-month requirement of *Code Civ. Proc. § 473* had been met by defendant's motion only with regard to the amended judgments, and not the initial default or default judgment (*61 Cal. App. 3d 536, 540-541)* . The court of appeal held that the trial court erred in that conclusion, in that neither of the amended judgments pertaining to punitive damages could have been properly vacated under *Code Civ. Proc. § 473*. The court stated that the defendant had six months from the date of the entry of default to apply for relief under the statute, but did not file a motion until well over two years later. The court held that the trial court's effort to set aside only the amended judgments was ineffective, because the six-month period runs from the date of entry of default, rather than from the date of entry of the default judgment. The court noted that despite the purported vacation of the amended judgments alone, pursuant to *Code Civ. Proc. § 473*, the default itself remained, which permitted immediate entry of another judgment that gave plaintiff the relief to which he was entitled on the basis of his complaint for dissolution (*61 Cal. App. 3d 536, 541)* . The court

further considered other issues unique to punitive damages awards, and concluded that the last amended judgment is valid (*61 Cal. App. 3d 536, 542-544)* .

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7-70 California Points & Authorities § 70.142

§ 70.142 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground that Motion Is Untimely [Code Civ. Proc. § 473(b)]--Relief Not Based on Attorney Affidavit of Fault--Motion Brought Within Six-Month Limitation But After Reasonable Time

[1] FORM

[*Caption. See § 70.120[1].*]

THE COURT SHOULD DENY THE MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other proceeding*)] BECAUSE IT IS UNTIMELY, IN THAT THE NOTICE OF MOTION WAS NOT FILED WITHIN A REASONABLE TIME AFTER THE ENTRY OF THE _____ [*identify proceeding, e.g.*, DEFAULT JUDGMENT].

A. Timeliness of Motion. [*See § 70.140[1], Paragraph A.*]

B. Extended Delay Must Be Sufficiently Explained. A moving party who files a motion under *Code of Civil Procedure Section 473(b)*, after an extended delay following entry of the default, must provide sufficient explanation of the delay (*Benjamin v. Dalmo Mfg. Co. (1948) 31 Cal. 2d 523, 529, 190 P.2d 593* ; *Conway v. Municipal Court (1980) 107 Cal. App. 3d 1009, 1019, 166 Cal. Rptr. 246*).

C. Showing of Diligence Required. The moving party under *Code of Civil Procedure Section 473(b)* has a double burden: he or she must show a satisfactory excuse for the default, as well as diligence in making the motion after discovery of the default (*Kendall v. Barker (1988) 197 Cal. App. 3d 619, 625, 243 Cal. Rptr. 42*).

D. Reasonable Time Test Is Independent Consideration. The reasonable time test under *Code of Civil Procedure Section 473(b)* stands as an independent consideration in any given situation; and its determination, within the maximum six-month period, depends on the circumstances of the particular case (*Benjamin v. Dalmo Mfg. Co. (1948)*

31 Cal. 2d 523, 530, 190 P.2d 593).

[*When appropriate, add points and authorities opposing the motion on additional particular grounds, for example, that motion is not timely (see, e.g., § 70.146 et seq.), or that the moving party has not made a sufficient showing justifying relief on the specific ground or grounds asserted (see, e.g., §§ 70.160 -70.216). Additional points and authorities may be also be added, when appropriate, supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief (see, e.g.,§ 70.230 et seq.).*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that a default and default judgment, or judgment, dismissal, order, or other proceeding should be set aside on the ground of mistake, inadvertence, surprise, or excusable neglect under *Code Civ. Proc. § 473(b)*. This form is for use when the relief sought is not based on an attorney affidavit of fault, and the ground of opposition is that the motion was not filed within a reasonable time under the circumstances [*see Code Civ. Proc. § 473(b)*].

For a form of points and authorities for use when the motion was brought after the six-month limitation period, see *§ 70.140[1]*. For a form of points and authorities for use in opposing a motion for relief based on an attorney's affidavit of fault, see *§ 70.145[1]*.

In an appropriate case, this form may be submitted in opposition to the points and authorities *set out in §§ 70.10 -70.41*.

This form may be combined with a memorandum generally opposing a motion to set aside under *Code Civ. Proc. § 473(b)* [*see § 70.120[1]*]. When appropriate, this form may be combined with points and authorities for use in refuting a contention that the preoccupation of the moving party's attorney with other matters is sufficient ground to justify delay in seeking relief [*see § 70.144[1*]; *see also § 70.212[1]* (opposing the grant of relief on the ground of excusable neglect when showing in support of this ground in the moving party's attorney's assertion of the press of other business)].

This form may be combined with points and authorities opposing relief on other particular grounds. For example, it may be combined with:

- Additional points and authorities showing that the motion is not timely [*see §§ 70.140 -70.148*].

- Additional points and authorities showing that the moving party has not made a sufficient showing justifying relief on the specific ground or grounds asserted [*see §§ 70.160 -70.216*; *see also* discussion in *§ 70.10[2][g]*].

This form may also be combined, when appropriate, with points and authorities supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief [*see §§ 70.230, 70.231*].

This form may also be adapted for use in a trial or appellate brief.

See also *§ 70.10[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b)*, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Counsel should therefore set

forth the relevant dates of entry of default and the date of the filing of the motion, and show that the motion was filed after an unexplained or inexcusable delay. See also *§ 70.120[2][b]* regarding evidentiary support for facts stated.

[c] Notice of Request to Enter Default

Code Civ. Proc. § 587, enacted in 1969, requires that all applications for entry of default under *Code Civ. Proc. §§ 585(a)-(c)* and *586*, include an affidavit (or declaration (*Code Civ. Proc. § 2015.5*) stating that a copy of the application has been mailed to defendant or his or her attorney of record, if any. This provision affects the "reasonable time" requirement under *Code Civ. Proc. § 473(b)*, in that the moving party has a greater burden to justify any delay in bringing the motion after receiving notice as required under that section. Even if the moving party adequately shows facts in support of a particular ground of relief, the motion will be denied if it is untimely [*see Kendall v. Barker (1988) 197 Cal. App. 3d 619, 625, 243 Cal. Rptr. 42* (discussed under [3][b], *below*)]. Cases decided before the enactment of this statute that discuss the moving party's conduct with respect to reasonableness of delay, should therefore be viewed in light of the current law regarding notice under *Code Civ. Proc. § 587*.

For further discussion of requirements for entry of default (including the procedural distinction between actions in which service was made by publication and those in which service was effected by other means), see California Forms of Pleading and Practice, Ch. 205, *Defaults and Default Judgments* (Matthew Bender).

[3] Discussion of Authorities

[a] Extended Delay Must Be Sufficiently Explained

Benjamin v. Dalmo Mfg. Co. *(1948) 31 Cal. 2d 523, 190 P.2d 593* , is discussed under [c], *below*.

In ***Conway v. Municipal Court*** *(1980) 107 Cal. App. 3d 1009, 166 Cal. Rptr. 246* , an action brought by a bank against an individual, the court of appeal reversed a superior court order granting defendant's petition for peremptory writ commanding the municipal court to set aside a default judgment against the defendant (*107 Cal. App. 3d 1009, 1021)* . The action was originally set for trial in municipal court. Approximately two months before the trial date, defendant was at the office of his attorney, who informed him of the trial date. Defendant made no attempt to contact the attorney after that meeting, and the attorney's attempts to contact the defendant after that point were unsuccessful. Defendant did not appear on the date of trial. When his attorney arrived in the courtroom, he waved to a clerk whom he believed knew him, and left to telephone the defendant. When no one in the courtroom answered for defendant, the matter was assigned to another courtroom for default hearing, and default judgment was entered against defendant. More than four months later, defendant filed a motion under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), to vacate the default and set aside the default judgment. After the trial court denied that motion, defendant filed a motion for reconsideration, which the court also denied. Defendant filed a petition for writ of mandamus, as well as an appeal from denial of the reconsideration motion, in the appellate department of the superior court. The superior court granted the petition, and ordered a peremptory writ of mandate to issue, commanding the municipal court to vacate the entry of default and set aside the default judgment. Plaintiff appealed the granting of the writ.

The court of appeal reversed (*107 Cal. App. 3d 1009, 1021)* . With respect to the motion under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), the court noted that the municipal court judge had discretionary power to set aside the default under the remedial provisions of that statute, and the judge's exercise of that discretion could not be disturbed unless there is a clear showing of abuse (*107 Cal. App. 3d 1009, 1016)* . As the moving party, defendant had the burden of proving he was entitled to relief. The court stated that neither mistake, inadvertence, or neglect will warrant relief unless on consideration of all the evidence, it is found to be of the excusable variety. To entitle defendant to relief, the acts that brought about the default must have been the acts of a reasonably prudent person under the same circumstances. Moreover, the credibility of the persons executing the declarations and the weight to be given their contents was for the determination of the municipal court. The court stated that when a

party's failure to appear is the result of the neglect of his or her attorney, the party is charged with the neglect. It concluded that defendant failed to sustain his burden of showing that the neglect leading to his default was excusable, in that he merely showed the combined neglect of himself and his prior counsel with no excuse for it.

The court of appeal rejected the superior court's conclusion that the attorney's conduct could not be imputed to the defendant (*107 Cal. App. 3d 1009, 1017)* . The court held that when the claimed mistake or neglect arises from the conduct of the party's attorney, the general rule is that the conduct must be shown to be of the excusable variety; otherwise, the default will not be set aside. The court noted that the reason for the rule is that the negligence of the attorney is imputed to the client, who is bound by the attorney's errors and omissions. An exception to the rule exists when the attorney's neglect is of that extreme degree amounting to positive misconduct, and the person seeking relief is relatively free from negligence. The court stated that the facts in the instant case do not fall within that exception, and that both the defendant and his attorney were negligent (i.e., defendant failed to appeal, and the attorney absented himself from the courtroom). The court stated that courts do not act as guardians for those who are grossly careless with their affairs (*107 Cal. App. 3d 1009, 1018)* . The court also noted that a motion under *Code Civ. Proc. § 473* must be made "within a reasonable time" not exceeding six months after the judgment, order, or proceeding. In this case, defendant delayed more than four months after the default and judgment were taken against him before seeking relief; and at the time he sought to have the judgment and default set aside, he failed to set forth any reason for the delay. The court concluded that, absent an explanation of the delay in bringing the motion, the trial court could not excuse and set aside the default, because it was not empowered to dispense with the reasonable-time requirement. The court noted finally that the record was without evidence that would justify the setting aside of the judgment or default (*107 Cal. App. 3d 1009, 1019)* .

Counsel should note, with respect to the discussion in *Conway* regarding the attorney's neglect, that *Conway* was decided prior to the 1988 amendment to *Code Civ. Proc. § 473* that provides for mandatory granting of relief based on an attorney's affidavit of fault if the conduct caused the default. For discussion, see *§ 70.145[3]*.

[b] Showing of Diligence Required

In ***Kendall v. Barker*** *(1988) 197 Cal. App. 3d 619, 243 Cal. Rptr. 42* , the defendant filed a motion to set aside the default and default judgment entered against him, almost six months after the default was entered. The only evidence in support of the motion was the defense attorney's declaration, which stated under information and belief that the defendant's previous attorney excusably neglected to answer the complaint. The trial court granted the motion, requiring the defendant to pay sanctions because of the "long delay in seeking relief from default." Plaintiff appealed.

The court of appeal reversed on the ground that the defendant failed to show diligence in filing the motion after discovery of default (*197 Cal. App. 3d 619, 625-626)* . The court noted that the discretion vested in the trial court to determine relief under *Code Civ. Proc. § 473* is not capricious or arbitrary, but impartial, guided and controlled in its exercise by fixed legal principles; it is a legal, rather than mental discretion, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice. The court stated that a party who seeks relief under the statute must make a showing that because of some mistake, either of fact or of law, of the party or the party's counsel, or through some inadvertence, surprise, or neglect that may properly be considered excusable, the judgment or order from which he or she seeks relief should be reversed. In a motion under *Code Civ. Proc. § 473* the initial burden is on the moving party to prove excusable neglect by a preponderance of the evidence (*197 Cal. App. 3d 619, 623-624)* . In addition, the motion must be made within a reasonable time, in no case exceeding six months, after the judgment, order, or proceeding was taken (*197 Cal. App. 3d 619, 624)* . The court stated that although the determination of reasonableness is largely for the trial court, the limitation is not perfunctory. The moving party has a double burden: he or she must show a satisfactory excuse for the default, as well as diligence in making the motion after discovery of the default (*197 Cal. App. 3d 619, 624-625)* . The court observed that nothing in the record supports an inference that the defendant exercised diligence in seeking relief after knowledge of the default. Defendant's present counsel asserted that he unsuccessfully sought to contact plaintiff's counsel during the long period between the

entry of default and filing of the motion, but the assertions were not supported by any evidence in the record. The court noted that statements of alleged fact in appellate briefs that are not contained in the record and were never presented to the trial court are disregarded by the appellate court. Pursuant to case law, unexplained delays of more than three months in seeking relief from default after knowledge of its entry generally result in denial of relief (*197 Cal. App. 3d 619, 625)* . Inasmuch as the defendant waited almost twice that long to remedy the default after discovering its existence, he did not act within a reasonable time (*197 Cal. App. 3d 619, 625-626)* .

[c] Reasonable Time Test Is Independent Consideration

Benjamin v. Dalmo Mfg. Co. *(1948) 31 Cal. 2d 523, 190 P.2d 593* , was an appeal from a minute order and written order setting aside a default and default judgment taken against defendant corporation. Six days after defendant failed to appear in the action, defendant's default was taken and a formal judgment entered. Three and one-half months later, defendant moved to set aside the default, supported by affidavits of the president and secretary and accompanied by a verified answer. No counter affidavits were filed. The trial court granted defendant's motion under *Code Civ. Proc. § 473*. Plaintiffs appealed.

The Supreme Court reversed, on the ground that defendant furnished no explanation for failing to move sooner than it did for relief under *Code Civ. Proc. § 473* (*31 Cal. 2d 523, 532-533)* . The Court noted that defendant had not cited, nor did their independent research reveal, any case in which a court had set aside a default when there was an unexplained delay of anything approaching three months after full knowledge of the default (*31 Cal. 2d 523, 529)* . On the contrary, the Court stated, under the proper procedure, the moving party presents some explanation, by affidavit or testimony, of any extended delay, and the court then determines if the explanation is sufficient to justify granting relief (*31 Cal. 2d 523, 529)* . Defendant relied heavily on *William Wolff & Co. v. Canadian P. Railway (1891) 89 Cal. 332, 337, 26 P. 825* , because of its statement that when a delay in instituting proceedings to set aside a default judgment does not appear to have been injurious to the rights of the other party, the six months' limitation prescribed by the statute should be considered as the only limit of reasonable time (*31 Cal. 2d 523, 529)* .

The Court in *Benjamin* noted that in *Wolff,* application for relief under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), was filed three days after the entry of the default judgment; some five months later, a defect was discovered in the application, and an amended application was filed. Meanwhile, the hearing had been delayed with the consent of both parties. In reviewing the situation, the Court in *Wolff* noted that the second application was substantially an amendment of the first, and for the purpose of determining the question of diligence, must be so regarded (*31 Cal. 2d 523, 529-530)* . Therefore, in *Wolff* the "reasonable time" of the making of the application was not open to dispute. The Court stated that although the statutory six-month limitation is the standard or criterion in all cases as the measure of the court's jurisdiction to grant relief in any event, the reasonable time test stands as an independent consideration. In any given situation, its determination, within the maximum six-month period, depends on the circumstances of the particular case (*31 Cal. 2d 523, 530)* . The Court acknowledged that when the plaintiff files no counter affidavit and makes no showing that he or she has suffered any prejudice or that injustice will result from the trial of the case on its merits, very slight evidence will be required to justify a court in setting aside the default. However, it held, that rule does not obviate a showing of compliance with the "reasonable time" requirement in making the motion (*31 Cal. 2d 523, 531)* .

The Court noted that in the case before it, the conduct of defendant's corporate officers in excuse for their inadvertence bearing on the entry of the default judgment, and their prompt action thereafter in mailing the process papers to defendant's attorney are fully presented in the record, but beyond that point "there is deep silence" (*31 Cal. 2d 523, 531-532)* . The Court also stated that although plaintiffs made no showing of prejudice, none was necessary until defendant had at least made some excuse for the delay in question. To hold otherwise (that in the absence of any explanation a delay of more than three months in undertaking to open a default can be excused), the Court held, would empower the trial court to dispense with the "reasonable time" requirement of the statute (*31 Cal. 2d 523, 532)* .

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7-70 California Points & Authorities § 70.143

§ 70.143 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground that Motion Is Untimely [Code Civ. Proc. § 473(b)]--Relief Not Based on Attorney Affidavit of Fault--Motion Brought Within Six Months From Entry of Judgment But Beyond Six-Months After Entry of Default

[1] FORM

[*Caption. See § 70.120[1]).*]

THE COURT SHOULD DENY THE MOTION TO SET ASIDE THE DEFAULT BECAUSE THE COURT HAS NO JURISDICTION TO GRANT RELIEF FROM THE DEFAULT IN THAT THE DEFAULT AND DEFAULT JUDGMENTS ARE DISCRETE EVENTS AND THE MOVING PARTY HAS FILED FOR RELIEF UNDER CODE OF CIVIL PROCEDURE SECTION 473(b) MORE THAN SIX MONTHS AFTER THE DEFAULT WAS ENTERED.

Court Has Jurisdiction to Set Aside Default Judgment, but Not Default. When circumstances of the case indicate that the default and default judgments are discrete events, and the moving party files for relief under *Code of Civil Procedure Section 473(b)* more than six months after the default was entered, but within six months after the judgment, the court has jurisdiction to grant relief from the judgment, but not the default (*Rutan v. Summit Sports, Inc. (1985) 173 Cal. App. 3d 965, 970, 219 Cal. Rptr. 381*).

[*When appropriate, add points and authorities opposing the motion on additional particular grounds, for example, that motion is not timely (see, e.g., § 70.146 et seq.), or that the moving party has not made a sufficient showing justifying relief on the specific ground or grounds asserted (see, e.g., §§ 70.160 -70.216). Additional points and authorities may be also be added, when appropriate, supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief (see, e.g.,§ 70.230 et seq.).*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that a default and default judgment should be set aside on the ground of mistake, inadvertence, surprise, or excusable neglect under *Code Civ. Proc. § 473(b)*. This form is for use when the relief sought is not based on an attorney affidavit of fault, and that the court has no jurisdiction to grant relief from the default in that the default and default judgments are discrete events and the moving party has filed for relief under *Code Civ. Proc. § 473(b)* more than six months after the default was entered.

For a form of points and authorities for use when the motion was brought within the six-month limitation period but not within a reasonable time generally, see *§ 70.142[1]*. For a form of points and authorities for use when the motion was brought after the six-month limitation period, see *§ 70.140[1]*. For a form of points and authorities for use in opposing a motion for relief based on an attorney's affidavit of fault, see *§ 70.145[1]*.

In an appropriate case, this form may be submitted in opposition to the points and authorities *set out in §§ 70.10 -70.41*.

This form may be modified to oppose a motion to set aside that was filed more than six months after the entry of default, but within six months after the entry of default judgment, and the default and default judgment *are not* considered discrete events, such that the court lacks jurisdiction for any purposes under *Code Civ. Proc. § 473(b)*, and therefore may not vacate either the default or the default judgment.

This form may be combined with a memorandum generally opposing a motion to set aside under *Code Civ. Proc. § 473(b)* [*see § 70.120[1]*]. When appropriate, this form may be combined with points and authorities for use in refuting a contention that the preoccupation of the moving party's attorney with other matters is sufficient ground to justify delay in seeking relief [*see § 70.144[1*]; *see also § 70.212[1]* (opposing the grant of relief on the ground of excusable neglect when showing in support of this ground in the moving party's attorney's assertion of the press of other business)].

This form may be combined with points and authorities opposing relief on other particular grounds. For example, it may be combined with:

- Additional points and authorities showing that the motion is not timely [*see §§ 70.140 -70.148*].

- Additional points and authorities showing that the moving party has not made a sufficient showing justifying relief on the specific ground or grounds asserted [*see §§ 70.160 -70.216*; *see also* discussion in *§ 70.10[2][g]*].

This form may also be combined, when appropriate, with points and authorities supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief [*see §§ 70.230, 70.231*].

This form may also be adapted for use in a trial or appellate brief.

See also *§ 70.10[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b)*, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 70.120[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Court Has Jurisdiction to Set Aside Default Judgment, But Not Default

In ***Rutan v. Summit Sports, Inc.*** *(1985) 173 Cal. App. 3d 965, 219 Cal. Rptr. 381* , plaintiffs brought an action against defendants to recover on a promissory note and to obtain possession of an airplane securing the note. The complaint alleged default on the note and security agreement, and sought damages on the note, plus interest and attorney fees. Plaintiffs also requested orders permitting them to take possession of and sell the airplane and apply the net proceeds of sale to the debt. Defendants were served with the summons and complaint, but failed to respond. Plaintiffs requested entry of default, and the court entered the default of defendants. At a hearing, the court granted plaintiffs possession of the property, but continued the default judgment hearing, indicating that it wished to consider the details of sale of the airplane to assure that it would be conducted in a commercially reasonable manner. The following year, plaintiffs sold the airplane for an amount less than that prayed for in the complaint. After a hearing, the court approved the sale and, after deducting expenses from the sale proceeds, determined plaintiffs were entitled to a deficiency judgment, attorney fees, and costs. The default judgment was entered shortly thereafter. More than four months later, defendants made their first appearance in the action by moving to vacate the default and default judgment under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), or, alternatively, under the court's inherent equitable power. The trial court granted the motion on the sole ground that the deficiency judgment obtained was barred by plaintiffs' failure to comply with certain procedures under the California Uniform Commercial Code. Plaintiffs appealed, contending, inter alia, that the court lacked jurisdiction to set aside the default under *Code Civ. Proc. § 473* and otherwise abused its equitable power to do so.

The court of appeal reversed in part and affirmed in part (and remanded the case for further determination), holding, inter alia, that the motion under *Code Civ. Proc. § 473* was untimely with respect to the default itself, because it was not filed within six months of entry of default, as distinct from the default judgment (*173 Cal. App. 3d 965, 970, 974)* . With respect to the jurisdictional issue under *Code Civ. Proc. § 473* the court noted that generally the six-month period within which to bring a motion to vacate under *Code Civ. Proc. § 473* runs from the date of the default and not from the judgment taken after it. The reason for the rule, the court explained, is that vacation of the judgment alone ordinarily would constitute an idle act; if the judgment were vacated, the default would remain intact and permit immediate entry of another judgment giving the plaintiff relief in accordance with the complaint. Nonetheless, the court stated, the default and default judgment are separate procedures. The default judgment does not necessarily have any bearing on, and *may* be set aside without disturbing, the default. The court noted that in the case before it, the default and default judgment are discrete events (*173 Cal. App. 3d 965, 970)* . The court noted that plaintiffs sued for two different forms of relief: recovery of the debt owing on the promissory note, and possession of the collateral securing the note under the security agreement. The court observed that the trial court clearly never intended the default entered in the instant case to be conclusive of plaintiffs' right to a deficiency judgment; in granting plaintiffs possession of the collateral, the court expressly reserved jurisdiction to determine the reasonableness of any deficiency remaining between the proceeds of the sale of the plane and the full amount of the indebtedness (*173 Cal. App. 3d 965, 971)* . Inasmuch as defendants' motion was made more than six months after the default was entered, but within six months after the judgment, the court had jurisdiction under the statute to grant relief from the judgment, but not the default (*173 Cal. App. 3d 965, 970)* . (The court also stated that the basis of the trial court's order does not constitute grounds in equity for setting aside the default (*173 Cal. App. 3d 965, 970)* ; and remanded the matter for determination of compliance with notice requirements under the Commercial Code, which affects the validity of the default (*173 Cal. App. 3d 965, 972-974)* .)

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7-70 California Points & Authorities § 70.144

§ 70.144 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground that Motion Is Untimely [Code Civ. Proc. § 473(b)]--Relief Not Based on Attorney Affidavit of Fault--Attorney's Preoccupation With Other Matters Is Insufficient Reason for Delay

[1] FORM

[*Caption. See § 70.120[1].*]

THE COURT SHOULD DENY THE MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other proceeding*)] BECAUSE IT IS UNTIMELY, AND THE ASSERTION THAT THE MOVING PARTY'S ATTORNEY WAS PREOCCUPIED WITH OTHER MATTERS IS AN INSUFFICIENT GROUND FOR FAILURE TO SEEK RELIEF FROM A _____ [*identify proceeding, e.g.,* DEFAULT] WITHIN A REASONABLE TIME.

Attorney's Preoccupation With Other Matters Is Insufficient Reason for Delay. The assertion that the moving party's attorney was preoccupied with other matters is an insufficient ground for failure to seek relief from a default within a reasonable time (*Martin v. Taylor (1968) 267 Cal. App. 2d 112, 117, 72 Cal. Rptr. 847*).

[*When appropriate, add points and authorities opposing the motion on additional particular grounds, for example, that motion is not timely (see, e.g., § 70.146 et seq.), or that the moving party has not made a sufficient showing justifying relief on the specific ground or grounds asserted (see, e.g., §§ 70.160 -70.216). Additional points and authorities may be also be added, when appropriate, supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief (see, e.g.,§ 70.230 et seq.).*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that a default and default judgment, or judgment, dismissal, order, or other proceeding should be set aside on the ground of mistake, inadvertence, surprise, or excusable neglect under *Code Civ. Proc. § 473(b)*. This form may be used to refute the contention that the preoccupation of the moving party's attorney with other matters is sufficient ground to justify delay in seeking relief, when the relief sought is not based on an attorney affidavit of fault [*see* also *§ 70.212[1*] (opposing the grant of relief on the ground of excusable neglect when showing in support of this ground in the moving party's attorney's assertion of the press of other business)].

For a form of points and authorities for use in opposing a motion for relief based on an attorney's affidavit of fault, see *§ 70.145[1]*.

In an appropriate case, this form may be submitted in opposition to the points and authorities *set out in §§ 70.10 -70.41*.

This form may be combined with a memorandum generally opposing a motion to set aside under *Code Civ. Proc. § 473(b)* [*see § 70.120[1]*]. This form may be combined with points and authorities opposing relief on other particular grounds. For example, it may be combined with:

- Additional points and authorities showing that the motion is not timely [*see §§ 70.140 -70.148*].

- Additional points and authorities showing that the moving party has not made a sufficient showing justifying relief on the specific ground or grounds asserted [*see §§ 70.160 -70.216*; *see also* discussion in *§ 70.10[2][g]*].

This form may also be combined, when appropriate, with points and authorities supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief [*see §§ 70.230, 70.231*].

This form may also be adapted for use in a trial or appellate brief.

See also *§ 70.10[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b),* and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 70.120[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Attorney's Preoccupation With Other Matters Is Insufficient Reason for Delay

In ***Martin v. Taylor*** *(1968) 267 Cal. App. 2d 112, 72 Cal. Rptr. 847* , defendants received the summons and complaint, and sent plaintiffs their check for the original amount agreed on by plaintiffs and defendants on the condition that it be accepted as payment in full. Plaintiffs returned the check, stating that it was returned on advice of counsel, and demanding a larger amount for the claim in addition to costs. Plaintiffs advised defendants they would dismiss the suit on receiving the principal amount, or they would accept a lower amount and litigate the question of the additional amount claimed. Defendants consulted their attorney, who requested them to obtain additional information with a view to filing a counterclaim. Their attorney did not contact either of the plaintiffs or their attorneys, nor did he in any manner let them know he was acting of defendants' behalf. He also did not seek an extension of time for defendants to appear. Plaintiffs, not hearing from defendants or their attorney, caused a default to be entered; a default judgment was entered the same day. Two weeks later, defendants conferred with their attorney, who telephoned plaintiffs' attorney and

learned that the default judgment had been entered. The trial court denied defendants' motion for relief from the default and default judgment under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*).

The court of appeal affirmed, holding that the inexcusable neglect of the defense attorney as well as the defendants themselves, precluded relief under the statute (*267 Cal. App. 2d 112, 114-118)* . The court noted that mere mistake, inadvertence, or neglect does not warrant relief unless, on a consideration of all the evidence, it is found to be excusable (*267 Cal. App. 2d 112, 113)* . Defendants contended that their failure to appear comes within the term "excusable neglect and mistake" in that plaintiffs' letter (included with the return check), stating that they would await word from the defendants or their counsel, misled them to believe that plaintiffs would allow them a "reasonable period of time" to negotiate the matter, and that there was no urgency. The court noted, however, that plaintiffs had made a prior demand for payment and after waiting a month, filed the complaint to enforce the demand. Under those circumstances, the court found it difficult to state that the delay in not appearing in the action within the time allowed by law was excusable under any of the grounds set forth in former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*). Moreover, the court stated, defendants had a second hurdle to clear: the burden of showing that their delay in instituting proceedings to set aside the default judgment was excusable (*267 Cal. App. 2d 112, 115)* . The motion, which was filed three days prior to the expiration of the six-month limitation period, was accompanied by a single declaration, that of the defendants' attorney, stating that the principal reason for the delay was due to his law partner's vacationing in Europe and the resultant backlog of work in the law office. The court held that the "busy attorney" reason for delay has been almost uniformly rejected by the courts as a ground for failure to seek relief from a default within a reasonable time. The court stated that to accept this ground as legal justification would be to discourage diligence in the prosecution of appeals and establish a precedent that might lead to vexatious delays (*267 Cal. App. 2d 112, 117)* . The court also noted that the defendants themselves were inexcusably negligent in their failure to remain in communication with their attorney after the default had been taken, and in their failure to pay him to take action (*267 Cal. App. 2d 112, 117-118)* .

Counsel should note that *Martin* was decided prior to the 1988 amendment to *Code Civ. Proc. § 473* that provides for mandatory granting of relief based on an attorney's affidavit of fault if the conduct caused the default. For discussion, see *§ 70.145[3]*.

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7-70 California Points & Authorities § 70.145

§ 70.145 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground that Motion Is Untimely [Code Civ. Proc. § 473(b)]--Relief Based on Attorney Affidavit of Fault

[1] FORM

[*Caption. See § 70.120[1].*]

THE COURT SHOULD DENY THE MOTION TO SET ASIDE THE _____ [DEFAULT *or* DEFAULT AND DEFAULT JUDGMENT *or* DISMISSAL] BECAUSE THE MOTION IS UNTIMELY IN THAT THE MOTION IS BASED ON AN ATTORNEY'S AFFIDAVIT OF FAULT AND WAS NOT MADE WITHIN SIX MONTHS AFTER ENTRY OF THE _____ [JUDGMENT *or* DISMISSAL].

Attorney Affidavit of Fault Filed. An application for relief from default based on an attorney's affidavit of fault is untimely when it is not made within six months after the judgment has been entered (*Code Civ. Proc. § 473(b)*).

[*When appropriate, add points and authorities opposing the motion on additional particular grounds, for example, that motion is not timely (see, e.g.,§ 70.146 et seq.), or that the moving party has not made a sufficient showing justifying relief on the specific ground or grounds asserted (see, e.g., §§ 70.160 -70.216). Additional points and authorities may be also be added, when appropriate, supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief (see, e.g., § 70.230 et seq.).*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that default judgment or dismissal should be set aside on the ground of mistake, inadvertence, surprise, or excusable neglect under *Code Civ. Proc. § 473(b)*. This form is for use when the motion for relief is based on an attorney affidavit of fault.

In an appropriate case, this form may be submitted in opposition to the points and authorities *set out in § 70.12*.

This form may be combined with a memorandum generally opposing a motion to set aside under *Code Civ. Proc. § 473(b)* [*see § 70.120[1]*]. It may also be combined with points and authorities opposing relief on other particular grounds. For example, it may be combined with additional points and authorities showing that the moving party has not made a sufficient showing justifying relief on the specific ground or grounds asserted [*see §§ 70.160 -70.216*; *see also* discussion in *§ 70.10[2][g]*]. This form may also be combined, when appropriate, with points and authorities supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief [*see §§ 70.230*, *70.231*].

This form may also be adapted for use in a trial or appellate brief.

See also *§ 70.10[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b)*, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Counsel should therefore set forth the relevant dates of entry of default and the date of the filing of the motion, and show that the motion is based on the moving party's attorney's affidavit of fault and was not made within six months after judgment had been entered [*see* [3], *below*]. See also *§ 70.120[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Attorney Affidavit of Fault Filed

Whenever an application for relief under ***Code Civ. Proc. § 473*** is made no more than six months after entry of judgment, and is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, the court is required to vacate any (1) resulting default entered by the clerk against his or her client and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise or neglect [*Code Civ. Proc. § 473(b)*]. For further discussion, see the *§ 70.12[3]*, and *§ 70.120[2][c]*.

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7-70 California Points & Authorities § 70.146

§ 70.146 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground that Motion Is Untimely [Code Civ. Proc. § 473(b)]--Proposed Responsive Pleading Is Untimely

[1] FORM

[*Caption. See § 70.120[1].*]

THE COURT SHOULD DENY THE MOTION TO SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT TAKEN AGAINST THE DEFENDANT BECAUSE THE PROPOSED RESPONSIVE PLEADING WAS NOT FILED WITHIN SIX MONTHS OF THE ENTRY OF THE DEFAULT.

Proposed Responsive Pleading Must Be Filed Within Six-Month Period. A motion for relief under *Code of Civil Procedure Section 473(b)* is not timely filed if the proposed responsive pleading is not filed within six month from the date of the default, even though the notice of motion itself is filed within that time (*Puryear v. Stanley (1985) 172 Cal. App. 3d 291, 294-295, 218 Cal. Rptr. 196*).

[*When appropriate, add points and authorities opposing the motion on additional particular grounds, for example, that motion is not timely (see, e.g., § 70.141 et seq.), or that the moving party has not made a sufficient showing justifying relief on the specific ground or grounds asserted (see, e.g., §§ 70.160 -70.216). Additional points and authorities may be also be added, when appropriate, supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief (see, e.g.,§ 70.230 et seq.).*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that a default and default judgment should be set aside on the ground of mistake, inadvertence, surprise, or excusable neglect under *Code Civ. Proc. § 473(b)* [*see Code Civ. Proc.*

§ 473(b)].

The ground of opposition is that the proposed responsive pleading, a copy of which must accompany the application for relief, was not filed within six months after the entry of default [*see Puryear v. Stanley (1985) 172 Cal. App. 3d 291, 294, 218 Cal. Rptr. 196* ; *contra Job v. Farrington (1989) 209 Cal. App. 3d 338, 341, 257 Cal. Rptr. 210* (discussed under [3], *below*)]. For a reply memorandum taking a contrary position, see *§ 70.236[1]* [*see also* discussion under [c], *below*].

In an appropriate case, this form may be submitted in opposition to the points and authorities *set out in §§ 70.10 -70.41*.

This form may be combined with a memorandum generally opposing a motion to set aside under *Code Civ. Proc. § 473(b)* [*see § 70.120[1]*]. It may also be combined, when appropriate, with points and authorities opposing relief on other particular grounds. For example, it may be combined with additional points and authorities showing that the motion is not timely [*see §§ 70.140 -70.145, 70.147, 70.148*, or with additional points and authorities showing that the moving party has not made a sufficient showing justifying relief on the specific ground or grounds asserted [*see §§ 70.160 -70.216*; *see also* discussion in *§ 70.10[2][g]*]. This form may also be combined, when appropriate, with points and authorities supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief [*see §§ 70.230, 70.231*].

This form may also be adapted for use in a trial or appellate brief.

See also *§ 70.10[2]* and *§ 70.120[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b)*, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Counsel should therefore set forth the relevant dates of entry of default and the date of filing, if any, of the moving party's proposed responsive pleading.

In addition, inasmuch as there is a conflict of opinion at the appellate level on the issue set forth in this form (discussed under [c], *below*), counsel may wish to show facts supporting the conclusion that defendant's failure to file a responsive pleading within the six-month period precludes a finding of substantial compliance with the statute. This point would be particularly compelling if, for example, the proposed pleading was not filed at all, was filed substantially later than the six-month period, or was not filed prior to the default hearing [*cf. Job v. Farrington (1989) 209 Cal. App. 3d 338, 340-341, 257 Cal. Rptr. 210* (finding substantial compliance based on filing of proposed pleading shortly after six-month period, and prior to default hearing)].

See also *§ 70.120[2][b]* regarding evidentiary support for facts stated.

[c] Conflict in Court of Appeal Decisions on Viability of Substantial Compliance

There is a conflict of opinion at the appellate level on the issue set forth in this form. Thus, the Court of Appeal of the Third Appellate District has ruled that, although a motion for relief from default and a default judgment is timely filed, the trial court is without jurisdiction to grant relief when the defendant fails to serve and file the proposed answer or other responsive pleading with the motion for relief or within the six-month period prescribed by the statute [*Puryear v. Stanley (1985) 172 Cal. App. 3d 291, 293-295, 218 Cal. Rptr. 196* (distinguishing *County of Los Angeles v. Lewis (1918) 179 Cal. 398, 399, 177 P. 154* , and *Sousa v. Capital Co. (1963) 220 Cal. App. 2d 744, 759-761, 34 Cal. Rptr. 71* , both involving substantial compliance with the statute; *see* [3], *below*)]. In *Puryear*, the court affirmed the order denying relief from default and default judgment on the ground that, although the motion was timely filed, the proposed

answer was not filed until after the six-month limitation period had passed.

However, the Court of Appeal of the Second Appellate District, Division 6, relying on the cases distinguished by *Puryear*, rejected *Puryear* and ruled to the contrary in a case involving substantially similar circumstances [*Job v. Farrington (1989) 209 Cal. App. 3d 338, 340-341, 257 Cal. Rptr. 210]* . In *Job v. Farrington*, the court reversed the order denying relief from default and default judgment when the motion for relief was timely filed within six months of entry of the default, but the proposed answer was not filed until after the six-month period had passed, although it was filed before the scheduled hearing on motion [*Job v. Farrington (1989) 209 Cal. App. 3d 338, 340-341, 257 Cal. Rptr. 210]* .

Citing *Job*, the Fifth Circuit held that a party substantially complies with the "accompanied by" requirement by filing the proposed answer sufficiently in advance of the hearing to permit the other party to prepare for the hearing [*County of Stanislaus v. Johnson (1996) 43 Cal. App. 4th 832, 838, 51 Cal. Rptr. 2d 73* , discussed in *§ 70.236[3]*].

[d] Reply Memorandum

In an appropriate case, the points and authorities *set out in § 70.236[1]* may be used to reply to the contention supported by this form.

[3] Discussion of Authorities

[a] Proposed Responsive Pleading Must Be Filed Within Six-Month Period

In ***Puryear v. Stanley*** *(1985) 172 Cal. App. 3d 291, 218 Cal. Rptr. 196* , the defendant's motion to set aside a default and default judgment was noticed within six months of entry of default, but was unaccompanied by a proposed answer or other responsive pleading as required by *Code Civ. Proc. § 473*. The default and default judgments were entered on February 8 and February 15, respectively. Defendant noticed a motion under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), for hearing on July 26. The motion stated that the answer was attached to the motion, and that the answer would be presented as a supplement to the motion; but the proposed answer was not filed until August 23, the date the motion was heard by the trial court. The trial court denied relief on the ground that the motion was rendered untimely because of the untimely filing of the proposed responsive pleading. The defendant appealed.

The court of appeal affirmed, holding that the motion was untimely filed (*172 Cal. App. 3d 291, 294-295)* . The court noted that the single issue on appeal is whether the defect of the untimely filing of the pleading may be cured after the six-month period has expired. It noted that former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), provides that the application for relief must be accompanied by a copy of the answer or other pleading proposed to be filed; and must be made within a reasonable time, in no case exceeding six months, after the judgment, order, or proceeding was taken. The court stated that when application is not made within the six-month period, the court is without jurisdiction to grant relief from a judgment. It further stated that before the trial court can be called on to exercise its discretion in relieving a party from a default judgment, the party in default must show not only a good excuse for the default, but also that he or she has a meritorious defense to the action (*172 Cal. App. 3d 291, 293)* . The court held that the requirement that a pleading accompany the application for relief or that one be on file is mandatory, and failure to comply necessarily results in denial of relief (*172 Cal. App. 3d 291, 293-294)* . It noted that an application for relief from default is deemed to have been made when notice of the motion for relief is filed. In the instant case, defendant's notice of motion was filed within six months of the entry of default and default judgment, but the proposed answer was not served on plaintiff or received by the court until after the six months had expired. The court distinguished from the instant case two appellate court cases in which a responsive pleading was submitted to the trial court two days before service of the motion; and a motion for an order continuing time within which to plead accompanied the motion, and the proposed answer was filed prior to the default hearing (*172 Cal. App. 3d 291, 294)* .

The court rejected the defendant's reliance on a case in which the notice of motion was timely filed and accompanied by a proposed answer, but after the six-month period, the trial court permitted the defendant to file affidavits in support of the motion; holding that the concept of substantial compliance in that case could not properly be extended to the facts in the present case. The court concluded that because defendant's proposed answer was not submitted within the six-month period, the trial court correctly determined that it was without jurisdiction to grant relief (*172 Cal. App. 3d 291, 295)* .

Counsel should note that there is a conflict of authority on this issue among appellate courts. *Puryear*, discussed *above*, was decided by the Third Appellate District. The Second Appellate District expressly disagreed with *Puryear*, and in a case involving similar circumstances, held to the contrary. In *Job v. Farrington (1989) 209 Cal. App. 3d 338, 257 Cal. Rptr. 210* , the Second District Court of Appeal reversed and remanded a trial court ruling based expressly on *Puryear*, holding instead that the defendant's filing of a motion under *Code Civ. Proc. § 473*, supported by a declaration and points and authorities, but unaccompanied by a proposed responsive pleading, was timely filed based on the filing of the proposed answer shortly after expiration of the six-month period and prior to the default hearing. *Job* held that the doctrine that the statute should be construed "liberally with a view to substantial compliance" supports a finding of timely filing under the facts (*172 Cal. App. 3d 291, 294)* . In support of its holding, Job cited *County of Los Angeles v. Lewis (1918) 179 Cal. 398, 400, 177 P. 154* , which stated that "[t]he plain object of the provision was simply to require the delinquent party seeking leave to contest on the merits, to show his good faith and readiness to at once file his answer in the event that leave is granted by producing a copy of the proposed answer for the inspection of his adversary and the court." *Job* also noted that the moving party may not file an answer until the court has ruled on the motion for relief (*172 Cal. App. 3d 291, 295)* .

Counsel should also note that the references in court opinions to the requirement of a showing of meritorious defense under *Code Civ. Proc. § 473(b)*, may in some instances be questionable. For further discussion of this point, see *§ 70.10[2][e]*.

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7-70 California Points & Authorities § 70.147

§ 70.147 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground that Motion Is Untimely [Code Civ. Proc. § 473(b)]--Alleged Fraud Is Intrinsic

[1] FORM

[*Caption. See § 70.120[1].*]

THE COURT SHOULD DENY THE MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other proceeding*)] BECAUSE THE ASSERTED FRAUD IS INTRINSIC AND THE MOVING PARTY FAILED TO FILE THE MOTION WITHIN _____ [SIX MONTHS *or* A REASONABLE TIME] OF THE ENTRY OF THE _____ [*identify proceeding, e.g.,* DEFAULT].

A. Alleged Fraud Is Intrinsic Not Extrinsic. Alleged fraud consisting of deliberate, intentional misrepresentations, untruths, half truths, and deceitfully misleading affidavits, arguments, and declarations on the part of the opposing party, constitutes intrinsic, rather than extrinsic fraud (*Buesa v. City of Los Angeles (2009) 177 Cal. App. 4th 1537, 1545-1548, 100 Cal. Rptr. 3d 86* ; *Beresh v. Sovereign Life Ins. Co. (1979) 92 Cal. App. 3d 547, 553, 155 Cal. Rptr. 74*).

B. Motion Based on Intrinsic Fraud Must Be Brought Within Six-Month Limitation Period. Although a motion based on extrinsic fraud may be brought pursuant to the court's equitable powers, without the time limitations of *Code of Civil Procedure Section 473(b),* a motion based on intrinsic fraud is available only under statutory authority, and must be brought within the time limitations of the statute, that is, within six months from the date of default, and within a reasonable time after default (*Beresh v. Sovereign Life Ins. Co. (1979) 92 Cal. App. 3d 547, 552, 155 Cal. Rptr. 74*).

[*When appropriate, add points and authorities opposing the motion on additional particular grounds, for example, that the motion is not timely (see, e.g., § 70.141 et seq.), or that the moving party has not made a sufficient showing justifying relief on the specific ground or grounds asserted (see, e.g., §§ 70.160 -70.216). Additional points and*

authorities may be also be added, when appropriate, supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief (see, e.g.,§ 70.230 et seq.).]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that a default and default judgment, or judgment, dismissal, order, or other proceeding should be set aside on the ground of mistake, inadvertence, surprise, or excusable neglect under *Code Civ. Proc. § 473(b)* [*see Code Civ. Proc. § 473(b)*]. The ground of opposition is that the motion was not filed in a timely manner, in that the motion was based on fraud, and, contrary to the assertion of the moving party that the fraud is extrinsic (and therefore not subject to the time limitations under *Code Civ. Proc. § 473(b)*), the facts show that the fraud was intrinsic, and, inasmuch as the motion was not filed within the statutory time limitations, it is untimely [*see, e.g., Beresh v. Sovereign Life Ins. Co. (1979) 92 Cal. App. 3d 547, 552-555, 155 Cal. Rptr. 74]* .

In an appropriate case, this form may be submitted in opposition to the points and authorities *set out in § 70.110[1]*.

This form may be combined with a memorandum generally opposing a motion to set aside under *Code Civ. Proc. § 473(b)* [*see § 70.120[1]*].

It may also be combined, when appropriate, with points and authorities opposing relief on other particular grounds. For example, it may be combined with additional points and authorities showing that the motion is not timely [*see §§ 70.140 -70.146, 70.148*], or with additional points and authorities showing that the moving party has not made a sufficient showing justifying relief on the specific ground or grounds asserted [*see §§ 70.160 -70.231*; *see also* discussion in *§ 70.10[2][g]*]. This form may also be combined, when appropriate, with points and authorities supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief [*see §§ 70.230, 70.231*].

This form may also be adapted for use in a trial or appellate brief.

See also *§ 70.10[2]* and *§ 70.120[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b)*, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Inasmuch as the opposing party must assert that the fraud is extrinsic, in order to circumvent the time limitation requirement under the statute, counsel should show why the conduct, if it does constitute fraud, constitutes intrinsic, rather than extrinsic fraud. See also *§ 70.120[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Alleged Fraud Is Intrinsic Not Extrinsic

In ***Buesa v. City of Los Angeles*** *(2009) 177 Cal. App. 4th 1537, 1545-1548, 100 Cal. Rptr. 3d 86* , after the two plaintiff police officers arrested a suspect, the defendant learned of alleged acts of misconduct by the plaintiffs arising from that arrest. The next day, a sergeant from the LAPD Internal Affairs Group was assigned to investigate the alleged misconduct. The Public Safety Officers Procedural *Bill of Rights* Act (*Gov. Code § 3300 et seq.* (POBRA)) provides a one-year statute of limitations for bringing police misconduct charges. The time runs from the discovery of the misconduct. The limitations period may be tolled while a criminal investigation or prosecution is pending. The sergeant asked LAPD superiors to toll the statute of limitations against the plaintiffs because of the pending criminal

investigation. The Los Angeles Police Commission found the plaintiffs guilty of misconduct and recommended that they be discharged. Accordingly, the defendant terminated the plaintiffs.

The plaintiffs filed a petition for writ of administrative mandamus seeking review of their terminations. They alleged that the sergeant furnished a false declaration regarding the date of the criminal investigation, thereby fraudulently extending the tolling period authorized by POBRA. The trial court denied the petition.

The plaintiffs filed a separate action seeking damages against the defendant for violation of POBRA based upon the plaintiffs' claim for perjury in the underlying mandamus proceeding. The defendant filed a motion for judgment on the pleadings. The trial court granted the defendant's motion, holding that perjury is not a basis for collateral attack on a judgment.

On appeal, the plaintiffs argued that they were not collaterally attacking the mandate judgment, and therefore the doctrines of finality of judgments and collateral estoppel did not apply. They argued that their rights under POBRA were thwarted by the sergeant's alleged perjury. The court of appeal held that after the time for seeking a new trial has expired and any appeals have been exhausted, a final judgment may not be directly attacked and set aside on the ground that evidence has been suppressed, concealed, or falsified. Similarly, a judgment may not be collaterally attacked on the ground that evidence was falsified [*177 Cal. App. 4th 1537, 1544-1545*]. The court distinguished between intrinsic fraud, which may not be used to overthrow a judgment, and extrinsic fraud which can [*177 Cal. App. 4th 1537, 1545-1546*]. The court held that the introduction of perjured testimony is a classic example of intrinsic fraud [*177 Cal. App. 4th 1537, 1545-1546*]. The plaintiffs argued that the finality of judgments policy does not apply because their second action was based on different legal issues than their administrative mandate action. The court disagreed and held that, because the tolling issue was actually litigated in the mandate proceeding, a new claim based on the allegedly perjured declaration was a collateral attack on the mandate decision and was not allowed [*177 Cal. App. 4th 1537, 1548*].

In ***Beresh v. Sovereign Life Ins. Co.*** *(1979) 92 Cal. App. 3d 547, 155 Cal. Rptr. 74* , summary judgment was entered against the plaintiffs. Two months later, plaintiffs filed a notice of appeal. While the appeal was pending, plaintiffs also filed the first of two motions under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), to vacate the trial court's order granting summary judgment. The trial court denied the motion on the ground that it had no jurisdiction during pendency of appeal. More than six months after entry of the summary judgment, plaintiffs filed their second motion to vacate, in conjunction with an "Abandonment of Appeal" from the summary judgment they sought vacated. The trial court denied the motion on the ground that it was filed more than six months after entry of default, and therefore was untimely. The trial court stated that a motion to reconsider a motion under *Code Civ. Proc. § 473*, filed after six months have expired from the date of default, does not relate back to the date of filing the original motion. Accordingly, all issues that could have been reconsidered on a motion under *Code Civ. Proc. § 473*, including intrinsic fraud, could not be considered on the motion for reconsideration. The trial court also stated that although plaintiffs are correct in asserting that the running of the six-month limitations period does not prevent the filing of a motion based on extrinsic fraud, the facts alleged by plaintiffs amount at the most to intrinsic, not extrinsic, fraud. Plaintiffs appealed from the two orders denying their motions made under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), for relief from summary judgment.

The court of appeal affirmed, holding that the appeal from the denial of the first motion was untimely (and that the trial court's ruling regarding lack of jurisdiction was correct), and that the second motion to vacate was untimely filed (*92 Cal. App. 3d 547, 551-555)* . The court stated that although *Code Civ. Proc. § 473* does not expressly refer to fraud, cases have nevertheless regarded fraud as an even more compelling ground for relief than mistake, which is an enumerated ground under the statute. If the fraud is extrinsic, equitable relief may be had without the time limitations under the statute. If the fraud is intrinsic (occurring in the course of an adversary hearing), equitable relief is unavailable, but a motion under the statute will lie (*92 Cal. App. 3d 547, 552)* . The court observed that although plaintiffs did not speak specifically in terms of extrinsic fraud in their appellate brief, they clearly based their second

motion primarily on the power of the court to grant equitable relief from a judgment procured by extrinsic fraud. However, the court noted, the alleged fraud, consisting of deliberate, intentional misrepresentation, untruths, half truths, and deceitfully misleading affidavits, arguments, and declaration on the part of defendants, is clearly what courts have consistently characterized as intrinsic fraud (*92 Cal. App. 3d 547, 553)* .

The court stated that there is no question that in equity, a former judgment or decree may be set aside and annulled for some frauds; but the fraud must be extrinsic or collateral to the questions examined and determined in the action. In equity, a decree will not be vacated merely because it was obtained by forged documents or perjured testimony. The reason for the rule is that there must be an end of litigation. When parties have once submitted a matter, and when they have exhausted all review procedures, it must be regarded as final and conclusive, unless it can be shown that the jurisdiction of the court has been imposed on, or that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy. The court stated that extrinsic fraud consists of such conduct as keeping the unsuccessful party away from the court by a false promise of a compromise, or purposely keeping him or her in ignorance of the suit. It also exists when an attorney fraudulently pretends to represent a party, and connives at his or her defeat, or, being regularly employed, corruptly "sells out" the client's interest. In all such instances, the unsuccessful party is really prevented, by the fraudulent contrivance of his or her adversary, from having a trial. However, at trial, the party must be prepared to meet and expose perjury then and there (*92 Cal. App. 3d 547, 553)* . If he or she fails to prove an injustice on a motion for a new trial, and the judgment is affirmed on appeal, the party is without a remedy. Although the wrong committed is "grievous," the courts cannot remedy the evil without producing mischiefs far worse than the evil to be remedied. The court stated that endless litigation in which nothing was ever finally determined, would be worse than occasional miscarriages of justice (*92 Cal. App. 3d 547, 554)* .

Further, the court stated, California cases uniformly hold that the introduction of perjured testimony or false documents in a fully litigated case constitutes intrinsic fraud rather than extrinsic fraud. Inasmuch as plaintiffs failed to show that the summary judgment was procured by extrinsic fraud, the motion to vacate was untimely. The court also noted that if the second motion were to be considered a motion for reconsideration of the first motion, the result would be the same. Although there is no statutory ground for a motion for reconsideration in such a case, appellate courts have always recognized that a court has power, on a subsequent motion, to reconsider its prior decision denying a similar motion. However, because such a motion is considered a renewal of the previous motion, the subsequent motion must also meet the requirements of the statute (*92 Cal. App. 3d 547, 554)* .

[b] Motion Based on Intrinsic Fraud Must Be Brought Within Six-Month Limitation Period

Beresh v. Sovereign Life Ins. Co. *(1979) 92 Cal. App. 3d 547, 155 Cal. Rptr. 74* , is discussed under [a], *above*. The court of appeal stated that although *Code Civ. Proc. § 473* does not expressly refer to fraud, cases have nevertheless regarded fraud as an even more compelling ground for relief than mistake, which is an enumerated ground under the statute. If the fraud is extrinsic, equitable relief may be had without the time limitations under the statute. If the fraud is intrinsic (occurring in the course of an adversary hearing), equitable relief is unavailable, but a motion under the statute will lie (*92 Cal. App. 3d 547, 552)* .

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7-70 California Points & Authorities § 70.148

§ 70.148 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground that Motion Is Untimely [Code Civ. Proc. § 473(b)]--Motion Not Filed Within Shortened Statutory Limitation Period Regarding Property Rights

[1] FORM

[*Caption. See § 70.120[1].*]

THE COURT SHOULD DENY THE MOTION TO SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT BECAUSE IT IS UNTIMELY, IN THAT THE NOTICE OF MOTION WAS NOT FILED WITHIN 90 DAYS AFTER THE ENTRY OF DEFAULT, PURSUANT TO THE REQUIREMENT UNDER CODE OF CIVIL PROCEDURE SECTION 473(b), REGARDING AN ACTION INVOLVING PROPERTY RIGHTS.

Action Involving Property Rights. In the case of a judgment, dismissal, order, or other proceeding determining the ownership or right to possession of real or personal property, without extending the six-month period under the general rule of limitation, when a notice in writing is personally served within California both on the party against whom the judgment, dismissal, order, or other proceeding has been taken, and on his or her attorney of record, if any, notifying the party and attorney that the order, judgment, dismissal, or other proceedings was taken against him or her, and that any rights the party has to apply for relief under *Code of Civil Procedure Section 473(b)* shall expire 90 days after service of the notice, then the application must be made within 90 days after service of the notice on the defaulting party or his or her attorney of record, if any, whichever service is later (*Code Civ. Proc. § 473(b)*).

[*When appropriate, add points and authorities opposing the motion on additional particular grounds, for example, that motion is not timely (see, e.g., § 70.141 et seq.), or that the moving party has not made a sufficient showing justifying relief on the specific ground or grounds asserted (see, e.g., §§ 70.160 -70.216). Additional points and authorities may be also be added, when appropriate, supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief (see, e.g.,§ 70.230 et seq.).*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that a default and default judgment should be set aside on the ground of mistake, inadvertence, surprise, or excusable neglect under *Code Civ. Proc. § 473(b)* [*see Code Civ. Proc. § 473(b)*]. The ground of opposition is that the motion was not filed in a timely manner pursuant to the shortened limitation period applicable to an action concerning a proceeding determining the ownership or right to possession of real or personal property [*see Code Civ. Proc. § 473(b)*].

In an appropriate case, this form may be submitted in opposition to the points and authorities *set out in § 70.10 -70.41*.

This form may be combined with a memorandum generally opposing a motion to set aside under *Code Civ. Proc. § 473(b)* [*see § 70.120[1]*]. It may also be combined, when appropriate, with points and authorities opposing relief on other particular grounds. For example, it may be combined with additional points and authorities showing that the motion is not timely [*see §§ 70.140 -70.147*], or with additional points and authorities showing that the moving party has not made a sufficient showing justifying relief on the specific ground or grounds asserted [*see §§ 70.160 -70.231*; *see also* discussion in *§ 70.10[2][g]*]. This form of points and authorities may also be combined, when appropriate, with points and authorities supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief [*see §§ 70.230, 70.231*].

This form may also be adapted for use in a trial or appellate brief.

See also *§ 70.10[2]* and *§ 70.120[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b)*, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Counsel should therefore set forth the nature of the action and show the applicability of the relevant limitation provision; and should also set forth all the relevant dates. See also *§ 70.120[2][b]* regarding evidentiary support for facts stated.

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[Reserved]

§§ 70.149[Reserved]

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7-70 California Points & Authorities § 70.160

§ 70.160 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground That There Is Insufficient Showing of Mistake [Code Civ. Proc. § 473(b)]--General Form

[1] FORM

[*This form should be combined with a memorandum generally opposing a motion to set aside under Code Civ. Proc. § 473(b) (see § 70.120[1]).*]

THE COURT SHOULD DENY THE MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other proceeding*)] BECAUSE THERE IS INSUFFICIENT SHOWING OF AN EXCUSABLE MISTAKE, WITHIN THE MEANING OF CODE OF CIVIL PROCEDURE SECTION 473(b), THAT WOULD ENTITLE THE MOVING PARTY TO RELIEF.

No Showing That Mistake Excusable. Mere mistake, inadvertence, or neglect does not warrant relief under Code of Civil Procedure Section 473(b) unless, on a consideration of all the evidence, it is found to be excusable (*Martin v. Taylor (1968) 267 Cal. App. 2d 112, 113, 72 Cal. Rptr. 847*).

[*When appropriate, add points and authorities opposing the motion on particular grounds, for example, that motion is not timely (see, e.g., § 70.141 et seq.). When appropriate, add additional points and authorities asserting that the moving party has not made a sufficient showing justifying relief on the specific ground or grounds asserted in the motion (see, e.g., §§ 70.161 -70.216). Additional points and authorities may be also be added, when appropriate, supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief (see, e.g.,§ 70.230 et seq.).*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that a default and default judgment, or judgment, dismissal, order, or other proceeding should be set aside on the ground of mistake under *Code Civ. Proc. § 473(b)*, because there is an insufficient showing of entitlement to relief for a mistake [*see, e.g., Martin v. Taylor (1968) 267 Cal. App. 2d 112, 113, 72 Cal. Rptr. 847]* . For points and authorities for use when the defendant has asserted the specific ground of a mistake of law, but has failed to show that a mistake of law occurred, see *§ 70.161[1]*.

In an appropriate case, this form may be submitted in opposition to the points and authorities *set out in §§ 70.50 -70.64*.

This form should be combined with a memorandum generally opposing a motion to set aside under *Code Civ. Proc. § 473(b)* [*see § 70.120[1]*]. It may also be combined, when appropriate, with points and authorities opposing relief on other particular grounds. For example, it may be combined with additional points and authorities showing that the motion is not timely [*see §§ 70.140 -70.148*], or with additional points and authorities showing that the moving party has not made a sufficient showing justifying relief on the specific ground or grounds asserted [*see §§ 70.161 -70.216*; *see also* discussion in *§ 70.10[2][g]*]. This form may also be combined, when appropriate, with points and authorities supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief [*see §§ 70.230, 70.231*].

This form may also be adapted for use in a trial or appellate brief.

See also *§ 70.10[2]* and *§ 70.120[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b)*, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Counsel should therefore show why the mistake was not excusable under the circumstances. See also *§ 70.120[2][b]* regarding evidentiary support for facts stated.

[c] Attorney Affidavit of Fault

Whenever an application for relief under *Code Civ. Proc. § 473* is timely, in proper form, and accompanied by an attorney's sworn affidavit attesting to his or her mistake, the court must vacate any resulting default judgment or dismissal entered against his or her client unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake [*Code Civ. Proc. § 473*]. For further discussion, see the *§ 70.12[3]* and *§ 70.120[2][c]* [*see* also *§ 70.140* et seq.].

[3] Discussion of Authorities

[a] No Showing That Mistake Excusable

Martin v. Taylor *(1968) 267 Cal. App. 2d 112, 72 Cal. Rptr. 847* , is discussed in *§ 70.144[3]*.

[4] Additional Authorities

[a] No Showing That Mistake Excusable

In *Drinnon v. Oliver (1972) 24 Cal. App. 3d 571, 101 Cal. Rptr. 120* , an action arising from a traffic accident, the court of appeal reversed a trial court order granting relief under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), to the defendant's insurer as intervenor. After the accident occurred, the insurer denied coverage, and plaintiff obtained a default judgment against the defendant. Plaintiff and defendant settled their

controversy, and commenced an action against the defendant's insurer. At that point, the insurer moved to set aside the default, intervene in the action between plaintiff and defendant, and file an answer on behalf of the defendant. The trial court granted the motion, and plaintiff and defendant appealed. The court of appeal reversed, on several issues, including estoppel and notice (*24 Cal. App. 3d 571, 579-586)* . The court noted parenthetically that the insurer was well aware of its mistake, and could not obtain relief under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), because it did not act with the same degree of diligence as a person of ordinary prudence usually bestows on his or her important business affairs (*24 Cal. App. 3d 571, 586)* .

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7-70 California Points & Authorities § 70.161

§ 70.161 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground That There Is Insufficient Showing of Mistake [Code Civ. Proc. § 473(b)]--No Showing of Mistake of Law

[1] FORM

[*This form should be combined with a memorandum generally opposing a motion to set aside under Code Civ. Proc. § 473(b) based on excusable mistake (see § 70.160[1]).*]

THE COURT SHOULD DENY THE MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other proceeding*)] BECAUSE THERE IS INSUFFICIENT SHOWING OF A MISTAKE OF LAW.

No Showing of Mistake of Law. No relief is available under *Code of Civil Procedure Section 473(b)* based on a mistake of law, when there is no showing of a mistake of law (*Ludka v. Memory Magnetics International (1972) 25 Cal. App. 3d 316, 321, 101 Cal. Rptr. 615*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that a default and default judgment, or judgment, dismissal, order, or other proceeding should be set aside on the ground of mistake under *Code Civ. Proc. § 473(b),* because defendant has asserted the specific ground of a mistake of law, but has failed to show that a mistake of law occurred.

In an appropriate case, this form may be submitted in opposition to the points and authorities *set out in §§ 70.50 -70.64*.

This form should be combined with a form of memorandum opposing a motion for relief under *Code Civ. Proc. § 473(b)* based on excusable mistake generally [*see § 70.160[1]*].

This form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 70.120[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] No Showing of Mistake of Law

In ***Ludka v. Memory Magnetics International*** *(1972) 25 Cal. App. 3d 316, 101 Cal. Rptr. 615* , the trial court denied defendant's motion under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), for relief from a default against it. Defendant's motion was filed more than three months after the default was entered, and prior to entry of default judgment. Following denial of that motion, the defendant filed a second motion to vacate the order denying the motion to vacate the default and set aside the judgment, which was also denied. Defendant appealed.

The court of appeal affirmed, holding that there was no showing in support of the motion, and that the motion was untimely filed (*25 Cal. App. 3d 316, 321-324)* . The court noted that the basis of defendant's motion to vacate the default was that it had not been properly served. Defendant presented declarations asserting that copies of the summons and complaint were given to people in defendant's office building who were not employed by or associated with defendant's business. The opposing declarations of plaintiff's counsel recited his previous difficulties in attempting to serve defendant, and his decision to order "abode service" to be made on defendant (that is, leaving the papers at office or home of the person being served, and mailing a copy to the person being served, pursuant to *Code Civ. Proc. § 415.20*). Another declaration in opposition to the motion stated that defendant used many corporate titles, that an employee of one of those corporations had been served, and that defendant's reception area was the only public access to defendant's offices.

The court noted that the lower court has discretionary power to decide the issue growing out of a motion for relief under the remedial provisions of *Code Civ. Proc. § 473*, and its exercise of that discretion will not be disturbed by an appellate tribunal unless there is a clear showing of abuse. The court stated that, tested by this elementary principle, the trial court was will within its discretion in denying the motion, based primarily on two considerations: (1) effective service on defendant of the summons and complaint; and (2) the untimeliness of the motion. With respect to the issue of service, the court noted that the trial court could well find that a copy of the summons and complaint had been left during usual office hours of defendant with the person who was apparently in charge, and that plaintiff properly mailed a copy to defendant pursuant to the statutory requirements. The court noted that, pursuant to *Code Civ. Proc. § 415.20*, service was completed on the 10th day after mailing. The court stated that, although a mistake of law may be grounds for granting relief under *Code Civ. Proc. § 473*, in the instant case there is no showing that defendant, in fact, labored under any mistake of law. The court found that the "totally erroneous and entirely gratuitous" advice of one declarant (who observed the delivery of papers in the reception area of defendant's office building) that service had not been effected, did not constitute a mistake of defendants; he himself declared that he was not an officer, employee, agent, or otherwise associated with defendant (*25 Cal. App. 3d 316, 321)* .

For further discussion of the timeliness issue in *Ludka*, see *§ 70.142[3]*.

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7-70 California Points & Authorities § 70.162

§ 70.162 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground That There Is Insufficient Showing of Mistake [Code Civ. Proc. § 473(b)]--Attorney's Mistake of Law--Mistake Is Not Justifiable

[1] FORM

[*This form should be combined with a memorandum generally opposing a motion to set aside under Code Civ. Proc. § 473(b) based on excusable mistake (see § 70.160[1]).*]

THE COURT SHOULD DENY THE MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other proceeding*)] BECAUSE THE MISTAKE OF LAW COMMITTED BY THE ATTORNEY FOR THE MOVING PARTY IS NOT EXCUSABLE.

Justifiability of Mistake of Law Required for Relief. An attorney's failure to determine the correct law will not support the grant of relief under *Code of Civil Procedure Section 473(b)*, if the error is not reasonable or justifiable under the circumstances (*Martin v. Johnson (1979) 88 Cal. App. 3d 595, 605-607, 151 Cal. Rptr. 816* ; *A & S Air Conditioning v. John J. Moore Co. (1960) 184 Cal. App. 2d 617, 620, 7 Cal. Rptr. 592*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that a default and default judgment, or judgment, dismissal, order, or other proceeding should be set aside on the ground of mistake, based on a mistake of law made by the moving party's attorney at the time the default was taken [*see Code Civ. Proc. § 473(b)*]. The ground of opposition is that the mistake was not excusable or justifiable [*see A & S Air Conditioning v. John J. Moore Co. (1960) 184 Cal. App. 2d 617, 620, 7 Cal. Rptr. 592]* . For a form of memorandum that includes points and authorities opposing relief on the ground that an attorney's negligence is imputed to the client, see *§ 70.124[1]*.

In an appropriate case, this form may be submitted in opposition to the points and authorities *set out in §§ 70.60 -70.64*.

This form should be combined with a memorandum generally opposing a motion to set aside based on excusable mistake [*see § 70.160[1]*]. It may also be combined, when appropriate, with points and authorities opposing relief on other particular grounds. For example, it may be combined with additional points and authorities showing that the motion is not timely [*see §§ 70.140 -70.148*], or with additional points and authorities showing that the moving party has not made a sufficient showing justifying relief on the specific ground or grounds asserted [*see §§ 70.160, 70.161, 70.163 -70.216*; *see also* discussion in *§ 70.10[2][g]*]. This form may also be combined, when appropriate, with points and authorities supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief [*see §§ 70.230, 70.231*].

This form may also be adapted for use in a trial or appellate brief.

See also *§ 70.10[2]* and *§ 70.120[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b)*, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Counsel should therefore show why the mistake was not justifiable, for example, that it was caused by the attorney's ignorance of the relevant law, coupled with his or her laxness or negligence in a matter that was not complex or inherently confusing [*see Security Truck Line v. Monterey (1953) 117 Cal. App. 2d 441, 445, 257 P.2d 755]* . See also *§ 70.120[2][b]* regarding evidentiary support for facts stated.

[c] Attorney Affidavit of Fault

Whenever an application for relief under *Code Civ. Proc. § 473* is timely, in proper form, and accompanied by an attorney's sworn affidavit attesting to his or her mistake, the court must vacate any resulting default judgment entered against his or her client unless the court finds that the default was not in fact caused by the attorney's mistake [*Code Civ. Proc. § 473*]. For further discussion, see the *§ 70.12[3]* and *§ 70.120[2][c]* [*see* also *§ 70.140* et seq.].

[3] Discussion of Authorities

[a] Justifiability of Mistake of Law Required for Relief

In ***Martin v. Johnson*** *(1979) 88 Cal. App. 3d 595, 151 Cal. Rptr. 816* , a defamation action, the trial court denied plaintiff's motion to set aside a summary judgment in defendants' favor. At the hearing on the summary judgment motion, defendants argued that plaintiff's affidavits in opposition to the motion were legally defective because they contained hearsay and were not based on the declarant's personal knowledge. On that basis, the trial court granted defendants' motion to strike certain crucial portions of plaintiff's declaration and exhibits; and ultimately awarded summary judgment to defendants. Plaintiff filed a motion to set aside the judgment under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*). In support of the motion, plaintiff asserted that his attorney inadvertently and mistakenly filed affidavits that were not within plaintiff's personal knowledge. His attorney asserted in a declaration that he attached the defective affidavits to the opposition papers because he waited too long to file them (and did not wish to seek a continuance), and believed the affidavits were sufficient to allow plaintiff to state what other persons had told him personally. The trial court denied plaintiff's motion to set aside the summary judgment, as well as a motion for a new trial. Plaintiff appealed.

The court of appeal affirmed (*88 Cal. App. 3d 595, 608)* . With regard to the motion to set aside the judgment, the court stated that it is axiomatic that a motion for relief under former Code Civ. Proc. § 473, 3rd Paragraph (*now see*

Code Civ. Proc. § 473(b)), is addressed to the sound discretion of the trial court, and that the exercise of that discretion will not be disturbed on appeal absent a clear showing of abuse. The discretion to be exercised is that of the trial court, not that of the reviewing court. Therefore, even if the reviewing court might have ruled otherwise in the first instance, the trial court's order will not be reversed unless, as a matter of law, it is not supported by the record. The court stated that the law favors trials on the merits, and that courts are loath to penalize a litigant for the omission of counsel, particularly when the litigant has acted promptly, and has relied on the attorney to protect the client's rights (*88 Cal. App. 3d 595, 604)* . Nevertheless, to obtain relief under the statute, the plaintiff must demonstrate that the mistake or neglect on the part of counsel was excusable (*88 Cal. App. 3d 595, 604-605)* . The court noted that California courts have expressly taken the position that ignorance of the law, at least when coupled with negligence in failing to look it up, will not justify a trial court in granting relief, and those facts will certainly sustain a denial of relief (*88 Cal. App. 3d 595, 605)* . By contrast, an honest mistake when the problem is complex and debatable, and when there are no elements of negligence, laxness, or indifference, may compel the granting of a motion under *Code Civ. Proc. § 473* (*88 Cal. App. 3d 595, 606)* . In the present case, the court noted that the declaration offered by plaintiff's original counsel fails to offer any adequate excuse to permit relief under the statute, but rather demonstrates a failure to read carefully the procedural requirements with regard to avoiding an adverse summary judgment motion, pursuant to *Code Civ. Proc. § 437c* (*88 Cal. App. 3d 595, 606-607)* . The concluding assertion that "the affidavits were mistakenly thought to be legally sufficient" fails to explain why the obvious mistake occurred; and the circumstances involve an easy, uncomplicated rule of law expressly embodied in the Code of Civil Procedure. The court concluded that the misconception was not reasonable nor justifiable; and that the trial court consequently did not abuse its discretion in denying the motion (*88 Cal. App. 3d 595, 607)* .

In ***A & S Air Conditioning v. John J. Moore Co.*** *(1960) 184 Cal. App. 2d 617, 7 Cal. Rptr. 592* , the trial court denied defendants' motion to set aside a default and default judgment entered in plaintiff's action on two promissory notes. The damages awarded included attorneys' fees in the sum of $6,000. When defendants were served with the summons and complaint, they did not contest their liability on the notes, but considered the attorneys' fee figure too high. In a telephone conversation with defendants' attorney, plaintiff's attorney stated that the figure represented fees for a contested case, and that in the case of default, the fees allowed would be nominal. After defendants' attorney became aware of the actual fees awarded, he moved to set aside the default and default judgment, arguing in part that the figure was too high, and that he mistakenly believed that the court would follow a particular (lower) fee schedule.

The court of appeal affirmed. The court noted that if there is any reasonable ground on which the action of the lower court may be upheld, it was bound to do so (*184 Cal. App. 2d 617, 619-620)* . It rejected defendants' argument that their attorney's mistaken belief as to the rules governing fees on default matters required the default be vacated. The court pointed out that although an honest mistake of law is a valid ground for relief when a problem is complex and debatable, ignorance of the law coupled with negligence in ascertaining it will certainly sustain a finding denying relief. The court observed that because it would have been simple for the attorney to determine the applicable fee schedule, the mistake was not excusable (*184 Cal. App. 2d 617, 620)* .

[4] Additional Authorities

[a] Justifiability of Mistake of Law Required for Relief

In *Hanooka v. Pivko (1994) 22 Cal. App. 4th 1553* , *28 Cal. Rptr. 2d 70* , defendants moved for summary judgment on the ground that the one-year limitations period of Code Civ. Proc. § 340.5had run. The trial court granted the motion, finding that the one-year period had not been extended by virtue of *Code Civ. Proc. § 364(d)*, which provides an extension when notice of intent to file a medical malpractice action is served within the last ninety days, because the defendant-doctors had not received actual notice of the intent to sue. Plaintiffs sought relief pursuant to *Code Civ. Proc. § 473* on the basis of plaintiffs' counsel's mistake of law in complying with the service requirements for the notice of intent to sue. The trial court denied the motion, and the court of appeal affirmed. The court of appeal held that Section 473 could not be used to extend the statute of limitations. Moreover, the court went on to state that even if Section 473

did apply, the counsel's mistake in failing to properly effectuate service was not based on a reasonable mistake of law (*22 Cal. App. 4th 1553, 1563)* .

In *Garroway v. Jennings (1922) 189 Cal. 97, 207 P. 554* , defendant moved to set aside the default and default judgment entered against him on the ground that his attorney mistakenly believed that the trial court's order overruling the demurrer to plaintiff's complaint was appealable and that an appeal would stay all further proceedings. The Supreme Court affirmed denial of the motion, noting that the attorney could have remedied his failure if he had read the Code of Civil Procedure; and, instead of showing an excuse for his failure, the attorney's affidavit showed that the mistake was due to his own gross neglect to take any pains whatsoever to inform himself as to the law affecting his case (*189 Cal. 97, 99)* .

In *Guenter v. Lomas & Nettleton Co. (1983) 140 Cal. App. 3d 460, 189 Cal. Rptr. 470* , a consolidated action asserting a fraudulent reconveyance of a deed of trust, the court of appeal affirmed, inter alia, the trial court's denial of plaintiff's motion to set aside an order striking class action allegations of the complaint and striking a document purporting to associate nonparties as plaintiffs. The plaintiff's attorney asserted, among other things, that he relied on the apparent propriety of filing that document, based on the trial court's suggestion to do so, and opposing counsel's failure to object at the time. The court held that plaintiff was not entitled to relief on the ground of reasonable mistake, because the particular mistake of law is not of the type that caused the attorney to fail to make the showing he could have made at the hearing on the motion to strike; and moreover, that he is not entitled to blame the opposing counsel for his failure to determine correctly the validity of the document in question (*140 Cal. App. 3d 460, 466-467)* .

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7-70 California Points & Authorities § 70.163

§ 70.163 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground That There Is Insufficient Showing of Mistake [Code Civ. Proc. § 473(b)]--Attorney's Mistake of Law Is Not Excusable--Ignorance and Negligence Compel Denial of Relief

[1] FORM

[This form should be combined with a memorandum generally opposing a motion to set aside under *Code Civ. Proc. § 473(b)* based on excusable mistake (see *§ 70.160[1]*)].

THE COURT SHOULD DENY THE MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other proceeding*)] BECAUSE THE MISTAKE OF LAW IS COUPLED WITH NEGLIGENCE IN ASCERTAINING IT.

Ignorance and Negligence Compel Denial of Relief. Relief under *Code of Civil Procedure Section 473(b)* is not justified based on ignorance of the law, coupled with negligence in ascertaining it (*A & S Air Conditioning v. John J. Moore Co. (1960) 184 Cal. App. 2d 617, 620, 7 Cal. Rptr. 592* ; *Security Truck Line v. Monterey (1953) 117 Cal. App. 2d 441, 445, 257 P.2d 755*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that a default and default judgment, or judgment, dismissal, order, or other proceeding should be set aside on the ground of mistake, based on a mistake of law made by the moving party's attorney at the time the default was taken [*see Code Civ. Proc. § 473(b)*]. The ground of opposition is that the attorney was negligent in ascertaining the law.

For a form of memorandum opposing relief based on mistake of law generally, see *§ 70.162[1]*. For a form of

memorandum that includes points and authorities opposing relief on the ground that an attorney's negligence is imputed to the client, see *§ 70.124[1]*.

In an appropriate case, this form may be submitted in opposition to the points and authorities *set out in §§ 70.50 -70.64*.

This form should be combined with a memorandum generally opposing a motion to set aside based on excusable mistake [*see § 70.160[1]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 70.120[2][b]* regarding evidentiary support for facts stated.

[c] Attorney Affidavit of Fault

Whenever an application for relief under *Code Civ. Proc. § 473* is timely, in proper form, and accompanied by an attorney's sworn affidavit attesting to his or her mistake, the court must vacate any resulting default judgment entered against his or her client unless the court finds that the default was not in fact caused by the attorney's mistake [*Code Civ. Proc. § 473*]. For further discussion, see the *§ 70.12[3]* and *§ 70.120[2][c]* [*see* also *§ 70.140* et seq.].

[3] Discussion of Authorities

[a] Ignorance and Negligence Compel Denial of Relief

A & S Air Conditioning v. John J. Moore Co. *(1960) 184 Cal. App. 2d 617, 7 Cal. Rptr. 592* , is discussed in *§ 70.162[3]*.

In ***Security Truck Line v. Monterey*** *(1953) 117 Cal. App. 2d 441, 257 P.2d 755* , plaintiff filed its complaint on October 11. On October 25, after a hearing, the trial court issued a preliminary injunction from which defendants appealed on November 14. The city attorney erroneously believed that defendants' appeal operated as a stay of all proceedings in the action. On November 16, plaintiff, after having warned defendants two weeks earlier, caused defendants' default to be entered. On November 20, defendants moved to set aside the default. At the hearing on the motion, the trial court denied the motion and entered judgment in plaintiff's favor.

The court of appeal affirmed (*117 Cal. App. 2d 441, 446)* . The court stated that an honest mistake of law is a ground for granting relief, and, in a proper case, the granting of relief may be compelled if the mistake is an honest one, the problem involved is complex and debatable, and there are no elements of negligence, laxness, or indifference. On the other hand, ignorance of the law, at least when coupled with negligence in failing to look it up, will not justify a trial court in granting relief (*117 Cal. App. 2d 441, 445)* . Noting that its function was only to determine if the trial court's holding was within its discretion, the court found that the problem of law involved was a simple one and its solution was readily ascertainable (*117 Cal. App. 2d 441, 445-446)* . Coupled with the fact that plaintiff had warned defendants that it would take their default, it was clear that the trial court was justified in believing that the failure to look up the law indicated at least indifference (*117 Cal. App. 2d 441, 446)* .

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7-70 California Points & Authorities §§ 70.164-70.169

[Reserved]

§§ 70.164[Reserved]

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7-70 California Points & Authorities § 70.170

§ 70.170 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground That There Is Insufficient Showing of Excusable Inadvertence [Code Civ. Proc. § 473(b)]--General Form

[1] FORM

[*This form should be combined with a memorandum generally opposing a motion to set aside under Code Civ. Proc. § 473(b) (see § 70.120[1]).*]

THE COURT SHOULD DENY THE MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other proceeding*)] BECAUSE THERE IS INSUFFICIENT SHOWING OF EXCUSABLE INADVERTENCE, WITHIN THE MEANING OF CODE OF CIVIL PROCEDURE SECTION 473(b), THAT WOULD ENTITLE THE MOVING PARTY TO RELIEF.

Inadvertence Inexcusable. Inadvertence that is wholly inexcusable will not support entitlement to relief from default under *Code of Civil Procedure Section 473(b)* (*Shearman v. Jorgensen (1895) 106 Cal. 483, 485, 39 P. 863* ; *Davis v. Kay (1973) 34 Cal. App. 3d 680, 683-684, 110 Cal. Rptr. 198*).

[*When appropriate, add points and authorities opposing the motion on additional, particular grounds, e.g., that the motion is not timely (see, e.g., §§ 70.140 -70.148), or that the moving party has not made a sufficient showing justifying relief on any other specific ground or grounds asserted (see, e.g., §§ 70.160 -70.163, §§ 70.180 -70.216). Additional points and authorities may be also be added, when appropriate, supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief (see, e.g., §§ 70.230, 70.231).*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that a default and default judgment, or judgment, dismissal, order, or other proceeding should be set aside on the ground of inadvertence [*see Code Civ. Proc. § 473(b)*]. The ground of opposition is that the inadvertence asserted by the moving party will not support entitlement to relief [*see, e.g., Kendall v. Barker (1988) 197 Cal. App. 3d 619, 624, 243 Cal. Rptr. 42]* . For points and authorities opposing the motion on ground that mere inadvertence in the abstract is not a ground for relief, see *§ 70.171[1]*.

In an appropriate case, this form may be submitted in opposition to the points and authorities *set out in §§ 70.70, 70.71*.

This form should be combined with a memorandum generally opposing a motion to set aside under *Code Civ. Proc. § 473(b)* [*see § 70.120[1]*]. It may also be combined, when appropriate, with points and authorities opposing relief on other particular grounds. For example, it may be combined with additional points and authorities showing that the motion is not timely [*see §§ 70.140 -70.148*], or with additional points and authorities showing that the moving party has not made a sufficient showing justifying relief on the specific ground or grounds asserted [*see §§ 70.160 -70.163, 70.171 -70.216*; *see also* discussion in *§ 70.10[2][g]*]. This form may also be combined, when appropriate, with points and authorities supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief [*see §§ 70.230, 70.231*].

This form may also be adapted for use in a trial or appellate brief.

See also *§ 70.10[2]* and *§ 70.120[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b)*, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Counsel should therefore show that the asserted inadvertence is inexcusable under the circumstances set forth. See also *§ 70.120[2][b]* regarding evidentiary support for facts stated.

[c] Attorney Affidavit of Fault

Whenever an application for relief under *Code Civ. Proc. § 473* is timely, in proper form, and accompanied by an attorney's sworn affidavit attesting to his or her mistake, the court must vacate any resulting default judgment entered against his or her client unless the court finds that the default was not in fact caused by the attorney's mistake [*Code Civ. Proc. § 473*]. For further discussion, see the *§ 70.12[3]* and *§ 70.120[2][c]* [*see* also *§ 70.140* et seq.].

[3] Discussion of Authorities

[a] Inadvertence Inexcusable

In ***Shearman v. Jorgensen*** *(1895) 106 Cal. 483, 39 P. 863* , defendants' attorney received a notice from plaintiff's attorney that his demurrer to plaintiff's complaint had been overruled and that he had 10 days to answer. Taking more than 10 days to draft an answer because he mistakenly believed that the notice was of no legal effect, he did prepare the answer but failed to serve or file it. No further showing was made at the default judgment hearing. The trial court granted defendants' motion for relief under *Code Civ. Proc. § 473*, 3rd Paragraph, on grounds of mistake of law and inadvertence. Plaintiff appealed.

The Supreme Court reversed and remanded (*106 Cal. 483, 485)* . With respect to the ground of inadvertence, the Court stated that the moving party's showing was "wholly inadequate" to meet the needs of the statute. The Court stated that the reasons, causes, and excuses for the inadvertence are matters that concern the Court, but were not stated by the moving party. The Court held that inadvertence in the abstract is no plea on which to set aside a default. The trial court must be made acquainted with the reasons for the inadvertence and, if satisfactory, will act on them and relieve the

moving party from burdens caused by them. However, if the inadvertence is wholly inexcusable, as if it arises from gross negligence, the court will not grant relief (*106 Cal. 483, 485)* .

In ***Davis v. Kay*** *(1973) 34 Cal. App. 3d 680, 110 Cal. Rptr. 198* , a default judgment was entered against defendants after defendants failed to file a responsive pleading within the statutory time allowed. Defendant filed a motion under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), for relief from the default judgment on the ground of excusable neglect attributable to counsel's secretary. The trial court granted the motion. Plaintiff filed a motion for summary judgment; defendants filed no opposition to the motion, and did not appear on the date set for the summary judgment hearing. The trial court granted the summary judgment motion. Shortly thereafter, defendants filed a motion under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), to vacate the summary judgment, also on the ground of excusable neglect because of an oversight by counsel's secretary. The trial court granted the motion to set aside the judgment. Plaintiff appealed.

The court of appeal reversed, holding that no showing was made in support of the motion to set aside the summary judgment (*34 Cal. App. 3d 680, 684)* . The court noted that the affidavit of the secretary for defendants' counsel stated that the secretary failed to enter the motion on counsel's calendar, and that counsel was therefore unaware of the date of the hearing on the motion for summary judgment. It observed that the granting of relief under *Code Civ. Proc. § 473* is largely a matter of discretion, and unless an abuse of discretion affirmatively appears, the ruling will not be disturbed on appeal. The court stated that "the busiest attorneys with completely competent secretaries generally charge their minds with pressing and complex court commitments which appear to be imminent." The court stated that it could not assume that any attorney examining the notice of motion would not have noted the time it was set to be heard, especially, as was the case, if the attorney told the secretary that he intended to prepare counter-declarations. The court noted with disapproval that counsel for defendant waited 23 days after they were notified of the ruling on the summary judgment motion before taking any steps to vacate it. It observed that the tactics of defense counsel was to "proceed with all deliberate delay," and it stated that the court would not tolerate such tactics (*34 Cal. App. 3d 680, 683)* . The court held that the trial court abused its discretion with respect to vacating the judgment. It stated that the inadvertence referred to in *Code Civ. Proc. § 473* is not inadvertence in the abstract, but it must be inadvertence that is satisfactory (*34 Cal. App. 3d 680, 683-684)* . The court held that in the instant case, defense counsel should have been placed on notice of the alleged unreliability of his secretary when the first default was entered, but irrespective of the secretary's omission the first time, the record clearly charges counsel with personal notice of the date of the summary judgment hearing. The court sated that no showing of excusable neglect or inadvertence is made that has a legal, equitable, or otherwise valid claim on judicial discretion for relief (*34 Cal. App. 3d 680, 684)* .

[4] Additional Authorities

[a] Inadvertence Inexcusable

In *Baratti v. Baratti (1952) 109 Cal. App. 2d 917, 242 P.2d 22* , the trial court denied defendant wife's motion to have her default and the related interlocutory decree of divorce vacated on the ground of mistake, inadvertence, surprise, and excusable neglect on her part. Her affidavit in support of the motion stated that, had she known she was pregnant at the time of her default, she would not have permitted the default to be taken. She further stated that she had been confused by the divorce suit and had not known what to do about it. The court of appeal affirmed, stating that inadvertence is defined as lack of heedfulness or attentiveness, inattention, or fault from negligence. The court noted that defendant presented no excuse for her failure to file for relief until five months after entry of her default, nor did she make a showing of any of the grounds claimed for relief. Rather, her motion to be relieved from the default was due solely to a change of mind, for which no relief was available (*109 Cal. App. 2d 917, 921-923)* .

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7-70 California Points & Authorities § 70.171

§ 70.171 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground That There Is Insufficient Showing of Excusable Inadvertence [Code Civ. Proc. § 473(b)]--Inadvertence In the Abstract Is Not Ground for Relief

[1] FORM

[*This form should be combined with a memorandum generally opposing a motion to set aside under Code Civ. Proc. § 473(b) based on excusable inadvertence (see § 70.170[1]).*]

THE COURT SHOULD DENY THE MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other proceeding*)] BECAUSE MERE INADVERTENCE IN THE ABSTRACT IS NOT A GROUND FOR RELIEF.

Inadvertence in the Abstract. Inadvertence in the abstract is not a ground for relief under *Code of Civil Procedure Section 473(b)*(*Shearman v. Jorgensen (1895) 106 Cal. 483, 485, 39 P. 863* ; *Kendall v. Barker (1988) 197 Cal. App. 3d 619, 624, 243 Cal. Rptr. 42*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that a default and default judgment, or judgment, dismissal, order, or other proceeding should be set aside on the ground of inadvertence [*see Code Civ. Proc. § 473(b)*]. The ground of opposition is that mere inadvertence in the abstract is not a ground for relief.

In an appropriate case, this form may be submitted in opposition to the points and authorities *set out in §§ 70.70, 70.71*.

This form should be combined with a memorandum generally opposing a motion to set aside under *Code Civ. Proc. § 473(b)* based on inadvertence [*see § 70.170[1]*]. It may also be combined, when appropriate, with points and authorities

opposing relief on other particular grounds. For example, it may be combined with additional points and authorities showing that the motion is not timely [*see §§ 70.140 -70.148*], or with additional points and authorities showing that the moving party has not made a sufficient showing justifying relief on the specific ground or grounds asserted [*see §§ 70.160 -70.163, 70.170, 70.180 -70.216*; *see also* discussion in *§ 70.10[2][g]*]. This form may also be combined, when appropriate, with points and authorities supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief [*see §§ 70.230, 70.231*].

This form may also be adapted for use in a trial or appellate brief.

See also *§ 70.10[2]* and *§ 70.120[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b)*, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Counsel should therefore show that the moving has failed to state the reasons, causes, and excuses for the inadvertence [*Shearman v. Jorgensen (1895) 106 Cal. 483, 485, 39 P. 863]* . See also *§ 70.120[2][b]* regarding evidentiary support for facts stated.

[c] Attorney Affidavit of Fault

Whenever an application for relief under *Code Civ. Proc. § 473* is timely, in proper form, and accompanied by an attorney's sworn affidavit attesting to his or her mistake, the court must vacate any resulting default judgment entered against his or her client unless the court finds that the default was not in fact caused by the attorney's mistake [*Code Civ. Proc. § 473*]. For further discussion, see the *§ 70.12[3]* and *§ 70.120[2][c]* [*see* also *§ 70.140* et seq.].

[3] Discussion of Authorities

[a] Inadvertence in the Abstract

Shearman v. Jorgensen *(1895) 106 Cal. 483, 39 P. 863* , is discussed in *§ 70.170[3]*.

The facts and procedural background of ***Kendall v. Barker*** *(1988) 197 Cal. App. 3d 619, 243 Cal. Rptr. 42* , are discussed in *§ 70.142[3][b]*. In *Kendall*, the court of appeal held that the moving party under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), has a double burden: he or she must show a satisfactory excuse for the default; and must also show diligence in making the motion after discovery of the default (*197 Cal. App. 3d 619, 625)* . The court in Kendall also held that the moving party made no showing to support the entitlement to relief under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*). The court noted that the defendant's entire substantive showing in support of the motion for relief consisted of a conclusory declaration by his counsel stating on information and belief that defendant's previous attorney "excusably neglected" to answer the complaint. The court stated that the reasons, causes, and excuses for the inadvertence are matters that concern the court, but were not stated by the moving party. The court held that inadvertence in the abstract is no plea on which to set aside a default. The court must be made acquainted with the reasons for the inadvertence and, if satisfactory, will act on them and relieve the moving party from burdens caused by them. However, if the inadvertence is wholly inexcusable, as if it arises from gross negligence, the court will not grant relief (citing *Shearman v. Jorgensen (1895) 106 Cal. 483, 39 P. 863* , discussed in *§ 70.140[3]*) (*197 Cal. App. 3d 619, 624)* .

[4] Additional Authorities

[a] Inadvertence in the Abstract

The facts and procedural background of *Davis v. Thayer (1980) 113 Cal. App. 3d 892, 170 Cal. Rptr. 328* , are

discussed § 70.190[3][b]. In *Davis*, the court of appeal held that the defendant was not entitled to relief under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), because his conduct in permitting the matter to go to default was not the result of mistake, inadvertence, or surprise; and that it was solely the consequence of inexcusable neglect (*113 Cal. App. 3d 892, 906)* . In the course of discussing defendant's failure to show a legitimate ground under the statute for relief, the court also held that inadvertence in the abstract is no plea on which to set aside a default (*113 Cal. App. 3d 892, 905)* .

Davis v. Kay (1973) 34 Cal. App. 3d 680, 110 Cal. Rptr. 198 , is discussed in *§ 70.170[3]*.

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7-70 California Points & Authorities §§ 70.172-70.179

[Reserved]

§§ 70.172[Reserved]

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7-70 California Points & Authorities § 70.180

§ 70.180 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground That There Is Insufficient Showing of Surprise [Code Civ. Proc. § 473(b)]

[1] FORM

[*This form should be combined with a memorandum generally opposing a motion to set aside under Code Civ. Proc. § 473(b) (see § 70.120[1]).*]

THE COURT SHOULD DENY THE MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other proceeding*)] BECAUSE THERE IS INSUFFICIENT SHOWING OF SURPRISE, WITHIN THE MEANING OF CODE OF CIVIL PROCEDURE SECTION 473(b), THAT WOULD ENTITLE THE MOVING PARTY TO RELIEF.

No Showing of Surprise. Relief under *Code of Civil Procedure Section 473(b)*, on the ground of surprise, is not available unless the surprise alleged is some condition or situation in which a party is unexpectedly placed to his or her injury, without any fault of the party, under circumstances that he or she was not reasonably called on to anticipate and that ordinary foresight could not have guarded against (*Lint v. Chisholm (1981) 121 Cal. App. 3d 615, 620, 177 Cal. Rptr. 314*).

[*When appropriate, add points and authorities opposing the motion on additional, particular grounds, e.g., that the motion is not timely (see, e.g., §§ 70.140 -70.148), or that the moving party has not made a sufficient showing justifying relief on any other specific ground or grounds asserted (see, e.g., §§ 70.160 -70.171, 70.190 -70.216). Additional points and authorities may be also be added, when appropriate, supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief (see, e.g., §§ 70.230, 70.231).*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that a default and default judgment, or judgment, dismissal, order, or other proceeding should be set aside on the ground of surprise [*see Code Civ. Proc. § 473(b)*]. The ground of opposition is that the moving party has failed sufficiently to show that the default was caused by surprise [*see Lint v. Chisholm (1981) 121 Cal. App. 3d 615, 620, 177 Cal. Rptr. 314]* .

In an appropriate case, this form may be submitted in opposition to the points and authorities *set out in §§ 70.80 -70.81*.

This form should be combined with a memorandum generally opposing a motion to set aside under *Code Civ. Proc. § 473(b)* [*see § 70.120[1]*]. It may also be combined, when appropriate, with points and authorities opposing relief on other particular grounds. For example, it may be combined with additional points and authorities showing that the motion is not timely [*see §§ 70.140 -70.148*], or with additional points and authorities showing that the moving party has not made a sufficient showing justifying relief on the specific ground or grounds asserted [*see §§ 70.160 -70.171, 70.190 -70.216*; *see also* discussion in *§ 70.10[2][g]*]. This form may also be combined, when appropriate, with points and authorities supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief [*see §§ 70.230, 70.231*].

This form may also be adapted for use in a trial or appellate brief.

See also *§ 70.10[2]* and *§ 70.120[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b)*, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Counsel should therefore show that the asserted surprise is not a condition or circumstance that warrants relief under *Code Civ. Proc. § 473(b)*, for example, that the moving party was at fault and should have anticipated and prevented the entry of default. See also *§ 70.120[2][b]* regarding evidentiary support for facts stated.

[c] Attorney Affidavit of Fault

Whenever an application for relief under *Code Civ. Proc. § 473* is timely, in proper form, and accompanied by an attorney's sworn affidavit attesting to his or her mistake, the court must vacate any resulting default judgment entered against his or her client unless the court finds that the default was not in fact caused by the attorney's mistake [*Code Civ. Proc. § 473*]. For further discussion, see the *§ 70.12[3]* and *§ 70.120[2][c]* [*see* also *§ 70.140* et seq.].

[3] Discussion of Authorities

[a] No Showing of Surprise

In ***Lint v. Chisholm*** *(1981) 121 Cal. App. 3d 615, 177 Cal. Rptr. 314* , plaintiff filed a complaint in municipal court based on alleged conversion, breach of contract, and fraud. Defendant moved unsuccessfully for summary judgment; and plaintiff filed an amended complaint. Defendant answered and cross complained. Defendant removed the case to superior court, and was ordered to pay transfer fees, which he failed to do. Plaintiff eventually paid the transfer fees, and trial was set in superior court. Notice was mailed to both parties at the addresses listed with the court clerk. Defendant failed to appear at trial. After hearing, plaintiff was granted relief as prayed. The trial court denied defendant's motion for relief under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*). Defendant appealed.

The court of appeal affirmed after modification of the interest award, holding, inter alia, that the defendant failed to assert any ground for relief under *Code Civ. Proc. § 473* (*121 Cal. App. 3d 615, 620-621, 625)* . The court rejected defendant's assertion that the trial court erred in rejecting his claim of surprise and excusable neglect. He argued that

overwhelming domestic problems resulted in his inability to receive mail regularly during the period in which notice was sent; but conceded that he did not notify the clerk of any change of address. The court stated that the events described by the defendant do not constitute surprise or excusable neglect under the statute. It held that the "surprise" contemplated by the statute is some condition or situation in which a party is unexpectedly placed to his or her injury, without any fault on the part of the moving party, under circumstances that he or she was not reasonably called on to anticipate and that ordinary foresight could not have guarded against. Excusable neglect is that neglect that might have been the act of a reasonably prudent person under the same circumstances. The court concluded that defendant did not show that: (1) his failure to notify the court of his address change, or alternatively to otherwise adequately arrange for mail delivery, was the act of a reasonably prudent person under the same circumstances; or (2) the nonreceipt occurred without any fault of his own (*121 Cal. App. 3d 615, 620)* . Inasmuch as the defendant was an attorney licensed to practice in other jurisdictions, the court noted that he was aware of his duty to inform the court of any change of address, and that his failure to do so does not enable him to claim lack of notice (*121 Cal. App. 3d 615, 620-621)* .

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7-70 California Points & Authorities §§ 70.181-70.189

[Reserved]

§§ 70.181[Reserved]

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7-70 California Points & Authorities § 70.190

§ 70.190 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground of Inexcusable Neglect of Defendant [Code Civ. Proc. § 473(b)]--Deliberate Refusal to Act

[1] FORM

[*This form should be combined with a memorandum generally opposing a motion to set aside under Code Civ. Proc. § 473(b) (see § 70.120[1]).*]

THE COURT SHOULD DENY DEFENDANT'S MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other proceeding*)] BECAUSE THE DEFENDANT'S DELIBERATE REFUSAL TO ACT CONSTITUTES INEXCUSABLE NEGLECT.

A. Burden of Proof on Moving Party to Show Excusable Neglect. On a motion for relief from default, the moving party has the burden of showing that the neglect leading to default was excusable (*Kendall v. Barker (1988) 197 Cal. App. 3d 619, 624, 243 Cal. Rptr. 42* ; *Jackson v. Bank of America (1983) 141 Cal. App. 3d 55, 58, 190 Cal. Rptr. 78*).

B. Deliberate Refusal to Act. When a default occurred as a result of deliberate refusal to act, and relief is sought after a change of mind, the remedy under *Code of Civil Procedure Section 473(b)* is inappropriate (*Davis v. Thayer (1980) 113 Cal. App. 3d 892, 907, 170 Cal. Rptr. 328*).

[*When appropriate, add points and authorities opposing the motion on additional, particular grounds, e.g., that the motion is not timely (see, e.g., §§ 70.140 -70.148), or that the moving party has not made a sufficient showing justifying relief on any other specific ground or grounds asserted (see, e.g., §§ 70.160 -70.180, 70.191 -70.216). Additional points and authorities may be also be added, when appropriate, supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief (see, e.g., §§ 70.230, 70.231).*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that a default and default judgment, or judgment, dismissal, order, or other proceeding should be set aside on the ground of asserted excusable neglect on the part of the moving party [*see Code Civ. Proc. § 473(b)*]. The ground of opposition is that the moving party's deliberate refusal to act constitutes inexcusable neglect [*see Davis v. Thayer (1980) 113 Cal. App. 3d 892, 907, 170 Cal. Rptr. 328]* .

For points and authorities based on other conduct considered inexcusable neglect, see *§§ 70.191 -70.195*. For points and authorities opposing relief on the ground of an attorney's inexcusable neglect, see *§§ 70.210 -70.216*.

In an appropriate case, this form may be submitted in opposition to the points and authorities *set out in §§ 70.90 -70.100*.

This form should be combined with a memorandum generally opposing a motion to set aside under *Code Civ. Proc. § 473(b)* [*see § 70.120[1]*]. It may also be combined, when appropriate, with points and authorities opposing relief on other particular grounds. For example, it may be combined with additional points and authorities showing that the motion is not timely [*see §§ 70.140 -70.148*], or with additional points and authorities showing that the moving party has not made a sufficient showing justifying relief on the specific ground or grounds asserted [*see §§ 70.160 -70.180, 70.191 -70.216*; *see also* discussion in *§ 70.10[2][g]*]. This form may also be combined, when appropriate, with points and authorities supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief [*see §§ 70.230, 70.231*].

This form may also be adapted for use in a trial or appellate brief.

See also *§ 70.10[2]* and *§ 70.120[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b)*, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Counsel should therefore show why the moving party's conduct constituted mere inexcusable failure to act or a decision not to act followed by a change of mind. Therefore, counsel should set forth facts regarding the date on which the moving party was served with the summons and complaint, and the unexplained failure to file a responsive pleading in a timely manner. See also *§ 70.120[2][b]* regarding evidentiary support for facts stated.

[c] Attorney Affidavit of Fault

Whenever an application for relief under *Code Civ. Proc. § 473* is timely, in proper form, and accompanied by an attorney's sworn affidavit attesting to his or her mistake, the court must vacate any resulting default judgment entered against his or her client unless the court finds that the default was not in fact caused by the attorney's mistake [*Code Civ. Proc. § 473*]. For further discussion, see the *§ 70.12[3]* and *§ 70.120[2][c]* [*see* also *§ 70.140* et seq.].

[3] Discussion of Authorities

[a] Burden of Proof on Moving Party to Show Excusable Neglect

Kendall v. Barker *(1988) 197 Cal. App. 3d 619, 243 Cal. Rptr. 42* is discussed in *§ 70.142[3][b]*.

Jackson v. Bank of America *(1983) 141 Cal. App. 3d 55, 190 Cal. Rptr. 78* , is discussed in *§ 70.140[3][b]*.

[b] Deliberate Refusal to Act

In ***Davis v. Thayer*** *(1980) 113 Cal. App. 3d 892, 170 Cal. Rptr. 328* , the plaintiff filed a complaint against two defendants, alleging fraud in connection with a sales contract. Plaintiff had one defendant (the defendant) served with process while he appeared in court on criminal charges related to the plaintiff's claim. His mother (the codefendant) was served at her home. Approximately one month later, both defendants were served by mail, at the mother's address, with a copy of a request for entry of default. After hearing, the trial court granted judgment on the cause of action for fraud, awarding actual and punitive damages. Defendants filed a notice of motion for relief under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), approximately six months later. The trial court denied the motion, and defendants appealed.

The court of appeal affirmed, holding that both parties were negligent in failing to take any meaningful action to protect themselves after being served with summons and complaint and notice requesting entry of their defaults (*113 Cal. App. 3d 892, 911)* . Because the motion was arguably filed more than six months after the default was entered, the court first determined that the six month period is defined as one-half of a year, or 182 days. Under that definition, the motion was filed within six months from the date of the default, and the court therefore had jurisdiction to grant the motion (*113 Cal. App. 3d 892, 901-904)* . The court then considered whether the evidence supported the trial court's denial of the motion. The court noted that in his declarations in support of the motion, the defendant stated that he lacked funds to file an answer, that his primary concern was the criminal charges, and that he was unaware that the complaint sought damages for fraud (*113 Cal. App. 3d 892, 905)* . The court observed that his conduct in permitting the matter to go to default was not the result of mistake, inadvertence, or surprise; and that it was solely the consequence of inexcusable neglect (*113 Cal. App. 3d 892, 906)* . The court stated that it is the duty of every party desiring to resist an action or to participate in a judicial proceeding to take timely and adequate steps to retain counsel or to act to avoid an undesirable judgment. Unless in arranging for a defense, the defendant shows that he or she has exercised such reasonable diligence as a person of ordinary prudence usually bestows on important business, the motion for relief under *Code Civ. Proc. § 473* will be denied. The court stated that the law frowns on setting aside default judgments resulting from inexcusable neglect of the complainant; and when the default occurred as a result of deliberate refusal to act, and relief is sought after a change of mind, the remedy is clearly inappropriate. The court noted that the defendant did not deny that when served with the papers, an attorney who represented him told him to pick them up from the ground to which he permitted them to fall. The court surmised that the defendant must have discussed the matter to some extent with that attorney (*113 Cal. App. 3d 892, 907)* . The court stated that the notice requirement under *Code Civ. Proc. § 587* is designed to protect the unwary litigant from the entry of default; and that the beneficial purposes of that provision would be thwarted if defendants are permitted to disregard, with impunity, the notices served pursuant to it (*113 Cal. App. 3d 892, 907-908)* . The court noted that the codefendant asserted that her poor health and preoccupation with family matters precluded her timely response to the complaint (*113 Cal. App. 3d 892, 909)* . (She also asserted that her son operated the business, and that she was merely an employee, but the court observed that her proposed answer stated otherwise (*113 Cal. App. 3d 892, 910)* . The court concluded that she, too, is guilty of inexcusable neglect, in that she made no showing that her alleged circumstances completely prevented timely response for six months (*113 Cal. App. 3d 892, 909-910)* .

[4] Additional Authorities

[a] Burden of Proof on Moving Party to Show Excusable Neglect

Conway v. Municipal Court (1980) 107 Cal. App. 3d 1009, 166 Cal. Rptr. 246 , is discussed in *§ 70.142[3][a]*.

[b] Deliberate Refusal to Act

Martin v. Taylor (1968) 267 Cal. App. 2d 112, 72 Cal. Rptr. 847 , is discussed in *§ 70.144[3]*.

In *Fidelity Fed. Sav. & Loan Assn. v. Long (1959) 175 Cal. App. 2d 149, 345 P.2d 568* , the court of appeal affirmed

the trial court's order denying a motion to set aside a default judgment entered against the defendant in an action based on a promissory note. In support of his motion for relief under *Code Civ. Proc.§ 473,* 3rd Paragraph, made three and one-half months after the default judgment had been entered, defendant claimed that he mistakenly believed that a provision in the note precluded a defense based on a discharge in bankruptcy. However, no petition in bankruptcy had been filed at the time the action was commenced; when it was filed it was involuntary; and defendant did not consent to an adjudication in bankruptcy until nearly four months after the filing of the complaint. The court of appeal stated that it could be reasonably inferred from the record that before the default had been entered, defendant contemplated neither a discharge in bankruptcy nor the fact that a discharge might be available to him as a defense (*175 Cal. App. 2d 149, 153)* . The court stated that the only occasion for the application of *Code Civ. Proc. § 473* is when a party is unexpectedly placed in a situation to his or her injury because of no fault or negligence of his or her own. Neither one's change of mind nor one's inexcusable negligence is ground for vacating a judgment (*175 Cal. App. 2d 149, 155)* .

In *Baratti v. Baratti (1952) 109 Cal. App. 2d 917, 242 P.2d 22* , the court of appeal affirmed a trial court's denial of a motion for relief from default under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*). The court held that defendant's unexplained delay of three months after she consulted with her present attorney precluded relief under the statute, noting that her failure to appear was not due to mistake, inadvertence, surprise, or excusable neglect, but was solely due to a change of mind (*109 Cal. App. 2d 917, 922-923)* .

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7-70 California Points & Authorities § 70.191

§ 70.191 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground of Inexcusable Neglect of Defendant [Code Civ. Proc. § 473(b)]--Failure to Act Despite Full Knowledge of Proceedings

[1] FORM

[*This form should be combined with a memorandum generally opposing a motion to set aside under Code Civ. Proc. § 473(b) (see § 70.120[1]).*]

THE COURT SHOULD DENY DEFENDANT'S MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other proceeding*)] BECAUSE THE DEFENDANT'S FAILURE TO ACT DESPITE FULL KNOWLEDGE OF THE PROCEEDINGS CONSTITUTES INEXCUSABLE NEGLECT.

A. Burden of Proof on Moving Party to Show Excusable Neglect. [*See § 70.190[1], Paragraph A.*]

B. Failure to Act Despite Full Knowledge of Proceedings. When a defendant with full knowledge of the proceedings fails to take action to protect his or her interests until after the default, it is an abuse of discretion to set the default aside (*Northridge Financial Corp. v. Hamblin (1975) 48 Cal. App. 3d 819, 824, 122 Cal. Rptr. 109*).

[*When appropriate, add points and authorities opposing the motion on additional, particular grounds, e.g., that the motion is not timely (see, e.g., §§ 70.140 -70.148), or that the moving party has not made a sufficient showing justifying relief on any other specific ground or grounds asserted (see, e.g., §§ 70.160 -70.190, 70.192 -70.216). Additional points and authorities may be also be added, when appropriate, supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief (see, e.g., §§ 70.230, 70.231).*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that a default and default judgment, or judgment, dismissal, order, or other proceeding should be set aside on the ground of asserted excusable neglect on the part of the moving party [*see Code Civ. Proc. § 473(b)*]. The ground of opposition is that the moving party's failure to act despite full knowledge of the proceedings constitutes inexcusable neglect [*Northridge Financial Corp. v. Hamblin (1975) 48 Cal. App. 3d 819, 824, 122 Cal. Rptr. 109]* .

For points and authorities based on other conduct considered inexcusable neglect, see *§§ 70.190, 70.192 -70.195*. For points and authorities opposing relief on the ground of an attorney's inexcusable neglect, see *§§ 70.210 -70.216*.

In an appropriate case, this form may be submitted in opposition to the points and authorities *set out in §§ 70.90 -70.100*.

This form should be combined with a memorandum generally opposing a motion to set aside under *Code Civ. Proc. § 473(b)* [*see § 70.120[1]*]. It may also be combined, when appropriate, with points and authorities opposing relief on other particular grounds. For example, it may be combined with additional points and authorities showing that the motion is not timely [*see §§ 70.140 -70.148*], or with additional points and authorities showing that the moving party has not made a sufficient showing justifying relief on the specific ground or grounds asserted [*see §§ 70.160 -70.190, 70.192 -70.216*; *see also* discussion in *§ 70.10[2][g]*]. This form may also be combined, when appropriate, with points and authorities supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief [*see §§ 70.230, 70.231*].

This form may also be adapted for use in a trial or appellate brief.

See also *§ 70.10[2]* and *§ 70.120[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b)*, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Counsel should therefore show why the moving party's conduct constituted mere inexcusable failure to act or a decision not to act followed by a change of mind. Therefore, counsel should set forth facts regarding the date on which the moving party was served with the summons and complaint, and the unexplained failure to file a responsive pleading in a timely manner. See also *§ 70.120[2][b]* regarding evidentiary support for facts stated.

[c] Attorney Affidavit of Fault

Whenever an application for relief under *Code Civ. Proc. § 473* is timely, in proper form, and accompanied by an attorney's sworn affidavit attesting to his or her mistake, the court must vacate any resulting default judgment entered against his or her client unless the court finds that the default was not in fact caused by the attorney's mistake [*Code Civ. Proc. § 473*]. For further discussion, see the *§ 70.12[3]* and *§ 70.120[2][c]* [*see* also *§ 70.140* et seq.].

[3] Discussion of Authorities

[a] Failure to Act Despite Full Knowledge of Proceedings

In ***Northridge Financial Corp. v. Hamblin*** *(1975) 48 Cal. App. 3d 819, 122 Cal. Rptr. 109* , an action against an individual and a corporation, the trial court denied defendants' motion under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), for relief from the entry of a default judgment (and motion for reconsideration). Plaintiff's counsel granted defendants' counsel an extension to answer the complaint. After the extension period had passed and no answer had been filed, plaintiff's counsel filed a request to enter default. A default

was entered, followed by a default judgment. Defendants filed a motion for relief under *Code Civ. Proc. § 473* five days prior to the statutory six-month limitation period. The trial court denied that motion, as well as defendants' subsequent motion for reconsideration. Defendants appealed.

The court of appeal affirmed, holding, inter alia, that defendants failed to show excusable neglect in support of their request for relief (*48 Cal. App. 3d 819, 824)* . The court stated that at the outset, it is clear from the attorney's declaration that defendants' default was not the result of mistake, inadvertence, or surprise. It found that the trial court could reasonably have inferred from the attorney's declaration that a deliberate decision was made by defendants not to move immediately for relief from default. The inference then arose that defendants might choose not to answer (*48 Cal. App. 3d 819, 823)* . Specifically, the court noted that the individual defendant initially decided to pursue a bankruptcy proceeding in lieu of filing an answer to the complaint in the instant action; the extension of time was obtained for that purpose. Following the entry of default, the defendants' attorney discussed the defaults with the defendants, who decided at that time to wait several more weeks until a final decision on filing a petition in bankruptcy was made, before requesting relief from the default (*48 Cal. App. 3d 819, 823)* . The attorney's declaration showed that subsequent to that time, he misfiled the relevant papers in the instant action with the bankruptcy papers, and did not remember them until proceeding with the bankruptcy petition. The court stated that when a defendant with full knowledge of the proceedings fails to take action to protect his or her interests until after the default, it is an abuse of discretion to set the default aside; the trial court does not have the legal power to set aside the default simply because the defendant did not realize the legal effect of failing to file an answer. The court noted that defendants were given additional time to file their answer, yet did not file one; and held that the fact that one of the defendants contemplated bankruptcy is no excuse. The moving party's attorney also averred that he was distracted from attending to the client's affairs because of his relocation to a new law office The court held, however, that the assertion that the attorney's practice was disrupted does not negate the fact that defendants were given an extension and still did not bother to file any answer; nor does the fact that the file may have been misplaced militate against the inference that defendants decided not to file their answer because they were considering filing a petition for bankruptcy (*48 Cal. App. 3d 819, 824)* .

[4] Additional Authorities

[a] Failure to Act Despite Full Knowledge of Proceedings

Yarbrough v. Yarbrough (1956) 144 Cal. App. 2d 610, 301 P.2d 426 , is discussed in *§ 70.194[3]*.

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7-70 California Points & Authorities § 70.192

§ 70.192 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground of Inexcusable Neglect of Defendant [Code Civ. Proc. § 473(b)]--No Relief When Defendant's Conduct Is Not Reasonable

[1] FORM

[*This form should be combined with a memorandum generally opposing a motion to set aside under Code Civ. Proc. § 473(b) (see § 70.120[1]).*]

THE COURT SHOULD DENY DEFENDANT'S MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other proceeding*)] BECAUSE THERE MAY BE NO RELIEF WHEN THE DEFENDANT'S CONDUCT IS NOT REASONABLE.

A. Burden of Proof on Moving Party to Show Excusable Neglect. [*See § 70.190[1], Paragraph A.*]

B. No Relief When Defendant's Conduct Not That of Reasonably Prudent Person. Relief under *Code of Civil Procedure Section 473(b)*, on the ground of excusable neglect, is not available unless the defendant is able to show that the neglect asserted might have been the act of a reasonably prudent person under the same circumstances (*Lint v. Chisholm (1981) 121 Cal. App. 3d 615, 620, 177 Cal. Rptr. 314*).

[*When appropriate, add points and authorities opposing the motion on additional, particular grounds, e.g., that the motion is not timely (see, e.g., §§ 70.140 -70.148), or that the moving party has not made a sufficient showing justifying relief on any other specific ground or grounds asserted (see, e.g., §§ 70.160 -70.191, 70.193 -70.216). Additional points and authorities may be also be added, when appropriate, supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief (see, e.g., §§ 70.230, 70.231).*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that a default and default judgment, or judgment, dismissal, order, or other proceeding should be set aside on the ground of asserted excusable neglect on the part of the moving party [*see Code Civ. Proc. § 473(b)*]. The ground of opposition is that the moving party failed to act as a reasonably prudent person would under similar circumstances [*Lint v. Chisholm (1981) 121 Cal. App. 3d 615, 620, 177 Cal. Rptr. 314]* .

For points and authorities based on other conduct considered inexcusable neglect, see *§§ 70.190, 70.191, 70.193 -70.195*. For points and authorities opposing relief on the ground of an attorney's inexcusable neglect, see *§§ 70.210 -70.216*.

In an appropriate case, this form may be submitted in opposition to the points and authorities *set out in §§ 70.90 -70.100*.

This form should be combined with a memorandum generally opposing a motion to set aside under *Code Civ. Proc. § 473(b)* [*see § 70.120[1]*]. It may also be combined, when appropriate, with points and authorities opposing relief on other particular grounds. For example, it may be combined with additional points and authorities showing that the motion is not timely [*see §§ 70.140 -70.148*], or with additional points and authorities showing that the moving party has not made a sufficient showing justifying relief on the specific ground or grounds asserted [*see §§ 70.160 -70.191, 70.193 -70.216*; *see also* discussion in *§ 70.10[2][g]*]. This form may also be combined, when appropriate, with points and authorities supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief [*see §§ 70.230, 70.231*].

This form may also be adapted for use in a trial or appellate brief.

See also *§ 70.10[2]* and *§ 70.120[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b)*, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Counsel should therefore show why the moving party's conduct constituted mere inexcusable failure to act or a decision not to act followed by a change of mind. Therefore, counsel should set forth facts regarding why the moving party's actions were not reasonable under the circumstances, and the unexplained failure to file a responsive pleading in a timely manner. See also *§ 70.120[2][b]* regarding evidentiary support for facts stated.

[c] Attorney Affidavit of Fault

Whenever an application for relief under *Code Civ. Proc. § 473* is timely, in proper form, and accompanied by an attorney's sworn affidavit attesting to his or her mistake, the court must vacate any resulting default judgment entered against his or her client unless the court finds that the default was not in fact caused by the attorney's mistake [*Code Civ. Proc. § 473*]. For further discussion, see the *§ 70.12[3]* and *§ 70.120[2][c]* [*see* also *§ 70.140* et seq.].

[3] Discussion of Authorities

[a] No Relief When Defendant's Conduct Not That of Reasonably Prudent Person

Lint v. Chisholm *(1981) 121 Cal. App. 3d 615, 177 Cal. Rptr. 314* , is discussed in *§ 70.180[3]*.

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7-70 California Points & Authorities § 70.193

§ 70.193 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground of Inexcusable Neglect of Defendant [Code Civ. Proc. § 473(b)]--Unreasonable Reliance on Third Party's Agreement to Defend

[1] FORM

[*This form should be combined with a memorandum generally opposing a motion to set aside under Code Civ. Proc. § 473(b) (see § 70.120[1]).*]

THE COURT SHOULD DENY DEFENDANT'S MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other proceeding*)] BECAUSE DEFENDANT'S RELIANCE ON THE AGREEMENT BY _____ [*identify third party*] TO UNDERTAKE HIS/HER DEFENSE WAS UNREASONABLE.

A. Burden of Proof on Moving Party to Show Excusable Neglect. [*See § 70.190[1], Paragraph A.*]

B. Unreasonable Reliance on Third Party's Agreement to Defend. A defendant's reliance on a third party to undertake his or her defense is not a proper ground for relief under *Code of Civil Procedure Section 473(b)*when that reliance is unreasonable (*Cyrus v. Haveson (1976) 65 Cal. App. 3d 306, 315, 135 Cal. Rptr. 246*).

[*When appropriate, add points and authorities opposing the motion on additional, particular grounds, e.g., that the motion is not timely (see, e.g., §§ 70.140 -70.148), or that the moving party has not made a sufficient showing justifying relief on any other specific ground or grounds asserted (see, e.g., §§ 70.160 -70.192, 70.194 -70.216). Additional points and authorities may be also be added, when appropriate, supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief (see, e.g., §§ 70.230, 70.231).*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that a default and default judgment, or judgment, dismissal, order, or other proceeding should be set aside on the ground of asserted excusable neglect on the part of the moving party [*see Code Civ. Proc. § 473(b)*]. The ground of opposition is that the moving party's reliance on a third party's agreement to defend was unreasonable under the circumstances [*Cyrus v. Haveson (1976) 65 Cal. App. 3d 306, 315, 135 Cal. Rptr. 246]* .

For points and authorities based on other conduct considered inexcusable neglect, see *§§ 70.190 -70.192, 70.194, 70.195*. For points and authorities opposing relief on the ground of an attorney's inexcusable neglect, see *§§ 70.210 -70.216*.

In an appropriate case, this form may be submitted in opposition to the points and authorities *set out in §§ 70.90 -70.100*.

This form should be combined with a memorandum generally opposing a motion to set aside under *Code Civ. Proc. § 473(b)* [*see § 70.120[1]*]. It may also be combined, when appropriate, with points and authorities opposing relief on other particular grounds. For example, it may be combined with additional points and authorities showing that the motion is not timely [*see §§ 70.140 -70.148*], or with additional points and authorities showing that the moving party has not made a sufficient showing justifying relief on the specific ground or grounds asserted [*see §§ 70.160 -70.192, 70.194 -70.216*; *see also* discussion in *§ 70.10[2][g]*]. This form may also be combined, when appropriate, with points and authorities supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief [*see §§ 70.230, 70.231*].

This form may also be adapted for use in a trial or appellate brief.

See also *§ 70.10[2]* and *§ 70.120[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b)*, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Counsel should therefore show why the moving party's conduct constituted mere inexcusable failure to act or a decision not to act followed by a change of mind. Therefore, counsel should set forth facts regarding the moving party's unreasonable reliance on a third party's promise to defend, and the unexplained failure to file a responsive pleading in a timely manner. See also *§ 70.120[2][b]* regarding evidentiary support for facts stated.

[c] Attorney Affidavit of Fault

Whenever an application for relief under *Code Civ. Proc. § 473* is timely, in proper form, and accompanied by an attorney's sworn affidavit attesting to his or her mistake, the court must vacate any resulting default judgment entered against his or her client unless the court finds that the default was not in fact caused by the attorney's mistake [*Code Civ. Proc. § 473*]. For further discussion, see the *§ 70.10[2]* and *§ 70.120[2]* [*see* also *§ 70.140* et seq.].

[3] Discussion of Authorities

[a] Unreasonable Reliance on Third Party's Agreement to Defend

In ***Cyrus v. Haveson*** *(1976) 65 Cal. App. 3d 306, 135 Cal. Rptr. 246* , the trial court denied defendants' motion to set aside a default and default judgment. When defendants were served with copies of the summons and complaint, they informed the insurance company whose policy covered plaintiff's claims. The company assigned an investigator, and, for approximately seven months, plaintiff's attorney and the investigator attempted to settle the matter. When plaintiff's

attorney decided that the matter would not be settled, he informed defendants twice in writing that counsel intended to enter their default if no answer was filed. No answer was filed. Defendants appealed the trial court's order denying their motion.

The court of appeal affirmed with modification (regarding the type and amount of allowable damages), holding that defendants' continued reliance on the insurance company to provide a defense was unreasonable, precluding relief (*65 Cal. App. 3d 306, 315, 319)* . The court stated that the record does not establish that the trial court abused it discretion when it determined that defendants had not made a sufficient showing to satisfy the requirements under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*). The court noted that the statute provides in part that the court may relieve a party from a judgment, order, or other proceeding taken against the party through the party's mistake, inadvertence, surprise, or excusable neglect. It stated that the mistake, inadvertence, or surprise that justifies a court in setting aside a default must be reasonable. The court observed that the trial court could properly find that defendants did not act reasonably in failing to plead to the complaint. Defendants sought to excuse their neglect by their reliance on the insurance company and its investigator. The court stated that although reliance on a third person's agreement to defend may be reasonable so as to justify a failure to plead to a complaint, the instant case contains evidence from which the trial court could determine that defendants' continued reliance on the insurance company was unreasonable. The court stated that defendants properly relied on the insurance company until they were informed by plaintiff's counsel that a default would be taken. They were thus placed on notice that some action was required of them, and counsel's subsequent letter emphasized that the investigator and the company he represented were not protecting defendants' position in the litigation. Because their declarations did not explain why no action was taken by them until well after the default was taken, the court concluded that the evidence supported the trial court's implied finding of inexcusable neglect (*65 Cal. App. 3d 306, 315)* .

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7-70 California Points & Authorities § 70.194

§ 70.194 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground of Inexcusable Neglect of Defendant [Code Civ. Proc. § 473(b)]--Disregard of Process

[1] FORM

[*This form should be combined with a memorandum generally opposing a motion to set aside under Code Civ. Proc. § 473(b) (see § 70.120[1]).*]

THE COURT SHOULD DENY DEFENDANT'S MOTION TO SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT BECAUSE DEFENDANT'S DISREGARD OF PROCESS DOES NOT CONSTITUTE EXCUSABLE NEGLECT.

A. Burden of Proof on Moving Party to Show Excusable Neglect. [*See § 70.190[1], Paragraph A.*]

B. Disregard of Process. The mislaying of process, forgetfulness, or intentional disregard of service does not constitute mistake, inadvertence, surprise, or excusable neglect as those terms are used in *Code of Civil Procedure Section 473(b)*, and does not require a court to set aside a default (*Price v. Hibbs (1964) 225 Cal. App. 2d 209, 217, 37 Cal. Rptr. 270*).

[*When appropriate, add points and authorities opposing the motion on additional, particular grounds, e.g., that the motion is not timely (see, e.g., §§ 70.140 -70.148), or that the moving party has not made a sufficient showing justifying relief on any other specific ground or grounds asserted (see, e.g., §§ 70.160 -70.193, 70.195 -70.216). Additional points and authorities may be also be added, when appropriate, supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief (see, e.g., §§ 70.230, 70.231).*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that a default and default judgment should be set aside on the ground of asserted excusable neglect on the part of the moving party [*see Code Civ. Proc. § 473(b)*]. The ground of opposition is that the moving party's disregard of process does not constitute excusable neglect under section 473(b) [*Price v. Hibbs (1964) 225 Cal. App. 2d 209, 217, 37 Cal. Rptr. 270]* .

For points and authorities based on other conduct considered inexcusable neglect, see *§§ 70.190 -70.193, 70.195*. For points and authorities opposing relief on the ground of an attorney's inexcusable neglect, see *§§ 70.210 -70.216*.

In an appropriate case, this form may be submitted in opposition to the points and authorities *set out in §§ 70.90 -70.100*.

This form should be combined with a memorandum generally opposing a motion to set aside under *Code Civ. Proc. § 473(b)* [*see § 70.120[1]*]. It may also be combined, when appropriate, with points and authorities opposing relief on other particular grounds. For example, it may be combined with additional points and authorities showing that the motion is not timely [*see §§ 70.140 -70.148*], or with additional points and authorities showing that the moving party has not made a sufficient showing justifying relief on the specific ground or grounds asserted [*see §§ 70.160 -70.193, 70.195 -70.216*; *see also* discussion in *§ 70.10[2][g]*]. This form may also be combined, when appropriate, with points and authorities supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief [*see §§ 70.230, 70.231*].

This form may also be adapted for use in a trial or appellate brief.

See also *§ 70.10[2]* and *§ 70.120[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b)*, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Counsel should therefore show why the moving party's conduct constituted mere inexcusable failure to act or a decision not to act followed by a change of mind. Therefore, counsel should set forth facts showing that the moving party's actions were due to mere forgetfulness or were an intentional disregard of service. See also *§ 70.120[2][b]* regarding evidentiary support for facts stated.

[c] Attorney Affidavit of Fault

Whenever an application for relief under *Code Civ. Proc. § 473* is timely, in proper form, and accompanied by an attorney's sworn affidavit attesting to his or her mistake, the court must vacate any resulting default judgment entered against his or her client unless the court finds that the default was not in fact caused by the attorney's mistake [*Code Civ. Proc. § 473*]. For further discussion, see the *§ 70.12[3]* and *§ 70.120[2][c]* [*see* also *§ 70.140* et seq.].

[3] Discussion of Authorities

[a] Disregard of Process

Price v. Hibbs *(1964) 225 Cal. App. 2d 209, 37 Cal. Rptr. 270* , is discussed in *§ 70.120[3]*.

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7-70 California Points & Authorities § 70.195

§ 70.195 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground of Inexcusable Neglect of Defendant [Code Civ. Proc. § 473(b)]--Press of Business Is Inadequate Excuse

[1] FORM

[*This form should be combined with a memorandum generally opposing a motion to set aside under Code Civ. Proc. § 473(b) (see § 70.120[1]).*]

THE COURT SHOULD DENY DEFENDANT'S MOTION TO SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT BECAUSE THE PRESS OF BUSINESS IS NOT A SUFFICIENT EXCUSE FOR FAILING TO RESPOND TO THE SERVICE OF A SUMMONS AND COMPLAINT.

A. Burden of Proof on Moving Party to Show Excusable Neglect. [*See § 70.190[1], Paragraph A.*]

B. Press of Business Inadequate Excuse. The press of business is not a sufficient excuse for failing to respond to service of a summons and complaint (*Bellm v. Bellia (1984) 150 Cal. App. 3d 1036, 1038, 198 Cal. Rptr. 389*).

[*When appropriate, add points and authorities opposing the motion on additional, particular grounds, e.g., that the motion is not timely (see, e.g., §§ 70.140 -70.148), or that the moving party has not made a sufficient showing justifying relief on any other specific ground or grounds asserted (see, e.g., §§ 70.160 -70.194, 70.210 -70.216). Additional points and authorities may be also be added, when appropriate, supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief (see, e.g., §§ 70.230, 70.231).*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that a default and default judgment should be set aside on

the ground of asserted excusable neglect on the part of the moving party [*see Code Civ. Proc. § 473(b)*]. The ground of opposition is that the press of business is not a sufficient excuse for failing to respond to service of a summons and complaint [*Bellm v. Bellia (1984) 150 Cal. App. 3d 1036, 1038, 198 Cal. Rptr. 389]* .

For points and authorities based on other conduct considered inexcusable neglect, see *§§ 70.190 -70.194*. For points and authorities opposing relief on the ground of an attorney's inexcusable neglect, see *§§ 70.210 -70.216*.

In an appropriate case, this form may be submitted in opposition to the points and authorities *set out in §§ 70.90 -70.100*.

This form should be combined with a memorandum generally opposing a motion to set aside under *Code Civ. Proc. § 473(b)* [*see § 70.120[1]*]. It may also be combined, when appropriate, with points and authorities opposing relief on other particular grounds. For example, it may be combined with additional points and authorities showing that the motion is not timely [*see §§ 70.140 -70.148*], or with additional points and authorities showing that the moving party has not made a sufficient showing justifying relief on the specific ground or grounds asserted [*see §§ 70.160 -70.194*, *70.210 -70.216*; *see also* discussion in *§ 70.10[2][g]*]. This form may also be combined, when appropriate, with points and authorities supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief [*see §§ 70.230, 70.231*].

This form may also be adapted for use in a trial or appellate brief.

See also *§ 70.10[2]* and *§ 70.120[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b)*, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Therefore, counsel should refer to declarations supporting the motion and point out the motion is based solely on press of business and, therefore, does not justify relief under *Code Civ. Proc. § 473(b)*. See also *§ 70.120[2][b]* regarding evidentiary support for facts stated.

[c] Attorney Affidavit of Fault

Whenever an application for relief under *Code Civ. Proc. § 473* is timely, in proper form, and accompanied by an attorney's sworn affidavit attesting to his or her mistake, the court must vacate any resulting default judgment entered against his or her client unless the court finds that the default was not in fact caused by the attorney's mistake [*Code Civ. Proc. § 473*]. For further discussion, see the *§ 70.12[3]* and *§ 70.120[2][c]* [*see* also *§ 70.140* et seq.].

[3] Discussion of Authorities

[a] Press of Business Inadequate Excuse

In ***Bellm v. Bellia*** *(1984) 150 Cal. App. 3d 1036, 198 Cal. Rptr. 389* , the trial court denied defendant's motion under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), for relief from a default judgment taken against him. Plaintiff had defendant served with copies of the summons and complaint. Defendant filed no response. Counsel for plaintiff represented another person who had sued the same defendant, and had periodic communications with defendant's attorney concerning discovery matters in that case, but did not notify defendant's attorney of the present action against defendant, or of the impending default. Defendant moved to set aside the default a few weeks after it was entered, and the trial court denied the motion. After the default hearing, judgment was ordered in favor of plaintiff for damages, costs, and interest. Defendant appealed.

The court of appeal affirmed, holding that defendant failed to show entitlement to relief under the statute. Defendant

contended that the trial court abused its discretion when it denied his motion, because defendant made a showing of excusable neglect justifying relief from the default under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*). In his declarations, defendant stated that after he was served with the summons and complaint he forgot about the matter because of the business pressures of the holiday season, and because of the serious illness of his father, and the recent death of his mother. The court noted that the only allegations defendant made regarding the effect of those factors were that his parents' illnesses and death "were very trying," and that business pressures caused him to forget about the service of papers. Defendant did not allege that his parents' illnesses occupied any amount of his time or that he was too distraught to think about the complaint. The court stated that although denial of relief is a harsh measure, defendant's showing of excuse was not strong enough to require relief as a matter of law. Defendant also contended that plaintiff's counsel should have given notice of the impending default to the attorney who represented defendant in the other matter. Although as a matter of professional courtesy, counsel should have given notice of the impending default, counsel was under no legal obligation to do so. By taking a default without giving notice, counsel took the risk that the trial court would grant relief from the default, but the failure to give notice did not require the court to grant relief (*150 Cal. App. 3d 1036, 1038)* .

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[Reserved]

§§ 70.196[Reserved]

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7-70 California Points & Authorities § 70.210

§ 70.210 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground of Inexcusable Neglect of Counsel [Code Civ. Proc. § 473(b)]--Mere Neglect Is Not Sufficient Ground for Relief

[1] FORM

[*This form should be combined with a memorandum generally opposing a motion to set aside under Code Civ. Proc. § 473(b) (see § 70.120[1]).*]

THE COURT SHOULD DENY THE MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other proceeding*)] BECAUSE THE INACTION OF THE ATTORNEY FOR THE MOVING PARTY CONSTITUTES INEXCUSABLE NEGLECT.

A. Mere Neglect or Negligence of Counsel. Mere neglect or negligence is not a sufficient ground for relief under *Code of Civil Procedure Section 473(b)*; to afford relief under this ground, the neglect or mistake on the part of counsel must be excusable (*Cochran v. Linn (1984) 159 Cal. App. 3d 245, 252, 205 Cal. Rptr. 550*).

B. Required Showing That Counsel's Neglect Was Excusable. A party who seeks relief under *Code of Civil Procedure Section 473(b)* on the basis of mistake or inadvertence of counsel must demonstrate that the mistake, inadvertence, or general neglect was excusable, because the negligence of the attorney is imputed to the client and may not be offered by the client as a basis for relief (*Beeman v. Burling (1990) 216 Cal. App. 3d 1586, 1602, 265 Cal. Rptr. 719*).

[*When appropriate, add points and authorities opposing the motion on additional, particular grounds, e.g., that the motion is not timely (see, e.g., §§ 70.140 -70.148), or that the moving party has not made a sufficient showing justifying relief on any other specific ground or grounds asserted (see, e.g., §§ 70.160 -70.190, 70.211 -70.216). Additional points and authorities may be also be added, when appropriate, supporting the imposition of terms, including an award of*

attorney's fees, costs, or sanctions, in the event that the court grants relief (see, e.g., §§ 70.230, 70.231).]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a default and default judgment, or judgment, dismissal, order, or other proceeding should be set aside on the ground of mistake, based on asserted excusable neglect on the part of the moving party's attorney [*see Code Civ. Proc. § 473(b)*]. The ground of opposition is that the neglect of the moving party's attorney was inexcusable [*see Davis v. Thayer (1980) 113 Cal. App. 3d 892, 906, 170 Cal. Rptr. 328]* .

For other points and authorities related to an attorney's inexcusable neglect, see *§ 70.211* et seq. For points and authorities opposing a motion for relief based on the moving party's inexcusable neglect generally, see *§§ 70.190 -70.195*. See also *§ 70.144[1]* (opposing relief on the ground that the attorney's press of business is no excuse for failing to file the motion within a reasonable time), and § 70.124[1] (opposing relief on the ground that an attorney's negligence is imputed to the client).

In an appropriate case, this form may be submitted in opposition to the points and authorities *set out in §§ 70.90 -70.100*.

This form should be combined with a memorandum generally opposing a motion to set aside under *Code Civ. Proc. § 473(b)* [*see § 70.120[1]*]. It may also be combined, when appropriate, with points and authorities opposing relief on other particular grounds. For example, it may be combined with additional points and authorities showing that the motion is not timely [*see §§ 70.140 -70.148*], or with additional points and authorities showing that the moving party has not made a sufficient showing justifying relief on the specific ground or grounds asserted [*see §§ 70.160 -70.195, 70.211 -70.216*; *see also* discussion in *§ 70.10[2][g]*]. This form may also be combined, when appropriate, with points and authorities supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief [*see §§ 70.230, 70.231*].

This form may also be adapted for use in a trial or appellate brief.

See also *§ 70.10[2]* and *§ 70.120[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b)*, and alternative methods for obtaining relief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should set forth facts showing that the opposing counsel's failure to respond in a timely manner to the complaint was due to inexcusable neglect rather than uncontrollable circumstances. See also *§ 70.120[2][b]* regarding evidentiary support for facts stated.

[c] Attorney Affidavit of Fault

Whenever an application for relief under *Code Civ. Proc. § 473* is timely, in proper form, and accompanied by an attorney's sworn affidavit attesting to his or her mistake, the court must vacate any resulting default judgment entered against his or her client unless the court finds that the default was not in fact caused by the attorney's mistake [*Code Civ. Proc. § 473*]. For further discussion, see the *§ 70.12[3]* and *§ 70.120[2][c]* [*see also § 70.140* et seq.].

[3] Discussion of Authorities

[a] Mere Neglect or Negligence of Counsel

In ***Cochran v. Linn*** *(1984) 159 Cal. App. 3d 245, 205 Cal. Rptr. 550* , the trial court entered summary judgment against plaintiffs, and denied plaintiffs' motion under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), to vacate the judgment. Plaintiffs appealed.

The court of appeal affirmed, holding that the trial court did not abuse its discretion in denying the motion (*159 Cal. App. 3d 245, 252-253)* . The court noted that plaintiffs' motion to set aside the summary judgment (and to be permitted to file an amended complaint) was based on former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), and is addressed to the court's sound discretion. The court stated that the exercise of that discretion will not be disturbed on appeal absent a clear showing of abuse, and that the discretion is that of the trial court, not that of the reviewing court. Therefore, even if the reviewing court might have ruled otherwise in the first instance, the trial court's order will not be reversed unless, as a matter of law, it is not supported by the record. The court noted that the thrust of plaintiffs' argument is that certain information came to the attention of their counsel subsequent to the granting of the summary judgment regarding a basis of liability attributable to defendant that had not been stated in their pleadings. The court observed, however, that most of that information was in plaintiffs' possession prior to the summary judgment hearing (*159 Cal. App. 3d 245, 251)* . The court stated that even assuming that new information had been revealed to plaintiffs subsequent to the summary judgment hearing, no showing was made whatsoever by plaintiffs that the failure to secure the information was the result of excusable neglect, as required by *Code Civ. Proc. § 473*. The court held that mere neglect or negligence is not a sufficient ground for relief under the statute. On the contrary, the neglect or mistake on the part of counsel must be *excusable.* The court of appeal noted that in its minute order denying the motion to vacate the judgment, the trial court stated that plaintiffs' counsel relied on the fact that they were negligent in preparing their case, and that no good cause had been shown that would permit relief under the statute. The court concluded that the trial court was therefore completely justified in refusing to vacate the summary judgment; and that, in the absence of an abuse of discretion, it is not the function of the appellate court to substitute its discretion for that of the trial court (*159 Cal. App. 3d 245, 252)* .

[b] Required Showing That Counsel's Neglect Was Excusable

In ***Beeman v. Burling*** *(1990) 216 Cal. App. 3d 1586, 265 Cal. Rptr. 719* , a wrongful-eviction action, the plaintiff sought special and general damages according to proof, punitive damages, and treble statutory damages under local rent-control ordinances. The defendant demurred and moved to strike portions of the amended complaint. The trial court overruled the demurrer, granted the motion to strike in part, and ordered the defendant to respond to the complaint within 30 days. Defendant's counsel agreed to answer the complaint in the instant action, as well as related complaints by other tenants who were also represented by plaintiff's attorney, by a specific date approximately four months later; and answered several of the other complaints within that time period. Shortly after that date, plaintiff's counsel served defendant's counsel with a statement of damages, and offered to settle for a specific sum, pursuant to *Code Civ. Proc. § 998*. Approximately one month later, he warned defendant's counsel that he would obtain a default in the absence of a response. The defendant's attorney did not respond, according to his declaration, because his girlfriend's hospitalization during that time distracted him and caused him additional personal responsibilities. He claimed not to have seen the letter threatening default until after the stated deadline had passed. At the hearing on the default judgment, plaintiff presented witness testimony, and the trial court awarded plaintiff damages and costs. The defendant was unaware of those proceedings, and did not learn of the judgment until he retained new counsel approximately two weeks later. His new counsel moved for relief from default on the grounds that: (1) the default was taken in violation of *Code Civ. Proc. § 425.11*, which, he alleged, requires personal service of a statement of damages; and (2) an answer was not filed because of the former counsel's excusable mistake and neglect, which warranted relief under Code Civ. Poc. § 473. The trial court denied the motion on the ground that defendant did not demonstrate that the default resulted from counsel's excusable neglect. Defendant appealed.

The court of appeal affirmed, holding, inter alia, that the conduct of defendant's former counsel did not constitute

excusable neglect, and that the 1988 amendment to former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*) (effective January 1, 1989), mandating relief pursuant to an attorney's affidavit regarding mistake, inadvertence, surprise, or neglect, is not retroactive in application (*216 Cal. App. 3d 1586, 1602-1607)* . With respect to the issue of entitlement of relief under *Code Civ. Proc. § 473*, the court noted that it is axiomatic that a motion for relief from default under the statute is addressed to the sound discretion of the trial court; and that the exercise of that discretion will not be disturbed on appeal absent a clear showing of abuse. The court stated that a party who seeks relief under the statute on the basis of mistake or inadvertence of counsel must demonstrate that the mistake, inadvertence, or general neglect was excusable because the negligence of the attorney is imputed to the client, and may not be offered by the client as a basis for relief. The client's redress for inexcusable neglect by counsel is an action for malpractice. The court observed that in the case before it, defendant's counsel was warned that a default would be taken shortly, in the absence of a response; and that the default was actually taken after the stated date. Moreover, counsel was informed of the default judgment hearing date, and was asked whether he would bring a motion under *Code Civ. Proc. § 473* prior to that date, but took no steps to avert the judgment (*216 Cal. App. 3d 1586, 1602)* .

The court rejected the contention that the hospitalization of the attorney's girlfriend established a basis for excusable neglect, holding that excusable neglect is an act or omission that might have been committed by a reasonably prudent person under the same circumstances. The court concluded that the trial court was entirely justified in finding the neglect inexcusable and denying relief under the motion (*216 Cal. App. 3d 1586, 1602-1603)* . The court also rejected the contention that defendant was abandoned by his attorney and consequently should not be penalized for the attorney's errors; holding that under the facts the attorney did not entirely abandon the client within the meaning of the exception for the attorney's "gross misconduct," which, if established, would justify relief (*216 Cal. App. 3d 1586, 1603-1604)* . Defendant also contended that the 1988 amendment to *Code Civ. Proc. § 473* requiring the trial court to grant relief from default based on an attorney's affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, although effective after the date of the default and default judgment, should be applied retroactively to mandate relief. The court discussed at length the retroactive application of procedural, as distinct from substantive, statutes, in the absence of a statutory provision expressly regarding retroactivity. The court concluded that the effect of retroactive application of the amendment would be substantive in nature, in that it would effect a trial on the merits despite the fact that under the law existing at the time of the default judgment, the defendant clearly lost that right. Consequently, the court stated, the amendment cannot be applied retroactively (*216 Cal. App. 3d 1586, 1604-1607)* .

[4] Additional Authorities

[a] Required Showing That Counsel's Neglect Was Excusable

In *In re Marriage of Fuller (1985) 163 Cal. App. 3d 1070, 210 Cal. Rptr. 73* , the court of appeal issued a writ of mandate vacating the portion of a court order awarding sanctions against an attorney based on failure to comply with an order compelling the production of documents. Relief was granted on due process grounds (that is, lack of notice that the attorney would have to defend his own actions) (*163 Cal. App. 3d 1070, 1075-1079)* . However, the court of appeal also found that the trial court did not abuse its discretion in denying the attorney's motion under *Code Civ. Proc. § 473* for relief from the imposition of sanctions, when the motion was based the attorney's assertions that he advised his client to obtain an accountant for the purpose of gathering the information required by the production order, and that he was scheduled to take a vacation during that period of time and left the matter for resolution by the client. The court noted that the moving party established no grounds under *Code Civ. Proc. § 473* for vacating the sanction order (*163 Cal. App. 3d 1070, 1074-1075)* .

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7-70 California Points & Authorities § 70.211

§ 70.211 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground of Inexcusable Neglect of Counsel [Code Civ. Proc. § 473(b)]--No Showing of Causation Between Excusable Neglect and Default

[1] FORM

[*This form should be combined with a memorandum generally opposing a motion to set aside under Code Civ. Proc. § 473(b) (see § 70.120[1]).*]

THE COURT SHOULD DENY THE MOTION TO SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT BECAUSE THE MOVING PARTY HAS FAILED TO SHOW THAT EXCUSABLE NEGLECT WAS THE ACTUAL CAUSE OF THE DEFAULT AND DEFAULT JUDGMENT.

Causation Between Excusable Neglect and Default. To obtain relief under *Code of Civil Procedure Section 473(b)* on the ground of excusable neglect, the moving party must show that the excusable neglect was the actual cause of the default (*Cisneros v. Vueve (1995) 37 Cal. App. 4th 906, 908, 44 Cal. Rptr. 2d 682* ; *Transit Ads, Inc. v. Tanner Motor Livery, Ltd. (1969) 270 Cal. App. 2d 275, 279, 75 Cal. Rptr. 848*).

[*When appropriate, add points and authorities opposing the motion on additional, particular grounds, e.g., that the motion is not timely (see, e.g., §§ 70.140 -70.148), or that the moving party has not made a sufficient showing justifying relief on any other specific ground or grounds asserted (see, e.g., §§ 70.160 -70.210, 70.212 -70.216). Additional points and authorities may be also be added, when appropriate, supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief (see, e.g., §§ 70.230, 70.231).*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a default and default judgment should

be set aside on the ground of mistake, based on asserted excusable neglect on the part of the moving party's attorney [*see Code Civ. Proc. § 473(b)*]. The ground of opposition is that the moving party has failed to show that excusable neglect was the actual cause of the default and default judgment [*Cisneros v. Vueve (1995) 37 Cal. App. 4th 906, 908, 44 Cal. Rptr. 2d 682* ; *Transit Ads, Inc. v. Tanner Motor Livery, Ltd. (1969) 270 Cal. App. 2d 275, 279, 75 Cal. Rptr. 848]* .

For other points and authorities related to an attorney's inexcusable neglect, see *§§ 70.210* and *70.212* et seq.. For points and authorities opposing a motion for relief based on the moving party's inexcusable neglect generally, see *§§ 70.190 -70.195*. See also *§ 70.144[1]* (opposing relief on the ground that the attorney's preoccupation with other matters is no excuse for failing to file the motion within a reasonable time), and § 70.124[1] (opposing relief on the ground that an attorney's negligence is imputed to the client).

In an appropriate case, this form may be submitted in opposition to the points and authorities *set out in §§ 70.90 -70.100*.

This form should be combined with a memorandum generally opposing a motion to set aside under *Code Civ. Proc. § 473(b)* [*see § 70.120[1]*]. It may also be combined, when appropriate, with points and authorities opposing relief on other particular grounds. For example, it may be combined with additional points and authorities showing that the motion is not timely [*see §§ 70.140 -70.148*], or with additional points and authorities showing that the moving party has not made a sufficient showing justifying relief on the specific ground or grounds asserted [*see §§ 70.160 -70.210, 70.212 -70.216*; *see also* discussion in *§ 70.10[2][g]*]. This form may also be combined, when appropriate, with points and authorities supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief [*see §§ 70.230, 70.231*].

This form may also be adapted for use in a trial or appellate brief.

See also *§ 70.10[2]* and *§ 70.120[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b)*, and alternative methods for obtaining relief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should set forth facts showing that the opposing counsel's failure to respond in a timely manner was not actually caused by the asserted excusable neglect. See also *§ 70.120[2][b]* regarding evidentiary support for facts stated.

[c] Attorney Affidavit of Fault

Whenever an application for relief under *Code Civ. Proc. § 473* is timely, in proper form, and accompanied by an attorney's sworn affidavit attesting to his or her mistake, the court must vacate any resulting default judgment entered against his or her client unless the court finds that the default was not in fact caused by the attorney's mistake [*Code Civ. Proc. § 473*]. For further discussion, see the *§ 70.12[3]* and *§ 70.120[2][c]* [*see* also *§ 70.140* et seq.].

[3] Discussion of Authorities

[a] Causation Between Excusable Neglect and Default

In ***Cisneros v. Vueve*** *(1995) 37 Cal. App. 4th 906, 44 Cal. Rptr. 2d 682* , plaintiff had defendants' default entered in June 1993. On learning of the default, the defendants notified their insurance carrier about the lawsuit. In July, plaintiff appeared for a "prove-up" hearing. In August, the defendants' insurer retained an attorney to represent defendants, but the attorney became involved in other matters and completely forgot about the file. The court entered default judgment

against the defendants in September. In March 1994, the attorney filed an affidavit confessing his responsibility for the lengthy period of inaction in the case. The trial court denied defendants motion to set aside the default because the underlying default was not caused by the attorney.

The court of appeal affirmed the order denying relief on the basis that since the attorney was not representing the defendants at the time the default was entered he was not the proximate cause of the entry of default (*37 Cal. App. 4th 906, 912)* . The defendants argued that relief under the mandatory provision of *Code Civ. Proc. § 473* is required when the default judgment was caused by attorney neglect even if the attorney had nothing to do with the underlying default. Defendants suggested that the Legislature was using the word "default" in the statute generically, to refer to either the default or the default judgment. However, the court reasoned that even under that interpretation the defendants would lose the appeal because the trial court could deny relief if either event were not caused by counsel (*37 Cal. App. 4th 906, 911)* . Furthermore, the court concluded that the legislative history indicated that the statute was directly calculated to deny relief to parties who bear personal responsibility for allowing the default to occur in the first place (*37 Cal. App. 4th 906, 912)* . The court thus held that the trial court properly concluded that the defendants were not entitled to relief under the attorney affidavit provisions of *Code Civ. Proc. § 473* (*37 Cal. App. 4th 906, 912)* .

Transit Ads, Inc. v. Tanner Motor Livery, Ltd. *(1969) 270 Cal. App. 2d 275, 75 Cal. Rptr. 848* , is discussed in *§ 70.212[3]*.

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7-70 California Points & Authorities § 70.212

§ 70.212 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground of Inexcusable Neglect of Counsel [Code Civ. Proc. § 473(b)]--Attorney's Press of Business, By Itself Is Not Ground for Relief

[1] FORM

[*This form should be combined with a memorandum generally opposing a motion to set aside under Code Civ. Proc. § 473(b) (see § 70.120[1]).*]

THE COURT SHOULD DENY THE MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other proceeding*)] BECAUSE THE MOVING PARTY HAS FAILED TO SHOW EXCUSABLE NEGLECT IN THAT UNUSUAL PRESS OF AN ATTORNEY'S BUSINESS, BY ITSELF, IS NOT A LEGITIMATE EXCUSE FOR GRANTING RELIEF UNDER CODE OF CIVIL PROCEDURE SECTION 473(b).

Attorney's Press of Business, by Itself, Is Not Ground for Relief. The unusual press of an attorney's business, by itself, is not a legitimate excuse for granting relief under *Code of Civil Procedure Section 473(b)*(*Transit Ads, Inc. v. Tanner Motor Livery, Ltd. (1969) 270 Cal. App. 2d 275, 281, 75 Cal. Rptr. 848* ; *Fairfield v. Ahlstrom (1962) 206 Cal. App. 2d 590, 592, 24 Cal. Rptr. 70*).

[*When appropriate, add points and authorities opposing the motion on additional, particular grounds, e.g., that the motion is not timely (see, e.g., §§ 70.140 -70.148), or that the moving party has not made a sufficient showing justifying relief on any other specific ground or grounds asserted (see, e.g., §§ 70.160 -70.211, 70.213 -70.216). Additional points and authorities may be also be added, when appropriate, supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief (see, e.g., §§ 70.230, 70.231).*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a default and default judgment, or judgment, dismissal, order, or other proceeding should be set aside on the ground of mistake, based on asserted excusable neglect on the part of the moving party's attorney [*see Code Civ. Proc. § 473(b)*]. The ground of opposition is that unusual press of an attorney's business, by itself, is not a legitimate excuse for granting relief under section 473(b) [*Transit Ads, Inc. v. Tanner Motor Livery, Ltd. (1969) 270 Cal. App. 2d 275, 281, 75 Cal. Rptr. 848* ; *Fairfield v. Ahlstrom (1962) 206 Cal. App. 2d 590, 592, 24 Cal. Rptr. 70]* .

For other points and authorities related to an attorney's inexcusable neglect, see *§§ 70.210, 70.211*, and *70.213* et seq.. For points and authorities opposing a motion for relief based on the moving party's inexcusable neglect generally, see *§§ 70.190 -70.195*. See also *§ 70.144[1]* (opposing relief on the ground that the attorney's preoccupation with other matters is no excuse for failing to file the motion within a reasonable time), and § 70.124[1] (opposing relief on the ground that an attorney's negligence is imputed to the client).

In an appropriate case, this form may be submitted in opposition to the points and authorities *set out in §§ 70.90 -70.100*.

This form should be combined with a memorandum generally opposing a motion to set aside under *Code Civ. Proc. § 473(b)* [*see § 70.120[1]*]. It may also be combined, when appropriate, with points and authorities opposing relief on other particular grounds. For example, it may be combined with additional points and authorities showing that the motion is not timely [*see §§ 70.140 -70.148*], or with additional points and authorities showing that the moving party has not made a sufficient showing justifying relief on the specific ground or grounds asserted [*see §§ 70.160 -70.211, 70.213 -70.216*; *see also* discussion in *§ 70.10[2][g]*]. This form may also be combined, when appropriate, with points and authorities supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief [*see §§ 70.230, 70.231*].

This form may also be adapted for use in a trial or appellate brief.

See also *§ 70.10[2]* and *§ 70.120[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b)*, and alternative methods for obtaining relief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should refer to declarations supporting the motion and point out the motion is based solely on press of business and, therefore, does not justify relief under *Code Civ. Proc. § 473(b)*. See also *§ 70.120[2][b]* regarding evidentiary support for facts stated.

[c] Attorney Affidavit of Fault

Whenever an application for relief under *Code Civ. Proc. § 473* is timely, in proper form, and accompanied by an attorney's sworn affidavit attesting to his or her mistake, the court must vacate any resulting default judgment entered against his or her client unless the court finds that the default was not in fact caused by the attorney's mistake [*Code Civ. Proc. § 473*]. For further discussion, see the *§ 70.12[3]* and *§ 70.120[2][c]* [*see* also *§ 70.140* et seq.].

[3] Discussion of Authorities

[a] Attorney's Press of Business, by Itself, Is Not Ground for Relief

In ***Transit Ads, Inc. v. Tanner Motor Livery, Ltd.*** *(1969) 270 Cal. App. 2d 275, 75 Cal. Rptr. 848* , the trial court granted defendant's motion to set aside an entry of default and a default judgment. After defendant was served with

summons and complaint, defendant's attorney obtained two extensions of time to answer. When the answer was not filed, plaintiff's attorney wrote defendant's attorney, explaining that defendant's default would be entered unless he received the answer in one week. When there was no response to his letter, plaintiff's attorney entered defendant's default. Approximately one month later, defendant's attorney contacted plaintiff's attorney to state that he had been ill, that he had requested another attorney to prepare the answer, and that he would try to provide an answer within the next few days. Plaintiff's attorney agreed to vacate the entry of default on the filing of an answer in the next two days. The defendant's attorney turned the matter over to substitute counsel, but failed to advise him of the urgency of filing an answer. The two defense attorneys failed to keep various appointments to meet for the purpose of drafting an answer, and plaintiff's attorney, not having heard from defendant's attorney again, obtained a default judgment almost two months after his last discussion with defendant's attorney. When substitute counsel prepared an answer in the following month, he telephoned the office of plaintiff's attorney, and was told that a default judgment had been entered, but that plaintiff intended to seek a modification of the judgment to obtain a higher damages award, and would take no action on the case until the attorney returned from Europe. When plaintiff's attorney returned, he consulted with plaintiff, who refused to agree to vacate the default and default judgment, but agreed to a possible settlement. Defendant's original attorney filed a motion for relief under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), shortly thereafter. Plaintiff's appealed the trial court's grant of the motion.

The court of appeal reversed, holding, inter alia, that the attorney's conduct constituted inexcusable neglect (*270 Cal. App. 2d 275, 286-288)* . The court stated that the burden of proof was on the defendant, who was required to establish his position by a preponderance of the evidence (*270 Cal. App. 2d 275, 279)* . It stated that when the ground for the motion is excusable neglect, the neglect must be an act or omission that might have been committed by a reasonably prudent person under the same circumstances, and must be the actual cause of the default (*270 Cal. App. 2d 275, 279)* . With respect to the specific ground of counsel's illness, the court stated that illness constitutes excusable neglect if counsel is disabled and moves promptly for relief as soon as the disability terminates or attenuates to the extent that a reasonable person under similar conditions would take action for relief. If there was an opportunity to obtain substitute counsel to prevent the default from occurring, no relief should be granted (*270 Cal. App. 2d 275, 280)* . The court also noted that the affidavits or declarations supporting the motion may disclose inexcusable carelessness by silence as well as by facts affirmatively set forth. The court stated that the failure to produce evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its tenor is unfavorable to the party's cause. Moreover, the court noted, unusual pressure of business by itself is not a legitimate excuse for granting relief (*270 Cal. App. 2d 275, 281)* . The court concluded that: (1) there was no adequate showing that the prescribed treatment confined the defendant's attorney to a bed or hospital or rendered him suddenly unfit; (2) there was no showing that he could not have explained the situation to his client in order to obtain substitute counsel; (3) there was no showing of an excuse for not keeping in closer contact with the attorney with whom he had associated; and (4) there was, thus, no showing that the disabling illness and counsel's inexcusable neglect were the real causes for the default. The court also held that there was an unreasonable delay in setting aside the default and default judgment (*270 Cal. App. 2d 275, 286-288)* .

In ***Fairfield v. Ahlstrom*** *(1962) 206 Cal. App. 2d 590, 24 Cal. Rptr. 70* , the defendant sought relief under *Code Civ. Proc. § 473*, from an order striking his memorandum of costs on the ground that it was filed late. The trial court denied the motion, and defendant appealed.

The court of appeal affirmed, holding that the trial court did not abuse its discretion in denying the motion, because the assertion of the defendant's attorney that he was occupied with other matters constituted an insufficient excuse (*206 Cal. App. 2d 590, 592-593)* . The court noted that the declaration of the defendant's attorney explained his failure to file the memorandum within the time allowed by stating that he was "busily engaged in representing other defendants" at that time (*206 Cal. App. 2d 590, 591-592)* . He also stated that he was required to give substantial time to other matters that he was handling in the course of his law practice, and that he had difficulty in verifying the items of taxable costs for inclusion in the memorandum. The court held that, manifestly, the trial court did not abuse its discretion in denying the motion for relief. It stated that the burden of proof is on the party seeking relief under *Code Civ. Proc. § 473* to

show a failure to act within the time allowed by statute through mistake, inadvertence, surprise, or excusable neglect. The court observed that the facts stated in the attorney's declaration made an extremely weak case, because the information needed by the attorney was readily available. The court held that an attorney's preoccupation with other matters affords insufficient grounds to warrant relief under *Code Civ. Proc. § 473*; nor is the unusual press of business a legal excuse. The court noted that to accept that excuse as a legal justification would be to discourage diligence in the prosecution of appeals, and establish a precedent that might lead to vexatious delays (*206 Cal. App. 2d 590, 592)* .

[4] Additional Authorities

[a] Attorney's Press of Business, by Itself, Is Not Ground for Relief

In *Farias v. Farias (1917) 33 Cal. App. 237, 164 P. 818* , the court of appeal affirmed the trial court's order denying defendant's motion for relief under *Code Civ. Proc. § 473* from a judgment by default in an action for divorce. The court held that the motion was insufficiently supported by facts showing that the defendant's attorney was travelling on other business during the time in which it was necessary to file required papers in the action (*33 Cal. App. 237, 238-239)* .

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7-70 California Points & Authorities § 70.213

§ 70.213 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground of Inexcusable Neglect of Counsel [Code Civ. Proc. § 473(b)]--Attorney's Illness When Substitute Counsel Was Obtainable

[1] FORM

[*This form should be combined with a memorandum generally opposing a motion to set aside under Code Civ. Proc. § 473(b) (see § 70.120[1]).*]

THE COURT SHOULD DENY THE MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other proceeding*)] BECAUSE THE MOVING PARTY HAS FAILED TO SHOW EXCUSABLE NEGLECT IN THAT COUNSEL'S ILLNESS DOES NOT CONSTITUTE EXCUSABLE NEGLECT BECAUSE THERE WAS AN OPPORTUNITY TO OBTAIN SUBSTITUTE COUNSEL TO PREVENT THE _____[*identify proceeding, e.g.,* DEFAULT].

Attorney's Illness When Substitute Counsel Obtainable. The illness of counsel does not constitute excusable neglect if there was an opportunity to obtain substitute counsel to prevent the default from occurring (*Transit Ads, Inc. v. Tanner Motor Livery, Ltd. (1969) 270 Cal. App. 2d 275, 280, 75 Cal. Rptr. 848*).

[*When appropriate, add points and authorities opposing the motion on additional, particular grounds, e.g., that the motion is not timely (see, e.g., §§ 70.140 -70.148), or that the moving party has not made a sufficient showing justifying relief on any other specific ground or grounds asserted (see, e.g., §§ 70.160 -70.212, 70.214 -70.216). Additional points and authorities may be also be added, when appropriate, supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief (see, e.g., §§ 70.230, 70.231).*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a default and default judgment, or judgment, dismissal, order, or other proceeding should be set aside on the ground of mistake, based on asserted excusable neglect on the part of the moving party's attorney [*see Code Civ. Proc. § 473(b)*]. The ground of opposition is that the illness of counsel does not constitute excusable neglect if there was an opportunity to obtain substitute counsel to prevent the default from occurring [*Transit Ads, Inc. v. Tanner Motor Livery, Ltd. (1969) 270 Cal. App. 2d 275, 280, 75 Cal. Rptr. 848]* .

For other points and authorities related to an attorney's inexcusable neglect, see *§§ 70.210 -70.212*, and *70.214* et seq. For points and authorities opposing a motion for relief based on the moving party's inexcusable neglect generally, see *§§ 70.190 -70.195*. See also *§ 70.144[1]* (opposing relief on the ground that the attorney's preoccupation with other matters is no excuse for failing to file the motion within a reasonable time), and § 70.124[1] (opposing relief on the ground that an attorney's negligence is imputed to the client).

In an appropriate case, this form may be submitted in opposition to the points and authorities *set out in §§ 70.90 -70.100*.

This form should be combined with a memorandum generally opposing a motion to set aside under *Code Civ. Proc. § 473(b)* [*see § 70.120[1]*]. It may also be combined, when appropriate, with points and authorities opposing relief on other particular grounds. For example, it may be combined with additional points and authorities showing that the motion is not timely [*see §§ 70.140 -70.148*], or with additional points and authorities showing that the moving party has not made a sufficient showing justifying relief on the specific ground or grounds asserted [*see §§ 70.160 -70.212, 70.214 -70.216*; *see also* discussion in *§ 70.10[2][g]*]. This form may also be combined, when appropriate, with points and authorities supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief [*see §§ 70.230, 70.231*].

This form may also be adapted for use in a trial or appellate brief.

See also *§ 70.10[2]* and *§ 70.120[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b)*, and alternative methods for obtaining relief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should refer to declarations supporting the motion which point out that substitute counsel was available and, therefore, relief under Code Civ. Proc. § 473(b) is not justified. See also *§ 70.120[2][b]* regarding evidentiary support for facts stated.

[c] Attorney Affidavit of Fault

Whenever an application for relief under *Code Civ. Proc. § 473* is timely, in proper form, and accompanied by an attorney's sworn affidavit attesting to his or her mistake, the court must vacate any resulting default judgment entered against his or her client unless the court finds that the default was not in fact caused by the attorney's mistake [*Code Civ. Proc. § 473*]. For further discussion, see the *§ 70.12[3]* and *§ 70.120[2][c]* [*see* also *§ 70.140* et seq.].

[3] Discussion of Authorities

[a] Attorney's Illness When Substitute Counsel Obtainable

Transit Ads, Inc. v. Tanner Motor Livery, Ltd. *(1969) 270 Cal. App. 2d 275, 75 Cal. Rptr. 848* , is discussed in *§ 70.212[3]*.

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7-70 California Points & Authorities § 70.214

§ 70.214 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground of Inexcusable Neglect of Counsel [Code Civ. Proc. § 473(b)]--Attorney's Illness Occurred After Time for Response Expired

[1] FORM

[*This form should be combined with a memorandum generally opposing a motion to set aside under Code Civ. Proc. § 473(b) (see § 70.120[1]).*]

THE COURT SHOULD DENY THE MOTION TO SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT BECAUSE THE MOVING PARTY HAS FAILED TO SHOW EXCUSABLE NEGLECT IN THAT COUNSEL'S ILLNESS OCCURRED AFTER THE STATUTORY TIME FOR FILING A RESPONSE HAD EXPIRED.

Attorney's Illness Occurring After Time for Response Has Expired. The illness of counsel does not constitute excusable neglect if it occurred after the time for filing a response within the regular statutory time (*Transit Ads, Inc. v. Tanner Motor Livery, Ltd. (1969) 270 Cal. App. 2d 275, 280, 75 Cal. Rptr. 848*).

[*When appropriate, add points and authorities opposing the motion on additional, particular grounds, e.g., that the motion is not timely (see, e.g., §§ 70.140 -70.148), or that the moving party has not made a sufficient showing justifying relief on any other specific ground or grounds asserted (see, e.g., §§ 70.160 -70.213, 70.215 -70.216). Additional points and authorities may be also be added, when appropriate, supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief (see, e.g., §§ 70.230, 70.231).*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a default and default judgment should be set aside on the ground of mistake, based on asserted excusable neglect on the part of the moving party's attorney [

see Code Civ. Proc. § 473(b)]. The ground of opposition is that the illness of counsel does not constitute excusable neglect because the illness occurred after the time for filing a response within the regular statutory time [*Transit Ads, Inc. v. Tanner Motor Livery, Ltd. (1969) 270 Cal. App. 2d 275, 280, 75 Cal. Rptr. 848]* .

For other points and authorities related to an attorney's inexcusable neglect, see *§§ 70.210 -70.213*, and *70.215* et seq.. For points and authorities opposing a motion for relief based on the moving party's inexcusable neglect generally, see *§§ 70.190 -70.195*. See also *§ 70.144[1]* (opposing relief on the ground that the attorney's press of business is no excuse for failing to file the motion within a reasonable time), and § 70.124[1] (opposing relief on the ground that an attorney's negligence is imputed to the client).

In an appropriate case, this form may be submitted in opposition to the points and authorities *set out in §§ 70.90 -70.100*.

This form should be combined with a memorandum generally opposing a motion to set aside under *Code Civ. Proc. § 473(b)* [*see § 70.120[1]*]. It may also be combined, when appropriate, with points and authorities opposing relief on other particular grounds. For example, it may be combined with additional points and authorities showing that the motion is not timely [*see §§ 70.140 -70.148*], or with additional points and authorities showing that the moving party has not made a sufficient showing justifying relief on the specific ground or grounds asserted [*see §§ 70.160 -70.213*, *70.215 -70.216*; *see also* discussion in *§ 70.10[2][g]*]. This form may also be combined, when appropriate, with points and authorities supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief [*see §§ 70.230*, *70.231*].

This form may also be adapted for use in a trial or appellate brief.

See also *§ 70.10[2]* and *§ 70.120[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b)*, and alternative methods for obtaining relief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should refer to facts revealing that the asserted illness of the moving party's counsel occurred after the statutory period elapsed. See also *§ 70.120[2][b]* regarding evidentiary support for facts stated.

[c] Attorney Affidavit of Fault

Whenever an application for relief under *Code Civ. Proc. § 473* is timely, in proper form, and accompanied by an attorney's sworn affidavit attesting to his or her mistake, the court must vacate any resulting default judgment entered against his or her client unless the court finds that the default was not in fact caused by the attorney's mistake [*Code Civ. Proc. § 473*]. For further discussion, see the *§ 70.12[3]* and *§ 70.120[2][c]* [*see* also *§ 70.140* et seq.].

[3] Discussion of Authorities

[a] Attorney's Illness Occurring After Time For Response Has Expired

Transit Ads, Inc. v. Tanner Motor Livery, Ltd. *(1969) 270 Cal. App. 2d 275, 75 Cal. Rptr. 848* , is discussed in *§ 70.212[3]*.

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1. Relief Based on Mistake, Inadvertence, Surprise, or Excusable Neglect

7-70 California Points & Authorities § 70.215

§ 70.215 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground of Inexcusable Neglect of Counsel [Code Civ. Proc. § 473(b)]--Positive Misconduct Exception Does Not Apply When There Is No Abandonment of Attorney-Client Relationship

[1] FORM

[*This form should be combined with a memorandum generally opposing a motion to set aside under Code Civ. Proc. § 473(b) (see § 70.120[1]), and with points and authorities generally opposing relief on the ground of excusable neglect of counsel (see, e.g., §§ 70.210 -70.214.*]

THE COURT SHOULD DENY THE MOTION TO SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT BECAUSE THE "POSITIVE MISCONDUCT" EXCEPTION DOES NOT APPLY, IN THAT THE CONDUCT OF THE ATTORNEY FOR THE MOVING PARTY DID NOT CONSTITUTE AN ABANDONMENT OF THE ATTORNEY-CLIENT RELATIONSHIP; CONSEQUENTLY, THE ATTORNEY'S NEGLIGENCE IS IMPUTED TO HIS/HER CLIENT, THE _____ [PLAINTIFF *or* DEFENDANT], WHO IS THEREFORE NOT ENTITLED TO RELIEF.

A. Attorney's Negligence Imputed to Client. As a general rule, a party seeking relief on the basis of mistake or inadvertence of counsel must demonstrate that the mistake, inadvertence, or general neglect was excusable, because the negligence of an attorney is imputed to the client and may not be offered by the client as a basis for relief (*Carroll v. Abbott Laboratories, Inc. (1982) 32 Cal. 3d 892, 898, 187 Cal. Rptr. 592, 654 P.2d 775*).

B. No Abandonment of Attorney-Client Relationship. The "positive misconduct" rule, an exception to the general rule that no relief will be afforded under *Code of Civil Procedure Section 473(b)* based on the attorney's inexcusable neglect, does not apply unless the attorney's conduct is so grossly negligent that it effectually and unknowingly deprives the client of representation (*Carroll v. Abbott Laboratories, Inc. (1982) 32 Cal. 3d 892, 898-899, 187 Cal. Rptr. 592, 654 P.2d 775* ; *Kendall v. Barker (1988) 197 Cal. App. 3d 619, 626, 243 Cal. Rptr. 42*).

C. Narrow Application of Positive Misconduct Exception. The "positive misconduct" exception should be narrowly applied (*Carroll v. Abbott Laboratories, Inc. (1982) 32 Cal. 3d 892, 900, 187 Cal. Rptr. 592, 654 P.2d 775*).

[*When appropriate, add points and authorities opposing the motion on additional, particular grounds, e.g., that the motion is not timely (see, e.g., §§ 70.140 -70.148), or that the moving party has not made a sufficient showing justifying relief on any other specific ground or grounds asserted (see, e.g., §§ 70.160 -70.214, 70.216). Additional points and authorities may be also be added, when appropriate, supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief (see, e.g., §§ 70.230, 70.231).*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that a default and default judgment should be set aside on the ground of neglect on the part of the moving party's attorney that, although inexcusable, allegedly falls within the "positive misconduct" exception to the general rule that an attorney's inexcusable neglect does not afford relief [*see Code Civ. Proc. § 473(b)*]. The ground of opposition is that the attorney's conduct was not of the type that affords relief under the exception, that is, that the attorney did not in essence abandon the client, and deprive him or her of misrepresentation.

For other points and authorities related to an attorney's inexcusable neglect, see *§§ 70.210 -70.214, 70.216*. For points and authorities opposing a motion for relief based on the moving party's inexcusable neglect generally, see *§§ 70.190 -70.195*. See also *§ 70.144[1]* (opposing relief on the ground that the attorney's preoccupation with other matters is no excuse for failing to file the motion within a reasonable time), and § 70.124[1] (opposing relief on the ground that an attorney's negligence is imputed to the client).

In an appropriate case, this form may be submitted in opposition to the points and authorities *set out in § 70.100[1]*.

This form should be combined with a memorandum generally opposing a motion to set aside under *Code Civ. Proc. § 473(b)* [*see § 70.120[1]*]. It may also be combined, when appropriate, with points and authorities opposing relief on other particular grounds. For example, it may be combined with additional points and authorities showing that the motion is not timely [*see §§ 70.140 -70.148*], or with additional points and authorities showing that the moving party has not made a sufficient showing justifying relief on the specific ground or grounds asserted [*see §§ 70.160 -70.214, 70.216*; *see also* discussion in *§ 70.10[2][g]*]. This form may also be combined, when appropriate, with points and authorities supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief [*see §§ 70.230, 70.231*].

This form may also be adapted for use in a trial or appellate brief.

See also *§ 70.10[2]* and *§ 70.120[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b)*, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Counsel should therefore set forth facts showing that the attorney's conduct was merely negligent rather than grossly negligent, that is, that there was no obliteration of the attorney-client relationship. For example, if appropriate, counsel should show that the moving party's attorney maintained communications with the client throughout the period in which the default was taken, and although the attorney mishandled the case, he or she was available to the client and for all relevant purposes and

continued to represent the client for the entire period of time involved. See also *§ 70.120[2][b]* regarding evidentiary support for facts stated.

[c] Attorney Affidavit of Fault

Whenever an application for relief under *Code Civ. Proc. § 473* is timely, in proper form, and accompanied by an attorney's sworn affidavit attesting to his or her mistake, the court must vacate any resulting default judgment entered against his or her client unless the court finds that the default was not in fact caused by the attorney's mistake [*Code Civ. Proc. § 473*]. For further discussion, see the *§ 70.12[3]* and *§ 70.120[2][c]* [*see* also *§ 70.140* et seq.].

[3] Discussion of Authorities

[a] Attorney's Negligence Imputed to Client

Carroll v. Abbott Laboratories, Inc. *(1982) 32 Cal. 3d 892, 187 Cal. Rptr. 592, 654 P.2d 775* , is discussed in [b], *below*.

[b] No Abandonment of Attorney-Client Relationship

In ***Carroll v. Abbott Laboratories, Inc.*** *(1982) 32 Cal. 3d 892, 187 Cal. Rptr. 592, 654 P.2d 775* , the trial court granted plaintiff's motion under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), seeking relief from a judgment of dismissal. The action involved a claim by a minor plaintiff against defendant drug manufacturer for injuries allegedly suffered when plaintiff's mother, while pregnant with plaintiff, ingested a drug manufactured by defendant. The action was dismissed after plaintiff's counsel failed to comply with two orders compelling discovery of certain documents. Plaintiff's counsel moved for relief from the dismissal under *Code Civ. Proc. § 473*. The trial court granted the motion on the condition that plaintiff and his counsel file declarations stating that they did not know the whereabouts of the requested documents. When they failed to fulfill the condition, the motion was taken off calendar. Plaintiff's counsel filed a second motion for relief, declaring that plaintiff did possess the requested documents after all. The documents had in fact been turned over to counsel but had been inadvertently returned to plaintiff. The trial court granted the second motion for relief after finding that counsel had substantially complied with the court order and that counsel had been grossly negligent in representing plaintiff. Plaintiff appealed.

The Supreme Court reversed (*32 Cal. 3d 892, 901)* . The Court reiterated the general rule that a party seeking relief on the basis of mistake or inadvertence of counsel must demonstrate that the mistake, inadvertence, or general neglect was excusable because the negligence of an attorney is imputed to the client and may not be offered by the client as a basis for relief. Excepted from this rule, however, are those instances in which the attorney's neglect is of such an extreme degree as to amount to positive misconduct and the person seeking relief is relatively free from negligence. The exception is premised on the concept that the attorney's conduct, in effect, obliterates the existence of the attorney-client relationship (*32 Cal. 3d 892, 898)* . The Court noted that the exception is applicable when there has been a total failure on the part of counsel to represent the client (*32 Cal. 3d 892, 898-900)* . In this case, the Court held that, although plaintiff's counsel grossly mishandled a routine discovery matter, no abandonment of the client appeared. He had participated in other discovery matters and had obtained four extensions to respond to the motions to compel discovery of the documents. After dismissal of the action, he obtained the favorable judgment from which defendant appealed. Therefore, although in connection with the production of documents, the attorney obviously failed to give effective representation, he did not obliterate the existence of the attorney-client relationship. The Court noted that when inexcusable neglect is condoned even tacitly by the courts, they themselves unwittingly become instruments undermining the orderly process of the law. Given that concern, the "positive misconduct" exception should be narrowly applied, lest negligent attorneys find that the simplest way to gain the twin goals of rescuing clients from defaults and themselves from malpractice liability, is to "rise to ever greater heights of incompetence and professional irresponsibility while, nonetheless, maintaining a beatific attorney-client relationship" (*32 Cal. 3d 892, 900)* .

The facts and procedural background of ***Kendall v. Barker*** *(1988) 197 Cal. App. 3d 619, 243 Cal. Rptr. 42* , are discussed in *§ 70.142[3][b]*. In *Kendall*, the court of appeal reversed the trial court's grant of defendant's motion for relief under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), from a default and default judgment entered against him, holding that the defendant failed to show diligence in filing the motion after discovery of default (*197 Cal. App. 3d 619, 624-626)* . The court in *Kendall* also held that the positive misconduct exception did not apply to afford relief under the facts of the case. The court noted that defendant's motion for relief was based on the alleged "excusable neglect" of his "former counsel." The court stated that in general, a party who seeks relief under the statute on the basis of mistake or inadvertence of counsel must demonstrate that the mistake, inadvertence, or general neglect was excusable, because the negligence of the attorney is imputed to the client and may not be offered by the client as a basis for relief. The court noted the exception to the general rule applies in those instances in which the attorney's neglect is of that extreme degree amounting to positive misconduct, and the person seeking relief is relatively free from negligence. The exception, the court stated, is premised on the concept that the attorney's conduct, in effect, obliterates the existence of the attorney-client relationship, and for this reason the negligence should not be imputed to the client. The court observed that the record in the case before it sheds no light on the conduct of the defendant's attorney, other than that he failed to respond to plaintiff's written request for a responsive pleading, and received notice of request for entry of default. The court concluded that there was nothing before it that suggests positive misconduct so egregious as to obliterate the attorney-client relationship. Moreover, the court found the defendant not to be free from negligence because he knew about the default for several months and did nothing about it (*197 Cal. App. 3d 619, 626)* .

[c] Narrow Application of Positive Misconduct Exception

Carroll v. Abbott Laboratories, Inc. *(1982) 32 Cal. 3d 892, 187 Cal. Rptr. 592, 654 P.2d 775* , is discussed under No Abandonment of Attorney-Client Relationship, *above*.

[4] Additional Authorities

[a] No Abandonment of Attorney-Client Relationship

The facts and procedural background of *Conway v. Municipal Court (1980) 107 Cal. App. 3d 1009, 166 Cal. Rptr. 246* , are discussed in *§ 70.142[3][a]*. In Conway, the court of appeal held that the superior court abused its discretion in commanding the municipal court to vacate a default and set aside a default judgment on the ground of excusable neglect, when the motion was untimely, and no evidence supported the finding that the neglect was excusable (*107 Cal. App. 3d 1009, 1016-1019)* . In rejecting the application of the positive misconduct exception, the court noted that at all relevant times, defendant's attorney continued his efforts to represent the defendant; and that the attorney-client relationship remained intact (*107 Cal. App. 3d 1009, 1018)* .

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7-70 California Points & Authorities § 70.216

§ 70.216 Opposing Contention That Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding on Ground of Inexcusable Neglect of Counsel [Code Civ. Proc. § 473(b)]--Positive Misconduct Exception Does Not Apply When Moving Party Is Negligent

[1] FORM

[*This form should be combined with a memorandum generally opposing a motion to set aside under Code Civ. Proc. § 473(b) (see § 70.120[1]), and with points and authorities generally opposing relief on the ground of excusable neglect of counsel (see, e.g., §§ 70.210 -70.215.*]

THE COURT SHOULD DENY THE MOTION TO SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT BECAUSE THE "POSITIVE MISCONDUCT" EXCEPTION DOES NOT APPLY BECAUSE THE MOVING PARTY WAS NEGLIGENT IN PERMITTING THE DEFAULT TO BE ENTERED.

Positive Misconduct Exception Inapplicable When Moving Party Also Negligent. The "positive misconduct" exception does not apply when the moving party is not relatively free from his or her own negligence in permitting the default to be entered (*Kendall v. Barker (1988) 197 Cal. App. 3d 619, 626, 243 Cal. Rptr. 42* ; see *Cisneros v. Vueve (1995) 37 Cal. App. 4th 906, 44 Cal. Rptr. 2d 682*).

[*When appropriate, add points and authorities opposing the motion on additional, particular grounds, e.g., that the motion is not timely (see, e.g., §§ 70.140 -70.148), or that the moving party has not made a sufficient showing justifying relief on any other specific ground or grounds asserted (see, e.g., §§ 70.160 -70.215). Additional points and authorities may be also be added, when appropriate, supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief (see, e.g., §§ 70.230, 70.231).*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that a default and default judgment should be set aside on the ground of neglect on the part of the moving party's attorney that, although inexcusable, allegedly falls within the "positive misconduct" exception to the general rule that an attorney's inexcusable neglect does not afford relief [*see Code Civ. Proc. § 473(b)*]. The ground of opposition is that the positive misconduct exception does not apply when the moving party was negligent in permitting the default to be entered [*Kendall v. Barker (1988) 197 Cal. App. 3d 619, 626, 243 Cal. Rptr. 42]* .

For other points and authorities related to an attorney's inexcusable neglect, see *§§ 70.210 -70.215*. For points and authorities opposing a motion for relief based on the moving party's inexcusable neglect generally, see *§§ 70.190 -70.195*. See also *§ 70.144[1]* (opposing relief on the ground that the attorney's preoccupation with other matters is no excuse for failing to file the motion within a reasonable time), and § 70.124[1] (opposing relief on the ground that an attorney's negligence is imputed to the client).

In an appropriate case, this form may be submitted in opposition to the points and authorities *set out in § 70.100[1]*.

This form should be combined with a memorandum generally opposing a motion to set aside under *Code Civ. Proc. § 473(b)* [*see § 70.120[1]*]. It may also be combined, when appropriate, with points and authorities opposing relief on other particular grounds. For example, it may be combined with additional points and authorities showing that the motion is not timely [*see §§ 70.140 -70.148*], or with additional points and authorities showing that the moving party has not made a sufficient showing justifying relief on the specific ground or grounds asserted [*see §§ 70.160 -70.215*; *see also* discussion in *§ 70.10[2][g]*]. This form of points and authorities may also be combined, when appropriate, with points and authorities supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief [*see §§ 70.230, 70.231*].

This form may also be adapted for use in a trial or appellate brief.

See also *§ 70.10[2]* and *§ 70.120[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b)*, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Counsel should therefore set forth facts showing that the default resulted from the moving party's negligence and, consequently, the positive misconduct exception does not apply. See also *§ 70.120[2][b]* regarding evidentiary support for facts stated.

[c] Attorney Affidavit of Fault

Whenever an application for relief under *Code Civ. Proc. § 473* is timely, in proper form, and accompanied by an attorney's sworn affidavit attesting to his or her mistake, the court must vacate any resulting default judgment entered against his or her client unless the court finds that the default was not in fact caused by the attorney's mistake [*Code Civ. Proc. § 473*]. For further discussion, see the *§ 70.12[3]* and *§ 70.120[2][c]* [*see* also *§ 70.140* et seq.].

[3] Discussion of Authorities

[a] Positive Misconduct Exception Inapplicable When Moving Party Also Negligent

Kendall v. Barker *(1988) 197 Cal. App. 3d 619, 243 Cal. Rptr. 42* , is discussed in *§ 70.215[3][b]*.

The facts and procedural background of ***Cisneros v. Vueve*** *(1995) 37 Cal. App. 4th 906, 44 Cal. Rptr. 2d 682* , are discussed in *§ 70.211[3]*. In *Cisneros v. Vueve*, a purchaser of real property obtained a default against a real estate broker in an action alleging fraud and breach of fiduciary duty. The real estate broker contacted his insurance carrier,

who retained counsel to represent the broker in the action. After starting work on a motion to set aside the default, the attorney became involved in other matters and forgot about the file. Thereafter, the court entered a default judgment in the amount of $598,049 against the real estate broker in favor of the purchaser. The lawyer brought a section 473 motion on the broker's behalf to set aside the default and default judgment. In support of the motion, the lawyer filed an affidavit confessing his responsibility for the lengthy period of inaction in the case. The court denied the motion and the insurance broker appealed.

The court of appeal affirmed the trial court's order denying the *Code Civ. Proc. § 473* motion. The court assumed that the application was timely and that the affidavit was sufficient to establish attorney neglect. Thus, the court pointed out, relief was mandatory absent application of the "unless" clause of the statute. That provision provides an exception to the mandatory duty when "the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." The court observed that while the section 473 authorizes relief from both default and default judgment, the statute is clear that for mandatory relief to apply the court must also satisfy itself that the *default* was in fact caused by the attorney's mistake or neglect (*37 Cal. App. 4th 906, 910-911)* . The Legislature did not intend to relieve parties who carelessly permit the default to be entered when they subsequently hire equally neglectful attorneys whose failure to take action allows the default to ripen into a judgment (*37 Cal. App. 4th 906, 912)* .

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7-70 California Points & Authorities §§ 70.217-70.229

[Reserved]

§§ 70.217[Reserved]

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7-70 California Points & Authorities § 70.230

§ 70.230 Opposing Motion to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding [Code Civ. Proc. § 473(b)] With Alternative Request That Terms Be Imposed or Money Awarded in Event Relief Is Granted--Relief From Default May Be Granted on Terms as May Be Just

[1] FORM

[*This form should be combined with a memorandum generally opposing a motion to set aside under Code Civ. Proc. § 473(b) (see § 70.120[1])*].

IF THE COURT GRANTS THE MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* DISMISSAL *or* ORDER *or* _____ (*identify other proceeding*)], THE COURT _____ [SHOULD IMPOSE THE FOLLOWING CONDITIONS, AS JUST UNDER THE CIRCUMSTANCES: _____ (*specify conditions*) *and/or* SHOULD AWARD TO _____ (PLAINTIFF *or* DEFENDANT) _____ (ATTORNEY'S FEES *and/or* COSTS *and/or* SANCTIONS) IN THE FORM OF _____ (*specify, e.g.,* A PENALTY CHARGED AGAINST THE ATTORNEY FOR THE DEFENDANT)].

A. Application for Relief From Default. A court that relieves a party from a judgment, dismissal, order, or other proceeding taken against him or her under *Code of Civil Procedure Section 473(b)*, may do so on any terms as may be just (*Code Civ. Proc. § 473(b)*).

B. Award of Attorney's Fees and Costs Allowed. The term "on any terms as may be just," as used in *Code of Civil Procedure Section 473(b)*, allows the court to require the moving party to pay costs or attorney's fees to the adverse party to compensate him or her for any losses or expenses suffered by the granting of the motion for relief (*Jade K. v. Viguri (1989) 210 Cal. App. 3d 1459, 1474, 258 Cal. Rptr. 907*).

C. Penalties and Sanctions Discretionary. Whenever the court grants relief from a default or default judgment based on any of the provisions of *Code of Civil Procedure Section 473(b)*, the court may do any of the following: impose a

penalty of no greater than $1,000 on an offending attorney or party, direct that an offending attorney pay an amount no greater than $1,000 to the State Bar Client Security Fund, grant other relief as is appropriate (*Code Civ. Proc. § 473(c)(1)*).

[2] Comments

[a] Use of Form

This form is for use in a motion opposing the grant of relief under *Code Civ. Proc. § 473(b)*, to request that, in the event that the court does grant relief notwithstanding the arguments in opposition, the relief be granted subject to certain conditions that are just under the circumstances, including a monetary award to the opposing party for attorney's fees or costs, either pursuant to the general wording of *Code Civ. Proc. § 473(b)*, relating to relief from judgments, dismissals, orders, or other proceedings (Paragraphs A, B). For a form of points and authorities for use when relief is granted under the specific provision of *Code Civ. Proc. § 473(b)* based on an attorney affidavit of fault, see *§ 70.231*.

This form should be combined with a memorandum generally opposing a motion to set aside under *Code Civ. Proc. § 473(b)* [*see § 70.120[1]*]. It may also be combined, when appropriate, with points and authorities opposing relief on other particular grounds [*see §§ 70.140 -70.216*]. In an appropriate case, these points and authorities may also be combined with points and authorities generally supporting a motion for the imposition of sanctions under *Code Civ. Proc. § 128.5* (frivolous or dilatory tactics in actions filed before January 1, 1995) or under *Code Civ. Proc. § 128.7* (sanctions in actions filed on or after January 1, 1995) [*see* California Forms of Pleading and Practice, Ch. 174, *Costs and Attorney's Fees* (Matthew Bender)].

This form may also be adapted for use in a trial or appellate brief.

See also *§ 70.10[2]* and *§ 70.120[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b)*, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Therefore, for example, counsel should state facts showing the costs and fees incurred by the opposing party as the result of the moving party's default and the subsequent proceeding for relief from that default. Facts supporting the imposition of a monetary award should be set out by affidavit or declaration under penalty of perjury submitted with the points and authorities in opposition to the motion for relief from default and default judgment; this may be relied on by the court as a basis for imposing a monetary award [*see* [d], *below*]. See also *§ 70.120[2][b]* regarding evidentiary support for facts stated.

[c] Court's Statutory Authority to Award Costs

If relief from a default or default judgment under *Code Civ. Proc. § 473(b)*, is granted, the court may, under *Code Civ. Proc. § 473(c)(1)*, do any of the following:

(A) Impose monetary penalties no greater than $1,000 against an offending attorney or party.

(B) Direct that the offending attorney pay an amount no greater than $1,000 to the State Bar Client Security Fund.

(C) Grant other relief as is appropriate.

Because the options appear to be stated in the alternative, counsel should, if he or she is claiming such other relief, include the entire statement of the applicable law in the memorandum (Paragraph C). For further discussion, see *§ 70.10[2][h]*.

Whenever an application for relief under *Code Civ. Proc. § 473* is timely, in proper form, and accompanied by an attorney's sworn affidavit attesting to his or her mistake, the court must vacate any resulting default judgment entered against his or her client unless the court finds that the default was not in fact caused by the attorney's mistake [*Code Civ. Proc. § 473*; *see § 70.231[1*] (form)]. For further discussion, see the *§ 70.12[3]* and *§ 70.120[2][c]* [*see* also *§ 70.140* et seq.].

[d] Written Statement Supporting Sanctions Required

Although *Code Civ. Proc. § 473(b)*, empowers the trial court to award attorney's fees occasioned by the resisting party, due process requires that the court provide the party with a written statement of reasons for the award when the fees are imposed as "sanctions." The requirement of written reasons affords a safeguard against an abuse of the trial court's discretion and permits appellate review of that discretion [*Hearst v. Ferrante (1987) 189 Cal. App. 3d 201, 204, 234 Cal. Rptr. 385* (order awarding attorney's fees as sanctions vacated in absence of written statement of reasons; discussed under [4], *below*)].

[e] Award of Attorney's Fees Must Be Just Condition

An award of attorney's fees will be reversed if, under the circumstances, it is not a just condition on granting of relief under *Code Civ. Proc. § 473(b)* [*see In re the Marriage of Kerry (1984) 158 Cal. App. 3d 456, 463-465, 204 Cal. Rptr. 660* (discussed in *§ 70.53[3*] (relating to mistake caused by incapacity))].

[f] Related Pleading and Practice Chapters

For discussion and forms relating to the imposition of sanctions based on frivolous or dilitory tactics under Code Civ. Proc. §§ 128.5, 128.7, see California Forms of Pleading and Practice, Ch. 510, *Sanctions* (Matthew Bender).

[g] Related Points and Authorities

For points and authorities related to the imposition of sanctions based on frivolous or dilitory tactics under *Code Civ. Proc. §§ 128.5, 128.7*, see Ch. 60, *Costs* .

[3] Discussion of Authorities

[a] Award of Attorney's Fees and Costs Allowed

In ***Jade K. v. Viguri*** *(1989) 210 Cal. App. 3d 1459, 258 Cal. Rptr. 907* , a default was entered against the defendant in an action alleging professional negligence. Defendant filed a motion under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), for relief from the default and any default judgment, and shortly before the hearing on the motion, tendered his defense to his insurance carrier. The trial court denied the motion. Defendant filed a motion for reconsideration; the trial court proceeded with the default judgment hearing, and entered a default judgment against the defendant. The insurer, as intervenor, filed a motion under *Code Civ. Proc. § 473* for relief from the default taken against the defendant, on the ground that before entry of default, it was unaware of the plaintiff's claim against the defendant, and was therefore unable to extend a defense. The trial court denied the defendant's motion for reconsideration, and the insurer's motion to vacate. Defendant and the insurer appealed.

The court of appeal dismissed the defendant's appeal from the default judgment and the order denying his motion to vacate default as untimely and affirmed the denial of his motion to reconsider (*210 Cal. App. 3d 1459, 1474)* . The court also reversed the order denying the insurer's motion to vacate the default judgment (discussed in *§ 70.40[4]*). The court also stated that former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), permits the court to grant relief "upon such terms as may be just," and that the court may properly order payment of costs or

attorney fees to the adverse party as compensation for loss or expense occasioned by the granting of the motion. Accordingly, the court held, as a condition to relief from default under the statute, that the insurer must pay the plaintiff reasonable costs and attorney fees in an amount to be determined by the trial court (*210 Cal. App. 3d 1459, 1474)* . The 1992 amendment of *Code of Civ. Proc. § 473*, which changed the phrase "upon such terms as may be just" to "upon any terms as may be just" should not change this holding.

[4] Additional Authorities

[a] Award of Attorney's Fees and Costs Allowed

Hearst v. Ferrante (1987) 189 Cal. App. 3d 201, 234 Cal. Rptr. 385 , was a breach of contract action in which defendants cross complained against plaintiff for damages for false imprisonment and infliction of emotional distress. Plaintiff did not file a responsive pleading to the cross complaint; his default was entered and a default judgment against him was taken. Plaintiff moved to set aside the default and default judgment on the ground that plaintiff's attorneys believed that the cross complaint had not been served. The motion for relief was granted, and the trial court awarded cross complainants $600 for attorney's fees incurred on the motion. Plaintiff appealed. The court of appeal stated that former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), permits the trial court to relieve a party from a judgment or order against him or her under specified conditions and "upon such terms as may be just," and that courts have long construed this phrase to allow payment of costs or attorney's fees to the adverse party to compensate him or her for any losses suffered by reason of the motion. The 1992 amendment of *Code of Civ. Proc. § 473*, 3rd Paragraph, which changed the phrase "upon such terms as may be just" to "upon any terms as may be just" should not change this result. The court further stated that although *Code Civ. Proc. § 473* empowers the trial court to award attorney's fees occasioned by the resisting party, due process requires that the court provide the party with a written statement of reasons for the award when the fees are imposed as "sanctions." The requirement of written reasons affords a safeguard against an abuse of the trial court's discretion and permits appellate review of that discretion (*189 Cal. App. 3d 201, 204)* . Consequently, the court remanded the case to enable the trial court to make findings or to vacate its award of attorney's fees (*189 Cal. App. 3d 201, 204-205)* .

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7-70 California Points & Authorities § 70.231

§ 70.231 Opposing Motion to Vacate and Set Aside Default and Default Judgment or Other Judgment, Dismissal, Order, or Proceeding [Code Civ. Proc. § 473(b)] With Alternative Request That Terms Be Imposed or Money Awarded in Event Relief Is Granted--Award of Fees and Costs Is Mandatory on Attorney's Affidavit of Fault

[1] FORM

[*This form should be combined with a memorandum generally opposing a motion to set aside under Code Civ. Proc. § 473(b) (see § 70.120[1]), and with points and authorities generally opposing relief on the ground of excusable neglect of counsel (see, e.g., §§ 70.210 -70.216.*]

IF THE COURT GRANTS THE MOTION TO SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT BASED ON THE ATTORNEY'S AFFIDAVIT OF FAULT, THE COURT SHOULD DIRECT THE OPPOSING PARTY'S ATTORNEY, _____ [*name*], TO PAY REASONABLE COMPENSATORY LEGAL FEES AND COSTS.

Mandatory Fees and Costs Based on Attorney Affidavit of Fault. Whenever relief is granted based on an attorney's affidavit of fault, the court is required to direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties (*Code Civ. Proc. § 473(b)*).

[*When appropriate, add points and authorities opposing the motion on additional, particular grounds, e.g., that the motion is not timely (see, e.g., §§ 70.140 -70.148), or that the moving party has not made a sufficient showing justifying relief on any other specific ground or grounds asserted (see, e.g., §§ 70.160 -70.216).*]

[2] Comments

[a] Use of Form

This form is for use in a motion opposing the grant of relief under *Code Civ. Proc. § 473(b)*, to request that, in the event that the court does grant relief notwithstanding the arguments in opposition, the relief be granted subject to a monetary

award to the opposing party for attorney's fees or costs under the specific provision of *Code Civ. Proc. § 473(b)*, relating to relief based on an attorney affidavit of fault.

For a form of points and authorities for use in generally requesting that conditions be imposed on terms as may be just, see *§ 70.230[1]*. For a form of points and authorities for use when relief is granted pursuant to the general wording of section 473(b) relating to relief from judgments, dismissals, orders, or other proceedings under the specific provision of *Code Civ. Proc. § 473(b)* based on an attorney affidavit of fault, see *§ 70.230[1]*. For discussion regarding requirement of written statement supporting award of sanctions, see *§ 70.230[2][d]*.

This form should be combined with a memorandum generally opposing a motion to set aside under *Code Civ. Proc. § 473(b)* [*see § 70.120[1]*]. It may also be combined, when appropriate, with points and authorities opposing relief on other particular grounds [*see §§ 70.140 -70.216*]. In an appropriate case, these points and authorities may also be combined with points and authorities generally supporting a motion for the imposition of sanctions under *Code Civ. Proc. § 128.5*(frivolous or dilatory tactics in actions filed before January 1, 1995) or under *Code Civ. Proc. § 128.7* (sanctions in actions filed on or after January 1, 1995) [*see* California Forms of Pleading and Practice, Ch. 174, *Costs and Attorney's Fees* (Matthew Bender)].

This form may also be adapted for use in a trial or appellate brief.

See also *§ 70.10[2]* and *§ 70.120[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473(b)*, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Therefore, for example, counsel should state facts showing the costs and fees incurred by the opposing party as the result of the moving party's default and the subsequent proceeding for relief from that default. Facts supporting the imposition of a monetary award should be set out by affidavit or declaration under penalty of perjury submitted with the points and authorities in opposition to the motion for relief from default and default judgment; this may be relied on by the court as a basis for imposing a monetary award [*see § 70.230[2][d]*]. See also *§ 70.120[2][b]* regarding evidentiary support for facts stated.

[c] Relief Based on Attorney Affidavit of Fault

Whenever relief from a default or default judgment is granted based on an attorney's affidavit of fault, the court is required to direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties [*Code Civ. Proc. § 473(b)*; *see also § 70.230[2*][c] (court's statutory authority to award costs)]. However, the relief granted from the default or default judgment must not be made conditional on the attorney's payment of compensatory legal fees or costs or monetary penalties imposed by the court or on compliance with other sanctions ordered by the court [*Code Civ. Proc. § 473(c)(2)*].

[d] Related Pleading and Practice Chapters

For discussion and forms relating to the imposition of sanctions based on frivolous or dilitory tactics under Code Civ. Proc. §§ 128.5, 128.7, see California Forms of Pleading and Practice, Ch. 510, *Sanctions* (Matthew Bender).

[e] Related Points and Authorities

For points and authorities related to the imposition of sanctions based on frivolous or dilitory tactics under *Code Civ. Proc. §§ 128.5, 128.7*, see Ch. 60, *Costs* .

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7-70 California Points & Authorities §§ 70.232-70.235

[Reserved]

§§ 70.232[Reserved]

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7-70 California Points & Authorities § 70.236

§ 70.236 Reply Memorandum Supporting Motion to Vacate and Set Aside Default and Default Judgment Based on Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. § 473(b)]--Substantial Compliance With Requirement for Filing of Proposed Answer

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	REPLY MEMORANDUM IN SUPPORT OF DE-
_____ [*name*],	)	FENDANT'S MOTION TO SET ASIDE DEFAULT
Defendant.	)	AND DEFAULT JUDGMENT
	)	Date: _____
	)	Time: _____
		Location: _____

_____

DEFENDANT HAS SUBSTANTIALLY COMPLIED WITH THE REQUIREMENT THAT THE NOTICE OF MOTION BE ACCOMPANIED BY THE PROPOSED ANSWER BY FILING THE PROPOSED ANSWER SUFFICIENTLY IN ADVANCE OF THE HEARING TO PERMIT PLAINTIFF TO PREPARE FOR THE HEARING.

Substantial Compliance When Opposing Party Has Time to Prepare. A party substantially complies with the "accompanied by" requirement in *Code of Civil Procedure Section 473(b)* by filing the proposed answer sufficiently in

advance of the hearing to permit the other party to prepare for the hearing. The objectives of the six-month limitation are fulfilled by timely and substantial compliance with that section] (*County of Stanislaus v. Johnson (1996) 43 Cal. App. 4th 832, 837-838, 51 Cal. Rptr. 2d 73 (Fifth Appellate District))* .

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*moving party*]

[2] Comments

[a] Use of Form

This form is a reply memorandum that may be submitted in support of a motion to set aside a default and default judgment under *Code Civ. Proc. § 473(b)*. The basis of the reply is that defendant has substantially complied with the *Code Civ. Proc. § 473(b)* requirement that the notice of motion be accompanied by the proposed response because the pleading was filed sufficiently in advance of the hearing to permit the plaintiff to prepare for the hearing. The optional language in the form provides that the objective of the six-month requirement is satisfied by substantial compliance with the section.

In an appropriate case, these points and authorities may be submitted in reply to opposing memorandum *set out in § 70.146[1]*.

These points and authorities may be adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs ; see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* ,].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should include specific facts showing that the proposed answer was served on the plaintiff sufficiently in advance of the hearing to permit the plaintiff to prepare for the hearing. See also *§ 70.10[2][b]* regarding evidentiary support for facts stated.

[c] Conflict in Court of Appeal Decisions on Viability of Substantial Compliance

The form in [1], *above*, should be used with caution. There is a conflict of opinion at the appellate level on the issue of whether there may be substantial compliance with the requirement in *Code Civ. Proc. § 473(b)* that the notice of motion "shall be accompanied by a copy of the answer or other pleading proposed to be filed therein."

The form sets out a position that is contrary to the holding by the *Third Appellate District in Puryear v. Stanley (1985) 172 Cal. App. 3d 291, 293-295, 218 Cal. Rptr. 196* [*compare Puryear v. Stanley (1985) 172 Cal. App. 3d 291, 293-295, 218 Cal. Rptr. 196 with County of Stanislaus v. Johnson (1996) 43 Cal. App. 4th 832, 838, 51 Cal. Rptr. 2d 73 (Fifth Appellate District)* ; *Job v. Farrington (1989) 209 Cal. App. 3d 338, 340-341, 257 Cal. Rptr. 210 (Second Appellate District)]* .

For further discussion, see *§ 70.146[2][c]*.

[d] Related Pleading and Practice Forms

For further discussion and forms for use in proceedings to set aside a default, default judgment, or other judgment, dismissal, or order, see California Forms of Pleading and Practice, Ch. 489, *Relief From Judgments and Orders* (Matthew Bender).

[3] Discussion of Authorities

[a] Substantial Compliance When Opposing Party Has Time to Prepare

County of Stanislaus v. Johnson *(1996) 43 Cal. App. 4th 832, 51 Cal. Rptr. 2d 73* , involved an action by a county against a father of a minor child to recover child support. After default and default judgment was entered against him, the father's attorney filed a timely motion to set aside the judgment, but failed to file a proposed answer with the notice of motion. The county filed an opposition to the motion contending that the motion was defective because it was not *accompanied by points and authorities* and contending that the father should lose on the merits. At the county's request, the hearing on the motion was continued. When the hearing was held, the county contended for the first time that the court was without jurisdiction to grant the motion because the father did not file a proposed answer. The matter was reset and the father filed a proposed answer. The matter was heard before a commissioner and the court adopted the commissioner's recommendation that the motion for relief be granted. The county appealed.

The court of appeal affirmed the order. The court stated that it was satisfied the trial court had jurisdiction because the father's moving papers substantially complied with *Code Civ. Proc. § 473*. The notice of motion and accompanying declaration adequately informed the county of the basis of the father's attack on the judgment. The court concluded that there was substantial compliance with the "accompanied by" requirement by serving and filing the proposed answer three weeks in advance of the hearing on the section 473 motion, which was sufficiently in advance of the hearing to permit the other party to prepare for the hearing (*43 Cal. App. 4th 832, 838)* . Johnson criticized the *Puryear v. Stanley (1985) 172 Cal. App. 3d 291, 218 Cal. Rptr. 196* (Third Appellate District, discussed in *§ 70.146[3]*) refusal to extend the concept of substantial compliance to the section 473 directive that a motion for relief be accompanied by an answer or other proposed pleading and be submitted to the trial court within six months of entry of default. Johnson stated that *Puryear*'s "rigid application of the 'accompanied by' requirement fails to give full remedial effect to the statute and is unnecessarily strict" (*43 Cal. App. 4th 832, 837)* . The court instead, favored the holding in *Job v. Farrington (1989) 209 Cal. App. 3d 338, 341, 257 Cal. Rptr. 210* (Fifth Appellate District, discussed in *§ 70.146[2][c]*) that a motion for relief from default may substantially comply with section 473 even if the proposed answer is not attached to the motion when it is filed (*43 Cal. App. 4th 832, 838)* .

Further, according to the court, the trial court is deprived of jurisdiction merely because the proposed pleading was not filed within the six month time limitation. Rather, the objectives of that requirement are fulfilled by timely and substantial compliance with section 473. The opposing party is on notice within a reasonable time that the judgment is under attack, even if that notice is defective in some manner (*43 Cal. App. 4th 832, 837-838)* .

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[Reserved]

§§ 70.237[Reserved]

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2. Other Statutory Relief

7-70 California Points & Authorities § 70.240

§ 70.240 Supporting Motion to Vacate and Set Aside Default and Default Judgment on Ground That Service of Summons Did Not Result in Actual Notice to Defendant in Time to Defend [Code Civ. Proc. § 473.5]--General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF MOTION TO
Plaintiff,	)	SET ASIDE DEFAULT AND DEFAULT JUDG-
vs.	)	MENT
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD GRANT DEFENDANT'S MOTION UNDER CODE OF CIVIL PROCEDURE SECTION 473.5 FOR RELIEF FROM THE DEFAULT AND DEFAULT JUDGMENT BECAUSE HE/SHE RECEIVED NO ACTUAL NOTICE OF THE ACTION IN TIME TO DEFEND, HE/SHE FILED A TIMELY MOTION FOR RELIEF, AND THE DEFAULT AND DEFAULT JUDGMENT WERE NOT CAUSED BY DEFENDANT'S AVOIDANCE OF

SERVICE OR INEXCUSABLE NEGLECT.

A. Motion for Relief From Default for Lack of Actual Notice. When service of a summons has not resulted in actual notice to a party in time to defend the action and a default or default judgment has been entered against him or her in the action, the party may serve and file a notice of motion to set aside the default or default judgment and for leave to defend the action (*Code Civ. Proc. § 473.5(a)*).

B. Court May Grant Relief on Timely Motion if Defendant Not at Fault. On a finding by the court that the motion was made within the period permitted by *Code of Civil Procedure Section 473.5(a)* and that his or her lack of actual notice in time to defend the action was not caused by his or her avoidance of service or inexcusable neglect, it may set aside the default or default judgment on whatever terms as may be just and allow the party to defend the action (*Code Civ. Proc. § 473.5(c)*; *Goya v. P.E.R.U. Enterprises (1978) 87 Cal. App. 3d 886, 890-891, 151 Cal. Rptr. 258*).

C. Granting of Relief Within Discretion of Trial Court. Whether or not relief should be granted under *Code of Civil Procedure Section 473.5* is a matter within the discretion of the trial court (*Brockman v. Wagenbach (1957) 152 Cal. App. 2d 603, 611, 313 P.2d 659*).

D. Policy Favors Application for Relief. Unless inexcusable neglect is clear, the policy favoring trial on the merits prevails over the general rule of deference to the trial court's exercise of discretion, and doubts are resolved in favor of the application for relief from default (*Tunis v. Barrow (1986) 184 Cal. App. 3d 1069, 1079, 229 Cal. Rptr. 389*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*moving party*]

[2] Comments

[a] Use of Form

This memorandum may be used in support of a motion to set aside a default and default judgment under *Code Civ. Proc. § 473.5*. It is a general form that sets out the grounds for obtaining relief from defaults under *Code Civ. Proc. § 473.5*, that is:

- Service of summons did not result in actual notice to defendant.
- A default and default judgment was entered against defendant in the action.
- Defendant filed a timely motion for relief.
- Lack of notice was not caused by defendant's avoidance of service or inexcusable neglect.

The caption and form should be modified as necessary when relief is sought from the entry of default only, as distinguished from the entry of default and a resulting default judgment.

Paragraph B of this form may be adapted for use in a reply memorandum to oppose a contention that defendant is not entitled to relief because he or she avoided service or in some way inexcusably neglected to prevent the default.

This form may be combined with additional points and authorities supporting a request for relief under *Code Civ. Proc. § 473.5* based on specific grounds [*see §§ 70.241*, 70.272].

This form may also be combined, in an appropriate case, with additional points and authorities supporting a grant of relief based on other statutory or decisional authority [*see* discussion under [c], *below*].

This form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Counsel should therefore show that relief is appropriate under *Code Civ. Proc. § 473.5*, for example, that the moving party did not receive actual notice, and the lack of actual notice was not caused by the moving party's avoidance of service or his or her inexcusable neglect.

In an appropriate case, counsel would refer to evidence set forth in:

- Declarations submitted in support of relief from the judgment, order, or dismissal [*see Cal. Rules of Court, Rule 3.1306(a)*].
- Discovery documents, such as deposition transcripts and answers to interrogatories and requests for admission.
- The opposing party's pleadings that constitute admissions.
- Other documentary evidence generally.

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*].

When counsel cites facts in his or her argument, counsel should refer to the particular page and line number of the declaration, deposition transcript, or other document, that contains the cited facts. In addition, the relevant portion of any testimony in a deposition should be marked in a manner that calls attention to the testimony [*see Cal. Rules of Court, Rule 3.1116(c)*].

For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Alternative Methods of Obtaining Relief

Various other statutes provide additional grounds for relief from a default judgment [*see, e.g., Code Civ. Proc. §§ 473, 473.1*]. For forms of memoranda supporting a grant of relief from default judgment on other statutory grounds, which may, in an appropriate case, be combined with this form, see *§§ 70.10 -70.110, 70.250 -70.270*. A default judgment may

also be set aside under *Code Civ. Proc. § 473(d)*, on the ground that it is void. For forms of memoranda supporting a grant of relief from a void default judgment or other void judgment or order, which may, in an appropriate case, be combined with this form, see *§ 70.310* et seq. Finally, a default judgment may be attacked by a motion or separate action in equity, when the judgment was obtained through extrinsic fraud, mistake, or duress. For forms of memoranda supporting a grant of relief from a default judgment or other judgment or order on such equitable grounds, which may, in an appropriate case, be combined with this form, see *§ 70.480* et seq.

[d] Timely Filing of Motion Under Code Civ. Proc. § 473.5

A notice of motion under *Code Civ. Proc. § 473.5* must be served and filed within a reasonable time, but in no event exceeding the earlier of: (1) two years after entry of a default judgment against the moving party; or (2) 180 days after service on the moving party of a written notice that the default or default judgment has been entered [*Code Civ. Proc. § 473.5(a)*; *see §§ 70.280, 70.281*].

[e] Requirement of Showing of Meritorious Defense Unconstitutional

Code Civ. Proc. § 473.5 does not expressly require any showing of a meritorious defense as a prerequisite to obtaining relief under that section. Such a requirement would, in fact, violate procedural due process when a defendant has received no actual notice of the proceeding that is the subject of the default [*see Peralta v. Heights Medical Center, Inc. (1988) 485 U.S. 80, 84-87, 108 S. Ct. 896, 99 L. Ed. 2d 75* (holding that a requirement in a foreign state statute, that a defendant show a meritorious defense to obtain relief from default despite the fact that service on the defendant was defective, violated the due process clause of *U.S. Const., amend. XIV*)]. For further discussion, see California Forms of Pleading and Practice, Ch. 489, *Relief From Judgments and Orders* (Matthew Bender).

[f] Opposing Memoranda

In an appropriate case, the points and authorities *set out in §§ 70.280 -70.282* may be used to oppose this form.

[g] Related Pleading and Practice Chapters

For discussion and forms relating to relief from default and default judgment based on lack of actual notice under Code Civ. Proc. § 473.5, see California Forms of Pleading and Practice, Ch. 489, *Relief From Judgments and Orders* (Matthew Bender).

[3] Discussion of Authorities

[a] Court May Grant Relief on Timely Motion if Defendant Not at Fault

In ***Goya v. P.E.R.U. Enterprises*** *(1978) 87 Cal. App. 3d 886, 151 Cal. Rptr. 258* , plaintiff filed a complaint based on the unauthorized publication of her photograph. She subsequently filed an amended complaint, substituting various named defendants for Does. Service was allegedly made on defendants by plaintiff's counsel. Plaintiff obtained default judgments against all but one defendant, and gave notice of entry of the judgments seven months later. Four months after receiving notice of the default judgments, three individual defendants, in their individual capacities and representing their respective businesses, filed motions to set aside the default and vacate the default judgments. The court granted the motions, and plaintiff appealed, contending that defendants failed to meet their burden of proving by a preponderance of the evidence that they did not receive actual notice of the lawsuit, and that she was seriously prejudiced by the granting of relief from default.

The court of appeal affirmed (*87 Cal. App. 3d 886, 895)* . The court stated that ***Code Civ. Proc. § 473.5*** permits the court to set aside a default or default judgment against a defendant and allow him or her to defend the action on its merits if: (1) the defendant received through no inexcusable fault of the defendant's, no actual notice of the action in

time to appear and defend, and had not made a general appearance; (2) a default or default judgment has been entered against him or her by the court; and (3) he or she acted with reasonable diligence in serving and filing the notice of motion to set aside the default or default judgment (*87 Cal. App. 3d 886, 890-891)* . After viewing the defendants' declarations, the court concluded that they supported the implied finding that if service of summons and complaint was made, it did not result in actual notice of the action in time to defend (*87 Cal. App. 3d 886, 891)* . The opposing declarations showed that service on one of the individual defendants was made by leaving a copy of the summons and complaint with someone not a party to the action, who identified himself as the defendant's assistant, and by mailing copies to the defendant. (The person served was not, in fact, defendant's agent, and he later stated he did not remember receiving any documents.) They also alleged personal service on the remaining defendants by virtue of service of copies of the summons and complaint at their residence (*87 Cal. App. 3d 886, 891-892)* . The supporting declarations established that the first defendant was never personally served with summons and complaint or amended complaint, either as an individual, or on behalf of any fictitious entity, never received any documents relating to the lawsuit, and never received any papers from the person who identified himself as his assistant; and that he had no actual notice in time to defend the action. The supporting declarations also showed that the remaining two defendants, although served with copies of summons and complaint and amended complaint, were unaware of the nature of the documents, and that the documents did not result in actual notice to them in time to defend the action (*87 Cal. App. 3d 886, 891-892)* . Specifically, their declarations established, inter alia, that they took no active part in running the business, that they were natives of Peru and did not understand the documents or the oral explanation given to them by the person who served te papers and that they turned the documents over to the active owner of the business, who did nothing about them. The court noted that the trial court obviously believed the supporting declarations, in which case the defendants had met their burden of proof. The court observed that the declarations supported not only the implied finding that service of summons and complaint and the amended complaint did not result in actual notice to defendants in time to defend the action, but also the express finding that their motion was made within the period of time specified by the statute, and that defendants' lack of actual notice was not caused by avoidance of service or inexcusable neglect (*87 Cal. App. 3d 886, 892)* .

The court also stated that the moving party must show a meritorious defense in order to obtain relief (*87 Cal. App. 3d 886, 891)* . On this point the decision appears to have abrogated by the United States Supreme Court's decision in *Peralta v. Heights Medical Center, Inc. (1988) 485 U.S. 80, 84-87, 108 S. Ct. 896, 99 L. Ed. 2d 75* , discussed under [2][e], *above*.

[b] Granting of Relief Within Discretion of Trial Court

In ***Brockman v. Wagenbach*** *(1957) 152 Cal. App. 2d 603, 313 P.2d 659* , an action for personal injuries in which service of process was made by publication, defendant's default was entered six months after the order for publication was issued, and judgment was entered a month later. More than six months after entry of the judgment, defendant moved under former Code Civ. Proc. § 473a [*now see Code Civ. Proc. § 473.5*] to set aside the default judgment and obtain permission to file his verified answer. The motion was granted and plaintiff appealed, arguing that the court abused its discretion in that defendant had knowledge of the pendency of the action but unreasonably and in bad faith delayed entering his appearance; defendant had failed to show a meritorious defense; plaintiff was prejudiced by defendant's delay; and defendant's motion had attacked only the judgment, not the default underlying it.

The court of appeal reviewed the terms of former Code Civ. Proc. § 473a [*now see Code Civ. Proc. § 473.5*] and noted that under its provisions, defendant was entitled to relief if he could show that he was not personally served and that he had a good defense on the merits, unless it appeared that he had actual notice, and that failure to appear in the action was due to neglect or laches and resulted in prejudice to plaintiff such that it would be inequitable to grant relief (*152 Cal. App. 2d 603, 611)* . The court held that whether or not relief should be granted was a matter within the discretion of the trial court, and that its order would not be disturbed except on a showing of abuse of discretion (*152 Cal. App. 2d 603, 611)* . The court concluded that defendant appeared to have had knowledge of the proceeding but did not know that service by publication had been authorized. The court further found that plaintiff was not prejudiced by defendant's

failure to appear (*152 Cal. App. 2d 603, 611-612)* . The court agreed with defendant that his motion was sufficient to vacate the default as well as the judgment, in that filing of his proposed answer indicated his intention to move for relief from the default (*152 Cal. App. 2d 603, 613-614)* . The court concluded that the trial court did not abuse its discretion, and affirmed the order vacating the default and the default judgment (*152 Cal. App. 2d 603, 617)* .

Note that, to the extent that the court stated that the defendant was required to show a meritorious defense in order to obtain relief, the decision appears to have been abrogated by the United States Supreme Court's decision in *Peralta v. Heights Medical Center, Inc. (1988) 485 U.S. 80, 84-87, 108 S. Ct. 896, 99 L. Ed. 2d 75* , discussed in under [2][e], *above*.

[c] Policy Favors Application for Relief

In ***Tunis v. Barrow*** *(1986) 184 Cal. App. 3d 1069, 229 Cal. Rptr. 389* , plaintiff purchaser of a trailer sued defendant seller for breach of contract and fraud based on defendant's failure to deliver title. Plaintiff purchased a trailer from the individual defendant, who promised that he would soon deliver the pink slip to plaintiff. Unknown to plaintiff, the trailer was subject to a lien in favor of the manufacturer of the trailer. The defendant gave his attorney a portion of the purchase price paid by the plaintiff, so that he could pay the manufacturer that sum in return for the pink slip. The attorney assured defendant that he would carry out those instructions, but in fact, failed to do so. After filing suit, the plaintiff filed a first amended complaint, adding corporate defendants. Pursuant to court order, the corporate defendants were eventually served through the secretary of state. Plaintiff served a writ of attachment on the county sheriff, covering proceeds in escrow payable to the individual defendant. On the same day that the sheriff received money from that attachment, service was made on defendant's attorney (that is, the same attorney who failed to procure the pink slip). Approximately two months later, after unsuccessfully attempting to serve defendant personally, plaintiff served defendant by publication. Defaults were entered against the corporate defendants and the individual defendant, and copies of requests to enter default were mailed to defendant's previous address. The court entered default judgment against all defendants. Defendant's attorney did not inform him of the existence of the action filed by plaintiff. Approximately six months after entry of judgment, another attorney, who was a friend of the defendant, informed him of the action and the default judgment entered. The defendant asked his attorney to take immediate steps to set the judgment aside, but the attorney again failed to carry out the request. Several months later, defendant dismissed that attorney and retained other counsel. Defendants moved to vacate the default judgment under *Code Civ. Proc. § 473.5*, on the ground that they id not receive actual notice of the action in time to defend it; they also sought equitable relief. The trial court denied that motion, as well a motion for rehearing. Defendants appealed.

The court of appeal dismissed the appeal from the order denying the motion for rehearing, reversed the order denying the motion to vacate default judgment against defendant seller, and affirmed the order denying the motion to vacate default judgment against corporate defendants (*184 Cal. App. 3d 1069, 1080)* . The court noted that *Code Civ. Proc. § 473.5* provides that when service of a summons has not resulted in actual notice to a party in time to defend the action and a default or default judgment has been entered against him or her, the party may move to set it aside if he or she acts within two years after entry of the default judgment and shows that lack of actual notice in time to defend the action was not caused by the party's avoidance of service or inexcusable neglect. The court of appeal noted that in *Rosenthal v. Garner (1983) 142 Cal. App. 3d 891, 895, 191 Cal. Rptr. 300* , it previously construed *Code Civ. Proc. § 473.5* "to mean what it says when it refers to actual notice." It rejected the notion that there is an identity of attorney and client so as to impute invariably to a client the attorney's inaction concerning the attorney's notice of new litigation to which the client is an unknowing party defendant. The court stated that in denying corporate defendants' motion to vacate the default judgment, the trial court determined that defendants received actual notice of the existence of plaintiff's action through the attorney, who was acting for the individual defendant in dealing with the plaintiff, and was not discharged by that defendant until after the default was entered. The trial court distinguished *Rosenthal* from the instant case on the ground that in *Rosenthal*, the defendant's attorney represented him in an action prior to the one in which the default judgment was entered against him. The court of appeal stated that the difference in the respective positions of the attorneys is irrelevant. Under *Code Civ. Proc. § 473.5*, pursuant to *Rosenthal*, a defendant's right to relief from a default

judgment initially turns on whether or not he or she had actual notice of the action in which the judgment was entered against the defendant. In *Rosenthal*, the phrase "actual notice" under the statute was construed to mean "genuine knowledge of the party litigant and does not contemplate notice imputed to a principal from an attorney's actual notice." In his declaration in support of the motion to vacate the default judgment, the defendant in the instant case conceded that the escrow company informed him of the attachment of his funds in escrow; however, he further stated that when he asked his attorney about the attachment, his attorney said the plaintiff was allowed to "file a lien" against the escrow funds without filing a lawsuit. The court stated that the evidence is uncontradicted that although the defendant's attorney had notice of the action, he never informed the defendant of its existence, and that the defendant did not lean of the action through any source until six months after entry of the default judgment (*184 Cal. App. 3d 1069, 1077)* .

The court also stated that a defendant seeking vacation of a default judgment must further show that his or her lack of actual notice in time to defend the action was not caused by his or her inexcusable neglect or avoidance of service (*184 Cal. App. 3d 1069, 1077-1078)* . The court observed that defendants recognize the general rule that neglect of the attorney is imputed to the client and may not be offered by the client as a basis for relief, but argue that in the present case, the "positive misconduct" exception applies. According to that exception, in those instances in which the attorney's neglect is of that extreme degree amounting to positive misconduct, and the person seeking relief is relatively free from negligence, the attorney's conduct obliterates the existence of the attorney-client relationship; therefore, the attorney's negligence should not be imputed to the client. The court stated that courts applying that exception have emphasized that an attorney's authority to bind his or her client does not permit the attorney to impair or destroy the client's cause of action or defense. The court agreed that the facts of the instant case bring it within the exception (*184 Cal. App. 3d 1069, 1078)* . The court also rejected plaintiff's contention that lack of actual notice was caused by the defendant's avoidance of service. The court observed that although the defendant left the state on occasion, and eventually moved outside California, he informed his attorney of his whereabouts, and no evidence showed that his moving was motivated by a desire to avoid service (*184 Cal. App. 3d 1069, 1078-1079)* . The court stated that when, as in the instant case, the trial court denies the motion for relief from default, the strong policy in favor of trial on the merits conflicts with the general rule of deference to the trial court's exercise of discretion. Unless inexcusable neglect is clear, the policy favoring trial on the merits prevails. Doubts are resolved in favor of the application for relief from default, and reversal of an order denying relief results (*184 Cal. App. 3d 1069, 1079)* . The court stated, however, that the corporate defendants were properly served and were therefore not entitled to relief (*184 Cal. App. 3d 1069, 1079-1080)* .

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7-70 California Points & Authorities § 70.241

§ 70.241 Supporting Motion to Vacate and Set Aside Default and Default Judgment on Ground That Service of Summons Did Not Result in Actual Notice to Defendant in Time to Defend [Code Civ. Proc. § 473.5]--Service on Attorney Whose Failure to Inform Defendant Results From Positive Misconduct

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion for relief from default or default judgment based on lack of actual notice (see, e.g., § 70.240[1]).*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION UNDER CODE OF CIVIL PROCEDURE SECTION 473.5 FOR RELIEF FROM THE DEFAULT AND DEFAULT JUDGMENT BECAUSE DEFENDANT'S ATTORNEY FAILED TO INFORM HIM/HER OF THE ACTION, AND THAT FAILURE RESULTED FROM SUCH POSITIVE MISCONDUCT THAT THE ATTORNEY-CLIENT RELATIONSHIP IS OBLITERATED,

Service on Attorney Who Commits Positive Misconduct. Service on defendant's attorney is not imputed to the defendant if the attorney's failure to inform the defendant of the existence of the action results from the attorney's positive misconduct such that the attorney-client relationship is obliterated; and the defendant otherwise receives no actual notice, within the meaning of *Code of Civil Procedure Section 473.5*, of the action, and is relatively free from negligence in causing the default (*Tunis v. Barrow (1986) 184 Cal. App. 3d 1069, 1078, 229 Cal. Rptr. 389* ; *Rosenthal v. Garner (1983) 142 Cal. App. 3d 891, 893-895, 897-898, 191 Cal. Rptr. 300*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that a default and default judgment against the defendant should be set aside on the ground of lack of actual notice [*see Code Civ. Proc. § 473.5*]. The specific ground of the contention is that although the defendant's attorney was served in the action, the attorney's positive misconduct caused the defendant to remain uninformed of the action; and that the defendant did not otherwise receive actual notice of the

action in time to defend, nor was he or she negligent in causing the default [*see Rosenthal v. Garner (1983) 142 Cal. App. 3d 891, 893-895, 897-898, 191 Cal. Rptr. 300]* .

This form should be combined with a general memorandum supporting a motion for relief under *Code Civ. Proc. § 473.5* [*see § 70.240[1]*]. It may also be combined when appropriate, with points and authorities supporting relief on other, specific grounds [*see, e.g., § 70.242[1]*].

These points and authorities may also be adapted for use in a reply memorandum, to refute opposing argument that defendant is not entitled to relief because the default was caused by the inexcusable neglect of the defendant's attorney, which is imputed to defendant. They may also be adapted for use in a trial or appellate brief.

See also *§ 70.240[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473.5*, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Counsel should therefore show that the attorney's conduct amounted to neglect so extreme that it constituted positive misconduct, and effected a severance of the attorney-client relationship. If appropriate, counsel should set forth facts showing that plaintiff had notice that defendant's purported counsel was not in fact acting in the capacity of his or her legal representative with respect to the action in which the default was taken. See also *§ 70.240[2][b]* regarding evidentiary support for facts stated.

[c] Positive Misconduct Exception

Cases applying the "positive misconduct" exception have found a "total failure on the part of counsel to represent the client to the extent that each attorney had de facto substituted himself out of the case" [*see Mitchell v. Department of Transportation (1985) 163 Cal. App. 3d 1016, 1023, 210 Cal. Rptr. 266* (regarding relief from late filing of claim under Torts Claims Act (*Gov. Code § 900 et seq.*)]. The "positive misconduct" exception is frequently litigated in the context of a motion for relief under *Code Civ. Proc. § 473(b)*, on the ground of excusable neglect, as an exception to the general rule that an attorney's negligence is imputed to the client. For points and authorities in support of, and in opposition to, a grant of relief on this ground under *Code Civ. Proc. § 473(b)*, see *§§ 70.100* and *70.215*, *70.216*, respectively.

[3] Discussion of Authorities

[a] Service on Attorney Who Commits Positive Misconduct

Tunis v. Barrow *(1986) 184 Cal. App. 3d 1069, 229 Cal. Rptr. 389* , is discussed in *§ 70.240[3][c]*.

In ***Rosenthal v. Garner*** *(1983) 142 Cal. App. 3d 891, 191 Cal. Rptr. 300* , defendant had been represented by an attorney in a previous action between the parties. When plaintiffs filed another action against defendant, the complaint was sent to defendant's attorney, who neither responded to the suit nor notified defendant of the existence of the action. Plaintiffs effected service on defendant by publication, and obtained a judgment after default. Some 21 months later, defendant learned of the litigation through sources other than her attorney, and moved to set aside the default and default judgment. The trial court denied the motion, and defendant appealed.

The court of appeal reversed (*142 Cal. App. 3d 891, 899)* . Plaintiffs contended that sending a copy of the summons and complaint to defendant's attorney provided defendant with "actual notice," although it did not constitute personal service. They also contended that the failure of defendant's attorney to advise her of the litigation was inexcusable neglect, which is imputed to defendant. The court noted that although *Code Civ. Proc. § 473.5* refers to "actual notice," plaintiffs assert that constructive notice under *Civ. Code § 2332* (regarding notice to principal or agent) is sufficient to

vitiate a motion to set aside a default judgment. However, the court held, *Civ. Code § 2332* should not be applied to meet the requirement of actual knowledge. The court stated that to read "actual notice" as imputed notice would "stand [the definition of actual and constructive notice set out in] *Civ. Code § 18* on its head." Consequently, the court held, "actual notice" means genuine knowledge of the party litigant and does not contemplate notice imputed to a principal from an attorney's actual notice. The court also rejected plaintiffs' argument that a letter to defendant's attorney threatening a possible future lawsuit was actual notice to defendant of litigation to be defended within the meaning of *Code Civ. Proc. § 473.5*. The court stated that an attorney is usually the agent of his or her client in transactions in which the attorney acts for the client (*142 Cal. App. 3d 891, 895)* . Therefore, the court observed, the doctrine of imputed notice is usually invoked by the attorney-client relationship. However, the doctrine of imputation of the attorney's knowledge to the client has its exceptions. In the instant case, the court noted "a certain distance, rather than a close connection" between the attorney's prior representation of defendant and the filing of the subsequent action. Under the facts, the court noted, rather than speculate that an attorney-client relationship continued beyond the first action, plaintiffs might as well have assumed that friction existed between the two, which belied the existence of that relationship (*142 Cal. App. 3d 891, 896)* .

The court noted that under the "positive misconduct" exception to the general rule that an attorney's negligence is imputed to the client, when an attorney's neglect is so extreme as to amount to positive misconduct, the attorney-client relationship is obliterated. In the instant case, the court held, before defendant moved for relief from the default judgment, that there was a total failure on the part of counsel to represent the client. Under such circumstances, the court concluded, neither notice to the attorney, nor the asserted inexcusable neglect of the attorney, is imputed to defendant (*142 Cal. App. 3d 891, 897)* . The court held that the proof established the kind of de facto severance of the attorney-client relationship that invokes the positive misconduct doctrine (*142 Cal. App. 3d 891, 898)* .

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7-70 California Points & Authorities § 70.242

§ 70.242 Supporting Motion to Vacate and Set Aside Default and Default Judgment on Ground That Service of Summons Did Not Result in Actual Notice to Defendant in Time to Defend [Code Civ. Proc. § 473.5]--Defendant Unaware of Nature of Documents Served

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion for relief from default or default judgment based on lack of actual notice (see, e.g., § 70.240[1]).*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION UNDER CODE OF CIVIL PROCEDURE SECTION 473.5 FOR RELIEF FROM THE DEFAULT AND DEFAULT JUDGMENT BECAUSE DEFENDANT WAS JUSTIFIABLY UNAWARE OF THE NATURE OF THE DOCUMENTS; THEREFORE, SERVICE DID NOT RESULT IN ACTUAL NOTICE.

Defendant Unaware of Nature of Documents. Even if the defendant was actually served with the summons and complaint, if he or she was justifiably unaware of the nature of the documents, service does not result in actual notice (*Goya v. P.E.R.U. Enterprises (1978) 87 Cal. App. 3d 886, 892, 892 n.3, 151 Cal. Rptr. 258*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that a default and default judgment against the defendant should be set aside on the ground of lack of actual notice [*see Code Civ. Proc. § 473.5*]. The specific ground of the contention is that although the defendant was personally served with a copy of the summons and complaint, he or she was unable to understand the nature of the documents in time to defend the action [*see Goya v. P.E.R.U. Enterprises (1978) 87 Cal. App. 3d 886, 892, 892 n.3, 151 Cal. Rptr. 258]* .

This form should be combined with a general memorandum supporting a motion for relief under *Code Civ. Proc. §*

473.5 [*see § 70.240[1]*]. It may also be combined when appropriate, with points and authorities supporting relief on other, specific grounds [*see, e.g., § 70.241[1]*].

This form may also be adapted for use in a reply memorandum, to refute opposing argument that defendant is not entitled to relief because the defendant was personally served with a copy of the summons and complaint. They may also be adapted for use in a trial or appellate brief.

See also *§ 70.240[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473.5*, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Counsel should therefore show that the defendant was unaware of the nature of the documents served because, for example, he or she did not understand the documents or any oral explanation given regarding the documents. See also *§ 70.240[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Defendant Unaware of Nature of Documents

Goya v. P.E.R.U. Enterprises *(1978) 87 Cal. App. 3d 886, 890-891, 151 Cal. Rptr. 258* , is discussed in *§ 70.240[3][a]*.

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[Reserved]

§§ 70.243[Reserved]

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7-70 California Points & Authorities § 70.250

§ 70.250 Supporting Motion to Vacate and Set Aside Default and Default Judgment on Ground of Improper Venue in Consumer Action [Code Civ. Proc. § 585.5]--General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION TO SET ASIDE DEFAULT AND DEFAULT JUDGMENT
vs.	)	
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD GRANT DEFENDANT'S MOTION TO SET ASIDE THE _____ [DEFAULT *or* DEFAULT AND DEFAULT JUDGMENT] BECAUSE THE ACTION WAS COMMENCED IN AN IMPROPER COURT, CONTRARY TO THE VENUE PROVISIONS OF _____ [*CIVIL CODE SECTION 1812.10 or CIVIL CODE SECTION 2984.4 or* CODE OF CIVIL PROCEDURE SECTION 395(b)], AND DEFENDANT IS ENTITLED TO RELIEF UNDER CODE OF CIVIL PROCEDURE SECTION 585.5.

A. Motion for Relief From Default When Action Filed in Wrong Venue. When a default or default judgment has been entered without full compliance with the venue provision of _____ [*Civil Code Section 1812.10* or *Civil Code Section 2984.4*, or *Code of Civil Procedure Section 395(b)*], the defendant may serve and file a notice of motion to set aside the default or default judgment and for leave to defend the action in the proper court (*Code Civ. Proc. § 585.5(b)*).

B. Relief Available to Defendant. On a finding by the court that defendant's motion is timely and that the action was not commenced in the proper court, it shall set aside the default or default judgment on such terms as may be just, and allow defendant to defend the action in the proper court (*Code Civ. Proc. § 585.5(d)*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*moving party*]

[2] Comments

[a] Use of Form

These points and authorities may be used in support of a motion to set aside a default or default and default judgment entered in an action governed by the Unruh Retail Installment Sales Act [*Civ. Code § 1801 et seq.*], the Automobile Sales Finance Act [*Civ. Code § 2981 et seq.*], or the venue provision of *Code Civ. Proc. § 395(b)* regarding consumer actions other than those governed by these two acts, when the action was brought in an improper court [*see Code Civ. Proc. § 585.5*].

This form may also be combined, in an appropriate case, with additional points and authorities supporting a grant of relief based on other statutory or decisional authority [*see* discussion under [c], *below*].

This form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Counsel should show that the action is governed by the relevant consumer statute, and the basis for venue.

In an appropriate case, counsel would refer to evidence set forth in:

- Declarations submitted in support of relief from the judgment, order, or dismissal [*see Cal. Rules of Court, Rule 3.1306(a)*].

- Discovery documents, such as deposition transcripts and answers to interrogatories and requests for admission.

- The opposing party's pleadings that constitute admissions.

- Other documentary evidence generally.

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*].

When counsel cites facts in his or her argument, counsel should refer to the particular page and line number of the declaration, deposition transcript, or other document, that contains the cited facts. In addition, the relevant portion of any testimony in a deposition should be marked in a manner that calls attention to the testimony [*see Cal. Rules of Court, Rule 3.1116(c)*].

For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Alternative Methods of Obtaining Relief

Various other statutes provide additional grounds for relief from a default judgment [*see, e.g., Code Civ. Proc. §§ 473, 473.5*]. For forms of memoranda supporting a grant of relief from default judgment on other statutory grounds, which may, in an appropriate case, be combined with this form, see *§§ 70.10 -70.110*, *70.240 -70.242*, and *70.251 -70.270*. A default judgment may also be set aside under *Code Civ. Proc. § 473(d)*, on the ground that it is void. For forms of memoranda supporting a grant of relief from a void default judgment or other void judgment or order, which may, in an appropriate case, be combined with this form, see *§ 70.310* et seq. Finally, a default judgment may be attacked by a motion or separate action in equity, when the judgment was obtained through extrinsic fraud, mistake, or duress. For forms of memoranda supporting a grant of relief from a default judgment or other judgment or order on such equitable grounds, which may, in an appropriate case, be combined with this form, see *§ 70.330* et seq.

[d] Unruh Retail Installment Sales Act

Civ. Code § 1812.10 provides, in part, that actions on contracts or installment accounts under the provisions of the Unruh Retail Installment Sales Act [*Civ. Code § 1801 et seq.*] must be tried in the county in which: (1) the contract was signed; (2) the buyer resided at the time of signing the contract; (3) the buyer resides at the commencement of the action; or (4) goods purchased under the contract have been affixed to real property. The statute also provides that plaintiff must state facts in an affidavit or verified complaint showing that the action has been commenced in the proper court. If plaintiff fails to do so, the court is required to dismiss the action on its own motion or on motion of any party to the action, without prejudice.

[e] Automobile Sales Finance Act

Civ. Code § 2984.4 is the venue provision of the Automobile Sales Finance Act (also known as the Rees-Levering Act) [*Civ. Code § 2981 et seq.*] and contains provisions similar to those under *Civ. Code § 1812.10*. An action on a contract or purchase order under the act must be tried in the county in which: (1) the contract or purchase order was signed by the buyer; (2) the buyer resided at the time the contract or purchase order was signed; (3) the buyer resides at commencement of the action; or (4) the motor vehicle purchased under the contract or purchase order is permanently garaged. As with *Civ. Code § 1812.10*, plaintiff is required to state on oath facts showing that the action was commenced in the proper court.

[f] General Consumer Provision

Code Civ. Proc. § 395(b) is the venue provision for the following types of actions:

(1) Actions arising from an offer or provision of goods, services, loans or extensions of credit intended primarily for personal, family or household use, other than an obligation described in *Civ. Code § 1812.10* or *Civ. Code § 2984.4*; or

(2) Actions arising from a transaction consummated as a proximate result of an unsolicited telephone call made by a seller engaged in the business of consummating transactions of that kind or electronic transmission made by the buyer or lessee in response to a solicitation by the seller.

The proper county for trial of these actions is the county in which the buyer or lessee in fact signed the contract, the county in which the buyer or lessee resided at the time the contract was entered into, or the county in which the buyer or lessee resides at the commencement of the action [*Code Civ. Proc. § 395(b)*].

[g] Opposing Memoranda

In an appropriate case, the points and authorities *set out in § 70.290[1]* may be used to oppose this form.

[h] Related Pleading and Practice Chapters

For a discussion and forms relating to the Unruh Retail Installment Sales Act [Civ. Code § 1801 et seq.], and the Automobile Sales Finance Act [Civ. Code § 2981 et seq.], see California Forms of Pleading and Practice, Ch. 501, *Sales: Retail Installment Sales* (Matthew Bender). For discussion of Code Civ. Proc. § 395(b), see Ch. 140, *Contracts* , and Ch. 490, *Rescission and Restitution* , in that publication.

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7-70 California Points & Authorities § 70.251

§ 70.251 Supporting Motion to Vacate and Set Aside Default and Default Judgment on Ground of Improper Venue in Consumer Action [Code Civ. Proc. § 585.5]--Damages and Costs May Be Awarded to Moving Party

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside under Code Civ. Proc. § 585.5 (see § 70.250[1]).*]

THE COURT SHOULD AWARD DEFENDANT ACTUAL DAMAGES AND COSTS, INCLUDING REASONABLE ATTORNEY'S FEES, ON A FINDING BY THE COURT THAT THE ACTION WAS FILED IN THE WRONG VENUE.

Award of Damages and Costs to Defendant. Unless plaintiff can show the use of reasonable diligence to avoid filing the action in the improper court, on a finding that venue is improper, the court shall award the defendant actual damages and costs, including reasonable attorney's fees (*Code Civ. Proc. § 585.5(e)*).

[2] Comments

[a] Use of Form

These points and authorities may be used in support of a motion to set aside a default or default and default judgment entered in an action governed by the Unruh Retail Installment Sales Act [*Civ. Code § 1801 et seq.*], the Automobile Sales Finance Act [*Civ. Code § 2981 et seq.*], or the venue provision of *Code Civ. Proc. § 395(b)* regarding consumer actions other than those governed by these two acts, when the action was brought in an improper court [*see Code Civ. Proc. § 585.5*], and the moving party seeks an award of actual damages and costs, including reasonable attorney's fees [*Code Civ. Proc. § 585.5(e)*].

These points and authorities should be combined with points and authorities generally supporting a motion to set aside under *Code Civ. Proc. § 585.5* [*see § 70.250[1]*].

This form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Counsel should show that the action is governed by the relevant consumer statute, and the basis for venue. See also *§ 70.250[2][b]* regarding evidentiary support for facts stated.

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7-70 California Points & Authorities §§ 70.252-70.259

[Reserved]

§§ 70.252[Reserved]

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7-70 California Points & Authorities § 70.260

§ 70.260 Supporting Motion to Vacate and Set Aside Default and Default Judgment on Ground That Defendant's Military Service Prejudiced Defense [50 U.S.C. App. § 521(g)]--Application for Relief Is Proper

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION TO
vs.	)	SET ASIDE DEFAULT JUDGMENT BY DEFEND-
_____ [*name*],	)	ANT IN MILITARY SERVICE
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD GRANT DEFENDANT'S MOTION TO SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT BECAUSE THEY WERE ENTERED IN VIOLATION OF THE SERVICEMEMBERS CIVIL RELIEF ACT, IN THAT DEFENDANT WAS ENGAGED IN MILITARY SERVICE, WHICH PREJUDICED HIS/HER ABILITY TO PRESENT A DEFENSE IN A TIMELY MANNER.

Application for Vacation of Default Judgment. If a default judgment is entered in an action covered by the Servicemembers Civil Relief Act against a servicemember during the servicemember's period of military service, or within 60 days after termination of or release from military service, the court entering the judgment must, upon application by or on behalf of the servicemember, reopen the judgment for the purpose of allowing the servicemember to defend the action if it appears that the servicemember was materially affected by reason of that military service in making a defense to the action, and the servicemember has a meritorious or legal defense to the action or some part of it [*50 U.S.C. App. § 521(a), (g)(1)*].
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to vacate and set aside a default and default judgment on the ground that a default and/or default judgment was entered against the moving party during his or her period of military service [*see* [d], *below*] (or within 60 days after termination of or release from military service), in violation of the Servicemembers Civil Relief Act (*50 U.S.C. App. § 501 et seq.*) [*see 50 U.S.C. App. § 521*]. The governing statute applies in any civil action or proceeding in which the defendant did not make an appearance [*50 U.S.C. App. § 521(a)*].

This form may also be combined, in an appropriate case, with additional points and authorities supporting a grant of relief based on other statutory or decisional authority [*see* discussion under [c], *below*].

This form may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Counsel should show that the motion for relief is timely, either by indicating that defendant is still in the military or that the application for relief is made within 90 days of his or her release from the service. Prejudice to the defendant should be explained by reference to facts demonstrating defendant's difficulties in presenting a defense to the action because of his or her military service. Counsel should also set forth facts in support of a meritorious defense.

In an appropriate case, counsel would refer to evidence set forth in:

- Declarations submitted in support of relief from the judgment, order, or dismissal [*see Cal. Rules of Court, Rule 3.1306(a)*].

- Discovery documents, such as deposition transcripts and answers to interrogatories and requests for admission.

- The opposing party's pleadings that constitute admissions.

- Other documentary evidence generally.

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in

support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*].

When counsel cites facts in his or her argument, counsel should refer to the particular page and line number of the declaration, deposition transcript, or other document, that contains the cited facts. In addition, the relevant portion of any testimony in a deposition should be marked in a manner that calls attention to the testimony [*see Cal. Rules of Court, Rule 3.1116(c)*].

For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Alternative Methods of Obtaining Relief

Various other statutes provide additional grounds for relief from a default judgment [*see, e.g., Code Civ. Proc. §§ 473, 473.5*]. For forms of memoranda supporting a grant of relief from default judgment on other statutory grounds, which may, in an appropriate case, be combined with this form, see *§§ 70.10 -70.110, 70.240 -70.242, 70.250 -70.251, 70.261 -70.270*. A default judgment may also be set aside under *Code Civ. Proc. § 473(d)*, on the ground that it is void. For forms of memoranda supporting a grant of relief from a void default judgment or other void judgment or order, which may, in an appropriate case, be combined with this form, see *§ 70.310* et seq. Finally, a default judgment may be attacked by a motion or separate action in equity, when the judgment was obtained through extrinsic fraud, mistake, or duress. For forms of memoranda supporting a grant of relief from a default judgment or other judgment or order on such equitable grounds, which may, in an appropriate case, be combined with this form, see *§ 70.480* et seq.

[d] Military Service Defined

Under the Servicemembers Civil Relief Act, the term "servicemember" means a member of the uniformed services, as "uniformed services" is defined in *10 U.S.C. § 101(a)(5)* [*50 U.S.C. App. § 511(1)*]. *10 U.S.C. § 101(a)(5)* defines "uniformed services" as including the armed forces, the commissioned corps of the National Oceanic and Atmospheric Administration, and the commissioned corps of the Public Health Service. Under the Servicemembers Civil Relief Act, the term "military service" means, in the case of a member of the Army, Navy, Air Force, Marine Corps, or Coast Guard, active duty as defined in *10 U.S.C. § 101(d)(1)*, and in the case of a member of the National Guard, includes service under a call to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days under *32 U.S.C. § 502(f)*, for purposes of responding to a national emergency declared by the President and supported by Federal funds; in the case of a servicemember who is a commissioned officer of the Public Health Service or the National Oceanic and Atmospheric Administration, active service, and any period during which a servicemember is absent from duty on account of sickness, wounds, leave, or other lawful cause [*50 U.S.C. App. § 511(2)(C)*].

The period of military service begins on the date on which a servicemember enters military service and ends on the date on which the servicemember is released from military service or dies while in military service [*50 U.S.C. App. § 511(3)*].

[e] Timeliness of Application

Defendant seeking relief from a default judgment entered while he or she was in the military service may apply for relief not later than 90 days after termination of the military service [*50 U.S.C. App. § 521(g)(2)*].

[f] Showing of Prejudice to Defendant

A default judgment rendered against a person in military service may be opened if it appears that the servicemember was prejudiced in making his or her defense in the action by reason of his or her military service [*50 U.S.C. App. § 521(g)(1)*].

[g] Showing of Meritorious or Legal Defense

Relief from a default judgment is available to a defendant in military service under the Servicemembers Civil Relief Act when it is made to appear that the defendant has a meritorious or legal defense to the action or some part thereof [*50 U.S.C. App. § 521(g)(1)*].

[h] Opposing Memoranda

In an appropriate case, the points and authorities *set out in §§ 70.300 -70.303* et seq. may be used to oppose this form.

[i] Related Pleading and Practice Chapters

For discussion and forms relating to declarations under the Servicemembers Civil Relief Act (*50 U.S.C. App. § 501 et seq.*), see the California Forms of Pleading and Practice, Ch. 205, *Defaults and Default Judgments* (Matthew Bender).

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7-70 California Points & Authorities § 70.261

§ 70.261 Supporting Motion to Vacate and Set Aside Default and Default Judgment on Ground That Defendant's Military Service Prejudiced Defense [50 U.S.C. App. § 521(b)]--Relief Based on Failure to Appoint Attorney

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside under Code Civ. Proc. § 585.5 (see § 70.250[1]).*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION TO SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT BECAUSE THE COURT FAILED TO APPOINT AN ATTORNEY FOR DEFENDANT PRIOR TO ENTERING THE DEFAULT JUDGMENT.

Failure to Appoint Attorney. A default judgment cannot be entered against a defendant who is in military service without an order of the court, and the court cannot order entry of judgment until it appoints an attorney to represent the defendant and protect his or her interests (*50 U.S.C. App. § 521(b)(2)*). If the court fails to appoint an attorney for defendant prior to entering the default judgment, the defendant may obtain relief from the judgment (*50 U.S.C. App. § 521(g)*; *Allen v. Allen (1947) 30 Cal. 2d 433, 436, 182 P.2d 551*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to vacate and set aside a default and default judgment on the ground that the court entered a default judgment against the defendant without first appointing an attorney to protect the defendant's interests [*see 50 U.S.C. App. § 521(b)(2)*].

This form may also be combined, in an appropriate case, with additional points and authorities supporting a grant of relief based on other statutory or decisional authority [*see § 70.260[2][c]*].

This form may be adapted for use in a trial or appellate brief.

See also *§ 70.260[2]* for further discussion and related Pleading and Practice Chapters.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Counsel should show that the motion for relief is timely, either by indicating that defendant is still in the military or that the application for relief is made within 90 days of his or her release from the service. Prejudice to the defendant should be explained by reference to facts demonstrating defendant's difficulties in presenting a defense to the action because of his or her military service. Counsel should also set forth facts in support of a meritorious defense. See also *§ 70.260[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Failure to Appoint Attorney

In ***Allen v. Allen*** *(1947) 30 Cal. 2d 433, 182 P.2d 551* , two years after entry of a final judgment of divorce, plaintiff served on defendant's former attorney a notice of motion to modify the support provisions. The attorney informed plaintiff's counsel that he was no longer authorized to represent defendant and did not know of his whereabouts, except that he was in the military. Attempts by the attorney to locate defendant had been unsuccessful, and he so informed the court. However, on defendant's default, the court granted plaintiff's motion for increased support without appointing an attorney to represent the defendant. Defendant first learned of the modification 27 months later. Shortly thereafter, and immediately on his release from the service, defendant moved to vacate the modification on the ground that it was void because of plaintiff's failure to comply with the former Soldiers' and Sailors' Civil Relief Act of 1940, now entitled the Servicemembers Civil Relief Act (50 U.S.C. App. § 501 et seq.). The motion was denied, and defendant appealed.

The Supreme Court reversed (*30 Cal. 2d 433, 437)* . The Court noted that plaintiff had filed no affidavits regarding defendant's military status, as required by former Section 200(1) of the act (former 50 U.S.C. App. § 520(1); *see now* Section 201(b) of the act, 50 U.S.C. Appen. § 521(b)) although the trial court was informed of defendant's military service (*30 Cal. 2d 433, 434-435)* . The Court found that the trial court erred in failing to appoint an attorney for defendant (*30 Cal. 2d 433, 435)* . However, proceedings contrary to the act are valid until properly attacked, rather than void (*30 Cal. 2d 433, 436)* .

[4] Additional Authorities

[a] Failure to Appoint Attorney

In re Marriage of Lopez (1981) 115 Cal. App. 3d 776, 173 Cal. Rptr. 718 , concerned the court of appeal's reversal of a trial court order denying relief to a defendant based on a post-dissolution modification order entered while he was in the military. The court held that the trial court's failure to appoint an attorney to represent the defendant's interests required vacation of the modification order, and the trial court's denial of defendant's motion constituted an abuse of discretion (*115 Cal. App. 3d 776, 783-784)* .

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7-70 California Points & Authorities § 70.262

§ 70.262 Supporting Motion to Vacate and Set Aside Judgment Entered During Period of Military Service [Mil. & Vet. Code § 402(d)]--Defendant Was Prejudiced and Has Meritorious or Legal Defense

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION TO
vs.	)	SET ASIDE JUDGMENT ENTERED DURING
_____ [*name*],	)	PROTECTED PERIOD OF MILITARY SERVICE
Defendant.	)	Date: _____
	)	Time: _____
	)	Dept.: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD GRANT DEFENDANT'S MOTION TO SET ASIDE THE JUDGMENT BECAUSE THE JUDGMENT WAS ENTERED [*either* DURING A PERIOD OF MILITARY SERVICE AS DEFINED IN SECTION 400(b) OF THE MILITARY AND VETERANS CODE *or* WITHIN 30 DAYS OF A PERIOD OF MILITARY SERVICE AS DEFINED IN SECTION 400(b) OF THE MILITARY AND VETERANS CODE], DEFENDANT WAS PREJUDICED BY REASON OF MILITARY SERVICE FROM MAKING A DEFENSE TO THE ACTION, AND DEFENDANT HAS A MERITORIOUS OR LEGAL DEFENSE.

Entry of Judgment During Period of Military Service. If a judgment is rendered against a service member, as defined in *Mil. & Vet. Code § 400(a)*, during a period of military service, as defined in *Mil. & Vet. Code § 400(b)*, or within 30 days thereafter, and it appears that the service member was prejudiced by reason of the service in making a defense to the action, the court rendering the judgment may open it on application by the service member or his or her legal representative no later than 90 days after termination of the service, provided the application states a meritorious or legal defense to the action or to some part of it (*Mil. & Vet. Code § 402(d)*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to vacate and set aside a judgment on the ground that the court entered the judgment against the defendant during a period of protected military service and that defendant has a meritorious or legal defense to the action or to some part of it [*Mil. & Vet. Code § 402(d)*].

This form may also be combined, in an appropriate case, with additional points and authorities supporting a grant of relief based on other statutory or decisional authority.

This form may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Counsel should show that the motion for relief is timely, either by indicating that defendant is still in military service or that the application for relief is made within 90 days of termination of his or her service. Prejudice to the defendant should be explained by reference to facts demonstrating defendant's difficulties in presenting a defense to the action because of his or her military service. Counsel should also set forth facts in support of a meritorious or legal defense.

[3] Discussion of Authorities

Effective June 21, 2002, if any judgment is rendered in any action or proceeding against a service member during the period of his or her service or within 30 days thereafter, and it appears that the service member was prejudiced by reason of the military service in making a defense to the judgment, on application by the service member or his or her legal representative, the judgment may be opened by the court rendering it and the defendant or his or her legal representative allowed to defend. Application to reopen must be made by the service member or his or her legal representative not later than 90 days after termination of military service and must state a meritorious or legal defense to the action or some part of it [*Mil. & Vet. Code § 402(d)*]. However, the vacating, setting aside or reversal of a judgment for this reason will not impair any right or title acquired by a bona fide purchaser for value under the judgment [*Mil. & Vet. Code § 402(d)*].

A "service member" is defined for these purposes as either of the following [*Mil. & Vet. Code § 400(a)*]:

- Officers and enlisted members of the National Guard called or ordered into active state service by the Governor pursuant to *Mil. & Vet. Code §§ 143* or *146* or into active federal service by the President pursuant to Title 10 or 32 of the United States Code.

- Reservists of the United States Military Reserve who have been called to full-time active duty.

"Military service" means full-time active state or federal service as defined in *Mil. & Vet. Code § 400(a)(1)* or full-time active of a reservist as defined in *Mil. & Vet. Code § 400(a)(2)*, for a period in excess of seven days in any 14-day period. Days of service for a service member called to active service or duty since September 11, 2001, to engage in

homeland defense against terrorism are credited toward the seven-day period [*Mil. & Vet. Code § 400(b)*].

A certificate signed by an appropriately authorized officer of the military department, branch, or unit in which a service member is serving is prima facie evidence as to any of the following facts as stated in the certificate [*Mil. & Vet. Code § 409.8(a)*]:

- That a person named has not been, or is, or has been in the military service.
- The time when and the place where the person entered military service.
- The person's residence at that time, and the rank, branch, and unit of the service the person entered.
- The dates within which the person was in the military service.
- The monthly pay received by the person at the date of issuing the certificate.
- The time when and the place where the person died in or was discharged from the service.

The authorized officer must furnish the certificate on application. Any certificate purporting to be signed by an officer purporting on the face of the certificate to have been authorized to sign it, is prima facie evidence of its contents and of the authority of the signer to issue it [*Mil. & Vet. Code § 409.8(b)*].

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7-70 California Points & Authorities §§ 70.263-70.269

[Reserved]

§§ 70.263[Reserved]

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§ 70.270 Supporting Motion to Vacate and Set Aside Default and Default Judgment on Ground of Court's Jurisdiction Over Law Practice of Defendant's Attorney [Code Civ. Proc. § 473.1]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF MOTION TO
Plaintiff,	)	SET ASIDE DEFAULT AND DEFAULT JUDG-
vs.	)	MENT
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD GRANT DEFENDANT'S MOTION TO SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT BECAUSE THE DEFAULT AND DEFAULT JUDGMENT WERE ENTERED AFTER FILING OF THE APPLICATION FOR THE ASSUMPTION OF COURT JURISDICTION OVER THE LAW PRACTICE OF DEFENDANT'S ATTORNEY, AND DEFENDANT IS THEREFORE ENTITLED TO RELIEF PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 473.1.

Relief From Judgment When Court Assumed Jurisdiction Over Attorney's Law Practice. The court may, on such terms as may be just, relieve a party from a judgment, order, or other proceeding taken against him or her if a California court has assumed jurisdiction, pursuant to *Business and Professions Code section 6180* or *6190*, over the law practice of the attorney for the party, and the judgment, order, or other proceeding was taken against the party after the application for the court to assume jurisdiction over the practice was filed (*Code Civ. Proc. § 473.1*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*moving party*]

[2] Comments

[a] Use of Form

This form may be used in support of a motion to set aside a default and default judgment, on the ground that the judgment was entered after the filing of an application for a California court to assume jurisdiction over the defendant's attorney [*see Bus. & Prof. Code §§ 6180, 6190* (court jurisdiction over law practice); *Code Civ. Proc. § 473.1* (relief from judgment or other proceeding based on court jurisdiction over law practice)]. The caption and form should be modified as necessary when relief is sought from the entry of default only, as distinguished from the entry of default and a resulting default judgment.

This form may be adapted for use by a plaintiff to seek relief from an involuntary dismissal [*see Code Civ. Proc. § 473.1* (referring to relief on the same grounds from a dismissal under *Code Civ. Proc. § 581* and former Code Civ. Proc. §§ 581a, 583 [*now see Code Civ. Proc. §§ 583.110-583.430*])]. This form may also be modified, as appropriate, for use in seeking relief in situations other than a default and default judgment, that is, from any other "judgment, order, or other proceeding" [*Code Civ. Proc. § 473.1*].

This form may also be combined, in an appropriate case, with additional points and authorities supporting a grant of relief based on other statutory or decisional authority [*see* [c], *below*].

This form may, in addition, be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Counsel should show that the application for court jurisdiction over defendant's attorney was filed prior to the entry of the default or default and default judgment.

In an appropriate case, counsel would refer to evidence set forth in:

- Declarations submitted in support of relief from the judgment, order, or dismissal [*see Cal. Rules of Court, Rule 3.1306(a)*].

- Discovery documents, such as deposition transcripts and answers to interrogatories and requests for admission.

- The opposing party's pleadings that constitute admissions.

- Other documentary evidence generally.

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*].

When counsel cites facts in his or her argument, counsel should refer to the particular page and line number of the declaration, deposition transcript, or other document, that contains the cited facts. In addition, the relevant portion of any testimony in a deposition should be marked in a manner that calls attention to the testimony [*see Cal. Rules of Court, Rule 3.1116(c)*].

For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Alternative Methods of Obtaining Relief

Various other statutes provide additional grounds for relief from a default judgment [*see, e.g., Code Civ. Proc. §§ 473, 473.5*]. For forms of memoranda supporting a grant of relief from default judgment on other statutory grounds, which may, in an appropriate case, be combined with this form, see *§§ 70.10 -70.110, 70.240 -70.242*, and *70.250 -70.261*. A default judgment may also be set aside under *Code Civ. Proc. § 473(d)*, on the ground that it is void. For forms of memoranda supporting a grant of relief from a void default judgment or other void judgment or order, which may, in an appropriate case, be combined with this form, see *§ 70.310* et seq. Finally, a default judgment may be attacked by a motion or separate action in equity, when the judgment was obtained through extrinsic fraud, mistake, or duress. For forms of memoranda supporting a grant of relief from a default judgment or other judgment or order on such equitable grounds, which may, in an appropriate case, be combined with this form, see *§ 70.480* et seq.

[d] Limitations Period

Application for relief under *Code Civ. Proc. § 473.1* must be made within a reasonable period of time, in no case exceeding six months, after the court takes jurisdiction over the practice. However, in the case of a judgment, order, or other proceeding determining the ownership or right to possession of real or personal property, without extending the six-month period, when a notice in writing is personally served within California both on the party against whom the judgment (or order or other proceeding) has been taken, and on the attorney appointed pursuant to *Bus. & Prof. Code § 6180.5* to act under the court's direction, notifying the party and the appointed attorney that the judgment (or order or other proceeding) was taken against him or her and that any rights the party has to apply for relief under the provisions of the statute expire 90 days after service of notice, then application for relief must be made within 90 days after service of the notice on the defaulting party or the attorney appointed to act under the court's direction, whichever service is later [*Code Civ. Proc. § 473.1*; *cf.* §§ 70.140, 70.148 (opposing grant of relief under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), when moving party fails to satisfy similar time limitations under that section)].

[e] No Declaration of Merits Required

No affidavit or declaration of merits is required of the moving party who applies for relief under *Code Civ. Proc. § 473.1*[*Code Civ. Proc. § 473.1*].

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7-70 California Points & Authorities §§ 70.271-70.279

[Reserved]

§§ 70.271[Reserved]

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7-70 California Points & Authorities § 70.280

§ 70.280 Opposing Motion to Vacate and Set Aside Default and Default Judgment on Ground That Service of Summons Did Not Result in Actual Notice to Defendant in Time to Defend [Code Civ. Proc. § 473.5]--Motion Is Untimely--Notice of Motion Was Not Filed Within Statutory Period

[1] FORM

[*Caption. See § 70.120[1].*]

THE COURT SHOULD DENY DEFENDANT'S MOTION UNDER CODE OF CIVIL PROCEDURE SECTION 473.5 TO SET ASIDE THE _____ [DEFAULT *or* DEFAULT AND DEFAULT JUDGMENT] BECAUSE IT IS UNTIMELY, IN THAT THE NOTICE OF MOTION WAS NOT FILED WITHIN _____ [TWO YEARS AFTER THE ENTRY OF THE DEFAULT JUDGMENT *or* 180 DAYS AFTER SERVICE OF NOTICE OF ENTRY OF THE _____ (DEFAULT *or* DEFAULT JUDGMENT)].

Timeliness of Motion. A notice of motion under *Code of Civil Procedure Section 473.5* must be served and filed within a reasonable time, but in no event exceeding the earlier of: (1) two years after entry of a default judgment against the moving party; or (2) 180 days after service on the moving party of a written notice that the default or default judgment has been entered (*Code Civ. Proc. § 473.5(a)*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*opposing party*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion to set aside a default or default and default judgment on the ground of lack of actual notice [*see Code Civ. Proc. § 473.5*]. The ground of opposition is that the motion is untimely, in that it was not filed within time limitations of that section. For points and authorities for use in opposing a motion under section 473.5 on that ground that the motion was not filed within a "reasonable time" under the facts, see *§ 70.281[1]*.

In an appropriate case, this form may be submitted in opposition to the points and authorities *set out in § 70.240 -70.242*.

This form may be combined with additional points and authorities opposing a grant of relief under *Code Civ. Proc. § 473.5* on other specific grounds [*see §§ 70.281 -70.282*]. If the moving party has sought relief on additional grounds other than those provided under *Code Civ. Proc. § 473.5*, they may also be combined, as appropriate, with points and authorities opposing the grant of such alternative relief [*see, e.g., § 70.120[1*] (relief based on mistake, surprise, inadvertence, or excusable neglect), § 70.310 et seq. (relief from void judgments), § 70.480 et seq. (equitable relief)].

This form may also be adapted for use in a trial or appellate brief.

See also *§ 70.240[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473.5* and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Counsel should therefore set forth the relevant dates of entry of default or the date of notice of entry of the default or default judgment (whichever is earlier), and the date of the filing of the motion, and show that the motion was filed later than the date of the applicable period.

In an appropriate case, this form may be submitted in opposition to the points and authorities *set out in §§ 70.10 -70.41*.

When appropriate, this form may be combined with the following points and authorities generally opposing the motion for relief, on the following grounds:

- The motion should be denied based on policy [*see, e.g., § 70.121[1]*].
- The mistake, inadvertence, surprise, or excusable neglect was not reasonable [*see, e.g., § 70.122[1]*].
- The moving party failed to exercise reasonable diligence in arranging for his or her defense [*see, e.g., § 70.123[1]*].
- An attorney's negligence is imputed to the client [*see, e.g., § 70.124[1]*].
- The moving party's argument that he or she has a meritorious defense is irrelevant [*see, e.g., § 70.125[1]*].

This form should be combined with additional points and authorities opposing relief on other particular grounds. For example, it may be combined with additional points and authorities showing that:

- The motion is not timely [*see §§ 70.140 -70.148*].

- The moving party has not made a sufficient showing justifying relief on the specific ground or grounds asserted [*see §§ 70.160 -70.216*; *see also* discussion in *70.10[2][g]*].

This form may also be combined, in an appropriate case, with additional points and authorities opposing a grant of relief based on other statutory or decisional authority, when the motion and supporting memorandum has asserted such additional authority as alternate bases for relief [*see* discussion in *§ 70.10[2][c]*]. This form may also be combined, when appropriate, with points and authorities supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief [*see §§ 70.230*, *70.231*].

[c] Related Pleading and Practice Chapters

For discussion and forms relating to relief from default and default judgment based on lack of actual notice under Code Civ. Proc. § 473.5, see California Forms of Pleading and Practice, Ch. 489, *Relief From Judgments and Orders* (Matthew Bender).

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7-70 California Points & Authorities § 70.281

§ 70.281 Opposing Motion to Vacate and Set Aside Default and Default Judgment on Ground That Service of Summons Did Not Result in Actual Notice to Defendant in Time to Defend [Code Civ. Proc. § 473.5]--Motion Is Untimely--Moving Party Failed to Act With Reasonable Diligence

[1] FORM

[*This form should be combined with a memorandum generally opposing a motion to set aside under Code Civ. Proc. § 473.5 on ground of untimeliness (see § 70.280[1]).*]

THE COURT SHOULD DENY DEFENDANT'S MOTION UNDER CODE OF CIVIL PROCEDURE SECTION 473.5 TO SET ASIDE THE _____ [DEFAULT *or* DEFAULT AND DEFAULT JUDGMENT] BECAUSE IT IS UNTIMELY, IN THAT THE NOTICE OF MOTION WAS NOT FILED WITHIN A REASONABLE TIME.

Diligence Required. A party seeking relief pursuant to *Code of Civil Procedure Section 473.5* must show that he or she acted with reasonable diligence in serving and filing the notice of motion to set aside the default or default judgment (*Goya v. P.E.R.U. Enterprises (1978) 87 Cal. App. 3d 886, 891, 151 Cal. Rptr. 258*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion to set aside a default or default and default judgment on the ground of lack of actual notice [*see Code Civ. Proc. § 473.5*]. The ground of opposition is that the motion was not filed within a "reasonable time" under the facts [*Goya v. P.E.R.U. Enterprises (1978) 87 Cal. App. 3d 886, 891, 151 Cal. Rptr. 258]* .

In an appropriate case, this form may be submitted in opposition to the points and authorities *set out in §§ 70.240 -70.242*.

This form should be combined with a form generally opposing a motion for relief under *Code Civ. Proc. § 473.5* on the ground of untimeliness [*see § 70.280[1]*].

This form may also be adapted for use in a trial or appellate brief.

See also *§ 70.240[2]* for related chapters in California Forms of Pleading and Practice.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Counsel should therefore set forth the relevant dates of entry of default or the date of notice of entry of the default or default judgment (whichever is earlier), and the date of the filing of the motion, and show that the motion was filed after an unexplained and inexcusable delay. See also *§ 70.280[2][b]* regarding evidentiary support for facts stated.

[c] Related Pleading and Practice Chapters

For discussion and forms relating to relief from default and default judgment based on lack of actual notice under Code Civ. Proc. § 473.5, see California Forms of Pleading and Practice, Ch. 489, *Relief From Judgments and Orders* (Matthew Bender).

[3] Discussion of Authorities

[a] Diligence Required

Goya v. P.E.R.U. Enterprises *(1978) 87 Cal. App. 3d 886, 151 Cal. Rptr. 258* , is discussed in *§ 70.240[3][a]*.

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7-70 California Points & Authorities § 70.282

§ 70.282 Opposing Motion to Vacate and Set Aside Default and Default Judgment on Ground That Service of Summons Did Not Result in Actual Notice to Defendant in Time to Defend [Code Civ. Proc. § 473.5]--Denial of Relief Is Proper Exercise of Court's Discretion

[1] FORM

[*Caption. See § 70.120[1].*]

THE COURT SHOULD DENY DEFENDANT'S MOTION UNDER CODE OF CIVIL PROCEDURE SECTION 473.5 TO SET ASIDE THE _____ [DEFAULT *or* DEFAULT AND DEFAULT JUDGMENT] UNDER THE FACTS, PURSUANT TO THE COURT'S PROPER EXERCISE OF SOUND DISCRETION.

Trial Court Has Discretion to Grant or Deny Relief. The trial court has a sound discretion to grant or deny relief under *Code of Civil Procedure Section 473.5* if the evidence is conflicting (*Crescendo Corp. v. Shelted, Inc. (1968) 267 Cal. App. 2d 209, 213, 72 Cal. Rptr. 776*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that a default or default and default judgment should be set aside on the ground of lack of actual notice [*see Code Civ. Proc. § 473.5*]. The ground of opposition is that under the facts, the trial court in its sound discretion should deny relief [*see Crescendo Corp. v. Shelted, Inc. (1968) 267 Cal. App. 2d 209, 213, 72 Cal. Rptr. 776]* .

In an appropriate case, this form may be submitted in opposition to the points and authorities *set out in §§ 70.240 -70.242*.

This form may be combined with additional points and authorities opposing a grant of relief under *Code Civ. Proc. §*

473.5 on other specific grounds [*see §§ 70.280, 70.281*]. If the moving party has sought relief on additional grounds other than those provided under *Code Civ. Proc. § 473.5*, they may also be combined, as appropriate, with points and authorities opposing the grant of such alternative relief [*see, e.g., § 70.120[1*] (relief based on mistake, surprise, inadvertence, or excusable neglect), § 70.310 et seq. (relief from void judgments), § 70.480 et seq. (equitable relief)].

This form may also be adapted for use in a trial or appellate brief.

See also *§ 70.240[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473.5* and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Counsel should therefore describe defendant's conduct with respect to the entry of default, and show that relief is not warranted under the circumstances, for example, because the defendant actively avoided plaintiff's attempts to complete service. See also *§ 70.280[2][b]* regarding evidentiary support for facts stated.

[c] Related Pleading and Practice Chapters

For discussion and forms relating to relief from default and default judgment based on lack of actual notice under Code Civ. Proc. § 473.5, see California Forms of Pleading and Practice, Ch. 489, *Relief From Judgments and Orders* (Matthew Bender).

[3] Discussion of Authorities

[a] Trial Court Has Discretion to Grant or Deny Relief

In ***Crescendo Corp. v. Shelted, Inc.*** *(1968) 267 Cal. App. 2d 209, 72 Cal. Rptr. 776* , a default judgment was entered against a corporate defendant in an unlawful detainer action. Defendant moved for relief from the judgment under former Code Civ. Proc. § 473a [*now see Code Civ. Proc. § 473.5*], contending that service, which was made on one of defendant's corporate officers, was insufficient. The trial court denied the motion, and defendant appealed.

The court of appeal affirmed, holding that the trial court properly exercised its discretion in denying relief (*267 Cal. App. 2d 209, 213)* . The court noted that plaintiff had served a three-day notice on an individual who was an officer of defendant corporation; there was no dispute regarding the notice. Subsequently, the process server attempted to serve the same person with a copy of the summons and complaint. He visited the same residence, knocked on the front door, and heard a man's voice tell another person that if the call was for him, to say that he was not at home. The process server could see the man through a window, and identified him as the same person to whom he had served the three-day notice. A woman answered the door, and stated that the man was not at home. The process server stated loudly that he was serving the corporate officer with a copy of the unlawful detainer, and left the papers under the windshield wiper of a car parked in a carport; the car was registered to the corporate officer. The corporation made no appearance in the action (*267 Cal. App. 2d 209, 211)* . In his affidavit in support of relief, the corporate officer who received the papers falsely denied service. However, at the hearing on the motion, he admitted that he found the papers on his car, and subsequently advised other officers and directors, and consulted a lawyer (*267 Cal. App. 2d 209, 212-213)* . The court stated that personal service usually contemplates actual delivery. However, the person on whom service is sought may not, by merely declining to take the document offered, deny the personal service on the ground of lack of delivery, when under the circumstances it would be obvious to a reasonable person that personal service was being attempted. In such a case, the service may be made by merely depositing the process in some appropriate place where it would be most likely to come to the attention of the person being served. The court observed that the trial court determined on conflicting evidence that the process server attempted to make personal service and did effect good and sufficient service on the corporate officer on behalf of the corporation (*267 Cal. App. 2d 209, 212)* . The court stated that the

individual on whom the process server attempts to make personal service by manual delivery may not claim that service was improper because he or she refused to accept service; and that the evidence was sufficient to support the court's necessarily implied finding that the process server attempted to deliver the documents to the corporate officer personally but was prevented from doing so by that person. The court stated that under *Code Civ. Proc. § 473* (see *§ 70.10* et seq.) and former Code Civ. Proc. § 473a [*now see Code Civ. Proc. § 473.5*], when the evidence s conflicting, the court has sound discretion to grant or deny the motion, and in the absence of a clear showing of abuse of discretion, the trial court's order will not be interfered with on appeal (*267 Cal. App. 2d 209, 213)* .

[4] Additional Authorities

[a] Trial Court Has Discretion to Grant or Deny Relief

In *Trujillo v. Trujillo (1945) 71 Cal. App. 2d 257, 162 P.2d 640* , the trial court denied defendant's motion under former Code Civ. Proc. § 473a [*now see Code Civ. Proc. § 473.5*] for relief from entry of default in a divorce action, after considering conflicting evidence with regard to whether the defendant was served with copies of the summons and complaint (that is, defendant attempted to avoid service, but the process server left the papers on his car). The court of appeal affirmed, holding that the evidence adequately supports the finding of personal service of process, and that when the evidence is conflicting, the trial court has sound discretion to grant or deny the motion (*71 Cal. App. 2d 257, 259-260)* .

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7-70 California Points & Authorities § 70.283

§ 70.283 Opposing Motion to Vacate and Set Aside Default and Default Judgment on Ground That Service of Summons Did Not Result in Actual Notice to Defendant in Time to Defend [Code Civ. Proc. § 473.5]--Moving Party Had Actual Notice in Time to Defend

[1] FORM

[*Caption. See § 70.120[1].*]

THE COURT SHOULD DENY DEFENDANT'S MOTION UNDER CODE OF CIVIL PROCEDURE SECTION 473.5 TO SET ASIDE THE _____ [DEFAULT *or* DEFAULT AND DEFAULT JUDGMENT] UNDER THE FACTS, BECAUSE DEFENDANT HAD ACTUAL NOTICE IN TIME TO DEFEND.

Defendant Had Actual Notice in Time to Defend. A motion to vacate a default or default judgment when service of summons has not resulted in actual notice to a party in time to defend the action should be denied when the party had actual notice in time to defend (*Code Civ. Proc. § 473.5(a)*; *Ellard v. Conway (2001) 94 Cal. App. 4th 540, 547-548, 114 Cal. Rptr. 2d 399*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that a default or default and default judgment should be set aside on the ground of lack of actual notice [*Code Civ. Proc. § 473.5*]. The ground of opposition is that under the facts, the defendant had actual notice in time to defend the lawsuit [*see Ellard v. Conway (2001) 94 Cal. App. 4th 540, 547-548, 114 Cal. Rptr. 2d 399]* .

In an appropriate case, this form may be submitted in opposition to the points and authorities *set out in §§ 70.240 -70.242*.

This form may be combined with additional points and authorities opposing a grant of relief under *Code Civ. Proc. § 473.5* on other specific grounds [*see §§ 70.280, 70.281*]. If the moving party has sought relief on additional grounds other than those provided under *Code Civ. Proc. § 473.5*, they may also be combined, as appropriate, with points and authorities opposing the grant of such alternative relief [*see, e.g., § 70.120[1*] (relief based on mistake, surprise, inadvertence, or excusable neglect), § 70.310 et seq. (relief from void judgments), § 70.480 et seq. (equitable relief)].

This form may also be adapted for use in a trial or appellate brief.

See also *§ 70.240[2]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 473.5* and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Counsel should therefore describe the facts of defendant's obtaining actual notice and facts showing defendant obtained actual notice in time to defend the lawsuit. See also *§ 70.280[2][b]* regarding evidentiary support for facts stated.

[c] Related Pleading and Practice Chapters

For discussion and forms relating to relief from default and default judgment based on lack of actual notice under Code Civ. Proc. § 473.5, see California Forms of Pleading and Practice, Ch. 489, *Relief From Judgments and Orders* (Matthew Bender).

[3] Discussion of Authorities

[a] Defendant Had Actual Notice in Time to Defend

In ***Ellard v. Conway*** *(2001) 94 Cal. App. 4th 540, 114 Cal. Rptr. 2d 399* , plaintiffs sued defendants for fraud and to void deeds of trust and notes which plaintiffs had executed and delivered to defendants on three residential properties to secure promissory notes. The process server who attempted to achieve personal service on the defendants was informed that they had moved. Plaintiffs' counsel obtained a forwarding address, which was a private mail service. The process server confirmed that defendants received mail there, left the summons and complaint with the manager and later mailed a copy to the defendants at that address. Plaintiffs' counsel also mailed a copy of the summons and complaint to the defendants at the private mail service. One of the defendants then called plaintiff's counsel. The next day, he faxed counsel a signed waiver proposing to toll the time limit for responding and/or answering, specifying the case number. He later called plaintiffs' counsel to discuss settlement, at which time counsel told him that if counsel did not receive an answer, he would seek a default. Plaintiffs then moved for a default and mailed a copy of the request to the defendants. The court entered default judgment against the defendants and plaintiffs' counsel mailed a copy of the judgment to defendants. Defendants moved to vacate the default judgment under *Code Civ. Proc. § 473.5* on the grounds they were not properly served and did not have actual notice of the litigation. The trial court denied the motion (*94 Cal. App. 4th 540, 543-544)* .

The Court of Appeal affirmed. The court held that service was proper (*94 Cal. App. 4th 540, 544-547)* . The court then found that the trial court did not abuse its discretion in denying the motion to vacate the default judgment. The court found that the trial court could reasonably conclude that defendants had actual notice, since one of the defendants had plaintiffs' counsel's telephone number and the case number, and he wanted to settle the case. The court concluded that the defendant would not have been willing to settle if he were unaware of the plaintiffs' claims against the defendants. The court then found that the trial court could also reasonably conclude that the defendants had time to defend the action, since they had actual notice two weeks before an answer was due, and their failure to answer was a result of inexcusable neglect, since they knew their answer was due and chose not to respond (*94 Cal. App. 4th 540, 547-548)* .

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7-70 California Points & Authorities §§ 70.284-70.289

[Reserved]

§§ 70.284[Reserved]

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7-70 California Points & Authorities § 70.290

§ 70.290 Opposing Motion to Vacate and Set Aside Default and Default Judgment on Ground of Improper Venue in Consumer Action [Code Civ. Proc. § 585.5]--Motion Is Untimely

[1] FORM

[*Caption. See § 70.120[1].*]

THE COURT SHOULD DENY THE MOTION TO SET ASIDE THE _____ [DEFAULT *or* DEFAULT AND DEFAULT JUDGMENT] BECAUSE IT IS UNTIMELY, IN THAT THE NOTICE OF MOTION WAS NOT FILED WITHIN 60 DAYS AFTER THE DEFENDANT FIRST RECEIVED NOTICE OF THE PROCEDURE FOR ENFORCING THE DEFAULT JUDGMENT.

Sixty-Day Limitation Period. A motion to set aside a default or default judgment entered without full compliance with Civil Code *Section 1812.10, Civil Code* Section 2984.4, or *Code of Civil Procedure Section 395(b)*, must be served and filed within 60 days after the defendant first receives notice of levy under a writ of execution, or notice of any other procedure for enforcing the default judgment (*Code Civ. Proc. § 585.5(b)*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*opposing party*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion to vacate a default or default and default judgment entered in an action governed by the Unruh Retail Installment Sales Act (*Civ. Code § 1801 et seq.*), the Automobile Sales Finance Act (*Civ. Code § 2981 et seq.*), or the general consumer provision under *Code Civ. Proc. § 395(b)*, based on improper venue [*see Civ. Code §§ 1812.10, 2984.4*; *Code Civ. Proc. §§ 395(b), 585.5*]. The ground of opposition is that the motion was not brought within 60 days after the defendant first received notice of levy under a writ of execution, or notice of any other procedure for enforcing the default judgment [*see Code Civ. Proc. § 585.5(b)*].

In an appropriate case, this form may be submitted in opposition to the points and authorities *set out in §§ 70.250 -70.251*.

This form may be adapted for use in a trial or appellate brief.

See also *§ 70.250[b]* for additional general considerations relating to a motion for relief under *Code Civ. Proc. § 585.5* and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Counsel should therefore set forth the nature of the action and show the applicability of the relevant limitation provision; and should also set forth the date of entry of default and the date of the filing of the motion.

In an appropriate case, this form may be submitted in opposition to the the points and authorities *set out in §§ 70.10 -70.41*.

When appropriate, this form may be combined with the following points and authorities generally opposing the motion for relief, on the following grounds:

- The motion should be denied based on policy [*see, e.g., § 70.121[1]*].
- The mistake, inadvertence, surprise, or excusable neglect was not reasonable [*see, e.g., § 70.122[1]*].
- The moving party failed to exercise reasonable diligence in arranging for his or her defense [*see, e.g., § 70.123[1]*].
- An attorney's negligence is imputed to the client [*see, e.g., § 70.124[1]*].
- The moving party's argument that he or she has a meritorious defense is irrelevant [*see, e.g., § 70.125[1]*].

This form should be combined with additional points and authorities opposing relief on other particular grounds. For example, it may be combined with additional points and authorities showing that:

- The motion is not timely [*see §§ 70.140 -70.148*].
- The moving party has not made a sufficient showing justifying relief on the specific ground or grounds asserted [*see §§ 70.160 -70.216*; *see also* discussion in *70.10[2][g]*].

These points and authorities may also be combined, in an appropriate case, with additional points and authorities

opposing a grant of relief based on other statutory or decisional authority, when the motion and supporting memorandum has asserted such additional authority as alternate bases for relief [*see* discussion in *§ 70.10[2][c]*]. These points and authorities may also be combined, when appropriate, with points and authorities supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief [*see §§ 70.230, 70.231*].

[c] Related Pleading and Practice Chapters

For a discussion and forms relating to the Unruh Retail Installment Sales Act [Civ. Code § 1801 et seq.], and the Automobile Sales Finance Act [Civ. Code § 2981 et seq.], see California Forms of Pleading and Practice, Ch. 501, *Sales: Retail Installment Sales* (Matthew Bender). For discussion of Code Civ. Proc. § 395(b), see Ch. 140, *Contracts* , and Ch. 490, *Rescission and Restitution* , in that publication.

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7-70 California Points & Authorities §§ 70.291-70.299

[Reserved]

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7-70 California Points & Authorities § 70.300

§ 70.300 Opposing Motion to Vacate and Set Aside Default and Default Judgment on Ground That Defendant's Military Service Prejudiced Defense [50 U.S.C. App. § 521(g)]--No Relief Absent Showing of Prejudice

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN OPPOSITION TO MOTION
vs.	)	TO SET ASIDE DEFAULT JUDGMENT BY DE-
_____ [*name*],	)	FENDANT IN MILITARY SERVICE
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD DENY DEFENDANT'S MOTION TO SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT BECAUSE HE/SHE HAS FAILED TO SHOW THAT MILITARY SERVICE PREJUDICED HIS/HER PRESENTATION OF A DEFENSE TO THE ACTION.

A. No Relief Absent Showing of Prejudice. A judgment rendered in the absence of a court-appointed attorney

representing the defendant under the provisions of the Servicemembers Civil Relief Act is not void, and may be set aside only on a showing that defendant was prejudiced in making his or her defense by reason of military service (*Kromm v. Kromm (1948) 84 Cal. App. 2d 523, 530, 191 P.2d 115*).

B. No Relief Absent Showing of Material Effect on Defense. The relief provided by the Servicemembers Civil Relief Act is only available when the military service materially affects the conduct of a defendant's defense; the rights under the act are not absolute but dependent in each case on the judge's determination whether the military person's rights would be adversely affected by the fact of his or her service (*Wilterdink v. Wilterdink (1947) 81 Cal. App. 2d 526, 535, 184 P.2d 527*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion to vacate and set aside a default and default judgment on the ground that the entry of the default and default judgment took place during the moving party's period of military service [*see § 70.260[2][d]*] (or within 60 days after termination of or release from military service), in violation of the Servicemembers Civil Relief Act (*50 U.S.C. App. § 501 et seq.*) [*see 50 U.S.C. App. § 521*]. The governing statute applies in any civil action or proceeding in which the defendant did not make an appearance [*50 U.S.C. App. § 521(a)*]. The ground of opposition is that the defendant failed to show that his or her military service prejudiced the defense of the action [*see, e.g., Kromm v. Kromm (1948) 84 Cal. App. 2d 523, 530, 191 P.2d 115]* .

For points and authorities for use when the defendant based his or her motion on the plaintiff's filing of a false affidavit regarding the defendant's military status, see *§ 70.301[1]*. For points and authorities for use when the defendant executed a waiver of rights prior to the entry of default, see *§ 70.302[1]*.

In an appropriate case, this form may be submitted in opposition to points and authorities *set out in § 70.260[1]*.

This form may be adapted for use in a trial or appellate brief.

See also *§ 70.260[2]* for additional general considerations relating to a motion for relief under *50 U.S.C. App. § 521(g)* and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Counsel should therefore show that the defendant's military service did not prejudice his or her defense. If applicable, counsel should set forth the terms of any waiver executed by the defendant.

In an appropriate case, this form may be submitted in opposition to the points and authorities set out in *§§ 70.10 -70.41*.

When appropriate, this form may be combined with the following points and authorities generally opposing the motion for relief, on the following grounds:

- The motion should be denied based on policy [*see, e.g., § 70.121[1]*].

- The mistake, inadvertence, surprise, or excusable neglect was not reasonable [*see, e.g., § 70.122[1]*].

- The moving party failed to exercise reasonable diligence in arranging for his or her defense [*see, e.g., § 70.123[1]*].

- An attorney's negligence is imputed to the client [*see, e.g., § 70.124[1]*].

- The moving party's argument that he or she has a meritorious defense is irrelevant [*see, e.g., § 70.125[1]*].

This form should be combined with additional points and authorities opposing relief on other particular grounds. For example, it may be combined with additional points and authorities showing that:

- The motion is not timely [*see §§ 70.140 -70.148*].

- The moving party has not made a sufficient showing justifying relief on the specific ground or grounds asserted [*see §§ 70.160 -70.216*; *see also* discussion in *70.10[2][g]*].

This form may also be combined, in an appropriate case, with additional points and authorities opposing a grant of relief based on other statutory or decisional authority, when the motion and supporting memorandum has asserted such additional authority as alternate bases for relief [*see* discussion in *§ 70.10[2][c]*]. This form may also be combined, when appropriate, with points and authorities supporting the imposition of terms, including an award of attorney's fees, costs, or sanctions, in the event that the court grants relief [*see §§ 70.230, 70.231*].

[c] Related Pleading and Practice Chapters

For discussion and forms relating to declarations under the Servicemembers Civil Relief Act (*50 U.S.C. § 501 et seq.*), see the California Forms of Pleading and Practice, Ch. 205, *Defaults and Default Judgments* (Matthew Bender).

[3] Discussion of Authorities

[a] No Relief Absent Showing of Prejudice

In ***Kromm v. Kromm*** *(1948) 84 Cal. App. 2d 523, 191 P.2d 115* , the trial court denied defendant's motion to set aside a default and default judgment in a divorce action. Defendant asserted that the trial court failed to appoint counsel to represent him, and that he had been in the military service and confined by severe illness in a military hospital at the time of the entry of the default and default judgment.

The court of appeal affirmed. The court stated that a judgment rendered without the court appointing an attorney under the former Soldiers' and Sailors' Civil Relief Act of 1940 (now called the Servicemembers Civil Relief Act) is not void and may be set aside only on a showing, as required by the act, that the defendant was prejudiced in presenting a defense by reason of military service. The court found defendant's affidavit in support of his motion deficient in showing prejudice. Although the affidavit of defendant's attorney stated that defendant had been confined in an army hospital (which was hearsay), it did not claim that if he desired to do so, he could not have appeared at the trial. The court also found evidence from which the trial court could have inferred that defendant had intended to permit a default to be entered against him, but later changed his mind. The court also observed that plaintiff's opposing affidavit claimed that defendant had been away from the hospital at the time defendant claimed he was confined in the hospital (*84 Cal. App. 2d 523, 530)* .

[b] No Relief Absent Showing of Material Effect on Defense

In ***Wilterdink v. Wilterdink*** *(1947) 81 Cal. App. 2d 526, 184 P.2d 527* , the trial court denied defendant's motion to set aside his default and an interlocutory decree of divorce. When defendant and plaintiff decided to obtain a divorce, both parties visited an attorney. Defendant agreed that he would not retain an attorney and would permit his default to be entered in a divorce action to be commenced by his wife. He later confirmed his satisfaction with this arrangement in a letter to plaintiff. However, after his default had been obtained and the interlocutory decree entered, defendant moved to set the default and decree aside under both *Code Civ. Proc. § 473* and former 50 U.S.C. Appen. § 520(1) (*now see* 50 U.S.C. Appen. § 521(g)) In part, defendant argued that although he was to be retired from military service within five months after the decree was entered, the affidavit filed in compliance with the Servicemembers Civil Relief Act falsely stated that defendant was not in the military; and that therefore the judgment should be set aside since no attorney had been appointed for him as provided in former 50 U.S.C. Appen. § 520(1) (*now see* 50 U.S.C. Appen. § 521(b)(2)).

The court of appeal affirmed (*81 Cal. App. 2d 526, 536)* . The court stated that there is effectively no distinction between a failure to file an affidavit and the filing of a false affidavit, since in either case defendant must show how his or her military service prejudiced him in making a defense (*81 Cal. App. 2d 526, 534)* . (There was no contention that plaintiff filed the affidavit in bad faith.) The court concluded that the decree was voidable but not void, and that defendant failed to show any prejudice, since the decree conformed exactly to the previous agreement made between the parties (*81 Cal. App. 2d 526, 534-535)* .

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7-70 California Points & Authorities § 70.301

§ 70.301 Opposing Motion to Vacate and Set Aside Default and Default Judgment on Ground That Defendant's Military Service Prejudiced Defense [50 U.S.C. App. § 521(g)]--False Affidavit Does Not Render Judgment Void

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside under 50 U.S.C. App. § 521(g) (see § 70.300[1]).*]

THE COURT SHOULD DENY DEFENDANT'S MOTION TO SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT BECAUSE THE FILING OF AN AFFIDAVIT THAT FALSELY STATES THAT THE DEFENDANT IS NOT IN THE MILITARY SERVICE DOES NOT RENDER THE JUDGMENT VOID.

Filing of False Affidavit Does Not Render Judgment Void. The filing of an affidavit that falsely states that the defendant is not in the military service does not render the judgment void, particularly when the untrue statement could well have been the result of a misunderstanding of the true situation, and when the defendant was not prejudiced by it (*Wilterdink v. Wilterdink (1947) 81 Cal. App. 2d 526, 534, 184 P.2d 527*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion to vacate and set aside a default and default judgment on the ground that the filing of an affidavit that falsely states that the defendant is not in the military service does not render the judgment void, particularly when the untrue statement could well have been the result of a misunderstanding of the true situation, and when the defendant was not prejudiced by it [*Wilterdink v. Wilterdink (1947) 81 Cal. App. 2d 526, 534, 184 P.2d 527]* .

In an appropriate case, this form may be submitted in opposition to points and authorities *set out in § 70.260[1]*.

This form should be combined with a memorandum generally supporting a motion to set aside under *50 U.S.C. App. § 521(g)*. For points and authorities for use when the defendant executed a waiver of rights prior to the entry of default, see *§ 70.302[1]*. This form may be adapted for use in a trial or appellate brief.

See also *§ 70.260[2]* for additional general considerations relating to a motion for relief under *50 U.S.C. App. § 521(g)* and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 70.260[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Filing of False Affidavit Does Not Render Judgment Void

Wilterdink v. Wilterdink *(1947) 81 Cal. App. 2d 526, 184 P.2d 527* , is discussed in *§ 70.300[3][b]*.

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7-70 California Points & Authorities § 70.302

§ 70.302 Opposing Motion to Vacate and Set Aside Default and Default Judgment on Ground That Defendant's Military Service Prejudiced Defense [50 U.S.C. App. § 521(g)]--Defendant Waived Rights

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside under 50 U.S.C. App. § 521(g) (see § 70.300[1]).*]

THE COURT SHOULD DENY DEFENDANT'S MOTION TO SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT BECAUSE HE/SHE HAS WAIVED HIS/HER RIGHTS UNDER THE SERVICEMEMBERS CIVIL RELIEF ACT.

Waiver of Rights. A servicemember may waive any of the rights and protections provided by the Servicemembers Civil Relief Act (*see* 50 TU.S.C. Appen. § 507(a)). A defendant's waiver of rights under the Servicemembers Civil Relief Act supports the denial of defendant's subsequent request for relief from default (*McMahon v. McMahon (1945) 70 Cal. App. 2d 126, 127-128, 160 P.2d 892*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion to vacate and set aside a default and default judgment on the ground that the defendant waived his or her rights under the Servicemembers Civil Relief Act, and that waiver supports the denial of defendant's subsequent request for relief from default [*McMahon v. McMahon (1945) 70 Cal. App. 2d 126, 127-128, 160 P.2d 892]* .

In an appropriate case, this form may be submitted in opposition to points and authorities *set out in § 70.260[1].*

This form should be combined with a memorandum generally supporting a motion to set aside under *50 U.S.C. App. §*

521(g). For points and authorities for use when the defendant based his or her motion on the plaintiff's filing of a false affidavit regarding the defendant's military status, see *§ 70.301[1]*.

See also *§ 70.260[2]* for additional general considerations relating to a motion for relief under *50 U.S.C. App. § 521(g)* and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 70.260[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Waiver of Rights

A servicemember may waive any of the rights and protections provided by the Servicemembers Civil Relief Act (*see* 50 U.S.C. Appen. § 507(a)). In the case of a waiver that permits an action based on modification, termination, or cancellation of a contract, lease, or bailment or an obligation secured by a mortgage, trust, deed, lien, or other security in the nature of a mortgage, or the repossession, retention, foreclosure, sale, forfeiture, or taking possession of property that is security for any obligation or was purchased or received under a contract, lease, or bailment, the waiver is effective only if made pursuant to a written agreement of the parties executed during or after the servicemember's period of military service. In that case, the written agreement must specify the legal instrument to which the waiver applies and, if the servicemember is not a party to that instrument, the servicemember concerned (50 U.S.C. Appen. § 507(a), (b)).

In ***McMahon v. McMahon*** *(1945) 70 Cal. App. 2d 126, 160 P.2d 892* , defendant was served with the summons and copy of plaintiff's complaint for divorce. On the same day, he filed his voluntary appearance, stipulating that the action might be heard as a default, and waived all of his rights under the former Soldiers' and Sailors' Civil Relief Act of 1940 (now called the Servicemembers Civil Relief Act). After the entry of the default and the interlocutory decree of divorce, he moved under *Code Civ. Proc. § 473* to vacate the waiver and set aside the default. The trial court denied the motion.

The court of appeal affirmed, holding that the trial court did not abuse its discretion in denying relief. The court noted that there was no indication that the trial court did not seriously consider the motion to vacate the default (*70 Cal. App. 2d 126, 127)* . The trial court impliedly found that the defendant suffered no mistake, inadvertence, surprise, or excusable neglect. The court noted that defendant was healthy, intelligent, and mature, and was not suffering from any form of hypnosis or oppression. Defendant was apprised of the contents of the decree to be entered, and waived his right to a delay under the federal statute after hearing an explanation of his rights under the statute. Consequently, the court concluded that the trial court properly exercised its discretion in denying the motion (*70 Cal. App. 2d 126, 128)* .

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§ 70.303 Opposing Motion to Vacate and Set Aside Judgment Entered During Protected Period of Military Service [Mil. & Vet. Code § 402(d)]--Defendant Was Not Prejudiced by Reason of Military Service in Making Defense

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OPPOSING MOTION TO SET
Plaintiff,	)	ASIDE JUDGMENT ENTERED DURING PRO-
vs.	)	TECTED PERIOD OF MILITARY SERVICE
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Dept.: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD DENY DEFENDANT'S MOTION TO SET ASIDE THE JUDGMENT BECAUSE THE DEFENDANT HAS FAILED TO SHOW THAT MILITARY SERVICE PREJUDICED DEFENDANT'S PRESENTATION OF A DEFENSE TO THE ACTION.

No Relief Absent Showing of Prejudice. The court may not reopen a judgment entered during a period of protected military service unless it appears that the service member was prejudiced by reason of military service in making a

defense to an action (*see Mil. & Vet. Code § 402(d)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*opposing party*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion to vacate and set aside a judgment on the ground that the entry of the judgment took place while the defendant was in military service or within 30 days after the termination of defendant's military service (*Mil. & Vet. Code § 402(d)*). The ground of opposition is that the defendant failed to show that his or her military service prejudiced the defense of the action.

For points and authorities to use when the ground of opposition is that the defendant does not have a meritorious or legal defense to the action, see *§ 70.304[1]*.

In an appropriate case, this form may be submitted in opposition to points and authorities *set out in § 70.262[1]*.

This form may be adapted for use in a trial or appellate brief.

See also *§ 70.262[2]* for additional general considerations relating to a motion for relief under *Mil. & Vet. Code § 402(d)*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Counsel should therefore show that the defendant's military service did not prejudice his or her defense.

When appropriate, this form may be combined with the following points and authorities generally opposing the motion for relief, on the following grounds:

- The motion should be denied based on policy [*see, e.g., § 70.121[1]*].
- The mistake, inadvertence, surprise, or excusable neglect was not reasonable [*see, e.g., § 70.122[1]*].
- The moving party failed to exercise reasonable diligence in arranging for his or her defense [*see, e.g., § 70.123[1]*].
- An attorney's negligence is imputed to the client [*see, e.g., § 70.124[1]*].
- The moving party's argument that he or she has a meritorious defense is irrelevant [*see, e.g., § 70.125[1]*].

This form should be combined with additional points and authorities opposing relief on other particular grounds. For example, it may be combined with additional points and authorities showing that:

- The motion is not timely [*see §§ 70.140 -70.148*].

- The moving party has not made a sufficient showing justifying relief on the specific ground or grounds asserted [*see §§ 70.160 -70.216*; *see also* discussion in *§ 70.10[2][g]*].

This form may also be combined, in an appropriate case, with additional points and authorities opposing a grant of relief based on other statutory or decisional authority, when the motion and supporting memorandum has asserted such additional authority as alternate bases for relief [*see* discussion in *§ 70.10[2][c]*].

[c] Related Pleading and Practice Chapters

For discussion and forms relating to declarations under Mil. & Vet. Code § 402(d), see California Forms of Pleading and Practice, Ch. 489, *Relief from Judgments Orders* (Matthew Bender).

[3] Discussion of Authorities

For discussion of the provisions of *Mil. & Vet. Code § 402(d)*, see *§ 70.262[3]*.

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7-70 California Points & Authorities § 70.304

§ 70.304 Opposing Motion to Vacate and Set Aside Judgment Entered During Protected Period of Military Service [Mil. & Vet. Code § 402(d)]--Defendant Has No Meritorious or Legal Defense

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside under Mil. & Vet. Code § 402(d) (see § 70.303[1]).*]

THE COURT SHOULD DENY DEFENDANT'S MOTION TO SET ASIDE THE JUDGMENT BECAUSE DEFENDANT HAS NO MERITORIOUS OR LEGAL DEFENSE TO THE ACTION OR TO ANY PART OF IT.

No Meritorious or Legal Defense. For the court rendering a judgment during a period of military service to open it and allow the defendant to defend, the application to vacate or set aside the judgment must state a meritorious or legal defense to the action or to some part of it (*Mil. & Vet. Code § 402(d)*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion to vacate and set aside a judgment on the ground that the defendant has failed to state a meritorious or legal defense to the action in the application to open the judgment under *Mil. & Vet. Code § 402(d)*.

In an appropriate case, this form may be submitted in opposition to points and authorities *set out in § 70.262[1]*.

This form should be combined with a memorandum generally supporting a motion to set aside under *Mil. & Vet. Code § 402(d)*. See *§ 70.303[1]*.

See also *§ 70.262[2]* for additional general considerations relating to a motion for relief under *Mil. & Vet. Code §*

402(d).

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 70.262[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

For discussion of the provisions of *Mil. & Vet. Code § 402(d)*, see *§ 70.262[3]*.

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7-70 California Points & Authorities §§ 70.305-70.309

[Reserved]

§§ 70.305[Reserved]

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B. Statutory Relief From Void Judgment or Order Under Code Civ. Proc. § 473(d)
1. Relief From Judgment or Order Void on Its Face

7-70 California Points & Authorities § 70.310

§ 70.310 Supporting Motion to Set Aside Judgment or Order Void on Its Face [Code Civ. Proc. § 473(d)]--General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF MOTION TO
Plaintiff,	)	SET ASIDE VOID _____
vs.	)	[DEFAULT AND DEFAULT JUDGMENT *or*
_____ [*name*],	)	JUDGMENT *or* ORDER]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] IN THIS ACTION AS VOID ON ITS FACE BECAUSE _____ [*specify, e.g.,* DEFENDANT WAS NEVER SERVED WITH SUMMONS IN THIS CASE AND MADE NO APPEARANCE IN IT, AND THE FAILURE TO SERVE DEFENDANT APPEARS FROM THE JUDGMENT ROLL, IN THAT IT

CONTAINS NO PROOF OF SERVICE].

A. Relief From Void Judgment or Order. The court may, on motion of either party after notice to the other party, set aside any void judgment or order (*Code Civ. Proc. § 473(d)*).

B. Inherent Power to Set Aside Judgment Void on Its Face. A court has inherent power, independent of statute, to set aside a judgment or order that is void on its face (*People v. Greene (1887) 74 Cal. 400, 405-406, 16 P. 197* ; *Hendrix v. Hendrix (1955) 130 Cal. App. 2d 379, 383, 279 P.2d 58*).

C. Test for Establishing That Judgment Is Void on Its Face. A judgment or order is void on its face when its invalidity appears from an examination of the judgment roll (*People v. Davis (1904) 143 Cal. 673, 676, 77 P. 651* ; *Carrasco v. Craft (1985) 164 Cal. App. 3d 796, 808, 210 Cal. Rptr. 599*).

[*EITHER*]

D. Judgment Roll When Complaint Not Answered. If the complaint is not answered by any defendant, the following papers, without being attached together, constitute the judgment roll: the summons, with the affidavit or proof of service; the complaint; the request for entry of default with a memorandum endorsed thereon that the default of the defendant in not answering was entered, and a copy of the judgment; if defendant has appeared by demurrer, and the demurrer has been overruled, then notice of the overruling thereof served on defendant's attorney, together with proof of the service; and in case the service is made by publication, the affidavit for publication of summons, and the order directing the publication of summons (*Code Civ. Proc. § 670(a)*).

[*OR*]

D. Judgment Roll When Complaint Answered by at Least One Defendant. In all cases, other than those in which the complaint is not answered by any defendant, the following papers, without being attached together, constitute the judgment roll: the pleadings, all orders striking out any pleading in whole or in part, a copy of the verdict of the jury, the statement of decision of the court, or finding of the referee, and a copy of any order made on demurrer, or relating to a change of parties, and a copy of the judgment. If there are two or more defendants in the action, and any one of them has allowed judgment to pass against him or her by default, the following will also be included in the judgment roll: the summons, with proof of its service, on the defendant; and if the service on the defaulting defendant is by publication, the affidavit for publication, and the order directing the publication of the summons (*Code Civ. Proc. § 670(b)*).

[*When appropriate, add points and authorities supporting additional grounds for relief from the void judgment or order (see, e.g., §§ 70.330 -70.421). In addition, when applicable, add points and authorities that generally support a defendant's motion for relief from a judgment or order that is void on its face (see, e.g., § 70.311 et seq.).*]

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*moving party*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to set aside a judgment or order that is void on its face. The form is a general one which sets out the authority of the court to set aside a facially void judgment or order under *Code Civ. Proc. § 473(d)*, and under the court's inherent power. This form may be adapted as necessary for use by a party other than a defendant (for example, a cross defendant).

For points and authorities for use by a party seeking to intervene for the purpose of attacking a void judgment, see *§ 70.313[1]*. For forms of memoranda of points and authorities relating to intervention by a nonparty generally, see Ch. 124, *Intervention* .

For points and authorities for use in obtaining relief from a default judgment, when a defendant files a motion under *Code Civ. Proc. § 473(d)*, in conjunction with a motion to quash service of summons for lack of jurisdiction, see *§ 70.314[1]* [*see Code Civ. Proc. § 418.10*]. For forms of memoranda supporting a motion to quash under *Code Civ. Proc. § 418.10*, which may in such cases be combined with this form, see Ch. 132, *Jurisdiction: Personal Jurisdiction and Inconvenient Forum* .

For points and authorities for use when a notice of appeal has been filed on the void judgment or order, see *§ 70.315[1]*.

This form should be combined with points and authorities that generally support a defendant's motion for relief from the void judgment or order [*see, e.g., § 70.311* et seq.]. In addition, this form should be combined, when appropriate, with additional points and authorities supporting a grant of relief under *Code Civ. Proc. § 473(d)*, on the ground that other, specific defects in the judgment roll have rendered the judgment void on its face [*see, e.g., §§ 70.330 -70.421*].

This form may also be combined, in an appropriate case, with additional points and authorities supporting a grant of relief based on other statutory or decisional authority [*see* discussion under [c], *below*].

This form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should specify how the judgment is void (for example, the court lacked personal jurisdiction because service was not made in the manner required by law), and demonstrate how the defect is shown by examination of the judgment roll.

In proceedings to set aside a judgment or order that is void on its face, no supporting or opposing affidavit or declaration is prepared. Counsel should, however, request that the court take judicial notice of the judgment or order and the judgment roll, or, if some other paper or report filed in the action is relevant to the issue of validity, that particular paper or report. For matters subject to judicial notice, and the manner of requesting it, see *Evid. Code §§ 452(d), 453*. For discussion of documents that are included in the judgment roll for purposes of *Code Civ. Proc. § 473(d)*, see [d][iii].

[c] Alternative Methods of Obtaining Relief

A judgment not valid on its face, but void in fact (that is, its invalidity may be shown by extrinsic evidence) may also be set aside as void under *Code Civ. Proc. § 473(d)* [for further discussion, *see* [d], *below*]. For forms of memoranda supporting a grant of relief from a judgment or order on the ground that it is void in fact, which may, in an appropriate case, be combined with this form, see *§§ 70.360 -70.363*.

A party may, in addition, obtain relief from a default and default judgment or other judgment, dismissal, order, or proceeding on the ground of mistake, inadvertence, surprise, or excusable neglect [*Code Civ. Proc. § 473(b)*]. Additional statutory grounds also exist for relief from a default and default judgment [*see, e.g., Code Civ. Proc. §§ 473.1, 473.5*]. For forms of memoranda supporting a grant of relief from default and default judgment or other judgment or order on these various additional statutory grounds, which may, in an appropriate case, be combined with this form, see *§ 70.240* et seq.

A default judgment or other judgment or order may also be attacked by a motion or separate action in equity when the judgment was obtained through extrinsic fraud, mistake, or duress. For forms of memoranda supporting a grant of relief from a default judgment or other judgment or order on such equitable grounds, which may, in an appropriate case, be combined with this form, see *§ 70.480* et seq.

[d] Void Judgment or Order

[i] In General

An order or judgment that is void on its face is simply a nullity, and can be neither the basis nor evidence of any right whatever [*Forbes v. Hyde (1866) 31 Cal. 342, 355]* . A court may not only set aside such a judgment or order on the motion of a party, but may on its own motion set it aside or disregard it, regardless of how the invalidity is brought to its attention [*Morgan v. Clapp (1929) 207 Cal. 221, 224, 277 P. 490* ; *Andrisani v. Saugus Colony Limited (1992) 8 Cal. App. 4th 517, 523* , 10 Cal. Rtpr. 2d 444].

[ii] Invalidity Determined From Judgment Roll

As set out in Paragraph C of this form (discussed under [3][c], *below*), the general rule is that a judgment or order is void on its face when its invalidity appears from an examination of the judgment roll [*Morgan v. Clapp (1929) 207 Cal. 221, 224, 277 P. 490* ; *People v. Davis (1904) 143 Cal. 673, 676, 77 P. 651]* . What constitutes the judgment roll is discussed under [iii], *below.*

Courts sometimes refer to judgments or orders that are void on their "face" [*see, e.g., Hendrix v. Hendrix (1955) 130 Cal. App. 2d 379, 383, 279 P.2d 58]* , or void on the face of the "record" [*see, e.g., Nagel v. P & M Distributors, Inc. (1969) 273 Cal. App. 2d 176, 179-180, 78 Cal. Rptr. 65]* , or void on the face of the "judgment roll" [*see, e.g., People v. Davis (1904) 143 Cal. 673, 676, 77 P. 651]* . Generally, these terms are synonymous and refer to a judgment or order whose invalidity can be determined by examination of the judgment roll, without resort to extrinsic evidence.

Notwithstanding the foregoing general rule, however, some courts have held a judgment to be void on its face by resort to papers in the record other than those that are strictly included in the judgment roll. For example, one court has held that a default judgment entered without any statement of damages being served on the defendant is void on the "face of the record" and may be successfully challenged at any time [*Lopez v. Fancelli (1990) 221 Cal. App. 3d 1305, 1310, 271 Cal. Rptr. 87* ; *Plotitsa v. Superior Court (1983) 140 Cal. App. 3d 755, 760, 189 Cal. Rptr. 769* ; *see §§ 70.400 -70.403*]. Another court has held that an order requiring a stepfather to pay child support was void on its face based on evidence stated in a domestic relations officer's report [*Swain v. Swain (1967) 250 Cal. App. 2d 1, 10, 58 Cal. Rptr. 83* ; *see §§ 70.420, 70.421*].

[iii] What Constitutes the Judgment Roll

If the complaint is not answered by any defendant, the following papers, without being attached together, constitute the judgment roll [*Code Civ. Proc. § 670(a)*]:

- The summons, with the affidavit or proof of service.

- The complaint.

- The request for entry of default with a memorandum endorsed thereon that the default of the defendant in not answering was entered, and a copy of the judgment.

- If defendant has appeared by demurrer, and the demurrer has been overruled, then notice of the overruling thereof served on defendant's attorney, together with proof of the service; and in case the service is made by publication, the affidavit for publication of summons, and the order directing the publication of summons.

In all cases, other than those in which the complaint is not answered by any defendant, the following papers, without being attached together, constitute the judgment roll [*Code Civ. Proc. § 670(b)*]:

- The pleadings.

- All orders striking out any pleading in whole or in part.

- A copy of the verdict of the jury.

- The statement of decision of the court, or finding of the referee.

- A copy of any order made on demurrer, or relating to a change of parties.

- Copy of the judgment.

If there are two or more defendants in the action, and any one of them has allowed judgment to pass against him or her by default, the following will also be included in the judgment roll [*Code Civ. Proc. § 670(b)*]:

- The summons, with proof of its service, on the defendant.

- If the service on the defaulting defendant is by publication, the affidavit for publication, and the order directing the publication of the summons.

[iv] Distinguished From Judgment Valid on Its Face but Void in Fact

A judgment or order void on its face is distinguished from one that is valid on its face but void in fact, that is, void only by reference to extrinsic evidence [*see City of Los Angeles v. Morgan (1951) 105 Cal. App. 2d 726, 730, 234 P.2d 319]* (if invalidity of a judgment or order is not apparent by an inspection of the judgment or judgment roll, it may nonetheless be set aside by motion made within a reasonable time); for forms of memoranda supporting a motion to set aside a judgment valid on its face but void in fact, see *§§ 70.460 -70.463*.

The critical distinction between a judgment or order void on its face and one void in fact is that, in the latter case, there is a time limitation for seeking relief by motion [*see, e.g., Rogers v. Silverman (1989) 216 Cal. App. 3d 1114, 1124, 265 Cal. Rptr. 286* (discussed in *§ 70.470[3*][b])], whereas a motion for relief from a judgment or order void on its face may be sought at any time [*see, e.g., Nagel v. P & M Distributors, Inc. (1969) 273 Cal. App. 2d 176, 176, 179-180, 78 Cal. Rptr. 65* (discussed in *§ 70.312[3*])]. Note that, while a judgment void on its face may be set aside by motion at any time, or otherwise attacked collaterally, or simply ignored, it may be desirable in some instances to seek relief promptly, for example, to clear record title of property affected by the judgment.

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 70.430 -70.453* may be used to oppose this form.

[f] Related Pleading and Practice Chapters

For forms of a notice of motion and order relating to a motion to set aside judgment, see California Forms of Pleading and Practice, Ch. 489, *Relief From Judgments and Orders* (Matthew Bender).

[g] Related Points and Authorities

For memoranda of points and authorities for use proceedings relating the subject matter or personal jurisdiction of the court, see Ch. 132, *Jurisdiction: Personal Jurisdiction and Inconvenient Forum* , and Ch. 133, *Jurisdiction: Subject Matter Jurisdiction* .

[3] Discussion of Authorities

[a] Relief From Void Judgment or Order

In 1933, *Code Civ. Proc. § 473* was amended to provide that a court may, on motion of either party after notice to the other party, set aside any void judgment or order [*now see* ***Code Civ. Proc. § 473(d)***]. This particular provision had formerly applied only to municipal courts, which as courts of limited jurisdiction had not been deemed to posses this power inherently [*see* former Code Civ. Proc. § 900a (repealed by Stats. 1933, ch. 744, § 198]. Thus, the 1933 amendment merely codified and made applicable to all trial courts a power that superior courts had and do possess inherently and independent of statute [*see F.E. Young Co. v. Fernstrom (1938) 31 Cal. App. 2d Supp. 763, 765 , 79 P.2d 1117* ; *see also People v. Greene (1887) 74 Cal. 400, 405-406, 16 P. 197* ; *Estate of Estrem (1940) 16 Cal. 2d 563, 571, 107 P.2d 36* ; *Hendrix v. Hendrix (1955) 130 Cal. App. 2d 379, 383, 279 P.2d 58* ; and [b], *below*)].

[b] Inherent Power to Set Aside Judgment Void on Its Face

People v. Greene *(1887) 74 Cal. 400, 16 P. 197* , involved an action to foreclose on the interest of the defendant under a certificate of purchase of real estate. A judgment by default was taken against the defendant and the defendant thereafter moved to have the judgment set aside and for leave to answer. The motion was granted and an answer was filed setting up a defense to the action. The trial court, however, later annulled the order without taking action on the defendant's answer. The defendant moved to set aside the latter order and the judgment. The trial court denied the motion and the defendant appealed.

The Supreme Court reversed the order and directed the trial court to set aside the judgment. The Court stated that a court whose process is abused by an attempt to enforce a void judgment will interfere, for its own dignity, and for the protection of its officers, to arrest further action. The version of *Code Civ. Proc. § 473* then in existence (prior to the 1933 amendment which added what is now *Code Civ. Proc. § 473(d)* providing for a motion to set aside void judgments) was intended to apply to cases when a judgment has been taken against a party by mistake, accident, surprise, or excusable neglect; to cases in which the moving party must move on evidence outside the record; and to cases in which the relief to be granted is largely in the sound discretion of the court. The section had no application to a pretended judgment which was shown by the judgment roll to be void for want of jurisdiction, either of the person of the defendant or of the subject matter (*74 Cal. 400, 405-406)* . Since by the judgment roll it appeared that there was no personal service on the defendant, and no sufficient affidavit that the summons was ever in fact published, the judgment was void, and should have been set aside, and a trial had on the complaint and answer on file (*74 Cal. 400, 406)* .

Hendrix v. Hendrix *(1955) 130 Cal. App. 2d 379, 279 P.2d 58* , involved an action for the custody of minor children by the plaintiff husband against the defendant wife. The wife did not appear in the action and a hearing was held. The

court awarded the husband the exclusive custody of the children. Thereafter, the wife filed a motion to set aside the default. The trial court denied the motion, but ordered plaintiff to pay attorneys fees of $75 to defendant's counsel. The trial court later reconsidered its order granting the attorney's fees and decreed that the order was void and set it aside. Defendant appealed, contending that the trial court abused its discretion.

The court of appeal affirmed. The court cited the rule that except when attorney's fees are specifically allowed by statute, or by contract of the parties, they are not recoverable by a successful litigant as costs or otherwise. The court held that the trial court properly set aside its prior order since the order permitting attorneys fees was void on its face. A court has inherent power, apart from statute, to correct its records by vacating a judgment which is void on its face, for such judgment is a nullity and may be ignored (*130 Cal. App. 2d 379, 383)* .

[c] Test for Establishing That Judgment Is Void on Its Face

People v. Davis *(1904) 143 Cal. 673, 77 P. 651* , involved an appeal from an order vacating and setting aside a prior order vacating and setting aside a default judgment. The action was brought to foreclose and annul a certificate of purchase of state lands which had been issued to the defendant. The defendant did not appear and a default judgment was entered against him, annulling and declaring void the certificate of purchase held by him and his rights thereunder. Defendant's successor in interest thereafter moved for an order setting aside and vacating the default judgment, and the trial court after a hearing made an order purporting to vacate the default judgment. On application of the plaintiff's attorney, the trial court vacated its previous order setting aside the judgment on the ground that the order was beyond the jurisdiction of the court and was null and void. From the latter order the defendant appealed.

The Supreme Court affirmed the order. The issue before the Court was whether the original default judgment was void on its face. If it was not void on its face, the order setting it aside was on its face an absolute nullity, and it was not necessary for the plaintiff to appeal therefrom. The Supreme Court stated that whether the judgment was void on its face must be determined from an inspection of the judgment roll (*143 Cal. 673, 677)* . A court's jurisdiction to declare a judgment or order a nullity derives solely from the fact that a judgment or order on the face of the judgment roll demonstrates to the world its own invalidity. If a judgment or order on its face is such that it could not be successfully assailed in a collateral proceeding, the court that rendered or made it cannot by determining otherwise give itself jurisdiction to vacate it. Whether or not it is such a judgment or order is purely a question of law presented by the judgment roll; in other words, the jurisdiction of the court to vacate it depends on what the judgment roll shows as a matter of law, and not on what such court may determine that it shows (*143 Cal. 673, 676)* .

Although the defendant contended that there were various defects in the summons and publication of the summons, after examination of the judgment roll, the Supreme Court held that the lower court did not err in holding that the judgment was on its face a valid judgment, and that the order purporting to vacate it, made after the lapse of eight years, was a mere nullity and was properly vacated (*143 Cal. 673, 678)* .

In ***Carrasco v. Craft*** *(1985) 164 Cal. App. 3d 796, 210 Cal. Rptr. 599* , defendants had not answered the amended complaint against them for several reasons, including the following: they were not represented by counsel at the time it was served; they had insufficient funds to retain counsel and did not feel competent to answer it in pro per; they had answered the original complaint and they did not think they had to answer the amended complaint; and, they believed it had been filed only for the purpose of naming new defendants and stating proper causes of action against them. Five months after the entry of default and four months and three weeks after the entry of the default judgment, after having saved money and retained counsel, defendants filed a motion to set aside the default under *Code Civ. Proc. § 473* on the grounds of excusable neglect. Although not specified as a ground in the notice of motion, a supplemental memorandum in support of the motion urged the court to examine the judgment for voidness because, in fact, no answer to the amended complaint was required of them, and they were therefore not in default. The trial court found excusable neglect, but did not consider the lapse of time, even in light of defendants' lack of funds to retain counsel, reasonable. The trial court denied the motion to set aside the default judgment based on excusable neglect and held that the voidness

ground was not properly before it. Defendants appealed.

The court of appeal reversed. After finding evidentiary support for the trial court's determination that the lapse of time precluded granting relief for excusable neglect, the court of appeal went on to consider the voidness issue. That issue, it said, was properly before the trial court. According to the court, the question of whether the default judgment should be voided is a legal one determinable by examination of the judgment roll. The notice of motion had specified that it was based on accompanying papers and the record, therefore the defect in the notice of motion, in stating voidness as a ground for relief, should have been disregarded (*164 Cal. App. 3d 796, 808)* . The court then considered the differences between the original complaint and the amended complaint and concluded that, as a matter of law, the original answer could stand as the answer to the amended complaint, and that it was error to enter the default and default judgment on the bases that the defendants failed to file an answer to the amended complaint (*164 Cal. App. 3d 796, 811)* .

[4] Additional Authorities

[a] Inherent Power to Set Aside Judgment Void on Its Face

Riley v. Superior Court (1952) 111 Cal. App. 2d 365, 244 P.2d 474 , involved proceedings to set aside an order vacating a dismissal filed by the clerk in a declaratory relief action. After the complaint was filed, the defendant demurred, moved to strike portions of the complaint, filed her answer, and moved for judgment on the pleadings. Thereafter the plaintiffs filed a dismissal of the action with the county clerk. Plaintiffs then objected to further proceedings at the hearing on the motions and demurrer on the ground that a dismissal of the action was on file with the clerk. The objection was overruled and the court ordered that the dismissal be set aside. Plaintiffs filed a petition for a writ of prohibition and certiorari. The court of appeal denied the writ. The plaintiffs contended that the entry of an order for dismissal in the clerk's register has the effect of a final judgment and that a judgment can be nullified by the court which rendered it only on a motion for new trial, motion under *Code Civ. Proc. § 473*, or motion when the judgment is void on its face. The court stated, however, that since affirmative relief was sought in the answer, the dismissal was without authority and was void. Citing *Olivera v. Grace (1942) 19 Cal. 2d 570, 574, 122 P.2d 564* , the court stated that a court has inherent power, apart from statute, to correct its records by vacating a judgment which is void on its face, because such a judgment is a nullity and may be ignored (*111 Cal. App. 2d 365, 367)* .

See also *Estate of Estrem (1940) 16 Cal. 2d 563, 571, 107 P.2d 36* and *Sullivan v. Sullivan (1967) 256 Cal. App. 2d 301, 303-304, 64 Cal. Rptr. 82* ("Long prior to this amendment (adding what is now 5th paragraph of Section 473) it was well established that the superior court had jurisdiction at any time set aside a judgment or order void on its face," and citing cases).

[b] Test for Establishing that Judgment Is Void on Its Face

The facts and procedural background of *Morgan v. Clapp (1929) 207 Cal. 221, 277 P. 490* , are discussed in *§ 70.312[3]* . In *Morgan*, the Court, in affirming the trial court's order setting aside its earlier order vacating a default judgment, and affirming the default judgment, stated that a judgment or order is said to be void on its face when the invalidity is apparent on an inspection of the judgment roll (*207 Cal. 221, 224)* . At the time the affidavit was filed in the case, former Code Civ. Proc. § 412 (*now see Code Civ. Proc. § 415.50*) authorized an order directing publication of summons when, among other requirements, in the absence of a verified complaint it appeared by affidavit that there is a cause of action against the defendant to whom the service is made or that it is an action which relates to real property in which the defendant claims an interest or demands relief that excludes the plaintiff from any interest in the property. Since it was readily apparent from the affidavit that the action related to adverse interests in certain real property situated in California, and had as its object and purpose the exclusion of appellant from any interest in the property, the statutory requirements were fully satisfied. Hence, the Court held that since the affidavit was sufficient, the judgment thereafter entered was valid on its face and the order purporting to vacate the judgment was void and properly

disregarded by the trial court (*207 Cal. 221, 226)* .

In *Heidary v. Yadollahi (2002) 99 Cal. App. 4th 857, 121 Cal. Rptr. 2d 695* , cross-complainants entered into agreements with cross-defendants and a third cross-defendant concerning the ownership and operation of two gas stations. The cross-complaint alleged breaches of those agreements. The cross-complaint prayed for compensatory and punitive damages, although it specified the amount of compensatory damages sought in only a few causes of action, and never specified any amount of punitive damages. Cross-defendants' attorney received permission from the court to withdraw as their counsel, and the withdrawal order included the last known addresses for each cross-defendant. Several months later, plaintiff's counsel served a notice of continuance of the trial date, but that notice did not include cross-defendants or their former counsel. Neither cross-defendant appeared for the trial. The trial court, apparently without checking to see if cross-defendants had been given notice, ordered their answers to the cross-complaint stricken and their defaults entered for failure to appear at trial. The court continued the trial date again. The day after the court ordered the defaults, the cross-complainants filed a request for entry of default with the clerk. It was served on the cross-defendants by mail on the same date, at the addresses included in the order relieving their counsel. The default was entered by the clerk the same day the request was filed and mailed to the cross-defendants. Approximately one month later, the cross-complainants filed an ex parte application for entry of judgment based on the defaults, including a "statement of damages" sought. The statement made no distinction between the varied claims asserted against each cross-defendant, and simply requested general and punitive damages totaling $942,952.37. The cross-complainants did not serve cross-defendants with any of the documents supporting the entry of judgment. The judgment was entered the application and supporting documents were filed, and in the exact total amount requested in the statement of damages. It is not clear when cross-defendants first became aware of the judgment entered against them, but the record suggests it may have been when the cross-complainants recorded an abstract of judgment and a lien. Less than one month later, cross-defendants re-retained their previous lawyer and filed a motion to vacate the judgment. They argued the judgment was void because they had never received notice of the trial, and the court had no power to enter their defaults. They also argued that the damages awarded in the judgment were in excess of the damages specified in the complaint. The court denied the motion to vacate on the grounds the amounts of the judgments were supported by the cross-complaint (*99 Cal. App. 4th 857, 859-861)* .

The Court of Appeal reversed. The court held first that the cross-defendants were not constrained by the six-month time limitation for moving to vacate the judgment in *Code Civ. Proc. § 473(b)* because the plaintiff neglected to inform them of the trial date; the court improperly ordered their default for failing to appear apparently without confirming they were notified; the cross-complainants sought a type and amount of damages not specified in their cross-complaint; and the court granted that request, so that none of the acts was attributable to anything done by cross-defendants (*99 Cal. App. 4th 857, 862)* . The court then held that the default order and judgment were void on their face, so that the motion was governed by *Code Civ. Proc. § 473(d)*, under which the court has authority to set aside the judgment at any time. The Court of Appeal found that the trial court had no power to enter cross-defendants' defaults when they failed to appear at the trial; the court's error was compounded by the fact they were never given notice of the trial, but that was irrelevant in establishing their right to relief. Even assuming they had been properly noticed, the court's only options when they did not appear were to proceed with the trial in their absence, or to continue the trial (*99 Cal. App. 4th 857, 862-864)* . The court also found the judgment void for awarding damages clearly exceeding what was pled, both because the amount was higher and because each cross-defendant was held jointly liable for the damages alleged against the other (*99 Cal. App. 4th 857, 864-868)* .

California Points & Authorities

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Volume 7 Chapters 70 DEFAULTS
CHAPTER 70 DEFAULTS, DEFAULT JUDGMENTS, AND RELIEF FROM JUDGMENTS AND ORDERS
PART II. FORMS
B. Statutory Relief From Void Judgment or Order Under Code Civ. Proc. § 473(d)
1. Relief From Judgment or Order Void on Its Face

7-70 California Points & Authorities § 70.311

§ 70.311 Supporting Motion to Set Aside Judgment or Order Void on Its Face [Code Civ. Proc. § 473(d)]--Judgment Is Void for Lack of Jurisdiction

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside judgment or order void on its face (see § 70.310[1]).*]

THE COURT SHOULD SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] IN THIS ACTION AS VOID ON ITS FACE BECAUSE IT APPEARS FROM THE JUDGMENT ROLL THAT THE COURT _____ [LACKED JURISDICTION OF THE SUBJECT MATTER *or* LACKED JURISDICTION OF THE DEFENDANT *or* EXCEEDED ITS JURISDICTION BY GRANTING RELIEF THAT IT HAD NO POWER TO GRANT].

Judgment Void for Lack of Jurisdiction. Any judgment or order of any court is absolutely void if it appears that there was a lack of jurisdiction either of the subject matter or of the defendant (*Hahn v. Kelly (1868) 34 Cal. 391, 402* (overruled on other grounds in *Belcher v. Chambers (1879) 53 Cal. 635, 643)* ; *County of Ventura v. Tillett (1982) 133 Cal. App. 3d 105, 110, 183 Cal. Rptr. 741*). [It is also void to the extent that the court which rendered the judgment exceeded its jurisdiction in granting relief that it had no power to grant (*County of Ventura v. Tillett (1982) 133 Cal. App. 3d 105, 110, 183 Cal. Rptr. 741*)].

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to set aside a judgment or order that is void on its face. The ground for relief set forth in this form is that the judgment or order is void for lack of jurisdiction, either of the person or of the subject matter, or because the court exceeded its jurisdiction [*County of Ventura v. Tillett (1982) 133 Cal. App. 3d 105, 110, 183 Cal. Rptr. 741]* .

This form should be combined with a memorandum generally supporting a motion to set aside judgment or order void on its face [*see § 70.310[1]*].

This form may be adapted for use in a trial or appellate brief.

See also *§ 70.310[2]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should specify how the judgment is void (for example, the court lacked personal jurisdiction because service was not made in the manner required by law), and demonstrate how the defect is shown by examination of the judgment roll.

In proceedings to set aside a judgment or order that is void on its face, no supporting or opposing affidavit or declaration is prepared. Counsel should, however, request that the court take judicial notice of the judgment or order and the judgment roll, or, if some other paper or report filed in the action is relevant to the issue of validity, that particular paper or report. For matters subject to judicial notice, and the manner of requesting it, see *Evid. Code §§ 452(d), 453*. For discussion of documents that are included in the judgment roll for purposes of *Code Civ. Proc. § 473(d)*, see *§ 70.310[2][d][iii]*.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 70.430 -70.453* may be used to oppose this form.

[d] Related Points and Authorities

For memoranda of points and authorities for use proceedings relating the subject matter or personal jurisdiction of the court, see Ch. 132, *Jurisdiction: Personal Jurisdiction and Inconvenient Forum* , and Ch. 133, *Jurisdiction: Subject Matter Jurisdiction* .

[3] Discussion of Authorities

[a] Judgment Void for Lack of Jurisdiction

Hahn v. Kelly *(1868) 34 Cal. 391* , involved an action to quiet title in real property which had been originally owned in part by one Jones. As the result of a judgment against Jones, his real property interest had been sold to plaintiff at an execution sale. Defendant, who had obtained a later judgment against Jones, sought to execute his judgment by an execution sale of the same property. Plaintiff brought the action to quiet title and restrain the sale by defendant. The trial court granted judgment for defendant on the ground that service by publication of summons in the earlier action, through which plaintiff had obtained his interest in the property, was defective and that the judgment was therefore void. The plaintiff appealed.

The Supreme Court reversed the judgment and ordered a new trial. Although the Court concluded that the judgment in the original case was valid on its face, the Supreme Court stated the rule that, when a judgment of a court of superior jurisdiction is offered in evidence during a trial, that judgment may be attacked on the ground that the court which rendered it had no jurisdiction either of the subject matter or of the defendant or of both; any judgment of any Court is absolutely void, if it appears that there was a want of jurisdiction in either respect (*34 Cal. 391, 402)* .

Note that *Hahn v. Kelly (1868) 34 Cal. 391* was overruled on another ground in *Belcher v. Chambers (1879) 53 Cal. 635, 643* .

County of Ventura v. Tillett *(1982) 133 Cal. App. 3d 105, 183 Cal. Rptr. 741 , cert. denied, 460 U.S. 1051, 103 S. Ct. 1497, 75 L. Ed. 2d 929 (1983)* , involved an action by a county for reimbursement of welfare funds that the county provided in support of defendant's two minor children, and for an order that defendant continue to make monthly child support payments to the county. Defendant and the county executed a "Judgment for Child Support and Reimbursement of Welfare Funds by Stipulation." Defendant thereafter moved to set aside and vacate the stipulated judgment when the county commenced proceedings on violation of summary probation for nonpayment of child support and arrears. The trial court denied the motion and defendant appealed.

The court of appeal reversed the order and remanded the case with directions. It appears that defendant's motion was equitable (*see 133 Cal. App. 3d 105, 115* , discussing applicability of laches; for discussion and forms relating to motions in equity, *see § 70.480* et seq.). The court, however, in reversing, stated that a judgment is void on its face if the court which rendered the judgment lacked personal or subject matter jurisdiction or exceeded its jurisdiction in granting relief which the court had no power to grant (*133 Cal. App. 3d 105, 110)* . The motion was based on the contention that the judgment was constitutionally invalid. Since California courts do not have jurisdiction to render judgments that violate the California or United States Constitutions, the defendant's argument was, essentially, that the superior court's judgment was in excess of the court's subject matter jurisdiction (*133 Cal. App. 3d 105, 110)* .

Note that *County of Ventura v. Tillett (1982) 133 Cal. App. 3d 105, 183 Cal. Rptr. 741 , cert. denied, 460 U.S. 1051, 103 S. Ct. 1497, 75 L. Ed. 2d 929 (1983)* , was disapproved on another point in *County of Los Angeles v. Soto (1984) 35 Cal. 3d 483, 492 n.4, 198 Cal. Rptr. 779, 674 P.2d 750*).

[4] Additional Authorities

[a] Judgment Void for Lack of Jurisdiction

The facts and procedural background of *People v. Greene (1887) 74 Cal. 400, 16 P. 197* , are discussed in *§ 70.310[3][b]* . In *People v. Greene,* the court held that the trial court's judgment was void and directed that it be set aside. The Court stated that the version of *Code Civ. Proc. § 473* then in existence (prior to the 1933 amendment adding the provision, now the 6th paragraph, for a motion to set aside void judgments), had no application to a pretended judgment which was shown by the judgment roll to be void for want of jurisdiction, either of the person of the defendant or of the subject matter and concluded that the time restraints under that section did not apply in such cases (*74 Cal. 400, 405-406)* .

Capital Bond and Invest. Co. v. Hood (1933) 218 Cal. 729, 24 P.2d 765 , involved an order setting aside a decree of foreclosure of bonds issued under an act providing for improvement of streets. The Supreme Court affirmed the order, stating that when the trial court entered judgment on the foreclosure on one of the bonds it had no jurisdiction of the subject matter because the bond was issued prior to an amendment of the act permitting foreclosure of such bonds by court action (*218 Cal. 729, 731)* .

In *John Siebel Associates v. Keele (1986) 188 Cal. App. 3d 560, 233 Cal. Rptr. 231* , the parties entered into a stipulated judgment whereby the defendant agreed to pay 15 percent annual interest on the principal, and the remaining balance plus accrued interest would become due on default. The defendant filed a motion seeking, among other things, to vacate the judgment as partially void on its face, contending that the stipulated judgment awarded a usurious interest rate of 15 percent. The trial court denied the motion and the defendant appealed. Although the court of appeal affirmed the trial court's judgment and found that a usurious interest rate was not awarded, the court stated that a stipulated judgment is as conclusive as one entered after trial and is subject to a motion to vacate. *Citing County of Ventura v. Tillett (1982) 133 Cal. App. 3d 105, 110-111, 183 Cal. Rptr. 741* , discussed under [3], *above,* the court stated that motions to vacate void judgments may be made at any time after judgment, that a judgment is void on its face if the trial court exceeded its jurisdiction by granting relief that it had no power to grant, that jurisdiction cannot be conferred on a

trial court by the consent of the parties, and, thus, the fact that a judgment is entered pursuant to stipulation does not insulate the judgment from attack on the ground that it is void (*188 Cal. App. 3d 560, 564 n.3*).

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7-70 California Points & Authorities § 70.312

§ 70.312 Supporting Motion to Set Aside Judgment or Order Void on Its Face [Code Civ. Proc. § 473(d)]--Judgment May Be Attacked at Any Time

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside judgment or order void on its face (see § 70.310[1]).*]

THE MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] IN THIS ACTION AS VOID ON ITS FACE IS TIMELY BECAUSE A JUDGMENT OR ORDER VOID ON ITS FACE MAY BE VACATED ON MOTION MADE AT ANY TIME.

Judgment May Be Attacked at Any Time. A judgment or order void on its face may be vacated on motion made at any time, or the court may, of its own motion, set it aside or disregard it, regardless of how the invalidity is brought to its attention (*Morgan v. Clapp (1929) 207 Cal. 221, 224, 277 P. 490* ; *Nagel v. P & M Distributors, Inc. (1969) 273 Cal. App. 2d 176, 179-180, 78 Cal. Rptr. 65*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to set aside a judgment or order that is void on its face. The ground for relief set forth in this form is that a judgment or order void on its face may be vacated on motion made at any time [*Morgan v. Clapp (1929) 207 Cal. 221, 224, 277 P. 490* ; *Nagel v. P & M Distributors, Inc. (1969) 273 Cal. App. 2d 176, 179-180, 78 Cal. Rptr. 65]* .

This form should be combined with a memorandum generally supporting a motion to set aside judgment or order void on its face [*see § 70.310[1]*].

This form may be adapted for use in a trial or appellate brief.

See also *§ 70.310[2]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, in this case, counsel would point out that the motion is timely because a motion to set aside a judgment or order that is void on its face may be filed at any time.

[c] Related Points and Authorities

For memoranda of points and authorities for use proceedings relating the subject matter or personal jurisdiction of the court, see Ch. 132, *Jurisdiction: Personal Jurisdiction and Inconvenient Forum* , and Ch. 133, *Jurisdiction: Subject Matter Jurisdiction* .

[3] Discussion of Authorities

[a] Judgment May Be Attacked at Any Time

Morgan v. Clapp *(1929) 207 Cal. 221, 277 P. 490* , involved an action to quiet the plaintiff's title to certain real property. Service of summons was by publication, and judgment as prayed for in the complaint was entered. More than two years later the defendant moved to set aside and vacate the judgment and decree on the ground that the affidavit accompanying the request for an order directing publication of summons failed to comply with statutory requirements by not averring sufficient probative facts to establish the existence of a cause of action against the defendant. The motion was granted. When the cause came on again for hearing in the trial court, the trial court reopened the proceedings looking to the vacation of the judgment on the ground that transferees of the plaintiff had not been served with the notice of motion to vacate the judgment. On reconsideration, the trial court concluded that the affidavit, filed by the original plaintiff, was sufficient to meet the code requirements and denied the defendant's motion to vacate the default judgment against her. The trial court also decreed that the substituted plaintiffs were the owners in fee. The defendant appealed.

The Supreme Court affirmed. The Court acknowledged that it is well settled that a court has no power to set aside or vacate, on motion, a judgment not void on its face, unless the motion is made within a reasonable time. Further, stated the Court, it is definitely determined that such time will not extend beyond the limit fixed by *Code Civ. Proc. § 473*. In the absence of application made within the time specified in Section 473, a judgment which is not invalid on its face is entirely beyond the reach of the court that rendered it, except in a separate action; and any order of the court purporting to vacate it is beyond the jurisdiction of the court, and therefore, void. However, a judgment or order void on its face may be vacated on motion made at any time, or the court may, of its own motion, set it aside or disregard it, regardless of how the invalidity is brought to its attention (*207 Cal. 221, 224)* . The Court stated that should it be determined that the affidavit accompanying the request for order directing publication of summons fully satisfied the requirements of the code, the underlying judgment would not be void on its face, and the attempt of the court to vacate it on motion made more than a year after entry would be beyond the jurisdiction of the court. The order purporting to vacate the judgment would occupy no better position than a judgment that is void on its face. Like such a judgment, the order would be assailable wherever and whenever it might be produced (*207 Cal. 221, 225)* . The Court, after reviewing the judgment roll in the case, concluded that the order purporting to vacate the judgment was void and properly disregarded by the trial court (*207 Cal. 221, 226)* .

Nagel v. P & M Distributors, Inc. *(1969) 273 Cal. App. 2d 176, 78 Cal. Rptr. 65* , involved a contract dispute between plaintiff and defendant corporation. Plaintiff filed a request to enter defendant's default, filing with it a declaration of service stating that defendant had been served pursuant to former Code Civ. Proc. § 410 [*now see Code*

Civ. Proc. § 412.30]. The request was denied because service had not been made pursuant to former Code Civ. Proc. § 411 [*now see Code Civ. Proc. § 416.10*]. Thereafter the process server executed a second declaration of service alleging that the service was on a person authorized to receive service of process pursuant to former Code Civ. Proc. § 411. Although a second request for entry of default was denied, plaintiff's third such request, made nearly a year after service was alleged to have been made on defendant, was granted and judgment entered thereon. On receiving notice of a levy of execution in connection with the judgment, defendant moved to vacate the judgment on the ground that jurisdiction was lacking because the person served on the corporation's behalf was a sales representative who was not authorized to accept service as provided for in relevant sections of the Corporations Code. Defendant's motion was granted.

The court of appeal affirmed the order setting aside the default and judgment. The court cited earlier cases for the proposition that a judgment or order which is void on the face of the record may be set aside at any time by the court that made it on the ground that it is void (*273 Cal. App. 2d 176, 179-180)* . Thus, the court said, the fact that defendant waited 10 months after it apparently learned of the entry of the judgment and the levy of execution did not preclude it from attacking the validity of the judgment by a motion to vacate (*273 Cal. App. 2d 176, 180)* . Examining the judgment roll, the court found that the judgment was void on its face for lack of jurisdiction in that there was nothing before the court alleging that the person receiving service was authorized to do so (*273 Cal. App. 2d 176, 181-182)* .

[4] Additional Authorities

[a] Judgment May Be Attacked at Any Time

In *Forbes v. Hyde (1866) 31 Cal. 342* , plaintiff purchased a lot in a sheriff's sale, made under a judgment foreclosing on a mortgage. Defendant also claimed title derived from the mortgagee. Plaintiff commenced an action for ejectment and recovered judgment. Defendant appealed.

The Supreme Court reversed the judgment and ordered a new trial. The Court stated a judgment absolutely void on its face may be attacked anywhere, directly or collaterally, whenever it presents itself, either by parties or strangers. It is simply a nullity, and can be neither the basis nor evidence of any right whatever. A judgment against a party over whose person the court has not acquired jurisdiction is void for want of jurisdiction (*31 Cal. 342, 347)* . The Court observed that the plaintiff's title to the land was derived through a judgment in favor of a judgment creditor who foreclosed on a mortgage, and a sheriff's sale and deed thereunder. However, it appeared from the record that there was a total absence of any legal evidence tending to prove an essential jurisdictional fact relating to an order to publish summons. For that reason the order for publication, and the publication pursuant to it, were absolutely void, and the court failed to acquire jurisdiction of the person of the defendant (*31 Cal. 342, 355)* .

The facts and procedural background of *People v. Greene (1887) 74 Cal. 400, 16 P. 197* , are discussed in *§ 70.310[3][b]* . In *People v. Greene*, the court held that the trial court's judgment was void and directed that it be set aside. The Court was faced with the issue of whether the superior court, after the lapse of a period of twelve years from the entry of a judgment could set it aside even if void (*74 Cal. 400, 403)* . The question arose because there was authority that no motion could be entertained by a district court to set aside a judgment on any ground, including for lack of jurisdiction over the defendant, after the expiration of the term during which it was entered. The rule originated under a former system of practice in California in which trial courts sat during terms. At the time of the opinion, however, terms of court had been abolished and the relief that formerly could be obtained only during the term could, under the version of *Code Civ. Proc. § 473* then existing, be sought within a reasonable time up to six months (the case was decided before the 1933 amendment that added the provision, *now see Code Civ. Proc. § 473(d)*, for a motion to set aside a void judgment).

The Court stated that a judgment which is void on its face, and which requires only an inspection of the judgment roll to demonstrate its want of vitality is a dead limb on the judicial tree that should be lopped off if the power to do so exists. It can bear no fruit to the plaintiff, but is a constant menace to the defendant. A court, whose process is abused by an

attempt to enforce a void judgment, will interfere, for its own dignity and for the protection of its officers, to arrest further action. The Court concluded that former Section 473, and its time limitation, was not intended to apply to such cases (*74 Cal. 400, 405)* .

In *Luckenbach v. Krempel (1922) 188 Cal. 175, 204 P. 591* , on application of the plaintiff, the trial court appointed a receiver over the property of a judgment debtor company to collect on a money judgment. Thereafter the receiver began an action against the defendants. The defendants moved for an order vacating orders appointing the receiver and authorizing him to sue. The court denied the motion, and the defendants appealed and petitioned the Supreme Court for a writ of supersedeas to restrain further proceedings by the receiver and in the court below, pending the appeals.

The Supreme Court issued the writ of supersedeas staying all proceedings in the court below in any action begun by the receiver. The Court stated that the motions to set aside the order appointing the receiver were made on matters appearing on the face of the record and on the ground that the court had no jurisdiction to appoint the receiver; in other words, that the order was void because of lack of jurisdiction in the court to make it. If that order was void, the orders purporting to authorize the receiver to sue would also be void. The Court cited the rule that a judgment or order which is void on the face of the record thereof may be set aside at any time by the court that made it (*188 Cal. 175, 176-177)* .

In *Estate of Poder (1969) 274 Cal. App. 2d 786, 79 Cal. Rptr. 484* , setting aside a decree of final distribution and an order admitting a will to probate, the court stated that when the record on its face discloses a want of jurisdiction a judgment or order may be attacked at any time on this ground. The court added that statutes of limitations do not protect a void judgment (*274 Cal. App. 2d 786, 790)* .

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7-70 California Points & Authorities § 70.313

§ 70.313 Supporting Motion to Set Aside Judgment or Order Void on Its Face [Code Civ. Proc. § 473(d)]--Intervention to Set Aside Void Judgment

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside judgment or order void on its face (see § 70.310[1]).*]

THE COURT SHOULD PERMIT INTERVENTION IN THIS ACTION BY THE MOVING PARTY BECAUSE INTERVENTION IS ALLOWED AFTER JUDGMENT FOR THE PURPOSE OF SETTING ASIDE A JUDGMENT THAT IS VOID ON ITS FACE.

Intervention to Set Aside Void Judgment. Intervention is allowed after judgment for the purpose of setting aside a judgment that is void on its face (*Johnson v. Hayes Cal Builders, Inc. (1963) 60 Cal. 2d 572, 575-576, 35 Cal. Rptr. 618, 387 P.2d 394*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to set aside a judgment or order that is void on its face by a person seeking to intervene for the purpose of setting aside the void judgment or order [*Johnson v. Hayes Cal Builders, Inc. (1963) 60 Cal. 2d 572, 575-576, 35 Cal. Rptr. 618, 387 P.2d 394]* .

This form should be combined with a memorandum generally supporting a motion to set aside judgment or order void on its face [*see § 70.310[1]*].

This form may be adapted for use in a trial or appellate brief.

See also *§ 70.310[2]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel would refer to facts that establish the applicant's right to intervene, or his or her interest permitting intervention, and those facts would normally be contained in a declaration supporting the motion to intervene and set aside the void judgment or order [*see Code Civ. Proc. § 387*]. The question of whether the person should or must be permitted to intervene is independent of the question of whether the judgment or order should be set aside as void on its face, and grounds for the latter must appear on the judgment roll.

For discussion regarding evidentiary support for facts stated in counsel's argument generally, see *§ 70.10[2][b]*. For further discussion and forms relating to mandatory and permissive intervention, see California Forms of Pleading and Practice, Ch. 395, *Parties* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For discussion and forms relating to mandatory and permissive intervention, including motion to intervene and complaint in intervention, see California Forms of Pleading and Practice, Ch. 395, *Parties* (Matthew Bender).

[d] Related Points and Authorities

For memoranda of points and authorities relating to intervention by a nonparty generally, see Ch. 124, *Intervention* .

[3] Discussion of Authorities

[a] Intervention to Set Aside Void Judgment

In ***Johnson v. Hayes Cal Builders, Inc.*** *(1963) 60 Cal. 2d 572, 35 Cal. Rptr. 618, 387 P.2d 394* , the parties stipulated to the release of plaintiff's writ of attachment on obtaining a release of attachment bond. The bond was subsequently issued by Continental. Thereafter, defendant failed to answer certain interrogatories plaintiff had served on it, its answer to plaintiff's first amended complaint was stricken, its default was then entered within the requisite statutory time, and after a default hearing, judgment was entered for plaintiff. Seven months after the default, Continental moved to set aside the default and judgment and to intervene on the ground of the invalidity of the judgment. The trial court ordered the judgment set aside and permitted Continental to intervene. Plaintiff appealed.

The Supreme Court reversed, but held that intervention was proper to set aside a judgment void on its face. It noted that because Continental's motion was more than six months after the default had been entered, it could not have been addressed to the discretion of the trial court under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)* (*60 Cal. 2d 572, 576)* . Instead, Continental's contention had to be that the judgment was void on its face and therefore could be set aside despite the expiration of the six-month period. Continental's problem was that former Code Civ. Proc. § 387 required intervention "before trial" (present *Code Civ. Proc. § 387* merely provides that intervention must be on "timely application"), and prior case law had held that a default hearing was the equivalent of trial. However, the Court reasoned first that the contention that a default judgment was void on its face questioned the authenticity of the default hearing and, therefore, no legitimate trial had taken place. Moreover, the Court pointed out that any judgment void on its face may be set aside by the court on its own motion so that intervention in this case did no more than direct the Court's attention to a matter which it could have examined and resolved itself. However, the Court held that the judgment was not void on its face since the alleged defect in the judgment did not appear on the judgment roll (*60 Cal. 2d 572, 577-578)* .

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7-70 California Points & Authorities § 70.314

§ 70.314 Supporting Motion to Set Aside Judgment or Order Void on Its Face [Code Civ. Proc. § 473(d)]--Motion in Conjunction With Motion to Quash Is Not General Appearance

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside judgment or order void on its face (see § 70.310[1]).*]

A MOTION UNDER CODE OF CIVIL PROCEDURE SECTION 473(d), WHEN JOINED WITH A MOTION TO QUASH UNDER CODE OF CIVIL PROCEDURE SECTION 418.10, DOES NOT CONSTITUTE A GENERAL APPEARANCE BY THE DEFENDANT.

Motion in Conjunction With Motion to Quash Does Not Constitute General Appearance. A motion under *Code of Civil Procedure Section 473(d)*, when joined with a motion to quash under *Code of Civil Procedure Section 418.10*, does not constitute a general appearance by the defendant (*Code Civ. Proc. § 418.10(d)*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to set aside a judgment or order that is void on its face. This form is for use in obtaining relief from a default judgment, when a defendant files a motion under *Code Civ. Proc. § 473(d)*, in conjunction with a motion to quash service of summons for lack of jurisdiction [*see Code Civ. Proc. § 418.10*].

This form should be combined with a memorandum generally supporting a motion to set aside judgment or order void on its face [*see § 70.310[1]*].

This form may be adapted for use in a trial or appellate brief.

See also *§ 70.310[2]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, in this case, counsel would point out that the motion to set aside is combined with a motion to quash, and by statute the combined motion does not constitute a general appearance [*Code Civ. Proc. § 418.10(d)*].

[c] Related Points and Authorities

For forms of memoranda supporting a motion to quash under *Code Civ. Proc. § 418.10* which may in be combined with this form, see Ch. 132, *Jurisdiction: Personal Jurisdiction and Inconvenient Forum* .

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7-70 California Points & Authorities § 70.315

§ 70.315 Supporting Motion to Set Aside Judgment or Order Void on Its Face [Code Civ. Proc. § 473(d)]--Pending Appeal Will Not Prevent Relief

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside judgment or order void on its face (see § 70.310[1]).*]

THE FACT THAT AN APPEAL IS PENDING IN THIS CASE DOES NOT DEPRIVE THE TRIAL COURT OF JURISDICTION TO CONSIDER WHETHER TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] AS VOID ON ITS FACE.

Pending Appeal Will Not Prevent Relief From Void Judgment or Order. As an exception to the general rule that a pending appeal deprives the trial court of jurisdiction of the cause, a court may set aside a void order at any time. An appeal will not prevent the court from at any time lopping off what has been termed a dead limb on the judicial tree--a void order (*Andrisani v. Saugus Colony Limited (1992) 8 Cal. App. 4th 517, 523* , 10 Cal. Rtpr. 2d 444).

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to set aside a judgment or order that is void on its face. This form is for use when a notice of appeal has been filed on the void judgment or order.

For a tactical advantage, counsel may consider using this argument in a reply memorandum to respond to a contention in the opposing memorandum that a trial court is deprived of jurisdiction by the taking of an appeal, rather than raising the point in his or her supporting memorandum [*see Code Civ. Proc. § 916(a)*; *Andrisani v. Saugus Colony Limited (1992) 8 Cal. App. 4th 517, 523, 10 Cal. Rptr. 2d 444]* .

This form should be combined with a memorandum generally supporting a motion to set aside judgment or order void on its face [*see § 70.310[1]*].

This form may be adapted for use in a trial or appellate brief.

See also *§ 70.310[2]* for related chapters in California Forms of Pleading and Practice (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, in this case, counsel would point out that although an appeal is pending in the action, the trial court maintains jurisdiction to determine the motion to set aside the facially void judgment or order.

[3] Discussion of Authorities

[a] Pending Appeal Will Not Prevent Relief From Void Judgment or Order

In ***Andrisani v. Saugus Colony Limited*** *(1992) 8 Cal. App. 4th 517* , 10 Cal. Rtpr. 2d 444, the court of appeal, in a prior unpublished opinion, had reversed the dismissal of plaintiff's complaint for failure to post security on the ground that the trial court abused its discretion in setting the amount of security under the vexatious litigant statute [*see Code Civ. Proc. § 391.1*]. While a petition for review in the Supreme Court was pending, the trial court conducted a new hearing to set the amount of security and issued a new order requiring a lower amount of security. The trial court then issued a minute order granting defendants' motion to dismiss for failure to furnish that security. The Supreme Court summarily denied the pending petition for review, and remittitur to the trial court issued. The trial court later entered the order of dismissal and plaintiff appealed. Shortly thereafter, the trial court, apparently realizing that the remittitur had not issued prior to its orders setting the security and dismissing the case, vacated those orders and reset the matter for hearing. After the hearing, the trial court again ordered plaintiff to furnish security and subsequently granted a motion to dismiss for failure to furnish it. Plaintiff appealed from that order.

The court of appeal dismissed the first of these new appeals as moot and on the second appeal affirmed the judgment. Plaintiff contended that the trial court lacked jurisdiction to enter its order dismissing appellant's complaint for failure to furnish security because a petition for review of the matter was pending in the Supreme Court and the remittitur had not issued. The court acknowledged that although under the general rule the perfecting of an appeal stays proceedings in the trial court on the judgment or order appealed from [*see Code Civ. Proc. § 916(a)*], it is subject to certain exceptions. Quoting from *People v. West Coast Shows, Inc. (1970) 10 Cal. App. 3d 462, 467, 89 Cal. Rptr. 290* , the court stated that a court may set aside a void order at any time. An appeal will not "prevent the court from at any time lopping off what has been termed a dead limb on a judicial tree--a void order." Such a void order may be set aside on the court's motion and by a judge, other than the one who made it. In addition, the setting aside of a void order by the trial court while an appeal is pending renders the appeal moot and subject to dismissal (*8 Cal. App. 4th 517, 523)* .

Although *Andrisani, above,* involves a *sua sponte* order setting aside a void judgment, it appears that a party may also bring the defect to the court's attention by motion since a court may set aside a judgment or order that is void on its face regardless of how the invalidity is brought to its attention [*Morgan v. Clapp (1929) 207 Cal. 227, 224, 277 P. 490]* .

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[Reserved]

§§ 70.316[Reserved]

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7-70 California Points & Authorities § 70.330

§ 70.330 Supporting Motion to Set Aside Judgment or Order Void on Its Face [Code Civ. Proc. § 473(d)] Based on Defective Summons or Manner of Service--General Form--Statutory Requirement for Service of Summons

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside judgment or order void on its face (see § 70.310[1]).*]

THE COURT SHOULD SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] IN THIS ACTION AS VOID ON ITS FACE BECAUSE IT APPEARS FROM THE RECORD THAT THE COURT LACKED PERSONAL JURISDICTION OVER DEFENDANT.

A. Statutory Requirement for Service of Summons. Except as otherwise provided by statute, a summons must be served on a person within California in the manner prescribed in *Code of Civil Procedure, Section 413.10 et seq.*, and a defendant has an absolute right to demand that process be issued against him or her in a manner prescribed by law (*Code Civ. Proc. § 413.10(a); Mannesmann DeMag, Ltd. v. Superior Court (1985) 172 Cal. App. 3d 1118, 1123, 218 Cal. Rptr. 632*).

B. Judgment Void on Its Face for Insufficient Service. When the record speaks as to what was done on the subject of service, it will not be presumed that something other, different, or additional was done; and when what was done is insufficient as a matter of law to give the court jurisdiction, the judgment is void on its face when the remainder of the record is silent on the question of service, appearance, and default of the party affected (*Steuri v. Junkin (1938) 27 Cal. App. 2d 758, 760, 82 P.2d 34*).

[*When appropriate, add points and authorities supporting additional grounds for relief from void judgment or order (see, e.g., §§ 70.335 -70.421). In addition, when applicable, add points and authorities based on particular grounds for granting relief from a judgment or order that is void on its face because of defective service (see, e.g., § 70.331 et seq.).*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to set aside a judgment or order when the defendant was not served with a summons in the form or manner specified by statute, and the failure or deficiency is apparent by inspection of the judgment roll. This form may be adapted as necessary for use by a party other than a defendant (for example, a cross defendant).

These points and authorities should be combined with a general memorandum supporting a motion for relief from a void judgment or order [*see § 70.310[1]*]. In addition, when applicable, these points and authorities should be combined with points and authorities that support a defendant's motion for relief from a judgment or order that is void on its face because of defective service in particular situations, for example:

- The default should be set aside because defendant was not served [*see § 70.331*].

- Personal jurisdiction was not conferred because the summons is substantially defective [*see § 70.332*].

- Personal jurisdiction was not conferred because the manner of service was improper [*see § 70.333*].

- Notice was inadequate because it did not substantially comply with statutory requirements for service of summons [*see § 70.334*].

For points and authorities for use when combining a motion for relief under *Code Civ. Proc. § 473(d)*, with a motion to quash service of summons for lack of jurisdiction, see *§ 70.314[1]* [*see also Code Civ. Proc. § 418.10*; forms and discussion in Ch. 132, *Jurisdiction: Personal Jurisdiction and Inconvenient Forum*].

These points and authorities may also be combined, when appropriate, with points and authorities supporting relief from a void judgment on other particular grounds [*see, e.g., §§ 70.335 -70.421*]. They may also be adapted for use in a trial or appellate brief.

See also *§ 70.310[2]* for additional general considerations relating to a motion for relief from a void judgment or order and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should refer to the specific document in the judgment roll, or the absence of proof in the judgment roll, that shows that the defendant was not served with a summons in the form or manner specified by statute.

In proceedings to set aside a judgment or order that is void on its face, no supporting or opposing affidavit or declaration is prepared. Counsel should, however, request that the court take judicial notice of the judgment or order and the judgment roll, or, if some other paper or report filed in the action is relevant to the issue of validity, that particular paper or report. For matters subject to judicial notice, and the manner of requesting it, see *Evid. Code §§ 452(d), 453*. For discussion of documents that are included in the judgment roll for purposes of *Code Civ. Proc. § 473(d)*, see *§ 70.310[2][d][iii]*.

[c] Methods of Service of Summons

The five alternative methods for the serving of summons authorized by the basic service of summons statutes are [*Code Civ. Proc. § 415.10 et seq.*]:

- Personal delivery of a copy of the summons and complaint to the person to be served [*Code Civ. Proc. § 415.10*].

- The leaving of a copy of the summons and complaint with a specified person at the defendant's usual place of abode, usual place of business or, if no physical address is known, at the person's usual mailing address, other than a United States Postal Service post office box, with the person who is apparently in charge [*Code Civ. Proc. § 415.20*].

- The sending of a copy of the summons and complaint by ordinary mail to the person to be served with a request that he or she execute and return an enclosed statutory form of "Acknowledgment of Receipt of Summons" to the sender [*Code Civ. Proc. § 415.30*].

- The sending of a copy of the summons and complaint to the person to be served, by first-class mail, postage prepaid, requiring a return receipt [*Code Civ. Proc. § 415.40*].

- The service of summons by publication [*Code Civ. Proc. § 415.50*].

Service by mail under *Code Civ. Proc. § 415.40* may be used only to effectuate service of summons on a person who is outside the State of California [*Code Civ. Proc. § 415.40*]. Any of the other four methods of serving summons may be used to effectuate the service of summons on a person either within or outside of the State of California [*Code Civ. Proc. § 413.10*; *see* 1969 Annual Report, Judicial Council of California, p. 43 (Comment to *Code Civ. Proc. § 415.10*)].

[d] Absence of Proof of Service in Judgment Roll Not Definitive

Counsel should use this memorandum with caution. A default judgment may be affirmed despite the absence or defect of proof of service in the judgment roll, when service as required by statute was in fact made [*see, e.g., Hibernia S. and L. Soc. v. Matthai (1897) 116 Cal. 424, 426, 48 P. 370* (default judgment affirmed although judgment roll did not contain the summons with proof of service, when judgment recited that defendants were duly served, and trial court on proof of loss of originals authorized copies to be filed); for further discussion and authorities, *see § 70.461*].

[e] Alternative Relief When Improper Service Does Not Appear From Examination of Judgment Roll

In some instances a defect in manner of service may be established only by facts from sources outside the judgment roll. In these instances, the judgment is not void on its face but void in fact, and certain forms of points and authorities, particularly the *form in § 70.333[1]* , should be modified as necessary and combined with a memorandum supporting a motion for relief from a judgment valid on its face but void in fact [*see § 70.460 -70.463*; *see also* discussion in *§ 70.310[2*][d][iv]].

[f] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 70.440 -70.453* may be used to oppose these points and authorities.

[g] Related Pleading and Practice Chapters

For forms of a notice of motion relating to proceedings to quash service of summons on ground of lack of personal jurisdiction, see California Forms of Pleading and Practice, Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances* (Matthew Bender). For forms of notice of motion relating to service and return of summons,

see California Forms of Pleading and Practice, Ch. 518, *Service of Summons and Papers* (Matthew Bender).

[3] Discussion of Authorities

[a] Statutory Requirement for Service of Summons

Mannesmann DeMag, Ltd. v. Superior Court *(1985) 172 Cal. App. 3d 1118, 218 Cal. Rptr. 632* , involved a personal injury action in which the plaintiff filed an amendment to his complaint identifying Doe 13 as the company that manufactured a crane which malfunctioned and injured him. Just prior to expiration of the three year statute of limitations, the plaintiff attempted service of process on the company by delivering a copy of the summons, complaint and amendment to the company's supervisor and vice president. The company had actual knowledge that it was being sued. After the three-year period elapsed, the company moved to dismiss, alleging fatal defective service of process. The motion was denied by the trial court, and the defendant petitioned the court of appeal for writ mandate to require the trial court to set aside its order.

The court of appeal issued the writ of mandate. The court quoted *MJS Enterprises, Inc. v. Superior Court (1984) 153 Cal. App. 3d 555, 557, 200 Cal. Rptr. 286* (discussed in *§ 70.332[3]*), in support of its statement that summons is the process by which a court acquires personal jurisdiction over a defendant in a civil action, and a defendant has an absolute right to demand that process be issued against him in a manner prescribed by law (*172 Cal. App. 3d 1118, 1122)* . The court found that there was no indication on the face of the summons that the person served was not being served in an individual capacity and held that the summons was so incomplete on its face as to render it ineffective to impart notice to its recipient and therefore the attempted service on defendant did not satisfy the mandate of *Code Civ. Proc. § 412.30* (*172 Cal. App. 3d 1118, 1124)* .

[b] Judgment Void on Its Face for Insufficient Service

Steuri v. Junkin *(1938) 27 Cal. App. 2d 758, 82 P.2d 34* , involved a motion to set aside a judgment against a person on the ground that the judgment was void on its face. The moving party was named in a counterclaim, but had not previously been a party to the suit. No summons was ever issued on the counterclaim, nor was personal service ever had on the moving party as a party to the action or otherwise. The counterclaim was served by leaving a copy with the secretary of a defendant who was named in the original action. The trial court granted the motion to set aside the judgment and the plaintiff appealed.

The court of appeal affirmed. The court of appeal stated that the judgment did not recite service on the moving party, or his appearance, or default. But, on the contrary, the judgment roll showed that service was on the secretary of a defendant named in the original action. The court stated that when what occurred is conclusively established by the record, the contrary cannot be presumed. When the record speaks as to what was done on the subject of service, it will not be presumed that something other, different, or additional was done; and when what was done is insufficient as a matter of law to give the court jurisdiction, the judgment is void on its face when the remainder of the record is silent on the question of service, appearance, and default of the party affected (*27 Cal. App. 2d 758, 760)* .

[4] Additional Authorities

[a] Statutory Requirement for Service of Summons

In *Chaplin v. Superior Court (1927) 81 Cal. App. 367, 253 P. 954* , the court issued a writ of prohibition to restrain the respondent court from taking further proceedings under orders awarding alimony, child support, and counsel fees in a pending divorce action on the ground that they were void for lack of jurisdiction over the defendant. The court stated that in the absence of obtaining service on the defendant by any of the modes prescribed by statute, the ordinary rule appears to be that an order such as those in question is unauthorized and void (*81 Cal. App. 367, 371)* .

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7-70 California Points & Authorities § 70.331

§ 70.331 Supporting Motion to Set Aside Judgment or Order Void on Its Face [Code Civ. Proc. § 473(d)] Based on Defective Summons or Manner of Service--Entry of Default Is Proper Only if Defendant Was Served

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside judgment or order void on its face, based on a defective summons or manner of service (see § 70.310[1]).*]

THE COURT SHOULD SET ASIDE THE _____ [DEFAULT *or* DEFAULT JUDGMENT *or* DEFAULT AND DEFAULT JUDGMENT] IN THIS ACTION AS VOID ON ITS FACE BECAUSE IT APPEARS FROM THE RECORD THAT DEFENDANT WAS NOT SERVED WITH A SUMMONS IN THE ACTION.

Entry of Default Proper Only if Defendant Was Served. Entry of default and default judgment, by the clerk or by the court, may be had only if the defendant has been served and the plaintiff makes written application for entry of default and judgment with proof of service (*Code Civ. Proc. § 585*; *Steuri v. Junkin (1938) 27 Cal. App. 2d 758, 760, 82 P.2d 34*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to set aside a default judgment when the defendant was not served with a summons, and the failure or deficiency is apparent by inspection of the judgment roll.

This form may be adapted as necessary for use by a party other than a defendant (for example, a cross defendant).

These points and authorities should be combined with a general memorandum supporting a motion for relief from a void judgment or order based on a defective summons or manner of service [*see § 70.330[1]*].

These points and authorities may be adapted for use in a trial or appellate brief.

For related Pleading and Practice chapters, see *§ 70.330[2][g]*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if a default was entered on a cross complaint against the person against whom the default was taken, and the person was never served with the summons and the omission is disclosed by the judgment roll, counsel would refer to the fact of nonservice and the absence of proof in the judgment roll in arguing that the essential jurisdictional fact of service does not exist and that as a consequence the judgment should be set aside as void on its face [*see Steuri v. Junkin (1938) 27 Cal. App. 2d 758, 760, 82 P.2d 34* , discussed under [3], *below*].

In proceedings to set aside a judgment or order that is void on its face, no supporting or opposing affidavit or declaration is prepared. Counsel should, however, request that the court take judicial notice of the judgment or order and the judgment roll, or, if some other paper or report filed in the action is relevant to the issue of validity, that particular paper or report. For matters subject to judicial notice, and the manner of requesting it, see *Evid. Code §§ 452(d), 453*. For discussion of documents that are included in the judgment roll for purposes of *Code Civ. Proc. § 473(d)*, see *§ 70.310[2][d][iii]*.

[3] Discussion of Authorities

[a] Entry of Default Proper Only if Defendant Was Served

The facts and procedural background of ***Steuri v. Junkin*** *(1938) 27 Cal. App. 2d 758, 82 P.2d 34* , are discussed in *§ 70.330[3][b]*. In *Steuri v. Junkin*, the court of appeal affirmed the trial court's order granting the motion to set aside the judgment. The court stated that when what occurred is conclusively established by the record, the contrary cannot be presumed. When the record speaks as to what was done on the subject of service, it will not be presumed that something other, different, or additional was done; and when what was done is insufficient as a matter of law to give the court jurisdiction, the judgment is void on its face when the remainder of the record is silent on the question of service, appearance, and default of the party affected (*27 Cal. App. 2d 758, 760)* .

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7-70 California Points & Authorities § 70.332

§ 70.332 Supporting Motion to Set Aside Judgment or Order Void on Its Face [Code Civ. Proc. § 473(d)] Based on Defective Summons or Manner of Service--Personal Jurisdiction Is Not Conferred if Summons Is Substantially Defective

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside judgment or order void on its face, based on a defective summons or manner of service (see § 70.310[1]).*]

THE COURT SHOULD SET ASIDE THE _____ [DEFAULT *or* DEFAULT JUDGMENT *or* DEFAULT AND DEFAULT JUDGMENT] IN THIS ACTION AS VOID ON ITS FACE BECAUSE IT APPEARS FROM THE RECORD THAT THE COURT LACKS PERSONAL JURISDICTION OVER THE DEFENDANT IN THAT THE SUMMONS IS SUBSTANTIALLY DEFECTIVE.

Personal Jurisdiction Not Conferred if Summons Substantially Defective. A summons is the process by which a court acquires personal jurisdiction over a defendant in a civil action. The form of a summons is prescribed by law, and this form must be substantially observed. Service of a substantially defective summons does not confer jurisdiction over a party (*MJS Enterprises, Inc. v. Superior Court (1984) 153 Cal. App. 3d 555, 557, 200 Cal. Rptr. 286* ; *see Earl W. Schott, Inc. v. Kalar (1993) 20 Cal. App. 4th 943, 946-947, 24 Cal. Rptr. 2d 580* (failure to name business entity in its proper capacity).

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to set aside a default judgment when personal jurisdiction was not conferred because of a substantially defective summons deficiency is apparent by inspection of the judgment roll.

This form may be adapted as necessary for use by a party other than a defendant (for example, a cross defendant).

These points and authorities should be combined with a general memorandum supporting a motion for relief from a void judgment or order based on a defective summons or manner of service [*see § 70.330[1]*].

These points and authorities may be adapted for use in a trial or appellate brief.

For related Pleading and Practice chapters, see *§ 70.330[2][g]*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the defendant is a corporation, counsel would refer to the summons and point out each defect shown on the face of the summons, such as when the summons served notified the recipient that he or she was being served as an individual defendant under *Code Civ. Proc. § 416.90*, but provided no notice that he or she was also being served on behalf of a corporation named as a defendant in the complaint [*see MJS Enterprises, Inc. v. Superior Court (1984) 153 Cal. App. 3d 555, 200 Cal. Rptr. 286* , discussed under [3], *below*].

In proceedings to set aside a judgment or order that is void on its face, no supporting or opposing affidavit or declaration is prepared. Counsel should, however, request that the court take judicial notice of the judgment or order and the judgment roll, or, if some other paper or report filed in the action is relevant to the issue of validity, that particular paper or report. For matters subject to judicial notice, and the manner of requesting it, see *Evid. Code §§ 452(d), 453*. For discussion of documents that are included in the judgment roll for purposes of *Code Civ. Proc. § 473(d)*, see *§ 70.310[2][d][iii]*.

[3] Discussion of Authorities

[a] Personal Jurisdiction Not Conferred if Summons Substantially Defective

In ***MJS Enterprises, Inc. v. Superior Court*** *(1984) 153 Cal. App. 3d 555, 200 Cal. Rptr. 286* , the summons served notified the recipient that he was being served as an individual defendant under *Code Civ. Proc. § 416.90*, but provided no notice that he was also being served on behalf of a corporation named as a defendant in the complaint. A default judgment was entered against the corporation, and it moved under *Code Civ. Proc. § 473* to set the judgment aside. The motion was denied, and the corporation petitioned for a writ of mandate.

The court of appeal granted the writ. The court held that the default judgment was void for lack of personal jurisdiction over the corporation and that the trial court had therefore exceeded its jurisdiction in denying the motion (*153 Cal. App. 3d 555, 558)* . Even though the corporation had notice of the litigation, the summons completely failed to comply with the requirements of *Code Civ. Proc. § 412.30*. The court concluded that the summons was fatally defective in light of the rule that a summons does not confer personal jurisdiction over a party in the absence of substantial compliance with the statutory requirements for service (*153 Cal. App. 3d 555, 557-558)* .

Earl W. Schott, Inc. v. Kalar *(1993) 20 Cal. App. 4th 943, 24 Cal. Rptr. 2d 580* , involved an action for breach of contract, fraud and common counts against "Gary Kalar, individually and DBA Kalar Construction Co." The plaintiff served the individual and the company by leaving a copy of the summons and complaint with the company's office manager. The plaintiff then filed its first proof of service of the summons and complaint without a declaration of due diligence or a notation of the subsequent mailing of a copy of the summons and complaint. After the plaintiff filed several requests for entry of default, which were rejected for defective proof of service, it obtained an entry of default based on a substituted service via delivery of the summons and complaint to the office manager for Gary Kalar, as an individual. The court entered default judgment against Gary Kalar, individually and doing business as Kalar Construction. Gary Kalar appealed in both capacities.

The court of appeal reversed. Plaintiff conceded that it had not exercised due diligence in serving Kalar Construction Company, as required by *Code Civ. Proc. § 415.20(b)*, but argued that Kalar Construction Company was a corporation and, thus, due diligence was not required, pursuant to *Code Civ. Proc. § 415.20(a)*. In rejecting this contention, the court refused to take judicial notice that Kalar Construction was a corporation (*20 Cal. App. 4th 943, 945 n. 3*), noting that the complaint, summons, and lower court judgment all listed Gary Kalar, individually, and dba Kalar Construction as the defendants (*20 Cal. App. 4th 943, 945)* . Because the plaintiff had not named the corporation as a defendant, jurisdiction was never effected over the corporation and no valid judgment was entered against it (*20 Cal. App. 4th 943, 945-947)* . The court relied on the Judicial Council comment to *Code Civ. Proc. § 416.10*, which provides that service on a corporation or unincorporated association can only be accomplished by serving some individual as its representative. The court concluded that if the existence of corporate structure is not alleged in either the complaint or the summons, it is not possible for an individual to have been served in his or her representative capacity for the unnamed corporation (*20 Cal. App. 4th 943, 946)* . The court also rejected plaintiff's argument that naming an entity as an association or partnership instead of a corporation should be treated as a minor spelling error that would not defeat the judgment (*20 Cal. App. 4th 943, 947)* .

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7-70 California Points & Authorities § 70.333

§ 70.333 Supporting Motion to Set Aside Judgment or Order Void on Its Face [Code Civ. Proc. § 473(d)] Based on Defective Summons or Manner of Service--Personal Jurisdiction Is Not Conferred if Manner of Service Is Improper

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside judgment or order void on its face, based on a defective summons or manner of service (see § 70.310[1]).*]

THE COURT SHOULD SET ASIDE THE _____ [DEFAULT *or* DEFAULT JUDGMENT *or* DEFAULT AND DEFAULT JUDGMENT] IN THIS ACTION AS VOID ON ITS FACE BECAUSE IT APPEARS FROM THE RECORD THAT THE DEFENDANT HAS NOT BEEN SERVED WITH THE SUMMONS IN THE MANNER REQUIRED BY STATUTE.

Personal Jurisdiction Not Conferred If Manner of Service Improper. A court does not obtain jurisdiction over a defendant until, in the absence of an appearance, the defendant is served with summons in the manner required by statute (*Apartments, Inc. v. Trott (1959) 172 Cal. App. 2d 7, 14, 342 P.2d 32* ; *see* *Wilson v. Eddy (1969) 2 Cal. App. 3d 613, 616, 82 Cal. Rptr. 826* (involving motion to quash service of summons)).

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to set aside a default judgment when the defendant has not been served with the summons in the manner required by statute [*Apartments, Inc. v. Trott (1959) 172 Cal. App. 2d 7, 14, 342 P.2d 32* ; *see* *Wilson v. Eddy (1969) 2 Cal. App. 3d 613, 616, 82 Cal. Rptr. 826* (involving motion to quash service of summons)].

This form may be adapted as necessary for use by a party other than a defendant (for example, a cross defendant).

These points and authorities should be combined with a general memorandum supporting a motion for relief from a void judgment or order based on a defective summons or manner of service [*see § 70.330[1]*].

These points and authorities may be adapted for use in a trial or appellate brief.

For related Pleading and Practice chapters, see *§ 70.330[2][g]*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, a trial court lacked personal jurisdiction over the defendants when service was made on defendants' attorney pursuant to an agreement executed by plaintiffs but not by defendants, which agreement purported to appoint the attorney as defendants' agent in California for the service of process [*see Wilson v. Eddy (1969) 2 Cal. App. 3d 613, 616, 82 Cal. Rptr. 826* , discussed under [3], *below*].

In proceedings to set aside a judgment or order that is void on its face, no supporting or opposing affidavit or declaration is prepared. Counsel should, however, request that the court take judicial notice of the judgment or order and the judgment roll, or, if some other paper or report filed in the action is relevant to the issue of validity, that particular paper or report. For matters subject to judicial notice, and the manner of requesting it, see *Evid. Code §§ 452(d), 453*. For discussion of documents that are included in the judgment roll for purposes of *Code Civ. Proc. § 473(d)*, see *§ 70.310[2][d][iii]*.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 70.440 -70.453* may be used to oppose these points and authorities.

[3] Discussion of Authorities

[a] Personal Jurisdiction Not Conferred if Manner of Service Improper

Apartments, Inc. v. Trott *(1959) 172 Cal. App. 2d 7, 342 P.2d 32* , involved a judgment and order denying transfer of a case to the county of the defendants' residence. Defendants' argued that since they filed an answer and a cross complaint in the particular county, that county was the first to acquire jurisdiction over the action.

The court of appeal affirmed the trial court's order. The court rejected the contention that the court in the county of the defendants' residence had already obtained jurisdiction and stated that the mere filing of a complaint does not confer jurisdiction. Service of summons is indispensable (*172 Cal. App. 2d 7, 14)* . Since no where in the record before the court did it appear that summons on the cross complaint in was ever served, the court was required to assume that the county did not acquire jurisdiction over the action (*172 Cal. App. 2d 7, 14-15)* .

In ***Wilson v. Eddy*** *(1969) 2 Cal. App. 3d 613, 82 Cal. Rptr. 826* , plaintiffs filed a contract action against defendants, who were residents of New York. Service was made on defendants' attorney pursuant to an agreement executed by plaintiffs but not by defendants, which agreement purported to appoint the attorney as defendants' agent in California for the service of process. Defendants' motion to quash service was granted and plaintiffs appealed.

The court of appeal affirmed the order to quash service. The court considered the propriety of a private individual appointing another private individual to accept service and noted the applicability of former Code Civ. Proc. § 411 [*now see Code Civ. Proc. § 416.10 et seq.*]. The court declared that, absent service in conformance with statutes, no jurisdiction is acquired by the court (*2 Cal. App. 3d 613, 616)* . The court went on to consider whether defendants had

in fact appointed the attorney as their agent and found sufficient evidence to support the decision of the trial court that the attorney did not have that authority (*2 Cal. App. 3d 613, 618-619)* .

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7-70 California Points & Authorities § 70.334

§ 70.334 Supporting Motion to Set Aside Judgment or Order Void on Its Face [Code Civ. Proc. § 473(d) Based on Defective Summons or Manner of Service--Notice Without Substantial Compliance With Statute Is Inadequate

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside judgment or order void on its face, based on a defective summons or manner of service (see § 70.310[1]).*]

THE COURT SHOULD SET ASIDE THE _____ [DEFAULT *or* DEFAULT JUDGMENT *or* DEFAULT AND DEFAULT JUDGMENT] IN THIS ACTION AS VOID ON ITS FACE BECAUSE IT APPEARS FROM THE RECORD THAT SERVICE OF THE SUMMONS DOES NOT SUBSTANTIALLY COMPLY WITH THE STATUTORY REQUIREMENTS FOR SERVICE OF THE SUMMONS.

Notice Without Substantial Compliance With Statute Inadequate. Notice of the litigation does not confer personal jurisdiction absent substantial compliance with the statutory requirements for service of summons (*Mannesmann DeMag, Ltd. v. Superior Court (1985) 172 Cal. App. 3d 1118, 1123, 218 Cal. Rptr. 632* ; *MJS Enterprises, Inc. v. Superior Court (1984) 153 Cal. App. 3d 555, 557, 200 Cal. Rptr. 286*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to set aside a default judgment when notice of the litigation lacks substantial compliance with statutory requirements [*Mannesmann DeMag, Ltd. v. Superior Court (1985) 172 Cal. App. 3d 1118, 1123, 218 Cal. Rptr. 632* ; *MJS Enterprises, Inc. v. Superior Court (1984) 153 Cal. App. 3d 555, 557, 200 Cal. Rptr. 286* , discussed under [3], *below*].

This form may be adapted as necessary for use by a party other than a defendant (for example, a cross defendant).

These points and authorities should be combined with a general memorandum supporting a motion for relief from a void judgment or order based on a defective summons or manner of service [*see § 70.330[1]*].

These points and authorities may be adapted for use in a trial or appellate brief.

For related Pleading and Practice chapters, see *§ 70.330[2][g]*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, for example, when it may be asserted that the defendant had actual notice of the litigation, counsel would refer to papers in the judgment roll (or their absence) and point out the specific respects in which service of the summons and complaint fails to substantially comply with statutory requirements.

In proceedings to set aside a judgment or order that is void on its face, no supporting or opposing affidavit or declaration is prepared. Counsel should, however, request that the court take judicial notice of the judgment or order and the judgment roll, or, if some other paper or report filed in the action is relevant to the issue of validity, that particular paper or report. For matters subject to judicial notice, and the manner of requesting it, see *Evid. Code §§ 452(d), 453*. For discussion of documents that are included in the judgment roll for purposes of *Code Civ. Proc. § 473(d)*, see *§ 70.310[2][d][iii]*.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 70.440 -70.453* may be used to oppose these points and authorities.

[3] Discussion of Authorities

[a] Notice Without Substantial Compliance With Statute Inadequate

The facts and procedural background of ***Mannesmann DeMag, Ltd. v. Superior Court*** *(1985) 172 Cal. App. 3d 1118, 218 Cal. Rptr. 632* , are discussed in *§ 70.330[3][a]* . In *Mannesmann*, the court acknowledged that, while it was undeniable that the defendant had actual notice of the lawsuit by reason of correspondence by its attorney to real party's attorney, the court quoted *MJS Enterprises, Inc. v. Superior Court (1984) 153 Cal. App. 3d 555, 557, 200 Cal. Rptr. 286* (discussed in *§ 70.332[3]*), in concluding that notice of the litigation does not confer personal jurisdiction absent substantial compliance with the statutory requirements for service of summons (*172 Cal. App. 3d 1118, 1124)* .

The facts and procedural background of ***MJS Enterprises, Inc. v. Superior Court*** *(1984) 153 Cal. App. 3d 555, 200 Cal. Rptr. 286* , are discussed in *§ 70.332[3]* . In this case, although the court concurred with the assertion that the statutes governing service of summons should be liberally construed to uphold jurisdiction when the defendant receives actual notice it is being sued, the court stated the rule that notice of the litigation does not confer personal jurisdiction absent substantial compliance with the statutory requirements for service of summons (*153 Cal. App. 3d 555, 557-558)* . Liberal construction, according to the court, cannot cure the plaintiff's complete failure to comply with *Code Civ. Proc. § 412.30* (notice to person served on behalf of corporation or unincorporated association) (*153 Cal. App. 3d 555, 558)* .

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7-70 California Points & Authorities § 70.335

§ 70.335 Supporting Motion to Set Aside Judgment or Order Void on Its Face [Code Civ. Proc. § 473(d)] Based on Defective Summons or Manner of Service--Failure to Provide Statutory Notice to Person Served on Behalf of Corporation, Unincorporated Association, or Partnership [Code Civ. Proc. § 412.30]

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside judgment or order void on its face (see § 70.310[1]), and with points and authorities generally supporting relief on the ground of lack of personal jurisdiction due to defective service (see, e.g., § 70.330[1]).*]

THE COURT SHOULD SET ASIDE THE JUDGMENT AS VOID ON ITS FACE BECAUSE IT APPEARS FROM THE RECORD THAT THE SUMMONS SERVED ON DEFENDANT _____ [CORPORATION *or* UNINCORPORATED ASSOCIATION *or* PARTNERSHIP] DID NOT CONTAIN THE MANDATORY NOTICE REQUIRED BY LAW.

A. Notice Requirement for Summons for Corporation, Unincorporated Association, or Partnership. In an action against a corporation or an unincorporated association, including a partnership, the copy of the summons that is served must contain the notice stating in substance as provided in *Code of Civil Procedure Section 412.30*. If such notice does not appear on the copy of the summons served, no default may be taken against the corporation or unincorporated association or against such person individually, as the case may be (*Code Civ. Proc. § 412.30*).

B. Judgment Based on Service of Summons Lacking Corporate Notice Requirement Is Void. A default judgment against a corporation or an unincorporated association defendant is void for lack of personal jurisdiction and may be set aside if the summons served on the defendant did not contain the mandatory notice required by *Code Civil Procedure Section 412.30* or otherwise indicate an attempt to assert judicial power over the defendant (*Mannesmann DeMag, Ltd. v. Superior Court (1985) 172 Cal. App. 3d 1118, 1123, 218 Cal. Rptr. 632* ; *MJS Enterprises, Inc. v. Superior Court (1984) 153 Cal. App. 3d 555, 558, 200 Cal. Rptr. 286*).

[*When appropriate, add points and authorities supporting additional grounds for relief from void judgment or order (see, e.g., § 70.336 -70.421).*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to set aside a default judgment when a summons served on a person on behalf of a defendant corporation or unincorporated association (including a partnership) lacks the notice required by *Code Civ. Proc. § 412.30*, and the failure or deficiency is apparent by inspection of the judgment roll. This form may be adapted as necessary for use by a party other than a defendant (for example, a cross defendant).

These points and authorities should be combined with a general memorandum supporting a motion for relief from a void judgment or order [*see § 70.310[1]*]. They may also be combined with points and authorities generally supporting relief on the ground of lack of personal jurisdiction due to defective service [*see, e.g., § 70.330[1]*]. For points and authorities for use when combining a motion for relief under *Code Civ. Proc. § 473(d)*, with a motion to quash service of summons for lack of jurisdiction, see *§ 70.314[1]* [*see also Code Civ. Proc. § 418.10*; forms and discussion in Ch. 132, *Jurisdiction: Personal Jurisdiction and Inconvenient Forum*].

These points and authorities may also be combined, when appropriate, with points and authorities supporting relief from a void judgment on other particular grounds [*see, e.g., §§ 70.336 -70.421*]. They may also be adapted for use in a trial or appellate brief.

See also *§§ 70.310, 70.330* for additional general considerations relating to a motion for relief from a void judgment or order, alternative methods for obtaining relief, and discussion relating to use of this form to support an alternative motion for relief from a judgment valid on its face but void in fact.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the default was taken against a corporate defendant, counsel may refer to the "Notice to the Person Served" portion of the summons when it indicates that the person served was served as an individual defendant, rather than on behalf of the corporation [*see, e.g., MJS Enterprises, Inc. v. Superior Court (1984) 153 Cal. App. 3d 555, 558, 200 Cal. Rptr. 286* (discussed under [3], *below*)].

In proceedings to set aside a judgment or order that is void on its face, no supporting or opposing affidavit or declaration is prepared. Counsel should, however, request that the court take judicial notice of the judgment or order and the judgment roll, or, if some other paper or report filed in the action is relevant to the issue of validity, that particular paper or report. For matters subject to judicial notice, and the manner of requesting it, see *Evid. Code §§ 452(d), 453*. For discussion of documents that are included in the judgment roll for purposes of *Code Civ. Proc. § 473(d)*, see *§ 70.310[2][d][iii]*.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 70.440 -70.443* may be used to oppose this form.

[3] Discussion of Authorities

[a] Judgment Based on Service of Summons Lacking Corporate Notice Requirement Is Void

The facts and procedural background of ***Mannesmann DeMag, Ltd. v. Superior Court*** *(1985) 172 Cal. App. 3d 1118,*

218 Cal. Rptr. 632 , are discussed in *§ 70.330[3][a]*. In *Mannesmann*, the court found that there was no indication on the face of the summons that the person served was not being served in an individual capacity and held that the summons was so incomplete on its face as to render it ineffective to impart notice to its recipient and therefore the attempted service on defendant did not satisfy the mandate of *Code Civ. Proc. § 412.30* (*172 Cal. App. 3d 1118, 1124)* .

The facts and procedural background of ***MJS Enterprises, Inc., v. Superior Court*** *(1984) 153 Cal. App. 3d 555, 200 Cal. Rptr. 286* , are discussed in *§ 70.332[3]*. In *MJS Enterprises*, summons in the action was personally served on a person and the proof of service indicated that the person was served on behalf of the defendant corporation. The summons that was served, however, under the "Notice to the Person Served" heading, stated that the person was served as an individual defendant. Nothing in the summons indicated that the process was directed to the defendant corporation (*153 Cal. App. 3d 555, 557)* . The court of appeal stated that the summons served on the corporation was fatally defective because it did not contain the mandatory notice required by law, nor did it otherwise in any manner indicate an attempt to assert judicial power over defendant. Thus, the default taken against the defendant corporation was expressly prohibited by *Code Civ. Proc. § 412.30* (*153 Cal. App. 3d 555, 558)* .

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7-70 California Points & Authorities § 70.336

§ 70.336 Supporting Motion to Set Aside Judgment or Order Void on Its Face [Code Civ. Proc. § 473(d)] Based on Defective Summons or Manner of Service--Defective Affidavit for Publication of Summons [Code Civ. Proc. § 415.50]

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside judgment or order void on its face (see § 70.310[1]), and with points and authorities generally supporting relief on the ground of lack of personal jurisdiction due to defective service (see, e.g., § 70.330[1]).*]

THE COURT SHOULD ASIDE THE JUDGMENT AS VOID ON ITS FACE BECAUSE IT APPEARS FROM THE RECORD THAT THE AFFIDAVIT FOR PUBLICATION OF SUMMONS FAILED TO COMPLY WITH THE REQUIREMENTS OF STATUTE.

A. Requirements for Service by Publication. Service of summons by publication is permitted if on affidavit it appears to the satisfaction of the court in which the action is pending that the party to be served cannot with reasonable diligence be served in another manner specified in *Sections 415.10 through 415.50 of the Code of Civil Procedure* and that: (1) a cause of action exists against the party on whom service is to be made or he or she is a necessary or proper party to the action; or (2) the party to be served has or claims an interest in real or personal property in this state that is subject to the jurisdiction of the court or the relief demanded in the action consists wholly or in part in excluding the party from any interest in the property (*Code Civ. Proc. § 415.50(a)*).

B. Strict Construction of Service by Publication Statute. Statutory provisions for acquiring jurisdiction of the person by publication of summons instead of a personal service must be strictly construed (*Forbes v. Hyde (1866) 31 Cal. 342, 356* ; *see Transamerica Title Ins. Co. v. Hendrix (1995) 34 Cal. App. 4th 740, 746, 40 Cal. Rptr. 2d 614* (failure to attempt service by mail under *Code Civ. Proc. § 415.30* when plaintiff was aware of post office box at which defendant received mail invalidated application for service by publication)).

C. Defective Affidavit for Service by Publication. If the affidavit on which the order directing publication of summons was had fails to comply with the provisions of statute, the default judgment thereafter entered on such defective service would be void on its face, and the trial court at any time may properly set it aside (*Forbes v. Hyde (1866) 31 Cal. 342, 354* ; *In re Behymer (1933) 130 Cal. App. 200, 202, 19 P.2d 829*).

[*When appropriate, add points and authorities supporting additional grounds for relief from void judgment or order (see, e.g., §§ 70.335, 70.350 -70.421).*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion to set aside a default judgment when service on the defendant was by publication of summons, the affidavit for publication under *Code Civ. Proc. § 415.50* was defective, and the defect is apparent by inspection of the judgment roll. The form may be adapted as necessary for use by a party other than a defendant (for example, a cross defendant).

These points and authorities should be combined with a general memorandum supporting a motion for relief from a void judgment or order [*see § 70.310[1]*]. They may also be combined with and with points and authorities generally supporting relief on the ground of lack of personal jurisdiction due to defective service [*see, e.g., § 70.330[1]*]. For points and authorities for use when combining a motion for relief under *Code Civ. Proc. § 473(d)*, with a motion to quash service of summons for lack of jurisdiction, see *§ 70.314[1]* [*see also Code Civ. Proc. § 418.10*; forms and discussion in Ch. 132, *Jurisdiction: Personal Jurisdiction and Inconvenient Forum*].

These points and authorities may also be combined, when appropriate, with points and authorities supporting relief from a void judgment on other particular grounds [*see, e.g., §§ 70.335, 70.350 -70.421*]. They may also be adapted for use in a trial or appellate brief.

See also *§§ 70.310, 70.330* for additional general considerations relating to a motion for relief from a void judgment or order, alternative methods for obtaining relief, and discussion relating to use of this form to support an alternative motion for relief from a judgment valid on its face but void in fact.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should state the particular defects that are shown on the face of the affidavit for publication.

In proceedings to set aside a judgment or order that is void on its face, no supporting or opposing affidavit or declaration is prepared. Counsel should, however, request that the court take judicial notice of the judgment or order and the judgment roll, or, if some other paper or report filed in the action is relevant to the issue of validity, that particular paper or report. For matters subject to judicial notice, and the manner of requesting it, see *Evid. Code §§ 452(d), 453*. For discussion of documents that are included in the judgment roll for purposes of *Code Civ. Proc. § 473(d)*, see *§ 70.310[2][d][iii]*.

[c] Motion Under Code Civ. Proc. § 473.5 Distinguished

The circumstances in which this form may be used is to be distinguished from those on which a party may bring a motion under *Code Civ. Proc. § 473.5* [*see § 70.240* et seq.]. *Code Civ. Proc. § 473.5* applies primarily to cases in which the service was constructive, and constructive service is permitted, and a valid judgment is secured, but the court relieves from the valid judgment because the defendant was not personally served.

When the service made is an invalid service, the court never acquires jurisdiction, the judgment based on such service is void, and may be collaterally or otherwise attacked [*see People v. One 1941 Chrysler Sedan (1947) 81 Cal. App. 2d 18, 31, 183 P.2d 368* (construing former Code Civ. Proc. § 473a; *disapproved on another ground in People v. One 1941 Chevrolet Coupe (1951) 37 Cal. 2d 283, 303, 231 P.2d 832*)].

[d] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 70.440 -70.443* may be used to oppose these points and authorities.

[3] Discussion of Authorities

[a] Strict Construction of Service by Publication Statute

Forbes v. Hyde *(1866) 31 Cal. 342* , involved an ejectment to recover possession of a lot. Plaintiff recovered judgment in the trial court. Defendants' motion for new trial was denied and the defendants appealed from the judgment and order denying new trial. The plaintiff offered the judgment roll of an earlier case as one of the links in his chain of title. Defendants objected on the ground that it appeared from the judgment roll in that case that the court never acquired personal jurisdiction over the defendants in the earlier action, and that the judgment was therefore void. The judgment against the defendants in the earlier action was by default on a service of summons attempted to be made by publication.

The Supreme Court reversed the judgment and order denying new trial and ordered a new trial. The question to be determined by the Court was whether service in the earlier case was valid. The Court stated that the principle remains untouched, that whenever the want of jurisdiction appears, the judgments of any and all courts will be void; and when the party in interest is to be brought in by means of a public notice, the want of such notice will be fatal. According to the Court, it had been well settled by prior decisions of the Supreme Court that when it appears in the record that the court had no jurisdiction of the person of the defendant against whom judgment is rendered, the judgment may be collaterally attacked (*31 Cal. 342, 348)* . After reviewing the sufficiency of the affidavit, the Court concluded that it appeared from the record that there was a total absence of any legal evidence tending to prove an essential jurisdictional fact, and for that reason the order for publication, and the publication pursuant to it, were absolutely void. The court in the earlier action, therefore, failed to acquire personal jurisdiction over the defendants (*31 Cal. 342, 355)* . Since the earlier action was void, it was improperly admitted into evidence (*31 Cal. 342, 356)* .

In ***Transamerica Title Ins. Co. v. Hendrix*** *(1995) 34 Cal. App. 4th 740, 40 Cal. Rptr. 2d 614* , plaintiff brought an action against a defendant who was not a resident of California at the time the complaint was filed. At the time the plaintiff applied for an order for service by publication, the defendant maintained a post office box in California. Although the plaintiff knew of this post office box, plaintiff indicated in its application to serve by publication that it was unable to serve defendant by mail. The trial court granted the application, and notice of the summons was published. Thereafter, defendant's default and a default judgment were entered. On learning of the judgment, defendant petitioned the trial court to set it aside or vacate it. The motion was denied and the defendant appealed.

The court of appeal reversed. The court held that service by publication under *Code Civ. Proc. § 415.50* was defective as a matter of law when the plaintiff had been aware that the defendant was receiving mail at a post office box. A post office box is a sufficient address for *Code Civ. Proc. § 415.30* service by mail, so that plaintiff's failure to attempt such service invalidated plaintiff's application for service by publication (*34 Cal. App. 4th 740, 746)* . The court therefore reversed, and directed the trial court to vacate the default and default judgment and to permit the defendant to file an answer.

[b] Defective Affidavit for Service by Publication

For discussion of ***Forbes v. Hyde*** *(1866) 31 Cal. 342* , see [a], *above.*

In re Behymer *(1933) 130 Cal. App. 200, 19 P.2d 829* , involved a judgment on a petition for initial registration of title to a city lot. The contestants filed an answer alleging that they were the owners in fee simple, as joint tenants, and were in possession and entitled to possession of the property. The matter was heard before a referee whose findings were adopted by the court and judgment was rendered in favor of the petitioners. The contestants appealed.

The court of appeal affirmed. The contestants claimed title through a judgment quieting title and by adverse possession. The court stated that the attack made on the judgment quieting title was collateral and not direct and that the chief distinction between a collateral and a direct attack on such judgment is that in a collateral attack the evidence which may be received to show excess of jurisdiction is restricted to the judgment roll as defined by law at the time of the rendition of the judgment. But when by resort to such evidence the want of vitality in the judgment is demonstrated, the duty to declare it void is as imperative on collateral as on direct attack. The court, citing *Morgan v. Clapp (1929) 207 Cal. 221, 224, 277 P. 490* (discussed in *§ 70.312[3]*), stated that if the affidavit on which the order directing publication of summons was had fails to comply with the provisions of statute, the default judgment thereafter entered on such defective service would be void on its face, and the trial court at any time may properly set it aside (*130 Cal. App. 200, 202)* . One of the papers constituting the judgment roll in the quiet title action was the affidavit for publication of summons. The court, after reviewing the affidavit, concluded that it omitted the formal requisites and failed to meet the test of sufficiency of an affidavit, requiring an affidavit to be so clear and certain that an indictment for perjury may be sustained on it if false (*130 Cal. App. 200, 203-204)* . In addition, all the statements in the affidavit showing diligence were hearsay (*130 Cal. App. 200, 204)* . The court also concluded that the acts claimed to constitute adverse possession failed to meet the requirements of statute (*130 Cal. App. 200, 205)* .

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[Reserved]

§§ 70.337[Reserved]

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7-70 California Points & Authorities § 70.350

§ 70.350 Supporting Motion to Set Aside Judgment or Order Void on Its Face When Default Judgment Entered on Amended Complaint [Code Civ. Proc. § 473(d)]--Amended Complaint Was Not Served [Code Civ. Proc. § 471.5]

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside judgment or order void on its face (see § 70.310[1]).*]

THE COURT SHOULD SET ASIDE THE DEFAULT JUDGMENT AS VOID ON ITS FACE BECAUSE IT IS BASED ON A COMPLAINT THAT WAS AMENDED _____ [BEFORE *or* AFTER] ENTRY OF DEFAULT AND THE _____ [AMENDMENT *or* AMENDED COMPLAINT] WAS NEVER SERVED ON DEFENDANT.

A. Service of Amended Complaint Required. If a complaint is amended, a copy of the amendments or of the amended complaint must be filed and served on the defendants affected thereby in the manner provided for service of process. Defendant may answer the amendments or the complaint as amended within 30 days after service thereof, or such other time as the court may direct (*Code Civ. Proc. § 471.5(a)*; *see Code Civ. Proc. §§ 413.10-415.50* (manner of service of process)).

B. Judgment Void if Based on Unserved Amended Complaint. A default judgment based on an amended complaint which has not been served on defendant is void (*Woods v. Stallworth (1960) 177 Cal. App. 2d 517, 520, 2 Cal. Rptr. 250*).

[*When appropriate, add points and authorities supporting additional grounds for relief from void judgment or order (see, e.g., §§ 70.330 -70.336, 70.360 -70.421). In addition, when applicable, add points and authorities based on particular grounds for granting relief from a judgment or order that is void on its face because of an amended complaint that had not been served (see, e.g., § 70.352[1]).*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to set aside a default judgment when the judgment was entered on an amended complaint or amendment to a complaint that was not served on the defaulting party, and the deficiency appears on the face of the judgment roll. This form may be adapted as necessary for use by a party other than a defendant (for example, a cross defendant).

These points and authorities should be combined with a general memorandum supporting a motion for relief from a void judgment or order [*see § 70.310[1]*]. They may also be combined, when appropriate, with points and authorities supporting relief from a void judgment on other particular grounds [*see, e.g., §§ 70.330 -70.336, 70.360 -70.421*]. The *form in § 70.352[1],* in particular, includes additional grounds for relief from a judgment based on an amended complaint. They may also be adapted for use in a trial or appellate brief.

See also *§§ 70.310, 70.330* for additional general considerations relating to a motion for relief from a void judgment or order, alternative methods for obtaining relief, and discussion relating to use of this form to support an alternative motion for relief from a judgment valid on its face but void in fact.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Counsel should refer to the fact that it appears from the judgment roll that the amendments to the complaint or the amended complaint itself were not served on the defaulting defendant.

In proceedings to set aside a judgment or order that is void on its face, no supporting or opposing affidavit or declaration is prepared. Counsel should, however, request that the court take judicial notice of the judgment or order and the judgment roll, or, if some other paper or report filed in the action is relevant to the issue of validity, that particular paper or report. For matters subject to judicial notice, and the manner of requesting it, see *Evid. Code §§ 452(d), 453*. For discussion of documents that are included in the judgment roll for purposes of *Code Civ. Proc. § 473(d)*, see *§ 70.310[2][d][iii]*.

[3] Discussion of Authorities

[a] Judgment Void if Based on Unserved Amended Complaint

Woods v. Stallworth *(1960) 177 Cal. App. 2d 517, 2 Cal. Rptr. 250* , involved an action seeking an annulment of a sale of real property under a deed of trust, and other relief. The plaintiff filed a second amended complaint in the action and a summons was issued thereon. The defendants did not answer and the summons, with a writing stating that the summons attached to the second amended complaint was served on each defendant, was filed. The statement, however, bore no verification. The clerk entered the default of the defendants who did not answer. On motion of the defendants, the default was vacated. Thereafter, all the defendants in the action moved for an order dismissing the action, which was granted, and judgment of dismissal with costs was entered. The plaintiff moved to vacate the judgment and the order vacating the default. The motion was denied and the plaintiff appealed from the order.

The court of appeal affirmed the order. The court stated that there was no merit in the contention that the trial court committed error in vacating the default. The court, citing *Reinhart v. Lugo (1890) 86 Cal. 395, 24 P. 1089* , held that the unverified statement of service filed with the return of the summons constituted no proof of service. Thus, the clerk had no authority to enter the default of the defendants in the absence of valid proof of service (*177 Cal. App. 2d 517, 520)* . The void character of the entry of the default appeared on the face of the record. The trial court, therefore, had a duty on application of the party or of its own motion to vacate the void entry of the default [*see Code Civ. Proc. §*

473(d)].

In ***Falahati v. Kondo*** *(2005) 127 Cal. App. 4th 823, 26 Cal. Rptr. 3d 104* , plaintiffs' original verified complaint sued defendant along with a number of other defendants for intentional interference with economic relationship and prospective economic advantage, defamation, fraud, negligent misrepresentation, unfair business practices, and intentional infliction of emotional distress. The original complaint alleged numerous acts of wrongdoing by defendant that caused harm to plaintiffs. In response to a series of demurrers, plaintiffs eventually filed a verified third amended complaint which did not name defendant in the caption and contained no allegations he did anything which caused harm to plaintiffs. Defendant did not file a responsive pleading to the third amended complaint. Eight months after plaintiffs filed their third amended complaint, they filed a "Notice of Errata" to add defendant to the caption only, but did not amend the complaint to allege defendant engaged in any conduct causing them damage. The same day plaintiffs filed their "errata," they filed a request to enter his default, and the court clerk entered the default as requested. Four months later the trial court held a default prove-up hearing and awarded plaintiffs judgment against defendant. The record was silent as to whether defendant was served with notice of entry of the default judgment. Ten months after entry of the default judgment, defendant filed a motion to vacate the default and set aside the subsequent judgment on the ground he had not been served with the initial summons and complaint in the action and that adding him to the caption of the third amended complaint and entering his default on the complaint the same day denied him due process. The trial court denied the motion.

The court of appeal reversed. The court held that the third amended complaint failed to apprise defendant of the nature of the plaintiffs' demand against him, and neither the third amended complaint nor any subsequent notice, informed defendant of the amount of damages plaintiffs were seeking from him (*127 Cal. App. 4th 823, 829-831)* . In addition, the court held that the default was obtained through extrinsic fraud because it was entered the same day plaintiffs amended the complaint to add defendant to the caption, and defendant was thereby denied the opportunity to respond to the complaint in violation of *Code Civ. Proc. § 471.5* and his right to due process under the federal and state constitutions (*127 Cal. App. 4th 823, 831-834)* .

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7-70 California Points & Authorities § 70.351

§ 70.351 Supporting Motion to Set Aside Judgment or Order Void on Its Face When Default Judgment Entered on Amended Complaint [Code Civ. Proc. § 473(d)]--Substantial Amendment After Entry of Default Opens Default

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside judgment or order void on its face, based on the failure to serve an amended complaint (see § 70.350[1]).*]

THE COURT SHOULD SET ASIDE THE DEFAULT JUDGMENT AS VOID ON ITS FACE BECAUSE PLAINTIFF OPENED THE DEFAULT BY AMENDING THE COMPLAINT IN A MATTER OF SUBSTANCE AFTER HE/SHE ENTERED DEFENDANT'S DEFAULT, AND FAILED TO SERVE THE DEFENDANT WITH THE AMENDMENT.

Amendment of Complaint After Entry of Default. A defendant in default as to the original complaint is entitled to service of any amended pleading making a change of substance, and has a right to answer or demur to such amendments. When, after defendant's default is entered, the complaint is amended in a matter of substance as distinguished from a matter of mere form, the amendment opens the default and a judgment on the default is improper unless the amended complaint is served on the defendant (*Ford v. Superior Court (1973) 34 Cal. App. 3d 338, 342-343, 109 Cal. Rptr. 844*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to set aside a default judgment when a plaintiff opens a default by amending the complaint in a matter of substance after defendant's default was entered and failing to serve the defendant with the amended pleading. This form may be adapted as necessary for use by a party other than a defendant (for example, a cross defendant).

This form should be combined with a memorandum generally supporting a motion to set aside judgment or order void on its face, based on the failure to serve an amended complaint [see *§ 70.350[1]*]. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should refer, in proper chronological order, to the papers in the judgment roll showing that the court lacked personal jurisdiction to award the judgment on the amended pleading. For example, counsel would refer to:

- The summons, with the affidavit or proof of service, relating to the original pleading.
- The original complaint.
- The request for entry of default with a memorandum endorsed thereon that the default of the defendant in not answering was entered.
- The complaint as amended.

Counsel would refer to specific allegations of the complaint that were modified in matters of substance, as well as the absence of any proof of service of the amended pleading in the record, arguing that the judgment on the complaint as amended was facially void.

In proceedings to set aside a judgment or order that is void on its face, no supporting or opposing affidavit or declaration is prepared. Counsel should, however, request that the court take judicial notice of the judgment or order and the judgment roll, or, if some other paper or report filed in the action is relevant to the issue of validity, that particular paper or report. For matters subject to judicial notice, and the manner of requesting it, see *Evid. Code §§ 452(d), 453*. For discussion of documents that are included in the judgment roll for purposes of *Code Civ. Proc. § 473(d)*, see *§ 70.310[2][d][iii]*.

[3] Discussion of Authorities

[a] Amendment of Complaint After Entry of Default

In ***Ford v. Superior Court*** *(1973) 34 Cal. App. 3d 338, 109 Cal. Rptr. 844* , plaintiff sued on a promissory note. Defendant was validly served and his default was entered on his failure to answer the complaint. Thereafter, plaintiff filed her first amended complaints incorporating by reference causes of action in the original complaint, adding a third cause of action, and seeking recovery of an additional sum from each of the defendants. The defaulting defendant was not served with this amended complaint. Plaintiff filed a second amended complaint a year later, again incorporating the first cause of action and adding a new cause of action and seeking a recovery on another theory. Again, the defaulting defendant did not receive service of the amended complaint. Approximately two years later, plaintiff obtained a clerk's judgment against the defaulting defendant and dismissed the action as to the other defendants. Defendant later moved to vacate the default judgment, and when his motion was denied he petitioned for a writ of mandate to compel the trial court to vacate the judgment.

The court of appeal issued the writ, requiring the trial court to vacate its order denying relief and to grant defendant's motion. The court found two distinct infirmities in the judgment: (1) the entry of judgment by the clerk was improper [*see also § 70.360* et seq.]; (2) defendant was entitled to service of amended complaints. On the latter issue, the court declared that plaintiff's filing of the amended pleadings had the effect of opening up the default on the original

complaint. The court asserted that a defendant who is in default on the original complaint is entitled to service of amended pleadings making changes of substance as opposed to form, and following service such defendant has a right to answer or demur to the amendments (*34 Cal. App. 3d 338, 342)* . The amendments here involved purported to state new causes of action, asking for additional damages and basing claims on alternative legal theories. These, the court reasoned, were not mere matters of form (*34 Cal. App. 3d 338, 343)* . The court further noted that, in such circumstances, it is irrelevant whether the amendment is accomplished by an amended complaint or by an amendment to the complaint (*34 Cal. App. 3d 338, 343)* .

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7-70 California Points & Authorities § 70.352

§ 70.352 Supporting Motion to Set Aside Judgment or Order Void on Its Face When Default Judgment Entered on Amended Complaint [Code Civ. Proc. § 473(d)]--Judgment Based on Failure to Answer Void When Amended Complaint Required No Answer

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside judgment or order void on its face (see § 70.310[1]).*]

THE COURT SHOULD SET ASIDE THE DEFAULT JUDGMENT AS VOID ON ITS FACE BECAUSE IT IS BASED ON DEFENDANT'S FAILURE TO ANSWER AN AMENDED COMPLAINT, BUT THE AMENDMENTS WERE IMMATERIAL AND REQUIRED NO ANSWER FROM DEFENDANT.

Default Judgment Void When Based on Failure to Answer Immaterial Amendments. When a complaint has been amended only as to formal or immaterial matters, and does not change the cause of action against a particular defendant, that defendant does not have to answer. A default judgment entered under those circumstances is void and should be set aside (*Carrasco v. Craft (1985) 164 Cal. App. 3d 796, 808-811, 210 Cal. Rptr. 599*).

[*When appropriate, add points and authorities supporting additional grounds for relief from void judgment or order (see, e.g., §§ 70.330 -70.351, 70.360 -70.421).*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to set aside a default judgment when the judgment was entered based on the defendant's failure to answer an amended complaint, but the amended complaint made changes only as to formal or immaterial matters, and the deficiency appears on the face of the judgment roll. This form may be adapted as necessary for use by a party other than a defendant (for example, a cross defendant).

These points and authorities should be combined with a general memorandum supporting a motion for relief from a void judgment or order [*see § 70.310[1]*]. They may also be combined, when appropriate, with points and authorities supporting relief from a void judgment on other particular grounds [*see, e.g., §§ 70.330 -70.351, 70.360 -70.421*]. They may also be adapted for use in a trial or appellate brief.

See also *§§ 70.310, 70.330* for additional general considerations relating to a motion for relief from a void judgment or order, alternative methods for obtaining relief, and discussion relating to use of this form to support an alternative motion for relief from a judgment valid on its face but void in fact.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Counsel should refer to the specific facts and allegations in the original and amended complaint, as set out in the record, to demonstrate that the amendments in the latter complaint were so immaterial that they did not require an answer as a matter of law.

In proceedings to set aside a judgment or order that is void on its face, no supporting or opposing affidavit or declaration is prepared. Counsel should, however, request that the court take judicial notice of the judgment or order and the judgment roll, or, if some other paper or report filed in the action is relevant to the issue of validity, that particular paper or report. For matters subject to judicial notice, and the manner of requesting it, see *Evid. Code §§ 452(d), 453*. For discussion of documents that are included in the judgment roll for purposes of *Code Civ. Proc. § 473(d)*, see *§ 70.310[2][d][iii]*.

[3] Discussion of Authorities

[a] Default Judgment Void When Based on Failure to Answer Immaterial Amendments

The facts and procedural background of ***Carrasco v. Craft*** *(1985) 164 Cal. App. 3d 796, 210 Cal. Rptr. 599* , are discussed in *§ 70.310[3][c]*. In *Carrasco v. Craft*, the court of appeal, relying on *Gray v. Hall (1928) 203 Cal. 306, 310-311, 265 P. 246* , for the proposition that a defendant need not answer an amendment that relates merely to formal or immaterial matters and does not change a cause of action, examined nine changes in the amended complaint. Four of the changes related to other defendants; one changed the amount of punitive damages sought, and four were minor and immaterial and did not alter the causes of action against the defaulting defendants. The court concluded that defendants' original answer could, as a matter of law, stand as their answer to the amended complaint and held that the entry of default was in error, and the default judgment was void (*164 Cal. App. 3d 796, 808-811)* .

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[Reserved]

§§ 70.353[Reserved]

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7-70 California Points & Authorities § 70.360

§ 70.360 Supporting Motion to Set Aside Judgment or Order Void on Its Face Based on Unauthorized Entry of Default or Judgment by Clerk [Code Civ. Proc. § 585(a)]--General Form

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside judgment or order void on its face (see § 70.310[1]).*]

THE COURT SHOULD SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT AS VOID ON ITS FACE BECAUSE THE CLERK'S ACTION WAS IN EXCESS OF HIS/HER STATUTORY AUTHORITY UNDER CODE OF CIVIL PROCEDURE SECTION 585(a).

A. Clerk's Statutory Authority to Enter Default and Default Judgment. In an action arising on a contract or a judgment of a California court for recovery of money or damages, the clerk is authorized to enter defendant's default and judgment thereon on written application of plaintiff and proof of service of summons on defendant (*Code Civ. Proc. § 585(a)*).

B. Judgment Void in Excess of Clerk's Authority. When the clerk is authorized to enter a default judgment, he or she has no authority other than that conferred by statutes and the failure to stay strictly within the statutory authorization renders any judgment entered by the clerk void on the face of the record (*Burtnett v. King (1949) 33 Cal. 2d 805, 808, 205 P.2d 657* ; *Brown v. Superior Court (1966) 242 Cal. App. 2d 519, 524, 51 Cal. Rptr. 633*).

[*When appropriate, add points and authorities supporting additional grounds for relief from void judgment or order (see, e.g., §§ 70.330 -70.352, 70.380 -70.421). In addition, when applicable, add points and authorities based on particular grounds for granting relief from a judgment or order that is void on its face because of an unauthorized entry of a default or default judgment by the court clerk (see, e.g., § 70.361 et seq.).*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to set aside a default and default judgment when they were entered in excess of the clerk's statutory authority under *Code Civ. Proc. § 585(a)*, and the deficiency appears on the face of the judgment roll. This form may be adapted as necessary for use by a party other than a defendant (for example, a cross defendant).

These points and authorities should be combined with a general memorandum supporting a motion for relief from a void judgment or order [*see § 70.310[1]*]. They may also be combined, when appropriate, with points and authorities supporting relief from a void judgment on other particular grounds [*see, e.g., §§ 70.330 -70.352, 70.380 -70.421*]. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, for example, when the defaulting party claims that the entry of the default on which the judgment was based was premature, counsel should refer to judgment roll to show that the dates indicate that the default was entered before the time such entry was authorized by law [*see § 70.361[1]*].

In proceedings to set aside a judgment or order that is void on its face, no supporting or opposing affidavit or declaration is prepared. Counsel should, however, request that the court take judicial notice of the judgment or order and the judgment roll, or, if some other paper or report filed in the action is relevant to the issue of validity, that particular paper or report. For matters subject to judicial notice, and the manner of requesting it, see *Evid. Code §§ 452(d), 453*. For discussion of documents that are included in the judgment roll for purposes of *Code Civ. Proc. § 473(d)*, see *§ 70.310[2][d][iii]*.

[3] Discussion of Authorities

[a] Judgment Void in Excess of Clerk's Authority

In ***Burtnett v. King*** *(1949) 33 Cal. 2d 805, 205 P.2d 657* , plaintiff sought to quiet title in certain real property which had been community property of himself and his former wife. Wife had been awarded all of the community property of the couple when husband defaulted in her divorce action, and she had subsequently conveyed the property to defendants. Defendants argued that the divorce decree was res judicata on the issue of title to the property. Judgment was granted for the defendants in the trial court, and the plaintiff appealed.

The court of appeal reversed the judgment. The court of appeal first pointed out that *Code Civ. Proc. § 580* limits the amount of relief that can be granted on default to the amount demanded in the complaint, and noted additional language in *Code Civ. Proc. § 585* authorizing the court to render a default judgment only for a sum not exceeding the amount stated in the complaint (*33 Cal. 2d 805, 807)* . In the divorce action, wife's complaint had made no mention of the property at issue, but had merely prayed for general relief. The court found that under these circumstances not only did the relief accorded wife exceed her demand, it adjudicated property rights when none were asserted, claimed, or prayed for (*33 Cal. 2d 805, 807)* . The court stated that due to the mandatory language of the statutes, the court's jurisdiction to render default judgments could be exercised only in the way authorized by statute (*33 Cal. 2d 805, 807)* and any act beyond the limits of the statute would render it in excess of the court's jurisdiction (*33 Cal. 2d 805, 807)* . Thus, the court in the divorce action had wholly lacked jurisdiction to render a judgment affecting the community property of the couple, in the absence of a demand for such relief, and that court's judgment was void (*33 Cal. 2d 805, 807)* . Similarly, when the clerk is authorized to enter a default judgment, he or she must strictly stay within the statutory authorization of former Code Civ. Proc. § 585(1) [*now see Code Civ. Proc. § 585(a)*], and a failure to do so renders the judgment void (*33 Cal. 2d 805, 808* , citing earlier cases). The court distinguished dissolution cases in which support

was awarded without a specific demand therefor, reasoning that the issue of support or alimony is so germane to the issue of divorce that a defendant must anticipate an award of support although there is no prayer to that effect (*33 Cal. 2d 805, 809-810)* .

In ***Brown v. Superior Court*** *(1966) 242 Cal. App. 2d 519, 51 Cal. Rptr. 633* , plaintiff sued defendants for recovery of legal fees owed to plaintiff's assignor. On defendants' default, plaintiff obtained entry of a default judgment by the clerk. Defendants' motion to set the default judgment aside was denied by the trial court, and defendants thereafter filed a proceeding in mandate to nullify the default and default judgment in the belief that the order denying relief was not appealable.

The court of appeal issued the peremptory writ of mandate. The court of appeal agreed with defendants' contention that the default judgment was void in that it was improperly entered by the clerk. The court pointed out that the complaint sought recovery of the reasonable value of the attorney's services. Citing *Lynch v. Bencini (1941) 17 Cal. 2d 521, 525, 110 P.2d 662* , the court declared that if the determination of damages involves the exercise of discretion or the taking of evidence, the clerk has no power to enter a default judgment. If on the face of the complaint a case is not within the scope of former Code Civ. Proc. § 585(1) [*now see Code Civ. Proc. § 585(a)*], the clerk's unauthorized entry of default judgment is void on the face of the record (*242 Cal. App. 2d 519, 524)* . Such a judgment may be set aside independently of *Code Civ. Proc. § 473*, with no fixed limit on the time within which a motion may be made (*242 Cal. App. 2d 519, 524)* . Thus, when the reasonable value of services must be determined, the clerk has no power to enter default judgment (*242 Cal. App. 2d 519, 525)* . The court concluded by pointing out that the invalidity of the default judgment did not affect the default which preceded it (*242 Cal. App. 2d 519, 526)* .

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7-70 California Points & Authorities § 70.361

§ 70.361 Supporting Motion to Set Aside Judgment or Order Void on Its Face Based on Unauthorized Entry of Default or Judgment by Clerk [Code Civ. Proc. § 585(a)]--Premature Entry of Default

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside judgment or order void on its face, based on the unauthorized entry of default or judgment by clerk (see § 70.360[1]).*]

THE COURT SHOULD SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT AS VOID ON THEIR FACE BECAUSE THE ENTRY OF THE DEFAULT WAS PREMATURE AND THEREFORE IN EXCESS OF THE CLERK'S STATUTORY AUTHORITY UNDER CODE OF CIVIL PROCEDURE SECTION 585(a).

Premature Entry of Default. When the clerk enters a default prematurely because of an error in his or her mechanical computation of the time elapsed since service was completed, a judgment based on such default is void (*Montgomery v. Norman (1953) 120 Cal. App. 2d 855, 857-858, 262 P.2d 360*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to set aside a default and default judgment when the default was entered prematurely and was, therefore, in excess of the clerk's statutory authority under *Code Civ. Proc. § 585(a)*, and the deficiency appears on the face of the judgment roll. This form may be adapted as necessary for use by a party other than a defendant (for example, a cross defendant).

This form should be combined with a memorandum generally supporting a motion to set aside judgment or order void on its face, based on the unauthorized entry of default or judgment by clerk [*see § 70.360[1]*]. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, when the defaulting party claims that the entry of the default on which the judgment was based was premature, counsel should refer to judgment roll to show that the dates indicate that the default was entered before the time such entry was authorized by law.

In proceedings to set aside a judgment or order that is void on its face, no supporting or opposing affidavit or declaration is prepared. Counsel should, however, request that the court take judicial notice of the judgment or order and the judgment roll, or, if some other paper or report filed in the action is relevant to the issue of validity, that particular paper or report. For matters subject to judicial notice, and the manner of requesting it, see *Evid. Code §§ 452(d), 453*. For discussion of documents that are included in the judgment roll for purposes of *Code Civ. Proc. § 473(d)*, see *§ 70.310[2][d][iii]*.

[3] Discussion of Authorities

[a] Premature Entry of Default

In ***Montgomery v. Norman*** *(1953) 120 Cal. App. 2d 855, 262 P.2d 360* , after the trial court sustained a demurrer to a complaint and denied the defendant's motion to quash a writ of attachment, the defendant was required to respond to the amended complaint within 10 days after notice of the filing of an undertaking by the plaintiff. Plaintiff mailed notice of the undertaking to the defendant and the notice was received the next day. On the tenth day, a Friday, the plaintiff mailed to the clerk request to enter default. The clerk received and entered the default the following Monday morning, and entered the judgment on Wednesday. The defendant moved to set aside the default and the default judgment. The trial court granted the motion and the plaintiff appealed.

The court of appeal affirmed. The court agreed with defendant's contention that the version of *Code Civ. Proc. § 1013* then in effect allowed the defendant an additional day because of distance between the place of deposit and the place of address. With that allowance, the tenth day would have fallen on a Saturday, which is a legal holiday on which the county clerk's office is closed, and since Sunday was also such a legal holiday, defendant had all day Monday in which to appear. Therefore, the clerk erroneously entered the default on Monday morning (*120 Cal. App. 2d 855, 857)* . The court then stated that the clerk is not authorized to enter a default or a default judgment until the time for appearance has expired. If the clerk enters such a judgment without such authority the judgment is void (*120 Cal. App. 2d 855, 858)* .

It should be noted that although the court stated that a judgment, void on its face, is not governed by *Code Civ. Proc. § 473*, this was in response to the plaintiff's contention that the defendant did not file an affidavit of merits in connection with his motion to set aside the default and default judgment. The statement therefore related to *Code Civ. Proc. § 473(b)*, as distinguished from the provision under *Code Civ. Proc. § 473(d)*, codifying the court's inherent power to set aside void judgments and orders.

[4] Additional Authorities

[a] Premature Entry of Default

Bristol Convalescent Hosp. v. Stone (1968) 258 Cal. App. 2d 848, 66 Cal. Rptr. 404 , involved a dispute on an agreement relating to the building of a convalescent hospital. Plaintiff filed an amended complaint which was served on defendant's attorney by mail. Defendant's default was taken and judgment entered against him on his failure to answer the amendments. The court of appeal reversed the default judgment with directions to the trial court to dispose of issues raised in defendant's cross complaint. In dictum, the court noted that if the clerk's mechanical computation of the time elapsed since service was completed is in error and he or she enters default prematurely, a judgment based on such default is void (*258 Cal. App. 2d 848, 862* , citing earlier cases). Such a default judgment may be set aside at any time, regardless of how it comes to the court's attention (*258 Cal. App. 2d 848, 862)* .

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7-70 California Points & Authorities § 70.362

§ 70.362 Supporting Motion to Set Aside Judgment or Order Void on Its Face Based on Unauthorized Entry of Default or Judgment by Clerk [Code Civ. Proc. § 585(a)]--Default Was Entered With Responsive Pleading on File

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside judgment or order void on its face, based on the unauthorized entry of default or judgment by clerk (see § 70.360[1]).*]

THE COURT SHOULD SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT AS VOID ON THEIR FACE BECAUSE THE DEFAULT WAS ENTERED WHEN A RESPONSIVE PLEADING WAS ON FILE AND THEREFORE IN EXCESS OF THE CLERK'S STATUTORY AUTHORITY UNDER CODE OF CIVIL PROCEDURE SECTION 585(a).

Entry of Default When Responsive Pleading on File. A default judgment is void if, when the defendant's default was taken, a responsive pleading was on file (*Stevens v. Torregano (1961) 192 Cal. App. 2d 105, 112, 13 Cal. Rptr. 604* ; *see Laguna Village, Inc. v. Laborers' Internat. Union of North America (1983) 35 Cal. 3d 174, 182, 197 Cal. Rptr. 99, 672 P.2d 882*). Such judgment is void even if the responsive pleading was filed after expiration of the time to plead (*Goddard v. Pollock (1974) 37 Cal. App. 3d 137, 141, 112 Cal. Rptr. 215*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to set aside a default and default judgment when the default was entered when a responsive pleading was on file and was, therefore, in excess of the clerk's statutory authority under *Code Civ. Proc. § 585(a)*, and the deficiency appears on the face of the judgment roll. This form may be adapted as necessary for use by a party other than a defendant (for example, a cross defendant).

This form should be combined with a memorandum generally supporting a motion to set aside judgment or order void on its face, based on the unauthorized entry of default or judgment by clerk [*see § 70.360[1]*]. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel would refer to the answer, demurrer, or other responsive pleading on file and argue that the entry of the default was therefore not was authorized by law.

In proceedings to set aside a judgment or order that is void on its face, no supporting or opposing affidavit or declaration is prepared. Counsel should, however, request that the court take judicial notice of the judgment or order and the judgment roll, or, if some other paper or report filed in the action is relevant to the issue of validity, that particular paper or report. For matters subject to judicial notice, and the manner of requesting it, see *Evid. Code §§ 452(d), 453*. For discussion of documents that are included in the judgment roll for purposes of *Code Civ. Proc. § 473(d)*, see *§ 70.310[2][d][iii]*.

[3] Discussion of Authorities

[a] Entry of Default When Responsive Pleading on File

In ***Stevens v. Torregano*** *(1961) 192 Cal. App. 2d 105, 13 Cal. Rptr. 604* , plaintiff, claiming as a pretermitted heir, filed an action to impose a constructive trust on assets of an estate and for other relief. The court overruled defendant's general demurrer to the first cause of action in the complaint, but sustained the demurrer as to the rest of the complaint. Plaintiff amended the complaint and defendant again demurred. While the matter was under submission in the trial court, plaintiff took defendant's default. Defendant moved to set aside the default on the ground that it was void because it was taken while the demurrer was under submission. Defendant's motion was granted and plaintiff appealed.

The court of appeal affirmed. In holding that the default was properly set aside as void under what was formerly the last paragraph of Code Civ. Proc. § 473 (*now see Code Civ. Proc. § 473(d))*, the court noted that it is not the business of the clerk to pass on questions of the sufficiency or validity of a pleading filed within the time allowed (*192 Cal. App. 2d 105, 112)* . At the time the default was taken, there was a general demurrer on file, valid on its face and raising questions that could also be raised in an answer. Thus, the default was void and the trial court had properly set it aside (*192 Cal. App. 2d 105, 112)* .

The facts and procedural background of ***Laguna Village, Inc. v. Laborers' Internat. Union of North America*** *(1983) 35 Cal. 3d 174, 197 Cal. Rptr. 99, 672 P.2d 882* , is discussed in *§ 70.363[3]* . In *Laguna*, the Supreme Court reversed the trial court's decision declining to set aside a default and held that the motion to dismiss filed in federal court prior to remand was sufficiently similar to a demurrer to constitute a responsive pleading for purposes of avoiding default, and that the default was therefore voidable and should have been set aside (*35 Cal. 3d 174, 182)* .

In ***Goddard v. Pollock*** *(1974) 37 Cal. App. 3d 137, 112 Cal. Rptr. 215* , plaintiffs sued defendants, alleging that defendants had breached an agreement to redeem certain bonds and certificates of deposit purchased from defendants by plaintiffs. Defendants' default was taken after defendants had filed a notice of motion to quash service. The defendants moved for an order vacating the clerk's entry of default and default judgment. The trial court denied the order and the defendants appealed.

The court of appeal reversed the order denying defendants' motion with directions to the trial court to set aside the clerk's entry of default and the default judgment against the defendants. The court, although recognizing that the motion to quash was defective in that it was unaccompanied by supporting declarations or memoranda, determined that the trial

court had erred in ordering entry of defendants' default. The court pointed out that a motion to quash is specifically mentioned in *Code Civ. Proc. § 585* and clearly constitutes a pleading which, if timely filed, would preclude the clerk from entering a default (*37 Cal. App. 3d 137, 141)* . Defendants' motion to quash came after expiration of the time to plead. However, the court declared that it is "well established" that when a pleading is belatedly filed, but at a time when the default has not yet been taken, plaintiff has, in effect, granted defendant additional time within which to plead, and defendant is not strictly in default. The proper procedure in that situation is for plaintiff to move to strike the untimely pleading and, if the court grants the motion, to proceed to obtain entry of default (*37 Cal. App. 3d 137, 141)* .

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7-70 California Points & Authorities § 70.363

§ 70.363 Supporting Motion to Set Aside Judgment or Order Void on Its Face Based on Unauthorized Entry of Default or Judgment by Clerk [Code Civ. Proc. § 585(a)]--Entry of Default in Action Remanded After Motion to Dismiss Is Granted in Federal Action

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside judgment or order void on its face, based on the unauthorized entry of default or judgment by clerk (see § 70.360[1]).*]

THE COURT SHOULD SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT AS VOID ON THEIR FACE BECAUSE A MOTION TO DISMISS WAS FILED IN THE FEDERAL COURT PRIOR TO THE CASE BEING REMANDED TO STATE COURT, CONSEQUENTLY, THE ENTRY OF THE DEFAULT WAS PREMATURE AND IN EXCESS OF THE CLERK'S STATUTORY AUTHORITY UNDER CODE OF CIVIL PROCEDURE SECTION 585(a).

Entry of Default in Action Remanded to State Court After Motion to Dismiss Filed in Federal Action. A motion to dismiss filed in federal court is sufficiently similar to a demurrer to constitute a responsive pleading for purposes of avoiding default after the action is remanded to state court (*Laguna Village, Inc. v. Laborers' Internat. Union of North America (1983) 35 Cal. 3d 174, 182, 197 Cal. Rptr. 99, 672 P.2d 882*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to set aside a default and default judgment when the default was entered in an action remanded to state court after a motion to dismiss was filed in a federal action and was, therefore, in excess of the clerk's statutory authority under *Code Civ. Proc. § 585(a)*; and the deficiency appears on the face of the judgment roll. This form may be adapted as necessary for use by a party other than a defendant (for example, a cross defendant).

This form should be combined with a memorandum generally supporting a motion to set aside judgment or order void on its face, based on the unauthorized entry of default or judgment by clerk [*see § 70.360[1]*]. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should refer to judgment roll to show that the dates indicate that the default was entered after a motion to dismiss was filed in the action while in federal court.

In proceedings to set aside a judgment or order that is void on its face, no supporting or opposing affidavit or declaration is prepared. Counsel should, however, request that the court take judicial notice of the judgment or order and the judgment roll, or, if some other paper or report filed in the action is relevant to the issue of validity, that particular paper or report. For matters subject to judicial notice, and the manner of requesting it, see *Evid. Code §§ 452(d), 453*. For discussion of documents that are included in the judgment roll for purposes of *Code Civ. Proc. § 473(d)*, see *§ 70.310[2][d][iii]*.

[3] Discussion of Authorities

[a] Entry of Default in Action Remanded to State Court After Motion to Dismiss Filed in Federal Action

Laguna Village, Inc. v. Laborers' Internat. Union of North America *(1983) 35 Cal. 3d 174, 197 Cal. Rptr. 99, 672 P.2d 882* , involved an action for trespass by an employer against a labor union. After the action was filed in state court by plaintiff, defendant union removed to federal court and there filed a motion to dismiss for failure to state a cause of action. Plaintiff filed a brief in opposition to the motion to dismiss and moved for remand to the state court. The federal court granted the remand and stated that in light of the remand, it declined to consider the motion to dismiss. After being granted one extension of time to file a response to the complaint in the state court, defendant filed a response several days after the extended period had already run. Plaintiff subsequently sought and obtained entry of default, set a hearing on damages that counsel for defendant failed to attend, and obtained judgment. Defendant moved to set aside the default pursuant to former Code Civ. Proc. § 473, 4th Paragraph [*now see Code Civ. Proc. § 473(d)*], but the trial court denied the motion. Defendant appealed.

The Supreme Court reversed the trial court's decision declining to set aside the default. The Court held that the motion to dismiss filed in federal court was sufficiently similar to a demurrer to constitute a responsive pleading for purposes of avoiding default, and that the default was therefore voidable (that is void) and should have been set aside (*35 Cal. 3d 174, 182)* . The Court noted that the trial court was apparently swayed by the fact that *Code Civ. Proc. § 585*, which provides for entry of default unless defendant has filed one of the responses enumerated in that section, does not list a motion to dismiss in federal court as one of the responses that avoid default. Older decisions had declined to give effect on remand to pleadings filed in federal court after a defendant had tried to remove the case. However, these cases were decided before an amendment of the federal removal statute, which now expressly prohibits any proceeding in the state court after removal and prior to remand. Recently, courts have been willing to give effect to pleadings filed in federal court before remand (*35 Cal. 3d 174, 179-180)* . The Court identified three policy considerations from the more recent cases for giving effect to federal pleadings before remand. The first is judicial economy and avoidance of duplication of effort. The Court stated that this consideration did not apply to the case before it, since defendant could have simply refiled the federal motion to dismiss as a demurrer at little added expense in time or money. The second consideration is that a plaintiff suffers no real prejudice from a court's giving effect to federal pleadings. The Court stated that this consideration did apply to the case before it, since plaintiff had been served with the motion to dismiss and had filed an opposition to it and was therefore clearly appraised of the federal pleading and the contentions made. Third, there is a policy of favoring resolution of disputes on the merits. This policy suggests flexibility rather than mechanical adherence

to motion and pleading labels, even at the expense of sacrificing a degree of procedural rigidity. The Court noted that a federal motion to dismiss and a demurrer in a state action are closely related in substance, and that the motion to dismiss performs the function in federal courts that was formerly performed by a demurrer. The Court stated that these policy considerations overcame any weight that it might otherwise give to plaintiff's technical assertion that because demurrers and motions to dismiss are different in form, the trial court was justified in refusing to give effect to the motion (*35 Cal. 3d 174, 181-182)* .

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7-70 California Points & Authorities § 70.364

§ 70.364 Supporting Motion to Set Aside Judgment or Order Void on Its Face Based on Unauthorized Entry of Default or Judgment by Clerk [Code Civ. Proc. § 585(a)]--Entry of Default Judgment in Contract Action

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside judgment or order void on its face, based on the unauthorized entry of default or judgment by clerk (see § 70.360[1]).*]

THE COURT SHOULD SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT AS VOID ON THEIR FACE BECAUSE THE DETERMINATION OF DAMAGES IN A CONTRACT ACTION INVOLVES THE EXERCISE OF DISCRETION AND IS THEREFORE IN EXCESS OF THE CLERK'S STATUTORY AUTHORITY UNDER CODE OF CIVIL PROCEDURE SECTION 585(a).

Judgment in Contract Actions. When a contract action is involved, the clerk has power to enter a default judgment only if the terms of the contract provide for some definite fixed amount of damages or if such sum can be ascertained from the terms of the contract by simple mathematical computation by the clerk (*Liberty Loan Corp. of North Park v. Petersen (1972) 24 Cal. App. 3d 915, 918, 101 Cal. Rptr. 395*). If the determination of damages involves the exercise of discretion or the taking of evidence, the clerk has no power to enter a judgment (*Lynch v. Bencini (1941) 17 Cal. 2d 521, 525, 110 P.2d 662* ; *Brown v. Superior Court (1966) 242 Cal. App. 2d 519, 524, 51 Cal. Rptr. 633*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to set aside a default and default judgment. This form may be used when the default judgment was entered as a consequence of an exercise of discretion by the court clerk in determining damages in a contract action, and the deficiency appears on the face of the judgment roll. The clerk has no power to enter a judgment in such a case [*Lynch v. Bencini (1941) 17 Cal. 2d 521, 525, 110 P.2d 662* ; *Brown v. Superior Court (1966) 242 Cal. App. 2d 519, 524, 51 Cal. Rptr. 633* ; discussed under [3], *below*].

This form should be combined with a memorandum generally supporting a motion to set aside judgment or order void on its face, based on the unauthorized entry of default or judgment by clerk [*see § 70.360[1]*]. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should refer to judgment roll to show that the determination of damages involved the exercise of discretion or the taking of evidence.

In proceedings to set aside a judgment or order that is void on its face, no supporting or opposing affidavit or declaration is prepared. Counsel should, however, request that the court take judicial notice of the judgment or order and the judgment roll, or, if some other paper or report filed in the action is relevant to the issue of validity, that particular paper or report. For matters subject to judicial notice, and the manner of requesting it, see *Evid. Code §§ 452(d), 453*. For discussion of documents that are included in the judgment roll for purposes of *Code Civ. Proc. § 473(d)*, see *§ 70.310[2][d][iii]*.

[3] Discussion of Authorities

[a] Judgment in Contract Actions

In ***Liberty Loan Corp. of North Park v. Petersen*** *(1972) 24 Cal. App. 3d 915, 101 Cal. Rptr. 395* , the superior court denied plaintiff's petition for a writ of mandate to compel the clerk of the municipal court to enter a default judgment in an action on a promissory note. The clerk had refused to enter the judgment because the note sued on contained a notation that it was secured by a chattel mortgage. Plaintiff's attorney resubmitted the request for entry of default judgment, with a declaration stating that the note was unsecured. The clerk again refused to enter judgment and plaintiff sought a writ of mandate rather than attempting to secure a court judgment under former Code Civ. Proc. § 585(2) [*now see Code Civ. Proc. § 585(b)*].

The court of appeal affirmed the superior court's denial of the writ. The court noted authorities for the principle that when a contract action is involved, the clerk has authority to enter a default judgment only if the terms of the contract provide for some fixed amount of damages or if such a sum can be ascertained from the terms of the contract by simple mathematical computation by the clerk (*24 Cal. App. 3d 915, 918)* . The court declared that a default judgment for a deficiency after a creditor has sold property which was security for the debt sued on is not the type of default judgment a clerk is authorized to enter. Such a judgment would require a determination that the sale of the security complied with the provisions of former Com. Code § 9501 et seq. (*now see Com. Code § 9601 et seq.*), a determination that would require the exercise of judicial discretion (*24 Cal. App. 3d 915, 919)* . The court emphasized that since the clerk's authority is strictly construed, it should not be exercised in doubtful cases. The court concluded that when the note sued on shows on its face that it was secured, the clerk is not required to enter a default judgment absent positive allegations in a verified complaint that the creditor has not resorted to collateral securing the note in any manner (*24 Cal. App. 3d 915, 920)* .

Lynch v. Bencini *(1941) 17 Cal. 2d 521, 110 P.2d 662* , involved a dispute over an agreement to repurchase corporate stock. A default judgment was entered against one defendant and the action was dismissed as to another. The defaulting defendant's motion to set the default judgment aside was denied by the trial court. The defendant appealed.

The Supreme Court reversed with directions. One of the issues on defendant's appeal from that judgment was the question of the authority of the clerk to enter a default judgment. Noting the strict construction of the clerk's authority under former Code Civ. Proc. § 585(1) [*now see Code Civ. Proc. § 585(a)*], the Supreme Court declared that the clerk has no power to enter a default judgment when the taking of evidence is necessary or when the reasonable value of

services or goods must be determined (*17 Cal. 2d 521, 525)* . Citing *Landwehr v. Gillette (1917) 174 Cal. 654, 657, 163 P. 1018* , the Court stated that if the contract sued on is indefinite or uncertain in the amount of damages to be awarded, the matter is one for judicial determination by the court (*17 Cal. 2d 521, 525-526)* . Since the relief available was unclear from the contract at issue in *Lynch*, the Court thought it clear that evidence was needed, which indicated the impropriety of allowing the clerk to enter a judgment in the action (*17 Cal. 2d 521, 529)* . After considering the other issues involved in the action, the Court reversed the judgment against defendant with orders to the trial court to dismiss the action as to defendant.

The facts and procedural background of ***Brown v. Superior Court*** *(1966) 242 Cal. App. 2d 519, 51 Cal. Rptr. 633* , is discussed in *§ 70.360[3]* . In *Brown*, the court declared that if the determination of damages involves the exercise of discretion or the taking of evidence, the clerk has no power to enter a default judgment (*242 Cal. App. 2d 519, 524)* .

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7-70 California Points & Authorities § 70.365

§ 70.365 Supporting Motion to Set Aside Judgment or Order Void on Its Face Based on Unauthorized Entry of Default or Judgment by Clerk [Code Civ. Proc. § 585(a)]--Entry of Default Judgment Against One of Several Defendants

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside judgment or order void on its face, based on the unauthorized entry of default or judgment by clerk (see § 70.360[1]).*]

THE COURT SHOULD SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT AS VOID ON THEIR FACE BECAUSE THE JUDGMENT WAS RENDERED AGAINST ONE OF SEVERAL DEFENDANTS EACH OF WHOM MAY BE LIABLE IN THE ACTION AND THEREFORE IN EXCESS OF THE CLERK'S STATUTORY AUTHORITY UNDER CODE OF CIVIL PROCEDURE SECTION 585(a).

Judgment Against One of Several Defendants. The clerk has no authority to enter a default judgment against a single defaulting defendant when the action is prosecuted against more than one defendant and a several judgment can be rendered (*Kooper v. King (1961) 195 Cal. App. 2d 621, 628-629, 15 Cal. Rptr. 848*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion to set aside a default and default judgment against one of several defendants, each of whom may be liable in the action, and was, therefore, in excess of the clerk's statutory authority under *Code Civ. Proc. § 585(a)*, and the deficiency appears on the face of the judgment roll. This form may be adapted as necessary for use by a party other than a defendant (for example, a cross defendant).

This form should be combined with a memorandum generally supporting a motion to set aside judgment or order void on its face, based on the unauthorized entry of default or judgment by clerk [*see § 70.360[1]*]. They may also be

adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should refer to judgment roll to show that the judgment was entered against a single defaulting defendant when the action was prosecuted against more than one defendant and a several judgment could be rendered.

In proceedings to set aside a judgment or order that is void on its face, no supporting or opposing affidavit or declaration is prepared. Counsel should, however, request that the court take judicial notice of the judgment or order and the judgment roll, or, if some other paper or report filed in the action is relevant to the issue of validity, that particular paper or report. For matters subject to judicial notice, and the manner of requesting it, see *Evid. Code §§ 452(d), 453*. For discussion of documents that are included in the judgment roll for purposes of *Code Civ. Proc. § 473(d)*, see *§ 70.310[2][d][iii]*.

[3] Discussion of Authorities

[a] Judgment Against One of Several Defendants

In ***Kooper v. King*** *(1961) 195 Cal. App. 2d 621, 15 Cal. Rptr. 848* , defendant failed to answer a cross complaint after he inadvertently misfiled the summons and cross complaint. The cross plaintiff obtained a clerk's judgment of default, and defendant's subsequent motion to set aside the default judgment was granted. On appeal, the court of appeal first considered the question of defendant's neglect in failing to answer the cross complaint, and concluded that there was no showing of excusable neglect under *Code Civ. Proc. § 473* to warrant relief from the default itself. Thus, the trial court had abused its discretion in setting aside the default and permitting defendant to answer. However, the court went on to state that there was no error by the trial court in setting aside the judgment entered by the clerk. The court believed that the interests of justice might best be served by holding that *Code Civ. Proc. § 579* constitutes an implied limitation on the provisions of former Code Civ. Proc. § 585(1) [*now see Code Civ. Proc. § 585(a)*]. *Code Civ. Proc. § 579* provides that in an action against several defendants, the court may, in its discretion, render a judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper. The court declared that the discretion to be exercised under *Code Civ. Proc. § 579* is a judicial one to be exercised by the court and not the clerk (*195 Cal. App. 2d 621, 628-629)* . On that issue, the court concluded that when there are two or more defendants and defenses interposed by an answering defendant to the right of the plaintiff to recover, and when such a defense is successful, final judgment must be entered not only in favor of the answering defendant but in favor of the defaulting defendant as well (*195 Cal. App. 2d 621, 629)* . The trial court's order was reversed as to the default and affirmed as to the default judgment, with the court noting that the trial court would have discretion to render a judgment against the defaulting defendant, leaving the action to proceed as to the others, or to refuse to enter a final judgment against defendant until after trial on the merits (*195 Cal. App. 2d 621, 629)* .

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[Reserved]

§§ 70.366[Reserved]

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7-70 California Points & Authorities § 70.380

§ 70.380 Supporting Motion to Set Aside Judgment or Order Void on Its Face When Relief Awarded to Plaintiff Is in Excess of Demand of Complaint [Code Civ. Proc. §§ 425.10, 425.11, 425.115, 580]--Complaint Must Contain Demand for Judgment

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside void judgment or order void on its face (see § 70.310[1]).*]

THE COURT SHOULD SET ASIDE THE DEFAULT JUDGMENT AS VOID ON ITS FACE BECAUSE IT APPEARS FROM THE RECORD THAT THE JUDGMENT VIOLATES CODE OF CIVIL PROCEDURE SECTION 580, IN THAT THE RELIEF GRANTED TO PLAINTIFF IN THE JUDGMENT EXCEEDS THE DEMAND OF THE COMPLAINT.

A. Demand for Judgment in Complaint. With exceptions not relevant to this case, "a complaint or cross complaint must contain a demand for judgment for the relief to which the pleader claims to be entitled. If the recovery of money or damages is demanded, the amount demanded shall be stated ... ." (*Code Civ. Proc. § 425.10(a)(2)*).

B. Limitation on Relief Awarded to Plaintiff on Default. The relief granted to the plaintiff, if there is no answer, cannot exceed that which the plaintiff shall have demanded in his or her complaint, in the statement required by *Code of Civil Procedure Section 425.11*, or in the statement provided for in *Code of Civil Procedure Section 425.115* (*Code Civ. Proc. § 580*).

C. Judgment Void When Relief Exceeds Demand of Complaint. By reason of the mandatory language of *Code of Civil Procedure Section 580*, a default judgment that exceeds the demand of the complaint or gives relief when no demand is made therefore is void as in excess of the court's jurisdiction (*Burtnett v. King (1949) 33 Cal. 2d 805, 807, 205 P.2d 657* ; *Stein v. York (2010) 181 Cal. App. 4th 320, 325-327, 105 Cal. Rptr. 3d 1* ; *National Diversified Services, Inc. v. Bernstein (1985) 168 Cal. App. 3d 410, 417, 214 Cal. Rptr. 113*).

[*When appropriate, add memoranda supporting additional grounds for relief from void judgment or order (see, e.g., §§ 70.330 -70.365, 70.400 -70.421). In addition, when applicable, add memoranda based on particular grounds for granting relief from a judgment or order that is void on its face because relief was awarded in excess of the demand of the complaint or statement required by statute (see, e.g., § 70.383 et seq.).*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion to set aside a default judgment when the defaulting party alleges that the judgment is void because the relief awarded to the plaintiff exceeds the demand made by plaintiff in his or her complaint [*Code Civ. Proc. § 580*], and the deficiency appears on the face of the judgment roll. The form may be adapted as necessary for use by a party other than a defendant (for example, a cross defendant).

This memorandum should be combined with a general memorandum supporting a motion for relief from a void judgment or order [*see § 70.310[1]*]. It may also be combined, when appropriate, with a memorandum supporting relief from a void judgment on other particular grounds [*see, e.g., §§ 70.330 -70.365, 70.400 -70.421*]. See *§§ 70.400 -70.404*, in particular, for related memoranda supporting a grant of relief on the ground that plaintiff failed to serve the statement of damages required in a personal injury or wrongful death action under *Code Civ. Proc. § 425.11*. In addition, when applicable, this memorandum may be combined with a memorandum regarding particular grounds for granting relief from a judgment or order that is void on its face because relief was awarded in excess of the demand of the complaint or statement required by statute [*see, e.g., § 70.381* et seq.)].

This form may also be adapted for use in a trial or appellate brief.

See also *§§ 70.310, 70.330* for additional general considerations relating to a motion for relief from a void judgment or order, alternative methods for obtaining relief, and discussion relating to use of this form to support an alternative motion for relief from a judgment valid on its face but void in fact.

[b] Argument

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should refer to judgment roll to show that the complaint does not set out the amount sought or that the amount of the judgment exceeds the amount stated in the complaint, and argue that the judgment is void, therefore, on its face.

In proceedings to set aside a judgment or order that is void on its face, no supporting or opposing affidavit or declaration is prepared. Counsel should, however, request that the court take judicial notice of the judgment or order and the judgment roll, or, if some other paper or report filed in the action is relevant to the issue of validity, that particular paper or report. For matters subject to judicial notice, and the manner of requesting it, see *Evid. Code §§ 452(d), 453*. For discussion of documents that are included in the judgment roll for purposes of *Code Civ. Proc. § 473(d)*, see *§ 70.310[2][d][iii]*.

[3] Discussion of Authorities

[a] Demand for Judgment in Complaint

The function of this form is to identify when the plaintiff should have stated the amount of damages claimed, which acts as a ceiling on the amount of the default judgment [*see Code Civ. Proc. § 580*], so that the argument may then move on to explain how and why the judgment exceeds the amount demanded. This form may be used in cases in which the

complaint must include the amount demanded and there is no need to specifically address the exceptions to that rule [***Code Civ. Proc. § 425.10(a)(2)***].

For a memorandum for use in cases in which the complaint is brought in superior court for personal injury or wrongful death and a *Code Civ. Proc. § 425.11* statement of damages must be served on defendant before default may be taken, see *§ 70.381[1]*. For a memorandum for use in cases in which the complaint includes a claim for punitive damages, but is not one brought in superior court for personal injury or wrongful death, and a *Code Civ. Proc. § 425.115* statement reserving punitive damages is required before default may be taken, see *§ 70.382[1]*.

[b] Judgment Void When Relief Exceeds Demand of Complaint

The factual and procedural background of ***Burtnett v. King*** *(1949) 33 Cal. 2d 805, 205 P.2d 657* , is discussed in *§ 70.360[3]*. In *Burtnett*, the court of appeal pointed out that *Code Civ. Proc. § 580* limits the amount of relief that can be granted on default to the amount demanded in the complaint, and noted additional language in *Code Civ. Proc. § 585* authorizing the court to render a default judgment only for a sum not exceeding the amount stated in the complaint (*33 Cal. 2d 805, 806-807)* . In the divorce action, wife's complaint had made no mention of the property at issue, but had merely prayed for general relief. The court found that under these circumstances not only did the relief accorded wife exceed her demand, it adjudicated property rights when none were asserted, claimed, or prayed for. The court stated that due to the mandatory language of the statutes, the court's jurisdiction to render default judgments could be exercised only in the way authorized by statute and any act beyond the limits of the statute would render it in excess of the court's jurisdiction (*33 Cal. 2d 805, 807)* .

In ***Stein v. York*** *(2010) 181 Cal. App. 4th 320, 325-327, 105 Cal. Rptr. 3d 1* , the plaintiff sued the defendant for legal malpractice. The complaint did not specify the amount of damages sought. The parties engaged in pretrial procedures, including discovery, but the defendant did not file an answer to the complaint. At the default prove-up hearing, which the defendant attended, the court noted the complaint did not contain a prayer for damages. At the end of the hearing, the plaintiff requested damages of $2.61 million. When the defendant argued that the judgment was void pursuant to *Code Civ. Proc. § 580*, the plaintiff argued that the defendant was on notice of the amount of damages claimed and therefore was estopped from attempting to modify the damages awarded. The defendant filed a reply, asserting that he was not given formal notice of the amount of damages and therefore the default judgment was void. The trial court held that the defendant was in default and lacked standing to challenge the damage award. The court also concluded that the defendant waived his right to object to the amount of damages because he had been actively involved in discovery and had every opportunity to find out the amount of the plaintiff's claim.

The court of appeal disagreed. It held that *Code Civ. Proc. § 580* must be strictly construed and that actual notice of the damages sought is not sufficient. Due process requires that the defendant have formal notice of the damages sought (*181 Cal. App. 4th 320, 326-327)* . The court held that the defendant was not on notice of the damages merely because he attended the default hearing. The court held that although the defendant was present at the hearing, he was in default, and therefore "out of court" (*181 Cal. App. 4th 320, 327)* .

National Diversified Services, Inc. v. Bernstein *(1985) 168 Cal. App. 3d 410, 214 Cal. Rptr. 113* , involved an action for breach of contract in which plaintiff agreed to purchase two Ferrari automobiles from defendant corporation in exchange for which plaintiff was to convey a boat and to pay an additional specified amount. The original complaint was filed, alleging that plaintiff conveyed the boat to defendant corporation, but defendant corporation refused to deliver the automobiles. The complaint was amended approximately two and one-half years later adding allegations designed to pierce the corporate veil of defendant corporation and naming an individual as defendant. The individual defendant was served shortly thereafter. A return of service was filed approximately three years and four months after the action was commenced. Approximately one month later, the plaintiff requested to enter his default and judgment was entered on the same day for the amount of $56,779.89. The individual defendant moved to vacate the default judgment and the trial court denied the order. The individual defendant appealed from the order.

The court of appeal affirmed the default judgment in part, and modified in part. The defendant argued that because he was not served until over four months beyond the three-year period of limitation under former Code Civ. Proc. § 581a [*now see Code Civ. Proc. § 583.210 et seq.*], the service was invalid and the resulting default judgment based thereon was void and subject to attack at any time. The court rejected this argument (*168 Cal. App. 3d 410, 414)* . The court did, however, find merit to defendant's contention that the default judgment was void to the extent that the defendant was not apprised by the complaint or the request to enter default of the damages sought from him under *Code Civ. Proc. § 580*. Citing *Burtnett v. King (1949) 33 Cal. 2d 805, 808, 205 P.2d 657* , discussed *above*, the court stated that the policy behind the statute is that a defendant is entitled to be informed of the maximum liability which he or she will face if he chooses to default. If a judgment other than that which is demanded is taken against him or her, the defendant is deprived of his or her right to a hearing on the matter adjudicated (*168 Cal. App. 3d 410, 417)* . Thus, the court concluded that the judgment rendered was partially void for being excessive, concluding that the largest money judgment it could say that defendant was on notice of would be the value of the boat plus a sum for its detention (*168 Cal. App. 3d 410, 419)* .

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7-70 California Points & Authorities § 70.381

§ 70.381 Supporting Motion to Set Aside Judgment or Order Void on Its Face When Relief Awarded to Plaintiff Is in Excess of Demand of Complaint [Code Civ. Proc. §§ 425.10, 425.11, 425.115, 580--Demand for Judgment in Section 425.11 Statement of Damages

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside void judgment or order void on its face (see § 70.310[1]).*]

THE COURT SHOULD SET ASIDE THE DEFAULT JUDGMENT AS VOID ON ITS FACE BECAUSE IT APPEARS FROM THE RECORD THAT THE JUDGMENT VIOLATES CODE OF CIVIL PROCEDURE SECTION 580, IN THAT THE RELIEF GRANTED TO PLAINTIFF IN THE JUDGMENT EXCEEDS THE CODE OF CIVIL PROCEDURE SECTION 425.11 STATEMENT OF DAMAGES.

A. Demand for Judgment in Section 425.11 Statement of Damages. A complaint or cross complaint must contain a demand for judgment for the relief to which the pleader claims to be entitled. If the recovery of money or damages is demanded, the amount demanded shall be stated [*Code Civ. Proc. § 425.10(a)(2)*]. "[W]here an action is brought to recover actual or punitive damages for personal injury or wrongful death, the amount demanded shall not be stated, but the complaint shall comply with Section 422.30 [of the Code of Civil Procedure] and, in a limited civil case, with subdivision (b) of *Section 70613 of the Government Code* (*Code Civ. Proc. § 425.10(b)*). [In addition, no claim for exemplary damages shall state an amount or amounts (*Civ. Code § 3295(e)*)]. When a complaint or cross complaint is filed in an action in superior court to recover damages for personal injury or wrongful death, a statement of the nature and amount of damages being sought must be served on the defendant before a default may be taken (*Code Civ. Proc. § 425.11(c)*). [The plaintiff must serve a statement reserving the right to punitive damages on the defendant pursuant to *Code of Civil Procedure Section 425.115* before a default may be taken, when the motion for default judgment includes a request for punitive damages (*Code Civ. Proc. § 425.115(b)*). (The Section 425.115 statement may be served on the defendant as part of the statement required by Section 425.11 (*Code Civ. Proc. §§ 425.11(e), 425.115(e)*)].

B. Limitation on Relief Awarded to Plaintiff on Default. [*See § 70.380[1], Paragraph B.*]

C. Judgment Void When Relief Exceeds Demand of Complaint. [*See § 70.380[1], Paragraph C.*]

[*When appropriate, add memoranda supporting additional grounds for relief from void judgment or order (see, e.g., §§ 70.330 -70.365, 70.400 -70.421). In addition, when applicable, add memoranda based on particular grounds for granting relief from a judgment or order that is void on its face because relief was awarded in excess of the demand of the complaint or statement required by statute (see, e.g., § 70.384 et seq.).*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion to set aside a default judgment when the defaulting party alleges that the judgment is void. It may be used when the relief awarded to the plaintiff exceeds the demand made by plaintiff in the statement of damages required by *Code Civ. Proc. § 425.11*, and the deficiency appears on the face of the judgment roll. The form may be adapted as necessary for use by a party other than a defendant (for example, a cross defendant).

This memorandum should be combined with a general memorandum supporting a motion for relief from a void judgment or order [*see § 70.310[1]*]. It may also be combined, when appropriate, with points and authorities supporting relief from a void judgment on other particular grounds [*see, e.g., §§ 70.330 -70.365, 70.400 -70.421*]. See *§§ 70.400 -70.404*, in particular, for related memoranda supporting a grant of relief on the ground that plaintiff failed to serve the statement of damages required in a personal injury or wrongful death action under *Code Civ. Proc. § 425.11*. In addition, when applicable, this form may be combined with other memoranda addressing particular grounds for granting relief from a judgment or order that is void on its face because relief was awarded in excess of the demand of the complaint or statement required by statute [*see, e.g., § 70.384* et seq.)].

This form may also be adapted for use in a trial or appellate brief.

See also *§§ 70.310, 70.330* for additional general considerations relating to a motion for relief from a void judgment or order, alternative methods for obtaining relief, and discussion relating to use of this form to support an alternative motion for relief from a judgment valid on its face but void in fact.

[b] Argument

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should refer to judgment roll to show that the amount of the judgment exceeds the amount stated in the *Code Civ. Proc. § 425.11* statement of damages, and argue that the judgment therefore is void on its face.

In proceedings to set aside a judgment or order that is void on its face, no supporting or opposing affidavit or declaration is prepared. Counsel should, however, request that the court take judicial notice of the judgment or order and the judgment roll, or, if some other paper or report filed in the action is relevant to the issue of validity, that particular paper or report. For matters subject to judicial notice, and the manner of requesting it, see *Evid. Code §§ 452(d), 453*. For discussion of documents that are included in the judgment roll for purposes of *Code Civ. Proc. § 473(d)*, see *§ 70.310[2][d][iii]*.

[3] Discussion of Authorities

[a] Demand for Judgment in Section 425.11 Statement of Damages

The function of this form is to identify when the plaintiff should have stated the amount of damages claimed, which acts as a ceiling on the amount of the default judgment [*see Code Civ. Proc. § 580*], so that the argument may then move on to explain how and why the judgment exceeds the amount demanded. This form may be used when the complaint is brought in superior court for personal injury or wrongful death, in which case the complaint must not state the damages claimed, but a *Code Civ. Proc. § 425.11* statement of damages must be served on defendant before default may be taken [***Code Civ. Proc. §§ 425.10(b), 425.11(c)***]. This form includes optional sentences that should be included if the complaint includes a claim for punitive damages [*see* ***Code Civ. Proc. § 425.115***].

For memoranda for use in cases in which plaintiff is awarded damages in excess of the demand of the complaint, see *§ 70.380[1]*. For points and authorities for use in cases in which the complaint includes a claim for punitive damages, but is not one brought in superior court for personal injury or wrongful death, and a *Code Civ. Proc. § 425.115* statement reserving punitive damages is required before default may be taken, see *§ 70.382[1]*.

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7-70 California Points & Authorities § 70.382

§ 70.382 Supporting Motion to Set Aside Judgment or Order Void on Its Face When Relief Awarded to Plaintiff Is in Excess of Demand of Complaint [Code Civ. Proc. §§ 425.10, 425.11, 425.115, 580]--Demand for Judgment in Complaint and Section 425.115 Statement Reserving Punitive Damages

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside void judgment or order void on its face (see § 70.310[1]).*]

THE COURT SHOULD SET ASIDE THE DEFAULT JUDGMENT AS VOID ON ITS FACE BECAUSE IT APPEARS FROM THE RECORD THAT THE JUDGMENT VIOLATES CODE OF CIVIL PROCEDURE SECTION 580, IN THAT THE RELIEF GRANTED TO PLAINTIFF IN THE JUDGMENT EXCEEDS THE CODE OF CIVIL PROCEDURE SECTION 425.115 STATEMENT RESERVING THE RIGHT TO SEEK PUNITIVE DAMAGES.

A. Demand for Judgment in Complaint and in Section 425.115 Statement Reserving Punitive Damages. With an exception for superior court actions involving personal injury or wrongful death, a complaint or cross complaint must contain a demand for judgment for the relief to which the pleader claims to be entitled. If the recovery of money or damages is demanded, the amount demanded must be stated (*Code Civ. Proc. § 425.10(a)(2)*). However, no claim for exemplary damages shall state an amount or amounts (*Civ. Code § 3295(e)*). The plaintiff must serve a statement reserving the right to punitive damages on the defendant pursuant to Code of *Civil Procedure Section 425.115* before a default may be taken, when the motion for default judgment includes a request for punitive damages (*Code Civ. Proc. § 425.115(b)*).

B. Limitation on Relief Awarded to Plaintiff on Default. [*See § 70.380[1], Paragraph B.*]

C. Judgment Void When Relief Exceeds Demand of Complaint. [*See § 70.380[1], Paragraph C.*]

[*When appropriate, add memoranda supporting additional grounds for relief from void judgment or order (see, e.g., §§*

70.330 -70.365, 70.400 -70.421). In addition, when applicable, add memoranda based on particular grounds for granting relief from a judgment or order that is void on its face because relief was awarded in excess of the demand of the complaint or statement required by statute (see, e.g., § 70.384 et seq.).]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion to set aside a default judgment when the defaulting party alleges that the judgment is void. It may be used when the relief awarded to the plaintiff exceeds the amount stated in the *Code Civ. Proc. § 425.115* statement reserving punitive damages, and the deficiency appears on the face of the judgment roll. The form may be adapted as necessary for use by a party other than a defendant (for example, a cross defendant).

This memorandum should be combined with a general memorandum supporting a motion for relief from a void judgment or order [*see § 70.310[1]*]. It may also be combined, when appropriate, with points and authorities supporting relief from a void judgment on other particular grounds [*see, e.g., §§ 70.330 -70.365, 70.400 -70.421*]. See *§§ 70.400 -70.404*, in particular, for related points and authorities supporting a grant of relief on the ground that plaintiff failed to serve the statement of damages required in a personal injury or wrongful death action under *Code Civ. Proc. § 425.11*. In addition, when applicable, these points and authorities may be combined with points and authorities on particular grounds for granting relief from a judgment or order that is void on its face because relief was awarded in excess of the demand of the complaint or statement required by statute [*see, e.g., § 70.384* et seq.)].

They may also be adapted for use in a trial or appellate brief.

See also *§§ 70.310, 70.330* for additional general considerations relating to a motion for relief from a void judgment or order, alternative methods for obtaining relief, and discussion relating to use of this form to support an alternative motion for relief from a judgment valid on its face but void in fact.

[b] Argument

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should refer to judgment roll to show that the amount of the judgment exceeds the amount stated in the *Code Civ. Proc. § 425.115* statement reserving punitive damages, and argue that the judgment is void, therefore, on its face.

In proceedings to set aside a judgment or order that is void on its face, no supporting or opposing affidavit or declaration is prepared. Counsel should, however, request that the court take judicial notice of the judgment or order and the judgment roll, or, if some other paper or report filed in the action is relevant to the issue of validity, that particular paper or report. For matters subject to judicial notice, and the manner of requesting it, see *Evid. Code §§ 452(d), 453*. For discussion of documents that are included in the judgment roll for purposes of *Code Civ. Proc. § 473(d)*, see *§ 70.310[2][d][iii]*.

[3] Discussion of Authorities

[a] Demand for Judgment in Complaint and in Section 425.115 Statement Reserving Punitive Damages

The function of this form is to identify when the plaintiff should have stated the amount of damages claimed, which acts as a ceiling on the amount of the default judgment [*see Code Civ. Proc. § 580*], so that the argument may then move on to explain how and why the judgment exceeds the amount demanded. This form may be used when the complaint includes a claim for punitive damages, but is not one brought in superior court for personal injury or wrongful death. No

claim for punitive damages may state the amount claimed, but a Code Civ. Proc. § 425.115 statement reserving punitive damages must be served on defendant before default may be taken [***Civ. Code § 3295(e)*, 425.115(b)**].

For points and authorities for use in cases in which plaintiff is awarded damages in excess of the demand of the complaint, see *§ 70.380[1]*. For points and authorities for use in cases in which the complaint includes a claim for punitive damages, but is not one brought in superior court for personal injury or wrongful death, and a *Code Civ. Proc. § 425.11* statement of damages, see *§ 70.381[1]*.

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7-70 California Points & Authorities § 70.383

§ 70.383 Supporting Motion to Set Aside Judgment or Order Void on Its Face When Relief Awarded to Plaintiff Is in Excess of Demand of Complaint [Code Civ. Proc. §§ 425.10, 425.11, 425.115, 580]--Default Judgment Awarding Support Is Void When Not Requested in Petition for Marital Dissolution

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside void judgment or order void on its face (see § 70.310[1]).*]

THE COURT SHOULD SET ASIDE THE DEFAULT JUDGMENT AS VOID ON ITS FACE BECAUSE IT APPEARS FROM THE RECORD THAT THE DEFAULT JUDGMENT ORDERED CHILD SUPPORT EVEN THOUGH THERE WAS NO REQUEST FOR CHILD SUPPORT IN THE PETITION FOR MARITAL DISSOLUTION AND NO REQUEST FOR CHILD SUPPORT WAS SERVED ON DEFENDANT.

Default Judgment Awarding Child Support Void When Not Requested in Petition Marital Dissolution. If a plaintiff's petition for marital dissolution fails to request child support, and no notice of any such request was served on the defendant, a default judgment ordering the defendant to pay child support is void for lack of notice and subject to collateral attack (*In re Marriage of Lippel (1990) 51 Cal. 3d 1160, 1163, 276 Cal. Rptr. 290, 801 P.2d 1041*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion to set aside a default judgment when the defaulting party alleges that the judgment is void. This form may be used when the default judgment awards child support when that support is not requested in the petition for marital dissolution. The form may be adapted as necessary for use by a party other than a defendant (for example, a cross defendant).

These points and authorities should be combined with a general memorandum supporting a motion for relief from a

void judgment or order [*see § 70.310[1]*]. They may also be combined, when appropriate, with points and authorities supporting relief from a void judgment on other particular grounds [*see, e.g., §§ 70.330 -70.365, 70.400 -70.421*]. See *§§ 70.400 -70.404*, in particular, for related points and authorities supporting a grant of relief on the ground that plaintiff failed to serve the statement of damages required in a personal injury or wrongful death action under *Code Civ. Proc. § 425.11*. In addition, when applicable, these points and authorities may be combined with points and authorities on particular grounds for granting relief from a judgment or order that is void on its face because relief was awarded in excess of the demand of the complaint or statement required by statute [*see, e.g., § 70.385* et seq.)].

They may also be adapted for use in a trial or appellate brief.

See also *§§ 70.310, 70.330* for additional general considerations relating to a motion for relief from a void judgment or order, alternative methods for obtaining relief, and discussion relating to use of this form to support an alternative motion for relief from a judgment valid on its face but void in fact.

[b] Argument

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should refer to judgment roll to show that the judgment awarded child support when that relief was not requested in the petition for dissolution, and argue that the judgment is void, therefore, on its face.

In proceedings to set aside a judgment or order that is void on its face, no supporting or opposing affidavit or declaration is prepared. Counsel should, however, request that the court take judicial notice of the judgment or order and the judgment roll, or, if some other paper or report filed in the action is relevant to the issue of validity, that particular paper or report. For matters subject to judicial notice, and the manner of requesting it, see *Evid. Code §§ 452(d), 453*. For discussion of documents that are included in the judgment roll for purposes of *Code Civ. Proc. § 473(d)*, see *§ 70.310[2][d][iii]*.

[3] Discussion of Authorities

[a] Default Judgment Awarding Child Support Void When Not Requested in Petition Marital Dissolution

In re Marriage of Lippel *(1990) 51 Cal. 3d 1160, 276 Cal. Rptr. 290, 801 P.2d 1041* , involved proceedings for assignment of wages pursuant to former Civ. Code § 4701 (*now see Fam. Code § 5200 et seq.*). The wife had filed a petition for dissolution of marriage requesting custody of the child. She did not, however, check the block requesting "support of children if need is found." The husband was served with a summons and a copy of the petition and did not file a response. A default was entered, and thereafter the court entered an interlocutory judgment of dissolution of marriage, awarding the wife custody, and the husband visitation rights. The court also ordered the husband to pay a specified amount of child support monthly. The husband was never served with, and never received, a copy of the judgment and was allegedly unaware of its existence until the county commenced proceedings to assign his wages, judgment against him rendered, and an abstract of the judgment recorded and served on him. The husband moved to vacate the child support provision of the interlocutory judgment and to vacate the order assigning his wages. The trial court denied the motion, and the court of appeal affirmed the trial court's order.

The Supreme Court reversed. The Court held that it is a denial of due process, as embodied in *Code Civ. Proc. § 580*, to enter a default judgment ordering a husband to pay child support, when the wife's petition for marital dissolution, which was served on the husband, did not request child support and no notice of any such request was ever served on the husband. The Court concluded that such a default judgment is void for lack of notice and therefore subject to collateral attack by the husband (*51 Cal. 3d 1160, 1163)* . The Court stated that it is a fundamental concept of due process that a judgment against a defendant cannot be entered unless he or she was given proper notice and an opportunity to defend. California satisfies these due process requirements in default cases through *Civ. Code § 580* (*51 Cal. 3d 1160, 1166)* .

The Court also reviewed prior Supreme Court decisions and, in light of the pleading requirements for a dissolution action under the former Family Law Act (former Civ. Code § 4000 et seq.; *now see* Family Code), declined to perpetuate an exception to *Civ. Code § 580* in dissolution cases based on the idea that a prayer for general relief in such cases supports an award of support (*51 Cal. 3d 1160, 1170-1171)* .

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7-70 California Points & Authorities § 70.384

§ 70.384 Supporting Motion to Set Aside Judgment or Order Void on Its Face When Relief Awarded to Plaintiff Is in Excess of Demand of Complaint [Code Civ. Proc. §§ 425.10, 425.11, 425.115, 580]--Demand for Damages in Excess of Specified Amount or According to Proof

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside void judgment or order void on its face (see § 70.310[1]).*]

THE COURT SHOULD SET ASIDE THE DEFAULT JUDGMENT AS VOID ON ITS FACE BECAUSE IT APPEARS FROM THE RECORD THAT THE JUDGMENT VIOLATES CODE OF CIVIL PROCEDURE SECTION 580, IN THAT THE COMPLAINT SEEKS DAMAGES IN EXCESS OF A SPECIFIED AMOUNT OR ACCORDING TO PROOF, AND THE TRIAL COURT EXCEEDED ITS JURISDICTION INSOFAR AS IT AWARDED DAMAGES IN EXCESS OF THAT SPECIFIED AMOUNT.

Demand for Damages in Excess of Specified Amount or According to Proof. A prayer for damages according to proof satisfies the requirements of *Code of Civil Procedure Section 580* only if a specific amount of damages is alleged in the body of the complaint. Thus, when the complaint seeks damages in excess of a specified amount or according to proof, a trial court exceeds its jurisdiction insofar as it awards damages in excess of that specified amount (*Becker v. S.P.V. Construction Co. (1980) 27 Cal. 3d 489, 494, 165 Cal. Rptr. 825, 612 P.2d 915* ; *Pino v. Campo (1993) 15 Cal. App. 4th Supp. 1, 4-5 , 19 Cal. Rptr. 2d 483*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion to set aside a default judgment when the defaulting party alleges that the judgment is void. This form may be used when the complaint seeks damages in excess of a specified amount or according to proof and the trial court has exceeded its jurisdiction insofar as it awarded

damages in excess of that specified amount [*Becker v. S.P.V. Construction Co. (1980) 27 Cal. 3d 489, 494, 165 Cal. Rptr. 825, 612 P.2d 915]* .

These points and authorities should be combined with a general memorandum supporting a motion for relief from a void judgment or order [*see § 70.310[1]*].

These points and authorities may be combined, when appropriate, with those supporting relief on the ground that the relief awarded to the plaintiff is in excess of the demand of the complaint [*see § 70.380[1]*], the *Code Civ. Proc. § 425.11* statement of damages [*see § 70.381[1]*], or the *Code Civ. Proc. § 425.115* statement reserving punitive damages [*see § 70.382[1]*]. They may also be combined, when appropriate, with points and authorities supporting relief from a void judgment on other particular grounds [*see, e.g., §§ 70.330 -70.365, 70.400 -70.421*]. They may also be adapted for use in a trial or appellate brief.

See also *§§ 70.310, 70.330* for additional general considerations relating to a motion for relief from a void judgment or order, alternative methods for obtaining relief, and discussion relating to use of this form to support an alternative motion for relief from a judgment valid on its face but void in fact.

[b] Argument

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should refer to judgment roll to show that the complaint seeks damages in a specified amount or according to proof, and the court awarded a sum in excess of the specified amount; and argue that the judgment is void, therefore, on its face.

In proceedings to set aside a judgment or order that is void on its face, no supporting or opposing affidavit or declaration is prepared. Counsel should, however, request that the court take judicial notice of the judgment or order and the judgment roll, or, if some other paper or report filed in the action is relevant to the issue of validity, that particular paper or report. For matters subject to judicial notice, and the manner of requesting it, see *Evid. Code §§ 452(d), 453*. For discussion of documents that are included in the judgment roll for purposes of *Code Civ. Proc. § 473(d)*, see *§ 70.310[2][d][iii]*.

[3] Discussion of Authorities

[a] Demand for Damages in Excess of Specified Amount or According to Proof

In ***Becker v. S.P.V. Construction Co.*** *(1980) 27 Cal. 3d 489, 165 Cal. Rptr. 825, 612 P.2d 915* , a default judgment awarded plaintiffs $26,457.50 in damages, and $2,500 in attorney's fees. The trial court without opinion granted defendants' motion to set aside the judgment. Plaintiff appealed.

The Supreme Court reversed the trial court's order vacating the entire judgment and remanded to the trial court with directions to modify the judgment by striking the award of damages in excess of $20,000 and any attorney's fees. Defendant contended that the judgment violated *Code Civ. Proc. § 580* since it awarded compensatory damages in excess of $20,000 when plaintiffs' complaint sought damages "in excess of $20,000 ... or according to proof," punitive damages of $100,000, and costs. Reasoning that the purpose of *Code Civ. Proc. § 580* is to insure that defendants in cases which involve a default judgment have adequate notice of the judgment that may be taken against them, the Supreme Court concluded that no matter how reasonable it might appear in a particular case, the door would be opened to speculation to hold that a prayer for damages according to proof provided adequate notice of a defaulting defendant's potential liability (*27 Cal. 3d 489, 494)* . Relying on *Thorson v. Western Development Corp. (1967) 251 Cal. App. 2d 206, 59 Cal. Rptr. 299* , the Court held that a prayer for damages according to proof passes muster under *Code Civ. Proc. § 580* only if a specific amount of damages is alleged in the body of the complaint. Since $20,000 was the only

specific figure alleged in plaintiffs' complaint, the trial court exceeded its jurisdiction when it awarded damages in excess of that amount (*27 Cal. 3d 489, 494)* .

The Court also held that since no attorney's fees were prayed for in the complaint, the trial court exceeded its jurisdiction when it granted such relief. Finally, the Court held that the trial court's errors did not render the judgment void (*27 Cal. 3d 489, 495)* . Since the trial court could have modified the judgment to save that portion which was not void in a direct attack on the judgment under *Code Civ. Proc. § 473*, there was no reason why it could not be modified in a collateral attack. Accordingly, the case was reversed and remanded to the trial court with directions to modify the judgment as provided in the Court's opinion.

Pino v. Campo *(1993) 15 Cal. App. 4th Supp. 1* , *19 Cal. Rptr. 2d 483* , involved a complaint for personal injuries sustained in an automobile accident. The complaint was filed in municipal court and sought damages "according to proof" and exceeding "the jurisdiction minimum of [the municipal] court." The complaint expressly remitted all amounts in excess of the municipal court's jurisdiction, but nowhere requested a specific amount of damages. After defendant's default was taken for failure to answer timely, defendant moved to set the default aside on the ground the complaint failed to state the amount of damages as required by *Code Civ. Proc. § 425.10*. The motion was denied, and a default judgment was entered for $20,867.84. The defendant appealed.

In reversing, the appellate department held that *Code Civ. Proc. § 580* is designed to provide fundamental fairness by ensuring that defendants against whom default judgments are entered have adequate notice of the amount of the judgment that might be taken against them (*15 Cal. App. 4th Supp. 1, 4)* . The court rejected *Brown v. McAdoo (1987) 196 Cal. App. 3d Supp. 20, 22-23* , *242 Cal. Rptr. 473 (Los Angeles Superior Court, Appellate Department)* , which holds on the identical issue that a complaint for damages according to proof and remitting amounts in excess of the court's jurisdiction, without stating a specific amount, is sufficient to support a default judgment up to the court's maximum jurisdictional limit. The *Brown* view rests on the assumption that the all defendants are aware of the amount of the monetary limit on the municipal court's jurisdiction. The court in *Pino* (Orange County Superior Court, Appellate Department), rejected that assumption, noting that the California Supreme Court had recently questioned whether a defendant has constructive notice of the minimum jurisdiction of the superior court. The *Pino* court, making the statements set out in the form, thus held that *Code Civ. Proc. § 580* applies to municipal courts to limit default judgments to the amount specified in the complaint, and that the statute and due process require that defendants be told exactly what their exposure is (*15 Cal. App. 4th Supp. 1, 4-5)* .

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7-70 California Points & Authorities § 70.385

§ 70.385 Supporting Motion to Set Aside Judgment or Order Void on Its Face When Relief Awarded to Plaintiff Is in Excess of Demand of Complaint [Code Civ. Proc. §§ 425.10, 425.11, 425.115, 580]--Demand Expressly Remits Damages in Excess of Court's Jurisdiction

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside void judgment or order void on its face (see § 70.310[1]).*]

THE COURT SHOULD SET ASIDE THE DEFAULT JUDGMENT AS VOID ON ITS FACE BECAUSE IT APPEARS FROM THE RECORD THAT THE JUDGMENT VIOLATES CODE OF CIVIL PROCEDURE SECTION 580, IN THAT THE DEMAND IN THE COMPLAINT REMITTING ANY DAMAGES IN EXCESS OF THE COURT'S JURISDICTION DEPRIVED DEFENDANT OF HIS/HER DUE PROCESS RIGHT TO BE TOLD EXACTLY WHAT HIS/HER EXPOSURE IS.

Demand Expressly Remitting Damages in Excess of Court's Jurisdiction. It is doubtful a municipal court defendant can be charged with constructive notice of the municipal court's jurisdictional limit. Moreover, such a defendant has no notice, actual or constructive, of the actual amount sought by the plaintiff. Even if defendants may be deemed to have constructive notice of the jurisdictional limit, due process requires that they know exactly what risk they assume by not responding to the pleading. It is not enough to know that this risk is no more than $25,000. *Code of Civil Procedure Section 580* and due process require that defendants be told exactly what their exposure is (*Pino v. Campo (1993) 15 Cal. App. 4th Supp. 1, 5 , 19 Cal. Rptr. 2d 483* (reversing default judgment for $20,867.84), *criticizing Brown v. McAdoo (1987) 196 Cal. App. 3d Supp. 20 , 242 Cal. Rptr. 473*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion to set aside a default judgment when the

defaulting party alleges that the judgment is void. This form may be used when the demand in the complaint expressly remits damages in excess of the court's jurisdiction [*Pino v. Campo (1993) 15 Cal. App. 4th Supp. 1, 5 , 19 Cal. Rptr. 2d 483]* .

These points and authorities should be combined with a general memorandum supporting a motion for relief from a void judgment or order [*see § 70.310[1]*].

These points and authorities may be combined, when appropriate, with those supporting relief on the ground that the relief awarded to the plaintiff is in excess of the demand of the complaint [*see § 70.380[1]*], the *Code Civ. Proc. § 425.11* statement of damages [*see § 70.381[1]*], or the *Code Civ. Proc. § 425.115* statement reserving punitive damages [*see § 70.382[1]*]. They may also be combined, when appropriate, with points and authorities supporting relief from a void judgment on other particular grounds [*see, e.g., §§ 70.330 -70.365, 70.400 -70.421*]. They may also be adapted for use in a trial or appellate brief.

See also *§§ 70.310, 70.330* for additional general considerations relating to a motion for relief from a void judgment or order, alternative methods for obtaining relief, and discussion relating to use of this form to support an alternative motion for relief from a judgment valid on its face but void in fact.

[b] Argument

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should refer to judgment roll to show that the complaint remits damages in excess of the court's jurisdictional limit, arguing that the defendant was deprived of his or her due process right to have notice of the relief sought by the plaintiff, and that the judgment is void, therefore, on its face.

In proceedings to set aside a judgment or order that is void on its face, no supporting or opposing affidavit or declaration is prepared. Counsel should, however, request that the court take judicial notice of the judgment or order and the judgment roll, or, if some other paper or report filed in the action is relevant to the issue of validity, that particular paper or report. For matters subject to judicial notice, and the manner of requesting it, see *Evid. Code §§ 452(d), 453*. For discussion of documents that are included in the judgment roll for purposes of *Code Civ. Proc. § 473(d)*, see *§ 70.310[2][d][iii]*.

[3] Discussion of Authorities

[a] Demand Expressly Remitting Damages in Excess of Court's Jurisdiction

The facts and procedural background of ***Pino v. Campo*** *(1993) 15 Cal. App. 4th Supp. 1 , 19 Cal. Rptr. 2d 483* , are discussed in *§ 70.384[3]*. The appellate department of the superior court reversed the municipal court's denial of defendant's motion to set aside a default on the ground that the complaint failed to state the amount of damages as required by *Code Civ. Proc. § 425.10*. The court held that *Code Civ. Proc. § 580* is designed to provide fundamental fairness by ensuring that defendants against whom default judgments are entered have adequate notice of the amount of the judgment that might be taken against them (*15 Cal. App. 4th Supp. 1, 4)* . The court rejected *Brown v. McAdoo (1987) 196 Cal. App. 3d Supp. 20 , 242 Cal. Rptr. 473 (Los Angeles Superior Court, Appellate Department)* , which holds on the identical issue that a complaint for damages according to proof and remitting amounts in excess of the court's jurisdiction, without stating a specific amount, is sufficient to support a default judgment up to the court's maximum jurisdictional limit. The *Brown* view rests on the assumption that the all defendants are aware of the amount of the monetary limit on the municipal court's jurisdiction. The court in *Pino* (Orange County Superior Court, Appellate Department), rejected that assumption, noting that the California Supreme Court had recently questioned whether a defendant has constructive notice of the minimum jurisdiction of the superior court. The *Pino* court, making the statements set out in the form, thus held that *Code Civ. Proc. § 580* applies to municipal courts to limit default

judgments to the amount specified in the complaint, and that the statute and due process require that defendants be told exactly what their exposure is (*15 Cal. App. 4th Supp. 1, 4-5)* .

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7-70 California Points & Authorities § 70.386

§ 70.386 Supporting Motion to Set Aside Judgment or Order Void on Its Face When Relief Awarded to Plaintiff Is in Excess of Demand of Complaint [Code Civ. Proc. §§ 425.10, 425.11, 425.115, 580]--Plaintiff in Action for Accounting Must Give Post-Complaint and Pre-Default Notice of Amount Sought

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside void judgment or order void on its face (see § 70.310[1]).*]

THE COURT SHOULD SET ASIDE THE DEFAULT JUDGMENT AS VOID ON ITS FACE BECAUSE IT APPEARS FROM THE RECORD THAT THE JUDGMENT VIOLATES CODE OF CIVIL PROCEDURE SECTION 580, IN THAT THE PLAINTIFF FAILED TO GIVE DEFENDANT NOTICE OF THE AMOUNT PLAINTIFF WOULD SEEK TO PROVE WAS DUE THE PLAINTIFF IF THERE IS A DEFAULT IN THIS ACTION FOR ACCOUNTING.

Plaintiff in Action for Accounting Required to Give Post-Complaint and Pre-Default Notice of Amount Sought. A plaintiff who seeks an accounting is required to give notice to the defendant of the amount the plaintiff will seek to prove was due the plaintiff if the defendant defaults. The notice must be given with adequate time for the defendant to respond before a default is entered (*Ely v. Gray (1990) 224 Cal. App. 3d 1257, 1262-1263, 274 Cal. Rptr. 536*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion to set aside a default judgment when the defaulting party alleges that the judgment is void. This form may be used when the plaintiff fails to give the defendant post-complaint and pre-default notice of the amount sought in an accounting [*Ely v. Gray (1990) 224 Cal. App. 3d 1257, 1262-1263, 274 Cal. Rptr. 536]* .

These points and authorities should be combined with a general memorandum supporting a motion for relief from a void judgment or order [*see § 70.310[1]*].

These points and authorities may be combined, when appropriate, with those supporting relief on the ground that the relief awarded to the plaintiff is in excess of the demand of the complaint [*see § 70.380[1]*], the *Code Civ. Proc. § 425.11* statement of damages [*see § 70.381[1]*], or the *Code Civ. Proc. § 425.115* statement reserving punitive damages [*see § 70.382[1]*]. They may also be combined, when appropriate, with points and authorities supporting relief from a void judgment on other particular grounds [*see, e.g., §§ 70.330 -70.365, 70.400 -70.421*].

They may also be adapted for use in a trial or appellate brief.

See also *§§ 70.310, 70.330* for additional general considerations relating to a motion for relief from a void judgment or order, alternative methods for obtaining relief, and discussion relating to use of this form to support an alternative motion for relief from a judgment valid on its face but void in fact.

[b] Argument

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should refer to judgment roll to show that the default was entered despite the plaintiff's failure to give notice of the amount the plaintiff sought to prove was due from the defendant, and argue that the judgment is void, therefore, on its face.

In proceedings to set aside a judgment or order that is void on its face, no supporting or opposing affidavit or declaration is prepared. Counsel should, however, request that the court take judicial notice of the judgment or order and the judgment roll, or, if some other paper or report filed in the action is relevant to the issue of validity, that particular paper or report. For matters subject to judicial notice, and the manner of requesting it, see *Evid. Code §§ 452(d), 453*. For discussion of documents that are included in the judgment roll for purposes of *Code Civ. Proc. § 473(d)*, see *§ 70.310[2][d][iii]*.

[3] Discussion of Authorities

[a] Plaintiff in Action for Accounting Required to Give Post-Complaint and Pre-Default Notice of Amount Sought

In ***Ely v. Gray*** *(1990) 224 Cal. App. 3d 1257, 274 Cal. Rptr. 536* , the plaintiff filed an action for dissolution of two partnerships and for an accounting of both of them. Neither the body of the complaint nor the prayer for relief specifies or estimates a sum due plaintiff. Defendant did not answer the complaint and plaintiff requested a default judgment, without specifying the amount of money sought. At a hearing, the trial court ordered entry of the default, heard testimony from plaintiff detailing the sums he claimed were due him, and granted the judgment as requested, in the amount of $44,618.44. The defendant appealed from the judgment.

The court of appeal affirmed in part and reversed in part. The court stated that the case presented the meeting of two discordant legal principles. On the one hand, the defendant was provided with no notice of any amount of money that plaintiff claimed he was owed, and appealed arguing that a default judgment is void when the defendant is given no notice of the amount claimed. On the other hand, an action for accounting is such that an amount cannot be specified and specification of a precise amount may be grounds to deny the action (*224 Cal. App. 3d 1257, 1259-1260)* . The court resolved the conflict in the defendant's favor by citing the due process requirement of notice of the decree of financial liability of a defaulting defendant. The court stated that the plaintiff could have specified an amount before entry of the judgment since plaintiff offered proof to the court of the amount due. The court referred, by analogy, to the requirement in the case of a complaint requesting damages for personal injuries or wrongful death that the amount of

damages not be stated in the complaint, but that, before a default may be taken against such a defendant, the defendant must have received notice from the plaintiff of the amount and nature of the damages sought to be recovered [*see Code Civ. Proc. §§ 425.10, 425.11*]. By analogy to the statutes on wrongful death and personal injury damages, the court found that a plaintiff who is unable to specify an amount in the prayer to which the plaintiff is willing to be limited in the case of a default is solved by a post-complaint and pre-default notice to the defendant of the amount the plaintiff will seek to prove was due him or her if the defendant defaults. As with *Code Civ. Proc. § 425.11*, the notice must be given with adequate time for the defendant to respond before a default is entered (*224 Cal. App. 3d 1257, 1263)* . The court affirmed the portion of the default judgment decreeing the dissolution of the partnership, but reversed with regard to the amount of $44,618.44, stating that the grant of relief not demanded in the complaint was in excess of the court's jurisdiction (*224 Cal. App. 3d 1257, 1264)* .

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7-70 California Points & Authorities § 70.387

§ 70.387 Supporting Motion to Set Aside Judgment or Order Void on Its Face When Relief Awarded to Plaintiff Is in Excess of Demand of Complaint [Code Civ. Proc. §§ 425.10, 425.11, 425.115, 580]--Amount of Punitive Damages Sought Is Irrelevant to Determination of Whether Compensatory Award Is Excessive

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside void judgment or order void on its face (see § 70.310[1]).*]

THE COURT SHOULD SET ASIDE THE DEFAULT JUDGMENT AS VOID ON ITS FACE DESPITE THE FACT THAT THE TRIAL COURT'S AWARD OF COMPENSATORY AND PUNITIVE DAMAGES WAS WITHIN THE TOTAL AMOUNT OF COMPENSATORY AND PUNITIVE DAMAGES DEMANDED IN THE COMPLAINT, BECAUSE COMPENSATORY AND PUNITIVE DAMAGES ARE DIFFERENT REMEDIES.

Amount of Punitive Damages Sought Is Irrelevant to Determination of Whether Compensatory Damages Award Is Excessive. The fact that a trial court's award of compensatory and punitive damages was within the total amount of compensatory and punitive damages demanded in the complaint is irrelevant, since compensatory and punitive damages are different remedies in both nature and purpose and a demand or prayer for one is not a demand legally, or otherwise, for the other, or both (*Becker v. S.P.V. Construction Co. (1980) 27 Cal. 3d 489, 494-495, 165 Cal. Rptr. 825, 612 P.2d 915* (quoting in part *Gudarov v. Hadjieff (1952) 38 Cal. 2d 412, 417, 240 P.2d 621*); *see Ostling v. Loring (1994) 27 Cal. App. 4th 1731, 1741, 33 Cal. Rptr. 2d 391*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion to set aside a default judgment when the defaulting party alleges that the judgment is void. This form may be used when the amount of the judgment is in excess of the demand for compensatory damages, but within the total amount of compensatory and punitive damages

demanded in the complaint [*Becker v. S.P.V. Construction Co. (1980) 27 Cal. 3d 489, 494-495, 165 Cal. Rptr. 825, 612 P.2d 915]* .

For a tactical advantage, counsel may consider using this argument in a reply memorandum to respond to a contention in the opposing memorandum that defendant had adequate notice of the damages since the award was within the total amount of compensatory and punitive damages demanded in the complaint.

These points and authorities should be combined with a general memorandum supporting a motion for relief from a void judgment or order [*see § 70.310[1]*].

These points and authorities may be combined, when appropriate, with those supporting relief on the ground that the relief awarded to the plaintiff is in excess of the demand of the complaint [*see § 70.380[1]*], the *Code Civ. Proc. § 425.11* statement of damages [*see § 70.381[1]*], or the *Code Civ. Proc. § 425.115* statement reserving punitive damages [*see § 70.382[1]*]. They may also be combined, when appropriate, with points and authorities supporting relief from a void judgment on other particular grounds [*see, e.g., §§ 70.330 -70.365, 70.400 -70.421*].

They may also be adapted for use in a trial or appellate brief.

See also *§§ 70.310, 70.330* for additional general considerations relating to a motion for relief from a void judgment or order, alternative methods for obtaining relief, and discussion relating to use of this form to support an alternative motion for relief from a judgment valid on its face but void in fact.

[b] Argument

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should refer to judgment roll to show that the amount awarded in the judgment exceeded the demand for compensatory damages, despite the fact that the award was within the total amount of compensatory and punitive damages demanded in the complaint, and argue that the judgment is void, therefore, on its face.

In proceedings to set aside a judgment or order that is void on its face, no supporting or opposing affidavit or declaration is prepared. Counsel should, however, request that the court take judicial notice of the judgment or order and the judgment roll, or, if some other paper or report filed in the action is relevant to the issue of validity, that particular paper or report. For matters subject to judicial notice, and the manner of requesting it, see *Evid. Code §§ 452(d), 453*. For discussion of documents that are included in the judgment roll for purposes of *Code Civ. Proc. § 473(d)*, see *§ 70.310[2][d][iii]*.

[3] Discussion of Authorities

[a] Amount of Punitive Damages Sought Is Irrelevant to Determination of Whether Compensatory Damages Award Is Excessive

The factual and procedural background of ***Becker v. S.P.V. Construction Co.*** *(1980) 27 Cal. 3d 489, 165 Cal. Rptr. 825, 612 P.2d 915* , is discussed in *§ 70.384[3]* . In *Becker*, the Supreme Court held that the trial court had exceeded its jurisdiction in awarding compensatory damages beyond the specific figure plaintiffs demanded in their complaint, and that it was irrelevant that the award of damages was within the total amount of compensatory and punitive damages demanded in the complaint (*27 Cal. 3d 489, 494)* . Quoting from *Gudarov v. Hadjieff (1952) 38 Cal. 2d 412, 417, 240 P.2d 621* , the Court stated that since compensatory and punitive damages are different remedies in both nature and purpose, a demand or prayer for one is not a demand legally, or otherwise, for the other, or both (*27 Cal. 3d 489, 494-495)* .

Ostling v. Loring *(1994) 27 Cal. App. 4th 1731, 33 Cal. Rptr. 2d 391* , involved an action by landowners against defendant for the wrongful cutting down of trees. The complaint demanded actual damages of not less than $50,000 and up to treble damages pursuant to statutes relating to malicious injury to trees on the property of another. The defendant defaulted. At the default judgment hearing, plaintiffs requested actual damages of $150,000, and the trial court entered judgment in the amount of $150,000 in special damages. Defendant thereafter filed a motion to set aside the judgment on the ground that the court exceeded its jurisdiction by awarding relief in a different form than demanded. The trial court granted defendant's motion, vacated the judgment and the default and plaintiffs appealed.

The court of appeal affirmed the court's order vacating the judgment (*27 Cal. App. 4th 1731, 1751)* . It noted that the statutory damages, which included either mandatory double damages under *Civ. Code § 3346* or discretionary treble damages under either *Civ. Code § 3346* or *Code Civ. Proc. § 733*, were penal and punitive, and, therefore, the plaintiffs' complaint could not support a default judgment awarding $150,000 in special, or actual, damages. Since the complaint prayed for $50,000 in actual damages, the default judgment awarding $150,000 in actual damages was properly vacated (*27 Cal. App. 4th 1731, 1742)* .

The court then reversed that part of the trial court's order that had set aside the default underlying the judgment, noting that ordinarily when a default judgment is set aside on the ground the damages exceeded those pled, the appropriate action is to modify the judgment to the maximum allowable amount warranted by the complaint (*27 Cal. App. 4th 1731, 1742-1748)* . The court then determined that the complaint adequately notified defendant of the prospect of statutory damages and that double damages were mandatory under *Civ. Code § 3346*. Thus, the court directed the trial court to enter judgment in the amount of $100,000 (*27 Cal. App. 4th 1731, 1750-1751)* .

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7-70 California Points & Authorities § 70.388

§ 70.388 Supporting Motion to Set Aside Judgment or Order Void on Its Face When Relief Awarded to Plaintiff Is in Excess of Demand of Complaint [Code Civ. Proc. §§ 425.10, 425.11, 425.115, 580]--General Allegation of Entitlement to Punitive Damages Is Insufficient

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside void judgment or order void on its face (see § 70.310[1]).*]

THE COURT SHOULD SET ASIDE THE DEFAULT JUDGMENT AS VOID ON ITS FACE BECAUSE IT APPEARS FROM THE RECORD THAT THE JUDGMENT VIOLATES CODE OF CIVIL PROCEDURE SECTION 580, IN THAT THE GENERAL ALLEGATION OF ENTITLEMENT TO PUNITIVE DAMAGES IN THE COMPLAINT IS NOT REASONABLY CALCULATED TO APPRISE THE DEFENDANT OF POTENTIAL FINANCIAL LIABILITY FOR PUNITIVE DAMAGES IF JUDGMENT IS TAKEN BY DEFAULT.

General Allegation of Entitlement to Punitive Damages Insufficient. A general allegation of entitlement to punitive damages is not reasonably calculated to apprise the defendant of potential financial liability for punitive damages if judgment is taken by default (*Wiley v. Rhodes (1990) 223 Cal. App. 3d 1470, 1474, 273 Cal. Rptr. 279*), and plaintiff _____ [did not *or* did not properly] serve a *Code of Civil Procedure Section 425.115* statement reserving the right to seek punitive damages.

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion to set aside a default judgment when the defaulting party alleges that the judgment is void. This form may be used when the complaint contains a general allegation of entitlement to punitive damages [*Wiley v. Rhodes (1990) 223 Cal. App. 3d 1470, 1474, 273 Cal. Rptr. 279]* .

These points and authorities should be combined with a general memorandum supporting a motion for relief from a void judgment or order [*see § 70.310[1]*].

These points and authorities may be combined, when appropriate, with those supporting relief on the ground that the relief awarded to the plaintiff is in excess of the demand of the complaint [*see § 70.380[1]*], the *Code Civ. Proc. § 425.11* statement of damages [*see § 70.381[1]*], or the *Code Civ. Proc. § 425.115* statement reserving punitive damages [*see § 70.382[1]*]. They may also be combined, when appropriate, with points and authorities supporting relief from a void judgment on other particular grounds [*see, e.g., §§ 70.330 -70.365, 70.400 -70.421*].

They may also be adapted for use in a trial or appellate brief.

See also *§§ 70.310, 70.330* for additional general considerations relating to a motion for relief from a void judgment or order, alternative methods for obtaining relief, and discussion relating to use of this form to support an alternative motion for relief from a judgment valid on its face but void in fact.

[b] Argument

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should refer to judgment roll to show that the complaint contains a mere general allegation of entitlement to punitive damages, and argue that the judgment violated the defendant's due process right to notice of the relief sought by the plaintiff, and is therefore facially void.

In proceedings to set aside a judgment or order that is void on its face, no supporting or opposing affidavit or declaration is prepared. Counsel should, however, request that the court take judicial notice of the judgment or order and the judgment roll, or, if some other paper or report filed in the action is relevant to the issue of validity, that particular paper or report. For matters subject to judicial notice, and the manner of requesting it, see *Evid. Code §§ 452(d), 453*. For discussion of documents that are included in the judgment roll for purposes of *Code Civ. Proc. § 473(d)*, see *§ 70.310[2][d][iii]*.

[3] Discussion of Authorities

[a] General Allegation of Entitlement to Punitive Damages Insufficient

In ***Wiley v. Rhodes*** *(1990) 223 Cal. App. 3d 1470, 273 Cal. Rptr. 279* , after a default prove up hearing and trial court judgment awarding plaintiff specified amounts of general and punitive damages, and costs, the defendant appealed the judgment contending that the punitive damage award violated due process because before entry of the default judgment, the defendant was not given notice of the specified amount of punitive damages.

The court of appeal reversed the judgment. The court stated that while *Civ. Code § 3295(e)* provides that no claim for exemplary damages shall state an amount or amounts, and the statute does not specify how a plaintiff should notify the defendant of the amount of punitive damages, a default judgment greater than the amount specifically demanded is void as beyond the court's jurisdiction. Due process, according to the court, requires a defendant in a case involving a default judgment be given adequate notice of the judgment that may be entered (*223 Cal. App. 3d 1470, 1472)* . The court disagreed with the plaintiff's contention that allegations in the complaint claiming entitlement to punitive damages "appropriate to punish or set example of defendants" constituted sufficient notice to satisfy due process. The court stated that the plaintiff would leave defendants to speculate about the potential consequences of refusing to pursue a defense. A general allegation of entitlement to punitive damages is not reasonably calculated to apprise the defendant of potential financial liability for punitive damages if judgment is taken by default. Hence, the court concluded, the superior court should not have awarded the plaintiff punitive damages (*223 Cal. App. 3d 1470, 1474)* . The court noted

the nothing in *Civ. Code § 3295(e)* prohibits a plaintiff from giving the defendant notice, separate from the complaint, of the amount of punitive damages sought (*223 Cal. App. 3d 1470, 1474 n.4*).

Several years subsequent to *Wiley*, the Legislature enacted *Code Civ. Proc. § 425.115*, which provides a procedure for serving a statement preserving the right to seek a specified amount of punitive damages under *Civ. Code § 3294*. Thus, in using this paragraph of the form, counsel should point out the plaintiff's failure to satisfy *Code Civ. Proc. § 425.115*. For discussion of the procedure, see California Forms of Pleading and Practice, Ch. 205, *Defaults and Default Judgments* (Matthew Bender).

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7-70 California Points & Authorities § 70.389

§ 70.389 Supporting Motion to Set Aside Judgment or Order Void on Its Face When Relief Awarded to Plaintiff Is in Excess of Demand of Complaint [Code Civ. Proc. §§ 425.10, 425.11, 425.115, 580]--Attorney's Fees Award Is Improper Without Prayer

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside void judgment or order void on its face (see § 70.310[1]).*]

THE COURT SHOULD SET ASIDE THE DEFAULT JUDGMENT AS VOID ON ITS FACE BECAUSE IT APPEARS FROM THE RECORD THAT THE JUDGMENT VIOLATES CODE OF CIVIL PROCEDURE SECTION 580, IN THAT THE TRIAL COURT AWARDED ATTORNEY'S FEES EVEN THOUGH PLAINTIFF FAILED TO PRAY FOR ATTORNEY'S FEES IN THE COMPLAINT.

Attorney's Fees Award Improper if Not Prayed for. A trial court exceeds its authority under *Code of Civil Procedure Section 580* in awarding attorney's fees if plaintiff fails to set forth in his or her complaint a prayer for attorney's fees (*Becker v. S.P.V. Construction Co. (1980) 27 Cal. 3d 489, 495, 165 Cal. Rptr. 825, 612 P.2d 915* ; *Wiley v. Rhodes (1990) 223 Cal. App. 3d 1470, 1474, 273 Cal. Rptr. 279*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion to set aside a default judgment when the defaulting party alleges that the judgment is void. This form may be used when the judgment awards attorney's fees despite plaintiff's failure to request attorney's fees in the complaint [*Becker v. S.P.V. Construction Co. (1980) 27 Cal. 3d 489, 495, 165 Cal. Rptr. 825, 612 P.2d 915* ; *Wiley v. Rhodes (1990) 223 Cal. App. 3d 1470, 1474, 273 Cal. Rptr. 279]* .

These points and authorities should be combined with a general memorandum supporting a motion for relief from a void judgment or order [*see § 70.310[1]*].

These points and authorities may be combined, when appropriate, with those supporting relief on the ground that the relief awarded to the plaintiff is in excess of the demand of the complaint [*see § 70.380[1]*], the *Code Civ. Proc. § 425.11* statement of damages [*see § 70.381[1]*], or the *Code Civ. Proc. § 425.115* statement reserving punitive damages [*see § 70.382[1]*]. They may also be combined, when appropriate, with points and authorities supporting relief from a void judgment on other particular grounds [*see, e.g., §§ 70.330 -70.365, 70.400 -70.421*].

They may also be adapted for use in a trial or appellate brief.

See also *§§ 70.310, 70.330* for additional general considerations relating to a motion for relief from a void judgment or order, alternative methods for obtaining relief, and discussion relating to use of this form to support an alternative motion for relief from a judgment valid on its face but void in fact.

[b] Argument

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should refer to judgment roll to show that the complaint fails to request attorney's fees and the judgment awarded those fees, and argue that the judgment is therefore facially void.

In proceedings to set aside a judgment or order that is void on its face, no supporting or opposing affidavit or declaration is prepared. Counsel should, however, request that the court take judicial notice of the judgment or order and the judgment roll, or, if some other paper or report filed in the action is relevant to the issue of validity, that particular paper or report. For matters subject to judicial notice, and the manner of requesting it, see *Evid. Code §§ 452(d), 453*. For discussion of documents that are included in the judgment roll for purposes of *Code Civ. Proc. § 473(d)*, see *§ 70.310[2][d][iii]*.

[3] Discussion of Authorities

[a] Attorney's Fees Award Improper if Not Prayed for

The factual and procedural background of ***Becker v. S.P.V. Construction Co.*** *(1980) 27 Cal. 3d 489, 165 Cal. Rptr. 825, 612 P.2d 915* , is discussed in *§ 70.384[3]* . In *Becker,* the Supreme Court held that since no attorney's fees were prayed for in the complaint, the trial court exceeded its jurisdiction when it granted such relief (*27 Cal. 3d 489, 495)* .

The facts and procedural background of ***Wiley v. Rhodes*** *(1990) 223 Cal. App. 3d 1470, 273 Cal. Rptr. 279* , is discussed in *§ 70.388[3]*. In *Wiley,* the court of appeal held that a default judgment awarding attorney's fees as costs violated due process because the complaint did not allege any contract or statute authorizing attorney's fees or demand them in the prayer, and the plaintiff failed to request attorney's fees as costs on the request to enter default under former Cal. Rules of Ct., Rule 870(a) [*now see Cal. Rules of Ct., Rule 3.1700(a)*] (*223 Cal. App. 3d 1470, 1474 n.5*).

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7-70 California Points & Authorities § 70.390

§ 70.390 Supporting Motion to Set Aside Judgment or Order Void on Its Face When Relief Awarded to Plaintiff Is in Excess of Demand of Complaint [Code Civ. Proc. §§ 425.10, 425.11, 425.115, 580]--Limitation on Relief Applies When Answer Is Stricken as Discovery Sanction

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside void judgment or order void on its face (see § 70.310[1]).*]

THE COURT SHOULD SET ASIDE THE DEFAULT JUDGMENT AS VOID ON ITS FACE BECAUSE IT APPEARS FROM THE RECORD THAT THE JUDGMENT VIOLATES CODE OF CIVIL PROCEDURE SECTION 580, IN THAT THE DEFAULT JUDGMENT WAS ENTERED AS A DISCOVERY SANCTION AND THE DEFENDANT'S ANSWER WAS STRICKEN, BUT THE AWARD EXCEEDED THE AMOUNT PRAYED FOR IN THE COMPLAINT.

Limitation on Relief Applicable When Answer Stricken as Discovery Sanction. When a default judgment is entered as a discovery sanction and the defendant's answer is stricken, the award is limited to the amount prayed for by the plaintiff in the complaint (*Greenup v. Rodman (1986) 42 Cal. 3d 822, 824, 231 Cal. Rptr. 220, 726 P.2d 1295*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion to set aside a default judgment when the defaulting party alleges that the judgment is void. This form may be used when a default judgment is entered as a discovery sanction and the defendant's answer is stricken, but the award exceeds the amount prayed for in the complaint [*Greenup v. Rodman (1986) 42 Cal. 3d 822, 824, 231 Cal. Rptr. 220, 726 P.2d 1295]* .

These points and authorities should be combined with a general memorandum supporting a motion for relief from a

void judgment or order [*see § 70.310[1]*].

These points and authorities may be combined, when appropriate, with those supporting relief on the ground that the relief awarded to the plaintiff is in excess of the demand of the complaint [*see § 70.380[1]*], the *Code Civ. Proc. § 425.11* statement of damages [*see § 70.381[1]*], or the *Code Civ. Proc. § 425.115* statement reserving punitive damages [*see § 70.382[1]*]. They may also be combined, when appropriate, with points and authorities supporting relief from a void judgment on other particular grounds [*see, e.g., §§ 70.330 -70.365, 70.400 -70.421*].

They may also be adapted for use in a trial or appellate brief.

See also *§§ 70.310, 70.330* for additional general considerations relating to a motion for relief from a void judgment or order, alternative methods for obtaining relief, and discussion relating to use of this form to support an alternative motion for relief from a judgment valid on its face but void in fact.

[b] Argument

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should refer to judgment roll to show:

- The default was entered as a result of a discovery sanction.
- The answer was stricken.
- The amount of damages prayed for in the complaint.
- The amount of the judgment.
- The extent to which the judgment exceeds the amount prayed for in the complaint.

Counsel would argue that the judgment is therefore facially void.

In proceedings to set aside a judgment or order that is void on its face, no supporting or opposing affidavit or declaration is prepared. Counsel should, however, request that the court take judicial notice of the judgment or order and the judgment roll, or, if some other paper or report filed in the action is relevant to the issue of validity, that particular paper or report. For matters subject to judicial notice, and the manner of requesting it, see *Evid. Code §§ 452(d), 453*. For discussion of documents that are included in the judgment roll for purposes of *Code Civ. Proc. § 473(d)*, see *§ 70.310[2][d][iii]*.

[3] Discussion of Authorities

[a] Limitation on Relief Applicable When Answer Stricken as Discovery Sanction

In ***Greenup v. Rodman*** *(1986) 42 Cal. 3d 822, 231 Cal. Rptr. 220, 726 P.2d 1295* , plaintiff brought an action against defendant for, inter alia, fraud and conversion. After repeated refusals by defendant to comply with discovery requests, the court granted plaintiff's motion to strike the answer and enter a default. The default judgment awarded plaintiffs $338,000 in compensatory damages and $338,000 in punitive damages. Plaintiff's complaint, however, had only requested the specific sum of $100,000 in exemplary and punitive damages, with other damages subject to proof at the time of trial, or as the court deemed just. Defendants appealed, contending that the court lacked jurisdiction to award damages in an amount exceeding the prayer. The court of appeal affirmed the judgment and the Supreme Court then granted review to consider whether a default judgment entered as a discovery sanction is excepted from the general rule

under *Code Civ. Proc. § 580* that "if there be no answer" filed, the plaintiff's relief "cannot exceed that which he shall have demanded in his complaint."

The Supreme Court reversed the judgment, and directed that the award be amended. The Court concluded that a plaintiff's demand sets a ceiling on recovery for any default judgment entered, including a judgment entered when an answer is stricken as a discovery sanction (*42 Cal. 3d 822, 824, 828)* . The Court stated that when an answer is stricken as a sanction for the defendant's obstruction of discovery, it is as if no answer had been filed in the first instance. Consequently, the ceiling on recovery in *Code Civ. Proc. § 580* is applicable (*42 Cal. 3d 822, 828)* .

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[Reserved]

§§ 70.391[Reserved]

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7-70 California Points & Authorities § 70.400

§ 70.400 Supporting Motion to Set Aside Default Judgment Void on Its Face for Failure to Serve Statement of Damages on Cause of Action for Personal Injury or Wrongful Death [Code Civ. Proc. § 425.11]--General Form

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside void judgment or order under Code Civ. Proc. § 473(d) (see § 70.310[1]).*]

THE COURT SHOULD SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT IN THIS ACTION AS VOID ON THEIR FACE BECAUSE IT APPEARS FROM THE RECORD THAT DEFENDANT WAS NOT SERVED WITH _____ [ANY *or* A SUFFICIENT] STATEMENT OF DAMAGES.

A. Service of Statement of Damages Required in Personal Injury or Wrongful Death Action. If no request is made for a statement of damages setting forth the nature and amount of damages being sought in an action in the superior court to recover damages for personal injury or wrongful death, the plaintiff must serve on the defendant a statement of the amount of special and general damages sought to be recovered before a default may be taken (*Code Civ. Proc. § 425.11*; *Schwab v. Rondel Homes, Inc. (1991) 53 Cal. 3d 428, 430, 435, 280 Cal. Rptr. 83, 808 P.2d 226*).

B. Defendant Must Be Given Actual Notice of Special and General Damages Claimed. Use of the word "notice" and the terms of art "special and general damages," in *Code of Civil Procedure Section 425.11*, imply that the Legislature intended that a defendant be given actual notice of the special and general damages claimed by a plaintiff (*Schwab v. Rondel Homes, Inc. (1991) 53 Cal. 3d 428, 435, 280 Cal. Rptr. 83, 808 P.2d 226*).

C. Failure to Serve Statement of Damages Renders Default Void on Its Face. A default entered without any statement of damages being served on the defendant is void on the face of the record and may be successfully challenged beyond the limitation period specified in *Section 473 of the Code of Civil Procedure* (*Plotitsa v. Superior Court (1983) 140 Cal. App. 3d 755, 760, 189 Cal. Rptr. 769* ; *Stevenson v. Turner (1979) 94 Cal. App. 3d 315, 319-320, 156 Cal. Rptr. 499*).

[*When appropriate, add points and authorities supporting additional grounds for relief from void judgment or order (see, e.g., §§ 70.330 -70.390, 70.401 -70.421).*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion to set aside a default judgment in an action for personal injury or wrongful death, when the defaulting party alleges that the judgment is void because the plaintiff failed to serve a statement of damages as required under Code *Civ. Proc. § 425.11*, and the deficiency appears on the face of the judgment roll. The form may be adapted as necessary for use by a party other than a defendant (for example, a cross defendant).

These points and authorities should be combined with a general memorandum supporting a motion for relief from a void judgment or order [*see § 70.310[1]*]. They may also be combined, when appropriate, with points and authorities supporting relief from a void judgment on other particular grounds [*see, e.g., §§ 70.330 -70.390, 70.401 -70.421*]. See *§§ 70.380 -70.390*, in particular, for related points and authorities supporting a grant of relief on the ground that the relief awarded in the judgment exceeds that demanded in the complaint. Also see *§§ 70.410 -70.413*, relating to relief based on failure to have served a *Code Civ. Proc. § 425.115* statement reserving the right to punitive damages. The points and authorities in this form may also be adapted for use in a trial or appellate brief.

See also *§§ 70.310, 70.330* for additional general considerations relating to a motion for relief from a void judgment or order, alternative methods for obtaining relief, and discussion relating to use of this form to support an alternative motion for relief from a judgment valid on its face but void in fact.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. That is, counsel should refer to the record to show that the defendant was not, or was not properly, served with a statement of damages as required under *Code Civ. Proc. § 425.11*.

In proceedings to set aside a judgment or order that is void on its face, no supporting or opposing affidavit or declaration is prepared. Counsel should, however, request that the court take judicial notice of the judgment or order and the judgment roll, or, if some other paper or report filed in the action is relevant to the issue of validity, that particular paper or report. For matters subject to judicial notice, and the manner of requesting it, see *Evid. Code §§ 452(d), 453*. For discussion of documents that are included in the judgment roll for purposes of *Code Civ. Proc. § 473(d)*, see *§ 70.310[2][d][iii]*.

[c] Specification of Damages in Personal Injury and Wrongful Death Action

[i] Service of Statement of Damages Required

In an action for personal injury or wrongful death, the amount of damages sought cannot be stated in the complaint [*see Code Civ. Proc. § 425.10(b)*]. However, before a default can be taken in such an action, plaintiff must notify defendant of the amount of general and special damages sought by means of a statement setting forth those amounts [*Code Civ. Proc. §§ 425.11, 580*]. Failure by plaintiff to serve a statement of damages will render a subsequent default judgment void on its face, and the judgment may be successfully challenged beyond the limitation period specified in *Code Civ. Proc. § 473* [*Plotitsa v. Superior Court (1983) 140 Cal. App. 3d 755, 760, 189 Cal. Rptr. 769* (discussed under [3][c], *below*)].

[ii] Manner of Service

The statement of damages must be served in the same manner as a summons if the party against whom the default is being taken has not appeared in the action [*Code Civ. Proc. § 425.11(d)(1)*]. If the party against whom default is to be taken has appeared in the action, the statement of damages must be served either on the party's attorney or, if the party appears without an attorney, on the party. Service must be either in the manner provided for the service of summons or in the manner provided by *Code Civ. Proc. § 1010 et seq.* [*Code Civ. Proc. § 425.11(d)(2)*]. For points and authorities for use when the statement of damages was not served in the same manner as the summons, see *§ 70.403[1]*.

[iii] Service by Publication

Under *Code Civ. Proc. §§ 425.11* and *585(c)*, as amended by 1993 Stats., ch. 456, the defendant is entitled to be served with a statement of damages. Presumably, if service was originally by publication, the defendant has not appeared, and the defendant still cannot be served otherwise, the statement would be served by publication [*see Code Civ. Proc. § 425.11(d)(1)*; *see also Code Civ. Proc. § 415.50* (service by publication)]. The 1993 amendments resolve a conflict in the courts of appeal [*compare Candelaria v. Avitia (1990) 219 Cal. App. 3d 1436, 1441, 269 Cal. Rptr. 32* (Sixth Appellate Dist., relying on *Code Civ. Proc. § 585(c)* and excusing service by publication of statement of damages as futile) *with Parish v. Peters (1991) 1 Cal. App. 4th 202, 210-214, 1 Cal. Rptr. 2d 836* (Third Appellate Dist., service by publication constitutionally mandated)].

[iv] Time for Service

The phrase "before a default may be taken" has been construed to require that the notice be given before the default is entered by the clerk [*Hamm v. Elkin (1987) 196 Cal. App. 3d 1343, 1346, 242 Cal. Rptr. 545]* .

Prudent counsel should allow 30 days to elapse after service of the statement of damages before taking the defendant's default [*but see Code Civ. Proc. § 1005(a)(13), (b)* (16-day notice for proceedings that require notice, but do not otherwise specify a time)]. *Code Civ. Proc. § 425.11*, prior to its amendment by 1993 Stats., ch. 456, contained no language stating or suggesting the amount of notice that a plaintiff must give a defendant concerning the amount of damages sought before seeking default [*Connelly v. Castillo (1987) 190 Cal. App. 3d 1583, 1588, 236 Cal. Rptr. 112]* . The Supreme Court, construing *Code Civ. Proc. § 425.11*, held that a defendant is entitled to actual notice of the liability to which he or she may be subjected, a reasonable period of time before default may be entered [*Schwab v. Rondel Homes, Inc. (1991) 53 Cal. 3d 428, 435, 280 Cal. Rptr. 83, 808 P.2d 226]* . Prior to the *Schwab* decision, some courts, analogizing the situation to the time permitted to answer an amended complaint increasing the amount of damages sought, had held that the plaintiff must defer the entry of default until 30 days from the date the statement of damages was served [*Twine v. Compton Supermarket (1986) 179 Cal. App. 3d 514, 517, 224 Cal. Rptr. 562* ; *Plotitsa v. Superior Court (1983) 140 Cal. App. 3d 755, 761, 189 Cal. Rptr. 769]* . At least one court had rejected the 30-day rule, and held that a reasonable time was adequate [*Connelly v. Castillo (1987) 190 Cal. App. 3d 1583, 1589-1590, 236 Cal. Rptr. 112* (27 days)]. When *Schwab* held that a reasonable period of time was required, it cited the cases that required 30 days [*see Schwab v. Rondel Homes, Inc. (1991) 53 Cal. 3d 428, 434-435, 280 Cal. Rptr. 83, 808 P.2d 226]* . The amendment of *Code Civ. Proc. § 425.11* by 1993 Stats., ch. 456, to specify the manner of service, seems to strengthen the service of summons analogy [*see* [ii], *above*].

[v] Defective Proof of Service

The distinction between the fact of service of the statement of damages and the proof of service should be kept in mind. A default judgment is valid when based on actual service of summons on the defendant, although no proof of service was filed prior to entry of the judgment. In such cases, the judgment is irregular, but not void. This rule has also been applied with regard to service of the statement of damages. Thus, when the plaintiff personally served the defendant with a statement of damages before requesting default, the plaintiff's failure to file proof of that service constitutes a

mere irregularity that does not void the judgment [*Connelly v. Castillo (1987) 190 Cal. App. 3d 1583, 1589, 236 Cal. Rptr. 112* (discussed in *§ 70.453[3*])].

[vi] Actual Notice of Special and General Damages Required

The Supreme Court has held that the use of the word "notice" and the terms of art "special and general damages" in *Code Civ. Proc. § 425.11* require that a defendant be given actual notice of the special and general damages claimed by the plaintiff [*Schwab v. Rondel Homes, Inc. (1991) 53 Cal. 3d 428, 435, 280 Cal. Rptr. 83, 808 P.2d 226]* .

The requirement for actual notice of damages sought has been satisfied by the complaint itself. For example, a prayer for general damages in excess of the court's jurisdictional requirements, although not following the procedure required by *Code Civ. Proc. §§ 425.10, 425.11*, is sufficient notice to the defendant of the amount of damages claimed [*Schwab v. Rondel Homes, Inc. (1991) 53 Cal. 3d 428, 435, 280 Cal. Rptr. 83, 808 P.2d 226* (dictum, citing *Greenup v. Rodman (1986) 42 Cal. 3d 822, 830, 231 Cal. Rptr. 220, 726 P.2d 1295* with approval)].

The mere fact that an action is an unlimited civil case, however, does not put defendant on notice that the amount of general and special damages will be at least the jurisdictional minimum of the court. Thus, merely pleading damages "according to proof," without serving a statement of special and general damages on the defendant does not satisfy the requirements of *Code Civ. Proc. § 425.11* [*Schwab v. Rondel Homes, Inc. (1991) 53 Cal. 3d 428, 434, 280 Cal. Rptr. 83, 808 P.2d 226* , overruling *Morgan v. Southern Cal. Rapid Transit Dist. (1987) 192 Cal. App. 3d 976, 237 Cal. Rptr. 756* ; *see also Hamm v. Elkin (1987) 196 Cal. App. 3d 1343, 1347, 242 Cal. Rptr. 545* (unspecified general and special damages inadequate to fulfill function of statement of damages)].

Code Civ. Proc. § 425.11 requires specific notice of special and general damages. Thus, a prayer for statutory and punitive damages is insufficient to satisfy the statute [*Schwab v. Rondel Homes, Inc. (1991) 53 Cal. 3d 428, 435, 280 Cal. Rptr. 83, 808 P.2d 226]* .

[d] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 70.450 -70.453* may be used to oppose a motion supported by the points and authorities in this form.

[3] Discussion of Authorities

[a] Service of Statement of Damages Required in Personal Injury or Wrongful Death Action

In ***Schwab v. Rondel Homes, Inc.*** *(1991) 53 Cal. 3d 428, 280 Cal. Rptr. 83, 808 P.2d 226* , two tenants brought an action the owners and managers of an apartment complex for housing discrimination, claiming that the defendants would not rent to them because one of the two plaintiffs was deaf. The prayer of the complaint requested damages for emotional distress, further monetary and pecuniary losses and damages in amounts according to proof, treble statutory damages in amounts according to proof "but in a sum no less than $250," attorney's fees, and punitive damages of $500,000. The defendants failed to respond to the complaint, and a default was entered. Thereafter, at a prove-up hearing, the trial court awarded each plaintiff the principle sum of $50,000, punitive damages of $100,000, and attorney's fees and costs. The defendants moved to set aside the default and the default judgment. The trial court granted the motion, finding that plaintiffs should have served a statement of damages on defendants under *Code Civ. Proc. § 425.11*. The court of appeal reversed the order setting aside the default, but limited the amount of damages.

The Supreme Court reversed the judgment of the court of appeal. The plaintiffs relied on *Morgan v. Southern Cal. Rapid Transit Dist. (1987) 192 Cal. App. 3d 976, 237 Cal. Rptr. 756* , and argued that since the action was brought in superior court, the defendants were on notice that the plaintiffs claimed at least the jurisdictional minimum. *Morgan*, according to the Court, interpreted *Greenup v. Rodman (1986) 42 Cal. 3d 822, 231 Cal. Rptr. 220, 726 P.2d 1295*

(discussed in *§§ 70.390[3], 70.452[3]*), to hold that all defendants should be presumed to be on notice of the plaintiffs' claim for general damages of at least the jurisdictional minimum, regardless of the form of complaint. The Court, however, distinguished *Greenup* by pointing out that, although *Greenup* awarded the plaintiff the jurisdictional minimum in general damages, the complaint in that case specifically pleaded general damages "in excess" of the court's jurisdictional requirements. Based on that notice, *Greenup* held that the defendant knew, or should have known, that the plaintiff was claiming at least the jurisdictional minimum of $15,000 (*53 Cal. 3d 428, 433-434)* . In the case before it, however, the Court noted that the demand for $500,000 per plaintiff in *punitive* damages in itself properly put the case before the superior court. Thus, neither a lay person nor an experienced attorney could be presumed to know the amount of *general* damages that the plaintiffs were seeking. Accordingly, the Court disapproved of *Morgan* to the extent that it suggested that a default judgment may be entered in the absence of notice in the complaint or a "statement of damages" of the special and general damages sought. The Court held that in § 425.11, the use of the word "notice" and the terms of art "special and general damages" imply that the Legislature intended that a defendant be given actual notice of the special and general damages claimed by a plaintiff. Hence, plaintiffs' prayer for statutory damages in an amount according to proof but no less than $250 and punitive damages in the amount of $500,000 was not sufficient to meet the requirements of § 425.11 (*53 Cal. 3d 428, 435)* .

[b] Defendant Must Be Given Actual Notice of Special and General Damages Claimed

The facts and procedural background of ***Schwab v. Rondel Homes, Inc.*** *(1991) 53 Cal. 3d 428, 280 Cal. Rptr. 83, 808 P.2d 226* , are discussed under [a], *above.* In this case, the Supreme Court held that in *Code Civ. Proc. § 425.11*, the use of the word "notice" and the terms of art "special and general damages" imply that the Legislature intended that a defendant be given actual notice of the special and general damages claimed by a plaintiff. Hence, plaintiffs' prayer for statutory damages in an amount according to proof but no less than $250 and punitive damages in the amount of $500,000 was not sufficient to meet the requirements of § 425.11 (*53 Cal. 3d 428, 435)* .

[c] Failure to Serve Statement of Damages Renders Default Void on Its Face

In ***Plotitsa v. Superior Court*** *(1983) 140 Cal. App. 3d 755, 189 Cal. Rptr. 769* , a default judgment was taken against the defendants in a personal injury action. The defendants filed a joint motion to set aside the default pursuant to *Code Civ. Proc. § 473(b)*, claiming excusable neglect or inadvertence, and filed a reply memorandum contending that the default was void because the request to enter default had not been personally served and because entry of default one day after copies of the request were mailed to them did not afford them a due process opportunity to determine whether to defend against the action once they are apprised of the precise amount of damages plaintiff claimed, as required by *Code Civ. Proc. § 425.11*. The defendants' motion was denied, and they filed a petition for a writ of mandate in the court of appeal.

The court of appeal issued a peremptory writ of mandate directing the trial court to vacate its order denying the defendants' motion for relief from default and to enter a new order granting the motion. The court stated that nothing in Section 425.11 would preclude the use of the request for default as a statement of damages, but held that the use here was inadequate, because time between service and the taking of default was inadequate and because the request merely stated a total amount sought without a breakdown between the special and general damages (*140 Cal. App. 3d 755 760-761* ,). The court held that the plaintiffs had not satisfied the requirements of Section 425.11, and that a default entered in a personal injury or wrongful death action without any statement of damages being served on the defendant is void on the face of the record and may be successfully challenged beyond the six-month limitation period specified in former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*) (*140 Cal. App. 3d 755, 760, 762)* .

The facts and procedural background of ***Stevenson v. Turner*** *(1979) 94 Cal. App. 3d 315, 156 Cal. Rptr. 499* , are discussed under [4][a], *below.* In *Stevenson,* the court found that there was a defect in the pre-default procedure which affected the validity of the subsequent entry of default in that plaintiff's failure to serve a statement of requested damages deprived defendant of any actual notice of her potential liability (*94 Cal. App. 3d 315, 320)* .

[4] Additional Authorities

[a] Service of Statement of Damages Required in Personal Injury or Wrongful Death Action

Barragan v. Banco BCH (1986) 188 Cal. App. 3d 283, 232 Cal. Rptr. 758 , involved an action by former depositors of a nationalized Mexican bank against the bank for conversion, accounting, fraud and deceit, conspiracy, negligence, breach of contract, and false imprisonment arising out of the bank's refusal to honor checks drawn by the depositors on their account, which refusal resulted in the loss of their business and residence. The trial court entered a default judgment in favor of the former depositors, and denied the bank's motion for relief from the default. The court of appeal affirmed, holding, in part, that failure of the depositors to file the required notice of damages pursuant to *Code Civ. Proc. § 425.11* did not render the default judgment void because their nonpersonal injury damages were clearly isolated from their personal injury damages and amply supported the amount set forth in the prayer for relief (*188 Cal. App. 3d 283, 303-304)* .

In *Jones v. Interstate Recovery Service (1984) 160 Cal. App. 3d 925, 206 Cal. Rptr. 924* , which was an action for trespass, assault, conversion, intentional infliction of emotional distress, and wrongful repossession, the court of appeal held that the nonpersonal injury claims were so closely tied to the personal injury claims as to require the entire default judgment to be set aside for failure of plaintiff to give the *Code Civ. Proc. § 425.11* disclosures (*160 Cal. App. 3d 925, 929-930)* .

In *Stevenson v. Turner (1979) 94 Cal. App. 3d 315, 156 Cal. Rptr. 499* , the plaintiff was awarded damages in the amount of $20,000 by a default judgment. Although the defendant moved for relief from default under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), after the six-month limitation period, the court found, that there was a defect in the pre-default procedure which affected the validity of the subsequent entry of default. The court cited *Code Civ. Proc. § 425.11* requiring that a plaintiff give notice to the defendant of the amount of special and general damages sought to be recovered before a default may be taken, and observed that the record was barren of any indication that such a statement was ever served on the defendant at any time prior to the entry of default (*94 Cal. App. 3d 315, 319)* . The court noted that the clear import of the statute is to give the defendant one "last clear chance" to respond to the allegations of the complaint and to avoid the precise consequences which had obtained in the case before it, that is, a judgment for a substantial sum, well after the time for relief from default had passed, after an evidentiary hearing of which the defendant did not receive notice. The court held that the failure to serve the statement of requested damages deprived defendant of any actual notice of her potential liability and thus it could not be said that the omission was harmless (*94 Cal. App. 3d 315, 320)* .

[b] Failure to Serve Statement of Damages Renders Default Void on Its Face

In *In re Marriage of Wells (1988) 206 Cal. App. 3d 1434, 254 Cal. Rptr. 185* , the court of appeal affirmed a default judgment of dissolution of marriage in which the trial court had reserved the issue of spousal support, although support was not sought in the petition. The court reasoned that although *Code Civ. Proc. § 580* (relief granted plaintiff when no answer is filed cannot exceed demand in complaint) is a general statute applying to all judgments taken by default for failure to answer, the trial court had jurisdiction to reserve the issue under former Civ. Code § 4801 (*now see Fam. Code § 4300 et seq.*), a special statute authorizing the court to order spousal support, and that the general statute had to yield to the special statute. The court nevertheless pointed out that the intent of *Code Civ. Proc. § 580* is to ensure that a defendant who declines to contest an action does not thereby subject himself or herself to open-ended liability; because a default judgment that exceeds the demand would effectively deny a fair hearing to the defaulting party, courts have consistently read *Code Civ. Proc. § 580* to mean that a default judgment greater than the amount specifically demanded is void as beyond the court's jurisdiction (*206 Cal. App. 3d 1434, 1438)* . The court added that the purpose of *Code Civ. Proc. § 580* is to assure a defendant that if he or she does not contest the action, the judgment taken against him or her will not go beyond the prayer of the complaint, for a defendant has the right to assume that the judgment that would follow a default on his or her part would embrace only the issues presented by the complaint and the relief therein asked

(*206 Cal. App. 3d 1434, 1437-1438)* ; the court concluded that this purpose is fully accomplished in a divorce action even though the trial court reserves the issue of spousal support regarding both parties (*206 Cal. App. 3d 1434, 1438)* .

Petty v. Manpower, Inc. (1979) 94 Cal. App. 3d 794, 156 Cal. Rptr. 622 , involved an action for personal injuries in which defendant's default was taken. Plaintiff's complaint complied with *Code Civ. Proc. § 425.10* in that it did not state the amount of damages sought. Plaintiff did not file a statement notifying defendant of the amount of special and general damages sought as required by *Code Civ. Proc. § 425.11*, nor did she indicate the amount of judgment to be entered in the request to enter default. Defendant's motion to set aside its default was denied and judgment was entered against it. On appeal, the court of appeal held that plaintiff's failure to notify defendant of the damages sought, in compliance with *Code Civ. Proc. § 425.11*, required reversal of the default judgment (*94 Cal. App. 3d 794, 798)* . Considering *Code Civ. Proc. §§ 425.10* and *425.11* together with *Code Civ. Proc. § 580* (limiting the amount of damages recoverable on default), the court concluded that any other result would effectively deny a defendant due process, a fair hearing. In the court's opinion, "[t]he meaning of section 425.11 is clear and removes the anomaly between section 580 and section 425.10." The court declared that a default judgment in excess of the amount of relief demanded by the prayer denies a defaulting party a fair hearing and is an act in excess of the court's jurisdiction. Thus, the court said, it would appear that when no specific amount of damages is requested, any amount would be in excess of that demanded (*94 Cal. App. 3d 794, 798)* .

The court noted that defendant's failure to present this ground in its motion to set aside the default in the trial court did not bar its consideration on appeal because questions of jurisdiction are never waived and may be raised for the first time on appeal (*94 Cal. App. 3d 794, 798-799)* . The fact that defendant had notice of the amount sought after it had been awarded was not adequate notice, despite plaintiff's reliance on marital dissolution cases which permit spousal support pursuant to a request of an unspecified amount. The court declared that such cases were not in point in that in dissolution cases the issue of support is so germane that a defendant must anticipate an award of support although there is no prayer to that effect. The court reversed the default judgment and stated that the trial court had erred in denying defendant's motion to set aside the default (*94 Cal. App. 3d 794, 799)* .

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7-70 California Points & Authorities § 70.401

§ 70.401 Supporting Motion to Set Aside Default Judgment Void on Its Face for Failure to Serve Statement of Damages on Cause of Action for Personal Injury or Wrongful Death [Code Civ. Proc. § 425.11]--Indication of Value During Settlement Conference Is Insufficient

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside void judgment or order under Code Civ. Proc. § 473(d), based on the failure to serve Code Civ. Proc. § 425.11 statement of damages (see § 70.400[1]).*]

THE COURT SHOULD SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT IN THIS ACTION AS VOID ON THEIR FACE BECAUSE THE ASSERTED INDICATION OF THE CASE'S VALUE MADE IN THE COURSE OF SETTLEMENT DISCUSSIONS BETWEEN COUNSEL FOR THE PARTIES IS NOT THE ACTUAL NOTICE OF SPECIAL AND GENERAL DAMAGES REQUIRED BY CODE OF CIVIL PROCEDURE SECTION 425.11.

Indication of Value During Settlement Conference Is Insufficient. An indication of the value of a case made in the course of settlement discussions between counsel for the parties is not the actual notice of special and general damages required by *Code of Civil Procedure Section 425.11*. The legislative purpose behind the statutory requirement is evident: it is to give the defendant a specific notice of damages sought that is separate and apart from the existing mechanisms of settlement conference statements and the at-issue memorandum (*Debbie S. v. Ray (1993) 16 Cal. App. 4th 193, 199, 19 Cal. Rptr. 2d 814*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to set aside a default and default judgment as facially void. This form may be used when opposing counsel asserts that defendant received actual notice of general and special damages by an indication of the value of the case made in the course of settlement discussion between parties' counsel. This form

may be adapted as necessary for use by a party other than a defendant (for example, a cross defendant).

For a tactical advantage, counsel may consider using this argument in a reply memorandum to respond to a contention in the opposing memorandum that the defendant received actual notice by reason of counsels' valuation of the case during settlement negotiations.

This form should be combined with a memorandum generally supporting a motion to set aside void judgment or order under *Code Civ. Proc. § 473(d)*, based on the failure to serve *Code Civ. Proc. § 425.11* statement of damages [*see § 70.400[1]*]. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. That is, counsel should refer to the record to show that the defendant was not, or was not properly, served with a statement of damages as required under *Code Civ. Proc. § 425.11*, and argue that any valuation discussion during settlement negotiation does not satisfy the statutory requirements.

In proceedings to set aside a judgment or order that is void on its face, no supporting or opposing affidavit or declaration is prepared. Counsel should, however, request that the court take judicial notice of the judgment or order and the judgment roll, or, if some other paper or report filed in the action is relevant to the issue of validity, that particular paper or report. For matters subject to judicial notice, and the manner of requesting it, see *Evid. Code §§ 452(d), 453*. For discussion of documents that are included in the judgment roll for purposes of *Code Civ. Proc. § 473(d)*, see *§ 70.310[2][d][iii]*.

[3] Discussion of Authorities

[a] Indication of Value During Settlement Conference Is Insufficient

In ***Debbie S. v. Ray*** *(1993) 16 Cal. App. 4th 193, 19 Cal. Rptr. 2d 814* , plaintiff tenant, who was raped in her apartment, sued defendants landlord and apartment manager for premises liability based on failure to take adequate safety precautions. Plaintiff's settlement offers, one for $175,000, and two later offers of $250,000 were rejected. The defendants did not appear at trial. The individual defendant apartment manager was dismissed, and on plaintiff's proof of damages against the corporate defendant landlord, judgment was entered for $1,000,000. Two days later a receiver was appointed for the corporate defendant. The receiver moved to vacate the judgment on the ground that plaintiff had not filed a statement of damages 60 days before trial as required by *Code Civ. Proc. § 425.11*. The court vacated the judgment and plaintiff appealed.

The court of appeal affirmed, first holding that a party may move to vacate a judgment for failure to comply with Section 425.11, even though alternative procedures, such as seeking new trial under *Code Civ. Proc. § 657*, moving to set aside the judgment under *Code Civ. Proc. § 663*, or appealing from the judgment, would also be proper. The court declined to determine minimum contents for a statement of damages, and limited itself to examining the record in the case (*16 Cal. App. 4th 193, 198)* . The court then noted that the plaintiff's complaint, which sought damages "according to proof," gave no notice of the damages sought. The court also found that the various settlement demands and the at-issue memorandum were inadequate to give notice. Finally, the court found that counsel's statements to the defense counsel that the value of the case before a jury would be in the $1,000,000 range were also not the type of notice required by Section 425.11 (*16 Cal. App. 4th 193, 198-199)* .

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7-70 California Points & Authorities § 70.402

§ 70.402 Supporting Motion to Set Aside Default Judgment Void on Its Face for Failure to Serve Statement of Damages on Cause of Action for Personal Injury or Wrongful Death [Code Civ. Proc. § 425.11]--Service of Statement of Damages Did Not Precede Clerk's Entry of Default

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside void judgment or order under Code Civ. Proc. § 473(d), based on the failure to serve Code Civ. Proc. § 425.11 statement of damages (see § 70.400[1]).*]

THE COURT SHOULD SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT IN THIS ACTION AS VOID ON THEIR FACE BECAUSE THE NOTICE OF THE AMOUNT OF DAMAGES REQUIRED BY CODE OF CIVIL PROCEDURE SECTION 425.11 WAS NOT SERVED BEFORE THE CLERK ENTERED THE DEFAULT.

Service of Statement of Damages to Precede Clerk's Entry of Default. The notice to defendant of the amount of damages required under *Code of Civil Procedure Section 425.11* must be given not merely before the entry of the default judgment, but before the clerk enters the default (*Hamm v. Elkin (1987) 196 Cal. App. 3d 1343, 1346, 242 Cal. Rptr. 545*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to set aside a default and default judgment as facially void. This form may be used when the statement of damages was not served prior to entry of default by the clerk. This form may be adapted as necessary for use by a party other than a defendant (for example, a cross defendant). This form should be combined with a memorandum generally supporting a motion to set aside void judgment or order under *Code Civ. Proc. § 473(d)*, based on the failure to serve *Code Civ. Proc. § 425.11* statement of damages [*see § 70.400[1]*]. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. That is, counsel should refer to the record to show that the defendant was not, or was not properly, served with a statement of damages as required under *Code Civ. Proc. § 425.11* prior to entry of the default by the clerk.

In proceedings to set aside a judgment or order that is void on its face, no supporting or opposing affidavit or declaration is prepared. Counsel should, however, request that the court take judicial notice of the judgment or order and the judgment roll, or, if some other paper or report filed in the action is relevant to the issue of validity, that particular paper or report. For matters subject to judicial notice, and the manner of requesting it, see *Evid. Code §§ 452(d), 453*. For discussion of documents that are included in the judgment roll for purposes of *Code Civ. Proc. § 473(d)*, see *§ 70.310[2][d][iii]*.

[3] Discussion of Authorities

[a] Service of Statement of Damages to Precede Clerk's Entry of Default

In ***Hamm v. Elkin*** *(1987) 196 Cal. App. 3d 1343, 242 Cal. Rptr. 545* , plaintiff filed an action for battery in which the complaint requested unspecified general and special damages and $100,000 in punitive damages. The plaintiff served a statement of damages on the defendant after the clerk had entered the default, but before the court rendered a default judgment after hearing the evidence of damages. Defendant did not appear at the hearing on damages and the court entered a judgment against him for $5,000 in general damages and $5,000 in punitive damages. The trial court granted defendant's motion to set aside the default and default judgment on the grounds that the statement of damages did not comply with the requirements of *Code Civ. Proc. § 425.11* because it had not been served prior to entry of the clerk's default. Plaintiff appealed.

The court of appeal affirmed, holding that the trial court had correctly interpreted the statute as requiring service of the statement of damages before entry of the clerk's default. It noted that one of the purposes of *Code Civ. Proc. § 425.11* is to give the defendant a final chance to respond to the allegations of the complaint, and this purpose would be frustrated if the plaintiff could wait to serve the statement until after the clerk's default was entered, when the defendant could respond only on the issue of damages (*196 Cal. App. 3d 1343, 1346)* . The appellate court also rejected plaintiff's contention that the absence of a statement was not prejudicial because the complaint sought $100,000 in punitive damages and thus gave notice to defendant of the amount sought. The court said that because the complaint requested *unspecified* general and special damages in addition to the punitive damages, it could not have fulfilled the function of a statement of damages as it did not give notice of the total amount of damages sought before the clerk entered the default (*196 Cal. App. 3d 1343, 1347)* .

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7-70 California Points & Authorities § 70.403

§ 70.403 Supporting Motion to Set Aside Default Judgment Void on Its Face for Failure to Serve Statement of Damages on Cause of Action for Personal Injury or Wrongful Death [Code Civ. Proc. § 425.11]--Unauthorized Method of Service--Defendant Has Not Appeared in Action [Code Civ. Proc. § 425.11(d)(1)]

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside void judgment or order under Code Civ. Proc. § 473(d), based on the failure to serve Code Civ. Proc. § 425.11 statement of damages (see § 70.400[1]).*]

THE COURT SHOULD SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT IN THIS ACTION AS VOID ON THEIR FACE BECAUSE DEFENDANT HAS NOT APPEARED IN THIS ACTION AND THE STATEMENT OF DAMAGES WAS NOT SERVED IN THE SAME MANNER AS THE SUMMONS AS REQUIRED BY CODE OF CIVIL PROCEDURE SECTION 425.11(d)(1).

Method of Service. If a party has not appeared in the action, the statement of damages must be served in the same manner as a summons (*Code Civ. Proc. § 425.11(d)(1)*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to set aside a default and default judgment as facially void. This form may be used when the statement of damages was not served in the same manner as the summons as required by *Code Civ. Proc. § 425.11(d)(1)*. This form may be adapted as necessary for use by a party other than a defendant (for example, a cross defendant). For a form of points and authorities for use in supporting a motion for relief when the defendant has appeared in the action, see *§ 70.404[1]*.

This form should be combined with a memorandum generally supporting a motion to set aside void judgment or order

under *Code Civ. Proc. § 473(d)*, based on the failure to serve *Code Civ. Proc. § 425.11* statement of damages [*see § 70.400[1]*]. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. That is, counsel should refer to the record to show that the statement of damages was not served as required by *Code Civ. Proc. § 425.11(d)(1)*, and argue that the judgment, therefore, is void on its face.

In proceedings to set aside a judgment or order that is void on its face, no supporting or opposing affidavit or declaration is prepared. Counsel should, however, request that the court take judicial notice of the judgment or order and the judgment roll, or, if some other paper or report filed in the action is relevant to the issue of validity, that particular paper or report. For matters subject to judicial notice, and the manner of requesting it, see *Evid. Code §§ 452(d), 453*. For discussion of documents that are included in the judgment roll for purposes of *Code Civ. Proc. § 473(d)*, see *§ 70.310[2][d][iii]*.

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7-70 California Points & Authorities § 70.404

§ 70.404 Supporting Motion to Set Aside Default Judgment Void on Its Face for Failure to Serve Statement of Damages on Cause of Action for Personal Injury or Wrongful Death [Code Civ. Proc. § 425.11]--Unauthorized Method of Service--Defendant Has Appeared in Action [Code Civ. Proc. § 425.11(d)(2)]

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside void judgment or order under Code Civ. Proc. § 473(d), based on the failure to serve Code Civ. Proc. § 425.11 statement of damages (see § 70.400[1]).*]

THE COURT SHOULD SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT IN THIS ACTION AS VOID ON THEIR FACE BECAUSE DEFENDANT HAS APPEARED IN THIS ACTION BUT HAS NOT BEEN SERVED WITH THE STATEMENT OF DAMAGES EITHER IN THE SAME MANNER AS A SUMMONS, OR IN THE MANNER PROVIDED FOR NOTICES AND OTHER PAPERS.

Method of Service. If the party has appeared in the action, the statement of damages must be served on his or her attorney, or on the party if he or she has appeared without an attorney, either in the same manner as a summons pursuant to Article 3 (commencing with *Section 415.10) of Chapter 4 of Title 5 of the Code of Civil Procedure* or in the manner provided by Chapter 5 (commencing with *Section 1010 of Title 14 of Part 2 of the Code of Civil Procedure* (*Code Civ. Proc. § 425.11(d)(2)*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to set aside a default and default judgment as facially void. This form may be used when the defendant was not served with the statement of damages either in the same manner as a summons pursuant to *Code Civ. Proc. § 415.10 et seq.* or in the manner provided for notices and other papers pursuant to *Code Civ. Proc. § 1010 et seq.* [*Code Civ. Proc. § 425.11(d)(2)*]. For a form of points and authorities for use in

supporting a motion for relief when the defendant has not appeared in the action, see *§ 70.403[1]*.

This form should be combined with a memorandum generally supporting a motion to set aside void judgment or order under *Code Civ. Proc. § 473(d)*, based on the failure to serve *Code Civ. Proc. § 425.11* statement of damages [*see § 70.400[1]*]. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. That is, counsel should refer to the record to show that the statement of damages was not served as required by *Code Civ. Proc. § 425.11(d)(2)*, and argue that the judgment, therefore, is void on its face.

In proceedings to set aside a judgment or order that is void on its face, no supporting or opposing affidavit or declaration is prepared. Counsel should, however, request that the court take judicial notice of the judgment or order and the judgment roll, or, if some other paper or report filed in the action is relevant to the issue of validity, that particular paper or report. For matters subject to judicial notice, and the manner of requesting it, see *Evid. Code §§ 452(d), 453*. For discussion of documents that are included in the judgment roll for purposes of *Code Civ. Proc. § 473(d)*, see *§ 70.310[2][d][iii]*.

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7-70 California Points & Authorities §§ 70.405-70.409

[Reserved]

§§ 70.405[Reserved]

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7-70 California Points & Authorities § 70.410

§ 70.410 Supporting Motion to Set Aside Default Judgment Void on Its Face for Failure to Serve or Improper Service of Statement Reserving Right to Punitive Damages [Code Civ. Proc. § 425.115]--General Form

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside void judgment or order under Code Civ. Proc. § 473(d) (see § 70.310[1]).*]

THE COURT SHOULD SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT IN THIS ACTION AS VOID ON ITS FACE BECAUSE IT APPEARS FROM THE RECORD THAT DEFENDANT WAS NOT SERVED WITH _____ [ANY *or* A SUFFICIENT] STATEMENT RESERVING PLAINTIFF'S RIGHT TO PUNITIVE DAMAGES.

A. Service of Statement Reserving Right to Punitive Damages Required Before Default. The plaintiff must serve a statement reserving the right to punitive damages on the defendant pursuant to *Code of Civil Procedure Section 425.115* before a default may be taken, when the motion for default judgment includes a request for punitive damages (*Code Civ. Proc. § 425.115(f)*).

B. Failure to Serve Statement Reserving Punitive Damages Renders Default Void on Its Face. A default entered without any *Code of Civil Procedure Section 425.11* statement of damages being served on the defendant is void on the face of the record and may be successfully challenged beyond the limitation period specified in *Code of Civil Procedure Section 473*(*Plotitsa v. Superior Court (1983) 140 Cal. App. 3d 755, 760, 189 Cal. Rptr. 769* ; *Stevenson v. Turner (1979) 94 Cal. App. 3d 315, 319-320, 156 Cal. Rptr. 499*). Failure to serve a *Code of Civil Procedure Section 425.115* statement reserving the right to punitive damages should compel the same result because the Section 425.115 requirement parallels the Section 425.11 requirement.

[*When appropriate, add points and authorities supporting additional grounds for relief from void judgment or order (see, e.g., §§ 70.330 -70.404, 70.420, 70.421).*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion to set aside a default judgment that includes an award of punitive damages when the defaulting party alleges that the judgment is void because the plaintiff failed to serve a *Code Civ. Proc. § 425.115* statement reserving the right to punitive damages, and the deficiency appears on the face of the judgment roll [*see Code Civ. Proc. § 425.115(f)*].

The form may be adapted as necessary for use by a cross defendant [*see Code Civ. Proc. § 425.115(a)*].

These points and authorities should be combined with a general memorandum supporting a motion for relief from a void judgment or order [*see § 70.310[1]*]. They may also be combined, when appropriate, with points and authorities supporting relief from a void judgment on other particular grounds [*see, e.g., §§ 70.330 -70.404, 70.420, 70.421*]. See *§§ 70.380 -70.390* in particular for related authorities supporting relief on the ground the judgment awarded relief in excess of that demanded in the complaint or in a *Code Civ. Proc. § 425.11* statement of damages.

See also *§§ 70.310, 70.330* for additional general considerations relating to a motion for relief from a void judgment or order, alternative methods for obtaining relief, and discussion relating to use of this form to support an alternative motion for relief from a judgment valid on its face but void in fact.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should refer to the record to show that the defendant was not, or was not properly, served with a *Code Civ. Proc. § 425.115* statement reserving the right to punitive damages.

In proceedings to set aside a judgment or order that is void on its face, no supporting or opposing affidavit or declaration is prepared. Counsel should, however, request that the court take judicial notice of the judgment or order and the judgment roll, or, if some other paper or report filed in the action is relevant to the issue of validity, that particular paper or report. For matters subject to judicial notice, and the manner of requesting it, see *Evid. Code §§ 452(d), 453*. For discussion of documents that are included in the judgment roll for purposes of *Code Civ. Proc. § 473(d)*, see *§ 70.310[2][d][iii]*.

[c] Reservation of Right to Punitive Damages

No claim for exemplary damages may state an amount or amounts [*Civ. Code § 3295(e)*]. However, before a default can be taken in an action in which the plaintiff will seek punitive damages in the default judgment, the plaintiff must notify the defendant of the amount of punitive damages sought in a statement reserving the right to punitive damages [*see Code Civ. Proc. § 425.115(f), 580*]. Authorities construing the similar requirement of a statement of damages in superior court actions for personal injury or wrongful death have held that failure to serve the statement will render a subsequent default judgment void on its face, and that the judgment may be challenged beyond the limitation period specified in *Code Civ. Proc. § 473* [*see Plotitsa v. Superior Court (1983) 140 Cal. App. 3d 755, 760, 189 Cal. Rptr. 769* ; *Stevenson v. Turner (1979) 94 Cal. App. 3d 315, 319-320, 156 Cal. Rptr. 499*)]. For further discussion of issues that may arise regarding Section 425.11 and 425.115 statements, see *§ 70.400[2]*.

[3] Discussion of Authorities

[a] Failure to Serve Statement Reserving Punitive Damages Renders Default Void on Its Face

The facts and procedural background of ***Plotitsa v. Superior Court*** *(1983) 140 Cal. App. 3d 755, 189 Cal. Rptr. 769* ,

and ***Stevenson v. Turner*** *(1979) 94 Cal. App. 3d 315, 156 Cal. Rptr. 499* , are discussed in *§ 70.400[3][c]*.

Although these cases involved a *Code Civ. Proc. § 425.11* statement of damages, *Code Civ. Proc. § 425.115* substantially parallels that statute [*compare Code Civ. Proc. § 425.11 with Code Civ. Proc. § 425.115*]. Moreover, *Code Civ. Proc. § 580* treats both statutes the same as sources of the maximum amount that may be awarded on a default judgment. Therefore, while *Plotitsa* and *Stevenson* are not controlling authority, counsel may wish to argue them as persuasive authority on this point.

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7-70 California Points & Authorities § 70.411

§ 70.411 Supporting Motion to Set Aside Default Judgment Void on Its Face for Failure to Serve or Improper Service of Statement Reserving Right to Punitive Damages [Code Civ. Proc. § 425.115]--Service to Precede Clerk's Entry of Default

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside void judgment or order under Code Civ. Proc. § 473(d), based on the failure to serve Code Civ. Proc. § 425.115 statement reserving right to punitive damages (see § 70.410[1]).*]

THE COURT SHOULD SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT IN THIS ACTION AS VOID ON THEIR FACE BECAUSE THE NOTICE OF THE AMOUNT OF PUNITIVE DAMAGES CLAIMED AS REQUIRED BY CODE OF CIVIL PROCEDURE SECTION 425.115 WAS NOT SERVED BEFORE THE CLERK ENTERED THE DEFAULT.

Service of Statement to Precede Clerk's Entry of Default. The *Code of Civil Procedure Section 425.115* notice to defendant of the amount of punitive damages claimed must be given not merely before the entry of the default judgment, but before the clerk enters the default (*see Hamm v. Elkin (1987) 196 Cal. App. 3d 1343, 1346, 242 Cal. Rptr. 545* (construing parallel language in *Code Civ. Proc. § 425.11*, relating to the statement of damages required in superior court actions for personal injury or wrongful death)).

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to set aside a default and default judgment as facially void. This form may be used when the defendant was not served with the statement reserving right to punitive damages before the clerk entered the default.

This form should be combined with a memorandum generally supporting a motion to set aside void judgment or order under *Code Civ. Proc. § 473(d)*, based on the failure to serve *Code Civ. Proc. § 425.115* statement reserving right to punitive damages [*see § 70.410[1]*]. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. That is, counsel should refer to the record to show that the defendant was not, or was not properly, served with a statement of damages as required under *Code Civ. Proc. § 425.115* before the clerk entered the default, and argue that the default and default judgment are therefore void on their face.

In proceedings to set aside a judgment or order that is void on its face, no supporting or opposing affidavit or declaration is prepared. Counsel should, however, request that the court take judicial notice of the judgment or order and the judgment roll, or, if some other paper or report filed in the action is relevant to the issue of validity, that particular paper or report. For matters subject to judicial notice, and the manner of requesting it, see *Evid. Code §§ 452(d), 453*. For discussion of documents that are included in the judgment roll for purposes of *Code Civ. Proc. § 473(d)*, see *§ 70.310[2][d][iii]*.

[3] Discussion of Authorities

[a] Service of Statement to Precede Clerk's Entry of Default

The facts and procedural background of ***Hamm v. Elkin*** *(1987) 196 Cal. App. 3d 1343, 242 Cal. Rptr. 545* are discussed in *§ 70.402[3]*.

Although this case involved a *Code Civ. Proc. § 425.11* statement of damages, *Code Civ. Proc. § 425.115* contains a comparable requirement that the statement it requires be served "before a default may be taken" [*compare Code Civ. Proc. § 425.11(c)* with *Code Civ. Proc. § 425.115(f)*]. Therefore, while *Hamm* is not controlling authority, counsel may wish to argue it as persuasive authority on this point.

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7-70 California Points & Authorities § 70.412

§ 70.412 Supporting Motion to Set Aside Default Judgment Void on Its Face for Failure to Serve or Improper Service of Statement Reserving Right to Punitive Damages [Code Civ. Proc. § 425.115]--Unauthorized Method of Service--Defendant Has Not Appeared in Action [Code Civ. Proc. § 425.115(g)(1)]

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside void judgment or order under Code Civ. Proc. § 473(d), based on the failure to serve Code Civ. Proc. § 425.115 statement reserving right to punitive damages (see § 70.410[1]).*]

THE COURT SHOULD SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT IN THIS ACTION AS VOID ON THEIR FACE BECAUSE DEFENDANT HAS NOT APPEARED IN THIS ACTION BUT HAS NOT BEEN SERVED WITH THE STATEMENT RESERVING THE RIGHT TO PUNITIVE DAMAGES IN THE SAME MANNER AS A SUMMONS.

Method of Service. If the party has not appeared in the action, the statement reserving punitive damages must be served in the same manner as a summons pursuant to Article 3 (commencing with *Section 415.10) of Chapter 4 of Title 5 of Part 2 of the Code of Civil Procedure* (*Code Civ. Proc. § 425.115(g)(1)*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to set aside a default and default judgment as facially void. This form may be used when the defendant was not served with the statement reserving right to punitive damages in the same manner as a summons pursuant to *Code Civ. Proc. § 415.10 et seq.*[*Code Civ. Proc. § 425.115(g)(1)*]. For a form of points and authorities for use in supporting a motion for relief when the defendant has appeared in the action, see *§ 70.413[1]*.

This form should be combined with a memorandum generally supporting a motion to set aside void judgment or order under *Code Civ. Proc. § 473(d)*, based on the failure to serve *Code Civ. Proc. § 425.115* statement reserving right to punitive damages [*see § 70.410[1]*]. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. That is, counsel should refer to the record to show that the defendant was not, or was not properly, served with a statement of damages as required under *Code Civ. Proc. § 425.115*, and argue that the default and default judgment are therefore void on their face.

In proceedings to set aside a judgment or order that is void on its face, no supporting or opposing affidavit or declaration is prepared. Counsel should, however, request that the court take judicial notice of the judgment or order and the judgment roll, or, if some other paper or report filed in the action is relevant to the issue of validity, that particular paper or report. For matters subject to judicial notice, and the manner of requesting it, see *Evid. Code §§ 452(d), 453*. For discussion of documents that are included in the judgment roll for purposes of *Code Civ. Proc. § 473(d)*, see *§ 70.310[2][d][iii]*.

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7-70 California Points & Authorities § 70.413

§ 70.413 Supporting Motion to Set Aside Default Judgment Void on Its Face for Failure to Serve or Improper Service of Statement Reserving Right to Punitive Damages [Code Civ. Proc. § 425.115]--Unauthorized Method of Service--Defendant Has Appeared in Action [Code Civ. Proc. § 425.115(g)(2)]

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside void judgment or order under Code Civ. Proc. § 473(d), based on the failure to serve Code Civ. Proc. § 425.115 statement reserving right to punitive damages (see § 70.410[1]).*]

THE COURT SHOULD SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT IN THIS ACTION AS VOID ON THEIR FACE BECAUSE DEFENDANT HAS APPEARED IN THIS ACTION BUT HAS NOT BEEN SERVED WITH THE STATEMENT RESERVING THE RIGHT TO PUNITIVE DAMAGES, EITHER IN THE SAME MANNER AS A SUMMONS, OR IN THE MANNER PROVIDED FOR NOTICES AND OTHER PAPERS.

Method of Service. If the party has appeared in the action, the statement reserving punitive damages must be served on his or her attorney, or on the party if he or she has appeared without an attorney, either in the same manner as a summons pursuant to Article 3 (commencing with *Section 415.10) of Chapter 4 of Title 5 of the Code of Civil Procedure* or in the manner provided by Chapter 5 (commencing with *Section 1010) of Title 14 of Part 2 of the Code of Civil Procedure* (*Code Civ. Proc. § 425.115(g)(2)*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to set aside a default and default judgment as facially void. This form may be used when the defendant was not served with the statement reserving right to punitive damages either in the same manner as a summons pursuant to *Code Civ. Proc. § 415.10 et seq.* or in the manner provided for notices and other papers pursuant to *Code Civ. Proc. § 1010 et seq.* [*Code Civ. Proc. § 425.115(g)(2)*]. For a form of points and

authorities for use in supporting a motion for relief when the defendant has not appeared in the action, see *§ 70.412[1]*.

This form should be combined with a memorandum generally supporting a motion to set aside void judgment or order under *Code Civ. Proc. § 473(d)*, based on the failure to serve *Code Civ. Proc. § 425.115* statement reserving right to punitive damages [*see § 70.410[1]*]. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. That is, counsel should refer to the record to show that the defendant was not, or was not properly, served with a statement reserving the right to punitive damages as required under *Code Civ. Proc. § 425.115*, and argue that the default and default judgment are therefore void on their face.

In proceedings to set aside a judgment or order that is void on its face, no supporting or opposing affidavit or declaration is prepared. Counsel should, however, request that the court take judicial notice of the judgment or order and the judgment roll, or, if some other paper or report filed in the action is relevant to the issue of validity, that particular paper or report. For matters subject to judicial notice, and the manner of requesting it, see *Evid. Code §§ 452(d), 453*. For discussion of documents that are included in the judgment roll for purposes of *Code Civ. Proc. § 473(d)*, see *§ 70.310[2][d][iii]*.

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7-70 California Points & Authorities §§ 70.414-70.419

[Reserved]

§§ 70.414[Reserved]

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7-70 California Points & Authorities § 70.420

§ 70.420 Supporting Motion to Set Aside Default Judgment Void on Its Face When Judgment in Family Law Proceeding Involving Children Is Void for Lack of Subject Matter Jurisdiction--General Form

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside void judgment or order under Code Civ. Proc. § 473(d) (see § 70.310[1]).*]

THE COURT SHOULD SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] IN THIS ACTION AS VOID ON ITS FACE BECAUSE IT APPEARS FROM THE RECORD THAT THE TRIAL COURT LACKED JURISDICTION OVER THE SUBJECT MATTER OF THE ACTION/PROCEEDING.

Establishing That Judgment Is Void on Its Face in Family Law Proceeding Relating to Children. The words "judgment roll" are not an open sesame conjuring up the solution to whether presence or lack of subject matter jurisdiction appears "on the face of the record" in domestic relations proceedings applicable to children (*Swain v. Swain (1967) 250 Cal. App. 2d 1, 10, 58 Cal. Rptr. 83*).

[*When appropriate, add points and authorities supporting additional grounds for relief from void judgment or order (see, e.g., §§ 70.330 -70.413).*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to set aside a judgment or order in a family law proceeding when it appears from the record that the court lacked subject matter jurisdiction over the matter adjudicated.

These points and authorities should be combined with a general memorandum supporting a motion for relief from a

void judgment or order [*see § 70.310[1]*]. They may also be combined, when appropriate, with points and authorities supporting relief from a void judgment on other particular grounds [*see, e.g., §§ 70.330 -70.413*]. They may also be adapted for use in a trial or appellate brief.

See also *§§ 70.310, 70.330* for additional general considerations relating to a motion for relief from a void judgment or order, alternative methods for obtaining relief, and discussion relating to use of this form to support an alternative motion for relief from a judgment valid on its face but void in fact.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should refer to the record to show that the trial court lacked jurisdiction over the subject matter adjudicated.

In proceedings to set aside a judgment or order that is void on its face, no supporting or opposing affidavit or declaration is prepared. Counsel should, however, request that the court take judicial notice of the judgment or order and the judgment roll, or, if some other paper or report filed in the action is relevant to the issue of validity, that particular paper or report. For matters subject to judicial notice, and the manner of requesting it, see *Evid. Code §§ 452(d), 453*. For discussion of documents that are included in the judgment roll for purposes of *Code Civ. Proc. § 473(d)*, see *§ 70.310[2][d][iii]*.

[3] Discussion of Authorities

[a] Establishing That Judgment Is Void on Its Face in Family Law Proceeding Relating to Children

Swain v. Swain *(1967) 250 Cal. App. 2d 1, 58 Cal. Rptr. 83* , was an action in which there was a divorce decree that declared the defendant husband to be the father of a minor child of the wife. The husband noticed a motion to vacate the decree on the ground that the trial court had acted in excess of jurisdiction for the reason that the father was not the child's natural father, but only a stepfather. The motion was granted and the trial court issued an order setting aside the provisions of the interlocutory and final decrees relating to parentage and support of the plaintiff wife. The wife moved for an order to vacate the set aside order and the trial court denied the motion. The wife appealed.

The court of appeal affirmed the order setting aside the provisions of the interlocutory and final decrees relating to parentage and support. The court stated that an issue in the case was whether the husband was entitled to attack the decree collaterally by a motion to modify made two years after the entry of decree. Right to such an attack, according to the court, was limited to extrinsic fraud or mistake and to defects appearing on the face of the record. The court, citing a treatise, stated that a judgment void on its face may be collaterally attacked. That is another way of saying that the presumption of jurisdiction is overcome when the defects may be shown without going outside the "record" or "judgment roll," including the pleadings, proof of service, findings or verdict, and judgment. The court noted that "judgment roll" has been used synonymously with "record" and concluded that unless "there is magic in semantics" it could not accept the rigidity of the so-called "judgment roll" rule and unreasonably apply it in the case before it. The court stated that a court has no power to declare a child not the child of a defendant, either by birth or adoption, to be one, and no power to saddle the nonfather with the support of such child until her majority or emancipation, that is, it has no such power when nonparentage appears on the face of the record. On the other hand, according to the court, when the question of parentage or adoption is an issue properly litigated with both parties afforded a fair and equal chance to present evidence, the court does have jurisdiction to decide the issue. The words "judgment roll" are not an open sesame conjuring up the solution to whether presence or lack of subject matter jurisdiction appears "on the face of the record," not in that part of domestic relations proceedings applicable to children. The court went on to find that the report of the domestic relations officer presented the answer (*250 Cal. App. 2d 1, 10)* , disclosing that the husband was merely the stepfather, and not the natural father, of the child, a fact apparently forgotten by the trial court when it rendered its decree (*250 Cal. App. 2d 1, 12)*

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7-70 California Points & Authorities § 70.421

§ 70.421 Supporting Motion to Set Aside Default Judgment Void on Its Face When Judgment in Family Law Proceeding Involving Children Is Void for Lack of Subject Matter Jurisdiction--Lack of Jurisdiction Appears on Face of Domestic Relations Officer Report

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion to set aside void judgment or order under Code Civ. Proc. § 473(d), based on lack of subject matter jurisdiction in family law proceeding involving children (see § 70.420[1]).*]

THE COURT SHOULD SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] IN THIS ACTION AS VOID ON ITS FACE BECAUSE IT APPEARS FROM THE REPORT OF THE DOMESTIC RELATIONS OFFICER THAT THE TRIAL COURT LACKED JURISDICTION OVER THE SUBJECT MATTER OF THE ACTION/PROCEEDING.

Lack of Subject Matter Jurisdiction Appears on Face of Domestic Relations Officer Report. The lack of subject matter jurisdiction to render judgment may be established by facts in the report of the domestic relations officer, affirmed and accepted by the parties, read and considered by the court, and filed as a part of the record (*Swain v. Swain (1967) 250 Cal. App. 2d 1, 10, 58 Cal. Rptr. 83*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to set aside a default and default judgment as facially void. This form may be used when the lack of subject matter jurisdiction appears on the face of domestic relations officer report [*Swain v. Swain (1967) 250 Cal. App. 2d 1, 10, 58 Cal. Rptr. 83]* .

This form should be combined with a memorandum generally supporting a motion to set aside void judgment or order

under *Code Civ. Proc. § 473(d)*, based on lack of subject matter jurisdiction in family law proceeding involving children [*see § 70.420[1]*]. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. That is, counsel should refer to the record to show that the lack of subject matter jurisdiction appears on the face of domestic relations officer report.

In proceedings to set aside a judgment or order that is void on its face, no supporting or opposing affidavit or declaration is prepared. Counsel should, however, request that the court take judicial notice of the judgment or order and the judgment roll, or, if some other paper or report filed in the action is relevant to the issue of validity, that particular paper or report. For matters subject to judicial notice, and the manner of requesting it, see *Evid. Code §§ 452(d), 453*. For discussion of documents that are included in the judgment roll for purposes of *Code Civ. Proc. § 473(d)*, see *§ 70.310[2][d][iii]*.

[3] Discussion of Authorities

[a] Lack of Subject Matter Jurisdiction Appears on Face of Domestic Relations Officer Report

The facts and procedural background of ***Swain v. Swain*** *(1967) 250 Cal. App. 2d 1, 58 Cal. Rptr. 83* , are discussed in *§ 70.420[3]*. The court of appeal stated that the words "judgment roll" are not an open sesame conjuring up the solution to whether presence or lack of subject matter jurisdiction appears "on the face of the record," not in that part of domestic relations proceedings applicable to children. The court went on to find that the report of the domestic relations officer presented the answer (*250 Cal. App. 2d 1, 10)* , disclosing that the husband was merely the stepfather, and not the natural father, of the child, a fact apparently forgotten by the trial court when it rendered its decree (*250 Cal. App. 2d 1, 12)* .

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7-70 California Points & Authorities §§ 70.422-70.429

[Reserved]

§§ 70.422[Reserved]

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7-70 California Points & Authorities § 70.430

§ 70.430 Opposing Motion to Set Aside Judgment or Order Void on Its Face [Code Civ. Proc. § 473(d)]--General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN OPPOSITION TO MOTION
Plaintiff,	)	TO SET ASIDE VOID _____
vs.	)	[DEFAULT AND DEFAULT JUDGMENT *or*
_____ [*name*],	)	JUDGMENT *or* ORDER]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD DENY DEFENDANT'S MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] ON THE GROUND THAT IT IS VOID ON ITS FACE BECAUSE AN EXAMINATION OF THE JUDGMENT ROLL DOES NOT DISCLOSE ANY INVALIDITY IN THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER].

Presumption Favoring Validity of Judgment. Every presumption is in favor of the validity of the judgment, and any condition of facts consistent with its validity, and not affirmatively contradicted by the judgment roll, will be presumed to have existed rather than one which will defeat it (*Wells Fargo & Co. v. City etc. of S.F. (1944) 25 Cal. 2d 37, 40, 152 P.2d 625*).

[*When appropriate, add points and authorities opposing a grant of relief on other particular grounds asserted by the moving party (see, e.g., §§ 70.440 -70.453).*]

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*opposing party*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion to set aside a judgment or order on the ground that it is void on its face [*see Code Civ. Proc. § 473(d)*]. This form may be adapted as necessary for use by a party other than a plaintiff (for example, a cross complainant).

In an appropriate case, this form may be submitted in opposition to the motion supported by the points and authorities *set out in §§ 70.310 -70.421*.

This form should be combined, when appropriate, with additional points and authorities opposing a grant of relief on other particular grounds asserted by the moving party [*see, e.g., §§ 70.440 -70.453*]. This form may also be combined, in an appropriate case, with additional points and authorities opposing a grant of relief based on other statutory or decisional authority [*see* discussion under [c], *below*]. This form may, in addition, be adapted for use in a trial or appellate brief.

See also *§§ 70.310[2]* and *70.330[2]* for additional general considerations relating to a motion for relief from a void judgment or order, alternative methods for obtaining relief, and discussion relating to use of this form to oppose an alternative motion for relief from a judgment valid on its face but void in fact.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. That is, counsel should refer to facts in the judgment roll that are consistent with validity of the judgment.

In proceedings to set aside a judgment or order that is void on its face, no supporting or opposing affidavit or declaration is prepared. Counsel should, however, request that the court take judicial notice of the judgment or order and the judgment roll, or, if some other paper or report filed in the action is relevant to the issue of validity, that particular paper or report. For matters subject to judicial notice, and the manner of requesting it, see *Evid. Code §§ 452(d), 453*. For discussion of documents that are included in the judgment roll for purposes of *Code Civ. Proc. §*

473(d), see *§ 70.310[2][d][iii]*.

[c] Alternative Methods of Obtaining Relief

A judgment that is void on its face and void in fact (that is, its invalidity may be shown by extrinsic evidence) may also be set aside under *Code Civ. Proc. § 473(d)* [for further discussion, *see § 70.460[2][d]*. For a form of memorandum opposing a grant of relief from a judgment or order on the ground that it is void in fact, which may, in an appropriate case, be combined with this form, see *§ 70.470*.

A party may, in addition, obtain relief from a default and default judgment or other judgment, dismissal, order, or proceeding on the ground of mistake, inadvertence, surprise, or excusable neglect [*Code Civ. Proc. § 473(b)*]. Additional statutory grounds also exist for relief from a default and default judgment [*see, e.g., Code Civ. Proc. §§ 473.1, 473.5*]. For forms of memoranda opposing a grant of relief from default and default judgment or other judgment or order on these various additional statutory grounds, which may, in an appropriate case, be combined with this form, see *§ 70.240* et seq.

A default judgment or other judgment or order may also be attacked by a motion or separate action in equity, when the judgment was obtained through extrinsic fraud, mistake, or duress. For forms of memoranda opposing a grant of relief from a default judgment or other judgment or order on such equitable grounds, which may, in an appropriate case, be combined with this form, see *§ 70.480* et seq.

[3] Discussion of Authorities

[a] Presumption Favoring Validity of Judgment

Wells Fargo & Co. v. City etc. of S.F. *(1944) 25 Cal. 2d 37, 152 P.2d 625* , involved actions to recover from the county taxes paid under protest. In each case a general demurrer was overruled and time was allowed to answer, but no answers were filed. The plaintiff secured default judgments. Defendant thereafter moved to set the judgments aside as void. Among other contentions, the defendant asserted that the court had no jurisdiction to enter the judgments on the application of an attorney who was not plaintiff's attorney of record, and that both the awarding of costs against a subdivision of the state and the granting of interest for a period preceding the judgment were in excess of the jurisdiction of the county. The trial court granted the motions to set aside and the plaintiff appealed from the orders.

The Supreme Court reversed. In holding that the judgments were not subject to collateral attack, the Court stated that every presumption is in favor of the validity of the judgment, and any condition of facts consistent with its validity, and not affirmatively contradicted by the judgment roll, will be presumed to have existed rather than one which will defeat it (*25 Cal. 2d 37, 40)* .

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7-70 California Points & Authorities § 70.431

§ 70.431 Opposing Motion to Set Aside Judgment or Order Void on Its Face [Code Civ. Proc. § 473(d)]--Mere Erroneous Decision on Question of Law Does Not Make Judgment Void

[1] FORM

[*This form should be combined with a memorandum generally opposing a motion to set aside void judgment or order under Code Civ. Proc. § 473(d) (see § 70.430[1]).*]

THE COURT SHOULD DENY DEFENDANT'S MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] ON THE GROUND THAT IT IS VOID ON ITS FACE BECAUSE A MERE ERRONEOUS DECISION ON A QUESTION OF LAW, EVEN THOUGH THE ERROR APPEARS ON THE FACE OF THE RECORD, DOES NOT MAKE THE JUDGMENT VOID.

Mere Erroneous Decision Does Not Make Judgment Void. A mere erroneous decision on a question of law, even though the error appears on the face of the record, does not make the judgment void, if the court had jurisdiction of the subject matter and of the person of the defendant (*Wells Fargo & Co. v. City etc. of S.F. (1944) 25 Cal. 2d 37, 40, 152 P.2d 625*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion to set aside a judgment or order on the ground that it is void on its face [*see Code Civ. Proc. § 473(d)*]. This form may be used when the asserted invalidity is an error of law and the court otherwise has jurisdiction of the subject matter and the person [*Wells Fargo & Co. v. City etc. of S.F. (1944) 25 Cal. 2d 37, 40, 152 P.2d 625]* . This form may be adapted as necessary for use by a party other than a plaintiff (for example, a cross complainant).

In an appropriate case, this form may be submitted in opposition to the motion supported by the points and authorities

set out in §§ 70.310 -70.421.

This form should be combined with a memorandum generally opposing a motion to set aside void judgment or order under *Code Civ. Proc. § 473(d)* [*see § 70.430[1]*].

See also *§ 70.430[2]* for additional comments relating to opposition to a motion for relief from a void judgment or order.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus for example, counsel may:

- Point out that the motion is based on an error of law rather than a ground of voidness, such as lack of jurisdiction.
- Argue that the appropriate forum for challenging the asserted defect is appeal.
- Request that the motion be dismissed because the time to file a notice of appeal has expired.

In proceedings to set aside a judgment or order that is void on its face, no supporting or opposing affidavit or declaration is prepared. Counsel should, however, request that the court take judicial notice of the judgment or order and the judgment roll, or, if some other paper or report filed in the action is relevant to the issue of validity, that particular paper or report. For matters subject to judicial notice, and the manner of requesting it, see *Evid. Code §§ 452(d), 453*. For discussion of documents that are included in the judgment roll for purposes of *Code Civ. Proc. § 473(d)*, see *§ 70.310[2][d][iii]*.

[3] Discussion of Authorities

[a] Mere Erroneous Decision Does Not Make Judgment Void

The facts and procedural background of ***Wells Fargo & Co. v. City etc. of S.F.*** *(1944) 25 Cal. 2d 37, 152 P.2d 625* , is discussed in *§ 70.430[3]* . In *Wells Fargo & Co.*, the Court stated that a mere erroneous decision on a question of law, even though the error appears on the face of the record, does not make the judgment void, if the court had jurisdiction of the subject matter and of the person of the defendant (*25 Cal. 2d 37, 40)* .

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7-70 California Points & Authorities § 70.432

§ 70.432 Opposing Motion to Set Aside Judgment or Order Void on Its Face [Code Civ. Proc. § 473(d)]--Judgment Not Void Because of Failure of Complaint to State a Cause of Action

[1] FORM

[*For caption, see § 70.430, with which this form should be combined.*]

THE COURT SHOULD DENY DEFENDANT'S MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] AS VOID. THE JUDGMENT IS NOT VOID MERELY BECAUSE THE UNDERLYING COMPLAINT WOULD HAVE BEEN SUBJECT TO DEMURRER FOR FAILURE TO STATE A CAUSE OF ACTION.

Failure of Complaint to State Cause of Action Does Not Render Default Judgment Void Judgment. A default judgment is not void, as long as the court has jurisdiction over the parties and the subject matter, even if the complaint does not state a cause of action and would have been subject to a demurrer (*Molen v. Friedman (1998) 64 Cal. App. 4th 1149, 75 Cal. Rptr. 2d 651*).

[2] Comments

[a] Use of Form

This form points and authorities may be submitted by a defendant in opposition to a motion to set aside a judgment or order on the ground that it is void on its face [*see Code Civ. Proc. § 473(d)*]. This form may be used when the asserted invalidity is the failure of the complaint to state a cause of action.

This form should be combined with a memorandum generally opposing a motion to set aside a void judgment or order under *Code Civ. Proc. § 473(d)* [*see* § 70-430[1]].

[b] Argument

Counsel should add argument linking the points in the form with the facts of the case.

[3] Discussion of Authorities

[a] Failure of Complaint to State Cause of Action Does Not Render Default Judgment Void

In ***Molen v. Friedman*** *(1998) 64 Cal. App. 4th 1149, 75 Cal. Rptr. 2d 651* , the defendants failed to answer the plaintiffs' complaint for breach of a commercial lease and a default judgment was entered. The defendants moved to set aside the judgment because the complaint did not state a cause of action. The trial court set aside the judgment but entered a new judgment based on the complaint. The court of appeal affirmed. It concluded that a default judgment is void on its face only if the court lacked personal or subject matter jurisdiction, or if the court granted relief not within its powers, such as damages for which no notice had been given. Failure to state a cause of action was not cause for setting aside the judgment (*64 Cal. App. 4th 1149, 1156-1157)* .

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7-70 California Points & Authorities §§ 70.433-70.439

[Reserved]

§§ 70.433[Reserved]

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1. Relief From Judgment or Order Void on Its Face

7-70 California Points & Authorities § 70.440

§ 70.440 Opposing Motion to Set Aside Judgment or Order Void on Its Face [Code Civ. Proc. § 473(d)] on Ground That Service on Defendant Was Properly Made--General Form

[1] FORM

[*This form should be combined with a memorandum generally opposing a motion to set aside void judgment or order under Code Civ. Proc. § 473(d) (see § 70.430[1]).*]

THE COURT SHOULD DENY DEFENDANT'S MOTION TO SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT BECAUSE SERVICE ON HIM/HER/IT WAS PROPERLY MADE.

A. Liberal Construction of Service of Process Statutes. The service of process statutes are to be liberally construed to effectuate service and uphold jurisdiction of the court if actual notice has been received by the defendant, and in the last analysis the question of service should be resolved by considering each situation from a practical standpoint (*Courtney v. Abex Corp. (1986) 176 Cal. App. 3d 343, 346, 221 Cal. Rptr. 770*).

B. Defect in Return of Service of Little Importance if Service Was Proper. The purpose of requiring a return to the court of the summons and proof of service is to give the court notice that the plaintiff is diligently prosecuting the case and that the defendant has been informed of the action against him or her and knows he or she must appear in court. If service on the defendant is properly made, it is of little importance that there is a defect in the return since it is the fact of service that gives the court jurisdiction, not the proof of service (*Courtney v. Abex Corp. (1986) 176 Cal. App. 3d 343, 346-347, 221 Cal. Rptr. 770*).

[*When appropriate, add points and authorities opposing a grant of relief on additional particular grounds asserted by the moving party (see, e.g., §§ 70.450 -70.453. When applicable, add points and authorities opposing a grant of relief on particular grounds relating to the adequacy of service on defendant (see, e.g., § 70.441 et seq.).*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion to set aside a default and default judgment brought on the ground that defects in the proof of service indicates that the court lacked personal jurisdiction over the defendant. The basis for the opposition is that the requirements for service under statute were in fact satisfied, although the return of service was defective. This form may be adapted as necessary for use by a party other than a plaintiff (for example, a cross complainant).

In an appropriate case, this form may be submitted in opposition to the motion supported by the points and authorities *set out in §§ 70.310 -70.336*.

This form should be combined with a general memorandum opposing a motion for relief from a void judgment or order [*see § 70.430[1]*]. When applicable, they may be combined with points and authorities opposing a grant of relief on particular grounds relating to the objection that service on defendant was proper [*see, e.g., § 70.441* et seq.]. They may also be combined, when appropriate, with additional points and authorities opposing a grant of relief on other particular grounds asserted by the moving party [*see, e.g., §§ 70.450 -70.453*]. They may also be adapted for use in a trial or appellate brief.

See also *§§ 70.310[2], 70.330[2]* and *70.430[2]* for additional general considerations relating to a motion for relief from a void judgment or order, alternative methods for obtaining relief, and discussion relating to use of this form to oppose an alternative motion for relief from a judgment valid on its face but void in fact.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the defendant's motion to set aside is based on the claim that the person serving the summons and complaint was not at least 18 years of age, as required by *Code Civ. Proc. § 414.10*, counsel should refer to evidence in an opposing declaration establishing that the true age of the person making the service was at least 18 years of age at the time of the service.

[3] Discussion of Authorities

[a] Liberal Construction of Service of Process Statutes

In ***Courtney v. Abex Corp.*** *(1986) 176 Cal. App. 3d 343, 221 Cal. Rptr. 770* , plaintiffs brought an action against several companies alleging personal injuries caused by exposure to asbestos and silica products while they worked at a car dealership. Almost three years after commencing the action, the defendants, as "Does Two through Five" were served by mail with copies of the summons and the complaint and plaintiffs returned copies of the summons and proofs of service to the court just within three years of commencement of the action. The plaintiffs later moved to file the original summons nunc pro tunc to correct their failure to file it during the three-year statutory period and defendants moved to dismiss under former Code Civ. Proc. § 581a [*now see Code Civ. Proc. § 583.210*]. The trial court denied the plaintiffs' motion to file the original summons and granted the defendants' motion to dismiss. The plaintiffs appealed.

The court of appeal reversed the judgment of dismissal. The court, quoting *Torgersen v. Smith (1979) 98 Cal. App. 3d 948, 952, 159 Cal. Rptr. 781* (disapproved on other grounds in *Johnson & Johnson v. Superior Court (1985) 38 Cal. 3d 243, 254 n.7, 211 Cal. Rptr. 517, 695 P.2d 1058*), stated that the service of process statutes are to be liberally construed to effectuate service and uphold jurisdiction of the court if actual notice has been received by the defendant, and in the last analysis the question of service should be resolved by considering each situation from a practical standpoint. The statutory scheme governing the commencement of actions and jurisdiction contemplates that a defendant received notice of the action against him or her; hence, the goal is satisfied by the defendant's receipt of a copy of the summons or the original (*176 Cal. App. 3d 343, 346)* . The court held that the defendants were properly

served and the return of the copies of the summons and to the trial court was timely (*176 Cal. App. 3d 343, 348)* .

[b] Defect in Return of Service of Little Importance if Service Was Proper

The facts and procedural background of ***Courtney v. Abex Corp.*** *(1986) 176 Cal. App. 3d 343, 221 Cal. Rptr. 770* , are discussed under [a], *above*. In *Courtney*, the defendants moved to dismiss the action under former Code Civ. Proc. § 581a [*now see Code Civ. Proc. § 583.210*], citing the plaintiffs' failure to return the original summons to the court within the three year period. In holding that the filing of a copy of the original summons indicating service on the defendants within three years after commencement of the action satisfies the "return" requirement of former Section 581a, the court stated that the purpose of requiring a return to the court of the summons and proof of service is to give the court notice that the plaintiff is diligently prosecuting the case and that the defendant has been informed of the action against him or her and knows he or she must appear in court. If service on the defendant is properly made, it is of little importance that there is a defect in the return since it is the fact of service that gives the court jurisdiction, not the proof of service (*176 Cal. App. 3d 343, 346-347)* .

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7-70 California Points & Authorities § 70.441

§ 70.441 Opposing Motion to Set Aside Judgment or Order Void on Its Face [Code Civ. Proc. § 473(d)] on Ground That Service on Defendant Was Properly Made--Copies of Summons With Affidavits of Proof of Service Are Sufficient for Return

[1] FORM

[*This form should be combined with a memorandum generally opposing a motion to set aside void judgment or order under Code Civ. Proc. § 473(d), on ground that service on defendant was proper (see § 70.430[1]).*]

THE COURT SHOULD DENY DEFENDANT'S MOTION TO SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT BECAUSE THE TRIAL COURT HAS RECEIVED ADEQUATE NOTICE BY WAY OF RETURN OF A COPY OF THE SUMMONS WITH AFFIDAVIT OF PROOF OF SERVICE THAT THE DEFENDANT HAS BEEN SERVED AND NOTIFIED OF THE CASE PENDING AGAINST HIM/HER.

Copies of Summons With Affidavits of Proof of Service Sufficient for Return. A trial court receives adequate notice by way of return of a copy of the summons with affidavit of proof of service that the defendant has been served and notified of the case pending against him or her (*Sakaguchi v. Sakaguchi (2009) 173 Cal. App. 4th 852, 858-860, 92 Cal. Rptr. 3d 717* ; *Courtney v. Abex Corp. (1986) 176 Cal. App. 3d 343, 347, 221 Cal. Rptr. 770*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion to set aside a judgment or order on the ground that it is void on its face [*see Code Civ. Proc. § 473(d)*]. This form may be used when the asserted invalidity is insufficient service of process on the defendant, but the trial court has received adequate notice by way of return of a copy of the summons with affidavit of proof of service that the defendant has been served and notified of the case pending against him or her [*Courtney v. Abex Corp. (1986) 176 Cal. App. 3d 343, 347, 221 Cal. Rptr. 770]* . This form may be adapted as necessary for use by a party other than a plaintiff (for example, a cross complainant).

In an appropriate case, this form may be submitted in opposition to the motion supported by the points and authorities *set out in §§ 70.310 -70.336*.

This form should be combined with a memorandum generally opposing a motion to set aside void judgment or order under *Code Civ. Proc. § 473(d)* on the ground of adequacy of service [*see § 70.440[1]*].

See also *§ 70.430[2]* for additional comments relating to opposition to a motion for relief from a void judgment or order.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel would refer to the judgment roll to show the basis for the personal jurisdiction of the court. Specifically counsel would refer to the copy of the summons with affidavit of proof of service returned to the court to argue that the defendant has been served and notified of the case pending against him or her.

In proceedings to set aside a judgment or order that is void on its face, no supporting or opposing affidavit or declaration is prepared. Counsel should, however, request that the court take judicial notice of the judgment or order and the judgment roll, or, if some other paper or report filed in the action is relevant to the issue of validity, that particular paper or report. For matters subject to judicial notice, and the manner of requesting it, see *Evid. Code §§ 452(d), 453*. For discussion of documents that are included in the judgment roll for purposes of *Code Civ. Proc. § 473(d)*, see *§ 70.310[2][d][iii]*.

[3] Discussion of Authorities

[a] Copies of Summons With Affidavits of Proof of Service Sufficient for Return

In ***Sakaguchi v. Sakaguchi*** *(2009) 173 Cal. App. 4th 852, 858-860, 92 Cal. Rptr. 3d 717* , a wife sued her husband for assault and battery arising from a domestic dispute. The husband was incarcerated for the assault when the wife served him with the summons and complaint. Pursuant to the proof of service and notice of acknowledgement of receipt, the wife complied with *Code Civ. Proc. § 416.90* and *Penal Code § 4013* by serving process by mail on the sheriff, who had custody of the husband. The husband argued that service by mail was ineffective because he did not personally sign the acknowledgement of receipt. The court of appeal disagreed, holding that the husband failed to address *Penal Code § 4013*, which permitted the service [*173 Cal. App. 4th 852, 858-860]* .

The facts and procedural background of ***Courtney v. Abex Corp.*** *(1986) 176 Cal. App. 3d 343, 221 Cal. Rptr. 770* , are discussed in *§ 70.440[3]* . In *Courtney*, the court held that a trial court receives adequate notice by way of return of a copy of the summons with affidavit of proof of service that the defendant has been served and notified of the case pending against him (*176 Cal. App. 3d 343, 345, 347)* .

[4] Additional Authorities

[a] Copies of Summons With Affidavits of Proof of Service Sufficient for Return

The facts and procedural background of *Hibernia S. and L. Soc. v. Matthai (1897) 116 Cal. 424, 48 P. 370* , are discussed in *§ 70.443[3]* . In this case, at the time the appeal was taken the original summons with the proof of service on the defendant had been lost from the files of the superior court, but afterward, the superior court, on proof of the loss, authorized copies to be filed and used in place of the originals. The court held that the order of the superior court authorizing the copies to be filed was a determination by that tribunal that they were correct copies of the originals, and the papers thus substituted were entitled to the same weight as would be the originals (*116 Cal. 424, 426)* .

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7-70 California Points & Authorities § 70.442

§ 70.442 Opposing Motion to Set Aside Judgment or Order Void on Its Face [Code Civ. Proc. § 473(d)] on Ground That Service on Defendant Was Properly Made--Late Return of Summons Is Mere Irregularity

[1] FORM

[*This form should be combined with a memorandum generally opposing a motion to set aside void judgment or order under Code Civ. Proc. § 473(d), on ground that service on defendant was proper (see § 70.430[1]).*]

THE COURT SHOULD DENY DEFENDANT'S MOTION TO SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT BECAUSE THE JUDGMENT IS BASED ON A LATE RETURN OF THE SUMMONS WHICH IS MERELY AN IRREGULARITY, BUT NOT VOID AND NOT SUBJECT TO COLLATERAL ATTACK.

Late Return of Summons Mere Irregularity. A judgment based on a late return of a summons is merely an irregularity, but is not void and is not subject to collateral attack by reason of the late return (*National Diversified Services, Inc., v. Bernstein (1985) 168 Cal. App. 3d 410, 416, 214 Cal. Rptr. 113*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion to set aside a judgment or order on the ground that it is void on its face [*see Code Civ. Proc. § 473(d)*]. This form may be used when the asserted invalidity is insufficient service of process on the defendant, but the judgment is based on a late return of a summons which is merely an irregularity and not void [*National Diversified Services, Inc. v. Bernstein (1985) 168 Cal. App. 3d 410, 416, 214 Cal. Rptr. 113]* . This form may be adapted as necessary for use by a party other than a plaintiff (for example, a cross complainant).

In an appropriate case, this form may be submitted in opposition to the motion supported by the points and authorities *set out in §§ 70.310 -70.336*.

This form should be combined with a memorandum generally opposing a motion to set aside void judgment or order under *Code Civ. Proc. § 473(d)* on the ground of adequacy of service [*see § 70.440[1]*].

See also *§ 70.430[2]* for additional comments relating to opposition to a motion for relief from a void judgment or order.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel would refer to the judgment roll to show the basis for the personal jurisdiction of the court. Specifically counsel would refer to the copy of the summons with affidavit of proof of service returned and argue that while the return of the summons was late, the judgment is not void and is not subject to collateral attack by reason of the late return.

In proceedings to set aside a judgment or order that is void on its face, no supporting or opposing affidavit or declaration is prepared. Counsel should, however, request that the court take judicial notice of the judgment or order and the judgment roll, or, if some other paper or report filed in the action is relevant to the issue of validity, that particular paper or report. For matters subject to judicial notice, and the manner of requesting it, see *Evid. Code §§ 452(d), 453*. For discussion of documents that are included in the judgment roll for purposes of *Code Civ. Proc. § 473(d)*, see *§ 70.310[2][d][iii]*.

[3] Discussion of Authorities

[a] Late Return of Summons Mere Irregularity

The facts and procedural background of ***National Diversified Services, Inc., v. Bernstein*** *(1985) 168 Cal. App. 3d 410, 214 Cal. Rptr. 113* , are discussed in *§ 70.380[3]*. In this case the court of appeal affirmed the default judgment in part. The defendant in the case argued that because he was not served until over four months beyond the three-year period of limitation under former Code Civ. Proc. § 581a [*now see Code Civ. Proc. § 583.210 et seq.*], the service was invalid and the resulting default judgment based thereon was void and subject to attack at any time. The court noted that the defendant's argument would benefit by citation to *Pearson v. Superior Court (1932) 122 Cal. App. 571, 574-575, 10 P.2d 489* , which held that a default judgment based on an untimely return of summons was void on the face of the record for want of jurisdiction. The court concluded, however, that the rationale of *Pearson* had succumbed to the evolution of the law regarding dismissals for failure to serve and return summons within three years and that several statutory and case law exceptions had developed since the time of that opinion (*168 Cal. App. 3d 410, 414)* . The court stated that it is illogical to say any longer that a judgment based on a late return of summons is void on its face. A judgment is void on its face when a jurisdiction defect appears on review of the judgment roll. A late return is not necessarily invalid and its validity will often depend on facts not appearing in the record until opposition to a motion to dismiss is filed. The court noted, for example, that a party's appearance may avoid dismissal, although not filed within the three-year period. Further, a written stipulation extending time may also avoid dismissal, although not filed within the three-year period. In addition, facts justifying estoppel of a defendant or demonstrating the impracticality or futility of returning a summons may not adequately appear on the face of the record absent a showing opposing a motion to dismiss (*168 Cal. App. 3d 410, 415-416)* .

The foregoing led the court to conclude that the modern rule must be that a judgment based on a late return of summons is irregular, but not void. The court held that the late return of a summons is merely an irregularity which does not render a default judgment based thereon subject to collateral attack (*168 Cal. App. 3d 410, 416)* . The court did, however, find merit to defendant's contention that the default judgment was void to the extent that the defendant was not apprised by the complaint or the request to enter default of the damages sought from him, under *Code Civ. Proc. § 580*, and on that basis concluded that the judgment rendered was partially void for being excessive (*168 Cal. App. 3d 410, 419)* .

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7-70 California Points & Authorities § 70.443

§ 70.443 Opposing Motion to Set Aside Judgment or Order Void on Its Face [Code Civ. Proc. § 473(d)] on Ground That Service on Defendant Was Properly Made--Proof of Service May Be Amended and Filed Nunc Pro Tunc as of Date of Judgment

[1] FORM

[*This form should be combined with a memorandum generally opposing a motion to set aside void judgment or order under Code Civ. Proc. § 473(d), on ground that service on defendant was proper (see § 70.430[1]).*]

THE COURT SHOULD DENY DEFENDANT'S MOTION TO SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT BECAUSE A FAILURE TO MAKE THE PROOF OF SERVICE A MATTER OF RECORD DID NOT DEPRIVE THE COURT OF ITS JURISDICTION, AND A SUBSEQUENT AMENDMENT OF THE RECORD BY SUPPLYING PROOF OF SERVICE IS AS EFFECTIVE TO SUPPORT THE JUDGMENT AS IF IT HAD BEEN FILED BEFORE ITS ENTRY.

Proof of Service May Be Amended and Filed Nunc Pro Tunc as of Date of Judgment. A court acquires jurisdiction by the service of its process and does not lose it by neglecting to make the proof of such service a matter of record. A subsequent amendment of the record by supplying proof of service is as effective to support the judgment as if it had been filed before its entry (*Hibernia S. and L. Soc. v. Matthai (1897) 116 Cal. 424, 426, 48 P. 370* ; *Herman v. Santee (1894) 103 Cal. 519, 523-524, 37 P. 509*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion to set aside a judgment or order on the ground that it is void on its face [*see Code Civ. Proc. § 473(d)*]. This form may be used when the court neglected to make the proof of such service a matter of record [*see Hibernia S. and L. Soc. v. Matthai (1897) 116 Cal. 424, 426, 48 P. 370* ; *Herman v. Santee (1894) 103 Cal. 519, 523-524, 37 P. 509]* . This form may be adapted as necessary for use by a party other than

a plaintiff (for example, a cross complainant).

In an appropriate case, this form may be submitted in opposition to the motion supported by the points and authorities *set out in §§ 70.310 -70.336*.

This form should be combined with a memorandum generally opposing a motion to set aside void judgment or order under *Code Civ. Proc. § 473(d)* on the ground of adequacy of service [*see § 70.440[1]*].

See also *§ 70.430[2]* for additional comments relating to opposition to a motion for relief from a void judgment or order.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel would refer to the amended or late-filed proof of service to show that the defendant had in fact received notice sufficient for the court to exercise personal jurisdiction.

In proceedings to set aside a judgment or order that is void on its face, no supporting or opposing affidavit or declaration is prepared. Counsel should, however, request that the court take judicial notice of the judgment or order and the judgment roll, or, if some other paper or report filed in the action is relevant to the issue of validity, that particular paper or report. For matters subject to judicial notice, and the manner of requesting it, see *Evid. Code §§ 452(d), 453*. For discussion of documents that are included in the judgment roll for purposes of *Code Civ. Proc. § 473(d)*, see *§ 70.310[2][d][iii]*.

[3] Discussion of Authorities

[a] Proof of Service May Be Amended and Filed Nunc Pro Tunc as of Date of Judgment

Hibernia S. and L. Soc. v. Matthai *(1897) 116 Cal. 424, 48 P. 370* , involved a judgment of foreclosure entered on the default of the defendant. The judgment roll did not contain a copy of the summons with proof of service on the defendant. The defendant appealed, contending that by reason of the failure of the record to show that the court had acquired jurisdiction, the judgment must be reversed.

The Supreme Court affirmed the judgment. The Court noted that it was recited in the judgment that the defendants in the action were severally, personally, and duly served with the summons, together with a copy of the complaint. At the time the appeal was taken the original summons with the proof of service thereof on the defendant had been lost from the files of the superior court, but afterward, the superior court, on proof of the loss, authorized copies to be filed and used in place of the originals. The court held that the order of the superior court authorizing the copies to be filed was a determination by that tribunal that they were correct copies of the originals, and the papers thus substituted were entitled to the same weight as would be the originals. The court cited *Herman v. Santee (1894) 103 Cal. 519, 37 P. 509* , for the principle that the court had jurisdiction to enter the default even though at the time the summons with proof of service had not been filed with the clerk, and a subsequent amendment of the record by supplying proof of service was as effective to support the judgment as if had been filed before its entry (*116 Cal. 424, 426)* .

Herman v. Santee *(1894) 103 Cal. 519, 37 P. 509* , involved an action to foreclose a mortgage given to secure payment of a promissory note. A decree of foreclosure was entered as prayed for, reciting that the defendants had been duly summoned to answer, defaulted, and that default had been duly entered. Defendant moved to vacate and set aside the decree, so far as it provided for a deficiency judgment against him, on the ground that previous to the commencement of the action he had been discharged from the indebtedness by bankruptcy. Prior to the hearing, without previous notice, plaintiff presented an amended affidavit of service of the summons and complaint in the case, and

asked for an order that it be filed nunc pro tunc as of the date of the foreclosure decree and made a part of the judgment roll. The summons was served by a person other than the sheriff, and the affidavit of service, as originally made and returned, was defective because it did not state that the affiant was over the age of 18 years at the time of the service. The trial court granted the plaintiff's motion to amend the summons and denied the defendant's motion to vacate the default judgment. The defendant appealed from the judgment and the order granting the plaintiff's motion.

The Supreme Court affirmed. The defendant contended that because the affidavit of service was insufficient the clerk had no authority to enter the default, and the court had no jurisdiction to enter the judgment, and that both the default and judgment were void. The Court, citing previous opinions, stated that it is the fact of service which gives the court jurisdiction, not the proof of service. The Court considered that the amended affidavit of service, which the trial court allowed to be filed, was in all respects in proper form, and showed that the defendant was regularly served with a copy of the summons and complaint. None of the facts stated in the affidavit were controverted, concluded the Court, therefore, from the time of the service the court acquired jurisdiction of the parties to the action (*103 Cal. 519, 523)* . Further, the Court disapproved of the statement in *Reinhart v. Lugo (1890) 86 Cal. 395, 401, 24 P. 1089* , that the default and default judgment was void, not because there was no service, but because there was, at the time of entering the default and default judgment, no proof of service. Rather, the Court cited a Supreme Court opinion predating that of *Reinhart*, to state that to support judgments entered on insufficient proof of service of process, or without the proof of such service appearing in the record, courts have uniformly permitted such proof to be amended or supplied, not for the purpose of authorizing them to enter new judgments based on such proof, but to show that judgments previously entered were not entered without jurisdiction, and are not, and never were, void (*103 Cal. 519, 524)* .

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[Reserved]

§§ 70.444[Reserved]

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7-70 California Points & Authorities § 70.450

§ 70.450 Opposing Motion to Set Aside Judgment or Order Void on Its Face [Code Civ. Proc. § 473(d)] on Ground That Defendant Received Adequate Notice of Damages--Superior Court Personal Injury or Wrongful Death Action [Code Civ. Proc. § 425.11]

[1] FORM

[*This form should be combined with a memorandum generally opposing a motion to set aside void judgment or order under Code Civ. Proc. § 473(d) (see § 70.430[1]).*]

THE COURT SHOULD DENY DEFENDANT'S MOTION TO SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT BECAUSE DEFENDANT HAS RECEIVED NOTICE OF THE AMOUNT OF THE SPECIAL AND GENERAL DAMAGES SOUGHT TO BE RECOVERED FROM HIM OR HER.

Defendant Received Statement of Damages. When a complaint is filed in an action to recover damages for personal injury or wrongful death, the defendant may at any time request a statement setting forth the nature and amount of damages being sought. If a defendant does not request the statement, the plaintiff must serve the statement on the defendant before a default may be taken. If a party has not appeared in the action, the statement must be served in the same manner as a summons [*Code Civ. Proc. § 425.11*; *Sakaguchi v. Sakaguchi (2009) 173 Cal. App. 4th 852, 860-861, 92 Cal. Rptr. 3d 717]* .

[*When appropriate, add points and authorities opposing a grant of relief on additional particular grounds asserted by the moving party (see, e.g., §§ 70.440 -70.443, 70.451 -70.453.*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion to set aside a default and default judgment brought on the grounds the defendant in a wrongful death or personal injury action in superior court was not, or was not properly,

served a *Code Civ. Proc. § 425.11* statement of damages. The basis for the opposition is that the requirements for service under the statute were in fact satisfied because defendant received notice of the amount of damages sought to be recovered and the notice received satisfies minimum standards of due process. The form may be adapted for use by a cross complainant [*see Code Civ. Proc. § 425.11(a)*].

In an appropriate case, these points and authorities may be submitted in opposition to the motion supported by the points and authorities *set out in §§ 70.400 -70.404*.

These points and authorities should be combined with a general memorandum opposing a motion for relief from a void judgment or order [*see § 70.430*]. These points and authorities may be combined with points and authorities opposing a motion in an action that includes a claim for punitive damages on the ground that the defendant was not, or was not properly, served a *Code Civ. Proc. § 425.115* statement of reserving the right to punitive damages [*see § 70.451[1]*]. They may also be combined, when appropriate, with additional points and authorities opposing a grant of relief on other particular grounds asserted by the moving party [*see, e.g., §§ 70.440 et seq., 70.452, 70.453*]. They may also be adapted for use in a trial or appellate brief.

See also *§§ 70.310[2], 70.330[2]* and *70.430[2]* for additional general considerations relating to a motion for relief from a void judgment or order, alternative methods for obtaining relief, and discussion relating to use of this form to oppose an alternative motion for relief from a judgment valid on its face but void in fact.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the defendant has moved to set aside a default judgment which was granted in the amount of the jurisdictional minimum of the superior court, and the defendant was not served a statement of damages but the complaint served on the defendant alleged that the plaintiff suffered general damages in an amount that exceeds the jurisdictional requirements of the court, counsel should refer to the specific paragraph of that allegation in the complaint in his or her argument [*see Greenup v. Rodman (1986) 42 Cal. 3d 822, 829-830, 231 Cal. Rptr. 220, 726 P.2d 1295* (discussed in *§ 70.452[3*]); *see also Schwab v. Rondel Homes, Inc. (1991) 53 Cal. 3d 428, 433-434, 280 Cal. Rptr. 83, 808 P.2d 226* (citing *Greenup* with approval; *see § 70.452[3]* and [3], *below*)].

In proceedings to set aside a judgment or order that is void on its face, no supporting or opposing affidavit or declaration is prepared. Counsel should, however, request that the court take judicial notice of the judgment or order and the judgment roll, or, if some other paper or report filed in the action is relevant to the issue of validity, that particular paper or report. For matters subject to judicial notice, and the manner of requesting it, see *Evid. Code §§ 452(d), 453*. For discussion of documents that are included in the judgment roll for purposes of *Code Civ. Proc. § 473(d)*, see *§ 70.310[2][d][iii]*.

[3] Discussion of Authorities

[a] Service of Statement of Damages Complied with Code Civ. Proc. § 425.11

In ***Sakaguchi v. Sakaguchi*** *(2009) 173 Cal. App. 4th 852, 858-860, 92 Cal. Rptr. 3d 717* , a wife sued her husband for assault and battery arising from a domestic dispute. The husband was incarcerated for the assault when the wife served him with the summons and complaint. Pursuant to the proof of service and notice of acknowledgment of receipt, the wife complied with *Code Civ. Proc. § 416.90* and *Penal Code § 4013* by serving process by mail on the sheriff, who had custody of the husband. She served the statement of damages in the same manner. The husband argued that *Code Civ. Proc. § 425.11* required that the statement of damages be personally served on him. However, the court held that this interpretation of *Code Civ. Proc. § 425.11* contradicted the plain language of the statute, i.e., that if a party has not appeared in the action, the statement may be served in the same manner as a summons [*173 Cal. App. 4th 852,*

858-860] . As the court discussed (*see § 70.441[3]*), a summons may be served by mail pursuant to Code Civ. Proc. § 415.3. Thus, the court held, a statement of damages also may be served by mail, subject to the same requirements [*173 Cal. App. 4th 852, 858-860]* .

The factual and procedural background of ***Schwab v. Rondel Homes, Inc.*** *(1991) 53 Cal. 3d 428, 280 Cal. Rptr. 83, 808 P.2d 226* , is discussed in *§ 70.400[3]*. In *Schwab*, although the Supreme Court held that the plaintiffs' prayer for statutory damages in an amount according to proof but no less than $250 and punitive damages in the amount of $500,000 was not sufficient to meet the requirements of *Code Civ. Proc. § 425.11* and that the trial court properly vacated the default judgment entered against the defendants in the case, the Court stated that in *Code Civ. Proc. § 425.11*, the use of the word "notice" and the terms of art "special and general damages" imply that the Legislature intended that a defendant be given actual notice of the special and general damages claimed by a plaintiff (*53 Cal. 3d 428, 435)* . The Court cited with approval *Greenup v. Rodman (1986) 42 Cal. 3d 822, 231 Cal. Rptr. 220, 726 P.2d 1295* , *discussed under § 70.452[3]* . In that case the plaintiff was awarded the jurisdictional minimum in general damages based on a complaint that specifically pleaded general damages "in excess" of the court's jurisdictional requirements. Based on that notice, the Supreme Court in *Greenup* held that the defendant knew, or should have known, that the plaintiff was claiming at least the jurisdictional minimum of $15,000 (*53 Cal. 3d 428, 433-434)* .

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7-70 California Points & Authorities § 70.451

§ 70.451 Opposing Motion to Set Aside Judgment or Order Void on Its Face [Code Civ. Proc. § 473(d)] on Ground That Defendant Received Adequate Notice of Damages--Action With Claim for Punitive Damages [Code Civ. Proc. § 425.115]

[1] FORM

[*This form should be combined with a memorandum generally opposing a motion to set aside void judgment or order under Code Civ. Proc. § 473(d) (see § 70.430[1]).*]

THE COURT SHOULD DENY DEFENDANT'S MOTION TO SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT BECAUSE DEFENDANT HAS RECEIVED NOTICE OF THE AMOUNT OF THE PUNITIVE DAMAGES SOUGHT TO BE RECOVERED FROM HIM/HER, AND THE NOTICE RECEIVED MEETS AT LEAST MINIMUM STANDARDS OF DUE PROCESS.

Notice Satisfies Minimum Standards of Due Process. *Code of Civil Procedure Section 425.115*, requires a plaintiff to serve a statement reserving the right to punitive damages on the defendant before taking a default if the motion for a default judgment includes a request for punitive damages (*Code Civ. Proc. § 425.115(f)*). Section 425.115 requires that the statement be served in the _____ [same manner as a summons pursuant to Article 3 (commencing with *Section 415.10) of Chapter 4 of Title 5 of Part 2 of the Code of Civil Procedure* if the party has not appeared in the action *or* same manner as a summons pursuant to Article 3 (commencing with *Section 415.10) of Chapter 4 of Title 5 of the Code of Civil Procedure* or in the manner provided by Chapter 5 (commencing with *Section 1010) of Title 14 of Part 2 of the Code of Civil Procedure* if the party has appeared in the action] (*Code Civ. Proc. § 425.115(g)*). Cases construing a comparable statement required by *Code of Civil Procedure Section 425.11* have held that there was no hard-and-fast rule regarding the precise method or timing of service of the statement of damages required by Section 425.11. Rather, the court is to determine in each case whether minimum standards of due process have been met (*California Novelties, Inc. v. Sokoloff (1992) 6 Cal. App. 4th 936, 945, 7 Cal. Rptr. 2d 795* ; *see Schwab v. Rondel Homes, Inc. (1991) 53 Cal. 3d 428, 432, 280 Cal. Rptr. 83, 808 P.2d 226*). Although Section 425.115(g) provides a manner of service, it does not address the timing of service. Therefore as to the timing of service of the statement, the

reasonable time rule of these cases should continue to apply.

[*When appropriate, add points and authorities opposing a grant of relief on additional particular grounds asserted by the moving party (see, e.g., §§ 70.440 -70.443, 70.450, 70.452, 70.453.*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion to set aside a default and default judgment brought on the ground that the defendant in any action including a claim for punitive damages was not, or was not properly, served a *Code Civ. Proc. § 425.115* statement of reserving the right to punitive damages. The basis for the opposition is that the requirements for service under the statute were in fact satisfied because defendant received notice of the amount of damages sought to be recovered and the notice received satisfies minimum standards of due process. The form may be adapted for use by a cross complainant [*see Code Civ. Proc. § 425.115(a)*].

In an appropriate case, these points and authorities may be submitted in opposition to the motion supported by the points and authorities *set out in §§ 70.400 -70.413*.

These points and authorities should be combined with a general memorandum opposing a motion for relief from a void judgment or order [*see § 70.430*]. These points and authorities may be combined with points and authorities opposing a motion in a wrongful death or personal injury action in superior court made on the ground that the defendant was not, or was not properly, served a *Code Civ. Proc. § 425.11* statement of damages [*see § 70.450[1]*]. They may also be combined, when appropriate, with additional points and authorities opposing a grant of relief on other particular grounds asserted by the moving party [*see, e.g., §§ 70.440 et seq., 70.452, 70.453*]. They may also be adapted for use in a trial or appellate brief.

See also *§§ 70.310[2], 70.330[2]* and *70.430[2]* for additional general considerations relating to a motion for relief from a void judgment or order, alternative methods for obtaining relief, and discussion relating to use of this form to oppose an alternative motion for relief from a judgment valid on its face but void in fact.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In proceedings to set aside a judgment or order that is void on its face, no supporting or opposing affidavit or declaration is prepared. Counsel should, however, request that the court take judicial notice of the judgment or order and the judgment roll, or, if some other paper or report filed in the action is relevant to the issue of validity, that particular paper or report. For matters subject to judicial notice, and the manner of requesting it, see *Evid. Code §§ 452(d), 453*. For discussion of documents that are included in the judgment roll for purposes of *Code Civ. Proc. § 473(d)*, see *§ 70.310[2][d][iii]*.

[c] Reasonable Time Rule Pertaining to Statement of Damages May Apply by Analogy to Statement Reserving Right to Punitive Damages

Counsel should be particularly careful in evaluating whether to pursue the arguments in this form. Although the cases are applying Section 425.11, so that they apply to *Code Civ. Proc. § 425.115* only by analogy, it seems even clearer that Section 425.115 does not prescribe a time for service. Section 425.11(d) merely say that service shall be served "in the same manner as a summons" without referring to time or the statutes governing service of summons. Section 425.115(g) contains the same language but also specifies that it is referring to service of a summons pursuant to the article of the Code of Civil Procedure commencing with Section 415.10. The timing for service of summons is not given in that article of the Code of Civil Procedure, so Section 425.115 does not specify or incorporate a time requirement for serving the statement. Therefore, a strong argument can be made that the rule of *California Novelties, Inc. v. Sokoloff*

(1992) 6 Cal. App. 4th 936, 945, 7 Cal. Rptr. 2d 795 should apply to service of a Section 425.115 statement, as long as service was made in a proper manner. For further discussion, see *§ 70.450[2][c]*.

[3] Discussion of Authorities

[a] Notice Satisfies Minimum Standards of Due Process

California Novelties, Inc. v. Sokoloff *(1992) 6 Cal. App. 4th 936, 7 Cal. Rptr. 2d 795* , is discussed in *§ 70.450[3]*.

Schwab v. Rondel Homes, Inc. *(1991) 53 Cal. 3d 428, 280 Cal. Rptr. 83, 808 P.2d 226* , is discussed in *§ 70.450[3]*.

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7-70 California Points & Authorities § 70.452

§ 70.452 Opposing Motion to Set Aside Judgment or Order Void on Its Face [Code Civ. Proc. § 473(d)] on Ground That Defendant Received Adequate Notice of Damages--Notice Requirement Was Satisfied by Complaint

[1] FORM

[*This form should be combined with a memorandum opposing a motion to set aside void judgment or order under Code Civ. Proc. § 473(d) on ground that defendant received adequate notice of damages (see §§ 70.450, 70.451).*]

THE COURT SHOULD DENY DEFENDANT'S MOTION TO SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT BECAUSE THE NOTICE REQUIRED BY _____ [CODE OF CIVIL PROCEDURE SECTION 425.11 *or* CODE OF CIVIL PROCEDURE SECTION 425.115] WAS SATISFIED BY THE COMPLAINT.

Notice Requirement Satisfied by Complaint. The requirements of *Code of Civil Procedure Section 425.11* may be satisfied by the complaint itself (*Schwab v. Rondel Homes, Inc. (1991) 53 Cal. 3d 428, 435, 280 Cal. Rptr. 83, 808 P.2d 226* ; *Greenup v. Rodman (1986) 42 Cal. 3d 822, 829, 231 Cal. Rptr. 220, 726 P.2d 1295*). [Because the requirements of *Code of Civil Procedure Section 425.115* are substantially parallel to those of Section 425.11, the same principle should apply when punitive damages have been stated in the complaint].

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion to set aside a default and default judgment brought on the grounds the defendant was not, or was not properly, served a statement of damages or statement reserving the right to punitive damages. The basis for the opposition is that the requirements for service under the statute were in fact satisfied by the complaint in the action [*Schwab v. Rondel Homes, Inc. (1991) 53 Cal. 3d 428, 435, 280 Cal. Rptr. 83, 808 P.2d 226* ; *Greenup v. Rodman (1986) 42 Cal. 3d 822, 829, 231 Cal. Rptr. 220, 726 P.2d 1295]* .

In an appropriate case, these points and authorities may be submitted in opposition to the motion supported by the points and authorities *set out in §§ 70.400 -70.413*.

These points and authorities should be combined with a opposing a motion to set aside void judgment or order under *Code Civ. Proc. § 473(d)* on ground that defendant received adequate notice of damages [*see §§ 70.450, 70.451*]. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel would refer to the specific allegations in the complaint that satisfy the notice requirement under the relevant statute.

In proceedings to set aside a judgment or order that is void on its face, no supporting or opposing affidavit or declaration is prepared. Counsel should, however, request that the court take judicial notice of the judgment or order and the judgment roll, or, if some other paper or report filed in the action is relevant to the issue of validity, that particular paper or report. For matters subject to judicial notice, and the manner of requesting it, see *Evid. Code §§ 452(d), 453*. For discussion of documents that are included in the judgment roll for purposes of *Code Civ. Proc. § 473(d)*, see *§ 70.310[2][d][iii]*.

[3] Discussion of Authorities

[a] Notice Requirement Satisfied by Complaint

The factual and procedural background of ***Schwab v. Rondel Homes, Inc.*** *(1991) 53 Cal. 3d 428, 280 Cal. Rptr. 83, 808 P.2d 226* , is discussed in *§ 70.400[3]*. In *Schwab,* the Supreme Court cited *Greenup v. Rodman (1986) 42 Cal. 3d 822, 231 Cal. Rptr. 220, 726 P.2d 1295* (discussed *below*), with approval. That case upheld a plaintiff's default judgment even though no statement of damages had been served on the defendant, based on the notice given to the defendant from the allegations of the complaint alone (*53 Cal. 3d 428, 433-434)* .

In ***Greenup v. Rodman*** *(1986) 42 Cal. 3d 822, 231 Cal. Rptr. 220, 726 P.2d 1295* , plaintiff brought an action against defendants for, inter alia, fraud and conversion. After repeated refusals by defendants to comply with discovery requests, the court granted plaintiff's motion to strike the answer and enter a default. The default judgment awarded plaintiffs $338,000 in compensatory damages and $338,000 in punitive damages. Plaintiff's complaint, however, had only requested the specific sum of $100,000 in exemplary and punitive damages, with other damages subject to proof at the time of trial, or as the court deemed just. Defendants appealed, contending that the court lacked jurisdiction to award damages in an amount exceeding the prayer. The court of appeal affirmed the judgment. The Supreme Court then granted review to consider whether a default judgment entered as a discovery sanction is excepted from the general rule under *Code Civ. Proc. § 580* that if there be no answer filed, the plaintiff's relief cannot exceed that which he or she shall have demanded in his or her complaint.

The Supreme Court reversed the judgment, and directed that the award be amended. The Court concluded that a plaintiff's demand sets a ceiling on recovery for any default judgment entered, including a judgment entered when an answer is stricken as a discovery sanction (*42 Cal. 3d 822, 824, 828)* . The Court stated that when an answer is stricken as a sanction for the defendant's obstruction of discovery, it is as if no answer had been filed in the first instance. Consequently, the ceiling on recovery in *Code Civ. Proc. § 580* is applicable (*42 Cal. 3d 822, 828)* . The Court rejected, however, the defendants' argument that because the plaintiff stated no amount of damages in her prayer, she was entitled to no compensatory damages whatever. The Court, citing the holding in *Becker v. S.P.V. Construction Co. (1980) 27 Cal. 3d 489, 494, 165 Cal. Rptr. 825, 612 P.2d 915* , that the allegations of a complaint may cure a defective prayer for damages and noted that each of the plaintiff's causes of action, with the exception of her personal

injury claim, concluded with the allegation that she suffered damage "in an amount that exceeds the jurisdictional requirements of this court." From this, the Court concluded that by her allegations, the plaintiff gave sufficient notice to defendants that she claimed at least $15,000 in compensatory damages (*42 Cal. 3d 822, 829-830)* .

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CHAPTER 70 DEFAULTS, DEFAULT JUDGMENTS, AND RELIEF FROM JUDGMENTS AND ORDERS
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1. Relief From Judgment or Order Void on Its Face

7-70 California Points & Authorities § 70.453

§ 70.453 Opposing Motion to Set Aside Judgment or Order Void on Its Face [Code Civ. Proc. § 473(d)] on Ground That Defendant Received Adequate Notice of Damages--Late Return of Proof of Service of Statement of Damages Is Mere Irregularity

[1] FORM

[*This form should be combined with a memorandum opposing a motion to set aside void judgment or order under Code Civ. Proc. § 473(d) on ground that defendant received adequate notice of damages (see §§ 70.450 -70.452).*]

THE COURT SHOULD DENY DEFENDANT'S MOTION TO SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT BECAUSE PLAINTIFF PERSONALLY SERVED ON THE DEFENDANT THE STATEMENT OF DAMAGES BEFORE REQUESTING DEFAULT, THEREFORE, THE PLAINTIFF'S FAILURE TO FILE PROOF OF THAT SERVICE CONSTITUTES A MERE IRREGULARITY THAT DOES NOT VOID THE JUDGMENT

Late Return of Proof of Service of Statement of Damages Mere Irregularity. When a plaintiff personally serves on the defendant a statement of damages before requesting default, the plaintiff's failure to file proof of that service constitutes a mere irregularity that does not void the judgment (*Connelly v. Castillo (1987) 190 Cal. App. 3d 1583, 1589, 236 Cal. Rptr. 112*). [Because the requirements of *Code of Civil Procedure Section 425.115* are substantially parallel to those of Section 425.11, the same principle should apply when plaintiff has failed to file the proof of service of the Section 425.115 statement].

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion to set aside a default and default judgment brought on the grounds the defendant was not, or was not properly, served a statement of damages or statement reserving the right to punitive damages. The basis for the opposition is that the late return of proof of service of statement of damages is a mere irregularity [*Connelly v. Castillo (1987) 190 Cal. App. 3d 1583, 1589, 236 Cal. Rptr.*

112] .

In an appropriate case, these points and authorities may be submitted in opposition to the motion supported by the points and authorities *set out in §§ 70.400 -70.413*.

These points and authorities should be combined with a opposing a motion to set aside void judgment or order under *Code Civ. Proc. § 473(d)* on ground that defendant received adequate notice of damages [*see §§ 70.450 -70.452*]. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In proceedings to set aside a judgment or order that is void on its face, no supporting or opposing affidavit or declaration is prepared. Counsel should, however, request that the court take judicial notice of the judgment or order and the judgment roll, or, if some other paper or report filed in the action is relevant to the issue of validity, that particular paper or report. For matters subject to judicial notice, and the manner of requesting it, see *Evid. Code §§ 452(d), 453*. For discussion of documents that are included in the judgment roll for purposes of *Code Civ. Proc. § 473(d)*, see *§ 70.310[2][d][iii]*.

[3] Discussion of Authorities

[a] Late Return of Proof of Service of Statement of Damages Mere Irregularity

Connelly v. Castillo *(1987) 190 Cal. App. 3d 1583, 236 Cal. Rptr. 112* , involved a personal injury action in which the plaintiff personally served on the defendant a statement of special and general damages. The plaintiff did not, however, file proof of the service in superior court. Plaintiff subsequently filed her request to enter default and thereafter filed the damages statement with the trial court together with proof of service of the statement by mail on defendant. Meanwhile, the defendant mailed his answer to the complaint, which the court mailed back, informing the defendant that the plaintiff's request for default had already been filed. The matter was heard and default judgment was granted against the defendant. The defendant later moved to set aside the default, contending that it was void for the plaintiff's failure to give the defendant notice of the nature and amount of her damages under *Code Civ. Proc. § 425.11*. The trial court granted the defendant's motion and ordered the default judgment set aside, finding the previous judgment void. The plaintiff appealed.

The court of reversed. The court stated that an examination of the record on appeal in the present case reveals that the plaintiff personally served the defendant with a statement of damages before requesting default. The judgment is therefore not invalid on its face (*190 Cal. App. 3d 1583, 1588-1589)* . The court stated that a default judgment is valid when based on actual service of summons on the defendant, although no proof of service is filed prior to entry of the judgment. The modern rule is that such a judgment is irregular, but not void. Thus, the court held that the plaintiff's failure to file proof of service of the statement of damages constituted a mere irregularity that did not void the judgment (*190 Cal. App. 3d 1583, 1589)* .

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7-70 California Points & Authorities §§ 70.454-70.459

[Reserved]

§§ 70.454[Reserved]

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2. Relief From Judgment or Order Void in Fact

7-70 California Points & Authorities § 70.460

§ 70.460 Supporting Motion to Set Aside Judgment or Order Is Not Void on Its Face but Void in Fact [Code Civ. Proc. § 473(d)]--General Form

[1] FORM

[*Caption. See § 70.310[1].*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] HEREIN ON THE GROUND THAT IT IS VOID BECAUSE, ALTHOUGH ITS INVALIDITY MAY NOT APPEAR FROM AN EXAMINATION OF THE JUDGMENT ROLL, IT IS NONETHELESS VOID IN FACT IN THAT _____ [*specify*].

A. Statutory Power to Set Aside Void Judgment. [*See § 70.310[1], Paragraph A.*]

B. Inherent Power to Set Aside Judgment Not Void on Its Face but Void in Fact. The law is settled that courts of record possess inherent power to set aside a void judgment, whether or not it is void on its face (*Rogers v. Silverman (1989) 216 Cal. App. 3d 1114, 1122, 265 Cal. Rptr. 286*).

C. Court Has Duty to Set Aside Judgment. It is well settled that when an application to vacate and set aside a judgment that is not void on its face but void in fact is made within a reasonable time after its rendition, and is based on a sufficient showing, it is within the power of the court, and its duty, to set it aside (*Smith v. Bratman (1917) 174 Cal. 518, 520, 163 P. 892*).

[*When appropriate, add points and authorities supporting additional grounds for relief from the void judgment or order (see, e.g., § 70.461[1]).*]

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*moving party*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to set aside a judgment or order that is void in fact although not void on its face. The form is a general one, setting out the trial court's authority to set aside void judgments or orders generally, under *Code Civ. Proc. § 473(d)*, and under the court's inherent power. In addition, the form sets out the court's more specific power to set aside a judgment or order that is void in fact on a motion brought within a reasonable time. This form may be adapted as necessary for use by a party other than a defendant (for example, a cross defendant).

This form should be combined, when appropriate, with additional points and authorities supporting a grant of relief under *Code Civ. Proc. § 473(d)*, from a judgment or order void in fact because of other particular [*see, e.g., §§ 70.461, 70.482*].

This form may also be combined, in an appropriate case, with additional points and authorities supporting a grant of relief based on other statutory or decisional authority [*see* discussion under [c], *below*].

This form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. That is, counsel should refer to extrinsic evidence showing that the judgment or order is void for lack of jurisdiction over the person or the subject matter, or is void in whole or part as a judgment or order rendered in excess of the court's jurisdiction. Counsel should also refer to facts showing that the motion for relief was brought within a reasonable time under the circumstances of the case [*see also § 70.470*].

In an appropriate case, counsel would refer to evidence set forth in:

- Declarations submitted in support of relief from the judgment, order, or dismissal [*see Cal. Rules of Court, Rule 3.1306(a)*].

- Discovery documents, such as deposition transcripts and answers to interrogatories and requests for admission.

- The opposing party's pleadings that constitute admissions.

- Other documentary evidence generally.

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*].

When counsel cites facts in his or her argument, counsel should refer to the particular page and line number of the declaration, deposition transcript, or other document, that contains the cited facts. In addition, the relevant portion of any testimony in a deposition should be marked in a manner that calls attention to the testimony [*see Cal. Rules of Court, Rule 3.1116(c)*].

For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Alternative Methods of Obtaining Relief

A judgment void on its face may also be set aside as void under *Code Civ. Proc. § 473(d)*, and under the court's inherent power [for further discussion, *see* [d], *below*]. For forms of memoranda supporting a grant of relief from a judgment or order on the ground that it is void on its face, which may, in an appropriate case, be combined with this form, see *§§ 70.310 -70.421*.

A party may, in addition, obtain relief from a default and default judgment or other judgment, dismissal, order, or proceeding on the ground of mistake, inadvertence, surprise, or excusable neglect [*Code Civ. Proc. § 473(b)*]. Additional statutory grounds also exist for relief from a default and default judgment [*see, e.g., Code Civ. Proc. §§ 473.1, 473.5*]. For forms of memoranda supporting a grant of relief from default and default judgment or other judgment or order on these various additional statutory grounds, which may, in an appropriate case, be combined with this form, see *§ 70.310* et seq.

A default judgment or other judgment or order may also be attacked by a motion or separate action in equity, when the judgment was obtained through extrinsic fraud, mistake, or duress. For forms of memoranda supporting a grant of relief from a default judgment or other judgment or order on such equitable grounds, which may, in an appropriate case, be combined with this form, see *§ 70.480* et seq.

[d] Void Judgment or Order

[i] In General

An judgment or order may be shown to be void either on its face, by examination of the judgment roll [*see, e.g., Forbes v. Hyde (1866) 31 Cal. 342, 355* ; *Morgan v. Clapp (1929) 207 Cal. 221, 224, 277 P. 490]* , or in fact, by reference to extrinsic evidence outside the judgment roll [*see City of Los Angeles v. Morgan (1951) 105 Cal. App. 2d 726, 730, 234 P.2d 319* (if invalidity of a judgment or order is not apparent by an inspection of the judgment or judgment roll, it may nonetheless be set aside by motion made within a reasonable time)]. For further discussion of what constitutes the judgment roll or record by which a judgment or order may be shown to be void on its face, see the *§ 70.310[2]*.

[ii] Time Limitation for Motion to Set Aside Judgment Void in Fact

The critical distinction between a judgment or order void on its face and one void in fact is that, in the latter case, there is a time limitation for seeking relief by motion [*see, e.g., Johnson v. E-Z Insurance Brokerage, Inc. (2009) 175 Cal. App. 4th 86, 98-99, 95 Cal. Rptr. 3d 782* (discussed in *§ 70.140*); *Rogers v. Silverman (1989) 216 Cal. App. 3d 1114, 1124, 265 Cal. Rptr. 286* (discussed under [3][a], *below*, and in § 70.470[3])], whereas a motion for relief from a judgment or order void on its face may be sought at any time [*see, e.g., Nagel v. P & M Distributors, Inc. (1969) 273 Cal. App. 2d 176, 179-180, 78 Cal. Rptr. 65* (discussed in *§ 70.312[3*])].

Generally, any motion to set aside a judgment or order that is not void on its face but is void in fact must be brought within a "reasonable time" [*City of Los Angeles v. Morgan (1951) 105 Cal. App. 2d 726, 730, 234 P.2d 319]* . In

determining the outer limits of what constitutes a reasonable time, courts have referred by analogy to statutory limitation periods. Some courts have applied the six-month limitation period applicable to motions under *Code Civ. Proc. § 473(b)* (relief from otherwise valid judgment, order, or proceeding based on mistake, inadvertence, surprise, and excusable neglect) [*see, e.g., Wells Fargo & Co. v. City etc. of S.F. (1944) 25 Cal. 2d 37, 40, 152 P.2d 625* ; *In re Dahnke (1923) 64 Cal. App. 555, 560-563, 222 P. 381* ; for further discussion regarding this period, *see* the *§ 70.10[2]*]. Other courts have applied the two-year or 180-day limitation period applicable to motions under *Code Civ. Proc. § 473.5*, particularly when the judgment or order is void in fact due to some extrinsic defect in service [*see, e.g., Rogers v. Silverman (1989) 216 Cal. App. 3d 1114, 1122, 265 Cal. Rptr. 286]* . For further discussion, see *§ 70.470[2]*.

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 70.470[1]* may be used to oppose this form.

[f] Related Pleading and Practice Chapters

For forms of a notice of motion and order relating to a motion to set aside judgment, see California Forms of Pleading and Practice, Ch. 489, *Relief From Judgments and Orders* (Matthew Bender).

[g] Related Points and Authorities

For memoranda of points and authorities for use in proceedings relating to the jurisdiction of the court over the subject matter and person, generally, see Ch. 132, *Jurisdiction: Personal Jurisdiction and Inconvenient Forum* , and Ch. 133, *Jurisdiction: Subject Matter Jurisdiction* .

[3] Discussion of Authorities

[a] Inherent Power to Set Aside Judgment Not Void on Its Face but Void in Fact

The facts and procedural background of ***Rogers v. Silverman*** *(1989) 216 Cal. App. 3d 1114, 265 Cal. Rptr. 286* , is discussed in *§ 70.461[3]*. In *Rogers*, the court of appeal, citing *People v. One 1941 Chrysler Sedan (1947) 81 Cal. App. 2d 18, 21-22, 183 P.2d 368* , noted that is well established that trial courts have inherent power to set aside a void judgment whether or not it is void on its face. The court noted also that, when a judgment is not void on its face but is void in fact, this power may be used so long as a motion to set aside the judgment is made within a reasonable time. If a motion to set aside a judgment void in fact is not made within a reasonable time, the party seeking relief is relegated to an action in equity (*216 Cal. App. 3d 1114, 1121)* .

[b] Court Has Duty to Set Aside Judgment

In ***Smith v. Bratman*** *(1917) 174 Cal. 518, 163 P. 892* , the plaintiff brought suit against the defendant and others to quiet title, had summons issued, and filed an affidavit by a person who stated that she had personally served the defendant with a summons and copy of the complaint. Subsequently, a default was entered and a decree quieting title of the plaintiff against the defendant was entered. Approximately four months thereafter, the defendant moved to vacate and set aside the decree on the ground that the affidavits of service on them were false, that no service whatever had been made on them, and that, hence, the court had not acquired jurisdiction to pronounce a decree against them and that the decree attempted to be pronounced was therefore void. In support of his motion, the defendant filed an affidavit stating that he had never been served and knew nothing of the pendency of the action until the decree was issued. The trial court granted the motion to set aside the decree and the plaintiff appealed.

The Supreme Court affirmed the trial court's order setting aside the decree, stating that it is well settled that when an application to vacate and set aside a judgment that is not void on its face but void in fact is made within a reasonable time after its rendition, and is based on a sufficient showing, it is within the power of the court, and its duty, to set it

aside. According to the Court, what is a reasonable time within which to make such a motion has been clearly laid down in this state as being the same time that is allowed for motions which are permitted to be made under *Code Civ. Proc. § 473*, and must be made within six months after the entry of the order, judgment, or decree (*174 Cal. 518, 520)* . The Court held that since the motion in the case was made within six months after the entry of the decree, it was made within time and a sufficient showing in the judgment of the trial court having been made to warrant it, the order setting aside the decree must be sustained (*174 Cal. 518, 520-521)* .

Note that, in another opinion involving the same parties, the Supreme Court observed that two time periods were stated by *Code Civ. Proc. § 473*: one being six months [*now see Code Civ. Proc. § 473(b)*] and the other being one year [*now see Code Civ. Proc. § 473.5* (providing a two-year or 180-day period, formerly a one-year period under former Code Civ. Proc. § 473 and, from 1933 to 1969, under former Code Civ. Proc. § 473a)]. In that case, however, the court did not reach the question of which period was applicable, since the motion had been made more than one year after the judgment [*see Smith v. Jones (1917) 174 Cal. 513, 515, 163 P. 890* (discussed in *§ 70.470[3*])]. For further discussion, see the Comments under [2][d][ii], *above.*

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7-70 California Points & Authorities § 70.461

§ 70.461 Supporting Motion to Set Aside Judgment or Order Is Not Void on Its Face but Void in Fact [Code Civ. Proc. § 473(d)]--Judgment or Order Is Void for Lack of Personal Jurisdiction Because of Improper Service of Process--Evidence Admissible to Challenge Fact of Service

[1] FORM

[*The following should be combined with a memorandum generally supporting a motion to set aside a judgment or order void in fact (see, e.g., § 70.460).*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION TO SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT HEREIN, ON THE GROUND THAT IT IS VOID IN FACT, BECAUSE IT APPEARS FROM EXTRINSIC EVIDENCE THAT DEFENDANT WAS NOT SERVED WITH SUMMONS AND A COPY OF THE COMPLAINT AS REQUIRED BY STATUTE.

A. Statutory Requirement for Service of Summons. [*See § 70.330[1], Paragraph A.*]

B. Personal Jurisdiction Not Conferred If Manner of Service Improper. [*See § 70.333[1]*].

C. Default Judgment Void in Fact Because of Improper Service. A default judgment that is not void on its face may be otherwise void in fact because service of the summons was improper (*Rogers v. Silverman (1989) 216 Cal. App. 3d 1114, 1121, 265 Cal. Rptr. 286*).

D. Evidence Admissible to Challenge Fact of Service. A sworn return of service of summons may be impeached by evidence that contradicts it (*City of Los Angeles v. Morgan (1951) 105 Cal. App. 2d 726, 731, 234 P.2d 319*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to set aside a judgment that is not void on its face but void in fact, because it appears from evidence outside the judgment roll that service was defective. This form may be adapted as necessary for use by a party other than a defendant (for example, a cross defendant).

This form may be combined with points and authorities supporting a motion to set aside a void default and default judgment on the ground that defendant was not served [*see § 70.331[1]*]. It may also be combined with points and authorities supporting a motion to set aside when the motion is made in conjunction with a motion to quash [*see § 70.314[1]*]. For forms of memoranda supporting a motion to quash under *Code Civ. Proc. § 418.10*, which may in such cases be combined with this form, see Ch. 132, *Jurisdiction: Personal Jurisdiction and Inconvenient Forum* .

This form should be combined with a general memorandum supporting a motion for relief from a judgment or order void in fact [*see § 70.460[1]*]. They may also be adapted for use in a trial or appellate brief.

See also *§ 70.460[2]* for additional general considerations relating to a motion for relief from a judgment or order void in fact and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the judgment was not void on its face but void in fact because defendant was never served despite a false statement to the contrary in the proof of service, counsel should refer to facts in the moving party's supporting declaration that establish nonservice. See also *§ 70.460[2][b]* regarding evidentiary support for facts stated.

[c] Alternative Relief When Improper Service Appears on Examination of Judgment Roll

In some instances a defect in manner of service may be established by examination of the judgment roll. In these instances, the judgment is void on its face in addition to, or instead of, being void in fact. For further discussion and points and authorities for use in these instances, which may, in an appropriate case, be combined with this form, see *§§ 70.330 -70.336*.

[d] Methods of Service of Summons

The five alternative methods for the serving of summons authorized by the basic service of summons statutes are:

- Personal delivery of a copy of the summons and complaint to the person to be served [*Code Civ. Proc. § 415.10*].

- The leaving of a copy of the summons and complaint with a specified person at the defendant's usual place of abode, usual place of business or, if no physical address is known, at the person's usual mailing address, other than a United States Postal Service post office box, with the person who is apparently in charge [*Code Civ. Proc. § 415.20*].

- The sending of a copy of the summons and complaint by ordinary mail to the person to be served with a request that he or she execute and return an enclosed statutory form of "Acknowledgment of Receipt of Summons" to the sender [*Code Civ. Proc. § 415.30*].

- The sending of a copy of the summons and complaint to the person to be served, by first-class mail, postage prepaid, requiring a return receipt [*Code Civ. Proc. § 415.40*].

- The service of summons by publication [*Code Civ. Proc. § 415.50*]. Service by mail under *Code Civ.*

Proc. § 415.40 may be used only to effectuate service of summons on a person who is outside the State of California [*Code Civ. Proc. § 415.40*].

Any of the other four methods of serving summons may be used to effectuate the service of summons on a person either within or outside of the State of California [*Code Civ. Proc. § 413.10*; *see* 1969 Annual Report, Judicial Council of California, p. 43 (Comment to *Code Civ. Proc. § 415.10*)].

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 70.470 -70.471* may be used to oppose this form.

[f] Related Pleading and Practice Chapters

For forms of a notice of motion relating to proceedings to quash service of summons on ground of lack of personal jurisdiction, see California Forms of Pleading and Practice, Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances* (Matthew Bender). For forms of notice of motion relating to service and return of summons, see California Forms of Pleading and Practice, Ch. 518, *Service of Summons and Papers* (Matthew Bender).

[3] Discussion of Authorities

[a] Default Judgment Void in Fact Because of Improper Service

The facts and procedural background of ***Rogers v. Silverman*** *(1989) 216 Cal. App. 3d 1114, 265 Cal. Rptr. 286* , are discussed in *§ 70.482[3]* . In *Rogers*, the defendant's motion for relief was grounded in part on former Code Civ. Proc. § 473, 6th Paragraph (*now see Code Civ. Proc. § 473(d)*), which empowers a court on motion of either party after notice to the other party, to set aside any void judgment or order. The plaintiffs in the case did not dispute that a default judgment valid on its face but otherwise void because service was improper was governed by that section (*216 Cal. App. 3d 1114, 1120-1121)* .

[b] Evidence Admissible to Challenge Fact of Service

City of Los Angeles v. Morgan *(1951) 105 Cal. App. 2d 726, 234 P.2d 319* , involved an action by the city to condemn a parcel of land in which the trial court was required to determine ownership. A decree in a quiet title action occurring nearly 30 years prior to the condemnation action had quieted title to the property in J. Truitt, the grantor of Catherine McKinna, a defendant in the condemnation suit. In that quiet title action, the title owner of record, a corporation, was not named as a defendant, but was purportedly served as a fictitious defendant. However, it appeared that service on the corporation was not made and that the return of service filed in the quiet title action was fraudulent. In the years following the quiet title action, the corporation and its successor, Los Angeles Rock and Gravel Company, paid property taxes and maintained possession of the property, during which time McKinna evinced no interest in the property. The trial court in the condemnation action determined, on the basis of these facts, that Los Angeles Rock and Gravel was the absolute owner of the property and as such was entitled to the condemnation award. McKinna appealed, contending among other things that the gravel company had constructive notice of the fraud in the quiet title action when the decree therein was recorded and for that reason could not be relieved of that judgment.

Affirming the trial court's judgment, the court of appeal cited *McDonald v. Mabee (1917) 243 U.S. 90, 37 S. Ct. 343, 61 L. Ed. 608* , for the statement that under the due process clause of the federal Constitution a personal judgment rendered without service of process on, or legal notice to, a defendant is void, in the absence of a voluntary appearance or waiver (*105 Cal. App. 2d 726, 730)* . The court noted that a judgment void on its face may be vacated at any time, but went on to say that if the invalidity of the judgment is not apparent by an inspection of the judgment or the judgment roll, it may be set aside by a motion filed within a reasonable time. The court stated that a reasonable time is "not longer than the time set forth in *Code of Civil Procedure section 473*" (*105 Cal. App. 2d 726, 730)* . If the "reasonable time"

has passed, the challenge permitted is restricted to an independent action in equity to vacate the judgment (*105 Cal. App. 2d 726, 730)* . The court cited earlier cases for the principle that a false affidavit of service constitutes extrinsic fraud in that it prevents a party from having his or her day in court, and that it has been the accepted rule in California that a sworn return of service of summons may be impeached by evidence that contradicts it (*105 Cal. App. 2d 726, 731)* .

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7-70 California Points & Authorities § 70.462

§ 70.462 Supporting Motion to Set Aside Judgment or Order Is Not Void on Its Face but Void in Fact [Code Civ. Proc. § 473(d)]--Judgment or Order Is Void for Lack of Personal Jurisdiction Because of Improper Service of Process--Time Limitation on Default Judgment Is Void in Fact for Lack of Proper Service

[1] FORM

[*The following should be combined with a memorandum supporting a motion to set aside a judgment or order void in fact because of lack of personal jurisdiction due to improper service of process (see, e.g., § 70.461[1]).*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION TO SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT HEREIN, BECAUSE THE MOTION IS TIMELY MADE.

Time Limitation on Default Judgment Valid on Its Face but Void in Fact for Lack of Proper Service. The period of limitations stated *Code Civil Procedure Section 473.5* governs, by analogy, the time within which a motion may be brought to set aside a judgment that is valid on its face but void in fact because of improper service of process. That section, which governs motions to set aside a default or default judgment when the service of summons has not resulted in actual notice to the defendant, requires that the motion for relief be made within two years after entry of the default judgment or 180 days after service on the defendant of a written notice that the default or default judgment has been entered, whichever is earlier (*Rogers v. Silverman (1989) 216 Cal. App. 3d 1114, 1124, 265 Cal. Rptr. 286*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to set aside a judgment that is not void on its face but void in fact, because the motion is timely under the period of limitations stated in *Code Civ. Proc. § 473.5* [*Rogers v. Silverman (1989) 216 Cal. App. 3d 1114, 1124, 265 Cal. Rptr. 286]* . This form may be adapted as necessary for use by a party other than a defendant (for example, a cross defendant).

These points and authorities should be combined with a memorandum supporting a motion to set aside a judgment or order void in fact because of lack of personal jurisdiction due to improper service of process [*see, e.g., § 70.461[1]*]. They may also be adapted for use in a trial or appellate brief.

See also *§ 70.460[2]* for additional general considerations relating to a motion for relief from a judgment or order void in fact and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 70.460[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Time Limitation on Judgment Not Void on Its Face but Void in Fact for Lack of Proper Service

Rogers v. Silverman *(1989) 216 Cal. App. 3d 1114, 265 Cal. Rptr. 286* , was an action filed on September 27, 1984, for fraud and negligent misrepresentation. The proof of service stated that the summons and complaint were served on October 19, 1985, by leaving them at a specified address in Mission Hills, California, with defendant's brother Richard, who was stated to be a co-occupant, competent adult apparently in charge at the place of defendant's residence. Defendant's default was entered on January 13, 1986, and a default judgment awarding plaintiff the sum of almost $3 million was entered March 4, 1987. On December 3, 1987, defendant appeared specially and moved (1) to quash service of summons (*Code Civ. Proc. § 418.10(a)(1)*) on the ground the court lacked jurisdiction over the defendant's person; (2) to set aside the judgment (*Code Civ. Proc. § 473(d)*) on the ground the judgment was void for lack of jurisdiction; and (3) to dismiss the action (*Code Civ. Proc. § 583.210*) on the ground the summons and complaint had not been served within three years after the complaint was filed. In support of his motion, defendant declared (1) that he had never lived at or near the specified address in Mission Hills, California, and did not know and was not related to anyone living at that address; (2) that, since August 1984, he had lived at a specified address in Las Vegas, Nevada, and that before that time he had lived in Culver City, California; and (3) that he had no brother named Richard, only a brother named Jerome, who had never lived at the Mission Hills address but, rather, lived at a specified address in Tarzana, California, where he had resided for at least the past 10 years. The trial court granted defendant's motion, but set aside its order on a motion for reconsideration on the ground that defendant's motion for relief was untimely, having been made more than one year after the entry of default. Defendant appealed.

In reversing the order with directions to reinstate that part of its prior order vacating the default judgment, the court of appeal traced the legislative history of *Code Civ. Proc. § 473* and related provisions. The court noted that previously most courts had applied a one-year limitation period to motions to set aside judgments that were void in fact, at least when the judgment had been obtained by default because of defective service. This period was derived by analogy to the one-year period in former Code Civ. Proc. § 473a, which provided for relief from a default judgment when service was constructive only and did not provide defendant with actual notice or an opportunity to defend. However, this one-year period has been altered under its successor statute, *Code Civ. Proc. § 473.5*, which now provides that a motion under that section must be served and filed within a reasonable time not either two years after entry of the default judgment, or 180 days after service on the defendant of a written notice that such default or default judgment had been entered, whichever period expires earlier (*216 Cal. App. 3d 1114, 1121-1124)* . The court concluded that in cases such as the one before it, when there had been no effective service on defendant, the period under *Code Civ. Proc. § 473.5* should now apply by analogy, just as the former one-year period under former Code Civ. Proc. § 473a had previously been applied. Noting that no notice of the default or default judgment had been properly served on the defendant, the court concluded that the two-year period specified in *Code Civ. Proc. § 473.5* applied by analogy and that the motion to vacate had been timely served and filed (*216 Cal. App. 3d 1114, 1124)* .

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7-70 California Points & Authorities § 70.463

§ 70.463 Supporting Motion to Set Aside Judgment or Order Is Not Void on Its Face but Void in Fact [Code Civ. Proc. § 473(d)]--Judgment or Order Is Void for Lack of Authority of Attorney

[1] FORM

[*The following should be combined with a memorandum generally supporting a motion to set aside a judgment or order void in fact (see, e.g., § 70.460[1]).*]

THE COURT SHOULD GRANT PLAINTIFF'S MOTION TO SET ASIDE THE JUDGMENT OF DISMISSAL HEREIN, ON THE GROUND THAT IT IS VOID IN FACT, BECAUSE IT APPEARS FROM EXTRINSIC EVIDENCE THAT PLAINTIFF'S ATTORNEY WAS ACTING WITHOUT AUTHORITY.

A. Void Judgment May Be Vacated if Attorney Acted Without Authorization of Client. A judgment of dismissal with prejudice is void and may be vacated if the party's attorney dismissed the action without the client's authorization (*Robinson v. Hiles (1953) 119 Cal. App. 2d 666, 673, 260 P.2d 194*).

B. Attorney's Mistaken Dismissal With Prejudice Is Without Client's Authorization. Plaintiffs' attorney's lack of authority to dismiss the action with prejudice invalidated the dismissal (*Romadka v. Hoge (1991) 232 Cal. App. 3d 1231, 1237, 283 Cal. Rptr. 878*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to set aside a judgment of dismissal with prejudice when the attorney did not have the client's authorization to dismiss with prejudice.

This form should be combined with a general memorandum supporting a motion for relief from a judgment or order void in fact [*see § 70.460[1]*]. They may also be adapted for use in a trial or appellate brief.

See also *§ 70.460[2]* for additional general considerations relating to a motion for relief from a judgment or order void in fact and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the judgment was not void on its face but void in fact because the moving party never authorized dismissal with prejudice, counsel should refer to facts in the declaration of the moving party's supporting declaration that establish the lack of authorization. See also *§ 70.460[2][b]* regarding evidentiary support for facts stated.

[c] Related Pleading and Practice Chapters

For forms of a notice of motion and order relating to a motion to set aside judgment, see California Forms of Pleading and Practice, Ch. 318, *Judgments* (Matthew Bender).

[3] Discussion of Authorities

[a] Void Judgment May Be Vacated if Attorney Acted Without Authorization of Client

In ***Robinson v. Hiles*** *(1953) 119 Cal. App. 2d 666, 260 P.2d 194* , plaintiff's attorney had entered into a settlement agreement and subsequently dismissed the action with prejudice. The trial court granted plaintiff relief under *Code Civ. Proc. § 473* based on plaintiff's assertion that he had not authorized settlement of the action. The court of appeal affirmed, noting that motions under *Code Civ. Proc. § 473* are addressed to the sound discretion of the trial court and will not be disturbed unless there is a showing of an abuse of discretion (*119 Cal. App. 2d 666, 673-674)* .

[b] Attorney's Mistaken Dismissal With Prejudice Is Without Client's Authorization

In ***Romadka v. Hoge*** *(1991) 232 Cal. App. 3d 1231, 283 Cal. Rptr. 878* , plaintiffs' action in Santa Clara county fell subject to mandatory dismissal without prejudice for failure to serve defendant within three years. Within the limitations period, plaintiffs refiled the action in Santa Cruz county. Plaintiff's attorney then filed a request for dismissal of the still pending Santa Clara county action but, by mistake, checked the "with prejudice" box instead of the "without prejudice" box. Plaintiffs had not authorized dismissal of the action with prejudice. At trial defendant obtained a judgment based on the dismissal with prejudice; plaintiffs' motion to vacate the dismissal with prejudice or to correct it to reflect a dismissal without prejudice was denied (*232 Cal. App. 3d 1231, 1234)* .

Defendant then obtained a dismissal of the Santa Cruz county action on the ground of res judicata. Plaintiffs appealed from the judgment, arguing that the voluntary dismissal with prejudice was invalid because plaintiffs' attorney lacked authority to surrender plaintiffs' substantial rights in the action (*232 Cal. App. 3d 1231, 1234)* .

The court of appeal agreed, and reversed the denial of plaintiffs' motion to vacate and the ensuing judgment in the Santa Cruz action. Given that there was no conceivable reason to dismiss the action with prejudice rather than without prejudice, the trial court abused its discretion in disbelieving the attorney's testimony that she acted without authority and by mistake (*232 Cal. App. 3d 1231, 1237)* .

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[Reserved]

§§ 70.464[Reserved]

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7-70 California Points & Authorities § 70.470

§ 70.470 Opposing Motion to Set Aside Judgment or Order Not Void on Its Face but Void in Fact [Code Civ. Proc. § 473(d)] on Ground That Motion Is Untimely--When Motion Asserts That Judgment Is Void in Fact Based on Defective Service--In General

[1] FORM

[*Caption. See § 70.430[1].*]

THE COURT SHOULD DENY DEFENDANT'S MOTION TO SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT BECAUSE DEFENDANT DID NOT BRING THE MOTION WITHIN A REASONABLE TIME.

A. Court's Power to Set Aside Judgment Not Void on Its Face Limited to Reasonable Time. In order to invoke the power of the court to set aside a judgment that is not void on its face, the motion must be made within a reasonable time (*Smith v. Jones (1917) 174 Cal. 513, 515, 163 P. 890*).

B. Application by Analogy of *Code of Civil Procedure Section 473.5* Time Limitation. The time limitation set forth in *Code of Civil Procedure Section 473.5* applies by analogy to motions under the last paragraph of *Code of Civil Procedure Section 473* for relief from a default judgment valid on its face but otherwise void because of improper service (*Rogers v. Silverman (1989) 216 Cal. App. 3d 1114, 1124, 265 Cal. Rptr. 286* ; *Schenkel v. Resnik (1994) 27 Cal. App. 4th Supp. 1, 3-4* , *33 Cal. Rptr. 2d 60*). Section 473.5 requires the defendant to bring the motion within a reasonable time, but in no event exceeding the earlier of (1) two years after entry of a default judgment against him or her; or (2) 180 days after service on him or her of a written notice that the default or default judgment has been entered (*Code Civ. Proc. § 473.5(a)*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*opposing party*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion to set aside a default and default judgment when the judgment is not void on its face but is asserted to be void in fact. The ground for opposition is that the motion is untimely if the motion asserts that judgment is void in fact for lack of personal jurisdiction based on defective service. The form may be adapted as necessary for use by a party other than a plaintiff (for example, a cross complainant).

In an appropriate case, these points and authorities may be submitted in opposition to the motion supported by the points and authorities *set out in §§ 70.460 -70.482*. These points and authorities may be adapted for use in a trial or appellate brief. They may also be combined, in an appropriate case, with additional points and authorities opposing a grant of relief based on other statutory or decisional authority [*see* discussion under [c], *below*].

For a form of points and authorities setting forth the test for what constitutes reasonable time, see *§ 70.471[1]*.

See also *§§ 70.310*, *70.430*, and *70.460* for additional general considerations relating to a motion for relief from a void judgment or order, alternative methods for obtaining relief, and discussion relating to use of these points and authorities to oppose an alternative motion for relief from a judgment void on its face.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. That is, counsel should refer to facts showing that under the circumstances, the motion was not made within a reasonable time. See also *§ 70.460[2][b]* regarding evidentiary support for facts stated.

[c] Alternative Methods of Obtaining Relief

A party may also obtain relief from a default and default judgment or other judgment, dismissal, order, or proceeding on the ground of mistake, inadvertence, surprise, or excusable neglect [*Code Civ. Proc. § 473(b)*]. Additional statutory grounds also exist for relief from a default and default judgment [*see, e.g., Code Civ. Proc. §§ 473.1*, *473.5*]. For points and authorities supporting a grant of relief from default and default judgment or other judgment or order on these various additional statutory grounds, which may, in an appropriate case, be combined with the points and authorities in this form, see *§ 70.10* et seq.

A default judgment or other judgment or order may also be attacked by a motion or separate action in equity, when the judgment was obtained through extrinsic fraud, mistake, or duress. For points and authorities supporting a grant of relief from a default judgment or other judgment or order on those equitable grounds, which may, in an appropriate case, be combined with the points and authorities in this form, see *§ 70.480* et seq.

[d] Time Limitation for Motion to Set Aside Judgment Void in Fact

Generally, a motion to set aside a judgment or order that is not void on its face but is void in fact must be brought within a "reasonable time" [*City of Los Angeles v. Morgan (1951) 105 Cal. App. 2d 726, 730, 234 P.2d 319]* . In determining the outer limits of what constitutes a reasonable time, courts have referred by analogy to statutory limitation periods.

Some courts have applied the six-month limitation period applicable to motions under *Code Civ. Proc. § 473(b)* (relief from otherwise valid judgment, order, or proceeding based on mistake, inadvertence, surprise, and excusable neglect) [*see, e.g., Wells Fargo & Co. v. City etc. of S.F. (1944) 25 Cal. 2d 37, 40, 152 P.2d 625* . For further discussion regarding this period, *see* the *§ 70.10[2]*].

When the judgment or order is void in fact due to an extrinsic defect in service, some courts have applied the two-year or 180-day limitation period applicable to motions under *Code Civ. Proc. § 473.5* [*see, e.g., Rogers v. Silverman (1989) 216 Cal. App. 3d 1114, 1122, 265 Cal. Rptr. 286* ; *Schenkel v. Resnik (1994) 27 Cal. App. 4th Supp. 1, 3-4 , 33 Cal. Rptr. 2d 60]* .

The cases are not always clear, and in some instances appear to be confused or mistaken, in applying the proper statutory limitation period by analogy. It appears reasonable to conclude from them, however, that the reasonable time rule, subject to the two-year or 180-day limitation, of *Code Civ. Proc. § 473.5* applies, by analogy, in any case in which the judgment is asserted to be void in fact because of lack of jurisdiction resulting from defective service, as set out in Paragraph B and § 70.471[1]. This is because relief under *Code Civ. Proc. § 473.5* is authorized in a similar situation, in which a default judgment has been entered after proper constructive service, but the defendant has not received actual notice and has had no opportunity to defend [*see Rogers v. Silverman (1989) 216 Cal. App. 3d 1114, 1121-1124, 265 Cal. Rptr. 286]* .

[3] Discussion of Authorities

[a] Court's Power to Set Aside Judgment Not Void on Its Face Limited to Reasonable Time

Smith v. Jones *(1917) 174 Cal. 513, 163 P. 890* , involved an action to quiet title to a tract of land. Summons was issued and a person subsequently filed an affidavit that he had personally served the defendant with a copy of the summons and complaint in the action. A default and default judgment was entered. Later, the defendant moved to set aside the default and vacate the judgment on the ground that he had never been served in the action. In support of the motion, the defendant submitted an affidavit swearing, among other things, that he had not been served with summons in the action at any time and that he was not in the county or the state during the year of the purported service, and that he had no knowledge of the pendency of the action until about a year after the rendition of the action against him. The motion was heard on the affidavit and the judgment roll in the case, and the trial court made an order setting aside the default and the judgment. The plaintiff appealed.

The Supreme Court reversed, noting that it was not contended that the judgment entered in the action against the defendant was invalid on its face. What was claimed was that the judgment was in fact void because the affidavit of service by the person purporting to make the service was false, that no summons had ever been served on the defendant, and hence, the court was without jurisdiction to pronounce judgment against him. The court stated that, undoubtedly, though it may appear from the record of a judgment entered on a default that service was made on a defendant, and, hence, a judgment against him is valid on its face, it is well settled that such a judgment may be set aside on motion either under *Code Civ. Proc. § 473* on any the grounds specified in that section, or independent of that section when, as in the case before the Court, the motion is made on the ground that its entry was based solely on a false return of person service on the defendant. In order to invoke the power of the court to set aside the judgment, however, the motion must be made within a reasonable time, or the right to make it is lost, and the party is remitted to an action in equity to have the judgment declared void (*174 Cal. 513, 515)* . The Court then referred to Section 473 to determine whether the motion was brought within a reasonable time, pointing out that two periods of time given in the version of Section 473 then in effect, which were six months and one year. The Court concluded that whether the latter period applied to the case before it was immaterial since the motion was not made even within that period (*174 Cal. 513, 516)* . Thus, the court held that the defendant's motion to set aside the judgment was made too late, and for that reason, the court had no power to make the order (*174 Cal. 513, 517)* .

[b] Application by Analogy of Code of Civil Procedure Section 473.5 Time Limitation

The facts and procedural background of ***Rogers v. Silverman*** *(1989) 216 Cal. App. 3d 1114, 265 Cal. Rptr. 286* , are discussed in *§ 70.461[3]*. In *Rogers*, the court of appeal cited opinions applying the limitation periods in former Code Civ. Proc. § 473a, by analogy, to motions to relief a party from a void judgment not void on its face when there was no personal service (*216 Cal. App. 3d 1114, 1121-1122)* . The court noted that in 1969 former Code Civ. Proc. § 473a was repealed and replaced by the current *Code Civ. Proc. § 473.5*, and that the Legislature, in replacing Section 473a did not make a sweeping revision of the law relating to motions to set aside defaults and default judgments. The court held that what is a "reasonable time," for purpose of bringing a motion to vacate a default judgment that is valid on its face but is otherwise void for lack of jurisdiction because of improper service of the summons on the defendant, is to be determined by reference to the period of limitations set forth in *Code Civ. Proc. § 473.5*, which applies by analogy (*216 Cal. App. 3d 1114, 1123)* .

Under that statute, because the plaintiff had not served written notice of entry of a default judgment, the defendant had two years from entry of the default or default judgment to move for relief. The court rejected the plaintiff's argument that the two-year period had to be calculated from the entry of default as opposed to entry of the default judgment. Thus, the court held that the defendant's motion had therefore been timely, and that the trial court had jurisdiction to rule on the motion (*216 Cal. App. 3d 1114, 1124-1126)* . Because the trial court, on reconsideration of its original order vacating the default judgment, had reversed itself on the ground it had lacked jurisdiction to make that order because the motion had been untimely, the court of appeal reversed (*216 Cal. App. 3d 1114, 1120)* .

In ***Schenkel v. Resnik*** *(1994) 27 Cal. App. 4th Supp. 1* , *33 Cal. Rptr. 2d 60* , defendant failed to file an answer to plaintiff's civil complaint. Plaintiff wrote to defendant's counsel, informing him that plaintiff had requested the entry of defendant's default. On October 8, 1990, five days after the default was entered, defendant's counsel acknowledged the entry of default by letter to plaintiff. On July 11, 1991, the trial court entered a default judgment for plaintiff and on May 14, 1992, defendant filed a motion to set aside the default judgment pursuant to *Code Civ. Proc. § 473* on the grounds that defendant had not been served a copy of the summons, and that the judgment exceeded the relief demanded in the complaint. The trial court denied the motion, ruling that it had not been filed within a reasonable time after defendant's acknowledgment of the default (*27 Cal. App. 4th Supp. 1, 3)* .

The appellate department of the superior court affirmed. Defendant contended that under *Rogers v. Silverman (1989) 216 Cal. App. 3d 1114, 265 Cal. Rptr. 286* , he had two years from the date the default judgment was entered to file a motion to set aside the default judgment. The court agreed that the time limitation set forth in *Code Civ. Proc. § 473.5* applies by analogy to motions for relief from a default judgment valid on its face but otherwise void because of improper service, but disagreed with the defendant's argument of how that rule applied to the case (*27 Cal. App. 4th Supp. 1, 3-4)* .

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7-70 California Points & Authorities § 70.471

§ 70.471 Opposing Motion to Set Aside Judgment or Order Not Void on Its Face but Void in Fact [Code Civ. Proc. § 473(d)] on Ground That Motion Is Untimely--When Motion Asserts That Judgment Is Void in Fact Based on Defective Service--What Constitutes Reasonable Time

[1] FORM

[*The following should be combined with a memorandum generally opposing a motion to set aside a judgment or order void in fact on ground that motion is untimely (see, e.g., § 70.470[1]).*]

THE COURT SHOULD DENY DEFENDANT'S MOTION TO SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT BECAUSE DEFENDANT HAS FAILED TO SHOW BOTH A SATISFACTORY EXCUSE FOR THE DEFAULT AND DILIGENCE IN MAKING THE MOTION AFTER DISCOVERY OF THE DEFAULT.

What Constitutes "Reasonable Time." The "reasonable time" limitation operates separately from the two-year or 180-day limitation periods, and begins to run on discovery of the default, not on entry of the default judgment (*Schenkel v. Resnik (1994) 27 Cal. App. 4th Supp. 1, 3-4 , 33 Cal. Rptr. 2d 60*). Thus, although the court has jurisdiction to set aside the judgment within the time periods specified in Section 473.5 (*Rogers v. Silverman (1989) 216 Cal. App. 3d 1114, 1124, 265 Cal. Rptr. 286*), the party bringing a motion within that period must, by analogy to the construction of similar language in *Code of Civil Procedure Section 473*, third paragraph, show both a satisfactory excuse for the default and diligence in making the motion after discovery of the default (*Schenkel v. Resnik (1994) 27 Cal. App. 4th Supp. 1, 3-4*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion to set aside a default and default judgment when the judgment is not void on its face but is asserted to be void in fact. The ground for opposition is that the motion is untimely in that the defendant did not act with satisfactory diligence in making the motion after discovery of the

default. The form may be adapted as necessary for use by a party other than a plaintiff (for example, a cross complainant).

In an appropriate case, these points and authorities may be submitted in opposition to the motion supported by the points and authorities *set out in §§ 70.460 -70.482*.

These points and authorities should be combined with a memorandum generally opposing a motion to set aside a judgment or order void in fact on ground that motion is untimely [*see, e.g., § 70.470[1]*].

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. That is, counsel should refer to facts showing that under the circumstances, the motion was not made within a reasonable time. See also *§ 70.460[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] What Constitutes "Reasonable Time"

The facts and procedural background of ***Schenkel v. Resnik*** *(1994) 27 Cal. App. 4th Supp. 1 , 33 Cal. Rptr. 2d 60* , and ***Rogers v. Silverman*** *(1989) 216 Cal. App. 3d 1114, 265 Cal. Rptr. 286* , are discussed in *§ 70.470[2][b]*.

After agreeing that the time limitation of *Code Civ. Proc. § 473.5* applied to the motion by analogy, the court in *Schenkel* distinguished *Rogers*, which had discussed the two-year limit. The *Schenkel* court held that under the language of *Code Civ. Proc. § 473.5*, although the two years begins to run after entry of a default judgment, the reasonable time requirement is entirely separate. The court looked to cases interpreting analogous language in *Code Civ. Proc. § 473(b)* relating to relief based on mistake, inadvertence, surprise, or excusable neglect to hold that the reasonable time requirement requires both a satisfactory excuse for the entry of default and diligence in making the motion after discovery of the default. Applying that rule, the court found that defendant knew he had been sued and that plaintiff had requested a default in October, 1990. Since defendant took no action until May, 1992, the court concluded that the trial court did not abuse its discretion in finding that the motion was not made within a reasonable time (*27 Cal. App. 4th Supp. 1, 3-4)* .

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7-70 California Points & Authorities § 70.472

§ 70.472 Opposing Motion to Set Aside Judgment or Order Not Void on Its Face but Void in Fact [Code Civ. Proc. § 473(d)] on Ground That Motion Is Untimely--When Motion Asserts Reason Other Than Defective Service

[1] FORM

[*Caption. See § 70.430[1].*]

THE COURT SHOULD DENY DEFENDANT'S MOTION TO SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT BECAUSE DEFENDANT DID NOT BRING THE MOTION WITHIN A REASONABLE TIME.

A. Court's Power to Set Aside Judgment Not Void on Its Face Limited to Reasonable Time. [*See § 70.470[1], Paragraph A.*]

B. Motion Must Be Brought Within Six-Month Period in *Code Civ. Proc. § 473(b)*. A motion to vacate a judgment, made after the expiration of the six-month period allowed in *Code of Civil Procedure Section 473(b)*, is governed by the rules applicable to collateral attack. Under those rules, unless extrinsic fraud or mistake is shown, a judgment cannot be set aside unless it is void on its face (*Wells Fargo & Co. v. City etc. of S.F. (1944) 25 Cal. 2d 37, 40, 152 P.2d 625*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*opposing party*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion to set aside a default and default judgment when the judgment is not void on its face but is asserted to be void in fact. The ground for opposition is that the motion is untimely if the motion asserts that judgment is void in fact for a reason other than for lack of personal jurisdiction based on defective service. The form may be adapted as necessary for use by a party other than a plaintiff (for example, a cross complainant).

In an appropriate case, these points and authorities may be submitted in opposition to the motion supported by the points and authorities *set out in §§ 70.460 -70.482*. These points and authorities may be adapted for use in a trial or appellate brief. They may also be combined, in an appropriate case, with additional points and authorities opposing a grant of relief based on other statutory or decisional authority.

See also *§§ 70.310, 70.430*, and *70.460* for additional general considerations relating to a motion for relief from a void judgment or order, alternative methods for obtaining relief, and discussion relating to use of these points and authorities to oppose an alternative motion for relief from a judgment void on its face.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. That is, counsel should refer to facts showing that under the circumstances, the motion was not made within a reasonable time. See also *§ 70.460[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Motion Must Be Brought Within Six-Month Period in Code Civ. Proc. § 473(b)

Wells Fargo & Co. v. City etc. of S.F. *(1944) 25 Cal. 2d 37, 40, 152 P.2d 625* , involved actions to recover from the county taxes paid under protest. In each case a general demurrer was overruled and time was allowed to answer, but no answers were filed. The plaintiff secured default judgments. Defendant thereafter moved to set the judgments aside as void. Among other contentions, the defendant asserted that the court had no jurisdiction to enter the judgments on the application of an attorney who was not plaintiff's attorney of record, and that both the awarding of costs against a subdivision of the state and the granting of interest for a period preceding the judgment were in excess of the jurisdiction of the county. The trial court granted the motions to set aside and the plaintiff appealed from the orders.

The Supreme Court reversed, stating that a motion to vacate a judgment, made after the expiration of the six-month period allowed in former (*now see Code Civ. Proc. § 473(b)* is governed by the rules applicable to collateral attack. In the absence of extrinsic fraud or mistake, a judgment so attacked cannot be set aside unless it is void on its face (*25 Cal. 2d 37, 40)* .

California Points & Authorities

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Volume 7 Chapters 70 DEFAULTS
CHAPTER 70 DEFAULTS, DEFAULT JUDGMENTS, AND RELIEF FROM JUDGMENTS AND ORDERS
PART II. FORMS
B. Statutory Relief From Void Judgment or Order Under Code Civ. Proc. § 473(d)
2. Relief From Judgment or Order Void in Fact

7-70 California Points & Authorities §§ 70.473-70.479

[Reserved]

§§ 70.473[Reserved]

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Volume 7 Chapters 70 DEFAULTS
CHAPTER 70 DEFAULTS, DEFAULT JUDGMENTS, AND RELIEF FROM JUDGMENTS AND ORDERS
PART II. FORMS
C. Equitable Relief From Default Judgment or Other Judgment or Order Based on Extrinsic Fraud, Mistake, or Duress
1. Motions in Equity

7-70 California Points & Authorities § 70.480

§ 70.480 Supporting Motion in Equity to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress--General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF DEFEND-
vs.	)	ANT'S MOTION TO SET ASIDE
_____ [*name*],	)	_____ [DEFAULT AND DE-
Defendant.	)	FAULT JUDGMENT *or* JUDGMENT *or* ORDER]
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] ON THE GROUND THAT DEFENDANT WAS PREVENTED BY EXTRINSIC _____ [MISTAKE *or* FRAUD *or* DURESS] FROM PRESENTING HIS/HER CASE TO THE COURT.

A. Inherent Equitable Power of Court to Set Aside Judgment. The Court possesses an inherent equity power under which, apart from its statutory authority, it has the power to grant relief from a default judgment when there has been extrinsic fraud or mistake (*Weitz v. Yankosky (1966) 63 Cal. 2d 849, 855, 48 Cal. Rptr. 620, 409 P.2d 700* ; *Manson, Iver & York v. Black (2009) 176 Cal. App. 4th 36, 43-49, 97 Cal. Rptr. 3d 522*). A motion is a proper means of raising grounds for equitable relief when the court that rendered the judgment possesses general jurisdiction in law and equity (*Olivera v. Grace (1942) 19 Cal. 2d 570, 576, 122 P.2d 564* (dictum)).

B. Motion Addressed to Discretion of Court. A motion for relief from a default is addressed to the sound discretion of the trial court (*Weitz v. Yankosky (1966) 63 Cal. 2d 849, 854, 48 Cal. Rptr. 620, 409 P.2d 700*).

C. Policy of Law. The policy of law favors, whenever possible, a hearing on the merits, and disfavors a party who, regardless of the merits of the case, attempts to take advantage of the mistake, surprise, inadvertence, or neglect of his or her adversary. Thus, appellate courts are much more disposed to affirm an order if the result is to compel a trial on the merits than they are when the judgment by default is allowed to stand and it appears that a substantial defense could be made (*Weitz v. Yankosky (1966) 63 Cal. 2d 849, 854-855, 48 Cal. Rptr. 620, 409 P.2d 700*).

[*Add additional points and authorities supporting relief from judgment or order in particular circumstances (see, e.g., §§ 70.550 -70.623). In addition, when applicable, include additional points and authorities that generally support a defendant's motion in equity for relief from judgment or order (see, e.g., § 70.481 et seq.).*]

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*moving party*]

[2] Comments

[a] Use of Form

This memorandum may be used in support of a motion in equity to set aside a default and default judgment or other judgment or order, on the ground of extrinsic fraud or mistake. The form may be adapted as necessary for use by a party other than a defendant (for example, a cross defendant).

These points and authorities should be combined, when appropriate, with additional points and authorities supporting a grant of relief under the particular circumstances [*see, e.g., §§ 70.550 -70.623*].

In addition, as applicable, this form should be combined with additional points and authorities that generally support a defendant's motion in equity for relief from judgment or order, for example:

- Motion is timely [§ 70.481[1]].
- Defendant has a meritorious defense to the action [§ 70.482[1]].

- Judgment or order resulted from extrinsic fraud [§ 70.483[1]].

- Judgment or order resulted from extrinsic mistake [§ 70.484[1]].

The points and authorities may also be combined, in an appropriate case, with additional points and authorities supporting a grant of relief based on other decisional or statutory authority [*see* discussion under [c], *below*].

The points and authorities may also be adapted for use in a trial or appellate brief.

With appropriate modifications, the points and authorities set out in the form may be combined with points and authorities support a grant of equitable relief from default in a separate suit in equity. For example, they may be used in connection with a memorandum opposing a demurrer to a complaint for equitable relief from default [*see, e.g., §§ 70.520 -70.528*] or a memorandum opposing a motion for summary judgment in such an action [*see, e.g., §§ 70.540, 70.541*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

In an appropriate case, counsel would refer to evidence set forth in:

- Declarations submitted in support of relief from the judgment, order, or dismissal [*see Cal. Rules of Court, Rule 3.1306(a)*].

- Discovery documents, such as deposition transcripts and answers to interrogatories and requests for admission.

- The opposing party's pleadings that constitute admissions.

- Other documentary evidence generally.

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*].

When counsel cites facts in his or her argument, counsel should refer to the particular page and line number of the declaration, deposition transcript, or other document, that contains the cited facts. In addition, the relevant portion of any testimony in a deposition should be marked in a manner that calls attention to the testimony [*see Cal. Rules of Court, Rule 3.1116(c)*].

For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Alternative Methods of Obtaining Relief

In addition to equitable relief, a party may obtain relief from a default and default judgment or other judgment, dismissal, order, or proceeding on the ground of mistake, inadvertence, surprise, or excusable neglect [*Code Civ. Proc. § 473(b)*]. Additional statutory grounds also exist for relief from a default and default judgment [*see, e.g., Code Civ.*

Proc. §§ 473.1, 473.5]. For forms of memoranda supporting a grant of relief from default and default judgment or other judgment or order on these various additional statutory grounds, which may, in an appropriate case, be combined with these points and authorities, see *§ 70.10* et seq.

A default judgment or other judgment or order may also be set aside under *Code Civ. Proc. § 473(d)*, on the ground that it is void. For forms of memoranda supporting a grant of relief from a void default judgment or other void judgment or order, which may, in an appropriate case, be combined with these points and authorities, see *§ 70.310* et seq.

[d] Motion for Equitable Relief From Default

[i] In General

This form is a general one that sets out the policy of the law with respect to motions for equitable relief from default, and the elements the moving party must show to obtain relief, including:

- Diligence in seeking relief within a reasonable time after the discovery of the entry of the judgment.

- A showing of meritorious defense to the action, in cases involving relief from default judgments (except those involving marital dissolution or void judgments) [*see* discussion under [ii], *below*].

- The ground for relief, which requires a showing that the judgment resulted from the extrinsic mistake of the defaulting party or his or her attorney, or extrinsic fraud practiced on the defendant by the opposing party.

In an appropriate case, this form may be modified to support a motion for relief based on duress [*see §§ 70.600 -70.603*].

[ii] Showing of Meritorious Defense

Generally, equitable relief may be granted from a default and default judgment only when defendant can subsequently present a meritorious case [*Olivera v. Grace (1942) 19 Cal. 2d 570, 578, 122 P.2d 564]* . Thus, the points and *authorities in § 70.482[1]* should generally be used when seeking relief from a default judgment.

There are two noted exceptions to this general rule, however. One, for policy reasons, involves proceedings for marital dissolution [*see, e.g., Sanchez v. Sanchez (1969) 273 Cal. App. 2d 159, 164, 77 Cal. Rptr. 884]* . The other involves void judgments, which are deemed a nullity and hence may be set aside on a defendant's motion without a showing of good defense or that a different judgment would result from a new trial [*see, e.g., Cadenasso v. Bank of Italy (1932) 214 Cal. 562, 568-569, 6 P.2d 944* ; *Mattison v. Lichlyter (1958) 162 Cal. App. 2d 60, 65, 327 P.2d 599* ; *see also Peralta v. Heights Medical Center, Inc. (1988) 485 U.S. 80, 108 S. Ct. 896, 99 L. Ed. 2d 75]* . For forms of points and authorities supporting a grant of equitable relief on the basis of these two exceptions, see *respectively §§ 70.622, 70.623*.

[iii] Motion in Probate Proceeding

This memorandum may not be submitted in probate court proceedings since the superior court sitting in probate has no general equity jurisdiction but only has the power to apply equitable principles in aid of its functions as a probate court. This means that a judgment sought to be vacated which is not void on the face thereof may not be challenged by a motion to vacate on grounds of extrinsic fraud but may be challenged only as part of proceedings which are well within the accepted function of a court exercising its probate jurisdiction [*see Neubrand v. Superior Court (1970) 9 Cal. App. 3d 311, 322, 88 Cal. Rptr. 586* (discussed under [4], *below*)]. Note, however, that a party may seek relief from a probate court decree or order in a separate action in equity [*see Bacon v. Bacon (1907) 150 Cal. 477, 481-482, 89 P. 317*

(discussed in *§ 70.522[3*])].

[iv] Independent Suit in Equity

If a motion in equity is denied, a later suit in equity may be maintained if the issues involved in the action were not fully presented in the hearing on the motion [*Rohrbasser v. Lederer (1986) 179 Cal. App. 3d 290, 298, 224 Cal. Rptr. 791* ; *Darlington v. Basalt Rock Co. (1961) 188 Cal. App. 2d 706, 710, 10 Cal. Rptr. 556]* . If a motion under *Code Civ. Proc. § 473* is denied, a subsequent suit in equity may be brought on the same grounds presented in the hearing on the motion even if these grounds had been fully presented, since the statutory remedy is cumulative and does not displace the equitable remedy [*Bacon v. Bacon (1907) 150 Cal. 477, 484-485, 89 P. 317* ; *Estudillo v. Security Loan etc. Co. (1906) 149 Cal. 556, 564-565, 87 P. 19]* . For forms of memoranda of points and authorities relating to an independent suit in equity, see *§ 70.500* et seq.

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 70.490* may be used to oppose the motion supported by these points and authorities.

[3] Discussion of Authorities

[a] Inherent Equitable Power of Superior Court to Set Aside Judgment

In ***Weitz v. Yankosky*** *(1966) 63 Cal. 2d 849, 48 Cal. Rptr. 620, 409 P.2d 700* , defendant's default was taken and judgment entered against him when he failed to answer the complaint due to his reliance on his insurance company to defend. His motion to set aside the judgment was not made until nearly two years after entry of the default.

The Supreme Court affirmed the trial court's order granting defendant's motion. The Court, citing earlier cases, noted that, because his motion was made more than six months after entry of the default, it was not directed to the court's statutory power to grant relief under *Code Civ. Proc. § 473*; rather it was directed to the court's inherent equity power, under which the court has the power to grant relief from a default judgment when there has been "extrinsic" fraud or mistake (*63 Cal. 2d 849, 855)* .

Olivera v. Grace *(1942) 19 Cal. 2d 570, 122 P.2d 564* , involved an equitable action brought by the administrator of an estate to set aside a default judgment rendered against the deceased prior to her death, at a time when the deceased was mentally incompetent. The plaintiff administrator appealed from the trial court's judgment for defendant.

The Supreme Court reversed the judgment. The Court discussed the law relating to the setting aside of judgments rendered against incompetent defendants, noting both a statutory power and an inherent power residing in the courts to open, vacate, or modify judgments (*19 Cal. 2d 570, 573-575)* . Citing earlier cases, the Court stated that one who has been prevented by extrinsic factors from presenting his or her case to the court may bring an independent suit in equity for relief from a judgment (*19 Cal. 2d 570, 575)* . Furthermore, the Court asserted, when the court that rendered the judgment possesses a general jurisdiction in law and in equity, the jurisdiction of equity may be invoked by means of a motion addressed to that court (*19 Cal. 2d 570, 576)* .

For further discussion of *Olivera v. Grace (1942) 19 Cal. 2d 570, 122 P.2d 564* , see *§ 70.520* et seq.

In ***Manson, Iver & York v. Black*** *(2009) 176 Cal. App. 4th 36, 43-49, 97 Cal. Rptr. 3d 522* , the plaintiff filed a complaint for personal injury against "Pamela Black," but served the complaint on defendant "Paula Black." Upon receiving the complaint, the defendant notified the plaintiff's counsel that she was not the person named in the complaint. Nonetheless, the plaintiff obtained a default judgment against her. The plaintiff subsequently filed an ex parte application to amend the judgment to correct the defendant's name, claiming that he had discovered her name was

not Pamela Black, but Paula Black. The court granted the application and entered the order. The record does not reflect that notice of this application was given to the defendant. The defendant filed a motion to set aside the default judgment. The trial court granted the motion.

The court of appeal affirmed, holding that the trial court did not have jurisdiction to amend the judgment against "Pamela Black" ex parte to name the defendant. Accordingly, the judgment against the defendant was void on its face and could be set aside under *Code of Civ. Proc. § 473(d)* [*176 Cal. App. 4th 36, 43-47*]. In addition, the court held the judgment could be set aside on the ground of extrinsic mistake which occurs when circumstances extrinsic to the litigation unfairly cost a party a hearing on the merits. Extrinsic mistake occurs when the defaulting party's excusable neglect prevents him or her from appearing and presenting a claim or defense. If that neglect results in an unjust judgment without a fair adversary hearing, the basis for equitable relief on the ground of extrinsic mistake is present. However, the court held, relief will be denied if the complaining party's negligence permitted the mistake to occur [*176 Cal. App. 4th 36, 47*]. The court held the defendant acted diligently in notifying the plaintiff's counsel of the mistake, yet the plaintiff proceeded to take the defendant's default and amend the judgment years later [*176 Cal. App. 4th 36, 48-49*].

[b] Express Equitable Power of Municipal Court to Set Aside Judgment

Marianos v. Tutunjian *(1977) 70 Cal. App. 3d 61, 138 Cal. Rptr. 529* , involved an appeal from an order of the municipal court setting aside a default judgment. Defendant made a motion to vacate the judgment seeking relief pursuant to *Code Civ. Proc. § 473* approximately seven months after the default judgment was entered. In support of the motion, defendant stated that he had delivered the summons and complaint in the action to an attorney, but defendant had never received notice of the default. His vehicle was later seized pursuant to a writ of execution. Defendant obtained another attorney, who made the motion for relief. The trial court set aside the default, finding excusable neglect by defendant within the meaning of former Code Civ. Proc. § 89(b)(3) (*now see Code Civ. Proc. § 86(b)(3)*), even though defendant's motion had been based on *Code Civ. Proc. § 473*.

The court of appeal noted that a motion for relief pursuant to *Code Civ. Proc. § 473* must be made within a reasonable time, not exceeding six months, after entry of a judgment. Despite this six-month limitation, it has been held that courts of general jurisdiction have inherent equitable power to vacate and set aside default judgments obtained through extrinsic fraud or mistake, citing *Weitz v. Yankosky (1966) 63 Cal. 2d 849, 855, 48 Cal. Rptr. 620, 409 P.2d 700* (*70 Cal. App. 3d 61, 64)* . However, the Supreme Court in *Bloniarz v. Roloson (1969) 70 Cal. 2d 143, 147, 74 Cal. Rptr. 285, 449 P.2d 221* , decided that municipal courts, having no inherent equitable jurisdiction, were limited to exercising the powers set forth in *Code Civ. Proc. § 473* (*70 Cal. App. 3d 61, 65)* . The Legislature then added former Code Civ. Proc. § 89(b)(3), in what the *Marianos* court says "can only be regarded as a response to the *Bloniarz* decision," giving municipal courts jurisdiction of cases in equity to vacate a judgment or order of the court obtained through extrinsic fraud, mistake, inadvertence, or excusable neglect (*70 Cal. App. 3d 61, 65)* . Former Code Civ. Proc. § 89(b)(3) was amended in 1976 and renumbered as *Code Civ. Proc. § 86(b)(3).*

The court in *Marianos* stated that it did not believe the Legislature intended to supersede Code Civ. Proc. § 473 with respect to municipal courts, or to expand the jurisdiction of the inferior courts to vacate defaults beyond that of the superior court (*70 Cal. App. 3d 61, 65)* . The court therefore held that under *Code Civ. Proc. § 86(b)(3)*, municipal courts have equitable powers coextensive with those of the superior courts to relieve parties from default (*70 Cal. App. 3d 61, 65)* . Since in the present case there was no evidence of extrinsic fraud or mistake, the applications for relief based on excusable neglect had to be brought within the six-month period specified in *Code Civ. Proc. § 473* (*70 Cal. App. 3d 61, 65)* .

The request for relief which the court in *Marianos* found to be untimely was based on excusable neglect. The court, however, appears to be of the opinion that a request may be entertained beyond the six-month period of *Code Civ. Proc. § 473* on a showing of extrinsic fraud or mistake.

[c] Motion Addressed to Discretion of Court

The facts and procedural background of ***Weitz v. Yankosky*** *(1966) 63 Cal. 2d 849, 48 Cal. Rptr. 620, 409 P.2d 700* , are discussed under [a], *above*. In *Weitz,* the Supreme Court, in affirming the order of the trial court setting aside a default judgment, stated that a motion to set aside a default judgment is addressed to the sound discretion of the trial court, and, in the absence of a clear showing of abuse of discretion when the trial court grants the motion, the appellate court will not disturb the order (*63 Cal. 2d 849, 854)* .

[d] Policy of Law

The facts and procedural background of ***Weitz v. Yankosky*** *(1966) 63 Cal. 2d 849, 48 Cal. Rptr. 620, 409 P.2d 700* , are discussed under [a], *above*. In *Weitz,* the Supreme Court stated that the policy of law favors, whenever possible, a hearing on the merits, and disfavors a party who, regardless of the merits of the case, attempts to take advantage of the mistake, surprise, inadvertence, or neglect of his or her adversary. Thus, appellate courts are much more disposed to affirm an order if the result is to compel a trial on the merits than they are when the judgment by default is allowed to stand and it appears that a substantial defense could be made (*63 Cal. 2d 849, 854-855)* .

[4] Additional Authorities

[a] Inherent Equitable Power of Superior Court to Set Aside Judgment

In *McGuinness v. Superior Court (1925) 196 Cal. 222, 237 P. 42* , the Supreme Court denied a writ of prohibition seeking to restrain the trial court from considering a motion to set aside a final decree of divorce on the ground of fraud in its procurement. The Court held that the power to vacate on motion a judgment obtained by fraud is inherent in courts of general jurisdiction (*196 Cal. 222, 231-232)* .

In *Bacon v. Bacon (1907) 150 Cal. 477, 89 P. 317* , the Supreme Court ruled that the reviewing court's equitable jurisdiction was not affected by the provisions of former Code Civ. Proc. § 1666 [*now see Prob. Code §§ 11603(b), 11605*], making the decree conclusive, nor by *Code Civ. Proc. § 473*. The Court stated that the Legislature does not possess power to divest the court of its constitutional jurisdiction and that *Code Civ. Proc. § 473* does not displace the remedy in equity (*150 Cal. 477, 484-485)* .

In *Sanchez v. Sanchez (1969) 273 Cal. App. 2d 159, 77 Cal. Rptr. 884* , the court of appeal affirmed an order setting aside a default judgment in a divorce action on the motion of the wife. The basis of the motion was that the wife was mentally incompetent at the time of the entry of the default and that, therefore, she had been deprived of a fair adversary proceeding. The court of appeal stated that since the motion was made more than six months after the default was entered, it was not directed to the trial court's statutory power to grant relief for mistake and excusable neglect under *Code Civ. Proc. § 473*. On the contrary, said the court, it was directed to the court's inherent equity power under which, apart from its statutory authority, the court has power to grant relief from a default judgment when there has been extrinsic fraud or mistake. The court added that while there was no allegation of fraud, it is well established that incompetency is a basis for equitable relief and that equity will relieve an incompetent from a judgment taken without an adversary hearing, citing *Olivera v. Grace (1942) 19 Cal. 2d 570, 122 P.2d 564* (discussed under [3][a], *above*) (*273 Cal. App. 2d 159, 163-164)* .

In *Neubrand v. Superior Court (1970) 9 Cal. App. 3d 311, 88 Cal. Rptr. 586* , the court of appeal affirmed the probate court's denial of a motion to vacate a judgment which was not void on its face on grounds of extrinsic fraud, holding that although the probate court could vacate a judgment which is void on its face it had no jurisdiction to hear and determine the merits of the motion since it had no general equitable jurisdiction. In the original case, on petition of the administrators, the probate court made and entered orders and a judgment for partial distribution. Subsequently, certain alleged but unreported heirs filed a motion addressed to the court's equity power to vacate on the grounds of extrinsic

fraud. The court of appeal noted the general rules that a judgment which is void on its face and which requires only an inspection of the judgment roll or record to show its invalidity, may be set aside on motion at any time after its entry by the court rendering the judgment and that when a judgment has been obtained through extrinsic fraud it may be set aside, though long since final, either by an independent suit in equity or, when the court that rendered the judgment possesses a general jurisdiction in law and in equity, by means of a motion addressed to that court (*9 Cal. App. 3d 311, 317-318)* . However, said the court, while the superior court sitting in probate is a court of general jurisdiction, its jurisdiction and powers are wholly statutory (*9 Cal. App. 3d 311, 318)* . It has no general equity jurisdiction; however, it has the power to apply equitable principles in aid of its functions as a probate court (*9 Cal. App. 3d 311, 318)* . The court then analyzed the cases of *Security-First Nat. Bk. v. Superior Court (1934) 1 Cal. 2d 749, 37 P.2d 69 (holding that on a collateral attack the probate court is not vested with power to avoid its own decrees which have become final on the ground of extrinsic fraud) and Estate of Ausender 1960) 53 Cal. 2d 615, 2 Cal. Rptr. 769, 349 P.2d 537* (stating that, insofar as *Security* holds that a probate court cannot set aside a prior final order on the ground of extrinsic fraud, it appeared to have been impliedly overruled). The court concluded that insofar as statements in *Security* may be construed as meaning that in no case can a probate court set aside its prior final order on the ground of extrinsic fraud, it has been impliedly overruled. That a probate court may do so in a proper case now appears to be settled, the court of appeal held. However, in the case at issue, the judgment to be vacated was not void on its face and was challenged directly by a motion to vacate on grounds of extrinsic fraud long after it had become final. In the instant case, said the court, the probate court had no such general equity jurisdiction (*9 Cal. App. 3d 311, 322)* . The court of appeal added that the petitioner's independent civil action in the superior court to set aside the decree and the petition to determine heirship pending in the probate court could be consolidated for trial (*9 Cal. App. 3d 311, 322-323)* .

In *Humes v. MarGil Ventures, Inc. (1985) 174 Cal. App. 3d 486, 220 Cal. Rptr. 186* , which involved a controversy under the Artists' Managers Act governed by *Lab. Code § 1700.44,* defendant had written a letter to the Labor Commissioner requesting that the hearing be postponed because his incarceration prevented his attendance. The hearing officer, to whom *Code Civ. Proc. §§ 1280-1294.2* relating to arbitration, were applicable, ignored his power under *Code Civ. Proc. § 1282.2(b)* to postpone the hearing for good cause on request of a party and held the hearing in defendant's absence. Plaintiff obtained a default judgment and filed a petition in superior court seeking its confirmation. Defendant wrote a letter to the trial court explaining his inability to be heard at the original hearing and asked for a stay of proceedings; the letter, deemed a response, was filed more than 100 days after the date of service of the award on him. The superior court granted the petition for confirmation, and defendant appealed.

The court of appeal reversed, and directed the superior court to conduct a full adversary hearing to consider defendant's response seeking vacation of the award. The court of appeal held that defendant's failure to file a timely response seeking vacation of the award was an excusable mistake due to his disability of imprisonment, that he had acted diligently in seeking relief from the court once he became aware of the need to act, and that the defense he sought to present had potential merit. The court of appeal noted that excusable mistake applies to cases in which the complaining party is disabled at the time judgment is entered, and that such a disability necessarily includes imprisonment. The court used its inherent equitable power to relieve defendant of the default and deemed the request to have been timely filed in the superior court (*174 Cal. App. 3d 486, 498-500)* . Because the court also held that the fact of defendant's incarceration and other circumstances raised grounds which may support the vacation of the determination under former Code Civ. Proc. § 1286.2(e) (*now see Code Civ. Proc. § 1286.2(a)(5)*), the court reversed the confirmation of the award and remanded to the superior court to determine whether defendant had presented sufficient cause for postponement to the hearing officer, and whether the officer's refusal to postpone substantially prejudiced defendant's rights (*174 Cal. App. 3d 486, 496-498)* .

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PART II. FORMS
C. Equitable Relief From Default Judgment or Other Judgment or Order Based on Extrinsic Fraud, Mistake, or Duress
1. Motions in Equity

7-70 California Points & Authorities § 70.481

§ 70.481 Supporting Motion in Equity to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress--Timeliness of Motion

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion in equity for relief (see § 70.480[1]).*]

THE COURT SHOULD SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] BECAUSE THE MOTION IS MADE IN A TIMELY MANNER AND IS JUSTIFIED UNDER THE CIRCUMSTANCES.

Timeliness of Motion. After six months from entry of default, a trial court may still vacate a default on equitable grounds even if statutory relief is unavailable (*Rappleyea v. Campbell (1994) 8 Cal. 4th 975, 981, 35 Cal. Rptr. 2d 669, 884 P.2d 126*). The time limit for the filing of a motion for relief from default or default judgment is a reasonable time from discovery of the default or default judgment irrespective of when it may actually have been entered (*Munoz v. Lopez (1969) 275 Cal. App. 2d 178, 181, 79 Cal. Rptr. 563*). Thus, relief may be granted when the defaulting party is diligent in making his or her motion for relief after learning of the entry of the default or default judgment. Factors to be considered in this regard are the failure of plaintiff to show any prejudice from any delay by defendant and the reasonableness of defendant's actions in filing his or her motion for relief, in light of the circumstances known to defendant (*Weitz v. Yankosky (1966) 63 Cal. 2d 849, 857, 48 Cal. Rptr. 620, 409 P.2d 700*).

[2] Comments

[a] Use of Form

This memorandum may be used in support of a motion in equity to set aside a default and default judgment or other judgment or order, on the ground that the motion was timely.

For a tactical advantage, counsel may consider using this argument in a reply memorandum to respond to a contention in the opposing memorandum that the motion in equity was not timely.

These points and authorities should be combined, when appropriate, with a memorandum generally supporting a motion in equity for relief [*see § 70.480[1]*].

The points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 70.480[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 70.490* may be used to oppose the motion supported by these points and authorities.

[3] Discussion of Authorities

[a] Timeliness of Motion

In ***Rappleyea v. Campbell*** *(1994) 8 Cal. 4th 975, 35 Cal. Rptr. 2d 669, 884 P.2d 126* , defendants, residents of Arizona, were personally served with summons in a California action. They elected to appear in propria persona and had a friend, who was an Arizona attorney, telephone the Los Angeles County Superior Court to determine the filing fee. The court clerk misinformed the friend as to the appropriate fee. When the defendants' answer arrived by mail with a check for the amount the clerk had indicated, which was insufficient, the clerk rejected it and returned it to defendants. Defendants promptly answered with the proper fee, but due to the error, the answer was filed eight days late. The plaintiff had taken the defendant's default the first day it was possible to do so. Defendants did not move promptly to set aside the default. Before the six-month period for obtaining relief had expired, plaintiff's counsel sent a letter to the defendants misdescribing California law and advising them that they had forfeited their rights under *Code Civ. Proc. § 473*. The record was not clear, but defendants contended that the plaintiff's counsel had led them to miss the deadline by falsely saying he would stipulate to setting aside the default. In the meantime, the plaintiff did not move promptly to prove damages and obtain the judgment. When the court informed the defendants that entry of judgment was imminent, the defendants moved to set aside the default. The motion was denied for failure to show good cause under Section 473. The $70 filing fee error thus led to entry of a $200,000 judgment against defendants, who appealed. The court of appeal affirmed.

The Supreme Court reversed. The court first noted that the trial court's ground for denial was incorrect because the motion was made more than six months after the default was entered so that Section 473 relief was not available. The court then turned to alternative bases regarding the motion, and stated that after the six months have elapsed, a trial court may still vacate a default on equitable grounds even if statutory relief is unavailable (*8 Cal. 4th 975, 980-981)* . The court went on to reverse. It applied a stringent three-prong test, and stated that its decision was narrowly drawn, based on the clerk's error and the plaintiff's incorrect statement of law. The court stressed that mere self-representation is not a ground for exceptionally lenient treatment, and that rules of civil procedure apply equally to represented and unrepresented parties (*8 Cal. 4th 975, 983)* .

This four to three decision is accompanied by a vigorous dissent asserting that the majority had simply substituted its judgment for that of the trial court and had failed to identify the true issue on appeal: whether the court of appeal erred in holding that the trial court did not abuse its discretion in refusing to grant relief. The dissent describes the majority decision as aberrational (*8 Cal. 4th 975, 986-987)* .

In ***Munoz v. Lopez*** *(1969) 275 Cal. App. 2d 178, 79 Cal. Rptr. 563* , an action for legal malpractice, plaintiffs filed a seriously defective affidavit and certification of personal service on defendant, which alleged service in Los Angeles at an address in Mexico City. Defendant's default was taken and judgment entered against him, on a finding by the trial court that jurisdiction was obtained by publication and by personal service on defendant. Some four and one-half years after entry of the default, defendant filed a notice of motion to vacate the judgment on the ground that personal jurisdiction was lacking due to the failure of plaintiffs to serve him personally, an allegation which implied that the purported affidavit and certification of service were false. The trial court granted the motion and plaintiffs appealed, contending that the motion was not timely and that the trial court had erred in admitting certain extrinsic evidence.

The court of appeal affirmed the order granting relief. The court first considered the issue of timeliness of defendant's motion. Plaintiffs contended that a motion to set aside a default judgment void, not on its face, but in fact for lack of jurisdiction over defendant, must be made within the time limits set out in former Code Civ. Proc. § 473a [*now see Code Civ. Proc. § 473.5*; *see also §§ 70.490* -70.492]. The court, however, said that such a contention "ignores the reality that a motion made pursuant to [that] section is not the only method of setting aside a default for failure of service" (*275 Cal. App. 2d 178, 180-181)* . The court pointed out that there is an equity power under which the court may grant relief from a default judgment obtained through extrinsic fraud or mistake (*275 Cal. App. 2d 178, 181)* . Citing *Weitz v. Yankosky (1966) 63 Cal. 2d 849, 48 Cal. Rptr. 620, 409 P.2d 700* (discussed in *§ 70.480[3]*), and other cases, the court noted that the time limit for filing a motion or separate suit in equity on such grounds is a reasonable time from discovery of the default judgment irrespective of when it may actually have been entered (*275 Cal. App. 2d 178, 181)* . Citing *Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 558, 305 P.2d 20* , and the Restatement on Judgments, § 117, Comment C, p. 565, the court stated that a false recital of service, whether deliberate or not, will be treated as extrinsic fraud or mistake in the context of an equitable action to set aside a default judgment (*275 Cal. App. 2d 178, 181)* . The court found that this basis of equitable relief was adequately alleged and that the trial court had properly treated the matter as one governed by a time limitation of a reasonable period after discovery of the existence of the judgment (*275 Cal. App. 2d 178, 181-182)* .

The facts and procedural background of ***Weitz v. Yankosky*** *(1966) 63 Cal. 2d 849, 48 Cal. Rptr. 620, 409 P.2d 700* , are discussed in *§ 70.480[3]*. In *Weitz,* the Supreme Court considered the issue of defendant's diligence in moving to set aside a default judgment nearly two years after entry of his default, and some four months after defendant learned of the default judgment. The Court stated that one moving in equity to set aside a default judgment must act diligently in making his or her motion for relief after learning of the judgment (*63 Cal. 2d 849, 856-857)* . Noting that this requirement is sometimes put in terms of laches, the Court asserted that laches was not the appropriate doctrine to apply because it required a finding of prejudice caused by defendant's delay. Citing *Benjamin v. Dalmo Mfg. Co. (1948) 31 Cal. 2d 523, 531, 190 P.2d 593* , the court declared that lack of prejudice is only one of the factors the trial court may properly consider on a motion to set aside a default judgment (*63 Cal. 2d 849, 857)* . The other factor to be considered, the Court asserted, is whether defendant, in the light of the circumstances known to him, acted reasonably in not filing a motion to set aside the default judgment earlier (*63 Cal. 2d 849, 857)* . The Court believed that the defendant in *Weitz* was in a position analogous to that of a nominal party at the time he learned of the judgment against him. He had settled his own claim for damages with plaintiff's insurance company and could reasonably assume that the real parties in interest in the action were plaintiff and defendant's insurance company. Defendant was assured by the company that the matter would be taken care of and was not informed for some time that there was a possibility that he would not be indemnified by the insurer. The Court stated that, under these circumstances, the trial court could properly have concluded that defendant was justified in relying on the insurance company, that delays attributable to the insurance company should not prejudice defendant, and that defendant's one month delay in moving for relief after learning of the insurance company's failure to represent him was not unreasonable (*63 Cal. 2d 849, 858)* . The Court acknowledged that the showing of diligence was not strong, but said that it was not unreasonable for the trial court to have resolved any doubt it may have had in favor of permitting an adjudication on the merits (*63 Cal. 2d 849, 858)* .

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CHAPTER 70 DEFAULTS, DEFAULT JUDGMENTS, AND RELIEF FROM JUDGMENTS AND ORDERS
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7-70 California Points & Authorities § 70.482

§ 70.482 Supporting Motion in Equity to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress--Showing of Meritorious Defense

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion in equity for relief (see § 70.480[1]).*]

THE COURT SHOULD SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] BECAUSE THE DEFENDANT HAS A MERITORIOUS DEFENSE TO THE ACTION.

Showing of Meritorious Defense. Equitable relief may be granted from default and default judgment when defendant can present a meritorious case, but defendant is not required to provide an absolute guarantee of victory (*Olivera v. Grace (1942) 19 Cal. 2d 570, 578-579, 122 P.2d 564*).

[2] Comments

[a] Use of Form

This memorandum may be used in support of a motion in equity to set aside a default and default judgment or other judgment or order, on the ground that the defendant presents a meritorious case [*Olivera v. Grace (1942) 19 Cal. 2d 570, 578-579, 122 P.2d 564]* .

These points and authorities should be combined, when appropriate, with a memorandum generally supporting a motion in equity for relief [*see § 70.480[1]*].

The points and authorities may also be adapted for use in a trial or appellate brief.

For discussion relating to the showing of a meritorious defense, see *§ 70.480[2][d][ii]*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 70.480[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 70.490* may be used to oppose the motion supported by these points and authorities.

[3] Discussion of Authorities

[a] Showing of Meritorious Defense

The facts and procedural background of ***Olivera v. Grace*** *(1942) 19 Cal. 2d 570, 122 P.2d 564* , is discussed in *§ 70.480[3]*. In *Olivera*, the Supreme Court noted that it is a general rule that equity will not interfere with a judgment which is unjust unless it appears that the aggrieved party can present a meritorious case (*19 Cal. 2d 570, 578)* . However, the Court went on to state that the requirement that the complaint in equity allege a meritorious case does not require an absolute guarantee of victory (*19 Cal. 2d 570, 579)* . Rather, it is enough if the complaint presents facts from which it can be ascertained that plaintiff has a sufficiently meritorious claim to entitle him to a trial of the issue in an adversary proceeding (*19 Cal. 2d 570, 579)* .

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7-70 California Points & Authorities § 70.483

§ 70.483 Supporting Motion in Equity to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress--Motion Based on Extrinsic Fraud

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion in equity for relief (see § 70.480[1]).*]

THE COURT SHOULD SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] BECAUSE THE CIRCUMSTANCES OF THIS CASE FIT WITHIN THE BROAD MEANING GIVEN TO "EXTRINSIC FRAUD" FOR THE PURPOSE OF GRANTING RELIEF IN EQUITY.

A. Extrinsic Fraud Defined. Extrinsic fraud is that fraud practiced by an opposing party which prevents the unsuccessful party from presenting all of his or her case to the court (*Caldwell v. Taylor (1933) 218 Cal. 471, 479, 23 P.2d 758* ; *Granzella v. Jargoyhen (1974) 43 Cal. App. 3d 551, 555, 117 Cal. Rptr. 710* (both involving appeal from judgment of dismissal after order sustaining demurrer without leave to amend)).

B. Broad Meaning Given to Grounds of "Extrinsic Fraud" and "Extrinsic Mistake." The terms "extrinsic fraud" and "extrinsic mistake" are given a very broad meaning tending to encompass all circumstances that deprive an adversary of fair notice of a hearing, whether or not those circumstances would qualify as fraudulent or mistaken in the strict sense (*In re Marriage of Coffin (1976) 63 Cal. App. 3d 139, 149, 133 Cal. Rptr. 583*).

[2] Comments

[a] Use of Form

This memorandum may be used in support of a motion in equity to set aside a default and default judgment or other judgment or order, on the ground that the circumstances of the case fit within the term "extrinsic fraud" for purposes of equitable relief [*Olivera v. Grace (1942) 19 Cal. 2d 570, 578-579, 122 P.2d 564]* . For points and authorities

supporting a motion based on extrinsic fraud, see *§ 70.483[1]*].

These points and authorities should be combined, when appropriate, with a memorandum generally supporting a motion in equity for relief [*see § 70.480[1]*].

The points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 70.480[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 70.490* may be used to oppose the motion supported by these points and authorities.

[3] Discussion of Authorities

[a] Extrinsic Fraud Defined

In ***Caldwell v. Taylor*** *(1933) 218 Cal. 471, 23 P.2d 758* , plaintiff sued in equity to have the defendant beneficiary of his father's will declared an involuntary trustee of the property devised to her on the ground that the will had been procured by fraud practiced on the testator by the defendant. Plaintiff further alleged that he had been prevented from presenting his contest of the will by fraud practiced on him by the defendant. The trial court entered a judgment of dismissal against plaintiff based on an order sustaining defendant's demurrer without leave to amend. The plaintiff appealed.

The Supreme Court reversed. The Court first noted that the jurisdiction of equity to afford relief from orders and decrees in probate proceedings is well settled (*218 Cal. 471, 475)* . The Court declared that, under the authorities, only on proof of extrinsic and collateral fraud could plaintiff seek and secure equitable relief from the judgment (*218 Cal. 471, 476)* . The Court cited *United States v. Throckmorton (1878) 98 U.S. 61, 65, 25 L. Ed. 93* , discussed in *§ 70.582[4]*, for its holding that a decree will not be vacated merely because it was obtained by forged documents or perjured testimony (*218 Cal. 471, 476)* . Quoting *Throckmorton*, the Court stated that relief from judgment would be granted in cases in which by reason of something done by the prevailing party, there was no adversary trial or decision of the issue in the case (*218 Cal. 471, 476)* . Examples of such fraud were said by the *Throckmorton* court to include cases when the unsuccessful party was kept from court by false promises of compromise, when defendant was given no notice of the suit, and when defendant's attorney sells out his client's interests to the other side (*218 Cal. 471, 476)* . The Court pointed out that such cases permit relief on the ground that by some fraud practiced directly on the party seeking relief against the judgment, that party was prevented from presenting all of his case to the court (*218 Cal. 471, 477)* , quoting *Throckmorton*). According to the Court in *Caldwell*, "[t]his definition has become the well recognized and standard definition of extrinsic fraud" (*218 Cal. 471, 477)* . The Court went on to say that the fraud alleged must not be the fraud on which the cause of action in the former suit was based (*218 Cal. 471, 477)* . Thus, plaintiff would be foreclosed from relief unless he could establish that by fraud practiced on him by defendant, he was prevented from presenting to the court his allegations of fraud practiced on the testator (*218 Cal. 471, 477-478)* . Admitting that the distinction between intrinsic and extrinsic fraud is "quite nebulous," the Court concluded that the fraud alleged by plaintiff did come within the general definition of extrinsic fraud, noting that "[t]he main requirement to establish extrinsic fraud is that the unsuccessful party was prevented by his adversary from presenting *all* of his case to the court" (*218 Cal. 471, 479)* .

Granzella v. Jargoyhen *(1974) 43 Cal. App. 3d 551, 117 Cal. Rptr. 710* , involved a claim by plaintiffs that their

deceased uncle's will, under which property had been distributed to defendant, was forged by defendant. Plaintiffs further alleged that defendant had represented to plaintiffs of her own personal knowledge that the will was genuine and that, in reliance on these representations and because of their blood relationship with defendant, plaintiffs had not contested the will nor had they discovered the true facts until after distribution of the estate. The trial court sustained without leave to amend defendant's demurrer to plaintiffs' complaint seeking to establish a constructive trust on property distributed under the will, and entered a judgment of dismissal against plaintiffs. The plaintiffs appealed (*43 Cal. App. 3d 551, 553)* .

The court of appeal reversed the judgment of dismissal. The court cited *Caldwell v. Taylor (1933) 218 Cal. 471, 23 P.2d 758* , discussed, *above*, for its discussion of the distinction between intrinsic and extrinsic fraud, noting that *Caldwell* "seems to be the leading case in California on the subject of extrinsic fraud" (*43 Cal. App. 3d 551, 554)* . Citing Witkin, the court commented that the most common ground for equitable relief is extrinsic fraud, the essential characteristic of which is that it has the effect of preventing a fair adversary hearing; the aggrieved party being deliberately kept in ignorance of the action or proceeding, or in some other way fraudulently prevented from presenting his or her claim or defense (*43 Cal. App. 3d 551, 555)* . Acknowledging that forgery constitutes intrinsic fraud, the court pointed out that the complaint alleged that before, during, and after the probate proceedings, defendant made representations to plaintiffs as to the genuineness of the will, thereby stopping plaintiffs from contesting the probate or attempting to discover the true facts. The court declared that such deceit practiced on plaintiffs was "just as effective to prevent them from presenting to the court the true facts concerning the invalidity of the will as if defendant had physically prevented plaintiffs from appearing in the probate proceedings" (*43 Cal. App. 3d 551, 556)* . Finding that the interests of justice required that plaintiffs be given an opportunity to prove their case in court, the court held that the trial court had erred in sustaining the demurrer to the complaint, inasmuch as it alleged extrinsic fraud (*43 Cal. App. 3d 551, 556-557)* .

[b] Broad Meaning Given to Grounds of "Extrinsic Fraud" and "Extrinsic Mistake"

In re Marriage of Coffin *(1976) 63 Cal. App. 3d 139, 133 Cal. Rptr. 583* , involved a marital dissolution action in which husband obtained an interlocutory decree of dissolution on wife's default. Approximately nine months after entry of her default, wife moved to set aside the default and interlocutory judgment, claiming that husband had failed to disclose to her the existence of pension benefits that were community property of the parties. The trial court ordered the default and default judgment set aside. The husband appealed.

The court of appeal affirmed. The court of appeal noted that when the six-month period for relief has passed, relief may still be granted under the court's equity powers and that, although the grounds on which equitable relief may be granted are somewhat narrower than the statutory grounds, the procedure is essentially the same for both types of motions (*63 Cal. App. 3d 139, 148-149)* . Citing *Munoz v. Lopez (1969) 275 Cal. App. 2d 178, 181, 79 Cal. Rptr. 563* , discussed in *§ 70.481[3]* , the court enumerated the rules pertaining to equitable motions and quoted the *Munoz* court's statement that, "[w]hile the grounds for an equitable action to set aside a default judgment are commonly stated as being those of extrinsic fraud or mistake, the terms are given a very broad meaning which tends to encompass all circumstances that deprive an adversary of fair notice of hearing whether or not those circumstances would qualify as fraudulent or mistaken in the strict sense" (*63 Cal. App. 3d 139, 149)* . Applying the rule that affidavits favoring the prevailing party are accepted as true on appeal, the court pointed out that the wife's affidavits revealed that she was unaware of the existence of the retirement benefits at issue and that her husband did not inform her of them (*63 Cal. App. 3d 139, 149-150)* . The court reviewed earlier cases holding that the nondisclosure of community property has long been recognized as a basis for setting aside property settlement agreements and dispositions of property based thereon (*63 Cal. App. 3d 139, 150-154)* .

Husband contended that amendments to the California Civil Code, effective January 1, 1975, had destroyed husband's fiduciary duty of disclosure to wife in that such amendments gave both spouses management and control of the community property in lieu of the husband's exclusive management and control [former Civ. Code §§ 5125, 5127 (*now*

see Fam. Code §§ 1100, 1102]. The court questioned the retroactivity of these statutes (*63 Cal. App. 3d 139, 154)* , and concluded that as of the time the agreement and judgment in question were procured, husband was under a fiduciary obligation to disclose the existence of all community assets to wife, and his failure to disclose the existence of retirement benefits was a constructive fraud on wife (*63 Cal. App. 3d 139, 154-155)* . The court affirmed the granting of relief to wife, finding that wife's delay in seeking relief from the judgment to avoid interfering with her child's marriage was not laches as a matter of law and that husband's claim of prejudice was unsupported (*63 Cal. App. 3d 139, 155)* .

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7-70 California Points & Authorities § 70.484

§ 70.484 Supporting Motion in Equity to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress--Motion Based on Extrinsic Mistake

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion in equity for relief (see § 70.480[1]).*]

THE COURT SHOULD SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] BECAUSE THE CIRCUMSTANCES OF THIS CASE FIT WITHIN THE BROAD MEANING GIVEN TO "EXTRINSIC MISTAKE" FOR THE PURPOSE OF GRANTING RELIEF IN EQUITY.

A. Extrinsic Mistake Defined. Extrinsic accident or mistake may be found when there are circumstances not amounting to extrinsic fraud but of a serious nature, for which defendant is not responsible and which prevented defendant from being heard (*Corey v. Weerts (1963) 214 Cal. App. 2d 416, 423, 29 Cal. Rptr. 533*).

B. Broad Meaning Given to Grounds of "Extrinsic Fraud" and "Extrinsic Mistake." [*See § 70.484[1], Paragraph B.*]

[2] Comments

[a] Use of Form

This memorandum may be used in support of a motion in equity to set aside a default and default judgment or other judgment or order, on the ground that the circumstances of the case fit within the term "extrinsic mistake" for purposes of equitable relief [*Olivera v. Grace (1942) 19 Cal. 2d 570, 578-579, 122 P.2d 564]* . For points and authorities supporting a motion based on extrinsic fraud, see *§ 70.483[1]*].

These points and authorities should be combined, when appropriate, with a memorandum generally supporting a motion

in equity for relief [*see § 70.480[1]*].

The points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 70.480[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 70.490* may be used to oppose the motion supported by these points and authorities.

[3] Discussion of Authorities

[a] Extrinsic Mistake Defined

Corey v. Weerts *(1963) 214 Cal. App. 2d 416, 29 Cal. Rptr. 533* , involved a dispute on an agreement of sale under which plaintiffs were to purchase a restaurant business from defendants. Because plaintiffs had serious financial difficulties and defendants feared that plaintiffs would be forced into bankruptcy, defendants hesitated to press plaintiffs for payment of the promissory note and mortgage executed by plaintiffs under the agreement. Defendants attempted through an attorney to settle their differences, but plaintiffs were unresponsive. Several months thereafter, plaintiffs filed an action against defendants for fraud, giving defendants an open extension of time to plead. Plaintiffs' attorney indicated to defendants' attorney that he had filed the action only to satisfy his clients and that he hoped the matter would be settled. Despite continuing efforts by defendants' attorney to negotiate a settlement, plaintiffs secured entry of a default and default judgment against defendants, without notice to defendants. When plaintiffs refused to stipulate that the default could be set aside, defendants immediately moved to set the default and default judgment aside, which motion was granted by the trial court. The plaintiffs appealed.

The court of appeal affirmed. The court stated that the principal question was whether the facts supported a conclusion that there was an extrinsic mistake, extrinsic accident, or extrinsic fraud (*214 Cal. App. 2d 416, 422)* . The court cited *Galper v. Galper (1958) 162 Cal. App. 2d 391, 397, 328 P.2d 487* , for its statement that since circumstances not amounting to extrinsic fraud, but of a serious nature, for which defendant was not responsible and which prevented him or her from being heard may exist to create an injustice, the courts in certain situations, such as those labeled extrinsic accident and mistake of fact, may exercise their inherent power to relieve a party from a judgment when it is probable that an injustice has resulted (*214 Cal. App. 2d 416, 423)* .

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[Reserved]

§§ 70.485[Reserved]

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7-70 California Points & Authorities § 70.490

§ 70.490 Opposing Motion in Equity to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress--Motion Not Made Within Reasonable Time Is Untimely

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN OPPOSITION TO DEFEND-
Plaintiff,	)	ANT'S MOTION TO SET ASIDE
vs.	)	_____[DEFAULT AND DEFAULT
_____ [*name*],	)	JUDGMENT *or* JUDGMENT *or* ORDER]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD DENY THE DEFENDANT'S MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] BECAUSE THE MOTION IS UNTIMELY.

Motion Is Not Timely. In addition to demonstrating that a case has merit and that the defaulted party has an adequate excuse for failing to defend, the party seeking relief must produce evidence that he or she has acted diligently to set aside the judgment (*Stiles v. Wallis (1983) 147 Cal. App. 3d 1143, 1149, 195 Cal. Rptr. 377*).

[*When appropriate, add or substitute points and authorities opposing relief from judgment or order on other particular grounds (see, e.g., §§ 70.630 -70.670).*]

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*opposing party*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion in equity to vacate and set aside a judgment or order which the defendant asserts as having been obtained as a result of extrinsic fraud, extrinsic mistake, or duress. The ground for opposition is that the motion is untimely under the circumstances. This form may be adapted as necessary for use by a party other than a plaintiff (for example, a cross complainant).

In an appropriate case, this form may be submitted in opposition to the motion supported by the points and authorities *set out in §§ 70.480 -70.484*.

This form should be combined, when appropriate, with additional points and authorities opposing a grant of relief under the particular circumstances [*see, e.g., §§ 70.630 -70.670*].

This form may also be combined, in an appropriate case, with additional points and authorities opposing a grant of relief based on other decisional or statutory authority [*see* discussion under [c], *below*].

This form may also be adapted for use in a trial or appellate brief.

With appropriate modifications, the points and authorities set out in this form may be combined with points and authorities opposing a grant of equitable relief from default in a separate suit in equity. For example, they may be used in connection with a memorandum supporting a demurrer to a complaint for equitable relief from default [*see, e.g., §§ 70.500 -70.503*] or a memorandum supporting a motion for summary judgment in such an action [*see, e.g., §§ 70.510 -70.511*].

See also *§ 70.480[2]* for additional general considerations relating to an equitable motion for relief based on extrinsic fraud, mistake, or duress.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

In an appropriate case, counsel would refer to evidence set forth in:

- Declarations submitted in opposition to relief from the judgment, order, or dismissal [*see Cal. Rules of Court, Rule 3.1306(a)*].

- Discovery documents, such as deposition transcripts and answers to interrogatories and requests for admission.

- The moving party's pleadings that constitute admissions.

- Other documentary evidence generally.

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish, or controvert the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*].

When counsel cites facts in his or her argument, counsel should refer to the particular page and line number of the declaration, deposition transcript, or other document, that contains the cited facts. In addition, the relevant portion of any testimony in a deposition should be marked in a manner that calls attention to the testimony [*see Cal. Rules of Court, Rule 3.1116(c)*].

For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Alternative Methods of Obtaining Relief

In addition to equitable relief, a party may obtain relief from a default and default judgment or other judgment, dismissal, order, or proceeding on the ground of mistake, inadvertence, surprise, or excusable neglect [*Code Civ. Proc. § 473(b)*]. Additional statutory grounds also exist for relief from a default and default judgment [*see, e.g., Code Civ. Proc. §§ 473.1, 473.5*]. For forms of memoranda opposing a grant of relief from default and default judgment or other judgment or order on these various additional statutory grounds, which may, in an appropriate case, be combined with this form, see *§ 70.10* et seq.

A default judgment or other judgment or order may also be set aside under *Code Civ. Proc. § 473(d)*, on the ground that it is void. For forms of memoranda opposing a grant of relief from a void default judgment or other void judgment or order, which may, in an appropriate case, be combined with this form, see *§ 70.310* et seq.

[3] Discussion of Authorities

[a] Motion Is Not Timely

Stiles v. Wallis *(1983) 147 Cal. App. 3d 1143, 195 Cal. Rptr. 377* , involved a motion to set aside an earlier default judgment against the defendant. The default was based on defendant's failure to file an answer to plaintiff's complaint for fraud, negligent misrepresentation, constructive fraud, and breach of contract. The trial court relied on its equity power in setting aside the default. The plaintiffs appealed.

The court of appeal reversed the order setting aside the judgment. The court decided that the superior court's authority for setting aside the default must have been predicated on grounds of extrinsic mistake (*147 Cal. App. 3d 1143, 1147)* .

The court listed three elements necessary to set aside a default judgment based on extrinsic mistake: (1) the defaulted party must demonstrate that it has a meritorious case; (2) the party seeking to set aside the default must articulate a satisfactory excuse for not presenting a defense to the action; and (3) the moving party must demonstrate diligence in seeking to set aside the default once it has been discovered (*147 Cal. App. 3d 1143, 1147-1148)* . In discussing whether defendant had demonstrated a meritorious case, the court held that sufficiency was established by defendant's proposed verified answer (*147 Cal. App. 3d 1143, 1148)* . As to the second element, defendant had offered two explanations for failure to defend in a timely fashion, namely that he thought his employer was obligated to provide him with a defense and that he was an Australian citizen born in England and was therefore unfamiliar with California law (*147 Cal. App. 3d 1143, 1148)* . The court found defendant's explanations insufficient to justify setting aside the default judgment (*147 Cal. App. 3d 1143, 1149)* . As to the third element, the court found that defendant failed to act with proper diligence by waiting more than 20 months before taking action (*147 Cal. App. 3d 1143, 1149-1150)* .

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CHAPTER 70 DEFAULTS, DEFAULT JUDGMENTS, AND RELIEF FROM JUDGMENTS AND ORDERS
PART II. FORMS
C. Equitable Relief From Default Judgment or Other Judgment or Order Based on Extrinsic Fraud, Mistake, or Duress
1. Motions in Equity

7-70 California Points & Authorities § 70.491

§ 70.491 Opposing Motion in Equity to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress--Extrinsic Fraud Not Shown

[1] FORM

[*This form should be combined with a memorandum generally opposing a motion in equity for relief (see § 70.490[1]).*]

THE COURT SHOULD DENY THE DEFENDANT'S MOTION TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] BECAUSE THE DEFENDANT HAS NOT SHOWN EXTRINSIC FRAUD.

Extrinsic Fraud Not Shown. To obtain equitable relief, the defendant must show fraud that is extrinsic to the proceedings, not intrinsic. Extrinsic fraud usually arises when the defendant has been denied a fair adversary hearing because someone has kept the defendant deliberately in ignorance concerning the proceedings. Intrinsic fraud, on the other hand, goes to the merits of the proceedings, for example, to the facts and issues that would have been argued in the proceedings had the defendant diligently defended. Intrinsic fraud is insufficient to obtain equitable relief (*In re Margarita D. (1999) 72 Cal. App. 4th 1288, 1294-1295, 85 Cal. Rptr. 2d 713*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion in equity to vacate and set aside a judgment or order which the defendant asserts as having been obtained as a result of extrinsic fraud. The ground for opposition is that the defendant has not shown extrinsic fraud. This form may be adapted as necessary for use by a party other than a plaintiff (for example, a cross complainant).

See also *§ 70.490[2]* for general considerations and additional uses of this form.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case, that is, those facts tending to show that fraud, if any, is intrinsic to the proceedings rather than extrinsic.

See also *§ 70.490[2]* for additional discussion regarding the evidence supporting argument relating to this form.

[3] Discussion of Authorities

[a] Extrinsic Fraud Not Shown

In re Margarita D. *(1999) 72 Cal. App. 4th 1288, 1294-1295, 85 Cal. Rptr. 2d 713* , one who claimed to be the biological father of a minor sought to set aside, based on equitable grounds, a judgment that had determined another man to be the minor's father in a paternity proceeding. He asserted that false facts had been presented in the trial concerning paternity, resulting in an erroneous judgment that the other man was the minor's father. The trial court denied the motion to set aside the judgment

The court of appeal affirmed. It held that the fraud claimed by the appellant was intrinsic to the proceedings because it did not prevent him from claiming paternity in the earlier action. The fraud was intrinsic because it went to the merits of the proceeding (*72 Cal. App. 4th 1288, 1294-1295)* .

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7-70 California Points & Authorities §§ 70.492-70.499

[Reserved]

§§ 70.492[Reserved]

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C. Equitable Relief From Default Judgment or Other Judgment or Order Based on Extrinsic Fraud, Mistake, or Duress
2. Suits in Equity

7-70 California Points & Authorities § 70.500

§ 70.500 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] in Equity to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress--Alleged Extrinsic Fraud or Mistake Not Pleaded With Particularity and Specificity

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF DEMURRER
Plaintiff,	)	TO COMPLAINT FOR EQUITABLE RELIEF
vs.	)	FROM JUDGMENT OBTAINED BY EXTRINSIC
_____ [*name*],	)	FRAUD OR MISTAKE
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD SUSTAIN THE DEMURRER TO THE COMPLAINT FOR EQUITABLE RELIEF FROM THE PRIOR _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] BECAUSE THE COMPLAINT FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION IN THAT IT FAILS TO PLEAD THE FACTS CONSTITUTING THE FRAUD OR MISTAKE WITH PARTICULARITY AND SPECIFICITY.

A. Objection by Demurrer. The party against whom a complaint has been filed may object, by demurrer as provided in *Section 430.30 of the Code of Civil Procedure*, to the complaint on the ground that the complaint does not state facts sufficient to constitute a cause of action (*Code Civ. Proc. § 430.10(e)*). When any ground for objection to a complaint appears on the face thereof [or from any matter of which the court is required to or may take judicial notice], the objection on that ground may be taken by a demurrer to the complaint (*Code Civ. Proc. § 430.30(a)*).

B. Pleading of Facts. In an action for equitable relief from a judgment allegedly obtained by extrinsic fraud or mistake, the facts constituting the fraud or mistake must be pleaded specifically and with particularity (*Hammell v. Britton (1941) 19 Cal. 2d 72, 82, 119 P.2d 333*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*moving party*]

[2] Comments

[a] Use of Form

This memorandum may be used in support of a general demurrer to a complaint for equitable relief from a prior judgment or order allegedly obtained through extrinsic fraud or mistake. The ground for the demurrer is that the complaint fails to state facts sufficient to constitute a cause of action because the facts constituting extrinsic fraud or mistake have not been pleaded specifically or with sufficient particularity.

This form should be combined, when appropriate, with additional points and authorities supporting a demurrer on other grounds [*see, e.g., §§ 70.501 -70.503*]. This form may be combined, when appropriate, with additional points and authorities opposing a grant of equitable relief in particular circumstances [*see, e.g., §§ 70.630 -70.670*]. This form may also be adapted for use in a trial or appellate brief.

With appropriate modifications, this form may be used in another procedural context, such as in support of a defendant's motion for judgment on the pleadings.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel in his or her argument should refer to the specific allegations of the complaint, by paragraph numbers, and to any matter of which the court must or may take judicial notice, that disclose the lack of specificity or particularity in pleading fraud or mistake. See also *§ 70.480[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 70.520 -70.522* may be used to oppose the demurrer supported by this form.

[d] Related Pleading and Practice Chapters

For a general form of demurrer, *see* California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For forms of complaint to set aside a judgment rendered due to extrinsic fraud or mistake, *see* Ch. 489, *Relief From Judgments and Orders* , and Ch. 318, *Judgments* , in that publication.

[e] Related Points and Authorities

For general forms of memoranda supporting a demurrer to a complaint or a motion for judgment on the pleadings, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Pleading of Facts

Hammell v. Britton *(1941) 19 Cal. 2d 72, 119 P.2d 333* , was an action for equitable relief in which the plaintiff attacked and sought to have set aside a judgment rendered against him. The case involved title to real property which depended on the status of the grantor as a married man. That status, in turn, depended on the validity of a Colorado divorce decree. A later Colorado judgment vacated the divorce decree for fraud, but the plaintiff contended that a third Colorado judgment ruled that the original divorce decree was valid and that the second one had been obtained through fraud. The defendant demurred and the court sustained the demurrer without leave to amend. The plaintiff appealed.

The Supreme Court affirmed a judgment of dismissal. The Supreme Court pointed out that the allegations of the plaintiff's complaint for equitable relief with respect to the alleged fraud were insufficient. His complaint alleged that he had charged, in a Colorado proceeding, that an earlier Colorado judgment had been obtained by means of fraud. However, there were no allegations of the facts constituting the fraud. Nor was there any allegation establishing that the plaintiff was prevented by fraud from making any defense available to him in the California action which resulted in the judgment under attack. The Court held it elementary that in an action for equitable relief based on extrinsic fraud in obtaining a judgment, the facts constituting the fraud must be pleaded with particularity and specificity (*19 Cal. 2d 72, 81-82)* .

[4] Additional Authorities

[a] Pleading of Facts

Westphal v. Westphal (1942) 20 Cal. 2d 393, 126 P.2d 105 , involved an action seeking relief from a prior judgment on the grounds of fraud and mistake following the trial court's sustaining of a demurrer to the complaint. The prior judgment was a probate court order for decree of distribution of an estate pursuant to a petition therefor. The testator's will had provided for distribution of his estate as follows: one-fifth to each of three sons and one-fifth in trust to each of two other sons with remainders to the survivors of the trust beneficiaries. The testator had also provided that if any child contested his will, that child should take nothing. The latter two sons contested the will and the executors sought and were granted distribution excluding the contestants. Following the death of one of the excluded sons, his survivors brought this action against the recipients of the deceased's share asking that the defendants be declared involuntary trustees and seeking other relief. The defendants demurred on the grounds that the decree as not subject to attack because the alleged fraud and mistake were intrinsic. The trial court sustained the demurrer as to certain plaintiffs (*20 Cal. 2d 393, 395-396)* .

The Supreme Court affirmed, observing that no extrinsic fraud or mistake sufficient to constitute the basis for an attack in equity on the prior decree of distribution was alleged by the plaintiffs in the absence of any allegation that they had not received proper notice of the prior proceedings (*20 Cal. 2d 393, 398)* . Instead, it was presumed that the plaintiffs received such notice and that they had an opportunity to present their case (*20 Cal. 2d 393, 398-399)* .

In *Baldwin v. Daniels (1955) 132 Cal. App. 2d 560, 282 P.2d 522* , the court of appeal affirmed the trial court's judgment for the defendants after its entry of an order sustaining a demurrer to a complaint for equitable relief from a prior judgment. The plaintiff's first complaint alleged that the defendants had caused a court decree to be entered "through extrinsic fraud" and that said judgment was "void ab initio and altogether null" (*132 Cal. App. 2d 560, 561)* . An amended complaint repeated the first pleading in that it merely alleged fraud as a conclusion without any attempt to plead the facts constituting the claimed fraud. The court cited the memoranda of points and authorities submitted by the defendant in connection with her demurrers to both complaints stating: that (1) it is essential that the facts and circumstances which constitute the fraud should be set out clearly, concisely, and with sufficient particularity to apprise the opposite party of what he or she is called on to answer and to enable the court to determine if, on the facts pleaded, there is any foundation, prima facie, at least, for the charge of fraud; (2) allegations of fraud in general terms are merely allegations of conclusions of law which present no issuable facts (*132 Cal. App. 2d 560, 561)* ; (3) innumerable authorities indicate that equitable relief from the effect of a judgment or decree may only be obtained on allegations and proof of extrinsic fraud; and (4) it is elementary that in an action for equitable relief based on extrinsic fraud in obtaining a judgment, the facts constituting the fraud must be pleaded with particularity and specificity (*132 Cal. App. 2d 560, 562)* . The court of appeal thus concluded that the pleading was obviously defective. Moreover, the court noted that the defect had been clearly pointed out before the pleading was amended and that the amended complaint not only made no attempt to cure the defect but also stated that the plaintiff's position was that fraud could be pleaded as an ultimate fact notwithstanding innumerable authorities to the contrary (*132 Cal. App. 2d 560, 563)* .

In *Pentz v. Kuppinger (1973) 31 Cal. App. 3d 590, 107 Cal. Rptr. 540* , the court of appeal reversed the trial court's dismissal of an action based on fraud in the procurement of a Mexican judgment, holding that the complaint contained sufficient allegations to form a valid basis for a claim of extrinsic fraud. The court stated that the fraud sufficient to justify equitable relief from a judgment must be extrinsic or collateral to the questions examined or determined. In an action for such relief based on extrinsic fraud in obtaining a judgment, the fraud must be pleaded with particularity (*31 Cal. App. 3d 590, 595)* . The complaint alleged that the defendant did not disclose to the Mexican courts or to any California court the fact of, or the amount of, certain payments involved, that the plaintiff was first informed thereof after the end of the Mexican proceedings, and that the plaintiff had inquired into such payments during the Mexican proceedings but that such inquiries were not answered. The trial court concluded, in sustaining the demurrer, that no additional facts were offered to support the claim of extrinsic fraud. The court of appeal noted that from the allegations involved it was clear that the plaintiff was denied the opportunity to acquaint the Mexican court with evidence as to the payment involved and that the alleged concealment constituted extrinsic fraud. Since the plaintiff was denied her day in court as to the issues tendered by her pleading, the court of appeal concluded that the trial court had erred in sustaining the demurrer (*31 Cal. App. 3d 590, 597)* .

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7-70 California Points & Authorities § 70.501

§ 70.501 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] in Equity to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress--Plaintiff Is Not Proper Party

[1] FORM

[*Caption. See § 70.500[1].*]

THE COURT SHOULD SUSTAIN THE DEMURRER TO THE COMPLAINT FOR EQUITABLE RELIEF FROM THE PRIOR _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] BECAUSE THE COMPLAINT FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION IN THAT IT FAILS TO SHOW THAT PLAINTIFF IS A PARTY ENTITLED TO BRING SUCH A CAUSE OF ACTION.

A. Objection by Demurrer. [*See § 70.500[1], Paragraph A.*]

B. Proper Parties Plaintiff. A party or one in privity with him/her who has been prevented from obtaining a fair adversary hearing through extrinsic fraud or mistake may bring an equitable action to vacate the judgment. A stranger may maintain such an action only if his/her interests have been adversely affected by the judgment (*People ex rel. Public Util. Com. v. Ryerson (1966) 241 Cal. App. 2d 115, 119, 50 Cal. Rptr. 246*).

C. Interest Necessary for Action. The interest necessary to allow a third party to seek relief from a judgment must involve such an immediate and direct claim on the subject matter of the litigation that the intervenor will either gain or lose by the direct operation of the judgment (*People ex rel. Public Util. Com. v. Ryerson (1966) 241 Cal. App. 2d 115, 119, 50 Cal. Rptr. 246*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

Attorney for Defendant

[2] Comments

[a] Use of Form

This memorandum may be used in support of a general demurrer to a complaint for equitable relief from a prior judgment allegedly obtained through extrinsic fraud or mistake. The ground for the demurrer is that the complaint fails to state facts sufficient to constitute a cause of action because the complaint discloses that the plaintiff is not a proper party, that is, not a party to the prior action nor in privity with such a party, nor a stranger whose interests have been adversely affected by the judgment.

This form should be combined, when appropriate, with additional points and authorities supporting a demurrer on other grounds [*see, e.g., §§ 70.500, 70.502, 70.503*].

This form may be combined, when appropriate, with additional points and authorities opposing a grant of equitable relief in particular circumstances [*see, e.g., §§ 70.630 -70.670*].

This form may also be adapted for use in a trial or appellate brief.

With appropriate modifications, this form may be used in another procedural context, such as in support of a defendant's motion for judgment on the pleadings or a defendant's motion for summary judgment. If modified for use in support of a motion for summary judgment, counsel should attach supporting affidavits or declarations and a separate statement of material facts in addition to the supporting memorandum [*see Code Civ. Proc. § 437c(b)*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel in his or her argument should refer to the absence of facts in the complaint establishing the requisite interest required, and, if applicable, to specific allegations in the complaint, by paragraph number, and to any matter of which the court must or may take judicial notice, that disclose facts establishing the absence of that interest.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 70.520 -70.523* may be used to oppose the demurrer supported by this form.

[d] Related Pleading and Practice Chapters

For a general form of demurrer, *see* California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For forms of complaint to set aside a judgment rendered due to extrinsic fraud or mistake, *see* Ch. 489, *Relief From Judgments and Orders* , and Ch. 318, *Judgments* , in that publication.

[e] Related Points and Authorities

For general forms of memoranda supporting a demurrer to a complaint or a motion for judgment on the pleadings, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For general forms of memoranda supporting a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Proper Parties Plaintiff

In ***People ex rel. Public Util. Com. v. Ryerson*** *(1966) 241 Cal. App. 2d 115, 50 Cal. Rptr. 246* , after an investigation and decision by the Public Utilities Commission (PUC) and pursuant to a PUC order, a carrier brought action against a shipper to recover undercharges. In that action, the parties entered into a factual stipulation on which judgment was rendered for the shipper. The PUC sought to vacate that judgment on the ground that it had been obtained by extrinsic fraud or mistake consisting of collusion between the parties. The parties contended that the people did not have a sufficient interest to have entitled them to bring the action to vacate the judgment. The defendant demurrer and the trial court sustained the demurrer and dismissed the action (*241 Cal. App. 2d 115, 117-119)* .

The court of appeal reversed the judgment of dismissal. The court of appeal held that a party or one in privity with him or her who has been prevented from obtaining a fair adversary hearing through extrinsic fraud or mistake may bring an equitable action to vacate the judgment and that a stranger may maintain such an action if his or her interests have been adversely affected by the judgment. The court stated that while the interest is normally pecuniary, that is not an indispensable element. The interest of the people in maintaining the integrity of the PUC order was clearly sufficient (*241 Cal. App. 2d 115, 119-120)* .

[b] Interest Necessary for Action

The facts and procedural background of ***People ex rel. Public Util. Com. v. Ryerson*** *(1966) 241 Cal. App. 2d 115, 50 Cal. Rptr. 246* , are discussed under [a], *above.* In *Ryerson*, on the issue of whether the Commission was entitled to intervene in the action, the court stated that a party or one in privity with him or who has been prevented from obtaining a fair adversary hearing through extrinsic fraud or mistake may bring an equitable action to vacate the judgment. A stranger may maintain such an action if his or her interests have been adversely affected by the judgment. According to the court, the interest necessary for intervention must involve such an immediate and direct claim on the very subject matter of the litigation that the intervener will either gain or lose by the direct operation of the judgment that may be rendered therein. In addition, while the interest is normally pecuniary, that is not an indispensable element (*241 Cal. App. 2d 115, 119)* . The court concluded that the interest of the people in maintaining the integrity of the order of the Public Utilities Commission is clearly sufficient (*241 Cal. App. 2d 115, 120)* .

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7-70 California Points & Authorities § 70.502

§ 70.502 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] in Equity to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress--Lapse of Statute of Limitations

[1] FORM

[*Caption. See § 70.500[1].*]

THE COURT SHOULD SUSTAIN THE DEMURRER TO THE COMPLAINT FOR EQUITABLE RELIEF FROM THE PRIOR _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] BECAUSE THE COMPLAINT FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION IN THAT IT SHOWS THAT THE ALLEGED FRAUD OR MISTAKE OCCURRED MORE THAN THREE YEARS PRIOR TO THE TIME THE ACTION WAS COMMENCED AND FAILS TO PLEAD FACTS SHOWING THAT THE ALLEGED FRAUD OR MISTAKE WAS DISCOVERED WITHIN THREE YEARS IMMEDIATELY PRIOR TO COMMENCEMENT OF THE ACTION.

A. Objection by Demurrer. [*See § 70.500[1], Paragraph A.*]

B. Failure to State Cause of Action. The objection that an action is barred by the statute of limitations must be deemed to be included in the ground of demurrer that the complaint does not state facts sufficient to constitute a cause of action (*Bell v. Bank of California (1908) 153 Cal. 234, 245, 94 P. 889*).

C. Three-Year Limitation Period. The period prescribed for the commencement of an action for relief on the ground of fraud or mistake is three years from the time the aggrieved party discovers the facts constituting the fraud or mistake (*Code Civ. Proc. § 338(d)*).

D. Pleading Facts Relating to Discovery of Fraud or Mistake. A showing that the plaintiff did not discover the facts constituting the fraud or mistake until within three years immediately prior to commencement of the action is an essential element of the right of action and must be affirmatively pleaded (*Anglo California Trust Co. v. Kelley (1931)*

117 Cal. App. 692, 696, 4 P.2d 604).

E. Plaintiff Must Affirmatively Excuse Failure to Discover Fraud or Mistake. The tolling of the statute limitations until discovery of fraud or mistake under *Code of Civil Procedure Section 338(d)* is an exception, and, accordingly, the plaintiff must affirmatively excuse his or her failure to discover within three years by showing that he or she was not negligent in failing to make the discovery sooner and that he or she had no actual or presumptive knowledge of facts sufficient to put him or her on inquiry (*Bedolla v. Logan & Frazer (1975) 52 Cal. App. 3d 118, 129, 125 Cal. Rptr. 59*).

[*This form may be combined with points and authorities for use in support of a general demurrer to a complaint that fails to plead facts relating to discovery of the fraud or mistake (see § 70.503[1]).*]

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

Attorney for Defendant

[2] Comments

[a] Use of Form

This memorandum may be used in support of a general demurrer to a complaint for equitable relief from a prior judgment allegedly obtained through extrinsic fraud or mistake. The ground for demurrer is that the complaint fails to state facts sufficient to constitute a cause of action because it appears that the action is barred by a statute of limitations.

This form should be combined, when appropriate, with additional points and authorities supporting a demurrer on other grounds [*see, e.g., §§ 70.500, 70.501*, 70.504].

This form may be combined, when appropriate, with additional points and authorities opposing a grant of equitable relief in particular circumstances [*see, e.g., §§ 70.630 -70.670*].

This form may also be adapted for use in a trial or appellate brief.

With appropriate modifications, this form may be used in another procedural context, such as in support of a defendant's motion for judgment on the pleadings or a defendant's motion for summary judgment. If modified for use in support of a motion for summary judgment, counsel should attach supporting affidavits or declarations and a separate statement of material facts in addition to the supporting memorandum [*see Code Civ. Proc. § 437c(b)*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In arguing that the complaint fails to comply with the exception allowed under *Code Civ. Proc. § 338(d)*, counsel should from the complaint and specific allegations therein, by paragraph number, and to any matter of which the court must or may take judicial notice, identify:

- The date the action was commenced;
- The date the plaintiff was alleged to have discovered the fraud or mistake; and

- The absence of affirmative pleading of plaintiff's diligence regarding discovery.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 70.523 -70.526* may be used to oppose the demurrer supported by this form.

[d] Related Pleading and Practice Chapters

For a general form of demurrer, *see* California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For forms of complaint to set aside a judgment rendered due to extrinsic fraud or mistake, *see* Ch. 489, *Relief From Judgments and Orders* , and Ch. 318, *Judgments* , in that publication. For a form of demurrer to a complaint based on the bar of a statute of limitations, see Ch. 345, *Limitation of Actions* .

[e] Related Points and Authorities

For general forms of memoranda supporting a demurrer to a complaint or a motion for judgment on the pleadings, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For a general memorandum supporting a general demurrer to a complaint on the ground of lapse of the applicable statute of limitations, see Ch. 143, *Limitation of Actions* . For general forms of memoranda supporting a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Failure to State Cause of Action

Bell v. Bank of California *(1908) 153 Cal. 234, 94 P. 889* , was an action for the recovery of shares of stock. The defendant asserted in a general demurrer that the action was barred by a statute of limitations, and the trial court sustained the demurrer and dismissed the action. The method of asserting the defense of a bar of a statute of limitations was not, apparently, an issue either in the trial court or on appeal, but the Supreme Court said, "The bar of the statute of limitations is not specified in the code as a ground of demurrer ..., and that objection to a complaint, while required to be stated in the demurrer, must be deemed to be included within the ground of want of facts sufficient to constitute a cause of action" (*153 Cal. 234, 245)* .

[b] Pleading Facts Relating to Discovery of Fraud or Mistake

Anglo California Trust Co. v. Kelley *(1931) 117 Cal. App. 692, 4 P.2d 604* , involved an action to quiet title to certain real property, alleging that in a prior action to foreclose a mortgage on the property the trial court duly made the decree of foreclosure. The defendant's answer denied this allegation and affirmatively alleged that the decree was secured by reason of the defendants' mistake and the plaintiff's fraud, thereby preventing the defendants from presenting their defenses. The plaintiff moved for judgment on the pleadings against the answer and judgment was granted by the trial court. The defendants appealed.

The court of appeal affirmed, stating that equity will relieve an injured party from the effect of a judgment procured by extrinsic fraud, mistake, or excusable neglect which was not the result of negligence or laches on the part of the complainant (*117 Cal. App. 692, 694)* . The court noted that approximately four years elapsed from the commission of the alleged fraud or the happening of the mistake before the defendants sought relief. Nowhere in the answer was there any statement as to the time when the defendants learned the facts constituting the fraud or mistake nor any statement excusing their failure to learn the facts within the statutory period of limitation (*117 Cal. App. 692, 695)* . The statutory period was three years from discovery of the fraud or mistake (*Code Civ. Proc. § 338*). The court held, citing *Osmont*

v. All Persons (1913) 165 Cal. 587, 596, 133 P. 480 , that the right of a party to invoke the aid of a court of equity for relief against fraud after the expiration of three years from the time when the fraud was committed is an exception to the general statute and cannot be asserted unless that party brings himself or herself within the terms of the exception. This can only be done by a showing that he or she did not discover the facts constituting the fraud until within the three years immediately prior to the commencement of his or her action. This showing is an essential element of the right of action and must be affirmatively pleaded in order to authorize the court to entertain the action (*117 Cal. App. 692, 695-696)* .

[c] Plaintiff Must Affirmatively Excuse Failure to Discover Fraud or Mistake

Bedolla v. Logan & Frazer *(1975) 52 Cal. App. 3d 118, 125 Cal. Rptr. 59* , involved a cross action by a limited partnership against its accountants, alleging fraud, breach of fiduciary duty, and professional negligence in the performances of services rendered on behalf of the limited partnership in connection with a lawsuit in which the partnership was a defendant. A jury trial was had and the trial court bifurcated the issue of the statute of limitations and presented the question to the jury before consideration of the merits of the case. The jury rendered verdicts on behalf of the accountants by finding that the claims contained in the cross complaint were barred by the statute of limitations. The cross complainant limited partnership appealed.

The court of appeal affirmed the judgment. The court acknowledged the rule stated in former Code Civ. Proc. § 338(4) [*now see Code Civ. Proc. § 338(d)*] that the statute of limitations commences to run only when the wrongful acts are discovered, or could have been discovered with reasonable diligence (*52 Cal. App. 3d 118, 125)* . The trial court had instructed the jury that the cross complainant had the burden of proving that it did not know and should not have known of the material facts before the statutory deadline. The court of appeal stated that the cases construing Section 338(4) have held that the provision tolling operation of the statute until discovery is an exception, and, accordingly, the plaintiff must affirmatively excuse his or her failure to discover the fraud within three years by showing that he or she was not negligent in failing to make the discovery sooner and that he or she had no actual or presumptive knowledge of facts sufficient to put him or her on inquiry. The court concluded that the trial court's instruction was in full harmony with the above precepts and accurately laid down the applicable law (*52 Cal. App. 3d 118, 129)* .

[4] Additional Authorities

[a] Failure to State Cause of Action

In *Anderson v. McNally (1957) 150 Cal. App. 2d 778, 310 P.2d 975* , affirming a judgment of dismissal following the sustaining of a demurrer to the complaint in a wrongful death action, the court stated that a demurrer based on failure to state facts sufficient to constitute a cause of action because the action was not commenced within the applicable period of limitation must be considered a general demurrer (*150 Cal. App. 2d 778, 783-784)* .

[b] Three-Year Limitation Period

Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 305 P.2d 20 , involved a direct attack on a prior judgment by an action for declaration of rights in a membership bank. The plaintiff had first learned of the possibility of her rights as a stockholder in the bank less than three years after she discovered facts indicating that she had a cause of action but filed her suit more than seven years after the judgment involved. She contended that judgment was obtained without proper service of process and by extrinsic fraud. The defendant demurred to plaintiff's first amended complaint. The trial court granted the demurrer without leave to amend, and dismissed the action.

The Supreme Court reversed the trial court's judgment. The Court stated that when it appears there was a willful failure to give the required service, a direct attack may be made on the judgment on the ground of extrinsic fraud, and the failure of the bank to comply with the statutory requirements for personal service constituted grounds for the vacation of the judgment (*47 Cal. 2d 540, 558)* . Moreover, in cases involving fraud or mistake, the statute of limitations commences to run when the plaintiff discovers that he or she has cause of action or, through the use of reasonable

diligence, should have discovered it (*47 Cal. 2d 540, 559, 561)* .

[c] Pleading Facts Relating to Discovery of Fraud or Mistake

In *Hart v. Gudger (1957) 153 Cal. App. 2d 217, 314 P.2d 549* , the court of appeal affirmed the trial court's judgment for the defendants after sustaining a third amended complaint without leave to amend in an action to vacate a judgment in a will contest. The complaint had been filed more than three years after the discovery of the facts constituting the alleged fraud, and there was no sufficient showing in any of the complaints filed by the plaintiff of any excuse for the late filing. The court of appeal concluded that the action was barred under former Code Civ. Proc. § 338(4) [*now see Code Civ. Proc. § 338(d)*], holding that the statute applies to actions in equity for relief from judgments obtained by fraud or mistake (*153 Cal. App. 2d 217, 232)* .

[d] Plaintiff Must Affirmatively Excuse Failure to Discover Fraud or Mistake

Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 305 P.2d 20 , involved a direct attack on a prior judgment by an action for declaration of rights in a membership bank. The plaintiff had first learned of the possibility of her rights as a stockholder in the bank less than three years after she discovered facts indicating that she had a cause of action but filed her suit more than seven years after the judgment involved. She contended that judgment was obtained without proper service of process and by extrinsic fraud. The defendant demurred to plaintiff's first amended complaint. The trial court granted the demurrer without leave to amend, and dismissed the action.

The Supreme Court reversed the trial court's judgment. The Court stated that when it appears there was a willful failure to give the required service, a direct attack may be made on the judgment on the ground of extrinsic fraud, and the failure of the bank to comply with the statutory requirements for personal service constituted grounds for the vacation of the judgment (*47 Cal. 2d 540, 558)* . Moreover, in cases involving fraud or mistake, the statute of limitations commences to run when the plaintiff discovers that he or she has cause of action or, through the use of reasonable diligence, should have discovered it (*47 Cal. 2d 540, 559, 561)* .

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7-70 California Points & Authorities § 70.503

§ 70.503 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] in Equity to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress--Laches Precludes Relief

[1] FORM

[*Caption. See § 70.500[1].*]

THE COURT SHOULD SUSTAIN THE DEMURRER TO THE COMPLAINT FOR EQUITABLE RELIEF FROM THE PRIOR _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] BECAUSE THE COMPLAINT FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION IN THAT THE FACTS ALLEGED BY PLAINTIFF ESTABLISH THAT HE/SHE WAS GUILTY OF LACHES AND FAIL TO ESTABLISH THAT THERE WAS SUFFICIENT EXCUSE FOR THE DELAY INVOLVED

A. Objection by Demurrer. [*See § 70.500[1], Paragraph A.*]

B. Laches Is Bar to Action. The equitable rule that stale demands will not be recognized and enforced in equity, commonly called laches, may bar an action for equitable relief from a prior judgment (*Hynes v. M.J. & M.M. Consolidated (1914) 168 Cal. 651, 654, 144 P. 144*).

C. Laches Shown on Face of Complaint. A complaint for equitable relief from a prior judgment which shows on its face that the plaintiff was guilty of laches fails to state facts sufficient to constitute a cause of action (*American Sur. Co. of N.Y. v. City St. Improvement Co. (1915) 169 Cal. 172, 173, 146 P. 428*).

D. Pleading Excuse for Delay. In the absence of any allegation of a sufficient excuse for delay, an action for equitable relief from a prior judgment may be barred by the equitable doctrine of laches (*see* *Hynes v. M.J. & M.M. Consolidated (1914) 168 Cal. 651, 654-655, 144 P. 144*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

Attorney for Defendant

[2] Comments

[a] Use of Form

This memorandum may be used in support of a general demurrer to a complaint for equitable relief from a prior judgment allegedly obtained through extrinsic fraud or mistake. The ground for demurrer is that the complaint fails to state facts sufficient to constitute a cause of action because it appears that the action is barred by the equitable doctrine of laches.

This form should be combined, when appropriate, with additional points and authorities supporting a demurrer on other grounds [*see, e.g., §§ 70.501 -70.502*]. The form may be combined, when appropriate, with additional points and authorities opposing a grant of equitable relief in particular circumstances [*see, e.g., §§ 70.630 -70.670*]. This form may also be adapted for use in a trial or appellate brief.

With appropriate modifications, this form may be used in another procedural context, such as in support of a defendant's motion for judgment on the pleadings.

With appropriate modifications, this form may be used in another procedural context, such as in support of a defendant's motion for judgment on the pleadings or a defendant's motion for summary judgment. If modified for use in support of a motion for summary judgment, counsel should attach supporting affidavits or declarations and a separate statement of material facts in addition to the supporting memorandum [*see Code Civ. Proc. § 437c(b)*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should refer to the allegations of the complaint, by specific paragraph number, and to any matter of which the court must or may take judicial notice, that demonstrate that the plaintiff's delay in bringing the action was long and that the complaint fails to sufficiently explain the delay. See also *§ 70.480[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 70.527, 70.528* may be used to oppose the demurrer supported by this form.

[d] Related Pleading and Practice Chapters

For a general form of demurrer, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , and see Ch. 489, *Relief From Judgments and Orders* , and Ch. 318, *Judgments* (Matthew Bender) for forms of complaint to set aside a judgment rendered due to extrinsic fraud or mistake.

[e] Related Points and Authorities

For general forms of memoranda supporting a demurrer to a complaint or a motion for judgment on the pleadings, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For general forms of memoranda supporting a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Laches Is Bar to Action

In ***Hynes v. M.J. & M.M. Consolidated*** *(1914) 168 Cal. 651, 144 P. 144* , the plaintiff brought a suit in equity to set aside a judgment in a prior action. The judgment which the complaint sought to set aside was rendered in 1892 and the instant action was begun in 1911. The judgment at issue had the effect of declaring that a purchase of land by one Davis from the State of California on the payment of 20 percent of the purchase price was null and void and to terminate all right, interest, and estate of Davis in and to the land. The defendants filed demurrers, which the trial court sustained without leave to amend. The plaintiff appealed.

The Supreme Court affirmed the judgment. The Court noted that no action was taken with respect to the land by anyone claiming under Davis until after oil was discovered thereon; however, it was clear that before that event they did not intend to complete the purchase and did not want the land. On the other hand, the defendants, who were the parties claiming the land under a subsequent purchase, had expended large sums in making the discovery. The plaintiffs did not plead ignorance but, on the contrary, showed that 11 years before bringing this action they had become aware of all the facts set forth in their complaint. Thus, the Supreme Court ruled that no sufficient excuse for the delay had been alleged and that the equitable rule that stale demands will not be recognized and enforced in equity, commonly called the doctrine of laches, was a sufficient bar to the action (*168 Cal. 651, 654)* .

[b] Laches Shown on Face of Complaint

In ***American Sur. Co. of N.Y. v. City St. Improvement Co.*** *(1915) 169 Cal. 172, 146 P. 428* , a surety company brought an action in equity to set aside a judgment in favor of a creditor in an earlier action, in which the surety company was a surety on a bond given to release an attachment issued to recover money claimed against the debtor in the prior action. The debtor in the prior action became insolvent and the action was brought to trial. Judgment was granted to the creditor without anyone appearing in opposition. In bringing the present action, the surety company was seeking to assert a defense available to the debtor in the prior action. The creditor, now the defendant, demurred to the complaint. The trial court sustained the demurrer and gave judgment in favor of the defendant.

The Supreme Court affirmed. The Court observed that the surety knew when it gave the bond that the action was pending and that the case had been set for trial. Since the complaint was devoid of allegations as to fraud or mistake, the Court held that the ruling on the demurrer was proper. In addition, said the Court, the complaint was subject to the objection that it showed on its face that the plaintiff was guilty of laches. A period of more than two years elapsed between the filing of the complaint in the former action and the taking of judgment. During that time, the surety took no action to protect its interest and waited almost six months after entry of judgment before seeking equitable relief. During this interval, the situation of the property of the debtor in the former action had changed in such a manner that the creditor had lost all possible chance of recovery on its claim from any source other than the bond. Thus, the Court concluded that the complaint was without equity and did not state a cause of action (*169 Cal. 172, 173)* .

[c] Pleading Excuse for Delay

The facts and procedural background of ***Hynes v. M.J. & M.M. Consolidated*** *(1914) 168 Cal. 651, 144 P. 144* , is discussed under [a], *above.* In *Hynes*, the Supreme Court ruled that no sufficient excuse for the plaintiff's delay in bringing the action in equity had been alleged and that the equitable rule that stale demands will not be recognized and enforced in equity, commonly called the doctrine of laches, was a sufficient bar to the action (*168 Cal. 651, 654)* .

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[Reserved]

§§ 70.504[Reserved]

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7-70 California Points & Authorities § 70.510

§ 70.510 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] on Complaint in Equity to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress--Plaintiff Had Adequate Opportunity to Litigate Issues at Hearing on Prior Motion to Vacate

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF MOTION FOR
Plaintiff,	)	SUMMARY JUDGMENT ON COMPLAINT FOR
vs.	)	EQUITABLE RELIEF FROM JUDGMENT OB-
_____ [*name*],	)	TAINED BY FRAUD OR MISTAKE
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD GRANT THE SUMMARY JUDGMENT FOR DEFENDANT BECAUSE, FROM ALL THE PAPERS SUBMITTED, IT IS SHOWN THAT PLAINTIFF HAS ALREADY FULLY LITIGATED THE ISSUES INVOLVED IN THIS LAWSUIT IN AN EARLIER MOTION TO VACATE AND SET ASIDE THE

_____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER].

A. Summary Judgment. A defendant may move for summary judgment in any action or proceeding if it is contended that the action has no merit. Such motion must be granted if all of the papers submitted show that there is no triable issue as to any material fact and that defendant is entitled to a judgment as a matter of law (*Code Civ. Proc. § 437c(a), (c)*).

B. Opportunity to Litigate on Motion to Vacate. A detailed presentation of issues of fraud and mistake on a motion to vacate, with full opportunity at the hearing to develop the issues by oral testimony, may bar a subsequent action to set aside the order attacked by the earlier motion (*Darlington v. Basalt Rock Co. (1961) 188 Cal. App. 2d 706, 710, 10 Cal. Rptr. 556*).

[2] Comments

[a] Use of Form

This memorandum may be submitted by the defendant in an action for equitable relief from a judgment allegedly obtained through extrinsic fraud or mistake in support of a motion for summary judgment. The ground for the motion is that there is no triable issue of material fact and that the moving party is entitled to judgment as a matter of law [*see Code Civ. Proc. § 437c(a), (c)*], because it is established by all the papers submitted with the motion that the plaintiff had previously submitted a motion to vacate the judgment on the same grounds and had an opportunity to litigate the issues involved at the hearing on that motion. For points and authorities in support of a motion for summary judgment asserting that an exhaustive adversarial hearing or presentation of a particular type of evidence is not essential, see *§ 70.511[1]*.

Counsel should attach supporting affidavits or declarations and a separate statement of material facts in addition to the supporting memorandum [*see Code Civ. Proc. § 437c(b)*].

This form may be combined, when appropriate, with additional points and authorities opposing a grant of equitable relief in particular circumstances [*see, e.g., §§ 70.630 -70.670*].

With appropriate modifications, this form may be used in another procedural context, such as in support of a demurrer or motion for judgment on the pleadings [*see Barker v. Hull (1987) 191 Cal. App. 3d 221, 226, 236 Cal. Rptr. 285]* .

This form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should refer to the record of the proceedings of motion to vacate, and to supporting declarations, in his or her argument that the same opportunity to litigate the issues before the court in the present lawsuit existed when the motion to vacate was made. See also *§ 70.480[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 70.540* and *70.541* may be used to oppose the demurrer supported by this form.

[d] Related Pleading and Practice Chapters

For a general form of demurrer, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for*

Judgment on the Pleadings , and for forms of complaint to set aside a judgment rendered due to extrinsic fraud or mistake, see Ch. 489, *Relief From Judgments and Orders* , and Ch. 318, *Judgments* (Matthew Bender).

[e] Related Points and Authorities

For general forms of memoranda supporting a motion for summary judgment, see Ch. 221, *Summary Judgments* . For general forms of memoranda supporting a demurrer to a complaint or a motion for judgment on the pleadings, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Opportunity to Litigate on Motion to Vacate

In ***Darlington v. Basalt Rock Co.*** *(1961) 188 Cal. App. 2d 706, 10 Cal. Rptr. 556* , the plaintiff brought an action in equity to vacate an order approving the compromise of a minor's claim for damages for personal injuries. While the plaintiff was a minor, his claim was compromised and the settlement was approved by the trial court. Shortly after attaining the age of majority (*see Fam. Code § 6502(a)* (age of majority prior to 1974 was age 21)), the plaintiff filed a motion to vacate the order approving the compromise on the grounds that his attorneys at the time had not independently investigated the facts but had negligently relied on false representations of the defendant's agent that the defendant was not negligent, and that the attorneys had mistakenly assumed that some of the plaintiff's injuries were not permanent. After a full hearing which included oral testimony, the court refused to set aside the order. That action was affirmed on appeal. Thereafter, plaintiff brought this action in which no facts were alleged which were not raised in the hearing on the motion. On motion by the defendant, the trial court dismissed the action. The plaintiff appealed.

The court of appeal affirmed the judgment of dismissal. The question on appeal was whether or not the adverse decision on the first attack (by motion) barred the second attack (by independent action in equity). The court ruled that the motion is not a bar when it fails to raise the same grounds urged in the later action, stating that the mere fact that issues might have been raised on the motion does not bar presentation of those issues in a later action if in fact they were not presented on the motion. The court added that the mere presentation of issues by affidavits supporting the motion is not a bar to the later action if the opportunity to present evidence was withheld in the discretion of the court to which the motion was made. However, the court held, detailed presentation of the issues of fraud and mistake on a motion to vacate, with full opportunity at a hearing to develop the issues by oral testimony, may bar a subsequent action to set aside the order attacked by the earlier motion (*188 Cal. App. 2d 706, 710)* .

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7-70 California Points & Authorities § 70.511

§ 70.511 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] on Complaint in Equity to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress--Exhaustive Adversarial Hearing or Presentation of Particular Type of Evidence Not Essential

[1] FORM

[*Caption. See § 70.510[1].*]

THE COURT SHOULD GRANT THE SUMMARY JUDGMENT FOR DEFENDANT BECAUSE AN EXHAUSTIVE ADVERSARIAL HEARING [OR PRESENTATION OF A PARTICULAR TYPE OF EVIDENCE IS NOT ESSENTIAL].

Exhaustive Adversarial Hearing or Presentation of Particular Type of Evidence Not Essential. There is no requirement that an exhaustive adversarial hearing be held on an earlier motion to vacate a judgment in order to preclude relitigation of an issue. [Further, it need not be established that any particular type of evidence, such as oral testimony, was presented] (*Barker v. Hull (1987) 191 Cal. App. 3d 221, 226, 236 Cal. Rptr. 285*).

[2] Comments

[a] Use of Form

This memorandum may be submitted by the defendant in an action for equitable relief from a judgment allegedly obtained through extrinsic fraud or mistake in support of a motion for summary judgment. This form is for use to contend that an exhaustive adversarial hearing or presentation of a particular type of evidence is not essential [*Barker v. Hull (1987) 191 Cal. App. 3d 221, 226, 236 Cal. Rptr. 285]* . For points and authorities that generally supports a motion for summary judgment on the ground that plaintiff is relitigating issues resolved in a prior hearing on a motion to vacate, see *§ 70.510[1]*.

For a tactical advantage, counsel may consider using this argument in a reply memorandum to respond to a contention in the opposing memorandum that the plaintiff did not have an adequate opportunity to litigate issues in the prior hearing on the motion to vacate [*Barker v. Hull (1987) 191 Cal. App. 3d 221, 226, 236 Cal. Rptr. 285]* .

This form may also be adapted for use in a trial or appellate brief.

For reference to related Pleading and Practice chapters, see *§ 70.510[2]*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 70.480[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 70.540* and *70.541* may be used to oppose the demurrer supported by this form.

[3] Discussion of Authorities

[a] Exhaustive Adversarial Hearing or Presentation of Particular Type of Evidence Not Essential

In ***Barker v. Hull*** *(1987) 191 Cal. App. 3d 221, 236 Cal. Rptr. 285* , the plaintiff was the president of a corporation who brought an action against a shareholder of the corporation and his attorney for various causes of action premised on an alleged representation made by the shareholder that an earlier action filed against the plaintiff and the corporation were not being filed against the plaintiff personally, but in his capacity as an officer of the corporation. The defendants moved for judgment on the pleadings, arguing that the plaintiff was barred by the doctrine of collateral estoppel from relitigating the fraud issue through a motion to vacate the earlier judgment. The trial court granted judgment on the pleadings and the plaintiff appealed.

The court of appeal affirmed the judgment on the pleadings. The court, citing *Darlington v. Basalt Rock Co. (1961) 188 Cal. App. 2d 706, 10 Cal. Rptr. 556* (discussed in *§ 70.510[3]*), stated that the party asserting a collateral estoppel must prove that the issue was raised, actually submitted for determination and determined. A mere showing that affidavits were submitted may not be sufficient to carry the burden of proving that the issue was actually litigated, and denial of the motion does not establish an estoppel if the basis of the denial cannot be determined. The court did not believe, however, that the foregoing principles require that in every case an exhaustive adversarial hearing must be held on a motion to vacate in order to preclude relitigation of an issue. Rather, the court concluded the appropriate principle is that, while the party urging the estoppel must prove that the issue was actually litigated and that evidence was not *restricted*, he or she need not establish that any particular type of evidence, such as oral testimony, was presented (*191 Cal. App. 3d 221, 226)* . The court noted that in addition to the pleadings and the order, motion, declaration of the plaintiff and points and authorities from the previous case, the court took judicial notice of the file in the previous case. Neither party objected, and judicial notice of the prior file was appropriate. Thus, the court concluded that the trial court had sufficient undisputed facts before it, which were appropriate subjects of judicial notice, to support the conclusion that the issue was, therefore, actually litigated and determined in the prior action (*191 Cal. App. 3d 221, 227)* .

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7-70 California Points & Authorities §§ 70.512-70.519

[Reserved]

§§ 70.512[Reserved]

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7-70 California Points & Authorities § 70.520

§ 70.520 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] in Equity to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress--General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN OPPOSITION TO DEMUR-
Plaintiff,	)	RER TO COMPLAINT FOR EQUITABLE RELIEF
vs.	)	FROM JUDGMENT OBTAINED BY FRAUD OR
_____ [*name*],	)	MISTAKE
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD OVERRULE THE DEMURRER TO THE COMPLAINT BECAUSE THE PLAINTIFF MAY INVOKE EQUITABLE JURISDICTION TO INTERFERE WITH A _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] BY AN INDEPENDENT ACTION IN EQUITY TO SECURE

RELIEF WHEN THE COURT POSSESSES _____ [GENERAL JURISDICTION IN LAW AND IN EQUITY *or* STATUTORY JURISDICTION].

Independent Action in Equity. One who has been prevented by extrinsic factors such as fraud or mistake from presenting his/her case to the court in a prior action may bring an independent action in equity to secure relief from the judgment in such prior action (*Olivera v. Grace (1942) 19 Cal. 2d 570, 575, 122 P.2d 564*).

[*This form may be combined with other points and authorities opposing a demurrer on particular grounds, such as the municipal court has jurisdiction in equity to vacate the judgment or order (see, e.g., §§ 70.521, 70.521)*].

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

Attorney for Plaintiff

[2] Comments

[a] Use of Form

This memorandum may be used to oppose a general demurrer to a complaint in an equitable action for relief from a prior judgment or order allegedly obtained through extrinsic fraud or mistake. The ground for opposition is, in general, that the complaint alleges facts that do constitute a cause of action for equitable relief that is within the court's jurisdiction.

In an appropriate case, this form may be submitted in opposition to the demurrer supported by the points and authorities *set out in § 70.500[1]*.

This form should be combined, when appropriate, with additional points and authorities opposing a demurrer on other grounds [*see, e.g., §§ 70.523 -70.528*].

This form may be combined with other points and authorities opposing a demurrer on particular grounds, such as:

- The municipal court has jurisdiction in equity to vacate the judgment or order [§ 70.521[1]].

- A probate court decree is subject to review in equity on a showing that it was procured by extrinsic fraud or mistake [§ 70.521[2]].

This form may be combined, when appropriate, with additional points and authorities supporting a grant of equitable relief in particular circumstances [*see, e.g., §§ 70.550 -70.623*].

This form may also be adapted for use in a trial or appellate brief.

With appropriate modifications, this form may be used in another procedural context, such as in opposition to a defendant's motion for judgment on the pleadings.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should refer to

specific allegations in the complaint by paragraph number, and to any matter of which the court must or may take judicial notice, that state material facts that establish a cause of action for equitable relief within the court's jurisdiction. See also *§ 70.480[2][b]* regarding evidentiary support for facts stated.

[c] Related Pleading and Practice Chapters

For a general form of demurrer, *see* California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , and for forms of complaint to set aside a judgment rendered due to extrinsic fraud or mistake, *see* Ch. 489, *Relief From Judgments and Orders* , and Ch. 318, *Judgments* (Matthew Bender).

[d] Related Points and Authorities

For general forms of memoranda supporting a demurrer to a complaint or a motion for judgment on the pleadings, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Independent Action in Equity

The facts and procedural background of ***Olivera v. Grace*** *(1942) 19 Cal. 2d 570, 122 P.2d 564* , are discussed in *§ 70.480[3]*. In *Olivera*, the Supreme Court stated that there exists a well-recognized jurisdiction in equity which has been utilized to relieve incompetent defendants from judgments taken under circumstances of unfairness and injustice. Equity's jurisdiction to interfere with final judgments is based on the absence of a fair, adversary trial in the original action. According to the Court, typical of the situations in which equity has interfered with final judgments are the cases when the lack of a fair adversary hearing in the original action is attributable to matters outside the issues adjudicated therein which prevented one party from presenting his or her case to the court, as for example, when there is extrinsic fraud (*19 Cal. 2d 570, 575)* . The Court held that the action by the defendant constituted extrinsic fraud, and ruled that the facts set forth were sufficient to justify the intervention of a court of equity (*19 Cal. 2d 570, 577-578)* .

[4] Additional Authorities

[a] Independent Action in Equity

The facts and procedural background of *Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 305 P.2d 20* , are discussed in *§ 70.502[4]*. In *Bennett*, the Supreme Court ruled that a suit in equity instituted for the purpose of vacating a judgment is a direct attack which may be made on the ground of extrinsic fraud or mistake (*47 Cal. 2d 540, 558)* .

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7-70 California Points & Authorities § 70.521

§ 70.521 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] in Equity to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress--Municipal Court's Statutory Jurisdiction

[1] FORM

[*This form should be combined with a memorandum generally opposing a demurrer to a complaint in equity to vacate a judgment or order (see § 70.520[1]).*]

THE COURT SHOULD OVERRULE THE DEMURRER TO THE COMPLAINT BECAUSE THE MUNICIPAL COURT HAS JURISDICTION IN EQUITY TO DO SO.

Municipal Court's Statutory Jurisdiction. Municipal courts have jurisdiction in equity to vacate a judgment or order obtained through extrinsic fraud or mistake (*Code Civ. Proc. § 86(b)(3)*).

[2] Comments

[a] Use of Form

This memorandum may be used to oppose a general demurrer to a complaint in an equitable action for relief from a prior judgment or order allegedly obtained through extrinsic fraud or mistake. The ground for opposition is that the municipal court has jurisdiction in equity to vacate the judgment or order [*Code Civ. Proc. § 86(b)(3)*].

In an appropriate case, this form may be submitted in opposition to the demurrer supported by the points and authorities *set out in § 70.500[1]*.

These points and authorities should be combined with a form of points and authorities generally opposing a general demurrer to a complaint in an equitable action for relief [*see § 70.520[1*].

This form may also be adapted for use in a trial or appellate brief.

For references to related Pleading and Practice Chapters and points and authorities, see *§ 70.520[2]*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 70.480[2][b]* regarding evidentiary support for facts stated.

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7-70 California Points & Authorities § 70.522

§ 70.522 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] in Equity to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress--Review of Probate Court Decrees

[1] FORM

[*This form should be combined with a memorandum generally opposing a demurrer to a complaint in equity to vacate a judgment or order (see § 70.520[1]).*]

THE COURT SHOULD OVERRULE THE DEMURRER TO THE COMPLAINT BECAUSE A PROBATE COURT DECREE IS SUBJECT TO REVIEW IN EQUITY ON A SHOWING THAT IT WAS PROCURED BY EXTRINSIC FRAUD OR MISTAKE.

Review of Probate Court Decrees. A probate court decree is subject to review in equity on a showing that it was procured by extrinsic fraud or mistake (*Bacon v. Bacon (1907) 150 Cal. 477, 481, 89 P. 317*).

[2] Comments

[a] Use of Form

This memorandum may be used to oppose a general demurrer to a complaint in an equitable action for relief from a prior judgment or order allegedly obtained through extrinsic fraud or mistake. The ground for opposition is that a probate court decree is subject to review in equity on a showing that it was procured by extrinsic fraud or mistake [*Bacon v. Bacon (1907) 150 Cal. 477, 481, 89 P. 317]* .

In an appropriate case, this form may be submitted in opposition to the demurrer supported by the points and authorities *set out in § 70.500[1]*.

These points and authorities should be combined with a form of points and authorities generally opposing a general

demurrer to a complaint in an equitable action for relief [*see § 70.520[1*].

This form may also be adapted for use in a trial or appellate brief.

For references to related Pleading and Practice Chapters and points and authorities, see *§ 70.520[2]*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In his or her argument, counsel would refer to specific allegations in the complaint, by paragraph number, and to any matter of which the court must or may take judicial notice.

[3] Discussion of Authorities

[a] Review of Probate Court Decrees

Bacon v. Bacon *(1907) 150 Cal. 477, 89 P. 317* , involved an equitable action to declare a probate court decree void and to revise the distribution ordered therein. In the probate proceedings, a will which gave the plaintiff a legacy of $10,000 was, by mistake, copied so as to give her only $2,000. As a result of that mistake and without the negligence of the plaintiff, the final decree was for distribution of the latter amount only with the balance going to residuary legatees. On discovery of the mistake, the plaintiff sued and obtained a judgment declaring that the legacy bequeathed to her was the larger sum, that the balance remained unpaid, that a lien be declared on property of the estate which had been distributed, and that the decree of satisfaction be held void.

The Supreme Court affirmed the judgment. On appeal, the defendants contended that the superior court had no jurisdiction of the subject matter of the action and that decrees of distribution cannot be reviewed in equity. The Supreme Court ruled that the complaint stated a cause of action within the class of actions cognizable in equity and within the jurisdiction of the superior courts. Moreover, the Court held, the proposition that a decree of distribution is subject to review in equity on a showing that it was procured by fraud or mistake was well settled (*150 Cal. 477, 481)* . On analysis of facts showing the plaintiff had relied on statements made by her husband and the executors, who were also residuary legatees, that the legacy was the smaller sum and thus failed to appear at the time of the distribution, the Court concluded that she was not negligent and that there had been extrinsic mistake (*150 Cal. 477, 492-493)* .

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7-70 California Points & Authorities § 70.523

§ 70.523 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] in Equity to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress--Action Not Barred by Statute of Limitations or Laches Due to Tolling of Three-Year Statute of Limitations Until Discovery of Facts Constituting Fraud or Mistake--General Form

[1] FORM

[*Caption. See § 70.520[1].*]

THE COURT SHOULD OVERRULE THE DEMURRER TO THE COMPLAINT BECAUSE A CAUSE OF ACTION FOR EQUITABLE RELIEF FROM A _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] OBTAINED BY FRAUD OR MISTAKE DOES NOT ACCRUE UNTIL THE DISCOVERY, BY THE AGGRIEVED PARTY, OF THE FACTS CONSTITUTING THE FRAUD OR MISTAKE, AND THE MERE FACT THAT AN EARLIER INVESTIGATION MIGHT HAVE REVEALED SUCH FACTS WILL NOT ALONE BAR RECOVERY.

A. Accrual of Action for Relief From Fraud or Mistake. Although an action for relief on the ground of fraud or mistake must be commenced within three years, the cause of action will not be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake (*Code Civ. Proc. § 338(d)*).

B. Investigation Which Would Have Revealed Facts. The fact that an investigation would have revealed the fraud or mistake sooner will not alone bar recovery. Further, a party's right to proceed on the theory of fraud or mistake is not destroyed merely because opportunities for examination or means of knowledge were open to the party when no legal duty devolved on him or her to employ that means of knowledge (*Harkins v. Fielder (1957) 150 Cal. App. 2d 528, 538, 310 P.2d 423*).

[*This form may be combined with other points and authorities opposing a demurrer on particular grounds, such as the municipal court has jurisdiction in equity to vacate the judgment or order (see, e.g., §§ 70.524, 70.525)*].

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

Attorney for Plaintiff

[2] Comments

[a] Use of Form

This memorandum may be used to oppose a general demurrer to a complaint in an equitable action for relief from a prior judgment or order allegedly obtained through extrinsic fraud or mistake. The ground for opposition is that the three-year statute of limitations [*Code Civ. Proc. § 338(d)*] does not operate to bar the cause of action because plaintiff has alleged facts showing that the statute was tolled until discovery of the facts constituting the fraud or mistake.

In an appropriate case, this form may be submitted in opposition to the demurrer supported by the points and authorities *set out in § 70.502[1]*.

This form may be combined with other points and authorities opposing a demurrer on particular grounds, such as:

- The statute of limitation was tolled until the plaintiff discovers fraudulent concealment by the defendant that caused the plaintiff to forgo investigation [§ 70.524[1]].

- Defendant made representations that dissuaded inquiry and thereby precluded constructive notice to the plaintiff [§ 70.525[1]].

This form should be combined, when appropriate, with additional points and authorities opposing a demurrer on other grounds [*see, e.g., §§ 70.520 -70.522, 70.526 -70.528*].

This form may be combined, when appropriate, with additional points and authorities supporting a grant of equitable relief in particular circumstances [*see, e.g., §§ 70.550 -70.623*].

This form may also be adapted for use in a trial or appellate brief.

With appropriate modifications, this form may be used in another procedural context, such as in opposition to a defendant's motion for judgment on the pleadings or motion for summary judgment. If modified for use in opposing a motion for summary judgment, counsel should attach opposing affidavits or declarations and a separate statement of material facts in addition to the opposing memorandum [*see Code Civ. Proc. § 437c(b)*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In the argument, counsel should refer to specific allegations in the complaint, by paragraph number, and to any matter of which the court must or may take judicial notice.

[c] Related Pleading and Practice Chapters

For a general form of demurrer, *see* California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , and for forms of complaint to set aside a judgment rendered due to extrinsic fraud or

mistake, *see* Ch. 489, *Relief From Judgments and Orders* , and Ch. 318, *Judgments* (Matthew Bender). For a form of demurrer to a complaint based on the bar of a statute of limitations, see Ch. 345, *Limitation of Actions* in that publication.

[d] Related Points and Authorities

For general forms of memoranda opposing a demurrer to a complaint or a motion for judgment on the pleadings, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For a general memorandum opposing a general demurrer to a complaint on the ground of lapse of the applicable statute of limitations, see Ch. 143, *Limitation of Actions* . For general forms of memoranda opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Investigation Which Would Have Revealed Facts

Harkins v. Fielder *(1957) 150 Cal. App. 2d 528, 310 P.2d 423* , involved actions seeking adjudications that property distributed pursuant to a probate decree be held in trust for the plaintiffs. The decedent died intestate leaving a brother who was the distributee, a half brother, and four half sisters who were the plaintiffs in the action at issue. The trial court found that the distributee breached a duty to disclose to the probate court, to his attorneys, and to his nominee for the position of administrator of the estate, the existence of the plaintiffs; that he breached a duty to the plaintiffs to refrain from any conduct preventing communication to them of their interest in the intestate's estate. These breaches of duty amounted to a fraud by which he was unjustly enriched. The defendants appealed.

The court of appeal affirmed judgments for the plaintiffs. The defendant argued that the statute of limitations barred the action in that the plaintiffs had known of the intestate decedent's death and that his property was being transferred to the defendant and were thus put on inquiry regarding the probate proceedings as to the means by which defendant was acquiring the property. The court of appeal, however, ruled that the fact that an investigation would have revealed the fraud sooner will not alone bar recovery. A party's right to seek equitable relief from a prior judgment on the theory of fraud is not destroyed merely because opportunities for examination or means of knowledge were open to him or her when no legal duty devolved on him or her to employ such means of knowledge. On analysis of the evidence, the court of appeal ruled that it could not hold as a matter of law that any of the circumstances known to the plaintiffs should have put a reasonably prudent person on inquiry at an earlier time. Since it is a question for the trier of fact to determine whether the plaintiffs' delay in the investigation and discovery of the true facts was reasonable and excusable, and since the trial court had decided in favor of the plaintiff, the judgment was affirmed (*150 Cal. App. 2d 528, 539)* .

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7-70 California Points & Authorities § 70.524

§ 70.524 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] in Equity to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress--Action Not Barred by Statute of Limitations or Laches Due to Tolling of Three-Year Statute of Limitations Until Discovery of Facts Constituting Fraud or Mistake--Improper Concealment Causing Lack of Investigation

[1] FORM

[*This form should be combined with a memorandum generally opposing a demurrer to a complaint in equity to vacate a judgment or order on the ground that the action is not barred by the statute of limitations due to tolling (see § 70.520[1]).*]

THE COURT SHOULD OVERRULE THE DEMURRER TO THE COMPLAINT BECAUSE DEFENDANT IMPROPERLY CONCEALED FACTS AT THE TIME OF THE TRANSACTION IN QUESTION AND AFTER THAT TIME THAT CAUSED PLAINTIFF TO FOREGO INVESTIGATION, THEREFORE, THE STATUTE OF LIMITATIONS DID NOT COMMENCE TO RUN UNTIL PLAINTIFF DISCOVERED THE FRAUD THEREBY WORKED.

Improper Concealment Causing Lack of Investigation. When there is an improper concealment of facts at the time of the transaction in question and thereafter that causes a party to forego an investigation, the statute of limitations does not commence to run until the party discovers the fraud thereby worked (*Harkins v. Fielder (1957) 150 Cal. App. 2d 528, 538, 310 P.2d 423*).

[2] Comments

[a] Use of Form

This memorandum may be used to oppose a general demurrer to a complaint in an equitable action for relief from a prior judgment or order allegedly obtained through extrinsic fraud or mistake. The ground for opposition is that the

statute of limitation was tolled until the plaintiff discovered the defendant's fraudulent concealment that caused the plaintiff to forego investigation [*Harkins v. Fielder (1957) 150 Cal. App. 2d 528, 538, 310 P.2d 423]* .

This form should be combined with a memorandum generally opposing a demurrer to a complaint in equity to vacate a judgment or order on the ground that the action is not barred by the statute of limitations due to tolling [*see § 70.520[1]*].

This form may also be adapted for use in a trial or appellate brief.

For references to related Pleading and Practice chapters and points and authorities, § 70.523[2].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, in the case of an improper concealment that caused the plaintiff to forego an investigation, counsel should identify specific allegations in the complaint, by paragraph number, and to any matter of which the court must or may take judicial notice, that raise the issue of concealment.

[3] Discussion of Authorities

[a] Improper Concealment Causing Lack of Investigation

The facts and procedural background of ***Harkins v. Fielder*** *(1957) 150 Cal. App. 2d 528, 310 P.2d 423* , are discussed in *§ 70.523[3]*. In *Harkins*, the court of appeal ruled that it could not hold as a matter of law that any of the circumstances known to the plaintiffs should have put a reasonably prudent person on inquiry at an earlier time (*150 Cal. App. 2d 528, 539)* . When there is an improper concealment of facts at the time of the transaction and thereafter which causes a party to forego an investigation, the statute of limitations does not commence to run until he or she discovers the fraud thereby worked on him or her. When, by reason of representations made to a defrauded party he or she is dissuaded from making inquiry, he or she is not charged with constructive notice of the contents of public records (*150 Cal. App. 2d 528, 538)* .

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7-70 California Points & Authorities § 70.525

§ 70.525 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] in Equity to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress--Action Not Barred by Statute of Limitations or Laches Due to Tolling of Three-Year Statute of Limitations Until Discovery of Facts Constituting Fraud or Mistake--Representations Dissuading Inquiry Precludes Constructive Notice of Public Records

[1] FORM

[*This form should be combined with a memorandum generally opposing a demurrer to a complaint in equity to vacate a judgment or order on the ground that the action is not barred by the statute of limitations due to tolling (see § 70.520[1]).*]

THE COURT SHOULD OVERRULE THE DEMURRER TO THE COMPLAINT BECAUSE PLAINTIFF IS NOT CHARGED WITH CONSTRUCTIVE NOTICE OF PUBLIC RECORDS FOR THE REASON THAT DEFENDANT MADE REPRESENTATIONS TO THE PLAINTIFF THAT DISSUADED HIM/HER FROM MAKING INQUIRY.

Representations Dissuading Inquiry Precludes Constructive Notice. When, by reason of representations made to a defrauded party, he or she is dissuaded from making inquiry, he or she is not charged with constructive notice of the contents of public records [which might have revealed the pertinent facts] (*Harkins v. Fielder (1957) 150 Cal. App. 2d 528, 538, 310 P.2d 423*).

[2] Comments

[a] Use of Form

This memorandum may be used to oppose a general demurrer to a complaint in an equitable action for relief from a prior judgment or order allegedly obtained through extrinsic fraud or mistake. The ground for opposition is that the defendant made representations that dissuaded inquiry, thereby precluding constructive notice to the plaintiff [*Harkins v. Fielder (1957) 150 Cal. App. 2d 528, 538, 310 P.2d 423]* .

This form should be combined with a memorandum generally opposing a demurrer to a complaint in equity to vacate a judgment or order on the ground that the action is not barred by the statute of limitations due to tolling [*see § 70.520[1]*].

This form may also be adapted for use in a trial or appellate brief.

For references to related Pleading and Practice chapters and points and authorities, see *§ 70.523[2][c]*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, in the case of an improper representations that caused the plaintiff to forego an inquiry of public records, counsel should identify specific allegations in the complaint, by paragraph number, and to any matter of which the court must or may take judicial notice, that raise the issue of such improper representations.

[3] Discussion of Authorities

[a] Representations Dissuading Inquiry Precludes Constructive Notice

The facts and procedural background of ***Harkins v. Fielder*** *(1957) 150 Cal. App. 2d 528, 310 P.2d 423* , are discussed in *§ 70.524[3]*. In *Harkins*, the court found that, as a matter of law, none of the circumstances known to the plaintiffs should have put a reasonably prudent person on inquiry at an earlier time (*150 Cal. App. 2d 528, 539)* . The court went on to state that when there is an improper concealment of facts at the time of the transaction and thereafter which causes a party to forego an investigation, the statute of limitations does not commence to run until he or she discovers the fraud thereby worked on him or her. When, by reason of representations made to a defrauded party he or she is dissuaded from making inquiry, he or she is not charged with constructive notice of the contents of public records (*150 Cal. App. 2d 528, 538)* .

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7-70 California Points & Authorities § 70.526

§ 70.526 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] in Equity to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress--Action Not Barred by Statute of Limitations or Laches Due to Aggrieved Party's Disability

[1] FORM

[*Caption. See § 70.520[1].*]

THE COURT SHOULD OVERRULE THE DEMURRER TO THE COMPLAINT BECAUSE A COMPLAINT FOR EQUITABLE RELIEF FROM A _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] OBTAINED BY EXTRINSIC FRAUD OR MISTAKE IS NOT BARRED, EVEN THOUGH IT SHOWS ON ITS FACE THAT IT WAS BROUGHT MORE THAN THREE YEARS BUT LESS THAN FOUR YEARS AFTER THE CAUSE OF ACTION AROSE, WHEN THE GRAVAMEN OF THE COMPLAINT IS THE DISABILITY OF THE AGGRIEVED PARTY IN THE ACTION LEADING TO THE JUDGMENT UNDER ATTACK.

Four-Year Period of Limitation Applicable. An action for relief from a judgment, grounded on the disability of a party in the action leading to the judgment under attack, is within the reach of *Section 343 of the Code of Civil Procedure*, the four-year statute of limitations governing actions not otherwise covered by statute (*Zastrow v. Zastrow (1976) 61 Cal. App. 3d 710, 716-717, 132 Cal. Rptr. 536*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

Attorney for Plaintiff

[2] Comments

[a] Use of Form

This memorandum may be used to oppose a general demurrer to a complaint in an equitable action for relief from a prior judgment or order allegedly obtained through extrinsic fraud or mistake. The ground for opposition is that the three-year statute of limitations [*Code Civ. Proc. § 338(d)*] does not operate to bar the cause of action because plaintiff has alleged facts showing his or her disability, so as to bring the cause of action within the four-year limitation period of *Code Civ. Proc. § 343*.

In an appropriate case, this form may be submitted in opposition to the demurrer supported by the points and authorities *set out in § 70.502[1]*.

This form should be combined, when appropriate, with additional points and authorities opposing a demurrer on other grounds [*see, e.g., §§ 70.520 -70.525, 70.527, 70.528*]. This form may be combined, when appropriate, with additional points and authorities supporting a grant of equitable relief in particular circumstances [*see, e.g., §§ 70.550 -70.623*].

With appropriate modifications, this form may be used in another procedural context, such as in opposition to a defendant's motion for judgment on the pleadings or motion for summary judgment. If modified for use in opposing a motion for summary judgment, counsel should attach opposing affidavits or declarations and a separate statement of material facts in addition to the opposing memorandum [*see Code Civ. Proc. § 437c(b)*].

This form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should refer to specific allegations in the complaint, by paragraph number, and to any matter of which the court must or may take judicial notice, that establish:

- Plaintiff's disability led to the judgment under attack; and
- The action was brought less than four years after the cause of action arose.

[c] Related Pleading and Practice Chapters

For a general form of demurrer, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For forms of complaint to set aside a judgment rendered due to extrinsic fraud or mistake, see Ch. 489, *Relief From Judgments and Orders* , and Ch. 318, *Judgments* , in that publication. For a form of demurrer to a complaint based on the bar of a statute of limitations, see Ch. 345, *Limitation of Actions* in that publication.

[d] Related Points and Authorities

For general forms of memoranda opposing a demurrer to a complaint or a motion for judgment on the pleadings, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For a general memorandum opposing a general demurrer to a complaint on the ground of lapse of the applicable statute of limitations, see Ch. 143, *Limitation of Actions* . For general forms of memoranda opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Four-Year Period of Limitation Applicable

In ***Zastrow v. Zastrow*** *(1976) 61 Cal. App. 3d 710, 132 Cal. Rptr. 536* , former wife sued the former husband to set aside the divorce decree and rescind the property settlement agreement, alleging her mental incompetence at the time of the property settlement agreement and marital dissolution decree incorporating it. The former husband filed a demurrer, alleging that the action was barred by former Code Civ. Proc. § 338(4) [*now see Code Civ. Proc. § 338(d)*], the three-year statute of limitations. The trial court sustained the demurrer without leave to amend, and the former wife appealed.

The court of appeal reversed, as the trial court's ruling was apparently based on the thesis that the suit was one to rescind a property settlement agreement that had merged with a judicial decree procured by fraud or mistake and was thus governed by the three-year statute of limitations was hence barred thereby since it was filed three years and five months after the statute began to run (*61 Cal. App. 3d 710, 713)* . The court of appeal noted that the suit involved an action by an ex-wife against her ex-husband, alleging her mental incompetence at the time of the execution of a property settlement agreement and the entry of the marital dissolution decree incorporating it. The plaintiff charged neither fraud nor mistake in express terms, although her complaint alleged facts which might culminate in findings of fraud or mistake. However, neither of these represented the dominant fact at the heart of her claim: mental incompetence. Fraud and mistake are the usual, but not the only grounds for equitable relief from a judgment. Equity has power to relieve incompetent defendants from judgments taken under circumstances of unfairness and injustice which deprive them of a fair opportunity fully to submit their cases to the courts (*61 Cal. App. 3d 710, 715-716)* . Thus, the plaintiff sought relief on the ground of her mental incompetence; a ground entirely distinct from fraud and mistake and outside the ambit of *Code Civ. Proc. § 338(d)* but within the reach of the four-year statute of limitations governing actions not otherwise covered by statute (*Code Civ. Proc. § 343*) (*61 Cal. App. 3d 710, 717)* .

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7-70 California Points & Authorities § 70.527

§ 70.527 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] in Equity to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress--Action Not Barred by Laches Due to Reasonable Diligence in Commencing Action--General Form

[1] FORM

[*Caption. See § 70.520[1].*]

THE COURT SHOULD OVERRULE THE DEMURRER TO THE COMPLAINT BECAUSE THE COMPLAINT SEEKING EQUITABLE RELIEF FROM A _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] OBTAINED BY FRAUD OR MISTAKE IS NOT BARRED BY LACHES, IN THAT THE FACTS ALLEGED SHOW THAT PLAINTIFF, AFTER DISCOVERY OF THE FACTS CONSTITUTING THE FRAUD OR MISTAKE, EXERCISED REASONABLE DILIGENCE THEREAFTER IN THE COMMENCEMENT AND PROSECUTION OF THE ACTION.

Reasonable Diligence After Discovery of Facts. A plaintiff seeking equitable relief from a prior judgment obtained by extrinsic fraud or mistake is not barred by laches from maintaining suit until after he or she discovers the facts constituting the fraud or mistake if, on learning the facts which leads him or her to suspect the fraud or mistake, the plaintiff exercises reasonable diligence in the commencement and prosecution of the action (*In re Marriage of Modnick (1983) 33 Cal. 3d 897, 908-910, 191 Cal. Rptr. 629, 663 P.2d 187* ; *Sullivan v. Lumsden (1897) 118 Cal. 664, 670, 50 P. 777*).

[*This form may be combined with other points and authorities opposing a demurrer on particular grounds, such as when the opposing party has suffered only minimal prejudice (see, e.g., § 70.528[1])*].

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

Attorney for Plaintiff

[2] Comments

[a] Use of Form

This memorandum may be used to oppose a general demurrer to a complaint in an equitable action for relief from a prior judgment or order allegedly obtained through extrinsic fraud or mistake. The ground for opposition is that the plaintiff is not barred under the doctrine of laches, because the allegations sufficiently establish that the plaintiff, after learning of the facts concerning the fraud or mistake, exercised reasonable diligence in commencing and prosecuting the action.

In an appropriate case, this form may be submitted in opposition to the demurrer supported by the points and authorities *set out in § 70.503[1]*.

This form may be combined with other points and authorities opposing a demurrer on particular grounds, such as when the opposing party has suffered only minimal prejudice [*see, e.g., § 70.528[1]*]. This form should be combined, when appropriate, with additional points and authorities opposing a demurrer on other grounds [*see, e.g., §§ 70.520 -70.526*]. This form may be combined, when appropriate, with additional points and authorities supporting a grant of equitable relief in particular circumstances [*see, e.g., §§ 70.550 -70.623*].

With appropriate modifications, this form may be used in another procedural context, such as in opposition to a defendant's motion for judgment on the pleadings or motion for summary judgment. If modified for use in opposing a motion for summary judgment, counsel should attach opposing affidavits or declarations and a separate statement of material facts in addition to the opposing memorandum [*see Code Civ. Proc. § 437c(b)*].

This form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should refer to specific allegations in the complaint, by paragraph number, and to any matter of which the court must or may take judicial notice, that show that the plaintiff, on learning the facts that led him or her to suspect the fraud or mistake, exercised reasonable diligence in commencing the action.

[c] Related Pleading and Practice Chapters

For a general form of demurrer, *see* California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For forms of complaint to set aside a judgment rendered due to extrinsic fraud or mistake, *see* Ch. 489, *Relief From Judgments and Orders* , and Ch. 318, *Judgments* , in that publication.

[d] Related Points and Authorities

For general forms of memoranda opposing a demurrer to a complaint or a motion for judgment on the pleadings, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For general forms of memoranda opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Reasonable Diligence After Discovery of Facts

In re Marriage of Modnick *(1983) 33 Cal. 3d 897, 191 Cal. Rptr. 629, 663 P.2d 187* , involved a dissolution action in which the trial court had entered interlocutory and final judgments. After entry, the wife moved to vacate the judgments on the basis of extrinsic fraud, claiming that the husband had concealed the existence of certain community property during the proceedings. However, on reliance on her husband's assurances that she would not have to pursue legal remedies to obtain a fair division of the hidden property, she abandoned her motion, discharged her attorney, and had several meetings with her former husband and his counsel. When negotiations failed, she hired a new attorney who later withdrew from the action. After the present attorney was hired and another six months of futile negotiations were engaged in, a second motion to vacate was filed. The trial court denied the motion. The wife appealed.

The Supreme Court reversed the order of the trial court denying the wife's motion to vacate the interlocutory and final judgments of dissolution insofar as it related to the property settlement incorporated into the divorce decree and the award of spouse support. In all other aspects, the Court affirmed the order. One of the husband's arguments was that his wife was barred from seeking equitable relief by the doctrine of laches. In examining the reasonableness of the wife's actions in not filing a motion to vacate earlier, the Court found that, under the circumstances, the wife had acted with reasonable diligence in seeking relief following her discovery of the concealment. Therefore, the doctrine of laches did not preclude the claim of fraud (*33 Cal. 3d 897, 910)* .

In ***Sullivan v. Lumsden*** *(1897) 118 Cal. 664, 50 P. 777* , the plaintiffs brought an action to have a decree of partition of certain lands vacated and set aside and a new partition made, on the ground that the referees and the court, in the prior action, by mistake and inadvertence, failed to allot or set apart to the plaintiffs any part or interest in the lands, but did set apart to them land in an adjoining lot, to which the plaintiffs could thereby acquire no title. The case was tried and the trial court found, among other things, that the averments of the complaint were true, and gave judgment in favor of the plaintiffs as prayed for. The defendants appealed from the judgment and an order denying a new trial.

The Supreme Court affirmed. The Supreme Court noted that the suit in equity was brought within one year after the original decree ordering partition of lands was entered (*118 Cal. 664, 667)* , that there was nothing in the report of the referees, the record of the prior action, or the decree to indicate the mistake. The Court further noted that the mistake was concealed by reason of the description of the lands in the complaint. Moreover, without fault or negligence on the part of the plaintiffs, the mistake was not discovered until after their remedy by motion or other legal process in the original action had expired. The plaintiffs took immediate steps to ascertain the facts as soon as they received information which led them to suspect the mistake and employed counsel to prosecute the suit in action. At all times, said the Court, they used reasonable diligence in the commencement and prosecution of the action. Thus, the Court held that the plaintiffs were not barred from maintaining their action by reason of delay or laches (*118 Cal. 664, 670)* , and the Court concluded that it found nothing in the record calling for a reversal, and affirmed the judgment and order appealed from (*118 Cal. 664, 671)* .

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2. Suits in Equity

7-70 California Points & Authorities § 70.528

§ 70.528 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] in Equity to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress--Action Not Barred by Laches Due to Reasonable Diligence in Commencing Action--Minimal Prejudice to Opposing Party

[1] FORM

[*This form should be combined with a memorandum generally opposing a demurrer to a complaint in equity to vacate a judgment or order on the ground that the action is not barred by laches (see § 70.527[1]).*]

THE COURT SHOULD OVERRULE THE DEMURRER TO THE COMPLAINT BECAUSE THE COMPLAINT SEEKING EQUITABLE RELIEF FROM A _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] OBTAINED BY FRAUD OR MISTAKE IS NOT BARRED BY LACHES, IN THAT THE PREJUDICE SUFFERED BY THE DEMURRING PARTY, IF ANY, IS MINIMAL AT MOST.

Minimal Prejudice to Opposing Party. The doctrine of laches will not bar a motion to vacate a judgment on the basis of fraud when the moving party has been reasonably diligent in seeking relief and the prejudice resulting to the opposing party from the delay is minimal at most (*In re Marriage of Modnick (1983) 33 Cal. 3d 897, 908-910, 191 Cal. Rptr. 629, 663 P.2d 187*).

[2] Comments

[a] Use of Form

This memorandum may be used to oppose a general demurrer to a complaint in an equitable action for relief from a prior judgment or order allegedly obtained through extrinsic fraud or mistake. The ground for opposition is that the prejudice suffered by the demurring party, if any, is minimal at most [*In re Marriage of Modnick (1983) 33 Cal. 3d 897, 908-910, 191 Cal. Rptr. 629, 663 P.2d 187]* .

In an appropriate case, this form may be submitted in opposition to the demurrer supported by the points and authorities *set out in § 70.503[1]*.

For references to related Pleading and Practice chapters and points and authorities, see *§ 70.527[2]*.

This form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should refer to specific allegations in the complaint, by paragraph number, and to any matter of which the court must or may take judicial notice, that show that the prejudice suffered by the defendant, if any, is minimal at most.

[3] Discussion of Authorities

[a] Minimal Prejudice to Opposing Party

The facts and procedural background of ***In re Marriage of Modnick*** *(1983) 33 Cal. 3d 897, 191 Cal. Rptr. 629, 663 P.2d 187* , are discussed in *§ 70.527[3]*. In that case, the Supreme Court held that a two-year delay in seeking relief from a judgment on the basis of concealment of property by the moving party's former husband was not barred by laches. The concealment on which the motion was based took place over a period of eight years prior to the motion, and the Court held that a two-year delay did not significantly add to the husband's burden to account for the concealed property for that period of time (*33 Cal. 3d 897, 908-909)* . In passing on the argument of laches, the Court held, the court must look to the extent of prejudice to the opposing party and to the reasonableness of the moving party in not filing the motion earlier (*33 Cal. 3d 897, 908)* . In the present case, such prejudice was minimal, if any, and was balanced by reasonable diligence on the part of the moving party in seeking relief (*33 Cal. 3d 897, 910)* .

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7-70 California Points & Authorities §§ 70.529-70.539

[Reserved]

§§ 70.529[Reserved]

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2. Suits in Equity

7-70 California Points & Authorities § 70.540

§ 70.540 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c] on Complaint in Equity to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress on Ground That Prior Motion to Vacate Does Not Bar Present Action--General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN OPPOSITION TO MOTION
Plaintiff,	)	FOR SUMMARY JUDGMENT ON COMPLAINT
vs.	)	FOR RELIEF FROM JUDGMENT OBTAINED BY
_____ [*name*],	)	FRAUD OR MISTAKE
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD DENY THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE A TRIABLE ISSUE OF MATERIAL FACT EXISTS AND THE MOVING PARTY IS NOT ENTITLED TO A JUDGMENT AS A MATTER OF LAW, IN THAT, ALTHOUGH THERE WAS A PRIOR MOTION TO VACATE

THE EARLIER _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER], PLAINTIFF DID NOT MAKE A DETAILED PRESENTATION OF THE ISSUE(S) OF EXTRINSIC _____ [FRAUD *and/or* MISTAKE], NOR DID HE/SHE HAVE A FULL OPPORTUNITY AT THE TIME OF THE HEARING TO DEVELOP THE ISSUE(S) BY ORAL TESTIMONY.

A. No Summary Judgment Unless There Are No Triable Issues. A motion for summary judgment is appropriate only when no triable issue of material fact exists and when the moving party's affidavits set forth sufficient facts to sustain a judgment in its favor. A defendant moving for summary judgment maintains the burden of establishing the lack of merit of the plaintiff's action. Because of the drastic nature of the relief sought, the affidavits of the party moving for summary judgment must be strictly construed, while a liberal construction must be accorded any affidavits in opposition (*Rohrbasser v. Lederer (1986) 179 Cal. App. 3d 290, 296, 224 Cal. Rptr. 791*).

B. Attack on Judgment by Motion to Vacate and Independent Equitable Action Distinct and Cumulative. It is well settled in California that a judgment procured by extrinsic fraud or mistake may be attacked either by a motion in the same action or by an independent action in a court having equity jurisdiction, and that each remedy is distinct and cumulative. The preferred practice is for plaintiff to seek a summary disposition of the issue of whether the prior judgment was procured by extrinsic fraud or mistake on motion, and if defeated in that proceeding to commence a separate action for relief (*Estudillo v. Security Loan etc. Co. (1906) 149 Cal. 556, 565, 87 P. 19* ; *Rohrbasser v. Lederer (1986) 179 Cal. App. 3d 290, 297-298, 224 Cal. Rptr. 791*).

C. Test Is Whether Issues Were Fully Presented or Full Opportunity to Develop Issues by Oral Testimony Granted. The test is whether the person attacking the judgment made a detailed presentation of the issues of fraud or mistake on his or her motion to vacate, or was given a full opportunity at the time of the hearing to develop the issues by oral testimony. Otherwise, denial of the motion is not res judicata of the issues and the subsequent independent action can be maintained (*Rohrbasser v. Lederer (1986) 179 Cal. App. 3d 290, 298, 224 Cal. Rptr. 791*).

[*This form may be combined with other points and authorities opposing a motion for summary judgment or demurrer (see, e.g., § 70.541[1])*].

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

Attorney for Plaintiff

[2] Comments

[a] Use of Form

This memorandum may be submitted by a plaintiff in an action for equitable relief from a judgment allegedly obtained through extrinsic fraud or mistake in opposition to a defendant's motion for summary judgment. The ground for opposition is that summary judgment is improper because a triable issue of material fact exists, and defendant is not entitled to judgment as a matter of law [*see Code Civ. Proc. § 437c(a), (c)*], in that all the papers submitted for and against the motion show that, although plaintiff had previously submitted a motion to vacate the judgment on the same grounds, he or she either did not make a detailed presentation of the issue of extrinsic fraud or mistake, or was not granted a full opportunity to develop the issue by oral testimony. Counsel should attach opposing affidavits or declarations and a separate statement of material facts in addition to the opposing memorandum [*see Code Civ. Proc. § 437c(b)*].

In an appropriate case, this form may be submitted in opposition to the demurrer supported by the points and authorities *set out in § 70.510[1]*.

This form may be combined with other points and authorities opposing a motion for summary judgment or demurrer [*see, e.g., § 70.541[1]*]. This form may be combined, when appropriate, with additional points and authorities supporting a grant of equitable relief in particular circumstances [*see, e.g., §§ 70.550 -70.623*].

With appropriate modifications, this form may be used in another procedural context, such as in opposition to a demurrer or motion for judgment on the pleadings [*see Barker v. Hull (1987) 191 Cal. App. 3d 221, 226, 236 Cal. Rptr. 285]* .

This form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Therefore, in counsel's argument, counsel should refer to the record of the motion to vacate, as well as any pertinent affidavits or declarations, and identify: (1) the issues of fraud or mistake that must have been raised under the prior motion to vacate to bar the present action; and (2) facts showing either that a full presentation of those issues were not made, or that the plaintiff in this action was not granted a full opportunity to develop the issue by oral testimony. See also *§ 70.480[2][b]* regarding evidentiary support for facts stated.

[c] Related Pleading and Practice Chapters

For a general form of summary judgment, an opposing declaration, and an opposing statement of material facts, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender). For forms of complaint to set aside a judgment rendered due to extrinsic fraud or mistake, *see* Ch. 489, *Relief From Judgments and Orders* , and Ch. 318, *Judgments* , in that publication.

[d] Related Points and Authorities

For general forms of memoranda supporting a motion for summary judgment, see Ch. 221, *Summary Judgments* . For general forms of memoranda supporting a demurrer to a complaint or a motion for judgment on the pleadings, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] No Summary Judgment Unless There Are No Triable Issues

In ***Rohrbasser v. Lederer*** *(1986) 179 Cal. App. 3d 290, 224 Cal. Rptr. 791* , the plaintiff was an assignee of a default judgment obtained in an earlier action against the defendant. The plaintiff brought the action to set aside a fraudulent conveyance by the defendant. In addition to answering the complaint, the defendant filed a cross complaint against the plaintiff seeking to set aside the default judgment on the ground of extrinsic fraud. The cross complainant had also sought to vacate the default and set aside the default judgment previous to the present action by a motion, which was denied. The cross defendant filed a motion for summary judgment, claiming that the cross complaint was barred by the doctrine of res judicata, and contending that the issues raised in the cross complaint were resolved in the cross complainant's motion to vacate the default and set aside the default judgment. The trial court granted the motion and entered judgment for the cross defendant. The cross complainant appealed.

The court of appeal reversed and remanded the matter, instructing the trial court to deny the cross defendant's motion for summary judgment. The court stated that a motion for summary judgment is appropriate only when no triable issue

of material fact exists and when the moving party's affidavits set forth sufficient facts to sustain a judgment in its favor. The court of appeal stated the principle that a defendant moving for summary judgment has the burden of establishing the lack of merit of the plaintiff's action. In addition, the court of appeal cited *Rowland v. Christian (1968) 69 Cal. 2d 108, 111, 70 Cal. Rptr. 97, 443 P.2d 561* , for the proposition that, because of the drastic nature of the relief sought, the affidavits of the party moving for summary judgment must be strictly construed, while a liberal construction must be accorded any affidavits in opposition (*179 Cal. App. 3d 290, 296)* . The court held that the cross complainant's motion to vacate the default and set aside the default judgment could not operate as a bar to the cross complaint (*179 Cal. App. 3d 290, 293, 300)* .

[b] Attack on Judgment by Motion to Vacate and Independent Equitable Action Distinct and Cumulative

In ***Estudillo v. Security Loan etc. Co.*** *(1906) 149 Cal. 556, 87 P. 19* , the plaintiffs were husband and wife who mortgaged certain lands to secure an indebtedness to the defendant loan corporation. Under a judgment of foreclosure entered on their default, the mortgaged premises were sold to the corporation by its codefendant, acting as special commissioner under the decree. The plaintiffs brought an action to obtain a decree vacating the foreclosure sale, canceling the certificates and deeds executed and recorded under the sale, requiring the corporation to account for moneys received by it from the plaintiffs, and for general relief. The trial court sustained the defendant's demurrer. Plaintiffs declined to amend and judgment was entered dismissing the action. The plaintiffs appealed.

The court of appeal reversed and remanded the cause, instructing the trial court to overrule the demurrer with leave to the defendants to answer. The court of appeal considered whether a party against whom an excessive judgment has been entered due to a fraudulent and collusive agreement between his or her attorney and the opposing party can maintain a separate suit in equity to vacate the judgment, or enjoin its enforcement when it appears that he or she had notice of its entry and the fraud in its procurement in ample time to have moved for relief under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*) (*149 Cal. 556, 562-563)* . The court observed that the burden of proof rests on no one more heavily than on a plaintiff seeking relief on the ground of fraud, and that plaintiff ought not to be unduly hampered as to the means of making proof. In support of a motion, the plaintiff is limited to ex parte affidavits of voluntary witnesses unless the court in its discretion permits a wider latitude. In a separate suit, the plaintiff may bring unwilling witnesses into court by subpoena, and may take their depositions. The remedy is ampler and more efficacious, and the case is one which demands the amplest and most efficacious remedy. The court then concluded that the plaintiffs had the right to maintain the suit, notwithstanding they knew of the fraud alleged in ample time to have moved on that ground (*149 Cal. 556, 564)* .

Further, the court stated that the fact that the plaintiff did move to vacate in this case was not res judicata, since the allegations of the complaint did not show that the order denying the motion to vacate is a bar to the action. In this latter regard, the court stated that in an action to set aside a judgment on the ground of fraud, neither the judgment thus sought to be vacated, nor an order refusing to set aside a default and permit an answer in that case can be set up as a bar to the action. The court observed that the correct practice would be to move promptly under former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), and if defeated in that proceeding to commence a separate action for relief on the ground of the plaintiff's fraud; a practice to be commended as convenient and expeditious in case the motion should be granted, and as affording the injured party all the advantage of a regular trial of the issue of fraud if the more summary proceeding proved ineffectual (*149 Cal. 556, 565)* .

The facts and procedural background of ***Rohrbasser v. Lederer*** *(1986) 179 Cal. App. 3d 290, 224 Cal. Rptr. 791* , are discussed under [a], *above*. In *Rohrbasser*, the court of appeal stated that it is well settled in California that a judgment procured by extrinsic fraud or mistake may be attacked either by a motion in the same action or by an independent action in a court having equity jurisdiction, and that each remedy is distinct and cumulative. The court compared, on the one hand, the heavy burden of proof on the plaintiff seeking relief on the ground of fraud, and that he or she is usually limited to evidence in declarations of voluntary witnesses, with, on the other hand, the more effective remedy of a separate suit in which the plaintiff may bring unwilling witnesses into court by subpoena. Citing *Estudillo v. Security*

Loan etc. Co. (1906) 149 Cal. 556, 565, 87 P. 19 (discussed *above*), the court stated that the better practice is to seek a summary disposition of the issue of whether the prior judgment was procured by extrinsic fraud or mistake on motion, and if defeated in that proceeding to commence a separate action for relief (*179 Cal. App. 3d 290, 297-298)* .

[c] Test Is Whether Issues Were Fully Presented or Full Opportunity to Develop Issues by Oral Testimony Granted

The facts and procedural background of ***Rohrbasser v. Lederer*** *(1986) 179 Cal. App. 3d 290, 224 Cal. Rptr. 791* , are discussed under [a], *above*. In *Rohrbasser*, the court of appeal stated that the test for determining whether an order denying a prior motion for relief from a judgment is or is not res judicata is whether the person attacking the judgment made a detailed presentation of the issues of fraud or mistake on his or her motion to vacate, or was given a full opportunity at the time of the hearing to develop the issues by oral testimony. Absent these circumstances, a denial of the motion is not res judicata of the issues and the subsequent independent action can be maintained (*179 Cal. App. 3d 290, 298)* .

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7-70 California Points & Authorities § 70.541

§ 70.541 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437] on Complaint in Equity to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress on Ground That Prior Motion to Vacate Does Not Bar Present Action--Presentation of Issues Test Applies Whether Prior Motion Was in Equity or Under

[1] FORM

[*This form should be combined with a memorandum generally opposing a motion for summary judgment on a complaint in equity to vacate a judgment or order (see § 70.540[1]).*]

THE FULL PRESENTATION OF ISSUES TEST APPLIES WHETHER THE PRIOR MOTION WAS MADE IN EQUITY OR UNDER CODE OF CIVIL PROCEDURE SECTION 473.

Presentation of Issues Test Applies Whether Prior Motion Was in Equity or Under *Code Civ. Proc. § 473* . The test requiring either detailed presentation of issues of extrinsic fraud or mistake or that there was granted a full opportunity to develop those issues by oral testimony, applies regardless of whether the prior motion was made pursuant to *Section 473 of the Code of Civil Procedure* or was one addressed to the equity power of the court (*Rohrbasser v. Lederer (1986) 179 Cal. App. 3d 290, 299, 224 Cal. Rptr. 791*).

[2] Comments

[a] Use of Form

This memorandum may be submitted by a plaintiff in an action for equitable relief from a judgment allegedly obtained through extrinsic fraud or mistake in opposition to a defendant's motion for summary judgment. These points and authorities set forth the rule that the presentation of issues test applies whether prior motion was in equity or under *Code Civ. Proc. § 473*.

This form should be combined with a memorandum generally opposing a motion for summary judgment on a complaint

in equity to vacate a judgment or order [*see § 70.540[1]*].

For references to related Pleading and Practice chapters and points and authorities, see *§ 70.540[2]*.

This form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See the *§ 70.480[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Presentation of Issues Test Applies Whether Prior Motion Was in Equity or Under Code Civ. Proc. § 473

The facts and procedural background of ***Rohrbasser v. Lederer*** *(1986) 179 Cal. App. 3d 290, 224 Cal. Rptr. 791* , are discussed in *§ 70.540[3]*. In *Rohrbasser*, the court of appeal stated that the test for determining whether an order denying a prior motion for relief from a judgment is or is not res judicata, which requires either detailed presentation of issues of extrinsic fraud or mistake or that there was granted a full opportunity to develop those issues by oral testimony, applies regardless of whether the prior motion was made pursuant to former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), or was addressed to the equity power of the court (*179 Cal. App. 3d 290, 299)* .

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7-70 California Points & Authorities §§ 70.542-70.549

[Reserved]

§§ 70.542[Reserved]

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3. Grounds for Granting or Denying Equitable Relief

7-70 California Points & Authorities § 70.550

§ 70.550 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress--General Grounds for Grant of Equitable Relief

[1] FORM

[*The following may be included in a general memorandum supporting a motion in equity (see, e.g., § 70.480[1]), a memorandum opposing a demurrer to a complaint for equitable relief (see, e.g., §§ 70.520 -70.528), a memorandum opposing a defendant's motion for summary judgment in an independent suit in equity (see, e.g., § 70.540[1]), or in a trial or appellate brief.*]

THE COURT SHOULD GRANT RELIEF IN EQUITY AND SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] BECAUSE _____ [THERE WAS AN ABSENCE OF A FAIR ADVERSARY TRIAL AT LAW IN THE ACTION IN WHICH THE JUDGMENT WAS RENDERED *or* THE JUDGMENT IN THE (PRIOR) ACTION WAS TAKEN UNDER CIRCUMSTANCES OF UNFAIRNESS AND INJUSTICE WHICH DEPRIVED THE AGGRIEVED PARTY OF A FAIR OPPORTUNITY TO SUBMIT THE CASE TO THE COURT].

[*EITHER*]

A. Absence of Fair Adversary Trial in Prior Action. Equity's jurisdiction to interfere with final judgments is based on the absence of a fair adversary at law in the original action (*Olivera v. Grace (1942) 19 Cal. 2d 570, 575, 122 P.2d 564*).

[*OR*]

A. Judgment Taken Under Circumstances of Unfairness and Injustice. Equity has power to grant relief from judgments taken under circumstances of unfairness and injustice which deprived the aggrieved party of a fair opportunity to submit his/her case fully to the court (*Zastrow v. Zastrow (1976) 61 Cal. App. 3d 710, 716, 132 Cal. Rptr. 536*).

[*EITHER*]

B. Extrinsic Fraud Which Prevents Fair Adversary Trial. When the lack of a fair adversary hearing in the original action is attributable to matters outside the issues adjudicated therein that prevented one party from presenting a case to the court, as for example, when there was extrinsic fraud, equity will interfere with the final judgment rendered in such prior action (*Olivera v. Grace (1942) 19 Cal. 2d 570, 575, 122 P.2d 564*).

[*OR*]

B. Extrinsic Mistake in Absence of Fair Adversary Trial. Extrinsic mistake is a ground for vacation of a judgment in equity when there has been no fair adversary trial or when the lack of such trial is attributable to extrinsic mistake (*Olivera v. Grace (1942) 19 Cal. 2d 570, 575, 122 P.2d 564*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of the contention that the party is entitled to equitable relief from a prior judgment or order obtained by reason of either extrinsic fraud or mistake. This memorandum establishes the general principle that equity may act when, because of extrinsic fraud or mistake, there was no fair adversary trial in the original action or the judgment was taken under circumstances of unfairness and injustice.

This form should be combined with a general memorandum, depending on the procedural context in which the contention is to be raised. It may, for example, be combined with a general form of points and authorities supporting a motion in equity [*see, e.g., § 70.480[1]*]. It may also be combined with a memorandum used to oppose a defendant's attempt to dispose of an independent suit in equity through a pretrial proceeding such as a general demurrer to the complaint [*see, e.g., §§ 70.520 -70.528*], or a motion for summary judgment [*see, e.g., § 70.540[1]*].

This form may also be combined, when appropriate, with additional points and authorities supporting a grant of equitable relief on other particular grounds [*see, e.g., §§ 70.560 -70.623*].

See also *§ 70.480[2]* for additional general considerations relating to equitable relief, and alternative methods for obtaining relief.

This form may also be used in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus counsel should refer to specific facts establishing that the plaintiff was prevented from exhibiting fully his or her case. For example, counsel may refer to testimony that establishes the probability that the plaintiff's former, regularly employed, attorney corruptly sold out plaintiff's interests to the opposing side [*see United States v. Throckmorton (1878) 98 U.S. 61, 66, 25 L. Ed. 93* , discussed under [4], *below*].

See also *§ 70.480[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In appropriate cases, the points and authorities *set out in §§ 70.630* -780.668, and *70.660 -70.670* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Absence of Fair Adversary Trial in Prior Action

The facts and procedural background of ***Olivera v. Grace*** *(1942) 19 Cal. 2d 570, 122 P.2d 564* , are discussed in *§ 70.480[3]* [*see also* discussion in *§ 70.520[3]*]. In *Olivera*, the Supreme Court observed that equity's jurisdiction to interfere with final judgments is based on the absence of a fair, adversary trial in the original action and that typical situations in which equity has interfered with such judgments are cases when the lack of a fair adversary hearing in the original action is attributable to matters outside the issues adjudicated therein which prevented one party from presenting his or her case to the court, as for example, when there is extrinsic fraud or mistake. The Court concluded that one who has been prevented by extrinsic factors from presenting his or her case to the court may bring an independent action in equity to secure relief from the judgment entered against him or her (*19 Cal. 2d 570, 575)* .

[b] Judgment Taken Under Circumstances of Unfairness and Injustice

The facts and procedural background of ***Zastrow v. Zastrow*** *(1976) 61 Cal. App. 3d 710, 132 Cal. Rptr. 536* , are discussed in *§ 70.526[3]*. In *Zastrow*, the court of appeal stated that fraud and mistake are the usual but not the only grounds for equitable relief from a judgment. Citing *Olivera v. Grace (1942) 19 Cal. 2d 570, 575, 122 P.2d 564* , the court pointed out that equity has power to relieve incompetent defendants from judgments taken under circumstances of unfairness and injustice which deprive them of a fair opportunity fully to submit their cases to the courts (*61 Cal. App. 3d 710, 716)* .

[c] Extrinsic Fraud Which Prevents Fair Adversary Trial

The facts and procedural background of ***Olivera v. Grace*** *(1942) 19 Cal. 2d 570, 122 P.2d 564* , are discussed in *§ 70.480[3]* [*see also* discussion in *§ 70.520[3]*]. In *Olivera*, the Supreme Court observed that typical situations in which equity has interfered with judgments are cases where the lack of a fair adversary hearing in the original action is attributable to matters outside the issues adjudicated therein which prevented one party from presenting his or her case to the court (*19 Cal. 2d 570, 575)* . The Court noted that when the defendant is under such a legal disability, and the plaintiff has knowledge of the defendant's condition, a duty rests on the plaintiff to disclose such matters to the court and to have a guardian appointed for the purpose of the proceeding. If the plaintiff knows of the defendant's incompetency but conceals the information from the court and, to prevent a true adversary hearing, proceeds to a default judgment by taking advantage of defendant's condition, the plaintiff's conduct constitutes fraud on the court as well as on the incompetent defendant. Since the direct effect of such concealment is to prevent the incompetent from presenting whatever defense the defendant has to the court, it is clear, the Court concluded, that the fraud is extrinsic in nature (*19 Cal. 2d 570, 577)* .

[d] Extrinsic Mistake in Absence of Fair Adversary Trial

The facts and procedural background of ***Olivera v. Grace*** *(1942) 19 Cal. 2d 570, 122 P.2d 564* , are discussed in *§ 70.480[3]* [*see also* discussion in *§ 70.520[3]*]. In *Olivera*, the Supreme Court observed that courts have granted relief when the plaintiff's ignorance of defendant's legal disability prevented a true adversary hearing as well as when the plaintiff's fraud prevented such a hearing. After characterizing such a situation as extrinsic mistake, the Court held that

even if no actual fraud on the part of the defendant could be proved, the facts of the case before it, involving judgment against an incompetent person who was not judicially declared of unsound mind and for whom no guardian was appointed, were sufficient to justify the intervention of a court of equity if the other requirements for equitable relief could have been established (*19 Cal. 2d 570, 578)* .

[4] Additional Authorities

[a] Absence of Fair Adversary Trial in Prior Action

In *United States v. Throckmorton (1878) 98 U.S. 61, 25 L. Ed. 93* , the Supreme Court affirmed a decree of the circuit court sustaining a demurrer to a bill in chancery and dismissing it on its merits, ruling, however, that when there has never been a real contest in the trial or hearing of a case a new suit may be sustained to set aside and annul the former judgment or decree and open the case for a new and fair hearing. The Court stated the general rule that when an unsuccessful party who has been prevented from exhibiting fully his or her case by fraud or deception practiced on him or her by his or her opponent, such as by keeping him or her away from court or a false promise of a compromise or who never had knowledge of the suit because of certain acts of the plaintiff, or when an attorney fraudulently or without authority assumes to represent a party and connives at his or her defeat, or an attorney regularly employed corruptly sells out his or her client's interest to the other side are examples of cases in which there has never been a real contest in the trial or hearing of the case and in which a new suit may be sustained. The Court analyzed the facts and concluded that the case involved a mere charge of carelessness or negligence on the part of an attorney which would not have supported a motion for a new trial much less a suit in chancery to set aside a decree (*98 U.S. 61, 69)* .

[b] Extrinsic Fraud Which Prevents Fair Adversary Trial

The facts and procedural background of *United States v. Throckmorton (1878) 98 U.S. 61, 25 L. Ed. 93* , are discussed under [a], *above.* The United States Supreme Court in *Throckmorton* cited examples of conduct extrinsic fraud on a defendant, such as keeping him or her away from court or a false promise of a compromise, or who never had knowledge of the suit because of certain acts of the plaintiff, or when an attorney fraudulently or without authority assumes to represent a party and connives at his or her defeat, or an attorney regularly employed corruptly sells out his or her client's interest to the other side (*98 U.S. 61, 65-66)* .

[c] Extrinsic Mistake in Absence of Fair Adversary Trial

The facts and procedural background of *Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 305 P.2d 20* , are discussed in *§ 70.502[4]*. In *Bennett,* the plaintiffs alleged, in the prior action which it brought to determine membership rights, that the defendant bank failed to comply with statutory provisions as to personal service to members even though it knew of the membership rights of the plaintiffs' predecessor and her address, thereby precluding notice to the predecessor and opportunity to participate in the action. The Supreme Court held that these allegations were sufficient to bring the case within the principles of both extrinsic fraud and extrinsic mistake. The Court further ruled that the failure to comply with the statutory provisions for service of process constitutes grounds for the vacation of a judgment by way of a direct attack in equity. Such an attack may be made on the ground of extrinsic fraud when it appears that there was a willful failure to give the required service or that willfully false affidavits of service were filed. Moreover, the Court observed, a direct attack has been allowed in an independent action in equity when there has been a failure to exercise the degree of diligence required by law in connection with personal service, when false recitals of service were the result of fraud, negligence, or mistake, and when failure to name a person as a party was the result of mistake. These attacks have been made in accord with the general principle that extrinsic mistake may be a ground for vacation of a judgment by an independent action in equity when there has been no fair adversary trial (*47 Cal. 2d 540, 558-559)* .

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7-70 California Points & Authorities §§ 70.551-70.559

[Reserved]

§§ 70.551[Reserved]

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7-70 California Points & Authorities § 70.560

§ 70.560 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Mistake of Fact--Generally

[1] FORM

[*The following may be included in a general memorandum supporting a motion in equity (see, e.g., § 70.480[1]), a memorandum opposing a demurrer to a complaint for equitable relief (see, e.g., §§ 70.520 -70.528), a memorandum opposing a defendant's motion for summary judgment in an independent suit in equity (see, e.g., § 70.540[1]), or in a trial or appellate brief.*]

THE COURT SHOULD EXERCISE EQUITABLE JURISDICTION TO GRANT RELIEF AGAINST THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] BECAUSE THE AGGRIEVED PARTY WAS PREVENTED BY EXTRINSIC ACCIDENT AND MISTAKE FROM PRESENTING HIS/HER DEFENSE IN THE [PRIOR] ACTION.

Relief in Equity for Mistake of Fact. A party who is prevented by extrinsic accident and mistake of fact from presenting his or her defense to an action may seek equitable intervention for relief from the mistake (*Hallett v. Slaughter (1943) 22 Cal. 2d 552, 557, 140 P.2d 3*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of the contention that the party is entitled to equitable relief from a prior judgment or order obtained by reason of extrinsic mistake.

This form should be combined with a general memorandum, depending on the procedural context in which the contention is to be raised. It may, for example, be combined with a general form of points and authorities supporting a motion in equity [*see, e.g., § 70.480[1]*]. It may also be combined with a memorandum used to oppose a defendant's

attempt to dispose of an independent suit in equity through a pretrial proceeding such as a general demurrer to the complaint [*see, e.g., §§ 70.520 -70.528*], or a motion for summary judgment [*see, e.g., § 70.540[1]*].

This form may also be combined, when appropriate, with additional points and authorities supporting a grant of equitable relief on other particular grounds [*see, e.g., §§ 70.550, 70.561 -70.623*], particularly additional points and authorities supporting relief based on extrinsic mistake in particular circumstances [*see, e.g., § 70.561 -70.567*].

See also *§ 70.480[2]*for additional general considerations relating to equitable relief, and alternative methods for obtaining relief.

This form may also be used in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the defendant's answer was never received by the court clerk for filing, but was in fact mailed to the court, counsel may refer to facts in declarations showing that the answer was prepared and given to the secretary for mailing, and that as a matter of customary office procedure that if the documents had been given to the secretary to be mailed, they were mailed with sufficient postage [*see, e.g., Hallett v. Slaughter (1943) 22 Cal. 2d 552, 555-556, 140 P.2d 3* (discussed under [3], *below*)].

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 70.630* -780.668, and *70.660 -70.670* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Relief in Equity for Mistake of Fact

Hallett v. Slaughter *(1943) 22 Cal. 2d 552, 140 P.2d 3* , involved an action in equity to set aside and vacate an earlier judgment by default that had been entered against the plaintiff in a municipal court action. The plaintiff had contacted an attorney to represent her in the municipal court action, and the attorney had mailed an answer to the complaint in the action to the clerk of the municipal court as well as to the opposing attorney. Neither the answer nor the copy was received by the clerk or the attorney. The evidence at trial on this matter showed that although the secretary for plaintiff's attorney in the municipal court action did not recall the matter, if the documents had been given to her to be mailed, they were mailed with sufficient postage as a matter of customary office procedure. The trial court granted judgment for the plaintiff and the defendant appealed.

The Supreme Court affirmed the judgment. The Supreme Court found that the testimony given at the trial court supported the finding that the papers were mailed. Also finding that any delay in failing to discover the default sooner did not constitute inexcusable neglect as a matter of law, the Court stated that plaintiff was prevented by extrinsic accident and mistake of fact from presenting her defense in the municipal court action. That such accident and mistake furnished a ground for equitable intervention under the circumstance of the case was clear according to the Court (*22 Cal. 2d 552, 557)* .

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7-70 California Points & Authorities § 70.561

§ 70.561 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Mistake of Fact--Mistake Preventing Proper Notice or Appearance

[1] FORM

[*The following may be included in a general memorandum supporting a motion in equity (see, e.g., § 70.480[1]), a memorandum opposing a demurrer to a complaint for equitable relief (see, e.g., §§ 70.520 -70.528), a memorandum opposing a defendant's motion for summary judgment in an independent suit in equity (see, e.g., § 70.540[1]), or in a trial or appellate brief.*]

THE COURT SHOULD GRANT RELIEF IN EQUITY AND SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] BECAUSE A MISTAKE PREVENTED THE AGGRIEVED PARTY FROM _____ [BEING GIVEN PROPER NOTICE OF *or* APPEARING IN] THE [PRIOR] ACTION.

Mistake Preventing Proper Notice or Appearance. When mistake prevents a defendant from having his/her day in court in the former action, that party is entitled to equitable relief against the judgment rendered in that action (*Boyle v. Boyle (1929) 97 Cal. App. 703, 706-707, 276 P. 118*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of the contention that the party is entitled to equitable relief from a prior judgment or order obtained by reason of extrinsic mistake which prevented the party from receiving proper notice of the action or from appearing in the action.

This form should be combined with a general memorandum, depending on the procedural context in which the

contention is to be raised. It may, for example, be combined with a general form of points and authorities supporting a motion in equity [*see, e.g., § 70.480[1]*]. It may also be combined with a memorandum used to oppose a defendant's attempt to dispose of an independent suit in equity through a pretrial proceeding such as a general demurrer to the complaint [*see, e.g., §§ 70.520 -70.528*], or a motion for summary judgment [*see, e.g., § 70.540[1]*].

This form may also be combined, when appropriate, with additional points and authorities supporting a grant of equitable relief on other particular grounds [*see, e.g., §§ 70.550 -70.560, 70.562 -70.623*], particularly additional points and authorities supporting relief based on extrinsic mistake in particular circumstances [*see, e.g., §§ 70.560, 70.562 -70.567*].

See also *§ 70.480[2]*for additional general considerations relating to equitable relief, and alternative methods for obtaining relief.

This form may also be used in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the basis for the contention is that the aggrieved party was not named a party to the action in which the judgment was rendered because of an extrinsic mistake, counsel should refer to the circumstances that establish the mistake [*see, e.g., Boyle v. Boyle (1929) 97 Cal. App. 703, 706, 276 P. 118* (plaintiff in prior action had been laboring under the mistaken belief that her decree would not affect her daughter's title), discussed under [3], *below*].

See also *§ 70.480[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 70.630* -780.668, and *70.660 -70.670* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Mistake Preventing Proper Notice or Appearance

In ***Boyle v. Boyle*** *(1929) 97 Cal. App. 703, 276 P. 118* , involved an action to quiet title in the deceased, whose title to the property was at issue, had, during her lifetime, executed and delivered a deed of gift to the property to her daughter. The deed, which went unrecorded, reserved a life estate to the mother and gave the remainder to the daughter. Later, after the records of the mother's title to the property were destroyed by earthquake and fire, the mother obtained a decree under a remedial statute, the McEnerny Act, quieting title in her without notifying the daughter. The trial court had found that the mother's omission to name the daughter as a party in the original action was not fraudulent and, thus, held for the administrator, despite allegations in the daughter's cross complaint that the decree had been obtained without any notice to her whatever as a result of her mother's mistake and ignorance as to the legal effect of the decree on the cross complaint's title. The daughter appealed.

The court of appeal reversed the judgment. The court noted that the mother had been laboring under the mistaken belief that her decree would not affect her daughter's title. It was also noted that if the daughter had been kept away from court by fraud on the part of her mother so that she never had her day in court, she would be entitled to equitable relief. Mistake, said the court, is just as potent as fraud as a ground for such relief when that mistake has prevented a defendant from having his or her day in court. Accordingly, the court held in favor of the cross complainant daughter (*97 Cal. App. 703, 706-707)* .

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7-70 California Points & Authorities § 70.562

§ 70.562 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Mistake of Fact--Mistake of Prevailing Party in Original Action

[1] FORM

[*The following may be included in a general memorandum supporting a motion in equity (see, e.g., § 70.480[1]), a memorandum opposing a demurrer to a complaint for equitable relief (see, e.g., §§ 70.520 -70.528), a memorandum opposing a defendant's motion for summary judgment in an independent suit in equity (see, e.g., § 70.540[1]), or in a trial or appellate brief.*]

THE COURT SHOULD GRANT RELIEF IN EQUITY AND SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] BECAUSE AN EXTRINSIC MISTAKE ON THE PART OF THE PARTY WHO PREVAILED IN THE [PRIOR] ACTION PREVENTED THE AGGRIEVED PARTY FROM PARTICIPATING IN THE ACTION OR PRESENTING ALL OF HIS/HER CASE TO THE COURT.

Extrinsic Mistake of Prevailing Party. When the extrinsic mistake of the prevailing party has prevented the aggrieved party from participating in the original action or presenting all of his/her case to the court, the court is justified in granting equitable relief against the judgment (*Olivera v. Grace (1942) 19 Cal. 2d 570, 577-578, 122 P.2d 564* ; *Bacon v. Bacon (1907) 150 Cal. 477, 492, 89 P. 317*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of the contention that the party is entitled to equitable relief from a prior judgment or order obtained by reason of extrinsic mistake, when the judgment or order was obtained by extrinsic mistake on the part of the party who prevailed in the original action.

This form should be combined with a general memorandum, depending on the procedural context in which the contention is to be raised. It may, for example, be combined with a general form of points and authorities supporting a motion in equity [*see, e.g., § 70.480[1]*]. It may also be combined with a memorandum used to oppose a defendant's attempt to dispose of an independent suit in equity through a pretrial proceeding such as a general demurrer to the complaint [*see, e.g., §§ 70.520 -70.528*], or a motion for summary judgment [*see, e.g., § 70.540[1]*].

This form may also be combined, when appropriate, with additional points and authorities supporting a grant of equitable relief on other particular grounds [*see, e.g., §§ 70.550 -70.561, 70.563 -70.623*], particularly additional points and authorities supporting relief based on extrinsic mistake in particular circumstances [*see, e.g., §§ 70.560, 70.561, 70.563 -70.567*].

See also *§ 70.480[2]* for additional general considerations relating to equitable relief, and alternative methods for obtaining relief.

This form may also be used in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the prevailing party in the action in which the judgment rendered had failed to secure the appointment of a guardian to represent an incompetent person or to inform the court as to the incompetency, counsel should refer to facts establishing the incompetency, knowledge of that incompetency by the prevailing party, and the prevailing party's failure to disclose that fact to the court [*see Olivera v. Grace (1942) 19 Cal. 2d 570, 578, 122 P.2d 564]* .

See also *§ 70.480[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 70.630* -780.668, and *70.660 -70.670* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Extrinsic Mistake of Prevailing Party

The facts and procedural background of ***Olivera v. Grace*** *(1942) 19 Cal. 2d 570, 122 P.2d 564* , are discussed in *§ 70.480[3]* [*see also* discussion in *§ 70.520[3]*]. In *Olivera*, the defendant in the prior action was an incompetent and the plaintiff had failed to secure the appointment of a guardian to represent her or to inform the court as to the incompetency. The Supreme Court ruled that the right of such a defendant to equitable relief may be established if the plaintiff's ignorance of the defendant's disability prevented a true adversary hearing as well as when the plaintiff's fraud prevented such a hearing. While some courts characterize such a situation as constructive fraud, the Court stated that it would be more accurate to characterize such a situation as extrinsic mistake, a recognized ground for the intervention of equity when the mistake has prevented a fair adversary hearing (*19 Cal. 2d 570, 578)* .

The facts and procedural background of ***Bacon v. Bacon*** *(1907) 150 Cal. 477, 89 P. 317* , are discussed in *§ 70.522[3]*. In *Bacon*, the aggrieved party had received $2,000 of a $10,000 legacy by reason of a misreading of the will involved. The Supreme Court noted that the plaintiff had been informed of the smaller figure during the probate period by her husband who was a personal representative of the estate and had been given a copy of the will which reflected the same misreading, and that she had thereby been induced to believe she was receiving her claim in full and had no reason to appear in the distribution proceeding, in which the same mistake was perpetuated. By reason of this mistake, said the Court, she was prevented from exhibiting her case fully and as a result there was no adversary trial, no real

contest, and no fair submission of the question of whether her legacy was $2,000 or $10,000 (*150 Cal. 477, 492)* .

[4] Additional Authorities

[a] Extrinsic Mistake of Prevailing Party

The facts and procedural background of *Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 305 P.2d 20* , is discussed in *§ 70.502[4]*. In *Bennett*, a bank failed to comply with statutory provisions relating to personal service to members even though it knew of the membership rights of the plaintiff's predecessor and her address, thereby precluding notice to the predecessor and opportunity to participate in the action. The Supreme Court held that allegations stating these facts were sufficient to bring the case within the principles of both extrinsic fraud and extrinsic mistake (*47 Cal. 2d 540, 558-559)* .

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7-70 California Points & Authorities § 70.563

§ 70.563 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Mistake of Fact--Mistake of Aggrieved Party--Loss of Answer in Mail

[1] FORM

[*The following may be included in a general memorandum supporting a motion in equity (see, e.g., § 70.480[1]), a memorandum opposing a demurrer to a complaint for equitable relief (see, e.g., §§ 70.520 -70.528), a memorandum opposing a defendant's motion for summary judgment in an independent suit in equity (see, e.g., § 70.540[1]), or in a trial or appellate brief.*]

THE COURT SHOULD GRANT RELIEF IN EQUITY AND SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] BECAUSE OF EXTRINSIC MISTAKE, IN THAT THE FAILURE OF THE AGGRIEVED PARTY TO FILE A RESPONSIVE PLEADING WAS BECAUSE THE PLEADING HAD BEEN LOST IN THE MAIL AFTER IT HAD BEEN DULY ADDRESSED AND MAILED.

A. Extrinsic Mistake of Aggrieved Party. When the aggrieved party was prevented by extrinsic mistake [of fact] from presenting a defense in the prior action, there is a ground for equitable intervention and relief against the judgment in that action (*Hallett v. Slaughter (1943) 22 Cal. 2d 552, 557, 140 P.2d 3*).

B. Loss of Answer in Mail as Basis for Equitable Relief. Mistake of fact may furnish ground for equitable intervention to relieve a party from a default or default judgment when the party's failure to file a responsive pleading was because the pleading had been lost in the mail after it had been duly addressed and mailed (*Hallett v. Slaughter (1943) 22 Cal. 2d 552, 557, 140 P.2d 3*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of the contention that the party is entitled to equitable relief from a prior judgment or order obtained by reason of extrinsic mistake, when the judgment or order was obtained by extrinsic mistake on the part of the aggrieved party, specifically, when the party's failure to file a responsive pleading was because the pleading had been lost in the mail after it had been duly addressed and mailed to the party who prevailed in the original action.

This form should be combined with a general memorandum, depending on the procedural context in which the contention is to be raised. It may, for example, be combined with a general form of points and authorities supporting a motion in equity [*see, e.g., § 70.480[1]*]. It may also be combined with a memorandum used to oppose a defendant's attempt to dispose of an independent suit in equity through a pretrial proceeding such as a general demurrer to the complaint [*see, e.g., §§ 70.520 -70.528*], or a motion for summary judgment [*see, e.g., § 70.540[1]*].

This form may also be combined, when appropriate, with additional points and authorities supporting a grant of equitable relief on other particular grounds [*see, e.g., §§ 70.550 -70.562, 70.564 -70.623*], particularly additional points and authorities supporting relief based on extrinsic mistake in particular circumstances [*see, e.g., §§ 70.560 -70.562, 70.564 -70.567*].

See also *§ 70.480[2]*for additional general considerations relating to equitable relief, and alternative methods for obtaining relief.

This form may also be used in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the defendant's answer was never received by the court clerk for filing, but was in fact mailed to the court, counsel may refer to facts in declarations showing that the answer was prepared and given to the secretary for mailing, and that as a matter of customary office procedure that if the documents had been given to the secretary to be mailed, they were mailed with sufficient postage.

See also *§ 70.480[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 70.630* -780.668, and *70.660 -70.670* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Extrinsic Mistake of Aggrieved Party

The facts and procedural background of ***Hallett v. Slaughter*** *(1943) 22 Cal. 2d 552, 140 P.2d 3* , are discussed in *§ 70.560[3]*. In *Hallett*, the Supreme Court found that any delay in failing to discover the default sooner did not constitute inexcusable neglect as a matter of law, when it was demonstrated to the satisfaction of the Court that the answer was lost in the mail. That plaintiff was prevented by extrinsic accident and mistake of fact from presenting her defense in the municipal court action and that such accident and mistake furnished a ground for equitable intervention under the circumstance of the case was clear, according to the Court (*22 Cal. 2d 552, 557)* .

[b] Loss of Answer in Mail as Basis for Equitable Relief

The facts and procedural background of ***Hallett v. Slaughter*** *(1943) 22 Cal. 2d 552, 140 P.2d 3* , are discussed in *§*

70.560[3]. In *Hallett*, the plaintiff had contacted an attorney to represent her in the municipal court action, and the attorney had mailed an answer to the complaint in the action to the clerk of the municipal court as well as to the opposing attorney. Neither the answer nor the copy was received by the clerk or the attorney. The evidence at trial on this matter showed that although the secretary for plaintiff's attorney in the municipal court action did not recall the matter, if the documents had been given to her to be mailed, they were mailed with sufficient postage as a matter of customary office procedure. The Supreme Court found that the testimony given at the trial court supported the finding that the papers were mailed. Also finding that any delay in failing to discover the default sooner did not constitute inexcusable neglect as a matter of law, the Court stated that plaintiff was prevented by extrinsic accident and mistake of fact from presenting her defense in the municipal court action (*22 Cal. 2d 552, 557)* .

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Volume 7 Chapters 70 DEFAULTS
CHAPTER 70 DEFAULTS, DEFAULT JUDGMENTS, AND RELIEF FROM JUDGMENTS AND ORDERS
PART II. FORMS
C. Equitable Relief From Default Judgment or Other Judgment or Order Based on Extrinsic Fraud, Mistake, or Duress
3. Grounds for Granting or Denying Equitable Relief

7-70 California Points & Authorities § 70.564

§ 70.564 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Mistake of Fact--Mistake of Aggrieved Party--Reasonable Reliance on Representations of Opposing Party's Attorney

[1] FORM

[*The following may be included in a general memorandum supporting a motion in equity (see, e.g., § 70.480[1]), a memorandum opposing a demurrer to a complaint for equitable relief (see, e.g., §§ 70.520 -70.528), a memorandum opposing a defendant's motion for summary judgment in an independent suit in equity (see, e.g., § 70.540[1]), or in a trial or appellate brief.*]

THE COURT SHOULD GRANT RELIEF IN EQUITY AND SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] BECAUSE OF EXTRINSIC MISTAKE, IN THAT THE DEFAULT WAS TAKEN BECAUSE THE AGGRIEVED PARTY WAS JUSTIFIABLY LULLED INTO A FALSE SENSE OF SECURITY BY THE IMPLIED OR EXPRESS REPRESENTATIONS OF OPPOSING COUNSEL.

A. Extrinsic Mistake of Aggrieved Party Induced by Prevailing Party. The right of equitable relief from judgments extends to judgments given by reason of mistake on the part of the aggrieved party and induced by the prevailing party (*Corey v. Weerts (1963) 214 Cal. App. 2d 416, 423-424, 29 Cal. Rptr. 533*).

B. Reliance on Representations of Opposing Counsel. When a party or a party's counsel is lulled into a sense of security by the express or implied representations of opposing counsel that no action need be taken, and for that reason such party's default is taken, a default and default judgment taken against the party may be set aside on the ground of extrinsic mistake (*Hammel v. Lindner (1964) 224 Cal. App. 2d 426, 435, 36 Cal. Rptr. 656*).

C. Deliberate Delay in Enforcing Default Judgment. A factor to be considered in determining if the defendant had been lulled into a sense of security by the express or implied representations of opposing counsel is the delay of the plaintiff in failing to take earlier action to secure and enforce the default judgment (*see Hallett v. Slaughter (1943) 22*

Cal. 2d 552, 556, 140 P.2d 3 ; *Hammel v. Lindner (1964) 224 Cal. App. 2d 426, 435, 36 Cal. Rptr. 656*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of the contention that the party is entitled to equitable relief from a prior judgment or order obtained by reason of extrinsic mistake, when the judgment or order was obtained by extrinsic mistake on the part of the aggrieved party, specifically, when a default judgment was taken because the aggrieved party was lulled into a false sense of security by the express or implied representations of opposing counsel.

This form should be combined with a general memorandum, depending on the procedural context in which the contention is to be raised. It may, for example, be combined with a general form of points and authorities supporting a motion in equity [*see, e.g., § 70.480[1]*]. It may also be combined with a memorandum used to oppose a defendant's attempt to dispose of an independent suit in equity through a pretrial proceeding such as a general demurrer to the complaint [*see, e.g., §§ 70.520 -70.528*], or a motion for summary judgment [*see, e.g., § 70.540[1]*].

This form may also be combined, when appropriate, with additional points and authorities supporting a grant of equitable relief on other particular grounds [*see, e.g., §§ 70.550 -70.563, 70.565 -70.623*], particularly additional points and authorities supporting relief based on extrinsic mistake in particular circumstances [*see, e.g., §§ 70.560 -70.563, 70.565 -70.567*].

This form may also be modified for use in support of the contention that the prior judgment should be set aside on the ground of extrinsic fraud. One of the most common forms of extrinsic fraud involves the case when the defaulting party, in reliance on representations made by the opposing party that his or her interests will not be adversely affected, is induced not to appear in the action [*Davi v. Belfiore (1957) 153 Cal. App. 2d 325, 327, 314 P.2d 596* (discussed under [4], *below*); *see §§ 70.580 -70.591*].

Counsel may consider whether to pursue relief by motion to set aside and vacate default and default judgment under *Code Civ. Proc. § 473(b)*, because of mistake, inadvertence, surprise, or excusable neglect [*see Beard v. Beard (1940) 16 Cal. 2d 645, 648, 107 P.2d 385* ; *Nelson v. Southerland (1960) 187 Cal. App. 2d 140, 142, 9 Cal. Rptr. 735* ; *see generally § 70.10 et seq., and § 70.480[2][c]*]. See also *§ 70.480[2]*for additional general considerations relating to equitable relief, and alternative methods for obtaining relief.

This form may also be used in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should refer to facts of the representations made by the opposing counsel that led to the contending party's justifiable reliance on those representations and the judgment [*see, e.g., Hammel v. Lindner (1964) 224 Cal. App. 2d 426, 429, 36 Cal. Rptr. 656* (discussed under [3][b], *below*)].

See also *§ 70.480[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 70.630* -780.668, and *70.660 -70.670* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Extrinsic Mistake of Aggrieved Party Induced by Prevailing Party

The facts and procedural background of ***Corey v. Weerts*** *(1963) 214 Cal. App. 2d 416, 29 Cal. Rptr. 533* , are discussed in *§ 70.484[3]*. In *Corey*, the court of appeal found that the trial court had properly concluded that there was a sufficient showing of extrinsic mistake on the part of the defendants and noted the general rule that the right of equitable relief from judgments is not confined to judgments procured by fraud, but that it extends to judgments wrongfully given by mistake on the part of the injured party, unmixed with fraud, and not the result of negligence of the injured party (*214 Cal. App. 2d 416, 422)* .

[b] Reliance on Representations of Opposing Counsel

Hammel v. Lindner *(1964) 224 Cal. App. 2d 426, 36 Cal. Rptr. 656* , involved a default judgment granted against the plaintiff on defendant's cross complaint because of plaintiff's failure to answer certain interrogatories. The plaintiff moved to set aside the default and default judgment. In support of the motion, plaintiff's counsel contended that defendant's counsel had agreed with plaintiff's former counsel to contact the court to continue the hearing on defendant's motion to compel plaintiff to answer interrogatories and to inform the attorney of the date when the matter would be set for hearing. Defendant's counsel, however, failed to notify plaintiff's counsel of this date and therefore plaintiff's counsel did not learn that on this date the trial court had granted defendant's motion to dismiss the complaint and the answer to the cross complaint and that plaintiff's default was then entered. The trial court granted the motion and the defendant appealed.

The court of appeal affirmed. The court rejected the defendant's primary contention on appeal that the attorney's affidavit was insufficient in that it was based on hearsay. The court acknowledged that the affidavit contained hearsay, and that the hearsay was essential evidence to support the setting-aside order, because everything else in the affidavit related to defendant's and defendant counsel's own activity after the default and default judgment had become known to the plaintiff (*224 Cal. App. 2d 426, 429)* . The mere declaration that statements in the affidavit supporting the motion are hearsay does not constitute an objection to the admissibility of the affidavit, in whole or in part. The court concluded that the declaration was not in form an objection to admissibility nor was it in form a motion to strike. When admitted without objection, incompetent statements included in an affidavit in support of a motion to vacate a default become competent evidence. The court construed the defendant counsel's declaration as urging that the hearsay was of less probative value than personal declarations would have been, and that defendant's counsel, having made this observation, was content to meet the hearsay with his own affidavit. After analyzing the defendant counsel's affidavit, however, it found little direct conflict (*224 Cal. App. 2d 426, 432)* .

The court stated that when an extrinsic factor is present (in this case, defendant counsel's representation), the favor of the law for trial on the merits is to be weighed among all of the factors which are before the trial judge (*224 Cal. App. 2d 426, 435)* . No showing of prejudice was made by defendant and the attorneys for defendant were paid $375 plus court costs. The court also noted the additional factor that defendant had refrained from taking action on the judgment he had obtained by default until a few days after the six-month limitation of *Code Civ. Proc. § 473* had expired (*224 Cal. App. 2d 426, 435)* .

Note that the decision in *Hammel, above*, underscores a common problem that may arise when initially seeking relief by motion in equity: because the evidence supporting such a motion is usually confined to a declaration by a voluntary witness, it may be subject to evidentiary objections on the ground of hearsay, especially in situations when the relief is sought because of reliance of representations by opposing parties or their counsel. In these situations, if the motion is denied, counsel should consider the possibility of initiating a separate action in equity, in which case hostile witnesses may be subpoenaed and cross examined; the prior denial of the motion does not bar such suit when the aggrieved party can show that he or she did not have the opportunity for detailed presentation of the issues of fraud or mistake on his or her motion, or was not given a full opportunity at the time of the hearing to develop the issues by oral testimony [*see Rohrbasser v. Lederer (1986) 179 Cal. App. 3d 290, 298, 224 Cal. Rptr. 791* (discussed in *§ 70.540[3*])].

[c] Deliberate Delay in Enforcing Default Judgment

The facts and procedural background of ***Hallett v. Slaughter*** *(1943) 22 Cal. 2d 552, 140 P.2d 3* , are discussed in *§ 70.560[3]*. In *Hallett*, on appeal from a judgment setting aside an earlier default judgment, defendant argued in part that plaintiff's attorney in the earlier action was negligent in failing to discover sooner that plaintiff's answer had not been filed. In affirming the judgment, the Supreme Court said that although some degree of negligence could be charged, it was not prepared to say that his remissness amounted to such inexcusable neglect as a matter of law that plaintiff should be foreclosed of her right to maintain this suit. Moreover, the Court added, plaintiff's delay in discovering the entry of her default was due in part at least to the apparently designed and deliberate failure of defendants to take earlier action to secure and enforce their judgment (*22 Cal. 2d 552, 556)* .

The facts and procedural background of ***Hammel v. Lindner*** *(1964) 224 Cal. App. 2d 426, 36 Cal. Rptr. 656* , are discussed under [b], *above*. In *Hammel*, the court stated that it is also to be considered, as an element of lulling the aggrieved party, in addition to the opposing party's representation, that the opposing party refrained from taking action on the judgment he obtained by default until a few days after the six-month limitation of former Code Civ. Proc. § 473, 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), had expired (*224 Cal. App. 2d 426, 435)* .

[4] Additional Authorities

[a] Reliance on Representations of Opposing Counsel

The facts and procedural background of *Hallett v. Slaughter (1943) 22 Cal. 2d 552, 140 P.2d 3* , are discussed in *§ 70.560[3]*. In *Hallett*, the Supreme Court stated that plaintiff was prevented by extrinsic accident and mistake of fact from presenting her defense in the municipal court action. That such accident and mistake furnished a ground for equitable intervention under the circumstance of the case was clear according to the Court (*22 Cal. 2d 552, 557)* .

In *Davi v. Belfiore (1957) 153 Cal. App. 2d 325, 314 P.2d 596* , defendant's default was taken in an action filed by plaintiff in municipal court. A default judgment was entered against him and a writ of execution was issued on the judgment. On defendant's motion the trial court set aside the judgment on the theory that the judgment was void as in excess of the municipal court's jurisdiction and that the judgment had been secured by extrinsic fraud on the part of plaintiff.

Affirming the order granting relief to defendant, the court of appeal found it unnecessary to consider the issue of the municipal court's jurisdiction because it was of the opinion that the judgment was obtained by extrinsic fraud (*153 Cal. App. 2d 325, 326)* . Evidence in support of defendant's motion showed that when served with the original summons on the original and amended complaints, and again when served with the order of examination, defendant had contacted plaintiff to ask why he had been served. Plaintiff had assured defendant repeatedly that he had been served only as a witness against other defendants and that plaintiff did not wish to recover any judgment against defendant. Plaintiff had agreed to meet with defendant at the office of plaintiff's attorney, but had failed to appear. The court noted that this evidence supported a finding of extrinsic fraud practiced by plaintiff against defendant, as well as showing diligence and excusable neglect on defendant's part (*153 Cal. App. 2d 325, 327)* . The court also noted that one of the most common forms of extrinsic fraud occurs when the aggrieved party in reliance on representations made by the adverse party that his or her interests will not be adversely affected, is induced not to appear (*153 Cal. App. 2d 325, 327)* . The court concluded that plaintiff's representations to defendant were calculated to induce, and did induce, defendant not to appear. The court noted that extrinsic fraud exists when the unsuccessful party was prevented from presenting all of his case to the court (*153 Cal. App. 2d 325, 327)* .

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7-70 California Points & Authorities § 70.565

§ 70.565 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Mistake of Fact--Mistake of Aggrieved Party--Disability of Aggrieved Party or Party's Attorney Rendered Aggrieved Party Unable to Defend

[1] FORM

[*The following may be included in a general memorandum supporting a motion in equity (see, e.g., § 70.480[1]), a memorandum opposing a demurrer to a complaint for equitable relief (see, e.g., §§ 70.520 -70.528), a memorandum opposing a defendant's motion for summary judgment in an independent suit in equity (see, e.g., § 70.540[1]), or in a trial or appellate brief.*]

THE COURT SHOULD GRANT RELIEF IN EQUITY AND SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] BECAUSE OF EXTRINSIC MISTAKE, IN THAT THE AGGRIEVED PARTY WAS DEPRIVED OF A HEARING ON THE MERITS DUE TO _____ [HIS/HER DISABILITY *or* THE DISABILITY OF HIS/HER ATTORNEY].

[*EITHER*]

Relief for Incompetent Defendant. A mentally incompetent defendant is entitled to equitable relief from a judgment for mistake in that, through no fault of his or her own, the defendant was not permitted to participate in the proceedings (*Olivera v. Grace (1942) 19 Cal. 2d 570, 577-578, 122 P.2d 564* ; *Conforti v. Dunmeyer (1962) 209 Cal. App. 2d 41, 44, 25 Cal. Rptr. 504*).

[*OR*]

Relief in Equity for Disability of Attorney. Counsel's death or serious physical or mental illness which prevents a fair

presentation of defendant's cause warrants intervention by the court in equity to set aside a judgment taken against defendant (*McCreadie v. Arques (1967) 248 Cal. App. 2d 39, 45, 56 Cal. Rptr. 188*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of the contention that the party is entitled to equitable relief from a prior judgment or order obtained by reason of extrinsic mistake, when the judgment or order was obtained by extrinsic mistake on the part of the aggrieved party, specifically, because of the disability of the aggrieved party or his or her attorney.

This form should be combined with a general memorandum, depending on the procedural context in which the contention is to be raised. It may, for example, be combined with a general form of points and authorities supporting a motion in equity [*see, e.g., § 70.480[1]*]. It may also be combined with a memorandum used to oppose a defendant's attempt to dispose of an independent suit in equity through a pretrial proceeding such as a general demurrer to the complaint [*see, e.g., §§ 70.520 -70.528*], or a motion for summary judgment [*see, e.g., § 70.540[1]*].

This form may also be combined, when appropriate, with additional points and authorities supporting a grant of equitable relief on other particular grounds [*see, e.g., §§ 70.550 -70.564*, 70.596 -*70.623*], particularly additional points and authorities supporting relief based on extrinsic mistake in particular circumstances [*see, e.g., §§ 70.560 -70.564*, 70.596, *70.567*].

This form may also be used in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, for example, counsel should refer to facts establishing the incompetency and evidencing that there was no true adversarial hearing conducted for the aggrieved party's benefit [*see, e.g., Olivera v. Grace (1942) 19 Cal. 2d 570, 578, 122 P.2d 564* (discussed under [a], *below*)].

See also *§ 70.480[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 70.630* -780.668, and *70.660 -70.670* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Relief for Incompetent Defendant

The facts and procedural background of ***Olivera v. Grace*** *(1942) 19 Cal. 2d 570, 122 P.2d 564* , are discussed in *§ 70.480[3]* [*see also* discussion in *§ 70.520[3]*] . *Olivera* involved an appeal from a judgment of dismissal entered after the trial court sustained defendant's demurrer to a complaint, brought by the plaintiff, who was the administratrix of the estate, to set aside a default judgment. The judgment had been entered in an action to reform a joint tenancy deed in which the decedent had been named as one of the joint tenants. The basis of the complaint was the decedent's complete loss of mental capabilities because of a serious head injury which rendered her wholly devoid of understanding and incapable of transacting business of any nature at the time the underlying action had been commenced against her (*19 Cal. 2d 570, 572)* . Plaintiff alleged that defendant knew of Emilie's condition but failed to secure the appointment of a

guardian and failed to inform the court of her condition (*19 Cal. 2d 570, 572-573)* . Reviewing the general authority of a court to set aside a judgment rendered against incompetent defendants when it is probable that injustice had resulted (*19 Cal. 2d 570, 573)* , the Supreme Court stated that out-of-state decisions which would support the power of a trial court to set aside a default judgment under *Code Civ. Proc. § 473* could not be relied on to support an independent action in equity (*19 Cal. 2d 570, 574)* or a motion addressed to the equitable jurisdiction of the trial court (*19 Cal. 2d 570, 576)* .

In turning to the equitable grounds for the action, either extrinsic fraud or extrinsic mistake, the Court stated that if a plaintiff knows of the defendant's incompetency but conceals such information from the court, and, to prevent a true adversary hearing, proceeds to a default judgment by taking advantage of defendant's condition, his or her conduct constitutes a fraud on the court as well as on the incompetent defendant, and, thus, is extrinsic in nature (*19 Cal. 2d 570, 577)* . In reversing the trial court, the Court found that allegations, such as those found in plaintiff's complaint, are sufficient to state a cause of action in equity on behalf of the incompetent (*19 Cal. 2d 570, 577)* .

However, the Court added that it should not be understood that plaintiff's fraud in the underlying action was essential to obtaining equitable relief. Even if plaintiff was ignorant of defendant's legal disability, if the disability prevented a true adversary hearing, relief could be granted. Although out-of-state decisions had termed this type of equitable relief "constructive fraud," the Court stated that it is more accurate to characterize such a situation as extrinsic mistake. Thus, the Court concluded, even if no actual fraud on defendant's part could be proved in the present action, the allegations were sufficient to justify equity's intervention if the other requirements for equitable relief could be established (*19 Cal. 2d 570, 578)* .

Conforti v. Dunmeyer *(1962) 209 Cal. App. 2d 41, 25 Cal. Rptr. 504* , was an appeal from a judgment of dismissal entered after the trial court sustained without leave to amend defendants' demurrer to plaintiff's third amended complaint to set aside a default judgment entered in defendants' earlier action to foreclose plaintiff's interest in certain real property. The complaint alleged that at the time the default judgment was entered, plaintiff was mentally ill, insane, and incompetent, and no guardian had been appointed for her (*209 Cal. App. 2d 41, 43)* .

Although affirming the judgment on other grounds, the court of appeal reviewed the courts' equitable powers to set aside judgments, relying in part on *Olivera* (discussed *above*), and stated that incompetent defendants are entitled to relief in equity such as are characterized by extrinsic mistake (*209 Cal. App. 2d 41, 44)* . The fact that no fraudulent design was alleged on defendants' parts made no difference in that the principle of law involved was that through no fault of defendant he was not permitted to participate in the proceedings (*209 Cal. App. 2d 41, 44)* .

[b] Relief in Equity for Disability of Attorney

McCreadie v. Arques *(1967) 248 Cal. App. 2d 39, 56 Cal. Rptr. 188* , involved an action for damages for negligence and breach of warranty. On service of the summons and complaint, defendant had turned the matter over to his attorney. Unfortunately, the attorney was in the midst of a "physical-mental" breakdown. He was unable to do any work at all and suffered from a series of blackouts during which he could remember nothing. He did not answer plaintiff's complaint and assured defendant that any report of a default, or a default judgment, having been entered was entirely untrue. Plaintiff was completely unaware of his attorney's mental state until he was served with a writ of execution two years later and the attorney confessed to having lied to his client. Defendant moved to set aside the default and default judgment under the trial court's equitable powers. The trial court denied the motion and the defendant appealed.

Although affirming the trial court order on the ground of defendant's lack of diligence, the court of appeal agreed with the trial court's determination that defendant should not be chargeable with neglect for permitting the default or taking no action until he received a letter from plaintiff's attorney that a default judgment had been entered. The court said that it is established in California that the death or serious illness of counsel which prevents an appearance at the trial or a fair presentation of the cause may warrant the intervention of equity to set aside the judgment, at least in a situation

when the circumstances could not reasonably have been anticipated or avoided by the exercise of due diligence (*248 Cal. App. 2d 39, 45)* .

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7-70 California Points & Authorities § 70.566

§ 70.566 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Mistake of Fact--Mistake of Aggrieved Party--Inexcusable Neglect of Aggrieved Party's Attorney Rendered Aggrieved Party Unable to Defend

[1] FORM

[*The following may be included in a general memorandum supporting a motion in equity (see, e.g., § 70.480[1]), a memorandum opposing a demurrer to a complaint for equitable relief (see, e.g., §§ 70.520 -70.528), a memorandum opposing a defendant's motion for summary judgment in an independent suit in equity (see, e.g., § 70.540[1]), or in a trial or appellate brief.*]

THE COURT SHOULD GRANT RELIEF IN EQUITY AND SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] BECAUSE OF EXTRINSIC MISTAKE, IN THAT THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] WAS THE RESULT OF THE INEXCUSABLE NEGLECT OF THE AGGRIEVED PARTY'S ATTORNEY [AND THE NEGLECT WAS OF SUCH AN EXTREME DEGREE THAT IT AMOUNTED TO POSITIVE MISCONDUCT].

Relief for Attorney's Inexcusable Neglect. A client who is relatively free from personal neglect may be relieved from a default or dismissal attributable to the inaction or procrastination of his or her counsel. [This is particularly true when the attorney's failure to represent the client amounts to positive misconduct] (*Orange Empire Nat. Bank v. Kirk (1968) 259 Cal. App. 2d 347, 353, 66 Cal. Rptr. 240*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of the contention that the party is entitled to equitable relief from a prior judgment or order obtained by reason of extrinsic mistake, when the judgment or order was obtained by extrinsic

mistake on the part of the aggrieved party, specifically, because of neglect of the aggrieved party or his or her attorney.

This form should be combined with a general memorandum, depending on the procedural context in which the contention is to be raised. It may, for example, be combined with a general form of points and authorities supporting a motion in equity [*see, e.g., § 70.480[1]*]. It may also be combined with a memorandum used to oppose a defendant's attempt to dispose of an independent suit in equity through a pretrial proceeding such as a general demurrer to the complaint [*see, e.g., §§ 70.520 -70.528*], or a motion for summary judgment [*see, e.g., § 70.540[1]*].

This form may also be combined, when appropriate, with additional points and authorities supporting a grant of equitable relief on other particular grounds [*see, e.g., §§ 70.550 -70.565, 70.567 -70.623*], particularly additional points and authorities supporting relief based on extrinsic mistake in particular circumstances [*see, e.g., §§ 70.560 -70.565, 70.567*].

This form may also be modified for use in support of the contention that the prior judgment should be set aside on the ground of extrinsic fraud [*see, e.g., Lovato v. Santa Fe Internat. Corp. (1984) 151 Cal. App. 3d 549, 554-555, 198 Cal. Rptr. 838* (discussed under [4], *below*); *see §§ 70.580 -70.591*].

This form may also be used in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should detail facts illustrating the negligence of the attorney at fault, either in the memorandum or in accompanying affidavits or declarations. Similarly, the actions of the client should be set out to demonstrate the client's diligence and lack of negligence in retaining and continuing to employ the attorney, including facts showing that the client was unaware of the attorney's omissions.

See also *§ 70.480[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 70.630* -780.668, and *70.660 -70.670* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Relief for Attorney's Inexcusable Neglect

Orange Empire Nat. Bank v. Kirk *(1968) 259 Cal. App. 2d 347, 66 Cal. Rptr. 240* , involved a cross complaint based on a guaranty that cross defendant claimed he never signed. When the summons and complaint were served, cross defendant's attorney stated that he would take care of the entire matter. That proved to be something of an exaggeration. In fact, he never filed an appearance. Notified of his client's default, he failed to take any action within six months to set the default aside (except to request a stipulation to vacate the default, which cross complainant's attorney would not agree to); and having advance notice of the trial date (no default judgment was entered) and assuring his client that he would handle the defense, he again failed to act, such inaction resulting in a judgment of $50,000 being entered against his client. Thereafter, he continued to assure his client that the judgment would be set aside but did nothing. Defendant thereafter obtained new counsel who filed a motion to vacate the default and set aside the judgment. The trial court denied the motion and the defendant appealed.

The court of appeal reversed the trial court's order. The court stated that it would be difficult to conceive a set of circumstances when counsel displayed a more flagrant disregard for his or her client's best interests (*259 Cal. App. 2d*

347, 354) . Noting that the motion was addressed to the court's inherent equity power (*259 Cal. App. 2d 347, 352)* the court stated that although generally the law charges the client with the inexcusable neglect of his or her attorney, there are exceptional cases in which the client who is relatively free from personal neglect will be relieved from a default or dismissal attributable to the inaction or procrastination of his or her counsel. Citing *Daley v. County of Butte (1964) 227 Cal. App. 2d 380, 38 Cal. Rptr. 693* (discussed under [4], *below*), the court stated that when a client is unknowingly deprived of effective representation by counsel's failure to serve process, appear at the pretrial conference, communicate with the court, client, and other counsel, and the action is dismissed by reason of the attorney's misrepresentation, the client will not be charge with responsibility for the misconduct of nominal counsel of record, providing the client acts with due diligence in moving for relief and the opposing party's rights will not be prejudiced nor suffer injustice as a result of granting relief (*259 Cal. App. 2d 347, 353)* . Finding that cross defendant had acted with due diligence and that the cross complainant would not suffer prejudice, the court reversed the order (*259 Cal. App. 2d 347, 355-356)* .

[4] Additional Authorities

[a] Relief for Attorney's Inexcusable Neglect

The facts and procedural background of *Hallett v. Slaughter (1943) 22 Cal. 2d 552, 140 P.2d 3* , are discussed in *§ 70.560[3]*. In *Hallett*, the defendants in an independent action in equity to set aside a prior judgment argued that because of neglect the plaintiff should not be permitted to seek relief from equity. The Supreme Court rejected the argument by noting that although some degree of negligence may be charged to the attorney employed by the plaintiff to defend her in the earlier municipal court action in not sooner discover that plaintiff's answer had not been filed, the Court was not prepared to say that the attorney's remissness in that regard amounted to such inexcusable neglect as a matter of law that the plaintiff should have been foreclosed of her right to maintain the suit. Moreover, stated the Court, the plaintiff's delay in discovering the entry of the default was due in part at least to the apparently designed and deliberate failure of the defendants to take earlier action to secure and enforce their judgment (*22 Cal. 2d 552, 556)* .

In *Lovato v. Santa Fe Internat. Corp. (1984) 151 Cal. App. 3d 549, 198 Cal. Rptr. 838* , defendant's attorney was suspended from practice and then dismissed by defendant. Afterwards, unknown to defendant, the former attorney continued representing to plaintiff that he was counsel for defendant, and plaintiff continued serving defendant through this attorney, with interrogatories, a notice of motion to compel answers, and finally a notice of motion for sanctions for failure to comply with the order compelling answers. Although the attorney asked plaintiff on two occasions for additional time to respond to the interrogatories, he took no other action on receipt of plaintiff's papers and never notified defendant of their existence. A default was consequently entered against defendant, who unsuccessfully sought relief from the trial court. The court of appeal reversed on two grounds, the first being that the judgment was void for lack of notice (*151 Cal. App. 3d 549, 553-554)* . The court also held that the trial court had abused its discretion in denying relief on the ground that the attorney's positive misconduct constituted extrinsic fraud, while defendant was relatively free from personal neglect, and no prejudice to plaintiff appeared (*151 Cal. App. 3d 549, 554-555)* .

In *Daley v. County of Butte (1964) 227 Cal. App. 2d 380, 38 Cal. Rptr. 693* , the court of appeal reversed a trial court order denying plaintiff's motion to set aside a judgment of dismissal granted by the court for lack of prosecution of the action. Evidence relied on by the court of appeal in its opinion showed gross negligence on the part of plaintiff's attorney in that he maintained almost complete silence and inactivity in the action for some two years, failing to make any appearance in numerous pretrial conferences, place the action at issue by serving a party joined as defendant, or communicate with his client, the court, or opposing counsel. When plaintiff attempted to substitute another attorney, the original attorney failed to sign the substitution form until he received notice of the motion to dismiss. The court declared that under these circumstances, "where the client was unknowingly deprived of effective representation, she will not be charged with responsibility for the misconduct of her nominal counsel of record" (*227 Cal. App. 2d 380, 392)* . Plaintiff's failure to seek new counsel at an earlier point in the litigation was excused by the court on the ground that lay persons cannot be expected to know about statutory deadlines and should not be forced to act as "hawklike inquisitors" of their attorneys (*227 Cal. App. 2d 380, 392)* . Furthermore, the trial court itself might have attempted to remedy the

situation when it became apparent that the attorney's continued failure to act in his client's behalf might lead the client to disaster (*227 Cal. App. 2d 380, 393)* . The court pointed out that it would be ironic to penalize plaintiff for omissions of which she was ignorant but which the trial court had the means to remedy (*227 Cal. App. 2d 380, 393)* .

In *Vartanian v. Croll (1953) 117 Cal. App. 2d 639, 256 P.2d 1022* , the trial court granted plaintiff's motion to set aside a judgment rendered after a trial on the merits in favor of defendant. Plaintiff's attorney had failed to discover and produce certain facts and documents, in part because he had turned the case over to his son, a nonlawyer, for investigation and preparation. Affirming the trial court order granting relief to plaintiff, the court of appeal stated that, standing alone, the attorney's neglect would not warrant relief, but when considered with defendant's threats to a prospective witness, which tended to prevent a full trial on the merits, evidence supported the trial court's ruling (*117 Cal. App. 2d 639, 647)* .

Note that *Vartanian*, though relying for its holding on the fraud of defendant in preventing a fair trial, has been cited by courts for the proposition that relief is available to a party when judgment is rendered against such party because of the negligence of his or her attorney [*see, e.g.,* *Daley v. County of Butte (1964) 227 Cal. App. 2d 380, 391, 38 Cal. Rptr. 693* (discussed *above*)].

Antonsen v. Pacific Container Co. (1941) 48 Cal. App. 2d 535, 120 P.2d 148 , involved an action in equity to set aside two judgments that had been entered in a prior action as a result of an action that one Seely had filed on behalf of plaintiff under the purported authority of a power of attorney. Defendants in this action served cross complaints on plaintiff's attorney, who failed to notify anyone of the purported service of these papers and had in fact been suspended from the practice of law five days earlier. The trial court entered judgment in favor of the plaintiff and the defendants appealed.

The court of appeal affirmed the judgment. Defendants argued, in part that the trial court had no equitable jurisdiction in the matter since no actual fraud had been alleged on defendants' part. The court of appeal pointed out the weakness in the argument by observing that equity will grant relief from a default judgment for extrinsic mistake as well as actual fraud (*48 Cal. App. 2d 535, 538)* . Stating in addition that plaintiff could not be charged with knowledge of his attorney's suspension as a matter of law, the court found that plaintiff had been deprived, through no fault of his own, from appearing and presenting his defense to the cross complaints (*48 Cal. App. 2d 535, 539)* .

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7-70 California Points & Authorities § 70.567

§ 70.567 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Mistake of Fact--Mistake of Court or Referee

[1] FORM

[*The following may be included in a general memorandum supporting a motion in equity (see, e.g., § 70.480[1]), a memorandum opposing a demurrer to a complaint for equitable relief (see, e.g., §§ 70.520 -70.528), a memorandum opposing a defendant's motion for summary judgment in an independent suit in equity (see, e.g., § 70.540[1]), or in a trial or appellate brief.*]

THE COURT SHOULD GRANT RELIEF IN EQUITY AND SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] BECAUSE EXTRINSIC MISTAKE ON THE PART OF THE _____ [COURT *or* REFEREE *or* COMMISSIONER] THAT LED THE COURT TO DO WHAT IT NEVER INTENDED TO DO JUSTIFIES THE GRANTING OF EQUITABLE RELIEF AGAINST THE _____ [*specify, e.g.,* JUDGMENT].

Extrinsic Mistake of Court, Referee, or Commissioner. An extrinsic mistake on the part of the _____ [court *or* referee *or* commissioner] that led the court to do what it never intended to do justifies the court in granting equitable relief against the judgment (*Sullivan v. Lumsden (1897) 118 Cal. 664, 669, 50 P. 777*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of the contention that the party is entitled to equitable relief from a prior judgment or order obtained by reason of extrinsic mistake, when the judgment or order was obtained by extrinsic mistake on the part of the court or its agents (that is, a referee or commissioner) which had the effect of leading the court to do what it never intended to do.

This form should be combined with a general memorandum, depending on the procedural context in which the contention is to be raised. It may, for example, be combined with a general form of points and authorities supporting a motion in equity [*see, e.g., § 70.480[1]*]. It may also be combined with a memorandum used to oppose a defendant's attempt to dispose of an independent suit in equity through a pretrial proceeding such as a general demurrer to the complaint [*see, e.g., §§ 70.520 -70.528*], or a motion for summary judgment [*see, e.g., § 70.540[1]*].

This form may also be combined, when appropriate, with additional points and authorities supporting a grant of equitable relief on other particular grounds [*see, e.g., §§ 70.550 -70.566, 70.580 -70.623*], particularly additional points and authorities supporting relief based on extrinsic mistake in particular circumstances [*see, e.g., §§ 70.560 -70.566*].

This form may also be used in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel would identify the specific error in the court's judgment or order, showing from the court's record of the prior proceedings or other admissible evidence the ruling the court intended to make.

See also *§ 70.480[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 70.630* -780.668, and *70.660 -70.670* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Extrinsic Mistake of Court, Referee, or Commissioner

The facts and procedural background of ***Sullivan v. Lumsden*** *(1897) 118 Cal. 664, 50 P. 777* , are discussed in *§ 70.527[3]*. In *Sullivan*, the Supreme Court determined that the mistake was clearly extrinsic and collateral to the questions examined in the original action and that it led the court to do what it never intended to do; that is, to confirm to the plaintiffs a piece of land not described or referred to in the complaint or in the findings or interlocutory judgment and which was then owned and in the adverse possession of one who was not a party to the suit. The Court then concluded that the mistake complained of was one against which equity will grant relief (*118 Cal. 664, 669)* .

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7-70 California Points & Authorities §§ 70.568-70.579

[Reserved]

§§ 70.568[Reserved]

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7-70 California Points & Authorities § 70.580

§ 70.580 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud--Collusive Judgment--Generally

[1] FORM

[*The following may be included in a general memorandum supporting a motion in equity (see, e.g., § 70.480[1]), a memorandum opposing a demurrer to a complaint for equitable relief (see, e.g., §§ 70.520 -70.528), a memorandum opposing a defendant's motion for summary judgment in an independent suit in equity (see, e.g., § 70.540[1]), or in a trial or appellate brief.*]

THE COURT SHOULD GRANT RELIEF IN EQUITY AND SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] ON THE GROUND OF EXTRINSIC FRAUD BECAUSE THE _____ [*specify, e.g.,* JUDGMENT] WAS ARRIVED AT BY COLLUSION BETWEEN THE PARTIES TO THE ORIGINAL CAUSE OF ACTION, AND HAS ADVERSELY AFFECTED THE AGGRIEVED PARTY.

A. Collusive Judgment. A collusive judgment adversely affecting the rights of third persons may be set aside on the ground of extrinsic fraud (*People ex rel. Public Util. Com. v. Ryerson (1966) 241 Cal. App. 2d 115, 121, 50 Cal. Rptr. 246*).

B. Standing of Third Parties. A stranger to a prior action resulting in a judgment may obtain equitable relief to vacate that judgment on the ground that it was obtained through extrinsic fraud or mistake when his/her interests have been adversely affected by that judgment (*see People ex rel. Public Util. Com. v. Ryerson (1966) 241 Cal. App. 2d 115, 119, 50 Cal. Rptr. 246*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of the contention that the party is entitled to equitable relief from a prior judgment or order obtained by reason of extrinsic fraud, when there was collusion between the original parties to the action. For a supporting memorandum asserting that a pecuniary interest is not an indispensable element for intervention, see *§ 70.581[1]*.

This form should be combined with a general memorandum, depending on the procedural context in which the contention is to be raised. It may, for example, be combined with a general form of points and authorities supporting a motion in equity [*see, e.g., § 70.480[1]*]. It may also be combined with a memorandum used to oppose a defendant's attempt to dispose of an independent suit in equity through a pretrial proceeding such as a general demurrer to the complaint [*see, e.g., §§ 70.520 -70.528*], or a motion for summary judgment [*see, e.g., § 70.540[1]*].

This form may also be combined, when appropriate, with additional points and authorities supporting a grant of equitable relief on other particular grounds [*see, e.g., §§ 70.550 -70.567, 70.581 -70.623*], particularly additional points and authorities supporting relief based on extrinsic mistake in particular circumstances [*see, e.g., §§ 70.560 -70.567*].

This form may also be used in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel would identify the specific error in the court's judgment or order, showing from the court's record of the prior proceedings or other admissible evidence the ruling the court intended to make.

See also *§ 70.480[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 70.630* -780.668, and *70.660 -70.670* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Collusive Judgment

The facts and procedural background of ***People ex rel. Public Util. Com. v. Ryerson*** *(1966) 241 Cal. App. 2d 115, 50 Cal. Rptr. 246* , are discussed in *§ 70.501[3]*. In *Ryerson*, the court of appeal reversed a judgment sustaining a general demurrer in an independent action in equity brought by the Public Utilities Commission against a motor carrier to set aside a judgment based on extrinsic fraud. On the issue of whether the judgment should be set aside in equity, the court reviewed the allegations of the complaint. The complaint, as amended, alleged that there was no mistake on the part of the carrier in issuing freight bills that did not comply with tariff requirements, that the carrier colluded with the shipper in entering into a stipulation of facts for the purpose of enabling the shipper to obtain, with respect to numerous separate shipments, the benefit of lower multiple lot rates, and that an earlier judgment was entered on the basis of the collusive stipulation. It was further alleged that no notice was given to the Commission of the proposed stipulation or of its filing with the court although its decision and order required the carrier to keep the Commission informed on the progress made in collecting under charges (*241 Cal. App. 2d 115, 120-121)* . The court stated that a collusive judgment adversely affecting the rights of third persons may be set aside on the ground of extrinsic fraud, and concluded that the complaint as amended alleged facts sufficient to constitute a cause of action for equitable relief on the ground of extrinsic fraud (*241 Cal. App. 2d 115, 121)* .

[b] Standing of Third Parties

People ex rel. Public Util. Com. v. Ryerson *(1966) 241 Cal. App. 2d 115, 50 Cal. Rptr. 246* , is discussed in *§ 70.501[3]* .

[4] Additional Authorities

[a] Collusive Judgment

In *Babbitt v. Babbitt (1955) 44 Cal. 2d 289, 282 P.2d 1* , the Supreme Court affirmed a judgment awarding certain property to the wife in a divorce case, notwithstanding the existence of a prior stipulated judgment dividing title to that property between the husband and another person. The husband had commenced living with another woman, Agnes, and acquired property in her name. In an action against the husband by Agnes for ejectment, the parties entered into a stipulated judgment that each should take a one-half interest in the property. The wife sued for a divorce and joined Agnes praying that it be decreed that Agnes held the property in trust for the community. The Court ruled that the trial court had properly held that such an agreed judgment was in effect merely a compromise among wrongdoers in a controversy between themselves as to a division of the spoils. On no principle of right or justice should that judgment be deemed binding on the plaintiff (*44 Cal. 2d 289, 293)* .

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7-70 California Points & Authorities § 70.581

§ 70.581 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud--Collusive Judgment--Pecuniary or Other Interest

[1] FORM

[*The following may be included in a general memorandum supporting a motion in equity (see, e.g., § 70.480[1]), a memorandum opposing a demurrer to a complaint for equitable relief (see, e.g., §§ 70.520 -70.528), a memorandum opposing a defendant's motion for summary judgment in an independent suit in equity (see, e.g., § 70.540[1]), or in a trial or appellate brief.*]

A PECUNIARY INTEREST IS NOT INDISPENSABLE ELEMENT FOR INTERVENTION.

Pecuniary or Other Interest. While an intervener's interest in a judgment entered in an action between other parties is normally pecuniary, a pecuniary interest is not an indispensable element for intervention (*People ex rel. Public Util. Com. v. Ryerson (1966) 241 Cal. App. 2d 115, 119, 50 Cal. Rptr. 246*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of the contention that the party is entitled to equitable relief from a prior judgment or order obtained by reason of extrinsic fraud, when there was collusion between the original parties to the action. This form sets forth the principle that a pecuniary interest is not an indispensable element for intervention [*People ex rel. Public Util. Com. v. Ryerson (1966) 241 Cal. App. 2d 115, 119, 50 Cal. Rptr. 246]* . For a form generally supporting the contention that the party is entitled to equitable relief when there was collusion between the original parties to the action, with which this form may be combined, see *§ 70.580[1]*.

This form should be combined with a general memorandum, depending on the procedural context in which the

contention is to be raised. It may, for example, be combined with a general form of points and authorities supporting a motion in equity [*see, e.g., § 70.480[1]*]. It may also be combined with a memorandum used to oppose a defendant's attempt to dispose of an independent suit in equity through a pretrial proceeding such as a general demurrer to the complaint [*see, e.g., §§ 70.520 -70.528*], or a motion for summary judgment [*see, e.g., § 70.540[1]*].

This form may also be combined, when appropriate, with additional points and authorities supporting a grant of equitable relief on other particular grounds [*see, e.g., §§ 70.550 -70.580, 70.582 -70.623*], particularly additional points and authorities supporting relief based on extrinsic fraud in particular circumstances [*see, e.g., §§ 70.582 -70.591*].

This form may also be used in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 70.480[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 70.630* -780.668, and *70.660 -70.670* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Pecuniary or Other Interest

The facts and procedural background of ***People ex rel. Public Util. Com. v. Ryerson*** *(1966) 241 Cal. App. 2d 115, 50 Cal. Rptr. 246* , are discussed in *§ 70.501[3]*. In *Ryerson*, the court of appeal stated that, while the interest necessary for intervention is normally pecuniary, that is not an indispensable element (*241 Cal. App. 2d 115, 119)* . The court held that the interest of the people in maintaining the integrity of the order of the Public Utilities Commission is clearly sufficient (noting that the collection of undercharges, as ordered by the Commission in the case before it, had been held to be one of the most effective means of preserving the minimum transport rate structure and of eliminating collusion between carriers and shippers) (*241 Cal. App. 2d 115, 120)* .

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7-70 California Points & Authorities § 70.582

§ 70.582 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud--Fraudulent Change in Terms of Oral Settlement

[1] FORM

[*The following may be included in a general memorandum supporting a motion in equity (see, e.g., § 70.480[1]), a memorandum opposing a demurrer to a complaint for equitable relief (see, e.g., §§ 70.520 -70.528), a memorandum opposing a defendant's motion for summary judgment in an independent suit in equity (see, e.g., § 70.540[1]), or in a trial or appellate brief.*]

THE COURT SHOULD GRANT RELIEF IN EQUITY AND SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] ON THE GROUND OF EXTRINSIC FRAUD BECAUSE THE _____ [*specify, e.g.,* JUDGMENT] REFLECTS A FRAUDULENT CHANGE FROM THE TERMS OF A PRIOR ORAL SETTLEMENT UNDER CIRCUMSTANCES EXCUSING THE AGGRIEVED PARTY'S FAILURE TO DISCOVER THE CHANGE.

Change in Terms of Oral Settlement. A court will grant equitable relief from a judgment rendered pursuant to an agreement between the parties when it is shown that one party fraudulently changed the terms of the oral agreement in reducing it to a written document under such circumstances as would excuse the other party from recognizing and contesting the change (*Lopez v. Lopez (1965) 63 Cal. 2d 735, 738-739, 48 Cal. Rptr. 136, 408 P.2d 744*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of the contention that the party is entitled to equitable relief from a prior judgment or order obtained by reason of extrinsic fraud, when there was a fraudulent change in the terms of an oral settlement between the parties.

This form should be combined with a general memorandum, depending on the procedural context in which the contention is to be raised. It may, for example, be combined with a general form of points and authorities supporting a motion in equity [*see, e.g., § 70.480[1]*]. It may also be combined with a memorandum used to oppose a defendant's attempt to dispose of an independent suit in equity through a pretrial proceeding such as a general demurrer to the complaint [*see, e.g., §§ 70.520 -70.528*], or a motion for summary judgment [*see, e.g., § 70.540[1]*].

This form may also be combined, when appropriate, with additional points and authorities supporting a grant of equitable relief on other particular grounds [*see, e.g., §§ 70.550 -70.581, 70.583 -70.623*], particularly additional points and authorities supporting relief based on extrinsic fraud in particular circumstances [*see, e.g., §§ 70.580, 70.581, 70.583 -70.591*].

This form may also be used in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel would identify facts that establish the true terms of the oral agreement between the parties, and the specific words and phrases in the writing that do not conform to the oral agreement. See also *§ 70.480[2][b]* regarding evidentiary support for facts stated.

[c] Effect of Parol Evidence Rule

Counsel should be prepared to address objections based on the parol evidence rule. Extrinsic evidence can be admitted if an imperfection of the writing is put in issue by the pleadings or the validity of the agreement is the fact in dispute. In addition, the parol evidence rule does not exclude other evidence of the circumstances under which the agreement was made or to which it relates [*see Code Civ. Proc. § 1860* (circumstances surrounding making of an instrument); *see also Civ. Code § 3399* (written contract that does not truly express intention of parties because of fraud may be revised)]. For additional discussion of the parol evidence rule and its exceptions, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 70.630* -780.668, and *70.660 -70.670* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Change in Terms of Oral Settlement

In ***Lopez v. Lopez*** *(1965) 63 Cal. 2d 735, 48 Cal. Rptr. 136, 408 P.2d 744* , pursuant to an oral stipulation between the parties, a husband and a wife, in open court, entered into a property settlement specifying that support payments would continue until the wife's death or remarriage. It was also stipulated that on reduction of the agreement to writing, either party might apply to the court for a default hearing. Thereafter, the husband's attorney drafted an agreement and submitted it to the husband, who was also an attorney. The writing inserted the words "or husband" into the agreement, so that it provided for payments to continue until either party died or remarried. The agreement was then submitted to the wife's attorney who did not notice the words that had been added. The wife likewise did not notice the insertion of the words. Thereafter, at a default hearing the executed agreement was introduced in evidence by the husband, and it was approved by the court and incorporated into the interlocutory decree of divorce, and subsequently into the final decree of divorce. Shortly after the final decree was entered, the husband remarried. He then stopped making the payments for the former wife's support in accordance with the terms of the writing. The wife moved for equitable relief,

and the trial court set aside the interlocutory decree, the final decree, and the property settlement agreement on the ground of fraud on the part of the husband and ordered the husband to pay the wife all sums that had accrued under the provisions of the oral stipulation, together with attorney's fees and costs. The husband appealed.

The Supreme Court reversed the order, insofar as it set aside the interlocutory and final decrees of divorce. In all other aspects, the order was affirmed. Although the Court noted that there was no evidence of extrinsic fraud or mistake insofar as either decree was concerned (*63 Cal. 2d 735, 738)* , as to the property settlement agreement, the Court held that under the circumstances, the trial court's finding that extrinsic fraud was committed was supported by evidence in the record and that the court had properly set aside the agreement (*63 Cal. 2d 735, 739)* . The Court noted in a footnote that the trial court took judicial notice of the fact that it is *usual* to include in a written agreement for support a provision that "payments shall continue until such time as said wife shall die or remarry," but *not usual* to provide that such payments shall terminate on the remarriage of the husband, and found that the wife's attorney was justified in relying on the stipulation made in open court and under the circumstances need not have expected any substantial changes between the stipulation and the written agreement. The trial court further found that the husband anticipated that, in the absence of a letter or other communication pointing out any changes, the wife's attorney would fail to examine carefully the clauses considered "formal," that the wife herself, by reason of her upset and nervous condition, would be incapable of seeing the change, and that as a result, he would obtain a fraudulent, unfair, and unconscionable benefit (*63 Cal. 2d 735, 739 n.1*).

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7-70 California Points & Authorities § 70.583

§ 70.583 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud--Concealment of Legal Disability of Aggrieved Party

[1] FORM

[*The following may be included in a general memorandum supporting a motion in equity (see, e.g., § 70.480[1]), a memorandum opposing a demurrer to a complaint for equitable relief (see, e.g., §§ 70.520 -70.528), a memorandum opposing a defendant's motion for summary judgment in an independent suit in equity (see, e.g., § 70.540[1]), or in a trial or appellate brief.*]

THE COURT SHOULD GRANT RELIEF IN EQUITY AND SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] ON THE GROUND OF EXTRINSIC FRAUD BECAUSE THE DEFENDANT IN THE FORMER ACTION, THE AGGRIEVED PARTY HEREIN, WAS UNDER A LEGAL DISABILITY AT THE TIME OF THE ACTION AND THAT THE DISABILITY WAS KNOWN TO BUT CONCEALED BY THE PLAINTIFF IN THAT ACTION.

Concealment of Disability. In adversary proceedings, when the defendant is under a legal disability and the plaintiff has knowledge of the defendant's condition, [a duty rests on the plaintiff to disclose such matters to the court and to have a guardian appointed for the purpose of the proceeding and] if the plaintiff conceals such information from the court, a cause of action for relief in equity can be stated on the ground that extrinsic fraud prevented a fair adversary proceeding (*Olivera v. Grace (1942) 19 Cal. 2d 570, 577, 122 P.2d 564* ; *Saunders v. Saunders (1958) 157 Cal. App. 2d 67, 72, 320 P.2d 131*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of the contention that the party is entitled to equitable relief from a

prior judgment or order obtained by reason of extrinsic fraud, when there was a concealment of a legal disability of the plaintiff.

This form should be combined with a general memorandum, depending on the procedural context in which the contention is to be raised. It may, for example, be combined with a general form of points and authorities supporting a motion in equity [*see, e.g., § 70.480[1]*]. It may also be combined with a memorandum used to oppose a defendant's attempt to dispose of an independent suit in equity through a pretrial proceeding such as a general demurrer to the complaint [*see, e.g., §§ 70.520 -70.528*], or a motion for summary judgment [*see, e.g., § 70.540[1]*].

This form may also be combined, when appropriate, with additional points and authorities supporting a grant of equitable relief on other particular grounds [*see, e.g., §§ 70.550 -70.582, 70.584 -70.623*], particularly additional points and authorities supporting relief based on extrinsic fraud in particular circumstances [*see, e.g., §§ 70.580 -70.582, 70.584 -70.591*].

This form may also be used in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should refer to facts that establish that the aggrieved party was under a legal disability in the prior proceedings; facts tending to prove that the plaintiff in the former action knew of the aggrieved party's condition; and the fact that the aggrieved party's disability was concealed from the court by the plaintiff in that action.

See also *§ 70.480[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 70.630* -780.668, and *70.660 -70.670* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Concealment of Disability

The facts and procedural background of ***Olivera v. Grace*** *(1942) 19 Cal. 2d 570, 122 P.2d 564* , are discussed in *§ 70.480[3]* [*see also* discussion in *§ 70.520[3]*]. In *Olivera*, the defendant, who had been the plaintiff in the former action and who had failed to disclose to that court the incompetency of the then defendant, contended that, since there had been no judicial finding as to incompetency, there was no fraud since she could not have had knowledge of such incapacity and that concealment of information does not constitute fraud in the absence of a confidential relationship between the parties requiring disclosure. However, the Supreme Court ruled that incompetency that is alleged to render a party wholly devoid of understanding and incapable of transacting business of any nature is a condition that exists independently of a judicial determination. When the defendant is under such a legal disability and the plaintiff has knowledge of his or her condition, a duty rests on the plaintiff to disclose such matters to the court and to have a guardian appointed for the purpose of the proceeding. If the plaintiff knows of the defendant's incompetency but conceals such information from the court and, to prevent a true adversary hearing, proceeds to a default judgment by taking advantage of the defendant's condition, his or her conduct constitutes a fraud on the court as well as on the incompetent defendant. Since the direct effect of such concealment is to prevent the incompetent from presenting whatever defense he or she has to the court, it is clear that the fraud is extrinsic. The Court added that in cases such as this, when an adversary hearing has in fact been held, a cause of action for relief can be stated on the ground that extrinsic fraud prevented a fair adversary proceeding (*19 Cal. 2d 570, 577)* .

Saunders v. Saunders *(1958) 157 Cal. App. 2d 67, 320 P.2d 131* , involved an action by a wife to set aside an interlocutory judgment divorce on the ground of extrinsic fraud. The complaint alleged that the plaintiff in the former action, the husband, had known of but concealed from the court therein the fact that the wife was mentally incompetent throughout the pendency of that action. At the beginning of trial, the defendant moved to exclude evidence, which the trial court granted. The trial court thereafter refused to allow the plaintiff to file an amended complaint which alleged that the wife's attorneys were ignorant of the fact of her incompetence, that the husband knew of their ignorance as well as the fact of the wife's disability and failed to reveal either fact to the court. Thereafter, the trial court entered judgment dismissing the action. The plaintiff appealed.

The court of appeal reversed with instructions to permit the filing of the plaintiff's proposed amended complaint. The defendant sought to distinguish the case from *Olivera v. Grace (1942) 19 Cal. 2d 570, 122 P.2d 564* (discussed *above*), on the ground that the plaintiff in this case (the defendant in the prior action) was not wholly without understanding as was the defendant in *Olivera* (*157 Cal. App. 2d 67, 71)* . Despite allegations in the complaint that indicated that the plaintiff was not devoid of understanding, the court determined that it would accept as true for the purposes of the appeal that the plaintiff was mentally incompetent throughout the divorce proceeding (*157 Cal. App. 2d 67, 71)* . The court, however, did conclude that the reasoning in *Olivera* applied equally to the case before it. The court stated that while the defendant, as plaintiff in the divorce action, took no affirmative step to keep the wife away from the court and made no express misrepresentation to the court, he was in a position in which he had a positive duty to speak and to tell the truth. Cases involving confidential relationships, such as husbands and wife, are to the effect that the unwarranted silence of one who should speak works an extrinsic fraud or mistake that will undo a judgment obtained thereby (*157 Cal. App. 2d 67, 72)* . The averments of the amended complaint showed that the wife's attorneys were ignorant of the fact of her incompetency, that the plaintiff husband knew of their ignorance as well as the fact of the wife's disability and failed to reveal either fact to the court. This, said the court of appeal, raised an equity in favor of the wife sufficient to overthrow the interlocutory decree, whether it be called extrinsic fraud or extrinsic mistake or an exercise of the "well recognized jurisdiction in equity which has been utilized to relieve incompetent defendants from judgments taken under circumstances of unfairness and injustice." Equity's jurisdiction to interfere with final judgments is based on the absence of a fair, adversary trial in the original action. The court concluded that when an adversary hearing has in fact been held, a cause of action for relief in equity can be stated on the ground that extrinsic fraud prevented a fair adversary hearing. Accordingly, the court of appeal ruled that the trial court should have allowed the plaintiff to file the amended complaint (*157 Cal. App. 2d 67, 73)* .

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7-70 California Points & Authorities § 70.584

§ 70.584 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud--Concealment or Misrepresentation by Fiduciary--Generally

[1] FORM

[*The following may be included in a general memorandum supporting a motion in equity (see, e.g., § 70.480[1]), a memorandum opposing a demurrer to a complaint for equitable relief (see, e.g., §§ 70.520 -70.528), a memorandum opposing a defendant's motion for summary judgment in an independent suit in equity (see, e.g., § 70.540[1]), or in a trial or appellate brief.*]

THE COURT SHOULD GRANT RELIEF IN EQUITY AND SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] ON THE GROUND OF EXTRINSIC FRAUD BECAUSE THE AGGRIEVED PARTY'S ADVERSARY IN THE FORMER ACTION, IN VIOLATION OF A DUTY ARISING FROM A TRUST OR CONFIDENTIAL RELATION, CONCEALED FROM THE AGGRIEVED PARTY FACTS ESSENTIAL TO THE PROTECTION OF HIS/HER RIGHTS.

Concealment or Misrepresentation by Fiduciary. A party may seek relief from a judgment entered in a proceeding in which he/she was deprived of a fair opportunity to present fully his/her case when the party's adversary, in violation of a duty arising from a trust or confidential relation, has concealed from him/her facts essential to the protection of his/her rights, even if such facts concerned issues involved in the case in which the judgment was entered (*Estate of Anderson (1983) 149 Cal. App. 3d 336, 349, 196 Cal. Rptr. 782*).

[*Add additional points and authorities supporting relief from judgment or order in particular circumstances relating to concealment by a fiduciary (see, e.g., §§ 70.585 -70.588).*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of the contention that the party is entitled to equitable relief from a prior judgment or order obtained by reason of extrinsic fraud, due to a fiduciary's concealment from or misrepresentation of facts to the aggrieved party.

When applicable, this form may be combined with additional points and authorities supporting relief from judgment or order in particular circumstances relating to concealment by a fiduciary, for example, points and authorities on the following grounds:

- Failure by fiduciary to make disclosure [*see § 70.585*].
- False conclusions of fact or law made by fiduciary [*see § 70.586*].
- Fiduciary's lack of intent to defraud is immaterial [*see § 70.587*].
- A personal representative is shielded by good faith only in absence of negligence [*see § 70.588*].

This form should be combined with a general memorandum, depending on the procedural context in which the contention is to be raised. It may, for example, be combined with a general form of points and authorities supporting a motion in equity [*see, e.g., § 70.480[1]*]. It may also be combined with a memorandum used to oppose a defendant's attempt to dispose of an independent suit in equity through a pretrial proceeding such as a general demurrer to the complaint [*see, e.g., §§ 70.520 -70.528*], or a motion for summary judgment [*see, e.g., § 70.540[1]*].

This form may also be combined, when appropriate, with additional points and authorities supporting a grant of equitable relief on other particular grounds [*see, e.g., §§ 70.550 -70.582, 70.584 -70.623*], particularly additional points and authorities supporting relief based on extrinsic fraud in particular circumstances [*see, e.g., §§ 70.580 -70.583, 70.585 -70.591*].

This form may also be used in a trial or appellate brief.

See also *§ 70.480[2]* for additional general considerations relating to equitable relief, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should refer to facts that indicate: (1) the specific nature of the confidential relationship; (2) the specific misrepresentation, concealment, or nondisclosure; and (3) the resulting deprivation of the aggrieved party's right to a fair opportunity to fully present his or her case.

See also *§ 70.480[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 70.630* -780.668, and *70.660 -70.670* may be used to oppose the contention supported by this form. See, *in particular, § 70.633[3]*.

[3] Discussion of Authorities

[a] Concealment or Misrepresentation by Fiduciary

Estate of Anderson *(1983) 149 Cal. App. 3d 336, 196 Cal. Rptr. 782* , involved a judgment surcharging an executor bank for the estate of a decedent the amount of $1,563,759 as damages to the estate. The objectors were the sons of the decedent and life beneficiaries under a trust established by the decedent's will. In surcharging the bank, the trial court found that, due to the bank's acts of extrinsic fraud, the objectors were not barred, by a prior order confirming sale, from challenging the bank's actions. The bank appealed.

The court of appeal affirmed the judgment. Applying the rules governing extrinsic fraud stated by the *Supreme Court in Jorgensen v. Jorgensen (1948) 32 Cal. 2d 13, 19-20, 193 P.2d 728* , the court upheld the trial court's findings of extrinsic fraud. According to *Jorgensen*, it is necessary to examine the facts in light of the policy that a party who fails to assemble all his or her evidence at the trial should not be privileged to relitigate a case, as well as the policy permitting a party to seek relief from a judgment entered in a proceeding in which he or she was deprived of a fair opportunity to fully present his or her case. This latter policy applies when a party's adversary, in violation of a duty arising from a trust or confidential relation, has concealed from him or her facts essential to the protection of his or her rights, even though such facts concerned issues involved in the case in which judgment was entered. The court determined that the acts of the bank constituting extrinsic fraud, in the judgment of the court below, included concealment from objectors and the court of material facts in three communications (*149 Cal. App. 3d 336, 347-348)* .

Extrinsic fraud was, in the opinion of the court, supported by findings that the bank had deliberately either misstated, or failed to state, the following material facts: the failure of the bank to calculate the tax consequences of the sale; the loss of the 10-year installment deferment plan; the increase in estate taxes caused by the sale being far in excess of the down payment received from the sale; and, the knowledge by the bank that the estate obligations could not be discharged as represented. Further, the bank was notified by the IRS four days after the hearing, and before the order was signed of a new valuation on the retained parcel, yet no disclosure of that development was made until after confirmation of the sale had become res judicata (*149 Cal. App. 3d 336, 349)* .

[4] Additional Authorities

[a] Concealment or Misrepresentation by Fiduciary

Jorgensen v. Jorgensen (1948) 32 Cal. 2d 13, 193 P.2d 728 , involved an action to set aside provisions of an interlocutory divorce judgment relating to a property settlement agreement. The wife's complaint alleged that in the divorce action the parties had agreed on division of the community property and that the husband had represented that a property settlement agreement drafted by his attorney did so, whereas it deprived her of such interest in certain stock. She alleged that the interlocutory decree approving and adopting the property settlement agreement was induced by the defendant's extrinsically fraudulent representations as to the character of the shares. The husband moved for judgment on the pleadings, which the trial court granted. The Supreme Court affirmed the judgment. However, the Court stated that it is necessary to examine the facts in light of the policy that a party who failed to assemble all his or her evidence at the trial should not be privileged to relitigate a case, as well as the policy permitting a party to seek relief from a judgment entered in a proceeding in which he or she was deprived of a fair opportunity fully to present his or her case. The latter policy, according to the Court, applies when a party's adversary, in violation of a duty arising from a trust or confidential relation, has concealed from him or her facts essential to the protection of his or her rights, even though such facts concerned issues involved in the case in which the judgment was entered (*32 Cal. 2d 13, 19)* .

Rivercourt Co. Ltd. v. Dyna-Tel, Inc. (1996) 41 Cal. App. 4th 1477, 49 Cal. Rptr. 2d 279 , involved a confession of judgment that was fraudulently entered. The court of appeal held that the trial court properly set aside the judgment when an attorney was found to have acted as counsel for both parties, and was not independently representing the aggrieved party, despite attorney's statement in his declaration in support of confession of judgment that he had examined proposed judgment and had advised the party with respect to waiver of rights and defenses under the confession of judgment procedure (*41 Cal. App. 4th 1477, 1481-1482)* .

The facts and procedural background of *Harkins v. Fielder (1957) 150 Cal. App. 2d 528, 310 P.2d 423* , are discussed in *§ 70.520[3]*. In *Harkins*, the court of appeal observed that while there are many facets of extrinsic fraud, one familiar example consists of deceptive conduct on the part of the distributee of an estate which has kept other interested parties away from court by some fraudulent artifice or willful suppression of material facts (*150 Cal. App. 2d 528, 535)* .

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7-70 California Points & Authorities § 70.585

§ 70.585 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud--Concealment or Misrepresentation by Fiduciary--Failure by Fiduciary to Make Disclosure

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion in equity for relief, based on fraud resulting from concealment by a fiduciary (see § 70.584[1]).*]

THE COURT SHOULD GRANT RELIEF IN EQUITY AND SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] ON THE GROUND OF EXTRINSIC FRAUD, BECAUSE THE _____ [*identify capacity of party's fiduciary, e.g.,* PERSONAL REPRESENTATIVE] OF THE AGGRIEVED PARTY FAILED TO MAKE DISCLOSURES TO THE AGGRIEVED PARTY, AND THAT FAILURE CONSTITUTES A FRAUD FOR WHICH EQUITY MAY GRANT RELIEF.

Failure by Fiduciary to Make Disclosure. The failure to perform the duty to speak or make disclosures that rests on one because of a trust or confidential relation is a fraud for which equity may relieve from a judgment thereby obtained (*Estate of Anderson (1983) 149 Cal. App. 3d 336, 347-348, 196 Cal. Rptr. 782*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of the contention that the party is entitled to equitable relief from a prior judgment or order obtained by reason of extrinsic fraud, due to a fiduciary's nondisclosure of facts to the aggrieved party.

This form should be combined with points and authorities generally supporting relief from judgment or order based on fraud resulting from concealment by a fiduciary, see *§ 70.584*.

This form may also be used in a trial or appellate brief.

See also *§ 70.480[2]* for additional general considerations relating to equitable relief, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should refer to facts that indicate: (1) the specific nature of the confidential relationship; (2) the specific nondisclosure; and (3) the resulting deprivation of the aggrieved party's right to a fair opportunity to fully present his or her case.

See also *§ 70.480[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 70.630* -780.668, and *70.660 -70.670* may be used to oppose the contention supported by this form. See, *in particular, § 70.633[3]*.

[3] Discussion of Authorities

[a] Failure by Fiduciary to Make Disclosure

The facts and procedural background of ***Estate of Anderson*** *(1983) 149 Cal. App. 3d 336, 196 Cal. Rptr. 782* , are discussed in *§ 70.584[3]*. In *Estate of Anderson*, in holding that representations by an executor bank to objectors and beneficiaries under the decedent's will constituted extrinsic fraud, the court stated that the failure to perform the duty to speak or make disclosures which rests on one because of a trust or confidential relation is obviously a fraud, for which equity may relieve from a judgment thereby obtained [*citing Jorgensen v. Jorgensen (1948) 32 Cal. 2d 13, 19, 193 P.2d 728]* (*149 Cal. App. 3d 336, 349)* . Put another way, the court stated that a special or fiduciary relationship dictates full and complete disclosure, and short of it, a finding of extrinsic fraud is required (*149 Cal. App. 3d 336, 350)* .

[4] Additional Authorities

[a] Failure by Fiduciary to Make Disclosure

The facts and procedural background of *Jorgensen v. Jorgensen (1948) 32 Cal. 2d 13, 193 P.2d 728* , are discussed § 70.584[3]. In *Jorgensen*, although the Supreme Court upheld a judgment on the pleadings in an action in equity to set aside a judgment in a prior proceeding, the Court stated that the failure to perform the duty to speak or make disclosures which rests on one because of a trust or confidential relation is obviously a fraud, for which equity may relieve from a judgment thereby obtained, even though the breach of duty occurs during a judicial proceeding and involves false testimony, and this is true whether such fraud be regarded as extrinsic or as an exception to the extrinsic fraud rule (*32 Cal. 2d 13, 19)* .

The facts and procedural background of *Harkins v. Fielder (1957) 150 Cal. App. 2d 528, 310 P.2d 423* , are discussed in *§ 70.523[3]*. In *Harkins*, the court of appeal stated the invocation of equity on the grounds of extrinsic fraud is warranted when an heir or legatee fails to notify the court of the existence of other heirs of whose existence he or she has knowledge and files false petitions with the court representing that there are no such heirs (*150 Cal. App. 2d 528, 535)* .

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7-70 California Points & Authorities § 70.586

§ 70.586 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud--Concealment or Misrepresentation by Fiduciary--False Conclusions of Fact or Law Equally Condemned

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion in equity for relief, based on fraud resulting from concealment by a fiduciary (see § 70.584[1]).*]

THE COURT SHOULD GRANT RELIEF IN EQUITY AND SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] ON THE GROUND OF EXTRINSIC FRAUD, BECAUSE THE _____ [*identify capacity of party's fiduciary, e.g.,* PERSONAL REPRESENTATIVE] OF THE AGGRIEVED PARTY MADE STATEMENTS OF FALSE CONCLUSIONS OF _____ [FACT *or* LAW].

False Conclusions of Fact or Law Equally Condemned. Statements of false conclusions of fact or law made by a fiduciary to a beneficiary are condemned equally with untrue factual statements (*Estate of Anderson (1983) 149 Cal. App. 3d 336, 350, 196 Cal. Rptr. 782*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of the contention that the party is entitled to equitable relief from a prior judgment or order obtained by reason of extrinsic fraud, due to a fiduciary's statements of false conclusions of fact or law to the aggrieved party.

This form should be combined with points and authorities generally supporting relief from judgment or order based on fraud resulting from concealment by a fiduciary, see *§ 70.584*.

This form may also be used in a trial or appellate brief.

See also *§ 70.480[2]* for additional general considerations relating to equitable relief, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should refer to facts that indicate: (1) the specific nature of the confidential relationship; (2) the specific statements of false conclusions of fact or law; and (3) the resulting deprivation of the aggrieved party's right to a fair opportunity to fully present his or her case.

See also *§ 70.480[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 70.630* -780.668, and *70.660 -70.670* may be used to oppose the contention supported by this form. See, *in particular, § 70.633[3]*.

[3] Discussion of Authorities

[a] False Conclusions of Fact or Law Equally Condemned

The facts and procedural background of ***Estate of Anderson*** *(1983) 149 Cal. App. 3d 336, 196 Cal. Rptr. 782* , are discussed in *§ 70.584[3]*. In *Estate of Anderson*, in concluding that the judgment was obtained as a result of extrinsic fraud of a fiduciary, the court stated that it must be remembered that statements of false conclusions of fact or law made by a fiduciary to a beneficiary are condemned equally with untrue factual statements (*149 Cal. App. 3d 336, 349-350)* .

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§ 70.587 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud--Concealment or Misrepresentation by Fiduciary--Lack of Intent to Defraud Immaterial

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion in equity for relief, based on fraud resulting from concealment by a fiduciary (see § 70.584[1]).*]

THE COURT SHOULD GRANT RELIEF IN EQUITY AND SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] ON THE GROUND OF EXTRINSIC FRAUD DESPITE ANY LACK OF INTENT TO DEFRAUD BY THE _____ [*identify capacity of party's fiduciary, e.g.,* PERSONAL REPRESENTATIVE], BECAUSE AN INTENT TO DEFRAUD IS IMMATERIAL.

Lack of Intent to Defraud Immaterial. When one party standing in a fiduciary relationship to another fails to reveal a fact or to speak, such action will constitute grounds for equity to afford relief regardless of the lack of intent to defraud (*Cardozo v. Bank of America (1953) 116 Cal. App. 2d 833, 837-839, 254 P.2d 949*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of the contention that the party is entitled to equitable relief from a prior judgment or order obtained by reason of extrinsic fraud, despite a lack of intent to defraud on the part of the fiduciary [*Cardozo v. Bank of America (1953) 116 Cal. App. 2d 833, 837-839, 254 P.2d 949]* .

This form should be combined with points and authorities generally supporting relief from judgment or order based on fraud resulting from concealment by a fiduciary, see *§ 70.584*.

This form may also be used in a trial or appellate brief.

See also *§ 70.480[2]* for additional general considerations relating to equitable relief, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 70.480[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 70.630* -780.668, and *70.660 -70.670* may be used to oppose the contention supported by this form. See, *in particular, § 70.633[3]*.

[3] Discussion of Authorities

[a] Lack of Intent to Defraud Immaterial

In ***Cardozo v. Bank of America*** *(1953) 116 Cal. App. 2d 833, 254 P.2d 949* , involved an action to establish a trust in those assets of an estate which had been distributed pursuant to a probate decree allegedly obtained through the fraud of the executrix-beneficiary. The will involved had given the defendant a life estate with remainder over to the plaintiff. The defendant had filed a petition for probate falsely stating that plaintiff's address was unknown. She also filed a petition for distribution falsely stating that she was the sole surviving heir and entitled to all of the estate. Judgment was granted in favor of the defendant, and the plaintiff appeal.

The court of appeal reversed. The court ruled that the circumstances of the case supported the trial court's conclusion that the defendant's actions were not done with any intent to defraud and that there can be no actual fraud without such intent. However, defendant's failure to give the plaintiff notice of the probate proceedings and to act in the utmost good faith towards him and her obtaining an undue advantage of him by her erroneous petition for distribution constituted a constructive fraud in view of the fiduciary relationship she bore towards him (*116 Cal. App. 2d 833, 837)* . Executors occupy trust relations towards the legatees and are bound to the utmost good faith in their transactions with the beneficiary, the court held. If there is a duty to speak because of a trust or confidential relation, a failure to do so is obviously a fraud for which equity may afford relief (*116 Cal. App. 2d 833, 838)* . In view of the fact that she notified the plaintiff that he was entitled to half of the remainder, rather than all, and that this fact had lulled him to some extent into a sense of security, defendant had thereby secured an unconscionable advantage, entitling the plaintiff to relief. The fact that she did not intend to defraud him is not important, the court held, since he was just as defrauded as if she had intended to defraud him (*116 Cal. App. 2d 833, 839)* .

[4] Additional Authorities

[a] Lack of Intent to Defraud Immaterial

The facts and procedural background of *Harkins v. Fielder (1957) 150 Cal. App. 2d 528, 310 P.2d 423* , are discussed in *§ 70.523[3]*. In *Harkins*, the court of appeal stated that actual or positive fraud is not required as an element of extrinsic fraud since a mistake on the part of the distributee, which keeps a legatee in ignorance of the true facts or deprives him or her of a fair notice of the probate proceedings, constitutes a type of extrinsic fraud (*150 Cal. App. 2d 528, 535)* . Accordingly, the court held that the distributee's concealment was a fraud on the court and on the plaintiffs (*150 Cal. App. 2d 528, 536)* .

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7-70 California Points & Authorities § 70.588

§ 70.588 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud--Concealment or Misrepresentation by Fiduciary--Good Faith Shields Personal Representative Only in Absence of Negligence

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion in equity for relief, based on fraud resulting from concealment by a fiduciary (see § 70.584[1]).*]

THE COURT SHOULD GRANT RELIEF IN EQUITY AND SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] ON THE GROUND OF EXTRINSIC FRAUD, AND THE AGGRIEVED PARTY'S PERSONAL REPRESENTATIVE WILL NOT BE SHIELDED BY ANY SHOWING OF GOOD FAITH, BECAUSE HE/SHE IS NOT FREE OF NEGLIGENT CONDUCT.

Good Faith Shields Personal Representative Only in Absence of Negligence. Good faith will shield a personal representative charged with knowledge reasonably required of it in discharging its fiduciary duties only when the personal representative is free of negligence (*Estate of Anderson (1983) 149 Cal. App. 3d 336, 350, 196 Cal. Rptr. 782*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of the contention that the party is entitled to equitable relief from a prior judgment or order obtained by reason of extrinsic fraud, and the aggrieved party's personal representative will not be shielded by any showing of good faith, because he/she is not free of negligent conduct [*Estate of Anderson (1983) 149 Cal. App. 3d 336, 350, 196 Cal. Rptr. 782]* .

This form should be combined with points and authorities generally supporting relief from judgment or order based on

fraud resulting from concealment by a fiduciary, see *§ 70.584*.

This form may also be used in a trial or appellate brief.

See also *§ 70.480[2]* for additional general considerations relating to equitable relief, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 70.480[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 70.630* -780.668, and *70.660 -70.670* may be used to oppose the contention supported by this form. See, *in particular, § 70.633[3]*.

[3] Discussion of Authorities

[a] Good Faith Shields Personal Representative Only in Absence of Negligence

The facts and procedural background of ***Estate of Anderson*** *(1983) 149 Cal. App. 3d 336, 196 Cal. Rptr. 782* , are discussed in *§ 70.584[3]*. In *Estate of Anderson*, the executor challenged one of the findings of extrinsic fraud by characterizing a misrepresentation it made as a clear and honest opinion. The court of appeal rejected the argument because it essentially holds for a good faith exception to chargeable knowledge. The court stated that good faith will shield an executor charged with knowledge reasonably required of it in discharging its fiduciary duties only when the executor is free of negligence (*149 Cal. App. 3d 336, 350)* .

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7-70 California Points & Authorities § 70.589

§ 70.589 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud--Fraudulent or Negligent Failure to Give Notice of Original Action--Willful Failure to Give Required Service

[1] FORM

[*The following may be included in a general memorandum supporting a motion in equity (see, e.g., § 70.480[1]), a memorandum opposing a demurrer to a complaint for equitable relief (see, e.g., §§ 70.520 -70.528), a memorandum opposing a defendant's motion for summary judgment in an independent suit in equity (see, e.g., § 70.540[1]), or in a trial or appellate brief.*]

THE COURT SHOULD GRANT RELIEF IN EQUITY AND SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] ON THE GROUND OF EXTRINSIC FRAUD BECAUSE PREVAILING PARTY IN THE [PRIOR] ACTION FRAUDULENTLY OR NEGLIGENTLY FAILED TO GIVE NOTICE OF THAT ACTION TO THE AGGRIEVED PARTY.

Willful Failure to Give Required Service. A suit in equity may be instituted for the purpose of vacating a judgment on the ground of extrinsic fraud when it appears that there was a willful failure to give the required service (*Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 558, 305 P.2d 20*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of the contention that the party is entitled to equitable relief from a prior judgment or order obtained by reason of extrinsic fraud, when there was a fraudulent or negligent failure to give notice of the former action to the defendant. This form is based on the willful failure to give required service.

For points and authorities supporting relief in equity based on a lack of diligence in effecting personal service, see *§*

70.590[1]. For points and authorities supporting relief in equity based on false recitals regarding service, see *§ 70.591[1]*

This form should be combined with a general memorandum, depending on the procedural context in which the contention is to be raised. It may, for example, be combined with a general form of points and authorities supporting a motion in equity [*see, e.g., § 70.480[1]*]. It may also be combined with a memorandum used to oppose a defendant's attempt to dispose of an independent suit in equity through a pretrial proceeding such as a general demurrer to the complaint [*see, e.g., §§ 70.520 -70.528*], or a motion for summary judgment [*see, e.g., § 70.540[1]*].

This form may also be combined, when appropriate, with additional points and authorities supporting a grant of equitable relief on other particular grounds [*see, e.g., §§ 70.550 -70.588, 70.590 -70.623*], particularly additional points and authorities supporting relief based on extrinsic fraud in particular circumstances [*see, e.g., §§ 70.580 -70.588*].

This form may also be modified for use in support of the contention that the prior judgment should be set aside on the ground of extrinsic mistake, when the failure to name a person as a party was the result of mistake [*see Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 558, 305 P.2d 20* ; *Boyle v. Boyle (1929) 97 Cal. App. 703, 706, 276 P. 118* (discussed under [4], *below*); §§ 70.560-70.567].

See also *§ 70.480[2]* for additional general considerations relating to equitable relief, and alternative methods for obtaining relief.

This form may also be used in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel would refer to the specific conduct that discloses the willful failure to provide the required service to the aggrieved party.

See also *§ 70.480[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 70.630* -780.668, and *70.660 -70.670* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Willful Failure to Give Required Service

The facts and procedural background of ***Bennett v. Hibernia Bank*** *(1956) 47 Cal. 2d 540, 305 P.2d 20* , are discussed in *§ 70.502[4]*. In *Bennett*, the Supreme Court held that the defendant bank's failure to comply with statutory provisions concerning service constituted grounds for vacation of the prior judgment. The Court stated that a suit in equity instituted for the purpose of vacating a judgment constitutes a direct attack, and such an attack may be made on the ground of extrinsic fraud when it appears that there was a willful failure to give the required service or that willfully false affidavits of service were filed. It also observed that a direct attack is allowed in an independent action in equity when there has been a failure to exercise the degree of diligence required by law in connection with personal service, when false recitals of service were the result of fraud, negligence, or mistake, and when failure to name a person as a party was the result of mistake (*47 Cal. 2d 540, 558)* . These rules, said the Court, were in accord with the general principles followed by the Court in holding that extrinsic mistake may be a ground for the vacation of a judgment by an independent action in equity when there has been no fair adversary trial (*47 Cal. 2d 540, 558-559)* .

[4] Additional Authorities

[a] Willful Failure to Give Required Service

In *Wool v. Scott (1956) 140 Cal. App. 2d 835, 296 P.2d 17* , the court of appeal reversed a judgment for the defendants based on an order sustaining a demurrer to a complaint in an action for equitable relief against a judgment, holding that the original judgment was subject to attack in equity since the failure of the plaintiff in that action to serve the aggrieved party therein constituted extrinsic fraud. The plaintiff contended that in the prior action, a quiet title action, the plaintiff land company had failed to serve plaintiff's predecessor in interest even though that party was a known adverse claimant. The court of appeal stated that there can be no doubt that the failure to serve a party who is known by the party quieting title to assert an adverse claim in certain property is extrinsic fraud which will make the judgment subject to attack by the party kept in ignorance of the suit, citing *United States v. Throckmorton (1878) 98 U.S. 61, 25 L. Ed. 93* , discussed in *§ 70.550[4]* (*140 Cal. App. 2d 835, 841)* .

The facts and procedural background of *Boyle v. Boyle (1929) 97 Cal. App. 703, 276 P. 118* , are discussed in *§ 70.561[3]*. In *Boyle,* the court of appeal reversed a decree in favor of a plaintiff as administrator of the estate of a deceased, the defendant's mother, quieting title to certain property. The deceased, whose title to the property was at issue, had, during her lifetime, executed and delivered a deed of gift to the property to her daughter. The deed, which went unrecorded, reserved a life estate to the mother and gave the remainder to the daughter. Later, after the records of the mother's title to the property were destroyed by earthquake and fire, the mother obtained a decree under a remedial statute, the McEnerny Act, quieting title in her without notifying the daughter. The trial court had found that the mother's omission to name the daughter as a party in the original action was not fraudulent and, thus, held for administrator, despite allegations in the daughter's cross complaint that the decree had been obtained without any notice to her whatever as a result of her mother's mistake and ignorance as to the legal effect of the decree on the cross complaint's title. The court of appeal concluded that the mother had been laboring under the mistaken belief that her decree would not affect her daughter's title. It also noted that if the daughter had been kept away from court by fraud on the part of her mother so that she never had her day in court, she would be entitled to equitable relief. Mistake, said the court, is just as potent as fraud as a ground for such relief when that mistake has prevented a defendant from having his or her day in court. Accordingly, the court held in favor of the cross complainant (*97 Cal. App. 703, 706-707)* .

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7-70 California Points & Authorities § 70.590

§ 70.590 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud--Fraudulent or Negligent Failure to Give Notice of Original Action--Lack of Diligence in Effecting Personal Service

[1] FORM

[*The following may be included in a general memorandum supporting a motion in equity (see, e.g., § 70.480[1]), a memorandum opposing a demurrer to a complaint for equitable relief (see, e.g., §§ 70.520 -70.528), a memorandum opposing a defendant's motion for summary judgment in an independent suit in equity (see, e.g., § 70.540[1]), or in a trial or appellate brief.*]

THE COURT SHOULD GRANT RELIEF IN EQUITY AND SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] ON THE GROUND OF EXTRINSIC FRAUD BECAUSE THERE HAS BEEN A FAILURE TO EXERCISE THE DEGREE OF DILIGENCE REQUIRED BY LAW IN CONNECTION WITH PERSONAL SERVICE.

Lack of Diligence in Effecting Personal Service. A suit in equity may be instituted for the purpose of vacating a judgment on the ground of extrinsic fraud when there has been a failure to exercise the degree of diligence required by law in connection with personal service (*Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 558, 305 P.2d 20*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of the contention that the party is entitled to equitable relief from a prior judgment or order obtained by reason of extrinsic fraud, when there was a fraudulent or negligent failure to give notice of the former action to the defendant. This form is based on the failure to exercise required diligence in serving the aggrieved party.

For points and authorities supporting relief in equity based on a willful failure to give required service, see *§ 70.589[1]*. For points and authorities supporting relief in equity based on false recitals regarding service, see *§ 70.591[1]*

This form should be combined with a general memorandum, depending on the procedural context in which the contention is to be raised. It may, for example, be combined with a general form of points and authorities supporting a motion in equity [*see, e.g., § 70.480[1]*]. It may also be combined with a memorandum used to oppose a defendant's attempt to dispose of an independent suit in equity through a pretrial proceeding such as a general demurrer to the complaint [*see, e.g., §§ 70.520 -70.528*], or a motion for summary judgment [*see, e.g., § 70.540[1]*].

This form may also be combined, when appropriate, with additional points and authorities supporting a grant of equitable relief on other particular grounds [*see, e.g., §§ 70.550 -70.589, 70.591 -70.623*], particularly additional points and authorities supporting relief based on extrinsic fraud in particular circumstances [*see, e.g., §§ 70.580 -70.588*].

This form may also be modified for use in support of the contention that the prior judgment should be set aside on the ground of extrinsic mistake, when the failure to name a person as a party was the result of mistake [*see Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 558, 305 P.2d 20* ; *Boyle v. Boyle (1929) 97 Cal. App. 703, 706, 276 P. 118* (discussed under [4], *below*); §§ 70.560-70.567].

See also *§ 70.480[2]* for additional general considerations relating to equitable relief, and alternative methods for obtaining relief.

This form may also be used in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the plaintiff in the prior action made very few and perfunctory efforts at serving the aggrieved party, counsel would refer to the sum of plaintiff's efforts and contrast those efforts with efforts that would be considered reasonably diligent under the circumstances [*see Code Civ. Proc. § 415.20(b)*].

See also *§ 70.480[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 70.630* -780.668, and *70.660 -70.670* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Lack of Diligence in Effecting Personal Service

The facts and procedural background of ***Bennett v. Hibernia Bank*** *(1956) 47 Cal. 2d 540, 305 P.2d 20* , are discussed in *§ 70.502[4]*. In *Bennett*, the Supreme Court, citing *Stern v. Judson (1912) 163 Cal. 726, 728, 127 P. 38* (discussed under [4], *below*), stated that a direct attack has been allowed in an independent action in equity when there has been a failure to exercise the degree of diligence required by law in connection with personal service (*47 Cal. 2d 540, 558)* .

[4] Additional Authorities

[a] Lack of Diligence in Effecting Personal Service

In *Stern v. Judson (1912) 163 Cal. 726, 127 P. 38* , the Supreme Court affirmed the trial court's judgment for the

plaintiff in an action to set aside a prior judgment rendered following a constructive service of summons, holding that the plaintiff in that action had failed to use due, reasonable, or bona fide diligence to ascertain the whereabouts or address of the defendant therein (*163 Cal. 726, 736)* . The complaint alleged that the plaintiff's affidavit in the prior action for the order of publication of summons was false in stating that: (1) he had inquired of the county tax collector as to the defendant's address; (2) the tax collector gave him a negative reply; and (3) he had used due diligence in attempting to ascertain the address or whereabouts of the defendant. The complaint further alleged that the plaintiff was well acquainted with the parties from whom the plaintiff in this action had purchased the real property in question, and that by the exercise of reasonable diligence he could have ascertained by inquiry of them the defendant's whereabouts. The Supreme Court held that in availing himself or herself of constructive service of summons, a plaintiff must, in fact, have exercised due diligence. The question of due diligence is open, said the Court, as between the parties, and under a direct attack on the ground of fraud on the part of the plaintiff in procuring the judgment. When a false affidavit is presented to the court for the purpose of obtaining an order for the service of summons by publication, this of itself is an act of fraud both on the defendant and on the court, and any judgment based thereon will be set aside in an action by the defendant constructively served against the plaintiff claiming the benefit of the judgment thus fraudulently procured (*163 Cal. 726, 735)* .

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7-70 California Points & Authorities § 70.591

§ 70.591 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud--Fraudulent or Negligent Failure to Give Notice of Original Action--False Recitals Regarding Service

[1] FORM

[*The following may be included in a general memorandum supporting a motion in equity (see, e.g., § 70.480[1]), a memorandum opposing a demurrer to a complaint for equitable relief (see, e.g., §§ 70.520 -70.528), a memorandum opposing a defendant's motion for summary judgment in an independent suit in equity (see, e.g., § 70.540[1]), or in a trial or appellate brief.*]

THE COURT SHOULD GRANT RELIEF IN EQUITY AND SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] BASED ON THE FILING OF WILLFULLY FALSE AFFIDAVITS OF SERVICE.

False Recitals Regarding Service. A suit in equity may be instituted for the purpose of vacating a judgment on the ground of extrinsic fraud when willfully false affidavits of service were filed (*Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 558, 305 P.2d 20*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of the contention that the party is entitled to equitable relief from a prior judgment or order obtained by reason of extrinsic fraud, when there was a fraudulent or negligent failure to give notice of the former action to the defendant. This form is based on the filing of willfully false affidavits of service.

For points and authorities supporting relief in equity based on a willful failure to give required service, see *§ 70.589[1]*. For points and authorities supporting relief in equity based on the failure to exercise required diligence in serving the

aggrieved party, see *§ 70.590[1]*

This form should be combined with a general memorandum, depending on the procedural context in which the contention is to be raised. It may, for example, be combined with a general form of points and authorities supporting a motion in equity [*see, e.g., § 70.480[1]*]. It may also be combined with a memorandum used to oppose a defendant's attempt to dispose of an independent suit in equity through a pretrial proceeding such as a general demurrer to the complaint [*see, e.g., §§ 70.520 -70.528*], or a motion for summary judgment [*see, e.g., § 70.540[1]*].

This form may also be combined, when appropriate, with additional points and authorities supporting a grant of equitable relief on other particular grounds [*see, e.g., §§ 70.550 -70.590*, 70.592 -*70.623*], particularly additional points and authorities supporting relief based on extrinsic fraud in particular circumstances [*see, e.g., §§ 70.580 -70.588*].

This form may also be modified for use in support of the contention that the prior judgment should be set aside on the ground of extrinsic mistake, when the failure to name a person as a party was the result of mistake [*see Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 558, 305 P.2d 20* ; *Boyle v. Boyle (1929) 97 Cal. App. 703, 706, 276 P. 118* (discussed under [4], *below*); §§ 70.560-70.567].

See also *§ 70.480[2]* for additional general considerations relating to equitable relief, and alternative methods for obtaining relief.

This form may also be used in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel would refer to the specific statements in the affidavit of service that are false.

See also *§ 70.480[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 70.630* -780.668, and *70.660 -70.670* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] False Recitals Regarding Service

The facts and procedural background of ***Bennett v. Hibernia Bank*** *(1956) 47 Cal. 2d 540, 305 P.2d 20* , are discussed in *§ 70.502[4]*. In *Bennett*, the Supreme Court stated that a suit in equity for the purpose of vacating a judgment, as a direct attack, may be made on the ground of extrinsic fraud when it appears that willfully false affidavits of service were filed (*47 Cal. 2d 540, 558)* .

[4] Additional Authorities

[a] False Recitals Regarding Service

In *Carney v. Simmonds (1957) 49 Cal. 2d 84, 315 P.2d 305* , plaintiff sued defendants for partition of real property distributed under the will of plaintiff's son. Defendants' motion for judgment on the pleadings was granted and judgment was entered in defendants' favor. Plaintiff thereafter moved for a new trial and an order vacating the judgment. That motion was granted and defendants appealed. After determining that the motion for a new trial was a proper procedure (

49 Cal. 2d 84, 88-91) , the Supreme Court turned to the issue of whether the new trial was properly granted under the circumstances. Plaintiff claimed that defendants had fraudulently procured a decree assigning the whole of the estate of plaintiff's deceased son to decedent's wife and defendants by misrepresenting the value of the estate and had failed to give plaintiff the notice required by *Prob. Code § 1200*. In its discussion, the Court cited *Purinton v. Dyson (1937) 8 Cal. 2d 322, 324, 65 P.2d 777* , at length. The *Purinton* court had noted that "it is difficult to see how fraud could be practiced more directly ... than by keeping [a defendant] in ignorance of the proceedings" (*49 Cal. 2d 84, 94)* . *Purinton* had acknowledged that most cases of extrinsic fraud involve representations to defendant or acts amounting to such representations, but had declared that "the rule allowing the maintenance of an action in equity for extrinsic fraud should not be limited so strictly as to require as a basis evidence of representations made directly to the one defrauded" (*49 Cal. 2d 84, 94)* . Citing *Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 558, 305 P.2d 20* (discussed in *§ 70.589[3]*), the Court in *Carney* observed that a direct attack, such as the one involved in *Carney*, can be made on the ground of extrinsic fraud when it appears that there was a willful failure to give the required service or that willfully false affidavits of service were filed (*49 Cal. 2d 84, 95)* . Quoting *Bennett*, the Court recited instances in which equity had provided relief, including cases involving failure to exercise diligence in connection with personal service, false recitals of service resulting from fraud, negligence or mistake, and the failure to name a person as a party by mistake (*49 Cal. 2d 84, 95)* . Concluding that the trial court should have permitted plaintiff to amend her complaint, the Court affirmed the order vacating the judgment and granting a new trial (*49 Cal. 2d 84, 97-98)* .

In *Rivieccio v. Bothan (1946) 27 Cal. 2d 621, 165 P.2d 677* , the Supreme Court affirmed a trial court's judgment for the plaintiff in an action for declaratory relief and to have a decree of divorce set aside, holding that the willful misstatement of the address of the defendant in that action (the plaintiff herein) in an affidavit for publication of summons was extrinsic fraud which justified setting aside the judgment. The plaintiff in the original divorce action had given a fictitious address as that of his wife, the defendant therein, with the fraudulent intent of withholding from her any notice of the proceedings against her. The trial court's conclusion that the plaintiff there had acted with fraudulent intent was justified by evidence of the plaintiff's familiarity with the streets in the city in which his wife was residing, his knowledge of her place of residence, and his previous addressing of letters so that they reached her. On the contention of the defendant in this action that there was no basis for an attack in equity on the final judgment, the Supreme Court ruled that it is settled that a willful misstatement of the defendant's address in an affidavit for publication of summons is extrinsic fraud which justifies setting aside the judgment resulting from proceedings of which the defendant did not have notice (*27 Cal. 2d 621, 624)* .

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[Reserved]

§§ 70.592[Reserved]

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7-70 California Points & Authorities § 70.600

§ 70.600 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Duress--Generally

[1] FORM

[*The following may be included in a general memorandum supporting a motion in equity (see, e.g., § 70.480[1]), a memorandum opposing a demurrer to a complaint for equitable relief (see, e.g., §§ 70.520 -70.528), a memorandum opposing a defendant's motion for summary judgment in an independent suit in equity (see, e.g., § 70.540[1]), or in a trial or appellate brief.*]

THE COURT SHOULD GRANT RELIEF IN EQUITY AND SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] BECAUSE THE AGGRIEVED PARTY WAS DENIED A FAIR ADVERSARY HEARING BY REASON OF DURESS.

A. Duress Is Valid Ground to Set Aside Judgment or Order. A judgment or order may be set aside when through duress, an aggrieved party was denied a fair adversary hearing (*In re Marriage of Baltins (1989) 212 Cal. App. 3d 66, 83, 260 Cal. Rptr. 403*).

B. Duress Defined. Duress, which includes whatever destroys one's free agency and constrains him or her to do what is against his or her will, may be exercised by threats, importunity, or any species of mental coercion. It is shown when a party intentionally used threats or pressure to induce action or inaction to the other party's detriment (*In re Marriage of Baltins (1989) 212 Cal. App. 3d 66, 84, 260 Cal. Rptr. 403*).

C. Determination of Duress Depends on Effect on Threatened Person's Mind. To determine whether a default judgment was the product of duress, the courts look not so much to the nature of the threats, but to their effect on the state of the threatened person's mind (*In re Marriage of Baltins (1989) 212 Cal. App. 3d 66, 84, 260 Cal. Rptr. 403*).

[*When appropriate, add additional points and authorities supporting equitable relief from judgment or order based on*

duress (see, e.g., §§ 70.601 -70.603).]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of the contention that the party is entitled to equitable relief from a prior judgment or order obtained by reason of extrinsic factors showing duress.

When appropriate, add additional points and authorities supporting equitable relief from judgment or order based on duress [*see, e.g., §§ 70.601 -70.603*].

This form should be combined with a general memorandum, depending on the procedural context in which the contention is to be raised. It may, for example, be combined with a general form of points and authorities supporting a motion in equity [*see, e.g., § 70.480[1]*]. It may also be combined with a memorandum used to oppose a defendant's attempt to dispose of an independent suit in equity through a pretrial proceeding such as a general demurrer to the complaint [*see, e.g., §§ 70.520 -70.528*], or a motion for summary judgment [*see, e.g., § 70.540[1]*].

This form may also be combined, when appropriate, with additional points and authorities supporting a grant of equitable relief on other particular grounds [*see, e.g., §§ 70.550 -70.591, 70.610 -70.623*].

See also *§ 70.480[2]* for additional general considerations relating to equitable relief, and alternative methods for obtaining relief.

This form may also be used in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, in *In re Marriage of Baltins (1989) 212 Cal. App. 3d 66, 260 Cal. Rptr. 403* , the court of appeal cited various facts taken considered by the trial court including, testimony of a doctor to the effect that the wife, who was the moving party, was "very emotional, upset and distraught to the point that ... she was acting under her husband's will"; lack of independent legal advice; the gross unfairness of the agreement; and threats and misrepresentations by the other party (*In re Marriage of Baltins (1989) 212 Cal. App. 3d 66, 85-87, 260 Cal. Rptr. 403*).

See also *§ 70.480[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 70.630* -780.668, and *70.660 -70.670* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Duress Is Valid Ground to Set Aside Judgment or Order

In re Marriage of Baltins *(1989) 212 Cal. App. 3d 66, 260 Cal. Rptr. 403* , involved a motion by a wife to set aside the property and support provisions of the interlocutory and final judgments of dissolution of marriage on the grounds of duress and intrinsic fraud or mistake. The husband prepared a summons and a notice and acknowledgment of receipt of summons, as well as an appearance, stipulation, and waivers. The latter provided that the cause could be tried as an uncontested matter without notice. Without advice of counsel, the wife signed the documents. Two days later, the

husband had the default entered, and an uncontested hearing that same day resulted in the court's granting an interlocutory judgment of dissolution of marriage. Six months later, the court entered the final judgment on the husband's request. Thereafter the wife filed her motion to set aside portions of the interlocutory and final judgments dividing the community property of the parties and providing for support. The trial court filed its ruling on motion setting aside the judgment and the husband appealed.

The court of appeal affirmed. The court, citing *In re Marriage of Brockman (1987) 194 Cal. App. 3d 1035, 1045-1047, 240 Cal. Rptr. 96* and *In re Marriage of Stevenot (1984) 154 Cal. App. 3d 1051, 1073 n.7, 202 Cal. Rptr. 116* , stated that duress has been recognized as a ground justifying relief from a final judgment. The court acknowledged that it found no cases that state that they are granting relief from the judgment solely on the ground of duress, but this, explained the court, is probably because duress is often characterized as fraud (*212 Cal. App. 3d 66, 83)* . After reviewing the evidence, the court held that through the "extrinsic" factor of duress, the wife was denied a fair adversary hearing (*212 Cal. App. 3d 66, 87)* , and that the trial court did not abuse its discretion in setting aside the interlocutory and final judgments, including the marital settlement agreement (*212 Cal. App. 3d 66, 95)* .

[b] Duress Defined

The facts and procedural background of ***In re Marriage of Baltins*** *(1989) 212 Cal. App. 3d 66, 260 Cal. Rptr. 403* , are discussed under [a], *above.* In *Baltins*, the court of appeal held that the aggrieved party was denied a fair adversary hearing through duress (*212 Cal. App. 3d 66, 87)* . The court noted that the stringent definition of duress contained in *Civ. Code § 1569*, codifying the early common law rule, has been relaxed. Under the modern rule, duress, which includes whatever destroys one's free agency and constrains him or her to do what is against his or her will, may be exercised by threats, importunity, or any species of mental coercion. It is shown when a party intentionally used threats or pressure to induce action or inaction to the other party's detriment. The coercion must induce the assent of the coerced party, who has no reasonable alternative to succumbing (*212 Cal. App. 3d 66, 84)* .

[c] Determination of Duress Depends on Effect on Threatened Person's Mind

The facts and procedural background of ***In re Marriage of Baltins*** *(1989) 212 Cal. App. 3d 66, 260 Cal. Rptr. 403* , are discussed under [a], *above.* In *Baltins*, the court of appeal stated that to determine whether a contract or a default judgment was the product of duress, the courts look not so much to the nature of the threats, but to their effect on the state of the threatened person's mind (*212 Cal. App. 3d 66, 84)* . In this regard, the court noted that the trial court cited as particularly persuasive the "overwhelming" testimony of a doctor that the wife was "very emotional, upset and distraught to the point that ... she was acting under her husband's will" (*212 Cal. App. 3d 66, 84-85)* . The threats consisted of the husband threatening the wife with bankruptcy and urging her with immediate action to prevent dissipation of her share of the property through credits to him of all payments for debts and support; he represented that she had no interest in his medical practice, telling her that she had not worked for it and that she was not an equal partner in the marriage; and he aimed at her most vulnerable spot when he threatened not to see their child (*212 Cal. App. 3d 66, 86)* .

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7-70 California Points & Authorities § 70.601

§ 70.601 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Duress--Determination of Whether Consent to Entry of Default Judgment Was Voluntary

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion in equity for relief based on duress (see § 70.600[1]).*]

THE COURT SHOULD GRANT RELIEF IN EQUITY AND SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] BECAUSE THE AGGRIEVED PARTY WAS DENIED A FAIR ADVERSARY HEARING BY REASON OF DURESS, IN THAT THE AGGRIEVED PARTY WAS IN SUCH A MENTALLY WEAKENED CONDITION DUE TO ANXIETY AND EMOTIONAL EXHAUSTION THAT HE/SHE WAS UNABLE TO PROTECT HIMSELF/HERSELF AGAINST THE OTHER PARTY'S DEMANDS RELATING TO ENTRY OF THE DEFAULT.

Determination of Whether Consent to Entry of Default Judgment Was Voluntary. The statutory grounds for attacking the validity of a contract set forth in *Civil Code Section 1567* are relevant in determining whether consent to entry of a default judgment has been voluntary. To show lack of consent, however, it is unnecessary to establish that the aggrieved party lacked the capacity to contract, only that he or she was in such a mentally weakened condition due to anxiety and emotional exhaustion that he or she was unable to protect himself or herself against the other party's demands (*In re Marriage of Baltins (1989) 212 Cal. App. 3d 66, 83, 85, 260 Cal. Rptr. 403*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of the contention that the party is entitled to equitable relief from a prior judgment or order obtained by reason of extrinsic factors showing duress. This form is based on the lack of

capacity to contract for the entry of the default judgment.

This form should be combined with a general memorandum seeking relief from a judgment or order based on duress [*see § 70.600[1]*].

See also *§ 70.480[2]* for additional general considerations relating to equitable relief, and alternative methods for obtaining relief.

This form may also be used in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 70.480[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 70.630* -780.668, and *70.660 -70.670* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Determination of Whether Consent to Entry of Default Judgment Was Voluntary

The facts and procedural background of ***In re Marriage of Baltins*** *(1989) 212 Cal. App. 3d 66, 260 Cal. Rptr. 403* , are discussed in *§ 70.600[3]* . In *Baltins*, the court of appeal considered whether a marital settlement agreement, including waivers that provided that the cause could be tried as an uncontested matter without notice, and the resulting entry of default and interlocutory and final judgments of dissolution of marriage, had been voluntary. The court stated that in addition to being grounds for setting aside a final judgment, both duress and fraud are statutory grounds for attacking the validity of a contract. *Civ. Code § 1567* provides that an apparent consent is not real or free when obtained through duress, menace, fraud, undue influence, or mistake. These same grounds are relevant in determining whether consent to entry of a default judgment has been voluntary. Facts sufficient to set aside a contract, however, are not automatically sufficient to set aside judgment and each case will depend on whether the circumstances are sufficiently egregious to justify departing from the policy favoring the finality of judgments (*212 Cal. App. 3d 66, 83)* . The court later stated that to show lack of consent on the part of the wife, it was unnecessary to establish that she lacked the capacity to contract; only that she was in such a mentally weakened condition due to anxiety and emotion anguish or exhaustion that she was unable to protect herself against the husband's demands (*212 Cal. App. 3d 66, 85)* . The court held that from the totality of the circumstances, as shown by the evidence before the court, the trial court could infer that the husband intentionally used coercion to induce the wife's consent to an unconscionable contract and a default judgment dissolving the marriage (*212 Cal. App. 3d 66, 87)* .

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7-70 California Points & Authorities § 70.602

§ 70.602 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Duress--Lack of Independent Advice Is a Fact to Be Weighed

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion in equity for relief based on duress (see § 70.600[1]).*]

THE COURT SHOULD GRANT RELIEF IN EQUITY AND SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] BECAUSE THE AGGRIEVED PARTY WAS DENIED A FAIR ADVERSARY HEARING BY REASON OF DURESS, IN THAT THE COURT MAY CONCLUDE THAT THE AGGRIEVED PARTY DID NOT ACT VOLUNTARILY AND WITH COMPLETE UNDERSTANDING AFTER THE COURT WEIGHS THE LACK OF INDEPENDENT ADVICE TO THE AGGRIEVED PARTY, TOGETHER WITH THE OTHER CIRCUMSTANCES OF THIS CASE.

Lack of Independent Advice Is a Fact to Be Weighed. The lack of independent advice is a fact to be weighed by the trial court in determining whether the party acted voluntarily and with complete understanding of the transaction (*In re Marriage of Baltins (1989) 212 Cal. App. 3d 66, 85, 260 Cal. Rptr. 403*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of the contention that the party is entitled to equitable relief from a prior judgment or order obtained by reason of extrinsic factors showing duress. This form is based on the lack of independent advice as factor in determining whether the aggrieved party acted voluntarily and with complete understanding of the transaction.

This form should be combined with a general memorandum seeking relief from a judgment or order based on duress [*see § 70.600[1]*].

See also *§ 70.480[2]* for additional general considerations relating to equitable relief, and alternative methods for obtaining relief.

This form may also be used in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 70.480[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 70.630* -780.668, and *70.660 -70.670* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Lack of Independent Advice Is a Fact to Be Weighed

The facts and procedural background of ***In re Marriage of Baltins*** *(1989) 212 Cal. App. 3d 66, 260 Cal. Rptr. 403* , are discussed § 70.600[3]. In *Baltins*, the court of appeal stated that lack of independent advice, standing alone, is not sufficient to support a finding that the wife's consent to a marital settlement agreement and default judgment dissolving the marriage was obtained through coercion. But, it is a fact to be weighed by the trial court in determining whether that party acted voluntarily and with a complete understanding of the transaction (*212 Cal. App. 3d 66, 85)* . Under the circumstances of the case, the court concluded, that lack of independent advice was persuasive evidence in support of the trial court's ruling (*212 Cal. App. 3d 66, 85)* .

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7-70 California Points & Authorities § 70.603

§ 70.603 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Duress--Lack of Independent Advice With Interference With Attempts to Obtain Advice Is Persuasive

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion in equity for relief based on duress (see § 70.600[1]).*]

THE COURT SHOULD GRANT RELIEF IN EQUITY AND SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] BECAUSE THE AGGRIEVED PARTY WAS DENIED A FAIR ADVERSARY HEARING BY REASON OF DURESS, IN THAT THE CIRCUMSTANCES OF THIS CASE INVOLVE A PERSON'S ACTIVE INTERFERENCE WITH THE AGGRIEVED PARTY'S ATTEMPTS TO OBTAIN LEGAL ASSISTANCE, AND THE LACK OF INDEPENDENT ADVICE IS PERSUASIVE EVIDENCE TO SUPPORT THE COURT'S RULING TO SET ASIDE THE JUDGMENT OR ORDER HEREIN.

Lack of Independent Advice With Interference With Attempts to Obtain Advice Is Persuasive. When the circumstances of the case involve a person's active interference with the aggrieved party's attempts to obtain legal assistance, the lack of independent advice is persuasive evidence to support a court's ruling to set aside a judgment or order on the ground of duress (*In re Marriage of Baltins (1989) 212 Cal. App. 3d 66, 85, 260 Cal. Rptr. 403*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of the contention that the party is entitled to equitable relief from a prior judgment or order obtained by reason of extrinsic factors showing duress. This form is based on the active interference with aggrieved party's attempts to obtain legal assistance.

This form should be combined with a general memorandum seeking relief from a judgment or order based on duress [*see § 70.600[1]*].

See also *§ 70.480[2]* for additional general considerations relating to equitable relief, and alternative methods for obtaining relief.

This form may also be used in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 70.480[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 70.630* -780.668, and *70.660 -70.670* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Lack of Independent Advice With Interference With Attempts to Obtain Advice Is Persuasive

The facts and procedural background of ***In re Marriage of Baltins*** *(1989) 212 Cal. App. 3d 66, 260 Cal. Rptr. 403* , are discussed in *§ 70.600[3]* . In *Baltins*, the court of appeal noted that the evidence showed that the opposing party actively interfered with the aggrieved party's attempt to obtain legal assistance (*212 Cal. App. 3d 66, 85)* . Under the circumstances of the case, the court concluded, the lack of independent advice was persuasive evidence in support of the court's finding (*212 Cal. App. 3d 66, 85)* .

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7-70 California Points & Authorities §§ 70.604-70.609

[Reserved]

§§ 70.604[Reserved]

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7-70 California Points & Authorities § 70.610

§ 70.610 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained When Moving Party's Negligence Does Not Prejudice Opposing Party

[1] FORM

[*The following may be included in a general memorandum supporting a motion in equity (see, e.g., § 70.480[1]), a memorandum opposing a demurrer to a complaint for equitable relief (see, e.g., §§ 70.520 -70.528), a memorandum opposing a defendant's motion for summary judgment in an independent suit in equity (see, e.g., § 70.540[1]), or in a trial or appellate brief.*]

THE COURT SHOULD GRANT RELIEF IN EQUITY AND SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] BECAUSE A PARTY MAY BE RELIEVED FROM THE CONSEQUENCES OF HIS/HER EXTRINSIC MISTAKE OF FACT, EVEN IF HE OR SHE WERE SOMEWHAT NEGLIGENT IN MAKING THE MISTAKE, IF THE NEGLIGENCE IN NO WAY PREJUDICED THE OPPOSING PARTY.

Mistake of Fact of Somewhat Negligent Plaintiff. A party may have relief in equity from the consequences of his/her extrinsic mistake of fact, even though he/she [or his/her counsel] was somewhat negligent in making the mistake, if the negligence in no way prejudiced the opposing party (*Hallett v. Slaughter (1943) 22 Cal. 2d 552, 556-557, 140 P.2d 3* : *Soule v. Bacon (1907) 150 Cal. 495, 497, 89 P. 324*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of the contention that the party is entitled to equitable relief from a prior judgment or order obtained by reason of extrinsic mistake, fraud or duress, despite the fact that the aggrieved party was somewhat negligent, because his or her negligence did not prejudice the opposing party.

This form should be combined with a general memorandum, depending on the procedural context in which the contention is to be raised. It may, for example, be combined with a general form of points and authorities supporting a motion in equity [*see, e.g., § 70.480[1]*]. Note, however, that if used in this context, this form would most likely be adapted for use in a reply memorandum, following opposition to the motion which raised the issue of the moving party's negligence. This form may also be combined, for example, with a memorandum used to oppose a defendant's attempt to dispose of an independent suit in equity through a pretrial proceeding such as a general demurrer to the complaint [*see, e.g., §§ 70.520 -70.528*], or a motion for summary judgment [*see, e.g., § 70.540[1]*].

This form may also be combined, when appropriate, with additional points and authorities supporting a grant of equitable relief on other particular grounds [*see, e.g., §§ 70.550 -70.603, 70.620 -70.623*].

See also *§ 70.480[2]* for additional general considerations relating to equitable relief, and alternative methods for obtaining relief.

This form may also be used in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, in his or her argument, counsel should identify facts indicating that any negligence by counsel or the aggrieved party has not impaired the opposing party's ability to present his or her case.

See also *§ 70.480[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 70.630* -780.668, and *70.660 -70.670* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Mistake of Fact by Somewhat Negligent Plaintiff

The facts and procedural background of ***Hallett v. Slaughter*** *(1943) 22 Cal. 2d 552, 140 P.2d 3* , are discussed in *§ 70.171[3]*. In *Hallett*, the Supreme Court noted that although some degree of negligence could be charged to the attorney employed by the plaintiff to defend her in the prior action in not sooner discovering that her answer had not been transmitted through the mails to the court and filed, it could not be said that the attorney's remissness amounted to such inexcusable neglect as a matter of law that the plaintiff should be foreclosed of her right to maintain the suit. Moreover, the Court noted that the defendants had not shown that they had suffered injury as a result of the delay before the plaintiff learned of the mistake (*22 Cal. 2d 552, 556-557)* .

In ***Soule v. Bacon*** *(1907) 150 Cal. 495, 89 P. 324* , involved a judgment declaring that certain residuary legatees under a will held funds in trust for the plaintiff which had been distributed to them under a prior decree of distribution. The plaintiff had received only $2,000 of a $10,000 legacy because the word "ten" in the will had been misread as "two," and the mistake was perpetuated in a copy made of the will which was given to the plaintiff by his wife, who was one of the personal representatives of the deceased. The plaintiff was thereby induced to believe that he was receiving his claim in full and had no reason to appear in the distribution proceeding, in which the same mistake was perpetuated, or to otherwise contest the amount, even though shortly after receiving the copy of the will he read a news account of the will to the effect that the legacy was $10,000. The plaintiff attributed the newspaper account to typographical error or ordinary newspaper exaggeration. The trial court gave judgment for the plaintiff and the defendants appealed.

The Supreme Court affirmed the judgment. The Court noted that there are many cases holding that a party may have relief in equity from the consequences of his or her mistake of fact, although he or she was somewhat negligent in making the mistake, if his or her negligence in no way prejudiced the opposing party. The Court stated that although this rule may not apply with full force to suits in equity to relieve a party from a judgment, nevertheless the failure of the plaintiff under the circumstances of the case to make an earlier discovery of the true amount due him was not negligence of such a character that it must be declared negligence in law, contrary to the implied finding of the trial court that it was not negligence (*150 Cal. 495, 497)* . At most, it was a question of fact for the court below to determine whether or not the lack of vigilance on the part of the plaintiff was such as would not have occurred with a man of ordinary care and prudence, under the same circumstances (*150 Cal. 495, 498)* .

[4] Additional Authorities

[a] Mistake of Fact of Somewhat Negligent Plaintiff

The facts and procedural background of *Corey v. Weerts (1963) 214 Cal. App. 2d 416, 29 Cal. Rptr. 533* , are discussed in *§ 70.484[3]*. In *Corey*, the court of appeals reviewed cases setting out the "fundamental rules" governing equitable relief from judgments. The court cited *Olivera v. Grace (1942) 19 Cal. 2d 570, 122 P.2d 564* , and other cases for the proposition that circumstances not amounting to extrinsic fraud might support relief from default and default judgment. The court noted that to deny relief in equity, the lack of vigilance on the part of a person seeking to be relieved from a default or default judgment must be such as would not have occurred with a person of ordinary care and prudence in similar circumstance (*214 Cal. App. 2d 416, 422-423)* . In affirming the trial court's order granting relief, the court perceived no abuse of discretion in the trial court's conclusion that there was sufficient extrinsic mistake shown, that defendants were free from contributory fault, and that defendants had made a satisfactory showing of excuse for their failure to answer the complaint (*214 Cal. App. 2d 416, 424)* .

In *Palmer v. Moore (1968) 266 Cal. App. 2d 134, 71 Cal. Rptr. 801* , a default and default judgment were entered against defendant when defendant's attorney failed to appear at a hearing on plaintiff's motion for entry of default for failure to answer interrogatories. The attorney's absence was due to the failure of his secretary to properly schedule the hearing date. Affirming the trial court's order granting relief, the court of appeal deduced that the trial court considered the attorney's absence at the hearing excusable, and said that "even if there was some negligence on the part of defendant's counsel the negligence might be excused if it did not prejudice the opposing party" (*266 Cal. App. 2d 134, 141)* . In this case, the court found no showing by plaintiff that the setting aside of the default and default judgment and the consequent requirement of a trial on the merits would be prejudicial to plaintiff (*266 Cal. App. 2d 134, 141)* .

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7-70 California Points & Authorities §§ 70.611-70.619

[Reserved]

§§ 70.611[Reserved]

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7-70 California Points & Authorities § 70.620

§ 70.620 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order on Ground That Requirement of Showing Meritorious Claim or Defense Is Satisfied--Meritorious Claim or Defense Sufficiently Shown--Generally

[1] FORM

[*The following may be included in a general memorandum supporting a motion in equity (see, e.g., § 70.480[1]), a memorandum opposing a demurrer to a complaint for equitable relief (see, e.g., §§ 70.520 -70.528), a memorandum opposing a defendant's motion for summary judgment in an independent suit in equity (see, e.g., § 70.540[1]), or in a trial or appellate brief.*]

THE COURT SHOULD GRANT RELIEF IN EQUITY AND SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] BECAUSE THE AGGRIEVED PARTY HAS A SUFFICIENTLY MERITORIOUS _____ [CLAIM *or* DEFENSE] TO ENTITLE HIM/HER TO A TRIAL OF THE ISSUE AT A PROPER ADVERSARY HEARING.

Meritorious Claim or Defense Sufficiently Shown. Equity may interfere with a judgment that is unjust when it appears that the one whose interests were thus infringed can present a meritorious case. An absolute guarantee of victory, however, is not required. It is enough that the aggrieved party has a sufficiently meritorious claim to entitle him/her to a trial of the issue at a proper adversary proceeding (*Olivera v. Grace (1942) 19 Cal. 2d 570, 578-579, 122 P.2d 564*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of the contention that the party is entitled to equitable relief from a prior judgment obtained by reason of extrinsic mistake, fraud or duress, because he or she has sufficiently satisfied the requirement of showing that he or she has a meritorious claim or defense to the action, entitling him or her to a trial on

the merits at a proper adversary proceeding.

This form should be combined with a general memorandum, depending on the procedural context in which the contention is to be raised. It may, for example, be combined with a general form of points and authorities supporting a motion in equity [*see, e.g., § 70.480[1]*]. Note, however, that if used in this context, this form would most likely be adapted for use in a reply memorandum, following opposition to the motion which raised the issue of the moving party's insufficient showing of a meritorious claim or defense. This form may also be combined, for example, with a memorandum used to oppose a defendant's attempt to dispose of an independent suit in equity through a pretrial proceeding such as a general demurrer to the complaint [*see, e.g., §§ 70.520 -70.528*], or a motion for summary judgment [*see, e.g., § 70.540[1]*].

This form may also be combined, when appropriate, with additional points and authorities supporting a grant of equitable relief on other particular grounds [*see, e.g., §§ 70.550 -70.610, 70.621 -70.623*], particularly additional points and authorities supporting relief on other particular grounds relating to the requirement of a meritorious claim or defense [*see, e.g., § 70.622 -70.623*].

See also *§ 70.480[2]* for additional general considerations relating to equitable relief, and alternative methods for obtaining relief.

They may, in addition, be used in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, the Supreme Court held that the complaint in ***Olivera v. Grace*** *(1942) 19 Cal. 2d 570, 579, 122 P.2d 564* (discussed in [3], *below*), sufficiently alleged a meritorious claim, by alleging that but for the conduct of the opposing party, the court in the former action would have considered the testimony of additional witnesses concerning the grantor's intention in executing the original deed and would have reached a different conclusion.

See also *§ 70.480[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 70.650[1]* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Meritorious Claim or Defense Sufficiently Shown

The facts and procedural background of ***Olivera v. Grace*** *(1942) 19 Cal. 2d 570, 122 P.2d 564* , are discussed in *§ 70.480[3]* [*see also* discussion in *§ 70.520[3]*]. In *Olivera*, in an independent action in equity to set aside a prior judgment, defendant argued that the complaint failed to state a cause of action because it did not allege that a different result would have been reached if the interests of the aggrieved party had been properly protected. The Supreme Court stated that is a general rule that equity will not interfere with a judgment that is unjust unless it appears that the one whose interests were thus infringed can present a meritorious case (*19 Cal. 2d 570, 578)* . The requirement that the complaint allege a meritorious case does not require an absolute guarantee of victory. It is enough if the complaint presents facts from which it can be ascertained that the plaintiff has a sufficiently meritorious claim to entitle him or her to a trial of the issue at a proper adversary proceeding. The complaint in *Olivera* alleged that but for the conduct of the defendant, the court in the former action would have considered the testimony of additional witnesses concerning the grantor's intention in executing the original deed and would have reached a different conclusion. This, according to the

Court, was a sufficient allegation under the rule stated (*19 Cal. 2d 570, 579)* .

[4] Additional Authorities

[a] Meritorious Claim or Defense Sufficiently Shown

The facts and procedural background of *Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 305 P.2d 20* , are discussed in *§ 70.502[4]*. In *Bennett*, the Supreme Court reversed a judgment of dismissal on sustaining a demurrer without leave to amend. The Court stated that ordinarily equity will not interfere with a judgment on the ground of extrinsic fraud or mistake unless the one whose interests were infringed can present a meritorious case; the plaintiff must plead and prove facts from which it appears, at least prima facie, that if the judgment were set aside and the proceedings were reopened, a different result would probably follow (*47 Cal. 2d 540, 554)* .

In *Turner v. Allen (1961) 189 Cal. App. 2d 753, 11 Cal. Rptr. 630* , the court of appeal affirmed a judgment setting aside a default judgment taken against the plaintiff when he was a defendant in a prior action. The complaint alleged, as to the merits of the plaintiff's defense in the prior action, that he had built an electric car for the plaintiff in that action, that the car had no defects, that the plaintiff had returned the car stating that he had been in an accident and that he had repaired and returned it, and that he did not hear from the plaintiff again until he filed the prior action. Through a series of technical omissions on the part of the attorney for the defendant in that action a default was taken against him but the default judgment was not entered until after the filing of the complaint in this action for equitable relief. The court of appeal ruled that the ground for the exercise of equitable jurisdiction is that there had been no fair adversary trial at law (*189 Cal. App. 2d 753, 757)* , and that extrinsic accident and mistake of fact would, under appropriate circumstances, justify the intervention of equity (*189 Cal. App. 2d 753, 758)* .

The court added that the plaintiff in this case was required to plead and prove that a good defense existed to the original claim which would be likely to result in a favorable judgment if asserted in a new trial. The court concluded that the required pleading of such matters was had in the case at bar (*189 Cal. App. 2d 753, 759)* .

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7-70 California Points & Authorities § 70.621

§ 70.621 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order on Ground That Requirement of Showing Meritorious Claim or Defense Is Satisfied--Meritorious Claim or Defense Sufficiently Shown--Difficulty of Proof Is Not Determinative of Sufficiency of Allegation in Complaint

[1] FORM

[*This form should be combined with a memorandum generally supporting a motion in equity for relief on the ground that a meritorious claim or defense is sufficiently shown (see § 70.620[1]).*]

THE COURT SHOULD GRANT RELIEF IN EQUITY AND SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] BECAUSE THE AGGRIEVED PARTY HAS A SUFFICIENTLY MERITORIOUS _____ [CLAIM *or* DEFENSE] TO ENTITLE HIM/HER TO A TRIAL OF THE ISSUE AT A PROPER ADVERSARY HEARING, AND THE MERE FACT THAT THE CLAIM OR DEFENSE MAY BE DIFFICULT TO PROVE IS NOT DETERMINATIVE.

Difficulty of Proof Not Determinative of Sufficiency of Allegation in Complaint. Although a complaint seeking equitable relief from a judgment on the ground of extrinsic fraud or mistake must allege facts showing a meritorious claim or defense, the fact that the claim or defense may be difficult to prove is not determinative (*Evry v. Tremble (1957) 154 Cal. App. 2d 444, 448, 316 P.2d 49*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of the contention that the party is entitled to equitable relief from a prior judgment obtained by reason of extrinsic mistake, fraud or duress, because he or she has sufficiently satisfied the requirement of showing that he or she has a meritorious claim or defense to the action, entitling him or her to a trial on the merits at a proper adversary proceeding. This form is based on the principle that the fact that a claim or defense may

be difficult to prove is not determinative [*Evry v. Tremble (1957) 154 Cal. App. 2d 444, 448, 316 P.2d 49]* .

This form should be combined with a memorandum generally supporting a motion in equity for relief on the ground that a meritorious claim or defense is sufficiently shown [*see § 70.620[1]*].

See also *§ 70.480[2]* for additional general considerations relating to equitable relief, and alternative methods for obtaining relief.

They may, in addition, be used in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 70.480[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 70.650[1]* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Difficulty of Proof Not Determinative of Sufficiency of Allegation in Complaint

Evry v. Tremble *(1957) 154 Cal. App. 2d 444, 316 P.2d 49* , involved a "petition to vacate judgment" on the ground of extrinsic mistake regarding a sale by the plaintiff to the defendant of certain real property. The defendant contended that in underlying action she would have had a meritorious defense that contrary to the contention of the plaintiff there, she was the owner of the whole of the property involved at the time of the sale and that the plaintiff in that action knew there was no water on the property. The trial court treated the petition as a motion to set aside the judgment, and granted the motion. The plaintiff appealed.

The court of appeal affirmed the trial court's order. On the issue of whether a meritorious defense was pleaded in the complaint for equitable relief, the court of appeal stated that the requirement for a showing of a meritorious defense does not require a guaranty of victory. The fact that the defense may be difficult to prove, said the court, is not determinative (*154 Cal. App. 2d 444, 448)* .

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7-70 California Points & Authorities § 70.622

§ 70.622 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order on Ground That Requirement of Showing Meritorious Claim or Defense Is Satisfied--Showing of Meritorious Defense Not Required--Relief From Decree or Order in Marital Dissolution Proceeding

[1] FORM

[*The following may be included in a general memorandum supporting a motion in equity (see, e.g., § 70.480[1]), a memorandum opposing a demurrer to a complaint for equitable relief (see, e.g., §§ 70.520 -70.528), a memorandum opposing a defendant's motion for summary judgment in an independent suit in equity (see, e.g., § 70.540[1]), or in a trial or appellate brief.*]

THE AGGRIEVED PARTY IS NOT REQUIRED TO SHOW THAT HE/SHE HAS A MERITORIOUS DEFENSE BECAUSE THAT REQUIREMENT IS NOT APPLICABLE TO MARITAL DISSOLUTION ACTIONS.

Showing of Meritorious Defense Not Required in Marital Dissolution Action. The general rule that a party attempting to set aside a default must show that he or she has a meritorious defense to the action is not applicable in marital dissolution actions in that the interest of the state in preserving marriage is such that a decree of dissolution of marriage will be set aside on a very slight showing without an affidavit of merits (*Sanchez v. Sanchez (1969) 273 Cal. App. 2d 159, 164, 77 Cal. Rptr. 884*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of the contention that the party is entitled to equitable relief from a prior default judgment obtained by reason of extrinsic mistake, fraud or duress, despite the fact that he or she has made no showing of a meritorious defense to prior proceeding, because the prior proceeding was one for marital dissolution, in which cases the requirement of a meritorious defense is not applicable.

This form should be combined with a general memorandum, depending on the procedural context in which the contention is to be raised. It may, for example, be combined with a general form of points and authorities supporting a motion in equity [*see, e.g., § 70.480[1]*]. Note, however, that if used in this context, this form would most likely be adapted for use in a reply memorandum, following opposition to the motion which raised the issue of the moving party's insufficient showing of a meritorious claim or defense. This form may also be combined, for example, with a memorandum used to oppose a defendant's attempt to dispose of an independent suit in equity through a pretrial proceeding such as a general demurrer to the complaint [*see, e.g., §§ 70.520 -70.528*], or a motion for summary judgment [*see, e.g., § 70.540[1]*].

This form may also be combined, when appropriate, with additional points and authorities supporting a grant of equitable relief on other particular grounds [*see, e.g., §§ 70.550 -70.621, 70.623*], particularly additional points and authorities supporting relief on other particular grounds relating to the requirement of a meritorious claim or defense [*see, e.g., § 70.622 -70.623*].

See also *§ 70.480[2]* for additional general considerations relating to equitable relief, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. That is, counsel would establish that the prior action was in fact one for dissolution of marriage.

See also *§ 70.480[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 70.650[1]* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Showing of Meritorious Defense Not Required in Marital Dissolution Action

In ***Sanchez v. Sanchez*** *(1969) 273 Cal. App. 2d 159, 77 Cal. Rptr. 884* , plaintiff husband was granted an interlocutory judgment of divorce by default, giving defendant wife custody of the couple's minor child and child support, but no community property or spousal support. When plaintiff obtained a final judgment, defendant's guardian ad litem filed a motion to vacate defendant's default and set aside the judgment on the ground that defendant was mentally incompetent at the time of the entry of her default. The trial court granted the motion. The plaintiff appealed.

The court of appeal affirmed the trial court order setting aside the default and judgment. The court noted that the motion, having been made more than six months after entry of the default, was addressed to the court's inherent equity power rather than to its statutory power under *Code Civ. Proc. § 473* (*273 Cal. App. 2d 159, 163)* . The court stated that it is well established that equity will relieve an incompetent from a judgment taken without an adversary hearing (*273 Cal. App. 2d 159, 163-164)* . Although plaintiff had not raised the issue of defendant's lack of showing of merits, the court felt that some mention should have been made of the issue (*273 Cal. App. 2d 159, 164)* . On that point, the court cited earlier cases for the principle that the interest of the state in preserving the marriage state is such that a divorce decree will be set aside on a very slight showing without an affidavit of merits (*273 Cal. App. 2d 159, 164)* . The court concluded that the uncontradicted affidavit of defendant's guardian ad litem as to defendant's mental condition was sufficient allegation of the necessity for the relief requested (*273 Cal. App. 2d 159, 164)* .

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7-70 California Points & Authorities § 70.623

§ 70.623 Supporting Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order on Ground That Requirement of Showing Meritorious Claim or Defense Is Satisfied--Meritorious Claim or Defense Sufficiently Shown--Showing of Meritorious Defense Not Required--Relief From Void Judgment or Order

[1] FORM

[*The following may be included in a general memorandum supporting a motion in equity (see, e.g., § 70.480[1]), a memorandum opposing a demurrer to a complaint for equitable relief (see, e.g., §§ 70.520 -70.528), a memorandum opposing a defendant's motion for summary judgment in an independent suit in equity (see, e.g., § 70.540[1]), or in a trial or appellate brief.*]

THE AGGRIEVED PARTY IS NOT REQUIRED TO SHOW THAT HE/SHE HAS A MERITORIOUS DEFENSE BECAUSE THAT REQUIREMENT IS NOT APPLICABLE WHEN THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] UNDER ATTACK IS A VOID JUDGMENT.

Showing of Meritorious Defense Not Required When Judgment Is Void. The rule that a complaint for equitable relief from a prior judgment must allege facts showing that the plaintiff has a meritorious case does not apply when the judgment under attack is void (*Cadenasso v. Bank of Italy (1932) 214 Cal. 562, 568-569, 6 P.2d 944*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of the contention that the party is entitled to equitable relief from a prior default judgment obtained by reason of extrinsic mistake, fraud or duress, despite the fact that he or she has made no showing of a meritorious defense to prior action, because that requirement does not apply when relief is being sought from the resulting judgment on the ground that it is void.

This form should be combined with a general memorandum, depending on the procedural context in which the contention is to be raised. It may, for example, be combined with a general form of points and authorities supporting a motion in equity [*see, e.g., § 70.480[1]*]. Note, however, that if used in this context, this form would most likely be adapted for use in a reply memorandum, following opposition to the motion which raised the issue of the moving party's insufficient showing of a meritorious claim or defense. This form may also be combined, for example, with a memorandum used to oppose a defendant's attempt to dispose of an independent suit in equity through a pretrial proceeding such as a general demurrer to the complaint [*see, e.g., §§ 70.520 -70.528*], or a motion for summary judgment [*see, e.g., § 70.540[1]*].

This form may also be combined, when appropriate, with additional points and authorities supporting a grant of equitable relief on other particular grounds [*see, e.g., §§ 70.550 -70.622*], particularly additional points and authorities supporting relief on other particular grounds relating to the requirement of a meritorious claim or defense [*see, e.g., § 70.620 -70.622*].

See also *§ 70.480[2]* for additional general considerations relating to equitable relief, and alternative methods for obtaining relief.

They may, in addition, be used in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. That is, counsel would identify in what manner the prior judgment or order is void.

See also *§ 70.480[2][b]* regarding evidentiary support for facts stated.

[c] Due Process Considerations

The United States Supreme Court has held that, before setting aside a default judgment, a court may not require a defendant to show that he or she has a meritorious defense when that defendant did not receive proper notice and the judgment had substantial adverse consequences for the defendant; to require such a showing would violate the due process clause of the *Due Process Clause of the Fourteenth Amendment* [*Peralta v. Heights Medical Center, Inc. (1988) 485 U.S. 80, 108 S. Ct. 896, 99 L. Ed. 2d 75, 80-82]* . The Court, citing *Mullane v. Central Hanover Bank & Trust Co. (1950) 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865* , stated that an elementary and fundamental requirement of due process in any proceeding that is to be accorded finality is notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections. Failure to give notice violates the most rudimentary demands of due process of the law [*Peralta v. Heights Medical Center, Inc. (1988) 485 U.S. 80, 84, 108 S. Ct. 896, 99 L. Ed. 2d 75, 84]* .

The decision in *Peralta* thus appears to abrogate cases that have held that the meritorious case requirement applies to proceedings in equity to set aside a judgment on the ground that summons had not been served or that service was in some manner defective [*Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 554-555, 305 P.2d 20* ; *see also New York Higher Education Assistance Corp. v. Siegel (1979) 91 Cal. App. 3d 684, 689, 154 Cal. Rptr. 200]* . Because such judgments are void for lack of personal jurisdiction, the decision in *Peralta* further supports the proposition that a meritorious defense is not required in seeking equitable relief from a void judgment.

[d] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 70.650[1]* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Showing of Meritorious Defense Not Required When Judgment Is Void

In ***Cadenasso v. Bank of Italy*** *(1932) 214 Cal. 562, 6 P.2d 944* , involved an action for equitable relief from a prior judgment. The original action had been brought by the Bank of Italy against the plaintiffs in this action. It was tried by the court without a jury and resulted in a judgment for the bank. Later, the plaintiffs in this action learned for the first time that the trial judge was a stockholder of the bank and by reason thereof was disqualified from acting as a judge in that action. The defendant filed a demurrer and the trial court sustained the demurrer. The plaintiffs appealed.

The Supreme Court reversed, holding that any act of a disqualified judge is absolutely void whenever brought in question. The defendants contended, that, nevertheless, the plaintiffs' complaint failed to state sufficient facts to constitute a cause of action because they failed to allege that they had a meritorious defense to the original cause of action and that a like judgment would not result from a new trial of that action. However, the Court stated that a different rule prevails when the judgment is void. It is no answer to say in the case of a disqualification of a judge in the prior action that the decision was correct. If the judge rendering the judgment was without jurisdiction in the proceeding, his action was a nullity. It was just as much a nullity if he decided the case correctly as if he had rendered an erroneous judgment. Therefore, as this was an action to set aside a void judgment, it was unnecessary for the plaintiffs to show that they had a good defense to the prior action or that a different judgment would result from a new trial in said action (*214 Cal. 562, 568-569)* .

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7-70 California Points & Authorities §§ 70.624-70.629

[Reserved]

§§ 70.624[Reserved]

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7-70 California Points & Authorities § 70.630

§ 70.630 Opposing Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress on Ground That There Is Insufficient Showing of Extrinsic Fraud, Mistake, or Duress Justifying Relief--Generally

[1] FORM

[*The following may be included in a general memorandum opposing a motion in equity (see, e.g., § 70.490[1]), a memorandum supporting a demurrer to a complaint for equitable relief (see, e.g., §§ 70.500 -70.503), a memorandum supporting a defendant's motion for summary judgment in an independent suit in equity (see, e.g., §§ 70.510, 70.511), or in a trial or appellate brief.*]

THE AGGRIEVED PARTY IS NOT ENTITLED TO RELIEF IN EQUITY SETTING ASIDE THE PRIOR _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] BECAUSE HE/SHE HAS FAILED TO ESTABLISH ANY SUFFICIENT GROUND FOR THAT RELIEF.

Circumstances of Case Do Not Overcome Strong Policy Favoring Finality of Judgments. A court's equitable power to modify a valid final judgment can only be exercised when the circumstances of the case are sufficient to overcome the strong policy favoring the finality of judgments. Public policy requires that only in exceptional circumstances should the consequences of res judicata be denied to a valid judgment (*Kulchar v. Kulchar (1969) 1 Cal. 3d 467, 470, 82 Cal. Rptr. 489, 462 P.2d 17*).

[*This form may be combined with other points and authorities opposing a contention that equitable relief should be granted because of extrinsic fraud, mistake, or duress (see, e.g., §§ 70.631 -70.638)*].

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to the contention that the party is entitled to equitable relief from a

prior default judgment obtained by reason of extrinsic mistake, fraud or duress. The ground for opposition is that the aggrieved party has not made a sufficient showing of extrinsic fraud or mistake so as to justify a grant of equitable relief.

In an appropriate case, these points and authorities may be submitted in opposition to the contentions supported by the points and authorities *set out in §§ 70.550 -70.623*.

These points and authorities should be combined with a general memorandum, depending on the procedural context in which the contention is to be raised. It may, for example, be combined with a general form of points and authorities opposing a motion in equity [*see, e.g., § 70.490[1]*]. They may also be combined, for example, with a memorandum supporting a defendant's attempt to dispose of an independent suit in equity through a pretrial proceeding such as a general demurrer to the complaint [*see, e.g., §§ 70.500 -70.503*], or a motion for summary judgment [*see, e.g., §§ 70.510, 70.511*]. They may, in addition, be used in a trial or appellate brief.

These points and authorities may also be combined, when appropriate, with additional points and authorities opposing a grant of equitable relief on other particular grounds [*see, e.g., §§ 70.650*- 700].

See also *§§ 70.480[2]* and *70.490[2]* for additional general considerations relating to equitable relief, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the aggrieved party seeks relief on the basis of fraud, and counsel wishes to establish that the fraud was intrinsic rather than extrinsic, counsel should refer to facts showing that the party seeking relief was given proper notice of the action, has not been prevented from fully participating therein, and has had an opportunity to present his or her case to the court and to protect himself or herself from any alleged fraud [*see Westphal v. Westphal (1942) 20 Cal. 2d 393, 397, 126 P.2d 105* (discussed in *§ 70.631[3*])].

See also *§ 70.490[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Circumstances of Case Do Not Overcome Strong Policy Favoring Finality of Judgments

Kulchar v. Kulchar *(1969) 1 Cal. 3d 467, 82 Cal. Rptr. 489, 462 P.2d 17* , involved a trial court's order striking a portion of a prior divorce decree. The decree provided that the defendant husband would indemnify and hold the plaintiff free and harmless as to any taxes. After the divorce, the husband received a federal income tax assessment based on theretofore undisclosed income accumulated during the marriage by a foreign corporation in the wife's name. The husband moved to modify the decree to relieve him of liability for such taxes on the grounds of extrinsic fraud and mistake. The trial court concluded that the tax provision in the decree was included and approved by the parties as a result of the mutual mistake of the parties, and struck the tax provision from the decree.

The Supreme Court reversed the trial court's order. The Court stated that under certain circumstances a court, sitting in equity can set aside or modify a valid final judgment. This power, however, can only be exercised when the circumstances of the case are sufficient to overcome the strong policy favoring the finality of judgments. The Court, citing a comment to the Restatement, Judgments, stated that a basic requirement of an action which can lead to a valid judgment is that a procedure should be adopted which in the normal case will give to the parties an opportunity for a fair trial that is reasonable in view of the requirements of public policy in the particular type of case. If this requirement is met, a judgment awarded in an action is not void merely because the particular individual against whom it was rendered

did not in fact have an opportunity to present his or her claim or defense before an impartial tribunal. Public policy requires that only in exceptional circumstances should the consequences of res judicata be denied to a valid judgment (*1 Cal. 3d 467, 470)* . Citing *Jorgensen v. Jorgensen (1948) 32 Cal. 2d 13, 22-23, 193 P.2d 728* (discussed under Issues Previously Litigated, *below*), the Court held that the husband was barred from obtaining equitable relief because he and his attorney chose not to investigate the husband's taxability (*1 Cal. 3d 467, 474)* .

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7-70 California Points & Authorities § 70.631

§ 70.631 Opposing Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress on Ground That There Is Insufficient Showing of Extrinsic Fraud, Mistake, or Duress Justifying Relief--Relief Denied if Party Had Notice and Was Not Prevented From Participating

[1] FORM

[*This form should be combined with a memorandum generally opposing the contention that equitable relief should be granted because of extrinsic fraud, mistake, or duress (see § 70.630[1]).*]

THE AGGRIEVED PARTY IS NOT ENTITLED TO RELIEF IN EQUITY SETTING ASIDE THE PRIOR _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] BECAUSE HE/SHE WAS GIVEN NOTICE OF THE ACTION AND WAS NOT PREVENTED FROM PARTICIPATING THEREIN.

Relief Is Denied if Party Has Been Given Notice and Not Prevented From Participating. Relief in equity is denied if a party has been given notice of an action and has not been prevented from participating therein. [He or she has had the opportunity to present his or her case to the court and to protect himself or herself from mistake or from any fraud attempted by his or her adversary] (*Kulchar v. Kulchar (1969) 1 Cal. 3d 467, 472, 82 Cal. Rptr. 489, 462 P.2d 17* ; *Westphal v. Westphal (1942) 20 Cal. 2d 393, 397, 126 P.2d 105*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to the contention that the party is entitled to equitable relief from a prior default judgment obtained by reason of extrinsic mistake, fraud or duress. The ground for opposition is that relief is denied if the aggrieved party has been given notice and has not prevented from participating [*Kulchar v. Kulchar (1969) 1 Cal. 3d 467, 472, 82 Cal. Rptr. 489, 462 P.2d 17* ; *Westphal v. Westphal (1942) 20 Cal. 2d 393, 397, 126 P.2d 105]* .

In an appropriate case, these points and authorities may be submitted in opposition to the contentions supported by the points and authorities *set out in §§ 70.550 -70.623*.

This form should be combined with a memorandum generally opposing the contention that equitable relief should be granted because of extrinsic fraud, mistake, or duress [*see § 70.630[1]*]. They may, in addition, be used in a trial or appellate brief.

These points and authorities may also be combined, when appropriate, with additional points and authorities opposing a grant of equitable relief on other particular grounds [*see, e.g., §§ 70.650-* 700].

See also *§§ 70.480[2]* and *70.490[2]* for additional general considerations relating to equitable relief, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should refer to facts showing that the party seeking relief was given proper notice of the action, has not been prevented from fully participating therein, and has had an opportunity to present his or her case to the court and to protect himself or herself from any alleged fraud [*see Westphal v. Westphal (1942) 20 Cal. 2d 393, 397, 126 P.2d 105* (discussed in *§ 70.631[3*])].

See also *§ 70.490[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Relief Is Denied if Party Has Been Given Notice and Not Prevented From Participating

The facts and procedural background of ***Kulchar v. Kulchar*** *(1969) 1 Cal. 3d 467, 82 Cal. Rptr. 489, 462 P.2d 17* , are discussed in *§ 70.630[3]*. In *Kulchar,* the Supreme Court stated that relief in equity is denied if a party has been given notice of an action and has not been prevented from participating therein. He or she has had the opportunity to present his or her case to the court and to protect himself or herself from mistake or from any fraud attempted by his or her adversary (*1 Cal. 3d 467, 472)* .

The facts and procedural background of ***Westphal v. Westphal*** *(1942) 20 Cal. 2d 393, 126 P.2d 105* , are discussed in *§ 70.500[4]*. In *Westphal,* the Supreme Court stated that if an unsuccessful party to an action has been kept in ignorance thereof or has been prevented from fully participating therein, there has been no true adversary proceeding, and the judgment is open to attack at any time. A party who has been given proper notice of an action, however, and who has not been prevented from full participation therein, has had an opportunity to present his or her case to the court and to protect himself or herself from any fraud attempted by his or her adversary (*20 Cal. 2d 393, 397)* . The Court held that under the presumption of service plaintiffs had notice of the proceedings, and there was nothing to prevent their participating therein. They therefore had an opportunity to present their case and direct attention of the court to their interest in the estate (*20 Cal. 2d 393, 398-399)* .

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7-70 California Points & Authorities § 70.632

§ 70.632 Opposing Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress on Ground That There Is Insufficient Showing of Extrinsic Fraud, Mistake, or Duress Justifying Relief--Relief Only When Fraud or Mistake Is Extrinsic

[1] FORM

[*This form should be combined with a memorandum generally opposing the contention that equitable relief should be granted because of extrinsic fraud, mistake, or duress (see § 70.630[1]).*]

THE AGGRIEVED PARTY IS NOT ENTITLED TO RELIEF IN EQUITY SETTING ASIDE THE PRIOR _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] BECAUSE RELIEF MAY BE GRANTED ONLY IF THERE HAS BEEN EXTRINSIC FRAUD OR MISTAKE, AND THE AGGRIEVED PARTY HAS FAILED TO SHOW THAT SUCH FRAUD OR MISTAKE OCCURRED.

A. Relief Only When Fraud or Mistake Is Extrinsic. A final judgment [of a court having jurisdiction over persons and subject matter] can be attacked in equity [after the time for appeal or other direct attack has expired] only if the alleged fraud or mistake is extrinsic rather than intrinsic (*Lopez v. Lopez (1965) 63 Cal. 2d 735, 738, 48 Cal. Rptr. 136, 408 P.2d 744* ; *Westphal v. Westphal (1942) 20 Cal. 2d 393, 397, 126 P.2d 105* ; *In re Marriage of Melton (1994) 28 Cal. App. 4th 931, 937, 33 Cal. Rptr. 2d 761*).

B. Intrinsic Fraud or Mistake Defined. An alleged fraud or mistake which goes to the merits of the prior proceedings [and which should have been guarded against at that time] is intrinsic and the courts will deny relief (*Kulchar v. Kulchar (1969) 1 Cal. 3d 467, 472-473, 82 Cal. Rptr. 489, 462 P.2d 17* ; *Hendricks v. Hendricks (1932) 216 Cal. 321, 323, 14 P.2d 83* ; *In re Marriage of Melton (1994) 28 Cal. App. 4th 931, 937-938, 33 Cal. Rptr. 2d 761*).

C. Extrinsic Fraud or Mistake Distinguished. Fraud or mistake is extrinsic when it deprives the unsuccessful party of an opportunity to present his/her case to the court (*Lopez v. Lopez (1965) 63 Cal. 2d 735, 738, 48 Cal. Rptr. 136, 408*

P.2d 744 ; *Westphal v. Westphal (1942) 20 Cal. 2d 393, 397, 126 P.2d 105* ; *In re Marriage of Melton (1994) 28 Cal. App. 4th 931, 938, 33 Cal. Rptr. 2d 761*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to the contention that the party is entitled to equitable relief from a prior default judgment obtained by reason of extrinsic mistake, fraud or duress. The ground for opposition is that relief is denied unless there is a showing of extrinsic fraud or mistake if the aggrieved party has been given notice and has not prevented from participating [*Kulchar v. Kulchar (1969) 1 Cal. 3d 467, 472, 82 Cal. Rptr. 489, 462 P.2d 17* ; *Westphal v. Westphal (1942) 20 Cal. 2d 393, 397, 126 P.2d 105]* .

In an appropriate case, these points and authorities may be submitted in opposition to the contentions supported by the points and authorities *set out in §§ 70.550 -70.623*.

This form should be combined with a memorandum generally opposing the contention that equitable relief should be granted because of extrinsic fraud, mistake, or duress [*see § 70.630[1]*]. They may, in addition, be used in a trial or appellate brief.

These points and authorities may also be combined, when appropriate, with additional points and authorities opposing a grant of equitable relief on other particular grounds [*see, e.g., §§ 70.650-* 700].

See also *§§ 70.480[2]* and *70.490[2]* for additional general considerations relating to equitable relief, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 70.490[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Relief Only When Fraud or Mistake Is Extrinsic

The facts and procedural background of ***Lopez v. Lopez*** *(1965) 63 Cal. 2d 735, 48 Cal. Rptr. 136, 408 P.2d 744* , are discussed in *§ 70.582[3]*. In *Lopez*, the Supreme Court reversed an order setting aside a trial court's interlocutory and final decrees of divorce, observing that there was no evidence of extrinsic fraud or mistake insofar as either decree was concerned. The final judgment of a court having jurisdiction over persons and subject matter can be attacked in equity after the time for appeal or other direct attack has expired only if the alleged fraud or mistake is extrinsic rather than intrinsic. Fraud or mistake is extrinsic when it deprives the unsuccessful party of an opportunity to present his or her case to the court. Thus, it was error to grant the motion to set aside the decrees (*63 Cal. 2d 735, 738)* .

The facts and procedural background of ***Westphal v. Westphal*** *(1942) 20 Cal. 2d 393, 126 P.2d 105* , are discussed in *§ 70.500[4]*. In *Westphal*, the Supreme Court, citing *United States v. Throckmorton (1878) 98 U.S. 61, 25 L. Ed. 93* , and *Olivera v. Grace (1942) 19 Cal. 2d 570, 122 P.2d 564* , ruled that the final judgment of a court having jurisdiction over persons and subject matter can be attacked in equity after time for appeal or other direct attack has expired only if the alleged fraud or mistake is extrinsic rather than intrinsic. Fraud or mistake, said the Court, is extrinsic when it deprives the unsuccessful party of an opportunity to present his or her case to the court. If an unsuccessful party to an action has been kept in ignorance thereof or has been prevented from fully participating therein, there has been no true adversary proceeding, and the judgment is open to attack at any time. A party who has been given proper notice of an

action, however, and who has not been prevented from full participation therein, has had an opportunity to present his or her case to the court and to protect himself or herself from any fraud attempted by his or her adversary. Thus, said the Court, fraud perpetrated under such circumstances is intrinsic, even though the unsuccessful party does not avail himself or herself or herself of his or her opportunity to appear before the court. Having had an opportunity to protect his or her interest, he or she cannot attack the judgment once the time has elapsed for appeal or other direct attack (*20 Cal. 2d 393, 397)* . In the absence of any allegation that the plaintiffs had not received proper notice of the proceedings, it was presumed that they received such notice and the Court concluded that they had an opportunity to present their case and that plaintiffs alleged no extrinsic fraud or mistake sufficient to constitute the basis for an attack in equity on the decree of distribtin (*20 Cal. 2d 393, 38-399)* .

In ***In re Marriage of Melton*** *(1994) 28 Cal. App. 4th 931, 33 Cal. Rptr. 2d 761* , a former wife filed a motion for an order interpreting and implementing a stipulated dissolution judgment or, in the alternative, for an order setting the judgment aside for extrinsic fraud or mistake. On dissolution of their marriage, the parties had entered into a stipulation for entry of judgment and order under which the husband's future pension benefits were to be divided based on estimates supplied by the pension plan administrator. Due to the husband's decision to retire later than planned, along with certain amendments to the plan, the judgment resulted in far lower payments to the wife than to the husband. The trial court rejected the wife's contention that the husband had concealed the true amount of his expected retirement benefits and misled her into accepting a lesser dollar amount and denied her request to set aside the judgment, finding insufficient evidence of extrinsic fraud.

The court of appeal affirmed the order denying the motion to set aside the judgment, first stating that after six months, when relief is no longer available under *Code Civ. Proc. § 473* for mistake, inadvertence, surprise, or excusable neglect, an otherwise valid judgment may only be set aside for extrinsic fraud or mistake (*28 Cal. App. 4th 931, 937)* .

[b] Intrinsic Fraud or Mistake Defined

The facts and procedural background of ***Kulchar v. Kulchar*** *(1969) 1 Cal. 3d 467, 82 Cal. Rptr. 489, 462 P.2d 17* , are discussed in *§ 70.630[3]*. In *Kulchar*, the Supreme Court noted that equitable relief from a judgment is denied if a party has been given notice of an action and has not been prevented from participating therein and that courts deny relief when the fraud or mistake is "intrinsic"; that is, when it goes to the merits of the prior proceedings, which should have been guarded against at that time (*1 Cal. 3d 467, 472-473)* . In this case, the Court stated, both parties knew of the foreign assets, but the husband and his attorney chose not to investigate their taxability. The property settlement agreement expressly covered unknown tax liability. Having had full opportunity to consider all the wife's income and its concurrent tax consequences, the husband could not complain of the added tax burden (*1 Cal. 3d 467, 474)* .

Hendricks v. Hendricks *(1932) 216 Cal. 321, 14 P.2d 83* , involved an action to set aside an interlocutory decree of divorce allegedly obtained by coercion and duress based on false threats. The complaint for equitable relief alleged that the defendant had coerced the plaintiff to abandon a separate maintenance suit against the defendant and institute an action for divorce instead by means of threats which were false, untrue, and made solely to intimidate and compel the plaintiff to bring the divorce action and free the defendant from his marital obligations. The defendant filed a general demurrer, which the trial court sustained without leave to amend.

The Supreme Court affirmed. The Court stated that equity will not vacate a judgment obtained through the connivance of the parties to the action. To warrant such relief, said the Court, there must be a showing of fraud on the party complaining, and the fraud must be extrinsic or collateral to the subject of dispute in the action involved. When, however, evidence of the fraud could have been presented to the court or to an attorney of the complainant's own choosing during the pendency of the action so that full examination of the facts could have been made and full protection given to the rights of the parties, equity will not interfere but will leave the parties to the fraudulent transactions in which they have placed themselves, said the Court (*216 Cal. 321, 323)* . The Court observed that the allegations of the complaint disclosed, at best, intrinsic fraud and that the action, therefore, was precluded since the

complaint failed to present a case of equitable cognizance (*216 Cal. 321, 324)* .

The facts and procedural background of ***In re Marriage of Melton*** *(1994) 28 Cal. App. 4th 931, 33 Cal. Rptr. 2d 761* , are discussed under [a], *above*.

In affirming the order denying the motion to set aside the judgment, the court of appeal stated that extrinsic fraud occurs when a party is deprived of the opportunity to present his or her claim or defense to the court, when he or she was kept in ignorance or in some other manner fraudulently prevented from fully participating in the proceeding. Examples cited by the court included concealing the existence of a community property asset and failing to give notice of the action (*28 Cal. App. 4th 931, 937)* . Fraud is intrinsic and not a valid ground for setting aside a judgment when the party has been given notice of the action and has had an opportunity to present his or her case and to protect himself or herself from any mistake or fraud of the adversary party, but has unreasonably neglected to do so (*28 Cal. App. 4th 931, 937-938)* .

Addressing the case before it, the court noted that both parties were represented by counsel, the husband had not concealed the existence of the pension plan and the plan itself was a party to the dissolution action. Although the husband did misrepresent the present value of his future pension benefits with the assistance of the plan administrator, the wife's attorney had a copy of the plan and could have discovered, with the exercise of reasonable diligence, that the plan increased benefits from time to time. Since the plan was a party, the wife's attorney could have conducted discovery on the plan to determine the projected benefits. Although the court noted that the husband may have been involved in a "sharp practice," it did not amount to extrinsic fraud, the essence of which is one party's preventing the other from having his or her day in court (*28 Cal. App. 4th 931, 938)* .

[c] Extrinsic Fraud or Mistake Distinguished

The facts and procedural background of ***Lopez v. Lopez*** *(1965) 63 Cal. 2d 735, 48 Cal. Rptr. 136, 408 P.2d 744* , are discussed in *§ 70.582[3]*. In *Lopez*, the Supreme Court reversed the order of the trial court setting aside divorce decrees and a property settlement agreement. The Court stated that fraud or mistake is extrinsic when it deprives the unsuccessful party of an opportunity to present his or her case to the court (*63 Cal. 2d 735, 738)* .

The facts and procedural background of ***Westphal v. Westphal*** *(1942) 20 Cal. 2d 393, 126 P.2d 105* , are discussed in *§ 70.500[4]*. In *Westphal*, the Supreme Court stated that fraud or mistake is extrinsic when it deprives the unsuccessful party of an opportunity to present his or her case to the court (*20 Cal. 2d 393, 397)* . In that case, the Court affirmed a judgment of the trial court following the sustaining of a demurrer to the complaint.

In re Marriage of Melton *(1994) 28 Cal. App. 4th 931, 33 Cal. Rptr. 2d 761* , is discussed under [b], *above*.

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7-70 California Points & Authorities § 70.633

§ 70.633 Opposing Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress on Ground That There Is Insufficient Showing of Extrinsic Fraud, Mistake, or Duress Justifying Relief--Perjured Testimony or Forged Instrument Intrinsic

[1] FORM

[*This form should be combined with a memorandum generally opposing the contention that equitable relief should be granted because of extrinsic fraud, mistake, or duress (see § 70.630[1]).*]

THE AGGRIEVED PARTY IS NOT ENTITLED TO RELIEF IN EQUITY SETTING ASIDE THE PRIOR _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] BECAUSE THE ALLEGED _____ [PERJURED TESTIMONY *or* FORGED INSTRUMENT] WOULD CONSTITUTE MERE INTRINSIC FRAUD.

Perjured Testimony or Forged Instrument Intrinsic. Equitable relief from a judgment arising out of a contested action will not be granted merely because it was obtained by perjured testimony or forged documents--that constitutes intrinsic fraud against which defense could have been made at the trial (*Hammell v. Britton (1941) 19 Cal. 2d 72, 82, 119 P.2d 333*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to the contention that the party is entitled to equitable relief from a prior default judgment obtained by reason of extrinsic mistake, fraud or duress. The ground for opposition is that relief is denied when the basis of the aggrieved party's application for relief is that the judgment resulted from perjured testimony or a forged instrument [*Hammell v. Britton (1941) 19 Cal. 2d 72, 82, 119 P.2d 333]* .

In an appropriate case, these points and authorities may be submitted in opposition to the contentions supported by the points and authorities *set out in §§ 70.550 -70.623*.

This form should be combined with a memorandum generally opposing the contention that equitable relief should be granted because of extrinsic fraud, mistake, or duress [*see § 70.630[1]*]. They may, in addition, be used in a trial or appellate brief.

These points and authorities may also be combined, when appropriate, with additional points and authorities opposing a grant of equitable relief on other particular grounds [*see, e.g., §§ 70.650-* 700].

See also *§§ 70.480[2]* and *70.490[2]* for additional general considerations relating to equitable relief, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 70.490[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Perjured Testimony or Forged Instrument Intrinsic

The facts and procedural background of ***Hammell v. Britton*** *(1941) 19 Cal. 2d 72, 119 P.2d 333* , are discussed in *§ 70.500[3]*. In *Hammell,* the plaintiff contended that a Colorado judgment which vacated a divorce decree had been obtained through fraud. Assuming the truth of that contention, the Court held the plaintiff had failed to state a case because such fraud would be intrinsic rather than extrinsic. The Colorado judgment that the Colorado divorce decree was invalid constituted conclusive evidence of that fact, and if obtained by fraud, was not unlike a forged instrument or perjured testimony forming the evidentiary basis for a judgment. Equitable relief will not be granted merely because it was obtained by perjured testimony or forged documents; that constitutes intrinsic fraud against which defense may be made at the trial (*19 Cal. 2d 72, 82)* . Thus, the Court concluded that the plaintiff had failed to allege extrinsic fraud entitling him to relief. The Court further observed that the plaintiff was not prevented by any fraudulent conduct of defendants from presenting his full case in court and that he had not set forth any equitable excuse for not having made the defense of fraud (*19 Cal. 2d 72, 83)* .

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7-70 California Points & Authorities § 70.634

§ 70.634 Opposing Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress on Ground That There Is Insufficient Showing of Extrinsic Fraud, Mistake, or Duress Justifying Relief--Excuse for Failure to Present Defense Required

[1] FORM

[*This form should be combined with a memorandum generally opposing the contention that equitable relief should be granted because of extrinsic fraud, mistake, or duress (see § 70.630[1]).*]

THE AGGRIEVED PARTY IS NOT ENTITLED TO RELIEF IN EQUITY SETTING ASIDE THE PRIOR _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] BECAUSE THE AGGRIEVED PARTY HAS FAILED TO DEMONSTRATE A SATISFACTORY EXCUSE FOR NOT RESPONDING TO THE ORIGINAL ACTION IN A TIMELY MANNER.

Excuse for Failure to Present Defense Required. The party seeking relief from a default must demonstrate a satisfactory excuse for not responding to the original action in a timely manner (*Stiles v. Wallis (1983) 147 Cal. App. 3d 1143, 1148, 195 Cal. Rptr. 377*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to the contention that the party is entitled to equitable relief from a prior default judgment obtained by reason of extrinsic mistake, fraud or duress. The ground for opposition is that the party seeking relief from a default has failed to demonstrate a satisfactory excuse for not responding to the original action in a timely manner [*Stiles v. Wallis (1983) 147 Cal. App. 3d 1143, 1148, 195 Cal. Rptr. 377]* .

In an appropriate case, these points and authorities may be submitted in opposition to the contentions supported by the

points and authorities *set out in §§ 70.550 -70.623*.

This form should be combined with a memorandum generally opposing the contention that equitable relief should be granted because of extrinsic fraud, mistake, or duress [*see § 70.630[1]*]. They may, in addition, be used in a trial or appellate brief.

These points and authorities may also be combined, when appropriate, with additional points and authorities opposing a grant of equitable relief on other particular grounds [*see, e.g., §§ 70.650-* 700].

See also *§§ 70.480[2]* and *70.490[2]* for additional general considerations relating to equitable relief, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 70.490[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Excuse for Failure to Present Defense Required

The facts and procedural background of ***Stiles v. Wallis*** *(1983) 147 Cal. App. 3d 1143, 195 Cal. Rptr. 377* , are discussed in *§ 70.490[3]*. In *Stiles,* the court listed three elements necessary to set aside a default judgment based on extrinsic mistake: (1) the defaulted party must demonstrate that it has a meritorious case; (2) the party seeking to set aside the default must articulate a satisfactory excuse for not presenting a defense to the action; and (3) the moving party must demonstrate diligence in seeking to set aside the default once it has been discovered (*147 Cal. App. 3d 1143, 1147-1148)* . As to the second element, defendant had offered two explanations for failure to defend in a timely fashion, namely that he thought his employer was obligated to provide him with a defense and that he was an Australian citizen born in England and was therefore unfamiliar with California law (*147 Cal. App. 3d 1143, 1148)* . The court found defendant's explanations insufficient to justify setting aside the default judgment (*147 Cal. App. 3d 1143, 1149)* . As to the third element, the court found that defendant failed to act with proper diligence by waiting more than 20 months before taking action (*147 Cal. App. 3d 1143, 1150)* .

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7-70 California Points & Authorities § 70.635

§ 70.635 Opposing Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress on Ground That There Is Insufficient Showing of Extrinsic Fraud, Mistake, or Duress Justifying Relief--Issues Previously Litigated

[1] FORM

[*This form should be combined with a memorandum generally opposing the contention that equitable relief should be granted because of extrinsic fraud, mistake, or duress (see § 70.630[1]).*]

THE AGGRIEVED PARTY IS NOT ENTITLED TO RELIEF IN EQUITY SETTING ASIDE THE PRIOR _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] BECAUSE THE AGGRIEVED PARTY IS SEEKING TO RELITIGATE AN ISSUE INVOLVED IN THE FORMER PROCEEDING.

Issues Previously Litigated. Equitable relief from a judgment allegedly obtained by fraud or mistake will be denied when the plaintiff seeks to relitigate an issue involved in the former proceeding on the ground that allegations or proof of either party was fraudulent or based on mistake (*Jorgensen v. Jorgensen (1948) 32 Cal. 2d 13, 18, 193 P.2d 728*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to the contention that the party is entitled to equitable relief from a prior default judgment obtained by reason of extrinsic mistake, fraud or duress. The ground for opposition is that the party seeking relitigate and issue already decided in the prior proceeding [*Jorgensen v. Jorgensen (1948) 32 Cal. 2d 13, 18, 193 P.2d 728]* .

In an appropriate case, these points and authorities may be submitted in opposition to the contentions supported by the points and authorities *set out in §§ 70.550 -70.623*.

This form should be combined with a memorandum generally opposing the contention that equitable relief should be granted because of extrinsic fraud, mistake, or duress [*see § 70.630[1]*]. They may, in addition, be used in a trial or appellate brief.

These points and authorities may also be combined, when appropriate, with additional points and authorities opposing a grant of equitable relief on other particular grounds [*see, e.g., §§ 70.650-* 700].

See also *§§ 70.480[2]* and *70.490[2]* for additional general considerations relating to equitable relief, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 70.490[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Issues Previously Litigated

The facts and procedural background of ***Jorgensen v. Jorgensen*** *(1948) 32 Cal. 2d 13, 193 P.2d 728* , are discussed in *§ 70.584[4]*. In *Jorgensen,* in affirming a judgment for defendant on the pleadings in an action to set aside provisions of an interlocutory divorce judgment relating to a property settlement agreement, the Supreme Court noted that the public policy underlying the principle of res judicata requires issues involved in a case to be set at rest by a final judgment, even though a party has persuaded the court or jury by false allegations supported by perjured testimony. However, the Court added that this policy must be considered together with the policy that a party may not be deprived of a fair adversary proceeding in which he or she can fully present his or her case. Thus, said the Court, equitable relief will be denied when a party seeks to relitigate an issue involved in the former proceeding on the ground that allegations or proof of either party was fraudulent or based on mistake, but such relief may be granted if the party seeking it was precluded by fraud or the mistake of the other party from participating in the proceeding or from fully presenting his or her case (*32 Cal. 2d 13, 18)* . The latter policy applies, the Court ruled, when a party's adversary, in violation of a duty arising from a trust or confidential relation, has concealed from him facts essential to the protection of his or her rights, even though such facts concerned issues involved in the case in which the judgment was entered (*32 Cal. 2d 13, 19)* .

Thus, the issue in this case was whether or not the wife was deprived of a fair opportunity to submit her case fully because of a breach of a fiduciary duty on the part of the husband. There was no allegation of concealment of assets--they were disclosed. A husband, at the time of divorce, is entitled to take a position favorable to his own interest in claiming as separate property assets a court might hold to be community property. Confronted with such an assertion, the wife must take her own position and, if necessary, investigate the facts. If, as in this case, the wife and her attorney are satisfied with the husband's classification of the property, the wife cannot reasonably contend that fraud was committed or that there was such mistake as to allow her to overcome the finality of a judgment. The wife did not allege that her attorney intentionally failed to protect her interests (*32 Cal. 2d 13, 22-23)* . Thus, the Court held that the plaintiff was barred from obtaining equitable relief by her admission that she and her attorney did not investigate the facts, choosing instead to rely on the husband's statements as to the character of the property (*32 Cal. 2d 13, 23)* .

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7-70 California Points & Authorities § 70.636

§ 70.636 Opposing Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress on Ground That There Is Insufficient Showing of Extrinsic Fraud, Mistake, or Duress Justifying Relief--Attorney's Erroneous Legal Conclusion

[1] FORM

[*This form should be combined with a memorandum generally opposing the contention that equitable relief should be granted because of extrinsic fraud, mistake, or duress (see § 70.630[1]).*]

THE AGGRIEVED PARTY IS NOT ENTITLED TO RELIEF IN EQUITY SETTING ASIDE THE PRIOR _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] BECAUSE THE MISTAKEN CONCLUSION BY THE AGGRIEVED PARTY'S ATTORNEY THAT CERTAIN FACTS ARE OF NO LEGAL SIGNIFICANCE IS MERELY AN INTRINSIC MISTAKE FOR WHICH NO RELIEF MAY BE GRANTED.

Attorney's Erroneous Legal Conclusion. When an attorney knows the facts but mistakenly concludes that they are of no legal significance and does not present them at the hearing of the matter in question, his/her mistake is intrinsic and not extrinsic (*Lennefelt v. Cranston (1964) 231 Cal. App. 2d 171, 177, 41 Cal. Rptr. 598*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to the contention that the party is entitled to equitable relief from a prior default judgment obtained by reason of extrinsic mistake, fraud or duress. The ground for opposition is that a mistake by the aggrieved party's attorney that certain facts were of no legal significance and consequently failed to present them at the hearing is an intrinsic mistake [*Lennefelt v. Cranston (1964) 231 Cal. App. 2d 171, 177, 41 Cal. Rptr. 598]* .

In an appropriate case, these points and authorities may be submitted in opposition to the contentions supported by the points and authorities *set out in §§ 70.550 -70.623*.

This form should be combined with a memorandum generally opposing the contention that equitable relief should be granted because of extrinsic fraud, mistake, or duress [*see § 70.630[1]*]. They may, in addition, be used in a trial or appellate brief.

These points and authorities may also be combined, when appropriate, with additional points and authorities opposing a grant of equitable relief on other particular grounds [*see, e.g., §§ 70.650-* 700].

See also *§§ 70.480[2]* and *70.490[2]* for additional general considerations relating to equitable relief, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 70.490[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Attorney's Erroneous Legal Conclusion

Lennefelt v. Cranston *(1964) 231 Cal. App. 2d 171, 41 Cal. Rptr. 598* , involved an action to set aside an order fixing inheritance tax on the ground of extrinsic mistake. If the facts of which the plaintiffs were aware, and which were related to the attorney-accountant employed to represent the executrix in the original hearing, had been made known to the inheritance tax appraiser, the plaintiffs would have been classified as Class A transferees and the court would have fixed the inheritance tax at a lower amount than set in the order under attack. The trial court found that the mistake was intrinsic rather than extrinsic and denied relief. The plaintiff appealed from the judgment.

The court of appeal affirmed the judgment. Noting that fraud or mistake is extrinsic when it deprives the unsuccessful party of an opportunity to present his or her case to the court, the court observed that in the instant case the plaintiffs were given the opportunity to present all of the facts of which they had knowledge and that equity will not grant relief against a judgment at law when such judgment was obtained in consequence of the neglect, inattention, mistake, or incompetence of the attorney, unless caused by the opposite party (*231 Cal. App. 2d 171, 175)* . Moreover, held the court, when an attorney knows the facts but mistakenly concludes that they are of no legal significance and does not present them at the hearing of the matter in question, his or her mistake is intrinsic and not extrinsic (*231 Cal. App. 2d 171, 177)* .

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7-70 California Points & Authorities § 70.637

§ 70.637 Opposing Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress on Ground That There Is Insufficient Showing of Extrinsic Fraud, Mistake, or Duress Justifying Relief--Attorney's Neglect

[1] FORM

[*This form should be combined with a memorandum generally opposing the contention that equitable relief should be granted because of extrinsic fraud, mistake, or duress (see § 70.630[1]).*]

THE AGGRIEVED PARTY IS NOT ENTITLED TO RELIEF IN EQUITY SETTING ASIDE THE PRIOR _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] BECAUSE THE BASIS FOR THE AGGRIEVED PARTY'S APPLICATION FOR RELIEF IS THE INEXCUSABLE NEGLECT OF HIS/HER LAWYER, AND EQUITY ORDINARILY WILL NOT SET ASIDE A FINAL JUDGMENT IN SUCH A CASE.

Attorney's Neglect. Ordinarily, equity will not set aside a final judgment if it resulted from the inexcusable neglect of the aggrieved party's lawyer (*Tuck v. Tuck (1968) 264 Cal. App. 2d 743, 745-746, 70 Cal. Rptr. 822*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to the contention that the party is entitled to equitable relief from a prior default judgment obtained by reason of extrinsic mistake, fraud or duress. The ground for opposition is equity ordinarily will not grant relief based on inexcusable neglect by the aggrieved party's attorney [*Tuck v. Tuck (1968) 264 Cal. App. 2d 743, 745-746, 70 Cal. Rptr. 822]* .

In an appropriate case, these points and authorities may be submitted in opposition to the contentions supported by the

points and authorities *set out in §§ 70.550 -70.623*.

This form should be combined with a memorandum generally opposing the contention that equitable relief should be granted because of extrinsic fraud, mistake, or duress [*see § 70.630[1]*]. They may, in addition, be used in a trial or appellate brief.

These points and authorities may also be combined, when appropriate, with additional points and authorities opposing a grant of equitable relief on other particular grounds [*see, e.g., §§ 70.650*- 700].

See also *§§ 70.480[2]* and *70.490[2]* for additional general considerations relating to equitable relief, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 70.490[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Attorney's Neglect

Tuck v. Tuck *(1968) 264 Cal. App. 2d 743, 70 Cal. Rptr. 822* , involved an action in equity to set aside a prior final judgment dissolving a partnership and ordering an accounting. The plaintiff in this action contended that the neglect of the attorney who represented him in the prior action on the merits deprived him of a new trial, of corrected findings and a modified judgment as ordered by the trial court, and of his right to appeal. The defendant filed a demurrer, which the trial court sustained without leave to amend and dismissed the action.

The court of appeal affirmed the judgment of dismissal. The court of appeal noted that the cases in which equity has intervened to set aside a final judgment are cases in which the principal ground was that there was no fair adversary trial at law. No cases were cited and none had been found, said the court, setting aside a final judgment entered after a fully contested adversary hearing merely because an attorney's neglect deprived the aggrieved party of a new trial or his right to appeal (*264 Cal. App. 2d 743, 745)* . Ordinarily, the court stated, equity will not set aside a final judgment, even when there has been no adversary hearing, if it resulted from the inexcusable neglect of the aggrieved party or his lawyer, and the principle that an attorney's neglect is usually not grounds for equitable relief from a judgment applies rigidly to a matter heard on the merits (*264 Cal. App. 2d 743, 746)* .

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7-70 California Points & Authorities § 70.638

§ 70.638 Opposing Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress on Ground That There Is Insufficient Showing of Extrinsic Fraud, Mistake, or Duress Justifying Relief--Mutual Mistake

[1] FORM

[*This form should be combined with a memorandum generally opposing the contention that equitable relief should be granted because of extrinsic fraud, mistake, or duress (see § 70.630[1]).*]

THE AGGRIEVED PARTY IS NOT ENTITLED TO RELIEF IN EQUITY SETTING ASIDE THE PRIOR _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] BECAUSE THE BASIS FOR THE AGGRIEVED PARTY'S APPLICATION FOR RELIEF IS MUTUAL MISTAKE, WHICH IS NOT SUFFICIENT TO SET ASIDE A FINAL JUDGMENT.

Mutual Mistake. A mutual mistake that might be sufficient to set aside a contract is not sufficient to set aside a final judgment (*Kulchar v. Kulchar (1969) 1 Cal. 3d 467, 472, 82 Cal. Rptr. 489, 462 P.2d 17*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to the contention that the party is entitled to equitable relief from a prior default judgment obtained by reason of extrinsic mistake, fraud or duress. The ground for opposition is equity ordinarily will not grant relief from a final judgment based on mutual mistake [*Kulchar v. Kulchar (1969) 1 Cal. 3d 467, 472, 82 Cal. Rptr. 489, 462 P.2d 17]* .

In an appropriate case, these points and authorities may be submitted in opposition to the contentions supported by the points and authorities *set out in §§ 70.550 -70.623*.

This form should be combined with a memorandum generally opposing the contention that equitable relief should be granted because of extrinsic fraud, mistake, or duress [*see § 70.630[1]*]. They may, in addition, be used in a trial or appellate brief.

These points and authorities may also be combined, when appropriate, with additional points and authorities opposing a grant of equitable relief on other particular grounds [*see, e.g., §§ 70.650-* 700].

See also *§§ 70.480[2]* and *70.490[2]* for additional general considerations relating to equitable relief, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 70.490[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Mutual Mistake

The facts and procedural background of ***Kulchar v. Kulchar*** *(1969) 1 Cal. 3d 467, 82 Cal. Rptr. 489, 462 P.2d 17* , are discussed in *§ 70.630[3]*. In *Kulchar*, the Supreme Court ruled that mutual mistake (as to the taxability of certain foreign assets in this case) that might be sufficient to set aside a contract is not sufficient to set aside a final judgment. Quoting the Restatement of Judgments § 126 comment a, the Court stated that the principles of res judicata demand that the parties present their entire case in one proceeding. Public policy requires that pressure be brought on litigants to use great care in preparing cases for trial and in ascertaining all the facts. A rule which would permit the reopening of cases previously decided because of error or ignorance during the progress of the trial would in a large measure vitiate the effects of the rules of res judicata (*1 Cal. 3d 467, 472)* .

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7-70 California Points & Authorities §§ 70.639-70.649

[Reserved]

§§ 70.639[Reserved]

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7-70 California Points & Authorities § 70.650

§ 70.650 Opposing Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress on Ground That There Is Insufficient Showing of Meritorious Defense

[1] FORM

[*The following may be included in a general memorandum opposing a motion in equity (see, e.g., § 70.490[1]), a memorandum supporting a demurrer to a complaint for equitable relief (see, e.g., §§ 70.500 -70.503), a memorandum supporting a defendant's motion for summary judgment in an independent suit in equity (see, e.g., §§ 70.510, 70.511), or in a trial or appellate brief.*]

THE AGGRIEVED PARTY IS NOT ENTITLED TO RELIEF IN EQUITY TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] BECAUSE HE/SHE IS UNABLE TO DEMONSTRATE THAT HE/SHE HAS A MERITORIOUS _____ [CLAIM *or* DEFENSE].

A. Ability to Present Meritorious Claim or Defense. Equity will not interfere with a judgment which is unjust unless it appears that the one whose interests were thus infringed can present a meritorious case (*Olivera v. Grace (1942) 19 Cal. 2d 570, 578, 122 P.2d 564*).

B. Demonstration of Meritorious Claim or Defense Required. Courts are not required to set aside judgments for parties who flagrantly ignore the responsibility to present a claim or defense. The party seeking relief from a default is required to present evidence of a meritorious case (*see Stiles v. Wallis (1983) 147 Cal. App. 3d 1143, 1148, 195 Cal. Rptr. 377*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to the contention that the party is entitled to equitable relief from a prior default judgment obtained by reason of extrinsic mistake, fraud or duress. The ground for opposition is that the aggrieved party has not sufficiently shown that he or she can present a meritorious claim or defense.

In an appropriate case, this form may be submitted in opposition to the contentions supported by the points and authorities *set out in §§ 70.620 -70.623*.

These points and authorities should be combined with a general memorandum, depending on the procedural context in which the contention is to be raised. It may, for example, be combined with a general form of points and authorities opposing a motion in equity [*see, e.g., § 70.490[1]*]. They may also be combined, for example, with a memorandum supporting a defendant's attempt to dispose of an independent suit in equity through a pretrial proceeding such as a general demurrer to the complaint [*see, e.g., §§ 70.500 -70.503*], or a motion for summary judgment [*see, e.g., §§ 70.510, 70.511*]. They may, in addition, be used in a trial or appellate brief.

These points and authorities may also be combined, when appropriate, with additional points and authorities opposing a grant of equitable relief on other particular grounds [*see, e.g., §§ 70.630*- 70.668, 70.660-70.670].

See also *§§ 70.480[2]* and *70.490[2]* for additional general considerations relating to equitable relief, and alternative methods for obtaining relief. See particularly § 70.480[2][d][ii].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the aggrieved party is seeking relief by way of motion to set aside a default judgment on the basis of extrinsic mistake, but has submitted no evidence that the aggrieved party has a meritorious defense to the underlying action, counsel would refer to that absence in his or her argument.

See also *§ 70.490[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Ability to Present Meritorious Claim or Defense

The facts and procedural background of ***Olivera v. Grace*** *(1942) 19 Cal. 2d 570, 122 P.2d 564* , are discussed in *§ 70.480[3]* [*see also* discussion in *§ 70.520[3]*]. In *Olivera*, the Supreme Court reversed judgment for the defendant in an action to set aside a judgment after the sustaining of a demurrer to a third amended complaint without leave to amend. The plaintiff brought this action to set aside a judgment reforming a joint tenancy deed. The plaintiff alleged that in the former action, the defendant, who was the plaintiff there, knew that the defendant in that action was incompetent prior to commencement thereof and throughout its prosecution but failed to secure the appointment of a guardian or to inform the court of her condition. Holding that such action constituted extrinsic fraud, the Court ruled that the facts set forth were sufficient to justify the intervention of a court of equity. However, the defendant in this action suggested that the complaint failed to state a cause of action because it did not allege that a different result would have been reached if the interests of the incompetent party had been properly protected. The Court stated the general rule that equity will not interfere with a judgment which is unjust unless it appears that the interests of the one whose interests were thus infringed can present a meritorious case. It continued, however, that the requirement for the allegation of a meritorious case does not require an absolute guarantee of victory. It is enough if the complaint presents facts from which it can be ascertained that the plaintiff has a sufficiently meritorious claim to entitle him to a trial of the issue at a proper adversary proceeding. The complaint alleged that but for the conduct of the defendant, the court in the former action would have considered the testimony of additional witnesses concerning the intention of the party who executed the joint tenancy deed and would have reached a different conclusion. This, said the Court, was a sufficient

allegation under the rule stated. Accordingly, it concluded, that the complaint stated a cause of action for relief in equity and that the general demurrer should have been overruled (*19 Cal. 2d 570, 578-579)* .

[b] Demonstration of Meritorious Claim or Defense Required

The facts and procedural background of ***Stiles v. Wallis*** *(1983) 147 Cal. App. 3d 1143, 195 Cal. Rptr. 377*), are discussed in *§ 70.490[3]*. In *Stiles*, the court of appeal stated that although the policy of the law is to favor a hearing on the merits of a case, courts are not required to set aside default judgments for defendants who flagrantly ignore the responsibility to present a defense. The court noted that the respondent provided evidence of a meritorious case by filing with his motion to set aside the default a proposed verified answer denying the material allegations of the first amended complaint. It has long been established, stated the court, that merely attaching a verification to a proposed answer is sufficient to demonstrate meritoriousness (*147 Cal. App. 3d 1143, 1148)* .

[4] Additional Authorities

[a] Ability to Present Meritorious Claim or Defense

The facts and procedural background of *Hallett v. Slaughter (1943) 22 Cal. 2d 552, 140 P.2d 3* , are discussed in *§ 70.560[2]*. In *Hallett*, the Supreme Court affirmed a superior court's judgment setting aside a default judgment taken against the plaintiff in a municipal court. The superior court had held that the plaintiff had sufficiently shown a meritorious defense. The complaint alleged that (1) a major portion of the bill for medical services sued on in the original action was for services to her son at a time when he was a minor, rather than to herself; (2) for such services her obligation to the plaintiff was as guardian of the estate of her son, rather than individually; (3) the statute of limitations barred the debt; (4) the plaintiff doctor in that action had released and discharged her from all liability prior to bringing suit; (5) any obligation she had to the doctor had been discharged in bankruptcy; and (6) neither she nor her son had been under the doctor's care during certain months covered by the bill. The Supreme Court noted that the requirement that the complaint allege a meritorious case does not require an absolute guarantee of victory and stated that the plaintiff need only show with reasonable certainty that she would emerge in a more favorable position (*22 Cal. 2d 552, 558)* .

In *Page v. Insurance Co. of N. America (1969) 3 Cal. App. 3d 121, 83 Cal. Rptr. 44* , the court of appeal ruled that a valid judgment will not be set aside merely because it was obtained by fraud or mistake in order to give the barren right to an adversary hearing. The plaintiff must plead and prove that he has a meritorious case, that is, a good claim or defense which, asserted in a new trial, would be likely to result in a judgment favorable to him. The court added that equitable relief from a judgment will be granted only when, and to the extent that, the judgment has deprived the complainant of something to which he is equitably entitled (*3 Cal. App. 3d 121, 130)* . In the final analysis of the newly discovered evidence the plaintiff sought to adduce at any new trial following vacation of the prior judgment of dismissal, the court concluded, nothing would be added to the plaintiff's claim (*3 Cal. App. 3d 121, 131)* .

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7-70 California Points & Authorities §§ 70.651-70.659

[Reserved]

§§ 70.651[Reserved]

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7-70 California Points & Authorities § 70.660

§ 70.660 Opposing Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress on Ground That Negligence or Fault of Party Seeking Relief Precludes Relief--Generally

[1] FORM

[*The following may be included in a general memorandum opposing a motion in equity (see, e.g., § 70.490[1]), a memorandum supporting a demurrer to a complaint for equitable relief (see, e.g., §§ 70.500 -70.503), a memorandum supporting a defendant's motion for summary judgment in an independent suit in equity (see, e.g., §§ 70.510, 70.511), or in a trial or appellate brief.*]

THE AGGRIEVED PARTY IS NOT ENTITLED TO RELIEF IN EQUITY BECAUSE HE/SHE IS UNABLE TO DEMONSTRATE THAT HE/SHE WAS FREE FROM NEGLIGENCE OR OTHER FAULT CONTRIBUTING TO THE RENDITION OF _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] AGAINST HIM/HER.

A. Fault on Part of Complaining Party. Equity will interfere to grant equitable relief from a prior judgment only when there has been no negligence or other fault on the part of the party seeking relief or his/her agents (*Olivera v. Grace (1942) 19 Cal. 2d 570, 575, 122 P.2d 564*).

[*EITHER, if used in opposition to motion in equity*]

B. Requirement of Diligence in Seeking Relief. One moving in equity to set aside a [default] judgment must act diligently in making his/her motion after learning of the judgment (*Weitz v. Yankosky (1966) 63 Cal. 2d 849, 856-857, 48 Cal. Rptr. 620, 409 P.2d 700*).

[*OR, if used in opposing independent suit in equity*]

B. Pleading Diligence in Seeking Relief After Discovery. As an indispensable condition of equitable relief from a judgment, a plaintiff is required to allege and prove diligence in seeking relief after discovery of the facts (*Page v. Insurance Co. of N. America (1969) 3 Cal. App. 3d 121, 128-129, 83 Cal. Rptr. 44* ; *Turner v. Allen (1961) 189 Cal. App. 2d 753, 759, 11 Cal. Rptr. 630*).

[*This form may be combined with particular points and authorities opposing a contention that equitable relief should be granted because of fault on the part of the aggrieved party (see, e.g., §§ 70.661, 70.662)*].

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to the contention that the party is entitled to equitable relief from a prior default judgment obtained by reason of extrinsic mistake, fraud or duress. The ground for opposition is that the aggrieved party's own negligence contributed to the judgment or order form which relief is sought, thus precluding a grant of equitable relief.

In an appropriate case, this form may be submitted in opposition to the contentions supported by the points and authorities *set out in §§ 70.550 -70.623*. See, *in particular, § 70.610[1]*.

These points and authorities should be combined with a general memorandum, depending on the procedural context in which the contention is to be raised. It may, for example, be combined with a general form of points and authorities opposing a motion in equity [*see, e.g., § 70.490[1]*]. This form may be combined with particular points and authorities opposing a contention that equitable relief should be granted because of fault on the part of the aggrieved party [see, e.g., *§§ 70.661, 70.662*]. They may also be combined, for example, with a memorandum supporting a defendant's attempt to dispose of an independent suit in equity through a pretrial proceeding such as a general demurrer to the complaint [*see, e.g., §§ 70.500 -70.503*], or a motion for summary judgment [*see, e.g., §§ 70.510, 70.511*]. They may, in addition, be used in a trial or appellate brief.

These points and authorities may also be combined, when appropriate, with additional points and authorities opposing a grant of equitable relief on other particular grounds [*see, e.g., §§ 70.630 -70.650, 70.670*].

See also *§§ 70.480[2]* and *70.490[2]* for additional general considerations relating to equitable relief, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should identify facts indicating that the party seeking relief did not exercise due care.

See also *§ 70.490[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Fault on Part of Complaining Party

The facts and procedural background of ***Olivera v. Grace*** *(1942) 19 Cal. 2d 570, 122 P.2d 564* , are discussed in *§ 70.480[3]* [*see also* discussion in *§ 70.520[3]*]. In *Olivera*, the Supreme Court ruled that equity will interfere to grant equitable relief from a prior judgment on the suit of one against whom a legal judgment had been obtained through

extrinsic fraud or mistake when there has been no negligence, laches, or other fault on his or her part or on the part of his or her agents (*19 Cal. 2d 570, 575)* .

[b] Requirement of Diligence in Seeking Relief

The facts and procedural background of ***Weitz v. Yankosky*** *(1966) 63 Cal. 2d 849, 48 Cal. Rptr. 620, 409 P.2d 700* , are discussed in *§ 70.480[3]*. In *Weitz*, the Supreme Court affirmed a trial court's order setting aside a default judgment on the motion of the defendant, holding that the defendant had exercised diligence in seeking such relief. The plaintiff sued the defendant for property damage and personal injury in an automobile accident. The defendant mailed the summons and complaint to his insurer's office but they were not received. Only when the defendant received word that his driver's license would be revoked did the insurer become aware of the suit and the default, whereupon it moved to have the judgment set aside. After determining that the defendant had acted reasonably in assuming that his insurer would defend and that the trial court had not abused its discretion in holding the defendant's failure to answer on time was due to an excusable extrinsic mistake, the Court added that it remained to be determined whether or not the defendant was barred from relief due to delay in moving to set aside the judgment. The Court held that one moving in equity to set aside a default judgment must act diligently in making his or her motion after he or she learns of the default judgment. It observed that this requirement is sometimes put in terms of laches but that this is not the appropriate doctrine because laches requires a finding of prejudice caused by the delay (*63 Cal. 2d 849, 856-857)* .

[c] Pleading Diligence in Seeking Relief After Discovery

Page v. Insurance Co. of N. America *(1969) 3 Cal. App. 3d 121, 83 Cal. Rptr. 44* , involved a trial court's order issued pursuant to a petition for a writ of error coram nobis vacating a prior judgment. In the prior cause of action, grounded on uninsured motorist liability, the plaintiff's allegations were that the defendant's vehicle had collided with his vehicle when an unidentified vehicle had crossed the center line of the roadway, but it omitted any allegation that vehicle had come into contact with either the plaintiff's or the defendant's vehicle. The complaint was dismissed following the sustaining of a general demurrer. Approximately six months after the judgment of dismissal was affirmed on appeal, the plaintiff for the first time deposed the defendant and obtained new evidence. The plaintiff applied to recall the remittitur filed in the court of appeal and petitioned for a writ of coram nobis in the trial court. The application to court of appeal was denied, but the petition to the trial court was granted. The trial court vacated the judgment and permitted the plaintiff to file and a second amended complaint. The defendant appealed.

The court of appeal reversed the trial court's order. The court of appeal noted that the plaintiff's attorney had known that the insurer's defense was based on the lack of physical contact with the unidentified vehicle, and that the defendant was the only eyewitness other than the plaintiff. The court held that the plaintiff's failure to obtain defendant's evidence during the extended pleading stage of the case was inexcusable neglect. The court ruled that an indispensable condition of equitable relief from a judgment is the plaintiff's freedom from negligence or other fault contributing to the rendition of the judgment against him or her. He or she must allege and prove a satisfactory excuse for not having discovered the facts prior to the entry of the judgment. In addition, said the court, he or she must plead and prove diligence in seeking relief after discovery of the facts (*3 Cal. App. 3d 121, 128-129* . The court further observed that because of the policy of the law that final judgments ought not to be set aside lightly on unsubstantial grounds, the claim of newly discovered evidence has not been looked on with favor and that a strong showing of the essential requirements has been demanded (*3 Cal. App. 3d 121, 129)* .

The facts and procedural background of ***Turner v. Allen*** *(1961) 189 Cal. App. 2d 753, 11 Cal. Rptr. 630* , are discussed in *§ 70.620[4]*. In *Turner*, the court of appeal stated that the plaintiff was required to plead and prove that a good defense existed to the original claim which would be likely to result in a favorable judgment if asserted in a new trial, that he had a satisfactory excuse for not having made such defense in the earlier proceeding, that he diligently sought relief after discovery of the facts, and that his conduct in no way prejudiced the other party (*189 Cal. App. 2d 753, 758-759)* . Citing *Hallett v. Slaughter (1943) 22 Cal. 2d 552, 140 P.2d 3* , the court added that if the aggrieved

party makes a strong showing of diligence in seeking relief after discovery of the facts, and the judgment creditor is unable to show prejudice from the delay, the original negligence in allowing the default to be taken will be excused on a weak showing (*189 Cal. App. 2d 753, 759)* .

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7-70 California Points & Authorities § 70.661

§ 70.661 Opposing Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress on Ground That Negligence or Fault of Party Seeking Relief Precludes Relief--Complaining Party Contributed to Fraud or Mistake

[1] FORM

[*This form should be combined with a memorandum generally opposing the contention that equitable relief should be granted because of extrinsic fraud, mistake, or duress, because fault of aggrieved party precludes (see § 70.660[1]).*]

THE AGGRIEVED PARTY IS NOT ENTITLED TO RELIEF IN EQUITY BECAUSE HE/SHE CONTRIBUTED TO THE ALLEGED _____ [FRAUD *or* MISTAKE] GIVING RISE TO THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER] AGAINST HIM/HER.

Complaining Party Contributed to Fraud or Mistake. Relief from a judgment will be denied when the complaining party has contributed to the fraud or mistake giving rise to the judgment thus obtained (*Kulchar v. Kulchar (1969) 1 Cal. 3d 467, 473, 82 Cal. Rptr. 489, 462 P.2d 17* ; *Hammell v. Britton (1941) 19 Cal. 2d 72, 80, 119 P.2d 333*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to the contention that the party is entitled to equitable relief from a prior default judgment obtained by reason of extrinsic mistake, fraud or duress. The ground for opposition is that the aggrieved party contributed to the fraud or mistake that gave rise to the judgment obtained against him or her [*Hammell v. Britton (1941) 19 Cal. 2d 72, 80, 119 P.2d 333* ; *Kulchar v. Kulchar (1969) 1 Cal. 3d 467, 473, 82 Cal. Rptr. 489, 462 P.2d 17]* .

In an appropriate case, this form may be submitted in opposition to the contentions supported by the points and

authorities *set out in §§ 70.550 -70.623*. See, *in particular, § 70.610[1]*.

This form should be combined with a memorandum generally opposing the contention that equitable relief should be granted because of extrinsic fraud, mistake, or duress, because fault of aggrieved party precludes [*see § 70.660[1]*].

See also *§§ 70.480[2]* and *70.490[2]* for additional general considerations relating to equitable relief, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 70.490[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Complaining Party Contributed to Fraud or Mistake

The facts and procedural background of ***Kulchar v. Kulchar*** *(1969) 1 Cal. 3d 467, 82 Cal. Rptr. 489, 462 P.2d 17* , are discussed in *§ 70.630[3]*. In *Kulchar*, the Supreme Court noted that both parties knew of the foreign assets at issue prior to the divorce. The defendant testified that he knew the plaintiff was receiving income from those assets, listed the wife's interest therein as her separate property in his divorce questionnaire, and offered to transfer to the plaintiff any interest he might have therein. The plaintiff also knew of the holdings but did not know of their value or tax consequences but stated to the defendant's attorney that another law firm had advised her that the income therefrom was not taxable. The defendant's attorney knew that the foreign holdings were sizable. The case, therefore, did not involve the failure of one spouse to disclose fully the assets to be divided on separation but, rather, one in which the husband and his attorney chose not to investigate the taxability of the foreign assets; yet the property settlement agreement expressly covered unknown tax liability. Having had full opportunity to consider all income of the wife and its concurrent tax consequences, the husband could not later complain of the added tax burden pursuant to the property settlement agreement. Relief is denied when the complaining party has contributed to the fraud or mistake giving rise to the judgment thus obtained, and, if the complainant was guilty of negligence in permitting the fraud to be practiced or the mistake to occur, equity will deny relief (*1 Cal. 3d 467, 473)* .

The facts and procedural background of ***Hammell v. Britton*** *(1941) 19 Cal. 2d 72, 119 P.2d 333* , are discussed in *§ 70.500[3]*. In *Hammell*, the Supreme Court pointed out that under proper circumstances an action will lie for equitable relief from a judgment but that a party is not entitled to that relief on grounds which would have been a defense to the original action in the absence of a showing of some appropriate equitable excuse for not having made the defense or of not having succeeded if made (*19 Cal. 2d 72, 80)* .

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7-70 California Points & Authorities § 70.662

§ 70.662 Opposing Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress on Ground That Negligence or Fault of Party Seeking Relief Precludes Relief--Complaining Party Guilty of Negligence

[1] FORM

[*This form should be combined with a memorandum generally opposing the contention that equitable relief should be granted because of extrinsic fraud, mistake, or duress, because fault of aggrieved party precludes (see § 70.660[1]).*]

THE AGGRIEVED PARTY IS NOT ENTITLED TO RELIEF IN EQUITY BECAUSE HE/SHE IS GUILTY OF NEGLIGENCE IN PERMITTING THE ALLEGED _____ [FRAUD TO BE PRACTICED *or* MISTAKE TO OCCUR].

Complaining Party Guilty of Negligence. If the complaining party was guilty of negligence in permitting the fraud to be practiced or the mistake to occur, equity will deny relief from the judgment thus obtained (*Olivera v. Grace (1942) 19 Cal. 2d 570, 575, 122 P.2d 564* ; *Kulchar v. Kulchar (1969) 1 Cal. 3d 467, 473, 82 Cal. Rptr. 489, 462 P.2d 17*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to the contention that the party is entitled to equitable relief from a prior default judgment obtained by reason of extrinsic mistake, fraud or duress. The ground for opposition is that the aggrieved party contributed to the fraud or mistake that gave rise to the judgment obtained against him or her by his or her own negligence [*Kulchar v. Kulchar (1969) 1 Cal. 3d 467, 473, 82 Cal. Rptr. 489, 462 P.2d 17]* .

In an appropriate case, this form may be submitted in opposition to the contentions supported by the points and authorities *set out in §§ 70.550 -70.623*. See, *in particular, § 70.610[1]*.

This form should be combined with a memorandum generally opposing the contention that equitable relief should be granted because of extrinsic fraud, mistake, or duress, because fault of aggrieved party precludes [*see § 70.660[1]*].

See also *§§ 70.480[2]* and *70.490[2]* for additional general considerations relating to equitable relief, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. See also *§ 70.490[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Complaining Party Guilty of Negligence

The facts and procedural background of ***Olivera v. Grace*** *(1942) 19 Cal. 2d 570, 122 P.2d 564* , are discussed in *§ 70.480[3]* [*see also* discussion in *§ 70.520[3]*]. In *Olivera*, the Supreme Court pointed out that when the prior judgment was obtained or entered through fraud or mistake or when the defendant in the action, having a valid legal defense on the merits, was prevented from maintaining it by fraud or mistake and there had been no negligence, laches, or other fault on his or her part or on the part of his or her agents, then a court of equity will interfere (*19 Cal. 2d 570, 575)* .

The facts and procedural background of ***Kulchar v. Kulchar*** *(1969) 1 Cal. 3d 467, 82 Cal. Rptr. 489, 462 P.2d 17* , are discussed in *§ 70.630[3]*. In *Kulchar*, the Supreme Court stated that if the complainant was guilty of negligence in permitting the fraud to be practiced or the mistake to occur, equity will deny relief (*1 Cal. 3d 467, 473)* .

[4] Additional Authorities

[a] Complaining Party Guilty of Negligence

In *Wilson v. Wilson (1942) 55 Cal. App. 2d 421, 130 P.2d 782* , the court of appeal affirmed a judgment of nonsuit in an action to set aside an interlocutory decree of divorce, holding that the plaintiff was either guilty of negligence or chargeable with the negligence of her attorney in connection with the prior adverse decree. The plaintiff contended that her absence from the trial and her failure to secure the presence of counsel was caused by her unavoidable illness. The court of appeal noted that equity will not grant relief from a prior judgment unless the complainant was without fault. If the complainant was guilty of negligence in permitting the fraud to be practiced or the mistake to occur, equity will deny relief (*55 Cal. App. 2d 421, 427)* . The nonsuit was proper, said the court, in view of the facts that the plaintiff had more than two months to secure replacement counsel when her original attorney withdrew from the case, particularly since the latter had told her it would be difficult to obtain any further continuance of the matter and that the plaintiff made no real effort to secure counsel until two days before the trial (*55 Cal. App. 2d 421, 429)* .

California Points & Authorities

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Volume 7 Chapters 70 DEFAULTS
CHAPTER 70 DEFAULTS, DEFAULT JUDGMENTS, AND RELIEF FROM JUDGMENTS AND ORDERS
PART II. FORMS
C. Equitable Relief From Default Judgment or Other Judgment or Order Based on Extrinsic Fraud, Mistake, or Duress
3. Grounds for Granting or Denying Equitable Relief

7-70 California Points & Authorities §§ 70.663-70.669

[Reserved]

§§ 70.663[Reserved]

California Points & Authorities

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Volume 7 Chapters 70 DEFAULTS
CHAPTER 70 DEFAULTS, DEFAULT JUDGMENTS, AND RELIEF FROM JUDGMENTS AND ORDERS
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7-70 California Points & Authorities § 70.670

§ 70.670 Opposing Contention That Equitable Relief Should Be Granted to Vacate and Set Aside Default and Default Judgment or Other Judgment or Order Obtained Through Extrinsic Fraud, Mistake, or Duress on Ground That Court Should Exercise Discretion to Deny Equitable Relief Under Particular Circumstances of Case

[1] FORM

[*The following may be included in a general memorandum opposing a motion in equity (see, e.g., § 70.490[1]), a memorandum supporting a demurrer to a complaint for equitable relief (see, e.g., §§ 70.500 -70.503), a memorandum supporting a defendant's motion for summary judgment in an independent suit in equity (see, e.g., §§ 70.510, 70.511), or in a trial or appellate brief.*]

THE COURT SHOULD EXERCISE ITS DISCRETION TO DENY RELIEF IN THIS CASE BECAUSE IT WOULD BE UNJUST AND UNFAIR TO SET ASIDE THE _____ [DEFAULT AND DEFAULT JUDGMENT *or* JUDGMENT *or* ORDER].

A. Court Has Discretion to Deny Relief. Relief from a [default] judgment is addressed to the sound discretion of the trial court, and, in the absence of a clear showing of abuse of discretion when the trial court grants relief, an appellate court will not disturb the order (*Weitz v. Yankosky (1966) 63 Cal. 2d 849, 854, 48 Cal. Rptr. 620, 409 P.2d 700* (motion in equity)).

B. Discretion to Be Exercised With View Toward Accomplishment of Justice. The discretion of a court in deciding whether to set aside a judgment or order should be exercised with a view to seeing that justice is done (*Sanford v. Smith (1970) 11 Cal. App. 3d 991, 998, 90 Cal. Rptr. 256*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to the contention that the party is entitled to equitable relief from a prior default judgment obtained by reason of extrinsic mistake, fraud or duress. The ground for opposition is that the circumstances are such that the more just result would be for the court to exercise its discretion to deny relief [*see Gudarov v. Hadjieff (1952) 38 Cal. 2d 412, 418, 240 P.2d 621* (the fact that a motion for relief from default is addressed to the discretion of the trial court "is a rule as familiar as any to be found in the books")].

In an appropriate case, this form may be submitted in opposition to the contentions supported by the points and authorities *set out in §§ 70.550 -70.623*.

These points and authorities should be combined with a general memorandum, depending on the procedural context in which the contention is to be raised. It may, for example, be combined with a general form of points and authorities opposing a motion in equity [*see, e.g., § 70.490[1]*]. This form may be combined with particular points and authorities opposing a contention that equitable relief should be granted because of fault on the part of the aggrieved party [*see, e.g., §§ 70.661, 70.662*]. They may also be combined, for example, with a memorandum supporting a defendant's attempt to dispose of an independent suit in equity through a pretrial proceeding such as a general demurrer to the complaint [*see, e.g., §§ 70.500 -70.503*], or a motion for summary judgment [*see, e.g., §§ 70.510, 70.511*]. They may, in addition, be used in a trial or appellate brief.

This form may also be combined, when appropriate, with additional points and authorities opposing a grant of equitable relief on other particular grounds [*see, e.g., §§ 70.630 -70.662*].

See also *§§ 70.480[2]* and *70.490[2]* for additional general considerations relating to equitable relief, and alternative methods for obtaining relief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should identify facts that show that a setting aside of the judgment would be unfair and unjust.

See also *§ 70.490[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Court Has Discretion to Deny Relief

The facts and procedural background of ***Weitz v. Yankosky*** *(1966) 63 Cal. 2d 849, 48 Cal. Rptr. 620, 409 P.2d 700* , are discussed in *§ 70.480[3]*. In *Weitz*, the Supreme Court affirmed the order of the trial court setting aside a default judgment. However, the Court stated the general rule that a motion to set aside a default judgment is addressed to the sound discretion of the trial court, and, in the absence of a clear showing of abuse of discretion when the trial court grants the motion, the appellate court will not disturb the order (*63 Cal. 2d 849, 854)* .

[b] Discretion to Be Exercised With View Toward Accomplishment of Justice

In ***Sanford v. Smith*** *(1970) 11 Cal. App. 3d 991, 90 Cal. Rptr. 256* , the court of appeal reversed a superior court order denying defendants' motion to set aside their default and the judgment entered thereon. There, defendants' motion for relief under *Code Civ. Proc. § 473* was based on their assertion that service by publication was improper in that they had been available for personal service and the order permitting publication had been based on declarations containing hearsay allegations contrary to the requirements of Code Civ. Proc. § 412. The court first stated the general rule regarding the court's discretion in granting or denying equitable relief, and went on to note that the trial court should exercise its discretion to see that justice is done, "particularly when prompt application for relief is made" (*11 Cal. App. 3d 991, 998)* .

California Points & Authorities

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Volume 7A Chapters 71-79 DEMURRERS
CHAPTER 71 DEMURRERS AND MOTIONS FOR JUDGMENT ON THE PLEADINGS

7A-71 California Points & Authorities 71.syn

§ 71.syn Synopsis to Chapter 71: DEMURRERS AND MOTIONS FOR JUDGMENT ON THE PLEADINGS

§ 71.01 Scope of Chapter

§ 71.02 Governing Statutes

§ 71.03 Raising Objection to Complaint, Cross Complaint, or Answer by Demurrer

[1] When Ground for Objection Appears on Face of Pleading

[2] When Ground for Objection Appears From Judicially Noticed Matter

[3] Demurrer to All or Part of Pleading

§ 71.04 Grounds for Objection

[1] To Complaint or Cross Complaint

[a] In General

[b] Lapse of Statute of Limitations

[2] To Answer

§ 71.05 "General" and "Special" Demurrers Distinguished

§ 71.06 Waiver of Objection to Complaint or Cross Complaint

§ 71.07 Attacking Defects in Pleadings

§ 71.08 How to Use the Forms in This Chapter

[1] Page Limits on Memoranda

[2] Using the Forms to Build a Draft Memorandum

§ 71.09 Related Pleading and Practice Chapters

§ 71.10 Related Memoranda

§§ 71.11-71.19 [Reserved]

§ 71.20 Supporting General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Nonwaiver of Objection

[c] Allegations Stated as Conclusions of Law

[d] Related Pleading and Practice Forms

[e] Related Memoranda

[f] Opposing Memoranda

[3] Discussion of Authorities

[a] Allegations Stated as Conclusions of Law

[b] Conjectured Facts Not Stated

[c] Sustain Demurrer Without Leave to Amend

[d] Complaint Affirmatively Alleges Affirmative Defense

[e] Allegations of Complaint on Their Face Are Barred by Compulsory Cross-Complaint Statute

[4] Additional Authorities

[a] Allegations Stated as Conclusions of Law

[b] Conjectured Facts Not Stated

[c] Sustain Demurrer Without Leave to Amend

[d] Complaint Affirmatively Alleges Affirmative Defense

§ 71.21 Supporting General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Insufficiency Established by Judicially Noticed Matter [Evid. Code § 452]

[1] FORM

[2] Comments

[a] Use of Form

[b] Mandatory Judicial Notice

[c] Request for Permissive Judicial Notice

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Ground for Objection Appears From Matter of Which Court May Take Judicial Notice

[b] City and County Ordinances

[c] Acts of State Administrative Agencies

[d] Court Records

[e] Facts and Propositions Not Reasonably Subject to Dispute

[4] Additional Authorities

[a] Ground for Objection Appears From Matter of Which Court May Take Judicial Notice

[b] Acts of State Administrative Agencies

[c] Court Records

§ 71.22 Supporting General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Plaintiff Lacks Standing to Maintain Action

[1] FORM

[2] Comments

[a] Use of Form

[b] Amendment to Substitute Parties

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Prosecution by Real Party in Interest

[b] Action Stated Not in Plaintiff

[4] Additional Authorities

[a] Action Stated Not in Plaintiff

§ 71.23 Supporting General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Action Is Premature

[1] FORM

[2] Comments

[a] Use of Form

[b] Prematurity Must Exist at Time Issue Determined

[c] Waiver of Ground of Objection

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Premature Complaint Fails to State Cause of Action

[b] Another Matter to Be Resolved

[c] Action on Note Before Maturity

[d] Action on Accelerated Contract Balance Prior to Occurrence of Condition Precedent

[e] Action Against Buyer Before Expiration of Credit Period

[f] Action on Debt Superseded by Nonmatured Promissory Note

[g] Action Against Personal Representative of Decedent Prior to Presentation of Claim

§ 71.24 Supporting General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Action Barred by Prior Judgment (Res Judicata)

[1] FORM

[2] Comments

[a] Use of Form

[b] Sameness of Parties

[c] Sameness of Actions

[d] Sameness of Issues

[e] Matters Concluded by Former Judgment

[f] Issues That Might Have Been Raised

[g] Voluntary Dismissal With Prejudice

[h] Collateral Estoppel Distinguished

[i] Related Points and Authorities

[j] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Conclusiveness of Judgment

[b] Effect of Prior Judgment

[c] Showing That Action Is Barred

[d] Judicial Notice of Prior Action

[e] Sameness of Actions

[f] Sameness of Issues

[g] Matters Concluded by Former Judgment

[h] Issues That Might Have Been Raised

[i] Voluntary Dismissal With Prejudice

[4] Additional Authorities

[a] Effect of Prior Judgment

[b] Showing That Action Is Barred

[c] Sameness of Actions

[d] Issues That Might Have Been Raised

[e] Judicial Notice of Prior Action

[f] Sameness of Actions

[g] Issues That Might Have Been Raised

§ 71.25 Supporting General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Operative Allegations Contradicted by Written Instrument Attached to Complaint

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Attached Exhibit Subject to Court Examination on Demurrer

[b] Pleader's Allegations of Exhibit's Legal Effect Treated as Surplusage

[c] Sustention of Demurrer

[4] Additional Authorities

[a] Attached Exhibit Subject to Court Examination on Demurrer

[b] Sustention of Demurrer

§ 71.26 Supporting General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Amended Complaint Is Inconsistent With Prior Complaint

[1] FORM

[2] Comments

[a] Use of Form

[b] Purpose of Rule

[c] Judicial Notice

[d] Verification of Original Complaint

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Allegations Inconsistent With Prior Pleading Not Assumed True

[b] Examination of Prior Complaint Permitted

[c] Inconsistent or Omitted Allegations Read Into Amended Complaint

[4] Additional Authorities

[a] Allegations Inconsistent With Prior Pleading Not Assumed True

[b] Examination of Prior Complaint Permitted

[c] Inconsistent or Omitted Allegations Read Into Amended Complaint

§ 71.27 Supporting General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Equitable Action Barred by Laches

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Action Barred by Laches

[4] Additional Authorities

[a] Action Barred by Laches

§ 71.28 Supporting General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Insufficiency Established by Judicial Admission

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Insufficiency Established by Judicial Admission

§ 71.29 Supporting General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Judicial Restraint Requires Lack of Intervention

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Judicial Restraint Is Compelled in Areas of General Public Policy

§ 71.29A Supporting General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Previous Demurrer to Same Cause of Action Was Sustained

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Previous Demurrer to Same Cause of Action Was Sustained

§ 71.30 Opposing General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Complaint States Cause of Action

[b] Demurrer Limited to Face of Pleading and Judicially Noticed Matter

[c] At Least One Count or Cause of Action Not Subject to Objection Raised

[d] Rule of Liberal Construction

[e] Cause of Action Alleged Despite Mistaken Labels and Confusion of Legal Theory

[f] Cause of Action Alleged Despite Legal Conclusions

[g] Cause of Action Alleged Despite Unclear Facts

[h] Cause of Action Alleged Despite Irrelevant Facts

[i] Cause of Action Alleged Despite Demand for Wrong Relief

[j] Implied or Inferred Facts Deemed True

[k] Disregard of Nonprejudicial Defect

[l] Cause of Action Not Necessarily Barred By Affirmative Defense

[m] Demurrer Inappropriate to Determine Truth of Disputed Facts

[4] Additional Authorities

[a] Complaint States Cause of Action

[b] Demurrer Limited to Face of Pleading and Judicially Noticed Matter

[c] At Least One Count or Cause of Action Not Subject to Objection Raised

[d] Rule of Liberal Construction

[e] Cause of Action Alleged Despite Mistaken Labels and Confusing Legal Theory

[f] Cause of Action Alleged Despite Legal Conclusions

[g] Cause of Action Alleged Despite Unclear Facts

[h] Cause of Action Alleged Despite Demand for Wrong Relief

[i] Implied or Inferred Facts Deemed True

[j] Disregard of Nonprejudicial Defect

§ 71.31 Opposing General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Insufficiency Not Established by Judicially Noticed Matter [Evid. Code § 452]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Taking of Judicial Notice Does Not Require Acceptance of Truth of Related Factual Matters

[b] Judicially Noticed Matter Not Dispositive of Demurrer When Factual Dispute Exists

[c] Matter Requested to be Judicially Noticed Not Supported by Sufficient Information

§ 71.32 Opposing General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Complaint Rendered Sufficient by Judicially Noticed Facts [Evid. Code § 452]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Complaint Sufficient by Inclusion of Judicially Noticed Matter

§ 71.33 Opposing General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Plaintiff Is Authorized by Statute to Sue [Code Civ. Proc. § 369]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Person Authorized by Statute May Sue

[b] Taxpayer's Action

§ 71.34 Opposing General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Action Is No Longer Premature

[1] FORM

[2] Comments

[a] Use of Form

[b] Premature Filing

[c] Continuance

[3] Discussion of Authorities

[a] Prematurity of Action as Plea in Abatement

[b] Ground No Longer Exists

[4] Additional Authorities

[a] Prematurity of Action as Plea in Abatement

[b] Ground No longer Exists

§ 71.35 Opposing General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Action Not Barred by Res Judicata if Federal Court in Prior Action Declined to Exercise Pendent Jurisdiction Over State Claim

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Nonexercise of Pendent Jurisdiction

§ 71.36 Opposing General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--General Demurrer Does Not Raise Objections Constituting Grounds of Special Demurrer

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] General Demurrer Does Not Raise Objections Made Grounds of Special Demurrer

§ 71.37 Opposing General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Inconsistent Counts Not Incorporating Each Other's Inconsistent Allegations Do Not Render Complaint Defective

[1] FORM

[2] Comments

[a] Use of Form

[b] Rules With Respect to Other Inconsistencies

[c] Effect of Verification of Complaint

[3] Discussion of Authorities

[a] Inconsistent or Alternative Counts May Be Pled

[b] Inconsistent Allegations in Separate Counts Are Not Subject to General Demurrer

§ 71.38 Opposing General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Action Is Not Founded on Attached Exhibit

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Action Not Founded on Attached Document

[4] Additional Authorities

[a] Action Not Founded on Attached Document

§ 71.39 Opposing General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--General Damages Are Sufficiently Alleged

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] General Damages Sufficiently Alleged

§ 71.40 Opposing General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Plaintiff May Omit Facts Pled in Prior Pleading to Correct Mistakes

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Omission of Facts in Amended Pleading Permitted to Correct Mistakes

[4] Additional Authorities

[a] Omission of Facts in Amended Pleading Permitted to Correct Mistakes

§ 71.41 Opposing General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Fact That Prior Pleadings May Have Contained True, but Irrelevant, Matters Does Not Render Proposed Amended Complaint a Sham

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Sham Pleading Rule Is Inapplicable When There Are No Inconsistencies in the Underlying Material or Factual Allegations

§ 71.42 Opposing General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Delay Alone Does Not Establish Laches

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and authorities

[3] Discussion of Authorities

[a] Delay Without Acquiescence or Prejudice

[4] Additional Authorities

[a] Delay Without Acquiescence or Prejudice

§ 71.43 Opposing General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Demurrer Supplies Missing Allegation

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Missing Allegation Supplied by Demurrer

§ 71.44 Opposing General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Prior Demurrer to Same Cause of Action Overruled

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Previous Demurrer to Same Cause of Action Was Overruled

§§ 71.45-71.59 [Reserved]

§ 71.60 Supporting Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Court Lacks Jurisdiction of Subject of Cause of Action Alleged [Code Civ. Proc. § 430.10(a)]--Jurisdiction of Action Is in Probate Court

[1] FORM

[2] Comments

[a] Use of Form

[b] Nature of Probate Jurisdiction

[3] Discussion of Authorities

[a] Jurisdiction Over Property of Decedent's Estate and Those Claiming Under It Rests Exclusively in Probate Court

§ 71.61 Supporting Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Court Lacks Jurisdiction of Subject of Cause of Action Alleged [Code Civ. Proc. § 430.10(a)]--Jurisdiction of Action Exclusively in Federal Court

[1] FORM

[2] Comments

[a] Use of Form

[b] Federal Preemption

[3] Discussion of Authorities

[a] Lack of Jurisdiction Over Subject Matter Based on Preemption by Federal Law Is Ground for Demurrer

[b] Exclusive Federal Jurisdiction

[4] Additional Authorities

[a] Exclusive Federal Jurisdiction

§ 71.62 Supporting Special Demurrer to Complaint Code Civ. Proc. § 430.30(a)]--Plaintiff Does Not Have Legal Capacity to Sue [The Moses Taylor v. Wilson Hammons (1867) 4 Wall. 411, 429, 18 L. Ed. 2d 397 4 Wall. 411, 429) McCormick v. TravelerIns. Co. (2001) 86 Cal. App. 4th 404, 103 Cal. Rptr. 2d 258 42 U.S.C. § 4001 et seq. 86 Cal. App. 4th 404, 409-410) 86 Cal. App. 4th 404, 420) Washington Mutual Bank v. Superior Court (2002) 95 Cal. App. 4th 606, 619-621, 115 Cal. Rptr. 2d 765 Civ. Code § 2948.5 42 U.S.C. § 1461 et seq.de Civ. Proc. § 430.10(b)]--Failure to Allege Compliance With Fictitious Business Name Statutes [Bus. & Prof. Code § 17918]

[1] FORM

[2] Comments

[a] Use of Form

[b] Fictitious Business Name

[c] Lack of Capacity and Lack of Standing Distinguished

[d] Objection by Answer

[e] Waiver of Objection

[f] Subsequent Compliance

[g] Related Pleading and Practice Forms

[h] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Objection by Demurrer

[b] Maintenance of Action Prohibited

[c] Failure to Allege Compliance

§ 71.63 Supporting Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Plaintiff Does Not Have Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Guardian or Conservator Suing as Plaintiff for Damages Suffered by Ward or Conservatee

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Guardian or Conservator Lacks Legal Capacity to Sue in Own Name

§ 71.64 Supporting Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Plaintiff Does Not Have Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Foreign Personal Representative Suing on Behalf of Conservatee, Decedent's Estate, or Ward [Code Civ. Proc. § 1913]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Foreign Personal Representative Lacks Legal Capacity to Sue

§ 71.65 Supporting Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Another Action Is Pending Between Same Parties on Same Cause [Code Civ. Proc. § 430.10(c)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Judicial Notice of Prior Pending Action

[c] Abatement of Action

[d] Interlocutory Judgment on Abatement of action

[e] Review by Extraordinary Writ

[f] Waiver of Objection

[g] Related Pleading and Practice Forms

[h] Related Points and Authorities

[i] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Objection by Demurrer

[b] Pending Action Defined

[c] Judicial Notice of Court Records and Request

[d] Sameness of Actions

[e] Test for Determining Sameness of Actions

[f] Rule Against Splitting Cause of Action

[g] Basis of Rule Against Splitting Cause of Action

[h] Right to Have Second Action Abate

[4] Additional Authorities

[a] Objection by Demurrer

[b] Pending Action Defined

[c] Sameness of Actions

[d] Test for Determining Sameness of Actions

[e] Rule Against Splitting Cause of Action

[f] Basis of Rule Against Splitting Cause of Action

[g] Right to Have Second Action Abate

§ 71.66 Supporting Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Defect or Misjoinder of Parties [Code Civ. Proc. § 430.10(d)]--Nonjoinder of Party

[1] FORM

[2] Comments

[a] Use of Form

[b] Mandatory Joinder

[c] Dismissal of Action

[d] Waiver of Objection

[e] Related Pleading and Practice Forms

[f] Related Points and Authorities

[g] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Joinder Required

[4] Additional Authorities

[a] Joinder Required

§ 71.67 Supporting Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Defect or Misjoinder of Parties [Code Civ. Proc. § 430.10(d)]--Misjoinder of Party

[1] FORM

[2] Comments

[a] Use of Form

[b] No Charging Allegation

[c] Waiver of Objection

[d] Related Pleading and Practice Forms

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Objection by Demurrer

[b] Improper Plaintiff

[c] Improper Defendant

[d] No Charging Allegation

[4] Additional Authorities

[a] Improper Plaintiff

[b] Improper Defendant

[c] No Charging Allegation

§ 71.68 Supporting Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Pleading Is Uncertain [Code Civ. Proc. § 430.10(f)]--Material Allegations Left to Surmise

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Waiver of Objection

[d] Related Pleading and Practice Forms

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Objection by Demurrer

[b] Matters Left to Surmise

[4] Additional Authorities

[a] Matters Left to Surmise

§ 71.69 Supporting Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Pleading Is Uncertain [Code Civ. Proc. § 430.10(f)]--Material Time or Date Omitted

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Failure to Specify Time or Date

[4] Additional Authorities

[a] Failure to Specify Time or Date

§ 71.70 Supporting Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Pleading Is Uncertain [Code Civ. Proc. § 430.10(f)]--Meaning of Allegations Ambiguous or Doubtful

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Meaning Doubtful

[4] Additional Authorities

[a] Meaning Doubtful

§ 71.71 Supporting Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Pleading Is Uncertain [Code Civ. Proc. § 430.10(f)]--Allegations Are Unintelligible

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Incoherent Allegations

[4] Additional Authorities

[a] Incoherent Allegations

§ 71.72 Supporting Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Pleading in Action on Contract Does Not Sufficiently Establish Whether Contract Is Written, Oral, or Implied by Conduct [Code Civ. Proc. § 430.10(g)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Waiver of Objection

[c] Related Pleading and Practice Forms

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Objection by Demurrer

[b] Sustention of Demurrer

[4] Additional Authorities

[a] Sustention of Demurrer

§ 71.73 Supporting Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Certificate Required in Action Based on Professional Negligence [Code Civ. Proc. §§ 411.35(g), 430.10(h)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Waiver of Objection

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Objection by Demurrer

[b] Judicial Notice of Court Records and Request

§ 71.74 Opposing Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Plaintiff Has Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Lack of Capacity Not Shown on Face of Complaint

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] No Statute Requires Plaintiff to Allege Capacity to Sue

[b] Lack of Capacity Does not Appear on Face of Complaint

§ 71.75 Opposing Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Plaintiff Has Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Plaintiff Is Entity Exempt From Fictitious Business Name Statutes [Bus. & Prof. Code § 17911]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Who Must File Statement

[b] Nonprofit Organizations

[c] Real Estate Investment Trust

[d] Capacity to Sue

[e] Capacity of Association to Sue

§ 71.76 Opposing Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Plaintiff Has Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Plaintiff's Name Is Not Fictitious [Bus. & Prof. Code § 17900]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Inapplicability of Business and Professions Code Section 17918 to Plaintiff

[4] Additional Authorities

[a] Inapplicability of Bus. & Prof. Code § 17918 to Plaintiff

§ 71.77 Opposing Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Plaintiff Has Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Failure to File and Publish Fictitious Business Name Statement [Bus. & Prof. Code §§ 17910, 17917] Does Not Bar Tort Action

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Business and Professions Code Section 17918 Does Not Apply to Tort Actions

§ 71.78 Opposing Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Plaintiff Has Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Plaintiff Is Foreign Business Not Transacting Business in California

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Who Must Comply

§ 71.79 Opposing Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--No Other Action Is Pending Between Same Parties on Same Cause [Code Civ. Proc. § 430.10(c)]--Other Action Is Not Between Same Parties

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Nonfavored Plea

[b] Same Parties and Same Actions Required

[c] Actions Not Between Same Parties

[d] Actions Not on Same Cause

[4] Additional Authorities

[a] Nonfavored Plea

[b] Actions Not Between Same Parties

[c] Actions Not on Same Cause

§ 71.80 Opposing Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--No Other Action Is Pending Between Same Parties on Same Cause [Code Civ. Proc. § 430.10(c)]--Prior Action Is No Longer Pending

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Requirement That Other Action Be Pending

[b] Prior Action No Longer Pending

[4] Additional Authorities

[a] Prior Action No Longer Pending

§ 71.81 Opposing Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--No Other Action Is Pending Between Same Parties on Same Cause [Code Civ. Proc. § 430.10(c)]--Demurrer Does Not Lie to Abate First Action

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Objection Does Not Lie to Complaint in First Action

[4] Additional Authorities

[a] Objection Does Not Lie to Complaint in First Action

§ 71.82 Opposing Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Defect or Misjoinder of Parties [Code Civ. Proc. § 430.10(d)] Not Established--Nonjoined Party Is Jointly and Severally Liable in Tort

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Joinder of Jointly and Severally Liable Tortfeasor Not Required

[4] Additional Authorities

[a] Joinder of Jointly and Severally Liable Tortfeasor Not Required

§ 71.83 Opposing Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Defect or Misjoinder of Parties [Code Civ. Proc. § 430.10(d)] Not Established--Joinder Not Feasible [Code Civ. Proc. § 389(b)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Joinder Not Feasible

[4] Additional Authorities

[a] Joinder Not Feasible

§ 71.84 Opposing Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Defect or Misjoinder of Parties [Code Civ. Proc. § 430.10(d)] Not Established--No Misjoinder When Pleading Shows Common Questions of Law or Fact for Relief Arising Out of Same Transaction or Series of Transactions [Code Civ. Proc. § 378]

[1] FORM

[2] Comments

[a] Use of Form

[b] Permissive Joinder of Parties

[3] Discussion of Authorities

[a] Permissive Joinder of Plaintiffs

[b] Permissive Joinder of Defendants

[4] Additional Authorities

[a] Permissive Joinder of Plaintiffs

[b] Joinder in Case of Doubt as to Defendant Liable

§ 71.85 Opposing Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Defect or Misjoinder of Parties [Code Civ. Proc. § 430.10(d)] Not Established--Demurring Defendant Not Misjoined

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Who May Object

[4] Additional Authorities

[a] Who May Object

§ 71.86 Opposing Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Pleading Is Not Uncertain [Code Civ. Proc. § 430.10(f)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Demurrer For Uncertainty Not Dispositive of Cause of Action

[3] Discussion of Authorities

[a] Failure to Specify in What Particulars Pleading Is Uncertain

[b] Defendant Apprised of Issues to Be Met

[c] Ambiguous Facts Alleged Presumptively Within Defendant's Knowledge

[d] Challenged Allegations Immaterial

[e] Uncertainty as to Legal Effect of Facts Alleged

[f] Demurrer for Uncertainty Challenges Only Allegations Made

[4] Additional Authorities

[a] Defendant Apprised of Issues to Be Met

[b] Ambiguous Facts Alleged Presumptively Within Defendant's Knowledge

[c] Challenged Allegations Immaterial

[d] Uncertainty as to Legal Effect of Facts Alleged

[e] Demurrer for Uncertainty Challenges Only Allegations Made

§ 71.87 Opposing Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Pleading Does Not Sufficiently Establish Whether Contract Is Written, Oral, or Implied by Conduct [Code Civ. Proc. § 430.10(g)]--Action Not Founded on Contract

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Objection Lies Only Where Action Is Founded on Contract

[4] Additional Authorities

[a] Objection Lies Only When Action Is Founded on Contract

§ 71.88 Opposing Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Demurrer Construed as Nonmeritorious Because of Absence of Memoranda [Cal. Rules of Ct., Rule 3.1113(a)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Absence of Memorandum Construed as Admission of Nonmerit and Waiver of Grounds

§§ 71.89-71.99 [Reserved]

§ 71.100 Supporting General Demurrer to Answer [Code Civ. Proc. §§ 430.20(a), 430.30(a)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Demurrer to Answer

[c] Related Pleading and Practice Forms

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Objection by Demurrer

[b] Failure to State Defense

[4] Additional Authorities

[a] Failure to State Defense

§ 71.101 Supporting General Demurrer to Answer [Code Civ. Proc. §§ 430.20(a), 430.30(a)]--Denial of Immaterial Allegations Only

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Denial of Immaterial Matter Only

[4] Additional Authorities

[a] Denial of Immaterial Matter Only

§ 71.102 Supporting General Demurrer to Answer [Code Civ. Proc. §§ 430.20(a), 430.30(a)]--On Ground No Defense Is Stated [Code Civ. Proc. § 430.20(a)]--Conjunctive Denial of Matters Conjunctively Alleged

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Conjunctive Denial of Matters Conjunctively Alleged

[b] Sustension of Demurrer

§ 71.103 Supporting General Demurrer to Answer [Code Civ. Proc. §§ 430.20(a), 430.30(a)]--On Ground No Defense Is Stated [Code Civ. Proc. § 430.20(a)]--Affirmative Defense of Setoff Not Applicable [Code Civ. Proc. § 431.70]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Setoff as Allowed Only in Action

[b] Unemployment and Disability Benefits Immune From Banker's Setoff

[c] Claims Must Be Mutual

§ 71.104 Supporting Special Demurrer to Answer [Code Civ. Proc. §§ 430.20(b), 430.30(a)]--Pleading Is Uncertain

[1] FORM

[2] Comments

[a] Use of Form

[b] Waiver of Objection

[c] Related Pleading and Practice Forms

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Objection by Demurrer

§ 71.105 Opposing General Demurrer to Answer [Code Civ. Proc. §§ 430.20(a), 430.30(a)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Answer Raises Material Issue

[b] General Demurrer Admits Facts Well Pleaded

[4] Additional Authorities

[a] Answer Raises Material Issue

[b] General Demurrer Admits Facts Well Pleaded

§ 71.106 Opposing General Demurrer to Answer [Code Civ. Proc. §§ 430.20(a), 430.30(a)]--General Demurrer Does Not Lie to Challenge Defectively Stated Facts

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Facts Defectively Stated Not Subject to General Demurrer

[b] Answer Sufficient Against General Demurrer Despite Unclear or Irrelevant Facts, or Demand for Wrong Relief

[4] Additional Authorities

[a] Facts Defectively Stated Not Subject to General Demurrer

§ 71.107 Opposing General Demurrer to Answer [Code Civ. Proc. §§ 430.20(a), 430.30(a)]--Demurrer to Whole Answer on Ground No Defense Is Stated [Code Civ. Proc. § 430.20(a)]--Answer Pleads at Least One Valid Defense

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Sufficiency of One Defense

[4] Additional Authorities

[a] Sufficiency of One Defense

§ 71.108 Opposing General Demurrer to Answer [Code Civ. Proc. §§ 430.20(a), 430.30(a)]--Demurrer on Ground No Defense Is Stated [Code Civ. Proc. § 430.20(a)]--Pleading Inconsistent Defenses in Answer Is Permissible

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Separate Consideration of Defenses

[b] Inconsistent Defenses Permitted

[4] Additional Authorities

[a] Separate Consideration of Defenses

[b] Inconsistent Defenses Permitted

§ 71.109 Opposing General Demurrer to Answer [Code Civ. Proc. §§ 430.20(a), 430.30(a)]--Demurrer on Ground No Defense Is Stated [Code Civ. Proc. § 430.20(a)]--Affirmative Defense of Payment Available Although Independent Action on Claim Barred by Statute of Limitations at Time Answer Filed [Code Civ. Proc. § 431.70]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Defense of Payment Available Although Statute of Limitations Bars Independent Claim

[b] Code of Civil Procedure Section 431.70 as Applicable to Unliquidated Cross Demands

[4] Additional Authorities

[a] Defense of Payment Available Although Statute of Limitations Bars Independent Claim

§ 71.110 Opposing Special Demurrer to Answer [Code Civ. Proc. §§ 430.20(b), 430.30(a)]--Demurrer Fails to Specify Uncertainty

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Demurrer Fails to Specify Uncertainty

§§ 71.111-71.129 [Reserved]

§ 71.130 Supporting Motion by Plaintiff for Judgment on Pleadings [Code Civ. Proc. § 438(c)(1)(A)]--Complaint States a Cause of Action and Answer Does Not Deny Material Allegation of Complaint and Alleges No Affirmative Defense--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] When Motion Should Be Granted

[b] Evasive Answer Raising No Material Issue

[4] Additional Authorities

[a] When Motion Should Be Granted

[b] Evasive Answer Raising No Material Issue

§ 71.131 Supporting Motion by Plaintiff for Judgment on Pleadings [Code Civ. Proc. § 438(c)(1)(A)]--Complaint States a Cause of Action and Answer Does Not Deny Material Allegations of Complaint and Alleges No Affirmative Defense--Denial on Information and Belief of Matters Within Defendant's Presumptive Knowledge

[1] FORM

[2] Comments

[a] Use of Form

[b] Applicability of Rule to Corporations and Associations

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Denial of Information and Belief of Matters Presumptively Known

[4] Additional Authorities

[a] Denial on Information and Belief of Matters Presumptively Known

§ 71.132 Supporting Motion by Plaintiff for Judgment on Pleadings [Code Civ. Proc. § 438(c)(1)(A)]--Complaint

States a Cause of Action and Answer Does Not Deny Material Allegation of Complaint and Alleges No Affirmative Defense--Matters Denied for Lack of Information or Belief Within Defendant's Presumptive Knowledge

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Denial for Lack of Information or Belief of Matters Presumptively Known

[4] Additional Authorities

[a] Denial for Lack of Information or Belief of Matters Presumptively Known

§ 71.133 Supporting Motion by Plaintiff for Judgment on Pleadings [Code Civ. Proc. § 438(c)(1)(A)]--Complaint States a Cause of Action and Answer Does Not Deny Material Allegation of Complaint and Alleges No Affirmative Defense--Denial of Legal Conclusion Only as Insufficient

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Denial of Legal Conclusion Only

§ 71.134 Opposing Motion by Plaintiff for Judgment on the Pleadings [Code Civ. Proc. § 438(c)(1)(A)]--Answer Raises Material Issue of Fact or Defense--General Form

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Material Issue of Fact or Defense Raised

[b] Truth of Answer Assumed

[c] Motion Not Available in Lieu of Special Demurrer

[4] Additional Authorities

[a] Material Issue of Fact or Defense Raised

[b] Truth of Answer Assumed

§§ 71.135-71.149 [Reserved]

§ 71.150 Supporting Motion by Defendant for Judgment on the Pleadings [Code Civ. Proc. § 438(c)(1)(B)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Objection to Complaint by Motion for Judgment on Pleadings

[b] Motion Directed to Portion of Complaint

[c] Insufficiency Is Established by Facts Appearing on Face of Complaint

[d] Essential Allegation Omitted

[e] No Legal Duty Alleged

[f] Action Barred by Limitations

[4] Additional Authorities

[a] Objection to Complaint by Motion for Judgment on the Pleadings

[b] Motion Directed to Portion of Complaint

[c] No Legal Duty Alleged

§ 71.151 Supporting Motion by Defendant for Judgment on the Pleadings [Code Civ. Proc. § 438 (c)(1)(B)]--Insufficiency Established by Facts Subject to Judicial Notice [Code Civ. Proc. § 438(d)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Judicial Notice

[4] Additional Authorities

[a] Judicial Notice

§ 71.152 Supporting Motion by Defendant for Judgment on the Pleadings [Code Civ. Proc. § 438(c)(B)]--Insufficiency Established by Judicial Admission

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Action Barred by Judicial Admission

§ 71.153 Opposing Motion by Defendant for Judgment on Pleadings [Code Civ. Proc. § 438(c)(1)(B)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Denial of Motion

[b] Sufficiency of Complaint

[c] Rule of Liberal Construction

[d] Motion as Admitting Allegations

[4] Additional Authorities

[a] Denial of Motion

[b] Rule of Liberal Construction

[c] Motion as Admitting Allegations

§ 71.154 Opposing Motion by Defendant for Judgment on Pleadings [Code Civ. Proc. § 438(c)(1)(B)]--Motion Does Not Lie to Challenge Defectively Stated or Uncertain Facts

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Defective Statement or Uncertain Facts

§ 71.155 Opposing Motion by Defendant for Judgment on Pleadings [Code Civ. Proc. § 438(c)(1)(B)]--Motion May Not Be Based on Extrinsic Matter Not Subject to Judicial Notice

[1] FORM

[2] Comments

[a] Use of Form

[b] Judicial Notice

[3] Discussion of Authorities

[a] Extrinsic Evidence

[b] Interpretations Requiring Extrinsic Evidence

[4] Additional Authorities

[a] Extrinsic Evidence

§ 71.156 Opposing Motion by Defendant for Judgment on Pleadings [Code Civ. Proc. § 438(c)(1)(B)]--Defects in Pleading Cured by Admissions in Answer

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Defect Cured by Answer

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CHAPTER 71 DEMURRERS AND MOTIONS FOR JUDGMENT ON THE PLEADINGS
PART I. INTRODUCTION

7A-71 California Points & Authorities § 71.01

§ 71.01 Scope of Chapter

The first set of forms includes memoranda relating to demurrers. Subpart A relates to demurrers to complaints or cross complaints. Subpart B relates to motions for judgments on the pleadings.

The first set of forms includes memoranda supporting [*see §§ 71.20 -71.29*] and opposing [*see §§ 71.30 -71.43*] a general demurrer. It also includes memoranda supporting [*see §§ 71.61 -71.73*] and opposing [*see §§ 71.74 -71.88*] a special demurrer. The memoranda supporting a demurrer to the complaint on the ground of uncertainty [*see §§ 71.68 -71.71*] and on the ground that it cannot be ascertained whether the contract on which the action is founded is written or oral [*see § 71.72*] may, with appropriate modifications, be used to support a demurrer to an answer on similar grounds under *Code Civ. Proc. § 430.20(b)* or *(c)*. Moreover, the memorandum set forth in this chapter (supporting and opposing motions for judgment on the pleadings) may be used to support or oppose a general demurrer to a complaint or cross complaint [*Code Civ. Proc. §§ 430.10(e), 430.30(a)*], or to an answer [*Code Civ. Proc. §§ 430.20(a), 430.30(a)*], as the case may be.

This chapter also includes memoranda supporting [*see §§ 71.100 -71.103*] and opposing [*see §§ 71.105 -71.109*] a general demurrer to an answer, and memoranda supporting [*see § 71.104*] and opposing [*see § 71.110*] a special demurrer to an answer.

Memoranda relating to demurrers in particular types of actions, such as actions based on contracts, are set out in the specific chapters in this set covering those actions.

This chapter also includes memoranda relating to motions for judgment on the pleadings. It includes memoranda supporting [*see §§ 71.130 -71.133*] and opposing [*see § 71.134*] a plaintiff's motion for judgment on the pleadings. It also includes memoranda of points and authorities supporting [*see §§ 71.150 -71.152*] and opposing [*see §§ 71.153 -71.156*] a defendant's motion for judgment on the pleadings.

Legal Topics:

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

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePretrial JudgmentsJudgment on the Pleadings

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Volume 7A Chapters 71-79 DEMURRERS
CHAPTER 71 DEMURRERS AND MOTIONS FOR JUDGMENT ON THE PLEADINGS
PART I. INTRODUCTION

7A-71 California Points & Authorities § 71.02

§ 71.02 Governing Statutes

Demurrers are governed generally by *Code Civ. Proc. §§ 422.10, 430.10-430.80, 472a-472d, 589, 591,* and by *Cal. Rules of Ct., Rules 1.6, 2.100-2.119, 3.1100, 3.1103(c), 3.1109,* and *3.1320*. Points and authorities in support of a demurrer are required by *Cal. Rules of Ct., Rules 3.1100* and *3.1113(a)*.

The service and filing of demurrers and points and authorities are governed by *Code Civ. Proc. §§ 465, 1011-1013, 1015, 1017, 1020,* and by *Cal. Rules of Ct., Rules 1.30-1.45, 3.1100, 3.1103(b),* 3.1113(a), and proof of service by *Code Civ. Proc. §§ 1013a, 2009, 2015.5*.

The amendment of pleadings, which term includes a demurrer [*Code Civ. Proc. § 422.10*; *Baxter v. Boston-Pacific Oil Co. (1927) 81 Cal. App. 187, 189, 253 P. 185]* , is governed by *Code Civ. Proc. §§ 471.5, 472, 473(a),* and the entry of a default judgment against a defendant who fails to plead to an amended complaint or to answer a complaint after his or her demurrer to it has been overruled, is governed by *Code Civ. Proc. § 586(a)(1), (2)*.

Some of the rules established pursuant to the Trial Court Delay Reduction Act [*see Gov. Code § 68600 et seq.*] include special provisions when the responsive pleading is a demurrer [*see, e.g.,* Alameda Co. Super. Ct. Rules, Rule 4.2(3)(c)(2) (no extension of time to file response to demurrer by stipulation of parties, except by order of court on proper application to court on showing of good cause); Los Angeles Co. Super. Ct. Rules, Rule 7.7(a)(3) (if demurrer is filed, court will on hearing make appropriate orders regarding filing of further pleadings)]. Thus, counsel is advised to consult local rules in all cases. For further discussion of the Trial Court Delay Reduction Act, see California Forms of Pleading and Practice, Ch. 552, *Trial Court Delay Reduction* (Matthew Bender).

Motions for judgment on the pleadings are governed by *Code Civ. Proc. § 438,* which became effective January 1, 1994. Prior to 1994, the motion was governed only by case law [*see, e.g.,* *Hibernia S. & L. Soc. v. Thornton (1897) 117 Cal. 481, 482, 49 P. 573* ; *Sofias v. Bank of America (1985) 172 Cal. App. 3d 583, 586, 218 Cal. Rptr. 388]* .

Legal Topics:

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

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedurePretrial JudgmentsJudgment on the PleadingsCivil ProcedurePretrial MattersContinuances

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CHAPTER 71 DEMURRERS AND MOTIONS FOR JUDGMENT ON THE PLEADINGS
PART I. INTRODUCTION

7A-71 California Points & Authorities § 71.03

§ 71.03 Raising Objection to Complaint, Cross Complaint, or Answer by Demurrer

[1] When Ground for Objection Appears on Face of Pleading

When any ground for objection to a complaint, cross complaint, or answer appears on the face of the pleading the objection on that ground may be taken by demurrer to the pleading [*Code Civ. Proc. § 430.30(a)*].

[2] When Ground for Objection Appears From Judicially Noticed Matter

An objection by demurrer may also be taken from any matter of which the court must or may take judicial notice [*Code Civ. Proc. § 430.30(a)*]. The matters of which the court must take judicial notice are listed in *Evid. Code § 451* and the matters of which it may take judicial notice in *Evid. Code § 452* [*see § 71.21*]. The matter must be specified in the demurrer or supporting points and authorities for the purpose of invoking such notice, except as the court may otherwise permit [*Code Civ. Proc. § 430.70*; *see also Evid. Code § 453*].

For discussion and forms relating to judicial notice, see California Forms of Pleading and Practice, Ch. 321, *Judicial Notice* .

[3] Demurrer to All or Part of Pleading

A demurrer to a complaint or cross complaint may be taken to the whole complaint or cross complaint or to any of the causes of action stated in it [*Code Civ. Proc. § 430.50(a)*]. A demurrer to fewer than all causes of action may be filed without answering the other causes of action [*Cal. Rules of Ct., Rule 3.1320(b)*].

A demurrer to an answer may be taken to the whole answer or to any one or more of the several defenses set up in the answer [*Code Civ. Proc. § 430.50(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersEvidenceJudicial NoticeGeneral

Overview

California Points & Authorities

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7A-71 California Points & Authorities § 71.04

§ 71.04 Grounds for Objection

[1] To Complaint or Cross Complaint

[a] In General

A party against whom a complaint or cross complaint has been filed may object, by demurrer or answer as provided in *Code Civ. Proc. § 430.30* [*see § 71.03*], to the pleading on any one or more of the following grounds:

- The court has no jurisdiction of the cause of action alleged in the pleading [*Code Civ. Proc. § 430.10(a)*; *see §§ 71.60 -71.61*].

- The person who filed the pleading does not have legal capacity to sue [*Code Civ. Proc. § 430.10(b)*; *see §§ 71.62 -71.64, 71.75 -71.78*].

- There is another action pending between the same parties on the same cause of action [*Code Civ. Proc. § 430.10(c)*; *see §§ 71.65, 71.79 -71.80*].

- There is a defect or misjoinder of parties [*Code Civ. Proc. § 430.10(d)*; *see §§ 71.66, 71.67, 71.82 -71.84*].

- The pleading does not state facts sufficient to constitute a cause of action [*Code Civ. Proc. § 430.10(e)*; *see §§ 71.20 -71.43*].

- The pleading is "uncertain," which term includes "ambiguous" and "unintelligible" [*Code Civ. Proc. § 430.10(f)*; *see §§ 71.68 -71.71, 71.86*].

- In an action founded on a contract, it cannot be ascertained from the pleading whether the contract is written or oral, or whether it is implied by conduct [*Code Civ. Proc. § 430.10(g)*; *see §§ 71.72, 71.87*].

- In an action for damages arising out of the professional negligence of an architect, professional

engineer, or land surveyor, no certificate of merit was filed as required by *Code Civ. Proc. § 411.35* [*Code Civ. Proc. §§ 411.35(g), 430.10(h)*; *see also § 71.73*].

Although *Code Civ. Proc. § 430.10(i)* authorizes a demurrer when the certificate required by *Code Civ. Proc. § 411.36* has not been filed, there is no longer any such requirement, because Section 411.36 was repealed by its own terms as of January 1, 1997.

Additional or alternative grounds of demurrer to a pleading filed in a special proceeding may be found in the particular statutes governing the special proceeding. See, for example, *Code Civ. Proc. §§ 1250.350-1250.370* (proceeding in eminent domain).

[b] Lapse of Statute of Limitations

The defense that an action is barred by a statute of limitations may be raised by demurrer when the ground of objection appears on the face of the pleading or from matter of which a court must or may take judicial notice [*see Code Civ. Proc. § 430.30(a)*; *see also Kendrick v. City of Eureka (2000) 82 Cal. App. 4th 364, 367, 98 Cal. Rptr. 2d 153]* . The statutory basis for a demurrer grounded on the statute of limitations is that the challenged pleading does not state facts sufficient to constitute a cause of action [*see Code Civ. Proc. § 430.10(e)*].

For a memorandum supporting a demurrer on the ground of the statute of limitations, see Ch. 143, *Limitation of Actions* .

[2] To Answer

A party against whom an answer has been filed may object to it by demurrer as provided in *Code Civ. Proc. § 430.30* [*see § 71.03*] on any one or more of the following grounds:

- The answer does not state facts sufficient to constitute a defense [*Code Civ. Proc. § 430.20(a)*; *see §§ 71.100 -71.103, 71.105 -71.109*].

- The answer is "uncertain," which term includes "ambiguous" and "unintelligible" [*Code Civ. Proc. § 430.20(b)*; *see §§ 71.104, 71.110*].

- When the answer pleads a contract, it cannot be ascertained from the answer whether the contract is written or oral [*Code Civ. Proc. § 430.20(c)*; *see § 71.72*].

If the party against whom the answer is filed fails to demur to the answer, the party is deemed to have waived the objection unless it is an objection that the answer does not state facts sufficient to constitute a defense [*Code Civ. Proc. § 430.80(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProceduresPleading & PracticePleadingsAnswers

California Points & Authorities

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7A-71 California Points & Authorities § 71.05

§ 71.05 "General" and "Special" Demurrers Distinguished

A "general demurrer" describes either a demurrer to a complaint or cross complaint on the ground that it fails to state facts sufficient to constitute a cause of action [*see Code Civ. Proc. § 430.10(e)*] or a demurrer to an answer on the ground that it does not state facts sufficient to constitute a defense [*see Code Civ. Proc. § 430.20(a)*]. Demurrers on all other grounds listed in *Code Civ. Proc. §§ 430.10, 430.20* are referred to as "special demurrers" [*see, e.g., Buss v. J.O. Martin Co., Inc. (1966) 241 Cal. App. 2d 123, 133, 50 Cal. Rptr. 206* ; *Timberidge Enterprises, Inc. v. Santa Rosa (1978) 86 Cal. App. 3d 873, 879-80, 150 Cal. Rptr. 606]* . The fundamental effect of this distinction is that the general demurrer objection of failure to state a cause of action or defense is never waived. Grounds for special demurrer, however, must be raised by demurrer or answer or are deemed waived [*see Code Civ. Proc. § 430.80*].

The exception to the foregoing rule is that the special demurrer objection that the court has no jurisdiction of the subject of the cause of action alleged in the pleading also is not waived by a failure to raise it by demurrer or answer [*see Code Civ. Proc. § 430.80*].

The California Rules of Court also refer to a "special demurrer" [*see Cal. Rules of Ct., Rules 3.1113(a)* (absence of memoranda may be construed as admission that special demurrer is not meritorious and as waiver of all grounds not supported), *3.1320(f)* (failure to appear in support of special demurrer may be construed as admission that special demurrer is not meritorious and waiver of all grounds thereof)]. Although considered a special demurrer, a demurrer based on lack of subject matter jurisdiction [*Code Civ. Proc. § 430.10(a)*; *see §§ 71.60 -71.61*], however, would not be governed by the foregoing rules of court since the objection is not waived by a failure to raise it by demurrer or answer and can normally be raised at any time [*see Code Civ. Proc. § 430.80(a)*].

Special demurrers are not allowed in a limited civil case [*Code Civ. Proc. § 92(c)*; *see Code Civ. Proc. §§ 85, 85.1, 86, 91(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading &

PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsWaiver & Preservation

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7A-71 California Points & Authorities § 71.06

§ 71.06 Waiver of Objection to Complaint or Cross Complaint

Under *Code Civ. Proc. § 430.80(a)*, a party who fails to object by demurrer or answer to a complaint or cross complaint is deemed to have waived any objection to it other than the objection that the court lacks jurisdiction of the subject of the action [*Code Civ. Proc. § 430.10(a)*; *see §§ 71.60 -71.61*] or that the pleading fails to state a cause of action [*Code Civ. Proc. § 430.10(e)*; *see §§ 71.20 -71.43*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsWaiver & Preservation

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7A-71 California Points & Authorities § 71.07

§ 71.07 Attacking Defects in Pleadings

Defects in pleadings may be attacked by demurrers [*Code Civ. Proc. §§ 430.10, 430.20, 430.30, 430.80*], motions to strike [Code Civ. Proc. §§ 435-437], motions for judgment on the pleadings [*Code Civ. Proc. § 438*], and answers [*Code Civ. Proc. §§ 430.10, 430.30(b), 430.80(a), 431.30(b)(2)*].

In addition, the objection that the complaint or cross complaint fails to state facts sufficient to constitute a cause of action [*Code Civ. Proc. § 430.10(e)*] and the objection that the court lacks jurisdiction of the subject of the action [*Code Civ. Proc. § 430.10(a)*] may normally be made at any time during the proceedings [*see, e.g., Wilson v. Sharp (1954) 42 Cal. 2d 675, 677, 268 P.2d 1062* ; *Parker v. Bowron (1953) 40 Cal. 2d 344, 351, 254 P.2d 6]* , or on appeal [*see, e.g., Greene v. Municipal Court (1975) 51 Cal. App. 3d 446, 450, 124 Cal. Rptr. 139]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewCivil ProceduresPleading & PracticePleadingsAnswersCivil ProceduresPretrial JudgmentsJudgment on the Pleadings

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7A-71 California Points & Authorities § 71.08

§ 71.08 How to Use the Forms in This Chapter

[1] Page Limits on Memoranda

One of the more significant drafting requirements to keep in mind are page limits: supporting memoranda (other than those in a summary judgment proceeding) must not exceed 15 pages in length. Exhibits, declarations, attachments, and tables of content are not included in the page limitation. A reply or closing memorandum may not exceed 10 pages in length. Any party desiring to file a longer memorandum must obtain leave of court [*see Cal. Rules of Ct., Rule 3.1113(d)*]. These and other drafting requirements are discussed in *further detail in Ch. 1, Writing Legal Memoranda and Briefs, § 1.05*.

[2] Using the Forms to Build a Draft Memorandum

The forms included in this chapter are designed to be combined with other points and authorities to form a complete memorandum. For a detailed discussion on how to select and use the forms in the publication to build a draft memorandum and complete the draft, with detailed discussion of all drafting requirements and strategic or stylistic considerations, see *Ch. 1, Writing Legal Memoranda and Briefs, §§ 1.02 -1.06*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaGovernmentsCourtsRule Application & Interpretation

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7A-71 California Points & Authorities § 71.09

§ 71.09 Related Pleading and Practice Chapters

A discussion and forms of demurrers and notices of motion for judgment on the pleadings are contained in California Forms of Pleading and Practice Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). Alternative and additional forms of demurrers are also contained in Ch. 3, *Abatement of Actions*, and other titles in that publication relating to specific types of actions.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePretrial JudgmentsJudgment on the Pleadings

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7A-71 California Points & Authorities § 71.10

§ 71.10 Related Memoranda

For memoranda for use in a specific action (for example, contracts), see the chapter relating to that action. For memoranda relating to motions for separate trial of issues which are also grounds for demurrers, see Ch. 10, *Abatement and Survival of Actions* .

For memoranda relating to demurrers based on the statute of limitations, see Ch. 143, *Limitation of Actions* .

For memoranda supporting and opposing a motion to strike, see Ch. 160, *Motions to Strike* .

For a discussion of how to use the forms in this chapter to draft a memorandum or a trial or appellate brief, and for a sample of a complete memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPleading & PracticeMotion PracticeSupporting Memoranda

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7A-71 California Points & Authorities §§ 71.11-71.19

[Reserved]

§§ 71.11[Reserved]

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PART II. FORMS
A. Demurrers
1. General Demurrers to Complaint

7A-71 California Points & Authorities § 71.20

§ 71.20 Supporting General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--General Form

[1] FORM Supporting General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--General Form
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF DEMURRER
Plaintiff,	)	TO COMPLAINT
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THE COURT SHOULD SUSTAIN THE GENERAL DEMURRER TO THE COMPLAINT BECAUSE THE COMPLAINT FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION.

A. Ground for Objection Appears on Face of Complaint. When any ground for objection to a complaint appears on the face thereof, the objection on that ground may betaken by a demurrer to the pleading (*Code Civ. Proc. § 430.30(a)*).

B. Objection by General Demurrer. The party against whom a complaint has been filed may object, by demurrer to the pleading, on the ground that the pleading does not state facts sufficient to constitute a cause of action (*Code Civ. Proc. § 430.10(e)*).

[*Optional*] **C. Allegations Stated as Conclusions of Law.** Conclusions of law set forth in a complaint are not admitted by a general demurrer and must be ignored in ruling on the sufficiency of the complaint to state a cause of action (*Going v. Dinwiddie (1890) 86 Cal. 633, 638-639, 25 P. 129* ; *Beresford Neighborhood Assn. v. City of San Mateo (1989) 207 Cal. App. 3d 1180, 1190, 255 Cal. Rptr. 434*).

[*Optional*] **D. Conjectured Facts Not Stated.** In order to be sufficient, a complaint must contain a statement of facts which, without the aid of other conjectured facts not stated, shows a complete cause of action (*Going v. Dinwiddie (1890) 86 Cal. 633, 637, 25 P. 129* ; *see Garcia v. Superior Court (1990) 50 Cal. 3d 728, 737, 268 Cal. Rptr. 779, 789 P.2d 960*).

[*Optional*] **E. Sustain Demurrer Without Leave to Amend.** A trial court does not abuse its discretion by sustaining a general demurrer without leave to amend if it appears from the complaint that under applicable substantive law there is no reasonable possibility that an amendment could cure the complaint's defect (*Coffman Specialties, Inc. v. Dept. of Transp. (2009) 176 Cal. App. 4th 1135, 1144, 98 Cal. Rptr. 3d 643* ; *Heckendorn v. City of San Marino (1986) 42 Cal. 3d 481, 486, 229 Cal. Rptr. 324, 723 P.2d 64* ; *Dalton v. East Bay Mun. Utility Dist. (1993) 18 Cal. App. 4th 1566, 1570-1571, 23 Cal. Rptr. 2d 230*). Moreover, when a complaint is successfully challenged by a general demurrer, the burden is on the plaintiff to demonstrate how the complaint might be amended to cure it of the defect (***Nazir v. United Airlines*** *(2009) 178 Cal. App. 4th 243, 100 Cal. Rptr. 3d 296* ; *Association of Community Organizations for Reform Now v. Department of Industrial Relations (1995) 41 Cal. App. 4th 298, 302, 48 Cal. Rptr. 2d 486*).

[*Optional*] **F. Complaint Affirmatively Alleges Affirmative Defense.** When a complaint affirmatively alleges facts amounting to an affirmative defense, it is subject to a demurrer (*Halvorsen v. Aramark Uniform Services, Inc. (1998) 65 Cal. App. 4th 1383, 1391, 77 Cal. Rptr. 2d 383*).

[*Optional*] **G. Allegations of Complaint on Their Face Are Barred by Compulsory Cross-Complaint Statute.** A demurrer will be sustained without leave to amend if the allegations of the complaint on their face are barred by *Code Civ. Proc. § 426.30(a)*, the compulsory cross-complaint statute, because they are claims logically related to a pleading in a prior suit and were required to have been asserted in the prior suit (*Align Technology, Inc. v. Tran (2009) 179 Cal. App. 4th 949, 102 Cal. Rptr. 3d 343*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a general demurrer (that is, a demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action) when the defect appears on the face of the pleading [*Code Civ. Proc. §§ 430.10(e), 430.30(a)*].

For a memorandum for use if the failure to state facts sufficient to constitute a cause of action is revealed by facts of which the court may take judicial notice, see *§ 71.21*.

This form contains optional paragraphs for use when the complaint avers only legal conclusions, rather than the facts

supporting the legal conclusion, or relies on conjectured facts to state a cause of action. Optional Paragraph E of the form may be used to argue that the demurrer should be sustained without leave to amend.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, if the plaintiff attempts to sue for breach of contract but fails to allege any loss as a result of the alleged breach, counsel would (1) cite the rule that a complaint alleging breach of contract must specify the damages proximately caused by the defendant's breach [*see Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 830, 69 Cal. Rptr. 321, 442 P.2d 377* , discussed in *§ 71.22[4][a]*]; (2) refer to the complaint, pointing out that omission; and (3) conclude that the complaint fails to allege facts sufficient to state a cause of action for breach of contract and that the general demurrer should for that reason be granted [*see Hawkins v. Oakland Title Ins. & Guar. Co. (1958) 165 Cal. App. 2d 116, 121-123, 331 P.2d 742 , discussed under § 71.20[4][b]*].

With appropriate modifications, this form may be used in support of a demurrer that is directed against a single cause of action or count in a complaint that alleges multiple causes of action or counts. The form may also be modified for use in support of a demurrer to a cross complaint [*Code Civ. Proc. §§ 430.10, 430.30(a)*], or to a single cause of action or count set up in a cross complaint [*Code Civ. Proc. § 430.50(a)*], or in support of a motion by a defendant or cross defendant for judgment on the pleadings [*see* § 170.150 et seq.], or an objection by a defendant or cross defendant at trial to the introduction of any evidence [*see Parker v. Bowron (1953) 40 Cal. 2d 344, 351, 254 P.2d 6]* . With appropriate modifications, they may also be used in support of a petition for writ of mandate to compel the trial court to sustain the demurrer after that court has erroneously overruled it [*see Babb v. Superior Court (1971) 3 Cal. 3d 841, 851, 92 Cal. Rptr. 179, 479 P.2d 379]* .

[b] Nonwaiver of Objection

The objection that the complaint or cross complaint fails to state facts sufficient to constitute a cause of action is not waived by failure to raise it by demurrer or answer [*Code Civ. Proc. § 430.80(a)*].

Cal. Rules of Ct., Rule 3.1113(a), requires that a party filing a demurrer serve and file with it a supporting memorandum. Although the absence of a memorandum may be construed by the court as an admission that a special demurrer is not meritorious and cause for its denial and as a waiver of all grounds not supported, arguably, this would not be true of a general demurrer, since even a total failure to demurrer does not waive the defect of insufficient facts to state a cause of action [*see Dikkers v. Superior Court (1948) 88 Cal. App. 2d 816, 819, 199 P.2d 709]* .

[c] Allegations Stated as Conclusions of Law

A general demurrer is proper only if, after omitting the legal conclusions, the complaint lacks an essential allegation necessary to state a cause of action [*see City of Santa Barbara v. Eldred (1895) 108 Cal. 294, 297-298, 41 P. 410* ; *see also § 71.30*]. Otherwise, objections that a complaint is ambiguous or uncertain, or that essential facts appear only inferentially, or as conclusions of law, or by way of recitals, must be raised by special demurrer, and cannot be reached on a general demurrer [*City of Santa Barbara v. Eldred (1895) 108 Cal. 294, 297-298, 41 P. 410* ; *Johnson v. Mead (1987) 191 Cal. App. 3d 156, 160, 236 Cal. Rptr. 277]* .

[d] Related Pleading and Practice Forms

For forms of demurrers on single and multiple grounds and forms of general demurrers, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender).

[e] Related Memoranda

For memoranda in support of a general demurrer in a particular substantive context, see the specific chapter. The following are some of the chapters that include forms of points and authorities that may be used to support a demurrer

against a complaint for failure to state facts sufficient to constitute a cause of action: Ch. 21, *Assault and Battery*; Ch. 33, *Carriers*; Ch. 35, *Civil Rights: Unruh Civil Rights Act*; Ch. 43, *Common Counts and Bills of Particulars*; Ch. 46, *Conspiracy*; Ch. 50, *Contracts*; Ch. 52, *Corporations*, Pts. II, IV, and V; Ch. 66, *Death and Survival Actions*; Ch. 103, *False Imprisonment*, Parts I, IV, and V; Ch. 105, *Fraud and Deceit*, Pts. I and II; Ch. 100, *Employer and Employee*; Ch. 120, *Insurance*, Pt. III; Ch. 141, *Landlord and Tenant*; Ch. 142, *Libel and Slander (Defamation)*; Ch. 147, *Malicious Prosecution and Abuse of Process*; Ch. 153, *Mental Suffering and Emotional Distress*; Ch. 165, *Negligence*, Pt. I; Ch. 175, *Physicians and Surgeons: Medical Malpractice*; Ch. 195, *Public Administrative Law*; Ch. 196, *Public Entities*; Ch. 198, *Quieting Title*; Ch. 206, *Sales*; Ch. 214, *Specific Performance*; Ch. 225, *Trespass*; and Ch. 135, *Unfair Competition*, Pt. I.

[f] Opposing Memoranda

In an appropriate case, the memorandum *set out in §§ 71.30 -71.43* may be used to oppose the general demurrer supported by these points.

[3] Discussion of Authorities

[a] Allegations Stated as Conclusions of Law

Going v. Dinwiddie *(1890) 86 Cal. 633, 25 P. 129* , was an action for damages for false imprisonment against a justice of the peace who had had plaintiff jailed for contempt of court for disobeying a writ of restitution. Plaintiff in her complaint had alleged that defendant "wrongfully" caused plaintiff to be arrested and "unlawfully" did certain other things. Defendant's demurrer to the complaint was overruled and defendant appealed from the subsequent judgment for plaintiff.

The Supreme Court reversed the judgment with directions to the superior court to sustain defendant's demurrer to the complaint. The Court pointed out that there may be some instances in which "wrongfully" and "unlawfully," and similar adverbs, have some significance, but the ordinary rule is that for the purposes of pleading, they are utterly valueless (*86 Cal. 633, 638)* .

The Court, at 86 Cal. 633, 638-639, reviewed earlier cases that had considered the issue. In *Miles v. McDermott (1866) 31 Cal. 271, 273* , the Court had stated that such words as "duly," "wrongfully," and "unlawfully," so frequently used in pleadings, might better be omitted as they tender no issue. In *Triscony v. Orr (1875) 49 Cal. 612, 617* , which was an action for conversion of certain sheep, the complaint had merely alleged that the defendants took the property "unlawfully, fraudulently, willfully, and maliciously," and the Supreme Court affirmed a judgment entered after a demurrer to the complaint had been sustained. The Court in *Triscony* had stated that whether the defendants took the sheep "unlawfully" was a question of law, and not the statement of an issuable fact. If they were taken "fraudulently," the facts constituting fraud should have been averred, otherwise no issuable fact was stated. In *Reardon v. San Francisco (1885) 66 Cal. 492, 496, 6 P. 317* , the Court had said that if the defendant was empowered by law to do the work counted on, the averment in the complaint that such work was unlawful and wrongful would amount to nothing. Such epithets in a pleading are, in general, meaningless and unless the matters averred show the acts complained of to be unlawful or wrongful, such words are mere superfluous verbiage. The Court in *Going* concluded in the case before it that the complaint was insufficient because it failed to show that the acts complained of were in excess of defendant's jurisdiction as justice of the peace, and that use of the words "wrongfully" and "unlawfully" did not supply the omitted facts (*86 Cal. 633, 639)* .

In ***Beresford Neighborhood Assn. v. City of San Mateo*** *(1989) 207 Cal. App. 3d 1180, 255 Cal. Rptr. 434* , the plaintiff neighborhood association brought an action against the defendant city seeking declaratory and injunctive relief and a writ of mandate, alleging various improprieties associated with the city's purchase of a site for a senior citizens' project. The city demurred, and the trial court sustained the demurrer without leave to amend on the ground that no

causes of action were stated because the plaintiff failed to comply with applicable statutes of limitation and had not joined indispensable parties. The plaintiff appealed from the judgment.

The court of appeal affirmed the judgment. With regard to the failure to comply with the statutes of limitation and failure to join indispensable parties, the court stated that the burden was on the appellant association to demonstrate that the trial court abused its discretion in sustaining the demurrer without leave to amend and discussed why the burden had not been met (*207 Cal. App. 3d 1180, 1190-1191)* . Although the judgment dismissed the entire complaint, the reasons given by the trial court only disposed of some of the claims advanced. With regard to one of the remaining claims, the court noted that the complaint alleged that the city was required under its municipal code to employ bidding procedures in connection with the proposed transfer of the site. This, however, was a conclusion of law and, a demurrer does not admit conclusions of law. The association alleged no facts tending to show that failure to follow bidding procedures in the case was an abuse of discretion. The court therefore held that the claim was properly dismissed for failure, under *Code Civ. Proc. § 430.10(e)*, to state facts sufficient to constitute a cause of action (*207 Cal. App. 3d 1180, 1190-1191)* .

[b] Conjectured Facts Not Stated

Garcia v. Superior Court *(1990) 50 Cal. 3d 728, 268 Cal. Rptr. 779, 789 P.2d 960* , involved an action by the survivors of a murder victim against the murderer's parole officer and the state for wrongful death and violation of civil rights. The trial court sustained demurrers by the defendants without leave to amend. The court of appeal denied plaintiffs' petition for writ of mandate.

The Supreme Court affirmed the court of appeal's decision insofar as it held that plaintiffs did not state a cause of action and dismissed the purported civil rights cause of action, but reversed insofar as the denial of leave to amend. In all cases for negligent misrepresentation, the Court stated, plaintiffs must allege facts sufficient to show that the defendant actually and reasonably relied on the alleged misrepresentations. The Court concluded that the complaint was deficient in this regard (stating that an allegation that the victim failed to take steps to protect herself from the murderer did not suffice to satisfy the reasonable reliance requirement). The Court stated that it should not be required by conjecture to supply a necessary but missing allegation, which, if it had been made, would run counter to reasonable probability, even though it would have to be accepted as true for the purpose of testing the sufficiency of the complaint (*50 Cal. 3d 728, 737)* .

The facts and procedural background of ***Going v. Dinwiddie*** *(1890) 86 Cal. 633, 25 P. 129* , are *discussed under § 71.20[3][a]*. In *Going*, the Supreme Court reversed the trial court's judgment with directions to sustain the defendant's demurrer to the complaint. The Court held that the complaint, which alleged false imprisonment against a justice of the peace who had the plaintiff jailed for contempt of court, was fatally defective because it was clear that the acts complained of were done by the defendant in his official capacity as a judicial officer, there was no averment in the complaint that the acts were without or in excess of his jurisdiction, and there were no facts averred from which such want of jurisdiction appeared. The Court said that the question was not one of evidence or of burden of proof, but one of pleading, and that a complaint, to be sufficient, must contain a statement of facts that, without the aid of other conjectured facts not stated, shows a complete cause of action (*86 Cal. 633, 637)* . The Court explained that pleadings poorly subserve the purpose intended if the court, before declaring the law on the points presented in a case, is compelled to surmise many of the essential facts on which the points turn (*86 Cal. 633, 637)* . In the case at bar the court was left to assume, to imagine, and to surmise that defendant, as justice of the peace, for some unrevealed and unknown reason had no jurisdiction to do the acts complained of (*86 Cal. 633, 637)* . The Supreme Court reversed the judgment with directions to the superior court to sustain defendant's demurrer to the complaint.

Note, however, that while a court may not resort to aid of conjecture of facts not stated, a court may take as true facts that may be implied or inferred from those expressly alleged [*see C & H Foods Co. v. Hartford Ins. Co. (1984) 163 Cal. App. 3d 1055, 1062, 211 Cal. Rptr. 765* (dicta)].

[c] Sustain Demurrer Without Leave to Amend

Heckendorn v. City of San Marino *(1986) 42 Cal. 3d 481, 229 Cal. Rptr. 324, 723 P.2d 64* , involved a complaint for declaratory and injunctive relief against an ordinance that imposed a tax. The complaint alleged that the tax violated the Cal. Const., art. XIII A, limitation on ad valorem taxes on real property. The trial court sustained the defendant's general demurrer without leave to amend, and plaintiff appealed.

The Supreme Court affirmed, concluding that the tax at issue was not an ad valorem tax. The Court stated that a trial court does not abuse its discretion by sustaining a general demurrer without leave to amend if it appears from the complaint that under applicable substantive law there is no reasonable possibility that an amendment could cure the complaint's defect (*42 Cal. 3d 481, 486)* . The Court concluded that the trial court properly sustained the general demurrer without leave to amend because under the applicable law there was no reasonable possibility that an amendment could cure the complaint's defect (*42 Cal. 3d 481, 489)* .

Dalton v. East Bay Mun. Utility Dist. *(1993) 18 Cal. App. 4th 1566, 23 Cal. Rptr. 2d 230* , was an action by employees of a public entity for breach of fiduciary duty and denial of equal protection. The complaint alleged that the entity and its retirement board discriminated between different groups of employees because of the manner in which the entity's retirement system was funded. The defendants demurred, asserting that plaintiffs' failure to file a claim under the California Tort Claims Act barred their claims, that defendants were fulfilling all their obligations to plaintiffs, and that the funding practice did not violate plaintiff's equal protection rights. Without stating specific grounds, the trial court sustained the demurrer without leave to amend, and dismissed the complaint. Plaintiff appealed.

The court of appeal initially stated the standard for granting a demurrer with or without leave to amend, citing *Heckendorn v. City of San Marino (1986) 42 Cal. 3d 481, 229 Cal. Rptr. 324, 723 P.2d 64* , discussed, *above*, (*18 Cal. App. 4th 1566, 1570-1571)* . The court then held that the plaintiffs' claim did not fall into any exception to the claims statute and the action was barred by failure to have filed a claim and affirmed the judgment (*18 Cal. App. 4th 1566, 1571-1574)* .

In ***Association of Community Organizations for Reform Now v. Department of Industrial Relations*** *(1995) 41 Cal. App. 4th 298, 48 Cal. Rptr. 2d 486* , a political public interest organization challenged the constitutionality of California's minimum wage laws. The trial court sustained a demurrer without leave to amend and rendered a defense judgment. On appeal, plaintiff first argued that the minimum wage laws were unconstitutional as applied to it, and then contended that the trial court should have granted it leave to amend the complaint.

The court of appeal affirmed the judgment. The court held that the minimum wage laws are not unconstitutional as applied because the compelling state interest in ensuring a minimum wage justifies any incidental infringement on the plaintiff's *First Amendment* freedoms. With regard to whether the trial court should have granted leave to amend, the court recognized that if there is a reasonable possibility that the defect in a complaint can be cured by amendment, then it is an abuse of discretion to sustain a demurrer without leave to amend. However, the court stated that the burden is on the plaintiff to demonstrate the manner in which the complaint might be amended, and concluded that no error was demonstrated because plaintiff had not met this burden (*41 Cal. App. 4th 298, 302)* . The court further noted that a recent decision had held that when a demurrer is sustained to an original complaint, a denial of leave to Amend constitutes an abuse of discretion if the pleading does not show on its face that it is incapable of amendment. However, the court stated that this rule is limited to cases in which the complaint is good as against a general demurrer for failure to state a cause of action but is subject to a special demurrer for uncertainty or ambiguity in the pleading; in such cases the plaintiff must be given an opportunity to clarify the uncertainty or ambiguity unless the pleading shows on its face that the defect cannot be cured. Since the complaint in this action fell to a general demurrer this special rule did not apply, and the burden remained on the plaintiff to demonstrate how the complaint might be amended (*41 Cal. App. 4th 298, 302)* .

In ***Coffman Specialties, Inc. v. Dept. of Transp.*** *(2009) 176 Cal. App. 4th 1135, 1144, 98 Cal. Rptr. 3d 643* , the plaintiff engineering contractor brought an action against the defendant California Department of Transportation (Caltrans), seeking a declaratory judgment that arbitration provisions in the State Contract Act (*Pub. Contract Code, § 10240 et seq.*) were unconstitutional. The San Diego County Superior Court, entered judgment in favor of Caltrans after sustaining its demurrer without leave to amend. The contractor appealed.

The contractor contended that the arbitration provisions, on their face and as applied, violated its constitutional rights to a neutral arbitrator, petition the government, and equal protection of the law. The court held the plaintiff's facial and an as-applied challenge to the constitutionality of the public works arbitration statutes may be decided on a demurrer; however, the analysis is different on each claim. In evaluating a facial challenge, a court considers "only the text of the measure itself, not its application to the particular circumstances of an individual." On an as-applied challenge, the plaintiff must plead and prove the specific facts giving rise to the alleged constitutional violation. The courts reasoned that the constitutional challenges were inadequate as a matter of law and sustained the demmurrer without leave to amend was appropriate (*176 Cal. App. 4th 1135, 1150-1155)* .

[d] Complaint Affirmatively Alleges Affirmative Defense

Halvorsen v. Aramark Uniform Services, Inc. *(1998) 65 Cal. App. 4th 1383, 77 Cal. Rptr. 2d 383* , involved an at will employee who was terminated. The employee sued his manager alleging the manager intentionally interfered with the employment relationship by wrongfully inducing plaintiff's employer to terminate plaintiff. Plaintiff sued the employer for breach of contract and breach of the implied covenant of good faith and fair dealing, and the employer's manager for intentional interference with contractual relations. The trial court granted the manager's demurrer and the employer's motion for summary judgment and thereafter entered judgment against plaintiff. Plaintiff appealed (*65 Cal. App. 4th 1386-1387)* .

The court of appeal affirmed. After reviewing the contract and the factual allegations made in the complaint and the motion for summary judgment, the court concluded the trial court was correct in determining plaintiff's employment with the defendant employer was at will as a matter of law (*65 Cal. App. 4th 1383, 1387)* . Plaintiff's employment was at will under the terms of the contract and an implied in fact promise not to terminate except for good cause cannot contradict the contractual at will provision (*65 Cal. App. 4th 1383, 1390)* . Although the law may permit modification of a written contract by an oral agreement under *Civ. Code § 1698(c)* (which provides that unless the contract otherwise expressly provides, a contract in writing may be modified by an oral agreement supported by new consideration), the facts presented in the case do not rise to the level of an agreement to modify by contract (*65 Cal. App. 4th 1383, 1389)* . Summary judgment on the breach of contract action was proper (*65 Cal. App. 4th 1383, 1390)* .

Next, plaintiff attempted to create a requirement of good cause for termination by invoking the covenant of good faith and fair dealing. The court found that this attempt was futile because the covenant of good faith and fair dealing cannot be used to imply an obligation that would completely obliterate a right expressly provided by a written contract. Moreover, the requirement to conduct a reasonable investigation before termination under *Cotran v. Rollins Hudig Hall Internat., Inc. (1998) 17 Cal. 4th 93, 95, 69 Cal. Rptr. 2d 900, 948 P.2d 421* is inapplicable. *Cotran* expressly applies only to cases in which an employee is under an implied agreement not to be dismissed except for good cause. Plaintiff was under no such agreement (*65 Cal. App. 4th 1383, 1390-1391)* .

Finally, plaintiff contended that the trial court improperly concluded the employer's manager could not be held liable in tort for intentional interference with contractual relations. The trial court reasoned that the manager's alleged actions in inducing plaintiff's termination were privileged under the manager's privilege (*65 Cal. App. 4th 1383, 1391)* . A privilege, such as the manager's privilege, is an affirmative defense to the tort. When a complaint affirmatively alleges facts amounting to an affirmative defense, it is subject to a demurrer. There are three formulations of the manager's privilege: (1) absolute, (2) mixed motive, and (3) predominant motive. Citing cases applying each of the formulations, the court concluded that under the circumstances of the case the manager's privilege was absolute (*65 Cal. App. 4th*

1383, 1391-1395) . Although this approach is not consistent with all the cases on the management privilege because there is no consensus to follow, it is, however, consistent with *Marin v. Jacuzzi (1964) 224 Cal. App. 2d 549, 553-554, 36 Cal. Rptr. 2d 880* , the California case most in point (*65 Cal. App. 4th 1383, 1395)* . Accordingly, when an at will employee is terminated, the manager's privilege is absolute. The manager's state of mind is irrelevant under these circumstances and, therefore, an action against the manager for interference with contractual relations may be deposed of by way of demurrer. Applying these principles, the trial court properly sustained the demurrer (*65 Cal. App. 4th 1383, 1396)* .

[e] Allegations of Complaint on Their Face Are Barred by Compulsory Cross-Complaint Statute

In ***Align Technology, Inc. v. Tran*** *(2009) 179 Cal. App. 4th 949, 102 Cal. Rptr. 3d 343* , plaintiff sued a former employee for (among other things) breach of contract and conversion of patents belonging to the employer. The former employee demurred, claiming that the action was barred under *Code Civ. Proc. § 426.30*, the compulsory cross-complaint statute. He asserted that plaintiff, in a prior state court action, had sued him, he had cross-complained for wrongful termination, and plaintiff failed to assert the current claims at the time it answered the cross-complaint. The trial court agreed that plaintiff's claims were barred under section 426.30 because they should have been raised in the prior suit, and it sustained the demurrer without leave to amend. The court concluded that the claims now being asserted against defendant were related claims that plaintiff failed to assert in the underlying litigation. It did not specify the reasoning for denying plaintiff leave to amend (*179 Cal. App. 4th 949, 953-958)* .

The Court of Appeal reversed, concluding that the allegations of the complaint included claims that were barred on their face by the compulsory cross-complaint statute because they were claims logically related to the cross-complaint that should have been asserted in the prior suit (*179 Cal. App. 4th 949, 958-970)* . However, based upon certain allegations in the complaint and representations made by counsel both at the hearing on the demurrer and on appeal, plaintiff could be able to assert claims against defendant that did not exist when it answered defendant's cross-complaint in the prior suit and would thus not be barred under *Code Civ. Proc. § 426.30*. Thus, plaintiff should have been granted leave to amend, and the court remanded with instructions that the trial court enter an order sustaining the demurrer with leave to amend (*179 Cal. App. 4th 949, 971-972)* .

[4] Additional Authorities

[a] Allegations Stated as Conclusions of Law

In *Freeman v. San Diego Assn. of Realtors (1999) 77 Cal. App. 4th 171, 91 Cal. Rptr. 2d 534* , the trial court sustained defendants' demurrers to plaintiff's third amended complaint that alleged claims for violation of the Cartwright Act (*Bus. & Prof. Code § 16700 et seq.*) and dismissed the action. Plaintiff appealed. The court of appeal affirmed.

Initially, the court noted that when examining the sufficiency of a complaint against a general demurrer, an appellate court treats as true all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law (*77 Cal. App. 4th 171, 178 n.1*). The court concluded that the complaint, read in the context of facts subject to judicial notice, and shorn of its conclusory allegations, did not state an illegal tying claim (*77 Cal. App. 4th 171, 183-184)* . Similarly, the court concluded that the complaint did not state a price fixing claim, which requires allegation of facts demonstrating that separate entities conspired together. A general demurrer will be sustained if the complaint makes conclusory allegations of a combination and does not allege with factual particularity that separate entities maintaining separate and independent interests combined for to restrain trade (*77 Cal. App. 4th 171, 188-189)* . A conclusory allegation that two entities are competitors is a legal conclusion that does not preclude a court from dismissing a complaint for not stating a claim (*77 Cal. App. 4th 171, 192 n.21*). The court also concluded that the complaint did not state a group boycott claim in that a conclusory allegation by plaintiff was insufficient to satisfy the requirement of alleging overt acts in furtherance of the conspiracy. California requires a high degree of particularity in the pleading of Cartwright Act violations, and therefore, generalized allegations of antitrust violations are usually insufficient, and

general allegations of conspiracy unaccompanied by factual allegations of overt acts in furtherance of conspiracy are insufficient to state a group boycott antitrust claim (*77 Cal. App. 4th 171, 195-196)* .

In *C & H Foods Co. v. Hartford Ins. Co. (1984) 163 Cal. App. 3d 1055* , *211 Cal. Rptr. 765* , the court of appeal affirmed an order of dismissal in an action by insureds against their insurer to obtain benefits from a marine insurance policy for loss of pails of cured beef. The Court stated that contentions, deductions, or conclusions of fact or law alleged in a complaint are not considered in judging the complaint's sufficiency (*163 Cal. App. 3d 1055, 1062)* . The court found that the provisions of the policy concerning a private statute of limitations that were incorporated into the complaint as an exhibit were inconsistent with the plaintiff's conclusory allegations concerning them. It held that when a conclusion and special facts from which the conclusion is drawn are alleged, the special facts control if they are inconsistent with the conclusion. In this case, the sufficiency of the complaint is determined from the special facts pleaded (*163 Cal. App. 3d 1055, 1063-1064)* .

Megeff v. Doland (1981) 123 Cal. App. 3d 251, 176 Cal. Rptr. 467 , was a personal injury action against the wife and daughter of the perpetrator of a stabbing for negligent failure to exercise control over the perpetrator. Plaintiffs alleged, among other things, that but for defendants' voluntary assumption of custody over the perpetrator, the hospital in which the perpetrator had been temporarily confined would have instituted commitment proceedings against him, that defendants themselves should have instituted such proceedings against the perpetrator, and that such proceedings would have been successful. The trial court granted judgment on the pleadings to defendant wife.

In upholding the trial court's granting of judgment on the pleadings, the court of appeal held that these allegations constituted nothing but legal or factual conclusions, unsupported by ultimate facts, and consequently would not be deemed true in a ruling on a demurrer or motion for judgment on the pleadings (*123 Cal. App. 3d 251, 258-259)* .

Faulkner v. Cal. Toll Bridge Authority (1953) 40 Cal. 2d 317, 253 P.2d 659 , was an action to restrain the public agency defendants, from constructing and financing a bridge and to compel the defendants to grant plaintiffs a fair and adequate hearing on the question of whether a bridge or an earth-fill type crossing should be built. The first four causes of action of the complaint alleged that the defendants failed to comply with certain regulations and a statute and the fifth alleged that defendant had not made an adequate study and investigation. After stating various investigations and studies that the defendants allegedly failed to make, plaintiffs alleged that "such insufficient investigation, study and consideration ... constitutes arbitrary, capricious and unreasonable conduct" and that the decision to construct the bridge based on "such insufficient investigation, constitutes an abuse of the discretion vested in" the defendants (*40 Cal. 2d 317, 325-326)* . Defendants' general demurrer to the complaint was sustained without leave to amend, and plaintiffs appealed from the judgment. The Supreme Court affirmed the judgment, holding that the statutes and regulations did not apply to the circumstances as alleged in the first four causes of action. With regard to the fifth cause of action, the Court stated that allegations that the acts were "arbitrary, capricious, fraudulent, wrongful and unlawful," like other adjectival descriptions of such proceedings, constitute mere conclusions of law that are not to be deemed admitted by a demurrer (*40 Cal. 2d 317, 329)* .

Marin v. Jacuzzi (1964) 224 Cal. App. 2d 549, 36 Cal. Rptr. 880 , was an action for general and punitive damages for wrongful discharge by a former employee of a corporation against the corporate vice president and general manager, who was also a director, and other individuals who, together, made up a majority of the corporation's board of directors. The complaint alleged that the defendants had no authority to discharge plaintiff and that the act was done maliciously. Defendants' demurrer was sustained without leave to amend, and plaintiff appealed from the subsequent judgment of dismissal. The court of appeal affirmed, stating that a demurrer does not admit contentions, deductions, or conclusions of fact or law alleged in a complaint, and that the allegation that defendants had no authority to discharge plaintiff was Such a conclusion, as was the allegation that the act was done maliciously (*224 Cal. App. 2d 549, 552)* . The court said that use of the words "wrongfully," "willfully," and "maliciously" added nothing to the pleadings, except to convey a sense of outrage on the part of plaintiff (*224 Cal. App. 2d 549, 552)* .

Beeler v. West American Finance Co. (1962) 201 Cal. App. 2d 702, 20 Cal. Rptr. 190 , was an action for damages based on fraud and conspiracy arising out of a foreclosure sale after plaintiff had defaulted on the payment of a note secured by a trust deed on the property. Defendants were a title insurance company, a finance company, and certain individuals. With regard to the finance company defendant, the court held, however, that no cause of action was stated and affirmed the judgment as to it. The allegations relied on by plaintiff to state a cause of action were that defendants by misrepresentation, fraud, deceit, and the violation of a confidential relationship on the part of the defendant did by "surreptitious and underhanded means, in collaboration and in conspiracy" with other defendants obtain an interest in real property adverse to that of plaintiff. The court pointed out that these allegations were merely generalities and conclusions insofar as the finance company was concerned and, as such, insufficient as a statement of a cause of action against that defendant (*201 Cal. App. 2d 702, 707)* .

See also *Sklar v. Franchise Tax Board (1986) 185 Cal. App. 3d 616, 621, 230 Cal. Rptr. 42* (court as not admitting truth of allegations that action was "impermissible," "improper," "arbitrary and capricious," "contrary to law," and "an abuse of discretion"); *Zumbrun v. University of Southern California (1972) 25 Cal. App. 3d 1, 12, 101 Cal. Rptr. 499* (allegations of damages without allegations of fact to support them as conclusions of Law which are not admitted by demurrer); *Holmes v. City of Oakland (1968) 260 Cal. App. 2d 378, 382* , *67 Cal. Rptr. 197* (demurrer as not admitting contentions, deductions, or conclusions of fact or law, or facts impossible in law, or allegations contrary to facts of which court may take judicial knowledge); and *Hilltop Properties v. State of California (1965) 233 Cal. App. 2d 349, 353-354, 43 Cal. Rptr. 605* (demurrer as not admitting contentions, deductions or conclusions of fact or law, or construction placed on instrument pleaded in complaint, or facts impossible in law, or allegations contrary to facts of which court may take judicial knowledge).

[b] Conjectured Facts Not Stated

Hawkins v. Oakland Title Ins. & Guar. Co. (1958) 165 Cal. App. 2d 116, 331 P.2d 742 , was an action against a title insurance company by two individuals and a corporation for damages for an alleged defect in a title insurance policy, arising out of defendant's failure to reveal the existence of a recorded deed from a prior owner of the covered real property granting access rights to the property to the state. In the first of the individual plaintiffs' two counts, plaintiffs sought damages for breach of the contract of title insurance but failed to allege any facts showing that they suffered pecuniary loss as a result of the breach. The title policy expressly disclaimed coverage for any defects, liens, etc., which did not result in pecuniary loss to the insured. The defendant's demurrers to all four counts of the complaint were sustained without leave to amend. The court of appeal affirmed the judgment in part and reversed in part. In holding that the trial court properly sustained the general demurrer to the first count (but that it erred in denying leave to amend), the court of appeal, after quoting from *Going v. Dinwiddie (1890) 86 Cal. 633, 25 P. 129* , *discussed under § 71.20[3][a]*, said that it was only with the aid of conjecture that it could be concluded that plaintiffs might have sustained some loss and that it therefore appeared the complaint was vulnerable to a general demurrer (*165 Cal. App. 2d 116, 122)* .

[c] Sustain Demurrer Without Leave to Amend

In *Patrick v. Alacer Corp. (2008) 167 Cal. App. 4th 995, 84 Cal. Rptr. 3d 642* , plaintiff asserted shareholder derivative and direct causes of action against defendant corporation and three individuals who were both on the board of directors and trustees of the shareholder trust. Defendant demurred to plaintiff's cause of action for fraud, and the trial court sustained the demurrer without leave to amend. Plaintiff appealed. The court of appeals affirmed. Plaintiff was unable to state a cause of action for fraud because she could not establish causation. Plaintiff alleged defendants' misrepresentations induced her to vote the three defendants onto the board, and in turn she suffered damages because the board fired her and she ceased receiving corporate benefits. However, because the three defendants held the majority of the voting power in the trust, they did not need her vote to become directors. The misrepresentation did not lead to plaintiff's damages. Defendants' demurrer was therefore sustained without leave to amend (*167 Cal. App. 4th 995, 1017)* .

In *Rakestraw v. California Physicians' Service (2000) 81 Cal. App. 4th 39, 96 Cal. Rptr. 2d 354* , the trial court sustained a demurrer to plaintiffs' third amended complaint and entered judgment for defendant. Plaintiffs appealed. The court of appeal affirmed. The issue before the court was whether a private health care service plan contract requiring a $1,000 copayment in connection with pregnancy and child delivery violated the prohibition against the use of copayments "because of sex" in the Knox-Keene Health Care Service Plan Act of 1975 (*Health & Saf. Code § 1340 et seq.*). In affirming the judgment, the court concluded that the complaint did not state a cause of action, and moreover, that the plaintiffs had not provided adequate legal authority or factual allegations as required to satisfy their burden of showing that there was a possibility that they could have amended the legal effect of their complaint (*81 Cal. App. 4th 39, 53)* . The court stated that when a demurrer is sustained without leave to amend, the appellate court decides whether a reasonable possibility exists that amendment may cure the defect. The plaintiff bears the burden of proving there is a reasonable possibility of amendment. The plaintiff may make this showing for the first time on appeal. To satisfy that burden, the plaintiff must show in what manner the plaintiff can amend the complaint and how that amendment will change the legal effect of the pleading. The plaintiff must clearly and specifically set forth the applicable substantive law and legal basis for amendment, i.e., the elements of the cause of action and authority for it (*81 Cal. App. 4th 39, 43)* . Allegations must be factual and specific, not vague or conclusory. The burden of showing that a reasonable possibility exists that amendment can cure the defects remains with plaintiff; neither the trial court nor appellate court will rewrite the complaint. When the appellant offers no allegations to support the possibility of amendment and no legal authority showing the viability of new causes of action, there is no basis for finding the trial court abused its discretion when it sustained the demurrer without leave to amend (*81 Cal. App. 4th 39, 44)* .

G.L. Mezzetta, Inc. v. City of American Canyon (2000) 78 Cal. App. 4th 1087, 93 Cal. Rptr. 2d 292 , involved an action for breach of an oral and written contract, inverse condemnation, and civil rights violations. The trial court ultimately sustained defendant's demurrers as to all causes of action without leave to amend. In affirming the trial court's order, the court of appeal noted that when a demurrer is sustained without leave to amend, the appellate court will only reverse for abuse of discretion if it determines there is a reasonable possibility the pleading can be cured by amendment. Otherwise, trial court's decision will be affirmed for lack of abuse (*78 Cal. App. 4th 1087, 1091-1092)* .

Lazar v. Hertz Corp. (1999) 69 Cal. App. 4th 1494, 82 Cal. Rptr. 2d 368 , involved a class action complaint for damages and injunctive relief against four rental car companies alleging that they refused to rent automobiles to persons under 25 years old or unreasonably restricted such rentals. Causes of action were pled for age discrimination in violation of the Unruh Civil Rights Act; unlawful, fraudulent and unfair business practices; unfair and fraudulent advertising; and false and misleading advertising. Initially, the trial court sustained one defendant's demurrer to four of seven causes of action alleged without leave to amend, but overruled the demurrer on the other three causes of action. Thereafter, plaintiff moved for and obtained a dismissal without prejudice of two causes of action, leaving one cause of action. Ultimately, the trial court granted a motion for summary adjudication filed by two of the defendants on the last cause of action. Judgment in the defendants' favor was then entered (*69 Cal. App. 4th 1494, 1499-1500)* . The court of appeal upheld the judgment. In concluding that the trial court properly sustained the demurrer without leave to amend, the court of appeal noted that when the trial court sustains a demurrer without leave to amend, the appellate court must consider whether the complaint might state a cause of action if a defect could reasonably be cured by amendment. If the defect can be cured, judgment of dismissal must be reversed to allow plaintiff opportunity to do so. The plaintiff bears the burden of demonstrating a reasonable possibility to cure any defect by amendment. The trial court abuses its discretion if it sustains a demurrer without leave to amend when the plaintiff shows a reasonable possibility to cure any defect by amendment. If the plaintiff cannot show an abuse of discretion, the trial court's order sustaining the demurrer without leave to amend must be affirmed (*69 Cal. App. 4th 1494, 1501)* .

Redmond v. Secure Horizons, Pacificare, Inc. (1997) 60 Cal. App. 4th 96, 70 Cal. Rptr. 2d 174 , involved a bad faith action based on the plaintiff's claim for reimbursement of health care expenses covered under plaintiff's Medicare-subsidized agreement with defendant. Defendant filed a demurrer claiming that the court lacked subject matter jurisdiction because plaintiff failed to exhaust administrative remedies under the Medicare Act and also that subject matter jurisdiction was lacking because of plaintiff's non-joinder/misjoinder of parties (*60 Cal. App. 4th 96,*

99-100) . The court granted defendant's demurrer without leave to amend and judgment was entered in defendant's favor (*60 Cal. App. 4th 96, 100)* . In affirming the judgment and holding that the trial court did not abuse its discretion in failing to grant leave to amend, the court of appeal pointed out that denial of leave to amend constitutes an abuse of discretion if the pleading does not show on its face that it is incapable of amendment. Generally it is an abuse of discretion to sustain a demurrer without leave to amend if there is any reasonable possibility that the defect can be cured by amendment. However, the burden is on plaintiff to demonstrate that the trial court abused its discretion. Plaintiff must show in what manner plaintiff can amend plaintiff's complaint and how that amendment will change the legal effect of plaintiff's pleading. If there are no factual disputes in the case, the nature of the claim is obvious, and no liability exists under the applicable substantive law, a court should deny leave to amend. Under the circumstances of the case, there was no reasonable possibility that plaintiff could amend plaintiff's complaint to allege that the conduct on which plaintiff based plaintiff's actions formed the basis for one or more causes of action over which the trial court had jurisdiction (*60 Cal. App. 4th 96, 105-106)* .

Lucas v. Santa Maria Public Airport Dist. (1995) 39 Cal. App. 4th 1017, 46 Cal. Rptr. 2d 177 , involved a complaint against an Airport District alleging that the District violated law and the public trust by entering into a multiyear employment contract with its general manager. The plaintiff claimed that the Public Utilities Code did not permit the District to employ a general manager for a term of years. The trial court sustained the District's demurrer to the complaint. The court of appeal noted that it was required to determine whether the complaint stated a cause of action and whether the pleading could be cured by amendment (*39 Cal. App. 4th 1017, 1022)* . The court then determined that as a matter of law, the provisions of the District's employment contract did not violate any applicable statutes or administrative regulations (*39 Cal. App. 4th 1017, 1024)* . The court thus affirmed the order sustaining the demurrer (*39 Cal. App. 4th 1017, 1029)* .

[d] Complaint Affirmatively Alleges Affirmative Defense

In *Easton v. Sutter Coast Hospital (2000) 80 Cal. App. 4th 485, 95 Cal. Rptr. 2d 316* , the court construed the breadth of the immunity from civil liability conferred under *Welf. & Inst. Code § 15634* both for those who report suspected elder abuse and those who facilitate access to the victims of suspected abuse. Plaintiffs, successors in interest to deceased, alleged causes of action for trespass and false imprisonment. As to both torts, the complaint alleged intentional or negligent infliction of emotional distress. The complaint also alleged negligent infliction of emotional distress based on the failure to train and supervise employees and failure to promulgate reasonable policies to minimize excessive suffering to patient's relatives. The trial court sustained defendants' demurrers concluding that under *Welf. & Inst. Code § 15634* defendants were immunized from their conduct and dismissed plaintiffs' complaint (*80 Cal. App. 4th 485, 488-490)* . The court of appeal affirmed the judgment of dismissal (*80 Cal. App. 4th 485, 497)* . Under the facts, the court construed *Welf. & Inst. Code § 15634* to create absolute privileges barring plaintiffs' claims (*80 Cal. App. 4th 485, 490-497)* . During the course of the opinion the court noted that a demurrer to a complaint is properly sustained if the complaint on its face alleges facts amounting to an affirmative defense of absolute privilege (*80 Cal. App. 4th 485, 490)* .

California Points & Authorities

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Volume 7A Chapters 71-79 DEMURRERS
CHAPTER 71 DEMURRERS AND MOTIONS FOR JUDGMENT ON THE PLEADINGS
PART II. FORMS
A. Demurrers
1. General Demurrers to Complaint

7A-71 California Points & Authorities § 71.21

§ 71.21 Supporting General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Insufficiency Established by Judicially Noticed Matter [Evid. Code § 452]

[1] FORM Supporting General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Insufficiency Established by Judicially Noticed Matter [Evid. Code § 452]

[*The following should be combined with a general form of memorandum in support of a general demurrer (see § 71.20).*]

THE GENERAL DEMURRER TO THE COMPLAINT SHOULD BE SUSTAINED BECAUSE THE INSUFFICIENCY IS ESTABLISHED BY FACTS OF WHICH THE COURT IS REQUIRED TO OR MAY TAKE JUDICIAL NOTICE.

A. Ground for Objection Appears From Matter of Which Court May Take Judicial Notice. When any ground for objection to a complaint or cross complaint appears from any matter of which the court is required to or may take judicial notice, the objection on that ground may be taken by a demurrer to the pleading (*Code Civ. Proc. § 430.30(a)*). Accordingly, matters judicially noticed may be read into the complaint in determining its sufficiency to state a cause of action (*see E.H. Morrill Co. v. State of California (1967) 65 Cal. 2d 787, 795, 56 Cal. Rptr. 479, 423 P.2d 551*).

B. Objection by General Demurrer. [*See § 71.20, Paragraph B*].

[*EITHER*]

C. Laws of Other States. The court may take judicial notice of the _____ [decisional *or* constitutional *or* statutory *or combination of these*] laws of any state of the United States, to the extent that such matters are not embraced within *Section 451 of the Evidence Code*, relating to mandatory Judicial Notice (*Evid. Code § 452(a)*).

[*AND/OR*]

D. Resolutions and Private Acts of Congress or Legislature. The court may take judicial notice of the resolutions and private acts of the _____ [Congress of the United States *or* Legislature of this state *or both*], to the extent that such matters are not embraced within *Section 451 of the Evidence Code*, relating to mandatory judicial notice (*Evid. Code § 452(a)*).

[*AND/OR*]

E. Regulations and Enactments of Federal Government or Public Entity. The Court may take judicial notice of regulations and legislative enactments issued by or under the authority of _____ [the United States *or* any public entity in the United States *or both*], to the extent that such matters are not embraced within *Section 451 of the Evidence Code*, relating to mandatory judicial notice (*Evid. Code § 452(b)*).

[*Optional*] **F. City and County Ordinances.** City and county ordinances may be judicially noticed, under *Section 452(b) of the Evidence Code*, as regulations and legislative enactments issued by or under the authority of a public entity in the United States (*see Beresford Neighborhood Assn. v. City of San Mateo (1989) 207 Cal. App. 3d 1180, 1190-1191, 255 Cal. Rptr. 434* ; *Grant v. Hipsher (1967) 257 Cal. App. 2d 375, 380 n.2, 64 Cal. Rptr. 892*).

[*AND/OR*]

G. Official Acts of Federal and State Government. The court may take judicial notice of official acts of the _____ [legislative *or* executive *or* judicial] department of _____ [the United States *or* any state of the United States], to the extent that such matters are not embraced within *Section 451 of the Evidence Code*, relating to mandatory judicial notice (*Evid. Code § 452(c)*).

[*Optional*] **H. Acts of State Administrative Agencies.** Regulations and legislative enactments issued by or under the authority of any public entity in the United States, include, within the meaning of *Section 452 of the Evidence Code*, the orders, regulations, decisions, and records of state administrative agencies (*El Rancho Unified School Dist. v. National Education Assn. (1983) 33 Cal. 3d 946, 950 n.6, 192 Cal. Rptr. 123, 663 P.2d 893*

[*AND/OR*]

I. Court Records. The court may take judicial notice of records of _____ [any court of this state *or* any court of record of the United States *or* any court of record of any state of the United States *or combination of these*], to the extent that such matters are not embraced within *Section 451 of the Evidence Code*, relating to mandatory judicial notice (*Evid. Code § 452(d)*; *Cote v. Henderson (1990) 218 Cal. App. 3d 796, 802, 267 Cal. Rptr. 274* ; *Tarr v. Merco Constr. Engineers, Inc. (1978) 84 Cal. App. 3d 707, 712, 148 Cal. Rptr. 813*).

[*AND/OR*]

J. Court Rules. The court may take judicial notice of the rules of court of _____ [any court of this state *or* any court of record of the United States *or* any court of record of any state of the United States *or combination of these*], to the extent that such matters are not embraced within *Section 451 of the Evidence Code*, relating to mandatory judicial notice (*Evid. Code § 452(e)*).

[*AND/OR*]

K. Laws of Foreign Nations and Public Entities. The court may take Judicial Notice of the law of _____ [an organization of nations *or* foreign nations *or* public entities in foreign nations *or combination of these*], to the extent that such matters are not embraced within *Section 451 of the Evidence Code*, relating to mandatory judicial notice (*Evid. Code § 452(f)*.)

[*AND/OR*]

L. Facts and Propositions of Common Knowledge Within Court's Territorial Jurisdiction. The court may take judicial notice of facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute, to the extent that such matters are not embraced within *Section 451 of the Evidence Code*, relating to mandatory judicial notice (*Evid. Code § 452(g)*).

[*AND/OR*]

M. Facts and Propositions Not Reasonably Subject to Dispute. The court may take judicial notice of facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy, to the extent that such matters are not embraced within *Section 451 of the Evidence Code*, relating to mandatory judicial notice (*Evid. Code § 452(h)*; *Estate of Rudolph (1980) 112 Cal. App. 3d 81, 84, 169 Cal. Rptr. 126*).

[*CONTINUE*]

N. Requirement That Court Take Judicial Notice. A trial court is, on proper request that it do so, required to take judicial notice of the matters specified in *Evidence Code Section 452* (*Evid. Code §§ 11, 453*).

O. Request That Court Take Judicial Notice. The court is hereby requested to take judicial notice of _____ [*specify matter to be judicially noticed, e.g.,* the Constitution of the State of _____ (*sister state*), and, specifically, of Article II, § 15 thereof], and to enable the court to do so, a _____ [*e.g.,* copy of that Constitution, certified by the Secretary of State of _____ (*sister state*) as being current], is attached hereto and made a part hereof. (*See Code Civ. Proc. § 430.70*.)

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in support of a general demurrer when the failure to state facts sufficient to constitute a cause of action appears by reference to facts that may be judicially noticed by the court.

The foregoing memorandum should be combined with a general form of memorandum in support of a demurrer to a complaint made on the ground that the complaint fails to state facts sufficient to constitute a cause of action [*see § 71.20*]. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated. For example, if the plaintiff is suing defendant for breach of contract, but his or her claim had already been transferred to a trustee in bankruptcy proceedings before commencing the action, the defendant should argue that (1) the court may take judicial notice of the bankruptcy petition as a record of a court of record of the United States; (2) the petition bears a filing date prior to the filing date of plaintiff's action; and (3) because plaintiff's claim was transferred to the bankruptcy trustee prior to the action, plaintiff lacks standing to sue, the complaint fails to state facts sufficient to constitute a cause of action, and the demurrer, therefore, should be sustained [*see Tarr v. Merco Constr. Eng'rs, Inc. (1978) 84 Cal. App. 3d 707, 712, 148 Cal. Rptr. 813 , discussed under § 71.21[3][d]*].

[b] Mandatory Judicial Notice

Matters of which the court is required to [*Evid. Code § 11*] take Judicial Notice are enumerated in *Evid. Code § 451*. These matters would be cited in the memorandum as primary authorities (e.g., the decisional, constitutional, and statutory laws of California, the Rules of Professional Conduct for attorneys, the California Rules of Court, etc.).

[c] Request for Permissive Judicial Notice

When the ground for demurrer is based on a matter that the court may take permissive judicial notice under *Evid. Code § 452* or *453*, the matter must be specified in the demurrer, or in the supporting points and authorities for the purpose of invoking the notice, except as the court may otherwise permit [*Code Civ. Proc. § 430.70*].

The trial court is required to take judicial notice of any matter specified in *Evid. Code § 452*, if a party requests it, and (a) gives each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request; and (b) furnishes the court with sufficient information to enable it to take judicial notice of the matter [*Evid. Code § 453*; *see also Evid. Code §§ 454* (consultation of pertinent information by court), 455 (opportunity to present information by parties), 456 (denial of request)].

Various tests or rules have been applied in determining whether a court taking Judicial Notice of a document may take the further step of accepting its truth or adopting a proposed interpretation of its meaning [*Joslin v. H.A.S. Ins. Brokerage (1986) 184 Cal. App. 3d 369, 374, 228 Cal. Rptr. 878]* . The court in *Joslin* noted three specific approaches [*see Joslin v. H.A.S. Ins. Brokerage (1986) 184 Cal. App. 3d 369, 374-375, 228 Cal. Rptr. 878]* .

The first approach is that when a court takes judicial notice of a document in its own files or in the files of another court [*see Evid. Code § 452(d)*], the court will not consider the truth of the document's contents unless it is an order, statement of decision, or judgment [*Joslin v. H.A.S. Ins. Brokerage (1986) 184 Cal. App. 3d 369, 374-375, 228 Cal. Rptr. 878* (citing *Garcia v. Sterling (1985) 176 Cal. App. 3d 17, 22, 221 Cal. Rptr. 349* and *Ramsden v. Western Union (1977) 71 Cal. App. 3d 873, 879, 138 Cal. Rptr. 426*)]. Under this approach, a court may take Judicial Notice of the existence of each document in a court file [*see Evid. Code § 452(d)*], but can only take judicial notice of the truth of facts asserted in documents such as orders, statements of decision, and judgments. A court may not judicially notice as true, assertions in declarations and affidavits filed in court proceedings or factual matters asserted in a court's file in other proceedings, or hearsay allegations, just because they are part of a court record or file [*Bach v. NcNelis (1989) 207 Cal. App. 3d 852, 864-865, 255 Cal. Rptr. 232]* .

The second approach is that the court may accept the truth of statements made by the party whose pleadings are being challenged but not statements of an opponent or third party [*Joslin v. H.A.S. Ins. Brokerage (1986) 184 Cal. App. 3d 369, 374-375, 228 Cal. Rptr. 878* (citing *Del E. Webb Corp. v. Structural Materials Co. (1981) 123 Cal. App. 3d 593, 604-605, 176 Cal. Rptr. 824* , and *Able v. Van Der Zee (1967) 256 Cal. App. 2d 728, 734, 64 Cal. Rptr. 481*)].

The third approach, which provides maximum flexibility while still insisting that disputed factual issues cannot be resolved on demurrer, proposes judicial notice of matters on demurrer will be dispositive only in those instances in

which there is not or cannot be a factual dispute concerning that which is sought to be judicially noticed [*Joslin v. H.A.S. Ins. Brokerage(1986) 184 Cal. App. 3d 369, 374-375, 228 Cal. Rptr. 878* (citing *Cruz v. County of Los Angeles (1985) 173 Cal. App. 3d 1131, 1134, 219 Cal. Rptr. 661*)]. Under this approach, judicial notice is dispositive of a demurrer only when no factual dispute exists concerning that which is sought to be judicially noticed. The taking of judicial notice does not in and of itself require acceptance of the truth of a factual matter that might be deduced from that matter, since in many instances what is being noticed and thereby established is no more than the existence of an act or a thing and not, without supporting evidence, what might factually be associated with or flow from the noticed matter [*Cruz v. County of Los Angeles (1985)173 Cal. App. 3d 1131, 1134, 219 Cal. Rptr. 661]* .

The court in *Joslin* concluded that correct results will be reached in most cases by application of either of the first two rules, but that there may be occasional cases that can only be resolved properly by using the third approach; and although this approach is more subtle and for this reason requires greater skill in its use, the third approach is the most reliable in all cases [*Joslin v. H.A.S. Ins. Brokerage (1986) 184 Cal. App. 3d 368, 375, 228 Cal. Rptr. 878]* .

[d] Related Points and Authorities

For additional authorities, including cases, supporting the taking of judicial notice of the prior records of a court in ruling on a general demurrer based on res judicata, see *§ 71.24*.

For a memorandum in support of a special demurrer to a complaint on the ground of another action pending and invoking judicial notice of that other action, see *§ 71.65*.

[e] Opposing Points and Authorities

In an appropriate case, the memorandum *set out in §§ 71.30 -71.32* may be used to oppose the general demurrer supported by the foregoing memorandum.

See also *§ 71.20[2]*.

[3] Discussion of Authorities

[a] Ground for Objection Appears From Matter of Which Court May Take Judicial Notice

Code Civ. Proc. § 430.10 authorizes a party against whom a complaint or cross complaint has been filed to object by demurrer or answer, as provided in *Code Civ. Proc. § 430.30*, to the pleading on any one or more of the grounds enumerated in that section, and *Code Civ. Proc. § 430.30(a)* provides that when the ground for objection appears on the face of the pleading or from any matter of which the court is required to or may take judicial notice, the objection on that ground may be taken by a demurrer to the pleading.

E.H. Morrill Co. v. California *(1967) 65 Cal. 2d 787, 56 Cal. Rptr. 479, 423 P.2d 551* , was an action for damages for the costs of performing additional work under a construction contract with the state. The damages were alleged to have resulted from the state's misrepresentation or warranty as to the subsurface conditions the contractor would encounter in excavating for the facility to be constructed. The complaint set forth three causes of action: the first based on misrepresentation, the second on breach of implied warranty, and the third on a common count that derived its validity or lack of it from the propriety of either of the first two causes of action. The state's demurrer to the complaint was sustained without leave to amend. The trial court took judicial notice of section four of the General Conditions of the contract between the parties which it construed as constituting a disclaimer of liability by the state.

The Supreme Court reversed the judgment of dismissal. The Court held that the trial court erred in construing section four of the General Conditions as an effective disclaimer as a matter of law, that the complaint stated a cause of action for recovery on a theory of breach of implied warranty, and that the complaint could be amended to state a cause of

action for fraudulent misrepresentation (*65 Cal. 2d 787, 791)* . In rejecting plaintiff's contention that the trial court improperly took judicial notice of section four of the General Conditions of the contract, which plaintiff had failed to include in its pleadings, the Supreme Court said, "*Section 1875 of the Code of Civil Procedure* [repealed; now *Evid. Code § 452(a), (c)*] provides: 'Courts take judicial notice of the following: ... 3. Public and private official acts of the legislative, executive and judicial departments of this state and of the United States. ...' It has been held proper for the trial and appellate courts to take judicial notice of the official records of a state agency (see [citation]) and, specifically, that 'The trial court was bound to notice judicially the provisions of the contract [between defendant and the United States government] and, in considering the complaint, to read the pleading as if the contract were set out in full therein.' [Citations.] In determining the sufficiency of the complaint those matters properly judicially noticed may be considered" (*65 Cal. 2d 787, 794-795)* .

[b] City and County Ordinances

The facts and procedural background of ***Beresford Neighborhood Assn. v. City of San Mateo*** *(1989) 207 Cal. App. 3d 1180, 255 Cal. Rptr. 434* , are discussed in *§ 71.20[3][a]*. In *Beresford Neighborhood Assn.*, the court of appeal noted that the complaint alleged that the city was required under its municipal code to employ bidding procedures in connection with the proposed transfer of the site. The defendant city asked the trial court to take Judicial Notice of the city's municipal code, which indicated that the city's use of bidding procedures is discretionary. The court stated that for the purposes of a demurrer, a court may consider matters that are subject to judicial notice (*207 Cal. App. 3d 1180, 1191)* .

Grant v. Hipsher *(1967) 257 Cal. App. 2d 375, 64 Cal. Rptr. 892* , was a wrongful death action in which administrator of the decedent's estate sued the owner of property where the decedent drowned in a swimming pool. The property was leased to a tenant at the time of the accident. A jury verdict was entered for defendant owner and the administrator appealed, arguing that the trial court erred in withholding from the jury the question of whether defendant violated provisions of a county ordinance requiring that the premises be fenced with self-closing and self-latching gates.

The court of appeal reversed, holding that it was the duty of the lessor to see that permanent improvements to the demised premises conformed to applicable safety ordinances. The court stated, in a footnote, that normally it would have been necessary for the plaintiff to have offered to prove the contents of an ordinance before he or she could complain on appeal of the court's rulings with reference thereto. If, however, it would have been futile to offer the ordinance into evidence such an offer would have been excused. Futility in this case, the court concluded, was established by the fact that at the time the case went to trial (prior to the January 1, 1967, operative date of *Evid. Code § 452*), courts did not take judicial notice of the contents of a city or county ordinance. By way of dictum, the court then cited *Evid. Code § 452(b)*, "for the present rule," implying that, at the time the appeal was taken, courts were authorized under that section to take judicial notice of the contents of a city or county ordinance (*257 Cal. App. 2d 375, 380 n.2*).

[c] Acts of State Administrative Agencies

In ***El Rancho Unified School Dist. v. National Education Assn.*** *(1983) 33 Cal. 3d 946, 192 Cal. Rptr. 123, 663 P.2d 893* , plaintiff, a school district, charged the four defendant labor unions with violations of the Education Employment Relations Act (Gov. Code § 3450 et seq.). During the pendency of administrative hearings on the matter, the district filed a tort action in superior court. The defendants demurred to the complaint on the ground that the court lacked subject matter jurisdiction of the action because a provision of the Government Code divested the trial court of jurisdiction. While still in the pleading stages, the case went on appeal to the Supreme Court on the issue of jurisdiction.

The Supreme Court affirmed the trial court's order sustaining the union's demurrer and dismissing the school district's action. Prior to its discussion of the merits of the case, the Court stated in a footnote that defendants' demurrer reached not only the contents of the challenged pleading itself but also such matters as may be properly considered under the doctrine of judicial notice. The Supreme Court cited *Evid. Code § 452(c)* as authority for the rule that such matters

include the orders, regulations, decisions, and records of state administrative agencies (*33 Cal. 3d 946, 950 n.6*).

[d] Court Records

In ***Cote v. Henderson*** *(1990) 218 Cal. App. 3d 796, 267 Cal. Rptr. 274* , plaintiff filed a complaint against defendant for malicious prosecution and intentional infliction of emotional distress. Defendant's general demurrer was sustained without leave to Amend and plaintiff appealed from the order of dismissal.

The court of appeal affirmed. On appeal, the plaintiff asserted that it was error for the trial court to take judicial notice of the truth of factual matters such as arrest reports, probation and sentencing reports as well as psychiatric reports. The court stated that it had no quarrel with the plaintiff's recitation of the law, but found that nothing in the record on appeal reflected that the trial court improperly took judicial notice of anything in the court files in question (*218 Cal. App. 3d 796, 801-802)* . The court quoted *Day v. Sharp (1975) 50 Cal. App. 3d 904, 914, 123 Cal. Rptr. 918* , for the rule that a court may take judicial notice of the truth of facts asserted in documents such as orders, findings of fact and conclusions of law (now statement of decision), and judgments (*218 Cal. App. 3d 796, 802)* .

Tarr v. Merco Constr. Eng'rs, Inc. *(1978) 84 Cal. App. 3d 707 , 148 Cal. Rptr. 813* , was an action against a construction company and an insurer for damages arising out of a construction contract. Defendants demurred to plaintiff's third amended complaint on the ground, among others, that plaintiff lacked standing to sue since he had filed for bankruptcy prior to commencement of the action and his claim had passed to his trustee in bankruptcy. The trial court took judicial notice of the filing by plaintiff of a petition in bankruptcy, sustained the demurrers, and entered a judgment of dismissal.

The court of appeal affirmed the judgment. The court stated that the doctrine is well settled that, in measuring the validity of a pleading in the face of a demurrer, both the trial court and the appellate court are entitled to consider the impact of information that has surfaced by reason of invocation of the doctrine of judicial notice (*84 Cal. App. 3d 707, 712)* .

[e] Facts and Propositions Not Reasonably Subject to Dispute

In ***Estate of Rudolph*** *(1980) 112 Cal. App. 3d 81, 84, 169 Cal. Rptr. 126* , the decedent's sister petitioned the court for revocation of an order admitting decedent's formally executed will and codicil to probate and appointing an administrator with the will annexed, and for admission to probate of a holograph that did not mention the month of execution, only "Monday 26, 1978." Without objection the trial court took judicial notice that in the year 1978 only once did the 26th day of a month occur on a Monday: in June. Nevertheless, the petition was denied on the sole ground the document did not contain an "entire" date.

The court of appeal reversed. The court stated that although some decisions contain language which if read out of context require inscription of the month, day, and year, they were distinguishable because not one of them involved a dating that could refer to only one day. In this case, judicial notice corrected the facially incomplete dating without resort to extrinsic evidence, and both capacity and chronology could then be appropriately determined (*112 Cal. App. 3d 81, 83-84)* .

[4] Additional Authorities

[a] Ground for Objection Appears From Matter of Which Court May Take Judicial Notice

In *Scannell v. County of Riverside (1984) 152 Cal. App. 3d 596, 199 Cal. Rptr. 644* , plaintiff sued a county and certain of its employees, attempting to state, among others, causes of action for false imprisonment. The trial court sustained general demurrers to these causes of action without leave to amend, and plaintiff appealed the ensuing judgment of dismissal. The court of appeal affirmed as to these causes of action. The court held that the causes of action

were barred by the applicable statute of limitation, *Gov. Code § 911.2*. The court stated the rule that a complaint otherwise good on its face is nevertheless subject to demurrer when facts judicially noticed render it defective (*152 Cal. App. 3d 596, 606)* . In this case the causes of action were timely on their face, but were nonetheless defective in light of facts manifesting that the plaintiff was actually released from jail over 10 months before he filed his claim against the county pursuant to *Gov. Code § 911.2*. Specifically, the court took judicial notice of the municipal court record of the prior criminal case showing the date the plaintiff filed his bail bond, and of the booking sheet of the county sheriff's department showing the date of his release from jail (*152 Cal. App. 3d 596, 605-606)* .

See also *Dwan v. Dixon (1963) 216 Cal. App. 2d 260, 265, 30 Cal. Rptr. 749* ("The rule is well established that a complaint good on its face is nevertheless subject to demurrer when facts judicially noticed render it defective"); *Byrne v. Harvey (1962) 211 Cal. App. 2d 92, 106-107, 27 Cal. Rptr. 110* .

[b] Acts of State Administrative Agencies

Contractor's etc. Assn. v. Cal. Comp. Ins. Co. (1957) 48 Cal. 2d 71, 307 P.2d 626 , was an action to recover dividends on an agreement made in conjunction with the purchase of a workers' compensation insurance policy. Defendant's "oral demurrer" (objection) to the introduction of any evidence was sustained on the ground the agreement constituted an illegal rebate and was unenforceable. In affirming the subsequent judgment of dismissal, the Supreme Court said that in ruling on the demurrer the trial court, in concluding the agreement was illegal, had before it the Insurance Code and administrative rules of the Insurance Commissioner and that a consideration of these was proper. Although not pleaded, the trial court could take judicial notice pursuant to *Code Civ. Proc. § 1875* (repealed; *now see Evid. Code § 452(a), (c)*) of "Public and private official acts of the legislative, executive and judicial department of this state. ..." (*48 Cal. 2d 71, 75)* .

Note:

In the above-cited case plaintiff was seeking to recover illegal rebates under workers' compensation insurance and the substantive ruling in the case has been distinguished on this ground in subsequent cases [*see* *Homestead Supplies, Inc. v. Executive Life Ins. Co. (1978) 81 Cal. App. 3d 978, 987-990, 147 Cal. Rptr. 22* (court assumed without deciding that oral agreement to modify premiums on term life insurance after specified number of years violated both rebate and price discrimination statutory provisions but held illegality was not such as to render agreement unenforceable under circumstances of case); *R.D. Reeder Lathing Co. v. Cypress Ins. Co. (1970) 3 Cal. App. 3d 995, 998-999, 84 Cal. Rptr. 98* (action, not to recover illegal rebates, but to recover damages suffered when defendants fraudulently induced plaintiff to enter into illegal transaction involving workers' compensation insurance)].

Chas. L. Harney, Inc. v. State of California (1963) 217 Cal. App. 2d 77, 31 Cal. Rptr. 524 , was an action by a contractor against the state on a claim for work done and materials furnished for a highway project. Defendant demurred to the complaint on several grounds, including the ground of failure to state a cause of action, and filed in the trial court certified copies of plaintiff's claims filed with the State Board of Control and other documents relating to it. Defendant's position was that the official documents, together with plaintiff's pleadings, showed that the causes of action attempted to be set forth in the second amended complaint were barred by the statute of limitations, that is, that they had not been brought within six months after rejection of the original claim as required by Gov. Code § 644 (repealed; *now see Gov. Code § 945.6*). The trial court sustained the demurrer without leave to amend, and plaintiff appealed from the judgment of dismissal. In affirming the judgment, the court of appeal said that courts have power to take judicial notice of the official records and files of the State Board of Control and of the office of the State Controller and that the matters to be judicially noticed were properly brought to the attention of the trial court by transmission of the certified copies of the records involved (*217 Cal. App. 2d 77, 85-86)* . The court held that matters judicially noticed may be considered in construing the pleadings, that in the consideration of a pleading the courts must read it as if it contained a statement of all matters of which they are required to take judicial notice, even when the pleading contains an express allegation to the contrary, and that the rule is well established that a complaint good on its face is nevertheless subject to demurrer

when facts not alleged but judicially noticed render it defective (*217 Cal. App. 2d 77, 86-87)* .

[c] Court Records

In *Britz, Inc. v. Dow Chemical Co. (1999) 73 Cal. App. 4th 177, 86 Cal. Rptr. 2d 188* , a joint tortfeasor settled with plaintiffs who had brought separate actions, obtained a good faith settlement determination, was dismissed from the actions and dismissed a cross-complaint for indemnity against its codefendants that it had brought in one of the actions. The joint tortfeasor then filed an action against its former codefendants seeking indemnity for the amount it had paid to settle with the plaintiffs. Subsequently, the former codefendants settled with the plaintiffs and, after notice to the joint tortfeasor, obtained a good faith settlement. Thereafter, the joint tortfeasor filed a first amended complaint against its former codefendants seeking indemnity, declaratory relief and damages for fraud and negligent misrepresentation. The trial court sustained the former codefendants' demurrer to the first amended complaint taking judicial notice of the good faith settlement determinations and dismissed the action. In affirming, the court of appeal noted that when court records which the court may judicially notice provide ground for objection to a complaint, a demurrer on that ground is proper (*73 Cal. App. 4th 177, 180)* .

Morton v. Loveman (1968) 267 Cal. App. 2d 712, 73 Cal. Rptr. 623 , was an action in equity to set aside certain property provisions of interlocutory and final divorce decrees. Defendant's general and special demurrer to the amended complaint was sustained without leave to amend after plaintiff elected to stand on her pleading, and the action was dismissed. The theory of the amended complaint was that defendant had breached his fiduciary duty to plaintiff in the prior divorce action by undervaluing some community assets and concealing others. It appeared from the record in the divorce case that the issues presently sought to be litigated were before the court in the prior action. In affirming the judgment, the court of appeal held that it was proper for the trial court to take judicial notice of the prior divorce action, and, quoting from *Watson v. Los Altos School Dist. (1957) 149 Cal. App. 2d 768, 771-772, 308 P.2d 872* , said, "The rule is well settled that a complaint otherwise good on its face is nevertheless subject to demurrer when facts judicially noticed render it defective. As pointed out in 2 Witkin, California Procedure, page 1185: 'The theory is that the pleader should not be allowed to by-pass a demurrer by suppressing facts which the court will judicially notice. The principle is that of *truthful pleading,* and is applied for the same reason as in the similar situation of pleaded exhibits which contradict allegations.' " (*267 Cal. App. 2d 712, 717)* .

See also *Able v. Van Der Zee (1967) 256 Cal. App. 2d 728, 734, 64 Cal. Rptr. 481* (in ruling on a demurrer, the court may "take judicial notice of evidentiary matters in its own records, including affidavits, declarations, and interrogatories or requests for admissions, which are inconsistent with the allegations in the complaint").

California Points & Authorities

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Volume 7A Chapters 71-79 DEMURRERS
CHAPTER 71 DEMURRERS AND MOTIONS FOR JUDGMENT ON THE PLEADINGS
PART II. FORMS
A. Demurrers
1. General Demurrers to Complaint

7A-71 California Points & Authorities § 71.22

§ 71.22 Supporting General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Plaintiff Lacks Standing to Maintain Action

[1] FORM Supporting General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Plaintiff Lacks Standing to Maintain Action

[*The following should be combined with a general form of memorandum in support of a general demurrer (see § 71.20).*]

THE GENERAL DEMURRER TO THE COMPLAINT SHOULD BE SUSTAINED BECAUSE IT APPEARS ON THE FACE OF THE COMPLAINT [OR FROM MATTERS OF WHICH THE COURT MUST OR MAY TAKE JUDICIAL NOTICE] THAT PLAINTIFF IS NOT THE REAL PARTY IN INTEREST.

A. Prosecution by Real Party in Interest. Every action must, except as otherwise expressly authorized by law, be prosecuted in the name of the real party in interest (*Code Civ. Proc. § 367*; *see Killian v. Millard (1991) 228 Cal. App. 3d 1601, 1605, 279 Cal. Rptr. 877*).

B. Action Stated Not in Plaintiff. A complaint that states a cause of action in a person other than plaintiff, and does not state a cause of action in plaintiff is subject to a general demurrer for failure to state a cause of action (*Klopstock v. Superior Court (1941) 17 Cal.2d 13, 19, 108 P.2d 906* ; *Ventura County Ry. Co. v. Hadley Auto Transport (1995) 38 Cal. App. 4th 878, 880, 45 Cal. Rptr. 2d 362*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a general demurrer to a complaint when it appears on the face of the complaint or from judicially noticed matter that the cause of action stated is in some person other than plaintiff, and plaintiff is not a person expressly authorized by law to maintain the action [*see Klopstock v. Superior*

Court (1941) 17 Cal. 2d 13, 19, 108 P.2d 906 , discussed under § 71.22[3][b]]. For a similar memorandum in support of a general demurrer to a petition for writ of mandate, see Ch. 150, *Mandate and Prohibition* .

For the procedure for invoking judicial notice, see *§ 71.21[2]*.

These points and authorities should be combined with a general form of memorandum in support of a demurrer to a complaint made on the ground that the complaint fails to state facts sufficient to constitute a cause of action [*see § 71.20*]. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing how the allegations of the complaint or facts from which the court is required to or may take Judicial Notice establish that the plaintiff is not the real party in interest in the action.

[b] Amendment to Substitute Parties

If the demurrer is sustained, the court may permit the filing of an amended complaint naming the real party in interest as the plaintiff [*see Klopstock v. Superior Court (1941) 17 Cal. 2d 13, 21, 108 P.2d 906* ; *Tinsley v. Palo Alto Unified School Dist. (1979) 91 Cal. App. 3d 871, 888-889, 154 Cal. Rptr. 591]* . Amendments to substitute a plaintiff with standing for one who is not a real party in interest are freely allowed [*Charpentier v. Los Angeles Rams Football Co. (1999) 75 Cal. App. 4th 301, 308, 89 Cal. Rptr. 2d 115]* .

[c] Opposing Points and Authorities

In an appropriate case, the memorandum *set out in § 71.33* may be used to oppose the general demurrer supported by these points and authorities.

See also *§ 71.20[2]*.

[3] Discussion of Authorities

[a] Prosecution by Real Party in Interest

Code Civ. Proc. § 367 provides that every action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute. For example, *Code Civ. Proc. § 369*, and *Civ. Code § 1363(c)*, relate respectively, to actions by executors, administrators, trustees of an express trust, and other persons expressly authorized by statute, and to actions by owners' associations established in condominium, community apartment, and undivided interest subdivision projects and planned developments.

Killian v. Millard *(1991) 228 Cal. App. 3d 1601, 279 Cal. Rptr. 877* , was a breach-of-contract action, in which the trial court voided certain agreements between plaintiffs and third-party investors under which plaintiffs, to fund their lawsuit, had sold units to the investors in return for a percentage share in the net profits of the lawsuit. The court also ordered plaintiffs to repay, with interest, the money they had received under the agreements. The orders were made on the defendant's motion. The investors were not parties to the lawsuit and plaintiffs' agreements with them were not relevant to any issue in the case. Plaintiffs appealed from the orders.

The court of appeal reversed. Although the case involved an attempt by defendant, through an improper use of the motion procedure, to secure an adjudication of his claim, the court of appeal said it is well settled that only parties with a real interest in a dispute have standing to seek its adjudication, that a real party in interest ordinarily is defined as the person possessing the right sued on by reason of the substantive law, that the question of standing to sue is one of the right to relief and goes to the existence of a cause of action against the defendant, and that when a complaint states a cause of action in someone, but not in the plaintiff, a general demurrer for failure to state a cause of action will be

sustained (*288 Cal. App. 3d 1601, 1605)* . The court said that defendant had no substantive right in the agreements with the investors, that he lacked standing to seek to void them, and that lack of standing is not waived by the failure to raise it in the trial court, but may be raised at any point in the proceedings (*288 Cal. App. 3d 1601, 1605)* . The court concluded that defendant lacked standing to attack the agreements and the trial court erred in making the orders (*288 Cal. App. 3d 1601, 1607)* .

[b] Action Stated Not in Plaintiff

Klopstock v. Superior Court *(1941) 17 Cal. 2d 13, 108 P.2d 906* , was a mandate proceeding to compel respondent court to dismiss an action after judgment in the case had been reversed on appeal. In 1926 a corporation was organized with its entire stock held by three brothers, Isaac, Frederick, and Samuel Klopstock, who were also its directors. In 1933 Isaac died, leaving his property to his wife, Grace. While Isaac's estate was still in probate, Grace died and Samuel Samter was appointed executor of her will. Samter then commenced the action on behalf of the corporation to compel the two surviving brothers to repay to the corporation certain sums alleged to have been wrongfully withheld. His theory was that since Isaac had died leaving his property to Grace, Grace was the beneficial owner of the stock (no distribution in Isaac's estate had yet been made), and that when Grace died, he, as her executor, could bring the action on behalf of the corporation. Defendants' general demurrer to the complaint was overruled and judgment after trial was given in favor of Isaac's estate. The court of appeal reversed on the ground Isaac's estate was not a party to the action. It also declared that plaintiff was not the proper party to bring the action and that this objection could be raised by general demurrer. After the reversal, Samter sought and, over defendants' objection, was granted leave to file an amended complaint naming the administratrix of Isaac's estate as plaintiff. Defendants then filed their petition for writ of mandate to compel dismissal.

The Supreme Court denied the writ. The Court stated that although the holding on the prior appeal that Samter lacked standing to sue was correct, the trial court also correctly allowed the filing of the amended complaint to name the real party in interest as plaintiff.

In the course of the opinion, the court also distinguished the objection that plaintiff lacks capacity to sue, a ground of special demurrer, from the objection that plaintiff lacks standing to sue (*17 Cal. 2d 13, 17-19)* . The court stated that the former raises the question of whether any general legal disability exists, such as infancy or insanity, or want of title in the plaintiff to the character in which he or she sues, and such defect is waived by a failure to demur to it specially, whereas the latter allows that a complaint may state a cause of action in someone, but not in the plaintiff. In addition, the court cited a case from another state providing that there is a difference between capacity to sue, which is the right to come into court, and a cause of action, which is the right to relief in court (*17 Cal. 2d 13, 18-19)* . For discussion related to the distinction between a general and special demurrer generally, see *§ 71.05*.

In ***Ventura County Ry. Co. v. Hadley Auto Transport*** *(1995) 38 Cal. App. 4th 878, 45 Cal. Rptr. 2d 362* , a truck driver was injured in his truck was hit by a train. In the ensuing litigation, the railway cross complained against the truck driver's employer, alleging that the employer unlawfully discriminated against the employee under the Americans with Disabilities Act (ADA; *42 U.S.C. § 12101 et seq.*) by refusing to rehire him because of his injuries. The railway's theory was that this employment would mitigate damages. The employer demurred on the ground that the railway lacked standing. The trial court sustained the demurrer, and the railway appealed.

The court of appeal affirmed. The court first quoted the language of *Code Civ. Proc. § 367*, requiring every action to be brought by the real party in interest, except as otherwise provided by statute. The court then defined real party in interest as the person possessing the right sued on by reason of the substantive law and stated that when the complaint states a cause of action in someone, but not the plaintiff, a demurrer will be sustained (*38 Cal. App. 4th 878, 880)* . Reviewing the terms of the ADA, the court concluded that, despite the broad language of the Act, the railway had failed to establish that it sought to assert its own substantive rights, so that it failed to satisfy the requirements of *Code Civ. Proc. § 367* (*38 Cal. App. 4th 878, 882)* .

[4] Additional Authorities

[a] Action Stated Not in Plaintiff

Hart v. County of Alameda (1999) 76 Cal. App. 4th 766, 90 Cal. Rptr. 2d 386 , involved an action brought by plaintiff on behalf of himself and others similarly situated against 25 California counties, seeking the return of unused jury deposit fees. The trial court sustained the counties' demurrers without leave to amend. The court of appealed affirmed. In so doing, the court initially noted that plaintiff had alleged that plaintiff or his assignors made jury deposits in courts in four counties. The remaining 22 counties contended plaintiff lacked standing to sue because plaintiff did not allege plaintiff made a deposit in those counties and therefore plaintiff was not the real party in interest. The court concluded that this contention had merit, whether characterized as a standing defect or a failure to satisfy the class action typicality requirement. Plaintiff did not allege that plaintiff or plaintiff's assignors deposited jury fees in 22 of the 25 counties nor did plaintiff allege any facts to fit within an exception requiring a personal cause of action. Thus, plaintiff had no standing to sue the 22 counties and was not a proper class representative in claims against those counties (*76 Cal. App. 4th 766, 775-776)* . The court also found that the complaint failed to state a cause of action on several other grounds (*see 76 Cal. App. 4th 766, 776-783)* .

Charpentier v. Los Angeles Rams Football Co. (1999) 75 Cal. App. 4th 301, 89 Cal. Rptr. 2d 115 , involved an action for breach of contract, intentional misrepresentation, concealment and breach of the implied covenant of good faith and fair dealing. The trial court concluded the complaint did not state a cause of action and dismissed the case. The court of appeal affirmed in part and reversed in part. With regard to the standing issue, the defendant had not raised plaintiff's standing as an issue during the demurrer proceedings. Defendant, however, argued on appeal that plaintiff lacked, or was judicially estopped to, assert standing to appeal. The court of appeal concluded that the factual allegations of plaintiff's second amended complaint contained sufficient allegations as to plaintiff's standing and that plaintiff's standing was an issue to be fleshed out in discovery or perhaps at trial (*75 Cal. App. 4th 301, 307-308)* . In reaching this conclusion the court discussed standing, noting that a complaint filed by a party who lacks standing is subject to demurrer. A complaint by a party lacking standing fails to state a cause of action by the particular named plaintiff, inasmuch as the claim belongs to somebody else. A more accurately stated rationale would be that there is a defect in the parties, since the party named as plaintiff is not the real party in interest (*75 Cal. App. 4th 301, 307)* .

American Home Ins. Co. v. Travelers Indemnity Co. (1981) 122 Cal. App. 3d 951, 175 Cal. Rptr. 826 , involved a complaint for reformation of an insurance contract and declaratory relief. Plaintiff, a liability insurer, sought reformation of a policy executed between defendant insurance company and a distributing company that was a subsidiary, along with plaintiff's assured (the sales division), of a larger corporation. After a fire destroyed property leased by the distributor from plaintiff's assured, plaintiff sought to reform defendant's policy to include plaintiff's assured on grounds that the parties mistakenly omitted the sales division from the policy and that the alter ego relationship between the two subsidiaries dictated that the distributor had entered into the insurance contract on sales division's behalf. Rejecting plaintiff's contentions, the trial court sustained defendant's demurrer to the complaint without leave to Amend on grounds that plaintiff lacked standing to seek either reformation or declaratory relief.

The court of appeal affirmed the dismissal, remanding only for a declaration of the rights and duties of both insurers with regard to the distributor. The general principles of third-party beneficiary law apply equally to insurance contracts, stated the court, and are decisive of a plaintiff's standing to sue. The sales division, as lessor of the damaged property, was only an incidental beneficiary and not an intended insured, and thus could not enforce any terms in the policy. Since plaintiff was seeking to assert whatever rights the incidental beneficiary had, it was similarly without standing to reform the contract (*122 Cal. App. 3d 951, 967-968)* .

Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 69 Cal. Rptr. 321, 442 P.2d 337 , was an action by an insured against his insurers for actual and punitive damages for malicious nonpayment of fire insurance. Defendants' general demurrer to the second amended complaint was sustained without leave to amend and plaintiff appealed from the

judgment of dismissal. The Supreme Court affirmed the judgment on the ground the complaint showed on its face that plaintiff had been adjudicated a bankrupt after the cause of action accrued and hence under Section 70 of the Federal Bankruptcy Act [11 U.S.C. § 110; repealed, *now see 11 U.S.C. § 541*], the rights plaintiff sought to assert had passed to his trustee in bankruptcy and were no longer claims resident in him (*68 Cal. 2d 822, 830, 837)* .

People v. Kings Point Corp. (1986) 188 Cal. App. 3d 544, 233 Cal. Rptr. 227 , involved an appeal of a judgment against a defendant who had declared bankruptcy. The bankruptcy trustee had assumed all authority in the litigation, and stipulated to the judgment. After it became clear to the bankrupt that the bankruptcy trustee was not going to appeal the judgment, the bankrupt filed an appeal. The court of appeal dismissed the appeal, holding that the bankrupt had no standing in the action, even on appeal. Instead, the bankrupt's remedy is to petition the bankruptcy court to compel the trustee to file an appeal or to authorize the bankrupt to file an appeal on its own behalf (*188 Cal. App. 3d 544, 549)* .

By contrast, in *Kaley v. Catalina Yachts (1986) 187 Cal. App. 3d 1187, 232 Cal. Rptr. 384* , a personal injury plaintiff, after filing the action, filed a petition in bankruptcy under Title 11 of the United States Code. On appeal of judgment for plaintiff, defendant unsuccessfully argued that the bankruptcy trustee should have been substituted in for plaintiff, and that he had been denied a fair trial against the trustee, who was the real party in interest. The court of appeal upheld the judgment, holding that although plaintiff's cause of action for personal injuries became a part of the bankruptcy estate on the filing of the bankruptcy petition [*see 11 U.S.C. § 541(a)*], the transfer by operation of law did not divest plaintiff of his right to continue to prosecute the action, pending assertive action by the bankruptcy trustee as representative of the estate. Until the bankruptcy trustee intervenes and substitutes himself or herself in the action, the trustee is not the real party in interest. Under former Code Civ. Proc. § 385 (*now see Code Civ. Proc. § 368.5*), the bankrupt remains the real party in interest even after the cause of action is transferred to the bankruptcy estate by operation of law, until the time that the trustee seeks, and is allowed, to substitute in by the state court. In the meantime, a bankruptcy trustee may allow a plaintiff to pursue an action and await the results, any recovery being first for the benefit of the estate (*187 Cal. App. 3d 1187, 1194-1195)* .

The facts and procedural background of *Tarr v. Merco Constr. Engineers, Inc. (1978)84 Cal. App. 3d 707, 148 Cal. Rptr. 813* , are discussed in *§ 71.21[3][d]*. *Tarr* was an action against a construction company and an insurer for damages arising out of a construction contract. Defendants' demurrer to plaintiff's third amended complaint on the ground, among others, that plaintiff lacked standing to sue since he had filed for bankruptcy prior to the commencement of the action and his claim had passed to his trustee in bankruptcy. The trial court took judicial notice of the filing by plaintiff of a petition in bankruptcy, sustained the demurrers, and entered a judgment of dismissal. In affirming the judgment on the ground that plaintiff lacked standing to sue, the court of appeal pointed out that the fact that plaintiff's attorney had been appointed by the bankruptcy judge as special counsel to pursue the claim on behalf of a corporation wholly owned by plaintiff, that was also in bankruptcy, did not give plaintiff standing to sue in his own behalf, and the fact that plaintiff alleged in his complaint that such corporation might have an interest in plaintiff's cause of action as a debtor in bankruptcy and was being joined as a defendant pursuant to the provisions of *Code Civ. Proc. § 389* lacked merit, since *Code Civ. Proc. § 389* cannot be construed to authorize a debtor in bankruptcy to file an action on a cause of action that has vested in the trustee in bankruptcy (*84 Cal. App. 3d 707, 714-716)* .

Phillips v. Crocker-Citizens National Bank (1974) 38 Cal. App. 3d 901, 113 Cal. Rptr. 688 , was a purported class action against four lending institutions alleging their collection from borrowers of mortgage insurance premiums was in excess of the amount of such premiums actually paid to the FHA. The general demurrers of three of the defendants, to whom plaintiff was not indebted, were sustained without leave to amend and the complaint dismissed as to them. On appeal from the subsequent order of dismissal, the court of appeal, in affirming the judgment (order), pointed out that plaintiff had alleged no concerted action or conspiracy among the defendants and pleaded no dealings with or injury suffered at the hands of the three defendants as to whom the complaint had been dismissed. Having stated no personal cause of action against them, he could not represent a class of plaintiffs alleged to have been injured by them (*38 Cal. App. 3d 901, 908)* . The court held that the defect was subject to attack by demurrer and stated the following rule: the question of standing to sue is one of the right to relief and goes to the existence of a cause of action against the

defendant; when the complaint states a cause of action in someone, but not in plaintiff, a general demurrer for failure to state a cause of action will be sustained (*38 Cal. App. 3d 901, 910)* .

Hart v. County Los Angeles (1968) 260 Cal. App. 2d 512, 67 Cal. Rptr. 242 , was an action for declaratory relief, forfeiture, and an accounting, and arose out of the last will and testament of one William S. Hart, Sr., which designated defendant county as trustee of two charitable trusts consisting of a 220-acre ranch, cash, other personal property, and the residue and remainder of the testator's estate. Plaintiff, William S. Hart, Jr., was the only issue of the decedent, who left no surviving spouse, and would have been entitled to the entire estate had his father died intestate. He unsuccessfully contested the will, and the exclusive management, supervision, and control of the property was awarded to defendant county pursuant to the two trusts. The will provided that if specified conditions were not performed by the county, the property would revert to the testator's estate and be distributed to the State of California for the same uses and purposes and on the same conditions as imposed on the county. In his present action, plaintiff alleged that the county had failed to perform the conditions of the will, that plaintiff was informed and believed that the state would not accept the property or trusts, and that plaintiff was, therefore, entitled to it the same as if decedent had died intestate. Defendant's demurrer to the second amended complaint on the ground that it did not state facts sufficient to constitute a cause of action "in that said cause of action is not brought by the real party in interest," was sustained without leave to amend on the grounds that a charitable trust for the public benefit would not fail for want of a trustee, that the court would, if necessary, appoint a trustee to carry out the purposes of the trust, and that the property could not revert to plaintiff as an heir at law. The court of appeal, in affirming the subsequent judgment of dismissal with prejudice, agreed with the trial court and held that the general demurrer was properly sustained as the complaint did not state a cause of action in plaintiff and could not be amended to do so, since the party to enforce the provisions of such trusts was the state Attorney General (*260 Cal. App. 2d 512, 517)* .

See also *McKinny v. Board of Trustees (1982) 31 Cal. 3d 79, 90, 181 Cal. Rptr. 549, 642 P.2d 460* (plaintiff who lacks standing to sue cannot state valid cause of action and, therefore, contention based on plaintiff's lack of standing cannot be waived under *Code Civ. Proc. § 430.80* and may be raised at any time in the action); *Powers v. Ashton (1975) 45 Cal. App. 3d 783, 790, 119 Cal. Rptr. 729* (demurrer is properly sustained when plaintiff is not real party in interest but leave to amend in such case is required); *Oakland Municipal Improvement League v. City of Oakland (1972) 23 Cal. App. 3d 165, 170, 100 Cal. Rptr. 29* (when complaint states cause of action in someone but not in plaintiff, general demurrer for failure to state cause of action will be sustained, or issue may be raised at any time in the proceedings, as by objection to introduction of any evidence); compare *Electric Utilities Co. v. Smallpage (1934) 137 Cal. App. 640, 642, 31 P.2d 412* (demurrer to complaint on ground of defect of parties plaintiff (*Code Civ. Proc. § 430.10(d)*) when it appeared cause of action, if any, had been vested in plaintiff's trustee in bankruptcy held properly sustained).

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7A-71 California Points & Authorities § 71.23

§ 71.23 Supporting General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Action Is Premature

[1] FORM Supporting General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Action Is Premature

[*The following should be combined with a general form of memorandum in support of a general demurrer (see § 71.20).*]

THE GENERAL DEMURRER TO THE COMPLAINT SHOULD BE SUSTAINED BECAUSE IT APPEARS ON THE FACE OF THE COMPLAINT [OR FROM MATTERS OF WHICH THE COURT MUST OR MAY TAKE JUDICIAL NOTICE] THAT THE ACTION IS PREMATURE.

A. Premature Complaint Fails to State Cause of Action. A complaint that shows on its face that the action sued on has not yet accrued and, hence, is premature fails to state facts sufficient to constitute a cause of action (*Bank of Italy etc. Assn. v. Bentley (1933) 217 Cal. 644, 658, 20 P.2d 940* ; *Breneric Associates v. City of Del Mar (1998) 69 Cal. App. 4th 166, 188-189, 81 Cal. Rptr. 2d 324*).

[*Optional*] **B. Another Matter to Be Resolved.** A general demurrer is appropriate if the causes of action in the complaint are not yet ripe because they depend on the final determination in some other matter (*Schell v. Southern Cal. Edison Co. (1988) 204 Cal. App. 3d 1039, 1047, 251 Cal. Rptr. 667*).

[*Optional*] **C. Action on Note Before Maturity.** An action on a promissory note prior to its maturity is premature (*Southern Cal. M. Co. v. Skinner (1911) 17 Cal. App. 205, 208, 119 P. 106*).

[*Optional*] **D. Action on Accelerated Contract Balance Prior to Occurrence of Condition Precedent.** An action to recover the accelerated balance due under a contract after its breach but prior to the occurrence of an essential condition precedent is premature (*Southern Cal. M. Co. v. Skinner (1911) 17 Cal. App. 205, 208, 119 P. 106*).

[*Optional*] **E. Action Against Buyer Before Expiration of Credit Period.** An action to recover the purchase price of goods sold and delivered when the goods were sold on credit for a period that has not yet expired is premature (*Landis v. Morrissey (1886) 69 Cal. 83, 86-87, 10 P. 258*).

[*Optional*] **F. Action on Debt Superseded by Nonmatured Promissory Note.** An action on a debt that has been superseded by a promissory note, accepted by the creditor, that has not yet matured is premature (*Gardner v. Shreve (1949) 89 Cal. App. 2d 804, 808, 202 P.2d 322*).

[*Optional*] **G. Action Against Personal Representative of Decedent Prior to Presentation of Claim.** An action sounding in contract against the personal representative of a decedent's estate prior to presentation of a claim is premature (*Burke v. Maguire (1908) 154 Cal. 456, 462, 98 P. 21*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a general demurrer to a complaint when it appears on the face of the complaint or from judicially noticed matter that the action is premature.

These points and authorities should be combined with a general form of memorandum in support of a demurrer to a complaint made on the ground that the complaint fails to state facts sufficient to constitute a cause of action [*see § 71.20*]. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing how the allegations of the complaint, or facts that may be judicially noticed, indicate that at this time there is no cause of action properly before the court. For example, if successful recovery by plaintiff depends on the determination of a fact that the court does not have jurisdiction to decide, and the fact is yet undetermined, counsel should (1) indicate that the particular fact alleged is one that is necessary to state a cause of action; (2) argue the fact is one that the court lacks jurisdiction to determine, but must yet be determined; and (3) argue that until an appropriate tribunal determines the matter, the plaintiff's action is not ripe and the defendant is therefore entitled to a general demurrer [*see Schell v. Southern Cal. Edison Co. (1988) 204 Cal. App. 3d 1039, 1047, 251 Cal. Rptr. 667 , discussed under § 71.23[3][b]*].

For the procedure for invoking judicial notice, see *§ 71.21[2][c]*.

[b] Prematurity Must Exist at Time Issue Determined

The cases cited in this form, as well as in others [*see, e.g., Jaffe v. Albertson Co. (1966) 243 Cal. App. 2d 592, 616, 53 Cal. Rptr. 25* ; *Browar v. Paul Hardeman, Inc. (1960) 183 Cal. App. 2d 708, 712, 7 Cal. Rptr. 231]* insofar as they state or hold that the cause of action must exist at the time the complaint is filed and that the rights of the parties must be judged by conditions existing at the time the action is commenced, have been modified by subsequent cases holding that for the plea of prematurity to be sustained the prematurity must exist at the time the issue is determined [*see, e.g., Ostrowski v. Miller (1964) 226 Cal. App. 2d 79, 86, 37 Cal. Rptr. 790* ; *see also § 71.34*, and *Ch. 10, Abatement and Survival of Actions, § 10.30* et seq.].

[c] Waiver of Ground of Objection

Although *Code Civ. Proc. § 430.80* provides in part that the objection that the complaint does not state facts sufficient to constitute a cause of action is not waived by failure to take it by demurrer or answer, the rule is otherwise when the failure to state a cause of action results from the fact that no cause of action has accrued when the complaint is filed.

The plea that an action has been prematurely brought is in the nature of a dilatory plea that must be specially pleaded to be available as a defense [*Verbeck v. Clymer (1927) 202 Cal. 557, 562, 261 P. 1017* ; *see also Kelley v. Upshaw (1952) 39 Cal. 2d 179, 186, 246 P.2d 23* ; *Seches v. Bard (1932) 215 Cal. 79, 81, 8 P.2d 835]* . Failure to plead it by demurrer or answer normally constitutes a waiver of it [*see Bollinger v. National Fire Ins. Co. (1944) 25 Cal. 2d 399, 405-406, 154 P.2d 399* (defendant lost privilege of urging defense of prematurity by failing to plead it plainly and to assert it promptly); *Green v. Sherritt (1936) 17 Cal. App. 2d 732, 737-738, 62 P.2d 769* (defense that action was premature when not pleaded in answer as waived); *see also Vanoni v. County of Sonoma (1974) 40 Cal. App. 3d 743, 748, 115 Cal. Rptr. 485* (claim of prematurity cannot be raised for first time on appeal)].

[d] Opposing Points and Authorities

In an appropriate case, the memorandum *set out in § 71.34* may be used to oppose the general demurrer supported by these points and authorities.

See also *§§ 71.20[2]* and *71.34[2]*.

[3] Discussion of Authorities

[a] Premature Complaint Fails to State Cause of Action

Bank of Italy Trust & Sav. Ass'n v. Bentley *(1933) 217 Cal. 644, 20 P.2d 940* , was an action, filed three days before expiration of the statute of limitations, to recover on a promissory note secured by a trust deed. Defendants, by way of affirmative defense in their answer, alleged that the action was premature for the reason that at the time the complaint was filed no cause of action existed. The trial court upheld this defense on the theory that no action may be brought on a note secured by a trust deed until the security is exhausted. From a judgment for defendants, plaintiff appealed contending, among other things, that under the circumstances the action must be deemed one to keep the obligation of the note alive until it could sell under the trust deed.

The Supreme Court affirmed the judgment. The Court stated that it was elementary that under our system there is no such thing as filing an action to keep an obligation alive unless at the time the complaint is filed a cause of action exists, and that every complaint is predicated on the theory that plaintiff is entitled to judgment at the time it is filed (*217 Cal. 644, 658)* .

In ***Breneric Associates v. City of Del Mar*** *(1998) 69 Cal. App. 4th 166, 81 Cal. Rptr. 2d 324* , defendant denied plaintiffs' application for a design review permit regarding a two-story addition to an existing single-family house. Thereafter, plaintiffs filed a lawsuit against the defendant seeking (1) a writ of administrative mandate to compel defendant to issue a design review permit and (2) damages under *42 U.S.C. § 1983*. The trial court sustained defendant's demurrer to the section 1983 claim without leave to amend and dismissed that claim. The trial court also, however, granted plaintiffs' petition for writ of mandate. Plaintiffs appealed arguing the ruling on the section 1983 claim was error and defendant cross-appealed arguing the granting of the writ of administrative mandate was error.

The court of appeal reversed the judgment granting the writ of mandate and directed the trial court to enter a new judgment denying the writ, but affirmed the judgment in all other respects (*69 Cal. App. 4th 166, 189)* . With regard to the section 1983 claim based on a taking, the court held that the complaint alleged no facts sufficient to show the claim was ripe. The court noted that a demurrer may be sustained when the complaint shows on its face the claim is not ripe for adjudication. A plaintiff's action for damages under section 1983 based on a regulatory taking is premature until the plaintiff has (1) obtained a final determination from the administrative agency charged with enforcing the regulation and (2) exhausted his or her state provided remedies for receiving just compensation for the alleged taking. California provides a procedure for an applicant to seek just compensation for alleged injuries from regulatory takings. A section 1983 claim is ripe for adjudication only when those avenues have been pursued and fail to yield just compensation for

the alleged regulatory taking (*69 Cal. App. 4th 166, 188)* . The face of the complaint showed that plaintiffs' had not exhausted those state remedies but instead was pursuing those remedies in this action. Thus, to the extent the section 1983 claim was based on an assertion of a taking without just compensation it was premature, and defendant's demurrer was properly sustained on that basis (*69 Cal. App. 4th 166, 189)* .

[b] Another Matter to Be Resolved

In ***Schell v. Southern Cal. Edison Co.*** *(1988) 204 Cal. App. 3d 1039, 251 Cal. Rptr. 667* , plaintiff was the owner of a recreational park who brought an action against a utility company for damages, constructive trust, and injunctive relief, alleging that the utility company discriminated against him by charging him a commercial rate for electricity and by refusing to supply him under a rate schedule reserved for mobile homes. The utility company generally demurred to the complaint on the ground that the complaint failed to state a cause of action. The trial court sustained the defendant utility company's general demurrer without leave to amend.

The court of appeal affirmed the judgment, stating that a demurrer is appropriate if the causes of action are not yet ripe. In the plaintiff's case, his causes of action would not ripen until the Public Utilities Commission and, ultimately, the Supreme Court had made a final determination as to whether or not the rate schedule reserved for mobile homes applied to him. The court concluded, therefore, that the causes of action in the complaint were not properly before the court at that time (*204 Cal. App. 3d 1039, 1047)* .

[c] Action on Note Before Maturity

Southern Cal. M. Co. v. Skinner *(1911) 17 Cal. App. 205, 119 P. 106* , was an action on a promissory note and for the balance due under a sales contract. A copy of each of these instruments, neither of which referred to the other, was attached to the complaint. The complaint alleged a sale by plaintiff to defendant of a piano for $405, that on July 15, 1909, defendant executed and delivered to plaintiff his promissory note and contract in payment for the piano, that no part of the $405, other than the sum of $25, had been paid, that defendant had defaulted in his payments, that plaintiff had declared the balance of the sum due, and that no part of the balance had been paid. The note was for $380 payable 48 months after date with interest at 6 percent per annum and providing for payment of attorney's fees in the amount of 10 percent of the judgment if suit were brought to enforce payment of the note. The action was commenced long before the date the note matured. Defendant demurred to the complaint both generally, for failure to state a cause of action, and specially on the ground of uncertainty in that it could not be determined from the complaint whether the action was on the promissory note, the alleged agreement, or both. The trial court overruled the demurrer and, after trial, rendered judgment for plaintiff. Defendant appealed.

The court of appeal reversed with directions to the trial court to sustain the demurrer. With respect to the promissory note, the court pointed out that the action was commenced some six months after its date, which, by its own terms, was not to become due until four years after that date, that the agreement contained no reference to the note, that the complaint failed to allege any fact under which the note might be declared due prior to its maturity date, and that the complaint, therefore, failed to state facts sufficient to constitute a cause of action on the promissory note (*17 Cal. App. 205, 208)* .

[d] Action on Accelerated Contract Balance Prior to Occurrence of Condition Precedent

The facts and procedural background of ***Southern Cal. M. Co. v. Skinner*** *(1911) 17 Cal. App. 205, 119 P. 106* , are *discussed under § 71.23[3][c]*. In *Southern Cal. M. Co.,* the agreement for the sale of the piano required payment of $25 cash on delivery of the instrument and the balance in installments of $8 per month, payable on the 15th day of each month. It was further provided that should defendant fail to pay monthly installments when due, plaintiff could rescind the contract and take possession of the piano, or if such monthly payment remained due and unpaid for a period of 60 days, plaintiff could declare the whole sum still unpaid under the contract due and payable. The complaint alleged

defendant's default in paying installments but not that they were unpaid for a period of 60 days.

The court of appeal reversed the judgment with directions to the trial court to sustain the demurrer. The court pointed out that the agreement gave plaintiff no right to accelerate payment of the balance merely because of defendant's default in the payment of an installment. The court said that to constitute a cause of action for a breach of the contract, assuming that such a right exists, the complaint should not only allege that defendant had defaulted in the payment of one or more installments, but that the default had continued for the period of 60 days (*17 Cal. App. 205, 208)* .

[e] Action Against Buyer Before Expiration of Credit Period

Landis v. Morrissey *(1886) 69 Cal. 83, 10 P. 258* , was an action to recover from defendant, as the survivor of a partnership, the agreed price of goods, wares, and merchandise allegedly sold by plaintiffs to the partnership. The complaint alleged that payment was to be made on demand, that demand had been made, and that neither all nor any part of the agreed price had been paid. Defendant denied specifically the material allegations of the complaint, including the allegation that payment was to be made on demand. At trial, defendant offered to prove that the sale had been made on a credit of 60 days, which period had not expired when the action was commenced. Plaintiffs' objection that the offered testimony was not within the issues raised by the pleadings was sustained, and defendant appealed from a judgment for plaintiffs.

The Supreme Court reversed. It said that defendant's offer was to show that the cause of action did not exist when the action was begun and that the issue was properly raised by defendant's denials (*69 Cal. 83, 86-87)* . The Court observed that counsel erred in assuming that defendant's offer could only be presented in a plea in abatement, and said that it went to the merits of the action and showed it never existed when suit was brought, that it was an answer to the whole action and a perfect defense, that such a defense can be made without any plea in abatement, and that it does not merely abate the action but defeats it (*69 Cal. 83, 87)* .

[f] Action on Debt Superseded by Nonmatured Promissory Note

Gardner v. Shreve *(1949) 89 Cal. App. 2d 804, 202 P.2d 322* , was an action to recover the sum of $5,000 which defendant, after termination of the parties' business relationship, promised to repay to plaintiff on or before April 15, 1947. The defendant failed to pay. Plaintiff's action on the agreement to recover the $5,000, with interest at 7 percent from April 15, 1947, was filed November 20, 1947. On November 21, 1947, plaintiff received by registered mail a promissory note signed by defendant and dated April 15, 1947, in which she promised to pay the sum of $5,000 one year from the date with interest at the rate of 6 percent. The letter had been mailed on November 19, 1947, and the complaint was served on defendant on November 24, 1947. The note was never returned to defendant, but in the course of the present action it was delivered by plaintiff to the court with an affidavit that plaintiff did not at any time accept it. Plaintiff's motion for summary judgment was granted and defendant appealed.

The court of appeal reversed on the ground a triable issue of fact was presented With respect to the acceptance of the note and said that an executed agreement to give and receive the note in full satisfaction of the debt is effective to discharge the original debt (a novation) and that even when the note is accepted without such agreement, the right of action on the debt is suspended until maturity of the note (*89 Cal. App. 2d 804, 808)* .

The court also rejected plaintiff's argument that the judgment should be affirmed since after its entry the note matured, saying that the defect could not be cured by a supplemental complaint founded on what subsequently occurred (*89 Cal. App. 2d 804, 810)* . However, it appears that this rule has been modified by subsequent cases [*see § 71.34*].

[g] Action Against Personal Representative of Decedent Prior to Presentation of Claim

Burke v. Maguire *(1908) 154 Cal. 456, 98 P. 21* , was one of nine appeals in nine actions, each by a different plaintiff,

taken against defendant, the administrator of the estate of one Bridget McDermott. Plaintiffs were legatees under the will of Hugh McDermott, deceased, and distributees under the final distribution of his estate. Bridget McDermott had been the executrix of his estate. Each plaintiff was suing the administrator of her estate to recover the share of the legacy to which he was entitled under the distribution of Hugh McDermott's estate. In each case, the trial court sustained a demurrer to the complaint and rendered judgment for defendant, from which the plaintiff appealed. The allegations in each case were the same and the cases were consolidated on appeal and presented for decision on the transcript of the record in one alone. The second count alleged the background facts and that the money required by terms of Hugh's will to be distributed to trustees for the eventual benefit of plaintiffs was never paid to the trustees, but that Bridget, until her death, retained possession of it as executrix of Hugh's estate, and that plaintiff was entitled to a part of the fund applicable to the legacies and sought judgment against Bridget's estate for the share due plaintiff.

The Supreme Court affirmed the judgment. The Court held that the second count was deficient by failing to allege that any claim for the demand sued on was ever presented for allowance against Bridget's estate, since the demand was clearly founded on contract and the Code of Civil Procedure (now see Probate Code) requires that such demands be presented to the administrator of the estate for allowance [Code Civ. Proc. § 1493; repealed, *now see Prob. Code § 9002(a)*] and provides that no action can be maintained on it unless a claim for it has been so presented before the action is begun [*Code Civ. Proc. § 1500*; repealed, *now see Prob. Code § 9351*] (*154 Cal. 456, 461-462)* .

California Points & Authorities

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Volume 7A Chapters 71-79 DEMURRERS
CHAPTER 71 DEMURRERS AND MOTIONS FOR JUDGMENT ON THE PLEADINGS
PART II. FORMS
A. Demurrers
1. General Demurrers to Complaint

7A-71 California Points & Authorities § 71.24

§ 71.24 Supporting General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Action Barred by Prior Judgment (Res Judicata)

[1] FORM Supporting General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Action Barred by Prior Judgment (Res Judicata)

[*The following should be combined with a general form of memorandum in support of a general demurrer (see § 71.20).*]

THE GENERAL DEMURRER TO THE COMPLAINT SHOULD BE SUSTAINED BECAUSE IT APPEARS ON THE FACE OF THE COMPLAINT [OR FROM MATTERS OF WHICH THE COURT IS REQUIRED TO OR MAY TAKE JUDICIAL NOTICE] THAT THE ACTION IS BARRED BY A PRIOR JUDGMENT AND IS RES JUDICATA.

A. Conclusiveness of Judgment. A final judgment is conclusive with respect to the matter adjudicated in an action or proceeding in rem; in other actions a judgment is conclusive as between the parties, their successors in interest, and persons who were not parties but who controlled the action (*Code Civ. Proc. § 1908*).

B. Effect of Prior Judgment. A final judgment on the merits between the same parties bars a later action on the same cause of action (*Weil v. Barthel (1955) 45 Cal. 2d 835, 839, 291 P.2d 30* ; *Carroll v. Puritan Leasing Co. (1978) 77 Cal. App. 3d 481, 486, 143 Cal. Rptr. 772*).

C. Showing That Action Is Barred. When all the facts necessary to show that the action is barred by res judicata are within the complaint or subject to judicial notice, the complaint is subject to a general demurrer on the ground it fails to state facts sufficient to constitute a cause of action (*Carroll v. Puritan Leasing Co. (1978) 77 Cal. App. 3d 481, 485, 143 Cal. Rptr. 772*).

D. Judicial Notice of Prior Action. In ruling on a demurrer the court may take judicial notice of the records of

_____ [any court of this state *or* any court of record of the United States *or* any court of record of any state of the United States] and on proper request therefor is required to do so (*Evid. Code §§ 11, 452(d), 453*; *Code Civ. Proc. §§ 430.10(e), 430.30(a), 430.70*; *Lazzarone v. Bank of America (1986) 181 Cal. App. 3d 581, 590, 226 Cal. Rptr. 855*). Pursuant to this requirement, the court is hereby requested to take judicial notice of the case of _____ [*name*] vs. _____ [*name*], No. _____ filed in the _____ Court of _____ and to enable it to do so, certified copies of the complaint, answer, and judgment filed in that case, together with a certificate from the clerk, and under the seal, of that court authenticating these papers and certifying that the judgment is final, are attached hereto and made a part hereof.

[*Optional*] **E. Sameness of Parties.** Parties are deemed to be the same when those between whom the evidence is offered were on opposite sides in the former case, and a judgment or other determination could in that case have been made between them alone, though other parties were joined with both or either (*Code Civ. Proc. § 1910*).

[*Optional*] **F. Sameness of Actions.** Under the primary rights theory, which is consistently applied in California to identify a cause of action under the doctrine of res judicata, an invasion of one primary right gives rise to a single cause of action. Two actions constitute a single cause of action if they both affect the same primary right. The cause of action is based on the harm suffered rather than the particular theory asserted by the litigant. Although there may be multiple theories on which recovery might be predicated, one injury gives rise to only one claim for relief. A cause of action is to be distinguished from the remedy or relief sought, in view of the fact that a plaintiff may frequently be entitled to several species of remedy for the enforcement of a single right (*Weikel v. TCW Realty Fund II Holding Co. (1997) 55 Cal. App. 4th 1234, 1246-1247, 65 Cal. Rptr. 2d 25* ; *see* *Hatch v. Bank of America (1960) 182 Cal. App. 2d 206, 211, 5 Cal. Rptr. 875*). When there is only one primary right, an adverse judgment on the merits in the first suit is a bar even though the second suit is based on a different theory, or seeks a different remedy. Thus, when a plaintiff splits a cause of action (*i.e.*, divides a primary right into more than one lawsuit) and a judgment on the merits is entered in one of the lawsuits, the defendant in the second suit may set up that judgment as a bar under the principles of res judicata (*Weikel v. TCW Realty Fund II Holding Co. (1997) 55 Cal. App. 4th 1234, 1249-1250, 65 Cal. Rptr. 2d 25* ; *Phillips v. Western Pac. R.R. Co. (1971) 22 Cal. App. 3d 441, 444, 99 Cal. Rptr. 451*).

[*Optional*] **G. Sameness of Issues.** Res judicata bars relitigation of an issue previously adjudicated between the same parties or their privies to final judgment on the merits (*Sych v. Insurance Co. of North America (1985) 173 Cal. App. 3d 321, 328, 220 Cal. Rptr. 692*).

[*Optional*] **H. Matters Concluded by Former Judgment.** That which appears on the face of a former judgment to have been adjudged, or which was actually and necessarily included therein or necessary thereto, is deemed to have been adjudged by that judgment (*Code Civ. Proc. § 1911*).

[*Optional*] **I. Issues That Might Have Been Raised.** The prior judgment determines not only every issue raised in that action, but every issue that might have been raised (*Interinsurance Exchange of the Auto. Club v. Superior Court (1989) 209 Cal. App. 3d 177, 183, 257 Cal. Rptr. 37* ; *Carroll v. Puritan Leasing Co. (1978) 77 Cal. App. 3d 481, 486, 143 Cal. Rptr. 772*).

[*Optional*] **J. Voluntary Dismissal With Prejudice.** A voluntary dismissal of an action with prejudice constitutes a retraxit and bars a second action based on the same factual situation (*Kronkright v. Gardner (1973) 31 Cal. App. 3d 214, 218-219, 107 Cal. Rptr. 270*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a general demurrer to a complaint when the present action

is barred by a former judgment between the same parties on the same cause and, consequently, is res judicata.

These points and authorities should be combined with a general form of memorandum in support of a demurrer to a complaint made on the ground that the complaint fails to state facts sufficient to constitute a cause of action [*see § 71.20*]. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. That is, counsel would refer to facts in the complaint or to matters of which the court is required to or may take judicial notice establishing that the current action is barred by res judicata.

[b] Sameness of Parties

This form provides an optional paragraph for use if the parties in the two actions are not identical [*see* Optional Paragraph E]. For example, it is appropriate when the prior action involved multiple plaintiffs or multiple defendants, or both, and the present action is by a single plaintiff who was a plaintiff in the prior action against a single defendant who was a defendant in the prior action. Or, the form may be used when the relationship of the parties in the two lawsuits is not identical, such as when the roles of the parties as plaintiff and defendant are reversed. In addition, since successors in interest to the original parties and persons who control the prior action may also be privies for the purposes of res judicata, the form may also be used in such cases [*see Code Civ. Proc. § 1908(a)(2), (b)*; *see also § 71.24[3][a]*].

[c] Sameness of Actions

This form provides an optional paragraph for use if the two actions are on the same cause of action but in each, liability is predicated on a different legal theory [*see* Optional Paragraph F]. For example, it is appropriate if in the first action plaintiff sues to recover on the basis of negligence and loses, and in the second suit sues on the same cause of action basing liability on strict liability in tort. The paragraph may also be used when the remedy or relief sought in the two actions is different. For example, it is appropriate if a plaintiff injured in an automobile accident sues and recovers judgment for general damages for personal injuries, and then sues to recover special damages for medical expenses incurred in treating the personal injuries.

[d] Sameness of Issues

This form provides an optional paragraph for use if the issues litigated in the prior action are identical to the issues in the present action, and the prior action was adjudicated between either the same parties or their privies, even if the second suit is for a different cause of action [*see* Optional Paragraph G]. For example, it is appropriate in an action brought by a third party against an insurer, after a prior action against the insured has been concluded adversely to plaintiff.

[e] Matters Concluded by Former Judgment

This form provides an optional paragraph for use if the issue sought to be adjudicated in the present action was necessarily, although not expressly, adjudicated in the prior action [*see* Optional Paragraph H].

[f] Issues That Might Have Been Raised

This form provides an optional paragraph for use if the issue sought to be adjudicated in the present action could have been, but was not, litigated in the prior action [*see* Optional Paragraph I]. For example, if a plaintiff injured in a car accident sues and recovers judgment for damages for personal injuries and in a second action sues to recover property damage for the loss of his or her automobile proximately caused by the same collision (injury to person and injury to property are separate causes of action--that is, invasion of two different primary rights--even though they both result from the same wrong).

[g] Voluntary Dismissal With Prejudice

This foregoing form provides an optional paragraph to use if the two actions are between the same parties on the same cause and plaintiff dismissed the prior action with prejudice [*see* Optional Paragraph J].

[h] Collateral Estoppel Distinguished

Closely related to res judicata is the doctrine of collateral estoppel by judgment. It decrees that any issue necessarily decided in the litigation of a cause of action finally determined by a court of competent jurisdiction is conclusively determined as to the parties or their privies if it is involved in a subsequent lawsuit on a different cause of action [*O'Connor v. O'Leary (1967) 247 Cal. App. 2d 646, 648, 56 Cal. Rptr. 1]* . This defense is seldom one that would appear from the face of the complaint or, without the introduction of extrinsic evidence, from judicially noticed matter, and would normally be raised by pleading it as an affirmative defense and then moving either for a separate trial of that issue under *Code Civ. Proc. § 597* or for summary judgment under *Code Civ. Proc. § 437c*.

For further discussion comparing the effects of res judicata and collateral estoppel, see Ch. 491, *Res Judicata* in California Forms of Pleading and Practice.

For points and authorities asserting the doctrine of collateral estoppel in contexts of a wrongful death action or indemnity, see Ch. 66, *Death and Survival Actions* and Ch. 115, *Indemnity and Contribution* , respectively.

[i] Related Points and Authorities

For points and authorities in support of a special demurrer to a complaint on the ground of another action pending between the same parties for the same cause that contains additional points and authorities against splitting a cause of action, see *§ 71.65*.

[j] Opposing Points and Authorities

In an appropriate case, the memorandum *set out in § 71.35* may be used to oppose the general demurrer supported by the foregoing memorandum.

See also *§ 71.20[2]*.

[3] Discussion of Authorities

[a] Conclusiveness of Judgment

Code Civ. Proc. § 1908 provides that the effect of a judgment or final order in an action or special proceeding before a court or judge of this state, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows:

1. In case of a judgment or order against a specific thing, or in respect to the probate of a will; or the administration of the estate of a decedent; or in respect to the personal, political, or legal condition or relation of a particular person, the judgment or order is conclusive on the title to the thing, the will, or administration, or the condition or relation of the person.

2. In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding (*Code Civ. Proc. § 1908(a)*).

In addition, the section provides that a person who is not a party but who controls an action, individually or in cooperation with others, is bound by the adjudications of litigated matters as if the person were a party if the person has a proprietary or financial interest in the judgment or in the determination of a question of fact or of law with reference to the same subject matter or transaction. If the other party has notice of that participation, the other party is equally bound (*Code Civ. Proc. § 1908(b)*).

[b] Effect of Prior Judgment

Weil v. Barthel *(1955) 45 Cal. 2d 835, 291 P.2d 30* , was an action to compel redemption and to quiet title to real property. Plaintiff alleged that in a prior action against plaintiff's assignors in the same court involving title to the same property, the property was by judgment of the court ordered sold as on execution and the effect of the judgment was to create in plaintiff's assignors, as an equitable interest, a right to redeem the property. The complaint included the official record of the prior judgment but pleaded its terms by a statement of their legal effect. It was further alleged that pursuant to the judgment the property was sold by the sheriff at execution sale to defendants and that prior to expiration of the redemption period the sheriff delivered a deed of the property to defendants who recorded it. The trial judge, in ruling on defendants' general demurrer, considered the prior judgment, concluded that the present action was barred by it, and sustained the demurrer without leave to amend.

The Supreme Court affirmed the judgment. The Court pointed out that a final judgment is res judicata of the issues involved in the action when the trial court has jurisdiction (*45 Cal. 2d 835, 837)* . The Court concluded that the very issue presented in the present case was before the trial court in the prior action and that all equity of redemption was expressly foreclosed in that judgment (*435 Cal. 2d 835, 839)* .

Carroll v. Puritan Leasing Co. *(1978) 77 Cal. App. 3d 481, 143 Cal. Rptr. 772* , was a quiet title action by which plaintiff sought to invalidate a judgment lien against her separate property. In a prior action, defendant had secured judgment against plaintiff and her husband, jointly and severally, for breach of their restaurant equipment lease and for plaintiff's breach of her guarantee of the lease. That decision became final. Defendant then recorded with the county recorder an abstract of judgment creating a lien on plaintiff's separate real property in the county and commenced execution proceedings against that property. In her present action, plaintiff alleged that (1) she was the sole owner of the property; (2) she and her former husband had entered into the lease agreement with defendant for rental of certain restaurant equipment; (3) the restaurant enterprise was community property; (4) defendant obtained a judgment against them for the lease, which she asserted was a debt secured by the restaurant enterprise; (5) the abstract of judgment filed by defendant affected her land which washer separate property; and (6) pursuant to former Civ. Code § 5123 (relating to liability of spouse's separate property for debt secured by hypothecation of community property), her sole and separate property could not be held liable for the debt. Defendant's demurrer to the complaint was sustained and, on plaintiff's failure to amend, the trial court dismissed the action on the ground it was res judicata.

The court of appeal affirmed the judgment. The court said that when a judgment prior to the quiet title action determined the same rights between the same parties as in the quiet title action, that judgment was a defense to the quiet title action (*77 Cal. App. 3d 481, 485)* , and that it is well settled that a final judgment on the merits between the same parties bars a later action on the same cause (*77 Cal. App. 3d 481, 486)* . The court pointed out that by bringing a quiet title action to assert limits on the liability of her separate property based on Civ. Code § 5123, plaintiff was once again attempting to litigate the extent of personal liability under the contract of guarantee, and that that cause of action had been conclusively litigated on its merits by the same parties in the previous action (*77 Cal. App. 3d 481, 488)* .

The court added that even if it assumed that which it did not assume--that the quiet title action was based on a distinct cause of action--the action would still be barred under the doctrine of collateral estoppel (*77 Cal. App. 3d 481, 489-494)* .

[c] Showing That Action Is Barred

The facts and procedural background of ***Carroll v. Puritan Leasing Co.****(1978) 77 Cal. App. 3d 481, 143 Cal. Rptr. 772* , are *discussed under § 71.24[3][b]*. In *Carroll*, the defendant had demurred to the complaint on the ground that the action was barred by a former judgment in its favor against plaintiff and her husband, jointly and severally, and had properly invoked judicial notice of the prior action. The trial court sustained the demurrer with leave to amend and, on plaintiff's failure to amend, granted defendant's motion to dismiss. On appeal, plaintiff contended that the prior action did not decide the limitations on the liability of her separate property under former Civ. Code §§ 5121 and 5123, and that consequently res judicata did not apply.

The court of appeal affirmed the judgment. The court held that the prior action was res judicata as to the present action and barred it and said that if all of the facts necessary to show that the action is barred are within the complaint or subject to judicial notice, a trial court may properly sustain a general demurrer (*77 Cal. App. 3d 481, 485)* .

[d] Judicial Notice of Prior Action

For matters of which the court may take judicial notice and the procedure for invoking such notice, see *§ 71.21*.

In ***Lazzarone v. Bank of America*** *(1986) 181 Cal. App. 3d 581, 226 Cal. Rptr. 855* , plaintiff was a beneficiary of a trust who brought an action in superior court for damages based on negligence and fraud against a bank that administered the trust, after the plaintiff learned that the trust corpus sustained losses during the bank's administration. The bank demurred on grounds that the plaintiff's claims were within the exclusive jurisdiction of the probate court and were barred by res judicata. The trial court ordered the bank's demurrer sustained without leave to amend and entered a judgment dismissing the action. Plaintiff appealed.

The court of appeal affirmed the judgment. Although the plaintiff's principal contention was that the trial court erred in sustaining the bank's demurrer without leave to amend because the action was properly brought in superior court sitting outside of probate, the parties briefed the res judicata issue and the court found it dispositive of the appeal (*181 Cal. App. 3d 581, 590)* . The court noted that prior to the present action, the bank obtained from the probate court orders settling its several accounts and reports as trustee. Although affirmative defenses such as res judicata are not properly alleged in a complaint and ordinarily may not be raised on demurrer, a complaint maybe read as if it included matters judicially noticed. The bank requested the trial court to take judicial notice of all orders, pleadings, and other matters on file in the earlier matter before the probate court, and the trial court was required to judicially notice those matters on the bank's request [*Evid. Code §§ 452(d), 453*]. Under former Prob. Code §§ 1120, 1123 [*now see* Prob. Code §§ 17104(b), *17200(b)(5)*], the orders settling trustee accounts are given res judicata effect and are binding as to all matters passed on, but not binding as to those matters not passed on. Because the probate court, in approving the bank's several accountings and its request for discharge, necessarily passed on the bank's veracity and its exercise of due care, the probate court's orders are conclusive on those issues, and the plaintiff's complaint was therefore barred by the res judicata affect of those orders (*181 Cal. App. 3d 581, 587, 591-592)* .

[e] Sameness of Actions

Weikel v. TCW Realty Fund II Holding Co. *(1997) 55 Cal. App. 4th 1234, 65 Cal. Rptr. 2d 25* , involved an ongoing controversy entering its second decade concerning a small wedge of land that formed the boundary line between two adjacent shopping centers. Plaintiff owned a shopping center on one side of the wedge, and wished to build on the wedge. To accomplish this, plaintiff initially entered into an agreement with the developer of the shopping center on the other side of the wedge. The developer granted plaintiff an encroachment or building easement over its side of the wedge to allow plaintiff to build over the wedge. The developer then sold the shopping center, and shortly thereafter plaintiff learned that the building easement would not work because the city, as its policy, would not approve construction which straddled a lot boundary. Plaintiff and the new owner then entered into an agreement enabling plaintiff to build on the wedge, but the building department would not approve the plans because the lot line relocation

caused a tenant's shop to be in violation of both the building code and the zoning code. All of plaintiff's proposals to solve the concerns of the building department were rejected by the department, the tenant, and the new owner. The initial lawsuit was commenced against the new owner, its developer, and the tenant. The complaint included counts for breach of agreement, fraud, declaratory relief, injunction, and a common count for restitution.

Ultimately, judgment was rendered in favor of defendants, and the court of appeal affirmed the great bulk of the trial court's rulings. Slightly over one month later, when that opinion became final, plaintiff filed another lawsuit against all of the original defendants seeking to: quiet title to interests conveyed by the building easement; recover damages for trespass; abate a nuisance; recover damages for alleged breach of warranty and of an implied covenant; and obtain various declarations of rights and restitution for use of the easements. The owner demurred, one ground being that plaintiff's claims were barred by res judicata, and the tenant moved for judgment on the pleadings on the same grounds. The court sustained the demurrer without leave to amend, holding that the action was barred by the doctrine of res judicata. Judgment of dismissal was thereafter entered. Similarly, after the developer's default was set aside, its demurrer to the complaint was sustained without leave to amend, and judgment of dismissal was thereafter entered. Plaintiff appealed.

The court of appeal affirmed the judgment. The court pointed out that the doctrine of res judicata precludes piecemeal litigation that results from splitting a single cause of action or relitigating the same cause of action on a different legal theory or for different relief. The central question is whether plaintiff's second suit was an attempt to relitigate the same cause of action on a different legal theory. In conducting this analysis, it is irrelevant whether identical causes of action were in fact litigated in the two lawsuits; all that is required is for plaintiff to have had the opportunity to litigate in the first lawsuit the claims that were litigated in the second. The relevant question is whether the causes of action resolved the first lawsuit, and those matters as to which plaintiff then had an opportunity to litigate, embrace the claims sought to be asserted in the second lawsuit (*55 Cal. App. 4th 1234, 1245-1246)* . This in turn requires a determination as to the primary rights to be asserted. For the purpose of identifying a cause of action under the doctrine of res judicata, California has consistently applied the primary rights theory under which an invasion of one primary right gives rise to a single cause of action. But the cause of action is based on the harm suffered, as opposed to the particular theory asserted by the litigant. Even when there are multiple theories on which recovery might be predicated, one injury gives rise to only one claim for relief. Thus, two actions constitute a single cause of action if they both affect the same primary right (*55 Cal. App. 4th 1234, 1246)* . A cause of action is to be distinguished from the remedy or relief sought, for a plaintiff may frequently be entitled to several species of remedy for the enforcement of a single right (*55 Cal. App. 4th 1234, 1247)* . The primary rights theory is most often invoked when a plaintiff attempts to divide a primary right and enforce it in two lawsuits. The theory prevents this result in one of two ways: (1) if the first suit is still pending at the time of the filing of the second suit, defendant may plead that fact in abatement in the second suit, or (2) if an adverse judgment on the merits has been rendered against plaintiff, under the principles of res judicata, defendant may set up the judgment as a bar in the second suit (*55 Cal. App. 4th 1234, 1249)* . Accordingly, when there is only one primary right, an adverse judgment on the merits in the first suit is a bar even though the second suit is based on a different theory or seeks a different remedy (*55 Cal. App. 4th 1234, 1249-1250)* .

The court pointed out that in the case at bar, the primary right involved must be seen as plaintiff's interest in constructing a building on a portion of the wedge of land. The corresponding primary duty owed to plaintiff by defendant owner is no more than the duty not to unreasonably interfere with plaintiff's rights, but that duty cannot be transmuted into an obligation to tear down the structure of an existing tenant for the sole benefit of plaintiff. Essentially, the refusal of the owner to damage its own tenant for the benefit of plaintiff is the breach of the primary right which is the subject of plaintiff's second lawsuit, just as it was asserted as a basis for judicial action in the first lawsuit. This does not suffice (*55 Cal. App. 4th 1234, 1248)* .

Hatch v. Bank of America *(1960) 182 Cal. App. 2d 206, 5 Cal. Rptr. 875* , was an action for damages for conversion of a truck, and for the loss of operating revenues. Plaintiff had pursued to final judgment a prior action against the same defendants and others to quiet title to the same truck, claiming to be the owner of the truck. Final judgment in that case

was entered in favor of plaintiff. A second action was commenced to recover damages for the conversion and for the loss of operating revenues for the period of time during which plaintiff was deprived of the use and benefit of the truck. On separate trial of the special defense of res judicata, the trial court found that the damages sought had accrued at the time the prior action was filed, and concluded that the relief sought was barred by the judgment in the prior action.

The court of appeal affirmed judgment for defendants on the ground that the action was barred by the doctrine of res judicata. A party may not split a single cause of action raising the same obligation as the basis of separate suits. When this is done, the judgment in the first action may be pleaded as a bar to a subsequent suit based on the same fundamental claim that could have been presented in the first action (*182 Cal. App. 2d 206, 210-211)* . Quoting from *Wulfjen v. Dolton (1944) 24 Cal. 2d 891, 895-896, 151 P.2d 846* (discussed in *§ 71.65[3][d]*), the Court held that "the violation of one primary right constitutes a single cause of action, although it may entitle the injured party to many forms of relief, and the relief is not to be confounded with the cause of action, one not being determinative of the other" (*182 Cal. App. 2d 206, 211)* .

Phillips v. Western Pac. R.R. Co. *(1971) 22 Cal. App. 3d 441, 99 Cal. Rptr. 451* , was an action by an insurance company, as subrogee, to recover from a railroad company the full face amount of a policy the insurance company had paid its insureds as a result of the destruction of their real and personal property by a fire for which defendant railroad was responsible. The insureds were joined as defendants under *Code Civ. Proc. § 382*, which provides that if the consent of one who should have been joined as plaintiff cannot be obtained, that person may be made a defendant. The insureds cross-complained against the railroad for the total amount of alleged damage to their property as a result of the fire, which greatly exceeded the amount of the insurance company's claim. The railroad settled with the insurance company for the full amount of insurance paid by it, and judgment in that amount was entered for plaintiff. The railroad then filed an answer to the cross-complaint in which it alleged that the insureds were proceeding on the same cause of action as the insurer, and that they were barred from splitting their cause of action. The insureds' demurrer to this defense was sustained without leave to amend, and after trial, judgment was rendered for the insureds. The railroad appealed.

The court of appeal affirmed the judgment, determining that the procedure followed by plaintiff and the insureds in the trial court was proper, and that no splitting of causes of action was involved. The court noted that the rule against splitting a cause of action is based on two principles: (1) the defendant should be protected against vexatious litigation, and (2) it is against public policy to permit litigants to consume the court's time by relitigating matters already judicially determined, or by asserting claims which properly should have been settled in some prior action. The court further acknowledged that the rule against splitting a cause of action is harsh as applied in some cases, and consequently, in some situations approaches to the rule have been developed where causes of action should be viewed with flexibility to avoid a harsh result not intended by the basic principles of the rule. One of these situations is in regard to actions by a partial assignee or subrogee. A partial subrogee may sue, as in the case at bar, the negligent party who cause the monetary damage partially paid by the subrogee (*22 Cal. App. 3d 441, 444-445)* .

[f] Sameness of Issues

Sych v. Insurance Co. of North America *(1985) 173 Cal. App. 3d 321, 220 Cal. Rptr. 692* , was an action brought on behalf of a minor against the insurer of a physician alleging several causes of action based on the minor's premature birth and complications arising from the premature birth. The action was brought under *Ins. Code § 790.03* (statutory remedy for unfair insurance practices), prior to the California Supreme Court's holding in *Moradi-Shalal v. Fireman's Fund Ins. Companies (1988) 46 Cal. 3d 287, 297-305, 250 Cal. Rptr. 116, 758 P.2d 58* (discussed in Ch. 120, *Insurance* , Part III, Subpart B) precluding a private action by a third party under that statute. Plaintiff had previously filed a suit against the physician for damages based on professional negligence. Prior to the trial, plaintiff and defendants in the instant action attempted unsuccessfully to negotiate a settlement. A jury in the prior trial found in favor of defendant physician. Defendants in the instant action filed demurrers without leave to amend, on the ground that plaintiff could not state a cause of action. The trial court sustained the demurrers, and plaintiff appealed.

The court of appeal affirmed, holding that the previously litigated action against the physician constituted a bar to the instant action (*173 Cal. App. 3d 321, 328*). Principles of public policy and res judicata preclude plaintiff from relitigating the issue of the physician's alleged negligence and liability. It is a rational inference, in a third-party action against an insurer, that the value of plaintiff's claim is equivalent to the amount of judgment entered against the insured. Even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified (*173 Cal. App. 3d 321, 328*). Moreover, the court held that the prior adverse judgment precluded a prima facie case for violation *Ins. Code § 790.03(h)(5)* (Unfair Practices Act), in that the complaint fails to state facts sufficient to constitute a cause of action (*173 Cal. App. 3d 321, 327-328*). (As mentioned previously, a private cause of action no longer exists for violation of this statute; however, the res judicata issue decided in the above case may apply with regard to a previous action brought by a third party pursuant to a common-law bad faith insurance action, following a proper assignment of the claim to the third party by the insured. See Ch. 120, *Insurance* , Part III, Subpart A.)

[g] Matters Concluded by Former Judgment

Under *Code Civ. Proc. § 1911*, that only is deemed to have been adjudged in a former judgment which appears on its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto.

[h] Issues That Might Have Been Raised

Interinsurance Exchange of the Auto. Club v. Superior Court *(1989) 209 Cal. App. 3d 177, 257 Cal. Rptr. 37* , was a mandate proceeding that arose out of an action by an insured against her insurer for damages for breach of the covenant of good faith and fair dealing. The insured had been involved in an automobile accident with another driver who was also insured by the same insurer. The insured signed a release for all claims connected with the accident. The insurer thereafter refused to renew her insurance, and she filed a negligence action against the other driver, who obtained a summary judgment. On appeal from that judgment, the insured argued for the first time that the insurer had committed fraud and overreaching. The summary judgment was affirmed. The insured then filed the instant action against the insurer. The insurer's demurrer to the complaint, based on collateral estoppel, was overruled, and the insurer petitioned the court of appeal for a writ of mandate.

The court of appeal issued the writ, directing the superior court to vacate its order overruling the defendant's general demurrer to the complaint, to enter an order sustaining the demurrer without leave to amend, and to dismiss the action. The court quoted extensively from *Sutphin v. Speik (1940) 15 Cal. 2d 195, 202, 99 P.2d 652* and concluded that the issue involved (breach of the covenant of good faith and fair dealing) was the same as that raised on the prior appeal (alleged fraud and overreaching of the insurer) and could have been decided in the earlier action had it been raised in the trial court. The court said that as a result of the final adjudication of the issue of the effectiveness of the insured's assent to the release, which was based on facts with which the insured could have urged theories of fraud and overreaching as bases for vitiating her consent, the insured is precluded from asserting her cause of action for breach of the covenant of good faith and fair dealing based on the same factual background (*209 Cal. App. 3d 177, 183)* .

The facts and procedural background of ***Carroll v. Puritan Leasing Co.****(1978) 77 Cal. App. 3d 481, 143 Cal. Rptr. 772* , are *discussed under § 71.24[3][b]*. In *Carroll*, the plaintiff contended that the liability of her separate property for the judgment had not been adjudicated in the prior action because the issue had been mentioned in neither the trial court's findings of fact nor judgment in that case. The liability of plaintiff's separate property had not been raised in the prior action until after trial and the case had been submitted on briefs to be filed. Defendants then fired their trial lawyer, and new counsel asked for an extension of time to file defendants' brief. It was in this request that, for the first time, it was asserted that the judgment in that action should contain a condition that the wife's separate property was not liable. This theme was expanded in the brief subsequently filed. The trial court's memorandum of decision on August 16, 1974, had

discussed this contention and had found it had no merit because "a wife who signs a guarantee cannot claim a lack of consideration because the transaction involved her spouse." On September 26, 1974, defendants had asked for special findings, one of which (finding seven) would have been to the effect that the property sold by the leasing company was the community property of the parties. A hearing with respect to findings was held November 8, 1974, and requested finding number seven was denied. The judgment, entered December 18, 1974, did not limit plaintiff's liability nor did it expressly say that her liability extended to her separate property (*77 Cal. App. 3d 481, 487 n.3* *77 Cal. App. 3d 481, 484)* .

The court of appeal in *Carroll,* after pointing out that a final judgment on the merits between the same parties bars a later action on the same cause, stated that the Prior Judgment determined not only every issue raised in that action, but every issue that might have been raised as well (*77 Cal. App. 3d 481, 486)* . The court observed that the prior judgment was not qualified by any stated limitation that it be satisfied only out of community property (*77 Cal. App. 3d 481, 487)* and explained that when former Civ. Code §§ 5121, 5123 operated to limit a party's personal liability, the judgment itself should have been specifically limited with a direction that it be satisfied only out of such separate property as is made liable by the section (*77 Cal. App. 3d 481, 488)* . When such limitation is appropriate, a general unqualified personal judgment would constitute error (*77 Cal. App. 3d 481, 488)* . Thus, plaintiff's assertion that her liability under the lease did not extend to her separate property interests was a matter within the scope of the previously litigated cause of action and barred her present action that sought in essence to subtract from rights that the previous judgment had confirmed to defendant (*77 Cal. App. 3d 481, 488)* .

[i] Voluntary Dismissal With Prejudice

Kronkright v. Gardner *(1973) 31 Cal. App. 3d 214, 107 Cal. Rptr. 270* , involved a second action after a prior action based on identical grounds had been voluntarily dismissed by plaintiff with prejudice. Defendant's general demurrer to the complaint in the present action was sustained without leave to amend and the action was dismissed as to him.

The court of appeal affirmed the judgment of dismissal. The court held that a voluntary dismissal of an action with prejudice constitutes a judgment (*31 Cal. App. 3d 214, 218)* and that the judgment constituted a retraxit and hence was a bar to the second action (*31 Cal. App. 3d 214, 218-219)* .

[4] Additional Authorities

[a] Effect of Prior Judgment

The facts and procedural background of ***Weikel v. TCW Realty Fund II Holding Co.*** *(1997) 55 Cal. App. 4th 1234, 65 Cal. Rptr. 2d 25* , are *discussed under § 71.24[3][e]*. In *Weikel,* the court of appeal stated that res judicata operates as a bar to maintaining a second suit between the same parties or parties in privity with them on the same cause of action. The doctrine of res judicata gives conclusive effect to a final judgment rendered on the merits by a court having jurisdiction of the cause (*55 Cal. App. 4th 1234, 1245)* .

The facts and procedural background of *Morton v. Loveman (1968) 267 Cal. App. 2d 712, 73 Cal. Rptr. 623* , are discussed in *§ 71.21[4][c]*. In *Morton v. Loveman,* the court of appeal affirmed the trial court's order sustaining the defendant's general and special demurrers without leave to amend. The court stated that when parties have once submitted a matter, or have had the opportunity of submitting it, for investigation and determination, and when they have exhausted every means for reviewing such determination in the same proceeding, it must be regarded as final and conclusive unless it can be shown that the prevailing party, by some extrinsic or collateral fraud (which did not appear in the present case), has prevented a fair submission of the controversy (*267 Cal. App. 2d 712, 717-718)* .

Legg v. United Benefit Life Ins. Co. (1960) 182 Cal. App. 2d 573, 6 Cal. Rptr. 73 , was an action filed March 12, 1959, by an insured in propria persona to recover monthly disability payments under a policy issued in October, 1948,

for an injury suffered in February, 1947 before the policy was issued. Plaintiff alleged that a judgment of dismissal under former Code Civ. Proc. § 583 [*now see Code Civ. Proc. §§ 583.110-583.430*] had been entered against her in a prior action on the same policy for the same injury but asserted that it was not res judicata as to any subsequent monthly disability benefits thereafter accruing. That is, she submitted to the application of the doctrine of res judicata as to her original claim. Defendant's general and special demurrers to the complaint were sustained without leave to amend and plaintiff appealed from the subsequent judgment of dismissal. The court of appeal affirmed. It pointed out that it could not be ascertained from the complaint whether the prior judgment was on the merits but that plaintiff had settled the issue by having submitted to application of the doctrine of res judicata any matter relating to initial liability under the policy by seeking only subsequently accruing payments (*182 Cal. App. 2d 573, 579)* . Because liability under the policy had been resolved against her by the Prior Judgment, there was no liability on which a continuing obligation to make monthly payments could be predicated (*182 Cal. App. 2d 573, 580)* .

See also *Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 554, 305 P.2d 20* (a complaint that discloses the existence of a prior judgment determining plaintiff's rights is subject to demurrer on the ground of res judicata unless additional facts are alleged that will justify setting aside the prior judgment).

[b] Showing That Action Is Barred

The facts and procedural background of *Weil v. Barthel (1955) 45 Cal. 2d 835, 291 P.2d 30* , are *discussed under § 71.24[3][b]*. In *Weil,* the Supreme Court held that a properly pleaded former judgment may be considered by the trial court on demurrer in determining whether it is res judicata of a plaintiff's alleged cause of action (*45 Cal. 2d 835, 837)* .

Note:

In *Weil,* the dissent was of the view that because a copy of the judgment had not been attached to the complaint and only portions of it had been pleaded, the trial court could not take judicial notice of the unpleaded portions that were the ones relied on by defendants in establishing the defense of res judicata. The law of judicial notice, however, has since been changed and under present law the court is expressly authorized to take judicial notice of the records of any court of this state [*see Code Civ. Proc. §§ 430.30(a), 430.70*; *Evid. Code §§ 452(d), 453*].

The facts and procedural background of *Legg v. United Benefit Life Ins. Co. (1960)182 Cal. App. 2d 573, 6 Cal. Rptr. 73* , are *discussed under § 71.24[4][a]*. In *Legg,* the court of appeal said that in raising the issue of res judicata on the face of her complaint and relying on several prior actions, plaintiff not only directly allowed the plea of res judicata to be raised on demurrer by defendant but also permitted the trial court to take judicial notice of the actions referred to (*182 Cal. App. 2d 573, 580)* . The court pointed out that it appeared from the face of the pleading that plaintiff had been previously defeated in a suit for the same injuries on the same policy and held that in this manner the plea of res judicata had been made good on demurrer (*182 Cal. App. 2d 573, 581)* .

[c] Sameness of Actions

The facts and procedural background of *Carroll v. Puritan Leasing Co. (1978) 77 Cal. App. 3d 481, 143 Cal. Rptr. 772* , are *discussed under § 71.24[3][b]*. In *Carroll,* plaintiff urged that the two actions were not the same because the prior action was based on breach of agreements, whereas the action at bar sought to quiet title to property, and to have it declared free of a judgment lien. In rejecting this contention, the court of appeal pointed out that the nature and substance of a cause of action are determined by the right or liability sought to be established or enforced, and that if the second action is based on the same right or obligation, the cause of action is the same even though different or additional relief is sought (*77 Cal. App. 3d 481, 487)* . The Court held that the two causes of action were the same (*77 Cal. App. 3d 481, 485)* , and that plaintiff's error in her contention rested on a false distinction between liability of persons and liability of property. The Court recognized that former Civ. Code §§ 5121 and 5123 referred to liability of a

spouse's separate property, but explained that these sections do not act directly on property or purport to exempt property from execution, as that phrase was used in the exemption provisions under former Code Civ. Proc. § 690 et seq. [*now see Code Civ. Proc. § 703.010 et seq.*], but rather that they act directly on persons, defining the nature and extent of personal liability for the contractual obligations of spouses (*77 Cal. App. 3d 481, 487-488)* .

[d] Issues That Might Have Been Raised

See Weikel v. TCW Realty Fund II Holding Co. (1997) 55 Cal. App. 4th 1234, 65 Cal. Rptr. 2d 25 , which is *discussed under § 71.24[3][e]*.

See also *Willson v. Security-First Nat'l Bank (1943) 21 Cal. 2d 705, 710-711, 134 P.2d 800* (although holding that, under law as it then existed, a court may not generally take judicial notice of another proceeding with a view to determining whether it is a bar to a pending suit, nevertheless said that it is the general rule that defense of res judicata may be raised by demurrer when the facts which give rise to it appear in the complaint); *Savage v. Emery (1967) 255 Cal. App. 2d 603, 604-605, 63 Cal. Rptr. 566* (prior action against minor and car owner resulted in rendition and payment of judgment for plaintiff; present action was against minor's father, on ground he was liable as signer of minor's application for driver's license under *Veh. Code § 17707*, to recover damages in addition to those recovered in prior action, and held that second action was barred by res judicata and trial court properly sustained demurrer to complaint without leave to amend).

[e] Judicial Notice of Prior Action

In *Dunkin v. Boskey (2000) 82 Cal. App. 4th 171, 98 Cal. Rptr. 2d 44* , the trial court had dismissed plaintiff's breach of contract action after sustaining a demurrer without leave to amend. In reversing the judgment for defendant in part and remanding the case to the trial court, the court of appeal noted that to determine whether to sustain a demurrer on res judicata grounds, judicial notice may be taken of a prior judgment and other court records. The court observed that the trial court had not confronted the issue of res judicata in sustaining defendant's demurrer (*82 Cal. App. 4th 171, 180 n.4*).

The facts and procedural background of *Carroll v. Puritan Leasing Co. (1978) 77 Cal. App. 3d 481, 143 Cal. Rptr. 772* , are *discussed under § 71.24[3][b]*. In *Carroll*, the court of appeal said, relying on *Evid. Code § 452*, that it is now settled that a court may take judicial notice of the official acts or records of any court in this state and any state of the United States (*77 Cal. App. 3d 481, 486)* . Pursuant to this authority, a trial court may take notice of the prior judgment in deciding whether to sustain a demurrer based on res judicata (*77 Cal. App. 3d 481, 486)* . In analyzing a demurrer based on res judicata, the court will take judicial notice of a prior judgment, whether or not pleaded, provided only that (1) the court has been correctly apprised of the judgment, and (2) the plaintiff is given adequate notice and opportunity to be heard as to the effect of the judgment (*77 Cal. App. 3d 481, 486)* .

The facts and procedural background of *Morton v. Loveman (1968) 267 Cal. App. 2d 712, 73 Cal. Rptr. 623* , are *discussed under § 71.24[4][a]*. In *Morton*, the court of appeal held that it was proper in that case for the trial court to take judicial notice of the records in the prior divorce action since the amended complaint made specific reference to it by name and case number, and in effect sought to make a collateral attack on the judgment therein. The court added that the former proceedings were further reflected by true copies of the relevant portions of the records accompanying the memorandum in support of the demurrer (*267 Cal. App. 2d 712, 717)* .

The facts and procedural background of *Kronkright v. Gardner (1973) 31 Cal. App. 3d 214, 107 Cal. Rptr. 270* , are *discussed under § 71.24[3][i]* and *[4][f]*. In *Kronkright*, the court of appeal, in holding that the present action was barred by the voluntary dismissal with prejudice of the prior action, said it had no doubt that the defense was properly raised by demurrer (*31 Cal. App. 3d 214, 217)* . The court explained that the demurrer was heard and determined in 1971 when *Code Civ. Proc. § 431.5* [*now see Code Civ. Proc. § 430.70*] was in effect, and that the memorandum

accompanying the demurrer properly invoked judicial notice of the earlier file pursuant to *Evid. Code §§ 452(d), 453* (*31 Cal. App. 3d 214, 217-218)* .

The facts and procedural background of *Legg v. United Benefit Life Ins. Co. (1960) 182 Cal. App. 2d 573, 6 Cal. Rptr. 73* , are *discussed under § 71.24[4][a]*. In *Legg,* the court of appeal said that a complaint otherwise good on its face is nevertheless subject to demurrer when facts judicially noticed render it defective, basing this on the theory of "truthful pleading," that the pleader should not be allowed to bypass a demurrer by suppressing facts that the court can judicially notice (*182 Cal. App. 2d 573, 581)* .

See also *Flores v. Arroyo (1961) 56 Cal. 2d 492, 496, 497, 15 Cal. Rptr. 87, 364 P.2d 263* (although holding action was not barred by res judicata and reversing judgment of dismissal entered following sustaining without leave to amend of general demurrer to complaint, held that in ruling on demurrer essentially founded on res judicata, trial court may take judicial notice of prior judgment in different case even though judgment or its content is not pleaded in the complaint, provided (a) judgment is appropriately drawn to court's attention, and (b) plaintiff has adequate notice and opportunity to be heard on question of effect of such judgment). The Court overruled prior Supreme Court decisions and disapproved court of appeal decisions to the extent they contained any statements contrary to the foregoing rule.

[f] Sameness of Actions

The facts and procedural background of *Kronkright v. Gardner (1973) 31 Cal. App. 3d 214, 107 Cal. Rptr. 270* , are *discussed under § 71.24[3][i]*. In *Kronkright,* the complaints in both actions involved the same property of which plaintiff was formerly the record owner and the same joint venture agreement executed by plaintiff and defendant. In each plaintiff claimed she was induced to execute the agreement by the false and fraudulent representations of the defendant. Plaintiff sought to distinguish the prior action on the ground the relief sought was not in all respects identical, particularly since in the first case she sought to rescind the joint venture agreement whereas in the present case she did not request rescission but asked that the joint venture be dissolved. In rejecting this contention, the court of appeal observed that the lawsuits arose from the same alleged factual situation and the fact that different forms of relief were sought "is here irrelevant. Were the rule otherwise, litigation finally would end only when a party ran out of counsel whose knowledge and imagination could conceive of different theories of relief based upon the same factual background" (*31 Cal. App. 3d 214, 216)* . Quoting from *Owl Drug Co. v. Bryant (1953) 115 Cal. App. 2d 296, 302, 252 P.2d 69* , the court said that it is the title, right, or obligation sought to be established or enforced, not the remedy or relief sought, which determines the nature and substance of the cause of action (*31 Cal. App. 3d 214, 217)* .

[g] Issues That Might Have Been Raised

Sutphin v. Speik (1940) 15 Cal. 2d 195, 99 P.2d 652, 101 P.2d 497 , was an action to recover royalties accruing after entry of a prior judgment adjudicating plaintiff's rights under an assignment of a participating royalty interest in an oil and gas lease. In this case it was defendant who attacked the findings and judgment of the court in the prior action between the same parties which judgment was determinative of plaintiff's right to recover in the current suit. Defendant argued that certain of its present contentions had not been adjudicated in the prior action. The trial court decided the case on the theory that the prior judgment was res judicata and defendant appealed.

The Supreme Court affirmed the judgment. The Court declined to discuss the conflicting evidence in the case on the ground that the action was res judicata and that plaintiff was entitled to judgment without any further consideration of the merits (*15 Cal. 2d 195, 204)* . The Court stated the applicable rules pointing out that if the matter was within the scope of the action, related to the subject matter and relevant to the issues, so that it could have been raised, the judgment inconclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged (*15 Cal. 2d 195, 202)* . A party cannot by negligence or design withhold issues and litigate them in consecutive actions, and therefore the rule is that the prior judgment is *res judicata* on matters that were raised or could have been raised, on matters litigated or litigable (*15 Cal. 2d 195, 202)* . The principle set out in *Price v. Sixth District Agricultural Ass'n*

(1927) 201 Cal. 502, 511, 258 P. 387 , that an issue may not be split into pieces and, if it has been determined in a former action, it is binding even though the litigants may have omitted to urge for or against matters which, if urged, would have produced an opposite result, also operates to demand of a defendant that all of its defenses to the cause of action urged by the plaintiff be asserted under the penalty of forever losing the right to thereafter so urge them (*15 Cal. 2d 195, 202)* .

The facts and procedural background of *Kronkright v. Gardner (1973) 31 Cal. App. 3d 214, 107 Cal. Rptr. 270* , are discussed under *71.24[3][i]*. In *Kronkright*, the court quoted the rule stated in *Sutphin v. Speik (1940) 15 Cal. 2d 195, 202, 99 P.2d 652, 101 P.2d 497* (*31 Cal. App. 3d 214, 216-217)* , discussed *above.* Quoting from *Owl Drug Co. v. Bryant (1953) 115 Cal. App. 2d 296, 302, 252 P.2d 69* , the court said that when an action has once been adjudicated it cannot be relitigated on any grounds that were or that could have been determined in the former action (*31 Cal. App. 3d 214, 217)* .

Glendale v. Roseglen Constr., Inc. (1970) 10 Cal. App. 3d 777, 89 Cal. Rptr. 219 , was an interpleader action by a city holding a fund deposited by a developer to secure its performance in regard to a development. The action named several defendants, including a successor trustee in bankruptcy of the original developer. Each defendant, including the trustee, filed a cross complaint claiming the fund. The trial court concluded that the trustee had no interest in the interpleaded fund because of a prior adjudication in the United States District Court, affirmed by the United States Court of Appeals, that the fund was not an asset in the bankrupt estate. The successor trustee appealed. In affirming the judgment, the court of appeal pointed out that the successor trustee could assert no rights in the fund as the federal court had determined that the fund was not an asset of the estate, that the determination was conclusive, and that the successor trustee was bound by the prior judgment (*10 Cal. App. 3d 777, 780)* . In answer to the successor trustee's argument that the issue as to whether the amount of the fund exceeded the value of the work not performed by the original developer was not decided in the federal action, the court of appeal said that it was immaterial whether appellant's predecessor in that action actually raised the issue since the issue concerning the ownership of the fund was squarely raised and decided adversely to appellant's predecessor. The court then quoted the rules announced in *Sutphin v. Speik (1940) 15 Cal. 2d 195, 202, 99 P.2d 652, 101 P.2d 497* , discussed *above* (*10 Cal. App. 3d 777, 781)* .

See also *Van Horne v. Treadwell (1913) 164 Cal. 620, 622, 130 P. 5* (second action to recover damages for wrongfully withholding stock barred by prior action to recover possession of stock in which claim for damages for withholding could have been adjudicated); *Lortz v. Connell (1969) 273 Cal. App. 2d 286, 297, 78 Cal. Rptr. 6* (quoting in part rule stated in *Sutphin v. Speik (1940) 15 Cal. 2d 195, 202, 99 P.2d 652, 101 P.2d 497* , discussed *above*); *McCaffrey v. Wiley (1951) 103 Cal. App. 2d 621, 626, 230 P.2d 152* (second action for damages for wrongful withholding of land barred by prior action of ejectment in which issues of damages for withholding could have been litigated).

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1. General Demurrers to Complaint

7A-71 California Points & Authorities § 71.25

§ 71.25 Supporting General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Operative Allegations Contradicted by Written Instrument Attached to Complaint

[1] FORM Supporting General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Operative Allegations Contradicted by Written Instrument Attached to Complaint

[*The following should be combined with a general form of memorandum in support of a general demurrer (see § 71.20).*]

THE GENERAL DEMURRER TO THE COMPLAINT SHOULD BE SUSTAINED BECAUSE THE COMPLAINT INCORPORATES AS AN EXHIBIT A WRITTEN INSTRUMENT THAT REVEALS FACTS SHOWING THAT THE CAUSE OF ACTION ALLEGED IS FATALLY DEFECTIVE.

A. Attached Exhibit Subject to Court Examination on Demurrer. Although allegations in complaint must be accepted as true for purposes of demurrer, facts appearing in exhibits attached to complaint are also accepted as true and, if contrary to allegations of the pleading, are given precedence (*Holland v. Morse Diesel Internat., Inc. (2001) 86 Cal. App. 4th 1443, 1447, 104 Cal. Rptr. 2d 239* ; *Dodd v. Citizens Bank of Costa Mesa (1990) 222 Cal. App. 3d 1624, 1626-1627, 272 Cal. Rptr. 623*).

[*Optional*] **B. Pleader's Allegations of Exhibit's Legal Effect Treated as Surplusage.** When a written instrument that is the foundation of a cause of action is attached to a pleading as an exhibit and incorporated into it by proper reference, the court may, on demurrer, examine the exhibit and treat the pleader's allegations of its legal effect as surplusage (*Hill v. City of Santa Barbara (1961) 196 Cal. App. 2d 580, 586, 16 Cal. Rptr. 686*).

C. Sustention of Demurrer. A general demurrer to a complaint should be sustained when it appears from the attached and incorporated writing on which the action is founded that no cause of action exists, notwithstanding the allegations of the complaint to the contrary (*Gosewisch v. Doran (1911) 161 Cal. 511, 515-516, 119 P. 656* ; *Beck v. American Health Group Internat., Inc. (1989) 211 Cal. App. 3d 1555, 1560, 1562, 260 Cal. Rptr. 237*).

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in support of a general demurrer to a complaint in an action founded on a written instrument attached to and incorporated by reference in the complaint when the material provisions of the incorporated instrument are contrary to plaintiff's allegations of them and thus render the complaint fatally defective.

The foregoing memorandum should be combined with a general form of memorandum in support of a demurrer to a complaint made on the ground that the complaint fails to state facts sufficient to constitute a cause of action [*see § 71.20*]. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated. That is, counsel should refer to specific portions of the exhibit and point out the statements that contradict material allegations of the complaint, disclosing that the complaint fails to state facts sufficient to constitute a cause of action.

[b] Opposing Points and Authorities

In an appropriate case, the memorandum *set out in § 71.38* may be used to oppose the general demurrer supported by the foregoing memorandum.

See also *§ 71.20[2]*.

[3] Discussion of Authorities

[a] Attached Exhibit Subject to Court Examination on Demurrer

In ***Holland v. Morse Diesel Internat., Inc.*** *(2001) 86 Cal. App. 4th 1443, 104 Cal. Rptr. 2d 239* the plaintiff, an individual, filed an action against a general contractor for breach of contract and racial discrimination. The initial complaint pled that the plaintiff had a contract with the defendant to supply construction site cleanup services that was breached by defendant; also the complaint pled racial discrimination claims. Defendant's demurrers were sustained on the grounds that the services performed were those required to be performed by a licensed contractor, and plaintiff was not a licensed contractor. Plaintiff thereafter pled that he was providing labor and materials and was therefore not required to be a licensed contractor. The court examined the terms of the contract that was attached to the original complaint and determined that it contradicted plaintiff's allegation in his second amended complaint that he was merely a supplier of labor and materials. The contract provided for cleanup services to be performed for a fixed sum, rather than for provision of labor to be paid at a set rate (*86 Cal. App. 4th 1443, 1446-1447)* .

The Court of Appeals affirmed the trial court's sustaining of the demurrers as to the breach of contract claims. Not only did the exhibits to earlier versions of the complaint establish that plaintiff was acting as a contractor, but plaintiff's allegations in earlier versions of the complaint also pled that plaintiff was acting as a contractor. If an amended complaint contradicts or omits facts pleaded in the earlier complaints, the court will take judicial notice of the earlier complaints and disregard inconsistent allegations, absent an explanation for the inconsistency. The court may also take notice of exhibits attached to the complaints. If facts appearing in the exhibits contradict those alleged, the facts in the exhibits take precedence (*Catholic Healthcare West v. California Ins. Guarantee Assn. (2009) 178 Cal. App. 4th 15, 23, 100 Cal. Rptr. 3d 125* .

Dodd v. Citizens Bank of Costa Mesa *(1990) 222 Cal. App. 3d 1624, 272 Cal. Rptr. 623* , was an action by a trucking business operator against a payroll service for unauthorized use of plaintiff's funds and against the service's bank for alleged negligent mismanagement of the payroll account. Plaintiff had contracted with the payroll service for the

preparation of his payroll checks and tax returns and authorized it to transfer funds from his bank directly into the payroll service's account at defendant bank. Plaintiff attached as an exhibit to his complaint a signature card that identified the payroll service as the account holder. The trial court ruled that plaintiff was not a customer of defendant bank and that the bank owed him no duty. It sustained the bank's demurrer to the causes of action against it without leave to amend and dismissed the complaint as to bank. Plaintiff appealed, pointing out that his complaint alleged a customer relationship between him and the bank and that such allegation must be accepted as true for the purposes of demurrer. He contended that notwithstanding the signature card, a question of fact was created by his allegations that defendant bank knew about the payroll service's method of operation, accepted preauthorized deposits from plaintiff's bank, and processed checks identifying plaintiff as the account holder and argued that the trier of fact should be allowed to examine his relationship with defendant bank to determine whether it should have sent him statements and canceled checks that would have revealed the payroll service's misuse of his funds.

The court of appeal rejected these arguments and affirmed the judgment. The court said that although allegations in a complaint must be accepted as true for the purposes of a demurrer, the facts appearing in exhibits attached to the complaint will also be accepted as true and, if contrary to the allegations in the pleading, will be given precedence (*222 Cal. App. 3d 1624, 1626-1627)* . The Court said that former Com. Code § 4104 (*now see Com. Code § 4104(a)*) defines "customer" as a person having an account with the bank and said that the signature card clearly identified the payroll service as the account holder (*222 Cal. App. 3d 1624, 1627)* .

[b] Pleader's Allegations of Exhibit's Legal Effect Treated as Surplusage

In ***Hill v. City of Santa Barbara*** *(1961) 196 Cal. App. 2d 580, 16 Cal. Rptr. 686* , plaintiff filed an action seeking a declaration of rights under a deed allegedly conveying real property to defendant city as plaintiff's trustee under a trust agreement. The complaint alleged that the city was to convey the property to whomever the plaintiff directed, and that the trustee had no interest in the property other than legal title for the benefit of the plaintiff. A copy of the deed was attached to the complaint and incorporated by reference. The city interposed a general demurrer based on, among other grounds, the failure to state facts sufficient to constitute a cause of action. The plaintiff declined to amend the complaint and the trial court entered a judgment of dismissal in favor of the defendant city. The plaintiff appealed.

The court of appeal affirmed the judgment. The court, citing *Alphonzo E. Bell Corp. v. Bell View Oil Syndicate (1941) 46 Cal. App. 2d 684, 691, 116 P.2d 786* , *discussed under § 71.25[4][b]*, stated that recitals in an exhibit to the complaint, if contrary to allegations in the pleading, will be given precedence, and the pleader's inconsistent allegations as to the meaning and effect of an unambiguous document will be disregarded. The court observed that the plaintiff's allegations in the complaint were inconsistent with the recitals contained in the exhibit because the complaint alleged delivery with a condition limiting the use of the property as expressed in a formal motion and acceptance by the defendant's city council, but the exhibit, consisting of the deed and the city council's resolution, did not contain any such condition or restriction (*196 Cal. App. 2d 580, 586)* .

[c] Sustention of Demurrer

Gosewisch v. Doran *(1911) 161 Cal. 511, 119 P. 656* , was a libel action arising from allegedly libelous statements made by defendants in a complaint filed by them in a prior action against plaintiff. Plaintiff alleged that in the prior complaint he had been charged with the misappropriation and embezzlement of corporate funds and that the charge was false, malicious, and defamatory and wholly without justification or excuse, and was not pertinent or material or at all necessary to the proceedings instituted by the filing of the complaint. A copy of the prior complaint was attached to the present complaint. Defendants' demurrer was sustained.

The Supreme Court affirmed the judgment. In holding that the demurrer was properly sustained, the Court said that as against the showing of the exact contents of the prior complaint filed against plaintiff, plaintiff's allegation in the complaint that the publications charging him with misconduct were not pertinent or material to the prior action was a

mere conclusion of law not admitted by the demurrer and had to be disregarded as contrary to the facts alleged (*161 Cal. 511, 515-516)* .

Beck v. American Health Group Internat., Inc. *(1989) 211 Cal. App. 3d 1555, 260 Cal. Rptr. 237* , was an action by a psychiatrist against a hospital and its parent corporation for damages for breach of an alleged employment contract. The alleged contract was in the form of a letter, signed by the hospital's executive director and the plaintiff, which was incorporated by reference and which showed on its face that it was not a contract but a preliminary agreement concerning the terms of a contract to be executed in the future. Defendants' general demurrer to the complaint was sustained without leave to amend, and plaintiff appealed from the subsequent judgment of dismissal.

The court of appeal affirmed, concluding that there was no contract, but merely an agreement to agree which cannot be made the basis of a cause of action (*211 Cal. App. 3d 1555, 1563)* . The court held that the trial court did not err in construing the alleged contract on demurrer because the plaintiff neither alleged that the "contract" was ambiguous nor placed any definite construction on it by averment (which is required if extrinsic evidence as to its meaning is to be introduced and considered), but merely attached it to the complaint and incorporated it by reference, leaving it to speak for itself (*211 Cal. App. 3d 1555, 1560-1562)* .

[4] Additional Authorities

[a] Attached Exhibit Subject to Court Examination on Demurrer

Washer v. Bank of America (1943) 21 Cal. 2d 822, 136 P.2d 297 (overruled on another point in *MacLeod v. Tribune Pub. Co. (1959) 52 Cal. 2d 536, 551, 343 P.2d 36*), was an action for damages for libel and slander. Defendants' general and special demurrers to the second amended complaint were sustained without leave to amend and Plaintiff appealed from the subsequent judgment for defendants. The Supreme Court reversed the judgment. The Court stated that the general rule is that when a written instrument that is the foundation of a cause of action or defense is attached to a pleading as an exhibit and incorporated into it by proper reference, the court may, on demurrer, examine the exhibit and treat the pleader's allegations of its legal effect as surplusage. An instrument that is not, however, the basis of a cause of action or defense falls in a different category. The pleading of such a document as an exhibit is only an assertion of its existence and character in the absence of allegations indicating the pleader's intention to adopt as his or her own the recitals of the exhibit. There was nothing in the complaint that indicated that the plaintiff intended to include as a part of his pleading any statement of facts included in the exhibit (*21 Cal. 2d 822, 829-830)* .

Kronsberg v. Milton J. Wershow Co. (1965) 238 Cal. App. 2d 170, 47 Cal. Rptr. 592 , was an action for damages for breach of contract, conversion, and fraud. Plaintiff alleged the parties had entered into a written agreement supplemented by another writing executed the same day (copies of which were attached as exhibits to and incorporated in the complaint) by the terms of which defendant was to sell at auction certain of plaintiffs' personal and real property; that title to the property was conveyed to defendant, the auction was held, and certain property was sold; that an "air facility" was not sold and never redelivered to plaintiffs; and that defendant accepted bids on the real property but never arranged for consummation of the sales. After demurrers and motions to strike had been granted with respect to the several amended pleadings and plaintiff had finally elected to stand on its fourth amended complaint, the trial court granted defendant's motion to dismiss. The court of appeal affirmed the judgment. It noted that the trial court had properly applied the rule of *Washer v. Bank of America (1943) 21 Cal. 2d 822, 828-830, 136 P.2d 297* , discussed *above,* which it had cited in ruling on the second amended complaint. The court held that the attached exhibits constituted the contract between the parties and that all of plaintiff's contrary allegations in the complaint as to the agreement were to be disregarded under the rule of *Washer,* which it quoted (*238 Cal. App. 2d 170, 173)* . The court then examined the provisions of the attached exhibits and concluded that under the facts alleged by plaintiff, defendant had complied with, rather than breached, its contract, that the same was true of the conversion count, and that the oral representations relied on as establishing fraud had been superseded by the written agreements (*238 Cal. App. 2d 170, 173-174)* .

See also *Weitzenkorn v. Lesser (1953) 40 Cal. 2d 778, 785-786, 256 P.2d 947* (the general rule is that when a written instrument that is the foundation of a cause of action or defense is attached to a pleading as an exhibit and incorporated in it by proper reference, the court may, on demurrer, examine the exhibit and treat the pleader's allegations of its legal effect as surplusage); *Peak v. Republic Truck Sales Corp. (1924) 194 Cal. 782, 790, 230 P. 948* (when pleader sets forth in pleading what he or she either admits or alleges to be substance or legal effect of written instrument and in same pleading sets forth in *haecverba* written instrument itself, if latter is unambiguous, matter in pleading that is inconsistent with text of writing will be treated as surplusage); *Stoddard v. Treadwell (1864) 26 Cal. 294, 302-303* (when plaintiff sets forth contract in terms in which it is written and then proceeds by averment to put false construction on terms, allegations repugnant to terms should be regarded as surplusage to be struck out on motion); *Lingsch v. Savage (1963) 213 Cal. App. 2d 729, 740, 29 Cal. Rptr. 201* (court noted that provisions of agreement attached to and incorporated in a complaint by reference and bearing on the right of either party to recover may thereby generate defect or defense apparent on face of complaint, defeating recovery by the plaintiff and making complaint subject to a general demurrer); *Bashford v. A. Levy & J. Zentner Co. (1932) 123 Cal. App. 204, 209-210, 11 P.2d 51* (allegations of pleading that are negated by express and certain language of written instrument set forth in, or made part of pleading by reference, are to be disregarded as surplusage).

[b] Sustention of Demurrer

Byrne v. Harvey (1962) 211 Cal. App. 2d 92, 27 Cal. Rptr. 110 , was an action for damages for breach of contract, consisting of a letter agreement, a copy of which was attached to and incorporated in the complaint. Defendant was sued in his individual capacity. The attached letter agreement was directed to and accepted by defendant in his representative capacity as the administrator of two probate estates. Defendant's demurrer was sustained without leave to amend, and plaintiff appealed from the subsequent judgment of dismissal. The court of appeal affirmed. It held that the trial court properly ignored plaintiff's allegation that the agreement was duly signed by defendant individually because, in accordance with the rule stated in *Washer v. Bank of America (1943) 21 Cal. 2d 822, 136 P.2d 297* , *discussed under § 71.25[4][a]*, when a written instrument that is the foundation of a cause of action or defense is attached to a pleading as an exhibit and incorporated into it by proper reference, the court may, on demurrer, examine the exhibit and treat the pleader's allegations of its legal effect as surplusage (*211 Cal. App. 2d 92, 104)* .

Alphonzo E. Bell Corp. v. Bell View Oil Syndicate (1941) 46 Cal. App. 2d 684, 116 P.2d 786 , was an action for damages and injunctive relief against a business trust and its trustees who were alleged to have abstracted large quantities of oil from plaintiff's property by means of slant wells. Unit holders of the trust intervened seeking to prevent the trust estate from being held liable for the torts of its trustees. The trustees compromised and settled the action by payment to plaintiff of $450,000 from the trust estate. Demurrers to the amended and supplemental complaints in intervention were sustained without leave to amend. On appeal from the subsequent judgment of dismissal, appellants argued that the trustees were without right to drill the wells, that the trust estate was not a party capable of being sued in court, and that the trustees were without power to defend the estate in court, and hence, without power to compromise and settle the litigation, but that all these conclusions of the pleader were contrary to the express terms of the instrument creating the trust that was pleaded in full and made a part of the complaint. Under those circumstances a court would, in hearing on the demurrer, examine the exhibits and treat the pleader's conclusions as surplusage (*46 Cal. App. 2d 684, 691)* . The court said that turning to the trust indenture it found that the trustees were given express power to develop and operate oil properties and wells in the name of the trust estate, to exercise the exclusive management and control of the trust estate, and to employ counsel to begin, prosecute, defend or settle law suits, at law, in equity or otherwise, and to compromise or to refer to arbitration, any claims in favor of or against the trust (*46 Cal. App. 2d 684, 691)* . The court concluded that the demurrers were properly sustained and affirmed the judgment (*46 Cal. App. 2d 684, 693)* .

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7A-71 California Points & Authorities § 71.26

§ 71.26 Supporting General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Amended Complaint Is Inconsistent With Prior Complaint

[1] FORM Supporting General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Amended Complaint Is Inconsistent With Prior Complaint

[*The following should be combined with a general form of memorandum in support of a general demurrer (see § 71.20).*]

THE GENERAL DEMURRER TO THE COMPLAINT SHOULD BE SUSTAINED BECAUSE THE PLEADING WITHOUT EXPLANATION, _____ [OMITS FACTS ALLEGED IN *and/or* IS INCONSISTENT WITH] A PRIOR COMPLAINT, THEREBY RENDERING THE COMPLAINT FATALLY DEFECTIVE.

A. Allegations Inconsistent With Prior Pleading Not Assumed True. Although a court generally must assume the truth of the factual allegations of the complaint, an exception exists when a party files an amended complaint and seeks to avoid the defects of a prior complaint either by omitting the facts that rendered the complaint defective or by pleading facts inconsistent with the allegations of the prior pleadings (*Owens v. Kings Supermarket (1988)198 Cal. App. 3d 379, 384, 243 Cal. Rptr. 627*).

B. Examination of Prior Complaint Permitted. Courts will not disregard an original pleading after an amended pleading has been filed, if an amended complaint attempts to avoid defects set forth in a prior complaint by ignoring them. The court may examine the prior complaint to ascertain whether the amended complaint is merely a sham (*Amid v. Hawthorne Community Medical Group, Inc. (1989) 212 Cal. App. 3d 1383, 1387, 261 Cal. Rptr. 240*).

C. Inconsistent or Omitted Allegations Read Into Amended Complaint. The policy against sham pleading permits the court to take judicial notice of the prior pleadings and to require that the pleader explain the inconsistency. If the pleader fails to do so, the court may disregard the inconsistent allegations and read into the amended complaint the allegations of the superseded complaint (*Owens v. Kings Supermarket (1988) 198 Cal. App. 3d 379, 384, 243 Cal.*

Rptr. 627).

D. Court Records. [*See § 71.21, Paragraph I.*]

E. Request That Court Take Judicial Notice. [*See § 71.21, Paragraph O.*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in support of a general demurrer to a complaint if an amended complaint without explanation omits facts from, or is inconsistent with, the original complaint.

The foregoing memorandum should be combined with a general form of memorandum in support of a demurrer to a complaint made on the ground that the complaint fails to state facts sufficient to constitute a cause of action [*see § 71.20*]. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated. For example, if the amended complaint omits a fact alleged in the original complaint, counsel should (1) request judicial notice of the court's file in the case and, specifically, of the earlier pleading; (2) identify the now-omitted fact, specifically referring to the paragraph number of the earlier pleading; (3) point out that the fact was omitted from the current pleading; (4) argue that if the omitted fact were true, the complaint would fail to state facts sufficient to constitute a cause of action, and the general demurrer should therefore be sustained.

[b] Purpose of Rule

The rule set out in the foregoing form, that allegations of fact in a complaint subsequently omitted or contradicted are still binding on the plaintiff, is valid and useful to defeat abuses of the privilege to amend and to discourage sham and untruthful pleadings. However, the rule is not intended to prevent honest plaintiffs from correcting erroneous allegations of generic terms that may have legal implications but that are also loosely used by lay persons, or to prevent the correction of ambiguous statements of fact [*Contreras v. Blue Cross of California (1988)199 Cal. App. 3d 945, 950, 245 Cal. Rptr. 258* ; *see § 71.40*].

[c] Judicial Notice

The court is permitted to take judicial notice of records of any court of this state to the extent that such matters are not embraced within *Evid. Code § 451*, relating to mandatory judicial notice [*Evid. Code § 452(d)*; *Tarr v. Merco Constr. Eng'rs, Inc. (1978) 84 Cal. App. 3d 707, 712, 148 Cal. Rptr. 813]* . For discussion of the procedure for requesting judicial notice, and forms of request and argument supporting the request, see *§ 71.21*.

[d] Verification of Original Complaint

One formulation of the rule set forth in the foregoing complaint is that material factual allegations in a verified pleading that are omitted in a subsequent amended pleading without adequate explanation will be considered by the court in ruling on a demurrer to the later pleading [*see Shoemaker v. Myers (1990) 52 Cal. 3d 1, 12, 276 Cal. Rptr. 303, 801 P.2d 1054* ; *Lamoreux v. San Diego etc. Ry. Co (1957) 48 Cal. 2d 617, 623, 311 P.2d 1]* . Although this statement of the rule refers to verification, apparently, it is not essential that the original pleading be verified [*see Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 836, 69 Cal. Rptr. 321, 442 P.2d 377* ; *Hills Transp. Co. v. Southwest Forest Indus., Inc. (1968) 266 Cal. App. 2d 702, 710-711, 72 Cal. Rptr. 441* ; *see also* Witkin, California Procedure, vol. 5, *Pleading*, § 1117 (3d ed. 1985) ("Although some of the cases stress the fact that the complaint was verified, the rule applies equally to unverified pleadings")].

In *Reichert*, the Supreme Court stated, "In the case before us, it does not appear that the original complaint is verified. Nevertheless we feel that the principle underlying the above authorities [defect in original infects subsequent pleadings] is applicable here" [*Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 836, 69 Cal. Rptr. 321, 442 P.2d 377]* . In *Hills Trans. Co.*, the court observed that a respectable number of cases had applied the rule that superseded pleadings may be considered by the court at a subsequent stage of the case to prior pleadings in general, without drawing any distinction between verified and unverified pleadings. In these latter cases the pleadings appeared to The Court to have been unverified, at least so far as the court could tell from the opinion. The court stated its view that the better formulation of the rule "draws no artificial distinction between verified and unverified pleadings but permits the trial court in either case to function without blinkers and take note, when pertinent, of the entire history of the pleadings" [*Hills Transp. Co. v. Southwest Forest Indus., Inc. (1968) 266 Cal. App. 2d 702, 710-711, 72 Cal. Rptr. 441* ; *discussed under § 71.26[4][c]*].

[e] Opposing Points and Authorities

In an appropriate case, the memorandum *set out in § 71.40* may be used to oppose the general demurrer supported by the foregoing memorandum.

See also *§§ 71.20[2]* and *71.21[2]*.

[3] Discussion of Authorities

[a] Allegations Inconsistent With Prior Pleading Not Assumed True

Owens v. Kings Supermarket *(1988) 198 Cal. App. 3d 379, 243 Cal. Rptr. 627* , was an action against a supermarket by a customer for injuries sustained when he was struck by a motorist while on a public street adjacent to the supermarket's property. The original complaint alleged that plaintiff was injured in the street adjacent to the supermarket premises. The same allegations were made in the first amended complaint. In his second amended complaint, plaintiff alleged that the injury occurred on "defendant's premises" rather than on the street. He offered no explanation for the inconsistency. The trial court sustained defendant's demurrer to the second amended complaint without leave to amend, and Plaintiff appealed from the order of dismissal.

The court of appeal affirmed the judgment. The court reiterated the rule that when reviewing a judgment entered following the sustaining of a demurrer without leave to amend, the appellate court must assume the truth of the factual allegations of the complaint (*198 Cal. App. 3d 379, 383)* . However, said the court, an exception exists when a party files an amended complaint and seeks to avoid the defects of a prior complaint either by omitting the facts that rendered the complaint defective or by pleading facts inconsistent with the allegations of prior pleadings. In these circumstances, the policy against sham pleadings permits the court to take judicial notice of the prior pleadings and requires that the pleader explain the inconsistency. If he or she fails to do so, the court may disregard the inconsistent allegations and read into the amended complaint the allegations of the superseded complaint (*198 Cal. App. 3d 379, 384)* . The appellate court held that the trial court properly disregarded the allegation in the second amended complaint that the accident occurred on defendant's premises and that for the purposes of appeal, the appellate court assumed that, as alleged in the original and first amended complaints, the plaintiff was injured while on the street adjacent to the premises of the supermarket (*198 Cal. App. 3d 379, 385)* . So assuming, the court of appeal affirmed the judgment on the ground that the defendant owed plaintiff no duty of care (*198 Cal. App. 3d 379, 384-388)* .

[b] Examination of Prior Complaint Permitted

Amid v. Hawthorne Community Medical Group, Inc. *(1989) 212 Cal. App. 3d 1383, 261 Cal. Rptr. 240* , involved an action by plaintiff doctor against his hospital employer. The dispute arose after the hospital's board of directors adopted a peer review committee's evaluation of the doctor's medical performance and forwarded a copy of the report's

recommendations to an affiliated health insurer. The doctor's initial complaint alleged a "contractual relationship" with the hospital and did not state whether the original complaint was written, oral, or implied, what its terms were, and whether there was a nondisclosure term. A second amended complaint alleged that the doctor entered into written employment contracts with the hospital. A third amended complaint stated that the breach of contract cause of action was based on an implied contract (covenants of good faith and fair dealing) and was not based on any express contract, either written or oral. Finally, the doctor's fourth amended complaint alleged an explicit oral contract of nondisclosure and omitted any mention of good faith or fair dealing covenants. The latter alleged causes of action for breach of contract, intentional and negligent breach of a confidential relationship, interference with prospective business advantage, and negligence. The hospital filed a general demurrer to the complaint. The trial court sustained the demurrer without leave to amend, and entered an order of dismissal. The plaintiff appealed from the judgment.

The court of appeal affirmed. The court stated that although a demurrer admits all material and issuable facts, properly pleaded, it does not admit contentions, deductions or conclusions of law. When an allegation is contrary to law or to a fact of which the court may take judicial notice, it is to be treated as a nullity. The court is permitted to take judicial notice of such records as an appellant's affidavits and prior complaints in the same action. The court said that although generally, after an amended pleading has been filed, courts will disregard the original pleading, they will not do so when an amended complaint attempts to avoid defects set forth in a prior complaint by ignoring them. The court may examine the prior complaint to ascertain whether the amended complaint is merely a sham (*212 Cal. App. 3d 1383, 1387)* . The court cited *Owens v. Kings Supermarket (1988) 198 Cal. App. 3d 379, 384, 243 Cal. Rptr. 627* , discussed *below*, and concluded that in the present case, as in *Owens*, no explanation for the pleading inconsistency having been offered, the trial court was entitled to conclude that the doctor's breach of contract cause of action was a sham (*212 Cal. App. 3d 1383, 1390-1391)* .

[c] Inconsistent or Omitted Allegations Read Into Amended Complaint

The facts and procedural background of ***Owens v. Kings Supermarket****(1988) 198 Cal. App. 3d 379, 243 Cal. Rptr. 627* , are *discussed under § 71.26[3][a]*. In *Owens*, the court of appeal, citing *Hills Trans. Co. v. Southwest Forest Industries, Inc. (1968) 266 Cal. App. 2d 702, 709-713, 72 Cal. Rptr. 441* , *discussed under § 71.26[2][d]* and *[4][c]*, said that when a party files an amended complaint and seeks to avoid the defects of a prior complaint either by omitting the facts that rendered the complaint defective or by pleading facts inconsistent with the allegations of the prior pleadings, the policy against sham pleadings permits the court to take judicial notice of the prior pleadings and requires that the pleader explain the inconsistency. If he or she fails to do so, the court may disregard the inconsistent allegations and read into the amended complaint the allegations of the superseded complaint (*198 Cal. App. 3d 379, 384)* .

[4] Additional Authorities

[a] Allegations Inconsistent With Prior Pleading Not Assumed True

Continental Ins. Co. v. Lexington Ins. Co. (1997) 55 Cal. App. 4th 637, 64 Cal. Rptr. 2d 116 , was an action involving an insurance coverage dispute between insurance companies concerning primary and excess insurance coverage. The trial court sustained defendant's general demurrer without leave to amend, and judgment of dismissal was entered. The court of appeal affirmed the judgment, noting that in reviewing the sustaining of a demurrer, the court determines whether the complaint alleged facts sufficient to state a cause of action, and accepts as true all material facts properly pleaded in the complaint (*55 Cal. App. 4th 637, 647)* . Even if appellant were given leave to amend its complaint, it would not be allowed to amend the complaint to state a fact contradictory to one stated previously. Citing *California Dental Assn. v. California Dental Hygienists' Assn. (1990) 222 Cal. App. 3d 49, 53, n.1, 271 Cal. Rptr. 410* , the court noted that a plaintiff may not discard factual allegations of a prior complaint, or avoid them by contradictory averments, in a superseding, amended pleading (*55 Cal. App. 4th 637, 646)* .

[b] Examination of Prior Complaint Permitted

Reichert v. General Ins. Co (1968) 68 Cal. 2d 822, 69 Cal. Rptr. 321, 442 P.2d 377 , was an action by an insured against four insurance companies for alleged malicious nonpayment of fire insurance after a fire damaged plaintiff's hotel, as a result of which plaintiff was adjudicated a bankrupt. The second amended complaint set forth nine causes of action, the first four of which were common counts. Defendants' demurrers were sustained without leave to amend. The plaintiff appealed. The Supreme Court, pointed out that plaintiff's original complaint contained an allegation as to his bankruptcy and that the demurrers were sustained on the ground that plaintiff lacked capacity to sue. However, in both his first and second amended complaints, he set forth the four common counts alleging causes of action *ex contractu* and omitted reference to his bankruptcy. The Court observed that such actions would have vested in the trustee by virtue of the bankruptcy allegation of the original complaint but on their face failed to disclose the defect in plaintiff's right arising from the bankruptcy. The Court held that plaintiff could not circumvent a demonstrated defect by such an expedient. If a verified complaint contains allegations destructive of a cause of action, the defect cannot be cured in subsequently filed pleadings by simply omitting such allegations without explanation. In such a case the original defect infects the subsequent pleading so as to render it vulnerable to a demurrer. The Court noted that it did not appear in the case before it that the original complaint was verified but held that the foregoing rules nevertheless applied (*68 Cal. 2d 822, 836)* .

It should be noted the Court in *Reichert* pointed out that a party should be allowed to correct a pleading by omitting an allegation that, it appears, was made as the result of mistake or inadvertence, but concluded that the allegation of plaintiff's bankruptcy in his prior unverified complaint was not the result of any such mistake or inadvertence (*68 Cal. 2d 822, 836-837)* .

Sackett v. Wyatt (1973) 32 Cal. App. 3d 592, 108 Cal. Rptr. 219 , was an action by an employer against a union representative. In his original verified complaint, plaintiff named the union representative, the union local, and a Joint Committee as defendants and alleged two causes of action arising out of an alleged breach of an oral agreement to withdraw grievances against plaintiff before the Joint Committee in consideration of plaintiff's withdrawing pending disciplinary charges against certain of his employees who were union members and a refusal of the Joint Committee to issue a clarification of its decision against plaintiff. Over a year later, before any responsive pleading was filed, plaintiff filed an amended complaint naming only the union representative and certain Does as defendants and again setting forth two causes of action. In the first, he sought damages for breach of contract for defendant's failure to withdraw, and instead prosecuting, the grievances against him. In the second cause of action, he sought damages for fraud and alleged that defendant had not intended to withdraw the grievances at the time oral agreement was entered into and that his promise to do so was false and fraudulent. Defendant's demurrer to the complaint was sustained without leave to amend. In affirming the judgment of dismissal, the court of appeal, with respect to the first cause of action, said that in ruling on the demurrer the trial court was not confined to the allegations of the first amended complaint but was entitled to consider the verified allegations of the earlier complaint, and that allegations of fact made under oath may not ordinarily be dropped without adequate explanation merely for the purpose of avoiding their harmful effect in a subsequent pleading (*32 Cal. App. 3d 592, 597)* . The Court then pointed out that the original complaint contained factual allegations showing that defendant in doing the things alleged was acting as a known agent for a disclosed principal and that under California law a personal judgment for damages for breach of contract may not be obtained against such a person (*32 Cal. App. 3d 592, 597)* .

[c] Inconsistent or Omitted Allegations Read Into Amended Complaint

Freeman v. San Diego Assn. of Realtors (1999) 77 Cal. App. 4th 171, 91 Cal. Rptr. 2d 534 , involved an action alleging violation of the Cartwright Act (*Bus. & Prof. Code § 16700 et seq.*). The trial court sustained defendants' demurrers to plaintiff's third amended complaint and dismissed the action. Plaintiff appealed. The court of appeal affirmed. In so doing, the court noted that a plaintiff may not avoid defects of plaintiff's earlier pleadings by omitting facts that made the earlier pleadings defective or alleging new facts inconsistent with the allegations of the earlier pleading parenthetically noting that when plaintiff pleads inconsistent facts without explaining the inconsistency, the court will read into the amended complaint the facts alleged in the superseded complaint. Moreover, the court noted that

when affidavits or exhibits filed by a plaintiff may be judicially noticed, the court may consider those facts to assess whether the complaint survives a general demurrer (*77 Cal. App. 4th 171, 178 n.3*).

Software Design & Application, Ltd. v. Hoefer & Arnett, Inc. (1996) 49 Cal. App. 4th 472, 56 Cal. Rptr. 2d 756 , involved an action by a foreign corporation and its sole owner and founder, against banks and brokerage firms. Plaintiffs, who were not customers of defendants, attempted to state causes of action against defendants for negligence, conversion, and violation of *California Uniform Commercial Code § 11204*. The real culprit, however, was plaintiffs' faithless financial consultant entrusted with a valuable portfolio, who liquidated the assets with the help of his sister through a scheme involving a series of fictitious accounts. One transaction involved the transfer of individual plaintiff's Paine- Webber portfolio to an account opened by the consultant in the name of a limited partnership that did not exist with defendant Hoeffer & Arnett, Inc. The trial court sustained demurrers to the first amended complaint, concluding there was no liability under the pleadings, and then dismissed the complaint after plaintiffs failed to further amend.

The court of appeal affirmed the judgment. The court pointed out that in connection with the transfer of the individual plaintiff's Paine-Webber portfolio to defendant Hoeffer & Arnett, plaintiffs averred that certain documentation from Paine-Webber accompanied the transfer of the portfolio to Hoefer & Arnett which indicated that the securities and funds being transferred were owned and controlled exclusively by the individual plaintiff. The initial pleading stated that the documentation included true copies of a letter signed by plaintiff, and a transfer request form signed by him which were attached as exhibits. The amended complaint, however, did not include a description of this documentation, nor were copies of these documents attached. The court noted that these documents were not at all questionable or irregular on their face and authorized a transfer of plaintiff's account. The court further noted that plaintiffs cannot retreat from these allegations and supporting exhibits concerning actual documentation and supplant them in amended pleadings, with conclusory allegations characterizing documentation in general terms, and with an entirely different twist. When a complaint contains allegations destructive to a cause of action, the defect cannot be cured by their omission without explanation in a subsequent pleading. Moreover, allegations in a complaint must yield to contrary facts found in exhibits to the complaint (*49 Cal. App. 4th 472, 484)* .

Zappas v. King Williams Press, Inc. (1970) 10 Cal. App. 3d 768, 89 Cal. Rptr. 307 , was an action against owners of real property. Plaintiff's third amended complaint alleged an oral contract by defendants to compensate him in connection with his obtaining of a lessee and a building contractor for defendants and sought an accounting and judgment for the sums owed him under the alleged oral agreement. The original and first amended complaints had been unverified; the second and third amended complaints were verified. Defendants' demurrer to the last amended complaint was sustained without leave to amend. Although the trial court cited no reasons for the ruling, its later order denying reconsideration indicated that it felt the oral contract pleaded was barred by the statute of frauds. The court of appeal held that the action was not barred by the statute of frauds as it read at the time of the transaction involved, but affirmed the judgment on the grounds that under *Bus. & Prof. Code § 10136* plaintiff was required to both allege and prove that he was a licensed broker at the time of the transaction, that plaintiff never claimed he could amend to so allege, and the trial court was entitled to believe on the record before it, including the prior unverified complaints filed in the action, that plaintiff was unable to allege facts that would cast him in the role of a "finder" exempt from the operation of the statute. In this connection, the court quoted the rule that when a verified complaint contains allegations destructive of a cause of action, the defect cannot be cured in subsequently filed pleadings by simply omitting such allegations without explanation. The court, citing *Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 836-837, 69 Cal. Rptr. 321, 442 P.2d 377 , discussed under § 71.26[4][b]*, held that the rule applies as well to unverified complaints (*10 Cal. App. 3d 768, 775)* .

Hills Transp. Co. v. Southwest Forest Indus., Inc. (1968) 266 Cal. App. 2d 702, 72 Cal. Rptr. 441 , was an action for damages for alleged breach of a contract to transport goods. The issue was whether the trial court abused its discretion in sustaining defendants' demurrer to the verified second amended complaint without leave to amend. The court of appeal affirmed the judgment of the trial court. The court said that a pleader may not attempt to breathe life into a complaint by omitting relevant facts that made the previous complaint defective, and that if an amended pleading is

only a sham and it is apparent that no cause of action can be truthfully stated, the court should disregard that pleading (*266 Cal. App. 2d 702, 713)* .

The *Hill* court further stated that a respectable number of cases had applied the rule that superseded pleadings may be considered by the court at a subsequent stage of the case to prior pleadings in general, without drawing any distinction between verified and unverified pleadings (*266 Cal. App. 2d 702, 710)* . For additional discussion relating to the question of whether the original pleadings should be verified, see *§ 71.26[2][d]*.

See also *Converse v. Joslin (1959) 176 Cal. App. 2d 638, 643, 1 Cal. Rptr. 777* (when verified complaint contains allegations destructive of a cause of action, the defect cannot be cured in subsequently filed pleadings by simply omitting such allegations without explanation) and cases cited there.

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§ 71.27 Supporting General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Equitable Action Barred by Laches

[1] FORM Supporting General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Equitable Action Barred by Laches

[*The following should be combined with a general form of memorandum in support of a general demurrer (see § 71.20).*]

THE GENERAL DEMURRER TO THE COMPLAINT SHOULD BE SUSTAINED BECAUSE IT APPEARS ON THE FACE OF THE COMPLAINT [OR FROM MATTERS OF WHICH THE COURT IS REQUIRED TO OR MAY TAKE JUDICIAL NOTICE] THAT THE ACTION IS BARRED BY LACHES.

Action Barred by Laches. A complaint in equity that on its face shows a great lapse of time between the time the cause of action arose and the filing of the complaint that would make it inequitable to enforce the claim and fails to allege facts excusing the delay and showing good faith and reasonable diligence on plaintiff's part fails to state facts sufficient to constitute a cause of action and is demurrable on that ground (*Kleinclaus v. Dutard (1905) 147 Cal. 245, 248-250, 81 P. 516* ; *Converse v. Joslin (1959) 176 Cal. App. 2d 638, 645, 1 Cal. Rptr. 777*).

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in support of a general demurrer to a complaint for equitable relief when it appears on the face of the complaint or from judicially noticed matter that the action is barred by laches. The equitable doctrine of laches becomes pertinent only when the statutory period of limitations has not yet run; if it has run, the action is barred by the statute of limitations [*see Estate of Peebles (1972) 27 Cal. App. 3d 163, 166, 103 Cal. Rptr. 560]* . For memoranda of points and authorities in support of a general demurrer to a complaint on the ground the action is barred by the statute of limitations, see Ch. 143, *Limitation of Actions* .

The foregoing memorandum should be combined with a general form of memorandum in support of a demurrer to a complaint made on the ground that the complaint fails to state facts sufficient to constitute a cause of action [*see § 71.20*]. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated. Referring to the complaint or judicially noticed facts, counsel should identify the date the cause of action accrued, the date the action was filed, the death of any witnesses, and loss of evidence, and argue that these circumstances would prejudice the defendant [*see Converse v. Joslin (1959) 176 Cal. App. 2d 638, 645, 1 Cal. Rptr. 777]* .

[b] Opposing Points and Authorities

In an appropriate case, the memorandum *set out in § 71.42* may be used to oppose the general demurrer supported by the foregoing memorandum.

See also *§§ 71.20[2]* and *71.21[2]*.

[3] Discussion of Authorities

[a] Action Barred by Laches

Kleinclaus v. Dutard *(1905) 147 Cal. 245, 81 P. 516* , was an action against the executors of the will of Hyppolite Dutard to establish that all property possessed by him at the time of his death was held in trust for his siblings. Plaintiffs were a brother and sister of Hyppolite. The amended complaint alleged that (1) Hyppolite's father owned a small produce business; (2) he requested Hyppolite to carry on the business after his death for the benefit of Hyppolite's mother, his siblings, and himself; (3) Hyppolite promised to do so; (4) the father died in 1865; (5) Hyppolite, then a 20-year-old man, assumed control of the business that was then worth $15,000; (6) Hyppolite promised and agreed with his mother and siblings to build up, enlarge, carry on, conduct, and extend the business in trust for them and himself; (7) he so managed the business, and on the death of the mother in 1875 it was worth $100,000; (8) on the death of the mother he renewed his promise to his siblings; and (9) he continued to manage the business and to invest and reinvest the proceeds until his death in 1900 when he left an estate worth $2,500,000 consisting of both personal and real property. It was further alleged in terms that no accounting had ever been had and that nothing had ever been paid or delivered by Hyppolite to any of the alleged beneficiaries. Defendants' general demurrer to the amended complaint was sustained without leave to amend. The trial court stated that it was manifest that it would have been impossible after the death of Hyppolite Dutard to do justice to the parties by attempting to ascertain what property was left by the father at the time of his death, and trace it in all its mutations and transformations down to the time of the death of Hyppolite Dutard (*147 Cal. 245, 252)* . The plaintiffs should have asserted what rights they claimed in this property during Hyppolite Dutard's life (*147 Cal. 245, 252)* . By reason of his death it had become morally impossible for the court to do what it was asked to do by the complaint (*147 Cal. 245, 252)* .

The Supreme Court affirmed the judgment (*147 Cal. 245, 252)* . In concurring with the trial court, the Supreme Court pointed out that one of the grounds of the demurrer was that it appeared on the face of the complaint that the action was barred by laches and that trial court had held this ground to have been well taken (*147 Cal. 245, 248)* . The Court said that entirely independent of any statutory period of limitations, stale demands will not be aided by equity when the claimant has slept on his rights for so long a time and under such circumstances as to make it inequitable to enter on an inquiry as to their validity, and under such conditions the demand is, in a court of equity, barred by laches (*147 Cal. 245, 249)* . The Court held the present action was barred by laches and that this defense had been properly raised by demurrer on the ground the complaint failed to state facts sufficient to constitute a cause of action (*147 Cal. 245, 250)* .

Converse v. Joslin *(1959) 176 Cal. App. 2d 638, 1 Cal. Rptr. 777* , was an action to establish a trust in property. Special and general demurrers to the second amended complaint were sustained without leave to amend. The defendants were the heirs of Melville E. Joslin, the Joslin Lumber Company, and various other persons. Melville had been president of the lumber company and had owned one share of its stock; his mother-in-law, Alameda A. Converse, had owned 518 shares and had been its first vice president; Ploma Joslin was Alameda's daughter and Melville's wife; Byron J. Converse was Alameda's son and the distributee of her estate; plaintiff, Helen M. Converse, was Byron's widow. Plaintiff alleged that in 1938 Melville "attempted" to dissolve the corporation but never turned any of its assets over to Alameda. The court of appeal held that the second amended complaint failed to state a cause of action because the case depended on dissolution of the lumber company and plaintiff had not alleged that it had been dissolved or that action necessary to dissolution had been taken (*176 Cal. App. 3d 638, 644-645)* .

The court of appeal affirmed the judgments of dismissal. The court stated that another equally serious defect appeared. The attempted dissolution had occurred in 1938 and the action was not commenced until March of 1953. During that period the following casualties took place: Melville E. Joslin died August 8, 1952; Ploma, his wife, was committed to Camarillo State Hospital in April of 1940, and was still there when the second amended complaint was filed; Alameda A. Converse died in 1945; Byron J. Converse died in August of the following year; and all of these facts appear in the second amended complaint. What appeared was an unexcused delay of about 15 years from the wrong complained of until the action was commenced during which period those who could tell of the understanding reached, the reasons for action taken, the explanation for inaction, became permanently unable to do so. This amounted to laches appearing from the pleading itself (*176 Cal. App. 3d 638, 645)* . Then, quoting from *Zakaessian v. Zakaessian (1945) 70 Cal. App. 2d 721, 725, 161 P.2d 677* , discussed in *§ 71.42[4][a]*, the court said that it is a well-settled rule of law that the defense of laches can be raised by a general demurrer and that when an action is commenced many years after its accrual, the death of witnesses or destruction of evidence, presumed as well as actual, may prejudice the defendant and justify denial of relief because of staleness of the claim (*176 Cal. App. 3d 638, 645)* .

[4] Additional Authorities

[a] Action Barred by Laches

In *Williams v. International Longshoremen's & Warehousemen's Union (1959)172 Cal. App. 2d 84, 341 P.2d 729* , although the court of appeal affirmed judgment of dismissal entered after the defendant's demurrer to first amended complaint was sustained without leave to amend on ground action was barred by statute of limitations, which defense was properly raised (*172 Cal. App. 2d 84, 88)* , the court pointed out that the defense of laches maybe properly raised by general demurrer (*172 Cal. App. 2d 84, 86)* .

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§ 71.28 Supporting General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Insufficiency Established by Judicial Admission

[1] FORM Supporting General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Insufficiency Established by Judicial Admission

[*The following should be combined with a general form of memorandum in support of a general demurrer (see § 71.20).*]

THE GENERAL DEMURRER TO THE COMPLAINT SHOULD BE SUSTAINED BECAUSE IT APPEARS FROM A JUDICIAL ADMISSION ON THE FACE OF THE COMPLAINT THAT A CAUSE OF ACTION CANNOT BE STATED.

A. Insufficiency Established by Judicial Admission. A complaint that on its face contains an admission that negates an essential element of the cause of action fails to state facts sufficient to constitute a cause of action; the plaintiff is bound by such an admission in his or her complaint (*see Setliff v. E. I. Du Pont De Nemours & Co. (1995) 32 Cal. App. 4th 1525, 1534, 38 Cal. Rptr. 2d 763*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a general demurrer to a complaint when an admission contained within the complaint negates the plaintiff's ability to allege an essential element of the cause of action.

These points and authorities should be combined with a general form of memorandum in support of a demurrer to a complaint made on the ground that the complaint fails to state facts sufficient to constitute a cause of action [*see § 71.20*]. They may also be adopted for use in a trial or appellate brief.

Counsel should insert argument in the form showing the relationship between the facts in the case and the points of law stated. Thus counsel should include discussion showing how the allegations of the complaint containing the admission negates the possibility of the plaintiff being able to allege an element essential to state a cause of action.

[3] Discussion of Authorities

[a] Insufficiency Established by Judicial Admission

Setliff v. E. I. Du Pont De Nemours & Co. *(1995) 32 Cal. App. 4th 1525, 38 Cal. Rptr. 2d 763* , involved a Judicial Council form amended complaint in which plaintiff attempted to state a cause of action for negligence and products liability under traditional theories as well as a cause of action for products liability under alternative liability and market share theories. Defendants were manufactures of paint, solvents, strippers and glue products (*32 Cal. App. 4th 1525, 1529-1530)* . Plaintiff, among other things, alleged in the amended complaint that he was an employee of a paint store and was injured by these products (*32 Cal. App. 4th 1525, 1530)* . Several defendants demurred claiming that the complaint failed to state a cause of action, seizing on an admission by the plaintiff contained in an allegation of plaintiff's complaint that he could not identity the product or products that injured him. The trial court focused on this judicial admission in sustaining the defendants' demurrers and granted plaintiff 20 days leave to amend (*32 Cal. App. 4th 1525, 1532)* . Other allegations in the complaint contained certain other admissions. After the plaintiff failed to amend, the demurring defendants moved for dismissal and judgments of dismissal were entered for these defendants. Other defendants then moved for judgment on the pleadings on the same grounds as the successful demurrers and the court granted judgment on the pleadings in favor of these defendants (*32 Cal. App. 4th 1525, 1532)* . Still other defendants settled with the plaintiff. Ultimately, the trial court granted judgment in favor of all the nonsettling defendants and plaintiff appealed (*32 Cal. App. 4th 1525, 1532-1533)* .

On appeal, the judgment was affirmed. Initially, the court noted that a judgment on the pleading is governed by the same standard as a judgment following a successful demurrer and that an identical standard of review applies (*32 Cal. App. 4th 1525, 1532-1533)* . With regard to the traditional theories of negligence and products liability, the court pointed out that plaintiff in his amended complaint admitted that plaintiff "is unable to identify which of the products separately or jointly injured him" and that plaintiff could not identify the specific chemicals and toxins involved in his injury or which defendant manufactured the product or products responsible for his injury (*32 Cal. App. 4th 1525, 1534)* . Noting that the plaintiff is bound by an admission in his pleading, the court concluded that these admissions negated any attempt to allege that plaintiff was injured by a particular defendant's product. Thus, without this element of causation, under a traditional tort theory plaintiff failed to state a cause of action (*32 Cal. App. 4th 1525, 1534)* .

With regard to a cause of action for products liability under either the alternative liability or market share theories, the court considered certain admissions contained in the plaintiff's opposition to the demurrers in concluding that plaintiff could not state a cause of action under either theory (*32 Cal. App. 4th 1525, 1534-1537)* . The court noted that plaintiff's papers in opposition to the demurrers are reliable indications of plaintiff's position on the facts and that The Court may use these admissions against him (*32 Cal. App. 4th 1525, 1536)* . The admissions defeated plaintiff's attempt to state a cause of action under either theory (*32 Cal. App. 4th 1525, 1534-1537)* .

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§ 71.29 Supporting General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Judicial Restraint Requires Lack of Intervention

[1] FORM Supporting General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Judicial Restraint Requires Lack of Intervention

[*The following should be combined with a general form of memorandum or points and authorities in support of a general demurrer (see § 71.20).*]

THE GENERAL DEMURRER TO THE COMPLAINT SHOULD BE SUSTAINED BECAUSE THE ISSUES RAISED ARE BEST ADDRESSED BY THE LEGISLATURE RATHER THAN THE JUDICIAL SYSTEM.

Judicial Restraint Is Compelled in Areas of General Public Policy. Judicial interference is unwarranted and improper in the area of general economic policy for the *State (Wolfe v. State Farm Fire & Casualty Ins. Co. (1996) 46 Cal. App. 4th 554, 565, 53 Cal. Rptr. 2d 878*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a general demurrer to a complaint on the ground that the subject matter of the complaint is not appropriate for judicial intervention because it involves a matter of general public policy or economic policy that is best left to the Legislature.

These points and authorities may be combined with points and authorities pertaining to other procedural contexts in which counsel wishes to raise the substantive issue that a court should adopt the policy of judicial restraint, for example in a motion for summary judgment. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the general public policy effects of the remedy sought by the complaint, and should argue that the matter is not appropriate or proper for judicial intervention [*see Wolfe v. State Farm Fire & Casualty Ins. Co. (1996) 46 Cal. App. 4th 554, 559, 53 Cal. Rptr. 2d 878]* .

[3] Discussion of Authorities

[a] Judicial Restraint Is Compelled in Areas of General Public Policy

In ***Wolfe v. State Farm Fire & Casualty Ins. Co****. (1996) 46 Cal. App. 4th 554, 53 Cal. Rptr. 2d 878* , plaintiff, acting as a "private attorney general," filed a complaint seeking injunctive relief against a group of the largest residential real property insurers in the state on the ground that their failure to sell new homeowners insurance policies was an unfair business practice. The insurers had ceased selling such policies because state law required them to offer earthquake insurance with homeowner coverage, and they had decided to avoid writing new earthquake policies. The insurers demurred to the complaint on various grounds, including the contention that judicial interference in a matter involving the highly regulated insurance industry was unwarranted and improper. The trial court sustained the demurrers, stating that the issues raised were best addressed by the Legislature.

The court of appeal agreed with the trial court, and affirmed the dismissal following the order sustaining the demurrers (*46 Cal. App. 4th 554, 559)* . The court noted that it has neither the power nor the duty to determine the wisdom of any economic policy because that function rests solely with the Legislature (*46 Cal. App. 4th 554, 562)* . The court concluded that a judicial resolution of plaintiff's complaint would involve the courts in microeconomic managing, so that judicial restraint required that the court decline to undo what the Legislature had done (*46 Cal. App. 4th 554, 567-568)* .

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§ 71.29A Supporting General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Previous Demurrer to Same Cause of Action Was Sustained

[1] FORM

[*The following should be combined with a general form of memorandum or points and authorities in support of a general demurrer (see § 71.20).*]

THE GENERAL DEMURRER TO THE COMPLAINT SHOULD BE SUSTAINED BECAUSE A PREVIOUS DEMURRER TO THE SAME CAUSE OF ACTION WAS SUSTAINED.

Previous Demurrer to Same Cause of Action Was Sustained. A demurrer should be sustained when a previous demurrer to the same cause of action was sustained (*Berg & Berg Enterprises, LLC v. Boyle (2009) 178 Cal. App. 4th 1020, 1034-1036, 100 Cal. Rptr. 3d 875*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a general demurrer to a complaint on the ground that a previous demurrer to the same cause of action was sustained.

These points and authorities may be combined with points and authorities pertaining to other procedural contexts in which counsel wishes to raise the substantive issue that a court should adopt the policy of judicial restraint, for example in a motion for summary judgment. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

For a memorandum opposing a demurrer on the ground that a demurrer to the same cause of action was previously overruled, see *§ 71.44*.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Previous Demurrer to Same Cause of Action Was Sustained

In ***Berg & Berg Enterprises, LLC v. Boyle*** *(2009) 178 Cal. App. 4th 1020, 100 Cal. Rptr. 3d 875* , a creditor of a failed company sued the individual members of the company's board of directors. After they challenged the creditor's prior pleadings by successful demurrers and an anti-SLAPP (strategic lawsuit against public participation) motion, the creditor's operative pleading alleged a single cause of action for breach of fiduciary duty. The initial complaint alleged a single cause of action for breach of fiduciary duty. Before any responsive pleadings were filed, the creditor filed a first amended complaint restating the breach-of-fiduciary-duty claim and adding two causes of action for fraudulent and negligent misrepresentation. The directors demurred to the amended pleading on various grounds, and some filed an anti-SLAPP motion (under *Code Civ. Proc. § 425.16*) to the misrepresentation causes of action, which the other defendants joined. In the face of the anti-SLAPP motion, the creditor voluntarily dismissed its two misrepresentation causes of action, leaving only its claim for breach of fiduciary duty as the target of the demurrers. The trial court sustained the demurrers with leave to amend based, in essence, on lack of standing, *i.e.*, the creditor's claim of injury was not unique to itself or to a particular class of creditors but rather incidental to injury that all of the company's creditors might have suffered. Therefore, the claim was not direct and particular to the creditor, but, rather, derivative and assertable only on behalf of all of the creditors. The court further noted that in light of its dispositive ruling, it need not directly address another ground raised by demurrer--that the directors were insulated from liability by the business judgment rule. However, "for the guidance of the parties," the court nevertheless observed that particular allegations of the first amended complaint appeared "sufficient to rebut the business judgment presumption." The creditor filed a second amended complaint, on behalf of itself and all other creditors of the company, consistent with the court's prior ruling. The new pleading in substance restated the allegations of the previously asserted breach-of-fiduciary-duty claim. The directors demurred to the second amended complaint on numerous grounds. The trial court determined that while the pleading could be reasonably be interpreted as alleging a creditors' claim under common law, the creditor had failed to allege specific facts to rebut the business judgment rule and thus had not stated a viable claim for breach of fiduciary duty. The creditor filed a third amended complaint, for itself and purportedly on behalf of all of the creditors, restating its single cause of action for breach of fiduciary duty against the directors. The directors all demurred to the third amended complaint for its failure to state facts sufficient to constitute a cause of action, reprising many arguments they had raised in previous pleading challenges. The trial court sustained the demurrers without leave to amend on the ground that the third amended complaint failed to allege a viable claim for breach of fiduciary duty against the directors. The creditor moved for reconsideration of the order under *Code Civ. Proc. § 1008*. Over defendants' opposition, the trial court granted reconsideration of its prior order, but affirmed its prior order sustaining the demurrers to the third amended complaint without leave to amend (*178 Cal. App. 4th 1020, 1024-1033)* .

The Court of Appeal affirmed. The court held that the jurisdictional components of *Code Civ. Proc. § 1008*, governing motions for reconsideration of prior rulings and renewed motions, did not preclude the trial court from considering the viability of the breach-of-fiduciary-duty claim. There was only one cause of action and the prior demurrers to that cause of action were sustained. When the creditor filed an amended pleading in response to the orders sustaining the prior demurrers to the breach of fiduciary cause of action with leave to amend, the amended cause of action was treated as a new pleading and the defendants were free to respond to it by demurrer on any ground. Because defendants demurred to the single cause of action of the new third amended complaint as to which no prior demurrer had been overruled, the restrictive provisions of *Code Civ. Proc. § 1008* were inapplicable. Thus, the trial court did not err by disposing of the third amended complaint based on the creditor's failure to state a viable claim for breach of fiduciary duty and by not limiting its consideration of the pleading challenge to the bar of the business judgment rule (*178 Cal. App. 4th 1020,*

1034-1036) .

California Points & Authorities

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Volume 7A Chapters 71-79 DEMURRERS
CHAPTER 71 DEMURRERS AND MOTIONS FOR JUDGMENT ON THE PLEADINGS
PART II. FORMS
A. Demurrers
1. General Demurrers to Complaint

7A-71 California Points & Authorities § 71.30

§ 71.30 Opposing General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--General Form

[1] FORM Opposing General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*] Plaintiff,	)	MEMORANDUM IN OPPOSITION TO DEMUR-
vs.	)	RER TO COMPLAINT
_____ [*name*], Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THE GENERAL DEMURRER SHOULD BE OVERRULED BECAUSE THE COMPLAINT HAS STATED FACTS SUFFICIENT TO CONSTITUTE A CAUSE Of ACTION.

A. Complaint States Cause of Action. A complaint is invulnerable to a general demurrer if on any theory it states a cause of action (*Johnson v. Clark (1936) 7 Cal. 2d 529, 536, 61 P.2d 767* ; *Truta v. Avis Rent A Car System, Inc. (1987) 193 Cal. App. 3d 802, 815, 238 Cal. Rptr. 806*). That is, all that is necessary as against a general demurrer is to plead facts showing that the plaintiff may be entitled to some relief (*Richard H. v. Larry D. (1988) 198 Cal. App. 3d 591, 594, 243 Cal. Rptr. 807*).

[*Optional*] **B. Demurrer Limited to Face of Pleading and Judicially Noticed Matter.** In ruling on a demurrer, the court is limited to defects that appear from the face of the pleading and matter subject to judicial notice. The rule is well established that, except for judicially noticed matter, a demurrer can neither allege facts that if true would disclose a defect in the challenged pleading nor bring in extrinsic evidence that would disclose such a defect (*Code Civ. Proc. § 430.30(a)*; *Brosterhous v. State Bar (1995) 12 Cal. 4th 315, 324, 48 Cal. Rptr. 2d 87, 906 P.2d 1242* ; *SKF Farms v. Superior Court (1984) 153 Cal. App. 3d 902, 905-906, 200 Cal. Rptr. 2d 497*).

[*Optional*] **C. At Least One Count or Cause of Action Not Subject to Objection Raised.** A demurrer that attacks an entire pleading should be overruled if one of the counts therein is not vulnerable to the objection raised (*Lord v. Garland (1946) 27 Cal. 2d 840, 850, 168 P.2d 5* ; *Knickerbocker v. City of Stockton (1988) 199 Cal. App. 3d 235, 245, 244 Cal. Rptr. 764*).

D. Rule of Liberal Construction. In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties (*Code Civ. Proc. § 452*; *Saxer v. Philip Morris, Inc. (1975) 54 Cal. App. 3d 7, 18, 126 Cal. Rptr. 327*).

[*Optional*] **E. Cause of Action Alleged Despite Mistaken Labels and Confusion of Legal Theory.** The court is not limited to plaintiff's theory of recovery in testing the sufficiency of the complaint against a demurrer, but instead must determine whether the factual allegations of the complaint are adequate to state a cause of action under any legal theory. Mistaken labels and confusion of legal theory are not fatal; if the plaintiff's complaint states a cause of action on any theory, the plaintiff is entitled to introduce evidence thereon (*Nguyen v. Scott (1988) 206 Cal. App. 3d 725, 729-730, 253 Cal. Rptr. 800*).

[*Optional*] **F. Cause of Action Alleged Despite Legal Conclusions.** Although a court in ruling on a general demurrer may ignore allegations of the complaint that are in the form of legal conclusions, the court should overrule the demurrer when, apart from the legal conclusions, the complaint sets forth sufficient facts to state a cause of action (*Maxwell v. City of Santa Rosa (1959) 53 Cal. 2d 274, 279-281, 1 Cal. Rptr. 334, 347 P.2d 678*).

[*Optional*] **G. Cause of Action Alleged Despite Unclear Facts.** If on a consideration of all the facts stated it appears that the plaintiff is entitled to any relief at the hands of the court against the defendant, the complaint will be held good, although the facts may not be clearly stated (*Chase Chemical Co. v. Hartford Accident & Indemnity Co. (1984) 159 Cal. App. 3d 229, 242-243, 205 Cal. Rptr. 469*).

[*Optional*] **H. Cause of Action Alleged Despite Irrelevant Facts.** If on a consideration of all the facts stated it appears that the plaintiff is entitled to any relief at the hands of the court against the defendant, the complaint will be held good, although the facts may be intermingled with a statement of other facts irrelevant to the cause of action shown (*Chase Chemical Co. v. Hartford Accident & Indemnity Co. (1984) 159 Cal. App. 3d 229, 242-243, 205 Cal. Rptr. 469*).

[*Optional*] **I. Cause of Action Alleged Despite Demand for Wrong Relief.** If on a consideration of all the facts stated it appears that the plaintiff is entitled to any relief at the hands of the court against the defendant, the complaint will be held good, although the plaintiff may demand relief to which he or she is not entitled under the facts alleged (*Chase Chemical Co. v. Hartford Accident & Indemnity Co. (1984)159 Cal. App. 3d 229, 242-243, 205 Cal. Rptr. 469*).

[*Optional*] **J. Implied or Inferred Facts Deemed True.** The sole issue involved in a hearing on a demurrer is whether the complaint, as it stands, unconnected with extraneous material, states a cause of action. In testing the legal sufficiency of a pleading against a general demurrer, all properly pleaded allegations, including those that arise by reasonable inference, are deemed admitted regardless of the possible difficulty of proof at trial (*Saxer v. Philip Morris, Inc. (1975) 54 Cal. App. 3d 7, 18, 126 Cal. Rptr. 327*).

[*Optional*] **K. Disregard of Nonprejudicial Defect.** A court is required, in every stage of an action, to disregard any defect in the pleadings that in the opinion of the court does not affect the substantial rights of the parties (*Code Civ. Proc. § 475*; *Gressley v. Williams (1961) 193 Cal. App. 2d 636, 639, 14 Cal. Rptr. 496*).

[*Optional*] **L. Cause of Action Not Necessarily Barred By Affirmative Defense.** A demurrer based on an affirmative defense cannot properly be granted when the action might be barred by the defense, but is not necessarily barred (*CrossTalk Productions, Inc. v. Jacobson (1998) 65 Cal. App. 4th 631, 635, 76 Cal. Rptr. 2d 615*).

[*Optional*] **M. Demurrer Inappropriate to Determine Truth of Disputed Facts.** A demurrer is not the appropriate procedure for determining the truth of disputed facts or what inferences should be drawn when competing inferences are possible (*CrossTalk Productions, Inc. v. Jacobson (1998) 65 Cal. App. 4th 631, 635, 76 Cal. Rptr. 2d 615*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to a general demurrer to a complaint under *Code Civ. Proc. § 430.10(e)*, failure to state facts sufficient to constitute a cause of action. Several optional paragraphs are provided for use in responding to a variety of objections to the complaint, when the complaint, notwithstanding the objections, does state a cause of action.

In an appropriate case, these points and authorities may be submitted in opposition to the general demurrer supported by the memorandum *set out in §§ 71.20 -71.27*.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, if the defendant objects to the complaint on the basis that the complaint omits an element essential for stating a particular cause of action designated in the complaint, the plaintiff should (1) argue that if the plaintiff's complaint states a cause of action on any theory, the general demurrer should be overruled [*see Nguyen v. Scott (1988) 206 Cal. App. 3d 725, 729-730, 253 Cal. Rptr. 800 , discussed under § 71.30[3][e]*]; (2) identify some other theory under which plaintiff would be entitled to relief; and (3) identify the essential elements of the alternative theory and the facts alleged in the pleading satisfying those elements, and based on those allegations, request that the court overrule the demurrer.

With appropriate modifications, these points and authorities may be used in opposition to a demurrer that is directed against a single cause of action or count in a complaint that alleges multiple causes of action or counts. The form may also be modified for use in opposition to a demurrer to a cross complaint [*Code Civ. Proc. §§ 430.10, 430.30(a)*], or to a single cause of action or count set up in a cross complaint [*Code Civ. Proc. § 430.50(a)*], or in opposition to a motion by a defendant or cross defendant for judgment on the pleadings [*see § 71.130* et seq.], or an objection by a defendant or cross defendant at trial to the introduction of any evidence [*see Parker v. Bowron (1953) 40 Cal. 2d 344, 351, 254 P.2d 6]* . With appropriate modifications, they may also be used in opposition to a petition for writ of mandate to compel the trial court to sustain the demurrer after the court has overruled it [*see Babb v. Superior Court (1971) 3 Cal. 3d 841, 851, 92 Cal. Rptr. 179, 479 P.2d 379]* .

[b] Related Pleading and Practice Forms

For discussion of the grounds, format, and accompanying papers in proceedings on demurrer, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* in California Forms of Pleading and Practice.

[c] Related Points and Authorities

For points and authorities in opposition to a general demurrer in a particular substantive context, see the specific chapter.

See also *§ 71.20[2]*.

[3] Discussion of Authorities

[a] Complaint States Cause of Action

Johnson v. Clark *(1936) 7 Cal. 2d 529, 536, 61 P.2d 767* , was an action for breach of contract in which the defendant, who purchased the plaintiff's retail store, agreed to pay plaintiff $350 a month for the rest of plaintiff's life, or until her marriage, in consideration of plaintiff transferring the business to defendant in trust to operate and conduct the business for the plaintiff's benefit. Concurrent with the transfer, the parties executed an agreement, prepared by defendant's attorney, providing for payment of $350 to the plaintiff in consideration of love and affection. The complaint alleged that the agreement failed to embody the understanding of the parties that the expressed consideration of love and affection was not the true consideration, but rather the transfer of the business to defendant. Defendant filed a general demurrer against the first cause of action. The trial court sustained the demurrer without leave to amend and entered judgment for defendant.

The Supreme Court reversed the judgment. The complaint was framed on the theory of an express agreement by the defendant to hold the property in trust for the plaintiff. The theory was revealed to be untenable, however, by the written agreement set forth in the complaint. According to the Court, even though there was no allegation in the complaint that the agreement between the parties transferring the business to the defendant set up a trust, the plaintiff was seeking to hold the defendant to account for the proceeds of the business that the defendant held in trust for her. It does not follow from the fact that the plaintiff failed to allege a trust based on an agreement therefor, either written or oral, between the parties, that the complaint fails to state a cause of action. The Court cited facts alleged that support a cause of action for imposition of a constructive trust. The Court stated that a complaint is invulnerable to a general demurrer if on any theory it states a cause of action (*7 Cal. 2d 529, 536)* .

Richard H. v. Larry D. *(1988) 198 Cal. App. 3d 591, 243 Cal. Rptr. 807* , involved a complaint for fraud, professional negligence, and negligent infliction of emotional distress against a psychiatrist and a hospital, alleging that the psychiatrist had surreptitious sexual relations with the plaintiff's wife while the couple were the defendant's patients for purposes of receiving marital counseling. The psychiatrist filed a general demurrer claiming that the claims are barred by *Civ. Code § 43.5*, which provides that no cause of action arises for alienation of affection, criminal conversation, or seduction of a person over the age of legal consent. The trial court sustained the demurrer without leave to amend. The plaintiff appealed.

The court of appeal reversed the judgment and remanded with instructions to vacate the order granting the demurrer, and to enter a new order overruling it as to the doctor on all causes of action, and as to the hospital on one cause of action, and granting the plaintiff leave to amend against the hospital on certain other causes of action. According to the court, all that is necessary as against a general demurrer is to plead facts showing that the plaintiff may be entitled to some relief (*198 Cal. App. 3d 591, 594)* . The court stated that a review of the decisional law applying *Civ. Code § 43.5* revealed that the statute does not create a blanket immunization from liability for conduct that, although technically within the constraints of the statute, breaches a duty of care independent of the causes of action barred in the statute.

The court cited examples in which a defendant may be held liable for professional negligence and misrepresentation, and not protected by the section. In the instant case, the defendant, as a psychiatrist rendering marriage counseling owed the plaintiff a special duty to use care for the patient's health in the conduct of the therapist-patient relationship (*198 Cal. App. 3d 591, 595)* . The court concluded that the statute was enacted to shield innocent persons from the burden of defending fraudulent or meritless litigation, but was not intended to lower the standard of care that psychiatrists owe their patients, or to permit them to avoid liability for breach of their professional and fiduciary responsibility, or to commit fraud (*198 Cal. App. 3d 591, 596)* .

Truta v. Avis Rent A Car System, Inc. *(1987) 193 Cal. App. 3d 802, 238 Cal. Rptr. 806* , involved a dispute over a "collision damage waiver" provision in an automobile rental agreement, which provided that for a daily fee the automobile rental company defendants agreed to assume responsibility (subject to certain terms and conditions) for the term of one day for collision or upset damage or loss to the vehicle in an amount up to $1,000. The complaint was brought by the plaintiff who had rented the vehicles from the various defendants. The complaint consisted of several causes of action alleging unlawful business practices constituting unfair competition, fraud, and negligent misrepresentation, unconscionability, and unlawful price-fixing. The defendants demurred and the trial court entered a judgment of dismissal after sustaining the demurrer without leave to amend. The plaintiff appealed.

The court of appeal reversed. The court initially observed, quoting *Johnson v. Clark (1936) 7 Cal. 2d 529, 536, 61 P.2d 767* , discussed *above*, that a complaint is invulnerable to general demurrer if on any theory it states a cause of action. The court considered each cause of action and concluded that the general demurrer was properly sustained as to all, except the cause of action based on unconscionability. The court stated that the contract itself was one of adhesion and the plaintiff had alleged the defendants' superior bargaining position and the nonnegotiable nature of the contract terms. According to the court, this absence of meaningful choice on the part of one of the parties together with contract terms that are unreasonably favorable to the other party, will permit affirmative relief based on the concept of unconscionability. The court held that sufficient facts were pled to survive a general demurrer (*193 Cal. App. 3d 802, 821)* .

[b] Demurrer Limited to Face of Pleading and Judicially Noticed Matter

Code Civ. Proc. § 430.30(a) authorizes the filing of a demurrer only when the objection raised [*see Code Civ. Proc. § 430.10*] appears on the face of the challenged pleading or from matter of which the court is required to or may take judicial notice.

In ***Brosterhous v. State Bar*** *(1995) 12 Cal. 4th 315, 48 Cal. Rptr. 2d 87, 906 P.2d 1242* , plaintiffs, members of the State Bar, challenged a procedure by which a member's challenge to the State Bar's annual calculation of the amount of compulsory membership dues to be used for "political activities" were to be resolved by arbitration. After an arbitration decision which allowed a $4.36 refund to challengers, plaintiffs filed an action against the State Bar alleging that even after the dues reduction allowed by the arbitrator, the State Bar had compelled all attorneys to pay for expenditures related to political and ideological activities of the State Bar, thus violating their *First Amendment* rights to freedom and speech and association. The State Bar demurred, and the trial court sustained the demurrer.

The court of appeal reversed, viewing the State Bar's arbitration procedure as analogous to labor arbitration conducted pursuant to a collective bargaining agreement which does not preclude a separate legal action to vindicate violation of an employee's statutory rights. The court of appeal concluded that plaintiffs were entitled to bring a Section 1983 action to vindicate their rights. On appeal, the State Bar argued that, because plaintiffs had an available state administrative remedy, the arbitration was entitled to res judicata effect.

The Supreme Court affirmed the judgment of the court of appeal. The court stated that the initial problem with the State Bar's argument was that the complaint did not allege all of the facts necessary to establish that the action was barred on res judicata grounds, since the complaint did not establish on its face that the issues in the arbitration were identical (

12 Cal. 4th 315, 324) . In an attempt to overcome this procedural bar to consideration of the res judicata defense on a demurrer, the State Bar asked the court to take judicial notice of the entire record of the arbitration proceeding. The court acknowledged that a demurrer may be good if the grounds on which it is based appear either on the face of the complaint or from a matter of which The Court is required to or may take judicial notice. However, the State Bar did not ask the Superior Court to take judicial notice of the arbitration record, so that the record of the arbitration was not before the superior court (*12 Cal. 4th 315, 325)* . Although a reviewing court may take judicial notice of matters not before the trial court, it need not do so, and the Supreme Court declined to do so in this case since the matter should have been presented to the trial court for its consideration in the first instance (*12 Cal. 4th 315, 325-326)* .

In ***SKF Farms v. Superior Court*** *(1984) 153 Cal. App. 3d 902, 200 Cal. Rptr. 497* , plaintiff sought to recover for damage to crops caused by defendants' cropdusting of an adjacent farm on a theory, among others, of strict liability. The trial court sustained defendants' demurrer to this cause of action without leave to amend, based on its ruling that as a matter of law crop dusting was not an ultrahazardous activity giving rise to strict liability. Plaintiff sought a writ of mandate to compel the trial court to overrule the demurrer to cause of action.

The court of appeal granted the writ. The court first noted that there was no precedent ruling that crop dusting was not an ultrahazardous activity. The court held that it was error to determine this issue on demurrer, since the determination of whether or not the activity was ultrahazardous necessarily required the consideration of several factors that were beyond the Pleadings and matters subject to judicial notice and therefore were beyond the proper scope of demurrer (*153 Cal. App. 3d 902, 905-906)* .

[c] At Least One Count or Cause of Action Not Subject to Objection Raised

Lord v. Garland *(1946) 27 Cal. 2d 840, 168 P.2d 5* , was an action against the director and registrar of the state Department of Motor Vehicles for declaratory and injunctive relief. The complaint set forth three causes of action. Defendants demurred to the whole complaint on the grounds there was another action pending between the same parties for the same cause [*now see Code Civ. Proc. § 430.10(c)*] and that several causes of action had been improperly united (no longer a ground of objection). (As additional grounds for demurrer, they asserted that the first and third counts stated insufficient facts to constitute a cause of action [*now see Code Civ. Proc. § 430.10(e)*] and that the second count was ambiguous, unintelligible, and uncertain [*now see Code Civ. Proc. § 430.10(f)*].) The trial court, without indicating the basis for its ruling, sustained the demurrer without leave to amend and Plaintiff appealed from the subsequent judgment of dismissal.

The Supreme Court, reversed the judgment with directions to overrule the demurrer with respect to the ground of objection that another action was pending. The Court held that the second count was not subject to that objection (*27 Cal. 2d 840, 849)* , and stated that a demurrer that attacks an entire pleading should be overruled if one of the counts in the pleading is not vulnerable to the objection (*27 Cal. 2d 840, 850)* .

Knickerbocker v. City of Stockton *(1988) 199 Cal. App. 3d 235, 244 Cal. Rptr. 764* , involved an action by a police officer seeking damages for loss of pay and benefits, and for emotional distress as a result of being fired from the defendant city's police department. The plaintiff had challenged his firing at city civil service commission hearing, and received an order reinstating him at a lower rank with back pay. He thereafter filed a timely claim for damages with the city, which was deemed rejected by operation of law, and the plaintiff filed his lawsuit. The defendant filed a general demurrer to the plaintiff's second amended complaint on the ground that the plaintiff had failed to exhaust his "administrative" remedies by not challenging the decision of the commission through a writ of administrative mandamus. The trial court sustained the demurrer without leave to amend. The Plaintiff appealed.

The court of appeal reversed. The court stated that the doctrine of exhaustion of administrative remedies had no application in the case, but that defendant was really asserting exhaustion of "judicial remedies." The court stated that since plaintiff acquiesced to the commission's determination by failing to seek review, the plaintiff was bound by that

determination to the extent that his causes of action were inconsistent. However, the court noted, while the issue of plaintiff's demotion was conclusively adjudicated in the earlier administrative proceeding before the commission, the adverse determination was not fatal to his causes of action seeking recovery for emotional distress, to the extent that he could prove that he suffered emotional distress from the improper firing (as distinguished from that related to his proper demotion). The court stated that it is settled that it is error to sustain a demurrer without leave to amend as to the entire complaint when the defect relates only to part of the complaint and at least one count is good (*199 Cal. App. 3d 235, 245)* .

[d] Rule of Liberal Construction

Code Civ. Proc. § 452 states the rule that in the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties.

Saxer v. Philip Morris, Inc. *(1975) 54 Cal. App. 3d 7, 126 Cal. Rptr. 327* , was a class action by the purchaser of a home in a large development complex, which at the time of the action consisted of some 4,000 homes and 20,000 people, against the corporation selling the homes, the corporation that controlled it, and the selling corporation's subsidiary corporations (an escrow corporation and a financial lending corporation). The complaint set forth three causes of action. The first in substance alleged that defendants entered into a conspiracy to restrain trade in the sale of escrow services required by purchasers of the homes and to increase the price of such escrow services to an amount in excess of those charged by other firms in the surrounding area. The second alleged in substance that the selling corporation combined with the financial corporation to restrain trade to increase the price of new homes sold, enabling the selling corporation to reap a higher profit and to prevent outside lending institutions from making any F.H.A. and V.A. guaranteed loans to the home buyers, thereby assuring the financial corporation of a monopoly in lending. The third contained similar averments as to restrictions of trade and excessive prices for upgraded floor coverings, which a purchaser selected in lieu of those provided with the home and for which the purchaser was given a credit, provided the upgraded coverings were purchased from the Decorating Center which was a separate operating division of the selling corporation. The complaint alleged numerous facts showing the formation, operation, and purposes of the combinations in restraint of trade, the illegal acts done, the damage caused by such acts, and, in the third cause of action, an illegal tying arrangement. Demurrers to the first, second, and third amended complaints were sustained with leave to amend and demurrers to the fourth amended complaint were sustained without leave to amend.

The court of appeal reversed the judgment of dismissal with a direction that plaintiff be allowed to proceed to trial without the necessity of amending. In so doing, the court enunciated the following rules to be applied in determining the sufficiency of a complaint: the sole issue involved in a hearing on a demurrer is whether the complaint, as it stands, unconnected with extraneous material, states a cause of action; that in testing the legal sufficiency of a pleading against a general demurrer, all properly pleaded allegations, including those that arise by reasonable inference, are deemed admitted regardless of the possible difficulty of proof at trial; and that the allegations must be liberally construed with a view toward substantial justice between the parties, under *Code Civ. Proc. § 452* (*54 Cal. App. 3d 7, 18)* . The court held that plaintiff had exceeded the requirements for alleging a cause of action for a combination in restraint of trade (*54 Cal. App. 3d 7, 20)* , that both proximate cause and injury resulting from the illegal combination, under the rule of liberal construction, were sufficiently alleged (*54 Cal. App. 3d 7, 22-23)* , and that the complaint sufficiently alleged facts showing a tying arrangement in violation of *Bus. & Prof. Code §§ 16720, 16726* (*54 Cal. App. 3d 7, 23-24)* . The court also held that sufficient facts were alleged to establish the participation of the controlling corporation in the allegedly unlawful combinations (*54 Cal. App. 3d 7, 24-25)* and that plaintiff had standing to bring the action (*54 Cal. App. 3d 7, 26)* .

[e] Cause of Action Alleged Despite Mistaken Labels and Confusion of Legal Theory

In ***Nguyen v. Scott*** *(1988) 206 Cal. App. 3d 725, 253 Cal. Rptr. 800* , the plaintiffs were owners of an interest in an apartment complex who brought an action against areal estate broker who represented a cotenant's lender, for failing to

transmit to the lender the plaintiffs' offer to buy the cotenant's interest and instead purchasing the interest for himself at a lower price. A second amended complaint in the action sought damages and imposition of a constructive trust. The trial court sustained defendant's general demurrer without leave to amend. The plaintiffs appealed.

The court of appeal reversed the judgment as to the defendant broker. The court stated that the complaint must be liberally construed with a view toward attaining substantial justice among the parties. Hence, the court was not limited to the plaintiffs' theory of recovery in testing the sufficiency of their complaint against a demurrer but instead must determine if the factual allegations of the complaint are adequate to state a cause of action under any legal theory. Mistaken labels and confusion of legal theory are not fatal; if appellant's complaint states a cause of action on any theory, he or she is entitled to introduce evidence thereon. The first and second causes of action sought damages and to impose a constructive trust. Although the allegations of the complaint did not support a dual agency relationship, the allegations did support the inference that the defendant was acting in his capacity as a broker for the lender. Thus, court concluded, both causes of action were premised on the alleged breach of a duty owed by a licensed real estate broker to prospective purchasers (*206 Cal. App. 3d 725, 731, 737)* .

[f] Cause of Action Alleged Despite Legal Conclusions

Maxwell v. City of Santa Rosa *(1959) 53 Cal. 2d 274, 1 Cal. Rptr. 334, 347* P.2d 678, was an action against the city and members of its city council to enjoin enforcement of street assessments against plaintiffs' properties and to secure a determination that the assessment proceedings were null and void. Defendants' demurrers to the amended complaint were sustained and when plaintiffs elected to stand on their pleading the action was dismissed.

The Supreme Court reversed the judgment. The Court summarized the contents of the complaint and held that any of the various matters alleged (fraud, manifestly unjust assessment, arbitrary and unreasonable action by the city council, or abuse of discretion) would entitle plaintiffs to relief if properly pleaded and proved. The Court then held that the complaint stated sufficient facts to constitute a cause of action (*53 Cal. 2d 274, 279-281)* . In this regard, the Court said that defendants' principal attack on the specific allegations of the complaint was that the allegations of fraud were general in nature, consisted of legal conclusions, and failed to point out any acts amounting to fraud. The Court said that while the complaint was long and rambling and contained many conclusions it did contain sufficient allegations, good as against a general demurrer (*53 Cal. 2d 274, 280)* . In summarizing the contents of the complaint, the Court noted that while it was alleged that something was "fraudulently" done, this allegation was followed by a specific allegation of the facts constituting the alleged fraud and on this ground distinguished the case relied on by defendants that involved allegations in the form of bare legal conclusions without specifically alleging the particulars of the fraud (*53 Cal. 2d 274, 280-281)* .

[g] Cause of Action Alleged Despite Unclear Facts

In ***Chase Chemical Co. v. Hartford Accident & Indemnity Co.*** *(1984) 159 Cal. App. 3d 229, 205 Cal. Rptr. 469* , employees brought an action against a chemical company for injuries sustained while the employees were using a degreasing machine. The chemical company filed a cross complaint against the employer, the employer's insurance carrier, and the employer's workers' compensation carrier, for indemnity, comparative contribution, and an offset of workers' compensation benefits. The employer's insurance carrier demurred. In sustaining the insurer's demurrer without leave to amend, the trial court found that because the cross complainant could not sue the employer directly, in the absence of an allegation of a written agreement to indemnify, under *Lab. Code § 3864*, it could not sue the employer's insurance carrier for the same conduct. The cross complainant appealed.

The court of appeal reversed the order of dismissal. The court stated that in determining whether or not the complaint is sufficient as against the demurrer, on the ground that it does not state facts sufficient to constitute a cause of action, the rule is, that if on a consideration of all the facts stated it appears that the plaintiff is entitled to any relief at the hands of the court against the defendants, the complaint will be held good, although the facts may not be clearly stated, or may be

intermingled with a statement of other facts irrelevant to the cause of action shown, or although the plaintiff may demand relief to which he or she is not entitled under the facts alleged (*159 Cal. App. 3d 229, 242)* .

Although the workers' compensation law barred the employee's action at law for an initial injury, a cause of action may exist for aggravation of the disease because of an employer's fraudulent concealment of the condition and its cause. Hence, the cross complainant, as a third party, may have been entitled to indemnity from the employer for such aggravation without regard to the lack of existence of a written indemnity agreement for those damages proximately caused by the aggravation. The cross complaint, however, failed to allege facts sufficient to establish fraudulent concealment. The cross complaint did, albeit disjunctively, in the court's view, state a valid cause of action for offset of compensation benefits. The fact that the cross complainant requested relief to which it was not entitled to does not negate the fact that it has stated a valid cause of action. Whether the chemical company could also state a cause of action for comparative indemnity could only be decided after the filing of the next amended cross complaint. Therefore, the court held that the trial court abused its discretion in sustaining the demurrer to the cross complaint without leave to amend (*159 Cal. App. 3d 229, 243)* .

[h] Cause of Action Alleged Despite Irrelevant Facts

Chase Chemical Co. v. Hartford Accident & Indemnity Co. *(1984) 159 Cal. App. 3d 229, 205 Cal. Rptr. 469* , is *discussed under § 71.30[3][g].*

[i] Cause of Action Alleged Despite Demand for Wrong Relief

Chase Chemical Co. v. Hartford Accident & Indemnity Co. *(1984) 159 Cal. App. 3d 229, 205 Cal. Rptr. 469* , is *discussed under § 71.30[3][g].*

[j] Implied or Inferred Facts Deemed True

The facts and procedural background of ***Saxer v. Philip Morris, Inc.*** *(1975) 54 Cal. App. 3d 7, 126 Cal. Rptr. 327* , were *discussed under § 71.30[3][d].* In *Saxer v. Philip Morris, Inc.*, the court of appeal reversed the judgment of dismissal with a direction that plaintiff be allowed to proceed to trial without the necessity of amending. The plaintiff contended that sufficient facts were alleged to establish the participation of defendants in allegedly unlawful combinations. After reciting the relevant allegations and argument by the defendants, the court concluded that at least an inference of knowing and willful participation by the particular defendant in the allegedly illegal conduct could be gleaned from the pleadings (*54 Cal. App. 3d 7, 25-26)* .

[k] Disregard of Nonprejudicial Defect

Code Civ. Proc. § 475 in pertinent part provides that the court must, in every stage of an action, disregard any defect in the pleadings that, in the opinion of the court, does not affect the substantial rights of the parties.

Gressley v. Williams *(1961) 193 Cal. App. 2d 636, 14 Cal. Rptr. 496* , was an action for damages for breach of two oral contracts employing plaintiff as an automobile sales manager at a fixed salary plus a percentage of gross profits and for an accounting. The sixth amended complaint set forth three counts, the first two of which were for breach of the oral contracts and the third for an accounting. Defendants demurred generally to all three counts and specially, on the grounds of uncertainty, ambiguity, and unintelligibility, to Counts I and II. The demurrer was sustained and, after plaintiff's counsel stated he did not desire to further amend, it was sustained without leave to amend. In holding that the general demurrer to the first count was properly sustained since that action was barred by the statute of frauds but that both the second and third counts each stated facts sufficient to constitute a cause of action and reversing the judgment on that ground, the court of appeal, citing *Code Civ. Proc. § 475*, stated the rule that a court must, in every stage of an action, disregard any defect in the Pleadings that does not affect the substantial rights of the parties (*193 Cal. App. 2d 636, 639)* .

With respect to the statute of frauds defense, it should be noted that in *Nesson v. Moes (1963) 215 Cal. App. 2d 655, 657, 30 Cal. Rptr. 428* , the court of appeal distinguished *Gressley* on the ground the services under the oral contract in *Gressley* were only partly performed whereas the services under the oral contract in *Nesson* were fully performed and hence the statute of frauds did not apply.

[l] Cause of Action Not Necessarily Barred By Affirmative Defense

In ***CrossTalk Productions, Inc. v. Jacobson*** *(1998) 65 Cal. App. 4th 631, 76 Cal. Rptr. 2d 615* , the complaint alleged, among other things, that plaintiffs were employees of a television network. Defendant was a vice--president of the television network and plaintiffs' boss. Defendant's responsibilities at the television network included selecting outside vendors, overseeing vendor contracts, and approving contract payments to vendors. Defendant would select the vendor, negotiate the terms of the contract and approve the final contract. Even if a vendor contract exceeded defendant's final authority dollar level, thus requiring the signature of defendant's superior, defendant decided which vendors to select and defendant's superior routinely approved defendant's decision. Plaintiffs approached defendant with the idea of forming an outside company to contract with the television network to provide video promotional spots and asked defendant if they might negotiate such a contract with the television network. The defendant said yes.

Thereafter, the individual plaintiffs met with defendant and defendant's superior to make a formal request to be considered for an exclusive contract with the television network for the production of video promotional spots. Defendant's superior approved the request and directed defendant to prepare the contract. Defendant and defendant's superior asked the individual plaintiffs to remain with the television network until replacements could be hired. At or about this time plaintiffs let it be known to management they would be leaving the television network to form CrossTalk Productions, Inc. (another plaintiff in the action hereafter called CrossTalk). The next day, defendant told one of the individual plaintiff's that defendant wanted plaintiff's company to help defendant out by paying defendant $500 a month. By this time, defendant knew the individual plaintiffs had notified management that they were leaving and had staked their entire future on CrossTalk's deal with the television network. In considering defendant's demand, the individual plaintiffs knew that defendant had the ability to kill the contract CrossTalk was negotiating with the Television network, and the power to terminate the contract once the individuals were out on their own. The defendant was also still the individual plaintiffs' boss and had the power to terminate their employment before they could start up CrossTalk. The television network had not yet provided the promised contract, and the individual plaintiffs feared they would lose both the contract and there jobs if they refused, or told anyone of, defendant's demand. Plaintiffs believed that they had no reasonable alternative under the circumstance but to accede to defendant's demand in order to secure CrossTalk's contract with the Television network. Accordingly, plaintiffs reluctantly agreed to pay. The individual plaintiffs then incorporated CrossTalk and the contract was executed. Under the contract CrossTalk would work exclusively for the television network for two years in exchange for a guaranteed minimum number of projects.

Thereafter, plaintiffs made three monthly payments to defendant in September, October, and November of 1996. Plaintiffs in the meantime heard from a different source that defendant wanted to cancel the agreement and they become more fearful of the consequences of failing to pay. In December, 1996, one of the individual plaintiff's called defendant to discuss billing on a project for which CrossTalk sought additional compensation at which time defendant said defendant wanted defendant's payments increased to $1,000. Defendant was told that CrossTalk could not afford that sum. Thereafter, defendant failed to respond to work related communications, which made CrossTalk's performance under the contract difficult. Later on in the month $300 in cash and $200 in gift certificates were delivered to defendant in the hopes it would pass as the fourth payment. Defendant then claimed there were a number of problems with CrossTalk projects. Although other television network representatives had voiced satisfaction with CrossTalk's work, one of the individual plaintiff's learned that defendant had been overheard suggesting that CrossTalk would not be with the television network much longer. On January 16, 1997, the individual plaintiffs met with defendant and were given a letter detailing the alleged problems with CrossTalk's work that had to be resolved to avoid cancellation of the contract. The individual plaintiffs believed they were being set up and that the identified problems were merely props for

defendant's staged threat. Unable to afford the $1,000 and believing that the defendant was about to terminate the contract, the individual plaintiffs on January 17, told the television network about defendant's demands along with the threat to cancel the contract after CrossTalk indicated it could not pay the increased amount. The television network terminated defendant in March of 1997 (giving defendant a substantial settlement). By letter dated May 15, 1997, the television network stated it was terminating CrossTalk's contract on the basis of the admitted wrongdoing of the individual plaintiffs. Plaintiffs then sued.

Plaintiffs complaint advanced three theories against defendant. The first titled "Economic Duress" alleged that defendant "wrongfully employed economic duress in demanding and receiving payments. ... " The individual plaintiffs also asserted claims for intentional and negligent infliction of emotional distress. Defendant demurred to all three causes of action for failure to state a claim on which relief could be granted because each claim was barred by the affirmative defense of unclean hands.

The trial court sustained the demurrers without leave to amend on the theory that the allegations in the complaint established as a matter of law that the individual plaintiffs committed Commercial Bribery as defined in *Pen. Code § 641.3*, and that such an offense would necessarily establish a defense of unclean hands. Judgment of dismissal was entered and plaintiffs appealed (*65 Cal. App. 4th 631, 636-639)* .

The court of appeal reversed. The court noted that a demurrer is treated as admitting all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law. The appellate court gives the complaint a reasonable interpretation, reading it as a whole and its parts in their context. When a demurrer is sustained, the appellate court determines whether the complaint states facts sufficient to constitute a cause of action, and when it is sustained without leave to amend, the appellate court decides whether there is a reasonable possibility that the defect can be cured by amendment. If there is a reasonable possibility that the defect can be cured by amendment the trial court has abused its discretion and the appellate court reverses whereas if the defect cannot be so cured there has been no abuse of discretion and the appellate court affirms. The complaint must be liberally construed with a view toward substantial justice between the parties. Here, the demurrer was based on an affirmative defense (unclean hands). In such a case, the affirmative defense must clearly appear on the face of the complaint in order to support a demurrer. A demurrer is not the appropriate procedure for determining the truth of disputed facts or what inferences should be drawn when competing inferences are possible. Nor is a demurrer the appropriate procedure for determining the truth of disputed facts or what inferences should be drawn when competing inferences are possible. The complaint here did contain a factual ambiguity (*65 Cal. App. 4th 631, 635)* .

The complaint alleged that plaintiffs believed " 'that they had no reasonable alternative under these circumstances but to accede to [defendant's] demand in order to *secure* CrossTalk's contract with [the television network]' (Italics added)." The trial court apparently interpreted the word "secure" in the sense of "obtain, procure, get, acquire or gain." "Secure," however, can also mean "protect, guard or safeguard." Applying the first meaning stated above, the complaint could be read to mean that the individual plaintiffs paid defendant a bribe in order to obtain CrossTalk's contract with the television network. If this is what the individual plaintiffs did, *i.e.*, pay a bribe to obtain a contract, the doctrine of unclean hands would apply to bar their claim for damages caused by losing that very contract (*65 Cal. App. 4th 631, 639-640)* . The individual plaintiffs, however, argued that the word "secure" was used in the complaint in the second sense noted above. Applying the second sense, the complaint alleged that the individual plaintiffs were forced to accede to defendant's extortionate demands in order to safeguard the finalization of a contract which had already been negotiated between the television network and CrossTalk and which would be finalized without incident in the absence of extortionate interference by defendant. This safeguarding was necessary, according to a fair reading of the complaint, only because of the defendant's extortionate threats. If what actually happened here is the second scenario, *i.e.*, an extortionate scheme perpetrated by defendant to take advantage of plaintiffs' vulnerable position, there appears to be no authority that would bar plaintiffs from recovering against defendant merely for trying to avoid the damage that might follow if defendant's extortionate threats were carried out. So long as no bribe was paid to obtain CrossTalk's contract with the television network and hence the contract was awarded on merit, defendant's moral culpability would be far

and away greater than any that would attach to CrossTalk and the individual plaintiffs. The defendant would then not be shielded by the individual plaintiffs' failure to resist extortionate demands. To construe the doctrine of unclean hands otherwise would be to transform the doctrine into protection for extortionists. Unclean hands is an equitable doctrine. Thus, the court found that the proposition that it is not equitable to protect extortionists against liability for the injuries caused their victims should not require an elaborate defense (*65 Cal. App. 4th 631, 640)* .

Ironically, this case would probably not have been on appeal had counsel used some other word than "secure" to describe what happened. Or the entire passage in which the word "secure" appeared could have been deleted without detracting materially from the complaint. If the allegation that plaintiffs believed " 'that they had no reasonable alternative under these circumstances but to accede to [defendant's] demand in order to *secure* CrossTalk's contract with [the television network]' (Italics added)" ended with a period after the word "demand," the appeal might not have been necessary. Although precision is generally a virtue, counsel drafting a complaint can hardly be expected to anticipate that a word such as "secure" will be construed as necessarily constituting an adverse admission, much less that leave to amend will then be denied. Courts should not sustain demurrers without leave to amend based on such ambiguities. Instead, the court found that leave to amend should be granted to clarify ambiguity (*65 Cal. App. 4th 631, 640-641)* .

Because the doctrine of unclean hands is heavily fact dependent, the court also found that it is a uniquely poor candidate to support a demurrer. There have been unusual situations, however, in which a defense of unclean hands has been established solely by the allegations of the complaint. The court pointed to *Blain v. Doctor's Co. (1990) 222 Cal. App. 3d 1048, 1060, 272 Cal. Rptr. 250* as an example. There, the court applied a three prong analysis to determine whether the doctrine of unclean hands applies, *i.e.*, whether there is a bar depends on (1) the analogous case law, (2) the nature of the misconduct, and (3) the relationship of the misconduct to the claimed injuries (*65 Cal. App. 4th 631, 641)* . In this case the three prongs of the *Blain* test were not established by the pleadings and a defense of unclean hands cannot support a demurrer (*65 Cal. App. 4th 631, 649)* . Similarly, the court found that the allegations of the complaint did not compel the conclusion that plaintiffs necessarily committed commercial bribery under *Pen. Code § 641.3*. The facts alleged here did not necessarily establish that plaintiffs intended to injure or defraud anyone. The complaint did not necessarily demonstrate any intent on the plaintiffs that the television network not receive the full benefit of a market value bargain or that the plaintiffs obtained a contract improperly (*65 Cal. App. 4th 631, 643-644)* .

With regard to economic duress, the doctrine of economic duress can apply when one party has done a wrongful act which is sufficiently coercive to cause a reasonably prudent person, faced with no reasonable alternative, to agree to an unfavorable contract. The party subjected to the coercive act, and having no reasonable alternative, can then plead economic duress to avoid the contract. The instant case directly concerned not economic duress, but instead allegations of extortion. Plaintiffs, however, used the term economic duress in their complaint and the treatment of the reasonable alternative issue in economic duress cases is instructive. When a party pleads economic duress, that party must have had no reasonable alternative to the action it now seeks to avoid (generally agreeing to the contract). If a reasonable alternative was available, and there hence was no compelling necessity to submit to coercive demands, economic duress cannot be established. Whether the party asserting economic duress had a reasonable alternative is determined by examining whether a reasonably prudent person would follow the alternative course, or whether a reasonably prudent person might submit. The court found that this inquiry was clearly a factual one, rarely if ever susceptible to determination on demurrer (*65 Cal. App. 4th 631, 644)* .

Plaintiffs also cited the related concept of an exception to the unclean hands doctrine which allows a party relief even if the party has been guilty of wrongdoing. The exception can apply only when the party seeking the relief is the one least at fault. The rule is ordinarily invoked when the party seeking relief is not a free moral agent and that party's participation in the wrongdoing is the result of undue influence, menace, or duress of the other party. The court found that the existence of duress always depends on the circumstances and is a factual question (*65 Cal. App. 4th 631, 644-645)* . Defendant argued there is no cause of action for economic duress. It appears that the Supreme Court has noted a general right to be free from acts constituting duress and the propriety of a cause of action for wrongful acts in the nature of duress. Such duress may consist of threats to business or property interests. Moreover, other theories are

potentially applicable to the facts alleged here. For example, plaintiffs' allegations did not negate the possibility of amendment to state a cause of action for interference with prospective economic advantage (*65 Cal. App. 4th 631, 645-646)* . Plaintiffs could easily have chosen a label other than economic duress for their theory that defendant caused them to lose their contract with the television network. Hence there was ample basis for successful amendment and possible eventual recovery against defendant. Thus, it was error for the trial court to sustain the demurrer without leave to amend (*65 Cal. App. 4th 631, 649)* .

[m] Demurrer Inappropriate to Determine Truth of Disputed Facts

CrossTalk Productions, Inc. v. Jacobson *(1998) 65 Cal. App. 4th 631, 635, 76 Cal. Rptr. 2d 615* , is *discussed under § 71.30[3][l].*

[4] Additional Authorities

[a] Complaint States Cause of Action

In *Savage v. Trammell Crow Co. (1990) 223 Cal. App. 3d 1562, 273 Cal. Rptr. 302* , the court of appeal reversed a judgment dismissing a complaint by an individual who was distributing religious tracts in a shopping center parking lot, seeking an injunction against the shopping center management. Although the court affirmed the trial court's order denying the plaintiff a preliminary injunction with regard to the leafleting, the court held that a written prohibition by defendants against nonpolitical expression unlawfully distinguished between "political" and "religious" speech and therefore gave rise to a cause of action against them. The court stated that a trial court may not sustain a demurrer without leave to amend when the plaintiff has alleged facts showing entitlement to relief under any possible legal theory (*223 Cal. App. 3d 1562, 1576)* .

The court of appeal in *Rogoff v. Grabowski (1988) 200 Cal. App. 3d 624, 246 Cal. Rptr. 185* , reversed the judgment entered against plaintiff after sustaining general and special demurrers. Because the trial court denied the demurrers in general terms, it had to be assumed that that court had ruled only on the general demurrer (*200 Cal. App. 3d 624, 628)* . Plaintiff's second amended complaint had one count labeled "tortious breach of covenant of good faith and fair dealing." Although plaintiff had not stated a cause of action for tortious breach of the covenant of good faith and fair dealing, the demurrers should not have been sustained, because the complaint stated at least one other valid cause of action (*200 Cal. App. 3d 624, 634)* . The court of appeal stated the rule as being that if the facts pleaded will support any theory of recovery, it is immaterial that the plaintiff may have misconceived the theory of his or her cause of action (*200 Cal. App. 3d 624, 628)* .

Surina v. Lucey (1985) 168 Cal. App. 3d 539, 214 Cal. Rptr. 509 , involved a complaint for damages alleging interference with a parental relationship by a third party. The complaint, by parents of a female teenager, alleged that her uncle had impermissibly removed her from their custody, induced her to remain away, and entered into a sexual relationship. The trial court sustained the uncle's demurrer to the second amended complaint without leave to amend. The court of appeal reversed the dismissal and held that the parents' multiple allegations stated a cause of action under *Civ. Code § 49* (*168 Cal. App. 3d 539, 543-545)* .

In *Certified Grocers of California, Ltd. v. San Gabriel Valley Bank (1983) 150 Cal. App. 3d 281, 197 Cal. Rptr. 710* , a creditor's action against a bank in which the judgment debtor had an account, the bank's general demurrer was sustained and the action was dismissed. On appeal, the court of appeal reversed the dismissal except as to an isolated issue of punitive damages. The court held that a pleading is sufficient against a general demurrer if it contains allegations essential to the statement of any one cause of action, even, as in the instant case, an abortive attempt is made to state facts calling for other and different relief (*150 Cal. App. 3d 281, 288)* .

See also *Alcorn v. Anbro Engineering, Inc. (1970) 2 Cal. 3d 493, 496, 86 Cal. Rptr. 88, 468 P.2d 216* (plaintiff need

only plead facts showing he or she may be entitled to some relief); *Maxwell v. City of Santa Rosa (1959) 53 Cal. 2d 274, 279, 1 Cal. Rptr. 334, 347 P.2d 678* (same); *TRIM, Inc. v. County of Monterey County (1978) 86 Cal. App. 3d 539, 543, 150 Cal. Rptr. 351* (if, on a consideration of all facts stated, it appears plaintiff is entitled to any relief at hands of court against defendants, complaint will be held good, although facts may not be clearly stated, or may be intermingled with statement of other facts irrelevant to cause of action shown, or although plaintiff may demand relief to which he or she is not entitled under facts alleged); *Gonzales v. State of California (1977) 68 Cal. App. 3d 621, 631, 137 Cal. Rptr. 681* (same); *Jaffe v. Carroll (1973) 35 Cal. App. 3d 53, 57, 110 Cal. Rptr. 435* (same); *Taschner v. City Council (1973) 31 Cal. App. 3d 48, 57, 107 Cal. Rptr. 214* (same; overruled on another point in *Associated Home Builders Etc., Inc. v. City of Livermore (1976) 18 Cal. 3d 582, 596 n.14, 135 Cal. Rptr. 41, 557 P.2d 473*); *Tiburon v. Northwestern P. R. Co. (1970) 4 Cal. App. 3d 160, 170, 84 Cal. Rptr. 469* (same); *Laing v. Laubach (1965) 233 Cal. App. 2d 511, 516-517, 43 Cal. Rptr. 537* (all that is necessary as against a general demurrer is to plead facts entitling the pleader to some relief).

[b] Demurrer Limited to Face of Pleading and Judicially Noticed Matter

Johnson Rancho etc. Dist. v. County of Yuba (1963) 223 Cal. App. 2d 681, 35 Cal. Rptr. 828 , was an action by the water district against the county and others by which plaintiff sought to quiet title to certain water rights claimed under a written assignment that was pleaded according to its legal effect and not appended to the complaint. Defendants demurred both generally and specially to the complaint and at the same time filed a demand under former Code Civ. Proc. § 449 for production of the written assignment. Thereafter the assignment was produced and filed with the clerk by defendants. The water rights covered by it were not those described in the complaint. The trial court sustained the demurrer without leave to amend on the ground, among others, that the agreement showed on its face that the water rights claimed were not included in those covered by the written assignment. Plaintiff appealed from the subsequent judgment of dismissal. The court of appeal held that the trial court erred In sustaining the demurrer since demurrers reach only those defects appearing on the face of the complaint or judicially noticeable (*223 Cal. App. 2d 681, 684)* and the proper way to have raised and disposed of the issue was by a motion for summary judgment (*223 Cal. App. 2d 681, 685)* . The court nevertheless affirmed the judgment on the ground plaintiff had effectually confessed it had no cause of action because it claimed no interference with the water rights described in its assignment and had acquired no interest in the water rights described in its complaint (*223 Cal. App. 2d 681, 684)* .

Hayward v. Henderson (1979) 88 Cal. App. 3d 64, 151 Cal. Rptr. 505 , was an action by a former city police officer trainee challenging procedures used in his dismissal. Funding for his trainee position was provided by the federal government under the Comprehensive Employment Training Act, and plaintiff was dismissed near the end of his one-year probationary period. Defendants' demurrer to the complaint on the ground plaintiff had not sufficiently alleged his exhaustion of applicable administrative remedies provided under federal rules and regulations, was sustained and, on plaintiff's failure to amend his complaint, the action was dismissed. On appeal it was plaintiff who contended that the trial court in ruling on the demurrer tried the facts and erred in failing to make findings of fact and conclusions of law. In rejecting this contention, on the ground no relevant authority for this novel position was cited, and affirming the judgment, the court of appeal said that a demurrer, by its very nature involves no issue of fact. A defendant cannot make allegations of fact in his or her demurrer which, if true, would disclose a defect in the complaint, nor can he or she strengthen the demurrer by asserting evidence that would make the complaint defective (*88 Cal. App. 3d 64, 71)* .

Cravens v. Coghlan (1957) 154 Cal. App. 2d 215, 315 P.2d 910 , was an action against an executrix on a rejected claim for the value of work and services allegedly rendered by plaintiff to decedent. Defendant demurred on the ground plaintiff lacked capacity to sue because, when the complaint was filed and the services were rendered, plaintiff was either serving time instate prison for a felony or on parole and had not received permission from the Adult Authority to enter into contracts or sue. At the hearing, the court entered its order "finding" that plaintiff was, at the time the complaint was filed, in prison for the commission of a felony and that neither before nor after the filing of the complaint, and while on parole, did plaintiff secure the consent of the Adult Authority to file a civil action. Based on these "findings," the court sustained the demurrer without leave to amend. In reversing the subsequent judgment of

dismissal, the court of appeal pointed out that the trial court had no power on demurrer to pass on the factual issue raised because it could be presented only by answer. The court stated that it is an elementary rule that the sole function of a demurrer is to test the sufficiency of the challenged pleading, and it cannot properly be addressed to or be based on evidence or other extrinsic matters. A defendant is not permitted to allege facts in his demurrer that, if true, would make the complaint vulnerable (*154 Cal. App. 2d 215, 217)* .

Stratford Irr. Dist. v. Empire Water Co. (1941) 44 Cal. App. 2d 61, 111 P.2d 957 , was a condemnation proceeding by the irrigation district against a water company. Defendant demurred generally and specially on several grounds, including the ground of nonjoinder of parties defendant. This latter ground was based on a recorded contract and deed claimed to have been pleaded by reference to the deed in the complaint, although the terms of the contract and deed were not set forth in the complaint. The trial court sustained the demurrers on the ground the complaint did not state facts sufficient to constitute a cause of action. In reversing the subsequent judgment of dismissal, the court of appeal, with respect to the ground of nonjoinder of parties, stated the rule that a demurrer admits all the material allegations of a complaint but does not change or enlarge those allegations and it certainly cannot insert allegations in a complaint that do not appear in it. The court pointed out that there was not the slightest reference in the complaint to the contract on the terms of which defendants rested their argument of nonjoinder, that the complaint made only a causal reference to the deed that defendants maintained referred to the contract, and that plaintiff made no attempt to plead either the deed or contract by stating its substance, by attaching copies as exhibits, or by reference to the book when the contract was recorded (*44 Cal. App. 2d 61, 70)* .

See also *Kleiner v. Garrison (1947) 82 Cal. App. 2d 442, 447, 187 P.2d 57* (in ruling on a demurrer the court is bound by the facts alleged in the pleading against which the demurrer is directed and cannot consider facts presented in an affidavit accompanying the demurrer); *Kadota Fig Assn. v. Case-Swayne Co. (1946) 73 Cal. App. 2d 796, 803, 167 P.2d 518* (same); *Mackay v. Clark Rig Bldg. Co. (1935) 5 Cal. App. 2d 44, 55, 42 P.2d 341* (same).

[c] At Least One Count or Cause of Action Not Subject to Objection Raised

Cooper v. Leslie Salt Co. (1969) 70 Cal. 2d 627, 75 Cal. Rptr. 766, 451 P.2d 406 , cert. denied 396 U.S. 821, 90 S. Ct. 62, 24 L. Ed. 2d 72 , was an action attacking the manner in which municipal improvements and services were financed by a municipal improvement district of which plaintiff was a taxpayer. The complaint alleged four causes of action on various theories and was amended twice. Defendants' general demurrer to the second amended complaint was sustained without leave to amend, and plaintiff appealed from the subsequent judgment of dismissal. Though holding the demurrer was properly sustained without leave to amend, the Supreme Court stated the general rule that if one count of a complaint states a cause of action it is an abuse of discretion to sustain the demurrer as to that count (*70 Cal. 2d 627, 636)* .

Polderman v. C.G. Hokanson Co., Inc. (1958) 157 Cal. App. 2d 28, 320 P.2d 59 , was an action to recover the reasonable value of services rendered and for other relief. A general demurrer to the second amended complaint was sustained with leave to amend and, on plaintiff's failure to timely amend, the action was dismissed. On appeal, the court stated that in light of the familiar rule that if any count or cause of action in a complaint setting up several counts or causes of action is good against a demurrer, a judgment of dismissal for insufficiency of the complaint cannot be sustained and that the court therefore needed to consider whether any count stated a cause of action against the demurrer directed thereto (*157 Cal. App. 2d 28, 30)* . The court held that the second cause of action was sufficient and reversed the judgment.

Skipper v. Gilbert J. Martin Constr. Co. (1957) 156 Cal. App. 2d 82, 318 P.2d 732 , was an action to foreclose a mechanic's lien and for money allegedly due under a written contract and additional money due under a subsequent oral contract to furnish materials and labor. Defendant's demurrer to plaintiff's second amended complaint was sustained without leave to amend and plaintiff appealed from the subsequent judgment of dismissal. Although holding plaintiff could not recover for the work performed pursuant to the written contract since that contract showed on its face that

plaintiff was contracting as a contractor, for which he had no license [*see Bus. & Prof. Code § 7031*], the court reversed the judgment on the ground it could not hold as a matter of law that plaintiff was not entitled to the additional sum he sought under the alleged oral contract. In this connection, the court said that a demurrer that attacks an entire pleading should be overruled if one of the counts therein is not vulnerable to the objection raised, and that if any count or cause of action in a complaint setting up several counts or causes of action is good as against demurrer, a judgment of dismissal for insufficiency of the complaint cannot be sustained (*156 Cal. App. 2d 82, 86-87)* .

Shook v. Pearson (1950) 99 Cal. App. 2d 348, 221 P.2d 757 , was an action for damages for breach of oral contracts. The complaint set forth two causes of action. The first was for breach of an oral contract granting plaintiff an exclusive agency for the marketing of defendants' products and the second was for breach of an oral contract to manufacture certain airplanes for plaintiff. Defendants' demurrer to the fourth amended complaint on the grounds of failure to state a cause of action and for uncertainty with respect to the allegation of special damages was sustained without leave to amend and plaintiff appealed from the subsequent order of dismissal. Although holding that both counts stated a cause of action (but that the special demurrer was properly sustained), and reversing the judgment on that ground, the court of appeal said that it is the general rule that a demurrer that attacks an entire pleading should be overruled if one of the counts in the pleading is not vulnerable to the objection and that if any count or cause of action in a complaint setting up several counts or causes of action is good as against a demurrer, a judgment of dismissal for insufficiency of the complaint cannot be sustained (*99 Cal. App. 2d 348, 351)* .

See also *Brandt v. Brandt (1918) 178 Cal. 548, 550, 174 P. 55* (demurrer directed to complaint as a whole and not to separate causes of action stated in it should be overruled if any count is good); *Taylor v. S & M Lamp Co. (1961) 190 Cal. App. 2d 700, 703, 12 Cal. Rptr. 323* (demurrer that attacks entire pleading should be overruled if one of the counts in the pleading is not vulnerable to the objection); *Bacon v. Wahrhaftig (1950) 97 Cal. App. 2d 599, 605, 218 P.2d 144* (same).

[d] Rule of Liberal Construction

See *Dunkin v. Boskey (2000) 82 Cal. App. 4th 171, 98 Cal. Rptr. 2d 44 , discussed under § 71.30[4][e]*.

Mack v. Soung (2000) 80 Cal. App. 4th 966, 95 Cal. Rptr. 2d 830 involved an action by surviving children against their deceased parent's former physician for either violation of the Elder Abuse and Dependent Adult Civil Protection Act (*Welf. & Inst. Code § 15600 et seq.*), or intentional infliction of emotional distress. Demurrers to both causes of actions were ultimately sustained without leave to amend in the trial court. The court of appeal reversed the judgment concerning the elder abuse cause of action, concluding that plaintiffs sufficiently stated a cause of action for elder abuse (*see 80 Cal. App. 4th 966, 968, 975-976)* . The court liberally construed the pleadings noting that for demurrer purposes, the allegations of a complaint must be liberally construed with a view to substantial justice between the parties (*80 Cal. App. 4th 966, 972)* .

Stevens v. Superior Court (1999) 75 Cal. App. 4th 594, 89 Cal. Rptr. 2d 370 , involved the issue of whether a plaintiff, on behalf of the general public, may state a claim under the Unfair Competition Act (*Bus. & Prof. Code § 17200*), for violation of Insurance Code and California Code of Regulations provisions that require insurance agents, brokers, and automobile dealers, to be licensed to transact insurance. In two related actions the trial court had sustained defendants' demurrers without leave to amend. The court of appeal consolidated the cases for review. In reversing, the court of appeal noted that for purpose of determining the effect of a complaint, its allegations are liberally construed, with a view toward substantial justice (*75 Cal. App. 4th 594, 601)* .

See *CrossTalk Productions, Inc. v. Jacobson (1998) 65 Cal. App. 4th 631, 635, 76 Cal. Rptr. 2d 615 , discussed under § 71.30[3][l]*.

[e] Cause of Action Alleged Despite Mistaken Labels and Confusing Legal Theory

Dunkin v. Boskey (2000) 82 Cal. App. 4th 171, 98 Cal. Rptr. 2d 44 , involved a breach of contract action. The trial court had dismissed plaintiff's action after sustaining a demurrer without leave to amend. In reversing the judgment for defendant in part and remanding the case to the trial court, the court of appeal noted that regardless of the labels attached to a cause of action, the appellate court must examine the complaint's factual allegations to determine whether they state a cause of action on any available legal theory. Reversible error is committed if the facts alleged show entitlement to relief under any possible legal theory. And if the complaint, liberally construed, can state a cause of action, or if it is reasonably possible that the plaintiffs can cure the complaint by amendment, the trial court should not sustain a demurrer without leave to amend (*82 Cal. App. 4th 171, 180)* .

Schnall v. Hertz Corp. (2000) 78 Cal. App. 4th 1144, 93 Cal. Rptr. 2d 439 , involved a class action seeking damages and injunctive relief against defendant based on fuel service charges under defendant's rental agreement. Plaintiff's amended complaint alleged four causes of action: (1) violation of the Unfair Competition Law (*Bus. & Prof. Code § 17200 et seq.*); (2) money had and received on the basis of an unconscionable and adhesive contract; (3) restitution; and (4) violation of the Consumers Legal Remedies Act (*Civ. Code § 1750 et seq.*). The trial court sustained defendant's demurrer without leave to amend on the ground that plaintiff failed to state facts sufficient to constitute any alleged cause of action and entered judgment for defendant, dismissing the action with prejudice. The court of appeal reversed. In so doing, the court noted that in determining whether or not a complaint is sufficient to constitute a cause of action, the rule is, that if on consideration of all the facts stated it appears that the plaintiff is entitled to any relief at the hands of the court against the defendants, the complaint will be held good, although the facts may not be clearly stated, or may be intermingled with a statement of other facts irrelevant to the cause of action shown, or although the plaintiff may demand relief to which he or she is not entitled under the facts alleged. In other words, plaintiff need only plead facts showing that he or she may be entitled to some relief (*78 Cal. App. 4th 1144, 1152)* .

LiMandri v. Judkins (1997) 52 Cal. App. 4th 326, 339, , involved an appeal from a judgment of dismissal entered after the court had sustained defendant's general demurrer to plaintiff's complaint without leave to amend. Plaintiff had alleged four causes of action, including a third cause of action for intentional interference with prospective economic advantage. The court of appeal affirmed the judgment as to the first, second, and fourth causes of action, but reversed the judgment of dismissal as to the third cause of action, and directed the trial court to overrule the general demurrer as to that cause of action (*52 Cal. App. 4th 326, 350*). The court concluded that although the complaint failed to state a cause of action for intentional interference with prospective economic advantage as the third cause of action was titled, the complaint stated facts sufficient to constitute a cause of action for the distinct tort of intentional interference with contractual relations (*52 Cal. App. 4th 326, 339-344*). In reaching its conclusion, the court of appeal noted that it has been long established that the trial court in ruling on a demurrer must look past the form of a pleading to its substance. Labels that are attached that are erroneous or confusing must be ignored if the complaint pleads facts that would entitle plaintiff to relief. What a paper is, rather than how it is named, fixes its character (*52 Cal. App. 4th 326, 339*).

[f] Cause of Action Alleged Despite Legal Conclusions

Wise v. Southern Pacific Co. (1963) 223 Cal. App. 2d 50, 35 Cal. Rptr. 652 , disapproved on other grounds by Applied Equipment Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 521 n.10, 28 Cal. Rptr. 2d 475, 869 P.2d 454 (rejecting *Wise* to the extent it held that a party to a contract may be held liable in tort based on a conspiracy to interfere with its own contract), was an action for damages for the alleged wrongful discharge by defendant railroad of plaintiff from its employ in breach of a collective bargaining agreement (first count) and for damages resulting from the alleged conspiracy among all defendants, including the railroad, to obtain the discharge (second count). Defendants' demurrers asserted that each count of the complaint failed to state facts sufficient to constitute a cause of action and was uncertain, ambiguous, and unintelligible in various particulars. These demurrers were sustained without leave to amend. In reversing the subsequent judgment of dismissal, the court of appeal, among other things, distinguished those cases that involved the pleading of essential allegations in the form of bare legal conclusions. The Court said that it did not face the problem of a bare allegation without more, that said defendant "breached" or "violated" its contract, an

allegation that would clearly be conclusionary and insufficient (*223 Cal. App. 2d 50, 60)* . Equally conclusionary and defective are allegations that an act was "wrongful," "illegal," "without authority," "unlawful," "unjust," "arbitrary," or "fraudulent" which, without additional allegations, raise no triable issue (*223 Cal. App. 2d 50, 60)* . If plaintiff had done no more than characterize defendant's acts by the terms "wrongful," "unjust," and "without cause" the general demurrer would be well taken, but the court was satisfied that there was considerably more pleaded and that the first count complied with the rule that sufficient facts should be alleged to apprise the defendant of the specific conduct that the plaintiff assigns as violative of the contract (*223 Cal. App. 2d 50, 60)* .

[g] Cause of Action Alleged Despite Unclear Facts

The facts and procedural background of *Holmes v. City of Oakland (1968) 260 Cal. App. 2d 378, 67 Cal. Rptr. 197* , are discussed in *§ 71.32[3][a]*. In *Holmes v. City of Oakland*, the court of appeal discussed the rules applicable to demurrers. Citing *Gressley v. Williams (1961) 193 Cal. App. 2d 636, 639, 14 Cal. Rptr. 496 , discussed under § 71.30[3][k]*, the court said that all that is necessary against a general demurrer is that, on a consideration of all the facts stated, it appears that the plaintiff is entitled to any judicial relief against the defendant, notwithstanding unclearly stated facts, facts intermingled with a statement of other facts irrelevant to the cause of action shown, or a demand for relief by plaintiff to which he or she is not entitled under the facts alleged (*260 Cal. App. 2d 378, 382-383)* .

[h] Cause of Action Alleged Despite Demand for Wrong Relief

Scott v. City of Indian Wells (1972) 6 Cal. 3d 541, 99 Cal. Rptr. 745, 492 P.2d 1137 , was a class action for declaratory relief to void a conditional use permit granted by the city without notice to nonresident owners of adjoining land (class represented), except the individual plaintiffs who received notice by mistake. Defendant's general demurrer to the complaint was sustained without leave to amend and plaintiffs appealed from the subsequent judgment for defendant. In reversing the judgment with directions, the Supreme Court held that the complaint stated facts sufficient, as against a general demurrer, to constitute a cause of action on the basis of the city's failure to give nonresidents notice as required by its ordinance to the same extent as given to similarly situated city residents. The Court said that as against a general demurrer it is unimportant that plaintiff's pleading was not in form a petition for mandamus or certiorari; all that is required is that plaintiff state facts entitling him to some type of relief, and if a cause of action for mandamus or certiorari has been stated, the general demurrer should have been overruled; accordingly, an action for declaratory relief to review an administrative order should be regarded as a petition for a writ of mandate for purposes of ruling on a general demurrer (*6 Cal. 3d 541, 546)* . The Court further said that the rule is that, if on a consideration of all the facts stated it appears that plaintiff is entitled to any relief at the hands of the court against the defendants, the complaint will be held good, although the facts may not be clearly stated, or maybe intermingled with a statement of other facts irrelevant to the cause of action shown, or although the plaintiff may demand relief to which he or she is not entitled under the facts alleged (*6 Cal. 3d 541, 549)* .

[i] Implied or Inferred Facts Deemed True

Harvey v. City of Holtville (1969) 271 Cal. App. 2d 816, 76 Cal. Rptr. 795 , was an action for damages for injuries allegedly caused by a dangerous condition of defendant city's property. Defendant demurred generally to the complaint on the ground it did not allege the presentation of the claim within the time provided by *Gov. Code §§ 911.4, 911.6*. The demurrer was sustained with leave to amend and, after intervening appellate court proceedings in the case and a denial of a subsequent motion for reconsideration, the action was dismissed on plaintiff's failure to have filed an amendment. In reversing the judgment, The Court of appeal pointed out that the trial court had concluded that the complaint did now show presentation of the claim within the time required by law because it was not alleged that plaintiff's application for leave to present a late claim had been granted. To this, the court observed that, although not expressly alleged, the fact her application had been granted is supplied by inference or implication from the allegations she applied for leave to present a late claim, her application was accompanied by her claim, and defendant denied the claim itself (*271 Cal. App. 2d 816, 818)* . The court, citing numerous cases, then stated the rule that a general demurrer admits not only the

facts expressly alleged but also facts essential to a cause of action that the facts alleged supply by implication or inference (*271 Cal. App. 2d 816, 819)* .

Taeleifi v. Southern Cal. Rapid Transit Dist. (1982) 130 Cal. App. 3d 366, 368 n.1, 181 Cal. Rptr. 697 , noted the established rule that on demurrer all material facts properly pleaded and all reasonable inferences that can be drawn from them are deemed admitted; disapproved on another ground in *Lopez v. Southern Cal. Rapid Transit Dist. (1985) 40 Cal.3d 780, 787 n.4, 221 Cal. Rptr. 840, 710 P.2d 907* ; *Universal By-Products, Inc. v. City of Modesto (1974) 43 Cal. App. 3d 145, 151, 117 Cal. Rptr. 525* (although holding city immune to suit, court said that in testing the sufficiency of a pleading against a general demurrer, all well-pleaded allegations, including those that arise by reasonable inference, are deemed admitted irrespective of the difficulty of proof at trial).

[j] Disregard of Nonprejudicial Defect

Smith v. Kern County Land Co. (1958) 51 Cal. 2d 205, 331 P.2d 645 , was an action for damages for personal injuries sustained by plaintiff, a county employee. The amended complaint alleged that plaintiff was using heavy excavating equipment on defendant's property to remove certain trees, roots, and stumps; that the trees grew on a right-of-way owned by the county; that the roots extended into defendant's adjoining land; that on defendant's land, a blade on plaintiff's equipment struck a buried pipeline containing highly combustible fluids; and that in the resulting explosion plaintiff was injured. He alleged that the proximate cause of the injury was defendant's negligent failure to advise the county and its employees of the presence of the pipeline and the dangerous substances it carried. Plaintiff further alleged that the defendant and the county "desired and wished" the trees, roots, and stumps to be removed and that several days before the accident defendant "gave permission" to the county and its employees to enter on the land for that purpose. Defendant's general and special demurrer to the complaint was sustained with leave to amend. Plaintiff elected to stand on his pleading and the action was dismissed. Defendant contended that the complaint showed on its face that plaintiff was, under the law as it then existed, a mere licensee to whom no affirmative duty to inform existed and that the phrases "desired and wished" and "gave permission" were mere conclusions of law. In rejecting these contentions and reversing the judgment with directions to overrule the demurrer, the Supreme Court, citing *Code Civ. Proc. § 475* and several cases, stated that any defects in the complaint that do not affect the substantial rights of the parties should be disregarded (*51 Cal. 2d 205, 207)* .

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§ 71.31 Opposing General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Insufficiency Not Established by Judicially Noticed Matter [Evid. Code § 452]

[1] FORM Opposing General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Insufficiency Not Established by Judicially Noticed Matter [Evid. Code § 452]

[*The following should be combined with a general form of memorandum in opposition to a general demurrer to a complaint (see § 71.30).*]

THE GENERAL DEMURRER TO THE COMPLAINT SHOULD BE OVERRULED BECAUSE A FACTUAL DISPUTE STILL EXISTS AS TO MATTERS THAT ARE ASSOCIATED WITH OR FLOW FROM THE JUDICIALLY NOTICED MATTER.

A. Taking of Judicial Notice Does Not Require Acceptance of Truth of Related Factual Matters. The taking of judicial notice does not in and of itself require acceptance of the truth of a factual matter that might be deduced from that matter, since in many instances what is being noticed and thereby established is no more than the existence of an act or a thing and not, without supporting evidence, what might factually be associated with or flow from the noticed matter (*Cruz v. County of Los Angeles (1985) 173 Cal. App. 3d 1131, 1134, 219 Cal. Rptr. 661*).

B. Judicially Noticed Matter Not Dispositive of Demurrer When Factual Dispute Exists. Judicial notice of a matter is dispositive of the demurrer only when no factual dispute exists concerning that which is sought to be judicially noticed. When a factual dispute exists over the very fact that occasioned the request for judicial notice, it is error for the trial court to sustain a demurrer (*Cruz v. County of Los Angeles (1985) 173 Cal. App. 3d 1131, 1134, 219 Cal. Rptr. 661*).

C. Matter Requested to be Judicially Noticed Not Supported by Sufficient Information. The burden is on the party seeking judicial notice to provide sufficient information to allow the court to take judicial notice, and in the absence of sufficient information the court may refuse to judicially notice the evidence and overrule the demurrer (*Ross v. Creel*

Printing and Publishing Co. (2002) 100 Cal. App. 4th 736, 744, 122 Cal. Rptr. 2d 787).

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in opposition to a general demurrer to a complaint when the trial court has judicially noticed matter but factual dispute nevertheless remains over the very fact that occasioned the request for the judicial notice. The ground of opposition is that the court may not deduce the truth of certain facts relating to the viability of the cause of action from the mere judicial notice of certain matter, and that since those facts remain in dispute, it would be improper for the court to make a factual determination at the demurrer stage of the proceedings.

The foregoing memorandum should be combined with a general form of memorandum in opposition to a demurrer to a complaint made on the ground that the complaint fails to state facts sufficient to constitute a cause of action [*see § 71.30*]. They may also be adapted for use in a trial or appellate brief.

In an appropriate case, the foregoing memorandum may be submitted in opposition to the general demurrer supported by the memorandum *set out in § 71.21*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. For example, if the defendant requests and obtains judicial notice of a governmental entity's practice of preparing and mailing rejections of claims to establish that the plaintiff's complaint was filed after expiration of the period of limitations, and the plaintiff disputes whether the judicially noticed procedure was in fact practiced in the plaintiff's case, the plaintiff should point out that, because a factual dispute still existed as to whether or not the practice judicially noticed had actually been followed in this instance, it would be inappropriate for the trial court to resolve that factual dispute at the demurrer stage of the proceedings [*see Cruz v. County of Los Angeles (1985) 173 Cal. App. 3d 1131, 1134, 219 Cal. Rptr. 661 , discussed under § 71.31[3][a]*].

See also *§§ 71.20[2]* and *71.30[2]*.

[3] Discussion of Authorities

[a] Taking of Judicial Notice Does Not Require Acceptance of Truth of Related Factual Matters

In ***Cruz v. County of Los Angeles*** *(1985) 173 Cal. App. 3d 1131, 219 Cal. Rptr. 661* , a baby allegedly suffered injuries at birth at a county medical center. The baby's guardian ad litem (hereinafter "plaintiff") filed a timely claim with the county on April 19, 1983, and a complaint for medical malpractice in superior court on February 6, 1984. The county demurred to the complaint on the ground that it was barred by the statute of limitations of *Gov. Code § 945.6*, which requires that an action against a county be filed within six months from the date that a notice of rejection of a county claim is deposited in the mail. The county requested that the court take judicial notice of the county's practice of preparing and mailing rejections of claims, and attached to its demurrer a proof of service that plaintiff had been personally mailed a letter of rejection. The court sustained the demurrer with leave to amend. Plaintiff then amended the complaint, alleging that the notice had never been received. The county again demurred, and the court again sustained the demurrer, this time without leave to amend. Plaintiff appealed.

The court of appeal reversed, holding that the trial court erred in sustaining the demurrer. The court explained that the taking of judicial notice of the official act of a governmental entity does not in and of itself require acceptance of the truth of a factual matter that might be deduced from that matter, since in many instances what is being noticed and thereby established is no more than the existence of that act and not, without supporting evidence, what might factually be associated with or flow from the noticed matter. Rather, judicial notice of a matter is dispositive of the demurrer only when no factual dispute exists concerning that which is sought to be judicially noticed. In the case at bar, because

factual dispute still existed as to whether or not the practice judicially noticed had actually been followed in this instance (that is, the very fact that occasioned the request for judicial notice), it was inappropriate for the trial court to resolve that factual dispute at the demurrer stage of the proceedings. Therefore, the trial court erred In sustaining the demurrer (*173 Cal. App. 1131, 1134)* .

[b] Judicially Noticed Matter Not Dispositive of Demurrer When Factual Dispute Exists

Cruz v. County of Los Angeles *(1985) 173 Cal. App. 3d 1131, 219 Cal. Rptr. 661* , is discussed in *§ 71.31[3][a]*.

[c] Matter Requested to be Judicially Noticed Not Supported by Sufficient Information

In ***Ross v. Creel Printing and Publishing Co.*** *(2002) 100 Cal. App. 4th 736* , a demurrer to a complaint for intentional infliction of emotional distress was supported by a request for judicial notice of a "Bad Check Diversion Unit Handbook for Business" allegedly issued by a Nevada District Attorney's office. The purpose of the judicial notice request was to prove that the handbook showed the District Attorney's office is empowered to prosecute consumer fraud claims and that the handbook fell under the category of a regulation or legislative enactment. The court declined to take judicial notice of the handbook because the defendant did not provide information about its source, purpose, or official ratification (*100 Cal. App. 4th 736, 744)* . Additionally, in support of the demurrer, the defendant submitted a request for judicial notice of a complaint filed by defendant against plaintiff in a Nevada proceeding. The court declined to take judicial notice of the complaint because it was neither certified nor provided under subpoena from the Nevada court (*100 Cal. App. 4th 736, 743)* .

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7A-71 California Points & Authorities § 71.32

§ 71.32 Opposing General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Complaint Rendered Sufficient by Judicially Noticed Facts [Evid. Code § 452]

[1] FORM Opposing General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Complaint Rendered Sufficient by Judicially Noticed Facts [Evid. Code § 452]

[*The following should be combined with a general form of memorandum in opposition to a general demurrer to a complaint (see § 71.30).*]

THE GENERAL DEMURRER TO THE COMPLAINT SHOULD BE OVERRULED BECAUSE FACTS ALLEGED IN THE COMPLAINT, SUPPLEMENTED BY MATTERS OF WHICH THE COURT MAY TAKE JUDICIAL NOTICE, ARE SUFFICIENT TO STATE A CAUSE OF ACTION.

A. Complaint Sufficient by Inclusion of Judicially Noticed Matter. Matter subject to judicial notice may, on proper request, be read into a complaint, which is otherwise insufficient on its face, in determining on demurrer the sufficiency of the complaint to state a cause of action (*Performance Plastering v. Richmond American Homes of California, Inc. (2007) 153 Cal. App. 4th 659, 665, 63 Cal.Rptr.3d 537* ; *Holmes v. City of Oakland (1968) 260 Cal. App. 2d 378, 384, 67 Cal. Rptr. 197*).

[*Here, and in subsequent paragraphs, set forth bases for judicial notice under Evid. Code § 452, and a request that the court take judicial notice of that fact (see § 71.21, Paragraphs C through O).*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in opposition to a general demurrer to a complaint that omits essential facts to a statement of the cause of action, when the omitted facts may be supplied by matters of which the court may take judicial notice. The ground of opposition set out is that the omitted facts are subject to judicial notice. For further

discussion of judicial notice, see *§ 71.21[2]*.

In an appropriate case, the foregoing memorandum may be submitted in opposition to the general demurrer supported by the memorandum *set out in §§ 71.20 -71.27*.

The foregoing memorandum should be combined with a general form of memorandum in opposition to a demurrer to a complaint made on the ground that the complaint fails to state facts sufficient to constitute a cause of action [*see § 71.30*]. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. That is, counsel should identify the particular matter that the court is required to or may take judicial notice of that will supply the omitted allegation, and argue that from the face of the pleading and the judicially noticed fact, the complaint states facts sufficient to constitute a cause of action and the demurrer should therefore be denied.

See also *§ 71.30[2]*.

[3] Discussion of Authorities

[a] Complaint Sufficient by Inclusion of Judicially Noticed Matter

In ***Performance Plastering v. Richmond American Homes of California, Inc.*** *(2007) 153 Cal. App. 4th 659, 63 Cal. Rptr. 3d 537* , home builder Richmond American had contracted with Performance Plastering to perform stucco work on some of Richmond's homes. CalFarm Insurance Co. was Performance's liability insurer. Richmond began receiving complaints that Performance's work was defective, and eventually Richmond and Performance entered into what were named the *El Nino* settlement agreements, which released Performance and CalFarm from liability for defects at 65 homes in exchange for a certain amount of money. Additionally, Richmond and CalFarm entered into the *Air Design* settlement agreement, which gave Performance a release from all claims in exchange for a payment from CalFarm to Richmond. At this point, Performance was a suspended corporation. Subsequently, CalFarm and Performance sued Richmond for declaratory relief and breach of contract based on alleged violations of the settlement agreements. Richmond demurred to the complaint on the basis that Performance, as a suspended corporation, had no capacity to sue and that CalFarm had no standing to bring a suit as it was not a party to the *El Nino* agreements. The trial court sustained the demurrer without leave to amend.

The court of appeal reversed, holding that CalFarm had standing to bring a lawsuit based on the *El Nino* agreements because it was a third party beneficiary to those agreements. Although the *El Nino* agreements were outside the four corners of the complaint, the court took judicial notice of the agreements, which were attached to CalFarm's opposition to demurrer, because there could be no factual dispute concerning their contents (*153 Cal. App. 4th 659, 665 n.2*).

Holmes v. City of Oakland *(1968) 260 Cal. App. 2d 378, 67 Cal. Rptr. 197* , was an action, based on the alleged maintenance of a dangerous condition [*see Gov. Code § 835*], against a city for personal injuries sustained by plaintiff when he was run over by a train on a railroad's right-of-way over city-owned land. The complaint set forth four "causes of action" (counts), although enforcement of only a single right allegedly violated by the city was involved. The essence of the complaint was that the city owed plaintiff the duty of maintaining its property in a safe condition and that it breached this duty resulting in injuries and damages to plaintiff. The city's contended that it had no duty to plaintiff because the definition of property of a public entity in *Gov. Code § 830(c)* excluded easements and encroachments and other property located on the property of the public entity but not owned or controlled by the public entity. Defendant city's demurrer to the complaint was sustained with leave to amend and, on plaintiff's failure to amend, the action was dismissed. The plaintiff appealed.

The court of appeal reversed the judgment and directed the trial court to overrule the general demurrer as to the second and third counts. The court of appeal explained that while the complaint did not allege facts indicating whether the right-of-way came within the meaning of land owned by a public entity or the exception, regulations and enactments of the city that disclose the relationship between the city and the railroad and the legal status and nature of the subject right-of-way are matters that may be judicially noticed and read into the complaint (*260 Cal. App. 2d 378, 384)* . The court noted that the record did not disclose that any such matter had been judicially noticed by the trial court or that the trial court had been appropriately requested under *Evid. Code § 453* to take such notice. Nevertheless, the appellate court invoked the provisions of *Evid. Code § 459*, allowing an appellate court the same discretionary power to take judicial notice as is possessed by the trial court, and requested the city to furnish it with pertinent information to enable it to determine the propriety of taking judicial notice and the tenor of the matter to be noticed. On receipt of this information the court examined it and concluded that the property involved was under the control of the city and was property of a public entity within the meaning of *Gov. Code § 830(c)* (*260 Cal. App. 2d 378, 384-385)* .

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§ 71.33 Opposing General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Plaintiff Is Authorized by Statute to Sue [Code Civ. Proc. § 369]

[1] FORM Opposing General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Plaintiff Is Authorized by Statute to Sue [Code Civ. Proc. § 369]

[*The following should be combined, when appropriate, with a general form of memorandum in opposition to a general demurrer to a complaint (See § 71.30).*]

THE GENERAL DEMURRER SHOULD BE OVERRULED BECAUSE PLAINTIFF IS A PERSON EXPRESSLY AUTHORIZED BY STATUTE TO MAINTAIN THE ACTION.

A. Person Authorized by Statute May Sue. A person expressly authorized by statute may sue without joining with him or her the persons for whose benefit the action is prosecuted (*Code Civ. Proc. § 369*).

[*EITHER*]

B. Taxpayer's Action. A resident taxpayer may sue to enjoin the illegal expenditure of, waste of, or injury to the estate, funds, or other property of a county, town, city, or city and county of this state (*Code Civ. Proc. § 526a*). [This section is broadly construed to authorize similar actions against state officers (*Duskin v. San Francisco Redevelopment Agency (1973) 31 Cal. App. 3d 769, 773, 107 Cal. Rptr. 667*)].

[*OR*]

B. _____ [*Set forth other statutory authorization for prosecution of the specific action involved by plaintiff*].

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a general demurrer to a complaint on the ground plaintiff lacks standing to sue. The ground of opposition set out is that plaintiff is authorized by statute to maintain the action, and the specific authority illustrated is *Code Civ. Proc. § 526a*, authorizing an action by a resident taxpayer to enjoin illegal expenditures or waste of public funds or injuries to public property.

In an appropriate case, these points and authorities may be submitted in opposition to the general demurrer supported by the memorandum *set out in § 71.22*.

These points and authorities should be combined with a general form of memorandum in opposition to a demurrer to a complaint made on the ground that the complaint fails to state facts sufficient to constitute a cause of action [*see § 71.30*]. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel would refer to facts in the complaint or of which the court is required to or may take judicial notice that establish that plaintiff satisfies applicable statutory standards for maintaining the action.

See also *§§ 71.20[2]* and *71.30[2]*.

[3] Discussion of Authorities

[a] Person Authorized by Statute May Sue

Code Civ. Proc. § 369 enumerates each person who may sue without joining as parties the persons for whose benefit the action is prosecuted, and specifies that any person expressly authorized by statute may sue [*Code Civ. Proc. § 369(a)(4)*].

[b] Taxpayer's Action

Code Civ. Proc. § 526a in relevant part provides that an action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to the estate, funds, or other property of a county, town, city, or city and county of the state may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or within one year before the commencement of the action, has paid, a tax therein. The section, however, prohibits enjoining the sale, offering for sale, or issuance of municipal bonds for public improvements or public utilities.

Duskin v. San Francisco Redevelopment Agency *(1973) 31 Cal. App. 3d 769, 107 Cal. Rptr. 667* , was a representative taxpayers' action against defendant agency and its director and commissioners for declaratory relief and to restrain the sale by the agency of certain public property to a corporation for an amount alleged to be less than its fair value in violation of specified federal and state statutes and regulations. Defendants demurred generally to the first amended complaint on the ground, among others, that *Code Civ. Proc. § 526a* authorizes taxpayers' actions against officers and agents of counties, towns, and cities only, and defendant was a state agency. The demurrer was sustained without leave to amend.

The court of appeal reversed the subsequent judgment. The court noted that the complaint was not limited to and did not specify *Code Civ. Proc. § 526a* but added that in any event court decisions have established the right to sue state officers under *Code Civ. Proc. § 526a* (*31 Cal. App. 3d 769, 773)* .

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1. General Demurrers to Complaint

7A-71 California Points & Authorities § 71.34

§ 71.34 Opposing General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Action Is No Longer Premature

[1] FORM Opposing General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Action Is No Longer Premature

[*The following should be combined with a general form of memorandum in opposition to a general demurrer to a complaint (see § 71.30).*]

THE GENERAL DEMURRER SHOULD BE OVERRULED BECAUSE THE ACTION IS NO LONGER PREMATURE.

A. Prematurity of Action as Plea in Abatement. The defense that an action is premature is simply a matter of abatement (*Radar v. Rogers (1957) 49 Cal. 2d 243, 250, 317 P.2d 17* ; *Edwards v. Container Kraft Carton & Paper Supply Co. (1958) 161 Cal. App. 2d 752, 756, 327 P.2d 622*).

B. Ground No Longer Exists. The plea that the action is premature should be disregarded if the prematurity no longer exists (*Radar v. Rogers (1957) 49 Cal. 2d 243, 250, 317 P.2d 17* ; *Edwards v. Container Kraft Carton & Paper Supply Co. (1958) 161 Cal. App. 2d 752, 756, 327 P.2d 622*).

[*If appropriate, here, and in subsequent paragraphs, set forth bases of judicial notice of facts (see Evid. Code § 452) that establish that the action has matured, and a request that the court take judicial notice of such facts (see § 71.21, Paragraphs C through O).*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in opposition to a general demurrer to a complaint on the ground the

action is premature in that the complaint shows on its face or it appears from judicially noticed matter that the action is premature. The ground of opposition is that the action has matured and, therefore, the ground of objection no longer exists.

In an appropriate case, the foregoing memorandum may be submitted in opposition to the general demurrer supported by the memorandum *set out in § 71.23*.

The foregoing memorandum should be combined with a general form of memorandum in opposition to a demurrer to a complaint made on the ground that the complaint fails to state facts sufficient to constitute a cause of action [*see § 71.30*]. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. For example, if the complaint seeking to recover damages for malicious prosecution of another action was filed before the time to appeal from the judgment in the other action had expired (although that judgment had become final before hearing on the demurrer in the instant action), counsel would argue that (1) the prematurity of plaintiff's action is merely a ground for abatement, (2) the prematurity has since been cured, (3) the complaint is no longer defective based on the prematurity and the general demurrer should therefore be dismissed [*see Edwards v. Container Kraft Carton & Paper Supply Co. (1958) 161 Cal. App. 2d 752, 327 P.2d 622* , *discussed under § 71.34[3][a]*].

If the occurrence of the condition precedent to bringing the action is one of which the court may or is required to take judicial notice, the memorandum should include argument setting forth the relevant basis for taking judicial notice and an application that the court take judicial notice [*see § 71.21*].

If the occurrence of the condition precedent cannot be shown from either the face of the complaint or judicially noticeable facts, counsel should request leave to file a supplemental complaint [*see Code Civ. Proc. § 464*]. For memoranda of points and authorities relating to supplementing pleadings in civil actions generally, see Ch. 16, *Amended and Supplemental Pleadings* .

[b] Premature Filing

The filing of a complaint before a cause of action has accrued is to be distinguished from the filing of a complaint after a cause of action has accrued but before completion of some procedural condition precedent, such as the filing of a claim against, and its rejection by, a public entity or the representative of a decedent's estate. In both situations, the filing of the complaint is premature, but in the former situation the error cannot normally be corrected by the filing of a supplemental complaint after the cause of action accrues whereas in the latter situation, a supplemental complaint may normally be filed to show the subsequent occurrence or performance of the condition precedent.

This distinction was, however, not noted in *Walton v. Kern County (1940) 39 Cal. App. 2d 32, 102 P.2d 531* , in which the court of appeal held that plaintiff could not file a supplemental complaint to allege the defendant county's denial by operation of law of plaintiff's claim when the original complaint had failed to allege the submission and rejection of the claim (although plaintiff had in fact timely submitted the claim) and the statute of limitations had run by the time plaintiff sought to file the supplemental complaint. In affirming a judgment on the Pleadings entered for defendant on the ground of the prematurity of action, the court stated that the supplemental complaint had to fall with the original complaint since the action had been prematurely brought and the supplemental complaint could not stand as an original complaint because it was barred by the statute of limitations [*Walton v. Kern County (1940) 39 Cal. App. 2d 32, 34-35, 102 P.2d 531]* .

Subsequent cases have substantially eroded the *Walton* holding, although the Supreme Court has never expressly disapproved the case nor has it been overruled. In *Radar v. Rogers (1957) 49 Cal. 2d 243, 247, 317 P.2d 17* , involving

the filing of a claim against a decedent tortfeasor's estate, the Supreme Court held that the defense that the suit was commenced before presentation and rejection of the claim was a matter of abatement and that the *Walton* rule did not require dismissal of the case when at the time defendant sought to raise the defense, plaintiff had already presented the claim and it had been rejected. *Cory v. Huntington Beach (1974) 43 Cal. App. 3d 131, 135, 117 Cal. Rptr. 475* , noted the serious erosion of *Walton* in the recent years and pointed out that it is now recognized that the waiting period requirement is not part of the cause of action but a procedural condition precedent to suit. Quoting from *Petersen v. Vallejo (1968) 259 Cal. App. 2d 757, 771, 66 Cal. Rptr. 776* , the court of appeal said that the Legislature has since realized that in providing the manner in which a public entity may be sued, a cause of action is not being created, only the manner in which it may be asserted is being prescribed.

For points and authorities relating to the issues of whether a supplemental pleading relates back to the original pleading and of the requirement of the filing and rejection of a claim against a public entity, see Ch. 16, *Amended and Supplemental Pleadings* and Ch. 196, *Public Entities* respectively.

[c] Continuance

As a concomitant of the rule that the matter in abatement must exist at the time the pleading urging it is filed and that it may be disregarded if the ground does not exist at the time of trial, the court may, when the matter of abatement still exists at the time of the hearing on the plea and can be corrected, on application by plaintiff, continue the hearing to a future date to give plaintiff an opportunity to correct it [*see, e.g., Ostrowski v. Miller (1964) 226 Cal. App. 2d 79, 86, 37 Cal. Rptr. 790* ; *see also Ch. 10, Abatement and Survival of Actions, § 10.30* et seq.].

See also *§§ 71.20[2], 71.23[2],* and *71.30[2]*.

[3] Discussion of Authorities

[a] Prematurity of Action as Plea in Abatement

Radar v. Rogers *(1957) 49 Cal. 2d 243, 317 P.2d 17* , was an action for damages for personal injuries and property damage arising out of a motor vehicle collision. The defendant had been killed in that accident, and at the time the complaint was filed no personal representative had been appointed. The complaint named as defendants "John Doe and Jane Doe, as Administrator and/or Administratrix of the Estate of George Rogers, Deceased" and alleged "that the defendants John Doe and Jane Doe are sued herein as Administrator and/or Administratrix of the Estate of George Rogers, deceased, for the reason that the true name of the administrator and/or administratrix is unknown to plaintiffs at this time." Almost a year later, an administratrix was appointed and notice to creditors was published. Plaintiffs presented their claims to the administratrix who gave notice of rejection of the claims. Approximately six months later, plaintiffs filed a first amended complaint to name "Alpha C. Rogers, as Administratrix of the Estate of George W. Rogers," as defendant. Defendant demurred generally and specially to this complaint and the demurrer was sustained with leave to amend. Plaintiffs then filed a second amended complaint to which defendant again demurred and, for the first time in the supporting points and authorities, raised the contention that the action was barred by limitation because it was not instituted within three months after rejection of the claims as assertedly required by former Prob. Code § 714 [*now see Prob. Code § 9353*]. This demurrer was sustained without leave to amend and plaintiffs appealed from the subsequent judgment of dismissal.

The Supreme Court reversed the judgment with directions to overrule it (*49 Cal. 2d 243, 250)* . The Court concluded that the general demurrer had been improperly sustained. The Court first said that the so-called amended complaints were, technically speaking, by code definition, supplemental complaints because they alleged facts material to the case occurring after the former complaint, citing *Code Civ. Proc. § 464* (*49 Cal. 2d 243, 247)* . The Court further held that the general rule that a supplemental pleading has no place as a pleading when an action is prematurely brought and the original complaint must fall did not apply to a case when the cause of action had already accrued before the complaint

was filed. The Court said the present cause of action accrued when the accident happened and that every fact essential to state a cause of action, at least in the absence of a plea in abatement, was well pleaded (*49 Cal. 2d 243, 247)* . The Court held that it would be "highly technical" to apply former Prob. Code § 714 to bar this complaint, which was not filed too late, but, at worst, prematurely (*49 Cal. 2d 243, 249)* and said the defense that the suit was commenced before the presentation and rejection of claim is simply a matter of abatement (*49 Cal. 2d 243, 250)* .

Edwards v. Container Kraft Carton & Paper Supply Co. *(1958) 161 Cal. App. 2d 752, 327 P.2d 622* , was an action for damages for malicious prosecution of an action for injunctive relief. The complaint was filed, however, before the time to appeal from the judgment in the injunction action had expired, although that judgment had become final before trial of the instant action. Judgment was for plaintiff and defendant appealed arguing, among other things, that the action was premature.

The court of appeal affirmed the judgment. The court of appeal said that California is now definitely committed to the doctrine that prematurity of action is merely ground for abatement (*161 Cal. App. 2d 752, 756*).

[b] Ground No Longer Exists

The facts and procedural background of ***Radar v. Rogers*** *(1957) 49 Cal.2d 243, 317 P.2d 17* , are *discussed under § 71.34[3][a]*. In *Radar,* the Supreme Court said the defense that suit was commenced before the presentation and rejection of claim is simply a matter of abatement--a defense that is not favored, and must be made by plea, and in proper time, or it is waived. The Court added that in the case before it, there was no occasion to consider whether the unfavored defense was waived, for it had ceased to exist at the time defendant sought to raise it, and that a consequence of the disfavor with which such pleas are viewed is that matter in abatement must exist at the time of filing the pleading urging it and if the stated ground does not exist at the time of trial, it may be disregarded (*49 Cal.2d 243, 250)* .

The facts and procedural background of ***Edwards v. Container Kraft Carton & Paper Supply Co.*** *(1958) 161 Cal. App. 2d 752, 327 P.2d 622* , are *discussed under § 71.34[3][a]*. In *Edwards,* the court quoted at page 756 the statements from *Radar v. Rogers (1957) 49 Cal. 2d 243, 250, 317 P.2d 17 , above.*

[4] Additional Authorities

[a] Prematurity of Action as Plea in Abatement

Moore v. Fellner (1958) 50 Cal. 2d 330, 325 P.2d 857 , was an action to recover attorney's fees on a contingent fee contract. As a result of a dispute between plaintiff and defendant as to whether plaintiff was entitled to an additional fee for handling an appeal on an underlying action and plaintiff's refusal to handle it unless he were paid the additional fee, defendant discharged plaintiff and plaintiff filed the present action to recover the reasonable value of his services. Defendant, for the first time, objected at trial to the introduction of evidence by plaintiff on the ground the action was premature in that it was filed while the appeal by Steinbaum was still pending. The judgment had, however, by that time been affirmed on appeal and defendant had collected the judgment. The trial court overruled the objection and denied the subsequent motion for nonsuit made on the same ground, judgment for plaintiff was entered and both parties appealed. The Supreme Court reversed the judgment with directions to the trial court to redetermine the value of the services (*50 Cal. 2d 330, 334, 344)* . The Court said the unfavored defense that the action was prematurely brought is simply a matter of abatement (*50 Cal. 2d 330, 343)* .

Note:

Moore, discussed *above,* was overruled on another point in *Fracasse v. Brent (1972) 6 Cal. 3d 784, 790, 100 Cal. Rptr. 385, 494 P.2d 9* .

See also *Bemmerly v. Woodward (1899) 124 Cal. 568, 574-575, 57 P. 561* (prematurity of action is simply a matter of abatement); *San Mateo County v. Bartole (1960) 184 Cal. App. 2d 422, 430, 7 Cal. Rptr. 569* (same); *Taylor v. Los*

Angeles (1960) 180 Cal. App. 2d 255, 263-264, 4 Cal. Rptr. 209 (same).

[b] Ground No longer Exists

The facts and procedural background of *Moore v. Fellner (1958) 50 Cal. 2d 330, 325 P.2d 857* , are *discussed under § 71.34[3][a]*. In *Moore*, the Supreme Court said the unfavored defense that the action was prematurely brought must be pleaded in proper time or it is waived and that if the defense has ceased to exist at the time defendant seeks to raise it, there is no occasion to consider whether it has been waived, as it may be disregarded (*50 Cal. 2d 330, 343)* .

Bahten v. Merced County (1976) 59 Cal. App. 3d 101, 130 Cal. Rptr. 539 , was an action for damages for injuries sustained by a minor in a high school football game on October 6, 1972. The minor's parents did not seek legal advice until almost a year after the injury. On September 27, 1973, plaintiffs presented to the county board of supervisors a petition for leave to file a late claim against the county. A verified claim was attached to the petition. The board took no action on the petition and it was deemed denied by operation of law 45 days after it was presented. The complaint, naming the county and others as defendants and alleging a cause of action for negligent medical care and treatment of the minor's injuries, was filed October 1, 1973. It did not allege compliance with *Gov. Code § 945.4*, relating to claims against public entities. Plaintiffs' subsequent motion for an order relieving them from compliance with *Gov. Code § 945.4* was granted and plaintiffs filed an amended complaint alleging the prior order relieving them from compliance with *Gov. Code § 945.4* and two separate causes of action: (1) negligent medical care; and (2) negligent management, control, and supervision of the football game. Defendant county moved to strike the amended complaint on the ground the complaint did not state a cause of action against it and concurrently demurred on the same ground. The trial court granted the motion to strike and sustained the demurrer without leave to amend and dismissed the complaint against the county only.

In reversing the judgment, the court of appeal said that there was no showing whatsoever that any of the county's rights were prejudiced or impaired by the premature filing of the Original Complaint (before expiration of time county had to act on petition for leave to file late claim) and pointed out that defendant had made no attempt to abate the prematurely filed action. It said that when defendant filed its motion to strike and demurrer, the defect in the complaint arising from plaintiffs' failure to allege either the filing of a claim or relief from the provisions of the claims presentation statutes had been earlier cured by the order granting plaintiffs' relief from the provisions of *Gov. Code § 945.4* (*59 Cal. App. 3d 101, 112)* .

See also *Walter J. Warren Ins. Agency v. Surpur Timber Co. (1967) 250 Cal. App. 2d 99, 105, 58 Cal. Rptr. 143* (prematurity of action is merely ground for abatement and if ground has ceased to exist before time of trial it cannot then or thereafter prevail); *Miller v. Mountain View Sav. & L. Ass'n (1965) 238 Cal. App. 2d 644, 654-655, 48 Cal. Rptr. 278* (defense that action is premature cannot be interposed for first time after defect has ceased to exist); *San Mateo County v. Bartole (1960) 184 Cal. App. 2d 422, 430, 7 Cal. Rptr. 569* (same); *Taylor v. Los Angeles (1960) 180 Cal. App. 2d 255, 263, 264, 4 Cal. Rptr. 209* (if defense of prematurity has ceased to exist at time defendant seeks to raise it, it may be disregarded).

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7A-71 California Points & Authorities § 71.35

§ 71.35 Opposing General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Action Not Barred by Res Judicata if Federal Court in Prior Action Declined to Exercise Pendent Jurisdiction Over State Claim

[1] FORM Opposing General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Action Not Barred by Res Judicata if Federal Court in Prior Action Declined to Exercise Pendent Jurisdiction Over State Claim

[*The following should be combined with a general form of memorandum in opposition to a general demurrer to a complaint (see § 71.30).*]

THE GENERAL DEMURRER TO THE COMPLAINT SHOULD BE OVERRULED BECAUSE THE FEDERAL COURT _____ [DECLINED *or* CLEARLY WOULD HAVE DECLINED, HAD IT BEEN REQUESTED TO DO SO], TO EXERCISE PENDENT JURISDICTION OVER THE STATE CLAIM HEREIN SUED ON.

Nonexercise of Pendent Jurisdiction. A cause of action on a state claim is not barred by res judicata on the ground the issues raised could have been adjudicated in a prior federal court action between the same parties if the federal court declined[, or clearly would have declined had it been requested to do so], to exercise pendent jurisdiction over the cause (*Merry v. Coast Community College Dist. (1979) 97 Cal. App. 3d 214, 225-228, 158 Cal. Rptr. 603*).

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in opposition to a general demurrer to a complaint based on the objection that the action, although on a state claim, is barred by a federal court judgment previously entered against plaintiff on a federal claim. The basis for the opposition is that the federal court declined to exercise pendent jurisdiction over the state claim. The opposition may also be based on the ground that the federal court clearly would have declined to exercise jurisdiction had it been requested to do so, in which case the optional language in the form should be used.

In an appropriate case, the foregoing memorandum may be submitted in opposition to the general demurrer supported by the memorandum *set out in § 71.24* (memorandum in support of demurrer based on bar of res judicata).

The foregoing memorandum should be combined with a general form of memorandum in opposition to a demurrer to a complaint made on the ground that the complaint fails to state facts sufficient to constitute a cause of action [*see § 71.30*]. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. For example, if a federal court has refused to exercise pendant jurisdiction, counsel would request the court to take judicial notice of the file of the federal court action, and particularly its order declining pendant jurisdiction over the state claim now being asserted in plaintiff's action [*see Evid. Code § 452(d)*]. For a form of application to take judicial notice, see *§ 71.21*.

See also *§§ 71.20[2]* and *71.30[2]*.

[3] Discussion of Authorities

[a] Nonexercise of Pendent Jurisdiction

Merry v. Coast Community College Dist. *(1979) 97 Cal. App. 3d 214, 158 Cal. Rptr. 603* , was an action by a college professor against a college district and others arising out of a contract relating to the production of a color television series on cultural anthropology, of which plaintiff was to be the project director. The contract provided that all right, title, and interest in the series, including any royalties or residuals from the series, would vest exclusively in the district. Plaintiff objected to the waiver of rights to royalties and residuals, but district representatives informed him that the county counsel had advised them that it would be illegal for plaintiff to receive royalties, and plaintiff signed the contract. Unknown to plaintiff at the time was the existence of a written district policy that would have permitted the district to negotiate an agreement with plaintiff permitting him to retain ownership rights to the series provided the district was reimbursed for the production cost. Plaintiff thereafter wrote the material for the series, participated in the planning and shooting of the film, appeared on the screen as the narrator, and took part in handling technical and other details involved in the production of the series. After completion of the series, defendant district began leasing the film to school districts and educational television stations throughout the United States. Plaintiff's demand for an accounting of royalties and residuals was refused.

In 1975, plaintiff filed an action in the United States District Court for the Central District of California in which he sought redress of alleged violations of his civil rights under color of law, declaratory relief, infringement of common law copyright, recovery under quasi-contract, and imposition of a constructive trust. Defendant's motion to dismiss the action on the ground it was not a person within the meaning of the Civil Rights Act (*42 U.S.C. § 1983*) was granted and the case was dismissed in January, 1976. In March, 1976, plaintiff filed a second action in the federal court to redress alleged grievances and violations of civil rights under color of law and for declaratory relief. The complaint alleged substantially the same facts alleged in the first action. Defendants' motion for summary judgment on the merits was granted on the ground there was no genuine issue as to any material fact and that the facts failed to state a claim on which relief could be granted under the cited provisions of the federal Constitution and federal statutes. Plaintiff then sued in state court for the vindication of his state claims based on the same operative facts. Defendants' demurrer was sustained without leave to amend on the ground the federal court summary judgment was res judicata. Plaintiff appealed from the subsequent judgment of dismissal.

The court of appeal reversed the judgment. The court summarized the general rules applicable to the two aspects of res judicata (bar and collateral estoppel) (*97 Cal. App. 3d 214, 221-222, 223-225)* , and stated that the prior federal court judgment must be given the same effect instate courts as it would have in a federal court (*97 Cal. App. 3d 214, 222)* . The court explained when federal courts may exercise pendent jurisdiction over state claims (*97 Cal. App. 3d 214,*

222-223) , and said that the refusal to exercise such jurisdiction over a state claim following pretrial dismissal of a federal claim does not bar litigation of the state claim in a state court (*97 Cal. App. 3d 214, 228)* . The court concluded that had plaintiff raised his state claims in the federal action they would have been dismissed without prejudice, because the federal claims were patently so flimsy and insubstantial that they called for summary pretrial disposition (*97 Cal. App. 3d 214, 225)* and held that since the federal court would have declined to adjudicate plaintiff's state claims had they been raised, the federal court summary did not bar the present action (*97 Cal. App. 3d 214, 225, 231)* . The court dismissed the argument that plaintiff was attempting to split his cause of action by saying that plaintiff's right to pursue his state remedies in the state court depends, not on whether it involves a different primary right, but on whether under federal law the summary judgment on the federal claims is res judicata of the state law claims (*97 Cal. App. 3d 214, 227)* .

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§ 71.36 Opposing General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--General Demurrer Does Not Raise Objections Constituting Grounds of Special Demurrer

[1] FORM Opposing General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--General Demurrer Does Not Raise Objections Constituting Grounds of Special Demurrer

[*The following should be combined with a general form of memorandum in opposition to a general demurrer to a complaint (see § 71.30).*]

THE GENERAL DEMURRER TO THE COMPLAINT SHOULD BE OVERRULED BECAUSE THE ONLY OBJECTION IT RAISES IS A GROUND FOR SPECIAL DEMURRER.

General Demurrer Does Not Raise Objections Made Grounds of Special Demurrer. A general demurrer to a complaint, pursuant to *Section 430.10(e) of the Code of Civil Procedure*, does not lie to raise objections that are subject to being raised by special demurrer only (*Tennant v. Pfister (1876) 51 Cal. 511, 513* ; *Central Sur. & Ins. Corp. v. Foley (1962) 204 Cal. App. 2d 738, 741-743, 22 Cal. Rptr. 504*).

[2] Comments

[a] Use of Form

The foregoing point and authorities may be submitted in opposition to a general demurrer to a complaint when the general demurrer seeks to raise objections subject to special demurrer only, and the challenged pleading states facts sufficient to constitute a cause of action. For discussion of the distinctions between a general and special demurrer, see *§ 71.05*.

The foregoing point and authorities should be combined with a general form of memorandum in opposition to a demurrer to a complaint made on the ground that the complaint fails to state facts sufficient to constitute a cause of action [*see § 71.30*]. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. For example, if the essence of defendant's objection to the complaint is that facts are in an uncertain form, counsel should argue that for the purpose of evaluating the sufficiency of a complaint against a general demurrer, the court disregards alleged uncertainties because a general demurrer is not an appropriate vehicle for such objections, and that unless there is an entire absence of some fact or facts essential to a cause of action, it should be overruled [*see Uptown Enterprises v. Strand (1961) 195 Cal. App. 2d 45, 50, 15 Cal. Rptr. 486 , discussed under § 71.154[3][a]*].

See also *§§ 71.20[2]* and *71.30[2]*.

[3] Discussion of Authorities

[a] General Demurrer Does Not Raise Objections Made Grounds of Special Demurrer

Tennant v. Pfister *(1876) 51 Cal. 511* , was an action against sureties on an undertaking given by appellants on appeal from a judgment in a prior action partitioning real property, which judgment was affirmed, to recover the value of the use and occupation of the land by appellants pending the appeal. Defendants demurred to the complaint on the ground of misjoinder of parties plaintiff. The demurrer was overruled but at trial the court granted defendants' motion to exclude all of the evidence of plaintiffs on that ground. The Supreme Court reversed the subsequent judgment for defendants on the ground that, having overruled the demurrer, the trial court should have proceeded with the case as if no demurrer had been interposed or should have set aside its prior order overruling the demurrer and granted reconsideration. On remand, the case was tried and judgment was for plaintiffs. Defendants appealed on the ground their demurrer for misjoinder should have been sustained.

The Supreme Court explained its prior holding that was, in effect, that a motion to exclude all evidence is proper only when the complaint fails to state facts sufficient to constitute a cause of action. In this connection the Court said that if on the face of a complaint there appears to be a misjoinder of parties plaintiff, the objection must be taken by special demurrer or it is waived, and that, under a general demurrer for failure to state facts sufficient to constitute a cause of action, the objection of misjoinder cannot be raised (*51 Cal. 511, 513)* . The Court nevertheless held there was a misjoinder of parties plaintiff and reversed the judgment with directions to the trial court to sustain the demurrer.

Central Sur. & Ins. Corp. v. Foley *(1962) 204 Cal. App. 2d 738, 22 Cal. Rptr. 504* , arose out of an action by property owners against the contractors and their surety on a building contract. The surety cross complained against the contractors for indemnity. It prayed for an order that the contractors be required to deposit collateral to secure it against any loss, costs, or damages for which it might become liable, that if plaintiffs recovered judgment against it, the court award it damages in that amount over against the contractors, and that it be awarded judgment against them for the costs of investigation and attorney's fees it had incurred. Judgment went against plaintiffs in the main action. When the cross complaint came on for trial, the contractors objected on the grounds that because judgment had gone against plaintiffs no deposit was required, that there was no judgment or claim as to which the surety could seek indemnity, that the attorney's fees and other costs sought were not mentioned in the body of the cross complaint but only in the prayer, and that the cross complainant had in any case failed to allege the amount of these fees and costs. The trial court sustained the objection and rendered judgment for cross defendants. As an alternative ground for its judgment, it found that the cross complaint failed to plead any items of damages and amounts thereof in detail and with certainty.

The court of appeal reversed with directions to allow an amendment to the cross complaint. It said that in awarding judgment solely on the face of the cross complaint the trial court was in effect ruling, as on a general demurrer, that it failed to state a cause of action. Quoting from *American Tel. & Tel. Co. v. California Bank (1943) 59 Cal. App. 2d 46, 53, 138 P.2d 49* , the court explained that as against a general demurrer any mere ground of special demurrer for uncertainty will be resolved in support of the complaint and that a general demurrer will be overruled when the

necessary facts are shown to exist, although inaccurately or ambiguously stated, or appearing only by necessary implication (*204 Cal. App. 2d 738, 741)* . If the cross complaint was not already sufficient to state a cause of action, it could easily have been amended to do so (*204 Cal. App. 2d 738, 743)* . With respect to the trial court's alternative ground for the judgment, the court of appeal said that a mere failure to plead damages in detail and with certainty is the type of defect that is waived in the absence of a demurrer on that ground (*204 Cal. App. 2d 738, 743)* ; that is, it is not an objection raised by general demurrer.

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7A-71 California Points & Authorities § 71.37

§ 71.37 Opposing General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Inconsistent Counts Not Incorporating Each Other's Inconsistent Allegations Do Not Render Complaint Defective

[1] FORM Opposing General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Inconsistent Counts Not Incorporating Each Other's Inconsistent Allegations Do Not Render Complaint Defective

[*The following should be combined with a general form of memorandum in opposition to a general demurrer to a complaint (see § 71.30).*]

THE GENERAL DEMURRER SHOULD BE OVERRULED BECAUSE INCONSISTENT ALLEGATIONS IN DIFFERENT COUNTS DO NOT RENDER A PLEADING SUBJECT TO GENERAL DEMURRER IF THE COUNTS DO NOT INCORPORATE THE INCONSISTENT ALLEGATIONS.

[*EITHER*]

A. Inconsistent or Alternative Counts May Be Pled. A complaint may plead inconsistent causes of action, although it is verified, if there are no contradictory or antagonistic facts. Thus, unless the alternative pleadings contain antagonistic statements, the statement of facts sufficient to constitute a cause of action in one count is not a bar to the maintenance of a separately stated count in the same pleading based on inconsistent allegations (*Steiner v. Rowley (1950) 35 Cal. 2d 713, 718-719, 221 P.2d 9* ; *Berman v. Bromberg (1997) 56 Cal. App. 4th 936, 944-945, 65 Cal. Rptr. 2d 777*). In the absence of inconsistent factual allegations any inconsistency between plaintiff's legal theories is immaterial (*Berman v. Bromberg (1997) 56 Cal. App. 4th 936, 945, 65 Cal. Rptr. 2d 777*).

[*OR*]

A. Inconsistent or Alternative Counts May Be Pled. When the exact nature of the facts is in doubt, or when the exact

legal nature of a plaintiff's right and a defendant's liability depend on facts not well known to the plaintiff, the pleading may properly set forth alternative theories in varied and inconsistent counts (*Rader Co. v. Stone (1986) 178 Cal. App. 3d 10, 29, 223 Cal. Rptr. 806*).

[*CONTINUE*]

B. Inconsistent Allegations in Separate Counts Are Not Subject to General Demurrer. The fact that the allegations of one count of a multicount complaint are inconsistent with the allegations of another count that does not incorporate by reference the inconsistent allegations of the first count, does not render either count subject to a general demurrer (Lambert v. Southern Counties Gas Co. (1959) *52 Cal. 2d 347, 352, 340 P.2d 608*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a general demurrer to a complaint on the ground that the allegations of one count or cause of action are inconsistent with those of another count or cause of action set forth in the same pleading. The ground of opposition set out is that the inconsistent allegations of one count or cause of action are not incorporated by reference into the other.

Two versions of point A (Inconsistent or Alternative Counts May Be Pled) are set forth in the form. Counsel may use the version that is best suited for the facts and circumstances of his or her case.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. That is, counsel should identify each allegation that defendant cites as inconsistent, by paragraph number, and showing the allegation to be consistent with the other allegations in the same count.

[b] Rules With Respect to Other Inconsistencies

When there is any inconsistency between specific allegations of the complaint on which a conclusion must be based and the conclusion, the specific allegation controls [*Wood v. Elling Corp. (1977) 20 Cal. 3d 353, 364 n.8, 142 Cal. Rptr. 696, 527 P.2d 755]* . Furthermore, the specific pleading of a matter controls, limits, and supersedes a general pleading in the same or a prior complaint [*Henderson v. Superior Court (1978) 77 Cal. App. 3d 583, 590, 142 Cal. Rptr. 478]* .

[c] Effect of Verification of Complaint

A complaint may plead inconsistent causes of action even though the complaint is verified, if there are no contradictory or antagonistic facts [*Faulkner v. Cal. Toll Bridge Authority (1953) 40 Cal. 2d 317, 328, 253 P.2d 659* ; *Steiner v. Rowley (1950) 35 Cal. 2d 713, 718-719, 221 P.2d 9* ; *see DuBarry Internat., Inc. v. Southwest Forest Industries, Inc. (1991) 231 Cal. App. 3d 552, 576, 282 Cal. Rptr. 181]* . The Supreme Court noted in *Faulkner* that the rule allowing a plaintiff to plead inconsistent counts or causes of actions was not intended to sanction the statement in a verified complaint of certain facts as constituting a transaction in one count or cause of action, and in another count or cause of action a statement of contradictory or antagonistic facts as constituting the same transaction. In short, stated the Court, "the rule does not permit the pleader to blow both hot and cold in the same complaint on the subject of facts of which [the plaintiff] purports to speak with knowledge under oath" [*Faulkner v. Cal. Toll Bridge Authority (1953) 40 Cal. 2d 317, 328, 253 P.2d 659* , *citing Beatty v. Pacific States Sav. & Loan Co. (1935) 4 Cal. App. 2d 692, 679, 41 P.2d 378* with approval]. To verify inconsistent facts alleged in a complaint indicates perjury in the matter [*Manti v. Gunari (1970) 5 Cal. App. 3d 442, 449, 85 Cal. Rptr. 366]* .

See also *§§ 71.20[2]* and *71.30[2]*.

[3] Discussion of Authorities

[a] Inconsistent or Alternative Counts May Be Pled

Steiner v. Rowley *(1950) 35 Cal. 2d 713, 221 P.2d 9* , was an action by the purchasers of real property to recover a commission paid to a real estate broker, an alleged secret profit, and exemplary damages. The complaint was in four counts, all arising out of the same transaction. The first alleged that defendant was employed by plaintiffs as a broker under an oral contract and owed them $2,000 paid to him for their use and benefit. More specifically, it alleged that the grantees of the property purchased by plaintiffs paid defendant that amount as a side payment and secret profit in consideration of receiving from him a favorable recommendation for the purchase of certain property. This payment, it was asserted, was obtained by defendant in violation of his duty to deal with plaintiffs honestly and fairly as their real estate broker. The second count was for money had and received. The third count alleged that in addition to the fee paid by plaintiffs to defendant, defendant received a secret profit of $2,000 out of a certain escrow to which plaintiffs were parties without plaintiffs' knowledge or consent. The fourth count sought exemplary damages based on defendant's fraud, oppression, and malice, express or implied, in obtaining the $2,000. Defendant's general demurrer to the complaint was sustained and plaintiffs appealed from the subsequent judgment of dismissal.

In holding all four counts sufficient and reversing the judgment, the Supreme Court pointed out that even if the facts pleaded in the third count showed knowledge of the secret purpose of the payment, the first count would not fall because of those allegations (*35 Cal. 2d 713, 718)* . The Court explained that a complaint may plead inconsistent causes of action, although it be verified, if there are no contradictory or antagonistic facts (*35 Cal. 2d 713, 718-719)* . The Court pointed out that the allegations of the first count to the effect that the profit was secret at most would be inconsistent with, but not antagonistic to, those of the third count in regard to the payments out of escrow. Even though under the third count the plaintiffs would be charged with notice that the defendant would be paid $2,000 out of the escrow, that knowledge would not include notice of an illegal purpose for the payment, which was not disclosed by the escrow documents (*35 Cal. 2d 713, 718)* . Moreover, even if the allegations of the third count showed knowledge of the illegal purpose of the payment, evidence offered at trial in support of the first count might tend to prove the invalidity of the escrow contract, ambiguity in its terms, or mistake in connection with its execution, and if, for any reason, the escrow contract was invalid, then the plaintiffs were not by imputation bound through knowledge of its provisions. The Court further said that in the parallel field of aider by reference, the averments of one count cannot be amplified by the allegations of another separately stated cause of action in the same pleading unless the latter are included by special reference or otherwise in the portion of the complaint under attack. Similarly, the Court also found that unless the alternate pleadings contain antagonistic statements, the statement of facts sufficient to constitute a cause of action in one count is not a bar to the maintenance of a separately stated count in the same pleading based on inconsistent allegations (*35 Cal. 2d 713, 719)* .

The facts and procedural background of ***Berman v. Bromberg*** *(1997) 56 Cal. App. 4th 936, 65 Cal. Rptr. 2d 777* , are discussed in *§ 71.41[3][a]*. With regard to inconsistent or alternative counts, the court pointed out that a complaint may plead inconsistent causes of action, although it be verified, if there are no contradictory or antagonistic facts. Thus, unless the alternate pleadings contain antagonistic statements, the statement of facts sufficient to constitute a cause of action in one count is not a bar to the maintenance of a separately stated count in the same pleading based on inconsistent allegations. In the absence of inconsistent factual allegations any inconsistency between plaintiff's legal theories is immaterial (*56 Cal. App. 4th 936, 944-945)* .

In ***Rader Co. v. Stone*** *(1986) 178 Cal. App. 3d 10, 29, 223 Cal. Rptr. 806* , the plaintiff brought various causes of action against defendant to recover a broker's commission allegedly due the plaintiff for its services in procuring a tenant for defendant's real property. Defendant demurred to plaintiff's third amended complaint mainly in reliance on the statute of frauds. The trial court sustained the demurrer without leave to amend and entered an order of dismissal as to the defendant. The plaintiff appealed.

The court of appeal reversed. Defendant maintained that writings appended to the complaint did not show on their face the fact of the plaintiff's employment and none of the writings were signed by the party to be charged. The court discussed the applicability of the statute of frauds and concluded that its requirements were satisfied by the writings at issue. In addition, the court stated that the plaintiff was not precluded by law from alleging in one cause of action a breach of contract and an inconsistent theory of recovery in another cause of action. To the extent the plaintiff's allegation in one cause of action of a fully executed contract with the defendant was at odds with an allegation in a separate cause of action that another party interfered in plaintiff's advantageous relationship with defendant, that inconsistency, stated The Court, was not fatal to the plaintiff's claims at the pleading stage, as a plaintiff is permitted to plead inconsistent or alternative counts. When the exact nature of the facts is in doubt, or when the exact legal nature of a plaintiff's right and a defendant's liability depend on facts not well-known to the plaintiff, the pleading may properly set forth alternative theories in varied and inconsistent counts (*178 Cal. App. 3d 10, 29)* .

[b] Inconsistent Allegations in Separate Counts Are Not Subject to General Demurrer

Lambert v. Southern Counties Gas Co. *(1959) 52 Cal. 2d 347, 340 P.2d 608* , was an action by owners of a bulldozer for its destruction by fire after it struck and punctured an underground gas pipeline. The first count was directed against the lessees of the bulldozer and was based on their alleged negligence in the operation of the bulldozer over the pipeline when they should have known its location. The second count was against the gas company and was based on its alleged negligence in permitting its pipeline to remain so near the surface of the ground. The gas company demurred generally to the first amended complaint on the ground that plaintiffs by alleging negligence on the part of the lessees in count one, which negligence was imputed to plaintiffs as the owner of the bulldozer, pleaded their own contributory negligence that barred them from recovery against it. The demurrer was sustained without leave to amend, and plaintiffs appealed from the judgment for the gas company.

The Supreme Court reversed the judgment. The Court pointed out that a plaintiff may plead inconsistent causes of action in separate counts of a single complaint, that each count or cause of action in a complaint must be complete in itself and must either contain all the averments necessary to state a cause of action or expressly refer therefor to other counts, and that a count sufficient within itself may not ordinarily be defeated by importing from another count an allegation to which the sufficient count makes no reference (*52 Cal. 2d 347, 352)* . The Court, after pointing out that the gas company alone was named defendant in count two and that only its alleged negligence was involved in that count, explained that the two counts in their respective separate statements of alleged negligence--that of the ranch owners, on the one hand, and that of the gas company, on the other--indicated that plaintiffs were in doubt as to which defendants should be held liable for the damages sustained (*52 Cal. 2d 347, 353)* . For that reason plaintiffs elected to set forth their two causes of action in the one complaint, which plaintiffs were permitted to do under the right of joinder of defendants afforded by our system of code pleading (*52 Cal. 2d 347, 353)* . The Court stated it would defeat the principles underlying our liberal system of pleading to permit the gas company, the only defendant named in count two, to import, from the separately stated count one, allegations against other defendants based on a different premise of liability; each count should be tested on the basis of its own allegations (*52 Cal. 2d 347, 353-354)* . The Court concluded that the allegations of count two were sufficient to state a cause of action against the gas company, and that its general demurrer should have been overruled (*52 Cal. 2d 347, 354)* .

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7A-71 California Points & Authorities § 71.38

§ 71.38 Opposing General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Action Is Not Founded on Attached Exhibit

[1] FORM Opposing General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Action Is Not Founded on Attached Exhibit

[*The following should be combined with a general form of memorandum in opposition to a general demurrer to a complaint (see § 71.30).*]

THE GENERAL DEMURRER SHOULD BE OVERRULED BECAUSE THE ACTION IS NOT FOUNDED ON THE EXHIBIT AND THE COMPLAINT DOES NOT ALLEGE AN INTENT TO ADOPT THE RECITALS.

Action Not Founded on Attached Document. The pleading of an instrument, attached as an exhibit to and incorporated by reference in the complaint, that is not the basis of the cause of action is, in the absence of allegations indicating the pleader's intentions to adopt the recitals of the exhibit as his or her or its own, only an assertion of its existence and character; recitals not so adopted may not be read into the complaint in determining the sufficiency of the complaint to state a cause of action (*Washer v. Bank of America (1943) 21 Cal. 2d 822, 830, 136 P.2d 297* (overruled on another point in *MacLeod v. Tribune Pub. Co. (1959) 52 Cal. 2d 536, 551, 343 P.2d 36*)).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to A general demurrer to a complaint based on the objection that allegations in the complaint are contradicted by statements contained in an exhibit that is attached to and by reference incorporated in the complaint. The ground of opposition set out is that the action is not founded on the exhibit, which is attached for evidentiary purposes only.

In an appropriate case, these points and authorities may be submitted in opposition to the general demurrer supported by

the memorandum *set out in § 71.25*.

These points and authorities should be combined with a general form of memorandum in opposition to a demurrer to a complaint made on the ground that the complaint fails to state facts sufficient to constitute a cause of action [*see § 71.30*]. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel would refer to the complaint, pointing out the absence of any allegations expressly or impliedly indicating the pleader's intentions to adopt the recitals of the exhibit as his or her or its own.

See also *§§ 71.20[2]* and *71.30[2]*.

[3] Discussion of Authorities

[a] Action Not Founded on Attached Document

Washer v. Bank of America *(1943) 21 Cal. 2d 822, 136 P.2d 297* (overruled on another point in *MacLeod v. Tribune Pub. Co. (1959) 52 Cal. 2d 536, 551, 343 P.2d 36*), was an action for damages for slander and libel. Plaintiff had been employed, and subsequently discharged, by defendant bank. The National Labor Relations Board ordered his reinstatement on the ground he had been fired because of his activities in connection with the organization of a labor union. The complaint in the first cause of action for slander alleged that the individual defendant, acting in the scope of his duties as vice president and personnel director of defendant bank, in commenting on the board's decision, orally made the following statement concerning plaintiff to newspaper reporters and others solely for the purpose that it be published and it was so published, "We cannot see how this institution could possibly reinstate anybody who had admitted he had falsified his expense account, who has been guilty of flagrant insubordination." Plaintiff additionally pleaded the innuendo, detriment, damages, and malice. The second cause of action was for libel and was in substantially the same form but alleged that the individual defendant handed the press in writing his comment on the board's decision. Defendants demurred both specially and generally to the complaint on the ground, among others, that the complaint taken as a whole showed the truth of the alleged defamatory language and to support this assertion relied on the statement of facts set forth in the copy of the board's decision which plaintiff had attached as an exhibit to his complaint. Plaintiff took the position that the exhibit could not be used to establish the truth or falsity of the alleged defamatory statement as the language of the complaint showed that the sole purpose of the exhibit was to identify plaintiff as the person concerning whom the statement was made. The demurrers were sustained without leave to amend.

The Supreme Court reversed the subsequent judgment. In so doing, the Court said that when a written instrument, that is the foundation of a cause of action or defense, is attached to a pleading as an exhibit and incorporated into it by proper reference, the court may, on demurrer, examine the exhibit and treat the pleader's allegations of its legal effect as surplusage (*21 Cal. 2d 822, 829-830)* . The Court added, however, that an instrument that is not the basis of a cause of action or defense falls into a different category (*21 Cal. 2d 822, 830)* . The Court explained that in this latter situation the pleading of the document as an exhibit is only an assertion of its existence and character, in the absence of allegations indicating the pleader's intention to adopt as his own the recitals in it, and that, consequently, the language of the complaint or answer determines the extent to which the document has been made a part of the pleading (*21 Cal. 2d 822, 830)* . The Court concluded that there was nothing in the complaint indicating plaintiff intended to include as apart of his pleading any statement of facts made by the board in deciding the matter before it, and hence, the recitals could be considered only insofar as they showed that there was a determination concerning plaintiff and that the individual defendant's comment was made in reference to the requirement as to reinstatement (*21 Cal. 2d 822, 830)* .

[4] Additional Authorities

[a] Action Not Founded on Attached Document

Morrison v. Home Sav. & L. Ass'n (1959) 175 Cal. App. 2d 765, 346 P.2d 917 , was an action for damages. Although recitals in instruments attached to the complaint were not contrary to any allegations in the complaint, the court of appeal, in reversing a judgment of dismissal, pointed out that although the action against defendant arose out of the failure of the contract of sale between plaintiffs and the purchaser, it was in fact based on the defendant's breach of an agreement not evidenced by a writing attached to the complaint and hence did not come under the rule that allegations in a complaint contrary to the recitals in an instrument on which the action is based that is attached to and incorporated in the complaint are to be disregarded as surplusage (*175 Cal. App. 2d 765, 771-773)* .

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§ 71.39 Opposing General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--General Damages Are Sufficiently Alleged

[1] FORM Opposing General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--General Damages Are Sufficiently Alleged

[*The following should be combined with a general form of memorandum in opposition to a general demurrer to a complaint (see § 71.30).*]

THE GENERAL DEMURRER SHOULD BE OVERRULED BECAUSE A COMPLAINT DOES NOT LACK SUFFICIENT ALLEGATIONS OF DAMAGES IF ONLY GENERAL DAMAGES ARE SOUGHT AND THOSE DAMAGES PROXIMATELY RESULTING FROM DEFENDANT'S BREACH ARE ALLEGED.

General Damages Sufficiently Alleged. A complaint for damages that sets forth a legal right on the plaintiff's part, a wrongful violation of that right by defendant, and damages proximately resulting therefrom states a cause of action, and it is not necessary to point out in detail in the complaint the nature and extent of such damages unless special damages are claimed (*Colvig v. RKO Gen., Inc. (1965) 232 Cal. App. 2d 56, 68-69, 42 Cal. Rptr. 473*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a general demurrer to a complaint based on the objection that plaintiff failed to allege damages sufficiently. The ground of opposition set out is that the fact that plaintiff sustained detriment and general damages in a specified amount as a proximate result of defendant's breach is alleged.

These points and authorities should be combined with a general form of memorandum in opposition to a demurrer to a complaint made on the ground that the complaint fails to state facts sufficient to constitute a cause of action [*see § 71.30*]. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel would refer to specific allegations in the complaint, by paragraph number, indicating that only general damages are sought and those damages proximately resulting from defendant's breach are alleged.

See also *§§ 71.20[2]* and *71.30[2]*.

[3] Discussion of Authorities

[a] General Damages Sufficiently Alleged

Colvig v. RKO Gen., Inc. *(1965) 232 Cal. App. 2d 56, 42 Cal. Rptr. 473* , was an action against RKO, KFRC, and a number of Doe defendants by which plaintiff sought recovery of damages resulting from defendants' failure to comply fully with an arbitrator's award, confirmed by the superior court, ordering that he be restored to his position as a staff announcer on KFRC. The complaint alleged that plaintiff was a third-party beneficiary to a contract between defendants and the American Federation of Television and Radio Artists, that he had been terminated by defendants from employment as a staff announcer at KFRC, that defendants were ordered to restore plaintiff to such position by an arbitration award made pursuant to the contract, that the award recognized that plaintiff had "a right to practice his profession there," that defendants paid all salary due but failed and refused to broadcast plaintiff's voice over the radio waves, that defendants' conduct was intended to and did deprive plaintiff of a personal right that had been fixed by that award to practice his profession there, and that as a proximate result of defendants' conduct, plaintiff "has been damaged" in his profession by not being able to be and remain known to the public as a radio announcer to his "detriment" in the sum of $250,000. The general and special demurrer of defendant RKO, which was the owner of KFRC, to the complaint was sustained without leave to amend. Plaintiff appealed from the subsequent judgment of dismissal.

The court of appeal reversed the judgment. The court held that the complaint stated a cause of action and, with respect to defendant's contention that the complaint lacked sufficient allegations of damages, said it is the general rule that if the allegations of a complaint demurred to set forth a legal right on the part of the plaintiff, a wrongful violation of that right by the defendant, and damages proximately resulting from the violation of that right, a cause of action is stated, and it is not necessary to point out in detail in the pleadings the nature and extent of such damages unless special damages are claimed (*232 Cal. App. 2d 56, 68-69)* . The court explained that damages that may be said to be the normal and natural result of the breach complained of may be denominated general damages and pleaded accordingly, while those suffered as a consequence, though not necessarily the certain result of the breach, must be pleaded specially, and that, accordingly, the natural and ordinary damages resulting from a breach of contract may be recovered under a general allegation of damages (*232 Cal. App. 2d 56, 69)* . The court added that the question as to how general damages from the breach of a contract have arisen otherwise than as disclosed by the general allegation of damages, is the subject of evidence, rather than pleading, but that special damages must be specially set forth in the complaint or the plaintiff will not be permitted to give evidence of it at trial (*232 Cal. App. 2d 56, 69)* . The court held that the instant complaint satisfied the requirement with respect to general damages but that insofar as it might purport to be a claim for special damages it was deficient and vulnerable to a special demurrer (*232 Cal. App. 2d 56, 69)* .

It is to be noted that the court in *Colvig* used the word "damages" variously to mean both "damages" and "detriment" and that plaintiff in his complaint used the word "detriment" to mean "damages." "Detriment" is the loss or harm suffered by plaintiff in person or property [*Civ. Code § 3282*] as a result of defendant's unlawful act [*Civ. Code § 3281*]. "Damages" is the measure of that detriment in terms of money [*Civ. Code § 3281*]. Thus, by reason of a defendant's unlawful act, a person is, for example, deprived of the use of property to which he or she is entitled. The detriment sustained is the loss of the use of that property. The damages sustained are the value of that lost use. The amount of damages is yet a third element.

A complaint, to be sufficient, must allege both the detriment suffered by plaintiff as a proximate result of defendant's alleged wrong, and damages. The amount of the damages must also be set forth, unless the action is to recover actual or punitive damages for personal injury or wrongful death, in which case the amount must not be stated [*Code Civ. Proc. § 425.10(b)*].

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7A-71 California Points & Authorities § 71.40

§ 71.40 Opposing General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Plaintiff May Omit Facts Pled in Prior Pleading to Correct Mistakes

[1] FORM Opposing General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Plaintiff May Omit Facts Pled in Prior Pleading to Correct Mistakes

[*The following should be combined with a general form of memorandum in opposition to a general demurrer to a complaint (see § 71.30).*]

THE GENERAL DEMURRER SHOULD BE OVERRULED BECAUSE PLAINTIFF IS ENTITLED TO CORRECT _____ [ERRONEOUS ALLEGATIONS OF GENERIC TERMS THAT MAY HAVE LEGAL IMPLICATIONS BUT THAT ARE ALSO LOOSELY USED BY LAY PERSONS *and/or* AMBIGUOUS STATEMENTS OF FACT].

Omission of Facts in Amended Pleading Permitted to Correct Mistakes. The rule that all allegations of fact in a verified complaint that are subsequently omitted or contradicted, are still binding on the complainant is valid and useful, but it does not exist in a vacuum and cannot be mechanically applied. It is not a rule intended to prevent honest complainants from correcting erroneous allegations of generic terms that may have legal implications but that are also loosely used by lay persons or to prevent the correction of ambiguous statements of fact (*Contreras v. Blue Cross of California (1988) 199 Cal. App. 3d 945, 950, 245 Cal. Rptr. 258*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a general demurrer to a complaint that objects to an omission, without explanation, of facts alleged in the Original Complaint.

In an appropriate case, these points and authorities may be submitted in opposition to the general demurrer supported by

the memorandum *set out in § 71.26*.

These points and authorities should be combined with a general form of memorandum in opposition to a demurrer to a complaint made on the ground that the complaint fails to state facts sufficient to constitute a cause of action [*see § 71.30*]. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should argue that the subsequent pleading is a clarification of the plaintiff's valid claims.

See also *§§ 71.20[2]* and *71.30[2]*.

[3] Discussion of Authorities

[a] Omission of Facts in Amended Pleading Permitted to Correct Mistakes

Contreras v. Blue Cross of California *(1988) 199 Cal. App. 3d 945, 245 Cal. Rptr. 258* , was a wrongful discharge action involving numerous plaintiffs. A demurrer to the original complaint was sustained with leave to amend. Plaintiffs, however, failed to amend within the time permitted by leave to amend and defendants moved to dismiss the action. Plaintiffs opposed the motion to dismiss and promptly submitted the first amended complaint, urging that extenuating circumstances had prevented them from filing it in time. The trial court, however, dismissed the action first, telling plaintiffs that their remedy was under *Code Civ. Proc. § 473* to set aside the dismissal. The plaintiffs submitted a motion to set aside the dismissal and the trial court granted the motion. Defendants filed notice of appeal from the order, contending that the original complaint contained allegations that rendered it defective, due to federal preemption under ERISA, and that the first amended complaint was basically the same but with the offensive allegations improperly omitted. The defendants contended that this was one of those cases in which a pleader should not be permitted to withdraw allegations in a prior pleading, and that in such circumstances the trial court abused its discretion by granting relief.

The court of appeal affirmed the order. The court quoted *Macomber v. State of California (1967) 250 Cal. App. 2d 391, 399, 58 Cal. Rptr. 393* , stating that rules of pleading are conveniences to promote justice and not to impede or warp it. *Macomber* did not question the rule that all allegations of fact in a verified complaint, which are subsequently omitted or contradicted, are still binding on the complainant. The court agreed that the rule is valid and useful but stated that it does not exist in a vacuum and cannot be mechanically applied. It is a good rule to defeat abuses of the privilege to amend and to discourage sham and untruthful pleadings. It is not a rule, however, that is intended to prevent honest complainants from correcting erroneous allegations of generic terms that may have legal implications but that are also loosely used by lay persons or to prevent the correction of ambiguous statements of fact (*199 Cal. App. 3d 945, 950)* .

The court observed that the case before it involved numerous individual plaintiffs having individual circumstances with a wide variety of employment promises alleged to have been broken and that possible federal preemption under ERISA was not a simple, blatant, and incurable defect such as res judicata or delay beyond the statute of limitations. Plaintiffs had the right to amend to clarify their claims in light of the complex and developing law. The first amended complaint in the case was extensively reorganized and improved and was not nearly identical to the original complaint. The amended pleading was not the type of sham pleading to which the rule of preventing omission of an incurable defect applies (*199 Cal. App. 3d 945, 950)* . The court concluded that to deny the plaintiffs' request for relief would result in a windfall for the defendants, unrelated to the potential merit of any of the causes of action stated in the first amended complaint (*199 Cal. App. 3d 945, 951)* .

[4] Additional Authorities

[a] Omission of Facts in Amended Pleading Permitted to Correct Mistakes

The facts and procedural background of *Berman v. Bromberg (1997) 56 Cal. App. 4th 936, 65 Cal. Rptr. 2d 777* , are discussed in *§ 71.41[3][a]*. With regard to correcting mistakes, quoting *Contreras v. Blue Cross of California (1988) 199 Cal. App. 3d 945, 950, 245 Cal. Rptr. 258* , the court noted that it did not question the rule that all allegations of fact in a verified complaint, which are subsequently omitted or contradicted, are still binding on the complainant. The rule is valid and useful, but it does not exist in a vacuum and cannot be mechanically applied. It is a good rule to defeat abuses of the privilege to amend and to discourage sham and untruthful pleadings. It is not a rule, however, which is intended to prevent honest complainants from correcting erroneous allegations of generic terms which may have legal implications but which are also loosely used by laymen or to prevent the correction of ambiguous statements of fact (*56 Cal. App. 4th 936, 946)* .

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7A-71 California Points & Authorities § 71.41

§ 71.41 Opposing General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Fact That Prior Pleadings May Have Contained True, but Irrelevant, Matters Does Not Render Proposed Amended Complaint a Sham

[1] FORM Opposing General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Fact That Prior Pleadings May Have Contained True, but Irrelevant, Matters Does Not Render Proposed Amended Complaint a Sham

[*The following should be combined with a general form of memorandum in opposition to a general demurrer to a complaint (see § 71.30) and may also be combined with § 71.37, if appropriate.*]

THE GENERAL DEMURRER SHOULD BE OVERRULED BECAUSE AN AMENDED COMPLAINT THAT ALLEGES DIFFERENT LEGAL THEORIES BASED ON THE SAME SET OF GENERAL FACTS AS SET OUT IN THE SUPERSEDED PLEADINGS, BUT OMITS FACTUAL ALLEGATIONS THAT ARE IRRELEVANT AND IMMATERIAL TO THE NEW LEGAL THEORIES ASSERTED, IS NOT A SHAM

A. Sham Pleading Rule Is Inapplicable When There Are No Inconsistencies in the Underlying Material or Factual Allegations. The fact that the prior pleadings in the case may have contained true, but irrelevant, matters does not render the amended complaint a sham. Although prior legal theories are abandoned in the amended complaint, it is based on the same general set of underlying material facts. The sham pleading rule should not be applied in a case where the plaintiff seeks to change plaintiff's legal theory of recovery and the legal conclusions plaintiff seeks to draw from the underlying factual events, and also seeks to omit factual allegations that are irrelevant and immaterial to the new legal theories asserted (*Berman v. Bromberg (1997) 56 Cal. App. 4th 936, 948-949, 65 Cal. Rptr. 2d 777*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a general demurrer to an amended complaint based on an objection that the amended complaint attempts to avoid defects set forth in a prior complaint by avoiding them, when

the amended complaint has omitted factual allegations that are irrelevant and immaterial to new legal theories asserted in the amended complaint and the new legal theories are based on the same general set of underlying facts. Under the sham pleading rule, when an amended complaint attempts to avoid defects set forth in a prior complaint by ignoring them, the court may examine the prior complaint to ascertain if the amended complaint is merely a sham. Moreover, any inconsistencies with prior pleadings must be explained and if the pleader fails to do so the court may disregard the inconsistent allegations [*see Berman v. Bromberg (1997) 56 Cal. App. 4th 936, 945-946, 65 Cal. Rptr. 2d 777]* . For effect of verification, see *discussion under § 71.37[2][c]*.

Counsel may wish to consider combining this form with the points and *authorities in § 71.37*, which support the contention that inconsistent allegations may be made in different counts in a complaint.

Counsel should insert argument in the form, showing the relationship between the facts and the points of law stated. Counsel should show how each omitted fact in the amended complaint is irrelevant and immaterial to the new legal theories asserted and that the new legal theories are based on the same general set of underlying facts.

[3] Discussion of Authorities

[a] Sham Pleading Rule Is Inapplicable When There Are No Inconsistencies in the Underlying Material or Factual Allegations

In ***Berman v. Bromberg*** *(1997) 56 Cal. App. 4th 936, 65 Cal. Rptr. 2d 777* , plaintiff brought an action against the defendant for an accounting, audit, breach of contract, intentional and negligent misrepresentation, and declaratory relief arising out of plaintiff's investment in a limited partnership and thereafter filed a verified first amended complaint containing essentially the same causes of action. Before filing the original complaint, plaintiff had asked for an accounting from the defendants and also for copies of financial statements. One of the defendant's responded by sending plaintiff a check for $30,000 stating on its face and in an accompanying letter that it was for the purchase of the plaintiff's interest in the limited partnership. Defendants answered the verified first amended complaint and alleged as an affirmative defense that they tendered payment in full to the plaintiff for plaintiff's entire interest in the partnership, that plaintiff accepted payment and never tendered return or returned payment to the defendants, and since that time plaintiff has never been a member of the partnership. Ultimately, defendants filed a motion for judgment on the pleadings and plaintiff filed an opposition to the motion and also filed a motion for leave to file a second amended complaint indicating plaintiff's intention to abandon all of the causes of action in the first amended complaint and allege two causes of action based on the same general set of facts, but premised on two different legal theories, one being for violation of *Corp. Code § 25401*. Plaintiff's proposed verified second amended complaint alleged that plaintiff at no time intended a sale of plaintiff's interest in the limited partnership nor did plaintiff agree to such a sale, but if plaintiff did so, plaintiff did so based on untrue statements or omissions made by the defendants. At the hearing the court apparently elected to treat the motion for judgment on the pleadings as a demurrer to the first amended complaint and sustained the demurrer as to all the causes of action with 20 days leave to amend. At the hearing on the motion for leave to file the second amended complaint the court denied the motion without prejudice and thereafter plaintiff filed a motion for leave to file a third verified amended complaint which was substantially similar to the second amended complaint except that it added a third cause of action for "constructive fraud--breach of fiduciary duty owed limited partner by general partner and president." The proposed third amended complaint did not contain the language of the proposed second amended complaint relating to the plaintiff's subjective intent not to sell plaintiff's interest, but instead alleged that plaintiff cashed the check and that such transaction constituted a sale of security within the meaning of *Corp. Code §§ 25401, 25019* and that a sale of a security occurred when plaintiff cashed the check. Defendants opposed the motion for leave to amend maintaining that because the allegations concerning a sale of a security contradict the earlier allegations that there was no sale of plaintiff's interest, the third amended complaint was a sham and the fatal defect could not be cured by simply omitting the earlier allegations in a later pleading without explanation. The trial court agreed with the defendants' argument and denied the motion to amend. Judgment was entered in defendants' favor and plaintiff appealed (*56 Cal. App. 4th 936, 940-944*).

The court of appeal reversed. The only issue before the court of appeal was whether the trial court properly denied the motion for leave to amend on the ground that the third amended complaint was a sham pleading designed to untruthfully omit a fatal and incurable defect (*56 Cal. App. 4th 936, 947 n.3*). Notwithstanding this, the points of law discussed in the court's opinion also apply to demurrer cases. The court pointed out that generally, after an amended pleading has been filed, courts will disregard the original pleading. There is an exception when an amended complaint attempts to avoid defects set forth in a prior complaint by ignoring them. The court may examine the prior complaint to ascertain whether the amended complaint is a sham. The rationale for this is that a pleader may not attempt to breathe life into a complaint by omitting relevant facts that made the previous complaint defective. Moreover, any inconsistencies with the prior pleading must be explained and if the pleader fails to do so, the court may disregard the inconsistent allegations (*56 Cal. App. 4th 936, 945-946)* .

Turning to the case at hand, the court noted that the fact that the prior pleadings may have contained true, but irrelevant, matters does not render the proposed amended complaint a sham. The third amended complaint alleged different legal theories based on the same set of general facts as set out in the superseded pleadings and the prior omitted allegations pertaining to the plaintiff's lack of intent and lack of agreement to sell the plaintiff's partnership interest, even if true and even if read into the third amended complaint, were immaterial to the legal theories set out in the third amended complaint (*56 Cal. App. 4th 936, 946-948)* . The sham pleading rule should not be applied in a case where the plaintiff seeks to change plaintiff's legal theory of recovery and the legal conclusions plaintiff seeks to draw from the underlying factual events, and also seeks to omit factual allegations that are irrelevant and immaterial to the new legal theories asserted (*56 Cal. App. 4th 936, 949)* . Accordingly, the court held that the sham pleading rule was inapplicable and that there was no need for the plaintiff to explain the reasons for the amended pleading because there were no inconsistencies in the underlying material or relevant factual allegations (*56 Cal. App. 4th 936, 949)* .

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7A-71 California Points & Authorities § 71.42

§ 71.42 Opposing General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Delay Alone Does Not Establish Laches

[1] FORM Opposing General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Delay Alone Does Not Establish Laches

[*The following should be combined with a general form of memorandum in opposition to a general demurrer to a complaint (see § 71.30).*]

THE GENERAL DEMURRER TO THE COMPLAINT SHOULD BE OVERRULED BECAUSE THE COMPLAINT SHOWS ONLY THAT PLAINTIFF DELAYED FILING THE ACTION, AND DOES NOT SHOW ANY PREJUDICE TO DEFENDANT BECAUSE OF IT OR ACTS INDICATING THAT BY SUCH DELAY PLAINTIFF ACQUIESCED IN THE ACT OF WHICH COMPLAINT IS MADE.

Delay Without Acquiescence or Prejudice. The defense of laches requires unreasonable delay plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay; absent a showing on the face of the complaint of unreasonable delay plus prejudice or acquiescence, a demurrer on this ground should not be sustained (*Barndt v. County of Los Angeles (1989) 211 Cal. App. 3d 397, 259 Cal. Rptr. 372* ; *Duskin v. San Francisco Redevelopment Agency (1973) 31 Cal. App. 3d 769, 774-775, 107 Cal. Rptr. 667*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to A general demurrer to a complaint based on the objection that an equitable action is barred by laches. The ground of opposition set out is that it does not appear from the face of the complaint, or from any judicially noticed matter, that defendant has been prejudiced by plaintiff's delay in commencing the action, or that plaintiff has acquiesced in the act complained of.

In an appropriate case, these points and authorities may be submitted in opposition to the general demurrer supported by the memorandum *set out in § 71.27*.

These points and authorities should be combined with a general form of memorandum in opposition to a demurrer to a complaint made on the ground that the complaint fails to state facts sufficient to constitute a cause of action [*see § 71.30*]. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel would point out that it does not appear from the face of the complaint, or from any judicially noticed matter, that defendant has been prejudiced from any delay by the plaintiff in filing his or her action.

[b] Related Points and authorities

For memoranda of points and authorities in opposition to a demurrer to a complaint on the ground the action is barred by the statute of limitations, see Ch. 143, *Limitation of Actions* .

See also *§§ 71.20[2]* and *71.30[2]*.

[3] Discussion of Authorities

[a] Delay Without Acquiescence or Prejudice

In ***Barndt v. County of Los Angeles*** *(1989) 211 Cal. App. 3d 397, 259 Cal. Rptr. 372* , plaintiff initiated an action against the county to specifically enforce the terms of a settlement agreement entered into by the parties to resolve a long-standing employment dispute between them. The action was commenced nearly four years after the plaintiff had been denied appointment to the cardiology section of defendant's medical center as a physician specialist. The defendant demurred to the third amended complaint, contending that plaintiff was collaterally estopped from asserting the validity of the settlement agreement, and as a separate ground, that plaintiff was guilty of laches because of unreasonable and prejudicial delay in filing the complaint. The trial court sustained the defendant's demurrer to the third amended complaint without leave to amend, finding that plaintiff was collaterally estopped to seek such relief because of the denial of his petition for writ of mandate in another proceeding and that plaintiff was guilty of laches. Following entry of a stipulated judgment of dismissal, plaintiff appealed.

Although the court of appeal affirmed the judgment on the independent ground that the settlement agreement, which contemplated personal services, could not be specifically enforced under *Civ. Code § 3390* (*211 Cal. App. 3d 397, 403-407)* , it nevertheless held that the third amended complaint did not establish the defense of laches as a matter of law sufficient to support the sustaining of the demurrer (*211 Cal. App. 3d 397, 403)* . Quoting Witkin, California Procedure, vol. 3, *Pleading*, § 913 (3d ed. 1985), the court said that laches consists of unreasonable delay that result in some prejudice to the defendant; delay alone, apart from the statute of limitations, is not a bar. If the complaint merely discloses the lapse of a long period of time without affirmatively showing or necessarily implying any injury to the defendant from the delay, it does not show laches on its face, and a demurrer should not be sustained. Prejudice may then be pleaded in the answer and the issue will be determined at the trial (*211 Cal. App. 3d 397, 403)* . The court pointed out that the complaint adequately pleaded justification for the delay based on plaintiff's belief that the county intended to comply with the settlement agreement, and the court could not say at this stage of the proceedings that, as a matter of law, such belief was unreasonable or that the delay in filing resulted in undeniable prejudice to the county (*211 Cal. App. 3d 397, 403)* .

The facts and procedural background of ***Duskin v. San Francisco Redevelopment Agency*** *(1973) 31 Cal. App. 3d 769, 107 Cal. Rptr. 667* , are discussed in *§ 71.33[3][b]*. In reversing the judgment, the court of appeal, quoting from *Conti v. Board of Civil Serv. Comm'rs (1969) 1 Cal. 3d 351, 82 Cal. Rptr. 337, 461 P.2d 617* , *discussed under §*

71.42[4][a], said that the court has consistently rejected the concept that lapse of time less than the period of limitation in itself constitutes a defense. The defense of laches requires unreasonable delay plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay (*31 Cal. App. 3d 769, 774)* . The court acknowledged the "well established" rule that the defense of laches may be raised by demurrer if the complaint shows on its face unreasonable delay, plus prejudice or acquiescence, and that only then is the burden of establishing an excuse shifted to the plaintiff (*31 Cal. App. 3d 769, 744)* . The Court concluded that no prejudice appeared from the face of the complaint and that the agency had not seen fit to augment its demurrer with an affidavit setting forth any facts pertaining to prejudice, although its brief on appeal alluded to the existence of certain facts that, if properly pleaded by a verified answer or affidavit supporting a motion for summary judgment, would have enabled the court to resolve the matter (*31 Cal. App. 3d 769, 774-775)* . Under these circumstances, said the court, it was clear that laches had not been established on the face of the complaint and could not have been a ground on which the court sustained the general demurrer of the Agency (*31 Cal. App. 3d 769, 775)* .

To the extent the court in the above-quoted statement implied that an affidavit might have been used in support of the demurrer to set forth facts establishing prejudice, it must be kept in mind that any such facts submitted, in the form of an affidavit or otherwise, must be such as to be subject to judicial notice [*see Code Civ. Proc. §§ 430.30(a), 430.70*; *Evid. Code §§ 451, 452*] and, in the case of permissive judicial notice [*Evid. Code § 452*], a proper request that the court take judicial notice of the matter must have been made [*see Code Civ. Proc. § 430.70*; *Evid. Code § 453*; *see also § 71.21[2]*]. The rule is well established that, except for judicially noticed matter, a demurrer can neither allege facts that, if true, would disclose a defect in the challenged pleading, nor bring in extrinsic evidence that would disclose such a defect [*see § 71.30*]. The proper way to secure pretrial review of a defense to the action that does not appear from the face of the complaint is by motion for summary judgment [*Code Civ. Proc. § 437c*], as suggested by the court, or by pleading the defense in the answer as an affirmative defense [*Code Civ. Proc. § 431.30(b)(2)*] and then moving for a separate trial of this issue [*Code Civ. Proc. § 597*], subject to the exception noted above that if the defense can be established by matter subject to judicial notice the complaint is subject to demurrer.

[4] Additional Authorities

[a] Delay Without Acquiescence or Prejudice

Conti v. Board of Civil Serv. Comm'rs (1969) 1 Cal. 3d 351, 82 Cal. Rptr. 337, 461 P.2d 617 , did not involve a demurrer but did involve the defense of laches. The Court said that it had consistently rejected the concept that lapse of time less than the period of limitation in itself constitutes a defense (*1 Cal. 3d 351, 359)* . The defense of laches requires unreasonable delay plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay (*1 Cal. 3d 351, 359)* . The Court also stated that laches may be raised by demurrer, but only if the complaint shows on its face unreasonable delay plus prejudice or acquiescence and that, in the absence of prejudice or acquiescence, delay does not establish a defense and petitioner therefore did not need to plead excuse or explanation (*1 Cal. 3d 351, 362)* . The Court overruled *Wolstenholme v. Oakland (1960) 54 Cal. 2d 48, 4 Cal. Rptr. 153, 351 P.2d 321* , and disapproved its progeny and other court of appeal cases to the extent they held or implied that, in an action or proceeding seeking reinstatement to public employment, prejudice is presumed from undue delay (*1 Cal. 3d 351, 362)* .

Jones v. H.F. Ahmanson & Co. (1969) 1 Cal. 3d 93, 81 Cal. Rptr. 592, 460 P.2d 464 , was an action for damages and other relief by a minority stockholder against a holding company formed by the defendant majority stockholders and officers based on alleged breaches of the fiduciary duty. Certain of defendants' general and special demurrers were sustained without leave to amend. Plaintiff appealed from the subsequent judgment of dismissal, and defendants filed a protective cross appeal. The Supreme Court affirmed the trial court order overruling the demurrer. After reviewing the sequence of events, the Court said the delay in initiating the action was not so long as to be unreasonable and to constitute laches as a matter of law, and that it is well established that a mere lapse of time without a showing of prejudice to the defendant does not constitute laches (*1 Cal. 3d 93, 120)* . Since prejudice to the defendants did not

appear from the complaint and stipulated facts, the order of the trial court overruling the demurrer on that ground was proper (*1 Cal. 3d 93, 120)* .

Maguire v. Hibernia Sav. & L. Soc'y (1944) 23 Cal. 2d 719, 146 P.2d 673 , involved consolidated actions brought after 1940 for declaratory relief by successors in interest to alleged members of and depositors in an incorporated savings and loan society. On their demurrer, defendants argued that since the rights sought to be declared had their origin in a contract entered into in 1862 and a determination of those rights required an inquiry into transactions commencing in 1859, plaintiffs' claims were stale and hence barred (*23 Cal. 2d 719, 735-736)* . Demurrers to the amended complaints were sustained without leave to amend on the ground that no cause of action was stated and that the relief sought was barred by the statute of limitations and by laches. The Supreme Court reversed the judgments. The Court explained that the policy of this state with respect to lapse of time is embodied in statutes applicable to both legal and equitable actions, and mere lapse of time, other than that prescribed by such statutes, does not bar relief (*23 Cal. 2d 719, 736)* . The defense of stale claims is a particular application of the doctrine of laches and is based on estoppel (*23 Cal. 2d 719, 736)* . When, for example, an action is commenced many years after its accrual, the death of witnesses or destruction of evidence, presumed as well as actual, may prejudice the defendant and justify denial of relief because of staleness of the claim (*23 Cal. 2d 719, 736)* ; even the authorities that refer to staleness of claims as a distinct concept recognize that lapse of time is of no consequence in the absence of a showing of any act by the defendant in denial of the plaintiff's rights that would have required affirmative action by the plaintiff (*23 Cal. 2d 719, 736)* . The Court concluded that it did not appear from the face of the complaint that the cause of action alleged in either the first or second count was barred by the statute of limitations or by laches and reversed the judgments (*23 Cal. 2d 719, 737)* .

Warren v. Atchison, Topeka & Santa Fe Ry. Co. (1971) 19 Cal. App. 3d 24, 96 Cal. Rptr. 317 , was an action by the trustees of a dissolved corporation against the railroad and others arising out of two deeds executed by the dissolved corporation in 1888 granting defendant railroad's predecessor in interest either easements or property in fee, or both, for railroad purposes only. The third amended complaint alleged that portions of the easements or property were being used for nonrailway purposes and sought a judgment quieting title and incidental injunctive relief. The trial court sustained without leave to amend the general demurrers to the complaint. In reversing the judgments of dismissal on the grounds the trial court erred sustaining the general demurrers, and that the complaint stated a cause of action for relief, the court of appeal, in response to defendants' contention that the demurrers were properly sustained because the complaint showed on its face that relief was barred by laches, said that even if it be assumed that laches may be asserted as a defense to an action for quiet title pursuant to former Code Civ. Proc. § 738, a demurrer on the basis of laches cannot be sustained absent a showing on the face of the complaint of an unexplained, unreasonable delay and some prejudicial effect from that delay, and pointed out that no such facts were apparent from the face of the third amended and supplemental complaint (*19 Cal. App. 3d 24, 35-36)* .

In *Zakaessian v. Zakaessian (1945) 70 Cal. App. 2d 721, 161 P.2d 677* , the court of appeal concluded that laches did not apply unless the delay resulted in some prejudice to defendants (*70 Cal. App. 2d 721, 726)* . The court noted that the only possible prejudice to defendants that appeared from the face of the complaint, other than mere lapse of time, was the death of a witness (*70 Cal. App. 2d 721* , 726). The court held, however, that although the death of a material witness is a factor to be considered in determining whether laches is present, it is not sufficient in itself to establish as a matter of law that the action is barred by laches and, on this ground, reversed the judgment (*70 Cal. App. 2d 721, 726-728)* .

See also *Gerhard v. Stephens (1968) 68 Cal. 2d 864, 904, 69 Cal. Rptr. 612, 442 P.2d 692* (defendant asserting laches on plaintiff's part must show that plaintiff has acquiesced in defendant's wrongful acts and has unduly delayed seeking equitable relief to the prejudice of defendant; mere lapse of time, other than that prescribed by statutes of limitations, does not bar relief); *Laing v. Laubach (1965) 233 Cal. App. 2d 511, 519, 43 Cal. Rptr. 537* (delay induced by defendant); *South v. Wishard (1956) 146 Cal. App. 2d 276, 288-289, 303 P.2d 805* (delay induced by defendant's fraud).

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§ 71.43 Opposing General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Demurrer Supplies Missing Allegation

[1] FORM Opposing General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Demurrer Supplies Missing Allegation

[*The following should be combined with a general form of memorandum in opposition to a general demurrer to a complaint (see § 71.30).*]

THE GENERAL DEMURRER TO THE COMPLAINT SHOULD BE OVERRULED BECAUSE THE DEMURRER SUPPLIES THE ALLEGATION THAT DEFENDANT COMPLAINS IS MISSING.

Missing Allegation Supplied by Demurrer. The rule is well settled that a complaint that lacks the averment of a fact essential to a cause of action may be so aided by the averment of that fact in the answer as to uphold a judgment thereon (*Mohlmann v. City of Burbank (1986) 179 Cal. App. 3d 1037, 1041 n.2, 225 Cal. Rptr. 109*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a general demurrer to a complaint when the demurrer supplies information that the demurring party asserts is missing.

These points and authorities should be combined with a general form of memorandum in opposition to a demurrer to a complaint made on the ground that the complaint fails to state facts sufficient to constitute a cause of action [*see § 71.30*]. They may also be adapted for use in a trial or appellate brief.

For a form of memorandum in opposition to motion for judgment on the pleadings, for use when an answer supplies facts omitted from a complaint, see *§ 71.156*.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should identify the fact stated in the demurrer that supplies the missing material allegation in the complaint.

See also *§§ 71.20[2]* and *71.30[2]*.

[3] Discussion of Authorities

[a] Missing Allegation Supplied by Demurrer

In ***Mohlmann v. City of Burbank*** *(1986) 179 Cal. App. 3d 1037* , *225 Cal. Rptr. 109* , the plaintiff appealed from a dismissal after a demurrer to his complaint was sustained. The complaint alleged false arrest and imprisonment, and intentional and negligent infliction of emotional distress arising out of plaintiff's arrest by the city and police department defendants. In their demurrer, the defendants correctly pointed out that on the face of the complaint, the claim was presented more than 100 days after the plaintiff's arrest.

The court of appeal reversed the dismissal. The court observed that the demurrer had attached to it copies of the claim filed by the plaintiff that stated the criminal charge filed against the plaintiff following his arrest and the date of the dismissal of the charge. The court observed that a statute existing at the time of plaintiff's arrest postponed both the filing of the lawsuit and the date for filing a claim against the employing government entity. The court found that the claim and the correspondence attendant to it did not appear to be matters properly the subject of judicial notice and defendants' offering "evidence" of plaintiff's claim was improper. However, stated the court, the defendants cannot complain when their responsive pleading aids the plaintiff by plugging gaps in his complaint. The rule is well settled that a complaint that lacks the averment of a fact essential to a cause of action may be so aided by the averment of that fact in the answer as to uphold a judgment on it. The court stated that there is no reason why an admission of "fact" in a demurrer may not similarly be employed (*179 Cal. App. 3d 1037, 1041 n.2*). The speaking demurrer offered "evidence" not before the court, in the complaint or otherwise, that supplemented the complaint and filled the holes. But for that fact, concluded The Court, a demurrer would have been properly sustained. As so aided, however, the complaint was not deficient and the demurrer was erroneously sustained (*179 Cal. App. 3d 1037, 1045)* .

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§ 71.44 Opposing General Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Prior Demurrer to Same Cause of Action Overruled

[1] FORM

[*The following should be combined with a general form of memorandum in opposition to a general demurrer to a complaint (see § 71.30).*]

THE GENERAL DEMURRER TO THE COMPLAINT SHOULD BE OVERRULED BECAUSE THE DEMURRER CHALLENGES THE SAME CAUSE OF ACTION AS TO WHICH A PREVIOUS DEMURRER WAS OVERRULED.

Previous Demurrer to Same Cause of Action Was Overruled. Where a prior demurrer was sustained as to some causes of action but overruled as to others, a defendant may not demur again on the same grounds to those portions of an amended pleading as to which the prior demurrer was overruled (*Bennett v. Suncloud (1997) 56 Cal. App. 4th 91, 96-97, 65 Cal. Rptr. 2d 80*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a general demurrer to a complaint when the demurrer challenges a cause of action as to which a demurrer was previously overruled.

These points and authorities should be combined with a general form of memorandum in opposition to a demurrer to a complaint made on the ground that the complaint fails to state facts sufficient to constitute a cause of action [*see § 71.30*]. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law

stated. Thus, counsel should identify the fact stated in the demurrer that supplies the missing material allegation in the complaint.

For a memorandum opposing a demurrer on the ground that a demurrer to the same cause of action was previously overruled, see *§ 71.29A.*

[3] Discussion of Authorities

[a] Previous Demurrer to Same Cause of Action Was Overruled

In ***Bennett v. Suncloud*** *(1997) 56 Cal. App. 4th 91, 65 Cal. Rptr. 2d 80* , an attorney acting on his own behalf filed a complaint for negligence, property damage, and fraud, alleging that he was injured by a defective pair of one defendant's sunglasses purchased at another defendant's store. The complaint further stated that defendants represented that the sunglasses were unbreakable or break resistant, safe, and otherwise suitable and specifically designed for skiing, and that in reliance on that representation, appellant purchased the product and used it while skiing. The manufacturer of the sunglasses demurred on the grounds that the causes of action were barred by the one-year statute of limitations (*see Code Civ. Proc. § 340(3)*), and that the complaint failed to plead the fraud cause of action with sufficient specificity. The trial court sustained the demurrer to all three causes of action with 30 days leave to amend, and specifically stated that to the extent the attorney claimed his inability to file the action prevented the statute of limitations from running, those facts had to be alleged in the complaint. As to the fraud cause of action, the court concluded more specificity was required. The attorney filed a first amended complaint alleging causes of action for breach of express warranty, breach of implied warranty, products liability, false advertising, unfair competition, intentional infliction of emotional distress, negligent infliction of emotional distress, negligence per se, and negligence. The amended complaint alleged that while shopping at the defendant store, he was directed to the sunglasses as suitable for ski eyewear. Concerning the sunglasses manufacturer, the complaint alleged on "information and belief" that it "expressly and implicitly stated, described, conveyed, indicated, affirmed, reassured, reiterated, promised, guaranteed, represented, and warranted" that the subject sunglasses "were and are designed, made, manufactured, fabricated, assembled, produced, suitable, safe, and intended for use as snow-skiing eyewear, unbreakable, nonbreakable, break resistant, flexible, and/or safe for snow-skiing activities and otherwise suitable and fit for the particular uses and purposes intended and/or reasonably foreseeable." He alleged that he appeared at the west district courthouse to file his original complaint, but that the courthouse, and "upon information and belief, all Superior Courts in Los Angeles County within which Plaintiff's complaint was permitted and/or required to be filed," were closed. Attached to the complaint was a media advisory, which stated that due to damage resulting from the Northridge earthquake, specified court facilities in the Los Angeles Superior Court would be closed for business on the specified date. The manufacturer demurred to the first amended complaint on both statute of limitations and failure to state cause of action grounds based on insufficient specificity as to its conduct as opposed to the store's, and the demurrer was sustained by the trial court pursuant to the moving papers, with leave to amend. The attorney filed a second amended complaint, which essentially repeated the allegations and claims of the first amended complaint with some minor elaboration. The manufacturer demurred, again on statute of limitations and failure to state a cause of action grounds. The trial court found that the statute of limitation was tolled for one day by the earthquake, so that the filing was timely, but sustained the demurrer to the causes of action for false advertising/unfair competition, fraud, intentional infliction of emotional distress, and negligence per se with 30 days leave to amend. The attorney filed the third amended complaint, making the same allegations with some slight modification to the false advertising/unfair competition, fraud, and negligence per se causes of action, and withdrew the cause of action for intentional infliction of emotional distress. The manufacturer demurred to the entire complaint on the same grounds as in its three previous demurrers, and the trial court sustained the demurrer to all causes of action, without leave to amend, on the grounds of the bar of the statute of limitations and that plaintiff could not cure the pleading defects. The attorney filed a motion for reconsideration, which was denied.

The Court of Appeal affirmed. The order concerning the second amended complaint sustained the demurrer to the false advertising/unfair competition, fraud, intentional infliction of emotional distress, and negligence per se causes of action.

After the specified causes of action were amended, the manufacturer was free to demur to those causes of action on any ground. The order concerning the statute of limitations and the failure of the appellant to cure the previously noted pleading defects was completely appropriate as it pertained to those causes of action. On the other hand, when the trial court overruled the demurrer to causes of action for breach of express warranty, breach of implied warranty, products liability, negligent infliction of emotional distress, and negligence, the trial court was foreclosed from rendering a new determination on the viability of those claims unless some new facts or circumstances were brought to his attention. Thus, the decision to render judgment on the entire complaint and not just the three amended causes of action was improper (*56 Cal. App. 4th 91, 96-97)* .

California Points & Authorities

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PART II. FORMS
A. Demurrers
1. General Demurrers to Complaint

7A-71 California Points & Authorities §§ 71.45-71.59

[Reserved]

§§ 71.45[Reserved]

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CHAPTER 71 DEMURRERS AND MOTIONS FOR JUDGMENT ON THE PLEADINGS
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2. Special Demurrers to Complaint

7A-71 California Points & Authorities § 71.60

§ 71.60 Supporting Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Court Lacks Jurisdiction of Subject of Cause of Action Alleged [Code Civ. Proc. § 430.10(a)]--Jurisdiction of Action Is in Probate Court

[1] FORM Supporting Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Court Lacks Jurisdiction of Subject of Cause of Action Alleged [Code Civ. Proc. § 430.10(a)]--Jurisdiction of Action Is in Probate Court

[*Caption. See § 71.20.*]

THE SPECIAL DEMURRER TO THE COMPLAINT SHOULD BE SUSTAINED BECAUSE JURISDICTION OVER THE SUBJECT MATTER OF THE CAUSE(S) Of action ALLEGED IS EXCLUSIVELY VESTED IN THE SUPERIOR COURT SITTING IN PROBATE.

A. Lack of Jurisdiction Over Subject Matter Is Ground for Demurrer. The party against whom a complaint has been filed may object to it by demurrer on the ground the court has no jurisdiction of the subject of the cause of action alleged when the ground of the objection appears from the face of the complaint [or from any matter of which the court is required to or may take judicial notice] (*Code Civ. Proc. §§ 430.10(a), 430.30(a)*).

B. Jurisdiction Over Property of Decedent's Estate and Those Claiming Under It Rests Exclusively in Probate Court. The Probate Code provides one comprehensive, exclusive method for administration on the estates of decedents. The proceeding is in rem and the jurisdiction of the court is complete over the property of the estate and over all persons claiming interests therein under the decedent, as to all matters involved in a complete and effective administration (*Spencer v. Crocker First Nat. Bank (1948) 86 Cal. App. 2d 397, 401, 194 P.2d 775* ; *see Prob. Code §§ 800, 7050(b)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a special demurrer to a complaint when it appears on the face of the complaint or from matter of which the court is required to or may take judicial notice that the action or proceeding is within the exclusive jurisdiction of the superior court sitting in probate.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show, from the face of the complaint or by facts of which the court is required to or may take judicial notice, specifically how the subject matter of the action is one that is reserved to the superior court sitting in probate. For example, if the complaint is labeled as an action for money had and received and fraud, counsel may point out that the action is, in its essence, really a controversy between the executor and the beneficiaries relating to the conduct of the executor and its administration of the estate [*see Spencer v. Crocker First Nat. Bank (1948) 86 Cal. App. 2d 397, 401 , 194 P.2d 775 , discussed under § 71.60[3][a]*].

[b] Nature of Probate Jurisdiction

The jurisdiction of the courts is created by the California Constitution [*see Cal. Const., art. VI, § 10*]. The superior courts have original jurisdiction of all civil actions and special proceedings of a civil nature, other than those enumerated for other courts [*see Cal. Const., art. VI, § 10*]. The superior court has jurisdiction of proceedings under the Probate Code concerning the administration of the decedent's estate [*Prob. Code § 7050*]. According to the Law Revision Commission, the reference to the superior court in former Section 7050(a) (now simply Section 7050) means the department or judge of the court that deals with probate matters [*see* Cal. L. Revision Comm'n Comment to 1990 enactment of *Prob. Code § 7050*]. *Prob. Code § 800* further maintains the distinction by referring to the "court in proceedings under this code." Hence, §§ 800 and 7050 preserve the division among different departments of the superior court [*see* Cal. L. Revision Comm'n Comment to 1990 enactment of *Prob. Code § 7050* (former Section 7050(b) subsequently moved to become *Prob. Code § 800*)].

The Probate Code provides in the probate court one comprehensive, exclusive method for administration on the estates of decedents. The proceeding is in rem and the jurisdiction of The Court is complete over the property of the estate and over all persons claiming interests therein under the decedent, as to all matters involved in a complete and effective administration. Thus, actions within the probate court's jurisdiction that are brought in other courts, or in the superior court not sitting in probate, are subject to general demurrer [*see Spencer v. Crocker First Nat. Bank (1948) 86 Cal. App. 2d 397, 194 P.2d 775 , discussed under § 71.61[3][a]*].

For further discussion of the scope and nature of probate jurisdiction, see California Probate Practice, Chapter 3.

See also *§§ 71.20[2]* and *71.60*

[3] Discussion of Authorities

[a] Jurisdiction Over Property of Decedent's Estate and Those Claiming Under It Rests Exclusively in Probate Court

In ***Spencer v. Crocker First Nat. Bank*** *(1948) 86 Cal. App. 2d 397, 194 P.2d 775* , the plaintiffs, who were beneficiaries under a will, filed a second amended complaint alleging causes of action for money had and received and fraud against the defendant bank. The complaint alleged that the bank, the executor of the decedent's estate, fraudulently procured the plaintiffs to release portions of their shares in the estate. The defendant demurred, both specially and generally, and the trial court sustained the demurrer without leave to amend.

The court of appeal affirmed. The court stated that although the plaintiffs contended that their action was one against the defendant bank in its individual capacity for fraud, their cause of action was actually based on the fact that they were beneficiaries under the will; that the defendant, as executor, fraudulently induced them to act in order that the defendant might settle a contest of the will; and that the defendant had improperly failed to pay them the share of the estate. The action was really a controversy between the executor and the beneficiaries relating to the conduct of the executor and its administration of the estate. The court quoted *Colden v. Costello (1942) 50 Cal. App. 2d 363, 370, 122 P.2d 959* , stating that the Probate Code provides one comprehensive, exclusive method for administration on the estates of decedents. The proceeding is in rem and the jurisdiction of the court is complete over the property of the estate and over all persons claiming interests in the property under the decedent, as to all matters involved in a complete and effective administration (*86 Cal. App. 2d 397, 401)* . The court held that because the sole jurisdiction of the subject matter and the parties is in the probate court, the demurrer to the second amended complaint was properly sustained without leave to amend (*86 Cal. App. 2d 397, 406)* .

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7A-71 California Points & Authorities § 71.61

§ 71.61 Supporting Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Court Lacks Jurisdiction of Subject of Cause of Action Alleged [Code Civ. Proc. § 430.10(a)]--Jurisdiction of Action Exclusively in Federal Court

[1] FORM Supporting Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Court Lacks Jurisdiction of Subject of Cause of Action Alleged [Code Civ. Proc. § 430.10(a)]--Jurisdiction of Action Exclusively in Federal Court

[*Caption. See § 71.20.*]

THE SPECIAL DEMURRER TO THE COMPLAINT SHOULD BE SUSTAINED BECAUSE JURISDICTION OVER THE SUBJECT MATTER OF THE CAUSE(S) OF ACTION ALLEGED IS EXCLUSIVELY VESTED IN THE FEDERAL COURTS.

A. Lack of Jurisdiction Over Subject Matter Based on Preemption by Federal Law Is Ground for Demurrer. The party against whom a complaint has been filed may object to it by demurrer on the ground the court has no jurisdiction of the subject of the cause of action alleged when the ground of objection appears from the face of the complaint [or from any matter of which the court is required to or may take judicial notice] (*Code Civ. Proc. §§ 430.10(a), 430.30(a)*). A demurrer is an appropriate vehicle to secure a dismissal of a state law action based on federal law preemption (*Ball v. GTE Mobilnet of California (2000) 81 Cal. App. 4th 529, 535, 96 Cal. Rptr. 2d 801*).

B. Exclusive Federal Jurisdiction. Congress may so completely preempt a particular area, that any civil complaint raising this select group of claims is necessarily federal in character and exclusive jurisdiction is vested in the federal courts (*see Metropolitan Life Ins. Co. v. Taylor (1987) 481 U.S. 58, 63, 107 S. Ct. 1542, 95 L. Ed. 2d 55* ; The Moses Taylor v. Wilson Hammons (1867) 4 Wall. 411, 429, 18 L. Ed.2d 397).

_____ [*Set forth points and authorities for federal preemption of the cause (s) of action brought by plaintiff*].
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a special demurrer to a complaint filed in a superior court when it appears on the face of the complaint or from matter of which the court is required to or may take judicial notice that the action or proceeding is preempted by federal law.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show, from the face of the complaint or by facts of which the court is required to or may take judicial notice, specifically how jurisdiction of the subject matter of the action has been exclusively vested in the federal courts.

[b] Federal Preemption

Whether or not federal law has completely preempted state law depends on whether the preemptive force of the federal statute is so powerful as to entirely displace any state cause of action. If so, then any such suit is purely a creature of federal law, despite the fact that state law would provide a cause of action in the absence of the federal statute [*see Caterpillar Inc. v. Williams (1987) 482 U.S. 386, 393-394, 393 n.8, 107 S. Ct. 2425, 96 L. Ed. 2d 318* ; *Metropolitan Life Ins. Co. v. Taylor (1987) 481 U.S. 58, 63, 107 S. Ct. 1542, 95 L. Ed. 2d 55* ; *Washington Mutual Bank v. Superior Court (2002) 95 Cal. App. 4th 606, 619-621, 115 Cal. Rptr. 2d 765* (Home Owners' Loan Act [*42 U.S.C. § 1461 et seq.*] preempted state claims under California's *Civ. Code § 2948.5* alleging unlawful interest on home loans)].

Complete preemption is the exception rather than the rule, and has been found in a limited number of cases [*see Caterpillar Inc. v. Williams (1987) 482 U.S. 386, 393-394, 393 n.8, 107 S. Ct. 2425, 96 L. Ed. 2d 318]* . The following is a partial list of areas in which complete preemption exists:

- Actions by and against foreign ambassadors [*28 U.S.C. § 1251*].
- Admiralty, maritime, and prize cases [*28 U.S.C. § 1333*].
- Bankruptcy proceedings [*28 U.S.C. § 1334*].
- Cases arising under federal patent laws [*28 U.S.C. § 1338*].
- Actions against foreign consuls [*28 U.S.C. § 1351*].
- Actions under Employee Retirement Income Security Act of 1974 [*Metropolitan Life Ins. Co. v. Taylor (1987) 481 U.S. 58, 67, 107 S. Ct. 1542, 95 L. Ed. 2d 55* ; *see 29 U.S.C. § 1001*; *see also § 71.61[3][b]* and Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*].
- Actions for right of possession to Indian tribal lands [*Oneida Indian Nation v. County of Oneida (1974) 414 U.S. 661, 675, 94 S. Ct. 772, 39 L. Ed. 2d 73]* .

- Actions to enforce collective bargaining contract under *§ 301 of Labor* Management Relations Act [*Avco Corp. v. Aero Lodge, I.A.M. & A.W. (1968) 390 U.S. 557, 559-561, 88 S. Ct.1235, 20 L. Ed. 2d 126* ; *see 29 U.S.C. § 185(a)*; *see also* Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*].

The question is whether a state-law claim necessarily raises a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities [*Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg. (2005) 545 U.S. 308, 314, 125 S. Ct. 2363, 162 L. Ed. 2d 257]* . For example, exclusive federal jurisdiction under *28 U.S.C. § 1338* is proper only when a well-pleaded complaint establishes either that federal patent law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law, in that patent law is a necessary element of one of the well-pleaded claims [*Christianson v. Colt Industries Operating Corp. (1988) 486 U.S. 800, 809, 108 S. Ct. 2166, 100 L. Ed. 2d 811]* . Thus, federal jurisdiction over a legal malpractice action based on patent proceedings is exclusive when the nature and extent of the patent rights present a substantial issue of federal patent law that is properly adjudicated in federal court [*Landmark Screens, LLC v. Morgan, Lewis & Bockius, LLP (2010) 183 Cal. App. 4th 238, 244-251, 107 Cal. Rptr. 3d 373]* .

See also *§§ 71.20[2]* and *71.60*.

[3] Discussion of Authorities

[a] Lack of Jurisdiction Over Subject Matter Based on Preemption by Federal Law Is Ground for Demurrer

In ***Ball v. GTE Mobilnet of California*** *(2000) 81 Cal. App. 4th 529, 96 Cal. Rptr. 2d 801* , plaintiffs sued every major provider and owner of cellular phone services and related wireless personal communication services in California. Basically, plaintiffs objected to having to pay for noncommunication time when using these services. The grounds for their objection were based on California's law on unfair and unlawful business practices (*Bus. & Prof. Code § 17200 et seq.*). The trial court sustained defendants' demurrer without leave to amend on the ground that the Federal Communications Act § 332(c)(3)(A) (42 U.S.C. § 332(c)(3)(A)) preempted all state regulatory authority over wireless service rates. Judgment of dismissal was entered and plaintiffs appealed.

The court of appeal reversed. The court held that under its standard of review for a demurrer sustained without leave to amend, there was a reasonable possibility that plaintiffs could allege state law causes of action (*81 Cal. App. 4th 529, 544)* . Although the court reached this conclusion, the court also noted that a demurrer is an appropriate vehicle to secure a dismissal of a state law action based on federal law preemption (*81 Cal. App. 4th 529, 535)* .

[b] Exclusive Federal Jurisdiction

Metropolitan Life Ins. Co. v. Taylor *(1987) 481 U.S. 58, 63, 107 S. Ct. 1542, 95 L. Ed. 2d 55* , involved an action in which the defendant sought removal to federal district court based on preemption of the plaintiff's state court claim by federal law. The employee was involved in a job-related automobile accident and sustained injury. He filed a worker's compensation claim for his injury and later filed suit in Michigan state court against the employer and the employer's worker's compensation insurance carrier, praying for judgment for compensatory damages for money contractually owed plaintiff, compensation for mental anguish caused by breach of the contract, and reimplementation of benefits. The plaintiff also asserted claims for wrongful termination of his employment and retaliation for the workers' compensation claim. The defendants removed the suit to federal court alleging federal question jurisdiction over the disability benefits claim by virtue of ERISA (*29 U.S.C. § 1001 et seq.*), and pendent jurisdiction over the remaining claims. The U.S. district court found the case properly removable and granted summary judgment on the merits. The U.S. court of appeals reversed on the ground the U.S. district court lacked removal jurisdiction and the U.S. Supreme

Court granted certiorari.

The U.S. Supreme Court reversed the judgment of the court of appeals. The Court reviewed the "well-pleaded complaint rule," which provides that a cause of action arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law. The Court stated that federal preemption is ordinarily a federal defense to the plaintiff's suit. As a defense, it does not appear on the face of a well-pleaded complaint, and therefore, does not authorize removal to the federal court. The Court recharacterized the state law complaint, however, as an action arising under federal law by virtue of the "clearly manifested intent of Congress" (*481 U.S. 58, 67)* .

Although in *Metropolitan Life Ins. Co.*, preemption did not appear on the face of the complaint and apparently was not obvious at the time the suit was filed, the Supreme Court cited a corollary to the well-pleaded complaint rule, that states that Congress may so completely preempt a particular area, that any civil complaint raising this select group of claims is necessarily federal in character (*481 U.S. 58, 63)* .

The Moses Taylor v. Wilson Hammons (1867) 4 Wall. 411, 429, 18 L. Ed. 2d 397 , was an action brought by a steerage passenger against owners of a steamship for breach of a contract for passage on the vessel from New York to San Francisco. The action was brought in a California court under a state statute relating to actions against steamers, vessels, and boats. The defendants objected to jurisdiction, insisting that the cause of action was one over which the courts of admiralty had exclusive jurisdiction, and also traversed the matters alleged as breaches of contract. The trial court overruled the objection to jurisdiction and appeals were made to the county court, which was the highest court of jurisdiction based on the amount in controversy. The objection to jurisdiction was made de novo, and again overruled. The case was then brought to the U.S. Supreme Court by a writ of error.

The U.S. Supreme Court reversed the judgment of the county court and remanded the cause, with directions to dismiss th **The Moses Taylor v. Wilson Hammons** (1867) 4 Wall. 411, 429, 18 L. Ed. 2d 397 action for want of jurisdiction. The Court cited the declaration of Congress that in certain cases, from their commencement, jurisdiction in the federal courts is exclusive, and that civil causes of the admiralty and maritime jurisdiction, were among such cases. Congress's declaration recognized and was framed on the theory that in all cases to which the judicial power of the United States extends, Congress may rightfully vest exclusive jurisdiction in the federal courts (*4 Wall. 411, 429)* .

[4] Additional Authorities

[a] Exclusive Federal Jurisdiction

In *Landmark Screens, LLC v. Morgan, Lewis & Bockius, LLP (2010) 183 Cal. App. 4th 238, 107 Cal. Rptr. 3d 373* , a former client sued an attorney and his law firm for legal malpractice in patent prosecution. The client alleged that defendants engaged in a deceptive course of action by actively concealing from the client the negligent filing of a divisional application. The trial court dismissed the action after sustaining defendants' demurrer for lack of subject matter jurisdiction based on exclusive federal jurisdiction under *28 U.S.C. § 1338* (*183 Cal. App. 4th 238, 240-243*). The Court of Appeal affirmed, concluding that the action should have been adjudicated in federal court because of the substantial patent questions presented in the elements of causation and damages. The showing required by the client went beyond the question of whether defendants' alleged concealment and deception amounted to malpractice. To recover, the client needed to prove that but for defendants' failure to disclose, or their intentional concealment of, the attorney's negligence in filing the application, it would not have lost valuable and pioneering patent rights. The client's success would have derived from demonstrating that the concealment closed the door on its opportunity to pursue patent rights for its invention. The nature and extent of those rights presented a substantial issue of federal patent law that was properly adjudicated in federal court (183 Cal. App. 4th 238, 244-251).

In *McCormick v. Travelers Ins. Co. (2001) 86 Cal. App. 4th 404, 103 Cal. Rptr. 2d 258* , the plaintiff, an insured homeowner, brought an action against a private insurer that had insured plaintiffs against flood loss under a standard

flood insurance policy issued as part of the National Flood Insurance Program (NFIP) [*42 U.S.C. § 4001 et seq.*], alleging breach of the insurance contract, bad faith, and fraud. The court held that the federal courts have exclusive jurisdiction over all of the claims asserted in the McCormicks' first amended complaint. While the insurer in this action is a private entity, in 1983, the Federal Emergency Management Administration (FEMA) exercised its regulatory authority by creating the Write Your Own (WYO) program to assist it in the marketing and administration of flood insurance through the "facilities of the Federal Government." While flood insurance can be issued either by FEMA or by private WYO insurers, in either case, FEMA fixes the terms and conditions of the policies, and the standard language to be included in all federal flood insurance policies is set out verbatim in the Code of Federal Regulations, and no provision of the policy may be altered, varied, or waived other than by the express written consent of the Federal Insurance Administrator (*86 Cal. App. 4th 404, 409-410)* . This exclusive jurisdiction encompasses all claims regardless of whether they plead contract, tort, or state statutory remedies and damages, and regardless of whether the named defendant is the FEMA or a WYO insurer (*86 Cal. App. 4th 404, 420)* .

In *Washington Mutual Bank v. Superior Court (2002) 95 Cal. App. 4th 606, 619-621, 115 Cal. Rptr. 2d 765* , two class actions were brought against Washington Mutual Bank alleging that the Bank's practice of charging pre-closing interest on home loans violated California law [*Civ. Code § 2948.5*]. The court held that the Home Owners' Loan Act [*42 U.S.C. § 1461 et seq.*] preempted these state claims even though there was no federal statute or regulation directly on point.

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7A-71 California Points & Authorities § 71.62

§ 71.62 Supporting Special Demurrer to Complaint Code Civ. Proc. § 430.30(a)]--Plaintiff Does Not Have Legal Capacity to Sue [The Moses Taylor v. Wilson Hammons (1867) 4 Wall. 411, 429, 18 L. Ed. 2d 397 4 Wall. 411, 429) McCormick v. TravelerIns. Co. (2001) 86 Cal. App. 4th 404, 103 Cal. Rptr. 2d 258 42 U.S.C. § 4001 et seq. 86 Cal. App. 4th 404, 409-410) 86 Cal. App. 4th 404, 420) Washington Mutual Bank v. Superior Court (2002) 95 Cal. App. 4th 606, 619-621, 115 Cal. Rptr. 2d 765 Civ. Code § 2948.5 42 U.S.C. § 1461 et seq.de Civ. Proc. § 430.10(b)]--Failure to Allege Compliance With Fictitious Business Name Statutes [Bus. & Prof. Code § 17918]

[1] FORM Supporting Special Demurrer to Complaint Code Civ. Proc. § 430.30(a)]--Plaintiff Does Not Have Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Failure to Allege Compliance With Fictitious Business Name Statutes [Bus. & Prof. Code § 17918]

[*Caption. See § 71.20.*]

THE SPECIAL DEMURRER TO THE COMPLAINT ON OR ON ACCOUNT OF A _____ [CONTRACT MADE *or* TRANSACTION HAD] IN A FICTITIOUS BUSINESS NAME ON THE GROUND OF LACK OF LEGAL CAPACITY TO SUE SHOULD BE SUSTAINED BECAUSE PLAINTIFF HAS FAILED TO ALLEGE COMPLIANCE WITH THE FILING AND PUBLISHING REQUIREMENTS OF THE FICTITIOUS BUSINESS NAME STATUTES.

A. Objection by Demurrer. The party against whom a complaint has been filed may object to it by demurrer on the ground that plaintiff does not have legal capacity to sue when the ground of objection appears from the face of the complaint [or from any matter of which the court is required to or may take judicial notice] (*Code Civ. Proc. §§ 430.10(b), 430.30(a)*).

B. Maintenance of Action Prohibited. A plaintiff transacting business under a fictitious business name is prohibited from maintaining any action on, or on account of, any contract made, or transaction had, in the fictitious business name until the fictitious business name statutes requiring the filing and publishing of the fictitious business name statement have been complied with (*Bus. & Prof. Code § 17918*).

C. Failure to Allege Compliance. A demurrer for lack of legal capacity to sues should be sustained when the complaint shows on its face that plaintiff is suing on or on account of a contract made, or transaction had, in the fictitious business name but is silent as to whether or not plaintiff has complied with the filing and publication requirements of the fictitious business name statute (*Pleaters & Stitchers Ass'n v. Davis (1934) 140 Cal. App. 403, 406, 35 P.2d 401*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a demurrer to a complaint on or on account of a contract made or transaction had by plaintiff in a fictitious business name when the complaint fails to allege that plaintiff has complied with the filing and publishing requirements of the fictitious business name statutes [*see Bus. & Prof. Code § 17918*].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show how the contract or transaction that plaintiff is suing on was in a fictitious business name as that term is defined by statute [*see Bus. & Prof. Code § 17900*], and that the complaint fails to allege plaintiff's compliance with the fictitious business name statute; and argue that the court should sustain the demurrer on the ground of the plaintiff's noncompliance.

[b] Fictitious Business Name

In determining whether or not to demur on this ground, defendant will first want to be sure that plaintiff's name is in fact a fictitious business name. That term is defined in *Bus. & Prof. Code § 17900*, with respect to individuals, partnerships and other associations, and corporations, as being:

1. In the case of an individual, a name that does not include the surname of the individual or a name that suggests the existence of additional owners [*Bus. & Prof. Code § 17900(b)(1)*].

2. In the case of a partnership or other association of persons, other than (1) a limited partnership that has filed a certificate of limited partnership with the Secretary of State pursuant to *Corp. Code § 15621*, or *15902.01*, (2) a foreign limited partnership that has filed an application for registration with the Secretary of State pursuant to *Corp. Code § 15692* or 15692.02, (3) a registered limited liability partnership that has filed a registration pursuant to *Corp. Code § 15049* or *16953*, or (4) a foreign limited liability partnership that has filed an application for registration pursuant to *Corp. Code § 15055* or *16959*, a name that does not include the surname of each general partner or a name that suggests the existence of additional owners *Bus. & Prof. Code § 17900(b)(2)*].

3. In the case of a corporation, any name other than the corporate name stated in its articles of incorporation [*Bus. & Prof. Code § 17900(b)(3)*].

4. In the case of a limited partnership that has filed a certificate of limited partnership with the Secretary of State pursuant to *Corp. Code § 15621* or *15902.01*, and in the case of a foreign limited partnership that has filed an application for registration with the Secretary of State pursuant to *Corp. Code § 15692* or *15902.02*, any name other than the name of the limited partnership as on file with the Secretary of State [*Bus. & Prof. Code § 17900(b)(4)*].

5. In the case of a limited liability company, any name other than the name stated in its articles of organization and in the case of a foreign limited liability company which has filed an application for registration with the Secretary of State pursuant to *Corp. Code § 17451*, any name other than the name of the company as on file with the Secretary of State [*Bus. & Prof. Code § 17900(b)(5)*].

A name that suggests the existence of additional owners within the meaning of the above definitions is defined as one that includes such words as "Company," "& Company," "& Son," "& Sons," "& Associates," "Brothers," and the like, but not words that merely describe the business being conducted [*Bus. & Prof. Code § 17900(c)*].

Moreover, the fictitious business name requirements do not apply to nonprofit corporations or associations, including, without limitation, organizations such as churches, labor unions, fraternal and charitable organizations, nonprofit hospitals, and similar organizations [*Bus. & Prof. Code § 17911*; *see § 71.75*].

Limited liability partnerships (LLPs) also appear not to be subject to the fictitious business name statutes. When this form of business was authorized in 1995 Stats., ch. 679, *Bus. & Prof. Code § 17900(a)(2)* [now see *Bus. & Prof. Code § 17900(b)(2)*] was amended to exclude them from the provision defining fictitious business names of partnerships or other associations of persons. However, LLPs were not added to the definition of persons to whom the fictitious business name provisions apply [*see Bus. & Prof. § 17902*]. Requirements for the names of registered LLPs are established by *Corp. Code § 15048*, or for LLPs formed after December 31, 1996, and for all LLPs after December 31, 1998, *Corp. Code § 16952*, and for the names of foreign LLPs by *Corp. Code § 15054*, or for foreign LLPs formed after December 31, 1996, and for all LLPs after December 31, 1998, *Corp. Code § 16959(a)(1)* [*see Corp. Code § 16111*].

[c] Lack of Capacity and Lack of Standing Distinguished

A distinction must be drawn between lack of capacity to sue and lack of standing to sue. Incapacity is merely a legal disability, such as illustrated in the foregoing form or such as infancy or insanity, which deprives a party of the right to come into court; the objection is raised by a special demurrer on the ground plaintiff has no legal capacity to sue. Standing to sue goes to the existence of a cause of action in plaintiff, and the objection that plaintiff lacks standing to sue is raised by a general demurrer, rather than by a special demurrer, to the complaint [*see Parker v. Bowron (1953) 40 Cal. 2d 344, 351, 254 P.2d 6* ; *Klopstock v. Superior Court (1941) 17 Cal. 2d 13, 19, 108 P.2d 906* ; Oakland Municipal improvement *League v. City of Oakland (1972) 23 Cal. App. 3d 165, 170, 100 Cal. Rptr. 29* ; *see also § 71.22*].

[d] Objection by Answer

A line of older cases stated by way of dictum that compliance with the provisions of former Civ. Code §§ 2466 and 2468 (repealed; *now see Bus. & Prof. Code §§ 17910* and *17917*) need not be affirmatively alleged in a complaint and that the failure to have complied with these sections was a matter of special defense to be raised by answer [*see, e.g., Holden v. Mensinger (1917) 175 Cal. 300, 303, 165 P. 950* ; *Carlock v. Cagnacci (1891) 88 Cal. 600, 601, 26 P. 597* ; *Curtin v. Salomon (1926) 80 Cal. App. 470, 476, 251 P. 237* ; *Amundson v. Shafer (1918) 36 Cal. App. 398, 400, 172 P. 173]* . The modern view, however, appears to be that if the complaint shows on its face that plaintiff is doing business under a fictitious business name and that the contract or transaction sued on was made or had in the fictitious business name, then failure to allege compliance with the fictitious business name statutes renders the complaint vulnerable to attack by demurrer on the ground plaintiff lacks capacity to sue [*see* cases cited under *§ 71.62[3][c]*]. However, if a determination of the issue requires a consideration of facts not appearing from the face of the complaint (such as whether plaintiff, a foreign business, regularly transacts business in California under a fictitious business name so as to render it subject to the filing and publishing requirements of the fictitious business name statutes), the objection should probably be taken by answer followed by a motion for separate trial of that defense under *Code Civ. Proc. § 597* [*see § 71.78[2]*].

[e] Waiver of Objection

The objection that the plaintiff lacks legal capacity to sue is waived if not taken by demurrer or answer [*Code Civ. Proc. § 430.80(a)*; *Tingley v. Times Mirror (1907) 151 Cal. 1, 13, 89 P. 1097]* .

[f] Subsequent Compliance

The objection that plaintiff lacks legal capacity to sue because of his, her, or its failure to have filed and published the fictitious business name statement required by *Bus. & Prof. Code §§ 17910* and *17917* is a plea in abatement. Hence, compliance with the statutes at any time before trial of the issue constitutes sufficient compliance with the statutes [*see, e.g., Holden v. Mensinger (1917) 175 Cal. 300, 303, 165 P. 950* (involving predecessor statutes); *Goodman v. Anglo-California Trust Co. (1923) 62 Cal. App. 702, 708, 217 P. 1078* (same)]. Moreover, the court may grant plaintiff a continuance, if necessary, to allow time for compliance [*see* Ch. 10, *Abatement and Survival of Actions*]. For discussion relating to general demurrer on ground that action is premature, see *§§ 71.23* and *71.34*.

[g] Related Pleading and Practice Forms

For a form of demurrer on the ground of lack of legal capacity to sue, see *Ch. 206, Demurrers and Motions for Judgment on the Pleadings, § 206.124*, in California Forms of Pleading and Practice.

[h] Opposing Points and Authorities

In an appropriate case, the memorandum *set out in §§ 71.75 -71.78* may be used to oppose the special demurrer supported by the foregoing memorandum.

See also *§§ 71.20[2]* and *71.60*.

[3] Discussion of Authorities

[a] Objection by Demurrer

Code Civ. Proc. § 430.10 provides that the party against whom a complaint has been filed may object to it by demurrer or answer, as provided in *Code Civ. Proc. § 430.30*, on the ground "(b) The person who filed the pleading does not have the legal capacity to sue." *Code Civ. Proc. § 430.30(a)* provides that when any ground for objection to a complaint appears on the face thereof, or from any matter of which the court is required to or may take judicial notice, the objection on that ground may be taken by a demurrer to the pleading. For a discussion of judicial notice generally, see *§ 71.21[2]*.

[b] Maintenance of Action Prohibited

Bus. & Prof. Code § 17918 in relevant part provides that no person transacting business under a fictitious business name contrary to the provisions of "this chapter" (that is, *Bus. & Prof. Code § 17900 et seq.*), or his or her assignee, may maintain any action on or on account of any contract made, or transaction had, in the fictitious business name in any court of this state until the fictitious business name statement has been executed, filed, and published as required by "this chapter."

[c] Failure to Allege Compliance

Pleaters & Stitchers Asso. v. Davis *(1934) 140 Cal. App. 403, 35 P.2d 401* , was a proceeding to confirm an arbitrator's award. Respondent demurred to the petition on the ground, among others, that petitioner lacked legal capacity to sue in that it had failed to allege compliance with the provisions of former Civ. Code § 2468, the

predecessor to *Bus. & Prof. Code § 17918*. The demurrer was sustained without leave to amend and petitioner appealed from the subsequent judgment of dismissal.

Although it reversed the judgment on the ground the trial court should not have denied leave to amend the petition, the court of appeal, with respect to the fictitious business name statute, stated that the complaint showed on its face that plaintiff was a voluntary association doing business under a fictitious name, but the record was silent as to whether or not petitioner had filed the certificate required under former Civ. Code § 2468 (*140 Cal. App. 403, 406*). Therefore the lower court properly sustained the demurrer, although it had erred in sustaining the demurrer without leave to amend (*140 Cal. App. 403, 406*).

Other cases in which the objection that plaintiff did not comply with the fictitious business name statutes include *Rivers v. Beadle (1960) 183 Cal. App. 2d 691, 700-701, 7 Cal. Rptr. 170* (propriety of demurrer assumed); and *Spreckels v. Grace Darling Hosp. Assn. (1915) 28 Cal. App. 646, 648, 153 P. 718* (question as to plaintiff's want of legal capacity to sue may be raised by special demurrer on that ground when the fact he or she is doing business under fictitious name within meaning of former Civ. Code §§ 2466 and 2468 appears on face of complaint).

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7A-71 California Points & Authorities § 71.63

§ 71.63 Supporting Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Plaintiff Does Not Have Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Guardian or Conservator Suing as Plaintiff for Damages Suffered by Ward or Conservatee

[1] FORM Supporting Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Plaintiff Does Not Have Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Guardian or Conservator Suing as Plaintiff for Damages Suffered by Ward or Conservatee

[*Caption. See § 71.20.*]

THE SPECIAL DEMURRER TO THE COMPLAINT SHOULD BE SUSTAINED ON THE GROUND OF LACK OF LEGAL CAPACITY TO SUE BECAUSE THE ACTION IS BROUGHT IN THE NAME OF THE _____ [GUARDIAN *or* CONSERVATOR] RATHER THAN IN THE NAME OF THE _____ [WARD *or* CONSERVATEE].

A. Objection by Demurrer. [*See § 71.62, Paragraph A.*]

B. Appearance by Guardian or Conservator. A party who is a minor, an incompetent person, or a person for whom a conservator has been appointed is required to appear in the action either by a guardian or conservator of his or her estate or by a guardian ad litem appointed by the court in which the action or proceeding is pending (*Code Civ. Proc. § 372(a)*).

C. Guardian or Conservator Lacks Legal Capacity to Sue in Own Name. A guardian suing in his or her own name rather than in the name of the ward lacks legal capacity to sue (*Siegal v. Superior Court (1962) 203 Cal. App. 2d 22, 27, 21 Cal. Rptr. 348*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]

By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a special demurrer to a complaint prosecuted in the name of the personal representative rather than in the name of the ward or conservatee by the guardian or conservator.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should demonstrate, from facts appearing on the face of the complaint or of which the court is required to or may take judicial notice, that the action is one that is required to be brought in the name of the ward or conservatee, the action was not brought in the ward's or conservatee's name, and because the action was not brought in the ward's or conservatee's name, the demurrer should be sustained.

See also *§§ 71.20[2]*, *71.60[2]*, and *71.62[2]*.

[3] Discussion of Authorities

[a] Guardian or Conservator Lacks Legal Capacity to Sue in Own Name

Siegal v. Superior Court *(1962) 203 Cal. App. 2d 22, 21 Cal. Rptr. 348* , was a proceeding in mandate to compel the superior court to dismiss an action by the foreign guardian of a minor ward on the ground that under *Code Civ. Proc. § 1913* [*see § 71.64*], the foreign guardian had no authority outside the jurisdiction that appointed him and, hence, lacked legal capacity to sue in California. The action arose out of a contract entered into by Rancho Tomasina of Sonora, Mexico, with a corporation and an individual concerning the production and sale of watermelons under which, among other things, the latter parties agreed to pay Rancho Tomasina the sum of $10,000. The individual died in Los Angeles County later the same year. A creditor's claim on behalf of Rancho Tomasina was filed against his estate and rejected, whereupon the present action was brought. The complaint named as plaintiff "Pedro R. Morillon, Administrator of the Estate of Tomasina Jamison Provas, a Minor, owner of Rancho Tomasina." The minor was alleged to be a Mexican citizen and the owner of Rancho Tomasina. The complaint showed that the minor was the real party in interest. It was not alleged that Morillon had qualified in this state as guardian. Defendant's motion to dismiss the action under the authority of *Code Civ. Proc. § 1913* was denied and defendant petitioned the court of appeal for a writ of mandate.

Although it denied the peremptory writ, the court of appeal pointed out, among other things, that under *Code Civ. Proc. § 372*, as it then read, an action by a minor or insane or incompetent person was required to be prosecuted in the name of the ward as a party by the ward's guardian or guardian ad litem. Although acknowledging that this defect was not raised by demurrer or answer, was not the basis of the present petition, and was not jurisdictional in the fundamental sense, the court nevertheless said that the trial court has no authority to disregard the statutory requirement that a minor appear by a general guardian or guardian ad litem and that were that court to proceed to trial and judgment, it would be an act in excess of that court's jurisdiction which could be prevented by prohibition (*203 Cal. App. 2d 22, 27*).

The court, however, held that the defect was one that could be corrected by amendment and, in effect, directed the trial court, on application properly made within a reasonable time, to allow an amendment to the complaint to properly name the minor as plaintiff, by a guardian ad litem (*203 Cal. App. 2d 22, 27-28*).

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7A-71 California Points & Authorities § 71.64

§ 71.64 Supporting Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Plaintiff Does Not Have Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Foreign Personal Representative Suing on Behalf of Conservatee, Decedent's Estate, or Ward [Code Civ. Proc. § 1913]

[1] FORM Supporting Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Plaintiff Does Not Have Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Foreign Personal Representative Suing on Behalf of Conservatee, Decedent's Estate, or Ward [Code Civ. Proc. § 1913]

[*Caption. See § 71.20.*]

THE SPECIAL DEMURRER TO THE COMPLAINT SHOULD BE SUSTAINED ON THE GROUND OF LACK OF LEGAL CAPACITY TO SUE BECAUSE THE ACTION IS BROUGHT ON BEHALF OF A _____ [CONSERVATEE *or* DECEDENT'S ESTATE *or* WARD] BY A FOREIGN PERSONAL REPRESENTATIVE WHO HAS NOT QUALIFIED AS SUCH IN THIS STATE OR BEEN APPOINTED PLAINTIFF'S GUARDIAN AD LITEM.

A. Objection by Demurrer. [*See § 71.62, Paragraph A.*]

B. Limitation on Authority of Personal Representative. The authority of A guardian, conservator, or committee, or of a personal representative, does not extend beyond the jurisdiction of the government under which that person was invested with authority, except to the extent expressly authorized by statute (*Code Civ. Proc. § 1913(b)*).

C. Foreign Personal Representative Lacks Legal Capacity to Sue. A foreign guardian suing in a California court on behalf of his or her ward lacks legal capacity to sue when he or she has not qualified as such in California or been appointed plaintiff's guardian ad litem (*Siegal v. Superior Court (1962) 203 Cal. App. 2d 22, 25-27, 21 Cal. Rptr. 348*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be used to support a special demurrer to a complaint prosecuted on behalf of a conservatee, decedent's estate, or ward by a foreign personal representative who has not qualified as such in this state or been appointed guardian ad litem of the ward.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should refer to allegations in the complaint, or to facts of which the court is required to or may take judicial notice, indicating that the person who is suing on behalf of the real party at interest has not been invested with Authority to serve as guardian, conservator, or personal representative in this state and has not been appointed guardian ad litem.

See also *§§ 71.20[2], 71.60[2],* and *71.62[2].*

[3] Discussion of Authorities

[a] Foreign Personal Representative Lacks Legal Capacity to Sue

The facts and procedural background of ***Siegal v. Superior Court*** *(1962) 203 Cal. App. 2d 22, 21 Cal. Rptr. 348* , are discussed in *§ 71.63[3][a]*. With respect to the objection that the foreign guardian lacked capacity to appear in the action on behalf of the foreign minor, the court pointed out that under *Code Civ. Proc. § 1913* the authority of a guardian or committee does not extend beyond the jurisdiction of the government under which he or she was invested with authority (*203 Cal. App. 2d 22, 25)* . Although holding that the provisions of *Code Civ. Proc. § 1913* did not go to the jurisdiction of the court, the court of appeal said that they did place the foreign representative under a disability that involved the question of capacity to sue (*203 Cal. App. 2d 22, 26-27)* , that the trial court has no authority to disregard the public policy expressed in *Code Civ. Proc. § 1913* with respect to the incapacity of a foreign guardian, and that to proceed to trial and judgment in the present posture of the case would have been an act in excess of the trial court's jurisdiction that could be prevented by prohibition (*203 Cal. App. 2d 22, 27)* .

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§ 71.65 Supporting Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Another Action Is Pending Between Same Parties on Same Cause [Code Civ. Proc. § 430.10(c)]

[1] FORM Supporting Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Another Action Is Pending Between Same Parties on Same Cause [Code Civ. Proc. § 430.10(c)]

[*Caption. See § 71.20.*]

THE SPECIAL DEMURRER TO THE COMPLAINT SHOULD BE SUSTAINED BECAUSE THERE IS ANOTHER ACTION PENDING BETWEEN THE SAME PARTIES ON THE SAME CAUSE OF ACTION.

A. Objection by Demurrer. The party against whom a complaint has been filed may object to it by demurrer on the ground there is another action pending between the same parties on the same cause of action when the ground of objection appears on the face of the complaint or from any matter of which the court is required to or may take judicial notice (*Code Civ. Proc. §§ 430.10(c), 430.30(a)*; *Bistawros v. Greenberg (1987)189 Cal. App. 3d 189, 191-192, 234 Cal. Rptr. 377*).

B. Pending Action Defined. A civil action is deemed to be pending from the time the complaint is filed until its final determination on appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied (*Code Civ. Proc. §§ 411.10, 1049*).

C. Judicial Notice of Court Records and Request. This court may take judicial notice of the records of any court of this state [or of any court of record of the United States or of any court of record of any state of the United States] and on proper request therefor is required to do so (*Evid. Code §§ 452(d), 453*). Pursuant to this authority, The Court is hereby requested to take judicial notice of the case of _____ [*name*] vs. _____ [*name*], No. _____ now pending in the _____ Court of _____, and to enable it to do so certified copies of the complaint and answer filed in that case, together with a certificate from the clerk, and under the seal, of that court showing the present status of that case, are attached hereto and made a part hereof (*see Code Civ. Proc. § 430.70*).

[*Optional*] **D. Sameness of Parties.** Parties are deemed to be the same when those between whom the evidence is offered were on opposite sides in the former case, and a judgment or other determination could in that case have been made between them alone, though other parties were joined with both or either (*Code Civ. Proc. § 1910*).

[*Optional*] **E. Sameness of Actions.** The nature and substance of a cause of action are determined by the right or liability sought to be established or enforced; if the prior and present actions are both based on the same right or obligation, then the causes of action are the same even though the relief sought by each is different (*Carroll v. Puritan Leasing Co. (1978) 77 Cal. App. 3d 481, 487, 143 Cal. Rptr. 772* ; *see also Wulfjen v. Dolton (1944) 24 Cal. 2d 891, 895-896, 151 P.2d 846*).

[*Optional*] **F. Test for Determining Sameness of actions.** The circumstance that the remedies sought by the two actions are not precisely the same is of little moment. The true test is whether or not the determination in the first suit would be res judicata in the second suit (*Stearns v. Los Angeles City School Dist. (1966) 244 Cal. App. 2d 696, 714, 53 Cal. Rptr. 482*).

[*Optional*] **G. Rule Against Splitting Cause of Action.** A party may not split up a single cause of action and make it the basis of separate suits; should a party do so, the first action may be pleaded in abatement of any subsequent suit on the same claim (*Wulfjen v. Dolton (1944) 24 Cal. 2d 891, 894, 151 P.2d 846*).

[*Optional*] **H. Basis of Rule Against Splitting Cause of Action.** The basis of the rule against splitting a cause of action is twofold: (1) defendant should be protected against vexatious litigation; and (2) it is against public policy to permit litigants to consume the time of the courts by relitigating matters already judicially determined or by asserting claims which property should have been settled in some prior action (*Wulfjen v. Dolton (1944) 24 Cal. 2d 891, 894-895, 151 P.2d 846*).

[*Optional*] **I. Right to Have Second Action Abate.** When it is shown that there is another action pending in a California state court between the same parties on the same cause of action, defendant is entitled to the entry of an interlocutory judgment abating the second action (*Code Civ. Proc. § 597*; *Lord v. Garland (1946) 27 Cal. 2d 840, 851, 168 P.2d 5* ; *Shahin v. Wawro (1982) 136 Cal. App. 3d 749, 754, 186 Cal. Rptr. 446*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in support of a demurrer to a complaint when it appears on the face of the complaint or from judicially noticed matter that there is another action pending between the same parties on the same cause. For a discussion of judicial notice generally, see *§ 71.21[2]*.

Optional Paragraph D would be used when the parties in the two actions are not identical. Optional Paragraphs E and F would be used together when the relief sought by plaintiff in the two actions is different. Optional Paragraphs G and H would be used together when plaintiff issuing on a split cause of action, that is, when plaintiff is suing defendant on a part of a cause of action only and has another action against defendant on another part of the same cause of action

pending in the same or another court. Optional Paragraph I would be used when the prior action is pending in a California state court.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. That is, counsel should identify the parties in the former action and the right or obligation that is common to both actions.

[b] Judicial Notice of Prior Pending Action

All that is required for a court to sustain a demurrer on the ground of another action pending is that the other action be pending between the same parties on the same cause [*Code Civ. Proc. § 430.10(c)*].

The former statutory provision, adopted in 1957, authorizing the court to take judicial notice of other pending actions but limiting its power to do so to other actions pending in the same or another California court [*see* former Code Civ. Proc. § 433, as amended by Stats. 1957, ch. 1442; and, *e.g.*, *Colvig v. RKO General, Inc. (1965) 232 Cal. App. 2d 56, 70, 42 Cal. Rptr. 473* ; *Hanrahan v. Superior Court (1947) 81 Cal. App. 2d 432, 435, 184 P.2d 157]* was repealed by the 1965 amendment to former Code Civ. Proc. § 433 and the concomitant adoption of the Evidence Code, both operative January 1, 1967 [Stats. 1965, ch. 299]. Since January 1, 1967, a California court may take judicial notice of the records of any court of this state or of any court of record of the United States or of any state of the United States [*Evid. Code § 452(d)*] and must do so if a proper request is made [*Evid. Code §§ 11, 453*; *see* *Bistawros v. Greenberg (1987) 189 Cal. App. 3d 189, 191-192, 234 Cal. Rptr. 377 , discussed under § 71.65[3][a]*]. Under current law, the pendency of an action in a federal court of record or a court of record of a sister state is, therefore, subject to judicial notice by a California court.

[c] Abatement of Action

The court is required to abate the second action when the prior action on the same cause is pending in a California state court [*see, e.g.,* *Simmons v. Superior Court (1950) 96 Cal. App. 2d 119, 122-123, 214 P.2d 844* ; and § 71.65[2][e]]. But it is not required to do so when the prior action is pending in a court of a sister state or in a federal court in another state; rather, whether a stay in this situation will be granted is within the sound discretion of the trial court [*Thomson v. Continental Ins. Co. (1967) 66 Cal. 2d 738, 748, 59 Cal. Rptr. 101, 427 P.2d 765* (prior action pending in federal court in another state); *Farmland Irrigation Co. v. Dopplmaier (1957) 48 Cal. 2d 208, 215, 308 P.2d 732* (same); *Leeds v. Superior Court (1965) 231 Cal. App. 2d 723, 724, 42 Cal. Rptr. 151* (prior action pending in court of sister state)]. On the factors to be considered by the court in such case, see *Thomson v. Continental Ins. Co. (1967) 66 Cal. 2d 738, 746-747, 59 Cal. Rptr. 101, 427 P.2d 765* .

It would appear that when there is another action pending between the same parties on the same cause in a federal court in California, the California state court should abate the second action, although whether it does so remains a matter of comity [*see* discussion in *Thomson v. Continental Ins. Co. (1967) 66 Cal. 2d 738, 747-748, 59 Cal. Rptr. 101, 427 P.2d 765]* .

On staying or dismissing a California state court action on the related ground of inconvenient forum, see *Code Civ. Proc. §§ 410.30, 418.10*; and Ch. 132, *Jurisdiction: Personal Jurisdiction and Inconvenient Forum.*

[d] Interlocutory Judgment on Abatement of action

If the demurrer is sustained and the court abates the action, the court will enter an interlocutory judgment in favor of the defendant to the effect that no trial of other issues shall be had until the final determination of the other action [*Code Civ. Proc. § 597*; *Lord v. Garland (1946) 27 Cal. 2d 840, 851, 168 P.2d 5]* . An order dismissing the action in such case would normally be error [*Lord v. Garland (1946) 27 Cal. 2d 840, 850-851, 168 P.2d 5* ; *Childs v. Eltinge*

(1973) 29 Cal. App. 3d 843, 848, 105 Cal. Rptr. 864 ; *Colvig v. RKO Gen., Inc. (1965) 232 Cal. App. 2d 56, 71, 42 Cal. Rptr. 473]* .

[e] Review by Extraordinary Writ

When two or more courts in this state have concurrent jurisdiction, the court first assuming jurisdiction retains it to the exclusion of all other courts in which the action might have been initiated. Should another court proceed to exercise jurisdiction, it may be restrained from doing so by issuance of a writ of prohibition from a higher court [*see, e.g., Greene v. Superior Court (1951) 37 Cal. 2d 307, 310, 231 P.2d 821* ; *Browne v. Superior Court (1940) 16 Cal. 2d 593, 597, 107 P.2d 1* ; *Kresteller v. Superior Court (1967) 248 Cal. App. 2d 545, 549, 56 Cal. Rptr. 771* ; *Morrisette v. Superior Court (1965) 236 Cal. App. 2d 597, 599-600, 46 Cal. Rptr. 153]* . This rule applies when the objection that another action is pending between the same parties in California on the same cause of action is erroneously overruled [*Padula v. Superior Court (1965) 235 Cal. App. 2d 567, 571, 45 Cal. Rptr. 500* (plea of another action pending raised in answer); *see also Stearns v. Los Angeles City School Dist. (1966) 244 Cal. App. 2d 696, 711, 53 Cal. Rptr. 482* ; *see also Childs v. Eltinge (1973) 29 Cal. App. 3d 843, 848-852, 105 Cal. Rptr. 864* (comparing rule of exclusive concurrent jurisdiction and demurrer rule with respect to another action pending)].

The foregoing rule does not apply, however, when the prior action is pending in a federal court or in a court of record of a sister state. But should the trial court erroneously overrule the demurrer, the defendant may petition a higher court for a writ of mandate to compel the trial court to stay the California action [*see, e.g., Simmons v. Superior Court (1950) 96 Cal. App. 2d 119, 131-133, 214 P.2d 844]* .

[f] Waiver of Objection

The objection that there is another action pending between the same parties on the same cause of action is waived if not taken by demurrer or answer [*Code Civ. Proc. § 430.80(a)*].

[g] Related Pleading and Practice Forms

For a form of demurrer on the ground of another action pending between the same parties on the same cause, see *Ch. 206, Demurrers and Motions for Judgment on the Pleadings, § 206.125*, in California Forms of Pleading and Practice.

[h] Related Points and Authorities

For points and authorities in support of a general demurrer to a complaint on the ground the action is res judicata and barred, see *§ 71.24*.

[i] Opposing Points and Authorities

In an appropriate case, the memorandum *set out in §§ 71.79 -71.81* may be used to oppose the special demurrer supported by the foregoing memorandum.

See also *§§ 71.20[2]* and *71.60[2]*.

[3] Discussion of Authorities

[a] Objection by Demurrer

Code Civ. Proc. § 430.10(c) provides that the party against whom a complaint has been filed may object to it by demurrer or answer, as provided in *Code Civ. Proc. § 430.30*, on the ground that there is another action pending between the same parties on the same cause of action. *Code Civ. Proc. § 430.30(a)* provides that when any ground for

objection to a complaint appears on the face thereof, or from any matter of which the court is required to or may take judicial notice, the objection on that ground may be taken by a demurrer to the pleading.

In ***Bistawros v. Greenberg*** *(1987) 189 Cal. App. 3d 189, 234 Cal. Rptr. 377* , plaintiff filed an action against an attorney hired to represent him in his quest for religious asylum in the United States. The complaint claimed there was a conspiracy between the attorney and the "Underground Egyptian Intelligence Agency of the Egyptian Embassy," and that he was illegally detained and physically mistreated when a member of defendant law firm called the police to prevent removal of the plaintiff's file from the office. Thereafter, the plaintiff and his brother filed another complaint against the same defendants alleging substantially the same facts. The defendants demurred to the second complaint on the ground that the earlier cause of action involved the same cause of action against the same parties. The trial court sustained the demurrer without leave to amend. The plaintiff appealed.

The court of appeal affirmed the trial court's judgment and imposed sanctions for pursuing a frivolous appeal. The court stated that the plaintiff's claim that the demurrer was improperly sustained was patently insupportable and that it is well settled that the law abhors vexatious and unnecessary litigation wherein several lawsuits are brought involving the same parties and subject matter. An objection to a complaint on the basis that a substantially similar lawsuit is pending is properly raised by demurrer under *Code Civ. Proc. § 430.10(c)*, provided the defect appears on the face of the pleading or from judicially noticed facts (*189 Cal. App. 3d 189, 191-192)* .

[b] Pending Action Defined

Code Civ. Proc. § 411.10 provides that a civil action is commenced by filing a complaint with the court. *Code Civ. Proc. § 1049* provides that an action is deemed to be pending from the time of its commencement until its final determination on appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied.

[c] Judicial Notice of Court Records and Request

Evid. Code § 452 in pertinent part provides that judicial notice may be taken of the following matters to the extent that they are not embraced in *Evid. Code § 451* (relating to mandatory judicial notice): "(d) Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States." *Evid. Code § 453* provides that the trial court "shall" (which is defined in *Evid. Code § 11* as being mandatory) take judicial notice of any matter specified in *Evid. Code § 452* if a party requests it and (a) gives each adverse party sufficient notice of the request, through the Pleadings or otherwise, to enable such adverse party to prepare to meet the request; and (b) furnishes the court with sufficient information to enable it to take judicial notice of the matter.

Code Civ. Proc. § 430.70 provides that when the ground of demurrer is based on a matter of which the court may take judicial notice pursuant to *Evid. Code § 452* or *453*, such matter shall be specified in the demurrer, or in the supporting points and authorities for the purpose of invoking such notice, except as the court may otherwise permit.

[d] Sameness of Actions

The facts and procedural background of ***Carroll v. Puritan Leasing Co.*** *(1978) 77 Cal. App. 3d 481, 143 Cal. Rptr. 772* , are discussed in *§ 71.24[3][b]*. In *Carroll v. Puritan Leasing Co.*, the court of appeal affirmed a dismissal of the action on the ground that it was res judicata. In discussing the sameness of the actions, the court of appeal said that the nature and substance of a cause of action are determined by the right or liability sought to be established or enforced and that, if the second action is based on the same right or obligation, the cause of action is the same even though different or additional relief is sought (*77 Cal. App. 3d 481, 487)* . The court pointed out that plaintiff's liability to defendant had been established in the prior action and, since the judgment in that action did not prohibit execution on her separate property, her separate property could be levied on to satisfy her liability on the judgment debt (*77 Cal. App. 3d 481, 488-494)* .

Wulfjen v. Dolton *(1944) 24 Cal. 2d 891, 151 P.2d 846* , was an action against four named individuals for damages based on an alleged conspiracy to commit and perpetrate a series of frauds on plaintiff. The transactions involved were also the subject of a prior action by plaintiff against three of the named individuals and a corporation. The complaint in the prior action alleged in part that plaintiff, having been induced through the fraud and misrepresentations of the individual defendants to part with substantial sums of money to the defendant corporation, which she later learned was insolvent, had elected to rescind and had rescinded the agreement and each and every transaction relating to it. Prior to the commencement of that action, plaintiff had served a notice of rescission on the defendants. At trial of that action, a nonsuit was granted as to one of the individual defendants on all five of the causes of action alleged and as to the other two individual defendants on the first cause of action only. After trial, the court found that the rescission was effective against the corporation because it had consented to it by defaulting, that the corporation was not the alter ego of the individual defendants, and that all the money advanced by plaintiff went to the corporation. Judgment was entered for plaintiff against the defendant corporation, from which no appeal was taken, and for the individual defendants on the four remaining causes of action not covered by the nonsuit. Plaintiff appealed from the adverse portions of the judgment. That appeal was pending when the present action was filed and was still pending.

In the second action, defendants interposed the defenses of another action pending, election of remedies, and estoppel. On trial of these separate defenses the court found that the allegations of the complaint in the prior action were substantially identical with those in the present action, that by the prior action plaintiff had elected the remedy of rescission, that the remedy was inconsistent with the remedy sought in the present action, and that plaintiff was estopped from maintaining the present action. Judgment was entered in favor of all four defendants and Plaintiff appealed.

The Supreme Court affirmed the judgment as to the three defendants who were also the individual defendants in the prior action and reversed it as to the other defendant who was not a party to the prior action. The Court said that whatever plaintiff's ground of recovery might be for the single wrong involved--that is, defendant's perpetration of fraud to plaintiff's injury in advancing various sums of money without consideration--she was bound to frame her complaint in the prior action so as to avail herself of whatever relief the controlling set of facts would warrant and so meet any possible developments in the presentation of the evidence (*24 Cal. 2d 891, 895)* . The Court said that the violation of one primary right constitutes a single cause of action, though it may entitle the injured party to many forms of relief and that the relief is not to be confounded with the cause of action, one not being determinative of the other (*24 Cal. 2d 891, 895-896)* .

Note that the Supreme Court in *Wulfjen* concluded that plaintiff had had her day in court in the prior action and affirmed the judgment of dismissal as to three of the four defendants. Normally, a defendant whose plea of another action pending is sustained, is merely entitled to an interlocutory judgment that the second action abate [*see Code Civ. Proc. § 597*; *see also § 71.65[3][h]*], rather than to a judgment of dismissal. The judgment in the prior action, once it has become final, may then be raised as a bar to the present action under the doctrine of res judicata.

[e] Test for Determining Sameness of Actions

Stearns v. Los Angeles City School Dist. *(1966) 244 Cal. App. 2d 696, 53 Cal. Rptr. 482* , was an action against the Los Angeles City School District, the Los Angeles City High School District, and fictitiously named defendants to quiet title to real property in Mendocino County and was filed in the superior court of that county. Plaintiffs were the transferees of the property. Defendant districts demurred to the complaint and moved to stay the action on the ground another action was pending between the same parties in the Los Angeles County Superior Court. This latter action, brought by the districts against the original owners and transferors of the property, the transferees, and others claiming under the transferors, was in the nature of a creditor's bill to have various conveyances of the property set aside as having been made in fraud of creditors. The trial court ordered that the action be stayed pending determination of the Los Angeles action "or until further order of the court." Thereafter, plaintiffs moved to vacate the order and the motion

was granted. The districts then filed a cross complaint. Cross defendants' demurrers to the cross complaint were sustained and the court dismissed the cross complaint. After trial, judgment was for plaintiffs decreeing that title to the property was vested in them and that the districts had no interest in it, and enjoining the districts from asserting any claim to the property. The districts appealed.

The court of appeal reversed the judgment for plaintiffs on the merits for error in law and for error in vacating the stay order, with directions to set aside the order vacating the stay of proceedings. The court said that the true test in determining whether the two actions are the same is whether or not the determination in the first suit would be res judicata in the second suit (*244 Cal. App. 2d 696, 714)* . Quoting from *Myers v. Superior Court (1946) 75 Cal. App. 2d 925, 931, 172 P.2d 84* , the court explained that the circumstance that the remedies sought by the two actions Are Not precisely the same is of little moment, the significant fact being that the court in the prior pending action has the power and is charged with the duty of litigating all the issues and giving all the relief to which any of the parties may be entitled under the pleadings (*244 Cal. App. 2d 696, 714)* .

[f] Rule Against Splitting Cause of Action

The facts and procedural background of ***Wulfjen v. Dolton*** *(1944) 24 Cal. 2d 891, 151 P.2d 846* , are *discussed under § 71.65[3][d]*. The Supreme Court said that it was clearly established that a party may not split up a single cause of action and make it the basis of separate suits and that in such case the first action may be pleaded in abatement of any subsequent suit on the same claim (*24 Cal. 2d 891, 894)* . The Court pointed out, with respect to the three defendants who were joined in both actions, that the theory of relief urged in the present action was open to plaintiff within the legitimate scope of her pleading in the prior action and that, if plaintiff through negligence in not properly presenting her claim in the first instance lost her right to recover money that she allegedly advanced in reliance on fraudulent representations of the individual defendants, it was a hardship but one from which the courts cannot relieve if the general and well-established rule against splitting of a single cause of action is to be followed for the benefit of all (*24 Cal. 2d 891, 896)* .

[g] Basis of Rule Against Splitting Cause of Action

The facts and procedural background of ***Wulfjen v. Dolton*** *(1944) 24 Cal.2d 891, 151 P.2d 846* , are *discussed under § 71.65[3][d]*. The Court explained that the rule against splitting a cause of action is based on two reasons: (1) that the defendant should be protected against vexatious litigation; and (2) that it is against public policy to permit litigants to consume the time of the courts by relitigating matters already judicially determined, or by asserting claims that properly should have been settled in some prior action. Quoting from *Bingham v. Kearney (1902) 136 Cal. 175, 177, 68 P. 597* , The Court said that it is not the policy of the law to allow a new and different suit between the same parties concerning the same subject matter that has already been litigated, and that, in addition, the law will not allow the parties to trifle with the courts by piecemeal litigation (*24 Cal.2d 891, 894-895)* . The court concluded that the fact plaintiff's judgment against the insolvent corporation might prove fruitless did not alter the situation as to the right of the individual defendants in the prior action to be protected from harassment by successive suits on the same basic cause of action (*24 Cal.2d 891, 896)* .

[h] Right to Have Second Action Abate

Code Civ. Proc. § 597 requires that if the defense of another pending action, or a demurrer based on another action pending pursuant to *Code Civ. Proc. § 430.10(c)*, is sustained, an interlocutory judgment must be entered in favor of the defendant to the effect that no trial of the issues in the action may be had until the final determination of that other action, and the plaintiff may appeal from the interlocutory judgment in the same manner and within the same time as provided for appeals from judgment.

The facts and procedural background of ***Lord v. Garland*** *(1946) 27 Cal.2d 840, 168 P.2d 5* , are *discussed under §*

71.65[4][d]. In *Lord,* the Supreme Court held that the word "answer," as used in *Code Civ. Proc. § 597,* includes demurrers, and hence, an interlocutory judgment abating the action is required to be entered when the defense of another action pending is raised by demurrer and sustained (*27 Cal.2d 840, 851)* . See also discussion in *§ 71.65[2][c]*.

In ***Shahin v. Wawro*** *(1982) 136 Cal. App. 3d 749, 186 Cal. Rptr. 446* , a shareholder-employee of a corporation filed a complaint that included a cause of action to validate an election of a corporate director. Defendant's demurrer to that cause of action was sustained on two grounds: (1) failure to state a cause of action and (2) that another action was pending.

The court of appeal reversed the judgment, finding that plaintiff had stated a cause of action, but remanded the case with directions to enter an order to (1) sustain the demurrer to the subject cause of action on the basis of another action pending and (2) to abate that cause. The Court found that the action to validate the election was properly subject to abatement based on a pending proceeding for the dissolution of the corporation because both actions depended on a resolution of the same issues (*136 Cal. App. 3d 749, 754)* .

[4] Additional Authorities

[a] Objection by Demurrer

Fresno Planing Mill Co. v. Manning (1912) 20 Cal. App. 766, 130 P. 196 , was an action to recover for building materials sold and delivered by plaintiff to defendants and used by them as contractors in the construction of a building for a third person. Prior to commencement of the action, plaintiff had filed an action to foreclose its mechanic's lien on the third person's property and in that action named both the third person and the present defendants as defendants. In their answer to the complaint in the present action, defendants pleaded the pendency of the previous action in abatement. Plaintiff both moved to strike this defense and demurred to it. The motion to strike was granted and the demurrer was not ruled on. Judgment was for plaintiff and defendants appealed. In reversing the judgment on the ground that the pendency of the prior action was a material defense and that the trial court prejudicially erred in granting the motion to strike it, the court of appeal pointed out that a plea in abatement, based on the ground of another action pending, may be raised either by demurrer or answer (*20 Cal. App. 766, 769)* .

[b] Pending Action Defined

The facts and procedural background of *Fresno Planing Mill Co. v. Manning (1912) 20 Cal. App. 766, 130 P. 196* , are *discussed under § 71.65[4][a]*. The court of appeal, citing *Code Civ. Proc. §§ 350* (repealed, now *Code Civ. Proc. § 411.10*) and 1049, said that an action is commenced when the complaint in the action is filed and it is thereafter deemed to be pending until it is finally determined on appeal (*20 Cal. App. 766, 769)* .

[c] Sameness of Actions

In *Lawyers Title Ins. Corp. v. Superior Court (1984) 151 Cal. App. 3d 455, 199 Cal. Rptr. 1* , the trial court denied a motion for abatement made under *Code Civ. Proc. §§ 430.10* and *597,* and the moving party sought review by petition for a writ of prohibition. In granting the writ, the reviewing court noted that it was undisputed that there was another action pending for declaratory relief at the time a second action for damages was filed, and that both actions involved the same parties and arose out of the same transaction (*151 Cal. App. 3d 455, 458)* . The court held that this was a sufficient ground for abatement of the second action, despite the fact that it sought a dissimilar type of relief than the first action, because there was no obstacle to preclude the filing of a cross complaint for damages in the first action, and it was thus possible for the first action to afford the same relief sought in the second (*151 Cal. App. 3d 455, 459-460)* .

Merchants Fire Assur. Corp. v. Retail Credit Co., Inc. (1962) 206 Cal. App. 2d 55, 23 Cal. Rptr. 544 , involved consolidated appeals in two cases between the same parties. The first action had been dismissed by the trial court after a separate trial on the statute of limitations. The second action had been abated by interlocutory judgment after separate

trial on the issue of another action pending. The court of appeal reversed the judgment of dismissal on the ground the complaint sounded in fraud, rather than for breach or tortious breach of contract, and hence was not barred by the applicable statute of limitations, but affirmed the interlocutory judgment abating the second action pending determination of the dismissed action. Plaintiff was in the business of insuring property against physical damage, and defendant was in the business of furnishing information for a price to insurance companies among others. Plaintiff issued a policy insuring a certain home against all physical loss. Subsequently, plaintiff ordered a report from defendant for the purpose of evaluating the risk and to determine whether to cancel the policy. Defendant furnished the report that stated, among other things, that the house was not on filled land. However, it was on filled land. Plaintiff relied on the report and kept the policy in force. Thereafter, a landslide of the fill caused damage to the house and plaintiff settled the claim with its insured for $18,750 and then commenced the first action to recover its damages from defendant. After dismissal of the first action, plaintiff filed the second action for damages for fraudulent deceit and breach of written contract. Defendant's plea of another action pending between the same parties on the same cause was separately tried [*Code Civ. Proc. § 597*] and resulted in the interlocutory judgment of abatement. In holding that the trial court properly abated the second action so long as the first case remained pending, the court of appeal said that the cause of action is the obligation sought to be enforced or the primary right that was involved, that new legal theories do not make new causes of action, and that the transaction, the acts done, the legal duties, and the primary rights involved in the second case were the very same as in the former case (*206 Cal. App. 2d 55, 63)* .

See also *Colvig v. RKO Gen., Inc. (1965) 232 Cal. App. 2d 56, 66, 42 Cal. Rptr. 473* (the essence of a cause of action is the existence of a primary right and a violation of that right; that is, it arises out of an antecedent primary right and corresponding duty, and a breach of the primary right and duty by the person on whom the duty rests; the primary right and duty and the delict or wrong constitute the cause of action in the legal sense; the cause of action is simply the obligation sought to be enforced), and discussion of cause of action in *Abatti v. Eldridge (1980) 103 Cal. App. 3d 484, 487-489, 163 Cal. Rptr. 82* .

[d] Test for Determining Sameness of Actions

In *Lord v. Garland (1946) 27 Cal. 2d 840, 168 P.2d 5* , the Supreme Court said that a demurrer on the ground of another action pending between the same parties for the same cause may be made only when the face of the complaint shows that the causes of action and the issues in the two suits are substantially the same and that as a test for determining whether the causes of action are the same or different, it is the universal rule that a plea in abatement may be maintained only when the claim sued on in the second action is such that a final judgment in the first one could be pleaded in bar as a former adjudication (*27 Cal. 2d 840, 848)* . The Court held, however, it did not appear that the prior suit involved the entire cause of action presented by the complaint in the present case (and hence that the plea of abatement should have been raised by answer rather than by demurrer), and reversed the judgment with directions to overrule the demurrer.

Note:

When *Lord* was decided, the objection, to be raised by demurrer, had to appear from the face of the complaint; under present law, it may appear either from the face of the complaint or from matter of which the court is required to or may take judicial notice [*Code Civ. Proc. § 430.30(a)*].

San Martin v. Superior Court (1959) 169 Cal. App. 2d 14, 336 P.2d 618 , was a prohibition proceeding to restrain respondent superior court from taking further proceedings in an annulment action after that court had denied petitioner's motion to abate the action. The motion was made on the ground that on the same day the annulment action was filed petitioner had filed an action for separate maintenance in another superior court and that this latter court had first obtained jurisdiction of the subject matter by service of summons. The summons in that action was served on November 2, 1958. The summons in the present action, as well as an order to show cause re pendente lite suit money, support, and child custody, were served December 6, 1958. Respondent court, on December 9, 1958, pursuant to the stipulation of respective counsel, made its order granting the pendente lite relief. That order became final December 18, 1958, the

same day petitioner moved for the abatement order. In denying the motion, respondent court noted that the pendente lite order to which petitioner had stipulated gave it priority.

Although it denied the writ on the grounds petitioner had submitted to the jurisdiction of respondent court, had stipulated to the pendente lite order, and had subsequently filed a cross complaint for separate maintenance in that action, the court of appeal stated that the general test applied to determine the identity of causes of action is that when the claim sued on in the second action is such that a final judgment in the first one could be pleaded in bar as a former adjudication, the actions are substantially the same (*169 Cal. App. 2d 14, 16)* .

[e] Rule Against Splitting Cause of Action

Phillips v. Western Pac. R.R. Co. (1971) 22 Cal. App. 3d 441, 99 Cal. Rptr. 451 , was an action by an insurance company, as subrogee, to recover $10, 300, the full face amount of a policy, it had paid its insureds as a result of the destruction of their real and personal property by a fire for which defendant railroad was responsible. The insureds were joined as defendants under the provisions of *Code Civ. Proc. § 382*, providing that if the consent of one who should have been joined as plaintiff cannot be obtained, that person may be made a defendant. The insureds cross complained against the railroad for damages in the sum of $47, 643, the total amount of alleged damage to their property as a result of the fire, and alleged that plaintiff had paid them a total of $10, 300 on its policy. The railroad settled with plaintiff for the full amount of insurance paid by it and judgment in that amount was entered for plaintiff. The railroad then filed an answer to the cross complaint in which it alleged that the insureds were proceeding on the same cause of action as the insurer and that they were proceeding to split their cause of action and were barred. The insureds' demurrer to this defense was sustained without leave to amend and, after trial, judgment was rendered for the insureds. The railroad appealed. Although holding that the procedure followed by the plaintiff and insureds in the trial court was proper and no splitting of causes of action was involved, the court of appeal, in affirming the judgment, said that an entire claim cannot be divided and made the basis of several suits, and that if an effort is made to split a cause of action into more than one lawsuit, the defendant in the second suit may plead the pendency of the first in abatement (*22 Cal. App. 3d 441, 444)* .

The facts and procedural background of *Merchants Fire Assur. Corp. v. Retail Credit Co., Inc. (1962) 206 Cal. App. 2d 55, 23 Cal. Rptr. 544* , are *discussed under § 71.65[4][c]*. The court of appeal, after pointing out that plaintiff based the second action on exactly the same facts on which it relied in the first case, quoting from *Wulfjen v. Dolton (1944) 24 Cal. 2d 891, 894, 151 P.2d 846* , *discussed under § 71.65[3][g]*, said it is clearly established that a party may not split up a single cause of action and make it the basis of separate suits, and in such case the first action may be pleaded in abatement of any subsequent suit on the same claim (*206 Cal. App. 2d 55, 63)* .

The facts and procedural background of *Fresno Planing Mill Co. v. Manning (1912) 20 Cal. App. 766, 130 P. 196* , are *discussed under § 71.65[4][a]*. The court of appeal said that it is not the policy of the law to permit different suits to be instituted and pending between the same parties concerning the same subject matter; hence the rule that an action abates on a showing of the institution and pendency of a prior action between the same parties on the same subject matter (*20 Cal. App. 766, 769)* .

[f] Basis of Rule Against Splitting Cause of Action

The facts and procedural background of *Phillips v. Western Pac. R.R. Co. (1971) 22 Cal. App. 3d 441, 99 Cal. Rptr. 451* , are *discussed under § 71.65[4][e]*. Although holding the rule inapplicable to the case before it, the court of appeal, citing *Wulfjen v. Dolton (1944) 24 Cal. 2d 891, 894-895, 151 P.2d 846* , *discussed under § 71.65[3][g]*, said that the California Supreme Court has held that the rule against splitting is based on two principles as follows: (1) The defendant should be protected against vexatious litigation; and (2) it is against public policy to permit litigants to consume the time of the courts by relitigating matters already judicially determined, or by asserting claims that properly should have been settled in some prior action (*22 Cal. App. 3d 441, 444)* .

The facts and procedural background of *Fresno Planing Mill Co. v. Manning (1912) 20 Cal. App. 766, 130 P. 196* , are *discussed under § 71.65[4][a]*. The court of appeal said that the reason for the rule that an action abates on a showing of the pendency of a prior action between the same parties on the same subject matter is founded on the theory that, if the first suit affords an ample remedy to the party claiming to be aggrieved, it would be not only unnecessary but vexatious to permit the prosecution of a second suit founded on the same cause of action (*20 Cal. App. 766, 769)* .

[g] Right to Have Second Action Abate

The facts and procedural background of *Lawyers Title Ins. Corp. v. Superior Court (1984) 151 Cal. App. 3d 455, 199 Cal. Rptr. 1* , are *discussed under § 71.65[4][c]*. In *Lawyers Title Ins. Corp.*, the court of appeal granted a writ of prohibition to restrain an action for damages when it was undisputed that another action was pending for declaratory relief, involving the same parties and arising out of the same transaction (*151 Cal. App. 3d 455, 458, 461)* . The court held that this was a ground for abatement as a matter of right, not discretion, under the circumstances, and it made no difference that the second action for damages might seem more appropriate or expeditious than the otherwise proper first action for declaratory relief (*151 Cal. App. 3d 455, 460)* .

Hanrahan v. Superior Court (1947) 81 Cal. App. 2d 432, 184 P.2d 157 , was a prohibition proceeding to restrain respondent court from proceeding with an action. Real party in interest (plaintiff) had originally filed an action in that court seeking a judgment for goods sold and delivered and for equipment rentals. Defendant's motion for change of venue was granted and the case transferred to another superior court. Plaintiff then filed in respondent court a dismissal of the action without prejudice and, subsequently, filed in that same court a new action based on the same grounds as the prior action but which included allegations showing that that county was the proper venue. Defendant then petitioned the court of appeal for the writ of prohibition. Although it denied the peremptory writ on the ground defendant had failed to seek relief in respondent court (*81 Cal. App. 2d 432, 436)* , the court of appeal stated that the "well settled" rule in California is that the pendency of a prior action based on the same cause and contested by the same parties is ground for abatement of the second action (*81 Cal. App. 2d 432, 435)* .

California Points & Authorities

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Volume 7A Chapters 71-79 DEMURRERS
CHAPTER 71 DEMURRERS AND MOTIONS FOR JUDGMENT ON THE PLEADINGS
PART II. FORMS
A. Demurrers
2. Special Demurrers to Complaint

7A-71 California Points & Authorities § 71.66

§ 71.66 Supporting Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Defect or Misjoinder of Parties [Code Civ. Proc. § 430.10(d)]--Nonjoinder of Party

[1] FORM Supporting Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Defect or Misjoinder of Parties [Code Civ. Proc. § 430.10(d)]--Nonjoinder of Party

[*Caption. See § 71.20.*]

THE SPECIAL DEMURRER TO THE COMPLAINT SHOULD BE SUSTAINED BECAUSE THERE IS A DEFECT OF PARTIES.

A. Objection by Demurrer. The party against whom a complaint has been filed may object to it by demurrer on the ground there is a defect of parties when the ground of objection appears on the face of the complaint [or from any matter of which the court is required to or may take judicial notice] (*Code Civ. Proc. §§ 430.10(d), 430.30(a)*).

[*EITHER*]

B. Joinder Required. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action must be joined as a party in the action if in his or her or its absence complete relief cannot be accorded among those who are already parties (*Code Civ. Proc. § 389(a)*). If the person has not been so joined, the court is required to order that he or she or it be made a party (*Code Civ. Proc. § 389(a)*).

[*OR*]

B. Joinder Required. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action must be joined as a party in the action if he or she or it claims an interest relating to the subject of the cause of action and is so situated that the disposition of the action in his or her or its

absence may as a practical matter impair or impede his or her or its ability to protect that interest or leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his or her or its claimed interest (*Code Civ. Proc. § 389(a)*). If the person has not been so joined, the court is required to order that he or she or it be made a party (*Code Civ. Proc. § 389(a)*).

[*CONTINUE*]

C. Factors to Determine Indispensability. In determining whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed without prejudice, the following factors are to be considered: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or her or to those who are already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff or cross complainant will have an adequate remedy if the action is dismissed for nonjoinder (*Code Civ. Proc. § 389(b)*).

[*Optional*] **D. Dismissal of Action.** When it appears that the nonjoined person is one described in *Section 389(a) of the Code of Civil Procedure*, that the person cannot be made a party to the action, and that on a consideration of the factors set forth in *Section 389(b) of the Code of Civil Procedure*, the action should be dismissed, the court should dismiss the action without prejudice, the absent person being thus regarded as indispensable to the action (*Code Civ. Proc. § 389(b)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in support of a demurrer to a complaint when it appears from the face of the complaint or from judicially noticed matter that there is a defect of parties, that is, that a person described in *Code Civ. Proc. § 389(a)* [*see* Paragraph B of form] has not been made a party to the action.

The first alternative Paragraph B may be used in the situation in which complete relief cannot be accorded among those already parties because of the absence of a person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action [*see Code Civ. Proc. § 389(a)*].

The second alternative Paragraph B may be used in the situation in which a person who is not a party to the action claims an interest relating to the subject of the cause of action and is so situated that the disposition of the action in his or her or its absence may as a practical matter impair or impede his or her or its ability to protect that interest or leave any of the persons who are already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his or her or its claimed interest [*see Code Civ. Proc. § 389(a)*].

Optional Paragraph D would be used when the nonjoined person cannot be made a party to the action and is indispensable in the conclusory sense [*see § 71.66[2][b]*].

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should argue, from facts appearing on the face of the complaint or of which the court is required to or may take judicial notice, that (1) a certain person was not named a party in the action, (2) the person is one who is described in *Code Civ. Proc. § 389(a)*, and *(3)(b)* the failure to name the person constitutes a defect of parties and the defendant's demurrer should therefore be sustained.

[b] Mandatory Joinder

Code Civ. Proc. § 389 was completely reworded in 1971 [Stats. 1971, ch. 244, operative July 1, 1972]. Prior to this amendment the section defined an "indispensable party" as one (1) whose absence would prevent the court from rendering any effective judgment between the parties, or (2) whose absence would seriously prejudice any party before the court, or (3) whose interest would be inequitably affected or jeopardized by a judgment rendered between the parties. It defined a "conditionally necessary party" as a person who was not an indispensable party but whose joinder would enable the court to determine additional causes of action arising out of the transaction or occurrence involved in the action. The section required joinder of both classes of parties. Subdivision (a) of the revised statute, which is substantially set forth in Paragraph B of the form, omits the indispensable party-conditionally necessary party dichotomy, but requires joinder of persons who formerly fit the definition of either so long as such person is subject to service of the court's process and the joinder will not deprive the court of subject matter jurisdiction.

[c] Dismissal of Action

If the person described in *Code Civ. Proc. § 389(a)* cannot be made a party, the court is required to determine whether in equity and in good conscience the action should proceed among the parties before it, or should be dismissed without prejudice, the absent person being regarded as indispensable. In making this determination, the court will consider the following factors: (1) to what extent a judgment rendered in the person's absence might be prejudicial to that person or to those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder [*Code Civ. Proc. § 389(b)*]. Under *Code Civ. Proc. § 389(a), above,* if the demurrer is sustained and the omitted person can be joined, the court will order joinder [*see, e.g., Conrad v. Unemployment Ins. Appeals Bd. (1975) 47 Cal. App. 3d 237, 241, 120 Cal. Rptr. 803]* . If the consent of one who should have been joined as plaintiff cannot be obtained, that person may be made a defendant, the reason thereof being stated in the complaint [Code Civ. Proc. § 382]. If the omitted person cannot be joined and it is concluded that the person is indispensable, the demurrer will be sustained without leave to amend and a judgment of dismissal without prejudice will be entered [*see Vanoni v. County of Sonoma (1974) 40 Cal. App. 3d 743, 746, 115 Cal. Rptr. 485* (discussed in *§ 71.83[3][a]*].

The California Law Revision Commission, which proposed the 1971 amendment to *Code Civ. Proc. § 389*, stated that the statute was amended to substitute practically in its entirety *Fed. R. Civ. P., Rule 19* for the former wording of the statute, but that the words "without prejudice" had been added to the language of the federal rule in *Code Civ. Proc. § 389(b)* merely to avoid any contrary implication that might be created by the omission of the somewhat similar provision formerly found in *Code Civ. Proc. § 389*.

The Commission explained that basically the statute as amended requires joinder of persons materially interested in an action whenever feasible, that in certain instances joinder cannot be accomplished because it would deprive the court of subject matter jurisdiction, that in other situations joinder is impossible because personal jurisdiction over the party cannot be obtained, and that when joinder cannot be accomplished the circumstances must be examined and a choice made between proceeding with or dismissing the action. The adequacy of the relief that may be granted in a person's absence and the possibility of prejudice to either such person or the parties before the court are factors to be considered by the court in making this choice. However, a person is regarded as indispensable only in the conclusory sense that, in the person's absence, the court has decided the action should be dismissed. When the decision is to proceed, the court

has the power to make a legally binding adjudication between the parties properly before it.

The Commission further explained that *Code Civ. Proc. § 389* formerly attempted not only to avoid prejudice to the parties or absent person but also to promote the general convenience of the courts by preventing a multiplicity of suits. As revised, the section takes a different approach; it limits compulsory joinder to those situations when the absence of a person may result in substantial prejudice to that person or to the parties already before the court. Under the former law, an indispensable party had to be joined in the action; until and unless the person was joined the court had no jurisdiction to proceed with the case. This absolute rule has been changed; however, practically speaking, the change is perhaps more one of emphasis. The guidelines provided in *Code Civ. Proc. § 389* are substantially those that have guided the courts for years [*see Bank of Cal. v. Superior Court (1940) 16 Cal. 2d 516, 106 P.2d 879]* . These guidelines should require dismissal in the same circumstances when formerly a person was characterized as indispensable [10 Cal. L. Rev. Comm. Reps. 535-536 (1971)].

[d] Waiver of Objection

The objection that there is a defect of parties plaintiff or defendant is waived if not raised by demurrer or answer [*Code Civ. Proc. § 430.80(a)*; *see, e.g., Work v. Campbell (1912) 164 Cal. 343, 349, 128 P. 943* ; *Kraus v. Willow Park Public Golf Course (1977) 73 Cal. App. 3d 354, 364, 140 Cal. Rptr. 744* ; *Peerless Ins. Co. v. Superior Court (1970) 6 Cal. App. 3d 358, 361, 85 Cal. Rptr. 679]* , unless the nonjoined person is an indispensable party.

An objection to the nonjoinder of an indispensable party may be raised at any time. However, when the issue of failure to join an indispensable party is raised for the first time on appeal, that fact is itself a factor that may be evaluated in considering joinder [*Kraus v. Willow Park Public Golf Course (1977) 73 Cal. App. 3d 354, 370 n.11, 140 Cal. Rptr. 744]* .

Both before and after the 1971 revision of *Code Civ. Proc. § 389* it was said that the failure to join an indispensable party is a jurisdictional defect [*see, e.g., Bank of California v. Superior Court (1940) 16 Cal. 2d 516, 522, 106 P.2d 879* ; *Fraser-Yamor Agency, Inc. v. County of Del Norte (1977) 68 Cal. App. 3d 201, 214, 137 Cal. Rptr. 118* ; *Vanoni v. County of Sonoma (1974) 40 Cal. App. 3d 743, 746, 115 Cal. Rptr. 485]* . However, in *Kraus v. Willow Park Public Golf Course (1977) 73 Cal. App. 3d 354, 140 Cal. Rptr. 744* , the court stated that the failure to join an indispensable party is not a jurisdictional defect in the fundamental sense. Even in the absence of an indispensable party, the court still has the power to render a decision as to the parties before it which will stand. The court stated that it is for reasons of equity and convenience, and not because it is without the power to proceed, that the court should not proceed with a case when it determines that an indispensable party is absent and cannot be joined [*Kraus v. Willow Park Public Golf Course (1977) 73 Cal. App. 3d 354, 364, 140 Cal. Rptr. 744]* . *Kraus,* citing both *Fraser-Yamor Agency, Inc.* and *Vanoni,* acknowledged that the courts of appeal had continued to state that the absence of an indispensable party deprives the court of jurisdiction over the subject matter. According to the court, this conclusion was dicta and not the correct rule under either the former Code Civ. Proc. § 389, or as amended in 1971 [*Kraus v. Willow Park Public Golf Course (1977) 73 Cal. App. 3d 354, 365, 140 Cal. Rptr. 744* ; *see also* Witkin, California Procedure, vol. 5, *Pleading,* § 922 (3d ed. 1985)].

[e] Related Pleading and Practice Forms

For a form of demurrer on the ground of defect of parties, see *Ch. 206, Demurrers and Motions for Judgment on the Pleadings, § 206.126,* in California Forms of Pleading and Practice. For forms relating to joinder of parties on motion, see Ch. 395, *Parties* in that set.

[f] Related Points and Authorities

For memoranda of points and authorities supporting or opposing motions to bring in new parties to an action, see Ch.

168, *Parties* .

[G] Opposing Points and Authorities

In an appropriate case, the memorandum *set out in §§ 71.82* and *71.83* may be used to oppose the special demurrer supported by the foregoing memorandum.

See also *§§ 71.20[2]* and *71.60[2]*.

[3] Discussion of Authorities

[a] Joinder Required

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action must be joined as a party in the situations described in *Code Civ. Proc. § 389(a)* [*see* Paragraphs B of form, *above*]. If the person has not been joined, the court is required to order that the person be made a party [*Code Civ. Proc. § 389(a)*].

[4] Additional Authorities

[a] Joinder Required

Greco v. Oregon Mut. Fire Ins. Co. (1961) 191 Cal. App. 2d 674, 12 Cal. Rptr. 802 (party plaintiff), was an action by the vendor, the vendee, and the encumbrancer of improved real property against an insurance company for a declaration of rights under a fire insurance policy issued by defendant to the vendor. The insurance company denied liability under the policy on a number of grounds, none of which was sustained. Judgment was for plaintiffs and defendant appealed. The court of appeal reversed the judgment for a new trial on the sole issue of who was the real party plaintiff in interest. The court said that under the circumstances of the case the nonjoined third person was the real party in interest. The court said that plaintiff in a suit on a chose in action, to qualify as the real party in interest, must have such a title to the chose that a judgment against defendant will protect the latter from future annoyance or loss, that the assignee of a chose in action has such a title and is a necessary party to any suit on it even though he or she may hold it for security purposes only, that failure to join such a party is reversible error, and that the assignor, although a proper party to the suit, is not a necessary party (*191 Cal. App. 2d 674, 687)* . The court noted exceptions to the rule that failure to join the assignee is reversible error when (1) the assignee consents that suit be brought by the assignor; and (2) the assignment occurs after the suit has been filed. In this latter situation, the action may be continued in the name of the assignor or the court may permit the assignee to be substituted in the action (*191 Cal. App. 2d 674, 687)* .

Although decided prior to the 1971 revision of *Code Civ. Proc. § 389*, the case would support joinder under present *Code Civ. Proc. § 389(a)(2)(ii)* (nonjoinder would leave defendant subject to substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of nonjoined person's claimed interest).

Bank of California v. Superior Court (1940) 16 Cal. 2d 516, 106 P.2d 879 (party defendant), arose out of an action to enforce the provisions of an alleged contract by which decedent agreed to leave her entire estate to plaintiff. The complaint named as defendants the executor and all the beneficiaries under decedent's will, but only the executor and the residuary beneficiary were served with summons. When the matter came on for trial, the appearing defendants moved for an order to have summons issued and served on the other defendants as necessary and indispensable parties to the action. On denial of the motion, the executor petitioned for a writ of prohibition. The Supreme Court, in holding the other heirs were not indispensable parties and denying the peremptory writ, discussed which parties were indispensable. It stated that there may be some persons whose interests, rights, or duties will inevitably be affected by any decree that can be rendered in the action such as in situations when a number of persons have undetermined interests in the same property and one of them seeks, in an action, to recover the whole, to fix his or her share, or to

recover a portion (*16 Cal. 2d 516, 521)* . The other persons with similar interests are indispensable parties as a judgment would affect their rights since a judgment in favor of one claimant for part of the property or fund would necessarily determine the amount or extent of what remains available to the others (*16 Cal. 2d 516, 521)* . Thus, the Court stated, in an action by one creditor against assignees for the benefit of creditors seeking an accounting and payment of his share of the assets, the other creditors were held indispensable; and in an action by plaintiff to enforce a trust, when he claimed the property in his own right, to the exclusion of another actual beneficiary, failure to join the latter was held fatal to the judgment (*16 Cal. 2d 516, 521-522*). Also, when the plaintiff seeks some other type of affirmative relief that, if granted, would injure or affect the interests of a third person not joined, that third person is an indispensable party. Thus, in an action by a lessor against a sublessee to forfeit a parent lease because of acts of the sublessee, the sublessors (original lessees) were indispensable parties, since a decree of forfeiture would deprive them of their lease, and in a suit to cancel illegal registration of voters, all voters whose registration was challenged were indispensable parties (*16 Cal. 2d 516, 522)* . The Court stated that all of these persons are, of course, "necessary" parties, but the decisions show that they come within a special classification of necessary parties, to which the term "indispensable" seems appropriate (*16 Cal. 2d 516, 522*).

Covarrubias v. James (1971) 21 Cal. App. 3d 129, 98 Cal. Rptr. 257 , was a taxpayers' action to restrain defendants, a city and certain public agencies and officials, from disbursing public funds on a named public construction project and on unspecified future public construction projects on the ground the building trade unions that would supply skilled workers to the subcontractors engaged by the general contractors discriminated against racial minorities. Neither the general contractor on the named construction project nor any other contractor, subcontractor, or union was joined as a defendant. Defendants' general and special demurrers to the amended complaint were sustained without leave to amend on the ground, among others, that the general contractor, subcontractors, and unions whose practices were challenged were indispensable parties. Plaintiffs appealed from the subsequent judgment of dismissal, and the court of appeal affirmed. The court stated that California courts have consistently held that when a plaintiff seeks some type of affirmative relief that, if granted, would injure or affect the interests of a third person not joined, that third person is an indispensable party, and that under this definition the contractor, the anonymously mentioned subcontractors, and the unions alluded to in the complaint were indispensable parties, due to the impact of the case on their contracts and collective bargaining agreements (*21 Cal. App. 3d 129, 133)* . The court held that the nonjoined persons were indispensable parties as defined in *Code Civ. Proc. § 389* prior to its 1971 revision. Under the former wording, an indispensable party was defined as one (1) whose absence would prevent the court from rendering any effective judgment between the parties, or (2) whose absence would seriously prejudice any party before the court, or (3) whose interest would be inequitably affected or jeopardized by a judgment rendered between the parties. The substance of this definition is incorporated in the present *Code Civ. Proc. § 389(a)* [*see* Paragraph B of form, *above*], and the factors to be considered by the court under *Code Civ. Proc. § 389(b)* [*see* Comments, Dismissal of Action, *above*].

See also *Ursino v. Superior Court (1974) 39 Cal. App. 3d 611, 617-618, 114 Cal. Rptr. 404* ; *Hebbard v. Colgrove (1972) 28 Cal. App. 3d 1017, 1026, 105 Cal. Rptr. 172* ; *Irwin v. City of Manhattan Beach (1964) 227 Cal. App. 2d 634, 637-638, 38 Cal. Rptr. 875* ; *Thomson v. Talbert Drainage Dist. (1959) 168 Cal. App. 2d 687, 689, 336 P.2d 174* ; *Miracle Adhesives v. Peninsula Tile Assn. (1958) 157 Cal. App. 2d 591, 593, 321 P.2d 482* .

California Points & Authorities

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Volume 7A Chapters 71-79 DEMURRERS
CHAPTER 71 DEMURRERS AND MOTIONS FOR JUDGMENT ON THE PLEADINGS
PART II. FORMS
A. Demurrers
2. Special Demurrers to Complaint

7A-71 California Points & Authorities § 71.67

§ 71.67 Supporting Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Defect or Misjoinder of Parties [Code Civ. Proc. § 430.10(d)]--Misjoinder of Party

[1] FORM Supporting Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Defect or Misjoinder of Parties [Code Civ. Proc. § 430.10(d)]--Misjoinder of Party

[*Caption. See § 71.20.*]

THE SPECIAL DEMURRER TO THE COMPLAINT SHOULD BE SUSTAINED BECAUSE THERE IS A MISJOINDER OF PARTIES.

A. Objection by Demurrer. The party against whom a complaint has been filed may object to it by demurrer on the ground there is a misjoinder of parties when the ground of objection appears on the face of the complaint [or from any matter of which the court is required to or may take judicial notice] (*Code Civ. Proc. §§ 430.10(d), 430.30(a)*).

[*EITHER*]

B. Improper Plaintiff. A person may be joined as a plaintiff only if he, she, or it either (1) asserts a right to relief jointly, severally, or in the alternative, in respect of or a rising out of the same transaction, occurrence, or series of transactions or occurrences and a question of law or fact common to all plaintiffs will arise in the action or (2) the person has a claim, right, or interest adverse to defendant in the _____ [property *or* controversy] that is the subject of the action (*Code Civ. Proc. § 378(a)*). A plaintiff who meets neither of these requirements is an improperly joined plaintiff (*Coleman v. Twin Coast Newspaper, Inc. (1959) 175 Cal. App. 2d 650, 653-654, 346 P.2d 488*).

[*OR*]

B. Improper Defendant. A person may be joined as a defendant in an action if either (1) there is asserted against him, her, or it any right to relief jointly, severally, or in the alternative, in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action; or (2) there is asserted against him, her, or it any claim, right, or interest in the property or controversy that is the subject of the action (*Code Civ. Proc. § 379(a)*). A plaintiff may also, if in doubt as to the person from whom he or she is entitled to redress, join two or more defendants with the intent that the question as to which, if any, of them is liable and to what extent may be determined between the parties (*Code Civ. Proc. § 379(c)*). Finally, a plaintiff may join as a defendant a person who should have been joined as plaintiff but whose consent to such joinder could not be obtained, the reason for the joinder of such person as defendant being stated in the complaint (*Code Civ. Proc. § 382*). A defendant who comes within none of the above categories is an improperly joined defendant (*see Farmers Ins. Exchange v. Adams (1985) 170 Cal. App. 3d 712, 722, 216 Cal. Rptr. 287* ; *Hoag v. Superior Court (1962) 207 Cal. App. 2d 611, 618, 620, 24 Cal. Rptr. 659*).

[*CONTINUE*]

[*Optional*] **C. No Charging Allegation.** A defendant who is not charged in the complaint with any act giving rise to liability to plaintiff for the cause of action sued on is not a proper party to the action (*Gardner v. Samuels (1897)116 Cal. 84, 88, 47 P. 935*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in support of a special demurrer to a complaint when it appears on the face of the complaint or from judicially noticed matter that there is a misjoinder of parties. For discussion relating to judicial notice generally, see *§ 71.21[2]*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should argue, from facts appearing on the face of the complaint or of which the court is required to or may take judicial notice, that a party to the action does not possess the requisite community of interest necessary to allow permissive joinder [*see Coleman v. Twin Coast Newspaper, Inc. (1959) 175 Cal. App. 2d 650, 653-654, 346 P.2d 488 , discussed under § 71.67[3][b]*].

[b] No Charging Allegation

With respect to the point set forth in Optional Paragraph C in the body of the foregoing form, although demurrers on the ground of misjoinder of parties defendant have been filed and sustained under the circumstances set out in that paragraph, as shown by the authorities cited under 71.67[3] and [4]. it would appear that the proper ground of objection would be failure to state a cause of action under *Code Civ. Proc. § 430.10(e)* rather than misjoinder [*see, e.g., Converse v. Joslin (1959) 176 Cal. App. 2d 638, 642-643, 645, 649, 1 Cal. Rptr. 777* (general demurrer of defendant whose name appeared only in title of action and nowhere else in complaint properly sustained without leave to amend)]. The objection that there is a misjoinder of parties defendant, strictly speaking, should lie only in the situation described in the alternative Paragraphs B of the form.

[c] Waiver of Objection

The objection that there is a misjoinder of parties is waived if not raised by demurrer or answer [*Code Civ. Proc. § 430.80(a)*; *see also Follansbee v. Benzenberg (1954) 122 Cal. App. 2d 466, 474-475, 265 P.2d 183* ; *Shahabian v. Najarian (1936) 14 Cal. App. 2d 435, 441-442, 58 P.2d 396]* .

[d] Related Pleading and Practice Forms

For a form of demurrer on the ground of misjoinder of parties, see *Ch. 206, Demurrers and Motions for Judgment on the Pleadings § 206.127* in California Forms of Pleading and Practice.

[e] Opposing Points and Authorities

In an appropriate case, the memorandum *set out in §§ 71.84* and *71.85* may be used to oppose the special demurrer supported by the foregoing memorandum.

See also *§§ 71.20[2]* and *71.60[2]*.

[3] Discussion of Authorities

[a] Objection by Demurrer

Code Civ. Proc. § 430.10 provides that a party against whom a complaint or cross complaint has been filed may object to it by demurrer or answer, as provided in *Code Civ. Proc. § 430.30*, on the ground "(d) There is a ... misjoinder of parties." *Code Civ. Proc. § 430.30(a)* provides that when any ground for objection to a complaint or cross complaint appears on the face thereof, or from any matter of which the court is required to or may take judicial notice, the objection on that ground may be taken by a demurrer to the pleading.

Counsel should note that once the requirements of *Code Civ. Proc. § 378(a)* (set out in first Paragraph B of form) are met, it is not necessary that each plaintiff be interested as to every cause of action or as to all relief prayed for and that judgment may be given for one or more of the plaintiffs according to their respective right to relief (*Code Civ. Proc. § 378(b)*).

[b] Improper Plaintiff

Coleman v. Twin Coast Newspaper, Inc. *(1959) 175 Cal. App. 2d 650, 346 P.2d 488* , arose from actions by three chiropractors against an employee of the State Food and Health Department, an investigator of the State Board of Medical Examiners, Twin Coast Newspaper, Inc., and several Doe defendants. Each plaintiff set forth a separate cause of action against the three named defendants sounding in trespass; each also set forth a separate second cause of action against two of the named defendants for damages for conversion. Thus, the complaint contained six separate causes of action, each of which referred only to the particular plaintiff involved. Although each plaintiff alleged a conspiracy among the defendants in committing the trespasses, the complaint contained no allegation to the effect that there was any community of interest among the three plaintiffs in any respect whatsoever. The State Food and Health Department employee demurred to the third amended complaint on the ground of misjoinder of parties plaintiff. The demurrer was sustained on that ground in that the causes of action alleged by each plaintiff were not only separate and distinct from the causes of action alleged by the other two plaintiffs, but that the causes of action of each plaintiff were based on a transaction entirely separate and distinct from the transactions giving rise to the causes of action of the other two. On plaintiffs' failure to file a fourth amended complaint, a judgment dismissing the actions as against the demurring defendant was entered and plaintiffs appealed.

The court of appeal affirmed the judgment. The court stated that the ruling of the trial court was clearly correct. The

court quoted *Code Civ. Proc. § 378* as it then read (which in substance is the same as the current provisions of that section) and said that the purpose of the section was to permit joinder in one action of several causes arising out of identical, related transactions and involving common issues and that the section applied to tort actions as well as to contract actions. The court pointed out that *Code Civ. Proc. § 378* permits permissive joinder of parties plaintiff in two situations: (1) when there exists both a common interest in the subject of the action and any question of law or fact common to all the plaintiffs, and (2) when there exists both a right to relief arising out of the same transaction or series of transactions and any common question of law or fact (*175 Cal. App. 2d 650, 653)* . The court said that in the case before it three separate and distinct plaintiffs were suing to recover damages for alleged trespasses on separate and distinct premises and for alleged conversions of separate and distinct property. Clearly, these events did not constitute a single transaction and nothing was alleged to indicate a related series of transactions. The only fact that appeared in the complaint was that three chiropractors, practicing in the same city, underwent scrutiny during the course of the same day. The community of interest necessary to allow permissive joinder under *Code Civ. Proc. § 378* was entirely lacking (*175 Cal. App. 2d 650, 654)* .

[c] Improper Defendant

Note that once the requirements of *Code Civ. Proc. § 379(a)* [*see* second alternative Paragraph B of form] are met, it is not necessary that each defendant be interested as to every cause of action or as to all relief prayed for [*Code Civ. Proc. § 379(b)*]. Judgment may then be given against one or more defendants according to their respective liabilities [*Code Civ. Proc. § 379(b)*].

In ***Farmers Ins. Exchange v. Adams*** *(1985) 170 Cal. App. 3d 712, 216 Cal. Rptr. 287* , an insurance company brought an action for declaratory relief against several homeowner insureds, seeking a declaration that the plaintiff's policies do not provide coverage for damages or losses arising out of a heavy storm that damaged defendants' property because of subsurface and ground water and earth movement conditions. Defendants demurred on various grounds, including the contention that there was misjoinder of the various defendant insureds. The trial court sustained the demurrers without leave to amend and dismissed the amended complaint. Judgment was entered and the plaintiff appealed.

The court of appeal affirmed the judgment. The court noted that the trial court sustained the demurrer on the ground of misjoinder of defendants because of the need to individually analyze the causation question with regard to each insured. Citing *Code Civ. Proc. § 379*, the court stated that joinder was inappropriate because the insurance company's alleged right to declaratory relief against the numerous insureds did not arise out of the same transaction or occurrence (*170 Cal. App. 3d 712, 722-723)* . Although the same storm played a role in the damage to the property of all the defendants, noted the court, it could not be said that all the claims of the insureds arose out of the same transaction or occurrences. The court found it improper to label the damage to innumerable types of structures, occurring at widely separated locations within the state, resulting from a myriad of causes, and under various conditions as the "same transaction or occurrence" within the meaning of § 379. Thus, the trial court properly sustained the demurrer on the ground of misjoinder (*170 Cal. App. 3d 712, 723)* .

Hoag v. Superior Court *(1962) 207 Cal. App. 2d 611, 24 Cal. Rptr. 659* , was a mandate proceeding to compel transfer from the Los Angeles Superior Court to the Orange County Superior Court of three alleged causes of action against petitioner in a complaint for damages for invasion of privacy filed by three separate plaintiffs. Each plaintiff had set forth a separate cause of action against each of the four defendants for a total of 12 causes of action. The actions arose out of the alleged unauthorized use by defendants at separate times and places of mug shots of plaintiffs taken by the San Francisco police department. No conspiracy or concerted action among the defendants was alleged. With respect to the three defendants other than petitioner, at least one of whom resided in Los Angeles County, the unauthorized use took place at different times and places in Los Angeles County. Petitioner's unauthorized use was alleged to have occurred in San Bernardino County. Petitioner's motion in the trial court for change of venue with respect to the actions alleged against him to his county of residence (Orange County), pursuant to *Code Civ. Proc. § 395* was denied.

The court of appeal issued a peremptory writ of mandate directing the trial court to transfer the three causes of action alleged against petitioner on the ground there had been a misjoinder of actions and a misjoinder of parties defendant. With respect to misjoinder of parties, the court said that although the modern joinder statutes are to be liberally construed and applied, neither the statutes nor the case law in California permit unlimited joinder and that while defendants may be joined even though each named defendant is not a party to, or interested in, or affected by every count pleaded in the complaint, there must be some sort of factual nexus connecting or associating the claim pleaded against the several defendants (*207 Cal. App. 2d 611, 618*). The court stated that in the instant case, there was no allegation of conspiracy, community of interest, or concerted action in any respect. The complaint demonstrated no doubt as to the person from whom plaintiffs claimed they were entitled to redress, nor was there any showing that the acts of defendants operated successively to cause the injury for which recovery was sought. There was no one cause in which all defendants were interested or affected (*207 Cal. App. 2d 611, 618-619)* . The court further pointed out that the existence of possible common questions of law and fact was insufficient in itself to permit joinder (*207 Cal. App. 2d 611, 620)* .

See also *Southern Cal. Edison Co. v. State Farm Mut. Auto. Ins. Co. (1969) 271 Cal. App. 2d 744, 748, 76 Cal. Rptr. 909* (improper joinder of actions and defendants in action by utility company against three separate insurance companies and a number of their insureds for damages to plaintiff's telephone poles arising out of 17 separate and unrelated automobile collisions).

[d] No Charging Allegation

Gardner v. Samuels *(1897) 116 Cal. 84, 47 P. 935* , was an action to recover the value of improvements placed by plaintiff lessee on leased premises during the term of the lease. The lease permitted, but did not obligate, plaintiff to place improvements on the property but provided that if he did so the lessor would pay him their value, not to exceed $1,500, on termination of the lease. The lessor refused to comply with this agreement. Named as defendants were the lessor and the person to whom he had sold the property some 18 months after the lease terminated. Each defendant demurred separately to the complaint on the grounds of failure to state a cause of action and misjoinder of parties defendant. The demurrers were sustained and plaintiff appealed from the subsequent judgment.

The Supreme Court held that the purchaser's demurrer was properly sustained on the ground of misjoinder of parties defendant because the lessor's agreement to pay for the improvements was not a covenant that could be enforced against the subsequent purchaser of the land and that on breach of the agreement plaintiff had merely a right of action against the lessor that was purely personal and that was not assumed by the purchaser when he subsequently became the owner of the land (*116 Cal. 84, 88*). The court reversed the judgment as to the lessor, however, on the ground the complaint stated a cause of action against him and he could not object to the misjoinder of the purchaser without showing that his interests were affected by the misjoinder (*116 Cal. 84, 90-91)* . This point is discussed in *§ 71.85* opposing demurrer on ground of misjoinder of parties.

[4] Additional Authorities

[a] Improper Plaintiff

Gonzales v. State of California (1977) 68 Cal. App. 3d 621, 137 Cal. Rptr. 681 , was a class action brought by plaintiffs on their own behalf and on behalf of others who had or would have had their convictions for misdemeanor drunk driving under former Veh. Code § 23102(a) [*now see Veh. Code § 23152(a)*] declared unconstitutional to establish and enforce a constructive trust naming the state as trustee of fines or penalties paid pursuant to the convictions. Defendant's demurrer to the amended complaint on the ground, among others, that there was a misjoinder of parties plaintiff was sustained and the action was dismissed on plaintiffs' motion, plaintiffs having elected to stand on their amended pleading. In affirming the judgment, the court of appeal concluded that the demurrer for misjoinder of

parties was properly sustained since the allegations of the complaint did not establish facts necessary to constitute a class action. There was not a cognizable and manageable class of plaintiffs and the utilization of a class action would not serve the ends of justice. The court explained that the complaint not only sought to encompass convictions that had been declared constitutionally invalid but also all those that in the future might fit into this category (*68 Cal. App. 3d 621, 629)* . The court concluded that because a manageable class had not been defined, the demurrer on the misjoinder ground had been properly sustained (*68 Cal. App. 3d 621, 630)* .

[b] Improper Defendant

Oppenheimer v. Ashburn (1959) 173 Cal. App. 2d 624, 343 P.2d 931 , was an action against associate justices of the court of appeal to recover statutory damages under *Penal Code § 1505*. At that time, *Penal Code § 1505* provided that if any judge, after a proper application is made, refuses to grant an order for a writ of habeas corpus, or if the officer or person to whom such writ may be directed, refuses obedience to the command thereof, he shall forfeit and pay to the person aggrieved a sum not exceeding $5,000 (now $10,000) to be recovered by action in any court of competent jurisdiction. The complaint charged three associate justices on a division of a court of appeal with having "willfully and unlawfully" on August 14, 1957, denied plaintiff a writ of habeas corpus and sought $5,000 from each justice. Thereafter, plaintiff amended his complaint repleading the above cause of action as count I and including a second count against three additional associate justices charging them with having violated *Penal Code § 1505* on December 26, 1956, and seeking recovery of statutory damages from them. The justices named in the second count demurred on the grounds of failure to state facts sufficient to constitute a cause of action, misjoinder of actions (no longer a ground of demurrer), and misjoinder of parties defendant. The demurrer was sustained with leave to amend and, on plaintiff's failure to amend, a judgment of dismissal as to these judges was entered.

The court of appeal affirmed the judgment of dismissal. The court held that the general demurrer was properly sustained since the material allegations of the complaint were conclusionary averments only, which are not admitted by demurrer, and that the special demurrers for misjoinder of actions and parties were properly sustained. In this latter regard the court said that the alleged tortious denial by the judges in count I and count II constituted independent and disconnected events, separated in time by more than seven months, that respondents are merely persons who were alleged to have committed the same type of tort as the defendants named in count I, and that they had no interest in the subject matter of count I *(173 Cal. App. 2d 624, 634)* .

The court also held *Penal Code § 1505* unconstitutional as a violation of the separation of powers doctrine. The section was amended in 1959 to delete the reference to judges Stats. 1959, ch. 559].

[c] No Charging Allegation

Helfrich v. Kerley (1961) 192 Cal. App. 2d 726, 13 Cal. Rptr. 753 , was an action by plaintiff individually and as assignee of two named associates against Kerley, a corporation, and others to recover an undivided one-third interest in land purchased at a probate sale by Kerley in the name of the corporation that was alleged to be Kerley's alter ego. Under the agreement Kerley was to bid for the land up to a specified amount. Plaintiff's group was to pay one third of the purchase price and of the expenses of purchase, and Kerley, if successful in acquiring the land, agreed to convey an undivided one-third interest to plaintiff's group. The complaint alleged that in reliance on Kerley's promise plaintiff did not bid, that Kerley acting through his alleged alter ego corporation was the successful bidder and acquired the land, that Kerley refused to perform the agreement, and that he never intended to perform his promises. The demurrer to plaintiff's second amended complaint was sustained without leave to amend and plaintiff appealed from the subsequent judgment of dismissal.

The court of appeal reversed the judgment with directions to overrule the general demurrer, sustain the special demurrers, and grant plaintiff a reasonable time to amend. The court concluded that the allegation of actual fraud that induced plaintiff and his associates not to bid and permitted Kerley to bid without competition was sufficient to permit

imposition of a constructive trust and because the corporation was alleged to be Kerley's alter ego, the trust could be enforced against it. With respect to the demurrer for misjoinder of parties defendant, the court pointed out that the complaint did not allege that defendant Spect had taken part in the alleged fraud or had any interest in the subject real property and was misjoined. The court said that there was no allegation that would show him to be a proper party (*192 Cal. App. 2d 726, 729)* .

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7A-71 California Points & Authorities § 71.68

§ 71.68 Supporting Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Pleading Is Uncertain [Code Civ. Proc. § 430.10(f)]--Material Allegations Left to Surmise

[1] FORM Supporting Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Pleading Is Uncertain [Code Civ. Proc. § 430.10(f)]--Material Allegations Left to Surmise

[*Caption. See § 71.20.*]

THE SPECIAL DEMURRER TO THE COMPLAINT ON THE GROUND OF UNCERTAINTY SHOULD BE SUSTAINED BECAUSE ALLEGATIONS OF MATERIAL FACTS ARE LEFT TO SURMISE.

A. Objection by Demurrer. The party against whom a complaint has been filed may object to it by demurrer on the ground the complaint is uncertain when the ground of objection appears on the face of the complaint (*Code Civ. Proc. §§ 430.10(f), 430.30(a)*). The term "uncertain" in this context includes ambiguous and unintelligible (*Code Civ. Proc. § 430.10(f)*).

B. Matters Left to Surmise. Mere recitals, references to, or allegations of material facts that are left to surmise are subject to a special demurrer for uncertainty (*Bernstein v. Piller (1950) 98 Cal. App. 2d 441, 443-444, 220 P.2d 558* ; *see also Ankeny v. Lockheed Missiles & Space Co. (1979) 88 Cal. App. 3d 531, 537, 151 Cal. Rptr. 828*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in support of a special demurrer to a complaint when the complaint is uncertain (which term includes ambiguous [*see § 71.70*] and unintelligible [*see § 71.71*] in that material allegations are left to surmise).

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. For example, if the complaint alleges that the defendant has enticed customers of the plaintiff to sever their business relationships with the plaintiffs and instead patronize defendant's business, but omitted the names of the customers, counsel would refer to the allegation and omission, arguing that defendant is left to surmise the particulars of the wrongful conduct he or she is alleged to have committed and for that reason, the special demurrer should be sustained [*see Bernstein v. Piller (1950) 98 Cal. App. 2d 441, 444, 220 P.2d 558 , discussed under § 71.68[3][b]*].

[b] Related Uses

With appropriate modifications, the foregoing memorandum may be used in support of a special demurrer to an answer to a complaint or cross complaint [*Code Civ. Proc. §§ 430.20(b), 430.30(a)*] or to a single defense in the answer [*Code Civ. Proc. § 430.50(b)*].

[c] Waiver of Objection

The objection that the pleading is uncertain is waived if not raised by demurrer or answer [*Code Civ. Proc. § 430.80(a)*; *see also Cutting Fruit Packing Co. v. Canty (1904) 141 Cal. 692, 695, 75 P. 564* ; *Cole v. Segraves (1891) 88 Cal. 103, 105, 25 P. 1109* ; *Stockton Newspapers, Inc. v. Redevelopment Agency (1985) 171 Cal. App. 3d 95, 103, 214 Cal. Rptr. 561]* .

[d] Related Pleading and Practice Forms

For forms of demurrers to the complaint and to the answer on the ground of uncertainty, see *Ch. 206, Demurrers and Motions for Judgment on the Pleadings § 206.128*, in California Forms of Pleading and Practice.

[e] Opposing Points and Authorities

In an appropriate case, the memorandum *set out in § 71.86* may be used to oppose the special demurrer supported by the foregoing memorandum.

See also *§§ 71.20[2]* and *71.60[2]*.

[3] Discussion of Authorities

[a] Objection by Demurrer

Code Civ. Proc. § 430.10 provides that a party against whom a complaint or cross complaint has been filed may object to it by demurrer or answer, as provided in *Code Civ. Proc. § 430.30*, on the ground "(f) The pleading is uncertain. As used in this subdivision, 'uncertain' includes ambiguous and unintelligible." *Code Civ. Proc. § 430.30(a)* provides that when any ground for objection to a complaint or cross complaint appears on the face thereof, or from any matter of which the court is required to or may take judicial notice, the objection on that ground may be taken by a demurrer to the pleading.

[b] Matters Left to Surmise

Bernstein v. Piller *(1950) 98 Cal. App. 2d 441, 220 P.2d 558* , was an action for an injunction, an accounting, and damages for an alleged conspiracy and wrongful use of plaintiffs' secret lists and processes. The complaint alleged that defendant Piller had been a former partner of plaintiffs in the collection service business, that the other defendants were former employees of plaintiffs, that defendant Piller in January 1948 sold his interest in the partnership to plaintiffs, and that in January 1949 defendants formed a partnership for the purpose of conducting a collection service business. Paragraph XXIX of the complaint further alleged, "3. That Defendants have endeavored to induce various employees of Plaintiffs to leave the employ of Plaintiffs and to enter the employ of Defendants. ... 5. That Defendants have solicited customers and clientele obtained from said secret and confidential list of Plaintiffs' customers. 6. That Defendants have attempted to induce and entice and have actually induced and enticed various of said Plaintiffs' customers and clientele to sever their business relationships with Plaintiffs and instead to patronize Defendants. ..." Defendants demurred specially to the complaint on the ground the quoted paragraphs were uncertain in that it could not be ascertained how defendants endeavored to induce various employees of plaintiffs to leave plaintiffs' employ and enter defendants' employ or the names of such employees and that it could not be ascertained what customers defendants had solicited, or what customers defendants had attempted to induce and entice and had actually induced and enticed, to sever their business relationships with plaintiffs and instead to patronize defendants' business. The demurrers were sustained. On plaintiffs' failure to amend within the time allowed, the court dismissed the action and plaintiffs appealed.

The court of appeal affirmed the judgment. The court stated that in pleading, the essential facts on which a determination of the controversy depends should be stated with clearness and precision so that nothing is left to surmise (*98 Cal. App. 2d 441, 443)* . Mere recitals, references to or allegations of material facts that are left to surmise are subject to a special demurrer for uncertainty (*98 Cal. App. 2d 441, 443-444)* . The court held that the complaint was uncertain in the particulars specified because it did not give (a) the names of the employees of plaintiffs or any of them whom defendants endeavored to induce to leave plaintiffs' employ, (b) the names of any of the customers or clients defendants allegedly obtained from the secret and confidential list of plaintiffs' customers, and the names of the customers or clients of plaintiffs whom defendants had attempted to induce or had actually induced to sever their business relationships with plaintiffs (*98 Cal. App. 2d 441, 444*).

The facts and procedural background of ***Ankeny v. Lockheed Missiles & Space Co.*** *(1979) 88 Cal. App. 3d 531, 151 Cal. Rptr. 828* , are discussed in *§ 71.70[4][a]*. In holding that the trial court was correct in sustaining defendant's special demurrer to the complaint for uncertainty, the court of appeal said that, in pleading, the essential facts on which a determination of the controversy depends should be stated with clearness and precision so that nothing is left to surmise and, citing *Bernstein v. Piller (1950) 98 Cal. App. 2d 441, 443-444, 220 P.2d 558* , discussed *above*, said that those recitals, references to, or allegations of material facts that are left to surmise are subject to special demurrer for uncertainty (*88 Cal. App. 3d 531, 537)* .

[4] Additional Authorities

[a] Matters Left to Surmise

The facts and procedural background of *Gonzales v. State of California (1977) 68 Cal. App. 3d 621, 137 Cal. Rptr. 681* , are discussed in *§ 71.67[4][a]*. Defendant demurred to the amended complaint on the ground, among others, that the complaint was uncertain. One of its objections on this latter ground was that the complaint did not make clear whether the convictions that had been declared unconstitutional had been so declared on appeal or on a collateral attack; defendant sought clarity of this matter on the ground that if the complaint disclosed that the convictions were declared constitutionally invalid as the result of a collateral attack plaintiffs could not state a cause of action. The demurrer was sustained on all the grounds set forth in it with leave to amend. Plaintiffs chose not to amend and the action was, on plaintiffs' motion, dismissed. In affirming the judgment, the court of appeal held that plaintiffs' failure to set forth clearly how or in what manner the convictions had been declared constitutionally invalid rendered the complaint vulnerable to demurrer for uncertainty and that the demurrer had been properly sustained (*68 Cal. App. 3d 621, 634)* .

In a footnote the court pointed out that plaintiffs also failed to allege the amounts of the fines and/or penalties assessed for which they sought recovery, but that this element of uncertainty had not been specified as a basis for the special demurrer (*68 Cal. App. 3d 621, 634 n.5*). With respect to the ground of special demurrer that was upheld, the court added that the nonalleged matter was material to plaintiffs' cause of action and would also have been ground for a general demurrer because it was an uncertainty with regards to matters not alleged that were essential to the cause of action (*68 Cal. App. 3d 621, 634)* .

Hege v. Worthington, Park & Worthington (1962) 209 Cal. App. 2d 670, 26 Cal. Rptr. 132 , was an action against a building contractor, its surety, a law firm, and others arising out of the contractor's failure to complete construction of a residence for plaintiff. The law firm was joined on the ground it had been retained by plaintiff to prosecute plaintiff's action against the contractor and surety and had allowed the statute of limitations to run. With respect to the cause of action against the surety, the third amended complaint alleged that the surety had issued a bond to ensure faithful performance of the contract for construction of the residence, that the contractor had defaulted and abandoned its contract, that the surety elected and agreed to complete the contract on behalf of the contractor, and that in spite of that fact, the surety failed, neglected, and refused to do so, to plaintiff's damage in the sums set forth. The surety demurred to this cause of action both generally and specially on the grounds of misjoinder of actions (no longer a ground of demurrer) and uncertainty. The general demurrer was overruled but the special demurrer was sustained with leave to amend and plaintiff elected not to amend.

On the subsequent appeal from the judgment for defendants, the court of appeal reversed various portions of the judgment but affirmed it insofar as it was based on the order sustaining the surety's special demurrer for uncertainty. The court pointed out that the demurrer alleged that count two of the complaint was uncertain in that it failed to give the date the surety refused to complete the contract; whether the residence had ever been occupied or used; the date the surety ceased work on the dwelling; in what respect the surety failed, neglected, and refused to complete the contract; and whether plaintiff was alleging that the surety refused to complete the contract in each of the respects in which the contractor failed to complete it. The court held that all these matters were ones the surety was entitled to be informed about in the complaint (*209 Cal. App. 2d 670, 682)* .

See also *Burke v. Maguire (1908) 154 Cal. 456, 467, 98 P. 21* (inadequate description of property in action based on fraudulent concealment of property); *Warren v. Atchison, Topeka & Santa Fe Ry. Co. (1971) 19 Cal. App. 3d 24, 36, 96 Cal. Rptr. 317* (defect in description of property in quiet title complaint); *Hills Trans. Co. v. Southwest Forest Industries, Inc. (1968) 266 Cal. App. 2d 702, 707-708, 72 Cal. Rptr. 441* (complaint for damages for fraud uncertain in numerous respects); *Ingram v. Glissman (1956) 145 Cal. App. 2d 418, 421-422, 302 P.2d 640* (complaint against surety on broker's bond for broker's defalcations uncertain in numerous respects); *Geo. Pepperdine Foundation v. Pepperdine (1954) 126 Cal. App. 2d 154, 162-163, 271 P.2d 600* (complaint by nonprofit charitable corporation against its former directors for damages resulting from alleged mismanagement of corporation's affairs during their incumbencies uncertain in numerous respects; case disapproved on another point in *Holt v. College of Osteopathic Physicians & Surgeons (1964) 61 Cal. 2d 750, 757, 40 Cal. Rptr. 244, 394 P.2d 932*); *Corum v. Hartford Acc. & Ind. Co. (1945) 67 Cal. App. 2d 891, 894, 155 P.2d 710* (complaint by plaintiff, who had been injured when hit by car of defendant's insured, to recover under insurance policy as alleged third-party beneficiary failed to allege date of accident); *Craig v. City of Los Angeles (1941) 44 Cal. App. 2d 71, 73, 111 P.2d 977* (disjointed and incoherent complaint in action for damages for alleged conspiracy to defraud); *Powell v. Lampton (1938) 30 Cal. App. 2d 43, 45-46, 85 P.2d 495* (complaint uncertain in its pleading of another action that might have constituted a plea in bar to the present action on the ground of es judicata or a plea in abatement on the ground of another action pending); *Butler v. Wyman (1933) 128 Cal. App. 736, 740, 18 P.2d 354* (complaint inaction for damages for personal injuries uncertain in raising doubt as to whether plaintiff at time of injury was in defendant's employ and injured in course of employment); *Lapique v. Ruef (1916) 30 Cal. App. 391, 392, 158 P. 339* (complaint uncertain and ambiguous in that it was not clear whether causes of action sued on were founded on alleged injuries to plaintiff's person, to his property, or to his character, or on injury to property of another, and whether acts complained of were committed by defendants in their

individual capacities or in one of other capacities in which they were alleged to have acted).

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7A-71 California Points & Authorities § 71.69

§ 71.69 Supporting Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Pleading Is Uncertain [Code Civ. Proc. § 430.10(f)]--Material Time or Date Omitted

[1] FORM Supporting Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Pleading Is Uncertain [Code Civ. Proc. § 430.10(f)]--Material Time or Date Omitted

[*Caption. See § 71.20.*]

THE SPECIAL DEMURRER TO THE COMPLAINT ON THE GROUND OF UNCERTAINTY SHOULD BE SUSTAINED BECAUSE THE COMPLAINT FAILS TO STATE THE DATE OR TIME THE ISSUABLE FACTS ALLEGED OCCURRED.

A. Objection by Demurrer. [*See § 71.68, Paragraph A.*]

B. Failure to Specify Time or Date. A complaint that fails to state the date or time of the issuable facts averred is uncertain and subject to demurrer on that ground (*Kraner v. Halsey (1889) 82 Cal. 209, 212, 22 P. 1137* ; *Gonzales v. State of California (1977) 68 Cal. App. 3d 621, 634, 137 Cal. Rptr. 681*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in support of a special demurrer for uncertainty when the complaint fails to state the date or time the issuable facts averred occurred.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel would the point out the omission from the face of the pleading, arguing, for example, that the date is essential to ascertain whether action is barred by the statute of limitations.

[b] Opposing Points and Authorities

In an appropriate case, the memorandum *set out in § 71.86* may be used to oppose the special demurrer supported by the foregoing memorandum.

See also *§§ 71.60[2]* and *71.68[2]*.

[3] Discussion of Authorities

[a] Failure to Specify Time or Date

Kraner v. Halsey *(1889) 82 Cal. 209, 22 P. 1137* , was an action to recover money paid by plaintiff at defendant's request. The complaint failed to state the date and time the issuable facts took place. Defendant demurred on the grounds the complaint failed to state facts sufficient to constitute a cause of action, the action was barred by the statute of limitations, and the complaint was uncertain, ambiguous, and unintelligible. The demurrer was sustained and plaintiff appealed from the subsequent judgment.

The Supreme Court reversed the judgment with directions to overrule the demurrer. The Court held that the complaint sufficiently stated a cause of action, that since dates and times were omitted it could not be ascertained from the face of the complaint whether or not the action was barred by the statute of limitations, and that the complaint was uncertain in having omitted the times and dates the issuable facts occurred. The court, however, held that the complaint was neither ambiguous nor unintelligible and that since these three grounds (uncertain, ambiguous, and unintelligible) were stated in the conjunctive and only one such ground appeared, the trial court erred in sustaining the demurrer on these grounds (*82 Cal. 209, 211-212)* .

It is to be noted that at the time the *Kraner* case decided, uncertainty, ambiguity, and unintelligibility each constituted a separate ground of demurrer. Under present law, ambiguity and unintelligibility are not separate grounds of demurrer, but, rather, are included in the word "uncertain." A principal reason a defendant may have for wanting the dates and times the issuable events occurred alleged is to expose the fact that the action is barred by the statute of limitations. Defendant will then file a demurrer to the amended complaint raising the objection that the complaint fails to state facts sufficient to constitute a cause of action in that it shows on its face that the action is barred by the statute of limitations. For points and authorities in support of such a demurrer, see Ch. 143, *Limitation of Actions* .

The facts and procedural background of ***Gonzales v. State of California*** *(1977) 68 Cal. App. 3d 621, 137 Cal. Rptr. 681* , are discussed in *§ 71.67[4][a]*. Defendant demurred to the amended complaint on the ground, among others, that the complaint was uncertain. One of its objections on this latter ground was that the complaint failed to set forth when the alleged causes of action arose, when the setting aside of the previous convictions occurred, or when the filing of the claim with the State Board of Control was made. The demurrer was sustained on all the grounds set forth in it with leave to amend. Plaintiffs chose not to amend and the action was, on plaintiffs' motion, dismissed. In affirming the judgment the court of appeal held that the complaint was objectionable in failing to set forth when the alleged causes of action arose and when the setting aside of the previous convictions occurred and that the demurrer for uncertainty was properly sustained (*68 Cal. App. 3d 621, 634)* .

Note that the court added that the foregoing matters were material to plaintiffs' cause of action and would also have been grounds for general demurrer because they were uncertainties with regard to matters not alleged that were essential to the cause of action (*68 Cal. App. 3d 621, 634)* .

[4] Additional Authorities

[a] Failure to Specify Time or Date

Geo. Pepperdine Foundation v. Pepperdine (1954) 126 Cal. App. 2d 154, 271 P.2d 600 , was an action by a nonprofit charitable corporation against its former directors for damages resulting from mismanagement of the corporation's affairs during their incumbencies. General and special demurrers to the second amended complaint were sustained and the action was dismissed on plaintiff's failure to amend. The court of appeal affirmed the judgment. With respect to the demurrers for uncertainty, the appellate court held that the complaint was uncertain in numerous respects. Among these, were the following: "While actions for negligence are barred after the lapse of two years from the act complained of, no dates are given whereby it can be ascertained which investments were made after February 6, 1950. Neither can it be ascertained which notes were sold after that date, or which transactions were completed prior to February 6, 1952, the date the action was filed." (*126 Cal. App. 2d 154, 162)* and, "It is alleged that the directors advanced $95,000 to Albert Nobell between January 6, 1948, and July 18, 1950. It is not certain what significance should be ascribed to such allegations. The failure to allege specific dates of such advances makes an intelligible answer impossible. Appellant has custody of all its books and correspondence; respondents have none of them. The dates of the occurrences of such events must be alleged with certainty." (*126 Cal. App. 2d 154, 162-163)* .

Note:

This case was disapproved on another point in *Holt v. College of Osteopathic Physicians & Surgeons (1964) 61 Cal. 2d 750, 757, 40 Cal. Rptr. 244, 394 P.2d 932* .

See also *Hills Trans. Co. v. Southwest Forest Industries, Inc. (1968) 266 Cal. App. 2d 702, 706, 72 Cal. Rptr. 441* (complaint in action for damages for breach of contract uncertain as to duration of contract); *Hege v. Worthington, Park & Worthington (1962)209 Cal. App. 2d 670, 682, 26 Cal. Rptr. 132* (discussed in *§ 71.68[4][a]*); *Corum v. Hartford Acc. & Ind. Co. (1945) 67 Cal. App. 2d 891* , 894, *155 P.2d 710* (complaint alleging accident occurred "on a date well known to defendant" rather than alleging date).

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7A-71 California Points & Authorities § 71.70

§ 71.70 Supporting Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Pleading Is Uncertain [Code Civ. Proc. § 430.10(f)]--Meaning of Allegations Ambiguous or Doubtful

[1] FORM Supporting Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Pleading Is Uncertain [Code Civ. Proc. § 430.10(f)]--Meaning of Allegations Ambiguous or Doubtful

[*Caption. See § 71.20.*]

THE SPECIAL DEMURRER TO THE COMPLAINT ON THE GROUND OF UNCERTAINTY SHOULD BE SUSTAINED BECAUSE THE MEANING OF THE ALLEGATIONS OF THE PLEADING ARE AMBIGUOUS, THAT IS, DOUBTFUL.

A. Objection by Demurrer. [*See § 71.68, Paragraph A.*]

B. Meaning Doubtful. A complaint is uncertain, which term includes ambiguous, when because of lack of clarity in pleading or inconsistency between allegations, its meaning is doubtful as to the theory of liability or basis of recovery, or as to other material matters (*Crow v. Hildreth (1870) 39 Cal. 618, 620* ; *Oppenheimer v. General Cable Corp. (1956) 143 Cal. App. 2d 293, 298, 300 P.2d 151*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in support of a special demurrer for uncertainty if the meaning of the allegations in the complaint is doubtful and hence ambiguous.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus counsel would identify conflicting allegations in the complaint, by paragraph number. For example, if a complaint in a breach of employment contract action contains in a single cause of action, allegations that plaintiff's damages resulted from wrongful discharge and from defendant's failure to give the employee the position for which the employee applied, counsel would argue that the conflict renders the defendant unable to prepare a defense and the court should therefore sustain the demurrer [*see Oppenheimer v. General Cable Corp. (1956) 143 Cal. App. 2d 293, 298, 300 P.2d 151* , discussed under *§ 71.70[3][a]*].

[b] Opposing Points and Authorities

In an appropriate case, the memorandum set out in *§ 71.86* may be used to oppose the special demurrer supported by the foregoing memorandum.

See also *§§ 71.60[2]* and *71.68[2]*.

[3] Discussion of Authorities

[a] Meaning Doubtful

Crow v. Hildreth *(1870) 39 Cal. 618* , was an action for damages for the alleged breach of an agreement. In one part of the complaint plaintiff alleged that the agreement breached was one to make a lease and in another part of the complaint that the agreement was a lease. This doubt as to the nature of the agreement was not clarified by the allegation as to the breach since it was to the effect that defendants had "wholly neglected, failed and refused to comply with the terms of their said agreement or to keep and perform any of their covenants, though often requested so to do." Defendants' demurrer to the complaint was overruled and they appealed from the subsequent judgment for plaintiff.

The Supreme Court reversed the judgment with directions to the trial court to sustain the demurrer. The Court stated that the demurrer should have been sustained on the ground of ambiguity (now uncertainty) and that this was not a mere matter of form since plaintiffs would been titled to a different measure of damages if it were a lease than they would be entitled to if it were a contract for a lease (*39 Cal. 618, 620)* .

Oppenheimer v. General Cable Corp. *(1956) 143 Cal. App. 2d 293, 300 P.2d 151* , was an action for declaratory relief or damages for breach of contract. Plaintiff was employed by defendant corporation and working pursuant to an employment contract between defendant and a labor union acting as a collective bargaining agent. The contract required defendant to recognize the principle of seniority in cases of layoffs, transfers, promotions, and filling vacancies and to fill vacancies by transfer or promotion of employees within defendant's respective units. Plaintiff alleged he was hired by defendant on October 28, 1955, that on November 30, 1955, defendant declared a vacancy in the position of raw materials and cost control clerk and invited applications from its employees, that plaintiff applied, that a few days later defendant hired a new employee to replace him in his current position, that the next day defendant orally notified him he was not being considered for the vacant position, and that he was then discharged without just or any cause and replaced by the new employee. He sought declaratory relief as to the rights and duties of the parties under the contract and damages up to $5,000 for any substantial breach by defendant determined to have occurred. Defendant's general demurrer was overruled but its special demurrer for ambiguity (now uncertainty) was sustained and on plaintiff's failure to amend the action was dismissed.

The court of appeal affirmed the judgment. The court stated that in an action for damages for breach of an employment

contract it is incumbent on a plaintiff to state with clarity how or in what manner he or she has been damaged, that this is particularly true when his or her pleading is challenged by a special demurrer for ambiguity on such grounds, and that the defendant was entitled to know the basis of plaintiff's claim for damages to enable it to prepare a defense. The court pointed out that in certain of his allegations the plaintiff seemed to base his claim for damages on the ground he was wrongfully discharged, while in other allegations he seemed to indicate his damages flowed from defendant's failure to give him the position for which he applied. The court said it was apparent that the plaintiff's complaint was ambiguous in failing to show clearly on which basis he intended to rely and concluded that it could not be ascertained from the complaint how or in what manner the plaintiff had been damaged, that such information was important to the defendant in the preparation of its defense, and that the defendant had properly sought this information by way of a special demurrer (*143 Cal. App. 2d 293, 298)* .

[4] Additional Authorities

[a] Meaning Doubtful

Hawley Bros. etc. Co. v. Brownstone (1899) 123 Cal. 643, 56 P. 468 , was an action to recover on six promissory notes. The caption of the complaint named Isaac Brownstone and Joseph Brownstone, partners, doing business under the firm name and style of I. Brownstone & Co., defendants. The body of the complaint did not name the defendants, contained no allegation as to who were the members of the partnership, referred throughout the six counts to the "defendant" in the singular number, and when referring to that defendant used the possessive adjective "its." Defendants demurred to the complaint on the grounds it failed to state facts sufficient to constitute a cause of action and was ambiguous (now uncertain). The demurrer was overruled and defendants filed an answer. Plaintiff's demurrer to the answer on the grounds it failed to state facts sufficient to constitute a defense and was uncertain was sustained, and judgment was entered for plaintiff from which judgment defendants appealed.

The Supreme Court reversed the judgment on the ground the demurrer to the answer should have been overruled and the demurrer to the complaint sustained (*123 Cal. 643, 648)* . The Court pointed out that the caption is not part of the complaint unless referred to in the body of the complaint (*123 Cal. 643, 646)* and said that it was not possible by any reading of the complaint, without interpolation, to say, whether one, and if one, which one, of the persons named in the caption, or whether both, or whether the partnership by its common name, was the defendant. To make the pleading intelligible and free from ambiguity it would be necessary to change the language in several material particulars, such as changing the word "defendant" to "defendants" in all the counts, wherever the word defendant appeared; changing the word "its" to "their," so that it would refer to the persons sued as copartners, and making the complaint show, what it does not, that they, the defendants named, were copartners as I. Brownstone & Co.; and that the several notes were executed by these defendants in the copartnership name. The Court stated that to do this, however, would extend the liberal rules of construction beyond reasonable bounds (*123 Cal. 643, 646-647)* .

Ankeny v. Lockheed Missiles & Space Co. (1979) 88 Cal. App. 3d 531, 151 Cal. Rptr. 828 , was an action by an employee against his employer and fellow employees for damages for intentional infliction of emotional distress causing physical illness and disability. Lockheed demurred specially and generally to the third amended complaint on several grounds. The trial court concluded it had no jurisdiction over the action, because workers' compensation was plaintiff's only remedy, that the complaint failed to state a cause of action for intentional infliction of emotional distress, and that the complaint was uncertain, and it sustained the demurrer. Plaintiff appealed from the subsequent judgment of dismissal.

The court of appeal held the demurrer had properly been sustained on all the above-stated grounds and affirmed the judgment. With respect to the demurrer for uncertainty, the appellate court pointed out that plaintiff had alleged that defendants "tortiously caused" and "conspired to tortiously cause" acts of an unspecified nature that caused plaintiff to be passed over for promotion and deprived of stewardship in his union. After first stating the rule that a pleading must allege facts and not conclusions and that material facts must be alleged directly and not by way of recital, the court said

that, in pleading, the essential facts on which a determination of the controversy depends should be stated with clearness and precision so that nothing is left to surmise and that those recitals, references to, or allegations of material facts that are left to surmise are subject to special demurrer for uncertainty. The court concluded that these conclusionary allegations, without facts to support them, were ambiguous. In response to plaintiff's argument that defendant was complaining of insufficient facts and not uncertainty, the court replied that an examination of the pleading with reference to these points showed the allegations to be ambiguous, hence uncertain, and that the trial court had properly sustained this special demurrer (*88 Cal. App. 3d 531, 537)* .

See also *Lapique v. Ruef (1916) 30 Cal. App. 391, 392, 158 P. 339* (complaint uncertain and ambiguous in that it was not clear whether causes of action sued on were founded on alleged injuries to plaintiff's person, to his property, or to his character, or on injury to property of another, and whether acts complained of were committed by defendants in their individual capacities or in one of other capacities in which they were alleged to have acted).

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7A-71 California Points & Authorities § 71.71

§ 71.71 Supporting Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Pleading Is Uncertain [Code Civ. Proc. § 430.10(f)]--Allegations Are Unintelligible

[1] FORM Supporting Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Pleading Is Uncertain [Code Civ. Proc. § 430.10(f)]--Allegations Are Unintelligible

[*Caption. See § 71.20.*]

THE SPECIAL DEMURRER TO THE COMPLAINT ON THE GROUND OF UNCERTAINTY SHOULD BE SUSTAINED BECAUSE THE ALLEGATIONS OF THE COMPLAINT ARE UNINTELLIGIBLE.

A. Objection by Demurrer. [*See § 71.68, Paragraph A.*]

B. Incoherent Allegations. A complaint, the allegations of which are so disjointed and incoherent as to render their meaning incomprehensible, is unintelligible (*Evarts v. Jones (1951) 104 Cal. App. 2d 109, 111, 231 P.2d 74*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in support of a special demurrer for uncertainty if the allegations in the complaint are unintelligible.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel would identify each statement in the complaint that renders the allegations unintelligible.

[b] Opposing Points and Authorities

In an appropriate case, the memorandum *set out in § 71.86* may be used to oppose the special demurrer supported by the foregoing memorandum.

See also *§§ 71.60[2]* and *71.68[2]*.

[3] Discussion of Authorities

[a] Incoherent Allegations

Evarts v. Jones *(1951) 104 Cal. App. 2d 109, 231 P.2d 74* , was an action for specific performance. The amended complaint was long, set forth the content of conversations, quoted from textbooks, code sections, and court decisions, and contained much lengthy argument. Defendant's demurrer on the grounds of failure to state a cause of action, misjoinder of actions (no longer a ground of demurrer), ambiguity, unintelligibility, and uncertainty was sustained with leave to amend, and on plaintiffs' failure to amend the action was dismissed. Plaintiffs appealed.

The court of appeal affirmed the judgment on the grounds the complaint failed to state a cause of action and that it was uncertain and unintelligible. The court, with respect to these latter grounds, said, "The uncertainties in the amended complaint are too numerous to enumerate here. The entire document is thoroughly unintelligible." Quoting from *Craig v. Los Angeles (1941) 44 Cal. App. 2d 71, 73, 111 P.2d 977* , the court added that the complaint was framed in such a disjointed and incoherent manner that the only course open to defendant was that of interposing a demurrer raising the questions of misjoinder of causes of action, uncertainty, ambiguity and unintelligibility (*104 Cal. App. 2d 109, 111)* .

[4] Additional Authorities

[a] Incoherent Allegations

The facts and procedural background of *Beresford Neighborhood Assn. v. City of San Mateo (1989) 207 Cal. App. 3d 1180, 255 Cal. Rptr. 434* , are discussed in *§ 71.20[3][a]*. In *Beresford Neighborhood Assn.*, the court of appeal affirmed judgment entered after the trial court sustained a demurrer and denied leave to amend. The complaint alleged, among other things that hearings by defendant city on a redevelopment project "were not in accordance with substantive due process." The court concluded that the demurrer was proper as to this claim because the claim was unintelligible (*207 Cal. App. 3d 1180, 1191)* .

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7A-71 California Points & Authorities § 71.72

§ 71.72 Supporting Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Pleading in Action on Contract Does Not Sufficiently Establish Whether Contract Is Written, Oral, or Implied by Conduct [Code Civ. Proc. § 430.10(g)]

[1] FORM Supporting Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Pleading in Action on Contract Does Not Sufficiently Establish Whether Contract Is Written, Oral, or Implied by Conduct [Code Civ. Proc. § 430.10(g)]

[*Caption. See § 71.20.*]

THE SPECIAL DEMURRER TO THE COMPLAINT FOUNDED ON A CONTRACT SHOULD BE SUSTAINED BECAUSE IT CANNOT BE ASCERTAINED FROM THE COMPLAINT WHETHER THE CONTRACT IS WRITTEN OR ORAL OR IMPLIED BY CONDUCT.

A. Objection by Demurrer. The party against whom a complaint has been filed may object to it by demurrer when the action is founded on a contract and it cannot be ascertained from the complaint whether the contract is written or oral or implied by conduct (*Code Civ. Proc. §§ 430.10(g), 430.30(a)*).

B. Sustention of Demurrer. When it cannot be ascertained from the complaint whether the contract on which the action is founded is written or oral or implied by conduct, a demurrer on that ground should be sustained (*see Otworth v. Southern Pac. Transportation Co. (1985) 166 Cal. App. 3d 452, 458-459, 212 Cal. Rptr. 743* ; *Hills Trans. Co. v. Southwest Forest Industries, Inc. (1968) 266 Cal. App. 2d 702, 706, 72 Cal. Rptr. 441*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in support of a special demurrer to a complaint if it cannot be ascertained from the complaint whether the contract on which the action is founded is written or oral or implied by conduct.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel would (1) identify allegations that establish the action to be one founded on contract; and (2) point out the absence of any allegation as to whether the alleged contract is written, oral, or implied by conduct.

With appropriate modifications, the foregoing memorandum may be used in support of a special demurrer to an answer that pleads a contract and from which it cannot be ascertained whether the contract is written or oral or implied by conduct [*Code Civ. Proc. § 430.20(c)*]. For a form of demurrer to the answer on this ground, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , § in California Forms of Pleading and Practice.

[b] Waiver of Objection

The objection that it cannot be ascertained from the pleading whether the contract on which the action is founded is written or oral or implied by conduct is waived if not raised by demurrer or answer [*Code Civ. Proc. § 430.80(a)*].

[c] Related Pleading and Practice Forms

For a form of demurrer on the ground it cannot be ascertained from the complaint whether the contract on which the action is founded is written or oral or implied by conduct, see the Ch. 206, *Demurrers and Motions for Judgment on the Pleadings,* § 206.129, in California Forms of Pleading and Practice.

[d] Opposing Points and Authorities

In an appropriate case, the memorandum *set out in § 71.87* may be used to oppose the special demurrer supported by the foregoing memorandum.

See also *§§ 71.20[2]* and *71.60[2]*.

[3] Discussion of Authorities

[a] Objection by Demurrer

Code Civ. Proc. § 430.10(g) provides that a party against whom a complaint or cross complaint has been filed may object to it by demurrer or answer, as provided in *Code Civ. Proc. § 430.30*, on the ground that in an action founded on a contract, it cannot be ascertained from the pleading whether the contract is written, oral, or implied by conduct. *Code Civ. Proc. § 430.30(a)* provides that when any ground for objection to a complaint or cross complaint appears on the face thereof, or from any matter of which the court is required to or may take judicial notice, the objection on that ground may betaken by a demurrer to the pleading.

[b] Sustention of Demurrer

In ***Otworth v. Southern Pac. Transportation Co.*** *(1985) 166 Cal. App. 3d 452 , 212 Cal. Rptr. 743* , the complaint, which alleged numerous theories of recovery, including breach of contract, arose out of a dispute concerning wage withholdings for income tax purposes by an employer. The defendant's demurrer was sustained and the plaintiff

appealed.

The court of appeal affirmed the dismissal. The court held that the complaint failed to state a cause of action. The court reasoned that the complaint failed to allege whether the employment contract was written or oral, it did not set forth the contract terms, and did not assert whether plaintiff, the employee, had performed. It also failed to allege whether the contract required the employer to refrain from withholding wages for tax purposes, even though that type of contract provision might have been invalid (*166 Cal. App.3d 452, 458-459)* .

Hills Trans. Co. v. Southwest Forest Industries, Inc. *(1968) 266 Cal. App. 2d 702, 72 Cal. Rptr. 441* , was an action by a truck common carrier against a paper company for damages for alleged breach of a haulage contract. The second amended complaint alleged that on September 1, 1962, defendant entered into a written contract with a newspaper company (originally named as a defendant but subsequently dropped from the action) to sell the latter newsprint at a price to include cost of delivery to the newspaper company in Los Angeles and that under this contract the newsprint was to be shipped by rail to Los Angeles and from the Los Angeles rail depot by a single trucking company to the newspaper company in Los Angeles. The complaint further alleged that (1) on October 19, 1962, defendant offered plaintiff an exclusive contract to haul the newsprint by truck from the railway depot to the newspaper facility; (2) under this offer deliveries were to start February 2, 1963, and to continue thereafter for a reasonable time; (3) the provisions of the defendant newspaper company contract governing delivery would be incorporated in the contract; (4) rates would be adjusted at 30-day intervals in accordance with the requirements of the Public Utilities Commission; (5) on November 8, 1962, plaintiff, in writing, accepted the offer; (6) plaintiff invested some $200,000 in equipment to carry out its duties under the contract; and (7) on May 13, 1964, defendant breached the contract by commencing to ship newsprint by truck direct from Arizona to the newspaper company in Los Angeles resulting in elimination of the local haulage business previously enjoyed by plaintiff under the contract. Defendant's general and special demurrers were sustained without leave to amend and plaintiff appealed from the subsequent judgment of dismissal.

The court of appeal affirmed the judgment. One of the grounds of special demurrer was that it could not be ascertained from the face of the pleading whether the contract sued on was written or oral. The appellate court held that this demurrer was properly sustained. The court pointed out that the complaint specifically described the contract between defendant and the newspaper company as written and plaintiff's acceptance of defendant's offer was written, but that it failed to state whether defendant's offer to plaintiff was written or oral.

[4] Additional Authorities

[a] Sustention of Demurrer

In *Ingram v. Glissman (1956) 145 Cal. App. 2d 418, 302 P.2d 640* , defendant surety demurred on the grounds of failure to state a cause of action, uncertainty, and failure to state whether plaintiff's contract employing defendant broker was written or oral. The trial court sustained the demurrer but did not specify the grounds. On plaintiff's failure to amend, the action was dismissed as to the surety and plaintiff appealed. The court of appeal held the special demurrers were properly sustained and affirmed the judgment. It pointed out numerous respects in which the complaint was uncertain (*145 Cal. App. 2d 418, 421-422)* and said that the uncertainties were aggravated by the fact that plaintiff refused to allege whether his agreement with defendant broker, on which the action against the surety was founded, was oral or written, which was a proper ground of demurrer (*145 Cal. App. 2d 418, 421*).

See also *Bollotin v. Cal. State Personnel Board (1955) 131 Cal. App. 2d 197, 202, 280 P.2d 509* (failure to allege whether contractual undertakings to employ plaintiff were written or oral).

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7A-71 California Points & Authorities § 71.73

§ 71.73 Supporting Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Certificate Required in Action Based on Professional Negligence [Code Civ. Proc. §§ 411.35(g), 430.10(h)]

[1] FORM Supporting Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Certificate Required in Action Based on Professional Negligence [Code Civ. Proc. §§ 411.35(g), 430.10(h)]

[*Caption. See § 71.20.*]

THE COURT SHOULD SUSTAIN THE DEMURRER TO THE COMPLAINT BECAUSE THE COMPLAINT SEEKS DAMAGES ARISING OUT OF THE ALLEGED PROFESSIONAL NEGLIGENCE OF DEFENDANT AS _____ [*specify, e.g.,* AN ARCHITECT *or* PROFESSIONAL ENGINEER *or* LAND SURVEYOR] AND PLAINTIFF'S ATTORNEY HAS NOT FILED THE CERTIFICATE REQUIRED BY CODE OF CIVIL PROCEDURE SECTION 411.35.

A. Objection by Demurrer. In an action for damages arising out of the professional negligence of an _____ [architect *or* professional engineer *or* land surveyor] holding a valid _____ [certificate *or* registration *or* license] issued under California law, the defendant may object to the complaint by demurrer when it appears that the certificate required by *Code of Civil Procedure Section411.35(a)* to be executed and filed by the plaintiff's attorney has not been filed (*Code Civ. Proc. §§ 411.35(g), 430.10(h), 430.30(a)*).

B. Judicial Notice of Court Records and Request. This court may take judicial notice of the records of any court of this state (which includes its own) and on proper request therefor is required to do so (*Evid. Code §§ 452, 453*). Pursuant to this authority, the court is hereby requested to take judicial notice of its records and file in this action (*see Code Civ. Proc. § 430.70*), which will reveal that the required certificate has not been filed.
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]

By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a demurrer to a complaint in an action for damages based on the professional negligence of an architect, professional engineer, or land surveyor, certified, registered, or licensed under California law, when plaintiff's attorney has not filed the certificate required by *Code Civ. Proc. § 411.35(a)*.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Counsel should refer to facts that may be judicially noticed by the court, in this case the court's records showing the absence of the certificate to be filed by plaintiff's attorney, and point out that the omission is grounds for a demurrer under *Code Civ. Proc. § 411.35(g)* and that the defendant's demurrer should therefore be sustained.

[b] Waiver of Objection

Although no appellate case has yet construed the provisions of *Code Civ. Proc. §§ 411.35* and *430.10(h)* vis-a-vis *Code Civ. Proc. §§ 430.30* and *430.80(a)*, it appears that the requirement of a certificate under *Code Civ. Proc. § 411.35(a)* is waived if not raised by demurrer or motion to strike [*see Code Civ. Proc. § 411.35(g)*]. That is, the objection is not one that may be raised by answer [*see Code Civ. Proc. § 430.80(a)* (providing that failure of a party against whom a complaint has been filed to object to it by demurrer or answer is deemed a waiver of the objection unless the objection is that the court has no jurisdiction of the subject of the action alleged or the pleading fails to state facts sufficient to constitute a cause of action)]. This conclusion is based on the fact that *Code Civ. Proc. § 411.35(g)* expressly makes failure to file the certificate grounds for objection by demurrer or motion to strike only [*see also Code Civ. Proc. § 430.30(a)* (authorizing filing of demurrer when the ground for objection appears on its face and from matter of which the court may take judicial notice)]. The court may take judicial notice of its own records in the case [*see Evid. Code § 452(d)*] that will disclose the failure to have filed the certificate.

[c] Related Pleading and Practice Forms

For a form of demurrer on the ground that the certificate required by Code Civ. Proc. § 411.35(a) has not been filed, see *Ch. 206, Demurrers and Motions for Judgment on the Pleadings, § 206.130*, in California Forms of Pleading and Practice (Matthew Bender).

See also §§ 71.20[2] and *71.60[2]*.

[3] Discussion of Authorities

[a] Objection by Demurrer

Code Civ. Proc. § 411.35(a) requires that on or before the date of service of the complaint (or cross complaint) on any defendant in any action for damages or indemnity, arising out of the professional negligence of a person holding a valid architect's certificate or a valid registration as a professional engineer or a valid land surveyor's license issued under California law, the plaintiff's (or cross complainant's) attorney shall file and serve the certificate specified in *Code Civ. Proc. § 411.35(b)*. This requirement applies to any complaint or cross complaint for equitable indemnity arising out of the rendition of professional services, whether or not the complaint or cross complaint specifically asserts or uses the terms "professional negligence" or "negligence" [*Code Civ. Proc. § 411.35(i)*].

Code Civ. Proc. § 411.35(g) provides that failure to file the certificate "shall be grounds for a demurrer" pursuant to *Code Civ. Proc. § 430.10* or a motion to strike pursuant to *Code Civ. Proc. § 435*.

Code Civ. Proc. § 430.10 provides that the party against whom a complaint or cross complaint has been filed may object to it by demurrer or answer as provided in *Code Civ. Proc. § 430.30* on the ground that no certificate was filed as required by *Code Civ. Proc. § 411.35* [*Code Civ. Proc. §§ 430.10, 430.10(h)*].

Code Civ. Proc. § 430.30(a) provides that when any ground for objection to a complaint or cross complaint appears on the face thereof, or from any matter of which the court is required to or may take judicial notice, the objection on that ground may be taken by a demurrer to the pleading.

[b] Judicial Notice of Court Records and Request

Evid. Code § 452 in pertinent part provides that judicial notice may be taken of the following matters to the extent they are not embraced in *Evid. Code § 451* (relating to mandatory judicial notice): "(d) Records of (1) any court of this state. ..." *Evid. Code § 453* provides that the trial court "shall" (which is defined in *Evid. Code § 11* as being mandatory) take judicial notice of any matter specified in *Evid. Code § 452* if a party requests it and (a) gives each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request; and (b) furnishes the court with sufficient information to enable it to take judicial notice of the matter.

Code Civ. Proc. § 430.70 provides that when the ground of demurrer is based on a matter of which the court may take judicial notice pursuant to *Evid. Code § 452* or *453*, such matter shall be specified in the demurrer, or in the supporting points and authorities for the purpose of invoking such notice, except as the court may otherwise permit.

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7A-71 California Points & Authorities § 71.74

§ 71.74 Opposing Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Plaintiff Has Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Lack of Capacity Not Shown on Face of Complaint

[1] FORM Opposing Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Plaintiff Has Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Lack of Capacity Not Shown on Face of Complaint

[*Caption. See § 71.30.*]

THE SPECIAL DEMURRER TO COMPLAINT SHOULD BE OVERRULED BECAUSE THE PLAINTIFF IS NOT REQUIRED TO ALLEGE CAPACITY TO SUE IN THIS ACTION AND THE FACE OF THE COMPLAINT DOES NOT DISCLOSE THAT HE/SHE LACKS CAPACITY TO SUE.

A. No Statute Requires Plaintiff to Allege Capacity to Sue. Unless a governing statute states otherwise, a complaint need not allege the plaintiff's capacity to sue (*Hydrotech Systems, Ltd. v. Oasis Waterpark (1991) 52 Cal. 3d 988, 994 n.4, 277 Cal. Rptr. 517, 803 P.2d 370*).

B. Lack of Capacity Does not Appear on Face of Complaint. If lack of capacity does not appear on the face of the complaint, it cannot be raised by demurrer (*Hydrotech Systems, Ltd. v. Oasis Waterpark (1991) 52 Cal. 3d 988, 994 n.4, 277 Cal. Rptr. 517, 803 P.2d 370*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in opposition to a special demurrer to a complaint based on the ground plaintiff lacks legal capacity to sue. The ground of opposition set out is that the plaintiff is not required by statute [*see, e.g., Bus. & Prof. Code § 17918*; *see also § 71.62*], to allege capacity to sue and alack of capacity is not apparent on the face of the complaint.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel would indicate that the complaint does not allege any facts showing that plaintiff is required by a statute to allege capacity to sue or that the plaintiff lacks capacity to sue.

Although the issue may not be raised by demurrer when the lack is not apparent from the face of the complaint (and, presumably, from facts of which the court is required to or may take judicial notice), the issue may be raised in the defendant's answer to the complaint as a special plea in abatement [*see Hydrotech Systems, Ltd. v. Oasis Waterpark (1991) 52 Cal. 3d 988, 994 n.4, 277 Cal. Rptr. 517, 803 P.2d 370]* .

See also *§ 71.20[2]*.

[3] Discussion of Authorities

[a] No Statute Requires Plaintiff to Allege Capacity to Sue

In ***Hydrotech Systems, Ltd. v. Oasis Waterpark*** *(1991) 52 Cal. 3d 988, 277 Cal. Rptr. 517, 803 P.2d 370* , an out-of-state corporation that manufactures and installs equipment designed to simulate ocean waves sued a California corporation that operates a water-oriented amusement park for, among other theories, breach of written contract and fraud. The defendant demurred on various grounds, including the ground that the complaint failed to show plaintiff's capacity to sue because it did not allege that plaintiff, as a foreign corporation conducting intrastate business had obtained a certificate of qualification from the Secretary of State (*52 Cal. 3d 988, 994 n.4*). The trial court sustained the demurrer to the written contract count with leave to amend, and sustained the demurrers to all other causes of action, including fraud, without leave to amend, and entered an order dismissing most of the defendants from the action. The plaintiff appealed. The court of appeal reversed the portion of the trial court's judgment that dismissed the plaintiff's fraud count, but affirmed the dismissal of the complaint in all other respects. Both parties sought review.

The Supreme Court reversed the judgment of the court of appeal insofar as it upheld the plaintiff's cause of action for fraud and affirmed in all other respects. In dicta, however, the Court addressed defendant's contention that the plaintiff failed to allege its capacity to sue. The Court stated that the business qualification issue was not presented by the appeal for that reason that unless the governing statute states otherwise, a complaint need not allege the plaintiff's capacity to sue. If lack of capacity does not appear on the face of the complaint, it cannot be raised by demurrer, but is a special plea in abatement (*52 Cal. 3d 988, 994 n.4*).

[b] Lack of Capacity Does not Appear on Face of Complaint

Hydrotech Systems, Ltd. v. Oasis Waterpark *(1991) 52 Cal. 3d 988, 277 Cal. Rptr. 517, 803 P.2d 370* , is *discussed under § 71.74[3][a]*.

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7A-71 California Points & Authorities § 71.75

§ 71.75 Opposing Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Plaintiff Has Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Plaintiff Is Entity Exempt From Fictitious Business Name Statutes [Bus. & Prof. Code § 17911]

[1] FORM Opposing Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Plaintiff Has Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Plaintiff Is Entity Exempt From Fictitious Business Name Statutes [Bus. & Prof. Code § 17911]

[*Caption. See § 71.30.*]

THE SPECIAL DEMURRER TO COMPLAINT SHOULD BE OVERRULED BECAUSE THE PLAINTIFF IS A _____ [NONPROFIT CORPORATION *or* NONPROFIT ASSOCIATION *or* REAL ESTATE INVESTMENT TRUST] AND THEREFORE EXEMPT FROM FICTITIOUS BUSINESS NAME STATUTE REQUIREMENTS.

A. Who Must File Statement. Only an individual, a limited liability company, or a partnership or other association or a corporation that regularly transacts business in this state for profit under a fictitious business name is required to file and publish a fictitious business name statement (*Bus. & Prof. Code §§ 17902, 17910, 17917*).

[*EITHER*]

B. Nonprofit Organizations. The fictitious business name statutes (*Bus.& Prof. Code § 17900 et seq.*) do not apply to nonprofit corporations or associations (*Bus. & Prof. Code § 17911*; *see Athens Lodge No. 70 v. Wilson (1953) 117 Cal. App. 2d 322, 324, 255 P.2d 482)* .

[*OR*]

B. Real Estate Investment Trust. The fictitious business name statutes (*Bus. & Prof. Code § 17900 et seq.*) do not apply to a real estate investment trust, as defined in *Section 23000 of the Corporations Code*, which has on file, pursuant to *Section 18200 of the Corporations Code*, a statement designating an agent for service or process or has qualified to do business under *Sections 2100 through 2116 of the Corporations Code* (*Bus. & Prof. Code § 17912*).

[*CONTINUE*]

C. Capacity to Sue. A plaintiff not required by the fictitious business name statutes (*Bus. & Prof. Code § 17900 et seq.*) to publish and file a fictitious business name statement is not barred from maintaining a court action for its failure to have done so (*see Bus. & Prof. Code § 17918*).

[*Optional*] **D. Capacity of Association to Sue.** Any partnership or other unincorporated association may sue in the name that it has assumed or by which it is known (*Code Civ. Proc. § 369.5(a)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a special demurrer to a complaint based on the ground plaintiff lacks legal capacity to sue because the complaint does not allege that plaintiff has filed and published a fictitious business name statement. The ground of opposition set out is that plaintiff is a nonprofit organization or real estate investment trust and, hence, is exempt from that requirement.

In an appropriate case, these points and authorities may be submitted in opposition to the demurrer supported by the memorandum *set out in § 71.62*.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. That is, counsel should demonstrate, from facts appearing on the face of the complaint or from those that the court is required to or may take judicial notice, that the plaintiff is an entity that is by statute exempt from the fictitious business name filing requirements.

See also *§§ 71.20[2]* and *71.74[2]*.

[3] Discussion of Authorities

[a] Who Must File Statement

Bus. & Prof. Code § 17910 in pertinent part provides that every person who regularly transacts business in this state for profit under a fictitious business name shall file a fictitious business name statement.

Bus. & Prof. Code § 17902 defines "person" as used in the fictitious business name statutes [*Bus. & Prof. Code § 17900 et seq.*] as including individuals, a limited liability company, partnerships and other associations, and corporations.

Bus. & Prof. Code § 17917 sets forth the requirements with respect to the publication of the fictitious business name statement.

[b] Nonprofit Organizations

Bus. & Prof. Code § 17911 provides that "this chapter" [i.e., *Bus. & Prof. Code § 17900 et seq.*] does not apply to a nonprofit corporation or association, including, but not limited to, organizations such as churches, labor unions, fraternal and charitable organizations, nonprofit hospitals, and similar organizations.

Athens Lodge No. 70 v. Wilson *(1953) 117 Cal. App. 2d 322, 255 P.2d 482* , was an action by an unincorporated fraternal association to enjoin acts of alleged unfair competition. Both in the trial court and on appeal from the judgment for plaintiff, defendant contended that plaintiff did not have legal capacity to sue both on the ground it was not a jural entity and hence could not sue in its own name and on the ground it had not published and filed the fictitious business name certificate required by former Civ. Code § 2466 et seq. (the predecessor statutes to *Bus. & Prof. Code § 17900 et seq.*).

The court of appeal held that the association could, under former Civ. Code § 3369, sue in its own name [*now see Code Civ. Proc. § 369.5, discussed under § 71.75[3][e]*], and that it was not required to publish and file a fictitious business name certificate. With respect to this latter ground the court pointed out that the former statutes applied (as does *Bus. & Prof. Code § 17910*) only to a plaintiff "transacting business in this state" and that plaintiff was not transacting business within the meaning of the statute (*117 Cal. App. 2d 322, 324)* . (Implicit in the court's holding was the requirement that the business engaged in be for profit and this requirement is now made express in the present statute.)

[c] Real Estate Investment Trust

Bus. & Prof. Code § 17912 exempts from the fictitious business name statutes [*Bus. & Prof. Code § 17900 et seq.*] a real estate investment trust meeting the requirements of that section as set forth in Optional Paragraph D of the form.

[d] Capacity to Sue

Bus. & Prof. Code § 17918 in pertinent part provides that no person transacting business under a fictitious business name contrary to the provisions of "this chapter" [*i.e., Bus. & Prof. Code § 17900 et seq.*], or his, her, or its assignee, may maintain any action on or on account of any contract made, or transaction had, in the fictitious business name in any court of this state until the fictitious business name statement has been executed, filed, and published as required by this chapter.

[e] Capacity of Association to Sue

Code Civ. Proc. § 369.5(a) provides that any partnership or other unincorporated association, whether organized for profit or not, may sue and be sued in the name that it has assumed or by which it is known.

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7A-71 California Points & Authorities § 71.76

§ 71.76 Opposing Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Plaintiff Has Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Plaintiff's Name Is Not Fictitious [Bus. & Prof. Code § 17900]

[1] FORM Opposing Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Plaintiff Has Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Plaintiff's Name Is Not Fictitious [Bus. & Prof. Code § 17900]

[*Caption. See § 71.30.*]

THE SPECIAL DEMURRER TO THE COMPLAINT SHOULD BE OVERRULED BECAUSE PLAINTIFF'S BUSINESS NAME IS NOT FICTITIOUS.

[*EITHER*]

A. Nonfictitious Business Name. For the purpose of determining if the fictitious business name statutes should be complied with, a fictitious business name is defined as, in the case of an individual, a name that does not include the surname of the individual or a name that suggests the existence of additional owners (*Bus. & Prof. Code § 17900(b)(1)*). A name that suggests the existence of additional owners within the meaning of subdivision (b) is one which includes such words as "Company," "& Company," "& Son," "& Sons," "& Associates," "Brothers," and the like, but not words that merely describe the business being conducted (*Bus. & Prof. Code § 17900(c)*).

[*OR*]

A. Nonfictitious Business Name. For the purpose of determining if the fictitious business name statutes should be complied with, a fictitious business name is defined as, in the case of a partnership or other association of persons, other than a limited partnership which has filed a certificate of limited partnership with the Secretary of State pursuant to *Corporations Code Section 15621* or *15902.01*, a foreign limited partnership which has filed an application for registration with the Secretary of State pursuant to *Corporations Code Section 15692* or *15902.02*, a registered limited

liability partnership that has filed a registration pursuant to *Corporations Code Section 15049* or *16953*, or a foreign limited liability partnership that has filed an application for registration pursuant to *Corporations Code Section 15055* or *16959*, a name that does not include the surname of each general partner or a name that suggests the existence of additional owners (*Bus. & Prof. Code § 17900(b)(2)*). A name that suggests the existence of additional owners within the meaning of subdivision (a) is one which includes such words as "Company," "& Company," "& Son," "& Sons," "& Associates," "Brothers," and the like, but not words that merely describe the business being conducted (*Bus. & Prof. Code § 17900(c)*).

[*OR*]

A. Nonfictitious Business Name. For the purpose of determining if the fictitious business name statutes should be complied with, a fictitious business name is defined as, in the case of a corporation, any name other than the corporate name stated in its articles of incorporation (*Bus. & Prof. Code § 17900(b)(3)*).

[*OR*]

A. Nonfictitious Business Name. For the purpose of determining if the fictitious business name statutes should be complied with, a fictitious business name is defined as, in the case of a _____ [limited partnership which has filed a certificate of limited partnership with the Secretary of State pursuant to *Corporations Code Section 15621 or* foreign limited partnership which has filed an application for registration with the Secretary of State pursuant to *Corporations Code Section 15692*], any name other than the name of the limited partnership as on file with the Secretary of State (*Bus. & Prof. Code § 17900(b)(4)*).

[*OR*]

A. Nonfictitious Business Name. For the purpose of determining if the fictitious business name statutes should be complied with, a fictitious business name is defined as, in the case of a _____ [limited liability company, any name other than the name stated in its articles of organization *or* foreign limited liability company which has filed an application for registration with the Secretary of State pursuant to *Corporations Code Section 17451*], any name other than the name of the limited liability company as on file with the Secretary of State (*Bus. & Prof. Code § 17900(b)(5)*).

[*CONTINUE*]

B. Inapplicability of *Business and Professions Code Section 17918* to Plaintiff. *Business and Professions Code Section 17918*, prohibiting maintenance of an action by a party who has failed to file and publish a fictitious business name statement, does not apply to a business whose name is not a fictitious business name within the meaning of *Business and Professions Code Section 17900* (*Flora v. Hankins (1928) 204 Cal. 351, 352-353, 268 P. 331*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a special demurrer to a complaint based on the ground plaintiff lacks legal capacity to sue because the pleading does not allege that plaintiff has filed and published a fictitious business name statement. The ground of opposition set out is that plaintiff's name is not a fictitious business name within the meaning of *Bus. & Prof. Code § 17900*.

In an appropriate case, these points and authorities may be submitted in opposition to the demurrer supported by the memorandum *set out in § 71.62*.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel would point out how the name under which plaintiff sues is not a fictitious business name, as that term is defined in *Bus. & Prof. Code § 17900*.

See also *§§ 71.20[2]* and *71.74[2]*.

[3] Discussion of Authorities

[a] Inapplicability of Business and Professions Code Section 17918 to Plaintiff

Flora v. Hankins *(1928) 204 Cal. 351, 268 P. 331* , was an action by copartners doing business under the name of Flora & Mahedy to foreclose a mechanic's lien on real property. Defendant appealed the judgment for plaintiffs, contending, among other things, that plaintiffs lacked capacity to maintain the action because they had not been shown to have filed or published the fictitious business name certificate (now statement) required by former Civ. Code §§ 2466 and 2468 [*now see Bus. & Prof. Code §§ 17910* and *17917*].

The Supreme Court affirmed the judgment. The Court pointed out that Flora & Mahedy, which were the surnames of the two partners, was not a fictitious business name, and held that compliance with the fictitious business name statutes is not required when the business name is not a fictitious one (*204 Cal. 351, 352-353)* .

[4] Additional Authorities

[a] Inapplicability of Bus. & Prof. Code § 17918 to Plaintiff

Lamberson v. Bashore (1914) 167 Cal. 387, 139 P. 817 , was an action by an attorney against his clients on promissory notes and an account stated. Some of the notes had been executed while plaintiff was in legal partnership with his son doing business under the name of Lamberson & Lamberson and were made payable to the firm, but plaintiff had acquired the entire interest in the notes before suit. Defendants appealed from a judgment for plaintiff contending, among other things, that plaintiff, as the assignee of the firm of Lamberson & Lamberson, lacked capacity to sue because the firm had failed to sign and acknowledge the certificate (now statement) required by former Civ. Code §§ 2466 and 2468 [*now see Bus. & Prof. Code §§ 17910, 17917*]. In modifying the judgment with respect to the amount awarded and affirming it as modified, the Supreme Court said there was no merit in defendants' contention since the name, Lamberson & Lamberson, indicates that there are two persons of that name engaged in business together and is not a fictitious business name (*167 Cal. 387, 391)* .

Pendleton v. Cline (1890) 85 Cal. 142, 24 P. 659 , was an action by copartners, doing business under the firm name of Pendleton & Williams, to recover for services in making an abstract of title. Defendants counterclaimed for damages caused by plaintiffs' alleged failure to make the abstract in time to enable them to borrow money on their property with which to purchase other lands for which they had been negotiating and which had substantially increased in value

during the period of the delay. From a judgment for plaintiffs, defendants appealed, contending, among other things, that plaintiffs were prevented from recovery in their action because they had never published the fictitious business name required by former Civ. Code § 2466 [*now see Bus. & Prof. Code § 17917*]. The Supreme Court, after pointing out that the name of one of the partners was Pendleton and that of the other was Williams and that the firm name of Pendleton & Williams was "certainly not fictitious," held that former Civ. Code § 2466 was inapplicable to such a name (*85 Cal. 142, 144-145)* and affirmed the judgment (*85 Cal. 142, 146*).

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7A-71 California Points & Authorities § 71.77

§ 71.77 Opposing Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Plaintiff Has Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Failure to File and Publish Fictitious Business Name Statement [Bus. & Prof. Code §§ 17910, 17917] Does Not Bar Tort Action

[1] FORM Opposing Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Plaintiff Has Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Failure to File and Publish Fictitious Business Name Statement [Bus. & Prof. Code §§ 17910, 17917] Does Not Bar Tort Action

[*Caption. See § 71.30.*]

THE SPECIAL DEMURRER TO THE COMPLAINT SHOULD BE OVERRULED BECAUSE THE ACTION SUED ON IS IN TORT AND NOT ON A CONTRACT MADE OR TRANSACTION HAD IN THE FICTITIOUS BUSINESS NAME.

Business and Professions Code Section 17918 **Does Not Apply to Tort Actions.** *Business and Professions Code Section 17918* by its own terms, prohibits maintenance by a plaintiff who is required but has failed to file and publish a fictitious business name statement only of actions on or on account of a contract made or transaction had in the fictitious business name. The statement, therefore, is not a condition precedent to the maintenance of an action in tort (*see Bus. & Prof. Code § 17918*; *Ralph v. Lockwood (1882) 61 Cal. 155, 156* ; *Thompson v. Byers (1931) 116 Cal. App. 214, 216-217, 2 P.2d 496*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in opposition to a special demurrer to a complaint based on the ground plaintiff lacks legal capacity to sue because the complaint does not allege that plaintiff has filed and published a fictitious business name statement. The ground of opposition set out is that *Bus. & Prof. Code § 17918*, prohibiting maintenance of an action by a person who is required but has failed to file and publish a fictitious business name statement, does not apply to tort actions.

In an appropriate case, the foregoing memorandum may be submitted in opposition to the demurrer supported by the memorandum *set out in § 71.62*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should refer to specific allegations in the complaint that indicate that the action is a tort action.

See also *§§ 71.20[2]* and *71.74[2]*.

[3] Discussion of Authorities

[a] Business and Professions Code Section 17918 Does Not Apply to Tort Actions

Ralph v. Lockwood *(1882) 61 Cal. 155* , was an action for conversion of crops. Defendant, among other things, contended that plaintiffs could not maintain the action for the reason they had not filed the certificate (now statement) required by former Civ. Code §§ 2466 and 2468 [*now see Bus. & Prof. Code §§ 17910, 17917, 17918*]. From a judgment for plaintiffs, defendant appealed.

The Supreme Court affirmed the judgment. The Court said that *Civ. Code § 2468* [*now see Bus. & Prof. Code § 17918*] does not apply to torts and that as the action was for a conversion of personal property, plaintiffs' rights were unaffected by the provisions of that section (*61 Cal. 155, 156)* .

Thompson v. Byers *(1931) 116 Cal. App. 214, 2 P.2d 496* , was an action for conversion of a stock of goods. Plaintiff conducted business under the name of Home Specialty Company and was retailing goods under that name but had neither filed nor published a fictitious business name certificate (now statement) as required by former Civ. Code §§ 2466 and 2468 [*now see Bus. & Prof. Code §§ 17910, 17917, 17918*]. The action was brought in plaintiff's own name. The trial court ruled that plaintiff's failure to file and publish any certificate of carrying on business under a fictitious name was immaterial as to her right to maintain the action. From a judgment for plaintiff, defendant appealed contending, among other things, that the above ruling was error. Defendant attempted to distinguish the earlier cases holding that former Civ. Code § 2468 did not apply to tort actions by pointing out that that section had been amended to include the phrase "or transactions had."

The court of appeal affirmed the judgment. The court reiterated the rule that former Civ.Code § 2468 did not apply to tort cases and, specifically, that the word "transaction," as used in the section as amended, "must be something of a mutual nature and would not extend to torts" (*116 Cal. App. 214, 216-217)* . The court explained that had the phrase been added to the statute to cover tort cases, the Legislature could and properly would have added "in all cases" or "transactions and torts." The court pointed out that the Legislature did not do this and that the court would not presume that the Legislature meant anything more than it said (*116 Cal. App. 214, 217)* .

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7A-71 California Points & Authorities § 71.78

§ 71.78 Opposing Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Plaintiff Has Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Plaintiff Is Foreign Business Not Transacting Business in California

[1] FORM Opposing Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Plaintiff Has Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Plaintiff Is Foreign Business Not Transacting Business in California

[*Caption. See § 71.30.*]

THE SPECIAL DEMURRER TO THE COMPLAINT SHOULD BE OVERRULED BECAUSE THE COMPLAINT SHOWS ONLY THAT PLAINTIFF IS A FOREIGN BUSINESS SUING ON A _____ [CONTRACT MADE *or* TRANSACTION HAD] IN ITS FICTITIOUS BUSINESS NAME AND _____ [DOES NOT ALLEGE ANY FACTS FROM WHICH IT MAY BE INFERRED THAT PLAINTIFF IS (REGULARLY) TRANSACTING *or* AFFIRMATIVELY ALLEGES FACTS SHOWING THAT PLAINTIFF IS NOT (REGULARLY) TRANSACTING] BUSINESS IN CALIFORNIA UNDER ITS FICTITIOUS BUSINESS NAME.

A. When Demurrer Is Authorized. A demurrer to a complaint on the ground plaintiff lacks legal capacity to sue (*Code Civ. Proc. § 430.10(b)*) is authorized only when the ground for objection appears from the face of the complaint or from matter of which the court is required to or may take judicial notice (*Code Civ. Proc. § 430.30(a)*).

B. Applicability of Statutory Prohibition Against Maintenance of Action. The statutory prohibition against maintenance of an action by a person doing business under a fictitious business name on a _____ [contract made *or* transaction had] in the fictitious business name until he or she or it has filed and published a fictitious business name statement as required by *Sections 17900 through 17930 of the Business and Professions Code* applies only to actions by persons required to comply with those statutes (*Bus.& Prof. Code § 17918*).

C. Who Must Comply. Only a person who regularly transacts business in California for profit under a fictitious business name is required to file and publish a fictitious business name statement in accordance with the provisions of *Sections 17900 through 17930 of the Business and Professions Code* (*Bus. & Prof. Code §§ 17910, 17917(a)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in opposition to a special demurrer to a complaint based on the ground plaintiff lacks legal capacity to sue because the complaint does not allege that plaintiff has filed and published a fictitious business name statement. The ground of opposition is that plaintiff is excluded from the filing and publishing requirement of *Bus. & Prof. Code § 17918* because the plaintiff is a foreign business not transacting, or not regularly transacting, business in California under a fictitious business name [*see Bus. & Prof. Code § 17910*].

In an appropriate case, the foregoing memorandum may be submitted in opposition to the demurrer supported by the memorandum *set out in § 71.62*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should demonstrate from facts appearing on the face of the complaint, or of which the court is required to or may take judicial notice, that the plaintiff is not transacting, or is not regularly transacting business in California.

See also *§§ 71.20[2]* and *71.74[2]*.

[3] Discussion of Authorities

[a] Who Must Comply

Bus. & Prof. Code § 17910 requires only persons who regularly transact business in this state for profit under a fictitious business name to file a fictitious business name statement. *Bus. & Prof. Code § 17917(a)* requires that a fictitious business name statement be published within 30 days after it has been filed.

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7A-71 California Points & Authorities § 71.79

§ 71.79 Opposing Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--No Other Action Is Pending Between Same Parties on Same Cause [Code Civ. Proc. § 430.10(c)]--Other Action Is Not Between Same Parties

[1] FORM Opposing Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--No Other Action Is Pending Between Same Parties on Same Cause [Code Civ. Proc. § 430.10(c)]--Other Action Is Not Between Same Parties

[*Caption. See § 71.60.*]

THE SPECIAL DEMURRER TO THE COMPLAINT SHOULD BE OVERRULED BECAUSE THE TWO ACTIONS ARE NOT _____ [BETWEEN THE SAME PARTIES *or* BASED ON THE SAME CAUSE].

A. Nonfavored Plea. The objection that there is another action pending between the same parties on the same cause is a plea in abatement and is not favored (*Lord v. Garland (1946) 27 Cal. 2d 840, 848, 168 P.2d 5*).

B. Same Parties and Same Actions Required. An objection that there is another action pending on the same cause of action lies only when the parties to the two actions are the same and the prior pending action is on the same cause as the present action (*see Code Civ. Proc. § 430.10(c)*).

[*EITHER*]

C. Actions Not Between Same Parties. A demurrer on the ground of another action pending does not lie unless it appears that both actions are contested by the same parties (*Williams v. California (1976) 62 Cal. App. 3d 960, 965, 133 Cal. Rptr. 539*).

[*OR*]

C. Actions Not on Same Cause. A demurrer on the ground of another action pending does not lie unless it appears that

the causes of action and the issues in the two suits are substantially identical (*Lord v. Garland (1946) 27 Cal. 2d 840, 848, 168 P.2d 5*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in opposition to a special demurrer to a complaint based on the ground of another action pending. The grounds of opposition set out are that the two pending actions are not contested by the same parties or are not based on the same cause of action.

In an appropriate case, the foregoing memorandum may be submitted in opposition to the demurrer supported by the memorandum *set out in § 71.65*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should refer to the absence of allegations in the complaint and of judicially noticeable facts from which it may be inferred that there is another action pending between the same parties on the same cause of action, and should refer to any affirmative allegations and judicially noticeable facts showing that the action pending is not between the same parties on the same cause of action.

[b] Related Points and Authorities

For points and authorities opposing a general demurrer to a complaint to a ground the action is barred by a prior federal court judgment and the point of the opposition is that the federal court in the prior action declined to exercise pendent jurisdiction over the state claim sued on, see *§ 71.35*.

See also *§§ 71.20[2]* and *71.74[2]*.

[3] Discussion of Authorities

[a] Nonfavored Plea

Lord v. Garland *(1946) 27 Cal. 2d 840, 168 P.2d 5* , was an action for declaratory and injunctive relief and to recover money deposited with the State Department of Motor Vehicles. Pursuant to a stipulation filed in a prior action and a court order based on it, plaintiff had paid certain fees imposed by a statute to the DMV on condition that, if the statute should finally be declared unconstitutional in that action or otherwise, the amount deposited should be returned to him, but in the event of a contrary determination the department might retain the fund, which amounted to over $88,000. The prior action was not brought to trial within five years and was dismissed on that ground. The present action was filed during the pendency of the appeal in the prior action. The complaint was in three counts: (1) for a declaration of the rights of the parties to the money deposited under the stipulation and order in the prior litigation; (2) for a determination of the constitutionality of the specific statute involved; and (3) for an order enjoining the state officials as trustees from disposing of the fund created pursuant to the stipulation prior to an adjudication on the merits. Defendants' general and special demurrer to the complaint on the ground, among others, of another action pending was sustained without leave to amend, although the trial court did not indicate the basis for its ruling. Plaintiff appealed from the subsequent

judgment of dismissal.

The Supreme Court reversed the judgment with directions to the trial court to overrule the demurrer. The Court said that under Code Civ. Proc. § 430 (repealed; now see *Code Civ. Proc. § 430.10*), the pendency of another action between the same parties for the same cause is made a ground for demurrer, but that the plea is dilatory in its nature and is not favored (*27 Cal. 2d 840, 848)* .

[b] Same Parties and Same Actions Required

Code Civ. Proc. § 430.10 provides that a party against whom a complaint or cross complaint has been filed may object to it by demurrer or answer as provided in *Code Civ. Proc. § 430.30* on the ground "(c) There is another action pending between the same parties on the same cause of action."

[c] Actions Not Between Same Parties

Williams v. California *(1976) 62 Cal. App. 3d 960, 133 Cal. Rptr. 539* , was an action against the State of California and the Director of the California Department of Benefit Payments by an applicant for benefit payments under Aid to the Totally Disabled Program (ATD) for damages allegedly resulting from the director's failure to have rendered a fair hearing decision on the application within the time prescribed by law. The State's demurrer on the ground the complaint failed to state facts sufficient to constitute a cause of action (based on alleged immunity from suit) was overruled but its demurrer on the ground of another action pending was sustained without leave to amend and plaintiff appealed.

Although the court of appeal affirmed the judgment on the ground the general demurrer should have been sustained, the court held that the special demurrer on the ground of another action pending should not have been sustained since the prior action was no longer pending, it was not between the same parties, and it was not on the same cause. With respect to the special demurrer, the court pointed out that the prior action was a class action for a writ of mandate to compel the director to comply with the time requirements of the federal regulation, that while plaintiff was not a named party in the prior action he was within the class of persons represented, that judgments in class actions were binding on all members of the class subsequently coming into the class, and that the judgment is one which can be availed of by every member of there presented class, present or future (*62 Cal. App. 3d 960, 965)* . But, to sustain the idea of another action pending, it is essential that it appear that both suits are contested by the same parties. The court concluded that both suits were not contested by the same parties (*62 Cal. App. 3d 960, 965)* and held that the trial court erred in sustaining the demurrer on the ground of another action pending (*62 Cal. App. 3d 960, 966)* .

[d] Actions Not on Same Cause

The facts and procedural background of ***Lord v. Garland*** *(1946) 27 Cal.2d 840* , *168 P.2d 5* , are *discussed under § 71.79[3][a]*. In reversing the judgment with directions to the trial court to overrule the demurrer, the Supreme Court said that a demurrer on the ground of another action pending may be made only when the face of the complaint shows that the causes of action and issues in the two suits are substantially the same and that when the prior suit does not involve the entire cause of action presented by the complaint in the later litigation, the plea should be raised by answer rather than by demurrer (*27 Cal.2d 840, 848)* . The Court said the plea could be maintained only when the claim sued on in the second action was such that a final judgment in the first could be pleaded in bar as a former adjudication (*27 Cal.2d 840, 848)* and that the rule of res judicata extends only to the facts and conditions as they existed at the time the judgment was rendered, or more correctly speaking, at the time the issues in the first action were made, and to the legal rights and relations of the parties as fixed by the facts determined by that judgment, and that when other facts or conditions intervene before the second suit, furnishing a new basis for the claims and defenses of the respective parties, the issues are no longer the same and the former judgment cannot be pleaded in bar to the second action (*27 Cal.2d 840, 849)* . Applying these rules to the complaint before it, the Court said it did not appear whether all matters sued on in the second action were adjudged in the former action, or whether such matters were actually and necessarily included

in or necessary to the first action, or whether other facts and conditions had intervened before commencement of the second suit and for these reasons, at least, the objection of another action pending should have been raised by answer rather than by demurrer (*27 Cal.2d 840, 849)* .

With respect to the statement in the above case that the ground of abatement must appear from the face of the complaint, note that under present law the objection may appear either from the face of the complaint or from judicially noticed matter [*Code Civ. Proc. § 430.30(a)*].

[4] Additional Authorities

[a] Nonfavored Plea

The facts and procedural background of *Williams v. California (1976) 62 Cal. App. 3d 960, 133 Cal. Rptr. 539* , are *discussed under § 71.79[3][c]*. With respect to the special demurrer on the ground of another action pending, the court of appeal explained that the underlying theory of the plea that there is another action pending is that the first action normally will be an ample remedy and that the second action is therefore unnecessary and vexatious, that such a plea does not challenge plaintiff's claim on the merits but merely objects to the particular proceeding to enforce it, and that, for this reason, the ground of demurrer is regarded as a plea in abatement and is not favored (*62 Cal. App. 3d 960, 964)* .

The facts and procedural background of *Colvig v. RKO Gen., Inc. (1965) 232 Cal. App. 2d 56, 42 Cal. Rptr. 473* , are discussed in *§ 71.39[3][a]*. The court of appeal held that the plaintiff's demurrer should not have been sustained on any of the asserted grounds, including the ground that the court lacked jurisdiction to hear the matter because it involved the same controversy that was the subject of the confirmation of an arbitration award in a prior proceeding in the same court. With respect to the objection that another action was pending, the court said that this ground of demurrer is a plea in abatement, also sometimes called a dilatory plea, and that such a plea does not challenge the plaintiff's claim on the merits but merely objects to the particular proceeding to enforce it, and that, for this reason, a plea in abatement is said to be disfavored (*232 Cal. App. 2d 56, 70)* . The court added that with respect to this plea, the underlying theory is that the first cause of action will normally be an ample remedy, and that the second action is therefore unnecessary and vexatious (*232 Cal. App. 2d 56, 70)* .

See also *Perry v. Jordan (1949) 34 Cal. 2d 87, 90, 207 P.2d 47* (plea of another action pending is dilatory in nature and not favored by the courts); *Conner v. Bank of Bakersfield (1917) 174 Cal. 400, 402, 163 P. 353* (same); *San Martin v. Superior Court (1959) 169 Cal. App. 2d 14, 18, 336 P.2d 618* (a plea in abatement is dilatory in nature and not favored).

[b] Actions Not Between Same Parties

The facts and procedural background of *Colvig v. RKO Gen., Inc. (1965) 232 Cal. App. 2d 56, 42 Cal. Rptr. 473* , are discussed in *§ 71.39[3][a]*. In reversing the judgment, the court of appeal said that to sustain the plea of another action pending it is essential that it shall appear that both suits are contested by the same parties (*232 Cal. App. 2d 56, 70)* .

See also *Ashton v. Heggerty (1900) 130 Cal. 516, 520, 62 P. 934* (overruling plea in abatement was justified since present action was not between same parties as former action); *Daly v. White (1950) 100 Cal. App. 2d 22, 26, 222 P.2d 950* (abatement lies only when parties plaintiff and parties defendant are identical).

[c] Actions Not on Same Cause

The facts and procedural background of *Williams v. California (1976) 62 Cal. App. 3d 960, 133 Cal. Rptr. 539* , are discussed under § 7179[3][c]. The court said that to sustain the plea of another action pending, it must appear that both suits are predicated on the same cause of action. The court explained that the two suits were not on the same cause since

the prior action sought compliance by the director with federal and state law whereas the present action sought damages for personal injuries allegedly sustained by the defendants' delay in granting plaintiff ATD assistance (*62 Cal. App. 3d 960, 965)* .

The facts and procedural background of *Colvig v. RKO Gen., Inc. (1965) 232 Cal. App. 2d 56, 42 Cal. Rptr. 473* , are discussed in *§ 71.39[3][a]*. The court of appeal said that for a second action to be abated because of the pendency of a prior action, it is elementary that the issues in the two actions must be substantially the same and that in determining this question the test applied is whether a final judgment in the first action could be pleaded in bar as a former adjudication (*232 Cal. App. 2d 56, 73)* . In applying the rules set forth in *Lord v. Garland (1946) 27 Cal. 2d 840, 849, 168 P.2d 5* , *discussed under § 71.79[3][d],* the court of appeal said it appeared the issues in the proceeding leading to the judgment confirming the arbitrator's award were not the same as those involved in the present action and that the judgment rendered in the prior case could not be pleaded in bar as a former adjudication. The court then cited several factual distinctions between the two cases and concluded that since these facts or conditions furnished a new basis for the claim, the issues were no longer the same and the former judgment could not be pleaded in bar of the present action (*232 Cal. App. 2d 56, 74)* .

See also *Knapp v. Knapp (1940) 15 Cal. 2d 237, 243, 100 P.2d 759* (prior action on promissory note not same cause of action as subsequent action for accounting of partnership interest that was consideration for note previously sued on); *Hagan v. Fairfield (1961) 194 Cal. App. 2d 240, 246, 16 Cal. Rptr. 14* (when prior suit did not involve entire cause of action presented by complaint in later litigation, plea of abatement should be raised by answer rather than by demurrer); *Trickey v. Long Beach (1951) 101 Cal. App. 2d 871, 881, 226 P.2d 694* (to abate second action because of pendency of prior action, "it is elementary that the issues in the two actions must be substantially the same"); *Daly v. White (1950) 100 Cal. App. 2d 22, 26, 222 P.2d 950* (second action may be abated only when subject of the two actions is the same).

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7A-71 California Points & Authorities § 71.80

§ 71.80 Opposing Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--No Other Action Is Pending Between Same Parties on Same Cause [Code Civ. Proc. § 430.10(c)]--Prior Action Is No Longer Pending

[1] FORM Opposing Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--No Other Action Is Pending Between Same Parties on Same Cause [Code Civ. Proc. § 430.10(c)]--Prior Action Is No Longer Pending

[*Caption. See § 71.30.*]

THE SPECIAL DEMURRER TO THE COMPLAINT SHOULD BE OVERRULED BECAUSE THE PRIOR ACTION IS NO LONGER PENDING.

A. Nonfavored Plea. [*See § 71.79, Paragraph A.*]

B. Requirement That Other Action Be Pending. An objection that there is another action between the same parties on the same cause lies only when the other action is still pending (*see Code Civ. Proc. § 430.10(c)*).

C. Prior Action No Longer Pending. A demurrer on the ground of another action pending does not lie when the prior action is no longer pending at the time the objection is made (*Williams v. California (1976) 62 Cal. App. 3d 960, 965, 133 Cal. Rptr. 539*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in opposition to a special demurrer to a complaint based on the ground of another action pending. The ground of objection set out is that the prior action is no longer pending.

In an appropriate case, the foregoing memorandum may be submitted in opposition to the demurrer supported by the memorandum *set out in § 71.65*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should point out, from facts of which the court is required to or may take judicial notice (for example, the court's file), that the prior action is no longer pending.

See also *§§ 71.20[2]* and *71.74[2]*.

[3] Discussion of Authorities

[a] Requirement That Other Action Be Pending

Code Civ. Proc. § 430.10 provides that a party against whom a complaint has been filed may object to it by demurrer or answer as provided in *Code Civ. Proc. § 430.30* on the ground "(c) There is another action pending between the same parties on the same cause of action."

[b] Prior Action No Longer Pending

The facts and procedural background of ***Williams v. California*** *(1976) 62 Cal. App. 3d 960, 133 Cal. Rptr. 539* , are discussed in *§ 71.79[3][c]*. The prior action involved in that case was a class action seeking a writ of mandate to compel the director to render his fair hearing decisions on applications within the time required by the applicable federal regulation. The trial court had denied the writ but its judgment had been reversed on appeal with directions to the trial court to grant relief compelling compliance with the time requirement of the regulation. In *Williams*, the court of appeal said that a demurrer on the ground of another action pending will not be sustained if the former action is no longer pending, and that an action is deemed pending only from the time of its commencement until its final determination on appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied, and that the asserted prior action had been finally determined on appeal prior to the commencement of the present action (*62 Cal. App. 3d 960, 965)* .

[4] Additional Authorities

[a] Prior Action No Longer Pending

The facts and procedural background of *Colvig v. RKO Gen., Inc. (1965) 232 Cal. App. 2d 56, 42 Cal. Rptr. 473* , are discussed in *§ 71.39[3][a]*. In reversing the judgment of dismissal with directions, the court of appeal, with respect to the demurrer on the ground of another action pending, said that a demurrer on this ground will not be sustained if the former action is no longer pending, and that an action commenced, tried, and pursued to judgment is deemed to be pending only from the time of its commencement until its final determination on appeal, or until the time for appeal has passed unless the judgment is sooner satisfied. The court pointed out that the judgment confirming the arbitrator's award in the former action had become final before the present action was commenced (*232 Cal. App. 2d 56, 71)* .

See also *National Auto. Ins. Co. v. Winter (1943) 58 Cal. App. 2d 11, 16, 136 P.2d 22* (another action pending as ground for demurrer does not include an action that has been fully adjudicated and plea is ineffective unless former suit is actually pending at time later suit is commenced).

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§ 71.81 Opposing Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--No Other Action Is Pending Between Same Parties on Same Cause [Code Civ. Proc. § 430.10(c)]--Demurrer Does Not Lie to Abate First Action

[1] FORM Opposing Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--No Other Action Is Pending Between Same Parties on Same Cause [Code Civ. Proc. § 430.10(c)]--Demurrer Does Not Lie to Abate First Action

[*Caption. See § 71.30.*]

THE SPECIAL DEMURRER TO THE COMPLAINT SHOULD BE OVERRULED BECAUSE THE PRESENT ACTION IS THE FIRST, AND NOT THE SUBSEQUENT, ACTION FILED.

A. Nonfavored Plea. [*See § 71.79, Paragraph A.*]

B. Objection Does Not Lie to Complaint in First Action. The objection that another action is pending between the same parties for the same cause may be raised only in the subsequent action filed and not in the first filed action (*California Union Ins. Co. v. Trinity River Land Co. (1980) 105 Cal. App. 3d 104, 108-109, 163 Cal. Rptr. 802* ; *Hagan v. Fairfield (1961) 194 Cal. App. 2d 240, 246-247, 16 Cal. Rptr. 14*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in opposition to a special demurrer to a complaint based on the ground of another action pending. The ground of opposition set out is that the demurrer is filed to the complaint in the first action rather than in the subsequently filed action.

In an appropriate case, the foregoing memorandum may be submitted in opposition to the demurrer supported by the memorandum *set out in § 71.65*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should refer to the filing dates of the respective actions in argument that the action before the court is the first action.

See also *§§ 71.20[2]* and *71.74[2]*.

[3] Discussion of Authorities

[a] Objection Does Not Lie to Complaint in First Action

California Union Ins. Co. v. Trinity River Land Co. *(1980) 105 Cal. App. 3d 104, 163 Cal. Rptr. 802* , was an action by plaintiff insurers for a declaration of nonliability or limited liability to defendant corporation whose insured building was destroyed by fire. The action was against the corporation and its sole shareholder and alleged that the sole shareholder was responsible for the fire. About one month after the original complaint was served, defendants filed a complaint in another county claiming a loss under the policy, wrongful refusal to pay the claim, negligence of an insurance agent in failing to provide $50,000 worth of insurance, and misrepresentation, unfair claim practices, and defamation by plaintiffs. Both plaintiffs and the insurance agent were named defendants in this action. The day after defendants filed their action they demurred to the amended complaint in the present action. Their demurrer was sustained without leave to amend on the ground the complaint failed to state a cause of action and another action was pending, being the action filed by defendants. Plaintiffs' motion for reconsideration was denied and plaintiffs appealed from the subsequent judgment of dismissal.

The court of appeal reversed the judgment with directions to overrule the demurrer. The court held that the complaint stated a cause of action and that the special demurrer was erroneously sustained and stated that, with respect to the special demurrer, the pendency of another action growing out of the same transaction is a ground for abatement of the second action but never for abatement of the first. The underlying theory of the plea of another action pending, according to the court, is that the first action will normally be an ample remedy and the second action is therefore unnecessary and vexatious (*105 Cal. App. 3d 104, 108-109)* . The court said that since there was no issue raised in the second suit that could not be raised and determined in the first suit and no necessary party who could not be joined in that suit, neither the special demurrer nor the rule of exclusive concurrent jurisdiction allows "granting defendants' motion" [*sic*, sustaining defendants' demurrer?] (*105 Cal. App. 3d 104, 109*). The court explained that the rule of exclusive current jurisdiction provides that when two superior courts have concurrent jurisdiction over the subject matter and all the parties involved in litigation, the first to assume jurisdiction has exclusive and continuing jurisdiction over the subject matter and all parties involved until such time as all necessarily related matters have been resolved and that priority of jurisdiction resides in the tribunal where process is first served. The court pointed out that the proof of service in the present case attached to plaintiffs' initial complaint showed that service was effected on July 25, 1978, prior to defendants' August 23, 1978, filing of suit and concluded that the trial court erred in sustaining defendants' demurrer on the ground of another action pending (*105 Cal. App. 3d 104, 109)* .

Hagan v. Fairfield *(1961) 194 Cal. App. 2d 240, 16 Cal. Rptr. 14* , was an action by two plaintiffs against the last elected officers and directors of a corporation and the managing agent to whom they had relinquished control of the corporation several years previous to the commencement of the action. Plaintiffs sought judgment compelling

defendants to register on the corporation's books shares of stock purchased by them from various stockholders and to issue new certificates in their names evidencing such shares, which defendants had refused to do, and for an order enjoining defendants from transferring or disbursing any assets of the corporation until a new board of directors had been elected. Defendants demurred to the amended complaint on several grounds, including the ground of other actions pending between the same parties for the same cause. In support of this ground, defendants filed a declaration for the purpose of invoking judicial notice of three other actions or proceedings pending in the same court. The demurrer was sustained without leave to amend and defendants' concurrent motion to dismiss the complaint on the ground it was sham and frivolous was granted, and plaintiffs appealed.

The court of appeal reversed the judgment with directions to deny the motion to dismiss and to grant leave to file a second amended complaint within a reasonable time. The court, with respect to the plea of other actions pending, held that one of the pending actions did not involve the same subject matter and that the present action was filed prior to the other two pending actions. In this regard, the court, quoting from *Kirman v. Borzage (1949) 89 Cal. App. 2d 898, 903, 202 P.2d 303* , *discussed under § 71.81[4][a]*, said that the pendency of another action growing out of the same transaction is ground for the abatement of the second action but never for the abatement of the first action (*194 Cal. App. 2d 240, 246-247)* .

The court further pointed out that even when the plea is properly sustained the only judgment to which defendant is entitled under *Code Civ. Proc. § 597* is a judgment abating the second action and not a judgment of dismissal (*194 Cal. App. 2d 240, 247)* .

[4] Additional Authorities

[a] Objection Does Not Lie to Complaint in First Action

Kirman v. Borzage (1949) 89 Cal. App. 2d 898, 202 P.2d 303 , was an action to foreclose a mechanic's lien and to recover money due on a written contract. The action resulted in a judgment for plaintiffs that was reversed on appeal. Thereafter, plaintiffs filed their amended, second amended, and third amended complaints; defendant's demurrer to the latter pleading was sustained without leave to amend, and judgment was entered accordingly, although reversed on appeal. On retrial on the third amended complaint, plaintiffs recovered judgment and defendant appealed. In affirming the judgment, the court of appeal stated one of the issues as follows: Was there another action pending at the time of the trial that would bar the judgment in the present case? The court answered the question in the negative. It pointed out that subsequent to the filing of the present action, plaintiffs filed another action to preserve their rights on the second cause of action alleged in their original complaint in the event the appellate court should sustain the ruling of the trial court in dismissing their action on the third amended complaint. The court said that the rule is that the pendency of another action growing out of the same transaction is ground for abatement of the second action but never for the abatement of the first action and that, applying this rule to the present case, it was apparent that the present action being first in point of time of filing was not abated by the filing of the subsequent action (*89 Cal. App. 2d 898, 903)* .

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7A-71 California Points & Authorities § 71.82

§ 71.82 Opposing Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Defect or Misjoinder of Parties [Code Civ. Proc. § 430.10(d)] Not Established--Nonjoined Party Is Jointly and Severally Liable in Tort

[1] FORM Opposing Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Defect or Misjoinder of Parties [Code Civ. Proc. § 430.10(d)] Not Established--Nonjoined Party Is Jointly and Severally Liable in Tort

[*Caption. See § 71.30.*]

THE COURT SHOULD OVERRULE THE SPECIAL DEMURRER TO THE COMPLAINT BASED ON NONJOINDER OF A PARTY DEFENDANT BECAUSE THE NONJOINED PERSON IS A JOINTLY AND SEVERALLY LIABLE TORTFEASOR AND THEREFORE MERELY A PERMISSIVE PARTY.

A. Circumstances In Which Joinder Is Required. [*See § 71.66, Alternative Paragraphs B.*]

B. Joinder of Jointly and Severally Liable Tortfeasor Not Required. The description of the circumstances in *Section 389 of the Code of Civil Procedure*, in which a person is required to be joined in an action, is not at variance with the settled authorities holding that a tortfeasor with the usual joint and several liability is merely a permissive party to an action against another with like liability. Joinder of such a tortfeasor is regulated by *Section 379 of the Code of Civil Procedure*, governing permissive joinder of defendants (10 Cal. L. Revision Comm'n Reports, pp. 536-538; *see Grundel v. Union Iron Works (1900) 127 Cal. 438, 442, 59 P. 826*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in opposition to a special demurrer to a complaint on the ground of defect of parties defendant. The ground of objection is that the alleged defect is not objectionable because it consists of the nonjoinder of a person whose liability on the tort sued on is joint and several with that of defendant.

In an appropriate case, the foregoing memorandum may be submitted in opposition to the demurrer supported by the memorandum *set out in § 71.66*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Counsel would, therefore, refer to the allegations of the complaint and to facts of which the court is required to or may take judicial notice (such as the court's file in the separate action against the nonjoined defendant), pointing out that the person not named in the present case would be jointly and severally liable with the defendant in tort.

[3] Discussion of Authorities

[a] Joinder of Jointly and Severally Liable Tortfeasor Not Required

In 1971 *Code Civ. Proc. § 389* was revised to substitute practically in its entirety *Fed. R. Civ. P., Rule 19* for former Code Civ. Proc. § 389 [*see* Stats. 1971, ch. 244, operative July 1, 1972; *see also § 71.66[2][b]*]. In its comment to *Code Civ. Proc. § 389*, the Law Revision Commission stated that the explanatory note prepared by the Federal Rules Advisory Committee in conjunction with the amendment of *Fed. R. Civ. P., Rule 19* is "particularly helpful in describing the nature and effect of *Code Civ. Proc. § 389*. "The Commission quoted excerpts of the note to explain that the subdivision (a) definition of persons to be joined is not couched in terms of the abstract nature of their interests, such as "joint," "united," "separable," or the like [*see* former Code Civ. Proc. § 382]. The excerpt, citing Moore's Federal Practice (2d ed.), went on to state that it should be noted particularly, however, that the description is not at variance with the settled authorities holding that a tortfeasor with the usual joint and several liability is merely a permissive party to an action against another with like liability, and that joinder of these tortfeasors continues to be regulated by *Fed. R. Civ. P., Rule 20* [*see Code Civ. Proc. §§ 378, 379*; *see, e.g. Grundel v. Union Iron Works (1900) 127 Cal. 438, 442, 59 P. 826* (stating common law rule, discussed *below*)].

In ***Grundel v. Union Iron Works*** *(1900) 127 Cal. 438, 442, 59 P. 826* , the plaintiff executor brought a wrongful death action to recover damages on account of the death of the deceased. One of the defendants, United Iron Works, moved for dismissal from the action on the ground that it was a joint tortfeasor with other defendants who had instituted proceedings in federal court for limitation of liability and obtained a restraining order against the plaintiff from proceeding to trial. The trial court granted the motion, and entered a judgment of dismissal. The plaintiff appealed.

The Supreme Court reversed the judgment and remanded the cause. The Court stated that the general rule followed in America is that the liability of two or more persons who jointly engage in the commission of a tort is joint and several, and gives the same rights of action to the person injured as a joint and several contract. Consequently, a judgment recovered against one of the two joint tortfeasors, remaining unsatisfied, is no bar to an action against the other for the same tort (*127 Cal. 438, 440-441*). The Court further stated that if one is injured by a tortious act, he or she is entitled to compensation for the injury suffered, and, if several persons are guilty in common of the tort, the injured one has his or her right of action for damages against each and all of the joint tortfeasors, and may at his or her election sue them individually or together (*127 Cal. 438, 442)* .

[4] Additional Authorities

[a] Joinder of Jointly and Severally Liable Tortfeasor Not Required

Williams v. Reed (1952) 113 Cal. App. 2d 195, 248 P.2d 147 , was an action to enforce payment of two promissory notes and to foreclose a chattel mortgage given to secure the notes. Named as defendants were the four makers of the notes on which each maker was jointly and severally liable. The appearing defendants moved for summary judgment and dismissal and the motions were granted on the ground the debt sued on had been satisfied by judgment. The plaintiff appealed. The court of appeal reversed the judgment. In dicta, the court, citing *Grundel v. Union Iron Works (1900) 127 Cal. 438, 442, 59 P. 826* , *discussed under § 71.82[3][a]*, stated the common law rule governing joinder of tortfeasors that in an action against one or more, and less than all, of a number of persons jointly and severally obligated as tortfeasors, a judgment obtained against one is not a bar to an action against the others (nothing short of satisfaction in some form constitutes a bar). The court concluded, by analogy, that the same rule applied with respect to joint and several obligors under a contract (*113 Cal. App. 2d 195, 204)* .

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7A-71 California Points & Authorities § 71.83

§ 71.83 Opposing Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Defect or Misjoinder of Parties [Code Civ. Proc. § 430.10(d)] Not Established--Joinder Not Feasible [Code Civ. Proc. § 389(b)]

[1] FORM Opposing Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Defect or Misjoinder of Parties [Code Civ. Proc. § 430.10(d)] Not Established--Joinder Not Feasible [Code Civ. Proc. § 389(b)]

[*Caption. See § 71.60.*]

THE SPECIAL DEMURRER TO THE COMPLAINT ON THE GROUND OF DEFECT OF PARTIES SHOULD BE OVERRULED BECAUSE THE NONJOINED PERSON CANNOT BE MADE A PARTY TO THE ACTION AND, IN EQUITY AND GOOD CONSCIENCE, THE ACTION SHOULD PROCEED AMONG THE PARTIES BEFORE THE COURT.

Joinder Not Feasible. When joinder is not feasible the court is required to determine whether in equity and good conscience the action should proceed among the parties before it, or be dismissed without prejudice, the absent person being thus regarded as indispensable. The factors to be considered by the court include (1) to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; and (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder (*Code Civ. Proc. § 389(b)*; *see also Vanoni v. Sonoma County (1974) 40 Cal. App. 3d 743, 747, 115 Cal. Rptr. 485*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in opposition to a special demurrer to a complaint on the ground of defect of parties. The ground of opposition set out is that the nonjoined person is one described in *Code Civ. Proc. § 389(a)* and cannot be made a party to the action but the action should, on a consideration of the factors listed in *Code Civ. Proc. § 389(b)*, in equity and good conscience, proceed among the parties before the court.

In an appropriate case, the foregoing memorandum may be submitted in opposition to the demurrer supported by the memorandum *set out in § 71.66*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated, and why, on a consideration of the factors listed in *Code Civ. Proc. § 389(b)*, the action should proceed.

See also *§§ 71.20[2]*, 71.66[2], and 71.74[2].

[3] Discussion of Authorities

[a] Joinder Not Feasible

Code Civ. Proc. § 389(a) provides that a person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his or her absence complete relief cannot be accorded among those already parties or (2) he or she claims an interest relating to the subject of the action and is so situated that the disposition of the action in his or her absence may (i) as a practical matter impair or impede his or her ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his or her claimed interest, and that if he or she has not been joined the court shall order that he or she be made a party.

Code Civ. Proc. § 389(b) provides that if a person described in *Code Civ. Proc. § 389(a)(1)* or *(2)* cannot be made a party, the court shall determine whether inequity and good conscience the action should proceed among the parties before it, or should be dismissed without prejudice, the absent person being thus regarded as indispensable. In making this determination, the court is to consider the factors set out in the form.

Vanoni v. Sonoma County *(1974) 40 Cal. App. 3d 743, 115 Cal. Rptr. 485* , was a taxpayers' action against the county, a flood control district having boundaries coterminous with the county, members of the county board of supervisors, and members of the district's board of directors. The complaint alleged that in 1964 the district had entered into a contract with the United States obligating the county and the district for debts in excess of the county's annual revenue and income without the consent of two thirds of the electors as required by *Cal. Const., art. XIII, § 40* (repealed, now see *Cal. Const., art. XVI, § 18*), which provided in part that no county, city, town, township, board of education, or school district shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two thirds of the qualified electors thereof, voting at an election to be held for that purpose. Plaintiffs sought declaratory relief and an injunction prohibiting further action under the contract. Defendants' demurrer to the complaint was sustained without leave to amend and plaintiffs appealed from the subsequent judgment for defendants.

Although the court of appeal affirmed the judgment on the ground the above-cited constitutional provision did not apply to flood control and water conservation districts, the court considered defendants' objection that the United States was an indispensable party to the action, although not raised in the trial court, on the ground the objection is one that may be

raised for the first time on appeal (*40 Cal. App. 3d 743, 746)* . The court said that parties to a contract should usually be joined in an action challenging the validity of the contract (*40 Cal. App. 3d 743, 746)* , but that joinder of the United States was not feasible because the United States is not subject to the jurisdiction of the state courts (*40 Cal. App. 3d 743, 747)* . The court explained that when joinder is not feasible, *Code Civ. Proc. § 389(b)*, discussed *above*, directs the court to determine whether in equity and good conscience the action should proceed among the parties before it or should be dismissed without prejudice, the absent person being thus regarded as indispensable. The court then quoted the four factors set forth in *Code Civ. Proc. § 389(b)*, discussed *above*, to be considered by the court in reaching this determination and concluded that the term "indispensable" is used in *Code Civ. Proc. § 389(b)* only in a conclusory sense--a person is regarded as indispensable when he or she cannot be made a party and, on a consideration of relevant factors, it is determined that in his or her absence it would be preferable to dismiss the action (*40 Cal. App. 3d 743, 747)* . The court observed that no direct authority had been found on the question of whether, under the circumstances of the case, the United States should be regarded as an indispensable party but observed that plaintiffs would be left with no remedy in the state courts if their action were dismissed for nonjoinder of the United States. Since *Code Civ. Proc. § 389* directs that one factor to be considered by the court is whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder, equity and good conscience suggested that the action should proceed (*40 Cal. App. 3d 743, 747)* .

[4] Additional Authorities

[a] Joinder Not Feasible

Citizens Task Force on Sohio v. Board of Harbor Comrs. (1979) 23 Cal. 3d 812, 153 Cal. Rptr. 584, 591 P.2d 1236 , was a mandate proceeding by which petitioner sought to compel the Board of Harbor Commissioners of the Port of Long Beach to comply with the California Environmental Quality Act. The petition challenged the adequacy of an environmental impact report prepared jointly by the port and by the Public Utilities Commission with regard to a project to move Alaskan crude oil from a delivery point in Long Beach by overland pipeline to Texas. The board's motion to compel joinder of the PUC as an indispensable party was granted and the trial court then transferred the matter to the Supreme Court on the ground it lacked authority to compel the PUC to comply with the act. In holding the transfer improper on the ground the port was the lead agency and hence required to defend the adequacy of the entire report, the Supreme Court, in ordering the case transferred back to the superior court, said that accordingly, although the PUC could not properly be made a party because its joinder would deprive the court of jurisdiction over the subject matter, the court should have permitted the action to proceed against the port alone (*23 Cal. 3d 812, 814)* .

California Points & Authorities

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Volume 7A Chapters 71-79 DEMURRERS
CHAPTER 71 DEMURRERS AND MOTIONS FOR JUDGMENT ON THE PLEADINGS
PART II. FORMS
A. Demurrers
2. Special Demurrers to Complaint

7A-71 California Points & Authorities § 71.84

§ 71.84 Opposing Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Defect or Misjoinder of Parties [Code Civ. Proc. § 430.10(d)] Not Established--No Misjoinder When Pleading Shows Common Questions of Law or Fact for Relief Arising Out of Same Transaction or Series of Transactions [Code Civ. Proc. § 378]

[1] FORM Opposing Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Defect or Misjoinder of Parties [Code Civ. Proc. § 430.10(d)] Not Established--No Misjoinder When Pleading Shows Common Questions of Law or Fact for Relief Arising Out of Same Transaction or Series of Transactions [Code Civ. Proc. § 378]

[*Caption. See § 71.30.*]

THE SPECIAL DEMURRER TO THE _____ [COMPLAINT *or* CROSS COMPLAINT] SHOULD BE OVERRULED BECAUSE, PURSUANT TO SECTION _____ [378 *or* 379] OF THE CODE OF CIVIL PROCEDURE, ALL OF THE _____ [PLAINTIFFS *or* CROSS COMPLAINANTS *or* DEFENDANTS *or* CROSS DEFENDANTS] ARE PERMITTED TO JOIN IN THE ACTION.

[*EITHER, if demurrer is for misjoinder of party plaintiffs or cross complainants*]

A. Permissive Joinder of Plaintiffs. All persons may join in one action as plaintiffs if (1) they assert any right to relief jointly, severally, or in the alternative, in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action; or (2) they have a claim, right, or interest adverse to the defendant in the property or controversy that is the subject of the action (*Code Civ. Proc. § 378(a)*; *State Farm Fire & Casualty Co. v. Superior Court (1996) 45 Cal. App. 4th 1093, 1113, 53 Cal. Rptr. 2d 229* ; *Anaya v. Superior Court (1984) 160 Cal. App. 3d 228, 231, 206 Cal. Rptr. 520*).

[*Optional*] **B. Interest in Action or Relief Need Not Be Same.** It is not necessary that each plaintiff be interested as to every cause of action or as to all relief prayed for. Judgment may be given for one or more of the plaintiffs according to their respective right to relief (*Code Civ. Proc. § 378(b)*).

[*Optional*] **C. Joinder of Cross Complainant Permitted.** When a person files a cross complaint as authorized by *Section 428.10 of the Code of Civil Procedure*, he or she may join any person as a cross complainant, whether or not such person is already a party to the action, if, had the cross complaint been filed as an independent action, the joinder of that party would have been permitted by the statutes governing joinder of parties (*Code Civ. Proc. § 428.20*).

[*OR, if demurrer is for misjoinder of party defendants*]

A. Permissive Joinder of Defendants. All persons may be joined in one action as defendants if there is asserted against them (1) any right to relief jointly, severally, or in the alternative, in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action, or (2) a claim, right, or interest adverse to them in the property or controversy that is the subject of the action (*Code Civ. Proc. § 379(a)*; *Javor v. State Bd. of Equalization (1974) 12 Cal. 3d 790, 802 n.10, 117 Cal. Rptr. 305, 527 P.2d 1153*).

[*Optional*] **B. Interest in Action or Relief Need Not Be Same.** It is not necessary that each defendant be interested as to every cause of action or as to all relief prayed for. Judgment may be given against one or more defendants according to their respective liabilities (*Code Civ. Proc. § 379(b)*).

[*Optional*] **C. Joinder in Case of Doubt as to Defendant Liable.** When the plaintiff is in doubt as to the person from whom he or she or it is entitled to redress, he or she or it may join two or more defendants, with the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined between the parties (*Code Civ. Proc. § 379(c)*).

[*Optional*] **D. Joinder of Cross Defendant Permitted.** When a person files a cross complaint as authorize by *Section 428.10 of the Code of Civil Procedure*, he or she may join any person as a cross defendant, whether or not such person is already a party to the action, if, had the cross complaint been filed as an independent action, the joinder of that party would have been permitted by the statutes governing joinder of parties (*Code Civ. Proc. § 428.20*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a special demurrer to a complaint on the ground of misjoinder of parties when it has been asserted that a plaintiff, defendant, cross complainant, or cross defendant has been improperly joined under the statutes governing joinder of parties [*Code Civ. Proc. §§ 378, 379, 428.10, 428.20*]. The ground of opposition set out is that the joinder is permitted because the pleading shows common questions of law or fact for relief arising out of the same transaction or series of transactions.

In an appropriate case, the foregoing memorandum may be submitted in opposition to the demurrer supported by the memorandum *set out in § 71.67*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the

points of law stated. Thus, counsel would show from the allegations in the complaint or from facts of which the court must or may take judicial notice that the joinder of the plaintiffs is permitted by statute.

[b] Permissive Joinder of Parties

The permissive joinder of plaintiffs is authorized by *Code Civ. Proc. § 378*. Permissive joinder of actions is governed by *Code Civ. Proc. § 427.10*.

In the case of joinder the court may order separate trials or make such other orders as appear just to prevent any party from being embarrassed, delayed, or put to undue expense [*Code Civ. Proc. § 379.5*; *see also Code Civ. Proc. § 1048* on severance and consolidation of causes generally].

Code Civ. Proc. § 378, and *Code Civ. Proc. § 379* relating to permissive joinder of defendants, are broader in their scope than is *Code Civ. Proc. § 389*, the compulsory joinder statute. Persons required to be joined under the latter statute would clearly be included in the persons described in the former statutes. Consequently, when the objection to a complaint or cross complaint is that there is a misjoinder of parties, the question is not whether such parties must be joined under *Code Civ. Proc. § 389*, but rather, whether such parties may be joined under *Code Civ. Proc. § 378* or *379*. If they may, the demurrer for misjoinder should be overruled.

See also *§§ 71.20[2]* and *71.74[2]*.

[3] Discussion of Authorities

[a] Permissive Joinder of Plaintiffs

Code Civ. Proc. § 378, as amended in 1971 [Stats. 1971, ch. 244, operative July 1, 1972], continued the substance of former California law and superseded former Code Civ. Proc. § 381, portions of *Code Civ. Proc. § 378*, and portions of former Code Civ. Proc. §§ 383 and 384. The California Law Revision Commission, in commenting on the amendment, stated that *Code Civ. Proc. § 378(a)(1)* and *(b)* was phrased in substantial conformity with *Fed. R. Civ. P., Rule 20(a)*, that the broadest sort of joinder is permitted under the transaction clause of the federal rule and under *Code Civ. Proc. § 378*, and that *Code Civ. Proc. § 378(a)(2)* is derived from the "interest in the subject of the action" provision formerly found in *Code Civ. Proc. § 378* and expressed in principle in former Code Civ. Proc. §§ 381, 383, and 384. The Commission explained that *Code Civ. Proc. § 378(a)(2)* was not, however, needed to expand the broad scope of permissive joinder under the transaction clause of *Code Civ. Proc. § 378(a)(1)* but was included to eliminate any possibility that omission of the "interest in the subject of the action" provision formerly found in *Code Civ. Proc. § 378*, and the deletion of other permissive joinder provisions, might be construed to preclude joinder in cases in which it was formerly permitted [10 Cal. Law Rev. Comm'n Reps. 528 (1971)].

In ***State Farm Fire & Casualty Co. v. Superior Court*** *(1996) 45 Cal. App. 4th 1093, 53 Cal. Rptr. 2d 229* , 165 individual plaintiffs filed a complaint against their insurer based on allegations of unfair and unreasonable claims practices regarding the treatment of claims on plaintiffs' homeowner insurance following a major earthquake. Defendant demurred on the ground that the plaintiffs are separate individuals with disparate claims who have been improperly joined together without a common occurrence or common question of law or fact. After the trial court overruled the demurrer, defendant petitioned for a writ of mandate to overturn the ruling.

The court of appeal agreed with the trial court that the plaintiffs were properly joined, noting initially that joinder of plaintiffs is permitted if there is any factual relationship between the claims alleged. The court considered the plaintiff's claim that defendant engaged in a systematic practice to deceive its policyholders with respect to their purchase of earthquake insurance, and concluded that this claim contained common facts central to the alleged deception (*45 Cal. App. 4th 1093, 1113)* . The court thus denied the petition for a peremptory writ of mandate.

In ***Anaya v. Superior Court*** *(1984) 160 Cal. App. 3d 228, 206 Cal. Rptr. 520* , some 218 plaintiffs sought damages for exposure to a chemical in a fertilizer and agricultural chemicals manufacturing facility. Defendants demurred, asserting misjoinder of plaintiffs. After hearing, the trial court ruled that plaintiffs were misjoined and that separate complaints should be filed on behalf of each allegedly injured employee. The plaintiffs unsuccessfully sought reconsideration of the trial court order, and petitioned the court of appeal for writ of mandate to compel the trial court to vacate its decision sustaining the demurrer.

The court of appeal issued the writ of mandate. The court distinguished the facts before it from those of *Coleman v. Twin Coast Newspaper, Inc. (1959) 175 Cal. App. 2d 650, 346 P.2d 488* , discussed in *§ 71.67[3][b]*, in which misjoinder had been found. In *Coleman*, three separate and distinct plaintiffs were suing to recover damages for trespasses on separate and distinct premises and for conversions of separate and distinct property. The only fact that appeared in the complaint was that three chiropractors, practicing in the same city, underwent scrutiny during the course of the same day. *Coleman* concluded that the community of interest necessary to allow permissive joinder under *Code Civ. Proc. § 378* was entirely lacking. In *Anaya*, however, the employees were said to have been exposed to harmful chemicals at one location over a period of many years by inhalation, drinking of water, and physical contact. Thus, according to the court, they were all involved in the same series of transactions or occurrences and asserted rights to relief therefrom. The fact that each employee was not exposed on every occasion any other employee was exposed did not destroy the community of interest linking the plaintiffs (*160 Cal. App. 3d 228, 233)* .

[b] Permissive Joinder of Defendants

Code Civ. Proc. § 379, as amended in 1971 [Stats. 1971, ch. 244, operative July 1, 1972], provides statutory standards for joinder of defendants comparable to those governing joinder of plaintiffs under *Code Civ. Proc. § 378*. The California Law Revision Commission, in commenting on the 1971 amendment, stated that the deleted provisions of *Code Civ. Proc. § 379* and former Code Civ. Proc. §§ 379a, 379b, 380, and 383 provided liberal joinder rules but were criticized for their uncertainty and overlap, and that the amendment to *Code Civ. Proc. § 379* substituted the more understandable "transaction" test set forth in *Fed. R. Civ. P., Rule 20(a)*. The Commission concluded that in so doing the section "probably makes explicit what was implicit in prior decisions." The Commission further explained that *Code Civ. Proc. § 379(a)(2)* was included merely to make clear that the section as amended permits joinder in any case in which it was formerly permitted, that the provision was derived from the deleted provisions of *Code Civ. Proc. § 379* and the principle stated in former Code Civ. Proc. §§ 379a, 379b, 379c, 380, and 383, and that the phrase "in the alternative" retains without change the prior law under former Code Civ. Proc. §§ 379a and 379c [10 Cal. Law Rev Comm'n Reps. 529 (1971)].

Javor v. State Bd. of Equalization *(1974) 12 Cal. 3d 790, 117 Cal. Rptr. 305, 527 P.2d 1153* , was a class action by a customer individually and on behalf of consumer purchasers of certain new motor vehicles and accessories in California during a specified period, against the retailers of the vehicles and accessories to recover overpayments of the state sales tax. The action arose out of the retroactive repeal by Congress of the federal manufacturers' excise tax imposed on the sale of specified new motor vehicles and accessories and the requirement that the manufacturers refund the federal tax to those persons who had made purchases during the retroactive period, approximately four months. The state sales tax was based on the sales price of the vehicle and accessories which price included the repealed federal excise tax. It was the sales tax paid on the excise tax that was sought to be recovered. The State Board of Equalization was joined as a party on the ground it held the excess sales tax collected and paid to it by the defendant retailers as a constructive trustee for the benefit of the plaintiffs. Plaintiff had alleged that the defendant retailers were under no statutory obligation to claim any refunds from the Board for the benefit of plaintiffs and had no financial interest to do so, and that defendant Board was under no statutory obligation to voluntarily refund the taxes to plaintiffs and had no financial interest in doing so. The Board's general demurrer to the complaint was sustained with leave to amend, and on plaintiff's election to stand on the complaint, the action was dismissed as to the Board.

The Supreme Court reversed the judgment with directions to overrule the demurrer and allow the Board to answer. The Court stated that since the Board has a vital interest in the integrity of the sales tax and would acquire rights to the money once the limitation period for refunds expired, it was clear that it could be joined as a defendant pursuant to *Code Civ. Proc. § 379(a)*, which provides that all persons may be joined in one action as defendants if there is asserted against them "(2) A claim, right, or interest adverse to them in the property of controversy which is the subject of the action." (*12 Cal. 3d 790, 802 n.10* .)

[4] Additional Authorities

[a] Permissive Joinder of Plaintiffs

Wadleigh v. Phelps (1906) 149 Cal. 627, 87 P. 93 , was an action to have certain deeds, absolute in form, decreed to be mortgages, to have the amount owing by plaintiffs ascertained, and for an order that on payment of the amount adjudged to be due, the property described in the deeds be reconveyed to plaintiffs. Defendant was the executrix of the will of the deceased lender-grantee. The complaint alleged in substance that plaintiff Wadleigh had borrowed specified sums of money from defendant's decedent, that he had given a note therefor, and that to secure the note he had executed conveyances of certain of his properties to the decedent. It was further alleged that to secure the same note, plaintiff Smith had executed a conveyance to decedent of certain of her mining property in Nevada County. Defendant demurred to the complaint on the grounds, among others, that there had been a misjoinder of actions (no longer a ground of demurrer) and a misjoinder of parties plaintiff, since Smith was the only proper party plaintiff in an action to redeem as to her land and Wadleigh was the only proper party plaintiff in an action to redeem as to his land. The demurrer was overruled and defendant appealed from the subsequent judgment for plaintiffs. In modifying the judgment with respect to the award of interest and affirming the judgment as modified, the Supreme Court said there was no misjoinder of causes of action because there was but a single cause of action stated, that the effect of the various deeds given to secure the one indebtedness was to combine all the property thereby conveyed as a single security for the debt (*149 Cal. 627, 635)* . The court further held that there was no misjoinder of parties, that when two tracts have been mortgaged by different persons to another person to secure a single indebtedness, the owners of both parcels and all persons interested in them must be parties to the action to redeem, if not as plaintiffs then at least as defendants (*149 Cal. 627, 636-637)* .

In *Aldrich v. Transcontinental Land & Water Co. (1955) 131 Cal. App. 2d 788, 281 P.2d 362* , defendants appealed from an order granting a preliminary injunction enjoining them from prosecuting municipal court actions for breach of contract against numerous plaintiffs who were suing them in superior court for rescission of the same contracts. Defendants argued, among other things, that there was a misjoinder of parties plaintiff in that there was no question of law or fact that was common to all the parties to the action, that in each of the numerous groups of causes of action a different parcel of real property was involved, and that in each sale a different plaintiff or plaintiffs were involved (*131 Cal. App. 2d 788, 790-791*). The court of appeal affirmed the orders, holding that the complaint presented questions of law and fact common to all the parties to the action and that the sales arose out of the same transaction or series of transactions. The common questions included, among others, whether defendants schemed to cheat and defraud plaintiffs, incorporated companies to shield individuals from liability, and made false representations (*131 Cal. App. 2d 788, 793-794)* . In addition, the court cited *Akely v. Kinnicutt (1924), 238 N.Y. 466, 144 N.E. 682* , which held that several purchases by plaintiffs in that case did not lose their character as a series of transactions because they occurred at different places and times extending through many months." (*131 Cal. App. 2d 788, 795-796* .)

DeMille v. Los Angeles County (1938) 25 Cal. App. 2d 506, 77 P.2d 905 , was an action to recover taxes paid under protest and to have an assessment levied by the county on plaintiffs' respective properties declared void. Defendant's demurrer on the grounds of failure to state a cause of action and misjoinder of parties plaintiff was overruled. On defendant's failure to answer, default and default judgment were entered that plaintiffs recover the taxes paid and declaring the assessment void. On appeal, the court held that the general demurrer for failure to state a cause of action should have been sustained and reversed the judgment with directions on that ground, but that the demurrer for misjoinder was without merit. The court held that when it appears that questions of law or fact would arise that are

common to all the parties mentioned in the complaint it is permissible for several plaintiffs to join in an action instead of severally instituting suits to obtain the same relief. The court said that from an examination of the various counts of the complaint it was apparent that there were questions of law that were common to all the parties plaintiff, that the validity of the assessment was attacked on the same ground by each of the plaintiffs, and that a decision as to the law involved in the case necessarily determined the rights of every one of them. The court said that the question of fact as to the value of the properties and the amount of the assessment that should be levied are the only different questions presented, but that the rate would be the same as applied to the properties of the different plaintiffs and that the law determining their rights would be exactly the same (*25 Cal. App. 2d 506, 508)* .

See also *Adams v. Albany (1954) 124 Cal. App. 2d 639, 646-647, 269 P.2d 142* (actions by war veterans and their wives for damages for conspiracy and fraud in construction of houses and their sale to plaintiffs).

[b] Joinder in Case of Doubt as to Defendant Liable

Landau v. Salam (1971) 4 Cal. 3d 901, 95 Cal. Rptr. 46, 484 P.2d 1390 , was an action for damages for personal injuries allegedly sustained as the result of both negligent driving of an automobile on April 28, 1968, and the negligent maintenance of property on August 12, 1968. Plaintiff joined as defendants the persons he alleged were responsible for each occurrence and asserted his uncertainty as to whether his injuries, medical expenses, and loss of income emanated from the first or second accident. Both causes of action asserted that plaintiff sustained permanent injuries, had and would incur medical expenses, and could not pursue his usual work. Both counts then stated that plaintiff was uncertain as to which defendant caused his described injuries and whether or not they were caused by the first or second cause of action, and he therefore joined both causes of action under Code Civ. Proc. § 379c [*now see Code Civ. Proc. § 379(c)*]. Defendants named regarding the automobile accident demurred to the complaint on the grounds of misjoinder of parties defendant. The trial court sustained the demurrer without leave to amend and dismissed the action as to those defendants. In reversing the judgment with directions to allow plaintiff to filea further amended complaint, the Supreme Court held that under Code Civ. Proc. § 379c [*now see Code Civ. Proc. § 379(c)*], a plaintiff may join two independent and successive tortfeasors in a single action if he or she pleads facts showing that he or she entertains a reasonable doubt as to which defendant is liable for his injuries, or the extent to which each may be liable, and that although the complaint failed to plead with specificity a "reasonable uncertainty" as to the liability of the respective defendants, plaintiff's opportunity to do so should not have been truncated by a demurrer sustained without leave to amend (*4 Cal. 3d 901, 903, 905, 909)* .

Kraft v. Smith (1944) 24 Cal. 2d 124, 148 P.2d 23 , was an action for damages for medical malpractice. Plaintiffs, husband and wife, joined as defendants two physicians and surgeons, who, independently of each other treated plaintiff wife at different times and places, but the treatment of each of whom, it was alleged, contributed to aggravating injuries she had previously received, including a broken ankle, a broken leg, and a fractured knee. Plaintiffs alleged they were in doubt as to whether they were entitled to redress from either or both of the defendants, and for that reason both defendants had been joined with the intent that the question as to whether both were or one was liable to the plaintiffs and to what extent might be determined in the action, and that the court might award judgment to plaintiffs as against the defendants either jointly, severally, or in the alternative. One of the defendants demurred, specifying as grounds of the special demurrer that there was a misjoinder of parties defendant and causes of action (no longer a ground of demurrer). From a judgment entered on the order sustaining the demurrer without leave to amend, plaintiffs appealed. The Supreme Court reversed the judgment with directions to grant plaintiffs a reasonable time within which to serve and file another amended complaint to clear up uncertainties. The Supreme Court held that the joinder of the actions and parties was authorized under former Code Civ. Proc. §§ 379a-379c [*now see Code Civ. Proc. §§ 379(a)(1)* (right to relief jointly, severally, or in the alternative), (b) (interest in action or relief need not be same), and (c) (joinder of defendants in case of doubt as to liability)] (*24 Cal. 2d 124, 127-129*). The Court stated that if it appeared that negligence of both defendants contributed proximately to cause an injury for which plaintiff was entitled to recover it might be a matter entailing great difficulty of proof as to the amount in which each defendant was responsible. Further, to require separate actions and separate trials in such a situation would enhance the difficulties of proof and tend to

obstruct, rather than to promote, justice, and that through having both defendants before the court at the same time and in the same action it could be expected more sanguinely that a jury should arrive at soundly based and just verdicts (*24 Cal. 2d 124, 130)* .

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CHAPTER 71 DEMURRERS AND MOTIONS FOR JUDGMENT ON THE PLEADINGS
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7A-71 California Points & Authorities § 71.85

§ 71.85 Opposing Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Defect or Misjoinder of Parties [Code Civ. Proc. § 430.10(d)] Not Established--Demurring Defendant Not Misjoined

[1] FORM Opposing Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Defect or Misjoinder of Parties [Code Civ. Proc. § 430.10(d)] Not Established--Demurring Defendant Not Misjoined

[*Caption. See § 71.30.*]

THE SPECIAL DEMURRER TO THE COMPLAINT SHOULD BE OVERRULED BECAUSE THE PARTY DEMURRING IS NOT MISJOINED, AND IT DOES NOT APPEAR THAT THE DEMURRING PARTY'S INTERESTS ARE ADVERSELY AFFECTED BY THE JOINDER.

Who May Object. Unless it appears that the interests of a properly named defendant will be adversely affected by the improper joinder of another party, only the improperly joined party may raise the objection of misjoinder of parties (*see California Farm & Fruit Co. v. Schiappa-Pietra (1907) 151 Cal. 732, 744, 91 P. 593* ; *Anaya v. Superior Court (1984) 160 Cal. App. 3d 228, 231 n.1, 206 Cal. Rptr. 520*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in opposition to a special demurrer to a complaint on the ground of

misjoinder of parties. The ground of opposition set out is that the demurring party is not misjoined and it does not appear that the interests of the demurring party will be adversely affected by the misjoinder of the other party.

In an appropriate case, the foregoing memorandum may be submitted in opposition to the demurrer supported by the memorandum *set out in § 71.67*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel would show from the complaint or from facts of which the court must or may take judicial notice that the demurring party is not the allegedly misjoined party and that his or her interests have not been adversely affected by the joinder.

See also *§§ 71.20[2]* and *71.74[2]*.

[3] Discussion of Authorities

[a] Who May Object

California Farm & Fruit Co. v. Schiappa-Pietra *(1907) 151 Cal. 732, 91 P. 593* , was an action brought by a corporation to rescind the sale to it of certain real property on the ground of alleged fraudulent representations and to restore the parties as far as possible to the same position they occupied at the time of entering into the transaction. To this end, the complaint sought the setting aside of the deed of the property, the cancellation of the notes and bonds given on the purchase, and an accounting to determine the amounts due plaintiff, and to have certain of its stock issued to one of the defendants cancelled. Defendants' demurrer to the complaint on the ground, among others, that there was a misjoinder of parties plaintiff because a bondholder, who owned the stock of the corporation, was joined as plaintiff, was sustained with leave to amend and, on plaintiffs' failure to amend, judgment was entered for defendants.

The Supreme Court reversed the judgment. The Court held that the bondholder would be a proper party defendant to oppose or advocate any proposed disposition of the bonds "... and if some disposition of them is essential to complete relief, he or she would be a necessary party. If he desires now to make common cause with the plaintiff corporation ... and makes proffer of the stock and bonds for the purposes of the suit, it is immaterial to the other defendants whether he or she is plaintiff or defendant" (*151 Cal. 732, 744)* .

The facts and procedural background of ***Anaya v. Superior Court*** *(1984)160 Cal. App. 3d 228, 206 Cal. Rptr. 520* , are discussed in *§ 71.84[3][a]*. On issuing a writ of mandate compelling the trial court to vacate its decision sustaining a demurrer based on misjoinder of parties, the court noted that in considering whether the plaintiffs qualify for joinder under *Code Civ. Proc. § 378(a)*, it could not ignore the observation that although the code seems to authorize the sustaining of a demurrer solely for misjoinder of parties, the authorities indicate that the defendant is entitled to a favorable ruling only when he or she can show some prejudice suffered or some interest affected by the misjoinder. In practical effect this means that such a demurrer can be successfully used only by the person improperly joined. A proper defendant is seldom injured by the joinder of unnecessary or improper parties plaintiff or defendant, and his or her demurrer ought to be overruled (*160 Cal. App. 3d 228, 231 n.1*).

[4] Additional Authorities

[a] Who May Object

The facts and procedural background of *Gardner v. Samuels (1897) 116 Cal. 84, 47 P. 935* , are discussed in *§ 71.67[3][d]*. In reversing the judgment as to the defendant lessor, the Supreme Court held that the complaint as to him stated a cause of action and that he was not a proper party to raise the objection that the purchaser had been misjoined as a defendant. The Court explained that a demurrer for misjoinder of parties defendant was taken from the system of equity pleading, that under that system the demurrer could be interposed only by the party who was improperly made a

defendant, and that a defendant against whom the complaint was sufficient could not object that others who had no interest in the subject matter of the dispute were made defendants unless it also appeared that his interests were thereby affected (*116 Cal. 84, 90)* .

Kennedy v. Bank of America (1965) 237 Cal. App. 2d 637, 47 Cal. Rptr. 154 , was an action against a bank as executor and the beneficiaries (real parties in interest) under a will. The second amended complaint was in two counts. The first was for quasi-specific performance of an alleged oral agreement to leave property to plaintiff by will as compensation for her services and the second on a quantum meruit, for the reasonable value of the same services, and seeking to impose a constructive trust on decedent's property. The bank's general and special demurrer to the first count was sustained without leave to amend and its general and special demurrer to the second count was sustained with leave to amend. The bank's demurrer to the third amended complaint was likewise sustained with leave to amend, one of the grounds being misjoinder of parties defendant. Plaintiff declined to further amend and the action was dismissed. In reversing the judgment on the second count but affirming it on the first, the court of appeal, with respect to the ground of misjoinder, based on the joining of the beneficiaries with the executor, which conceded that it was a proper party, said that it was not open to the executor to complain that the real parties in interest were misjoined, that only the person misjoined may complain, and that as to the executor, the improper joinder of its named codefendants did not adversely affect its interests in the action (*237 Cal. App. 2d 637, 653)* .

Division of Labor Law Enforcement v. Barnes (1962) 205 Cal. App. 2d 337, 23 Cal.Rptr. 55 (disapproved on another point in *White Lighting Co. v. Wolfson (1968) 68 Cal. 2d 336, 351 n.9, 66 Cal. Rptr. 697, 438 P.2d 345*), involved a cross complaint in an action brought by the division to recover on assigned claims for wages allegedly due to four ranch workers and for statutory penalties for nonpayment. The cross complaint was by the defendants against the division, a deputy labor commissioner, and the four assignors. The division and the deputy labor commissioner jointly filed a special and general demurrer and the four assignors jointly filed a similar demurrer. One of the grounds of both joint demurrers was that the division and the deputy labor commissioner had been misjoined as cross defendants. The demurrers were sustained without leave to amend and the concurrent motion to strike the cross complaint was granted. Cross complainants appealed from the subsequent judgment entered. The court of appeal, in affirming the judgment of dismissal of the causes of action against the division and deputy labor commissioner and holding that their joint demurrer for misjoinder was good, reversed the judgment as to the four wage claimants (assignors) on the grounds, among others, that their joint demurrer for misjoinder was improperly sustained, that only the person misjoined may complain of the misjoinder, and that the joinder of the Division and deputy labor commissioner did not adversely affect their interests (*205 Cal. App. 2d 337, 345)* .

Wuest v. Wuest (1942) 53 Cal. App. 2d 339, 127 P.2d 934 , was an action to vacate and modify in part an interlocutory judgment of divorce. Defendant's demurrer on both general and special grounds, including the ground of misjoinder of parties defendant, was sustained without leave to amend, and the action was dismissed. In reversing the judgment, the court of appeal, with respect to the ground of misjoinder, said that concerning defendant's claim of misjoinder of parties by naming the county clerk as a defendant, it may well be said that this ground of demurrer, while available to the county clerk, did not furnish defendant Wuest with a legal or valid objection to the complaint, and that it was not open to defendant Wuest to demur for misjoinder of parties when the action properly lay against him and his interests were not affected by the joinder of the county clerk (*53 Cal. App. 2d 339, 344)* .

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Volume 7A Chapters 71-79 DEMURRERS
CHAPTER 71 DEMURRERS AND MOTIONS FOR JUDGMENT ON THE PLEADINGS
PART II. FORMS
A. Demurrers
2. Special Demurrers to Complaint

7A-71 California Points & Authorities § 71.86

§ 71.86 Opposing Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Pleading Is Not Uncertain [Code Civ. Proc. § 430.10(f)]

[1] FORM Opposing Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Pleading Is Not Uncertain [Code Civ. Proc. § 430.10(f)]

[*Caption. See § 71.30.*]

THE SPECIAL DEMURRER TO THE COMPLAINT SHOULD BE OVERRULED BECAUSE _____ [IT FAILS TO SPECIFY IN WHAT PARTICULARS THE PLEADING IS UNCERTAIN *or* THE ALLEGATIONS OF THE COMPLAINT ARE SUFFICIENTLY CLEAR TO APPRISE DEFENDANT OF THE ISSUES TO BE MET *or* THE AMBIGUOUS FACTS ALLEGED ARE PRESUMPTIVELY WITHIN THE DEMURRING DEFENDANT'S KNOWLEDGE *or* THE CHALLENGED ALLEGATIONS ARE IMMATERIAL *or* THE DEMURRER IS BASED ON UNCERTAINTY ARISING FROM THE LEGAL EFFECT OF FACTS *or* IT ATTEMPTED TO REACH FAILURE TO ALLEGE SUFFICIENT FACTS *or combination of these.*]

[*EITHER*]

A. Failure to Specify in What Particulars Pleading Is Uncertain. The failure to specify the uncertain aspects of a complaint will defeat a demurrer based on the grounds of uncertainty (*see Code Civ. Proc. § 430.60*; *Fenton v. Groveland Community Services Dist. (1982) 135 Cal. App. 3d 797, 809, 185 Cal. Rptr. 758*).

[*AND/OR*]

B. Defendant Apprised of Issues to Be Met. When the allegations of the complaint are sufficiently clear to apprise the defendant of the issues to be met, a demurrer to the complaint on the ground of uncertainty should be overruled (*Lord v. Garland (1946) 27 Cal.2d 840, 853, 168 P.2d 5* ; *Williams v. Beechnut Nutrition Corp. (1986) 185 Cal. App. 3d*

135, 139 n.2, 229 Cal. Rptr. 605).

[*AND/OR*]

C. Ambiguous Facts Alleged Presumptively Within Defendant's Knowledge. A demurrer for uncertainty should not be sustained if the ambiguous facts alleged are presumptively within the knowledge of the demurring party (*Bacon v. Wahrhaftig (1950)97 Cal. App. 2d 599, 605, 218 P.2d 144*).

[*AND/OR*]

D. Challenged Allegations Immaterial. A demurrer for uncertainty will not lieas to uncertain and ambiguous allegations if such allegations refer to immaterial matters; in such event they will be treated as surplusage and will be disregarded (*Bacon v. Wahrhaftig (1950) 97 Cal. App. 2d 599, 605, 218 P.2d 144*).

[*AND/OR*]

E. Uncertainty as to Legal Effect of Facts Alleged. Uncertainty arising out of the legal effect of facts alleged is not a ground of demurrer (*Gressley v. Williams (1961) 193 Cal. App. 2d 636, 644, 14 Cal. Rptr. 496*).

[*AND/OR*]

F. Demurrer for Uncertainty Challenges Only Allegations Made. A demurrer for uncertainty does not lie to reach a failure to incorporate sufficient facts but is directed to uncertainty existing in the allegations actually made (*Bacon v. Wahrhaftig (1950) 97 Cal. App. 2d 599, 605, 218 P.2d 144*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in opposition to a special demurrer to a complaint on the ground of uncertainty, which term includes ambiguity and unintelligibility. The grounds of objection set out, which may be used singly or in combination with each other, are (1) the demurrer fails to specify in what particulars the pleading is uncertain (Paragraph A); (2) the complaint sufficiently apprises defendant of the issues to be met (Paragraph B); (3) the facts asserted to be ambiguously alleged are presumptively within defendant's knowledge (Paragraph C); (4) the allegations objected to as uncertain are immaterial to the cause of action alleged (Paragraph D); (5) defendant's objection is that there is uncertainty in the legal effect of the facts alleged (Paragraph E); (6) defendant's objection is misdirected to an asserted failure to have alleged facts rather than to an uncertainty in allegations actually made (Paragraph F).

Paragraph F is for use in opposing the contention that the complaint is uncertain because it fails to incorporate other facts. The basis for the opposition is that a special demurrer may not be used to raise such an objection when the allegations of the complaint are sufficiently clear to apprise the defendant of the issues that he or she is to meet [*see, e.g., People v. Lim (1941) 18 Cal. 2d 872, 882-883, 118 P.2d 472]* . Thus, a memorandum asserting Paragraph F would also normally include the point set forth in Paragraph B. It should be noted that although a defendant's objection that a complaint fails to incorporate particular facts is not a proper ground for a special demurrer when the complaint is sufficiently clear, the objection that the complaint fails to state facts sufficient to constitute a cause of action may be raised at any time [*see Code Civ. Proc. §§ 430.10(e), 430.80(a)*]. Hence, counsel should also be prepared to address that objection when appropriate. For memoranda of points and authorities opposing a demurrer to a complaint on the ground that the complaint fails to state facts sufficient to constitute a cause of action, see *§§ 71.30 -71.43*.

In an appropriate case, the foregoing memorandum may be submitted in opposition to the demurrer supported by the memorandum *set out in §§ 71.68 -71.71*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. For example, if the defendant objects to the complaint on the ground of uncertainty as to matters that are presumptively within his or her knowledge, plaintiff would refer to allegations in the complaint that show defendant's capacity, control, position, or other facts from which the court may infer that defendant should reasonably be presumed to have knowledge as to those matters [*see Gressley v. Williams (1961) 193 Cal. App. 2d 636, 644, 14 Cal. Rptr. 496]* .

[b] Demurrer For Uncertainty Not Dispositive of Cause of Action

For actions brought in Los Angeles County Superior Court, that court has stated in its local rules that demurrers founded on uncertainty under *Code Civ. Proc. § 430.10(f)* should be used sparingly and that such demurrers are disfavored when they are not dispositive of one or more causes of action [Los Angeles Co. Super. Ct. Rules, Rule 9.18(c)].

See also *§§ 71.20[2]* and *71.74[2]*.

[3] Discussion of Authorities

[a] Failure to Specify in What Particulars Pleading Is Uncertain

In ***Fenton v. Groveland Community Services Dist.*** *(1982) 135 Cal. App. 3d 797, 185 Cal. Rptr. 758* , the plaintiffs filed an amended complaint alleging a conspiracy on the part of several public and private defendants to deny them of their right to vote and negligence. The defendants filed a general and special demurrer. The trial court sustained the demurrer and granted plaintiffs 20 days leave to file an amended complaint. Thereafter, the defendants filed a motion to dismiss the case for failure to timely file an amended complaint. The trial court granted the motion, and judgment was entered. The plaintiffs appealed.

The court of appeal reversed. With regard to the demurrer on the grounds of uncertainty, the court stated that the accompanying points and authorities failed to specify in what particulars the complaint was uncertain. The court, citing *Code Civ. Proc. § 430.60*, stated that generally, the failure to specify the uncertain aspects of a complaint will defeat a demurrer based on the grounds of uncertainty (*135 Cal. App. 3d 797, 809)* . In referring to the record before it, the court concluded that the trial court erred in sustaining the demurrer on the grounds of uncertainty because none of the grounds found in the record, nor the grounds alleged in the defendants' brief, were sufficient to sustain a demurrer (*35 Cal. App. 3d 797, 811)* .

[b] Defendant Apprised of Issues to Be Met

Lord v. Garland *(1946) 27 Cal. 2d 840, 168 P.2d 5* , was an action against the director and registrar of the state

Department of Motor Vehicles for declaratory and injunctive relief. The complaint set forth three causes of action. The defendants demurred to the whole complaint both generally and specially on several grounds, including the ground that the second cause of action was ambiguous, unintelligible, and uncertain (*now see Code Civ. Proc. § 430.10(f)*). The trial court, without indicating the basis of its ruling, sustained the demurrer without leave to amend and plaintiff appealed from the subsequent judgment of dismissal.

The Supreme Court reversed the judgment with directions to overrule the demurrer. The Court stated that with respect to the demurrer for uncertainty, the allegations of the complaint were sufficiently clear to apprise the defendants of the issues that they were to meet, and the special demurrer therefore should have been overruled (*7 Cal. 2d 840, 853)* .

Williams v. Beechnut Nutrition Corp. *(1986) 185 Cal. App. 3d 135, 229 Cal. Rptr. 605* , involved an action for damages resulting from plaintiff's use of an alleged defective product. Defendant manufacturer demurred to the fourth amended complaint on various grounds, including the objection that the complaint was uncertain due to the plaintiff's failure to label the causes of action, as required by former Los Angeles Co. Super. Ct., Law Depts. Pol. Man., Rule 103(d) [*now see* Los Angeles Co. Super. Ct. Rules, Rule 9.3 (providing for motion to strike cause of action with leave to amend)]. The trial court sustained the defendant's demurrer without leave to amend and the plaintiff appealed.

The court of appeal reversed the judgment, and ordered the trial court to enter an order overruling the demurrer and allowing defendant a reasonable time to answer. The court, citing *Parnham v. Parnham (1939) 32 Cal. App. 2d 93, 96, 89 P.2d 189* , stated that when the complaint contains substantive factual allegations sufficiently apprising the defendant of the issues it is being asked to meet, a demurrer for uncertainty should be overruled or plaintiff be given leave to amend. "It is not what a paper is named," quoted the court, "but what it is that fixes its character." The court observed that although inconvenient, annoying, and inconsiderate, the lack of labels for the plaintiff's causes of action did not substantially impair the defendant's ability to understand the complaint, and the demurrer sustained on the ground of uncertainty without leave to amend should have been overruled (*185 Cal. App. 3d 135, 139 n.2*).

[c] Ambiguous Facts Alleged Presumptively Within Defendant's Knowledge

Bacon v. Wahrhaftig *(1950) 97 Cal. App. 2d 599, 218 P.2d 144* , was an action for partition of oil land and other relief. The trial court sustained the demurrers of three named defendants on the ground of misjoinder of causes of action (no longer a ground of demurrer) and the demurrers of the other defendants on both general grounds and the ground of uncertainty. Judgments of dismissal were entered after plaintiff declined to amend and plaintiff appealed.

The court of appeal reversed the judgment and held that none of the grounds of the demurrer was well taken and reversing the judgments. The court, quoting from *Merlino v. West Coast Macaroni Mfg. Co. (1949) 90 Cal. App. 2d 106, 108, 202 P.2d 748 , discussed under § 71.86[4][a]*, said that a demurrer for uncertainty will not lie when the ambiguous facts are presumptively within the knowledge of the demurring party. Specifically, most, if not all, of the matters defendants claimed were uncertain, arose out of transactions that were evidenced by writings attached to the complaint and pleaded in their exact language (*97 Cal. App. 2d 599, 605)* .

[d] Challenged Allegations Immaterial

The facts and procedural background of ***Bacon v. Wahrhaftig*** *(1950) 97 Cal. App. 2d 599, 218 P.2d 144* , are *discussed under § 71.86[3][c]*. In holding the demurrers for uncertainty were not well grounded in that case, the court, quoting from *Merlino v. West Coast Macaroni Mfg. Co. (1949) 90 Cal. App. 2d 106, 108, 202 P.2d 748 , discussed under § 71.86[4][a]*, said that a demurrer for uncertainty will not lie as to even uncertain and ambiguous allegations, if such allegations refer to immaterial matters, and that in such event they will be treated as surplusage and will be disregarded (*97 Cal. App. 2d 599, 605)* .

[e] Uncertainty as to Legal Effect of Facts Alleged

Gressley v. Williams *(1961) 193 Cal. App. 2d 636, 14 Cal. Rptr. 496* , was an action for damages for breach of contracts employing plaintiff as an automobile sales manager at a fixed salary plus a percentage of gross profits and for an accounting. The sixth amended complaint contained three counts. The first two were for breach of the oral contracts and the third for an accounting. Defendant demurred to all three counts both generally and on the grounds of uncertainty, ambiguity, and unintelligibility. The demurrer was sustained. Plaintiff elected to stand on the pleading and the demurrer was sustained without leave to amend.

The court of appeal reversed the judgment. The court held the general demurrer to the first count was properly sustained because the action was barred by the statute of frauds; but that both the second and third counts stated a cause of action. The court pointed out that the record failed to disclose the grounds on which the demurrer was sustained but that it had examined the grounds of the special demurrer and found them inconsequential. It stated a number of rules applicable to special demurrers for uncertainty, and in this connection said that some of the claimed uncertainties arose out of the legal effect of facts alleged and that uncertainty arising out of the legal effect of facts alleged is not a ground of demurrer (*193 Cal. App. 2d 636, 644)* .

[f] Demurrer for Uncertainty Challenges Only Allegations Made

The facts and procedural background of ***Bacon v. Wahrhaftig*** *(1950) 97 Cal. App. 2d 599, 218 P.2d 144* , are *discussed under § 71.86[3][c]*. In reversing the judgments, the court of appeal, with respect to the demurrers for uncertainty, explained that nearly all of the specifications involved assertions or claims that demurrants could not determine how certain interests were adverse or how legal results occurred, that most, if not all, of the alleged uncertainties and ambiguities arose out of the pleader's attempt to state the legal effect of certain transactions and that these transactions were all evidenced by writings that were attached to the complaint and pleaded in their exact language. The court then set forth a number of rules applicable to demurrers for uncertainty, including the rule that a demurrer for uncertainty is not intended to reach the failure to incorporate sufficient facts in the pleading, but is directed at the uncertainty existing in the allegations actually made (*97 Cal. App. 2d 599, 605)* .

[4] Additional Authorities

[a] Defendant Apprised of Issues to Be Met

The facts and procedural background of *Gressley v. Williams (1961) 193 Cal. App. 2d 636, 14 Cal. Rptr. 496* , are *discussed under § 71.86[3][e]*. In holding the demurrer for uncertainty was not well grounded, the court said that a special demurrer should be overruled when the allegations of the complaint are sufficiently clear to apprise the defendant of the issues he or she is to meet, and that all that is required of a complaint, even as against a special demurrer, is that it set forth the essential facts of plaintiff's case with reasonable precision and with particularity sufficiently specific to acquaint defendant of the nature, source, and extent of the cause of action (*193 Cal. App. 2d 636, 643)* .

The facts and procedural background of *Bacon v. Wahrhaftig (1950) 97 Cal. App. 2d 599, 218 P.2d 144* , are *discussed under § 71.86[3][c]*. In reversing the judgments, the court of appeal, citing *Lord v. Garland (1946) 27 Cal. 2d 840, 853, 168 P.2d 5* , *discussed under § 71.86[3][b]*, stated that a special demurrer for uncertainty should not be sustained when the allegations of the complaint are sufficiently clear to apprise the defendant of the issues that he or she is to meet, and quoting from *Merlino v. West Coast Macaroni Mfg. Co. (1949) 90 Cal. App. 2d 106, 108, 202 P.2d 748* , *below*, said that a special demurrer should not be sustained if the allegations are sufficiently clear to apprise the defendant of the issues that must be met, even if the allegations of the complaint may not be as clear and as detailed as might be desired (*97 Cal. App. 2d 599, 605)* .

Merlino v. West Coast Macaroni Mfg. Co. (1949) 90 Cal. App. 2d 106, 202 P.2d 748 , was an action for breach of an

agreement to share profits of a corporation. Defendant corporation was a wholly owned subsidiary of another corporation that owned 800 of its 804 issued shares of capital stock; the other four shares were owned one each by plaintiff, plaintiff's wife, the individual defendant, and the individual defendant's wife. The parent corporation had 675 outstanding shares; of these plaintiff and the individual defendant each owned 337 1/2 shares and their wives each owned one share until the time plaintiff and his wife, pursuant to a court decree, transferred their shares to the individual defendant. The complaint alleged that it was the custom of plaintiff and the individual defendant to divide a substantial portion of the earnings of both corporations between themselves as payment of salary and that, when defendant corporation was incorporated, it was orally agreed between them that, so long as plaintiff owned 50 percent of the stock of the parent corporation, he would be in active control and would manage defendant corporation; it was further alleged that the agreement was subsequently modified to provide that each was too draw $9,000 a year from the consolidated enterprises as long as each should continue to own 50 percent of the parent corporation's stock. Plaintiff alleged facts showing that some six months prior to the date he transferred his shares to the individual defendant, the latter breached the agreement to share profits. Plaintiff sought recovery of the sum of $4,500 for that six-month period.

Defendants demurred to the complaint on both general and special grounds and pointed out numerous allegations they claimed generated uncertainties and ambiguities. The trial court sustained the demurrer and on plaintiff's failure to amend gave judgment for defendants. In reversing the judgment on the ground the complaint stated a cause of action and was not susceptible to the objection of uncertainty, the court stated a number of rules applicable to demurrers for uncertainty. Among these was the rule that a special demurrer should not be sustained if the allegations of the complaint are sufficiently clear to apprise the defendant of the issues that must be met, even if the allegations may not be as clear and as detailed as might be desired (*90 Cal. App. 2d 106, 108)* .

See also *Youngman v. Nevada Irrigation Dist. (1969) 70 Cal. 2d 240, 245, 74 Cal. Rptr. 398, 449 P.2d 462* (even as against special demurrer, plaintiff required only to set forth essential facts of his or her case with reasonable precision and with particularity sufficient to acquaint a defendant with the nature, source, and extent of cause of action); *Smith v. Williams (1961) 55 Cal. 2d 617, 619 , 12 Cal. Rptr. 665 , 361 P.2d 241* (asserted uncertainties not sufficient to warrant sustaining of demurrer on that ground if allegations sufficiently clear to apprise defendant of the issues he or she is to meet); *Smith v. Kern County Land Co. (1958) 51 Cal. 2d 205, 209, 331 P.2d 645* (even as against special demurrer, plaintiff required only to set forth in complaint the essential facts of case with particularity sufficiently specific to acquaint defendant of nature, source, and extent of cause of action); *People v. Lim (1941) 18 Cal. 2d 872, 882, 118 P.2d 472* (special demurrer for uncertainty should not be sustained when allegations of complaint are sufficiently clear to apprise defendant of issues that he or she is to meet); *Miller v. Luco (1889) 80 Cal. 257, 260 22 P. 195* (objection that complaint ambiguous and uncertain because land not sufficiently described as untenable; complaint describes land as that part of the Mission Rancho of San Diego, known as lot 23, containing 516 acres; description as sufficient for identification of property); *Gonzales v. California (1977) 68 Cal. App. 3d 621, 631, 137 Cal. Rptr. 681* (quoting from *Merlino v. West Coast Macaroni Mfg. Co. (1949) 90 Cal. App. 2d 106, 108, 202 P.2d 748 , above*); *Wise v. Southern Pac. Co. (1963) 223 Cal. App. 2d 50, 62-63, 35 Cal. Rptr. 652* (all that is required of plaintiff, even as against special demurrer, is that he or she set forth in complaint the essential facts with reasonable precision; essentially, problem is one of fairness in pleading so as to give defendant such notice by the complaint that he or she may prepare case); *Beeler v. West American Fin. Co. (1962)201 Cal. App. 2d 702, 706, 20 Cal. Rptr. 190* (when allegations of complaint are sufficiently clear as to apprise defendant of issues to be met, special demurrer should not be sustained even though allegations of complaint may not be as clear or as detailed as might be desired); *Butler v. Sequeira (1950) 100 Cal. App. 2d 143, 145-146, 223 P.2d 48* (special demurrer should not be sustained when the allegations of complaint sufficiently clear to apprise defendant of issues to be met).

[b] Ambiguous Facts Alleged Presumptively Within Defendant's Knowledge

The facts and procedural background of *Gressley v. Williams (1961) 193 Cal. App. 2d 636, 14 Cal. Rptr. 496* , are *discussed under § 71.86[3][e]*. In holding that the demurrer for uncertainty was not well grounded, the court said that while there were some uncertainties in counts II and III of the complaint, they were largely matters that lay within the

knowledge of defendants, and that a demurrer does not lie to such matters (*193 Cal. App. 2d 636, 644)* .

The facts and procedural background of *Merlino v. West Coast Macaroni Mfg. Co. (1949) 90 Cal. App. 2d 106, 202 P.2d 748* , are *discussed under § 71.86[4][a]*. In holding that the complaint was not susceptible to the objection of uncertainty, the court of appeal said that a demurrer for uncertainty will not lie when the ambiguous facts alleged are presumptively within the knowledge of the demurring party (*90 Cal. App. 2d 106, 108)* .

See also *Smith v. Kern County Land Co. (1958) 51 Cal. 2d 205, 209, 331 P.2d 645* (plaintiff need not particularize matters presumptively within the knowledge of the demurring defendant); *Cunningham v. Los Angeles R. Co. (1897) 115 Cal. 561, 566, 47 P. 452* (demurrer to the complaint was properly overruled; while negligence was averred in general terms, such mode of presenting facts is sufficient in this character of action (for personal injuries to child hit by streetcar) when, as a general thing, more specific facts are more largely within the knowledge of defendant than that of plaintiff; and the complaint cannot, therefore, beheld open to the objection of uncertainty); *Gonzales v. California (1977) 68 Cal. App. 3d 621, 631, 137 Cal. Rptr. 681* (quoting from *Merlino v. West Coast Macaroni Mfg. Co. (1949) 90 Cal. App. 2d 106, 108, 202 P.2d 748* , *above*); *Beeler v. WestAmerican Fin. Co. (1962) 201 Cal. App. 2d 702, 706, 20 Cal. Rptr. 190* ; *James v. Herbert (1957) 149 Cal. App. 2d 741, 750, 309 P.2d 91* ; *Dumm v. Pacific Valves (1956) 146 Cal. App. 2d 792, 799, 304 P.2d 738* ; *Terry v. Bender (1956) 143 Cal. App. 2d 198, 209, 300 P.2d 119* ; *Schessler v. Keck (1954) 125 Cal. App. 2d 827, 835-836, 271 P.2d 588* (less particularity required in allegations of complaint when, from nature of matters alleged, adverse party has knowledge of facts superior to the party pleading them).

[c] Challenged Allegations Immaterial

The facts and procedural background of *Gressley v. Williams (1961) 193 Cal. App. 2d 636, 14 Cal. Rptr. 496* , are *discussed under § 71.86[3][e]*. In holding the demurrer for uncertainty was not well grounded, the court said that a special demurrer for uncertainty will not lie as to even uncertain and ambiguous allegations if they are with respect to inconsequential matters, and that in such event they are to be treated as surplusage and disregarded (*193 Cal. App. 2d 636, 643)* .

The facts and procedural background of *Merlino v. West Coast Macaroni Mfg. Co. (1949) 90 Cal. App. 2d 106, 202 P.2d 748* , are *discussed under § 71.86[4][a]*. In holding the complaint not susceptible to the objection of uncertainty, the court of appeal said that a demurrer for uncertainty will not lie as to even uncertain and ambiguous allegations, if such allegations refer to immaterial matters and that in such event they will be treated as surplusage and will be disregarded (*90 Cal. App. 2d 106, 108)* .

See also *Gardner v. California Guar. Inv. Co. (1902) 137 Cal. 71, 75, 69 P. 844* (neither the question of actual fraud nor that of the statute of limitations is material to the case and it therefore makes no difference whether the allegations as to these are defective or otherwise); *Gonzales v. California (1977) 68 Cal. App. 3d 621, 631, 137 Cal. Rptr. 681* (quoting from *Merlino v. West Coast Macaroni Mfg. Co. (1949) 90 Cal. App. 2d 106, 108, 202 P.2d 748* , *above*); *Dumm v. Pacific Valves (1956) 146 Cal. App. 2d 792, 799, 304 P.2d 738* (a demurrer for uncertainty does not lie as to immaterial matter); *Swasey v. De L'Etanche (1936) 17 Cal. App. 2d 713, 717, 62 P.2d 753* (same; disapproved on another point in Gagne v. Bertran *(1954) 43 Cal. 2d 481, 487 n.4, 275 P.2d 15*).

[d] Uncertainty as to Legal Effect of Facts Alleged

Santa Clara County v. Hayes Co. (1954) 43 Cal. 2d 615, 275 P.2d 456 , was an action by the county against a newspaper owner for damages arising out of the defective publication of the contents of a proposed county charter. In the first cause of action of its amended complaint, plaintiff alleged that it orally contracted with defendant for the latter to publish in its newspaper a proposed county charter for 10 days before the election of November 2, 1948, that five of the publications were so defective that the charter was invalidated in quo warranto proceedings commenced a few

weeks after the charter went into effect on July 1, 1949, that on or about September 27, 1948, defendant filed its affidavit with plaintiff that the charter had been published for 10 days and plaintiff did not discover the defective publications until November 10, 1948, after the charter had been approved by the voters, and that in May, 1949, plaintiff had submitted the charter to the Legislature and that it had been adopted and approved. In its second cause of action, plaintiff realleged the facts stated in its first cause of action and also alleged that the oral contract had been reduced to writing by defendant, the writing consisting of defendant's bill for the publishing costs. In its third cause of action, it alleged facts purporting to show that defendant was estopped to plead the statute of limitations. Defendant's demurrer to each cause of action on the grounds it was barred by the statute of limitations and was uncertain, ambiguous, and unintelligible was sustained. After plaintiff declined to further amend, the court dismissed the action, from which judgment plaintiff appealed.

In reversing the judgment, the Supreme Court, after holding that the action was timely and in response to defendant's contention that the demurrer for uncertainty, unintelligibility, and ambiguity was properly sustained since it could not be determined whether the action was in contract or in tort, said that the uncertainty, if any, does not arise out of the allegations of the relevant facts, but out of the legal effect of those facts, and that the plaintiff could not be required to resolve such uncertainty on demurrer but was entitled to seek any relief consistent with the facts alleged (*43 Cal. 2d 615, 619-620)* .

See also *James v. Herbert (1957) 149 Cal. App. 2d 741, 750, 309 P.2d 91* (uncertainty arising out of the legal effect of facts alleged is not a ground for demurrer).

[e] Demurrer for Uncertainty Challenges Only Allegations Made

People v. Lim (1941) 18 Cal. 2d 872, 118 P.2d 472 , was an action by the district attorney to restrain the operation of a gambling establishment as a nuisance. The complaint set forth the manner in which the various games were played and alleged that the operation of the gambling house constituted a public nuisance by encouraging idle and dissolute habits, by disturbing the public peace, and by corrupting public morals. It was further alleged that previous attempts to eradicate this evil by prosecutions under the penal laws had proven ineffective and that the aid of equity was necessary to accomplish its suppression. Plaintiff also sought pendent elite injunctive relief. Defendants demurred both generally and specially for uncertainty. The trial court sustained the demurrers and denied plaintiff's motion for a preliminary injunction. On plaintiff's refusal to amend, the court entered judgment for defendants and plaintiff appealed. In reversing the judgment, the Supreme Court, with respect to the special demurrer for uncertainty, said that such a demurrer is not intended to reach the failure to incorporate sufficient facts in the pleading, but is directed at the uncertainty existing in the allegations actually made (*18 Cal. 2d 872, 883)* .

Dumm v. Pacific Valves (1956) 146 Cal. App. 2d 792, 304 P.2d 738 , was an action by minors through their guardian ad litem against a corporation and its majority stockholders for declaratory relief with respect to the ownership of 180 shares of the stock in defendant corporation and dividends. Defendants demurred to the third amended complaint on both general and special grounds, including the ground of uncertainty, the demurrer setting forth a number of specifications in which the complaint was assertedly uncertain. The trial court, without specifying the grounds of its ruling, sustained the demurrer with leave to amend and on plaintiff's failure to amend dismissed the action. In concluding the complaint stated a cause of action and that none of the grounds of the special demurrers were well taken, the court of appeal reversed the judgment. With respect to the demurrer for uncertainty, the appellate court pointed out that many of the uncertainties specified by the demurrer were with regard to matters not alleged, which, if essential to the cause of action, were grounds for general demurrer, not special, and said that a demurrer for uncertainty is directed at the allegations actually made (*146 Cal. App. 2d 792, 799)* .

See also *Callahan v. Broderick (1899) 124 Cal. 80, 83, 56 P. 782* (objection of uncertainty goes to doubt as to what pleader means by facts alleged, not to failure to allege sufficient facts; when facts alleged are insufficient, pleading is to be tested by general demurrer); *Brea v. McGlashan (1934) 3 Cal. App. 2d 454, 459, 39 P.2d 877* (objection of

uncertainty does not go to failure to allege sufficient facts but to doubt as to what pleader means by facts alleged); *Smith v. Hollander (1927) 85 Cal. App. 535, 542, 259 P. 958* (demurrer for uncertainty lies for what is said with an uncertain meaning and not for what is omitted; disapproved on another point in *Scott v. Burke (1952) 39 Cal. 2d 388, 401, 247 P.2d 313*).

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7A-71 California Points & Authorities § 71.87

§ 71.87 Opposing Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Pleading Does Not Sufficiently Establish Whether Contract Is Written, Oral, or Implied by Conduct [Code Civ. Proc. § 430.10(g)]--Action Not Founded on Contract

[1] FORM Opposing Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Pleading Does Not Sufficiently Establish Whether Contract Is Written, Oral, or Implied by Conduct [Code Civ. Proc. § 430.10(g)]--Action Not Founded on Contract

[*Caption. See § 71.30.*]

SPECIAL DEMURRER TO THE COMPLAINT ON THE GROUND THAT IT CANNOT BE ASCERTAINED FROM THE PLEADING WHETHER THE CONTRACT THEREIN REFERRED TO IS WRITTEN OR ORAL SHOULD BE OVERRULED BECAUSE THE ACTION IS NOT FOUNDED ON A CONTRACT.

Objection Lies Only When Action Is Founded on Contract. The failure of a complaint to allege whether the contract therein referred to is written or oral is not a ground for objection when the action is not founded on the contract (*Strozier v. Williams (1960) 187 Cal. App. 2d 528, 532, 9 Cal. Rptr. 683*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in opposition to a special demurrer to a complaint on the ground that it cannot be ascertained from the pleading whether the contract alleged is written, oral, or implied by conduct. The ground of opposition setout is that the action is not founded on the contract.

In an appropriate case, the foregoing memorandum may be submitted in opposition to the demurrer supported by the memorandum *set out in § 71.72*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel would refer to specific allegations in the complaint (and, if applicable, to any matters of which the court must or may take judicial notice), that indicate that the action is one based on tort and not on breach of contract.

See also *§§ 71.20[2]* and *71.74[2]*.

[3] Discussion of Authorities

[a] Objection Lies Only Where Action Is Founded on Contract

Strozier v. Williams *(1960) 187 Cal. App. 2d 528, 9 Cal. Rptr. 683* , was an action for declaratory relief and damages. Plaintiff's fourth amended complaint alleged that until August 12, 1958, and for a period of 10 years before, plaintiff was the owner of and was occupying certain real property in Los Angeles; that a certain mortgage company had instituted proceedings to foreclose a second trust deed on the property and plaintiff had filed a declaratory relief action against the encumbrance holder; that about August 8, 1958, plaintiff's attorney had entered into an agreement with the attorneys for the encumbrance holder that the foreclosure sale might take place and that plaintiff would bid at the sale $3,500, being the full amount of the encumbrance, but would pay only the sum of $1, 400 and dismiss certain actions previously filed by plaintiff; that defendant Williams represented to plaintiff that defendant Deckard would purchase the real property for $8,000, would pay plaintiff the sum of $2,800 in cash and assume the first trust deed of $5,200; that the $2,800 was in the bank and would be paid to plaintiff as soon as the deed was ready to be delivered; that plaintiff, relying on Williams' promise, authorized the trustee in foreclosure to make the deed to Deckard but instructed him to deliver the deed to plaintiff's attorney and that the deed would be turned over to defendants only on payment of the $2,800; that on August 12, 1958, Williams went to the office of the trustee in foreclosure and falsely represented to him that he was sent by plaintiff's attorney; that the trustee, believing the deed would be delivered to plaintiff gave it to Williams; that Williams thereupon proceeded to file the deed of record and to transfer the first trust deed to Deckard without performing his part of the agreement of paying the monies due under the agreement; that defendants claimed an estate or an interest in the real property adverse to plaintiff by reason of the trustee's deed; that defendants threatened and intimidated plaintiff and by reason of those threats and intimidation plaintiff moved from the premises; and that Deckard obtained a judgment in small claims court against plaintiff and recorded an abstract of it which was a cloud on plaintiff's property. Plaintiff prayed for a judgment that defendants be required to set forth the nature of their claims that all adverse claims of defendants be determined by decree of court, that it be declared that defendants had no estate or interest whatever in or to the real property, and that plaintiff be awarded actual damages of $2,500 and exemplary damages of $5,000. Defendants' demurrer was sustained without leave to amend on the representation of plaintiff's attorney that he could allege no additional ultimate facts. Plaintiff appealed from the subsequent judgment of dismissal.

The court of appeal reversed the judgment with directions to overrule the demurrer and grant defendants a reasonable time within which to answer. With respect to the special demurrer on the ground that it could not be ascertained from the complaint whether the agreement between plaintiff and defendants was written or oral, the court said that the action was not based on the agreement but, rather, was one growing out of fraud and held that the provisions of former Code Civ. Proc. § 430(10) [*now see Code Civ. Proc. § 430.10(g)*], therefore, did not apply and that the special demurrer on this ground was not well taken (*187 Cal. App. 2d 528, 532)* .

[4] Additional Authorities

[a] Objection Lies Only When Action Is Founded on Contract

Fanucchi v. Coberly-West Co. (1957) 151 Cal. App. 2d 72, 311 P.2d 33 , was a class action by 18 cotton growers against a ginning company and its agents to recover for a portion of the cottonseed derived from cotton delivered by the growers to defendants over a period of years for the purpose of ginning and processing the cotton and for an accounting of the proceeds. After separating the cotton lint from the cottonseed in each grower's cotton, defendants weighed each grower's lint and accounted for it. Each grower's cottonseed was not, however, separately weighed, but the seed coming from all the growers was commingled and weighed as a whole. Defendants fixed the amount of cottonseed to be attributed to each grower by using an arbitrary formula without regard to the actual weight of the seed in each grower's cotton, and on that basis statements and payments were made to each grower. The action was based on the theory that by this method of accounting to the respective growers for their cottonseed, the amounts paid to each grower for his cottonseed were erroneous and that a large overage of cottonseed remained that defendants retained for their own use and for which the growers had never been paid. Defendants filed both a general demurrer and a special demurrer separately stating 13 grounds, among which was the ground that the complaint was based on three sorts of contract without stating whether they were oral or written. The special demurrer was sustained on the grounds of misjoinder of parties plaintiff, failure to separately state causes of action (no longer a ground of demurrer), and want of capacity to sue, with 10 days' leave to amend, and was overruled on all other grounds. On plaintiffs' failure to amend, the action was dismissed and plaintiffs appealed.

In holding that the demurrer was erroneously sustained and reversing the judgment, the court of appeal, with respect to defendants' contention that the special demurrer for failure to allege whether the contracts were written or oral should have been sustained, said that the failure to allege whether a contract was written or oral is not a ground for demurrer when, as here, the action is not founded on a contract (*151 Cal. App. 2d 72, 83)* .

Brubaker v. Mallickzadha (1951) 105 Cal. App. 2d 780, 233 P.2d 635 , was an action for wages due for services rendered. Plaintiff alleged he had rendered services to defendant for which he was to receive $15 per day, that the total of wages earned amounted to $1,533, and that there was a balance of $743.83 due him from defendant. Defendant's demurrer on the ground that it could not be ascertained whether the contract was oral or in writing was overruled. After trial, judgment was rendered for plaintiff in the amount of $630 and defendant appealed, on the grounds, among others, that the trial court had erred in overruling his demurrer to the complaint. In affirming the judgment, the court of appeal said that plaintiff was suing for wages and not on a contract, and the court did not believe he was required to state whether or not there was any writing (*105 Cal. App. 2d 780, 781-782)* . The court, however, added that no prejudice could have resulted to defendant by the overruling of the demurrer since defendant did set up a written agreement as a defense and the trial court found that that agreement had been rescinded (*105 Cal. App. 2d 780, 782)* .

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7A-71 California Points & Authorities § 71.88

§ 71.88 Opposing Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Demurrer Construed as Nonmeritorious Because of Absence of Memoranda [Cal. Rules of Ct., Rule 3.1113(a)]

[1] FORM Opposing Special Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Demurrer Construed as Nonmeritorious Because of Absence of Memoranda [Cal. Rules of Ct., Rule 3.1113(a)]

[*Caption. See § 71.30.*]

THE SPECIAL DEMURRER TO THE COMPLAINT SHOULD BE OVERRULED BECAUSE THE DEFENDANT ADMITS, BY THE ABSENCE OF A SUPPORTING MEMORANDUM, THAT THE SPECIAL DEMURRER IS NOT MERITORIOUS, AND WAIVES ALL GROUNDS NOT SUPPORTED.

Absence of Memorandum Construed as Admission of Nonmerit and Waiver of Grounds. A party filing a demurrer must serve and file therewith a memorandum to be relied on. The absence of the memorandum may be construed by the court as an admission that the special demurrer is not meritorious and cause for its denial and as a waiver of all grounds not supported (*Cal. Rules of Ct., Rule 3.1113(a)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in opposition to a special demurrer when there is no memorandum

supporting the demurrer; or, if there is a memorandum, the memorandum fails to support certain grounds raised in the demurrer [*Cal. Rules of Ct., Rule 3.1113(a)*].

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should identify those grounds raised by the demurrer that are not supported by a memorandum.

See also *§§ 71.20[2]* and *71.74[2]*.

[3] Discussion of Authorities

[a] Absence of Memorandum Construed as Admission of Nonmerit and Waiver of Grounds

Under *Cal. Rules of Ct., Rule 3.1113(a)*, a party filing a demurrer is required to serve and file with it a supporting memorandum [*Cal. Rules of Ct., Rule 3.1113(a)*]. The absence of a supporting memorandum may be construed by the court, in the case of a special demurrer, as an admission that the demurrer is not meritorious and as a waiver of all grounds not supported by a memorandum [*Cal. Rules of Ct., Rule 3.1113(a)*].

The term, "special demurrer," as used in the foregoing rule obviously does not include a demurrer to a complaint or cross complaint on the ground the court lacks jurisdiction of the cause of action alleged [*see Code Civ. Proc. § 430.10(a)*], since this objection, like the objection that the complaint or cross complaint does not state facts sufficient to constitute a cause of action, is not waived by a failure to raise it by demurrer or answer [*Code Civ. Proc. § 430.80(a)*] and can normally be raised at any time [*Certified Grocers of California, Ltd. v. San Gabriel Valley Bank (1983) 150 Cal. App. 3d 281, 285 n.1, 197 Cal. Rptr. 710* ; *Buss v. J.O. Martin Co. (1966) 241 Cal. App. 2d 123, 133, 50 Cal. Rptr. 206* (demurrer on ground court lacks subject matter jurisdiction operates like, and is functionally similar to, a demurrer for insufficiency of facts)].

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7A-71 California Points & Authorities §§ 71.89-71.99

[Reserved]

§§ 71.89[Reserved]

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7A-71 California Points & Authorities § 71.100

§ 71.100 Supporting General Demurrer to Answer [Code Civ. Proc. §§ 430.20(a), 430.30(a)]--General Form

[1] FORM Supporting General Demurrer to Answer [Code Civ. Proc. §§ 430.20(a), 430.30(a)]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM IN SUPPORT OF DEMURRER
_____ [*name*], Plaintiff,	)	TO ANSWER
vs.	)	[*Code Civ. Proc. § 430.30*]
_____ [*name*], Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THE GENERAL DEMURRER TO THE ANSWER SHOULD BE SUSTAINED BECAUSE THE ANSWER FAILS TO DENY THE MATERIAL ALLEGATIONS OF THE COMPLAINT AND CONTAINS NO NEW MATTER CONSTITUTING AN AFFIRMATIVE DEFENSE.

A. Objection by Demurrer. A party against whom an answer has been filed may object to it by demurrer on the ground that it fails to state facts sufficient to constitute a defense when the ground of objection appears on the face of the answer [or from any matter of which the court is required to or may take judicial notice] (*Code Civ. Proc. §§*

430.20(a), 430.30(a)).

B. Failure to State Defense. An answer that fails to deny the material allegations of the complaint and contains no new matter constituting an affirmative defense fails to state facts sufficient to constitute a defense (*see Wheeler v. West (1888) 78 Cal. 95, 98, 20 P. 45* ; *LaMar v. Superior Court (1948) 87 Cal. App. 2d 126, 128, 196 P.2d 98*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in support of a general demurrer to an answer that fails to deny the material allegations of the complaint and sets forth no new matter that would constitute an affirmative defense to the action.

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated. Thus, counsel would refer to the answer showing that it fails to controvert each material element of the cause of action and assert any matter constituting an affirmative defense.

With appropriate modifications, the foregoing memorandum may be used in support of a motion by plaintiff or cross complainant for judgment on the pleadings [*see* pt. II].

Since the ground of a general demurrer to an answer (failure to state facts sufficient to constitute a defense) and the ground of a motion by plaintiff for judgment on the pleadings are the same [*see Carlson v. Lindauer (1953) 119 Cal. App. 2d 292, 301, 259 P.2d 925]* , the memorandum set forth in this form and in §§ 71.130-71.133, may also be used to support a plaintiff's motion for judgment on the pleadings.

[b] Demurrer to Answer

A party who has filed a complaint or cross complaint may, within 10 days after service of the answer to his or her pleading, demur to the answer [*Code Civ. Proc. § 430.40(b)*]. The demurrer may be taken to the whole answer or to any one or more of the several defenses set up in it [*Code Civ. Proc. § 430.50(b)*].

[c] Related Pleading and Practice Forms

For a form of general demurrer to an answer for failure to state facts sufficient to constitute a defense, see *Ch. 206, Demurrers and Motions for Judgment on the Pleadings, § 206.132*, in California Forms of Pleading and Practice.

[d] Opposing Points and Authorities

In an appropriate case, the memorandum *set out in §§ 71.105 -71.109* may be used to oppose the general demurrer to an answer supported by the foregoing memorandum.

See also *§ 71.20[2]*.

[3] Discussion of Authorities

[a] Objection by Demurrer

Code Civ. Proc. § 430.20(a) provides that a party against whom an answer has been filed may object to it by demurrer as provided in *Code Civ. Proc. § 430.30* on the ground the answer does not state facts sufficient to constitute a defense. *Code Civ. Proc. § 430.30(a)* provides that when any ground for objection to an answer appears on the face thereof, or from any matter of which the court is required to or may take judicial notice, the objection on that ground may be taken by a demurrer to the pleading.

[b] Failure to State Defense

Wheeler v. West *(1888) 78 Cal. 95, 20 P. 45* , was an action to enjoin defendants from trespassing on plaintiff's mining claim and taking gold from it. Defendants' amended answer to the amended complaint admitted the acts complained of by plaintiff and alleged immaterial matters not constituting an affirmative defense, including the facts that plaintiff had changed his form of action from ejectment (original complaint) to an action for injunction (amended complaint) without defendants' consent and that no summons was issued on the amended complaint. Plaintiff's motion to strike these and other immaterial matters alleged on the ground they were irrelevant and redundant was granted. The court also sustained plaintiff's demurrer to the answer and judgment was rendered against defendants.

In affirming the judgment, the Supreme Court held that the motion to strike was properly granted, that the answer was clearly insufficient, and that the demurrer to it was properly sustained (*78 Cal. 95, 97-98)* .

LaMar v. Superior Court *(1948) 87 Cal. App. 2d 126, 196 P.2d 98* , was an original proceeding in mandate to compel the superior court to amend an interlocutory judgment of divorce. The real party in interest filed a demurrer to the petition that contained argument but stated no ground for demurrer. She also filed an unverified answer consisting of argument and citations of authorities but did not deny any of the allegations of fact contained in the petition. She did deny that there had been any mistake or inadvertence on the part of the trial court in the interlocutory judgment but this was a conclusion of law.

The court of appeal ordered issuance of a peremptory writ of mandate directing the trial court to correct and amend the interlocutory divorce judgment in specified manners. The court stated that in the absence of a denial that raises an issue of fact petitioner's demurrer to the answer will be sustained (*87 Cal. App. 2d 126, 128*). The court concluded, on the merits, that the peremptory writ should issue. It overruled the demurrer of the real party in interest to the petition, sustained petitioner's demurrer to the real party in interest's answer, and ordered issuance of a peremptory writ of mandate directing the trial court to correct and amend the interlocutory divorce judgment in specified manners (*87 Cal. App. 2d 126, 134)* .

Note that the grounds of demurrer to a petition for writ of mandate or to an answer to the petition are, by virtue of the incorporating provisions of *Code Civ. Proc. § 1109*, the same as in civil actions, that is, the grounds set forth in *Code Civ. Proc. §§ 430.10* and *430.20*, respectively.

[4] Additional Authorities

[a] Failure to State Defense

California Trust Co. v. Gustason (1940) 15 Cal. 2d 268, 101 P.2d 74 , was an action to quiet title to real property. Defendant answered, admitting he claimed an interest in the property and denying his claim was without right. He also alleged that he had entered into certain agreements for the purchase of the property and that he rescinded the agreements when he discovered fraud had been perpetrated on him; he requested that the agreements be declared alien against the property. He also filed a cross complaint based on the alleged fraud in which he sought a judgment that the sum of

$11,356 paid by him prior to his discovery of the alleged fraud be declared a lien on the property. By affirmative defense in his answer he also pleaded that another action was pending between the same parties involving the same subject matter. Plaintiff filed general and special demurrers to both the answer and the cross complaint. After twice permitting amendments, the trial court sustained the demurrers without leave to amend and entered judgment quieting title in plaintiff.

The Supreme Court affirmed the judgment. It held the attempted pleading in the answer of fraud was insufficient in numerous respects but that, even if it had been properly pleaded, it would have constituted neither a defense to the action nor a valid counterclaim (counterclaims have since been abolished; see *Code Civ. Proc. § 428.80*); it would not have supported any claim of right, title, or interest to the property involved and hence was not a defense to the quiet title action; it would not have tended to diminish plaintiff's recovery in the action and hence was not a proper counterclaim (*15 Cal. 2d 268, 272-273*). The Court also held that the special demurrers for uncertainty were properly sustained since it was impossible to tell from the answer what right, title, or interest defendant claimed to have in the property, whether he claimed a title, a lien, or some other interest, or whether he claimed any such interest in the whole or in some part of it (*15 Cal. 2d 268, 273)* . With respect to the allegation in the answer that another action was pending, the answer failed to state when the other action was brought, what the cause of action was, or what relief was demanded (*15 Cal. 2d 268, 273)* . The Court also held, however, that the general demurrer to the cross complaint was properly sustained since the action alleged was barred by the statute of limitations (*15 Cal. 2d 268, 274)* .

Le Breton v. Stanley Contracting Co. (1911) 15 Cal. App. 429, 114 P. 1026 , was an action by the receiver of a defunct bank against the makers of a note. Defendants' answer made no attempt to deny the due execution of the note to the bank or the amount of indebtedness due on it; rather, it denied, for lack of information or belief, only those allegations that the bank had been adjudicated insolvent and plaintiff appointed its receiver. These denials were held to be improper and insufficient to raise any material issue (*15 Cal. App. 429, 433-434*). As an affirmative defense, defendants alleged they were the holders of a check drawn on the defunct bank by one of its depositors the day before the bank closed its doors and ceased to do business, and that by reason of the bank's failure, the check was never paid or presented for acceptance and payment, and was ever since held by defendants. The check was in an amount somewhat larger that the amount due on the note. The answer did not allege that the check had ever been certified or accepted by the bank or that it had been drawn against a special fund or that it was for the precise balance the drawer had on deposit with the bank. Plaintiff's general demurrer to the answer was sustained and its concurrent motion for judgment on the pleadings was granted. The court of appeal held that the demurrer had been properly sustained without leave to amend since, in the absence of an assignment of the amount of the check to defendant, no cause of action on it existed in favor of defendant against the bank and hence the check could not properly be pleaded as a defense (offset) to plaintiff's cause of action (*15 Cal. App. 429, 432-433)* .

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7A-71 California Points & Authorities § 71.101

§ 71.101 Supporting General Demurrer to Answer [Code Civ. Proc. §§ 430.20(a), 430.30(a)]--Denial of Immaterial Allegations Only

[1] FORM Supporting General Demurrer to Answer [Code Civ. Proc. §§ 430.20(a), 430.30(a)]--Denial of Immaterial Allegations Only

[*The following should be combined with a general form of memorandum in support of a general demurrer to an answer (see § 71.100).*]

THE GENERAL DEMURRER TO THE ANSWER SHOULD BE SUSTAINED BECAUSE THE ANSWER DENIES ONLY IMMATERIAL MATTER ALLEGED IN THE COMPLAINT AND SETS UP NO SUFFICIENT DEFENSE TO THE ACTION.

A. Objection by Demurrer. [*See § 71.100, Paragraph A.*]

B. Denial of Immaterial Matter Only. A demurrer to an answer that sets up no sufficient defense to the action and denies only immaterial allegations of the complaint should be sustained (*see Wheeler v. West (1888) 78 Cal. 95, 98, 20 P. 45*).

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in support of a general demurrer to an answer that sets up no sufficient defense and denies only immaterial matter in the complaint.

The foregoing memorandum should be combined with a general form of memorandum in support of a demurrer to an answer made on the ground that the answer fails to deny the material allegations of the complaint and sets forth no new matter that would constitute an affirmative defense to the action [*see § 71.100*]. They may also be adapted for use in a

trial or appellate brief.

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated. That is, counsel would specifically refer to each denial, showing that the denial relates to other than an essential element of the cause of action alleged. In addition, counsel would identify in what respects the defense is insufficient to state an affirmative defense.

[b] Opposing Points and Authorities

In an appropriate case, the memorandum *set out in §§ 71.105 -71.107* may be used to oppose the general demurrer to an answer supported by the foregoing memorandum.

See also *§§ 71.20[2]* and *71.100[2]*.

[3] Discussion of Authorities

[a] Denial of Immaterial Matter Only

The facts and procedural background of ***Wheeler v. West*** *(1888) 78 Cal.95, 20 P. 45* , are *set forth in § 71.100[3][b]*. In holding that plaintiff's demurrer to the answer was properly sustained, the Supreme Court stated that a defendant cannot answer a complaint by an allegation that the complaint was improperly filed. Such a question should be raised by objection to the filing of the amendment or by motion to strike the amended pleading. Hence, such a statement in the answer is immaterial and surplusage and properly striken out (*78 Cal.95, 97)* . The Court concluded that although the answer contained some denials, some of them were mere conclusions and the others did not, alone or in connection with the defenses pleaded, constitute a defense to the action (*78 Cal.95, 98)* .

[4] Additional Authorities

[a] Denial of Immaterial Matter Only

Goldberg v. Rempp (1928) 95 Cal. App. 452, 273 P. 63 , was an action on a joint and several bond given by defendant sureties to release certain property from attachment after plaintiff had recovered judgment against the debtor. Plaintiff alleged both a demand on defendant debtor (principal on the bond) for redelivery of the property (execution was returned "wholly unsatisfied") and a demand on the sureties for payment of the bond. With respect to this latter demand, plaintiff alleged that on July 5, 1925, plaintiff demanded of defendants, including defendant sureties, "the payment of said judgment, which was by each and all of them refused." Appellant surety filed an answer in which she denied that on July 5th or any other time plaintiff demanded of her the payment of said judgment, but she did not deny the remainder of the allegation, to wit, "which was by each and all of them refused." She also denied on information and belief that demand was made on the other defendants. Plaintiff's general demurrer to this answer was sustained and, on defendant's failure to amend, her default was entered and judgment was rendered against defendants. Defendant surety appealed. In affirming the judgment, the court of appeal said that failure to deny the allegation that payment "was by each and all of them refused" was equivalent to an admission that defendant refused to pay (*95 Cal. App. 452, 455)* . With respect to her denial on information and belief that demand had been made on the other defendants, the court said that the bond was joint and several and that for the purpose of a judgment against appellant, no demand for payment on the other defendants was necessary (*95 Cal. App. 452, 456)* .

See also *Loveland v. Garner (1887) 74 Cal. 298, 300, 15 P. 844* (judgment on pleadings for plaintiff affirmed when only direct and positive denial in answer was of immaterial allegation of complaint).

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7A-71 California Points & Authorities § 71.102

§ 71.102 Supporting General Demurrer to Answer [Code Civ. Proc. §§ 430.20(a), 430.30(a)]--On Ground No Defense Is Stated [Code Civ. Proc. § 430.20(a)]--Conjunctive Denial of Matters Conjunctively Alleged

[1] FORM Supporting General Demurrer to Answer [Code Civ. Proc. §§ 430.20(a), 430.30(a)]--On Ground No Defense Is Stated [Code Civ. Proc. § 430.20(a)]--Conjunctive Denial of Matters Conjunctively Alleged

[*The following should be combined with a general form of memorandum in support of a general demurrer to an answer (see § 71.100).*]

THE GENERAL DEMURRER TO THE ANSWER SHOULD BE SUSTAINED BECAUSE THE ANSWER DENIES CONJUNCTIVELY MATERIAL MATTERS CONJUNCTIVELY ALLEGED IN THE COMPLAINT.

A. Conjunctive Denial of Matters Conjunctively Alleged. A conjunctive denial in the answer of a material matter conjunctively alleged in the complaint is evasive and constitutes an admission of that matter (*California Trust Co. v. Gustason (1940) 15 Cal. 2d 268, 271, 101 P.2d 74*).

B. Sustention of Demurrer. When an answer denies conjunctively material matters conjunctively alleged in the complaint and no other good defense is set forth, plaintiff's demurrer to the answer should be sustained (*see California Trust Co. v. Gustason (1940) 15 Cal. 2d 268, 271, 101 P.2d 74*).

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in support of a general demurrer to an answer that denies in the conjunctive material allegations conjunctively alleged in the complaint.

The foregoing memorandum should be combined with a general form of memorandum in support of a demurrer to an answer made on the ground that the answer fails to deny the material allegations of the complaint and sets forth no new

matter that would constitute an affirmative defense to the action [*see § 71.100*]. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. For example, if the complaint alleges that plaintiff "is now and at all times herein mentioned as to it was the owner of the following described real property ...," and the answer reads, "... defendant denies that plaintiff is now and at all times herein mentioned was the owner of that certain real property described in the complaint," counsel would refer to the complaint's allegation and the answer's denial of that allegation, pointing out that the denial is a conjunctive denial of a matter conjunctively alleged, and is therefore subject to general demurrer [*see California Trust Co. v. Gustason (1940) 15 Cal. 2d 268, 271, 101 P.2d 74 , discussed under § 71.102[3][a]*].

See also *§§ 71.20[2]* and *71.100[2]*.

[3] Discussion of Authorities

[a] Conjunctive Denial of Matters Conjunctively Alleged

The facts and procedural background of ***California Trust Co. v. Gustason*** *(1940) 15 Cal. 2d 268, 101 P.2d 74* , are discussed in *§ 71.100[4][a]*. In *California Trust Co.,* plaintiff had alleged in its complaint that it "is now and at all time herein mentioned as to it was the owner of the following described real property. ..." The answer read, "... defendant denies that plaintiff is now and at all times here mentioned is [*sic*] the owner of that certain real property described in the complaint." In affirming the judgment for plaintiff after plaintiff's demurrers to the answer were sustained without leave to amend, the Supreme Court said that the courts have long held that the conjunctive denial of matters conjunctively alleged results in an admission of the allegation purportedly denied (in this case plaintiff's ownership of the property) for the reason that such a denial is evasive and either averment might be true, even though together they may not be (*15 Cal. 2d 268, 271)* .

[b] Sustension of Demurrer

The facts and procedural background of ***California Trust Co. v. Gustason*** *(1940) 15 Cal. 2d 268, 101 P.2d 74* , are discussed in *§§ 71.100[4][a]* and *71.102[3][a]*. In *California Trust Co.,* the Supreme Court held that since the denials and the affirmative defense were insufficient to raise any material issue, the demurrer had been properly sustained (*15 Cal. 2d 268, 274)* .

See also *Janeway & Carpender v. Long Beach Co. (1922) 190 Cal. 150, 153-154, 211 P. 6* , involving a motion for judgment on the pleadings, discussed in *§ 71.130[4][b]*.

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7A-71 California Points & Authorities § 71.103

§ 71.103 Supporting General Demurrer to Answer [Code Civ. Proc. §§ 430.20(a), 430.30(a)]--On Ground No Defense Is Stated [Code Civ. Proc. § 430.20(a)]--Affirmative Defense of Setoff Not Applicable [Code Civ. Proc. § 431.70]

[1] FORM Supporting General Demurrer to Answer [Code Civ. Proc. §§ 430.20(a), 430.30(a)]--On Ground No Defense Is Stated [Code Civ. Proc. § 430.20(a)]--Affirmative Defense of Setoff Not Applicable [Code Civ. Proc. § 431.70]

[*The following should be combined with a general form of memorandum in support of a general demurrer to an answer (see § 71.100).*]

THE GENERAL DEMURRER TO THE ANSWER BY _____ [*name*] SHOULD BE SUSTAINED BECAUSE THE AFFIRMATIVE DEFENSE OF PAYMENT AS A SETOFF IS NOT AVAILABLE IF _____ [*set forth applicable grounds under Code Civ. Proc. § 431.70, e.g.,* THERE NEVER WAS ANY POINT IN TIME WHEN THE CROSS DEMAND BY DEFENDANT WAS NOT BARRED BY THE STATUTE OF LIMITATIONS].

[*EITHER*]

A. Defense of Payment Unavailable if Cross Demand Previously Barred by Statute of Limitations. A defendant's right to a setoff under the defense of payment is only available if the cross demands for money between plaintiff and defendant existed at some point in time when neither demand was barred by the statute of limitations (*see Code Civ. Proc. § 431.70*).

[*AND/OR*]

B. Defense of Payment Unavailable if Cross Demand Not Asserted by Compulsory Cross Complaint in Prior Action. The affirmative defense of payment as provided for in *Section 431.70 of the Code of Civil Procedure* is not available if the cross demand is barred for failure to assert it in a prior action by a compulsory cross complaint pursuant to *Section 426.30 of the Code of Civil Procedure* (*Code Civ. Proc. § 431.70*).

[*AND/OR*]

C. Setoff as Allowed Only in Action. Under *Code Civ. Proc. § 431.70* a setoff can be alleged only in an action; the section does not apply to special proceedings, such as a special proceeding to confirm an arbitrator's award (Airfloor Co. of Cal., *Inc. v. Regents of Univ. of Cal. (1978) 84 Cal. App. 3d 1004, 1009, 149 Cal. Rptr. 130*).

[*AND/OR*]

D. Unemployment and Disability Benefits Immune From Banker's Setoff. Deposits derived from unemployment and disability benefits are immune from setoff by a bank (*Kruger v. Wells Fargo Bank (1974) 11 Cal. 3d 352, 367, 113 Cal. Rptr. 449, 521 P.2d 441* ; *see Code Civ. Proc. §§ 704.120, 704.130*).

[*AND/OR*]

E. Claims Must Be Mutual. *Code of Civil Procedure Section 431.70* requires that claims must be mutual if they are to qualify as "cross demands," because the statute was intended to protect mutual claims existing between the same persons in the same capacities (*Carnation Co. v. Olivet Egg Ranch (1986) 189 Cal. App. 3d 809, 820-821, 229 Cal. Rptr. 261*).

[2] Comments

[a] Use of Form

The foregoing memorandum may be used to support a demurrer to an answer on the ground that the affirmative defense of payment under *Code Civ. Proc. § 431.70* is not available because the cross demands never existed at any point in time when neither of them was not barred by the statute of limitation, because a special proceeding is involved and setoff is only available in an action, because the dispute involves unemployment or disability payments that are immune from setoff, or because the claims are not mutual claims existing between the same persons in the same capacities.

The foregoing memorandum should be combined with a general form of memorandum in support of a demurrer to an answer made on the ground that the answer fails to deny the material allegations of the complaint and sets forth no new matter that would constitute an affirmative defense to the action [*see § 71.100*]. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and points of law stated. For example, counsel should show from the face of the pleading, that at no point in time did both cross demands exist when neither was barred by the statute of limitations, or, when appropriate, that the source of money deposited in a bank claiming a setoff was unemployment or disability benefits.

[b] Related Points and Authorities

For a form of memorandum supporting a motion to compel acknowledgment of satisfaction of judgment through setoff

of cross demands, see Ch. 131, *Judgments* .

See also *§ 71.100[2]*.

[3] Discussion of Authorities

[a] Setoff as Allowed Only in Action

In ***Airfloor Co. of Cal., Inc. v. Regents of Univ. of Cal.*** *(1978) 84 Cal. App. 3d 1004* , *149 Cal. Rptr. 130* , a contractor petitioned the court to confirm an arbitration award. Defendant did not contest the award but claimed entitlement to set off an alleged debt, not subject to arbitration. The trial court held that litigation of a nonarbitrable debt is beyond the scope of the special proceeding. Defendant appealed.

The court of appeal affirmed. The court stated that hearings to confirm arbitration awards were special proceedings as contrasted with actions and were creatures of statute. Therefore, the court's jurisdiction in such proceedings was limited by statutory authority (*84 Cal. App. 3d 1004, 1007-1008)* . The court held that setoff could be alleged when an action, not a special proceeding, was commenced (*84 Cal. App. 3d 1004, 1009)* .

[b] Unemployment and Disability Benefits Immune From Banker's Setoff

In ***Kruger v. Wells Fargo Bank*** *(1974) 11 Cal. 3d 352, 113 Cal. Rptr. 449, 521 P.2d 441* , plaintiff maintained a deposit account comprised of payments from unemployment compensation and state disability benefits, from which defendant bank deducted the balance and applied it to her Master Charge delinquency, thereafter refusing to honor checks drawn on the account. Plaintiff sued, claiming exemption from attachment and execution under former Code Civ. Proc. § 690.18(a) [*now see Code Civ. Proc. §§ 704.120, 704.130*]. Defendant demurred. The superior court sustained the demurrer without leave to amend and plaintiff appealed.

The Supreme Court reversed. The Court held that to permit bankers' setoffs against unemployment and disability benefits would frustrate the Legislature's objectives in providing such benefits and in protecting them from seizure by creditors. Therefore, deposits derived from unemployment and disability benefits are immune from setoff (*11 Cal. 3d 352, 367)* .

[c] Claims Must Be Mutual

In ***Carnation Co. v. Olivet Egg Ranch*** *(1986) 189 Cal. App. 3d 809, 229 Cal. Rptr. 261* , a chickenfeed supplier brought an action against a limited partnership, a partner thereof, and several coventurers, to recover damages resulting from default on a promissory note arising from an outstanding commercial debt. Defendants filed cross complaints on various theories, including the assertion that damages incurred by the partner-defendant's previous partnership should set off plaintiff's damages, pursuant to *Code Civ. Proc. § 431.70*. On that issue, the trial court granted plaintiff's motion for directed verdict. Ultimately, the court ordered entry of the net judgment after separate judgments for both parties. Defendants appealed.

The court of appeal reversed the judgment with respect to the granting of a nonsuit regarding a provision of the Uniform Commercial Code (*189 Cal. App. 3d 809, 814-819)* . However, the court affirmed the judgment with regard to the directed verdict based on *Code Civ. Proc. § 431.70* (*189 Cal. App. 3d 809, 821)* . Section 431.70 requires that claims must be mutual if they are to qualify as "cross demands" under the statute (*189 Cal. App. 3d 809, 820)* . Therefore, the partner-defendant cannot set off a former partnership's claim against plaintiff, either individually or as a partner in the instant case, because the former partnership has no obligation regarding the instant action. The language of *Code Civ. Proc. § 431.70* and the cases interpreting it make clear that the statute was intended to protect mutual claims existing between the same persons in the same capacities. To allow defendants to assert a former partnership's claim against plaintiff when plaintiff is not maintaining any claim against it would require stretching *Code Civ. Proc. § 431.70*

beyond its intended boundaries. The underlying purpose of the statute is to prevent a party from not acting on a claim against a particular person, thereby inducing that person to permit a counterclaim to become time-barred, and then surprising the defenseless victim. That purpose would not be served by applying the statute in the instant case (*189 Cal. App. 3d 809, 821)* .

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7A-71 California Points & Authorities § 71.104

§ 71.104 Supporting Special Demurrer to Answer [Code Civ. Proc. §§ 430.20(b), 430.30(a)]--Pleading Is Uncertain

[1] FORM Supporting Special Demurrer to Answer [Code Civ. Proc. §§ 430.20(b), 430.30(a)]--Pleading Is Uncertain

[*Caption. See § 71.100.*]

THE SPECIAL DEMURRER TO THE ANSWER SHOULD BE SUSTAINED BECAUSE THE ANSWER IS UNCERTAIN.

Objection by Demurrer. The party against whom an answer has been filed may object to it by demurrer on the ground the answer is uncertain when the ground of objection appears on the face of the complaint (*Code Civ. Proc. §§ 430.20(b), 430.30(a)*; *California Trust Co. v. Gustason (1940) 15 Cal. 2d 268, 273, 101 P.2d 74*). The term "uncertain" in this context includes ambiguous and unintelligible (*Code Civ. Proc. § 430.20(b)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in support of a special demurrer to an answer on the ground that an answer is uncertain (which term includes ambiguous and unintelligible).

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. For example, if the answer is uncertain because of ambiguity, counsel should identify the particular allegations in the answer and demonstrate how those allegations are susceptible to two or more meanings.

[b] Waiver of Objection

The objection that the pleading is uncertain is waived if not raised by demurrer [*see Code Civ. Proc. § 430.80(b)*].

[c] Related Pleading and Practice Forms

For forms of demurrers to the complaint and to the answer on the ground of uncertainty, see *Ch. 206, Demurrers and Motions for Judgment on the Pleadings, § 206.133*, in California Forms of Pleading and Practice.

[d] Opposing Points and Authorities

In an appropriate case, the memorandum *set out in § 71.110* may be used to oppose the special demurrer to an answer supported by the foregoing memorandum.

See also *§§ 71.20[2]*, *71.68[2]*, and *71.100[2]*.

[3] Discussion of Authorities

[a] Objection by Demurrer

Code Civ. Proc. § 430.20(b) provides that a party against whom an answer has been filed may object to it by demurrer, as provided in *Code Civ. Proc. § 430.30*, on the ground the pleading is uncertain. As used in this subdivision, "uncertain" includes ambiguous and unintelligible. *Code Civ. Proc. § 430.30(a)* provides that when any ground for objection to an answer appears on the face thereof, or from any matter of which the court is required to or may take judicial notice, the objection on that ground may be taken by a demurrer to the pleading.

The facts and procedural background of ***California Trust Co. v. Gustason*** *(1940) 15 Cal. 2d 268, 101 P.2d 74* , are discussed in *§ 71.100[4][a]*. In *California Trust Co.*, in affirming the judgment, the Supreme Court stated that the answer was manifestly bad as against the special demurrer for uncertainty, ambiguity, and unintelligibility. It was impossible to tell what right, title or interest defendant claimed to have in the property; or whether he claimed title, a lien, or some other interest; or whether he claimed any such interest in the whole or in some part of it (*15 Cal. 2d 268, 273)* .

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7A-71 California Points & Authorities § 71.105

§ 71.105 Opposing General Demurrer to Answer [Code Civ. Proc. §§ 430.20(a), 430.30(a)]--General Form

[1] FORM Opposing General Demurrer to Answer [Code Civ. Proc. §§ 430.20(a), 430.30(a)]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM IN OPPOSITION TO DEMUR-
_____ [*name*] Plaintiff,	)	RER TO ANSWER
vs.	)	[*Code Civ. Proc. § 430.30*]
_____ [*name*], Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THE GENERAL DEMURRER TO THE ANSWER SHOULD BE OVERRULED BECAUSE THE ANSWER PUTS IN ISSUE A MATERIAL ALLEGATION OF THE COMPLAINT.

A. Answer Raises Material Issue. It is error to sustain a general demurrer to an answer if the answer raises a material issue of fact (*Warren v. Harootunian (1961) 189 Cal. App. 2d 546, 548, 11 Cal. Rptr. 305*). In other words, all that is necessary against a general demurrer is that on a consideration of all the facts stated, it appears that the party whose pleading is attacked by such a demurrer is entitled to any relief at the hands of the court against his or her adversary (

South Shore Land Co. v. Petersen (1964) 226 Cal. App. 2d 725, 733, 38 Cal. Rptr. 392).

[*Optional*] **B. General Demurrer Admits Facts Well Pleaded.** A general demurrer admits all facts well pleaded in the answer, including denials (*Warren v. Harootunian (1961) 189 Cal. App. 2d 546, 548, 11 Cal. Rptr. 305*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in opposition to a general demurrer to an answer when the answer puts in issue one or more material issues of fact.

In an appropriate case, the foregoing memorandum may be submitted in opposition to the general demurrer to an answer supported by the memorandum *set out in § 71.100*.

Optional Paragraph B would be included when plaintiff has urged that defendant's denial of a material allegation of the complaint is sham and that the allegation of the complaint is true.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should make specific reference to the denials and affirmative defenses of the answer, pointing out that notwithstanding any defectively stated facts, the specific facts plead suffice to raise issues of fact warranting the overruling of the general demurrer [*see South Shore Land Co. v. Petersen (1964) 226 Cal. App. 2d 725, 738, 38 Cal. Rptr. 392 , discussed under § 71.105[3][a]*].

With appropriate modifications, the foregoing memorandum may be used in opposition to a demurrer to an answer to a cross complaint, or to a motion by plaintiff or cross complainant for judgment on the pleadings [*see* pt. II].

See also *§§ 71.20[2]* and *71.30[2]*.

[3] Discussion of Authorities

[a] Answer Raises Material Issue

In ***South Shore Land Co. v. Petersen*** *(1964) 226 Cal. App. 2d 725, 38 Cal. Rptr. 392* , the plaintiff filed a complaint to quiet title to certain property, claiming that the plaintiff had been in the actual, exclusive, adverse possession of the parcel by itself and its predecessors continuously for 20 years prior to the filing of the complaint, claiming during all of that period to own the property in fee against the whole world, and in the five years preceding the filing of the complaint, paid all taxes levied or assessed against the property. The complaint was answered by the defendant, who also cross complained, seeking ejectment and damages. The plaintiff demurred generally and specially to both the answer and the cross complaint. The trial court sustained the demurrers without leave to amend and judgment was entered quieting title to the property against the defendant and decreeing that she take nothing by her answer and cross complaint. The defendant appealed.

The court of appeal reversed the judgment with directions. The court reviewed the general principles applicable to

general demurrers. That is, a demurrer reaches only to the contents of the pleading and such matters as may be considered under the doctrine of judicial notice; the allegations of the pleading demurred to must be regarded as true; a demurrer does not, however, admit contentions, deductions or conclusions of fact or law alleged in the pleading, or the construction placed on an instrument pleaded in the pleading, or facts impossible in law, or allegations contrary to facts of which a court may take judicial knowledge (*226 Cal. App. 2d 725, 732)* . All that is necessary against a general demurrer is that on a consideration of all facts stated it appears that the party whose pleading is attacked by such a demurrer is entitled to any relief at the hands of the court against his or her adversary, notwithstanding the facts may not be clearly stated, or may be intermingled with a statement of other facts irrelevant to the cause of action or defense shown, or although the plaintiff, in his or her complaint, or the defendant, in his or her answer, may demand relief to which he or she is not entitled under the facts alleged (*226 Cal. App. 2d 725, 733)* . The defendant had denied, by way of general denial, the allegations in the complaint that the plaintiff was the owner of the fee in the parcel in question and had denied that the plaintiff was in adverse possession of the land. She had also alleged in her answer that she was the owner in fee and in possession of the parcel in question and had alleged several facts not inconsistent with ownership. The court concluded that the specific facts pled in the answer sufficed to raise issues of fact warranting the overruling of the general demurrer to the answer (*226 Cal. App. 2d 725, 738*). (The court also concluded that the cross complaint was good against the general demurrer, but directed the trial court to rule on the points presented by the special demurrer.)

Warren v. Harootunian *(1961) 189 Cal. App. 2d 546, 11 Cal. Rptr. 305* , was an action to determine the validity of building restrictions on property owned by plaintiffs. The complaint alleged that plaintiffs were the owners of certain real property, that they had received the property by grant deed from their grantors for $2, 500, that the deed contained a provision that the property was subject to certain "covenants, conditions and restrictions now of record," that the grantors derived their title from defendants, and that the deed contained the following restriction: "One private dwelling to contain no less than 650 square feet of floor space; no tents, trailers or camping allowed at any time; and plans for home and set backs to be approved in writing by sellers." Plaintiffs further alleged that they desired to construct a multiple family dwelling on the property, that they could not build without subjecting themselves to the hazard of violating the building restrictions and to the hazard of litigation, that the property had been subdivided by the defendants, that defendants had sold virtually all the property, that building restrictions were inserted in the deeds to some of the property sold and not in others, that the result was that some property was subject to the restrictions and some not, that defendants failed to enforce the building restrictions, that in the immediate vicinity of the property owned by plaintiffs buildings were erected in violation of the restrictions, that plaintiffs' lot was no longer suitable for a single family residence, and that by reason of the changed conditions and the failure of defendants to enforce the restrictions they were not binding. Plaintiffs sought a declaration that the restrictions were not binding, were unenforceable inequity, and that the erection of a multiple family dwelling would not be in violation of the restrictions. Defendants' answer denied the allegations of the complaint and set up three affirmative defenses that allege laches and estoppel. Plaintiffs' general demurrer to the answer on the ground the answer did not state facts sufficient to constitute a defense was sustained with leave to amend and on defendants' failure to amend their default was entered and judgment was entered for plaintiffs granting them the relief prayed for. Defendants appealed.

The court of appeal reversed with directions to overrule the demurrer. The court said that the answer denied all the material allegations of the complaint, thus creating issues of fact as to the relief sought by plaintiffs, and that the three affirmative defenses were sufficient as against a general demurrer to set up the defenses of laches and estoppel. The court added that even if the general demurrer was good as to the special defenses, the trial court erred in entering judgment by default because the denials of the allegations in plaintiffs' complaint clearly created issues of fact (*189 Cal. App. 2d 546, 548)* .

[b] General Demurrer Admits Facts Well Pleaded

The facts and procedural background of ***Warren v. Harootunian*** *(1961) 189 Cal. App. 2d 546, 11 Cal. Rptr. 305* , are *discussed under § 71.105[3][a]*. In reversing the judgment in *Warren* for plaintiffs, the court of appeal said that a

general demurrer admits all facts well pleaded in the answer, including denials (*189 Cal. App. 2d 546, 548)* .

[4] Additional Authorities

[a] Answer Raises Material Issue

Pacific Gas & Elec. Co. v. Minnette (1949) 92 Cal. App. 2d 401, 206 P.2d 1138 , was an action by a public utility to quiet title to an easement that had been granted to it by defendants' predecessors in interest for the purpose of erecting and maintaining power poles and lines. The complaint alleged that the grant contained a covenant prohibiting the grantors from erecting or maintaining any building or structure beneath the power lines, that the grant had been recorded, that defendants had purchased the property in 1945, and that with full knowledge of the easement and the restriction defendants in 1947 had constructed beneath the power lines a basalt block building as an automobile garage and repair shop. Plaintiff sought a judgment quieting its title to the easement and a mandatory injunction requiring defendants to remove the building. The amended answer stated that the building covered only a portion of the alleged right-of-way and did not interfere with plaintiff's ingress and egress. In addition, however, it denied material allegations of the complaint and affirmatively alleged that defendants had no knowledge of the existence of the easements, that plaintiff's poles and wires were not erected or maintained on the easements, that for a long time prior to the construction of the building, other buildings were permitted by plaintiff, without objection, to remain beneath the wires on the easements in the immediate vicinity, including defendants' frame building that had been replaced by the basalt building, and that defendants, with full knowledge on plaintiff's part, tore down their frame building in January, 1947, and replaced it with the basalt block building at a cost of about $9,000, which building was under construction for eight months, during all of which time plaintiff had full notice and knowledge of the construction. Paragraph IV of the amended answer denied on information and belief that plaintiff erected its poles and wires on the easement granted but rather that they were erected on another part of defendants' land. In Paragraph VI, defendants denied affirmatively that the building was constructed on the easement or that they had invaded the easement by constructing and maintaining the building. The answer also alleged that prior to their purchase, defendants secured a title company report that the land was free and clear of any recorded easements, liens, or encumbrances whatsoever and it setup the defenses of estoppel and laches. Plaintiff's general demurrer to the answer was sustained without leave to amend and judgment was entered for plaintiff.

The court of appeal reversed the judgment with directions to overrule the demurrer. The court held that the answer presented an issue of fact as to whether the building was constructed on the easement, that it sufficiently alleged an equitable defense (estoppel), and that the trial court, therefore, erred in having sustained the demurrer to it (*92 Cal. App. 2d 401, 405, 408)* .

Coons v. Thompson (1946) 75 Cal. App. 2d 687, 171 P.2d 443 , was an action to quiet title to real property. In Paragraph III of the complaint, it was alleged that plaintiff was the owner and entitled to possession of certain real property. The third amended answer contained numerous allegations by which defendants endeavored to allege that they had certain equities in the property; it also denied "generally and specifically each and every allegation contained in paragraph III of plaintiff's complaint." Plaintiff's demurrer to the answer on both general and special grounds was sustained without leave to amend, and defendants appealed from the subsequent judgment for plaintiff.

The court of appeal reversed the judgment with directions to overrule the demurrer. The court said that in a quiet title action the denial in the answer of plaintiff's ownership and right to possession of the property raises issues of fact requiring a trial of the action (*75 Cal. App. 2d 687, 689*). The court concluded that since the third amended answer denied specifically the allegation of the complaint that plaintiff was the owner and entitled to possession of the real property described, it raised material issues of fact requiring a trial and that the trial court, therefore, had erred in sustaining the general demurrer to it (*75 Cal. App. 2d 687, 690)* .

See also *Cohn v. Klein (1930) 209 Cal. 421, 424, 287 P. 459* ("In view of the general allegations of ownership by

plaintiffs and the general denial thereof by defendants, it may be said that a motion by plaintiffs for judgment on the pleadings is improper as such a motion is in the nature of a demurrer to the answer and when the answer raises a material issue, no such motion can be allowed to prevail"); *Cass v. Rochester (1917) 174 Cal. 358, 360, 163 P. 212* ("Judgment on the pleadings cannot be given in favor of the plaintiff when the answer puts in issue a material allegation of the complaint, or sets up affirmative matter constituting a defense"); *Neale v. Morrow (1916) 174 Cal. 49, 54, 161 P. 1165* ("As the answer sets up a good defense and denies material allegations of the complaint, it was sufficient as against a general demurrer ...").

[b] General Demurrer Admits Facts Well Pleaded

Sheward v. Citizens' Water Co. (1891) 90 Cal. 635, 27 P. 439 , was an action to enjoin defendant water company from shutting off plaintiff's water for nonpayment of the monthly bills. Under a city ordinance, the monthly charge for water was either a flat rate, or if a meter was installed, the meter rate. Defendant, with plaintiff's consent, installed a water meter at plaintiff's house. Prior to the installation of the meter, plaintiff's monthly charge was $6.20. After the meter was installed, the charge for the succeeding two months was $12.95 and $11.95, respectively. Plaintiff tendered to defendant the sum of $6.20 on the last day of each of the months and demanded a receipt for payment in full, but defendant refused. On plaintiff's refusal to pay any more than the amounts tendered, defendant threatened to shut off the water and the action for injunction followed. Plaintiff's general demurrer to the amended answer was sustained, and on defendant's failure to file an amended pleading, judgment was rendered that that portion of the city ordinance providing for meter rates at the option of the company furnishing water was contrary to law and void and, permanently enjoining defendant from shutting off plaintiff's water. Defendant appealed.

In holding the amended answer sufficient and reversing the judgment, the Supreme Court said that a demurrer to the answer admits not only the facts alleged in it but also, for the purpose of determining the sufficiency of the answer, that the facts alleged in the complaint that are denied in the answer form no part of plaintiff's cause of action and are not to be regarded by the court (*90 Cal. 635, 639)* . Applying this rule, the Court said that it was thus admitted by plaintiff that the ordinance was properly adopted, that defendant was entitled to collect from plaintiff for the water consumed by him according to the rates specified in the ordinance, that defendant for the purpose of ascertaining the exact amount of water consumed on the premises applied a meter with plaintiff's knowledge and consent, that plaintiff's consumption during July and August 1890 was much in excess of the amount reasonably required and was large, unusual, and wasteful, that the meter would and did accurately measure the amount consumed, that the sums demanded of plaintiff for this water were reasonable, were the ordinary meter charge made by defendant to its customers, did not discriminate against plaintiff, and were less than the amount of the rates fixed by the ordinance, and that plaintiff refused to pay these sums (*90 Cal. 635, 639-640)* . The Court concluded on the facts thus admitted that plaintiff showed no cause of action for compelling defendant to continue to supply water to him or for enjoining it from cutting off his supply (*90 Cal. 635, 640)* .

See also *Miller & Lux, Inc. v. Light & Power Corp. (1932) 120 Cal. App. 589, 600, 8 P.2d 560* (demurrer to answer admits not only facts alleged in the answer, but also, for purpose of determining sufficiency of answer, that facts alleged in complaint that are denied in answer form no part of plaintiff's cause of action and are not to be regarded by court).

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7A-71 California Points & Authorities § 71.106

§ 71.106 Opposing General Demurrer to Answer [Code Civ. Proc. §§ 430.20(a), 430.30(a)]--General Demurrer Does Not Lie to Challenge Defectively Stated Facts

[1] FORM Opposing General Demurrer to Answer [Code Civ. Proc. §§ 430.20(a), 430.30(a)]--General Demurrer Does Not Lie to Challenge Defectively Stated Facts

[*The following should be combined with a general form of memorandum opposing a general demurrer to an answer (see § 71.105).*]

THE GENERAL DEMURRER TO THE ANSWER SHOULD BE OVERRULED BECAUSE THE DEMURRER CHALLENGES MERELY THE DEFECTIVE STATEMENT OF FACTS, RATHER THAN THE FAILURE TO RAISE ANY MATERIAL ISSUE OF FACT.

A. Facts Defectively Stated Not Subject to General Demurrer. A general demurrer does not lie to challenge facts defectively stated in an answer or those set forth therein by way of inference or argument (*Miller & Lux, Inc. v. Light & Power Corp. (1932) 120 Cal. App. 589, 602, 8 P.2d 560*).

[*Optional*] **B. Answer Sufficient Against General Demurrer Despite Unclear or Irrelevant Facts, or Demand for Wrong Relief.** If it appears that the party whose pleading is attacked by the demurrer is entitled to any relief at the hands of the court against the party's adversary, the general demurrer against the answer will be overruled, notwithstanding that the facts may not be clearly stated, or may be intermingled with a statement of other facts irrelevant to the defense shown, or although the defendant, in his or her answer, may demand relief to which the defendant is not entitled under the facts alleged (*South Shore Land Co. v. Petersen (1964) 226 Cal. App. 2d 725, 733, 38 Cal. Rptr. 392*).

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in opposition to a general demurrer to an answer when the answer raises one or more material issues of fact and the gist of the objection is merely that the facts alleged are defectively stated, for example, that they are uncertain (which term includes ambiguous and unintelligible).

In an appropriate case, the foregoing memorandum may be submitted in opposition to the general demurrer to an answer supported by the memorandum *set out in §§ 71.100 -71.103*.

The foregoing memorandum should be combined with a general form of memorandum in opposition to a demurrer to an answer made on the ground that the answer fails to deny the material allegations of the complaint and sets forth no new matter that would constitute an affirmative defense to the action [*see § 71.105*]. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel would refer to the answer and to matters of which the court is required to or may take judicial notice [*see § 71.21*], indicating that notwithstanding any defectively stated facts, the defendant is entitled relief [*see South Shore Land Co. v. Petersen (1964) 226 Cal. App. 2d 725, 733, 38 Cal. Rptr. 392 , discussed under § 71.106[3][b]*].

See also *§§ 71.20[2]* and *71.105[2]*.

[3] Discussion of Authorities

[a] Facts Defectively Stated Not Subject to General Demurrer

Miller & Lux, Inc. v. Light & Power Corp. *(1932) 120 Cal. App. 589, 8 P.2d 560* , was an action to enforce by injunction the terms of a contract executed some 20 years before, involving the rights of the parties to the waters of a river. Defendant's answer denied various allegations of the complaint and set forth 15 separate defenses. At trial plaintiff, on the close of its case, objected to the introduction of any evidence by defendant on the ground the answer failed to state any facts that would constitute a defense to the action. The court sustained the objection and also sustained plaintiff's general demurrer to the answer without leave to amend. Defendant appealed from the subsequent judgment. The court of appeal reversed the judgment with directions to overrule the demurrers to specified defenses. In a lengthy analysis of the pleadings and the law applicable to the defenses asserted, the court, although concluding some of the defenses stated no defense, held that other defenses alleged facts sufficient to constitute a defense to the action, requiring a trial of the case on the merits (*120 Cal. App. 589, 601-613)* . The court said that a general demurrer or objection to the admission of evidence under a pleading on account of its insufficiency as a pleading does not reach facts defectively stated or those set forth by way of inference or argument, but only the entire absence of any essential fact (*120 Cal. App. 589, 602)* .

[b] Answer Sufficient Against General Demurrer Despite Unclear or Irrelevant Facts, or Demand for Wrong Relief

The facts and procedural background of ***South Shore Land Co. v. Petersen*** *(1964) 226 Cal. App. 2d 725, 38 Cal. Rptr. 392* , are discussed in *§ 71.105[3][a]*. In *South Shore Land Co.,* the court stated that all that is necessary against a general demurrer is that on a consideration of all facts stated it appears that the party whose pleading is attacked by such a demurrer is entitled to any relief at the hands of the court against his or her adversary. This is true, notwithstanding that facts may not be clearly stated, or may be intermingled with a statement of other facts irrelevant to the cause of action or defense shown, or although the plaintiff, in his or her complaint, or the defendant, in his or her answer, may demand relief to which he or she is not entitled under the facts alleged (*226 Cal. App. 2d 725, 733)* .

[4] Additional Authorities

[a] Facts Defectively Stated Not Subject to General Demurrer

Terry Trading Corp. v. Barsky (1930) 210 Cal. 428, 292 P. 474 , was an action to collect the balance due on a promissory note. The elements of defendant's case, set forth with some duplication in his second amended answer and second amended cross complaint, boiled down to the pleas of usury and breach of contract, and a demand for an accounting. Plaintiff's general demurrers to these pleadings were sustained without leave to amend and defendant appealed from the subsequent judgment for plaintiff. In reversing the judgment with directions to overrule the demurrers to both pleadings the Supreme Court said: "It is sometimes a difficult task for the pleader to state enough facts to establish his cause of action or defense, and also to avoid the inclusion of confusing evidentiary matter. The code has provided adequate means for the correction of an error in either direction; the adverse party may move to strike out the evidentiary matter or demur specially to an inadequate statement of the facts on the ground of uncertainty or ambiguity. But to deny the party his right to a trial, there must be an obvious failure of the pleadings to state a cause of action or defense. This is not the case here, and as against the general demurrers, they should stand. We are enjoined by statute to construe pleadings liberally (*Code Civ. Proc., sec. 452*) and such has been our practice" (*210 Cal. 428, 438)* .

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§ 71.107 Opposing General Demurrer to Answer [Code Civ. Proc. §§ 430.20(a), 430.30(a)]--Demurrer to Whole Answer on Ground No Defense Is Stated [Code Civ. Proc. § 430.20(a)]--Answer Pleads at Least One Valid Defense

[1] FORM Opposing General Demurrer to Answer [Code Civ. Proc. §§ 430.20(a), 430.30(a)]--Demurrer to Whole Answer on Ground No Defense Is Stated [Code Civ. Proc. § 430.20(a)]--Answer Pleads at Least One Valid Defense

[*The following should be combined with a general form of memorandum opposing a general demurrer to an answer (see § 71.105).*]

THE GENERAL DEMURRER TO THE ENTIRE ANSWER SHOULD BE OVERRULED BECAUSE AT LEAST ONE OF THE DEFENSES IN THE ANSWER STATES FACTS SUFFICIENT TO CONSTITUTE A DEFENSE.

Sufficiency of One Defense. A demurrer to an entire answer setting forth two or more defenses should be overruled when at least one of the defenses is sufficient (*Ramsey v. Flournoy (1881) 58 Cal. 260, 261* ; *South Shore Land Co. v. Petersen (1964) 226 Cal. App. 2d 725, 734, 38 Cal. Rptr. 392*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in opposition to a general demurrer to an answer when the demurrer is

to the whole answer and the answer sets forth at least one valid defense.

In an appropriate case, the foregoing memorandum may be submitted in opposition to the general demurrer to an answer supported by the memorandum *set out in §§ 71.100 -71.103*.

The foregoing memorandum should be combined with a general form of memorandum in opposition to a demurrer to an answer made on the ground that the answer fails to deny the material allegations of the complaint and sets forth no new matter that would constitute an affirmative defense to the action [*see § 71.105*]. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the point of law stated. Thus, counsel would identify the valid defense asserted and set forth argument as to its validity.

See also *§§ 71.20[2]* and *71.105[2]*.

[3] Discussion of Authorities

[a] Sufficiency of One Defense

Ramsey v. Flournoy *(1881) 58 Cal. 260* , was an action involving conflicting claims to a certain tract of swamp and overflowed land. One of the defendants filed an answer denying that plaintiff was entitled to purchase the land in question and alleged that the land was surveyed and segregated by authority of the United States in 1876. Plaintiff's demurrer to the whole answer was sustained and judgment by default was entered against that defendant, from which he appealed. Although the Supreme Court affirmed the judgment on the ground the demurrer was properly sustained because the answer failed to state facts sufficient to defeat plaintiff's claim, it said that a demurrer to a whole answer, if there are more than one count in it and all are not bad, should be overruled (*58 Cal. 260, 261)* .

The facts and procedural background of ***South Shore Land Co. v. Petersen*** *(1964) 226 Cal. App. 2d 725, 38 Cal. Rptr. 392* , are discussed in *§ 71.05[3][a]*. In *South Shore Land Co.*, in reversing the judgment with directions to overrule the general demurrers to the second amended answer and cross complaint and to rule on the points presented by the special demurrers, the court of appeal said that if one of the defenses is free from the objections urged by demurrer, then a demurrer to the entire answer must be overruled (*226 Cal. App. 2d 725, 734)* .

[4] Additional Authorities

[a] Sufficiency of One Defense

Eich v. Greeley (1896) 112 Cal. 171, 44 P. 483 , was an action by the endorsee against the makers of a negotiable promissory note for $3,000 to recover the full amount of the note plus interest. Defendants in their answer among other things admitted the making of the note to John Eich as payee but averred that it was endorsed to plaintiff after maturity; they denied there was any consideration for the note beyond $2,000 and claimed an offset of $1,000 for labor performed for the payee while the latter was the owner and holder of the note and before the note became due; they also averred that prior to the endorsement they had paid $1,000 on the note and that plaintiff had notice of that payment before the transfer, that the transfer to plaintiff was made without consideration for the fraudulent intent on the part of the payee and plaintiff of defrauding defendants out of the $1,000, and that plaintiff was the payee's son. Plaintiff demurred to the whole answer and moved to strike portions of it other than the above. The motion was granted and the demurrer was sustained. Defendants declined to amend, their default was entered, and judgment was rendered for plaintiff from which defendants appealed.

In reversing the judgment with leave to defendants to amend their answer, the Supreme Court said that the demurrer, which was to the whole answer, was improperly sustained, that while that portion of it constituting a counterclaim (now

abolished; see *Code Civ. Proc. § 428.80*) was fatally defective, the plea of payment of $1,000 on the note before its endorsement to plaintiff, with notice of the payment to plaintiff, coupled with the denial that it was endorsed before maturity, and the allegation that the transfer of the note was without consideration, constituted, *pro tanto*, a valid defense to the action (*112 Cal. 171, 173-174)* .

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7A-71 California Points & Authorities § 71.108

§ 71.108 Opposing General Demurrer to Answer [Code Civ. Proc. §§ 430.20(a), 430.30(a)]--Demurrer on Ground No Defense Is Stated [Code Civ. Proc. § 430.20(a)]--Pleading Inconsistent Defenses in Answer Is Permissible

[1] FORM Opposing General Demurrer to Answer [Code Civ. Proc. §§ 430.20(a), 430.30(a)]--Demurrer on Ground No Defense Is Stated [Code Civ. Proc. § 430.20(a)]--Pleading Inconsistent Defenses in Answer Is Permissible

[*The following should be combined with a general form of memorandum opposing a general demurrer to an answer (see § 71.105).*]

THE GENERAL DEMURRER TO THE ANSWER ON THE GROUND THE SEVERAL DEFENSES PLEADED IN THE ANSWER ARE INCONSISTENT WITH EACH OTHER SHOULD BE OVERRULED BECAUSE THE PLEADING OF INCONSISTENT DEFENSES IS PERMISSIBLE.

A. Separate Consideration of Defenses. Each defense stated in the answer must be separately considered and the allegations of one defense cannot be read into the allegations of another separately stated defense (*South Shore Land Co. v. Petersen (1964) 226 Cal. App. 2d 725, 733, 38 Cal. Rptr. 392*).

B. Inconsistent Defenses Permitted. The joinder of inconsistent defenses is permissible and does not render the answer vulnerable to the objection that it fails to state facts sufficient to constitute a defense (*South Shore Land Co. v. Petersen (1964) 226 Cal. App. 2d 725, 733-734, 738, 38 Cal. Rptr. 392*).

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in opposition to a general demurrer to an answer that makes the objection that the answer pleads inconsistent defenses.

In an appropriate case, the foregoing memorandum may be submitted in opposition to the general demurrer to an

answer supported by the memorandum *set out in §§ 71.100 -71.103*.

The foregoing memorandum should be combined with a general form of memorandum in opposition to a demurrer to an answer made on the ground that the answer fails to deny the material allegations of the complaint and sets forth no new matter that would constitute an affirmative defense to the action [*see § 71.105*]. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated. Thus, counsel would refer to the affirmative defenses arguing that each must be considered separately without regard to any other defense

See also *§§ 71.20[2]* and *71.105[2]*.

[3] Discussion of Authorities

[a] Separate Consideration of Defenses

The facts and procedural background of ***South Shore Land Co. v. Petersen*** *(1964) 226 Cal. App. 2d 725, 38 Cal. Rptr. 392* , are discussed in *§ 71.105[3][a]*. In *South Shore Land Co.,* although the court of appeal said that the answer was prolix, discursive, and replete with evidentiary matters, conclusions of fact, conclusions of law, opinions, arguments, and immaterial matter, and was clearly vulnerable to a special demurrer and certainly subject to a motion to strike, it reversed the judgment with directions to overrule the general demurrers and to rule on the special demurrers for uncertainty, ambiguity, and unintelligibility (now only uncertainty) (*226 Cal. App. 2d 725, 747)* . In reaching this conclusion, the court, citing former Code Civ. Proc. § 441 (repealed by Stats. 1971, ch. 244, operative July 1, 1972; now see *Code Civ. Proc. § 431.30*), said that a rule, particularly applicable to the case of a demurrer to the answer, is that each so-called defense must be considered separately without regard to any other defense (*226 Cal. App. 2d 725, 733)* .

Former Code Civ. Proc. § 441, cited by the court, provided, "The defendant may set forth by answer as many defenses and counterclaims as he or she may have. They must be separately stated, and the several defenses must refer to the causes of action which they are intended to answer, in a manner by which they may be intelligibly distinguished. The defendant may also answer one or more of the several causes of action stated in the complaint and demur to the residue."

Counterclaims have since been abolished and causes of action formerly asserted by counterclaim must now be asserted by cross complaint [*Code Civ. Proc. § 428.80*]. Affirmative relief may no longer be claimed in the answer [*Code Civ. Proc. § 431.30(c)*]. To the extent that *Code Civ. Proc. § 431.30* continues the law set forth in former Code Civ. Proc. § 441, it in relevant part provides that the answer shall contain a statement of any new matter constituting a defense [*Code Civ. Proc. § 431.30(b)(2)*] and that defenses shall be separately stated and the several defenses shall refer to the causes of action that they are intended to answer, in a manner by which they may be intelligibly distinguished.

[b] Inconsistent Defenses Permitted

The facts and procedural background of ***South Shore Land Co. v. Petersen*** *(1964) 226 Cal. App. 2d 725, 38 Cal. Rptr. 392* , are discussed in *§ 71.105[3][a]*. In *South Shore Land Co.,* in reversing the judgment with directions to overrule the general demurrers to the second amended answer and cross complaint and to rule on the points presented by the special demurrers, the court of appeal pointed out that a separately stated defense that is sufficient in form and substance when viewed in isolation does not become insufficient when, on looking at the answer as a whole, that defense appears inconsistent with or repugnant to other parts of the answer (*226 Cal. App. 2d 725, 733-734)* . The court concluded that defendant's general denials as to plaintiff's alleged ownership and adverse possession, her independently pleaded

general allegation of ownership in herself, and the conclusionary allegation of ownership supported by the specific facts pleaded, sufficed to raise issues of fact warranting the overruling of the general demurrer to the answer, and that this was so notwithstanding the pleading by defendant of apparent inconsistent defenses that purported to assert that ownership of the parcel in question was in the United States, the State of California, and the County of Alameda (*226 Cal. App. 2d 725, 738)* .

[4] Additional Authorities

[a] Separate Consideration of Defenses

The facts and procedural background of *Miller & Lux, Inc. v. Light & Power Corp. (1932) 120 Cal. App. 589, 8 P.2d 560* , are discussed in *§ 71.106[3][a]*. In *Miller & Lux, Inc.*, the court of appeal, in a lengthy analysis of the pleadings and the law applicable to the defenses asserted, although concluding some of the defenses stated no defense, held that other defenses alleged facts sufficient to constitute a defense to the action, requiring a trial of the case on the merits (*120 Cal. App. 589, 601-613)* . The court said that each so-called defense must be considered separately without regard to any other defense and, no matter how illogical this may at times seem, it was the rule at common law and is the rule by our code, citing former Code Civ. Proc. § 441 (*120 Cal. App. 589, 601)* . For the wording of former Code Civ. Proc. § 441, see *§ 71.108[3][a]*.

See also *McDonald v. Southern C. R. Co. (1894) 101 Cal. 206, 213* ("[T]he statement in one defense cannot be used as evidence upon another issue, because to so hold would deprive the defendant of the benefit of his denials. This I understand to be the universal rule.").

[b] Inconsistent Defenses Permitted

Banta v. Siller (1898) 121 Cal. 414, 53 P. 935 , was an action for damages for personal injuries sustained by a bicyclist in a collision with a horse and wagon owned by defendants. In their answer, defendants, in addition to denials, set up two separate and distinct defenses: (1) at the time of the collision the horse and wagon were not under their control or being driven by their servants but were in possession and control of a named third person to whom they had furnished them for the purpose of carrying out an independent contract made by the third person; and (2) that the horse and wagon were at the time owned by them and being driven by them along the highway and that the accident occurred through the negligence of plaintiff and not through any fault of defendants. The court tried the case on the theory that when an answer is verified there cannot be set up in it two inconsistent and contradictory averments; it therefore refused to stop plaintiff's counsel in his argument to the jury from contending that defendants had committed perjury in their answer and it instructed the jury that the third person must be held to have been defendants' servant and that a defendant may plead as many separate defenses as he or she has, but a sworn answer must not deny a fact in one part, which is averred to be true in another part. Judgment was for plaintiff and defendants appealed. In reversing the judgment, the Supreme Court held the above rulings of the trial court erroneous (*121 Cal. 414, 417)* and quoted the statement from *Buhne v. Corbett (1872) 43 Cal. 264, 269* , quoted *below.*

Buhne v. Corbett (1872) 43 Cal. 264 , was an action to recover possession of land in Humboldt County. The pleadings were verified. Plaintiff, in his complaint, alleged that he was the owner in fee of the land, that on February 2, 1870, defendants had entered into possession of it, and that ever since defendants had unlawfully withheld possession from him. Defendants, on information and belief, denied that plaintiff was the owner or entitled to possession of the land, and denied that they had entered into possession of it, or that they had ever withheld possession from plaintiff. They alleged that the land was owned by the United States Government reserved for lighthouse purposes and that they were the keepers of the lighthouse, employed for that purpose by the United States, that is, that they were mere occupants of the land. They denied claiming any interest in the land or its improvements and averred that the United States by and through them and other of its employees had been and was in sole and exclusive possession of the property. Taking the position that defendants by their answer admitted their possession and withholding, plaintiff at trial offered no evidence

on the issue of possession and was nonsuited. The Supreme Court, in affirming the judgment and assuming the separate defenses were inconsistent with respect to defendants' possession, said that it would not follow that plaintiff would be at liberty to disregard them, or either of them, at trial. The Court explained that a party defendant in pleading may plead as many defenses as he or she may have and that "If a plea or defense separately pleaded in an answer contain several matters, these should not be repugnant or inconsistent in themselves. But the plea or defense regarded as an entirety, if it be otherwise sufficient in point of form and substance, is not to be defeated or disregarded merely because it is inconsistent with some other plea or defense pleaded. And there is no distinction in this respect between pleadings verified and pleadings unverified" (*43 Cal. 264, 269)* .

See also *Burrow v. Carley (1930) 210 Cal. 95, 103, 290 P. 577* (it is thoroughly settled that defenses, consistent in themselves, but inconsistent with one another, may be set up in answer and evidence may be admitted in support thereof); *McDonald v. Southern C. R. Co. (1894) 101 Cal. 206, 212-213* (one may verify certain inconsistent defenses and yet not commit perjury; for instance, one may deny execution of a note sued on and yet in another defense plead payment or the statute of limitations; in legal theory the second defense would admit the execution of the note, and the third admits its execution and that it has not been paid; yet one may claim that it is forged and also that he or she has paid it; and also, in case he or she fails in his proofs as to either point, that it is barred); *Southern Glass Co. v. Beverly Dairies (1935) 7 Cal. App. 2d 451, 454, 45 P.2d 1023* (a defendant may plead inconsistent defenses).

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A. Demurrers
3. Demurrers to Answer

7A-71 California Points & Authorities § 71.109

§ 71.109 Opposing General Demurrer to Answer [Code Civ. Proc. §§ 430.20(a), 430.30(a)]--Demurrer on Ground No Defense Is Stated [Code Civ. Proc. § 430.20(a)]--Affirmative Defense of Payment Available Although Independent Action on Claim Barred by Statute of Limitations at Time Answer Filed [Code Civ. Proc. § 431.70]

[1] FORM Opposing General Demurrer to Answer [Code Civ. Proc. §§ 430.20(a), 430.30(a)]--Demurrer on Ground No Defense Is Stated [Code Civ. Proc. § 430.20(a)]--Affirmative Defense of Payment Available Although Independent Action on Claim Barred by Statute of Limitations at Time Answer Filed [Code Civ. Proc. § 431.70]

[*The following should be combined with a general form of memorandum opposing a general demurrer to an answer (see § 71.105).*]

THE DEMURRER TO THE ANSWER SHOULD BE OVERRULED BECAUSE THE STATUTE OF LIMITATIONS DOES NOT BAR AN AFFIRMATIVE DEFENSE OF PAYMENT IF THE PARTIES' CROSS DEMANDS COEXISTED AT A TIME WHEN NEITHER DEMAND WAS BARRED.

A. Defense of Payment Available Although Statute of Limitations Bars Independent Claim. When cross demands for money have existed between persons at any point in time when neither demand was barred by the statute of limitations, and an action is thereafter commenced by one such person, the other person may assert in the answer the defense of payment in that the two demands are compensated so far as they equal each other, notwithstanding that an independent action asserting the person's claim would at the time of filing the answer be barred by the statute of limitations (*Code Civ. Proc. § 431.70*; *see Jones v. Mortimer (1946) 28 Cal. 2d 627, 632-633, 170 P.2d 893*).

[*Optional*] **B. *Code of Civil Procedure Section 431.70* as Applicable to Unliquidated Cross Demands.** The fact that a person's demand is an unliquidated claim for damages does not affect his or her right to setoff because *Section 431.70 of the Code of Civil Procedure* does not require that the cross demands be liquidated (*Hauger v. Gates (1954) 42 Cal. 2d 752, 755, 269 P.2d 609* (decided under former Code Civ. Proc. § 440; *now see Code Civ. Proc. § 431.70*).

[2] Comments

[a] Use of Form

The foregoing memorandum may be used to oppose a demurrer to an answer on the ground that the affirmative defense of payment is not barred by the statute of limitations because cross demands for money existed between plaintiff and defendant when neither demand was barred by the statute of limitations, and the action was commenced by plaintiff thereafter [*see Code Civ. Proc. § 431.70*].

Cases decided prior to the enactment of *Code Civ. Proc. § 431.70* in 1971 still appear to be persuasive authority as this section continues the substantive effect of former *Code Civ. Proc. § 440*.

The foregoing memorandum should be combined with a general form of memorandum in opposition to a demurrer to an answer made on the ground that the answer fails to deny the material allegations of the complaint and sets forth no new matter that would constitute an affirmative defense to the action [*see § 71.105*]. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and points of law stated. Thus, counsel should show that the cross demands both existed at a certain point in time when neither demand was barred by the statute of limitations.

[b] Related Points and Authorities

For a form of memorandum supporting a motion to compel acknowledgment of satisfaction of judgment through setoff of cross demands, see Ch. 131, *Judgments* .

See also *§§ 71.20[2]* and *71.105[2]*.

[3] Discussion of Authorities

[a] Defense of Payment Available Although Statute of Limitations Bars Independent Claim

In ***Jones v. Mortimer*** *(1946) 28 Cal. 2d 627, 170 P.2d 893* , plaintiff sued a corporation in receivership to recover for services rendered. Approximately five years after commencement of the action, the corporation levied a stock assessment, and plaintiff, a stockholder, became indebted to the corporation. Two years later, plaintiff recovered judgment on his original action. Plaintiff then sought a writ of execution to enforce his judgment; the corporation claimed the right to set off the assessment against the judgment although the statute of limitations would ordinarily have run on the assessment. The setoff was allowed and an order denying the petition to enforce payment of the judgment was issued. Plaintiff appealed.

The court of appeal affirmed. The court reasoned that the cross demands had existed between plaintiff and defendant at least at the time the assessment became due and plaintiff's action was pending. Thus, the claims existed under circumstances in which if either brought an action on his or her claim the other could have set up a counterclaim and there would be no question about the statute of limitations having run. Therefore, the court held that the demands were compensated, that is, each of the claimants was paid to the extent that their claims were equal and there was no outstanding claim on which the statute could run (*28 Cal. 2d 627, 632-633)* .

[b] Code of Civil Procedure Section 431.70 as Applicable to Unliquidated Cross Demands

In ***Hauger v. Gates*** *(1954) 42 Cal. 2d 752, 269 P.2d 609* , plaintiffs brought an action to set aside an extrajudicial sale made under a deed of trust. Defendants demurred to plaintiffs' second amended complaint. The demurrers were sustained without leave to amend. Plaintiffs appealed from the judgment entered for defendants. Plaintiffs contended that they were entitled to a setoff in an amount exceeding the amount due on the note and that therefore they were not in

default on their obligation.

The Supreme Court reversed. The Court held that the fact that plaintiffs' demand was an unliquidated claim for damages for breach of the contract of sale did not affect their right to setoff since former Code Civ. Proc. § 440 [*now see Code Civ. Proc. § 431.70*] did not require that the cross demands be liquidated (*42 Cal. 2d 752, 755)* .

[4] Additional Authorities

[a] Defense of Payment Available Although Statute of Limitations Bars Independent Claim

In *Davis & Cox v. Summa Corp. (9th Cir. 1985) 751 F.2d 1507* , the U.S. Court of Appeals held that the U.S. District Court erred in denying a corporation's motion to permit its counterclaims as a defense in an action against the corporation for attorney's fees without first determining whether the corporation's claim for malpractice coexisted with the attorney's claim for attorney's fees, for the purposes of *Code Civ. Proc. § 431.70* (*751 F.2d 1507, 1522)* .

In *Murchison v. Murchison (1963) 219 Cal. App. 2d 600, 33 Cal. Rptr. 285* , plaintiff in a divorce action appealed from an order denying a motion to quash execution and enter satisfaction of judgment. Plaintiff contended that part of an income tax deficiency paid after the divorce could be offset against the balance due defendant under the divorce judgment. The court of appeal reversed, stating that because plaintiff was compelled by law to make a payment that benefited defendant in that defendant's tax liability was discharged, and since a new claim or cause of action arose by operation of law in favor of plaintiff against defendant, the setoff applied between the parties to extinguish the debt even though no action was pending (*219 Cal. App. 2d 600, 604-605)* . The court held that the principle of setoff was not limited to judicial proceedings. Thus plaintiff's obligation to pay the balance of $3, 600 to defendant was extinguished when defendant became obligated to pay plaintiff a greater sum as contribution for tax deficiency. The effect was to compensate defendant just as though payment had been made to her in cash (*219 Cal. App. 2d 600, 605)* .

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7A-71 California Points & Authorities § 71.110

§ 71.110 Opposing Special Demurrer to Answer [Code Civ. Proc. §§ 430.20(b), 430.30(a)]--Demurrer Fails to Specify Uncertainty

[1] FORM Opposing Special Demurrer to Answer [Code Civ. Proc. §§ 430.20(b), 430.30(a)]--Demurrer Fails to Specify Uncertainty

[*Caption. See § 71.105.*]

THE SPECIAL DEMURRER TO THE ANSWER SHOULD BE OVERRULED BECAUSE THE DEMURRER FAILS TO SPECIFY WHEREIN THE ANSWER IS AMBIGUOUS, UNINTELLIGIBLE, OR UNCERTAIN.

Demurrer Fails to Specify Uncertainty. A special demurrer on the ground that an answer is ambiguous, unintelligible, or uncertain is insufficient unless the demurrer points out specifically wherein the pleading is ambiguous, uncertain, or unintelligible (*Coons v. Thompson (1946) 75 Cal. App. 2d 687, 690, 171 P.2d 443*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in opposition to a special demurrer to an answer on the ground of uncertainty when the demurrer fails to specify wherein the answer is uncertain.

In an appropriate case, the foregoing memorandum may be submitted in opposition to the special demurrer to an answer supported by the memorandum *set out in § 71.104*.

With appropriate modifications, the foregoing memorandum may be used in opposition to a demurrer to an answer to a cross complaint, or a motion by plaintiff or cross complainant for judgment on the pleadings [*see* pt. II].

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. That is, the memorandum should point out the omission in the demurrer of what specific portion of the answer is uncertain.

See also *§§ 71.20[2]* and *71.85[2]*.

[3] Discussion of Authorities

[a] Demurrer Fails to Specify Uncertainty

The facts and procedural background of ***Coons v. Thompson*** *(1946) 75 Cal. App. 2d 687, 171 P.2d 443* , are discussed in *§ 71.105[4][a]*. In *Coons*, the court of appeal, in reversing the trial court's judgment for the plaintiff after sustaining a demurrer to the answer without leave to amend, stated that a special demurrer on the ground that an answer is ambiguous, unintelligible, or uncertain is insufficient unless the demurrer points out specifically wherein the pleading is ambiguous, uncertain, or unintelligible. In the case before it, the court concluded that the special demurrer failed to point out wherein the answer was contained those defects (*75 Cal. App. 2d 687, 690)* .

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7A-71 California Points & Authorities §§ 71.111-71.129

[Reserved]

§§ 71.111[Reserved]

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1. Motion By Plaintiff

7A-71 California Points & Authorities § 71.130

§ 71.130 Supporting Motion by Plaintiff for Judgment on Pleadings [Code Civ. Proc. § 438(c)(1)(A)]--Complaint States a Cause of Action and Answer Does Not Deny Material Allegation of Complaint and Alleges No Affirmative Defense--General Form

[1] FORM Supporting Motion by Plaintiff for Judgment on Pleadings [Code Civ. Proc. § 438(c)(1)(A)]--Complaint States a Cause of Action and Answer Does Not Deny Material Allegation of Complaint and Alleges No Affirmative Defense--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM IN SUPPORT OF PLAINTIFF'S
_____ [*name*] Plaintiff,	)	MOTION FOR JUDGMENT ON THE PLEADINGS
vs.	)	Date: _____
_____ [*name*], Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS SHOULD BE GRANTED BECAUSE THE COMPLAINT STATES FACTS SUFFICIENT TO CONSTITUTE A CAUSE OR CAUSES OF ACTION AND THE ANSWER FAILS TO RAISE A MATERIAL ISSUE OR TO SET UP AN AFFIRMATIVE DEFENSE TO THE COMPLAINT.

A. When Motion Is Proper. A plaintiff's motion for judgment on the pleadings is proper when the plaintiff claims that the complaint states facts sufficient to constitute a cause or causes of action against the defendant and the answer does not state facts sufficient to constitute a defense to the complaint (*Code Civ. Proc. § 438(c)(1)(A)*).

B. When Motion Should Be Granted. A plaintiff's motion for judgment on the pleadings should be granted when the complaint is sufficient and the answer presents nothing, either by way of denial or new matter, to bar or defeat the action (*Hemme v. Hayes (1880) 55 Cal. 337, 339* ; *Allstate Ins. Co. v. Kim W. (1984) 160 Cal. App. 3d 326, 334-335, 206 Cal. Rptr. 609*).

[*Optional*] **C. Evasive Answer Raising No Material Issue.** A plaintiff is entitled to a judgment on the pleadings when the defendant's answer is evasive and raises no issue on a material allegation of the complaint (*Adjustment Corp. v. Hollywood Hardware & Paint Co. (1939) 35 Cal. App. 2d 566, 569, 96 P.2d 161*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in support of a motion by plaintiff for judgment on the pleadings when the complaint states facts sufficient to constitute a cause or causes of action and the answer states no defense to the action, either by the way of specific denial of a material allegation in the complaint or by setting up an affirmative defense. The optional paragraph would be used when a material allegation in the complaint is denied but the denial is evasive [*see Code Civ. Proc. § 438(c)(1)(A)*].

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated. For example, if the defendant's answer generally denies each and every allegation of the complaint, but also admits facts that are in conflict with, and that negate, the denials, plaintiff should identify the conflicts and indicate how each material allegation of the complaint remains uncontroverted [*see, e.g.,* *Adjustment Corp. v. Hollywood Hardware & Paint Co. (1939) 35 Cal. App. 2d 566, 569, 96 P.2d 161* , *discussed under § 71.130[3][b]*].

With appropriate modifications, the foregoing memorandum may be used in support of a general demurrer to an answer to a complaint or to an answer to a cross complaint that fails to state facts sufficient to constitute a defense.

In addition to the memoranda of points and authorities in the foregoing form, and in §§ 71.131-71.133, in an appropriate case memoranda supporting a general demurrer to an answer may be modified for use in supporting a plaintiff's motion for judgment on the pleadings [*see* pt. I, subpt. B].

[b] Opposing Points and Authorities

In an appropriate case, the memorandum *set out in § 71.134* may be used to oppose the motion supported by the foregoing memorandum. In addition, the memorandum *set out in §§ 71.105 -71.109*, opposing a general demurrer to an answer, may be modified for use in opposing the motion supported by the foregoing memorandum.

See also *§§ 71.20[2]*, *71.100[2]*, and *71.150[2]*.

[3] Discussion of Authorities

[a] When Motion Should Be Granted

Hemme v. Hayes *(1880) 55 Cal. 337* , was an action on a promissory note. Defendant denied the due execution of the note and that it was executed for a valuable consideration for certain reasons that he set forth in his answer. These reasons, however, did not show that the note was not duly executed or that it was not executed for a valuable consideration. There was, therefore, no denial of these allegations. Plaintiff's motion for judgment on the pleadings was granted and defendant appealed.

The Supreme Court affirmed. It said that the answer was frivolous, a frivolous answer being one that denies no material averment in the complaint and sets up no defense, and that when an answer presents nothing, either by way of denial or new matter to bar or defeat an action, a motion by plaintiff for judgment on the pleadings is properly granted (*55 Cal. 337, 339)* .

Allstate Ins. Co. v. Kim W. *(1984) 160 Cal. App. 3d 326, 335, 206 Cal. Rptr. 609* , involved an action by a minor, through her guardian ad litem against the defendant, seeking compensatory and punitive damages for injuries resulting from sexual assault. The defendant was insured under a homeowner's insurance policy, that expressly excluded coverage for bodily injury or property damage intentionally caused by an insured person. The defendant's insurer brought an action for declaratory relief against both the plaintiff and defendant, seeking a declaration that the policy provided no coverage for the acts alleged in the plaintiff's complaint. The plaintiff answered, denying most of the allegations of the insurer's complaint for lack of information and belief. The plaintiff attached a copy of her verified complaint as an exhibit to her answer. Immediately prior to the commencement of trial, the insurer moved for judgment on the pleadings [*now see Code Civ. Proc. § 438(e)*, under which this would no longer be a timely motion, absent the court's permission to bring it]. The trial court granted the motion and judgment was entered declaring that the defendant's insurance did not cover his acts of sexual molestation and assaults and batteries, and that the insurer was not required to defend him in the plaintiff's action. The plaintiff appealed.

The court of appeal affirmed the judgment on the pleadings. The court held that the plaintiff's answer and her pleading in the action against the defendant did not raise a material issue or set up affirmative matter constituting a defense to the insurer's complaint. The court stated that the answer denied, for lack of information and belief, the allegations of the insurer's complaint. However, the trial court was entitled to and did judicially notice the verified complaint attached to the plaintiff's answer, when it ruled on the motion for judgment on the pleadings. The plaintiff's own complaint alleged that the defendant's acts were willful and intentional. The plaintiff's purported cause of action for negligence specifically incorporated all the allegations of other causes of action, one of which expressly alleges that the assaults were intentional and for the purpose of causing harm. The court further stated that while a party may plead inconsistent defenses to a complaint, each defense must be consistent in itself (*160 Cal. App. 3d 326, 334-335)* .

[b] Evasive Answer Raising No Material Issue

Adjustment Corp. v. Hollywood etc. Co. *(1939) 35 Cal. App. 2d 566, 96 P.2d 161* , was an action by an assignee on a common count to recover for goods sold and delivered. Defendant answered, denying each and every allegation of the complaint, but admitting she had not paid all of her indebtedness to plaintiff's assignor. Plaintiff's motion for judgment on the pleadings was granted and defendant appealed. Affirming, the court of appeal said that although it is true that the answer denied generally and specifically each and every allegation of the complaint and that it is the rule that a plaintiff is not entitled to a judgment on the pleadings if the answer denies and thereby presents an issue or issues as to the material allegations of the complaint, the answer in question nevertheless admitted that defendant had not paid all of her indebtedness to plaintiff's assignor. In other words, the complaint alleged facts showing an indebtedness due to plaintiff's assignor from defendant and that the amount was then due and owing to plaintiff, but defendant, although denying each and every allegation of the complaint, by her express admission had presented an evasive answer that

failed to raise an issue on a material allegation of the complaint (*35 Cal. App. 2d 566, 569*). The court held that the motion was proper to test the sufficiency of the answer and that a judgment on the pleadings may be rendered if the answer is evasive, frivolous, or sham (*35 Cal. App. 2d 566, 569-570)* .

[4] Additional Authorities

[a] When Motion Should Be Granted

Boscus v. Bohlig (1916) 173 Cal. 687, 162 P. 100 , was an action to foreclose a mechanic's lien. The verified complaint alleged that (1) defendants owned the subject real property; (2) plaintiffs had entered into a written contract to furnish certain plumbing and gas-fitting work in a building on the property for the sum of $2,500 to be paid in stipulated installments; (3) the work had been fully performed by plaintiffs according to the contract; (4) defendants had accepted the work; (5) no part of the contract price (which was alleged to be the reasonable value of the work) had been paid; and (6) a claim of lien against the property had been filed within the time limited by statute. Defendants' answer failed to deny execution of the contract, plaintiffs' completion of all that was required of them, or defendants' acceptance of the work; and the denials it did contain were insufficient in form to raise any material issue of fact. Plaintiffs' motion for judgment on the pleadings was granted and defendants appealed.

Except for modifying the judgment with respect to the allowance of interest, the Supreme Court affirmed the judgment. It held that the allegations admitted by failure to deny established defendants' liability, that their denial of the reasonable value of the work was frivolous, and that their other denials were insufficient in form to raise an issue (*173 Cal. 687, 689-690)* .

Gribble v. Columbus Brewing Co. (1893) 100 Cal. 67, 34 P. 527 , was an action to foreclose a mortgage. Defendant corporation, through its president, had executed a note and mortgage of its premises to plaintiffs in consideration of a loan of $17,000 repayable in one year with interest at 10 percent payable monthly. The note contained an acceleration clause for nonpayment of interest and provided for payment of an attorney's fee in the event of foreclosure. The money was paid to the corporation, the mortgage was recorded, the corporation paid the monthly interest for three months but failed to pay in the fourth month, and the action to foreclose was commenced. Defendant's answer admitted all the allegations of the complaint except the amount claimed for attorney's fees and asserted that a specified lesser amount should be allowed. After commencement of the action, defendant was adjudicated insolvent and an assignee was appointed. The assignee was made a defendant in the action and filed an answer admitting the indebtedness but denying the president's authority to contract a loan for one year, to make interest payable monthly, to agree to acceleration, or to provide for payment of a counsel fee in the event of foreclosure on the grounds the corporate resolution authorizing the president to negotiate the loan at 10-percent interest authorized a five-year term and was silent as to when the interest would be paid, acceleration, and counsel fees. Plaintiffs' motion for judgment on the pleadings was granted and defendant assignee appealed. The Supreme Court affirmed on the grounds that execution of the note and mortgage was not *ultra vires,* that from the facts pleaded in the complaint it appeared the corporation ratified the acts of its president in negotiating the loan and hence estopped the corporation from denying his authority, and that the assignee's answer in admitting the indebtedness and failing to deny the ratification presented no defense to the action (*100 Cal. 67, 71-74)* .

Loveland v. Garner (1887) 74 Cal. 298, 15 P. 844 , was an action by a stockholder of a mining corporation against its directors to recover statutory penalties resulting from defendants' failure to have complied with certain provisions of then existing law. Only one denial in defendant's answer was direct and positive and it was of an immaterial allegation in the complaint. The rest of the denials were insufficient to raise any issue, and no new matter was set up as a defense. Plaintiff's motion for judgment on the pleadings was granted and defendants appealed. In affirming the judgment, the Supreme Court said that it was settled practice that a judgment for plaintiff may be rendered on the pleadings when the material averments of a sufficient complaint are not denied by the answer (*74 Cal. 298, 300)* .

Felch v. Beaudry (1871) 40 Cal. 439 , was an action to recover on a promissory note. The answer failed to deny the

material allegations of the complaint and set up a number of immaterial matters as defenses. Plaintiff's demurrer to the answer was overruled but plaintiff's later motion for judgment on the pleadings was granted and judgment was entered accordingly. Defendant's subsequent motion for leave to file an amended answer and to set aside the judgment was denied and defendant appealed. In affirming the judgment and order, the Supreme Court said that a plaintiff may move for judgment on the pleadings when defendant files an answer that (1) expressly admits the material facts stated in the complaint or fails to deny them; (2) is verified and contains denials that are literal merely, or conjunctive, evasive, or the like; and (3) insufficiently denies the material allegations of the complaint and sets forth new matter that is insufficient to bar or to defeat plaintiff's action (*40 Cal. 439, 443)* . The Court concluded that the answer disclosed no defense to plaintiff's action and that the trial court did not err in granting plaintiff's motion (*40 Cal. 439, 445)* .

Fitzgibbon v. Calvert (1870) 39 Cal. 261 , was an action on an undertaking executed by defendants to secure release of property levied on under a writ of attachment. Judgment was for plaintiff and defendants appealed. In affirming the judgment, the Supreme Court said that no material allegation of plaintiff's complaint was denied by defendants and that the substantive matter pleaded in the answer, even if proved as alleged, was no defense and that plaintiff would have been entitled to a judgment on the pleadings had a motion for it been made (*39 Cal. 261*).

The facts and procedural ground of *Adjustment Corp. v. Hollywood Hardware & Paint Co. (1939) 35 Cal. App. 2d 566, 96 P.2d 161* , are *discussed under § 71.130[3][b]*. In *Adjustment Corp.*, the court of appeal said that a plaintiff may recover judgment on the pleadings without the introduction of any evidence if the complaint states facts sufficient to constitute a cause of action and the answer interposed by defendant neither raises any material issue nor states a defense, that is, when the answer expressly or substantially admits or does not sufficiently deny all the material allegations of the complaint and sets up no new matter that is sufficient to bar or defeat the action (*35 Cal. App. 2d 566, 569)* .

Knoff v. City & County of San Francisco (1969) 1 Cal. App. 3d 184, 81 Cal. Rptr. 683 , was a taxpayer's suit for a writ of mandate to require that official action be taken addressed to the situation brought about by a former assessor's criminal misconduct in office as disclosed by a grand jury investigation. Defendants named were the city and county, its board of supervisors (as such and as the board of equalization), and the former assessor. The petition sufficiently alleged a cause of action. The answer pleaded admissions, denials, other matters, and 12 separate affirmative defenses, none of which negated the material allegations of the petition. Defendants' motion to strike various portions of the petition was denied and their general demurrer was overruled. The trial court stated that in its view, the material allegations of the petition had been admitted by the answering defendants and it entered judgment on the pleadings ordering issuance of a peremptory writ of mandate as prayed. In affirming this judgment, the court of appeal said that the trial court determined in the judgment that the answer to the petition for writ of mandate raised only questions of law, or put in issue immaterial statements not affecting the substantial rights of the parties or the gravamen of the action, and that it agreed with that determination (*1 Cal. App. 3d 184, 199-200*). The court concluded that the answer therefore stated no defense to the action and that the trial court, therefore, properly entered judgment on the pleadings (*1 Cal. App. 3d 184, 200)* .

[b] Evasive Answer Raising No Material Issue

Janeway & Carpender v. Long Beach Co. (1922) 190 Cal. 150, 211 P. 6 , was an action to recover the balance due on three sales contracts, each alleged in a separate count of the complaint. Each count alleged, among other things, that on a specified date defendant "made, executed and delivered" to plaintiff its contract for goods and that plaintiff sold and delivered the goods to defendant. Defendant denied that it "made, executed *and* delivered" the contracts. Plaintiffs' motion for judgment on the pleadings was granted and defendant appealed. In affirming the judgment, the Supreme Court held the foregoing denial insufficient. It said that under this denial defendant may have executed and delivered the contracts or it may have made and executed them, in which case the denial would be true and yet defendant would be liable. By connecting the words together with the conjunction "and," it limited its denial to a simple statement that it did not do all three of the things, leaving an admission that it did any two of them. The Court held that this amounted to

an admission that it executed the contract, which was all that was necessary to make it liable (*190 Cal. 150, 153)* . The Court further held that defendant's attempted denials of other material allegations of the complaint were, in effect, negatives pregnant and insufficient to raise a triable issue (*190 Cal. 150, 153-154)* .

The facts and procedural background of *Boscus v. Bohlig (1916) 173 Cal. 687, 162 P. 100* , are *discussed under § 71.130[4][a]*. In *Boscus,* the defendants additionally denied that plaintiffs had performed all the terms and conditions of the agreement. In affirming judgment on the pleadings for plaintiff as modified, the Supreme Court held this denial "utterly insufficient," that it amounted to an admission that substantially all of the terms and conditions of the agreement had been duly met and executed (*173 Cal. 687, 690)* .

See also *Felch v. Beaudry (1871) 40 Cal. 439, 443 , discussed under § 71.130[4][a]*, and *Kennedy v. Rosecrans Gardens, Inc. (1952) 114 Cal. App. 2d 87, 89, 249 P.2d 593* (denial that plaintiff had been damaged in sum of $3, 500 as alleged in complaint as admission that plaintiff had suffered substantial damage).

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1. Motion By Plaintiff

7A-71 California Points & Authorities § 71.131

§ 71.131 Supporting Motion by Plaintiff for Judgment on Pleadings [Code Civ. Proc. § 438(c)(1)(A)]--Complaint States a Cause of Action and Answer Does Not Deny Material Allegations of Complaint and Alleges No Affirmative Defense--Denial on Information and Belief of Matters Within Defendant's Presumptive Knowledge

[1] FORM Supporting Motion by Plaintiff for Judgment on Pleadings [Code Civ. Proc. § 438(c)(1)(A)]--Complaint States a Cause of Action and Answer Does Not Deny Material Allegations of Complaint and Alleges No Affirmative Defense--Denial on Information and Belief of Matters Within Defendant's Presumptive Knowledge

[*The following should be combined with a general form of memorandum in support of a plaintiff's motion for judgment on the pleadings (see § 71.130).*]

PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS SHOULD BE GRANTED BECAUSE THE DEFENDANT HAS DENIED MATERIAL ALLEGATIONS OF THE COMPLAINT ON INFORMATION AND BELIEF WHEN THE MATTERS ARE PRESUMPTIVELY WITHIN THE DEFENDANT'S KNOWLEDGE.

Denial on Information and Belief of Matters Presumptively Known. A denial on information and belief of material allegations of a complaint that are presumably within defendant's knowledge raises no issue of fact and subjects the answer to a motion by plaintiff for judgment on the pleadings (*Boscus v. Bohlig (1916) 173 Cal. 687, 689-690, 162 P. 100* ; *Dobbins v. Hardister (1966) 242 Cal. App. 2d 787, 791, 51 Cal. Rptr. 866*).

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in support of a plaintiff's motion for judgment on the pleadings when defendant's denials are on information and belief and are of matters presumptively within defendant's knowledge, or are matters of public record.

For a form of memoranda in support of a plaintiff's motion for judgment on the pleadings on the ground that the matters denied for lack of information or belief are within the defendant's presumptive knowledge, see *§ 71.132*

The foregoing memorandum should be combined with a general form of memorandum in support of a plaintiff's motion for judgment on the pleadings [*see § 71.130*]. They may also be adapted for use in an appellate brief.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. For example, if the action is for breach of contract and the defendant in the answer denied on information and belief that there was a contract with plaintiff, that plaintiff performed its part of the agreement, and that a certain amount of money became due under the agreement to plaintiff and that no part of it has been paid, counsel should argue that plaintiff is entitled to judgment on the pleadings on the ground that these matters are presumptively within the knowledge of defendant [*see Zany v. Rawhide Gold Min. Co. (1911) 15 Cal. App. 373, 375-376, 114 P. 1026* ; *see also Dobbins v. Hardister (1966) 242 Cal. App. 2d 787, 795, 51 Cal. Rptr. 866 , discussed under § 71.131[3][a]*].

[b] Applicability of Rule to Corporations and Associations

The rule illustrated in this form (a defendant's denial on information and belief of material facts alleged in a complaint, which facts are presumably within defendant's knowledge, raises no issue of fact and constitutes an admission of the allegation) applies to corporations and their officers [*Loveland v. Garner (1887) 74 Cal. 298, 300, 15 P. 844]* and to unincorporated associations [*Oliver v. Swiss Club Tell (1963) 222 Cal. App. 2d 528, 540, 35 Cal. Rptr. 324]* , as well as to individuals.

[c] Opposing Points and Authorities

In an appropriate case, the memorandum *set out in § 71.134* may be used to oppose the general demurrer to an answer supported by the foregoing memorandum.

See also *§§ 71.20[2], 71.100[2], 71.130[2],* and *71.150[2]*.

[3] Discussion of Authorities

[a] Denial of Information and Belief of Matters Presumptively Known

The facts and procedural background of ***Boscus v. Bohlig*** *(1916) 173 Cal. 687, 162 P. 100* , are discussed in *§ 71.130[4][a]*. In *Boscus,* defendants denied on information and belief that the reasonable value of the work was $2, 500 (which was the contract price) or any other sum and that plaintiffs had duly kept and performed all the terms of their agreement. The Supreme Court, in affirming the judgment as modified, held that the denial on information and belief of the reasonable value of the work was frivolous and that the other denials on information and belief were insufficient. Citing *Gribble v. Columbus Brewing Co. (1893) 100 Cal. 67, 34 P. 527* [discussed in *§ 71.130[4][a]*], the Court said that a positive denial is necessary when the pleader has knowledge, or means of acquiring knowledge, which might enable him or her to traverse or to admit the unequivocal averments in the complaint, and that a plaintiff must admit or deny facts alleged by plaintiff or must show how it happens that he or she is destitute of such knowledge concerning such facts (*173 Cal. 687, 689-690)* .

Dobbins v. Hardister *(1966) 242 Cal. App. 2d 787, 51 Cal. Rptr. 866* , was an action to recover the reasonable value of goods sold and delivered. The complaint set forth two counts, the first on a quantum valebant and the second on an open book account. Defendant's answer denied the allegations of both counts for lack of information and belief. Plaintiffs' general demurrer to the answer was overruled but their subsequent motion for judgment on the pleadings was granted. The ground of the demurrer and motion was that the matters denied were presumptively within defendant's knowledge and, hence, should have been admitted or denied positively (*242 Cal. App. 2d 787, 790-791)* . Defendant

appealed.

The court of appeal reversed the judgment. The ground for the court's reversal was that defendant should have been granted leave to amend his answer. However, the court said that if a matter alleged in the complaint is within the defendant's actual knowledge or by its nature is presumed to be within his knowledge, or if the defendant has the means of ascertaining whether or not it is true, a denial on information and belief or for lack of either will be deemed sham and evasive and may be stricken out or disregarded (*242 Cal. App. 2d 787, 791)* and that, consistent with this rule, if the answer otherwise fails to put in issue the material allegations of the complaint, judgment may be rendered for plaintiff and entered on the pleadings (*242 Cal. App. 2d 787, 792)* .

[4] Additional Authorities

[a] Denial on Information and Belief of Matters Presumptively Known

The facts and procedural background of *Loveland v. Garner (1887) 74 Cal. 298, 15 P. 844* , are discussed in *§ 71.130[4][a]*. In *Loveland,* other than one positive and direct denial of an immaterial allegation in the complaint, defendants' answer denied plaintiff's allegations on information and belief. All the matters denied on information and belief were presumably matters within defendants' knowledge. Plaintiff's motion for judgment on the pleadings was granted and defendants appealed. In affirming the judgment, the Supreme Court said that it is settled practice that a judgment for plaintiff may be rendered on the pleadings when the material averments of a sufficient complaint are not denied by the answer, that it is equally well settled that if the facts alleged in the complaint are presumably within defendant's knowledge defendant must answer positively, and that a denial on information and belief in such case will be treated as an evasion (*74 Cal. 298, 300)* .

See also *Dietlin v. General American Life Ins. Co. (1935) 4 Cal. 2d 336, 349, 49 P.2d 570* (allegation of verified complaint cannot be controverted on information and belief when alleged fact is presumably within defendant's knowledge or when defendant has means of ascertaining whether or not it is true); *Goldwater v. Oltman (1930) 210 Cal. 408, 425, 292 P. 624* (denial on information and belief of delivery of note sued on as raising no issue since matter was presumptively within defendants' knowledge and denial on information and belief of allegation that plaintiff had filed fictitious business name certificate as presenting no triable issue since whether plaintiff had filed certificate was matter of public record); *Mulcahy v. Buckley (1893) 100 Cal. 484, 489, 35 P. 144* (defendant as not permitted to controvert allegation of verified complaint on information and belief when alleged fact is presumably within defendant's knowledge or defendant has means of ascertaining whether it is true).

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1. Motion By Plaintiff

7A-71 California Points & Authorities § 71.132

§ 71.132 Supporting Motion by Plaintiff for Judgment on Pleadings [Code Civ. Proc. § 438(c)(1)(A)]--Complaint States a Cause of Action and Answer Does Not Deny Material Allegation of Complaint and Alleges No Affirmative Defense--Matters Denied for Lack of Information or Belief Within Defendant's Presumptive Knowledge

[1] FORM Supporting Motion by Plaintiff for Judgment on Pleadings [Code Civ. Proc. § 438(c)(1)(A)]--Complaint States a Cause of Action and Answer Does Not Deny Material Allegation of Complaint and Alleges No Affirmative Defense--Matters Denied for Lack of Information or Belief Within Defendant's Presumptive Knowledge

[*The following should be combined with a general form of memorandum in support of a plaintiff's motion for judgment on the pleadings (see § 71.130).*]

PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS SHOULD BE GRANTED BECAUSE DEFENDANT HAS DENIED MATERIAL ALLEGATIONS OF THE COMPLAINT FOR LACK OF INFORMATION OR BELIEF WHEN THE MATTERS ARE PRESUMPTIVELY WITHIN THE DEFENDANT'S KNOWLEDGE.

Denial for Lack of Information or Belief of Matters Presumptively Known. A denial for lack of information or belief of material allegations of a complaint that are presumably within a defendant's knowledge raises no issue of fact and subjects the answer to a plaintiff's motion for judgment on the pleadings (*Raphael Weill & Co. v. Crittenden (1903) 139 Cal. 488, 489-490, 73 P. 238* ; *Dobbins v. Hardister (1966) 242 Cal. App. 2d 787, 790, 51 Cal. Rptr. 866*).

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in support of a plaintiff's motion for judgment on the pleadings when the defendant's denials are for lack of information or belief and are of matters presumptively within the defendant's

knowledge, or are matters of public record.

For a form of memoranda in support of a plaintiff's motion for judgment on the pleadings on the ground that the matters denied on (rather than lack of) information or belief are within the defendant's presumptive knowledge, see *§ 71.131*.

The foregoing memorandum should be combined with a general form of memorandum in support of a plaintiff's motion for judgment on the pleadings [*see § 71.130*]. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. For example, if the plaintiff's action is one based on common counts and the defendant's answer denies on lack of information and belief that goods were sold and delivered by plaintiff to defendant and that defendant made any payments to the plaintiff for such goods, counsel would argue that these matters are presumptively within defendant's knowledge, that defendant should have positively admitted or denied them, that defendant has failed to do so, and therefore plaintiff's motion for judgment on the pleadings should be granted [*see Dobbins v. Hardister (1966) 242 Cal. App. 2d 787, 794, 51 Cal. Rptr. 866 , discussed under § 71.132[3][a]*].

[b] Opposing Points and Authorities

In an appropriate case, the memorandum *set out in § 71.134* may be used to oppose the general demurrer to an answer supported by the foregoing memorandum.

See also *§§ 71.20[2], 71.100[2], 71.130[2],* and *71.150[2]*.

[3] Discussion of Authorities

[a] Denial for Lack of Information or Belief of Matters Presumptively Known

Raphael Weill & Co. v. Crittenden *(1903) 139 Cal. 488, 73 P. 238* , was an action on a common count for goods sold and delivered. Plaintiff in the first paragraph of its complaint alleged its status as a California corporation and its principal place of business and in the second paragraph set forth the common count. Defendant in his answer alleged he had no information or belief on the subject sufficient to enable him to answer the above two paragraphs and placing his denial on that ground denied them. Plaintiff's motion for judgment on the pleadings was granted and defendant appealed. In affirming the judgment, the Supreme Court said that whether or not plaintiff had sold and delivered the property mentioned in the complaint to defendant was a matter presumably within defendant's knowledge and that defendant's denial was therefore insufficient and raised no issue (*139 Cal. 488, 489-490)* . (With respect to the denial of plaintiff's corporate capacity, the Court said that it need not consider the form of the denial since, in an action to recover the price of goods purchased and received by defendant from plaintiff, defendant is not in a position to question plaintiff's corporate capacity (*139 Cal. 488, 490)* .)

The facts and procedural background of ***Dobbins v. Hardster*** *(1966) 242 Cal. App. 2d 787, 51 Cal. Rptr. 866* , are discussed in *§ 71.131[3][a]*. In *Dobbins*, although it reversed the judgment on the ground defendant should have been granted leave to amend his answer, the court of appeal said that if a matter is within the defendant's actual knowledge or by its nature is presumed to be within his knowledge, or if the defendant has the means of ascertaining whether or not it is true, a denial on information and belief or for lack of either will be deemed sham and evasive and may be stricken out or disregarded (*242 Cal. App. 2d 787, 791)* and that, consistent with this rule, if the answer fails otherwise to put in issue the material allegations of the complaint, judgment may be rendered and entered on the pleadings (*242 Cal. App. 2d 787, 792)* .

Defendant sought to distinguish *Raphael Weill & Co. v. Crittenden (1903) 139 Cal. 488, 73 P. 238* , discussed *above*, on the ground, among others, that that case was over 60 years old. The Court acknowledged that *Crittenden* was not a

recent decision but pointed out that the principle of law stated in it, that denials cannot be made on information and belief as to matters presumptively within the defendant's knowledge, had been stated and applied in a number of more recent decisions that it cited (*242 Cal. App. 2d 787, 792)* and added that, in any event, being a decision of the Supreme Court, *Crittenden* was, under the doctrine of *stare decisis*, binding on the lower courts and had to be followed by it (*242 Cal. App. 2d 787, 792-793)* . The court in *Dobbins* also explained that if defendant, when he was served with the complaint, was actually ignorant of the items of the account or of the payments, if any, made for such items, it was his duty to become informed before he filed his answer since these were material facts that he should have known and that, since the complaint was framed in the form of common counts, defendant could have demanded a bill of particulars under *Code Civ. Proc. § 454* requiring plaintiffs to furnish him with the details regarding the items charged against him (*242 Cal. App. 2d 787, 794)* .

[4] Additional Authorities

[a] Denial for Lack of Information or Belief of Matters Presumptively Known

The facts and procedural background of *Gribble v. Columbus Brewing Co. (1893) 100 Cal. 67, 34 P. 527* , are discussed in *§ 71.130[4][a]*. In *Gribble*, the insolvent corporation's assignee also denied for lack of information or belief the allegation in the complaint that certain items of property attached to the building were fixtures necessary for the conduct of the business. In affirming judgment on the pleadings for plaintiffs, the Supreme Court held that this denial was insufficient on the ground that defendant, as assignee in insolvency, must be presumed to have been in possession of the property and to have known whether or not the appliances were so attached, and hence the denial should have been positive in form (*100 Cal. 67, 75)* .

Le Breton v. Stanley Contracting Co. (1911) 15 Cal. App. 429, 114 P. 1028 , was an action by the receiver of a defunct bank against the makers of a note. Defendant's answer denied only those allegations of the complaint with reference to the court's order adjudicating the bank to be insolvent and appointing plaintiff as its receiver, and these denials were based on lack of information or belief. No attempt was made to deny due execution of the note or the amount of the indebtedness due on it. Defendants also attempted to allege an affirmative defense that was held to be insufficient (*15 Cal. App. 429, 432-433)* . Plaintiff's general demurrer to the answer was sustained and its concurrent motion for judgment on the pleadings was granted. The court of appeal affirmed the judgment. With respect to the denials mentioned above, the court said that the truth of the allegations of the complaint with references to the order adjudicating the bank insolvent and appointing plaintiff as its receiver could have been readily ascertained by defendants from an inspection of the court records; therefore, defendants' denials of these allegations for lack of information or belief were wholly insufficient (*15 Cal. App. 429, 433)* . The court added that denials in this form, with knowledge or means of knowledge as to the truth or falsity of the allegation attempted to be denied, are never permissible, that they may be disregarded by the court, and that if the answer fails otherwise to put in issue the material allegations of the complaint, judgment may be rendered for plaintiff and entered on the pleadings (*15 Cal. App. 429, 434)* .

See also *Mullally v. Townsend (1897) 119 Cal. 47, 53-54, 50 P. 1066* (denial for lack of information sufficient to form belief of matters of public record as impermissible); *Mulcahy v. Buckley (1893) 100 Cal. 484, 487, 35 P. 144* (denial for lack of information and belief as not permitted when defendant may be presumed to know, or when he or she is aware before answering, that he or she has the means of ascertaining whether or not such allegation is true).

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1. Motion By Plaintiff

7A-71 California Points & Authorities § 71.133

§ 71.133 Supporting Motion by Plaintiff for Judgment on Pleadings [Code Civ. Proc. § 438(c)(1)(A)]--Complaint States a Cause of Action and Answer Does Not Deny Material Allegation of Complaint and Alleges No Affirmative Defense--Denial of Legal Conclusion Only as Insufficient

[1] FORM Supporting Motion by Plaintiff for Judgment on Pleadings [Code Civ. Proc. § 438(c)(1)(A)]--Complaint States a Cause of Action and Answer Does Not Deny Material Allegation of Complaint and Alleges No Affirmative Defense--Denial of Legal Conclusion Only as Insufficient

[*The following should be combined with a general form of memorandum in support of a plaintiff's motion for judgment on the pleadings (see § 71.130).*]

PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS SHOULD BE GRANTED BECAUSE THE ANSWER DENIES ONLY A LEGAL CONCLUSION SET FORTH IN THE COMPLAINT BUT NOT THE FACTS ALLEGED FROM WHICH THE LEGAL CONCLUSION FOLLOWS.

Denial of Legal Conclusion Only. An answer that denies only a legal conclusion alleged in the complaint and not the facts alleged that lead to that conclusion fails to raise any material issue of fact (*Morel v. Morel (1928) 203 Cal. 417, 419, 164 P. 760*).

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in support of a plaintiff's motion for judgment on the pleadings when defendant's answer fails to deny the material factual allegations of the complaint but denies only one or more legal conclusions alleged that flow from the facts alleged.

The foregoing memorandum should be combined with a general form of memorandum in support of a plaintiff's motion for judgment on the pleadings [*see § 71.130*]. They may also be adapted for use in an appellate brief.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. For example, if the defendant's answer denies only the allegation that plaintiff owns certain real property, counsel should argue that since the question of ownership is a legal conclusion, and defendant only denies that conclusion and not the facts on which the conclusion is based, the answer fails to raise any material issue of fact and the plaintiff's motion should therefore be granted [*see Morel v. Morel (1928) 203 Cal. 417, 419, 164 P. 760 , discussed under § 71.133[3][a]*].

See also *§§ 71.20[2], 71.100[2], 71.130[2],* and *71.150[2]*.

[3] Discussion of Authorities

[a] Denial of Legal Conclusion Only

Morel v. Morel *(1928) 203 Cal. 417, 164 P. 760* , was an action to quiet title to real property. Plaintiff, in her second amended complaint, alleged that she was the owner and was entitled to possession of the property and set forth in detail her chain of title. She also set forth with like detail the sources of the defendant's claim of an estate or interest in the property and alleged that his claims were false, fictitious, and fraudulent. Defendant in his answer merely denied that plaintiff was the owner or entitled to possession of the real property described. Plaintiff's motion for judgment on the pleadings was granted and defendant appealed from the subsequent judgment for plaintiff. He claimed his denial of plaintiff's ownership of the property raised a sufficient issue to require denial of the motion for judgment on the pleadings.

The Supreme Court affirmed the judgment. The trial court did not err in granting the motion, the Court held, because defendant's denial could not be held sufficient to present an issue in view of the fact that plaintiff's second amended complaint set forth in detail the probative facts on which plaintiff's title to ownership were based and since defendant failed to deny these allegations his denial was merely of a legal conclusion (*203 Cal. 417, 419)* .

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1. Motion By Plaintiff

7A-71 California Points & Authorities § 71.134

§ 71.134 Opposing Motion by Plaintiff for Judgment on the Pleadings [Code Civ. Proc. § 438(c)(1)(A)]--Answer Raises Material Issue of Fact or Defense--General Form

[1] FORM Opposing Motion by Plaintiff for Judgment on the Pleadings [Code Civ. Proc. § 438(c)(1)(A)]--Answer Raises Material Issue of Fact or Defense--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*] Plaintiff,	)	MEMORANDUM IN OPPOSITION TO
vs.	)	PLAINTIFF'S MOTION FOR JUDGMENT ON THE
_____ [*name*], Defendant.	)	PLEADINGS
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS SHOULD BE DENIED BECAUSE THE ANSWER RAISES A MATERIAL ISSUE OF FACT AND/OR SETS UP A DEFENSE.

A. Material Issue of Fact or Defense Raised. A motion by plaintiff for judgment on the pleadings is in the nature of a general demurrer to the answer and must be denied if the answer raises a material issue of fact or sets up a defense (

MacIsaac v. Pozzo (1945) 26 Cal. 2d 809, 812-813, 161 P.2d 449 ; *Barasch v. Epstein (1957) 147 Cal. App. 2d 439, 440, 442-443, 305 P.2d 283*).

[*Optional*] **B. Truth of Answer Assumed.** In ruling on a motion by plaintiff for judgment on the pleadings, the trial court must treat all of defendant's allegations as true (*MacIsaac v. Pozzo (1945) 26 Cal. 2d 809, 813, 161 P.2d 449* ; *Union Oil Co. v. Moesch (1979) 88 Cal. App. 3d 72, 78, 151 Cal. Rptr. 517*).

[*Optional*] **C. Motion Not Available in Lieu of Special Demurrer.** A motion for judgment on the pleadings does not lie to challenge defects in a pleading subject to special demurrer (*Barasch v. Epstein (1957) 147 Cal. App. 2d 439, 442, 305 P.2d 283*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in opposition to a motion by plaintiff for judgment on the pleadings when the answer raises material issues of fact or states a defense.

In an appropriate case, the foregoing memorandum may be submitted in opposition to a plaintiff's motion for judgment on the pleadings supported by the memorandum *set out in §§ 71.130 -71.133*.

Optional Paragraph C is for use only when the motion is based on a ground of special demurrer other than lack of subject matter jurisdiction. Lack of subject matter jurisdiction is expressly authorized as a ground for a defendant's motion for judgment on the pleadings [*Code Civ. Proc. § 438(c)(1)(B)(i)*].

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated. For example, if plaintiff claims that its motion for judgment on the pleadings should be granted on the ground that certain facts averred in the answer are false, counsel should argue that the trial court must treat all of defendant's allegations as true for the purpose of evaluating a motion for judgment on the pleadings, and demonstrate how the specific facts alleged create issues with regard to the material allegations of the complaint [*see MacIsaac v. Pozzo (1945) 26 Cal. 2d 809, 813, 161 P.2d 449 , discussed under § 71.134[3][a]*].

With appropriate modifications, the foregoing memorandum may be used in opposition to a general demurrer to an answer to a complaint or cross complaint.

In addition to the memoranda of points and authorities in the foregoing form, in an appropriate case memoranda opposing a general demurrer to an answer may be modified for use in opposing a plaintiff's motion for judgment on the pleadings [*see* pt. I, subpt. B].

See also *§ 71.20[2]*.

[3] Discussion of Authorities

[a] Material Issue of Fact or Defense Raised

MacIsaac v. Pozzo *(1945) 26 Cal. 2d 809, 161 P.2d 449* , was an action for declaratory relief arising out of a joint venture agreement for the construction of a housing project in which the profits were to be divided equally between the parties and a second joint venture agreement between the same parties that provided that certain facilities of the original joint venture should be used in the performance of a job for the Utah Fuel Company, profits to be divided 85 percent to plaintiffs and 15 percent to defendants. It was alleged that (1) partial payments made on account of the Utah Fuel job were divided on the 85 percent/15 percent basis; (2) defendants prevented the Utah Fuel Company from settling the amount of the balance owing to plaintiffs and defendants until the respective rights of plaintiffs and defendants shall have been determined; (3) an actual controversy existed between the parties; (4) defendants contended that the second joint venture agreement was invalid and not enforceable and that they were entitled to receive one half of the moneys theretofore paid and which might thereafter be paid; and (5) plaintiffs contended that the second joint venture agreement was an enforceable contract and that plaintiffs were entitled to receive the payments provided for in the contract. Defendants filed an answer in which they alleged facts showing that plaintiffs had perpetrated a fraud on defendants in inducing them to enter into the second joint venture agreement and showing that the work performed under this agreement was actually obtained by agents of the first joint venture and was work belonging to that venture. They also filed a cross complaint.

When the case came on for trial, plaintiffs moved for judgment on the pleadings on the ground the cross complaint did not state any cause of action against plaintiffs and that the answer to the complaint raised no issue of law whatever. The motion was granted and defendants' request for leave to amend their answer to conform with the trial court's expressed opinion regarding the pleadings was denied.

The Supreme Court reversed the judgment with directions to grant defendants leave to amend their pleadings. The Court held that, although the pleadings were uncertain in specified respects, the answer raised material issues of fact requiring determination and that the cross complaint sufficiently alleged facts appropriate to an action for rescission of the second joint venture agreement or for damages for fraud, as well as facts entitling defendants to an accounting (*26 Cal. 2d 809, 813-814)* . With respect to the sufficiency of the answer, the Court said that a motion by plaintiff for judgment on the pleadings is in the nature of a general demurrer and the motion must be denied if the defendant's pleadings raise a material issue or set up affirmative matter constituting a defense (*26 Cal. 2d 809, 812-813)* .

Barasch v. Epstein *(1957) 147 Cal. App. 2d 439, 305 P.2d 283* , was an action to recover money. The complaint alleged that (1) defendant was in effect the alter ego of a named corporation and its president; (2) he was authorized to draw checks on the corporation's funds; (3) on August 28, 1950, plaintiff was the owner and payee of $18,000 worth of promissory notes executed by the corporation and the owner of nine shares of the corporation's stock; (4) on that date plaintiff and defendant agreed in writing that plaintiff would sell the notes to defendant for $900 cash and Israeli pounds to be paid in installments on specified future dates; and (5) on defendant's failure to make the specified future payments, the agreement with respect to the future payments, was modified by a partly oral, partly written agreement by which it was agreed that in lieu of the Israeli pounds nine checks of 1,000 Israeli pounds each, payable on demand, would be drawn in favor of plaintiff by the corporation on its funds on deposit in a bank in Israel. The complaint further alleged that (1) defendant would guarantee in writing that the checks would equal $12,000 in American dollars; (2) defendant would advance to plaintiff $4, 500 against the $12,000 and plaintiff would give him credit for an additional $500; (3) the $4, 500 limit was paid but the checks were not issued; (4) plaintiff had performed his part of the agreement; and (5) there was then owing and unpaid the sum of $7,000 with interest. Defendant filed an answer admitting and denying various allegations of the complaint, setting up a special defense, and asserting a counterclaim (counterclaims have since been abolished; see *Code Civ. Proc. § 428.80*). Plaintiff's motion for judgment on the pleadings was granted and defendant appealed.

The court of appeal reversed the judgment. The court concluded that the answer explicitly traversed various material allegations of the complaint and held the trial court erred in granting the motion (*147 Cal. App. 2d 439, 440)* . The court said that (1) a plaintiff may recover judgment on a motion for judgment on the pleadings only if the complaint

states facts sufficient to constitute a cause of action and the answer neither raises a material issue nor states a defense (*147 Cal. App. 2d 439, 440)* ; (2) a motion by a plaintiff for judgment on the pleadings is in the nature of a general demurrer to the answer and must be denied if the answer raises a material issue or sets up affirmative matter constituting a defense (*147 Cal. App. 2d 439, 442)* ; and (3) when the answer, fairly construed, suggests that the defendant may have a good defense, a motion for judgment on the pleadings should not be granted (*147 Cal. App. 2d 439, 443)* .

[b] Truth of Answer Assumed

The facts and procedural background of ***MacIsaac v. Pozzo*** *(1945) 26 Cal. 2d 809, 161 P.2d 449* , are *discussed under § 71.134[3][a]*. In *MacIsaac*, in reversing the judgment on the pleadings for plaintiff with directions to grant defendants leave to amend their pleadings (answer and cross complaint), the Supreme Court, with respect to the answer, said that, for the purpose of ruling on plaintiff's motion for judgment on the pleadings, the trial court must treat all of defendant's allegations as being true, and because the moving party admits the untruth of his own allegations insofar as they have been controverted, all such averments must be disregarded whether there is a direct and specific denial or an indirect denial by virtue of affirmative allegations of a contrary state of facts (*26 Cal. 2d 809, 813)* .

Union Oil Co. v. Moesch *(1979) 88 Cal. App. 3d 72, 151 Cal. Rptr. 517* , was an unlawful detainer proceeding by the oil company against a gasoline service station operator. The complaint alleged a lease agreement between plaintiff as lessor and defendant as lessee executed on July 31, 1973, for real property to be used by defendant to operate a gasoline service station. The lease provided, "The term of the Lease commences July 31, 1973, and terminates July 30, 1976. The Lease ends automatically and without notice on the termination date. If the Lessee remains in possession of the Station after the termination date with Union's expressed or implied consent, Lessee is a tenant from month to month on the terms and conditions specified herein. ..." The complaint further alleged that defendant entered into possession on or about July 31, 1973, that pursuant to the above-quoted language he became a month-to-month tenant on July 31, 1976, that on January 6, 1977, plaintiff gave defendant notice it was terminating the lease effective March 16, 1977, that the termination was for good cause and legitimate business reasons, and that although the lease was duly terminated on March 16, 1977, defendant refused to vacate and to surrender possession of the premises. Defendant's first amended answer denied that there was good cause for termination of the lease and affirmatively alleged (1) the existence of a franchise agreement between plaintiff and defendant (consisting of the lease and a separate "Retail Dealer Gasoline Storage and Purchase Agreement"); (2) the applicability of *Bus. & Prof. Code § 20999.1* (prohibiting gasoline franchiser from terminating, cancelling, or refusing to renew existing franchise without good cause); and (3) as required by that code section, the lack of good cause to terminate the lease. It also contained other affirmative defenses. Plaintiff's motion for judgment on the pleadings, premised in part on the theory that the factual issue of good cause was immaterial because *Bus. & Prof. Code § 20999.1* was enacted after the instant leasehold was created and hence could not be constitutionally applied, was granted, and defendant appealed.

The court of appeal reversed the judgment. The court pointed out that the lease expired prior to the enactment of *Bus. & Prof. Code § 20999.1*, that plaintiff had thereafter given its approval to a month-to-month tenancy, and that the statute could, therefore, constitutionally be applied (*88 Cal. App. 3d 72, 77-78)* . The court said that in ruling on a motion by plaintiff for judgment on the pleadings the trial court is obliged to accept as true allegations of material fact contained in defendant's answer that disclose the possibility of an affirmative defense (*88 Cal. App. 3d 72, 78)* .

[c] Motion Not Available in Lieu of Special Demurrer

The facts and procedural background of ***Barasch v. Epstein*** *(1957) 147 Cal. App. 2d 439, 305 P.2d 283* , are *discussed under § 71.134[3][a]*. In *Barasch*, in reversing the judgment on the pleadings for plaintiff, the court of appeal said that a motion for judgment on the pleadings does not operate as a special demurrer and that uncertainty and ambiguities in a complaint must be specifically raised by proper procedure (*147 Cal. App. 2d 439, 442)* , that is, by demurrer [*see Code Civ. Proc. §§ 430.10(f), 430.30(a)*].

Subsequent to these cases, one ground of special demurrer, lack of subject matter jurisdiction, has been authorized by statute as a ground for a motion for judgment on the pleadings [*see Code Civ. Proc. § 438(c)(1)(B)(i)*].

[4] Additional Authorities

[a] Material Issue of Fact or Defense Raised

The facts and procedural background of *Union Oil Co. v. Moesch (1979) 88 Cal. App. 3d 72, 151 Cal. Rptr. 517* , are *discussed under § 71.134[3][b]*. In *Union Oil Co.*, in reversing the judgment on the pleadings for plaintiff, the court held that the trial court was obliged to accept as true that portion of the answer alleging as a material fact that plaintiff's termination of the lease was without good cause, and that because the pleadings thus disclosed the possibility of an affirmative defense under *Bus. & Prof. Code § 20999.1*, it was error for the trial court to have granted the motion (*88 Cal. App. 3d 72, 78)* .

Amacorp Indus. Leasing Co. v. Robert C. Young Associates, Inc. (1965) 237 Cal. App. 2d 724, 47 Cal. Rptr. 294 , was an action for money allegedly due on a lease contract of an offset duplicating press. Defendant in its answer denied every allegation of the complaint, admitting only the allegation as to the amount of money defendant had paid on the contract. Defendant also set up an affirmative defense in the answer and filed a cross complaint against plaintiff, adding as a new cross defendant a third party that it was alleged had represented itself to defendant as plaintiff's parent corporation. The cross complaint sought rescission of the lease contract and damages for breach of warranty. Plaintiff filed an answer to the cross complaint, but the third-party cross defendant demurred to it both generally and specially. The demurrer was sustained with leave to amend. Defendant timely served the amended cross complaint on both plaintiff and the third-party cross defendant but did not timely file it. Plaintiff filed an answer to the amended cross complaint but the third-party cross defendant demurred to it generally and moved to strike it on the ground it was not timely filed. The demurrer was sustained without leave to amend and the motion to strike was granted. Plaintiff then moved for judgment on the pleadings and the motion was granted. Defendant appealed from both judgments.

The court of appeal held that the cross complaint stated a cause of action for breach of warranty (*237 Cal. App. 2d 724, 728)* and that under the circumstances the trial court erred in granting the motion to strike (*237 Cal. App. 2d 724, 729-730)* . With respect to the judgment on the pleadings, the court said the effect of such a judgment is the same as a dismissal after ruling on a general demurrer, that the ruling in question determined that the answer constituted no defense and the amended cross complaint stated no cause of action. The court held that the cross complaint stated a cause of action against plaintiff as well as against the third-party cross defendant and that since the answer to the complaint was essentially the same as the amended cross complaint it was clear that a valid defense to plaintiff's action was stated. The court reversed the judgment with directions to overrule the third-party cross defendant's demurrer, to deny its motion to strike, and to deny plaintiff's motion for judgment on the pleadings (*237 Cal. App. 2d 724, 730)* .

See also *Richter v. United Cal. Theatres, Inc. (1960) 177 Cal. App. 2d 126, 128, 1 Cal. Rptr. 895* (it is well settled that if the answer puts in issue a material allegation or sets up affirmative matter constituting a defense, a motion for judgment on the pleadings made by the plaintiff should not be granted).

[b] Truth of Answer Assumed

The facts and procedural background of *Barasch v. Epstein (1957) 147 Cal. App. 2d 439, 305 P.2d 283* , are *discussed under § 71.134[3][a]*. In *Barasch*, in reversing the judgment on the pleadings for plaintiff, the court of appeal said that on such a motion the moving party admits the untruth of his or her own allegations insofar as they have been controverted, and all such averments must be disregarded whether there is a direct and specific denial or an indirect denial by virtue of affirmative allegations of a contrary state of facts, and that every allegation affirmatively pleaded in the answer must be deemed true (*147 Cal. App. 2d 439, 443)* .

California Points & Authorities

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Volume 7A Chapters 71-79 DEMURRERS
CHAPTER 71 DEMURRERS AND MOTIONS FOR JUDGMENT ON THE PLEADINGS
PART II. FORMS
B. Motions For Judgment on The Pleadings
1. Motion By Plaintiff

7A-71 California Points & Authorities §§ 71.135-71.149

[Reserved]

§§ 71.135[Reserved]

California Points & Authorities

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Volume 7A Chapters 71-79 DEMURRERS
CHAPTER 71 DEMURRERS AND MOTIONS FOR JUDGMENT ON THE PLEADINGS
PART II. FORMS
B. Motions For Judgment on The Pleadings
2. Motion By Defendant

7A-71 California Points & Authorities § 71.150

§ 71.150 Supporting Motion by Defendant for Judgment on the Pleadings [Code Civ. Proc. § 438(c)(1)(B)]--General Form

[1] FORM Supporting Motion by Defendant for Judgment on the Pleadings [Code Civ. Proc. § 438(c)(1)(B)]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM IN SUPPORT OF DEFEND-
_____ [*name*] Plaintiff,	)	ANT'S MOTION FOR JUDGMENT ON THE
vs.	)	PLEADINGS
_____ [*name*], Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS SHOULD BE GRANTED BECAUSE IT APPEARS FROM THE FACE OF THE COMPLAINT THAT THE PLEADING FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION.

[*EITHER*]

A. Lack of Subject Matter Jurisdiction. A motion for judgment on the pleadings may be made on the ground that the court has no subject matter jurisdiction of the cause of action alleged in the complaint (*Code Civ. Proc. § 438(c)(1)(B)(i)*). _____ [*Specify why court lacks subject matter jurisdiction, providing authority*].

[*OR*]

A. Objection to Complaint by Motion for Judgment on Pleadings. A defendant may move for judgment on the pleadings on the ground that the complaint fails to state a legally cognizable cause of action against him or her (*Code Civ. Proc. § 438(c)(1)(B)(ii)*; *see also* (*IMO Development Corp. v. Dow Corning Corp. (1982) 135 Cal. App. 3d 451, 457, 185 Cal. Rptr. 341* ; *see also* *Pierson v. Sharp Memorial Hospital, Inc. (1989) 216 Cal. App. 3d 340, 343, 264 Cal. Rptr. 673*).

[*CONTINUE*]

[*Optional*] **B. Motion Directed to Portion of Complaint.** A motion by defendant for judgment on the pleadings may be directed to one or more counts or causes of action of a multiple count or multiple cause of action complaint that fails to state facts sufficient to constitute a cause of action for recovery of the relief sought (*Code Civ. Proc. § 438(c)(2)(A)*; *see also* *Stencel Aero Eng'r Corp. v. Superior Court (1976) 56 Cal. App. 3d 978, 988, 128 Cal. Rptr. 691*).

C. Insufficiency Is Established by Facts Appearing on Face of Complaint. A motion for judgment on the pleadings has the same basic purpose and effect as a general demurrer, and like a demurrer is confined to the face of the pleading under attack (*City of Fresno v. California Highway Com. (1981) 118 Cal. App. 3d 687, 692, 173 Cal. Rptr. 671*).

[*Optional*] **D. Essential Allegation Omitted.** A motion for judgment on the pleadings may properly be granted if an essential allegation is absent (*Fraker v. Sentry Life Ins. Co. (1993) 19 Cal. App. 4th 276, 285-286, 15 Cal. Rptr. 2d 1144*).

[*Optional*] **E. No Legal Duty Alleged.** A complaint for damages fails to state facts sufficient to constitute a cause of action when it fails to set forth facts showing a legal duty owed by defendant (*see* *McCarthy v. Frost (1973) 33 Cal. App. 3d 872, 874, 109 Cal. Rptr. 470*), including when a state law which would otherwise impose a legal duty is inapplicable (*Smiley v. Citibank (1995) 11 Cal. 4th 138, 165, 44 Cal. Rptr. 2d 441, 900 P.2d 690*).

[*Optional*] **F. Action Barred by Limitations.** Judgment on the pleadings is proper if a complaint fails to state facts sufficient to constitute a cause of action because the complaint shows on its face, or it appears from judicially noticed matter, that the action sued on is barred by the statute of limitations and this fact has been pleaded in the answer as an affirmative defense (*see* *Wrightson v. Dougherty (1936) 5 Cal. 2d 257, 262, 264-265, 54 P.2d 13*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a pretrial motion by defendant for judgment on the pleadings when the court lacks subject matter jurisdiction of the action [*Code Civ. Proc. § 438(c)(1)(B)(i)*] or the complaint fails to state facts sufficient to constitute a cause of action [*Code Civ. Proc. § 438(c)(1)(B)(ii)*].

The form is for use when the insufficiency of the complaint appears on the face of the pleading. The court may also, however, consider matters subject to judicial notice [*Code Civ. Proc. § 438(d)*; *see also Hughes v. Western MacArthur Co. (1987) 192 Cal. App. 3d 951, 955, 237 Cal. Rptr. 738]* . For a memorandum of points and authorities supporting a defendant's motion for judgment on the pleadings based on facts subject to judicial notice, see *§ 71.151*. If the motion is based on an admission, see *§ 71.152*.

Because the motion raises the same objection as a general demurrer to the pleading [*Lehto v. City of Oxnard (1985) 171 Cal. App. 3d 285, 287, 217 Cal. Rptr. 450 , criticized on other grounds in Doggett v. U.S. (9th Cir. 1989) 875 F.2d 684, 690 n.4*], counsel may adapt the memorandum provided in §§ 71.20-71.27 for use in support of a defendant's general demurrer to a complaint, for use in a memoranda supporting a motion for judgment on the pleadings.

With appropriate modifications, these points and authorities may be used in support of a motion by a cross defendant against a cross complainant for judgment on the pleadings or to support a general demurrer to either a complaint or a cross complaint.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law raised.

[b] Related Pleading and Practice Forms

For a form of notice of motion for judgment on the pleadings, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*, § 206.149, in California Forms of Pleading and Practice.

[c] Opposing Points and Authorities

In an appropriate case, the memorandum *set out in §§ 71.153 -71.156* may be used to oppose the motion supported by these points and authorities. In addition, the memorandum *set out in §§ 71.30 -71.43*, opposing a general demurrer to a complaint, may be modified for use in opposing the motion supported by the foregoing memorandum.

See also *§ 71.20[2]*.

[3] Discussion of Authorities

[a] Objection to Complaint by Motion for Judgment on Pleadings

Pierson v. Sharp Memorial Hospital, Inc. *(1989) 216 Cal. App. 3d 340, 264 Cal. Rptr. 673* , involved an action for negligence and strict liability in which the plaintiff sought recovery for damages incurred from a fall caused by an allegedly defective carpet during her visit to her husband's room at the defendant hospital's facility. The hospital moved to strike the strict liability cause of action and nonsuit on the negligence claim. The trial court granted the motions, and entered judgment favoring the hospital. The plaintiff appealed.

The court of appeal affirmed. The court stated a motion for judgment on the pleadings is made on the same grounds and decided on the same basis as a general demurrer. That is, judgment on the pleadings will be granted if the complaint on its face fails to state a cause of action (*216 Cal. App. 3d 340, 342*). The court noted that while the hospital's motion was labeled a motion to strike, it attacked the strict liability claim on the ground that it failed to state facts sufficient to constitute a cause of action and therefore effectively sought judgment on the pleadings (*216 Cal. App. 3d 340, 343*).

The court held that the hospital was a provider of professional medical services, rather than a producer or marketer of products and because the room was an integral component of the professional services the hospital provided, the trial court properly declined to permit the plaintiff to proceed against the hospital in strict liability (*216 Cal. App. 3d 340, 347*).

IMO Development Corp. v. Dow Corning Corp. *(1982) 135 Cal. App. 3d 451, 185 Cal. Rptr. 341* , was an action for damages and declaratory relief by a purchaser of real property against the seller. At issue was the validity of a waiver provision. The defendant seller moved for judgment on the pleadings on the grounds that one of the causes of action sought an improper remedy of partial rescission and failed to state facts establishing a claim for economic duress. The plaintiff argued that it did not seek a partial rescission, but rather a declaration that a waiver clause in the contract was unenforceable as an unconscionable provision under *Civ. Code § 1670.5*. The trial court granted the motion without leave to amend and entered judgment in favor of defendant with damages, together with interest and attorney's fees. The plaintiff appealed.

With the exception of the attorney's fees award, the court of appeal affirmed the judgment. The court, citing *Crain v. Electronic Memories & Magnetics Corp. (1975) 50 Cal. App. 3d 509, 512, 123 Cal. Rptr. 419* , stated that a defendant may move for judgment on the pleadings on the ground that the complaint fails to state a legally cognizable cause of action. The court concluded that the plaintiff's contention that by merely pleading economic duress it had invoked the court's power to declare the waiver unconscionable was without merit because nowhere did the plaintiff allege in the pleading that it sought a declaration of the waiver as an unconscionable provision, nor did it allege ultimate facts demonstrating its unconscionability (for instance, that the sales agreement constituted a contract of adhesion, or that the waiver provision was unduly one-sided, oppressive, or inherently unfair) (*135 Cal. App. 3d 451, 457, 460)* .

[b] Motion Directed to Portion of Complaint

Stencel Aero Eng'r Corp. v. Superior Court *(1976) 56 Cal. App. 3d 978, 128 Cal. Rptr. 691* , was a mandate proceeding arising out of a wrongful death action by the heirs and special administratrix of the estate of one McCarthy, who had been killed in an airplane accident, against the manufacturers of the aircraft involved and its component parts. The complaint in that action was in five counts. The first three sought compensatory damages on varying theories for wrongful death; the fourth was by the special administratrix to recover $200 compensatory damages for property damage alleged to have been sustained by the decedent before his death actually occurred; the fifth was by all plaintiffs for punitive damages in the sum of $10,000,000. Stencel Aero moved for judgment on the pleadings on the fifth count only (for punitive damages). The motion was denied and Stencel Aero petitioned the court of appeal for a writ of mandate.

The court of appeal issued a peremptory writ of mandate directing the trial court to vacate its order denying defendant's motion for judgment on the pleadings as to the heirs and to grant it as to them. It further directed the trial court to order that the complaint be amended so that the special administratrix alone pleaded punitive damages and did so in association with the fourth count of the complaint with an appropriate theory or theories of liability (*56 Cal. App. 3d 978, 988)* . The court held that punitive damages were not recoverable in the wrongful death action [first three counts; *see* former Code Civ. Proc. § 377 (*now see Code Civ. Proc. § 377.61*); former Prob. Code § 573(c) (*now see Code Civ. Proc. § 377.34*)], but were recoverable on the survival count [fourth count; *see* former Prob. Code § 573(c) (*now see Code Civ. Proc. § 377.34*)] (*56 Cal. App. 3d 978, 983)* . The court further held that the denial of the motion was, however, correct as to the special administratrix and denied the relief prayed for as to her (that the trial court's order denying the motion be vacated and the motion granted) (*56 Cal. App. 3d 978, 988)* .

[c] Insufficiency Is Established by Facts Appearing on Face of Complaint

City of Fresno v. California Highway Com. *(1981) 118 Cal. App. 3d 687, 692, 173 Cal. Rptr. 671* , involved an action by a city against the state for, among other relief, an injunction compelling the state to build freeways in the city.

The action was based on so-called "freeway agreements" executed from 1962 until 1968 in which the state agreed, in contemplation of building a freeway, to pay for and to make necessary changes in city streets in exchange for the city's agreement to the changes and to accept future control and maintenance of the changes. The complaint alleged that the state began, but did not complete, the construction. The state demurred to the complaint and simultaneously moved for judgment on the pleadings. The trial court sustained the demurrer without leave to amend. The judgment on the pleadings ordered and determined that the freeway agreements alleged in the complaint did not bind the state to construct any freeway at a certain time and the state was not required by law to construct or budget for the construction of a freeway in the city. The city appealed.

The court of appeal affirmed the trial court's judgment. The court held that the ruling on the demurrer and entry of judgment on the pleadings was procedurally and substantively correct. The court stated the general principle that a motion for judgment on the pleadings has the same basic purpose and effect as a general demurrer, and like a general demurrer is confined to the face of the pleading under attack. In strictly construing the agreements, the court stated that it could not find any language that legally obligated the state to commence or complete construction of any planned freeway (*118 Cal. App. 3d 687, 692, 694)* .

[d] Essential Allegation Omitted

Fraker v. Sentry Life Ins. Co. *(1993) 19 Cal. App. 4th 276, 15 Cal. Rptr. 2d 1144* , involved an action for declaratory relief regarding plaintiff's right to reimbursement for medical expenses under his group health insurance policy and for fraud due to defendant's alleged misrepresentations that the group policy would provide certain medical coverage. The trial court granted defendant's motion for summary judgment as to the declaratory relief cause of action and granted defendant's motion for judgment on the pleadings as to the fraud count.

The court of appeal affirmed the trial court's orders. It stated that a motion for judgment on the pleadings has the same purpose and effect of a general demurrer in that it determines whether the complaint contains the necessary facts to state a cause of action. It noted that the plaintiff had concluded that there was a connection between his inability to obtain replacement insurance and defendant's conduct in terminating group coverage. The essential allegations for a fraud action include a false representation as to a material fact, knowledge of the falsity, intent to defraud, justifiable reliance and resulting damage. The court stated that the absence of any of these elements would preclude recovery. The court then found that, apart from other missing allegations, the element of damages was missing since plaintiff's complaint failed to state any facts connecting the defendant's alleged conduct to the damages claimed. The defendant had given plaintiff ample notice of the policy's termination and of his ability to retain insurance with it under an individual policy; no more was required under the group policy. Therefore, plaintiff had failed to properly allege the necessary element of resulting damage and judgment on the pleadings was properly granted in defendant's favor (*19 Cal. App. 4th 276, 285-286)* .

[e] No Legal Duty Alleged

McCarthy v. Frost *(1973) 33 Cal. App. 3d 872, 109 Cal. Rptr. 470* , was a wrongful death action by the widow and minor children of the decedent against highway patrolmen and the State of California. The complaint set forth seven causes of action. In the first three, plaintiffs alleged that the decedent was driving a 1966 Jaguar eastbound on Highway 101 near Sheffield Drive in Santa Barbara County and that "At all times and at such time and place defendants negligently and carelessly failed to discover William Joseph McCarthy, the decedent, and failed to search for him or his vehicle, failed to find him, failed to summon medical aid, failed to administer first aid, failed to remove him from his vehicle, prevented others from finding him and prevented others from rendering medical aid, and defendants so negligently and carelessly conducted themselves as to proximately cause the death of William Joseph McCarthy, deceased, as hereinabove alleged." Defendants moved for judgment on the pleading on the first three causes of action and the motion was granted. Plaintiffs appealed, stipulating that the other four causes of action could be dismissed with prejudice, and the appeal was entertained.

The court of appeal affirmed the judgment with directions to supplement it by the addition of a paragraph dismissing the remaining four causes of action against the patrolmen and the state. The court said that the complaint did not state a cause of action because it did not set forth a legal duty owed by defendants to decedent or to plaintiffs (*33 Cal. App. 3d 872, 874)* . Plaintiff's reliance on *Veh. Code § 2412*, authorizing highway patrolmen to investigate accidents resulting in personal injuries or death as establishing a duty was held misplaced on the grounds the complaint did not allege there was an accident and the code section merely authorizes highway patrolmen to investigate accidents but imposes no duty on them to do so (*33 Cal. App. 3d 872, 874-875)* . The court held, however, that regardless of "pleading niceties," the decision of a peace officer to investigate or not investigate is a matter of discretion for which the officers and state were immune from liability under *Gov. Code §§ 815.2(a)* and *820.2*, absent the pleading of facts that would justify specific reliance by the decedent that an investigation would be conducted at any particular time and place or in any particular fashion, which was not done (*33 Cal. App. 3d 872, 875-876)* .

Smiley v. Citibank *(1995) 11 Cal. 4th 138, 44 Cal. Rptr. 2d 441, 900 P.2d 690* , was a class action on behalf of California residents holding a specific credit card. The action stated various causes of action against a national bank arising under California law, going ultimately to the amount of late payment fees charged by the bank in connection with the credit card. The bank filed a motion for judgment on the pleadings, contending that the complaint failed to state facts sufficient to constitute a cause of action against it as a result of preemption by federal law regarding the amount a national bank could charge for late payment fees. The trial court denied the motion, but the bank obtained a writ of mandate from the court of appeal compelling the trial court to vacate its order or show cause. The trial court subsequently granted the judgment on the pleadings and filed a judgment of dismissal. On appeal, the court of appeal affirmed, holding that the state law regarding the amount of late payment fees was inapplicable due to preemption by federal law.

The Supreme Court affirmed the court of appeal judgment. The court initially stated that it was clear that the federal National Bank Act preempted state law within the coverage of the Act. The question thus was not the existence of preemption by federal law, but rather whether the scope of the federal law covered the late payment fees in question (*11 Cal. 4th 138, 148)* . The court ultimately concluded that the term "interest" in the federal law should be construed to cover late payment fees (*11 Cal. 4th 138, 153)* . Since the complaint was based on state law bearing on the amount of late payment fees, and that law was preempted by federal law, the pleading failed to state facts sufficient to constitute a cause of action (*11 Cal. 4th 138, 164)* .

[f] Action Barred by Limitations

Wrightson v. Dougherty *(1936) 5 Cal. 2d 257, 54 P.2d 13* , was an action against the administratrix of a decedent's estate and others to enforce an alleged oral agreement between plaintiff and the decedent allegedly entered into about three-and-one-half months before the latter's death in 1927. By the terms of this agreement, plaintiff agreed to cancel a $12,500 obligation owing to him from the decedent in consideration of the transfer by decedent to the decedent and plaintiff as copartners of 100 shares of oil company stock that decedent owned, subject to the proviso that the stock was to remain in the name and possession of the decedent. After the latter's death, the shares passed into the possession of the administratrix who, it was alleged, refused to deliver to plaintiff that portion of the 100 shares allegedly owned by him and his proportionate share of royalties and profits that had accrued. It does not appear from the court's opinion when the complaint was filed, but it was apparently filed several years after the decedent's death. The complaint was in two counts, the first, in effect, for claim and delivery of the stock and the second to quiet title. Defendants' demurrer to the complaint on general and special grounds was overruled (*5 Cal. 2d 257, 265)* , and defendants answered denying various allegations and pleading affirmative defenses, including the bar of the statute of limitations (*5 Cal. 2d 257, 260)* . At trial, after plaintiff's opening statement, which followed the allegations of his complaint, defendants moved for nonsuit and for judgment on the pleadings on the ground the action was barred by the statute of limitations (*5 Cal. 2d 257, 260)* . The motions were granted and plaintiff appealed from the subsequent judgments of dismissal.

The Supreme Court, affirmed the judgments (*5 Cal. 2d 257, 266)* . The Court assumed the complaint included the allegations essential to a statement of a cause of action (*5 Cal. 2d 257, 265)* , and held that the motions for judgment on the pleadings were properly granted since the complaint showed on its face that the action was barred by the three-year period specified in *Code Civ. Proc. § 338* (*5 Cal. 2d 257, 262, 264)* and, if the administratrix were regarded as an involuntary trustee of partnership property coming into her possession, by the four-year period specified in *Code Civ. Proc. § 343* (*5 Cal. 2d 257, 264)* , which section had been added to the answer by amendment (*5 Cal. 2d 257, 265)* . Note that the procedure in this case is affected by the subsequent enactment of *Code Civ. Proc. § 438(e)* and (g).

[4] Additional Authorities

[a] Objection to Complaint by Motion for Judgment on the Pleadings

Hibernia Sav. & L. Soc'y v. Thornton (1897) 117 Cal. 481, 49 P. 573 , was an action on a promissory note, a copy of which was attached to the complaint. On a former appeal in the case, the judgment for plaintiff had been reversed on the ground the note, at the time of its execution, was secured by a mortgage on real property and, by reason of *Code Civ. Proc. § 726*, the makers were not liable to an action on the note independent of a suit to foreclose the mortgage. On retrial, defendant moved for judgment on the pleadings on the ground that complaint did not state facts sufficient to constitute a cause of action because the copy of the note attached to the complaint stated that it was "secured by a mortgage of even date herewith." The motion was granted, judgment was rendered for defendant, and plaintiff appealed. Although the Supreme Court reversed the judgment on the ground it did not appear from the face of the complaint that the note was secured and that the recital in the note could not be treated as the equivalent of such averment in the complaint (*117 Cal. 481, 483)* , the court said that the right of a defendant to move for judgment on the pleadings when the complaint fails to state a cause of action is well settled in this state (*117 Cal. 481, 482)* .

The facts and procedural background of *McCarthy v. Frost (1973) 33 Cal. App. 3d 872, 109 Cal. Rptr. 470* , are *discussed under § 71.150[3][e]*. In affirming the judgment in *McCarthy* with directions to supplement it by the addition of a paragraph dismissing the remaining four actions against the patrolmen and the state, the court of appeal said that on a motion for judgment on the pleadings, as on a general demurrer, the question is whether the complaint states a cause of action (*33 Cal. App. 3d 872, 874)* .

Kachig v. Boothe (1971) 22 Cal. App. 3d 626, 99 Cal. Rptr. 393 , was an action against a real estate broker, his salesman, the other party to a real property exchange agreement with plaintiffs, and the attorney who represented the broker and the other party in two prior consolidated actions against plaintiffs. These prior actions resulted in judgments against plaintiffs in favor of the broker for $10,000 as his commission on the aborted exchange and for $100 plus costs in favor of the other party to the exchange agreement. Plaintiff paid the $10,000 judgment but not the $100 judgment. These judgments had been obtained by perjured testimony suborned by the attorney (who was subsequently convicted of the crime and both sentenced to prison and suspended from the practice of law) and false evidence manufactured by the attorney and the other party to the exchange agreement. Plaintiffs in the present action sought recovery of the $10,000 they had paid the broker and damages for severe emotional distress and loss of income. Their theories of recovery were fraud, malicious prosecution, and intentional infliction of emotional distress. Defendants' motion for judgment on the pleadings was granted and plaintiffs appealed.

The court of appeal affirmed on the ground the prior judgments had not been vacated and could not be vacated because they had been procured by intrinsic fraud (perjury and false evidence) for which there was no judicial relief (*22 Cal. App. 3d 626, 631-636)* . The court pointed out that recovery could not be had for malicious prosecution since plaintiffs had not prevailed in the prior consolidated actions (*22 Cal. App. 3d 626, 636, 638-640)* . Recovery for fraud could not be had for the same reason the prior judgments could not be vacated, to wit, the fraud was intrinsic (*22 Cal. App. 3d 626, 636-638)* . Finally, plaintiffs could not recover for intentional infliction of emotional distress since that would constitute a collateral attack on the prior judgments, and, like the causes of action for fraud and malicious prosecution, was precluded by the doctrine of finality of judgments (res judicata), as well as on the ground the perjured testimony

and false evidence were privileged under the rule that publications made in the course of judicial proceedings are absolutely privileged (*22 Cal. App. 3d 626, 640-641)* .

[b] Motion Directed to Portion of Complaint

See also *McCarthy v. Frost (1973) 33 Cal. App. 3d 872, 873-874, 109 Cal. Rptr. 470* (partial judgment on pleadings as to three of seven causes of action alleged); *Lortz v. Connell (1969) 273 Cal. App. 2d 286, 289 n.2, 78 Cal. Rptr. 6* (motion for judgment on pleadings as to two of three causes of action granted and subsequent motion as to remaining cause of action granted).

[c] No Legal Duty Alleged

In *Shin v. Kong (2000) 80 Cal. App. 4th 498, 95 Cal. Rptr. 304* , when plaintiff was divorced from his wife, plaintiff learned for the first time that he was not the biological father of the child born during their marriage. After disclaiming all parental rights to the child in the dissolution proceeding, plaintiff sued his wife's doctor and the true biological father. Plaintiff alleged that the doctor performed an artificial insemination on plaintiff's ex-wife without plaintiff's consent resulting in the birth of a child assumed to be plaintiff's son and demanded tort damages. Defendant filed a motion for judgment on the pleadings, arguing, among other things, that defendant owed no duty to plaintiff. The court found that absent a relationship between plaintiff and the doctor that would give rise to a duty, plaintiff could plead no viable cause of action. Judgment was entered and plaintiff appealed.

The court of appeal affirmed. The court concluded that plaintiff's complaint was barred for lack of a legal duty owing from the defendant doctor to plaintiff and for public policy reasons embodied in statutes that preclude recovery for breach of moral duties (*80 Cal. App. 4th 498, 501)* . Specifically, the court found that Fam. Code § 7613 did not apply to the case (*80 Cal. App. 4th 498, 504-506)* , public policy precluded liability in the case (*80 Cal. App. 4th 498, 506-509)* , plaintiff had not stated a cause of action for procreative rights (*80 Cal. App. 4th 498, 509-510)* , plaintiff could not recover for emotional distress on a direct or bystander theory (*80 Cal. App. 4th 498, 510-512)* , and plaintiff could not recover for intentional infliction of emotional distress (*80 Cal. App. 4th 498, 512-513)* .

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2. Motion By Defendant

7A-71 California Points & Authorities § 71.151

§ 71.151 Supporting Motion by Defendant for Judgment on the Pleadings [Code Civ. Proc. § 438 (c)(1)(B)]--Insufficiency Established by Facts Subject to Judicial Notice [Code Civ. Proc. § 438(d)]

[1] FORM Supporting Motion by Defendant for Judgment on the Pleadings [Code Civ. Proc. § 438 (c)(1)(B)]--Insufficiency Established by Facts Subject to Judicial Notice [Code Civ. Proc. § 438(d)]

[*The following should be combined with a general form of memorandum in support of a defendant's motion for judgment on the pleadings (see § 71.150).*]

DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS SHOULD BE GRANTED BECAUSE MATTERS SUBJECT TO JUDICIAL NOTICE ESTABLISH THAT THE COMPLAINT FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION.

A. Judicial Notice. As in the case of a demurrer, the court may, in ruling on a motion for judgment on the pleadings, consider matters subject to judicial notice (*Code Civ. Proc. 438(d)*; *see also Barker v. Hull (1987) 191 Cal. App. 3d 221, 224, 236 Cal. Rptr. 285* ; *Megeff v. Doland (1981) 123 Cal. App. 3d 251, 257-258, 176 Cal. Rptr. 467*).

[*Here, and in subsequent paragraphs, set forth bases for judicial notice under Evid. Code §§ 452 or 453, and a request that the court take judicial notice of that fact (See § 71.21, Paragraphs C through O).*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a pretrial motion by defendant for judgment on the pleadings when it appears from matters that are subject to judicial notice that the complaint fails to state facts sufficient to constitute a cause of action. For a form of memorandum for use when the insufficiency appears on the face of the complaint and for a general form in support of the motion, see *§ 71.150*. For a form for use when the insufficiency appears from a judicial admission, see *§ 71.152*.

These points and authorities should be combined with a general form of memorandum in support of a defendant's motion for judgment on the pleadings [*see § 71.150*]. They may also be adapted for use in an appellate brief.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law raised. For example, if a prior action between the parties finally determined facts that contradict material allegations in the complaint, counsel should request that the court take judicial notice of relevant portions of its file showing the final determination of those matters, and argue that because of those matters, the complaint fails to allege facts sufficient to state a cause of action [*see Barker v. Hull (1987) 191 Cal. App. 3d 221, 224, 227, 236 Cal. Rptr. 285 , discussed under § 71.151[3][a]*].

[b] Opposing Points and Authorities

In an appropriate case, the memorandum *set out in §§ 71.153 -71.156* may be used to oppose the motion supported by these points and authorities. In addition, the memorandum *set out in §§ 71.30 -71.43*, opposing a general demurrer to a complaint, may be modified for use in opposing the motion supported by these points and authorities.

See also *§§ 71.20[2]* and *71.150[2]*.

[3] Discussion of Authorities

[a] Judicial Notice

Barker v. Hull *(1987) 191 Cal. App. 3d 221, 236 Cal. Rptr. 285* , was a suit by a corporate president against a shareholder and the shareholder's attorney for, among other things, fraud and deceit, after a default judgment was entered against the president on behalf of the shareholder in an earlier action and a motion to set aside the judgment by the president was denied. The shareholder and attorney moved for judgment on the pleadings arguing that the president was barred by the doctrine of collateral estoppel from relitigating the fraud issue. Each party requested the court to take judicial notice of portions of the file in the previous case. The court took judicial notice of the entire file, determined that the issue of fraud has been previously determined and granted the motion. The president appealed.

The court of appeal affirmed the judgment on the pleadings. The court stated that in addition to the facts alleged in the complaint, the court may consider matters that may be judicially noticed, including court records. The court concluded that the trial court had sufficient undisputed facts before it, which were appropriate subjects of judicial notice, to support the conclusion that the issues involved were identical with those litigated in the earlier action (*191 Cal. App. 3d 221, 224, 227)* .

Megeff v. Doland *(1981) 123 Cal. App. 3d 251, 176 Cal. Rptr. 467* , was a personal injury action against the wife and daughter of the perpetrator of a stabbing for failure to exercise control over the perpetrator. Plaintiffs alleged that the perpetrator was insane and that defendants should have known of his propensity for violence and should have exercised control over him. Plaintiffs also alleged that had it not been for defendants' voluntary assumption of custody over the perpetrator, the hospital in which he had been temporarily confined just before he committed the stabbing would have instituted commitment proceedings, that defendants should have instituted such proceedings themselves, and that such proceedings would have been successful, thus preventing the perpetrator's release. The trial court granted judgment on the pleadings for defendant wife.

The court of appeal affirmed the judgment. The court held that a motion for judgment on the pleadings has the purpose and effect of a general demurrer and that allegations in the complaint that are contradicted by facts of which the courts may take judicial notice will not be assumed to be true for purposes of ruling on such a motion (*123 Cal. App. 3d 251, 257 n.1, 258)* . At the request of defendants, the court took judicial notice of the court files of two criminal cases that

had arisen out of the stabbing incident. The court held that certain psychiatric reports contained in these files indicated that the perpetrator of the stabbings had shown no propensity for violence in the past and contradicted plaintiff's essential allegation that defendants should have known of the perpetrator's propensity for violence (*123 Cal. App. 3d 251, 258)* .

[4] Additional Authorities

[a] Judicial Notice

Pang v. Beverly Hospital, Inc. (2000) 79 Cal. App. 4th 986, 94 Cal. Rptr. 2d 643 , involved three causes of action, in one of which plaintiff alleged she was fired in violation of the Moore-Brown-Roberti Family Rights Act (*Gov. Code §§ 12945.1, 12945.2*) for taking time off to care for her mother. Plaintiff brought a motion for summary adjudication concerning this cause of action. At the start of the hearing on the summary adjudication motion, the court issued a tentative decision denying the motion because plaintiff failed to properly refer to or argue the facts set forth in plaintiff's separate statement of undisputed facts. The court, on its own motion, deemed the matter a motion for judgment on the pleadings, heard argument, and granted the motion. Plaintiff then dismissed her two remaining causes of action and the court entered judgment for defendant.

The court of appeal affirmed (*79 Cal. App. 4th 986, 990)* . In so doing the court noted that in addition to the facts pleaded, the appellate court may consider matters that may be judicially noticed, including a party's admissions or concessions which can not reasonably be controverted (*79 Cal. App. 4th 986, 989-990)* . At the request of both parties, the appellate court did so as to certain evidence placed before the trial court by the summary adjudication motion. Specifically, the court judicially noticed declarations of plaintiff and her sister, excerpts from plaintiff's deposition testimony and plaintiff's separate statement of undisputed facts, to the extent they related to plaintiff's need for family leave. These items contained judicial admissions and concessions fatal to plaintiff's claim (*79 Cal. App. 4th 986, 990)* .

Evans v. California Trailer Court, Inc. (1994) 28 Cal. App. 4th 540 , *33 Cal. Rptr. 2d 646* , involved contract and tort claims arising out of the plaintiffs' sale of their trailer park business and property. Plaintiffs had taken back two promissory notes secured by separate deeds of trust on the real property and, following default by the buyers' transferee, reacquired the property at a nonjudicial foreclosure sale of the senior deed of trust with a bid of less than the amount of indebtedness. On the first day of trial, certain defendants sought judgment on the pleadings on the grounds that certain causes of action were barred by the antideficiency statutes, *Code Civ. Proc. §§ 580b, 580d*, and the one-action rule, *Code Civ. Proc. § 726*. Defendants requested that the court take judicial notice of a recorded trustee's deed; plaintiffs did not object. The trial court granted judgment on the pleadings and plaintiffs appealed (*28 Cal. App. 4th 540, 547-548)* .

The court of appeal upheld the trial court's action in judicially noticing the deed of trust, rejecting plaintiffs' contention that the lower court had improperly considered matters beyond the pleadings (*28 Cal. App. 4th 540, 549)* . It expressly stated that the court may take judicial notice of recorded deeds. It further noted that the deed did not negate any explicit allegation of the amended complaint, but even if it did its existence and authenticity could not reasonably be controverted as plaintiffs conceded these matters. Therefore, the court concluded that such admissions or concessions of matters which cannot reasonably be controverted were properly considered by the lower court on the motion for judgment on the pleadings (*28 Cal. App. 4th 540, 549)* .

Baillargeon v. Department of Water & Power (1977) 69 Cal. App. 3d 670, 138 Cal. Rptr. 338 , was an action against a city water and power department, the Board of Administration of the Water and Power Employees Retirement Plan, and various employees of the Plan arising out of dispute as to benefits payable for an on-the-job injury. The representation relied on by plaintiff to impose liability was a statement in a booklet issued by defendant board explaining benefits payable under the Plan on which plaintiff claimed to have relied in continuing her employment but which was contrary to the actual provisions of the Plan, which allowed limited benefits only. Plaintiff's complaint set

forth three causes of action: (1) breach of contract; (2) infliction of mental distress; and (3) declaratory relief. The department and board answered the complaint setting forth various affirmative defenses, including the statute of limitations. Their subsequent motion for judgment on the pleadings on the grounds the complaint failed to state a cause of action and was barred by the statute of limitations was granted, and plaintiff appealed from the ensuing judgment.

The court of appeal reversed the judgment as to the first and third causes of action and affirmed it as to the second on the grounds that (1) the complaint sufficiently alleged the elements of equitable estoppel; (2) the one-year period for presenting claims prescribed in *Gov. Code § 911.2* applied to the contract and declaratory relief actions and was tolled while plaintiff pursued her workers' compensation remedy; and (3) the 100-day period for presenting claims prescribed by the same code section (claim presentation period extended to six months for actions based on acts or omissions occurring after January 1, 1988) applied to the tort cause of action, that that period was not tolled and had expired, and hence, that that cause of action was barred. The court said, in effect, however, that the trial court, in ruling on a motion for judgment on the pleadings, as in the case of a demurrer, is limited to a consideration of the face of the pleading attacked and to matters subject to judicial notice (*69 Cal. App. 3d 670, 675-676)* .

See also *Sullivan v. Los Angeles County (1974) 12 Cal. 3d 710, 714 n.3, 117 Cal. Rptr. 241, 527 P.2d 865* (on defendant's motion for judgment on pleadings, trial court properly took judicial notice of relevant court files, records, and documents); *Tiffany v. Sierra Sands Unified School Dist. (1980) 103 Cal. App. 3d 218, 225, 162 Cal. Rptr. 669* (on motion for judgment on pleadings, court may consider matters subject to judicial notice); *Cristmat, Inc. v. Los Angeles County (1971) 15 Cal. App. 3d 590, 598, 93 Cal. Rptr. 325* (motion for judgment on the pleadings as used to perform function of general demurrer and reaches only contents of challenged pleading and such matters as may be considered under doctrine of judicial notice).

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7A-71 California Points & Authorities § 71.152

§ 71.152 Supporting Motion by Defendant for Judgment on the Pleadings [Code Civ. Proc. § 438(c)(B)]--Insufficiency Established by Judicial Admission

[1] FORM Supporting Motion by Defendant for Judgment on the Pleadings [Code Civ. Proc. § 438(c)(B)]--Insufficiency Established by Judicial Admission

[*The following should be combined with a general form of memorandum in support of a defendant's motion for judgment on the pleadings (see § 71.150).*]

DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS SHOULD BE GRANTED BECAUSE IT APPEARS FROM A JUDICIAL ADMISSION ON THE FACE OF THE COMPLAINT THAT A CAUSE OF ACTION CANNOT BE STATED.

A. Action Barred by Judicial Admission. A complaint that on its face contains an admission that negates an essential element of the cause of action fails to state facts sufficient to constitute a cause of action; the plaintiff is bound by such an admission in his or her complaint (*see Setliff v. E. I. Du Pont De Nemours & Co. (1995) 32 Cal. App. 4th 1525, 1534, 38 Cal. Rptr. 2d 763*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a pretrial motion by defendant for judgment on the pleadings when an admission contained within the complaint negates the plaintiff's ability to allege an essential element of the cause of action.

These points and authorities should be combined with a general form of memorandum in support of a defendant's motion for judgment on the pleadings [*see § 71.150*], and if the motion is also based on facts subject to judicial notice, with a form a form relating to judicial notice [*see § 71.151*]. They may also be adopted for use in an appellate brief.

Counsel should insert argument in the form showing the relationship between the facts in the case and the points of law stated. Thus counsel should include discussion showing how the allegations of the complaint containing the admission negates the possibility of the plaintiff being able to allege an element essential to state a cause of action.

[3] Discussion of Authorities

[a] Action Barred by Judicial Admission

Setliff v. E. I. Du Pont De Nemours & Co. *(1995) 32 Cal. App. 4th 1525, 38 Cal. Rptr. 2d 763* , is discussed in *§ 71.28[3][a]*.

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7A-71 California Points & Authorities § 71.153

§ 71.153 Opposing Motion by Defendant for Judgment on Pleadings [Code Civ. Proc. § 438(c)(1)(B)]--General Form

[1] FORM Opposing Motion by Defendant for Judgment on Pleadings [Code Civ. Proc. § 438(c)(1)(B)]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*] Plaintiff,	)	MEMORANDUM IN OPPOSITION TO DEFEND-
vs.	)	ANT'S MOTION FOR JUDGMENT ON THE
_____ [*name*], Defendant.	)	PLEADINGS
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS SHOULD BE DENIED BECAUSE THE COMPLAINT DOES NOT ENTIRELY OMIT AN ESSENTIAL ALLEGATION TO THE STATEMENT OF A CAUSE OF ACTION AND IT DOES NOT APPEAR FROM THE FACE OF THE COMPLAINT OR FROM JUDICIALLY NOTICED MATTER THAT THE ACTION IS BARRED BY AN AFFIRMATIVE DEFENSE.

A. Denial of Motion. A motion by defendant for judgment on the pleadings must be denied unless there is an entire absence of some essential allegation to the statement of a cause of action (*Rannard v. Lockheed Aircraft Corp. (1945)*

26 Cal. 2d 149, 151, 157 P.2d 1) or unless it appears from the face of the complaint or judicially noticed matter that the action is barred by an affirmative defense (*see Sullivan v. Los Angeles County (1974) 12 Cal. 3d 710, 714 n.3, 117 Cal. Rptr. 241, 527 P.2d 865* ; *Bach v. McNelis (1989) 207 Cal. App. 3d 852, 865, 255 Cal. Rptr. 232*).

[*Optional*] **B. Sufficiency of Complaint.** A complaint that sets forth the essential facts of the case with reasonable precision and with sufficient particularity to acquaint the defendant with the nature, source, and extent of the cause of action is sufficient (*Rannard v. Lockheed Aircraft Corp. (1945) 26 Cal. 2d 149, 156-157, 157 P.2d 1*).

[*Optional*] **C. Rule of Liberal Construction.** In ruling on a motion for judgment on the pleadings, the facts alleged in the complaint must be assumed to be true and liberally construed in favor of the party against whom the motion is made (*Code Civ. Proc. § 452*; *Mobil Oil Corp. v. Exxon Corp. (1986) 177 Cal. App. 3d 942, 947, 223 Cal. Rptr. 392*).

[*Optional*] **D. Motion as Admitting Allegations.** A motion by defendant for judgment on the pleadings, for the purpose of ruling on the motion, admits as true all the facts alleged in the complaint (*Hibernia Sav. & L. Soc'y v. Thornton (1897) 117 Cal. 481, 482, 49 P. 573* ; *Baillargeon v. Department of Water & Power (1977) 69 Cal. App. 3d 670, 676, 138 Cal. Rptr. 338*), if they are not contrary to facts of which the court may take judicial notice (*see Stoney Creek Orchards v. California (1970) 12 Cal. App. 3d 903, 906, 91 Cal. Rptr. 139*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion by defendant for judgment on the pleadings. The grounds of the opposition are that the complaint alleges all the essential elements of the cause of action and that it does not appear from the face of the complaint or from judicially noticed matter that the action is barred by an affirmative defense.

In an appropriate case, these points and authorities may be submitted in opposition to the defendant's motion for judgment on the pleadings supported by the memorandum *set out in §§ 71.150 -71.151*.

With appropriate modifications, these points and authorities may be used to oppose a motion by a cross defendant against a cross complainant for judgment on the pleadings or to oppose a general demurrer to either a complaint or a cross complaint.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, if defendant asserts that a certain fact on which an essential element of the complaint is based is false, counsel should argue that the facts as alleged are sufficient to state a cause of action and that in passing on the question of sufficiency; it is beyond the scope of the inquiry to ascertain whether the facts stated are true or untrue [*see Stoney Creek Orchards v. California (1970) 12 Cal. App. 3d 903, 906, 91 Cal. Rptr. 139 , discussed under § 71.153[3][d]*].

See also *§§ 71.20[2]* and *71.150[2]*.

[3] Discussion of Authorities

[a] Denial of Motion

Rannard v. Lockheed Aircraft Corp. *(1945) 26 Cal. 2d 149, 157 P.2d 1* , was an action against a physician and surgeon and his employer, Lockheed Aircraft Corp., by a husband and wife. The complaint alleged that: (1) the physician was employed by Lockheed to physically examine applicants for employment; (2) plaintiff husband applied for employment and had to submit to such an examination, which he did; (3) after the examination he was negligently advised by defendants that as a condition precedent to plaintiff husband's proposed employment he would have to submit to an operation designed to correct a purported double hernia purportedly discovered by defendant physician during the physical examination; (5) he submitted to the operation; (6) defendant physician negligently performed the operation and postoperative treatment; and (7) as a result plaintiff husband sustained injuries for which damages were sought. At the commencement of the trial after defendant Lockheed's objection to plaintiffs' introduction of any evidence had been sustained, defendant's motion for judgment on the pleadings was granted and plaintiffs appealed.

The Supreme Court reversed the judgment. The Court stated that it is only when there is an entire absence of some essential allegation that a motion for judgment on the pleadings may properly be granted (*26 Cal. 2d 149, 151)* . The Court held that negligence was alleged generally, which is permissible, and the complaint stated all the essential elements of a cause of action for medical malpractice against defendant physician and against Lockheed based on the doctrine of respondeat superior (*26 Cal. 2d 149, 154-159)* .

Sullivan v. Los Angeles County *(1974) 12 Cal. 3d 710, 117 Cal. Rptr. 241, 527 P.2d 865* , was an action for damages for false imprisonment resulting from the county's continued incarceration of defendant after criminal charges against him had been dismissed. The felony counts had been dismissed on July 13, 1967, and the misdemeanor count on July 21. Plaintiff was released on August 7. In his amended complaint, plaintiff alleged he was imprisoned in the county jail by county sheriffs and employees who knew or should have known there were no charges of any kind pending against him and that he was entitled to his release and freedom. In ruling on the motion, the trial court took judicial notice of the superior and municipal courts' records relating to the criminal proceedings and of when the release order to the sheriff was issued (August 7, 1967). At the hearing on the motion, the court stated that it assumed there was no proof the sheriff knew there were no charges pending against plaintiff prior to issuance of the release order and granted the motion on the ground the county was immune from liability (*12 Cal. 3d 710, 714 n.3*).

The Supreme Court reversed the judgment. The Court held that the county was not immune from liability for false imprisonment in view of the mandatory duty imposed by *Penal Code § 1384*, requiring discharge from custody of a defendant against whom criminal charges are dismissed and that the county's liability was both direct and derivative (*12 Cal. 3d 710, 715)* . The Court stated that while the trial court properly took judicial notice as indicated above, it improperly involved itself in the merits of the case when it failed to accept plaintiff's allegation as true and relied on the release order as negating the sheriff's knowledge (*12 Cal. 3d 710, 714 n.3*). The Court said that the fact no release order was sent prior to August 7, merely foreclosed one possible source of the sheriff's alleged knowledge but was not sufficient to defeat plaintiff's allegation that the sheriff had knowledge (*12 Cal. 3d 710, 714 n.3*).

Bach v. McNelis *(1989) 207 Cal. App. 3d 852, 255 Cal. Rptr. 232* , involved an action in which the complaint, among other issues, challenged the constitutional validity of the assignment of two judges to courts of record in the county and included causes of action claiming the judges violated the Political Reform Act of 1974 (*Gov. Code § 81000 et seq.*). Both of the judges demurred on the ground that the complaint failed to state a cause of action for violation of the Act and one of the judges also filed a motion for judgment on the pleadings that raised the identical contentions as the demurrer, as well as the claim of judicial immunity. The trial court sustained both demurrers and granted the motion for judgment on the pleadings. The plaintiff appealed.

With regard to the motion for judgment on the pleadings, the court of appeal reversed the portion of the judgment dismissing the cause of action based on the alleged violation of the Political Reform Act of 1974. The plaintiff argued that because the complaint properly reported that the judge violated the reporting requirements of the Act, the defendant

judge's assertion that he was not required to report on a loan could not be determined on demurrer. Although the judge countered that the court took judicial notice of a sworn affidavit, the court held that a court may not judicially notice the truth of assertions in declarations or affidavits filed in court proceedings. A motion for judgment on the pleadings is made on the same grounds, and is decided on the same basis, as a general demurrer. That is, the motion will be granted only if the complaint on its face fails to state a cause of action. Because the court erred in sustaining the demurrer for that reason, it erred for the same reason in granting the judge's motion of judgment on the pleadings. Because the complaint stated a cause of action on its face and was not otherwise defeated by matters properly subject to judicial notice, the motion should have been denied as well (*207 Cal. App. 3d 852, 865)* .

[b] Sufficiency of Complaint

The facts and procedural background of ***Rannard v. Lockheed Aircraft Corp.*** *(1945) 26 Cal. 2d 149, 157 P.2d 1* , are *discussed under § 71.153[3][a]*. In *Rannard,* in reversing judgment on the pleadings for defendant, the Supreme Court said that all that is required of a plaintiff, as a matter of pleading, even as against a special demurrer, is that the complaint set forth the essential facts of the case with reasonable precision and with sufficient particularity to acquaint the defendant with the nature, source, and extent of the cause of action, and that the complaint in question did so (*26 Cal. 2d 149, 156-157)* .

[c] Rule of Liberal Construction

Code Civ. Proc. § 452 provides that in the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties.

Mobil Oil Corp. v. Exxon Corp. *(1986) 177 Cal. App. 3d 942, 223 Cal. Rptr. 392* , involved an action by a group of oil companies against another group of oil companies to enjoin the second group from nominating arbitrators under a binding arbitration clause in a contract between the parties to jointly operate a petroleum reservoir. One of the plaintiffs' arguments was that the contract was ambiguous as to whether arbitration was permitted under the circumstances, and, therefore plaintiffs should be allowed to adduce evidence of intent in this regard. The defendants demurred and moved for judgment on the pleadings. The trial court overruled the demurrer but granted the motion for judgment on the pleadings without allowing extrinsic evidence on the interpretation of the contract and denied the plaintiffs' motion for a preliminary injunction. Arbitration was completed, but, the superior court stayed confirmation of the arbitration award.

The court of appeal reversed the trial court's judgment on the pleadings remanded for further proceedings. The court stated that on a motion for judgment on the pleadings, the facts alleged in the complaint must be assumed to be true and liberally construed in favor of the party against whom the motion is made. The court cited the plaintiffs' argument that they had not been permitted to complete their discovery, which was necessary in developing evidence on the intent of the parties, and therefore the granting of the judgment on the pleadings foreclosed the opportunity to present evidence on their interpretation of the arbitration provisions. The court agreed and concluded that judgment on the pleadings was error (*177 Cal. App. 3d 942, 948)* .

[d] Motion as Admitting Allegations

The facts and procedural background of ***Hibernia Sav. & L. Soc'y v. Thornton*** *(1897) 117 Cal. 481, 49 P. 573* , are *set forth in § 71.150[4][a]*. In *Hibernia Sav. & L. Soc'y,* the Supreme Court reversed the judgment on the pleadings for defendant, stating that all the facts alleged in the complaint are admitted for the purposes of the motion and that the court is simply to determine whether these facts constitute a cause of action (*117 Cal. 481, 482)* .

The facts and procedural background of ***Baillargeon v. Department of Water & Power*** *(1977) 69 Cal. App. 3d 670, 138 Cal. Rptr. 338* , are discussed in *§ 71.151[4][a]*. In *Baillargeon,* the court of appeal reversed the judgment on the pleadings for defendants as to two of the three causes of action alleged in the complaint and affirmed it as to the third,

stating that a motion for judgment on the pleadings performs the function of a general demurrer and, therefore, admits all material and issuable facts pleaded, and that the facts alleged in the pleading attacked must be accepted as true (*69 Cal. App. 3d 670, 676)* .

Stoney Creek Orchards v. California *(1970) 12 Cal. App. 3d 903, 91 Cal. Rptr. 139* , was an action against the state for erosion of plaintiff's property. The action was predicated on the theory that use of the Sacramento River as a canal and the artificial regimen of its flow attributable to the plan, design, construction, and operation of certain dams substantially contributed to the erosion and that the state was liable because it participated in the planning and development of the multi-reservoir system. The state's general demurrer to the complaint was sustained without leave to amend and plaintiff appealed from the subsequent judgment of dismissal.

The court of appeal reversed, with directions to rule on the special demurrer for uncertainty, on the ground the complaint stated a cause of action for inverse condemnation. With respect to the allegations of the complaint, the court said that in passing on the question of the sufficiency or insufficiency of a complaint to state a cause of action, it is wholly beyond the scope of the inquiry to ascertain whether the facts stated are true or untrue and that the allegations of the complaint must for the purposes of demurrer be accepted as true unless they are contrary to facts of which a court may take judicial notice (*12 Cal. App. 3d 903, 906)* .

Since the motion for judgment on the pleadings is a substitute for a general demurrer, the same rule would apply in ruling on the motion.

[4] Additional Authorities

[a] Denial of Motion

Lortz v. Connell (1969) 273 Cal. App. 2d 286, 78 Cal. Rptr. 6 , was an action arising out of plaintiff's purchase of a business in which he had been jointly interested with the defendants. The complaint set forth three causes of action: malicious prosecution, conversion, and breach of contract. Defense motions for judgment on the pleadings on the malicious prosecution and conversion causes of action were granted and were not involved in the present appeal. With respect to the breach of contract action, plaintiff alleged that on a specified date defendants entered into a written agreement with him for the sale and transfer to him of all their interest in a logging company, that they breached the agreement in that on a specified date they retook and seized possession of the logging company and all of its assets from plaintiff, and that they caused plaintiff to be arrested to prevent his possession and management of the company. Defendants' subsequent motion for judgment on the pleadings on this count was also granted. Although holding that the motion was properly granted (but that it was error to deny leave to amend), the court nevertheless stated that a motion for judgment on the pleadings should not be granted unless there is an entire absence of an essential allegation (*273 Cal. App. 2d 286, 291)* .

See also *Burrow v. Timmsen (1963) 223 Cal. App. 2d 283, 288, 35 Cal. Rptr. 668* (it is only where there is an entire absence of some essential allegation that motion for judgment on pleadings may be properly granted); *Welshans v. Santa Barbara (1962) 205 Cal. App. 2d 304, 305, 23 Cal. Rptr. 108* (motion by defendant for judgment on pleadings operates as demurrer to complaint and if complaint states a cause of action it is error to grant the motion); *Shabrick v. Moore (1961) 195 Cal. App. 2d 56, 60, 15 Cal. Rptr. 310* (some essential allegation must be entirely lacking from the complaint before motion for judgment on pleadings may be properly granted); *Uptown Enterprises v. Strand (1961) 195 Cal. App. 2d 45, 48, 15 Cal. Rptr. 486* (there must be an entire absence of some fact or facts essential to constituting a cause of action before motion for judgment on pleadings for defendant will be granted), discussed in *§ 71.154[3][a]*.

[b] Rule of Liberal Construction

In *Kempton v. City of Los Angeles (2008) 165 Cal. App. 4th 1344, 81 Cal. Rptr. 3d 852* , plaintiff homeowners sued the city of Los Angeles, seeking monetary damages and injunctive relief after the city rejected their efforts to require their neighbors to remove fencing constructed on city property. Plaintiffs alleged the fences created diminished sightlines and created a dangerous condition. The city moved for judgment on the pleadings, arguing plaintiffs had not alleged any damages. Plaintiffs appealed, and the appellate court reversed, holding the trial court erred in not granting plaintiffs leave to amend their complaint to state a cause of action for nuisance. On appeal, the court must review the pleadings to determine whether the facts as alleged support any valid cause of action and, if not, whether the complaint can be amended to do so. Leave to amend is liberally allowed following a motion for judgment on the pleadings (*165 Cal. App. 4th 1344, 1348)* .

In *Ludgate Ins. Co. v. Lockheed Martin Corp. (2000) 82 Cal. App. 4th 592, 98 Cal. Rptr. 2d 277* , the trial court granted cross defendant's motion for judgment on the pleadings to cross complainant's fifth amended cross complaint, having concluded that the cross complainant had failed to allege facts sufficient to state a cause of action for declaratory relief. Defendant and cross complainant appealed. The court of appeal reversed the order granting the motion for judgment on the pleadings and remanded the matter to the trial court (*82 Cal. App. 4th 592, 613-614)* . The court noted that review of a judgment on the pleadings requires the appellate court to determine, de novo and as a matter of law, whether the complaint states a cause of action. A motion for judgment on the pleadings is analogous to a general demurrer. All facts alleged in the complaint are deemed admitted, and the appellate court gives the complaint a reasonable interpretation by reading it as a whole and all of its parts in their context. The appellate court is not concerned with a plaintiff's possible inability to prove the claims made in the complaint, the allegations of which are accepted as true and liberally construed with a view toward attaining substantial justice (*82 Cal. App. 4th 592, 602)* .

In *Higgins v. Del Faro (1981) 123 Cal. App. 3d 558, 176 Cal. Rptr. 704* , the court of appeal reversed the trial court's order granting judgment on the pleadings in favor of defendant. The court cited the rule that in ruling on such a motion the facts alleged in the complaint are to be treated as true and liberally construed in favor of the party against whom the motion is made, and held that aside from a minor technical error easily resolved by amendment (replacement of an erroneous attachment), the complaint stated all essential elements for the cause of action (*123 Cal. App. 3d 558, 565)* .

Gabaldon v. United Farm Workers Organizing Comm. (1973) 35 Cal. App. 3d 757, 111 Cal. Rptr. 203 , was a class action by 10 farm workers against an unincorporated labor organization and 26 major growers of agricultural crops in the San Joaquin Valley for damages and declaratory and injunctive relief with respect to a collective bargaining agreement entered into between the defendant labor organization and growers. Plaintiffs in their complaint alleged that union security provisions in the agreement violated their fundamental rights and liberties under the state and federal constitutions. Defendants' motion for judgment on the pleadings was granted on the ground the complaint failed to state facts sufficient to constitute a cause of action. Although the court of appeal affirmed the judgment, it nevertheless stated that in ruling on a motion for judgment on the pleadings the facts alleged in the challenged pleading must be liberally construed in favor of the party against whom the motion is made (*35 Cal. App. 3d 757, 759)* .

The facts and procedural background of *Lortz v. Connell (1969) 273 Cal. App. 2d 286, 78 Cal. Rptr. 6* , are set forth under § 71.153[4][a]. In *Lortz*, although the court of appeal held that the motion was properly granted (but that it was error to deny leave to amend) since there was a failure to set forth an essential allegation of an action for breach of contract, to wit, plaintiff's performance of the contract or excuse for nonperformance, the court nevertheless stated that in ruling on a motion for judgment on the pleadings the challenged pleading must be liberally construed (*273 Cal. App. 2d 286, 291)* .

See also *Gill v. Curtis Pub. Co. (1952) 38 Cal. 2d 273, 275, 239 P.2d 630* ; *Pacific Architects Collaborative v. California (1979) 100 Cal. App. 3d 110, 118, 166 Cal. Rptr. 184* (a motion for judgment on the pleadings is treated identically to a demurrer; consequently, the complaint must be liberally construed in favor of plaintiff).

[c] Motion as Admitting Allegations

See Ludgate Ins. Co. v. Lockheed Martin Corp. (2000) 82 Cal. App. 4th 592, 98 Cal. Rptr. 2d 277 discussed under § 71.153[4][b].

See also Mechanical Contractors Assn. v. Greater Bay Area Assn. (1998) 66 Cal. App. 4th 672, 677, 78 Cal. Rptr. 2d 225 (motion admits truth of all material facts pleaded unless contrary to law or fact of which the court may take judicial notice); *Tiffany v. Sierra Sands Unified School Dist. (1980) 103 Cal. App. 3d 218, 225, 162 Cal. Rptr. 669* (because it is analogous to a general demurrer, motion for judgment on pleadings admits all material and issuable facts well pleaded; facts alleged in pleading attacked must be accepted as true, although court may consider matters subject to judicial notice); *Pacific Architects Collaborative v. California (1979) 100 Cal. App. 3d 110, 118, 166 Cal. Rptr. 184* (motion for judgment on pleadings is treated identically to demurrer; hence, facts alleged in complaint must be assumed to be true); *Sullivan v. Los Angeles County (1974) 12 Cal. 3d 710, 714 n.3, 117 Cal. Rptr. 241, 527 P.2d 865* (trial court in ruling on motion by defendant for judgment on pleadings improperly involved itself in merits of whether plaintiff's allegations were true); *Gill v. Curtis Pub. Co. (1952) 38 Cal. 2d 273, 275, 239 P.2d 630* (in ruling on motion by defendant for judgment on pleadings, allegations in plaintiff's complaint must be taken as true, and so taken, the question is whether a cause of action has been stated); *Gabaldon v. United Farm Workers Organizing Comm. (1973) 35 Cal. App. 3d 757, 759, 111 Cal. Rptr. 203* (facts alleged in complaint must be assumed to be true); *Hospital Council of N. Cal. v. Superior Court (1973) 30 Cal. App. 3d 331, 337-338, 106 Cal. Rptr. 247* (motion for judgment on pleadings is in nature of general demurrer and issues raised by it are legal and not factual; as such, motion admits material facts alleged in pleadings of adverse party).

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7A-71 California Points & Authorities § 71.154

§ 71.154 Opposing Motion by Defendant for Judgment on Pleadings [Code Civ. Proc. § 438(c)(1)(B)]--Motion Does Not Lie to Challenge Defectively Stated or Uncertain Facts

[1] FORM Opposing Motion by Defendant for Judgment on Pleadings [Code Civ. Proc. § 438(c)(1)(B)]--Motion Does Not Lie to Challenge Defectively Stated or Uncertain Facts

[*The following should be combined with a memorandum in opposition to a motion for judgment on the pleadings (see, e.g., § 71.153).*]

DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS SHOULD BE DENIED BECAUSE A MOTION FOR JUDGMENT ON THE PLEADINGS DOES NOT LIE TO CHALLENGE DEFECTIVELY STATED OR UNCERTAIN FACTS ALLEGED IN THE COMPLAINT.

Defective Statement or Uncertain Facts. A motion by defendant for judgment on the pleadings does not lie to raise the objection that the necessary facts contained in the complaint are defectively set forth or are uncertain in form (*Hibernia Sav. & L. Soc'y v. Thornton (1897) 117 Cal. 481, 482-483, 49 P. 573* ; *Uptown Enterprises v. Strand (1961) 195 Cal. App. 2d 45, 48, 15 Cal. Rptr. 486*).

[2] Comments

[a] Use of Form

These points and authorities may be combined with a memorandum in opposition to a motion by defendant for judgment on the pleadings, such as the one *set out in § 71.153*, when defendant's motion is directed not to the absence from the complaint of allegations necessary to state a cause of action but asserts that the allegations are defectively stated or uncertain in form.

These points and authorities should be combined with a general form of memorandum in opposition to a defendant's motion for judgment on the pleadings [*see § 71.153*]. They may also be adapted for use in an appellate brief.

In an appropriate case, these points and authorities may be submitted in opposition to the defendant's motion for judgment on the pleadings supported by the memorandum *set out in §§ 71.150* and *71.151*.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, if defendant objects to the complaint on the ground that facts are in an uncertain form, counsel should argue that for the purpose of evaluating the sufficiency of a complaint on a motion for judgment on the pleadings, the court disregards alleged uncertainties because the motion is not an appropriate vehicle for such objections, and that unless there is an entire absence of some fact or facts essential to a cause of action, the motion should be denied [*see Uptown Enterprises v. Strand (1961) 195 Cal. App. 2d 45, 50, 15 Cal. Rptr. 486 , discussed under § 71.154[3][a]*].

See also *§ 71.153[2]*.

[3] Discussion of Authorities

[a] Defective Statement or Uncertain Facts

The facts and procedural background of ***Hibernia Sav. & L. Soc'y v. Thornton*** *(1897) 117 Cal. 481, 49 P. 573* , are *set forth in § 71.150[4][a]*. In *Hibernia Sav. & L. Soc'y,* the Supreme Court, in reversing the judgment on the pleadings for defendant, stated that if all the facts necessary to state a cause of action are contained in the complaint, the objection that they are defectively set forth, or are in an ambiguous or uncertain form, may not be raised by a motion by defendant for judgment on the pleadings; to support such a motion, there must be an entire absence of some fact or facts essential to constituting a cause of action (*117 Cal. 481, 482-483)* .

Uptown Enterprises v. Strand *(1961) 195 Cal. App. 2d 45, 15 Cal. Rptr. 486* , was an action by the owner and operator of a drive-in theater to restrain a sheriff and his deputies from unlawful interference with the operation of the theater and to enjoin their threatened repeated trespasses. At trial, defendants' objection to the introduction of any evidence on the ground the complaint failed to state facts sufficient to constitute a cause of action was sustained, and a judgment on the pleadings for defendants was entered.

The court of appeal reversed, holding that the complaint stated a cause of action for injunctive relief on the two grounds mentioned above (unlawful interference and threatened repeated trespasses) (*195 Cal. App. 2d 45, 50)* . The court, quoting from *Hibernia Sav. & L. Soc'y,* discussed *above*, said that if the necessary facts are contained in the complaint, the objection that they are defectively set forth, or are in an ambiguous or uncertain form, will be unavailing and that to grant a defendant's motion for judgment on the pleadings there must be an entire absence of some fact or facts essential to constituting a cause of action (*195 Cal. App. 2d 45, 48)* . In examining the sufficiency of the complaint, the court stated that it had disregarded several ambiguities that appeared throughout the complaint because, although the motion may serve the office of a general demurrer, it is not a vehicle for objections that may be urged by special demurrer (*195 Cal. App. 2d 45, 50)* . This statement is no longer valid to the extent that one ground for a special demurrer, lack of subject matter jurisdiction, may be asserted by a defendant through a motion for judgment on the pleadings [*Code Civ. Proc § 438(c)(1)(B)(i)*].

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7A-71 California Points & Authorities § 71.155

§ 71.155 Opposing Motion by Defendant for Judgment on Pleadings [Code Civ. Proc. § 438(c)(1)(B)]--Motion May Not Be Based on Extrinsic Matter Not Subject to Judicial Notice

[1] FORM Opposing Motion by Defendant for Judgment on Pleadings [Code Civ. Proc. § 438(c)(1)(B)]--Motion May Not Be Based on Extrinsic Matter Not Subject to Judicial Notice

[*The following should be combined with a memorandum in opposition to a motion for judgment on the pleadings (see, e.g., § 71.153).*]

DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS SHOULD BE DENIED BECAUSE NONJUDICIALLY NOTICED, EXTRINSIC MATTER MAY NOT BE CONSIDERED BY THE COURT IN RULING ON THE MOTION.

A. Extrinsic Evidence. In ruling on a motion for judgment on the pleadings, the court may not consider any nonjudicially noticed matter outside the challenged pleading (*see Hibernia Sav. & L. Soc'y v. Thornton (1897) 117 Cal. 481, 482, 49 P. 573* ; *Uptown Enterprises v. Strand (1961) 195 Cal. App. 2d 45, 47, 15 Cal. Rptr. 486*). Thus, presentation of extrinsic evidence is not proper on a motion for judgment on the pleadings (*Cloud v. Northrop Grumman Corp. (1998) 67 Cal. App. 4th 995, 999, 79 Cal. Rptr. 2d 548*).

[*Optional*] **B. Interpretations Requiring Extrinsic Evidence.** In ruling on a motion for judgment on the pleadings, the court may not make interpretations of any of the matters before it when the proper interpretation of such matters is a fact question that could only be determined from evidence produced at time of trial (*see Trewin v. State of California (1984) 150 Cal. App. 3d 975, 980, 198 Cal. Rptr. 263*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a defendant's motion for judgment on the pleadings,

when defendant, to establish that the plaintiff has no cause of action against defendant, attempts to rely on extrinsic matters that are not subject to judicial notice under *Evid. Code § 451, 452* or *453* [*see § 71.21*]. The proper way to raise an affirmative defense not appearing on the face of the complaint or from matter subject to judicial notice is by alleging it in the answer [*Code Civ. Proc. § 431.30(b)(2)*]. If the action lacks merit and it can be established by affidavit, declaration, deposition, and so forth, that there is no triable issue as to any material fact, defendant can and should move for summary judgment [*see Code Civ. Proc. § 437c*].

These points and authorities should be combined with a general form of memorandum in opposition to a defendant's motion for judgment on the pleadings [*see § 71.153*]. They may also be adapted for use in a trial or appellate brief.

In an appropriate case, these points and authorities may be submitted in opposition to the defendant's motion for judgment on the pleadings supported by the memorandum *set out in §§ 71.150* and *71.151*.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should specify the facts that the defendant relies on that cannot be found by reference to the face of the complaint or to matters of which the court is required to or may take judicial notice.

the memorandum in this form may be adapted for use by the moving party when it is the opposing party who seeks to rely on extrinsic evidence not subject to judicial notice to support the sufficiency of the pleading [*see, e.g., McCarthy v. Frost (1973) 33 Cal. App. 3d 872, 874, n.2, 109 Cal. Rptr. 470* , cited in the form and discussed *below*].

[b] Judicial Notice

Matters subject to judicial notice are set out in *Evid. Code §§ 451, 452* and *453*. A court may, among other things, take judicial notice of its own records, including orders, statements of decision, and judgments [*see Evid. Code § 452(d)*]. However, it cannot, in this guise, judicially notice the truth of hearsay allegations simply because they are contained in supporting testimonial documents that are included in a court record or file [*Garcia v. Sterling (1985) 176 Cal. App. 3d 17, 21-22, 221 Cal. Rptr. 349]* .

For further discussion, see California Forms of Pleading and Practice.

See also *§§ 71.20[2]* and *71.153[2]*.

[3] Discussion of Authorities

[a] Extrinsic Evidence

The facts and procedural background of ***Hibernia Sav. & L. Soc'y v. Thornton*** *(1897) 117 Cal. 481, 49 P. 573* , are *set forth in § 71.150[4][a]*. In *Hibernia Sav. & L. Soc'y v. Thornton*, the Supreme Court reversed the judgment on the pleadings for defendant, stating that the trial court cannot, on a motion by defendant for judgment on the pleadings, consider any matter outside of the complaint, or any defense to it in the answer, but rather, that the motion is to be determined on the same principles as a demurrer to the complaint on the same ground (*117 Cal. 481, 482)* .

Note that the court may in ruling on a motion for judgment on the pleadings, as in the case of ruling on a general demurrer [*see Code Civ. Proc. §§ 430.30(a), 430.70*], consider matters subject to judicial notice [*see § 71.151*].

Cloud v. Northrop Grumman Corp. *(1998) 67 Cal. App. 4th 995, 79 Cal. Rptr. 2d 548* , involved an action for wrongful termination and sexual harassment against plaintiff's former employer and plaintiff's former supervisor (collectively referred to as Northrop). After being terminated from employment, plaintiff filed for chapter 7 bankruptcy protection (*11 U.S.C. § 701 et seq.*). In the schedules filed with the bankruptcy court, plaintiff did not disclose any claim

or potential claim against Northrop. While the bankruptcy action was pending, plaintiff filed a complaint against Northrop with the Department of Fair Employment and Housing and received a right-to-sue letter from the department. Shortly after plaintiff received a bankruptcy discharge, but while the bankruptcy action remained pending, plaintiff filed the wrongful termination and sexual harassment action. After the bankruptcy case was closed, Northrop moved for judgment on the pleadings requesting the court to take judicial notice of the bankruptcy filings, which revealed that plaintiff had not scheduled plaintiff's claims against Northrop as assets of plaintiff's bankruptcy estate. Northrop contended first that plaintiff lacked standing to pursue the civil action because, under bankruptcy law, plaintiff's claim against Northrop was the property of the bankruptcy estate and therefore the bankruptcy trustee was the real party in interest. Second, Northrop contended that plaintiff was judicially estopped from pursuing the lawsuit because of plaintiff's prior failure to schedule the lawsuit as an asset of the bankruptcy estate. The trial court agreed and granted the motion without leave to amend on the grounds that the plaintiff lacked standing and that plaintiff was judicially estopped from pursuing plaintiff's claim. Judgment in favor of Northrop was entered and plaintiff appealed (*67 Cal. App. 4th 995, 998-1000)* .

The court of appeal reversed. As to the standing issue the court held that leave to amend should have been granted either to substitute the real party in interest (the bankruptcy trustee) or to obtain the trustee's abandonment of the claim (*67 Cal. App. 4th 995, 1000)* . On the issue of judicial estoppel, the court noted that a motion for judgment on the pleadings attacks only defects appearing on the face of the pleadings or by matters that can be judicially noticed. Therefore presentation of extrinsic evidence is not proper on a motion for judgment on the pleadings (*67 Cal. App. 4th 995, 999)* . Because the defense of judicial estoppel raised factual issues that could not be decided solely by reviewing plaintiff's complaint and the bankruptcy filings that could be judicially noticed, it could not be decided on a motion for judgment on the pleadings (*67 Cal. App. 4th 995, 1000, 1018-1019)* .

The facts and procedural background of ***Uptown Enterprises v. Strand*** *(1961) 195 Cal. App. 2d 45, 15 Cal. Rptr. 486* , are discussed in *71.154[3][a]*. The court of appeal reversed the judgment on the pleadings for defendants. Quoting from *Hibernia Sav. & L. Soc'y,* discussed *above,* the court said that on a motion by defendant for judgment on the pleadings the court cannot consider any matter outside of the complaint, or any defense to the complaint in the answer, but rather, that the motion is to be determined on the same principles as would be a demurrer to the complaint on the same ground (*195 Cal. App. 2d 45, 47)* .

[b] Interpretations Requiring Extrinsic Evidence

Trewin v. State of California *(1984) 150 Cal. App. 3d 975, 198 Cal. Rptr. 263* , involved an action growing out of an automobile accident. Plaintiffs alleged that defendant state had issued a driver's license to the individual who had caused the accident after having determined that the individual was incapable of operating a motor vehicle safely for reasons of diminished mental and physical agility. The trial court granted judgment on the pleadings for defendant on the grounds that issuing the license had been a discretionary act, for which the state could not be sued. Plaintiffs appealed.

The court of appeal reversed the judgment on the pleadings. The court held that under the applicable statutes, the act of issuing the license was a violation of a mandatory duty, for which the state could be sued, if defendant had actually determined that the person who had received the license was not capable of operating a vehicle safely before issuing the license (*150 Cal. App. 3d 975, 981)* . Considering the propriety of the judgment on the pleadings, the court cited a portion on the record in which the trial court listened to plaintiffs state their proffered evidence to support their allegation that the DMV was aware of the person's unfitness to drive before issuing the license, including evidence that the DMV examiner noted on the person's driver's license application that the person was suffering from "general debilities." In the cited portion of record, the trial judge concluded that the notation of "general debilities" was not sufficient to show that the DMV had made a determination according to applicable statute that the person was not fit to drive a vehicle. The court of appeal held that the trial judge's statement showed that the trial court had acted outside the scope of the motion by receiving evidence and interpreting the notation of "general debilities" as a condition less severe than that required by statute to trigger the state's mandatory duty not to issue a license. The court stated that whether that

examiner was using the term "general debilities" in a sense analogous to the statutory provisions triggering the mandatory duty not to issue a license was a question of fact that could only be determined from all of the evidence produced by plaintiffs at the time of trial (*150 Cal. App. 3d 975, 980)* .

[4] Additional Authorities

[a] Extrinsic Evidence

The facts and procedural background of *McCarthy v. Frost (1973) 33 Cal. App. 3d 872, 109 Cal. Rptr. 470* , are discussed in *§ 71.150[3][e]*. In *McCarthy,* it was plaintiffs who sought to rely on extrinsic evidence in opposing defendants' motion for judgment on the pleadings. In affirming the judgment for defendants, the court of appeal said that on a motion for judgment on the pleadings, as on a general demurrer, the question is whether the complaint states a cause of action (*33 Cal. App. 3d 872, 874)* and in a footnote explained that in the light of this rule the court had to ignore plaintiffs' repeated reference to exhibits and depositions (*33 Cal. App. 3d 872, 874 n.2*).

The facts and procedural background of *Lortz v. Connell (1969) 273 Cal. App. 2d 286, 78 Cal. Rptr. 6* , are discussed in *§ 71.153[4][a]*. In *Lortz,* although holding that defendants' motion for judgment on the pleadings was properly granted but that it was error to deny plaintiff leave to amend, the court of appeal said that it is generally stated that on a motion for judgment on the pleadings the court cannot consider any matter outside the complaint and that neither the former judgment, nor the relevancy, competency, or weight of the evidence produced in the action, was a proper matter for consideration on the merits of the motion for judgment (*273 Cal. App. 2d 286, 292-293)* .

Note

that a prior judgment may be considered under the doctrine of judicial notice [*see § 71.21*] and that matters subject to judicial notice may be considered by the court in ruling on a motion for judgment on the pleadings [*see § 71.151*].

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7A-71 California Points & Authorities § 71.156

§ 71.156 Opposing Motion by Defendant for Judgment on Pleadings [Code Civ. Proc. § 438(c)(1)(B)]--Defects in Pleading Cured by Admissions in Answer

[1] FORM Opposing Motion by Defendant for Judgment on Pleadings [Code Civ. Proc. § 438(c)(1)(B)]--Defects in Pleading Cured by Admissions in Answer

[*The following should be combined with a memorandum in opposition to a motion for judgment on the pleadings (see, e.g., § 71.153).*]

DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS SHOULD BE DENIED BECAUSE THE DEFENDANT, BY HIS/HER ADMISSIONS IN THE ANSWER, HAS CURED THE ALLEGED DEFECT IN THE COMPLAINT.

Defect Cured by Answer. Notwithstanding the omission of an essential allegation in the complaint, it is error to grant judgment on the pleadings when the answer has come to the relief of the complaint by admitting the matters that were omitted (*see Way v. Shaver (1906) 2 Cal. App. 650, 652-653)* .

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion by defendant for judgment on the pleadings, when the defendant asserts that the complaint omits an essential allegation but alleges in the answer the matter omitted.

These points and authorities should be combined with a general form of memorandum in opposition to a defendant's motion for judgment on the pleadings [*see § 71.153*]. They may also be adapted for use in an appellate brief.

In an appropriate case, these points and authorities may be submitted in opposition to the defendant's motion for judgment on the pleadings supported by the memorandum *set out in §§ 71.150* and *71.151*.

It should be noted that a result contrary to the point raised in this memorandum was reached in *Hatch v. Draper (1943) 59 Cal. App. 2d 411, 412, 138 P.2d 682* . *Hatch,* without citing *Way v. Shaver,* stated that the complaint was not aided by the answer. Both opinions were rendered by the Second Appellate District. However, in *Estate of Supple (1966) 247 Cal. App. 2d 410, 415, 55 Cal. Rptr. 542* , the First Appellate District observed that the result in *Hatch* was presumably reached because the trial court had dismissed the complaint only after the plaintiff had been given leave to amend and declined to do so. In *Estate of Supple*, the motion for judgment on the pleadings was also affirmed because appellant's counsel declined to amend the pleading in conformity with the answer with the result being that he was not permitted to contend that the defects in the pleading were cured by matters in the answer [*Estate of Supple (1966) 247 Cal. App. 2d 410, 415-416, 55 Cal. Rptr. 542]* .

On the other hand, *Mohlmann v. City of Burbank (1986) 179 Cal. App. 3d 1037, 1041 n.2, 225 Cal. Rptr. 109* [*see § 71.43*], yet another Second Appellate District decision, stated that the rule is "well settled" that a complaint that lacks the averment of a fact essential to a cause of action may be so aided by the averment of that fact in the answer as to uphold a judgment on it. It would seem that the same result would apply in the case of a motion for judgment on the pleadings.

For a form of points and authorities in opposition to a demurrer when the demurrer supplies the missing allegation, see *§ 71.43*.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel would identify the fact admitted in the answer that supplies the allegation omitted from the complaint.

See also *§§ 71.20[2]* and *71.153[2]*.

[3] Discussion of Authorities

[a] Defect Cured by Answer

Way v. Shaver *(1906) 2 Cal. App. 650* , was an action by a creditor against a debtor to declare an instrument a deed of trust and for an order of sale of certain property for the benefit of the creditor. The debtor defendant moved for judgment on the pleadings on the ground that the complaint was insufficient to authorize the court to declare a trust because it failed to allege that the trustee denied the trust or refused to carry out the terms of the trust. The trial court granted the judgment on the pleadings.

The court of appeal reversed. The court stated that although the complaint did not aver any demand on the trustee to enforce the trust, any refusal to do so, or any knowledge of the plaintiff's claim, the answer came to the relief of the complaint by admitting knowledge of the claim, denying its validity, and pleading payment. The effect of these admissions was to admit that a formal demand would have been unavailing, and therefore not an essential prerequisite. The court distinguished the facts before it from those of *Hibernia Sav. & L. Soc'y v. Thornton (1897) 117 Cal. 481, 49 P. 573* , which determined that averments in the answer could not be considered, because in that case the effect of the allegations, if they were true, would be to defeat the action, and evidence is necessary to establish their truth. In this case, however, the allegations were in aid of the complaint and the court was bound to consider such admissions that would have the effect of obviating proof of particular matters on plaintiff's part, and if the complaint, coupled with such admissions, conferred jurisdiction in equity to declare a trust, the motion for a judgment should have been denied (*2 Cal. App. 650, 652)* .

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Chapters 72RESERVED

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 80 DISCOVERY: SCOPE, REGULATION, AND TIMING

8-80 California Points & Authorities 80.syn

§ 80.syn Synopsis to Chapter 80: DISCOVERY: SCOPE, REGULATION, AND TIMING

§ 80.01 Scope of Chapter

§ 80.02 Governing Law

[1] California Civil Discovery Act and Related Law

[2] General Provisions Limiting or Regulating Discovery

[3] Case Law Decided Under Prior Discovery Acts

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Liberal Standard for Subject Matter Relevancy

[b] Relevancy to Discovery Is Broader Than Relevancy to Issues

[c] Potential as Well as Actual Issues Are Relevant to Subject Matter

[4] Additional Authorities

[a] Matters Relevant to Subject Matter of Litigation Discoverable

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§ 80.20 Supporting Motion to Compel Discovery--Matters Relating to Defendant's Liability Insurance Are Discoverable [Code Civ. Proc. § 2017.210]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Existence and Extent of Liability Insurance Is Discoverable

[b] Insurer's Disclaimer of Liability Is Discoverable

[4] Additional Authorities

[a] Existence and Extent of Liability Insurance Is Discoverable

§ 80.21 Supporting Motion to Compel Discovery--Insurer's Loss Reserves and Reinsurance Information Are Relevant and Discoverable in Insurance Bad Faith Litigation

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Discoverability of Loss Reserves and Reinsurance Information

§ 80.22 Supporting Motion to Compel Discovery--Names, Addresses, and Files of Insurer's Claimants Are Relevant and Discoverable in Action for Unfair Settlement Practices

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Discovery of Names, Addresses, and Files of Insurer's Claimants

§ 80.23 Supporting Motion to Compel Discovery--Discovery of Matters Supporting Amendment of Pleadings

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Facts Needed to State Cause of Action

[b] Facts Needed to Amend Pleadings

[c] Facts Needed to Overcome Demurrer

[d] Potential Class Members

[4] Additional Authorities

[a] Facts Needed to Amend Pleadings

[b] Facts Needed to State Cause of Action

[c] Potential Class Members

§ 80.24 Supporting Motion to Compel Discovery--Discovery of Facts on Which Allegations Are Based, Contentions, Matters Known to Party Seeking Discovery, Evidence That May Be Inadmissible at Trial, Jurisdictional Information, Hearsay Evidence, or Questions That Assume Facts Not in Evidence

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Facts on Which Allegations Are Based

[b] Contentions of Party

[c] Matters Known to Party Seeking Discovery

[d] Evidence That May Be Inadmissible at Trial

[e] Jurisdictional Information

[f] Hearsay Evidence

[g] Questions That Assume Facts Not in Evidence

[4] Additional Authorities

[a] Facts on Which Allegations Are Based

§ 80.25 Supporting Motion to Compel Discovery--Discovery Into Areas Relating to Concession by Opposing Party

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Discovery Into Areas Relating to Matters Which Were Conceded

§§ 80.26-80.39 [Reserved]

§ 80.40 Opposing Motion to Compel Discovery--Discovery Improper When Irrelevant Matters Sought [Code Civ. Proc. § 2017.010]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Disclosure of Irrelevant Information

[b] Questions Unrelated to Claim for Relief

[c] Disclosure of Information Unrelated to Subject Matter of Action

[d] Questions That Are Unlikely to Lead to Discovery of Admissible Evidence

[4] Additional Authorities

[a] Questions That Are Irrelevant to Action and Unlikely to Lead to Discovery of Admissible Evidence

§§ 80.41-80.49 [Reserved]

§ 80.50 Opposing Motion to Compel Discovery--Discovery in Aid of Amendment of Pleadings Improper When No Cause of Action Stated or No Genuine Issue of Material Fact Present

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Uses

[3] Discussion of Authorities

[a] No Discovery When Complaint Cannot Be Improved by Amendment

[b] Discovery Improper When No Genuine Issue of Material Fact

§ 80.51 Opposing Motion to Compel Discovery--Information Relating to Non-Party Insurer's Financial Condition Is Not Discoverable for Settlement Purposes [Code Civ. Proc. § 2017.210]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Non-Party Insurer's Financial Condition Is Not Discoverable Under Code of Civ. Proc. § 2017 for Purposes of Settlement

[b] Non-Party Insurer's Reinsurance Information Is Irrelevant for Settlement Purposes

§§ 80.52-80.79 [Reserved]

§ 80.80 Supporting Motion for Protective Order--Burden, Expense, or Intrusiveness Outweighs Likelihood of Obtaining Admissible Evidence [Code Civ. Proc. § 2017.020]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Balancing Burden Against Likelihood of Discovering Admissible Evidence

[4] Additional Authorities

[a] Balancing Burden Against Likelihood of Discovering Admissible Evidence

§§ 80.81-80.99 [Reserved]

§ 80.100 Supporting Motion for Protective Order--Restricting Frequency or Extent of Use of Discovery Methods [Code Civ. Proc. § 2019.030]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Discovery Methods

[d] Related Pleading and Practice Forms

§ 80.101 Supporting Motion to Establish Sequence and Timing of Discovery [Code Civ. Proc. § 2019.020(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

§ 80.102 Supporting Motion for the Use of Technology in Complex Cases and Certain Other Cases [Code Civ. Proc. § 2017.730]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

§§ 80.103-80.109 [Reserved]

§ 80.110 Supporting Motion to Compel Discovery--Discovery Request on New Trial Is Not Barred by Discovery Cutoff Date for Initial Trial [Code Civ. Proc. § 2024.020]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Time for Completing Discovery For New Trial Is Subject to New Trial Cutoff Date

§ 80.111 Supporting Motion for Order Granting Leave to Complete Discovery, to Have Discovery Motion Heard, or to Reopen Discovery [Code Civ. Proc. § 2024.050]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Time Limitations on Discovery

[4] Additional Authorities

[a] Time Limitations on Discovery

[b] Factors to Be Considered

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CHAPTER 80 DISCOVERY: SCOPE, REGULATION, AND TIMING
PART I. INTRODUCTION

8-80 California Points & Authorities § 80.01

§ 80.01 Scope of Chapter

This chapter includes memoranda relating to the general provisions of the Civil Discovery Act that govern the overall scope, regulation and timing of civil discovery proceedings.

Subpart A of Part II includes memoranda relating to the general limits on the scope of discovery set out in *Code Civ. Proc. § 2017.010 et seq.*:

- Forms supporting [80.10 et seq.] and opposing [§ 80.40 et seq.] a motion to compel discovery based on the relevancy of the matter sought to be discovered.

- A form supporting [*§ 80.80*] a motion for protective order limiting the scope of discovery on the ground that the burden, expense, or intrusiveness of discovery under the particular circumstances outweighs the likelihood that the matters sought to be discovered will lead to admissible evidence.

Subpart B of Part II includes memoranda relating to the general provisions by which discovery may be regulated under *Code Civ. Proc. §§ 2019.010 et seq.* and *2024.010 et seq.*:

- A form supporting a motion for protective order [*§ 80.100*] under *Code Civ. Proc. § 2019.030* that restricts the frequency or extent of discovery that is unreasonably cumulative, burdensome, or expensive under the circumstances.

- A form supporting a motion to establish a particular sequence and timing for discovery [*§ 80.101*] under *Code Civ. Proc. § 2019.020(b)*, when it serves the convenience of parties or witnesses or otherwise serves the interests of justice.

- A form supporting [*§ 80.110*] a motion to compel discovery on the ground that it is not barred by the general time limits for completing discovery under *Code Civ. Proc. § 2024.020*.

- A form supporting [*§ 80.111*] a motion seeking leave under *Code Civ. Proc. § 2024.050* to complete

discovery, hear a discovery motion, or reopen discovery notwithstanding the general time limits for completing discovery.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMotions to CompelCivil ProcedureDiscoveryMotions to CompelCivil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryRelevanceCivil ProcedureDiscoveryUndue Burdens

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§ 80.02 Governing Law

[1] California Civil Discovery Act and Related Law

Civil discovery in California is governed primarily by the California Civil Discovery Act, codified at *Code Civ. Proc. § 2016.010 et seq.* The Act governs all discovery proceedings filed on or after its operative date, July 1, 2005 [Stats. 2004, ch. 182, § 64].

The Discovery Act also applies to discovery in other proceedings. The Act applies to:

- Limited civil cases, to the extent provided in *Code Civ. Proc. §§ 94* and *95* [*see Code Civ. Proc. § 94*; *see also* California Forms of Pleading and Practice, Ch. 345A, *Limited Civil Cases* (Matthew Bender)].

- Discovery in aid of enforcement of a money judgment, to the extent provided in *Code Civ. Proc. §§ 708.010-708.020* (written interrogatories to judgment debtor) [*see Code Civ. Proc. § 708.010*; *see also* California Forms of Pleading and Practice, Ch. 254, *Executions and Enforcement of Judgments* (Matthew Bender)].

- Judicial arbitration under *Code Civ. Proc. § 1141.10 et seq.*, subject to certain limitations [*see California Forms of Pleading and Practice, Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.50[2*] (Matthew Bender); *see generally* California Forms of Pleading and Practice, Ch. 36, *Judicial Arbitration* (Matthew Bender)].

- Probate proceedings, except as otherwise provided by the Probate Code or the rules adopted by the Judicial Council [*Prob. Code § 1000*; *see Mota v. Superior Court (2007) 156 Cal. App. 4th 351, 353, 67 Cal. Rptr. 3d 303* (petitioner was entitled to conduct discovery relevant to her objections to distribution petition)].

- Uninsured motorist proceedings provided for and limited by *Ins. Code § 11580.2(f)* [*see Miranda v.*

21st Century Ins. Co. (2004) 117 Cal. App. 4th 913, 926, 12 Cal. Rptr. 3d 159 (superior court has exclusive jurisdiction under uninsured motorist law to hear discovery matters arising in uninsured motorist arbitrations; thus, court had power to dismiss case as terminating sanction)].

- Formal state bar proceedings, as adopted and limited by the rules of procedure of the State Bar of California [*see* California Forms of Pleading and Practice, Ch. 70, *Attorney Admission and Discipline* (Matthew Bender)].

- Proceedings by the New Motor Vehicle Board, if deemed appropriate in proceedings by the New Motor Vehicle Board [*Veh. Code §§ 3050.1, 3050.2*].

- Family law court proceedings [*Schnabel v. Superior Court (1993) 5 Cal. 4th 704, 711, 21 Cal. Rptr. 2d 200, 854 P.2d 1117* (family law litigants are entitled to all the discovery provided by *Code Civ. Proc. § 2016.010 et seq.*); *see, e.g., In re Marriage of Hixson (2003) 111 Cal. App. 4th 1116, 1121, 4 Cal. Rptr. 3d 483* (family court did not abuse its discretion in preventing unnecessary discovery with respect to parties' stock)]. *Fam. Code § 3666* also specifically makes the usual practices of civil discovery applicable to the enforcement of expedited family law discovery [*see, e.g., In re Marriage of Loh (2002) 93 Cal. App. 4th 325, 327, 330-331, 112 Cal. Rptr. 2d 893* (reversing child support order based on "lifestyle" evidence consisting of photos of ex-spouse at his girlfriend's home and with different cars because such evidence "is not a cheap substitute for proper discovery of income reported on tax returns," when ex-wife made no motions to compel production of those documents)].

Depositions are available in certain circumstances in workers' compensation proceedings [*see Labor Code § 5710*].

In addition, the Third and Sixth Appellate Districts held that the Discovery Act applies to proceedings under the Sexually Violent Predators Act (SVPA) (*Welf. & Inst. Code § 6600 et seq.*) [*see Lee v. Superior Court (2009) 177 Cal. App. 4th 1108, 1128, 99 Cal. Rptr. 3d 712* (scope of appropriate discovery in SVPA proceedings is limited, citing *Cheek*); *People v. Superior Court (Cheek) (2001) 94 Cal. App. 4th 980, 991, 114 Cal. Rptr. 2d 760* (holding that deposition method of discovery is available in SVPA proceedings, that discovery in SVPA proceedings is subject to certain civil discovery provisions expressly authorizing trial court to manage discovery and to prevent misuse of discovery procedures, and that scope of discovery in SVPA proceedings is circumscribed by narrow issues presented at trial); *Leake v. Superior Court (2001) 87 Cal. App. 4th 675, 682, 104 Cal. Rptr. 2d 767 , overruled on other grounds, People v. Yartz (2005) 37 Cal. 4th 529, 537, 36 Cal. Rptr. 3d 328, 123 P.3d 604* (trial court erred by denying motion to compel exchange of expert witness information based on its erroneous conclusion that civil discovery procedures did not apply)]. However, the Fourth Appellate District, Division Three, held, as a matter of first impression, that requests for admissions may not be propounded in SVPA proceedings because their use would eviscerate the SVPA's requirement that the state prove its case beyond a reasonable doubt and, when the case is tried to a jury, obtain a unanimous verdict before a person may be committed. To relieve the state of this burden would deprive a person of liberty interests in violation of the right to due process [*Murillo v. Superior Court (2006) 143 Cal. App. 4th 730, 739-740, 49 Cal. Rptr. 3d 511]* . The Fourth Appellate District, Division Two, held that as a special proceeding of a civil nature, a civil commitment proceeding under the SVPA requires application of the civil discovery rules [*People v. Dixon (2007) 148 Cal. App. 4th 414, 443, 56 Cal. Rptr. 3d 33*]. However, the court did not address whether all of the specific procedures afforded under the Civil Discovery Act apply to SVPA proceedings, noting Division Three's holding that, in SVPA proceedings, the use of request for admission under *Code Civ. Proc. § 2019.010(e)* would violate defendant's due process rights [*People v. Dixon (2007) 148 Cal. App. 4th 414, 442 n.2, 56 Cal. Rptr. 3d 33* ; *see Murillo v. Superior Court (2006) 143 Cal. App. 4th 730, 740, 49 Cal. Rptr. 3d 511*].

The First Appellate District has held that the Discovery Act applies to competency hearings under *Penal Code § 1369* [*Baqleh v. Superior Court (People) (2002) 100 Cal. App. 4th 478, 491, 122 Cal. Rptr. 2d 673* ; *see Penal Code § 1367 et seq.* (mentally incompetent immune from trial or punishment; determination of competency)]. The appellate court ruled

the trial court may order a criminal defendant to submit to a mental examination by an expert designated by the prosecution in order to evaluate mental competence under *Penal Code § 1369*, but the order must comply with Discovery Act, specifying the time, place, manner, conditions, scope and nature of the examination, and the identity and specialty of persons performing the examination, in accordance with former Code Civ. Proc. § 2032(d) (*now see Code Civ. Proc. § 2032.310(b)*) [*Baqleh v. Superior Court (People) (2002) 100 Cal. App. 4th 478, 505-506, 122 Cal. Rptr. 2d 673]* .

Statewide rules of court relating to discovery papers and discovery motions are set out in *Cal. Rules of Ct., Rules 3.1000*, 3.1345, 3.1346, 3.1347, and 3.1348.

[2] General Provisions Limiting or Regulating Discovery

The general scope of permissible discovery under the Discovery Act is governed by *Code Civ. Proc. § 2017.010*.

General provisions for protective orders are set out in *Code Civ. Proc. § 2017.020*, which permits the issuance of a protective order to limit the scope of discovery on the ground that the burden, expense, or intrusiveness of discovery under the particular circumstances outweighs the likelihood that the matters sought to be discovered will lead to admissible evidence. In addition, the general provision of *Code Civ. Proc. § 2019.030* permits the issuance of a protective order to restrict the frequency or extent of use of discovery methods to prevent discovery that is unreasonably cumulative, burdensome, or expensive under the circumstances.

Note that elsewhere in the Discovery Act, provisions governing the particular method of discovery usually include more specific provisions for protective orders relating to the use of that particular method. For example, a protective order regarding a deposition is governed by *Code Civ. Proc. § 2025.420*, while a protective order regarding an interrogatory is governed by *Code Civ. Proc. § 2030.090*.

The general provision of *Code Civ. Proc. § 2019.020(b)* permits the court to make, in effect, a regulatory order, that is, an order establishing a particular sequence and timing for discovery, when to do so would serve the convenience of parties or witnesses or otherwise serve the interests of justice.

The general deadlines for completing discovery proceedings and motions, applicable generally to any motion to compel discovery, are set out in *Code Civ. Proc. § 2024.020*. A motion for an order granting leave to complete discovery or to have a discovery motion heard closer to the initial trial date, or to reopen discovery after a new trial date has been set, is governed by *Code Civ. Proc. § 2024.050*. Unless the court orders otherwise, the parties may also modify the procedures for taking depositions or using other discovery methods by written stipulation [*Code Civ. Proc. § 2016.030*].

[3] Case Law Decided Under Prior Discovery Acts

The Civil Discovery Act was passed in 2004 and became effective July 1, 2005. It repealed and renumbered the Civil Discovery Act of 1986 but did not substantively change the law of civil discovery [Stats. 2004, ch. 182 §§ 22, 23, 61]. Thus cases decided under the 1986 Act remain controlling authority. A considerable body of case law interpreted the discovery provisions of the Discovery Act of 1956 (former Code Civ. Proc. §§ 2016-2037.9), which preceded the 1986 Act. Although the 1986 Act, which became operative July 1, 1987, implemented numerous changes in the prior law, it also continued provisions of the prior law in many other instances, or even codified decisions interpreting the prior law. Decisions construing this prior law are therefore cited as persuasive, rather than controlling, authority to the extent that they are consistent with current provisions [*see In re Marriage of Skelley (1976) 18 Cal. 3d 365, 369, 134 Cal. Rptr. 197, 556 P.2d 297]* .

[4] Federal Authority

When the prior Discovery Act became operative in 1957 [*see* [3], *above*], its provisions adapted the then existing federal rules relating to discovery. The prior Act was intended to broaden discovery procedures in California so that they would be comparable to those in the federal courts [*see* Report of the Committee on Administration of Justice, 31 Cal. St. B.J., *Discovery*, 204-231 (1956); *Kahn v. Kahn (1977) 68 Cal. App. 3d 372, 384, 137 Cal. Rptr. 332]* . Federal cases, therefore, were frequently considered as authority in certain situations for the interpretation of California discovery statutes [*see, e.g., Gorman Rupp Indus., Inc. v. Superior Court (1971) 20 Cal. App. 3d 28, 30, 97 Cal. Rptr. 377]* .

Federal cases are now generally less useful, however, as persuasive authority for interpreting California's discovery provisions. With the revision of the Discovery Act in 1986 and with changes in the federal rules relating to discovery [*see Fed. R. Civ. P., Rules 26-37*], there is more disparity between the state and federal provisions. State appellate courts have also developed an extensive body of law construing the Discovery Act and related state provisions. Authorities cited in this and subsequent chapters on civil discovery are therefore almost exclusively state court decisions. Counsel with novel questions of law, however, may consider seeking federal authorities in support of their arguments, when the federal rules are substantially similar to the California statute to be construed [*see* Moore's Federal Practice, Ch. 26, *General Provisions Governing Discovery; Duty of Disclosure* ; Ch. 27, *Depositions or Other Discovery Before Action or Pending Appeal* ; Ch. 28, *Persons Before Whom Depositions May Be Taken* ; Ch. 29, *Stipulations Regarding Discovery Practice* ; Ch. 30, *Depositions Upon Oral Examination* ; Ch. 31, *Depositions Upon Written Questions* ; Ch. 32, *Use of Depositions in Court Proceedings* ; Ch. 33, *Interrogatories to Parties* ; Ch. 34, *Production of Documents and Things and Entry Upon Land for Inspections and Other Purposes* ; Ch. 35, *Physical and Mental Examinations of Persons* ; Ch. 36, *Requests for Admissions* ; Ch. 37, *Failure to Make Disclosure or Cooperate in Discovery: Sanctions* (3d ed. Matthew Bender)]. Similarly, due to the importance of federal rules covering electronic evidence and electronic discovery, and the lack of detailed California regulation of that topic [*see § 80.03A, below*], federal cases dealing with electronic evidence and e-discovery remain important in the context of these issues in California.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryProtective OrdersCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewLegal EthicsSanctionsDisciplinary ProceedingsInvestigations

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8-80 California Points & Authorities § 80.03

§ 80.03 Effect of Trial Court Delay Reduction Act and Local Delay Reduction Rules

Under the Trial Court Delay Reduction Act (*Gov. Code § 68600 et seq.*), many local courts have adopted delay reduction or "fast track" programs for non-complex cases. The Discovery Act, however, continues to govern discovery in cases subject to these programs, except in arbitration proceedings. Local rules are not allowed to shorten time periods set forth in the Discovery Act [*Gov. Code § 68616(f)*]. In limited civil cases, discovery is governed in addition by *Code Civ. Proc. §§ 94* and *95*, and discovery subject to these provisions also may not be affected by the provisions of a trial court delay program [*Gov. Code § 68620(c)*].

Nonetheless, local delay reduction programs may include rules providing for the court to regulate all discovery, consistent with these laws [*see, e.g., Code Civ. Proc. § 2019.020(b)* (court may make order establishing particular sequence and timing for discovery in interests of justice); *see also §§ 80.02[2]* and *80.101*]. In such cases, the trial court may, for example, inquire of the parties at status conferences as to the nature and extent of discovery remaining [Los Angeles Super. Ct. Rules, Rule 7.9(b)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryElectronic DiscoveryCivil ProcedurePretrial MattersConferencesCase ManagementGovernmentsCourtsRule Application & Interpretation

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2-80 California Points & Authorities § 80.03A

§ 80.03A Discovery of Electronically Stored Information (E-Discovery)

[1] California Governing Law

Discovery of electronically stored information under the Civil Discovery Act [*Code Civ. Proc. §§ 2016.010-2036.050*] is governed generally by the Electronic Discovery Act [*Code Civ. Proc. §§ 1985.8, 2031.010-2031.510*; Stats. 2009 Ch. 5], which became effective as an urgency measure on June 29, 2009. Related provisions of the Civil Discovery Act include the provisions governing discovery generally, set out in *Code Civ. Proc. §§ 2016.010-2019.030, 2023.010-2023.040*.

The extent of discovery permitted under the Civil Discovery Act is restricted in limited civil cases by the economic litigation provisions of *Code Civ. Proc. §§ 94* and *95* [*see* California Forms of Pleading and Practice, Ch. 345A, *Limited Civil Cases* (Matthew Bender)]. The use of demands for the production or inspection of tangible evidence is limited specifically by *Code Civ. Proc. § 94(a)*.

"Meet and confer" requirements regarding discovery of electronically stored information are set out in *California Rules of Court, Rule 3.724(8)*. Statewide rule provisions relating to the format, content, and service of discovery papers and motions, and to discovery sanctions, are contained in *Cal. Rules of Ct., Rules 3.1000, 3.1020, 3.1025*, and *3.1030*.

For a more detailed discussion of the Electronic Discovery Act, see Ch. 85A, *Discovery : E-Discovery*.

[2] Federal Rules Governing Electronic Discovery

The Electronic Discovery Act is modeled in part on federal rules governing e-discovery [*see Fed. R. Civ. P. 16(b)(3)(B)(iii), (iv), 26(b)(2)(B), (b)(5), (f)(3)(c), 34(b)(1)(C), (b)(2)(D), (b)(2)(E), 37(e)*]. The Federal Rules were revised to address e-discovery issues, effective December 1, 2006--before most states (including California) had enacted their own rules governing e-discovery in state proceedings. As a result, state courts throughout the United States have often looked to federal judicial decisions--primarily in the federal district courts--for guidance on how to deal with similar e-discovery issues under state law. Because the California electronic discovery statutes are new, and e-discovery issues were considered only infrequently in published California court opinions under the prior law [*see, e.g., People v. Lugashi (1988) 205 Cal. App. 3d 632, 640, 252 Cal. Rptr. 434* (allowing admission of bank computer records); *R.S.*

Creative v. Creative Cotton (1999) 75 Cal. App. 4th 486, 89 Cal. Rptr. 2d 353 (terminating sanctions for actions including spoliation of evidence on computers)]. California courts may be expected to look to federal decisions construing the federal rules, and to out-of-state authority, for guidance on the treatment of e-discovery issues.

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§ 80.04 How to Use the Forms in This Chapter

[1] Page Limits on Memoranda

One of the more significant drafting requirements to keep in mind is page limits: supporting and opposing memoranda filed in discovery motion proceedings may not exceed 15 pages. A reply or closing memorandum may not exceed 10 pages. Exhibits, declarations, attachments, the table of contents, the table of authorities, and the proof of service are excluded from these page limits. Any party must obtain leave of court to file a longer memorandum [*see Cal. Rules of Ct., Rule 3.1113(d)*]. These and other drafting requirements are discussed in further detail in Ch. 1, *Writing Legal Memoranda and Briefs* .

[2] Using the Forms to Build a Draft Memorandum

The forms included in this chapter are designed to be included in a memorandum supporting or opposing a particular type of discovery motion, such as motion to compel discovery or a motion for a protective order.

In many cases it will be appropriate to combine them with additional memoranda set out in the related discovery chapters, Chapters 81 through 89A. For example, they may be combined with memoranda supporting or opposing a motion to compel discovery, or a motion for protective order, in the context of a particular discovery method [*see, e.g., Ch. 83, Discovery: Depositions, § 83.30* et seq. (supporting and opposing motion to compel in context of deposition), § 83.80 et seq. (supporting and opposing motion for protective order in context of deposition)]. They may also be combined with memoranda supporting or opposing a motion to compel discovery based on the application of an evidentiary privilege or other provision limiting discovery [*see, e.g.,* Ch. 81, *Discovery: Privileges and Other Discovery Limitations*, § 81.60 et seq. (supporting and opposing motion to compel based on application of attorney-client privilege)].

It may also be appropriate to modify the memorandum for use in another procedural context. For example, memoranda designed to oppose a motion to compel may in an appropriate case be modified for use in supporting a motion for protective order.

For a detailed discussion on how to select and use the forms in the publication to build a draft memorandum and

complete the draft, with detailed discussion of all drafting requirements and strategic or stylistic considerations, see Ch. 1, *Writing Legal Memoranda and Briefs* . For a skeletal form of memorandum for use in creating a properly formatted outline in which to compile relevant forms from this publication, see also Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting Memoranda

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 80 DISCOVERY: SCOPE, REGULATION, AND TIMING
PART I. INTRODUCTION

8-80 California Points & Authorities § 80.05

§ 80.05 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

For background discussion of the general provisions of the Discovery Act relating to overall scope, regulation, and timing, with related forms of motions and supporting papers, see California Forms of Pleading and Practice, Ch. 190, *Discovery: Scope, Regulation and Timing* (Matthew Bender).

[2] Related Memoranda Chapters

For memoranda supporting or opposing a motion to compel discovery on the ground that the matter sought to be discovered is privileged or is otherwise protected from disclosure, see Ch. 81, *Discovery: Privileges and Other Discovery Limitations* .

For memoranda supporting or opposing a motion to compel discovery, or supporting or opposing a motion for protective order, in the context of a particular discovery method, see Ch. 83, *Discovery: Depositions* , through Ch. 88, *Discovery: Exchange of Expert Witness Information* .

For memoranda for use in seeking or opposing writs to review discovery orders, see Ch. 89A, *Discovery: Review of Discovery Orders* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsExpert Witness DiscoveryCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersWork ProductGeneral Overview

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8-80 California Points & Authorities §§ 80.06-80.09

[Reserved]

§§ 80.06[Reserved]

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8-80 California Points & Authorities § 80.10

§ 80.10 Supporting Motion to Compel Discovery--Refuting Irrelevancy Objection [Code Civ. Proc. § 2017.010]--General Form

[1] FORM Supporting Motion to Compel Discovery--Refuting Irrelevancy Objection [Code Civ. Proc. § 2017.010]--General Form

[*The following may be combined, when appropriate, with a general memorandum in support of a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11).*]

MATTERS ARE RELEVANT TO THE SUBJECT MATTER, AND THEREFORE DISCOVERABLE, IF THEY WILL LEAD TO ADMISSIBLE EVIDENCE OR HELP IN TRIAL PREPARATION, AND DOUBTS AS TO SUBJECT MATTER RELEVANCY SHOULD BE DECIDED IN FAVOR OF PERMITTING DISCOVERY.

A. Matters Relevant to Subject Matter of Litigation Discoverable. Unless otherwise limited by order of the court, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence (*Code Civ. Proc. § 2017.010*).

B. Liberal Standard for Subject Matter Relevancy. Discovery should not be denied on the grounds of "irrelevancy" if there is a reasonable possibility that the answers sought by a given line of questioning will lead to the discovery of admissible evidence or be helpful in preparation for trial. Doubts as to relevancy should be resolved in favor of permitting discovery (*Pacific Tel. & Tel. Co. v. Superior Court (1970) 2 Cal. 3d 161, 173, 84 Cal. Rptr. 718, 465 P.2d 854*).

C. Relevancy to Discovery Is Broader Than Relevancy to Issues. There is a wide divergence between the subject matter of anaction and the issues in an action. Relevancy to the subject matter is a broader concept than relevancy to the issues (*Greyhound Corp. v. Superior Court (1961) 56 Cal. 2d 355, 390, 15 Cal. Rptr. 90, 364 P.2d 266* ; *Pettie v. Superior Court (1960) 178 Cal. App. 2d 680, 687, 3 Cal. Rptr. 267*).

D. Potential as Well as Actual Issues Are Relevant to Subject Matter. Relevancy to the subject matter is not restricted to the issues formally raised in the pleadings. It is determined by potential as well as actual issues in the case (*Union Mut. Life Ins. Co. v. Superior Court (1978) 80 Cal. App. 3d 1, 10, 145 Cal. Rptr. 316*).

[*Optional*] **E. Discovery Relating to Claim or Defense.** Except as limited by privilege or court order, discovery may relate to the claim or defense of the party seeking discovery or of any other party to the action (*Code Civ. Proc. § 2017.010*).

[*Optional*] **F. Discovery of Identity or Location of Persons, Documents, or Things.** Except as limited by privilege or court order, discovery may be obtained of the identity and location of persons having knowledge of any discoverable matter, as well as of the existence, description, nature, custody, condition, and location of any document, tangible thing, or land or other property (*Code Civ. Proc. § 2017.010*).

[2] Comments

[a] Use of Form

These points and authorities may be used in support of compelling discovery if a party or other person has resisted providing discovery on the ground that it does not call for relevant material. Unless the moving party anticipates a relevancy objection to the motion, it will usually be used in a reply memorandum submitted in response to the opposing memorandum. It does not provide a complete memorandum but is designed to be combined with a general form of memorandum of points and authorities in support of compelling discovery, as well as with forms relating to the specific facts in question.

Note that cases cited in this form construe law in effect before the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that remain consistent with current provisions [*see also § 80.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should show how the mattersought to be discovered is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 80.40* may be used to oppose the motion supported by the foregoing points and authorities.

[3] Discussion of Authorities

[a] Liberal Standard for Subject Matter Relevancy

Plaintiff in ***Pacific Tel. & Tel. Co. v. Superior Court*** *(1970) 2 Cal. 3d 161, 84 Cal. Rptr. 718, 465 P.2d 854* , brought an action based on an alleged invasion of privacy through unauthorized wiretapping. Two defendants and a nonparty deponent refused to answer deposition questions posed by plaintiff's attorney relating to (1) procedure used in making unauthorized telephone taps; (2) knowledge of illegality of unauthorized monitoring; (3) a possible working relationship between the local police department and the security division of PT&T, and (4) monitoring of telephone conversations of subscribers other than plaintiff. Plaintiff filed motions for orders compelling answers to these questions, and defendant opposed the motions on the ground that the questions were irrelevant to the litigation and therefore not proper

matters for discovery under former Code Civ. Proc. § 2016(b) (*now see Code Civ. Proc. § 2017.010*). The trial court issued an order compelling answers to most of the questions on which the motion was based, and defendants sought a writ of prohibition to restrain the trial court from enforcing its order, which they claimed exceeded its jurisdiction.

In discussing the irrelevancy objection raised to the discovery, the Supreme Court stated that the standard of subject matter relevancy for discovery is broad and flexible (*2 Cal. 3d 161, 173)* . Some guidance is provided in interpreting the portion of former Code Civ. Proc. § 2016(b) (*now see Code Civ. Proc. § 2017.010*) that provides that the deponent may be examined regarding any matter "relevant to the subject matter involved in the pending action," by the following language, which provides that inadmissibility at trial is not an objection if the matter is "reasonably calculated to lead to the discovery of admissible evidence" (*2 Cal. 3d 161, 172)* . Although the Court has not articulated a single, comprehensive standard of relevancy to the subject matter, it has set forth the following guidelines: (1) the relevancy to the subject matter criterion is a broader concept than relevancy to the issues [*see, e.g., Chronicle Pub. Co. v. Superior Court (1960) 54 Cal. 2d 548, 560, 7 Cal. Rptr. 109, 354 P.2d 637]* ; (2) matters sought are discoverable if they will aid in the party's preparation for trial; (3) the trial court should give the party seeking discovery ample leeway inits determination of what is relevant for discovery purposes, since all of the issues and arguments that will come to light at trial often cannot be ascertained at the time discovery is sought (*2 Cal. 3d 161, 172-173)* . The Court concluded its discussion of this issue by stating that the standard of relevance to the subject matter must be reasonably applied under the liberal policies underlying discovery procedures, and doubts as to relevance should generally be resolved in favor of permitting discovery (*2 Cal. 3d 161, 173)* .

The Court in *Pacific Tel. & Tel. Co.* found the questions to be relevant to the subject matter of the action and upheld the trial court's order. The Court stated that the questions requesting general information about the wiretapping equipment, training, and method might lead to the discovery of evidence useful in challenging defendant's allegations that the interception consisted of a tape recording of only some phone conversations of the plaintiff, and questions concerning division of authority in the company's security division would identify the individuals who might be liable, as well as possibly illustrating the company's negligence in allocating authority (*2 Cal. 3d 161, 175-176)* . Questions concerning whether the employees who allegedly performed the unauthorized eavesdropping knew that the activity was illegal clearly related to the subject matter of the action, since plaintiff specifically alleged this knowledge in the complaint and the answer expressly denied it (*2 Cal. 3d 161, 176)* . Similarly, questions seeking information concerning a possible general practice of employees of the security division communicating with the local police were clearly relevant because defendants expressly denied in their answer that any information relayed to the police resulted in plaintiff's arrest (*2 Cal. 3d 161, 176)* . Questions inquiring into the existence of a general telephone company practice of unauthorized monitoring and into the number of subscribers subjected to unauthorized eavesdropping were also relevant for discovery purposes. The responses to those questions might have produced evidence of similar wrongful acts relevant to show motive, intent, knowledge, plan, and absence of mistake, and the fact that defendants admitted monitoring plaintiff's phone did not render this information irrelevant to the subject matter (*2 Cal. 3d 161, 177-178)* .

[b] Relevancy to Discovery Is Broader Than Relevancy to Issues

In the landmark case of ***Greyhound Corp. v. Superior Court*** *(1961) 56 Cal. 2d 355, 15 Cal. Rptr. 90, 364 P.2d 266* , the Supreme Court stated that it had previously considered and found untenable the contention that no material is discoverable under former Code Civ. Proc. § 2031 (*now see Code Civ. Proc. § 2031.010 et seq.*) unless it is shown to be relevant to the issues of the case (*56 Cal. 2d 355, 390)* . The Court mentioned its prior approval of the statements in *Pettie v. Superior Court (1960) 178 Cal. App. 2d 680, 3 Cal. Rptr. 267* , discussed *below*, relating to subject matter relevancy (*56 Cal. 2d 355, 390)* .

The *Greyhound* case is discussed in greater detail in Ch. 81, *Discovery: Privileges and Other Discovery Limitations*, § 81.10[3][a].

Pettie v. Superior Court *(1960) 178 Cal. App. 2d 680, 3 Cal. Rptr. 267* arose from a personal injury accident.

Defendant did not answer interrogatories seeking information about the extent or limits of her insurance coverage, and instead objected on the grounds that matters relating to a defendant's liability insurance did not relate to the subject matter involved in the action, and that the information was inadmissible in evidence and did not appear to be reasonably calculated to lead to admissible evidence. The trial court upheld the objections, and plaintiff sought a writ of mandate setting aside the trial court's order.

The court of appeal held that liability policy limits were clearly relevant to the subject matter involved in plaintiff's pending personal injury action against the insured (*178 Cal. App. 2d 680, 687)* . The court pointed out that the test is relevancy to the subject matter rather than relevancy to the issues, and that relevancy to the subject matter involved in a pending suit is a broader concept than relevancy to the issues (*178 Cal. App. 2d 680, 687)* . The court ordered the issuance of a peremptory writ of mandate.

[c] Potential as Well as Actual Issues Are Relevant to Subject Matter

Plaintiff in ***Union Mut. Life Ins. Co. v. Superior Court*** *(1978) 80 Cal. App. 3d 1, 145 Cal. Rptr. 316* brought an action for declaratory relief and breach of contract relating to a group disability insurance policy issued to plaintiff's employer. Plaintiff served interrogatories, and defendant objected to some of them on the ground that the interrogatories were not relevant to the subject matter of the action. The interrogatories to which defendant initially objected related to information concerning (1) plaintiff's coemployees covered under the same policy, (2) similar insurance policies that were issued to employers within California other than plaintiff's employer and that were terminated, and (3) employers in states other than California who were operating under the same master policy that had been terminated.

The parties in *Union Mut.* worked out their differences relating to the interrogatories listed under (1). The information sought in the interrogatories listed in Groups (2) and (3) was being sought to enable plaintiff to amend the complaint to state a class action relating to long-term employee disability policies issued by Union Mutual to employers other than plaintiff's employer. Defendant apparently contended that the information was not relevant to the subject matter of the action, since no California or nationwide class action was alleged in the complaint and, therefore, therewas no subject matter to which the material could be relevant. The court of appeal stated, however, that relevancy of the subject matter is not restricted to the issues formally raised in the pleadings; it is determined by potential as well as actual issues in the case. Furthermore, discovery is proper if it would be material to any possible issue raised by new allegations in an amended complaint, and it was clear from the complaint in question that plaintiff intended to include the class actions in question in his complaint if a basis for them was disclosed by discovery (*80 Cal. App. 3d 1, 10)* .

[4] Additional Authorities

[a] Matters Relevant to Subject Matter of Litigation Discoverable

In *Volkswagen of Am., Inc. v. Superior Court, 139 Cal. App. 4th. 1481, 1497, 43 Cal. Rptr. 3d 723* , plaintiff sued 67 named defendants, including petitioner Volkswagen of America, Inc. (Volkswagen), for injuries he allegedly suffered as a result of asbestos exposure. Volkswagen sought production of documents that plaintiff submitted to bankruptcy trusts that were administering assets of other defendants. The trial court limited discovery on basis that the documents might be inadmissible at trial or because they were prepared or signed by plaintiff's attorney rather than plaintiff. Volkswagen sought a writ of mandate. The court of appeal concluded the trial court's discovery order had to be reevaluated based on whether the requested information was reasonably calculated to lead to admissible evidence, as provided in *Code Civ. Proc. § 2017.010* (*139 Cal. App. 4th. 1481, 1497)* . The court also discussed three different types of documentation in the production request. First, claim forms were discoverable because they could lead to admissible admissions against interest (*139 Cal. App. 4th. 1481, 1493-1495)* . Second, factual information concerning plaintiff's work history and medical condition was discoverable to the extent it was contained in a submission to a bankruptcy trust, because Volkswagen had good reason to review that information to determine whether plaintiff has overstated Volkswagen's share of responsibility for plaintiff's asbestos related disease (*139 Cal. App. 4th. 1481, 1495-1496)* . Finally, the trial

court would be justified in refusing to order production of attempts to negotiate compromise if plaintiff itemized the documents and Volkswagen failed to show a reasonable likelihood that the documents would lead to admissible evidence (*139 Cal. App. 4th. 1481, 1497)* .

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[Reserved]

§§ 80.11[Reserved]

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8-80 California Points & Authorities § 80.20

§ 80.20 Supporting Motion to Compel Discovery--Matters Relating to Defendant's Liability Insurance Are Discoverable [Code Civ. Proc. § 2017.210]

[1] FORM Supporting Motion to Compel Discovery--Matters Relating to Defendant's Liability Insurance Are Discoverable [Code Civ. Proc. § 2017.210]

[*The following may be combined, when appropriate, with a general form of memorandum of points and authorities in support of a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11), as well as with a general form of points and authorities refuting an irrelevancy objection (see, e.g., § 80.10).*]

THE REQUESTED DISCOVERY SHOULD BE ALLOWED BECAUSE A PARTY MAY OBTAIN DISCOVERY OF THE EXISTENCE AND CONTENTS OF ANY AGREEMENT UNDER WHICH AN INSURANCE CARRIER MAY BE LIABLE TO SATISFY A JUDGMENT OR TO INDEMNIFY OR REIMBURSE FOR PAYMENTS MADE TO SATISFY A JUDGMENT[, AS WELL AS DISCOVERY ABOUT WHETHER THE INSURANCE CARRIER IS DISPUTING THE AGREEMENT'S COVERAGE OF THE CLAIM].

[*EITHER*]

A. Existence and Extent of Liability Insurance Is Discoverable. A party may obtain discovery of the existence and contents of any agreement under which any insurance carrier may be liable to satisfy in whole or in part a judgment that may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. This discovery may include the identity of the carrier and the nature and limits of the coverage (Code Civ. Proc.§ 2017.210; *see Pettie v. Superior Court (1960) 178 Cal. App. 2d 680, 687, 3 Cal. Rptr. 267*).

[*AND/OR*]

B. Insurer's Disclaimer of Liability Is Discoverable. A party may obtain discovery as to whether an insurance carrier that may be liable to satisfy or reimburse for payments on a judgment is disputing the agreement's coverage of the claim involved in the action (*Code Civ. Proc. § 2017.210*; *see Smith v. Superior Court (1961) 189 Cal. App. 2d 6, 11, 11 Cal. Rptr. 165*).

[2] Comments

[a] Use of Form

These points and authorities may be used in support of compelling discovery if a party or other person has resisted providing discovery on the ground that the existence or contents of liability insurance policies or disputes regarding coverage of the claims are not relevant or are otherwise improper. It does not provide a complete memorandum, but is designed to be combined with a general form of memorandum of points and authorities in support of compelling discovery, as well as with forms relating to the specific facts in question.

Note that while discovery about whether defendant's liability insurer is disputing coverage is proper, the nature and substance of the dispute is not discoverable, and information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial [*Code Civ. Proc. § 2017.210*].

Note that cases cited in this form construe law in effect before the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that remain consistent with current provisions [*see also § 80.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case.

[3] Discussion of Authorities

[a] Existence and Extent of Liability Insurance Is Discoverable

Pettie v. Superior Court *(1960) 178 Cal. App. 2d 680, 3 Cal. Rptr. 267* , concerned a personal injury action in which plaintiff inquired by writteninterrogatories about whether defendant was covered by liability insurance and, if so, the combined total liability limits of all such policies. Defendant objected to these questions on the ground of irrelevance, and the trial court sustained the objection.

The court of appeal issued a writ of mandate, holding that under California statutory and case law, there is a contractual relationship between the injured party and the insurer that gives the injured party a discoverable interest in the insured's liability policy. In this regard, the existence and extent of liability insurance are relevant to the subject matter of the action. Since relevance to the subject matter, rather than relevance to the issues, is the statutory test for relevance under former Code Civ. Proc. § 2016(b) (*now see Code Civ. Proc. § 2017.010*), the interrogatory in question was indeed proper (*178 Cal. App. 2d 680, 687)* .

The court held further that the disclosure of the existence and amount of liability insurance may lead to more efficacious disposition of negligence litigation, whether by trial or by settlement (*178 Cal. App. 2d 680, 688, 689)* . If a plaintiff is aware of the extent of insurance coverage, then he or she will be able to use better judgment concerning settlements (*178 Cal. App. 2d 680, 689)* . Moreover, it is important to the conduct of plaintiff's case that plaintiff's attorney be aware of whether his or her real adversary is an insurer or merely a private defendant (*178 Cal. App. 2d 680, 690)* .

[b] Insurer's Disclaimer of Liability Is Discoverable

Smith v. Superior Court *(1961) 189 Cal. App. 2d 6, 11 Cal. Rptr. 165* arose out of an action for personal injuries and wrongful death in which one of plaintiff's interrogatories inquired about whether defendant had reason to believe that his insurer might disclaim liability. The trial court refused to order defendant to answer this interrogatory on the ground that it called for immaterial and confidential information, and the court of appeal issued a writ of mandate. In discussing the interrogatory in question, the court held that it was proper, in that an answer to the interrogatory would serve the purpose of permitting plaintiff to ascertain realistically whether a settlement might be worked out (*189 Cal. App. 2d 6, 11)* .

[4] Additional Authorities

[a] Existence and Extent of Liability Insurance Is Discoverable

In *Hecht, Solberg, Robinson, Goldberg & Bagley LLP v. Superior Court (2006) 137 Cal. App. 4th 579, 40 Cal. Rptr. 3d 446* , a legal malpractice action brought by real party in interest client against attorneys who represented him in obtaining settlement from another law firm, the trial court found the non-party law firm's subpoenaed business records, including information about its financial condition and liability insurance polices, were discoverable, subject to protective order, because the information was relevant and material to prove that better result should have been obtained for plaintiff by the attorney defendants. Defendant law firm brought this writ proceeding, opposing discovery on privacy grounds. The court of appeal denied relief. While declining to rule on the extent of the firm's privacy rights, the court held the non-party law firm's insurance policies were discoverable under *Code Civ. Proc. § 2017.210*, because they could lead to admissible evidence about the extent of coverage provided and whether coverage would have been contested (*137 Cal App. 4th 579, 595)* . Admissible evidence also could include information about assets or net worth (*137 Cal App. 4th 579, 560-561)* .

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8-80 California Points & Authorities § 80.21

§ 80.21 Supporting Motion to Compel Discovery--Insurer's Loss Reserves and Reinsurance Information Are Relevant and Discoverable in Insurance Bad Faith Litigation

[1] FORM Supporting Motion to Compel Discovery--Insurer's Loss Reserves and Reinsurance Information Are Relevant and Discoverable in Insurance Bad Faith Litigation

[*The following may be combined, when appropriate, with a general form of memorandum of points and authorities in support of a motionto compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11), as well as with a general form of points and authorities refuting an irrelevancy objection (see, e.g., § 80.10).*]

THE MOTION TO COMPEL SHOULD BE GRANTED BECAUSE AN INSURER'S LOSS RESERVES AND REINSURANCE CONTRACTS ARE DISCOVERABLE IN INSURANCE BAD FAITH CLAIMS.

Discoverability of Loss Reserves and Reinsurance Information. In insurance bad faith litigation, parties may discover information pertaining to the insurer's loss reserves when such information will assist a party in evaluating the case, preparing for trial, or will facilitate settlement. Reinsurance information is discoverable on the same grounds, but must first be submitted to the court for an in camera inspection. (*Lipton v. Superior Court (1996) 48 Cal. App. 4th 1599, 1613-1618, 56 Cal. Rptr. 2d 341*).

[2] Comments

[a] Use of Form

These points and authorities may be used to compel discovery in an action for bad faith by an insurer. It should be combined with general memoranda of points and authorities supporting a motion to compel discovery.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel

should demonstrate how information about the insurer's loss reserves in the particular case will assist him or her in evaluating the case or preparing for trial or how access to the requested information will facilitate settlement.

[c] Related Pleading and Practice Forms

For discussion relating to discovery of insurance company information, see California Forms of Pleading and Practice, Ch. 191, *Discovery: Privileges and Other Discovery Limitations* (Matthew Bender).

[3] Discussion of Authorities

[a] Discoverability of Loss Reserves and Reinsurance Information

Lipton v. Superior Court *(1996) 48 Cal. App. 4th 1599, 56 Cal. Rptr. 2d 341* arose from plaintiff's allegations of bad faith on the part of a liability insurer. The opinion addressed the plaintiff's motion to compel production of information relating to the defendant insurer's loss reserves and any reinsurance contracts in effect. The insurer argued that the information was not discoverable because they did not relate to its obligations to the insured. Loss reserves are established in compliance with State regulations applicable to all insurers, and reinsurance agreements serve to indemnify insurers and diversify the insurers' risks of loss. The opinion focused, however, on the recognition that information is relevant for discovery purposes if it might reasonably assist a party in evaluating the case, preparing for trial, or if it may facilitate settlement (*48 Cal. App. 4th 1599, 1616)* .

Under this standard, the court found that the insurer's loss reserves were discoverable. The information is discoverable in bad faith litigation because it could demonstrate how the insurer viewed its potential obligations to the insured, whether the insurer had conducted a proper investigation, and whether it recognized the likelihood that the insured could face an excess verdict (*48 Cal. App. 4th 1599, 1613-1616)* .

These same considerations may also apply to communications between an insurer and a reinsurer discussing liability, exposure, coverage issues or the likelihood of an excess verdict. Before a party could discover such communications, however, the court must conduct an *in camera* inspection to protect against the disclosure of privileged information (*48 Cal. App. 4th 1599, 1616-1618)* .

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8-80 California Points & Authorities § 80.22

§ 80.22 Supporting Motion to Compel Discovery--Names, Addresses, and Files of Insurer's Claimants Are Relevant and Discoverable in Action for Unfair Settlement Practices

[1] FORM Supporting Motion to Compel Discovery--Names, Addresses, and Files of Insurer's Claimants Are Relevant and Discoverable in Action for Unfair Settlement Practices

[*The following may be combined, when appropriate, with a general form of memorandum of points and authorities in support of a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11), as wellas with a general form of points and authorities refuting an irrelevancy objection (see, e.g., § 80.10).*]

DISCOVERY OF THE NAMES, ADDRESSES, AND FILES OF AN INSURER'S CLAIMANTS WHO HAVE ATTEMPTED SETTLEMENTS IS RELEVANT IN AN ACTION FOR UNFAIR SETTLEMENT PRACTICES.

Discovery of Names, Addresses, and Files of Insurer's Claimants. Discovery of the names, addresses, and files of an insurer's nonparty claimants who have attempted settlements with the insurer's claims adjuster is relevant in an action for unfair settlement practices and may lead to admissible evidence (*Colonial Life & Accident Ins. Co. v. Superior Court (1982) 31 Cal. 3d 785, 792, 183 Cal. Rptr. 810, 647 P.2d 86*).

[2] Comments

[a] Use of Form

These points and authorities are for use in an action for unfair settlement practices to refute an insurer's objection to disclosing the names and addresses of its claimants who have attempted settlements on the ground that the information is irrelevant. The form may be combined with general memoranda of points and authorities supporting a motion to compel discovery.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. In particular, counsel should describe the alleged misconduct towards plaintiff and state plaintiff's need to acquire the names and addresses of other claimants in order to establish a pattern of unfair settlement practices.

[3] Discussion of Authorities

[a] Discovery of Names, Addresses, and Files of Insurer's Claimants

Colonial Life & Accident Ins. Co. v. Superior Court *(1982) 31 Cal. 3d 785, 183 Cal. Rptr. 810, 647 P.2d 86* arose out of an action by an insured's administratrix against an insurer and its claims adjuster for unfair settlement practices in violation of *Ins. Code § 790.03(h)*, breach of contract, and breach of the duty of fair dealing and good faith. The insured had sought coverage from defendants for a leg amputation. Defendants denied coverage and offered $1,500 as full settlement of the claim, contingent onsurrender of the policy. The insured refused the offer, demanding the maximum policy benefit of $10,000. After commencement of the action, plaintiff served the claims adjuster with a request to inspect and copy all documents pertaining to cases assigned by the insurer to the adjuster for settlement, about 35 in all. The adjuster refused to supply the information, basing its objection on the Insurance Information and Privacy Protection Act (*Ins. Code § 791 et seq.*), overbreadth, and relevancy considerations. On a motion to compel discovery, the trial court ordered the claims adjuster to produce the names and addresses of the claimants, and approved a letter to be sent by plaintiff's counsel to those individuals, requesting that they consent to the release of their records by the claims adjuster. The court expressly prohibited the parties and counsel from initiating any contact with nonparty claimants pending their response to the letter. On request of the claims adjuster, the court issued an additional protective order preventing plaintiff's counsel from disclosing to any other person the names, addresses, or records of nonparty claimants or from making use of the information except for preparation and trial of the action. Additional restrictions sought by the insurer to prevent plaintiff's attorney from soliciting new clients from those who responded to the letter were denied by the court. The insurer sought a writ of mandate preventing plaintiff's counsel from seeking to represent other claimants against defendants, and barring discovery of the names and records of the claimants on the ground that the information was irrelevant to a private action for unfair practices against insurers.

The Supreme Court denied the writ. In relation to the relevancy objection, the insurer argued that in an action by a private litigant for unfair settlement practices, evidence of a general business practice as a matter of law was irrelevant. The argument was based on a passage in *Royal Globe Ins. Co. v. Superior Court (1979) 23 Cal. 3d 880, 891, 153 Cal. Rptr. 842, 592 P.2d 329* (overturned prospectively in *Moradi-Shalal v. Fireman's Fund Ins. Companies (1988) 46 Cal. 3d 287, 297-305, 250 Cal. Rptr. 116, 758 P.2d 58*), which stated that the frequency of an insurer's misconduct and its application to others was irrelevant to a private litigant who can demonstrate that the insurer acted deliberately. The Court observed, however, that the statement in that case was made in the context of rejecting an insurance company's claim that a third-party claimant may not base such an action against an insurer on a single instance of unfair conduct, but must show a continuing course of conduct. The Court stated that *Ins. Code § 790.03(h)* and *Royal Globe, above,* clearly indicate that a plaintiff may establish a claim by showing either that the acts were knowingly committed or were engaged in with such frequency as to indicate a general business practice. When a knowing violation is difficult to establish, knowledge can be proved circumstantially. Discovery aimed at determining the frequency of alleged unfair settlement practices was thus likely to produce evidence directly relevant to the action (*31 Cal. 3d 785, 791)* . The Court also statedthat other instances of alleged unfair settlement practices may be relevant to plaintiff's claim for punitive damages, which may be proven directly or by implication (*31 Cal. 3d 785, 791-792)* . Thus, the Court held that the discovery of the names, addresses, and files of other claimants of the insurer with whom the claims adjuster attempted settlement was relevant to the subject matter of the action and might lead to admissible evidence (*31 Cal. 3d 785, 792)* . The Court also noted that the procedure for contacting other claimants approved by the trial court should satisfy the requirements of *Ins. Code § 791.13(a)*, which protects the privacy of claimants, if the authorization form included in the consent letter was returned within a year (*31 Cal. 3d 785, 792 n.10*), and denied a protective order prohibiting plaintiff's counsel from seeking employment from other claimants in the absence of any improper conduct by counsel (*31 Cal. 3d 785, 793-795)* .

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 80 DISCOVERY: SCOPE, REGULATION, AND TIMING
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8-80 California Points & Authorities § 80.23

§ 80.23 Supporting Motion to Compel Discovery--Discovery of Matters Supporting Amendment of Pleadings

[1] FORM Supporting Motion to Compel Discovery--Discovery of Matters Supporting Amendment of Pleadings

[*The following may be combined, when appropriate, with a general form of memorandum of points and authorities in support of a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11), as well as with a general form of points and authorities refuting an irrelevancy objection (see, e.g., § 80.10).*]

DISCOVERY INTO FACTS THAT AID A PARTY IN AMENDING PLEADINGS IS PROPER.

[*EITHER*]

A. Facts Needed to State Cause of Action. Discovery into facts essential to stating a cause of action is proper (*Budget Fin. Plan v. Superior Court (1973) 34 Cal. App. 3d 794, 798, 110 Cal. Rptr. 302*).

[*AND/OR*]

B. Facts Needed to Amend Pleadings. Discovery is proper when it enables a plaintiff to amend the complaint (*Union Mut. Life Ins. Co. v. Superior Court (1978) 80 Cal. App. 3d 1, 12, 145 Cal. Rptr. 316* ; *Keely v. Price (1972) 27 Cal. App. 3d 209, 217, 103 Cal. Rptr. 531*).

[*AND/OR*]

C. Facts Needed to Overcome Demurrer. Discovery into facts that are needed to overcome a demurrer is proper when the factsare within the knowledge of the opposing party (*see Credit Managers Assn. v. Superior Court (1975) 51*

Cal. App. 3d 352, 362, 124 Cal. Rptr. 242).

[*Optional*] **D. Potential Class Members.** Parties are entitled to discover other potential class members in the process of amending their complaint (*Budget Fin. Plan v. Superior Court (1973) 34 Cal. App. 3d 794, 799, 110 Cal. Rptr. 302*).

[2] Comments

[a] Use of Form

This form of points and authorities is for use in support of a motion compelling discovery of matters that are needed to amend pleadings, to state a cause of action, or to overcome a demurrer. Paragraph D may be used when plaintiff is seeking information regarding other potential class members which will be used in framing the complaint in a class action. This form may be combined, when appropriate, with general memoranda of points and authorities supporting motions to compel discovery.

Note that cases cited in this form construe law in effect before the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that remain consistent with current provisions [*see also § 80.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 80.50* may be used to oppose the motion supported by these points and authorities.

[3] Discussion of Authorities

[a] Facts Needed to State Cause of Action

Budget Fin. Plan v. Superior Court *(1973) 34 Cal. App. 3d 794, 110 Cal. Rptr. 302* concerned a class action in which two plaintiffs on behalf of themselves and others in the alleged class sought rescission of certain retail installment sales contracts. Each of the defendants filed a demurrer to the complaint, which the trial court granted with leave to amend. The theory on which the demurrers were sustained was that plaintiffs had failed to allege assignment of their particular contracts, and that therefore they had no legal capacity to sue. On the other hand, plaintiffs contendedthat the named defendants had financed the transactions in question, and contended further that they were entitled to know who the other class members were. Plaintiffs therefore propounded interrogatories that the trial court ordered defendants to answer. Defendants then petitioned for a writ of mandate, claiming that since the trial court had sustained a general demurrer, there was no proper party before the court to conduct discovery.

The court of appeal declined to issue the writ, holding that since the trial court had granted leave to amend, plaintiffs had remained parties to the cause of action. Thus former Code Civ. Proc. § 2030 (now *Code Civ. Proc. § 2030.010 et seq.*), which allows any party to serve interrogatories, allowed plaintiffs to undertake discovery even to the extent of inquiring into facts that were essential to their stating a cause of action (*34 Cal. App. 3d 794, 798)* .

[b] Facts Needed to Amend Pleadings

Union Mut. Life Ins. Co. v. Superior Court *(1978) 80 Cal. App. 3d 1, 145 Cal. Rptr. 316* arose out of an action for wrongful reduction in disability insurance benefits, in which plaintiff alleged that there were others similarly situated

whose insurance benefits were also wrongfully reduced. Seeking facts to support this allegation, plaintiff served interrogatories inquiring about persons covered under his employer's policy, and persons covered under other policies whose benefits were reduced by increased social security payments. The interrogatories were extensive, inquiring into last known addresses, telephone numbers, and other details. Defendant objected to the various interrogatories on several grounds, including their irrelevance in the absence of a determination that the lawsuit could proceed as a class action. Nevertheless, the trial court ordered defendant to answer all the interrogatories and imposed expenses on defendant under former Code Civ. Proc. § 2034(a) (now see *Code Civ. Proc. §§ 2023.010 et seq., 2030.290*). Defendant then petitioned for a writ of prohibition.

The court of appeal issued the writ, holding that the expense sanction was improper (*80 Cal. App. 3d 1, 15)* , and that the interrogatories that would be truly time consuming and expensive to answer (such as those calling for names, addresses, and telephone numbers of employees who have worked for employers other than plaintiff's employer) could be deferred until after a class determination had been made (*80 Cal. App. 3d 1, 14)* . However, insofar as general discovery was sought to enable plaintiff to amend his complaint to bring both a nationwide and a California class action, discovery would indeed be proper (*80 Cal. App. 3d 1, 12, 13)* .

Keely v. Price *(1972) 27 Cal. App. 3d 209, 103 Cal. Rptr. 531* concerned an action for breach of contract, fraud, and interference with advantageous economic relationship, in which plaintiff, a licensed real estate broker, sued the attorney who acted on behalf of the buyers of a certain parcel of real property. A general demurrer without leave to amend was sustained based on the oral nature of the contract, and the fact that estoppel was not applicable. Before the demurrer was sustained, plaintiff had attempted to depose defendant in order to inquire into the identity of the purchasers and to see if there had been a written memorandum of the agreement with defendant. The depositions had been scheduled for a certain date, but prior to that date, the demurrer was sustained and the depositions were never taken.

Plaintiff appealed the sustaining of the demurrer and the court of appeal reversed and remanded, holding that the cause of action for interference with advantageous economic relationship was capable of cure by amendment (*27 Cal. App. 3d 209, 216)* . The court also held that once leave to amend is granted, plaintiff should be allowed to take defendant's deposition and to pursue other types of discovery in aid of such amendment (*27 Cal. App. 3d 209, 217)* .

[c] Facts Needed to Overcome Demurrer

In ***Credit Managers Assn. v. Superior Court*** *(1975) 51 Cal. App. 3d 352, 124 Cal. Rptr. 242* , plaintiff filed a complaint for breach of fiduciary duty and conspiracy against a number of defendants. After a demurrer to the complaint was filed by Mordy and Company, one of the defendants, plaintiff filed an amended complaint. Again a demurrer filed by Mordy was sustained. Plaintiff then served interrogatories on Mordy for the purpose of enabling it to amend its complaint, and Mordy moved for a protective order, which the trial court granted.

The court of appeal issued a peremptory writ of mandate. In opposition to the writ, Mordy had argued that California law prohibits a plaintiff from using discovery to determine whether it has a cause of action (*51 Cal. App. 3d 352, 361)* . The court disagreed with this contention, holding that because the demurrer was based on the failure to allege facts that were within Mordy's knowledge, discovery should have been allowed. In fact, the court held that the victim of a wrongdoer (especially a fiduciary) who has concealed his or her misdeeds has a greater need for discovery, and as much right to it, as has the victim who is fully advised of all the details of the wrong (*51 Cal. App. 3d 352, 362)* .

[d] Potential Class Members

The facts and procedural background of ***Budget Fin. Plan v. Superior Court*** *(1973) 34 Cal. App. 3d 794, 110 Cal. Rptr. 302* are discussed in [a], *above*. There the court held that plaintiffs were entitled to discover other potential class members so that these other possible plaintiffs might help in the presentation of the case and share in the burdens of its prosecution (*34 Cal. App. 3d 794, 799)* .

[4] Additional Authorities

[a] Facts Needed to Amend Pleadings

In *Los Angeles Cemetery Ass'n v. Superior Court (1968) 268 Cal. App. 2d 492, 74 Cal. Rptr. 97* , plaintiff had sued a number of defendants for fraudulent representations. A demurrer was sustained with leave to amend, and plaintiff then served interrogatories on one of the defendants seeking information that might enable it to better plead its alter ego theory. The trial court denied plaintiff's motion to compel answers and granted defendant's motion for a protective order.

The court of appeal issued a writ of mandate, holding that under the circumstances of this case, since plaintiff already knew some of the facts it needed to plead a cause of action, it should be allowed to discover other facts so as to render its amended pleadings less conclusionary and more informative (*268 Cal. App. 2d 492, 494)* .

[b] Facts Needed to State Cause of Action

In *Best Buy Stores, L.P. v. Superior Court (2006) 137 Cal. App. 4th 772, 40 Cal. Rptr. 3d 575* , the trial court granted the attorney's motion for precertification discovery after finding that he could not act as both class representative and as counsel for the class. Best Buy argued, in part, that the trial court abused its discretion in permitting the discovery, because the order and the letter to be sent to Best Buy's customers violated their privacy rights. The court of appeal observed, first, that discovery to ascertain a suitable class representative is proper, citing *Budget Finance Plan v. Superior Court*, discussed in [3][a], *above* (*137 Cal. App. 4th 772, 779)* . In these circumstances, the trial court must "expressly identify any potential abuses of the class action procedure that may be created if the discovery is permitted, and weigh the danger of such abuses against the rights of the parties under the circumstances" (*137 Cal. App. 4th 772, 779)* . Here, the trial court performed that "weighing process" in formulating its order for discovery. However, the court of appeal directed the trial court to modify the letter to be sent to prospective class-action plaintiffs to protect their privacy by stating that the recipients were free to ignore the request for information and that the neutral third-party sender would not disclose their identities to the attorney (*137 Cal. App. 4th 772, 778)* .

[c] Potential Class Members

In *Cashcall, Inc. v. Superior Court (2008) 159 Cal. App. 4th 273, 71 Cal. Rptr. 3d 441* , petitioner, a lender, sought a writ of mandate challenging a superior court order that granted, in part, a motion filed by real party in interest borrowers for precertification discovery of the names and contact information of potential plaintiffs in a class action for violating the borrowers' privacy rights. The court of appeal found no abuse of discretion, concluding, as an issue of first impression, that an original plaintiff who lacked standing in a *Code Civ. Proc. § 382* class action should be allowed to obtain precertification discovery of the identities of potential plaintiffs with standing, subjectto a balancing test weighing the danger of potential abuses against the rights of the parties (*159 Cal. App. 4th 273, 286)* .

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8-80 California Points & Authorities § 80.24

§ 80.24 Supporting Motion to Compel Discovery--Discovery of Facts on Which Allegations Are Based, Contentions, Matters Known to Party Seeking Discovery, Evidence That May Be Inadmissible at Trial, Jurisdictional Information, Hearsay Evidence, or Questions That Assume Facts Not in Evidence

[1] FORM Supporting Motion to Compel Discovery--Discovery of Facts on Which Allegations Are Based, Contentions, Matters Known to Party Seeking Discovery, Evidence That May Be Inadmissible at Trial, Jurisdictional Information, Hearsay Evidence, or Questions That Assume Facts Not in Evidence

[*The following may be combined, when appropriate, with a general memorandum of points and authorities in support of a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11), as well as with a memorandum refuting an irrelevancy objection (see, e.g., 80.10).*]

DISCOVERY INTO _____ [FACTS ON WHICH ALLEGATIONS ARE BASED *or* A PARTY'S CONTENTIONS *or* MATTERS KNOWN TO THE PARTY SEEKING DISCOVERY *or* EVIDENCE THAT MAY BE INADMISSIBLE AT TRIAL *or* JURISDICTIONAL INFORMATION *or* HEARSAY EVIDENCE *or* QUESTIONS THAT ASSUME A FACT NOT IN EVIDENCE] IS PROPER.

[*EITHER*]

A. Facts on Which Allegations Are Based. A party is entitled to discover facts on which the opposing party's allegations are based(*Singer v. Superior Court (1960) 54 Cal. 2d 318, 324, 5 Cal. Rptr. 697, 353 P.2d 305*).

[*AND/OR*]

B. Contentions of Party. A party is entitled to discover the contentions of the opposing party both in regard to the facts and in regard to the possible issues in the case (*Code Civ. Proc. § 2030.010(b)*; *Burke v. Superior Court (1969)*

71 Cal. 2d 276, 281, 78 Cal. Rptr. 481, 455 P.2d 409 ; *see Code Civ. Proc. § 2017.010*).

[*AND/OR*]

C. Matters Known to Party Seeking Discovery. It is not a proper objection to an interrogatory that the answer is already known to the party propounding the interrogatory (*Singer v. Superior Court (1960) 54 Cal. 2d 318, 324, 5 Cal. Rptr. 697, 353 P.2d 305*).

[*AND/OR*]

D. Evidence That May Be Inadmissible at Trial. It is not necessary that the matters sought to be discovered be admissible in evidence at trial (*Code Civ. Proc. § 2017.010*; *Associated Brewers Distr. Co. v. Superior Court (1967) 65 Cal. 2d 583, 587, 55 Cal. Rptr. 772, 422 P.2d 332*).

[*AND/OR*]

E. Jurisdictional Information. Discovery is proper into jurisdictional information that is relevant to the subject matter of a motion to quash, even though the motion is made pursuant to a special appearance (*1880 Corp. v. Superior Court (1962) 57 Cal. 2d 840, 843, 22 Cal. Rptr. 209, 371 P.2d 985*).

[*AND/OR*]

F. Hearsay Evidence. An interrogatory that requires a party to give hearsay evidence is a proper one (*Durst v. Superior Court (1963) 218 Cal. App. 2d 460, 464, 32 Cal. Rptr. 627*).

[*AND/OR*]

G. Questions That Assume Facts Not in Evidence. It is not a proper objection to an interrogatory that the interrogatory assumes a fact not in evidence (*West Pico Furniture Co. v. Superior Court (1961) 56 Cal. 2d 407, 421, 15 Cal. Rptr. 119, 364 P.2d 295*).

[2] Comments

[a] Use of Form

This form of points and authorities is for use in support of a motion compelling discovery when discovery has been objected to on various grounds, including the impropriety of inquiry into (1) a party's factual or legal contentions, (2) matters which are already known to the party seeking discovery, (3) inadmissible evidence, (4) jurisdictional information, (4) hearsay evidence, or (5) questions that assume facts not in evidence. This form may be combined, when appropriate, with general memoranda of points and authorities supporting a motion to compel discovery, as well as with a general form of points and authorities refuting an irrelevancy objection.

Note that cases cited in this form construe law in effect before the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that remain consistent with current provisions [*see also § 80.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case.

[3] Discussion of Authorities

[a] Facts on Which Allegations Are Based

Singer v. Superior Court *(1960) 54 Cal. 2d 318, 5 Cal. Rptr. 697, 353 P.2d 305* , arose out of an action for personal injuries brought under the Jones Act. Defendant's answer raised the defenses of contributory negligence and assumption of the risk. During the course of discovery, plaintiff served interrogatories, including three that inquired into the facts known to defendant on which defendant based the allegations given in his answer. Defendant refused to answer the three interrogatories in question, and the trial court denied plaintiff's motion for an order requiring further answers.

Plaintiff then petitioned for a writ of mandate. In arguing against the writ, defendant made several arguments, including the argument that it should not be required to limit itself by stating all facts on which it might subsequently rely. The Supreme Court granted the writ, holding that interrogatories inquiring into facts that underlie the contentions of the parties are proper (*54 Cal. 2d 318, 324)* , so long as the inquiry is limited to facts that are presently known to the party from whom discovery is sought (*54 Cal. 2d 318, 325)* .

[b] Contentions of Party

Burke v. Superior Court *(1969) 71 Cal. 2d 276, 78 Cal. Rptr. 481, 455 P.2d 409* arose out of an action for wrongful attachment against a bonding company. Plaintiffs propounded interrogatories asking whether defendants contended that the levy was not valid or regular on its face, and requesting all facts, grounds, and evidence that would support the contentions. Defendants refused to answer these questions, claiming that they improperly called for legal conclusions, and the trial court denied plaintiffs' motion for further answers.

The Supreme Court issued a writ of prohibition, holding that it would subvert the whole purpose of discovery to hold that contentions are not the proper subject of discovery (*71 Cal. 2d 276, 281)* . Accordingly, the Court held that a party may be required to disclose not only the evidentiary facts underlying his or her denials or affirmative defenses, but may also be required to disclose whether he or she is making a particular contention either about the facts or possible issues in the case (*71 Cal. 2d 276, 281, 282)* .

Note that *Code Civ. Proc. § 2030.010(b)*, which became operative in 1987 as former Code Civ. Proc. § 2030(c)(6), codifies the 1969 holding in *Burke* to the extent that it specifically allows an interrogatory to relate to whether another party is making a certain contention, or to the facts, witnesses, and writings on which a contention is based. *Code Civ. Proc. § 2033.010* similarly allows a request for admission to relate to a matter that is in controversy between the parties.

[c] Matters Known to Party Seeking Discovery

The facts and procedural background of ***Singer v. Superior Court*** *(1960) 54 Cal. 2d 318, 5 Cal. Rptr. 697, 353 P.2d 305* are discussed in [a], *above.* There the court held that an objection that the answer to the interrogatory is already known to the propounding party is not a proper objection to an interrogatory (*54 Cal. 2d 318, 324)* .

[d] Evidence That May Be Inadmissible at Trial

Associated Brewers Distr. Co. v. Superior Court *(1967) 65 Cal. 2d 583, 55 Cal. Rptr. 772, 422 P.2d 332* involved an action for recovery of an amount allegedly due for goods delivered under a distributorship contract. Defendant counterclaimed for breach of an oral distribution agreement. In the course of discovery, defendant moved for production and inspection of some documents related to the termination of the oral agreement. Plaintiff opposed this discovery on

the ground that the parol evidence rule would bar proof of an oral agreement. The trial court denied the motion to produce on unrelated grounds, and the Supreme Court granted a writ of mandate, holding, inter alia, that the purpose of discovery is not only the discoveryof admissible evidence; it also enables the parties to effectively prepare for trial. Therefore, whether discovery is requested pursuant to the former version of Code Civ. Proc. § 2031 or by subpoena under *Code Civ. Proc. § 1985*, it is not necessary to show that the material sought will actually be admissible in evidence (*65 Cal. 2d 583, 587)* .

Note that *Code Civ. Proc. § 2017.010*, which became operative in 1987 as former Code Civ. Proc. § 2017(a), codifies the 1967 holding in *Associated Brewers* to the extent that it expressly allows discovery, not only of matters that are admissible in evidence, but also matters that appear reasonably calculated to lead to the discovery of admissible evidence.

[e] Jurisdictional Information

In ***1880 Corp. v. Superior Court*** *(1962) 57 Cal. 2d 840, 22 Cal. Rptr. 209, 371 P.2d 985* , defendant appeared specially and moved to quash a service of summons based on the absence of personal jurisdiction. Defendant claimed that it had never engaged in business in California. Plaintiff then served interrogatories that were designed to ascertain facts concerning the question of jurisdiction. Defendant refused to answer, and the trial court denied plaintiff's motion to compel answers.

The Supreme Court granted a writ of mandate, holding in part that the plaintiff should be entitled to this jurisdictional information, which was relevant to the subject matter of the motion to quash, even though this motion was made only on defendant's special appearance (*57 Cal. 2d 840, 843)* .

[f] Hearsay Evidence

Durst v. Superior Court *(1963) 218 Cal. App. 2d 460, 32 Cal. Rptr. 627* concerned an action against an insurance company for recovery under a disability policy. Plaintiff served interrogatories calling for facts known to defendant that were inconsistent with plaintiff's assertions of injuries and total disability. Defendant refused to answer on the grounds that the questions called for conclusions and for hearsay. The trial court denied plaintiff's motion for further answers.

The court of appeal granted a writ of mandate, holding that insofar as the hearsay objection was concerned, an interrogatory that compels a party to give hearsay evidence is a proper one (*218 Cal. App. 2d 460, 464)* .

[g] Questions That Assume Facts Not in Evidence

West Pico Furniture Co. v. Superior Court *(1961) 56 Cal. 2d 407, 15 Cal. Rptr. 119, 364 P.2d 295* arose out of an action against a loan company for allegedly making loans at usurious interest rates. Plaintiff propounded interrogatories, and defendant objected to one of them on the ground thatthe question assumed a fact not in evidence. The trial court sustained this objection, as well as the many other objections to other interrogatories, and plaintiff sought a writ of mandate.

The Supreme Court granted the writ, holding, inter alia, that the objection that one of the interrogatories assumed a fact not in evidence is not a valid objection. The court stated that when an answer is given in writing, as opposed to one given in oral examination, the answering party has due time for deliberation, so that he or she may frame an answer that avoids the pitfalls inherent in the form of the question (*56 Cal. 2d 407, 421)* .

[4] Additional Authorities

[a] Facts on Which Allegations Are Based

Sheets v. Superior Court (1967) 257 Cal. App. 2d 1, 64 Cal. Rptr. 753 concerned an action for injunctive relief and for dissolution of a limited partnership. Plaintiff also sought damages for breach of a partnership agreement and for fraud. During the course of discovery, defendant served some interrogatories on plaintiff, who answered some and objected to others. Some of the interrogatories to which plaintiff objected inquired into facts on which plaintiff and his experts based their allegations and conclusions. Defendant then sought and obtained an order requiring answers to those interrogatories to which plaintiff had objected. Plaintiff petitioned for a writ of prohibition.

The court of appeal granted the writ restraining the trial court from enforcing its order requiring plaintiff to answer certain of the interrogatories (*257 Cal. App. 2d 1, 13)* . It based its holding on the lawyer-client privilege, noting that although a party is entitled to discover facts on which the opposing party's allegations are based (*257 Cal. App. 2d 1, 8, 9)* , these interrogatories were improper in that they went far beyond such an inquiry by calling on plaintiff to disclose the evaluation and analysis of the experts' reports that plaintiff's lawyer had made in the course of trial preparation (*257 Cal. App. 2d 1, 9)* .

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8-80 California Points & Authorities § 80.25

§ 80.25 Supporting Motion to Compel Discovery--Discovery Into Areas Relating to Concession by Opposing Party

[1] FORM Supporting Motion to Compel Discovery--Discovery Into Areas Relating to Concession by Opposing Party

[*The following may be combined, when appropriate, with a general form of memorandum of points and authorities in support of a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11), as wellas with a general form of points and authorities refuting an irrelevancy objection (see, e.g., § 80.10).*]

DISCOVERY INTO AREAS RELATING TO MATTERS THAT WERE CONCEDED BY THE OPPOSING PARTY MAY NOT BE CURTAILED.

Discovery Into Areas Related to Matters That Were Conceded. One party cannot, by unilaterally conceding some matters, foreclose all discovery concerning that concession (*Pacific Tel. & Tel. Co. v. Superior Court (1970) 2 Cal. 3d 161, 174, 175, 84 Cal. Rptr. 718, 465 P.2d 854*).

[2] Comments

[a] Use of Form

This form of points and authorities is for use in supporting a motion to compel discovery when discovery has been resisted on the ground that the areas into which inquiry is sought were related to concessions that were made, and thus cannot be the subject of discovery. This form may be combined with general memoranda of points and authorities compelling discovery.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case.

[3] Discussion of Authorities

[a] Discovery Into Areas Relating to Matters Which Were Conceded

Pacific Tel. & Tel. Co. v. Superior Court *(1970) 2 Cal. 3d 161, 84 Cal. Rptr. 718, 465 P.2d 854* concerned an action for invasion of privacy through unauthorized wire tapping. Two defendants and a nonparty deponent refused to answer various deposition questions. Plaintiff filed motions for orders compelling answers to these questions, and defendant opposed the motions on the ground of irrelevance. The trial court issued an order compelling answers to most of the questions on which the motion was based. Defendants then apparently attempted to narrow the issues in the case, thereby avoiding the probing discovery approved by the court, by filing an amended answer admitting that they had recorded some of the plaintiff's conversations. Defendants continued to deny, however, that they knew their action constituted an invasion of privacy or was illegal, or that their conduct was malicious.

The Supreme Court declined to issue a writ of prohibition overturning the trial court's order compelling answers. In its opinion, the Court stated that defendants were wrong in their assumption that by admitting participation in the eavesdropping, and thereby ostensibly narrowing the issues for trial, they also narrowed the scope of permissible discovery (*2 Cal. 3d 161, 174)* . Although one purpose of discovery is to ascertain issues on which the parties agree, thereby simplifying the trial, one party cannot, by conceding some matters, unilaterally eliminate all discovery relating to that topic (*2 Cal. 3d 161, 174-175)* .

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[Reserved]

§§ 80.26[Reserved]

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8-80 California Points & Authorities § 80.40

§ 80.40 Opposing Motion to Compel Discovery--Discovery Improper When Irrelevant Matters Sought [Code Civ. Proc. § 2017.010]

[1] FORM Opposing Motion to Compel Discovery--Discovery Improper When Irrelevant Matters Sought [Code Civ. Proc. § 2017.010]

[*The following may be combined, when appropriate, with a general form of memorandum of points and authorities in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30).*]

DISCOVERY CONCERNING _____ [*specify subject matter of deposition question or other discovery request objected to*] SHOULD NOT BE _____ [PERMITTED *or* COMPELLED] BECAUSE THE MATTER IS NEITHER RELEVANT TO THIS ACTION NOR LIKELY TO LEAD TO THE DISCOVERY OF RELEVANT EVIDENCE.

[*EITHER*]

A. Disclosure of Irrelevant Information. Disclosure of information is not warranted when it is not relevant to any issue in the case (*see Shaffer v. Superior Court (1995) 33 Cal. App. 4th 993, 1000-1003, 39 Cal. Rptr. 2d 506*).

[*AND/OR*]

B. Questions Unrelated to Claim for Relief. Parties should not be required to answer questions that are unrelated to any claim for relief that has been asserted by them (*Alpine Mut. Water Co. v. Superior Court (1968) 259 Cal. App. 2d 45, 52, 66 Cal. Rptr. 250*).

[*AND/OR*]

C. Disclosure of Information Unrelated to Subject Matter of Action. Discovery is improper if it is so broad that it might necessitate production of information that would be wholly alien to the subject matter of the action (*City of Los Angeles v. Superior Court (1973) 33 Cal. App. 3d 778, 783, 109 Cal. Rptr. 365*).

[*AND/OR*]

D. Questions That Are Unlikely to Lead to Discovery of Admissible Evidence. Discovery is improper when the questions are neither relevant to the action nor likely to lead to the discovery of admissible evidence (*Deaile v. General Telephone Co. of California (1974) 40 Cal. App. 3d 841, 851, 115 Cal. Rptr. 582*).

[2] Comments

[a] Use of Form

These points and authorities are for use in opposing a motion to compel discovery when there has been an attempt to discover matters that are irrelevant to the subject matter of the action or of a particular party's claim for relief, or that are unlikely to lead to the disclosure of admissible evidence. This form may be used in opposition to points and authorities based on a general contention of relevancy [*see, e.g., § 80.10*]. This form should be used in combination with general forms of memoranda of points and authorities in opposition to a motion to compel discovery [*see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30*). These general forms set out the statutory requirements of subject matter relevancy for the specific methods of discovery.

Note that cases cited in this form construe law in effect before the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that remain consistent with current provisions [*see also § 80.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should point out the basis for the claim of irrelevancy.

[3] Discussion of Authorities

[a] Disclosure of Irrelevant Information

Shaffer v. Superior Court *(1995) 33 Cal. App. 4th 993, 39 Cal. Rptr. 2d 506* involved a client's malpractice action against a law firm in whichthe client alleged that he was charged unconscionable attorney's fees. The client, while taking the deposition of petitioner, a nonparty contract staff attorney who worked on defendant's representation of the client, questioned the petitioner regarding her hourly rate. Petitioner refused to answer, and the client filed a motion to compel her to answer. The trial court accepted a referee's recommendation and ordered petitioner to answer the question. Petitioner sought a writ of mandamus with the court of appeal.

The court of appeal issued a writ of mandate compelling the trial court to vacate its order and issue a new order denying plaintiff's motion to compel discovery of the hourly rate paid to the contract attorney by the law firm. The court held that disclosure of petitioner's hourly rate for her work on behalf of defendant simply constituted part of defendant's costs and was not relevant to whether the client was charged an unconscionable fee (*33 Cal. App. 4th 993, 996)* . The court held that an attorney's profit margin is not relevant to the issue of whether the attorney's fee is unconscionable; what *is*

relevant is whether the client received the services he or she paid for, as measured in the marketplace (*33 Cal. App. 4th 993, 1000-1002)* .

[b] Questions Unrelated to Claim for Relief

Alpine Mut. Water Co. v. Superior Court *(1968) 259 Cal. App. 2d 45, 66 Cal. Rptr. 250* involved an action in which some plaintiffs alleged slander of title arising out of an allegedly invalid lien, and other plaintiffs alleged other causes of action. Several plaintiffs objected on various grounds to answering some of the interrogatories propounded by defendants, including the ground of irrelevance, but the trial court ordered them to answer.

The court of appeal granted a writ of prohibition. Concerning the interrogatories relating to the slander of title action, the court held that plaintiffs who had no interest in that cause of action should not have to answer any questions unrelated to any claim for relief asserted by them (*259 Cal. App. 2d 45, 52)* .

[c] Disclosure of Information Unrelated to Subject Matter of Action

City of Los Angeles v. Superior Court *(1973) 33 Cal. App. 3d 778, 109 Cal. Rptr. 365* arose out of a personal injury action in which plaintiff alleged battery by a police officer. Among the interrogatories propounded by plaintiff were some inquiring whether other complaints had been made against the same police officer. Defendant city objected on various grounds, including irrelevance, but the trial court ordered defendant to answer the interrogatories. Defendant petitioned for a writ of mandate to review the order regarding these and other interrogatories.

The court of appeal issued a writ of mandate, partially on the ground that the interrogatories regarding other complaints were so broad that they might necessitate production of information that would be wholly alien to the subject matter of the action (*33 Cal. App. 3d 778, 783)* . The court held further that even if the interrogatories were narrowed to inquire into only similar assault and battery complaints, this inquiry would still only be of dubious value, since the evidence of other instances of misconduct is not admissible to prove misconduct on a particular occasion (*33 Cal. App. 3d 778, 784)* .

[d] Questions That Are Unlikely to Lead to Discovery of Admissible Evidence

Deaile v. General Telephone Co. of California *(1974) 40 Cal. App. 3d 841, 115 Cal. Rptr. 582* arose out of an action for defamation, intentional infliction of emotional distress, and wrongful discharge. Plaintiff propounded interrogatories inquiring, inter alia, about the names and addresses of all women employed by defendant as of a certain date. Defendant objected on the grounds of oppression, burden, and unreasonableness, and on the ground that the interrogatories were unlikely to lead to the discovery of relevant evidence. The trial court denied, in toto, plaintiff's motion to compel further answers. After a jury trial, the trial court entered a judgment that plaintiff take nothing by her complaint, and plaintiff appealed.

The court of appeal affirmed the judgment. Regarding the trial court's blanket refusal to compel further answers to interrogatories, the court held that the trial court's order was correct in that the questions were neither relevant to the action nor likely to lead to the discovery of admissible evidence (*40 Cal. App. 3d 841, 851)* .

[4] Additional Authorities

[a] Questions That Are Irrelevant to Action and Unlikely to Lead to Discovery of Admissible Evidence

In *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc. (2000) 78 Cal. App. 4th 847, 93 Cal. Rptr. 2d 364* , a complex insurance case in which two insurance companies appealed a judgment awarding compensatory and punitive damages to two insureds, insurers objected under *Evid. Code § 1152* to the trial court's admission of evidence relating to settlement negotiations between one of the insurers and one of the insureds (*78 Cal. App. 4th 847, 914)* .

The court of appeal affirmed the trial court's admission of the evidence as relevant to the issue of the insurer's bad faith, explaining that *Evid. Code § 1152* does not preclude the introduction of settlement negotiations if offered to prove failure to process the claim fairly and in good faith, not to prove liability for the original loss.Although this evidence contained allusions to the second insured's participation in the settlement negotiations, the court did not find prejudicial error. Moreover, to mitigate any prejudice, the court offered to give a limiting instruction and to allow the second insurance company to explain its own response to plaintiff's offer (*78 Cal. App. 4th 847, 915)* .

City of Los Angeles v. Superior Court (1985) 170 Cal. App. 3d 744, 216 Cal. Rptr. 311 involved an action by a city to enforce alleged violation of a rent control ordinance. The defendant sought to depose a city attorney with regard to her research and opinions in drafting the ordinance, arguing that the information was relevant to a proper interpretation of the ordinance. The trial court ordered this disclosure, and the city petitioned for a writ of mandate to vacate this and other discovery orders. The court of appeal issued a writ directing the trial court to vacate its order compelling disclosure by the city attorney. The court noted that even if the ordinance was ambiguous and required interpretation, the information sought was nonetheless irrelevant, because the ordinance was required to be interpreted according to the rules of statutory construction, not according to the drafter's opinion. Also, the information was not calculated to lead to the discovery of admissible evidence, because the motives or understandings of individual legislators are not considered in construing a statute, and the testimony of an individual legislator regarding his or her intention, motive, or opinion with respect to a particular piece of legislation is therefore inadmissible (*170 Cal. App. 3d 744, 752-753)* .

Covell v. Superior Court (1984) 159 Cal. App. 3d 39, 205 Cal. Rptr. 371 involved a malicious prosecution brought by plaintiff against defendants after the unsuccessful conclusion of a prior action brought by defendants against plaintiff. While deposing plaintiff, defendants asked about settlement offers that he made in the prior action. Plaintiff objected and, when the trial court subsequently granted a motion to compel answers, sought a writ of prohibition. The court of appeal treated plaintiff's petition as one for a writ of mandate and granted a writ to compel the trial court to vacate its order (*159 Cal. App. 3d 39, 41 n.1, 43-44)* . The court held that the settlement offers would be inadmissible at trial under *Evid. Code § 1152(a)*. It stated that under former Code Civ. Proc. § 2016(b) (*now see Code Civ. Proc. § 2017.010*), evidence that is inadmissible at trial may be discovered only if it is relevant to the subject matter of the pending action or appears reasonably calculated to lead to discovery of admissible evidence (*159 Cal. App. 3d 39, 42-43)* . Here the evidence in issue was sought to prove that defendants' prior action was not brought without probable cause or initiated with malice, by showing that plaintiff had offered to settle in recognition of the validity of defendants' claims. The court concluded that the issue in the malicious prosecution action was whether defendants believed that they had probable cause or whether they acted out of malice, and plaintiff's state of mind in making settlement offers was neither relevant to thesubject matter of the pending action, nor was it reasonably calculated to lead to the discovery of admissible evidence (*159 Cal. App. 3d 39, 43)* .

In *City and County of San Francisco v. Superior Court (1982) 130 Cal. App. 3d 481, 181 Cal. Rptr. 775* , a mandamus proceeding commenced by the city against its treasurer and controller to compel payments pursuant to a city ordinance to the surviving dependents of assassinated elected officials, the treasurer requested to inspect and copy the city attorney's tentative opinion draft on the ordinance's legality. The trial court ordered the city to produce the draft. On the city's application, the court of appeal issued a writ of mandate directing the trial court to set aside its discovery order. The court of appeal observed that effect must be given to a statute's plain meaning, and that it was not contended that the ordinance's intent or purpose was ambiguous or unclear. Moreover, in construing a statute, an individual legislator's testimony about his or her intention with regard to the legislation is inadmissible. A city supervisor had testified in a deposition that he would not have voted for the ordinance if he had known of the draft. Further, the court observed that any writing reflecting an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable. Thus, the court held that the draft was neither relevant admissible evidence, nor a matter reasonably calculated to lead to such evidence. Additionally, its discovery was not otherwise permitted by statute, and would not aid in resolution of the city's contentions or the issues in the trial court action regarding the ordinance's validity (*130 Cal. App. 3d 481, 485-486)* .

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CHAPTER 80 DISCOVERY: SCOPE, REGULATION, AND TIMING
PART II. FORMS
A. General Provisions Limiting Scope

8-80 California Points & Authorities §§ 80.41-80.49

[Reserved]

§§ 80.41[Reserved]

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8-80 California Points & Authorities § 80.50

§ 80.50 Opposing Motion to Compel Discovery--Discovery in Aid of Amendment of Pleadings Improper When No Cause of Action Stated or No Genuine Issue of Material Fact Present

[1] FORM Opposing Motion to Compel Discovery--Discovery in Aid of Amendment of Pleadings Improper When No Cause of Action Stated or No Genuine Issue of Material Fact Present

[*The following may be combined, when appropriate, with a general form of memorandum of points and authorities in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30).*]

DISCOVERY MAY NOT BE HAD _____ [TO CURE A DEFECT IN THE PLEADINGS WHEN NO CAUSE OF ACTION HAS BEEN STATED *or* TO AID IN RESISTING A JUDGMENT ON THEPLEADINGS WHEN NO GENUINE ISSUE OF MATERIAL FACT HAS BEEN PRESENTED].

[*EITHER*]

A. No Discovery When Complaint Cannot Be Improved by Amendment. Discovery may not be used to cure a defect in a complaint when no cause of action has been stated, and the complaint is not curable by amendment (*Silver v. City of Los Angeles (1966) 245 Cal. App. 2d 673, 674, 54 Cal. Rptr. 203*).

[*AND/OR*]

B. Discovery Improper When No Genuine Issue of Material Fact. When there is no genuine issue of material fact, then discovery is improper in resisting an action for judgment on the pleadings (*Knoff v. City and County of San Francisco (1969) 1 Cal. App. 3d 184, 200, 81 Cal. Rptr. 683*).

[2] Comments

[a] Use of Form

This form is for use in opposition to a motion to compel discovery when discovery is sought in aid of amending a complaint but the complaint is really not curable, or when discovery is attempted in resisting an action for judgment on the pleadings but there is an absence of any genuine issue of material fact. The form may be used, when appropriate, to oppose a form of memorandum of points and authorities such as that *set out in § 80.23*. This form may also be used in combination with general forms of memoranda of points and authorities in opposition to motion to compel discovery.

Note that cases cited in this form construe law in effect before the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that remain consistent with current provisions [*see also § 80.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. In particular, counsel might wish to show why the opposing party has not stated a cause of action or has not raised any genuine factual issue.

[c] Related Uses

These points and authorities may be combined with a general form of memorandum of points and authorities in support of a motion for a protective order [*see, e.g., Ch. 83, Discovery: Depositions, § 83.80* et seq. (protective order in context of oral deposition)].

[3] Discussion of Authorities

[a] No Discovery When Complaint Cannot Be Improved by Amendment

Silver v. City of Los Angeles *(1966) 245 Cal. App. 2d 673, 54 Cal. Rptr. 203* was an appeal from a dismissal of an action by a taxpayer to recover the salary of a superintendent of a hospital on the ground that the superintendent had not devoted his entire time to his duties. The trial court dismissed the action for failure to state a cause of action, and plaintiff appealed.

The court of appeal affirmed the judgment. One of the grounds for appeal was that the trial court had granted a protective order to prohibit the taking of depositions. The court of appeal ruled that this protective order was correct in that the infirmity in the complaint was not one of form and that there was no contention that the complaint could have been improved by amendment (*245 Cal. App. 2d 673, 674)* .

[b] Discovery Improper When No Genuine Issue of Material Fact

Knoff v. City and County of San Francisco *(1969) 1 Cal. App. 3d 184, 81 Cal. Rptr. 683* concerned a taxpayers' suit to correct abuses in the county assessor's office. The trial court entered judgment on the pleadings in favor of plaintiffs. Defendants appealed, contending, as one ground of error, that they should have been allowed to exercise their right to discovery under the former version of Code Civ. Proc. § 2030 [*now see Code Civ. Proc. § 2030.010 et seq*].

The court of appeal affirmed the judgment on this and other grounds. Insofar as discovery was concerned, the court held that since the pleadings joined no genuine issue of material fact, there was no error in denying defendants the exercise of their right to discovery (*1 Cal. App. 3d 184, 200)* .

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-80 California Points & Authorities § 80.51

§ 80.51 Opposing Motion to Compel Discovery--Information Relating to Non-Party Insurer's Financial Condition Is Not Discoverable for Settlement Purposes [Code Civ. Proc. § 2017.210]

[1] FORM Opposing Motion to Compel Discovery--Information Relating to Non-Party Insurer's Financial Condition Is Not Discoverable for Settlement Purposes [Code Civ. Proc. § 2017.210]

[*The following may be combined, when appropriate, with a general memorandum opposing a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30), as well as with a general memorandum refuting a relevancy objection (see, e.g., § 80.40).*]

INFORMATION RELATED TO A NON-PARTY INSURER'S FINANCIAL CONDITION IS NOT DISCOVERABLE UNDER CODE OF CIVIL PROCEDURE SECTION 2017.210 FOR PURPOSES OF SETTLEMENT.

A. Non-Party Insurer's Financial Condition Is Not Discoverable Under Code of Civil Procedure Section 2017 for Purposes of Settlement. *Code of Civil Procedure Section 2017.210* allows for discovery of the "existence and contents" of liability insurance policies that may be available to satisfy a judgment (Code Civ. Proc. § 2107.210). However, *Code of Civil Procedure Section 2017.210* does not authorize broad discovery of the financial health of the liability insurer or its ability to meet its contractual obligations under its policies (*Catholic Mut. Relief Soc'y v. Superior Court (2007) 42 Cal. 4th 358, 373-374, 64 Cal. Rptr. 3d 434, 165 P.3d 154*).

[*Optional*] B. **Non-Party Insurer's Reinsurance Information Is Irrelevant for Settlement Purposes.** Disclosure of information is not warranted when it is not relevant to any issue in the case [or when the information in neither admissible inevidence or reasonably calculated to lead to the discovery of admissible evidence]. A non-party insurer's reinsurance information is not relevant to settlement, because a liability insurer's reinsurance agreements do not increase the amounts of liability insurance policy limits directly available to respond to the underlying judgment (*Code Civ. Proc. § 2017.010*; *see Catholic Mut. Relief Soc'y v. Superior Court (2007) 42 Cal. 4th 358, 373, 64 Cal. Rptr. 3d 434, 165 P.3d 154*).

[2] Comments

[a] Use of Form

This memorandum may be used to oppose a motion to compel discovery of a non-party insurer's financial condition based on *Code Civ. Proc. § 2017.210*, permitting discovery of the existence and contents of liability insurance policies available to satisfy a judgment [*see § 80.20*], or on a general contention of relevancy [*see, e.g., § 80.10*]. This form does not provide a complete memorandum, but rather should be combined with a general memorandum in opposition to a motion to compel discovery [*see, e.g., § 80.40, Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30*]. These general forms set out the statutory requirements of subject matter relevancy for the specific methods of discovery.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should point out the basis for any claim of irrelevancy.

[3] Discussion of Authorities

[a] Non-Party Insurer's Financial Condition Is Not Discoverable Under Code of Civ. Proc. § 2017 for Purposes of Settlement

In ***Catholic Mut. Relief Soc'y v. Superior Court*** *(2007) 42 Cal. 4th 358, 373, 64 Cal. Rptr. 3d 434, 165 P.3d 154*), an insurer and the insurer's corporate parent sought to vacate a discovery order denying their motion to quash deposition subpoenas aimed at obtaining documents concerning the insurer's financial condition, including its reserves and any reinsurance agreements. In the underlying case, the Roman Catholic Archdiocese of San Diego had been sued by numerous individuals claiming they were the victims of childhood sexual abuse by various Catholic priests. Petitioners, the church's insurer and the insurer's corporate parent, were non-parties to the underlying litigation. Plaintiffs sought the information to determine whether the church's insurers were financially able to pay any judgment that might be entered. The trial court found that plaintiffs' subpoena requests were "clearly relevant and discoverable." The court's order was supported by decisions holding that information which might facilitate settlement was discoverable.

The court of appeal granted mandamus relief, holding that a non-party liability insurer's financial condition was not discoverable under Code Civ. Proc. § 2107.210, which authorizes limited discovery of a defendant's liability insurance coverage as a matter of right. The court further held that the insurer's financial condition was not discoverable for settlement purposes under the general relevancy rules of *Code Civ. Proc. § 2017.010*. Plaintiffs did not challenge the relevancy aspect of the court of appeal's holding on review. Instead, they sought review only of the specific question whether *Code Civ. Proc. § 2017.210* authorizes discovery of the nonparty liability insurer's *reinsurance* agreements, for purposes of facilitating pretrial settlement of underlying tort claims (*42 Cal. 4th 358, 366)* .

The Supreme Court held that *Code Civ. Proc. § 2017.210* does not authorize discovery of reinsurance policies by an injured plaintiff to facilitate settlement of the underlying tort action (*42 Cal. 4th 358, 373-374*). The Court concluded that the "language of section 2017.210 allows for discovery of the 'existence and contents' of liability insurance policies that may be available to satisfy a judgment, *not* the assets of the insurance companies providing the insurance. Reinsurance is an asset of a liability insurer, just as capital reserves are, and nothing in prior case law, legislative history, or the statutory language suggests that either the common law right to discover insurance information or section 2017.210 authorize broad discovery of the financial health of the liability insurer or its ability to meet its contractual obligations under its policies" (*42 Cal. 4th 358, 373-374)* . The Court added that a nonparty insurer's reinsurance information generally is irrelevant to a plaintiff in a tort action brought against the liability insurance policyholder and could lead to burdensome discovery requests directed at nonparties (*42 Cal. 4th 358, 368, 373)* .

The Supreme Court observed that in the only reported California decision to allow the discovery of an insurer's reinsurance information, discoverability also turned on whether the requested information was relevant to an issue in the case (*see Lipton v. Superior Court (1996) 48 Cal. App. 4th 1599, 1611-1612, 56 Cal. Rptr. 2d 341* , discussed in *§ 80.21[3][a]*). In that case, the discovery was allowed because the insurer was the defendant in a bad faith action and the information was relevant to the issues in the case. Discovery was limited to only unprivileged communications between the insurer and reinsurer concerning coverage issues and potential liability. That discovery was allowed under the general relevancy test of former Code Civ. Proc. § 2017(a) (*now see Code Civ. Proc. § 2017.010*), without reference to former Code Civ. Proc. § 2017(b) (*now see* Code Civ. Proc. § 2107.210). Accordingly, *Lipton* did not provide a basis for discovery in this case (*42 Cal. 4th 358, 368. n.7*).

The Supreme Court added, in dicta, that there may be "unusual circumstances" in which the discovery of reinsurance agreements would be appropriate, as when, for example, those agreements are "directly on the risk to satisfy a judgment" or are the subject matter of the litigation, as in a coverage dispute between a liability insurer and its reinsurer (*42 Cal. 4th 358, 374)* .

[b] Non-Party Insurer's Reinsurance Information Is Irrelevant for Settlement Purposes

The facts and procedural background of ***Catholic Mut. Relief Soc'y v. Superior Court*** *(2007) 42 Cal. 4th 358, 373, 64 Cal. Rptr. 3d 434, 165 P.3d 154*) are discussed in [a], *above*. There, the court of appeal rejected plaintiffs' argument that a non-party's insurer's reinsurance information is discoverable for purposes of settlement under the general relevancy test of Code Civ. Proc. § 2017(a) (*now see Code Civ. Proc. § 2017.010*), which provides that "information is discoverable if it is relevant to thesubject matter of the action and, additionally, is either admissible in evidence or reasonably calculated to lead to the discovery of admissible evidence." The court of appeal concluded that wide-ranging inquiry into the financial health of defendant's insurer was "simply far too remote from the subject matter of this action to be relevant," given that the liability insurer and the insurer's corporate parent had testified that the insured's coverage was not reduced by payment of other claims or fees.

Although plaintiffs did not appeal this aspect of the court of appeal's ruling on review, the Supreme Court observed that a nonparty insurer's reinsurance information is irrelevant to a plaintiff in a tort action brought against the liability insurance policyholder (*42 Cal. 4th 358, 368)* . The Court explained: "An essential feature of reinsurance is that it does *not* alter the terms, conditions or provisions of the contract of liability insurance between the direct liability insurer and its insured (the tort defendant) ... . The amounts of policy limits directly available to respond to the underlying judgment are not increased by the existence of reinsurance agreements. In other words, a reinsurance agreement does not answer to liability for the underlying third party tort claim" (*42 Cal. 4th 358, 369)* .

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[Reserved]

§§ 80.52[Reserved]

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8-80 California Points & Authorities § 80.80

§ 80.80 Supporting Motion for Protective Order--Burden, Expense, or Intrusiveness Outweighs Likelihood of Obtaining Admissible Evidence [Code Civ. Proc. § 2017.020]

[1] FORM Supporting Motion for Protective Order--Burden, Expense, or Intrusiveness Outweighs Likelihood of Obtaining Admissible Evidence [Code Civ. Proc. § 2017.020]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PROTECTIVE ORDER LIMITING SCOPE OF DISCOVERY
vs.	)	
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE SCOPE OF THE REQUESTED DISCOVERY SHOULD BE LIMITED BECAUSE ITS _____ [BURDEN *and/or* EXPENSE *and/or* INTRUSIVENESS] CLEARLY OUTWEIGHS THE LIKELIHOOD THAT THE INFORMATION SOUGHT WILL LEAD TO THE DISCOVERY OF ADMISSIBLE EVIDENCE.

A. Motion for Protective Order. _____ [A party *or* An affected person] may make a motion for a protective order to limit the scope of discovery (*Code Civ. Proc. § 2017.020*).

B. Balancing Burden Against Likelihood of Discovering Admissible Evidence. The court shall limit the scope of discovery if, pursuant to a motion for protective order, it determines that the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence (*Code Civ. Proc. § 2017.020(a)*; *see Southern California Edison Co. v. Superior Court (1972) 7 Cal. 3d 832, 842-843, 103 Cal. Rptr. 709, 500 P.2d 621* ; *Greyhound Corp. v. Superior Court (1961) 56 Cal. 2d 355, 383-384, 15 Cal. Rptr. 90, 364 P.2d 266* ; *Calcor Space Facility, Inc. v. Superior Court (1997) 53 Cal. App. 4th 216, 223, 61 Cal. Rptr. 2d 567*).

C. Court Must Impose Monetary Sanction Absent Specified Findings. The court must impose a monetary sanction under *Section 2023.010 et seq. of the Code of Civil Procedure* against any party, person, or attorney who unsuccessfully opposes a motion for a protective order, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust (*Code Civ. Proc. §§ 2017.020(b), 2023.030(a)*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

These points and authorities are for use in supporting a motion for a protective order to limit the scope of discovery [*see Code Civ. Proc. § 2017.020*]. The motion must be accompanied by a declaration stating facts showing a good faith attempt at an informal resolution of each issue presented by the motion [*Code Civ. Proc. §§ 2016.040, 2017.020(a)*].

Note that cases cited in this form construe law in effect before the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that remain consistent with current provisions [*see also § 80.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should state facts showing the burden, expense, or intrusiveness of the discovery, and that the likelihood that the information sought would lead to the discovery of admissible evidence is slight. Counsel's factual showing should demonstrate substantial justification for the motion in order to avoid a monetary sanction if the motion is denied [see *Code Civ. Proc. § 2017.020(b)*].

[c] Related Pleading and Practice Forms

For further discussion and a form of motion for protective order under Code Civ. Proc. § 2017.020, see California Forms of Pleading and Practice, Ch. 190, *Discovery: Scope, Regulation and Timing* (Matthew Bender).

[3] Discussion of Authorities

[a] Balancing Burden Against Likelihood of Discovering Admissible Evidence

Code Civ. Proc. § 2017.020 codifies the holding in ***Greyhound Corp. v. Superior Court*** *(1961) 56 Cal. 2d 355, 383-384, 15 Cal. Rptr. 90, 364 P.2d 266* and its progeny, discussed *below*, that in exercising their discretion in considering requests for discovery, courts should weigh the relative importance of the information sought against the hardship entailed by its production. The Reporter's Note to Proposed Code Civ. Proc. § 2017(c) (now *Code Civ. Proc. § 2017.020*) explains that in drafting Code Civ. Proc. § 2017(c), the State Bar-Judicial Council Joint Commission on Discovery "concluded that this discretion was so important as a counter-balance to the broad standard of discovery relevance, that it should be written into the statute, and not left to implication."

Southern California Edison Co. v. Superior Court *(1972) 7 Cal. 3d 832, 103 Cal. Rptr. 709, 500 P.2d 621* was a class action suit in nuisance and/or trespass, in which the class consisted of five named plaintiffs. In the course of discovery proceedings, defendant received the names of some unnamed plaintiffs and sought to depose 20 of them at random. When plaintiffs' attorney could only produce two, defendant sought depositions of 20 others, stating its intention to exclude from the class those who did not appear for depositions. On plaintiff's motion, the trial court issued a protective order which required defendant to subpoena the unnamed plaintiffs.

The Supreme Court upheld this order, denying defendant's petition for a writ of mandate (*7 Cal. 3d 832, 843)* . The Court noted that without the protective order, which shifts from plaintiffs to defendant the onus of compelling attendance of unnamed class members at depositions, the hardship on plaintiffs in class actions would be great (*7 Cal. 3d 832, 842)* . First of all, there is no particular reason for plaintiffs to be required to compel attendance; they have little control over the loosely knit class, and the defendants are just as capable as the named plaintiffs of compelling deponents' attendance (*7 Cal. 3d 832, 841-842)* . More importantly, however, the burden on the class in the absence of this particular type of protective order is severe in that plaintiffs' attorneys would be forced to expend extraordinary time and trouble to round up persons with whom they have had no prior contact. The risk they take if they fail to compelthe attendance of these persons is that the prospective deponents will be excluded from the class. Therefore, a defendant would effectively be able to stifle a class action at the discovery stage (*7 Cal. 3d 832, 842)* . The Supreme Court thus went on to hold that in fashioning this particular protective order, the trial court wisely balanced defendant's right to discovery against the hardships which would be imposed on plaintiffs in the absence of the protective order (*7 Cal. 3d 832, 842-843)* .

Greyhound Corp. v. Superior Court *(1961) 56 Cal. 2d 355, 15 Cal. Rptr. 90, 364 P.2d 266* is the leading case construing the purposes and philosophy behind the former Discovery Act. *Greyhound* concerned a personal injury action involving an accident between plaintiffs' motor vehicle and defendant's bus. At the scene of the accident, before plaintiffs were taken to the hospital, defendant's adjusters and investigators obtained written and signed statements concerning the accident from various witnesses, many of whom were out-of-state residents. After unsuccessfully attempting to obtain these witnesses' accounts from other sources, plaintiffs made a motion to require defendant to produce and permit the inspection, copying, or photographing of the witnesses' statements. Although defendant objected to the production of these statements on various grounds, the trial court ordered their production. This holding was affirmed by the Supreme Court, which denied defendant's application for a writ of prohibition (*56 Cal. 2d 355, 402)* .

In discussing factors which courts should apply in deciding whether to uphold or deny discovery, the *Greyhound* Court stated that courts should weigh the relative importance of the information sought against the hardship entailed by its production in exercising their discretion (*56 Cal. 2d 355, 383-384)* . Thus if great hardship would be imposed on the party whose depositions are sought, and if relatively unimportant information would be elicited from the depositions, then it is reasonable to infer that a protective order is proper.

Calcor Space Facility, Inc. v. Superior Court *(1997) 53 Cal. App. 4th 216, 61 Cal. Rptr. 2d 567* arose from a dispute over a contract to supply gun mounts for military aircraft. The defendant in the contract action had allegedly repudiated its original contract with the plaintiff and had arranged to obtain the gun mounts from Calcor, one of the contract

plaintiff's competitors. The contract plaintiffs had served a deposition subpoena on Calcor's custodian of records, seeking production of extensive documentation regarding all of Calcor's gun mount business, including any dealings with the contract defendant.

In this opinion, the court of appeal reversed the trial court's denial of Calcor's motion for a protective order because the 12-page demand, which included six pages of instructions and definitions was burdensome in the extreme, was overly general and failed to demonstrate any reasonable relationship between the materials sought to be produced and the issuesin the case (*53 Cal. App. 4th 216, 222-223)* . The court observed that in ruling on discovery motions, trial judges must carefully weight the cost, time, expense, and disruption of normal business resulting from an order compelling the discovery against the probative value of the material which might be disclosed (*53 Cal. App. 4th 216, 223)* .

[4] Additional Authorities

[a] Balancing Burden Against Likelihood of Discovering Admissible Evidence

In *Jaffe v. Albertson Co. (1966) 243 Cal. App. 2d 592, 53 Cal. Rptr. 25* , plaintiff sued for a breach of contract to pay a real estate commission. Before trial, there were exhaustive discovery proceedings, including an attempt to depose various persons concerning the settlement of litigation between defendant seller and the company which ultimately purchased the real property involved. Plaintiff had specified that the scope of the depositions would be limited to the terms of the settlement. However, defendant moved for a protective order, contending that the subject of the proposed depositions was irrelevant to the subject matter of the action, and also that taking of the depositions would cause delay in the commencement of trial, which was imminent. The trial court granted the protective order, and a writ of mandate seeking reversal of this order was denied.

The court in *Jaffe* noted, that one of the prime purposes of the former Discovery Act was to expedite the trial of an action (citing *Ryan v. Superior Court (1960) 186 Cal. App. 2d 813, 816, 817, 9 Cal. Rptr. 147*). The court held that, in balancing the delay that would be caused by the belated discovery against the relative unimportance of the information which plaintiff was seeking, the trial court had correctly exercised its discretion in denying the discovery (*243 Cal. App. 2d 592, 617, 618)* .

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CHAPTER 80 DISCOVERY: SCOPE, REGULATION, AND TIMING
PART II. FORMS
A. General Provisions Limiting Scope

8-80 California Points & Authorities §§ 80.81-80.99

[Reserved]

§§ 80.81[Reserved]

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8-80 California Points & Authorities § 80.100

§ 80.100 Supporting Motion for Protective Order--Restricting Frequency or Extent of Use of Discovery Methods [Code Civ. Proc. § 2019.030]

[1] FORM Supporting Motion for Protective Order--Restricting Frequency or Extent of Use of Discovery Methods [Code Civ. Proc. § 2019.030]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PROTECTIVE ORDER RESTRICTING _____ [FREQUENCY *and/or* EXTENT] OF USE OF DISCOVERY METHODS
vs.	)	
_____ [*name*],	)	
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
		[Judge: _____
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE _____ [FREQUENCY *and/or* EXTENT] OF USE OF _____ [*specify methods sought to be used, e.g.,* DEPOSITIONS AND INTERROGATORIES] SHOULD BE RESTRICTED BECAUSE THE DISCOVERY IS _____ [UNREASONABLY CUMULATIVE *and/or* UNREASONABLY DUPLICATIVE *and/or* OTHERWISE OBTAINABLE *and/or* UNDULY BURDENSOME *and/or* UNDULY EXPENSIVE].

A. Motion for Protective Order. _____ [A party *or* An affected person] may make a motion for a protective order to restrict the _____ [frequency *and/or* extent] of use of the discovery methods (*Code Civ. Proc. § 2019.030*).

[*EITHER*]

B. Restriction When Discovery Unreasonably Cumulative or Duplicative. The court must restrict the frequency or extent of use of any discovery method if, pursuant to a motion for a protective order, it determines that the discovery sought is unreasonably cumulative or duplicative (*Code Civ. Proc. § 2019.030(a)(1)*).

[*AND/OR*]

C. Restriction When Discovery Otherwise Obtainable. The court must restrict the frequency or extent of use of any discovery method if, pursuant to a motion for a protective order, it determines that the discovery sought is obtainable from some other source that is more convenient, less burdensome, or less expensive (*Code Civ. Proc. § 2019.030(a)(1)*).

[*AND/OR*]

D. Restriction When Discovery Method Unduly Burdensome or Expensive. The court must restrict the frequency or extent of use of any discovery method if, pursuant to a motion for protective order, it determines that the selected method of discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, and the importance of the issues at stake in the litigation (*Code Civ. Proc. § 2019.030(a)(2)*).

E. Court Must Impose Monetary Sanction Absent Specified Findings. The court must impose a monetary sanction under *Code of Civil Procedure Section 2023.010 et seq.* against any party, person, or attorney who unsuccessfully opposes a motion for a protective order, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust (*Code Civ. Proc. §§ 2019.030(c), 2023.030(a)*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum is for use in supporting a motion for a protective order to restrict the frequency or extent of use of the discovery methods [*see Code Civ. Proc. § 2019.030*]. The motion must be accompanied by a declaration stating

facts showing a good-faith attempt at an informal resolution of each issue presented by the motion [*Code Civ. Proc. § 2019.030(b)*].

Code Civ. Proc. § 2019.030 is generally patterned after FRCP, Rule 26(b)(1).

Note that cases cited in this form construe law in effect before the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that remain consistent with current provisions [*see also § 80.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should state facts showing that another method or methods have previously been used to obtain the same information, or showing another source from which the information could be obtained that is more convenient or less burdensome or less expensive, or showing how the selected method of discovery is unduly burdensome or expensive in relation to the factors of the case. Counsel's factual showing should demonstrate substantial justification for the motion in order to avoid a monetary sanction if the motion is denied [*see Code Civ. Proc. § 2019.030(c)*].

[c] Discovery Methods

The discovery methods that may be restricted by court order pursuant to *Code Civ. Proc. § 2019.030* are the following [*see Code Civ. Proc. § 2019.010*]:

- Oral or written depositions [*see Code Civ. Proc. §§ 2020.010 et seq.*, 2025.010 et seq., 2029.100 et seq.].
- Interrogatories to a party [*see Code Civ. Proc. § 2030.010 et seq.*].
- Inspection, copying, testing, or sampling of documents, tangible things, land or other property, and electronically stored information [*see Code Civ. Proc. § 2031.010 et seq.*].
- Physical and mental examinations [*see Code Civ. Proc. § 2032.010 et seq.*].
- Requests for admissions [*see Code Civ. Proc. § 2033.010 et seq.*].
- Exchanges of expert trial witness information [*see Code Civ. Proc. § 2034.010 et seq.*].

[d] Related Pleading and Practice Forms

For further discussion and a form of motion for protective order under Code Civ. Proc. § 2019.030, see California Forms of Pleading and Practice, Ch. 190, *Discovery: Scope, Regulation and Timing* (Matthew Bender).

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8-80 California Points & Authorities § 80.101

§ 80.101 Supporting Motion to Establish Sequence and Timing of Discovery [Code Civ. Proc. § 2019.020(b)]

[1] FORM Supporting Motion to Establish Sequence and Timing of Discovery [Code Civ. Proc. § 2019.020(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO ESTABLISH SEQUENCE AND TIMING OF DISCOVERY
vs.	)	
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD ESTABLISH THE SEQUENCE AND TIMING OF DISCOVERY AS REQUESTED BY _____ [*specify moving party, e.g.,* DEFENDANT] BECAUSE GOOD CAUSE HAS BEEN SHOWN FOR THE SEQUENCE AND TIMING REQUESTED, AND THE ORDER WILL FURTHER THE CONVENIENCE OF ALL PARTIES AND WITNESSES IN THE ACTION AND BE IN THE INTERESTS OF JUSTICE.

Court May Establish Sequence and Timing. On motion and for good cause shown, the court may establish the sequence and timing of discovery for the convenience of parties and witnesses and in the interests of justice (*Code Civ. Proc. § 2019.020(b)*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This form is a memorandum of points and authorities is for use in supporting a motion to establish the sequence and timing of discovery. Note that, absent a statewide or local court rule to the contrary, the methods of discovery otherwise may be used in any sequence. The fact that a party is conducting discovery, whether by deposition or otherwise, does not operate to delay the discovery of another party [*see Code Civ. Proc. § 2019.020(a)*; *see also* discussion in *§ 80.03*].

Code Civ. Proc. § 2019.020 is generally patterned after FRCP, Rule 26(d).

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should propose a particular sequence and timing, then show how that sequence and timing would be for the convenience of parties and witnesses and in the interests of justice, setting out facts good cause for the particular sequence and timing.

[c] Related Pleading and Practice Forms

For further discussion and a form for a motion to establish sequence and timing under Code Civ. Proc. § 2019.020(b), see California Forms of Pleading and Practice, Ch. 190, *Discovery: Scope, Regulation and Timing* (Matthew Bender).

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8-80 California Points & Authorities § 80.102

§ 80.102 Supporting Motion for the Use of Technology in Complex Cases and Certain Other Cases [Code Civ. Proc. § 2017.730]

[1] FORM Supporting Motion for the Use of Technology in Complex Cases and Certain Other Cases [Code Civ. Proc. § 2017.730]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF IN SUPPORT OF MOTION
Plaintiff,	)	FOR THE USE OF TECHNOLOGY IN DISCOV-
vs.	)	ERY
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD ENTER AN ORDER FOR THE USE OF _____ [*specify telephone, e-mail, CD-ROM, Internet web sites, electronic documents, electronic document depositories, Internet depositions and storage, videoconferencing, or other electronic technology used to improve communication and discovery*] IN CONDUCTING DISCOVERY [*and* FOR THE DISCOVERY TO BE MAINTAINED IN ELECTRONIC MEDIA] [*and* FOR THE APPOINTMENT OF _____, A TECHNOLOGY SERVICE PROVIDER].

A. Availability of Motion in Cases Designated as Complex, Cases Ordered to Be Coordinated, Exceptional

Cases, or Cases Assigned to Plan 3, or Upon the Stipulation of the Parties. Pursuant to noticed motion, a court may enter orders for the use of technology in conducting discovery in cases designated as complex pursuant to Section 19 of the Judicial Administration Standards, cases ordered to be coordinated pursuant to Part 2, Title 4, Chapter 3 of the Code of Civil Procedure (*Code Civ. Proc. § 404 et seq.*), or exceptional cases exempt from case disposition time goals pursuant to Title 8, Chapter 2, Article 5 of the Government Code (*Gov. Code § 68600 et seq.*, or cases assigned to Plan 3 pursuant to paragraph (3) of subdivision (b) of Section 2105 of the California Rules of Court, or upon stipulation of the parties [*Code Civ. Proc. § 2017.730(a)*].

B. Findings Required. The court must make express findings that the procedures adopted [*Code Civ. Proc. § 2017.730(c)*]:

- Promote cost-effective and efficient discovery or motions relating thereto.
- Do not impose or require undue expenditures of time or money.
- Do not create an undue economic burden or hardship on any person.
- Promote open competition among vendors and providers of services in order to facilitate the highest quality service at the lowest reasonable cost to the litigants.
- Do not require parties or counsel to purchase exceptional or unnecessary services, hardware, or software.

[*EITHER*]

C. Appointment of Provider. The court must appoint the person or organization agreed upon by the parties and approve the contract agreed upon by the parties and the service provider. If there is no agreement, and no nominations are received from any of the parties, the court must appoint one or more service providers [*Code Civ. Proc. § 2017.740(a)*].

[*OR*]

C. Appointment of Provider from Among Nominees. If the parties do not agree on the selection, each party should submit to the court up to three nominees for appointment together with a contract acceptable to the nominee and the court will appoint a service provider from among the nominees. The court may condition its appointment on the acceptance of modifications in the terms of the contract [*Code Civ. Proc. § 2017.740(a)*].

[*AND*]

D. Court Supervision. The continued service of the service provider is subject to review periodically, as agreed by the parties and the service provider, or annually if they do not agree. Any disputes involving the contract or the duties, rights, and obligations of the parties or service providers may be determined on noticed motion in the action [*Code Civ. Proc. § 2017.740(b)*].

[2] Comments

[a] Use of Form

This memorandum is for use in (1) cases designated as complex pursuant to Section 19 of the Judicial Administration Standards, (2) cases ordered to be coordinated pursuant to *Gov. Code § 404 et seq.*, (3) exceptional cases exempt from case disposition time goals pursuant to *Gov. Code § 68600 et seq.* or (4) cases assigned to Plan 3 pursuant to Cal. Rules of Court § 2105(b)(3), or (5) when the parties have stipulated to the use of technology in conducting discovery.

For an overview of issues and trends in e-discovery, see *§ 80.03A*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should describe the utility of electronic media in conducting discovery, such as data storage, tracking of data changes, reduced time in delivering data to other parties, reduced costs, commonality of data platforms, availability of vendors, and other facts in support of the findings required under *Code Civ. Proc. § 2017.730(c)*. If the parties have not agreed on a provider, nominees should be submitted, as well as a description of their qualifications and proposed contractual details.

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8-80 California Points & Authorities §§ 80.103-80.109

[Reserved]

§§ 80.103[Reserved]

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8-80 California Points & Authorities § 80.110

§ 80.110 Supporting Motion to Compel Discovery--Discovery Request on New Trial Is Not Barred by Discovery Cutoff Date for Initial Trial [Code Civ. Proc. § 2024.020]

[1] FORM Supporting Motion to Compel Discovery--Discovery Request on New Trial Is Not Barred by Discovery Cutoff Date for Initial Trial [Code Civ. Proc. § 2024.020]

[*The following may be combined, when appropriate, with a general memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30).*]

A REQUEST FOR DISCOVERY ON NEW TRIAL IS SUBJECT TO THE DISCOVERY CUTOFF DATE APPLICABLE TO THE NEW TRIAL, AND IS NOT BARRED BY CUTOFF DATE APPLICABLE TO THE INITIAL TRIAL.

Time for Completing Discovery For New Trial Is Subject to New Trial Cutoff Date. The deadlines for completing discovery proceedings and motions are determined by reference to the "date initially set for the trial of the action" (*Code Civ. Proc. § 2024.020(a)*). When a new trial or retrial has been ordered, this refers to the date initially set for the new trial or retrial, and not the date initially set for the original trial (*Fairmont Ins. Co. v. Superior Court (2000) 22 Cal. 4th 245, 247-249, 92 Cal. Rptr. 2d 70, 991 P.2d 156*).

[2] Comments

[a] Use of Form

These points and authorities in support of a motion for an order compelling discovery are for use by a party seeking discovery in the course of new trial or a retrial, when the opposing party is resisting discovery on the ground that the time for completing discovery has lapsed, as determined by the date on which the original trial in the action was first set. The ground for compelling discovery is that the discovery request is not untimely, because the time for completing discovery in the new trial is determined by reference to the date initially set for the new trial, not the date initially set for the original trial.

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum of points and authorities in support of a motion to compel discovery.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case.

[c] Related Pleading and Practice Forms

For further discussion and forms relating to the time limits for completing discovery proceedings and motions under Code Civ. Proc. § 2024.010 et seq., see California Forms of Pleading and Practice, Ch. 190, *Discovery: Scope, Regulation and Timing* (Matthew Bender).

[3] Discussion of Authorities

[a] Time for Completing Discovery For New Trial Is Subject to New Trial Cutoff Date

In ***Fairmont Ins. Co. v. Superior Court*** *(2000) 22 Cal. 4th 245, 92 Cal. Rptr. 2d 70, 991 P.2d 156* , a bad faith insurance action went through its original trial and an appeal. On appeal, the court of appeal reversed thetrial court's judgment for the defendant insurance company and remanded the cause for a new trial. On remand, the plaintiffs served the defendant with basic discovery requests, and the defendant objected. The defendant petitioned for review by extraordinary writ after the trial court granted the plaintiff's motion to compel. The court of appeal granted the writ, ordering the trial court to deny the motion to compel, holding that the cutoff for completing discovery under former Code Civ. Proc. § 2024(a) (now *Code Civ. Proc. § 2024.020*) is determined by reference to the date set for the original trial, regardless of whether a new trial is set after a reversal on appeal. The court of appeal added that the motion to compel could be renewed if the party requesting discovery could establish good cause for the additional discovery (*22 Cal. 4th 245, 249)* .

The Supreme Court granted review and reversed the decision of the court of appeal. The Court held that in the case of a mistrial, an order granting a new trial, or a remand for new trial after reversal of judgment on appeal, the last day for completing discovery is 15 days before the date initially set for the *new* trial (*22 Cal. 4th 245, 247)* . The Court agreed with the appellate court in *Beverly Hospital v. Superior Court (1993) 19 Cal. App. 4th 1289, 24 Cal. Rptr. 2d 238* , that the phrase "initial trial date" in former Code Civ. Proc. § 2024(a) (now *Code Civ. Proc. § 2024.020*) refers to first date set for each trial scheduled in the action for purposes of calculating discovery cutoff. It does not refer to date initially set for original trial of the action, without regard to the date set for new trial (*22 Cal. 4th 245, 247)* .

The Court explained that the court of appeal's construction in *Beverly Hospital* is more consistent with the language of former Code Civ. Proc. § 2024 (now *Code Civ. Proc. § 2024.010 et seq.*). Language in former Code Civ. Proc. § 2024 (now *Code Civ. Proc. § 2024.020(b)*), which states that, except as provided in former Code Civ. Proc. § 2024(e) (now *Code Civ. Proc. § 2024.050*), "a continuance or postponement of the trial date does not operate to reopen discovery proceedings," does not expressly limit discovery following an order granting a new trial, a mistrial, or a remand for a new trial after reversal on appeal. It refers simply to a continuance or postponement and its effect, whether it occurs during the original trial or in a subsequent new trial (*22 Cal. 4th 245, 251)* .

The construction in *Beverly Hospital* is also consistent with the legislative history of the provision, which indicates that the purpose of the statute is to eliminate a source of discovery abuse and unnecessary trial delays caused by party's seeking continuances or postponements of trial for the sole purpose of extending the time for discovery. The Court reasoned that parties were unlikely to manipulate the discovery procedure by creating grounds for a new trial, mistrial, or appellate reversal merely in order to extend the time for discovery (*22 Cal. 4th 245, 252)* .

Like the court in *Beverly Hospital*, the Supreme Court was disinclined to adopt a construction of former Code Civ. Proc. § 2024(a) (now *Code Civ. Proc. § 2024.020*) that would require additional court proceedings to determine if good cause existed to reopen discovery (*22 Cal. 4th 245, 252)* . The Court added that the lengthy timeframe of *Code Civ. Proc. § 583.320*, governing computation of time in which a new trial must be brought to action, appears to contemplate additional discovery by the parties (*22 Cal. 4th 245, 252)* .

Finally, the Court rejected arguments that reopening discovery would be unduly burdensome or duplicative, noting that discovery in the event of a new trial is not unlimited, and that a party objecting to a particular discovery request may seek a protective order (*22 Cal. 4th 245, 254-255)* .

For further discussion of the court of appeal opinion in *Beverly Hospital*, see *Ch. 88, Discovery: Exchange of Expert Witness Information, § 88.22[3][a]*.

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8-80 California Points & Authorities § 80.111

§ 80.111 Supporting Motion for Order Granting Leave to Complete Discovery, to Have Discovery Motion Heard, or to Reopen Discovery [Code Civ. Proc. § 2024.050]

[1] FORM Supporting Motion for Order Granting Leave to Complete Discovery, to Have Discovery Motion Heard, or to Reopen Discovery [Code Civ. Proc. § 2024.050]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION FOR ORDER GRANTING LEAVE TO _____ [COMPLETE DISCOVERY PROCEEDINGS CLOSER TO TRIAL DATE *or* HAVE DISCOVERY MOTION HEARD CLOSER TO TRIAL DATE *or* REOPEN DISCOVERY]
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	
	)	
	)	Date: _____
	)	Time: _____
	)	Location: _____
		[Judge: _____
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD EXERCISE ITS DISCRETION TO GRANT LEAVE TO _____ [COMPLETE DISCOVERY PROCEEDINGS CLOSER TO THE INITIAL TRIAL DATE *or* HAVE THE DISCOVERY MOTION HEARD CLOSER TO THE INITIAL TRIAL DATE *or* REOPEN DISCOVERY] BECAUSE

IT IS NECESSARY, _____ [*specify moving party, e.g.,* PLAINTIFF] HAS BEEN DILIGENT IN SEEKING DISCOVERY, AND IT IS UNLIKELY THAT THE DISCOVERY WILL PREVENT THE TRIAL FROM GOING TO TRIAL ON THE DATE SET OR OTHERWISE INTERFERE WITH THE TRIAL CALENDAR OR PREJUDICE ANY OTHER PARTY.

A. Availability of Motion. On motion of any party, accompanied by a declaration stating facts showing a reasonable and good-faith attempt at an informal resolution of each issue presented by themotion, the court may grant leave to _____ [complete discovery proceedings closer to the initial trial date *or* have a motion concerning discovery heard closer to the initial trial date *or* reopen discovery after a new trial date has been set] (*Code Civ. Proc. § 2024.050(a)*).

B. Factors to Be Considered. In exercising its discretion to grant leave to _____ [complete discovery proceedings *or* have a discovery motion heard *or* reopen discovery], the court is required to take into consideration any matter relevant to the leave requested, including but not limited to the following:

1. The necessity and the reasons for the discovery (*Code Civ. Proc. § 2024.050(b)(1)*);

2. The diligence of the party seeking the _____ [discovery *or* hearing of the discovery motion], and the reasons that the discovery _____ [was not completed *or* motion was not heard earlier] (*Code Civ. Proc. § 2024.050(b)(2)*);

3. Any likelihood, or absence thereof, that _____ [permitting the discovery *or* hearing the discovery motion] will prevent the case from going to trial on the day set, or otherwise interfere with the trial calendar, or result in prejudice to any other party (*Code Civ. Proc. § 2024.050(b)(3)*);

4. The length of time that has elapsed between the date(s) previously set, and the date presently set, for the trial of the action (*Code Civ. Proc. § 2024.050(b)(4)*).

C. Court Must Impose Monetary Sanction Absent Specified Findings. The court must impose a monetary sanction under *Section 2023.010 et seq. of the Code of Civil Procedure* against any party, person, or attorney who unsuccessfully opposes a motion to extend or reopen discovery, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust (*Code Civ. Proc. §§ 2023.030(a), 2024.050(c)*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum is for use in supporting a motion for an order granting leave to complete discovery proceedings, hear a discovery motion, or reopen discovery [*see Code Civ. Proc. § 2024.050*]. The motion must be accompanied by a

declaration stating facts showing a reasonable and good-faith attempt at an informal resolution of each issue presented by the motion [*Code Civ. Proc. § 2024.050(a)*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should state facts that show (1) necessity and reason for the discovery, (2) the diligence of the moving party in seeking the discovery or discovery hearing, (3) the reasons that the discovery was not completed or the hearing held earlier, (4) the lack of likelihood that permitting the discovery or hearing the discovery motion will prevent the case from going to trial on the date set or otherwise interfere with the trial calendar, or that prejudice will result to any party, and (5) if applicable, the length of time that has elapsed between any date previously set, and the date presently set, for the trial of the action. These facts should help demonstrate substantial justification for the motion in order to avoid a monetary sanction if the motion is denied [*see Code Civ. Proc. § 2024.050(c)*].

[c] Related Pleading and Practice Forms

For further discussion and forms relating to time limits for completing discovery proceedings and notions under Code Civ. Proc. § 2024.010 et seq., see California Forms of Pleading and Practice, Ch. 190, *Discovery: Scope, Regulation, and Timing* (Matthew Bender).

[3] Discussion of Authorities

[a] Time Limitations on Discovery

Code Civ. Proc. § 2024.010 et seq. derives from and supersedes former Cal. Rules of Ct., Rule 333. It provides that, as a general rule, any party is entitled as a matter of right to complete discovery proceedings until 30 days before the date initially set for the trial of the action. In addition, any party is entitled as a matter of right to have motions concerning discovery heard until 15 days before the initial trial date [*Code Civ. Proc. § 2024.020(a)*]. If either of these dates falls on a Saturday, Sunday, or holiday (*see Code Civ. Proc. § 10* (designated holidays)), the last day is the next court day closer to the trial date [*Code Civ. Proc. § 2016.060*]. However, any party is entitled as a matter of right to complete discovery proceedings pertaining to an expert witness [*see Code Civ. Proc. § 2034.010 et seq.*] until 15 days, and to have motions concerning that discovery heard until 10 days, before the date initially set for the trial of the action [*Code Civ. Proc. § 2024.030*]. If either of those days falls on a Saturday, Sunday, or holiday, the last day becomes the next court day closer to the trial date [*Code Civ. Proc. § 2016.060*; *see Code Civ. Proc. § 10* (designated holidays)]. Discovery is considered "completed" on the day a response is due or on the day a deposition begins [*Code Civ. Proc. § 2024.010*].

In the case of mistrial, an order granting a new trial, or remand for new trial after reversal of judgment on appeal, the last day for completing discovery is 15 days before the date initially set for the *new* trial [*Fairmont Ins. Co. v. Superior Court (2000) 22 Cal. 4th 245, 247, 249, 92 Cal. Rptr. 2d 70, 991 P.2d 156* ; *see* further discussion in *§ 80.110[3][a]*].

When the last day to perform or complete any act provided for in the California Civil Discovery Act (*Code Civ. Proc. §§ 2016.010 et seq.*-2036.010 et seq.), falls on a Saturday, Sunday, or holiday, the time limit is extended until the next court day closer to the trial date that is not a Saturday, Sunday, or holiday [*Code Civ. Proc. § 2016.060*; *see Code Civ. Proc. § 10* for definition of holiday].

Note that *Code Civ. Proc. § 2024.010 et seq.* does not apply to summary proceedings for obtaining possession of real property or to eminent domain proceedings [*Code Civ. Proc. § 2024.040(b)*]. Discovery in summary proceedings to obtain possession of real property must be completed on or before the fifth day before the date set for trial except as provided in *Code Civ. Proc. §§ 2024.050* and *2024.060* [*Code Civ. Proc. § 2024.040(b)(1)*]. Furthermore, the statute's

application in judicially arbitrated cases is restricted [*see Code Civ. Proc. § 2024.040(a)*].

Unless ordered otherwise pursuant to *Code Civ. Proc. § 2024.050*, a continuance or postponement of the trial date does not operate to reopen discovery proceedings [*Code Civ. Proc. § 2024.020(b)*].

After the time periods have passed, a party generally may not complete discovery proceedings, have discovery motions heard, or have discovery reopened unless the party obtains leave of court pursuant to *Code Civ. Proc. § 2024.050*. However, the parties may agree to extend the time for completion or hearing of motions, or to reopen discovery. The agreement, which may be informal, must be confirmed in a writing that specifies the extended date. Any party affected by the agreement must consent to it. In no event, however, may the agreement require a court to grant a continuance or postponement of the trial of the action [*Code Civ. Proc. § 2024.060*].

[4] Additional Authorities

[a] Time Limitations on Discovery

In *Hernandez v. Superior Court (2004) 115 Cal. App. 4th 1242, 9 Cal. Rptr. 3d 821* , personal injury plaintiff moved for a continuance of the trial date and to reopen discovery to supplement his expert witness list, after his attorney died of pancreatic cancer. The trial court continued the trial date one month and denied plaintiff's other requests. Plaintiff filed a petition for writ of mandate.

The court of appeal granted the writ, directing the trial court to vacate its orders and enter new orders continuing the trial to a date at least six months out and permitting plaintiff to supplement his designation of expert witnesses and extending the discovery cutoff date (*115 Cal. App. 4th 1242, 1248)* . Citing Cal. Stds. Jud. Admin., § 9 and former Code Civ. Proc. § 2024(e) (now *Code Civ. Proc. § 2024.050(b)*), the court held that death or serious illness of a trial attorney or a party should, under normal circumstances, be considered good cause for granting the continuance of a trial date, as well as good cause to reopen discovery after a trial date has been continued (*115 Cal. App. 4th 1242, 1247-1248)* . The court balanced the prejudice petitioner suffered due to the terminal illness and death of his attorney against real party's unsubstantiated claim that he would be prejudiced by the extension of the discovery cut-off date and a trial continuance, concluding that "the strong public policy favoring disposition on the merits outweighs the competing policy favoring judicial efficiency" (*115 Cal. App. 4th 1242, 1246)* .

[b] Factors to Be Considered

In *Pelton-Shepherd Industries, Inc. v. Delta Packaging Products, Inc. (2008) 165 Cal. App. 4th 1568, 82 Cal. Rptr. 3d 64* , defendant appealed trial court orders imposing monetary sanctions for discovery misconduct in a contract action, striking defendant's answer to plaintiff complaint, and dismissing defendant's cross-complaint (*165 Cal. App. 4th 1568, 1570)* . After the discovery motion cutoff date, plaintiff filed a motion to compel discovery without seeking leave from the trial court under *Code Civ. Proc. § 2024.050* to reopen discovery. The trial court granted the motion and later sanctioned defendant for failing to comply. The appellate court held that the trial court abused its discretion under *Code Civ. Proc. § 2024.020* by hearing the motion to compel without first deciding whether discovery should be reopened for that purpose, considering all of the relevant circumstances, as required by *Code Civ. Proc. § 2024.050(b)*. The trial court should have assessed plaintiff's reasons for seeking the discovery, and its diligence or lack of diligence (*165 Cal. App. 4th 1568, 1571, 1587-1588*). The error was prejudicial because it was reasonably probable that the trial court would have denied the motion to reopen discovery based on plaintiff's unexplained delay and the marginal relevance of the requested documents (*165 Cal. App. 4th 1568, 1571, 1589-1590)* .

California Points & Authorities

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 81 DISCOVERY: PRIVILEGES AND OTHER DISCOVERY LIMITATIONS

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§ 81.02 Governing Law

[1] California Civil Discovery Act and Related Law

[2] Evidentiary Privileges and Other Provisions Limiting Discovery

[3] Case Law Decided Under Prior Discovery Acts

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[1] Page Limits on Memoranda

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§ 81.04 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

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§§ 81.05-81.09 [Reserved]

§ 81.10 Supporting Motion to Compel Discovery--Refuting Claim of Privilege--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Uses

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Burden of Showing Privilege

[b] Strict Construction of Privileges

[c] No Implied Exceptions to Evidence Code Privileges

[4] Additional Authorities

[a] Burden of Showing Privilege

§§ 81.11-81.19 [Reserved]

§ 81.20 Opposing Motion to Compel Discovery--Privileged Material Not Discoverable--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Uses

[3] Discussion of Authorities

[a] Privileged Material Not Discoverable

§§ 81.21-81.59 [Reserved]

§ 81.60 Supporting Motion to Compel Discovery--Refuting Claim of Lawyer-Client Privilege [Evid. Code § 954]--Client's Communication to Lawyer Not Privileged When Not Intended to Be Confidential

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Privilege Applicable Only to Information Communicated in Confidence

[b] Privilege Inapplicable When Disclosure Made for Purpose of Communication to Another

[4] Additional Authorities

[a] Privilege Applicable Only to Information Communicated in Confidence

§ 81.61 Supporting Motion to Compel Discovery--Refuting Claim of Lawyer-Client Privilege [Evid. Code § 954]--Information Not Privileged Merely Because Communicated to Lawyer

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Information Not Privileged Merely Because Communicated to Lawyer

[4] Additional Authorities

[a] Information Not Privileged Merely Because Communicated to Lawyer

§ 81.62 Supporting Motion to Compel Discovery--Refuting Claim of Lawyer-Client Privilege [Evid. Code § 954]--Information Communicated Through Nonagent Third Party Not Privileged

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Privilege Not Applicable to Information Communicated Through Nonagent Third Party

[4] Additional Authorities

[a] Privilege Not Applicable to Information Communicated Through Nonagent Third Party

§ 81.63 Supporting Motion to Compel Discovery--Refuting Claim of Lawyer-Client Privilege [Evid. Code § 954]--Joint Client's Communication of Matters of Common Interest Not Privileged in Action Between Joint Clients [Evid. Code § 962]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Joint Client's Communication to Lawyer Not Privileged in Action Between Joint Clients

[4] Additional Authorities

[a] Joint Client's Communication to Lawyer Not Privileged in Action Between Joint Clients

§ 81.64 Supporting Motion to Compel Discovery--Refuting Claim of Lawyer-Client Privilege [Evid. Code § 954]--Communication by Nonparty Corporate Employee

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Communication Not Privileged if Information Does Not Emanate From Corporation

[b] Corporate Employee Is Independent Witness

[c] Dominant-Purpose Rule Applies When Employee Not Independent Witness

[4] Additional Authorities

[a] Corporate Employee Is Independent Witness

[b] Dominant-Purpose Rule Applies When Employee Not Independent Witness

§ 81.65 Supporting Motion to Compel Discovery--Refuting Claim of Lawyer-Client Privilege [Evid. Code § 954]--Privilege Waived by Holder's Disclosure of Communication [Evid. Code § 912(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Privilege Waived by Disclosure of Communication

[4] Additional Authorities

[a] Privilege Waived by Disclosure of Communication

§ 81.66 Supporting Motion to Compel Discovery--Refuting Claim of Lawyer-Client Privilege [Evid. Code § 954]--Privilege Waived by Consent to Disclosure of Communication [Evid. Code § 912(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Privilege Waived by Consent to Disclosure of Communication

[b] Failure to Claim Privilege

[c] Consent Inferred From Other Evidence

[4] Additional Authorities

[a] Privilege Waived by Consent to Disclosure of Communication

§ 81.67 Supporting Motion to Compel Discovery--Refuting Claim of Lawyer-Client Privilege [Evid. Code § 954]--Privilege Impliedly Waived

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Waiver Implied by Placing Mental State of Lawyer in Issue

[b] Implied Waiver Occurs When Gravamen of Suit Is So Inconsistent With Privilege as to Compel Waiver

[c] Implied Waiver Occurs When Party Designated as Expert Witness Produces Privileged Documents or Testifies as Expert

[d] Test for Implied Waiver of Lawyer-Client Privilege

§ 81.68 Supporting Motion to Compel Discovery--Refuting Claim of Lawyer-Client Privilege [Evid. Code § 954]--Matter Relates to Arbitration of Attorney-Client Fee Dispute [Bus. & Prof. Code § 6202]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

§ 81.69 Supporting Motion to Compel Discovery--Refuting Claim of Lawyer-Client Privilege [Evid. Code § 954]--Privilege Does Not Preclude Discovery by Successor Trustee

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Predecessor Trustee May Not Assert Lawyer-Client Privilege to Preclude Discovery by Successor Trustee

§ 81.70 Supporting Motion to Compel Discovery-Refuting Claim of Lawyer-Client Privilege [Evid. Code § 954]--Subject to Evidence Code Section 956.5--Confidential Communications Are Not Protected When Threat of Criminal Act Is Likely to Result in Death or Substantial Bodily Harm

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Exception to Lawyer-Client Privilege Under Evidence Code Section 956.5 Applies When Necessary to Prevent Client from Committing Criminal Act Likely to Result in Death or Serious Bodily Harm

[b] Lawyer-Client Privilege Is Inapplicable When Client Threatens to Kill or Harm Witnesses

§ 81.71 Supporting Motion to Compel Discovery--Refuting Claim of Lawyer-Client Privilege [Evid. Code §§ 953(c), 954, Prob. Code § 12252]--Deceased Client's Personal Representative Is Only Person Authorized to Assert Privilege

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Additional Authorities

[a] Personal Representative of Deceased Client Is Sole Holder of Privilege

§§ 81.72-81.79 [Reserved]

§ 81.80 Opposing Motion to Compel Discovery--Lawyer-Client Privilege [Evid. Code § 954] Applicable--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Claimant of Privilege

[b] Definition of Confidential Communication

[c] Presumption of Confidentiality

[d] Privilege Bars Discovery of Confidential Communication Irrespective of Whether or Not It Includes Unprivileged Material

[e] Identity of Clients Is Confidential

[4] Additional Authorities

[a] Claimant of Privilege

[b] Definition of Confidential Communication

[c] Presumption of Confidentiality

[d] Identity of Clients Is Confidential

§ 81.81 Opposing Motion to Compel Discovery--Lawyer-Client Privilege [Evid. Code § 954] Applicable--Communication When No Litigation Is Threatened

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Privilege Applies Although No Litigation Is Threatened

[b] Open Meeting Requirements Do Not Require Disclosure of City Attorney's Letter to City Council

[4] Additional Authorities

[a] Open Meeting Requirements Do Not Require Disclosure of City Attorney's Letter to City Council

§ 81.82 Opposing Motion to Compel Discovery--Lawyer-Client Privilege [Evid. Code § 954] Applicable--Communication Before Actual Employment of Lawyer as Privileged

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Communication Before Actual Employment of Lawyer

[4] Additional Authorities

[a] Communication Before Actual Employment of Lawyer

§ 81.83 Opposing Motion to Compel Discovery--Lawyer-Client Privilege [Evid. Code § 954] Applicable--Failure to Establish Joint-Client Relationship [Evid. Code § 962] by Showing Actual Employment of Lawyer

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Joint-Client Relationship Not Established When No Showing of Attorney's Actual Employment

§ 81.84 Opposing Motion to Compel Discovery--Lawyer-Client Privilege [Evid. Code § 954] Applicable--Communication by Nondefendant Corporate Employee as Privileged Under Facts

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Corporation Entitled to Same Lawyer-Client Privilege as Natural Person

[b] Communication Privileged When Information Emanates From Corporation

[c] Employee's Statement as Statement of Corporate Employer

[d] Applicability of Privilege to Corporate Employee's Communication Determined by Employer's Dominant Purpose

[e] Employee's Communication Privileged Although Obtained by Employer's Agent

[f] There Is No Shareholder Exception to Lawyer-Client Privilege

[4] Additional Authorities

[a] Applicability of Privilege to Corporate Employee's Communication Determined by Employer's Dominant Purpose

[b] There Is No Shareholder Exception to Lawyer-Client Privilege

§ 81.85 Opposing Motion to Compel Discovery--Lawyer-Client Privilege [Evid. Code § 954] Applicable--Communication to Insurer for Attorney's Use Is Privileged

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Confidential Statements Made by Insured to Insurer for Attorney's Use Are Protected

§ 81.86 Opposing Motion to Compel Discovery--Lawyer-Client Privilege [Evid. Code § 954] Applicable--Communication to Physician or Psychologist at Attorney's Request

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Client's Communication to Attorney's Agent in Preparation of Case Is Privileged

§ 81.87 Opposing Motion to Compel Discovery--Lawyer-Client Privilege [Evid. Code § 954] Applicable--Trustee's Confidential Communication to Attorney Is Privileged Against Beneficiaries

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Trustee May Assert Lawyer-Client Privilege to Preclude Discovery by Trust Beneficiaries

[b] Trustee's Confidential Communications With Its Attorneys About Its Potential Personal Liability Are Privileged

[c] Trustee Enjoys Absolute Privilege Against Beneficiaries for Confidential Communications About Trust Administration

§ 81.88 Opposing Motion to Compel Discovery--Lawyer-Client Privilege [Evid. Code § 954] Applicable--No Exception to Lawyer-Client Privilege for Condominium Owners

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] There Is No Exception to the Attorney-Client Privilege for Individual Condominium Owners When Condominium Association Brings Suit on Its Own Behalf

§ 81.89 Opposing Motion to Compel Discovery--Lawyer-Client Privilege [Evid. Code § 954] Applicable--Privilege Not Waived [Evid. Code § 912]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Intent to Disclose Not a Waiver

[b] Confidential Communication Privileged Although Information Previously Transmitted to Third Party

[c] Privilege Applicable to Communication Between Client and Particular Lawyer

[d] Waiver by Joint Holder Not Applicable

[e] Statements to Lawyer for Purpose of Answering Interrogatories as Privileged

[f] No Waiver of Privilege If Disclosure Coerced by Court Order

[g] Tendering Issue of Damages in Legal Malpractice Action

[h] No Waiver by Disclosure of Fact That Privileged Communication Occurred

[i] No Waiver Under Evidence Code Section 912 Without Disclosure

[j] Inadvertent Disclosure by Attorney Does Not Waive Privilege

[k] Partial Waiver of Attorney-Client Privilege

[4] Additional Authorities

[a] Confidential Communication Privileged Although Information Previously Transmitted to Third Party

[b] No Waiver of Privilege If Disclosure Coerced by Court Order

§ 81.90 Opposing Motion to Compel Discovery--Lawyer-Client Privilege [Evid. Code § 954] Applicable--Privilege Not Impliedly Waived

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] No Implied Waiver Unless Privileged Communication Has Been Put in Issue

[b] No Implied Waiver After Party Has Been Designated Expert Witness

[4] Additional Authorities

[a] No Implied Waiver Unless Privileged Communication Has Been Put in Issue

§ 81.91 Opposing Motion to Compel Discovery--Lawyer-Client Privilege [Evid. Code § 954] Applicable--Lawyer's Services Not Sought to Enable or Aid Commission of Crime or Fraud [Evid. Code § 956]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Privilege Applies Absent Crime or Fraud

[b] Evidence Code Section 956 Exception Inapplicable When Lawyer Commits Crime or Fraud

[c] Validity of Claim of Privilege Must Be Determined Before Discovery Is Ordered

[d] Proponent of Exception Must Show Something More Than Probable Cause

[4] Additional Authorities

[a] Privilege Applies Absent Crime or Fraud

[b] Validity of Claim of Privilege Must Be Determined Before Discovery Is Ordered

§§ 81.92-81.109 [Reserved]

§ 81.110 Supporting Motion to Compel Discovery--Refuting Claim of Physician-Patient Privilege [Evid. Code § 994]--Disclosure of Patient's Name Is Not Always Privileged

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Permissible Disclosure of Patient's Name

§ 81.111 Supporting Motion to Compel Discovery--Refuting Claim of Physician-Patient Privilege [Evid. Code § 994]--Purpose of Communication Not to Obtain Diagnosis of Subject's Condition [Evid. Code § 991]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Communication to Physician for Nondiagnostic Purpose Not Privileged

§ 81.112 Supporting Motion to Compel Discovery--Refuting Claim of Physician-Patient Privilege [Evid. Code § 994]--Waiver by Disclosure [Evid. Code §§ 912(a), 992]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Privilege Waived by Disclosure of Communication

[b] Consent to Disclosure May Be Manifested by Failure to Assert Privilege, or Other Conduct Indicating Consent

§§ 81.113-81.119 [Reserved]

§ 81.120 Opposing Motion to Compel Discovery--Physician-Patient Privilege [Evid. Code § 994] Applicable--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Uses

[3] Discussion of Authorities

[a] Claimant of Privilege

[b] Dual Purposes of Privilege

[c] Definition of Confidential Communication

[d] "Confidentiality" Liberally Construed in Favor of Patient

[e] Presumption of Confidentiality

§ 81.121 Opposing Motion to Compel Discovery--Physician-Patient Privilege [Evid. Code § 994] Applicable--Patient's Name as Privileged Under Certain Circumstances

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Patient's Name Is Privileged

[4] Additional Authorities

[a] Patient's Name Is Privileged

§ 81.122 Opposing Motion to Compel Discovery--Physician-Patient Privilege [Evid. Code § 994] Applicable--Claim of Privilege by Third-Party Recipient of Material

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Third Party Is Able to Claim Privilege

§ 81.123 Opposing Motion to Compel Discovery--Physician-Patient Privilege [Evid. Code § 994] Applicable--Information Transmitted to Third Party for Purpose of Payment of Physician's Fee

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Information Transmitted for Payment of Fee Is Privileged

§ 81.124 Opposing Motion to Compel Discovery--Physician-Patient Privilege [Evid. Code § 994] Applicable--Patient-Litigant Exception [Evid. Code § 996] Not Applicable

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Narrow Interpretation of Patient-Litigant Exception

[4] Additional Authorities

[a] Narrow Interpretation of Patient-Litigant Exception

§§ 81.125-81.139 [Reserved]

§ 81.140 Supporting Motion to Compel Discovery--Refuting Claim of Psychotherapist-Patient Privilege [Evid. Code § 1014]--Waiver [Evid. Code § 912(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Waiver of Privilege

[b] Inability of Psychotherapist to Assert Privilege When Patient Has Previously Waived It

[4] Additional Authorities

[a] Waiver of Privilege

§ 81.141 Supporting Motion to Compel Discovery--Refuting Claim of Psychotherapist-Patient Privilege [Evid. Code § 1014]--Privilege Inapplicable When Patient-Litigant Has Placed Mental Condition in Issue [Evid. Code § 1016]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Patient-Litigant Exception Applicable

[b] Psychotherapist's Right to Keep Patient's Confidence Limited by Patient-Litigant Exception

[c] Burden of Showing Applicability of Privilege on Patient After Mental Issue Tendered

§ 81.142 Supporting Motion to Compel Discovery--Refuting Claim of Psychotherapist-Patient Privilege [Evid. Code § 1014]--Privilege Inapplicable When Patient Threatened Danger to Another [Evid. Code § 1024]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Psychotherapist-Patient Privilege Inapplicable When Patient Believed to Be Dangerous to Another

[b] Psychotherapist-Patient Privilege Inapplicable to Warning Made to Victim

[4] Additional Authorities

[a] Psychotherapist-Patient Privilege Inapplicable When Patient Believed to Be Dangerous to Another

§ 81.143 Supporting Motion to Compel Discovery--Refuting Claim of Psychotherapist-Patient Privilege [Evid. Code § 1014]--Disclosure of Patient's Name, Address, and Telephone Number Is Necessary to Protect Patient in State Custody

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Right of Patient to Be Free From Harm While in State Custody Justifies Disclosure of Otherwise Privileged Information

§ 81.144 Supporting Motion to Compel Discovery--Refuting Claim of Psychotherapist-Patient Privilege [Evid. Code § 1014]--Privilege Inapplicable to Information Relating to Child Abuse and Neglect or Injuries Resulting From Weapons, Assault, or Abuse

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Psychotherapist Privilege Inapplicable to Information Reported Pursuant to Child Abuse and Neglect Reporting Act

[b] Psychotherapist Privilege Inapplicable to Information Reported Relating to Injuries Resulting From Weapons,

Assault, or Abuse

§ 81.145 Supporting Motion to Compel Discovery--Refuting Claim of Psychotherapist-Patient Privilege [Evid. Code § 1014]--Communication Was Not Privileged

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Dominant Purpose of Communication to Psychotherapist Must Be Within Course of Professional Counseling

[4] Additional Authorities

[a] Dominant Purpose of Communication to Psychotherapist Must Be Within Course of Professional Counseling

§§ 81.146-81.149 [Reserved]

§ 81.150 Opposing Motion to Compel Discovery--Psychotherapist-Patient Privilege [Evid. Code § 1014] Applicable--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Uses

[3] Discussion of Authorities

[a] "Confidentiality" Liberally Construed in Favor of Patient

[4] Additional Authorities

[a] "Confidentiality" Liberally Construed in Favor of Patient

[b] Definition of Confidential Communications

§ 81.151 Opposing Motion to Compel Discovery--Psychotherapist-Patient Privilege [Evid. Code § 1014] Applicable--Information Sought Not Within Patient-Litigant Exception [Evid. Code § 1016]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Limitation of Patient-Litigant Exception

[b] Party's Attempt to Invade Privilege Based Only on Speculation

[4] Additional Authorities

[a] Limitation of Patient-Litigant Exception

§ 81.152 Opposing Motion to Compel Discovery--Psychotherapist-Patient Privilege [Evid. Code § 1014] Applicable--Disclosure of Object of Treatment to Avoid Application of Patient-Litigant Exception Is Not Waiver

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Disclosure to Avoid Application of Patient-Litigant Exception Is Not Waiver

§ 81.153 Opposing Motion to Compel Discovery--Psychotherapist-Patient Privilege [Evid. Code § 1014] Applicable--Disclosure of Insignificant Part of Communication Is Not Waiver as to Remainder

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Insignificant Disclosure of Part Is Not Waiver of Confidentiality of Whole Psychotherapist-Patient Communication

[b] Insignificant Disclosure of Existence of Psychotherapist Visits

[c] Insignificant Disclosure of Purpose of Psychotherapeutic Treatment

[4] Additional Authorities

[a] Insignificant Disclosure of Existence of Psychotherapist Visits

[b] Insignificant Disclosure of Purpose of Psychotherapeutic Treatment

§ 81.154 Opposing Motion to Compel Discovery--Psychotherapist-Patient Privilege [Evid. Code § 1014] Applicable--Patient's Signing of General Medical Consent Form Is Not Waiver

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] General Medical Records Consent Is Not Waiver of Psychotherapist-Patient Privilege

§ 81.155 Opposing Motion to Compel Discovery--Psychotherapist-Patient Privilege [Evid. Code § 1014] Applicable--Exchange of Records Between Psychotherapist and Other Treating Professionals Is Not Waiver

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Exchange of Reports Between Healing Professionals Is Not Waiver of Psychotherapist-Patient Privilege

[4] Additional Authorities

[a] Exchange of Reports Between Healing Professionals Is Not Waiver of Psychotherapist-Patient Privilege

§ 81.156 Opposing Motion to Compel Discovery--Psychotherapist-Patient Privilege [Evid. Code § 1014] Applicable--Psychotherapist Is Unable to Waive Privilege by Disclosure Without Patient's Consent

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Psychotherapist Is Unable to Waive Psychotherapist-Patient Privilege Without Patient's Consent

[4] Additional Authorities

[a] Psychotherapist Is Unable to Waive Psychotherapist-Patient Privilege Without Patient's Consent

§ 81.157 Opposing Motion to Compel Discovery--Psychotherapist-Patient Privilege [Evid. Code § 1014] Applicable--Privilege Includes Communications by Patient's Family

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Communications by Patient's Intimate Family Members to Psychotherapists

§ 81.158 Opposing Motion to Compel Discovery--Psychotherapist-Patient Privilege [Evid. Code § 1014] Applicable--Disclosure of Fact of Psychiatric Treatment Is Privileged If Disclosure Would Divulge Nature of Condition for Which Treatment Sought

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Fact of Psychiatric Treatment Is Privileged If Disclosure Would Divulge Condition

[4] Additional Authorities

[a] Fact of Psychiatric Treatment Is Privileged If Disclosure Would Divulge Condition

§ 81.159 Opposing Motion to Compel Discovery--Psychotherapist-Patient Privilege [Evid. Code § 1014] Applicable--Privilege Includes Names, Addresses, and Telephone Numbers of Psychotherapist's Patients

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Identities of Psychotherapist's Patients Are Privileged

[4] Additional Authorities

[a] Identities of Psychotherapist's Patients Are Privileged

§ 81.160 Opposing Motion to Compel Discovery--Psychotherapist-Patient Privilege [Evid. Code § 1014] Applicable--Information Sought Is Not Within Court-Appointed Psychotherapist Exception [Evid. Code § 1017]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Limitation on Court-Appointed Psychotherapist Exception

§§ 81.161-81.179 [Reserved]

§ 81.180 Supporting Motion to Compel Discovery--Refuting Claim of Privilege Not to Disclose Tax Returns

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Uses

[3] Discussion of Authorities

[a] Waiver by Contract

[b] Waiver by Litigation

[c] Proceedings Involving Child, Family, or Spousal Support

[4] Additional Authorities

[a] Proceedings Involving Public Policy Greater Than That of Confidentiality of Tax Returns Involved--Proceedings Involving Child, Family, or Spousal Support

§§ 81.181-81.189 [Reserved]

§ 81.190 Opposing Motion to Compel Discovery--Privilege Not to Disclose Tax Returns

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Uses

[3] Discussion of Authorities

[a] State and Federal Income Tax Returns

[b] Corporate Tax Returns

[c] Partnership Tax Returns

[d] Employment Tax Returns

[e] Estate Tax Returns

[f] W-2 Forms

[g] Sales Tax Returns

[h] Holder of the Privilege

[i] New Spouse May Assert Privilege in Action for Modification of Child Support

[4] Additional Authorities

[a] State and Federal Income Tax Returns

[b] Corporate Tax Returns

§§ 81.191-81.199 [Reserved]

§ 81.200 Supporting Motion to Compel Discovery--Discovery Improperly Resisted on Ground of Work Product Protection [Code Civ. Proc. § 2018.010 et seq.]--Matters Not Protected by Work Product Doctrine

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Nature of Work Product Protection

[d] Protection Limited in Actions Between Attorney and Client

[e] No Work Product Protection May Be Asserted by Attorneys Suspected of Knowingly Participating in Crime or Fraud If Their Services Were Sought to Commit Crime or Fraud

[f] Effect of Civil Discovery Act on Prior Case Law

[g] Claim of Privilege or of Work Product Protection for Electronically Stored Information Produced in Discovery

[3] Discussion of Authorities

[a] Identity of Potential Nonexpert Witnesses

[b] Attorney's Legal Contentions

[c] Facts Relied on to Prove Case

[d] Notes Recording Witness's Statements

[e] Attorney's Notes Made as Business Agent

[f] Events Provable at Trial or Identity and Location of Physical Evidence

[g] Report of Investigator-Witness

§ 81.201 Supporting Motion to Compel Discovery--Discovery Improperly Resisted on Ground of Work Product Protection [Code Civ. Proc. § 2018.010 et seq.]--Material Not Product of Attorney or Attorney's Agents or Employees

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Work Product Required to Be Product of Attorney or Attorney's Agents or Employees

[4] Additional Authorities

[a] Work Product Required to Be Product of Attorney or Attorney's Agents or Employees

§ 81.202 Supporting Motion to Compel Discovery--Discovery Improperly Resisted on Ground of Work Product Protection [Code Civ. Proc. § 2018.010 et seq.]--Opinions and Reports of Experts Discoverable Under Certain Circumstances [Code Civ. Proc. § 2018.030(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Work Product of Experts

[d] Exchange of Expert Witness Lists

[3] Discussion of Authorities

[a] Expert to Be Called as Witness

[b] Discovery of Expert's Opinions When Required by Fairness and Justice

[c] Refusal to Designate Expert as Witness

[d] Expert's Observations Not Communicated to Attorney

[4] Additional Authorities

[a] Expert to Be Called as Witness

§ 81.203 Supporting Motion to Compel Discovery--Discovery Improperly Resisted on Ground of Work Product Protection [Code Civ. Proc. § 2018.010 et seq.]--Overcoming Conditional Protection [Code Civ. Proc. § 2018.030(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Partial Disclosure

[b] Disclosure Necessary to Impeach Credibility of Witness

§ 81.204 Supporting Motion to Compel Discovery--Discovery of Work Product Permissible--Waiver

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Waiver Under Discovery Act

[d] Related Uses

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Waiver of Work Product Protection by Revealing Material for Use by Witness

[b] Waiver by Attorney's Voluntary Disclosure

[c] Voluntary Disclosure by Prior Attorney

[4] Additional Authorities

[a] Waiver by Attorney's Voluntary Disclosure

§ 81.205 Supporting Motion to Compel Discovery--Discovery Improperly Resisted on Ground of Work Product Protection [Code Civ. Proc. § 2018.010 et seq.]--Attorney Is Holder of Privilege

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Attorney Is Holder of Privilege

[4] Additional Authorities

[a] Attorney Is Holder of Privilege

§ 81.206 Supporting Motion to Compel Discovery--Discovery Improperly Resisted on Ground of Work Product Protection [Code Civ. Proc. § 2018.010 et seq.]--Matter Relates to Arbitration of Attorney-Client Fee Dispute [Bus. & Prof. Code § 6202]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

§ 81.207 Supporting Motion to Compel Discovery--Discovery Improperly Resisted on Ground of Work Product Protection [Code Civ. Proc. § 2018.010 et seq.]--Work Product Discoverable in Action by Client [Code Civ. Proc. § 2018.080]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

§ 81.208 Supporting Motion to Compel Discovery--Discovery Improperly Resisted on Ground of Work Product Protection [Code Civ. Proc. § 2018.010 et seq.]--Work Product Discoverable in Official Proceeding When Attorney's Services Were Sought to Aid Commission of Crime or Fraud [Code Civ. Proc. § 2018.050]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Attorney's Right to In Camera Hearing

§§ 81.209-81.219 [Reserved]

§ 81.220 Opposing Motion to Compel Discovery--Work Product Protected From Disclosure [Code Civ. Proc. § 2018.020]--Absolute Protection [Code Civ. Proc. § 2018.030(a)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Discoverability of Work Product

[d] Work Product Protection Not a "Privilege"

[3] Discussion of Authorities

[a] Absolute Work Product Protection

[b] Legal Reasoning Not Discoverable

[4] Additional Authorities

[a] Absolute Work Product Protection

§ 81.221 Opposing Motion to Compel Discovery--Work Product Protected From Disclosure [Code Civ. Proc. § 2018.020]--Absolute Protection [Code Civ. Proc. § 2018.030(a)]--Not Subject to Evid. Code § 956 Commission of Crime or Fraud Exception

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Crime-Fraud Exception Not Applicable to Absolutely Protected Work Product Documents

§ 81.222 Opposing Motion to Compel Discovery--Work Product Protected From Disclosure [Code Civ. Proc. § 2018.020]--Absolute Protection [Code Civ. Proc. § 2018.030(a)]--Nature and Extent of Testimony of Nonexpert Witnesses, Comments on Statements of Nonexpert Witnesses, or Attorney's Legal Reasoning or Theories

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Inquiry Into Expected Testimony of Nonexpert Witnesses

[b] Comments on Statement of Witness by Attorney or Agent

[c] Attorney's Legal Reasoning or Theories

[4] Additional Authorities

[a] Attorney's Legal Reasoning or Theories

§ 81.223 Opposing Motion to Compel Discovery--Work Product Protected From Disclosure [Code Civ. Proc. § 2018.020]--Conditional Protection [Code Civ. Proc. § 2018.030(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Absolute Attorney Work Product Protection

[d] Discovery of Information Concerning Merely Potential Witnesses

[3] Discussion of Authorities

[a] Definition of Work Product

[b] Material Protected as Work Product

[c] Burden on Party Seeking Disclosure

[d] Complete List of Nonexpert Witnesses Who Will Be Called at Trial

[4] Additional Authorities

[a] Conditional Work Product Protection

§ 81.224 Opposing Motion to Compel Discovery--Work Product Protected From Disclosure [Code Civ. Proc. § 2018.020]--Conditional Protection [Code Civ. Proc. § 2018.030(b)]--Protection Against Discovery of Experts

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Good Cause Needed for Discovery of Expert's Opinions

[b] Broad Immunity From Discovery of Expert Witness Information If Expert Not Scheduled to Testify at Trial

[c] Discovery of Percipient, as Opposed to Retained, Experts

[d] Opinions Imparted to Experts

[e] Discovery of Experts Far in Advance of Trial

[f] Services of Expert Rendered in Purely Advisory Capacity

[g] Knowledge or Opinion of Expert Taken off List of Designated Trial Witnesses Before Deposition

[4] Additional Authorities

[a] Broad Immunity From Discovery of Expert Witness Information If Expert Not Scheduled to Testify at Trial

§ 81.225 Opposing Motion to Compel Discovery--Work Product Protected From Disclosure [Code Civ. Proc. § 2018.020]--Protection Not Waived

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Filing and Prosecuting Civil Action

[b] Giving File to Clients

[c] Involuntary Disclosure

[d] Tendering Probable Cause Defense in Malicious Prosecution Action

[e] Tendering Issue of Damages in Legal Malpractice Action

[4] Additional Authorities

[a] No Waiver of Protection if Disclosure Involuntary

§ 81.226 Opposing Motion to Compel Discovery--Work Product Protected From Disclosure [Code Civ. Proc. § 2018.020]--Protection Extends Beyond Termination of Litigation

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Protection Extends Beyond Termination of Litigation

[4] Additional Authorities

[a] Protection Extends Beyond Termination of Litigation

§ 81.227 Opposing Motion to Compel Discovery--Work Product Protected From Disclosure [Code Civ. Proc. § 2018.030(a)]--Client Has Standing to Claim Absolute Work Product Protection of Attorney [Code Civ. Proc. § 2018.030]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Client Has Standing to Claim Absolute Work Product Protection

§§ 81.228-81.239 [Reserved]

§ 81.240 Supporting Motion to Compel Discovery--Refuting Claim of Privacy--General Form--Privacy Must Be Balanced Against Compelling State Interest

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Uses

[3] Discussion of Authorities

[a] Requiring Discovery Despite Right to Privacy

[b] Compelling State Interest in Disclosure

[c] Disclosure of Relevant Matters Essential to Fair Resolution of Lawsuit

[4] Additional Authorities

[a] Requiring Discovery Despite Right to Privacy

[b] Compelling State Interest in Disclosure

[c] Disclosure of Relevant Matters Essential to Fair Resolution of Lawsuit

§ 81.241 Supporting Motion to Compel Discovery--Refuting Claim of Privacy--Narrowly Limited Disclosure Will Not Invade Right of Privacy

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Uses

[3] Discussion of Authorities

[a] Disclosure Permissible When Limited

[b] Disclosure Not Revealing Identity of Nonparties

[c] Disclosure Not Revealing Identity of Authors of Confidential Communications

[4] Additional Authorities

[a] Disclosure Permissible When Limited

§§ 81.242-81.249 [Reserved]

§ 81.250 Opposing Motion to Compel Discovery--Discovery Infringing Right of Privacy Is Improper--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Uses

[3] Discussion of Authorities

[a] Right of Privacy Valid Basis for Refusal to Submit to Discovery

[b] Right of Privacy Precludes Disclosure Even When Inquiry Is Relevant and Not Privileged

[c] Right of Privacy Self-Executing

[d] Burden on Party Seeking Discovery

[e] Broad Discovery May Be Impermissible Even When Compelling State Interest

[f] Broad Discovery May Be Impermissible Even If Waiver of Right to Privacy

[g] Any Required Disclosure Should Be Narrowly Drawn

[4] Additional Authorities

[a] Broad Discovery May Be Impermissible Even When Compelling State Interest

[b] Any Required Disclosure Should Be Narrowly Drawn

[c] Right to Privacy Valid Basis for Refusal to Submit to Discovery

§ 81.251 Opposing Motion to Compel Discovery--Discovery Infringing Right of Privacy Is Improper--Activities and Communications Covered by Right to Privacy

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Uses

[d] Scope of Authority

[3] Discussion of Authorities

[a] Sexual Relationships Within Zone of Privacy

[b] Financial Affairs Within Zone of Privacy

[c] Associational Activity Within Zone of Privacy

[d] Matters Protected by Physician-Patient Privilege Within Zone of Privacy

[e] Confidential Customer List Within Zone of Privacy

[f] Protection of Bank Customers

[g] Matters Protected by Psychotherapist-Patient Privilege Within Zone of Privacy

[h] Disclosure of HIV Positive Status Within Zone of Privacy

[4] Additional Authorities

[a] Sexual Relationships Within Zone of Privacy

[b] Associational Activity Within Zone of Privacy

[c] Matters Protected by Physician-Patient Privilege Within Zone of Privacy

[d] Protection of Bank Customers

[e] Disclosure of HIV Positive Status Within Zone of Privacy

§ 81.252 Opposing Motion to Compel Discovery--Discovery Infringing Right of Privacy Is Improper--Right to Privacy Outweighs Potential Usefulness of Information Sought

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Uses

[3] Discussion of Authorities

[a] Value of Information Highly Speculative

[b] Tenuous Relevance of Information Balanced Against Compelling State Interest Standard

[4] Additional Authorities

[a] Tenuous Relevance of Information Balanced Against Compelling State Interest Standard

§ 81.253 Opposing Motion to Compel Discovery--Discovery Infringing Right of Privacy as Improper--Disclosure Would Infringe Third Persons' Right of Privacy

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Uses

[3] Discussion of Authorities

[a] Burden on Party Seeking Discovery That Might Intrude on Third Parties' Privacy Rights

[b] Narrowly Limited Discovery for Protection of Third Parties

[c] Standing of Custodian of Records to Assert Rights of Third Parties

[d] Third Person Residing With Support-Paying Parent Does Not Waive Right of Privacy of Financial Records

[e] Right of Third Party in Administrative Proceeding to Object to Disclosure of Personal Records

[4] Additional Authorities

[a] Narrowly Limited Discovery for Protection of Third Parties

[b] Standing of Custodian of Records to Assert Rights of Third Parties

§ 81.254 Opposing Motion to Compel Discovery--Discovery Infringing Right of Privacy Is Improper--Right to Privacy in Psychotherapeutic Records Is Not Waived in Personal Injury Lawsuit

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Uses

[3] Discussion of Authorities

[a] Filing of Lawsuit Is Not Waiver of Right to Privacy

[b] Personal Injury Plaintiff With Limited Emotional Distress Claim Does Not Waive Privacy of Psychotherapeutic Records

§§ 81.255-81.269 [Reserved]

§ 81.270 Supporting Motion to Compel Discovery--Refuting Claim of Privilege Against Self-Incrimination [Evid. Code § 940]--Waiver of Privilege

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Privilege Against Self-Incrimination Is Waived With Reference to Factual Issues Tendered by Complaint

[b] Failure to Make Timely Objection Based on Privilege Against Self-Incrimination Serves as Waiver

[4] Additional Authorities

[a] Privilege Against Self-Incrimination Is Waived With Reference to Factual Issues Tendered by Complaint

§ 81.271 Supporting Motion to Compel Discovery--Refuting Claim of Privilege Against Self-Incrimination [Evid. Code § 940]--Insufficient Showing of Incrimination

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Claimant of Privilege Against Self-Incrimination Is Required to Demonstrate That Fear of Incrimination Is Reasonable

[b] Privilege Against Self-Incrimination Is Required to Be Claimed With Specific Reference to Particular Questions Asked or Other Evidence Sought

[4] Additional Authorities

[a] Claimant of Privilege Against Self-Incrimination Is Required to Demonstrate That Fear of Incrimination Is Reasonable

§ 81.272 Supporting Motion to Compel Discovery--Refuting Claim of Privilege Against Self-Incrimination [Evid. Code § 940]--Privilege Covers Only Personal Papers and Effects of Claimant

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Privilege Covers Only Personal Papers and Effects of Claimant

§ 81.273 Supporting Motion to Compel Discovery--Refuting Claim of Privilege Against Self-Incrimination [Evid. Code § 940]--Privilege Does Not Cover Voluntarily Kept Business Records or Records Required to Be Kept by Law

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Privilege Does Not Cover Voluntarily Kept Business Records or Records That Are Required to Be Kept by Law

§ 81.274 Supporting Motion to Compel Discovery--Refuting Claim of Privilege Against Self-Incrimination [Evid. Code § 940]--Witness Subject to Potential Civil, But Not Criminal, Liability

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Privilege Covers Only Matters That Will Subject Witness to Criminal, Not Civil, Liability

§ 81.275 Supporting Motion to Compel Discovery--Refuting Claim of Clergy-Penitent Privilege [Evid. Code § 1032]--Communication Not Within Scope of Privilege

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Privileged Penitential Communications

[b] Privilege Applicable Only to Information Communicated in Confidence

[c] Privilege Applicable Only to Information Communicated to Authorized Clergy Member

[d] Privilege Applicable Only to Information Communicated to Clergy Member With Religious Duty to Keep

Communication Secret

[4] Additional Authorities

[a] Privilege Applicable Only to Information Communicated to Clergy Member With Religious Duty to Keep Communication Secret

§ 81.276 Supporting Motion to Compel Discovery--Discovery of Official Information [Evid. Code § 1040]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Privilege Is Conditional in Absence of Specific Statute or Act Forbidding Disclosure

[4] Additional Authorities

[a] Disclosure of Official Information is Not Prohibited by Act or Statute and Is Not Against Public Interest

[b] Privilege Is Conditional in Absence of Specific Statute or Act Forbidding Disclosure

§ 81.277 Supporting Motion to Compel Discovery--Discovery of Official Information [Evid. Code § 1040]--Discovery of Information Found in Accident Reports

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Information Derived From Accident Reports Is Not Privileged

[b] Information Derived From Reports of Accidents at Same Location Is Discoverable

[4] Additional Authorities

[a] Information Derived From Reports of Accidents at Same Location Is Discoverable

§ 81.278 Supporting Motion to Compel Discovery--Discovery of Official Information [Evid. Code §

1040]--Discovery of Accident Reports

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Accident Reports May Be Discovered by Person With Proper Interest

§ 81.278A Supporting Motion to Compel Discovery--Discovery of Official Information [Evid. Code § 1040]--Discovery of Information Contained in DMV Records Relating to Physical and Mental Condition

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Information in DMV Files Relating to Physical and Mental Condition Is Not Privileged Under Vehicle Code Section 1808.5

[b] Vehicle Code Section 1808.5 Is Not a Statute that Forbids Disclosure of DMV Information Relating to Physical and Mental Condition Under Evidence Code Section 1040(b)(1)

[c] Necessity for Disclosure of DMV Information Relating to Motorist's Physical and Mental Condition Outweighs Public's Interest

§ 81.279 Supporting Motion to Compel Discovery--Refuting Claim of Newsperson's Qualified Privilege to Protect News Source--Existence and Veracity of News Source Placed in Issue by Newsperson

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Newsperson's First-Amendment Privilege Distinguished From Newsperson's Immunity From Contempt

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Newsperson's Qualified Privilege Must Give Way to Interest Favoring Disclosure When Newsperson Has Instituted Action Placing Existence and Veracity of News Source in Issue

§ 81.280 Supporting Motion to Compel Discovery--Discovery of Marital Communication [Evid. Code § 980]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Confidential Marital Communication Privilege Inapplicable to Statements Made While That Relationship Is Being Abused

[b] Privilege Waived by Disclosure

§§ 81.281-81.289 [Reserved]

§ 81.290 Opposing Motion to Compel Discovery--Married Spouse's Privilege Not to Be Called as Witness Against Spouse [Evid. Code § 971]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Refusal to Testify Against One's Spouse

[3] Discussion of Authorities

[a] Spouse's Privilege Not to Be Deposed by Party Who Is Adverse to Other Spouse

§ 81.291 Opposing Motion to Compel Discovery--Confidential Marital Communication Privilege [Evid. Code § 980]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Marital Communications

[3] Discussion of Authorities

[a] Marital Privilege Is Not Restricted to Oral Communications

§ 81.292 Opposing Motion to Compel Discovery--Discovery of Official Information [Evid. Code § 1040(b)(2)]--Discovery of Information in Police Investigative Files Sought in Civil Discovery

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Evidence in Police Investigative Files Is Confidential

[b] Information in Police Investigative Files Sought in Civil Discovery Remains Confidential When Need for Confidentiality Outweighs Benefit of Disclosure

[4] Additional Authorities

[a] Information in Police Investigative Files Sought in Civil Discovery Remains Confidential When Need for Confidentiality Outweighs Benefit of Disclosure

§ 81.293 Opposing Motion to Compel Discovery--Newsperson's Qualified Privilege to Protect News Source Applies

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Newsperson's First-Amendment Privilege Distinguished From Newsperson's Immunity From Contempt

[3] Discussion of Authorities

[a] Newsperson's Qualified Privilege to Protect News Source

[b] Availability of Privilege Depends on Balancing of Relevant Factors in Each Case

[c] Privilege Applies in Libel Action Against Newsperson When Plaintiff Fails to Show That Information Sought Goes to Heart of Claim, That There Are No Alternative Sources, and That Alleged Defamatory Statements Are False

§ 81.294 Opposing Motion to Compel Discovery--Unpublished Information or Source of Nonparty Newsperson Protected From Discovery by Contempt Shield Law [Cal. Const., art. I, § 2(b); Evid. Code § 1070]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Newsperson's Shield Provides Immunity From Contempt

[d] Additional Statutory Protections for Journalists Invoking Shield Law

[e] Relief Inappropriate Until Newsperson Held in Contempt

[3] Discussion of Authorities

[a] Nonconfidential Information Is Within Scope of Shield

[b] Shield Encompasses Source Materials Merely Confirming or Amplifying Published Information

[c] Criminal Defendant Seeking Disclosure of Unpublished Information Must Show Disclosure Will Materially Assist His or Her Defense

[d] Shield is Available to Online Journalists

[4] Additional Authorities

[a] Nonconfidential Information Is Within Scope of Privilege

[b] Shield Encompasses Source Materials Merely Confirming or Amplifying Published Information

§ 81.295 Opposing Motion to Compel Discovery--Discovery of Official Information Prohibited [Evid. Code § 1040]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Disclosure of Hospital Peer Review Records Is Against Public Interest

§ 81.296 Opposing Motion to Compel Discovery--Proceedings and Records of Health Care Committees and Peer Review Committees Protected From Discovery [Evid. Code § 1157]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[4] Additional Authorities

§ 81.297 Opposing Motion to Compel Discovery--Protection of Trade Secret Will Not Work Injustice [Evid. Code § 1060]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Trade Secret Is Protected Even When Relevant or Helpful

[b] Only Trade Secret Information That Is Relevant and Necessary to Material Element of Proof and Essential to Fair Resolution Is Discoverable

[4] Additional Authorities

[a] Only Trade Secret Information That Is Relevant and Necessary to Material Element of Proof and Essential to Fair Resolution Is Discoverable

§§ 81.298-81.329 [Reserved]

§ 81.330 Opposing Motion to Compel Discovery--Discovery of Plaintiff's Sexual Conduct in Action for Sexual Harassment or Assault Is Improper When Good Cause Not Shown [Code Civ. Proc. § 2017.220]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Discovery of Plaintiff's Sexual Conduct Requires Showing of Good Cause and Relevancy

[b] Strong Showing of Good Cause Required

[c] Protection From Discovery Includes Nonconsensual Sexual Conduct

§ 81.331 Opposing Motion to Compel Discovery--Action for Misappropriation of Trade Secret Not Yet Identified [Code Civ. Proc. § 2019.210]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Protection of Trade Secret Not Covered by Privilege

[3] Discussion of Authorities

[a] Plaintiff Required to Identify Trade Secret Prior to Seeking Discovery

[4] Additional Authorities

[a] Plaintiff Required to Identify Trade Secret Prior to Seeking Discovery

§ 81.332 Opposing Motion to Compel Discovery--Information Sought Would Identify Individual Who Is Subject of Blood Test to Detect Antibodies to HIV [Health & Safety Code § 120975]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Information That Would Identify Individual Who Is Subject of Test for AIDS Is Not Discoverable

[4] Additional Authorities

[a] Information That Would Identify Individual Who Is Subject to Test for AIDS Is Not Discoverable

§ 81.333 Opposing Motion to Compel Discovery--Requested Discovery Violates Requirements of International Comity

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Discovery Improper If Violates Requirements of International Comity

[b] Matters Subject to Permissive Judicial Notice

[c] Requirement That Court Take Judicial Notice on Request

§§ 81.334-81.339 [Reserved]

§ 81.340 Supporting Motion for Protective Order--Prohibiting Inquiry Into Defendants' Financial Affairs in Punitive Damages Cases [Civ. Code § 3295(c)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Prohibition on Discovery Into Defendant's Financial Affairs

§ 81.341 Supporting Motion for Protective Order--Presumptive Right Limiting Access to and Use of Financial Information [Cal. Const., art. I, § 1]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Presumptive Right to Protective Order Limiting Access to Financial Information

[b] Mere Failure to Show Annoyance, Embarrassment, or Oppression Does Not Negate Presumption of Right to Protective Order

[c] Right to Protective Order Is Not Waived by Plaintiff's Putting Financial Condition in Issue

[d] Sealing Financial Information

[e] Use of Defendant's Stipulation or Financial Statement in Action Involving Punitive Damages Claim

[f] Access to Financial Information May Be Limited to Discovering Party's Attorney

[4] Additional Authorities

[a] Presumptive Right to Protective Order Limiting Access to Financial Information

§§ 81.342-81.349 [Reserved]

§ 81.350 Opposing Motion for Protective Order--Financial Information Sought Goes to Heart of Punitive Damages Case [Civ. Code § 3295(c)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Civ. Code § 3295 Is Not Applicable When Financial Information Sought Goes to Heart of Cause of Action

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8-81 California Points & Authorities § 81.01

§ 81.01 Scope of Chapter

This chapter includes memoranda relating to the effect on civil discovery of evidentiary privileges and other provisions limiting or protecting against disclosure.

Subpart A of Part II includes memoranda relating to the general objection that matter sought to be discovered is privileged and therefore beyond the proper scope of discovery [§ 81.10 et seq.].

Subpart B of Part II includes memoranda opposing or supporting a motion to compel discovery on the ground that matter sought to be discovery is subject to the attorney-client privilege set out in *Evid. Code § 950 et seq.* [§ 81.60 et seq.].

Subpart C of Part II includes memoranda opposing or supporting a motion to compel discovery on the ground that matter sought to be discovery is subject to the physician-patient privilege set out in *Evid. Code § 990 et seq.* [§ 81.110 et seq.].

Subpart D of Part II includes memoranda opposing or supporting a motion to compel discovery on the ground that matter sought to be discovery is subject to the psychotherapist-patient privilege set out in *Evid. Code § 1010 et seq.* [§ 81.140 et seq.].

Subpart E of Part II includes memoranda opposing or supporting a motion to compel discovery on the ground tax returns are subject to protections from disclosure derived from provisions governing such returns (*e.g., Rev. & Tax. Code §§ 19542* (income taxes), and 7056 (sales taxes)) [§ 81.180 et seq.].

Subpart F of Part II includes memoranda opposing or supporting a motion to compel discovery on the ground that matter sought to be discovery is attorney work product protected from disclosure under *Code Civ. Proc. § 2018.010 et seq.* [§ 81.200 et seq.].

Subpart G of Part II includes memoranda opposing or supporting a motion to compel discovery on the ground that matter sought to be discovery is protected against disclosure by the right to privacy embodied in *Cal. Const., art. I, § 1*

[§ 81.240 et seq.].

Subpart H of Part II includes memoranda opposing or supporting a motion to compel discovery on the ground that matter sought to be discovery is subject to one of the privileges set out in the Evidence Code not otherwise covered in Parts B-D [§ 81.270 et seq.].

Subpart I of Part II includes memoranda opposing or supporting a motion to compel discovery on the ground that matter sought to be discovery is protected by one of a number of miscellaneous statutory protections both within and outside the Discovery Act (*Code Civ. Proc. § 2016.010 et seq.*) [§ 81.330 et seq.].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMotions to CompelCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewEvidencePrivilegesDoctor-Patient PrivilegeGeneral OverviewEvidencePrivilegesPsychotherapist-Patient PrivilegeGeneral Overview

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8-81 California Points & Authorities § 81.02

§ 81.02 Governing Law

[1] California Civil Discovery Act and Related Law

Civil discovery in California is governed primarily by the California Civil Discovery Act, codified at *Code Civ. Proc. §§ 2016.010-2036.050*. Discovery in limited civil cases is further governed by *Code Civ. Proc. §§ 94* and *95*. Statewide rules of court relating to discovery papers and discovery motions are set out in *Cal. Rules of Ct., Rules 3.1000*, 3.1345, 3.1346, 3.1347, and 3.1348.

[2] Evidentiary Privileges and Other Provisions Limiting Discovery

Code Civ. Proc. § 2017.010 limits discovery generally to matters that are relevant and "not privileged."

Evidentiary privileges are governed by *Evid. Code §§ 900-1070*. The constitutional right to privacy, which is applicable in some instances to limit discovery, is set out in *Cal. Const., art. I, § 1*.

Other provisions, both within and outside the Discovery Act, which operate to limit discovery or protect against disclosure in particular situations include, but are not limited to, the following:

- *Code Civ. Proc. § 2018.010 et seq.*, which sets out the protections against disclosure of an attorney's work product.

- *Code Civ. Proc. § 2017.210*, detailing discovery relating to insurance coverage.

- *Code Civ. Proc. § 2017.220*, providing protections against discovery relating to a defendant's sexual conduct.

- *Rev. & Tax. Code §§ 19542* (income taxes), and *7056* (sales taxes), and *Unemp. Ins. Code §§ 1094, 2111* (employment taxes), which protect against disclosure of tax returns.

- *Rev. & Tax. Code §§ 7099.1, 21028* and *Unemp. Ins. Code § 13019*, which extend the attorney-client

privilege to communications between a federally authorized tax practitioner (accountant, enrolled agent, or enrolled actuary) regarding tax advice.

- *Civ. Code § 3295*, which provides for the issuance of a protective order limiting discovery of a defendant's financial affairs in an action involving a claim for punitive damages.

[3] Case Law Decided Under Prior Discovery Acts

The Civil Discovery Act was passed in 2004 and became effective July 1, 2005.It repealed and renumbered the Civil Discovery Act of 1986 but did not substantively change the law of civil discovery [Stats. 2004, ch. 182 §§ 22, 23, 61]. Thus cases decided under the 1986 Act remain controlling authority. A considerable body of case law interpreted the discovery provisions of the Discovery Act of 1956 (former Code Civ. Proc. §§ 2016-2037.9), which preceded the 1986 Act. Although the 1986 Act, which became operative July 1, 1987, implemented numerous changes in the prior law, it also continued provisions of the prior law in many other instances, or even codified decisions interpreting the prior law. Decisions construing this prior law are therefore cited as persuasive, rather than controlling, authority to the extent that they are consistent with current provisions [*see In re Marriage of Skelley (1976) 18 Cal. 3d 365, 369, 134 Cal. Rptr. 197, 556 P.2d 297]* .

[4] Federal Authorities

When the 1957 Discovery Act became operative [*see § 81.02[3]*], its provisions were an adaptation of the existing federal rules relating to discovery. The 1957 Act was intended to broaden discovery procedures in California so that they would be comparable to those in the federal courts [*see* Report of the Committee on Administration of Justice, 31 Cal. St. B.J., *Discovery*, 204-231 (1956); *Kahn v. Kahn (1977) 68 Cal. App. 3d 372, 384, 137 Cal. Rptr. 332]* . Federal cases, therefore, were frequently considered as authority in certain situations for the interpretation of California discovery statutes [*see, e.g., Gorman Rupp Indus., Inc. v. Superior Court (1971) 20 Cal. App. 3d 28, 30, 97 Cal. Rptr. 377*].

Federal cases are now less useful, however, as persuasive authority for interpreting California's discovery provisions. With the revision of the Discovery Act in 1986 and with changes in the federal rules relating to discovery [*Fed. R. Civ. P., Rules 26-37*], there is more disparity between the state and federal provisions. State appellate courts have also developed an extensive body of law construing the 1986 Discovery Act and related state provisions. Authorities cited in this and subsequent chapters on civil discovery are therefore almost exclusively state court decisions. Counsel with novel questions of law, however, may consider seeking federal authorities in support of their arguments, when the federal rules are substantially similar to the California statute to be construed [*see* Moore's Federal Practice, Ch. 26, *General Provisions Governing Discovery; Duty of Disclosure* ; Ch. 27, *Depositions or Other Discovery Before Action or Pending Appeal* ; Ch. 28, *Persons Before Whom Depositions May Be Taken* ; Ch. 29, *Stipulations Regarding Discovery Procedure* ; Ch. 30, *Depositions Upon Oral Examination* ; Ch. 31, *Depositions Upon Written Questions* ; Ch. 32, *Use of Depositions in Court Proceedings* ; Ch. 33, *Interrogatories to Parties* ; Ch. 34, *Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes*; Ch. 35, *Physical and Mental Examinations of Persons*; Ch. 36, *Requests for Admission*; Ch. 37, *Failure to Make Disclosure or Cooperate in Discovery: Sanctions*; Ch. 37A, *Discovery of Computer-Based Information* (Matthew Bender)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryPrivileged MattersGeneral OverviewConstitutional LawSubstantive Due ProcessPrivacyGeneral OverviewEvidencePrivilegesAccountant-Client PrivilegeGeneral OverviewEvidencePrivilegesAttorney-Client PrivilegeGeneral OverviewTax LawState & Local TaxesAdministration & ProceedingsGeneral Overview

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8-81 California Points & Authorities § 81.03

§ 81.03 How to Use the Forms in This Chapter

[1] Page Limits on Memoranda

One of the more significant drafting requirements to keep in mind are page limits: supporting and opposing memoranda filed in discovery motion proceedings may not exceed 15 pages. A reply or closing memorandum may not exceed 10 pages. Exhibits, declarations, attachments, the table of contents, the table of authorities, and the proof of service are excluded from these page limits. Any party must obtain leave of court to file a longer memorandum [*see Cal. Rules of Ct., Rule 3.1113(d)*]. These and other drafting requirements are discussed in further detail in Ch. 1, *Writing Legal Memoranda and Briefs* .

[2] Using the Forms to Build a Draft Memorandum

The forms included in this chapter are designed to be included in a memorandum supporting or opposing a motion to compel discovery.

In many cases it will be appropriate to combine them with additional memoranda set out in the related discovery chapters, Chapters 80 and 82 through 89A. For example, they may be combined with memoranda supporting or opposing a motion to compel discovery in the context of a particular discovery method [*see, e.g., Ch. 83, Discovery: Depositions, § 83.30* et seq. (supporting and opposing motion to compel in context of deposition)].

It may also be appropriate to modify the memorandum for use in another procedural context. For example, a memorandum designed to oppose a motion to compel may in an appropriate case be modified for use in supporting a motion for protective order.

For a detailed discussion on how to select and use the forms in the publication to build a draft memorandum and complete the draft, with detailed discussion of all drafting requirements and strategic or stylistic considerations, see Ch. 1, *Writing Legal Memoranda and Briefs* . For a skeletal form of memorandum for use in creating a properly formatted outline in which to compile relevant forms from this publication, see also Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting Memoranda

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8-81 California Points & Authorities § 81.04

§ 81.04 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

For detailed discussion and forms relating to privileges and other protections against disclosure, see California Forms of Pleading and Practice, Ch. 191, *Discovery: Privileges and Other Discovery Limitations* (Matthew Bender).

[2] Related Points and Authorities Chapters

For memoranda supporting or opposing a motion to compel discovery based on a general objection of relevancy, see Ch. 80, *Discovery: Scope, Regulation, and Timing* .

For memoranda supporting or opposing a motion to compel discovery in the context of a particular discovery method, see Ch. 83, *Discovery: Depositions* , through Ch. 88, *Discovery: Exchange of Expert Witness Information* .

For memoranda for use in seeking or opposing writs to review discovery orders, see Ch. 89A, *Discovery: Review of Discovery Orders* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsExpert Witness DiscoveryCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMotions to CompelCivil ProcedureDiscoveryRelevanceCivil ProcedureRemediesWritsCommon Law WritsGeneral Overview

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[Reserved]

§§ 81.05[Reserved]

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PART II. FORMS
A. General Objections Based on Privilege

8-81 California Points & Authorities § 81.10

§ 81.10 Supporting Motion to Compel Discovery--Refuting Claim of Privilege--General Form

[1] FORM

[*The following may be combined, when appropriate, with a general memorandum in support of a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11).*]

PRIVILEGE STATUTES ARE STRICTLY CONSTRUED, WITH THE BURDEN OF SHOWING THAT MATERIAL IS PRIVILEGED ON THE ONE ASSERTING THE PRIVILEGE.

A. Burden of Showing Privilege. When there is a prima facie showing of relevance, the party opposing disclosure on the basis of a privilege bears the burden of establishing application of the privilege (*Gonzalez v. Superior Court (1995) 33 Cal. App. 4th 1539, 1548, 39 Cal. Rptr. 2d 896* ; *see Greyhound Corp. v. Superior Court (1961) 56 Cal. 2d 355, 398, 15 Cal. Rptr. 90, 364 P.2d 266*).

B. Strict Construction of Privileges. Privilege statutes are required to be narrowly construed, while discovery statutes must be liberally construed (*Greyhound Corp. v. Superior Court (1961) 56 Cal. 2d 355, 377, 396, 397, 15 Cal. Rptr. 90, 364 P.2d 266*).

C. No Implied Exceptions to Evidence Code Privileges. The Legislature has determined that evidentiary privileges are available only as defined by statute (*Schnabel v. Superior Court (1993) 5 Cal. 4th 704, 711-712, 21 Cal. Rptr. 2d 200, 854 P.2d 1117* ; *see Evid. Code § 911*). The courts may not add to the statutory privileges except as required by state or federal constitutional law, and the courts may not imply unwritten exceptions to existing statutory privileges (*Roberts v. City of Palmdale (1993) 5 Cal. 4th 363, 373, 20 Cal. Rptr. 2d 330, 853 P.2d 496*).

[*Add specific memorandum relating to the particular privileges and fact situations in question.*]

[2] Comments

[a] Use of Form

This memorandum may be used in support of a motion for an order compelling discovery if a party or other person has resisted providing discovery on the ground that the material sought is privileged. It does not provide a complete memorandum but is designed to be combined with a general memorandum in support of compelling discovery, as well as memoranda relating to the particular privilege and fact situation in question.

If electronically stored information produced in discovery is subject to a claim of privilege, and the receiving party contests the legitimacy of that claim, he or she may seek a determination of the claim from the court by making a motion within 30 days of receiving the claim and presenting the information to the court conditionally under seal [*Code Civ. Proc. § 2031.285(d)(1)*]. For further discussion of claims of privilege or work product protection for electronically stored information produced in discovery, see California Forms of Pleading and Practice, Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)* (Matthew Bender); see also Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, *Ch. 3, Ethical Issues for Attorneys in E-Discovery*, §§ 3.14, 3.15; Ch. 9, *Gathering and Producing Electronically Stored Information*, § 9.36 et seq. (privilege review); Ch. 10, *Opposing Demands for Production of Electronic Evidence in California Court*, § 10.14.

Note that some cases cited in this form construe law in effect before the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that remain consistent with current provisions [*see also § 81.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[c] Related Uses

This memorandum may be combined with a general memorandum opposing a motion for a protective order brought in the context of a particular discovery method [*see, e.g., Ch. 83, Discovery: Depositions, § 83.100* (in context of oral depositions)], when the protective order is being sought on the ground that the material is privileged. In such situations, this form should be combined with memoranda relating to the particular privilege and fact situation as well.

[d] Opposing Points and Authorities

In an appropriate case, the memorandum set out in *§ 81.20* may be used to oppose the motion supported by this memorandum.

[3] Discussion of Authorities

[a] Burden of Showing Privilege

Gonzalez v. Superior Court *(1995) 33 Cal. App. 4th 1539, 39 Cal. Rptr. 2d 896* was a sexual harassment case based on the display of photographs of a seminude female in a men's locker room of a police station, in which the plaintiff's assistant obtained the photographs for the plaintiff, a female police radio dispatcher. Defendants served interrogatories on plaintiff, asking in part for the identity of the assistant who obtained the photographs. Plaintiff refused to reveal the identity of the assistant because she feared the information might lead to retaliation against the assistant. Defendants moved to compel an answer, and the trial court granted the motion.

The court of appeal affirmed because the plaintiff failed to show that retaliation was more than speculative, and the assistant was not a whistle-blower. However, the court held that, even if the assistant was a whistle-blower, there is no whistle-blower's privilege. The court held that when there is a prima facie showing of relevance, the party opposing

disclosure on the basis of a privilege bears the burden of establishing the preliminary facts essential to the privilege claim. Here, the relevancy of the assistant's identity was clear, and no recognized privilege applied to the case (*33 Cal. App. 4th 1539, 1546-1550)* .

In ***Greyhound Corp. v. Superior Court*** *(1961) 56 Cal. 2d 355, 15 Cal. Rptr. 90, 364 P.2d 266* , the Supreme Court granted an alternative writ of prohibition to review an order for discovery made pursuant to plaintiff's motion under a former version of Code Civ. Proc. § 2031.010 et seq. for an order requiring defendant to produce and permit inspection of certain documents. The former version of Code Civ. Proc. § 2031.010 was amended in 1974 to permit inspection by request and in 1986 to provide for inspection by demand. However, under current law as well as prior law, the discovery of documents is limited to those that are not privileged [*Code Civ. Proc. § 2031.010(a)*; *see Code Civ. Proc. § 2017.010*].

In evaluating the defendant's claim that the requested statement of independent witnesses could not be compelled on the ground that such statements came within the attorney-client privilege existing at that time under former Code Civ. Proc. § 1881(2) [*see now Evid. Code §§ 950-962*], the Court relied on *Chronicle Pub. Co. v. Superior Court (1960) 54 Cal. 2d 548, 565, 7 Cal. Rptr. 109, 354 P.2d 637* , for the rule that the burden of establishing that the material is within the terms of the statute providing the privilege is on the party claiming the privilege (*56 Cal. 2d 355, 398*). The Court then went on to decide that the material was not privileged under the attorney-client privilege (*56 Cal. 2d 355, 399*) [*see also Mize v. Atchison, T. & S.F. Ry. Co. (1975) 46 Cal. App. 3d 436, 447, 120 Cal. Rptr. 787*].

[b] Strict Construction of Privileges

Greyhound Corp. v. Superior Court *(1961) 56 Cal. 2d 355, 15 Cal. Rptr. 90, 364 P.2d 266* is discussed in *§ 81.10[3][a]*. In discussing the discovery statutes, generally, the Court stated that in order to accomplish the legislative purposes of those statutes, they must be construed liberally in favor of disclosure unless the request is clearly improper by virtue of well-established causes for denial (*56 Cal. 2d 355, 377*). Later in its opinion,the Court discussed the attorney-client privilege, which is obviously a well-established cause for denial of discovery, and stated that because the privilege tends to suppress otherwise relevant facts, it must be strictly construed (*56 Cal. 2d 355, 396*). Since other privileges also tend to suppress otherwise relevant facts, this rule of strict construction appears to apply to them as well.

[c] No Implied Exceptions to Evidence Code Privileges

In ***Schnabel v. Superior Court*** *(1993) 5 Cal. 4th 704, 21 Cal. Rptr. 2d 200, 854 P.2d 1117* , the Supreme Court noted that the privileges contained in the Evidence Code are exclusive, and that the courts may not create new privileges as a matter of judicial policy (*5 Cal. 4th 704, 711-712*). The Legislature has determined that evidentiary privileges shall be available only as defined by statute [*Evid. Code § 911*]. As a result, the Supreme Court held in ***Roberts v. City of Palmdale*** *(1993) 5 Cal. 4th 363, 20 Cal. Rptr. 2d 330, 853 P.2d 496* , that the courts may not add to the statutory privileges except as required by state or federal constitutional law, and the courts may not imply unwritten exceptions to existing statutory privileges (*5 Cal. 4th 363, 373*). For further discussion of *Schnabel,* see *§ 81.180[3][c]*. For further discussion of *Roberts,* see *§ 81.81[3][a]*.

[4] Additional Authorities

[a] Burden of Showing Privilege

In the case underlying *Kirkland v. Superior Court (2002) 95 Cal. App. 4th 92, 115 Cal. Rptr. 2d 279* , plaintiff corporation sued defendant broker for damages for fraud and other civil wrongs. Plaintiff demanded production of documents and transcripts of testimony related to a Securities and Exchange Commission (SEC) investigation of defendant. Defendant admitted that he had copies of the transcripts and documents but refused to produce them. He claimed the request was vague, ambiguous, overbroad, oppressive, burdensome, irrelevant, and not likely to lead to the discovery of admissible evidence, and that it called for the production of "confidential documents relating to a private

SEC investigation." The discovery referee found that plaintiff had established good cause for the production of the SEC materials, that its discovery requests are clear and unambiguous, that defendant's claims of confidentiality and privacy were not supported by California law, and that the requested testimony and documents about the SEC transactions were relevant. The trial court adopted the referee's recommendations and ordered defendant to produce the documents and transcripts. At a further hearing held before the referee, defendant conceded the relevance of the SEC testimony relating to certain transactions and agreed to produce that testimony and related documents (*95 Cal. App. 4th 92, 95-96*). However, defendant argued that he was entitled to withholdpersonal financial material belonging to third parties, even though the information had been produced to the SEC in connection with his testimony (*95 Cal. App. 4th 92, 96*). The trial court disagreed and, once again, ordered defendant to produce the documents and transcripts. Defendant filed a petition for writ of mandate, seeking relief from the discovery order. The appellate court held that transcripts of testimony given before the SEC in the course of an investigation are discoverable in civil litigation when, as here, the party from whom discovery is sought has possession of, or ready access, to the documents and transcripts (*95 Cal. App. 4th 92, 94)* .

The court of appeal rejected defendant's contention that documents and transcripts related "to a private and confidential SEC investigation" should be deemed non-public because an investigation might not necessarily reveal any misconduct on the part of the subject of the investigation. The appellate court held that all doubts about discoverability were resolved in favor of disclosure (*95 Cal. App. 4th 92, 97*). Further, the court found the requested material relevant because it bore on defendant's intent and motives (*95 Cal. App. 4th 92, 97-98*). Ample good cause for the production of the SEC documents had also been shown. Once good cause was shown, the burden shifted to plaintiff to justify his objection (*95 Cal. App. 4th 92, 98*). Defendant produced no evidence to support his claim that he (or any witness) actually believed the SEC investigation was private or confidential (*95 Cal. App. 4th 92, 98-99*). In fact, witnesses who testify or produce documents to the SEC generally have the right to obtain copies of the transcripts of their testimony and documents, and when they have done so (as had defendant), there is no cognizable claim of confidentiality or privacy in those documents or transcripts. Moreover, to the extent there was a privilege, it belonged to the SEC, not the witness. Finally, it was not unduly burdensome to require witnesses in SEC investigations to obtain and produce copies of their own testimony and documents (*95 Cal. App. 4th 92, 99*).

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8-81 California Points & Authorities §§ 81.11-81.19

[Reserved]

§§ 81.11[Reserved]

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CHAPTER 81 DISCOVERY: PRIVILEGES AND OTHER DISCOVERY LIMITATIONS
PART II. FORMS
A. General Objections Based on Privilege

8-81 California Points & Authorities § 81.20

§ 81.20 Opposing Motion to Compel Discovery--Privileged Material Not Discoverable--General Form

[1] FORM

[*The following may be combined, when appropriate, with a general memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30).*]

PRIVILEGED MATERIAL IS NOT DISCOVERABLE.

Privileged Material Not Discoverable. Discovery may pertain only to unprivileged matters (*Code Civ. Proc. § 2017.010*). There can be no discovery of matter that is privileged (*Rudnick v. Superior Court (1974) 11 Cal. 3d 924, 929, 114 Cal. Rptr. 603, 523 P.2d 643* ; *Greyhound Corp. v. Superior Court (1961) 56 Cal. 2d 355, 395, 15 Cal. Rptr. 90, 364 P.2d 266*).

[*Add specific memoranda relating to the particular privileges and fact situations in question.*]

[2] Comments

[a] Use of Form

This memorandum in opposition to a motion for an order compelling discovery may be submitted by a party or other person who has resisted providing discovery on the ground that the information sought is privileged. It does not provide a complete memorandum but is designed to be combined with a general memorandum in opposition to compelling discovery, as well as memoranda relating to the particular privilege and fact situation in question.

In an appropriate case, this memorandum may be submitted in opposition to the motion supported by the memorandum in *§ 81.10*.

Note that cases cited in this form construe law in effect before the operative date of the Civil Discovery Act. They are

cited and discussed as persuasive authority to the extent that remain consistent with current provisions [*see also § 81.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[c] Related Uses

This memorandum may be combined with a general memorandum supporting a motion for a protective order brought in the context of a particular discovery method [*see, e.g., Ch. 83, Discovery: Depositions, § 83.80* (in context of oral depositions)], when the protective order is being sought on the ground that the material is privileged. In such situations, this form should be combined with memoranda relating to the particular privilege and fact situation as well.

[3] Discussion of Authorities

[a] Privileged Material Not Discoverable

Code Civ. Proc. § 2017.010 limits the discovery to matters that are not privileged. This provision applies generally to all methods of discovery. Furthermore, various statutes relating to specific discovery methods incorporate the provisions of *Code Civ. Proc. § 2017.010* [*see, e.g., Code Civ. Proc. §§ 2025.010* (depositions), *2030.010* (interrogatories), *2031.010(a)* (inspecting, copying, testing, or sampling documents, tangible things, land or other property, and electronically stored information)].

In ***Rudnick v. Superior Court*** *(1974) 11 Cal. 3d 924, 114 Cal. Rptr. 603, 523 P.2d 643* , plaintiff brought an action for damages for personal injuries allegedly sustained when she used a medication manufactured by defendants. At the deposition of their custodian of records, defendants refused to produce records as requested by plaintiff in the notice of deposition. The records contained adverse drug reaction reports made by doctors, and defendants claimed that the reports were confidential communications and that production of the reports would violate the physician-patient privilege of the patients who had experienced the adverse drug reactions. The trial court granted plaintiff's motion to compel production of the reports only in regard to the names and addresses of the doctors who made the reports. Plaintiff filed a petition for a writ of mandate in the court of appeal, and the court summarily denied the petition.

The Supreme Court granted a hearing and issued an alternative writ of mandate so it could consider the question of whether a third-party recipient of confidential information may assert the physician-patient privilege [*see § 81.122*]. In deciding this question, the Court restated the basic principle set forth in *Greyhound, above,* that there can be no discovery of matter that is privileged (*11 Cal. 3d 924, 929)* . The Court went on to discuss the question of when the physician-patient privilege may be claimed on behalf of a patient, and returned the case to the trial court for a determination of whether defendants could claim that the reports were protected from disclosure by the physician-patient privilege.

Greyhound Corp. v. Superior Court *(1961) 56 Cal. 2d 355, 15 Cal. Rptr. 90, 364 P.2d 266* is discussed in *§ 81.10[3][a]*. Although inspection is limited to matters that are not privileged (*56 Cal. 2d 355, 395*), the Court in *Greyhound* found that the trial court was justified in requiring defendant to disclose the statements in question because they were not privileged (*56 Cal. 2d 355, 399-402*).

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8-81 California Points & Authorities §§ 81.21-81.59

[Reserved]

§§ 81.21[Reserved]

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CHAPTER 81 DISCOVERY: PRIVILEGES AND OTHER DISCOVERY LIMITATIONS
PART II. FORMS
B. Attorney-Client Privilege

8-81 California Points & Authorities § 81.60

§ 81.60 Supporting Motion to Compel Discovery--Refuting Claim of Lawyer-Client Privilege [Evid. Code § 954]--Client's Communication to Lawyer Not Privileged When Not Intended to Be Confidential

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in support of a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11), as well as with points and authorities generally refuting a claim of privilege (see, e.g., § 81.10).*]

THE LAWYER-CLIENT PRIVILEGE CANNOT BE INVOKED WHEN THE CLIENT'S COMMUNICATION WAS NOT INTENDED TO BE CONFIDENTIAL.

A. Privilege Applicable Only to Information Communicated in Confidence. The lawyer-client privilege applies only to information communicated "in confidence" between a client and his or her lawyer. The privilege cannot be invoked when the client's communication was not intended to be confidential (*Evid. Code § 952*; *Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs. (1968) 263 Cal. App. 2d 41, 51, 69 Cal. Rptr. 480*).

[*Optional*] **B. Privilege Inapplicable When Disclosure Made for Purpose of Communication to Another.** The objection that a statement is protected by the lawyer-client privilege cannot be asserted when the disclosure by the client to the lawyer was made for the purpose of communication to another (*Solon v. Lichtenstein (1952) 39 Cal. 2d 75, 79, 244 P.2d 907* ; *Klang v. Shell Oil Co. (1971) 17 Cal. App. 3d 933, 938, 95 Cal. Rptr. 265*).

[2] Comments

[a] Use of Form

This memorandum may be used in support of a motion for an order compelling discovery if a party or other person has resisted providing discovery on the ground that the information sought is a privileged communication between lawyer and client but in fact the communication was notintended to be confidential. It does not provide a complete

memorandum but is designed to be combined with a general form of memorandum in support of compelling discovery, as well as a form refuting a claim of privilege generally. Optional Paragraph B may be used in those cases in which the facts indicate that the communication from the client to his or her attorney was made for the purpose of communication to another person.

Counsel who wish to set out general points relating to the attorney-client privilege as well may adapt the points and authorities in opposition to a motion to compel discovery *set out in § 81.80* and combine them with this form. For forms relating to waiver of the privilege, see *§§ 81.65 -81.67*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Privilege Applicable Only to Information Communicated in Confidence

Evid. Code § 952 provides, in part, that a confidential communication between client and lawyer, for the purposes of the privilege, means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence.

In ***Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs.*** *(1968) 263 Cal. App. 2d 41, 69 Cal. Rptr. 480* , plaintiff brought an action premised on asserted violations of California's public meeting law, the Brown Act [*Gov. Code § 54950 et seq.*]. The occasion for the lawsuit was a luncheon attended by the five county supervisors, the county counsel, county executive, county director of welfare, and several members of a labor union council at which the topic of discussion was a strike of a union against the county. Newspaper reporters sought, but were denied, admission to the gathering. At the behest of plaintiff, the trial court issued a preliminary injunction restraining the board of supervisors from holding any closed meeting at which three or more members were present, except under certain statutory exceptions. On appeal from the order granting the preliminary injunction, defendants contended that the injunction was too broad because the meeting was not within the scope of the Brown Act and was a lawful exercise of the lawyer-client privilege existing between the supervisors and the county counsel, as their attorney.

The court of appeal, in denying the claim of privilege under *Evid. Code § 952*, relied on the testimony of the supervisors that they had said nothing to the county counsel in confidence, did not claim attendance at the luncheon for the purpose of getting the county counsel's legal advice, and didnot claim receiving any. Nor did the record reveal any communication passing between the supervisors and their attorney at the luncheon. The court concluded that *Evid. Code § 952* confers the privilege only on information communicated "in confidence" to a lawyer and on advice given by a lawyer, and that any communications by the supervisors at the luncheon to the county counsel were not intended to be confidential (*263 Cal. App. 2d 41, 51*). Thus, the luncheon meeting was in violation of the Brown Act (*263 Cal. App. 2d 41, 51-52*). The court noted that California decisional law assumes without discussion that the privilege is just as available to public agency clients and their lawyers as to their private counterparts (*263 Cal. App. 2d 41, 53*).

The court in *Sacramento Newspaper Guild,* in addition to relying on *Evid. Code § 952*, cited as authority *San Francisco v. Superior Court of San Francisco, (1951) 37 Cal. 2d 227, 234235, 231 P.2d 26* . In that personal injury action, a physician who had examined the plaintiff at the request of the latter's attorneys in preparation for the lawsuit refused to answer certain deposition questions regarding the plaintiff's condition on the grounds that, inter alia, he was an intermediate agent for communication between plaintiff and his attorneys and therefore the information was privileged. The defendant sought a writ of mandamus to compel the trial court to order the doctor to answer the questions, which was denied by the Supreme Court. In discussing the attorney-client privilege, the Court reiterated that the privilege cannot be invoked unless the client intended the communication to be confidential (*37 Cal. 2d 227,*

234-235).

Although *City & County of San Francisco* was decided under former Code Civ. Proc. § 1881(2), and the attorney-client privilege is now governed by *Evid. Code §§ 950-962*, the rule that the privilege cannot be invoked unless the client intended the communication to be confidential is nevertheless still effective in interpreting the Evidence Code privilege, and it has been relied on in cases such as *Sacramento Newspaper Guild, above.*

[b] Privilege Inapplicable When Disclosure Made for Purpose of Communication to Another

In ***Solon v. Lichtenstein*** *(1952) 39 Cal. 2d 75, 244 P.2d 907* , plaintiff brought an action to establish a constructive trust in certain personal property that defendant held in joint tenancy with her deceased father. The trial court granted defendant's motion for a nonsuit, and on appeal, plaintiff contended, inter alia, that the trial court erred in excluding certain testimony on the theory that it constituted a privileged communication under the attorney-client privilege of former Code Civ. Proc. § 1881(2). The testimony excluded was the deposition of an attorney to the effect that the decedent had asked him to see if the plaintiff would agree to care for certain cemetery lots in Chicago in exchange for the decedent's transferring those lots to her. The attorney communicated decedent's request to plaintiff, whoagreed to the plan. The Supreme Court concluded that the trial court had erred in applying the attorney-client privilege to the attorney's deposition because the decedent had intended his instructions with regard to the cemetery lots to be conveyed by the attorney to the plaintiff, stating that the objection of a privileged statement cannot be asserted when the disclosure was made for the purpose of communication to another (*39 Cal. 2d 75, 79*).

In ***Klang v. Shell Oil Co.*** *(1971) 17 Cal. App. 3d 933, 95 Cal. Rptr. 265* , a personal injury action, plaintiff's former attorney had given a statement, which was very damaging to plaintiff, to a police officer regarding the automobile accident that was the subject of the case. At trial, plaintiff sought to exclude the statement on the ground that it had been a confidential communication between him and his attorney, but the trial court ordered the statement admitted in evidence. On appeal from a judgment entered on a defense verdict, plaintiff contended, inter alia, that the trial court had erred in admitting the statement. The court of appeal affirmed the judgment, holding that the record supported the inference that the attorney had disclosed the information about the accident to the officer with the plaintiff's consent to prevent plaintiff from being charged with a traffic violation. The court stated that the attorney-client privilege is lost when the attorney, with the consent of the client, discloses the content of an otherwise privileged communication other than in confidence, citing *Solon* as authority. The court also held that the fact of the client's consent may be inferred from other evidence, as for example the disclosure for the client's benefit in negotiations on his behalf (*17 Cal. App. 3d 933, 938*).

Although *Solon* was decided under former Code Civ. Proc. § 1881(2), and the attorney-client privilege is now governed by *Evid. Code §§ 950-962*, *Solon* was used by the court in *Klang* to interpret the Evidence Code privilege and is therefore good authority for such an interpretation.

[4] Additional Authorities

[a] Privilege Applicable Only to Information Communicated in Confidence

Stockton Newspapers, Inc. v. Redevelopment Agency (1985) 171 Cal. App. 3d 95, 214 Cal. Rptr. 561 involved an action for injunctive and declaratory relief concerning the violation of the notice and open-meeting requirements of the Brown Act (*Gov. Code § 54950 et seq.*). The court of appeal, in reversing a judgment on the pleadings in defendants' favor, held that allegations in the complaint of telephone conversations between defendant agency members and agency counsel were not privileged under *Evid. Code §§ 950-962*, but constituted a meeting within the meaning of the Brown Act. The complaint did not indicate that the conversations involved legal consultation regarding a lawsuit, or that they were otherwise a genuine occasion forattorney-client confidentiality; it alleged that they had the single purpose of taking legislative action in a manner calculated to evade the Brown Act. The complaint therefore stated a cause of

action and reversal of the judgment on the pleadings was required (*171 Cal. App. 3d 95, 104-105*).

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B. Attorney-Client Privilege

8-81 California Points & Authorities § 81.61

§ 81.61 Supporting Motion to Compel Discovery--Refuting Claim of Lawyer-Client Privilege [Evid. Code § 954]--Information Not Privileged Merely Because Communicated to Lawyer

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in support of a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11), as well as with points and authorities generally refuting a claim of privilege (see, e.g., § 81.10).*]

THE LAWYER-CLIENT PRIVILEGE DOES NOT EXTEND TO SUBJECT MATTER OTHERWISE UNPRIVILEGED MERELY BECAUSE IT HAS BEEN COMMUNICATED TO THE CLIENT'S LAWYER.

Information Not Privileged Merely Because Communicated to Lawyer. Knowledge that is not otherwise privileged does not become so merely by being communicated to an attorney (*People ex rel. Dept. of Public Works v. Donovan (1962) 57 Cal. 2d 346, 355, 19 Cal. Rptr. 473, 369 P.2d 1* ; *Jasper Constr., Inc. v. Foothill Jr. College Dist. (1979) 91 Cal. App. 3d 1, 17, 153 Cal. Rptr. 767*).

[2] Comments

[a] Use of Form

This memorandum may be used in support of a motion for an order compelling discovery if a party or other person has resisted providing discovery on the ground that the information is privileged because it was communicated to a client's attorney but in fact the information is not a protected communication. It does not provide a complete memorandum but is designed to be combined with a general form of memorandum in support of compelling discovery, as well as a form refuting a claim of privilege generally.

Counsel who wish to set out general points relating to the attorney-client privilege as well may adapt the points and authorities in opposition to amotion to compel discovery set out in *§ 81.80* and combine them with this form.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities set out in *§ 81.82* may be used to oppose the motion supported by these points and authorities.

[3] Discussion of Authorities

[a] Information Not Privileged Merely Because Communicated to Lawyer

In ***People ex rel. Dept. of Public Works v. Donovan*** *(1962) 57 Cal. 2d 346, 19 Cal. Rptr. 473, 369 P.2d 1* , defendant property owner appealed from a jury verdict awarding compensation in an eminent domain proceeding. The trial court had sustained an objection by plaintiff, the state, that the attorney-client privilege protected the disclosure of the opinion of the appraiser employed by the state, who was called as a witness by defendant. The Supreme Court held that since defendant only sought the expert's opinion about the fair market value of the property he had appraised, and not his disclosures to plaintiff's counsel, that opinion was not privileged and had not become privileged merely because it had been communicated to plaintiff's attorney (*57 Cal. 2d 346, 355*).

Although *People ex rel. Dept. of Public Works* was decided under former Code Civ. Proc. § 1881(2), and the lawyer-client privilege is now governed by *Evid. Code §§ 950-962*, it was cited as authority in *Jasper Construction, Inc.* (discussed *below*), in interpreting the Evidence Code privilege and is therefore good authority for interpreting that privilege.

In ***Jasper Constr., Inc. v. Foothill Jr. College Dist.*** *(1979) 91 Cal. App. 3d 1, 153 Cal. Rptr. 767* , a general contractor brought an action against a junior college district and architects for damages for breach of contract resulting from alleged defects in plans and specifications for the construction of an auditorium, and the district cross complained against the contractor for liquidated damages based on delays in completion of the construction project. On appeal by the district from a jury verdict in favor of the contractor, the court of appeal reversed, holding, inter alia, that the trial court had improperly excluded testimony of a consultant, who had been asked by the contractor to develop a claim against the district and who had met with the contractor and his attorney to report his findings after investigating the case. The contractor argued that the consultant'stestimony was privileged as a confidential communication between attorney and client. In rejecting this argument, the court found that the consultant was plainly not an intermediary for communication between the contractor and his attorney, and the fact that the consultant's findings were communicated to the attorney was irrelevant; the court stated that a litigant cannot silence a witness by having him reveal his knowledge to the litigant's attorney. The court cited ***People ex rel. Dept. of Public Works v. Donovan*** *(1962) 57 Cal. 2d 346, 19 Cal. Rptr. 473, 369 P.2d 1* (discussed *above*), as authority (*91 Cal. App. 3d 1, 17*).

[4] Additional Authorities

[a] Information Not Privileged Merely Because Communicated to Lawyer

In *Green & Shinee v. Superior Court (2001) 88 Cal. App. 4th 532, 105 Cal. Rptr. 2d 886* , petitioner law firm appealed an order by the trial court that released documents seized from the law firm's offices and sealed by a special master under *Penal Code § 1524(c)*. The law firm's appeal was treated as a petition for writ of mandate (*88 Cal. App. 4th 532, 533*). The law firm argued that the attorney-client privilege precluded the unsealing and protected the supplemental incident reports prepared by police officers and transmitted to the law firm for review and legal advice (*88 Cal. App. 4th 532, 536*). The court of appeal found, with sufficient evidentiary support, that the sheriff's department procedure required a supplemental report by any officer involved in a forceful encounter, whether on or off duty. Thus, the

deputies prepared the reports as part of their official duties and the reports were public records. The attorney-client privilege does not embrace matters otherwise unprivileged merely because the client has communicated those matters to its attorney (*88 Cal. App. 4th 532, 537*).

In *Sheets v. Superior Court (1967) 257 Cal. App. 2d 1, 64 Cal. Rptr. 753* , an action for injunctive relief, dissolution of a partnership, an accounting, and for damages for breach of the partnership agreement and fraud, defendant sought and obtained an order from the trial court requiring plaintiff to answer certain interrogatories to which he had objected. Plaintiff sought a writ of prohibition on the ground that the interrogatories sought information protected by the attorney-client privilege, namely an analysis and evaluation made by the plaintiff's lawyer, in the course of preparation of the case for trial, of the report of an accountant and an estimator who had been retained by plaintiff's attorney to examine the books and records of the partnership that was the subject of the litigation. The court of appeal issued the writ prohibiting enforcement of the trial court's order requiring plaintiff to answer the interrogatories, holding that the information sought by the interrogatories was privileged, but stating that the accountant's report, based on his examination of the partnership books that were themselves not privileged, was not privileged simply because it was reduced to writing and delivered to plaintiff's attorney. Rather, the information sought was privileged not because it asked for the report itself, but because it asked for the attorney's analysis and evaluation of the accountant's report, and the analysis and evaluation must be looked on as part of the advice given by the lawyer to the client in the course of their professional relationship (*257 Cal. App. 2d 1, 10*).

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B. Attorney-Client Privilege

8-81 California Points & Authorities § 81.62

§ 81.62 Supporting Motion to Compel Discovery--Refuting Claim of Lawyer-Client Privilege [Evid. Code § 954]--Information Communicated Through Nonagent Third Party Not Privileged

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in support of a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11), as well as with points and authorities generally refuting a claim of privilege (see, e.g., § 81.10).*]

THE LAWYER-CLIENT PRIVILEGE DOES NOT PROTECT INFORMATION COMING TO A LAWYER FROM A THIRD PERSON WHO IS NOT THE CLIENT'S AGENT.

Privilege Not Applicable to Information Communicated Through Nonagent Third Party. The lawyer-client privilege protects a "confidential communication" between "client and lawyer," but does not protect information coming to a lawyer from a third person who is not a client unless such person is acting as the client's agent [*Evid. Code § 952*; *People v. Lee (1970) 3 Cal. App. 3d 514, 527, 83 Cal. Rptr. 715* .

[2] Comments

[a] Use of Form

This memorandum may be used in support of a motion for an order compelling discovery if a party or other person has resisted providing discovery on the ground that the information is a privileged communication between attorney and client but in fact the information was communicated to the attorney through a third party who is not the client's agent. It does not provide a complete memorandum but is designed to be combined with a general form of memorandum in support of compelling discovery, as well as a form refuting a claim of privilege generally.

Counsel who wish to set out general points relating to the attorney-client privilege as well may adapt the points and authorities in opposition to a motion to compel discovery set out in *§ 81.80* and combine them with this form.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Privilege Not Applicable to Information Communicated Through Nonagent Third Party

In ***People v. Lee*** *(1970) 3 Cal. App. 3d 514, 83 Cal. Rptr. 715* , a jury found defendant guilty of attempted murder, partially because of evidence of blood on a pair of defendant's shoes that was found to be of the same type as the victim's blood, and which appeared to match a bloody footprint found at the scene of the crime. Defendant's wife delivered the shoes to his attorney and they were subsequently obtained by the district attorney through use of a search warrant and admitted as evidence at the trial over defendant's objection. On appeal, defendant argued that testimony from representatives of the public defender's office that they received the shoes from his wife should have been excluded on the basis of attorney-client privilege. The court of appeal affirmed the conviction, finding that the challenged testimony did not involve disclosure of confidential communications between defendant and his counsel; there was no evidence of an attorney-client relationship between defendant's wife and the public defender's office, nor any evidence that in delivering the shoes to the public defender, the wife was acting as defendant's agent or under his direction. *Evid. Code § 952* protects a "confidential communication between client and lawyer" but does not protect information coming to an attorney from a third person who is not a client unless such person is acting as the client's agent (*3 Cal. App. 3d 514, 527*).

[4] Additional Authorities

[a] Privilege Not Applicable to Information Communicated Through Nonagent Third Party

In *San Francisco v. Superior Court of San Francisco, (1951) 37 Cal. 2d 227, 231 P.2d 26* , a personal injury action, a physician who examined plaintiff solely for the purpose of the lawsuit refused to answer certain deposition questions on the ground of attorney-client privilege. The Supreme Court denied a writ of mandamus sought by defendants to compel the physician to answer, holding that although the physician could invoke no privilege of his own, he was an intermediate agent for communication between plaintiff and his attorney regarding the former's physical condition, and the attorney-client privilege could be invoked where no physician-patient relationship existed and where plaintiff's disclosure to the physician was made to the latter as agent of plaintiff's attorney (*37 Cal. 2d 227, 234-238*).

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8-81 California Points & Authorities § 81.63

§ 81.63 Supporting Motion to Compel Discovery--Refuting Claim of Lawyer-Client Privilege [Evid. Code § 954]--Joint Client's Communication of Matters of Common Interest Not Privileged in Action Between Joint Clients [Evid. Code § 962]

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in support of a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11), as well as with points and authorities generally refuting a claim of privilege (see, e.g., § 81.10).*]

A JOINT CLIENT'S COMMUNICATION TO HIS/HER LAWYER ON A MATTER OF COMMON INTEREST IS NOT PRIVILEGED IN A CIVIL PROCEEDING BETWEEN ANY OF THE JOINT CLIENTS.

Joint Client's Communication to Lawyer Not Privileged in Action Between Joint Clients. When two or more clients have retained or consulted a lawyer on a matter of common interest, none of them or their successors in interest may claim the privilege for a communication made in the course of that relationship when the communication is offered in a civil proceeding between any of the clients or their successors in interest (*Evid. Code § 962*; *Wortham & Van Liew v. Superior Court (1987) 188 Cal. App. 3d 927, 932-933, 233 Cal. Rptr. 725* ; *Glacier Gen. Assurance Co. v. Superior Court (1979) 95 Cal. App. 3d 836, 840, 157 Cal. Rptr. 435*).

[2] Comments

[a] Use of Form

This memorandum may be used in support of a motion for an order compelling discovery if a party or other person has resisted providing discovery on the ground that the information sought is a privileged communication between attorney and client but in fact the communication was made in the course of a relationship between joint clients and their attorney, and it is now being offered in a civil proceeding between any of the clients or their successors in interest. It does not provide a complete memorandum but is designed to be combined with a general form of memorandum in

support of compelling discovery, as well as a form refuting a claim of privilege generally.

Counsel who wish to set out general points relating to the attorney-client privilege as well may adapt the points and authorities in opposition to a motion to compel discovery set out in *§ 81.80* and combine them with this form.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[c] Opposing Points and Authorities

The points and authorities set out in *§ 81.83* may be used in an appropriate case to oppose a motion to compel discovery supported by this memorandum.

[3] Discussion of Authorities

[a] Joint Client's Communication to Lawyer Not Privileged in Action Between Joint Clients

Evid. Code § 962 sets forth an exception to the lawyer-client privilege. It provides that if two or more clients have retained or consulted a lawyer on a matter of common interest, neither they nor their successors in interest may claim the lawyer-client privilege for a communication made in the course of that relationship when such communication is offered in a civil proceeding between two of the clients.

In ***Wortham & Van Liew v. Superior Court*** *(1987) 188 Cal. App. 3d 927, 233 Cal. Rptr. 725* , plaintiff brought an action seeking dissolution and accounting of a partnership, and for judicial relief against defendants. Plaintiff and defendants formed a partnership for the purpose of developing a parcel of real estate. Later defendants formed a new partnership without plaintiff and conveyed to it title to the real property. Plaintiff contended the transfer was made without his consent in violation of the partnership agreement. After the attorney for the original partnership refused to answer questions during a deposition, plaintiff moved for an order compelling discovery. The trial court issued an order compelling the attorney to answer the questions. Defendants sought a writ of prohibition to prevent enforcement of that order, claiming that the information sought was protected by the lawyer-client privilege between the attorney and the second partnership.

The court of appeal denied the petition for a writ of prohibition and vacated the temporary stay order on the ground that the joint-client exception to the lawyer-client privilege applied, pursuant to *Evid. Code § 962* (*188 Cal. App. 3d 927, 929*). Plaintiff wanted the attorney to disclose information regarding communications between the attorney and defendants regardingthe formation of the second partnership and the transfer of the real property to the second partnership. Plaintiff based his request on the facts that the attorney was counsel for the original partnership as well as the new one, that he had played a key role in the transfer and formation of the new partnership, and that he had had numerous communications with defendants regarding their intent to form the new partnership. The court said that although the lawyer-client privilege is important, even more important is the relationship that the privilege is intended to protect, the relationship of an attorney to his or her client and his or her fiduciary obligations to the client. In the instant case, the attorney was counsel for the first partnership, and was therefore plaintiff's attorney. His fiduciary obligations to plaintiff required his disclosing to his client all matters concerning the partnership, including the formation of a second entity and the transfer of partnership property to it (*188 Cal. App. 3d 927, 931-932*). The court said that the exception of *Evid. Code § 962* is intended to provide joint clients access to communications with the jointly retained attorney that touch on matters affecting both clients. It also said that in the context of the representation of a partnership, the attorney for the partnership represents all the partners regarding matters of partnership business. Only matters involving purely private or personal interests of one of the partners may be privileged (*188 Cal. App. 3d 927, 932*). Although the communications between defendants and the attorney may have been actually intended to be confidential, the court found they could not be so legitimately regarded concerning the plaintiff, in light of the obligations of full disclosure

between partners regarding partnership affairs. *Evid. Code § 962* applied to communications between the attorney and either partnership involving the partnership business of the first partnership, including the circumstances regarding the disposition of the major asset of the first partnership (*188 Cal. App. 3d 927, 933*).

In ***Glacier Gen. Assurance Co. v. Superior Court*** *(1979) 95 Cal. App. 3d 836, 157 Cal. Rptr. 435* , an action by the assignees of a deceased doctor's cause of action against his insurer for bad-faith failure to settle a medical malpractice claim within the policy limits, the trial court ordered production of the entire litigation file of an attorney who had represented both the insurance company and the doctor in the malpractice action. The insurer sought a writ of mandamus against the trial court to prevent enforcement of the discovery order, contending that *Evid. Code § 962* should be interpreted as vitiating the privilege only for those communications made to an attorney by joint clients in the presence of each other; in the instant case, the doctor was not privy to the insurer's communications with the attorney. In denying the peremptory writ, the court of appeal held that the Legislature did not intend the effect of *Evid. Code § 962* to be limited to only those situations where both joint clients were privy to a communication with the attorney (*95 Cal. App. 3d 836, 841*). The insurer was still afforded some protection by the language of *Evid. Code § 962* itself, which limits disclosures to "a matter of common interest" between the joint clients (*95 Cal. App. 3d 836, 842*). The court emphasized that when an insurer employs counsel to defend its insured, as required by the contract of insurance, any communication with the lawyer concerning the handling of the claim against the insured is necessarily a matter of common interest to both the insured and the insurer (*95 Cal. App. 3d 836, 842*). The court found that the notice appeared to seek only matters that would have been of common interest to both clients (*95 Cal. App. 3d 836, 843*).

Counsel should note that in *Glade v. Superior Court (1978) 76 Cal. App. 3d 738, 143 Cal. Rptr. 119* , another district of the court of appeal stated as dicta that the exception to the attorney-client privilege defined by *Evid. Code § 962* is not invoked for communications made in confidence to the attorney by one of the joint clients at a time when the other client was not present (*76 Cal. App. 3d 738, 747*). The court in *Glacier* did not discuss *Glade*, but said it found no case that directly limits the joint-client exception to situations where communications were made in the presence of both clients (*95 Cal. App. 3d 836, 841*). However, the court in *Wortham* specifically rejected an attempt to use *Glade* as support for the argument that the joint-client exception does not apply to communications made outside the presence of the other client. It pointed out that such a holding would have a nonsensical effect, since the client, being present, would have little need to compel revelation of the communication and any privilege would have been waived. It also noted that in *Glade* the alleged joint clients were not shown to be clients of the attorney concerning a mutual transaction, and were not parties to the lawsuit involved, so that *Evid. Code § 962* was literally inapplicable (*188 Cal. App. 3d 927, 933*).

[4] Additional Authorities

[a] Joint Client's Communication to Lawyer Not Privileged in Action Between Joint Clients

In *Hecht v. Superior Court (1987) 192 Cal. App. 3d 560, 237 Cal. Rptr. 528* , plaintiff brought an action against defendant alleging that she was deprived of her interest in a corporation headed by defendant. The parties had lived together and started a business together. When a corporation was formed, an attorney was retained. The documentation listed plaintiff and defendant as officers and shareholders. When the parties ended their personal relationship, the corporate documents were redrafted, removing plaintiff's name. During discovery, plaintiff asked the attorney about the redrafting of the corporate documents, and he refused to answer, claiming the lawyer-client privilege. In ruling on plaintiff's motion to compel, the trial court held that defendant had only waived his right to assert the lawyer-client privilege concerning the conversations at which plaintiff was present.Plaintiff petitioned for a writ of mandate to compel the attorney to testify about all the lawyer-client conversations concerning formation of the corporation. The court of appeal issued a peremptory writ (*192 Cal. App. 3d 560, 567*). In responding to defendant's claim that the attorney was his alone, the court said that it is the intent and conduct of the parties that is critical to the formation of the lawyer-client relationship. The court said that the parties' intent was not clear, so it looked to their conduct. The court reviewed the facts and found that plaintiff's role in the business was no different than that of a partner (*192 Cal. App. 3d 560, 565-566*). The court said that in the context of the representation of a partnership, the attorney for the

partnership represents all the partners on matters of partnership business. The lawyer-client privilege will not bar disclosure of matters related to a partnership business simply because that business was conducted through a law firm. Only matters involving purely private or personal interests of one of the partners may be privileged (*192 Cal. App. 3d 560, 567*). The court found that plaintiff had made a showing sufficient to bring herself within the joint-client exception to the lawyer-client privilege, and was entitled to compel the testimony of the attorney about the lawyer-client conversations with defendant regarding the removal of plaintiff from corporate involvement. The court said that the disclosure was not limited to conversations at which plaintiff was present (*192 Cal. App. 3d 560, 567*).

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 81 DISCOVERY: PRIVILEGES AND OTHER DISCOVERY LIMITATIONS
PART II. FORMS
B. Attorney-Client Privilege

8-81 California Points & Authorities § 81.64

§ 81.64 Supporting Motion to Compel Discovery--Refuting Claim of Lawyer-Client Privilege [Evid. Code § 954]--Communication by Nonparty Corporate Employee

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in support of a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11), as well as with points and authorities generally refuting a claim of privilege (see, e.g., § 81.10).*]

THE COMMUNICATION BY THE NONDEFENDANT CORPORATE EMPLOYEE IS DISCOVERABLE BECAUSE IT IS NOT PRIVILEGED UNDER THE LAWYER-CLIENT PRIVILEGE.

A. Communication Not Privileged If Information Does Not Emanate From Corporation. When the employee of a defendantcorporation is not a codefendant or person who may be charged with liability, the employee's communication should not be privileged unless, under all of the circumstances of the case, he or she is a natural person to be speaking for the corporation, or in other words, unless the communication constitutes information that emanates from the corporation, as distinct from the nonlitigant employee, and the communicating employee is such a person who would ordinarily be utilized for communication to the corporation's lawyer (*D.I. Chadbourne, Inc. v. Superior Court (1964) 60 Cal. 2d 723, 736, 737, 36 Cal. Rptr. 468, 388 P.2d 700* ; *Sierra Vista Hospital v. Superior Court (1967) 248 Cal. App. 2d 359, 366-367, 56 Cal. Rptr. 387*).

[*EITHER*]

B. Corporate Employee Is Independent Witness. When an employee has been a witness to matters that require communication to the corporate employer's lawyer, and the employee has no connection with those matters other than as a witness, he or she is an independent witness; the fact that the employer requires him or her to communicate with or make a statement for transmittal to the employer's lawyer regarding the subject matter of the lawsuit does not alter his or

her status or make his or her statement subject to the lawyer-client privilege (*D.I. Chadbourne, Inc. v. Superior Court (1964) 60 Cal. 2d 723, 737, 36 Cal. Rptr. 468, 388 P.2d 700*).

[*AND/OR*]

C. Dominant-Purpose Rule Applies When Employee Not Independent Witness. If the employee's connection with the matter grows out of his or her employment to the extent that the employee's statement or report is required in the ordinary course of business, the employee is no longer an independent witness, and his or her statement or report is that of the employer (*D.I. Chadbourne, Inc. v. Superior Court (1964) 60 Cal. 2d 723, 737, 36 Cal. Rptr. 468, 388 P.2d 700*). Whether that communication is privileged is determined by the employer's dominant purpose in requiring it, unless a secondary purpose has resulted in a waiver of confidentiality; thus, if the employer does not direct the making of the report for confidential transmittal to its attorney, the communication is not privileged (*D.I. Chadbourne, Inc. v. Superior Court (1964) 60 Cal. 2d 723, 737, 36 Cal. Rptr. 468, 388 P.2d 700*).

[2] Comments

[a] Use of Form

This memorandum may be used in support of a motion for an order compelling discovery if a party or other person has resisted providing discovery on the ground that the material sought is privileged as a confidential communication between a corporate employer and its attorney, although made or prepared by a nonparty corporate employee who is not a natural person to be speaking for the corporation. Paragraph B is for use by a party contending that the employee is an independent witness. A party may argue instead or in the alternative that although the witness is not an independent witness because his or her connection with the matter grows out of his or her employment, since the report or statement was required in the ordinary course of the corporation's business, the report or statement is not privileged under the "dominant purpose" rule [Paragraph C].

Although this form is for use when the corporation is a defendant, portions of the form may be adapted for use when the corporation is a plaintiff.

The form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in support of compelling discovery, as well as a form refuting a claim of privilege generally.

Counsel who wish to set out general points relating to the attorney-client privilege as well may adapt the points and authorities in opposition to a motion to compel discovery *set out in § 81.80* and combine them with this form.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[c] Opposing Points and Authorities

The points and authorities *set out in § 81.84* may be used in an appropriate case to oppose a motion to compel discovery supported by this memorandum.

[3] Discussion of Authorities

[a] Communication Not Privileged if Information Does Not Emanate From Corporation

D.I. Chadbourne, Inc. v. Superior Court *(1964) 60 Cal. 2d 723, 36 Cal. Rptr. 468, 388 P.2d 700* was an action by a

husband and wife for personalinjuries that the wife allegedly sustained when she fell on a sidewalk as a result of defendant's negligence. In response to interrogatories, defendant stated that it had obtained the written statement of a person who had performed work on the sidewalk. When plaintiffs moved for an order allowing inspection of the statement pursuant to former Code Civ. Proc. § 2031(b) (*see now Code Civ. Proc. §§ 2031.300, 2031.310*), defendant opposed the motion on the ground that it was protected by the attorney-client privilege. The trial court found good cause for inspection of the statement and ordered defendant to allow inspection and copying of the statement.

The witness was an employee of defendant corporation. His statement had been taken by an investigator who contended the following: that he worked for a firm employed by defendant's insurance carrier for the purpose of investigating accidents likely to lead to litigation involving its insureds; that defendant's attorneys were the attorneys for the insurance carrier and had directed the investigator's firm to investigate all such accidents and transmit their reports "to their attorneys"; that the statement in question had been taken as part of the investigation and preparation for defense and after plaintiffs had engaged the services of their attorneys; and that the statement was made for the purpose of being, and was, transmitted to the insurance carrier for transmission to its attorney.

Defendant petitioned for a writ of mandate, and the Supreme Court denied the petition. The Court stated that if the attorney-client privilege was shown as a matter of law, the trial court was required to deny the motion for inspection (*60 Cal. 2d 723, 729*). However, if the privilege did not appear as a matter of law, but presented a question of fact, then the determination of the trial court could not be set aside (*60 Cal. 2d 723, 729*). The Court found that the facts presented to the trial court did not determine the question of privilege as a matter of law, and that the Supreme Court could not disturb the trial court's decision that the material was not privileged, since the evidence presented in support of the claim of privilege was inconclusive and subject to contrary inferences (*60 Cal. 2d 723, 739*).

In reaching its decision in *Chadbourne,* the Supreme Court set forth certain principles to be followed in the area of attorney-corporate client privilege, stating, inter alia, that when an employee of a corporate defendant is not a codefendant or person who may be charged with liability, his or her communication should not be privileged unless, under all the circumstances of the case, he or she is the natural person to be speaking for the corporation, or the communication constitutes information that emanates from the corporation as distinct from the nonlitigant employee, and that employee is such a person who would ordinarily be utilized for communication to the corporation's attorney (*60 Cal. 2d 723, 736-737*).

Note that *Chadbourne* was decided under the attorney-client privilege of former Code Civ. Proc. § 1881(2), and the lawyer-client privilege is nowgoverned by *Evid. Code §§ 950-962. Chadbourne,* however, has often been cited as authority in this area in cases based on the Evidence Code lawyer-client privilege (*see, e.g.,* cases cited in [4], *below*), and is therefore still good authority.

This case is also discussed in *§ 81.84[3][a]*.

The facts and procedural background of ***Sierra Vista Hospital v. Superior Court*** *(1967) 248 Cal. App. 2d 359, 56 Cal. Rptr. 387* are discussed in *§ 81.84[3][b]*. *Sierra Vista* was an action for medical negligence. The court of appeal issued a peremptory writ prohibiting the trial court from enforcing a discovery order, citing the principle of ***D.I. Chadbourne, Inc. v. Superior Court*** *(1964) 60 Cal. 2d 723, 36 Cal. Rptr. 468, 388 P.2d 700* , set out in Paragraph A of the form, as authority (*248 Cal. App. 2d 359, 366-367)* .

[b] Corporate Employee Is Independent Witness

The facts and procedural background of ***D.I. Chadbourne, Inc. v. Superior Court*** *(1964) 60 Cal. 2d 723, 36 Cal. Rptr. 468, 388 P.2d 700* are discussed in *§ 81.64[3][a]*. In *Chadbourne,* the Supreme Court set forth rules of the attorney-corporate client privilege, including the principle that when an employee has no connection, other than as a witness, with matters which he or she is required to communicate to his or her corporate employer's attorney, that

employee is an independent witness, and the fact that the employer requires the employee to communicate with the corporation's attorney regarding the subject matter of the litigation does not alter the employee's status or make the employee's statement or communication subject to the attorney-client privilege (*60 Cal. 2d 723, 737)* .

[c] Dominant-Purpose Rule Applies When Employee Not Independent Witness

In ***D.I. Chadbourne, Inc. v. Superior Court*** *(1964) 60 Cal. 2d 723, 36 Cal. Rptr. 468, 388 P.2d 700* (discussed in *§ 81.64[3][a]*), the Supreme Court set forth rules governing the attorney-corporate client privilege, including the dominant-purpose rule, which provides that when an employee is not an independent witness and a corporate employer defendant requires a nondefendant employee to make a report or communication regarding the subject matter of litigation, the privilege accorded that communication is determined by the employer's purpose in requiring it; when the employer has more than one purpose, the dominant purpose controls, unless the secondary use is such that confidentiality has been waived (*60 Cal. 2d 723, 737*).

[4] Additional Authorities

[a] Corporate Employee Is Independent Witness

In *Nalian Truck Lines, Inc. v. Nakano Warehouse & Transportation Corp. (1992) 6 Cal. App. 4th 1256, 8 Cal. Rptr. 2d 467* , a negligence action arising out of a fire, plaintiff filed a motion to have defendant's counsel disqualified after it was revealed that he had engaged in ex parte communications with plaintiff's former general manager. Plaintiff based its motion for disqualification on the grounds that the communication was a violation of State Bar *Rules of Professional Conduct, Rule 2-100* and the lawyer-client privilege. Defendant's counsel claimed that he had not discussed privileged information, but only discussed the underlying facts related to the fire loss, plaintiff's customers, lost profits, and alleged fraud. The trial court granted the motion, and stayed the action pending an appeal by defendant. The court of appeal reversed. The court outlined the rules regarding confidentiality of lawyer-client privilege. Although the party opposing the privilege has the burden of proof to show that the communication is not one made in confidence, the party claiming the privilege has the burden to show that the communication sought to be suppressed falls within the terms of the statute. The court concluded that the showing made by plaintiff, as claimant for the privilege, was inadequate. At best, it demonstrated that the former general manager possessed certain information protected by the privilege, but made a wholly inadequate showing to prove that particular protected communications were divulged by him (*6 Cal. App. 4th 1256, 1264-1265*). Defendant also argued that since the former general manager was neither a current employee nor a current member of plaintiff's control group at the time of the communication, it was not prohibited by Rule 2-100 from engaging in ex parte communication with him. Citing the legislative history of Rule 2-100 the court said that it applies only to persons employed at the time of the communication, and agree with defendant (*6 Cal. App. 4th 1256, 1261-1262*). However, the court suggested that a corporation, realizing which of its former employees may be parties to privileged communications, should seek a protective order with respect to communications with them (*6 Cal. App. 4th 1256, 1263-1264*).

In *Triple A Machine Shop, Inc. v. State of California (1989) 213 Cal. App. 3d 131, 261 Cal. Rptr. 493* , the State appealed a preliminary injunction prohibiting government authorities from contacting all present and certain former employees of a corporate machine shop in connection with civil and criminal proceedings involving alleged unlawful disposal of hazardous waste. The court of appeal reversed the order, noting that the information sought by the authorities concerned nonprivileged observations by the witnesses, and that those observations occurred outside any lawyer-client relationship. Applying the scope of the privilege established in *D.I. Chadbourne, Inc. v. Superior Court (1964) 60 Cal. 2d 723, 36 Cal. Rptr. 468, 388 P.2d 700* , the court concluded that there had been no demonstration that the privilege had been violated (*213 Cal. App. 3d 131, 141-143*). It found that the mere possibility that the authorities may inadvertently obtain privileged information was an insufficient basis for an injunction (*213 Cal. App. 3d 131, 144*).

The court distinguished *Bobele v. Superior Court (1988) 199 Cal. App. 3d 708, 245 Cal. Rptr. 144* (discussed *below*), decided under former Rule 7-103 of the Rules of Professional Conduct of the State Bar of California, observing that *Rule 2-100 of the Rules of Professional Conduct*, effective May 27, 1989, permits contact with certain current employees (*213 Cal. App. 3d 131, 140*).

Bobele v. Superior Court (1988) 199 App. 3d 708, 245 Cal. Rptr. 144 was a sex and age discrimination action brought by waitresses whose employment was terminated by defendant hotel. When counsel for plaintiffs attempted to interview former employees of the hotel, defendants objected on the grounds that the contact violated former Rule 7-103 of the Rules of Professional Conduct of the State Bar of California, which prohibited attorneys from communicating with a party represented by counsel on a subject of controversy, without the express consent of that counsel. Plaintiffs sought a protective order allowing them to interview ex parte defendant's former and current employees who do not "speak for the defendants." The trial court denied the motion, but stated that plaintiffs could depose former employees. Plaintiffs sought a writ of mandate granting their protective orders, and the court of appeal issued a peremptory writ directing the trial court to issue a new and different order. It found that absent a privilege, counsel for all parties have a right to interview an adverse party's witnesses in private, without the presence or consent of opposing counsel. Requiring plaintiffs to limit their contact with any of defendant's ex-employees to formal discovery procedure would make the litigation so costly for plaintiffs that they would be unable to pursue their case. The court characterized former employees who were not members of defendant's "control group," that is, not officers and agents responsible for directing the company's actions in response to legal advice, as third-party witnesses who were not sufficiently identified with defendant to be considered parties "represented by counsel" (199 App. 3d 708, 713). The court ordered that plaintiffs be permitted to contact ex parte all former employees, so long as they were not members of defendant's "control group." Defendant was free to seek a protective order with respect to any former employee if it knew or suspected that the former employee was privy to privileged information and believed there was a real danger that such information might be disclosed in an ex parte interview. The court prohibited ex parte contact of all current employees (199 App. 3d 708, 714).

[b] Dominant-Purpose Rule Applies When Employee Not Independent Witness

Scripps Health v. Superior Court (2003) 109 Cal. App. 4th 529, 135 Cal. Rptr. 2d 126 was a wrongful death medical malpractice case. During the course of discovery, plaintiffs served written document requests on defendant hospital, seeking all records regarding any incidents or changes in decedent's condition, during his hospital stay, not contained in his medical records. The hospital responded to the request by indicating it had five "occurrence reports" that it would withhold based on the attorney-client and work product privileges and the privilege for hospital peer review materials contained in *Evid. Code § 1157*. The hospital supplied a blank occurrence report form and provided a privilege log indicating that hospital employees prepared the reports in anticipation of litigation. Plaintiffs filed a motion for production. After a hearing, the trial court granted the motion. The court ruled that the reports did not fall under either the attorney-client or the attorney work product privileges, "essentially finding that the dominant purpose of the occurrence reports was accident prevention" (*109 Cal. App. 4th 529, 534*).

The appellate court reversed. It concluded that the undisputed facts showed the dominant purpose of the reports was for transmittal to an attorney in the course of the professional attorney-client relationship, under circumstances in which the hospital expected confidentiality (*109 Cal. App. 4th 529, 534*). The court relied on *D. I. Chadbourne, Inc. v. Superior Court of San Francisco (1964) 60 Cal. 2d 723, 36 Cal. Rptr. 468, 388 P.2d 700* (discussed in [3][a], *above*), detailing the basic principles to be applied in determining whether the attorney-client privilege exists in a corporate setting (*109 Cal. App. 4th 529, 533*). Although the court acknowledged that the reports served a dual purpose, attorney review in anticipation of possible litigation and quality assurance/peer review, the fact that the information contained in the communications might also have been used for incidental purposes not entitled to the privilege was unimportant. The actual physical reports were not reviewed or submitted to any peer review or quality assurance committee, but were kept confidential, with access provided only to the Risk Managers, in-house or outside counsel and third party litigation claim administrators. Accordingly, the attorney-client privilege was "clearly established" (*109 Cal. App. 4th 529, 536*

). Based on this conclusion, the court found no need to discuss application of the attorney work product privilege or the privilege for hospital peer review materials (*109 Cal. App. 4th 529, 536*).

The facts and procedural background of *Payless Drug Stores, Inc. v. Superior Court (1976) 54 Cal. App. 3d 988, 127 Cal. Rptr. 4* are *set out in § 81.84[3][d]*. *Payless* was an action arising from an accidental fall. The court of appeal issued a writ of prohibition to prevent enforcement of anorder compelling production of an accident report prepared by the defendant corporation's employees after the accident, holding that the dominant purpose for the preparation of the report was, in effect, the confidential communication of information by the corporation to its attorneys to defend against litigation arising out of the accident claim, and thus the attorney-client privilege applied as a matter of law. The court relied on the principle of *D.I. Chadbourne, Inc. v. Superior Court (1964) 60 Cal. 2d 723, 36 Cal. Rptr. 468, 388 P.2d 700* , set out in Paragraph C of this form, as authority (*54 Cal. App. 3d 988, 991*).

See also *Rodriguez v. North American Rockwell Corp. (1972) 28 Cal. App. 3d 441, 449, 104 Cal. Rptr. 678* (action for conspiracy to commit slander, discussed in *§ 81.84[3][a]*).

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8-81 California Points & Authorities § 81.65

§ 81.65 Supporting Motion to Compel Discovery--Refuting Claim of Lawyer-Client Privilege [Evid. Code § 954]--Privilege Waived by Holder's Disclosure of Communication [Evid. Code § 912(a)]

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in support of a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11), as well as with points and authorities generally refuting a claim of privilege (see, e.g., § 81.10).*]

THE LAWYER-CLIENT PRIVILEGE IS WAIVED BY THE HOLDER'S DISCLOSURE OF THE CONFIDENTIAL COMMUNICATION.

Privilege Waived by Disclosure of Communication. The right of any person to claim the lawyer-client privilege is waived with respect to a protected communication if any holder of the privilege, without coercion, has disclosed a significant part of the communication (*see Evid. Code § 912(a)*; *Julrik Productions, Inc. v. Chester (1975) 38 Cal. App. 3d 807, 811, 113 Cal. Rptr. 527*).

[2] Comments

[a] Use of Form

This memorandum may be used in support of a motion for an order compelling discovery if a party or other person has resisted providingdiscovery on the ground that the information sought is a privileged communication between lawyer and client when, in fact, the privilege has been waived by the holder through disclosure of a significant part of the communication. This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in support of compelling discovery, as well as a form refuting a claim of privilege generally.

Counsel who wish to set out general points relating to the attorney-client privilege as well may adapt the points and authorities in opposition to a motion to compel discovery *set out in § 81.80* and combine them with this form.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 81.89* may be used to oppose the motion supported by these points and authorities.

[3] Discussion of Authorities

[a] Privilege Waived by Disclosure of Communication

Except as provided in *Evid. Code § 912(b)-(d)*, the right of any person to claim the lawyer-client privilege of *Evid. Code § 954* is waived with respect to a communication protected by that privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication [*Evid. Code § 912(a)*].

The exceptions to this rule are that a waiver of the right of one joint holder does not affect the right of another joint holder to claim the privilege [*Evid. Code § 912(b)*; *see § 81.89*], a disclosure that is itself privileged is not a waiver [*Evid. Code § 912(c)*], and a confidential disclosure that is reasonably necessary for the accomplishment of the purpose for which the lawyer was consulted is not a waiver of the privilege [*Evid. Code § 912(d)*].

In ***Julrik Productions, Inc. v. Chester*** *(1975) 38 Cal. App. 3d 807, 113 Cal. Rptr. 527* , an action for damages for fraud in inducing the modification of a contract, the trial court sustained an objection to disclosure of a letter from plaintiff to his attorney on the ground of the lawyer-client privilege. On appeal from a judgment in plaintiff's favor, the court of appeal held that plaintiff had waived the privilege when, without objection, he testified under cross-examination not only that there was such a letter but went into some detail about its contents. The court stated, therefore, thatplaintiff had disclosed a significant part of the communication (*38 Cal. App. 3d 807, 811)* .

[4] Additional Authorities

[a] Privilege Waived by Disclosure of Communication

In *People v. Urbano (2005) 128 Cal. App. 4th 396, 403, 26 Cal. Rptr. 3d 871* , defendant appealed his conviction of assault by means likely to produce great bodily injury. He argued that the admission in evidence at trial of a comment and a gesture he made to his attorney in the jury box of his preliminary hearing courtroom when court was not in session violated the attorney-client privilege. The court of appeal disagreed. The attorney-client privilege is inapplicable to a conversation a client and his attorney hold in the presence of a third party. Here, defendant, sitting next to his attorney in the jury box when court was not in session and lawyers were engaged in conversation throughout the courtroom, spoke to his attorney loudly enough that the assault victim, openly present in the last row of seats in the courtroom, overheard his comment and saw his gesture. Accordingly, the attorney-client privilege was inapplicable because defendant made his communication in a way that clearly disclosed it to third persons, even though defendant intended that the communication be confidential (*128 Cal. App. 4th 396, 403)* .

McKesson HBOC, Inc. v. Superior Court (2004) 115 Cal. App. 4th 1229, 9 Cal. Rptr. 3d 812 involved consolidated civil actions against a corporation that was the target of federal government investigation for securities fraud. Plaintiffs moved to compel the corporation to produce an audit committee report and memoranda of employee interviews, which had been prepared by the attorneys retained by the corporation to perform an internal review of improperly recorded revenues, and which the corporation had shared with the government. The trial court found the documents were subject to the attorney-client privilege, but that the corporation had waived the privilege by disclosing the documents to third parties who did not have an interest in preserving the confidentiality of the documents. On appeal, the corporation again

asserted the government was not an adversary and had a common interest in rooting out the source of any accounting improprieties.

The court of appeal disagreed. An interest in maintaining confidentiality exists "when the parties are aligned on the same side in the litigation and have a similar stake in the outcome" (*115 Cal. App. 4th 1229, 1239-1240)* . In this case, there no real alignment of interests between the government and an entity or individuals under investigation for securities law violations. Accordingly, the corporation waived the attorney-client privilege when it shared the privileged documents with government investigators (*115 Cal. App. 4th 1229, 1240)* .

For discussion of work product protection in the context of this case, see *§ 81.204[4][b]*.

In *OXY Resources California LLC v. Superior Court (2004) 115 Cal. App. 4th 874, 9 Cal. Rptr. 3d 621* , plaintiff natural gas company sued two resources companies, contending it was denied the opportunity to exercise its contractual right of first refusal to purchase one defendant's interest in specified property. At issue was the confidentiality of some 200 documents reflecting communications that took place between defendants both before and after they finalized their transaction, but before plaintiff filed its lawsuit. Defendants argued that these documents were protected from disclosure by their "joint defense" agreement. The "joint defense" or "common interest" doctrine relies on the principle that parties who possess common legal interests may share privileged information without losing the protection afforded by the attorney-client privilege. The trial court granted in part, and denied in part, plaintiff's motion to compel production of the documents. Plaintiff and one defendant each petitioned for a writ of mandate.

The court of appeal concluded in camera inspection of the material must occur before determining whether disclosure was compelled (*115 Cal. App. 4th 874, 879)* . While the joint defense agreement was not void as a matter of public policy, it could not serve as sole ground for withholding the documents (*115 Cal. App. 4th 874, 893)* . The court instructed the trial court to take the following steps when ruling on a claim that documents are protected by a joint defense agreement: First, the trial court must establish that the documents are protected by either the attorney-client privilege or the attorney work product doctrine. Second, the trial court must determine that there was a reasonable expectation the communications would be maintained in confidence and that the disclosures were reasonably necessary for the purpose for which attorneys were consulted. "This determination will invariably hinge on the content and context of the communication." Finally, in order to assess the claims of common interest and the need for disclosure, the trial court may conduct an in camera review of the disputed documents (*115 Cal. App. 4th 874, 902)* .

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 81 DISCOVERY: PRIVILEGES AND OTHER DISCOVERY LIMITATIONS
PART II. FORMS
B. Attorney-Client Privilege

8-81 California Points & Authorities § 81.66

§ 81.66 Supporting Motion to Compel Discovery--Refuting Claim of Lawyer-Client Privilege [Evid. Code § 954]--Privilege Waived by Consent to Disclosure of Communication [Evid. Code § 912(a)]

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in support of a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions,§ 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11), as well as with points and authorities generally refuting a claim of privilege (see, e.g., § 81.10).*]

THE LAWYER-CLIENT PRIVILEGE IS WAIVED BY A DISCLOSURE OF THE COMMUNICATION TO WHICH THE HOLDER CONSENTED.

A. Privilege Waived by Consent to Disclosure of Communication. The right of any person to claim the lawyer-client privilege is waived with respect to a protected communication if any holder of the privilege, without coercion, has consented to such disclosure made by anyone (*see Evid. Code § 912(a)*).

B. Manifestation of Consent to Disclosure. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating his or her consent to the disclosure (*Evid. Code § 912(a)*).

[*Optional*] **C. Failure to Claim Privilege.** Consent to disclosure is manifested by the failure by the holder of the privilege to claim it in any proceeding in which he or she had legal standing and opportunity to claim the privilege (*Evid. Code § 912(a)*). The privilege is waived if not claimed at the first opportunity (*Mize v. Atchison, T. & S.F. Ry. Co. (1975) 46 Cal. App. 3d 436, 449, 120 Cal. Rptr. 787*).

[*Optional*] **D. Consent Inferred From Other Evidence.** The fact of the client's consent may be inferred from other evidence. An example of this is the disclosure for the client's benefit in negotiations on the client's behalf (*Klang v. Shell Oil Co. (1971) 17 Cal. App. 3d 933, 938, 95 Cal. Rptr. 265*).

[2] Comments

[a] Use of Form

This memorandum may be used in support of a motion for an order compelling discovery if a party or other person has resisted providing discovery on the ground that the information sought is a privileged communication between lawyer and client, but in fact the privilege has been waived by the holders through his or her consent to disclosure of a significant portion of the communication. This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in support of compelling discovery, as well as a form refuting a claim of privilege generally.

Counsel who wish to set out general points relating to the attorney-client privilege as well may adapt the points and authorities in opposition to a motion to compel discovery *set out in § 81.80* and combine them with this form.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Privilege Waived by Consent to Disclosure of Communication

Except as provided in *Evid. Code § 912(b)-(d)* (discussed in *§ 81.65[3][a]*), the right of any person to claim the lawyer-client privilege of *Evid. Code § 954* is waived if any holder of the privilege, without coercion, has consented to such disclosure made by anyone [*Evid. Code § 912(a)*].

[b] Failure to Claim Privilege

In ***Mize v. Atchison, T. & S.F. Ry. Co.*** *(1975) 46 Cal. App. 3d 436, 120 Cal. Rptr. 787* , an administrator of an estate brought a wrongful death action for the benefit of the heirs of a decedent's estate, as well as an action for damages for personal injuries sustained by decedent before his death. In the main action, judgment was entered for plaintiff. On appeal, the judgment was upheld. Two defendants contended that the trial court had erred when it allowed plaintiff's counsel to inspect a part of the file of the investigator of one of defendants. The investigator had been called as a witness and was examined, without objection, about taking certain statements. There was also no objection to the use of a certain letter. The court of appeal stated, citing *Kerns Constr. Co. v. Superior Court (1968) 266 Cal. App. 2d 405, 72 Cal. Rptr. 74* (discussed in *§ 81.83[3][c]*), held that the privilege is waived if not claimed at the first opportunity (*46 Cal. App. 3d 436, 449)* .

[c] Consent Inferred From Other Evidence

The facts and procedural background of ***Klang v. Shell Oil Co.*** *(1971) 17 Cal. App. 3d 933, 95 Cal. Rptr. 265* are discussed in *§ 81.60[3][b]*. The court stated that the lawyer-client privilege is lost if the attorney, with consent of the client, discloses the content of a privileged communication other than in confidence (*17 Cal. App. 3d 933, 938)* . The client's consent may be inferred from other evidence, such as the fact that the disclosure was for the client's benefit in negotiations on his or her behalf (*17 Cal. App. 3d 933, 938)* . In the case before the court, there was substantial evidence, such as the fact that the statement was given in a successful effort to prevent an assertion of criminal liability against the client, to support the trial court's inference that the attorney disclosed the information with the client's consent (*17 Cal. App. 3d 933, 938)* .

[4] Additional Authorities

[a] Privilege Waived by Consent to Disclosure of Communication

In *Hiott v. Superior Court (1993) 16 Cal. App. 4th 712, 20 Cal. Rptr. 2d 157* , the appellate court held that a personal injury plaintiff waived the attorney-client privilege with respect to a videotape of a conversation between her and her attorney made while she was in the hospital, when, in a verified response to defendant's discovery request, plaintiff informed defendant of the existence of the videotape and indicated that defendant was welcome to a copy of it. Plaintiff's verified response to the request, made while she was represented by three attorneys, constituted an express consent to the disclosure within the meaning of *Evid. Code § 912*. The court noted that plaintiff had the legal standing and the opportunity to claim the privilege in accordance with former Code Civ. Proc. § 2031(f) (*see now Code Civ. Proc. § 2031.240(b)*), and her failure to do so in the response also constituted consent to disclosure (*16 Cal. App. 4th 712, 719-720)* . For further discussion of *Hiott*, see *§ 81.80[4][c]*.

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8-81 California Points & Authorities § 81.67

§ 81.67 Supporting Motion to Compel Discovery--Refuting Claim of Lawyer-Client Privilege [Evid. Code § 954]--Privilege Impliedly Waived

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in support of a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11), as well as with points and authorities generally refuting a claim of privilege (see, e.g., § 81.10).*]

THE LAWYER-CLIENT PRIVILEGE MAY BE IMPLIEDLY WAIVED WHEN THE CLIENT HAS PUT OTHERWISE PRIVILEGED COMMUNICATIONS DIRECTLY AT ISSUE OR WHEN THE GRAVAMEN OF A LAWSUIT IS SO INCONSISTENT WITH THE PRIVILEGE AS TO COMPEL WAIVER.

[*EITHER*]

A. Waiver Implied by Placing Mental State of Lawyer in Issue. A party may impliedly waive the lawyer-client privilege by placing in issue the decisions, conclusions, and mental state of his or herlawyer, who will be called as a witness to prove those matters (*Merritt v. Superior Court (1970) 9 Cal. App. 3d 721, 730, 88 Cal. Rptr. 337*).

[*OR*]

A. Implied Waiver Occurs When Gravamen of Suit Is So Inconsistent With Privilege as to Compel Waiver. An implied waiver of the lawyer-client privilege may occur when the gravamen of the lawsuit is so inconsistent with the continued assertion of a privilege as to compel the conclusion that the privilege has in fact been waived. For example, in an action for fraud based on detrimental reliance, when corporate plaintiff's counsel is the one person who could most thoroughly testify concerning plaintiff's relevant knowledge and when the counsel's privileged and unprivileged

activities are so intertwined as to render them indistinguishable the privilege is impliedly waived (*Chicago Title Ins. Co. v. Superior Court (1985) 174 Cal. App. 3d 1142, 1150, 1154, 220 Cal. Rptr. 507*).

[*OR*]

A. Implied Waiver Occurs When Party Designated as Expert Witness Produces Privileged Documents or Testifies as Expert. A party designated as an expert trial witness impliedly waives the attorney-client privilege by producing privileged documents or testifying as an expert (such as by stating an opinion in a declaration or at a deposition) (*Shooker v. Superior Court (2003) 111 Cal. App. 4th 923, 930, 4 Cal. Rptr. 3d 334*).

B. Test for Implied Waiver of Lawyer-Client Privilege. The lawyer-client privilege may be impliedly waived when (1) there is a legitimate need to reach to evidence sought to be obtained, (2) there is a showing of the relevance and materiality of that evidence to the issue before the court, and (3) the party seeking to bar assertion of the privilege shows by a fair preponderance of the evidence, including all reasonable inferences, that the information cannot be secured from any less intrusive source (*Chicago Title Ins. Co. v. Superior Court (1985) 174 Cal. App. 3d 1142, 1153, 220 Cal. Rptr. 507*).

[2] Comments

[a] Use of Form

This memorandum may be used in support of a motion for an order compelling discovery if a party or other person has resisted providingdiscovery on the ground that the information sought is a privileged communication between lawyer and client when, in fact, the privilege has been impliedly waived by the client through placing otherwise privileged communications directly at issue. The Optional Paragraphs A reflect different factual situations. The first paragraph focuses on the client placing his or her lawyer's mental state in issue and depending on the lawyer's testimony for proof. The second paragraph is more appropriate for use when the client is a corporation, and the lawyer involved in the lawyer-client relationship is the corporate counsel. The third paragraph is for use when a party designated as an expert trial witness has impliedly waived the privilege by producing privileged documents or testifying as an expert.

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in support of compelling discovery, as well as a form refuting a claim of privilege generally.

For a form discussing waiver by the initiation of and manner of prosecuting a lawsuit, see *§ 81.65*.

Counsel who wish to set out general points relating to the attorney-client privilege may adapt the points and authorities in opposition to a motion to compel discovery *set out in § 81.80* and combine them with this form.

If the third Optional Paragraph A is used, this form may be combined with one or more forms refuting claims of work product protection on grounds such as waiver. For authorities that discuss when an expert's opinion may not be protected under the work product doctrine, see *§ 81.202*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[c] Opposing Points and Authorities

The points and authorities set out in Form § 81.91 may be used in an appropriate case to oppose a motion to compel discovery supported by this form.

[3] Discussion of Authorities

[a] Waiver Implied by Placing Mental State of Lawyer in Issue

Merritt v. Superior Court *(1970) 9 Cal. App. 3d 721, 88 Cal. Rptr. 337* arose from a personal injury claimant's action against an insurer for satisfaction of a judgment against its insured in excess of policy limits, basedon the insurer's wrongful failure to settle the claim within policy limits. Defendant sought by interrogatory to ascertain the mode, date, and substance of communications between plaintiff's prior personal injury counsel and the workers' compensation carrier, as well as the effect of a large workers' compensation lien on counsel's handling of the personal injury action. The trial court ordered plaintiff to answer over his objection that the information was protected by the lawyer-client privilege, and plaintiff sought a writ of prohibition or mandate to compel the trial court to vacate its order.

In denying the writ, the court of appeal held that by initiating a lawsuit in which he placed in issue the decisions, conclusions, and mental state of his then attorneys, particularly their confusion and disability allegedly caused by defendant's conduct that precluded them from making a settlement offer, and by relying heavily on evidence to be given by his prior counsel that could only have been learned in the course of their employment, plaintiff waived the lawyer-client privilege regarding the information sought by the interrogatories. The court stated that any plaintiff who brings an action against an insurer for bad-faith refusal to settle does not necessarily waive the lawyer-client privilege with respect to the prior negligence action; it was not merely the initiation of the lawsuit but rather the manner of its prosecution that constituted the waiver (*9 Cal. App. 3d 721, 730)* .

[b] Implied Waiver Occurs When Gravamen of Suit Is So Inconsistent With Privilege as to Compel Waiver

In ***Chicago Title Ins. Co. v. Superior Court*** *(1985) 174 Cal. App. 3d 1142, 220 Cal. Rptr. 507* , plaintiff corporation filed a suit against defendant bank, alleging five causes of action, among them fraud. The complaint alleged that plaintiff acted as an escrow agent in the transfer of funds involving two parties in transactions whereby checks were delivered to plaintiff drawn on one party's accounts with defendant. In reliance on that party's representations, plaintiff issued checks to the other party, who then endorsed these checks to the original party, who in turn deposited them in its accounts at defendant bank to cover the checks drawn on nonexistent funds. Plaintiff alleged that defendant knew of unusual activity of the accounts, placed the accounts on a "kite suspect" list, conducted its own investigation, and thereafter assisted those parties in perpetrating fraud on plaintiff. Plaintiff alleged that it was not informed of the kiting activity, was unaware of the fraud, and was unaware that the representations on which it relied were false. During the course of discovery, defendant deposed several of plaintiff's employees, including its in-house counsel. After the employees did not answer questions concerning certain communications, defendant moved to compel answers. The court adopted the recommendations of a discovery referee who found an implied waiver of the lawyer-client privilege. Plaintiff filed petitions for two writs of mandate, oneseeking review of the court's order compelling discovery and the other requesting vacation of the court order granting summary judgment.

The court of appeal denied both petitions. Initially the court observed that the in-house counsel performed functions not typically part of those of counsel, and confined its analysis to the acts performed in a legal capacity. The right to assert the lawyer-client privilege is not absolute. In addition to the waiver provided by *Evid. Code § 912(a)*, a waiver to the privilege may be implied. An implied waiver occurs when the plaintiff has placed in issue a communication that goes to the heart of the claim in controversy (*174 Cal. App. 3d 1142, 1149)* . The court reviewed the reasoning in earlier implied-waiver cases, notably that supporting a finding of waiver when the gravamen of the lawsuit is so inconsistent with the continued assertion of a privilege as to compel the conclusion that the privilege has in fact been waived (*174 Cal. App. 3d 1142, 1150)* . The court said that since an action for fraud involves an analysis of plaintiff's reliance and whether it was justified, plaintiff, by bringing such an action, put in issue the question of its own knowledge of the events complained of (*174 Cal. App. 3d 1142, 1151)* . It cited *Upjohn Co. v. United States (1981) 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584* , in saying that all confidential communications concerning the scope of their employment between corporate employees and the corporation's in-house counsel are covered by the lawyer-client privilege, and

then noted that nothing precludes application of a waiver to those communications (*174 Cal. App. 3d 1142, 1152)* . The court cited with approval a test to determine whether the privilege must yield: (1) there must be a legitimate need to reach to evidence sought to be obtained; (2) there must be a showing of relevance and materiality of that evidence to the issue before the court; and (3) the party seeking to bar assertion of the privilege must show by a fair preponderance of the evidence, including all reasonable inferences, the information cannot be secured from any less intrusive source (*174 Cal. App. 3d 1142, 1153)* . The court focused its analysis on the third part of the test, since the first two were clearly met. The court concluded that through the synthesis of both privileged and nonprivileged communications, as well as through direct involvement as a corporate employee, the in-house counsel had accumulated knowledge that could not be discovered elsewhere, and was the person who most thoroughly could attest to the knowledge of the corporate entity that had been placed in issue by the complaint. Consequently, any lawyer-client privilege existing between the in-house counsel and plaintiff must be deemed impliedly waived. The court cautioned that its finding did not mean that the lawyer-client privilege disappears solely by bringing a fraud action, nor does the employment of in-house counsel alone erode the privilege. Rather, the in-house counsel's merger of business and legal functions and plaintiff's assertion of detrimental reliance resulted in the waiver (*174 Cal. App. 3d 1142, 1153-1154)* .

[c] Implied Waiver Occurs When Party Designated as Expert Witness Produces Privileged Documents or Testifies as Expert

In ***Shooker v. Superior Court*** *(2003) 111 Cal. App. 4th 923, 4 Cal. Rptr. 3d 334* , a former partner of venture capital company sued the company and its owner for breach of their partnership agreement, breach of fiduciary duty, constructive fraud, and conversion. Plaintiff designated six expert trial witnesses, including himself. Defendant responded with a subpoena to plaintiff to testify at a deposition and produce documents in his capacity as an expert witness. Plaintiff appeared for his deposition and produced four binders filled with documents culled from the tens of thousands previously produced in this litigation, plus five charts he had prepared to summarize those documents. Plaintiff objected to deposition questions about conversations with his attorneys on the grounds of attorney- client privilege and work product. No privileged information was disclosed. Defendant claimed that plaintiff had waived the attorney-client privilege by designating himself as an expert. Plaintiff disagreed and sought a protective order. The discovery referee recommended that the motion be denied because plaintiff had "waived the attorney-client privilege because [his] testimony *will* necessarily disclose a significant part of the privileged communication with respect to all communications relating to the subject of his expert testimony." The designation itself constituted an implied waiver and disclosure was irrelevant. Plaintiff filed objections and requested a hearing. A few months later, plaintiff served notice that he was withdrawing his designation of himself as an expert witness and filed a motion for reconsideration. The discovery referee rejected plaintiff's argument that his withdrawal preserved the privilege and concluded again that the designation itself constituted an implied waiver, even though no privileged information had been disclosed before the withdrawal. The referee recommended that the court order plaintiff to submit to a resumed deposition. The trial court rejected plaintiff's motion for reconsideration and, ultimately, plaintiff filed for a writ of mandate.

The court of appeal agreed with plaintiff that his attorney-client privilege was not waived (impliedly or otherwise) by the expert witness designation, that he did not disclose any confidential information before he withdrew his designation, and that he was entitled to the full protection of the privilege (*111 Cal. App. 4th 923, 927)* . The court found two relevant cases. In *County of Los Angeles v. Superior Court (1990) 222 Cal. App.3d 647, 271 Cal. Rptr. 698* (discussed in detail § 81.224[3][a]), the County designated a pathologist as one of its experts but withdrew the designation before the doctor was deposed. When the plaintiff then designated the pathologist, the County moved to disqualify the plaintiff's attorney and for other relief, claiming the doctor was still its consultant, that his opinionswere the County's work product and that the doctor had disclosed privileged information to the plaintiff's attorney. In that context, the court held that "once it appears reasonably certain that the consultant-expert 'will give his ... professional opinion *as a witness on a material matter* in dispute,' the attorney's work product privilege terminates and the expert's knowledge and opinions are subject to discovery and disclosure." The court granted the requested relief (*111 Cal. App. 4th 923, 928-929)* . In *National Steel Products Co. v. Superior Court (1985) 164 Cal. App. 3d 476, 210 Cal. Rptr. 535* (discussed in detail § 81.224[3][f]), plaintiff wanted to discover an engineering report prepared by the defendant steel

manufacturer's expert trial witness for a New York case arising out of the construction of a similar building, and the trial court permitted the discovery. In response to the plaintiff's contention that the attorney-client privilege was waived "by identifying the expert as a witness," the court of appeal held "the information and opinion of an expert respecting the subject matter about which he is a *prospective witness* are subjects of discovery by interrogation or deposition procedures and, if submitted in a report confined thereto, by production of such a report. In addition, because the expert's *prospective testimony* will necessarily disclose a 'significant part' of the privileged communication to the expert, the privilege is waived with respect to all communications to that expert" (*111 Cal. App. 4th 923, 929-930)* .

This court distilled the following rule from these cases: The designation of a party as an expert trial witness is not in itself an implied waiver of the party's attorney-client privilege because the party's initial status is that of a possible expert witness. If the designation is withdrawn before the party discloses a significant part of a privileged communication (as in this case), or before it is known with reasonable certainty that the party will actually testify as an expert, the privilege is secure. However, if the party provides privileged documents or testifies as an expert (such as by stating his opinion in a declaration or at a deposition) the privilege is waived (*111 Cal. App. 4th 923, 930-931)* .

[d] Test for Implied Waiver of Lawyer-Client Privilege

Chicago Title Ins. Co. v. Superior Court *(1985) 174 Cal. App. 3d 1142, 220 Cal. Rptr. 507* is discussed in [b], *above.*

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8-81 California Points & Authorities § 81.68

§ 81.68 Supporting Motion to Compel Discovery--Refuting Claim of Lawyer-Client Privilege [Evid. Code § 954]--Matter Relates to Arbitration of Attorney-Client Fee Dispute [Bus. & Prof. Code § 6202]

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in support of a motionto compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11), as well as with points and authorities generally refuting a claim of privilege (see, e.g., § 81.10).*]

THE LAWYER-CLIENT PRIVILEGE DOES NOT APPLY TO RELEVANT COMMUNICATIONS IN CONNECTION WITH _____ [AN ARBITRATION HEARING PURSUANT TO *or* A TRIAL AFTER ARBITRATION UNDER *or* JUDICIAL CONFIRMATION, CORRECTION, OR VACATION OF AN ARBITRATION AWARD THAT WAS MADE UNDER] SECTIONS 6200-6206 OF THE BUSINESS AND PROFESSIONS CODE.

Privilege Inapplicable in Matter Related to Arbitration of Attorney's Fee. *Sections 950-962 of the Evidence Code*, governing the lawyer-client privilege, do not prohibit the disclosure of any relevant lawyer-client communications in connection with (1) an arbitration hearing or mediation pursuant to *Sections 6200 through 6206 of the Business and Professions Code*; (2) a trial after arbitration; or (3) judicial confirmation, correction, or vacation of an arbitration award (*Bus. & Prof. Code § 6202*).

[2] Comments

[a] Use of Form

This form is for use in support of a motion for an order compelling discovery, when the party or other person has resisted discovery on the ground that the information sought is protected by the lawyer-client privilege. The ground for compelling discovery is that, pursuant to *Bus. & Prof. Code § 6202*, the lawyer-client privilege does not prevent disclosure of communications that are relevant to a proceeding under *Bus. & Prof. Code §§ 6200-6206* (mandatory fee

arbitration).

The form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in support of compelling discovery, as well as a form refuting a claim of privilege generally.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[c] Related Points and Authorities

For a form supporting a motion to compel discovery on the ground that work product protection does not preclude discovery of communications relevant to a proceeding under *Bus. & Prof. Code §§ 6200-6206*, see *§ 81.206*.

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8-81 California Points & Authorities § 81.69

§ 81.69 Supporting Motion to Compel Discovery--Refuting Claim of Lawyer-Client Privilege [Evid. Code § 954]--Privilege Does Not Preclude Discovery by Successor Trustee

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in support of a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11), as well as with points and authorities generally refuting a claim of privilege (see, e.g., § 81.10).*]

THE LAWYER-CLIENT PRIVILEGE DOES NOT EXIST BETWEEN A PREDECESSOR TRUSTEE AND A LAWYER TO PREVENT DISCLOSURE TO THE SUCCESSOR TRUSTEE OF CONFIDENTIAL COMMUNICATIONS BETWEEN THE PREDECESSOR TRUSTEE AND THAT LAWYER REGARDING MATTERS OF TRUST ADMINISTRATION.

Predecessor Trustee May Not Assert Lawyer-Client Privilege to Preclude Discovery by Successor Trustee. A predecessor trustee may not assert the lawyer-client privilege to withhold from the successor trustee documents reflecting confidential communications between the predecessor trustee and a lawyer on matters of trust administration (*Moeller v. Superior Court (1997) 16 Cal. 4th 1124, 1130-1133, 69 Cal. Rptr. 2d 317, 947 P.2d 279*).

[2] Comments

[a] Use of Form

This form is for use in supporting a motion for an order compelling discovery when the person has resisted discovery on the ground that the information is protected by the lawyer-client privilege. The ground for compelling discovery is that the predecessor trustee maynot assert the lawyer-client privilege to preclude discovery by the successor trustee of confidential communications between the predecessor and a lawyer on matters of trust administration.

The form does not provide a complete memorandum, but should be combined with a general form of memorandum in

support of compelling discovery, as well as a form refuting a claim of privilege generally.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Predecessor Trustee May Not Assert Lawyer-Client Privilege to Preclude Discovery by Successor Trustee

In ***Moeller v. Superior Court*** *(1997) 16 Cal. 4th 1124, 69 Cal. Rptr. 2d 317, 947 P.2d 279* , a proceeding for an accounting, the successor trustee objected to the predecessor trustee's accounting and settlement petition and formally demanded production and inspection of certain documents and records related to the predecessor trustee's administration of the trust. The predecessor trustee contended that those documents and records were protected from disclosure by the lawyer-client privilege. The trial court held the privilege applied, while the court of appeal issued a writ of mandate compelling the trial court to order the production and inspection of the documents and records.

The Supreme Court granted the predecessor trustee's petition for review, and affirmed the judgment of the court of appeal (*16 Cal. 4th 1124, 1139)* . The Court said that a trustee has the power to assert the lawyer-client privilege to prevent disclosure of confidential communications between the trustee and a lawyer consulted on behalf of the trust. The trustee retains that right so long as it remains the holder of the privilege (*16 Cal. 4th 1124, 1129-1130)* . The privilege vests in the office of the trustee and not in any particular individual or entity who at one time is the trustee. When a successor trustee takes over administration of the trust, the predecessor trustee loses, and the successor trustee acquires, the privilege to refuse to disclose confidential lawyer-client communications regarding the predecessor trustee's administration of the trust (*16 Cal. 4th 1124, 1130-1133)* . A predecessor trustee may not assert the lawyer-client privilege to withhold from the successor trustee documents reflecting confidential communications between the predecessor and a lawyer on matters of trust administration. Unless the trust provides otherwise, which the Court noted was not at issue, on taking office a successor trustee assumes all of thepowers of trustee, including the power to assert the lawyer-client privilege regarding confidential communications on the subject of trust administration (*16 Cal. 4th 1124, 1131)* .

The Court noted that the successor trustee inherits the power to assert the privilege only as to those communications that occurred when the predecessor, in its fiduciary capacity, sought the lawyer's advice for guidance in administering the trust. If a predecessor trustee seeks legal advice in its personal capacity out of a genuine concern for possible future charges of breach of fiduciary duty, the predecessor may be able to avoid disclosing the advice to a successor trustee by hiring a separate lawyer and paying for the advice out of its personal funds (*16 Cal. 4th 1124, 1133-1135)* .

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8-81 California Points & Authorities § 81.70

§ 81.70 Supporting Motion to Compel Discovery-Refuting Claim of Lawyer-Client Privilege [Evid. Code § 954]--Subject to Evidence Code Section 956.5--Confidential Communications Are Not Protected When Threat of Criminal Act Is Likely to Result in Death or Substantial Bodily Harm

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in support of a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11), as well as with points and authorities generally refuting a claim of privilege (see, e.g., § 81.10).*]

THE EXCEPTION TO THE LAWYER-CLIENT PRIVILEGE UNDER *EVIDENCE CODE SECTION 956.5* APPLIES WHEN THE LAWYER REASONABLY BELIEVES THAT DISCLOSURE OF A CONFIDENTIAL COMMUNICATION IS NECESSARY TO PREVENT A CRIMINAL ACT THAT THE LAWYER REASONABLY BELIEVES IS LIKELY TO RESULT IN DEATH OF, OR SUBSTANTIAL BODILY HARM TO, AN INDIVIDUAL.

A. Exception to Lawyer-Client Privilege Under *Evidence Code Section 956.5* Applies When Necessary to Prevent Criminal Act Likely to Result in Death or Serious Bodily Harm. The exception to the lawyer-client privilege under *Evidence Code Section 956.5* applies when the lawyer reasonably believes that disclosure of any confidential communication relating to representation of a client is necessary to prevent a criminal act that the lawyer reasonablybelieves is likely to result in death of, or substantial bodily harm to, an individual (*Evid. Code § 956.5*; *see People v. Dang (2001) 93 Cal. App. 4th 1293, 1298-1299, 113 Cal. Rptr. 2d 763*).

[*Optional*] **B. Lawyer-Client Privilege Is Inapplicable When Client Threatens to Kill or Seriously Harm Witnesses.** The exception to the lawyer-client privilege provided by *Evidence Code Section 956.5* applies to otherwise protected communications when the client threatens to dissuade a witness by force likely to result in death or serious bodily harm (*People v. Dang (2001) 93 Cal. App. 4th 1293, 1298-1299, 113 Cal. Rptr. 2d 763*).

[2] Comments

[a] Use of Form

This memorandum may be used in support of a motion for an order compelling discovery if the party or other person has resisted providing discovery on the ground that the information sought is a privileged communication between lawyer and client, if the party moving to compel discovery contends that the privilege is inapplicable under the exception of *Evid. Code § 956.5*. That statute provides an exception to the privilege if the lawyer reasonably believes that disclosure of a confidential communication is necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm [*Evid. Code § 956.5*]. Effective July 1, 2004, the statute instead makes the exception applicable if the lawyer reasonably believes disclosure is necessary to prevent any criminal act that the lawyer reasonably believes is likely to result in death or substantial bodily harm to an individual [*Evid. Code § 956.5*, as amended effective July 1, 2004; *see* 2003 Stats., ch. 765 § 2]. This form may be modified and used to compel discovery of confidential communications between lawyer and client based on other statutory exceptions to the lawyer-client privilege [*see Evid. Code §§ 956-962*].

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in support of compelling discovery, as well as with points and authorities refuting a claim of privilege generally.

The case discussed below was decided under the statute in effect before July 1, 2004.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, the form may be adapted for use when the lawyer reasonably believes that disclosure of a confidential communication relating to a client's representation is necessary to prevent the *client* from committing a criminal act likely to result in death or substantial bodily harm [*see Evid. Code § 956.5*; [a], *above*].

[3] Discussion of Authorities

[a] Exception to Lawyer-Client Privilege Under Evidence Code Section 956.5 Applies When Necessary to Prevent Client from Committing Criminal Act Likely to Result in Death or Serious Bodily Harm

Evid. Code § 956.5 exempts certain communications from the scope of the attorney-client privilege. The exception applies when the lawyer reasonably believes that disclosure of any confidential communication relating to representation of a client is necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in death of, or substantial bodily harm to, an individual (*Evid. Code § 956.5*; as amended effective July 1, 2004; *see* 2003 Stats., ch. 765 § 2; [a], *above*).

In ***People v. Dang*** *(2001) 93 Cal. App. 4th 1293, 113 Cal. Rptr. 2d 763* , defendant was charged with various felonies, after he beat his girlfriend and threatened to kill her and other witnesses if they reported his conduct to the police. Before trial, defendant told his attorney that he was going to try to "pay off" one or more witnesses and that he would "whack" the witnesses if he was not successful in bribing them. In a second conversation, defendant repeated his threats against witnesses and also threatened the attorney. Defendant's attorney reported these threats to the district attorney and was relieved as defendant's counsel. At trial, the former attorney testified about defendant's threats against the witnesses. On appeal, defendant argued, in part, that the testimony of his former attorney violated the attorney-client privilege and should have been excluded. The government argued that the testimony came within *Evid. Code § 956.5* (as in effect before July 1, 2004; *see* [2][a], *above*). As a matter of first impression interpreting *Evid. Code § 956.5* (as in effect before July 1, 2004; *see* [2][a], *above*), the court of appeal concluded that defendant's death threats clearly fell within that exception to the lawyer-client privilege.

The court of appeal rejected defendant's characterization of the threats as an attempt to "pay off one or more witnesses," rather than threats of death or physical harm. The court concluded that "the language of section 956.5 is plain" and that it applied to the threats made by defendant (*93 Cal. App. 4th 1293, 1298)* . The court noted a possible conflict between *Evid. Code § 956.5* and *Bus. & Prof. Code § 6068(e)*, which requires the attorney to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Because defendant did not raise this issue either in the trial court or on appeal, the court found it unnecessary to resolve this conflict. However, the court noted that *Evid. Code § 956.5* is an evidentiary rule, while *Bus. & Prof. Code § 6068(e)* isa codified rule of conduct for attorneys. Other appellate cases have held that the duty of confidentiality under *Bus. & Prof. Code § 6068(e)* is modified by the exceptions to the attorney-client privilege codified in the Evidence Code (*93 Cal. App. 4th 1293, 1298-1299)* .

[b] Lawyer-Client Privilege Is Inapplicable When Client Threatens to Kill or Harm Witnesses

The facts and procedural background of ***People v. Dang*** *(2001) 93 Cal. App. 4th 1293, 113 Cal. Rptr. 2d 763* are discussed in *§ 81.70[3][a]*. In a case of first impression interpreting *Evid. Code § 956.5* (as in effect before July 1, 2004; *see § 81.70[2][a]*), the court of appeal held that defendant's statements to his attorney that he was going to try to "pay off" one or more witnesses, and that he would "whack" the witnesses if he were not successful in bribing them, clearly fell under the exception. Accordingly, the attorney's testimony about those statements was exempt from the lawyer-client privilege under *Evid. Code § 956.5*, (as in effect before July 1, 2004; *see § 81.70[2][a]*) because defendant threatened the witnesses with death if they testified (*93 Cal. App. 4th 1293, 1298)* .

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B. Attorney-Client Privilege

8-81 California Points & Authorities § 81.71

§ 81.71 Supporting Motion to Compel Discovery--Refuting Claim of Lawyer-Client Privilege [Evid. Code §§ 953(c), 954, Prob. Code § 12252]--Deceased Client's Personal Representative Is Only Person Authorized to Assert Privilege

[1] FORM

[*The following may be combined, when appropriate, with a general memorandum in support of a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11), as well as with memoranda generally refuting a claim of privilege (see, e.g., § 81.10)*].

THE PERSONAL REPRESENTATIVE OF A DECEASED CLIENT IS THE HOLDER OF THE DECEASED CLIENT'S LAWYER-CLIENT PRIVILEGE. NO OTHER PERSONS OR ENTITIES ARE AUTHORIZED BY STATUTE TO ASSERT THE LAWYER-CLIENT PRIVILEGE HELD BY THE DECEASED CLIENT, UNLESS THE PERSONAL REPRESENTATIVE HAS AUTHORIZED SOME OTHER PERSON TO CLAIM THE PRIVILEGE.

A. Privilege May Be Claimed Only by Holder of Privilege or Person Authorized by Holder. In the context of this case, the lawyer-client privilege may be claimed only by (1) the holder of the privilege; (2) a person who is authorized to claim the privilege by the holder of the privilege; or (3) the person who was the lawyer at the time of the confidential communication unless there is no holder of the privilege in existence or the lawyer is otherwise instructed by a person authorized to permit disclosure [*Evid Code § 954(a)*].

B. Personal Representative of Deceased Client Is Sole Holder of Privilege. If the client is deceased, the holder of the privilege is the personal representative of the client, including a personal representative appointed under *Probate Code Section 12252* for subsequent administration of the estate after the original personal representative was discharged. Except as provided in *Evidence Code Section 954(c)* with respect to the lawyer, no one else is authorized by statute to assert the privilege [*Evid. Code § 953(c)*].

[2] Comments

[a] Use of Form

This form may be used in support of a motion for an order compelling discovery when the person resisting discovery has asserted the attorney-client privilege, the client in question is deceased, and the person asserting the privilege is someone *other than* the decedent's personal representative, a person authorized by the personal representative, or the lawyer who originally was privy to the disclosure. The ground for compelling discovery in this situation is that the personal representative of a deceased client becomes the holder of the client's privilege under *Evid. Code § 953(c)* and, in the absence of a delegation to a third person, is the only person authorized to assert the privilege formerly held by the client.

This form is not a complete memorandum, but is designed to be combined with a general memorandum in supporting discovery and, if appropriate, refuting the claim of privilege generally.

[b] Argument

Counsel should add argument linking the points in this form with the fact of the case. Specifically, counsel should assert that client who was originally holder of the privilege is now deceased (*see Evid. Code § 953(c)*), and that the person who is now attempting to assert the privilege is not the personal representative of the client's estate, nor a person to whom the personal representative has delegated authority to assert the privilege [*see Evid. Code § 954(a), (b)*] (Note that the statute does not seem fully clear on the question of whether a delegation of authority by the client to a third person during the client's lifetime would remain valid after the client's death.)

[3] Additional Authorities

[a] Personal Representative of Deceased Client Is Sole Holder of Privilege

In *HLC Properties, Ltd. v. Superior Court (2005) 35 Cal. 4th 54, 24 Cal. Rptr. 3d 199, 105 P.3d 560* , a case concerning Bing Crosby's entertainment empire, the successor to Crosby's management company sued various recording companies for underpayment of royalties. The trial court held that Crosby was the client and the holder of the privilege and that the privilege terminated after his death. The court did not recognize Crosby's management company or its successor as a privilege holder. The court of appeal reversed, holding that the entity that was the legal successor of Crosby's management company was, under *Evid. Code § 953(d)*, the holder of the attorney-client privilege that belonged to that business organization.

The Supreme Court held that the attorney-client privilege terminates under California law, once the client who is a natural person is deceased and his or her estate has been finally distributed and the personal representative discharged because there is no longer any holder authorized by statute to assert the privilege (*35 Cal. 4th 54, 65-66)* . *Evid. Code § 953(c)* states without qualification that the holder of a deceased client's attorney-client privilege is the client's personal representative. *Evid. Code § 954* specifies that, except as otherwise provided by statute, the privilege may be claimed only by a holder of the privilege, by a person whom the holder authorizes to claim the privilege, or by the person who was the attorney at the time of the confidential communication, so long as a privilege holder exists and has not authorized disclosure. Taken together, these two sections unambiguously provide that, in the case of a deceased client, only a personal representative may claim the attorney-client privilege (*35 Cal. 4th 54, 65-66)* .

The record contained substantial evidence supporting the trial court's determination that a natural person, the decedent, was the original client who held the attorney-client privilege for the communications pertaining to the recording contracts at issue. The evidence also failed to show that the management company was the client of the named attorneys with interests of its own or its collective members to protect (*35 Cal. 4th 54, 64)* . Accordingly, when Crosby died, his privilege transferred to the executor of his estate and ceased to exist on the executor's discharge.

In arguing to the contrary, plaintiff (a limited partnership that was the legal successor of Bing Crosby's ongoing entertainment business organization) contended that, even assuming Crosby individually held the attorney-client privilege with respect to the documents in dispute, an estate also qualifies as an "organization" within the meaning of *Evid. Code § 953(d)*, so that it is capable of holding and then validly transferring the decedent's privilege to a "successor." Plaintiff reasoned that because it acquired all of the estate's rights to Crosby's recordings pursuant to a limited partnership agreement, it validly held the privilege under *Evid. Code § 953(d)*, as a successor to the estate (*35 Cal. 4th 54, 66)* .

The Court rejected plaintiff's argument that the term "organization," as it appears in *Evid. Code § 953(d)*, includes an estate. *Evid. Code § 953(c)* unambiguously limits the holder of the attorney-client privilege in cases of a deceased client to the personal representative. Moreover, "estates are not listed and do not logically belong in section 953, subdivision (d), where provision is made for the privilege to survive when the client is not a natural person and no longer exists." Such an interpretation would nullify *Evid. Code § 953*'s specific limitation on who may hold the privilege "if the client is dead" (*35 Cal. 4th 54, 66-67)* . Accordingly, the trial court correctly rejected plaintiff's claim of attorney attorney-client privilege with respect to the withheld documents, authored or received by persons Crosby had hired to help manage his business interests (*35 Cal. 4th 54, 68)* .

CAUTION:

The Supreme Court's holding above that the privilege ceased to exist on discharge of the personal representative appears to have been modified in part, or at least clarified, by the 2009 amendment to *Evid. Code § 953(c)* (Stats. 2009 ch. 8), which expanded that subsection to provide that the "holder of the privilege" of a deceased client includes a personal representative appointed pursuant to *Prob. Code § 12252*. *Prob. Code § 12252* provides that a personal representative may be appointed *after* the personal representative has been discharged if subsequent administration of the estate becomes necessary because other property is discovered, or for some other reason. Thus, even if the attorney-client privilege ceases to exist on initial discharge of the personal representative, as held by the Supreme Court above, it may in effect be resurrected if it later becomes necessary to again appoint a personal representative to conduct subsequent administration. The Law Revision Commission comments to the 2009 amendment provide in part that "Subdivision (c) is amended to make clear that a personal representative holds the decedent's lawyer-client privilege at any time while the personal representative has duties as a personal representative, including, without limitation, during any subsequent estate administration."

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[Reserved]

§§ 81.72[Reserved]

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B. Attorney-Client Privilege

8-81 California Points & Authorities § 81.80

§ 81.80 Opposing Motion to Compel Discovery--Lawyer-Client Privilege [Evid. Code § 954] Applicable--General Form

[1] FORM

[*The following may be combined, when appropriate, with a general memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30), as well as with memoranda relating to resisting discovery on the grounds of privilege generally (see, e.g., § 81.20).*]

THE INFORMATION SOUGHT IS NOT DISCOVERABLE BECAUSE IT IS PRIVILEGED UNDER THE LAWYER-CLIENT PRIVILEGE.

A. Claimant of Privilege. The privilege may be claimed by (1) the holder of the privilege, that is, the client, a guardian or conservator of the client, the personal representative of a deceased client, or a successor, assign, trustee in dissolution, or any similar representative of a firm, association, organization, partnership, limited liability company, business trust, corporation, or public entity that is no longer in existence; (2) a person authorized to claim the privilege by the holder of the privilege; or (3) the person who was the lawyer at the time of the confidential communication (*Evid. Code §§ 953, 954*; *see American Mut. Liab. Ins. Co. v. Superior Court (1974) 38 Cal. App. 3d 579, 113 Cal. Rptr. 561*).

B. Definition of Confidential Communication. A confidential communication between a client and lawyer means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or to those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship (*Evid. Code § 952*; *see Insurance Co. of N. America v. Superior Court (1980) 108 Cal. App. 3d 758, 763-765, 166 Cal. Rptr. 880* ; *In re Navarro (1979) 93 Cal. App. 3d 325, 328-329, 155 Cal. Rptr. 522*).

C. Presumption of Confidentiality. When it is claimed that the matter sought to be disclosed is a communication made in the course of the lawyer-client relationship, the communication is presumed to have been made in confidence. The opponent of the claim of privilege has the burden of establishing that the communication was not confidential (*Evid. Code § 917(a), Romo v. Southern Pac. Transportation Co. (1977) 71 Cal. App. 3d 909, 922, 139 Cal. Rptr. 787*).

D. Privilege Bars Discovery of Confidential Communication Irrespective of Whether or Not It Includes Unprivileged Material. When the communication is a confidential one between attorney and client, the entire communication, including its recitation or summary of factual material, is privileged (*Costco Wholesale Corp. v. Superior Court (2009) 47 Cal. 4th 725, 734, 101 Cal. Rptr. 3d 758, 219 P.3d 736*).

[*Optional*] **E. Identity of Clients Is Confidential.** The identity of a lawyer's clients may be protected by the lawyer-client privilege when so much is already known of the lawyer-client relationship that to disclose a client's name would betray a confidential communication (*Rosso, Johnson, Rosso & Ebersold v. Superior Court (1987) 191 Cal. App. 3d 1514, 1518, 237 Cal. Rptr. 242*).

[*Optional*] **F. No Presumption of Nonconfidentiality for Electronic Communications.** A communication between a client and his or her lawyer is not deemed lacking in confidentiality solely because the communication is transmitted by facsimile, cellular telephone, or other electronic means between the client and his or her lawyer (*Evid. Code § 917(b)*).

[*Add points and authorities relating to the applicability of this privilege in the specific factual context (see, e.g., § 81.81 et seq.).*]

[2] Comments

[a] Use of Form

This memorandum in opposition to a motion for an order compelling discovery may be submitted by a party or other person who has resisted providing discovery on the ground that the material sought is privileged as a confidential lawyer-client communication [*see Evid. Code §§ 950-962*]. It does not provide a complete memorandum but is designed to be combined with a general memorandum in opposition to compelling discovery, as well as memoranda relating to the particular factual situation.

In an appropriate case, this memorandum may be submitted in opposition to the motion supported by the form *set out in § 81.60*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Claimant of Privilege

Evid. Code § 954 states that a client has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between a client and a lawyer if the privilege is claimed by the persons set out in Paragraph A of this form. The holder of the privilege is defined in *Evid. Code § 953* and may be a claimant of the privilege pursuant to *Evid. Code § 954(a)*.

In ***American Mut. Liab. Ins. Co. v. Superior Court*** *(1974) 38 Cal. App. 3d 579, 113 Cal. Rptr. 561* , during trial of a

medical malpractice action, the court ordered an attorney, who had been employed by defendant surgeon's insurance company to defend him against numerous malpractice claims, to produce his files from four of those actions. While the attorney had been attorney of record for the surgeon in the instant case, he had withdrawn after the surgeon had filed a malfeasance action against him. The surgeon's insurer unsuccessfully objected to the disclosure of the files, claiming attorney-client privilege, and sought a writ of mandate to vacate the disclosure order. In vacating the trial court's order, the court of appeal discussed the applicability of the privilege, concluding that in regard to the malpractice actions, the attorney had two clients, the surgeon and the insurer, and both were entitled to claim the privilege, and that the trial court erroneously concluded that the insurer was not a client but merely the employer of the attorney on defendant's behalf (*38 Cal. App. 3d 579, 591-593)* . For a discussion of this case as it relates to waiver of the privilege, see *§ 81.89[3][d]*.

[b] Definition of Confidential Communication

Insurance Co. of N. America v. Superior Court *(1980) 108 Cal. App. 3d 758, 166 Cal. Rptr. 880* arose out of an action by an asbestos manufacturer against its products liability insurer, the insurer's parent holding company, and other affiliated companies for declaratory and other relief with respect to liability insurance coverage for asbestos-related claims. The insurer (petitioner herein) hired outside counsel to advise it on the claims and the extent of its insurance coverage. When counsel met with theinsurer, the vice-president in charge of the legal department of the parent holding company and the president of an affiliated subsidiary were in attendance. The manufacturer sought to discover the events, memorandums, notes, and conversations of the meeting, claiming the attorney-client privilege to be inapplicable because two outsiders were present at the meeting and attorney-client communications in the presence of third persons are not privileged. The trial court ordered discovery of the documents and testimony related to the meeting, reasoning that because outside counsel was hired only by the insurer, the presence at the meeting with the insurer's consent of the two officers from the other companies resulted in a waiver by the insurer of its attorney-client privilege.

On a petition for a writ of prohibition by the insurer, the court of appeal ordered a writ to issue prohibiting the trial court from enforcing its order and directing it to set the order aside. The court first held that the two officers were not outsiders to the insurer-subsidiary, that the confidentiality of the meeting was never breached, and that the legal communications remained privileged under *Evid. Code § 952* in that the vice-president of the parent holding company attended in the capacity of legal consultant and adviser to the insurer and the president of the affiliate attended in the capacity of temporary employee and consultant to the insurer, and thus both furthered the insurer's interest in the consultation (*108 Cal. App. 3d 758, 763-765*).

On a broader issue, the court considered the question of whether an officer or employee of a holding or affiliated company can receive legal advice from counsel employed by a wholly owned subsidiary or affiliate without destroying the confidentiality of the attorney-client communication. The court considered it to be apparent that the authors of *Evid. Code § 952* intended a comprehensive construction of the attorney-client privilege when they specified that neither disclosures to third persons present to further the interest of the client, nor disclosures to third persons that are reasonably necessary to transmit information or accomplish the purpose for which the attorney has been consulted, destroy confidentiality of communication (*108 Cal. App. 3d 758, 766*). Assuming that the president of the holding company was in attendance, the court stated that there was sufficient unity of interest and identity between the parent company and its wholly owned operating subsidiary to make the presence of a representative of the former at a legal briefing for representatives of the latter, one which furthers the interest of the client. The court applied similar reasoning to other representatives of the holding company and its affiliates who are present for good business reasons to further the interest of the client. Thus, the court held that absent some conflict of interest or some evidence of antagonism among entities, disclosure of counsel's legal opinion to holding company and affiliated company officers and employees who need to know this information in order to perform their duties properly is adisclosure that is reasonably necessary to accomplish the purpose for which counsel have been consulted, and is privileged. The court concluded, at least in the instance of wholly owned subsidiaries and affiliates, that the presence of a representative of a parent or affiliated company at a legal briefing of a subsidiary, and vice versa, does not destroy confidentiality of communication between

counsel and client (*108 Cal. App. 3d 758, 766-770*).

The court also held that disclosures of legal advice and opinion by written or oral communication to those persons to whom such information is reasonably necessary to accomplish the purpose of the legal consultation remain confidential, even though the recipients have not been briefed by counsel in person. Thus, the court construed *Evid. Code § 952* to mean that attorney-client communications in the presence of, or disclosed to, clerks, secretaries, interpreters, physicians, spouses, parents, business associates, or joint clients, when made to further the interest of the client or when reasonably necessary for transmission or accomplishment of the purpose of the consultation, remain confidential (*108 Cal. App. 3d 758, 770, 771*). The court noted that a discussion of corporate policy, as opposed to legal advice, is not confidential, and that the boundary lines between the two fields must be settled by the trier of fact during the course of discovery (*108 Cal. App. 3d 758, 770-771*).

In ***In re Navarro*** *(1979) 93 Cal. App. 3d 325, 155 Cal. Rptr. 522* , an attorney representing a defendant in a robbery case was called to testify at a preliminary hearing in which the same defendant was charged with murder but was being represented by a different attorney. Asserting the attorney-client privilege, the attorney refused to disclose whether she had shown a specific arrest report for robbery, the contents of which might have provided a motive for the murder, to defendant. The magistrate found that the privilege was not applicable and held the attorney in contempt. The superior court granted a writ of habeas corpus and discharged the contempt order. On appeal by the municipal court, the court of appeal affirmed, holding that the lawyer's act of handing a police report to her client, if in fact she had done so, was a confidential communication privileged under *Evid. Code § 952* because a "communication" need not be exclusively verbal but may be signs, actions, or other means (*93 Cal. App. 3d 325, 330*).

The court in *Navarro,* in addition to relying on *Evid. Code § 952*, cited *San Francisco v. Superior Court of San Francisco (1951) 37 Cal. 2d 227, 235236, 231 P.2d 26* , a personal injury action, as authority (*93 Cal. App. 3d 325, 330*). Although the latter case was decided under former Code Civ. Proc. § 1881(2), and the attorney-client privilege is now governed by *Evid. Code §§ 950-962*, the rule that a "communication" need not be exclusively verbal in order to be confidential is nevertheless still effective. For a discussion of the facts and procedural history of *City & County of San Francisco,* see *§ 81.60[3][a]*.

[c] Presumption of Confidentiality

In ***Romo v. Southern Pac. Transportation Co.*** *(1977) 71 Cal. App. 3d 909, 139 Cal. Rptr. 787* , a jury trial resulted in a verdict for defendant in an action for damages suffered in a railroad crossing accident when plaintiff's car was struck by a train. On appeal, plaintiff claimed, among other things, that the trial court had erred in denying, in part, his motion to inspect or have produced the files of a special committee established by defendant to reorganize its records of railroad crossing accidents. The trial court reviewed the files in camera and ruled that they were protected by the attorney-client privilege. In affirming, the court of appeal concluded that plaintiff had offered no evidence to disprove defendant's claim of privilege and therefore had not sustained its burden of establishing lack of confidentiality. In such a case, the court of appeal could not require in camera disclosure of the material in order to rule on the privilege claim (*71 Cal. App. 3d 909, 922*).

[d] Privilege Bars Discovery of Confidential Communication Irrespective of Whether or Not It Includes Unprivileged Material

In ***Costco Wholesale Corp. v. Superior Court*** *(2009) 47 Cal. 4th 725, 101 Cal. Rptr. 3d 758, 219 P.3d 736* , petitioner, a corporation defending a wage and hour claim brought by employees, sought mandate relief from an court order directing the corporation to produce an opinion letter written by outside counsel to the corporation's in-house attorneys. A referee had redacted the letter, concluding that parts of the communication were not privileged because they involved factual information about various employees' job responsibilities based on nonprivileged documents and interviews with two of the corporation's managers. The court of appeal denied the writ, holding that the unredacted

portions of the letter--factual statements that did not reveal strategy or communicate any legal knowledge, advice, or impressions--were protected by neither the attorney-client privilege nor work product protection (*47 Cal. 4th 725, 731)* .

The California Supreme Court reversed the judgment of the court of appeal and remanded with directions to vacate the trial court's discovery order and to remand the case to the trial court for further proceedings (*47 Cal. 4th 725, 741)* . The Court held that the attorney-client privilege attached to the attorney's opinion letter in its entirety because the opinion letter was a confidential communication as defined in *Evid. Code § 952*, irrespective of whether it included unprivileged material (*47 Cal. 4th 725, 734)* . Because *Evid. Code § 915* prohibits a trial court from ordering disclosure of a communication claimed to be privileged in order to rule on the claim of privilege, the trial court erred in ordering *in camera* review (*47 Cal. 4th 725, 732)* . Moreover, the corporation, as the party seeking extraordinary relief from a discovery order that wrongfully invaded the attorney-client relationship, did not need to establish that its case would be harmed by disclosure of the evidence (*47 Cal. 4th 725, 732)* .

The Court clarified that *Evid. Code § 915(a)* does not prohibit:

- Disclosure or examination of other information to permit the court to evaluate the basis for a claim of privilege, for example, whether the privilege is held by the party asserting it (*47 Cal. 4th 725, 737)* .

- Review of the facts asserted as the basis for the privilege to determine, for example, whether the attorney-client relationship existed at the time the communication was made, whether the client intended the communication to be confidential, or whether the communication emanated from the client (*47 Cal. 4th 725, 737)* .

- Voluntary disclosure of the communication *in camera*, by the party claiming the privilege, to prevent the court from ordering disclosure of private information bearing no relevance to the litigation (*47 Cal. 4th 725, 738)* .

- *In camera* disclosure of the content of a communication by the party claiming a privilege, to respond to an argument or tentative decision that the communication is not privileged (*Morse v. Frederick, 127 S. Ct. 2618 (2007)* .

The Court added that after a court has determined the privilege is waived or an exception applies generally, the court--to protect the claimant's privacy--may conduct or order an *in camera* review of the communication at issue to determine if some protection is warranted notwithstanding the waiver or exception (*47 Cal. 4th 725, 740)* .

[e] Identity of Clients Is Confidential

In ***Rosso, Johnson, Rosso & Ebersold v. Superior Court*** *(1987) 191 Cal. App. 3d 1514, 237 Cal. Rptr. 242* , in response to an advertisement placed by defendant attorneys, in which they claimed expertise with injuries sustained through the use of intrauterine devices, plaintiff contacted defendants. After reviewing plaintiff's case, defendants refused to take it, advising her of the need to contact another attorney promptly if she wished to pursue the case. Plaintiff retained another firm, which filed suit against defendants, alleging they had missed the applicable statute of limitations. Plaintiff requested production of defendants' client list of intrauterine device cases. Defendants refused, claiming the lawyer-client privilege. After the trial court granted plaintiff's motion to compel disclosure, defendants filed a petition of writ of mandate or prohibition to restrain the court from requiring disclosure.

The court of appeal issued a peremptory writ of mandate directing the trial court to vacate its discovery order (*191 Cal. App. 3d 1514, 1519*). The court said that generally, the identity of an attorney's clients is not protected by the lawyer-client privilege. However, in unusual situations, as when so much is already known of the lawyer-client

relationship that to disclose a client's name would betray a confidential communication, the identity of a client may be treated as privileged information (*191 Cal. App. 3d 1514, 1518*). The court observed that the client list consisted of women who were suffering injuries arising from the use of an intrauterine device, and that revealing their names would reveal the nature of their medical problems, which are considered confidential communications. The court concluded that since disclosure of the list would reveal the problem of the client, disclosure of the list revealing the identity of the clients should not be allowed either (*191 Cal. App. 3d 1514, 1519*).

[4] Additional Authorities

[a] Claimant of Privilege

In *Venture Law Group v. Superior Court (2004) 118 Cal. App. 4th 96, 12 Cal. Rptr. 3d 656* , a law firm and a former firm attorney filed a writ petition for relief from the trial court's discovery order compelling the attorney to answer deposition questions asked by real parties in interest about the legal advice given to the law firm's corporate client regarding a merger. Petitioners contended that the successor corporation was the holder of the attorney-client privilege of the merged client corporation, and because the successor corporation had not waived the privilege, the attorney could not answer the deposition questions without violating the privilege. The court of appeal agreed, and issued a peremptory writ of mandate to vacate the discovery order. *Evid. Code § 953(d)* provides that the successor of a disappeared corporation becomes the holder of the attorney-client privilege. Thus, after the merger, the attorney-client privilege belonged to the successor corporation, and petitioner attorney had a duty to assert the privilege in the absence of any contrary instructions from the successor corporation (*118 Cal. App. 4th 96, 105-106*).

In *Mylan Lab., Inc. v. Soon-Shiong (1999) 76 Cal. App. 4th 71, 90 Cal. Rptr. 2d 111* , appellants challenged, among other things, an order denying their motion to intervene. Appellants had sought intervention in order to become parties to the action so that they would have "standing" to assert the attorney-client privilege and the work-product doctrine with respect to a document sought by plaintiff. The court of appeal affirmed the trial court's order denying the motion, holding that appellants had standing to assert the attorney-client privilege based solely on their claimed status as holder of the privilege; they did not have to intervene as a party in order to assert any claim of privilege (*76 Cal. App. 4th 71, 73-74, 90 Cal. Rptr. 2d 111*). Moreover, the court concluded that intervention as a party was never intended to be used as a means by which a non-party could assert the attorney-client privilege. In so holding, the court relied on the language of *Evid. Code § 954*, which expressly provides that the privilege can be claimed by a non-party as long as the non-party asserting the privilege is the client or other authorized person, as well as on sound policy reasons to avoid the cumbersome and expensive process of intervention in this context (*76 Cal. App. 4th 71, 79-80, 90 Cal. Rptr. 2d 111*).

In *Kroll & Tract v. Paris & Paris (1999) 72 Cal. App. 4th 1537, 86 Cal. Rptr. 2d 78* , an attorney sued for malpractice by a former client cross-complained against the client's successor attorney for comparative equitable indemnity. The court of appeals affirmed the trial court's order sustaining the demurrer without leave to amend on the grounds that public policy considerations barred the requested relief. In so holding, the court rejected cross-complainant's argument that the fear of revealing confidences should not bar its cross-complaint because the commencement of the malpractice action as to one attorney should operate as a waiver of the attorney-client privilege as to both attorneys regarding communications relevant to the joint representation. The court explained that the client is the holder of the attorney-client privilege, and that the client expressly preserved the privilege as to its successor attorney by choosing not to sue it for malpractice (*72 Cal. App. 4th 1537, 1544, 86 Cal. Rptr. 2d 78*). The court added that if the indemnity action were allowed, the successor attorney would be unable to defend itself to the extent that its actions depended on client communications (*72 Cal. App. 4th 1537, 1544, 86 Cal. Rptr. 2d 78*).

[b] Definition of Confidential Communication

In *Zurich Am. Ins. Co. v. Superior Court (2007) 155 Cal. App. 4th 1485, 66 Cal. Rptr. 3d 833* , the court of appeal held that confidential communications between an insurer's employees regarding legal advice and strategy could be

privileged, because confidential communications under *Evid. Code § 952* includes information transmitted to persons to whom disclosure was reasonably necessary to further the interest of the litigant. Thus, even if the insurer's attorneys were not directly involved, and the documents did not include excerpts of direct communications from the attorneys, communications reflecting a discussion of litigation strategy and expressing that the strategy was in response to advice of counsel would come within the privilege (*155 Cal. App. 4th 1485, 1502-1504*). The court remanded the case to determine whether employees with whom advice of counsel was shared came within these principles (*155 Cal. App. 4th 1485, 1503-1504)* .

The facts and procedural background of *OXY Resources California LLC v. Superior Court (2004) 115 Cal. App. 4th 874* are discussed in *§ 81.65[4][a]*. There, the court of appeal held that when parties negotiating a business transaction entered into a joint defense agreement in anticipation of litigation by a third party, in camera review was required to determine whether the disclosure of the documents in the course of the transaction waived the attorney-client privilege or work product protection (*115 Cal. App. 4th 874, 879*). While the joint defense agreement was not void as matter of public policy, it could not serve as sole ground for withholding the documents. Rather, the agreement evidenced the expectation of confidentiality necessary to avoid waiver by disclosure to someone outside the attorney-client relationship, but could not protect the documents from disclosure unless they contained or reflected attorney-client communications or attorney work product (*115 Cal. App. 4th 874, 893*).

In *Roberts v. City of Palmdale (1993) 5 Cal. 4th 363, 20 Cal. Rptr. 2d 330, 853 P.2d 496* , the Supreme Court held that the attorney-client privilege applies to communications made in the course of professional employment that are intended to be confidential (*5 Cal. 4th 363, 371*). The privilege has a strong basis in public policy and the administration of justice in that it seeks to ensure the right of every person to freely and fully confer and confide in an attorney so that that person may have adequate legal advice (*5 Cal. 4th 363, 380*). For further discussion of *Roberts,* see *§ 81.81[3][a]*.

In *De Los Santos v. Superior Court (1980) 27 Cal. 3d 677, 166 Cal. Rptr. 172, 613 P.2d 233* , a minor had made statements to his mother, who was also his guardian ad litem for the lawsuit, in response to questions she asked at the request of the minor's attorney for the purpose of preparing the minor's answers to the interrogatories propounded by defendants or to assist the attorney in preparing for trial. The Supreme Court stated that the statements were given in the course of a lawyer-client relationship and were intended to be confidential. The Court also agreed with plaintiffs' contention that the mother, in her capacity as guardian ad litem, was a third party to whomcommunication was reasonably necessary for the transmission of the information to the lawyer, or the accomplishment of the purpose for which the lawyer was consulted under *Evid. Code § 952*, and that the statements were protected whether or not all of the minor's remarks were communicated in full to his lawyer (*27 Cal. 3d 677, 683, 685*). *De Los Santos* is discussed further in § 81.89[3][e].

Benge v. Superior Court (1982) 131 Cal. App. 3d 336, 182 Cal. Rptr. 275 arose out of an action by union members for damages resulting from lead poisoning. Defendant in the action obtained a trial court order compelling plaintiffs to respond to deposition questions regarding their discussions with other union members and attorneys at meetings held before commencement of the action. Plaintiffs and the other union members attended the meetings to obtain legal advice on their workers' compensation rights. At the first meeting, additional legal advice was given concerning plaintiffs' legal rights against third parties relative to the lead poisoning. The court of appeal issued a writ of mandate setting aside the trial court order, holding that the attorney-client privilege protected all communications made at the meetings concerning the alleged lead dust (*131 Cal. App. 3d 336, 348*).

In *Lohman v. Superior Court (1978) 81 Cal. App. 3d 90, 146 Cal. Rptr. 171* , an action for breach of trust, personal injury, and fraud by a conservatee against her temporary conservator and his attorney, the court of appeal held that answers given at a deposition by the plaintiff's former attorney, over plaintiff's objections, should be suppressed as violative of the attorney-client privilege (*81 Cal. App. 3d 90, 99*). The answers, regarding the deponent's opinions relating to the culpability of the defendants and his interpretation of the Probate Code, constituted a legal opinion under

the *Evid. Code § 952* definition of a confidential communication, which includes legal opinions formed and advice given by a lawyer in the course of the lawyer-client relationship (*81 Cal. App. 3d 90, 99*). For a more detailed discussion of the facts and procedural history of *Lohman*, see *§ 81.89[3][a]*.

In *Sheets v. Superior Court (1967) 257 Cal. App. 2d 1, 64 Cal. Rptr. 753* , an action for injunctive relief, dissolution of a partnership, an accounting, and damages for breach of the partnership agreement and fraud, the court of appeal found that plaintiff's attorney's analysis and evaluation of the report of a certified public accountant who examined the partnership books was, as distinguished from the accountant's report itself, part of the advice given by plaintiff's lawyer to his client in the course of his professional relationship within *Evid. Code § 952* and therefore was a privileged communication (*257 Cal. App. 2d 1, 10*). For a more detailed discussion of the facts and procedural history of *Sheets*, see *§ 81.61[3][a]*.

[c] Presumption of Confidentiality

In *Hiott v. Superior Court (1993) 16 Cal. App. 4th 712, 20 Cal. Rptr. 2d 157* , the court found that the lawyer-client privilege applied to a videotaped communication between a personal injury victim and her brother who was a lawyer made while she was in the hospital following the accident. Although there was nothing in the record indicating whether the plaintiff believed an attorney-client relationship existed at that time or whether she considered their communication confidential, such beliefs could be inferred from the circumstances surrounding their videotaped communication (*16 Cal. App. 4th 712, 717-718*). But note that although the videotaped communication was protected, the court held that plaintiff waived the protection (*16 Cal. App. 4th 712, 719-720)* .

In *Rockwell Internat. Corp. v. Superior Court (1994) 26 Cal. App. 4th 1255, 32 Cal. Rptr. 2d 153* , the court held that the presumption of confidentiality regarding a communication made in the course of a lawyer-client relationship is not established by a standard cooperation clause in a third-party liability insurance policy (*26 Cal. App. 4th 1255, 1261-1266)* .

[d] Identity of Clients Is Confidential

In *Tien v. Superior Court (2006) 139 Cal. App. 4th 528, 43 Cal. Rptr. 3d 121* , a putative class action lawsuit alleging wage and hour violations, petitioner employee brought a writ proceeding to challenge the Superior Court's order requiring disclosure to the real party in interest employer of the names, addresses, and telephone numbers of all putative class members who contacted the employees' counsel. The court of appeal concluded that the trial court's discovery order did not violate the attorney-client privilege. "It is well established that the attorney-client privilege, designed to protect communications between them, does not ordinarily protect the client's identity[], and, in this case, no personal, confidential information was requested" (*139 Cal. App. 4th 528, 537)* . However, discovery would violate the privacy rights of class members whose identities were disclosed, because they had a significant interest in maintaining their privacy, and the employer had no compelling need to learn their identities (*139 Cal. App. 4th 528, 540-541)* . For discussion of other aspects of this case, see *§ 81.253[4][a]*.

In *Hooser v. Superior Court (2001) 84 Cal. App. 4th 997, 101 Cal. Rptr. 2d 341* , the court of appeal considered whether a judgment debtor who is an attorney must disclose certain client information in judgment debtor examination, including a list of the attorney's current clients. The attorney relied on the attorney-client privilege and his clients' rights of privacy as the bases for refusing to respond to judgment creditor's discovery requests (*84 Cal. App. 4th 997, 1003*). Generally, the identity of an attorney's client is not within the protection of the attorney-client privilege. As the attorney made no argument that a recognized exception to this rule applied in his case, the court concluded that the attorney-client privilege did not apply to prevent disclosure of the identities of the attorney's clients (*84 Cal. App. 4th 997, 1005*). However, the court also concluded that the identity of an attorney's clients is sensitive, personal information that implicates the clients' rights of privacy (*84 Cal. App. 4th 997, 1005*).

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8-81 California Points & Authorities § 81.81

§ 81.81 Opposing Motion to Compel Discovery--Lawyer-Client Privilege [Evid. Code § 954] Applicable--Communication When No Litigation Is Threatened

[1] FORM

[*The following may be combined, when appropriate, with a general memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery:Production or Inspection of Tangible Evidence, § 85.30), as well as with points and authorities relating to resisting discovery on the grounds of privilege generally (see, e.g., § 81.20), and relating to the attorney-client privilege generally (see, e.g., § 81.80).*]

THE INFORMATION SOUGHT TO BE DISCOVERED IS PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE BECAUSE IT WAS CONFIDENTIAL INFORMATION BETWEEN _____ [*name*], AN ATTORNEY, AND HIS/HER CLIENT _____ [*name*], EVEN THOUGH NO LITIGATION WAS THREATENED IN THE MATTER.

A. Privilege Applies Although No Litigation Is Threatened. The attorney-client privilege applies to confidential communications between an attorney and his or her client, even though no litigation is threatened in the matter (*Roberts v. City of Palmdale (1993) 5 Cal. 4th 363, 371, 20 Cal. Rptr. 2d 330, 853 P.2d 496*).

[*Optional*] **B. Open Meeting Requirements Do Not Require Disclosure of City Attorney's Letter to City Council.** A city attorney's legal advice given by letter to a city council is not required to be disclosed under the Public Records Act (*Gov. Code § 6250 et seq.*) or the Brown Act (*Gov. Code § 54950 et seq.*). The language in *Government Code Section 54956.9* abrogating the attorney-client privilege applies to open meeting requirements only, and does not regulate the transmission of documents such as a city attorney's letter (*Roberts v. City of Palmdale (1993) 5 Cal. 4th 363, 373-381, 20 Cal. Rptr. 2d 330, 853 P.2d 496*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted by a party or other person resisting discovery on the ground that disclosure is not required simply because no litigation is threatened in the matter. This memorandum is designed to be combined with a general memorandum in opposition to discovery, as well as with points and authorities generally relating to the application of privileges and to the attorney-client privilege.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Privilege Applies Although No Litigation Is Threatened

In ***Roberts v. City of Palmdale*** *(1993) 5 Cal. 4th 363, 20 Cal. Rptr. 2d 330, 853 P.2d 496* , the Supreme Court held that the attorney-client privilege applies to communications made in the course of professional employment that are intended to be confidential (*5 Cal. 4th 363, 371*). The privilege applies not only to communications made in anticipation of litigation, but also to legal advice when no litigation is threatened (*5 Cal. 4th 363, 37)* . The privilege has a strong basis in public policy and the administration of justice in that it seeks to ensure the right of every person to freely and fully confer and confide in an attorney so that that person may have adequate legal advice (*5 Cal. 4th 363, 380*). The Court held that public entities have the right to assert the privilege (*5 Cal. 4th 363, 370-371*). It concluded that a letter the city attorney prepared for the city council in which the attorney expressed legal opinions concerning a resident's pending appeal of a parcel map was a confidential communication within the attorney-client privilege, even if the letter was not a document pertaining to pending litigation (*5 Cal. 4th 363, 373*). Disclosure of the letter was not required under the Public Records Act (*Gov. Code § 6250 et seq.*) or under the Brown Act (*Gov. Code § 54950 et seq.*). The language in *Gov. Code § 54956.9* abrogating the attorney-client privilege applies to open meeting requirements only, and does not regulate the transmission of documents such as the city attorney's letter (*5 Cal. 4th 363, 373-381*).

[b] Open Meeting Requirements Do Not Require Disclosure of City Attorney's Letter to City Council

Roberts v. City of Palmdale *(1993) 5 Cal. 4th 363, 20 Cal. Rptr. 2d 330, 853 P.2d 496* is discussed in [a], *above.*

[4] Additional Authorities

[a] Open Meeting Requirements Do Not Require Disclosure of City Attorney's Letter to City Council

At issue in *Shapiro v. Bd. of Directors of the Centre City Dev. Corp. (2005) 134 Cal. App. 4th 170, 35 Cal. Rptr. 3d 826* was whether the Brown Act, California's open meeting law, allowed a nonprofit corporation created by the city of San Diego to hold closed-session meetings with legal counsel for the city Redevelopment Agency to assist the Agency with its eminent domain litigation. *Gov. Code § 54956.9* permits the legislative body of a local agency to hold closed-session meetings with its legal counsel to discuss litigation to which it is a party. The trial court concluded that the non-profit was acting on behalf of the Agency with respect to the eminent domain litigation and thus could meet in closed session with the Agency's counsel under the closed-session rules applicable to the Agency. The court of appeal disagreed. It held that, under the plain language of the Brown Act, the non-profit could not meet in closed session with the Agency's counsel to discuss pending litigation to which the non-profit was not a party (*134 Cal. App. 4th 170, 174*). The appellate court reasoned that it was constrained to narrowly interpret exceptions to the Brown Act's open meeting requirements, and the Brown Act does not expressly authorize one local agency to delegate to a second local agency the authority to meet in closed session with legal counsel (*134 Cal. App. 4th 170, 185*).

In *County of Los Angeles v. Superior Court (Union of American Physicians and Dentists) (2005) 130 Cal. App. 4th 1099, 30 Cal. Rptr. 3d 708* , the superior court had granted the county's motion to compel production of documents

listed in a third-party deposition subpoena directed to the district attorney, who had conducted an investigation into whether the county board of supervisors violated the Brown Act during two closed sessions. The court of appeal reversed, holding that closed session minutes are specifically exempt from disclosure under *Gov. Code § 54957.2*. Although closed session minutes may be disclosed "to a court of general jurisdiction wherein the local agency lies" for the limited purpose of allowing the court to determine whether aBrown Act violation has occurred, here, the closed sessions were properly convened under *Gov. Code § 54956.9* to discuss anticipated litigation related to a federal agency's decision to terminate a medical center's Medicare and Medi-Cal funding. Thus, the minutes of the closed sessions were confidential and were not subject to discovery (*130 Cal. App. 4th 1099, 1106*).

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8-81 California Points & Authorities § 81.82

§ 81.82 Opposing Motion to Compel Discovery--Lawyer-Client Privilege [Evid. Code § 954] Applicable--Communication Before Actual Employment of Lawyer as Privileged

[1] FORM

[*The following may be combined, when appropriate, with a general memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30), as wellas with points and authorities relating to resisting discovery on the grounds of privilege generally (see, e.g., § 81.20), and relating to the attorney-client privilege generally (see, e.g., § 81.80).*]

INFORMATION ACQUIRED BY _____ [*name*], A LAWYER, IN THE COURSE OF INTERVIEWS OR NEGOTIATIONS LOOKING TOWARD HIS/HER EMPLOYMENT IS PRIVILEGED, EVEN THOUGH NO ACTUAL EMPLOYMENT FOLLOWED.

Communication Before Actual Employment of Lawyer. When a person consults a lawyer, with a view to employing him or her professionally, any information acquired by the lawyer in the course of interviews or negotiations looking toward such employment is privileged and cannot be disclosed, even though no actual employment of the lawyer, as such, follows (*People v. Canfield (1974) 12 Cal. 3d 699, 705, 117 Cal. Rptr. 81, 527 P.2d 633* ; *Sullivan v. Superior Court (1972) 29 Cal. App. 3d 64, 69, 105 Cal. Rptr. 241*).

[2] Comments

[a] Use of Form

These points and authorities in opposition to a motion for an order compelling discovery may be submitted by a party or other person who has resisted providing discovery on the ground that disclosure of a confidential communication between an attorney and a prospective client is privileged. It does not provide a complete memorandum but is designed to be combined with a general form of memorandum in opposition to compelling discovery, as well as with points and authorities relating to resisting discovery on the ground of privilege and relating to the attorney-client privilege

generally.

In an appropriate case, these points and authorities may be submitted in opposition to the motion supported by the points and authorities *set out in § 81.61*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Communication Before Actual Employment of Lawyer

In ***People v. Canfield*** *(1974) 12 Cal. 3d 699, 117 Cal. Rptr. 81, 527 P.2d 633* , a criminal case, the Supreme Court relied on *Sullivan, below,* in regardto the application of the privilege before employment as counsel, in discussing the extent of the attorney-client privilege (*12 Cal. 3d 699, 705*).

In ***Sullivan v. Superior Court*** *(1972) 29 Cal. App. 3d 64, 105 Cal. Rptr. 241* , the trial court ordered one of the plaintiffs in a personal injury action to produce a transcription of a tape-recorded conference with her attorney that the plaintiff had used to refresh her memory before the taking of her deposition. The court of appeal granted the petition of plaintiff's attorney for a writ to prohibit enforcement of the order to produce, holding that *Evid. Code § 771,* requiring a witness to produce, on request, any writing used to refresh his memory for testifying, could not be construed as applicable to a transcription of a client's discussion with her attorney concerning an accident for which she was employing the attorney's legal services. In discussing the attorney-client privilege, the court stated that when a person consults an attorney with a view to employing that attorney professionally, any information acquired by the attorney in the course of interviews or negotiations looking toward such employment is privileged and cannot be disclosed, even though no actual employment of the attorney as such follows (*29 Cal. App. 3d 64, 69*).

[4] Additional Authorities

[a] Communication Before Actual Employment of Lawyer

The facts and procedural background of *Benge v. Superior Court (1982) 131 Cal. App. 3d 336, 182 Cal. Rptr. 275* are discussed in *§ 81.80[4][b]*. The court of appeal held that the attorney-client privilege protected all communications made at meetings between union members and attorneys held before the commencement of the action. The members' legal rights concerning alleged lead poisoning were discussed at these meetings. The court stated that since the members were seeking legal advice, the fact that they did not intend to retain counsel when they went to the first meeting or that the attorneys at the meeting did not represent the members who eventually brought suit was irrelevant, since a person may discuss a problem with an attorney for the purpose of obtaining legal advice, and the discussion is privileged even though no actual employment ensues (*131 Cal. App. 3d 336, 347*).

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8-81 California Points & Authorities § 81.83

§ 81.83 Opposing Motion to Compel Discovery--Lawyer-Client Privilege [Evid. Code § 954] Applicable--Failure to Establish Joint-Client Relationship [Evid. Code § 962] by Showing Actual Employment of Lawyer

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30), as well as with points and authorities relating to resisting discovery on the grounds of privilege generally (see, e.g., § 81.20), and relating to the attorney-client privilege generally (see, e.g., § 81.80).*]

COMMUNICATIONS WITH AN ATTORNEY REMAIN PROTECTED UNDER THE LAWYER-CLIENT PRIVILEGE WHEN THERE IS NO SHOWING THAT THE ATTORNEY WAS ACTUALLY EMPLOYED CONCERNING MATTERS OF COMMON INTEREST SO AS TO ESTABLISH A JOINT-CLIENT RELATIONSHIP.

Joint-Client Relationship Not Established When No Showing of Attorney's Actual Employment. Confidential communications between one person and an attorney concerning a matter of common interest with a second person remain protected under the lawyer-client privilege in a subsequent action between the two persons, or their assignees, when there is no showing that the attorney was actually employed by the first person to handle the common matter so as to establish a joint-client relationship (*see Houston Gen. Ins. Co. v. Superior Court (1980) 108 Cal. App. 3d 958, 966-967, 166 Cal. Rptr. 904*).

[2] Comments

[a] Use of Form

These points and authorities opposing a motion for an order compelling discovery may be submitted by a party who has resisted discovery on the ground that the material sought is privileged as a confidential attorney-client communication, when the party moving to compel discovery has contended that the joint-client exception [*see Evid. Code § 962*] to the

lawyer-client privilege applies. This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in opposition to compelling discovery, as wellas with points and authorities relating to resisting discovery on the ground of privilege and relating to the attorney-client privilege generally.

In an appropriate case, these memorandum may be submitted in opposition to a motion to compel discovery supported by the points and authorities set out in *§ 81.63*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Joint-Client Relationship Not Established When No Showing of Attorney's Actual Employment

Houston Gen. Ins. Co. v. Superior Court *(1980) 108 Cal. App. 3d 958, 166 Cal. Rptr. 904* arose out of a personal injury action by a homeowner against a construction company for alleged negligence in construction of the home. Defense of the action was initially assumed by one insurance company, which tendered the defense to petitioner in this proceeding when it was revealed that petitioner had insured the construction company. Petitioner disclaimed coverage and refused to defend but did contact an attorney concerning its obligation to defend the action against its insured. Judgment was entered against the construction company, and its assignee, the homeowner, filed an action against petitioner seeking damages for bad-faith refusal to defend. The homeowner sought to discover excised portions of its file activity log kept by petitioner containing notes of telephone conversations between petitioner and the attorney it had contacted. The homeowner, citing the joint-client exception to the lawyer-client privilege contained in *Evid. Code § 962*, argued that the attorney was consulted by petitioner on a matter of common interest between his assignor and petitioner, and thus petitioner could not claim the privilege because the communications were to be offered in a civil proceeding between joint clients. The trial court ordered production of the excised portions of the log. Petitioner then sought a writ of mandate to have the order vacated.

The court of appeal directed that a peremptory writ of mandate be issued compelling the trial court to set aside its order compelling discovery of the excised portions of the log. After reviewing the depositions of the attorneys for the insurance companies involved and the rest of the record, the court stated it was apparent that the lawyer-client privilege protected confidential communications between the attorney and petitioner before petitioner's acceptance of its obligation under the policy and its employment of an attorney to defend the action filed against its insured. Although theattorney was consulted with respect to the action filed against the construction company, and gave advice to petitioner, the record contained no evidence that the attorney in question or any other attorney was employed by petitioner to defend the action. While the log stated that petitioner's employees had agreed to assign the case to the attorney contacted, there was no evidence that it was ever referred to that person except for an opinion (*108 Cal. App. 3d 958, 964-966*). The court distinguished *Glacier Gen. Assurance Co. v. Superior Court (1979) 95 Cal. App. 3d 836, 157 Cal. Rptr. 435* (discussed in *§ 81.63[3][a]*), in which the underlying action was based on a claim of bad-faith failure to settle a claim within the policy limits. It was clear from the facts of *Glacier* that the insurance company had engaged the services of a law firm to represent its insured in litigation that had proceeded to judgment, and thus any communication with the lawyer employed to defend the insured concerning the handling of the claim was necessarily a matter of common interest to both the insured and the insurer (*108 Cal. App. 3d 958, 966*). In this action, the homeowner had not met his burden of establishing that the communications between petitioner and the attorney were not confidential. There was no showing that the attorney was ever employed by petitioner to defend its insured. Consequently, the tripartite relationship that would have imposed on the attorney the dual obligation to the insured and to the insurer never materialized, and under *Evid. Code § 952*, the legal opinion formed and the advice given by the attorney to petitioner in the course of their lawyer-client relationship was clearly privileged (*108 Cal. App. 3d 958, 967*).

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8-81 California Points & Authorities § 81.84

§ 81.84 Opposing Motion to Compel Discovery--Lawyer-Client Privilege [Evid. Code § 954] Applicable--Communication by Nondefendant Corporate Employee as Privileged Under Facts

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30), as well as with points and authorities relating to resisting discovery on the grounds of privilege generally (see, e.g., § 81.20), and relating to the attorney-client privilege generally (see, e.g., § 81.80).*]

THE COMMUNICATION BY THE NONDEFENDANT CORPORATE EMPLOYEE IS NOT DISCOVERABLE BECAUSE IT IS PRIVILEGED UNDER THE LAWYER-CLIENT PRIVILEGE.

A. Corporation Entitled to Same Lawyer-Client Privilege as Natural Person. The public policy behind the lawyer-client privilege requires that an artificial person be given equal opportunity with a natural person to communicate with its lawyer, within the professional relationship, without fear that its communication will be made public (*D.I. Chadbourne, Inc. v. Superior Court (1964) 60 Cal. 2d 723, 736, 36 Cal. Rptr. 468, 388 P.2d 700* ; *Rodriguez v. North American Rockwell Corp. (1972) 28 Cal. App. 3d 441, 449, 104 Cal. Rptr. 678* ; *see Evid. Code §§ 175, 951*).

B. Communication Privileged When Information Emanates From Corporation. When the employee of a defendant corporation is not a codefendant or person who may be charged with liability, the employee's communication is privileged when, under all the circumstances of the case, he or she is a natural person to be speaking for the corporation, or in other words, the communication constitutes information that emanates from the corporation as distinguished from the employee, and the employee is a person who would ordinarily be used for communication to the corporation's lawyer (*D.I. Chadbourne, Inc. v. Superior Court (1964) 60 Cal. 2d 723, 736-737, 36 Cal. Rptr. 468, 388 P.2d 700* ; *Sierra Vista Hospital v. Superior Court (1967) 248 Cal. App. 2d 359, 366-367, 56 Cal. Rptr. 387*).

C. Employee's Statement as Statement of Corporate Employer. When the employee's connection with the subject matter of the statement grows out of his or her employment to the extent that his or her report or statement is required in the ordinary course of the corporation's business, the employee is no longer an independent witness, and the employee's statement or report is that of the employer (*D.I. Chadbourne, Inc. v. Superior Court (1964) 60 Cal. 2d 723, 737, 36 Cal. Rptr. 468, 388 P.2d 700* ; *Kerns Constr. Co. v. Superior Court (1968) 266 Cal. App. 2d 405, 412, 72 Cal. Rptr. 74*).

D. Applicability of Privilege to Corporate Employee's Communication Determined by Employer's Dominant Purpose. If a corporate employer requires the employee to make a report or other communication regarding the subject matter of a claim, the privilege of that communication is determined by the employer's dominant purpose in requiring it, unless a secondary purpose has resulted in a waiver of confidentiality. Thus, if the employer directs the making of the communication for confidential transmittal to its lawyer, it may be privileged (*D.I. Chadbourne, Inc. v. Superior Court (1964) 60 Cal. 2d 723, 737, 36 Cal. Rptr. 468, 388 P.2d 700* ; *Scripps Health v. Superior Court (2003) 109 Cal. App. 4th 529, 533, 135 Cal. Rptr. 2d 126* ; *Payless Drug Stores, Inc. v. Superior Court (1976) 54 Cal. App. 3d 988, 991, 127 Cal. Rptr. 4*).

[*Optional*] **E. Employee's Communication Privileged Although Obtained by Employer's Agent.** If otherwise privileged, a corporate employee's communication does not lose its privilege because it was obtained, with the knowledge and consent of the employer, by an agent of the employer acting under such agency (*D.I. Chadbourne, Inc. v. Superior Court (1964) 60 Cal. 2d 723, 737, 36 Cal. Rptr. 468, 388 P.2d 700* ; *Sierra Vista Hospital v. Superior Court (1967) 248 Cal. App. 2d 359, 367, 56 Cal. Rptr. 387*).

[*Optional*] **F. There Is No Shareholder Exception to Lawyer-Client Privilege.** Although shareholders have some rights to corporate information that are not enjoyed by the general public, they do not have unfettered access to corporate confidences and secrets. There is no shareholder exception to the corporate lawyer-client privilege. A lawyer representing a corporation does not become the representative of its stockholders merely because the lawyer's actions on behalf of the corporation also benefit the stockholders; as lawyer for the corporation, counsel's first duty is to the corporation (*National Football League Properties, Inc. v. Superior Court (1998) 65 Cal. App. 4th 100, 107-108, 75 Cal. Rptr. 2d 893*).

[2] Comments

[a] Use of Form

This form in opposition to a motion for an order compelling discovery may be submitted by a party or other person who has resisted providing discovery on the ground that the material sought is privileged as a confidential communication between a corporate employer and its attorney, although made or prepared by a nonparty corporate employee. It does not provide a complete memorandum but is designed to be combined with a general form of memorandum in opposition to compelling discovery, as well as with points and authorities relating to resisting discovery on the ground of privilege and relating to the attorney-client privilege generally.

In an appropriate case, these points and authorities may be submitted in opposition to the motion supported by the points and authorities set out in *§ 81.64*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Corporation Entitled to Same Lawyer-Client Privilege as Natural Person

The facts and procedural background of ***D.I. Chadbourne, Inc. v. Superior Court*** *(1964) 60 Cal. 2d 723, 36 Cal. Rptr. 468, 388 P.2d 700* are *set out in § 81.64[3][a]*. In *Chadbourne,* plaintiffs sought damages for personal injury resulting from a fall on defendant corporation's sidewalk and moved for an order allowing inspection of a written statement obtained from a corporate employee who had performed work on the sidewalk involved. The trial court ordered inspection and copying of the statement, and defendant sought a writ of mandate to prevent it. The court of appeal denied defendant's petition on the ground that, inter alia, there was no showing that defendant corporation intended that its employee's statement be transmitted to its attorney in confidence, or otherwise; thus, defendant did not carry its burden of proving the applicability of the attorney-client privilege as a matter of law. The Supreme Court set forth guidelines for applying the attorney-corporate client privilege, beginning with the basic principle that the public policy behind the attorney-client privilege requires that an artificial person be given equal opportunity with a natural person to communicate with its attorney, within the professional relationship, without fear that its communication will be made public (*60 Cal. 2d 723, 736*).

In ***Rodriguez v. North American Rockwell Corp.*** *(1972) 28 Cal. App. 3d 441, 104 Cal. Rptr. 678* , an action for conspiracy to commit slander, the court of appeal affirmed judgment in defendant's favor, holding that the trial court properly granted defendant's motion to quash a subpoena duces tecum designed to elicit information contained in reports made by corporate employees for transmission to defense counsel, when the evidence strongly supported the finding that the reports were made solely for the purpose of preparing for the defense of the action and that they were required and made for confidential transmittal to defense counsel (*28 Cal. App. 3d, 441, 448-449)* . In so holding, the court reiterated that the attorney-client privilege applies to corporate parties as well as to natural persons, citing *D.I. Chadbourne, Inc., above,* as authority (*28 Cal. App. 3d 441, 449*). Although the latter case was decided under former Code Civ. Proc. § 1881(2), and the attorney-client privilege is now governed by *Evid. Code §§ 950-962,* the principles for which it is cited as authority in *Rodriguez* are still effective.

Evid. Code § 951 defines a "client," one of the holders of the attorney-client privilege [*Evid. Code § 954(a)*], as a person who consults a lawyerfor certain purposes; "person" includes both a natural person and a corporation, as well as other artificial entities [*Evid. Code § 175*]. For a discussion of who is the proper claimant of the privilege, see *§ 81.80[3][a]*.

[b] Communication Privileged When Information Emanates From Corporation

The facts and procedural background of ***D.I. Chadbourne, Inc. v. Superior Court*** *(1964) 60 Cal. 2d 723, 36 Cal. Rptr. 468, 388 P.2d 700* are discussed in [a], *above*. The Court set forth certain principles to be followed in the area of attorney-corporate client privilege, stating that a communication by a nondefendant corporate employee may be privileged when it constitutes information that emanates from the corporation, as distinct from the employee (*60 Cal. 2d 723, 736-737*).

In ***Sierra Vista Hospital v. Superior Court*** *(1967) 248 Cal. App. 2d 359, 56 Cal. Rptr. 387* , an action for medical negligence, the trial court granted plaintiff's motion for production of an incident report made by the hospital, and the hospital sought a writ of prohibition to restrain the trial court from enforcing its order. The court of appeal issued a peremptory writ prohibiting enforcement of the order, holding that the incident report was privileged as a matter of law because it was prepared by the hospital's employees as a confidential communication and forwarded to the adjuster for the hospital's insurer in the event a lawsuit should be filed by the plaintiff (*248 Cal. App. 2d 359, 369*).

Sierra Vista Hospital, above, cites *D.I. Chadbourne, Inc., above,* as authority (*248 Cal. App. 2d 359, 366-367*). Although the latter case was decided under former Code Civ. Proc. § 1881(2), and the attorney-client privilege is now governed by *Evid. Code §§ 950-962,* the principles for which it is cited as authority in *Sierra Vista Hospital* are still effective.

[c] Employee's Statement as Statement of Corporate Employer

The facts and procedural background of ***D.I. Chadbourne, Inc. v. Superior Court*** *(1964) 60 Cal. 2d 723, 36 Cal. Rptr. 468, 388 P.2d 700* are discussed in [a], *above*. In *Chadbourne,* the Supreme Court set forth rules of the attorney-corporate client privilege, including the principle that when the employee's connection with the subject matter of his communication grows out of his employment to the extent that it is required in the ordinary course of corporate business, it becomes a communication by the employer (*60 Cal. 2d 723, 737*).

In ***Kerns Constr. Co. v. Superior Court*** *(1968) 266 Cal. App. 2d 405, 72 Cal. Rptr. 74* , an action for personal injuries, Kerns Construction Company, the cross defendant, moved for an order pursuant to *Evid. Code § 771* requiring the defendant to produce and permit it to inspect and copycertain investigation and accident reports made by defendant's employee in connection with the accident that gave rise to the personal injury suit, and on which he had based his deposition testimony. The employee had been directed to make the reports by defendant, who intended them to be confidential. The reports were to be forwarded to defendant's claims department and in the event of litigation, to defendant's attorneys. The discovery motion was denied on the ground of attorney-client privilege, and cross defendant sought a writ of mandate to compel the trial court to grant the motion to produce.

The court of appeal granted the writ on the ground that while the reports were privileged under the *Chadbourne* standards, defendant had waived the privilege (*266 Cal. App. 2d 405, 412-414*). In discussing the applicability of the privilege, the court quoted the language of *Chadbourne* indicating that when the employee's report or statement is required in the ordinary course of the corporation's business, his statement is that of the employer, and concluded that, under the facts in *Kerns,* the employee's statements were those of the defendant (*266 Cal. App. 2d 405, 412*). Although *D.I. Chadbourne, Inc.,* was decided under former Code Civ. Proc. § 1881(2), and the attorney-client privilege is now governed by *Evid. Code §§ 950-962,* the rule for which it is cited as authority in *Kerns Constr. Co.* is still effective.

[d] Applicability of Privilege to Corporate Employee's Communication Determined by Employer's Dominant Purpose

The facts and procedural background of ***D.I. Chadbourne, Inc. v. Superior Court*** *(1964) 60 Cal. 2d 723, 36 Cal. Rptr. 468, 388 P.2d 700* are discussed in [a], *above*. The Supreme Court set forth rules governing the attorney-corporate client privilege, including the dominant-purpose rule, which provides that when a corporate employer defendant requires a nondefendant employee to make a report or communication regarding the subject matter of litigation, the privilege accorded that communication is determined by the employer's dominant purpose in requiring it, unless the employer's secondary purpose has resulted in a waiver of confidentiality (*60 Cal. 2d 723, 737*).

The facts and procedural background of ***Scripps Health v. Superior Court*** *(2003) 109 Cal. App. 4th 529, 135 Cal. Rptr. 2d 126* are discussed in *§ 81.64[4][b]*. In this wrongful death medical malpractice case, the trial court abused its discretion in ruling that "occurrence reports" did not fall under either the attorney-client or the attorney work product privileges, "essentially finding that the dominant purpose of the occurrence reports was accident prevention" (*109 Cal. App. 4th 529, 534*). The undisputed facts showed the dominant purpose of the reports was for transmittal to an attorney in the course of the professional attorney-client relationship,under circumstances in which the hospital expected confidentiality (*109 Cal. App. 4th 529, 534*). The court relied on *D. I. Chadbourne, Inc. v. Superior Court of San Francisco (1964) 60 Cal. 2d 723, 36 Cal. Rptr. 468, 388 P.2d 700* (discussed in [3][a], *above*), detailing the basic principles to be applied in determining whether the attorney-client privilege exists in a corporate setting (*109 Cal. App. 4th 529, 533*). Although the court acknowledged that the reports served a dual purpose, attorney review in anticipation of possible litigation and quality assurance/peer review, the fact that the information contained in the communications might also have been used for incidental purposes not entitled to the privilege was unimportant. The actual physical reports are not reviewed or submitted to any peer review or quality assurance committee, but are kept confidential, with access provided only to the Risk Managers, in-house or outside counsel and third party litigation claim administrators.

Accordingly, the attorney-client privilege was "clearly established" (*109 Cal. App. 4th 529, 536*). Based on this conclusion, the court found no need to discuss application of the attorney work product privilege or the privilege for hospital peer review materials (*109 Cal. App. 4th 529, 536*).

In ***Payless Drug Stores, Inc. v. Superior Court*** *(1976) 54 Cal. App. 3d 988, 127 Cal. Rptr. 4* , an action arising from an accidental fall in a store, plaintiff moved to compel production of accident reports prepared by defendant corporation's employees after the accident. The trial court granted the motion and the employer sought a writ of prohibition to prevent its enforcement. The accident reports were prepared on preprinted forms supplied to defendant by its insurer and were forwarded by the carrier to defendant's attorney when the defense of the lawsuit was assigned to him. It appeared from the declaration submitted by defendant in opposition to the motion to compel that the insurance carrier required reports in cases in which accidents were claimed to have occurred, that both the insurance carrier and defendant intended the reports to be confidential for transmission to and use by attorneys defending the employer in litigation arising out of such claims, and that the reports were transmitted by the insurance carrier to defendant's attorney for use in defending litigation arising out of that claim.

In granting prohibition to prevent enforcement of the discovery order, the court of appeal held that the dominant purpose for the preparation of the report was, in effect, the confidential communication of information by the corporation to its attorneys to defend against litigation arising out of the accident claim, and thus the attorney-client privilege applied as a matter of law (*54 Cal. App. 3d 988, 991*). In discussing the applicability of the privilege, the court of appeal cited *D.I. Chadbourne, Inc.,* as authority for the dominant-purpose rule (*54 Cal. App. 3d 988, 991*).

Although *D.I. Chadbourne, Inc.,* was decided under former Code Civ. Proc. § 1881(2) and the attorney-client privilege is now governed by *Evid.Code §§ 950-962,* the rule for which it is cited as authority in *Payless Drug Stores, Inc.* is still effective.

[e] Employee's Communication Privileged Although Obtained by Employer's Agent

The facts and procedural background of ***D.I. Chadbourne, Inc. v. Superior Court*** *(1964) 60 Cal. 2d 723, 36 Cal. Rptr. 468, 388 P.2d 700* are discussed in [a], *above*. In *D.I. Chadbourne, Inc.,* the Supreme Court set forth rules governing the attorney-corporate client privilege, including the principle that if otherwise privileged under the rules of the attorney-corporate client privilege, a communication does not lose its privilege merely because it was obtained, with the knowledge and consent of the employer, by an agent of the employer acting under such agency; for such purpose, an insurance company with which the employer carries indemnity insurance, and its duly appointed agents, are agents of the employer corporation (*60 Cal. 2d 723, 737*).

In ***Sierra Vista Hospital v. Superior Court*** *(1967) 248 Cal. App. 2d 359, 56 Cal. Rptr. 387* , the incident report that was sought by plaintiff's motion for production had been forwarded from defendant hospital's administrator to the hospital's attorney directly through the agency of its insurance carrier. Citing the agency rule of *D.I. Chadbourne, Inc.,* discussed *above,* the court of appeal held that the incident report did not lose confidentiality by being transmitted in such a way through the employer's agent (*248 Cal. App. 2d 359, 367*).

[f] There Is No Shareholder Exception to Lawyer-Client Privilege

In *National Football League Properties, Inc. v. Superior Court (1998) 65 Cal. App. 4th 100, 75 Cal. Rptr. 2d 893* , the Oakland Raiders Football Club sued the National Football League (NFL), the National Football League Properties, Inc. (NFLP), and related entities, alleging that management's wrongful control of NFL entities resulted in a breach of fiduciary duty and adverse treatment of the Raiders. During discovery, a dispute arose concerning the Raiders' right to inspect corporate documents of NFLP that are protected by the lawyer-client privilege. NFLP objected to disclosure, arguing that the Raiders club is a shareholder that does not have a right to inspect corporate documents that are protected by the lawyer-client privilege. When the trial court disagreed, and ordered NFLP to produce the documents on

the ground that the club has a director's right of inspection, it filed a petition for writ of mandate.

The court of appeal found that the trial court had abused its discretion and issued a peremptory writ of mandate directing the trial court to vacate the portion of its order that compelled production of the documents, andto enter a new order denying that part of the motion (*65 Cal. App. 4th 100, 111-112*). The court characterized the issue as whether the Raiders club, as a plaintiff in a shareholder's suit against the corporation, has the right to inspect NFLP documents that are protected by the lawyer-client privilege (*65 Cal. App. 4th 100, 107*). Citing both statutory and case law, the court explained that under the Evidence Code a corporation is a person whose confidential communications with its lawyer are protected by the lawyer-client privilege. Although shareholders have some rights to corporate information that are not enjoyed by the general public, shareholder status does not in and of itself entitle an individual to unfettered access to corporate confidences and secrets. California courts, bound by *Evid. Code § 911* and its preclusion of judicially created exceptions to statutory privileges, have refused to carve out a shareholder exception to the lawyer-client privilege accorded to corporations (*65 Cal. App. 4th 100, 107*). Thus, the court concluded, there is no shareholder exception to the corporate lawyer-client privilege. A lawyer representing a corporation does not become the representative of its stockholders merely because the lawyer's actions on behalf of the corporation also benefit the stockholders; as lawyer for the corporation, counsel's first duty is to the corporation. Thus, even when counsel for a closely held corporation treats the interests of majority shareholders and the corporation interchangeably, it is the lawyer-client relationship that is paramount for purposes of upholding the lawyer-client privilege against a minority shareholder's challenge. Decisions holding that corporation lawyers stand in a fiduciary relationship to individual shareholders have relied upon a finding that the lawyers stood in a confidential relationship with respect to both the corporation and the individual shareholders, and not upon a rationale for piercing the corporate lawyer-client privilege (*65 Cal. App. 4th 100, 108*).

[4] Additional Authorities

[a] Applicability of Privilege to Corporate Employee's Communication Determined by Employer's Dominant Purpose

In *People ex rel. Dept. of Public Works v. Glen Arms Estate, Inc. (1964) 230 Cal. App. 2d 841, 41 Cal. Rptr. 303* , an eminent domain proceeding to acquire real property for state highway purposes, defendant owner appealed from a judgment entered on a jury verdict awarding compensation and damages, contending that the trial court erred in excluding as privileged the state appraiser's report on the value of the subject property. Citing *D.I. Chadbourne, Inc.*, the court of appeal concluded that the report had been prepared in the ordinary course of the appraiser's duties as an agent of the state for the purpose of preparing for litigation and had been transmitted to the state's attorneys; thus, judgment was affirmed (*230 Cal. App. 2d 841, 855-858*).

[b] There Is No Shareholder Exception to Lawyer-Client Privilege

In *Venture Law Group v. Superior Court (2004) 118 Cal. App. 4th 96, 12 Cal. Rptr. 3d 656* , a law firm and a former firm attorney filed a writ petition for relief from the trial court's discovery order compelling the attorney to answer deposition questions asked by real parties in interest about the legal advice given to the law firm's corporate client regarding a merger. Real parties in interest argued, in part, that the attorney's answers were not barred by the attorney-client privilege because the individual defendants had raised advice of counsel as a defense, thereby waiving the privilege by implication. The court of appeal disagreed. The implied waiver caused by asserting the advice of counsel defense is limited to situations in which "*the client* has placed into issue the decisions, conclusions, and mental state of the attorney who will be called as a witness to prove such matters." Here, there was no dispute that the defendants in their individual capacities as directors, officers, and majority shareholders of the merged corporation were not the clients of petitioner law firm and petitioner attorney. Rather, the successor corporation was the holder of the attorney-client privilege of the merged client corporation, as provided under *Evid. Code § 953(d)*; and because the successor corporation had not waived the privilege, the attorney could not answer the deposition questions without

violating the attorney-client privilege (*118 Cal. App. 4th 96, 105-106*).

For further discussion of *Venture Law Group v. Superior Court (2004) 118 Cal. App. 4th 96, 12 Cal. Rptr. 3d 656* refer to § 81.80[4][a].

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8-81 California Points & Authorities § 81.85

§ 81.85 Opposing Motion to Compel Discovery--Lawyer-Client Privilege [Evid. Code § 954] Applicable--Communication to Insurer for Attorney's Use Is Privileged

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30), as well as with points and authorities relating to resisting discovery on the grounds of privilege generally (see, e.g., § 81.20), and relating to the attorney-client privilege generally (see, e.g., § 81.80).*]

THE COMMUNICATION BY THE INSURED TO HIS/HER INSURER IS NOT DISCOVERABLE BECAUSE IT IS PROTECTEDUNDER THE LAWYER-CLIENT PRIVILEGE, IN THAT IT CONCERNED AN EVENT THAT WAS THE BASIS OF A COVERED CLAIM AND WAS INTENDED FOR USE BY AN ATTORNEY IN DEFENSE OF THAT CLAIM.

Confidential Statements Made by Insured to Insurer for Attorney's Use Are Protected. A report or other communication made by an insured to his or her liability insurance company, concerning an event which may be made the basis of a claim covered by the policy, is a privileged communication if the policy requires the company to defend the insured through its attorney, and the communication is intended for the information or assistance of the attorney in that defense (*Soltani-Rastegar v. Superior Court (1989) 208 Cal. App. 3d 424, 427, 256 Cal. Rptr. 255*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion for an order compelling discovery, by a party or other person who is resisting disclosure on the ground that the material sought is protected by the lawyer-client privilege. The ground for opposing discovery is that the material sought was communicated in confidence by an insured to his or her insurer for use by an attorney in defense of an action arising out of a claim covered by the insured's policy.

This form does not provide a complete memorandum, but is designed to be combined with a general form of memorandum in opposition to compelling discovery, as well as with points and authorities relating to resisting discovery on the ground of privilege and relating to the lawyer-client privilege generally.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Confidential Statements Made by Insured to Insurer for Attorney's Use Are Protected

In ***Soltani-Rastegar v. Superior Court*** *(1989) 208 Cal. App. 3d 424, 256 Cal. Rptr. 255* , plaintiffs in a personal injury action which arose out of an automobile accident sought to compel production of statements made by defendants to defendant owner's automobile insurance carrier. The statements had been made in confidence to the insurance agent for the solepurpose of defending defendants against claims brought by those involved in the accident, and were delivered along with the insurance file to defendants' attorney. The trial court found that defendants had not established the existence of a lawyer-client relationship justifying application of the privilege, and ordered production of the statements. Defendants petitioned for a writ of mandate.

The court of appeal granted a writ of mandate directing the trial court to vacate its order. The court said that confidential reports of an accident procured for the use of an insurance company's attorney are protected by the lawyer-client privilege. It further elaborated that a report or other communication made by an insured to his or her liability insurance company, concerning an event which may be made the basis of a claim covered by the policy, is a privileged communication, if the policy requires the company to defend the insured through its attorney, and the communication is intended for the information or assistance of the attorney in that defense. In discussing the dominant purpose test, the court observed that there is no privilege in a communication which is not made to or for further communication to an attorney, even though the communication might have some connection with possible liability in the future (*208 Cal. App. 3d 424, 427*). The court refuted plaintiff's claim that the statements were not protected because they were made long before the lawsuit was filed and before the insurer had retained an attorney to represent the defendants, and explained that there is no valid basis for a distinction between a communication created for transmittal to an attorney to prepare for threatened litigation following particular accidents, and a communication prepared for an identical purpose under standing rules in the case of all accidents involving person or property injury (*208 Cal. App. 3d 424, 427-428*). It concluded that the fact that litigation was only a threat on the horizon and that attorneys had not yet been selected to avert or to meet that threat did not convert the purpose of the transmission. To hold otherwise might encourage insurance companies to bring in their attorneys at early stages in the claims handling and discourage early settlement of claims (*208 Cal. App. 3d 424, 428*).

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8-81 California Points & Authorities § 81.86

§ 81.86 Opposing Motion to Compel Discovery--Lawyer-Client Privilege [Evid. Code § 954] Applicable--Communication to Physician or Psychologist at Attorney's Request

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions,§ 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30), as well as with points and authorities relating to resisting discovery on the grounds of privilege generally (see, e.g., § 81.20), and relating to the attorney-client privilege generally (see, e.g., § 81.80).*]

PLAINTIFF'S/DEFENDANT'S STATEMENT TO _____ [*name*], A _____ [PHYSICIAN *or* PSYCHOLOGIST], MADE AT HIS/HER ATTORNEY'S REQUEST FOR PURPOSES OF EVALUATION IN PREPARATION OF THE CASE, IS A PRIVILEGED COMMUNICATION BETWEEN AN ATTORNEY AND CLIENT UNDER *EVIDENCE CODE SECTION 952*.

Client's Communication to Attorney's Agent in Preparation of Case Is Privileged. A communication by any form of agency employed or set in motion by the client is within the attorney-client privilege, including communications through an interpreter or messenger, as well as communications originating with the client's agent and made to the attorney. When communication by a client to the attorney regarding the client's physical or mental condition requires a physician's assistance to interpret the client's condition to the attorney, the client is entitled to submit to an examination without fear that the physician will be compelled to reveal the information disclosed (*Rodriguez v. Superior Court (1993) 14 Cal. App. 4th 1260, 1266, 18 Cal. Rptr. 2d 120*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted by a party or other person resisting discovery on the ground that the communication to a physician or psychologist in preparation for the case is a confidential communication. This

memorandum is designed to be combined with a general form of memorandum in opposition to discovery, as well as with points and authorities generally relating to the application of privileges and to the attorney-client privilege.

In an appropriate case, these points and authorities may be used in opposition to a motion supported by § 81.62.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Client's Communication to Attorney's Agent in Preparation of Case Is Privileged

In ***Rodriguez v. Superior Court*** *(1993) 14 Cal. App. 4th 1260, 18 Cal. Rptr. 2d 120* , the appellate court held that a defendant's statement to a psychologist made at the request of defense counsel for purposes of evaluation in preparation of the defense case was within the definition of a privileged communication between an attorney and client under *Evid. Code § 952*. A communication by any form of agency employed or set in motion by the client is within the attorney-client privilege, including communications through an interpreter or messenger, as well as communications originating with the client's agent and made to the attorney. Communications of the attorney's agent to the attorney are also within the privilege, since the attorney's agent is also the client's subagent and is acting as such for the client. When communication by a client to the attorney regarding the client's physical or mental condition requires a physician's assistance to interpret the client's condition to the attorney, the client is entitled to submit to an examination by the physician without fear that the physician will be compelled to reveal the information disclosed (*14 Cal. App. 4th 1260, 1266*).

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8-81 California Points & Authorities § 81.87

§ 81.87 Opposing Motion to Compel Discovery--Lawyer-Client Privilege [Evid. Code § 954] Applicable--Trustee's Confidential Communication to Attorney Is Privileged Against Beneficiaries

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30), as well as with points and authorities relating to resisting discovery on the grounds of privilege generally (see, e.g., § 81.20), and relating to the attorney-client privilege generally (see, e.g., § 81.80).*]

THE LAWYER-CLIENT PRIVILEGE PROTECTS A TRUSTEE'S PRIVILEGED COMMUNICATIONS WITH ATTORNEYS AGAINST THE TRUST BENEFICIARIES.

A. Trustee May Assert Lawyer-Client Privilege to Preclude Discovery by Trust Beneficiaries. A trustee may assert thelawyer-client privilege to withhold privileged communications or documents from the trust beneficiaries, regardless of their subject matter (*Wells Fargo Bank v. Superior Court (2000) 22 Cal. 4th 201, 206, 91 Cal. Rptr. 2d 716, 990 P.2d 591*).

[*Optional*] **B. Trustee's Confidential Communications With Its Attorneys About Its Potential Personal Liability Are Privileged.** A trustee may assert the lawyer-client privilege to withhold privileged communications or documents from the trust beneficiaries concerning the beneficiaries' claims of trustee misconduct (*Wells Fargo Bank v. Superior Court (2000) 22 Cal. 4th 201, 209, 91 Cal. Rptr. 2d 716, 990 P.2d 591*).

[*Optional*] **C. Trustee Enjoys Absolute Privilege Against Beneficiaries for Confidential Communications About Trust Administration.** A trustee may assert the lawyer-client privilege to withhold privileged communications or documents from the trust beneficiaries concerning trust administration (*Wells Fargo Bank v. Superior Court (2000) 22 Cal. 4th 201, 209-210, 91 Cal. Rptr. 2d 716, 990 P.2d 591*).

[2] Comments

[a] Use of Form

These points and authorities in opposition to a motion for an order compelling discovery may be used by a trustee to resist providing discovery to the trust beneficiaries on the ground that the material sought is privileged as a confidential lawyer-client communication.

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in opposition to compelling discovery, as well as with points and authorities relating to resisting discovery on the ground of privilege and relating to the lawyer-client privilege generally.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Trustee May Assert Lawyer-Client Privilege to Preclude Discovery by Trust Beneficiaries

In ***Wells Fargo Bank v. Superior Court*** *(2000) 22 Cal. 4th 201, 91 Cal. Rptr. 2d 716, 990 P.2d 591* , a proceeding for an accounting, the trustbeneficiaries, real parties in interest, compelled petitioner trustee to disclose documents containing privileged communications with attorneys on the subject of trust administration. However, petitioner asserted the lawyer-client privilege as to documents reflecting communications with its attorneys about the beneficiaries' claims of misconduct. In addition, petitioner's outside trust administration counsel claimed the protection of the work product doctrine for other documents. The superior court granted trust beneficiaries' motion to compel production and ordered petitioner to produce the remaining documents. Trustee petitioned for a writ of mandate or prohibition and sought a stay of the superior court's order compelling production. The court of appeal vacated the superior court's order compelling production of documents subject to the lawyer-client privilege and directed the superior court to examine in camera the documents subject to the work product protection claim (*22 Cal. 4th 201, 205-206)* .

The Supreme Court affirmed the judgment of the court of appeal, holding that the beneficiaries were not entitled to privileged documents relating to trust administration or to petitioner trustee's personal liability (*22 Cal. 4th 201, 206)* . The Court found no authority under California law for requiring a trustee to produce communications protected by the lawyer-client privilege, regardless of their subject matter (*22 Cal. 4th 201, 206)* . The Court rejected the beneficiaries' argument that petitioner must produce privileged communications to fulfill its statutory and common law duties as a trustee to report to the beneficiaries about the trust and its administration. The Court found no justification for that argument in the relevant sections of the Probate Code (*see Prob. Code § 16060 et seq.*), governing a trustee's duties. Instead, the Court found that a trustee could provide a report of information to beneficiaries without having to disclose confidential information (*22 Cal. 4th 201, 206-207)* . The Court distinguished its decision in *Moeller v. Superior Court (1997) 69 Cal. Rptr. 2d 317, 947 P.2d 279* (discussed in *§ 81.69[3][a]*), explaining that that case did not suggest that anyone other than the current holder of the privilege might be entitled to inspect privileged communications; it merely identified the current holder of the privilege (*22 Cal. 4th 201, 209)* . The Court also rejected beneficiaries' argument that petitioner had waived its privilege as to remaining communications not yet disclosed through disclosures it had already made in discovery; the Court concluded that an honest mistake of law, when the law is unsettled and debatable, militated against a finding of waiver (*22 Cal. 4th 201, 211)* . Additionally, the Court rejected beneficiaries' contention that they were joint clients of petitioner's attorneys and, thus, were entitled to inspect any privileged communications, although the Court declined to say that trustees and beneficiaries could not possibly become joint clients (*22 Cal. 4th 201, 212)* .

With respect to the work product claim, the Court found that the court of appeal ruled correctly when it directed an in

camera review, noting thata superior court's inspection in camera is an appropriate way to determine whether documents are entitled to protection as work product (*22 Cal. 4th 201, 215)* .

[b] Trustee's Confidential Communications With Its Attorneys About Its Potential Personal Liability Are Privileged

Wells Fargo Bank v. Superior Court (2000) 22 Cal. 4th 201, 91 Cal. Rptr. 2d 716, 990 P.2d 591 is discussed in [a], *above*.

[c] Trustee Enjoys Absolute Privilege Against Beneficiaries for Confidential Communications About Trust Administration

Wells Fargo Bank v. Superior Court (2000) 22 Cal. 4th 201, 91 Cal. Rptr. 2d 716, 990 P.2d 591 is discussed in [a], *above*.

California Points & Authorities

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 81 DISCOVERY: PRIVILEGES AND OTHER DISCOVERY LIMITATIONS
PART II. FORMS
B. Attorney-Client Privilege

8-81 California Points & Authorities § 81.88

§ 81.88 Opposing Motion to Compel Discovery--Lawyer-Client Privilege [Evid. Code § 954] Applicable--No Exception to Lawyer-Client Privilege for Condominium Owners

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30), as well as with points and authorities relating to resisting discovery on the grounds of privilege generally (see, e.g., § 81.20), and relating to the attorney-client privilege generally (see, e.g., § 81.80).*]

THE INFORMATION SOUGHT TO BE DISCOVERED IS PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE BECAUSE THE CONDOMINIUM ASSOCIATION, NOT THE INDIVIDUAL CONDOMINIUM OWNERS, IS THE HOLDER OF THE PRIVILEGE.

There Is No Exception to the Attorney-Client Privilege for Individual Condominium Owners When Condominium Association Brings Suit on Its Own Behalf. A condominium association that brings a construction defect lawsuit on its own behalf is the holder of the attorney-client privilege, and the individual condominium owners, who are not individually named as plaintiffs in thelitigation, cannot demand production of privileged documents (*Smith v. Laguna Sur Villas Community Assn. (2000) 79 Cal. App. 4th 639, 643, 94 Cal. Rptr. 2d 321*).

[2] Comments

[a] Use of Form

These points and authorities in opposition to a motion compelling discovery may be submitted by a party or other person who has resisted providing discovery on the ground that the material sought is privileged as a confidential communication between a condominium association and its attorney. This form does not provide a complete memorandum, but is designed to be combined with a general form of memorandum in opposition to compelling discovery, as well as with points and authorities relating to resisting discovery on the ground of privilege and relating to

the attorney-client privilege generally.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] There Is No Exception to the Attorney-Client Privilege for Individual Condominium Owners When Condominium Association Brings Suit on Its Own Behalf

In ***Smith v. Laguna Sur Villas Community Assn.*** *(2000) 79 Cal. App. 4th 639, 643, 94 Cal. Rptr. 2d 321* , plaintiff condominium owners appealed the dismissal of their action against defendant condominium association for declaratory and injunctive relief, seeking to review defendant's legal materials in its action against a developer, which defendant claimed were privileged (*79 Cal. App. 4th 639, 642)* . The court of appeal refused to order disclosure, finding that defendant, who had retained the attorney to act on its behalf, was the holder of the attorney-client privilege (*79 Cal. App. 4th 639, 643)* .

The court rejected plaintiffs' argument that they were holders of the privilege as the "true clients" of the attorneys retained by the association because the condominium association could only act in a representative capacity (*79 Cal. App. 4th 639, 644)* . The court pointed out that corporations and unincorporated associations enjoy the benefit of the attorney-client privilege when the entity (rather than its individual members) has retained the attorney to act on its behalf (*79 Cal. App. 4th 639, 644)* . Thecourt also rejected plaintiff's argument that they were the attorney's true clients because the association owed them a fiduciary duty to act in their best interests as rightful owners who paid with their association dues for the legal services being rendered on their behalf. The court likened the relationship between the individual members of the condominium association and the association itself to that of shareholders to their corporation, and of beneficiaries to their trust or receivership. The court noted that there was no statutory exception for shareholders, even for closely held corporations, and even though the corporate board members owed a fiduciary duty to the complaining shareholders (*79 Cal. App. 4th 639, 644)* . The court pointed out that a receiver could assert an absolute privilege as to communications with its counsel, even as to a disclosure request by the corporation which was placed into receivership and to which it owned fiduciary responsibilities (*79 Cal. App. 4th 639, 644)* . The court followed the dictates of *Wells Fargo Bank v. Superior Court (2000) 22 Cal. 4th 201, 91 Cal. Rptr. 2d 716, 990 P.2d 591* (discussed in *§ 81.87[3][a]*), in which the California Supreme Court declined to create a so-called "fiduciary" exception to the attorney-client privilege and refused to create an exception in this case, explaining that cots "do not enjoy the freedom to restrict California's statutory exception to the attorney-client privilege based on notions of policy or ad hoc justification" (*79 Cal. App. 4th 639, 644)* . The court added that any indirect payment of attorneys fees by the association members did not determine the ownership of the attorney-client privilege (*79 Cal. App. 4th 639, 645)* .

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B. Attorney-Client Privilege

8-81 California Points & Authorities § 81.89

§ 81.89 Opposing Motion to Compel Discovery--Lawyer-Client Privilege [Evid. Code § 954] Applicable--Privilege Not Waived [Evid. Code § 912]

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30), as well as with points and authorities relating to resisting discovery on the grounds of privilege generally (see, e.g., § 81.20), and relating to the attorney-client privilege generally (see, e.g., § 81.80).*]

THE INFORMATION SOUGHT IS NOT DISCOVERABLE BECAUSE THE LAWYER-CLIENT PRIVILEGE HAS NOT BEEN WAIVED.

[*EITHER*]

A. Intent to Disclose Not a Waiver. The mere intent to disclose a privileged communication does not act as a waiver of the lawyer-client privilege absent actual voluntary disclosure (*Lohman v. Superior Court (1978) 81 Cal. App. 3d 90, 95, 146 Cal. Rptr. 171* ; *see Evid. Code § 912(a)*).

[*AND/OR*]

B. Confidential Communication Privileged Although Information Previously Transmitted to Third Party. It is not the content of a confidential communication but the lawyer-client relationship that is protected by the privilege. Thus, if the client discloses certain facts to a third person and later advises his or her lawyer of those same facts in the form of a confidential communication, there has been no waiver, since the client had not disclosed that certain information had been communicated to the lawyer (*Lohman v. Superior Court (1978) 81 Cal. App. 3d 90, 97, 146 Cal.*

Rptr. 171).

[*AND/OR*]

C. Privilege Applicable to Communication Between Client and Particular Lawyer. Waiver of a confidential communication with one lawyer does not waive confidential communications with subsequent lawyers who succeed to represent that client in the same substantive matter. The privilege protects the client from disclosure of the confidential communication between the client and a particular lawyer (*Lohman v. Superior Court (1978) 81 Cal. App. 3d 90, 97, 146 Cal. Rptr. 171*).

[*AND/OR*]

D. Waiver by Joint Holder Not Applicable. When two or more persons are joint holders of the lawyer-client privilege, a waiver of the right by one joint holder of the privilege to claim the privilege does not affect the right of another joint holder to claim the privilege (*Evid. Code § 912(b)*; *American Mut. Liab. Ins. Co. v. Superior Court (1974) 38 Cal. App. 3d 579, 595, 113 Cal. Rptr. 561*).

[*AND/OR*]

E. Statements to Lawyer for Purpose of Answering Interrogatories Are Privileged. Statements made by a client to his or her lawyer for the purpose of answering interrogatories do not lose their confidential character on the ground they were designed to be communicated by the lawyer to others (*De Los Santos v. Superior Court (1980) 27 Cal. 3d 677, 683, 166 Cal. Rptr. 172, 613 P.2d 233*).

[*AND/OR*]

F. No Waiver of Privilege If Disclosure Coerced by Court Order. Disclosure of items pursuant to a court order is coerced and does not constitute a waiver of the lawyer-client privilege (*Evid. Code § 919(b)*; *Schlumberger Limited v. Superior Court (1981) 115 Cal. App. 3d 386, 391-392, 171 Cal. Rptr. 413*).

[*AND/OR*]

G. Tendering Issue of Damages in Legal Malpractice Action. A plaintiff in a malpractice action against his or her former lawyer has not waived protection from disclosure of confidential communications with his or her present lawyer merely by tendering the issue of damages (*Schlumberger Limited v. Superior Court (1981) 115 Cal. App. 3d 386, 393, 171 Cal. Rptr. 413*).

[*AND/OR*]

H. No Waiver by Disclosure of Fact That Privileged Communication Occurred. Mere disclosure of the fact that a communication between client and lawyer has occurred does not amount to a disclosure of the specific content of that communication, and does not necessarily constitute a waiver of the privilege (*Mitchell v. Superior Court (1984) 37 Cal. 3d 591, 601-603, 208 Cal. Rptr. 886, 691 P.2d 642*).

[*AND/OR*]

I. No Waiver Under *Evidence Code Section 912* Without Disclosure. The exclusive means by which the lawyer-client privilege may be waived under *Evid. Code § 912* is by disclosure or consent to disclosure. Thus, when there is a timely assertion of the lawyer-client privilege, putting the other side on notice, a forced waiver for some technical shortfall under the civil discovery statutes is at odds with Section 912, and is excessive (*see Blue Ridge Ins. Co. v. Superior Court (1988) 202 Cal. App. 3d 339, 345-347, 248 Cal. Rptr. 346*).

[*AND/OR*]

J. Inadvertent Disclosure by Attorney Does Not Waive Privilege. When the client or privilege holder clearly did not consent or intend to disclose privileged matter, the accidental, inadvertent disclosure of such matter by the client's attorney does not constitute a waiver under *Evidence Code Section 912* (*State Comp. Ins. Fund v. WPS, Inc. (1999) 70 Cal. App. 4th 644, 652-654, 82 Cal. Rptr. 2d 799*).

[*AND/OR*]

K. Partial Waiver of Attorney-Client Privilege. A client's waiver of the attorney-client privilege regarding one aspect of the protected attorney-client relationship does not necessarily waive the privilege regarding other aspects of the relationship (*Rodriguez v. Superior Court (1993) 14 Cal. App. 4th 1260, 1270, 18 Cal. Rptr. 2d 120*).

[2] Comments

[a] Use of Form

These points and authorities in opposition to a motion for an order compelling discovery may be submitted by a party or other person who has resisted providing discovery on the ground that the material sought is privileged as a confidential lawyer-client communication, when the party moving to compel discovery has contended that the privilege has been waived:

- Paragraph A may be used when the holder of the privilege has evidenced the intent to disclose a significant part of the confidential communication but has not actually done so.

- Paragraph B is appropriate when the holder of the privilege has disclosed to a third person facts that are the same facts contained in the confidential communication, but has not disclosed the confidential communication itself.

- Paragraph C may be used when the privilege has been waived only for the client's communications with another lawyer in regard to the same matter.

- Paragraph D is for use when a joint holder has claimed the privilege.

- Paragraph E may be used when the client has communicated information to the lawyer in order to answer interrogatories.

- Paragraph F may be used when items have been disclosed pursuant to a court order.

- Paragraph G may be used when the issue of damages has been tendered in a legal malpractice action.

- Paragraph H may be used when there has been a disclosure of the fact that a privileged communication has occurred.

- Paragraph I may be used when the holder of the privilege committed a technical shortfall under the civil discovery statutes, but asserted the privilege in a timely manner.

- Paragraph J may be used when the client's attorney has inadvertently disclosed privileged communications, but the client clearly did not consent to or intend the disclosure.

- Paragraph K may be used if the client has waived part, but not all, of the privilege and now seeks to oppose discovery of the other protected part of the communication.

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in opposition to compelling discovery, as well as with points and authorities relating to resisting discovery on the ground of privilege and relating to the lawyer-client privilege generally.

In an appropriate case, these points and authorities may be submitted in opposition to the motion supported by the points and authorities *set out in §§ 81.65* and *81.66*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Intent to Disclose Not a Waiver

In ***Lohman v. Superior Court*** *(1978) 81 Cal. App. 3d 90, 146 Cal. Rptr. 171* , an action by a conservatee for breach of trust, personal injury, and fraud against her temporary conservator, defendant sought an order requiring plaintiff's former attorney to answer certain questions at his deposition that he refused to answer on the ground of lawyer-client privilege. The trial court issued the order compelling discovery and plaintiff sought a writ of mandamus or prohibition to direct the trial court to vacate that order.

The court of appeal issued a writ of mandate, holding that some of the communications sought to be discovered were protected by the lawyer-client privilege and that the privilege had not been waived (*81 Cal. App. 3d 90, 98)* . The court held that plaintiff had not waived the privilege by having issued a subpoena duces tecum to her former attorney because no records were produced in compliance with that subpoena. There was no voluntary disclosure or consent to disclosure made in fact. The intent to disclose does not operate as a waiver (*81 Cal. App. 3d 90, 95)* .

[b] Confidential Communication Privileged Although Information Previously Transmitted to Third Party

The facts and procedural background of ***Lohman v. Superior Court*** *(1978) 81 Cal. App. 3d 90, 146 Cal. Rptr. 171* are discussed in [a], *above*. The *Lohman* court held that plaintiff did not waive the lawyer-client privilege by testifying to privileged communications with her former attorneys, who were not being deposed, regarding the subject matter of thelitigation and by permitting one of her former attorneys to be so examined. The court stated that if a client discloses certain facts to a third person and subsequently advises his or her attorney of those same facts in the form of a confidential communication, there has been no waiver, since the client had not disclosed to the third person that certain information had been communicated to the attorney (*81 Cal. App. 3d 90, 96-97)* . In addition, the court held that the privilege protects the client from disclosure of the confidential communication between the client and a particular

attorney. Waiver of the privilege for a confidential communication between a client and an attorney does not operate as a waiver for confidential communications with subsequent attorneys who succeed to the representation of the client in the action (*81 Cal. App. 3d 90, 97)* .

[c] Privilege Applicable to Communication Between Client and Particular Lawyer

Lohman v. Superior Court *(1978) 81 Cal. App. 3d 90, 146 Cal. Rptr. 171* is discussed in [a] and [b], *above*.

[d] Waiver by Joint Holder Not Applicable

The facts and procedural background of ***American Mut. Liab. Ins. Co. v. Superior Court*** *(1974) 38 Cal. App. 3d 579, 113 Cal. Rptr. 561* are discussed in *§ 81.80[3][a]*. In *American Mut.*, the court of appeal held that an attorney who had been employed by the surgeon's insurance company to defend the surgeon with respect to previous malpractice claims had had joint clients, the doctor and the insurer, and that the doctor's waiver of the lawyer-client privilege in respect to the files of the malpractice actions could not act as a waiver of the privilege in regard to confidential communications between the attorney and American, the insurer (*38 Cal. App. 3d 579, 592, 595)* .

[e] Statements to Lawyer for Purpose of Answering Interrogatories as Privileged

In ***De Los Santos v. Superior Court*** *(1980) 27 Cal. 3d 677, 166 Cal. Rptr. 172, 613 P.2d 233* , a minor made statements to his mother, who was also his guardian ad litem in the lawsuit, at the request of his attorney for the purpose of preparing the minor's answers to defendants' interrogatories and to assist the attorney in preparation for trial. Defendants deposed the minor's mother, and asked her questions about statements the minor had made to her regarding the circumstances of the accident and the condition of his bicycle at the time of the accident. She refused to answer on the ground that the information was protected by the lawyer-client privilege. The trial court granted defendants' motion to compel answers. The Supreme Court issued a writ of mandate to compel the trialcourt to prohibit discovery of the information sought and to issue a protective order.

In deciding that the information was privileged, the Court remarked that statements made by a client to his or her lawyer for the purpose of answering interrogatories do not lose their confidential character on the ground that they were designed to be communicated by the attorney to others (*27 Cal. 3d 677, 682-683)* . The Court said that to so hold would completely destroy the privilege whenever a client sought to litigate his or her case, and would leave no opportunity for the full disclosure and open discussion between lawyer and client that the privilege exists to promote (*27 Cal. 3d 677, 683)* . For other points relating to the lawyer-client privilege discussed in *De Los Santos*, see *§ 81.80[4][b]*.

[f] No Waiver of Privilege If Disclosure Coerced by Court Order

Evid. Code § 919(b) provides that if a person authorized to claim the lawyer-client privilege claimed it, but nevertheless disclosure was erroneously required, neither the failure to refuse to disclose nor the failure to seek review of the order indicates consent to the disclosure or constitutes a waiver.

Schlumberger Limited v. Superior Court *(1981) 115 Cal. App. 3d 386, 171 Cal. Rptr. 413* is discussed in [g], *below*. The court held that plaintiff's failure to seek review of a prior court order compelling discovery did not prevent him from seeking relief from a subsequent order requiring production. The disclosure was coerced and did not constitute a waiver under *Evid. Code § 919(b)* (*115 Cal. App. 3d 386, 391-392)* .

[g] Tendering Issue of Damages in Legal Malpractice Action

Schlumberger Limited v. Superior Court *(1981) 115 Cal. App. 3d 386, 171 Cal. Rptr. 413* arose out of an action for legal malpractice by a client against a former attorney. Defendant requested production of communications and

memorandums between plaintiff and his present counsel for a certain period. Plaintiff refused to produce the items, arguing that production would violate his lawyer-client privilege. Defendant moved for and obtained an order from the trial court compelling production of the items on the ground that they were not privileged and were relevant to the subject matter of the lawsuit.

The court of appeal granted a peremptory writ of mandate directing the trial court to vacate its order compelling production. The court held that affirmatively tendering the issue of damages did not waive the lawyer-client privilege even though the communications might be relevant to the issue. Additionally, the court held that this was not a case in which the privilegewas impliedly waived because the decisions, conclusions, and mental state of the attorney were placed in issue or because the attorney would be used to prove matters that he or she could have learned only in the course of employment (*115 Cal. App. 3d 386, 393)* .

[h] No Waiver by Disclosure of Fact That Privileged Communication Occurred

Mitchell v. Superior Court *(1984) 37 Cal. 3d 591, 208 Cal. Rptr. 886, 691 P.2d 642* was an action against manufacturers, distributors, and marketers of a chemical used as an agricultural soil fumigant. Plaintiffs alleged that their water was contaminated by the chemical and they sought to recover under several causes of action for personal and property injuries, including intentional infliction of emotional distress, which plaintiffs allegedly suffered after becoming aware of the health dangers associated with the chemical. Defendants sought to compel one plaintiff to respond to interrogatories about the specific nature of information or warnings communicated to her by her attorney concerning the dangers of the chemical. The trial court granted defendants' motion.

The Supreme Court granted plaintiff's petition for a writ of mandate compelling the trial court to vacate its order compelling discovery. The Court, after holding that certain communications made by plaintiff's attorney were privileged, also held that the privilege was not waived by plaintiff's disclosure of the fact that these communications occurred. The Court stated that mere disclosure of the fact that a communication between client and attorney occurred does not amount to disclosure of the specific content of that communication, and as such does not necessarily constitute a waiver of the privilege under *Evid. Code § 912* (*37 Cal. 3d 591, 601-603)* .

[i] No Waiver Under Evidence Code Section 912 Without Disclosure

Blue Ridge Ins Co v. Superior Court *(1988) 202 Cal. App. 3d 339, 248 Cal. Rptr. 346* was a suit for bad faith, breach of duties, and fraud brought by plaintiffs, who were homeowners, against defendant, their insurance company. In a timely but unverified response to a request for production of documents, defendant asserted the lawyer-client privilege and work product protection with respect to three of the four categories of documents requested, and agreed to full production of the remaining category of documents. Plaintiffs claimed that because the response was unverified, defendant's objections were not timely, and that all of the requested documents should be produced. When defendant declined to do so, plaintiffs filed a motion to compel their production. The trial court ruled that defendant's failure to provide a verification at the time of service of its response was tantamount to a failure to respond, and that such a failureconstituted a waiver of objections. Defendant's motions for reconsideration and relief from default were denied, and it was ordered to produce all documents without objection and to pay sanctions. Defendant filed a petition for writ of mandate and/or prohibition, which was denied. A petition for review was granted by the Supreme Court, and the matter was transferred back to the court of appeal with directions to issue an alternative writ.

The court of appeal issued a peremptory writ of mandate directing the trial court to vacate its order. After observing that the trial court had erred in applying former Code Civ. Proc. § 2031(*l*) (*now see Code Civ. Proc. § 2031.250*) because it had not yet become operative during the period of discovery, the court said that neither former Code Civ. Proc. § 2031(*l*) nor the controlling provision, former Code Civ. Proc. § 2031(b), require that objections be verified in order to be preserved. The court concluded that defendant's objections were effective in that the response was timely filed, and there was no waiver of legal objections to the production request (*202 Cal. App. 3d 339, 343-345)* .

The court went on to consider whether the lawyer-client privilege could be waived because of a technical defect under the civil discovery statutes. The court emphasized the importance of the lawyer-client privilege, noting that the privilege should not be whittled away by means of specious argument that it has been waived. The exclusive means by which the privilege may be waived under *Evid. Code § 912* is by disclosure, by consent to disclosure, or by failing to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to do so. Accordingly, the court said that when there is a timely assertion of the lawyer-client privilege, putting the other side on notice, a forced waiver for some technical shortfall is at odds with *Evid. Code § 912*, and is an excessive sanction not reasonably calculated to achieve the purpose of effecting compliance with discovery (*202 Cal. App. 3d 339, 347)* .

[j] Inadvertent Disclosure by Attorney Does Not Waive Privilege

In ***State Comp. Ins. Fund v. WPS, Inc.*** *(1999) 70 Cal. App. 4th 644, 82 Cal. Rptr. 2d 799* , plaintiff's counsel, in response to a discovery request by defendant's counsel, sent documents that inadvertently included privileged communications between plaintiff and plaintiff's counsel. Plaintiff discovered the error and asked for the return of the privileged documents, but defense counsel refused. The trial court found this refusal to be in bad faith and imposed sanctions under *Code Civ. Proc. § 128.5*.

On appeal from this ruling, the court of appeal held the defendant's refusal was not justified by a waiver of the privilege through disclosure. A trial court called to determine whether inadvertent disclosure of privileged communications constitutes waiver of the privilege by the holder,must examine the subjective intent of the holder and the relevant surrounding circumstances for any manifestation of holder's consent to disclose. When, as in this case, the client or privilege holder clearly did not consent or intend to disclose privileged matter, the accidental, inadvertent disclosure of such matter by the client's attorney does not constitute a waiver under *Evid. Code § 912* (*70 Cal. App. 4th 644, 652-654)* .

For future cases, the court of appeal articulated an ethical standard of conduct to be followed by California attorneys who receive an apparently inadvertent disclosure of privileged matter, drawn from ABA Formal Ethics Opinion No. 92-368. For discussion of the ethical duty of counsel receiving inadvertently disclosed privileged matters, *see* California Forms of Pleading and Practice, Ch. 191, *Discovery: Privileges and Other Discovery Limitations* (Matthew Bender).

[k] Partial Waiver of Attorney-Client Privilege

In ***Rodriguez v. Superior Court*** *(1993) 14 Cal. App. 4th 1260, 18 Cal. Rptr. 2d 120* , the court held that a client's waiver of the attorney-client privilege as to one aspect of the protected attorney-client relationship does not necessarily waive the privilege as to other aspects of the relationship. Thus, disclosure of the client's psychological report, which was protected by the attorney-client privilege, pursuant to court order did not waive that privilege with respect to a deleted section of the report containing the client's remarks to the psychologist concerning the offenses with which he had been charged (*14 Cal. App. 4th 1260, 1270)* . For further discussion of *Rodriguez*, see *§ 81.86[3][a]*.

[4] Additional Authorities

[a] Confidential Communication Privileged Although Information Previously Transmitted to Third Party

In *Meza v. H. Muehlstein & Co. (2009) 176 Cal. App. 4th 969, 98 Cal. Rptr. 3d 422* , plaintiff sued numerous defendants, alleging personal injuries caused by workplace exposure to toxic chemical products. A case management conference (CMC) order authorized defense counsel to exchange information regarding their common interests without waiving the attorney-client and attorney work product privileges. Defense counsel shared their individual work product regarding the litigation. Plaintiff argued that the common interest doctrine did not apply, because defendants had separate, dissimilar and, at times, adverse interests (*176 Cal. App. 4th 969, 981-982)* . The trial court held the

defendants had a shared interest and that the communications among counsel, which were made in furtherance of that interest, were confidential (*176 Cal. App. 4th 969, 982)* . The court of appeal agreed. While all defendants had different and potentially adverse interests, they also indisputably had common interests. All defendants, for example, had common interests in plaintiff's medical condition, alleged discrepancies in her claims, and her presentation as a witness. Similarly, all defendants had common interests in anticipating and analyzing plaintiff's litigation strategies and in retaining joint defense consultants and experts. And in light of the CMC order, defendants' attorneys reasonably expected that counsel for co-defendants would preserve the confidentiality of attorney work product disclosed in communications regarding common interests. Finally, communications among defense counsel were "reasonably necessary" in order to better prepare for trial. Accordingly, under the common interest doctrine, the attorney work product privilege was not waived (*176 Cal. App. 4th 969, 982-983)* .

In *California Oak Foundation v. County of Tehama (2009) 174 Cal. App. 4th 1217, 94 Cal. Rptr. 3d 902* , the trial court denied plaintiff environmental group's petition for a writ of administrative mandamus to overturn defendant county's approval of a development project and an associated environmental impact report (EIR). The trial court denied plaintiff's motion to include in the administrative record documents that defendant claimed were subject to attorney-client privilege. The documents came from an outside law firm retained to provide advice on compliance issues under California Environmental Quality Act (*Pub. Res. Code § 21050 et seq.*). Defendant county had disclosed the documents to counsel for co-defendant developers. The court of appeal held that this disclosure did not waive attorney-client privilege, because the common interest doctrine codified in *Evid. Code § 912(d)* applied. The county and the developers both sought to defend the EIR in litigation, and disclosure of the advice was reasonably necessary to further the purpose of the original legal consultation (*174 Cal. App. 4th 1217, 1222)* .

In *OXY Resources California LLC v. Superior Court (2004) 115 Cal. App. 4th 874, 9 Cal. Rptr. 3d 621* , plaintiff natural gas company sued two resources companies, contending it was denied the opportunity to exercise its contractual right of first refusal to purchase defendant's interest in specified property. At issue was the confidentiality of some 200 documents reflecting communications that took place between defendants both before and after they finalized their transaction, but before plaintiff filed its lawsuit. Defendants argued that these documents were protected from disclosure by their "joint defense" agreement. The "joint defense" or "common interest" doctrine relies on the principle that parties who possess common legal interests may share privileged information without losing the protection afforded by the attorney-client privilege. The trial court granted in part, and denied in part, plaintiff's motion to compel production of the documents. Plaintiff and one defendant each petitioned for a writ of mandate.

The court of appeal held an in camera review was required to determine whether the disclosure of the documents in the course of the transaction waived the attorney-client privilege or work product protection (*115 Cal. App. 4th 874, 879)* . While the joint defense agreement was not void as matter of public policy, it could not serve as sole ground for withholding the documents. Rather, the agreement evidenced the expectation of confidentiality necessary to avoid waiver by disclosure to someone outside the attorney-client relationship, but could not protect the documents from disclosure unless they contained or reflected attorney-client communications or attorney work product (*115 Cal. App. 4th 874, 893)* .

For additional discussion of *OXY Resources California LLC*, refer to § 81.65[4][a].

In *Maas v. Municipal Court (1985) 175 Cal. App. 3d 601, 221 Cal. Rptr. 245* , codefendant entered into a plea bargain, agreeing to plead no contest to being an accessory to murder and to cooperate fully in the investigation and prosecution of defendant. Defendant issued a subpoena duces tecum requiring codefendant to appear and produce documents. Codefendant moved to quash, asserting the lawyer-client privilege. The magistrate denied the motion. Codefendant sought a writ of mandate in the superior court, and the court issued the writ, commanding the magistrate to vacate its order and grant the motion to quash. In affirming, the court of appeal concluded that codefendant's agreement to testify completely in exchange for immunity did not waive the lawyer-client privilege. Waiver of this privilege occurs with disclosure of a significant part of the communication, but a client does not waive the privilege by testifying about facts

that might have been discussed in confidential conversations with his or her attorney because that testimony is not equivalent to disclosure of the actual content of those lawyer-client conversations (*175 Cal. App. 3d 601, 606)* .

[b] No Waiver of Privilege If Disclosure Coerced by Court Order

In *Regents of Univ. of Cal. v. Superior Court (2008) 165 Cal. App. 4th 672, 81 Cal. Rptr. 3d 186* , a coordinated antitrust case, energy suppliers were under criminal and regulatory investigation when they disclosed the documents in response to subpoenas or requests for documents from federal agencies. At that time, the United States Department of Justice considered the extent of a corporation's willingness to cooperate with document requests in deciding whether to indict. The trial court found that the energy suppliers' cooperation with the federal agencies did not waive the attorney-client privilege or work product protection. The trial court concluded that production of the documents to the government was coerced within the meaning of *Evid. Code § 912(a)*, given the dramatic impact that failure to cooperate might have had and the absence of any cost-free redress (*165 Cal. App. 4th 672, 683)* . The appellate court agreed, denying petitioner energy users motion to compel production of the documents that had been disclosed to the federal government. The appellate court held that when privileged documents have been disclosed either in response to the request of a government agency or inadvertently in the course of civil discovery, the privilege is not waived if the holder has taken reasonable steps under the circumstances to prevent disclosure. The holder of the privilege is not required to take "strenuous or Herculean efforts." This standard is consistent with *Evid. Code § 919(b)*, which does not require that a privilege holder of a privilege suffer a contempt finding in order to preserve the privilege or to appeal an order directing disclosure (*165 Cal. App. 4th 672, 683)* .

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CHAPTER 81 DISCOVERY: PRIVILEGES AND OTHER DISCOVERY LIMITATIONS
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B. Attorney-Client Privilege

8-81 California Points & Authorities § 81.90

§ 81.90 Opposing Motion to Compel Discovery--Lawyer-Client Privilege [Evid. Code § 954] Applicable--Privilege Not Impliedly Waived

[1] FORM

[*The following may be combined, when appropriate, with a general memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30), as well as with points and authorities relating to resisting discovery on the grounds of privilege generally (see, e.g., § 81.20), and relating to the attorney-client privilege generally (see, e.g., § 81.80).*]

THE INFORMATION SOUGHT IS NOT DISCOVERABLE BECAUSE THE LAWYER-CLIENT PRIVILEGE HAS NOT BEEN IMPLIEDLY WAIVED.

A. No Implied Waiver Unless Privileged Communication Has Been Put in Issue. There is no implied waiver of the lawyer-client privilege unless the client has put an otherwise privileged communication directly at issue and disclosure is essential for a fair adjudication of the action (*Southern Cal. Gas Co. v. Public Utilities Com. (1990) 50 Cal. 3d 31, 40-43, 265 Cal. Rptr. 801, 784 P.2d 1373* ; *Mitchell v. Superior Court (1984) 37 Cal. 3d 591, 603-611, 208 Cal. Rptr. 886, 691 P.2d 642*).

[*AND/OR*]

B. No Implied Waiver After Party Has Been Designated Expert Witness. Designation of a party as an expert trial witness is not in itself an implied waiver of the party's attorney-client privilege; if the designation is withdrawn before the party discloses a significant part of a privileged communication, or before it is known with reasonable certainty that the party will actually testify as an expert, the privilege is secure (*Shooker v. Superior Court (2003) 111 Cal. App. 4th 923, 930, 4 Cal. Rptr. 3d 334*).

[2] Comments

[a] Use of Form

This memorandum are for use in opposition to a motion to compel discovery on the ground that there is no implied waiver of the attorney-client privilege because the party or other person resisting discovery has not put an otherwise privileged communication directly at issue, and disclosure is not essential to the fair adjudication of the action. In addition, this form may be used in opposition to a motion to compel discovery on the ground that designation of a party as an expert trial witness is not itself an implied waiver of the privilege, if the designation is withdrawn before the party discloses a significant part of a privileged communication, or before it is known with reasonable certainty that the party will actually testify as an expert.

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum opposing a motion to compel discovery, as well as with points and authorities that relate to privilege in general and the lawyer-client privilege in particular, as grounds for resisting discovery. If Optional Paragraph B is used, this form may be combined with one or more forms refuting claims of work product protection on grounds such as waiver. For authorities thatdiscuss protection of an expert's opinion under the work product doctrine, see *§ 81.224*.

In an appropriate case, these points and authorities may be submitted in opposition to the motion supported by the points and authorities *set out in § 81.67*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] No Implied Waiver Unless Privileged Communication Has Been Put in Issue

In ***Southern Cal. Gas Co. v. Public Utilities Com.*** *(1990) 50 Cal. 3d 31, 265 Cal. Rptr. 801, 784 P.2d 1373* , a gas company applied to the Public Utilities Commission to recover costs incurred as a result of buying out a supply contract it did not want to perform. The company disclosed to the commission that its attorney had advised that the contract could not be unilaterally terminated without subjecting the company to liability. The commission concluded that the company had thereby impliedly waived its lawyer-client privilege, and ordered the company to produce the documents containing its attorney's legal analysis regarding termination of the contract. The company appealed that order.

The State Supreme Court vacated the order, concluding that the lawyer-client privilege had not been impliedly waived. The Court observed that the gas company had expressly stated that it did not intend to rely on its attorney's advice or state of mind to demonstrate that it acted reasonably when it bought out the contract. Because the attorney's advice or state of mind was not in issue, the Court found the privilege had not been waived (*50 Cal. 3d 31, 42)* . Further, the Court said that although the reasonableness of the buyout was at issue, a determination of whether the contract was enforceable was an objective one that did not depend on a particular attorney's analysis. Finally, the Court found that the information sought, although relevant, was not vital to a fair adjudication in the proceedings (*50 Cal. 3d 31, 43)* .

The facts and procedural background of ***Mitchell v. Superior Court*** *(1984) 37 Cal. 3d 591, 208 Cal. Rptr. 886, 691 P.2d 642* are discussed in *§ 81.89[3][h]*. The trial court in *Mitchell* had granted the motion compelling discovery on the ground that plaintiff had placed her attorney's communications in issue by seeking damages for emotional distress because disclosure of these communications would help to determine the genuineness and reasonableness of her claim.

The Supreme Court granted plaintiff's petition for a writ of mandate compelling the trial court to vacate its order compelling discovery. The Court stated that while plaintiff's knowledge of the health hazards of the chemical was relevant and discoverable, the content of what she was told by her attorney was not put in issue (*37 Cal. 3d 591, 607)* .

The Court noted that in an action for intentional infliction of emotional distress, it is evidence of the outrageousness of the defendant's conduct that determines the genuineness of the claim, rather than any information provided by the plaintiff's attorney. The Court concluded that plaintiff had not put her attorney's communications directly in issue, and that disclosure of these communications was not necessary to a fair adjudication of the claim for emotional distress (*37 Cal. 3d 591, 609)* . Moreover, it said public policy considerations favored a finding of no waiver in such a case (*37 Cal. 3d 591, 609-611)* .

[b] No Implied Waiver After Party Has Been Designated Expert Witness

The facts and procedural background of ***Shooker v. Superior Court*** *(2003) 111 Cal. App. 4th 923, 4 Cal. Rptr. 3d 334* are discussed in *§ 81.67[3][c]*. In that case, the court of appeal issued a writ of mandate directing the trial court to enter a new order reflecting that plaintiff had not waived the attorney-client privilege. The court held that designation of a party as an expert trial witness is not in itself an implied waiver of the party's attorney-client privilege because the party's initial status is that of a possible expert witness. If the designation is withdrawn before the party discloses a significant part of a privileged communication (as in this case), or before it is known with reasonable certainty that the party will actually testify as an expert, the privilege is secure. However, if the party provides privileged documents or testifies as an expert (such as by stating his opinion in a declaration or at a deposition) the privilege is waived (*111 Cal. App. 4th 923, 930-931)* .

The court explained that in cases in which discovery was allowed, the expert had advanced from his initial role as a *possible* trial witness to the role of *prospective* trial witness, and no effort had been made by the proponent to withdraw the designation of that expert as a trial witness, even after the privilege issue was raised. In this case, plaintiff, who designated himself as an expert, appeared for his deposition, but recognized the privilege issue before he did anything more than identify his charts and the previously disclosed documents he had brought with him, and no confidential information was disclosed. On the facts of this case, plaintiff was entitled to relief (*111 Cal. App. 4th 923, 931)* .

[4] Additional Authorities

[a] No Implied Waiver Unless Privileged Communication Has Been Put in Issue

In *Laguna Beach County Water Dist. v. Superior Court (2004) 124 Cal. App. 4th 1453, 22 Cal. Rptr. 3d 387* , plaintiff alleged defective construction of a reservoir near her home. Plaintiff served deposition subpoenas, but defendant water district refused to produce certain documents, mainly letters from the defendant district's attorney to a water agencies association and the defendant's auditors. The trial court ruled that any privilege or work product protections had been waived. On appeal, the court found that two of the letters were not subject to work product protection because they merely transmitted non-privileged documents (*124 Cal. App. 4th 1453, 1458)* . However, defendant's attorney did not waive the right to assert attorney work product protection by sending letters containing work product to defendant's auditors. The letters themselves made clear that the attorney did not intend to waive protection; he sent letters only to comply with defendant's request; and the third party auditors had an interest in maintaining the confidentiality of the work product (*124 Cal. App. 4th 1453, 1459-1461)* .

In *Venture Law Group v. Superior Court (2004) 118 Cal. App. 4th 96, 12 Cal. Rptr. 3d 656* , a law firm and a former firm attorney filed a writ petition for relief from the trial court's discovery order compelling the attorney to answer deposition questions asked by real parties in interest about the legal advice given to the law firm's corporate client regarding a merger. Real parties in interest argued, in part, that the attorney's answers were not barred by the attorney-client privilege because the individual defendants had raised advice of counsel as a defense, thereby waiving the privilege by implication. The court of appeal disagreed. The implied waiver caused by asserting the advice of counsel defense is limited to situations in which "*the client* has placed into issue the decisions, conclusions, and mental state of the attorney who will be called as a witness to prove such matters." Here, there was no dispute that the defendants in their individual capacities as directors, officers, and majority shareholders of the merged corporation were

not the clients of petitioner law firm. Rather, the successor corporation was the holder of the attorney-client privilege of the merged client corporation, as provided under *Evid. Code § 953(d)*; and because the successor corporation had not waived the privilege, the attorney could not answer the deposition questions without violating the attorney-client privilege (*118 Cal. App. 4th 96, 105-106)* .

For further discussion of *Venture Law Group v. Superior Court (2004) 118 Cal. App. 4th 96, 12 Cal. Rptr. 3d 656* refer to § 81.80[4][a].

In *Kaiser Foundation Hospitals v. Superior Court (1998) 66 Cal. App. 4th 1217, 78 Cal. Rptr. 2d 543* , an action for sex discrimination andharassment, plaintiff sought to discover, among other things, the "complete investigation files ... for any and all complaints of sexual discrimination" involving defendant. In this case the defendant employer had arranged for nonattorney personnel to conduct the investigation, had already produced most of the documents in its investigation files, and had obtained a written stipulation between the parties that such production did not constitute a waiver as to any privileged communications made during the investigation between the employer, a or its nonattorney investigators, and employer's attorneys. The trial court nevertheless ruled that the employer could be compelled to produce documents otherwise protected by the attorney-client privilege and the attorney work product doctrine (*66 Cal. App. 4th 1217, 1221-1222)* . The employer sought review by writ, and the writ was granted (*66 Cal. App. 4th 1217, 1229)* .

Addressing the extent to which an employer may assert the protection of the attorney-client privilege and the attorney work product doctrine as to documents contained in its investigation files, when the employer pleads the adequacy of its prelitigation investigation into the claimed misconduct as a defense in the action, the court of appeal held that if an employer has produced the substance of relevant in-house investigations performed by *nonattorney* personnel and seeks only to protect specific communications between those personnel and the employer's attorneys, the protections afforded by the law for communications between attorneys and their clients are not waived (*66 Cal. App. 4th 1217, 1219-1220, 1228-1229)* . The court distinguished *Wellpoint Health Networks, Inc. v. Superior Court*, discussed *below*, noting that the court in *Wellpoint* posited a waiver only in the context of that case's particular circumstances, in which the employer's attorneys themselves had conducted the investigation, while the employer claimed the investigation was entirely privileged yet simultaneously placed its adequacy in issue by citing as a defense to the employee's charges. The court explained that *Wellpoint* does not make a blanket holding that the attorney-client privilege and the work product doctrine are waived in every case in which an employer puts the adequacy of its prelitigation investigation at issue (*66 Cal. App. 4th 1217, 1225)* .

In *Wellpoint Health Networks, Inc. v. Superior Court (1997) 59 Cal. App. 4th 110, 68 Cal. Rptr. 2d 844* , an employment discrimination action alleging a hostile work environment, plaintiff sought to discover documents resulting from an investigation of the workplace conducted by a lawyer retained by defendant. After the trial court sustained defendant's demurrer to plaintiff's second amended complaint, it granted plaintiff's motion to compel evidence. Defendant sought, and received, a stay of discovery from the court of appeal. Noting that the lawyer-client privilege and work product doctrine apply to prevent mandatory disclosure of such documents, the court of appeal said that the party opposing the privilege has the burden of showing that there has been a waiver (*59 Cal. App. 4th 110* ,123-124). Such a waiver may be shown when the employer, hoping to prevail by showing that it investigated an employee's complaint and took action appropriate to the findings of that investigation, places the adequacy of that investigation directly at issue. When the adequacy of such an investigation is directly at issue, the lawyer-client privilege and attorney work product protection regarding that investigation are waived (*59 Cal. App. 4th 110, 125-129)* . However, the court found that because there was no complaint on file showing whether a hostile work environment theory was at issue or an indication of defense strategy, an order compelling discovery would be premature.

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8-81 California Points & Authorities § 81.91

§ 81.91 Opposing Motion to Compel Discovery--Lawyer-Client Privilege [Evid. Code § 954] Applicable--Lawyer's Services Not Sought to Enable or Aid Commission of Crime or Fraud [Evid. Code § 956]

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30), as well as with points and authorities relating to resisting discovery on the grounds of privilege generally (see, e.g., § 81.20), and relating to the attorney-client privilege generally (see, e.g., § 81.80).*]

THE EXCEPTION UNDER *EVIDENCE CODE SECTION 956* TO THE LAWYER-CLIENT PRIVILEGE APPLIES ONLY WHEN THE LAWYER'S SERVICES ARE SOUGHT TO COMMIT A CRIME OR FRAUD.

A. Privilege Applies Absent Crime or Fraud. The exception to the lawyer-client privilege under *Evidence Code Section 956* is applicable only when the services of the lawyer were sought or obtained by the client to enable or aid anyone to commit or plan to commit a crime or a fraud (*Evid. Code § 956*; *Glade v. Superior Court (1978) 76 Cal. App. 3d 738, 745, 143 Cal. Rptr. 119*).

[*Optional*] **B. *Evidence Code Section 956* Exception Inapplicable When Lawyer Commits Crime or Fraud.** The exception to the lawyer-client privilege provided by *Evidence Code Section 956* does not apply to a lawyer's misuse of confidential information to defraud others if the client did not seek legal assistance to further thispurpose and was unaware of the lawyer's contemplated wrongdoing (*Glade v. Superior Court (1978) 76 Cal. App. 3d 738, 745-746, 143 Cal. Rptr. 119*).

[*Optional*] **C. Validity of Claim of Privilege Must Be Determined Before Discovery Is Ordered.** On a colorable claim of lawyer-client privilege, discovery of the allegedly privileged material may not be ordered until the validity of the claim is determined. If the only means to assess the validity of the claim requires examination of the purportedly privileged items, the court must examine the items in camera, regardless of the burdensome and time-consuming nature

of the inspection (*Geilim v. Superior Court (1991) 234 Cal. App. 3d 166, 173-177, 285 Cal. Rptr. 602* ; *see Penal Code § 1524(c)*).

[*Optional*] **D. Proponent of Exception Must Show Something More Than Probable Cause.** The crime-fraud exception to the lawyer-client privilege is very limited, and requires the proponent of the exception to prove the existence of a crime or fraud. Probable cause sufficient for issuance of a search warrant is not sufficient to establish a prima facie crime-fraud exception (*Geilim v. Superior Court (1991) 234 Cal. App. 3d 166, 174-175, 285 Cal. Rptr. 602*).

[2] Comments

[a] Use of Form

These points and authorities in opposition to a motion for an order compelling discovery may be submitted by a party or other person who has resisted providing discovery on the ground that the material sought is privileged as a confidential lawyer-client communication, if the party moving to compel discovery contends that the privilege has been waived under the crime or fraud exception of *Evid. Code § 956*. This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in opposition to compelling discovery, as well as with points and authorities relating to resisting discovery on the ground of privilege and relating to the lawyer-client privilege generally.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Privilege Applies Absent Crime or Fraud

In ***Glade v. Superior Court*** *(1978) 76 Cal. App. 3d 738, 143 Cal. Rptr. 119* , an action for declaratory relief and damages against an attorney for conflict of interest, the court of appeal held that *Evid. Code § 956* operates as an exception to the lawyer-client privilege only when the client abuses the professional relationship by seeking the lawyer's aid with the intent to enable or aid someone to commit a crime or fraud. Accordingly, the court held that the lawyer's misuse of confidential information to defraud others would not invoke the *Evid. Code § 956* exception absent the clients' intent and knowledge, and thus there had been no waiver of the lawyer-client privilege (*76 Cal. App. 3d 738, 745-746)* .

[b] Evidence Code Section 956 Exception Inapplicable When Lawyer Commits Crime or Fraud

Glade v. Superior Court *(1978) 76 Cal. App. 3d 738, 143 Cal. Rptr. 119* is discussed in [a], *above.*

[c] Validity of Claim of Privilege Must Be Determined Before Discovery Is Ordered

In ***Geilim v. Superior Court*** *(1991) 234 Cal. App. 3d 166, 285 Cal. Rptr. 602* , a criminal action against a lawyer for insurance fraud, property was taken from defendant's office pursuant to a search warrant. Defendant moved for the return of the seized property, claiming that the lawyer-client privilege applied and that the warrant was overbroad. The trial court postponed the hearing on the motion, but ordered that all the property that had been sealed pursuant to *Penal Code § 1524* could be unsealed by the State. Defendant petitioned for a writ of mandate/prohibition to prohibit the trial court from disclosing the items until after the hearing on the application of the lawyer-client privilege. Although the court of appeal denied the petition, the State Supreme Court granted defendant's petition for review, and transferred the matter back to the court of appeal with instructions to vacate its order.

The court of appeal granted the petition for writ of mandate/prohibition and ordered the trial court to conduct an in camera inspection to determine whether any of the seized documents were protected by the lawyer-client privilege or whether any of them were within the crime-fraud exception to that privilege. *Evid. Code § 915(a)* provides that in a *Penal Code § 1524(c)* hearing in which a claim of privilege is made and there is no other feasible means to rule on the validity of that claim other than to require disclosure, the court must conduct an in camera hearing. On a colorable claim of privilege, the court cannot order the unsealing of seized property until thevalidity of the claim is determined. If the only means to assess the validity of the claim requires examination of the purportedly privileged items, the court must examine the items in camera with only the person from whom disclosure is sought or the person authorized to claim the privilege, or both, and any other person authorized by the holder present.

If the judge determines that the information is privileged, neither the judge nor any other person may ever disclose, without the consent of a person authorized to permit disclosure, what was disclosed (*234 Cal. App. 3d 166, 173-174)* . Disclosure to the court for the purpose of determining the merits of a claim of privilege does not terminate the privilege (*234 Cal. App. 3d 166, 176)* . The court of appeal concluded that in camera inspection was warranted because the trial court ordered the disclosure with the expectation that the privilege could be claimed after examination by the State. That contradicts Evid. Code § 917 (*now see Evid. Code § 917(a)*), which creates a presumption of confidentiality and places the burden of proof to establish the nonprivileged nature of the item on the party seeking discovery. Once that party has free access to all the seized items, a substantial component of the privileged nature of the items would be destroyed, even if the information was never used. At the very least, disclosure prior to ruling on the status of the claimed privilege might invade an innocent client's right to privacy and implicate the privilege holder's due process rights. The fact that an in camera inspection might be burdensome and time-consuming does not render examination impractical. Rather, the seizure of a large quantity of materials increases the likelihood that privileged documents are gathered along with the legally seized property, thus making more urgent the need for careful, individualized review of each item (*234 Cal. App. 3d 166, 176-177)* .

[d] Proponent of Exception Must Show Something More Than Probable Cause

The facts and procedural background of ***Geilim v. Superior Court*** *(1991) 234 Cal. App. 3d 166, 285 Cal. Rptr. 602* are discussed in [c], *above*. The *Geilim* court explained that the crime-fraud exception to lawyer-client privilege is very limited. The proponent of the exception bears the burden of proof of the existence of crime or fraud. The prosecutor argued that the "probable cause" requirement for issuance of the search warrant was sufficient to establish a prima facie crime-fraud exception. The court was not persuaded, however, noting that such an argument presumes that all the items seized pursuant to a warrant fall within the exception and disregards the possibility that items outside the scope of the warrant were seized (*234 Cal. App. 3d 166, 174-175)* . Determination of a claim of privilege requires an in camera inspection. The alleged privilege stands until the party seeking disclosure presents evidence sufficient to establish an exception (*234 Cal. App. 3d 166, 176)* .

[4] Additional Authorities

[a] Privilege Applies Absent Crime or Fraud

In *Nowell v. Superior Court (1963) 223 Cal. App. 2d 652, 36 Cal. Rptr. 21* , a libel action, one of the defendants refused to answer numerous questions at his deposition on the ground of lawyer-client privilege. The trial court granted plaintiff's motion to require answers. Defendants sought a writ of prohibition to restrain the trial court from enforcing its order, arguing that plaintiff had not shown that they had consulted their attorney with the intent to commit a crime or fraud, among other things, and therefore that the privilege had not been waived. The court of appeal agreed, holding that plaintiff's mere assertion of crime or fraud was not sufficient to find that defendants had waived the privilege, and that the exception to the privilege for crime or fraud did not extend to communications to an attorney involving contemplated tortious acts as well (*223 Cal. App. 2d 652, 657)* . Although *Nowell* was decided before 1967, the

effective date of *Evid. Code § 956*, the court in *Glade v. Superior Court (1978) 76 Cal. App. 3d 738, 143 Cal. Rptr. 119* stated that *Evid. Code § 956* merely codified the common-law rule that had already been applied in California (*76 Cal. App. 3d 738, 745)* .

[b] Validity of Claim of Privilege Must Be Determined Before Discovery Is Ordered

In *People v. Superior Court (Bauman & Rose) (1995) 37 Cal. App. 4th 1757, 44 Cal. Rptr. 2d 734* , the Los Angeles District Attorney appealed the superior court's order sealing certain documents seized during a search of the respondents' law offices pursuant to a search warrant, as part of an investigation to uncover evidence of insurance fraud. The court of appeal affirmed. The court held that a trial court has the authority to hold an in camera hearing to determine the validity of an assertion of the attorney-client privilege by an attorney suspected of criminal activity (*37 Cal. App. 4th 1757, 1767)* [*see § 81.223[4*][a] (discussion of same case in context of work-product privilege)].

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[Reserved]

§§ 81.92[Reserved]

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C. Physician-Patient Privilege

8-81 California Points & Authorities § 81.110

§ 81.110 Supporting Motion to Compel Discovery--Refuting Claim of Physician-Patient Privilege [Evid. Code § 994]--Disclosure of Patient's Name Is Not Always Privileged

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in support of a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11), as well as with points and authorities generally refuting a claim of privilege (see, e.g., § 81.10).*]

A DISCLOSURE OF THE PATIENT'S NAME THAT DOES NOT REVEAL ANY COMMUNICATION CONCERNING THE PATIENT'S AILMENTS DOES NOT VIOLATE THE PHYSICIAN-PATIENT PRIVILEGE.

Permissible Disclosure of Patient's Name. If the connecting factor between the patient whose identity is sought and the action that is before the court is not the patient's ailments and treatment, the identity of the patient is not within the physician-patient privilege (*Ascherman v. Superior Court (1967) 254 Cal. App. 2d 506, 516, 62 Cal. Rptr. 547*).

[2] Comments

[a] Use of Form

This memorandum may be used in support of a motion for an order compelling discovery if a party or other person has resisted providing discovery on the ground that the patient's name is privileged, but in fact revealing the name would not reveal any communication concerning the patient's ailments. It does not provide a complete memorandum, but is designed to be combined with a general form of memorandum in support of compelling discovery, as well as a form refuting a claim of privilege, generally.

Counsel who also wish to set out general points relating to the physician-patient privilege may adapt the form in opposition to a motion to compel discovery *set out in § 81.120*, and combine it with this form.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Permissible Disclosure of Patient's Name

In ***Ascherman v. Superior Court*** *(1967) 254 Cal. App. 2d 506, 62 Cal. Rptr. 547* , plaintiff brought two actions for reinstatement of his hospital staff privileges. While deposing another physician, plaintiff's counsel attempted to ascertain the name of one of that physician's patients. The deponent had accused plaintiff of soliciting surgery from that patient, but refused to reveal the patient's name, claiming the physician-patient privilege.

In overturning an order that awarded sanctions against plaintiff and his attorneys and that arose from proceedings to compel answers to the deposition question, the court of appeal considered whether the patient's name was privileged information under former Code Civ. Proc. § 1881(4), which set forth the physician-patient privilege at the time in question. The court stated that the communication involved had no relation to treatment or to the patient's ailment. Because it is not necessary for a physician to know the name of the patient in order to treat him or her, and because any unethical solicitation by another is unrelated to information communicated to enable the physician to prescribe or act for the patient, the communication was not privileged (*254 Cal. App. 2d 506, 515-516)* .

The court in *Ascherman* distinguished *Costa v. Regents of Univ. of California (1953) 116 Cal. App. 2d 445, 463-464, 254 P.2d 85* in which an objection to a request for a patient's name was upheld. In that case, the factors connecting the patient and the action before the court were the patient's ailments and the physician's treatment, and the information was therefore within the policy of the privilege.

Counsel should note that although *Ascherman* was decided under former Code Civ. Proc. § 1881(4), and the physician-patient privilege is now governed by *Evid. Code §§ 990-1007*, the rule of *Ascherman* was cited with approval in *Rudnick v. Superior Court (1974) 11 Cal. 3d 924, 933-934 fn. 13, 114 Cal. Rptr. 603, 523 P.2d 643* , a case relating to the physician-patient privilege as set forth in the Evidence Code. For a discussion of *Rudnick*, see *§ 81.20[3][a]*, and for a discussion of cases holding that a patient's name is not discoverable under certain circumstances, see *§ 81.121*.

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8-81 California Points & Authorities § 81.111

§ 81.111 Supporting Motion to Compel Discovery--Refuting Claim of Physician-Patient Privilege [Evid. Code § 994]--Purpose of Communication Not to Obtain Diagnosis of Subject's Condition [Evid. Code § 991]

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in support of a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11), as well as with points and authorities generally refuting a claim of privilege (see, e.g., § 81.10).*]

THE PHYSICIAN-PATIENT PRIVILEGE DOES NOT PROTECT A COMMUNICATION MADE TO A PHYSICIAN WHEN THAT COMMUNICATION IS MADE FOR A PURPOSE OTHER THAN THAT OF SECURING A DIAGNOSIS OR TREATMENT.

Communication to Physician for Nondiagnostic Purpose Not Privileged. The physician-patient privilege only arises when a person consults a physician or submits to an examination by a physician for the purpose of securing a diagnosis or treatment of his or her physical or mental or emotional condition. When the purpose of a communication with a physician is for a different purpose, the physician-patient privilege is inapplicable (*Evid. Code § 991*; *Kizer v. Sulnick (1988) 202 Cal. App. 3d 431, 439, 248 Cal. Rptr. 712*).

[2] Comments

[a] Use of Form

This memorandum may be used in support of a motion for an order compelling discovery if a party or other person has resisted providing discovery on the ground that a communication to a physician is privileged, but in fact the communication was for a purpose other than securing a diagnosis or treatment of the subject's medical condition. It does not provide a complete memorandum, but is designed to be combined with a general form of memorandum in support of compelling discovery, as well as a form refuting a claim of privilege generally.

Counsel who also wish to set out general points relating to the physician-patient privilege may adapt the form in oppositionto a motion to compel discovery *set out in § 81.120*, and combine it with this form.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Communication to Physician for Nondiagnostic Purpose Not Privileged

In ***Kizer v. Sulnick*** *(1988) 202 Cal. App. 3d 431, 248 Cal. Rptr. 712* , as part of an investigation of whether a waste facility presented a threat to public health, the director of the Department of Health Services issued an administrative subpoena duces tecum to a private attorney to produce records generated as part of a health study of persons residing near the facility. The attorney had secured the study in connection with a lawsuit for personal injuries brought by a residents' group against the waste facility. The attorney refused to comply with the subpoena duces tecum, arguing that the records were protected on a number of grounds, among them the physician-patient privilege. The director filed a petition to compel compliance. The trial court denied the petition, and the director appealed.

The court of appeal reversed. The court cited *Evid. Code § 991*, which provides that the physician-patient privilege arises when a person "consults a physician or submits to an examination by a physician for the purpose of securing a diagnosis or preventive, palliative, or curative treatment." The party asserting the physician-patient privilege has the burden of proof regarding its existence. The court noted that although the brief description of the health effects study suggested that participation by the residents might constitute consultation with a physician, there was no evidence that the purpose of the communication was to obtain a diagnosis of the subjects' condition. Rather, the purpose appeared to be to determine whether a statistically significant portion of the residents shared similar medical complaints in order to ascertain whether the presence of the waste facility was the cause of these symptoms. The court said that participation in such a group study does not invoke the same considerations of confidentiality as an individual's communication with his or her doctor. It concluded that the record did not support a finding that the attorney had sustained his burden of proof that the physician-patient privilege was applicable (*202 Cal. App. 3d 431, 439)* .

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8-81 California Points & Authorities § 81.112

§ 81.112 Supporting Motion to Compel Discovery--Refuting Claim of Physician-Patient Privilege [Evid. Code § 994]--Waiver by Disclosure [Evid. Code §§ 912(a), 992]

[1] FORM

[*The following may be combined, when appropriate, with a general memorandum in support of a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11), as well as with points and authorities generally refuting a claim of privilege (see, e.g., § 81.10).*]

THE PHYSICIAN-PATIENT PRIVILEGE IS WAIVED BY THE HOLDER'S DISCLOSURE OF THE CONFIDENTIAL COMMUNICATION.

A. Privilege Waived by Disclosure of Communication. The right of any person to claim the physician-patient privilege is waived with respect to a protected communication if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone (*Evid. Code § 912(a)*).

B. Consent to Disclosure May Be Manifested by Failure to Assert Privilege, or Other Conduct Indicating Consent. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege (*Evid. Code § 912(a)*; *Manela v. Superior Court (2009) 177 Cal. App. 4th 1139, 1146-1147, 99 Cal. Rptr. 3d 736*).

[2] Comments

[a] Use of Form

This memorandum may be used in support of a motion for an order compelling discovery if a party or other person has opposed discovery on the ground that the information sought is a privileged communication between physician and patient, when the privilege has been waived by the holder through disclosure of a significant part of the communication.

This form does not provide a complete memorandum but is designed to be combined with a general memorandum in support of compelling discovery, as well as a memorandum refuting a claim of privilege generally.

Counsel who wish to set out general points relating to the physician-patient privilege as well may adapt the memorandum in opposition to a motion to compel discovery *set out in § 81.120* and combine them with this form.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Privilege Waived by Disclosure of Communication

The right of any person to claim the physician-patient privilege of *Evid. Code § 994* is waived (with exceptions not applicable here) with respect to a communication protected by that privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication, or has consented to such disclosure by anyone (*Evid. Code § 912(a)*; *see Evid. Code 992* ("confidential communication between patient and physician" defined); *see also Evid. Code § 912(b)-(d)* (exceptions)).

[b] Consent to Disclosure May Be Manifested by Failure to Assert Privilege, or Other Conduct Indicating Consent

Manela v. Superior Court *(2009) 177 Cal. App. 4th 1139, 99 Cal. Rptr. 3d 736* was a marital dissolution action brought by the real party in interest, a father, against the petitioner, the mother. The mother opposed joint custody of the couple's 4-year-old child and claimed that the father's medical records would support her allegations regarding the father's seizures. The superior court granted the father's motion to quash subpoenas for the medical records of two of the father's physicians on the ground that the documents were protected by the physician-patient privilege. The mother petitioned for a writ of mandate.

The court of appeal held that the trial court abused its discretion by quashing the subpoena to a doctor who had examined the father regarding his neurological condition. The father had waived the physician-patient privilege under *Evid. Code §§ 912(a)* and *992* with respect to certain medical records, because the mother was present during the father's intake exam with his neurologist, and the father consented to disclosure of significant part of his communications with the neurologist on that date (*177 Cal. App. 4th 1139, 1146-1147)* . Moreover, the father's filing of another physician's declaration, stating that he had treated father for the past nine years for hypnagogic movements, waived the privilege with respect to those records (*177 Cal. App. 4th 1139, 1147-1148)* . However, in keeping with the fact that the scope of the waiver of a privilege is generally construed narrowly, the disclosure of the father's communications with his current physicians did not relate back to the father's communications to a doctor who treated the father for seizures as a teenager. Access to the earlier records would undermine the father's interest in disclosing all necessary information to his treating physician. Therefore, the father's waiver of the physician-patient privilege with respect to his two current physicians did not waive the privilege with respect to the doctor who treated father as a child (*177 Cal. App. 4th 1139, 1148)* .

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[Reserved]

§§ 81.113[Reserved]

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8-81 California Points & Authorities § 81.120

§ 81.120 Opposing Motion to Compel Discovery--Physician-Patient Privilege [Evid. Code § 994] Applicable--General Form

[1] FORM

[*The following may be combined, when appropriate, with a general memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30), as well as with points and authorities relating to resisting discovery on the grounds of privilege generally (see, e.g., § 81.20).*]

THE INFORMATION SOUGHT IS NOT DISCOVERABLE BECAUSE IT IS PRIVILEGED UNDER THE PHYSICIAN-PATIENT PRIVILEGE.

A. Claimant of Privilege. The privilege may be claimed by: (1) the holder of the privilege, that is, the patient, a guardian or conservator of a patient, or the personal representative of a deceased patient; (2) a person authorized to claim the privilege by the holder of the privilege; or (3) the physician who received the confidential communication (*Evid. Code §§ 993, 994*; *Rudnick v. Superior Court (1974) 11 Cal. 3d 924, 929, 114 Cal. Rptr. 603, 523 P.2d 643*).

B. Dual Purposes of Privilege. The physician-patient privilege creates a zone of privacy for the purposes of (1) avoiding humiliation of the patient following disclosure of his or her ailments, and (2) encouraging the patient's full disclosure to the physician of all information necessary for effective diagnosis and treatment. Disclosure that subverts these purposes is violative of the privilege (*Binder v. Superior Court (1987) 196 Cal. App. 3d 893, 898, 242 Cal. Rptr. 231*).

C. Definition of Confidential Communication. A confidential communication between a patient and physician means information, including information obtained by an examination, transmitted between a patient and his or her physician in the course of that relationship and in confidence by a means which, so far as the patient is aware, does not disclose the information to third persons other than those present to further the patient's interest in the consultation, or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose

for which the physician is consulted. A diagnosis madeand the advice given by the physician in the course of the relationship are confidential communications (*Evid. Code § 992*; *Binder v. Superior Court (1987) 196 Cal. App. 3d 893, 897, 242 Cal. Rptr. 231*).

D. "Confidentiality" Liberally Construed in Favor of Patient. The provisions of *Section 992 of the Evidence Code*, which define confidential communications between a patient and physician, must be liberally construed in favor of the patient (*Carlton v. Superior Court (1968) 261 Cal. App. 2d 282, 288, 67 Cal. Rptr. 568*).

E. Presumption of Confidentiality. When it is claimed that the matter sought to be disclosed is a communication made in the course of the physician-patient relationship, the communication is presumed to have been made in confidence. The opponent of the claim of privilege has the burden of establishing that the communication was not confidential (*Evid. Code § 917(a)*; *Palay v. Superior Court (1993) 18 Cal. App. 4th 919, 926 n.7, 22 Cal. Rptr. 2d 839* ; *Carlton v. Superior Court (1968) 261 Cal. App. 2d 282, 288-289, 67 Cal. Rptr. 568*).

[*Add points and authorities relating to the applicability of this privilege in the specific factual context (see, e.g., § 81.121 et seq.).*]

[2] Comments

[a] Use of Form

These points and authorities in opposition to a motion for an order compelling discovery may be submitted by a party or other person who has resisted providing discovery on the ground that the material sought is privileged as a confidential physician-patient communication [*see Evid. Code § 990 et seq.*]. It does not provide a complete memorandum, but is designed to be combined with a general form of memorandum in opposition to compelling discovery, as well as points and authorities relating to the particular factual situation.

In an appropriate case, these points and authorities may be submitted in opposition to the motion supported by the points and authorities *set out in § 81.110* et seq.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[c] Related Uses

This form may be combined with a memorandum in opposition to discovery based on the right to privacy [*see, e.g., § 81.250* et seq.] or with a memorandum in support of a motion for a protective order [*see, e.g., Ch. 83, Discovery: Depositions, § 83.80* et seq.].

[3] Discussion of Authorities

[a] Claimant of Privilege

Evid. Code § 994 sets out the conditions under which a patient may refuse to disclose, or prevent another from disclosing, a confidential communication between patient and physician. It includes a "holder" of the privilege; "holder" is defined in *Evid. Code § 993*. *Evid. Code § 995* states that the physician who received or made a communication subject to the privilege shall claim the privilege whenever he or she is present when the communication is sought to be disclosed, there is a holder of the privilege in existence, and the physician is not otherwise instructed by the person authorized to permit disclosure [*see Evid. Code §§ 994(c), 995*].

The facts and procedural background of ***Rudnick v. Superior Court*** *(1974) 11 Cal. 3d 924, 114 Cal. Rptr. 603, 523 P.2d 643* are discussed in *§ 81.20[3][a]*. In considering the question of whether a third party may claim the physician-patient privilege, the Supreme Court stated that *Evid. Code § 994* limits the right to claim the physician-patient privilege to the holder of the privilege, a person authorized to claim the privilege by the holder of the privilege, or the physician who received the confidential communication (*11 Cal. 3d 924, 929)* . For a discussion of this case as it relates to a third party's claim of the privilege, see *§ 81.122[3][a]*.

[b] Dual Purposes of Privilege

In ***Binder v. Superior Court*** *(1987) 196 Cal. App. 3d 893, 242 Cal. Rptr. 231* , plaintiffs brought a medical malpractice action on behalf of their decedent who died allegedly due to defendant dermatologist's failure to diagnose the decedent patient's skin lesions as melanoma. Defendant's customary practice was to take photographs of all patients' skin lesions. As part of their discovery, plaintiffs requested defendant to produce any photographs in his possession depicting a lesion suspected to be or diagnosed as melanoma. Defendant objected, claiming that compliance with the request would violate the physician-patient privilege. The trial court granted plaintiffs' motion to compel defendant to comply with the request. After his motion for reconsideration was denied, defendant petitioned for a writ of mandate to vacate the trial court's order.

The court of appeal granted the petition. The court stated that the physician-patient privilege creates a zone of privacy for the purposes of preventing humiliation of the patient that might follow disclosure of his or her ailments, and encouraging the patient's full disclosure to the physician of all information necessary for effective diagnosis and treatment of the patient. The patient should have the assurance of knowing that the law recognizes the communication as confidential and guards against the possibility of his or her feelings being shocked or his or her reputation being tarnished by its subsequent disclosure. The court noted that matters disclosed to a physician arise in very sensitive areas that are often difficult to reveal even to the doctor. Unauthorized disclosure of such matters can provoke more than just simple humiliation in a fragile personality. The reasonable expectation that such personal matters will remain with the physician are no less important in a physician-patient relationship than in a relationship between patient and psychotherapist. The court concluded that the individual's right to privacy encompasses not only the state of his or her mind, but also his or her viscera, detailed complaints of physical ills, and their emotional overtones (*196 Cal. App. 3d 893, 898)* .

The court found that disclosure of the photographs as requested by plaintiffs would subvert both objectives of the physician-patient privilege. First, it would undoubtedly shock and humiliate present and former patients of defendant to learn that pictures of their bodies and ailments would be turned over to strangers. Furthermore, it is probable the patients' sensibilities would be offended whether or not their identities were disclosed together with the photographs (*196 Cal. App. 3d 893, 898)* . The court distinguished dictum in *Rudnick v. Superior Court (1974) 11 Cal. 3d 924, 114 Cal. Rptr. 603, 523 P.2d 643* (discussed in [a], *above*), which plaintiffs argued supported disclosure so long as the identity of the patients is not revealed. The court observed that having an ailment depicted in a photograph is quite different from having a description of an ailment read. The court also opined that a rule compelling disclosure of patient photographs would discourage patients from allowing physicians to photograph their ailments or other conditions (*196 Cal. App. 3d 893, 898-899)* .

[c] Definition of Confidential Communication

The facts and procedural background of ***Binder v. Superior Court*** *(1987) 196 Cal. App. 3d 893, 242 Cal. Rptr. 231* are discussed in [b], *above.* In *Binder,* the court of appeal found that photographs were taken in conjunction with and as part of defendant's examination of his patients. The court said they were taken strictly in the course of the physician-patient relationship. Moreover, both defendant and his patients understood that the photographs would be disclosed to no third persons other than those present during the taking of the photographs and medical personnel to whom disclosure would be reasonably necessary for the patient'streatment. The court characterized defendant's purpose in taking the

photographs as the obtaining of confidential and private information regarding the patients' condition to assist in rendering proper diagnosis and treatment. Thus, the photographs were clearly "confidential communications" within the meaning of *Evid. Code § 992* (*196 Cal. App. 3d 893, 897)* .

[d] "Confidentiality" Liberally Construed in Favor of Patient

Plaintiff in ***Carlton v. Superior Court*** *(1968) 261 Cal. App. 2d 282, 67 Cal. Rptr. 568* brought an action for damages for personal injuries sustained while he was a guest in an automobile driven by defendant who was allegedly intoxicated at the time of the accident. Plaintiff made a motion for inspection and copying under Code Civ. Proc. § 2031 (as it existed prior to the 1974 enactment of a provision providing for a self-executing request for inspection and the 1986 revision providing for a self-executing demand for inspection (*now see Code Civ. Proc. § 2031.010 et seq.*) of hospital records relating to the care and treatment of defendant on the date of the accident. Defendant opposed the motion on the ground that the records sought were confidential communications between him and his physician and were protected by the physician-patient privilege. The trial court granted the motion, limiting the inspection to materials relating to defendant's intoxicated condition. The custodian of records refused to open the records, and plaintiff brought another motion for an order requiring inspection of the records, and served a subpoena duces tecum by which the records were brought before the court. The court then issued an order for the court to examine the records to select the ones that were to be inspected. Defendant sought a writ of prohibition restraining the court from enforcing these orders.

Since defendant did not raise the issues of whether it was proper to proceed under Code Civ. Proc. § 2031 (*now see Code Civ. Proc. § 2031.010 et seq.*) to inspect the records of a nonparty hospital or whether there was good cause for the order, the court of appeal did not consider those issues. It did, however, grant a writ directing the trial court to vacate its orders (*261 Cal. App. 2d 282, 286-287)* . In considering whether the physician-patient privilege applied, the court noted that the privilege extends no further than a confidential communication between patient and physician and that the terms of *Evid. Code § 992*, defining a confidential communication, must be liberally construed in favor of the patient (*261 Cal. App. 2d 282, 288)* . The court also pointed out that pursuant to Evid. Code § 917 (*now see Evid. Code § 917(a)*), when there is a claim that the matter sought to be disclosed is a communication made in the course of the physician-patient relationship, the communication is presumed to have been made in confidence and the opponent of the privilege has the burden of establishing that the communication was not confidential (*261 Cal. App. 2d 282* ,288-289). The court found the material in question to be privileged under the physician-patient privilege, that it was not subject to the patient-litigant exception to the physician-patient privilege [*see § 81.124*], and that the court had improperly ordered an in camera inspection of the records (*261 Cal. App. 2d 282, 289-293)* .

[e] Presumption of Confidentiality

In ***Palay v. Superior Court*** *(1993) 18 Cal. App. 4th 919, 22 Cal. Rptr. 2d 839* , the court reiterated the general rule that communications between patient and physician are presumptively confidential. The burden of proof to establish otherwise is on the opponent pursuant to Evid. Code § 917 (*now see Evid. Code § 917(a)*) (*18 Cal. App. 4th 919, 926 n.7*).

Carlton v. Superior Court *(1968) 261 Cal. App. 2d 282, 67 Cal. Rptr. 568* is discussed in [d], *above.*

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8-81 California Points & Authorities § 81.121

§ 81.121 Opposing Motion to Compel Discovery--Physician-Patient Privilege [Evid. Code § 994] Applicable--Patient's Name as Privileged Under Certain Circumstances

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30), as well as with points and authorities relating to resisting discovery on the grounds of privilege generally (see, e.g., § 81.20), and relating to the physician-patient privilege generally (see, e.g., § 81.120).*]

THE PATIENT'S NAME IS PROTECTED FROM DISCLOSURE BY THE PHYSICIAN-PATIENT PRIVILEGE BECAUSE REVEALING THE NAME WOULD REVEAL A COMMUNICATION CONCERNING THE PATIENT'S CONDITION OR DIAGNOSIS.

Patient's Name Is Privileged. A patient's name is privileged from disclosure if the context would reveal any communication concerning the patient's condition or the physician's diagnosis (*Marcus v. Superior Court (1971) 18 Cal. App. 3d 22, 25, 95 Cal. Rptr. 545*).

[2] Comments

[a] Use of Form

These points and authorities in opposition to a motion for an order compelling discovery may be submitted by a party or other person who has resisted providing discovery on the ground that disclosure of a patient's name is privileged. It does not provide a complete memorandum, but is designed to be combined with a general form of memorandum in opposition to compelling discovery, as well as with points and authorities relating to resisting discovery on the ground of privilege and relating to the physician-patient privilege generally.

In an appropriate case, these points and authorities may be submitted in opposition to the motion supported by the

points and authorities *set out in § 81.110*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Patient's Name Is Privileged

In ***Marcus v. Superior Court*** *(1971) 18 Cal. App. 3d 22, 95 Cal. Rptr. 545* , plaintiff sought to recover damages from a physician and hospital for damages allegedly sustained when defendants performed various tests on him. Plaintiff sought disclosure through depositions, interrogatories, and a motion to produce documents, of the names and addresses of other patients to whom defendants gave angiographic testing, and defendants sought protective orders relieving them from disclosing this information. The trial court ordered defendants to supply plaintiff with the names and addresses of the eight patients who received the test before plaintiff did, and of the eight patients who received the test after plaintiff, including two patients who developed complications. Defendants applied to the court of appeal for a writ of prohibition setting aside the discovery order on the ground that it violated the physician-patient privilege of *Evid. Code §§ 990-1007*.

The court of appeal issued the writ. The court stated that a patient who received the test from defendant physician would have communicated to the physician facts about himself or herself indicating the need for the testing. By listing the persons who received the tests, the physician would necessarily reveal the confidential information (*18 Cal. App. 3d 22, 24)* . The court applied the rule of *Costa v. Regents of Univ. of California (1953) 116 Cal. App. 2d 445, 463, 254 P.2d 85* in which such a disclosure washeld to violate the physician-patient privilege that existed under former Code Civ. Proc. § 1881(4). The court in *Marcus* also recognized that the disclosure of a patient's name does not necessarily violate the privilege, citing as an example *Ascherman v. Superior Court (1967) 254 Cal. App. 2d 506, 62 Cal. Rptr. 547* , as a case in which the context in which the patient's name was disclosed did not reveal any part of a communication concerning the patient's condition or diagnosis (*18 Cal. App. 3d 22, 25)* . *Ascherman* is discussed in *§ 81.110[3][a]*, and involved disclosure of the name of a patient who had allegedly accused plaintiff physician of soliciting him as a patient for surgery.

[4] Additional Authorities

[a] Patient's Name Is Privileged

Rudnick v. Superior Court (1974) 11 Cal. 3d 924, 114 Cal. Rptr. 603, 523 P.2d 643 is discussed in *§ 81.120[3][a]*. The Supreme Court stated that the record indicated "sporadic and unclear concern by the parties as to the discoverability of patients' names in the context of the physician-patient privilege" (*11 Cal. 3d 924, 933 fn. 13*). Therefore, the Court discussed guidelines for the trial court. The Court cited *Ascherman v. Superior Court (1967) 254 Cal. App. 2d 506, 62 Cal. Rptr. 547* (discussed in *§ 81.110[3][a]*), for the rule that if disclosure of the patient's name reveals nothing of any communication concerning the patient's ailment, disclosure of the patient's name does not violate the privilege (*11 Cal. 3d 924, 933 n.13*). If, however, the disclosure of the patient's name would inevitably reveal in the context of the disclosure the confidential information, that is, the ailments, the disclosure would violate the privilege (*11 Cal. 3d 924, 933-934, n.13* , citing *Marcus v. Superior Court (1971) 18 Cal. App. 3d 22, 95 Cal. Rptr. 545* ; *Costa v. Regents of Univ. of California (1953) 116 Cal. App. 2d 445, 463, 254 P.2d 85*).

In *Blue Cross v. Superior Court (1976) 61 Cal. App. 3d 798, 132 Cal. Rptr. 635* , the court of appeal found that the trial court had improperly ruled that an interrogatory seeking the names, addresses, and telephone numbers of Blue Cross subscribers, other than plaintiff, who had filed claims for psoriasis treatment did not seek privileged information (*61 Cal. App. 3d 798, 801-802)* . This case is discussed in *§ 81.123[3][a]*.

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8-81 California Points & Authorities § 81.122

§ 81.122 Opposing Motion to Compel Discovery--Physician-Patient Privilege [Evid. Code § 994] Applicable--Claim of Privilege by Third-Party Recipient of Material

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30), as well as with points and authorities relating to resisting discovery on the grounds of privilege generally (see, e.g., § 81.20), and relating to the physician-patient privilege generally (see, e.g., § 81.120).*]

A THIRD PERSON TO WHOM DISCLOSURE OF A CONFIDENTIAL PHYSICIAN-PATIENT COMMUNICATION IS NECESSARY TO ACCOMPLISH THE PURPOSE FOR WHICH THE PHYSICIAN WAS CONSULTED MAY CLAIM THE PRIVILEGE.

Third Party Is Able to Claim Privilege. A third person has the right to claim the physician-patient privilege if the physician discloses, in confidence, communications protected by the privilege, with or without the consent of the patient, to a third person to whom disclosure is reasonably necessary for the accomplishment of the purpose for which the physician was consulted. The third person has thereby become a person authorized by the holder of the privilege to claim it, within the meaning of *Section 994 of the Evidence Code* (*Rudnick v. Superior Court (1974) 11 Cal. 3d 924, 932, 114 Cal. Rptr. 603, 523 P.2d 643*).

[2] Comments

[a] Use of Form

These points and authorities in opposition to a motion for an order compelling discovery may be submitted by a party or other person who has resisted providing discovery on the ground that he or she is a third-party recipient of a confidential physician-patient communication. It does not provide a complete memorandum, but is designed to be combined with a general form of memorandum in opposition to compelling discovery, as well as with points and authorities relating to

resisting discovery on the ground of privilege and relating to the physician-patient privilege generally.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Third Party Is Able to Claim Privilege

The facts and procedural background of ***Rudnick v. Superior Court*** *(1974) 11 Cal. 3d 924, 114 Cal. Rptr. 603, 523 P.2d 643* are discussed in *§ 81.20[3][a]*. The Supreme Court stated that the existence of a confidential patient-physician communication as defined by *Evid. Code § 992* appears to be determined at the time the information is communicated to, or ascertained by, the physician, and that the contents of the adverse drug reaction reports seemed to constitute a confidential communication and were protected by the privilege. The Court, therefore, was concerned only with the effect of the disclosure by the physicians to defendants (*11 Cal. 3d 924, 930)* .

Under *Evid. Code § 912(d)*, disclosure in confidence of a privileged communication is not a waiver of the privilege if the disclosure was reasonably necessary for the accomplishment of the purpose for which the physician was consulted (*11 Cal. 3d 924, 930)* . However, if the disclosure was not reasonably necessary to accomplish such purpose, a patient who expressly or impliedly consented to the disclosure would have waived the privilege, while a patient who did not consent to the disclosure would not have waived the privilege (*11 Cal. 3d 924, 932)* . In considering the question of whether defendant drug companies could claim the physician-patient privilege, the Court in *Rudnick* stated that *Evid. Code § 994* limits the right to claim that privilege to (1) the holder of the privilege, (2) a person authorized to claim the privilege by the holder, and (3) the physician who received the communication (*11 Cal. 3d 924, 929)* . The drug companies were neither the patient (the holder pursuant to *Evid. Code § 993*), nor the physician, so they could claim the privilege only on the basis that they were authorized to do so by the patient (*11 Cal. 3d 924, 929)* . Since there was no indication that the drug companies were expressly authorized to claim the privilege, the question was whether they had authorization impliedly, as a matter of law (*11 Cal. 3d 924, 929)* .

The Court held that if the disclosure to the third person is reasonably necessary for the accomplishment of the purpose for which the physician was consulted, the third person has the right to claim the privilege on behalf of the patient, as the third person has thereby become a person authorized to claim the privilege by the holder within the meaning of *Evid. Code § 994* (*11 Cal. 3d 924, 932)* . However, if the disclosure is not necessary to accomplish the purpose for which the physician was consulted, the third person may not claim the privilege even if the patient didnot consent to the disclosure and therefore did not waive the privilege (*11 Cal. 3d 924, 933)* . Under such circumstances, the third person is not a person authorized by the holder to claim the privilege because there is nothing in the Evidence Code, or its history or interpretation, or in reason, to warrant such a conclusion (*11 Cal. 3d 924, 933)* . In such cases, the third person cannot claim the privilege on behalf of the patient, but the trial court may, in its discretion, on its own motion or on the third person's motion protect the physician-patient privilege of an absent patient who has not waived the privilege (*11 Cal. 3d 924, 934)* . The Court in *Rudnick* returned the case to the trial court to determine whether the defendants were authorized to claim that the reports were privileged (*11 Cal. 3d 924, 934)* .

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8-81 California Points & Authorities § 81.123

§ 81.123 Opposing Motion to Compel Discovery--Physician-Patient Privilege [Evid. Code § 994] Applicable--Information Transmitted to Third Party for Purpose of Payment of Physician's Fee

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30), as well as with points and authorities relating to resisting discovery on the grounds of privilege generally (see, e.g., § 81.20), and relating to the physician-patient privilege generally (see, e.g., § 81.120).*]

A CONFIDENTIAL PHYSICIAN-PATIENT COMMUNICATION TRANSMITTED TO A THIRD PARTY TO ACCOMPLISH PAYMENT OF A PHYSICIAN'S FEES RETAINS PROTECTION OF THE PHYSICIAN-PATIENT PRIVILEGE.

Information Transmitted for Payment of Fee Is Privileged. Transmittal of information to a third party for the purpose of payment of the physician's fee is reasonably necessary to achieve the diagnostic and treatment purposes of the patient's consultation with his or her physician. Confidentiality of the information is retained and no waiver of the physician-patient privilege occurs (*Blue Cross v. Superior Court (1976) 61 Cal. App. 3d 798, 800-801, 132 Cal. Rptr. 635*).

[2] Comments

[a] Use of Form

These points and authorities in opposition to a motion for an order compelling discovery may be submitted by a party or other person who has resisted providing discovery on the ground that information transmitted for the purpose of payment of medical expenses, such as a claim to a prepaid health care plan, is privileged under the physician-patient privilege. It does not provide a complete memorandum, but is designed to be combined with a general form of memorandum in opposition to compelling discovery, as well as with points and authorities relating to resisting

discovery on the ground of privilege and relating to the physician-patient privilege generally.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Information Transmitted for Payment of Fee Is Privileged

In ***Blue Cross v. Superior Court*** *(1976) 61 Cal. App. 3d 798, 132 Cal. Rptr. 635* , plaintiff brought an action against Blue Cross for wrongful refusal to pay medical expenses she had incurred for psoriasis treatment. Plaintiff propounded an interrogatory to Blue Cross seeking the names, addresses, and telephone numbers of other Blue Cross subscribers who had filed claims for the same treatment. Blue Cross objected to the interrogatory, claiming overbreadth and privilege. The trial court sustained the first ground of objection, but overruled the assertion of privilege and rejected a request for a protective order which Blue Cross had sought to preserve the anonymity of the subscribers in question. Blue Cross then filed a petition for mandate or prohibition.

The court of appeal issued an order to show cause to consider the issue of whether disclosure of the requested information to a third party, in this case the operator of a prepaid health plan, caused loss of confidentiality or waiver of the privilege. In deciding the issue, the court considered *Evid. Code § 992*, which states that confidentiality is lost by disclosure to a third person unless the "disclosure is reasonably necessary for the ... accomplishment of the purpose for which the physician is consulted." The court also pointed out the parallel provision of *Evid. Code § 912(d)*, the section relating to waiver of confidential communication privileges, which provides, in effect, that the privilege is not waived by such a "reasonably necessary"disclosure (*61 Cal. App. 3d 798, 800)* . The court stated that anticipated payment is a prerequisite of medical care if financial recourse to a prepaid health plan is involved, and determination of such coverage unavoidably calls for disclosure of the patient's name and ailment (*61 Cal. App. 3d 798, 801)* . Such disclosure, therefore, is reasonably necessary to achieve the diagnostic and treatment purposes of the consultation. The court concluded that confidentiality of the information had not been lost, the privilege had not been waived, and the trial court had exceeded its authority when it ordered a response to the interrogatory (*61 Cal. App. 3d 798, 801-802)* . The court of appeal therefore issued a writ of mandate directing the trial court to vacate its order.

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8-81 California Points & Authorities § 81.124

§ 81.124 Opposing Motion to Compel Discovery--Physician-Patient Privilege [Evid. Code § 994] Applicable--Patient-Litigant Exception [Evid. Code § 996] Not Applicable

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30), as well as with points and authorities relating to resisting discovery on the grounds of privilege generally (see, e.g., § 81.20), and relating to the physician-patient privilege generally (see, e.g., § 81.120).*]

A PARTY SEEKING RECOVERY FOR PHYSICAL INJURIES WAIVES THE PHYSICIAN-PATIENT PRIVILEGE ONLY REGARDING THE CONDITIONS THAT PARTY HAS PLACED IN QUESTION.

Narrow Interpretation of Patient-Litigant Exception. The courts have placed a narrow interpretation on *Section 996 of the Evidence Code*, the patient-litigant exception to the physician-patient privilege. Although a litigant seeking recovery for physical injuries waives his or her physician-patient privilege regarding information concerning the medical conditions which that litigant has put in issue, and which are in question, all of the litigant's past medical history is not open to scrutiny (*Britt v. Superior Court (1978) 20 Cal. 3d 844, 849, 864, 143 Cal. Rptr. 695, 574 P.2d 766* ; *Hallendorf v. Superior Court (1978) 85 Cal. App. 3d 553, 557, 149 Cal. Rptr. 564*).

[2] Comments

[a] Use of Form

These points and authorities in opposition to a motion for an order compelling discovery may be submitted by a party or other person who has resisted providing discovery on the ground that the material is privileged under the physician-patient privilege if the moving party has contended that the patient waived the privilege by bringing the lawsuit [see *Evid. Code § 996*]. It does not provide a complete memorandum, but is designed to be combined with a general form of memorandum in opposition to compelling discovery, as well as with points and authorities relating to

resisting discovery on the ground of privilege and relating to the physician-patient privilege generally.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For instance, counsel should set forth the medical conditions that are in issue in the action and show how the information sought through discovery does not concern those conditions.

[3] Discussion of Authorities

[a] Narrow Interpretation of Patient-Litigant Exception

In ***Britt v. Superior Court*** *(1978) 20 Cal. 3d 844, 143 Cal. Rptr. 695, 574 P.2d 766* , plaintiffs brought an action seeking compensation for diminution of property values, personal injuries, and emotional disturbance, all allegedly due to the operation of an airfield as a facility for jet aircraft. Defendants sought to obtain certain information by deposition, and also served all 936 plaintiffs with interrogatories that included a request for a complete account of their entire medical histories covering all illnesses, physical injuries, and mental or emotional disturbances for which plaintiffs sought treatment at any time during their lives. Plaintiffs moved for a protective order challenging defendant's unlimited demand for medical information, and defendant moved for an order compelling answers to its questions. The trial court denied plaintiffs' motion for a protective order, granting defendant's motion to compel answers to deposition questions relating to the associational activities of plaintiffs and others, and fixed a deadline for plaintiffs to answer the interrogatories. Plaintiffs sought an extraordinary writ to restrain the trial court from requiring them to supply such information, and the Supreme Court issued an order to show cause.

The Court in *Britt* found that at least a significant portion of the medical histories sought to be discovered was privileged under *Evid. Code §§ 992* (physician-patient) and 1012 (psychotherapist-patient) (*20 Cal. 3d 844, 862)* [*see* discussion in *§ 81.151[4*][a]). The Court also discussed *Evid. Code § 996*, which establishes the patient-litigant exception to the physician-patient privilege, and provides that there is no privilege for communications relevant to an issue tendered by the patient concerning the condition of the patient. However, the Court noted (relying on *In re Lifschutz (1970) 2 Cal. 3d 415, 435, 85 Cal. Rptr. 829, 467 P.2d 557*) that communications not relevant to those specific conditions do not fall within the terms of the exception and remain privileged (*20 Cal. 3d 844, 863-864)* . The Court, therefore, issued the writ, holding that the trial court's discovery order was impermissibly overbroad and that plaintiffs, while they may not withhold information that relates to any physical or mental condition that they put in issue by bringing the lawsuit, are entitled to retain the confidentiality of all unrelated past treatments (*20 Cal. 3d 844, 864)* . The Court did point out that defendant would be entitled to discover information relating to illness or injuries which, although not attributed to defendant's conduct, contributed to a medical condition put in issue by plaintiff (*20 Cal. 3d 844, 864 n.9*).

Plaintiff in ***Hallendorf v. Superior Court*** *(1978) 85 Cal. App. 3d 553, 149 Cal. Rptr. 564* brought an action for damages arising from a collision with defendant's automobile. Defendant propounded interrogatories to plaintiff requesting information about medical problems before or since the accident, other than those caused by the accident, as well as a list of the names of all doctors examining or treating plaintiff for any medical condition before the accident, and a list of all hospitals in which plaintiff had been an in-patient or out-patient during his lifetime. Plaintiff refused to respond on the ground that the information was unrelated to injuries complained of in the action, and directed his physician of 20 years not to comply with a subpoena duces tecum seeking all of plaintiff's medical records. Defendant moved to compel answers to the interrogatories and compliance with the subpoena duces tecum on the ground that plaintiff had waived the physician-patient privilege under the patient-litigant exception of *Evid. Code § 996*. The trial court issued an order compelling answers to the interrogatories and enforcing the subpoena duces tecum. The court of appeal adopted the narrow interpretation of the patient-litigant exception set forth by the court in *Britt, above,* found the trial court's discovery order to be clearly overbroad, and issued a peremptory writ of prohibition (*85 Cal. App. 3d 553,*

557) .

[4] Additional Authorities

[a] Narrow Interpretation of Patient-Litigant Exception

In *Allison v. Workers' Comp. Appeals Bd. (1999) 72 Cal. App. 4th 654, 84 Cal. Rptr. 2d 915* , petitioner sought relief from an order of a workers'compensation judge directing her to answer questions relating to her general past medical history, asserting that the information was protected by her privacy rights and by the physician-patient privilege. Citing *Britt v. Superior Court (1978) 20 Cal. 3d 844, 143 Cal. Rptr. 695, 574 P.2d 766* discussed in [3][a], *above*, the court of appeal declined to determine with precision which portion of the requested discovery information was privileged and which was not because the discovery authorized by the challenged order was clearly overbroad. The court noted that "on remand the defendant will bear responsibility for framing narrower, more precisely tailored [discovery] which do[es] not improperly impinge on privileged information" (*72 Cal. App. 4th 654, 661)* . The court explained that defendant's own medical expert's analysis of plaintiff's workers' compensation claim, based on injury to her wrist, narrowed the scope of discovery to something far less broad than a general inquiry into plaintiff's hospitalization history prior to 1965 (*72 Cal. App. 4th 654, 661)* . The court added, for the guidance of the parties, that an attorney claiming a privilege on behalf of his or her client does not have a right unilaterally to determine the validity of the claim, but must advise opposing counsel so that opposing counsel can bring the matter before a workers' compensation appeals judge for determination of the validity of the claim (*72 Cal. App. 4th 654, 661)* .

In *Simek v. Superior Court (1981) 117 Cal. App. 3d 169, 172 Cal. Rptr. 564* , a marriage dissolution proceeding, the wife issued subpoenas duces tecum to produce her husband's medical records after they had failed to agree on a visitation schedule, claiming he was not competent to carry on normal visitation. After the trial court ordered production of the documents, the husband petitioned for and obtained a writ of mandate from the court of appeal directing the trial court to vacate its order and to grant the husband's motion to quash service of the subpoenas. The court held that the husband had not tendered his mental or emotional condition so as to invoke the patient-litigant exception under *Evid. Code § 996* to the physician-patient privilege by asserting his rights to visitation (*117 Cal. App. 3d 169, 176)* .

In *Carlton v. Superior Court (1968) 261 Cal. App. 2d 282, 67 Cal. Rptr. 568* , an action for personal injuries sustained in an automobile accident, the court of appeal issued a peremptory writ enjoining enforcement of the trial court's order permitting plaintiff to inspect hospital records relating to defendant's alleged condition of intoxication. The court of appeal stated that in such an action, the issues are tendered within the meaning of the patient-litigant exception of *Evid. Code § 996* by plaintiff's factual allegations, and not by defendant's denial of such allegations regarding his intoxicated condition (*261 Cal. App. 2d 282, 289-290)* . Since defendant had not put this condition in issue, the patient-litigant exception did not apply, and defendant had the benefit of the physician-patient privilege (*261 Cal. App. 2d 282, 290)* . *Carlton* is discussed in more detail in *§ 81.120[3][d]*.

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[Reserved]

§§ 81.125[Reserved]

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8-81 California Points & Authorities § 81.140

§ 81.140 Supporting Motion to Compel Discovery--Refuting Claim of Psychotherapist-Patient Privilege [Evid. Code § 1014]--Waiver [Evid. Code § 912(a)]

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in support of a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11), as well as with points and authorities generally refuting a claim of privilege (see, e.g., § 81.10).*]

THE PSYCHOTHERAPIST-PATIENT PRIVILEGE MAY NOT BE ASSERTED BY THE PSYCHOTHERAPIST IN REGARD TO INFORMATION THAT HAS PREVIOUSLY BEEN DISCLOSED BY THE HOLDER OF THE PRIVILEGE.

A. Waiver of Privilege. The right of a person to claim the psychotherapist-patient privilege is waived, with exceptions not applicable here, with respect to a communication protected thereby if a holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to such disclosure by anyone (*Evid. Code § 912(a)*). Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim it (*Evid. Code § 912(a)*; *In re Lifschutz (1970) 2 Cal. 3d 415, 430, 85 Cal. Rptr. 829, 467 P.2d 557*).

[*Optional*] **B. Inability of Psychotherapist to Assert Privilege When Patient Has Previously Waived It.** Although the psychotherapist who received or made a confidential communication must claim the psychotherapist-patient privilege whenever such person is present when the communication is sought to be disclosed and is otherwise properly authorized (*see Evid. Code § 1015*), such psychotherapist cannot assert the privilege if it previously has been waived by the holder thereof (*Evid. Code § 912(a)*; *In re Lifschutz (1970) 2 Cal. 3d 415, 430, 439, 85 Cal. Rptr. 829, 467 P.2d 557*).

[2] Comments

[a] Use of Form

This memorandum may be used in support of a motion for an order compelling discovery, if a party or other person has resisted providing discovery on the ground that it is protected by the psychotherapist-patient privilege, but the privilege has been waived. It does not provide a complete memorandum but is designed to be combined with a general form of memorandum in support of compelling discovery, as well as a form refuting a claim of privilege generally.

Counsel who wish to set out general points relating to the psychotherapist-patient privilege, as well, may adapt the points and authorities in opposition to a motion to compel discovery set out in *§ 81.150* and combine them with this form.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Waiver of Privilege

Evid. Code § 912(a) provides that except as provided in *Evid. Code § 912(b)-(d)*, the right of any person to claim a privilege provided by *Evid. Code § 1014* (psychotherapist-patient privilege) is waived if the holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to such disclosure made by anyone. The exceptions to this involve situations in which two or more persons are joint holders [*see Evid. Code § 912(b)*], when the disclosure itself is privileged [*see Evid. Code § 912(c)*], or when a disclosure is made in confidence and is reasonably necessary for the accomplishment of the purpose for which the psychotherapist was consulted [*Evid. Code § 912(d)*].

A psychiatrist sought a writ of habeas corpus in ***In re Lifschutz*** *(1970) 2 Cal. 3d 415, 85 Cal. Rptr. 829, 467 P.2d 557* to secure release from custody after being found in contempt of court for refusing to comply with a court order instructing him to answer questions and produce records relating to communications with a former patient. The patient had sued a third party for assault, alleging both physical injuries and severe mental and emotional distress, and on deposition by the defendant had disclosed having received the psychiatric treatment over a six-month period about 10 years earlier. The psychiatrist was subpoenaed by defendant to appear for a deposition and bring all records related to the patient, but he refusedto answer any questions relating to treatment of patients or to produce the records. He declined even to disclose if plaintiff had consulted him or had been his patient. Neither plaintiff nor his attorney appeared at the deposition or any subsequent hearings involving the psychiatrist, nor did the patient expressly claim or waive any privilege.

Defendant in the assault action then moved for an order to compel answers to the questions and production of the records. The superior court ruled the psychotherapist-patient privilege inapplicable because in instituting the action plaintiff had tendered as an issue his mental and emotional condition, bringing it under the patient-litigant exception of *Evid. Code § 1016*. The psychiatrist refused to comply with the order compelling answers and production and instead sought a writ of prohibition against the order. The writ was denied by the court of appeal, hearing was denied by the Supreme Court, and certiorari was denied by the United States Supreme Court. After a further trial court hearing and refusal by the psychiatrist, he was adjudged in contempt and ordered confined in custody. The psychiatrist then petitioned the court of appeal for habeas corpus; and on the denial of the petition without opinion, the Supreme Court agreed to hear the case and ordered the petitioner released on his own recognizance.

The Court determined that the psychiatrist had no constitutional privilege to avoid disclosure and was not denied equal protection even though clergy were given an absolute privilege of confidence under *Evid. Code § 1034* (*2 Cal. 3d 415,*

427-429) . In refusing the relief requested, the Court further noted that *Evid. Code § 912(a)* provides that the right to claim the psychotherapist-patient privilege is waived if the holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to such disclosure by anyone else, and that consent includes the failure to claim the privilege in the appropriate circumstances in a legal proceeding (*2 Cal. 3d 415, 430)* . Since the record showed that the holder of the privilege in the instant case had disclosed at a prior deposition that he had consulted the psychiatrist for psychiatric treatment, the Court determined that the patient therefore had waived whatever privilege he might have had to keep such information confidential (thus leaving the psychiatrist without a basis for asserting it either; see further discussion of case, *below*) (*2 Cal. 3d 415, 430)* .

[b] Inability of Psychotherapist to Assert Privilege When Patient Has Previously Waived It

The facts and procedural background of ***In re Lifschutz*** *(1970) 2 Cal. 3d 415, 85 Cal. Rptr. 829, 467 P.2d 557* are discussed in [a], *above.* The Court decided that the psychiatrist could not raise the psychotherapist-patient privilege when the holder thereof had already disclosed the communication (*2 Cal. 3d 415, 430)* . Since there was no evidence of expressinstructions from the patient directing the doctor to decline the privilege, *Evid. Code § 1015* permitted the latter generally to assert the patient's privilege to prevent disclosure of confidential communications (*2 Cal. 3d 415, 429-430)* . However, since the patient had disclosed at a prior deposition that he had consulted the doctor for psychiatric treatment, the psychiatrist could not properly have refused to answer at least that question concerning the communications (*2 Cal. 3d 415, 439)* .

Note, however, that the Court stated that the questions posed inquired only into whether the psychotherapist had treated plaintiff and whether he possessed records regarding plaintiff. In admitting the existence of the psychotherapist-patient relationship, plaintiff did not disclose a "significant part of the communication" so as subsequently to waive his right to claim the privilege as to other elements of the communication (*2 Cal. 3d 415, 430)* .

[4] Additional Authorities

[a] Waiver of Privilege

In *Inabnit v. Berkson (1988) 199 Cal. App. 3d 1230, 245 Cal. Rptr. 525* , plaintiffs, a mother and daughter, brought an action against defendant psychiatrist, seeking damages for his disclosure of their medical records to the defendant in a wrongful death action plaintiffs had previously brought. Defendant psychiatrist provided the records pursuant to a subpoena duces tecum served on him in accordance with *Code Civ. Proc. § 1985.3*. The trial court granted summary judgment for defendant psychiatrist, and the court of appeal affirmed. The court held that plaintiffs had waived their privilege by failing to take any action to prevent the unwanted disclosure after receiving the requisite notice under *Code Civ. Proc. § 1985.3(e)* of their right to object to production of their records, and to seek the services of an attorney in order to protect their privacy rights. As a result of plaintiffs' failure to act, defendant was compelled to disclose the medical records under *Civ. Code § 56.10(b)(3)*, which requires disclosure of medical information by a health care provider if the disclosure is compelled by a party to a proceeding before a court or administrative agency pursuant to a subpoena duces tecum (*199 Cal. App. 3d 1230, 1235-1239)* .

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8-81 California Points & Authorities § 81.141

§ 81.141 Supporting Motion to Compel Discovery--Refuting Claim of Psychotherapist-Patient Privilege [Evid. Code § 1014]--Privilege Inapplicable When Patient-Litigant Has Placed Mental Condition in Issue [Evid. Code § 1016]

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in support of a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11), as well as with points and authorities generally refuting a claim of privilege (see, e.g., § 81.10).*]

UNDER THE PATIENT-LITIGANT EXCEPTION OF SECTION 1016 OF THE EVIDENCE CODE, THE PSYCHOTHERAPIST-PATIENT PRIVILEGE IS INAPPLICABLE WHEN THE PATIENT'S MENTAL OR EMOTIONAL CONDITION HAS BEEN TENDERED TO THE COURT AS AN ISSUE BY THE PATIENT.

A. Patient-Litigant Exception Applicable. There is no psychotherapist-patient privilege regarding a communication relevant to an issue concerning the mental or emotional condition of the patient if the issue has been tendered by such person, as in bringing an action raising the issue of such conditions (*Evid. Code § 1016*; *In re Lifschutz (1970) 2 Cal. 3d 415, 435, 85 Cal. Rptr. 829, 467 P.2d 557* ; *see Caesar v. Mountanos (9th Cir. 1976) 542 F.2d 1064,1070)* .

[*Optional*] **B. Psychotherapist's Right to Keep Patient's Confidence Limited by Patient-Litigant Exception.** The patient-litigant exception to the psychotherapist-patient privilege limits the right of a psychotherapist to refuse to disclose confidential information concerning his or her patient (*In re Lifschutz (1970) 2 Cal. 3d 415, 423, 435, 438-439, 85 Cal. Rptr. 829, 467 P.2d 557* ; *see Caesar v. Mountanos (9th Cir. 1976) 542 F.2d 1064,1068,1070)* .

C. Burden of Showing Applicability of Privilege on Patient After Mental Issue Tendered. The burden rests on the patient initially to submit some showing that a given confidential communication between patient and psychotherapist is not directly related to the issue the party has tendered to the court (*In re Lifschutz (1970) 2 Cal. 3d 415, 436, 85 Cal. Rptr. 829, 467 P.2d 557*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for an order compelling discovery if a party or other person has resisted providing discovery on the ground that it is protected by the psychotherapist-patient privilege, but the patient-litigant exception to the psychotherapist-patient privilege applies because the mental or emotional conditions were put in issue by the patient. This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in support of compelling discovery, as well as a form refuting a claim of privilege generally.

Counsel who wish to set out general points relating to the psychotherapist-patient privilege, as well, may adapt the points and authorities in opposition to a motion to compel discovery *set out in § 81.150* and combine them with this form.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Patient-Litigant Exception Applicable

Evid. Code § 1016 provides that there is no psychotherapist-patient privilege regarding a communication relevant to an issue concerning the mental or emotional condition of the patient if such issue has been tendered by: (a) the patient; (b) any party claiming through or under the patient; (c) any party claiming as a beneficiary of the patient through a contract to which the patient is or was a party; or (d) the plaintiff in an action brought under *Code Civ. Proc. § 376* or *377* for damages for the injury or death of the patient (*Code Civ. Proc. § 377* was repealed and replaced by *Code Civ. Proc. § 377.10 et seq.* in 1992).

The facts and procedural background of ***In re Lifschutz*** *(1970) 2 Cal. 3d 415, 85 Cal. Rptr. 829, 467 P.2d 557* are discussed in *§ 81.140[3][a]*. To avoid the necessity for further contempt proceedings against the psychiatrist or delaying appellate review, the Supreme Court undertook to decide whether defendant had accurately identified the proper reach of the patient-litigant exception (*2 Cal. 3d 415, 431)* . It determined that under *Evid. Code § 1016*, disclosure can be compelled if restricted to those mental conditions the patient-litigant has disclosed by bringing an action in which such conditions are in issue (*2 Cal. 3d 415, 435)* . The Court statedthat since the statutory exception compels disclosure only in those cases in which the patient's own action initiates the exposure, "intrusion" into a patient's privacy remains essentially under the patient's control, and as such, the Court found no constitutional infirmity in it (*2 Cal. 3d 415, 435)* .

In ***Caesar v. Mountanos*** *(9th Cir. 1976) 542 F.2d 1064* , a psychiatrist sought a writ of habeas corpus seeking to set aside a contempt adjudication and sentence issued for his failure to answer questions on a deposition in a California superior court action. The psychiatrist had been consulted by a patient following a second automobile accident, the first one having occurred the previous year, and saw her on about 20 occasions. She filed actions for the accidents in the following year, alleging they caused her personal injury and pain and suffering not limited to physical ailments. At her deposition in one of the cases, plaintiff and her counsel indicated that "some" of the psychiatrist's care and treatment might be "involved" in the suit. The psychiatrist, on deposition after consolidation of the cases, refused to answer any questions regarding his treatment, stating such breach of confidence could be harmful to the patient's health and that he did not have her consent. He refused further when her counsel announced he had authorized stipulation of her consent, responding he would refuse testimony even with her consent. She then filed a notice revoking her waiver of the privilege.

On being ordered by the trial court to answer, on the ground that the patient-litigant exception provided by *Evid. Code § 1016* applied, the psychiatrist merely acknowledged he had treated plaintiff for her injuries and had diagnosed her condition as depressed. He refused to answer questions concerning the relationship of her emotional condition to the accidents. On receipt of the contempt order, the psychiatrist exhausted his state court remedies and then went to federal district court on writ of habeas corpus. The court upheld *Evid. Code § 1016* and found it did not invade any rights of the doctor or his patient.

The court of appeals for the Ninth Circuit Court of Appeals, in denying the petition, primarily agreed with the disposition of similar arguments that had been presented to the *California Supreme Court in In re Lifschutz (1970) 2 Cal. 3d 415, 85 Cal. Rptr. 829, 467 P.2d 557* (discussed *above*), in deciding the major issues of the instant case on constitutionality of the limited privilege. The federal appellate court determined, however, that all the communications in question were clearly not privileged due to the patient-litigant exception to the psychotherapist-patient privilege. Plaintiff had clearly raised the issue concerning her mental and emotional condition and was seeking damages for injuries in that area. By raising the issue, she herself had breached the confidential relationship and made her emotional problems known to the public (*542 F.2d 1064, 1070)* .

The psychiatrist was found to have testified that he had an opinion with respect to whether the plaintiff suffered emotional distress of any kindresulting from the two accidents, but he declined to give it. The relevant questions he refused to answer were all related directly to his opinion regarding whether plaintiff suffered emotional distress or depression from the accidents, whether any condition the psychiatrist found was the result of a combination of the accidents and other factors in plaintiff's life, and whether the psychological factors the psychiatrist found played a role in the origin or aggravation of cervical pain plaintiff testified she was suffering. The questions were all clearly relevant and related directly to the issue, raised by plaintiff, of her mental and emotional condition (*542 F.2d 1064, 1070)* .

[b] Psychotherapist's Right to Keep Patient's Confidence Limited by Patient-Litigant Exception

The facts and procedural background of ***In re Lifschutz*** *(1970) 2 Cal. 3d 415, 85 Cal. Rptr. 829, 467 P.2d 557* are discussed in [a], *above*, and in § 81.140[3][a]. The broadest issue before the court in the case, as the Supreme Court saw it, was whether the Legislature, in attempting to accommodate the conceded need of confidentiality in the psychotherapeutic process with general societal needs of access to information for the ascertainment of truth in litigation, unconstitutionally weighted its resolution in favor of disclosure under the patient-litigant exception of *Evid. Code § 1016*. The Court concluded that the exception did not unconstitutionally infringe the rights of privacy of either psychotherapists or their patients (*2 Cal. 3d 415, 423, 438)* .

The Court rejected the concept of an independent right of privacy on the part of a psychotherapist as grounded on *Griswold v. Connecticut (1965) 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510* , since the privilege even in that case belonged to the patient and not the physician (*2 Cal. 3d 415, 424)* . The Court also dismissed the contentions that requiring the psychotherapist to reveal confidences amounts to a "taking" of the right to practice such profession and does not allow for its successful practice. The Court pointed out that there has been a constitutionally adjudicated trend toward a reasonable amount of compelled disclosure; and it observed that psychotherapy has nevertheless flourished despite the fact that no such absolute privilege on a practitioner's part has been recognized (*2 Cal. 3d 415, 424-427)* .

Petitioner had also claimed denial of equal protection because the clergy are given an absolute privilege to retain a confidence separate from the penitent's privilege, under *Evid. Code § 1034*, whereas the psychotherapist has no privilege independent of the patient's. The Court disagreed that the functions of psychotherapists and clergy are the same for privilege purposes, although elements overlap. The Court decided that the priest-penitent privilege was primarily an accommodation by the secular state to strongly held religious tenets of a large segment of its citizenry (*2 Cal.3d 415, 427-429)* , and its allowance does not deny psychotherapists equal protection of the laws (*2 Cal. 3d 415, 439)* .

The facts and procedural background of ***Caesar v. Mountanos*** *(9th Cir. 1976) 542 F.2d 1064* are discussed in [a], *above*. The court denied that the psychiatrist had an absolute, constitutional privilege to retain the patient's confidences or that he was being denied equal protection because California afforded the clergy, but not psychotherapists, such an absolute privilege, just as both arguments were rejected in *In re Lifschutz (1970) 2 Cal. 3d 415, 423-429, 85 Cal. Rptr. 829, 467 P.2d 557* (discussed *above*). Contrary to petitioner's assertion that the more recent United States Supreme Court cases of *Roe v. Wade (1973) 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147* and *Doe v. Bolton (1973) 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201* offered a superseding analysis, the court of appeals found that such decisions spoke of and relied on a conditional right of privacy in the doctor-patient relationship (*542 F.2d 1064, 1067)* .

The court also agreed with the *Lifschutz* court that the special treatment of the clergy-penitent privilege was justified because of the different circumstances of that relationship and the policies it served (*542 F.2d 1064, 1068-1069)* . In addition, the court determined there was no denial of equal protection to psychotherapeutic patients by their losing the right to absolutely rely on confidences between themselves and their psychotherapists, since disclosure thereof is restricted to those issues tendered by the patient (*542 F.2d 1064, 1068)* .

[c] Burden of Showing Applicability of Privilege on Patient After Mental Issue Tendered

The facts and procedural background of ***In re Lifschutz*** *(1970) 2 Cal. 3d 415, 85 Cal. Rptr. 829, 467 P.2d 557* are discussed in [a], *above*, and in § 81.140[3][a]. In attempting to avoid the necessity for further contempt proceedings against the psychiatrist or delaying appellate review, the Court concluded that the burden rests on the patient initially to submit some showing that a given confidential communication is not directly related to the mental or emotional issue that patient has tendered to the court (*2 Cal. 3d 415, 436)* . This is because the patient alone, not the party seeking disclosure, knows both the nature of the ailments for which recovery is sought and the general content of the of the psychotherapeutic communications (*2 Cal. 3d 415, 436)* . The Court compared this policy with that expressed under *Evid. Code § 404*, in which a person claiming a privilege against self-incrimination must show that proffered evidence might tend to be so incriminating. The patient may have to delimit the claimed "mental or emotional distress" or explain, in general terms, the object of the psychotherapy in order to illustrate that it is not reasonably probable that the psychotherapeutic communications sought are directly relevant to the mental condition that party has placed in issue (*2 Cal. 3d 415, 436-437)* .

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8-81 California Points & Authorities § 81.142

§ 81.142 Supporting Motion to Compel Discovery--Refuting Claim of Psychotherapist-Patient Privilege [Evid. Code § 1014]--Privilege Inapplicable When Patient Threatened Danger to Another [Evid. Code § 1024]

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in support of a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11), as well as with points and authorities generally refuting a claim of privilege (see, e.g., § 81.10).*]

THE PSYCHOTHERAPIST-PATIENT PRIVILEGE DOES NOT APPLY BECAUSE THE PSYCHOTHERAPIST HAD REASONABLE CAUSE TO BELIEVE THE PATIENT WAS IN SUCH MENTAL OR EMOTIONAL CONDITION AS TO BE DANGEROUS TO _____ [*name or status, e.g.,* PLAINTIFF], WHO WAS READILY IDENTIFIABLE, AND THAT DISCLOSURE WOULD BE NECESSARY TO PREVENT THAT DANGER.

A. Psychotherapist-Patient Privilege Inapplicable When Patient Believed to Be Dangerous to Another. If a psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or herself, or to the person or property of another readily identifiable victim, and that disclosure of the communication is necessary to prevent the threatened danger (*see Evid. Code § 1024*), then the psychotherapist-patient privilege does not attach to communications in that relationship at that time (*Menendez v. Superior Court (1992) 3 Cal. 4th 435, 450-451, 11 Cal. Rptr. 2d 92, 834 P.2d 786* ; *Mavroudis v. Superior Court (1980) 102 Cal. App. 3d 594, 603-604, 162 Cal. Rptr. 724*).

[*Optional*] **B. Psychotherapist-Patient Privilege Inapplicable to Warning Made to Victim.** When a psychotherapist warns a potential victim pursuant to *Evidence Code Section 1024*, the psychotherapist is permitted to reveal, in a later trial or proceeding, both the substance of the warning and the patient's statements, made in therapy, that caused or triggered the warning (*People v. Wharton (1991) 53 Cal. 3d 522, 554, 563, 280 Cal. Rptr. 631, 809 P.2d 290*).

[2] Comments

[a] Use of Form

This memorandum may be used in support of a motion for an order compelling discovery if a party or other person has resisted discovery based on the psychotherapist-patient privilege, but that privilege is inapplicable because the psychotherapist could reasonably have believed the patient threatened danger to another and that a warning was necessary to prevent that danger. Optional Paragraph B may be used to support the argument that testimony by the psychotherapist, in a later trial or proceeding, concerning both the substance of the warning and the patient's statements, made in therapy, that caused or triggered the warning. It does not provide a complete memorandum but is designed to be combined with a general form of memorandum in support of compelling discovery, as well as a form refuting a claim of privilege generally.

Counsel who wish to set out general points relating to the psychotherapist-patient privilege, as well, may adapt the points and authorities in opposition to a motion to compel discovery set out in *§ 81.150* and combine them with this form.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

CAUTION:
Counsel should note that a psychotherapist's duty to predict a patient's violent behavior and warn or protect third persons is subject to certain statutory limitations [***see*** *Civ. Code § 43.92*; ***see also*** Ch.117, ***Insane and Incompetent Persons***].

[a] Psychotherapist-Patient Privilege Inapplicable When Patient Believed to Be Dangerous to Another

In ***Menendez v. Superior Court*** *(1992) 3 Cal. 4th 435, 11 Cal. Rptr. 2d 92, 834 P.2d 786* , while investigating the murder of a married couple, the police obtained a search warrant for the office and residence of the psychotherapist for the couple's two sons. Pursuant to the warrant, the police seized audiotapes of one treatment session as well as audiotapes of notes of other sessions. The tapes contained confidential communications andincluded threats aimed at the psychotherapist, his wife, and his mistress. The psychotherapist warned the women of the possible threat to their lives. After the sons were charged with the murders of their parents, the psychotherapist, joined by the sons, initiated proceedings to enforce the psychotherapist-patient privilege with regard to all of the tapes. The trial court held that the psychotherapist-patient privilege did not apply to any of the taped communications. The court of appeal denied the brothers' petition for a writ of mandate.

The State Supreme Court affirmed as to the order concerning one tape, finding that the dangerous-patient exception to the privilege applied, and that disclosure was permissible because the communication was not privileged. The Court explained that the dangerous-patient exception was applicable in that its conditions were met: the psychotherapist had reasonable cause to believe that his patients were dangerous to himself directly and to his wife and mistress collaterally, and that disclosure to the two women was necessary to prevent any harm (*3 Cal. 4th 435, 450)* . The exception requires only reasonable cause for belief by the psychotherapist in the dangerousness of the patient and the necessity of disclosure. It does not require that the patient be dangerous to a person other than the psychotherapist. Nor does it demand that the psychotherapist actually disclose the relevant communication or even issue a warning. The Court further explained that the reasonableness of the psychotherapist's belief of the patient's dangerousness is determined in light of the standards of the psychotherapeutic community. The test is objective, but takes account of all the relevant circumstances; it is based on the norms prevailing among psychotherapists as a group, but allows broad discretion to the individual psychotherapist. In certain cases, expert testimony as to the relevant standards may be necessary (*3 Cal. 4th 435, 451)* .

Petitioners in ***Mavroudis v. Superior Court*** *(1980) 102 Cal. App. 3d 594, 162 Cal. Rptr. 724* were plaintiffs in an action for personal injury damages against defendants, health care facilities that had treated their son for various mental disorders. Petitioners' son injured them in a hammer assault, and they contended that defendants knew or should have known that he posed a danger of physical violence to them, but failed to warn them. One defendant objected to petitioners' request to produce medical records based on *Evid. Code § 1014*, the psychotherapist-patient privilege. On petitioners' motion to compel production of the records, the trial court ordered production for an in-camera inspection, after which it denied the motion on the ground that there was no information indicating that a warning to the parents would have been appropriate. Petitioners' motion to reconsider requested that the records be inspected by their psychiatric expert under a protective order. The court denied this motion also, and petitioners filed a petition for a writ of mandate.

The court of appeal issued a writ requiring the trial court to vacate its order and reconsider the motion. The court noted that although the literalreach of *Evid. Code § 1024* appeared to be prospective only ("disclosure ... necessary to prevent the threatened danger"), precedent existed indicating that the exception to the privilege applies even when the disclosure is no longer necessary to prevent the threatened danger. The court said that in a civil proceeding, when it is claimed that defendants owed plaintiffs a duty to warn them of the patient's danger, a duty based on *Tarasoff v. Regents of University of California (1976) 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334* (discussed in [4][a], *below*), the court may determine the applicability of the dangerous patient exception to the privilege after the fact. If the preliminary facts on which the exception rests were present at a time before the injury complained of, no privilege attaches, and the psychiatric records are subject to discovery in the later proceeding. Thus, the court must find that, before the time of the injury, the therapist determined, or reasonably should have determined, that the patient presented a serious danger of violence to a readily identifiable victim and the disclosure of confidential communications was necessary to prevent the threatened danger (*102 Cal. App. 3d 594, 604)* . The court directed the trial court to examine the records in camera to determine if the material revealed that petitioners were readily identifiable as victims in the event their son was ultimately determined to have posed a serious threat of violence. If the court's examination negates such a finding, the dangerous-patient exception does not apply, and the records are not subject to discovery. However, if after its initial examination the court finds that petitioners were readily identifiable victims, the court must determine whether defendants determined, or reasonably should have determined, that the patient posed a serious danger of violence to them and whether the disclosure of confidential communications was necessary to prevent that threatened danger (*102 Cal. App. 3d 594, 605)* .

[b] Psychotherapist-Patient Privilege Inapplicable to Warning Made to Victim

In ***People v. Wharton*** *(1991) 53 Cal. 3d 522, 563, 280 Cal. Rptr. 631, 809 P.2d 290* , defendant was convicted of the first degree murder of his girlfriend. At his trial, two psychotherapists who had developed a relationship with defendant when he voluntarily sought mental health counseling had testified. They explained that, based on defendant's history, as well as comments made in therapy sessions, they had believed his girlfriend was at risk, and had so warned her. Defendant appealed his conviction and the imposition of the death penalty.

The State Supreme Court affirmed. Defendant argued that the trial court's decision to permit the prosecutor to examine his psychotherapists violated the psychotherapist-patient privilege. Defendant claimed that the trial court misconstrued the exception to the privilege embodied in *Evid. Code § 1024*. The Court explained that the mere fact that some statementsare nonprivileged by operation of *Evid. Code § 1024* does not automatically make all of the confidential communications nonprivileged. Rather, the exception permits testimony regarding statements made by the patient that led to the impressions and diagnosis and ultimate conclusion to communicate with the victim. Necessarily excluded are any statements that did not trigger the warning. The Court said that the trial court had correctly expressly limited application of § 1024 to those confidential communications that triggered their decision to warn the victim (*53 Cal. 3d 522, 554)* . Defendant also argued that § 1024 should not apply after the victim is dead because once the threat of harm ceases to exist, the reason for the exception evaporates. The Court disagreed, observing that if the exception ceases once

the threat of harm no longer exists, a dangerous patient could regain the protection of the privilege by simply killing his or her victim, which would be an absurd result. Such a rule would ill serve the public interest in safety from violent assault, an interest the Legislature found predominant when balanced against the admitted importance of maintaining the confidential nature of statements made in psychotherapy (*53 Cal. 3d 522, 554-555)* . The Court concluded that when a psychotherapist warns a potential victim pursuant to *Evid. Code § 1024*, the psychotherapist is permitted to reveal, in a later trial or proceeding, both the substance of the warning and the patient's statements, made in therapy, that triggered the warning (*53 Cal. 3d 522, 563)* .

[4] Additional Authorities

[a] Psychotherapist-Patient Privilege Inapplicable When Patient Believed to Be Dangerous to Another

In *Tarasoff v. Regents of University of California (1976) 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334* , a patient had confided an intention to kill an unnamed girl, who was readily identifiable, to a psychologist. The latter, in concert with some colleagues, arranged for the police to detain the patient, but the police released him with a warning. The director of the psychiatric facility, where the patient had been treated, then ordered certain records pertinent to the case to be destroyed and that no commitment action be taken with regard to the patient. No warning was given the girl or her parents by the psychotherapists or the police, and the patient killed her.

The Supreme Court upheld the trial court's order sustaining the demurrer without leave to amend only in regard to claims predicated on the psychotherapists' duty to confine the patient or the liability of the police, but it allowed amendment to state a claim against the psychotherapists on the basis of failure to protect and to warn the identifiable victim. Defendants, contending there was no duty to warn third persons, protested that confidential communication with patients was required for the successfulpractice of psychotherapy to encourage the cooperation of the patients, and that a warning would constitute a breach of trust. The Court said that the public interest in safety from violent assault must be weighed against the interest in supporting effective mental treatment and protecting patients' privacy along with safeguarding psychotherapeutic communication. It raised the related issue of the dangerous patient exception [*Evid. Code § 1024*] to the psychotherapist-patient rule and concluded that the public policy of protecting the particular confidential character of communication must yield to the extent to which disclosure is essential to avert danger to others--that the protective privilege ends where the public peril begins (*17 Cal. 3d 425, 440-442)* .

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8-81 California Points & Authorities § 81.143

§ 81.143 Supporting Motion to Compel Discovery--Refuting Claim of Psychotherapist-Patient Privilege [Evid. Code § 1014]--Disclosure of Patient's Name, Address, and Telephone Number Is Necessary to Protect Patient in State Custody

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in support of a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11), as well as with points and authorities generally refuting a claim of privilege (see, e.g., § 81.10).*]

THE PSYCHOTHERAPIST-PATIENT PRIVILEGE DOES NOT INCLUDE THE NAME, ADDRESS, AND TELEPHONE NUMBER OF A PATIENT WHEN THAT INFORMATION MAY BE NECESSARY TO PROTECT THE RIGHT OF A PATIENT WITHIN STATE CUSTODY TO BE FREE FROM HARM FROM ANOTHER PATIENT.

Right of Patient to Be Free From Harm While in State Custody Justifies Disclosure of Otherwise Privileged Information. A patient within the custody of the state is entitled to protection from harm from other patients, and the state's interest in facilitating the ascertainment of truth in connection with legal proceedings based on that right is substantial enough to compel disclosure of the name, address, and telephone number of a patient suspected of violating another patient's right to be free from harm (*County of Alameda v. Superior Court (1987) 194 Cal. App. 3d 254, 260-263, 239 Cal. Rptr. 400*).

[2] Comments

[a] Use of Form

This memorandum may be used in support of a motion for an order compelling discovery if a party or other person has resisted discovery based on the psychotherapist-patient privilege, but the privilege is inapplicable because the information is necessary to protect the rights of a patient within state custody. It does not provide a complete

memorandum but is designed to be combined with a general form of memorandum in support of compelling discovery, as well as a form refuting a claim of privilege generally.

Counsel who wish to set out general points relating to the psychotherapist-patient privilege, as well, may adapt the points and authorities in opposition to a motion to compel discovery *set out in § 81.150* and combine them with this form.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[c] Opposing Points and Authorities

The points and authorities *set out in § 81.159* may be used in an appropriate case to oppose a motion for discovery supported by this memorandum.

[3] Discussion of Authorities

[a] Right of Patient to Be Free From Harm While in State Custody Justifies Disclosure of Otherwise Privileged Information

In ***County of Alameda v. Superior Court*** *(1987) 194 Cal. App. 3d 254, 239 Cal. Rptr. 400* , plaintiff, a female patient of defendant county psychiatric hospital, brought a personal injury action against defendant after she had been raped while in its custody. Defendant refused to answer an interrogatory submitted to it by plaintiff that sought the name, address, and telephone number of the male patient found with plaintiff immediately after her rape. Its refusal was based on the psychotherapist-patient privilege. The trial court ordered defendant to answer the interrogatory. Defendant sought a writ of mandate to restrain the enforcement of the discovery order requiring disclosure.

The court of appeal affirmed the order, discharged the alternative writ, and denied the petition for a peremptory writ (*194 Cal. App. 3d 254, 264)* .The court distinguished the facts from those in *Smith v. Superior Court (1981) 118 Cal. App. 3d 136, 173 Cal. Rptr. 145* (discussed in *§ 81.159[3][a]*), and said that the *Smith* rule declaring the patient's identity to be a privileged communication should not be rigidly applied in every case (*194 Cal. App. 3d 254, 258-261)* . The court cited federal law that recognizes that while confined under state authority, a patient retains a liberty interest in personal security and is entitled to protection from harm from other patients (*194 Cal. App. 3d 254, 260)* . The court combined this safety right with the exception based on the necessity of preventing threatened danger to third parties and reasoned that disclosure was required (*194 Cal. App. 3d 254, 261-263)* . It also noted that if the male patient's identity was not revealed, plaintiff would be deprived of a real day in court (*194 Cal. App. 3d 254, 260)* . If the balance does weigh in favor of disclosure of private information because of a compelling state interest, the scope of the disclosure must be drawn with narrow specificity (*194 Cal. App. 3d 254, 263-264)* .

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8-81 California Points & Authorities § 81.144

§ 81.144 Supporting Motion to Compel Discovery--Refuting Claim of Psychotherapist-Patient Privilege [Evid. Code § 1014]--Privilege Inapplicable to Information Relating to Child Abuse and Neglect or Injuries Resulting From Weapons, Assault, or Abuse

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in support of a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11), as well as with points and authorities generally refuting a claim of privilege (see, e.g., § 81.10).*]

THE PSYCHOTHERAPIST-PATIENT PRIVILEGE DOES NOT APPLY TO INFORMATION SOUGHT TO BE DISCOVERED IN THIS ACTION BECAUSE IT WAS REPORTED PURSUANT TO _____ [THE CHILD ABUSE AND NEGLECT REPORT ACT *and/or* THE PENAL CODE REQUIREMENT THAT HEALTH PRACTITIONERS REPORT INJURIES RESULTING FROM WEAPONS, ASSAULT, OR ABUSE].

A. Psychotherapist Privilege Inapplicable to Information Reported Pursuant to Child Abuse and Neglect Reporting Act. Thepsychotherapist privilege does not apply to information reported pursuant to the Child Abuse and Neglect Reporting Act (*Penal Code § 11164 et seq.*) in any action or proceeding, including one that is not a prosecution action (*Roe v. Superior Court (1991) 229 Cal. App. 3d 832, 845, 280 Cal. Rptr. 380* ; *Penal Code § 11171.2(b)*).

[*AND/OR*]

B. Psychotherapist Privilege Inapplicable to Information Reported Relating to Injuries Resulting From Weapons, Assault, or Abuse. The psychotherapist-patient privilege does not apply in any court proceeding or administrative hearing to information required to be reported under *Penal Code § 11160 et seq.*, with respect to any patient suffering from any wound or other physical injury inflicted by his or her own act or inflicted by another when the injury is by means of a firearm, or any patient suffering from any wound or other physical injury that is the result of

assaultive or abusive conduct (*Penal Code §§ 11160(a), 11163.2(a)*).

[2] Comments

[a] Use of Form

This memorandum may be used in support of a motion for an order compelling discovery if a party or other person has resisted discovery based on the psychotherapist-patient privilege, but the privilege is inapplicable because the information sought was reported pursuant to the Child Abuse and Neglect Reporting Act (*Penal Code § 11164 et seq.*), or pursuant to *Penal Code § 11160 et seq.* with respect to self-inflicted wounds or injuries resulting from the use of firearms, certain weapons or from assaultive or abusive conduct [*see Penal Code §§ 11160(a), 11163.2(a)*]. The form does not provide a complete memorandum but is designed to be combined with a general form of memorandum points and authorities in support of compelling discovery, as well as a form refuting a claim of privilege generally.

Counsel who wish to set out general points relating to the psychotherapist-patient privilege, as well, may adapt the points and authorities in opposition to a motion to compel discovery *set out in § 81.150* and combine them with this form.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Psychotherapist Privilege Inapplicable to Information Reported Pursuant to Child Abuse and Neglect Reporting Act

In ***Roe v. Superior Court*** *(1991) 229 Cal. App. 3d 832, 280 Cal. Rptr. 380* , plaintiff brought a tort action against his former wife after he had been wrongly accused of abusing their son and had been temporarily denied visitation rights. These actions had been taken after the former wife's psychotherapist filed a suspected child abuse report against plaintiff. During discovery plaintiff moved to compel the therapist to give limited deposition testimony in order to authenticate her child abuse report, ascertain her oral communications with social workers who investigated the report, and determine whether the report was based on statements made by plaintiff's former wife. Defendant resisted such discovery, claiming it violated the psychotherapist-patient privilege and the right to privacy. The trial court granted plaintiff's motion, and defendant filed a petition for writ of mandate. After the court of appeal summarily denied the writ, the State Supreme Court transferred the matter back to the court of appeal with directions to vacate its order and to issue an alternative writ.

The court of appeal again denied the petition, concluding that the psychotherapist-patient privilege did not apply to information reported by a psychotherapist pursuant to the Child Abuse and Neglect Reporting Act [*Penal Code § 11164 et seq.*]. The Act requires psychotherapists to report known or suspected cases of child abuse, and subjects them to punishment if they fail to do so. By enacting that Act, specifically the exception to the psychotherapist privilege specified in Penal Code § 11171(b) (*now see Penal Code § 11171.2(b)*), the court said the Legislature has determined that the patient's right to privacy must yield in furtherance of the state's compelling interest to further the reporting, detection, and prosecution of child abuse cases (*229 Cal. App. 3d 832, 836-838)* . The court framed the issue as whether the exception of Penal Code § 11171(b) (*now see Penal Code § 11171.2(b)*) applied to plaintiff's action, which was not a prosecution of child abuse.

After weighing the interests protected by shielding the evidence sought with those advanced by disclosure, the court concluded that plaintiff's need for disclosure was paramount. It explained that one of the primary reasons for its conclusion was that the confidential communications had already been disclosed to several parties, including the

investigating authorities. Under the circumstances, to prohibit discovery would be obstructionist. In addition, to deny discovery under such circumstances would grant defendant de facto immunity from liability for filing a false child abuse report. Additionally, the court said that the evidence sought was essential to the adjudication of the complaint, in that plaintiff stoodlittle chance of being able to prove his allegations if he could not authenticate the psychotherapist's report or confirm that the information in the report came from defendant. The court concluded that the state's interest in facilitating the ascertainment of truth in connection with legal proceedings is substantial enough to compel disclosure of communications between psychotherapist and his or her patient (*229 Cal. App. 3d 832, 843)* . Finally, the court said that it was clear from the entire statutory scheme regarding child abuse that the Legislature never intended to provide immunity to patients who knowingly or recklessly caused their therapists to file false child abuse reports (*229 Cal. App. 3d 832, 844)* . The court concluded that although plaintiff's action was not a prosecution of child abuse, it fell within the ambit of the child abuse reporting exception, and Penal Code § 11171(b) (*now see Penal Code § 11171.2(b)*) applied to the information reported by the psychotherapist (*229 Cal. App. 3d 832, 844-845)* .

[b] Psychotherapist Privilege Inapplicable to Information Reported Relating to Injuries Resulting From Weapons, Assault, or Abuse

Acts that constitute "assaultive or abusive conduct" are listed in *Penal Code § 11160(d)*.

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8-81 California Points & Authorities § 81.145

§ 81.145 Supporting Motion to Compel Discovery--Refuting Claim of Psychotherapist-Patient Privilege [Evid. Code § 1014]--Communication Was Not Privileged

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in support of a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11), as well as with points and authorities generally refuting a claim of privilege (see, e.g., § 81.10).*]

THE PSYCHOTHERAPIST-PATIENT PRIVILEGE DOES NOT PROTECT THE COMMUNICATION BECAUSE _____ [*name or status of person claiming privilege, e.g.,* THE DEFENDANT] HAS NOT ESTABLISHED THAT THE DOMINANT PURPOSE OF THE COMMUNICATION WAS WITHIN THE COURSE OF PROFESSIONAL PSYCHOTHERAPEUTIC COUNSELING.

Dominant Purpose of Communication to Psychotherapist Must Be Within Course of Professional Counseling. Unless thedominant purpose for which an individual contacts a psychotherapist is to secure a diagnosis or treatment of his or her mental or emotional condition in the course of professional counseling, no psychotherapist-patient privilege has been established and a communication between those persons is not privileged (*People v. Cabral (1993) 12 Cal. App. 4th 820, 827-828, 15 Cal. Rptr. 2d 866* ; *see Evid. Code § 1011*).

[2] Comments

[a] Use of Form

This memorandum may be used in support of a motion for an order compelling discovery if a party or other person has resisted discovery based on the psychotherapist-patient privilege, but the privilege is inapplicable because the communication was not made within the course of a psychotherapist-patient relationship. It does not provide a complete memorandum but is designed to be combined with a general form of memorandum in support of compelling discovery, as well as a form refuting a claim of privilege generally.

Counsel who wish to set out general points relating to the psychotherapist-patient privilege, as well, may adapt the points and authorities in opposition to a motion to compel discovery *set out in § 81.150* and combine them with this form.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Dominant Purpose of Communication to Psychotherapist Must Be Within Course of Professional Counseling

In ***People v. Cabral*** *(1993) 12 Cal. App. 4th 820, 15 Cal. Rptr. 2d 866* , defendant, a man accused of sexually molesting his daughter, wrote a letter to the psychotherapist operating a program for admitted sex offenders that offered rehabilitation and reduced prison time. In the letter, he admitted the charges and requested admittance into the program. The trial court admitted the letter into evidence, over defendant's objection that it was protected by the psychotherapist-patient privilege. Defendant appealed his conviction.

The court of appeal reversed the judgment on one of the counts, but otherwise affirmed the judgment. The court said that the party claimingthe psychotherapist-patient privilege has the burden of proving the preliminary facts to show that the privilege applies. Citing reasoning from a case interpreting the attorney-client privilege, and finding that reasoning applicable to the psychotherapist-patient privilege, the court said that as an obstruction to discovery, the existence of the privilege is strictly construed. However, once the requisite facts, such as the psychotherapist-patient relationship, have been established, the privilege is liberally construed in the patient's favor (*12 Cal. App. 4th 820, 827)* . The court said that a person's purpose in consulting a psychotherapist is one preliminary fact necessary to establish a psychotherapist-patient privilege. Citing *Evid. Code § 1011*, the court explained that a patient is a person who consults a psychotherapist to secure a diagnosis or treatment of his or her mental or emotional condition (*12 Cal. App. 4th 820, 827)* . Relying on reasoning interpreting the attorney-client privilege, the court said that if the dominant purpose of the communication is for transmittal to a psychotherapist in the course of professional counseling, that communication is within the psychotherapist-patient privilege. Whether a particular communication is predominantly in furtherance of the psychotherapist-patient relationship is a question of fact (*12 Cal. App. 4th 820, 828)* . Applying this dominant-purpose test to the facts, the court found that defendant's purpose in contacting the psychotherapist was to receive a reduced prison sentence. Even assuming that part of his purpose was to receive treatment, the court found that defendant had not established that it was his dominant purpose. Accordingly, there was no psychotherapist-patient relationship and the letter was not a privileged communication (*12 Cal. App. 4th 820, 827-828)* .

[4] Additional Authorities

[a] Dominant Purpose of Communication to Psychotherapist Must Be Within Course of Professional Counseling

The facts and procedural background of *Story v. Superior Court (2003) 109 Cal. App. 4th 1007, 135 Cal. Rptr. 2d 532* are discussed in *§ 81.150[4][b]*. In that case, the court of appeal rejected the dominant purpose test set forth in *People v. Cabral (1993) 12 Cal. App. 4th 820, 15 Cal. Rptr. 2d 866* (discussed in [3][a], *above*), "to the extent the test would automatically preclude the application of the psychotherapist-privilege to records generated as the result of psychotherapy attended by a defendant as a condition of probation." The dominant purpose of probation-conditioned psychotherapy must always be therapeutic, regardless of defendant's motive because *Pen. Code § 1203.1(j)* expressly provides that the general purpose of all probation conditions is "the reformation and rehabilitation of the probationer" (*109 Cal. App. 4th 1007, 1016)* .

In *In re Tabatha G. (1996) 45 Cal. App. 4th 1159, 1168, 53 Cal. Rptr. 2d 93* , an action to terminate parental rights, the juvenile court properlyordered discovery of a bonding study of a child and her mother. The child was not a patient for purposes of the privilege since she was not seeking diagnosis or treatment for a mental or emotional condition nor was any scientific research involved. In addition, the bonding study was discoverable by the child's counsel and not protected by the qualified work product privilege since discovery of the study was in the child's best interest and denial of discovery would result in the injustice of the child having to undergo another examination. (*45 Cal. App. 4th 1159, 1168)* .

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[Reserved]

§§ 81.146[Reserved]

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8-81 California Points & Authorities § 81.150

§ 81.150 Opposing Motion to Compel Discovery--Psychotherapist-Patient Privilege [Evid. Code § 1014] Applicable--General Form

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30), as well as with points and authorities relating to resisting discovery on the grounds of privilege generally (see, e.g., § 81.20).*]

THE INFORMATION SOUGHT IS NOT DISCOVERABLE BECAUSE IT IS PRIVILEGED AS A CONFIDENTIAL COMMUNICATION BETWEEN PATIENT AND PSYCHOTHERAPIST.

A. Claimant of Privilege. The psychotherapist-patient privilege may be claimed, under appropriate circumstances, by: (1) the holder of the privilege, being the patient or the guardian, conservator, or personal representative thereof; (2) a person authorized to claim the privilege by the holder thereof; or (3) the psychotherapist at the time of the confidential communication (*Evid. Code § 1014*).

B. Definition of Confidential Communication. A confidential communication between patient and psychotherapist means information, including that obtained by an examination of the patient, transmitted between such two persons in the course of their relationship and in confidence. Such transmission is by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the patient's interest in the consultation, or those to whom disclosure isreasonably necessary for the transmission of the information or the accomplishment of the purpose for which the psychotherapist is consulted. Such a communication includes a diagnosis made and the advice given by the psychotherapist in the course of the relationship (*Evid. Code § 1012*).

C. "Confidentiality" Liberally Construed in Favor of Patient. In general, the statutory psychotherapist-patient privilege is to be liberally construed in favor of the patient (*In re Lifschutz (1970) 2 Cal. 3d 415, 437, 85 Cal. Rptr. 829, 467 P.2d 557*).

D. Presumption of Confidentiality. When a privilege is claimed on the ground that the matter sought to be disclosed is a communication made in confidence in the course of the psychotherapist-patient relationship, the communication is presumed to have been made in confidence. The opponent of the claim has the burden of proof to establish that the communication was not confidential (*Evid. Code § 917(a)*).

[*Add points and authorities relating to the applicability of this privilege in the specific factual context (see, e.g., § 81.151 et seq.).*]

[2] Comments

[a] Use of Form

These points and authorities in opposition to a motion for an order compelling discovery may be submitted by a party or other person who has resisted providing discovery on the ground that the material sought is privileged as a confidential psychotherapist-patient communication [*see Evid. Code §§ 1010-1027*]. It does not provide a complete memorandum, but is designed to be combined with a general form of memorandum in opposition to compelling discovery, as well as points and authorities relating to the particular factual situation.

Note that in addition to the psychotherapist-patient privilege, *Evid. Code §§ 1035-1036.2* provides a privilege for confidential communications between a victim of sexual assault and a sexual assault victim counselor, and *Evid. Code §§ 1037-1037.7* provides a privilege for confidential communications between a victim of domestic violence and a domestic violence counselor.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[c] Related Uses

This form may be combined with general points and authorities in support of a motion seeking a protective order [*see, e.g., Ch. 83, Discovery: Depositions, § 83.80* et seq.] as to portions of the psychotherapist-patient communications claimed to remain privileged.

[3] Discussion of Authorities

[a] "Confidentiality" Liberally Construed in Favor of Patient

The facts and procedural background of ***In re Lifschutz*** *(1970) 2 Cal. 3d 415, 85 Cal. Rptr. 829, 467 P.2d 557* are discussed in *§ 81.140[3][a]*. In attempting to avoid further contempt proceedings against the psychiatrist and delay of appellate review in that case, the Supreme Court considered the scope of the patient-litigant exception to the psychotherapist-patient privilege. It noted that in determining whether communications between psychotherapist and patient sufficiently relate to the mental condition at issue to require disclosure, the trial court should heed the basic privacy interests involved in the privilege. In general, the Court stated, the privilege as set out in *Evid. Code § 1014*, should be liberally construed in favor of the patient (*2 Cal. 3d 415, 437)* .

[4] Additional Authorities

[a] "Confidentiality" Liberally Construed in Favor of Patient

The facts and procedural background of *Roberts v. Superior Court (1973) 9 Cal. 3d 330, 107 Cal. Rptr. 309, 508 P.2d*

309 are discussed in *§ 81.151[3][a]*. In reaffirming its analysis of the narrow scope of the patient-litigant exception to the psychotherapist-patient privilege in *In re Lifschutz (1970) 2 Cal. 3d 415, 85 Cal. Rptr. 829, 467 P.2d 557* (discussed in [3][a], *above*), and granting prohibition against the discovery order, the Court noted that it had been concerned in that case about the patient's rights of privacy. Because of the potential encroachment on those constitutionally protected rights by the compelled disclosure of confidential communications between the patient and the psychotherapist, the Court stressed again, trial courts should carefully control compelled disclosures in this area. Thus, the Court restated the rule that the psychotherapist-patient privilege must be liberally construed in the patient's favor (*9 Cal. 3d 330, 337)* .

The facts and procedural background of *Alhambra v. Superior Court (1980) 110 Cal. App. 3d 513, 168 Cal. Rptr. 49* are discussed in *§ 81.158[3][a]*. In reviewing a challenge to the trial court's order compellingfurther answers to interrogatories on the ground that the information sought was protected from disclosure by the psychotherapist-patient privilege, the court of appeal restated the rule set forth in *In re Lifschutz (1970) 2 Cal. 3d 415, 437, 85 Cal. Rptr. 829, 467 P.2d 557* that the psychotherapist-patient privilege is to be construed liberally in favor of the patient and his or her right to privacy (*110 Cal. App. 3d 513, 518)* .

[b] Definition of Confidential Communications

In *Roman Catholic Archbishop of Los Angeles v. Superior Court (People) (2005) 131 Cal. App. 4th 417, 32 Cal. Rptr. 3d 209, mod.* 2005 Cal. App. LEXIS 1274 , a grand jury subpoenaed documents from petitioners, the Roman Catholic Archbishop of Los Angeles and two priests, for an investigation into allegations that the priests sexually assaulted children. Petitioners argued, in part, that the psychotherapist-patient privilege attached to the documents under *Evid. Code § 1012*, because disclosures by the Archbishop's staff about petitioner priests were made only as reasonably necessary to accomplish the purpose of the psychotherapy, the diagnosis and treatment of issues relating to celibacy and sexuality. The court of appeal found only one memorandum from a member of the Archbishop's staff to a priest's psychotherapist was protected by psychotherapist-patient privilege because this document supplied the troubled priest's therapeutic team with information about his personal history as an aid to diagnosis and treatment (*131 Cal. App. 4th 417, 455)* . For discussion of other aspects of this case, see *§ 81.275[3][b]*.

In *In re Christopher M. (2005) 127 Cal. App. 4th 684, 26 Cal. Rptr. 3d 61* , appellant juvenile, who was made a ward of the court after admitting he had committed a robbery that constituted a hate crime, appealed the trial court's order imposing various probation conditions on him, including that all records related to his treatment be made available to the trial court and the probation department. On appeal, the court affirmed. The probation conditions were reasonable and tailored to fit his rehabilitative needs, given his lack of empathy toward others, his gang activity history, his participation in criminal conduct that involved violence against innocent victims, his substance abuse problems, and his refusal to participate in treatment programs. Although defendant had a privacy interest in his medical and psychological treatment records, the state had a legitimate countervailing interest in protecting the public against defendant's violent and anti-social conduct and in determining whether he was fully complying with his probation conditions. Thus, the trial court did not violate defendant's right to privacy. And by reasonably limiting disclosure of otherwise privileged psychotherapist-patient communications to the probation officer and the trial court, the trial court "acted under the authority of *Evidence Code section 1012*" (*127 Cal. App. 4th 684, 696)* .

In *Story v. Superior Court (2003) 109 Cal. App. 4th 1007, 135 Cal. Rptr. 2d 532* , inmate petitioned for writ review, after the trial court denied his motion to quash the government's subpoena duces tecum and allow release of his psychotherapy records. The case presented an issue of first impression: whether the psychotherapist-patient privilege attaches to the records of psychotherapy a defendant has undergone as a condition of probation, in a subsequent criminal action in which the prosecution seeks *Evid. Code § 1108* evidence regarding the petitioner's commission of a previous sexual offense. Petitioner contended that the psychotherapist-patient privilege barred discovery of his psychotherapy records. He claimed that the psychotherapist-patient privilege attached to the records under *Evid. Code § 1012* because the records were the result of information that petitioner had given his psychotherapist in confidence, and the

prosecution had failed to rebut the presumption of confidentiality (*109 Cal. App. 4th 1007, 1014-1015)* . The government responded that the psychotherapist-patient privilege did not attach because petitioner was not a patient within the meaning of the *Evid. Code § 1011*, as petitioner's motivation in attending psychotherapy was to obtain probation, not to treat his mental or emotional condition. In support of this argument, the government cited *People v. Cabral (1993) 12 Cal. App. 4th 820, 828, 15 Cal. Rptr. 2d 866* (discussed in *§ 81.145[3][a]*). Relying on the reasoning interpreting the attorney-client privilege, the court of appeal in *Cabral* said that if the dominant purpose of the communication is for transmittal to a psychotherapist in the course of professional counseling, that communication is within the psychotherapist-patient privilege. On that basis, the court ruled that defendant's letter to a psychotherapist, confessing that he had sexually molested his daughter and requesting admission to a sex offenders treatment program, was not protected by the psychotherapist-patient privilege because the defendant admitted in the letter that his purpose was to obtain probation (*109 Cal. App. 4th 1007, 1014-1015)* .

The court of appeal rejected the government's argument that petitioner's communications were similarly non-privileged, for two reasons. First, this court rejected the dominant purpose test of *People v. Cabral*, "to the extent the test would automatically preclude the application of the psychotherapist-privilege to records generated as the result of psychotherapy attended by a defendant as a condition of probation." The dominant purpose of probation-conditioned psychotherapy must always be therapeutic, regardless of defendant's motive because *Pen. Code § 1203.1(j)* expressly provides that the general purpose of all probation conditions is "the reformation and rehabilitation of the probationer" (*109 Cal. App. 4th 1007, 1016)* . Second, in *Menendez v. Superior Court (1992) 3 Cal. 4th 435, 454, 11 Cal. Rptr. 2d 92, 834 P.2d 786* (discussed in *§ 81.142[3][a]*), the California Supreme Court established that a defendant's motive in attending psychotherapy is immaterial to a determination of whether the psychotherapist-patient privilege attaches. Accordingly, the court found it immaterial in this case that petitioner may have been motivated to attend psychotherapy as a means of obtaining probation and avoiding incarceration (*109 Cal. App.4th 1007, 1016)* . The court concluded that petitioner was a patient within the meaning of *Evid. Code § 1011* because, as stated in the Department of Corrections' diagnostic study and recommendation regarding petitioner, the purpose of the psychotherapy was to treat petitioner's emotional problems and thereby aid his reformation and rehabilitation while on probation (*109 Cal. App. 4th 1007, 1018-1019)* .

However, the court also held that some records or testimony concerning probation-conditioned psychotherapy may be disclosed without violating the psychotherapist-patient privilege, as explained by the court in *In re Pedro M. (2000) 81 Cal. App. 4th 550, 96 Cal. Rptr. 2d 839* (discussed *below*). Thus, the psychotherapy records of an adult probationer may be disclosed under *Evid. Code § 1012* to the extent necessary for the court to monitor the defendant's participation and progress in the psychotherapy ordered as a condition of probation (*109 Cal. App. 4th 1007, 1018-1019)* .For all these reasons, the trial court abused its discretion in ordering disclosure of petitioner's psychotherapy records (*109 Cal. App. 4th 1007, 1019)* .

In *In re Mark L. (2001) 94 Cal. App. 4th 573, 114 Cal. Rptr. 2d 499* , appellant father appealed a juvenile court order denying him visitation with his adopted son, after a review hearing six-months after the boy had been taken into protective custody. The appellate court affirmed the order because substantial evidence supported that visitation would be detrimental to the son at that time. However, the appellate court found that the trial court misinterpreted *Welf. & Inst. Code § 317(f)* (providing that a dependent child who is of sufficient age and maturity may invoke the psychotherapist-client privilege) to preclude the son's therapist from testifying or providing any information to the court or the county health and human services agency regarding his therapeutic progress (*94 Cal. App. 4th 573, 581)* . Appellant father was prejudiced, at the 12-month hearing, by the absence of information from his son's therapist regarding any therapeutic progress or changed circumstances during the intervening six months which might have made visitation appropriate or facilitated reunification (*94 Cal. App. 4th 573, 581)* . The court relied on *Evid. Code § 1012*, which defines confidential communications to exclude communications to "those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the psychotherapist is consulted." The court also found the rationale of *In re Pedro M. (2000) 81 Cal. App. 4th 550, 96 Cal. Rptr. 2d 839* (discussed *below*) applicable in the juvenile dependency context, in which therapy has a dual purpose-to treat the child

to ameliorate the effects of neglect or abuse and to disclose information from which reasoned recommendations and decisions regarding the child's welfare can be made (*94 Cal. App. 4th 573, 581)* . Therefore, the court held that, in the juvenile dependency context, the psychotherapist-patient privilege protected the minor's confidential communications and the details of his therapy, but did not preclude his therapist from giving "circumscribed information to accomplish the information-gathering goal of therapy" (*94 Cal. App. 4th 573, 583-584)* .

In *In re Kristine W. (2001) 94 Cal. App. 4th 521, 114 Cal. Rptr. 2d 369* , a juvenile court dependent (age 17) appealed the court's order permitting the county health and human services agency (agency) to receive certain information from her therapist regarding her therapy. She argued the court was not authorized to disregard her invocation of the psychotherapist-patient privilege. The court of appeal concluded the psychotherapist-patient privilege protected appellant's confidential communications and details of the therapy, but did not preclude her therapist from giving "circumscribed information to accomplish the information-gathering goal of therapy" (*94 Cal. App. 4th 521, 528)* . In reaching its decision, the court relied, in part, on *Evid. Code § 1012*, which defines "confidential communication between patient and psychotherapist" as "information, includinginformation obtained by an examination of the patient, transmitted between a patient and his [or her] psychotherapist in the course of that relationship and in confidence by a means [that], so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation, *or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the psychotherapist is consulted*" (italics added by this court) (*94 Cal. App. 4th 521, 527)* . The appellate court also observed that without the testimony of psychologists in many juvenile dependency and child custody cases, superior courts and juvenile courts would have little or no evidence, and would be reduced to arbitrary decisions based upon the emotional response of the court (*94 Cal. App. 4th 521, 528)* . However, the court recognized that appellant had a substantial privacy interest at stake in her therapy. Accordingly, the appellate court affirmed the juvenile court's order only to the extent it permitted limited disclosure of matters that would reasonably assist the court in evaluating whether further orders are necessary for appellant's benefit, while preserving the confidentiality of the details of her therapy (*94 Cal. App. 4th 521, 528-529)* .

In *In re Pedro M. (2000) 81 Cal. App. 4th 550, 96 Cal. Rptr. 2d 839* , appellant, a ward of the juvenile court, was placed in a sexual offender program subject to conditions of probation that required him, among other things, to cooperate in a plan for psychological testing and treatment. He was removed from the sexual offender program for refusing to comply with the treatment plan. The trial court found that he had violated the terms of his probation and ordered him committed to the California Youth Authority (CYA). Appellant sought review. Appellant contended that his therapist's testimony was erroneously admitted after he invoked the psychotherapist-patient privilege. The court of appeal relied on *Evid. Code § 1012* in holding that the trial court did not err in admitting the therapist's testimony after appellant's invocation of the psychotherapist-patient privilege (*81 Cal. App. 4th 550, 554)* . The court explained: "Quite obviously, the court's ability to evaluate [the minor]'s compliance with [a] condition of the court's disposition order and its effect on his rehabilitation would be severely diminished in the absence of some type of feedback from the therapist, and it would be unreasonable for [the minor] to think otherwise" (*81 Cal. App. 4th 550, 554)* . The court noted the juvenile court carefully sought to circumscribe the therapist's testimony so that the details of the therapeutic sessions would not be disclosed. As a consequence, no testimony was admitted regarding any specific statements appellant had made to the therapist, any advice given by, or diagnosis made by, the therapist. Under these circumstances, the psychotherapist-patient privilege did not preclude the therapist from testifying concerning appellant's participation and progress in the court-ordered treatment plan (*81 Cal. App. 4th 550, 554-555)* .

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8-81 California Points & Authorities § 81.151

§ 81.151 Opposing Motion to Compel Discovery--Psychotherapist-Patient Privilege [Evid. Code § 1014] Applicable--Information Sought Not Within Patient-Litigant Exception [Evid. Code § 1016]

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30), as well as with points and authorities relating to resisting discovery on the grounds of privilege generally (see, e.g., § 81.20), and relating to the psychotherapist-patient privilege generally (see, e.g., § 81.150).*]

DISCLOSURE MAY BE COMPELLED ONLY IN REGARD TO MENTAL CONDITIONS THAT THE PATIENT-LITIGANT HAS PLACED IN ISSUE BY THE PLEADINGS, BUT NOT REGARDING ANY OTHER CONFIDENTIAL COMMUNICATIONS WITH THE PSYCHOTHERAPIST ALTHOUGH THEY MAY BEAR SOME RELEVANCY TO SUBSTANTIVE ISSUES OF LITIGATION.

A. Limitation of Patient-Litigant Exception. The patient-litigant exception, *Section 1016 of the Evidence Code*, to the psychotherapist-patient privilege is limited to disclosure only of matters directly relevant to the specific emotional or mental conditions placed at issue by the patient's pleadings. Communications not directly relevant to the specific mental conditions thus disclosed remain privileged even if somehow "relevant" to the substantive issues of the litigation (*Roberts v. Superior Court (1973) 9 Cal. 3d 330, 337-339, 107 Cal. Rptr. 309, 508 P.2d 309* ; *In re Lifschutz (1970) 2 Cal. 3d 415, 431, 435, 85 Cal. Rptr. 829, 467 P.2d 557*).

[*Optional*] **B. Party's Attempt to Invade Privilege Based Only on Speculation.** The right of a party to an existing or prospective lawsuit to invade the psychotherapist-patient privilege is limited to cases in which something more than mere speculation supports the invasion (*Grey v. Superior Court (1976) 62 Cal. App. 3d 698, 703-704, 133 Cal. Rptr. 318*).

[2] Comments

[a] Use of Form

These points and authorities in opposition to a motion for an order compelling discovery may be submitted by a party or other person who has resisted providing discovery on the ground that the information being sought is not within the issues tendered in the action by the patient. It does not provide a complete memorandum, but is designed to be combined with a general form of memorandum in opposition to compelling discovery as well as with points and authorities relating to resisting discovery on the ground of privilege and relating to the psychotherapist-patient privilege generally.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Limitation of Patient-Litigant Exception

The petitioner in ***Roberts v. Superior Court*** *(1973) 9 Cal. 3d 330, 107 Cal. Rptr. 309, 508 P.2d 309* , as plaintiff in the trial court, filed an action for injuries arising out of an automobile collision, alleging she was rendered "sick, sore, lame, and disabled." Responding to defendants' written interrogatories regarding health history and present injuries, she mentioned past hospitalization for an overdose of pills and psychiatric treatment for a few months, after which the doctor had reported there was nothing wrong with her, and she stated she had no after effects. She also described present back pains. A different doctor's report noted she had suffered backache to some extent since her attempted suicide, but made no other connection to that incident. When the defendants subpoenaed all her records from the various treating physicians, the psychiatrist refused to submit his records on grounds of privilege. Defendants subsequently received certain reports of the psychiatrist, however, through other doctors' records. While not immediately objecting thereto, plaintiff eventually received an order in another proceeding sealing such reports. Defendants then obtained a limited order compelling production of the psychiatrist's records, after which the Supreme Court granted petitioner an alternative writ of prohibition sealing such records in the county clerk's possession until further notice.

In determining that in bringing the action for the alleged injuries plaintiff had not waived the psychotherapist-patient privilege, the Court extensively reviewed the analysis it had earlier rendered on the point in *In re Lifschutz (1970) 2 Cal. 3d 415, 431-437, 85 Cal. Rptr. 829, 467 P.2d 557* (discussed *below*), and explicitly reaffirmed that decision's narrow interpretation of the scope of the patient-litigant exception [*see also* *Britt v. Superior Court (1978) 20 Cal. 3d 844, 864, 143 Cal. Rptr. 695, 574 P.2d 766* , discussed in [4][a], *below*] (*9 Cal. 3d 330, 337-339)* .

The Court noted there were no allegations in the complaint claiming damages for emotional distress or mental suffering, and that in the verified petition for a writ of prohibition, and through counsel's argument thereon, plaintiff stated she had tendered no issue concerning her mental or emotional condition. Neither of the doctors who had examined petitioner had found any relationship between her previous psychiatric treatment and her current back problems, although they had known of the treatment. On such a showing, the Court concluded, it could not be said that it was reasonably probable that the psychotherapeutic communications were directly relevant to a specific mental condition placed in issue by plaintiff (*9 Cal. 3d 330, 338)* .

In refuting defendants' assertion that the allegations of the complaint regarding injuries, coupled with medical reports that her alleged effects seemed to be in excess of clinical findings, indicated her injuries contained a "mental component," the Court recognized that any physical injury is likely to have such a factor in the form of some amount of pain, at least insofar as the patient is conscious of such injury. However, it reasoned that to allow discovery of past psychiatric treatment merely to ascertain whether a past condition may have decreased the patient's tolerance to pain, or whether the patient may have discussed with the psychotherapist complaints similar to those to be litigated, would

defeat the purpose of the privilege of *Evid. Code § 1014* (*9 Cal. 3d 330, 338-339)* .

The Court also observed that the doctor's notes connecting the backache and the attempted suicide did not change this result. Defendants' speculation regarding the connection drew a conclusion not reached by the doctors in the case. Without further proof that the present back problems antedated the collision, the doctor's notes did not make it reasonably probable that the psychotherapeutic communications were directly relevant to a specific mental condition voluntarily placed at issue in the litigation by the petitioner (*9 Cal. 3d 330, 339)* .

The facts and procedural background of ***In re Lifschutz*** *(1970) 2 Cal. 3d 415, 85 Cal. Rptr. 829, 467 P.2d 557* are discussed in *§ 81.140[3][a]*. In attempting to avoid further contempt proceedings against the psychiatrist and delay of appellate review in that case, the Supreme Court considered the scope of the patient-litigant exception to the psychotherapist-patient privilege. It had been contended in the trial court by the defendant, who was seeking to depose the psychiatrist, that any communication between the plaintiff and the psychiatrist had lost its privileged status because the plaintiff had filed a personal injury action in the instant case, claimingrecovery for "mental and emotional distress." Defendant relied on *Evid. Code § 1016* which provides that there is no psychotherapist-patient privilege in regard to a communication relevant to an issue concerning the mental or emotional condition of the patient if such issue has been tendered by the patient or through certain derivative parties or capacity (*2 Cal. 3d 415, 431)* .

The Court concluded that the patient-litigant exception allows only a limited inquiry into the confidences of the psychotherapist-patient relationship, compelling disclosures of only those matters directly relevant to the nature of the specific emotional or mental condition that the patient has voluntarily disclosed and tendered in the pleadings or in answer to discovery inquiries (*2 Cal. 3d 415, 431)* . The whole purpose of the psychotherapist-patient privilege is to preclude the humiliation of the patient that might follow disclosure of such person's ailments. When the patient discloses those ailments by bringing an action in which they are in issue, there is no longer any reason for the privilege. However, the Court could see no reason to read the patient-litigant exception to signify an automatic, complete waiver of privilege whenever a patient institutes a claim for any physical or mental injury. The Court relied on the fact that cases dealing with a similar exception under the physician-patient privilege have so limited that exception and the more liberal psychotherapist-patient privilege exception should not be given a broader reading (*2 Cal. 3d 415, 434)* .

If the exception were so widely drawn, the Court speculated, it might effectively deter many psychotherapeutic patients from instituting general claims for mental suffering and damage out of fear of opening up all past communications to discovery (*2 Cal. 3d 415, 435)* . The Court noted that in *Griswold v. Connecticut (1965) 381 U.S. 479, 484, 85 S. Ct. 1678, 14 L. Ed. 2d 510* , the United States Supreme Court declared that various guarantees of the *Bill of Rights* create zones of privacy. The California Supreme Court announced its own belief that the confidentiality of the psychotherapeutic session falls within one such zone, so that a patient's interest in keeping such confidential revelations from public purview and in retaining such a substantial privacy has deeper roots than the California statute, drawing sustenance from a constitutional heritage (*2 Cal. 3d 415, 431-432)* .

The Court acknowledged that in some situations the patient's pleadings may clearly demonstrate that such person's entire mental condition is being placed in issue and that records of past psychotherapy will clearly be relevant (*2 Cal. 3d 415, 435)* . In other cases, however, the determination of the specific "mental condition" in issue may present more complex problems. The Court observed that the complaint in the instant case contained the typical allegations of "mental and emotional distress" arising out of a physical assault without specifically identifying the nature of the mental and emotional condition at issue. Yet, the Court stated, in incorporating this allegation, the plaintiff obviously neither disclosed his entiremedical history of treatment for mental or emotional conditions nor realistically waived his interest in maintaining the confidentiality of that treatment (*2 Cal. 3d 415, 436)* .

The Court saw that the generality of such a claim did create the possibility that some feature of plaintiff's psychological history might be directly relevant to the determination of whether his emotional or mental distress could be properly attributed to the alleged assault; the Court could not determine from the present state of the record whether plaintiff's

distress was merely the normal distress experienced as a result of physical assault or whether it included unusual or particularly serious elements on which prior history might be directly relevant. The Court doubted, however, that the 10-year-old therapeutic treatment sought to be discovered would be sufficiently relevant to a typical claim of mental distress to bring it within the patient-litigant exception (*2 Cal. 3d 415, 436)* .

The Court stated that the automatic waiver contemplated by *Evid. Code § 1016* must be construed not as a complete waiver of the psychotherapist-patient privilege, but only as a limited waiver concomitant with the purposes of the exception. Disclosure can be compelled only with respect to those mental conditions the patient-litigant has disclosed by bringing an action in which they are in issue. Communications which are not directly relevant to those specific conditions do not fall within the terms of the exception and remain privileged. Disclosure cannot be compelled with respect to other aspects of the patient-litigant's personality even though they may, in some sense, be relevant to the substantive issues of litigation. The Court ultimately observed on this point that the patient thus is not obligated to sacrifice all privacy to seek redress for a specific mental or emotional injury. Rather, the scope of the inquiry permitted depends on the nature of the injuries which the patient-litigant has brought before the court (*2 Cal. 3d 415, 435)* .

[b] Party's Attempt to Invade Privilege Based Only on Speculation

Petitioner in ***Grey v. Superior Court*** *(1976) 62 Cal. App. 3d 698, 133 Cal. Rptr. 318* was the widow of a doctor who was killed in an automobile which collided with a parked vehicle. Petitioner had filed a claim on a double indemnity life insurance policy, stating death had resulted from an "accidental bodily injury." In connection with a general medical authorization, petitioner listed physicians but not a psychiatrist her husband had consulted. The insurer, on learning of the psychiatrist, attempted to depose him and obtain his records, but both the latter and the widow denied such access on the basis of the psychiatrist-patient privilege. The insurer then filed an action for declaratory relief, basing its right to the information on the ground of a covenant of good faith and fair dealing among those interested in an insurance policy and the patient-litigant exception to theprivilege under *Evid. Code § 1016*. The insurer also asserted that it was relieved of liability because the insured's death was really a suicide, whether he was sane or insane at the time, or a result of bodily or mental disease, and the petitioner's refusal to divulge the psychiatric information was a breach of the insurance covenant. On the insurer's seeking and receiving an order for the deposition of the psychiatrist with production of records, the petitioner sought a writ of prohibition.

The court of appeal issued the peremptory writ. While it agreed with the holding of the trial court that petitioner's mere execution and filing of a proof of death form did not waive the psychotherapist-patient privilege, it decided it would not have to determine whether such filing waived the privilege under *Evid. Code § 1016(c)* (as a party claiming as a beneficiary of the patient's contract) because of its conclusion that invasion of that privilege would have to be supported by more than mere speculation (*62 Cal. App. 3d 698, 703)* . After reviewing the general public policy of encouraging people to confide in their professional counselors, the court concluded that the law does not allow an insurer merely to speculate that somewhere in an insured's past life, there may be some indication of a suicidal tendency. Such a speculation, the court went on, could be raised in every case involving a claim that death was accidental, and would subject everyone claiming damages therefore to a total revelation of all the decedent's past life (*62 Cal. App. 3d 698, 703-704)* .

The court advised that, in order to invade the patient's confidentiality of communication to, and diagnosis by, the psychiatrist the insurer must make some prima facie proof that there may be something to support its speculation. The only showing of materiality in the instant case was that an investigating officer had "speculated" the collision might have been due to suicide, and had determined that the car had drifted, with a hypothesis that the patient may have fallen asleep, and a "suggestion" that the sheriff investigate the possibility of suicide. That kind of speculation, the court concluded, based solely on the physical evidence of the collision, is not enough to justify an invasion of the patient's privacy (*62 Cal. App. 3d 698, 704)* .

[4] Additional Authorities

[a] Limitation of Patient-Litigant Exception

In *Britt v. Superior Court (1978) 20 Cal. 3d 844, 143 Cal. Rptr. 695, 574 P.2d 766* , petitioners had sued an airport authority for personal and property injuries and emotional disturbance allegedly caused by various kinds of pollution in operation of that facility. Defendant's main discovery tactic was to depose a number of plaintiffs on the subject of political associations, but it also served all 936 plaintiffs with interrogatories requesting, among other matters, a complete account of their entiremedical histories, including all mental or emotional disturbances for which they sought treatment at any time during their lives. The trial court denied plaintiffs' motion for a protective order, which included a challenge to the legal propriety of the unlimited demand for medical information, and instead granted defendant's motion for an order compelling plaintiffs to answer its questions, fixing a deadline for answers to the interrogatories. Plaintiffs filed a petition for extraordinary relief, and the Supreme Court issued an alternative writ of mandate.

The Court denied defendant's contention that the broad discovery order properly allowed it to determine for itself whether plaintiffs' injuries stemmed from airport activity or from other medical conditions and upheld petitioners' contention that the trial court's order to answer questions on their lifetime medical histories without regard to whether the information related in any way to physical or emotional injuries for which they sought recovery below had to be vacated as overbroad. The Court once again approved its analysis in *In re Lifschutz (1970) 2 Cal. 3d 415, 435, 85 Cal. Rptr. 829, 467 P.2d 557* , as reiterated in *Roberts v. Superior Court (1973) 9 Cal. 3d 330, 337-339, 107 Cal. Rptr. 309, 508 P.2d 309* (discussed in [3][a], *above*), that the patient-litigant exception did not automatically obviate the application of the psychotherapist-patient privilege (*20 Cal. 3d 844, 862-864)* . The Court concluded that, while petitioners could not withhold information which related to any physical or mental condition which they had put in issue by bringing the suit below, they would be entitled to retain the confidentiality of all unrelated medical or psychotherapeutic treatment they might have undergone in the past (*20 Cal. 3d 844, 864)* .

In *San Diego Trolley, Inc. v. Superior Court (2001) 87 Cal. App. 4th 1083, 105 Cal. Rptr. 2d 476* , plaintiff was injured while crossing defendant trolley company's tracks. In discovery, plaintiff learned that the driver had seen a psychiatrist for stress-related anxiety due to a previous work-related incident. Plaintiff sought discovery of, and the trial court ordered defendant company and defendant driver to disclose information about, the driver's communications to her psychiatrist [*87 Cal. App. 4th 1083, 1088-1089*]. The court of appeal reversed, holding that the driver did not waive her privilege by revealing, both in her deposition in this case and in her previous workers' compensation claims for stress-related anxiety due to the previous work-related incident, that she was seeing a psychiatrist. The driver's willingness to put her psychotherapeutic relationship somewhat at risk in the workers' compensation proceedings, and any resulting limited disclosure, did not support the inference that she meant her relationship with her psychiatrist could continue to be put at risk following the disposition of her claims [*87 Cal. App. 4th 1083, 1094]* . Moreover, in her testimony in this case, the driver disclosed only the fact that she was being treated for anxiety by a psychiatrist and the medications the psychiatrist prescribed.Nothing in this testimony could be construed as disclosing any significant part of her communications with her psychiatrist [*87 Cal. App. 4th 1083, 1094]* .

In *Simek v. Superior Court (1981) 117 Cal. App. 3d 169, 172 Cal. Rptr. 564* , a marriage dissolution proceeding, the wife issued subpoenas duces tecum to produce the husband's medical records after they had failed to agree on a visitation schedule, claiming he was not competent to carry on normal visitation. After the trial court ordered production of the documents, the husband petitioned for and obtained a writ of mandate from the court of appeal directing the trial court to vacate its order and to grant the husband's motion to quash service of the subpoenas. The court held that the husband had not tendered his mental or emotional condition so as to invoke the patient-litigant exception under *Evid. Code § 1016* to the psychotherapist-patient privilege by asserting his rights to visitation (*117 Cal. App. 3d 169, 176-177)* .

In *Boling v. Superior Court (1980) 105 Cal. App. 3d 430, 164 Cal. Rptr. 432* , decedent's mother brought a wrongful death action against a company which had rented bedding to decedent for his use in his home while he was recovering from an automobile accident. Decedent died when he was trapped in the bed which caught fire. Decedent's mother

resisted production of certain hospital records relating to decedent on the ground of the psychotherapist-patient privilege, and the court of appeal applied the reasoning of *In re Lifschutz (1970) 2 Cal. 3d 415, 85 Cal. Rptr. 829, 467 P.2d 557* (discussed in [3][a], *above*). The court in *Boling* found indications of the Legislature's intent that the psychotherapist-patient privilege survive on the death of the patient (*105 Cal. App. 3d 430, 439)* . The court also stated that there was no reason that the mere commencement of an action for the patient's wrongful death should operate as an automatic waiver of the privilege (*105 Cal. App. 3d 430, 439)* .

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8-81 California Points & Authorities § 81.152

§ 81.152 Opposing Motion to Compel Discovery--Psychotherapist-Patient Privilege [Evid. Code § 1014] Applicable--Disclosure of Object of Treatment to Avoid Application of Patient-Litigant Exception Is Not Waiver

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30), as wellas with points and authorities relating to resisting discovery on the grounds of privilege generally (see, e.g., § 81.20), and relating to the psychotherapist-patient privilege generally (see, e.g., § 81.150).*]

DISCLOSURE OF THE SUBJECT OF PSYCHIATRIC TREATMENT, WHEN MADE TO AVOID APPLICATION OF THE PATIENT-LITIGANT EXCEPTION TO THE PSYCHOTHERAPIST-PATIENT PRIVILEGE AS TO AN ISSUE TENDERED BY THE PATIENT, DOES NOT CONSTITUTE A WAIVER OF THE PRIVILEGE.

Disclosure to Avoid Application of Patient-Litigant Exception Is Not Waiver. The psychotherapist-patient privilege is not waived by disclosure of the object of psychotherapeutic treatment made to avoid application of the patient-litigant exception to the privilege after a mental or emotional issue has been tendered by the patient (*Roberts v. Superior Court (1973) 9 Cal. 3d 330, 340-341, 107 Cal. Rptr. 309, 508 P.2d 309*).

[2] Comments

[a] Use of Form

These points and authorities in opposition to a motion for an order compelling discovery may be submitted by a party or other person who has resisted providing discovery on the ground that disclosing the object of psychiatric treatment in order to avoid application of the patient-litigant exception to the psychotherapist-patient privilege, with respect to mental issues tendered by such person, is not a waiver of the privilege. It does not provide a complete memorandum, but is designed to be combined with a general form of memorandum in opposition to compelling discovery as well as with points and authorities relating to resisting discovery on the ground of privilege and relating to the

psychotherapist-patient privilege generally.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Disclosure to Avoid Application of Patient-Litigant Exception Is Not Waiver

The facts and procedural background of ***Roberts v. Superior Court*** *(1973) 9 Cal. 3d 330, 107 Cal. Rptr. 309, 508 P.2d 309* are discussed in *§ 81.151[3][a]*. Defendants argued that petitioner had waived the psychotherapist-patient privilege through disclosure in the interrogatories of the nature of the treatment given her by the psychiatrist, but the Supreme Court found she had disclosed no more than was necessary to avoid application of the patient-litigant exception to the psychotherapist-patient privilege. The Court referred to its opinion in *In re Lifschutz (1970) 2 Cal. 3d 415, 436-438, 85 Cal. Rptr. 829, 467 P.2d 557* (discussed in *§ 81.140[3][a]*, and in § 81.151[3][a]), in which it had recognized that in order to avoid the application of the patient-litigant exception to the privilege, the patient might be compelled to explain in general terms the object of the psychotherapy. The Court acknowledged the vast difference between the disclosure of a general description of the object of the patient's psychotherapeutic treatment, and the disclosure of all or a part of the patient's actual communications during psychotherapy. In the instant case, it concluded she did not waive her privilege merely by stating she had received psychiatric treatment following an overdose of pills. The Court determined that such disclosure was no more than it had suggested in *Lifschutz* as necessary to avoid application of the exception (*9 Cal. 3d 330, 340-341)* .

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8-81 California Points & Authorities § 81.153

§ 81.153 Opposing Motion to Compel Discovery--Psychotherapist-Patient Privilege [Evid. Code § 1014] Applicable--Disclosure of Insignificant Part of Communication Is Not Waiver as to Remainder

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30), as well as with points and authorities relating to resisting discovery on the grounds of privilege generally (see, e.g., § 81.20), and relating to the psychotherapist-patient privilege generally (see, e.g., § 81.150).*]

ALTHOUGH PART OF A CONFIDENTIAL COMMUNICATION BETWEEN PATIENT AND PSYCHOTHERAPIST WAS DISCLOSED, IF IT IS NOT A SIGNIFICANT PART, THEN THE DISCLOSURE DOES NOT WAIVE THE PSYCHOTHERAPIST-PATIENT PRIVILEGE AS TO THE REMAINDER.

A. Insignificant Disclosure of Part Is Not Waiver of Confidentiality of Whole Psychotherapist-Patient Communication. Disclosure of a confidential communication between patient and psychotherapist must reveal a significant part of the communication before a waiver of the psychotherapist-patient privilege occurs (*Evid. Code § 912(a)*; *Roberts v. Superior Court (1973) 9 Cal. 3d 330, 340, 107 Cal. Rptr. 309, 508 P.2d 309* ; *In re Lifschutz (1970) 2 Cal. 3d 415, 430, 85 Cal. Rptr. 829, 467 P.2d 557*).

[*Optional*] **B. Insignificant Disclosure of Existence of Psychotherapist Visits.** Disclosure of the existence of the psychotherapist-patient relationship, in itself, does not reveal a significant part of the communication and thus does not constitute a waiver of the psychotherapist-patient privilege (*In re Lifschutz (1970) 2 Cal. 3d 415, 430, 85 Cal. Rptr. 829, 467 P.2d 557*).

[*Optional*] **C. Insignificant Disclosure of Purpose of Psychotherapeutic Treatment.** Disclosure of the purpose of the psychotherapeutic treatment does not reveal a significant part of the communication and thus does not constitute a waiver of the psychotherapist-patient privilege (*Roberts v. Superior Court (1973) 9 Cal. 3d 330, 340-341, 107 Cal.*

Rptr. 309, 508 P.2d 309).

[2] Comments

[a] Use of Form

These points and authorities in opposition to a motion for an order compelling discovery may be submitted by a party or other person who has resisted providing discovery on the ground that the material is privileged by the psychotherapist-patient privilege, and who has disclosed an insignificant part of the communication. It does not provide a complete memorandum, but is designed to be combined with a general form of memorandum in opposition to compelling discovery, as well as with points and authorities relating to resisting discovery on the ground of privilege and relating to the psychotherapist-patient privilege generally.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Insignificant Disclosure of Part Is Not Waiver of Confidentiality of Whole Psychotherapist-Patient Communication

Roberts v. Superior Court *(1973) 9 Cal. 3d 330, 107 Cal. Rptr. 309, 508 P.2d 309* is discussed in [c], *below.* ***In re Lifschutz*** *(1970) 2 Cal. 3d 415, 85 Cal. Rptr. 829, 467 P.2d 557* is discussed in [b], *below.*

[b] Insignificant Disclosure of Existence of Psychotherapist Visits

The facts and procedural background of ***In re Lifschutz*** *(1970) 2 Cal. 3d 415, 85 Cal. Rptr. 829, 467 P.2d 557* are discussed in *§ 81.140[3][a]*. In preparing itself to address the question of the reach of the patient-litigant exception, and in order to avoid the necessity for further contempt proceedings against the psychiatrist or delaying appellate review, the Supreme Court determined that mere revelation of the existence of the psychotherapist-patient relationship did not render the privilege entirely inapplicable (*2 Cal. 3d 415, 430)* .

The Court recited the provisions of *Evid. Code § 912(a)*, providing for a waiver of the privilege through voluntary disclosure of a significant part of the communication. It concluded that in making the admission during deposition of his visits to the psychotherapist, the patient "certainly" had not disclosed a significant part of the communication between himself and the psychiatrist so as to waive his right to subsequently claim the privilege as to other elements of the communication. The Court then appeared to suggest that such topics as the nature of the treatment of the plaintiff, the diagnosis, or the content of any particular communication might all be separate issues for determination in the case as to whether they constituted elements of the communication that still remained under the privilege (*2 Cal. 3d 415, 430)* .

[c] Insignificant Disclosure of Purpose of Psychotherapeutic Treatment

The facts and procedural background of ***Roberts v. Superior Court*** *(1973) 9 Cal. 3d 330, 107 Cal. Rptr. 309, 508 P.2d 309* are discussed in *§ 81.151[3][a]*. In restating the provisions of *Evid. Code § 912(a)* that the disclosure must reveal a significant part of the communication protected by the psychotherapist-patient privilege before a waiver of it will occur, the Supreme Court noted that in *In re Lifschutz (1970) 2 Cal. 3d 415, 430, 85 Cal. Rptr. 829, 467 P.2d 557* (discussed in [b], *above*), it had made it clear that mere disclosure of the existence of the psychotherapist-patient relationship did not reveal a significant part of the communication and wasinsufficient to constitute a waiver. Similarly, the Court stated it did not believe that petitioner's disclosure in the instant case of the purpose of her psychiatric treatment waived the privilege either (*9 Cal. 3d 330, 340)* .

[4] Additional Authorities

[a] Insignificant Disclosure of Existence of Psychotherapist Visits

People v. Perry (1972) 7 Cal. 3d 756, 103 Cal. Rptr. 161, 499 P.2d 129 was an appeal by two defendants from a murder conviction. One of the defendants sought to review the records of a county mental health department where an accomplice who testified for the State had been treated by psychotherapists. He contended the psychotherapist-patient privilege asserted by the department on the accomplice's behalf was inapplicable because the psychotherapy had been ordered by a court (the exception of *Evid. Code § 1017*), and also because the accomplice had waived the privilege herself through disclosure [*see Evid. Code § 912*] by giving certain testimony on cross-examination.

The Supreme Court ruled against these contentions, as against all others raised by defendants in the case on appeal. After disposing of the first point, there having been no evidence of court appointment of the psychotherapists and defendant furthermore having failed to challenge the claim of privilege below (*7 Cal. 3d 756, 782)* , the Court reviewed the accomplice's cross-examination and determined she had not disclosed a significant part of any psychotherapeutic communication. At most, the Court found, her testimony disclosed that she had consulted two psychiatrists, but she had not revealed the substance of her consultations. It reiterated the holding of *In re Lifschutz (1970) 2 Cal. 3d 415, 430, 85 Cal. Rptr. 829, 467 P.2d 557* (discussed in [3][b], *above*), that mere admission that a psychotherapist-patient relationship exists does not disclose a significant part of the communication (*7 Cal. 3d 756, 783)* .

[b] Insignificant Disclosure of Purpose of Psychotherapeutic Treatment

The facts and procedural background of *People v. Perry (1972) 7 Cal. 3d 756, 103 Cal. Rptr. 161, 499 P.2d 129* are discussed in [a], *above.* In reviewing the cross-examination of the accomplice to find that she had not waived her psychotherapist-patient privilege by disclosing a significant part of the communication therein, the Court stated that the revelation that certain subjects were not discussed in a psychotherapist-patient relationship does not constitute such a disclosure resulting in waiver (*7 Cal. 3d 756, 783)* .

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8-81 California Points & Authorities § 81.154

§ 81.154 Opposing Motion to Compel Discovery--Psychotherapist-Patient Privilege [Evid. Code § 1014] Applicable--Patient's Signing of General Medical Consent Form Is Not Waiver

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30), as well as with points and authorities relating to resisting discovery on the grounds of privilege generally (see, e.g., § 81.20), and relating to the psychotherapist-patient privilege generally (see, e.g., § 81.150).*]

SIGNING OF A GENERAL CONSENT FORM FOR RELEASE OF A PATIENT'S MEDICAL RECORDS, NOT SPECIFICALLY AUTHORIZING RECORDS IN REGARD TO MENTAL CONDITION, DOES NOT CONSTITUTE A WAIVER OF THE PSYCHOTHERAPIST-PATIENT PRIVILEGE.

General Medical Records Consent Is Not Waiver of Psychotherapist-Patient Privilege. A general medical records consent form that does not apply specifically to records pertaining to the patient's mental condition or past psychiatric treatments is insufficient, on being signed by the patient, to constitute a waiver of such person's psychotherapist-patient privilege (*Roberts v. Superior Court (1973) 9 Cal. 3d 330, 343, 107 Cal. Rptr. 309, 508 P.2d 309*).

[2] Comments

[a] Use of Form

These points and authorities in opposition to a motion for an order compelling discovery may be submitted by a party or other person who has resisted providing discovery on the ground that signing of a general medical consent form does not constitute a waiver as to the psychotherapist-patient privilege. It does not provide a complete memorandum, but is designed to be combined with a general form of memorandum in opposition to compelling discovery, as well as with points and authorities relating to resisting discovery on the ground of privilege and relating to the psychotherapist-patient privilege generally.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] General Medical Records Consent Is Not Waiver of Psychotherapist-Patient Privilege

The facts and procedural background of ***Roberts v. Superior Court*** *(1973) 9 Cal. 3d 330, 107 Cal. Rptr. 309, 508 P.2d 309* are discussed in *§ 81.151[3][a]*. In deciding against the defendants' contention that petitioner had waived the psychotherapist-patient privilege by signing a medical records consent form, the Supreme Court first noted that the waiver of an important right must be a voluntary and knowing act done with sufficient awareness of the relevant circumstances and likely consequences. A form consent by a patient-litigant waiving the privilege is to be strictly construed against the insurance company supplying the form so that the waiver encompasses only that which clearly appears on its face (*9 Cal. 3d 330, 343)* .

The consent form in question authorized furnishing of all reports or information regarding (1) the petitioner's "medical history, physical condition, and treatment rendered," and (2) all x-rays or records regarding the latter items. The Court determined that these descriptions did not refer to past psychiatric treatment or mental conditions, respectively. The form also had been signed only six days after the petitioner's accident involving physical injuries, and this would lead such a person to believe that the authorization only applied to injuries resulting from the accident under investigation. Therefore, the Court concluded, the consent form was insufficient to constitute a waiver of petitioner's psychotherapist-patient privilege (*9 Cal. 3d 330, 343)* . The Court further opined that it hesitated to sanction the solicitation of such waivers, for this would substantially defeat the privacy afforded by the privilege and possibly disrupt the confidential relationship historically recognized as so fundamental to the psychotherapist-patient relationship (*9 Cal. 3d 330, 343)* .

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8-81 California Points & Authorities § 81.155

§ 81.155 Opposing Motion to Compel Discovery--Psychotherapist-Patient Privilege [Evid. Code § 1014] Applicable--Exchange of Records Between Psychotherapist and Other Treating Professionals Is Not Waiver

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30), as well as with points and authorities relating to resisting discovery on the grounds of privilege generally (see, e.g., § 81.20), and relating to the psychotherapist-patient privilege generally (see, e.g., § 81.150).*]

EXCHANGE OF A PATIENT'S RECORDS BETWEEN A PSYCHOTHERAPIST AND OTHER MEDICAL TREATMENT PROFESSIONALS DURING THE COURSE OF TREATMENT DOES NOT CONSTITUTE A WAIVER OF THE PSYCHOTHERAPIST-PATIENT PRIVILEGE.

Exchange of Reports Between Healing Professionals Is Not Waiver of Psychotherapist-Patient Privilege. Since disclosure in confidence of a communication protected by the psychotherapist-patient privilege, reasonably necessary to accomplish purposes of the consultation, remains privileged pursuant to *Section 912(d) of the Evidence Code*, the mere exchange of the patient's records between the psychotherapist and other physicians in the normal course of medical treatment does not constitute a waiver of the privilege (*Roberts v. Superior Court (1973) 9 Cal. 3d 330, 341, 107 Cal. Rptr. 309, 508 P.2d 309*).

[2] Comments

[a] Use of Form

These points and authorities in opposition to a motion for an order compelling discovery may be submitted by a party or other person who has resisted providing discovery on the ground that disclosure of the patient's records for purposes of the course of treatment is not a waiver of the privilege. It does not provide a complete memorandum, but is designed to be combined with a general form of memorandum in opposition to compelling discovery, as well as with points and

authoritiesrelating to resisting discovery on the ground of privilege and relating to the psychotherapist-patient privilege generally.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Exchange of Reports Between Healing Professionals Is Not Waiver of Psychotherapist-Patient Privilege

The facts and procedural background of ***Roberts v. Superior Court*** *(1973) 9 Cal. 3d 330, 107 Cal. Rptr. 309, 508 P.2d 309* are discussed in *§ 81.151[3][a]*. The Supreme Court denied the contention that the petitioner had waived the psychotherapist-patient privilege by reason of the exchange of the psychiatrist's reports with the patient's physicians (*9 Cal. 3d 330, 341)* . Defendants did not claim that plaintiff's medical doctors obtained plaintiff's psychiatric records in anything other than the normal course of treating her. The Court noted that under *Evid. Code § 912(d)*, a confidential disclosure of a protected psychotherapist-patient or physician-patient communication reasonably necessary to accomplish the purpose of the professional consultation is not a waiver of the privilege. The Court thus concluded that the psychotherapist's records remained confidential communications while in the hands of the physicians (*9 Cal. 3d 330, 341)* .

[4] Additional Authorities

[a] Exchange of Reports Between Healing Professionals Is Not Waiver of Psychotherapist-Patient Privilege

Petitioner in Huelter v. Superior Court (1978) 87 Cal. App. 3d 544, 151 Cal. Rptr. 138 , as the wife in a dissolution action below, had disclosed ailments through a physician's report that allegedly prevented her from accepting employment. Contrary to the husband's claim that she had opened up the entire issue of her physical and mental fitness, she contended that only the issue of her physical condition was being tendered as relevant for the determination of spousal support. The husband obtained an order directing production of all medical records in possession of her physicians, including records from any source requested, used, or relied on by them. While the order provided that records could not be subpoenaed from the wife's psychiatrist, the wife contended that the order violated her psychotherapist-patient privilege by allowing the husband to obtain the records of her psychiatrist that were in the possession of herinternist. In her declaration in support of a motion for a protective order, the wife had attached the treating physician's report noting disability because of disc injuries. She asserted that the report did not infer incapacity on any psychiatric ground, and that she was not claiming disability on such ground. She did not object to disclosure of her medical records from the internist or a neurologist, but argued that the psychiatric records in possession of the former remained privileged, since they did not involve her physiological condition or relate to her capacity to be employed. She sought a writ of mandate to compel the lower court to set aside its order.

In issuing the writ, the court of appeal determined that the mere exchange of records between psychiatrist and physician did not constitute a waiver of the psychotherapist-patient privilege, relying on the resolution of the similar situation in *Roberts v. Superior Court (1973) 9 Cal. 3d 330, 341, 107 Cal. Rptr. 309, 508 P.2d 309* (discussed in [3][a], *above*). It noted that in this case, as in *Roberts*, there was no showing that the physician had obtained the psychiatrist's records in anything other than the normal course of his medical treatment of the wife. Thus, the latter's records, in the hands of the doctor, remained confidential communications. The court concluded that the lower court's order permitted the husband to obtain indirectly that which he was not entitled to obtain directly (*87 Cal. App. 3d 544, 549)* .

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8-81 California Points & Authorities § 81.156

§ 81.156 Opposing Motion to Compel Discovery--Psychotherapist-Patient Privilege [Evid. Code § 1014] Applicable--Psychotherapist Is Unable to Waive Privilege by Disclosure Without Patient's Consent

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30), as well as with points and authorities relating to resisting discovery on the grounds of privilege generally (see, e.g., § 81.20), and relating to the psychotherapist-patient privilege generally (see, e.g., § 81.150).*]

DISCLOSURE BY A PSYCHOTHERAPIST OF A COMMUNICATION BETWEEN A PATIENT AND THE PSYCHOTHERAPIST, WITHOUT THE PATIENT'S CONSENT, DOES NOT CONSTITUTE A WAIVER OF THE PRIVILEGE PERTAINING TO THE COMMUNICATION.

Psychotherapist Is Unable to Waive Psychotherapist-Patient Privilege Without Patient's Consent. Disclosure of the confidential communication between patient and psychotherapist by the psychotherapist, unless done with the consent of the patient, does not constitute a waiver of the privilege under *Section 912(a) of the Evidence Code* (*Roberts v. Superior Court (1973) 9 Cal. 3d 330, 341, 107 Cal. Rptr. 309, 508 P.2d 309*).

[2] Comments

[a] Use of Form

These points and authorities in opposition to a motion for an order compelling discovery may be submitted by a party or other person who has resisted providing discovery on the ground that a psychotherapist does not waive the psychotherapist-patient privilege by disclosing a communication if doing so without the patient's authorization. It does not provide a complete memorandum, but is designed to be combined with a general form of memorandum in opposition to compelling discovery, as well as with points and authorities relating to resisting discovery on the ground of privilege and relating to the psychotherapist-patient privilege generally.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Psychotherapist Is Unable to Waive Psychotherapist-Patient Privilege Without Patient's Consent

The facts and procedural background of ***Roberts v. Superior Court*** *(1973) 9 Cal. 3d 330, 107 Cal. Rptr. 309, 508 P.2d 309* are discussed in *§ 81.151[3][a]*. Defendants argued that the petitioner had waived the privilege by virtue of an exchange of the psychiatrist's reports with certain physicians, who in turn disclosed the former's reports to defendants as part of their records. In deciding this was not a waiver of the petitioner's privilege, the Supreme Court reiterated that the psychotherapist, under *Evid. Code § 1015*, like the physician, under *Evid. Code § 995*, is under a duty to assert the privilege whenever present when a privileged communication is sought to be disclosed (*9 Cal. 3d 330, 341)* . *Evid. Code § 912(a)* contemplates a waiver of the privilege only when the holder thereof, the patient under *Evid. Code § 1013*, reveals a significant portion of the communication, consents to disclosure, or fails to object when having theopportunity. Thus, the Court concluded, disclosure of the communication by the psychotherapist, unless done with the consent of the patient, will not constitute a waiver of the privilege (*9 Cal. 3d 330, 341)* .

The Court also observed that the petitioner had actively asserted the privilege prior to the disclosure of the psychiatrist's report to defendants by the physicians, so that the contention that such physicians' disclosure waived the privilege must separately be rejected. The privilege had been properly invoked by the psychiatrist's refusal to release his records to defendants' photocopy service as requested in a subpoena duces tecum. There is no formal opportunity to assert the privilege until the party seeking discovery seeks an order to compel production. The argument that a waiver occurred because of the failure of counsel to object to production at the time the subpoena was served on the psychiatrist was thus without merit (*9 Cal. 3d 330, 342)* .

[4] Additional Authorities

[a] Psychotherapist Is Unable to Waive Psychotherapist-Patient Privilege Without Patient's Consent

The facts and procedural background of *Mavroudis v. Superior Court (1980) 102 Cal. App. 3d 594, 162 Cal. Rptr. 724* are discussed in *§ 81.142[3][a]*. In addition to their contention of the inapplicability of the psychotherapist-patient privilege, the petitioners had argued that the privilege had been waived when the health care facility defendants had failed to assert the privilege in response to petitioners' request for production of the patient's records and to the motion to compel production of those records. The court of appeal found such a position lacking in merit because only the holder of a privilege could waive it. Since the holder of the privilege was the patient (or may be, when appropriate, the guardian or personal representative), the therapist had no power to waive it but, in fact, was under a duty to assert it (*102 Cal. App. 3d 594, 602-603)* . In reaching this result, the court cited *Roberts v. Superior Court (1973) 9 Cal. 3d 330, 341, 107 Cal. Rptr. 309, 508 P.2d 309* , discussed in [3][a], *above.*

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8-81 California Points & Authorities § 81.157

§ 81.157 Opposing Motion to Compel Discovery--Psychotherapist-Patient Privilege [Evid. Code § 1014] Applicable--Privilege Includes Communications by Patient's Family

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in opposition to amotion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30), as well as with points and authorities relating to resisting discovery on the grounds of privilege generally (see, e.g., § 81.20), and relating to the psychotherapist-patient privilege generally (see, e.g., § 81.150).*]

THE PSYCHOTHERAPIST-PATIENT PRIVILEGE INCLUDES RELEVANT COMMUNICATIONS TO PSYCHOTHERAPISTS AND PSYCHIATRIC PERSONNEL BY INTIMATE FAMILY MEMBERS OF THE PATIENT.

Communications by Patient's Intimate Family Members to Psychotherapists. Communications by the patient's parents or other intimate members of the patient's family to psychotherapeutic personnel concerning the patient's behavior are within the purview of the psychotherapist-patient privilege of *Section 1014 of the Evidence Code* and are absolutely privileged (*Grosslight v. Superior Court (1977) 72 Cal. App. 3d 502, 505, 508, 140 Cal. Rptr. 278*).

[2] Comments

[a] Use of Form

These points and authorities in opposition to a motion for an order compelling discovery may be submitted by a party or other person who has resisted providing discovery on the ground that communications to psychotherapeutic personnel by intimate family members of the patient are covered under the psychotherapist-patient privilege. It does not provide a complete memorandum, but is designed to be combined with a general form of memorandum in opposition to compelling discovery, as well as with points and authorities relating to resisting discovery on the ground of privilege and relating to the psychotherapist-patient privilege generally.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Communications by Patient's Intimate Family Members to Psychotherapists

Petitioner in ***Grosslight v. Superior Court*** *(1977) 72 Cal. App. 3d 502, 140 Cal. Rptr. 278* was a girl approximately 16 years old who was beingsued for personal injuries. Her parents were joined as defendants on the ground that they knew of her dangerous propensities for violence but failed to properly control her. The parents' demurrer was sustained for the plaintiff's failure to state specific facts about their culpable knowledge, but plaintiff was allowed time to discover the bases for requisite allegations in an amended complaint. Plaintiff then noticed the deposition of the custodian of records at a psychiatric hospital where petitioner had been treated, hoping to find that the parents had given her doctor a history of her condition that would include admissions concerning their alleged culpable knowledge. The trial court ordered an in camera examination to determine whether any such admissions might appear in the records. Petitioner sought a writ of mandate to vacate that order.

In granting the writ, the court of appeal held that the psychotherapist-patient privilege established by *Evid. Code § 1014* includes all relevant communications to psychotherapists and psychiatric personnel by intimate family members of the patient (*72 Cal. App. 3d 502, 508)* . The court was not disturbed by the fact that the parents are not literally the patient, and it did not attempt to determine if they acted as her agent under analogy to an exception affording the attorney-client privilege to a third party acting on behalf of the client, as announced in *People v. Lee (1970) 3 Cal. App. 3d 514, 527, 83 Cal. Rptr. 715* (*72 Cal. App. 3d 502, 506)* . Instead, the court relied to some extent on the reasoning of *In re Terry W. (1976) 59 Cal. App. 3d 745, 130 Cal. Rptr. 913* in which a minor attempted to assert a parent-child privilege to defeat a delinquency adjudication by barring disclosure of his confession of burglary to his mother, the only incriminating evidence in the case. Although the *Terry* court did not extend the privilege to the parents under the circumstances of that case, it did state that there must be times where a communication from child to parent falls within a professional privilege. For example, it concluded that when the communication is to further the child's interest in communication with, or as necessary to transmit information to a psychotherapist, the communication is protected by the pertinent privilege. The *Grosslight* court noted, however, that there was no actual showing of facts in the case before it that the communication, if any, between the parents and hospital personnel was to further their daughter's interest in communication with a psychotherapist or with psychiatric personnel, or that it was necessary for transmission of information to the psychotherapist. Nevertheless, the court concluded that such communication between parent and hospital was for the purpose of furthering the child's interest in communicating with the psychotherapist and facilitating the diagnosis and treatment of the child (*72 Cal. App. 3d 502, 506)* . In response to the contention that the petitioner was old enough not to require her parents' presence in her professional consultations, the court observed that while she was clearly old enough to communicate verbally with her doctors, the nature of her problem was psychiatric. It was entirely possible that her psychiatric illness precludedobjective, accurate, and complete communication by her with hospital personnel without her parents' help (*72 Cal. App. 3d 502, 507)* .

The court acknowledged that inclusion of the parents' disclosures under the daughter's privilege could ultimately benefit the parents in the suit against them for negligent supervision. However, in general, such an inclusion primarily and essentially benefits the patient, not the patient's parents. Such a policy would encourage full disclosure of pertinent matters that otherwise might be withheld by embarrassed parents to the detriment of the patient. The court also relied on the rule of liberal construction in favor of the patient as reiterated in *Roberts v. Superior Court (1973) 9 Cal. 3d 330, 337, 107 Cal. Rptr. 309, 508 P.2d 309* (discussed in *§ 81.151[3][a]*). The court determined that such inclusion of communications by intimate family members will encourage the fullest disclosure by the patient's intimate family; a decision otherwise would cause an atrophy and erosion of the privilege inconsistent with its purposes (*72 Cal. App. 3d 502, 507)* . The court expressly added that it was not determining whether the privilege extends to nonfamily

communications (*72 Cal. App. 3d 502, 508 n.5*).

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8-81 California Points & Authorities § 81.158

§ 81.158 Opposing Motion to Compel Discovery--Psychotherapist-Patient Privilege [Evid. Code § 1014] Applicable--Disclosure of Fact of Psychiatric Treatment Is Privileged If Disclosure Would Divulge Nature of Condition for Which Treatment Sought

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30), as well as with points and authorities relating to resisting discovery on the grounds of privilege generally (see, e.g., § 81.20), and relating to the psychotherapist-patient privilege generally (see, e.g., § 81.150).*]

THE FACT OF HAVING RECEIVED PSYCHIATRIC TREATMENT IS PROTECTED BY THE PSYCHOTHERAPIST-PATIENT PRIVILEGE BECAUSE DISCLOSURE WOULD REVEAL THE NATURE OF CONDITION FOR WHICH TREATMENT WAS SOUGHT.

Fact of Psychiatric Treatment Is Privileged If Disclosure Would Divulge Condition. The fact of having received psychiatrictreatment is privileged from disclosure if its disclosure would simultaneously divulge the nature of the condition for which the patient sought treatment (*City of Alhambra v. Superior Court (1980) 110 Cal. App. 3d 513, 518-519, 168 Cal. Rptr. 49*).

[2] Comments

[a] Use of Form

These points and authorities opposing a motion for an order compelling discovery may be submitted by a party or other person who has resisted providing discovery on the ground that disclosure of the fact of having received psychiatric treatment would also disclose the nature of the condition for which treatment was sought. It does not provide a complete memorandum, but it is designed to be combined with a general form of memorandum in opposition to compelling discovery as well as with points and authorities relating to resisting discovery on the ground of privilege and relating to

the psychotherapist-patient privilege generally.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Fact of Psychiatric Treatment Is Privileged If Disclosure Would Divulge Condition

City of Alhambra v. Superior Court *(1980) 110 Cal. App. 3d 513, 168 Cal. Rptr. 49* was an action for assault and battery, intentional infliction of mental distress, false imprisonment, and violation of the federal Civil Rights Act brought against individual police officers and the city for which they worked. Plaintiffs propounded certain interrogatories, including questions directed to one of the police officers concerning whether he had received any psychiatric treatment, and, if so, the name and address of each institution, hospital, or person providing the treatment, the dates of hospitalization, and the nature of each condition for which treatment or hospitalization was received. Being dissatisfied with the answers received, plaintiffs moved for and obtained an order compelling further answers. Defendants petitioned for a writ of mandate to vacate the order compelling further answers to the interrogatories in question.

The court of appeal ordered that a peremptory writ of mandate be issued directing the trial court to vacate the portion of its order compelling further answers to the interrogatories described above, and to enter a new anddifferent order denying the motion concerning them. The court held that the interrogatory that sought the nature of the condition for which the police officer received treatment clearly fell within the psychotherapist-patient privilege. The other interrogatories in question did not seek the contents of any communications that passed between the police officer and a psychotherapist, and thus technically might be regarded as outside the privilege. However, the court held that when disclosure of the fact of consultation also of necessity discloses the nature of the condition for which the patient sought treatment, then the fact of consultation also falls within the psychotherapist-patient privilege. The court relied on *Marcus v. Superior Court (1971) 18 Cal. App. 3d 22, 25, 95 Cal. Rptr. 545* (discussed in *§ 81.121[3][a]*). The court held that if the police officer was compelled to divulge the fact of psychiatric treatment, he would simultaneously divulge more about the nature of the condition for which he sought treatment--to wit, an emotional or mental problem--than *Evid. Code § 1014* required him to disclose (*110 Cal. App. 3d 513, 518-519)* . The court also held that the exception to the physician-patient privilege contained in *Evid. Code § 999* (no privilege in regard to communication relevant to issue concerning patient's condition in proceeding to recover damages on account of patient's conduct if good cause shown for disclosure) is not applicable to the psychotherapist-patient privilege (*110 Cal. App. 3d 513, 519)* . Further, the court noted that the police officer may have divulged information to the other defendants concerning any psychiatric treatment, and that he might have waived his psychotherapist-patient privilege. Plaintiffs should have the opportunity to solicit information from the other defendants about their knowledge of the police officer's psychiatric history (*110 Cal. App. 3d 513, 519-520)* .

[4] Additional Authorities

[a] Fact of Psychiatric Treatment Is Privileged If Disclosure Would Divulge Condition

The facts and procedural background of *Pollock v. Superior Court (2001) 93 Cal. App. 4th 817, 113 Cal. Rptr. 2d 453* are discussed in *§ 81.159[4][a]*. On termination of his psychiatric disability benefits, petitioner insurance claimant served special interrogatories on real party in interest, his insurance company, including one in which he demanded the name and address of each insured whose psychiatric disability claim had been denied during a specified timeframe. The court of appeal held that the names of the insurance company's claimants were not discoverable because the disclosure of the names would reveal not only their identity but also the nature of their psychiatric disability (*93 Cal. App. 4th 817, 821)* .

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8-81 California Points & Authorities § 81.159

§ 81.159 Opposing Motion to Compel Discovery--Psychotherapist-Patient Privilege [Evid. Code § 1014] Applicable--Privilege Includes Names, Addresses, and Telephone Numbers of Psychotherapist's Patients

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30), as well as with points and authorities relating to resisting discovery on the grounds of privilege generally (see, e.g., § 81.20), and relating to the psychotherapist-patient privilege generally (see, e.g., § 81.150).*]

THE PSYCHOTHERAPIST-PATIENT PRIVILEGE INCLUDES THE NAMES, ADDRESSES, AND TELEPHONE NUMBERS OF THE PSYCHOTHERAPIST'S PATIENTS.

Identities of Psychotherapist's Patients Are Privileged. The names, addresses, and telephone numbers of a psychotherapist's patients are protected from disclosure as confidential communications under the psychotherapist-patient privilege (*Smith v. Superior Court (1981) 118 Cal. App. 3d 136, 141, 173 Cal. Rptr. 145*).

[2] Comments

[a] Use of Form

These points and authorities opposing a motion for an order compelling discovery may be submitted by a party or other person who has resisted providing discovery on the ground that the names, addresses, and telephone numbers of patients are protected from disclosure by the psychotherapist-patient privilege. It does not provide a complete memorandum, but it is designed to be combined with a general form of memorandum in opposition to compelling discovery as well as with points and authorities relating to resisting discovery on the ground of privilege and relating to the psychotherapist-patient privilege generally.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Identities of Psychotherapist's Patients Are Privileged

Smith v. Superior Court *(1981) 118 Cal. App. 3d 136, 173 Cal. Rptr. 145* arose out of a marital dissolution action brought by a wife against her husband, a licensed psychologist. The wife served an interrogatory on the husband seeking to obtain the names, addresses, and telephone numbers of patients for a certain period, and amount of money received from those patients. The husband objected to the interrogatory, and the wife filed a motion to compel discovery. The trial court ordered the production of the information, noting that the husband's offer to furnish copies of bank deposits and tax returns was inadequate when he acknowledged he did not bill patients and had no other financial records. The husband then petitioned for a writ of mandate or prohibition.

The court of appeal directed that a peremptory writ of prohibition be issued restraining the enforcement of the discovery order that required disclosure of the names, addresses, and telephone numbers of the patients. Relying on *City of Alhambra v. Superior Court (1980) 110 Cal. App. 3d 513, 168 Cal. Rptr. 49* (discussed in *§ 81.158[3][a]*), which held that the fact of having received psychiatric treatment is privileged, the court held that the names, addresses, and telephone numbers were protected as confidential communications under *Evid. Code § 1012*. The patient's purpose would be inhibited and frustrated by compelling disclosure of his or her identity without consent, and public knowledge of such treatment reveals the existence and, in a general sense, the nature of the malady (*118 Cal. App. 3d 136, 141-142)* . The court noted that the husband had to assert his clients' privilege under *Evid. Code § 1015* to prevent disclosure of the privileged communications (*118 Cal. App. 3d 136, 139)* . The court observed, however, that the wife could still examine her husband's receptionist or professional associates regarding the number of patients he ordinarily counseled and his customary fees and gross receipts, and could attempt to show any inconsistencies between her husband's representations regarding his income and past living expenses (*118 Cal. App. 3d 136, 142)* .

[4] Additional Authorities

[a] Identities of Psychotherapist's Patients Are Privileged

In *Pollock v. Superior Court (2001) 93 Cal. App. 4th 817, 113 Cal. Rptr. 2d 453* , petitioner insurance claimant, sued real party in interest, his insurance company, for breach of contract and bad faith termination of psychiatric disability benefits. Petitioner moved to compel discovery of the names and addresses of other claimants whose psychiatric disability benefits had been terminated, in order to contact them about the manner,method, and procedures used in the adjustment of their claims. The superior court denied the motion, noting that petitioner's proposed letter would confront the claimants with the fact that their psychiatric condition had been revealed. The claimant petitioned for writ of mandate. He relied on *Colonial Life & Accident Ins. Co. v. Superior Court (1982) 31 Cal. 3d 785, 183 Cal. Rptr. 810, 647 P.2d 86* (discussed in *§ 80.22[3][a]*), in which the Supreme Court held that in an action alleging an insurer's bad faith refusal to pay benefits under an accident policy, the plaintiff was entitled to discover the names and addresses of other claimants whose accident claims had been adjusted by the person who had adjusted the plaintiff's claim (*93 Cal. App. 4th 817, 821)* .

The court of appeal found *Colonial Life & Accident Ins. Co.* inapplicable to this action alleging an insurer's bad faith termination of benefits under a disability (as opposed to an accident) policy. The court concluded that the plaintiff was not entitled to discover the names and addresses of other claimants whose psychiatric disability claims (as opposed to accident claims) had been denied during a four-year period. "[W]here, as here, the disclosure of a claimant's identity necessarily discloses the claimant's psychiatric condition, the claimant's psychotherapist-patient privilege trumps the plaintiff's right to use this particular form of discovery" (*93 Cal. App. 4th 817, 821)* . The court noted, however, that its ruling did not preclude petitioner from suggesting an alternative approach, for example, a letter from the insurer to its

own insured, stating that no information about the insured had been disclosed, by that he or she had the option of contacting petitioner's lawyer (*93 Cal. App. 4th 817, 822)* .

In *Scull v. Superior Court (1988) 206 Cal. App. 3d 784, 254 Cal. Rptr. 24* , a psychiatrist was charged with sexually molesting one of his teen-aged patients. The district attorney moved to have the names, addresses, ages, and telephone numbers of defendant's female patients for the past 10 years released in order to contact them and determine whether any of them had been sexually abused or molested during treatment sessions. The trial court granted the motion, requiring that a psychotherapist make the initial contact to minimize the intrusion into the patients' privacy. The court of appeal issued a writ of mandate ordering the trial court to set aside its order releasing the information. It said that the mere disclosure of the patient's identity violates the psychotherapist-patient privilege. It explained that the harm to the patient's interest of privacy is exacerbated by the stigma that society often attaches to mental illness (*206 Cal. App. 3d 784, 789)* . The court found that the prosecution's claim, that communication with the former patients would increase the likelihood that defendant would have to answer for his behavior and thereby avert harm to his other patients, was insufficient to overcome the patients' right to confidentiality because the evidence sought was neither crucial to the case, nor necessary to protect the public from harm. It distinguished those cases involvingdiscovery concerning dangerous patients, saying that the policy requiring a doctor to warn of the proclivities of dangerous patients in order to prevent harm to others is not implicated when the persons sought to be identified are not sources of danger to the public (*206 Cal. App. 3d 784, 792-793)* .

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8-81 California Points & Authorities § 81.160

§ 81.160 Opposing Motion to Compel Discovery--Psychotherapist-Patient Privilege [Evid. Code § 1014] Applicable--Information Sought Is Not Within Court-Appointed Psychotherapist Exception [Evid. Code § 1017]

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30), as well as with points and authorities relating to resisting discovery on the grounds of privilege generally (see, e.g., § 81.20), and relating to the psychotherapist-patient privilege generally (see, e.g., § 81.150).*]

DISCLOSURE MAY BE COMPELLED WITH REGARD TO COMMUNICATIONS MADE TO A PSYCHOTHERAPIST APPOINTED BY THE COURT ONLY WHEN THE PURPOSE OF THAT APPOINTMENT IS TO GATHER INFORMATION CONCERNING THE PATIENT'S MENTAL OR EMOTIONAL CONDITION, BUT NOT WHEN THE APPOINTMENT IS FOR A DIFFERENT PURPOSE, SUCH AS PROVIDING THERAPEUTIC TREATMENT.

Limitation on Court-Appointed Psychotherapist Exception. The exception to the psychotherapist-patient privilege that exists when the psychotherapist was appointed by the court, as provided by *Evidence Code section 1017*, only exists when the appointment is for purposes of gathering information, such as determining the patient's mental or emotional condition for use by the patient or the court, or both. The exception does not apply when the appointment is for a different purpose, such as to provide a parent with therapeutic treatment (*see In re Eduardo A. (1989) 261 Cal. Rptr. 68*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion for an order compelling discovery by a party or other person who is resisting discovery on the ground that the material sought to be discovered is part of a

communication protected by the psychotherapist-patient privilege. The ground for opposing discovery is that, although the psychotherapist was appointed by the court, the privilege nevertheless applies because that appointment was for a purpose other than providing information to the court or the patient.

This form does not provide a complete memorandum, but is designed to be combined with a general form of memorandum in opposition to compelling discovery as well as with points and authorities relating to resisting discovery on the ground of privilege and relating to the psychotherapist-patient privilege generally.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Limitation on Court-Appointed Psychotherapist Exception

In ***In re Eduardo A.*** *(1989) 261 Cal. Rptr. 68* , five children were declared dependent children of the juvenile court because of sexual molestation by their father. The children were left in their mother's custody and their father was ordered to have no contact with them. After the mother allowed contact between the children and their father, the County Department of Children's Services (DCS) filed petitions to remove the children from her custody. When the mother's therapist was called as a witness at the adjudication hearing, the trial court sustained the mother's objection to testimony concerning confidential communications made during therapy. The petitions were dismissed and DCS appealed.

The court of appeal reversed and remanded, but held that the trial court was correct on its ruling concerning testimony by the therapist. The juvenile court had referred the mother to a therapist at a mental health center. DCS argued that the therapist, a psychiatric social worker, was appointed by the court to work with the mother, and that any patient-psychotherapist communications were thus subject to the exception of *Evid. Code § 1017(a).* The court did not consider a juvenile court referralfor counseling to be the equivalent of a court-ordered examination of a patient by a psychotherapist within the meaning of *Evid. Code § 1017(a)* (*, 209 Cal. App. 3d 1038, 1041)* . The court reviewed the broad powers given to juvenile courts by the Welfare and Institutions Code, and concluded that a juvenile court's referral of a parent for counseling after finding that children had been molested was consistent with those powers and goals, the purpose of that counseling being to assist the parent in understanding the problem and preventing its recurrence (*, 209 Cal. App. 3d 1038, 1041-1042)* . It distinguished such a referral from a court-ordered psychiatric examination, saying that such an examination is an information-gathering tool, rather than a treatment tool. Its purpose is to determine the patient's mental or emotional condition for the information of the patient or the court, or both. The court-ordered psychiatrist exception is based on this information-gathering purpose. The court concluded that there was no basis for broadening the exception to the psychotherapist-patient privilege to encompass the very different situation of court-ordered counseling (*, 209 Cal. App. 3d 1038, 1042)* .

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PART II. FORMS
D. Psychotherapist-Patient Privilege

8-81 California Points & Authorities §§ 81.161-81.179

[Reserved]

§§ 81.161[Reserved]

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E. Tax Returns

8-81 California Points & Authorities § 81.180

§ 81.180 Supporting Motion to Compel Discovery--Refuting Claim of Privilege Not to Disclose Tax Returns

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in support of a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11), as well as with points and authorities generally refuting a claim of privilege (see, e.g., § 81.10).*]

THE PRIVILEGE NOT TO DISCLOSE TAX RETURNS DOES NOT APPLY _____ [WHEN IT HAS BEEN WAIVED *or* IN AN ACTION BETWEEN FORMER SPOUSES FOR ENFORCEMENT OF CHILD SUPPORT OBLIGATIONS].

[*EITHER*]

Waiver by Contract. When a party is obligated by contract to furnish the opposing party with necessary information, some of which may be contained in tax returns, then there has been a waiver of the privilege not to disclose tax returns, in the sense of an intentional relinquishment of the right of nondisclosure (*Crest Catering Co. v. Superior Court (1965) 62 Cal. 2d 274, 278, 42 Cal. Rptr. 110, 398 P.2d 150*).

[*OR*]

Waiver by Litigation. The taxpayer privilege is waived if the taxpayer brings litigation that puts the existence or contents of his or her tax returns at issue (*Wilson v. Superior Court (1976) 63 Cal. App. 3d 825, 829, 830, 134 Cal. Rptr. 130*).

[*OR*]

Proceedings Involving Public Policy Greater Than That of Confidentiality of Tax Returns Involved--Proceedings Involving Child, Family, or Spousal Support. In proceedings involving child, family, or spousal support, no party may refuse to submit copies of his or her federal or state income tax returns to the court, whether individual or joint. The tax returns may be examined by the other party and are discoverable by the other party (*Fam. Code § 3552(a)*,(b)). [Thus, a spouse is entitled to discovery of the corporate tax returns of a close corporation in which the other spouse has an interest, since such returns are related to the parties' interest in determining the value of the corporation and in ascertaining their financial status. The spouse is also entitled to discovery of the corporation's quarterly payroll tax returns regarding the other spouse (*Schnabel v. Superior Court (1993) 5 Cal. 4th 704, 722-723, 21 Cal. Rptr. 2d 200, 854 P.2d 1117*)].

[2] Comments

[a] Use of Form

This form may be used in support of a motion for an order compelling discovery, if a party or other person has resisted providing discovery on the ground that the material sought comes within the privilege not to disclose tax returns. It does not provide a complete memorandum, but is designed to be combined with a general form of memorandum in support of a motion compelling discovery.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[c] Related Uses

This form may be combined with a general form of memorandum in opposition to a motion for a protective order [*see, e.g., Ch. 83, Discovery: Depositions, § 83.100* et seq.] when the protective order is being sought on the ground that the material is privileged.

[3] Discussion of Authorities

[a] Waiver by Contract

Crest Catering Co. v. Superior Court *(1965) 62 Cal. 2d 274, 42 Cal. Rptr. 110, 398 P.2d 150* arose out of an action to compel Crest Catering Company to pay contributions allegedly owed to a retirement fund under the provisions of a contract with a labor union. During discovery proceedings, the administrator of the fund sought production of Crest's employment tax returns, which the court granted. Crest then sought a writ of prohibition, claiming a privilege not to disclose the tax returns.

The Supreme Court declined to issue the writ, holding that there is a privilege not to disclose employment tax returns, but that Crest had waivedits rights to assert the privilege (*62 Cal. 2d 274, 277)* . The waiver was an intentional relinquishment of the right of nondisclosure that arose out of Crest's contract with the union, wherein Crest agreed to promptly furnish all necessary information on demand to the trustees or the plan administrator (*62 Cal. 2d 274, 278)* .

[b] Waiver by Litigation

Wilson v. Superior Court *(1976) 63 Cal. App. 3d 825, 134 Cal. Rptr. 130* arose out of an action for malpractice filed against two tax accountants for their alleged negligence in advising plaintiff on the tax consequences of a sale of real property, reported on plaintiff's 1972 tax return. Defendants moved for an order for production and inspection of

plaintiff's federal and state income tax returns for the years 1965 through 1973, and the trial court denied their motion. Defendants then sought a writ of mandate from the court of appeal.

The court granted the writ, noting that while under *Webb v. Standard Oil Co. (1957) 49 Cal. 2d 509, 319 P.2d 621* , former Rev. & Tax. Code § 19282 (*now see Rev. & Tax. Code § 19542*) requires that state and (by analogy) federal income tax returns are privileged, plaintiff nevertheless waived this privilege by putting her tax returns at issue (*63 Cal. App. 3d 825, 830)* . By analogy to the patient-litigant exception to the physician-patient privilege, the court held that by instituting litigation, plaintiff had placed the existence and contents of her tax returns in issue (*63 Cal. App. 3d 825, 829, 830)* . The relevance of her pre-1971 and post-1972 returns lay in the fact that the contents of such returns were relevant to the issues of mitigation of damages, and to other possible defenses that might have been available to defendants (*63 Cal. App. 3d 825, 830, 831)* .

[c] Proceedings Involving Child, Family, or Spousal Support

If a state or federal income tax return is produced pursuant to *Fam. Code § 3552*, the party submitting the return may be examined by the other party as to its contents [*Fam. Code § 3552(b)*]. If the judge finds that it is relevant to the case to retain the return, it will be sealed and maintained as a confidential court record [*Fam. Code § 3552(c)*]. If the court finds that the return is not relevant to the case's disposition, all copies of it must be returned to the party who submitted it [*Fam. Code § 3552(c)*].

In ***Schnabel v. Superior Court*** *(1993) 5 Cal. 4th 704, 21 Cal. Rptr. 2d 200, 854 P.2d 1117* , the Supreme Court held that in a marital dissolution proceeding, a spouse is entitled to discovery of the tax records involving the other spouse, since the Legislature has established a strong policy of full disclosure in dissolution proceedings. Thus, for example, a spouse is entitled to discovery of the corporate tax returns of a close corporation inwhich the other spouse has an interest, since such returns are related to the parties' interest in determining the value of the corporation and in ascertaining their financial status. The spouse is also entitled to discovery of the corporation's quarterly payroll tax returns regarding the other spouse, but is not entitled to discovery of the corporation's quarterly payroll tax returns identifying third persons absent a specific showing of relevance or need for those returns (*5 Cal. 4th 704, 722-723)* .

[4] Additional Authorities

[a] Proceedings Involving Public Policy Greater Than That of Confidentiality of Tax Returns Involved--Proceedings Involving Child, Family, or Spousal Support

In *Weingarten v. Superior Court (2002) 102 Cal. App. 4th 268, 125 Cal. Rptr. 2d 371* **,** defendant in a civil suit filed a petition for writ of mandate, after the trial court found she committed fraud and malice and ordered her to produce her tax returns to permit plaintiffs to prepare for the punitive damages phase. Defendant contended that the order violated her privilege to maintain confidentiality of her tax returns. The court of appeal agreed with defendant that finding a defendant liable for punitive damages is insufficient, by itself, to establish the tax return privilege is inapplicable. However, the court of appeal concluded that privilege was inapplicable in this case because the record showed defendant engaged in conduct precluding plaintiffs from obtaining relevant, nonprivileged financial information necessary to support plaintiffs' punitive damages claim, and there was no less intrusive alternative for plaintiffs to obtain the information (*102 Cal. App. 4th 268, 271)* . The court modified the order to include a provision requiring that defendant's husband receive notice and an opportunity to be heard before the court could compel disclosure of joint tax returns (*102 Cal. App. 4th 268, 271)* .

The court of appeal explained that the statutory tax return privilege is not absolute. The privilege will not be upheld when "(1) the circumstances indicate an intentional waiver of the privilege; (2) the gravamen of the lawsuit is inconsistent with the privilege; or (3) a public policy greater than that of the confidentiality of tax returns is involved" (quoting *Schnabel v. Superior Court*, discussed *above*) (*102 Cal. App. 4th 268, 274)* . This last exception is narrow and

applies only "when warranted by a legislatively declared public policy" (*102 Cal. App. 4th 268, 274)* . Although the public policy favoring the confidentiality of tax returns does not give way merely because the information is relevant to prove punitive damages, the balance changes when the defendant, without a valid basis, refuses to comply with legitimate discovery requests that seek nonprivileged financial information. In this case, defendant's conduct not only interfered with plaintiffs' abilityto prove their case, but it also "undermined the discovery process and the judicial system's ability to ensure an ordered process designed to uncover the truth." These policies, when considered together with the importance of obtaining financial condition evidence to establish a proper punitive damages amount, outweighed defendant's right to claim the tax return privilege as a basis to refuse to produce highly relevant evidence of her financial condition (*102 Cal. App. 4th 268, 275)* .

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8-81 California Points & Authorities §§ 81.181-81.189

[Reserved]

§§ 81.181[Reserved]

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8-81 California Points & Authorities § 81.190

§ 81.190 Opposing Motion to Compel Discovery--Privilege Not to Disclose Tax Returns

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30), as well as with points and authorities relating to resisting discovery on the grounds of privilege generally (see, e.g., § 81.20).*]

TAX RETURNS AND THE INFORMATION CONTAINED IN THEM ARE PRIVILEGED, AND THUS MAY NOT BE DISCOVERED.

[*EITHER*]

A. State and Federal Income Tax Returns. State and federal income tax returns and the information contained in them are privileged from disclosure (*Webb v. Standard Oil Co. (1957) 49 Cal. 2d 509, 513, 514, 319 P.2d 621* ; *see Sav-On Drugs, Inc. v. Superior Court (1975) 15 Cal. 3d 1, 7, 123 Cal. Rptr. 283, 538 P.2d 739*).

[*AND/OR*]

B. Corporate Tax Returns. Corporate tax returns and the information contained in them are privileged from disclosure (*Aday v. Superior Court (1961) 55 Cal. 2d 789, 796, 13 Cal. Rptr. 415, 362 P.2d 47* ; *see Sav-On Drugs, Inc. v. Superior Court (1975) 15 Cal. 3d 1, 7, 123 Cal. Rptr. 283, 538 P.2d 739*).

[*AND/OR*]

C. Partnership Tax Returns. Income tax returns of a partnership and the information contained in them are privileged from disclosure (*Rifkind v. Superior Court (1981) 123 Cal. App. 3d 1045, 1048-1049, 177 Cal. Rptr. 82* , disapproved on other grounds in *Schnabel v. Superior Court (1993) 5 Cal. 4th 704, 723, 21 Cal. Rptr. 2d 200, 854 P.2d 1117*).

[*AND/OR*]

D. Employment Tax Returns. Employment tax returns and the information contained in them are privileged from disclosure (*Crest Catering Co. v. Superior Court (1965) 62 Cal. 2d 274, 277, 42 Cal. Rptr. 110, 398 P.2d 150* ; *see Schnabel v. Superior Court (1993) 5 Cal. 4th 704, 722-723, 21 Cal. Rptr. 2d 200, 854 P.2d 1117* ; *Sav-On Drugs, Inc. v. Superior Court (1975) 15 Cal. 3d 1, 7, 123 Cal. Rptr. 283, 538 P.2d 739*).

[*AND/OR*]

E. Estate Tax Returns. Estate tax returns and the information contained in them are privileged from disclosure (*Deary v. Superior Court (2001) 87 Cal. App. 4th 1072, 1077-1078, 105 Cal. Rptr. 2d 132*).

[*AND/OR*]

F. W-2 Forms. W-2 forms are an integral part of the income tax return, and qualify as information contained in the returns that is privileged from disclosure (*Brown v. Superior Court (1977) 71 Cal. App. 3d 141, 143, 144, 139 Cal. Rptr. 327*).

[*AND/OR*]

G. Sales Tax Returns. Sales tax returns and the information contained in them are privileged from disclosure (*Sav-On Drugs, Inc. v. Superior Court (1975) 15 Cal. 3d 1, 6, 123 Cal. Rptr. 283, 538 P.2d 739*).

[*CONTINUE*]

[*Optional*] **H. Holder of the Privilege.** The privilege not to disclose tax returns is held by each party to a joint return, and may not be waived unless there has been a waiver by both parties (*Coate v. Superior Court (1978) 81 Cal. App. 3d 113, 115, 144 Cal. Rptr. 350*).

[*Optional*] **I. New Spouse May Assert Privilege in Action for Modification of Child Support.** Although the privilege not to disclose tax returns does not apply in an action between former spouses for enforcement of child support obligations, the new spouse of a party to an action for modification of child support may assert the privilege (*In re Marriage of Brown (1979) 99 Cal. App. 3d 702, 709, 160 Cal. Rptr. 524*).

[2] Comments

[a] Use of Form

This form in opposition to a motion for an order compelling discovery may be submitted by a party or other person who has resisted discovery on the ground that the material sought comes within the general privilege not to disclose tax returns or the information contained therein. Exceptions to the general rule of privilege are discussed in *§ 81.180*.

This form does not provide a complete memorandum, but is designed to be combined with a general form of memorandum in opposition to a motion compelling discovery.

Counsel should note that the case authority for *Optional Paragraph H, In re Marriage of Brown (1979) 99 Cal. App. 3d 702, 709, 160 Cal. Rptr. 524* was decided prior to the enactment of former Civ. Code § 4700.7 (*now see Fam. Code § 3552*). *Fam. Code § 3552*, discussed in *§ 81.180*, provides that no party to a proceeding for child, family, or spousal support may refuse to submit his or her tax returns for discovery. It would thus appear that the tax return of a new spouse would be discoverable in the event it was a joint return with a party to a support action, since the party would not be able to assert the privilege against disclosure.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[c] Related Uses

This form may be combined with a general form of memorandum in support of a motion for a protective order [*see, e.g., Ch. 83, Discovery: Depositions, § 83.80* et seq.] when the protective order is being sought on the ground that the material is privileged.

[3] Discussion of Authorities

[a] State and Federal Income Tax Returns

Webb v. Standard Oil Co. *(1957) 49 Cal. 2d 509, 319 P.2d 621* involved an action for property damage. Plaintiffs sued Standard Oil when their house was destroyed by a fire that was allegedly caused by defendant's negligent installation of propane gas cylinders. There was a court trial and a verdict of $30,000 was entered in favor of plaintiffs. Defendant appealed, claiming that the trial court should have ordered plaintiffs to producecopies of their federal and state income tax returns, since the contents of these returns might have been useful in impeaching plaintiffs' testimony concerning the amount of damages.

The Supreme Court affirmed, holding that former Rev. & Tax. Code § 19282 (*now see Rev. & Tax. Code § 19542*), which makes it a misdemeanor for an agent or employee of the Franchise Tax Board to disclose information contained in any return, manifested a legislative intent to preserve the secrecy of state tax returns (*49 Cal. 2d 509, 512)* . Thus, the effect of the statutory prohibition is to render the returns privileged (*49 Cal. 2d 509, 513)* . Moreover, federal tax returns are to be privileged as well as state returns, since they contain substantially the same information as state returns, and hence disclosure of federal returns would defeat the purpose of former Rev. & Tax. Code § 19282 (*49 Cal. 2d 509, 513, 514)* .

Criticism of the *Webb* case has been made in a Note, *The Case for Abrogation of Taxpayer Privilege in California, 29 Hastings L.J. 775 (1978)*. The author noted that the creation of the privilege from statutes in the Revenue and Taxation Code flies in the face of California precedent [*see, e.g., Valley Bank of Nevada v. Superior Court (1975) 15 Cal. 3d 652, 656, 125 Cal. Rptr. 553, 542 P.2d 977]* that privileges contained in the Evidence Code are exclusive, and that courts are not free to create new privileges as a matter of judicial policy (*29 Hastings L.J. at p. 782*). Moreover, the vast majority of states that have clearly faced this issue have held that there should be no taxpayer privilege for private litigants (*29 Hastings L.J. at p. 784*). Finally, the author contends that *Webb* misinterpreted the Revenue and Taxation statute in question, which was really only intended to prohibit disclosure by government officials (*29 Hastings L.J. at p. 780*), and that the policy of encouraging complete and truthful tax reporting might be better fostered by requiring disclosure, than by protection from disclosure (*29 Hastings L.J. at p. 783*).

Sav-On Drugs, Inc. v. Superior Court *(1975) 15 Cal. 3d 1, 123 Cal. Rptr. 283, 538 P.2d 739* arose out of a class action against six defendant retailers for sales tax violations in connection with trading stamps. The named plaintiff served interrogatories on defendants, three of which inquired into the location and contents of defendants' sales tax returns. One of the defendants objected to answering these questions on the basis of privilege, but the trial court granted plaintiff's motion to compel answers. Defendant then petitioned for a writ of prohibition.

The Supreme Court granted the writ, holding that *Rev. & Tax. Code § 7056* manifests a clear legislative intent to keep the information contained in sales tax returns confidential. In so holding, the Court relied on its previous decision in *Webb* (discussed *above*) that state and federal income tax returns are privileged from disclosure (*15 Cal. 3d 1, 6)* . The Court went on to hold that the privilege of nondisclosure protects the information contained in the returns as well as the returns themselves,since to hold otherwise would render meaningless the privilege recognized in *Webb* and its progeny (*15 Cal. 3d 1, 7)* .

[b] Corporate Tax Returns

Aday v. Superior Court *(1961) 55 Cal. 2d 789, 13 Cal. Rptr. 415, 362 P.2d 47* involved a criminal investigation for obscenity. Among some items seized from petitioners by police officers during the course of the investigation were federal and state corporate tax returns. Petitioners sought a writ of mandate to compel the trial court to return the property that was taken, including the tax returns. Petitioners contended that the tax returns were privileged and therefore exempt from seizure.

The Supreme Court granted the writ, holding that insofar as the tax returns were concerned, the portions of the Revenue and Taxation Code that deal with confidentiality of corporate tax returns [former Rev. & Tax. Code § 26451 et seq.] (*now see Rev. & Tax. Code § 19542 et seq.*) are substantially identical to those relating to personal income tax returns (*55 Cal. 2d 789, 796)* . The Court went on to hold that since the sole exception to nondisclosure is for criminal prosecution with respect to *tax* violations, the petitioners were correct in their contention that the search warrant was invalid as far as the corporate tax returns were concerned, since the returns were privileged, and therefore exempt from seizure (*55 Cal. 2d 789, 796, 797)* .

In *Hicks v. Miranda (1975) 422 U.S. 332, 346 fn. 15, 95 S. Ct. 2281, 45 L. Ed. 2d 223* , the Supreme Court questioned *Aday, above,* as to the continuing validity of the procedure for seizing the records.

The facts and procedural background of ***Sav-On Drugs, Inc. v. Superior Court*** *(1975) 15 Cal. 3d 1, 123 Cal. Rptr. 283, 538 P.2d 739* are set out in [a], *above.* In *Sav-On,* the Supreme Court held that the privilege recognized in *Aday* would be meaningless unless it protects the information contained in the returns as well as the returns themselves (*15 Cal. 3d 1, 7)* .

[c] Partnership Tax Returns

In ***Rifkind v. Superior Court*** *(1981) 123 Cal. App. 3d 1045, 177 Cal. Rptr. 82* , disapproved on other grounds in *Schnabel v. Superior Court (1993) 5 Cal. 4th 704, 723, 21 Cal. Rptr. 2d 200, 854 P.2d 1117* , a marriage dissolution proceeding, the wife sought to compel discovery of the state and federal income tax returns of three investment partnerships of which her husband was a member. After the trial court ordered production of the documents for inspection and copying, the husband petitioned for a writ of mandate to review the order.

The court of appeal ordered that a writ of mandate be issued directing the trial court to vacate its order and to strike certain paragraphs from it.The court stated that it is the law of California that the disclosure of the contents of an income tax return may not be coerced for the benefit of a private litigant. This rule is an immunity from coerced disclosure, although the taxpayer is free to disseminate copies of his or her tax return, or disclose its contents, as far as he or she sees fit to do so. The immunity applies even though the individual from whom discovery is sought holds the documents

for the reporting entity. Additionally, the wife is not entitled to coerce disclosure of the tax returns on the ground that she is married to the man who has possession of the returns. Although an interest in a partnership may be community property, the spouse of a partner has no community interest in the partnership property (*123 Cal. App. 3d 1045, 1048-1049)* .

[d] Employment Tax Returns

The facts and procedural background of ***Crest Catering Co. v. Superior Court*** *(1965) 62 Cal. 2d 274, 42 Cal. Rptr. 110, 398 P.2d 150* are discussed in *§ 81.180[3][a]*. The *Crest* court held that the privilege not to disclose tax returns applies to information submitted to the Department of Employment in employment tax returns (*62 Cal. 2d 274, 277)* .

In ***Schnabel v. Superior Court*** *(1993) 5 Cal. 4th 704, 21 Cal. Rptr. 2d 200, 854 P.2d 1117* , the Supreme Court held that in a marital dissolution proceeding, a spouse is entitled to discovery of the tax records involving the other spouse, since the Legislature has established a strong policy of full disclosure in dissolution proceedings. Thus, for example, a spouse is entitled to discovery of the corporate tax returns of a close corporation in which the other spouse has an interest, and to discovery of the corporation's quarterly payroll tax returns regarding the other spouse. Nevertheless, the spouse is not entitled to discovery of the corporation's quarterly payroll tax returns identifying third persons absent a specific showing of relevance or need for those returns (*5 Cal. 4th 704, 722-723)* .

The facts and procedural background of ***Sav-On Drugs, Inc. v. Superior Court*** *(1975) 15 Cal. 3d 1, 123 Cal. Rptr. 283, 538 P.2d 739* are discussed in [a], *above.* In *Sav-On,* the Supreme Court held that the privilege recognized in *Crest Catering Co., above,* would be rendered meaningless unless it is construed to protect the information contained in the returns as well as the returns themselves (*15 Cal. 3d 1, 7)* .

[e] Estate Tax Returns

In ***Deary v. Superior Court*** *(2001) 87 Cal. App. 4th 1072, 105 Cal. Rptr. 2d 132* , plaintiff alleged that decedent promised to provide her a home and financial support for the rest of her life, in return for her giving up her own employment, moving into his residence, and becoming his full time companion and care giver. However, neither decedent's will nor family trustprovided plaintiff the benefits she claimed. Plaintiff moved that defendants provide her with "all writings" on decedent's estate planning. After an initial response, defendant's opposition to the motion stated that the estate tax returns were privileged under *Webb v. Standard Oil Co. (1957) 49 Cal. 2d 509, 319 P.2d 621* , discussed under [3][a], above. In briefs, defendants explained that they viewed the tax returns and related materials as "estate administration" documents, rather than "estate planning documents," and therefore believed that the items did not fall with the scope of plaintiff's request for production. In addition, defendants reiterated their position that even if the returns were the intended target of the production demand, the returns were privileged from disclosure, citing Webb *[87 Cal. App. 4th 1072, 1074-1076]* . The trial court rejected defendant's contention that the tax returns were not encompassed in the previously ordered production of all documents concerning estate planning. The trial court also found that the privilege assertion was untimely, and that it yielded to plaintiff's entitlement to discovery [*87 Cal. App. 4th 1072, 1074-1076]* .

Defendants sought a writ of mandate, contending the discovery order requiring them to provide copies of estate tax returns to plaintiff violated their privilege to keep the returns confidential. The court of appeal concluded that the defendants' claim of privilege was well taken, and the order compelling disclosure was an abuse of discretion [*87 Cal. App. 4th 1072, 1081]* . Given the lack of precision in plaintiff's description of the records she desired and her failure to specifically address the issue when it was first raised by defendants, the court found that defendants were not late in asserting the privilege [*87 Cal. App. 4th 1072, 1080]* . Plaintiff did not dispute the fundamental premise that estate tax returns are entitled to the same protections against disclosure in civil proceedings as are other types of returns [*87 Cal. App. 4th 1072, 1078]* . The court concluded that the statutory privilege, interpreted by Webb and it progeny, protected the federal and state estate returns from disclosure, in light of the fact that defendants had not waived the privilege and

plaintiff demonstrated no supervening public policy [*87 Cal. App. 4th 1072, 1077, 1081]* . The court declined to determine whether "related" tax documents, including those used to prepare the returns, were protected, given the complete lack of information, or legal argument supporting this expansive claim of privilege [*87 Cal. App. 4th 1072, 1077, 1082]* .

[f] W-2 Forms

Brown v. Superior Court *(1977) 71 Cal. App. 3d 141, 139 Cal. Rptr. 327* concerned a personal injury action in which plaintiff sought a writ of prohibition to restrain the trial court from enforcing its order compelling her to produce and permit inspection of her W-2 forms. The court of appeal granted the writ, holding that W-2 forms constitute an essential part of a taxpayer's state and federal income tax returns (*71 Cal. App. 3d 141* ,143). Indeed, they are part of the information contained in the returns and are thus privileged within the holding of *Sav-On Drugs, Inc. v. Superior Court (1975) 15 Cal. 3d 1, 123 Cal. Rptr. 283, 538 P.2d 739* (*71 Cal. App. 3d 141, 144)* .

[g] Sales Tax Returns

The facts and procedural background of ***Sav-On Drugs, Inc. v. Superior Court*** *(1975) 15 Cal. 3d 1, 123 Cal. Rptr. 283, 538 P.2d 739* are discussed in [a], *above.* The Supreme Court in that case held that *Rev. & Tax. Code § 7056*, requiring nondisclosure of information contained in sales tax returns by administrative officers of the State Board of Equalization, manifests a clear legislative intent that disclosures made in sales tax returns shall not be exposed to public scrutiny (*15 Cal. 3d 1, 6)* .

[h] Holder of the Privilege

Coate v. Superior Court *(1978) 81 Cal. App. 3d 113, 144 Cal. Rptr. 350* arose out of an action for a breach of a partnership agreement. During the course of discovery, plaintiffs propounded interrogatories seeking information contained in joint tax returns of defendant and her deceased husband. Plaintiffs claimed that decedent had earlier waived the privilege of nondisclosure of the tax return, and the trial court granted their motion compelling further response.

The court of appeal issued a writ of mandate, holding that the privilege is jointly held by each party to a joint tax return (*81 Cal. App. 3d 113, 115)* . Therefore, each party to a joint tax return must waive the privilege in order for there to be disclosure of the tax returns (*81 Cal. App. 3d 113, 116)* .

[i] New Spouse May Assert Privilege in Action for Modification of Child Support

In re Marriage of Brown *(1979) 99 Cal. App. 3d 702, 160 Cal. Rptr. 524* involved an action against Roberta Brown for child support by her former husband, Gary Brown, who was custodial parent of their three children. The original decree did not require Roberta to pay child support. In support of this action, Gary deposed the present husband of his former wife (Paul Brown) who refused to produce income tax returns that were filed by him and Roberta, and refused to testify as well, claiming his marital privilege. Paul then moved to quash the subpoena summoning him to be deposed, and also moved to quash the subpoena duces tecum, ordering production of the tax returns. The trial court granted the motion to quash, and Gary then appealed.

The court of appeal affirmed, distinguishing *Miller v. Superior Court (1977) 71 Cal. App. 3d 145, 139 Cal. Rptr. 521* on two grounds: first, *Miller* dealt with enforcement of existing child support obligations, rather than the modification of an order that did not require child support payments; and, second, *Miller* involved an action between former spouses, while the *Brown* action involved rights of a third-party present husband (*99 Cal. App. 3d 702, 709)* . Thus, the court held that the public interest in the preservation of existing marital relationships requires that there be a privilege not to disclose tax returns filed jointly by an ex-spouse with his or her present spouse in an action for a modification of a decree that would create a new obligation of child support (*99 Cal. App. 3d 702, 709)* .

It is important to note that the holding of *In re Marriage of Brown* may have been affected by the subsequent enactment of former Civ. Code § 4700.7 (*now see Fam. Code § 3552*). See discussion in [2][a], *above.*

[4] Additional Authorities

[a] State and Federal Income Tax Returns

In *Firestone v. Hoffman (2006) 140 Cal. App. 4th 1408, 45 Cal. Rptr. 3d 534* , lender sued borrower on a note, alleging that the loan was never repaid. The trial court excluded the lender's Canadian tax returns, offered to show that the lender had written off the note on his taxes, finding that they were privileged and not relevant. The court of appeal reversed, holding that plaintiff's Canadian tax returns are relevant and not privileged. Neither *Civ. Code § 1799.1a* nor *Bus. & Prof. Code § 17530.5* creates a privilege shielding a litigant from discovery of the litigant's own tax returns or making those returns inadmissible at trial. In addition, neither statute applies to foreign tax returns because they are expressly limited to "federal or state" income tax returns (*140 Cal. App. 4th 1408, 1419)* . Although California case law does create a privilege for tax returns, that privilege does not apply to foreign taxes (*140 Cal. App. 4th 1408, 1420)* .

Fortunato v. Superior Court (2003) 114 Cal. App. 4th 475, 8 Cal. Rptr. 3d 82 arose from a will contest. Real party in interest (decedent's daughter) served a subpoena duces tecum on a bank, requesting the production of several documents relating to loans made to or guaranteed by the decedent or petitioner (decedent's brother). Petitioner objected to the discovery of his personal tax returns, which he had submitted to the bank in connection with a home loan. He filed a motion for a protective order to prevent their production. When the probate court denied petitioner's motion, he filed a petition for writ of mandate.

The court of appeal granted the writ. The court held that the submission of individual income tax returns to a bank to obtain a loan does not effect a waiver of the privilege against forced disclosure of tax returns enunciated in *Webb v. Standard Oil Co. (1957) 49 Cal. 2d 509, 319 P.2d 621* (discussed in [3][a], *above*) because compliance with a bank's requirement of submitting tax returns with a loan application is not an "entirely voluntary relinquishment" (*114 Cal. App 4th 475, 482)* . The court further stated that a bank customer also has reasonable expectation of privacy in the confidential information submitted with a loan application, and that when a waiver of the confidentiality of tax returns is argued,the trial court should conduct an in camera inspection to balance the need for discovery against the interests in privacy (*114 Cal. App 4th 475, 481)* .

In *King v. Mobile Home Rent Review Bd. (1990) 216 Cal. App. 3d 1532, 265 Cal. Rptr. 624* , after the county mobile home rent review board refused to process an application for a hardship rent increase filed by a mobile home park owner because of his failure to include copies of his federal income tax returns, the applicant filed a petition for peremptory writ of mandate to compel the board to process his application. The trial court granted the writ and ordered the board to process the application without the tax returns. The court of appeal affirmed, holding that the confidentiality of the applicant's federal income tax returns were privileged under former Rev. & Tax. Code § 19282 (*now see Rev. & Tax. Code § 19542*). The court said that the privilege applies in administrative proceedings as well as adversarial court proceedings (*216 Cal. App. 3d 1532, 1537)* . Further, it held that the applicant's voluntary participation in a publicly administered program did not amount to a waiver of the privilege, explaining that although the board required submission of tax returns, that requirement was adopted for the administrative convenience of the board, and was not part of the rent control ordinance (*216 Cal. App. 3d 1532, 1538-1539)* .

[b] Corporate Tax Returns

The facts and procedural background of *Rifkind v. Superior Court (1981) 123 Cal. App. 3d 1045, 177 Cal. Rptr. 82* are discussed in [3][c], *above.* The court of appeal vacated the part of the trial court order that granted the wife discovery of the income tax returns of her husband's law corporation based on the rule that disclosure of the contents of an income tax return may not be coerced for the benefit of a private litigant. The court noted that although a married person's stock

in a corporation may be community property, knowledge of confidential corporate affairs is not necessarily to be shared with the spouse (*123 Cal. App. 3d 1045, 1048-1049)* .

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[Reserved]

§§ 81.191[Reserved]

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F. Work Product Protection

8-81 California Points & Authorities § 81.200

§ 81.200 Supporting Motion to Compel Discovery--Discovery Improperly Resisted on Ground of Work Product Protection [Code Civ. Proc. § 2018.010 et seq.]--Matters Not Protected by Work Product Doctrine

[1] FORM

[*The following may be combined, when appropriate, with a general memorandum in support of a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11).*]

WORK PRODUCT PROTECTION DOES NOT APPLY TO _____ [NAMES AND ADDRESSES OF POTENTIAL NONEXPERT WITNESSES *and/or* AN ATTORNEY'S LEGAL CONTENTIONS *and/or* FACTS RELIED ON BY A PARTY TO PROVE HIS OR HER CASE *and/or* NOTES THAT MERELY RECORD A STATEMENT OF A WITNESS *and/or* NOTES OF AN ATTORNEY MADE WHILE ACTING AS A BUSINESS AGENT].

[*EITHER*]

A. Identity of Potential Nonexpert Witnesses. Names, addresses, and statistical information concerning potential witnesses are not within the work product protection (*see Borse v. Superior Court (1970) 7 Cal. App. 3d 286, 289, 86 Cal. Rptr. 559*).

[*AND/OR*]

B. Attorney's Legal Contentions. The legal contentions of an attorney are discoverable (*Burke v. Superior Court (1969) 71 Cal. 2d 276, 285, 78 Cal. Rptr. 481, 455 P.2d 409*).

[*AND/OR*]

C. Facts Relied on to Prove Case. Facts presently relied on by a party to prove his or her case are not protected by the work product protection and are discoverable no matter how they came into the attorney's possession (*Southern Pac. Co. v. Superior Court (1969) 3 Cal. App. 3d 195, 199, 83 Cal. Rptr. 231* , disapproved on other grounds in *Kadelbach v. Amaral (1973) 31 Cal. App. 3d 814, 822-823, 107 Cal. Rptr. 720*).

[*AND/OR*]

D. Notes Recording Witness's Statements. Notes that merely record a witness's statements should not be given work product protection (*Rodriguez v. McDonnell Douglas Corp. (1978) 87 Cal. App. 3d 626, 647, 151 Cal. Rptr. 399*).

[*AND/OR*]

E. Attorney's Notes Made as Business Agent. The notes of an attorney made while acting as a business agent of a client are not given work product protection (*Watt Indus., Inc. v. Superior Court (1981) 115 Cal. App. 3d 802, 805, 171 Cal. Rptr. 503*).

[*AND/OR*]

F. Events Provable at Trial or Identity and Location of Physical Evidence. Information regarding events provable at trial, or the identity and location of physical evidence cannot be brought within the work product privilege simply by transmitting it to the attorney (*Kadelbach v. Amaral (1973) 31 Cal. App. 3d 814, 822, 107 Cal. Rptr. 720* ; *Mack v. Superior Court (1968) 259 Cal. App. 2d 7, 10, 66 Cal. Rptr. 280*).

[*AND/OR*]

G. Report of Investigator-Witness. No work product protection is accorded an investigator's report once it is determined that the investigator is to be used as a witness (*see* *Mize v. Atchison, T. & S.F. Ry. Co. (1975) 46 Cal. App. 3d 436, 449, 120 Cal. Rptr. 787*).

[2] Comments

[a] Use of Form

This memorandum is for use in refuting a claim of work product protection on the ground that the material for which protection is claimed is within the class of matters that have been held not to be protected by the work product doctrine [*see, e.g.,* *Borse v. Superior Court (1970) 7 Cal. App. 3d 286, 289, 86 Cal. Rptr. 559]* .

This form may be combined with a general memorandum in support of a motion compelling discovery. It may be combined with additional memoranda when counsel wishes to contend that other material falls within the work product rule but is nevertheless discoverable on various grounds [*see, e.g., § 81.202* (experts), § 81.203 (non-absolute work product protection), and § 81.204 (waiver)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[c] Nature of Work Product Protection

The protection of work product is not one of the privileges enumerated in the Evidence Code, but is set out in *Code Civ. Proc. § 2018.010 et seq.*, and is in the nature of a limitation on pretrial discovery [*see Jasper Constr., Inc. v. Foothill Jr. College Dist. (1979) 91 Cal. App. 3d 1, 16, 153 Cal. Rptr. 767]* . Note, however, that the term "privilege" is used in many cases regarding work product issues. In discussion of those cases, the terminology of the opinion is retained for the purpose of accurately reflecting the opinions.

The stated purpose of the work product rule is to preserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of those cases, and to prevent attorneys from taking undue advantage of their adversary's industry and efforts [*Code Civ. Proc. § 2018.020*].

Although a list of nonexpert trial witnesses may be entitled to qualified work product protection [*see City of Long Beach v. Superior Court (1976) 64 Cal. App. 3d 65, 73, 134 Cal. Rptr. 468* , discussed in *§ 81.223*], under some circumstances, such as the application of a local court rule, disclosure of that list may be required. For example, a rule adopted by a juvenile court that required sealed witness lists to be submitted by the parties to the court seven to ten days prior to trial, and that provided that the lists would be distributed to the parties at the trial readiness conference was upheld by the court of appeal as a reasonable effort to manage the court's calendar efficiently, and one which was not in conflict with any legislative enactment, constitutional provision, or existing rule of court [*In re Jeanette H. (1990) 225 Cal. App. 3d 25, 34-37, 275 Cal. Rptr. 9]* .

[d] Protection Limited in Actions Between Attorney and Client

Work product is not protected in an action between and an attorney and a client or former client if it is relevant to an issue of breach of duty by the attorney [*see Code Civ. Proc. § 2018.080*; § 81.207]. Additionally, the State Bar may usually discover the work product of an attorney against whom disciplinary charges are pending when it is relevant to issues of breach of duty by the attorney [*see Code Civ. Proc. § 2018.070*].

[e] No Work Product Protection May Be Asserted by Attorneys Suspected of Knowingly Participating in Crime or Fraud If Their Services Were Sought to Commit Crime or Fraud

When an attorney is suspected of knowingly participating in a crime or fraud, work product is not protected in any official investigation, proceeding, or action brought by the state, if the attorney's services were sought or obtained to enable or aid anyone to commit or plan to commit a crime or fraud [*Code Civ. Proc. § 2018.050*; *see § 81.208*]. There is no limitation, however, on an attorney's ability to request an in camera hearing as provided for in *People v. Superior Court (Laff) (2001) 25 Cal. 4th 703, 107 Cal. Rptr. 2d 323, 23 P.3d 563* [*Code Civ. Proc. § 2018.060*; *see People v. Superior Court (Laff) (2001) 25 Cal. 4th 703, 709, 107 Cal. Rptr. 2d 323, 23 P.3d 563* (superior court has an obligation to determine claims of privilege regarding materials seized from attorneys, whether or not attorneys are suspected of criminal conduct, and court properly may conduct a hearing to resolve these claims)].

[f] Effect of Civil Discovery Act on Prior Case Law

The Civil Discovery Act did not change the substance of statutory law governing work product protection. Thus cases construing former Code Civ. Proc. § 2016 as it applied to work product are equally valid in construing current *Code Civ. Proc. § 2018.010 et seq.* Furthermore, *Code Civ. Proc. § 2018.040* provides that *Code Civ. Proc. § 2018.010 et seq.* is intended to be a restatement of existing law relating to work product protection, and is not intended to expand or reduce the extent to which work product is discoverable under existing law in any action.

[g] Claim of Privilege or of Work Product Protection for Electronically Stored Information Produced in Discovery

If electronically stored information produced in discovery is subject to a claim of privilege or of work product protection, and the receiving party contests the legitimacy of that claim, he or she may seek a determination of the claim from the court by making a motion within 30 days of receiving the claim and presenting the information to the court conditionally under seal [*Code Civ. Proc. § 2031.285(d)(1)*]. For further discussion of claims of privilege or work product protection for electronically stored information produced in discovery, see California Forms of Pleading and Practice, Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)* (Matthew Bender); see also Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, *Ch. 3, Ethical Issues for Attorneys in E-Discovery*, §§ 3.14, 3.15; Ch. 9, *Gathering and Producing Electronically Stored Information*, § 9.36 et seq. (privilege review); Ch. 10, *Opposing Demands for Production of Electronic Evidence in California Court*, § 10.14.

[3] Discussion of Authorities

[a] Identity of Potential Nonexpert Witnesses

Borse v. Superior Court *(1970) 7 Cal. App. 3d 286, 86 Cal. Rptr. 559* involved an FELA action against a railroad, in which plaintiff sought to prove that his signature on a release was fraudulently induced. In order to discover the names of others who might have similarly been induced to sign releases, plaintiff submitted interrogatories requesting the names of certain of defendant's employees involved in personal injury negotiations subsequent to 1963, the names of all claims adjusters, and the names and addresses of all others present at the negotiations. Defendant refused to respond, and plaintiff moved to compel answers. The trial court denied the motion, ruling that the information was not privileged and did not constitute work product, but that the interrogatories were burdensome and oppressive. Plaintiff brought a petition for a writ of mandate vacating the trial court's order sustaining defendant's objection.

The court of appeal granted the petition, holding however that the names and addresses of potential witnesses were not within the work product privilege (*7 Cal. App. 3d 286, 289)* .

[b] Attorney's Legal Contentions

Burke v. Superior Court *(1969) 71 Cal. 2d 276, 78 Cal. Rptr. 481, 455 P.2d 409* was an action for damages based on a promissory note, in which plaintiff caused a writ of attachment to be issued and levied on property owned by one of the defendants. Judgment was rendered in favor of the defendant whose property was attached, and one of the petitioners, who was the receiver for the other successful defendant's affairs. Petitioners filed an action for wrongful attachment against the bonding company, alleging in their unverified complaint, inter alia, that the attachment could not have been set aside. The bonding company filed an unverified answer, denying all allegations. Petitioners sought discovery of whether the bonding company actually contended that the attachment was vulnerable to pretrial attack, and, if so, to state all facts, grounds, and evidence that they claim to support the contentions. Petitioners contend that they attempted thereby to determine whether the bonding company's denial of the allegation concerning the attachment was sham or based on facts unknown to them. The trial court denied petitioners' discovery attempts, and petitioners sought a writ of mandate requiring the court to vacate its orders.

The Supreme Court granted the petition, noting that it is possible that the attempted discovery could be construed as requesting, inter alia, the bonding company's legal reasoning or theories. Insofar as they did, they did not need to be answered. However, insofar as petitioners sought to ascertain the specific bases, if any, for a contention that the attachment was vulnerable to pretrial attack, discovery could not be denied on the basis that it called for legal opinion. For example, the bonding company may be required to divulge whether it contended that there was a defect in the undertaking or affidavit supporting the writ of attachment, although it did not have to divulge the legal theory or reasoning process underlying a contention that there was a defect (*71 Cal. 2d 276, 285)* .

[c] Facts Relied on to Prove Case

Southern Pac. Co. v. Superior Court *(1969) 3 Cal. App. 3d 195, 83 Cal. Rptr. 231* (disapproved on other grounds in *Kadelbach v. Amaral (1973) 31 Cal. App. 3d 814, 822, 823, 107 Cal. Rptr. 720*) involved a wrongful death action in which defendant served interrogatories seeking in detail all facts that formed the basis of the allegations in the complaint. Plaintiffs refused to answer on the ground that all the facts were gathered by plaintiff's attorneys or by investigators hired by the attorneys. The trial court accepted this contention, holding that the information was protectedwork product under former Code Civ. Proc. § 2016(b) (*now see Code Civ. Proc. § 2018.010 et seq.*). Defendant sought a writ of mandate.

The court of appeal let the writ issue, holding that inquiry into facts relied on to prove a party's case is permissible no matter how the facts came into the attorney's possession (*3 Cal. App. 3d 195, 199)* .

In *Kadelbach*, the court of appeal stated that its own decision in *Southern Pac.* was wrong insofar as it included statements of witnesses within the class of protected derivative material in an attorney's possession (*31 Cal. App. 3d 814, 823)* . However, *Southern Pac.* remains good law in its holding that facts relied on by a party in proving his or her case are discoverable no matter how they came into the attorney's possession.

[d] Notes Recording Witness's Statements

Rodriguez v. McDonnell Douglas Corp. *(1978) 87 Cal. App. 3d 626, 151 Cal. Rptr. 399* concerned a personal injury action against several defendants. Prior to trial, an investigator hired by a law firm representing one of defendant corporations interviewed a witness and made notes of the interview. Following the trial court's refusal to quash a subpoena duces tecum to produce the notes, they were used to attack the witness's credibility. Defendant appealed from a jury verdict for plaintiff, claiming as one of the grounds of error the ordered production of the investigator's notes.

The court of appeal affirmed the judgment in favor of plaintiff, although it held that nonprejudicial error was committed by permitting disclosure of the notes that should have been given work product protection (*87 Cal. App. 3d 626, 649)* . The court held, however, that the part of the notes that merely recorded the witnesses' statements should not have been protected from disclosure under the work product doctrine (*87 Cal. App. 3d 626, 647)* .

[e] Attorney's Notes Made as Business Agent

Watt Indus., Inc. v. Superior Court *(1981) 115 Cal. App. 3d 802, 171 Cal. Rptr. 503* arose out of a rescission action against the purchaser of a condominium based on fraudulent violation of an alleged condition of sale requiring owner occupancy. Plaintiff deposed the defendant's attorney concerning a telephone conversation between the attorney and plaintiff's agent during which the attorney allegedly represented defendant's intention to reside in the unit. The attorney refused to produce notes he made during the conversation. Plaintiff's motion to compel production was denied, and plaintiff petitioned for a writ of mandate.

The court of appeal granted a peremptory writ directing the trial court to vacate its order and enter a new order compelling production. Relying on the statutory work product rule contained in former Code Civ. Proc. § 2016(b) (*now see Code Civ. Proc. § 2018.010 et seq.*), the court held thatwhen the attorney acted merely as a business agent for the client in conveying the client's position to a contracting party, there was no justification for protecting the attorney's notes concerning the conversation. The work product privilege applies to documents related to legal work performed for a client, not to notes memorializing acts performed as a mere agent (*115 Cal. App. 3d 802, 804-805)* .

[f] Events Provable at Trial or Identity and Location of Physical Evidence

Kadelbach v. Amaral *(1973) 31 Cal. App. 3d 814, 107 Cal. Rptr. 720* arose out of a personal injury action resulting in

a jury verdict for plaintiff. Defendants appealed, claiming that they were denied a fair trial in that tape recorded statements given by potential witnesses to defendant's counsel should not have been ordered to be disclosed even though the disclosure was subject to certain conditions, since the tape was the work product of defendant's counsel.

The court of appeal affirmed, rejecting defendant's contention that as a matter of law written or recorded statements of witnesses made to an attorney are to be given work product protection. Citing *Mack v. Superior Court (1968) 259 Cal. App. 2d 7, 66 Cal. Rptr. 280* (discussed in [g], *below*), the court held that mere transmission to an attorney of events provable at trial or the identity and location of physical evidence does not bring the information within the work product privilege (*31 Cal. App. 3d 814, 822)* .

[g] Report of Investigator-Witness

Mize v. Atchison, T. & S.F. Ry. Co. *(1975) 46 Cal. App. 3d 436, 120 Cal. Rptr. 787* was an appeal by one of the defendants from an adverse jury verdict rendered in a wrongful death suit. One of the grounds for appeal was that the trial court committed prejudicial error when it allowed plaintiff's attorney to inspect a part of the file compiled by defendant's investigator, who was called as a witness.

The judgment was affirmed. The court of appeal noted that even if the work product objection had been timely and properly made, there was a waiver of this protection arising out of the fact that the investigator was used as a witness (*46 Cal. App. 3d 436, 448, 449)* . Indeed, the court suggested that any work product privilege that would attach to an investigator's report, ceases the moment it is determined that the investigator is to be used as a witness (*46 Cal. App. 3d 436, 449)* .

Mack v. Superior Court *(1968) 259 Cal. App. 2d 7, 66 Cal. Rptr. 280* arose out of an eminent domain proceeding in which plaintiff sought answers to interrogatories concerning a real estate appraiser hired by defendants' former attorney. Defendants responded with a declaration that the answers sought concerned matters that were gathered solely for plaintiff's attorney's information, and that the appraiser was not to be called as a witness at trial. The trial court ordered defendants to answer, however, and defendants sought a writ of prohibition.

The court of appeal granted the writ, holding that information of a derivative character such as diagrams, audit reports, and appraisals, developed as the result of the initiative of counsel, are to be protected as work product, although information relating to events that are provable at trial, or the identity or location of physical evidence cannot be brought within work product protection merely by transmitting it to the attorney (*259 Cal. App. 2d 7, 10)* . Since no showing of unfair prejudice was made to overcome work product protection, the court held that defendants should not have had to answer the questions (*259 Cal. App. 2d 7, 11)* .

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8-81 California Points & Authorities § 81.201

§ 81.201 Supporting Motion to Compel Discovery--Discovery Improperly Resisted on Ground of Work Product Protection [Code Civ. Proc. § 2018.010 et seq.]--Material Not Product of Attorney or Attorney's Agents or Employees

[1] FORM

[*The following may be combined, when appropriate, with a general memorandum in support of a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11).*]

_____ [*Specify material sought to be discovered*] _____ [IS *or* ARE] NOT THE PRODUCT(S) OF ATTORNEY _____ [*name*] OR HIS/HER AGENTS OR EMPLOYEES, AND THUS _____ [IT *or* THEY] _____ [IS *or* ARE] NOT PROTECTED BY THE ATTORNEY WORK PRODUCT PRIVILEGE.

Work Product Required to Be Product of Attorney or Attorney's Agents or Employees. Material that is not the product of the attorney or of the attorney's agents or employees is not an attorney work product, and an attorney cannot by retroactive adoption convert the independent work of another, already performed, into the attorney's own work (*Bank of Orient v. Superior Court (1977) 67 Cal. App. 3d 588, 598, 136 Cal. Rptr. 741* ; *Wilson v. Superior Court (1964) 226 Cal. App. 2d 715, 723-724, 38 Cal. Rptr. 255* ; *see Code Civ. Proc. § 2018.010 et seq.*).

[2] Comments

[a] Use of Form

This form is for use in refuting a claim of work product protection on the ground that the material for which protection is sought was not the product of the attorney or the attorney's agents or employees [*see Code Civ. Proc. § 2018.010 et seq.*]. It may be combined with a general memorandum in support of a motion compelling discovery and with one or more forms refuting claims of work product protection on other grounds.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel may wish to show why the material for which protection was sought is not the work of the attorney or his or her agents or employees, but was done entirely at the behest of someone else.

[3] Discussion of Authorities

[a] Work Product Required to Be Product of Attorney or Attorney's Agents or Employees

Bank of Orient v. Superior Court *(1977) 67 Cal. App. 3d 588, 136 Cal. Rptr. 741* was an action commenced in May, 1975, for damages for conversion and negligence arising from embezzlement by an employee of plaintiff savings and loan association. Plaintiff's employee had deposited the embezzled funds in his personal checking account at defendant bank. The trial court denied defendant's motion to compel plaintiff to produce two documents, including an accounting firm's "Report to Management," and to compel plaintiff to answer deposition questions reasonably related to the contents of the documents. Defendant sought a writ of mandate to compel production of the documents and answers to the deposition questions, as well as on several grounds unrelated to discovery.

In issuing a writ of mandate to compel the discovery orders, the court of appeal rejected plaintiff's contention that the accountants' report was attorney work product. The court pointed out that there was evidence that the report was requested by plaintiff's board of directors in January, 1975. It was not commissioned by an attorney, and was requested four months prior to plaintiff's commencement of the action. The court stated, relying on *Wilson v. Superior Court (1964) 226 Cal. App. 2d 715, 724, 38 Cal. Rptr. 255* (*see* discussion, *below*), that a report that is not the product of the attorney or the attorney's agents or employees is not work product, and that an attorney cannot, by retroactive adoption, convert the independentwork already performed by that person into the attorney's own work (*67 Cal. App. 3d 598*).

In ***Wilson v. Superior Court*** *(1964) 226 Cal. App. 2d 715, 38 Cal. Rptr. 255* , plaintiff brought an action for personal injuries allegedly caused by the blowout of a defective tire purchased from one of the defendants. Plaintiff took the deposition of an employee of an independent adjuster who was hired by an insurance company and completed his investigation before the complaint was filed. The deponent refused to answer a series of questions relating to the tire and how he had secured it, on the ground that his actions during the investigation were protected by the attorney work product rule. Plaintiff moved for an order compelling answers to the questions. The trial court granted the motion.

The court of appeal upheld the trial court's order requiring the investigator to answer deposition questions, stating that the investigator was hired by an agent of the insurance carrier, not by defense counsel, and that the declarations showed that the matters he was questioned about took place long before the lawsuit was filed or counsel was retained by or on behalf of defendant. Even under the broadest possible definition of work product, it still must be the attorney's work or that of his or her agents or employees, and the attorney cannot, by retroactive adoption, convert the independent work already performed by another into the attorney's own work (*226 Cal. App. 2d 715, 724)* .

[4] Additional Authorities

[a] Work Product Required to Be Product of Attorney or Attorney's Agents or Employees

Jasper Constr., Inc. v. Foothill Jr. College Dist. (1979) 91 Cal. App. 3d 1, 153 Cal. Rptr. 767 was an appeal by defendant from a judgment against it for breach of contract. One of the grounds claimed as error was that a certain witness was precluded from testifying at trial (on the basis of work product protection) on the rationale that this witness had been hired by plaintiff's manager as a consultant, although he had been hired long before the lawsuit had been filed, and although plaintiff eventually dismissed him and refused to pay him.

The court of appeal reversed and remanded, holding, inter alia, that work product protection attaches only to the work of

an attorney or the agents or employees of such attorney, while here the consultant was employed by plaintiff and not by plaintiff's attorney (*91 Cal. App. 3d 1, 16)* . The court went on to hold that the fact that the consultant in *Jasper* may have later reported his findings and conclusions to plaintiff's attorney did not retroactively confer work product status on them (*91 Cal. App. 3d 1, 16, 17)* .

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8-81 California Points & Authorities § 81.202

§ 81.202 Supporting Motion to Compel Discovery--Discovery Improperly Resisted on Ground of Work Product Protection [Code Civ. Proc. § 2018.010 et seq.]--Opinions and Reports of Experts Discoverable Under Certain Circumstances [Code Civ. Proc. § 2018.030(b)]

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in support of a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11). It should also be preceded by general points and authorities relating to conditional protection of an attorney's work product (see, e.g., § 81.203).*]

THE OPINIONS AND REPORTS OF EXPERT _____ [*name*] ARE NOT PROTECTED BY THE WORK PRODUCT DOCTRINE BECAUSE _____ [HE/SHE WILL BE CALLED AS WITNESSES *or* JUSTICE AND FAIRNESS REQUIRE DISCLOSURE *or* WITHIN A REASONABLE TIME PRIOR TO TRIAL, _____ [*specify party resisting discovery, e.g.,* DEFENDANT _____ (*name*)] HAS REFUSED TO STATE WHETHER THE EXPERT WILL BE CALLED AS WITNESSES *or* IT IS THE EXPERT'S OWN OBSERVATIONS, NOT COMMUNICATED TO THE ATTORNEY, WHICH ARE SOUGHT, *or a combination of these*].

[*EITHER*]

A. Expert to Be Called as Witness. Once it is reasonably certain that an expert is to be called as a witness, then no work product protection is accorded the expert's opinions (*Swartzman v. Superior Court (1964) 231 Cal. App. 2d 195, 202, 203, 41 Cal. Rptr. 721* ; *Brokopp v. Ford Motor Co. (1977) 71 Cal. App. 3d 841, 857, 139 Cal. Rptr. 888* ; *see Williamson v. Superior Court (1978) 21 Cal. 3d 829, 834, 835, 148 Cal. Rptr. 39, 582 P.2d 126*).

[*AND/OR*]

B. Discovery of Expert's Opinions When Required by Fairness and Justice. The opinions of a nonwitness expert may be discovered when nondisclosure would not be consistent with fairness and justice (*Petterson v. Superior Court (1974) 39 Cal. App. 3d 267, 272, 114 Cal. Rptr. 20*).

[*AND/OR*]

C. Refusal to Designate Expert as Witness. An expert's opinions may be discovered if the attorney employing such expert is unwilling to state whether the expert will be used as a witness (*Scotsman Mfg. Co. v. Superior Court (1966) 242 Cal. App. 2d 527, 531-532, 51 Cal. Rptr. 511*).

[*AND/OR*]

D. Expert's Observations Not Communicated to Attorney. While an expert's communications to the attorney are protected by the work product doctrine, the expert's own observations, which are not communicated to the attorney, are not to be afforded the protection given to an attorney's work product (*Petterson v. Superior Court (1974) 39 Cal. App. 3d 267, 271, 114 Cal. Rptr. 20*).

[2] Comments

[a] Use of Form

These points and authorities is for use in refuting a claim of work product protection on the ground that the opinions of experts that are sought do not come under the protection of the work product doctrine. This form may be combined with a general memorandum in support of a motion compelling discovery and with one or more forms refuting claims of work product protection on other grounds such as waiver. For authorities that discuss the situations in which an expert's opinion may not be the subject of discovery, see *§ 81.224*. For a form for use when a party designated as an expert trial witness has impliedly waived the privilege by producing privileged documents or testifying as an expert, see *§ 81.67[1]*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[c] Work Product of Experts

Opinions and reports of experts developed as a result of the initiative of counsel in case preparation come entirely under the protection of the qualified work product rule [*see Williamson v. Superior Court (1978) 21 Cal. 3d 829, 834, 148 Cal. Rptr. 39, 582 P.2d 126* ; *National Steel Products Co. v. Superior Court (1985) 164 Cal. App. 3d 476, 487, 210 Cal. Rptr. 535]* . Thus, experts' opinions and reports are not discoverable unless the party seeking disclosure can demonstrate that nondisclosure will undulyprejudice his or her preparation or result in an injustice [*see Code Civ. Proc. § 2018.030(b)*]. The availability of discovery concerning the work of a party's expert depends largely on whether the expert will testify at trial. If the expert will testify at trial, discovery of the expert is generally permitted [*Williamson v. Superior Court (1978) 21 Cal. 3d 829, 834-835, 148 Cal. Rptr. 39, 582 P.2d 126]* .

However, when an individual is listed as an expert witness because a party intends to ask him or her one or more questions that "may call for the rendering of an expert opinion," discovery of that expert is very limited. Such an expert is a percipient expert witness rather than an employed or retained expert witness. Requiring the designating party to analyze that witness's anticipated testimony and share that analysis with opposing counsel would violate work product protection [*Hurtado v. Western Medical Center (1990) 222 Cal. App. 3d 1198, 1203, 272 Cal. Rptr. 324* (dicta

because treating physicians designated as expert witnesses by plaintiff were never deposed); *see also Code Civ. Proc. § 2034.260(c)* (percipient witness is not among those experts triggering requirement of expert witness declaration)].

On the other hand, if the expert was hired merely as a consultant, discovery is normally not permitted unless there is a compelling reason [*National Steel Products Co. v. Superior Court (1985) 164 Cal. App. 3d 476, 490, 210 Cal. Rptr. 535]* .

[d] Exchange of Expert Witness Lists

Code Civ. Proc. § 2034.010 et seq. provides a procedure by which a party to an action may initiate an exchange of expert witness information concerning experts who are expected to testify at trial. When the procedure is invoked, the provisions of *Code Civ. Proc. § 2034.010 et seq.* control the discovery of expert information to a large extent. However, this provision does not apply to information concerning experts who are not expected to testify at trial [*see Code Civ. Proc. § 2034.210(a)*]. For points and authorities relating to the expert witness exchange procedure, see Ch. 88, *Discovery: Exchange of Expert Witness Information* .

[3] Discussion of Authorities

[a] Expert to Be Called as Witness

Swartzman v. Superior Court *(1964) 231 Cal. App. 2d 195, 41 Cal. Rptr. 721* concerned an eminent domain proceeding brought by the state. In *Swartzman,* defendants noticed the deposition of the state's independent appraiser for a date in advance of the court-ordered exchange of appraisal reports. The state sought and obtained a protective order prohibiting the deposition on the grounds of annoyance, burden, oppression, and harassment, and defendants petitioned for a writ of mandate.

The court of appeal declined to issue the writ, noting that prior to being designated as a witness the expert wears two hats. He or she is both an advisor and technical consultant, and is also a potential witness at trial (*231 Cal. App. 2d 195, 202)* . However, it is only when it becomes reasonably certain that the expert will actually be a witness that his or her opinion should become the subject of pretrial discovery (*231 Cal. App. 2d 195, 203)* .

Brokopp v. Ford Motor Co. *(1977) 71 Cal. App. 3d 841, 139 Cal. Rptr. 888* was an appeal from a jury verdict for plaintiff in a personal injury action. Plaintiff's recovery was for injuries incurred in a single vehicle collision, allegedly resulting from a defect in the power steering mechanism. On appeal, defendant claimed, as one of the grounds for error, that it was a violation of the work product doctrine for plaintiff's counsel to have been provided with a copy of the data showing the results of tests relating to the power steering mechanism.

The court of appeal affirmed, holding that knowledge, reports, and opinions of an expert are immune from disclosure under the work product doctrine as long as an expert remains a consultant. However, once it seems reasonably certain that the expert is to become a witness at trial, the protection terminates (*71 Cal. App. 3d 841, 857)* . Thus, since defendant had determined long before trial that the expert would be called as a witness, work product protection would have been improper (*71 Cal. App. 3d 841, 858)* .

Williamson v. Superior Court *(1978) 21 Cal. 3d 829, 148 Cal. Rptr. 39, 582 P.2d 126* arose out of a personal injury action in which a defense expert was designated as a witness by one of the defendants. Plaintiff then scheduled a deposition of the expert, but on the eve of the scheduled deposition, defendant withdrew the expert's designation as a witness.

The apparent reason for this withdrawal is that while the expert's analysis was favorable to this particular defendant, it was unfavorable to one of the others. The withdrawal formed the basis for an indemnification agreement between the

two defendants.

After the withdrawal, defendant refused to let the witness be deposed. Plaintiff then moved for an order compelling the deposition, which the trial court granted with the proviso that the inquiry exclude the expert's investigation into and analysis of the accident. Plaintiff thereupon sought a writ of mandate, which the court of appeal granted. The Supreme Court then granted a hearing to resolve the novel issues of the work product doctrine that were involved.

The Court rejected the application of the work product doctrine in this case, discussing the general rule that although an expert's opinions are only discoverable on a showing of good cause, good cause may be shown by a demonstration that the expert may be called as a witness (*21 Cal. 3d 829, 834, 835)* .

The Court went on to hold that, while a party may ordinarily have the right to withdraw an expert's designation as a witness as a matter of trial tactics, the withdrawal in this case was done pursuant to an illegal contract between the two codefendants to suppress relevant evidence (*21 Cal. 3d 829, 835-837)* . Therefore, the Court held that to uphold the prohibition on discovery would aid in effectuating an illegal bargain between two codefendants, and would encourage a party in a multiparty case to, in effect, auction off the testimony of a witness to the highest bidder (*21 Cal. 3d 829, 838)* . The Court then issued a writ of mandate requiring full disclosure of the expert's report to prevent the conspiring codefendants from reaping any benefit from their attempted illegal contract (*21 Cal. 3d 829, 838, 839)* .

[b] Discovery of Expert's Opinions When Required by Fairness and Justice

Petterson v. Superior Court *(1974) 39 Cal. App. 3d 267, 114 Cal. Rptr. 20* concerned a will contest in which the contestants sought to depose the handwriting expert who had been engaged by respondents who were respondent beneficiaries of a holographic will. Respondents moved to prohibit the expert's deposition on the ground that the testimony sought was protected by the work product rule. The motion was accompanied by a declaration that the respondents had no intention of calling the expert as a witness at trial. The trial court denied the motion, and contestants petitioned for a writ of mandate.

The court of appeal declined to issue the writ, holding, inter alia, that it is not true, as respondents contended, that a party can never show good cause to depose an adversary's expert once it is determined that the expert will not testify at trial (*39 Cal. App. 3d 267, 271, 272)* . The court held to the contrary, noting that even where an expert is purely a consultant and is not to be called as a witness, there are situations in which there are compelling reasons for the discovery of the expert (*39 Cal. App. 3d 267, 272)* . Some of the situations outlined by the court include those in which the expert has tested an object that is no longer available, or situations in which the object was so altered by the testing that it cannot be subject to retesting. To prohibit the deposition of an expert under this or other of the infinite variety of circumstances that may arise in the course of human activity would not be consistent with principles of fairness and justice (*39 Cal. App. 3d 267, 272)* .

[c] Refusal to Designate Expert as Witness

Scotsman Mfg. Co. v. Superior Court *(1966) 242 Cal. App. 2d 527, 51 Cal. Rptr. 511* arose out of a personal injury action in which a butane lamp exploded. Defendant Scotsman, the installer of the lamp, cross complainedagainst Roberts Brass Manufacturing, the manufacturer of the lamp's valve.

In preparation for the action, Scotsman hired an expert who made a report on the lamp and delivered it to Scotsman's attorney. Roberts sought production of the report, which Scotsman refused on work product grounds. The trial court ordered discovery, and Scotsman then petitioned for a writ of prohibition.

The court of appeal granted the writ, holding that the report was prepared by the expert following employment by the attorney, and thus constituted work product subject to the discovery limitations of former Code Civ. Proc. § 2016(b) (

see now Code Civ. Proc. § 2018.030) (*242 Cal. App. 2d 527, 529)* . The court noted that Roberts had attempted to bring itself within the provisions of former Code Civ. Proc. § 2016(b), which allow for discovery of conditionally protected work product, by contending that since the cross complaint was filed some eight months after the other parties were served, discovery of the report was needed to enable Roberts to prepare for trial. As to this contention, the court held that lack of time to prepare is not proper prejudice to overcome the work product rule; the proper remedy is to seek an order fixing a later trial date (*242 Cal. App. 2d 527, 530)* .

The court also noted that Roberts had contended that Scotsman was unwilling to declare its intention as to whether it would use the expert as a witness. In response to this assertion, the court stated that when a court believes that a party is unwilling to declare its intention to designate an expert as a witness, then the trial court is authorized to compel discovery by way of depositions or interrogation (*242 Cal. App. 2d 527, 532)* .

Note that in the later case of *Sanders v. Superior Court (1973) 34 Cal. App. 3d 270, 109 Cal. Rptr. 770* , the court held that on a showing of good cause a party must designate the experts who will testify at trial at some appropriate stage of the proceedings, such as the pretrial hearing, and must disclose such election to the adversary (*34 Cal. App. 3d 270, 279)* . *Code Civ. Proc. § 2034.220* requires that any party may file and serve on any other party a demand to exchange lists of expert witnesses not later than the 10th day after a trial date is selected, or 70 days prior to the trial date set, whichever is later. This provision has been interpreted as embodying the legislative preference for the time at which disclosure must be made about which experts will be trial witnesses [*see South Tahoe Public Utility Dist. v. Superior Court (1979) 90 Cal. App. 3d 135, 139, 154 Cal. Rptr. 1]* . For points and authorities based on *Code Civ. Proc. § 2034.010 et seq.*, see Ch. 88, *Discovery: Exchange of Expert Witness Information* .

[d] Expert's Observations Not Communicated to Attorney

The facts and procedural background of ***Petterson v. Superior Court*** *(1974) 39 Cal. App. 3d 267, 114 Cal. Rptr. 20* are set out in [b], *above.* The *Petterson* court allowed discovery despite the claim that the expert's opinion constituted work product. In its opinion, the court noted that while an expert's communications to the attorney are protected by the work product privilege, his or her own observations based on those communications are not (*39 Cal. App. 3d 267, 271)* .

[4] Additional Authorities

[a] Expert to Be Called as Witness

In Shadow Traffic Network v. Superior Court (1994) *Court 24 Cal. App. 4th 1067, 29 Cal. Rptr. 2d 693* , involving alleged business torts, the trial court granted the plaintiff's motion to disqualify the defendant's attorneys for having retained as an expert an accounting firm previously interviewed by the plaintiff for the same lawsuit.

The court of appeal denied the defendant's petition for a writ of mandate, holding that substantial evidence supported the trial court's implicit finding that the plaintiff's attorneys had imparted confidential information to the accounting firm even though the plaintiff subsequently chose not to retain the firm as an expert witness. The subjects of discussion between the plaintiff's attorneys and the accounting firm concerned the factual and legal theories about the case, matters traditionally considered confidential. The fact that the plaintiff decided not to retain the firm as an expert witness did not, as a matter of law, render the information imparted to the firm nonconfidential. Communications made to a potential expert can be considered confidential and therefore subject to protection from subsequent disclosure even if the expert is not retained, so long as there was a reasonable expectation of confidentiality (*24 Cal. App. 4th 1067, 1078-1085)* .

In discussing the attorney-client privilege and the work product doctrine, the court noted that the attorney-client privilege embraces statements from the attorney to the expert that disclose confidential information communicated by the client when disclosure is reasonably necessary to further the attorney's representation of the client's interests. The

privilege is lost on designation of the expert as a witness, since the decision to use the expert as a witness manifests the client's consent to disclosure of the information (*24 Cal. App. 4th 1067, 1078-1079)* . Under the work-product doctrine, reports prepared by the expert as a consultant are protected until the expert is designated as a witness; then, the opposing party may seek disclosure of the reports on a showing of good cause. To the extent that the reports prepared by the expert witness embrace the attorney's impressions and conclusions, the work-product doctrine gives absolute protection to that information (*24 Cal. App. 4th 1067, 1079)* .

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CHAPTER 81 DISCOVERY: PRIVILEGES AND OTHER DISCOVERY LIMITATIONS
PART II. FORMS
F. Work Product Protection

8-81 California Points & Authorities § 81.203

§ 81.203 Supporting Motion to Compel Discovery--Discovery Improperly Resisted on Ground of Work Product Protection [Code Civ. Proc. § 2018.010 et seq.]--Overcoming Conditional Protection [Code Civ. Proc. § 2018.030(b)]

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in support of a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11).*]

THE MATERIAL SOUGHT TO BE CONDITIONALLY PROTECTED AS WORK PRODUCT SHOULD BE DISCOVERED BECAUSE THE DENIAL OF DISCOVERY WILL UNFAIRLY PREJUDICE _____ [*specify party seeking discovery, e.g.*, PLAINTIFF _____(*name*)] AND WILL RESULT IN AN INJUSTICE.

A. Discoverability of Conditionally Protected Material. A party may discover the conditionally protected work product of an attorney if the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice (*Code Civ. Proc. § 2018.030(b)*).

[*Optional*] **B. Partial Disclosure.** Fairness requires that after the holder of a privilege reaches a certain point of disclosure, he or she may not withhold the remainder (*Merritt v. Superior Court (1970) 9 Cal. App. 3d 721, 731, 88 Cal. Rptr. 337*).

[*Optional*] **C. Disclosure Necessary to Impeach Credibility of Witness.** The need for work product protection may be overcome by a showing that disclosure is necessary to impeach the credibility of a witness (*see Jasper Constr., Inc. v. Foothill Jr. College Dist. (1979) 91 Cal. App. 3d 1, 17, 153 Cal. Rptr. 767*).

[2] Comments

[a] Use of Form

This form is for use in overcoming a claim of conditional work product protection on the ground that unfair prejudice or injustice will result if discovery is denied.

This form may be combined with a general memorandum in support of a motion compelling discovery and with one or more forms refuting claims of work product protection on other grounds.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel might wish to show why foreclosing discovery would be basically unfair and unjust.

[3] Discussion of Authorities

[a] Partial Disclosure

Merritt v. Superior Court *(1970) 9 Cal. App. 3d 721, 88 Cal. Rptr. 337* arose out of a claim against two insurance companies for negligent and bad-faith failure to settle within policy limits, based partially on the contention that one of the insurers prevented plaintiff's personal injury counsel from proposing a settlement, in that it furnished counsel with conflicting and confusing statements concerning the amount of insurance coverage. Personal injury claimants in the case in chief were assigned the cause of action against the insurer by the personal injury defendants. During pretrial discovery in the bad-faith action, defendant insurer served interrogatories on plaintiff, including Interrogatory No. 27, which inquired into the nature of the communications between the carrier's employees and agents, and plaintiff and his attorneys. The interrogatory also inquired into plaintiff's attorney's investigation, trial strategy, and evaluation of the settlement potential. All these questions related to the original action in which plaintiff was a personal injury claimant.

Plaintiff declined to answer Interrogatory No. 27 on grounds of both attorney-client and work product privilege. On defendant's motion, the trial court ordered plaintiff to answer the interrogatory. Plaintiff thereupon sought a writ of mandate or prohibition.

The court of appeal declined to issue the writ, holding that plaintiff had waived the protection against disclosure of work product in initiating the litigation for failure to settle within policy limits (*9 Cal. App. 3d 721, 730)* . In addition, the court held that it would be basically unfair and would result in injustice for plaintiff to be allowed to withhold information because of the general rule that when the holder of a privilege reaches a certain point of disclosure (here the tendering of the issue of the state of mind of the personal injury counsel in conducting the case in chief), fairness requires that he or she may not withhold the remainder (*9 Cal. App. 3d 721, 731)* .

[b] Disclosure Necessary to Impeach Credibility of Witness

The facts and procedural background of ***Jasper Constr., Inc. v. Foothill Jr. College Dist.*** *(1979) 91 Cal. App. 3d 1, 153 Cal. Rptr. 767* are *set out in § 81.201[4][a]*. In *Jasper,* the trial court had refused to permit thetestimony of a consultant who had been hired by plaintiff's manager long before any litigation had been commenced, and whose findings were later reported to plaintiff's attorney.

The court of appeal reversed and remanded, holding, inter alia, that the trial court ruling was improper, since work product protection only attaches to the work of an attorney or the agents or employees of such attorney (*91 Cal. App. 3d 1, 16)* . Moreover, the court went on to hold that given the need for the consultant's testimony to impeach plaintiff's manager's credibility, it was an abuse of discretion for the trial court not to have ruled that the prejudice that would result from the nondisclosure outweighed the need for work product protection (*91 Cal. App. 3d 1, 17)* .

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8-81 California Points & Authorities § 81.204

§ 81.204 Supporting Motion to Compel Discovery--Discovery of Work Product Permissible--Waiver

[1] FORM

[*The following may be combined, when appropriate, with a general memorandum in support of a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11).*]

DISCOVERY OF _____ [*describe item of work product sought to be discovered, e.g.,* THE REPORTS DATED _____, MADE BY JOHN GREEN, THE INVESTIGATOR OF PLAINTIFF'S ATTORNEY, IN CONNECTION WITH THE TRAFFIC ACCIDENT THAT IS THE SUBJECT OF THE INSTANT LAWSUIT] IS PROPER BECAUSE THE WORK PRODUCT PROTECTION HAS BEEN WAIVED.

[*EITHER*]

A. Waiver of Work Product Protection by Revealing Material for Use by Witness. The work product protection is waived by an attorney who produces material to be used by a witness as a basis for the witness's testimony. The attorney cannot reveal the work product, allow the witness to testify from it, and then claim the work product protection to prevent the opposing party from viewing the document from which the witness testified (*Kerns Constr. Co. v. Superior Court (1968) 266 Cal. App. 2d 405, 411, 72 Cal. Rptr. 74*).

[*AND/OR*]

B. Waiver by Attorney's Voluntary Disclosure. An attorney's voluntary election to disclose certain matters during pretrialdiscovery that constitute his or her work product waives protection of that work product (*Lohman v. Superior Court (1978) 81 Cal. App. 3d 90, 101, 146 Cal. Rptr. 171*).

[*AND/OR*]

C. Voluntary Disclosure by Prior Attorney. If a prior attorney voluntarily discloses otherwise protected work product, then work product protection is waived permanently and it is not reinstated if the client retains another attorney (*Petterson v. Superior Court (1974) 39 Cal. App. 3d 267, 272, 273, 114 Cal. Rptr. 20*).

[2] Comments

[a] Use of Form

This memorandum is for use in refuting a claim of work product protection on the ground of waiver [*see, e.g., Kerns Constr. Co. v. Superior Court (1968) 266 Cal. App. 2d 405, 411, 72 Cal. Rptr. 74]* .

This form may be combined with a general memorandum in support of a motion compelling discovery. It may be combined with § 81.200 when counsel wishes to contend that other material is discoverable because it is not protected work product. It may be combined with additional memoranda when counsel wishes to contend that other material falls within the work product rule but is nevertheless discoverable on various grounds [*see, e.g., § 81.202* (experts) and § 81.203 (non-absolute work product protection)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[c] Waiver Under Discovery Act

For waiver of work product protection for failure to assert it by objection or response during discovery proceedings, see *Code Civ. Proc. §§ 2025.460(a)* (depositions), 2028.050(a) (deposition by written questions), 2030.290(a) (interrogatories), 2031.300(a) (inspection, copying, testing, or sampling of documents, tangible things, land or other property, and electronically stored information), and 2033.280(a) (request for admission of documents). Work product protection may also be waived for specified purposes if an officer or agent who is acting as the attorney for a party that is a public or private corporation, partnership, association, or governmental agency signs responses to interrogatories on behalf of that party [*see Code Civ. Proc. § 2030.250(b)*].

[d] Related Uses

This form may also be used in opposition to a motion for a protective order when the motion is based on the work product doctrine.

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 81.225* may be used to oppose this memorandum.

[3] Discussion of Authorities

[a] Waiver of Work Product Protection by Revealing Material for Use by Witness

Kerns Constr. Co. v. Superior Court *(1968) 266 Cal. App. 2d 405, 72 Cal. Rptr. 74* involved a personal injury action in which one of the defendants cross complained against petitioner. The deposition of an employee of cross complainant was taken, at which time the deponent testified that he had prepared reports in connection with his investigation of the accident. During the deposition, the deponent read the reports in order to refresh his memory as to their contents, and

testified from them. When deposing counsel requested that copies of the reports be appended to the transcript of the deposition, counsel for cross complainant objected on attorney-client and work product privilege grounds. Petitioner then sought an order to produce and inspect the reports, and cross complainant again resisted on the ground that the material was protected as work product and by the attorney-client privilege. The trial court initially granted the motion, then vacated its prior ruling based on attorney-client privilege, and petitioner sought a writ of mandate.

The court of appeal granted the petition, holding that if the reports were protected under the work product rule, the attorney for cross complainant waived the privilege when he produced the reports for the deponent's use. The court held that an attorney cannot reveal his or her work product, permit a witness to testify from them, and then claim work product protection to prevent the opposing party from viewing the document from which the witness testified (*266 Cal. App. 2d 405, 411)* .

[b] Waiver by Attorney's Voluntary Disclosure

Lohman v. Superior Court *(1978) 81 Cal. App. 3d 90, 146 Cal. Rptr. 171* arose out of an action for breach of trust, personal injuries, and fraud, brought by a former conservatee against her temporary conservator and his attorney. Defendants sought to depose plaintiff's former attorney. The trial court issued an order requiring that the deponent answer the questions that he had declined to answer on the basis of attorney-client privilege. Plaintiff sought a writ of prohibition or mandamus to overturn the trial court's order on grounds of attorney-client privilege. She also requested suppression of those answers that had already been given by her former attorney, on the rationale that the answers were in violation of both the attorney-client privilege and the work product doctrine.

The court of appeal let the writ issue, based on the attorney-client privilege. Insofar as the work product privilege was concerned, however, the court held that it is the attorney, not the client, who is the holder of the privilege (*81 Cal. App. 3d 90, 101)* . Thus, the court held that since plaintiff's former attorney elected to waive the privilege by answering deposition questions, the client cannot have his answers suppressed on work product grounds (*81 Cal. App. 3d 90, 101, 102)* .

[c] Voluntary Disclosure by Prior Attorney

The facts and procedural background of ***Petterson v. Superior Court*** *(1974) 39 Cal. App. 3d 267, 114 Cal. Rptr. 20* are discussed in *§ 81.202[3][b]*. In *Petterson*, the court of appeal ruled in favor of disclosure in the face of a work product claim. One of the grounds for its holding was that work product protection was waived by virtue of the respondents' former attorney's voluntary disclosures regarding the expert's opinions during the course of pretrial conversations with opposing counsel (*39 Cal. App. 3d 267, 272, 273)* . The court held it would be inconsistent with the waiver rule to reinstate the work product privilege when the client hires a new lawyer, once the client's former lawyer has waived the protection (*39 Cal. App. 3d 267, 273)* .

[4] Additional Authorities

[a] Waiver by Attorney's Voluntary Disclosure

In *Eddy v. Fields (2004) 121 Cal. App. 4th 1543, 18 Cal. Rptr. 3d 487* , predecessor trustees of an inter vivos trust hired appellant attorney (Fields) to assist in legal matters relating to the trust. After the predecessors resigned, the successor trustee requested that another attorney (Merzon) turn over his legal files. The trial court ordered Merzon to turn his complete legal files over to the successor trustee, rejecting Fields claim that some of those documents contained Field's attorney work product. Fields appealed, arguing that the trial court erred when it ruled that he had waived the work product privilege by turning over to Merzon any privileged documents. The court of appeal disagreed, concluding that Fields had waived any work product protection (*121 Cal. App. 4th 1543, 1549)* . The court noted the apparent conflict between the work product privilege in *Code Civ. Proc. § 2018.030(a)* and the client's right to his or her file under *Cal. Rules Prof. Conduct 3-700(D)*, but found it unnecessary to resolve the conflict (*121 Cal. App. 4th 1543,*

1549) . Even if Fields had an absolute privilege not to disclose his work product to his client, he implicitly waived that privilege by disclosing the allegedly privileged documents to Merzon in connection with Merzon's representation of one, or possibly both, of the predecessor trustees. In so doing, Fields effectively disclosed those documents to the predecessor trustees, thereby waiving the work productprivilege with respect to both the predecessor trustees and the successor trustee (*121 Cal. App. 4th 1543, 1549-1550)* . The court emphasized that it reached this result because Merzon was an agent of at least one of the former trustees, and it was a successor trustee who sought the documents. If an adversarial third party had made the demand, the court would have been "hard pressed" to say the privilege had been waived, given that a disclosure of work product to an attorney who represents a mutual client or a client with common interests does not necessarily operate as a waiver with respect to third parties (*121 Cal. App. 4th 1543, 1550)* .

McKesson HBOC, Inc. v. Superior Court (2004) 115 Cal. App. 4th 1229, 9 Cal. Rptr. 3d 812 involved consolidated civil actions against a corporation that was the target of federal government investigation for securities fraud. Plaintiffs moved to compel the corporation to produce an audit committee report and memoranda of employee interviews, which had been prepared by the attorneys retained by the corporation to perform internal review of improperly recorded revenues, and which the corporation had shared with the government. The trial court found the documents were subject to work product protection, but that the corporation had waived that protection by disclosing the documents to third parties who did not have an interest in preserving the confidentiality of the documents. On appeal, the corporation again asserted the government was not an adversary and had a common interest in rooting out the source of any accounting improprieties.

The court of appeal disagreed. An interest in maintaining confidentiality exists "when the parties are aligned on the same side in the litigation and have a similar stake in the outcome" (*115 Cal. App. 4th 1229, 1239-1240)* . In this case, there was no real alignment of interests between the government and an entity or individuals under investigation for securities law violations. Accordingly, the corporation waived the protection afforded attorney work product when it shared the privileged documents with government investigators (*115 Cal. App. 4th 1229, 1240)* . The court of appeal declined to adopt the "selective waiver" theory, under which a client could disclose a privileged or protected communication to the government, while continuing to assert it against other parties. The court found no support for that theory in the work product policies set forth in Code of Civil Procedure Section 2018(a) (*now see Code Civ. Proc. § 2018.020*) (*115 Cal. App. 4th 1229, 1241)* .

The facts and procedural background of *OXY Resources California LLC v. Superior Court (2004) 115 Cal. App. 4th 874, 9 Cal. Rptr. 3d 621* are discussed in *§ 81.65[4][a]*. There, the court of appeal held that when parties negotiating a business transaction entered into a joint defense agreement in anticipation of litigation by a third party, in camera review was required to determine whether the disclosure of the documents in the course of the transaction waived the attorney-client privilege or work product protection (*115 Cal. App. 4th 874, 879)* . While the joint defenseagreement was not void as matter of public policy, it could not serve as sole ground for withholding the documents. Rather, the agreement evidenced the expectation of confidentiality necessary to avoid waiver by disclosure to someone outside the attorney-client relationship, but could not protect the documents from disclosure unless they contained or reflected attorney-client communications or attorney work product (*115 Cal. App. 4th 874, 893)* . For more detailed discussion, refer to § 81.65[4][a].

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8-81 California Points & Authorities § 81.205

§ 81.205 Supporting Motion to Compel Discovery--Discovery Improperly Resisted on Ground of Work Product Protection [Code Civ. Proc. § 2018.010 et seq.]--Attorney Is Holder of Privilege

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in support of a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11).*]

THE ATTORNEY, NOT THE CLIENT, IS THE HOLDER OF THE WORK PRODUCT PRIVILEGE.

Attorney Is Holder of Privilege. The work product doctrine was created for the protection of the attorney (*Lohman v. Superior Court (1978) 81 Cal. App. 3d 90, 101, 146 Cal. Rptr. 171* ; *see Code Civ. Proc. § 2018.020*). Therefore, if the attorney chooses to claim or waive the privilege, the client may not object (*Fellows v. Superior Court (1980) 108 Cal. App. 3d 55, 64, 65, 166 Cal. Rptr. 274*).

[2] Comments

[a] Use of Form

This form is for use in refuting a claim of work product protection when a former attorney has waived work product protection and the client has objected to the waiver. It may be combined with a general memorandum in support of a motion compelling discovery and with one or more forms refuting claims of work product protection on other grounds.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Attorney Is Holder of Privilege

The facts and procedural background of ***Lohman v. Superior Court*** *(1978) 81 Cal. App. 3d 90, 146 Cal. Rptr. 171* are discussed in *§ 81.204[3][b]*. The *Lohman* court discussed the fact that plaintiff's former attorney had waived the work product privilege by voluntarily answering deposition questions on protected matters (*81 Cal. App. 3d 90, 101)* . The court noted that the privilege is not the client's to claim or waive, but belongs solely to the attorney for the purpose of protecting the fruits of his or her labor from discovery (*81 Cal. App. 3d 90, 100, 101)* .

The court based this conclusion partially on an analysis of former Code Civ. Proc. § 2016(g) (*see now Code Civ. Proc. § 2018.020*), which provided that it is the state's public policy both to preserve the rights of *attorneys* to prepare cases with the privacy necessary to encourage them to investigate all aspects of the case, and also to prevent an opponent from taking undue advantage of an *attorney's* preparation. The court noted that had the Legislature wished to afford the client some protection beyond the attorney-client privilege, it would have been relatively simple to so state in former Code Civ. Proc. § 2016(g) (*81 Cal. App. 3d 90, 101)* .

The holding in *Lohman* was clarified somewhat by the court of appeal in the later case of ***Fellows v. Superior Court*** *(1980) 108 Cal. App. 3d 55, 166 Cal. Rptr. 274* . *Fellows* arose out of an action for breach of an insurance contract, fraud, and deceit against an insurance company and others. The basis for the action against the insurance company was the alleged violation of its duty of fair dealing during the prior arbitration proceedings, which were undertaken to adjudicate plaintiff's claims for uninsured motorist coverage. During the pendency of the arbitration proceedings, plaintiffs were represented by attorney Kottler.

After the termination of the arbitration proceedings, plaintiffs filed a civil action for breach of contract, fraud, and deceit. Attorney Kottler turned his files over to plaintiffs, who retained new counsel to represent them in the subsequent civil action. During the course of discovery, defendants sought production of Kottler's files pertaining to the uninsured motorist claims and arbitration concerning them, and plaintiff resisted this claim on work product grounds. The trial court ordered production.

The court of appeal granted plaintiffs' petition for a writ of prohibition. In its opinion, the court noted that the *Lohman* decision was sound in holding that the work product privilege belongs to the attorney, who has the option of waiving it (*108 Cal. App. 3d 55, 64)* . Therefore, since the attorney in *Lohman* waived the privilege by agreeing to answer deposition questions concerning his work product, the former client could not object (*108 Cal. App. 3d 55, 65)* .

For further discussion of a client's rights vis-a-vis the work product privilege, see *§ 81.227[3][a]*.

[4] Additional Authorities

[a] Attorney Is Holder of Privilege

In *Dowden v. Superior Court (1999) 73 Cal. App. 4th 126, 86 Cal. Rptr. 2d 180* , petitioner, a *pro se* litigant, filed a writ of mandate seeking relief from an order to compel production of a diary, claiming a work product privilege under Code Civ. Proc. § 2018 (*now see Code Civ. Proc. § 2018.010 et seq.*). The underlying dispute arose when one brother (real party in interest) claimed another brother (petitioner) breached their agreement to divide certain property held in joint tenancy and sued for property damage and breach of contract. Petitioner cross-claimed for conversion and breach of contract. Petitioner's attorney allegedly advised him to keep a diary in anticipation of litigating his claims against real party in interest.

The trial court granted real party in interest's motion compelling production of the diary because it interpreted former Code Civ. Proc. § 2018's privilege to be available only to attorneys (*now see Code Civ. Proc. § 2018.010 et seq.*) (*73 Cal. App. 4th 126, 128)* . The court of appeal held that *pro se* litigants may assert former Code Civ. Proc. § 2018's work

product privilege and remanded the matter to the trial court to conduct an in camera review of the diary to determine whether it contained matter that was privileged under former Code Civ. Proc. § 2018 (*73 Cal. App. 4th 126, 136)* . The court of appeal distinguished the holding in *Lohman v. Superior Court (1978) 81 Cal. App. 3d 90, 146 Cal. Rptr. 171* (discussed in [3][a], *above*), in which the court analyzed the application of the privilege in the context of a client trying to prevent his attorney from disclosing the latter's work product. In this case, the litigant was not asserting the privilege as a client, but rather as one performing the functions of an attorney. The court of appeal reasoned that protecting the right of a litigant appearing *in propria persona* to create work product was consistent with the *Lohman* court's rationale of protecting the attorney's labor from discovery (*73 Cal. App. 4th 126, 134)* . In reaching its conclusion that the work product privilege is intended for the protection of litigants and not just attorneys, the court also noted that the use of the word "attorney" in Code Civ. Proc. § 2018 (*now see Code Civ. Proc. § 2018.010 et seq.*) was ambiguous because other provisions of that code and the California Rules of Court apply to both attorneys and litigants appearing in propria persona (*73 Cal. App. 4th 126, 129-130)* .

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8-81 California Points & Authorities § 81.206

§ 81.206 Supporting Motion to Compel Discovery--Discovery Improperly Resisted on Ground of Work Product Protection [Code Civ. Proc. § 2018.010 et seq.]--Matter Relates to Arbitration of Attorney-Client Fee Dispute [Bus. & Prof. Code § 6202]

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in support of a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11).*]

WORK PRODUCT PROTECTION UNDER SECTION 2018.010 et seq. OF THE CODE OF CIVIL PROCEDURE DOES NOT APPLY TO RELEVANT WORK PRODUCT OF AN ATTORNEY IN CONNECTION WITH _____ [AN ARBITRATION HEARING PURSUANT TO *or* A TRIAL AFTER ARBITRATION UNDER *or* JUDICIAL CONFIRMATION, CORRECTION, OR VACATION OF AN ARBITRATION AWARD THAT WAS MADE UNDER SECTIONS 6200-6206 OF THE BUSINESS AND PROFESSIONS CODE.

No Work Product Protection in Matters Related to Arbitration of Attorney's Fee. *Section 2018.010 et seq. of the Code of Civil Procedure*, generally protecting attorney work product from discovery, does not prohibit the disclosure of any relevant work product of the attorney in connection with (1) an arbitration hearing or mediation pursuant to *Sections 6200 through 6206 of the Business and Professions Code*; (2) a trial after arbitration; or (3) judicial confirmation, correction, or vacation of an arbitration award (*Bus. & Prof. Code § 6202*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to compel discovery, when the party or person is resisting discovery on the ground that the information sought is protected work product under *Code Civ. Proc. § 2018.010 et seq.* The ground for compelling discovery is that, pursuant to *Code Civ. Proc. § 2018.010 et seq.*, work product protection does not prevent disclosure of information that is relevant to a proceeding under *Bus. & Prof. Code §§ 6200-6206*

(mandatory fee arbitration).

This form may be combined with a general memorandum in support of a motion compelling discovery and with one or more forms refuting claims of work product protection on other grounds.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[c] Related Points and Authorities

For a form supporting a motion to compel discovery on the ground that the attorney-client privilege does not preclude discovery of communications relevant to a proceeding under *Bus. & Prof. Code § 6200 et seq.*, see *§ 81.68*.

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8-81 California Points & Authorities § 81.207

§ 81.207 Supporting Motion to Compel Discovery--Discovery Improperly Resisted on Ground of Work Product Protection [Code Civ. Proc. § 2018.010 et seq.]--Work Product Discoverable in Action by Client [Code Civ. Proc. § 2018.080]

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in support of a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11).*]

WORK PRODUCT PROTECTION DOES NOT APPLY IN AN ACTION BETWEEN AN ATTORNEY AND A CLIENT OR FORMER CLIENT IF THE WORK PRODUCT IS RELEVANT TO THE ISSUE OF BREACH OF DUTY BY THAT ATTORNEY.

A. No Work Product Protection in Action Involving Client. No work product protection under *Section 2018.010 et seq. of the Code of Civil Procedure* exists in an action between an attorney and a client or former client if the work product is relevant to an issue of breach by the attorney of a duty to his or her client arising out of the attorney-client relationship (*Code Civ. Proc. § 2018.080*).

[*Optional*] **B. State Bar May Discover Work Product in Client-Initiated Complaint.** Whenever a client has initiated a complaint against an attorney, the State Bar may discover the work productof that attorney when it is relevant to issues of breach of duty by the lawyer (*see Code Civ. Proc. § 2018.070*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to compel discovery, when the party or person from whom discovery is sought is the attorney who generated the work product and the person seeking discovery is a client or former client, and the work product is relevant to an issue of breach of duty by that attorney [*see Code Civ. Proc. §*

2018.080].

An optional paragraph is included for use when the proceeding is an investigation by the State Bar initiated by the client. The State Bar may discover the work product of an attorney against whom disciplinary charges are pending when it is relevant to issues of breach of duty by that attorney. Discoverability is subject to applicable client approval and to a protective order, when requested and for good cause, to ensure the confidentiality of work product except for its use by the State Bar in disciplinary investigations and its consideration under seal in State Bar court proceedings. For these purposes, whenever a client has initiated a complaint against an attorney, the requisite client approval is deemed to have been granted [*Code Civ. Proc. § 2018.070(c)*].

"Client" means a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from that lawyer in his or her professional capacity. Client includes an incompetent (a) who himself or herself so consults the lawyer or (b) whose guardian or conservator so consults the lawyer in behalf of the incompetent [*Code Civ. Proc. § 2018.010*; *Evid. Code § 951*].

This form may be combined with a general memorandum in support of a motion compelling discovery and with one or more forms refuting claims of work product protection on other grounds.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

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8-81 California Points & Authorities § 81.208

§ 81.208 Supporting Motion to Compel Discovery--Discovery Improperly Resisted on Ground of Work Product Protection [Code Civ. Proc. § 2018.010 et seq.]--Work Product Discoverable in Official Proceeding When Attorney's Services Were Sought to Aid Commission of Crime or Fraud [Code Civ. Proc. § 2018.050]

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum supporting a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.81, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11).*]

WORK PRODUCT PROTECTION DOES NOT APPLY IN ANY OFFICIAL PROCEEDING OR STATE ACTION, IF THE ATTORNEY'S SERVICES WERE SOUGHT TO ENABLE OR AID THE PLANNING OR COMMISSION OF A CRIME OR FRAUD.

No Work Product Protection in State Action Involving Attorney Suspect of Knowingly Participating in Crime or Fraud. When an attorney is suspected of knowingly participating in a crime or fraud, no work product protection exists under *Code of Civil Procedure Section 2018.010 et seq.* in any official investigation, proceeding, or action brought by the state, if the attorney's services were sought or obtained to enable or aid anyone to commit or plan to commit a crime or fraud (*Code Civ. Proc. § 2018.050*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to compel discovery, in any official proceeding, investigation, or state action, when the party or person from whom discovery is sought is the attorney who generated the work product and the attorney is suspected of knowingly participating in a crime or fraud. In these circumstances, the attorney may not assert work product protection on behalf of anyone who sought or obtained the attorney's services to commit or plan to commit the crime or fraud [*see Code Civ. Proc. § 2018.050*].

This form may be combined with a general memorandum in support of a motion compelling discovery and with one or more forms refuting claims of work product protection on other grounds.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[c] Attorney's Right to In Camera Hearing

Code Civ. Proc. § 2018.060 does not limit an attorney's ability to request an in camera hearing as provided for in *People v. Superior Court (Laff) (2001) 25 Cal. 4th 703, 107 Cal. Rptr. 2d 323, 23 P.3d 563* [*Code Civ. Proc. § 2018.060*; *see People v. Superior Court (Laff) (2001) 25 Cal. 4th 703, 709, 107 Cal. Rptr. 2d 323, 23 P.3d 563* (superior court has an obligation to determine claims of privilege regarding materials seized from attorneys, whether attorneys are suspected of criminal conduct, and court properly may conduct a hearing to resolve these claims)].

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8-81 California Points & Authorities §§ 81.209-81.219

[Reserved]

§§ 81.209[Reserved]

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8-81 California Points & Authorities § 81.220

§ 81.220 Opposing Motion to Compel Discovery--Work Product Protected From Disclosure [Code Civ. Proc. § 2018.020]--Absolute Protection [Code Civ. Proc. § 2018.030(a)]--General Form

[1] FORM

[*The following may be combined, when appropriate, with a general memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30).*]

THE WRITINGS OF _____ [PLAINTIFF'S *or* DEFENDANT'S] ATTORNEY REFLECTING HIS/HER IMPRESSIONS, CONCLUSIONS, OPINIONS, OR LEGAL RESEARCH OR THEORIES ARE ABSOLUTELY PROTECTED FROM DISCLOSURE PURSUANT TO SECTION 2018.030(a) OF THE CODE OF CIVIL PROCEDURE.

A. Absolute Work Product Protection. Any writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories, whether prepared in anticipation of litigation or for trial, or prepared while acting in a nonlitigation legal capacity, is not discoverable under any circumstances (*Code Civ. Proc. § 2018.030(a)*; *see Rico v. Mitsubishi Motors Corp. (2007) 42 Cal. 4th 807, 815, 68 Cal. Rptr. 3d 758, 171 P.3d 1092*).

B. Legal Reasoning Not Discoverable. While a party's contentions may be the subject of discovery, it is improper to seek disclosure of the legal research, reasoning, or theory behind the contentions (*Sav-On Drugs, Inc. v. Superior Court (1975) 15 Cal. 3d 1, 5, 123 Cal. Rptr. 283, 538 P.2d 739*).

[*Add points and authorities relating to the applicability of this protection in a specific factual context (see, e.g., § 81.222).*]

[2] Comments

[a] Use of Form

This form may be submitted by a party resisting discovery on the ground that the information sought is attorney's work product that is absolutely protected from disclosure under *Code Civ. Proc. § 2018.030(a)*. Counsel should use the points and *authorities in § 81.222*, instead of this form, if counsel wishes specifically to claim work product protection for the attorney's analysis of the testimony of nonexpert witnesses.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[c] Discoverability of Work Product

Absolute protection extends to any writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories [*Code Civ. Proc. § 2018.030(a)*]. Any other type of work product is subject to discovery under *Code Civ. Proc. § 2018.030(b)* [*see, e.g., § 81.203* (supporting discoverability regarding material subject to conditional work product protection)].

[d] Work Product Protection Not a "Privilege"

The protection of attorney's work product is not one of the privileges enumerated in the Evidence Code, but is set out in *Code Civ. Proc. § 2018.010 et seq.*, and is in the nature of limitations on pretrial discovery [*see Jasper Constr., Inc. v. Foothill Jr. College Dist. (1979) 91 Cal. App. 3d 1, 16, 153 Cal. Rptr. 767]* . Note, however, that the term "privilege" is used in many cases regarding work product issues. In discussion of those cases, the terminology of the opinion is retained for the purpose of accurately reflecting the opinions.

[3] Discussion of Authorities

[a] Absolute Work Product Protection

In ***Rico v. Mitsubishi Motors Corp.*** *(2007) 42 Cal. 4th 807, 68 Cal. Rptr. 3d 758, 171 P.3d 1092* , plaintiffs sued two auto companies and the California Department of Transportation after a sport utility vehicle rolled over while being driven on a freeway. During defendants' deposition of plaintiff's expert witness, one of plaintiff's attorneys inadvertently obtained a defense attorney's notes. Those notes were created for the attorney by his case manager, acting as the attorney's paralegal. They summarized a meeting at which defendants' attorney and two designated defense experts discussed their litigation strategy and vulnerabilities. The notes were written in a dialogue style and were dated, but were not labeled "confidential" or "work product." Plaintiff's attorney later used the notes during a deposition to impeach a defense expert. Defendants moved to disqualify plaintiffs' legal team and their experts on the ground that they had become privy to and had used a defense attorney's work product.

The trial court concluded that the notes were absolutely privileged by the work product rule. The court also held that the attorney had acted unethically by examining the document more closely than was necessary to determine that its contents were confidential, by failing to notify the defense that he had a copy of the document, and by surreptitiously using it to plaintiffs' gain. The court determined that the attorney'sviolation of the work product rule had irreparably prejudiced the defense. Accordingly, the court ordered plaintiffs' attorneys and experts disqualified. The court of appeal affirmed the disqualification order, and plaintiffs sought review (*42 Cal. 4th 807, 813)* .

The Supreme Court affirmed. The Court concluded that the notes were absolutely protected work product, because they contained the counsel's thoughts and impressions about the case (citing *Code Civ. Proc. § 2018.030(a)* (*42 Cal. 4th 807, 815)* . The Court also addressed the ethical duty owed by an attorney who inadvertently receives work product. The court concluded that plaintiffs' attorney should not have examined the document any more closely than was necessary to ascertain that it was privileged. Once it appeared that the document was privileged, plaintiffs' attorney should have immediately notified defense counsel and tried to resolve the situation, by agreement or with the court's guidance (*42*

Cal. 4th 807, 817) . Disqualification was the proper remedy (*42 Cal. 4th 807, 819-820)* .

[b] Legal Reasoning Not Discoverable

Sav-On Drugs, Inc. v. Superior Court *(1975) 15 Cal. 3d 1, 123 Cal. Rptr. 283, 538 P.2d 739* arose out of a class action brought against several retailers for abuses related to trading stamps and sales tax collection. Plaintiffs served defendants with interrogatories that included inquiries into the legal basis for deductions and adjustments made in sales tax returns. One of the defendants objected to these interrogatories on a number of grounds, including an objection that the laws on which the deductions were based were not discoverable. The trial court granted plaintiff's motion to compel answers to the interrogatories, and this petition for a writ of prohibition ensued.

The Supreme Court granted the writ for one of the challenged interrogatories, but refused to issue the writ for the others (*15 Cal. 3d 1, 7-8)* . Insofar as the interrogatory seeking defendant's legal reasoning was concerned, the Court held that no purpose would be served by compelling one party to perform legal research for the other. The Court further held that although a party's contentions may be the subject of discovery, it is improper to seek disclosure of the legal reasoning or theory behind the contentions (*15 Cal. 3d 1, 5)* .

Note that *Sav-On Drugs* construed law in effect before the operative date of the Civil Discovery Act. It is cited and discussed as persuasive authority to the extent that it remains consistent with current provisions [*see § 81.02[3]*].

[4] Additional Authorities

[a] Absolute Work Product Protection

In *Bak v. MCL Financial Group, Inc. (2009) 170 Cal. App. 4th 1118, 88 Cal. Rptr. 3d 800* , appellant, an attorney for defendants and cross-complainants, appealed a trial court judgment confirming an award issued by an arbitration panel. The court ordered the attorney to pay $ 7,500 in sanctions, based on of his conduct during a prehearing dispute over the return of privileged documents plaintiffs had inadvertently produced. Before the attorney returned the privileged material, he made a cursory review of the documents, copied them, and placed the copies in a sealed envelope, which he sent to the arbitration panel. In affirming the award of sanctions, the court of appeal clarified the rule first enunciated in *State Compensation Ins. Fund v. WPS, Inc. (1999) 70 Cal. App. 4th 644, 82 Cal. Rptr. 2d 799* and approved in *Rico v. Mitsubishi Motors Corp. (2007) 42 Cal. 4th 807, 68 Cal. Rptr. 3d 758, 171 P.3d 1092* (discussed in *§ 81.220[3][a]*): "When a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged. The parties may then proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified" (*170 Cal. App. 4th 1118, 1126-1127* , quoting *State Compensation Ins. Fund v. WPS, Inc. (1999) 70 Cal. App. 4th 644, 656-657, 82 Cal. Rptr. 2d 799*). Contrary to the attorney's assertion, *State Compensation* did not approve of a receiving party copying privileged material and sending it to a third party. In fact, *State Compensation* suggested that when, as in this case, defendants objected to plaintiffs' demand for immediate return of the privileged documents, defendants' attorney should have sought guidance from the arbitration panel, rather than unilaterally copying the material and sending it to panel (*170 Cal. App. 4th 1118, 1127)* .

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8-81 California Points & Authorities § 81.221

§ 81.221 Opposing Motion to Compel Discovery--Work Product Protected From Disclosure [Code Civ. Proc. § 2018.020]--Absolute Protection [Code Civ. Proc. § 2018.030(a)]--Not Subject to Evid. Code § 956 Commission of Crime or Fraud Exception

[1] FORM

[*The following may be combined, with a general memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30). It should also be preceded by general points and authorities relating to absolute protection of attorney's work product (see, e.g., § 81.220).*]

THE WRITINGS OF _____ [PLAINTIFF *or* DEFENDANT]'S ATTORNEY REFLECTING HIS/HER IMPRESSIONS, CONCLUSIONS, OPINIONS, OR LEGAL RESEARCH OR THEORIES ARE ABSOLUTELY PROTECTED FROM DISCLOSURE BECAUSE THE CRIME-FRAUD EXCEPTION PROVIDED BY SECTION 956 OF THE EVIDENCE CODE DOES NOT REQUIRE DISCLOSURE OF MATERIAL PROTECTED BY THE ABSOLUTE WORK PRODUCT RULE.

A. Absolute Work Product Protection. [*See § 81.220.*]

B. Crime-Fraud Exception Not Applicable to Absolutely Protected Work Product Documents. The *Evidence Code Section 956* crime-fraud exception is limited to lawyer-client privileged matter, and does not apply to documents protected by the absolute work product rule (*BP Alaska Exploration, Inc. v. Superior Court (1988) 199 Cal. App. 3d 1240, 1249-1251, 245 Cal. Rptr. 682*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted by a party resisting discovery on the ground that the information sought is attorney's work product that is absolutely protected from disclosure by *Code Civ. Proc. § 2018.030(a)*, to which the

crime-fraud exception to the lawyer-client privilege is inapplicable. It may be modified and used to resist discovery of absolutely protected work product based on other statutory exceptions to the lawyer-client privilege [*see BP Alaska Exploration, Inc. v. Superior Court (1988) 199 Cal. App. 3d 1240, 1251, 245 Cal. Rptr. 682* ; *see Evid. Code §§ 956-962*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Crime-Fraud Exception Not Applicable to Absolutely Protected Work Product Documents

BP Alaska Exploration, Inc. v. Superior Court *(1988) 199 Cal. App. 3d 1240, 245 Cal. Rptr. 682* arose out of an action between two oil exploration businesses involving allegations of breach of agreement and confidential relationship, misappropriation of trade secrets, unfair competition, and unjust enrichment. Plaintiff alleged that it had disclosed certain unique, confidential information to defendant in an attempt to persuade defendant to join with it in a venture involving a third business. Defendant eventually entered into an agreement with the third business that excluded plaintiff. Plaintiff then accused defendant of breaching an implied agreement that plaintiff would participate with defendant and the third business in the venture. Plaintiff's claims were investigated by defendant's counsel, and reports concerning their legal opinions and conclusions about defendant's defense were prepared and turned over to defendant. Subsequently, after filing suit, plaintiff sought discovery from defendant about its investigation of plaintiff's claims. Defendant refused to disclose the communications prepared by its counsel, on the grounds that they were protected by the lawyer-client privilege and work product protection. Plaintiff contended the communications had lost their privileged status under *Evid. Code § 956* because they were obtained in furtherance of a fraud. Plaintiff argued that alleged factual misrepresentations by defendant in a letter to plaintiff denying plaintiff's right to participate in the venture were made for the purpose of dissuading plaintiff from pursuing its claim. Plaintiff moved for an order compelling defendant to produce the documents. The trial court granted the order, and defendant filed a petition for a writ of prohibition.

The court of appeal granted the petition, holding that the *Evid. Code § 956* crime-fraud exception was limited to lawyer-client privileged matter, and thus was not applicable to those documents that reflected the absolute work product of the client's attorney. Observing that the motion was governed by the former discovery law, the court explained that the work product rule under former Code Civ. Proc. § 2016(b) (*now see Code Civ. Proc. § 2018.030(a)*) specifies that any writing reflecting an attorney's impressions, conclusions, opinions or legal theories is "not discoverable under any circumstances." Accordingly, courts have held that an attorney's opinion work product is absolutely insulated from discovery (*199 Cal. App. 3d 1240, 1250)* . *Evid. Code § 956* refers only to lawyer-client privileged matter, and there is no parallel fraud exception to the work product rule. The absence of a statutory crime-fraud exception to the work product rule implies that the exception does not apply to work product documents. The court concluded that in view of the absolute language of the work product statute, the plain meaning of that statute governs. Accordingly, it was error to order disclosure of documents that reflected the absolute work product of defendant's attorneys (*199 Cal. App. 3d 1240, 1251)* .

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8-81 California Points & Authorities § 81.222

§ 81.222 Opposing Motion to Compel Discovery--Work Product Protected From Disclosure [Code Civ. Proc. § 2018.020]--Absolute Protection [Code Civ. Proc. § 2018.030(a)]--Nature and Extent of Testimony of Nonexpert Witnesses, Comments on Statements of Nonexpert Witnesses, or Attorney's Legal Reasoning or Theories

[1] FORM

[*The following may be combined with a general memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30). It should also be preceded by general points and authorities relating to absolute protection of attorney's work product (see, e.g., § 81.220).*]

ABSOLUTE PROTECTION FROM DISCLOSURE UNDER THE WORK PRODUCT DOCTRINE IS TO BE GIVEN TO _____ [THE NATURE AND EXTENT OF EXPECTED TESTIMONY OF NONEXPERT WITNESSES *and/or* COMMENTS ON STATEMENTS OF WITNESSES *and/or* LEGAL REASONING OR THEORIES] MADE BY THE _____ [ATTORNEY *or* AGENT OF THE ATTORNEY] FOR _____ [PLAINTIFF *or* DEFENDANT], PURSUANT TO THE PROVISIONS OF SECTION 2018.030(a) OF THE CODE OF CIVIL PROCEDURE.

A. Absolute Work Product Protection. [*See § 81.220[1].*]

[*EITHER*]

B. Inquiry Into Expected Testimony of Nonexpert Witnesses. Discovery of the nature and extent of testimony by nonexpert witnesses requires the production of a writing reflecting the attorney's impressions, conclusions, and opinions and falls within the absolute work product protection (*Long Beach v. Superior Court (1976) 64 Cal. App. 3d 65, 80-81, 134 Cal. Rptr. 468*).

[*AND/OR*]

C. Comments on Statement of Witness by Attorney or Agent. Any portion of an attorney's notes or those of his or her agent that consists of comments on statements of witnesses is absolutely protected from disclosure under the work product doctrine (*Rodriguez v. McDonnell Douglas Corp. (1978) 87 Cal. App. 3d 626, 647, 648, 151 Cal. Rptr. 399*).

[*AND/OR*]

D. Attorney's Legal Reasoning or Theories. An attorney's legal reasoning or theories concerning a matter relevant to a proceedings is absolutely protected from disclosure under the work product doctrine (*Burke v. Superior Court (1969) 71 Cal. 2d 276, 285, 78 Cal. Rptr. 481, 455 P.2d 409*).

[2] Comments

[a] Use of Form

This form may be submitted by a party resisting discovery of an attorney's (or the attorney's agent's) notes that comment on a witness's statements, and the nature and extent of the testimony of all nonexpert witnesses. Different rules apply to disclosure relating to expert witnesses [*see, e.g., Code Civ. Proc. §§ 2018.030(b), 2034.010 et seq.*; *see also § 81.202*]. Counsel should use the points and *authorities in § 81.220*, instead of this form, to claim absolute work product protection not based on the grounds set forth in this form.

This form may be combined with § 81.223 when counsel wishes to contend that other work product material that is not absolutely protected is not discoverable because the party seeking discovery has failed to meet the statutory burden to compel production.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Inquiry Into Expected Testimony of Nonexpert Witnesses

Long Beach v. Superior Court *(1976) 64 Cal. App. 3d 65, 134 Cal. Rptr. 468* was an action to seek damages for personal injuries sustained in an automobile accident. Plaintiff served defendant city with interrogatories, one of which requested a list of the nonexpert witnesses intended to be called at trial and the nature and extent of their testimony. Defendant objected to the interrogatory on the ground that it was attorney work product under former Code Civ. Proc. § 2016(b), (g) (*now see Code Civ. Proc. § 2018.030(a)*). The trial court granted plaintiff's motion to compel further answers, and defendant filed a petition for a writ of mandate directing the trial court to vacate its order.

The court of appeal granted the petition, holding that requiring the attorney to describe the extent of the expected testimony of the witnessesclearly calls for production of a writing reflecting the attorney's impressions, conclusions, and opinions. The material therefore falls within the absolute work product privilege (*64 Cal. App. 3d 65, 80)* . The court cited *Sheets v. Superior Court (1967) 257 Cal. App. 2d 1, 10-11, 64 Cal. Rptr. 753* and *People v. Boehm (1969) 270 Cal. App. 2d 13, 21, 75 Cal. Rptr. 590* , holding that if an analysis of the testimony of each witness had already been prepared by defendant's attorney it would have been absolutely privileged. The fact that under the trial court's order the analysis would have been prepared specifically for submission to plaintiff did not justify a contrary result (*64 Cal. App. 3d 65, 80-81)* .

[b] Comments on Statement of Witness by Attorney or Agent

The facts and procedural background of ***Rodriguez v. McDonnell Douglas Corp.*** *(1978) 87 Cal. App. 3d 626, 151 Cal. Rptr. 399* are discussed in *§ 81.200[3][d]*. In *Rodriguez,* the court of appeal held that the part of an investigator's notes that merely recorded the witnesses' statements should not have been protected from disclosure under the work product doctrine (*87 Cal. App. 3d 626, 647)* . However, that portion of the notes consisting of the investigator's comments should have been given absolute protection from disclosure under former Code Civ. Proc. 2016(b) (*now see Code Civ. Proc. § 2018.030(a)*) (*87 Cal. App. 3d 626, 648)* .

[c] Attorney's Legal Reasoning or Theories

Burke v. Superior Court *(1969) 71 Cal. 2d 276, 78 Cal. Rptr. 481, 455 P.2d 409* is discussed in *§ 81.200[3][b]*.

[4] Additional Authorities

[a] Attorney's Legal Reasoning or Theories

Sav-On Drugs, Inc. v. Superior Court (1975) 15 Cal. 3d 1, 123 Cal. Rptr. 283, 538 P.2d 739 was a class action against retailers regarding allegedly excessive sales tax. One of the defendants brought a petition for a writ of prohibition restraining the trial court from compelling an answer to an interrogatory that asked what specific deductions or adjustments petitioner made in respect to sales tax returns for certain years, and also what law or regulation permits them. The Supreme Court granted the petition, holding, inter alia, that the request in essence seeks the legal reasoning and theories behind petitioner's contention that any sales tax deductions it took are proper; and that a party's contention may be the subject of discovery, but not the legal reasoning or theory behind the contention (*15 Cal. 3d 1, 5)* .

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8-81 California Points & Authorities § 81.223

§ 81.223 Opposing Motion to Compel Discovery--Work Product Protected From Disclosure [Code Civ. Proc. § 2018.020]--Conditional Protection [Code Civ. Proc. § 2018.030(b)]

[1] FORM

[*The following may be combined, when appropriate, with a general memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30).*]

THE _____ [*describe work product sought to be discovered, e.g.,* LIST OF ALL NONEXPERT WITNESSES WHO WILL BE CALLED AT TRIAL] IS PROTECTED WORK PRODUCT BECAUSE _____ [PLAINTIFF *or* DEFENDANT] HAS NOT SHOWN THAT DENIAL OF DISCOVERY WILL UNFAIRLY PREJUDICE _____ [PLAINTIFF *or* DEFENDANT] OR WILL RESULT IN AN INJUSTICE.

A. Conditional Work Product Protection. Subject to *Code of Civil Procedure Section 2018.030(a)*, the work product of an attorney is discoverable only if the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice (*Code Civ. Proc. § 2018.030(b)*).

B. Definition of Work Product. Since there is no statutory definition of material protected as attorney's work product, the court must therefore resort to case law and to the policy declared in *Code of Civil Procedure Section 2018.020* to determine whether work product is involved (*see Mack v. Superior Court (1968) 259 Cal. App. 2d 7, 10, 66 Cal. Rptr. 280*).

C. Material Protected as Work Product. The cases indicate generally that material of a derivative character, such as diagrams prepared for trial, audit reports, appraisals, and other expert opinions, developed as a result of the initiative of counsel in preparing for trial are to be protected as work product (*Mack v. Superior Court (1968) 259 Cal. App. 2d 7, 10, 66 Cal. Rptr. 280*).

D. Burden on Party Seeking Disclosure. The burden of proof is on the party seeking discovery, once the party resisting discovery has raised the objection of work product (*see Code Civ. Proc. § 2018.030(b)*; *Long Beach v. Superior Court (1976) 64 Cal. App. 3d 65, 79, 134 Cal. Rptr. 468*).

[*Optional*] **E. Complete List of Nonexpert Witnesses Who Will Be Called at Trial.** A complete list of nonexpert witnesses designated by the attorney to testify at trial is a derivative product developed as a result of the initiative of counsel in preparing for trial, and the forced revelation of the list would violate the work product doctrine because counsel's decision in this respect is strategic and necessarily reflects counsel's evaluation of the strengths and weaknesses of the case (*Long Beach v. Superior Court (1976) 64 Cal. App. 3d 65, 73, 134 Cal. Rptr. 468*).

[2] Comments

[a] Use of Form

This form is for use by a party resisting discovery when the information sought is work product that is not absolutely protected from disclosure, and the party seeking discovery has not met the statutory burden to compel production [*see Code Civ. Proc. § 2018.030(b)*]. Optional Paragraph E is for use if the work product sought to be discovered consists of a list of nonexpert witnesses designated by the attorney to testify at trial.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel may wish to show why foreclosing discovery would not result in unfair prejudice or injustice to the party seeking discovery.

[c] Absolute Attorney Work Product Protection

If discovery is sought of an attorney's writing that reflects the attorney's impressions, conclusions, opinions, or legal research or theories, the work product is absolutely protected pursuant to *Code Civ. Proc. § 2018.030(a)*, and counsel should use § 81.220 or § 81.222 instead of this form.

[d] Discovery of Information Concerning Merely Potential Witnesses

The names of all witnesses with knowledge of relevant facts, i.e., *potential* witnesses, are not within the work product privilege [*see Borse v. Superior Court (1970) 7 Cal. App. 3d 286, 289, 86 Cal. Rptr. 559* ; *see also § 81.200*]. However, an attorney's list of witnesses expected to be called at trial is distinguishable from a list of merely potential witnesses in that it reflects the initiative of counsel in preparing for trial [*see Long Beach v. Superior Court (1976) 64 Cal. App. 3d 65, 73, 134 Cal. Rptr. 468* ; *but see In re Jeanette H. (1990) 225 Cal. App. 3d 25, 34-37, 275 Cal. Rptr. 9* (juvenile court rule requiring disclosure of witness list at trial readiness conference was upheld)].

[3] Discussion of Authorities

[a] Definition of Work Product

The facts and procedural background of ***Mack v. Superior Court*** *(1968) 259 Cal. App. 2d 7, 66 Cal. Rptr. 280* are *set out in § 81.200[3][g]*. There, the court stated that since there is no statutory definition of work product, the courts must resort to the cases and to the policy set forth in former Code Civ. Proc. § 2019(g) [*see now Code Civ. Proc. § 2018.020*] in determining whether work product is involved in a particular case (*259 Cal. App. 2d 7, 10)* . The court went on to hold that since the appraiser's opinions that were sought were indeed work product, they need not be disclosed (*259 Cal. App. 2d 7, 10, 11)* .

[b] Material Protected as Work Product

The facts and procedural background of ***Mack v. Superior Court*** *(1968) 259 Cal. App. 2d 7, 66 Cal. Rptr. 280* are discussed in *§ 81.200[3][g]*. In *Mack*, the court held that while there is no statutory definition of work product, the cases generally have indicated that work product consists of such derivative material as diagrams prepared for trial, audit reports, appraisals, and other expert opinions developed as the result of an attorney's initiative in preparing for trial (*259 Cal. App. 2d 7, 10)* .

[c] Burden on Party Seeking Disclosure

Code Civ. Proc. § 2018.030(b) provides for the nondisclosure of attorney work product, unless the court finds that such nondisclosure will unfairly prejudice the party seeking discovery, or will result in injustice. This has been characterized as presenting a major change from the prestatutory work product doctrine in California. Previously, the party from whom discovery was sought bore the burden of establishing not only that workproduct protection was applicable, but that it would also be unjust to permit discovery [*see, e.g.,* *San Diego Professional Asso. v. Superior Court of San Diego County (1962) 58 Cal. 2d 194, 204, 23 Cal. Rptr. 384, 373 P.2d 448]* . Now, the burden of establishing that the material sought is work product remains with the party making the claim of work product, but the burden then shifts to the party seeking discovery to persuade the court that the denial of such discovery will cause unfair prejudice or will result in injustice [McCoy, *California Civil Discovery: Work Product of Attorneys* (1966) *18 Stan. L. Rev. 783, 803*].

The facts and procedural background of ***Long Beach v. Superior Court*** *(1976) 64 Cal. App. 3d 65, 134 Cal. Rptr. 468* are discussed in *§ 81.222[3][a]*. In *Long Beach*, the court held that defendant had established that the list of all nonexpert witnesses and the nature and extent of their testimony that defendant sought was clearly work product. The court went on to hold that since former Code Civ. Proc. § 2016(b) [*see now Code Civ. Proc. § 2018.030(b)*] specifically places the burden of proof on the party seeking discovery once the other party has raised the objection of work product protection, plaintiff ought to have made a showing of facts to overcome the qualified privilege. The court held that this showing was not made; plaintiff merely stated that the information was discoverable and not privileged, but never attempted to make the required showing of unfair prejudice (*64 Cal. App. 3d 65, 79)* .

[d] Complete List of Nonexpert Witnesses Who Will Be Called at Trial

The facts and procedural background of ***Long Beach v. Superior Court*** *(1976) 64 Cal. App. 3d 65, 134 Cal. Rptr. 468* are discussed in *§ 81.222[3][a]*. In *Long Beach*, the court of appeal held that requiring an attorney to describe the extent of the expected testimony of the witnesses calls for production of a writing reflecting the attorney's impressions, conclusions, and opinions, and therefore falls within the absolute work product protection (*64 Cal. App. 3d 65, 80)* . The governing statute (former Code Civ. Proc. § 2016(b); *see now Code Civ. Proc. § 2018.010 et seq.*) does not define work product, and the definition of work product must be resolved by individual court determinations on a case-by-case basis (*64 Cal. App. 3d 65, 71)* . Although a party may discover the names of all witnesses with knowledge of relevant facts, that is, percipient witnesses, the identity of witnesses who will be called at trial is a derivative product developed as a result of the initiative of counsel in preparing for trial. It necessarily reflects counsel's evaluation of the strengths and weaknesses of his or her case, and requiring disclosure of this information would inevitably chill counsel's willingness to investigate unfavorable as well as favorable aspects of the case (*64 Cal. App. 3d 65, 73)* .

[4] Additional Authorities

[a] Conditional Work Product Protection

The facts and procedural background of *Dowden v. Superior Court (1999) 73 Cal. App. 4th 126, 86 Cal. Rptr. 2d 180* are *set out in § 81.205[4][a]*. In *Dowden*, the court of appeal held that litigants *in propria persona* may assert Code Civ. Proc. § 2018's (*now see Code Civ. Proc. § 2018.010 et seq.*) work product privilege and that an *in camera* review of plaintiff's diary, which allegedly was prepared in anticipation of litigation, was required to determine whether it

contained matter that was privileged under Code Civ. Proc. § 2018 (*now see Code Civ. Proc. § 2018.010 et seq.*) (*73 Cal. App. 4th 126, 136)* .

In *People v. Superior Court (Bauman & Rose) (1995) 37 Cal. App. 4th 1757, 44 Cal. Rptr. 2d 734* , the Los Angeles District Attorney appealed the superior court's order sealing certain documents seized during a search of the respondents' law offices pursuant to a search warrant, as part of an investigation to uncover evidence of insurance fraud. The court ofappeal affirmed. The court held that an *in camera* hearing was required to determine whether the work-product privilege applies to the seized client files (*37 Cal. App. 4th 1757, 1767)* .

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8-81 California Points & Authorities § 81.224

§ 81.224 Opposing Motion to Compel Discovery--Work Product Protected From Disclosure [Code Civ. Proc. § 2018.020]--Conditional Protection [Code Civ. Proc. § 2018.030(b)]--Protection Against Discovery of Experts

[1] FORM

[*The following may be combined, when appropriate, with a general memorandum to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30). It should also be preceded by general points and authorities relating to conditional protection of attorney's work product (see, e.g., § 81.223).*]

CONDITIONAL WORK PRODUCT PROTECTION SHOULD BE GIVEN TO _____ [OPINIONS OF NONWITNESS EXPERTS *or* OPINIONS OF PERCIPIENT, AS OPPOSED TO RETAINED, EXPERTS *or* INFORMATION IMPARTED BY ATTORNEYS TO EXPERTS IN PREPARATION FOR LITIGATION *or* A LIST OF POTENTIAL EXPERT WITNESSES REQUESTED FAR IN ADVANCE OF TRIAL *or* THE PRODUCT OF AN EXPERT'S SERVICES THAT IS RENDERED IN A PURELY ADVISORY CAPACITY *or* THE KNOWLEDGE OR OPINION OF A PREVIOUSLY DESIGNATED EXPERT TRIAL WITNESS WHO WAS WITHDRAWN FROM THAT LIST BEFORE BEING DEPOSED *or combination of these*].

[*EITHER*]

A. Good Cause Needed for Discovery of Expert's Opinions. Good cause must be shown before there can be disclosure of the observations and conclusions of an independent expert engaged for the purpose of trial preparation (*County of Los Angeles v. Superior Court (1990) 222 Cal. App. 3d 647, 654, 271 Cal. Rptr. 698* ; *Grand Lake Drive In v. Superior Court (1960) 179 Cal. App. 2d 122, 129, 3 Cal. Rptr. 621*).

[*AND/OR*]

B. Broad Immunity From Discovery of Expert Witness Information If Expert Not Scheduled to Testify at Trial. Opinions ofan expert who has been engaged by an attorney to help in the preparation of a case should ordinarily be given broad immunity from discovery until such time as the expert is designated to be a witness at trial (*Swartzman v. Superior Court (1964) 231 Cal. App. 2d 195, 202, 203, 41 Cal. Rptr. 721* ; *Petterson v. Superior Court (1974) 39 Cal. App. 3d 267, 272, 114 Cal. Rptr. 20*).

[*AND/OR*]

C. Discovery of Percipient, as Opposed to Retained, Experts. An analysis of the anticipated testimony of percipient expert witnesses, as opposed to retained expert witnesses, is protected by the work product doctrine and is not discoverable (*Huntley v. Foster (1995) 35 Cal. App. 4th 753, 756-757, 41 Cal. Rptr. 2d 358*).

[*AND/OR*]

D. Opinions Imparted to Experts. It would be a violation of the work product rule to permit discovery of any information that an attorney might have imparted to experts in preparation for litigation (*Kenney v. Superior Court (1967) 255 Cal. App. 2d 106, 112, 63 Cal. Rptr. 84*).

[*AND/OR*]

E. Discovery of Experts Far in Advance of Trial. Discovery of the identity of experts consulted is improper when the party from whom discovery is sought has not yet determined whether to use any of the experts as witnesses, and when there is still a substantial period of time for trial preparation (*South Tahoe Public Utility Dist. v. Superior Court (1979) 90 Cal. App. 3d 135, 138, 154 Cal. Rptr. 1*).

[*AND/OR*]

F. Services of Expert Rendered in Purely Advisory Capacity. Work product protection attaches to an expert's services that are rendered in a purely advisory capacity, even if the expert is a potential witness (*National Steel Products Co. v. Superior Court (1985) 164 Cal. App. 3d 476, 487, 210 Cal. Rptr. 535* ; *Scotsman Mfg. Co. v. Superior Court (1966) 242 Cal. App. 2d 527, 531, 51 Cal. Rptr. 511*).

[*AND/OR*]

G. Knowledge or Opinion of Expert Taken off List of Designated Trial Witnesses Before Deposition. When an expert previously designated as an expert trial witness is withdrawn from thatlist at any time before the expert's deposition, the work product protection is revived with respect to that expert's knowledge or opinion that was previously made discoverable by its relevance to his or her expected testimony (*County of Los Angeles v. Superior Court (1990) 222 Cal. App. 3d 647, 655-658, 271 Cal. Rptr. 698*).

[2] Comments

[a] Use of Form

These points and authorities are intended for use in opposition to a motion to compel discovery on the ground that

expert opinions, reports, or names and addresses of experts that are sought are protected by the work product doctrine. This form may be combined with a general form in opposition to a motion to compel discovery, as well as with general points and authorities on conditional protection.

For authorities that discuss situations in which an expert's opinion may not come under the protection of the work product doctrine, see *§ 81.202*. For a form that may be used in opposition to a motion to compel discovery on the ground that designation of a party as an expert trial witness is not itself an implied waiver of the privilege, if the designation is withdrawn before the party discloses a significant part of a privileged communication, or before it is known with reasonable certainty that the party will actually testify as an expert, see *§ 81.90*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Good Cause Needed for Discovery of Expert's Opinions

In ***County of Los Angeles v. Superior Court*** *(1990) 222 Cal. App. 3d 647, 271 Cal. Rptr. 698* , a medical malpractice action, defendant county designated a neuropathologist as an expert witness pursuant to an exchange of expert witnesses under Code Civ. Proc. § 2034 (*now see Code Civ. Proc. § 2034.010 et seq.*). Before that neuropathologist's deposition was held, defendant amended its expert witness list by withdrawing the neuropathologist as a trial witness, but retained him as a consultant. Plaintiff's attorneys then contacted the neuropathologist, interviewed him, and attempted to designate him as an expert. Defendant moved for a protective order and to disqualify plaintiff's attorney. The trial court denied defendant's motions, and permitted plaintiff to augment his expert witnesslist to include the neuropathologist as his own expert. Defendant applied for a writ of mandate.

The court of appeal issued a peremptory writ of mandate directing the trial court to grant the relief requested by defendant. The court explained that the neuropathologist's opinions about the case constituted defendant's attorney's work product. Pursuant to Code Civ. Proc. § 2018(b) (*now see Code Civ. Proc. § 2018.030(b)*), plaintiff may discover that work product only upon a showing of unfair prejudice or injustice. In other words, work product protection may be suspended on a showing of good cause. The good-cause exception has come to mean there is no adequate substitute for the material generated by the expert. Plaintiff claimed that there was no adequate substitute for the neuropathologist's work because he was the only available expert in that field. However, the only supporting evidence presented by plaintiff was a declaration made by his attorney consisting of hearsay statements that the neuropathologist was one of a handful in the state, and one of only two in the city, the other of whom was employed by defendant. The court of appeal found that to be an insufficient showing of good cause. It suggested that evidence concerning the specific number of potential experts in the field, or about any undue expense involved in contacting the other experts within the state might have constituted good cause (*222 Cal. App. 3d 647, 654)* .

Grand Lake Drive In v. Superior Court *(1960) 179 Cal. App. 2d 122, 3 Cal. Rptr. 621* predated the 1963 amendments to former Code Civ. Proc. § 2016 [*see now Code Civ. Proc. § 2018.010 et seq.*], which gave statutory protection to an attorney's work product. Nevertheless, its judicial importation of the requirement of good cause into the area of discovery of experts remains good law.

The case arose out of an action for personal injuries based on a slip and fall. Defendant's attorney engaged a firm of testing engineers to inspect defendant's sidewalk surface. Plaintiff deposed the expert who actually made the tests, but the deponent refused to answer any questions at all. On plaintiff's motion, the trial court ordered the expert to answer all questions concerning the tests he had made and what he had observed.

The court of appeal granted a writ of mandate, holding that although the attorney-client privilege and the work product rule were not applicable, fairness requires that there be a showing of good cause as a precondition to the exercise of the power of the court to require pretrial disclosure of the observations and conclusions of an independent expert engaged in preparation for trial (*179 Cal. App. 2d 122, 129)* . The court went on to hold that it would not define good cause, but that good cause should lie where the object tested no longer exists or has been greatly altered by the testing (*179 Cal. App. 2d 122, 131)* .

Note that work product protection was deemed inapplicable because what was sought was not the research, thought, and effort of the attorney,but was solely the product of the expert (*179 Cal. App. 2d 122, 129)* . Although there was no statutory work product doctrine then in effect, the above statement appears to still be valid. For example, in *Petterson v. Superior Court (1974) 39 Cal. App. 3d 267, 271, 114 Cal. Rptr. 20* , the court of appeal distinguished the expert's protected reports to the attorney who retained that expert from an expert's own observations that are not communicated to the attorney, which are not so protected.

[b] Broad Immunity From Discovery of Expert Witness Information If Expert Not Scheduled to Testify at Trial

The facts and procedural background of ***Swartzman v. Superior Court*** *(1964) 231 Cal. App. 2d 195, 41 Cal. Rptr. 721* are *set out in § 81.202[3][a]*. There, in the context of an eminent domain proceeding, the court noted that consultation between the expert and counsel may be given broad immunity from discovery because the expert's opinion is ordinarily irrelevant unless and until he or she is called as a witness at trial (*231 Cal. App. 2d 195, 202, 203)* . This rule arose from the policy embodied in former Code Civ. Proc. § 2016 [*now see Code Civ. Proc. § 2018.020*] that discovery may not be used for the purposes of substituting an adversary's preparation for one's own (*231 Cal. App. 2d 195, 203)* .

The facts and procedural background of ***Petterson v. Superior Court*** *(1974) 39 Cal. App. 3d 267, 114 Cal. Rptr. 20* are discussed in *§ 81.202[3][b]*. The *Petterson* court noted, in dictum, that an expert who has been engaged by an attorney to assist in trial preparation but who will not be called as a witness at trial must be given broad immunity from having to give testimony, since his or her opinion will ordinarily not be a relevant factor in the case, citing *Swartzman v. Superior Court (1964) 231 Cal. App. 2d 195, 41 Cal. Rptr. 721* , discussed *above* (*39 Cal. App. 3d 267, 272)* . Despite the foregoing statement, however, the court went on to hold that depositions of respondent's handwriting expert could be compelled on various grounds including waiver and fairness (*39 Cal. App. 3d 267, 273, 274)* .

[c] Discovery of Percipient, as Opposed to Retained, Experts

In ***Huntley v. Foster*** *(1995) 35 Cal. App. 4th 753, 41 Cal. Rptr. 2d 358* , a personal injury action, the parties served a demand for expert witness information on each other. Plaintiff responded that she did not have any retained experts but would rely on the opinions of the medical care providers. At trial, one of the defendants sought to exclude the expert testimony of the doctors because plaintiff failed to provide the defendant with an expert witness declaration for them [*now see* Code Civ. Proc.§ 2034.260(c)]. The trial court granted defendant's in limine motion restricting the doctors to testifying as percipient, not expert, witnesses. The plaintiff and defendant stipulated to a monetary judgment in favor of plaintiff to enable plaintiff to appeal the trial court's order. Plaintiff then appealed the order.

The court of appeal reversed, holding that Civ. Proc. § 2034 (*now see Code Civ. Proc. § 2034.010 et seq.*)--under which the parties must provide an expert witness declaration on request--applies only to retained experts. An analysis of the anticipated testimony of percipient expert witnesses, as opposed to retained expert witnesses, is protected by the work product doctrine and is not discoverable. Thus, the disclosure requirements are not applicable to treating doctors, even if they may be asked for expert opinions at trial (*35 Cal. App. 4th 753, 756-757)* .

[d] Opinions Imparted to Experts

Kenney v. Superior Court *(1967) 255 Cal. App. 2d 106, 63 Cal. Rptr. 84* arose out of a medical malpractice action in which plaintiff served interrogatories inquiring about whether defendant had consulted with experts on the question of diagnosis and treatment, and if so, the names, addresses, and professional backgrounds of those experts. Plaintiff also inquired about whether the experts would be called as witnesses, and requested the information that had been imparted to a medical committee as well. When some of the questions went unanswered, plaintiff sought and obtained an order compelling responses.

The court of appeal issued a writ of mandate ordering the trial court to modify its order requiring further answers. The court of appeal noted that while names, addresses, and other statistical information concerning known potential witnesses may be discovered, it would violate the work product rule to permit discovery of any information that defendant or his attorney might have imparted to such experts in preparation for litigation (*255 Cal. App. 2d 106, 112)* .

[e] Discovery of Experts Far in Advance of Trial

In ***South Tahoe Public Utility Dist. v. Superior Court*** *(1979) 90 Cal. App. 3d 135, 154 Cal. Rptr. 1* , the trial court ordered plaintiff to answer an interrogatory inquiring about whether he had consulted with any experts regarding the issues raised in the complaint, and if so, to list the names, addresses, and areas of expertise of any such experts, except those who would not under any circumstances be called as trial witnesses. Plaintiff responded to this request by stating that it had not yet made a decision about whether to use any of its consultants as trial witnesses, and it therefore refused to answer on the ground that the information was protected by the work product doctrine. The trial court then ordered plaintiff to answer, and plaintiff sought a writ of mandate.

The court of appeal issued the writ, noting that plaintiff had not yet determined whether to use any of its experts as witnesses in the trial, and that there was still a substantial period of time left for trial preparation (*90 Cal. App. 3d 135, 138)* . Therefore, to allow premature disclosure would violate former Code Civ. Proc. § 2016(g) [*see now Code Civ. Proc. § 2018.020*] by discouraging plaintiff from fully investigating its case, and by giving defendant such full advantage of plaintiff's attorney's efforts that defendant would be largely able to determine its trial strategy without independent effort on its own part (*90 Cal. App. 3d 135, 138)* .

The court gave added weight to its holding by discussing former Code Civ. Proc. § 2037 [*now see Code Civ. Proc. § 2034.010 et seq.*], which was not in effect at the time of the court order. It noted that this section recognizes the importance of timing in the exchange of lists of expert witnesses (*90 Cal. App. 3d 135, 139)* .

[f] Services of Expert Rendered in Purely Advisory Capacity

National Steel Products Co. v. Superior Court *(1985) 164 Cal. App. 3d 476, 210 Cal. Rptr. 535* involved an action against a manufacturer for faulty design, fabrication, and erection of a metal building. A potential expert witness for defendant had prepared an engineering analysis during a prior, similar action against defendant in another state. The trial court granted plaintiff's request to discover this report, and defendant petitioned for a writ of mandate to vacate this order. The court of appeal granted the writ and ordered the trial court to inspect the report in camera and permit its discovery only to the extent that it was unprotected by the work product privilege (*164 Cal. App. 3d 476, 493)* . The court held that not all of an expert's services, reports, or opinions are discoverable merely because he or she becomes a potential witness. Expert services rendered in an advisory capacity are subject to the conditional work product privilege; those that qualify the person as an expert witness are subject to discovery when severable from those that are privileged. Advisory services are those that are designed to assist the attorney in such matters as preparation of pleadings, the manner of presentation of proof, and cross-examination of opposing expert witnesses, i.e., matters that are often reflective of the mental processes of the attorney under whose direction the expert works. Services that qualify a person as an expert witness are those that contain findings and opinions of the expert that go to the establishment or denial of a principal fact in issue (*164 Cal. App. 3d 476, 488-489)* . Portions of an expert witness's work found to be advisory and

subject to the conditional privilege may not be discovered absent some other compelling reason for discovery, such as the work's impeachment value or the availability of an adequate substitute (*164 Cal. App. 3d 476, 490-492)* .

The facts and procedural background of ***Scotsman Mfg. Co. v. Superior Court*** *(1966) 242 Cal. App. 2d 527, 51 Cal. Rptr. 511* are *set out in § 81.202[3][c]*. In *Scotsman*, the court held that even though an expert is a potential witness, that does not remove work product protection from the product of his services, which were rendered in a purely advisory capacity (*242 Cal. App. 2d 527, 531)* .

[g] Knowledge or Opinion of Expert Taken off List of Designated Trial Witnesses Before Deposition

The facts and procedural background of ***County of Los Angeles v. Superior Court*** *(1990) 222 Cal. App. 3d 647, 271 Cal. Rptr. 698* are discussed in [a], *above.* In *County of Los Angeles*, the court of appeal issued a peremptory writ of mandate, directing the trial court to grant the relief requested by defendant, which included disqualification of plaintiff's attorney. It explained that plaintiff's attorney had acted improperly by contacting the neuropathologist serving as defendant's expert consultant. The court said that the work of an expert-consultant is protected by the attorney work product doctrine. Once it appears reasonably certain that the expert-consultant will give his or her professional opinion as a witness on a material matter in dispute, as indicated by inclusion of that expert on the designated expert witness list, the work product protection terminates and the expert's knowledge and opinions are subject to discovery and disclosure (*222 Cal. App. 3d 647, 654-655)* . However, a party may withdraw a consultant-expert who has been named as a potential witness at any time before the expert's deposition (*222 Cal. App. 3d 647, 656)* . In this event, the work product protection is revived with respect to that expert's knowledge or opinion that was previously made discoverable because of its relevance to his or her expected testimony (*222 Cal. App. 3d 647, 655-658)* . Materials generated as a result of the expert's advisory services, the protection of which was not withdrawn by the expert's designation as a potential witness, remain protected work product (*222 Cal. App. 3d 647, 655)* . The court held that defendant had properly withdrawn the neuropathologist from the designated expert witness list, thereby reviving the work product protection (*222 Cal. App. 3d 647, 656)* .

The court noted further that once a previously designated expert has been withdrawn from the list of potential witnesses, if that expert continues his or her relationship with the party as a consultant, the opposing party is barred from communicating with the expert and from retaining him or her as an expert (*222 Cal. App. 3d 647, 657-658)* . The penalty for an attorney violating this rule is disqualification from the case (*222 Cal. App. 3d 647, 658)* .

[4] Additional Authorities

[a] Broad Immunity From Discovery of Expert Witness Information If Expert Not Scheduled to Testify at Trial

Armenta v. Superior Court, 101 Cal. App. 4th 525, 124 Cal. Rptr. 2d 273 (2002) arose from a case filed under the California False Claims Act, in which a qui tam plaintiff alleged on behalf of the Los Angeles Department of Water and Power (department) and other municipal water systems that real party in interest companies sold the water systems water valves, fittings and other metal water distribution parts that contained significantly higher levels of lead and zinc than allowed in the contract specifications and that could lead to an increase in lead levels in the water supply. The qui tam plaintiff and the department retained an expert on lead leaching, as well as two other experts. The expert on lead leaching and plaintiff individual's counsel consulted extensively with two other experts. To protect their work product, the parties executed a joint prosecution agreement. In response to a proposed settlement by the companies with the department, the department wanted to make all expert data available to them. The individual plaintiff, the district, city and county asserted a claim of work product under Code Civ. Proc. § 2018 (*now see Code Civ. Proc. § 2018.010 et seq.*). The superior court, however, found that Civ. Proc. § 2018 (*now see Code Civ. Proc. § 2018.010 et seq.*) did not prohibit the companies from using the expert reports. Petitioners were granted a writ of mandate.

The court of appeal found that the qui tam plaintiff had a valid work product interest in the reports of the expert retained as a consultant, but not designated as a witness, that counsel for the department could not waive. The materials sought came within the qualified privilege under Code Civ. Proc. § 2018(b) (*now see Code Civ. Proc. § 2018.030(b)*). "[R]eports prepared by an expert as a consultant are protected until the expert is designated as a witness ... . However, to the extent that said reports embrace counsel's impressions and conclusions, the work-product doctrine gives absolute protection to that information" (*101 Cal. App. 4th 525, 534)* . Further, the joint prosecution agreement provided full protection for that information. Because the expert's reports were the result of the qui tam plaintiff's and the department's joint collaboration, counsel for the department had no authority to waive the work product privilege on the qui tam plaintiff's behalf (*101 Cal. App. 4th 525, 534)* . Finally, no substantial evidence supported the trial court's conclusion that denial of access to the materials would unfairly prejudicial the companies' defense because the companies could generate comparable evidence (*101 Cal. App. 4th 525, 536)* .

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8-81 California Points & Authorities § 81.225

§ 81.225 Opposing Motion to Compel Discovery--Work Product Protected From Disclosure [Code Civ. Proc. § 2018.020]--Protection Not Waived

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30).*]

THE WORK PRODUCT PROTECTION OF _____ [_____ (PLAINTIFF *or* DEFENDANT) *or* (PLAINTIFF'S *or* DEFENDANT'S) ATTORNEY] IS NOT AUTOMATICALLY WAIVED BY _____ [FILING AND PROSECUTING A CIVIL ACTION *and/or* TENDERING A PROBABLE CAUSE OF DEFENSE IN A MALICIOUS PROSECUTION ACTION *and/or* TENDERING THE ISSUE OF DAMAGES IN A LEGAL MALPRACTICE ACTION *and/or* THE FORMER ATTORNEY'S GIVING THE FILE TO _____ (PLAINTIFF *or* DEFENDANT) *and/or* INVOLUNTARILY COMPELLED DISCLOSURE].

[*EITHER*]

A. Filing and Prosecuting Civil Action. Work product protection is not automatically waived by the filing and prosecution of a civil action (*Fellows v. Superior Court (1980) 108 Cal. App. 3d 55, 66, 166 Cal. Rptr. 274*).

[*AND/OR*]

B. Giving File to Clients. Work product protection is not waived by an attorney turning over the contents of his or her files to clients (*BP Alaska Exploration, Inc. v. Superior Court (1988) 199 Cal. App. 3d 1240, 1260, 245 Cal. Rptr. 682* ; *Fellows v. Superior Court (1980) 108 Cal. App. 3d 55, 65, 166 Cal. Rptr. 274*).

[*AND/OR*]

C. Involuntary Disclosure. A waiver of work product protection is not effected when disclosure of material otherwise protected under the work product rule is involuntarily compelled (*American Mut. Liab. Ins. Co. v. Superior Court (1974) 38 Cal. App. 3d 579, 595, 113 Cal. Rptr. 561*).

[*AND/OR*]

D. Tendering Probable Cause Defense in Malicious Prosecution Action. A defendant in a malicious prosecution action does notwaive protection from his or her attorney's disclosure of work product in a prior action merely by tendering a defense of probable cause (*Popelka, Allard, McCowan & Jones v. Superior Court (1980) 107 Cal. App. 3d 496, 502, 503, 165 Cal. Rptr. 748*).

[*AND/OR*]

E. Tendering Issue of Damages in Legal Malpractice Action. A plaintiff in a malpractice action against his or her former attorney does not waive protection from disclosure of the work product of his or her present attorney merely by tendering the issue of damages, even though the information requested may be relevant to the issue (*Schlumberger Limited v. Superior Court (1981) 115 Cal. App. 3d 386, 393, 171 Cal. Rptr. 413*).

[2] Comments

[a] Use of Form

This form is for use by a party resisting discovery on work product grounds when the opposing party has claimed that there has been a waiver of work product protection [*see, e.g., Fellows v. Superior Court (1980) 108 Cal. App. 3d 55, 66, 166 Cal. Rptr. 274]* .

It may be combined with a general form in opposition to a motion to compel discovery.

In an appropriate case, these points and authorities may be submitted in opposition to the motion supported by the points and authorities *set out in § 81.204*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Filing and Prosecuting Civil Action

Fellows v. Superior Court *(1980) 108 Cal. App. 3d 55, 166 Cal. Rptr. 274* arose out of an action for breach of an insurance contract, fraud, and deceit against an insurance company and others. The basis for the action against the insurance company was the alleged violation of its duty of fair dealing during prior arbitration proceedings regarding plaintiff's claims for uninsured motorist coverage. Plaintiff's arbitration attorney turned his files over to plaintiffs, who retained new counsel to represent them in a subsequent civil action for breach of contract, fraud, and deceit. Defendantssought production of the arbitration attorney's files pertaining to the uninsured motorist claims, and plaintiff resisted the claim on work product grounds. The trial court ordered production, on the ground that the work product

privilege was not applicable to litigation that arose after completion of the matter giving rise to the attorney's work product for which the privilege was claimed. Plaintiffs filed a petition for a writ of prohibition.

The court of appeal granted the petition, holding that the filing and prosecution of the civil action, after termination of the arbitration proceedings, did not constitute a waiver of the work product privilege (*108 Cal. App. 3d 55, 66)* . Moreover, protection of both absolutely and conditionally protected work product survives the litigation or other matter in which the work product was created (*108 Cal. App. 3d 55, 62, 63)* . The two-fold policy behind the privilege (allowing an attorney to analyze unfavorable aspects of his or her case, and preventing one attorney from taking advantage of another's efforts) would be furthered by the rule that the privilege does not terminate with the litigation in which the work product was created (*108 Cal. App. 3d 55, 63)* .

[b] Giving File to Clients

The facts and procedural background of ***BP Alaska Exploration, Inc. v. Superior Court*** *(1988) 199 Cal. App. 3d 1240, 245 Cal. Rptr. 682* are discussed in *§ 81.221[3][a]*. In vacating the discovery order of the trial court, the court of appeal considered the issue of whether an attorney's opinion letter or memorandum to a client lost its absolute work product status once the letter or memorandum was delivered in confidence to the client. The court held that an attorney's absolute work product protection continues concerning the contents of a writing delivered to a client in confidence. The protection precludes third parties not representing the client from discovery of the writing. The court said that recognition of an attorney's right to assert a work product protection in the contents of a writing after it is delivered to the client strengthens the attorney-client relationship by enabling the attorney to evaluate the client's case and to communicate his or her opinions to the client without fear that those opinions and theories will later be exposed to the opposing party or to the public in general for criticism or ridicule (*199 Cal. App. 3d 1240, 1260)* .

The facts and procedural background of ***Fellows v. Superior Court*** *(1980) 108 Cal. App. 3d 55, 166 Cal. Rptr. 274* are discussed in [a], *above.* In *Fellows*, the court of appeal held that the attorney's work product protection had not been waived by virtue of plaintiff's filing of a civil action. Moreover, an attorney's disclosure of the contents of his or her files to a client is not a waiver of work product protection for the material contained in the files because disclosure has not been made to a disinterested person (*108 Cal. App. 3d 55, 65)* .

[c] Involuntary Disclosure

American Mut. Liab. Ins. Co. v. Superior Court *(1974) 38 Cal. App. 3d 579, 113 Cal. Rptr. 561* arose out of four medical malpractice actions against a surgeon. At the conclusion of the first two of the actions, in which the respective plaintiffs received both compensatory and punitive damages, the surgeon sued his insurance carrier for misrepresentation and negligent and willful breach of its fiduciary obligations. Consequently, one of the firms hired by the carrier to defend the surgeon withdrew as counsel of record in all the cases then pending against him. In one of the pending actions, plaintiff's attorney served the withdrawn attorney with a subpoena duces tecum, requesting him to appear as a witness and to produce files of the prior cases, as well as all documents relating to the surgeon's competency and health. In addition, plaintiff sought all communications and records to or from the law firm concerning the surgeon's relationship to the codefendant hospital, and all communications among the members of the law firm and other counsel and investigators concerning the physician's judgment and abilities. The insurance carrier appeared specially in this action and objected to this disclosure as a violation of both the attorney-client privilege and the work product rule. The trial court ordered disclosure, and the malpractice carrier brought a petition for a writ of prohibition on the ground that the order was too broad.

The court of appeal granted the petition, noting the dual lawyer-client relationship that exists when a defense lawyer is retained by an insurance company (*38 Cal. App. 3d 579, 590-593, 597* ; *see § 81.80*). Work product protection arose from the attorney's need for privacy and confidentiality (*38 Cal. App. 3d 579, 594)* . Although the protection may be waived, production of files in response to a subpoena duces tecum is involuntary disclosure, and therefore cannot

constitute a waiver (*38 Cal. App. 3d 579, 595)* .

[d] Tendering Probable Cause Defense in Malicious Prosecution Action

Popelka, Allard, McCowan & Jones v. Superior Court *(1980) 107 Cal. App. 3d 496, 165 Cal. Rptr. 748* involved a malicious prosecution action against a law firm. One of the firm's partners refused to answer deposition questions relating to the prior action on which the claim of malicious prosecution was based, claiming attorney work product privilege. Plaintiffs moved to compel answers. The trial court granted the motion on the ground that defendant had waived any privilege because its answer raised the affirmative defense of probable cause. Defendant brought a petition for a writ of mandate requiring the trial court to vacate its order compelling answers.

The court of appeal granted the petition. The law firm's affirmative defense of probable cause merely denied plaintiffs' allegation of lack ofprobable cause, on which plaintiffs had the burden of proof, and was therefore redundant. Moreover, to hold the privilege waived in the instant case would be to hold it waived in every malicious prosecution action, thus defeating the purpose of the privilege (*107 Cal. App. 3d 496, 503)* .

[e] Tendering Issue of Damages in Legal Malpractice Action

Schlumberger Limited v. Superior Court *(1981) 115 Cal. App. 3d 386, 171 Cal. Rptr. 413* arose out of an action for legal malpractice. Defendant requested production of communications and memoranda between plaintiff and his present counsel for a certain period. Plaintiff refused to produce the items, contending, in part, that production would violate his attorney's work product privilege. Defendant moved for and obtained an order compelling production of the items on the ground that they were not privileged and were relevant to the subject matter of the lawsuit. Plaintiff brought a petition for a writ of mandate directing the trial court to vacate its order compelling production.

The court of appeal granted the petition, holding that affirmatively tendering an issue in litigation, such as the issue of damages, does not waive the privilege even though the evidence might be relevant on that issue (*115 Cal. App. 3d 386, 393)* .

[4] Additional Authorities

[a] No Waiver of Protection if Disclosure Involuntary

The facts and procedural background of *Schlumberger Limited v. Superior Court (1981) 115 Cal. App. 3d 386, 171 Cal. Rptr. 413* are discussed in [3][e], *above.* In *Schlumberger*, the court held that affirmatively tendering an issue in litigation, such as the issue of damages, does not waive the work product privilege even though the evidence might be relevant on that issue (*115 Cal. App. 3d 386, 393)* . Moreover, plaintiff's failure to seek review of a prior court order compelling production of communications and memoranda for an earlier period did not prevent him from seeking relief from a subsequent order requiring production for a later period because the disclosure was coerced and did not constitute a waiver under *Evid. Code § 919(b)* (*115 Cal. App. 3d 386, 391-392)* .

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8-81 California Points & Authorities § 81.226

§ 81.226 Opposing Motion to Compel Discovery--Work Product Protected From Disclosure [Code Civ. Proc. § 2018.020]--Protection Extends Beyond Termination of Litigation

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30).*]

THE WORK PRODUCT OF _____ [_____(PLAINTIFF *or* DEFENDANT) *or* _____(PLAINTIFF'S *or* DEFENDANT'S) ATTORNEY] IS NOT DISCOVERABLE BECAUSE THE WORK PRODUCT PROTECTION EXTENDS BEYOND THE TERMINATION OF LITIGATION.

Protection Extends Beyond Termination of Litigation. The work product protection does not terminate simply because the litigation or matter in which the work product was created has terminated (*Fellows v. Superior Court (1980) 108 Cal. App. 3d 55, 62, 63, 166 Cal. Rptr. 274*).

[2] Comments

[a] Use of Form

This form is for use by a party resisting discovery on work product grounds when the work product that the party seeks to protect from disclosure has been created during the course of prior litigation or other matters that are no longer pending [*see, e.g., Fellows v. Superior Court (1980) 108 Cal. App. 3d 55, 62, 63, 166 Cal. Rptr. 274]* .

It may be combined with a general memorandum in opposition to a motion to compel discovery.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Protection Extends Beyond Termination of Litigation

Fellows v. Superior Court *(1980) 108 Cal. App. 3d 55, 166 Cal. Rptr. 274* is discussed in *§ 81.225[3][a]*.

[4] Additional Authorities

[a] Protection Extends Beyond Termination of Litigation

The facts and procedural background of *Popelka, Allard, McCowan & Jones v. Superior Court (1980) 107 Cal. App. 3d 496, 165 Cal. Rptr. 748* are discussed in *§ 81.225[3][d]*. In *Popelka,* the court of appeal held that raising the affirmative defense of probable cause in a malicious prosecution action does not waive any work product privilege. The court noted with approval that the great weight of federal authority has held that the work product privilege may extend beyond the termination of litigation. The work product rule would not be served by a privilege that remained in effect only until the termination of the action. Therefore, in California, the privilege extends beyond the termination of the litigation for which the work product was prepared (*107 Cal. App. 3d 496, 502)* .

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8-81 California Points & Authorities § 81.227

§ 81.227 Opposing Motion to Compel Discovery--Work Product Protected From Disclosure [Code Civ. Proc. § 2018.030(a)]--Client Has Standing to Claim Absolute Work Product Protection of Attorney [Code Civ. Proc. § 2018.030]

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30).*]

_____ [PLAINTIFF *or* DEFENDANT] HAS STANDING TO ASSERT THE ABSOLUTE WORK PRODUCT PROTECTION ON BEHALF OF HIS/HER ATTORNEY BECAUSE THE ATTORNEY IS NOT PRESENT TO CLAIM IT.

Client Has Standing to Assert Absolute Work Product Protection of Attorney. The client may claim the absolute work product protection on behalf of his or her attorney if the attorney is not present to claim it (*see Fellows v. Superior Court (1980) 108 Cal. App. 3d 55, 64, 166 Cal. Rptr. 274* ; *see also Code Civ. Proc. § 2018.040*).

[2] Comments

[a] Use of Form

This form is for use by a party resisting discovery on work product grounds when the client seeks to claim the absolute protection on behalf of an attorney who is not present to claim the protection directly [*see Fellows v. Superior Court (1980) 108 Cal. App. 3d 55, 64, 166 Cal. Rptr. 274]* .

It may be combined with a general memorandum in opposition to a motion to compel discovery.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Client Has Standing to Claim Absolute Work Product Protection

The facts and procedural background of ***Fellows v. Superior Court*** *(1980) 108 Cal. App. 3d 55, 166 Cal. Rptr. 274* are discussed in *§ 81.225[3][a]*. In *Fellows*, the court of appeal held, inter alia, that the filing and prosecution of a civil action did not constitute a waiver of the work product privilege (*108 Cal. App. 3d 55, 66)* . Moreover, in an attorney's absence, the client has standing to assert the attorney's work product privilege (*108 Cal. App. 3d 55, 64, 65)* . As with other privileges such as physician-patient or psychotherapist-patient, the privilege may belong to one person, but another person is entitled to claim the privilege on behalf of the holder (*108 Cal. App. 3d 55, 65)* .

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8-81 California Points & Authorities §§ 81.228-81.239

[Reserved]

§§ 81.228[Reserved]

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G. Right to Privacy

8-81 California Points & Authorities § 81.240

§ 81.240 Supporting Motion to Compel Discovery--Refuting Claim of Privacy--General Form--Privacy Must Be Balanced Against Compelling State Interest

[1] FORM

[*The following may be combined, when appropriate, with a general memorandum in support of a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11).*]

DISCOVERY WILL NOT BE BARRED BY A CLAIM OF RIGHT TO PRIVACY WHEN THE COMPELLING STATE INTEREST IN DISCLOSURE OUTWEIGHS THE RIGHT TO PRIVACY.

A. Requiring Discovery Despite Right to Privacy. The right of privacy is not absolute, and disclosure may be required if it serves a compelling state interest that justifies substantial infringement of that right (*Britt v. Superior Court (1978) 20 Cal. 3d 844, 855, 143 Cal. Rptr. 695, 574 P.2d 766* ; *Alch v. Superior Court (2008) 165 Cal. App. 4th 1412, 1421-1422, 82 Cal. Rptr. 3d 470* ; *Save Open Space Santa Monica Mountains v. Superior Court (2001) 84 Cal. App. 4th 235, 248-250, 100 Cal. Rptr. 2d 725* ; *Olympic Club v. Superior Court (1991) 229 Cal. App. 3d 358, 362-365, 282 Cal. Rptr. 1*).

B. Compelling State Interest in Disclosure. The state has a compelling interest in disclosure when disclosure would facilitate the ascertainment of truth in connection with litigation (*Save Open Space Santa Monica Mountains v. Superior Court (2001) 84 Cal. App. 4th 235, 253, 100 Cal. Rptr. 2d 725* ; *Morales v. Superior Court (1979) 99 Cal. App. 3d 283, 290, 160 Cal. Rptr. 194*).

C. Disclosure of Relevant Matters Essential to Fair Resolution of Lawsuit. When activities within the zone of privacy are directly relevant to the cause of action, and when disclosure of these activities is essential to the resolution of the lawsuit, then the trial court may compel disclosure of the activities (*Britt v. Superior Court (1978) 20 Cal. 3d 844, 859, 143 Cal. Rptr. 695, 574 P.2d 766* ; *Olympic Club v. Superior Court (1991) 229 Cal. App. 3d 358, 363-364, 282 Cal. Rptr. 1*).

[2] Comments

[a] Use of Form

This memorandum may be used in support of a motion for an order compelling discovery if the party or other person has resisted discovery on the grounds that disclosure would violate the right of privacy of that person or of third persons who are not involved in the lawsuit. It does not provide a complete memorandum, but is designed to be combined with a general memorandum in support of compelling discovery.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[c] Related Uses

This form may be combined with a general memorandum in opposition to a motion for a protective order [*see, e.g., Ch. 83, Discovery: Depositions, § 83.100* et seq. (protective order in context of oral deposition)] when the protective order is being sought on the ground that disclosure would cause a violation of the right to privacy.

[3] Discussion of Authorities

[a] Requiring Discovery Despite Right to Privacy

Britt v. Superior Court *(1978) 20 Cal. 3d 844, 143 Cal. Rptr. 695, 574 P.2d 766* involved an action by 936 owners of land for diminution in land values and for personal injuries arising out of the operation of a nearby airport. Defendant, the owner and operator of the airport, deposed some of the plaintiffs, attempting to inquire into any of their past political activities that were connected with the airport. Plaintiffs sought a protective order restraining inquiry into past political activities, asserting that such activities were constitutionally privileged. The trial court granted defendant's motion to compel discovery and denied plaintiffs' motion for a protective order. Plaintiffs then petitioned the Supreme Court for a writ of mandate, which the Court issued, directing the trial court to vacate its discovery order.

In its opinion, the Supreme Court held that the trial court's discovery order would cause an unconstitutional invasion of plaintiffs' rights to associational privacy (*20 Cal. 3d 844, 852)* . However, the Court went on to note that such right to privacy is not absolute; disclosure may beconstitutionally compelled if there is a compelling state interest that justifies the substantial impairment of such a right (*20 Cal. 3d 844, 855)* .

In ***Alch v. Superior Court*** *(2008) 165 Cal. App. 4th 1412, 82 Cal. Rptr. 3d 470* , a consolidated class action suit by television writers asserting an industry-wide pattern and practice of age discrimination, the writers served subpoenas on third parties, seeking disclosure of their personal information--beyond contact information--from which the writers could prepare a statistical analysis to support their claims of age discrimination. Approximately 7,700 individuals filed objections to the disclosure on privacy grounds. The writers moved to overrule the objections, but the trial court sustained the objections in their entirety. The court of appeal issued a writ of mandate directing the trial court to vacate its orders and to enter a new and different order granting the writers access to the requested information (*165 Cal. App. 4th 1412, 1421-1422)* . The court concluded that the trial court abused its discretion when it sustained all objections to the disclosure of the requested information on privacy grounds. The trial court used a "broad brush to deny the writers access to *all* data about the objectors out of hand," without considering whether "a more nuanced approach" to the different categories of data would satisfy the balance between privacy interests and the litigants' need for discovery (*165 Cal. App. 4th 1412, 1421-1422)* . The writers could not prove their disparate impact claims without access to the directly relevant evidence from which they could perform a statistical analysis. The trial court erred in its purported balancing of the objectors' privacy rights and the countervailing interests of the litigants and the state, and erred in failing to analyze the types of information requested, failing to consider the state's interest in preventing discrimination,

and erroneously concluding the writers could proceed with a statistical analysis without information from the objectors (*165 Cal. App. 4th 1412, 1428-1438)* .

In ***Save Open Space Santa Monica Mountains v. Superior Court*** *(2001) 84 Cal. App. 4th 235, 100 Cal. Rptr. 2d 725* , plaintiff Save Open Space (SOS), a nonprofit organization devoted to maintaining open space, petitioned the Superior Court to compel real party in interest (the County of Los Angeles and the County Department of Regional Planning) to vacate decisions approving time extensions to maps for two neighboring proposed land divisions. Plaintiff obtained a court order vacating one of those decisions and filed a motion for attorneys's fees and expenses under *Code Civ. Proc. § 1021.5*, California's private attorney general statute. Opposing the motion, the County noticed the deposition of SOS persons "most knowledgeable" about their attorney's retainer agreement and demanded production of copies of the retainer agreement and of checks used to pay counsel. SOS moved for a protective order and imposition of sanctions, claiming that the information sought was irrelevant to the court's consideration of SOS's Section 1021.5 motion for attorney fees, and that the discovery would violate the attorney-client privilege and the attorney work product doctrine. In opposition to SOS's motion for protective order, the County justified its discovery request on the ground that courts have uniformly recognized that an attorney fee award is inappropriate when the applicant has a large economic or non-economic stake in the outcome. The County claimed that a public interest entity that pursues the private interests of its constituents rather than the broader public interests is not entitled to attorney fee reimbursement (*84 Cal. App. 4th 235, 240-241)* . The trial court denied the motions for a protective order and for sanctions and ordered compliance with the subpoenas and deposition notices that had been issued. SOS did not seek relief. In the meantime, County served notice, together with subpoenas, for two additional depositions concerning payment of SOS's attorneys' fees by two non-profit organizations. SOS filed a motion to quash the depositions on grounds that the information sought was irrelevant to its fee request, that it was protected by the attorney-client privilege, and that disclosure would infringe on the constitutionally protected right of freedom of association (*84 Cal. App. 4th 235, 243)* . The trial court denied SOS's motion, except to impose some limitations on the information real parties could obtain concerning donors and donation amounts. Regarding the identity of individual donors, the court ruled the County was entitled to learn the identity of only the 10 largest donors and donors who reside in certain areas near the proposed land divisions, as well as the amounts contributed by each of these donors. The trial court ruled this information could be disclosed only to persons who needed the information for the litigation and could be used only for the purpose of the litigation. SOS sought a writ of mandate to quash the subpoenas and a protective order prohibiting the County from discovering the donors to its litigation fund (*84 Cal. App. 4th 235, 245)* .

The court of appeal granted the writ, although not as requested. As a matter of first impression, the court concluded that when a party opposing a section 1021.5 attorney fee award has produced evidence suggesting that a public interest organization is litigating an action primarily for the benefit of nonlitigants, the court should, in order to resolve the issue, allow the opposing party to conduct limited discovery. What kinds of discovery will be permissible is to be decided on a case-by-case basis. The court cautioned, however, that before a trial court orders such discovery it must first determine whether the discovery ordered impermissibly infringes on the important associational privacy rights of third parties (*84 Cal. App. 4th 235, 250)* . Here, the court concluded that the right of privacy and a derivative right of confidentiality, as described in *Britt v. Superior Court (1978) 20 Cal. 3d 844, 143 Cal. Rptr. 695, 574 P.2d 766* , discussed *above*, were generally applicable to public interest organizations, such as those involved in this case (*84 Cal. App. 4th 235, 252)* . However, the court explained that compelling state interests may warrant disclosure. When it can be shown that private associational activities are directly relevant to plaintiff's claim and are essential to the fair resolution of the issues at hand, compelled disclosure must be narrowly drawn to provide maximum protection of the constitutional interests at stake (*84 Cal. App. 4th 235, 252-253)* . Limited discovery, beginning with an *in camera* review, was appropriate in this case. SOS would be required to provide information to the trial court about the amounts donated to its litigation fund. Eventually, the names and addresses of the donors would have to be disclosed to the County if it appeared that a donor making a substantial contribution to the fund had an interest in real property located in or around the area at issue (*84 Cal. App. 4th 234, 255)* .

In ***Olympic Club v. Superior Court*** *(1991) 229 Cal. App. 3d 358, 282 Cal. Rptr. 1* , a city sued defendant private club

under the Unruh Civil Rights Act (*Civ. Code § 51*) for an injunction against membership policies and practices that allegedly discriminated based on sex and race. As part of its investigation, the city asked defendant for a list of the names and business addresses of the 41 applicants who were rejected for membership between 1980 and 1989. Defendant resisted, asserting the privacy rights of those persons. The trial court ordered defendant to turn over the requested names and addresses under protection of an order preventing the city from divulging that information. Defendant petitioned for relief from that order.

The court of appeal issued a writ of mandate directing the trial court to vacate its order and to enter a new order establishing procedures for notification to the rejected applicants prior to release of their names. The court acknowledged that an individual's membership in an association is entitled to protection from disclosure by the right of associational privacy. Compelled disclosure of an individual's private associational activitiesposes a serious threat to the free exercise of that right. A member's right of privacy is not restricted to associations that are political, but extends to associations that are created for other purposes (*229 Cal. App. 3d 358, 361)* . Further, associational privacy rights extend to applications for membership. The right to apply for membership without governmental scrutiny is a natural adjunct to the right of associational privacy (*229 Cal. App. 3d 358, 361)* . Public access to lists of applicants could as easily threaten associational freedom as could access to an organization's membership list. However, the court explained that an intrusion into associational privacy may be permitted after a demonstration of a very important, compelling state interest that necessitates the disclosure. It cautioned that even when such justification is present, the scope of the compelled disclosure must be narrowly circumscribed to avoid undue interference with private associational rights (*229 Cal. App. 3d 358, 362)* .

[b] Compelling State Interest in Disclosure

The facts and procedural background of ***Save Open Space Santa Monica Mountains v. Superior Court*** *(2001) 84 Cal. App. 4th 235, 100 Cal. Rptr. 2d 725* are discussed in [a], *above*. In deciding a motion for attorneys' fees and expenses under *Code Civ. Proc. § 1021.5*, the court of appeal held that real parties' interest in discovering the donors to petitioner nonprofit organization's litigation fund implicated the right of privacy and a derivative right of confidentiality (*84 Cal. App. 4th 235, 252)* . However, the court explained, these associational privacy interests must be balanced against the interests compelling disclosure (*84 Cal. App. 4th 235, 253)* . Real parties in this case had a legitimate interest in ensuring that attorney fees are not awarded when the statutory requirements set forth in *Code Civ. Proc. § 1021.5* were not met. A trial court ruling on a motion for attorney fees under § 1021.5 cannot realistically assess the interests of a fee applicant if the applicant (and thus the nature and extent of the applicant's interest) can be hidden behind a public interest organization. And because attorney fee awards paid by the County are necessarily paid from taxpayer funds, county taxpayers have an interest in limiting unwarranted attorney fee awards so that funds needed for public services are not diverted to pay unauthorized attorney fees. The state (and thus all taxpayers) has an interest in ensuring that charitable contributions are not shams-and that the donated funds truly become the property of the charity that receives them. Equally as important as these interests is the state's compelling interest, as reflected in its broad discovery statutes, in facilitating the ascertainment of truth in connection with legal proceedings (*84 Cal. App. 4th 235, 254)* . The court concluded that real parties demonstrated a need for the discovery that would justify an invasion of the privy interests involved, since the evidence sought by real parties was crucial to the court's thorough analysis of petitioner's attorney fee request (*84 Cal. App. 4th 235, 254)* .

Morales v. Superior Court *(1979) 99 Cal. App. 3d 283, 160 Cal. Rptr. 194* arose out of a wrongful death action by a father and three minor children to recover for the death of their wife and mother. Interrogatories propounded by one of the defendants inquired into the plaintiff father's sexual relations with other women during the period of his marriage to the decedent. The interrogatories requested names, addresses, and phone numbers of the women. Plaintiff objected on relevancy grounds and on the grounds that any answers that he might have provided could possibly violate the right of privacy of certain individuals. Defendant then made a motion to compel answers, which was granted with the limitation that the answers be limited to contacts with other women within two years of decedent's death. Plaintiff sought a writ of mandate to command the trial court to overturn its order compelling answers, based on his rights to associational

privacy and to privacy in sexual relations.

The court of appeal granted the writ in part, holding that while the inquiry was indeed relevant to the question of pecuniary loss of comfort, society, and protection under former Code Civ. Proc. § 377 [*see now Code Civ. Proc. § 377.60 et seq.*] (the wrongful death statute), nevertheless, discovery would still be improper if it constituted an unreasonable invasion of the constitutional right to privacy (*99 Cal. App. 3d 283, 287-289)* . The court went on to hold that the rights of sexual and associational privacy, both of which were applicable) are not absolute, but must be balanced against the compelling state interest in ascertainment of truth in connection with legal proceedings (*99 Cal. App. 3d 283, 289, 290)* . The court held that because the state interest in a fair trial would be furthered by exploration of the possibility of impairment of the relation between plaintiff and his deceased wife, there must be some discovery regarding plaintiff's extramarital activities, but that it should be limited so as to assure the privacy of the other women involved (*99 Cal. App. 3d 283, 291, 292)* . In this regard, the court instructed the trial court to fashion a discovery order eliciting only whether and when plaintiff had had extramarital contacts, but not inquiring into the names, telephone numbers, and addresses of the people with whom he had such contact, if any (*99 Cal. App. 3d 283, 292)* .

[c] Disclosure of Relevant Matters Essential to Fair Resolution of Lawsuit

The facts and procedural background of ***Britt v. Superior Court*** *(1978) 20 Cal. 3d 844, 143 Cal. Rptr. 695, 574 P.2d 766* are discussed in [a], *above.* There, the Supreme Court held that if a party's associational activities are directly related to that party's claim, and if the disclosure of the party's associational activities is essential to the fair resolution of the litigation, then a trial court may properly require such disclosure. However, even under such circumstances, general *First Amendment* principlesmandate that the compelled disclosure be narrowly drawn to assure maximum protection of the constitutional rights at stake (*20 Cal. 3d 844, 859)* .

The facts and procedural background of ***Olympic Club v. Superior Court*** *(1991) 229 Cal. App. 3d 358, 282 Cal. Rptr. 1* are discussed in [a], *above*. In *Olympic Club*, the court of appeal permitted discovery of the names and addresses of the rejected applicants under carefully circumscribed conditions that would protect those applicants who wished to remain anonymous. The court said that the city had a palpable need to discover whether the rejected applicants were barred because of race, and that unless members of defendant's selection committee admitted that they rejected applicants on racial grounds, contact with the rejected applicants was necessary to determine whether race was a factor (*229 Cal. App. 3d 358, 363)* . It said that although in ordinary civil litigation, a plaintiff's need for information will not easily override a third party's privacy rights, in an action to uphold fundamental societal principles such as those embodied in the Unruh Act, the need for discovery takes on added importance (*229 Cal. App. 3d 358, 363-364)* .

[4] Additional Authorities

[a] Requiring Discovery Despite Right to Privacy

In *Pioneer Electronics (USA), Inc. v. Superior Court (2007) 40 Cal. 4th 360, 53 Cal. Rptr. 3d 513, 150 P.3d 198* , plaintiff, real party in interest, filed a class action lawsuit against an electronics manufacturer, claiming that the DVD player he (and potential class members) purchased from manufacturer was defective. Plaintiff asserted that he needed identifying information (names, addresses) from complaining customers to facilitate communication with potential class members. The trial court entered an order adopting the plaintiff's proposed language for a letter to those customers, including the provision that a failure to respond would be treated as consent to release of the information.

The court of appeal vacated the trial court's order and ordered defendant not to disclose the identifying information to plaintiff without the customers' affirmative consent. The appellate court concluded that the state constitution's privacy provision (*Cal. Const., art. I, § 1*) protected disclosure of an individual's name and other identifying information, that adequate steps to assure actual notice is a prerequisite to an assumed waiver of a customer's right of privacy, and that the measures ordered were inadequate.

The Supreme Court reversed and remanded the case to the court of appeal for further proceedings. The Court held that as a matter of policy, requiring an affirmative waiver from persons whose personal identifying information is sought by others could hamper litigation designed to remedy social problems, including consumer rights litigation, and reduce the effectiveness of class actions in securing consumer relief [*40 Cal. 4th 360, 374]* . It seemed unlikely that these customers, who had already voluntarily disclosed their identifying information to the manufacturer in hopes of gaining some relief for their allegedly defective DVD players, would have a reasonable expectation that their information would be kept private and withheld from a class action plaintiff unless they expressly consented to disclosure [*40 Cal. 4th 360, 372]* . Further, the proposed disclosure was not particularly sensitive, because it did not involve disclosing personal medical history or current medical condition or details about personal finances or other financial information [*40 Cal. 4th 360, 372]* . Thus, the trial court reasonably concluded that on balance, the plaintiff's interest in obtaining the customers' contact information outweighed the possibility that some customers might fail to receive their notice and thus lose the opportunity to object to disclosure [*40 Cal. 4th 360, 374-375]* .

In *John B. v. Superior Court (2006) 38 Cal. 4th 1177, 45 Cal. Rptr. 3d 316, 137 P.3d 153* , real party in interest, the wife of petitioner husband, sued the husband for infecting her with HIV. She sought discovery of the identities of the husband's previous sexual partners and about his knowledge that he was infected. The superior court, on recommendations from a referee, granted the wife's discovery requests. The husband filed a petition for writ of mandate, to reverse the discovery orders.

The court of appeal held that discovery of the identities of the husband's previous sexual partners was precluded by the constitutional right of sexual privacy, *Cal. Const. Art. I, § 1*. The inference supporting the demand, that the husband might have revealed his HIV status to previous partners, was speculative and overly broad. Under these circumstances, the court declined to subordinate the husband's right to privacy to the wife's alleged need for the information. However, the court of appeal found no error in compelling discovery of the husband's medical records and HIV tests. The court reasoned that the husband waived his right to prevent disclosure by relying on what he claimed were negative test results in support of a summary judgment motion.

A divided Supreme Court affirmed in part, and reversed in part. After balancing the wife's right to discover relevant evidence against the husband's right to privacy, the Court concluded that the wife was entitled to discovery concerning husband's sexual history and HIV status. The wife had "amply" established good cause for disclosure of the husband's medical records concerning HIV and AIDS. Discovery might reasonably lead to evidence that husband was aware of his HIV status. Discovery would also serve "the historically important state interest of facilitating the ascertainment of truth in connection with legal proceedings," as well as the state's compelling interest in preventing the spread of AIDS (*38 Cal. 4th 1177, 1199)* . While the wife's interrogatories and requests for admission sought information that fell within the zone of the husband's right to sexual privacy, he had a diminished privacy interest in his HIV status, since he hadadmitted his status in court filings and informally. Moreover, the husband also alleged in the complaint that the wife infected *him*. By thus putting his own medical condition at issue, the husband had a "substantially lowered" expectation of privacy (*38 Cal. 4th 1177, 1199)* . The Court agreed that the court of appeal had appropriately limited the wife's discovery of the identities of the husband's previous sexual partners and admissions concerning his "lifestyle" (*38 Cal. 4th 1177, 1199-1201)* . However, the Court further narrowed the scope of discovery in light of husband's negative HIV test on August 17, 2000, which restricted the period of possible infection to the six months preceding the negative test. Accordingly, the Court reversed the court of appeal's order compelling responses to plaintiff's discovery requests to the extent they sought information about the husband's sexual history outside the six-month time frame. On remand, however, the wife could overcome this temporal limitation by offering some basis to question the accuracy or reliability of the husband's negative HIV test (*38 Cal. 4th 1177, 1201)* .

In *Crab Addison, Inc. v. Superior Court (2008) 169 Cal. App. 4th 958, 974, 87 Cal. Rptr. 3d 400* , an employee who had filed a class action alleging wage and overtime violations served special interrogatories requesting identification of the class members' names, addresses, and telephone numbers. The employer objected on the ground that the

interrogatories sought confidential and private information. The employer argued that its employees had a heightened expectation of privacy with respect to their contact information based on forms that they had signed regarding release of their contact information. The trial court granted discovery, and the employer sought mandamus relief.

The court of appeal affirmed. Relying on *Puerto v. Superior Court* (discussed *below*), the court stated that *Code Civ. Proc. § 2017.010* provides a broad right to discover any relevant information that is not privileged, including the identity and location of witnesses. The right of privacy in *Cal. Const. art. I § 1* protects an individual's reasonable expectation of privacy against a "serious invasion" (*169 Cal. App. 4th 958, 966)* . Therefore, discovery of employee contact information should not be restricted unless privacy concerns or potential discovery abuses outweighs the right to discovery. In this employment law case, fundamental policy considerations tipped the balance of opposing interests toward permitting access to the information necessary to pursue the litigation (*169 Cal. App. 4th 958, 968*). Public policy concerns also weighed against enforcing a release form that had the effect of waiving an employee's right to notice of a pending class action lawsuit concerning the employer's alleged violations of overtime and wage statutes. Moreover, the employees who had indicated that they did not want their contact information disclosed were unaware of the litigation (*169 Cal. App. 4th 958, 974)* .

In *Lee v. Dynamex, Inc. (2008) 166 Cal. App. 4th 1325, 83 Cal. Rptr. 3d 241* , plaintiff, a driver for a parcel delivery company, alleged that the company improperly reclassified its drivers from employees to independent contractors. The trial court denied plaintiff's motion to compel the employer to identify and provide contact information for potential class members, and denied plaintiff's motion for class certification. Plaintiff appealed. The appellate court found reversible error in denying plaintiff's motion to compel disclosure (*166 Cal. App. 4th 1325, 1338)* . First, the identity of potential class members is generally discoverable, so that the lead plaintiff may learn the names of other persons who might assist in prosecuting the case (*166 Cal. App. 4th 1325, 1337)* . Second, discovery of potential class members' contact information should not be restricted unless the trial court can identify privacy concerns or potential discovery abuses that outweigh plaintiff's right to discovery. In this case, there was no showing of undue privacy invasion, and the employer's alleged violation of employment law would go unaddressed absent notice to potential class members (*166 Cal. App. 4th 1325, 1338)* .

In *Puerto v. Superior Court (2008) 158 Cal. App. 4th 1242, 70 Cal. Rptr. 3d 701* , a suit alleging wage and hour violations, the trial court granted the employees' motion to compel the employer to provide the addresses and telephone numbers of individuals identified as potential witnesses in a response to the employees' interrogatory, but required the employees to obtain the non-party potential witnesses' affirmative consent to disclosure by an opt-in procedure. The court of appeal issued a writ of mandate, directing the trial court to vacate the challenged order and to enter a new order directing the disclosure of contact information for the individuals identified in response to the interrogatory. The court applied the framework from *Pioneer Electronics (USA), Inc. v. Superior Court (2007) 40 Cal. 4th 360, 53 Cal. Rptr. 3d 513, 150 P.3d 198* , discussed *above*, to conclude that the opt-in notice exceeded the protections necessary to safeguard the witnesses' legitimate privacy interests in their contact information (*158 Cal. App. 4th 1242, 1259)* . First, any employees who were similarly situated to plaintiffs could reasonably be supposed to want their information disclosed to counsel, to determine if there were similar claims the witnesses could assert (*158 Cal. App. 4th 1242, 1253)* . Second, there was "simply... no evidence" that disclosure of the contact information for the already identified witnesses violated their right to privacy. "Indeed, it is only under unusual circumstances that the courts restrict discovery of nonparty witnesses' residential contact information" (*158 Cal. App. 4th 1242, 1254)* . Finally, the balancing of opposing interests favored permitting access to relevant information necessary to pursue the litigation. The court noted that "[g]enerally, witnesses are not permitted to decline to participate in civil discovery, even when the information sought from them is personal or private" (*158 Cal. App. 4th 1242, 1256-1257)* . Further, the opt-in letter procedure endorsed by the trial court effectively gave more protection to nonparty witnesses' contact information than the Discovery Act gives to much more sensitive consumer or employment records (*158 Cal. App. 4th 1242, 1259)* . The court explained why the opt-out letter outcome of *Pioneer* was not appropriate here: In *Pioneer*, the plaintiffs were looking for people who would want to participate in the lawsuit. Because pursuing litigation is a voluntary activity, an opt-out letter that offered recipients the option of participating or declining to participate was appropriate. In contrast, a

percipient witness's willingness to participate in civil discovery has never been considered relevant--"witnesses may be compelled to appear and testify whether they want to or not" (*158 Cal. App. 4th 1242, 1251-1252)* .

In *Belaire-West Landscape, Inc. v. Superior Court (2007) 149 Cal. App. 4th 554, 57 Cal. Rptr. 3d 197* , a putative class action lawsuit alleging wage and hour violations, the trial court granted the employees' motion to compel the employer to provide the names and contact information of all current and former employees, and adopted a proposed notice to those potential class members. The proposed notice required the potential class members to object in writing in order to prevent information about them from being disclosed to the employees. The employer filed a petition for writ of mandate, arguing that the opt-out notice should be rejected in favor of an opt-in privacy notice procedure.

The court of appeal denied relief. The court applied the analysis in *Pioneer Electronics (USA), Inc. v. Superior Court (2007) 40 Cal. 4th 360, 53 Cal. Rptr. 3d 513, 150 P.3d 198* , discussed *above*, to conclude that the opt-out notice was sufficient to protect potential class members' privacy rights [*149 Cal. App. 4th 554, 561]* . Although they had a reasonable expectation that their employer would disclose their identifying information only as required to governmental agencies and benefits providers, they also reasonably might be expected to want their information disclosed to a class action plaintiff who could recover for them unpaid wages that they were owed [*149 Cal. App. 4th 554, 561]* . The disclosure of the contact information was not overly personal or intrusive [*149 Cal. App. 4th 554, 561-562]* . Moreover, the current and former employees were potential percipient witnesses to the employer's employment and wage practices, and as such their identities and locations were discoverable under *Code Civ. Proc. § 2017.010*. Finally, the case involved the fundamental public policy of ensuring the prompt payment of wages due to employees [*149 Cal. App. 4th 554, 562]* .

In *Mansell v. Otto (2003) 108 Cal. App. 4th 265, 133 Cal. Rptr. 2d 276* , a crime victim sued the alleged perpetrator and his criminal defense counsel for invasion of her constitutional right of privacy based on the unauthorized reading of her mental health records by the defendants and other members of the defense team. The trial court sustained the defendants' demurrer to the plaintiff's complaint without leave to amend and dismissed the action. The trial court found the plaintiff's claim for invasion of her constitutional right of privacy was barred as a matter of law by the litigation privilege. The court of appeal, however, found the litigation privilege inapplicable to the noncommunicative acts alleged in the complaint. Nevertheless, the court found plaintiff could not state a claim for liability against defendants because they obtained her medical and psychiatric records through the court's normal processes, including a court order (*108 Cal. App. 4th 265, 276)* . The appellate court distinguished this case from cases finding liability for unauthorized dissemination of a patient's privileged records because the defense here received the confidential records through the prescribed judicial process (*108 Cal. App. 4th 265, 277)* . Unlike the cases in which courts have found liability for unauthorized dissemination, in this case the victim's confidential records were not delivered to counsel, but were delivered to the court under seal. The court then released the victim's records to the prosecutor, who in turn, provided copies to the defense. The trial court was underno legal obligation at the pretrial stage of the proceedings to review plaintiff's records in camera to determine which, if any, records could be released to counsel (*108 Cal. App. 4th 265, 277)* .

In *Johnson v. Superior Court (2000) 80 Cal. App. 4th 1050, 95 Cal. Rptr. 2d 864* , petitioner parents and their child, conceived by an anonymous donor's sperm, sought to compel the donor's deposition and production of documents related to his identity and medical history, and the health and medical history of his family, in order to discover information relevant to their action for professional negligence, fraud, and breach of contract against a sperm bank which allegedly transmitted a serious kidney disease to the child. The trial court denied petitioners' motion and granted motions to quash the deposition subpoena. Petitioners sought a writ of mandate directing the superior court to vacate its order and to issue a different order compelling the donor's deposition and the production of records (*80 Cal. App. 4th 1050, 1056-1060)* . The court of appeal granted the writ and ordered the donor to appear at his deposition and answer all questions and produce all documents relevant to the litigation (*80 Cal. App. 4th 1050, 1073)* . The court rejected the argument by real parties that petitioners were precluded from deposing the donor because the constitutional right of privacy protected his identity. Although the court agreed that the donor had a privacy interest in his medical history and

his identity, that right did not preclude his deposition and the production of documents regarding his medical history (*80 Cal. App. 4th 1050, 1067-1068)* . Here, the donor's reasonable expectation of privacy with regard to his medical history was lessened because the sperm bank routinely told its sperm donors that non-identifying medical history and related information could be disclosed to the purchasers of the sperm. Likewise, the donor's reasonable expectation of privacy in his identity was substantially diminished by his own conduct, which involved a substantial commercial transaction as a result of his hundreds of semen deposits (*80 Cal. App. 4th 1050, 1069-1070)* . However because petitioners sought all of the donor's records regarding his medical history of kidney disease and records pertaining to his family's affliction with kidney disease or cancer, such disclosure would involve an invasion of privacy unless reasonably curtailed. Accordingly, the court directed the trial court to fashion an appropriate order that would allow for the donor's testimony and production of documents while maintaining the confidentiality of his identity and that of his family (*80 Cal. App. 4th 1050, 1070-1073)* .

The facts and procedural background of *Rubio v. Superior Court (1988) 202 Cal. App. 3d 1343, 249 Cal. Rptr. 419* are *set out in § 81.291[3][a]*. In ruling on whether a videotape of the alleged victim's father and stepmother engaging in sexual acts was discoverable by the defendant accused of molesting the young girl, the court of appeal issued a writ of mandate directing the trial court to reverse its order quashing the subpoena duces tecum and ordered that it view the videotape *in camera* to determine whether defendant's right to due process outweighed the couple's constitutional privacy interests and their marital privilege. The court explained that the federal Constitution provides a right to privacy in the marital relationship. There is an analogous state right protecting marital relations. California accords privacy the constitutional status of an inalienable right. The court found without question that a videotape of sexual relations between a married couple invokes the constitutional right of privacy. It also explained that defendant had constitutional rights of confrontation and cross examination. Thus, the court explained that it must balance two competing federal constitutional rights, both of which are also inalienable state constitutional rights (*202 Cal. App. 3d 1343, 1349)* . It concluded there was no way to balance those competing rights without viewing the tape itself (*202 Cal. App. 3d 1343, 1350)* . The court reminded the trial court of its power to issue whatever protective orders are necessary, should any further disclosure be compelled, to preserve defendant's right to a fair trial. It observed that such procedures might be sufficient to preserve defendant's due process rights without invading the couple's privacy rights any more than necessary. But any such remedy should be considered only after the trial court has made a preliminary determination, after in camera review, that some disclosure is required (*202 Cal. App. 3d 1343, 1350-351)* .

[b] Compelling State Interest in Disclosure

The facts and procedural background of *John B. v. Superior Court (2006) 38 Cal. 4th 1177, 45 Cal. Rptr. 3d 316, 137 P.3d 153* , are discussed in.*§ 81.240[4][a]*. In the underlying case, a wife sued her husband for infecting her with HIV. With specified temporal limitations, the Supreme Court allowed discovery of husband's medical history, his sexual activity, and his HIV status, because discovery would serve "the historically important state interest of facilitating the ascertainment of truth in connection with legal proceedings," as well as the state's compelling interest in preventing the spread of AIDS (*38 Cal. 4th 1177, 1199)* .

The facts and procedural background of *Johnson v. Superior Court (2000) 80 Cal. App. 4th 1050, 95 Cal. Rptr. 2d 864* are discussed in [a], *above*. The court acknowledged that a person's medical history is a legally recognized privacy interest and that the donor had a privacy interest in his identity as a donor and in his medical history. However, the constitutional right to privacy is not absolute and when discovery orders are at issue, there must be a compelling state interest in disclosure. Balancing the donor's privacy interests with compelling state interests, including the state's interests in truth in court proceedings, compliance with subpoenas and discovery orders, and insuring that the injured receive full redress for injuries based on actionable conduct, the court concluded that the state's interests, as well as those of petitioners in obtaining information directly relevant to the issues in the litigation, outweighed the donor's privacy interests. Accordingly, the court ordered the donor to appear at his deposition and answer all questions and produce all documents relevant to the litigation. However, the court directed the trial court to fashion an appropriate order that would allow for the donor's testimony and production of documents while maintaining the confidentiality of

his identity and that of his family (*80 Cal. App. 4th 1050, 1067-1073)* .

In *Lantz v. Superior Court (1994) 28 Cal. App. 4th 1839, 1857, 34 Cal. Rptr. 2d 358* , a sexual harassment case in which the defendant countysubpoenaed plaintiff's medical records relating to her breast surgery, the trial court denied plaintiff's motion for a protective order because the records were relevant. On appeal, plaintiff contended that her medical records were protected from discovery by the right to privacy guaranteed by the California Constitution. The court of appeal held that the lower court used the wrong standard in determining whether the records were discoverable. The trial court's finding of relevance was an insufficient inquiry; the trial court must balance the plaintiff's privacy interest against the county's compelling need for discovery (*28 Cal. App. 4th 1839, 1853-1854, 1857)* .

In *Gregori v. Bank of America (1989) 207 Cal. App. 3d 291, 254 Cal. Rptr. 853* , during the course of litigation surrounding a lender-liability action brought by plaintiff growers' cooperative against defendant bank, plaintiff's attorney initiated and maintained an undisclosed social relationship with the defense counsel's secretary, who was familiar with all aspects of the litigation. Defendant moved to disqualify the attorney and, in the alternative, to compel further discovery regarding the nature of that relationship and the matters that may have been discussed. The trial court denied both motions. The court of appeal reversed the order refusing to compel discovery. The attorney had refused to answer numerous questions at his deposition, citing privacy grounds. The court of appeal explained that the right of privacy is not absolute, and under some circumstances disclosure may permissibly be compelled. Abridgement of the constitutional right has sometimes been justified in order to serve the historically important state interest of facilitating the ascertainment of truth in connection with legal proceedings. The court found this interest particularly strong here, where discovery is being resisted by an attorney whose inappropriate conduct created the issue the discovery is designed to resolve. The right to privacy of such an attorney is not the sort that courts have been at pains to protect in the context of civil discovery proceedings (*207 Cal. App. 3d 291, 312-313)* .

Rider v. Superior Court (1988) 199 Cal. App. 3d 278, 244 Cal. Rptr. 770 was a defamation action brought by a husband and wife against the husband's former employer, who publicly charged the husband with raping the employer's minor daughter. Plaintiffs served a subpoena duces tecum on the police department requesting production of records containing the minor's statements to an officer investigating the alleged rape. The police refused to produce the records, claiming the conditional privilege of *Evid. Code § 1040(b)(2)*, which allows governmental agencies to refuse to disclose information acquired in confidence if disclosure would be "against the public interest." The trial court denied plaintiffs' motion to produce the records. On petition for a writ of mandate, the court of appeal granted a writ ordering the trial court to compel production of the investigation reports on condition the information not be used or disclosed for anypurpose outside the confines of the litigation. The court held that, under the circumstances, plaintiff husband's interest in preserving his reputation against a charge of committing a heinous felony outweighed the minor's interest in sexual privacy, particularly when the reports would have been available to plaintiff if he had been prosecuted for rape. Disclosure would not involve intrusion into the minor's sexual experiences beyond what she had already revealed to others, nor be more than what would have been revealed if the People had elected to pursue prosecution (*199 Cal. App. 3d 278, 282-287)* .

[c] Disclosure of Relevant Matters Essential to Fair Resolution of Lawsuit

The facts and procedural background of *Save Open Space Santa Monica Mountains v. Superior Court (2001) 84 Cal. App. 4th 235, 100 Cal. Rptr. 2d 725* are discussed in *§ 81.240[3][a]*. In this writ proceeding, petitioner sought to require respondent superior court to quash certain subpoenas and issue a protective order prohibiting real parties in interest from discovering the donors to petitioner's litigation fund. The court of appeals acknowledged that the privacy interests of the donors and petitioner were strong. However, the court found equally strong the real parties' interests in determining whether a public interest organization had litigated an action for and at the direction of a specific group of individual, and whether those individuals had a private interest in the outcome of litigation so as to preclude the award of attorneys' fees under Code Civ. Proc. § 1201.5. The court found particularly strong the state's interest in promoting truth in litigation. Thus, the court concluded that real parties had demonstrated a need for the discovery that would

justify an invasion of the privacy interests involved, since the evidence sought by real parties was crucial to the court's thorough analysis of petitioner's motion for attorneys' fees (*84 Cal. App. 4th 235, 254)* .

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 81 DISCOVERY: PRIVILEGES AND OTHER DISCOVERY LIMITATIONS
PART II. FORMS
G. Right to Privacy

8-81 California Points & Authorities § 81.241

§ 81.241 Supporting Motion to Compel Discovery--Refuting Claim of Privacy--Narrowly Limited Disclosure Will Not Invade Right of Privacy

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in support of a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11) as well as with points and authorities relating generally to discovery resisted on the ground of right to privacy (see § 81.240).*]

DISCOVERY IS PERMISSIBLE WHEN NARROWED BY A PROPERLY FASHIONED PROTECTIVE ORDER, EVEN WHEN IT WOULD HAVE CONSTITUTED AN INVASION OF PRIVACY IN THE ABSENCE OF SUCH AN ORDER.

A. Disclosure Permissible When Limited. Disclosure of information that would otherwise violate the right of privacy is constitutionally permissible when it is limited by a properly fashioned protective order (*Olympic Club v. Superior Court (1991) 229 Cal. App. 3d 358, 364-365, 282 Cal. Rptr. 1* ; *Richards v. Superior Court (1978) 86 Cal. App. 3d 265, 273, 150 Cal. Rptr. 77*).

[*Optional*] **B. Disclosure Not Revealing Identity of Nonparties.** Discovery that would otherwise violate the right of privacy of nonparties will be constitutionally permissible if it is limited to the fact of the occurrences in which the nonparties were involved, without disclosing the identity of the nonparties (*Morales v. Superior Court (1979) 99 Cal. App. 3d 283, 292, 160 Cal. Rptr. 194* ; *see Davies v. Superior Court (1984) 36 Cal. 3d 291, 300, 204 Cal. Rptr. 154, 682 P.2d 349*).

[*Optional*] **C. Disclosure Not Revealing Identity of Authors of Confidential Communications.** Discovery that would otherwise violate the right of privacy of authors of confidential communications concerning the party requesting discovery will be constitutionally permissible if appropriate deletions are made of matters that identify the authors of the communications (*Board of Trustees v. Superior Court (1981) 119 Cal. App. 3d 516, 531-533, 174 Cal. Rptr. 160*).

[2] Comments

[a] Use of Form

This memorandum may be used in support of a motion for an order compelling discovery if the party or other person has resisted discovery on the ground that disclosure would violate the right to privacy. It does not provide a complete memorandum, but is designed to be combined with a general form of memorandum in support of a motion compelling discovery. The form may also be combined with a general form compelling discovery, when the disclosure is resisted on grounds of right to privacy [*see § 81.240*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[c] Related Uses

This form may be combined with a general form of memorandum in opposition to a motion for a protective order [*see, e.g., Ch. 83, Discovery: Depositions, § 83.100* et seq. (protective order in context of oral deposition)] when the protective order is being sought on the ground that disclosure would cause a violation of the right to privacy.

[3] Discussion of Authorities

[a] Disclosure Permissible When Limited

The facts and procedural background of ***Olympic Club v. Superior Court*** *(1991) 229 Cal. App. 3d 358, 282 Cal. Rptr. 1* are discussed in *§ 81.240[3][a]*. In *Olympic Club,* the court of appeal found that the scope of the compelled disclosure must be narrowly circumscribed to avoid undue interference with private associational rights (*229 Cal. App. 3d 358, 362)* . Accordingly, the court concluded that the names of the rejected applicants should be disclosed, but only after defendant sent them a letter informing them that the city was seeking to contact them and advising them to petition the court for protective orders if they sought anonymity. The names of those who obtain protective orders would be removed from the list furnished by defendant to the city (*229 Cal. App. 3d 358, 364)* .

Richards v. Superior Court *(1978) 86 Cal. App. 3d 265, 150 Cal. Rptr. 77* was an action for malicious prosecution, intentional interference with business relations, and intentional infliction of emotional distress. Plaintiffs propounded interrogatories concerning the financial status of the five defendants, who were members of a law firm. The relevance of the questions lay in the fact that the causes of action that were alleged permitted the assessment of punitive damages. Defendants filed objections to the interrogatories and moved for a protective order. The trial court overruled the objections, but issued a protective order requiring that answers be given, but that they should be sealed, delivered to the clerk of the court, and remain unopened except by the judge. The trial judge later dissolved the protective order, however, based on his belief that one of the defendants had not complied with the order.

The court of appeal issued a writ of mandate, requiring the trial court to issue a new protective order (*86 Cal. App. 3d 265, 271-272)* . The court held that so long as disclosure is correctly limited by a narrowly fashioned protective order, any invasion into the defendants' privacy would be within constitutional limits (*86 Cal. App. 3d 265, 273)* . See also *Cobb v. Superior Court (1979) 99 Cal. App. 3d 543, 550-551, 160 Cal. Rptr. 561* for the court's suggestions on how to protect defendants in punitive damages cases from invasion of privacy, while still requiring disclosure within narrow limitations.

Note that both *Richards* and *Cobb* were decided prior to the enactment of *Civ.Code § 3295*, which prohibits pretrial discovery of a defendant's financial condition or of profits gained by the defendant by means of the wrongful course of conduct, unless plaintiff shows that he or she has a substantial probability of prevailing on the punitive damages claim.

Under this statute, there can no longer be automatic discovery of the financial assets of a defendant in a punitive damages case. Discovery can only occur after plaintiff has made his or her motion, and has successfully shown the substantial probability of prevailing on the punitive damages issue. However, *Richards* remains good law, both in the general situation in which discovery would cause an invasion of privacy, and in the narrow context of discovery of defendant's assets in punitive damages situations, since once discovery is permitted, the party from whom discovery is sought should still be entitled to confine that discovery within the narrowest possible limits, so as to ensure that the intrusion into privacy is constitutionally permissible.

[b] Disclosure Not Revealing Identity of Nonparties

The facts and procedural background of ***Morales v. Superior Court*** *(1979) 99 Cal. App. 3d 283, 160 Cal. Rptr. 194* are discussed in *§ 81.240[3][b]*. In *Morales*, the right to privacy of the other women who might have been involved with plaintiff was protected by an order that discovery disclose only whether and when plaintiff had affairs, without disclosing the identity of the persons, if any, with whom he had such contacts (*99 Cal. App. 3d 283, 291, 292)* .

Davies v. Superior Court *(1984) 36 Cal. 3d 291, 204 Cal. Rptr. 154, 682 P.2d 349* was an action for personal injuries resulting from a motor vehicle accident. Plaintiff propounded interrogatories and a request for production of documents to defendant State of California regarding prior accidents at the same location. Defendant declined to provide discovery, arguing that the information sought was generated from required accident reports that are confidential under *Veh. Code §§ 20012* and *20014*, and was therefore privileged. The trial court declined to order discovery. Plaintiff petitioned for a writ of mandate.

The Supreme Court determined that the material sought was discoverable. The Court stated that in according confidential treatment to required accident reports, the Legislature intended to protect the privacy of reporting parties by keeping confidential their identities and information that might disclose their identities (*36 Cal. 3d 291, 299)* . The Court held that this purpose does not require extending the confidentiality accorded to mandatory accident reports to data generated from those reports, as long as no identifying data or data compromising the privacy interests of the reporting parties is disclosed. Such a construction of the reach of the confidentiality of information created by *Veh. Code §§ 20012* and *20014* is consistent with the need for a careful balancing of the rights of parties seeking discovery and of the persons for whose benefit confidentiality is created. The Court noted that in construing a statute that accords confidentiality to information sought by discovery, liberality in allowing discovery is the rule unless statutory or public-policy considerations clearly prohibit it (*36 Cal. 3d 291, 300)* . In reaching its holding, the Court disapproved earlier case law, such as *People ex rel. Dept. of Transportation v. Superior Court (Clark) (1976) 60 Cal. App. 3d 352, 131 Cal. Rptr. 476* to the extent that it had limited discovery of information derived from accident reports to the fact of prior accidents (*36 Cal. 3d 291, 300-301)* .

[c] Disclosure Not Revealing Identity of Authors of Confidential Communications

Board of Trustees v. Superior Court *(1981) 119 Cal. App. 3d 516, 174 Cal. Rptr. 160* involved an action for defamation by a university faculty member against the university and other faculty members. Plaintiff sought to discover, along with other documents, his personnel, tenure, and promotion files with the university. The trial court ordered defendants to produce the documents except for letters of reference to the university written when plaintiff was being considered for employment. Defendants petitioned for a writ of mandate.

The court of appeal issued the writ, ordering the trial court to enter a new order requiring discovery of plaintiff's personnel file, subject to appropriate safeguarding of the rights of privacy of those who had furnished information concerning plaintiff's qualifications for employment, promotion, additional compensation, or termination (*119 Cal. App. 3d 516, 533)* . The court stated that the dispute involved the conflicting privacy rights of plaintiff to have access to private information about himself and of those whose confidential communications were in plaintiff's personnel, tenure, and promotion files (*119 Cal. App. 3d 516, 528-529)* . The court held that the trial court should have extended privacy

protection not only to those furnishing confidential information when plaintiff was being considered for employment, but also to those who furnished confidential information after his employment concerning promotion, additional compensation, or termination (*119 Cal. App. 3d 516, 531)* . However, the court held that there was no compelling state purpose in maintaining the confidentiality of the contents of the letters of reference when appropriate deletions of identification of the sources of the letters could be made, thereby imposing partial limitations rather than outright denial of discovery (*119 Cal. App. 3d 516, 531-533)* .

[4] Additional Authorities

[a] Disclosure Permissible When Limited

The facts and procedural background of *John B. v. Superior Court (2006) 38 Cal. 4th 1177, 45 Cal. Rptr. 3d 316, 137 P.3d 153* , are discussed in *§ 81.240[4][a]*. In the underlying case, a wife sued her husband for infecting her with HIV. With specified temporal limitations, the Supreme Court allowed discovery concerning husband's medical history, his sexual activity, and his HIV status. Although the interrogatories and requests for admission the Court held discoverable sought information that fell within the husband's right to sexual privacy, that right is not absolute. Narrowly drawn disclosure is permitted if it serves the compelling interest of the facilitation of the truth-finding process in court proceedings and if it may be reasonably inferred that the inquiry will likely be productive (*38 Cal. 4th 1177, 1199-1200)* .

In *TBG Ins. Serv. Corp. v. Superior Court (2002) 96 Cal. App. 4th 443, 117 Cal. Rptr. 2d 155* , petitioner employer filed for a writ of mandate directing the superior court to vacate its order refusing to compel production of an employer-provided home computer used by the real party in interest, an employee, who filed suit for wrongful termination. The court of appeal granted the writ, holding that the trial court erred in denying production. The court found that the evidence was relevant and that, given the employee's consent to his employer's monitoring of both his home and his office computers, the employee had no reasonable expectation of privacy when he used the home computer for personal matters. Even assuming that employee has some lingering privacy interest in the information he stored on the home computer, the court concluded that petitioner's demand for production did not constitute a serious invasion of that interest. The court noted that appropriate protective orders could define the scope of petitioner's inspection and copying of information on the computer to that which was directly relevant to the litigation, and could prohibit the unnecessary copying and dissemination of employee's financial and other information that had no bearing on the case (*96 Cal. App. 4th 443, 454-455)* .

For additional facts and the procedural background of *TBG Ins. Serv. Corp.*, see *§ 85.11[4][a]*.

Bodenheimer v. Superior Court (1980) 108 Cal. App. 3d 885, 167 Cal. Rptr. 26 arose out of an action for conspiracy to defame brought against four organizations, petitioner defendant, and other individual persons. Plaintiffs in the original action deposed petitioner, asking him whether he was a member of one of the defendant organizations, whether he knew any members of that organization, and whether he participated in any meetings of that organization. The trial court directed petitioner to answer, subject to the protective order that any information elicited pursuant to the discovery order be used solely in connection with the preparation and trial of the lawsuit and not be disclosed to any other person for any other purpose.

The court of appeal denied petitioner's application for a writ commanding the trial court to refrain from compelling the discovery. Citing *Britt v. Superior Court (1978) 20 Cal. 3d 844, 864-865, 143 Cal. Rptr. 695, 574 P.2d 766* (discussed in *§ 81.240[3][a]*), the court stated that disclosure of confidential associational affiliations and activities must be justified by a compelling state interest and must be precisely tailored to avoid undue infringement of constitutional rights (*108 Cal. App. 3d 885, 888)* . The Supreme Court in *Britt* had pointed out that the attempted discovery of plaintiffs' memberships and political activities that were connected withan airport in an action for diminution of land values and for personal injuries arising out of the airport's operation had but a tenuous connection to the pleaded

defenses proffered, and concluded that the order compelling production of all this material was overbroad (*108 Cal. App. 3d 885, 888-889)* . In *Bodenheimer,* however, the court stated that the relationship between petitioner and the defendant organization was very pertinent to the lawsuit. All defendants were alleged participants in the conspiracy to defame, and petitioner was alleged to be an agent of the defendant organization, working under its direction and supervision and with knowledge of its purpose. The alleged defamatory material, part of which was signed by petitioner, when taken as a whole, suggested that petitioner and the organization were on the same side of a narrow local issue. Thus, to ask if petitioner was a member of that group was a narrow question having an important connection with the lawsuit (*108 Cal. App. 3d 885, 889)* . Although the pertinence of the other questions was less clear, the court stated that because the fact of membership was discoverable, the impact on privacy of the other questions was too minimal to warrant extraordinary relief. The question of whether petitioner knew any members or attended meetings could be prefatory to a permissible question: whether he knew any members of the organization who were involved in the writing of the alleged defamatory materials. However, if the questions were prefatory to an effort to discover the membership lists or protected discussions in meetings, a problem of impingement on associational privacy would emerge, but such questions had not yet been asked (*108 Cal. App. 3d 885, 889-890)* .

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[Reserved]

§§ 81.242[Reserved]

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G. Right to Privacy

8-81 California Points & Authorities § 81.250

§ 81.250 Opposing Motion to Compel Discovery--Discovery Infringing Right of Privacy Is Improper--General Form

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30).*]

DISCOVERY IS IMPROPER WHEN THE INQUIRY CONSTITUTES AN INVASION OF THE RIGHT OF PRIVACY.

A. Right of Privacy Valid Basis for Refusal to Submit to Discovery. The right of privacy may be invoked by litigant as a ground forrefusal to answer questions that constitute an unreasonable intrusion on that right (*Kahn v. Superior Court (1987) 188 Cal. App. 3d 752, 769-770, 233 Cal. Rptr. 662* ; *Fults v. Superior Court (1979) 88 Cal. App. 3d 899, 903, 152 Cal. Rptr. 210*).

B. Right of Privacy Precludes Disclosure Even When Inquiry Is Relevant and Not Privileged. Even when the inquiry is relevant and not privileged, such overriding constitutional considerations as the right to privacy under *Article I, Section 1, of the California Constitution* may require limitations on discovery (*Valley Bank of Nevada v. Superior Court (1975) 15 Cal. 3d 652, 656, 658, 125 Cal. Rptr. 553, 542 P.2d 977*).

C. Right of Privacy Self-Executing. The provision for the right of privacy under *Article I, Section 1, of the California Constitution* is self-executing in creating an enforceable right (*Craig v. Municipal Court (1979) 100 Cal. App. 3d 69, 76, 161 Cal. Rptr. 19*).

D. Burden on Party Seeking Discovery. When invasion of a right to privacy may occur, the relevance and materiality are not sufficient to establish discoverability. The party seeking discovery must demonstrate a compelling state interest to justify disclosure (*Rancho Publications v. Superior Court (1999) 68 Cal. App. 4th 1538, 1550, 81 Cal. Rptr. 2d 274*

; *Hinshaw, Winkler, Draa, Marsh & Still v. Superior Court (1996) 51 Cal. App. 4th 233, 239, 58 Cal. Rptr. 2d 791* ; *Fults v. Superior Court (1979) 88 Cal. App. 3d 899, 905, 152 Cal. Rptr. 210*).

E. Broad Discovery May Be Impermissible Even When Compelling State Interest. Even when the compelling state interest in ascertainment of truth in connection with litigation exists, disclosure must be narrowly and precisely circumscribed so as not to intrude on the constitutional right of privacy (*Fults v. Superior Court (1979) 88 Cal. App. 3d 899, 904, 905, 152 Cal. Rptr. 210*).

[*Optional*] **F. Broad Discovery May Be Impermissible Even If Waiver of Right to Privacy.** Even a waiver of the right to associational privacy by virtue of the bringing of a lawsuit must be narrowly construed so that plaintiffs will not be unduly deterred from instituting lawsuits (*Britt v. Superior Court (1978) 20 Cal. 3d 844, 859, 143 Cal. Rptr. 695, 574 P.2d 766*).

[*Optional*] **G. Any Required Disclosure Should Be Narrowly Drawn.** Even when disclosure is necessary to the fair resolution of a lawsuit, the compelled disclosure should be narrowly drawn so as to insure maximum protection of the constitutional interests atstake (*Britt v. Superior Court (1978) 20 Cal. 3d 844, 859, 143 Cal. Rptr. 695, 574 P.2d 766* ; *El Dorado Savings & Loan Assn. v. Superior Court (1987) 190 Cal. App. 3d 342, 235 Cal. Rptr. 303*).

[2] Comments

[a] Use of Form

These points and authorities in opposition to a motion for an order compelling discovery may be submitted by a party or other person who has resisted discovery on the ground that disclosure would cause a violation of the right to privacy. It does not provide a complete memorandum, but is designed to be combined with a general form of memorandum in opposition to a motion compelling discovery. When the person whose privacy is being invaded is not a party to the litigation, this form should be used in conjunction with § 81.253.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should specify the reasons why discovery would cause an invasion of privacy. Counsel may also wish to point out various protective orders that may be used to keep the disclosure within constitutional limits in case discovery cannot be eliminated altogether.

[c] Related Uses

This form may be combined with a general form of memorandum in support of a motion for a protective order [*see, e.g., Ch. 83, Discovery: Depositions, § 83.80* et seq. (protective order in context of oral deposition)] when the protective order is being sought on the ground that disclosure would cause a violation of the right of privacy.

[3] Discussion of Authorities

[a] Right of Privacy Valid Basis for Refusal to Submit to Discovery

In ***Kahn v. Superior Court*** *(1987) 188 Cal. App. 3d 752, 233 Cal. Rptr. 662* , plaintiff, a visiting professor who was considered for permanent appointment with the history department of a university, brought an action against a member of that department for defamation and tortious interference with an advantageous business relationship after he was denied tenure. When plaintiff noticed the deposition of defendant, who waspresent at the meeting at which plaintiff's tenure was considered, defendant moved for a protective order to prevent the taking of his deposition and demurred to the complaint. The demurrer was sustained, and plaintiff was allowed to amend his complaint. The trial court stayed the

deposition of defendant until the amended complaint could be considered, but allowed it to be taken for certain purposes. The parties then stipulated that defendant's deposition would not be taken until he had applied for an extraordinary writ.

The court of appeal issued an order staying the taking of the deposition, and later issued a peremptory writ of mandate directing the trial court to set aside its order allowing defendant to be deposed (*188 Cal. App. 3rd 752, 758, 771)* . Defendant argued that he had a qualified privilege, based on the California constitutional right to privacy and on the *First Amendment* right to academic freedom, not to disclose his vote or comments made in the course of plaintiff's tenure consideration (*188 Cal. App. 3rd 752, 758)* . The court agreed, finding that because the discussion and the vote at the faculty meeting were intended to be confidential, the comments made and the votes cast were covered by the communicator's constitutional right of privacy (*188 Cal. App. 3rd 752, 768-769)* . The court cited *Cal. Const., art. I, § 1*, which provides a right of privacy that may be abridged only when there is a compelling and opposing state interest. It noted that facilitating the ascertainment of truth in connection with legal proceedings is such a compelling state interest, and went on to discuss *Board of Trustees v. Superior Court (1981) 119 Cal. App. 3d 516, 174 Cal. Rptr. 160* , a case in which the compelling state interest in discovery had clashed with the fundamental right of privacy in the university setting (*188 Cal. App. 3rd 752, 765)* . The court highlighted the competing interests at play in the case, observing that if defendant's expressions at the faculty meeting and the motives underlying those expressions may not be inquired into, plaintiff's ability to seek redress will be impaired. It characterized the competing privacy interest, the peer review process, as central to the maintenance of academic standards, and said that confidentiality is indispensable to the university's promotion of academic excellence and freedom (*188 Cal. App. 3rd 752, 768)* . The court acknowledged that peer evaluations may provide an opportunity for abuse, but that the fostering of academic excellence finds support in the constitutional right to privacy (*188 Cal. App. 3rd 752, 769-770)* . The court concluded that plaintiff had the right to seek redress in the courts; in this case his interest was only in monetary damages, and he had no right to be employed by defendant university. The complaint made no claim of discrimination. Thus, to permit plaintiff to depose defendant would allow the most serious breach of the confidentiality of the tenure selection process, and would seriously undermine the public interest in promoting academic excellence (*188 Cal. App. 3rd 752, 770)* .

In ***Fults v. Superior Court*** *(1979) 88 Cal. App. 3d 899, 152 Cal. Rptr. 210* , the district attorney filed a paternity suit against defendant. During the course of this litigation, defendant propounded interrogatories to the petitioner (complainant in the paternity suit), two of which inquired into petitioner's sex life.

Petitioner objected to these interrogatories as irrelevant, embarrassing, and an invasion of her privacy, although in reply to a different interrogatory, she had answered that between three months before and three months after the probable date of conception, she had not had sexual intercourse with anyone other than defendant. The trial court disallowed petitioner's objections, but limited the scope of the interrogatories to a period of one year prior to the likely date of conception, and one year after that date.

The court of appeal agreed with the trial court that petitioner's relevancy objection was meritless (*88 Cal. App. 3rd 899, 902)* , but went on to issue a writ of mandate vacating the trial court's order on the ground that the interrogatories were constitutionally overbroad (*88 Cal. App. 3rd 899, 905)* . In discussing petitioner's contention that requiring her to answer questions about the most intimate aspects of her life would invade the right of privacy given to her by *Cal. Const., art. I, § 1*, the court of appeal stated that the right of privacy is properly invoked by a litigant as the basis for the refusal to answer questions that constitute an unreasonable intrusion on that right (*88 Cal. App. 3rd 899, 903)* .

[b] Right of Privacy Precludes Disclosure Even When Inquiry Is Relevant and Not Privileged

Valley Bank of Nevada v. Superior Court *(1975) 15 Cal. 3d 652, 125 Cal. Rptr. 553, 542 P.2d 977* arose out of an action by the bank to recover the balance allegedly due on a promissory note. The defense claimed by defendant debtors was that the bank had misrepresented the amount of the additional financing that defendants could get. To prove these allegations, defendants noticed depositions of the bank's chairman, asking that he bring with him records of certain

transactions between the bank and some of its customers.

The bank sought an order under former Code Civ. Proc. § 2019(b) (*see now Code Civ. Proc. § 2031.060(b)*) to protect the confidentiality of its customers. Holding that the information sought was both relevant and not privileged, the trial court ordered disclosure, but limited the scope of discovery to certain time periods and certain types of financial transactions. The bank then sought a writ of mandate, which the Supreme Court issued.

The Court affirmed the trial court on the issues of relevance and privilege. Nevertheless, it went on to hold that even when information is both relevantand nonprivileged, there may exist overriding constitutional considerations that require limitations on discovery. *Cal. Const., art. I, § 1* has elevated privacy to an inalienable constitutional right that may justify such limitations (*15 Cal. 3rd 652, 656)* .

[c] Right of Privacy Self-Executing

Craig v. Municipal Court *(1979) 100 Cal. App. 3d 69, 161 Cal. Rptr. 19* arose out of a misdemeanor prosecution in municipal court in which defendant obtained a discovery order for production of names and addresses of all persons who had been arrested on similar charges (battery and resisting arrest) within the preceding two years. Defendant hoped that others would testify about the police officers' violent conduct, which would be an important factor in his defense. The Commissioner of the California Highway Patrol petitioned the superior court for a writ of mandate ordering the municipal court to vacate the discovery order. The superior court issued the writ, holding that the discovery would be of minimal and speculative value, and would violate the rights of privacy of the arrestees. Defendant then appealed to the court of appeal, which affirmed the superior court ruling.

In discussing the standing of the Highway Patrol Commissioner to assert the right of privacy of the arrestees, the court noted that the constitutional provision allowing for the right of privacy is self-executing in creating an enforceable right (*100 Cal. App. 3rd 69, 76)* . Because the arrestees could not come forward to protect that right, it was proper for the Commissioner to seek protection in their behalf (*100 Cal. App. 3rd 69, 77)* .

See *§ 81.253* for a form dealing with protection of right to privacy of third parties.

[d] Burden on Party Seeking Discovery

Rancho Publications v. Superior Court *(1999) 68 Cal. App. 4th 1538, 81 Cal. Rptr. 2d 274* arose out of a defamation action filed by a hospital against a physician and an anonymous organization whose members were fictitiously named as defendants. During the pendency of the action, petitioner newspaper ran a series of "advertorials" (advertisements with style and content similar to an editorial), paid for by another anonymous organization, which were critical of hospital's affiliation with a for-profit HMO (*68 Cal. App. 4th 1538, 1541-1542)* . The hospital served a subpoena on the newspaper demanding production of all documents pertaining to these paid advertisements, including documents relating to communications to or from a member, supporter or representative of the anonymous organization. The newspaper sought to quash the subpoena and obtain a protective order based on the California constitutional qualified immunity of associational privacy articulated in *Britt v. Superior Court (1978) 20 Cal. 3d 844, 143 Cal. Rptr. 695, 574 P.2d 766* (discussed in *§ 81.240[3][a]*) and the "absolute immunity" of the media shield law. The trial court denied the motion, and the newspaper petitioned for writ review of the order holding it in contempt and directing it to produce the documents (*68 Cal. App. 4th 1538, 1542)* .

The court of appeal issued a writ to deny discovery. Declining to apply California media shield law "because it does not necessarily extend to paid advertisements" (*68 Cal. App. 4th 1538, 1542)* , the court ruled instead that the information was not discoverable because the qualified constitutional privacy privilege protects the speech and privacy rights of individuals who wish to promulgate their nondefamatory information and ideas in a public forum while keeping their identities secret (*68 Cal. App. 4th 1538, 1547)* .

The court explained that there is a nonstatutory qualified privilege grounded in federal and state free speech and privacy provisions which limits what courts can compel through civil discovery (*68 Cal. App. 4th 1538, 1547-1548* , citing *Britt v. Superior Court* (1978) *20 Cal. 3d 844, 143 Cal. Rptr. 695, 574 P.2d 766* , discussed in *§ 81.240[3][a]*). This qualified privilege is decided on a case-by-case basis, with courts carefully balancing the public need to disclose with confidentiality interests to withhold, giving great weight to fundamental privacy rights. The party seeking discovery must make a higher showing of relevance and materiality than otherwise would be required for less sensitive material (*68 Cal. App. 4th 1538, 1549)* .

Applying the balancing test, the court found the hospital failed to defeat the qualified privilege by showing a compelling need for disclosure of the names of anonymous authors of the advertisements because those advertisements involved core political speech. Moreover, since one admitted purpose of the hospital in seeking the names was to add potential new defamation claims against additional defendants, the impact of the proposed discovery on protected constitutional rights was severe (*68 Cal. App. 4th 1538, 1550-1551)* . The court deemed this "a classic *First Amendment* example" of why the speakers may have chose anonymity to avoid being swept into litigation purely out of spite for speaking out on hotly contested issues (*68 Cal. App. 4th 1538, 1550-1551)* . The court reasoned that the hospital's mere conjecture, based on thematic and stylistic similarities, that the authors of the advertisements were the same as those who authored the defamatory statements alleged in the hospital's complaint was not enough to overcome the right to privacy, or warrant shutting off political discourse on an important public issue, since the advertisements were not directly relevant to the defamation action (*68 Cal. App. 4th 1538, 1551)* .

In ***Hinshaw, Winkler, Draa, Marsh & Still v. Superior Court*** *(1996) 51 Cal. App. 4th 233, 58 Cal. Rptr. 2d 791* , two doctors who had been dropped as plaintiffs from a class action lawsuit sued their former attorneys for malpractice, claiming they had been improperly dropped. The class actionsuit had been resolved by means of a confidential settlement. In the malpractice action, the trial court had granted the doctors' motion to compel discovery pertaining to the confidential settlement on the grounds it was relevant to proof of the doctors' damages. The court of appeals issued a writ of mandate to deny discovery, ruling that the information was not discoverable because it was protected by the right to privacy and the plaintiffs had not shown a compelling state interest that would justify disclosure of the information (*51 Cal. App. 4th 233, 242)* .

Discovery of the confidential settlement would have revealed detailed financial information about the practices of the individual doctors involved in the agreement. The court of appeals indicated that these matters should receive at least as much privacy protection as bank account or tax information (*51 Cal. App. 4th 233, 241)* .

The court emphasized that relevance and materiality are not sufficient to establish discoverability of information protected by the right to privacy. The party seeking discovery must demonstrate a compelling state interest to justify disclosure. The plaintiffs' showing of a possibility of discovering relevant information did not satisfy this burden (*51 Cal. App. 4th 233, 239)* .

The facts and procedural background of ***Fults v. Superior Court*** *(1979) 88 Cal. App. 3d 899, 152 Cal. Rptr. 210* are discussed in [a], *above.* The *Fults* court held that the party seeking discovery must make an adequate foundation for inquiry prior to discovery. Since the challenged interrogatories concerning petitioner's sex life were not accompanied by any affirmative showing that the utility of the discovery manifestly outweighed the petitioner's right to privacy, the court struck them down, holding that they were constitutionally overbroad (*88 Cal. App. 3rd 899, 905)* .

[e] Broad Discovery May Be Impermissible Even When Compelling State Interest

The facts and procedural background of ***Fults v. Superior Court*** *(1979) 88 Cal. App. 3d 899, 152 Cal. Rptr. 210* are discussed in [a], *above.* In *Fults,* the court held that the state interest in ascertainment of truth in connection with legal proceedings is a compelling one, but that petitioner may have already served that interest by answering questions related

to sexual activity within three months on either side of the likely date of conception (*88 Cal. App. 3rd 899, 904)* . In any event, even when, as here, a compelling state interest is shown, disclosure must still be narrowly and precisely circumscribed so as to assure maximum protection of constitutional interests (*88 Cal. App. 3rd 899, 904, 905)* .

[f] Broad Discovery May Be Impermissible Even If Waiver of Right to Privacy

The facts and procedural background of ***Britt v. Superior Court*** *(1978) 20 Cal. 3d 844, 143 Cal. Rptr. 695, 574 P.2d 766* are discussed in *§ 81.240[3][a]*. The Supreme Court in *Britt* discussed defendant's claim that plaintiffs had waived their right to privacy by bringing the lawsuit. In this regard, the Court held that, while the bringing of an action may indeed bring about a partial waiver of a litigant's right to associational privacy, the scope of such a waiver must be narrowly construed so that plaintiffs will not be unduly deterred from instituting lawsuits ( ), .

[g] Any Required Disclosure Should Be Narrowly Drawn

The facts and procedural background of ***Britt v. Superior Court*** *(1978) 20 Cal. 3d 844, 143 Cal. Rptr. 695, 574 P.2d 766* are *set out in § 81.240[3][a]*. In *Britt,* the Supreme Court noted that even when disclosure must be made because of the direct relevance of associational activities to the fair resolution of the lawsuit, *First Amendment* principles dictate that the disclosure be narrowly drawn so as to assure maximum protection of the constitutional interests at stake (*20 Cal. 3d 844, 859*).

In ***El Dorado Savings & Loan Assn. v. Superior Court*** *(1987) 190 Cal. App. 3d 342, 235 Cal. Rptr. 303* , plaintiffs, female former employees of defendant, brought a sex and age discrimination action against defendant. During discovery plaintiffs sought production of the personnel records of the only male employee employed in the same capacity as they were, claiming he received compensation and benefits not afforded them. Defendant refused to produce the file, claiming it would violate the male employee's right to privacy. Plaintiffs filed a motion to compel production, and the court ordered defendant to produce the entire personnel file. Defendant and the male employee petitioned for a writ of mandate.

The court of appeal issued the writ (*190 Cal. App. 3rd 342, 344)* . Plaintiffs acknowledged the personnel records were protected by the right of privacy, but argued that disclosure was necessary to facilitate prosecution of the discrimination action. The court observed that even when confidential information in personnel files is directly relevant to litigation, discovery will not be permitted until a balancing of the compelling need for discovery against the fundamental right of privacy determines that the disclosure is appropriate. Even when the balance tips in favor of disclosure, constitutional concerns require a strict circumspection of the scope of the disclosure. The court found that the record was inadequate to support disclosure of the entire personnel file. It said that consideration must first be given to whether less intrusive means, such as depositions, would yield the information sought. Then, even if there were no means less intrusive to the privacy interests to satisfy plaintiff's legitimate need for relevant information, it was not established that the entire file was relevant to plaintiff's action. The trial court should first examine the file in camera and order disclosure of only that information that might be relevant to the suit (*190 Cal. App. 3d 342, 346)* .

[4] Additional Authorities

[a] Broad Discovery May Be Impermissible Even When Compelling State Interest

In *Garstang v. Superior Court (1995) 39 Cal. App. 4th 526, 46 Cal. Rptr. 2d 84* , plaintiff sued her former employer, Caltech, and three coworkers for slander and intentional infliction of emotional distress. Plaintiff attempted to depose two of the coworker-defendants, and one nonparty coworker, about their meetings with Caltech's ombudsman, during which they discussed rumors that plaintiff traded sexual favors for job advancement. Plaintiff claimed that during one meeting an admission was made that she had been treated unfairly. The deponents refused to answer questions relating to these meetings and opposed plaintiff's motion to compel further response, in part on the ground that the California constitutional right to privacy protected the communications. The superior court denied plaintiff's motion to compel

response.

The court of appeal denied plaintiff's petition for writ of mandate. The court said that the ascertainment of truth in connection with legal claims (in this case, the discovery of what was said during the meetings with the ombudsman) is a compelling public need under which the constitutional right of privacy may be abridged. Nevertheless, the court held that, in this case, this need was outweighed by the right of privacy of those participating in the meetings because the communications related to the private affairs of Caltech employees and were maintained in confidence by the institution (*39 Cal. App. 4th 526, 532)* . The court added that the qualified privacy privilege applied because the ombudsman acted within her authority in discussing the facts of the dispute and attempting to resolve a workplace dispute (*39 Cal. App. 4th 526, 536-537)* .

In *Scharf v. Regents of University of California (1991) 234 Cal. App. 3d 1393, 286 Cal. Rptr. 227* , plaintiffs, faculty members of the University of California who were denied tenure or promotion, sought complete access to information considered by the University in making its employment determinations. Plaintiffs contended that the University's refusal to reveal all the requested information violated the prior version of *Educ. Code § 92612* and their constitutional right to privacy. *Educ. Code § 92612*, applicable only to University employees, grants specific rights of access to certain personnel information. The trial court granted the University's motion for a judgment on the pleadings, finding that the University's procedures were not violative of the right of privacy. In affirming the trial court's order, the court of appeal rejected plaintiffs' contention that their right of privacy demanded access to the records. Plaintiffs asserted that one purpose of the right of privacy is to prevent the use of inaccurate government and business records regarding individuals unaware of or unable to correct erroneous information that might adversely affect them.While not disagreeing with that purpose, the court reiterated that the right to privacy is not absolute, but may yield to the furtherance of a strong competing need for disclosure. It noted a direct conflict with the privacy rights of those persons who contributed evaluative information, and observed that other cases balancing these interests, as well as those of the employing university, have all held against disclosure. Moreover, unlike previous cases, which involved the records of a single employee and would have had little impact on broad policy, if plaintiffs succeeded, disclosure would pertain to all academic employees seeking tenure or promotion and not merely to a single candidate, which the court found would be a thorough undermining of the confidentiality of records (*234 Cal. App. 3d 1393, 1408-1409)* . The court also found that *Educ. Code § 92612* is unconstitutional as an impermissible conflict with *Cal. Const., art. IX, § 9* (autonomy of University of California) (*234 Cal. App. 3d 1393, 1400-1405)* . The court cautioned that its holding was limited to the facial constitutional validity of university's peer review process, and was not a ruling on the operation of that process in any particular instance (*234 Cal. App. 3d 1393, 1409-1411)* .

The facts and procedural background of *Britt v. Superior Court (1978) 20 Cal. 3d 844, 143 Cal. Rptr. 695, 574 P.2d 766* are *set out in § 81.240[3][a]*. In *Britt*, the Supreme Court discussed defendant's contention that disclosure should be compelled because of the state's substantial interest in facilitating the ascertainment of truth in private litigation (*20 Cal. 3d 844, 856)* . The Court stated, however, that the identification of this interest is just the beginning of a court's analysis. In this regard, the permissible limits of discovery are circumscribed by state and federal constitutional considerations (*20 Cal. 3d 844, 857)* that dictate that orders compelling disclosure be narrowly drawn (*20 Cal. 3d 844, 859)* .

[b] Any Required Disclosure Should Be Narrowly Drawn

The facts and procedural background of *John B. v. Superior Court (2006) 38 Cal. 4th 1177, 45 Cal. Rptr. 3d 316, 137 P.3d 153* are discussed in detail in *§ 81.240[4][a]*. In the underlying case, a wife sued her husband for infecting her with HIV. Petitioner husband challenged the discovery order denying his motion to quash the subpoenas of his medical records, including the results of any HIV tests he took. He claimed the compelled disclosure of this information violated his constitutionally protected right of privacy. The court of appeal limited the wife's discovery of the identities of the husband's previous sexual partners and admissions concerning his "lifestyle," as speculative and overbroad. However, the court found no error in compelling discovery of the husband's medical records and HIV tests. The court reasoned

that the husband waived his right to prevent disclosure by relying on what he claimed were negative test results in support of a summary judgment motion.

A divided Supreme Court affirmed in part, and reversed in part. The Court agreed that the court of appeal had appropriately limited the wife's discovery of the identities of the husband's previous sexual partners and admissions concerning his "lifestyle" (*38 Cal. 4th 1177, 1199-1201)* . Further, after balancing the wife's right to discover relevant evidence against the husband's right to privacy, the Court also agreed that the wife was entitled to discovery concerning husband's medical history, his sexual activity, and his HIV status. However, the Court narrowed the scope of discovery in light of husband's negative HIV test on August 17, 2000, which restricted the period of possible infection to the six months preceding the negative test. Accordingly, the Court reversed the court of appeal's order compelling responses to plaintiff's discovery requests to the extent they sought information about the husband's sexual history outside the six-month time frame. On remand, however, the wife could overcome this temporal limitation by offering some basis to question the accuracy or reliability of the husband's negative HIV test (*38 Cal. 4th 1177, 1199-1202)* .

The facts and procedural background of *Allison v. Workers' Comp. Appeals Bd. (1999) 72 Cal. App. 4th 654, 84 Cal. Rptr. 2d 915* are *set out in § 81.124[4][a]*. In *Allison*, the court of appeal considered petitioner's contention that information relating to her general past medical history was protected by her privacy rights and by the physician-patient privilege. Citing *Britt v. Superior Court (1978) 20 Cal. 3d 844, 143 Cal. Rptr. 695, 574 P.2d 766* , discussed in *§ 81.240[3][a]* and in [3][g], *above*, the court declined to determine with precision which portion of the requested discovery information was privileged and which was not because the discovery authorized by the challenged order was clearly overbroad. The court held that on remand the defendant would bear responsibility for framing narrower, more precisely tailored discovery which does not improperly impinge on privileged information (*72 Cal. App. 4th 654, 661)* . The court explained that defendant's own medical expert's analysis of plaintiff's workers' compensation claim, based on injury to her wrist, narrowed the scopeof discovery to something far less broad than a general inquiry into plaintiff's hospitalization history prior to 1965 (*72 Cal. App. 4th 654, 661)* .

[c] Right to Privacy Valid Basis for Refusal to Submit to Discovery

In *City of Ontario v. Quon (2010) ___ U.S. ___, 130 S. Ct. 2619, 177 L. Ed. 2d. 216* , the United States Supreme Court reversed a Ninth Circuit decision that had upheld plaintiff police officers' claims that a search of their text messages violated their *Fourth Amendment* and California constitutional privacy rights. They claimed a reasonable expectation of privacy in the content of those messages, in light of their employer's informal policy of not auditing messages on payment of usage overages (*177 L. Ed. 2d. 216, 227)* . The Supreme Court sidestepped the parties' disagreement over the officers' privacy expectation, finding it preferable to dispose of the case on narrower grounds (177 L. Ed. 2d. 216, 227-228). Prudence counseled caution, the Court stated, before the facts in this case were used to establish "far-reaching premises that define the existence, and extent, of privacy expectations" of employees using employer-provided communication devices (177 L. Ed. 2d. 216, 227). The Court observed that rapid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior. At present, it is uncertain how workplace norms, and the law's treatment of them, will evolve (*177 L. Ed. 2d. 216, 227)* . For further discussion of City of Ontario v. Quon, see Ch. *85A, Discovery : E-Discovery*, § 85A.11.

California Points & Authorities

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 81 DISCOVERY: PRIVILEGES AND OTHER DISCOVERY LIMITATIONS
PART II. FORMS
G. Right to Privacy

8-81 California Points & Authorities § 81.251

§ 81.251 Opposing Motion to Compel Discovery--Discovery Infringing Right of Privacy Is Improper--Activities and Communications Covered by Right to Privacy

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30), as well as with points and authorities relating generally to discovery resisted on the ground of right to privacy (see, e.g., § 81.250).*]

THE RIGHT OF PRIVACY EXTENDS TO ONE'S _____ [SEXUAL RELATIONSHIPS *or* FINANCIAL AFFAIRS *or* ASSOCIATIONAL ACTIVITIES *or* MATTERS THAT FALL WITHIN THE PHYSICIAN-PATIENT PRIVILEGE *or* CONFIDENTIAL CUSTOMER LISTS].

[*EITHER*]

A. Sexual Relationships Within Zone of Privacy. Sexual relationships are within a well-established zone of privacy in which questions need not be answered in the absence of a compelling state interest (*Fults v. Superior Court (1979) 88 Cal. App. 3d 899, 903, 904, 152 Cal. Rptr. 210*).

[*AND/OR*]

B. Financial Affairs Within Zone of Privacy. The right of privacy secured by *Article I, Section 1, of the California Constitution* extends to one's confidential financial affairs (*Valley Bank of Nevada v. Superior Court (1975) 15 Cal. 3d 652, 656, 125 Cal. Rptr. 553, 542 P.2d 977* ; *Hinshaw, Winkler, Draa, Marsh & Still v. Superior Court (1996) 51 Cal. App. 4th 233, 241, 58 Cal. Rptr. 2d 791* ; *see Ameri-Medical Corp. v. Workers' Comp. Appeals Bd. (1996) 42 Cal. App. 4th 1260, 1287-1288, 50 Cal. Rptr. 2d 366*).

[*AND/OR*]

C. Associational Activity Within Zone of Privacy. Associational activity is constitutionally protected both insofar as it relates to the exercise of the right to associate, and as it relates to freedom fromdisclosure. The right to associational privacy exists even when the associations involved are not unpopular ones (*Britt v. Superior Court (1978) 20 Cal. 3d 844, 852-854, 143 Cal. Rptr. 695, 574 P.2d 766*).

[*AND/OR*]

D. Matters Protected by Physician-Patient Privilege Within Zone of Privacy. The physician-patient privilege under *Sections 990 through 1007 of the Evidence Code* creates a zone of privacy whose purposes are to protect the patient from humiliation, and to encourage the patient's full disclosure to the physician. Such right to privacy encompasses the state of the patient's mind, as well as the state of his or her viscera (*Board of Medical Quality Assurance v. Gherardini (1979) 93 Cal. App. 3d 669, 678, 679, 156 Cal. Rptr. 55*).

[*AND/OR*]

E. Confidential Customer List Within Zone of Privacy. A business's confidential customer list constitutes sensitive information entitled to qualified protection (*Hofmann Corp. v. Superior Court (1985) 172 Cal. App. 3d 357, 362-363, 218 Cal. Rptr. 355*).

[*AND/OR*]

F. Protection of Bank Customers. In proceedings in which a bank is a party, the bank must take reasonable steps to notify its nonparty customers of the pendency and nature of the proceedings prior to disclosing confidential customer information. The court may then make orders for the protection of the customers, such as the deletion of their names, the sealing of the information, and the holding of in-camera hearings (*Valley Bank of Nevada v. Superior Court (1975) 15 Cal. 3d 652, 658, 125 Cal. Rptr. 553, 542 P.2d 977*).

[*AND/OR*]

G. Matters Protected by Psychotherapist-Patient Privilege Within Zone of Privacy. The zone of privacy created by *Article I, Section 1, of the California Constitution* extends to communications between a psychotherapist and a patient. The psychotherapist-patient privilege set forth in *Evidence Code Sections 1010-1027* provides a scheme by which that right can be protected (*Cutter v. Brownbridge (1986) 183 Cal. App. 3d 836, 842, 845, 228 Cal. Rptr. 545* ; *see Davis v. Superior Court (1992) 7 Cal. App. 4th 1008, 1013, 1019-1020, 9 Cal. Rptr. 2d 331*).

[*AND/OR*]

[*Optional*] **H. Disclosure of HIV Positive Status Within Zone of Privacy.** The zone of privacy created by *Article I, Section 1, of the California Constitution* extends to the disclosure of HIV positive status to a healthcare worker for the purpose of alerting the worker to the need for taking safety precautions in handling medical implements contaminated with infected blood (*Urbaniak v. Newton (1991) 226 Cal. App. 3d 1128, 1135-1136, 277 Cal. Rptr. 354*).

[2] Comments

[a] Use of Form

This memorandum may be used in opposition to a motion for an order compelling discovery, by a party or other person who has resisted discovery on the ground that disclosure would violate the right to privacy. It does not provide a complete memorandum, but is designed to be combined with a general form in opposition to a motion compelling discovery, as well as with points and authorities relating generally to discovery resisted on the ground of the right to privacy.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[c] Related Uses

This form may be combined with a general form of memorandum in support of a motion for a protective order [*see, e.g., Ch. 83, Discovery: Depositions, § 83.80* et seq. (protective order in context of oral deposition)] when the protective order is being sought on the ground that disclosure would cause a violation of the right of privacy.

[d] Scope of Authority

The types of matters covered by the right to privacy that are set forth in this form are not intended to be exclusive or exhaustive. It is clear that the zone of privacy also includes one's arrest record [*see Craig v. Municipal Court (1979) 100 Cal. App. 3d 69, 77-79, 161 Cal. Rptr. 19* (discussed in *§ 81.250[3*][c])], one's participation as a witness or principal in the preparation of an accident report [*see State of California ex rel. Department of Transportation v. Superior Court (1980) 102 Cal. App. 3d 25, 29, 162 Cal. Rptr. 78]* , one's communications concerning the candidate for tenure made during the university tenure review process [*see Kahn v. Superior Court (1987) 188 Cal. App. 3d 752, 769-770, 233 Cal. Rptr. 662* (discussed in *§ 81.250[3*][a])], and one's personnel file [*see El Dorado Savings & Loan Assn. v. Superior Court (1987) 190 Cal. App. 3d 342, 345-346, 235 Cal. Rptr. 303* (discussed in *§ 81.250[4*][b])]. The points included in the foregoing form were chosen because they represent definitive statements by the courts about some of the areas included in the zone of privacy.

[3] Discussion of Authorities

[a] Sexual Relationships Within Zone of Privacy

The facts and procedural background of ***Fults v. Superior Court*** *(1979) 88 Cal. App. 3d 899, 152 Cal. Rptr. 210* are discussed in *§ 81.250[3][a]*. In *Fults*, the court of appeal discussed various aspects of the right to privacy, such as associational or financial privacy, which have been recognized by California courts (*88 Cal. App. 3d 899, 903, 904)* . The court went on to hold that one's sexual relations are also within the zone of privacy recognized by the *United States Supreme Court in Eisenstadt v. Baird (1972) 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349* and *Griswold v. Connecticut (1965) 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510* (*88 Cal. App. 3d 899, 904)* .

[b] Financial Affairs Within Zone of Privacy

The facts and procedural background of ***Hinshaw, Winkler, Draa, Marsh & Still v. Superior Court*** *(1996) 51 Cal. App. 4th 233, 58 Cal. Rptr. 2d 791* are discussed in *§ 81.250[3][d]*. In refusing to permit discovery of a confidential settlement agreement, the court stated that such agreements generate the same privacy concerns as bank accounts and tax information, and are entitled to equivalent protection from discovery (*51 Cal. App. 4th 233, 241)* .

In ***Ameri-Medical Corp. v. Workers' Comp. Appeals Bd.*** *(1996) 42 Cal. App. 4th 1260, 50 Cal. Rptr. 2d 366* , a worker's compensation action, employers challenged the bills submitted by the corporate medical clinic that examined the applicants. The court of appeal held that the trial court erred in granting broad discovery into the financial relationship between the clinic and the physicians who examined the applicants. While the clinic had no reasonable expectation of privacy in the financial data used to prepare its bills, it did retain a privacy interest in financial and employment information unrelated to its billing practices. While the constitutional right to privacy may only be asserted by individuals, corporations nevertheless possess limited privacy rights as well (*42 Cal. App. 4th 1260, 1287-1288)* .

The facts and procedural background of ***Valley Bank of Nevada v. Superior Court*** *(1975) 15 Cal. 3d 652, 125 Cal. Rptr. 553, 542 P.2d 977* are *set out in § 81.250[3][b]*. In *Valley Bank*, the Supreme Court discussedthe adoption of the constitutional amendment in 1974 which elevated the right of privacy to an inalienable right under *Cal. Const., art. I, § 1*, and held that this right extends to one's confidential financial affairs, as well as to the details of one's personal life (*15 Cal. 3d 652, 656)* .

[c] Associational Activity Within Zone of Privacy

The facts and procedural background of ***Britt v. Superior Court*** *(1978) 20 Cal. 3d 844, 143 Cal. Rptr. 695, 574 P.2d 766* are discussed in *§ 81.240[3][a]*. The Supreme Court in *Britt* discussed the fact that the rights to associational freedom and privacy under *Cal. Const., art. I, §§ 1-3* and under the *First Amendment to the U.S. Constitution*, require both freedom of association and freedom of nondisclosure concerning that association (*20 Cal. 3d 844, 852, 853)* . The foregoing freedoms are to be protected even when the associations involved are neither unpopular nor controversial (*20 Cal. 3d 844, 853-854)* .

[d] Matters Protected by Physician-Patient Privilege Within Zone of Privacy

In ***Board of Medical Quality Assurance v. Gherardini*** *(1979) 93 Cal. App. 3d 669, 156 Cal. Rptr. 55* , the custodian of the hospital's records resisted discovery on the grounds that the records were protected both by the physician-patient privilege and by the patients' right to privacy. The court of appeal recognized that a person's medical profile is an area of privacy that is vastly more intimate and personal than many of the areas already judicially recognized and protected (*93 Cal. App. 3d 669, 678)* . Indeed, the physician-patient privilege itself creates a zone of privacy that encompasses the state of the patient's viscera, as well as his or her state of mind. The dual purpose of this zone of privacy is protection of the patient from humiliation, and encouragement of full disclosure by the patient to the physician (*93 Cal. App. 3d 669, 678-679)* .

[e] Confidential Customer List Within Zone of Privacy

In ***Hofmann Corp. v. Superior Court*** *(1985) 172 Cal. App. 3d 357, 218 Cal. Rptr. 355* , a products liability case, plaintiffs obtained an order compelling defendant to disclose its entire confidential customer list and permitting plaintiffs to mail notice of the action to all customers together with questions relating to each addressee's experience with the product in issue. Defendant petitioned for a writ of mandate directing the trial court to vacate this order.

The court of appeal issued the writ (*172 Cal. App. 3d 357, 365)* . The court first noted that a limited protection is given to "sensitive information which people may wish to keep confidential," citing *Valley Bank of Nevada v. Superior Court (1975) 15 Cal. 3d 652, 125 Cal. Rptr. 553, 542 P.2d 977* (discussed in [b], *above*), and other cases that discuss the qualified protection afforded by the constitutional right of privacy (*172 Cal. App. 3d 357, 362)* . The court held that defendant's customer list was clearly within this sensitive category as evidenced by the protection given to confidential customer lists in the context of trade secret law (*172 Cal. App. 3d 357, 363)* . The court went on to hold that the trial court abused its discretion by permitting disclosure of the customer list because defendant had already disclosed other accidents or actions involving the product, and any benefit from further access to the customer list was outweighed by the potential harm to defendant (*172 Cal. App. 3d 357, 363-365)* .

Counsel should note that the opinion in *Hofmann* does not expressly mention the right of privacy as the basis for protection, but merely includes confidential customer lists within the category of "sensitive information" that cited cases held were protected as being within the zone of privacy. In addition, the court in *Hofmann* in effect holds that confidential customer lists are within this category due to their status as trade secrets, yet the court neither mentions nor considers the applicability of the trade secret privilege under *Evid. Code § 1060*.

[f] Protection of Bank Customers

The facts and procedural background of ***Valley Bank of Nevada v. Superior Court*** *(1975) 15 Cal. 3d 652, 125 Cal. Rptr. 553, 542 P.2d 977* are *set out in § 81.250[3][b]*. In *Valley Bank*, the Supreme Court upheld an order requiring limited disclosure of certain bank records of customer transactions insofar as the issues of relevance and privilege were concerned, finding that there is no bank-customer privilege among the list of exclusive privileges in the Evidence Code (*15 Cal. 3d 652, 656)* . Nevertheless, there is a right to privacy in the California Constitution (*Cal. Const., art. I, § 1*) that allows a bank customer to have a reasonable expectation that matters that he or she reveals to the bank will be used by the bank only for internal banking purposes, absent compulsion by legal process (*15 Cal. 3d 652, 656, 657)* . Thus, any protective order that is made pursuant to former Code Civ. Proc. § 2019(b) [*see now Code Civ. Proc. § 2025.420*] should represent a balance between the right of civil litigants to discover relevant information, and the right of bank customers to maintain reasonable privacy regarding their finances (*15 Cal. 3d 652, 657)* . In light of these considerations, the Court issued a writ of mandate to the trial court to refashion a protective order that would more thoroughly balance the competing interests (*15 Cal. 3d 652, 658, 659)* . The Court held, however, that before any confidential customer information may be disclosed during civil discovery proceedings, the bank must take reasonable steps to notify its customers of the pendency and nature of the proceedings in order to allow the customers the opportunity to protect their own interests (*15 Cal. 3d 652, 658)* . If, after being notified, a customer chooses to apply for aprotective order, the trial court may issue various orders such as 1) the deletion of the names, (2) the scaling of the information to be opened only on the further order of the court, and (3) in camera hearings (*15 Cal. 3d 652, 658)* .

[g] Matters Protected by Psychotherapist-Patient Privilege Within Zone of Privacy

In ***Cutter v. Brownbridge*** *(1986) 183 Cal. App. 3d 836, 228 Cal. Rptr. 545* , plaintiff's psychotherapist voluntarily executed a declaration describing his diagnosis of plaintiff, including details of plaintiff's personal life. The declaration was filed by plaintiff's former wife in an action seeking to suspend his visitation rights with his children. Plaintiff brought an action against the psychotherapist for damages from intentional infliction of emotional distress, alleging violation of his right of privacy. Defendant demurred, claiming the judicial proceedings immunity of former Civ. Code § 47(2) [*see now Civ. Code § 47(b)*]. The trial court sustained the demurrer and dismissed the complaint. Plaintiff appealed.

The court of appeal reversed, determining that the constitutional right of privacy outweighs the policies underlying the judicial immunity when private material is published without resort to a prior judicial determination (*183 Cal. App. 3d 836, 848)* . The court reviewed the psychotherapist-patient relationship, and noted that it was recognized in *In re Lifschutz (1970) 2 Cal. 3d 415, 85 Cal. Rptr. 829, 467 P.2d 557* , before *Cal. Const., art. I, § 1* was amended to include privacy. The court observed that a psychiatric patient must expose his or her entire self, including dreams, fantasies, sins, and shame to the psychotherapist. That confidence would be impossible if the patient knew that the psychiatrist would reveal those communications to others. The court noted that an individual's right to privacy encompasses the state of his or her mind and complaints of physical ills and their emotional overtones, and that if there is a quintessential zone of human privacy, it is the mind (*183 Cal. App. 3d 836, 842)* . However, the court said that the right of privacy is not absolute. The psychotherapist-patient privilege set forth in *Evid. Code §§ 1010-1027* provides a comprehensive scheme by which the need for ascertaining the truth in judicial proceedings can be balanced with a patient's right to privacy (*183 Cal. App. 3d 836, 845)* .

The facts and procedural background of ***Davis v. Superior Court*** *(1992) 7 Cal. App. 4th 1008, 9 Cal. Rptr. 2d 331* are discussed in *§ 81.254[3][a]*. In *Davis*, plaintiff sought to protect from discovery her records at a medical center specializing in the treatment of substance abuse. When the trial court permitted those records to be subpoenaed, plaintiff challenged that order as an improper violation of her psychotherapist-patient privilege and her right to privacy. The court of appeal said that the psychotherapist-patient privilege and the right of privacy are both interrelated and separate.Communications with a psychotherapist are within the zone of privacy. The court focused its analysis on the right of privacy, explaining that the privilege is merely one aspect of the broader privacy right, and that the privilege and any exceptions to it were subject to constitutional standards. Thus, even if the records fell outside the protection of the privilege, discovery might be improper as a contravention of plaintiff's right of privacy (*183 Cal. App. 3d 836)* . Without announcing the parameters of the requisite showing that a foundation for the right of privacy exists, the court concluded that plaintiff had make a sufficient showing (*183 Cal. App. 3d 836)* . The court noted that although a party may not assert the psychotherapist-patient privilege without first establishing the existence of the psychotherapist-patient relationship, such specificity is not required with the right of privacy (*183 Cal. App. 3d 836)* . A person's medical profile is an area of privacy that cannot be encroached except for good cause. The right of privacy also extends to the details of one's personal life, including records of treatment for substance abuse (*183 Cal. App. 3d 836)* . Further, the court observed that defendant tacitly recognized the confidential nature of the records sought, in that she subpoenaed the records under *Code Civ. Proc. § 1985.3*, which sets forth the procedure for obtaining records maintained by persons who traditionally manage confidential information (*183 Cal. App. 3d 836)* .

[h] Disclosure of HIV Positive Status Within Zone of Privacy

In ***Urbaniak v. Newton*** *(1991) 226 Cal. App. 3d 1128, 277 Cal. Rptr. 354* , after undergoing a neurological examination arranged by his former employer's insurer in response to his workers' compensation action, plaintiff informed the neurologist's nurse that he had tested positive for the HIV. He indicated that he did not want this information placed in the medical report, and that he was disclosing the information only to ensure that proper precautions be taken to sterilize the medical equipment. That information was included in the neurologist's report, which was then disseminated to attorneys for both sides, as well as the insurance company, plaintiff's chiropractor, and the Workers' Compensation Appeals Board. Plaintiff then sued the neurologist, opposing counsel, and the insurance company seeking damages for dissemination of the report on a variety of legal theories, including invasion of the right of privacy guaranteed by *Cal. Const., art. I, § 1*. The trial court granted defendants' motion for summary judgment and dismissed the action. Plaintiff's estate appealed.

The court of appeal reversed dismissal of the invasion of privacy action against the neurologist, and otherwise affirmed the judgment. The court said there is no confidential physician-patient relationship in a medical examination of a plaintiff arranged for the benefit of the defense. It observed that plaintiff's counsel advised him to cooperate with the examination onlybecause the defense could have secured an order compelling compliance under Code Civ. Proc. § 2032 (*now see Code Civ. Proc. § 2032.010 et seq.*). The court explained that in a discovery proceeding, the examining physician owes the claimant no duty of care. While an examining physician might incur liability by disclosing confidential information irrelevant to the purpose of the examination, that liability cannot be predicated on invasion of privacy in the absence of special circumstances indicating that the information was given in a confidential communication between patient and physician (*226 Cal. App. 3d 1128, 1135)* . The court said that plaintiff's asserted right of privacy must be based on the circumstances surrounding his disclosure to the nurse. He revealed his HIV positive status at a time and for a purpose that had no connection with the medical examination for his workers' compensation case. In fact, the examination was over, and his illness had not been discussed. Plaintiff chose to disclose his HIV positive status solely to alert the nurse to the need to take precautions in handling electrodes contaminated with his blood. The court concluded that a right of privacy arises in the disclosure of HIV positive status to a health care worker for the purpose of alerting the worker to the need for taking safety precautions in handling medical implements contaminated with infected blood (*226 Cal. App. 3d 1128, 1135-1136)* .

[4] Additional Authorities

[a] Sexual Relationships Within Zone of Privacy

The facts and procedural background of *Morales v. Superior Court (1979) 99 Cal. App. 3d 283, 160 Cal. Rptr. 194* are discussed in *§ 81.240[3][b]*. The *Morales* court discussed the fact that discovery into extramarital activities may constitute an invasion of the protected rights of both associational and sexual privacy (*99 Cal. App. 3d 283, 289, 290)* . The court went on to hold that the right of sexual privacy is not limited to the marital relationship (*99 Cal. App. 3d 283, 290)* .

[b] Associational Activity Within Zone of Privacy

The facts and procedural background of *Rancho Publications v. Superior Court (1999) 68 Cal. App. 4th 1538, 81 Cal. Rptr. 2d 274* are discussed in *§ 81.250[3][d]*. In *Rancho Publications*, a hospital was suing a physician and an organization whose members were anonymous for defamation. During the course of this litigation another anonymous organization published paid advertisements or "advertorials" in a local newspaper, criticizing the hospital's actions. The hospital served the newspaper with a deposition subpoena seeking information relating to the advertisements, including the names of their authors. The newspaper sought to quash the subpoena, asserting, among other things, the constitutional qualified immunity of associational privacy articulated in *Britt v. Superior Court (1978) 20 Cal. 3d 844, 143 Cal. Rptr. 695, 574 P.2d 766* (discussed in *§ 81.240[3][a]*). The court of appeal stated that this qualified privilege protects the speech and privacy rights of individuals who wish to promulgate their information and ideas in a public forum while keeping their identities secret (*68 Cal. App. 4th 1538, 1550-1551)* .

In *United Farm Workers of America v. Superior Court (1985) 170 Cal. App. 3d 391, 216 Cal. Rptr. 469* , a grower brought an action for damages against a farm workers' union, based on alleged unlawful activity during a strike. The grower sought to compel discovery of certain membership and strike activity attendance lists. After the trial court denied the union's motion to quash a subpoena duces tecum compelling the production of these records, the union petitioned for writ of mandate. The court of appeal issued the writ. Citing *Britt v. Superior Court (1978) 20 Cal. 3d 844, 143 Cal. Rptr. 695, 574 P.2d 766* , the court stated that the *First Amendment* right of freedom of association is not absolute, and associational affiliations or activities may be inquired into to further a compelling state interest. Nevertheless, while truth in litigation is a compelling state interest, no inquiry into associational affiliations or activities may be compelled unless disclosure is directly related to the party's claim such that disclosure is essential to a fair resolution of the case. Moreover, when disclosure is compelled, the order must be drawn with narrow specificity so that the right to associate is not unduly curtailed (*170 Cal. App. 3d 391, 394)* . Applying these principles, the court directed the trial court to grant the motion to quash with respect to a list of those attending a union convention, as this list had no demonstrable relevance to the action. With respect to union membership lists and lists of persons participating in strike activities, the court directed the trial court to grant a protective order limiting disclosure to only those parts of the lists found to be directly relevant to the action after an *in camera* inspection (*170 Cal. App. 3d 391, 394-396)* .

In *Church of Hakeem, Inc. v. Superior Court (1980) 110 Cal. App. 3d 384, 168 Cal. Rptr. 13* , member-ministers of defendant church brought an action alleging fraud, misrepresentation, and other causes of action on behalf of themselves and other member-ministers. Plaintiffs obtained an order compelling disclosure of the identity and location of other member-ministers. On petition by defendant, the court of appeal issued a writ of prohibition directing nullification of the order as one that violated the nonlitigant member-ministers' rights of associational privacy. The court determined that plaintiffs needed the list to aid in the certification of their class, but that other methods of identifying the member-ministers were available that would protect their anonymity. The court then held that plaintiffs had not demonstrated a compelling state interest necessary to justify impairment of the rights of privacy of the nonlitigant members of the church (*110 Cal. App. 3d 384, 388-390)* .

[c] Matters Protected by Physician-Patient Privilege Within Zone of Privacy

The facts and procedural background of *Britt v. Superior Court (1978) 20 Cal. 3d 844, 143 Cal. Rptr. 695, 574 P.2d*

766 are discussed in *§ 81.240[3][a]*. In *Britt,* defendant sought discovery into plaintiffs' lifetime medical histories. The relevance of this discovery request lay in plaintiffs' claim that defendant's activities in connection with its airport had caused them personal injuries and emotional distress. Although plaintiffs were willing to provide defendant with medical information relating to the physical and emotional injuries for which they sought redress, they objected to broad discovery into unrelated areas of physical and mental health. The trial court ordered plaintiffs to make the unlimited disclosure sought by defendant, and plaintiffs then petitioned for a writ of mandate to require the trial court to set aside this order, as well as the order requiring disclosure of plaintiffs' associational activities.

The Supreme Court ordered the trial court to limit the scope of the medical inquiry to those matters that plaintiffs themselves had put in issue by bringing the litigation. Following *In re Lifschutz (1970) 2 Cal. 3d 415, 432, 85 Cal. Rptr. 829, 467 P.2d 557* , the Court held that plaintiffs are not required to sacrifice all privacy in seeking recovery for a specific physical or emotional injury, but are entitled to retain the confidentiality of all unrelated medical or psychotherapeutic treatment that they may have undergone in the past (*20 Cal. 3d 844, 864)* .

Bearman v. Superior Court (2004) 117 Cal. App. 4th 463, 11 Cal. Rptr. 3d 644 arose from an investigation by the Medical Board of California into a claim that a physician indiscriminately recommended the medicinal use of marijuana to one of his patients. The Medical Board issued an administrative subpoena for the patient's medical records. However, the patient refused to waive his right of privacy, and the physician refused to produce the records based on physician-patient confidentiality and that the Medical Board had not shown good cause for invading that confidentiality. The Medical Board obtained an order from the superior court directing the physician to comply with the subpoena.

The court of appeal granted the physician's petition for a writ of mandate and ordered the trial court to vacate its order enforcing the subpoena. The court concluded that the Medical Board failed to demonstrate sufficient facts to support a finding of good cause to invade the patient's right of privacy in his medical records (*117 Cal. App. 4th 463, 472)* . Moreover, the patient did not waive his right of privacy by showing park rangers a letter from his physician as proof that he was a qualified patient entitled to protection from prosecution for marijuana use (*117 Cal. App. 4th 463, 473-474)* . This was not a case in which the patient voluntarily initiated an action placing his medical records at issue. To find that a person automatically waives the right of privacy in his or her medical records merely byshowing a peace officer a physician's written recommendation for the medicinal use of marijuana would run counter to the intent of *Health & Safety Code § 11362.5*, which is to facilitate the medical use of marijuana for the seriously ill (*117 Cal. App. 4th 463, 474)* .

The facts and procedural background of *Allison v. Workers' Comp. Appeals Bd. (1999) 72 Cal. App. 4th 654, 84 Cal. Rptr. 2d 915* are *set forth in § 81.124[4][a]*. In *Allison*, the court discussed petitioner's contention that information relating to her general past medical history was protected by her privacy rights and by the physician-patient privilege. Citing *Britt v. Superior Court (1978) 20 Cal. 3d 844, 143 Cal. Rptr. 695, 574 P.2d 766* , discussed *above*, the court of appeal declined to determine with precision which portion of the requested discovery information was privileged and which was not because the discovery authorized by the challenged order was clearly overbroad. The court held that "on remand the defendant will bear responsibility for framing narrower, more precisely tailored [discovery] which do[es] not improperly impinge on privileged information" (*72 Cal. App. 4th 654, 661)* . The court explained that defendant's own medical expert's analysis of plaintiff's workers' compensation claim, based on injury to her wrist, narrowed the scope of discovery to something far less broad than a general inquiry into plaintiff's hospitalization history prior to 1965 (*72 Cal. App. 4th 654, 661)* .

In *Heda v. Superior Court (1990) 225 Cal. App. 3d 525, 275 Cal. Rptr. 136* , plaintiff in a medical malpractice action made a motion for trial preference based on defendant's ill health, pursuant to *Code Civ. Proc. § 36(d)*, which requires clear and convincing medical documentation of a party's terminal illness. To support her motion, plaintiff propounded interrogatories asking defendant to state information concerning any life-threatening physical ailments he suffered and their current prognosis. Over defendant's objections, the trial court granted plaintiff's motion to compel answers and ordered disclosure of defendant's medical records. The court of appeal issued a writ of mandate vacating the trial court's

order. The court found that defendant's right to privacy included his medical records and outweighed plaintiff's interest in obtaining a trial preference (*225 Cal. App. 3d 525, 528)* . Plaintiff's desire for trial preference failed to overcome defendant's privacy rights, particularly since defendant's presence at trial was not essential, and plaintiff could obtain much of the information she needed by deposition (*225 Cal. App. 3d 525, 528-529)* . The court also found that defendant had not waived his right to privacy by using his health as a reason to change the location of a deposition, or by disclosing to plaintiff that he had heart problems (*225 Cal. App. 3d 525, 529)* . Waivers of constitutional rights are not found lightly, and defendant had not waived his right by simply admitting to his ill health (*225 Cal. App. 3d 525, 530)* .

The facts and procedural background of *Binder v. Superior Court (1987) 196 Cal. App. 3d 893, 242 Cal. Rptr. 231* are discussed in *§ 81.120[3][b]*.In *Binder*, the court of appeal stated that the physician-patient privilege creates a zone of privacy, the purposes of which are to preclude humiliation of the patient that might follow disclosure of his or her ailments, and to encourage the patient's full disclosure to the physician of all information necessary for effective diagnosis and treatment (*196 Cal. App. 3d 893, 898)* . The court elaborated on the patients' right of privacy, which defendant, as custodian of their records, was asserting. The court explained that although the constitutional right of privacy is not absolute it may be abridged only when there is a compelling and opposing state interest. An inquiry into an individual's private affairs will not be constitutionally justified simply because inadmissible and irrelevant matter sought to be discovered might lead to other relevant evidence. Even when discovery of private information is found directly relevant to the issues of ongoing litigation, it will not be automatically allowed; there must be a careful balancing of the compelling public need for discovery against the fundamental right of privacy. In balancing these interests, if state scrutiny is to be allowed, it must be by the least intrusive manner (*196 Cal. App. 3d 893, 900-901)* . The court applied this balancing test to the photographs in the medical records sought by plaintiffs. It concluded that plaintiffs had not shown that the photographs were directly relevant to any issue in the case and did not allow discovery (*196 Cal. App. 3d 893, 901)* .

[d] Protection of Bank Customers

The facts and procedural background of ***Fortunato v. Superior Court*** *(2003) 114 Cal. App. 4th 475, 8 Cal. Rptr. 3d 82* are discussed in *§ 81.190[4][a]*. In that case, the court of appeal held that the submission of individual income tax returns to a bank to obtain a loan does not effect a waiver of the privilege against forced disclosure of tax returns enunciated in *Webb v. Standard Oil Co. (1957) 49 Cal. 2d 509, 319 P.2d 621* (discussed in *§ 81.190[3][a]*) because compliance with a bank's requirement of submitting tax returns with a loan application is not an "entirely voluntary relinquishment" (*114 Cal. App 4th 475, 482)* . Moreover, although petitioner did not raise the issue, the court noted that "the constitutional right of privacy in financial documents in a bank's possession has bearing upon the question of whether the tax-return privilege was waived in this case" (*114 Cal. App 4th 475, 481)* . The court concluded that a bank customer has reasonable expectation of privacy in the confidential information submitted with a loan application, and that when a waiver of the confidentiality of tax returns is argued, the trial court should conduct an in camera inspection to balance the need for discovery against the interests in privacy (*114 Cal. App 4th 475, 481-482)* .

[e] Disclosure of HIV Positive Status Within Zone of Privacy

The facts and procedural background of *John B. v. Superior Court (2006) 38 Cal. 4th 1177, 45 Cal. Rptr. 3d 316, 137 P.3d 153* are discussed in *§ 81.240[4][a]*. After balancing the wife's right to discover relevant evidence against the husband's right to privacy, the Supreme Court concluded that the wife was entitled to discovery concerning husband's sexual history and HIV status. The wife had "amply" established good cause for disclosure of the husband's medical records concerning HIV and AIDS. Discovery might reasonably lead to evidence that husband was aware of his HIV status. Discovery would also serve "the historically important state interest of facilitating the ascertainment of truth in connection with legal proceedings," as well as the state's compelling interest in preventing the spread of AIDS (*38 Cal. 4th 1177, 1199)* . While the wife's interrogatories and requests for admission sought information that fell within the zone of the husband's right to sexual privacy, he had a diminished privacy interest in his HIV status, since he had

admitted his status in court filings and informally. Moreover, the husband also alleged in the complaint that the wife infected *him*. By thus putting his own medical condition at issue, the husband had a "substantially lowered" expectation of privacy (*38 Cal. 4th 1177, 1199)* .

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 81 DISCOVERY: PRIVILEGES AND OTHER DISCOVERY LIMITATIONS
PART II. FORMS
G. Right to Privacy

8-81 California Points & Authorities § 81.252

§ 81.252 Opposing Motion to Compel Discovery--Discovery Infringing Right of Privacy Is Improper--Right to Privacy Outweighs Potential Usefulness of Information Sought

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30), as well as with points and authorities relating generally to discovery resisted on the ground of right to privacy (see, e.g., § 81.250).*]

DISCOVERY SHOULD BE ELIMINATED OR LIMITED WHEN DISCLOSURE WOULD INTRUDE ON THE RIGHT OF PRIVACY, AND WHEN THE VALUE OF THE INFORMATION SOUGHT IS HIGHLY SPECULATIVE.

[*EITHER*]

Value of Information Highly Speculative. When the right to privacy of individuals whose identities would be disclosed in the discovery process outweighs the tenuous usefulness of disclosure to the party seeking discovery, then discovery should be denied (*Craig v. Municipal Court (1979) 100 Cal. App. 3d 69, 79, 161 Cal. Rptr. 19*).

[*OR*]

Tenuous Relevance of Information Balanced Against Compelling State Interest Standard. The compelling state interest in disclosure is not met merely because the information to be disclosed may be relevant to some defense if the relationship is tenuous (*Britt v. Superior Court (1978) 20 Cal. 3d 844, 860, 143 Cal. Rptr. 695, 574 P.2d 766* [dictum]).

[2] Comments

[a] Use of Form

This memorandum may be used in opposition to a motion for an order compelling discovery, by a party or other person who has resisted discovery on the ground that disclosure would violate the right to privacy. It does not provide a complete memorandum, but is designed to be combined with a general form in opposition to amotion compelling discovery, as well as with points and authorities relating generally to discovery resisted on the ground of right to privacy.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should point out why the information sought is only of tenuous usefulness.

[c] Related Uses

This form may be combined with a general form of memorandum in support of a motion for a protective order [*see, e.g., Ch. 83, Discovery: Depositions, § 83.80* et seq. (protective order in context of oral deposition)] when the protective order is being sought on the ground that disclosure would cause a violation of the right of privacy.

[3] Discussion of Authorities

[a] Value of Information Highly Speculative

The facts and procedural background of ***Craig v. Municipal Court*** *(1979) 100 Cal. App. 3d 69, 161 Cal. Rptr. 19* are *set out in § 81.250[3][c]*. In *Craig,* the court of appeal affirmed the trial court ruling denying discovery based on the right of privacy of persons who had been arrested on charges similar to those made against defendant. The court of appeal discussed the denial of discovery in the light of defendant's contention that the privacy of arrestees who have been convicted does not need protection because the court records of conviction are public records. In this regard, the court noted that it is unlikely that such records could be located by anyone who did not have some prior knowledge of the arrests (*100 Cal. App. 3d 69, 78)* , thus affording convicted persons a limited de facto protection against disclosure (*100 Cal. App. 3d 69, 79)* .

Moreover, the usefulness to defendant of the records of persons convicted is highly speculative, in that it is unlikely that such persons will provide the information that defendant seeks (*100 Cal. App. 3d 69, 79)* . Finally, regarding the records of the arrestees who were not convicted, the court held that their right of privacy outweighed the tenuous usefulness to defendant that disclosure of their identities might bring (*100 Cal. App. 3d 69, 79)* .

[b] Tenuous Relevance of Information Balanced Against Compelling State Interest Standard

The facts and procedural background of ***Britt v. Superior Court*** *(1978) 20 Cal. 3d 844, 143 Cal. Rptr. 695, 574 P.2d 766* are *set out in § 81.240[3][a]*.The Supreme Court in *Britt* discussed defendant's contention that the state has a compelling interest in discovery because the information on associational activities that defendant sought was related to various possible defenses, including statute of limitations, res judicata, and failure to mitigate damages. The Court explained that the connection between all three possible defenses and plaintiffs' associational activities was highly tenuous at best (*20 Cal. 3d 844, 860)* . For example, the Court pointed out that disclosure of plaintiffs' history of meetings and discussions might show when they first became annoyed with the airport, but subjective annoyance does not provide a proper basis for the resolution of the statute of limitations issue (*20 Cal. 3d 844, 860 n.4*). Therefore, the Court noted that defendant had probably failed to show the compelling state interest necessary to justify disclosure (*20 Cal. 3d 844, 860)* .

The Court went on to note, however, that it need not definitively resolve the question of whether defendant had made

the requisite showing because in any case, even if defendant could show that disclosure was more than tenuously related to its defense, the trial court order was clearly overbroad in allowing more discovery than would be necessary to resolve the issues tendered by defendant as a defense (*20 Cal. 3d 844, 861)* .

[4] Additional Authorities

[a] Tenuous Relevance of Information Balanced Against Compelling State Interest Standard

In *Juarez v. Boy Scouts of America (2000) 81 Cal. App. 4th 377, 97 Cal. Rptr. 2d 12* , an action in which plaintiff alleged that, while a member of a boy scout troop, he was sexually molested by his troop scoutmaster, plaintiff appealed a grant of judgment dismissing his action, challenging, among other things, the court's issuance of a protective order preventing discovery of certain confidential records maintained by the Boy Scouts. The files at issue identified individuals entirely unrelated to this case who had been determined to be "unfit" to serve as scouting volunteers and documented these determinations of ineligibility (*81 Cal. App. 4th 377, 384-385)* . The court of appeal affirmed the trial court's issuance of a protective order. Plaintiff never disputed that the information contained in these confidential records fell "manifestly within the Constitution's protected area of privacy." When requested material is constitutionally protected, it is not enough to show that matters encompassed by the right to privacy are merely relevant to the litigation; there must be a careful balancing of the compelling public need for discovery against the fundamental right of privacy. Plaintiff's sole argument purporting to establish his compelling need for the information was to provide knowledge of the rampant risk of pedophiles entering the Boy Scouts and molesting vulnerable Boy Scouts. However, the Boy Scouts admitted in response to plaintiff's request foradmission that it knew molestation could and did occur between scoutmasters and scouts before plaintiff was molested. Thus, plaintiff failed to show that the requested information was directly relevant to any disputed issue in the case, let alone that there was a compelling need for this information that outweighed the right of privacy of the many individuals who were not parties to this lawsuit (*81 Cal. App. 4th 377, 391-392)* .

In *Lantz v. Superior Court (1994) 28 Cal. App. 4th 1839, 1857, 34 Cal. Rptr. 2d 358* , a sexual harassment case in which the defendant county subpoenaed plaintiff's medical records relating to plaintiff's breast surgery, the trial court denied plaintiff's motion for a protective order because the records were relevant. On appeal, plaintiff contended that her medical records were protected from discovery by the right to privacy guaranteed by the California Constitution. The court of appeal held that the lower court used the wrong standard in determining whether the records were discoverable. The trial court's finding of relevance was an insufficient inquiry; the trial court must balance the plaintiff's privacy interest against the county's compelling need for discovery (*28 Cal. App. 4th 1839, 1853-1854, 1857)* .

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8-81 California Points & Authorities § 81.253

§ 81.253 Opposing Motion to Compel Discovery--Discovery Infringing Right of Privacy as Improper--Disclosure Would Infringe Third Persons' Right of Privacy

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30), as well as with points and authorities relating generally to discovery resisted on the ground of right to privacy (see, e.g., § 81.250).*]

DISCOVERY IS IMPROPER IN THIS CASE BECAUSE IT WOULD CAUSE AN UNREASONABLE INVASION OF THE RIGHT OF PRIVACY OF PERSONS WHO ARE NOT PARTIES TO THE LITIGATION.

A. Burden on Party Seeking Discovery That Might Intrude on Third Parties' Privacy Rights. Before obtaining discovery that would intrude on the constitutionally protected right to privacy of a third party, the party seeking discovery must show a compelling and opposing state interest (*Hinshaw, Winkler, Draa, Marsh & Still v. Superior Court (1996) 51 Cal. App. 4th 233, 239, 58 Cal. Rptr. 2d 791*).

B. Narrowly Limited Discovery for Protection of Third Parties. The rights of persons who are not parties to a lawsuit deserve protection by means of disclosure only within narrowly prescribed limits (*see Morales v. Superior Court (1979) 99 Cal. App. 3d 283, 291, 160 Cal. Rptr. 194* ; *see also Harris v. Superior Court (1992) 3 Cal. App. 4th 661, 668, 4 Cal. Rptr. 2d 564* (dicta)).

[*Optional*] **C. Standing of Custodian of Records to Assert Rights of Third Parties.** A custodian of records has the right and the duty to resist attempts at unauthorized disclosure of records when the records are compiled without the consent of third parties who are the subject of the records, or with their consent because of some legal requirement. Indeed, the third parties who are the subject of the records are entitled to expect that their rights will be thus asserted (*Craig v. Municipal Court (1979) 100 Cal. App. 3d 69, 77, 161 Cal. Rptr. 19*).

[*Optional*] **D. Third Person Residing With Support-Paying Parent Does Not Waive Right of Privacy of Financial Records.** A third person residing with a parent does not waive the right to maintain the privacy of his or her financial records in proceedings to change the amount of child support payments paid by the parent. The monetary contributions made by that person to a support-paying parent's living expenses are relevant in assessing the parent's ability to pay increased support, but that information should be discovered by requesting information concerning living expenses from the parent (*Harris v. Superior Court (1992) 3 Cal. App. 4th 661, 664-665, 667-668, 4 Cal. Rptr. 2d 564*).

[*Optional*] **E. Right of Third Party in Administrative Proceeding to Object to Disclosure of Personal Records.** Before confidential third-party personal records may be disclosed in administrative proceedings, the subpoenaing party must take reasonable steps to notify the third party of the pendency and nature of the proceedings, and must afford the third party a fair opportunity to object to disclosure by seeking a protective order or by instituting other legal proceedings to limit discovery (*Sehlmeyer v. Department of General Services (1993) 17 Cal. App. 4th 1072, 1080-1081, 21 Cal. Rptr. 2d 840*).

[2] Comments

[a] Use of Form

This memorandum may be used in opposition to a motion for an order compelling discovery when discovery is resisted on the grounds that disclosure would violate the right to privacy of third parties. It does not provide a complete memorandum, but is designed to be combined with a general form in opposition to a motion compelling discovery as well as with points and authorities relating generally to discovery resisted on the ground of right to privacy.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[c] Related Uses

This form may be combined with a general form of memorandum in support of a motion for a protective order [*see, e.g., Ch. 83, Discovery: Depositions, § 83.80* et seq. (protective order in context of oral deposition)] when the protective order is being sought on the ground that disclosure would cause a violation of the right of privacy.

[3] Discussion of Authorities

[a] Burden on Party Seeking Discovery That Might Intrude on Third Parties' Privacy Rights

The facts and procedural background of ***Hinshaw, Winkler, Draa, Marsh & Still v. Superior Court*** *(1996) 51 Cal. App. 4th 233, 58 Cal. Rptr. 2d 791* are discussed in *§ 81.250[3][d]*. The plaintiffs sought discovery concerning the confidential settlement of a class action. The court found that the privacy interests of the class members demanded that plaintiffs demonstrate a compelling state interest before such discovery could be allowed. The plaintiffs' showing of relevance was insufficient, and their motion to compel was denied (*51 Cal. App. 4th 233, 239)* .

[b] Narrowly Limited Discovery for Protection of Third Parties

The facts and procedural background of ***Morales v. Superior Court*** *(1979) 99 Cal. App. 3d 283, 160 Cal. Rptr. 194* are *set out in § 81.240[3][b]*. In discussing the trial court's discovery order permitting disclosure of names and addresses of the other women with whom plaintiff might havehad extramarital relations within two years of his wife's death, the court of appeal held that the privacy of the nonparties also deserves protection, and that the discovery order must be narrowly drawn so as not to unduly curtail the precious freedoms of these nonparties (*99 Cal. App. 3d 283, 291)* .

The facts and procedural background of ***Harris v. Superior Court*** *(1992) 3 Cal. App. 4th 661, 4 Cal. Rptr. 2d 564* are discussed in [d], *below*. After finding that the tax returns and wage statements of the former husband's housemate were not discoverable, the court observed that under different facts, some discovery of a third party's financial records may be appropriate in proceedings to change the amount of child support. It cited as an example the situation in which the former spouse, on moving in with a third party, realizes a sudden, significant gain in his or her standard of living. Even then, however, the third party is presumptively entitled to a protective order that permits discovery only to the extent necessary to a fair resolution of the case. To ensure that protection, a trial court must examine the financial documents in chambers and excise any information that is not necessary to a fair resolution of the case (*3 Cal. App. 4th 661, 668)* .

[c] Standing of Custodian of Records to Assert Rights of Third Parties

The facts and procedural background of ***Craig v. Municipal Court*** *(1979) 100 Cal. App. 3d 69, 161 Cal. Rptr. 19* are discussed in *§ 81.250[3][c]*. In *Craig*, defendant had argued that the Commissioner of the California Highway Patrol had no standing to assert the constitutional right of privacy of the individuals who were the subject of the arrest records that defendant sought. The court of appeal rejected this contention, holding that the right to privacy under *Cal. Const., art. I, § 1* is self-executing, and that the statutory scheme restricting access to criminal records imposes a duty by public officials to prevent unauthorized disclosure (*100 Cal. App. 3d 69, 76)* . Thus, a custodian of records that are compiled without a person's consent, or because of some legal requirement, has the right, and in fact the duty, to resist attempts at disclosure, and the person who is the subject of those records is entitled to expect that his or her rights will be thus asserted (*100 Cal. App. 3d 69, 77)* .

[d] Third Person Residing With Support-Paying Parent Does Not Waive Right of Privacy of Financial Records

In ***Harris v. Superior Court*** *(1992) 3 Cal. App. 4th 661, 4 Cal. Rptr. 2d 564* , a former wife seeking to increase the award for child support subpoenaed confidential information in the form of tax returns and wage statements from a woman with whom the former husband resided. The womanmoved to quash the subpoenas on the ground that the requested discovery violated her right of privacy, and the trial court denied the motion. The woman petitioned for a writ of mandate.

The court of appeal issued a writ of mandate directing the trial court to grant the motion to quash the subpoenas. The court said that the financial records of a third person are not automatically discoverable in proceedings regarding child support. Although a court may consider the monetary contributions made by anyone to the former spouse's living expenses in assessing his or her ability to pay increased support, that court must first balance the need for disclosure against the third person's interest in privacy (*3 Cal. App. 4th 661, 663, 665)* . Before the trial court should even balance these competing interests, however, the proponent of discovery must make a threshold showing that the privileged information is directly relevant to the claim for increased support (*3 Cal. App. 4th 661, 665)* . The court found that the former wife had failed to meet this burden. The relevant inquiry was not the source of the money available to the former husband, but the existence of that money. That money becomes relevant only in its impact on reducing the former husband's living expenses, which in turn, affects his ability to pay child support (*3 Cal. App. 4th 661, 667)* . The court observed that the woman had not waived her right to privacy by choosing to reside with the child-support-paying former husband (*3 Cal. App. 4th 661, 668)* .

[e] Right of Third Party in Administrative Proceeding to Object to Disclosure of Personal Records

In ***Sehlmeyer v. Department of General Services*** *(1993) 17 Cal. App. 4th 1072, 21 Cal. Rptr. 2d 840* , the court of appeal held that before confidential third party personal records may be disclosed in administrative proceedings, the subpoenaing party must take reasonable steps to notify the third party of the pendency and nature of the proceedings, and must afford the third party a fair opportunity to object to disclosure by seeking a protective order or by instituting other legal proceedings to limit discovery. The Legislature's failure to incorporate the notice provisions of *Code Civ.*

Proc. § 1985.3 (subpoena to produce personal records) into former Gov. Code § 11510 (*now see Gov. Code § 11450.10 et seq.*; subpoenas in administrative actions) does not diminish the constitutional privacy rights that protect confidential information. The right of administrative litigants to discover relevant facts must be balanced against the third party's privacy rights. The administrative law judge must consider the purpose of the information sought, the effect of disclosure on the parties and the hearing, the nature of the objections urged by the party resisting disclosure, and the ability to make an order granting partial disclosure, disclosure in another form, or disclosure only in the event that the party seeking the information undertakes certain specified burdens justifiedunder the circumstances (*17 Cal. App. 4th 1072, 1079-1081)* . To the extent the third party's records come within a statutory privilege, additional considerations must be balanced, for example, the existence of the privilege and questions of waiver (*17 Cal. App. 4th 1072, 1081 n.9*).

[4] Additional Authorities

[a] Narrowly Limited Discovery for Protection of Third Parties

In *Tien v. Superior Court (2006) 139 Cal. App. 4th 528, 43 Cal. Rptr. 3d 121* , a putative class action lawsuit alleging wage and hour violations, petitioner employee brought a writ proceeding to challenge the trial court's order requiring disclosure to the real party in interest employer of the names, addresses, and telephone numbers of all putative class members who contacted the employees' counsel. The court of appeal found no abuse of discretion in the trial court's conclusion that the names of class members who contacted the employees' counsel did not constitute work product under *Code Civ. Proc., § 2018.030*, because counsel was merely the passive recipient of telephone calls (*139 Cal. App. 4th 528, 536)* . The trial court's discovery order also did not violate the attorney-client privilege because no personal, confidential information was sought (*139 Cal. App. 4th 528, 537-538)* . However, discovery would violate the privacy rights of class members whose identities were disclosed because they had a significant interest in maintaining their privacy, and the employer had no compelling need to learn their identities (*139 Cal. App. 4th 528, 540-541)* .

In *Experian Information Solutions, Inc. v. Superior Court (2006) 138 Cal. App. 4th 122* , the trial court denied plaintiff's motion for class certification in an action alleging fair credit reporting violations. However, the court approved a letter to former potential class members identified in discovery covered by a protective order. The letter would inform recipients they might have claims subject to running statutes of limitation and request each recipient's consent to be contacted by plaintiff's counsel to determine whether he or she had evidence relevant to the issue of plaintiff's damages. Experian filed a petition for writ of mandate, challenging the trial court's approval of the letter. The court of appeal held that evidence that other debtors were similarly subjected to inaccurate reporting was relevant to support plaintiff's claim for punitive damages. Therefore, the letter requesting that information was permissible, provided that it protected the privacy rights of recipients by requiring their written consent to be contacted and limiting contact to those who provided signed authorization (*138 Cal. App. 4th 122, 134)* .

The facts and procedural background of *Best Buy Stores, L.P. v. Superior Court (2006) 137 Cal. App. 4th 772, 40 Cal. Rptr. 3d 575* are *set out in 80.23[4][b]*. In that case, the court of appeal approved a precertification discovery order for the purpose of identifying potential substitute class-action plaintiffs, in an action alleging that stores charged an illegal restocking fee for returned merchandise. The court directed that the trial court modify the letter to be sent to the prospective class-action plaintiffs to protect their privacy. In addition to using a neutral third party to communicate with customers, the court found that the letter should state that recipients were free to ignore it and that the sender would not disclose their identities to the attorney. The court also directed that the letter not identify the attorney by name and not contain any information that would facilitate direct contact (*137 Cal. App. 4th 772, 778-779)* .

In *Perez v. County of Santa Clara (2003) 111 Cal. App. 4th 671, 3 Cal. Rptr. 3d 867* , plaintiff alleged employment discrimination on the basis of her race and national origin. The trial court denied recovery, finding that plaintiff had established a prima facie case of retaliation and harassment, but the defendant had rebutted her showing by clear and convincing evidence. Plaintiff appealed, challenging, in part, a protective order restricting her access to the personnel

records of other nurses at the facility where she worked. The court of appeal found the trial court had struck the appropriate balance between the nurses' privacy rights and plaintiff's need for the information, by restricting access to the employees' disciplinary records but providing for interrogatory answers listing disciplinary acts by type and race (*111 Cal. App. 4th 671, 678)* .

In *Boler v. Superior Court (1987) 201 Cal. App. 3d 467, 247 Cal. Rptr. 185* , a workplace sexual harassment action, the trial court ordered defendant to answer deposition questions regarding the identities of all women with whom he had sexual contact who were his coworkers or former coworkers. On appeal, the court issued a writ of mandate ordering the trial court to vacate its discovery order. The court held that the discovery order was overbroad and impermissibly intrusive into the sexual privacy of both defendant and the unknown women. The court found that because it could not be assumed that all defendant's sexual contacts were coercive, the inquiry was overbroad and would disclose the intimate details of several persons' private lives without justification, and that there were less intrusive means by which plaintiff could contact and interview other alleged victims (*201 Cal. App. 3d 467, 474-475)* .

In *Rifkind v. Superior Court (1981) 123 Cal. App. 3d 1045, 177 Cal. Rptr. 82* , disapproved on other grounds in *Schnabel v. Superior Court (1993) 5 Cal. 4th 704, 723, 21 Cal. Rptr. 2d 200, 854 P.2d 1117* , a marital dissolution proceeding, the trial court ordered the husband to produce certain records pertaining to his law corporation, including payroll journals and compensation cards, the schedule of pension and profit sharing plan contributions, and other documents reflecting liabilities of shareholders and related parties to the law corporation. The court of appeal ordered that a writ of mandate be issued vacating the order. The court stated that when the interest of a private litigant in discovering relevant facts conflicts withthe right of others to maintain reasonable privacy regarding their financial affairs, a court must indulge in a careful balancing before ordering disclosure. The court held that disclosure of the private financial affairs of nonparties was ordered without a careful scrutiny of the real needs of the litigant seeking discovery. The court suggested to the trial court that it consider whether disclosure, even if shown to be relevant, may not be deferred until it has resolved other issues that might make the disclosure unnecessary (*123 Cal. App. 3d 1045, 1050-1052)* .

In *Board of Trustees v. Superior Court (1981) 119 Cal. App. 3d 516, 174 Cal. Rptr. 160* , a defamation action by a university faculty member against the university and other faculty members, the trial court ordered production of certain communications, and conclusions of, the university's committees that investigated plaintiff for possible misconduct. The court of appeal held that it was an abuse of discretion to order discovery of these documents. It stated that the communications of the university's faculty members as considered by the committees were tendered under a guaranty of confidentiality, and thus were within the Constitution's protected area of privacy. The court held that there was no direct relevance of the committees' investigation to the issues involved in the defamation action, and that even assuming such relevance, careful balancing disclosed no compelling public need for discovery as opposed to the fundamental right of privacy (*119 Cal. App. 3d 516, 527)* .

The facts and procedural background of *Church of Hakeem, Inc. v. Superior Court (1980) 110 Cal. App. 3d 384, 168 Cal. Rptr. 13* are discussed in *§ 81.251[3][c]*. The court issued a peremptory writ directing the trial court to nullify its contempt order and its discovery order requiring the disclosure of the membership lists of defendant church. The court held that plaintiff members failed to demonstrate a compelling state interest to obtain the disclosure, and thus the anonymity of the nonlitigant members remained protected by their right of associational privacy (*110 Cal. App. 3d 384, 390)* .

[b] Standing of Custodian of Records to Assert Rights of Third Parties

In *Denari v. Superior Court (1989) 215 Cal. App. 3d 1488, 264 Cal. Rptr. 261* , plaintiff brought a civil rights action under *42 U.S.C. § 1983*, claiming that the excessive use of force by police while she was being arrested and booked resulted in the breaking of her arm. In her search for witnesses, plaintiff sought the names of all persons arrested and booked in the county jail during the relevant time period. Defendant county refused to disclose that information,

claiming that disclosure would violate the privacy rights of those arrestees. After the trial court denied plaintiff's discovery request, she filed a petition for a writ of mandate, which was denied by the court of appeal. In explaining its decision, the court said that release of arrestrecords or dissemination of information about arrests implicates the arrestees' right to privacy. Moreover, it said that litigants who are the recipients of discovery demands have standing to assert the privacy rights of third persons not present who would be affected by the litigant's obedience to the order (*215 Cal. App. 3d 1488, 1498-1499)* .

California Points & Authorities

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 81 DISCOVERY: PRIVILEGES AND OTHER DISCOVERY LIMITATIONS
PART II. FORMS
G. Right to Privacy

8-81 California Points & Authorities § 81.254

§ 81.254 Opposing Motion to Compel Discovery--Discovery Infringing Right of Privacy Is Improper--Right to Privacy in Psychotherapeutic Records Is Not Waived in Personal Injury Lawsuit

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30), as well as with points and authorities relating generally to discovery resisted on the ground of right to privacy (see, e.g., § 81.250).*]

PLAINTIFF HAS NOT AUTOMATICALLY WAIVED HIS/HER RIGHT TO PRIVACY IN PSYCHOTHERAPEUTIC RECORDS BY FILING A PERSONAL INJURY LAWSUIT CLAIMING EMOTIONAL DISTRESS RESULTING FROM THE PAIN AND SUFFERING ASSOCIATED WITH THE PHYSICAL INJURIES SUSTAINED.

A. Filing of Lawsuit Is Not Waiver of Right to Privacy. A plaintiff does not automatically waive his or her right of privacy by filing a lawsuit. Any waiver must be narrowly construed and encompasses only discovery directly relevant to the claim and essential to the fair resolution of the lawsuit. Further, there must be a compelling need for the discovery (*Tylo v. Superior Court (1997) 55 Cal. App. 4th 1379, 1386-1389, 64 Cal. Rptr. 2d 731* ; *Davis v. Superior Court (1992) 7 Cal. App. 4th 1008, 1014, 9 Cal. Rptr. 2d 331*).

B. Personal Injury Plaintiff With Limited Emotional Distress Claim Does Not Waive Privacy of Psychotherapeutic Records. A personal injury plaintiff who limits his or her claim for emotional distress to the pain and suffering associated with the physical injuries sustained does not waive the right of privacy in his or her psychotherapeutic records (*Davis v. Superior Court (1992) 7 Cal. App. 4th 1008, 1015-1018, 9 Cal. Rptr. 2d 331*).

[2] Comments

[a] Use of Form

This memorandum may be used in opposition to a motion for an order compelling discovery in a personal injury action when discovery is resisted on the grounds that the filing of an action does not waive the right to privacy in psychotherapeutic records. They may also be used in a motion to quash a subpoena for those records. This form does not provide a complete memorandum, but is designed to be combined with a general form in opposition to a motion to compel discovery as well as with points and authorities relating generally to discovery resisted on the ground of right to privacy.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[c] Related Uses

This form may be combined with a general form of memorandum in support of a motion for a protective order [*see, e.g., Ch. 83, Discovery: Depositions, § 83.80* et seq. (protective order in context of oral deposition)] when the protective order is being sought on the ground that disclosure would cause a violation of the right of privacy.

[3] Discussion of Authorities

[a] Filing of Lawsuit Is Not Waiver of Right to Privacy

In ***Tylo v. Superior Court*** *(1997) 55 Cal. App. 4th 1379, 64 Cal. Rptr. 2d 731* , after defendants terminated her contract to act in a television program because of her pregnancy, plaintiff actress sued defendants on a variety of employment related claims for damages for compensatory losses, mental and emotional anxiety and distress, and medical expenses, as well as for punitive damages. When plaintiff refused to answer a number of questions relating to her relationship to her husband and her attempts to become pregnant, defendants brought a motion to compel answers to those questions. After the trial court granted the motion, plaintiff sought appropriate relief.

The court of appeal issued a peremptory writ of mandate and ordered the trial court to reverse its order on certain questions. Defendants contended that plaintiff had waived her privacy protection by filing the suit, and because plaintiff sought emotional distress damages, they had a right to discover other stressors that might have caused or contributed to heralleged emotional injuries, including any emotional distress resulting from her marriage. The court of appeal explained that the concept of waiver is construed narrowly and the necessary compelling public interest is demonstrated only when the material sought is directly relevant to the litigation. Further, depending on the claims and the information sought, certain information is discoverable based on waiver, while other information remains protected. The court found that plaintiff had tendered her psychological condition, but only as it related to termination of the employment contract, thereby limiting discovery to those injuries resulting from the contract termination. Before defendants could obtain information regarding any emotional distress from her marital relationship, they had to identify the specific emotional injuries allegedly the result of the contract termination and demonstrate a nexus between damages from termination and those that might arise out of the marital relationship (*55 Cal. App. 4th 1379, 1386-1389)* . However, the court found that questions regarding plaintiff's state of mind relating to her pregnancy, and her attempts to become pregnant when she was negotiating her contract, were relevant to her claim for negligent misrepresentation, and as long as they relate to the specific subject matter tendered in the litigation, they were permissible (*55 Cal. App. 4th 1379, 1390-1391)* .

In ***Davis v. Superior Court*** *(1992) 7 Cal. App. 4th 1008, 9 Cal. Rptr. 2d 331* , a personal injury action, plaintiff claimed compensatory damages and general damages for pain and suffering. Defendant subpoenaed records related to her "care and treatment" from a medical center specializing in the treatment of substance abuse. Plaintiff filed a motion to quash the subpoena and for a protective order to limit the discovery to directly relevant medical history during the 10 years before the accident. The trial court denied the motion to quash, but granted the protective order, and directed that the records be kept confidential by defendant. Plaintiff petitioned for a writ of mandate.

The court of appeal issued a writ of mandate directing the trial court to vacate its order and to enter an order granting the motion to quash. Although there may be an implicit, partial waiver of the right of privacy by bringing suit, the scope of any such waiver is narrowly construed, so that plaintiffs will not be deterred from instituting lawsuits. An implicit waiver encompasses only discovery directly relevant to the claim and essential to the fair resolution of the lawsuit. There must be a compelling and opposing state interest justifying the discovery. Moreover, even when discovery of private information is directly relevant, it is not automatically allowed; there must be a careful balancing of the compelling public need for discovery against the fundamental right of privacy. The scope of any disclosure must be narrowly circumscribed, drawn with narrow specificity, and must proceed by the least intrusive manner (*7 Cal. App. 4th 1008, 1014)* .

[b] Personal Injury Plaintiff With Limited Emotional Distress Claim Does Not Waive Privacy of Psychotherapeutic Records

The facts and procedural background of ***Davis v. Superior Court*** *(1992) 7 Cal. App. 4th 1008, 9 Cal. Rptr. 2d 331* are discussed in [a], *above*. In *Davis*, defendant sought discovery of plaintiff's psychotherapeutic records on the grounds that she had implicitly waived her right of privacy in them by filing a personal injury action. Acknowledging that mental condition may sometimes be an issue in such a case, the court said that the extent to which a mental component may be in issue in a particular suit depends on the facts of the particular case (*7 Cal. App. 4th 1008, 1015-1016)* . As the party seeking the constitutionally protected information, defendant had the burden to establish direct relevance. The court found that by limiting her claim for emotional distress to pain and suffering associated with stated physical injuries, and by explaining that the medical center provided no treatment in connection with those injuries, plaintiff established that it is not reasonably probable that the records were directly relevant to the condition she placed in issue. Defendant did not counter with any showing of direct relevance, but only speculated that in the records requested there could be material that might be relevant to various issues. The court held that mere speculation regarding the possibility that some portion of the records might be relevant to some substantive issue does not suffice. Defendant's request was overbroad because it necessarily encompassed privileged material that was not relevant. Nothing prevented defendant from seeking records directly relevant to plaintiff's claim by a narrowly drawn discovery request. If such a request were made, the trial court could then evaluate the respective interests of the parties and the necessity and appropriate extent of disclosure (*7 Cal. App. 4th 1008, 1017-1018)* .

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[Reserved]

§§ 81.255[Reserved]

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CHAPTER 81 DISCOVERY: PRIVILEGES AND OTHER DISCOVERY LIMITATIONS
PART II. FORMS
H. Miscellaneous Evidence Code Privileges

8-81 California Points & Authorities § 81.270

§ 81.270 Supporting Motion to Compel Discovery--Refuting Claim of Privilege Against Self-Incrimination [Evid. Code § 940]--Waiver of Privilege

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in support of a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11), as well as with points and authorities generally refuting a claim of privilege (see e.g., § 81.10).*]

THE MOTION TO COMPEL DISCOVERY SHOULD BE GRANTED BECAUSE _____ [PLAINTIFF'S FILING OF THE ACTION OPERATES AS A WAIVER OF HIS/HER PRIVILEGE AGAINST SELF-INCRIMINATION WITH REFERENCE TO ANY FACTUAL ISSUES TENDERED BY THE COMPLAINT *or* THE OPPOSING PARTY HAS WAIVED HIS/HER PRIVILEGE AGAINST SELF-INCRIMINATION BY FAILING TO MAKE A TIMELY OBJECTION].

[*EITHER*]

Privilege Against Self-Incrimination Is Waived With Reference to Factual Issues Tendered by Complaint. Plaintiff's filing of an action operates to waive his or her privilege against self-incrimination, as provided for in civil actions by *Section 940 of the Evidence Code*, with reference to any factual issues tendered by the complaint (*Fremont Indemnity Co. v. Superior Court (1982) 137 Cal. App. 3d 554, 560, 187 Cal. Rptr. 137*).

[*OR*]

Failure to Make Timely Objection Based on Privilege Against Self-Incrimination Serves as Waiver. When a party has the legal standing and opportunity to claim the privilege against self-incrimination, the failure to make a timely

objection based on that privilege will serve to waive that privilege (*Brown v. Superior Court (1986) 180 Cal. App. 3d 701, 711-712, 226 Cal. Rptr. 10*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for an order compelling discovery when the party opposing the motion is attempting to rely on the privilege against self-incrimination to resist discovery [*see Evid. Code § 940*] and the party seeking discovery is asserting a waiver of that privilege. The first alternate paragraph is based on a waiver of factual issues tendered by the complaint and should be used when the party claiming the privilege is the plaintiff in the action. The second alternate paragraph is based on a waiver due to failure to make a timely objection and will most likely be used against the defendant. This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in support of compelling discovery, as well as a form refuting a claim of privilege generally.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should show that the factual issues about which discovery is sought were tendered in the complaint.

[3] Discussion of Authorities

[a] Privilege Against Self-Incrimination Is Waived With Reference to Factual Issues Tendered by Complaint

Fremont Indemnity Co. v. Superior Court *(1982) 137 Cal. App. 3d 554, 187 Cal. Rptr. 137* involved an action by an insured against an insurer for recovery on a fire insurance policy after a fire had occurred on plaintiff's premises. Defendant insurer refused to pay on the claim, apparently asserting an exclusion under the policy for arson, when plaintiff came under suspicion of arson in an investigation following the fire. After plaintiff filed suit for defendant's alleged bad-faith refusal to settle the claim, defendant sought to depose plaintiff. Before the scheduled date of the depositions, plaintiff's counsel notified defendant's counsel that plaintiff would not appear for the deposition because plaintiff had been indicted for arson and was therefore asserting his constitutional privilege against self-incrimination. Defendant moved for an order to compel resumption of the deposition, coupled with a request for sanctions including dismissal if plaintiff persisted in his refusal to submit to deposition. Plaintiff countered with a motion for a protective order suspending resumption of the deposition until the criminal matter had been concluded. The trial court granted plaintiff's motion and denied defendant's motion. Defendant thereupon petitioned the court of appeal for a writ of mandate directing the trialcourt to vacate its protective order and to enter a new order compelling discovery.

The court of appeal granted the writ of mandate, directing the trial court to vacate its order and enter a new order compelling plaintiff to appear for the resumption of the deposition, and that if plaintiff refused to appear, to entertain and grant defendant's motion to dismiss the action. The court of appeal held that plaintiff's filing of an action to recover on the fire insurance policy operated to waive his constitutional privilege against self-incrimination for discovery purposes with reference to any factual issues tendered in the complaint, particularly regarding the applicability of the arson exclusion (*137 Cal. App. 3d 554, 560)* . In reaching its holding, the court relied on *Newson v. City of Oakland (1974) 37 Cal. App. 3d 1050, 1055, 112 Cal. Rptr. 890* , in which plaintiff's effort to invoke the privilege against self-incrimination during testimony was denied because the action had tendered issues to which the otherwise privileged information was relevant (*137 Cal. App. 3d 554, 557, 559)* . The court also cited *Wilson v. Superior Court (1976) 63 Cal. App. 3d 825, 829, 134 Cal. Rptr. 130* (discussed in *§ 81.180[3][b]*), in which the taxpayer's privilege not to disclose tax returns had been waived by tender of the action and thus could not be relied on at the discovery phase of the case (*137 Cal. App. 3d 554, 558-559)* . The court in *Fremont Indemnity Co.* concluded that plaintiff cannot postpone

discovery under the cloak of *Fifth Amendment* privilege (*137 Cal. App. 3d 554, 559, 187 Cal. Rptr. 130)* . The court pointed out that plaintiff may yet claim his privilege, but that he will have to dismiss the lawsuit if he persists in doing so (*137 Cal. App. 3d 554, 560, 187 Cal. Rptr. 130)* .

[b] Failure to Make Timely Objection Based on Privilege Against Self-Incrimination Serves as Waiver

In ***Brown v. Superior Court*** *(1986) 180 Cal. App. 3d 701, 226 Cal. Rptr. 10* , plaintiff sued defendants for assault and battery and for conspiracy to murder him. One defendant was facing criminal charges of attempted murder arising from the same incident. Plaintiff served written interrogatories on defendants, some of which were potentially self-incriminating. After receiving no response, plaintiff moved to compel answers. The court ordered answers within 30 days and awarded sanctions. When defendants did not respond, plaintiff moved that defendants' answer be stricken and a default judgment entered. When defendants did not object, the trial judge granted the motion unless the answers were filed within 10 days. After 11 days defendants served written objections to the interrogatories, asserting their privilege against self-incrimination under *U.S. Const., amend. V*, for all the interrogatories. These objections were made over six months after the interrogatories had been filed. In opposing plaintiff's motion for default for noncompliance, defendants claimed they were just one day late and that default was too great a sanction. After the trial court denied plaintiff's motion, plaintiff petitioned for a writ of mandate to compel entry of default.

The court of appeal issued a peremptory writ of mandate directing the trial court to grant the motion for default. The court initially noted that the *Fifth Amendment* privilege against self-incrimination has been codified in *Evid. Code § 940* and that privilege may be asserted by civil defendants who face possible criminal prosecution based on the same facts as the civil action. It framed the issue as whether a civil defendant may waive his or her right to assert the privilege against self-incrimination by failing to raise it as an objection to interrogatories within the 30-day period prescribed by Code Civ. Proc. § 2030 (*now see Code Civ. Proc. § 2030.260*) (*180 Cal. App. 3d 701, 708)* . The court observed that generally if an objection to interrogatories is not raised within that 30-day period, the objection is waived, absent good cause for relief from default (*180 Cal. App. 3d 701, 709)* . The means by which statutory privileges may be waived are specified in *Evid. Code § 912*. The court opined that the failure to include the self-incrimination privilege among those enumerated in *Evid. Code § 912* as waived by a failure to claim was not determinative. Defendants failed to claim the privilege when they had the legal standing and opportunity to do so. Since this is a case of first impression, and the federal rules can provide guidance, the court looked to the federal law, noting that although there are no federal cases directly on point, under the federal rules a failure to object to an interrogatory constitutes a waiver of the objection, including an objection based on a privilege (*180 Cal. App. 3d 701, 711)* . The court concluded that the privilege against self-incrimination should be treated no differently than the other privileges that are waived by a failure to make a timely objection to interrogatories (*180 Cal. App. 3d 701, 712)* .

Note that *Brown* construed law in effect before the operative date of the Civil Discovery Act. It is cited and discussed as persuasive authority to the extent that it appears to remain consistent with current provisions [*see § 81.02[3]*].

[4] Additional Authorities

[a] Privilege Against Self-Incrimination Is Waived With Reference to Factual Issues Tendered by Complaint

Dwyer v. Crocker National Bank (1987) 194 Cal. App. 3d 1418, 240 Cal. Rptr. 297 involved an action for compensatory and punitive damages following a setoff by defendant bank against plaintiff's account for a check that had been, according to defendant, fraudulently endorsed by plaintiff and deposited into his account. Plaintiff invoked the privilege against self-incrimination in refusing to answer questions at deposition or to produce documents. The trial court imposed sanctions prohibiting plaintiff from introducing evidence at trial or by motion supporting or opposing designated claims or defenses to which his refusal to answer questions or produce documents pertained. On appeal, the court of appeal affirmed,observing that the party invoking the privilege was the plaintiff, rather than a defendant who

had been brought involuntarily into court. It explained that courts do not permit a plaintiff to use the self-incrimination privilege as a "shield and a sword." Moreover, courts are quick to find a waiver of the privilege when a plaintiff seeks damages on the one hand and then attempts to inconvenience, hinder, or delay the defense in the presentation of its case by the imposition of a privilege (*194 Cal. App. 3d 1418, 1431-1432)* .

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8-81 California Points & Authorities § 81.271

§ 81.271 Supporting Motion to Compel Discovery--Refuting Claim of Privilege Against Self-Incrimination [Evid. Code § 940]--Insufficient Showing of Incrimination

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in support of a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11), as well as with points and authorities generally refuting a claim of privilege (see e.g., § 81.10).*]

THE MOTION TO COMPEL DISCOVERY FROM THE OPPOSING PARTY SHOULD BE GRANTED BECAUSE THE OPPOSING PARTY HAS NOT SUFFICIENTLY ESTABLISHED THE VALIDITY OF HIS/HER CLAIM OF PRIVILEGE AGAINST SELF-INCRIMINATION.

A. Claimant of Privilege Against Self-Incrimination Is Required to Demonstrate That Fear of Incrimination Is Reasonable. A person invoking the privilege against self-incrimination in a civil proceeding has the burden of showing that his or her fear of incrimination is reasonable and is not advanced fancifully or merely imagined; absent this showing, his or her claim of the privilege cannot be sustained (*Troy v. Superior Court (1986) 186 Cal. App. 3d 1006, 1011-1013, 231 Cal. Rptr. 108* ; *Warford v. Medeiros (1984) 160 Cal. App. 3d 1035, 1043-1044, 207 Cal. Rptr. 94*).

[*Optional*] **B. Privilege Against Self-Incrimination Is Required to Be Claimed With Specific Reference to Particular Questions Asked or Other Evidence Sought.** A person claiming the privilege against self-incrimination in a civil proceeding must do so withspecific reference to particular questions asked or other evidence sought, and the trial court must then undertake a particularized inquiry with respect to each specific claim of privilege to determine whether the claimant has sustained his or her burden of showing that the claim is justified (*Warford v. Medeiros (1984) 160 Cal. App. 3d 1035, 1045, 207 Cal. Rptr. 94*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for an order compelling discovery if the party opposing the motion is attempting to rely on the privilege against self-incrimination to resist discovery of information [*see Evid. Code § 940*]. This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in support of compelling discovery, as well as a form refuting a claim of privilege generally.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus counsel should show that the opposing party has not sufficiently demonstrated that his or her fear of incrimination is reasonable with respect to particular questions asked or other evidence sought.

[3] Discussion of Authorities

[a] Claimant of Privilege Against Self-Incrimination Is Required to Demonstrate That Fear of Incrimination Is Reasonable

In ***Troy v. Superior Court*** *(1986) 186 Cal. App. 3d 1006, 231 Cal. Rptr. 108* , after defendant was convicted of conspiracy and mail fraud, a number of his victims filed civil suits and obtained money judgments against him. A receiver was appointed by the court to collect funds that could be used to satisfy the judgments. The receiver obtained a court order directing that defendant appear to answer questions at a judgment debtor examination. During the examination, defendant took the *Fifth Amendment* in response to several questions, even though the court had earlier ruled that he had not met his burden with regard to the privilege. After defendant indicated he would not answer the questions even though ordered to do so by the court, the court announced its intention to hold him in contempt of court, but gave him time to seek appellate review. Defendant's petition for anextraordinary writ was denied, and the trial court issued its contempt order, but again granted him a stay to seek appellate relief. Defendant again petitioned for an extraordinary writ.

The court of appeal initially summarily denied the petition, but, on direction of the Supreme Court, issued an order to show cause why the petition should not be granted. The court of appeal subsequently discharged the order to show cause, and denied the petition (*186 Cal. App. 3d 1006, 1014)* . The court recited well established law concerning the *Fifth Amendment* privilege. The privilege against self-incrimination may not be asserted by merely declaring that an answer will incriminate; it must be evident from the implications of the question, in the setting in which it is asked, that an answer or an explanation of why the question cannot be answered might be dangerous because injurious disclosure could result. It is not enough that the witness fears incrimination from answering the questions; the fear must be reasonable. The privilege protects only against real dangers, and not remote and speculative possibilities. If the trial court determines that no threat of self-incrimination is evident, then the burden of showing the danger of self-incrimination shifts to the individual asserting the privilege. It must determine whether the claimant is confronted by substantial and real, and not merely trifling or imaginary, hazards of incrimination (*186 Cal. App. 3d 1006, 1010-1011)* . The court said that the questions put to defendant were those customarily asked at judgment debtor examinations. Since their incriminating nature was not self-evident, defendant had the burden to show why any response on his part would pose a threat of self-incrimination. The court found that defendant did not meet this standard (*186 Cal. App. 3d 1006, 1012)* . Defendant claimed that the revelation of any assets or personal information about himself could lead to an inquiry of how and when those assets were acquired, making that information a link in the chain of evidence that might be used to initiate a new criminal action against him. He pointed out that there were at least 80 potential complaining witnesses, and that he was on form probation and was subject to an injunction, lation of either of which could result in his imprisonment. The court found that defendant had amply demonstrated his fear of further prosecution, but said that fear alone is not enough to invoke the *Fifth Amendment* privilege; the fear must be reasonable. In order to establish that his fear was reasonable, defendant must demonstrate some nexus between the information

requested and the risk of criminal prosecution and conviction (*186 Cal. App. 3d 1006, 1012-1013)* . The court pointed out that there was no criminal investigation or prosecution pending against defendant. The pending action was a civil proceeding to discover assets that can be used to satisfy outstanding judgments. The court said that if defendant's argument was accepted, a defrauder could always be cloaked and immune from a subsequent judgment debtor examination because there would always be somebody whocould later initiate a prosecution. Defendant's fear of inadvertently providing information that might cause him to be pursued by various prosecutorial agencies was based on pure speculation, and not on the existence of the real danger that must exist for defendant to properly invoke the *Fifth Amendment* privilege (*186 Cal. App. 3d 1006, 1013)* .

In ***Warford v. Medeiros*** *(1984) 160 Cal. App. 3d 1035, 207 Cal. Rptr. 94* , plaintiffs filed a civil action in Hawaii and, subsequently in California, filed an application to compel discovery from nonparty deponents who had refused both to produce certain documents and to provide any deposition testimony other than their names and ages. The nonparty deponents opposed the application, invoking the privilege against self-incrimination. The trial court denied plaintiffs' application, and plaintiffs appealed. The court of appeal reversed. The court stated that a claim of privilege against self-incrimination under *Evid. Code § 940* cannot be sustained in a civil proceeding unless the person claiming the privilege demonstrates that his or her fear of incrimination is reasonable and not advanced fancifully or merely imagined (*160 Cal. App. 3d 1035, 1044)* . The court noted that in the case at bench, the trial judge never questioned the nonparty deponents but had apparently relied exclusively on their attorney's conclusory declaration that all testimony from his clients could be construed to be incriminating. The court held that this was insufficient to sustain their claim of the privilege, and on remand the trial judge was directed to determine, after a particularized inquiry, whether their claim of privilege may validly be asserted (*160 Cal. App. 3d 1035, 1045-1046)* .

[b] Privilege Against Self-Incrimination Is Required to Be Claimed With Specific Reference to Particular Questions Asked or Other Evidence Sought

The facts and procedural background of ***Warford v. Medeiros*** *(1984) 160 Cal. App. 3d 1035, 207 Cal. Rptr. 94* are discussed in [a], *above.* The court, by analogy to federal case law, held that a person claiming the privilege against self-incrimination under *Evid. Code § 940* does not have a blanket right to refuse to testify. In other words, a person claiming the privilege must do so with specific reference to particular questions asked or other evidence sought. Once this is done, the trial court must undertake a particularized inquiry with respect to each specific claim of privilege to determine whether the claimant has sustained his or her burden of establishing that the testimony or other evidence sought might tend to incriminate the claimant (*160 Cal. App. 3d 1035, 1045)* . The court also held that it was within the trial court's discretion to conduct this inquiry either *in camera* or in open court (*160 Cal. App. 3d 1035, 1048)* .

[4] Additional Authorities

[a] Claimant of Privilege Against Self-Incrimination Is Required to Demonstrate That Fear of Incrimination Is Reasonable

In *In re the Marriage of Sachs (2002) 95 Cal. App. 4th 1144, 116 Cal. Rptr. 2d 273* , plaintiff ex-wife served an order to appear at a judgment debtor examination and a subpoena duces tecum on defendant ex-husband, after filing a statement of registration of foreign support. The ex-husband invoked the *Fifth Amendment* privilege against self-incrimination and refused to answer questions or produce documents about his financial affairs, claiming that the evidence could incriminate him on contempt charges arising out of his alleged failure to comply with child and spousal support orders entered in three states. The trial court denied the ex-wife's motion to compel her ex-husband to answer questions and produce documents, and she appealed. The court of appeal reversed. Relying on *Troy v. Superior Court (1986) 186 Cal. App. 3d 1006, 231 Cal. Rptr. 108* and *Warford v. Medeiros (1984) 160 Cal. App. 3d 1035, 207 Cal. Rptr. 94* (discussed in [3][a], *above*), the court stated that the protection provided by the privilege against self-incrimination must be confined to "instances where the witness has reasonable cause to apprehend danger from a direct answer." To sustain the privilege, the burden is on the party or witness invoking the privilege to show that the

testimony or other evidence could tend to incriminate him or her (*95 Cal. App. 4th 1144, 1150-1154, 116 Cal. Rptr. 2d 273, 279-281)* . Here, the appellate court concluded that the ex-husband's silence about his income would not have incriminated him, but instead, would have prevented him from defending against contempt orders in all three states (*95 Cal. App. 4th 1144, 1155-1156, 116 Cal. Rptr. 2d 273, 283)* . After balancing the importance of both the *Fifth Amendment* and the obligation of a former spouse to make support payments, the court held that the ex-wife could conduct a judgment debtor examination, and that in conjunction with *Fam. Code § 3552*, she could obtain a copy of the ex-husband's income tax returns and examine him about their contents (*95 Cal. App. 4th 1144, 1160-1162, 116 Cal. Rptr. 2d 273, 287-288)* .

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8-81 California Points & Authorities § 81.272

§ 81.272 Supporting Motion to Compel Discovery--Refuting Claim of Privilege Against Self-Incrimination [Evid. Code § 940]--Privilege Covers Only Personal Papers and Effects of Claimant

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in support of a motionto compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11), as well as with points and authorities generally refuting a claim of privilege (see e.g., § 81.10).*]

THE MOTION TO COMPEL DISCOVERY FROM _____ [*specify, e.g,* DEFENDANT] SHOULD BE GRANTED BECAUSE HIS/HER PRIVILEGE AGAINST SELF-INCRIMINATION DOES NOT PROTECT PAPERS AND EFFECTS THAT ARE NOT HIS/HER PERSONAL PROPERTY BUT ARE HELD BY HIM/HER IN A REPRESENTATIVE CAPACITY.

Privilege Covers Only Personal Papers and Effects of Claimant. The privilege against self-incrimination cannot be employed by an individual to avoid production of papers, effects, or other property that he or she holds in a representative capacity because the privilege protects only the property of the individual claiming the privilege or property that is in his or her possession in a purely personal capacity (*People ex rel. Clancy v. Superior Court (1985) 39 Cal. 3d 740, 745, 218 Cal. Rptr. 24, 705 P.2d 347*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for an order compelling discovery if the opposing party is attempting to rely on the privilege against self-incrimination in order to resist discovery of another's property that he or she holds in a representative capacity. It does not provide a complete memorandum but is designed to be combined with a general form of memorandum in support of compelling discovery, as well as a form refuting a claim of privilege generally.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should show that the property sought to be discovered is not the personal property of the person claiming the privilege.

[3] Discussion of Authorities

[a] Privilege Covers Only Personal Papers and Effects of Claimant

In ***People ex rel. Clancy v. Superior Court*** *(1985) 39 Cal. 3d 740, 218 Cal. Rptr. 24, 705 P.2d 347* , a city brought an action against a bookstore, its proprietor, and individual employees to abate, as a public nuisance, the sale of obscene publications. Plaintiff served a subpoena duces tecum on an individual defendant employed at the store, demanding the production of certain publications. Defendants sought, and the trial court granted, an order preventing the production of the publications on the ground that doing so would violate the employee's privilege against self-incrimination. Plaintiff petitioned for a writ of mandate, seeking to vacate this order.

The Supreme Court granted the writ and directed the trial court to vacate its order (*39 Cal. 3d 740, 750)* . The Court stated the rule that the privilege against self-incrimination cannot be employed by an individual to avoid the production of records that he or she holds in a representative capacity as custodian on behalf of an organization. The papers and effects that the privilege protects must be the property of the person claiming the privilege, or at least must be in his or her possession in a purely personal capacity. The rule applies even if the evidence might incriminate the holder personally. Applying the rule, the Court noted that the publications in question were the property of the bookstore, an artificial entity not entitled to assert the privilege against self-incrimination, and the employee had possession of them only in his representative capacity as clerk of the store. The court held that the employee therefore could not avoid compliance with the subpoena (*39 Cal. 3d 740, 745)* .

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8-81 California Points & Authorities § 81.273

§ 81.273 Supporting Motion to Compel Discovery--Refuting Claim of Privilege Against Self-Incrimination [Evid. Code § 940]--Privilege Does Not Cover Voluntarily Kept Business Records or Records Required to Be Kept by Law

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in support of a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11), as wellas with points and authorities generally refuting a claim of privilege (see e.g., § 81.10).*]

THE MOTION TO COMPEL DISCOVERY FROM _____ [*specify, e.g.,* DEFENDANT] SHOULD BE GRANTED BECAUSE THE PRIVILEGE AGAINST SELF-INCRIMINATION DOES NOT PROTECT VOLUNTARILY-KEPT BUSINESS RECORDS OR RECORDS THAT ARE REQUIRED TO BE KEPT BY LAW THAT FALL WITHIN THE REQUIRED RECORDS EXCEPTION.

Privilege Does Not Cover Voluntarily Kept Business Records or Records That Are Required to Be Kept by Law. The privilege against self-incrimination cannot be employed to avoid the production of voluntarily-kept business records, or records that are required to be kept by law when (1) the purpose of the government's inquiry is regulatory, not criminal, (2) the information requested is contained in documents of a kind the regulated party customarily keeps, and (3) the records have public aspects (*In re Grand Jury Proceedings (9th Cir. 1986) 801 F.2d 1164,1167-1169)* .

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for an order compelling discovery, if the opposing party is attempting to rely on the privilege against self-incrimination in order to resist discovery of voluntarily-kept business records or records that are required to be kept by law that fall within the required records exception. It does not provide a complete memorandum but is designed to be combined with a general form of memorandum in support of

compelling discovery, as well as a form refuting a claim of privilege generally.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should show that the records sought to be discovered are voluntarily-kept business records or records required to be kept by law.

[3] Discussion of Authorities

[a] Privilege Does Not Cover Voluntarily Kept Business Records or Records That Are Required to Be Kept by Law

In ***In re Grand Jury Proceedings*** *(9th Cir. 1986) 801 F.2d 1164* , witnesses in a grand jury investigation refused to comply with a subpoena duces tecum compelling the production of voluntarily-kept business records and records that they were required to keep by law. The trial court issued an order holding the witnesses in contempt for their failure to comply with the subpoena duces tecum, and the witnesses appealed from the order.

The appellate court affirmed the order, holding that although the *Fifth Amendment* privilege against self-incrimination applies to grand jury proceedings, the contents of voluntarily-kept business records do not fall within the scope of the privilege, since the *Fifth Amendment* bars only compelled self-incrimination. Records that are required to be maintained by law are outside the scope of the privilege if certain conditions are met (*801 F.2d 1164, 1167)* . Citing *Grosso v. United States (1968) 390 U.S. 62, 67-68, 88 S. Ct. 709, 19 L. Ed. 2d 906, 43 Ohio Op. 2d 226* , the court stated that the *Fifth Amendment* privilege does not apply with respect to required records if (1) the purpose of the government's inquiry is regulatory, not criminal, (2) the information requested is contained in documents of a kind the regulated party customarily keeps, and (3) the records have public aspects (*801 F.2d 1164, 1168)* .

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8-81 California Points & Authorities § 81.274

§ 81.274 Supporting Motion to Compel Discovery--Refuting Claim of Privilege Against Self-Incrimination [Evid. Code § 940]--Witness Subject to Potential Civil, But Not Criminal, Liability

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in support of a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11), as well as with points and authorities generally refuting a claim of privilege (see e.g., § 81.10).*]

THE MOTION TO COMPEL DISCOVERY FROM _____ [*specify, e.g.,* PLAINTIFF] SHOULD BE GRANTED BECAUSE THEPRIVILEGE AGAINST SELF-INCRIMINATION IS NOT APPLICABLE TO MATTERS THAT MAY SUBJECT HIM/HER TO CIVIL, BUT NOT CRIMINAL, LIABILITY.

Privilege Covers Only Matters That Will Subject Witness to Criminal, Not Civil, Liability. The privilege against self-incrimination cannot be employed by a witness on the basis that the witness may be subject to civil, but not criminal, liability (*Blackburn v. Superior Court (1993) 21 Cal. App. 4th 414, 425-426, 27 Cal. Rptr. 2d 204*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for an order compelling discovery, if the opposing party is attempting to rely on the privilege against self-incrimination in order to resist discovery, on the grounds that the privilege is not applicable to matters that may subject the witness to civil liability. It does not provide a complete memorandum but is designed to be combined with a general form of memorandum in support of compelling discovery, as well as a form refuting a claim of privilege generally.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should show that the factual issues about which discovery is sought may subject the witness to civil, but not criminal, liability.

[3] Discussion of Authorities

[a] Privilege Covers Only Matters That Will Subject Witness to Criminal, Not Civil, Liability

In ***Blackburn v. Superior Court*** *(1993) 21 Cal. App. 4th 414, 27 Cal. Rptr. 2d 204* , an adult woman brought a civil action against her stepfather in which she alleged he had sexually abused her while she was a minor. The stepfather refused to answer most of the questions asked at his deposition, claiming the privilege against self-incrimination. The trial court denied his request for a protective order and for immunity from prosecution regarding his testimony during discovery or trial, since the statute of limitations for all possible offenses arising out of the woman's charges barred any criminal prosecution. The stepfather sought a writ of mandate and prohibition challenging the trial court's denial of his requests.

The court of appeal denied the petition for the writ, holding that the stepfather was not entitled to extraordinary relief because he had not demonstrated that he was compelled to testify or asked to incriminate himself. The stepfather's argument was based on the premise that the *Fifth Amendment* privilege against self-incrimination protected him from being subject to civil penalties. The court stated that while accommodation in this regard is sometimes made to a defendant in a civil action, it is done from the standpoint of fairness, not from any constitutional right (*21 Cal. App. 4th 414, 425)* . The self-incrimination privilege is not applicable to matters that will subject a witness to civil liability. Although the *Fifth Amendment* privilege may be invoked by a civil litigant, it does not provide protection against purely civil penalties. While the self-incrimination privilege of a criminal defendant is absolute, in a civil case a witness or a party may be required to waive the privilege or accept the civil consequences of silence if he or she exercises the privilege (*21 Cal. App. 4th 414, 426)* .

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8-81 California Points & Authorities § 81.275

§ 81.275 Supporting Motion to Compel Discovery--Refuting Claim of Clergy-Penitent Privilege [Evid. Code § 1032]--Communication Not Within Scope of Privilege

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in support of a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11), as well as with points and authorities generally refuting a claim of privilege (see e.g., § 81.10).*]

THE CLERGY-PENITENT PRIVILEGE CANNOT BE INVOKED WHEN THE COMMUNICATION WAS NOT MADE _____ [IN CONFIDENCE *and/or* TO A MEMBER OF THE CLERGY AUTHORIZED TO HEAR SUCH COMMUNICATIONS *and/or* TO A MEMBER OF THE CLERGY WITH A RELIGIOUS DUTY TO KEEP SUCH COMMUNICATIONS SECRET].

A. Privileged Penitential Communications. A statement is protected from disclosure under the clergy-penitent privilege only when it satisfies all of the requirements of a penitential communication: (1) it must be intended to be in confidence, (2) it must be made to a member of the clergy who in the course of his or her religious discipline or practice is authorized or accustomed to hear such communications, and (3) that member of the clergy has a duty under the discipline or tenets of the church, religious denomination or organization to keep such communications secret (*Evid. Code § 1032*; *People v. Edwards (1988) 203 Cal. App. 3d 1358, 1362-1363, 248 Cal. Rptr. 53*).

[*EITHER, when communication not made in confidence*]

B. Privilege Applicable Only to Information Communicated in Confidence. The clergy-penitent privilege applies only to information communicated "in confidence" between a penitent and his or her clergyman. The privilege cannot be invoked when the penitent's communication was not intended to be confidential (*Evid. Code § 1032*; *People v. Thompson (1982) 133 Cal. App. 3d 419, 426-427, 184 Cal. Rptr. 72*).

[*AND/OR, when communication not made to authorized clergyman*]

C. Privilege Applicable Only to Information Communicated to Authorized Clergy. The clergy-penitent privilege applies only to information communicated by a penitent to his or her clergyman who, in the course of the discipline or practice of his or her church, denomination, or organization, is authorized or accustomed to hear such communications (*Evid. Code § 1032*; *Roman Catholic Archbishop of Los Angeles v. Superior Court (People) (2005) 131 Cal. App. 4th 417, 444-445, 32 Cal. Rptr. 3d 209 , modified, 2005 Cal. App. LEXIS 1274*); *People v. Thompson (1982) 133 Cal. App. 3d 419, 426-427, 184 Cal. Rptr. 72*).

[*AND/OR, when clergyman is under no duty to keep communication secret*]

D. Privilege Applicable Only to Information Communicated to Clergy With Religious Duty to Keep Communication Secret. The clergy-penitent privilege applies only to information communicated to a member of the clergy who has a duty under the discipline or tenets of the church, religious denomination or organization to keep such communications secret (*Evid. Code § 1032*; *People v. Edwards (1988) 203 Cal. App. 3d 1358, 1363, 248 Cal. Rptr. 53*).

[2] Comments

[a] Use of Form

This memorandum may be used in support of a motion for an order compelling discovery if a party or other person has resisted providingdiscovery on the ground that the information sought is a privileged communication between a member of the clergy and the penitent, but in fact the communication was not within the scope of the privilege. It does not provide a complete memorandum but is designed to be combined with a general form of memorandum in support of compelling discovery, as well as a form refuting a claim of privilege generally. Depending on the circumstances of the case, Paragraphs B through D may be used together or separately to refute the claim of privilege.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should refer to facts showing that the person to whom the communication was made did not assure confidentiality and did not act as a spiritual counselor or assume the role of clergy for the person making the communication.

[3] Discussion of Authorities

[a] Privileged Penitential Communications

In ***People v. Edwards*** *(1988) 203 Cal. App. 3d 1358, 248 Cal. Rptr. 53* , defendant, who did not dispute her embezzlement of almost $30,000 from her Episcopal Church guild account, at the direction of the priest to whom she had initially confessed and asked forgiveness, sought out the pastor, requesting that their conversation be confidential. After he agreed, defendant explained that she needed his help in stopping payment on certain checks drawn against the guild account. She told him she had arranged to borrow money to cover her misappropriation but needed his help because the loan proceeds would not be available in time to prevent those checks from being dishonored. The pastor suggested two alternatives to defendant: he could keep her revelation in confidence as agreed, or he could talk to the church wardens on her behalf and seek their help in solving the problem. When defendant chose the latter option, the pastor informed the wardens of what had transpired and asked for their assistance. Acting on the advice of the diocese controller, the vestry reported the missing funds to the police because the church's fidelity bond was otherwise at risk.

Various bank records, ledgers, and cancelled checks seized during an authorized search of defendant's house were admitted in evidence at trial. The trial court determined that the clergy-penitent privilege did not apply and found defendant guilty of grand theft. Defendant appealed.

The court of appeal affirmed. Defendant argued that the trial court had erred in allowing into evidence the content of her confidential statement to the pastor and other incriminating evidence obtained as a direct result thereof. The court explained that in order for a statement to be privileged, it must satisfy all of the conceptual requirements of a penitential communication: (1) it must be intended to be in confidence, (2) it must be made to a member of the clergy who in the course of his or her religious discipline or practice is authorized or accustomed to hear such communications, and (3) that member of the clergy has a duty under the discipline or tenets of the church, religious denomination or organization to keep such communications secret. It noted that while there is a presumption of confidentiality whenever the statutory penitent's privilege is claimed, the right to claim such privilege may be waived when the claimant freely discloses, or consents to disclosure of, a significant part of the communication (*203 Cal. App. 3d 1358, 1363)* .

[b] Privilege Applicable Only to Information Communicated in Confidence

In ***Roman Catholic Archbishop of Los Angeles v. Superior Court (People)*** *(2005) 131 Cal. App. 4th 417, 32 Cal. Rptr. 3d 209 , modified, 2005 Cal. App. LEXIS 1274* , a grand jury subpoenaed documents from petitioners, the Roman Catholic Archbishop of Los Angeles and two priests, for an investigation into allegations that the priests sexually assaulted children. Petitioners objected, in part, that the subpoenaed documents constituted privileged penitential communications within the meaning of *Evid. Code § 1032* because they were generated in the course of the Archdiocese's interventions to help troubled priests. Petitioners appealed respondent superior court's adverse ruling.

The court of appeal agreed with the trial court: The penitential communications are not privileged because they were not "made in confidence, in the presence of no third person so far as the penitent is aware," to a cleric who is obligated "to keep those communications secret," as required by *Evid. Code, § 1032* (*131 Cal. App. 4th 417, 441)* . Both parties to the Archdiocese's troubled-priest interventions knew any communications likely would be transmitted to third parties. Furthermore, the subpoenaed documents themselves demonstrated that communications to and from the individual priests were routinely shared by other Archdiocese employees. This sharing of information vitiated any privilege under *Evid. Code § 1032*, or, alternatively, constituted a waiver of the privilege under *Evid. Code § 912(a)* (*131 Cal. App. 4th 417, 444-445)* .

In ***People v. Thompson*** *(1982) 133 Cal. App. 3d 419, 184 Cal. Rptr. 72* , defendant was convicted of first-degree murder. Defendant was a salesperson for a company whose employees were all members of the Church of Scientology. The company hired a consultant, who was trained as an ethics officer in the Church of Scientology, to counsel its employees on how to improve sales. Defendant told the consultant that he had committed a murder. The consultant asked defendant to write down a confession andto turn himself in. Defendant gave the consultant a written confession that was admitted into evidence during trial. On appeal, defendant contended that his conversation with the consultant and his written confession were erroneously admitted in violation of the clergyman-penitent privilege.

The court of appeal affirmed the conviction. The court stated that it is necessary to show that the statement was made in confidence or in the course of the required relationship between clergy and penitent in order for the privilege to apply. The court held that substantial evidence supported the trial court's conclusion that the confession was not made in confidence. The confession was not made to confess to a crime and to receive religious consolation and guidance in return. While the consultant did have training as an ethics officer under the tenets of Scientology, he was not hired as an ethics officer nor was he an auditor of the church authorized to take confidential statements. The consultant was hired only to improve sales and did not give an assurance of confidentiality to defendant (*133 Cal. App. 3d 419, 426-427)* .

[c] Privilege Applicable Only to Information Communicated to Authorized Clergy Member

The facts and procedural background of ***People v. Thompson*** *(1982) 133 Cal. App. 3d 419, 184 Cal. Rptr. 72* are discussed in [b], *above*. In denying that defendant's confession to a business consultant was protected by the clergyman-penitent privilege, the court of appeal found substantial evidence that the required relationship between clergyman and penitent did not exist. Although trained as an ethics officer under the tenets of Scientology, the consultant was hired solely to improve sales. He was not introduced to the employees as an ethics officer and had not assumed the role of clergyman or spiritual counselor (*133 Cal. App. 3d 419, 426-427)* .

[d] Privilege Applicable Only to Information Communicated to Clergy Member With Religious Duty to Keep Communication Secret

The facts and procedural background of ***People v. Edwards*** *(1988) 203 Cal. App. 3d 1358, 248 Cal. Rptr. 53* are discussed in [a], *above*. In affirming the trial court's determination that the information communicated to the pastor was not protected by the clergy-penitent privilege, the court of appeal considered the relevant doctrine of the Episcopal Church. It recognizes the inviolability of an act of confession by a penitent seeking God's forgiveness and absolution through a priest. However, the court observed that the church recognizes that the aid of priests is frequently sought for the disparate purposes of religious confession and pastoral counseling. It noted that the pastor had no recollection of defendant's request to make a true "confession" seeking forgiveness or absolution, the very essence of the spiritual relationship privileged under the statute. Rather, the pastor's clear recollection was that defendant stated she needed his help to prevent the bad checks from bouncing, thereby disclosing her wrongdoing and inflicting hurt in the process. The pastor emphasized that the conversation did not even remotely resemble a religious confession; rather, it involved a problem-solving entreaty under a promise of confidence from which defendant ultimately released him. He believed that the situation involved no more than pastoral counseling which was not subject to the seal of a confession. Moreover, dual confessions are unusual, and because defendant had already confessed to another priest, her second communication to him could not ordinarily be considered a true religious confession (*203 Cal. App. 3d 1358, 1364-1365)* . The court concluded that the trial court had fully considered all of the conflicting evidence and determined that the statement was not a penitential communication, and that no privilege attached preventing the pastor from otherwise consensually disclosing the content of the nonpenitential, though private, communication. When such a determination is supported by substantial, credible evidence, it will be upheld (*203 Cal. App. 3d 1358, 1365)* .

[4] Additional Authorities

[a] Privilege Applicable Only to Information Communicated to Clergy Member With Religious Duty to Keep Communication Secret

Doe 2 v. *Superior Court (Mark Calkins) (2005) 132 Cal. App. 4th 1504, 34 Cal. Rptr. 3d 458* involved a discovery dispute in an action in which real parties in interest alleged that they were sexually abused as minors by a clergy member. The trial court granted motions to compel petitioner church to provide responses to interrogatories and to produce documents in response to a production request. The church petitioned for a writ of mandate, challenging the discovery order. The appellate court found the trial court abused its discretion by failing to apply the correct legal standard in its determination that the clergy-penitent privilege did not apply. The fact that the term "incident" in discovery requests was not ambiguous, and that the statements at issue would be disclosed subject to a protective order, were irrelevant to whether the communications were penitential (*132 Cal. App. 4th 1504, 1517)* . The court provided guidance for the trial court in analyzing, on remand, whether the privilege applied to statements to a pastor by third persons. The court noted that the penitent is not required to be a member of any particular church, or to be of the same faith as the clergy member to whom he or she makes the penitential communication, unless the discipline of that church limits the clergy member's authority to receive penitential communications to church members only (*132 Cal. App. 4th 1504, 1517)* . The court also rejected respondent's argument that the statements had to be "confessions" for the privilege to apply (*132 Cal. App. 4th 1504, 1518-1519)* . Finally, the court directed that, if after remand the trial court rejected the church's clergy-penitent privilege assertion regarding communications by third parties to the pastor, the third parties must be formally notified of the proceedings and afforded a fair opportunity to assert their privacy interests (*132 Cal.*

App. 4th 1504, 1520) .

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8-81 California Points & Authorities § 81.276

§ 81.276 Supporting Motion to Compel Discovery--Discovery of Official Information [Evid. Code § 1040]--General Form

[1] FORM

[*The following may be combined, when appropriate, with a general memorandum in support of a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11), as well as with points and authorities generally refuting a claim of privilege (see e.g., § 81.10).*]

THE INFORMATION IN QUESTION IS DISCOVERABLE BECAUSE _____ [IT WAS NOT ACQUIRED IN CONFIDENCE *and/or* IT WAS PREVIOUSLY OPEN OR OFFICIALLY DISCLOSED TO THE PUBLIC *and/or* DISCLOSURE IS NOT FORBIDDEN BY A CALIFORNIA STATUTE OR FEDERAL ACT AND IS NOT AGAINST THE PUBLIC INTEREST].

[*EITHER*]

A. Information Not Acquired in Confidence. Information must be acquired in confidence by a public employee in the course of his or her duty to become privileged "official information" (*Evid. Code § 1040(a)*).

[*AND/OR*]

B. Information Open or Previously Disclosed to Public. Information that has been open or officially disclosed to the public prior to the claim of privilege is not protected "official information" (*Evid. Code § 1040(a)*).

[*AND/OR*]

C. Disclosure of Official Information Is Not Prohibited by Act or Statute and Is Not Against Public Interest. The privilege of a public entity to refuse to disclose official information does not apply if disclosure is not prohibited by California statute or an act of the United States Congress and is not against the public interest (*see Evid. Code § 1040(b)*).

[*Optional*] **D. Privilege Is Conditional in Absence of Specific Statute or Act Forbidding Disclosure.** In the absence of a specific statutory grant of privilege, the privilege of a public entity to refuse to disclose official information is conditional. The privilege does not apply unless the information in the documents is confidential and disclosure is against the public interest because the necessity for preserving the confidentiality of the information, without considering the interest of the public entity in the outcome of the litigation, outweighs the necessity for the disclosure in the interests of justice (*Evid. Code § 1040(b)(2)*; *Shepherd v. Superior Court (1976) 17 Cal. 3d 107, 124-128, 130 Cal. Rptr. 257, 550 P.2d 161*).

[*Optional*] **E. Interest of Public Entity Not Considered.** In determining whether disclosure of information is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered (*Evid. Code § 1040(b)(2)*).

[2] Comments

[a] Use of Form

This memorandum may be used in support of a motion to compel discovery of information if a public entity has refused to disclose the information on the ground that it is privileged official information.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, facts of the case that tend to show that the necessity for the disclosure in the interests of justice outweighs the public entity's interest in preserving the confidentiality of the information should be brought out. If any person authorized to do so has previously consented that the official information be disclosed in the proceeding, counsel should discuss the circumstances of the prior authorization [*see Evid. Code § 1040(b)(2)*].

[3] Discussion of Authorities

[a] Privilege Is Conditional in Absence of Specific Statute or Act Forbidding Disclosure

Shepherd v. Superior Court *(1976) 17 Cal. 3d 107, 130 Cal. Rptr. 257, 550 P.2d 161* involved a wrongful death action against a city and certain of its employees, including the police officers who allegedly wrongfully shot plaintiff's decedent. The trial court denied plaintiff's request for discovery of certain official records and documents relating to the shooting. The Supreme Court, however, on petition by plaintiff, issued a writ of mandate ordering the trial court to conduct a further hearing on whether to permit the discovery.

The Court initially noted that the privileges accorded by *Evid. Code § 1040* are applicable only when the information sought was received in confidence. The Court then noted that some of the material sought, such as voluntary statements of criminal suspects made to the investigating authorities, could not be deemed confidential. The Court assumed, however, that some of the material sought was confidential (*17 Cal. 3d 107, 124)* . The Court then concluded that the trial court had not followed the proper procedure in ruling on the discovery motions and remanded the case for a further hearing. The Court issued guidelines to be followed in determining whether a confidential privilege under *Evid. Code § 1040* applies (*17 Cal. 3d 107, 125)* .

The Court declared that ruling on the conditional privilege of *Evid. Code § 1040* entails a separate assessment of the "necessity for the disclosure in the interests of justice" and the "necessity for preserving the confidentiality of the information," in light of the consequences to the litigant of nondisclosure and the consequences to the public entity of disclosure (*17 Cal. 3d 107, 125-126)* . The Court noted thatconsequences to the litigant involved matters similar to those in issue in determining materiality under *Code Civ. Proc. § 1985*, including (1) the importance of the material sought to the fair presentation of the litigant's case, (2) the availability of the material to the litigant by other means, and (3) the effectiveness and relative difficulty of such other means. The Court also noted that consequences to the public entity of disclosure included matters relative to the effect of the disclosure on the integrity of public processes and procedures. In this regard, the Court found that discovery would not impinge on the policy of grand jury secrecy merely because much of the material sought involved the subject of a prior grand jury investigation (*17 Cal. 3d 107, 126-127)* .

[4] Additional Authorities

[a] Disclosure of Official Information is Not Prohibited by Act or Statute and Is Not Against Public Interest

In *Kleitman v. Superior Court (1999) 74 Cal. App. 4th 324, 87 Cal. Rptr. 2d 813* , the trial court granted a discovery motion compelling answers to interrogatories concerning personal recollections of city council members as to proceedings which took place during an unrecorded closed session of the city council, held under the Brown Act (*Gov. Code § 54956.8*; *see Gov. Code § 54950 et seq.*). The court of appeal issued a peremptory writ of mandate directing the trial court to vacate its order and entered a new order denying the motion. As a matter of first impression, the court held, among other things, that *Evid. Code § 1040(b)(2)*, which provides that a public entity is privileged to refuse to disclose official information when the privilege is properly claimed and disclosure is forbidden by a state statute, necessarily includes the Brown Act's prohibition of disclosure of closed session proceedings, except as provided by the Act (*74 Cal. App. 4th 324* , 335). In this case, the Brown Act's exceptions did not authorize such discovery (*74 Cal. App. 4th 324, 335)* .

[b] Privilege Is Conditional in Absence of Specific Statute or Act Forbidding Disclosure

In *San Joaquin Cty. Local Agency Formation Comm'n v. Superior Court (2008) 162 Cal. App. 4th 159, 76 Cal. Rptr. 3d 93* , the real party in interest, an irrigation district, sued a local agency formation commission, challenging denial of the district's application to provide retail electric service. The irrigation district noticed the taking of depositions of the commissioners and the commission's executive officer, and in response the commission moved for a protective order. It contended that discovery was not permitted because review of an administrative agency action was limited to the administrative record, and that questioning the commissioners about their decision violated the deliberative process privilege. The superior court granted the commission's motion for a protective order only partially. The commission petitioned for a writ of mandate (*162 Cal. App. 4th 159, 163)* .

The court of appeal issued the writ. A local agency formation commission is a quasi-legislative administrative agency, and its decisions are reviewed by traditional mandamus. The information sought did not fall within any exception to the rule that extra-record evidence was not admissible in traditional mandamus actions challenging quasi-legislative administrative decisions. Permitting the admission of extra-record evidence also would violate separation of powers principles (*162 Cal. App. 4th 159, 167)* . Even if an exception could be established, the commissioners' reasoning processes and the evidence they relied on in rejecting district's application were protected under the deliberative process privilege (*162 Cal. App. 4th 159, 172)* .

In *Michael P. v. Superior Court (2001) 92 Cal. App. 4th 1036, 113 Cal. Rptr. 2d 11* , petitioner father was the subject of a dependency action, after another child was fatally injured while in his care. Petitioner served subpoenas duces tecum on real parties in interest sheriff and police departments. Petitioner sought to discover forensic evidence and various investigative reports compiled by real parties during their ongoing criminal investigation into the death of the

child. The juvenile court granted real parties' motion to quash the subpoenas, finding the official information privilege applied to preclude disclosure of materials relating to an ongoing criminal investigation. Petitioner filed a petition for writ of mandate and requested a stay of the juvenile court proceedings. The court of appeal concluded the juvenile court abused its discretion by failing to conduct an in camera review of the requested items before ruling on real parties' motion. Accordingly, the court granted the stay and issued an alternative writ, directing the juvenile court to hold an in camera hearing to determine, with respect to each requested item of evidence, whether the claim of privilege should be upheld.

Citing *Shepherd v. Superior Court (1976) 17 Cal. 3d 107, 130 Cal. Rptr. 257, 550 P.2d 161* (discussed in [3][a], *above*), the court stated that a public entity can withhold information as privileged under *Evid. Code § 1040(b)(2)* "only upon a finding that ... its disclosure would be 'against the public interest.' " The weighing procedure entails a separate assessment, for *each* item of material sought, of the necessity for disclosure in the interest of justice and the necessity for preserving the confidentiality of the information. Implicit in this assessment is a consideration of consequences to the litigant of nondisclosure, and the consequences to the public of disclosure (*92 Cal. App. 4th 1036, 1043-1044)* . Here, the court found that petitioner father's desire for and right to "the companionship, care, custody and management" of his child was an important interest that "undeniably warrant[ed] deference and, absent a powerful countervailing interest, protection" (*92 Cal. App. 4th 1036, 1044-1045)* . The court noted that in *County of Orange v. Superior Court (2000) 79 Cal. App. 4th 759, 94 Cal. Rptr. 2d 261* (discussed in *§ 81.292[3]*), a civil action for damages, the court of appeal allowed the police to maintain the confidentiality of the entire investigative file "for some reasonable period of time" without any particularized judicial review of its contents. This court, however, declined to follow *County of Orange*, concluding that a parent's interest in having custody of his or her child weighs more heavily than a litigant's interest in prosecuting a civil action for damages. The court concluded the juvenile court's refusal to conduct an in camera review of the items listed on petitioner's subpoenas duces tecum, its failure to engage in any particularized inquiry of petitioner's need for disclosure of the requested items versus the government's need to preserve their confidentiality, and the court's resulting blanket application of the privilege to *all* of the items requested, violated the procedural mandates of *Shepherdv. Superior Court* (*92 Cal. App. 4th 1036, 1045-1046)* . The court noted that the mere fact evidence incriminates petitioner is not enough to prevent disclosure. The government must also show there is a real possibility release of the information would allow the perpetrator to avoid apprehension (for example, by allowing the perpetrator to tailor an explanation to fit the forensic evidence) (*92 Cal. App. 4th 1036, 1047)* .

In *People v. Jenkins (2000) 22 Cal. 4th 900, 95 Cal. Rptr. 2d 377, 997 P.2d 1044* , an automatic death penalty appeal, defendant contended, among other things, that the trial court erred in refusing to grant discovery of evidence of all cases which the murdered detective had investigated, or in which he had made an arrest, in the year before he was murdered. Defendant speculated that some person under investigation by the detective, but who had not, to the knowledge of the prosecution, made any threat against the officer, may have been responsible for murdering the officer. The Supreme Court found that individual citizens' arrest records were privileged under the official information privilege (*Evid. Code § 1040(b)(2)*) when weighed against defendant's discovery request. The significant interest in preserving the confidentiality of an individual citizen's arrest records outweighed defendant's showing of need for those records, which was based on speculation and constituted the "proverbial fishing expedition." Thus, the lower court acted within its discretion in concluding that defendant had not given sufficient justification for discovery and thus denying defendant's request to the extent that it was not focused on evidence of threats to the detective (*22 Cal. 4th 900, 956-957)* .

In *Marylander v. Superior Court (2000) 81 Cal. App. 4th 1119, 97 Cal. Rptr. 2d 439* , defendant in pending civil litigation sought to compel discovery from a state agency of records which were relevant to his defense in the underlying case. The records were memoranda from the state agency to the Governor's Office. The trial court denied a motion to compel production, agreeing with the state agency that such memoranda are absolutely privileged on the grounds that correspondence to the Governor is exempt from disclosure as a public record, and that a common law "deliberative process" privilege absolutely protects interoffice communications in order to facilitate candid advice and disclosures to the Governor (*81 Cal. App. 4th 1119, 1121)* . The court of appeal held that the trial court erred because *Evid. Code § 1040*, the official information privilege, represents the exclusive means by which a public entity may

assert a claim of governmental privilege based on the necessity of secrecy (*81 Cal. App. 4th 1119, 1125)* . *Evid. Code § 1040(b)(1)*, an absolute privilege, did not apply in this case because an exemption from disclosure under the Public Records Act, Gov. Code § 6450 et seq., is not a statute forbidding disclosure with the meaning of *Evid. Code § 1040(b)(1)*. Thus, the applicable privilege was not absolute but conditional under *Evid. Code § 1040(b)(2)*, which required the trial court to consider the party's need for disclosure in the interest of justice, and to determine whether that interest were outweighed by the public interest in preserving confidentiality (*81 Cal. App. 4th 1119, 1126)* . The appellate court directed the trial court to conduct further proceedings in accordance with *Evid. Code § 1040* (*81 Cal. App. 4th 1119, 1130)* .

The facts and procedural background of *County of Orange v. Superior Court (2000) 79 Cal. App. 4th 759, 94 Cal. Rptr. 2d 261* are discussed in *§ 81.292[3][a]*. Police files in an ongoing criminal investigation into a child's murder were held to be privileged under *Evid. Code § 1040(b)(2)* when weighed against the need for discovery in the suspect-parents' civil suit for defamation, conversion, spoilation of evidence and various civil rights violations, based on their public identification by police as suspects. The appropriate remedy in this case was for the trial court to stay discovery of the investigative information in the civil action in order to allow the police the necessary time to investigate. However, in the future, the trial court could determine that there has not been enough progress in the investigation to justify continued protection of most of the files (*79 Cal. App. 4th 759, 768-769)* .

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8-81 California Points & Authorities § 81.277

§ 81.277 Supporting Motion to Compel Discovery--Discovery of Official Information [Evid. Code § 1040]--Discovery of Information Found in Accident Reports

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in support of a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11), as well as with points and authorities generally refuting a claim of privilege (see e.g., § 81.10).*]

INFORMATION FOUND IN ACCIDENT REPORTS AND INFORMATION COMPILED FROM DATA FOUND IN SUCH REPORTS IS SUBJECT TO DISCOVERY.

A. Information Derived From Accident Reports Is Not Privileged. Information about other accidents that discloses neither theidentity of the reporting party nor identifying material, although generated from accident reports, is not made confidential by *Sections 20012-20014 of the Vehicle Code* (*Davies v. Superior Court (1984) 36 Cal. 3d 291, 294, 204 Cal. Rptr. 154, 682 P.2d 349*).

B. Information Derived From Reports of Accidents at Same Location Is Discoverable. Information generated by the state from reports of other accidents at the same location is subject to discovery in an action in which the plaintiff alleges that the highway or street at which the accident occurred was designed, built, or maintained in a defective and dangerous condition (*Davies v. Superior Court (1984) 36 Cal. 3d 291, 294, 204 Cal. Rptr. 154, 682 P.2d 349*).

[2] Comments

[a] Use of Form

These points and authorities is for use in support of a motion to compel discovery of information found in accident reports, as well as data compiled from such reports. It is for use primarily by persons involved in an accident at a given location who wish to establish that prior accidents were caused by a condition existing at that location. Accident reports,

whether prepared by law enforcement officers or persons required to make an accident report under *Veh. Code § 20008*, are available to persons involved in the accident, as well as others who establish a "proper interest" in the reports under *Veh. Code § 20012*. For a form for use by persons with a proper interest in an accident report, see *§ 81.278*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Information Derived From Accident Reports Is Not Privileged

In ***Davies v. Superior Court*** *(1984) 36 Cal. 3d 291, 204 Cal. Rptr. 154, 682 P.2d 349* , plaintiff, who was injured in an automobile accident on a state highway, brought an action against the state on the theory that the highway was designed, built, and maintained in a defective and dangerous condition of which the state had notice. Plaintiff sought discovery of information about prior accidents at the same location, including interrogatories concerning the date, type of accident, parties involved, whether litigation against the state had followed, and whether the accidents hadbeen recorded in the TASAS computer (the TASAS computer stores data on accidents in the state highway system). Plaintiff also sought collision diagrams prepared in conjunction with accidents at the same location, and traffic collisions reports of accidents occurring after his. The state opposed the discovery on the grounds that *Veh. Code §§ 20012* and *20014* precluded discovery of the accident reports and any information contained in or generated from those reports. The trial court denied plaintiff's motion to compel discovery. Plaintiff then sought a writ of mandate to compel discovery.

Before its final decision, the Supreme Court issued an alternative writ of mandate with which the superior court and the state complied. Although this rendered further proceedings moot, the Supreme Court issued an opinion on the grounds that the issue was one of statewide importance (*36 Cal. 3d 291, 294)* . The Court initially noted that *Veh. Code §§ 20012-20014* do not create privileges to refuse to disclose information contained in accident reports but rather create rules that should be narrowly construed so as not to impinge on the policy of liberal discovery (*36 Cal. 3d 291, 298-301)* . In reaching its decision, the Court reasoned that the purpose of *Veh. Code §§ 20012-20014* was to provide a limited confidentiality protecting the identity of the person who made the report in order to encourage truthfulness and accuracy in the reports. The Court then held that the confidentiality provided by statute to official accident reports does not extend to data generated from the reports from which the indicia of identity have been or can be excised (*36 Cal. 3d 291, 302)* .

[b] Information Derived From Reports of Accidents at Same Location Is Discoverable

The facts and procedural background of ***Davies v. Superior Court*** *(1984) 36 Cal. 3d 291, 204 Cal. Rptr. 154, 682 P.2d 349* are discussed in [a], *above*. In *Davies*, the Supreme Court rejected the claim of the state that plaintiff's attempt to discover information about prior accidents garnered from official accident reports was improper because such evidence was unlikely to lead to the discovery of admissible evidence. The Court reasoned that the data sought could reveal other accidents of a sufficient number at the location in question to suggest that a highway defect was a common contributory factor, and that such information was relevant to the lawsuit against the state based on a dangerous highway condition (*36 Cal. 3d 291, 301)* .

[4] Additional Authorities

[a] Information Derived From Reports of Accidents at Same Location Is Discoverable

People v. Ansbro (1984) 153 Cal. App. 3d 273, 200 Cal. Rptr. 210 involved a prosecution for vehicular manslaughter. Defendant sought to introduceevidence of other accidents at the location of his accident in order to establish a dangerous condition as the cause of the accident and sought discovery of prior accident reports. The trial court refused

discovery on the grounds that the reports were privileged under *Evid. Code § 1040(b)(1)*, which provides that a public entity has a privilege to refuse to disclose official information if disclosure is forbidden by another California statute. The court of appeal reversed and remanded. The court held that accident reports of police officers were not protected by *Veh. Code § 20012* and thus were not privileged under *Evid. Code § 1040(b)(1)* (*153 Cal. App. 3d 273, 277)* .

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8-81 California Points & Authorities § 81.278

§ 81.278 Supporting Motion to Compel Discovery--Discovery of Official Information [Evid. Code § 1040]--Discovery of Accident Reports

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in support of a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11), as well as with points and authorities generally refuting a claim of privilege (see e.g., § 81.10).*]

OFFICIAL ACCIDENT REPORTS ARE AVAILABLE TO ANY PERSON WITH A PROPER INTEREST IN THE REPORTS.

Accident Reports May Be Discovered by Person With Proper Interest. Reports of accidents, whether made by private individuals as required by *Section 20008 of the Vehicle Code* of persons involved in the accident or by an investigating law enforcement officer, are available to persons who have a proper interest therein, including, but not limited to, the drivers involved in the accident and any person who may incur civil liability arising out of the accident (*Veh. Code § 20012*; *State of California ex rel. Dep't of Transportation v. Superior Court (1985) 37 Cal. 3d 847, 857, 210 Cal. Rptr. 219, 693 P.2d 804* ; *Davies v. Superior Court (1984) 36 Cal. 3d 291, 301, 204 Cal. Rptr. 154, 682 P.2d 349*).

[2] Comments

[a] Use of Form

These points and authorities are for use in support of a motion to compel discovery of an accident report prepared by a party involved in the accident or an investigating law enforcement officer.

Note that even when a party is not an interested party within the meaning of *Veh. Code § 20012* and thus is not able to discover this type of accident report, the party may still be able to discover information generated from such reports [*see*

Davies v. Superior Court (1984) 36 Cal. 3d 291, 294, 204 Cal. Rptr. 154, 682 P.2d 349 (discussed in *§ 81.277[3*][a])].

Reports expressly declared by *Veh. Code § 20014* to be for the confidential use of designated governmental entities having jurisdiction over highway matters are not discoverable by private litigants, even though they contain information that is not confidential [*Nelson v. Superior Court (1986) 184 Cal. App. 3d 444, 450-451, 229 Cal. Rptr. 94* (California Highway Patrol accident investigation reports)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, facts showing that the party seeking the discovery was a party with a proper interest under *Veh. Code § 20012* should be brought out.

[3] Discussion of Authorities

[a] Accident Reports May Be Discovered by Person With Proper Interest

The facts and procedural background of ***Davies v. Superior Court*** *(1984) 36 Cal. 3d 291, 204 Cal. Rptr. 154, 682 P.2d 349* are discussed in *§ 81.277[3][a]*. In this case, plaintiff sought discovery of information derived from official reports of prior accidents in order to show that his accident was caused by a highway condition for which the state was responsible. In upholding plaintiff's right to discovery, the Supreme Court noted that it was not deciding whether plaintiff was entitled to the actual accident reports (*36 Cal. 3d 291, 295 n.4*). However, the Court, as part of its rationale in permitting discovery of information compiled from actual reports, did hold that such discovery might provide information showing that a highway defect may have been a cause of plaintiff's accident and that this information might then qualify plaintiff as a person with a proper interest in discovering the actual accident reports under *Veh. Code § 20012* (*36 Cal. 3d 291, 301)* .

In ***State of California ex rel. Dep't of Transportation v. Superior Court*** *(1985) 37 Cal. 3d 847, 210 Cal. Rptr. 219, 693 P.2d 804* , defendant in a criminal action was charged with vehicular manslaughter. She sought discovery of official accident reports prepared by law enforcement officers and by persons involved in the prior accidents as required by *Veh. Code § 20008* in order to show that a highway condition was responsible for the accident that led to the criminal charge. The trial court upheld defendant's right to discovery on the grounds that defendant had a proper interest in the accident reports under *Veh. Code § 20012*.

The Supreme Court agreed and denied the state's petition for a writ of prohibition. The Court held that defendant had a proper interest in the reports, since they were necessary to her defense and in light of the fact that she agreed to the deletion of names and other information from the reports that might disclose the identity of the party who prepared the report.

The holding of this case is of particular interest to civil litigants in that the Court held that reports prepared by law enforcement officials are subject to disclosure to persons with a proper interest under *Veh. Code § 20012*, even though *Veh. Code § 20014*, which provides for confidentiality of reports prepared by law enforcement officers, does not contain a "proper interest" exception. The Court reasoned that the Legislature had evidenced no intent to provide for greater confidentiality under *Veh. Code § 20014* than under *Veh. Code § 20012* (*37 Cal. 3d 847, 857)* .

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8-81 California Points & Authorities § 81.278A

§ 81.278A Supporting Motion to Compel Discovery--Discovery of Official Information [Evid. Code § 1040]--Discovery of Information Contained in DMV Records Relating to Physical and Mental Condition

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum supporting a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.81, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11), as well as with points and authorities generally refuting a claim of privilege (see, e.g., § 81.10).*]

DMV RECORDS RELATING TO PHYSICAL AND MENTAL CONDITION ARE DISCOVERABLE BECAUSE THE NEED FOR DISCLOSURE OUTWEIGHS THE PUBLIC'S INTEREST IN PRESERVING CONFIDENTIALITY.

A. Information in DMV Files Relating to Physical and Mental Condition Is Not Privileged Under *Vehicle Code Section 1808.5*. *Vehicle Code Section 1808.5*, declaring all DMV records relating to physical and mental condition confidential and not open to public inspection, does not create a privilege, independent of *Evidence Code Section 1040*, to withhold information in DMV records required to be produced by subpoena (*Dep't of Motor Vehicles v. Superior Court (2002) 100 Cal. App. 4th 363, 366, 122 Cal. Rptr. 2d 504*).

B. *Vehicle Code Section 1808.5* Is Not a Statute that Forbids Disclosure of DMV Information Relating to Physical and Mental Condition Under *Evidence Code Section 1040(b)(1)*. Although information relating to party's driver's license involves "official information" within meaning of Evidence Code Section 1040, Vehicle Code Section 1808.5 does not forbid disclosure of that official information within meaning of *Evidence Code Section 1040(b)(1)* (*Dep't of Motor Vehicles v. Superior Court (2002) 100 Cal. App. 4th 363, 366, 122 Cal. Rptr. 2d 504*).

C. Necessity for Disclosure of DMV Information Relating to Motorist's Physical and Mental Condition Outweighs Public's Interest. Under *Evidence Code Section 1040(b)(2)*, the necessity for disclosure of complete copies of motorist's driving records outweighs the DMV's interest in preserving confidentiality (*Dep't of Motor Vehicles v.*

Superior Court (2002) 100 Cal. App. 4th 363, 366, 122 Cal. Rptr. 2d 504).

[2] Comments

[a] Use of Form

These points and authorities are for use in support of a motion to compel discovery of information found in DMV records relating to a motorist's physical and mental condition. It is for use primarily by the state or the defendant in a criminal prosecution.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel might argue that the state or the defendant, or both, have an interest in all reasonably accessible information that is relevant to the defense in a criminal prosecution arising from a auto accident, in order to ensure a fair trial and an intelligent defense.

[3] Discussion of Authorities

[a] Information in DMV Files Relating to Physical and Mental Condition Is Not Privileged Under Vehicle Code Section 1808.5

Dep't of Motor Vehicles v. Superior Court *(2002) 100 Cal. App. 4th 363, 366, 122 Cal. Rptr. 2d 504* arose from a prosecution for vehicular homicide. The state issued a subpoena duces tecum for the motorist's driving records. Claiming privilege under *Veh. Code § 1808.5* and *Evid. Code § 1040(b)(2)*, the DMV issued only redacted records, withholding the medical information contained in the motorist's driving records. The DMV petitioned to have the trial court's order to produce the records vacated. Real party in interest joined with the state, asking that the DMV be required to produce unredacted copies of his driving record. On that basis, the trial court denied the DMV's petition and ordered the DMV to comply in full with the state's subpoena. In response, the DMV filed a petition for writ of mandate, contending that *Veh. Code § 1808.5* and *Evid. Code § 1040* created statutory privileges to withhold the medical information contained in the motorist's driving record, unaffected by his consent to release the information. In the alternative, the DMV argued that, even in the absence of an absolute privilege, the public interest in maintaining the confidentiality of medical information in the motorist's records outweighed the need for disclosure.

The court of appeal disagreed. The court rejected the DMV's claim of privilege under *Veh. Code § 1808.5*, which provides, in relevant part: "all records of the department relating to the physical or mental condition of any person ... are confidential and not open to public inspection." The word "confidential" in the statute did not equate with privilege (*100 Cal. App. 4th 363, 371)* . The court further held that the driving records sought constituted official information within the meaning of *Evid. Code § 1040(a)* (*100 Cal. App. 4th 363, 374)* . However, *Veh. Code § 1808.5* was not a statute that acted to forbid disclosure within the meaning of *Evid. Code § 1040(b)(1)* (*100 Cal. App. 4th 363, 374)* . Because, under *Evid. Code § 1040(b)(2)*, the necessity for disclosure of complete copies of real party in interest's driving records outweighed the DMV's interest in preserving the confidentiality of the records, the trial court properly required the DMV to produce the records (*100 Cal. App. 4th 363, 377)* .

[b] Vehicle Code Section 1808.5 Is Not a Statute that Forbids Disclosure of DMV Information Relating to Physical and Mental Condition Under Evidence Code Section 1040(b)(1)

The facts, procedural background, and related issues of ***Dep't of Motor Vehicles v. Superior Court*** *(2002) 100 Cal. App. 4th 363, 366, 122 Cal. Rptr. 2d 504* are discussed in [a], *above.* In upholding the state's and real party in interest's right to discovery of information contained in DMV records relating to real party in interest's physical and mental condition, the court of appeal observed that the same reasons that led it to conclude that *Veh. Code § 1808.5* does not

establish a privilege also led to the conclusion that *Veh. Code § 1808.5* is not a statute, within the meaning of *Evid. Code § 1040*, that "forbids disclosure" (*100 Cal. App. 4th 363, 374)* . The court distinguished a statute, like *Veh. Code § 1808.5* that "provides for confidentiality," from a statute that "prohibits the disclosure of records." A statute that "prohibits the disclosure of records" would invoke the absolute privilege of *Evid. Code §§ 1040* and *1041*; a statute that "provides for confidentiality" would not (*100 Cal. App. 4th 363, 374-375)* .

[c] Necessity for Disclosure of DMV Information Relating to Motorist's Physical and Mental Condition Outweighs Public's Interest

The facts, procedural background, and related issues of ***Dep't of Motor Vehicles v. Superior Court*** *(2002) 100 Cal. App. 4th 363, 366, 122 Cal. Rptr. 2d 504* are discussed in [a], *above.* In upholding the state's and real party in interest's right to discovery of information contained in DMV records relating to real party in interest's physical and mental condition, the court of appeal weighed the public policy against disclosure of the specified information against the requesting party's interest in obtaining that information, in accordance with *Evid. Code § 1040(b)(2)*. The court of appeal found that the interests of the state and the real party in interest in records relevant to the defense to a vehicular homicide charge outweighed the DMV's interest in preserving the records to "assure physicians that, when they are asked to submit to the DMV a candid evaluation of the safety risks presented by a driver's medical condition, that evaluation will then not be disclosed" (*100 Cal. App. 4th 363, 377)* .

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8-81 California Points & Authorities § 81.279

§ 81.279 Supporting Motion to Compel Discovery--Refuting Claim of Newsperson's Qualified Privilege to Protect News Source--Existence and Veracity of News Source Placed in Issue by Newsperson

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in support of a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11), as wellas with points and authorities generally refuting a claim of privilege (see e.g., § 81.10).*]

THE MOTION TO COMPEL DISCOVERY FROM THE OPPOSING PARTY SHOULD BE GRANTED, NOTWITHSTANDING THE NEWSPERSON'S QUALIFIED PRIVILEGE AGAINST DISCLOSURE OF CONFIDENTIAL NEWS SOURCES BECAUSE THE OPPOSING PARTY, AS PLAINTIFF/CROSS COMPLAINANT, HAS PLACED THE EXISTENCE AND VERACITY OF THE NEWS SOURCE IN ISSUE.

Newsperson's Qualified Privilege Must Give Way to Interest Favoring Disclosure When Newsperson Has Instituted Action Placing Existence and Veracity of News Source in Issue. When a newsperson seeks affirmative relief in an action or cross complaint that places in issue the existence or veracity of a confidential news source, the fair administration of justice compels disclosure notwithstanding his or her qualified privilege against disclosure of the news source; the shield of the newsperson's qualified privilege cannot be used as a sword (*Dalitz v. Penthouse International, Ltd. (1985) 168 Cal. App. 3d 468, 477-480, 214 Cal. Rptr. 254*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for an order compelling discovery if the party opposing the motion is attempting to rely on the newsperson's qualified privilege against disclosure of a confidential news source but is also seeking affirmative relief in an action or cross complaint that places the existence or veracity of the news source in issue. The form does not provide a complete memorandum but is designed to be combined with a

general form of memorandum in support of compelling discovery, as well as a form refuting a claim of privilege generally.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should show that the opposing party, as a plaintiff or cross complainant, has placed the existence or veracity of the news source in issue.

[c] Newsperson's First-Amendment Privilege Distinguished From Newsperson's Immunity From Contempt

These points and authorities relate to the application of the newsperson's qualified privilege to withhold disclosure of the identity of confidentialsources or unpublished information. This qualified privilege is constitutional rather than statutory, arising under the protections of freedom of the press under *U.S. Const., amend. I,* and *Cal. Const., art. I, § 2(a)* [*see Mitchell v. Superior Court (1984) 37 Cal. 3d 268, 279, 283-284, 208 Cal. Rptr. 152, 690 P.2d 625* and § 81.293]. This newsperson's qualified privilege against disclosure is to be distinguished from the newsperson's shield of immunity from contempt, which arises under *Cal. Const., art. I, § 2(b)* and *Evid. Code § 1070*; *see § 81.294*]. The immunity from contempt, unlike a qualified privilege, does not protect against non-contempt penalties such as monetary and issue-preclusion sanctions [*see New York Times Co. v. Superior Court (1990) 51 Cal. 3d 453, 462, 273 Cal. Rptr. 98, 796 P.2d 811* ; *In re Willon (1996) 47 Cal. App. 4th 1080, 1091, 55 Cal. Rptr. 2d 245]* .

[d] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 81.293* may be used to oppose the motion supported by the points and authorities in this form.

[3] Discussion of Authorities

[a] Newsperson's Qualified Privilege Must Give Way to Interest Favoring Disclosure When Newsperson Has Instituted Action Placing Existence and Veracity of News Source in Issue

In ***Dalitz v. Penthouse International, Ltd.*** *(1985) 168 Cal. App. 3d 468, 214 Cal. Rptr. 254* , plaintiffs brought a libel action against defendants, a publisher and other newspersons connected with an article that allegedly defamed plaintiffs. Defendant publisher then brought a cross complaint for defamation against plaintiffs, alleging that plaintiffs had made certain defamatory statements of it at a news conference held in response to the original article. The trial court dismissed the cross complaint as a sanction for defendants' failure to disclose the identity of their sources, and defendants appealed.

The court of appeal affirmed. The court recognized that a newsperson has a qualified privilege against disclosure of a confidential source absent a showing of compelling interest outweighing that privilege. The court concluded, however, that in the case at bench the fair administration of justice did compel disclosure, notwithstanding the qualified privilege, insofar as a newsperson had cross complained in a matter that arose because of reports by his or her news sources. The court reasoned that the "shield" of the qualified privilege cannot thus be used as a "sword" (*168 Cal. App. 3d 468, 477)* . On consideration of the factors set forth in *Mitchell v. Superior Court (1984) 37 Cal. 3d 268, 208 Cal. Rptr. 152, 690 P.2d 625* and *KSDO v. Superior Court (1982) 136 Cal. App. 3d 375, 186 Cal. Rptr. 211* (discussed in *§ 81.293[3][a]*), the court concluded that disclosure was compelled under the circumstances because the existence and veracity of cross complainant's news source went to the heart of cross defendant's defense (*168 Cal. App. 3d 468, 478-479)* . The court also suggested that a newsperson who brings an action or cross complaint waives his or her qualified privilege against disclosure of confidential news sources when these sources have information that goes to the heart of the defense (*168 Cal. App. 3d 468, 479)* . The court thus held that the trial court, in dismissing the cross complaint, properly determined that the qualified privilege did not apply (*168 Cal. App. 3d 468, 479-480)* .

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8-81 California Points & Authorities § 81.280

§ 81.280 Supporting Motion to Compel Discovery--Discovery of Marital Communication [Evid. Code § 980]

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in support of a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.31, Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11), as well as with points and authorities generally refuting a claim of privilege (see e.g., § 81.10).*]

THE CONFIDENTIAL MARITAL COMMUNICATION PRIVILEGE CANNOT SUCCESSFULLY BE INVOKED TO PREVENT DISCOVERY BECAUSE THE PRIVILEGE _____ [IS INAPPLICABLE TO STATEMENTS MADE WHILE THAT RELATIONSHIP IS BEING ABUSED *or* HAS BEEN WAIVED THROUGH DISCLOSURE].

[*EITHER*]

A. Confidential Marital Communication Privilege Inapplicable to Statements Made While That Relationship Is Being Abused. A marital communication made while one spouse is abusing the relationship on which the confidential marital communication privilege is based, such as during an assault on the other spouse, is not confidential, and is not protected by that privilege (*People v. Johnson (1991) 233 Cal. App. 3d 425, 437-438, 284 Cal. Rptr. 579*).

[*AND/OR*]

B. Privilege Waived by Disclosure. The right of any person to claim the confidential marital communication privilege is waived ifthat communication has been disclosed. The purpose of the privilege--to encourage confidences between the spouses for the benefit of the marital relationship--ceases to operate when confidentiality is lost (*see People v. Johnson (1991) 233 Cal. App. 3d 425, 437-438, 284 Cal. Rptr. 579*).

[2] Comments

[a] Use of Form

This form may be used to support a motion to compel discovery if the opposing party is attempting to assert the confidential marital communications privilege to prevent discovery [*see Evid. Code § 980*]. Alternative Paragraph A is based on the nonexistence of the privilege due to an abuse of the marital relationship on which it is based. Alternative Paragraph B is based on a waiver of the privilege through disclosure.

The form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in support of compelling discovery [*see, e.g., Ch. 83, Discovery: Depositions, § 83.31*; *Ch. 84, Discovery: Interrogatories, § 84.10, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11*], as well as a form refuting a claim of privilege generally [*see, e.g., § 81.10*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Confidential Marital Communication Privilege Inapplicable to Statements Made While That Relationship Is Being Abused

In ***People v. Johnson*** *(1991) 233 Cal. App. 3d 425, 284 Cal. Rptr. 579* , defendant was charged with the murder of a woman. At the preliminary hearing, defendant's wife testified about an incident in which defendant severely beat her, during which he told her that what had happened to the murder victim would happen to her. The defense did not object to those statements because at the time of the preliminary hearing, defendant-husband was also charged with the attempted murder of his wife. Those charges were later dismissed, and the defense attempted to prevent the wife from testifying at the murder trial, claiming the confidential marital communication privilege. The trial court permitted the testimony, and defendant was convicted. Defendant appealed.

The court of appeal affirmed. The court explained that the statements had never been confidential because they were made while defendant was battering his wife, thereby abusing the marital relationship on which the confidential marital communication privilege is based. The policy underlying the privilege is to preserve the trust that exists between marital partners. This objective would be ill-served by regarding as privileged threats made by one spouse while assaulting the other spouse (*233 Cal. App. 3d 425, 438)* .

[b] Privilege Waived by Disclosure

The facts and procedural background of ***People v. Johnson*** *(1991) 233 Cal. App. 3d 425, 284 Cal. Rptr. 579* are discussed in [a], *above*. In *Johnson*, the court of appeal upheld the admission of the wife's statements. It reasoned that once they were disclosed at the preliminary hearing, the statements lost their confidential character. Moreover, the reason for the privilege--to encourage confidences between the spouses for the benefit of the marital relationship--ceased to operate when confidentiality was lost. The court also cited *Evid. Code § 912(a)*, which provides that consent to disclosure is manifested by conduct on the part of the holder of the privilege that indicates consent. Such conduct includes the failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege. Any attempt by defendant to assert the marital communications privilege at the preliminary hearing would have been unsuccessful anyway because the privilege does not exist in a criminal proceeding in which one spouse is charged with committing a crime against the other spouse. At the time of the preliminary hearing, defendant had been charged with the attempted murder of his wife (*233 Cal. App. 3d 425, 437)* .

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[Reserved]

§§ 81.281[Reserved]

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8-81 California Points & Authorities § 81.290

§ 81.290 Opposing Motion to Compel Discovery--Married Spouse's Privilege Not to Be Called as Witness Against Spouse [Evid. Code § 971]

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30), as well as with points and authorities relating to resisting discovery on the ground of privilege generally (see, e.g., § 81.20).*]

EXCEPT AS OTHERWISE PROVIDED BY STATUTE AND UNLESS A WAIVER HAS OCCURRED, A MARRIED PERSON WHOSE SPOUSE IS A PARTY TO A PROCEEDING HAS A PRIVILEGE NOT BE CALLED AS A WITNESS BY AN ADVERSE PARTY TO THAT PROCEEDING.

Spouse's Privilege Not to Be Deposed by Party Who Is Adverse to Other Spouse. Except as otherwise provided by statute and unless a waiver has occurred, a married person whose spouse is a party to a proceeding has a privilege to refuse to be deposed by a party adverse to his or her spouse (*Evid. Code § 971*; *Jurcoane v. Superior Court (2001) 93 Cal. App. 4th 886, 889, 113 Cal. Rptr. 2d 483* ; *Duggan v. Superior Court (1981) 127 Cal. App. 3d 267, 272, 179 Cal. Rptr. 410* ; *see Evid. Code § 970*).

[2] Comments

[a] Use of Form

This form is for use in opposing a motion to compel discovery. It may be used by a married person whose spouse is a party to a proceeding to object to being deposed by a party adverse to his or her spouse. There are, however, statutory limitations on the use of the privilege. For example, the privilege is not available when the spouse claiming the privilege is opposing the other spouse in the action, or when the action was brought or defended for the immediate benefit of the spouse attempting to claim the privilege [*see Evid. Code §§ 972, 973*].

The form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in opposition to a motion to compel [*see, e.g., Ch. 83, Discovery: Depositions, § 83.45*; *Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30*], as well as a form resisting discovery on the ground of privilege generally [*see, e.g., § 81.20*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[c] Refusal to Testify Against One's Spouse

The privilege to refuse to testify against one's spouse is found in *Evid. Code § 970*. This privilege may be asserted in any action when a spouse is called as a witness but does not wish to testify against his or her spouse. The privileges of *Evid. Code §§ 970* and *971* can only be asserted by acurrent spouse [*People v. Dorsey (1975) 46 Cal. App. 3d 706, 120 Cal. Rptr. 508]* . However, the marital testimonial privilege contains no limitation requiring that a viable marital relationship exist (*see Evid. Code § 972* (exceptions to privilege)). Thus, the bright line of divorce is necessary to terminate the privilege.

The marital testimonial privilege of *Evid. Code §§ 970* and *971* should be distinguished from the confidential marital communication privilege of *Evid. Code § 980*, which enables a spouse to prevent disclosure of a confidential marital communication even after the marriage has been terminated. For a form opposing discovery based on *Evid. Code § 980*, see *§ 81.291*.

[3] Discussion of Authorities

[a] Spouse's Privilege Not to Be Deposed by Party Who Is Adverse to Other Spouse

In ***Jurcoane v. Superior Court*** *(2001) 93 Cal. App. 4th 886, 113 Cal. Rptr. 2d 483* , petitioner wife filed for a writ of prohibition to prevent the court from compelling her to testify against her husband. The trial court overruled petitioner's marital testimonial privilege claim (*Evid. Code, §§ 970-971*), holding that the privilege does not apply when a viable marital relationship no longer exists. Facts were undisputed that petitioner had had essentially no contact with her husband for 17 years, after he fled California to avoid prosecution for a double murder.

Finding the statutory scheme facially clear, the court of appeal held that the marital testimonial privilege contained express statutory exceptions (*see Evid. Code § 972*), which did not include whether the marital relationship was intact when one spouse asserted the privilege. The court also found that any additional exception could be created only by the legislature and not by judicial interpretation of the Evidence Code (*93 Cal. App. 4th 886, 889)* . The appellate court rejected the trial court's reliance on federal cases. Federal courts, interpreting federal rules, are expressly permitted to engage in common-law development of privileges and exceptions. California's statutory scheme, however, does not permit this approach, regardless of the strength of the government's policy argument in favor of such an exception, or the merits of the federal scheme. Moreover, California cases have consistently rejected attempts to judicially change a privilege or its exceptions, when the statutory term is clear on its face or has been defined by statute (*see, e.g., Wells Fargo Bank v. Superior Court (2000) 22 Cal. 4th 201, 206, 91 Cal. Rptr. 2d 716, 990 P.2d 591* , discussed in *§ 81.87[3][a]*) (*93 Cal. App. 4th 886, 897)* . Accordingly, the court of appeal upheld the claim of privilege, even though petitioner had not seen her husband in the 17 years since the murders with which he was charged,and her assertion of the privilege might deprive the government of crucial evidence in a double murder case (*93 Cal. App. 4th 886, 900)* .

Duggan v. Superior Court *(1981) 127 Cal. App. 3d 267, 179 Cal. Rptr. 410* was an action for dissolution of a partnership and an accounting. After defendant had obtained an order compelling the deposition of plaintiff's spouse, plaintiff sought a writ of prohibition to prevent the deposition. The court of appeal granted the writ, holding that the deposition could not be compelled in the face of the spousal privileges found in the Evidence Code. The court also

rejected the argument of defendant that since plaintiff's action, if successful, would increase the value of the community estate, plaintiff's spouse was an immediate beneficiary of the action and thus within the exception to the rule of spousal immunity found in *Evid. Code § 973(b)* (*127 Cal. App. 3d 267, 272)* .

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8-81 California Points & Authorities § 81.291

§ 81.291 Opposing Motion to Compel Discovery--Confidential Marital Communication Privilege [Evid. Code § 980]

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30), as well as with points and authorities relating to resisting discovery on the ground of privilege generally (see, e.g., § 81.20).*]

THE INFORMATION SOUGHT IS NOT SUBJECT TO DISCOVERY BECAUSE THE PERSON FROM WHOM IT IS SOUGHT HAS A MARITAL COMMUNICATIONS PRIVILEGE IN THAT THE COMMUNICATION WAS MADE IN CONFIDENCE TO HIS/HER SPOUSE WHILE THEY WERE HUSBAND AND WIFE.

A. Privilege Against Disclosure of Confidential Marital Communication. A spouse, whether or not a party, has a privilege during the marital relationship and afterwards to refuse to disclose, and to prevent another from disclosing, a communication if he or she claims the privilege and the communication was made in confidence between the couple while they were husband and wife (*Evid. Code § 980*).

[*Optional*] **B. Marital Privilege Is Not Restricted to Oral Communications.** The marital privilege extends to written as well as oralcommunications, and includes videotapes (*Rubio v. Superior Court (1988) 202 Cal. App. 3d 1343, 1347-1348, 249 Cal. Rptr. 419* ; *see Evid. Code § 250*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion to compel discovery by a party or person resisting discovery on the ground of the marital communication privilege of *Evid. Code § 980*. The ground for opposition is that the material sought is part of a confidential communication made to a spouse or former spouse during the course of their marriage.

While the confidential communication must have been made during the marriage relationship, the privilege may be asserted after the marriage has terminated [*see Evid. Code § 980*].

The form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in opposition to a motion to compel [*see, e.g., Ch. 83, Discovery: Depositions, § 83.45*; *Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30*], as well as a form resisting discovery on the ground of privilege generally [*see, e.g., § 81.20*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[c] Marital Communications

The marital communication privilege is distinct from the privilege to refuse to testify against a spouse provided by *Evid. Code § 970*. For a form opposing discovery based on *Evid. Code § 970*, see *§ 81.290*.

[3] Discussion of Authorities

[a] Marital Privilege Is Not Restricted to Oral Communications

In ***Rubio v. Superior Court*** *(1988) 202 Cal. App. 3d 1343, 249 Cal. Rptr. 419* , defendant was charged with molesting the seven-year-old daughter of his mother's employees. Defendant denied the molestation charges, and claimed the girl made up the story after viewing a videotape of her father and stepmother engaged in sexual acts. The girl's father and stepmotherrefused to turn the videotape over to the police and later moved to quash defendant's subpoena duces tecum to produce the videotape at his preliminary hearing. The magistrate granted their motion. At the preliminary hearing the girl was cross examined about what she saw on the tape. No objection was made to her testimony, although when called as witnesses, the couple asserted the marital privilege and refused to answer any questions concerning the videotape. After defendant was held to answer in superior court he again served the couple with a subpoena to produce the videotape, alleging the necessity of his access to the tape to show that the girl obtained her sexual knowledge and ideas concerning the alleged incident from the tape. The couple again sought to quash the subpoena. Their supporting affidavit established that the tape had been made by them privately in their home when no one else was present, that it was intended to be confidential, and that no one else had been given permission to view it. The trial court quashed the subpoena, concluding the marital privilege controlled. It ordered the couple to retain the tape until the issue of its discoverability was finally resolved by the appellate court. Defendant sought extraordinary writ relief. The court of appeal summarily denied a petition seeking reversal of the order quashing the subpoenas. The Supreme Court granted review, and directed the court of appeal to issue an alternative writ.

The court of appeal issued a writ of mandate directing the trial court to reverse its order quashing the subpoena duces tecum, and ordered that it view the videotape *in camera* to determine whether defendant's right to due process outweighed the couple's constitutional privacy interests and their marital privilege. The court said that *Evid. Code § 980* grants a spouse the privilege, during the marital relationship and afterwards, to refuse to disclose, and to prevent another from disclosing, a communication made between the couple while they were husband and wife, so long as the communication was made in confidence and the spouse asserts the privilege. The marital privilege extends to written as well as oral communications. A videotape is a writing within the meaning of *Evid. Code § 250* (*202 Cal. App. 3d 1343, 1347)* . The court observed that the fact of communicating, as opposed to the substance of the communication, is not privileged. Thus, the fact that sex acts were performed is probably not a privileged communication. Regardless, the videotape of those acts, as a writing, is a communication within the meaning of the privilege. A communication memorialized in ink does not diminish the spouse's intent to communicate confidentially. Neither does the recordation of the communication on videotape. Nor is the video camera a third party observer whose presence renders the communication nonconfidential. The court found that the couple took reasonable steps to preserve the tape's

confidentiality by secreting it in the closet. The daughter's description of what she saw on the tape, as the recitation of an eavesdropper, is not privileged; themarital privilege does not apply to communications in the hands of a third party (*202 Cal. App. 3d 1343, 1348)* .

The court also addressed the right of privacy, concluding that the videotapes invoked the couple's constitutional right of privacy (*202 Cal. App. 3d 1343, 1349)* . The court found that it should intervene pretrial and order *in camera* review of the videotape to determine whether defendant's right to due process outweighs the couple's constitutional right of privacy and their statutory privilege not to disclose confidential marital communications. It concluded there was no way to balance those competing rights without viewing the tape itself (*202 Cal. App. 3d 1343, 1350)* . The court reminded the trial court of its power to issue whatever protective orders are necessary should any further disclosure be compelled to preserve defendant's rights to a fair trial. The trial court might consider the appointment of a medical doctor to review the tape, provide a written report to the parties, and be available to provide expert testimony. That procedure might be sufficient to preserve defendant's due process rights without invading the couple's privacy rights any more than necessary. But any such remedy should be considered only after the trial court has made a preliminary determination, after *in camera* review, that some disclosure is required (*202 Cal. App. 3d 1343, 1350-1351)* .

California Points & Authorities

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PART II. FORMS
H. Miscellaneous Evidence Code Privileges

8-81 California Points & Authorities § 81.292

§ 81.292 Opposing Motion to Compel Discovery--Discovery of Official Information [Evid. Code § 1040(b)(2)]--Discovery of Information in Police Investigative Files Sought in Civil Discovery

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30), as well as with points and authorities relating to resisting discovery on the ground of privilege generally (see, e.g., § 81.20).*]

CONTENTS OF POLICE INVESTIGATIVE FILES SOUGHT IN CIVIL DISCOVERY MUST REMAIN CONFIDENTIAL AS LONG AS THE NEED FOR CONFIDENTIALITY OUTWEIGHS THE BENEFIT OF DISCLOSURE.

A. Evidence in Police Investigative Files Is Confidential. Evidence gathered by the police as part of an ongoing criminal investigation is by its nature confidential, pending the weighing of interestsunder *Evidence Code Section 1040(b)(2)*. There is no need to separately analyze the manner in which each element was obtained for application of the official information privilege (*County of Orange v. Superior Court (2000) 79 Cal. App. 4th 759, 765-766* ; *see Evid. Code § 1040(b)(2)*; *Gov. Code § 6254(f)*).

B. Information in Police Investigative Files Sought in Civil Discovery Remains Confidential When Need for Confidentiality Outweighs Benefit of Disclosure. The official information privilege applies to prohibit disclosure of information in police investigative files sought in civil discovery when the public interest in solving the crime and bringing the perpetrator to justice outweighs the civil litigants interest in obtaining the discovery sought (*County of Orange v. Superior Court (2000) 79 Cal. App. 4th 759, 765)* .

[2] Comments

[a] Use of Form

This form is for use in opposing a motion to compel discovery of police investigative files sought in a civil action on the ground that the information is privileged under the official information privilege of *Evid. Code § 1040(b)(2)*.

The form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in opposition to a motion to compel [*see, e.g., Ch. 83, Discovery: Depositions, § 83.45*; *Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30*], as well as a form resisting discovery on the ground of privilege generally [*see, e.g., § 81.20*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should demonstrate that the moving party has failed to show that the benefits of disclosure outweigh the need for confidentiality required to proceed with the official investigation.

[3] Discussion of Authorities

[a] Evidence in Police Investigative Files Is Confidential

County of Orange v. Superior Court *(2000) 79 Cal. App. 4th 759, 94 Cal. Rptr. 2d 261* involved a challenge to a superior court's order allowing suspects in an ongoing murder investigation to review the contents of the police investigative file through the medium of civil discovery. Suspects(real parties in interest), parents of a murdered child, filed a civil suit for defamation, conversion, spoilation of evidence and various civil rights violations, as a result of their initial detention and questioning by police and their public identification as suspects by police. The real parties in interest argued that much of the information contained in the investigative file, including their own statements, as well as the statements made by other witnesses, was not "acquired in confidence" and thus was not privileged under *Evid. Code § 1040(a)* (*79 Cal. App. 4th 759, 763-764)* . The court, however, found no need to separately analyze the manner in which each element was obtained for application of the official information privilege. Instead, the court concluded that evidence gathered by the police as part of an ongoing criminal investigation is by its nature confidential, pending the weighing of interests under *Evid. Code § 1040(b)(2)* (*79 Cal. App. 4th 759, 765-766)* . In support of its position, the court cited case and statutory law recognizing confidentiality of investigative files (*79 Cal. App. 4th 759, 765-766)* .

[b] Information in Police Investigative Files Sought in Civil Discovery Remains Confidential When Need for Confidentiality Outweighs Benefit of Disclosure

The facts and procedural background of ***County of Orange v. Superior Court*** *(2000) 79 Cal. App. 4th 759, 94 Cal. Rptr. 2d 261* are discussed in [a], *above*. Citing *Shepherd v. Superior Court (1976) 17 Cal. 3d 107, 126, 130 Cal. Rptr. 257, 550 P.2d 161* , discussed in *§ 81.276[3][a]*, the court stated that the weighing procedure entails a separate assessment of the necessity of disclosure in the interests of justice and the necessity for preserving the confidentiality of the information (*79 Cal. App. 4th 759, 765)* . Implicit in each assessment is a consideration of the consequences to the litigant of nondisclosure, and the consequences to the public of disclosure (*79 Cal. App. 4th 759, 765)* . The court found that the public interest in solving a child's homicide and bringing the perpetrator to justice outweighed the murdered child's parents' interest in obtaining the discovery sought in their civil suit for defamation, conversion, spoilation of evidence and various civil rights violations, based on their public identification by police as suspects. Thus, police files in the ongoing criminal investigation into the child's murder were held to be privileged under *Evid. Code § 1040(b)(2)*. The appropriate remedy in this case was for the trial court to stay discovery of the investigative information in the civil action in order to allow the police the necessary time to investigate. However, in the future, the trial court could determine that there has not been enough progress in the investigation to justify continued protection of most of the files (*79 Cal. App. 4th 759, 768-769)* . The court of appeal suggested that the trial court look for guidance from trade secret cases in fashioning a remedy to determine what parts of the investigative file to disclose when the passageof time reversed the balance of competing interests (*79 Cal. App. 4th 759, 769)* .

[4] Additional Authorities

[a] Information in Police Investigative Files Sought in Civil Discovery Remains Confidential When Need for Confidentiality Outweighs Benefit of Disclosure

In *Dixon v. Superior Court (2009) 170 Cal. App. 4th 1271, 88 Cal. Rptr. 3d 847* , petitioner reporter requested the complete coroner and autopsy reports of a murder victim from real party in interest sheriff-coroner under the California Public Records Act (CPRA), *Gov. Code § 6250 et seq.* The sheriff-coroner denied the request, and respondent Superior Court denied the reporter's petition for writ of mandate. The reporter sought writ review, and the court of appeal issued an alternative writ. The reviewing court applied *Gov. Code § 6254(f)*, which exempts from public disclosure investigatory files compiled by any local agency for law enforcement purposes. The court concluded "emphatically" that the office of the coroner is a local agency, that, as part of its local agency duties, compiles investigatory files for law enforcement purposes (*170 Cal. App. 4th 1271, 1276)* . Accordingly, these coroner and autopsy reports that constituted investigations of a suspected homicide death--in which the prospect of criminal law enforcement proceedings was concrete and definite--were public records that were exempt from disclosure under *Gov. Code § 6254(f)* (*170 Cal. App. 4th 1271, 1279)* .

The facts and procedural background of *Michael P. v. Superior Court (2001) 92 Cal. App. 4th 1036, 113 Cal. Rptr. 2d 11* are discussed in *§ 81.276[4][b]*. The court of appeal noted the striking procedural similarity between this case and *County of Orange v. Superior Court (2000) 79 Cal. App. 4th 759, 94 Cal. Rptr. 2d 261* (discussed in [3][a], [b], *above*): both were writ proceedings involving the application of the official information privilege to a murder investigation file which the prime suspects sought to obtain through civil discovery. However, this court declined to follow *County of Orange*, in which police were allowed to maintain the confidentiality of the entire investigative file "for some reasonable period of time" without any particularized judicial review of its contents. This court reasoned that a litigant's interest in prosecuting a civil action for damages, as in *County of Orange*, "pales" in comparison to petitioner father's interest, in this case, in having custody of his child (*92 Cal. App. 4th 1036, 1045-1046)* . Accordingly, the court of appeal concluded that the juvenile court abused its discretion by failing to conduct an in camera review of the requested items before ruling on real parties' motion to quash under *Evid. Code § 1040(b)(2)* (*92 Cal. App. 4th 1036, 1046)* .

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8-81 California Points & Authorities § 81.293

§ 81.293 Opposing Motion to Compel Discovery--Newsperson's Qualified Privilege to Protect News Source Applies

[1] FORM

[*The following may be combined with a general memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30), as well as with points and authorities relating to resisting discovery on the ground of privilege generally (see, e.g., § 81.20).*]

THE INFORMATION SOUGHT IS NOT SUBJECT TO DISCOVERY BECAUSE IT IS PROTECTED BY A NEWSPERSON'S QUALIFIEDPRIVILEGE TO PROTECT THE CONFIDENTIALITY OF A NEWS SOURCE.

A. Newsperson's First-Amendment Privilege to Protect News Source. In a civil action a reporter, editor, or publisher has a qualified privilege to withhold disclosure of the identity of confidential sources and of unpublished information supplied by such sources, based on the broad protections for freedom of the press guaranteed by the *United States Constitution, Amendment I*, and the *California Constitution, Article I, Section 2(a)* (*Mitchell v. Superior Court (1984) 37 Cal. 3d 268, 274, 279, 208 Cal. Rptr. 152, 690 P.2d 625* ; *see O'Grady v. Superior Court (2006) 139 Cal. App. 4th 1423, 44 Cal. Rptr. 3d 72* ; *KSDO v. Superior Court (1982) 136 Cal. App. 3d 375, 384-386, 186 Cal. Rptr. 211*).

B. Availability of Privilege Depends on Balancing of Relevant Factors in Each Case. The availability of the qualified newsperson's privilege in a given case depends on the consideration and weighing of a number of interrelated factors: (1) the nature of the litigation and whether the newsperson is a party; (2) whether the information sought is relevant to the extent that it goes to heart of the plaintiff's claim; (3) whether the party seeking discovery has exhausted all alternative means of obtaining the needed information; (4) the importance of protecting confidentiality under the circumstances; and (5) whether, in a defamation action, the plaintiff has made a prima facie showing that the alleged defamatory statements are false (*Mitchell v. Superior Court (1984) 37 Cal. 3d 268, 279-284, 208 Cal. Rptr. 152, 690 P.2d 625* ; *see O'Grady v. Superior Court (2006) 139 Cal. App. 4th 1423, 44 Cal. Rptr. 3d 72* ; *Anti-Defamation*

League of B'nai B'rith v. Superior Court (1998) 67 Cal. App. 4th 1072, 1080, 79 Cal. Rptr. 2d 597 ; *KSDO v. Superior Court (1982) 136 Cal. App. 3d 375, 385, 186 Cal. Rptr. 211*).

[*Optional*] **C. Privilege Applies in Libel Action Against Newsperson When Plaintiff Fails to Show That Information Sought Goes to Heart of Claim, That There Are No Alternative Sources, and That Alleged Defamatory Statements Are False.** In a defamation action against a newsperson, the qualified privilege should apply to prevent disclosure of confidential sources, or of unpublished information supplied by those sources, when the plaintiff's request for information is overly broad and is not limited to information that goes to the heart of the plaintiff's claim, when the plaintiff has made no showing that alternative means of obtaining the information have been exhausted, and when the plaintiff has made no prima facie showing that the alleged defamatory statements are false (*Mitchell v. Superior Court (1984) 37 Cal. 3d 268, 282-284, 208 Cal. Rptr. 152, 690 P.2d 625* ; *see KSDO v. Superior Court (1982) 136 Cal. App. 3d 375, 385, 186 Cal. Rptr. 211*).

[2] Comments

[a] Use of Form

This form is for use by a newsperson party in opposing a motion to compel discovery of his or her notes concerning a confidential source on the ground that the material sought is privileged under a newsperson's qualified right, guaranteed by *U.S. Const., amend. I*, and *Cal. Const., art. I, § 2(a)*, to protect the confidentiality of a news source.

The form does not provide a complete memorandum, but is designed to be combined with a general form of memorandum in opposition to a motion to compel [*see, e.g., Ch. 83, Discovery: Depositions, § 83.45*; *Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30*], as well as a form resisting discovery on the ground of privilege generally [*see, e.g., § 81.20*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should demonstrate that the moving party has failed to show that the information sought is unavailable from any other source or that the materials desired actually go to the heart of the claim.

[c] Newsperson's First-Amendment Privilege Distinguished From Newsperson's Immunity From Contempt

The constitutional provisions protecting the freedom of the press provide a qualified privilege to withhold disclosure of the identity of confidential sources or unpublished information [*U.S. Const., amend. I*; *Cal. Const., art. I, § 2(a)*]. This qualified privilege arising under constitutional protections of freedom of the press is distinct from the newsperson's shield of immunity from contempt for refusing to disclose either published information or the source of information procured for publication [*see Evid. Code § 1070*]. The media shield law provides an almost absolute immunity against contempt which cannot be overcome even "by a showing of need for unpublished information" [*New York Times Co. v. Superior Court (1990) 51 Cal. 3d 453, 461, 273 Cal. Rptr. 98, 796 P.2d 811]* . It is, however, just that, an immunity against contempt sanctions, rather than the more expansive protection afforded by an evidentiary privilege against disclosurethrough discovery or testimony [*In re Willon (1996) 47 Cal. App. 4th 1080, 1091, 55 Cal. Rptr. 2d 245]* . Thus, the shield law does not protect against such non-contempt penalties as monetary and issue-preclusion sanctions [*New York Times Co. v. Superior Court (1990) 51 Cal. 3d 453, 462, 273 Cal. Rptr. 98, 796 P.2d 811]* . For points and authorities relating to the media shield law, see *§ 81.294*.

[3] Discussion of Authorities

[a] Newsperson's Qualified Privilege to Protect News Source

Mitchell v. Superior Court *(1984) 37 Cal. 3d 268, 208 Cal. Rptr. 152, 690 P.2d 625* involved a libel action by a church and its founder against a magazine and several individual newspersons, based on an allegedly defamatory article that implied that plaintiffs enriched themselves by soliciting funds on the basis of fraudulent claims concerning their success in drug rehabilitation work. Plaintiffs requested extensive discovery of the source material of two defendant newspersons, and these newspersons objected on the ground that the information sought was privileged under federal and state constitutional provisions protecting freedom of the press. The trial court held that there was no such privilege and ordered defendants to comply with plaintiffs' requests. Defendants then sought a writ of prohibition to bar enforcement of the trial court's order.

The Supreme Court granted the writ, holding that the trial court erred in ruling that there was no newsperson's privilege in California (*37 Cal. 3d 268, 283-284)* . The Court, in reviewing pertinent federal decisions, noted that there were competing fundamental values involved. On one hand, the broad protections for freedom of the press guaranteed by *U.S. Const., amend. I*, and *Cal. Const., art. I, § 2(a)*, argued in favor of a newsperson's privilege against disclosure of sources because news vital to the public interest could frequently be gathered only from sources that would not come forward in the absence of some guarantee of confidentiality. On the other hand, other values argued in favor of disclosure, such as an individual's interest in his or her reputation, the court's interest in discovering the truth, and the duty of witnesses to testify (*37 Cal. 3d 268, 274-275)* . The Court therefore concluded that in a civil action, the constitutional provisions protecting freedom of the press gave a reporter, editor, or publisher a qualified privilege to withhold disclosure of the identity of confidential sources and of unpublished information supplied by those sources (*37 Cal. 3d 268, 279)* .

In ***O'Grady v. Superior Court*** *(2006) 139 Cal. App. 4th 1423, 1460-1466, 44 Cal. Rptr. 3d 72* , real party in interest, Apple Computer, Inc. (Apple) brought an action alleging that "persons unknown" caused the wrongful publication on the World Wide Web of Apple's secret plans to release a device that would facilitate the creation of digital live sound recordings on Apple computers. The trial court granted Apple authority to issue civil subpoenas to the publishers of the Web sites where the information appeared and to the email service provider for one of the publishers. The publishers moved for a protective order. The trial court denied the motion on the ground that the publishers had involved themselves in the unlawful misappropriation of a trade secret. The publishers filed a writ of mandate to prevent enforcement of the discovery order.

The court of appeal reversed. It held, in part, that discovery of confidential sources was barred by the conditional constitutional privilege against compulsory disclosure of confidential sources. The court determined, first, that the publishers of online news magazines were reporters, editors, or publishers for purposes of this privilege, finding "no sustainable basis to distinguish petitioners from the reporters, editors, and publishers who provide news to the public through traditional print and broadcast media" (*139 Cal. App. 4th 1423, 1467)* . The court then applied the balancing process outlined in *Mitchell v. Superior Court (1984) 37 Cal. 3d 268, 208 Cal. Rptr. 152, 690 P.2d 625* (*see* [b], *below*) to conclude that discovery of the publishers' sources was barred by newsreporter's qualified *first amendment* privilege, primarily because Apple failed to show that it had exhausted alternative avenues of investigation (*139 Cal. App. 4th 1423, 1479)* . For more detailed discussion of the court's application of the *Mitchell* factors in this case, see [b], *below*. For discussion of the application of California reporter's shield privilege (*Cal. Const., art. I, § 2(b)* and *Evid. Code § 1070*), refer to § 81.294[3][d].

KSDO v. Superior Court *(1982) 136 Cal. App. 3d 375, 186 Cal. Rptr. 211* involved an action for libel by members of a city police department against a radio station, one of its reporters, and a newspaper publisher, arising from a news story broadcast by the station and repeated by thenewspaper that implicated plaintiffs' involvement in a drug smuggling operation. During a deposition conducted by plaintiffs, defendant reporter revealed the sources of his information that had led to the news story. Plaintiffs then brought a motion to produce documents seeking the reporter's notes and memoranda of conversations between the reporter and certain named persons. The trial court granted the motion, and defendants filed a petition for a writ of mandate or prohibition to prevent enforcement of the discovery order.

The court of appeal granted a writ of mandate directing the trial court to annul its discovery order. In framing its holding, the court held that a newsperson has a qualified privilege to confidentiality of a news source, deriving from the *First Amendment to the United States Constitution*, which reflects the premise that unless there is a constitutionally protected right to gather news, including the use of confidential sources, the free flow of information to the public would be inhibited (*136 Cal. App. 3d 375, 384)* .

[b] Availability of Privilege Depends on Balancing of Relevant Factors in Each Case

The facts and procedural background of ***Mitchell v. Superior Court*** *(1984) 37 Cal. 3d 268, 208 Cal. Rptr. 152, 690 P.2d 625* are discussed in [a], *above*. The Supreme Court, in holding that California courts should recognize a newsperson's qualified privilege against disclosure of confidential sources, held that the scope of the privilege in any given case depended on consideration and weighing of the following interrelated factors (*37 Cal. 3d 268, 279)* :

(1) The nature of the litigation and whether the newsperson is a party. For example, disclosure is, in general, appropriate in a libel action when a newsperson is a party, except when other factors weigh against disclosure (*37 Cal. 3d 268, 279-280)* .

(2) The relevance of the information sought to the plaintiff's cause of action. Mere relevance is insufficient to compel discovery. Discovery should be denied unless the information goes to the heart of a plaintiff's claim (*37 Cal. 3d 268, 280)* .

(3) The fact that discovery should be denied unless the plaintiff has exhausted all alternative means of obtaining the needed information. Compulsory disclosure is a last resort, permissible only when the party seeking disclosure has no other practical means of obtaining the information (*37 Cal. 3d 268, 282)* .

(4) The importance of protecting confidentiality in the case at bench. Thus, when the information sought relates to matters of great public importance and the risk of harm to the source is a substantial one, the court may refuse to require disclosure even though the plaintiff has no other way of obtaining essential information (*37 Cal. 3d 268, 282-283)* .

(5) In a defamation action, the fact that the court may require the plaintiff to make a prima facie showing that the alleged defamatory statements are false before requiring disclosure. A showing of falsity is not a prerequisite to discovery, but it may be essential to tip the balance in favor of discovery (*37 Cal. 3d 268, 283)* .

The factual and procedural background of ***O'Grady v. Superior Court*** *(2006) 139 Cal. App. 4th 1423, 1460-1466, 44 Cal. Rptr. 3d 72* is set out in [3][a], *above*. In this case alleging misappropriation of trade secrets, the court of appeal applied the five factors outlined in *Mitchell v. Superior Court*, discussed above, to the circumstances shown by respondent computer company (Apple) to determine whether the qualified newsreporter's privilege was available to petitioner publishers of online news magazines.

The first factor noted in *Mitchell*--the "nature of the litigation and whether the reporter is a party"--favored nondisclosure, because this was not a libel action and petitioner publishers were not defendants (*139 Cal. App. 4th 1423, 1468-1470)* . The second factor--the "relevance of the information sought to plaintiff's cause of action"--favored disclosure. When a plaintiff alleges a misappropriation of its trade secrets, the identity of the misappropriator is crucial to the plaintiff's cause of action (*139 Cal. App. 4th 1423, 1470-1471)* . The third *Mitchell* factor--the extent to which the party seeking disclosure of confidential sources has "exhausted all alternative sources of obtaining the needed information"--weighed "decisively" against disclosure, based on the inadequacy of Apple's showing that it had exhausted alternative avenues of investigation (*139 Cal. App. 4th 1423, 1471-1475)* . Although the third factor was dispositive, the court commented on the remaining two factors. The fourth consideration--the "importance of protecting

confidentiality in the case at hand"--favored disclosure, because, in this case, the "statutory quasi-property right [in trade secrets] ... must give way, not the deeply rooted constitutional right to share and acquire information" (*139 Cal. App. 4th 1423, 1475-1479)* . The fifth and final consideration--whether the plaintiff had made a prima facie case that the challenged statements were false--favored disclosure, because evidence supported an inference of wrongdoing on someone's part. On balance, however, the factors favoring disclosure did not outweigh the countervailing factors favoring application of the privilege (*139 Cal. App. 4th 1423, 1479-1480)* .

One court of appeal has articulated an additional factor that may apply in determining whether the qualified journalist's privilege is available, that is: the extent to which a defendant obtained and used information for a journalistic purpose. In ***Anti-Defamation League of B'nai B'rith v. Superior Court*** *(1998) 67 Cal. App. 4th 1072, 79 Cal. Rptr. 2d 597* , plaintiffs were 17 political activists opposed to certain policies of the governments of South Africa and Israel. They sued defendant Anti-Defamation League of B'nai B'rith (ADL) under *Civ. Code § 1798.53*, which provides a statutory cause of action for invasion of privacy resulting from an intentional disclosure of personal information, not otherwise public, obtained from a state agency. Their claims alleged that ADL had secretly obtained from San Francisco police officers information relating to plaintiffs that was personal and not otherwise public, and that ADL had privately disclosed such information to the governments of South Africa and Israel (*67 Cal. App. 4th 1072, 1077-1078)* .

Plaintiffs sought production of documents. ADL moved for a protective order on the ground that it is a journalist protected by the qualified journalist's privilege set forth in *Mitchell v. Superior Court (1984) 37 Cal. 3d 268, 208 Cal. Rptr. 152, 690 P.2d 625 (1079)* , discussed *above*. The trial court ruled that ADL qualified as a journalist based on its publication of magazines and newsletters, and granted the protective order as against the plaintiffs' request as then phrased. The trial court stayed subsequent attempts without prejudice until plaintiffs could establish entitlement to discovery under *Mitchell* (*67 Cal. App. 4th 1072, 1080)* . Later, plaintiffs' requested reconsideration of their request for discovery, and the trial court ruled that they had met the *Mitchell* criteria and were entitled to discovery of specified items (*67 Cal. App. 4th 1072, 1082-1083)* . Defendants petitioned for review, arguing that discovery from ADL could be compelled because it cannot, consistent with free press guarantees, be liable under *Civ. Code § 1798.53*, and alternatively because plaintiffs did not satisfy the requirements of *Mitchell* (*67 Cal. App. 4th 1072, 1083)* .

The court of appeal noted that ADL was indeed a journalist entitled to claim the qualified privilege, since it published newsletters and a magazine. Defendant also performed other nonjournalistic functions, however, in its general activities as a civil rights organization. The court concluded that the qualified privilege applied, but defendant would be entitled to *First Amendment* protection from liability under *Civil Code § 1798.53 only* to the extent that defendant obtained, used, and disseminated information for a journalistic purpose (*67 Cal. App. 4th 1072, 1091-1092)* . Thus,plaintiffs were entitled to limited discovery to determine whether defendant had in fact obtained personal and nonpublic information and whether it had in fact disseminated such information for a nonjournalistic purpose, in private disclosures to foreign governments or other not acting as ADL journalists (*67 Cal. App. 4th 1072, 1098)* .

The facts and procedural background of ***KSDO v. Superior Court*** *(1982) 136 Cal. App. 3d 375, 186 Cal. Rptr. 211* are discussed in [a], *above*. In *KSDO*, the court of appeal provided a general discussion of the extent and scope of the newsperson's qualified *First Amendment* privilege. The court stated that in facing the question of whether to compel disclosure of the newsperson's confidential source, a court must make a factual analysis to determine (1) the nature of the proceeding, (2) the status of the newsperson as a party or nonparty, (3) alternative sources of information, and (4) the relationship of the information sought to be discovered to the heart of the claim involved in the action (*136 Cal. App. 3d 375, 385)* .

[c] Privilege Applies in Libel Action Against Newsperson When Plaintiff Fails to Show That Information Sought Goes to Heart of Claim, That There Are No Alternative Sources, and That Alleged Defamatory Statements Are False

The facts and procedural background of ***Mitchell v. Superior Court*** *(1984) 37 Cal. 3d 268, 208 Cal. Rptr. 152, 690*

P.2d 625 are discussed in [a], *above*. The factors weighed by the Supreme Court to determine whether the newsperson's qualified privilege should apply to prevent discovery in the case at issue are discussed in [b], *above*. After balancing these factors, the Court concluded that the privilege applied to prevent discovery to the extent ordered by the trial court (*37 Cal. 3d 268, 284)* . Despite the fact that discovery was generally appropriate in a libel action in which a newsperson was a defendant, several other factors weighed against disclosure. The Court found that the discovery order was overly broad and was not limited to the disclosure of source material that related to the alleged libelous statements that went to the heart of plaintiff's claim (*37 Cal. 3d 268, 282, 284)* . Moreover, plaintiffs had not shown that alternative sources had been exhausted, nor had they made a prima facie showing of the falsity of the alleged defamatory statements (*37 Cal. 3d 268, 284)* .

The facts and procedural background of ***KSDO v. Superior Court*** *(1982) 136 Cal. App. 3d 375, 186 Cal. Rptr. 211* are discussed in [a], *above*. The court of appeal stated that when the newsperson is a party to a libel case and the truth or falsity of the material published is an essential issue, the reliability of the source or accuracy of the reporter's notes is called into focus. It observed that production of a newsperson's notes can be essential to the successful prosecution of the action, particularly when the plaintiff is a public figure who must prove malice (*136 Cal. App. 3d 375, 385-386* ,citing Garland v. Torre (2d Cir. 1958) *259 F.2d 545* (applying heart-of-claim test), and *Branzburg v. Hayes (1972) 408 U.S. 665, 686, 92 S. Ct. 2646, 33 L. Ed. 2d 626* (leaving *Garland* rule intact)). The court stated that, even though the newsperson's status as a party to a civil libel case would ordinarily tip scales in favor of disclosure, since defendant reporter had already revealed the identity of his source on deposition, thereby leaving plaintiff free to test the reliability of the source without the necessity of disclosure of his notes, plaintiff had not shown that the information could not be obtained from other sources or that the materials sought actually went to the heart of the claim (*136 Cal. App. 3d 375, 386)* .

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California Points & Authorities

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 81 DISCOVERY: PRIVILEGES AND OTHER DISCOVERY LIMITATIONS
PART II. FORMS
H. Miscellaneous Evidence Code Privileges

8-81 California Points & Authorities § 81.294

§ 81.294 Opposing Motion to Compel Discovery--Unpublished Information or Source of Nonparty Newsperson Protected From Discovery by Contempt Shield Law [Cal. Const., art. I, § 2(b); Evid. Code § 1070]

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30).*]

_____ [*Name of newsperson*] CANNOT BE HELD IN CONTEMPT FOR FAILING TO REVEAL INFORMATION SOUGHT IN DISCOVERY BECAUSE HE/SHE/IT IS A NONPARTY NEWSPERSON AND THE INFORMATION SOUGHT IS WITHIN THE SCOPE OF THE NEWSPERSON SHIELD.

A. Unpublished Information or Source of Nonparty Newsperson Is Shielded. A publisher, editor, reporter, or other person connected with or employed on a newspaper, magazine, or other periodical publication, or by a press association or a wire service, or any other person who has been so connected or employed, cannot be adjudged in contempt by a judicial, legislative, or administrative body, or any other body having the power to issue subpoenas, for refusing to disclose, in any proceeding as defined in *Evid. Code § 901*, the source of any information procured while so connected or employed for publication in a newspaper, magazine, or other periodical publication, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving, orprocessing of information for communication to the public (*Cal. Const., art. I, § 2(b)*; *Evid. Code § 1070*).

[*Optional*] **B. Nonconfidential Information Is Within Scope of Shield.** The term "unpublished information" in the provision for a newsperson's shield from contempt, which is created by *California Constitution, Article I, Section 2(b)*, and *Evidence Code Section 1070*, includes information not obtained by a newsperson in confidence. Thus, it includes a newsperson's nonconfidential, eyewitness observations of an occurrence in a public place, as well as a newspaper's unpublished photographs of an automobile accident on a public highway (*see Delaney v. Superior Court (1990) 50 Cal. 3d 785, 797-799, 268 Cal. Rptr. 753, 789 P.2d 934* ; *New York Times Co. v. Superior Court (1990) 51 Cal. 3d 453, 461, 273 Cal. Rptr. 98, 796 P.2d 811*).

[*Optional*] **C. Shield Encompasses Source Materials Merely Confirming or Amplifying Published Information.** The protection set out in *California Constitution, Article I, Section 2(b),* and *Evidence Code Section 1070* extends to materials that could confirm or amplify published information (*Playboy Enterprises, Inc. v. Superior Court (1984) 154 Cal. App. 3d 14, 23, 201 Cal. Rptr. 207*).

[*Optional*] **D. Criminal Defendant Seeking Disclosure of Unpublished Information Must Show Disclosure Will Materially Assist His or Her Defense.** Once the nonparty newsperson meets the requirements of the shield law, any criminal defendant who seeks to compel disclosure on the ground that nondisclosure would violate the defendant's federal constitutional right to a fair trial must make a threshold showing that it is reasonably possible that unpublished information sought is necessary to his or her defense. The defendant's showing need not be detailed or specific but must rest on more than mere speculation (*People v. Sanchez (1995) 12 Cal. 4th 1, 53, 47 Cal. Rptr. 2d 843, 906 P.2d 1129 , overruled in part, 45 Cal. 4th 390 (2009)* ; *People v. Cooper (1991) 53 Cal. 3d 771, 820, 809 P.2d 865*).

[*Optional*] **E. Shield is Available to Online Journalists.** The phrase "newspaper, magazine, or other periodical publication" in *California Constitution, Article I, Section 2(b)* applies to online news magazines. Therefore, online journalists are "reporters," "editors," or "publishers" entitled to assert the protections of the shield law (*O'Grady v. Superior Court (2006) 139 Cal. App. 4th 1423, 1460-1466, 44 Cal. Rptr. 3d 72*).

[2] Comments

[a] Use of Form

This form is for use in opposing a contempt sanction when the newsperson is threatened with being held in contempt for failing to reveal information encompassed by the immunity provided by the newsperson's shield. With appropriate modification, the form may be used to oppose a motion to compel discovery of a newsperson or news organization's notes or other materials that are related to material published in a newspaper or periodical when the newsperson or organization is not a party to the underlying proceedings, on the theory that any order compelling discovery is inappropriate in that the newsperson cannot be held in contempt for failure to comply with discovery, and there would be no purpose served by such a discovery order. For discussion of a newsperson's qualified privilege that may apply to protect a confidential news source when the newsperson is a party, see *§ 81.293*. This form may be combined with a general form in opposition to a motion to compel discovery.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should show that the newsperson or organization against which the order is sought is not a party to the underlying litigation, and that the material sought is related to information that was published in a newspaper or periodical.

[c] Newsperson's Shield Provides Immunity From Contempt

A reporter or other person connected with the news media is immune from contempt for refusing to disclose either unpublished information or the source of information procured for publication [*Cal. Const., art. I, § 2(b)*; *Evid. Code § 1070*]. Commonly referred to as the newsperson's shield, the protection thereby created is only an immunity from contempt; no privilege is created [*see New York Times Co. v. Superior Court (1990) 51 Cal. 3d 453, 458, 273 Cal. Rptr. 98, 796 P.2d 811]* . Even when the shield is applicable, it is narrowly construed and protects the newsperson only from the imposition of a contempt sanction. Other sanctions may be imposed against the newsperson [*New York Times Co. v. Superior Court (1990) 51 Cal. 3d 453, 458, 273 Cal. Rptr. 98, 796 P.2d 811* (shield does not preclude monetary sanction under *Code Civ. Proc. § 1992*, which provides, in part, that a witness who fails to obey a subpoena or a court order also forfeits to the aggrieved party the sum of $500, and all damages that that party sustains by reason of the failure of the witness to attend, decided under prior law)].

When the newsperson is a party, the newsperson's qualified *First Amendment* privilege to gather news may become an issue, in which case the court may apply a balancing test to determine whether that newsperson may be compelled to disclose a confidential news source [*see Playboy Enterprises v. Superior Court (1984) 154 Cal. App. 3d 14, 27, 201 Cal. Rptr. 207* ; *KSDO v. Superior Court (1982) 136 Cal. App. 3d 375, 384, 186 Cal. Rptr. 211* ; *see § 81.293*].

[d] Additional Statutory Protections for Journalists Invoking Shield Law

Additional statutory protections exist with respect to the contempt immunity shield as set out in *Cal. Const., art. I, § 2(b)*. No testimony or other evidence given by a journalist under subpoena in a civil or criminal proceeding may be construed as a waiver of the immunity rights provided by *Cal. Const., art. I, § 2(b)* [*Code Civ. Proc. § 1986.1(a)*; *see Code Civ. Proc. § 1986.1(d)* ("journalist" means persons specified in *Cal. Const., art. I, § 2(b)*]. In addition, except in exigent circumstances, a journalist who is subpoenaed in a civil or criminal proceeding must be given at least five days' notice that his or her appearance will be required [*Code Civ. Proc. § 1986.1(b)*]. If a trial court holds a journalist in contempt of court in a criminal proceeding despite the constitutional provision, the court must set forth findings, either in writing or on the record, stating, at a minimum, why the information will be of material assistance to the party seeking the evidence, and why alternate sources of the information are not sufficient to satisfy the defendant's right to a fair trial under the *Sixth Amendment* [*Code Civ. Proc. § 1986.1(c)*].

Note that, when a journalist testifies for the defense in a criminal proceeding, but then invokes the shield law to resist proper cross examination by the prosecution, that journalist's direct testimony may, on motion by the prosecution, be barred or stricken, even if it did not consist of "unpublished information" protected by the shield law, unless the criminal defendant can show that the court's refusal to admit the direct testimony would deprive him or her of the federal constitutional right to a fair trial and that, in the circumstances, defendant's right transcends that of the witness under the shield law [*Fost v. Superior Court (2000) 80 Cal. App. 4th 724, 733-734, 95 Cal. Rptr. 2d 620]* .

[e] Relief Inappropriate Until Newsperson Held in Contempt

Because the shield law provides only an immunity from contempt, there is nothing from which to seek relief until a newsperson has been adjudged in contempt, thus a newsperson's petition for extraordinary relief is generally premature until a judgment of contempt has been entered [*cf.* Optional Paragraph D]. To avoid confinement under a judgment of contempt that may subsequently be set aside, a trial court should stay its judgment of contempt to allow the contemner newsperson sufficient time in which to seek writ relief if it believes there is any colorable argument the newsperson can make against the contempt adjudication. If the trial court nevertheless declines to issue a stay, a reviewing court should do so pending its decision whether to issue an extraordinary writ [*New York Times Co. v. Superior Court (1990) 51 Cal. 3d 453, 459-461, 273 Cal. Rptr. 98, 796 P.2d 811]* .

[3] Discussion of Authorities

[a] Nonconfidential Information Is Within Scope of Shield

In ***Delaney v. Superior Court*** *(1990) 50 Cal. 3d 785, 268 Cal. Rptr. 753, 789 P.2d 934* , two newspaper reporters accompanying two police officers on patrol observed their encounter with defendant, an individual later charged with illegal possession of brass knuckles. When asking him for his identification, the officers discovered the brass knuckles in defendant's jacket pocket. A few days later, the newspaper published a story about the police department and included information regarding the police contact with defendant, but did not refer to whether he had consented to the search of his jacket. In support of his motion to suppress evidence of the brass knuckles, based on an illegal search due to lack of consent, defendant subpoenaed the reporters to testify at the hearing. The reporters' motions to quash the subpoenas on the grounds their eyewitness observations of the public search and seizure were unpublished information protected by the newsperson shield were denied. At the hearing, the reporters refused to answer any questions concerning whether defendant had consented to the search. The municipal court cited the reporters for contempt. The

reporters filed petitions for writ of habeas corpus with the superior court, which granted their petitions. Defendant and The People filed a joint petition in the court of appeal, seeking to vacate the orders of the superior court. The court of appeal ordered the superior court to vacate its orders.

The Supreme Court affirmed the judgment of the court of appeal and directed it to issue a peremptory writ of mandate compelling the superior court to vacate its orders. Before discussing the scope of the meaning of "unpublished information," the Court emphasized the importance of the fact that the reporters were acting as newspersons and were directly engaged in the process of gathering, receiving, or processing information for communication to the public, and were thereby within the scope of the shield law when they made the observations in question (*50 Cal. 3d 785, 797-798)* . The parties seeking discovery argued that shield applies only to unpublished information obtained in confidence by a newsperson. The Court disagreed, saying use of the phrase "any unpublished information" made it clear that it applies to all information, regardless of whether it was obtained in confidence (*50 Cal. 3d 785, 798)* . The Court also found support for its conclusion by observing that nowhere in the constitutional definition of "unpublished information" is there an explicit or implied restriction of the shield to confidential information (*50 Cal. 3d 785, 799)* . The Court concluded by holding that the shield is not contingent on a showing that a newsperson's unpublished information was obtained in confidence, and that "unpublished information" includes a newsperson's nonconfidential, eyewitness observation of an occurrence in a public place (*50 Cal. 3d 785, 805)* .

After making this conclusion, the Court discussed whether the newsperson's protection under the shield law must yield to a criminal defendant's constitutional right to a fair trial when the newsperson's refusal to disclose information would unduly infringe on that right, and the Court ultimately concluded that the protection provision must yield (*50 Cal. 3d 785, 805-817)* . It specifically distinguished the application of the balancing test articulated in *Mitchell v. Superior Court (1984) 37 Cal. 3d 268, 208 Cal. Rptr. 152, 690 P.2d 625* (discussed in *§ 81.293[3][a]*), which was a defamation action, saying an identical approach is not entirely appropriate in a criminal proceeding (*50 Cal. 3d 785, 807)* .

In ***New York Times Co. v. Superior Court*** *(1990) 51 Cal. 3d 453, 273 Cal. Rptr. 98, 796 P.2d 811* , defendant automobile manufacturer in a product liability action arising out of an automobile accident sought discovery of unpublished photographs of the accident taken by a photographer working for the local newspaper. Defendant had served the newspaper with a subpoena for production of all photographs in its possession that related to the accident. The trial court quashed the subpoena, but ordered the newspaper to compare its photographs with those taken by the Highway Patrol to determine if its photographs contained any pertinent information not revealed by the Highway Patrol photographs. The newspaper did so and concluded that its photographs did contain some pertinent information of very little value. It opposed defendant's subsequent motion to compel production of the photographs, arguing that since it was not a party, its unpublished photographs were absolutely protected by the newsperson's shield. The trial court concluded that the newspaper had only a qualified privilege and ordered it to produce its photographs for in camera inspection so that the court could determine whether the claim of privilege was outweighed by defendant's right to discover relevant information. The newspaper petitioned the court of appeal for an extraordinary writ and stay of the trial court's order. The court of appeal issued a writ of mandate directing the trial court to set aside its order and issue a new order denying defendant's motion.

The Supreme Court affirmed the judgment of the court of appeal. The Court initially observed that the newspaper's petition for extraordinary relief was premature because a judgment of contempt had not been entered. It explained that *Cal. Const., art. I, § 2(b)*, and *Evid. Code § 1070*, provide a shield of immunity only from contempt; they do not create a privilege. Thus, there is nothing from which to seek relief until a newsperson has been adjudged in contempt (*51 Cal. 3d 453, 459)* . However, after acknowledging the premature nature of the petition, the Court proceeded to the merits of the dispute without remanding the case to the trial court for the purpose of entering a contempt judgment, explaining that no purpose would be served by doing so (*51 Cal. 3d 453, 460-461)* . The Court, citing *Delaney*, said that the shield law's protection is not contingent on ashowing that a newsperson's unpublished information was obtained in confidence, and then concluded that the newspaper's unpublished photographs are clearly within the scope of the shield law. The Court said that nothing in its language or history suggested that the immunity provided by the shield law is

qualified so that it can be overcome by a showing of need for the unpublished information within the scope of the shield law (*51 Cal. 3d 453, 461)* . Characterizing the instant case as a typical personal injury action for damages, in which a party seeks discovery of photographs taken by a nonparty newsperson in a public place, the Court distinguished it from *Delaney. Delaney* was a criminal case, which required a balancing of a newsperson's interest against a criminal defendant's well-established federal constitutional right to a fair trial from the case at issue. The Court said there was no federal or state constitutional right of the party seeking discovery sufficient to overcome the newspaper's claim of immunity under the state shield law. However, it specifically did not foreclose the possibility that in a future case a civil litigant seeking discovery from a nonparty newsperson might have either a state or federal constitutional right that would have to be weighed against a claim of immunity under the shield law (*51 Cal. 3d 453, 462)* .

Finally, the Court concluded that because the shield is a shield against contempt only, it provides no immunity for other applicable sanctions. Thus, defendant was entitled to bring an independent civil action under *Code Civ. Proc. § 1992* against the newspaper for a $500 forfeiture, plus those damages sustained because of the newspaper's failure to comply with the subpoena. Although, as a policy matter, it might make sense to extend the immunity to all sanctions, in order to avoid the subversion of the policy of protecting unpublished information, the Court declined to do so, saying that determining what the shield law *should* do was beyond its authority. The language of the statutes was unambiguous, and any changes had to come from the Legislature (*51 Cal. 3d 453, 462-463)* .

[b] Shield Encompasses Source Materials Merely Confirming or Amplifying Published Information

Playboy Enterprises, Inc. v. Superior Court *(1984) 154 Cal. App. 3d 14, 201 Cal. Rptr. 207* involved an action for fraud by plaintiff entertainers against their accountants. Defendants in the suit sought discovery from a magazine of source materials for an interview of plaintiffs published in the magazine. Plaintiffs also sought discovery of the address and whereabouts of the individual who wrote the interview. After the magazine refused to provide the requested information and materials, the trial court issued an order compelling discovery. The magazine thereupon petitioned for a writ of mandate.

The court of appeal granted the writ directing the trial court to vacate its order for production of source materials, but also directed it to issuea new order compelling disclosure of the whereabouts of the author of the interview. The court held that the source materials sought by defendants were covered by the newsperson's shield from contempt set forth in *Evid. Code § 1070*, and noted that the provisions of *Evid. Code § 1070* had been given constitutional status by the adoption of the virtually identical provisions in *Cal. Const., art. I, § 2* (*154 Cal. App. 3d 14, 23-24)* . The court distinguished *KSDO v. Superior Court (1982) 136 Cal. App. 3d 375* (discussed in *§ 81.293[3][a]*), noting that in that case the newsperson was a party. It said that *KSDO* had applied the *First Amendment* rather than *Cal. Const., art. I, § 2,* and *Evid. Code § 1070* because a discovery order against a party can be enforced by civil discovery remedies other than contempt, against which *Cal. Const., art. I, § 2,* and *Evid. Code § 1070* do not offer protection (*154 Cal. App. 3d 14, 27)* . The court rejected a construction of *Cal. Const., art. I, § 2,* and *Evid. Code § 1070* that would render the newsperson's shield inapplicable whenever the unpublished material sought would confirm or amplify the published information because nothing new would be disclosed by the unpublished materials. The court said that the newsperson's shield applied whether or not published information based on or related to the material sought had been disseminated. The court stated that by necessity published material that could or would be confirmed, amplified or discredited by undisseminated source material is related to or based on such unpublished material (*154 Cal. App. 3d 14, 23)* .

[c] Criminal Defendant Seeking Disclosure of Unpublished Information Must Show Disclosure Will Materially Assist His or Her Defense

In ***People v. Sanchez*** *(1995) 12 Cal. 4th 1, 47 Cal. Rptr. 2d 843, 906 P.2d 1129 , overruled in part, 45 Cal. 4th 390 (2009)* , a newspaper reporter interviewed the defendant after his arrest for murder. During the guilt phase of trial, the prosecution subpoenaed the newsperson as a witness, and, on cross-examination, the newsperson made a claim of immunity from contempt under the shield law. The defendant sought to compel disclosure by claiming that the

newsperson's claim of immunity was premature under *New York Times Co. v. Superior Court (1990) 51 Cal. 3d 453, 459-461, 273 Cal. Rptr. 98, 796 P.2d 811* (discussed in [a], *above*). The Court explained that its earlier holding in *New York Times* was based on a reasoning that granting precontempt relief from disclosure "would deprive trial courts of the opportunity to decide whether the shield law applies to the facts of the case." The Court held that this reasoning did not apply to foreclose a nonparty newsperson from asserting his or her "shield law" immunity as a basis for nondisclosure during cross-examination in a criminal case. The defendant argued that nondisclosure would deprive him of his constitutional right to a fair trial, but the Court concluded that the trial court had not erred in allowingnondisclosure. The defendant's showing consisted only of mere speculation (an unsupported claim that disclosure would impeach the nonparty's newsperson's credibility) or assertions that otherwise failed to show any possible deprivation of the right to a fair trial (in this instance an assertion undermining the defendant's own credibility, in that he claimed to have made inconsistent statements during the interview) (*12 Cal. 4th 1, 48-57) , overruled in part, 45 Cal. 4th 390 (2009)* .

In ***People v. Cooper*** *(1991) 53 Cal. 3d 771, 809 P.2d 865* , a newspaper received a letter purportedly written by a sheriff homicide detective, criticizing the investigation of charges of murder filed against defendant. In the defendant's criminal trial, the court quashed defendant's subpoena seeking to compel the newspaper to produce the letter. Although the newspaper had not been held in contempt, the Supreme Court affirmed the action of the trial court, concluding in effect that the Shield Law was a proper basis to quash the subpoena. If the Shield Law is asserted by a nonparty newsperson in a criminal case to avoid disclosure of unpublished material, the criminal defendant can compel disclosure only by showing that nondisclosure would infringe his or her constitutional right to a fair trial; the defendant must make a threshold showing (which the defendant had failed to do in this case), of a reasonable possibility that the unpublished information would materially assist the defense. While the showing need not be detailed or specific, it must be more than mere speculation; if the defendant's threshold showing is adequate, the court then conducts a balancing test to decide whether disclosure is warranted (*53 Cal. 3d 771, 818-820)* .

[d] Shield is Available to Online Journalists

The factual and procedural background of ***O'Grady v. Superior Court*** *(2006) 139 Cal. App. 4th 1423, 44 Cal. Rptr. 3d 72* is *set out in § 81.293[3][a]*. In this case alleging misappropriation of trade secrets, the court of appeal held, in part, that any subpoenas seeking unpublished information from the online magazines' publishers would be unenforceable through contempt proceedings in light of the California reporter's shield privilege (*Cal. Const., art. I, § 2(b)* and *Evid. Code § 1070*). The court concluded that the "open and deliberate" publication on a news-oriented Web site of news gathered for that purpose by site's operators was indistinguishable from publishing a newspaper, with respect to application of the shield law (*139 Cal. App. 4th 1423, 1459-1460)* . For discussion of other aspects of this case, refer to § 81.293[3][a], [b].

[4] Additional Authorities

[a] Nonconfidential Information Is Within Scope of Privilege

In *Miller v. Superior Court (1999) 21 Cal. 4th 883, 89 Cal. Rptr. 2d 834, 986 P.2d 170* , the California Supreme Court resolved the issue left unresolved in *Delaney v. Superior Court (1990) 50 Cal. 3d 785, 268 Cal. Rptr. 753, 789 P.2d 934* (discussed in *§ 81.294[3][a]*): whether the prosecution in a criminal proceeding can have a constitutional interest sufficient to require the disclosure of information otherwise protected by the shield law. In this case, petitioner conducted a videotaped interview with a criminal defendant. Portions of the interview were broadcast on the news. The respondent issued a subpoena for the entire interview, and petitioner submitted only the broadcast portions of the interview, invoking the shield law as to the outtakes that were not broadcast. The trial court ordered the petitioner to turn over the unedited videotape to the prosecution. Petitioner refused to do so and was adjudged in contempt. The court of appeal upheld the trial court's contempt order, denied a writ of prohibition, and lifted a stay on an order denying petitioner's motion to quash an order directingthe unsealing of the videotape. Relying on *Cal. Const., art. I, § 29*, which gives "the people of the State of California ... the right to due process of law," the court of appeal concluded that the

entire videotape should have been released and that a journalist's immunity from contempt is not absolute when the prosecution makes a showing of need for information the journalist possesses (*21 Cal. 4th 883, 888-891)* . The California Supreme Court reversed, finding that shield law immunity is not overcome by the prosecutor's need for evidence in a criminal prosecution. The Court explained that the prosecution's right to due process is not equivalent to a criminal defendant's right to due process and, therefore, does not carry the same weight as the federal rights enjoyed by a criminal defendant (*21 Cal. 4th 883, 896-897)* . Consequently, prosecutors are not entitled to unpublished information because they can show that it is relevant to their case (*21 Cal. 4th 883, 897)* . Rather, a newsperson's protection under the shield law is absolute and yields only to a "conflicting federal or, perhaps, state constitutional right" (*21 Cal. 4th 883, 901)* .

[b] Shield Encompasses Source Materials Merely Confirming or Amplifying Published Information

In *Fost v. Superior Court (2000) 80 Cal. App. 4th 724, 95 Cal. Rptr. 2d 620* , petitioner journalist, subpoenaed by a defendant in a state murder trial, was held in contempt of court for refusing to disclose "unpublished information" in answer to cross-examination questions by the prosecution. Petitioner claimed the shield law prohibited the contempt order and sought a writ to vacate the contempt order (*80 Cal. App. 4th 724, 728-730)* . The court of appeal issued a peremptory writ of prohibition, restraining enforcement of the contempt order (*80 Cal. App. 4th 724, 740)* . As a matter of first impression, the court held that in a criminal trial, when a defense witness protected under California's shield law, *Cal. Const. art. I, § 2(b), Evid. Code § 1070*, resists proper cross-examination on the basis of that law, the testimony of that witness on direct examination may, on appropriate motion by the prosecution, be barred or stricken, even if the testimony did not consist of "unpublished information" protected by the shield law, unless the defendant can show that the court's refusal to admit that evidence would deprive defendant of the federal constitutional right to a fair trial and that, in the circumstances, defendant's right transcends that of the witness under the shield law. If the defendant makes such a showing, the testimony of the witness on direct may be admitted and the newsperson may be held in contempt of court for refusing to respond to proper cross-examination seeking information that would otherwise be protected under the shield law (*80 Cal. App. 4th 724, 733-734)* . In the context of this holding, the court also held that petitioner's direct testimony regarding "published information" could not constitute a waiver of the right to refuse to discuss related information because the shield law explicitly provides thatunpublished information remain protected whether or not the related information has been disseminated (*80 Cal. App. 4th 724, 735)* .

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8-81 California Points & Authorities § 81.295

§ 81.295 Opposing Motion to Compel Discovery--Discovery of Official Information Prohibited [Evid. Code § 1040]--General Form

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30), as well as with points and authorities relating to resisting discovery on the ground of privilege generally (see, e.g., § 81.20).*]

THE INFORMATION SOUGHT IS NOT SUBJECT TO DISCOVERY BECAUSE IT WAS ACQUIRED IN CONFIDENCE BY A PUBLIC EMPLOYEE IN THE COURSE OF HIS OR HER DUTY AND IT WAS NOT PREVIOUSLY OPEN OR OFFICIALLY DISCLOSED TO THE PUBLIC *and* _____ [DISCLOSURE IS FORBIDDEN BY A CALIFORNIA STATUTE OR FEDERAL ACT *or* IS AGAINST THE PUBLIC INTEREST].

A. Information Acquired In Confidence by Public Employee in Course of Employee's Duty. Information acquired in confidence by a public employee in the course of his or her duty may become privileged "official information" (*Evid. Code § 1040(a)*).

B. Information Not Open or Previously Disclosed to Public. "Official information" that has not been open or officially disclosed to the public prior to the claim of privilege is protected (*Evid. Code § 1040(a)*).

[*EITHER*]

C. Disclosure of Information Is Prohibited by Act or Statute. The privilege of a public entity to refuse to disclose official information applies if disclosure is prohibited by California statute or an act of the United States Congress (*see Evid. Code § 1040(b)(1)*).

[*OR*]

D. Disclosure of Information Is Prohibited When Disclosure Is Against Public Interest. The privilege of a public entity to refuseto disclose official information applies if disclosure is against public interest (*see Evid. Code § 1040(b)(2)*).

[*Optional*] **E. Disclosure of Hospital Peer Review Records Is Against Public Interest.** The necessity of preserving the confidentiality of hospital peer review records, which inures to the benefit of the public by encouraging candid and uninhibited evaluations of physicians by their peers, greatly outweighs the "necessity of disclosure in the interest of justice" (*Fox v. Kramer (2000) 22 Cal. 4th 531, 542, 93 Cal. Rptr. 2d 497, 994 P.2d 343* ; *see Evid. Code § 1040(b)(2)*).

[2] Comments

[a] Use of Form

This form may be used to oppose a motion to compel discovery of information on the ground that it is privileged official information. In an appropriate case, these points and authorities may be submitted in opposition to the petition supported by the points and authorities *set out in § 81.276.*

The form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in opposition to a motion to compel [*see, e.g., Ch. 83, Discovery: Depositions, § 83.45*; *Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30*], as well as a form resisting discovery on the ground of privilege generally [*see, e.g., § 81.20*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, facts of the case that tend to show that the public's interest in preserving the confidentiality of the information outweighs the necessity of disclosure in the interests of justice should be brought out.

[3] Discussion of Authorities

[a] Disclosure of Hospital Peer Review Records Is Against Public Interest

In ***Fox v. Kramer*** *(2000) 22 Cal. 4th 531, 93 Cal. Rptr. 2d 497, 994 P.2d 343* , a medical malpractice suit, plaintiff attempted to subpoena expert testimony from a physician whose conclusions relied on hospital peer review materials unavailable to the public under *Evid. Code § 1157*. Thesuperior court granted defendants' motion to quash the subpoena, relying on *Evid. Code § 1157(a)* (*22 Cal. 4th 531, 536-537)* . Plaintiff appealed, contending that the trial court erred in excluding the physician's testimony and the hospital's peer review records. The court of appeal affirmed (*22 Cal. 4th 531, 538)* .

The Supreme Court affirmed the judgment, but not the reasoning of the court of appeal, which erroneously based its holding on *Evid. Code § 1151* (*22 Cal. 4th 531, 538, 544)* . Noting that the trial court did not directly address the Attorney General's argument that the subpoena should be quashed under *Evid. Code § 1040*, the Court nevertheless found that provision to be dispositive. The Court held that expert testimony from a physician whose conclusions relied on hospital peer review materials unavailable to the public under *Evid. Code § 1157* was privileged under *Evid. Code § 1040*. The expert's opinions were based on "official information" under *Evid. Code § 1040*, that is, information acquired in confidence by a public employee in the course of his duty and not disclosed to the public. The court reasoned that the

necessity of preserving such confidentiality with regard to hospital peer review records, which inures to the benefit of the public by encouraging candid and uninhibited evaluations by their peers, greatly outweighed "the necessity of disclosure in the interests of justice" (*22 Cal. 4th 531, 542)* .

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H. Miscellaneous Evidence Code Privileges

8-81 California Points & Authorities § 81.296

§ 81.296 Opposing Motion to Compel Discovery--Proceedings and Records of Health Care Committees and Peer Review Committees Protected From Discovery [Evid. Code § 1157]

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30), as well as with points and authorities relating to resisting discovery on the ground of privilege generally (see, e.g., § 81.20).*]

THE INFORMATION SOUGHT IS NOT SUBJECT TO DISCOVERY BECAUSE IT CONSTITUTES _____ [PROCEEDINGS AND RECORDS OF HEALTH CARE COMMITTEES *or* HEALTH CARE PEER REVIEW COMMITTEES].

A. Proceedings and Records of Health Care Committees and Peer Review Committees Are Not Subject to Discovery. Proceedings and records of organized health care committees and peerreview committees are protected from discovery under *Evidence Code Section 1157* (*see Evid. Code § 1157*).

[*Optional*] **B. Expert Testimony Based on Hospital Peer Review Materials Unavailable to Public Is Not Subject to Discovery.** The protection of *Evidence Code Section 1157* extends to expert testimony based on hospital peer review materials unavailable to the public under *Evidence Code Section 1157(a)* (*Fox v. Kramer (2000) 22 Cal. 4th 531, 540-541, 93 Cal. Rptr. 2d 497, 994 P.2d 343*).

[2] Comments

[a] Use of Form

This form may be used to oppose a motion to compel discovery of information on the ground that the information sought is privileged under *Evid. Code § 1157*, which protects the records and proceeding of certain organized health care committed and peer review committees against discovery [*see Evid. Code § 1157*].

The form does not provide a complete memorandum but is designed to be combined with a general form of memorandum in opposition to a motion to compel [*see, e.g., Ch. 83, Discovery: Depositions, § 83.45*; *Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30*], as well as a form resisting discovery on the ground of privilege generally [*see, e.g., § 81.20*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, facts of the case that show that the records at issue relate to immune proceedings should be brought out.

[3] Discussion of Authorities

The facts and procedural background ***Fox v. Kramer*** *(2000) 22 Cal. 4th 531, 93 Cal. Rptr. 2d 497, 994 P.2d 343* are discussed in *§ 81.295[3][a]*. In this medical malpractice case, the California Supreme Court held that protection of *Evid. Code § 1157* extended to expert testimony from a physician whose conclusions relied on hospital peer review materials unavailable to the public under *Evid. Code § 1157(a)* (*22 Cal. 4th 531, 540)* . Plaintiff was not permitted to accomplish indirectly what she was forbidden to do directly, that is, obtain the equivalent of discovery of the contents of the hospital peer review committee records, by subpoenaing the testimony or the report of the state investigator who reviewed them in the course of his public duties. When an expert has relied on privileged material toformulate an opinion, the court may exclude his or her testimony or report as necessary to enforce the privilege (*22 Cal. 4th 531, 540-541)* .

[4] Additional Authorities

In *County of Los Angeles v. Superior Court (2006) 139 Cal. App. 4th 8, 42 Cal. Rptr. 3d 390* , deceased inmate's family members claimed that the inmate was mentally ill and that he was not given his medications while in custody. The trial court compelled production of documents relating to the review of medical and mental health care complaints by the quality assurance committee for the county's jail mental health services agency. The County petitioned for a writ of mandate, challenging the trial court's order. The court of appeal held that the documents were exempt from disclosure because they met the criteria of *Evid. Code §§ 1157* and *1157.6* for documents generated by peer review bodies and correctional treatment quality assurance committees (*139 Cal. App. 4th 8, 14-15)* . The committee met the definition of a peer review body in *Bus. & Prof. Code § 805(a)(1)*, because it was comprised of the medical or professional staff of a health care facility, which included a correctional treatment center as defined in *Health & Safety Code § 1250(j)(1)*, and because the agency employed more than 25 licensed mental health care providers (*139 Cal. App. 4th 8, 14)* . The court added that the documents were not subject to discovery under *Evid. Code § 1156.1* because they were not research data (*139 Cal. App. 4th 8, 18-19)* .

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8-81 California Points & Authorities § 81.297

§ 81.297 Opposing Motion to Compel Discovery--Protection of Trade Secret Will Not Work Injustice [Evid. Code § 1060]

[1] FORM

[*The following may be combined with a general memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30).*]

THE REQUESTED DISCOVERY IS IMPROPER AND SHOULD BE DENIED BECAUSE _____ [PLAINTIFF *or* DEFENDANT] HAS NOT MADE A PRIMA FACIE PARTICULARIZED SHOWING THAT (1) THE TRADE SECRET IS RELEVANT AND NECESSARY TO THE _____ [PROOF OF *or* DEFENSE AGAINST] A MATERIAL ELEMENT OF ONE OR MORE CAUSES OF ACTION PRESENTED IN THE CASE, AND (2) IT IS REASONABLE TO CONCLUDE THAT THE TRADE SECRET IS ESSENTIAL TO A FAIR RESOLUTION OF THE LAWSUIT.

A. Trade Secret Is Protected From Disclosure. If the owner or his or her agent or employee claims the privilege, the owner of a trade secret has a privilege to refuse to disclose the secret, and to prevent another from disclosing it, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice (*Evid. Code § 1060*).

B. Trade Secret Is Protected Even When Relevant or Helpful. Allowance of the trade secret privilege does not "work injustice" within the meaning of *Evidence Code Section 1060* simply because it would protect information generally relevant to the subject matter of an action, or be helpful to the preparation of a case (*Bridgestone/Firestone, Inc. v. Superior Court (1992) 7 Cal. App. 4th 1384, 1390-1391, 9 Cal. Rptr. 2d 709*).

C. Only Trade Secret Information That Is Relevant and Necessary to Material Element of Proof and Essential to Fair Resolution Is Discoverable. The party seeking discovery of trade secrets must make a prima facie, particularized showing that the information sought is relevant and necessary to the proof of, or defenseagainst, a material element of a cause of action presented in the case, and that it is reasonable to conclude that the information is essential to a fair

resolution of the lawsuit (*Citizens of Humanity, LLC v. Costco Wholesale Corp. (2009) 171 Cal. App. 4th 1, 13, 89 Cal. Rptr. 3d 455* ; *Bridgestone/Firestone, Inc. v. Superior Court (1992) 7 Cal. App. 4th 1384, 1393, 9 Cal. Rptr. 2d 709*).

[2] Comments

[a] Use of Form

This form is for use in opposing a motion to compel discovery of information that is a trade secret. The party claiming the privilege must first establish its existence. If the party seeking discovery is able to make a prima facie, particularized showing that the information sought is relevant and necessary to a material element of one or more causes of action, and that it is reasonable to conclude that the information is essential to a fair resolution of the lawsuit, the claimant must then demonstrate any claimed disadvantages of discovery under the terms of a protective order [*Bridgestone/Firestone, Inc. v. Superior Court (1992) 7 Cal. App. 4th 1384, 1393, 9 Cal. Rptr. 2d 709* ; *see Citizens of Humanity, LLC v. Costco Wholesale Corp. (2009) 171 Cal. App. 4th 1, 13, 89 Cal. Rptr. 3d 455]* .

For points and authorities relating to the protection of a trade secret that has been placed in issue and is not otherwise privileged, see *§ 81.331*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[c] Related Pleading and Practice Forms

For a general discussion and forms relating to trade secrets, see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender).

[3] Discussion of Authorities

[a] Trade Secret Is Protected Even When Relevant or Helpful

In ***Bridgestone/Firestone, Inc. v. Superior Court*** *(1992) 7 Cal. App. 4th 1384, 9 Cal. Rptr. 2d 709* , plaintiffs, the survivors of a woman who was killed in an automobile accident allegedly caused by a defective tire, brought a wrongful death action against defendant tire manufacturer. Plaintiffs served defendant with interrogatories, requesting tire manufacturing specifications, including chemical formulas. Defendant objected, and plaintiffs moved for an order to compel answers. The trial court foundthat the formulas were trade secrets, and ordered disclosure of the specifications and formulas subject to a protective order. Defendant's writ of mandate was ultimately referred back to the court of appeal by the Supreme Court.

The court of appeal issued a peremptory writ of mandate directing the trial court to set aside its order. The court said that *Evid. Code § 1060* may not be read in isolation, but must be read in conjunction with the discovery statutes. Code Civ. Proc. § 2017 (*now see Code Civ. Proc. § 2017.010*) permits discovery regarding any matter, not privileged, that is relevant to the subject matter of the action or to the determination of any motion in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence. Emphasizing the "not privileged" clause of Code Civ. Proc. § 2017 (*now see Code Civ. Proc. § 2017.010*), the court said that disclosure of trade secret information that is only relevant to the subject matter of the pending action within the meaning of Code Civ. Proc. § 2017 (*now see Code Civ. Proc. § 2017.010*) would render *Evid. Code § 1060* meaningless. Allowance of the trade secret privilege may not be deemed to "work injustice" simply because it would protect information generally relevant to the subject matter of an action or helpful to preparation of a case (*7 Cal. App. 4th 1384, 1390-1391)* .

[b] Only Trade Secret Information That Is Relevant and Necessary to Material Element of Proof and Essential to Fair Resolution Is Discoverable

In ***Citizens of Humanity, LLC v. Costco Wholesale Corp.*** *(2009) 171 Cal. App. 4th 1, 89 Cal. Rptr. 3d 455* , plaintiff manufacturer of "high end denim apparel products" (Citizens) sued defendant (Costco) for the sale of stolen property under *Pen. Code § 496* after Costco refused to disclose its source for the Citizen's jeans that were being sold in its low-price warehouse-style stores. Costco filed a motion for judgment on the pleadings. Before the motion could be heard, Citizens filed a motion to compel discovery, seeking to compel Costco to identify the sources from which Costco had obtained Citizens jeans, and the terms of those transactions. Citizens argued that this information was necessary to support its claim that the jeans were stolen and that Costco had known the jeans were stolen. Costco opposed the discovery on the basis that its vendor information constituted a protectable trade secret. Costco produced evidence that its supplier list has economic value and that Costco makes substantial efforts to keep its suppliers' identities secret. Costco also argued that Citizens could not show that the discovery was necessary to pursue its action, or that there was no other way Citizens could obtain the necessary information. The trial court granted the motion for judgment on the pleadings with leave to amend. With regard to the motion to compel, the trial court concluded that Costco had established that the identity of its suppliers was a protected trade secret, and that Citizens had failed to establish entitlement to that information. However, the court granted the motion to compel in part, allowing Citizens to discover the nonprivileged information regarding the terms of the transactions by which Costco had obtained the jeans. After that limited discovery was completed, Citizens filed its first amended complaint, alleging that the jeans sold by Costco had been stolen. The trial court sustained Costco's demurrer to that complaint. Citizens declined to amend the complaint, and trial court dismissed the action. Citizens appealed (*171 Cal. App. 4th 1, 6-11)* .

The court of appeal concluded that the trial court did not err in denying Citizen's motion to compel discovery because the identity of Costco's suppliers was a protectable trade secret. Costco showed that that the identity of its sources was information that derived economic value from not being generally known, and it introduced evidence indicating that it had taken reasonable efforts to maintain the secrecy of its sources (*171 Cal. App. 4th 1, 13-14)* . The court summarily rejected Citizen's argument that while Costco may have produced evidence that the identity of its vendors, *in general*, was a trade secret, it failed to establish that the identity of only its *specific* suppliers of Citizens denim apparel was a trade secret. The court found this contention "meritless." Citizens provided no authority for its proposition that when an entire category of information is a trade secret, an individual piece of that information is not (*171 Cal. App. 4th 1, 14)* .

Because the identity of Costco's sources of Citizens jeans constituted a trade secret, the burden shifted to Citizens to make "a prima facie, particularized showing that the information sought is relevant and necessary to the proof of a material element of one or more causes of action presented in the case, and that it is reasonable to conclude that the information sought is essential to a fair resolution of the lawsuit" (*171 Cal. App. 4th 1, 13, 15* , quoting *Bridgestone/Firestone, Inc. v. Superior Court (1992) 7 Cal. App. 4th 1384, 1393, 9 Cal. Rptr. 2d 709* , discussed *below*). Citizens sought disclosure of Costco's sources in order to establish that the jeans sold by Costco were stolen. But Citizens' own evidence indicated that it could determine whether any of its jeans had been stolen from its customers simply by inquiring whether its customers had experienced any thefts (*171 Cal. App. 4th 1, 15)* . Moreover, Citizens failed to show that it would be unduly burdensome to ask its customers whether they had experienced any jeans thefts (*171 Cal. App. 4th 1, 16)* . In sum, Citizens did not meet its burden of demonstrating that the identity of Costco's sources was necessary to an element of a then-pending cause of action, and the trial court did not abuse its discretion in denying the motion to compel (*171 Cal. App. 4th 1, 16)* .

The facts and procedural background of ***Bridgestone/Firestone, Inc. v. Superior Court*** *(1992) 7 Cal. App. 4th 1384, 9 Cal. Rptr. 2d 709* are discussed in [a], *above.* In *Bridgestone,* the court of appeal explained that failure to disclose information would work an injustice within the meaning of *Evid. Code § 1060* when one side would have evidence--reasonably believed to be essential to a fair resolution of the lawsuit--that was denied the opposing party. Under such circumstances, a trial court is required to order disclosure of a trade secret unless, after balancing the interests of both sides, it concludes that under the circumstances no fraud or injustice would result from denying

disclosure. In the balancing process, the trial court must necessarily consider the protection afforded the holder of the privilege by a protective order as well as any less intrusive alternatives to disclosure proposed by the parties (*7 Cal. App. 4th 1384, 1392-1393)* . The party claiming the privilege has the burden of establishing its existence. The party seeking discovery then must make a prima facie, particularized showing that the information sought is relevant and necessary to the proof of, or defense against, a material element of one or more causes of action presented in the case, and that it is reasonable to conclude that the information is essential to a fair resolution of the lawsuit. Inresponse, the holder of the privilege must demonstrate any claimed disadvantages of a protective order. Either party may then propose or oppose less intrusive alternatives to disclosure of the trade secret. However, the claimant of the privilege has the burden of demonstrating that an alternative to disclosure will not be unduly burdensome to the opposing side and that it will maintain the same fair balance in the litigation that would have been achieved by disclosure (*7 Cal. App. 4th 1384, 1393)* .

The court considered the elements of plaintiffs' causes of action, their theories of recovery, and defendant's defenses. To demonstrate negligent manufacture and design, plaintiffs could rely on the doctrine of res ipsa loquitur, which eliminates the need for proof of a particular defect. Proof of strict liability for defective manufacture could be made by comparing the injury-producing tire with the manufacturer's plans or with other tires in the same product line. Strict liability for defective design could be proven either by showing that the tire failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or by demonstrating that the tire's design caused the injuries and that defendant failed to establish that the benefits of the design outweighed its inherent risks (*7 Cal. App. 4th 1384, 1394-1395)* . To prevail on the cause of action for negligent failure to warn, plaintiffs could show that a reasonably prudent manufacturer would have decided that the risk of harm was sufficient to require a warning. Proof of strict liability for failure to warn could be made by demonstrating that defendant failed to give warnings of dangers that were known to the scientific community at the time of manufacture and distribution of the tire. Thus, the court reasoned that while the specifications and formulas might be useful to prove the negligence and strict liability causes of action, and to rebut defendant's defenses, plaintiffs had not made the requisite showing of particularized need (*7 Cal. App. 4th 1384, 1395)* . The court relied on declarations submitted by the expert witnesses that established that the trade secret formulas would merely aid plaintiff's expert in evaluating the tire's failure, and other factual analysis. The court found nothing that demonstrated the necessity of the formulas to enable plaintiffs to carry their burden of proof (*7 Cal. App. 4th 1384, 1395-1396)* . The court noted, however, that if at any point in the litigation plaintiffs were able to make the required prima facie particularized showing of need, they could renew their request for discovery of the formulas (*7 Cal. App. 4th 1384, 1397 n.8*).

[4] Additional Authorities

[a] Only Trade Secret Information That Is Relevant and Necessary to Material Element of Proof and Essential to Fair Resolution Is Discoverable

In *Steiny and Co., v. California Electric Supply Co. (2000) 79 Cal. App. 4th 285, 93 Cal. Rptr. 2d 920* , a business owner, contractor,subcontractor, supplier, and manufacturer litigated liability as the result of the explosion of a faulty electric switchboard. The contractor agreed to settle with the owner; and the subcontractor and supplier propounded discovery seeking information about the basis of the owner-contractor settlement, and about the owner's damages from the power outage. The owner and contractor moved for a protective order on the ground that the information needed to support the owner's damage calculation was proprietary, and the trial court granted the order. When the cases proceeded to trial, the subcontractor moved to exclude contractor's evidence of damages, arguing that exclusion was an appropriate and necessary remedy for the contractor's invocation of the trade secrets privilege to prevent disclosure of that evidence. The trial court agreed, and barred the contractor from offering damages evidence. The contractor appealed, asserting error (*79 Cal. App. 4th 285, 288-290)* .

The court of appeal affirmed, holding that when plaintiffs' proper assertion of the trade secret privilege, and the blanket protective order they obtained, prevented defendant from examining key evidence needed to test the reasonableness of

the settlement which formed the basis for plaintiffs' damage claim, the trial court properly barred plaintiffs' damage evidence at trial (*79 Cal. App. 4th 285, 288)* . Although plaintiffs had the right to stand on the privilege, they did not have the right to proceed on its claim while at the same time insisting on withholding key evidence from their adversary. Further, they could have agreed to a more typical and less extreme protective order which would have allowed plaintiff to obtain the needed information while strictly confining its use. Accordingly, the trial court did not err in holding that defendants forfeited the right to proceed with their claim by instead insisting on an absolute withholding of all privileged information (*79 Cal. App. 4th 285, 292)* .

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[Reserved]

§§ 81.298[Reserved]

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8-81 California Points & Authorities § 81.330

§ 81.330 Opposing Motion to Compel Discovery--Discovery of Plaintiff's Sexual Conduct in Action for Sexual Harassment or Assault Is Improper When Good Cause Not Shown [Code Civ. Proc. § 2017.220]

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30), as well as with points and authorities generally supporting an objection that matters sought are not relevant (see, e.g., Ch. 80, Discovery: Scope, Regulation, and Timing, § 80.40).*]

DISCOVERY CONCERNING PLAINTIFF'S SEXUAL CONDUCT SHOULD BE DENIED BECAUSE DEFENDANT HAS FAILED TO ESTABLISH SPECIFIC FACTS SHOWING GOOD CAUSE FOR THE DISCOVERY, OR THAT THE MATTER SOUGHT TO BE DISCOVERED IS RELEVANT TO THE SUBJECT MATTER OF THE ACTION AND REASONABLY CALCULATED TO LEAD TO THE DISCOVERY OF ADMISSIBLE EVIDENCE.

A. Discovery of Plaintiff's Sexual Conduct Requires Showing of Good Cause and Relevancy. In any civil action alleging conduct that constitutes sexual harassment, sexual assault, or sexual battery, any party seeking discovery concerning the plaintiff's sexual conduct with individuals other than the alleged perpetrator is required to establish specific facts showing good cause for that discovery, and that the matter sought to be discovered is relevant to the subject matter of the action and reasonably calculated to lead to the discovery of admissible evidence. This showing must be made by noticed motion and must not be made or considered by the court at an ex parte hearing (*Code Civ. Proc. § 2017.220*; *Vinson v. Superior Court (1987) 43 Cal. 3d 833, 843, 239 Cal. Rptr. 292, 740 P.2d 404* ; *Mendez v. Superior Court (1988) 206 Cal. App. 3d 557, 569-574, 253 Cal. Rptr. 731*).

B. Strong Showing of Good Cause Required. A stronger showing of good cause must be made to justify inquiry into a plaintiff's sexual conduct under *Section 2017.220 of the Code of Civil Procedure* thanis needed for a general examination under *Section 2032.010 et seq. of the Code of Civil Procedure* (*Vinson v. Superior Court (1987) 43 Cal.*

3d 833, 843 n.8, 239 Cal. Rptr. 292, 740 P.2d 404 ; *see Barrenda L. v. Superior Court (1998) 65 Cal. App. 4th 794, 800-803, 76 Cal. Rptr. 2d 727*).

[*Optional*] **C. Protection From Discovery Includes Nonconsensual Sexual Conduct.** The protection from discovery provided by *Section 2017.220 of the Code of Civil Procedure* includes nonconsensual, as well as consensual, sexual conduct (*Knoettgen v. Superior Court (1990) 224 Cal. App. 3d 11, 13-14, 273 Cal. Rptr. 636*).

[2] Comments

[a] Use of Form

This form is for use in a civil action for sexual harassment, sexual assault, or sexual battery to oppose a motion to compel discovery relating to plaintiff's sexual conduct with individuals other than the alleged perpetrator. The ground for opposition is that the party seeking discovery has failed to show good cause or that the matters sought are relevant to the subject matter of the action and reasonably calculated to lead to the discovery of admissible evidence [*Code Civ. Proc. § 2017.220*]. This form may be used in opposition to points and authorities supporting a motion to compel discovery based on a general contention of relevancy [*see, e.g., Ch. 80, Discovery: Scope, Regulation, and Timing, § 80.10*].

Note that the party seeking discovery of plaintiff's sexual conduct must make the showing of good cause by noticed motion. This determination may not be made or considered by the court at an ex parte hearing [*Code Civ. Proc. § 2017.220*]. Note also that if plaintiff consulted with a sexual assault victim counselor, the substance of such communications may be privileged from discovery [*see Evid. Code § 1035 et seq.*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Discovery of Plaintiff's Sexual Conduct Requires Showing of Good Cause and Relevancy

In ***Vinson v. Superior Court*** *(1987) 43 Cal. 3d 833, 239 Cal. Rptr. 292, 740 P.2d 404* , an applicant for employment with a school district was allegedly subjected to the interviewer's sexual advances, which she declined.She later obtained a different job at the school without the interviewer's knowledge. Plaintiff also alleged that after the interviewer discovered her other job, he had her transferred to a position for which she was not qualified, and terminated her employment. The dismissed employee brought an action against the school district and the employee who interviewed her, to recover damages for sexual harassment and intentional infliction of severe emotional distress. Defendants moved for an order compelling plaintiff to undergo a medical and a psychological examination. Plaintiff opposed the motion as a violation of her right to privacy. Alternatively, she requested that in the event of an examination, the court issue a protective order preventing any questions regarding her sexual history or practices, and that her attorney be present. The trial court granted the motion without imposing any limitations. Plaintiff petitioned for a writ of prohibition or mandate to direct the trial court to forbid the examination or to issue appropriate protective orders. The court of appeal denied the petition. Plaintiff appealed.

The Supreme Court reversed the judgment of the court of appeal, with directions to issue a peremptory writ of mandate compelling the trial court to limit the scope of the mental examination (*43 Cal. 3d 833, 847)* . First, the Court rejected plaintiff's contention that the psychiatric examination would be an impermissible infringement on her right to privacy. Code Civ. Proc. § 2032(a) (*now see Code Civ. Proc. § 2032.020*) permits the mental examination of a party in any action in which the mental condition of that party is in controversy. The filing of a suit for sexual harassment does not *per se* place a plaintiff's mental condition in issue (*43 Cal. 3d 833, 840)* . Allegations of ongoing mental and emotional

distress do, however, place a plaintiff's own mental state in controversy (*43 Cal. 3d 833, 839)* . By asserting a causal link between plaintiff's mental distress and defendants' conduct, she implicitly claims it was not caused by a preexisting mental condition, thereby raising the question of alternative sources for the distress.

The Court held that plaintiff's right to privacy is protected by the requirement under Code Civ. Proc. § 2032(a) (*now see Code Civ. Proc. § 2032.020*) that the motion be made on a showing of good cause (*43 Cal. 3d 833, 840)* . With regard to an order preventing questions regarding plaintiff's sexual practices, the Court held that the mere initiation of a sexual harassment suit, even one alleging extreme mental and emotional damage, does not waive all of plaintiff's privacy interests (*43 Cal. 3d 833, 841)* . Plaintiff did not contend that the alleged acts were detrimental to her present sexuality, and her sexual history is even less relevant to her claim. Consequently, she did not waive her right to sexual privacy (*43 Cal. 3d 833, 842)* . Pursuant to Code Civ. Proc. § 2017(d) (*now see Code Civ. Proc. § 2017.220(a)*), in a civil suit alleging conduct that constitutes sexual harassment, sexual assault, or sexual battery, any party seeking discoveryconcerning the plaintiff's sexual conduct with an individual other than the alleged perpetrator must establish specific facts showing good cause for that discovery, and that the inquiry is relevant to the subject matter and reasonably calculated to lead to the discovery of admissible evidence. In enacting Code Civ. Proc. § 2017(d) (*now see Code Civ. Proc. § 2017.220*), the Legislature declared that the discovery of sexual aspects of the plaintiff's lives, as well as those of past and current friends and acquaintances, has the clear potential to discourage complaints and to annoy and harass litigants. Without protection against it, individuals whose intimate lives are unjustifiably and offensively intruded on might be faced with the eventuality of invoking their remedy only at the risk of enduring further intrusions. Absent extraordinary circumstances, inquiry into those areas should not be permitted, either in discovery or at trial (*43 Cal. 3d 833, 843)* . Plaintiff contended that *Code Civ. Proc. § 2017.220* (formerly Code Civ. Proc. § 2036.1) does not adequately protect her privacy interests because Code Civ. Proc. § 2032 (*now see Code Civ. Proc. § 2032.010 et seq.*) already requires "good cause" for a mental examination, and nothing is added by again requiring good cause for inquiry into a plaintiff's sexual history and practices. The legislative declaration accompanying former Code Civ. Proc. § 2036.1 states that inquiry into sexuality should not be permitted absent "extraordinary circumstances," suggesting that a stronger showing of good cause must be made to justify inquiry into this topic than is needed for a general examination. Furthermore, Code Civ. Proc. § 2032 (*now see Code Civ. Proc. § 2032.010 et seq.*) merely requires good cause for the examination as a whole, whereas under Code Civ. Proc. § 2017(d) (*now see Code Civ. Proc. § 2017.220*), a defendant must show specific facts justifying that particular inquiry (*43 Cal. 3d 833, 843 n.8*). Therefore, Code Civ. Proc. § 2017(d) (*now see Code Civ. Proc. § 2017.220*) amply protects plaintiff's privacy interests. In the majority of sexual harassment suits, a separate weighing of privacy against discovery will not be necessary. It should normally suffice for the court, in ruling on whether good cause exists for probing into the intimate life of a victim of sexual harassment, battery, or assault, to evaluate the showing of good cause in light of the legislative purpose in enacting that statute and the plaintiff's constitutional right to privacy (*43 Cal. 3d 833, 844)* .

In ***Mendez v. Superior Court*** *(1988) 206 Cal. App. 3d 557, 253 Cal. Rptr. 731* , a county sheriff's department employee brought an action against the county and a sheriff coworker for sexual assault and battery and infliction of emotional distress by the coworker. At a deposition of plaintiff, defendants questioned her concerning her extramarital sexual relationships with other members of the sheriff's department for four years prior to the incident. She denied having any, and later brought a motion in limine to exclude from trial any evidence of her sexual conduct with anyone other than defendant officer. Defendants' opposition to the motion evolved into noticed motions for discovery under former Code Civ. Proc. § 2036.1 [*seenow Code Civ. Proc. § 2017.220*]. The trial court denied plaintiff's motion and granted defendants' motions to discover. Plaintiff brought a motion for reconsideration and made a motion to stipulate concerning her sexual history. On reconsideration the court denied the discovery requests, and made plaintiff's stipulation a court order. After its motion for reconsideration was denied, defendant county sought a writ of mandate to compel the trial court to grant the discovery motion.

The court of appeal denied the writ. It upheld the trial court's denial of discovery due to defendants' failure to establish good cause, observing that defendants made no showing of how incidents within such a substantial time span would bear on the issues in the case, and that the request was not narrowly drawn to the claimed reasons for discovery, which

were a determination of the genesis of her emotional distress claim and the extent of her damages (*206 Cal. App. 3d 557, 570-572)* . The court explained that it should normally suffice for a court, in ruling on whether good cause exists for probing into the intimate life of a victim of sexual assault, to evaluate the showing of good cause in light of the legislative purpose in enacting Code Civ. Proc. § 2017(d) (*now see Code Civ. Proc. § 2017.220*) and the plaintiff's constitutional right to privacy. The court said that the essence of that legislative purpose is "absent extraordinary circumstances, inquiry into a complainant's sexual behavior should not be permitted, either in discovery or at trial" (*206 Cal. App. 3d 557, 569)* . The court reasoned that an essential aspect of the damage in any case of sexual assault is the outrage, shock, and humiliation of the individual abused. Thus, the typical case includes a concomitant claim for emotional upset inflicted by the conduct. Such distress is so inextricably intertwined in the cause of action that to allow privacy intrusion in the ordinary case would have a chilling effect on the pursuit of a cause of action for sexual assault (*206 Cal. App. 3d 557, 573)* . The court also observed that when vicarious liability is a potential basis for defendant's liability, that fact alone does not constitute good cause (*206 Cal. App. 3d 557, 574-575)* .

[b] Strong Showing of Good Cause Required

Vinson v. Superior Court *(1987) 43 Cal. 3d 833, 239 Cal. Rptr. 292, 740 P.2d 404* is discussed in [a], *above*.

In ***Barrenda L. v. Superior Court*** *(1998) 65 Cal. App. 4th 794, 76 Cal. Rptr. 2d 727* , two former foster children sued the county and others for negligence, seeking damages for physical and psychological injuries allegedly sustained as a result of sexual abuse in their foster home. The county moved to compel plaintiffs to answer deposition questions concerning sexual encounters other than those directly at issue and to compel independent psychological examinations. When the trial court granted both motions, plaintiffs sought relief through writ proceedings.

The court of appeal issued a peremptory writ of mandate directing the trial court to reverse its rulings ordering plaintiffs to answer deposition questions relating to sexual encounters other than those directly at issue and ordering them to undergo psychiatric examinations. The court concluded that defendants failed to demonstrate the necessary good cause for both motions (*65 Cal. App. 4th 794, 803)* . The court explained that the mere fact that a plaintiff initiated an action seeking damages for extreme mental and emotional distress arising out of conduct of a sexual nature does not ipso facto provide "good cause" for discovery of other sexual conduct. The issue is resolved by balancing the right to privacy with the defendant's right to discovery; a procedure articulated by Code Civ. Proc. § 2017(d) (*now see Code Civ. Proc. § 2017.220*) (*65 Cal. App. 4th 794, 800-801)* . Each of the disputed deposition questions related to sexual activity of plaintiffs other than incidents on which the legal action is based. Thus, the court said, it was the burden of defendants to produce specific factual evidence to demonstrate the emotional distress resulting from this other sexual activity, if any, was directly related to the injuries claimed in the litigation. It observed that the only factual support to demonstrate good cause was the declaration of defendants' counsel, which did not demonstrate that he had any psychological training or qualification that would lay the foundation for him to demonstrate any nexus between other sexual conduct and the nature of the damages claimed. There was no declaration by a mental health professional that evidence of other sexual conduct would be relevant and necessary to a determination of the cause of plaintiffs' emotional distress. The court also rejected defendants' contention that evidence of other sexual conduct may be relevant for impeachment purposes, saying that to allow discovery to find information collateral to the issues raised solely to impeach plaintiff was not justified (*65 Cal. App. 4th 794, 802)* . The court also found defendants' support for the examination to be inadequate. No declaration of a mental health professional was proffered to establish the relevance of other sexual conduct, whether before the incidents alleged or after. Counsel's declaration was not specific, and presented only unjustified conclusions about why the examination was necessary. While a plaintiff may place her mental state in controversy by a general allegation of severe emotional distress, the opposing party may not require her to undergo psychiatric testing solely on the basis of speculation that something of interest may surface (*65 Cal. App. 4th 794, 803)* .

[c] Protection From Discovery Includes Nonconsensual Sexual Conduct

In ***Knoettgen v. Superior Court*** *(1990) 224 Cal. App. 3d 11, 273 Cal. Rptr. 636* , plaintiff sued her employer and

coworkers for battery and employment discrimination based on sexual harassment. Defendant employerlearned that plaintiff had been attacked by men twice in her childhood, and questioned her at deposition concerning the attacks. After plaintiff refused to answer the questions, defendant moved for an order compelling her to answer, asserting that the information was directly relevant to plaintiff's sexual perceptions and to the nature and extent of emotional distress she claimed. When the trial court granted the motion, plaintiff petitioned for a writ of mandate.

The court of appeal issued a peremptory writ of mandate directing the trial court to set aside its order. The court rejected defendant's claim that the protection of Code Civ. Proc. § 2017(d) (*now see Code Civ. Proc. § 2017.220*) applies only to a plaintiff's consensual sexual conduct, and held that defendant had failed to make a good-cause showing sufficient to overcome the statute's protection (*224 Cal. App. 3d 11, 14)* . The court said that discovery of previous sexual attacks on a plaintiff was exactly the type of offensive and unjustifiable discovery that the Legislature was attempting to prohibit in enacting the statute (*224 Cal. App. 3d 11, 13-14)* . Further, the court said that even in the absence of Section 2017(d), defendant would not be entitled to the information because throughout the Discovery Act witnesses are afforded protection from unwarranted intrusiveness, annoyance, embarrassment, and oppression. The court further bolstered its holding by observing that when privacy is implicated, courts have been vigilant to provide extraordinary relief to prevent impairment of these protections (*224 Cal. App. 3d 11, 14-15)* .

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8-81 California Points & Authorities § 81.331

§ 81.331 Opposing Motion to Compel Discovery--Action for Misappropriation of Trade Secret Not Yet Identified [Code Civ. Proc. § 2019.210]

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30).*]

A PLAINTIFF IN AN ACTION FOR MISAPPROPRIATION OF A TRADE SECRET MUST IDENTIFY THE TRADE SECRET PRIOR TO SEEKING DISCOVERY RELATED TO THE TRADE SECRET.

Plaintiff Required to Identify Trade Secret Prior to Seeking Discovery. In any action alleging the misappropriation of a trade secret under the Uniform Trade Secrets Act (*Section 3426 et seq. of the Civil Code*), before commencing discovery relating to the trade secret, the party alleging them is appropriation must identify the trade secret with reasonable particularity (*Code Civ. Proc. § 2019.210*; *see Advanced Modular Sputtering, Inc. v. Superior Court (Sputtered Films, Inc.) (2005) 132 Cal. App. 4th 826, 33 Cal. Rptr. 3d 901, 903*).

[2] Comments

[a] Use of Form

This form is for use in opposing a motion to compel discovery related to a trade secret in a civil action alleging the misappropriation of a trade secret under the Uniform Trade Secrets Act [*see Civ. Code § 3426 et seq.*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[c] Protection of Trade Secret Not Covered by Privilege

As a general rule, the holder of a trade secret has the privilege to refuse to disclose a secret if the allowance of the privilege will not tend to conceal fraud or otherwise cause injustice [*see Evid. Code § 1060*]. However, this privilege does not apply when the holder of the privilege has brought an action under the Uniform Trade Secrets Act alleging the misappropriation of the secret. In such a case, the holder of the secret is entitled to a protective order or other precautions to preserve the secrecy of the trade secret [*see Civ. Code § 3426.5*; *Code Civ. Proc. § 2019.210*]. For a form supporting a motion for protective order in the context of an oral deposition that may be used in seeking an order protecting a trade secret, see *Ch. 83, Discovery: Depositions, § 83.80* [*see Code Civ. Proc. § 2025.420(b)(13)*].

[3] Discussion of Authorities

[a] Plaintiff Required to Identify Trade Secret Prior to Seeking Discovery

In ***Advanced Modular Sputtering, Inc. v. Superior Court (Sputtered Films, Inc.)*** *(2005) 132 Cal. App. 4th 826, 33 Cal. Rptr. 3d 901* , a trade secret civil discovery case of first impression, respondent trial court entered an order permitting real party in interest, a manufacturer, to conduct discovery on all of its causes of action against petitioner competitor other than its cause of action under the Uniform Trade Secrets Act (UTSA) (*Civ. Code § 3426 et seq.*) for misappropriation of trade secrets. The competitorpetitioned for a writ of mandate to reverse the order. The manufacturer also filed a writ petition, requesting that the court review the trial court's finding that its trade secrets designation did not satisfy *Code Civ. Proc. § 2019.210*.

The court of appeal held that when the plaintiff makes a showing that is "reasonable"--that is, "fair, proper, just, rational"--the trade secret has been described with "reasonable particularity" sufficient to permit discovery to begin (*132 Cal. App. 4th 826, 903)* . A sufficient showing of "reasonable particularity" is "a flexible inquiry" and depends on the "facts, law, and equities" of the situation (*132 Cal. App. 4th 826, 33 Cal. Rptr. 3d 901, 907-908)* . "Reasonable particularity," however, does not mean that the party alleging misappropriation "has to define every minute detail of its claimed trade secret at the outset of the litigation." While advances in the state of the art in a highly specialized technical field may require expert witness declarations, a discovery referee or trial court is not required to "conduct a miniature trial on the merits of a misappropriation claim before discovery may commence" (*132 Cal. App. 4th 826, 33 Cal. Rptr. 3d 901, 908)* .

The court also held that *Code Civ. Proc. § 2019.210* is not limited in its application to a cause of action under the Uniform Trade Secrets Act, for misappropriation of the trade secret, but extends to any cause of action that relates to the trade secret (*132 Cal. App. 4th 826, 33 Cal. Rptr. 3d 901, 903)* . The court reasoned that, by its express terms, *Code Civ. Proc. § 2019.210* is not "cause of action" specific, but instead refers to "any 'action,' i.e. the 'entire lawsuit.' " The court noted that it made no sense to bar discovery on the cause of action for misappropriation but permit it on the others, when every cause of action was dependent on the misappropriation allegation (*132 Cal. App. 4th 826, 33 Cal. Rptr. 3d 901, 907)* .

[4] Additional Authorities

[a] Plaintiff Required to Identify Trade Secret Prior to Seeking Discovery

In *Perlan Therapeutics, Inc. v. Superior Court (2009) 178 Cal. App. 4th 1333, 101 Cal. Rptr. 3d 211* , petitioner, a trade secret claimant, sought a writ of mandate or prohibition to challenge a superior court order granting defendant competitors' motion for a protective order. That order precluded the claimant from pursuing discovery relating to its claimed trade secrets until it provided a sufficient identification of them under *Code Civ. Proc. § 2019.210*. The claimant's *Code Civ. Proc. § 2019.210* trade secret statement repeated some of the narrative in the complaint and provided additional technical detail that was publicly available. The statement gave general descriptions of how various processes would be conducted, but it did not specifically identify the items used in these processes. The statement referenced a large quantity of other material, including grant and patent applications. The court of appeal concluded that

the trial court was justified in finding that the statement was vague and did not meet the standard of reasonable particularity in *Code Civ. Proc. § 2019.210*. While trade secret identification does not require "every minute detail" or the "greatest degree of particularity possible[,]" the claimant's *Code Civ. Proc. § 2019.210* trade secret statement was insufficient, in light of its broad language, surplusage, and voluminous attachments (*178 Cal. App. 4th 1333, 1350-1352)* .

In *Brescia v. Angelin (2009) 172 Cal. App. 4th 133, 90 Cal. Rptr. 3d 842* , appellant (Brescia), who had developed a high-protein, low-carbohydrate pudding, brought a cross-complaint against respondent cross-defendants, alleging that respondents participated with other cross-defendants in misappropriating Brescia's trade secrets. Brescia appealed from a judgment of dismissal. He argued that the trial court erred in finding his trade secret designation inadequate under *Code Civ. Proc. § 2019.210*, for failing to explain how it differed from matters within the general knowledge of skilled persons in the field of commercial food science. Although the court of appeal did not agree with Brescia's contention that a trade secret claimant can *never* be required to particularize how the alleged trade secret differs from prior products, the court agreed that the trial court erred in imposing such a requirement here. Whether a trade secret designation adequately distinguishes the allegedly protected information from the general knowledge of skilled persons in the field is a function of the "particularity" of the designation--that is, whether the stated details themselves are sufficient--given the nature of the alleged secret and the technology in which it arises--to permit the defendant to ascertain whether and in what way the information is distinguished from matters already known, and to permit the court to craft appropriate discovery. Absent a showing that the details alone, without further explanation, are inadequate to permit the defendant to discern the boundaries of the trade secret in order to prepare available defenses, or to permit the court to understand the identification in order to fashion discovery, the trade secret claimant need not particularize how the alleged secret differs from matters already known to skilled persons in the field. Further, consistent with *Advanced Molecular*, discussed in *§ 81.331[3][a]*, the trade secret designation is to be liberally construed, and reasonable doubts regarding its adequacy are to be resolved in favor of allowing discovery to go forward (*172 Cal. App. 4th 133, 143)* .

Brescia's trade secret designation met *Code Civ. Proc. § 2019.210*'s reasonable particularity requirement. He named two alleged trade secrets: the pudding formula and the manufacturing process. He particularly described the details of the pudding formula, listing the 15 specific ingredients by common name and the percentage of the total pudding. He also listed the same 15 ingredients by their supplier and brand name. He particularly described each step in the mixing, testing, and code marking of the pudding. This showing was adequate to permit respondents to investigate whether Brescia's alleged trade secrets were within the public domain and to prepare a defense, and to permit the trial court to determine the scope of relevant discovery (*172 Cal. App. 4th 133, 151-152)* .

The facts and procedural background of *Citizens of Humanity, LLC v. Costco Wholesale Corp. (2009) 171 Cal. App. 4th 1, 89 Cal. Rptr. 3d 455* , are discussed in *§ 81.297[3][b]*. In *Citizens*, the court of appeal explained that in resolving a claim of trade secret privilege, the party claiming the privilege has the initial burden of proving existence of the privilege (*171 Cal. App. 4th 1, 13)* . The Uniform Trade Secrets Act (*Civ. Code § 3426 et seq.*), *Civ. Code § 3426.1*, defines trade secrets in California. " 'Trade secret' means information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." The defendant in *Citizens* provided "substantial evidence" on both elements by showing that the identity of its sources was information that derived economic value from not being generally known and that it had taken reasonable efforts to maintain the secrecy of its sources (*171 Cal. App. 4th 1, 13-14)* .

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8-81 California Points & Authorities § 81.332

§ 81.332 Opposing Motion to Compel Discovery--Information Sought Would Identify Individual Who Is Subject of Blood Test to Detect Antibodies to HIV [Health & Safety Code § 120975]

[1] FORM

[*The following may be combined with a general memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30).*]

THE REQUESTED DISCOVERY IS IMPROPER AND SHOULD BE DENIED BECAUSE IT IDENTIFIES OR PROVIDES CHARACTERISTICS THAT WOULD IDENTIFY AN INDIVIDUAL WHO IS THE SUBJECT OF A BLOOD TEST TO DETECT ANTIBODIES TO HIV.

Information That Would Identify Individual Who Is Subject of Test for AIDS Is Not Discoverable. No person may be compelled in any state, county, city, or other local, civil, criminal, administrative, legislative, or other proceeding to identify or provide characteristics that would identify any individual who is the subject of a blood test to detect antibodies to HIV (*Health & Safety Code § 120975*; *Irwin Memorial Blood Bank v. Superior Court (1991) 229 Cal. App. 3d 151, 157, 279 Cal. Rptr. 911*).

[2] Comments

[a] Use of Form

This memorandum may be used to oppose a motion to compel discovery of information that identifies or provides characteristics that would identify any individual who is the subject of a blood test to detect antibodies to HIV. Except as provided in *Health & Safety Code §§ 1603.1, 1603.3,* or *121022* (required tests, reports, and disclosure), no person may be compelled in any state, county, city, or other local, civil, criminal, administrative, legislative, or other proceeding to provide this information [*Health & Safety Code § 120975*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Information That Would Identify Individual Who Is Subject of Test for AIDS Is Not Discoverable

In ***Irwin Memorial Blood Bank v. Superior Court*** *(1991) 229 Cal. App. 3d 151, 279 Cal. Rptr. 911* , plaintiffs, individuals infected with AIDS through transfusions, sued defendant blood bank for negligently furnishing blood or blood products containing the HIV virus in screening donors and testing donated blood. During discovery plaintiffs moved for access to blood donors who had been implicated in the transfusion of tainted blood. For donors who had been tested and found to be antibody positive, plaintiffs requested that anonymous depositions be arranged in which no identifying information would be revealed. For donors who had not been tested, plaintiffs requested that defendant be compelled to provide their names. The trial court ordered limited discovery in the form of written depositions supervised by a court-appointed referee pursuant to Code Civ. Proc. § 2028 (*now see Code Civ. Proc. § 2028.010 et seq.*) of those donors who had been implicated as possible carriers of the HIV virus. The deposition procedures included a number of safeguards to ensure confidentiality. The names, addresses, social security numbers, and other identifying information were not to be disclosed to anyone, including representatives of either plaintiffs or defendant. Defendant was to send a certified letter with written questions to the donor, requesting that the donor arrange a deposition time and location by telephone. If the donor did not respond with a phone call, a process server would deliver to the donor a sealed notice of deposition. The only persons who were to be informed of the date, time, or location of a deposition prior to its occurrence were the referee, the court reporter, the donor, and the donor's counsel. The donor could give his or her deposition from behind a screen. Defendant was to send a sealed envelope containing a copy of the original donor card to the referee, who would then verify identification by having the donor open the envelope and confirm that it was his or nor card. Defendant challenged the discovery orders by filing a petition for a writ.

The court of appeal issued a peremptory writ restraining the trial court from enforcing the deposition orders. The court cited former Health & Safety Code § 199.20 [*see now Health & Safety Code § 120975*], which provides that no person may be compelled in any civil, criminal, administrative, or other proceedings to identify or provide identifying characteristics that would identify an individual who is the subject of blood testing for positive antibodies to the probable causative agent of AIDS. Plaintiffs contended that the trial court's order did not violate former § 199.20 in light of the elaborate procedures designed to protect the donor's identity. The court disagreed, noting that the donor will be seen or heard during the deposition by the referee and the reporter. The appearance and the voice of the donor are obviously identifying characteristics. It also held that the very production of a donor for deposition is an identification, explaining that until the donor arrives to be deposed, he or she is a number unconnected to a person. Once the association between the number and person is made, the person has become identified. The extent to which that identification is made known to third parties will depend on the care taken at the deposition, but the identification in a civil proceeding will have been made. Thus, the court concluded that the orders were in violation of former § 199.20 (*229 Cal. App. 3d 151, 157)* . The court found former § 199.20 to be determinative, and did not reach the question of whether the orders would violate the donors' constitutional right to privacy (*229 Cal. App. 3d 151, 153)* .

[4] Additional Authorities

[a] Information That Would Identify Individual Who Is Subject to Test for AIDS Is Not Discoverable

The facts and procedural background of *John B. v. Superior Court (2006) 38 Cal. 4th 1177, 45 Cal. Rptr. 3d 316, 137 P.3d 153* are discussed in detail in *§ 81.240[4][a]*. After balancing the wife's right to discover relevant evidence against the husband's right to privacy, the Supreme Court concluded that the wife was entitled to discovery concerning husband's sexual history and HIV status. The wife had "amply" established good cause for disclosure of the husband's medical records concerning HIV and AIDS. Discovery might reasonably lead to evidence that husband was aware of his HIV status. Discovery would also serve "the historically important state interest of facilitating the ascertainment of truth

in connection with legal proceedings," as well as the state's compelling interest in preventing the spread of AIDS (*38 Cal. 4th 1177, 1199)* . While the wife's interrogatories and requests for admission sought information that fell within the zone of the husband's right to sexual privacy, he had a diminished privacy interest in his HIV status, since he had admitted his status in court filings and informally. Moreover, the husband also alleged in the complaint that the wife infected *him*. By thus putting his own medical condition at issue, the husband had a "substantially lowered" expectation of privacy (*38 Cal. 4th 1177, 1199)* .

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8-81 California Points & Authorities § 81.333

§ 81.333 Opposing Motion to Compel Discovery--Requested Discovery Violates Requirements of International Comity

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in opposition to a motion to compel discovery (see, e.g., Ch. 83, Discovery: Depositions, § 83.45, Ch. 84, Discovery: Interrogatories, § 84.20, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30).*]

DISCOVERY THAT FAILS TO SATISFY THE REQUIREMENTS OF INTERNATIONAL COMITY IS IMPROPER.

A. Discovery Improper if Violates Requirements of International Comity. An order compelling international discovery is improper if it fails to show that Hague Convention procedures are justified by considerations of international comity, based on a case-by-case balancing of facts, sovereign interests, and the likelihood of successful discovery (*Societe Nationale Industrielle Aerospatiale v. United States District Court (1987) 482 U.S. 522, 544, 107 S. Ct. 2542, 96 L. Ed. 2d 461* ; *American Home Assurance Co. v. Societe Commerciale Toutelectric (2002) 104 Cal. App. 4th 406, 436-437, 128 Cal. Rptr. 2d 430*).

B. Matters Subject to Permissive Judicial Notice. The court may take judicial notice, to the extent it is not embraced within *Section 451 of the Evidence Code* relating to mandatory judicial notice, of the law of _____ [an organization of nations *and/or* foreign nations *and/or* public entities in foreign nations] (*Evid. Code § 452(f)*).

C. Requirement That Court Take Judicial Notice on Request. A trial court is, on proper request that it do so, required to take judicial notice of the matters specified in *Section 452 of the Evidence Code* (*Evid. Code §§ 11, 453*).

D. Propriety of Taking Judicial Notice. In determining the propriety of taking judicial notice of a matter, any source of pertinent information, including the advice of persons learned in the subject matter, may be consulted or used, whether or not furnished by a party (*Evid. Code § 454(a)(1)*).

E. Expert Advice in Writing. When the subject of judicial notice is the law of an organization of nations, a foreign nation, or a publicentity in a foreign nation and the court resorts to the advice of persons learned in the subject matter, such advice, if not received in open court, must be in writing (*Evid. Code § 454(b)*).

F. Request That Court Take Judicial Notice. The court is hereby requested to take judicial notice of _____ [*specify, e.g.,* the Statutes of the nation of _____, and, specifically, of Sections _____ thereof; the Hague Convention of _____ (*specify year*) on the Taking of Evidence Abroad in Civil or Commercial Matters, and, specifically, Article _____ thereof; and the following chapters by persons learned in the subject matter: _____ (*specify*)]. To enable the court to do so, copies of these authorities are attached hereto and made a part hereof.

[2] Comments

[a] Use of Form

This form is for use in opposing a motion to compel international discovery when the discovery sought by the moving party takes insufficient account of the requirements of international comity. This form may be combined with general memoranda in opposition to a motion to compel discovery.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should set forth the facts and sovereign interests, showing that the use of Hague Convention procedures are not justified by considerations of international comity, and explain why resort to Convention procedures will not prove effective for discovery. Counsel should also request that judicial notice be taken of provisions of foreign law, treaties, and practice, and demonstrate how these provisions would be violated if the discovery order requested by the moving party is executed in the foreign nation. If counsel is agreeable to some form of discovery, he or she may wish to suggest specific discovery procedures that take into account ascertainable requirements of the foreign state and that are least likely to offend that state's sovereignty.

[3] Discussion of Authorities

[a] Discovery Improper If Violates Requirements of International Comity

In ***Societe Nationale Industrielle Aerospatiale v. United States District Court*** *(1987) 482 U.S. 522, 544, 107 S. Ct. 2542, 96 L. Ed. 2d 461* ,petitioners foreign corporations appealed a decision, by United States Court of Appeals for the Eighth Circuit, denying a writ of mandamus and holding that when the district court had jurisdiction over a foreign litigant, the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 2555 (Hague Convention), did not apply to production of evidence in litigant's possession. Thus, the question presented in this case concerned the extent to which a federal district court must use the Hague Convention procedures when litigants sought answers to interrogatories, the production of documents, and admissions from a French adversary over whom the court had personal jurisdiction.

The United States Supreme Court held that the Hague Convention was not the mandatory and exclusive procedure for obtaining documents and information located within the territory of a foreign signatory. Rather, the Convention was intended to establish *optional* procedures that would facilitate the taking of evidence abroad (*482 U.S. 522, 544)* . The Court found support for this view, based on Convention's use of nonmandatory language, and on the fact that it does not expressly require contracting states to use the specified procedures or change their own procedures (*482 U.S. 522, 534)* .

The Supreme Court observed that in "many situations, the Letter of Request procedure authorized by the Hague Convention would be unduly time consuming and expensive, as well as less certain to produce needed evidence than direct use of the Federal Rules" (*482 U.S. 522, 542)* . However, the Court also observed that "in other instances a litigant's first use of the Hague Convention procedures can be expected to yield more evidence abroad more promptly than use of the normal procedures governing pre-trial civil discovery. In those instances, the calculations of the litigant will naturally lead to a first-use strategy" (*482 U.S. 522, 542*). Accordingly, the interests of international comity require a court to conduct a case-by-case balancing of facts, sovereign interests, and the likelihood that resort to Convention procedures will prove effective before requiring resort to those procedures (*482 U.S. 522, 543-544)* . Moreover, when a federal district court otherwise has jurisdiction over a foreign national party, the Convention does not preempt discovery procedures available under the Federal Rules of Civil Procedure (*482 U.S. 522, 544)* .

In ***American Home Assurance Co. v. Societe Commerciale Toutelectric*** *(2002) 104 Cal. App. 4th 406, 128 Cal. Rptr. 2d 430* , plaintiff bonding company sued defendant guarantor, a French corporation, in a superior court in California, to recover its losses on payment and performance bonds and security riders it issued in connection with a power plant construction contract. The trial court entered a default judgment, after striking the defendant's answer as a discovery sanction. Defendant appealed the denial of its motion for a new trial.

Defendant argued that the trial court erred by refusing to apply the Hague Convention discovery procedures. The trial court concluded that defendant's failure to produce three material witnesses for deposition, coupled with its earlier failure to produce financial records, demonstrated a "persistent, willful, and unjustified refusal" to comply with its legitimate discovery obligations (*104 Cal. App. 4th 406, 419)* .

The court of appeal held that the tactics of defendant in responding to discovery were so inconsistent with Hague Convention procedures that the trial court properly found it waived the right to insist on those procedures. The appellate court concluded that the rule of first resort announced in *Volkswagenwerk Aktiengesellschaft v. Superior Court (1981) 123 Cal. App. 3d 840, 858, 176 Cal. Rptr. 874* had been superseded by the more particularized approach outlined by the United States Supreme Court in *Societe Nationale Industrielle Aerospatiale* (discussed *above*) (*104 Cal. App. 4th 406, 436-437)* . (*Volkswagenwerk Aktiengesellschaft* held that, even when a foreign defendant is subject to California jurisdiction, a California litigant must, as a matter of international comity, attempt to comply with the provisions of the Convention before attempting any discovery in the signatory nation). The court of appeal also held that the party seeking to utilize the Hague Convention procedures has the burden of convincing the trial court that they are justified by considerations of international comity (*104 Cal. App. 4th 406, 427)* . Moreover because Hague Convention procedures are only an optional method of pursuing discovery abroad, they may be waived by failing to raise the issue properly (*104 Cal. App. 4th 406, 429* , *overruling* Pierburg GmbH & Co. KG v. Superior Court (1982) *137 Cal. App. 3d 238, 186 Cal. Rptr. 876*). However, a party's neglect of its right to request application of the Hague Convention procedures must be substantial to support a finding of waiver (*104 Cal. App. 4th 406, 430)* . Finally, the appellate court found that a terminating sanction for the discovery abuses was not abuse of discretion (*104 Cal. App. 4th 406, 437)* .

[b] Matters Subject to Permissive Judicial Notice

Matters of which judicial notice may be taken to the extent that they are not embraced within *Evid. Code § 451* (matters subject to mandatory judicial notice) include the following: (1) official acts of the legislative, executive, and judicial departments of the United States or of any state of the United States [*Evid. Code § 452(c)*]; and (2) the law of an organization of nations, of foreign nations, and public entities in foreign nations [*Evid. Code § 452(f)*].

[c] Requirement That Court Take Judicial Notice on Request

The trial court must take judicial notice of any matter specified in *Evid. Code § 452* if a party requests it and (1) gives each adverse party sufficientnotice of the request, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request; and (2) furnishes the court with sufficient information to enable it to take judicial notice of

the matter [*Evid. Code §§ 11, 453*]. The request may be made in the memorandum, as appears here.

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8-81 California Points & Authorities §§ 81.334-81.339

[Reserved]

§§ 81.334[Reserved]

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8-81 California Points & Authorities § 81.340

§ 81.340 Supporting Motion for Protective Order--Prohibiting Inquiry Into Defendants' Financial Affairs in Punitive Damages Cases [Civ. Code § 3295(c)]

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in support of a motion for protective order (see, e.g., Ch. 83, Discovery: Depositions, § 83.80, Ch. 84, Discovery: Interrogatories, § 84.30, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.50).*]

DISCOVERY RELATING TO A DEFENDANT'S FINANCIAL CONDITION OR CERTAIN PROFITS IS NOT PERMITTED WITHOUT A COURT ORDER MADE ON A SHOWING OF SUBSTANTIAL PROBABILITY THAT PLAINTIFF WILL PREVAIL ON THE PUNITIVE DAMAGES CLAIM.

Prohibition on Discovery Into Defendant's Financial Affairs. There shall be no discovery into the financial condition of a defendant or into the profits gained by means of the allegedly wrongful course of conduct, unless plaintiff shows that he or she has a substantial probability of prevailing on his or her punitive damages claim (*Civ. Code § 3295(c)*); *see Jabro v. Superior Court (2002) 95 Cal. App. 4th 754, 758, 115 Cal. Rptr. 2d 843*).

[2] Comments

[a] Use of Form

This form is for use in seeking an order to protect against untoward discovery of sensitive or confidential financial matters by a defendant in litigation that permits the assessment of punitive damages. It should be used when the plaintiff either has not made a motion pursuant to *Civ. Code § 3295(c)*, or has made such a motion but without success. Because this type of protective order may be appropriate to thevarious forms of discovery, this form may be combined with any of the general forms of memoranda in support of a motion for a protective order [*see, e.g., Ch. 83, Discovery: Depositions, § 83.80, Ch. 84, Discovery: Interrogatories, § 84.30, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.50*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 81.350* may be used to oppose the motion supported by the foregoing points and authorities.

[3] Discussion of Authorities

[a] Prohibition on Discovery Into Defendant's Financial Affairs

In ***Jabro v. Superior Court*** *(2002) 95 Cal. App. 4th 754, 115 Cal. Rptr. 2d 843* , petitioners, defendants in the underlying action arising from a racially-motivated altercation, petitioned for a writ of mandate reversing the trial court's order, entered in accordance with *Civ. Code § 3295(c)*, allowing discovery of their financial condition. Petitioners argued that the trial court erred in allowing discovery because it considered only evidence in favor of discovery submitted by plaintiff and real party in interest, and concluded that plaintiff was entitled to discovery because he made a prima facie showing sufficient to avoid summary judgment on his punitive damages claim. The trial court determined that such a showing was all that is required under *Civ. Code § 3295(c)* (*95 Cal. App. 4th 754, 755-756)* .

The court of appeal rejected the standard articulated by the trial court, and issued a writ of mandate, directing the court to vacate its order granting discovery and to reconsider the matter applying the standard enunciated in this opinion. The court held that before a trial court may enter an order allowing discovery of financial condition information under *Civ. Code § 3295(c)*, it must weigh the evidence presented by both sides, and make a finding that it is very likely the plaintiff will prevail on his claim for punitive damages (*95 Cal. App. 4th 754, 755)* . The court interpreted the words "substantial probability" in the context of this statute to mean "very likely" or "a strong likelihood" (*95 Cal. App. 4th 754, 758)* .

The court noted that although *Civ. Code § 3295(c)* was enacted in 1980, there has not been a published case in which the section is specifically at issue and interpreted (*95 Cal. App. 4th 754, 757)* . The court foundsupport for its interpretation of *Civ. Code § 3295(c)*, however, by examining the statute's legislative history. The Senate Committee on the Judiciary noted that under *Civ. Code § 3295(c)*, "in order for the plaintiff to discover evidence of defendant's wealth or of profits made through wrongful conduct, *he would first be required to prove his case, with the burden of beyond a reasonable doubt, in a sort of 'mini-trial' before the judge*" (emphasis added by this court) (*95 Cal. App. 4th 754, 757)* . However, the court clarified that the statute is a discovery statute and does not implicate the traditional fact finding process or the right to a jury trial in any way. Rather, it concerns a defendant's right to privacy and protection from being forced to settle non-meritorious lawsuits in order to protect this right (*95 Cal. App. 4th 754, 759)* .

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8-81 California Points & Authorities § 81.341

§ 81.341 Supporting Motion for Protective Order--Presumptive Right Limiting Access to and Use of Financial Information [Cal. Const., art. I, § 1]

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum in support of a motion for protective order (see, e.g., Ch. 83, Discovery: Depositions, § 83.80, Ch. 84, Discovery: Interrogatories, § 84.30, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.50).*]

A PARTY AGAINST WHOM DISCOVERY OF FINANCIAL INFORMATION IS SOUGHT HAS A PRESUMPTIVE RIGHT TO A PROTECTIVE ORDER LIMITING ACCESS TO AND USE OF THE INFORMATION TO THAT WHICH IS NECESSARY TO THE LITIGATION.

[*EITHER*]

A. Presumptive Right to Protective Order Limiting Access to Financial Information. A party to a lawsuit in which the opposing party is entitled to discovery into the party's financial affairs is presumptively entitled, under the constitutional right to privacy established in *Section 1 of Article I of the California Constitution*, to a protective order requiring that the information only be revealed to persons for whom such information is necessary for trial preparation, and that after being so revealed, the information may only be used for purposes of the pending litigation, unless the party seeking discovery meets its burden of establishing a substantial reason related to the lawsuit why the protective order should be denied (*see Moskowitz v. Superior Court (1982) 137 Cal. App. 3d 313, 317-318, 187 Cal. Rptr. 4* ; *see also Richards v. Superior Court (1978) 86 Cal. App. 3d 265, 272, 150 Cal. Rptr. 77*).

[*Optional*] **B. Mere Failure to Show Annoyance, Embarrassment, or Oppression Does Not Negate Presumption of Right to Protective Order.** Failure on the part of the party, against whom discovery of financial information is sought, to support his or her motion for a protective order with a factual showing that annoyance, embarrassment, or oppression would result from the discovery is not sufficient to overcome the presumption that the party has a right to

such an order, or to overcome the burden of the party seeking discovery to show why the order should be denied (*see Moskowitz v. Superior Court (1982) 137 Cal. App. 3d 313, 317, 187 Cal. Rptr. 4*).

[*Optional*] **C. Right to Protective Order Is Not Waived by Plaintiff's Putting Financial Condition in Issue.** A plaintiff who puts his or her own financial worth in issue waives his or her constitutional right to privacy only to the extent necessary for a fair resolution of the action, and does not waive his or her presumptive right to a protective order limiting access to the discovered information (*see Moskowitz v. Superior Court (1982) 137 Cal. App. 3d 313, 317-318, 187 Cal. Rptr. 4*).

[*AND/OR*]

D. Sealing Financial Information. The court may issue a protective order requiring that confidential information concerning a party's financial information be sealed (*see Cobb v. Superior Court (1979) 99 Cal. App. 3d 543, 551, 160 Cal. Rptr. 561*).

[*AND/OR*]

E. Use of Defendant's Stipulation or Financial Statement in Action Involving Punitive Damages Claim. The court may issue a protective order requiring that defendant stipulate that he or she is in a position to satisfy the punitive damages claim, or may order that defendant furnish an already prepared financial statement, thus eliminating the need for a full disclosure of defendant's financial affairs (*see Cobb v. Superior Court (1979) 99 Cal. App. 3d 543, 551, 160 Cal. Rptr. 561*).

[*Optional*] **F. Access to Financial Information May Be Limited to Discovering Party's Attorney.** A protective order limiting disclosure of financial information to the discovering party's attorneys and barring disclosure to the client is proper if the party seeking theorder meets its burden of showing good cause (*see GT, Inc. v. Superior Court (1984) 151 Cal. App. 3d 748, 754-755, 198 Cal. Rptr. 892*).

[2] Comments

[a] Use of Form

This form is for use in seeking an order to protect against untoward disclosure of sensitive or confidential financial matters properly discovered during litigation. Paragraphs A--C may be used by a party who is required to permit discovery into his or her financial affairs, but who is still presumptively entitled to a protective order limiting access to the information. In place of or in addition to Paragraphs A--C, Paragraph D may be used to support a request for an order sealing the financial information, and Paragraph E may be used by a defendant seeking to use a stipulation or financial statement instead of full disclosure in an action involving punitive damages claims, particularly when the defendant is a public corporation or business entity. Optional Paragraph F may be used when the party seeking a protective order desires to limit disclosure to the discovering party's attorney.

This form may be used when the party against whom discovery is sought is not seeking to prevent actual discovery of the financial information, or when the party seeking discovery has established its right to such discovery, such as when a plaintiff in an action for punitive damages has obtained an order for discovery on a showing that he or she has a substantial probability of prevailing on the punitive damages claim [*see Civ. Code § 3295(c)*]. It should be combined with memorandum generally supporting a motion for a protective order [*see, e.g., Ch. 83, Discovery: Depositions, § 83.80, Ch. 84, Discovery: Interrogatories, § 84.30, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.50*].

In addition to a protective order, a defendant may apply to the court to preclude admissibility of his or her profits or financial condition until after the trier of fact returns a verdict for the plaintiff awarding actual damages and finds that punitive damages are appropriate under *Civ. Code § 3294* [*Civ. Code § 3295(d)*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Presumptive Right to Protective Order Limiting Access to Financial Information

Moskowitz v. Superior Court *(1982) 137 Cal. App. 3d 313, 187 Cal. Rptr. 4* involved an action for legal malpractice. Plaintiff alleged that because of the negligence of defendants, he was compelled, as a matter of financial survival and under threat of execution against his assets, to pay a substantial sum of money in settlement and satisfaction of a judgment in a case in which defendants had represented him. By means of a deposition, defendants elicited from plaintiff detailed information regarding his financial affairs for the past 20 years. Plaintiff moved the trial court for a protective order sealing the deposition and limiting dissemination of the information therein to counsel for the parties and such other persons related to the litigation who needed the information to prepare for trial. The trial court denied the motion, and plaintiff petitioned the court of appeal for a writ of mandate to overturn the order.

The court of appeal granted the petition and directed that the trial court's order be reversed. The court stated that personal financial information comes within the zone of privacy protected by *Cal. Const., art. I, § 1* (*137 Cal. App. 3d 313, 315, 316)* . Even when the state's interest in facilitating the ascertainment of truth in connection with legal proceedings weighs in favor of disclosure of private information, such disclosure is permitted only to the extent necessary for a fair resolution of the lawsuit. The court held that the fact that plaintiff was neither denying that his opponents were entitled to discovery of the information nor seeking to restrict the scope of such discovery did not justify denying plaintiff his constitutional right of privacy in the financial information (*137 Cal. App. 3d 313, 316)* . The court cited ***Richards v. Superior Court*** *(1978) 86 Cal. App. 3d 265, 150 Cal. Rptr. 77* (discussed *below*), for its basic holding that plaintiff was presumptively entitled to a protective order limiting access to the information disclosed in the deposition to those persons requiring it for purposes of trial preparation. The court concluded that the burden was on the party seeking discovery to establish a reason, related to the law suit, for denial of the protective order (*137 Cal. App. 3d 313, 317-318)* .

Richards v. Superior Court *(1978) 86 Cal. App. 3d 265, 150 Cal. Rptr. 77* was an action for malicious prosecution, intentional interference with business relations, and intentional infliction of emotional distress. Defendants were five members of a law firm. Plaintiffs propounded interrogatories concerning the financial status of each of them, the relevance of which lay in the fact that the causes of action that were alleged permitted the assessment of punitive damages. Defendants filed objections to the interrogatories and moved for a protective order. The trial court overruled the objections, but issued an order requiring that answers to interrogatoriesshould be given, but should be sealed, delivered to the clerk of the court, and should remain unopened except by the judge. The trial judge later dissolved his own protective order, believing that one of the five defendants had not complied with the order to disclose.

The court of appeal issued a writ of mandate, requiring the trial court to make a new protective order in lieu of the one that had been dissolved (*86 Cal. App. 3d 265, 271, 272)* . The court noted the range of undesirable consequences that may arise from an untoward disclosure of financial information. Because denial of the protective order to the fifth defendant would expose him to those consequences, the court held that denial to be an abuse of discretion (*86 Cal. App. 3d 265, 271)* . The court went on to hold that in every situation in which a party is compelled to reveal financial information because of its relevance to the subject matter of a claim for punitive damages, that part is presumptively

entitled to a protective order that the information only be revealed to the discovering party's attorney or representative of such attorney, and that once so revealed, the information may only be used for purposes of the pending litigation (*86 Cal. App. 3d 265, 272)* . No statutory authority was cited for the imposition of this protective order. The court did indicate, however, that the constitutional right to privacy includes the right to be free from unnecessary disclosure of financial information (*86 Cal. App. 3d 265, 272, 273)* .

Note that the decision in *Richards* was decided prior to the enactment of *Civ. Code § 3295(c)*. That statute eliminates discovery of a defendant's financial condition in a case involving a punitive damages claim, except when the plaintiff has successfully moved the court for such discovery on a showing that he or she has a substantial probability of prevailing on the punitive damages claim. Thus, after plaintiff has obtained permission to inquire into defendant's financial affairs pursuant to *Civ. Code § 3295(c)*, it is not clear as to whether the defendant's presumptive right to a protective order still exists. However, at least two court of appeal cases decided after the enactment of *Civ. Code § 3295(c)* have cited *Richards* as binding or persuasive precedent without mentioning any effect of *Civ. Code § 3295(c)* on either the rule set out in *Richards* or its underlying reasoning [*see Moskowitz v. Superior Court (1982) 137 Cal. App. 3d 313, 317-318, 187 Cal. Rptr. 4* ; *Martin v. Superior Court (1980) 110 Cal. App. 3d 391, 395, 167 Cal. Rptr. 811]* . It thus appears that the enactment of *Civ. Code § 3295(c)* has not affected a party's right to a protective order limiting access to and use of discovered financial information.

[b] Mere Failure to Show Annoyance, Embarrassment, or Oppression Does Not Negate Presumption of Right to Protective Order

The facts and procedural background of ***Moskowitz v. Superior Court*** *(1982) 137 Cal. App. 3d 313, 187 Cal. Rptr. 4* are set out in [a], *above*. In *Moskowitz*, the court rejected the argument of defendants, who were opposing the motion for a protective order, that the trial court's denial of the motion was proper because plaintiff had failed to support his motion with a factual showing of annoyance, embarrassment, or oppression, as required by former Code Civ. Proc. § 2019(b)(1) (*now see Code Civ. Proc. § 2025.420(b)*). The court stated that if the burden had rested on plaintiff to show good cause for the protective relief that he was seeking, the trial court's order denying the motion would not have constituted an abuse of discretion (*137 Cal. App. 3d 313, 317)* . The court held, however, that the burden was on defendants to establish a reason, related to the lawsuit, for denial of the protective order (*137 Cal. App. 3d 313, 318)* . The court rejected defendants' reasons for denying the motion as erroneous or insufficient, and thus ordered the trial court to vacate its order denying the motion for protective relief (*137 Cal. App. 3d 313, 318-319)* .

[c] Right to Protective Order Is Not Waived by Plaintiff's Putting Financial Condition in Issue

The facts and procedural background to ***Moskowitz v. Superior Court*** *(1982) 137 Cal. App. 3d 313, 187 Cal. Rptr. 4* are set out in [a], *above*. In *Moskowitz*, the court of appeal rejected argument by defendants, who were opposing the motion for protective relief, that plaintiff had waived his right of privacy with respect to the financial information by filing his action for legal malpractice. The action put in issue whether plaintiff had the financial resources to stay the execution of judgment entered against him in the action in which defendants had represented plaintiff (*137 Cal. App. 3d 313, 317-318)* . The court held that in filing the lawsuit and putting in issue his financial worth, plaintiff had waived his constitutional right to privacy only to the extent necessary for a fair resolution of the action. The court acknowledged that ***Richards v. Superior Court*** *(1978) 86 Cal. App. 3d 265, 150 Cal. Rptr. 77* (discussed in [a], *above*), on which the court based its holding, had involved discovery from a defendant that had not put its financial worth in issue. The court held, however, that *Richards* is applicable regardless of whether it is a plaintiff or defendant who seeks a protective order limiting the use of financial information obtained through discovery to legitimate purposes (*137 Cal. App. 3d 313, 318)* .

[d] Sealing Financial Information

Cobb v. Superior Court *(1979) 99 Cal. App. 3d 543, 160 Cal. Rptr. 561* was an action for fraud and for money had

and received. Plaintiff propounded interrogatories seeking the net worth of two defendants for punitive damages purposes. Defendants objected to the interrogatories, contending that they violated their constitutional right to privacy. The trial court granted plaintiff's motion to compel answers, but added a protectiveprovision limiting the use of the information solely to plaintiff and plaintiff's counsel, and only for purposes of the lawsuit.

The court of appeal issued a writ of mandate requiring the trial court to set aside its order based on the grounds that the trial court appeared to have made no effort to fashion its protective order within constitutional limits so as to best protect defendants (*99 Cal. App. 3d 543, 550)* . Thus, the court ordered the trial court to make a new protective order and discussed a number of possibilities for such an order. Among the possibilities suggested by the court were sealing the information disclosed by the discovery, or limiting the inquiry to net worth alone, provided that plaintiff has first received a stipulation from defendant that defendant is able to meet the amount of the punitive damages claim (*99 Cal. App. 3d 543, 550-551)* .

[e] Use of Defendant's Stipulation or Financial Statement in Action Involving Punitive Damages Claim

Cobb v. Superior Court *(1979) 99 Cal. App. 3d 543, 160 Cal. Rptr. 561* is discussed in [d], *above.*

[f] Access to Financial Information May Be Limited to Discovering Party's Attorney

GT, Inc. v. Superior Court *(1984) 151 Cal. App. 3d 748, 198 Cal. Rptr. 892* was a proceeding on a petition for review of a protective order in an antitrust action in which petitioner alleged that real parties in interest had driven it out of the alleged market through competitive underpricing practices. Petitioner sought extensive discovery of financial records and information of real parties pertinent to the question of whether real parties' pricing policy amounted to pricing below cost. After some procedural skirmishing, the trial court issued a protective order limiting disclosure of the information to petitioner's attorneys. Petitioner then petitioned for review.

The court of appeal denied the petition. The court initially held that the burden of showing good cause is on the parties seeking the protective order. The court stated that the application by the court in ***Moskowitz v. Superior Court*** *(1982) 137 Cal. App. 3d 313, 187 Cal. Rptr. 4* (discussed in [a], *above*), of the presumption of good cause when financial information pertinent to liability rather than punitive damages is sought was warranted if the protective order in issue limited dissemination to persons concerned with the lawsuit, but may have been improper if the order in issue sought to bar the clients from access to the information. A protective order is easy to justify when financial information is needed for punitive damages because the client has little need to know the information when preparinga case on the liability question, but that when the information goes to the heart of the cause of action itself, a litigant should not be denied access so easily (*151 Cal. App. 3d 748, 754)* . The court, however, rejected petitioner's argument that a court is not permitted to impose a "counsel only" protective order even when there is a showing of good cause. Reviewing the facts before it, the court noted that real parties did not at any point in the proceedings produce any evidence in favor of the protective order, but merely asserted on appeal that the trial judge had properly incorporated into the protective order a proper balance between real parties' privacy rights and petitioner's rights to discovery. Based on its own review of the record, however, the court concluded that the order was supported by good cause. The trial judge had shown that he understood the law on protective orders, had agreed that the evidence was directly relevant to the issues in the lawsuit, and had expressed concern that, given the animus between the parties, the information could be improperly used if disclosed to petitioner (*151 Cal. App. 3d 748, 755)* . There was no indication in the record as to whether petitioner ever objected to the evidentiary basis for the protective order. The court stated that petitioner had the burden of producing an adequate record and that it must presume the correctness of the order and, absent a showing to the contrary, that petitioner had failed to object before the trial court (*151 Cal. App. 3d 748, 756)* . The court also added that if petitioner' counsel concluded that disclosure of the information to their clients might resolve the case, such as by causing abandonment of settlement, they could seek an in camera hearing to determine whether disclosure to the clients would be warranted. The court cautioned that it was not deciding under what circumstances such disclosure should take place (*151 Cal. App. 3d 748, 756 n.4*).

[4] Additional Authorities

[a] Presumptive Right to Protective Order Limiting Access to Financial Information

In *Martin v. Superior Court (1980) 110 Cal. App. 3d 391, 167 Cal. Rptr. 811* , plaintiffs sought punitive damages in connection with three causes of action and sought discovery of defendants' assets in connection with the damage request. Defendants objected to the interrogatories that sought disclosure of their income, assets, and liabilities and made a motion to obtain a protective order. The trial court granted a protective order that directed that the financial information be sealed on filing with the court, that the information be used only in connection with the litigation and be disseminated only to the parties and/or counsel of record, or their designees, and that the information only had to be divulged after a specified date. Defendants considered the protective order insufficient, and petitioned for an extraordinary writ requiring the trial court to vacate its orderand issue a new one that would adequately protect their constitutional right of privacy.

The court of appeal directed that a peremptory writ of mandate be issued requiring the trial court to vacate the portion of its order that permitted dissemination of defendants' financial information and/or records to plaintiffs, as distinguished from their counsel, and enter a new order limiting dissemination solely to counsel for plaintiffs. The court held that the protective order was inadequate to preserve defendants' right of privacy defined by *Carmel-by-the-Sea v. Young (1970) 2 Cal. 3d 259, 268, 85 Cal. Rptr. 1, 466 P.2d 225* . The court stated that the record at best showed a tenuous base for the pending action. It was sufficiently clear to the court that nothing of probative value in the record other than allegation thereof supported the charges of fraud, oppression, and malice made by plaintiffs on which the claim for punitive damages was grounded, and that it was not improbable that the interrogatories in question may have been dictated primarily for tactical purposes. Citing *Richards v. Superior Court (1978) 86 Cal. App. 3d 265, 271-272, 150 Cal. Rptr. 77* , the court held that when a party is compelled in civil discovery to reveal financial information because the information is relevant to the subject matter of a claim for punitive damages, that party is, on his or her motion, presumptively entitled to a protective order that the information need be revealed only to counsel for the discovering party or to counsel's representative, and that once so revealed, the information may be used only for the purposes of the lawsuit. The burden is on the opposing party to establish a substantial reason why the order should be denied, and the reason must be related to the lawsuit (*110 Cal. App. 3d 391, 395)* .

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[Reserved]

§§ 81.342[Reserved]

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8-81 California Points & Authorities § 81.350

§ 81.350 Opposing Motion for Protective Order--Financial Information Sought Goes to Heart of Punitive Damages Case [Civ. Code § 3295(c)]

[1] FORM

[*The following should be combined with a memorandum opposing a motion for a protective order (see, e.g., Ch. 83, Discovery: Depositions, § 83.100.*]

THE REQUEST FOR A PROTECTIVE ORDER BY DEFENDANT TO LIMIT ACCESS TO HIS/HER/ITS FINANCIAL RECORDS SHOULD BE DENIED BECAUSE THE ORDER WOULD PREVENT DISCOVERY OF FINANCIAL INFORMATION THAT GOES TO THE HEART OF THE CAUSE OF ACTION.

Civ. Code 3295. When the financial information sought goes to the heart of the cause of action itself, and is the only way for the plaintiff to prove his or her case, the plaintiff should not be denied access to that information on the basis of *Section 3295 of the Civil Code*, which applies only when the financial information is unrelated to the substantive claim and is relevant to a measure of damages that may never be awarded (*Rawnsley v. Superior Court (1986) 183 Cal. App. 3d 86, 91, 227 Cal. Rptr. 806*).

[2] Comments

[a] Use of Form

This form is for use in opposition to a motion for a protective order under *Civ. Code § 3295*. *Civ. Code § 3295* provides that when a cause of action allows for the recovery of punitive damages, under certain circumstances the court may grant defendant a protective order requiring plaintiff to produce evidence of a prima facie case of liability for damages pursuant to *Civ. Code § 3294* before defendant will be required to disclose evidence concerning his or her financial condition. The ground for opposition is that those circumstances are not present due to the basis of the cause of action, and thus a protective order is inappropriate. This form should be combined with a general form of memorandum in opposition to a motion for a protective order in a specific procedural context [*see, e.g., Ch. 83, Discovery: Depositions, § 83.100*].

In an appropriate case, the foregoing points and authorities may be submitted in opposition to the motion supported by the points and authorities *set out in § 81.340*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Civ. Code § 3295 Is Not Applicable When Financial Information Sought Goes to Heart of Cause of Action

In ***Rawnsley v. Superior Court*** *(1986) 183 Cal. App. 3d 86, 227 Cal. Rptr. 806* , plaintiff was solicited by defendants to invest in a limited partnership. After plaintiff had invested, the partnership was dissolved and replaced by four new limited partnerships to maximize tax benefits. Alleging that defendants siphoned and failed to distribute profits, received excessive compensation for management duties, and misled plaintiff abouttheir compensation, plaintiff brought an action setting forth ten causes of action, several of which, if proven, would give rise to a claim for punitive damages. Plaintiff served requests for production of documents on defendants. After agreeing to produce some documentation and being granted an extension of time, defendants objected to some of the requests. Plaintiff brought a motion to compel production. Defendants opposed that motion, claiming the financial records were protected by *Civ. Code § 3295* and moved for relief under *Code Civ. Proc. § 473* for any default that might have occurred by failing to produce the documents in a timely manner. The trial court granted defendants request for relief from default and denied plaintiff's motion. Plaintiff sought relief in the form of a writ.

The court of appeal affirmed the relief from default and issued a peremptory writ of mandate directing the trial court to vacate its order denying plaintiff's motion for an order compelling production. The court observed that a plaintiff's right to pretrial discovery of the defendant's financial status was severely limited by *Civ. Code § 3295*. However, *Civ. Code § 3295* was designed to protect the defendant from a specific type of discovery abuse: a situation in which a plaintiff puts forth an easily alleged cause of action for punitive damages, thus requiring a defendant to expend time and money in compiling a complex mass of information unrelated to the substantive claim involved in the lawsuit and relevant only to a measure of damages that may never be awarded. The court distinguished plaintiff's case. Plaintiff did not seek discovery of defendant's financial status solely for the purpose of assessing a punitive damages claim; the documents sought were fundamental to his case. He was alleging conversion and diversion of his assets, and the only way he could prove his case was to obtain defendant's financial records. When the only reason for seeking financial information is to give a tactical edge to the party who has obtained discovery of the information by allowing that party the benefit of pressure in settlement negotiations by threat or implication of disclosure, the party against whom the discovery is sought should be afforded the full benefit of *Civ. Code § 3295*, including a protective order limiting access to that information. But when, as in plaintiff's case, the financial information goes to the heart of the cause of action itself, a litigant should not be denied access so easily (*183 Cal. App. 3d 86, 91)* .

California Points & Authorities

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 82 DISCOVERY: SANCTIONS FOR DISCOVERY MISUSE

8-82 California Points & Authorities 82.syn

§ 82.syn Synopsis to Chapter 82: DISCOVERY: SANCTIONS FOR DISCOVERY MISUSE

§ 82.01 Scope of Chapter

§ 82.02 Governing Law

[1] California Civil Discovery Act and Related Law

[2] Provisions Governing Discovery Sanctions

[3] Case Law Decided Under Prior Discovery Acts

§ 82.03 How to Use the Forms in This Chapter

[1] Page Limits on Memoranda

[2] Using the Forms to Build a Draft Memorandum

§ 82.04 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

[2] Related Memoranda

§§ 82.05-82.09 [Reserved]

§ 82.10 Supporting Motion for Discovery Sanctions [Code Civ. Proc. § 2023.010 et seq.]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Imposition of Sanctions

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Willfulness Is Not Prerequisite to Imposition of Sanctions

[b] Sanctions Are Not Limited to Listed Misuses

[c] Sanctions Are Within Discretion of Trial Court

[4] Additional Authorities

[a] Employing Method Causing Annoyance, Embarrassment, Oppression, or Undue Burden and Expense Is Discovery Misuse

[b] Failure to Respond or to Submit to Discovery Is Discovery Misuse

[c] Unmeritorious Objection Is Discovery Misuse

[d] Evasive Response Is Discovery Misuse

[e] Failure to Confer With Opposing Party Is Discovery Misuse

[f] Sanctions Are Within Discretion of Trial Court

§ 82.11 Supporting Motion for Discovery Sanctions [Code Civ. Proc. § 2023.010 et seq.]--Order for Monetary Sanction [Code Civ. Proc. § 2023.030(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Court May Impose Monetary Sanction for Engaging in or Advising Discovery Misuse

[b] Monetary Sanction Mandatory If No Substantial Justification or Mitigating Circumstances Found

[c] Nature and Purpose of Monetary Sanction

[d] Value of Attorney's Services

[e] Pro Se Litigant's Recovery of Costs as Sanctions

[4] Additional Authorities

[a] Court May Impose Monetary Sanction for Engaging in or Advising Discovery Misuse

[b] Monetary Sanction Mandatory If No Substantial Justification or Mitigation Found

[c] Nature and Purpose of Monetary Sanctions

§ 82.12 Supporting Motion for Discovery Sanctions [Code Civ. Proc. § 2023.010 et seq.]--Order for Issue Sanction [Code Civ. Proc. § 2023.030(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Court May Impose Issue Sanction That Facts Be Taken as Established

[b] Court May Impose Issue Sanction Prohibiting Support or Opposition to Claims or Defenses

[4] Additional Authorities

[a] Court May Impose Issue Sanction Prohibiting Support or Opposition to Claims or Defenses

§ 82.13 Supporting Motion for Discovery Sanctions [Code Civ. Proc. § 2023.010 et seq.]--Order for Evidence Sanction [Code Civ. Proc. § 2023.030(c)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Court May Impose Evidence Sanction

[b] Evidence Sanction Without Prior Court Order Is Appropriate When Order Would Be Futile

[c] Evidence Sanction Appropriate When Discovery Abuse First Discovered During Trial

[4] Additional Authorities

[a] Court May Impose Evidence Sanction

[b] Evidence Sanction Appropriate When Discovery Abuse First Discovered During Trial

[c] Evidence Sanctions Without Prior Court Order Is Appropriate When Order Would Be Futile

§ 82.14 Supporting Motion for Discovery Sanctions [Code Civ. Proc. § 2023.010 et seq.]--Order for Terminating Sanction [Code Civ. Proc. § 2023.030(d)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Court May Dismiss Action

[b] Court May Order Default Judgment

[c] Lesser Sanction Not Required Before Entering Default

[4] Additional Authorities

[a] Court May Stay Proceedings

[b] Court May Dismiss Action

[c] Court May Order Default Judgment

[d] Lesser Sanction Not Required Before Entering Default

§ 82.15 Supporting Motion for Discovery Sanctions [Code Civ. Proc. § 2023.010 et seq.]--Order for Contempt Sanction [Code Civ. Proc. § 2023.030(e)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Civil Contempt

[d] Related Pleading and Practice Forms

[e] Related Points and Authorities

§§ 82.16-82.19 [Reserved]

§ 82.20 Opposing Motion for Discovery Sanctions [Code Civ. Proc. § 2023.010 et seq.]--Sanctions Are Punitive Rather Than Remedial

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Purpose of Sanctions

[b] Inappropriateness of Type and Severity of Sanctions

[c] Limitation on Use of Sanctions

[d] Limitation on Court's Discretion

[4] Additional Authorities

[a] Inappropriateness of Type and Severity of Sanctions

[b] Limitation on Use of Sanctions

§ 82.21 Opposing Motion for Discovery Sanctions [Code Civ. Proc. § 2023.010 et seq.]--Attorney Did Not Advise Misconduct

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Attorney Must Have Advised Misconduct

§ 82.22 Opposing Motion for Discovery Sanctions [Code Civ. Proc. § 2023.010 et seq.]--Misconduct Was Not Willful

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Misconduct Must Be Willful

§§ 82.23-82.29 [Reserved]

§ 82.30 Opposing Motion for Discovery Sanctions [Code Civ. Proc. § 2023.010 et seq.]--Monetary Sanctions Are Limited to Actual Costs and Fees [Code Civ. Proc. § 2023.030(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Monetary Sanctions Are Limited to Actual Costs

[4] Additional Authorities

[a] Monetary Sanctions Are Limited to Actual Costs

§ 82.31 Opposing Motion for Sanctions Order [Code Civ. Proc. § 2023.010 et seq.]--Terminating Sanction Is Inappropriate [Code Civ. Proc. § 2023.030(d)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Default or Dismissal Should Be Used With Caution

[b] Dismissal Is Too Severe When Unable to Comply

[c] Dismissal Is Unjust Unless Noncompliance Causes Interference With Court's Truth-Seeking Mission

[d] Discovery Relates to Some Issues Only

[e] Discovery Sought Is Irrelevant to Issues Raised by Pleadings

[f] Default or Dismissal Is Unjust When Lesser Sanction Would Be Appropriate

[g] Dismissal Is Inappropriate for Attorney's Failure to Pay Monetary Sanction

[h] Acquiescence by Moving Party

[i] Dismissal Inappropriate Without Prior Court Order Compelling Discovery

[j] Default as Sanction Does Not Apply When Defendant Fails to Appear at Trial

[k] Order for Default Sanction May Not Be Based on Ex Parte Application

[4] Additional Authorities

[a] Default or Dismissal Is Unjust When Lesser Sanction Would Be Appropriate

[b] Dismissal Inappropriate Without Prior Court Order Compelling Discovery

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CHAPTER 82 DISCOVERY: SANCTIONS FOR DISCOVERY MISUSE
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8-82 California Points & Authorities § 82.01

§ 82.01 Scope of Chapter

This chapter includes memoranda relating to the general provisions of the California Civil Discovery Act that govern discovery sanctions:

- A general form supporting a motion for discovery sanctions [§ 82.10].

- Forms supporting a motion for the imposition of one of the particular types of discovery sanctions: monetary sanctions [§ 82.11]; issue sanctions [§ 82.12]; evidence sanctions [§ 82.13]; terminating sanctions [§ 82.14]; and a contempt sanction [§ 82.15].

- Forms opposing a motion for sanctions generally [§ 82.20 et seq.] and forms opposing a motion for the imposition of particular types of discovery sanctions [§ 82.30 et seq.].

In addition to the general sanction provisions of *Code Civ. Proc. § 2023.010 et seq.* that are covered in this chapter, there are included with the code sections governing each of the specific methods of discovery provisions for the imposition of sanctions in the context of proceedings involving that particular method. The general memoranda in this chapter should be combined, whenever appropriate, with the memoranda relating to the more specific provisions for sanctions: these are set out in the chapters dealing with each of the particular discovery methods [*see* Ch. 83, *Discovery: Depositions* through Ch. 88, *Discovery: Exchange of Expert Witness Information*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureSanctionsContemptCivil Contempt

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8-82 California Points & Authorities § 82.02

§ 82.02 Governing Law

[1] California Civil Discovery Act and Related Law

Civil discovery in California is governed primarily by the California Civil Discovery Act, codified at *Code Civ. Proc. §§ 2016.010-2036.050*. Discovery in limited civil cases is further governed by *Code Civ. Proc. §§ 94* and *95*. Statewide rules of court relating to discovery papers and discovery motions are set out in*Cal. Rules of Ct., Rules 3.1000*, 3.1345, 3.1346, 3.1347, and 3.1348.

[2] Provisions Governing Discovery Sanctions

The general provisions governing discovery sanctions are set out in *Code Civ. Proc. § 2023.010 et seq.* These provisions generally define what constitutes an abuse of the discovery process, and the sanctions that may be imposed for such abusive conduct.

Note that elsewhere in the Discovery Act, the code sections governing the particular method of discovery include more specific provisions for sanctions. It is the provisions in these code sections that actually authorize the imposition of one or more sanctions in the context of a proceeding involving a particular discovery proceeding. Typically these provide for monetary sanctions in the case of unsuccessfully pursuing or opposing a particular discovery motion without justification [*see, e.g., Code Civ. Proc. § 2025.410(c)* (motion to stay oral deposition and quash deposition notice); *Code Civ. Proc. § 2025.420* (motion for protective order in context of oral deposition); *Code Civ. Proc. § 2025.450* (motion to compel in context of oral deposition)]. Also typically, these provide for the imposition of issue, evidence, or terminating sanctions for a failure to obey an order compelling discovery [*see, e.g., Code Civ. Proc. § 2025.450(d)* (failure to obey motion compelling attendance and testimony at oral deposition)]. The sanction provisions relating to particular discovery methods are covered in the chapters relating to those methods [*see* Ch. 83, *Discovery: Depositions* through Ch. 88, *Discovery: Exchange of Expert Witness Information*].

This power to impose evidentiary sanctions under the Civil Discovery Act [*Code Civ. Proc. § 2016.010 et seq.*] as a remedy for litigation misconduct supplements, but does not supplant, a court's inherent power to deal with litigation abuse [*Peat, Marwick, Mitchell & Co. v. Superior Court (1988) 200 Cal. App. 3d 272, 285-291, 245 Cal. Rptr. 873]* . Thus, one California appellate court has held that a trial court, when faced with pervasive, deliberate, and egregious

misconduct--abuse that makes lesser sanctions inadequate to ensure a fair trial--may use its inherent judicial power to dismiss the action [*Stephen Slesinger, Inc. v. The Walt Disney Co. (2007) 155 Cal. App. 4th 736, 758, 66 Cal. Rptr. 3d 268* ; *but see New Albertsons, Inc. v. Superior Court (2008) 168 Cal. App. 4th 1403, 1431-1434, 1426, 86 Cal. Rptr. 3d 457* (imposition of evidence and issue sanctions based on court's inherent power to control litigation, absent defendant's failure to obey order compelling discovery, was abuse of discretion when there was no order compelling defendant to produce video recordings, and real parties had waived right to compel further response or inspection; sanctions based on court's inherent power are reserved for egregious violations of discovery process)]. In that case, the trial court properly terminated litigation for discovery misconduct "run riot," involving a plaintiff that employed an investigator to steal confidential documents from defendant's secure facilities and trash receptacles, altered those documents with the intent to mislead, and lied about the source and number of the stolen documents in its verified discovery responses [*Stephen Slesinger, Inc. v. The Walt Disney Co. (2007) 155 Cal. App. 4th 736, 744-756, 66 Cal. Rptr. 3d 268]* .

The provisions that currently govern the imposition of monetary sanctions in actions or proceedings generally, set out in *Code Civ. Proc. § 128.7*, apply to actions or proceedings initiated after 1994 [*Code Civ. Proc. § 128.7(i)*]. These provisions do not apply to disclosures and discovery requests, responses, objections, and motions [*Code Civ. Proc. § 128.7(g)*]. Therefore, monetary sanctions for discovery violations in actions or proceedings started after 1994 are limited to those specified in the Discovery Act.

In *Olmstead v. Arthur J. Gallagher & Co. (2004) 32 Cal. 4th 804, 10 Cal. Rptr. 3d 298, 86 P.3d 354* , the California Supreme Court clarified that former Code Civ. Proc. § 128.5 does not authorize trial courts to impose sanctions for any form of litigation misconduct arising "from a complaint filed, or a proceeding initiated" after December 31, 1994. The Court held that the *Code Civ. Proc. § 128.7* and former Code Civ. Proc. § 128.5 establish mutually exclusive sanctions regimes, with *Code Civ. Proc. § 128.5* controlling in proceedings initiated before January 1, 1995 and *Code Civ. Proc. § 128.7* controlling after that date [*Olmstead v. Arthur J. Gallagher & Co. (2004) 32 Cal. 4th 804, 809-819, 10 Cal. Rptr. 3d 298, 86 P.3d 354* (rejecting court of appeal's interpretation that former Code Civ. Proc. § 128.5 applies after 1994 to sanctions for conduct not involving pleadings)].

[3] Case Law Decided Under Prior Discovery Acts

There is a considerable body of case law that interpreted the discovery provisions preceding the current Act, that is, the Civil Discovery Act of 1956 (former Code Civ. Proc. §§ 2016-2037.9) and the Civil Discovery Act of 1986 (former Code Civ. Proc. §§ 2016-2036). The Civil Discovery Act, which became operative July 1, 2005 continued provisions of the prior law. Decisions construing these prior laws are therefore cited as controlling authority to the extent that they are consistent with current provisions [*see In re Marriage of Skelley (1976) 18 Cal. 3d 365, 369, 134 Cal. Rptr. 197, 556 P.2d 297]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to CompelCivil ProcedureDiscoveryProtective Orders

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8-82 California Points & Authorities § 82.03

§ 82.03 How to Use the Forms in This Chapter

[1] Page Limits on Memoranda

One of the more significant drafting requirements to keep in mind are page limits: supporting and opposing memoranda filed in discovery motion proceedings may not exceed 15 pages. A reply or closing memorandum may not exceed 10 pages. Exhibits, declarations, attachments, the table of contents, the table of authorities, and the proof of service are excluded from these page limits. Any party must obtain leave of court to file a longer memorandum [*see Cal. Rules of Ct., Rule 3.1113(d)*]. These and other drafting requirements are discussed in further detail in Ch. 1, *Writing Legal Memoranda and Briefs* .

[2] Using the Forms to Build a Draft Memorandum

The forms included in this chapter are designed to be included in a memorandum supporting or opposing a motion for sanctions brought in the context of a particular discovery proceeding. They should be combined when appropriate with additional memoranda relating to the particular discovery proceedings. These are found in the related discovery chapters on particular discovery methods: Ch. 83, *Discovery: Depositions* through Ch. 88, *Discovery: Exchange of Expert Witness Information*.

For a detailed discussion on how to select and use the forms in the publication to build a draft memorandum and complete the draft, with detailed discussion of all drafting requirements and strategic or stylistic considerations, see Ch. 1, *Writing Legal Memoranda and Briefs* . For a skeletal form for a memorandum for use in creating a properly formatted outline in which to compile relevant forms from this publication, see also Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPleading & PracticeMotion PracticeSupporting Memoranda

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8-82 California Points & Authorities § 82.04

§ 82.04 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

For discussion and forms for moving papers relating to sanctions under the Discovery Act, see California Forms of Pleading and Practice, Ch. 192, *Discovery: Sanctions for Discovery Abuse* (Matthew Bender).

[2] Related Memoranda

For memoranda supporting or opposing discovery sanctions in the context of a particular discovery method or proceeding, see Ch. 83, *Discovery: Depositions* through Ch. 88, *Discovery: Exchange of Expert Witness Information* .

For memoranda for use in seeking or opposing writs to review discovery orders, see Ch. 89A, *Discovery: Review of Discovery Orders* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsExpert Witness DiscoveryCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMisconductCivil ProcedureAppealsAppellate JurisdictionInterlocutory Orders

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8-82 California Points & Authorities §§ 82.05-82.09

[Reserved]

§§ 82.05[Reserved]

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PART II. FORMS

8-82 California Points & Authorities § 82.10

§ 82.10 Supporting Motion for Discovery Sanctions [Code Civ. Proc. § 2023.010 et seq.]--General Form

[1] FORM Supporting Motion for Discovery Sanctions [Code Civ. Proc. § 2023.010 et seq.]--General Form

[*The following may be combined with other memoranda as necessary to support a motion for sanctions (see, e.g., § 82.11 et seq.), and should be combined with memoranda supporting a motion for sanctions in the specific procedural context (see, e.g., Ch. 83, Discovery: Depositions, §§ 83.31, 83.32, Ch. 84, Discovery: Interrogatories, §§ 84.11, 84.12, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, §§ 85.12, 85.20).*]

THE COURT MAY IMPOSE SANCTIONS ON ANYONE WHO HAS ENGAGED IN CONDUCT CONSTITUTING A MISUSE OF THE DISCOVERY PROCESS.

A. Court May Impose Sanctions for Misuse of Discovery Process. To the extent authorized by Section _____ [*specify code section that governs particular discovery method, e.g., 2025.480 of the Code of Civil Procedure*], the court, after notice to any affected party, person, or attorney, and after opportunity for hearing, may impose sanctions against anyone who has engaged in conduct that is a misuse of the discovery process (*Code Civ. Proc. § 2023.030*).

[*Optional*] **B. Willfulness Is Not Prerequisite to Imposition of Sanctions.** Sanctions may be imposed for engaging in conduct that is a misuse of the discovery process without regard to whether the person acted willfully (*Kohan v. Cohan (1991) 229 Cal. App. 3d 967, 971, 280 Cal. Rptr. 474* (Second District interpreted imposition of monetary sanctions under former Code Civ. Proc. § 2023(b)(1) (*now see Code Civ. Proc. § 2023.030(a)*).

[*Optional*] **C. Persisting in Attempt to Obtain Discovery Outside Scope Is Discovery Misuse.** Persisting, over objection, and without substantial justification, in an attempt to obtain information or materials that are outside the scope of permissible discovery constitutes a misuse of the discovery process (*Code Civ. Proc. § 2023.010(a)*).

[*Optional*] **D. Failure to Comply With Procedures Is Discovery Misuse.** Using a discovery method in a manner that does not comply with its specified procedures constitutes a misuse of the discovery process (*Code Civ. Proc. § 2023.010(b)*).

[*Optional*] **E. Employing Method Causing Annoyance, Embarrassment, Oppression, or Undue Burden and Expense Is Discovery Misuse.** Employing a discovery method in a manner or to an extent that causes unwarranted _____ [annoyance *and/or* embarrassment *and/or* oppression *and/or* undue burden and expense] constitutes a misuse of the discovery process (*Code Civ. Proc. § 2023.010(c)*).

[*Optional*] **F. Failure to Respond or to Submit to Discovery Is Discovery Misuse.** Failing to _____ [respond *and/or* submit] to an authorized method of discovery constitutes a misuse of the discovery process (*Code Civ. Proc. § 2023.010(d)*).

[*Optional*] **G. Unmeritorious Objection Is Discovery Misuse.** Making an unmeritorious objection constitutes a misuse of the discovery process (*Code Civ. Proc. § 2023.010(e)*).

[*Optional*] **H. Evasive Response Is Discovery Misuse.** Making an evasive response constitutes a misuse of the discovery process (*Code Civ. Proc. § 2023.010(f)*).

[*Optional*] **I. Disobeying Court Order Is Discovery Misuse.** Disobeying a court order to provide discovery constitutes a misuse of the discovery process (*Code Civ. Proc. § 2023.010(g)*).

[*Optional*] **J. Making or Opposing Motion to Compel or to Limit Discovery Without Substantial Justification Is Discovery Misuse.** Making or opposing a motion to compel or to limit discovery without substantial justification constitutes a misuse of the discovery process (*Code Civ. Proc. § 2023.010(h)*).

[*Optional*] **K. Failure to Confer With Opposing Party Is Discovery Misuse.** Failing to confer in person, by telephone, or by letter with an opposing party or attorney in a reasonable and good faith attempt to resolve informally any dispute concerning discovery, when Section _____ [*specify code section that governs particular discovery motion, e.g.* 2025.480] of the Code of Civil Procedure requires the filing of a declaration stating facts showing that such an attempt has been made, constitutes a misuse of the discovery process. Notwithstanding the outcome of the motion, the court must impose a monetary sanction ordering that any party or attorney who fails to confer as required pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct (*Code Civ. Proc. § 2023.010(i)*).

[*Optional*] **L. Sanctions Are Not Limited to Listed Misuses.** The list of discovery misuses contained in *Section 2023.010 of the Code of Civil Procedure* is illustrative, not exhaustive. Sanctions may be imposed for an unlisted discovery misuse, such as a motion for reconsideration, so long as the misuse was without substantial justification and no other circumstances make an award of sanctions unjust (*Palm Valley Homeowners Assoc., Inc. v. Design MTC (2001) 85 Cal. App. 4th 553, 563-564, 102 Cal. Rptr. 2d 350* ; *Mattco Forge, Inc. v. Arthur Young & Co. (1990) 223 Cal. App. 3d 1429, 1440-1441, 273 Cal. Rptr. 262*).

M. Sanctions Are Within Discretion of Trial Court. The imposition of a sanction pursuant to *Section 2023.030 of the Code of Civil Procedure* is within the discretion of the trial court, so long as the sanction is appropriate to the dereliction, does not exceed that which is required to protect the interests of the party adversely affected by the discovery abuse, and is within the operation of *Section 2023.030 of the Code of Civil Procedure* (*see A & M Records, Inc. v. Heilman (1977) 75 Cal. App. 3d 554, 565, 142 Cal. Rptr. 390* ; *Stein v. Hassen (1973) 34 Cal. App. 3d 294, 301, 109 Cal. Rptr. 321*).

[*Optional*] **N. Court May Impose Sanctions Despite Lack of Opposition to Motion to Compel Discovery.** The court may award sanctions under the Discovery Act in favor of a party who files a motion to compel discovery, even though no opposition to the motion was filed, or opposition to the motion was withdrawn, or the requested discovery was provided to the moving party after the motion was filed (*Cal. Rules of Ct., Rule 3.1030(a)*).

[2] Comments

[a] Use of Form

This form of memorandum is for use in supporting a motion for sanctions to be imposed against a party or attorney who has engaged in abuse of the discovery process [*see Code Civ. Proc. § 2023.010 et seq.*].

The memorandum should be combined with other memoranda relating to the imposition of specific sanctions as necessary, such as those *set out in § 82.11* et seq. It should also be combined with forms supporting the imposition of sanctions in specific procedural contexts [*see, e.g., Ch. 83, Discovery: Depositions, § 83.32, Ch. 84, Discovery: Interrogatories, § 84.12, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.12 (supporting sanctions for failure to obey inspection order)*].

A request for a sanction in discovery matters must, in the notice of motion, identify every person, party, and attorney against whom the sanction is sought, and specify the type of sanction sought. The notice of motion must be supported by a memorandum, and accompanied by a declaration setting forth facts supporting the amount of any monetary sanction sought [*Code Civ. Proc. § 2023.040*].

A judicial officer also has the power to impose reasonable money sanctions not exceeding $1,500, notwithstanding any other provision of law, for any violation of a lawful court order done without good cause or substantial justification. The money is payable to the court. Persons against whom the sanction is available include a witness, a party, a party's attorney, or both. However, this power is not applicable to advocacy of counsel before the court [*Code Civ. Proc. § 177.5*].

Note that some cases cited in this form construe law in effect prior to the operative date of the Civil Discovery Act. They are cited and discussed aspersuasive authority to the extent that they remain consistent with the provisions of the current act.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should state facts showing the particular misuse of the discovery process in which the other party or attorney has engaged.

[c] Imposition of Sanctions

Sanctions may be imposed *against* anyone engaging in conduct constituting a misuse of the discovery process [*Code Civ. Proc. § 2023.030*]. The courts of appeal are divided on whether discovery sanctions can be awarded *in favor of* parties who did not propound the discovery that triggered the sanctions [*see, e.g., Parker v. Wolters Kluwer United States, Inc. (2007) 149 Cal. App. 4th 285, 301-302, 57 Cal. Rptr. 3d 18* (award of sanctions in favor of nonpropounding party is justified only if that party shows it suffered a detriment as result of sanctioned party's misuse of discovery process); *Townsend v. Superior Court (1998) 61 Cal. App. 4th 1431, 1438, 72 Cal. Rptr. 2d 333* ("outsiders [are] not entitled to be awarded sanctions"); *Calvert Fire Ins. Co. v. Cropper (1983) 141 Cal. App. 3d 901, 905, 190 Cal. Rptr. 593* (there is no limitation on who may request sanctions, decided under prior law)]. For further discussion, see California Forms of Pleading and Practice, Ch. 193, *Depositions* (Matthew Bender).

The imposition of an issue sanction, an evidence sanction, or a terminating sanction is dependent on the party to be sanctioned having failed to obey a court order compelling discovery. *Code Civ. Proc. § 2023.030* provides that these sanctions are available to the extent authorized by the section governing the particular discovery method. The methods of discovery that permit the issuance of these sanctions are all based on, and require, disobedience of a court order compelling discovery [*see, e.g., Code Civ. Proc. §§ 2025.450, 2025.480* (oral depositions), 2030.290, 2030.300

(interrogatories), 2031.300, 2031.310, 3031.320 (inspection, copying, testing, or sampling), 2032.240, 2032.410, 2032.420, 2032.620, 2032.650 (examinations), 2033.290 (admissions)]. Thus, although the court has the discretion to decide whether to impose these sanctions, they may not be imposed absent a prior court order compelling discovery or a stipulation that is "tantamount to a court order" [*see Mileikowsky v. Tenet Healthsystem (2005) 128 Cal. App. 4th 262, 279-281, 26 Cal. Rptr. 3d 831* (terminating sanctions were justified without evidence of violation of court order, based on parties' stipulation waiving right to insist on formal order compelling responses)].

[d] Related Pleading and Practice Forms

For discussion and forms for moving papers relating to sanctions under the Discovery Act, see California Forms of Pleading and Practice, Ch. 192, *Discovery: Sanctions for Discovery Abuse* (Matthew Bender).

[3] Discussion of Authorities

[a] Willfulness Is Not Prerequisite to Imposition of Sanctions

In ***Kohan v. Cohan*** *(1991) 229 Cal. App. 3d 967, 280 Cal. Rptr. 474* , plaintiffs brought an action against defendants for dissolution of partnership, an accounting, and other relief. In preparing for trial, the parties exchanged expert witness lists. Defendants' list included the name of a witness who had died two years earlier. Plaintiffs moved to exclude from trial a declaration by that expert, to preclude defendants from designating a different expert, and to impose monetary sanctions for misuse of discovery, claiming that the designation was an act of willful misconduct. The trial court granted plaintiffs' motions, including the motion for sanctions, finding that defendants manifested a lack of diligence that required plaintiffs to unnecessarily expend legal resources. Defendants appealed.

The court of appeal affirmed. Defendants contended that sanctions were inappropriate in that their behavior was not willful or done in bad faith or to gain an advantage in the litigation. The court explained that the monetary sanctions were imposed pursuant to former Code Civ. Proc. § 2023(b)(1) (*now see Code Civ. Proc. § 2023.030(a)*), which does not, by its terms, require that the misuse of the discovery process be willful. The court further explained that former Code Civ. Proc. § 2023(b)(1) (*now see Code Civ. Proc. § 2023.030(a)*) allows the one against whom sanctions are sought to show substantial justification to avoid the imposition of sanctions (*229 Cal. App. 3d 967, 971)* . The court concluded that inasmuch as defendants did not contend that the trial court abused its discretion in failing to find substantial justification for their misuse of the discovery process, the order imposing sanctions must be affirmed (*229 Cal. App. 3d 967, 972)* .

For conflicting authority holding that willfulness is a prerequisite to imposition of sanctions, see *§ 82.22[3][a]*.

[b] Sanctions Are Not Limited to Listed Misuses

In ***Palm Valley Homeowners Assoc., Inc. v. Design MTC*** *(2001) 85 Cal. App. 4th 553, 102 Cal. Rptr. 2d 350* , a law firm appealed after the trial court imposed sanctions under former Code Civ. Proc. § 2023 (*now see Code Civ. Proc. § 2023.010 et seq.*) for discovery abuses and under *Code Civ. Proc. § 128.5* for bad faith actions in the underlying construction defect litigation. The basis for the imposition of sanctions was that the firm pursued litigation activities on behalf of its client, even after the firm knew that the client was a suspended corporation. The law firm argued, first, that it continued to represent its client in the good faith belief that suspension under the Corporations Code for failure to file a required information statement with the Secretary of State, unlike a suspension for nonpayment of taxes under the Revenue and Taxation Code, did not disable acorporation from litigation. The firm contended that the trial court erred in holding that the two types of suspensions were equivalent and that the firm acted in bad faith in believing that they should be treated differently (*85 Cal. App. 4th 553, 555)* . The firm also argued that the imposition of sanctions in reliance on former Code Civ. Proc. § 2023 (*now see Code Civ. Proc. § 2023.010 et seq.*) was improper, because the firm did not engage in any abuse of the discovery process itself (*85 Cal. App. 4th 553, 558-559)* .

The court of appeal rejected appellant's arguments and affirmed. The court acknowledged that whether the two types of corporate suspensions both result in a disqualification from litigation appeared to be an issue of first impression. However, the court of appeal concluded that the relevant statutory language, as well as legislative policy, were more than sufficient to put any reasonable attorney on notice that a corporation suspended under the Corporations Code, like a corporation suspended for nonpayment of taxes, is truly suspended, and disabled from participating in any litigation activities. Thus, the trial court did not abuse its discretion in determining that the firm knew, or should have known, that the corporation was disqualified from representing itself in litigation (*85 Cal. App. 4th 553, 561)* . Further, the record belied the firm's assertions of good faith; rather, it showed that the firm deliberately concealed its knowledge of the suspension, and probable disability of its client, from both the court and opposing counsel, and continued to litigate vigorously, even seeking summary proceedings to terminate the case before the corporation's suspended status was discovered (*85 Cal. App. 4th 553, 562-563)* . Finally, the court rejected the firm's argument that the imposition of sanctions in reliance on former Code Civ. Proc. § 2023 (*now see Code Civ. Proc. § 2023.010 et seq.*) was improper, because its conduct in representing its client during ongoing discovery was not, in itself, an abuse of the discovery process (*85 Cal. App. 4th 553, 563)* . (Neither the client, nor the firm, for example, refused to provide relevant requested discovery, interposed abusive discovery requests, or did anything to harm or delay the regular processes ofdiscovery.) The conduct listed in former Code Civ. Proc. § 2023 (*now see Code Civ. Proc. § 2023.010*) is not exclusive. In the court's view, participating in discovery on behalf of a suspended corporation, knowing that the corporation was suspended, and having reason to know or suspect that this suspension disabled the corporation from participating in the litigation, qualified as conduct abusive of the discovery process, and thus sanctionable. The court concluded that there was no abuse of discretion in so holding, particularly as the sanctions order was also fully justified on other grounds under *Code Civ. Proc. § 128.5* (*85 Cal. App. 4th 553, 563-564)* .

In ***Mattco Forge, Inc. v. Arthur Young & Co.*** *(1990) 223 Cal. App. 3d 1429, 273 Cal. Rptr. 262* , while defendant's demurrer to plaintiff's original complaint was pending, plaintiff served on defendant a demand for inspection of documents. After defendant responded with blanket objections, plaintiff asked to meet and confer. Defendant refused, claiming it was premature to discuss discovery until the pleading issues were resolved. After the trial court sustained defendant's demurrer with leave to amend, plaintiff renewed its request to meet and confer. Defendant again refused. Plaintiff filed a motion to compel production and for monetary sanctions under former Code Civ. Proc. §§ 2023 (*now see Code Civ. Proc. § 2023.010 et seq.*) and 2031 (*now see Code Civ. Proc. § 2031.010 et seq.*). The trial court granted four fifths of plaintiff's motion to compel and awarded monetary sanctions. Defendant then filed a motion for reconsideration of only the monetary sanction, without seeking a reconsideration of the order to produce. The trial court denied the motion for reconsideration and granted plaintiff's request for additional sanctions. Defendant appealed from the second order and filed a writ of mandate concerning the first order.

The court of appeal denied the writ of mandate and affirmed the second monetary sanction, holding that both sanction awards were proper. The court explained that under former Code Civ. Proc. § 2031(*l*) (*now see Code Civ. Proc. § 2031.310(d)*), the trial court was required to award monetary sanctions against defendant unless defendant acted with substantial justification or other circumstances make the imposition of sanctions unjust. The court said that defendant's objections were without substantial justification, because pleading deficiencies do not affect a party's right to conduct discovery (*223 Cal. App. 3d 1429, 1436)* . With regard to the second award of sanctions, which had been brought under *Code Civ. Proc. § 128.5* (frivolous actions or delaying tactics) as well as former Code Civ. Proc. § 2023 (*now see Code Civ. Proc. § 2023.010 et seq.*), the court said that because it found the award was proper under former Code Civ. Proc. § 2023 (*now see Code Civ. Proc. § 2023.010 et seq.*), it would not address or consider any arguments based on *Code Civ. Proc. § 128.5*. It characterized defendant's motion for reconsideration of the sanction award as nothing more than a frivolous continuation of its opposition to plaintiff's motion to compel production based on defendant's unmeritorious objections (*223 Cal. App. 3d 1429, 1437-1438)* . The court said that the types of misuses of discovery listed in former Code Civ. Proc. § 2023(a) (*now see Code Civ. Proc. § 2023.010*) are not exhaustive, and that misuse of discovery is not limited to what is contained in the list. It concluded that a frivolous motion for reconsideration is directly within the operation of former Code Civ. Proc. § 2023(a) (*now see Code Civ. Proc. § 2023.010*). Further, because the motion for reconsideration was made without substantial justification and in the absence of other

circumstances making an award of sanctions unjust, the court held it was an abuse of the discovery process (*223 Cal. App. 3d 1429, 1440-1441)* .

[c] Sanctions Are Within Discretion of Trial Court

In ***A & M Records, Inc. v. Heilman*** *(1977) 75 Cal. App. 3d 554, 142 Cal. Rptr. 390* , a corporation that commercially manufactured and sold recorded musical performances brought an action against a corporation and its founder, individually, for advertising and selling record and tape albums which included performances of songs duplicated from recordings manufactured by plaintiff without making payments to plaintiff or to any of the musicians involved. During the pretrial proceedings, plaintiff sought to take the individual defendant's deposition and to have him produce certain documents. Although defendant appeared for the deposition, he did not produce the documents and refused to answer any questions of substance concerning the documents. Based on this refusal, the trial court entered an order pursuant to former Code Civ. Proc. § 2034(b)(2) [*now see Code Civ. Proc. § 2023.030(c)*], precluding defendant from testifying at the trial respecting any questions or matters which he refused to answer at the deposition and from introducing any documents at trial which he had not produced one week prior to trial. Defendant apparently produced the documents, and during the trial, the court interpreted the remainder of the order as limiting defendant's testimony and not that of any other witness. After the trial, judgment was entered for plaintiff. The individual defendant appealed in part on the grounds that the orders relating to discovery preventing his testimony at trial were improper in that the court could not make such orders without defendant first disobeying a court order, and that the order was an abuse of the court's discretion.

In denying the defendant's contentions and affirming the judgment, the court of appeal stated that the order employed in response to the defendant's failure to produce certain documents in discovery was a conditional order which only would have prevented him from introducing the documents at trial if he had once again failed to produce them a week before the scheduled start of the trial, in disobedience of the court order. The court said that when a party disobeys an order to produce documents, the court may make such orders in regard to the refusal as are just. As long as thesanction imposed was appropriate to the dereliction and did not exceed the protection required to protect the interests of the party entitled to but denied discovery, its imposition was within the discretion of the trial judge (*75 Cal. App. 3d 554, 565)* . The court found that given the facts of the case and the imminent date of trial, the trial court's action was appropriate, just, and within its discretion (*75 Cal. App. 3d 554, 565)* .

Note that the California Civil Discovery Act significantly alters the procedure that was employed in *A & M Records*. Current law now provides that a party or party-affiliated deponent may be served with a deposition notice [*see Code Civ. Proc. § 2025.010 et seq.*]. If the notice is disobeyed, the noticing party may move for an order to compel attendance, testimony, or production [*Code Civ. Proc. § 2025.450*]. If the court grants this motion, the court must also impose a monetary sanction, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*Code Civ. Proc. § 2025.450(c)(1)*]. The court may impose an issue, evidence, or terminating sanction only if the party or party-affiliated deponent then fails to obey the order to compel [*see Code Civ. Proc. § 2025.450(d)*]. However, the principles discussed by the court in *A & M Records* remain similar to those under prior law, and thus the case is persuasive authority for the proposition that the sanction ordered is in the discretion of the trial court.

In ***Stein v. Hassen*** *(1973) 34 Cal. App. 3d 294, 109 Cal. Rptr. 321* , plaintiff sued defendant, individually, and a hospital and sanitarium of which defendant was president or manager, alleging it was the defendant's alter ego, for monies due on promissory notes. Subsequent to the filing of defendant's answer and counterclaim, plaintiff served defendant with interrogatories seeking information concerning defendant's relationship to the sanitarium, any defense which might be asserted against personal liability on the notes, and matters pertaining to the counterclaim. After defendant filed what he asserted to be answers to the interrogatories, plaintiff noticed a motion to compel further answers on the ground that certain of defendant's answers to the interrogatories were nonresponsive, incomplete, and evasive, and for monetary sanctions incurred in obtaining the orders. Defendant then filed a document purporting to

contain additional answers. The motion was granted as to certain interrogatories, and defendant was given 30 days to file additional answers. When no further answers were filed within the time period, plaintiff sought an order striking defendant's answer and counterclaim and entering a default judgment. The court continued the matter and ordered defendant to provide further responses as previously ordered. Defendant moved for reconsideration and filed supplemental answers. At another hearing, the default judgment was entered. Defendant appealed, contending in part, that the ultimate sanction of striking his answer and counterclaim and entering a default was too severe, and that a lesser penalty would have been fitting.

In affirming the judgment, the court of appeal stated that while the purpose of sanctions under the discovery statutes is to enable the party to obtain the objects sought by the discovery and compliance with orders the court makes for such discovery, there are instances in which the sanction of striking an answer and entering default must be imposed in justice to the prevailing party (*34 Cal. App. 3d 294, 301)* . The true doctrine seems to be that so long as the penalty is appropriate to the dereliction, does not exceed that which is required to protect the interests of the party entitled to but denied discovery, and is one described by the statute, its imposition is within the discretion of the trial judge (*34 Cal. App. 3d 294, 301)* .

[4] Additional Authorities

[a] Employing Method Causing Annoyance, Embarrassment, Oppression, or Undue Burden and Expense Is Discovery Misuse

In *Blago Leko v. Cornerstone Home Inspection (2001) 86 Cal. App. 4th 1109, 103 Cal. Rptr. 2d 858* , an action arising out of a suit for negligent disclosure of defects in real property, cross-defendant's attorney appealed his monetary sanctions under former Code Civ. Proc. § 2023(a)(3) (*now see Code Civ. Proc. § 2023.010*). The court of appeal affirmed the order sanctioning the attorney for improperly filing a motion to compel attendance when he completely disregarded his obligation to attempt to informally resolve the discovery issue. *Blago Leko* is further discussed in *§ 82.10[4][b]*, below.

[b] Failure to Respond or to Submit to Discovery Is Discovery Misuse

In *Sears, Roebuck and Co. v. Nat'l Union Fire Ins. Co. (2005) 131 Cal. App. 4th 1342, 32 Cal. Rptr. 3d 717* , an insurance bad faith case, appellant attorney sought review of trial court orders that granted respondent policyholder's motion to compel discovery and imposed discovery sanctions on the attorney. The court of appeals affirmed the award of monetary sanctions under former Code Civ. Proc. §§ 2020(a), 2023(a)(4), (5), (6) (*now see Code Civ. Proc. §§ 2020.010(a), 2023.010(d), (e), (f)*), because evidence showed the attorney, in fact, knew he was obliged to produce documents to respondent's attorneys and repeatedly failed to do so. Moreover, the attorney's reliance on respondent's mistaken designation of him as the deposition officer to whom he should deliver the subpoenaed documents was not a good faith contention (*131 Cal. App. 4th 1342, 1351-1352)* .

[c] Unmeritorious Objection Is Discovery Misuse

The factual and procedural background of *Sears, Roebuck and Co. v. Nat'l Union Fire Ins. Co. (2005) 131 Cal. App. 4th 1342, 32 Cal. Rptr. 3d 717* is discussed in *82.10[4][b]*. The court of appeals affirmed the award of monetary sanctions under former Code Civ. Proc. §§ 2020(a), 2023(a)(4), (5), (6) (*now see Code Civ. Proc. §§ 2020.010(a), 2023.010(d), (e), (f)*), in part because the attorney's reliance on respondent's mistaken designation of him as the deposition officer to whom he should deliver the subpoenaed documents was not a good faith contention. "Not only did the subpoenas call for production at the address of [respondent's] lawyers, [appellant], as a lawyer himself, must have known what was intended. Simply put, his contention that he could comply by delivering the documents to himself is preposterous" (*131 Cal. App. 4th 1342, 1351-1352)* .

[d] Evasive Response Is Discovery Misuse

For discussion of *Sears, Roebuck and Co. v. Nat'l Union Fire Ins. Co. (2005) 131 Cal. App. 4th 1342, 32 Cal. Rptr. 3d 717* , refer to § 82.10[4][c].

[e] Failure to Confer With Opposing Party Is Discovery Misuse

In *Stewart v. Colonial W. Agency, Inc. (2001) 87 Cal. App. 4th 1006, 105 Cal. Rptr. 2d 115* , an action for breach of contract wrongful termination, defendant's attorneys argued that the trial court's order compelling further responses and awarding sanctions was erroneous, in part, because plaintiff's attorney failed to engage in a good faith effort to meet and confer. At a hearing on the motion to compel, the trial court specifically found that the attorney's meet and confer efforts complied with former Code Civ. Proc. § 2025(o) (*now see Code Civ. Proc. § 2025.480(b)*). The court of appeal agreed. Citing *Obregon v. Superior Court, (1998) 67 Cal. App. 4th 424, 431, 79 Cal. Rptr. 62* (discussed in *§ 82.11[4][a]*), the court of appeal explained that determining whether an attempt at informal resolution is adequate involves the exercise of discretion. Relevant consideration include the history of the litigation, the nature of the interaction between counsel, the nature of the issues, the type and scope of discovery requested, the prospects of success, and similar factors (*87 Cal. App. 4th 1006, 1015-1016)* . Apart from anything pertaining to the history of the litigation or the prior interaction between the parties of which the trial court may have been aware, the court of appeal noted a number of factors appearing in the record supported the finding of good faith. The objections were made during a deposition, so counsel had an opportunity to discuss the relatively simple matter face-to-face at the time the discovery dispute arose. There was need for immediate action because of the upcoming trial date and cut off dates for discovery and discovery motions. Moreover, defense attorney's announced unavailability for two long periods before trial left no time to conduct a lengthy meet and confer and file a discovery motion before the deadline. Finally, in his letter to plaintiff's attorney, the defense attorney did not himself suggest a date or time at which he would be available and did not indicate any intention to compromise. On these facts, the trial court did not err in finding that the efforts undertaken by plaintiff's counsel to meet and confer were adequate (*87 Cal. App. 4th 1006, 1015-1016)* .

In *Blago Leko v. Cornerstone Home Inspection (2001) 86 Cal. App. 4th 1109, 103 Cal. Rptr. 2d 858* , an action arising out of a suit for negligent disclosure of defects in real property, cross-defendant's attorney appealed his monetary sanctions under former Code Civ. Proc. § 2023(a)(3) (*now see Code Civ. Proc. § 2023.010(c)*) and former Code Civ. Proc. § 2023(a)(9) (*now see Code Civ. Proc. § 2023.010(i)*). Defendant realtors sued cross-defendant home inspectors, contending they were entitled to seek equitable indemnity from the home inspection companies that breached their duty to a home buyer to discover and disclose defects. The inspectors' attorney unilaterally noticed depositions, but due to oversight and a possible misunderstanding arising from a conversation with his associate, realtors' attorney did not calendar the dates. Inspectors' attorney's office called to confirm the depositions, but was informed that neither realtors' counsel nor realtors would be available. Despite realtors' attorney's multiple efforts to arrange an alternate date, cross-defendant's attorney refused to reschedule the depositions, responding, in part, with an a demeaning, unprofessional letter. He also filed a motion to compel. The trial court denied the motion and ultimately awarded sanctions under former Code Civ. Proc. § 2023(a)(3) (*now see Code Civ. Proc. § 2023.010(c)*), authorizing sanctions for "employing a discovery method in a manner or to an extent that causes unwarranted annoyance, embarrassment, or oppression, or undue burden and expense" (*see* optional Paragraph E in form, above). The court also referenced former Code Civ. Proc. § 2023(a)(9) (*now see Code Civ. Proc. § 2023.010(i)*), which authorizes sanctions for "failing to confer in person, by telephone, or by letter with an opposing party or attorney in a reasonable and good faith attempt to resolve informally any dispute concerning discovery, if the section governing a particular discovery motion requires the filing of a declaration stating facts showing that such an attempt has been made" (*86 Cal. App. 4th 1109, 1123)* .

Inspectors' attorney contended he could not be sanctioned because he was authorized to proceed with his motion to compel and was not required to seek an informal resolution with opposing counsel. He relied on former Code Civ. Proc. § 2025(j)(3)(B) (*now see Code Civ. Proc. § 2025.450(b)*), which governs a party witness's failure to appear at or proceed with a properly noticed deposition, and provides that a motion to compel attendance "shall be accompanied by a declaration stating facts showing a reasonable and good faith attempt at informal resolution of each issue presented by

it *or, when the deponent fails to attend the deposition ... by a declaration stating that petitioner has contacted the deponent to inquire about the nonappearance* (italics added)." The attorney reasoned that he complied with this statute by contacting realtors' attorney after he was toldher clients were unavailable on the scheduled dates (*86 Cal. App. 4th 1109, 1124)* .

The court of appeal rejected this argument. Instead, it held that implicit in the requirement that counsel contact the deponent to inquire about the nonappearance is a requirement that counsel listen to the reasons offered and make a good faith attempt to resolve the issue. Here, the failure to appear was due to oversight and opposing counsel expressed a willingness to reschedule the depositions at a mutually convenient date. The trial court did not abuse its discretion when it determined that inspectors' attorney did not comply with his obligations. Sanctions were properly awarded under former Code Civ. Proc. § 2023(a)(3), and (9) (*now see Code Civ. Proc. § 2023.010(c), (i)*)(*86 Cal. App. 4th 1109, 1124)* .

[f] Sanctions Are Within Discretion of Trial Court

The factual and procedural background of *Best Products, Inc. v. Superior Court (2004) 119 Cal. App. 4th 1181, 15 Cal. Rptr. 3d 154* is discussed in *§ 85.10[4][a]*. In this commercial litigation discovery dispute, the trial court erred when it issued, as a sanction, a judicial order that the attorney-client and work product privileges had been waived, based on defendant's failure to provide a privilege log in regard to the interrogatories propounded by plaintiff. Former Code Civ. Proc. § 2030(k) (*now see Code Civ. Proc. § 2030.290(a)*) provided the only method by which a claim of privilege can be waived in responding to an interrogatory: "If a party to whom interrogatories have been directed fails to serve a timely response, that party waives ... any objection to the interrogatories, including one based on privilege or on the protection for work product under Section 2018." This provision was inapplicable here, however, because defendant filed timely responses that complied with former Code Civ. Proc. § 2030(f)(3) (*now see Code Civ. Proc. § 2030.260*). Thus, the lack of a privilege log was a non-issue (*119 Cal. App. 4th 1181, 1189-1190)* . If plaintiff had properly moved to compel further responses to contest defendant's conclusory attorney-client and work product objections under former Code Civ. Proc. § 2031(m) (*now see Code Civ. Proc. § 2031.310*), defendant could have been required to produce a privilege log that was sufficiently specific so the trial court could determine whether a particular document was or was not privileged. However, plaintiff did not rely on that statutory provision in bringing its motion. Moreover, even if plaintiff had brought and prevailed on a motion on that statutory ground, the court could not have found a waiver of privilege. Former Code Civ. Proc. § 2031(m) (*now see Code Civ. Proc. § 2031.310*) set forth the exclusive remedies available to the court. The trial court can "make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under [former] Section 2023. In lieu of or in addition to that sanction, the court [could] impose a monetary sanction under [former] Section 2023." However, "even at that juncture, the statute does *not* include as an authorized sanction a judicial order that a privilege has been waived" (*119 Cal. App. 4th 1181, 1189-1190)* .

California Points & Authorities

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 82 DISCOVERY: SANCTIONS FOR DISCOVERY MISUSE
PART II. FORMS

8-82 California Points & Authorities § 82.11

§ 82.11 Supporting Motion for Discovery Sanctions [Code Civ. Proc. § 2023.010 et seq.]--Order for Monetary Sanction [Code Civ. Proc. § 2023.030(a)]

[1] FORM Supporting Motion for Discovery Sanctions [Code Civ. Proc. § 2023.010 et seq.]--Order for Monetary Sanction [Code Civ. Proc. § 2023.030(a)]

[*The following may be combined with other points and authorities as necessary to support a motion for sanctions (see, e.g., § 82.10 and § 82.12 et seq.), and should be combined with points and authorities supporting a motion for sanctions in the specific procedural context (see, e.g., Ch. 83, Discovery: Depositions, §§ 83.31, 83.32, Ch. 84, Discovery: Interrogatories, §§ 84.11, 84.12, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, §§ 85.12, 85.20).*]

THE COURT SHOULD IMPOSE A MONETARY SANCTION ON _____ [*specify party or attorney, e.g.,* PLAINTIFF *and/or* PLAINTIFF'S ATTORNEY] BECAUSE _____ [HE/SHE/IT *or* THEY] _____ [HAS *or* HAVE] ENGAGED IN A MISUSE OF THE DISCOVERY PROCESS, _____ [HE/SHE/IT *or* THEY] ACTED WITHOUT SUBSTANTIAL JUSTIFICATION, AND NO OTHER CIRCUMSTANCES MAKE THE IMPOSITION OF THE SANCTION UNJUST.

A. Court May Impose Sanctions for Misuse of Discovery Process. [*See § 82.10[1], Paragraph A.*]

[*EITHER*]

B. Court May Impose Monetary Sanction for Engaging in or Advising Discovery Misuse. The court may impose a monetarysanction against one engaging in the misuse of the discovery process or any attorney advising that conduct, or both (*Code Civ. Proc. § 2023.030(a)*; *Obregon v. Superior Court (1998) 67 Cal. App. 4th 424, 434-435, 79 Cal. Rptr. 2d 62*).

[*OR*]

B. Court May Impose Monetary Sanction for Improperly Asserting That Someone Has Engaged in or Advised Discovery Misuse. The court may impose a monetary sanction against one who has unsuccessfully asserted that another engaged in the misuse of the discovery process, and against any attorney who advised that assertion, or both (*Code Civ. Proc. § 2023.030(a)*).

[*CONTINUE*]

C. Monetary Sanction Mandatory If Substantial Justification or Mitigating Circumstances Not Found. If a monetary sanction is authorized by any provision of the Discovery Act (*Code Civ. Proc. §§ 2016.010-2036.050*), the court shall impose that sanction unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the sanction unjust (*Code Civ. Proc. § 2023.030(a)*; *Ghanooni v. Super Shuttle (1993) 20 Cal. App. 4th 256, 260-261, 24 Cal. Rptr. 2d 501*).

D. Amount of Monetary Sanction. In imposing a monetary sanction under *Code of Civil Procedure Section 2023.030(a)*, the court may order that the party or attorney subject to the sanction pay the reasonable expenses, including attorney's fees, incurred by another as a result of his or her conduct (*Code Civ. Proc. § 2023.030(a)*).

E. Nature and Purpose of Monetary Sanction. The nature of the monetary sanction available under *Code of Civil Procedure Section 2023.030(a)* is similar to the awards that may be imposed under *Code of Civil Procedure Sections 473* and *1024*, and serves a similar purpose, that is, to compensate for expenses incurred; thus, the court may award a reasonable amount to compensate a party for his or her expenses incurred and is not limited to the costs that might properly be taxed against the losing party after the trial of the action (*see Rosen v. Superior Court (1966) 244 Cal. App. 2d 586, 593, 596, 53 Cal. Rptr. 347*).

F. Value of Attorney's Services. The value of an attorney's services is a matter with which a judge must necessarily be familiar. When the court is informed of the extent and nature of such services, its own experience furnishes it with every element necessaryto fix their value (*Bacon v. Bacon (1948) 32 Cal. 2d 131, 143, 194 P.2d 697* ; *Spencer v. Collins (1909) 156 Cal. 298, 307, 104 P. 320*).

[*Optional*] **G. Pro Se Litigant's Recovery of Costs as Sanctions.** A pro se litigant, including pro se lawyers, cannot recover attorney's fees as a discovery sanction; however a pro se litigant can recover reasonable expenses incurred as sanctions, including photocopying, computer-assisted legal research, and other identifiable and allocable costs (*see Kravitz v. Superior Court (2001) 91 Cal. App. 4th 1015, 1017, 111 Cal. Rptr. 2d 385*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities is for use in generally supporting a motion for imposition of a monetary sanction against a party or attorney who has engaged in the misuse of the discovery process [*see Code Civ. Proc. §§ 2023.010, 2023.030(a)*].

The memorandum should be combined with other memoranda of points and authorities relating to the imposition of specific sanctions as necessary, such as those *set out in § 82.10* and *82.12* et seq. It should also be combined with forms supporting the imposition of sanctions in specific procedural contexts [*see, e.g., Ch. 83, Discovery: Depositions, §§ 83.30, 83.31, Ch. 84, Discovery: Interrogatories, §§ 84.10, 84.11, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.10, 85.11* (supporting monetary sanctions in context of seeking motion to compel)].

A notice of motion seeking sanctions must be supported by a memorandum of points and authorities, and be

accompanied by a declaration setting forth facts supporting the amount of any monetary sanction sought [*Code Civ. Proc. § 2023.040*].

Note that some cases cited in this form construe law in effect prior to the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that they remain consistent with the provisions of the current act.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should state facts showing the particular misuse of the discovery process in which the other party or attorney has engaged. However, counsel need not set forth facts showing that the person against whom the sanction is to be imposed acted without substantial justification, because *Code Civ. Proc. § 2023.030(a)* effectively places that burden on the person against whom the sanction is sought tobe imposed by requiring the court to impose a monetary sanction *unless* it finds that the person acted with substantial justification or that other circumstances would make the monetary sanction unjust.

[c] Related Pleading and Practice Forms

For discussion and forms of moving papers relating to sanctions under the Discovery Act, see California Forms of Pleading and Practice, Ch. 192, *Discovery: Sanctions for Discovery Abuse* (Matthew Bender).

[3] Discussion of Authorities

[a] Court May Impose Monetary Sanction for Engaging in or Advising Discovery Misuse

In ***Obregon v. Superior Court*** *(1998) 67 Cal. App. 4th 424, 79 Cal. Rptr. 2d 62* , the trial court, finding that the moving party had not made an adequate effort to resolve the dispute informally, denied further discovery. The court of appeal vacated the ruling and remanded for reconsideration of a more appropriate sanction for the moving party's inadequate effort at informal resolution. The appellate court stated that, in deciding on a sanction for inadequate effort to achieve an informal resolution, the trial court should not automatically deny further discovery but should consider whether it would be appropriate to specify additional efforts that will be required of the offending party before the court will turn to the merits of the request to compel (*67 Cal. App. 4th 424, 434-435)* . When appropriate, the court may assess monetary sanctions against the party whose efforts were found to be inadequate (*67 Cal. App. 4th 424, 435)* . *Obregon* is further discussed in *Ch. 84, Discovery: Interrogatories, § 84.11[4][c]*.

[b] Monetary Sanction Mandatory If No Substantial Justification or Mitigating Circumstances Found

In ***Ghanooni v. Super Shuttle*** *(1993) 20 Cal. App. 4th 256, 24 Cal. Rptr. 2d 501* , the appellate court noted that it is no longer required that the alleged misuse of the discovery process be willful in order for the court to impose monetary sanctions against a party (*20 Cal. App. 4th 256, 260)* . Thus, the trial court properly imposed monetary sanctions against a plaintiff when she failed to provide substantial justification for her refusal to submit to the defendants' demand for X-rays, and when her attorney's argument that the X-rays were unnecessary because only soft tissue injuries were involved was not supported by any expert medical opinion and was, in fact, contradicted by the plaintiff's treating physician (*20 Cal. App. 4th 256, 260-261)* . For further discussion of *Ghanooni*, see *§ 82.21[3][a]*.

[c] Nature and Purpose of Monetary Sanction

In ***Rosen v. Superior Court*** *(1966) 244 Cal. App. 2d 586, 53 Cal. Rptr. 347* , after a continuance of the trial, plaintiff's attorneys learned that a material witness who lived in New York would be unable to attend the trial. They obtained a

commission and served defendant's attorney with a notice of the taking of the deposition of that witness in New York City. Defendant's attorney traveled to New York, and found on the day set for the deposition that it had been continued, without notice to defendant or his attorney, by the New York attorney employed by plaintiff to take the deposition. After returning to California, defendant's attorney noticed a motion for an order imposing sanctions against plaintiff and his attorneys pursuant to former Code Civ. Proc. § 2019(g) (*now see Code Civ. Proc. §§ 2023.030(a), 2025.450*). The trial court denied the motion, and defendant filed a petition for a writ of mandate.

In granting the peremptory writ, the court of appeal analyzed former Code Civ. Proc. § 2019(g). Because no California cases had previously interpreted this statute, the court examined the power to impose sanctions under *Code Civ. Proc. § 473* if a continuance is caused by an amendment permitted under that section, or if a party suffered loss or expense due to relief granted pursuant to that section from a judgment, order, or other proceeding. The court also compared former Code Civ. Proc. § 2019(g) with *Code Civ. Proc. § 1024*, which at that time allowed the court to require the payment of costs (now termed "expenses"), which will be caused by the postponement of the trial as a condition of granting a continuance. The court concluded that the payment under *Code Civ. Proc. § 473* is not limited only to amounts which might be properly taxed as costs (*244 Cal. App. 2d 586, 593)* . When there is an amendment, the court may exercise its discretion in compensating the party for expenses to which he or she has been put, and when relief is granted from an order, judgment, or other proceeding, the court may require the payment of costs or attorney's fees to compensate the adverse party for loss or expense suffered due to the granting of the motion. Similarly, costs (now termed "expenses") due to a continuance pursuant to *Code Civ. Proc. § 1024* are not limited to items taxable as costs after the trial, but the court may award any reasonable amount to compensate the other party for expenses incurred in preparing for trial at the appointed time, including transportation and hotel bills of parties, attorneys, and witnesses. The court therefore held that the nature of monetary sanctions granted pursuant to former Code Civ. Proc. §§ 2019(g) and 2034(a), (d) (*now see Code Civ. Proc. §§ 2023.030(a), 2025.450*) is the same as those that may be imposed under *Code Civ. Proc. §§ 473* and *1024*, and serve the same purpose (*244 Cal. App. 2d 586, 593)* . The trial court had the power under former Code Civ. Proc. § 2019(g) to order plaintiff whose attorney had given notice of the taking of the deposition to pay to defendant the reasonable expenses which he and his attorneyincurred in attending at the time and place set forth in the notice, including reasonable attorney's fees (*244 Cal. App. 2d 586, 596)* . In the absence of any adequate rebuttal to the factual showing made by plaintiff in support of the motion, there was no room for the court to exercise its discretion, and the outright denial of defendant's motion constituted an abuse of the trial court's discretion (*244 Cal. App. 2d 586, 596-597)* .

[d] Value of Attorney's Services

Bacon v. Bacon *(1948) 32 Cal. 2d 131, 194 P.2d 697* , was an action for declaratory relief, an accounting, and the reconveyance of property. On appeal, plaintiffs contended that sums attributed to the prosecution of an underlying action for partition were unauthorized and excessive and should not have been allowed. The Court stated, relying on *Riverside County v. Brown (1939) 30 Cal. App. 2d 747, 749, 87 P.2d 60* , which quoted from ***Spencer v. Collins*** *(1909) 156 Cal. 298, 307, 104 P. 320* , that it was conceded that the value of an attorney's services is a matter with which a judge must necessarily be familiar and when the court is informed of the extent and nature of such service, its own experience furnishes it with every element necessary to fix their value. The Court held that the findings and judgment reasonably imply the further finding that the items of expenses were necessarily incurred and reasonable in amount (*32 Cal. 2d 131, 143)* .

[e] Pro Se Litigant's Recovery of Costs as Sanctions

In ***Kravitz v. Superior Court*** *(2001) 91 Cal. App. 4th 1015, 111 Cal. Rptr. 2d 385* , plaintiff sued defendant for legal malpractice. Defendant, an attorney, represented himself in the matter. Defendant served plaintiff with a request for the production of documents. When plaintiff's counsel failed to respond, defendant moved for an order compelling production and for sanctions pursuant to former Code Civ. Proc. §§ 2023 and 2031 (*now see Code Civ. Proc. §§ 2023.030(a), 2031.300*). With the exception of the court filing fee included in his motion, defendant calculated the

amount of sanctions based upon the time it took him to prepare the motion, time in court, and travel time, multiplied by the hourly rate at which he charged his clients for his legal services. Although the court found that as a general rule a pro se lawyer cannot recover attorney's fees as a discovery sanction, it held that some of the costs that pro se litigants incur, if reasonably identifiable and allocable, are recoverable as sanctions, even though those costs are ones that lawyers ordinarily include in their hourly rates or other fee structures. Therefore, a pro se litigant, including a lawyer, is entitled to recover reasonable expenses actually incurred, including photocopying, computer-assisted legal research, and other identifiable and allocable costs (*91 Cal. App. 4th 1015, 1017)* .

[4] Additional Authorities

[a] Court May Impose Monetary Sanction for Engaging in or Advising Discovery Misuse

In *Stewart v. Colonial W. Agency, Inc. (2001) 87 Cal. App. 4th 1006, 105 Cal. Rptr. 2d 115* , an action for breach of contract wrongful termination, defendant's attorneys argued that the trial court's order compelling further responses and awarding sanctions was erroneous, in part, because plaintiff's attorney failed to engage in a good faith effort to meet and confer. At a hearing on the motion to compel, the trial court specifically found that the attorney's meet and confer efforts complied with former Code Civ. Proc. § 2025(o) (*now see Code Civ. Proc. § 2025.480(b)*). The court of appeal agreed. Citing *Obregon v. Superior Court, (1998) 67 Cal. App. 4th 424, 431, 79 Cal. Rptr. 62* (discussed below), the court of appeal explained that determining whether an attempt at informal resolution is adequate involves the exercise of discretion. Relevant consideration include the history of the litigation, the nature of the interaction between counsel, the nature of the issues, the type and scope of discovery requested, the prospects of success, and similar factors (*87 Cal. App. 4th 1006, 1015-1016)* . Apart from anything pertaining to the history of the litigation or the prior interaction between the parties of which the trial court may have been aware, the court of appeal noted a number of factors appearing in the record supported the finding of good faith. The objections were made during a deposition, so counsel had an opportunity to discuss the relatively simple matter face-to-face at the time the discovery dispute arose. There was need for immediate action because of the upcoming trial date and cut off dates for discovery and discovery motions. Moreover, defense attorney's announced unavailability for two long periods before trial left no time to conduct a lengthy meet and confer and file a discovery motion before the deadline. Finally, in his letter to plaintiff's attorney, the defense attorney did not himself suggest a date or time at which he would be available and did not indicate any intention to compromise. On these facts, the trial court did not err in finding that the efforts undertaken by plaintiff's counsel to meet and confer were adequate (*87 Cal. App. 4th 1006, 1015-1016)* .

[b] Monetary Sanction Mandatory If No Substantial Justification or Mitigation Found

The factual and procedural background of *London v. Dri-Honing Corp. (2004) 117 Cal. App. 4th 999, 12 Cal. Rptr. 3d 240* is discussed in *Ch. 85, Discovery: Production and Inspection of Tangible Evidence, § 85.11[4][b]*. In a case arising out of a discovery dispute in a wrongful termination suit, the court of appeal held that a separate motion for discovery monetary sanctions may be made after an underlying motion to compel further response to an inspection demand is litigated (*117 Cal. App. 4th 999, 1001)* .The court found support for its decision in *Sherman v. Kinetic Concepts (1998) 67 Cal. App. 4th 1152, 79 Cal. Rptr. 2d 641* (discussed *below*), in which the court of appeal concluded that a motion for discovery monetary sanctions was appropriate even after the verdict. "[C]ommon sense dictates sanctions cannot be pursued before the affected party finds out about the alleged discovery dereliction of his or her opponent. The true facts may not emerge until the end of trial" (*117 Cal. App. 4th 999, 1007)* . While the better practice may be to include the request for monetary sanctions in the motion to compel further response, there is no legal requirement to do so (*117 Cal. App. 4th 999, 1008)* . Further, the timeliness of a separate motion for sanctions is subject to the trial court's discretion, rather than the 45-day limit from the time of the initial service of the response under former Code Civ. Proc. § 2031(m) (*now see Code Civ. Proc. § 2031.310(c)*) (*117 Cal. App. 4th 999, 1009)* .

In *Sherman v. Kinetic Concepts, Inc. (1998) 67 Cal. App. 4th 1152, 79 Cal. Rptr. 2d 641* , an action for products liability based on design defect, plaintiffs sought records of all complaints regarding one of defendant's products, and

the defendants provided only a small portion of the complaints it had actually received. The plaintiffs did not move to compel further responses because they had no reason to believe the response was incomplete. During trial defendant's officers and employees testified that there were no other complaints. After a verdict for defendant, plaintiffs discovered by chance the existence of a number of additional complaints. At this point other sanctions were not available. Under these circumstances, the court of appeal held that they were entitled not only to a new trial, but to an award of monetary damages under former Code Civ. Proc. § 2023 (*now see Code Civ. Proc. § 2023.030(a)*) in an amount at least equal to the costs and fees of the first trial (*67 Cal. App. 4th 1152, 1162-1164)* .

[c] Nature and Purpose of Monetary Sanctions

The facts and procedural background of *Sherman v. Kinetic Concepts, Inc. (1998) 67 Cal. App. 4th 1152, 79 Cal. Rptr. 2d 641* are discussed in *§ 82.11[4][b]*. In light of the defendant's deceptive responses during discovery, and lack of candor, if not outright lies, when testifying at trial, the appellate court ruled in *Sherman* that the trial court, on remand, was required to award sanctions in amount sufficient to compensate plaintiffs for their expenses and fees in prosecuting the first trial, and that it had discretion to award more (*67 Cal. App. 4th 1152, 1062, 1063-1064*).

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8-82 California Points & Authorities § 82.12

§ 82.12 Supporting Motion for Discovery Sanctions [Code Civ. Proc. § 2023.010 et seq.]--Order for Issue Sanction [Code Civ. Proc. § 2023.030(b)]

[1] FORM Supporting Motion for Discovery Sanctions [Code Civ. Proc. § 2023.010 et seq.]--Order for Issue Sanction [Code Civ. Proc. § 2023.030(b)]

[*The following may be combined with other memoranda as necessary to support a motion for sanctions (see, e.g., §§ 82.10, 82.11 and § 82.13 et seq.), and should be combined with memoranda supporting a motion for sanctions in the specific procedural context (see, e.g., Ch. 83, Discovery: Depositions, § 83.32, Ch. 84, Discovery: Interrogatories, § 84.12, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.12).*]

THE COURT SHOULD IMPOSE AN ISSUE SANCTION ON _____ [*specify party, e.g.,* PLAINTIFF] BECAUSE HE/SHE HAS ENGAGED IN A MISUSE OF THE DISCOVERY PROCESS.

A. Court May Impose Sanctions for Misuse of Discovery Process. [*See § 82.10[1], Paragraph A.*]

[*EITHER*]

B. Court May Impose Issue Sanction That Facts Be Taken as Established. The court may impose an issue sanction ordering that designated facts shall be taken as established in the action in accordance with the claim of the party adversely affected by the misuse of the discovery process (*Code Civ. Proc. § 2023.030(b)*; *Kuhns v. State of California (1992) 8 Cal. App. 4th 982, 988-990, 10 Cal. Rptr. 2d 773*).

[*AND/OR*]

C. Court May Impose Issue Sanction Prohibiting _____ [Support *or* Opposition] to _____ [Claims ***or*** Defenses]. The court may impose an issue sanction by an order prohibiting any party engaging in the misuse of the discovery process from _____ [supporting *or* opposing]

designated _____ [claims *or* defenses] (*Code Civ. Proc. § 2023.030(b)*; *see Karlsson v. Ford Motor Co. (2006) 140 Cal. App. 4th 1202, 1219-1220, 45 Cal. Rptr. 3d 265* ; *Wells Fargo Bank v. DiLeonardo (1994) 22 Cal. App. 4th 873, 878-879, 28 Cal. Rptr. 2d 16* ; *Sauer v. Superior Court (1987) 195 Cal. App. 3d 213, 228, 229, 240 Cal. Rptr. 489*).

[2] Comments

[a] Use of Form

This memorandum is for use in supporting a motion for imposition of an issue sanction against a party who has engaged in misuse of the discovery process [*see Code Civ. Proc. §§ 2023.010, 2023.030(b)*].

The memorandum should be combined with other memoranda relating to the imposition of sanctions for discovery misuses as necessary, such as those set out forth §§ 82.10, 82.11, and 82.13 et seq. The memorandum should also be combined with other memoranda supporting the imposition of sanctions in a specific procedural context [*see, e.g., Ch. 83, Discovery: Depositions, § 83.32, Ch. 84, Discovery: Interrogatories, § 84.12, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.12*]. A notice of motion seeking sanctions must be supported by a memorandum of points and authorities [*Code Civ. Proc. § 2023.040*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should state facts showing the particular misuse of the discovery process in which the other party or attorney has engaged, as well as other facts that would indicate that the imposition of an issue sanction would be appropriate under the circumstances.

[c] Related Pleading and Practice Forms

For discussion and forms of moving papers relating to sanctions under the Discovery Act, see California Forms of Pleading and Practice, Ch. 192, *Discovery: Sanctions for Discovery Abuse* (Matthew Bender).

[3] Discussion of Authorities

[a] Court May Impose Issue Sanction That Facts Be Taken as Established

In ***Kuhns v. State of California*** *(1992) 8 Cal. App. 4th 982, 10 Cal. Rptr. 2d 773* , plaintiffs brought a negligence action against the State after a truck lost control rounding a curve and spilled its load onto the freeway below, causing personal injuries to plaintiffs. After the State failed to obey a court order to produce documents relevant to the alleged dangerous condition of the road and the State's prior notice of that condition, the trial court imposed an issue sanction in the form of a deemed admission by the State that a dangerous condition existed on the site, and that it had previous knowledge of that condition. Later the trial court precluded the State from asserting the defense that it had taken reasonable action to warn of the dangerous condition.

The court of appeal affirmed the trial court judgment for plaintiffs. The State contended that the sanctions were unduly harsh and disproportionate to its discovery misuse and plaintiffs' need for the requested evidence. The appellate court disagreed, explaining that disobedience of the court's order was a misuse of discovery for which the court was authorized to impose the sanctions delineated in former Code Civ. Proc. § 2023(b) (*now see Code Civ. Proc. § 2023.030(b)*),which includes issue sanctions (*8 Cal. App. 4th 982, 988*). Because the State failed to produce information relevant to plaintiffs' claim of the dangerous condition of the property and the State's notice thereof, an issue sanction deeming those matters admitted was appropriate (*8 Cal. App. 4th 982, 989)* . The court also found the other issue sanction imposed--preclusion of the defense that a roadway sign constituted reasonable action to warn of the

dangerous condition--appropriate because it was necessarily intertwined with the circumstances establishing the dangerous condition and was therefore precluded by the initial issue sanction (*8 Cal. App. 4th 982, 990)* .

[b] Court May Impose Issue Sanction Prohibiting Support or Opposition to Claims or Defenses

The facts and procedural background of ***Karlsson v. Ford Motor Co.*** *(2006) 140 Cal. App. 4th 1202, 45 Cal. Rptr. 3d 265* , are discussed in *§ 82.13[3][b]*. Some of the sanctions precluded Ford from introducing evidence that Ford warned plaintiff that the two-point lap belt was or was not a dangerous condition and that Ford was unaware of its failure to warn, and stated that plaintiff was entitled to an instruction that the lap belt did not provide adequate protection and Ford failed to warn of that dangerous condition. These sanctions were based a pattern of misconduct by Ford that led the discovery referee and the trial court to find a persistent pattern of discovery abuse.

The court of appeal found no abuse of discretion in imposing the sanctions. The discovery referee and the trial court found, among other things, a failure by Ford to produce for deposition the person or persons best suited to testify about the issue of what seat belt warnings were given to minivan buyers such as the plaintiffs, including Ford's knowledge of the need for warnings, and why only certain warnings were given. The referee found that Ford's conduct was not in good faith. The referee also found that Ford did not act in good faith when it provided inadequate and incomplete information regarding the issue of three-point restraint system prototypes, and failed to disclose the existence of documents filed in its passive restraint reading room. Because "the persistent refusal to comply with discovery requests is equated with an admission that the disobedient party has no meritorious claim in regard to that issue, the appropriate sanction for such conduct is preclusion of that evidence from trial, even if that proves determinative in terminating the offending party's case" (*140 Cal. App. 4th 1202, 1218-1219)* . Moreover, given the nature of Ford's discovery violations, the sanctions were still warranted, despite the warning contained in the minivan's owner's manual about seat belt use and the increased risks to children from improper adjustment of the lap belt (*140 Cal. App. 4th 1202, 1219)* .

In ***Wells Fargo Bank v. DiLeonardo*** *(1994) 22 Cal. App. 4th 873, 28 Cal. Rptr. 2d 16* , a trustee sought a determination that a beneficiary's objections to the trustee's account were frivolous and in bad faith. The trial court found the objections to be frivolous, and imposed an issue sanction against the beneficiary. The appellate court upheld the sanction, finding that the beneficiary's objections were without merit and that her claims of conflict of interest were barred by res judicata or were untimely. The beneficiary had refused to comply with a court order compelling the production of documents that were highly relevant to her contention that she was excused by extrinsic fraud from timely raising her claim against the trustee. The trial court properly applied the issue sanction to all of the beneficiary's objections, even though the documents sought only related to two of the objections because the court found that the beneficiary had abandoned her other objections (*22 Cal. App. 4th 873, 878-879)* .

Sauer v. Superior Court *(1987) 195 Cal. App. 3d 213, 240 Cal. Rptr. 489* , was a wrongful discharge action in which plaintiff failed to respond to six requests by defendant, his former employer, to produce his personal financial records, and then failed to comply with the referee's order requiring their production. The trial court adopted the referee's recommendation to impose monetary sanctions under former Code Civ. Proc. § 2034(a) [*now see Code Civ. Proc. § 2023.030(a)*] and subsequently imposed an issue sanction order under former Code Civ. Proc. § 2034(b)(2) [*now see Code Civ. Proc. § 2023.030(b)*] precluding plaintiff from proving economic loss. Plaintiff petitioned for a writ of mandate to reverse those orders.

The court of appeal denied the writ. After determining that imposition of sanctions was proper, the court found that the particular sanction chosen--exclusion of all evidence of economic loss--was appropriate under the circumstances. It noted that a trial court has broad discretion in imposing discovery sanctions, subject to reversal only for arbitrary, capricious, or whimsical action. The sanction imposed should be appropriate to the dereliction, and should not exceed that which is required to protect the interests of the party entitled to but denied discovery. The court noted that when a motion to compel had previously been granted, the sanction should not operate in a fashion that puts the prevailing party in a better position than he or she would have had if the discovery sought had been obtained and been completely

favorable to his or her case. The court observed that the issue sanction properly put defendant as the demanding party in the position in which it would have been had the discovery been entirely favorable, i.e., the documents would have shown plaintiff suffered no economic loss. In choosing to preclude evidence of economic loss, the court tailored the sanction to the harm caused by the withheld discovery (*195 Cal. App. 3d 213, 228-229)* .

[4] Additional Authorities

[a] Court May Impose Issue Sanction Prohibiting Support or Opposition to Claims or Defenses

In re Marriage of Michaely (2007) 150 Cal. App. 4th 802, 810, 59 Cal. Rptr. 3d 56 was a dissolution proceeding in which the trial court imposed sanctions, in the form of factual findings, on the husband as the result of his conduct during discovery, in particular his uncooperative conduct at a deposition. The court of appeal found no abuse of discretion, based on the husband's egregious abuse of the discovery process both in his document production and in his answers to questions [*150 Cal. App. 4th 802, 809-810]* . The court also rejected the husband's claim that the wife had all the information she needed from other sources, including the business records he produced, finding that information "simply" too old, given the husband's plethora of assets and the fact that he moved money from entity to entity [*150 Cal. App. 4th 802, 811]* .

In re Marriage of Economou (1990) 224 Cal. App. 3d 1466, 274 Cal. Rptr. 473 was a marital dissolution proceeding in which the husband refused to adhere to a stipulation between the parties regarding the disclosure of financial information to the wife. The wife then filed a series of motions to compel discovery in an attempt to determine the amount of community assets concealed by the husband. After the husband refused to comply with the resulting court's orders, the court entered an issue sanction against the husband by entering his default on all issues except dissolution, child custody, and visitation, and precluding him from offering any evidence, making any objections, or cross-examining any of the wife's witnesses at trial on any issue except dissolution, custody, or visitation. The trial court ordered the marriage dissolved and divided the community property, finding that the husband had misappropriated extensive community funds. In affirming, the court of appeal held that the imposition of the issue sanction by the trial court was proper, and was not an abuse of discretion (*224 Cal. App. 3d 1466, 1476)* . The court observed that a trial court has broad discretion in imposing sanctions under former Code Civ. Proc. § 2023(b)(2) (*now see Code Civ. Proc. § 2023.030(b)*), subject to reversal only for arbitrary, capricious, or whimsical action (*224 Cal. App. 3d 1466, 1475)* .

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8-82 California Points & Authorities § 82.13

§ 82.13 Supporting Motion for Discovery Sanctions [Code Civ. Proc. § 2023.010 et seq.]--Order for Evidence Sanction [Code Civ. Proc. § 2023.030(c)]

[1] FORM Supporting Motion for Discovery Sanctions [Code Civ. Proc. § 2023.010 et seq.]--Order for Evidence Sanction [Code Civ. Proc. § 2023.030(c)]

[*The following may be combined with other memoranda as necessary to support a motion for sanctions (see, e.g., §§ 82.10, 82.11 and § 82.13 et seq.), and should be combined with memoranda supporting a motion for sanctions in the specific procedural context (see, e.g., Ch. 83, Discovery: Depositions, § 83.32, Ch. 84, Discovery: Interrogatories, § 84.12, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.12).*]

THE COURT SHOULD IMPOSE AN EVIDENCE SANCTION ON _____ [*specify party, e.g.,* PLAINTIFF] BECAUSE HE/SHE HAS ENGAGED IN MISUSE OF THE DISCOVERY PROCESS.

A. Court May Impose Sanctions for Misuse of Discovery Process. [*See § 82.10[1], Paragraph A.*]

B. Court May Impose Evidence Sanction. the court may impose an evidence sanction by an order prohibiting any party engaging in the misuse of the discovery process from introducing designated matters in evidence (*Code Civ. Proc. § 2023.030(c)*; *Waicis v. Superior Court (1991) 226 Cal. App. 3d 283, 287-288, 276 Cal. Rptr. 45*).

[*Optional*] **C. Evidence Sanction Without Prior Court Order Is Appropriate When Order Would Be Futile.** Although the conduct warranting imposition of an evidence sanction typically involves a refusal to comply with an order for discovery, when a formal order to comply would be futile, such as when the party is unable to provide the requested documents, and when imposition of a lesser sanction would permit the noncooperative party to benefit by its behavior, an evidence sanction precluding admission of specified evidence is appropriate (*Karlsson v. Ford Motor Co. (2006) 140 Cal. App. 4th 1202, 1214-1216, 45 Cal. Rptr. 3d 265* ; *Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns (1992) 7 Cal. App. 4th 27, 35-37, 9 Cal. Rptr. 2d 396*).

[*Optional*] **D. When Abuse of Discovery First Appears During Trial, Court May Apply Evidence Sanction**. If a party's deliberate attempt to thwart discovery is first discovered at trial, no other sanction may serve any useful purpose,

and the trial court may exercise its discretion to prohibit the abusive party from introducing any improperly concealed evidence at trial (*Pate v. Channel Lumber Co. (1997) 51 Cal. App. 4th 1447, 1454-1455, 59 Cal. Rptr. 2d 919*).

[2] Comments

[a] Use of Form

These points and authorities for use in supporting a motion for imposition of an evidence sanction against a party who has engaged in the misuse of the discovery process [*see Code Civ. Proc. §§ 2023.010, 2023.030(c)*].

These points and authorities should be combined with other points and authorities relating to the imposition of sanctions for misuse of the discovery process as necessary, such as those *set out in §§ 82.10 -82.12* and *§§ 82.14, 82.15*. These points and authorities should also be combined with other points and authorities supporting the imposition of sanctions in a specific procedural context [*see, e.g., Ch. 83, Discovery: Depositions, § 83.32, Ch. 84, Discovery: Interrogatories, § 84.12, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.12*]. A notice of motion seeking sanctions must be supported by a memorandum of points and authorities [*Code Civ. Proc. § 2023.040*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should state facts showing the particular misuse of the discovery process in which the other party or attorney has engaged, as well as other facts that would indicate that the imposition of an evidence sanction would be appropriate under the circumstances.

[c] Related Pleading and Practice Forms

For discussion and forms for moving papers relating to sanctions under the Discovery Act, see California Forms of Pleading and Practice, Ch. 192, *Discovery: Sanctions for Discovery Abuse* (Matthew Bender).

[3] Discussion of Authorities

[a] Court May Impose Evidence Sanction

In ***Waicis v. Superior Court*** *(1991) 226 Cal. App. 3d 283, 276 Cal. Rptr. 45* , a dental malpractice action, plaintiff listed two dentists as expert witnesses. Defendant attempted to depose one of the designated dentists. The deposition was renoticed five times to accommodate the dentist's schedule. One week prior to the deposition, plaintiff informed defendant that the dentist would be unavailable, and proposed a date on the eve of the arbitration hearing, well after the discovery cut-off period. Defendant brought a motion to compel, seeking sanctions and an order compelling the dentist's attendance, or, in the alternative, the striking of the disclosure of the expert witness or the exclusion of the dentist's testimony. The trial court continued the matter on the condition that the dentist be available on a specified day and time. The dentist did appear for that deposition, but left before its completion. When defendant renewed his motion to compel, the trial court ordered that the dentist be excluded from testifying. Plaintiff filed a writ of mandate to vacate the order.

The court of appeal denied the writ. The court said that the sanction of preclusion of the testimony of a noncooperative deponent is authorized by *Code Civ. Proc. §§ 2023.010, 2023.030(c),* and *2025.450(d)*. The court characterized the question as whether the trial court had abused its discretion in imposing the evidence sanction. It said that whether the dentist had been noncooperative was a question of fact to be determined by the trial court on the basis of substantial evidence. Far from being an abuse of discretion by the trial court, the court of appeal observed that there was overwhelming evidence of noncooperation. The court said the trial court had done everything it could to permit the dentist's deposition, but he would not cooperate, and even directly violated its order that he be available for the final

deposition scheduled. The court observed that the sanction was a response to an unvarying pattern of behavior (*226 Cal. App. 3d 283, 287)* . Although the sanction imposed was a severe one, the court concluded that it was not an abuse of discretion. It held that since plaintiff selected the dentist as an expert witness, she must bear the adverse consequences that flow from his failure. The court also noted that the consequences for plaintiff would not be unduly harsh in that she had other experts to testify on the same issues (*226 Cal. App. 3d 283, 288)* .

[b] Evidence Sanction Without Prior Court Order Is Appropriate When Order Would Be Futile

In ***Karlsson v. Ford Motor Co.*** *(2006) 140 Cal. App. 4th 1202, 45 Cal. Rptr. 3d 265* , a product liability suit relating to the absence of a three-point harness in a minivan, the trial court ordered evidence preclusion sanctions against Ford on the issues of warnings and the technical feasibility of a safer, alternative seat belt design, after Ford violated court orders and committed widespread, recurring discovery abuse. The trial court expressly based its findings and order on the pattern of abuse theory, citing *Do It Urself* (discussed *below*) as authority. A jury awarded plaintiff more than $30 million in compensatory and punitive damages. Ford appealed.

The court of appeal upheld the imposition of sanctions under *Code Civ. Proc. § 2023.030*, because Ford's repeated pattern of abuse led to loss of evidence on failure to warn (*140 Cal. App. 4th 1202, 1215-1216)* . Because the discovery cutoff had passed and trial was imminent, plaintiff lost the opportunity to explore fully any leads obtained from discovery that should have been produced. Lesser sanctions would have been futile because Ford no longer had the legal capability to correct its earlier abuses (*140 Cal. App. 4th 1202, 1215)* .

Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns *(1992) 7 Cal. App. 4th 27, 9 Cal. Rptr. 2d 396* was an action for breach of contract, negligence, and breach of fiduciary duty against an accounting firm in which the parties stipulated, at plaintiffs' request, to a continuance shortly before trial to permit plaintiffs to complete an audit. The audit was essential to proof of plaintiffs' claims, and the information was to be made available to defendants. However, some time later at the settlement conference, plaintiffs told defendants that an audit was not possible after all, but promised a summary of their accountants' preliminary findings together with supporting documentation. After several unsuccessful attempts to obtain that information, defendants filed a motion under former Code Civ. Proc. § 2023(b)(3) (*now see Code Civ. Proc. § 2023.030(c)*) to preclude plaintiffs from introducing any accounting evidence. The trial court granted that motion, as well as defendants' motion for summary judgment on the basis that plaintiffs could not win their case without the accounting evidence. Plaintiffs appealed.

The court of appeal upheld the sanction order but reversed the summary judgment. The court said that the trial court had not abused its discretion in imposing the evidence sanction since it was appropriately tailored to accomplish no more than protect the interests of the parties seeking discovery (*7 Cal. App. 4th 27, 35)* . Even though generally a party must have disobeyed a prior court order compelling discovery before an evidence sanction may be imposed, a formal order by the trial court compelling production of the requested documents would have been futile since plaintiffs admitted that production was not possible (*7 Cal. App. 4th 27, 35-36)* . The imposition of a less drastic sanction, such as a monetary sanction, would have permitted plaintiffs to benefit from their stalling tactics (*7 Cal. App. 4th 27, 36-37)* . Further, since plaintiffs and defendants had stipulated to continue trial to permit the preparation of the audit, a lesser sanction would have forced defendants to proceed to trial without the benefit of evidence for which they had bargained (*7 Cal. App. 4th 27, 37)* . The court also found that an evidence sanction suited the harm caused by plaintiffs' behavior, and was not punitive in nature. The evidence sanction was justified because the record clearly demonstrated plaintiffs' willful noncompliance in failing to meet their discovery obligations (*7 Cal. App. 4th 27, 36*). The court reversed the summary judgment because defendants still had to disprove the claims plaintiffs would have to prove at trial (*7 Cal. App. 4th 27, 38)* .

[c] Evidence Sanction Appropriate When Discovery Abuse First Discovered During Trial

In ***Pate v. Channel Lumber Co****. (1997) 51 Cal. App. 4th 1447, 59 Cal. Rptr. 2d 919* , a retail tenant sued its landlord,

charging that the landlord had overcharged them for the mall's common area maintenance. Plaintiff had sought discovery of all documents relating to expenses for which they were billed and relating to the calculation of their share of the expenses. Defendants had repeatedly assured them they had all the relevant documents. At trial, defendants offered testimony relating to documents that had not been made available to plaintiffs.

The trial court did not abuse its discretion when it disallowed introduction of any evidence relating to undisclosed documents. The court of appeal found that defendants had made a deliberate attempt to thwart discovery for the purpose of obtaining a tactical advantage. Given the late date on which the issue arose, no other sanction would have served any useful purpose (*51 Cal. App. 4th 1447, 1454-1455*).

[4] Additional Authorities

[a] Court May Impose Evidence Sanction

In *Juarez v. Boy Scouts of America (2000) 81 Cal. App. 4th 377, 97 Cal. Rptr. 2d 12* , plaintiff alleged that, while a member of a boy scout troop, he was sexually molested by his troop scoutmaster. Plaintiff appealed a grant of summary judgment following the imposition of evidentiary sanctions conclusively establishing that no information was available to defendants that would cause them to suspect that the troop scoutmaster had a propensity to molest children before he was accused of molesting plaintiff (*81 Cal. App. 4th 377, 384*). The court of appeal affirmed the trial court's evidence preclusion sanctions for failing to comply with the trial court's earlier orders (*81 Cal. App. 4th 377, 385*). There was ample evidence of plaintiff's misuse of the discovery process, including repeated instances of violations of court orders and, on several occasions, imposition of monetary sanctions (*81 Cal. App. 4th 377, 388*). The trial court's actions, "although certainly drastic," fell within the bounds of permissible discretion. By imposing an evidence preclusion sanction, the trial court simply prohibited plaintiff from producing at trial the evidence he repeatedly refused to produce during discovery (*81 Cal. App. 4th 377, 389*).

[b] Evidence Sanction Appropriate When Discovery Abuse First Discovered During Trial

In *Sherman v. Kinetic Concepts, Inc. (1998) 67 Cal. App. 4th 1152, 79 Cal. Rptr. 2d 641* , an action for products liability based on design defect, plaintiffs sought records of all complaints regarding one of defendant's products, and the defendants provided only a small portion of the complaints it had actually received. The plaintiffs did not move to compel further responses because they had no reason to believe the response was incomplete. During trial defendant's officers and employees testified that there were no other complaints. After a verdict for defendant, plaintiffs discovered by chance the existence of a number of additional complaints. Since the discovery abuse did not come to light until after trial, evidence sanctions were no longer available. Under these circumstances, the court of appeal held that plaintiffs were entitled to a new trial and to an award ofmonetary damages under former Code Civ. Proc. § 2023 (*now see Code Civ. Proc. § 2023.030(a)*) in an amount at least equal to the costs and fees of the first trial (*67 Cal. App. 4th 1152, 1162-1164* , relying on *Pate v. Channel Lumber Co.*, discussed in [3][c], *above*).

[c] Evidence Sanctions Without Prior Court Order Is Appropriate When Order Would Be Futile

The facts and procedural background of *Mileikowsky v. Tenet Healthsystem (2005) 128 Cal. App. 4th 262, 26 Cal. Rptr. 3d 831* are discussed in *§ 82.31[4][b]*. Plaintiff physician appealed from a court order that struck his pleadings and entered monetary and terminating sanctions for discovery violations under former Code Civ. Proc. § 2023(a)(4), (7) (*now see Code Civ. Proc. § 2023.010*). The trial court ordered these sanctions, resulting in dismissal, in response to plaintiff's repeated and willful pattern of delay and non-production, even after plaintiff stipulated that discovery would be completed by a specified date.

In considering whether the trial court abused its discretion in ordering terminating sanctions, the court of appeal noted that there was no order requiring plaintiff to respond to the specific interrogatories and requests for production of documents. The court concluded, however, that the stipulation signed by both parties waived the right to insist on

formal order compelling responses (required by former Code Civ. Proc. §§ 2030 and 2031 (*now see Code Civ. Proc. §§ 2030.010 et seq.* and *2031.010 et seq.*) as a precursor to imposing terminating sanctions, given that plaintiff's discovery violations were willful, preceded by a history of abuse, and evidence showed that less severe sanctions would not produce compliance (*128 Cal. App. 4th 262, 279-280*).

California Points & Authorities

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 82 DISCOVERY: SANCTIONS FOR DISCOVERY MISUSE
PART II. FORMS

8-82 California Points & Authorities § 82.14

§ 82.14 Supporting Motion for Discovery Sanctions [Code Civ. Proc. § 2023.010 et seq.]--Order for Terminating Sanction [Code Civ. Proc. § 2023.030(d)]

[1] FORM Supporting Motion for Discovery Sanctions [Code Civ. Proc. § 2023.010 et seq.]--Order for Terminating Sanction [Code Civ. Proc. § 2023.030(d)]

[*The following may be combined with other memoranda as necessary to support a motion for sanctions (see, e.g., §§ 82.10, 82.11 and § 82.13 et seq.), and should be combined with memorandum supporting a motion for sanctions in the specific procedural context (see, e.g., Ch. 83, Discovery: Depositions, § 83.32, Ch. 84, Discovery: Interrogatories, § 84.12, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.12).*]

THE COURT SHOULD IMPOSE A TERMINATING SANCTION ON _____ [*specify party, e.g.,* PLAINTIFF] BECAUSE HE/SHE HAS ENGAGED IN MISUSE OF THE DISCOVERY PROCESS.

A. Court May Impose Sanctions for Misuse of Discovery Process. [*See § 82.10[1], Paragraph A.*]

[*EITHER*]

B. Court May Strike Out Pleadings. The court may impose a terminating sanction by an order striking out pleadings or parts of pleadings of any party engaging in the misuse of the discovery process (*Code Civ. Proc. § 2023.030(d)(1)*).

[*AND/OR*]

C. Court May Stay Proceedings. The court may impose a terminating sanction by an order staying further proceedings by any party engaging in the misuse of the discovery process until an order for discovery is obeyed (*Code Civ. Proc. § 2023.030(d)(2)*).

[*AND/OR*]

D. Court May Dismiss Action. The court may impose a terminating sanction by an order dismissing the action, or any part of that action, of any party engaging in the misuse of the discovery process (*Code Civ. Proc. § 2023.030(d)(3)*; *see R.S. Creative, Inc. v. Creative Cotton, Ltd. (1999) 75 Cal. App. 4th 486, 496, 89 Cal. Rptr. 2d 353*).

[*AND/OR*]

E. Court May Order Default Judgment. The court may impose a terminating sanction by an order rendering a judgment by default against any party engaging in the misuse of the discovery process (*Code Civ. Proc. § 2023.030(d)(4)*; *Doppes v. Bentley Motors, Inc. (2009) 174 Cal. App. 4th 967, 971, 993, 94 Cal. Rptr. 3d 802* ; *Lang v. Hochman (2000) 77 Cal. App. 4th 1225, 1246-1247, 92 Cal. Rptr. 2d 322* .).

[*Optional*] **F. Lesser Sanction Not Required Before Entering Default.** Although the sanction of striking an answer and entering a default judgment, pursuant to *Code of Civil Procedure Sections 2023.030(d)(1)* and *2023.030(d)(4)*, is a drastic penalty that should be sparingly used only after a party has had an opportunity to comply with a court order, the unsuccessful imposition of a lesser sanction is not an absolute prerequisite to the utilization of the ultimate sanction of default (*see Housing Authority v. Gomez (1972) 26 Cal. App. 3d 366, 371, 102 Cal. Rptr. 657*).

[2] Comments

[a] Use of Form

This memorandum is for use in supporting a motion for impositionof a terminating sanction against a party who has engaged in the misuse of the discovery process [*see Code Civ. Proc. §§ 2023.010, 2023.030(d)(4)*].

This memorandum should be combined with other memoranda relating to the imposition of sanctions for misuse of the discovery process as necessary, such as those *set out in §§ 82.10 -82.13* and *§ 82.15*. This memorandum should also be combined with other memoranda supporting the imposition of sanctions in a specific procedural context [*see, e.g., Ch. 83, Discovery: Depositions, § 83.32, Ch. 84, Discovery: Interrogatories, § 84.12, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.12*]. A notice of motion seeking sanctions must be supported by a memorandum [*Code Civ. Proc. § 2023.040*].

Note that some cases cited in this form construe law in effect prior to the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that they remain consistent with the provisions of the current act.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should state facts showing the particular misuse of the discovery process in which the other party or attorney has engaged, as well as other facts that would indicate that the imposition of a terminating sanction would be appropriate under the circumstances.

[c] Related Pleading and Practice Forms

For discussion and forms for moving papers relating to sanctions under the Discovery Act, see California Forms of Pleading and Practice, Ch. 192, *Discovery: Sanctions for Discovery Abuse* (Matthew Bender).

[3] Discussion of Authorities

[a] Court May Dismiss Action

In ***R.S. Creative, Inc. v. Creative Cotton, Ltd.*** *(1999) 75 Cal. App. 4th 486, 89 Cal. Rptr. 2d 353* , the trial court imposed terminating sanctions for misuse of discovery and violation of court orders after it became evident that plaintiffs had incorporated a forged contract in their complaint, had refused to allow the completion of a principal's deposition after the forgery came to light, and had destroyed evidence.

The court of appeal affirmed the order dismissing plaintiffs' claim. The court observed that this was the first reported California case to consider terminating sanctions for spoliation of evidence after the California Supreme Court's decision in *Cedars-Sinai Med. Ctr. v. Superior Court (1998) 18 Cal. 4th 1, 74 Cal. Rptr. 2d 248, 954 P.2d 511* (discussed in *Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.90[3][a]*). In that case, the Supreme Court ruled that there was no tort cause of action for intentional spoliation of evidence against a party to the litigation, and emphasized the availability of other remedies for spoliation, including terminating sanctions under former Code Civ. Proc. § 2023 (*now see Code Civ. Proc. § 2023.030(d)*) (*75 Cal. App. 4th 486, 495*). The court of appeal set out in detail the activity of the sanctioned party in this case, to illustrate the kind of egregious discovery abuse that is intolerable in civil litigation (*75 Cal. App. 4th 486, 488-495*). The court concluded that the record amply supported the trial court's exercise of its discretion in dismissing the plaintiffs' complaint as a sanction for the repeated violations of stipulations and court orders, a forged document offered as true, and deliberate destruction of evidence pertinent to exposing that fact (*75 Cal. App. 4th 486, 496*). The court also rejected plaintiffs' argument that they were prevented from obtaining a fair hearing on the motion for terminating sanctions because their attorney had a conflict of interest in that monetary sanctions were sought against both him and his clients for the failure of plaintiff corporation's principal to appear at her deposition. The court explained that a rule preventing a remedy against a party and the party's attorney based on this sort of "conflict" would eviscerate former Code Civ. Proc. § 2023 (*now see Code Civ. Proc. § 2023.010 et seq.*), which expressly authorizes that relief (*75 Cal. App. 4th 486, 496*).

[b] Court May Order Default Judgment

In ***Doppes v. Bentley Motors, Inc.*** *(2009) 174 Cal. App. 4th 967, 94 Cal. Rptr. 3d 802* , plaintiff consumer brought an action for violation of the Song-Beverly Consumer Warranty Act (*Civ. Code § 1790 et seq.*), breach of express warranty, breach of implied warranty, and fraud, after defendant manufacturer failed to repair, repurchase, or replace a vehicle that had an obnoxious odor. The trial court denied plaintiff's request for terminating sanctions after defendant persistently "misused the discovery process," withheld documents, and violated discovery orders or directives from the discovery referee (*174 Cal. App. 4th 967, 971)* . Plaintiff argued on appeal that this was "the rare occasion" when the trial court abused its discretion by not imposing a terminating sanction for defendant's conduct (*174 Cal. App. 4th 967, 991)* . The court of appeal agreed, concluding the trial court abused its discretion by not imposing a terminating sanction pursuant to *Code Civ. Proc. §§ 2025.450(d), 2023.030* against defendant for its consistent and serious misuse of the discovery process. Defendant had engaged in repeated and egregious violations of the discovery laws--including failure to timely produce relevant and properly demanded, but potentially damaging, documents--that "not only impaired plaintiff's rights, but threatened the integrity of the judicial process" (*174 Cal. App. 4th 967, 993)* .

In ***Lang v. Hochman*** *(2000) 77 Cal. App. 4th 1225, 92 Cal. Rptr. 2d 322* , the trial court imposed terminating sanctions under former Code Civ. Proc. § 2023(b)(4) (*now see Code Civ. Proc. § 2023.030(d)*) and entered a $22 million default judgment against defendants when they failed to make full production after numerous discovery requests and court orders. The court of appeal affirmed, finding terminating sanctions appropriate when a substantial record indicated that defendant had spent months avoiding and evading discovery, thereby effectively preventing plaintiffs from preparing for trial (*77 Cal. App. 4th 1225, 1246-1247*). The court explained that, as amply illustrated in this case, a trial court generally will impose a terminating sanction after considering the totality of the circumstances: conduct of the party to determine if the action is willful; the detriment to the propounding part; and the number of formal and informal attempts to obtain the discovery (*77 Cal. App. 4th 1225, 1244-1245*).

The court also held that relief under *Code Civ. Proc. § 473(b)* from a default judgment is not available when the attorney and client are both responsible for discovery misconduct that results in a default judgment or dismissal of the action. Rather, Section 473(b) relief is available only when the attorney is solely responsible for the misconduct (*77 Cal. App. 4th 1225, 1228*).

[c] Lesser Sanction Not Required Before Entering Default

In ***Housing Authority v. Gomez*** *(1972) 26 Cal. App. 3d 366, 102 Cal. Rptr. 657* , plaintiff sued defendant to recover possession of property and to obtain money damages. Defendant answered, denying plaintiff's allegations, and cross complained, alleging that plaintiff had conspired with certain unnamed other parties to lower the value of his real estate. Defendant's deposition was noticed and then postponed by stipulation between both counsel, but defendant did not appear at the rescheduled time. Plaintiff moved to have the answer and cross complaint stricken, and to have reasonable expenses and attorney's fees imposed. The court heard the motion, but made an order for rescheduled depositions and continued the motion for the imposition of sanctions. When defendant failed to appear for the court-ordered deposition, plaintiff filed a supplemental motion for sanctions. Prior to the second hearing, various declarations under penalty of perjury were filed by the parties indicating that prior to the first scheduled deposition, defendant had indicated to his attorney that he would be spending time in Spain, and that his attorney had attempted to arrange a postponement of the first deposition on the ground that his client was out of the state. Also, prior to the second hearing, defendant notified his attorney that he had permanently transferred his residence to Spain and was no longer a resident of California. The trial court heard plaintiff's motion for sanctions and dismissed defendant's answer and cross claim, entering default judgment for plaintiff. Defendant appealed on the ground that he was not allowed a reasonable time within which to appear for the deposition, and that the sanctions imposed by the trial court were far too harsh a penalty in that they deprived him of a trial on the merits.

In affirming the trial court and rejecting defendant's position as "untenable," the court of appeal stated that although the sanction of striking an answer and entering a default is a drastic penalty that should be sparingly used, the unsuccessful imposition of a lesser sanction pursuant to former Code Civ. Proc. § 2034(b)(2) or (d) [*now see Code Civ. Proc. § 2023.030*] is not an absolute prerequisite to the utilization of that ultimate sanction, as long as the trial court has not abused its discretion when imposing it (*26 Cal. App. 3d 366, 371*). The court said that the facts of the case established both a willful failure of defendant to appear to be deposed and a disobedience of the lower court's order (*26 Cal. App. 3d 366, 372-373*). Under the circumstances, the trial court was justified in concluding that defendant had no intention of being deposed and would continue to engage in evasive tactics to achieve that end. The trial court clearly did not abuse its discretion in striking the answer and cross complaint and entering a default judgment (*26 Cal. App. 3d 366, 373*).

[4] Additional Authorities

[a] Court May Stay Proceedings

In *Fuller v. Superior Court (2001) 87 Cal. App. 4th 299, 104 Cal. Rptr. 2d 525* , petitioners, the plaintiffs in an underlying tort suit, were African-American shoppers who claimed they were beaten by security guards. Petitioners noticed the depositions of the individual guard-defendants. Fearing criminal prosecution arising from the same incident, the security guards moved the trial court for a protective order precluding the depositions, or staying them until the criminal statute of limitations expires. Petitioners opposed the motion and asked the trial court by a mandamus petition to prohibit the security guards from testifying at trial to matters about which they might, during deposition, invoke their privilege against self-incrimination. The trial court denied both the security guards' motion and petitioners' petition. Petitioners then sought a writ of mandate to direct the trial court to preclude the security guards from testifying at trial to matters about which the security guards *might* during deposition invoke their privilege (*87 Cal. App. 4th 299, 302*).

The court of appeal held that the trial court did not abuse its discretion in denying petitioner's request for trial testimony

preclusion and in refusing to stay the civil proceedings until the criminal statute of limitations expired (*87 Cal. App. 4th 299, 308-309*). With a view to accommodating all sides, the court weighed three competing interests: that of the defendant who invokes the privilege against self-incrimination during discovery in civil litigation to avoid exposure to criminal prosecution, that of the civil plaintiff who seeks to complete discovery without being unduly prejudiced if the defendant who invoked the privilege during discovery later waives it and testifies at trial, and that of the justice system and the court in fairly and expeditiously disposing of civil cases. The court concluded that any discovery order with respect to the security guards' privilege against self-incrimination was premature. The court explained that preclusion of trial testimony would have the unacceptable effect of penalizing the security guards for exercising their constitutional privilege. Moreover, the court noted, preclusion was only one tool available to petitioners to help avoid the surprise testimony at trial about matters previously not disclosed during discovery (*87 Cal. App. 4th 299, 309*). The court also concluded that a stay of discovery in the civil action until the criminal statute of limitations expired would run count to the interest of the courts in expeditious and efficient resolution of cases, and expose both side of the litigation to the risk of diminished memory and lost records (*87 Cal. App. 4th 299, 309*). Accordingly, the court denied the writ and held that the depositions should proceed. The court explained that if the security guards were to invoke their privilege, the court would then be able to fashion whatever protective order it deemed reasonable to balance the interests of the parties and the judicial system (*87 Cal. App. 4th 299, 309-310*).

In *Avant! Corp. v. Superior Court (2000) 79 Cal. App. 4th 876, 94 Cal. Rptr. 2d 505* , the court of appeal considered, as an issue of first impression in California, whether a corporation that is a defendant in related criminal and civil actions may obtain stay of discovery in a civil action while the criminal action is pending (*79 Cal. App. 4th 876, 881*). Petitioner corporation sought a writ of mandate to vacate an order denying its motion to stay civil proceedings or to stay discovery in respondent's suit for defamation, intentional infliction of emotional distress, and other torts, pending the disposition of a related criminal case (*79 Cal. App. 4th 876, 878-879*). Petitioner argued that the *Fifth Amendment* privilege against self-incrimination of the corporation's employees compelled a stay. The court denied the writ of mandate, holding that the trial court did not abuse its discretion in denying the stay because a corporation has no right against self-incrimination and the employees' *Fifth Amendment* rights were protected by the trial court's discovery order, which provided that the corporation's officers, employees, and agents were required to provide only non-privileged information in their custody or control (*79 Cal. App. 4th 876, 886-887*).

The court articulated the standard to be applied in deciding whether to stay civil proceedings until disposition of the criminal matter. In the discovery context, the trial court's decisions on these matters are reviewed under the abuse of discretion standard, not on *Fifth Amendment* grounds (*79 Cal. App. 4th 876, 886)* . The court explained that the weight of authority holds that while the implication of the right against self-incrimination must be given serious consideration, staying a civil discovery process to await the outcome of a related criminal case does not implicate constitutional issues, even when the defendant raising the question is an individual defendant (*79 Cal. App. 4th 876, 882-886)* . A court, however, has discretion to stay civil proceedings, to postpone discovery, or to impose protective orders and conditions when the interests of justice seem to require such action. In making that decision, the court should consider five factors, including the plaintiff's interest in proceeding expeditiously with the litigation, the burden on the defendants, the court's convenience in managing its cases, the interests of nonparties to the civil litigation, and the interest of the public in the pending civil and criminal litigation (*79 Cal. App. 4th 876, 885)* .

[b] Court May Dismiss Action

In *Williams v. Russ (2008) 167 Cal. App. 4th 1215, 1224-1225, 84 Cal. Rptr. 3d 813* , plaintiff, who had filed a legal malpractice complaint, demanded that his entire client file be turned over to him. Defendant attorney turned over to plaintiff's lawyer the entire file--36 file boxes. Before doing so, defendant's attorney copied only the correspondence between defendant and plaintiff. Plaintiff put the 36 file boxes in a storage space he rented for just that purpose. Plaintiff's attorney reviewed the contents of the file and copied about 11 boxes' worth. After the first month of the storage rental, plaintiff made only partial rental payments and eventually defaulted, despite repeated notifications that his default could lead to the sale of the items he was storing. The boxes containing his client filed were destroyed when

no one made a bid to purchase them. Plaintiff did not tell defendant that the files had been destroyed and, in the meantime, filed an amended complaint. Defendant moved to dismiss the action as a discovery sanction, on the ground that the destroyed documents had included some materials relevant to the new allegations in the amended complaint and that it would not be possible to reconstruct the file accurately. Because the evidence supported an inference that plaintiff had intentionally allowed material unfavorable to his claims to be destroyed and because the spoliation was highly prejudicial to the defense of the case, a terminating sanction was appropriate under *Code Civ. Proc. §§ 2023.010(d)* and *2023.030(d)* (*167 Cal. App. 4th 1215, 1224-1225)* .

In *Garber & Assoc. v. Eskandarian (2007) 150 Cal. App. 4th 813, 59 Cal. Rptr. 3d 1* , an action for unpaid attorney fees, the trial court granted plaintiff law firm's motions for terminating sanctions based on the defendants' discovery abuses, including failing to respond to interrogatories and production demands propounded by the firm, ignoring the trial court's orders compelling further answers, and failing to pay monetary sanctions. The court of appeal affirmed. Terminating sanctions were appropriate, even though defendants claimed that they had had no contact with their attorney and thus had no notice of the trial court's orders. Defendants "could not disappear in the midst of a pending case and avoid the consequences of such a tactic" (*150 Cal. App. 4th 813, 821-822)* .

In *Reedy v. Bussell (2007) 148 Cal. App. 4th 1272, 56 Cal. Rptr. 3d 216* , defendants, the widow and the son of a former trustee who had allegedly withdrawn trust money for his own benefit, appealed default judgments against them, as well as terminating sanctions imposed at the request of plaintiff successor trustee. Discovery violations included the widow's failure to comply with a court order to turn over documents related to the trust, the widow's and son's failure to provide adequate responses to discovery and repeated groundless objections, the widow's failure to complete her deposition as ordered by the trial court, and the son's failure to appear for trial. After the widow and son attempted to take additional depositions while the trial was in recess and mischaracterized the nature of those depositions, the trial court granted motions for terminating sanctions. The appellate court agreed that terminating sanctions were appropriate, based on defendants' recalcitrance "in virtually every aspect of discovery," concluding that lesser sanctions (such as additional monetary penalties) would not be sufficient to curb defendants' continued abuses (*148 Cal. App. 4th 1272, 1291-1293)* . However, the trial court erred in granting default judgments on two petitions that did not specify an amount of damages. If the complaint fails to specify the amount of damages sought, the trial court may impose a more limited discovery sanction that precludes litigation of other aspects of the case, while leaving the parties to have a contested trial on damages [*148 Cal. App. 4th 1272, 1294-1295]* . The appellate court remanded those two petitions with directions that the trial court reconsider whether more limited issue sanctions, relating to liability only, would be appropriate (*148 Cal. App. 4th 1272, 1295)* .

In *Hartbrodt v. Burke (1996) 42 Cal. App. 4th 168, 49 Cal. Rptr. 2d 562* , the plaintiff sought to recover money based on an oral agreement to create a company. The trial court dismissed the action because of plaintiff's refusal to comply with a discovery order to produce a tape recording of a conversation plaintiff recorded between him and the defendant.

The court of appeal affirmed. The court held that the terminating sanction of dismissal of the complaint may be imposed for refusal to comply with an order of production made pursuant to former Code Civ. Proc. § 2031 (*now see Code Civ. Proc. § 2031.010 et seq.*). Moreover, a plaintiff may not avoid a dismissal by voluntarily dismissing without prejudice prior to the hearing on the motion to dismiss (*42 Cal. App. 4th 168, 174-176)* .

[c] Court May Order Default Judgment

In *Liberty Mutual Fire Ins. Co. v. LcL Administrators, Inc. (2008) 163 Cal. App. 4th 1093, 78 Cal. Rptr. 3d 200* , the plaintiff propounded three sets of interrogatories, asking for witnesses, documents, and facts supporting the defendant's affirmative defenses and allegations of the cross-complaint. The defendant provided inadequate or evasive answers, and the trial court granted the plaintiff's motions to compel further responses (*163 Cal. App. 4th 1093, 1096)* . The defendant's supplemental responses were inadequate (*163 Cal. App. 4th 1093, 1097)* . The trial court gave the defendant another opportunity to provide adequate responses, imposed monetary sanctions against the defendant, but

denied the plaintiff's request for issue sanctions (*163 Cal. App. 4th 1093, 1097)* . The defendant failed to provide adequate answers and ignored the plaintiff's request to meet and confer (*163 Cal. App. 4th 1093, 1099)* . The trial court granted the plaintiff's motion for terminating sanctions, ruling the defendant "had abused the discovery process by repeatedly providing evasive and incomplete responses and by ignoring [the plaintiff]'s meet and confer letter requesting a third supplemental response" (*163 Cal. App. 4th 1093, 1099)* . The trial court struck the answer and cross-complaint, noting the defendant "not only repeatedly gave deficient responses but also failed to meet and confer," and the defendant's conduct "constituted " 'a flagrant abuse of the discovery process' " (*163 Cal. App. 4th 1093, 1101)* .

The court of appeal affirmed, concluding, given the defendant's months-long, willful lack of cooperation in providing straightforward information, witnesses, and documents to support its claims of malfeasance, the trial court could reasonably conclude that the ultimate sanction was appropriate (*163 Cal. App. 4th 1093, 1106)* .

In *Collisson & Kaplan v. Hartunian (1994) 21 Cal. App. 4th 1611, 26 Cal.Rptr. 2d 786* , the appellate court held that it was entirely appropriate for the trial court to strike defendants' answer to the complaint and to enter their default when defendants had repeatedly attempted to thwart plaintiff's legitimate attempts to obtain information from them. Defendants failed to respond entirely, responded in stock phrases, or made meritless objections to plaintiff's interrogatories, requests for documents, and requests for admissions. Numerous formal and informal attempts to secure the requested information had been unavailing. Thus, a terminating sanction was an appropriate sanction for repeated abuses of the discovery process (*21 Cal. App. 4th 1611, 1617-1621)* .

In *Morgan v. Southern Cal. Rapid Transit Dist. (1987) 192 Cal. App. 3d 976, 237 Cal. Rptr. 756* , *disapproved on other grounds* in *Schwab v. Rondel Homes, Inc. (1991) 53 Cal. 3d 428, 280 Cal. Rptr. 83, 808 P.2d 226* , during the course of plaintiff's negligence suit against defendant, the trial court twice ordered defendant to answer interrogatories and imposed monetary sanctions. Eventually, the trial court struck defendant's answer to the complaint and entered a default judgment against defendant. The court of appeal reversed the judgment because plaintiff failed to serve notice of the amount of damages sought prior to moving for the sanction, and the trial court was required to amend the default judgment, in that the amount exceeded the ceiling on damages imposed under *Code Civ. Proc. § 580* (*192 Cal. App. 3d 976, 980)* . However, it held that the order striking the answer was a proper discovery sanction. The court observed that since the trial court had already ordered defendant to answer interrogatories, it was authorized to make any just orders in regard to the refusal. It found that there was no time limit on enforcement of the discovery order by the trial court (*192 Cal. App. 3d 976, 981)* . The trial court has broad discretion in imposing discovery sanctions. A variety of factors may be relevant to the discretionary imposition of discovery sanctions, including the amount of time the party has had to answer; the difficulty in obtaining answers; the materiality of the unanswered questions; whether the party has acted in good faith and with reasonable diligence; whether the party was unable to comply with the previous order of the court; and whether a sanction short of default would be an appropriate remedy (*192 Cal. App. 3d 976, 981-982)* . In this case, the trial court had found that there was no meaningful sanction other than striking the answer, since it had already imposed two orders to answer the interrogatory, as well as monetary sanctions, and defendant had obeyed neither. It had also found that an order limiting evidence relating to the interrogatory would not be an effective sanction because the interrogatory only sought to discover a potential witness who might rebut defendant's claims. The court concluded that there is no question of the power of the trial court to apply the ultimate sanction of default against a litigant who persists in an outright refusal to comply with his or her discovery obligations, and that there were no less drastic sanctions available to the court (*192 Cal. App. 3d 976, 983-984)* .

[d] Lesser Sanction Not Required Before Entering Default

Williams v. Travelers Ins. Co. (1975) 49 Cal. App. 3d 805, 123 Cal. Rptr. 83 concerned an action by a physician who was the father of a deceased infant son, for coverage of the infant's life under an insurance policy. Defendant insurance company cross complained for damages for plaintiff's alleged fraud in applying for life insurance, based on his concealment of the genetic disease suffered by his infant son. During the course of discovery, defendant propounded requests for admissions about the nature of the genetic disease from which the insured infant had suffered, and

interrogatories concerning plaintiff's net and gross income. On plaintiff's providing evasive and equivocal answers (such as that he could not answer questions on the baby's disease because he was not a specialist in the field), the trial court ordered him to provide further answers. Plaintiff's new answers were still inadequate, and the court again ordered further answers. When plaintiff did not comply, the court ordered the complaint stricken. Plaintiff then appealed on the grounds that he was in substantial compliance with the discovery orders and that, in any case, the court had abused its discretion in imposing its severest sanctions. The court of appeal affirmed, holding that plaintiff had failed to substantially comply with the trial court's discovery order, that his answers were indeed inadequate (*49 Cal. App. 3d 805, 809)* , and that his equivocal and incomplete responses constituted an attempt to frustrate the purposes of the discovery statutes (*49 Cal. App. 3d 805, 810)* . Moreover, the court took judicial notice of the fact that the record was replete with evidence of plaintiff's continuous use of obstructive tactics, thus justifying the severe sanction of dismissal (*49 Cal. App. 3d 805, 810-811)* . Finally, dismissal was also justified because the interrogatories that plaintiff had refused to answer went to the very heart of his claim against defendant (*49 Cal. App. 3d 805, 811)* .

The facts and background of *Stein v. Hassen (1973) 34 Cal. App. 3d 294, 109 Cal. Rptr. 321* , are discussed in *§ 82.10[3][c]*. In *Stein*, the court of appeal affirmed the imposition of a default judgment that was entered against defendant, on the grounds that defendant had totally ignored two court orders, had repeatedly willfully refused to file adequate and sufficient answers to interrogatories, and had generally persisted in an outright refusal to comply with his discovery obligations (*34 Cal. App. 3d 294, 302)* .

California Points & Authorities

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 82 DISCOVERY: SANCTIONS FOR DISCOVERY MISUSE
PART II. FORMS

8-82 California Points & Authorities § 82.15

§ 82.15 Supporting Motion for Discovery Sanctions [Code Civ. Proc. § 2023.010 et seq.]--Order for Contempt Sanction [Code Civ. Proc. § 2023.030(e)]

[1] FORM Supporting Motion for Discovery Sanctions [Code Civ. Proc. § 2023.010 et seq.]--Order for Contempt Sanction [Code Civ. Proc. § 2023.030(e)]

[*The following may be combined with other memoranda as necessary to support a motion for sanctions (see, e.g., §§ 82.10 -82.14), and should be combined with points and authorities supporting a motion for sanctions in the specific procedural context (see, e.g., Ch. 83, Discovery: Depositions, § 83.32.)*]

THE COURT SHOULD IMPOSE A CONTEMPT SANCTION ON _____ [*specify party, e.g.,* PLAINTIFF] BECAUSE HE/SHE HAS ENGAGED IN MISUSE OF THE DISCOVERY PROCESS.

A. Court May Impose Sanctions for Misuse of Discovery Process. [*See § 82.10[1], Paragraph A.*]

B. Court May Impose Contempt Sanction. The court may impose a contempt sanction by an order treating the misuse of the discovery process as a contempt of court (*Code Civ. Proc. § 2023.030(e)*).

[2] Comments

[a] Use of Form

This memorandum is for use in supporting a motion for imposition of a contempt sanction against a party who has engaged in misuse of the discovery process [*see Code Civ. Proc. §§ 2023.010, 2023.030(e)*].

This memorandum should be combined with other memoranda relating to the imposition of sanctions for discovery misuses as necessary, such as those *set out in §§ 82.10 -82.14*. The memorandum may also be combined with other memoranda supporting the imposition of sanctions in a specific procedural context. For example, contempt may be imposed against a deponent for failure to obey an order compelling answers or production under *Code Civ. Proc. § 2025.480(g)* [*see Ch. 83, Discovery: Depositions, § 83.32*]. A notice of motion seeking sanctions must be supported by a memorandum [*Code Civ. Proc. § 2023.040*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should state facts showing the particular misuse of the discovery process in which the other party or attorney has engaged, as well as other facts that would indicate that the imposition of a contempt sanction would be appropriate under the circumstances.

[c] Civil Contempt

Civil contempt is generally governed by *Code Civ. Proc. §§ 1209-1222*. Contempt for disobedience of a subpoena requiring attendance before an officer out of court, pursuant to the Civil Discovery Act, is governed by *Code Civ. Proc. § 1991.1* [*see also Code Civ. Proc. § 1991.2*]. Contempt is authorized in the Discovery Act by *Code Civ. Proc. §§ 2020.240* (disobedience of deposition subpoena), 2025.440(b) (refusal to attend or be sworn at deposition after being served with deposition subpoena), and 2025.480(g) (refusal to obey order requiring deposition answer).

[d] Related Pleading and Practice Forms

For discussion and forms for moving papers relating to sanctions under the Discovery Act, see California Forms of Pleading and Practice, Ch. 192, *Discovery: Sanctions for Discovery Abuse* (Matthew Bender). For discussion and forms relating to civil contempt generally, see California Forms of Pleading and Practice, Ch. 135, *Contempt* (Matthew Bender).

[e] Related Points and Authorities

For memoranda concerning the imposition of contempt generally, see Ch. 47, *Contempt* .

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8-82 California Points & Authorities §§ 82.16-82.19

[Reserved]

§§ 82.16[Reserved]

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8-82 California Points & Authorities § 82.20

§ 82.20 Opposing Motion for Discovery Sanctions [Code Civ. Proc. § 2023.010 et seq.]--Sanctions Are Punitive Rather Than Remedial

[1] FORM Opposing Motion for Discovery Sanctions [Code Civ. Proc. § 2023.010 et seq.]--Sanctions Are Punitive Rather Than Remedial

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN OPPOSITION TO MOTION FOR ORDER IMPOSING SANCTIONS FOR _____ [*specify alleged abuse, e.g.,* FAILURE TO COMPLY WITH ORDER COMPELLING ATTENDANCE]
vs.	)	
_____ [*name*],	)	
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

SANCTIONS ARE IMPROPER WHEN THEY ARE PUNITIVE RATHER THAN REMEDIAL AND WHEN THEY GO BEYOND WHAT IS NECESSARY TO SECURE THE RESULTS OF THE DISCOVERY THAT WAS SOUGHT.

A. Purpose of Sanctions. The purpose of sanctions is to accomplish the object sought by the discovery process and to secure the just and expeditious resolution of actions, rather than to punish the party who has engaged in conduct

constituting a misuse of the discovery process (*see McGinty v. Superior Court (1994) 26 Cal. App. 4th 204, 210-216, 31 Cal. Rptr. 2d 292* ; *Caryl Richards, Inc. v. Superior Court (1961) 188 Cal. App. 2d 300, 304, 10 Cal. Rptr. 377* ; *Crummer v. Beeler (1960) 185 Cal. App. 2d 851, 858, 8 Cal. Rptr. 698*).

B. Inappropriateness of Type and Severity of Sanctions. Sanctions are improper if they are not appropriate to the dereliction, and if they exceed that which is necessary to protect the interests of the party adversely affected by the misuse of the discovery process (*see Vallbona v. Springer (1996) 43 Cal. App. 4th 1525, 1545, 51 Cal. Rptr. 2d 311* ; *Motown Record Corp. v. Superior Court (1984) 155 Cal. App. 3d 482, 492, 202 Cal. Rptr. 227* ; *Deyo v. Kilbourne (1978) 84 Cal. App. 3d 771, 793, 149 Cal. Rptr. 499*).

C. Limitation on Use of Sanctions. The chief limitation on the use of sanctions is that the sanction may not be used to put the prevailing party in a better position than that party might have been in had the misuse of the discovery process not been engaged in, and had the results of the discovery process been totally favorable to the prevailing party (*see Wilson v. Jefferson (1985) 163 Cal. App. 3d 952, 958-959, 210 Cal. Rptr. 464* ; *Stein v. Hassen (1973) 34 Cal. App. 3d 294, 303, 109 Cal. Rptr. 321*).

D. Limitation on Court's Discretion. The court's discretion in making orders relating to discovery is not unlimited. The power to impose sanctions under *Section 2023.030 of the Code of Civil Procedure* should not be interpreted as giving the court the power to arbitrarily select the sanctions that are listed therein (*see Caryl Richards, Inc. v. Superior Court (1961) 188 Cal. App. 2d 300, 303-304, 10 Cal. Rptr. 377*).

[*Optional*] **E. Failure to Oppose Motion Is Not Admission That Sanctions Are Proper.** The failure to file a written opposition or to appear at a hearing or the voluntary provision of discovery shall not be deemed an admission that the motion was proper or that sanctions should be awarded (*Cal. Rules of Ct., Rule 3.1030(b)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This form of memorandum is for use in opposition to a motion requesting a court to impose sanctions pursuant to *Code Civ. Proc. § 2023.030*. It is a basic form opposing the use of severe, punitive, or otherwise improper sanctions generally, and may be combinedwith § 82.31 as appropriate to oppose the imposition of the sanctions of default or dismissal, or with points and authorities opposing other types of sanctions. It may be combined with any other points and authorities opposing the imposition of sanctions in a specific procedural context.

Note that some cases cited in this form construe law in effect prior to the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that they remain consistent with the provisions of the current act.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel may wish to point out why the requested sanction is inappropriate or too severe with respect to the goals to be accomplished by the intended discovery.

[c] Related Pleading and Practice Forms

For discussion and forms of moving papers relating to sanctions under the Discovery Act, see California Forms of Pleading and Practice, Ch. 192, *Discovery: Sanctions for Discovery Abuse* (Matthew Bender).

[3] Discussion of Authorities

[a] Purpose of Sanctions

McGinty v. Superior Court *(1994) 26 Cal. App. 4th 204, 31 Cal. Rptr. 2d 292* , involved a wrongful death action arising from an airplane crash. The plaintiffs alleged that the crash was caused by a defective airplane engine, and intended to call an expert witness to testify as to the cause of the engine failure. The expert inadvertently forwarded materials to the plaintiffs' attorney that were subject to a protective order in another action.

The court of appeal held that the trial court abused its discretion by precluding the plaintiffs from using their expert witness because he had inadvertently forwarded the protected materials to their attorney. The attorney's conduct was not willful, the defendant was not prejudiced as these materials would have been discoverable through normal discovery, and the order was tantamount to a dismissal of the case. The sanctions were pure punishment to deter violation of court orders, which is not an appropriate aim of discovery sanctions (*26 Cal. App. 4th 204, 210-216)* .

In ***Caryl Richards, Inc. v. Superior Court*** *(1961) 188 Cal. App. 2d 300, 10 Cal. Rptr. 377* , plaintiffs husband and wife sought damages against defendant for injuries to the wife's eyes allegedly received as a result of use of hair spray manufactured by defendant. During pretrial discovery proceedings, the trial court ordered a further answer to an interrogatory thathad been propounded by plaintiffs. Defendant provided a further answer, but did not state the exact proportions of each ingredient in the formula as requested in the interrogatory. Plaintiffs then moved the court for an order imposing sanctions either by striking defendant's answer and entering a default, or by an order that certain facts specified by plaintiff be established. The court denied the motion to strike the answer, but entered an order that certain facts be established unless defendant gave further answers within 15 days giving details of the proportions of the ingredients with their common chemical names. Defendant provided a statement with certain information, and plaintiffs made a motion asking for the same sanctions they had previously requested. Another judge heard the motion, found that the answer was not sufficient and that defendant had willfully failed to comply with the court's order, and ordered that the answer be stricken and a default entered. Defendant sought a writ of mandate from the court of appeal requiring the trial court to vacate its order.

In granting defendant's petition, the court of appeal held that the trial court abused its discretion in entering the default. The court said that one of the principal purposes of discovery statutes is to enable a party to obtain evidence in the control of the adversary party in order to further the efficient, economical disposition of cases in accordance with right and justice on the merits (*188 Cal. App. 2d 300, 303, 307)* . The statutes are to be liberally interpreted so that they may accomplish their purpose (*188 Cal. App. 2d 300, 303)* . The sanctions the court could impose pursuant to former Code Civ. Proc. § 2034(b)(2) (*now see Code Civ. Proc. § 2023.030*) were such as were suitable and necessary to enable the party seeking discovery to obtain the objects of discovery being sought (*188 Cal. App. 2d 300, 304)* . However, the court emphasized that the trial court may not impose sanctions that are designed not to accomplish the objects of the discovery but to impose punishment instead (*188 Cal. App. 2d 300, 304)* . The court held that by striking defendant's answer and entering a default judgment, the trial court deprived defendant of due process because the judgment precluded trial on other facts and issues in the case (*188 Cal. App. 2d 300, 305)* . The court went on to state that an order under former Code Civ. Proc. § 2034(b)(2)(i) (*now see Code Civ. Proc. § 2023.030(b)*) that the facts sought to be proven by the interrogatories be taken as established for the purpose of the action would have secured the results that plaintiff had sought, while not depriving defendant of due process on the other issues in the action (*188 Cal. App. 2d 300, 305-306)* .

Crummer v. Beeler *(1960) 185 Cal. App. 2d 851, 8 Cal. Rptr. 698* , involved a suit for money had and received. The trial court granted plaintiff's motion to strike defendant's answer based on former Code Civ. Proc. § 2034(d) (*now see Code Civ. Proc. § 2023.030(d)(1)*) and on defendant's allegedly willful failure to appear for a noticed deposition. Defendant then moved to set aside the default under *Code Civ. Proc. § 473*, based on the factthat he was living in Canada and that, through his attorneys, he had attempted to move the depositions to a time that would have been convenient for him, but that plaintiff had adamantly refused. The motion to set aside the default was denied, and defendant appealed.

The court of appeal reversed the trial court's decision, holding that the purpose of former Code Civ. Proc. § 2034(d) (*now see Code Civ. Proc. § 2023.030*) was not punishment, but the just and expeditious resolution of actions (*185 Cal. App. 2d 851, 858, 860)* . In support of this statement, the court cited federal authority construing FRCP, Rule 37, which was substantially similar to the California sanctions statute. The court also noted that, under federal authority, imposition of sanctions was held to be improper unless the party who was not in compliance with discovery obligations was given an additional opportunity to comply (*185 Cal. App. 2d 851, 858-859)* . Counsel should note that *Code Civ. Proc. § 2023.030* is derived in part from both former Code Civ. Proc. § 2034 and FRCP, Rule 37.

[b] Inappropriateness of Type and Severity of Sanctions

The facts and procedural background of ***Vallbona v. Springer*** *(1996) 43 Cal. App. 4th 1525, 51 Cal. Rptr. 2d 311* are discussed in *§ 82.22[3][a]*.

In ***Motown Record Corp. v. Superior Court*** *(1984) 155 Cal. App. 3d 482, 202 Cal. Rptr. 227* , an action on a personal service contract, defendant served plaintiffs with a request for production of documents. Plaintiffs objected that the documents sought were protected by the attorney-client privilege. There followed a protracted series of discovery proceedings in which plaintiffs served and filed several supplementary responses to their objections purportedly providing a factual basis for their claim of privilege, and defendants twice moved to strike plaintiffs' pleadings for plaintiffs' failure to verify that they had provided all nonprivileged material. The trial court on two separate occasions determined that plaintiffs' factual showings were inadequate to verify that the materials sought were privileged, and ordered plaintiffs to provide further factual basis for their claim of privilege and imposed monetary sanctions on plaintiffs. Plaintiffs eventually served and filed a final and much-expanded set of descriptions of the documents and declarations to establish their privilege. Service of these materials occurred one whole day after the deadline that the trial court had set in its final order to plaintiffs to produce a factual basis for their claim. These materials suggested a tenuous basis for a claim of the attorney-client privilege. After further proceedings the trial court imposed monetary sanctions of $1,000 on plaintiffs for their tardiness in providing the final set of descriptions, held that plaintiffs' delay in providing these materials constituted a waiver of any attorney-client privilege, and ordered plaintiffs to produce all of the documents sought. Plaintiffs petitioned for a writ of mandate.

The court of appeal granted the writ. The court restated from earlier case law that the sanctions that a court could impose under former Code Civ. Proc. § 2034(b)(2) (*now see Code Civ. Proc. § 2023.030*) were such as were suitable and necessary to enable the party seeking discovery to obtain the object of the discovery, but that the court could not impose sanctions that were designed to punish (*155 Cal. App. 3d 482, 489)* . Responding to defendant's argument that plaintiffs' prior acts of delay and avoidance in providing the factual basis should be taken into account in reviewing the appropriateness of the sanctions imposed, the court noted that sanctions had already been imposed on plaintiffs for their prior insufficient factual showings. The court noted further that the sanctions at issue in the case were imposed not for insufficiency of the factual showing made, but for their tardiness, and stated that the minimal delay caused by this tardiness did not prejudice defendant (*155 Cal. App. 3d 482, 491)* . The court held that the sanctions imposed by the trial court were excessive in that they were not reasonably calculated to achieve the purpose of affecting compliance with discovery and were punitive in nature. The court also held that if the compelled waiver was part of the sanction, it too was excessive (*155 Cal. App. 3d 482, 490)* .

In ***Deyo v. Kilbourne*** *(1978) 84 Cal. App. 3d 771, 149 Cal. Rptr. 499* , an attorney sued a client for services rendered and the defendant, representing himself, filed an answer denying liability. Plaintiff served defendant with interrogatories, which were received by defendant while he was hospitalized with serious health problems that continued for the duration of the legal proceedings. After 60 days, during which time plaintiff granted defendant, through his wife, one extension to answer the interrogatories, the plaintiff brought a motion to strike defendant's answer for failure to answer, and the motion was denied. However, the court directed defendant to file answers by a specified date and ordered that his answers would be stricken if this was not done. Defendant filed answers by the date ordered, and although there was some response to each question and the answers did suggest a dispute existed concerning the amount of the fees, most of the answers were not fully responsive to the questions propounded. One month later, plaintiff filed a second motion for an order either compelling further answers to the interrogatories pursuant to former Code Civ. Proc. § 2030 (*now see Code Civ. Proc. § 2030.300*), or to have the answer stricken and default judgment entered pursuant to former Code Civ. Proc. § 2034(b)(2) or (d) (*now see Code Civ. Proc. § 2023.030(d)(1), (4)*). The trial court granted the motion to strike the answer and to enter a default judgment, including reasonable expenses and attorney's fees, as a result of the motion. Defendant finally employed counsel and requested a new trial, which was denied. Defendant then appealed.

In reversing, the court of appeal discussed what sanctions are proper when a party fails to fully answer interrogatories, and provided generalguidelines for trial courts to follow in imposing sanctions. The court said that interrogatories expedite the resolution of lawsuits and enable counsel to evaluate the reasonable value of claims and defenses, thereby encouraging prompt settlements or serving to facilitate trial preparation (*84 Cal. App. 3d 771, 779, 798)* . Answers must be complete and responsive (*84 Cal. App. 3d 771, 783)* . When the party desires a further response, he or she was then required to make a timely motion to compel further answers pursuant to former Code Civ. Proc. § 2030(a) (*now see Code Civ. Proc. § 2030.300*) (*84 Cal. App. 3d 771, 786-787)* . Attorney's fees and expenses could only be awarded when a motion pursuant to former Code Civ. Proc. § 2030(a) (*now see Code Civ. Proc. § 2030.300*) to compel was granted, and no other sanctions were authorized at that time (*84 Cal. App. 3d 771, 789)* . The sanctions provided in former Code Civ. Proc. § 2034(b)(2) applied only when the party refuses to obey an order made requiring further responses (*84 Cal. App. 3d 771, 789)* . (Counsel should note that under the California Civil Discovery Act of 2005, this procedure is specifically codified in *Code Civ. Proc. § 2030.300(d), (e),* which provide for the imposition of a monetary sanction to the prevailing party of a motion to compel, and provide for the imposition of an issue, evidence, or terminating sanction only if a party fails to obey an order compelling further response to interrogatories.) The court of appeal in *Deyo* went on to explain that when a party has refused to supply information relevant to a particular claim or defense, an order establishing certain facts or precluding designated claims or defenses pursuant to former Code Civ. Proc. § 2034(b)(2) (*now see Code Civ. Proc. § 2023.030(d)*) may be the appropriate sanction (*84 Cal. App. 3d 771, 792)* . When a motion to compel has previously been granted, the court stated that the sanction should be appropriate to the dereliction and should not exceed that which is required to protect the interests of the party entitled to but denied discovery (*84 Cal. App. 3d 771, 793)* . The court then ruled that since answers had been made to interrogatories, although they might not have been fully responsive, and the plaintiff had also made a motion to compel, the trial court had jurisdiction to direct the defendant to file further answers, but did not have the jurisdiction at that time to strike the answer and enter a default judgment (*84 Cal. App. 3d 771, 797-798)* .

[c] Limitation on Use of Sanctions

In ***Wilson v. Jefferson*** *(1985) 163 Cal. App. 3d 952, 210 Cal. Rptr. 464* , plaintiff brought a legal malpractice action against defendant, seeking actual and punitive damages for defendant's alleged negligence and fraud in failing to file plaintiff's personal injury action within the applicable statutory limitation period. The trial court, on plaintiff's motion, ordered defendant to produce documents relating to his office procedure to insure timely filings. Defendant failed to comply with this order and the trial court, under former Code Civ. Proc. § 2034(b)(2)(C) (*now see* Code Civ. Proc. § 2023.030(d)(1), (4)), ordered defendant's answer stricken and a default judgment entered. Defendant appealed.

The court of appeal reversed, holding that a sanction should not exceed that which is required to protect the interests of

the party seeking discovery by placing that party in a position better than that which he or she would have enjoyed if he or she had obtained the discovery sought and it had been completely favorable to his or her cause. In the case at bar, defendant's conduct was an attempt to avoid inquiry into the merit of an affirmative defense that he had no duty to file the action because plaintiff had agreed first to pay filing fees but had failed to do so. The court held that this conduct was not dispositive of all the issues present in the case, such as the question of fraud or punitive damages, and to enter a default judgment based on this conduct erroneously placed plaintiff in a better position than that necessary to protect her interests in obtaining the discovery sought (*163 Cal. App. 3d 952, 958-959)* .

The facts and procedural background of ***Stein v. Hassen*** *(1973) 34 Cal. App. 3d 294, 109 Cal. Rptr. 321* , are discussed in *§ 82.10[3][c]*. In *Stein*, the court of appeal upheld the sanction of default, noting that had proper discovery been conducted, it would have tended to support plaintiff's cause of action. Thus the sanction of dismissal was within the trial court's discretion, as limited by the rule that sanctions may not be used to put the prevailing party in a better position than that party might have been in had the discovery order been entirely favorable to the prevailing party. In support of this proposition, the *Stein* court cited Thompson, *Sanctions in California Civil Discovery* (1968) *8 Santa Clara L. Rev. 185* (*34 Cal. App. 3d 294, 303)* .

[d] Limitation on Court's Discretion

The facts and procedural background of ***Caryl Richards, Inc. v. Superior Court*** *(1961) 188 Cal. App. 2d 300, 10 Cal. Rptr. 377* , are discussed in [a], *above.* The court in *Caryl Richards* noted the limitations on a trial court's discretion in imposing sanctions, holding that the court's discretion is not unlimited, and that the court may not just select sanctions in an arbitrary manner (*188 Cal. App. 2d 300, 303-304)* .

[4] Additional Authorities

[a] Inappropriateness of Type and Severity of Sanctions

In *Maldonado v. Superior Court (2001) 94 Cal. App. 4th 1390, 115 Cal. Rptr. 2d 137* , an original writ proceeding arising from an employment discrimination action, petitioners (former employees) sought issue preclusion sanctions against real party in interest, former employer, for its failure to produce, as specified in deposition notices, and to answer at appropriatedepositions. Petitioner sought to preclude defendants from introducing testimony at trial or asserting affirmative defenses concerning matters for which they refused to disclose information and from "springing ... witnesses" who no longer worked for former employer on petitioners at trial. The court found that such a sanction would exceed the level of punishment justified under the facts and law (*94 Cal. App. 4th 1390, 1398)* .

The court explained that sanctions involving issue preclusion are not generally imposed at this point in a discovery dispute. When a party wrongfully fails to answer a question or produce a document requested in accordance with former Code Civ. Proc. § 2025 (*now see Code Civ. Proc. § 2025.010 et seq.*), and the party seeking discovery has gone to the court for relief, "if the court determines that the answer or production sought is subject to discovery, it shall order that the answer be given or the production be made on the resumption of the deposition" (*see Code Civ. Proc. § 2025.480(e)*) (*94 Cal. App. 4th 1390, 1398)* . In addition, the court "shall" impose a monetary sanction "against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel answer or production ..." unless it finds that "the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." It is only when a deponent "fails to obey an order entered under this subdivision" that *Code Civ. Proc. § 2025.480(g)* permits the court to "make those orders that are just against the disobedient party, or against the party with whom the disobedient deponent is affiliated, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under Section 2023 (*now see Code Civ. Proc. § 2030.010 et. seq.*)" (*94 Cal. App. 4th 1390, 1398-1399)* . The appellate court noted that some courts have held that the more serious sanctions may be imposed under former Code Civil Proc. § 2023 (*now see Code Civ. Proc. § 2023.030*), even when no specific order has been violated. However, those cases, unlike this one, involved repeated and willful refusals to permit

discovery or produce documents over a lengthy period of time, resulting in evidence becoming unavailable (*94 Cal. App. 4th 1390, 1398-1399)* . Accordingly, the court concluded that this case did not call for imposition of an issue-preclusion sanction. The court noted, however, that a monetary sanction could well be warranted in view of the fact that former Code Civ. Proc. § 2025(o) (*now see Code Civ. Proc. § 2025.480(f)*) required imposition of monetary sanctions unless the trial court finds that the party subject to sanction "acted with substantial justification" or that "other circumstances make the imposition of the sanction unjust" (*94 Cal. App. 4th 1390, 1399)* .

For additional facts and the procedural background of *Maldonado*, see *§ 83.31[4][a]*.

In *In re de la Parra (1986) 184 Cal. App. 3d 139, 228 Cal. Rptr. 864* , defendant failed to answer five of the interrogatories served on him byplaintiff without specifically objecting to them. Plaintiff filed a motion to compel answers, to which defendant objected on several grounds. The trial judge found that defendant should answer the questions. When defendant failed to answer four of the interrogatories, the judge found him in contempt of court and imposed punishment of 15 days incarceration. Defendant brought a writ of habeas corpus to review the contempt citation. The court of appeal vacated the contempt sanction because it was both unwarranted and jurisdictionally defective (*184 Cal. App. 3d 139, 145)* . The court observed that although statutory language does permit the use of the contempt power to enforce civil discovery, such a drastic solution is rarely imposed. It said that although lesser sanctions are more plentiful, even the imposition of those penalties requires that the punishments be tailored to the derelictions; draconian sanctions should be reserved to only the most flagrant abuses (*184 Cal. App. 3d 139, 144)* . The court said that the trial court had available many alternative solutions to imprisonment. It found the incarceration of defendant unnecessary and overbearing, and concluded that use of imprisonment should be reserved for situations where the court's dignity is truly compromised and no other suitable penalty can be found (*184 Cal. App. 3d 139, 145)* .

In *Richards v. Superior Court (1978) 86 Cal. App. 3d 265, 150 Cal. Rptr. 77* , plaintiffs propounded interrogatories concerning the financial status of five defendants in relation to causes of action that permitted the assessment of punitive damages. The trial court initially issued an order limiting access to the answers to the interrogatories, but later dissolved the order in the belief that defendants had not complied with the order. The court of appeal granted a writ of mandate directing that a new protective order be issued in line with the order dissolved (*86 Cal. App. 3d 265, 273)* . The court held that the order dissolving the protective order was clearly imposed as a sanction. It was inappropriate to whatever noncompliance there was by defendant in view of the potential violation of the right of privacy by the wholesale discovery of defendant's financial records (*86 Cal. App. 3d 265, 269-273)* .

[b] Limitation on Use of Sanctions

In *Foothill Properties v. Lyon/Coply Corona Assoc. (1996) 46 Cal. App. 4th 1542, 54 Cal. Rptr. 2d 488* , a seller of property sued the developers for breach of contract. The trial court awarded discovery sanctions against the defendant because it opposed the motion to compel production of documents. The court of appeal held that the propriety of a discovery sanction award is reviewed using the abuse of discretion standard. A sanction award can be overturned only if it was not based on a reasoned judgment or is at odds with legal principles and policies appropriate to the particular matter at issue. The court will uphold the award unless it exceeds the bounds of reason, all of the circumstances before it beingconsidered. Accordingly, the court of appeal held that the trial court abused its discretion in imposing sanctions on a party that had a valid claim of a right to a protective order with respect to unproduced documents that were alleged to be proprietary and confidential, and had substantial justification, as a matter of law, for withholding these documents until the motion for the protective order was determined, and for opposing the motion to compel (*46 Cal. App. 4th 1542, 1557)* .

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8-82 California Points & Authorities § 82.21

§ 82.21 Opposing Motion for Discovery Sanctions [Code Civ. Proc. § 2023.010 et seq.]--Attorney Did Not Advise Misconduct

[1] FORM Opposing Motion for Discovery Sanctions [Code Civ. Proc. § 2023.010 et seq.]--Attorney Did Not Advise Misconduct

[*Caption. See § 82.20.*]

MONETARY SANCTIONS SHOULD NOT BE AWARDED AGAINST _____ [*name*], PLAINTIFF'S/DEFENDANT'S ATTORNEY, BECAUSE HE/SHE DID NOT ADVISE PLAINTIFF/DEFENDANT TO ENGAGE IN THE ALLEGED CONDUCT THAT IS THE BASIS FOR THE REQUEST FOR SANCTIONS.

Attorney Must Have Advised Misconduct. Monetary sanctions against a party's attorney require a finding that the attorney advised the conduct (*Ghanooni v. Super Shuttle (1993) 20 Cal. App. 4th 256, 261, 24 Cal. Rptr. 2d 501*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities is for use in opposition to a motion under *Code Civ. Proc. § 2023.030(a)* for an order imposing monetary sanctions against an attorney. When appropriate, it may be combined with the memoranda of points and authorities *set forth in § 82.20, § 82.22* and *§ 82.30* et seq. It may also be combined with any other points and authorities opposing the imposition of sanctions in a specific procedural context.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[c] Related Pleading and Practice Forms

For discussion and forms of moving papers relating to sanctions under the Discovery Act, see California Forms of Pleading and Practice, Ch. 192, *Discovery: Sanctions for Discovery Abuse* (Matthew Bender).

[3] Discussion of Authorities

[a] Attorney Must Have Advised Misconduct

In ***Ghanooni v. Super Shuttle*** *(1993) 20 Cal. App. 4th 256, 24 Cal. Rptr. 2d 501* , the appellate court held that although monetary sanctions against a party may be based on the party's misuse of the discovery process, whether willful or not, monetary sanctions against the party's attorney require a finding that the attorney advised the conduct. In this case, the attorney's unrebutted declaration was sufficient to establish that plaintiff's refusal to submit to a medical examination requested by defendants was not based on the attorney's advice and, thus, monetary sanctions could not properly be imposed against the attorney (*20 Cal. App. 4th 256, 261)* . For further discussion of *Ghanooni*, see *§ 82.11[3][b]*.

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8-82 California Points & Authorities § 82.22

§ 82.22 Opposing Motion for Discovery Sanctions [Code Civ. Proc. § 2023.010 et seq.]--Misconduct Was Not Willful

[1] FORM Opposing Motion for Discovery Sanctions [Code Civ. Proc. § 2023.010 et seq.]--Misconduct Was Not Willful

[*Caption. See § 82.20.*]

DISCOVERY SANCTIONS SHOULD NOT BE AWARDED BECAUSE PLAINTIFF/DEFENDANT DID NOT ACT WILLFULLY.

Misconduct Must Be Willful. Two facts are prerequisite to imposition of discovery sanctions: there must be a failure to comply, and the failure must be willful (*Vallbona v. Springer (1996) 43 Cal. App. 4th 1525, 1545, 51 Cal. Rptr. 2d 311*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities is for use in opposition to a motion under *Code Civ. Proc. § 2023.030(a)* requesting a court to impose sanctions. When appropriate, it may be combined with the memoranda of points and authorities *set out in § 82.20, § 82.21*, and *§ 82.30*. It may also be combined with any other points and authorities opposing the imposition of sanctions in a specific procedural context.

Note that appellate panels in the Second Appellate District of the court of appeal have held that wilfulness is not a prerequisite for the imposition of sanctions [*see § 82.10[3][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[c] Related Pleading and Practice Forms

For discussion and forms of moving papers relating to sanctions under the Discovery Act, see California Forms of Pleading and Practice, Ch. 192, *Discovery: Sanctions for Discovery Abuse* (Matthew Bender).

[3] Discussion of Authorities

[a] Misconduct Must Be Willful

In ***Vallbona v. Springer*** *(1996) 43 Cal. App. 4th 1525, 51 Cal. Rptr. 2d 311* , plaintiffs sued a physician, his wife and his medical clinic for fraud, negligent misrepresentation and breach of contract. The trial court imposed evidence and issue sanctions against the defendants in response to their noncompliance with plaintiff's discovery request to produce documents.

The court of appeal affirmed. The court held that defendants did not formally reply to plaintiff's timely request for production. Furthermore, one of the defendants testified that he neglected discovery until a burglary precluded compliance, but later brought some of the purportedly stolen documents to trial. Finally, after twice ordering the defendant to complete his deposition, the court appointed a referee to mediate the final deposition session. Thus, the court concluded that the defendants willfully failed to comply with discovery requirements (*43 Cal. App. 4th 1525, 1545)* .

Note that there is conflicting authority holding that wilfulness is not a prerequisite for the imposition of sanctions [*see § 82.10[3][a]*].

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8-82 California Points & Authorities §§ 82.23-82.29

[Reserved]

§§ 82.23[Reserved]

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8-82 California Points & Authorities § 82.30

§ 82.30 Opposing Motion for Discovery Sanctions [Code Civ. Proc. § 2023.010 et seq.]--Monetary Sanctions Are Limited to Actual Costs and Fees [Code Civ. Proc. § 2023.030(a)]

[1] FORM Opposing Motion for Discovery Sanctions [Code Civ. Proc. § 2023.010 et seq.]--Monetary Sanctions Are Limited to Actual Costs and Fees [Code Civ. Proc. § 2023.030(a)]

[*Caption. See § 82.20.*]

MONETARY SANCTIONS PAYABLE TO AN OPPOSING PARTY THAT EXCEED THE ACTUAL REASONABLE COSTS INCURRED IN OBTAINING COMPLIANCE WITH DISCOVERY, INCLUDING REASONABLE ATTORNEY'S FEES, ARE IMPROPER.

Monetary Sanctions Are Limited to Actual Costs. When monetary sanctions are payable to an opposing party, the amount of those sanctions is limited to the opposing party's reasonable actual costs, including reasonable attorney's fees (*Code Civ. Proc. § 2023.030(a)*; *see In re Marriage of Niklas (1989) 211 Cal. App. 3d 28, 36-38, 258 Cal. Rptr. 921* (order under former Code Civ. Proc. § 2025(o) (*now see Code Civ. Proc. § 2025.480(f)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities is for use in opposition to a motion under *Code Civ. Proc. § 2023.030(a)* for an order imposing monetary sanctions in a specified amount. When appropriate, it may be combined with the memoranda of points and authorities *set forth in § 82.20 et seq. or § 82.31*. It may also be combined with any other

points and authorities opposing the imposition of sanctions in a specific procedural context.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel may wish to point out why a sanction in the amount requested would be excessive. For example, counsel might include evidence indicating that the costs requested included costs not related to securing compliance with discovery.

[c] Related Pleading and Practice Forms

For discussion and forms of moving papers relating to sanctions under the Discovery Act, see California Forms of Pleading and Practice, Ch. 192, *Discovery: Sanctions for Discovery Abuse* (Matthew Bender).

[3] Discussion of Authorities

[a] Monetary Sanctions Are Limited to Actual Costs

In ***In re Marriage of Niklas*** *(1989) 211 Cal. App. 3d 28, 258 Cal. Rptr. 921* , a marital dissolution proceeding, respondent husband noticed the depositions of wife and her attorney. Although wife appeared and testified at her deposition, her attorney refused to answer most of the questions at his deposition, asserting the attorney work-product doctrine and the attorney-client privilege. Husband sought a court order to compel wife's attorney to answer the questions and to impose sanctions. The trial court determined the attorney had waived the asserted protections by submitting a declaration based on his personal knowledge of husband's financial situation, and ordered him to answer the questions at a second deposition. The trial court also denied the request for sanctions. Although the attorney indicated he wished to seek appellate review, he did not do so. He appeared at the second deposition and answered every question, but frequently responded that he did not know, and he neither reviewed his files nor brought certain documents. He adjourned the deposition, stating he intended to apply for a protective order. Husband deposed wife a second time, pursuant to court order. Wife did not bring any of the documents listed in the notice of deposition and refused to answer related questions on the advice of her attorney. Husband filed a motion for discovery sanctions. The trial court ordered both wife and her attorney to resume their depositions, and continued the issue of appropriate sanctions. The depositions were continued in order to permit wife and her attorney to seek appellate review. After they failed to do so, they also failed to appear at the depositions, and later unsuccessfully sought a writ from the court of appeal. The trial court imposed issue sanctions against wife and her attorney. Wife filed a second writ petition in the court of appeal. The appellate court gave notice that it was considering issuing a peremptory writ directing the trial court to modify its order to impose only monetarysanctions on condition that wife and her attorney first answer the deposition questions. In response to that order, the trial court ordered wife and her attorney to complete their depositions, and ordered wife and her attorney, jointly and severally, to pay sanctions to husband in the amount of $45,000. Wife and her attorney appealed.

The court of appeal granted review by treating the appeal as an application for extraordinary relief, dismissed the appeal, and issued a peremptory writ directing the trial court to reconsider the amount of sanctions imposed. The court reviewed the provisions of former Code Civ. Proc. §§ 2023 and 2025(o) (*now see Code Civ. Proc. §§ 2023.030(a)* and *2025.480(f)*) regarding monetary sanctions, and explained that monetary discovery sanctions payable to an opposing party are limited to the opposing party's actual costs, including attorney's fees. The wife and her attorney contended the sanctions awarded were excessive because they were not limited to the actual amounts expended by the husband as a result of their failure to comply with the trial court's orders. The court said it was unable to determine from the trial court record what portion of the sanctions imposed was based on fees and costs incurred as a result of the noncompliance of the wife and her attorney, because the trial court order did not explain how it computed the award. The court declined to consider two orders purporting to explain how the award was computed, because the trial court issued these orders subsequent to the filing of the notice of appeal. The court said that such blatant disobedience of court orders warrants severe sanctions, but the imposition of sanctions must comport with the statutory authority on

which they are based. It did not hold $45,000 to be excessive, but only that (1) the evidence must be sufficient to support a finding that the amount of sanctions reflects the amount incurred by the husband in an attempt to obtain compliance with discovery, and (2) the record must reflect a determination by the trial court that such amount spent or incurred was reasonable. It concluded that on remand, the trial court must determine the amount of sanctions necessary to reimburse the husband for his reasonable attorney's fees and other costs and may consider other sanctions, including contempt, necessary to protect the dignity of the court and ensure compliance with the court's order (*211 Cal. App. 3d 28, 37-38)* .

[4] Additional Authorities

[a] Monetary Sanctions Are Limited to Actual Costs

In *Do v. Superior Court (2003) 109 Cal. App. 4th 1210, 135 Cal. Rptr. 2d 855* , a creditor filed an action against a debtor, alleging breach of a loan agreement. Because the debtor was indigent, she was represented on a pro bono basis. When the creditor twice failed to appear at a noticed deposition, the debtor filed a motion seeking sanctions. The superior court denied the motion. Relying on *Argaman v. Ratan (1999) 73 Cal. App. 4th 1173, 86 Cal. Rptr. 2d 917* (discussed *below*), the superior court reasoned that the situation of a litigant with pro bono counsel is analogous to that of an attorney appearing in propria persona. Former Code Civ. Proc. § 2023(b)(1) (*now see Code Civ. Proc. § 2023.030(a)*) refers to "reasonable expenses, including attorney's fees incurred ... as a result of a misuse of the discovery process" and, here, the debtor incurred no expenses because she was not required to pay the attorney fees. The debtor filed a petition for writ of mandate (*109 Cal. App. 4th 1210, 1212)* .

In a case of first impression, the court of appeal held that a party represented by pro bono counsel was entitled to an award of sanctions under former Code Civ. Proc. § 2025(j)(3) (*now see Code Civ. Proc. § 2025.450(c)(1)*) and former Code Civ. Proc. § 2023 (*now see Code Civ. Proc. § 2023.030*) against the opposing party, even though the party did not actually "incur" additional fees as a result of the opposing party's conduct, when there was no finding that the failure to appeal was "with substantial justification or that other circumstances make the imposition of the sanction unjust" (*109 Cal. App. 4th 1210, 1213)* . The court distinguished *Argaman*, in which the court of appeal concluded that awarding sanctions in the form of fees for discovery abuses by their opponents to lawyers representing themselves would result in disparate treatment between self-represented lawyer-litigants and self-represented non-lawyers. Rather, in this case, the court reasoned that "to permit lawyers who do not charge their clients to obtain monetary discovery sanctions in the form of fees does not result in disparate treatment; rather, the opposite is true" (*109 Cal. App. 4th 1210, 1217)* . To hold that parties represented by lawyers who provide their services free of charge are not entitled to sanctions, while parties who have to pay fees are, would be unfair, in effect creating two separate classes of discovery and granting different rights and remedies to each (*109 Cal. App. 4th 1210, 1217)* .

In *Argaman v. Ratan (1999) 73 Cal. App. 4th 1173, 86 Cal. Rptr. 2d 917* , plaintiff, an attorney litigating *in propria persona*, filed a motion to compel defendant to provide further answers to special interrogatories and for sanctions and attorney's fees. He requested compensation of $3500 for his time at his billable rate, as well as filing and copying costs. The trial court granted the motion to compel in part and denied the motion in part and ordered defendant to pay $500 in sanctions pursuant to former Code Civ. Proc. § 2030(*l*) (*now see Code Civ. Proc. § 2030.300(d)*). Defendant appealed the sanction order.

In a case of first impression, the court of appeal held that an attorney litigating *in propria persona* may not be awarded a monetary discovery sanction under former Code Civ. Proc. § 2023(b)(1) (*now see Code Civ. Proc. § 2023.030(a)*) based on attorney's fees incurred to compel compliance (*73 Cal. App. 4th 1173, 1179)* . The court was guided by the California Supreme Court's decision in *Trope v. Katz (1995) 11 Cal. 4th 274, 45 Cal. Rptr. 2d 241, 902 P.2d 259* (discussed in Ch. 25, *Attorney's Fees*), which held that an attorney acting in propria persona is not entitled to recover "reasonable attorney's fees" under *Civ. Code § 1717* because the attorney cannot be said to "incur," that is, become obliged to pay, compensation for his or her time and lost business opportunities (*73 Cal. App. 4th 1173, 1177-1179)* .

Similarly, an attorney is not entitled to an award of monetary discovery sanctions based on attorney's fees incurred, because a *pro se* attorney litigant does not incur attorney's fees, as the attorney litigant is not liable to pay consideration for the legal representation (*73 Cal. App. 4th 1173, 1179)* . The court then considered whether the value of the attorney's time and effort could be the basis of a monetary discovery sanction as a "reasonable expense" (*see Code Civ. Proc. § 2023.030(a)*). The court concluded that even if it were to view the attorney's time and effort as a reasonable expense, the expense would not be compensable under the statute because it had not been incurred (*73 Cal. App. 4th 1173, 1180)* .

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8-82 California Points & Authorities § 82.31

§ 82.31 Opposing Motion for Sanctions Order [Code Civ. Proc. § 2023.010 et seq.]--Terminating Sanction Is Inappropriate [Code Civ. Proc. § 2023.030(d)]

[1] FORM Opposing Motion for Sanctions Order [Code Civ. Proc. § 2023.010 et seq.]--Terminating Sanction Is Inappropriate [Code Civ. Proc. § 2023.030(d)]

[*Caption. See § 82.20.*]

THE SANCTION OF DEFAULT OR DISMISSAL SHOULD NOT BE ORDERED BECAUSE IT IS A DRASTIC ONE, WHICH IS FUNDAMENTALLY IMPROPER AND UNJUST EXCEPT IN CERTAIN NARROWLY PRESCRIBED CIRCUMSTANCES.

A. Default or Dismissal Should Be Used With Caution. The granting of a dismissal or default against a party who has engaged in conduct constituting a misuse of the discovery process, pursuant to *Code of Civil Procedure Section 2023.030(d)(3)* or *(4)*, is a drastic measure that should only be applied sparingly and with caution (*see Deyo v. Kilbourne (1978) 84 Cal. App. 3d 771, 793, 149 Cal. Rptr. 499*).

[*Optional*] **B. Dismissal Is Too Severe When Unable to Comply.** Code of Civil Procedure Section _____ [*specify code section governing specific procedure that authorizes court to issue order, including terminating sanction, e.g.,* 2025.450(d)] authorizes the court to order a terminating sanction, but the court may only make such an order if it is just. Thus, the court should not make such an order when the conduct of the offending party was due to aninability to comply rather than to willfulness, bad faith, or fault (*see Puritan Ins. Co. v. Superior Court (1985) 171 Cal. App. 3d 877, 885, 217 Cal. Rptr. 602* ; *Deyo v. Kilbourne (1978) 84 Cal. App. 3d 771, 793-794, 149 Cal. Rptr. 499*).

[*Optional*] **C. Dismissal Is Unjust Unless Noncompliance Causes Interference With Court's Truth-Seeking Mission.** Unless a person's conduct constituting a misuse of the discovery process interferes with the court's mission of seeking truth and justice, the sanction of dismissal is fundamentally unjust (*see Morgan v. Ransom (1979) 95 Cal. App. 3d 664, 670, 157 Cal. Rptr. 212*).

[*Optional*] **D. Discovery Relates to Some Issues Only.** The sanction of default or dismissal imposed against a party

who engaged in conduct constituting misuse of the discovery process is improper when it prohibits the party from presenting evidence on issues of fact that were completely unaffected by the discovery misuse (*see Caryl Richards, Inc. v. Superior Court (1961) 188 Cal. App. 2d 300, 305, 10 Cal. Rptr. 377*).

[*Optional*] **E. Discovery Sought Is Irrelevant to Issues Raised by Pleadings.** The sanction of dismissal or default is improper when the discovery method was not going to lead to the discovery of evidence that is relevant to any issue raised by the pleadings, and when there is no showing of prejudice arising from the conduct of the offending party (*see Morgan v. Ransom (1979) 95 Cal. App. 3d 664, 669-670, 157 Cal. Rptr. 212*).

[*Optional*] **F. Default or Dismissal Is Unjust When Lesser Sanction Would Be Appropriate.** The entering of a default or a dismissal inflicts unnecessary and excessive punishment on one litigant and confers a windfall on the other when the wrong done could be readily redressed by a lesser sanction such as a reasonable monetary award or striking out part of the pleadings (*see Thomas v. Luong (1986) 187 Cal. App. 3d 76, 82, 231 Cal. Rptr. 631* ; *Fred Howland Co. v. Superior Court (1966) 244 Cal. App. 2d 605, 611, 612, 53 Cal. Rptr. 341*).

[*Optional*] **G. Dismissal Is Inappropriate for Attorney's Failure to Pay Monetary Sanction.** Dismissal is never an appropriate remedy for an attorney's noncompliance with an order imposing monetary sanctions (*see Hurtado v. Western Medical Center (1990) 222 Cal. App. 3d 1198, 1204, 272 Cal. Rptr. 324* ; *Jones v. Otero (1984) 156 Cal. App. 3d 754, 758-759, 203 Cal. Rptr. 90*).

[*Optional*] **H. Acquiescence by Moving Party.** If the trial court can reasonably infer that the party moving for sanctions acquiesced to a request to defer discovery that had been made by the party who had engaged in questionable conduct, then the sanctions of default or dismissal are improper (*see Garza v. Delano Union Elementary School Dist. (1980) 110 Cal. App. 3d 303, 315, 167 Cal. Rptr. 629*).

[*Optional*] **I. Dismissal Inappropriate Without Prior Court Order Compelling Discovery.** Dismissal may be ordered as a sanction only after the court has ordered the party to comply with the requested discovery, and the party has had an opportunity to comply with the court order, but failed to do so (*see Ruvalcaba v. Government Employees Ins. Co. (1990) 222 Cal. App. 3d 1579, 1583, 272 Cal. Rptr. 541*).

[*Optional*] **J. Default as Sanction Does Not Apply When Defendant Fails to Appear at Trial.** Default entered under *Code of Civil Procedure Section 2023.030(d)(4)* as a sanction for the defendant's extreme misuse of the discovery process has no application to the situation where defendant simply fails to appear at trial (*see Heidary v. Yadollahi (2002) 99 Cal. App. 4th 857, 864, 121 Cal. Rptr. 2d 695*).

[*Optional*] **K. Order for Default Sanction May Not Be Based on Ex Parte Application.** A failure to notify and provide an opportunity to be heard to the defendants that their defaults might be entered as a discovery sanction violates due process, because sanctions for abuse or misuse of discovery may not be awarded ex parte under former Code of Civil Procedure Section 2023(b) (*now see Code Civ. Proc. § 2023.030*) (*see Sole Energy Co. v. Hodges (2005) 128 Cal. App. 4th 199, 208, 26 Cal. Rptr. 3d 823*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This form is for use in opposition to a motion for an order for the imposition of the sanctions of dismissal under *Code Civ. Proc. § 2023.030(d)(3)* or default under *Code Civ. Proc. § 2023.030(d)(4)*. It may be used in combination with a general form opposing the imposition ofsanctions because of their severity, or because they are punitive rather than remedial or otherwise improper [*see § 82.20*].

Note that some cases cited in this form construe law in effect prior to the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that they remain consistent with the provisions of the current act.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel might set forth facts showing that the conduct in question was due to an inability to comply rather than to willfulness, bad faith, or fault [*see* Optional Paragraph B], that the proposed discovery would not have furthered the ferreting out of the truth nor would it have expedited the litigation even if counsel or counsel's client had not engaged in the questioned conduct [*see* Optional Paragraph C], that the discovery which was sought related only to some or to none of the issues raised by the pleadings [*see* Optional Paragraphs D, E], that the only conduct involved was an attorney's failure to pay a monetary sanction [*see* Optional Paragraph G], that the moving party acquiesced to a request to defer discovery [*see* Optional Paragraph H], or that there had been no prior court order compelling discovery [*see* Optional Paragraph I].

[c] Related Pleading and Practice Forms

For discussion and forms of moving papers relating to sanctions under the Discovery Act, see California Forms of Pleading and Practice, Ch. 192, *Discovery: Sanctions for Discovery Abuse* (Matthew Bender).

[3] Discussion of Authorities

[a] Default or Dismissal Should Be Used With Caution

The facts and procedural background of ***Deyo v. Kilbourne*** *(1978) 84 Cal. App. 3d 771, 149 Cal. Rptr. 499* , are discussed in *§ 82.20[3][b]*. In *Deyo*, the court of appeal reversed the default judgment that the trial court had entered against defendant. In discussing the imposition of the sanction of default or dismissal under former Code Civ. Proc. § 2034(b) and (d) [*now see Code Civ. Proc. § 2023.030(d)(3), (4)*], the court noted that these were drastic measures that should only be sparingly employed (*84 Cal. App. 3d 771, 793)* .

[B] Dismissal Is Too Severe When Unable to Comply

Puritan Ins. Co. v. Superior Court *(1985) 171 Cal. App. 3d 877, 217 Cal. Rptr. 602* , involved an action for damages resulting from the failure of a drive shaft repaired by defendant. Plaintiff's expert lost the shaft after conducting an inspection. Consequently, plaintiff was unable to comply with an order compelling its production. Defendant sought and obtained an order of sanctions under former Code Civ. Proc. § 2034(b)(2) [*now see Code Civ. Proc. § 2023.030(c)*], which excluded from evidence the shaft, photographs of the shaft, and any expert testimony based on examination of the shaft or photographs. Plaintiff petitioned for a writ of mandate to vacate the order.

The court of appeal granted the writ, directing the trial court to vacate its order to the extent that it excluded photographs of the shaft and testimony based on the shaft (*171 Cal. App. 3d 877, 887-888)* . The court equated the order with one for dismissal because its effect was to preclude proof of an essential element of plaintiff's action (*171 Cal. App. 3d 877, 884-885)* . A sanction equivalent to dismissal was too harsh in this case, since the failure to produce the shaft was not willful and did not justify an inference that plaintiff's case lacked merit. It was proper to exclude the

lost shaft and related testimony because defendant never had a chance to inspect the shaft. However, defendant was able to inspect any photographs. The court therefore held that it was an abuse of discretion under former Code Civ. Proc. § 2034(b)(2) [*now see Code Civ. Proc. § 2023.030(c)*] to exclude photographs of the shaft and related testimony (*171 Cal. App. 3d 877, 885-887)* .

The facts and procedural background of ***Deyo v. Kilbourne*** *(1978) 84 Cal. App. 3d 771, 149 Cal. Rptr. 499* , are discussed in *§ 82.20[3][b]*. In *Deyo*, the court vacated the trial court's order striking defendant's answer and rendering a default judgment against defendant. In so doing, the court reasoned that, because sanctions imposed under former Code Civ. Proc. § 2034(b) and (d) [*now see Code Civ. Proc. § 2023.030*] must be appropriate and just, dismissal is unauthorized when the failure to comply is due to inability, and not to the willfulness, bad faith, or fault of the party who was ordered to comply (*84 Cal. App. 3d 771, 793-794)* . Note that statutes now govern the specific procedures that authorize issue, evidence, and terminating sanctions [*see, e.g., Code Civ. Proc. § 2025.450(d)* (court may make orders that are "just" when deponent fails to obey order to compel)].

[c] Dismissal Is Unjust Unless Noncompliance Causes Interference With Court's Truth-Seeking Mission

In ***Morgan v. Ransom*** *(1979) 95 Cal. App. 3d 664, 157 Cal. Rptr. 212* , a legal malpractice suit against an attorney by a former criminal client, defendant took the deposition of plaintiff, who represented himself, and then sent plaintiff interrogatories, eventually followed up by a letter reminding him that the answers to the interrogatories were overdue. Defendant then made a motion to compel answers to the interrogatories, which plaintiff had still not answered, and this motion was granted. The trial court order also required plaintiff to pay $250 as reasonable expenses andfees of the motion. Plaintiff then filed some handwritten documents that included a declaration that he had never received the interrogatories nor any information concerning them until he received the notice of the trial court's order. Also included in plaintiff's set of documents was a motion to vacate the trial court's ruling. Defendant then moved to dismiss the action for failure to comply with the court order. The next papers to be filed in the trial court file were four hand-printed answers to defendant's interrogatories. The trial judge apparently never saw these answers to interrogatories, however, until some time later. The motion to dismiss was then heard in plaintiff's absence, and the dismissal was granted.

The court of appeal reversed the dismissal (*95 Cal. App. 3d 664, 670)* . It gave a number of reasons for the reversal, including the fact that the court had not considered the existence and adequacy of plaintiff's answers to interrogatories when it ruled on defendant's motion to dismiss (*95 Cal. App. 3d 664, 669)* . More importantly, the court stated, defendant had never made a showing that he would be prejudiced in any way by plaintiff's failure to answer the interrogatory, nor was there any indication that the unanswered interrogatory was at all relevant (*95 Cal. App. 3d 664, 669-670)* . The court went on to hold that the sanction of peremptory dismissal is fundamentally unjust unless the conduct of the plaintiff is such that the noncompliance constitutes an interference with the court's mission of seeking truth and justice (*95 Cal. App. 3d 664, 670)* .

[d] Discovery Relates to Some Issues Only

The facts and procedural background of ***Caryl Richards, Inc. v. Superior Court*** *(1961) 188 Cal. App. 2d 300, 10 Cal. Rptr. 377* , are discussed in *§ 82.20[3][a]*. In *Caryl Richards*, the trial court struck defendant's answer and entered a default because of defendant's refusal to give adequate answers to interrogatories relating to one of the issues in the lawsuit. The court of appeal granted a writ of mandate setting aside the entry of default on the ground that it was improper to deny defendant the right to present evidence on issues of fact that were completely unaffected by the discovery procedure before the court (*188 Cal. App. 2d 300, 305, 307)* . The court went on to note that a less severe sanction, such as an order establishing the facts that plaintiff would have to prove, would not work a denial of due process if the established facts related only to the information sought by the interrogatory that defendant had not adequately answered (*188 Cal. App. 2d 300, 305-306)* .

[e] Discovery Sought Is Irrelevant to Issues Raised by Pleadings

The facts and procedural background of ***Morgan v. Ransom*** *(1979) 95 Cal. App. 3d 664, 157 Cal. Rptr. 212* , are discussed in [c], *above.* Among the reasons that the *Morgan* court gave for reversing the dismissal of plaintiff's action for failure to comply with a discovery order were that defendant had never shown that he would be prejudiced in any way by the noncompliance, and that there was no indication that the unanswered interrogatory was at all relevant to the issues in the case (*95 Cal. App. 3d 664, 669-670)* .

[f] Default or Dismissal Is Unjust When Lesser Sanction Would Be Appropriate

In ***Thomas v. Luong*** *(1986) 187 Cal. App. 3d 76, 231 Cal. Rptr. 631* , a personal injury action arising out of an automobile accident, plaintiff served defendant with a set of interrogatories, to which defendant responded. A year later plaintiff served defendant with form interrogatories, largely duplicative of the first set, and noticed defendant's deposition. Defendant failed to answer the interrogatories or appear at the deposition. Defendant's attorney was unable to locate defendant, but offered to admit defendant's liability, thereby making the only issue that of damages. Plaintiff brought a motion for sanctions. The trial court issued an order striking the answer, directing entry of default, and imposing monetary sanctions. Defendant's attorney petitioned for a stay and writ of mandate. After the petition was denied, a default hearing was held, and a default judgment was entered. Defendant's attorney appealed.

The court of appeal reversed the judgment and vacated the order striking defendant's answer and entering his default (*187 Cal. App. 3d 76, 83)* . The court said that the use of the ultimate sanction, such as a default, is a drastic penalty and should be used sparingly. A discovery penalty must be appropriate to the dereliction, and should not exceed that which is required to protect the interests of the party entitled to but denied discovery. A sanction should not put the prevailing party in a better position than he or she would have had if the discovery sought had been obtained and was completely favorable to his or her case. The purpose of discovery is not to provide a weapon for punishment, forfeiture, or the avoidance of a trial on the merits (*187 Cal. App. 3d 76, 81)* . The method chosen to sanction a party who refuses to provide discovery to which his or her adversary is entitled must not be arbitrary. It should not deprive a party of all right to defend any action if the discriminating imposition of a lesser sanction will serve to protect the legitimate interests of the party harmed by the failure to provide discovery. The court discussed defendant's attorney's offer to admit liability, saying that if the stipulation had been accepted or the lesser sanction of striking defendant's pleadings, insofar as they contested liability or causation, had been imposed, the deposition of defendant would have been superfluous. If plaintiff required further protection, the additional lesser sanction of precluding defendant from testifying could have been imposed (*187 Cal. App. 3d 76, 81-82)* . The court found that the sanction imposed substantially exceeded what was reasonably required toprotect the plaintiff. It constituted a forfeiture and abused judicial discretion (*187 Cal. App. 3d 76, 82)* .

In ***Fred Howland Co. v. Superior Court*** *(1966) 244 Cal. App. 2d 605, 53 Cal. Rptr. 341* , defendant Howland was one of several parties sued by plaintiff for damages for personal injuries received while working as a pipe fitter on a construction project for which defendant was the project manager. Plaintiff served a single set of interrogatories on all of the parties in the action. While the other parties filed answers within the statutory time limit, defendant Howland received five extensions over a period of six months, and at the end of that time, its former attorney substituted another law firm on the basis of a potential conflict of interest. Two months later, plaintiff filed a motion to have the defendant Howland's answer stricken and default judgment entered as a sanction for failure to answer the interrogatories. The hearing on the motion was postponed by mutual consent, and prior to its being held, partial answers were filed to the interrogatories. The defendant Howland's attorneys also filed a declaration indicating that the interrogatories not answered could only be answered when records, which were in storage in another state, had been received and when former officers of the company, who had not been with the company for more than two years, were consulted. The declaration stated that when the records had been received and former officers consulted, further answers would be made. After the hearing, the trial court entered a default judgment and awarded attorney's fees as additional sanctions. Defendant Howland filed a motion for reconsideration, accompanying it with complete answers to the interrogatories and a second declaration of its attorneys detailing factual explanations about the delay in submitting complete answers.

The trial court denied the motion, indicating its actions were taken pursuant to former Code Civ. Proc. § 2034(d) [*now see Code Civ. Proc. §§ 2023.030(a), 2023.030(d)(4)*]. Defendant Howland then sought a writ of mandamus from the court of appeal to compel the trial court to vacate its order and reinstate the answer.

In granting the writ, the court of appeal held that in order for sanctions to be imposed pursuant to former Code Civ. Proc. § 2034(d), the court must find that the failure to answer the interrogatories was "willful." (Counsel should note, however, that under *Code Civ. Proc. § 2023.030* of the current California Civil Discovery Act, "willfulness" is not a requirement for the imposition of sanctions). However, the court also held that the trial court had abused its discretion in striking the answer and entering a default judgment after the answers were filed, since that tied the hands of defendant in defending against that judgment and the punishment did not fit either the offense or the offender (*244 Cal. App. 2d 605, 610-611)* . (Counsel should note that this principle of law is most likely still applicable to the current Civil Discovery Act.) The court explained that there is no question of the power of the court to apply the ultimate sanction of default against a litigant who persists in an outright refusal to comply with discovery obligations, but those were not the circumstances in this case (*244 Cal. App. 2d 605, 612)* . Instead, the default sanction inflicted unnecessary and excessive punishment on one litigant, while conferring a windfall on the other, when the wrong done could have been readily redressed by the lesser sanction of a reasonable monetary award (*244 Cal. App. 2d 605, 611-612)* .

[g] Dismissal Is Inappropriate for Attorney's Failure to Pay Monetary Sanction

In ***Hurtado v. Western Medical Center*** *(1990) 222 Cal. App. 3d 1198, 272 Cal. Rptr. 324* , a medical malpractice action, plaintiff responded to defendant's demand for exchange of expert trial witness information by designating three physicians as her treating physicians. After defendant noticed depositions for each physician, plaintiff advised defendant that two of the dates were inconvenient and asked defendant to consult with the physicians and reschedule the depositions. Defendant refused to change the dates, informing plaintiff that it was her responsibility to reschedule the depositions of her expert witnesses. The trial court granted defendant's motion to compel attendance of the physicians on the specified dates, and ordered plaintiff to pay defendant's fees and costs. Plaintiff neither produced the physicians for deposition nor paid the sanctions. Later, defendant successfully moved to dismiss the action because of plaintiff's failure to provide discovery and to pay the monetary sanctions. Plaintiff appealed.

Although the court of appeal affirmed the judgment of dismissal on the basis of Cal. Rules of Ct., Rule 226 (*now see Cal. Rules of Ct., Rule 10.910*) (plaintiff's inability to proceed), it held that dismissal based on plaintiff's failure to pay monetary sanctions was error. The court held that dismissal of an action as punishment for failure to pay monetary sanctions violates a plaintiff's due process rights and is an abuse of discretion (*222 Cal. App. 3d 1198, 1204)* .

The court also examined plaintiff's contention that the order for which plaintiff was sanctioned for disobeying was itself invalid. The court agreed with plaintiff's argument that it was not her responsibility to reschedule the depositions of the physicians. The physicians were designated as experts by plaintiff because she intended to ask them one or more questions that "may call for the rendering of an expert opinion." The court found they were percipient expert witnesses rather than employed or retained expert witnesses, and that plaintiff had no obligation to provide defendants with the amounts of the expert witness fees, nor any burden of producing the experts for deposition. Thus, the trial court's order to produce the physicians for deposition was directly contrary to statute and was invalid, as was the order to pay sanctions. The subsequent dismissal based on plaintiff's failure to comply with the invalid trial court order was also invalid (*222 Cal. App. 3d 1198, 1203)* .

Jones v. Otero *(1984) 156 Cal. App. 3d 754, 203 Cal. Rptr. 90* involved an action for specific performance. Defendants moved to compel plaintiffs to provide answers to certain interrogatories and to produce certain documents, and for sanctions against plaintiffs for purposefully delaying prosecution of the case. The trial court ordered plaintiffs to provide the answers without objection and to produce the documents, and further ordered plaintiffs' attorney to pay a specified amount within 10 days as reasonable costs of obtaining the orders to compel. Plaintiffs' attorney hand delivered to defendants' attorney the interrogatory answers and a response to the requests for documents on the same

day that the order was handed down. Plaintiffs' attorney failed to appear at the appointed time for commencement of trial, having informed the court clerk that he would appear for second call. Defendants erroneously informed the trial court under oath that the order compelling discovery had not been properly complied with, and also stated that the monetary sanctions had not been paid. At the suggestion of the trial court, defendants moved for dismissal pursuant to former Code Civ. Proc. § 2034 [*now see Code Civ. Proc. § 2023.030(d)(3)*]. The trial court granted the motion and plaintiffs appealed.

The court of appeal reversed the order of dismissal. The court noted that the order to pay sanctions was directed to plaintiffs' attorney rather than to plaintiffs themselves and stated that a dismissal of the action based on the failure of either the plaintiffs' or the plaintiffs' attorney to pay the sanctions was an act in excess of the court's jurisdiction (*156 Cal. App. 3d 754, 758)* . The court held that dismissal can never be an appropriate remedy for an attorney's noncompliance with an order imposing monetary sanctions (*156 Cal. App. 3d 754, 759)* . The court also stated as an alternative ground for its reversal that plaintiffs had received no notice of defendants' motion to dismiss (*156 Cal. App. 3d 754, 757)* . However, counsel should note that the court reserved the question of whether dismissal could ever be an appropriate remedy for a party's noncompliance with a discovery order imposing monetary sanctions (*156 Cal. App. 3d 754, 759)* .

[h] Acquiescence by Moving Party

Garza v. Delano Union Elementary School Dist. *(1980) 110 Cal. App. 3d 303, 167 Cal. Rptr. 629* , involved a personal injury action against a school district and an individual arising out of a collision involving a school bus on which plaintiff was riding. Defendant school district served notice to take the depositions of plaintiff and her parents, scheduled a medical examination of plaintiff, and served interrogatories on plaintiff's attorney. Plaintiff's counsel advised defendant that plaintiff had returned to Mexico and would not attend the deposition or doctor appointment, but promised that notice would be given to defense counsel on the minor's return. The parties granted an open extension to answer interrogatories previously served on each other. Subsequent doctor appointments were cancelled, and defense counsel cancelled the deposition on request of plaintiff's counsel until they could locate their client. All the parties then stipulated to vacate the trial date and reset a new trial. Both defendants moved to dismiss for failure to prosecute within two years after filing and for sanctions under former Code Civ. Proc. § 2034 [*now see Code Civ. Proc. § 2023.010 et seq.*] for failure to allow discovery, but the individual defendant's motion to dismiss for lack of discovery was dropped. Plaintiff argued that defendant school district had acquiesced to continuing discovery, and thus plaintiff's conduct should not be viewed as a willful failure to comply with discovery. (Counsel should note that *Code Civ. Proc. § 2023.010 et seq.* no longer requires "willfulness" as a prerequisite to the imposition of sanctions.) Furthermore, plaintiff contended that there was no motion to compel attendance at the physical examination or compel answers to the interrogatories, and all parties had stipulated to continue the case. The trial court granted the motion to dismiss and plaintiff appealed.

The court of appeal reversed the judgment for defendant, holding that it was an abuse of the trial court's discretion to dismiss the action for lack of prosecution, and that the granting of the motion to dismiss for willful failure to allow discovery under former Code Civ. Proc. § 2034(d) [*now see Code Civ. Proc. § 2023.030(d)(3)*, which no longer requires "willful"] was also an abuse of discretion. Concerning the dismissal under former Code Civ. Proc. § 2034(d), the court noted that defendant school district had not obtained a court order for answers or further answers. (Counsel should note that under *Code Civ. Proc. §§ 2030.290(c)* and *2030.300(e)* of the California Civil Discovery Act of 2005, a terminating sanction under *Code Civ. Proc. § 2023.030(d)* may be ordered only if a party has failed to obey a court order compelling answers or further answers to interrogatories.) The court also noted that on plaintiff's request, the scheduled depositions were either continued or cancelled by defendant. The record did not disclose whether defendant ever informed plaintiff's counsel that his request to cancel was denied or that the deposition date was firm and the minor would be expected to appear. The record did disclose that the last scheduled deposition was cancelled by defendant at the oral and written request of plaintiff's counsel. Considering these matters, the court held that the trial court reasonably could have inferred that defendant school district acquiesced in plaintiff's request to defer the deposition and physical

examination until the minor's return from Mexico. The court also held that the trial court improperly gave consideration to plaintiff's failure to answer interrogatories, as the parties had stipulated to give each other open time for answering. Thus, the ultimate sanction of dismissal was too harsh under the facts of the case, and prejudice to defendant due to the delay was speculative (*110 Cal. App. 3d 303, 313-316)* .

[i] Dismissal Inappropriate Without Prior Court Order Compelling Discovery

In ***Ruvalcaba v. Government Employees Ins. Co.*** *(1990) 222 Cal. App. 3d 1579, 272 Cal. Rptr. 541* , plaintiff insured sued his insurance carrier for unreasonably failing to settle a personal injury lawsuit, thereby exposing him to the excess judgment subsequently rendered. Throughout the action plaintiff failed to respond reasonably to a variety of discovery devices, and the trial court had ordered compliance and sanctions against plaintiff. Finally, defendant made a demand for inspection of documents, which plaintiff failed to answer, even after being granted two extensions of time. Because plaintiff failed to respond to that demand, defendant brought a motion to dismiss for failure to comply with that discovery. The trial court granted the motion and ordered the matter dismissed. Plaintiff appealed.

The court of appeal reversed, holding that the Discovery Act indicates that dismissal is among those sanctions that requires a prior court order compelling compliance with discovery. The court explained that former Code Civ. Proc. § 2023(b) (*now see Code Civ. Proc. § 2023.030*), governing sanctions generally, and former Code Civ. Proc. § 2031(*l*) and (m) (*now see Code Civ. Proc. § 2031.300(c), (e)*), governing the failure to comply with a demand for production, permit a court to order a party to respond to the discovery request and impose a monetary sanction at that time. If the party fails to comply with that order, a variety of sanctions, including dismissal, are available. However, these sanctions are not available without the court order mandating compliance (*222 Cal. App. 3d 1579, 1583)* . The court also explained that the Discovery Act changed the law in this respect, in that cases decided prior to its enactment indicated that a court order was not necessary before a dismissal sanction could be ordered (*222 Cal. App. 3d 1579, 1581)* .

[j] Default as Sanction Does Not Apply When Defendant Fails to Appear at Trial

Heidary v. Yadollahi *(2002) 99 Cal. App. 4th 857, 864, 121 Cal. Rptr. 2d 695* arose from a dispute concerning the ownership of two gas stations. Defendants were represented by counsel until he withdrew. Several months later, plaintiff's counsel served notice of a continuance of the trial date. However, defendants were not given this notice. They did not appear at the scheduled trial date, and the trial court continued the trial and ordered that a default be entered against them. Plaintiffs later filed an ex parte application for the entry of a judgment based on the default. A judgment was entered as requested, and the trial court refused to set it aside. Defendants appealed, arguing that the judgment was void because their default was improperly based upon their failure to appear at a trial for which they were given no notice.

The court of appeal agreed. Even assuming defendants had been given proper notice of the trial (which they were not) the court had no authority to enter their defaults for failure to appear. The court's only options when they did not appear were to proceed with the trial in their absence, or to continue the trial (*99 Cal. App. 4th 857, 864)* . Moreover, as relevant here, the court of appeal held that default as a sanction under former Code Civ. Proc. § 2023(b)(4) (*now see Code Civ. Proc. § 2023.030(d)(4)*) for defendant's extreme misuse of the discovery process does not apply when defendant simply fails to appear at trial. The court observed that even if default in this case could otherwise be properly characterized as a "sanction," analogous to the discovery sanctions, it could not be sustained, because former Code Civ. Proc. § 2023(b), (c) (*now see Code Civ. Proc. §§ 2023.030, 2023.040*) specifically requires notice to the affected party and an opportunity to be heard *before* imposition of any sanction (*99 Cal. App. 4th 857, 864)* .

[k] Order for Default Sanction May Not Be Based on Ex Parte Application

In ***Sole Energy Co. v. Hodges*** *(2005) 128 Cal. App. 4th 199, 26 Cal. Rptr. 3d 823* , plaintiffs sued defendants, asserting causes of action for intentional interference with contractual relations, intentional interference with

prospective economic advantage, fraud, and breach of contract, based on a letter of intent from plaintiff's precursor to purchase from defendant specified stock and oil-and gas-related assets. The trial court entered a default judgment against defendants in an amount exceeding $27 million as a sanction for their discovery abuses. Defendants appealed.

The court of appeal concluded that the sanction orders violated due process and the notice requirements of former Code Civ. Proc. § 2023(b) (*now see Code Civ. Proc. § 2023.030*). Discovery sanctions may not be ordered ex parte, and an order purporting to do so is void. "Adequate notice prior to imposition of sanctions is mandated not only by statute, but also by the due process clauses of both the state and federal Constitutions" (*128 Cal. App. 4th 199, 208)* . Two defendants did not receive any notice, much less adequate notice, that the trial court might impose a terminating sanction as a result of their discovery abuses. The only notice given these defendants was for an order shortening time on a motion to compel attendance and for monetary and other unspecified sanctions (*128 Cal. App. 4th 199, 208-209)* . Defaulting a third defendant as a sanction was even more egregious because he was not named in any motion to compel or in any discovery order. Because no discovery order was directed to the third defendant, he could not have violated a discovery order (*128 Cal. App. 4th 199, 209)* . With respect to a fourth defendant, the ex parte applications mentioned that plaintiffs were seeking relief to file a motion to compel and for sanctions. The trial court's order requiring the fourth defendant to appear throughits counsel with documents in hand did not refer to sanctions of any type. The fourth defendant had no notice that sanctions of any kind might be imposed for its discovery abuses (*128 Cal. App. 4th 199, 209)* . Further, because the orders entering the defaults of defendants were void, the default judgment against defendants was also void (*128 Cal. App. 4th 199, 210)* .

[4] Additional Authorities

[a] Default or Dismissal Is Unjust When Lesser Sanction Would Be Appropriate

In *McArthur v. Bockman (1989) 208 Cal. App. 3d 1076, 256 Cal. Rptr. 522* , plaintiffs retained defendant architect to build them a house in Mexico. Under Mexican law, defendant held plaintiffs' power of attorney in reference to that property. Defendant architect exercised that authority and transferred the property to his mother, who then conveyed it to another relative. Plaintiffs filed an action for equitable and legal relief against defendant architect and his relatives. Defendants cross complained for malicious prosecution. After extensive discovery had been completed, plaintiffs successfully moved to depose defendants on their financial condition pursuant to *Civ. Code § 3295*, which authorizes pretrial discovery of a defendant's financial condition in an action seeking punitive damages. After defendants failed to appear at the deposition, plaintiffs obtained sanctions striking defendants' answer and cross complaint, which resulted in the entry of a default judgment against defendants. The court of appeal reversed, finding that a default judgment was an inappropriate sanction (*208 Cal. App. 3d 1076, 1080-1081)* . The court observed that any discovery ordered pursuant to *Civ. Code § 3295* is strictly limited to inquiry regarding the defendants' wealth and occurs after substantial discovery has already been conducted. Thus, it found that default was inappropriate in light of the specific purpose of the deposition and the minimal potential prejudice to plaintiffs, which consisted of the risk that they would be unable to obtain a punitive damage award commensurate with defendants' actual wealth. The court said the prejudice could have been eliminated by sanctions short of default, and suggested alternative sanctions more properly tailored to defendants' conduct, such as precluding defendants from introducing evidence of their wealth at trial or instructing the jury to assume that their financial condition would support the requested punitive damages award (*208 Cal. App. 3d 1076, 1081)* .

[b] Dismissal Inappropriate Without Prior Court Order Compelling Discovery

In *Mileikowsky v. Tenet Healthsystem (2005) 128 Cal. App. 4th 262, 26 Cal. Rptr. 3d 831* , plaintiff physician appealed from a court order that struck his pleadings and entered monetary and terminating sanctions for discovery violations under former Code Civ. Proc. § 2023(a)(4), (7) (*now see Code Civ. Proc. § 2023.010*). Plaintiff sued defendant health care providers, alleging beach of contract and various tort claims, after defendants' refused to reinstate him on their medical staff and suspended his clinical privileges. Plaintiff repeatedly and willfully failed to answer discovery

requests, despite five motions to compel, $8,500 in monetary sanctions awarded to defendants, and five requests for terminating sanctions. Plaintiff had also stipulated that production would be complete by a specified date. The stipulation, however, was never signed by the referee or by the court or filed. Despite the stipulation, plaintiff produced only an incomplete "confidentiality log" prepared by counsel and produced with his opposition to defendant's fifth motion for terminating sanctions. Noting that monetary sanctions had not successfully gained plaintiff's attention, the referee recommended, and the trial court ordered, terminating sanctions.

In addressing whether defendants' motion for terminating sanctions was well taken, the court of appeal noted that there was no order requiring plaintiff to respond to the specific interrogatories and requests for production of documents. The court concluded, however, that the trial court did not err in treating the stipulation as the order required by former Code Civ. Proc. §§ 2030 and 2031 (*now see Code Civ. Proc. §§ 2030.010 et seq.* and *2031.010 et seq.*). By signing the stipulation, counsel essentially waived plaintiff's right to insist on a formal order compelling responses as a precursor to an issuance of evidentiary, issue, or terminating sanctions. Thus, the trial court did not abuse its discretion in ordering terminating sanctions, in light of plaintiff's repeated pattern of delay and non-production (*128 Cal. App. 4th 262, 279-280)* .

California Points & Authorities

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 83 DISCOVERY: DEPOSITIONS

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[1] FORM

[2] Comments

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

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[1] FORM

[2] Comments

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[1] FORM

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[a] Matter Is Discoverable If Not Privileged and If Relevant to Subject Matter

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§ 83.32 Supporting Motion for Discovery Sanction Following Failure to Comply With Order Compelling Attendance, Testimony, Answer, or Production [Code Civ. Proc. §§ 2023.010 et seq., 2025.450, 2025.480]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Sanctions

[d] Related Pleading and Practice Forms

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[a] Court May Impose Monetary Sanction

[4] Additional Authorities

[a] Court May Impose Monetary Sanction

§§ 83.33-83.39 [Reserved]

§ 83.40 Opposing Motion for Order Compelling Attendance, Testimony, or Production of Documents or Things [Code Civ. Proc. § 2025.450]--General Requirements for Order Not Satisfied

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

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§ 83.45 Opposing Motion for Order Compelling Answer to Question or Production of Document or Thing [Code Civ. Proc. § 2025.480]--General Requirements for Order Not Satisfied

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

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[b] Answer or Production Must Be Subject to Discovery

[c] Matter Not Discoverable If Privileged or Irrelevant

[d] Matter Not Discoverable If Inadmissible or Does Not Lead to Admissible Evidence

[e] Deponent Not Required to Answer "Legal Contention" Questions

[f] Impropriety of Questions at Oral Deposition That Would Otherwise Be Proper in Interrogatories

[4] Additional Authorities

[a] Motion Must Be Timely

§ 83.46 Opposing Motion for Order Compelling Answer to Question or Production of Document or Thing [Code Civ. Proc. § 2025.480]--Deposition Subpoena Duces Tecum Is Too Broad

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Subpoena Must Describe Items

[b] Description of Items Requested

[c] "Omnibus" Description Improper

[d] Request for All Documents Improper

[e] Request for Writings and Things Unnecessarily Burdensome

§§ 83.47-83.49 [Reserved]

§ 83.50 Opposing Motion for Order Compelling Nonparty Testimony or Production [Code Civ. Proc. §§ 2020.410-2020.510]--Specific and Timely Objection by Nonparty Based on Privilege [Code Civ. Proc. § 2025.460(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Nonparty's Timely Objection to Order Compelling Production Is Sufficient; Motion to Quash Is Not Required to Object

§§ 83.51-83.59 [Reserved]

§ 83.60 Supporting Motion for Order Staying Taking of Deposition and Quashing Deposition Notice [Code Civ. Proc. § 2025.410]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Court Must Impose Monetary Sanction Absent Specific Findings

[4] Additional Authorities

[a] Motion May Be Made in Addition to Objection

§§ 83.61-83.69 [Reserved]

§ 83.70 Opposing Motion for Order Staying Taking of Deposition and Quashing Deposition Notice [Code Civ. Proc. § 2025.410]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

§§ 83.71-83.79 [Reserved]

§ 83.80 Supporting Motion for Protective Order for Deposition [Code Civ. Proc. §§ 2025.420, 2025.470]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Particular Orders Available

[b] Power to Prevent Abuse

[c] Factual Showing of Good Cause

[d] Balancing Burden Against Likelihood of Discovering Admissible Evidence

[e] Timing as Constituting Annoyance, Embarrassment, or Oppression

[f] Protection Against Disclosure of Privileged Matters

[4] Additional Authorities

[a] Power of Court to Issue Protective Order

[b] Objection on Grounds of Relevance

§ 83.81 Supporting Motion for Protective Order for Deposition [Code Civ. Proc. §§ 2025.420, 2025.470]--That Deposition Not Be Taken [Code Civ. Proc. § 2025.420(b)(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Protection of Privileged Documents

[b] Need to Expedite Trial Balanced Against Relatively Unimportant Inquiry

[c] No Right to Discovery That Is Untimely

[d] Protection Against Taking Depositions When Pretrial Disposition of Case Sought

[e] Protection Against Taking of Depositions When Party Seeking Discovery Has Failed to State Cause of Action

§ 83.82 Supporting Motion for Protective Order for Deposition [Code Civ. Proc. §§ 2025.420, 2025.470]--That Deposition of Opposing Counsel Not Be Taken

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Deposition of Opposing Counsel Permissible Only on Showing of Extremely Good Cause

§ 83.83 Supporting Motion for Protective Order for Deposition [Code Civ. Proc. §§ 2025.420, 2025.470]--That Deposition of High-Ranking Official in Defendant Corporation or Top Governmental Executive Not Be Taken

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] When Deponent Is High-Ranking Corporate Defendant Official or Top Governmental Executive, Burden of Proof for Protective Order Is Shifted

[b] Protective Order Will Be Granted Unless Plaintiff Meets Burden of Proof

§ 83.84 Supporting Motion for Protective Order for Deposition [Code Civ. Proc. §§ 2025.420, 2025.470]--That Scope of Inquiry Be Limited to Certain Matters [Code Civ. Proc. § 2025.420(b)(10)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Protective Order Limiting Scope of Inquiry in General

[b] Protective Order Limiting Scope of Inquiry Into Plaintiff's Medical History

§ 83.85 Supporting Motion for Protective Order for Deposition [Code Civ. Proc. §§ 2025.420, 2025.470]--That Deposition Be Taken by Written Questions Instead of Oral Examination [Code Civ. Proc. § 2025.420(b)(6)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Protective Order Requiring Deposition by Written Questions

§ 83.86 Supporting Motion for Protective Order for Deposition [Code Civ. Proc. §§ 2025.420, 2025.470]--That Defendants in Class Action Be Required to Compel Attendance of Unnamed Plaintiffs at Depositions

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Compelling Attendance at Depositions of Unnamed Class Plaintiffs

§§ 83.87-83.99 [Reserved]

§ 83.100 Opposing Motion for Protective Order for Deposition [Code Civ. Proc. §§ 2025.420, 2025.470]--General

Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Order Only on Showing of Good Cause

[b] Good Cause Defined

[c] Burden of Proof

[d] Insufficient Showing

[4] Additional Authorities

[a] Order Only on Showing of Good Cause

[b] Burden of Proof

[c] Insufficient Showing

§ 83.101 Opposing Motion for Protective Order for Deposition [Code Civ. Proc. §§ 2025.420, 2025.470]--Matter Is Discoverable and Discovery Should Be Permitted

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Liberal Interpretation of Discovery Rules

[b] Disclosure as Matter of Right

[c] Discovery Proper in Motion Matters

[d] Information Available From Affidavits and Declarations

§ 83.102 Opposing Motion for Protective Order for Deposition [Code Civ. Proc. §§ 2025.420, 2025.470]--Partial Limitation Preferable to Outright Denial of Discovery

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Partial Limitations Preferable to Outright Denial of Discovery

[b] Partial Limitations on Disclosure of Confidential Information

§ 83.103 Opposing Motion for Protective Order for Deposition [Code Civ. Proc. §§ 2025.420, 2025.470]--Protective Order Prohibiting Party From Attending Deposition Is Improper

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Protective Order Prohibiting Party From Attending Deposition Is Improper

§§ 83.104-83.109 [Reserved]

§ 83.110 Opposing Contention That Protective Order Sought During Deposition May Be Granted Ex Parte [Code Civ. Proc. §§ 2025.420, 2025.470]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Ex Parte Protective Order During Deposition Not Permissible

§§ 83.111-83.129 [Reserved]

§ 83.130 Supporting Motion for Leave to Take Subsequent Deposition [Code Civ. Proc. § 2025.610]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Subsequent Deposition When New Facts Arise

§§ 83.131-83.149 [Reserved]

§ 83.150 Supporting Motion to Sustain Objection to Form of Written Deposition Question [Code Civ. Proc. §§ 2028.040, 2028.070(c)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Objection to Form of Written Deposition Question

[d] Related Pleading and Practice Forms

§§ 83.151-83.159 [Reserved]

§ 83.160 Supporting Motion to Overrule Objection to Written Deposition Question Based on Privilege or Work Product Protection [Code Civ. Proc. §§ 2028.050, 2028.070(c)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Objection to Written Deposition Question Based on Privilege or Work Product Protection

[d] Related Pleading and Practice Forms

§§ 83.161-83.169 [Reserved]

§ 83.170 Supporting Motion for Protective Order Against Written Deposition [Code Civ. Proc. § 2028.070]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] [Reserved]

[4] Additional Authorities

[a] Deposition Taken Only on Oral Examination

California Points & Authorities

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 83 DISCOVERY: DEPOSITIONS
PART I. INTRODUCTION

8-83 California Points & Authorities § 83.01

§ 83.01 Scope of Chapter

This chapter includes memoranda relating to civil discovery by oral and written depositions. Forms in Part II include the following:

- Subpart A has memoranda relating to a motion for leave to take an oral deposition at a location other than that authorized under the Discovery Act [§ 83.10], and points and authorities relating to a motion for monetary sanctions for noncompliance with the procedures for arranging or attending an oral deposition [§ 83.11].

- Subpart B has memoranda supporting [§ 83.30 et seq.] and opposing [§§ 83.40 et seq., 83.45 et seq., and 83.50] a motion to compel attendance and testimony at an oral depositions.

- Subpart C has memoranda supporting [§ 83.60] and opposing [§ 83.70] a motion to stay the taking of an oral deposition and quash the deposition notice.

- Subpart D has memoranda supporting [§ 83.80 et seq.] and opposing [§ 83.100 et seq.] a motion for a protective order in the context of an oral deposition.

- Subpart E has memoranda relating to a proceeding for leave to take a subsequent oral deposition not otherwise authorized under the Discovery Act [§ 83.130].

- Subpart F has memoranda relating to proceedings involving a deposition by written questions [§ 83.150 et seq.].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsWritten DepositionsCivil ProcedureDiscoveryMotions to Compel

California Points & Authorities

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 83 DISCOVERY: DEPOSITIONS
PART I. INTRODUCTION

8-83 California Points & Authorities § 83.02

§ 83.02 Governing Law

[1] California Civil Discovery Act and Related Law

Civil discovery in California is governed primarily by the California Civil Discovery Act, codified at *Code Civ. Proc. §§ 2016.010-2036.050*. Discovery in limited civil cases is further governed by *Code Civ. Proc. §§ 94* and *95*. Statewide rules of court relating to discovery papers and discovery motions are set out in *Cal. Rules of Ct., Rules 3.1000*, 3.1345, 3.1346, 3.1347, and 3.1348.

[2] Provisions Governing Depositions

Civil discovery by oral deposition is governed primarily by *Code Civ. Proc. § 2025.010 et seq.* Depositions on written questions are governed by *Code Civ. Proc. § 2028.010 et seq.* Oral depositions taken outside of California are governed by *Code Civ. Proc. §§ 2026.010* (another state, territory, or insular possession of United States) and 2027.010 (foreign nation). Limits on the use of depositions in limited civil cases are set out in *Code Civ. Proc. § 94(b)*.

The requirements and procedures for use of deposition subpoenas, to compel the attendance and testimony, or the production of evidence, or both, by non-party witnesses, are set out in *Code Civ. Proc. § 2020.010 et seq.* Statutory provisions governing subpoenas generally, set out in *Code Civ. Proc. §§ 1985-1994*, and *Evid. Code §§ 1560-1567*, apply to civil discovery proceedings to the extent that these general provisions are consistent with the more specific provisions of *Code Civ. Proc. § 2020.010 et seq.*

Depositions of incarcerated persons are governed also by provisions outside the Discovery Act: *Penal Code § 2623* (prisoners in state prison) and *Code Civ. Proc. § 1995 et seq.* (prisoners confined in jail).

[3] Case Law Decided Under Prior Discovery Acts

The Civil Discovery Act was passed in 2004 and became effective July 1, 2005. It repealed and renumbered the Civil Discovery Act of 1986 but did not substantively change the law of civil discovery [Stats. 2004, ch. 182 §§ 22, 23, 61]. Thus cases decided under the 1986 Act remain controlling authority. A considerable body of case law interpreted the discovery provisions of the Discovery Act of 1956 (former Code Civ. Proc. §§ 2016-2037.9), which preceded the 1986

Act. Although the 1986 Act, which became operative July 1, 1987, implemented numerous changes in the prior law, it also continued provisions of the prior law in many other instances, or even codified decisions interpreting the prior law. Decisions construing this prior law are therefore cited as persuasive, rather than controlling, authority to the extent that they are consistent with current provisions [*see In re Marriage of Skelley (1976) 18 Cal. 3d 365, 369, 134 Cal. Rptr. 197, 556 P.2d 297]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsForeign DiscoveryCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsWritten DepositionsCivil ProcedurePretrial MattersSubpoenasCivil Rights LawPrisoner RightsGeneral Overview

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8-83 California Points & Authorities § 83.03

§ 83.03 How to Use the Forms in This Chapter

[1] Page Limits on Points and Authorities

One of the more significant drafting requirements to keep in mind are page limits: supporting and opposing memoranda filed in discovery motion proceedings may not exceed 15 pages. A reply or closing memorandum may not exceed 10 pages. Exhibits, declarations, attachments, the table of contents, the table of authorities, and the proof of service are excluded from these page limits. Any party must obtain leave of court to file a longer memorandum [*see Cal. Rules of Ct., Rule 3.1113(d)*]. These and other drafting requirements are discussed in further detail in Ch. 1, *Writing Legal Memoranda and Briefs* .

[2] Using the Forms to Build a Draft Memorandum

The forms included in this chapter are designed to be included in a memorandum supporting or opposing a particular type of discovery motion, such as motion to compel discovery or a motion for a protective order.

In many cases it will be appropriate to combine them with additional memoranda out in the related discovery chapters. In particular, they may be combined with the general memoranda for limiting or regulating discovery set out in Ch. 80, *Discovery: Scope, Regulation, and Timing* , or with the memoranda for limiting discovery based on the evidentiary privileges, work product protection, or other protective provisions found in Ch. 81, *Discovery: Privileges and Other Discovery Limitations* .

It may also be appropriate to modify the memoranda in this chapter for use in a different procedural context, such as in a trial or appellate brief or office memoranda relating to discovery practice.

For a detailed discussion on how to select and use the forms in the publication to build a draft memorandum and complete the draft, with detailed discussion of all drafting requirements and strategic or stylistic considerations, see Ch. 1, *Writing Legal Memoranda and Briefs* . For a skeletal form of memorandum for use in creating a properly formatted outline in which to compile relevant forms from this publication, see also Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting Memoranda

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8-83 California Points & Authorities § 83.04

§ 83.04 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

For background discussion of forms of moving papers relating to civil discovery or oral or written depositions, see California Forms of Pleading and Practice, Ch. 193, *Discovery: Depositions* (Matthew Bender).

[2] Related Points and Authorities Chapters

For memoranda supporting or opposing a motion to compel discovery based on general limiting or regulatory provisions of the Discovery Act, see Ch. 80, *Discovery: Scope, Regulation, and Timing* .

For memoranda supporting or opposing a motion to compel discovery on the ground that the matter sought to be discovered is privileged or is otherwise protected from disclosure, see Ch. 81, *Discovery: Privileges and Other Discovery Limitations* .

For memoranda supporting or opposing a motion to compel discovery, or supporting or opposing a motion for protective order, in the context of another discovery method, see Ch. 84, *Discovery: Interrogatories* , through Ch. 88, *Discovery: Exchange of Expert Witness Information* .

For memoranda relating to the use of depositions to preserve evidence or testimony before an action is commenced or pending an appeal, see Ch. 89, *Discovery: Preservation of Evidence* .

For memoranda for use in seeking or opposing writs to review discovery orders, see Ch. 89A, *Discovery: Review of Discovery Orders* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsExpert Witness DiscoveryCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsWritten DepositionsCivil ProcedureDiscoveryMotions to CompelCivil

ProcedureDiscoveryPrivileged MattersGeneral Overview

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8-83 California Points & Authorities §§ 83.05-83.09

[Reserved]

§§ 83.05[Reserved]

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PART II. FORMS
A. Attendance at Oral Deposition

8-83 California Points & Authorities § 83.10

§ 83.10 Supporting Motion for Order Authorizing Taking of Deposition of Party Deponent at Place More Than 75 or 150 Miles From Deponent's Residence [Code Civ. Proc. § 2025.260]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ORDER AUTHORIZING TAKING OF DEPOSITION AT PLACE MORE THAN _____ [75 *or* 150] MILES FROM DEPONENT'S RESIDENCE
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	Date: _____
	)	Time: _____
		Location: _____
		[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD ORDER THE ATTENDANCE FOR DEPOSITION OF _____ [*name*], A NATURAL PERSON WHO IS [_____ (AN OFFICER OF *or* A DIRECTOR OF *or* A MANAGING AGENT OF *or* AN EMPLOYEE OF] A PARTY TO THE ACTION AT A PLACE THAT IS [_____ MORE THAN 75 MILES FROM THAT PERSON'S RESIDENCE *or* WITHIN THE COUNTY WHERE THE ACTION IS PENDING AND MORE THAN 150 MILES FROM THAT PERSON'S

RESIDENCE] BECAUSE THE INTERESTS OF JUSTICE WILL BE SERVED BY THE ORDER.

A. Statutory Authority. Ordinarily, the deposition of a natural person who is a party to an action must be taken at a place that is, at the option of the person giving notice of the deposition, either within 75 miles of the deponent's residence, or within the county where the action is pending and within 150 miles of the deponent's residence (*Code Civ. Proc. § 2025.250(a)*). However, on motion accompanied by a declaration stating facts showing a reasonable and good-faith attempt at an informal resolution of each issue presented by the motion, the court in its discretion may order that a natural person who is a party to the action or an officer, director, managing agent, or employee of a party attend for deposition at a place that is further than the distance permitted under *Section 2025.250(a) of the Code of Civil Procedure* (*Code Civ. Proc. § 2025.260*).

B. Factors to Be Considered. In exercising its discretion to order attendance for deposition at a place that is more than 75 or 150 miles from the deponent's residence, the court shall take into consideration any factor tending to show whether the interests of justice will be served by requiring the deponent's attendance at that more distant place, including but not limited to the following: (A) whether the moving party selected the forum, (B) whether the deponent will be present to testify at the trial of the action, (C) the convenience of the deponent, (D) the feasibility of conducting the deposition by written questions under *Section 2028.010 et seq. of the Code of Civil Procedure*, or of using a discovery method other than a deposition, (E) the number of depositions sought to be taken at a place more distant than 150 miles from a deponent's residence, (F) the expense to the parties of requiring the deposition to be taken within the distance permitted under *Section 2025.250(a) of the Code of Civil Procedure*, and *(G)* the whereabouts of the deponent at the time for which the deposition is scheduled (*Code Civ. Proc. § 2025.260(b)*; *Glass v. Superior Court (1988) 204 Cal. App. 3d 1048, 1053, 251 Cal. Rptr. 690*).

[*Optional*] **C. Managing Agent of Party.** Generally, the managing agent of a corporation is a person who may exercise his or her judgment and discretion in dealing with corporate matters, who can be expected to comply with his or her employer's directive to appear for pretrial examination, and who can be anticipated to identify himself or herself with the interests of the corporation (*Waters v. Superior Court (1962) 58 Cal. 2d 885, 896, 27 Cal. Rptr. 153, 377 P.2d 265*).

D. Court Must Impose Monetary Sanction Absent Specified Findings. The court must impose a monetary sanction under *Section 2023.010 et seq. of the Code of Civil Procedure* against any party, person, or attorney who unsuccessfully opposes a motion to increase travel limits for a party-deponent, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust (*Code Civ. Proc. §§ 2023.030(a), 2025.260(d)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This form of memorandum of points and authorities is for use in supporting a motion for an order authorizing the moving party to take the deposition of a natural person who is a party to the action, or one who is an officer, director, managing agent, or employee of a party, at a place more than 75 miles from the deponent's residence, or within the county where the action is pending and more than 150 miles from the deponent's residence. The motion must be

accompanied by a declaration stating facts showing a reasonable and good-faith attempt at an informal resolution of each issue presented by the motion [*Code Civ. Proc. § 2025.260*].

The court may grant the order subject to the advancement by the moving party of the reasonable expenses and costs to the deponent for travel to the place of deposition [*Code Civ. Proc. § 2025.260(c)*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Argument should be directed at showing the court how the facts of the case indicate that justice would be served by making the order, particularly in view of the factors expressly to be considered under *Code Civ. Proc. § 2025.260(b)*, which are set out in Paragraph B and discussed in *§ 83.10[3][a]*. Counsel's factual showing should demonstrate substantial justification for the motion in order to avoid a monetary sanction if the motion is denied [*see Code Civ. Proc. § 2025.260*].

[c] Place of Deposition

Absent an order for attendance at a more distant place under *Code Civ. Proc. § 2025.260*, a deposition must be taken either within 75 miles of the deponent's residence, or within the county in which the action is pending and within 150 miles of the deponent's residence, if the deponent is a natural person, whether or not a party to the action [*Code Civ. Proc. § 2025.250(a)*]. Similarly, when the deponent is an organization that is a party to the action, the deposition must be taken at a place that is either within 75 miles of the organization's principal executive or business office in California, or in the county in which the action is pending and within 150 miles of the office [*Code Civ. Proc. § 2025.250(b)*].

If the deponent is a nonparty organization, the deposition must be taken within 75 miles of the organization's principal executive or business office in California, unless the organization consents to a more distant place [*Code Civ. Proc. § 2025.250(c)*]. If the organization has not designated a principal executive or business office in California, the deposition must be taken at a place that is, at the option of party giving notice of the deposition, either within the county where the action is pending or within 75 miles of any executive or business office of the organization in California [*Code Civ. Proc. § 2025.250(d)*]. With respect to a party or nonparty organization, there is no express provision under *Code Civ. Proc. § 2025.250* for taking the deposition at another, more distant place pursuant to an order under *Code Civ. Proc. § 2025.260*.

[d] Related Pleading and Practice Forms

For discussion and forms of moving papers relating to depositions generally and to proceedings for an order authorizing the taking of a deposition at a place more than 75 or 150 miles from the deponent's residence, see California Forms of Pleading and Practice, Ch. 193, *Discovery: Depositions* (Matthew Bender).

[3] Discussion of Authorities

[a] Factors to Be Considered

In ***Glass v. Superior Court*** *(1988) 204 Cal. App. 3d 1048, 251 Cal. Rptr. 690* , plaintiffs, Indiana corporations, sued defendants, former officers of a subsidiary company headquartered in California, for damages, alleging tortious diversion of business. Defendants cross-complained on a number of causes of action. In order to depose three senior members of plaintiffs' management teams in California, defendants moved for an order under *Code Civ. Proc. § 2025.260*. Plaintiffs opposed the motion on the ground they were Indiana residents and principals of Indiana corporations and could only be deposed within 75 miles of their residences. The trial court, in reliance on former Code Civ. Proc. § 2026 (*now see* Code Civ. Proc.§ 2026.010) (oral deposition in another state), denied the motion and awarded monetary sanctions against defendants and their counsel. Defendants petitioned for review by extraordinary writ.

The court of appeal granted the writ and ordered the trial court to set aside and vacate its orders denying the motion and assessing sanctions and to enter new orders granting the motion and denying the request for sanctions. Plaintiffs claimed that the deposition of an out-of-state resident may be taken in California only pursuant to stipulation. Otherwise, pursuant to former Code Civ. Proc. § 2026 (*now see Code Civ. Proc. § 2026.010(b)*), it must be taken within 75 miles of the deponent's out-of-state residence or business address (*204 Cal. App. 3d 1048, 1050)* . The court disagreed, saying that former Code Civ. Proc. § 2025 (*now see Code Civ. Proc. § 2025.260*) controls (*204 Cal. App. 3d 1048, 1051)* . Citing dicta from a California Supreme Court case that concerned the forerunner of *Code Civ. Proc. § 2025.260*, the court found that counsel may follow the procedures described by former Code Civ. Proc. § 2025 (*now see Code Civ. Proc. § 2025.010 et seq.*) and obtain an order to depose an out-of-state resident in California. Alternatively, counsel may travel to the witness within 75 miles of his or her residence pursuant to former Code Civ. Proc. § 2026 (*now see Code Civ. Proc. § 2026.010(b)*) (*204 Cal. App. 3d 1048, 1052-1053)* . The court observed that were it to remand for a hearing on the merits of the defendants' motion, the trial court would have no discretion but to grant it in light of the factors set forth in former Code Civ. Proc. § 2025(e)(3) (*now see Code Civ. Proc. § 2025.260(b)*). The court highlighted those factors in the case. Plaintiffs chose the forum. Defendants offered to schedule the depositions, if possible, at times convenient to all concerned, and indicated these might be the only depositions they would take at a distant place. The court explained that depositions are a preferred method of discovery in light of the complex nature of the lawsuit and the likelihood witness credibility will play a significant role in the litigation. Finally, it would be less expensive to conduct the depositions in California while the deponents are here on business than to require those concerned to travel to Indiana for that purpose. The court found that defendants' ameliorating offers more than offset any claim that California depositions would be burdensome, inconvenient, and unreasonable to plaintiffs. The court observed that the balance of former Code Civ. Proc. § 2025(e)(3) (*now see Code Civ. Proc. § 2025.260(b)*) factors weighed conclusively in defendants' favor. It concluded that because the trial court could exercise its discretion in only one way, a writ of mandate is appropriate to compel it to grant defendants' motion (*204 Cal. App. 3d 1048, 1053)* .

[b] Managing Agent of Party

In ***Waters v. Superior Court*** *(1962) 58 Cal. 2d 885, 27 Cal. Rptr. 153, 377 P.2d 265* , an attorney filed a complaint against Howard Hughes andthree corporate defendants for the recovery of legal fees. The summons was served on only one of the corporate defendants, but not on Hughes, of whom the corporation served was allegedly the alter ego. Plaintiff served the corporate defendant with a notice of taking the deposition of Hughes, and the corporate defendant served a notice of motion for an order that the deposition not be taken. Plaintiff then obtained an ex parte order to take the deposition without notice to unserved defendants. The court later vacated that order on the ground that plaintiff had obtained it by failing to disclose that he had already served the notice of taking the deposition, and that he had been served with a notice of motion for a protective order. Plaintiff then reapplied for orders under former Code Civ. Proc. § 2019(a)(3) to take Hughes's deposition as well as other depositions, and repeated the procedure of serving the notices of deposition prior to making an application under former Code Civ. Proc. § 2019(a)(3) to do so. The court denied both motions, and plaintiff sought a writ of mandate to set aside those orders.

The Supreme Court granted a peremptory writ of mandate, holding that plaintiff had showed good cause for not serving Hughes with a notice of the taking of the depositions, and that plaintiff had made a sufficient showing for obtaining authorization for taking the depositions without notice to Hughes (*58 Cal. 2d 885, 894-895)* . However, the Supreme Court also held that plaintiff had not made an adequate showing pursuant to former Code Civ. Proc. § 2019(a)(4) (now see *Code Civ. Proc. § 2025.280(a)*) that Hughes was the managing agent of the company (*58 Cal. 2d 885, 898)* . In discussing the latter issue, the Court stated that the question of whether a particular deponent is a "managing agent" for purposes of pretrial discovery must necessarily be answered pragmatically on an ad hoc basis (*58 Cal. 2d 885, 896)* . The Court stated that federal decisions have defined "managing agent" of a party as used in *Fed. R. Civ. P., Rule 37(d)* (sanctions for failure to attend deposition, or respond to interrogatories or request for inspection), although California courts had not interpreted a similar term as used in the Discovery Act of 1957 (now see *Code Civ. Proc. §§ 2016.010-2036.050*) (*58 Cal. 2d 885, 896)* . The Court stated that, in general, the managing agent of a corporation is a

person who may exercise his or her judgment and discretion in dealing with corporate matters, who can be expected to comply with his or her employer's directive to appear for pretrial examination, and who can be anticipated to identify himself or herself with the interests of the corporation (*58 Cal. 2d 885, 896)* . Though the Court could see no reason why the sole shareholder of a corporation cannot qualify as a "managing agent" of the corporation under the appropriate circumstances, it found that it could not hold, as a matter of law, that the affidavit made the necessary showing or that the trial court had abused its discretion (*58 Cal. 2d 885, 896-897)* .

Note that *Waters* construed law in effect prior to the operative date of the Civil Discovery Act. It is cited and discussed as persuasive authorityto the extent that it remains consistent with current provisions [*see § 23.03[3]*].

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8-83 California Points & Authorities § 83.11

§ 83.11 Supporting Motion for Monetary Sanction for Failure of Adverse Party to Attend or Proceed, to Produce Document or Thing, or to Serve Subpoena on Nonparty Deponent [Code Civ. Proc. §§ 2025.430-2025.450]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ORDER IMPOSING MONETARY SANCTION IN FAVOR OF PARTY ATTENDING DEPOSITION
vs.	)	
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

_____ [*Specify party, e.g.*, PLAINTIFF _____ (*name*) ATTENDED THE DEPOSITION OF _____ [*name*], BUT _____ [THE PROPONENT (*name*) FAILED _____ (TO ATTEND OR PROCEED WITH IT *or* TO SERVE A SUBPOENA ON THE DEPONENT WHO CONSEQUENTLY DOES NOT ATTEND) *or* PARTY DEPONENT (*name*) SERVED WITH NOTICE OF THE DEPOSITION FAILED TO _____ (ATTEND AND PROCEED *or* PRODUCE

A DOCUMENT OR THING FOR INSPECTION)], AND THUS THE COURT SHOULD IMPOSE AGAINST THAT _____ [PROPONENT *or* DEPONENT *and/or* DEPONENT'S ATTORNEY] A MONETARY SANCTION IN FAVOR OF THE PARTY ATTENDING THE DEPOSITION, CONSISTING OF THE REASONABLE EXPENSES, INCLUDING ATTORNEY'S FEES, INCURRED BY THAT PARTY IN HIS/HER ATTENDANCE, UNLESS THE COURT FINDS THAT THE _____ [PROPONENT *or* DEPONENT *and/or* DEPONENT'S ATTORNEY] ACTED WITH SUBSTANTIAL JUSTIFICATION OR THAT OTHER CIRCUMSTANCES MAKE THE SANCTION UNJUST.

[*EITHER, if proponent failed to attend*]

Monetary Sanction May Be Imposed Against Proponent for Failure to Attend or Proceed. If the party giving notice of a deposition fails to attend or proceed with it, the court must impose a monetary sanction under *Section 2023.030 of the Code of Civil Procedure* against that party, or the attorney for that party, or both, and in favor of any party attending in person or by attorney, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust (*Code Civ. Proc. § 2025.430*).

[*OR, if deponent failed to attend*
and was not served with subpoena]

Monetary Sanction May Be Imposed Against Proponent for Failure to Serve Subpoena. If a deponent does not appear for a deposition because the party giving notice of the deposition failed to serve a required deposition subpoena, the court must impose a monetary sanction under *Section 2023.030 of the Code of Civil Procedure* against that party, or the attorney for that party, or both, in favor of any other party who, in person or by attorney, attended at the time and place specified in the deposition notice in the expectation that the deponent's testimony would be taken, unless the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust (*Code Civ. Proc. § 2025.440*).

[*OR, if party or party-connected deponent failed*
to attend after being served with deposition notice]

Monetary Sanction May Be Imposed Against Deponent for Failure to Comply With Notice. If, after service of a deposition notice, a party to the action, an officer, director, managing agent, or employee of a party, or a person designated to appear on behalf of a party under *Section 2025.230 of the Code of Civil Procedure*, without having served a valid objection under *Section 2025.410 of the Code of Civil Procedure*, fails to appear for examination, fails to proceed with it, or fails to produce for inspection any document or tangible thing described in the deposition notice, that deponent or any party with whom the deponent is affiliated is subject to a monetary sanction under *Section 2023.030 of the Code of Civil Procedure* in favor of any party who, in person or by attorney, attended at the time and place specified in the deposition notice in the expectation that the deponent's testimony would be taken,unless the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust (*Code Civ. Proc. § 2025.450*).

[*Add points and authorities generally supporting the imposition of monetary sanctions. See Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]

By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities is for use by a party seeking the imposition of a monetary sanction under *Code Civ. Proc. § 2023.030(a)*, to recover expenses incurred in attending a deposition. It may be used if the party noticing the deposition failed to attend and proceed with the deposition [*Code Civ. Proc. § 2025.430*], or if the party noticing the deposition failed to serve a subpoena on a nonparty deponent, who consequently did not attend the deposition [*Code Civ. Proc. § 2025.440*].

This memorandum may also be used if a party or party-connected deponent was served a deposition notice but failed to attend or proceed or to produce a document or thing for inspection [*Code Civ. Proc. § 2025.450*]; however, if the moving party is also the party who served the deposition notice, and the moving party seeks also to compel attendance or production, counsel should use § 83.30 instead of this form. This form should be combined with general points and authorities supporting the imposition of monetary sanctions under *Code Civ. Proc. § 2023.030(a)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should state those expenses that were incurred due to the proponent's or deponent's failure to appear or proceed. However, counsel need not set forth facts showing that the proponent or deponent acted without substantial justification [*cf.* former Code Civ. Proc. § 2034(a)]. Insofar as *Code Civ. Proc. § 2023.030(a)* requires a court to impose monetary sanctions, when they are expressly authorized, *unless* it finds substantial justification, it effectively places theburden of showing substantial justification on the person subject to the sanction.

[c] Sanctions

The monetary sanction that may be imposed is an order that the deponent or party affiliated with the deponent pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of the deponent's conduct [*Code Civ. Proc. § 2023.030(a)*]..

The sanction awarded under *Code Civ. Proc. § 2025.430* is payable to the party who made the appearance; direct payment to that party's attorney is not authorized [*Poe v. Diamond (1987) 191 Cal. App. 3d 1394, 1398-1399, 237 Cal. Rptr. 80* (decided under former Code Civ. Proc. § 2019(g)(1))]. Under *Code Civ. Proc. § 2025.010 et seq.*, sanctions other than monetary sanctions are available only after a deponent has failed to comply with an order compelling attendance, testimony, or production [*see Code Civ. Proc. §§ 2025.450, 2025.480*; *see also § 83.32*].

[d] Related Pleading and Practice Forms

For forms and discussion related to the obtaining of an order under Code Civ. Proc. §§ 2023.030(a) and 2025.430-2025.450, requiring the payment of the expenses incurred by a party in attending a deposition, see California Forms of Pleading and Practice, Ch. 193, *Discovery: Depositions* (Matthew Bender).

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8-83 California Points & Authorities § 83.12

§ 83.12 Memorandum of Points and Authorities in Support of Motion for Order to Allow Nonparty Deponent to Appear by Telephone [Code Civ. Proc. § 2025.310]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*], Plaintiff,	)	IES IN SUPPORT OF MOTION FOR ORDER TO
vs.	)	ALLOW NONPARTY DEPONENT TO APPEAR
_____ [*name*], Defendant.	)	BY TELEPHONE
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD ENTER AN ORDER ALLOWING _____, WHO WAS SERVED WITH A DEPOSITION SUBPOENA, TO APPEAR BY TELEPHONE BECAUSE THE INTERESTS OF JUSTICE WILL BE SERVED BY THE ORDER.

A. Statutory Authority. Upon the express provision of the court, a nonparty deponent may attend a deposition by telephone if there is good cause shown, and no prejudice to any party (*Code Civ. Proc. § 2025.310*).

B. Good Cause and Absence of Prejudice. [*Add argument relating to specific facts and circumstances constituting good cause, including undue burden and expense. See §§ 83.86 and 83.100 for discussion of good cause.*]

[2] Comments

[a] Use of Form

This form of memorandum of points and authorities is for use in support of a motion to allow a nonparty deponent to attend a deposition by telephone.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should state facts and argument showing how this order is needed for protection from undue burden and expense.

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8-83 California Points & Authorities §§ 83.13-83.29

[Reserved]

§§ 83.13[Reserved]

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8-83 California Points & Authorities § 83.30

§ 83.30 Supporting Motion for Order Compelling Attendance, Testimony, or Production of Documents or Things [Code Civ. Proc. § 2025.450]--Failure of Party Deponent Served With Deposition Notice to Attend, Proceed, or Produce Document or Thing

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ORDER COMPELLING DEPONENT TO _____ [ATTEND AND TESTIFY AT DEPOSITION *and/or* PRODUCE DOCUMENT FOR INSPECTION *and/or* PRODUCE THING FOR INSPECTION] AND FOR MONETARY SANCTION
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

AFTER SERVICE OF A DEPOSITION NOTICE, _____ [*name*], [AN OFFICER OF *or* A DIRECTOR OF *or* A MANAGING AGENT OF *or* AN EMPLOYEE OF *or* A PERSON DESIGNATED TO APPEAR BY AN ORGANIZATION THAT IS] A PARTY TO THE ACTION, FAILED _____ [TO APPEAR FOR THE EXAMINATION *and/or* TO PROCEED WITH THE EXAMINATION *and/or* TO PRODUCE FOR INSPECTION ANY DOCUMENT OR TANGIBLE THING DESCRIBED IN THE DEPOSITION NOTICE], AND THUS THE COURT SHOULDGRANT THE MOTION TO COMPEL THE DEPONENT _____ [TO ATTEND *and/or* TO TESTIFY *and/or* TO PRODUCE FOR INSPECTION ANY DOCUMENT OR THING DESCRIBED IN THE DEPOSITION NOTICE], AND SHOULD IMPOSE A MONETARY SANCTION.

A. Motion to Compel Attendance, Testimony, or Production at Deposition. If, after service of a deposition notice, a party to the action, or an officer, director, managing agent, or employee of a party, or a person who is designated to appear by a party organization under *Code of Civil Procedure Section 2025.230*, without having served a valid objection under *Code of Civil Procedure Section 2025.410*, fails to appear for examination, or to proceed with it, or to produce for inspection any document or tangible thing described in the deposition notice, the party who gave the deposition notice may move for an order compelling the deponent's attendance and testimony, and the production for inspection of any document or thing described in the deposition notice (*Code Civ. Proc. § 2025.450(a)*).

B. Court Must Impose Monetary Sanction Absent Specified Findings. If the motion is granted, the court must impose a monetary sanction under *Code of Civil Procedure Section 2023.030* against the deponent or the party with whom the deponent is affiliated, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust (*Code Civ. Proc. § 2025.450(c)*).

[*Optional*] **C. Court May Impose Sanctions Despite Lack of Opposition to Motion to Compel Discovery.** The court may award sanctions under the Discovery Act in favor of a party who files a motion to compel discovery, even though no opposition to the motion was filed, or opposition to the motion was withdrawn, or the requested discovery was provided to the moving party after the motion was filed (*Cal. Rules of Ct., Rule 3.1030(a)*).

[*Add memoranda generally supporting the imposition of monetary sanctions. See Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum is for use by a party giving notice of a deposition, to support a motion for an order to compel the appearance and testimony of, or production of documents or tangible things by, a party to the action, or that party's officer, director, managing agent, employee, or designee under *Code Civ. Proc. § 2025.230*, when the party deponent has been served with a deposition notice but has failed to appear or proceed with examination or to produce for inspection any document or thing described in the deposition notice [*see Code Civ. Proc. § 2025.450*].

In addition, the moving party may use this form to seek a monetary sanction. If monetary sanctions are sought, this form should be combined with general memoranda supporting the imposition of monetary sanctions under *Code Civ. Proc. §*

2023.030(a) [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11*]. For a form of memorandum supporting a motion to impose monetary sanctions against the proponent of a deposition, or against a deponent when the motion seeks only monetary and not an order compelling compliance with a deposition notice, see *§ 83.11*.

A motion to compel under *Code Civ. Proc. § 2025.450* must set forth specific facts showing good cause justifying the production for inspection of any document or tangible thing described in the deposition notice, and must be accompanied by a declaration stating facts showing a reasonable and good-faith attempt at an informal resolution of each issue presented by the motion, or, when the deponent fails to attend the deposition and produce the documents or things described in the deposition notice, by a declaration stating that the petitioner has contacted the deponent to inquire about the nonappearance [*Code Civ. Proc. § 2025.450*].

One court has held that implicit in the requirement of *Code Civ. Proc. § 2025.450(b)(2)* that counsel contact the deponent about a nonappearance is the requirement that counsel listen to the reasons offered and make a good faith attempt to resolve the issue. Accordingly, either declaration submitted with a motion to compel under *Code Civ. Proc. § 2025.450* must show a reasonable and good faith attempt to resolve each issue presented, including those relating to a nonappearance [*Blago Leko v. Cornerstone Home Inspection (2001) 86 Cal. App. 4th 1109, 1124, 103 Cal. Rptr. 2d 858* (attorney sanctioned under former Code Civ. Proc. § 2023(a)(3), (9) (*now see Code Civ. Proc. § 2023.010(c), (i)*) for improperly filing motion to compel attendance when attorney completely disregarded his obligation to attempt to informally resolve discovery issue)]. Thus, if the deponent fails to appear, it appears that the better, if not the required, practice is to make a good faith effort to resolve the issue, and to include a description of those efforts in the supporting declaration [*see Code Civ. Proc. § 2025.450(b)(2)*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should state that the party or party-connected deponent was properly served with a deposition notice, did not file anobjection to the notice, then failed to appear, proceed, or produce documents or things, and that counsel's client incurred expenses as a result of that failure. However, counsel need not set forth facts showing that the deponent acted without substantial justification [*cf.* former Code Civ. Proc. § 2034(a)]. *Code Civ. Proc. §§ 2023.030(a)* and *2025.450* effectively place that burden on the person against whom the sanction is to be imposed, by requiring the court to impose a monetary sanction when it is expressly authorized *unless* it finds that there was substantial justification or that other circumstances would make the monetary sanction unjust.

[c] Sanctions

The monetary sanction that may be imposed is an order that the deponent, or the party affiliated with the deponent, pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of the deponent's conduct [*Code Civ. Proc. § 2023.030(a)*]. Other penalties (*e.g.*, issue, evidence, or terminating sanctions) are available only after a deponent has failed to comply with an order compelling attendance or testimony or production [*see Code Civ. Proc. §§ 2025.450, 2025.480*; *see also § 83.32*].

[d] Related Pleading and Practice Forms

For forms and discussion related to the obtaining of an order pursuant to Code Civ. Proc. § 2025.450 to compel appearance and testimony or production of documents pursuant to a deposition notice, and to obtain a monetary sanction for the expenses incurred by the deponent's failure to comply with the deposition notice pursuant to Code Civ. Proc. §§ 2023.030(a) and 2025.450, see California Forms of Pleading and Practice, Ch. 193, *Discovery: Depositions* (Matthew Bender).

[3] Additional Authorities

[a] Motion to Compel Attendance, Testimony, or Production at Deposition; Sanctions

Blago Leko v. Cornerstone Home Inspection (2001) 86 Cal. App. 4th 1109, 103 Cal. Rptr. 2d 858 , is an action arising out of a suit for negligent disclosure of defects in real property. The home inspectors' attorney unilaterally noticed depositions, but due to due to oversight and a possible misunderstanding arising from a conversation with an associate, the opposing attorney did not calendar the depositions and was unavailable. Despite opposing attorney's multiple efforts to arrange an alternate date, the home inspectors' attorney refused to reschedule the depositions, responding, in part, with a demeaning, unprofessional letter. He also filed a motion to compel. The trial court denied the motion and ultimately awarded sanctions under former Code Civ. Proc. §§ 2023(a)(3), (9) (*now see Code Civ. Proc. §§ 2023.010(c), (i), 2023.020*) (*86 Cal. App. 4th 1109, 1123)* .

The attorney contended he could not be sanctioned because he was authorized to proceed with his motion to compel and was not required to seek an informal resolution with opposing counsel. He relied on former Code Civ. Proc. § 2025(j)(3)(B) (*now see Code Civ. Proc. § 2025.450(b)(2)*), which governs a party witness's failure to appear at or proceed with a properly noticed deposition, and provides that a motion to compel attendance must be accompanied by a declaration stating facts showing a reasonable and good faith attempt at informal resolution of each issue presented by it "*or, when the deponent fails to attend the deposition ... by a declaration stating that the petitioner has contacted the deponent to inquire about the nonappearance* (italics added)." The attorney reasoned that he complied with this statute by contacting realtors' attorney after he was told her clients were unavailable on the scheduled dates (*86 Cal. App. 4th 1109, 1124)* .

The court of appeal rejected this argument. Instead, it held that implicit in the requirement that counsel contact the deponent to inquire about the nonappearance is a requirement that counsel listen to the reasons offered and make a good faith attempt to resolve the issue. Here, the failure to appear was due to oversight and opposing counsel expressed a willingness to reschedule the depositions at a mutually convenient date. The trial court did not abuse its discretion when it determined that inspectors' attorney did not comply with his obligations. Sanctions were properly awarded under former Code Civ. Proc. §§ 2023(a)(3), (9) (*now see Code Civ. Proc. §§ 2023.010(c), (i), 2023.020*) (*86 Cal. App. 4th 1109, 1124)* .

For additional discussion of *Blago Leko*, see *Ch. 82, Discovery: Sanctions for Discovery Misuse, §§ 82.10[4][a], [b].*

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8-83 California Points & Authorities § 83.31

§ 83.31 Supporting Motion for Order Compelling Answer to Question or Production of Document or Thing [Code Civ. Proc. § 2025.480]--Failure of Deponent to Answer or Produce as Specified in Deposition Notice or Subpoena

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION FOR ORDER COMPELLING DEPONENT TO _____ [ANSWER QUESTIONS *and/or* PRODUCE _____ (DOCUMENTS *and/or* TANGIBLE THINGS) UNDER DEPONENT'S CONTROL] AND FOR MONETARY SANCTION
vs.	)	
_____ [*name*],	)	
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

DEPONENT _____ [*name*] FAILED TO _____ [ANSWER A QUESTION *and/or* PRODUCE A _____ (DOCUMENT *and/or* TANGIBLE THING) UNDER HIS/HER CONTROL THAT WAS SPECIFIED IN THE DEPOSITION _____ (NOTICE *or* SUBPOENA)],

THE _____ [ANSWER *and/or* PRODUCTION] IS SUBJECT TO DISCOVERY, AND _____ [*name of party seeking discovery*] HAS MADE AN UNSUCCESSFUL BUT REASONABLE AND GOOD-FAITH ATTEMPT AT AN INFORMAL RESOLUTION OF THE ISSUE, AND THUS THE COURT SHOULD ISSUE AN ORDER COMPELLING THE _____ [ANSWER *and/or* PRODUCTION] AND SHOULD IMPOSE A MONETARY SANCTION ON THE DEPONENT.

A. Party Seeking Discovery May Move for Order Compelling Discovery. If a deponent fails to answer any question or fails to produce any document or tangible thing under the deponent's control that is specified in the deposition notice or subpoena, the party seeking discovery may make a motion, accompanied by a declaration stating facts showing a reasonable and good-faith attempt at an informal resolution of each issue presented by the motion, that the court issue an order compelling the answer or production (*Code Civ. Proc. § 2025.480*).

B. Matters Subject to Discovery May Be Compelled. If the court determines that the answer or production sought is subject to discovery, the court shall order that the answer be given or that the production be made on resumption of the deposition (*Code Civ. Proc. § 2025.480*).

C. Matter Is Discoverable if Not Privileged and if Relevant to Subject Matter. Any matter is discoverable if it is not privileged and if it is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence (*Code Civ. Proc. § 2017.010*).

D. Subject Matter of Action. The "subject matter" of the action is the circumstances and facts out of which the cause of action arises, that is, the property, contract, or other thing involved in the dispute. The subject matter of the action describes physical facts in relation to which the suit is prosecuted, not the act or acts that constitute the cause of action (*see Darbee v. Superior Court (1962) 208 Cal. App. 2d 680, 688, 25 Cal. Rptr. 520*).

[*Optional*] **E. Party May Be Compelled to Provide Nonverbal "Answers" by Reenacting Events During Video Recorded Deposition.** The language in *Section 2025.480 of the Code of Civil Procedure*, which authorizes a trial court to issue an order compelling a deponent to "answer" a question, is construed to include nonverbal as well as verbal responses at a video recorded deposition. Thus a deponent may be compelled to perform a demonstration or reenactment at the request of a party (*Emerson Electric Co. v. Superior Court (1997) 16 Cal. 4th 1101, 1111-1112, 68 Cal. Rptr. 2d 883, 946 P.2d 841*).

[*Optional*] **F. Right to Move for Order Not Waived by Adjournment or Completion of Examination.** When a deponent fails to answer a question or fails to produce a document or tangible thing under the deponent's control that is specified in the deposition notice or subpoena, the party seeking the answer or production may adjourn or complete the examination on other matters without waiving the right at a later time to move for an order compelling the answer or production under *Section 2025.480 of the Code of Civil Procedure* (*Code Civ. Proc. § 2025.460(d)*).

G. Court Must Impose Monetary Sanction Absent Specified Findings. The court must impose a monetary sanction under *Section 2023.030 of the Code of Civil Procedure* against any party, person, or attorney who unsuccessfully opposes a motion to compel answer or production, unless it finds that the one subject to thesanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust (*Code Civ. Proc. §§ 2023.030(a), 2025.480(f)*).

[*Optional*] **H. Court May Impose Sanctions Despite Lack of Opposition to Motion to Compel Discovery.** The court may award sanctions under the Discovery Act in favor of a party who files a motion to compel discovery, even though no opposition to the motion was filed, or opposition to the motion was withdrawn, or the requested discovery was provided to the moving party after the motion was filed (*Cal. Rules of Ct., Rule 3.1030(a)*).

[*Add memoranda generally supporting the imposition of monetary sanctions. See Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum is for use by a party seeking an order to compel the answer to a question or production of a document or tangible thing under the deponent's control that is specified in the deposition notice or deposition subpoena, and for a monetary sanction [*see Code Civ. Proc. § 2025.480*]. When a monetary sanction is sought, this form should be combined with general memoranda supporting the imposition of monetary sanctions under *Code Civ. Proc. § 2023.030(a)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11*].

The motion must be made no later than 60 days after the completion of the record of the deposition, and must be accompanied by a declaration stating facts showing a reasonable and good-faith attempt at an informal resolution of each issue presented by the motion. The motion must be noticed to all parties, and to the deponent either orally at the examination or by subsequent service in writing. Other procedures concerning transcripts are also required [*Code Civ. Proc. § 2025.480*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should state the nature of the answer or document or thing that the deponent failed to give, and how it is subject to discovery. Counsel's factual showing should demonstrate substantial justification for the motion in order to avoid a monetary sanction if the motion is denied [*see Code Civ. Proc. § 2025.480*]. However, counsel need not set forth facts showing that the deponent acted without substantial justification [*cf.* former Code Civ. Proc. § 2034(a)]. *Code Civ. Proc. §§ 2023.030(a)* and *2025.480* effectively place the burden on the person against whom the sanction is to be imposed, by requiring the court to impose a monetary sanction when it is expressly authorized *unless* it finds that that party acted with substantial justification or that other circumstances would make the monetary sanction unjust.

[c] Sanctions

The monetary sanction that may be imposed is an order that the deponent or party affiliated with the deponent pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of the deponent's conduct [*Code Civ. Proc. § 2023.030(a)*]. Under *Code Civ. Proc. § 2025.010 et seq.*, sanctions other than monetary sanctions are available only after a deponent has failed to comply with an order compelling attendance, testimony, or production [*see Code Civ. Proc. § 2025.450(d), 2025.480(g)*; *see also § 83.32*].

[d] Related Pleading and Practice Forms

For forms and discussion related to the obtaining of an order pursuant to Code Civ. Proc. § 2025.480 to compel an answer or the production of a writing or tangible thing pursuant to a deposition notice or subpoena, and to obtain a monetary sanction for the expenses incurred by the deponent's failure to comply pursuant to Code Civ. Proc. §§ 2023.030(a) and 2025.480, see California Forms of Pleading and Practice, Ch. 193, *Discovery: Depositions* (Matthew

Bender).

[3] Discussion of Authorities

[a] Subject Matter of Action

Darbee v. Superior Court *(1962) 208 Cal. App. 2d 680, 25 Cal. Rptr. 520* was an action for specific performance of an option contract for the purchase of land and for declaratory relief. Defendant took plaintiff's deposition and asked questions, including whether anyone had agreed to buy the property from plaintiff at the time he exercised the option and thereafter, and whether he had agreed to sell the property. Plaintiff refused to answer these questions, and the trial court ruled that questions relating to whether plaintiff had agreed to sell the property at or about the time he attempted to exercise the option were relevant to the subject matter of the action and that plaintiff must answer them. On further deposition, plaintiff refused to answer similar questions relating to a different time period, and another judge denied a motion to compel answers to these questions. Defendant then posed similar questions on written interrogatories; plaintiff objected, and defendant moved for an order requiring further response, which was denied by the trial court. Defendant filed a petition for a writ of mandate to compel the trial court to order plaintiff to answer the interrogatories.

In finding that the trial court had abused its discretion, the court of appeal stated that there was little doubt that the information sought was relevant to the subject matter of the action. The "subject matter of the action" is the circumstances and facts out of which the cause of action arises; it is the property, contract, or other thing involved in the dispute. The subject matter is not the act or acts that constitute the cause of action, but it describes physical facts in relation to which the suit is prosecuted. The court stated that the thing involved in the present case was the option agreement and its enforceability. Any of the physical facts and circumstances bearing on or touching that agreement would be proper matters for inquiry in the search for facts which might lead to admissible evidence (*208 Cal. App. 2d 680, 688)* .

Note that *Darbee* construed law in effect prior to the operative date of the Civil Discovery Act of 1986. It is cited and discussed as persuasive authority to the extent that it remains consistent with current provisions.

[b] Party May Be Compelled to Provide Nonverbal "Answers" by Reenacting Events During Video Recorded Deposition

In ***Emerson Electric Co. v. Superior Court*** *(1997) 16 Cal. 4th 1101, 1111-1112, 68 Cal. Rptr. 2d 883, 946 P.2d 841*), plaintiff brought an action against defendants for alleged injuries incurred while using defendant's product. Defendants sought to compel plaintiff, during a videotaped deposition, to demonstrate how the injury the occurred. The trial court deniedthe order to compel, based on a ruling in *Stermer v. Superior Court (1993) 20 Cal. App. 4th 777, 24 Cal. Rptr. 2d 577* that nonverbal responses could not be compelled. Defendants appealed, and the court of appeal, expressly disagreeing with *Stermer*, issued a writ of mandate ordering the trial court to grant the order to compel. Plaintiff petitioned for review and the Supreme Court granted the petition to resolve the conflicting court of appeal decisions.

The Supreme Court affirmed the judgment of the court of appeal, holding that "answer," as used in former Code Civ. Proc. § 2025(o) (*now see Code Civ. Proc. § 2025.480*), includes nonverbal as well as verbal responses at a video recorded deposition. The court disapproved the decision in *Stermer v. Superior Court (1993) 20 Cal. App. 4th 777, 24 Cal. Rptr. 2d 577* to the extent that it held to the contrary (*16 Cal. 4th 1101, 1104, 1111-1113)* .

The Court reasoned that *Stermer* had construed "answer" too narrowly by limiting it to verbal responses, noting that the word also denotes any action of saying, writing, or *doing* something called for in return (*16 Cal. 4th 1101, 1106-1107)* . A broader construction of "answer" is also more consistent with *Code Civ. Proc. § 2025.330(d)*, which provides that examination and cross examination of a deponent shall proceed as permitted under the Evidence Code; it is undisputed

that at trial, the Evidence Code permits nonverbal answers to questions, including a physical demonstration or reenactment of an incident (*16 Cal. 4th 1101, 1107)* . The Court also reasoned that allowing nonverbal responses at a videotaped deposition serves one of the legislative purposes of the discovery statutes: to educate the parties concerning claims and defenses so as to encourage settlements and facilitate and expedite trials, citing with approval its earlier decision in *Greyhound Corp. v. Superior Court (1961) 56 Cal. 2d 355, 376, 15 Cal. Rptr. 90, 364 P.2d 266* and stating that the conclusions in *Greyhound* apply equally to the discovery statutes enacted by the Civil Discovery Act of 1986, which retain the expansive scope of discovery (*16 Cal. 4th 1101, 1107-1108)* . The Court concluded that allowing such nonverbal responses was supported by the legislative history both of former Code Civ. Proc. § 2025(o) (*now see Code Civ. Proc. § 2025.480*), authorizing orders compelling a response, and also of former Code Civ. Proc. § 2025(i) (*now see Code Civ. Proc. § 2025.330(c)*), authorizing videotaping of depositions (*16 Cal. 4th 1101, 1108-1109)* . Finally, the court concluded that the discovery statutes' procedural requirements and safeguards provided adequate means to object and to protect deponents against potential abuses arising from distorted video recording or from requests for nonverbal responses that cause unwarranted annoyance, embarrassment, oppression, or undue burden and expense (*16 Cal. 4th 1101, 1109-1110)* .

Having concluded that a nonverbal response may be compelled at a video recorded deposition, the Court held that sanctions could be imposed under former Code Civ. Proc. § 2023 (*now see Code Civ. Proc. § 2023.010 et seq.*), for failure to comply with such an order (*16 Cal. 4th 1101, 1112)* .

The Court thus affirmed the judgment of the court of appeal and remanded the matter to the trial court for a new hearing in light of its holding and its disapproval of the language in *Stermer v. Superior Court (1993) 20 Cal. App. 4th 777, 24 Cal. Rptr. 2d 577* that the trial court had previously relied upon (*16 Cal. 4th 1101, 1113)* .

Note that the *Court in Emerson Electric Co. v. Superior Court (1997) 16 Cal. 4th 1101, 68 Cal. Rptr. 2d 883, 946 P.2d 841* , aside from disapproving *Stermer*, also recognized that the Discovery Act of 1986 was intended to supersede its decision in *Bailey v. Superior Court (1977) 19 Cal. 3d 970, 140 Cal. Rptr. 669, 568 P.2d 394* , in which the Court quashed an order to compel a video recorded reenactment after concluding that the former discovery statutes did not permit video recording absent mutual consent (*see 16 Cal. 4th 1101, 1109*). The Court did not, however, refer to a subsequent court of appeal decision, *Bailey v. Superior Court (1978) 79 Cal. App. 3d 444, 144 Cal. Rptr. 875* . In that case, after the Supreme Court had quashed the video recording order, the defendant subsequently moved for an order requiring plaintiff to reenact the accident in issue for purposes of photographing it. The court of appeal held the reenactment was improper under former Code Civ. Proc. § 2031 (*now see Code Civ. Proc. § 2031.010 et seq.*), whether the reenactment is recorded by photographs, motions pictures, or video (*79 Cal. App. 3d 444, 447)* . This decision must likewise be deemed superseded by the Supreme Court's construction of the new discovery statutes in *Emerson*.

[4] Additional Authorities

[a] Matter Is Discoverable If Not Privileged and If Relevant to Subject Matter

Maldonado v. Superior Court (2001) 94 Cal. App. 4th 1390, 115 Cal. Rptr. 2d 137 , an original proceeding in mandate, arose from an employment discrimination action. Petitioners, former employees, sought to overturn the trial court's order denying their motions to compel further responses to discovery from real party in interest, former employer. The former employees submitted three deposition notices to depose the person or persons most knowledgeable concerning the reasons for terminating two of the petitioners, the documents supporting the decisions to terminate, the identity of persons participating in the decisions, and additional information regarding former employer's sales and service areas. The notices also asked that documents be produced from a number of categories, including personnel files, job descriptions, documents pertaining to petitioners' employment or termination which were not in the personnel files, correspondence involving petitioners, and documents pertaining to the sales and service area. After the depositions had concluded, the former employees brought motions to compel further responses with regard to allthree depositions, but the trial court denied the motions (*94 Cal. App. 4th 1390, 1392-1394)* .

The court of appeal issued a peremptory writ of mandate, directing that the trial court vacate its order denying the former petitioners' motions to compel further responses and enter an order granting the motions (*94 Cal. App. 4th 1390, 1399-1400)* . The court agreed with petitioners that the former employer's responses were inadequate. It noted that the trial court specifically found that, under former Code Civ. Proc. § 2025(d)(6) (*now see Code Civ. Proc. § 2025.230*), the former employees had the right to ask the person most knowledgeable to bring in all of the documents that they felt were supportive and that the former employer was wrong in not reproducing for the depositions the documents that it said it had previously produced (*94 Cal. App. 4th 1390, 1392-1394)* . Thus, the trial court had no basis for denying the motions to compel. The former employer should have been ordered to bring its witnesses back to the depositions with the documents requested and with proof that the witnesses had undertaken some effort to familiarize themselves with the areas of their supposed "knowledge" (*94 Cal. App. 4th 1390, 1397)* . The appellate court expressed particular concern about the "cavalier attitude" displayed at the depositions concerning information that should have been readily available to the witnesses, as well as the fact that the witnesses appeared at the depositions at which document requests were made with no documents in their possession and no knowledge of whether documents responsive to the requests existed anywhere in the company's files (*94 Cal. App. 4th 1390, 1396)* .

[b] Subject Matter of Action

Pacific Auto. Ins. Co. v. Superior Court (1969) 273 Cal. App. 2d 61, 77 Cal. Rptr. 836 arose from an action for interference with contract filed by a county against defendants for money allegedly paid by the county to one of the defendants for medical services relating to injuries which he received when he was involved in an accident with one of the other defendants. The county caused a subpoena duces tecum (now termed "deposition subpoena" under the Discovery Act) to be issued and served on an investigator who investigated the accident for defendant insurance company, requiring the investigator to attend a deposition and to produce all records and correspondence between him and the insurance company prior to the filing of the complaint which concerned the accident and related settlement negotiations. The insurance company moved to quash the subpoena duces tecum and for a protective order, contending that the declaration filed as an application for the subpoena duces tecum was defective. The trial court denied the motions.

The court of appeal pointed out that although *Code Civ. Proc. § 1985* (governing deposition subpoenas under *Code Civ. Proc. § 2020.030*)contains language referring to a showing of "materiality to the issues," it had been held in *Shively v. Stewart (1966) 65 Cal. 2d 475, 481, 55 Cal. Rptr. 217, 421 P.2d 65* , that when the subpoena power is invoked to secure discovery, the good cause and materiality requirements of *Code Civ. Proc. § 1985* must be governed by discovery standards and it is not necessary to show that the material sought would be admissible in evidence (*273 Cal. App. 2d 61, 64-65)* . The county, therefore, was not required to show the materiality of the requested matter to the *issues* involved in the case. Since defendants made no claim that the documents were not relevant to the *subject matter* of the action, it had to be assumed that they were relevant to the subject matter (*273 Cal. App. 2d 61, 65)* . The court found, however, that good cause had not been shown for the issuance of the subpoena duces tecum, and that the request was too broad (*273 Cal. App. 2d 61, 66-70*), and therefore issued a writ of mandate requiring the court to vacate its order denying the motion to quash the subpoena duces tecum and to enter its order granting the motion (*273 Cal. App. 2d 61, 70-71*).

Note

that *Pacific Auto* construed law in effect prior to the operative date of the Civil Discovery Act of 1986. It is cited and discussed as persuasive authority to the extent that it remains consistent with current provisions.

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 83 DISCOVERY: DEPOSITIONS
PART II. FORMS
B. Motions to Compel Oral Deposition Matters

8-83 California Points & Authorities § 83.32

§ 83.32 Supporting Motion for Discovery Sanction Following Failure to Comply With Order Compelling Attendance, Testimony, Answer, or Production [Code Civ. Proc. §§ 2023.010 et seq., 2025.450, 2025.480]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ORDER OF SANCTION AGAINST _____ [PARTY DEPONENT *or* A PARTY-AFFILIATED DEPONENT *and/or* PARTY WITH WHOM DEPONENT AFFILIATED] FOR FAILURE OF DEPONENT TO OBEY COURT ORDER
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THE COURT SHOULD IMPOSE _____ [*specify, e.g.,* ISSUE AND MONETARY] SANCTIONS AGAINST _____ [*name*], _____ [A PARTY DEPONENT *and/or* A

PARTY-AFFILIATED DEPONENT *and/or* THE PARTY WITH WHOM A DEPONENT IS AFFILIATED] BECAUSE THE DEPONENT FAILED TO COMPLY WITH A COURT ORDER PURSUANT TO SECTION _____ [2025.450 *or* 2025.480] OF THE CODE OF CIVIL PROCEDURE.

A. Court May Make Order That Is Just. If the court issues an order compelling a deponent who is a party to the action, who is an officer, director, managing agent, or employee of an organization that is a party, or who is a person designated by an organization that is a party to attend and give testimony at a deposition, toanswer questions, or to produce a document, writing, or thing, and that deponent fails to obey that order, the court may make those orders that are just against the deponent or against the party with whom the deponent is affiliated, including the imposition of an issue sanction, evidence sanction, or terminating sanction under *Section 2023.030 of the Code of Civil Procedure* (*Code Civ. Proc. §§ 2025.450, 2025.480*).

[*EITHER, if deponent violated Code Civ. Proc. § 2025.450 order*]

B. Court May Impose Monetary Sanction. In lieu of or in addition to the imposition of an issue sanction, evidence sanction, or terminating sanction under *Section 2023.030 of the Code of Civil Procedure*, the court may impose a monetary sanction under *Section 2023.030(a) of the Code of Civil Procedure* against that deponent or against the party with whom party the deponent is affiliated, and in favor of any party who, in person or by attorney, attended the deposition in the expectation that the deponent's testimony would be taken pursuant to the order compelling testimony (*Code Civ. Proc. § 2025.450*).

[*OR, if deponent violated Code Civ. Proc. § 2025.480 order*]

B. Court May Impose Monetary Sanction. In lieu of or in addition to the imposition of an issue sanction, evidence sanction, or terminating sanction under *Section 2023.030 of the Code of Civil Procedure*, the court may impose a monetary sanction under *Section 2023.030(a) of the Code of Civil Procedure* against that party deponent or against any party with whom the deponent is affiliated (*Code Civ. Proc. § 2025.480(g)*; *see* In re marriage of *Niklas (1989) 211 Cal. App. 3d 28, 38, 258 Cal. Rptr. 921*).

[*Add points and authorities generally supporting the imposition of issue, evidence, terminating, and monetary sanctions. See Ch. 82, Discovery: Sanctions for Discovery Misuse, §§ 82.11 -82.14.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities is for use by a party seeking sanctions for the failure of a party or party-affiliated deponent to comply with an order compelling that deponent to attend and give testimony at a deposition, or to answer a question at a deposition, or to produce a document, writing, or tangible thing [*see Code Civ. Proc. §§ 2025.450, 2025.480*]. This form should be combined with general points and authorities supporting the imposition of an issue sanction, evidence sanctions, or terminating sanctions under *Code Civ. Proc. § 2023.030(b)-(d)* [*see Ch. 82,*

Discovery: Sanctions for Discovery Misuse, §§ 82.12 -82.14]. If a monetary sanction is sought is addition to or in lieu of these sanctions, this form should be combined with general points and authorities supporting the imposition of monetary sanctions under *Code Civ. Proc. § 2023.030(a)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11*]. For memoranda of points and authorities to use in support of the motion to compel, see *§§ 83.30* and *83.31*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel might wish to insert argument in favor of one particular type of sanction over another. However, counsel need not set forth facts showing that the deponent acted without substantial justification [*cf.* former Code Civ. Proc. § 2034(a)], because *Code Civ. Proc. § 2023.030(a)* effectively places the burden on the person against whom the sanction is to be imposed, by requiring that the court impose monetary sanctions when it is expressly authorized *unless* it finds that he or she had acted with substantial justification or that other circumstances would make the monetary sanction unjust.

[c] Sanctions

The monetary sanction that may be imposed is an order that the deponent or party affiliated with the deponent pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of the deponent's conduct [*Code Civ. Proc. § 2023.030(a)*].

If imposing an issue sanction, the court may order that designated facts shall be taken as established in the action in accordance with the claim of the party adversely affected by the deponent's discovery abuse, or the court may issue an order prohibiting the party deponent or the party with whom the deponent is affiliated from supporting or opposing designated claims or defenses [*see Code Civ. Proc. § 2023.030(b)*]. If imposing an evidence sanction, the court may issue an order prohibiting the party deponent or the party with whom the deponent is affiliated from introducingdesignated matters in evidence [*see Code Civ. Proc. § 2023.030(c)*]. If imposing a terminating sanction, the court may issue one of the following orders: (A) an order striking out pleadings or parts thereof of the party deponent or the party with whom the deponent is affiliated, (B) an order staying further proceedings by that party until the order compelling discovery is obeyed, (C) an order dismissing the action, or any part thereof, of that party, or (D) an order rendering a judgment by default against that party [*see Code Civ. Proc. § 2023.030(d)*].

Note also that if a deponent, whether or not he or she is a party or party-affiliated person, fails to obey an order compelling answers or production, the failure may considered a contempt of court [*Code Civ. Proc. § 2025.480(g)*]. For a form relating to the imposition of contempt in general for discovery abuse, see *Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11*.

[d] Related Pleading and Practice Forms

For forms and discussion related to the obtaining of sanctions for failure to comply with an order issued pursuant to Code Civ. Proc. §§ 2025.450 or 2025.480, see California Forms of Pleading and Practice, Ch. 193, *Discovery: Depositions* (Matthew Bender).

[3] Discussion of Authorities

[a] Court May Impose Monetary Sanction

In the case of ***In re Marriage of Niklas*** *(1989) 211 Cal. App. 3d 28, 258 Cal. Rptr. 921* , the court of appeal issued a peremptory writ directing the trial court to reconsider the *amount* of sanctions imposed, but also held that sanctions were clearly appropriate. In *Niklas*, a marital dissolution proceeding, husband sought and was granted a court order compelling wife's attorney to answer deposition questions which he had previously refused to answer. The attorney appeared at the second deposition where he answered every question but frequently responded that he did not know, and

neither reviewed his files nor brought certain documents. He adjourned the deposition, stating he intended to apply for a protective order. Husband also deposed wife a second time, pursuant to court order. She did not bring any of the documents listed in the notice of deposition and refused to answer related questions on the advice of her attorney. Again, after a motion by husband, the trial court ordered both wife and her attorney to resume their depositions. They failed to appear at those depositions, and monetary sanctions were imposed against them. The court of appeal reviewed the provisions of former Code Civ. Proc. §§ 2023 and 2025(o) (*now see Code Civ. Proc. §§ 2023.030* and *2025.480*) regarding monetary sanctions. It concluded that monetary sanctions were appropriate, observing that such blatant disobedience of court orders warrantssevere sanctions. In addition to directing the trial court to reconsider the award, the court of appeal suggested that the trial court consider other sanctions, including contempt, necessary to protect the dignity of the court and ensure compliance with the court's orders (*211 Cal. App. 3d 28, 37-38)* .

The decision in *Niklas,* is also discussed in *Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.30[3][a]*.

[4] Additional Authorities

[a] Court May Impose Monetary Sanction

The facts and procedural background of *Maldonado v. Superior Court (2001) 94 Cal. App. 4th 1390, 115 Cal. Rptr. 2d 137* are discussed in *§ 83.31[4][a]*. Petitioners (former employees) urged the court of appeal to instruct the trial court to issue an issue preclusion sanction, to prevent the former employer and real party in interest from introducing testimony at trial or asserting affirmative defenses concerning matters for which they refused to disclose information at appropriate depositions and from "springing ... witnesses" who no longer worked for former employer on petitioners at trial. The court found that such a sanction would exceed the level of punishment justified under the facts and law (*94 Cal. App. 4th 1390, 1398)* .

The court explained that sanctions involving issue preclusion are not generally imposed at this point in a discovery dispute. When a party wrongfully fails to answer a question or produce a document requested in accordance with former Code Civ. Proc. § 2025 (*now see Code Civ. Proc. § 2025.010 et seq.*), and the party seeking discovery has gone to the court for relief, "if the court determines that the answer or production sought is subject to discovery, it shall order that the answer be given or the production be made on the resumption of the deposition" (*see Code Civ. Proc. § 2025.480*) (*94 Cal. App. 4th 1390, 1398)* . In addition, the court "shall" impose a monetary sanction "against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel answer or production ..." unless it finds that "the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." It is only when a deponent "fails to obey an order entered under this subdivision" that former Code Civ. Proc. § 2025(o) (*now see Code Civ. Proc. § 2025.480*) permits the court to "make those orders that are just against the disobedient party, or against the party with whom the disobedient deponent is affiliated, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under former Section 2023" (*94 Cal. App. 4th 1390, 1398-1399)* . The appellate court noted that some courts have held that the more serious sanctions may be imposed under former Code Civil Proc. § 2025(o) (*now see* Code *Civil Proc. § 2023.030*), even when no specific order has been violated. However, those cases, unlike this one, involved repeated and willful refusals to permit discovery or produce documents over a lengthy period of time, resulting in evidence becoming unavailable (*94 Cal. App. 4th 1390, 1398-1399)* . Accordingly, the court concluded that this case did not call for imposition of an issue-preclusion sanction. The court noted, however, that a monetary sanction could well be warranted in view of the fact that former Code Civ. Proc. § 2025(o) (*now see Code Civ. Proc. § 2025.480(f)*) requires imposition of monetary sanctions unless the trial court finds that the party subject to sanction "acted with substantial justification" or that "other circumstances make the imposition of the sanction unjust" (*94 Cal. App. 4th 1390, 1399)* .

In *Stewart v. Colonial W. Agency, Inc. (2001) 87 Cal. App. 4th 1006, 105 Cal. Rptr. 2d 115* , a case alleging breach of contract wrongful termination, the court of appeal rejected defense attorney's arguments that the questions she instructed the deponent not to answer were objectionable on the ground that they would not produce admissible evidence.

Contrary to defense counsel's assertion that the questions pertained to the terminating manager's "character," most of the questions were designed to elicit information concerning the manager's employment practices and policies and his methods of dealing with employment-related issues. These questions could have led to discovery of admissible evidence, assisting plaintiff in establishing that her manager administered unjustified discipline as a matter of practice. The fact that some of the incidents took place shortly after plaintiff's termination had no bearing on their relevance (*87 Cal. App. 4th 1006, 1013)* . Moreover, irrelevance alone is an insufficient ground to justify preventing a witness from answering a question posed at a deposition. On these facts, the trial court's imposition of monetary sanctions was proper (*87 Cal. App. 4th 1006, 1014)* .

For additional facts and the procedural background of *Stewart*, see *Ch. 82, Discovery: Sanctions for Discovery Misuse, §§ 82.10[4][b], 82.11[4][a]*.

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8-83 California Points & Authorities §§ 83.33-83.39

[Reserved]

§§ 83.33[Reserved]

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CHAPTER 83 DISCOVERY: DEPOSITIONS
PART II. FORMS
B. Motions to Compel Oral Deposition Matters

8-83 California Points & Authorities § 83.40

§ 83.40 Opposing Motion for Order Compelling Attendance, Testimony, or Production of Documents or Things [Code Civ. Proc. § 2025.450]--General Requirements for Order Not Satisfied

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR ORDER COMPELLING DEPONENT TO _____ [ATTEND AND TESTIFY AT DEPOSITION *and/or* PRODUCE DOCUMENT *and/or* PRODUCE TANGIBLE THING]
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	Date: _____
	)	Time: _____
		Location: _____
		[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

_____ [*Name*], THE PARTY WHO GAVE THE DEPOSITION NOTICE, MAY NOT MOVE FOR AN ORDER UNDER SECTION 2025.450 OF THE CODE OF CIVIL PROCEDURE TO COMPEL THE DEPONENT'S _____ [ATTENDANCE AND TESTIMONY *and/or* PRODUCTION OF ANY DOCUMENT OR TANGIBLE THING] EXCEPT IN ACCORDANCE WITH THAT STATUTE.

[*EITHER*]

A. Deponent Must Be Party or Party-Affiliated. The party who gave the deposition notice may move for an order under *Section 2025.450 of the Code of Civil Procedure*, to compel the deponent's attendance and testimony or production of any document or tangible thing, only when the deponent is a party to the action, or is an officer, director, managing agent, or employee of a party, or a persondesignated by an organization that is a party pursuant to *Section 2025.230 of the Code of Civil Procedure* (*Code Civ. Proc. § 2025.450*).

[*AND/OR*]

B. Deponent Must Be Properly Served With Deposition Notice. The party who gave the deposition notice may move for an order under *Section 2025.450 of the Code of Civil Procedure*, to compel the deponent's attendance and testimony or the production of any document or tangible thing, only when the deponent has been properly served with a deposition notice (*Code Civ. Proc. § 2025.450*).

[*AND/OR*]

C. Motion Not Authorized When Deponent Served Moving Party With Timely Objection. The party who gave the deposition notice may move for an order under *Section 2025.450 of the Code of Civil Procedure*, to compel the deponent's attendance and testimony or the production of any document or tangible thing, only when the deponent has not served a valid objection pursuant to *Section 2025.410 of the Code of Civil Procedure* (*Code Civ. Proc. § 2025.450*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities is for use in opposition to a motion by a party seeking an order to compel a deponent's appearance and testimony or production of a document or tangible thing. The grounds for opposition are that the deponent is not a party to the action or that party's officer, director, managing agent, employee, or designee of a party organization, or that the deponent has not been served or properly served with a deposition notice, or that the deponent has timely served a valid objection under *Code Civ. Proc. § 2025.410* [*see Code Civ. Proc. § 2025.450*]. If the deponent opposes the motion on the grounds that the notice is defective and that he or she has served a valid objection, this form should be used in conjunction with a motion to quash the deposition notice on the grounds that the notice was defective or defectively served [*see § 83.60*; *see also Code Civ. Proc. §§ 2025.210-2025.270, 2025.410*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, if the opposition is due to a defective notice that was defectively served and the deponent timely objected to the notice, counsel should set forth facts showing the particular defects under *Code Civ. Proc. §§ 2025.210-2025.270*, and showing that the objection was proper and timely served under *Code Civ. Proc. § 2025.410*.

[c] Related Pleading and Practice Forms

For forms and discussion related to a motion pursuant to Code Civ. Proc. § 2025.450 to compel appearance and testimony or production of documents pursuant to a deposition notice, see California Forms of Pleading and Practice, Ch. 193, *Discovery: Depositions* (Matthew Bender).

California Points & Authorities

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8-83 California Points & Authorities §§ 83.41-83.44

[Reserved]

§§ 83.41[Reserved]

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8-83 California Points & Authorities § 83.45

§ 83.45 Opposing Motion for Order Compelling Answer to Question or Production of Document or Thing [Code Civ. Proc. § 2025.480]--General Requirements for Order Not Satisfied

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR ORDER COMPELLING DEPONENT TO _____ [ANSWER QUESTIONS *and/or* PRODUCE _____ (DOCUMENTS *and/or* TANGIBLE THINGS) UNDER DEPONENT'S CONTROL]
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

_____ [*Name of party seeking discovery*] MAY MOVE FOR AN ORDER UNDER CODE OF CIVIL PROCEDURE SECTION 2025.480, TO COMPEL THE DEPONENT'S _____ [ANSWER TO A QUESTION *and/or* PRODUCTION OF _____ (A DOCUMENT *and/or* A TANGIBLE THING) UNDER THE DEPONENT'S CONTROL THAT IS SPECIFIED IN THE DEPOSITION

_____ (NOTICE *or* SUBPOENA)], ONLY IN ACCORDANCE WITH THAT STATUTE.

[*EITHER*]

A. Motion Must Be Timely. A party seeking discovery must move for a motion to compel a deponent to answer questions or to produce documents or tangible things under his or her control no later than60 days after the completion of the record of the deposition (*Code Civ. Proc. § 2025.480*).

[*AND/OR*]

B. Motion Must Be Accompanied by Declaration. A party seeking discovery may only move for a motion to compel a deponent to answer questions or to produce writings or tangible things under his or her control if that motion is accompanied by a declaration stating facts showing a reasonable and good-faith attempt at an informal resolution of each issue presented by the motion (*Code Civ. Proc. § 2025.480(b)*; *Townsend v. Superior Court (1998) 61 Cal. App. 4th 1431, 1434-1438, 72 Cal. Rptr. 2d 333*).

[*AND/OR*]

C. Notice of Motion Must Be Properly Given. Notice of a motion to compel under *Code of Civil Procedure Section 2025.480* must be given to all parties, and to the deponent either orally at the examination, or by subsequent service in writing (*Code Civ. Proc. § 2025.480(c)*).

[*AND/OR*]

D. Moving Party Must Lodge Transcript With Court. Not less than five days prior to the hearing on a motion to compel under *Code of Civil Procedure Section 2025.480*, the moving party must lodge with the court a certified copy of any parts of the stenographic transcript of the deposition that are relevant to the motion. If the deposition is recorded by audio or video technology, the moving party is required to lodge a certified copy of a transcript of any parts of the deposition that are relevant to the motion (*Code Civ. Proc. § 2025.480(d)*).

[*AND/OR*]

E. Answer or Production Must Be Subject to Discovery. The court will not order that the answer be given or that the production be made on the resumption of the deposition unless the court first determines that the answer or production sought is subject to discovery (*Code Civ. Proc. § 2025.480(e)*; *see Ascherman v. Superior Court (1967) 254 Cal. App. 2d 506, 514, 62 Cal. Rptr. 547*).

[*Optional*] **F. Matter Not Discoverable If Privileged or Irrelevant.** Matter is not subject to discovery if it is privileged or if it is not relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, and a court clearly cannot compel its discovery (*Code Civ. Proc. §§ 2017.010*,2025.480; *see Ascherman v. Superior Court (1967) 254 Cal. App. 2d 506, 514, 62 Cal. Rptr. 547* ; *see also City of Los Angeles v. Superior Court (1985) 170 Cal. App. 3d 744, 752-753, 216 Cal. Rptr. 311*).

[*Optional*] **G. Matter Not Discoverable If Inadmissible or Does Not Lead to Admissible Evidence.** Matter is not subject to discovery if it is neither itself admissible in evidence nor appears reasonably calculated to lead to the

discovery of admissible evidence, and a court clearly cannot compel its discovery (*Code Civ. Proc. §§ 2017.010, 2025.480*; *see City of Los Angeles v. Superior Court (1985) 170 Cal. App. 3d 744, 752-753, 216 Cal. Rptr. 311*).

[*Optional*] **H. Deponent Not Required to Answer "Legal Contention" Questions.** A trial court may not require a deponent to answer "legal contention" questions at his or her deposition (*Rifkind v. Superior Court (1994) 22 Cal. App. 4th 1255, 1259-1263, 27 Cal. Rptr. 2d 822*).

[*Optional*] **I. Impropriety of Questions at Oral Deposition That Would Otherwise Be Proper in Interrogatories.** Certain questions, such as those which inquire as to a party's legal theories or those that assume a fact not in evidence, might be improper if posed at a deposition on oral examination, although they would otherwise be proper questions if posed as written interrogatories (*see West Pico Furniture Co. v. Superior Court (1961) 56 Cal. 2d 407, 421, 15 Cal. Rptr. 119, 364 P.2d 295*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities is for use in opposition to a motion by a party seeking an order to compel answers or the production of writings or tangible things, on the grounds that the proper procedure for the motion was not followed or that the answers or writings or things are not discoverable [*see Code Civ. Proc. § 2025.480*].

Note that some cases cited in this form construe law in effect before the operative date of the Civil Discovery Act. They are cited and discussed aspersuasive authority to the extent that they remain consistent with current provisions [*see also § 83.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, if the opposition is on the grounds that an answer is not discoverable, counsel should set forth facts and argument showing that the answer is privileged or would not be relevant, or is not admissible and would not lead to the discovery of admissible evidence.

[c] Related Pleading and Practice Forms

For forms and discussion related to a motion pursuant to Code Civ. Proc. § 2025.480 to compel answers or production of a writing or tangible thing, see California Forms of Pleading and Practice, Ch. 193, *Discovery: Depositions* (Matthew Bender).

[d] Related Points and Authorities

For memoranda of points and authorities relating to specific grounds of evidentiary privilege or other protection from discovery, see generally Ch. 81, *Discovery: Privileges and Other Discovery Limitations* . For memoranda of points and authorities supporting or opposing discovery on general grounds of relevancy, see *Ch. 80, Discovery: Scope, Regulation, and Timing, § 80.10* et seq.

[3] Discussion of Authorities

[a] Motion Must Be Accompanied by Declaration

In ***Townsend v. Superior Court*** *(1998) 61 Cal. App. 4th 1431, 72 Cal. Rptr. 2d 333* , plaintiff, acting on advice of counsel, objected to and refused to answer certain deposition questions. After heated discussion between counsel, the dispute was unresolved and the deposition adjourned. Defendants moved to compel further answers and for sanctions. Plaintiff sought writ of mandate after the trial court granted the motion and awarded sanctions.

The court of appeal directed the trial court to set aside its order granting the motion to compel and issue a new order denying the motion (*61 Cal. App. 4th 1431, 1438-1439)* . It agreed with plaintiff that there had been no reasonable and good faith attempts by defendants to resolve the issues before they brought the motion. The court observed that depositions are different from other methods of discovery in that the presence of counsel for both parties permits instantaneous discussion of an objection or other disputed issue and attempts at informal resolution. However, it noted thata reasonable and good faith attempt at informal resolution entails something more than argument. Counsel are required to attempt to talk the matter over, compare their views, consult, and deliberate. The court noted that the record indicated that far from being an effort at informal negotiation, the exchanges between counsel were heated argumentative skirmishes. There was no indication that the discussion was intended as compliance with the requirement of informal resolution (*61 Cal. App. 4th 1431, 1434-1438)* . The court was careful to explain that it was not proposing an absolute rule requiring that informal resolution must await the conclusion of a deposition. Instead, it said that the parties themselves should determine the proper time, manner, and place for such discussion and negotiation (*61 Cal. App. 4th 1431, 1438)* .

[b] Answer or Production Must Be Subject to Discovery

In ***Ascherman v. Superior Court*** *(1967) 254 Cal. App. 2d 506, 62 Cal. Rptr. 547* , the court of appeal reviewed an order requiring plaintiff and his attorneys to pay costs and expenses arising from proceedings to compel answers to a deposition question. In determining that the sanctions had been erroneously imposed, the court of appeal considered the question of whether the answer clearly could not have been compelled, a situation which would have justified an award of sanctions under former Code Civ. Proc. § 2034(a) (*now see Code Civ. Proc. § 2025.480*). The court stated that answers to deposition questions clearly cannot be compelled when the matter is privileged or not relevant to the subject matter of the pending action (*254 Cal. App. 2d 506, 514)* .

[c] Matter Not Discoverable If Privileged or Irrelevant

The facts and procedural background of ***Ascherman v. Superior Court*** *(1967) 254 Cal. App. 2d 506, 62 Cal. Rptr. 547* , are set out in [b], *above.*

City of Los Angeles v. Superior Court *(1985) 170 Cal. App. 3d 744, 216 Cal. Rptr. 311* , involved an action by a city to enforce an alleged violation of a rent control ordinance. Defendant sought to depose a city attorney with regard to her research and opinions in drafting the ordinance, arguing that the information was relevant to a proper interpretation of the ordinance. The trial court ordered this disclosure, and the city petitioned for a writ of mandate to vacate this and other discovery orders. The court of appeal issued a writ directing the trial court to vacate its order compelling disclosure by the city attorney. The court noted that, even if the ordinance was ambiguous and required interpretation, the information sought was nonetheless irrelevant, because the ordinance was required to be interpreted according to the rules of statutory construction, not according to the drafter's opinion. Also, the information was not calculated to lead to the discovery of admissible evidence, because the motives or understandings of individual legislators are not considered in construing astatute, and the testimony of an individual legislator regarding his or her intention, motive, or opinion with respect to a particular piece of legislation is therefore inadmissible (*170 Cal. App. 3d 744, 752-753)* .

[d] Matter Not Discoverable If Inadmissible or Does Not Lead to Admissible Evidence

City of Los Angeles v. Superior Court *(1985) 170 Cal. App. 3d 744, 216 Cal. Rptr. 311* , is discussed in [c], *above.*

[e] Deponent Not Required to Answer "Legal Contention" Questions

In ***Rifkind v. Superior Court*** *(1994) 22 Cal. App. 4th 1255, 27 Cal. Rptr. 2d 822* , the appellate court held that a trial court may not require a deponent to answer "legal contention" questions at his or her deposition, for example, to state all facts, list all witnesses, and identify all documents that support or pertain to a particular contention in the deponent's pleadings. These questions, while entirely appropriate for written interrogatories, are not proper at a party's deposition. The basic vice of such questions at a deposition is that they are unfair, in that they call on the deponent to sort out the factual material in the case according to specific legal contentions, and to do this by memory and on the spot (*22 Cal. App. 4th 1255, 1262)* . Questions asking a deponent about the basis for, or information concerning, a factual conclusion or assertion, however, are appropriate questions for a deposition. For example, if a party states that a certain event happened at a particular time or place, it is entirely proper to ask the party at his or her deposition how he or she became aware of the event, his or her knowledge about the event, and for similar information of a factual nature (*22 Cal. App. 4th 1255, 1259)* .

[f] Impropriety of Questions at Oral Deposition That Would Otherwise Be Proper in Interrogatories

West Pico Furniture Co. v. Superior Court *(1961) 56 Cal. 2d 407, 15 Cal. Rptr. 119, 364 P.2d 295* arose out of an action against a loan company for allegedly making loans at usurious interest rates. Plaintiff propounded interrogatories, and defendant objected to one of them on the ground that the question assumed a fact not in evidence. The trial court sustained this objection, as well as the many other objections to other interrogatories, and plaintiff sought a writ of mandate.

The Supreme Court granted the writ, holding, inter alia, that the objection that one of the interrogatories assumed a fact not in evidence is not a valid objection. The Court noted that even if this objection were well founded, the fact that the question was asked in written interrogatories, as opposed to in an oral examination, meant that the answering party haddue time for deliberation so that he or she might avoid the pitfalls that are inherent in the form of the question (*56 Cal. 2d 407, 421)* .

[4] Additional Authorities

[a] Motion Must Be Timely

In *Unzipped Apparel, LLC v. Bader (2007) 156 Cal. App. 4th 123, 67 Cal. Rptr. 3d 111* , an unfair competition action, the nonparties served timely objections and did not produce any documents in response to a subpoena for business records. The trial court granted a motion to compel that was brought more than 60 days after the objections were received, stating that, because no "deposition" had been taken, the 60-day time limit of *Code Civ. Proc. § 2025.480(b)* did not apply. The nonparty deponents challenged the order granting the motion to compel. The court of appeal reversed, concluding that the 60-day limit applied because a response to a business records subpoena--in this case, objections--is a "record of a deposition" within the meaning of *Code Civ. Proc. § 2025.480(b)*. The court noted that neither the number of objections nor the proportion of records produced could be used to define the record for purposes of determining when to bring a motion to compel. The record was complete as of the date set for the production, when the objections were received, and the 60-day period for filing a motion to compel began on that date. The deadline was mandatory (*156 Cal. App. 4th 123, 136)* .

The court rejected defendant's reliance on *Code Civ. Proc. § 1987.1*. Defendant reasoned that because *Code Civ. Proc. § 1987.1* does not contain a specific deadline for bringing a motion to compel, but states only that a motion must be "reasonably made," its motion was timely because it was brought within a *reasonable time*. The court concluded that "reasonably made" suggested the *manner*, not the time, in which an act is accomplished. Moreover, there was no need

for *Code Civ. Proc. § 1987.1* to set forth filing deadlines that appear in other statutes (*156 Cal. App. 4th 123, 135-136)*
.

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8-83 California Points & Authorities § 83.46

§ 83.46 Opposing Motion for Order Compelling Answer to Question or Production of Document or Thing [Code Civ. Proc. § 2025.480]--Deposition Subpoena Duces Tecum Is Too Broad

[1] FORM

[*Caption. See § 83.45.*]

PRODUCTION AT A DEPOSITION MAY NOT BE COMPELLED PURSUANT TO A DEPOSITION SUBPOENA THAT IS TOO GENERAL OR TOO BROAD.

[*EITHER*]

A. Subpoena Must Describe Items. A deposition subpoena that commands only the production of business records for copying must designate the business records to be produced either by specifically describing each individual item or by reasonably particularizing each category of item [*Code Civ. Proc. § 2020.410(a)*; *see Flora Crane Service, Inc. v. Superior Court (1965) 234 Cal. App. 2d 767, 786, 45 Cal. Rptr. 79]* .

[*OR*]

A. Subpoena Must Describe Items. A deposition subpoena that commands both the attendance and testimony of the deponent as well as the production of records, documents, or things, must designate the business records to be produced either by specifically describing each individual item or by reasonably particularizing each category of item, and must specify any testing or sampling that is being sought [*Code Civ. Proc. § 2020.510(a)*; *see Flora Crane Service, Inc. v. Superior Court (1965) 234 Cal. App. 2d 767, 786, 45 Cal. Rptr. 79]* .

[*CONTINUE*]

B. Description of Items Requested. The writing or thing must be described with such certainty as to apprise the opponent or custodian of records of what is desired. Whether the description of the item is sufficient to inform its custodian of what is desired presents a question merely of whether under the circumstances and situation generally, considered in the light of reason and common sense, he or she ought to recognize and be able to distinguish or to identify the particular thing that is required (*see Union Trust Co. v. Superior Court (1938) 11 Cal. 2d 449, 458, 81 P.2d 150* ; *Pacific Auto. Ins. Co. v. Superior Court (1969) 273 Cal. App. 2d 61, 68-69, 77 Cal. Rptr. 836*).

C. "Omnibus" Description Improper. The requisite identification is defeated by generality of description, and is inadequate if the items are designated by or included within an "omnibus" description (*see Flora Crane Service, Inc. v. Superior Court (1965) 234 Cal. App. 2d 767, 786-787, 45 Cal. Rptr. 79*).

D. Request for All Documents Improper. A request for all correspondence, records, and documents is too broad (*see Pacific Auto. Ins. Co. v. Superior Court (1969) 273 Cal. App. 2d 61, 69-70, 77 Cal. Rptr. 836*).

[*Optional*] **E. Request for Writings and Things Unnecessarily Burdensome.** Production of writings and things should not be required when that production places a heavy burden on the party from whom production is sought, and the purposes of the discovery can be served by a less obtrusive means (*see Stony Brook I Homeowners Ass'n v. Superior Court (2001) 84 Cal. App. 4th 691, 699-700* ; *Calcor Space Facility, Inc. v. Superior Court (1997) 53 Cal. App. 4th 216, 223, 61 Cal. Rptr. 2d 567* ; *Allen v. Superior Court (1984) 151 Cal. App. 3d 447, 453, 198 Cal. Rptr. 737*).

[*These points and authorities may be combined, when appropriate, with the memorandum opposing a motion to compel contained in § 83.45.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

These points and authorities are for use in opposition to a motion made under *Code Civ. Proc. § 2025.480* for production of writings or tangible things at a depositionpursuant to a deposition subpoena [*see* Code Civ.Proc. § 2020.020 (deposition subpoena)]. The ground for opposition is that the specification of documents or things to be produced is too general or broad. Optional Paragraph E may be used if the requested production is not only too broad but is also overly burdensome in view of the availability of less obtrusive means of discovery.

This form may be combined with the memorandum of points and authorities opposing a motion to compel contained in § 83.45. For related forms of memoranda supporting a motion for a protective order under *Code Civ. Proc. §§ 2017.020* and *2019.030*, on general grounds of unreasonable burden or expense, see *Ch. 80, Discovery: Scope, Regulation, and Timing, § 80.80* and *§ 80.100*.

With appropriate modifications, this form may used to support a motion under *Code Civ. Proc. § 1987.1* to quash or to modify the deposition subpoena. Although a person served with a deposition subpoena may make a motion to quash or modify, he or she is not required to do so, but may simply refuse to produce the writings or things at the deposition, and then oppose any motion seeking to compel production [*see, e.g., Johnson v. Superior Court (1968) 258 Cal. App. 2d*

829, 837-839, 66 Cal. Rptr. 134 (prior law)]. Counsel should note, however, that *Code Civ. Proc. § 2020.240* provides that a person who disobeys a deposition subpoena may be punished for contempt without the necessity of a prior court order directing compliance, and is subject to a civil action under *Code Civ. Proc. § 1992* to recover a $500 forfeiture and damages, if any, incurred as a result of the disobedience. As an alternative to a contempt sanction, the court may issue a warrant for the arrest of witness or person who fails to appear [*Code Civ. Proc. § 1993(a)(1)*; *see Code Civ. Proc. §§ 1993(a)(2), (b), 1993.1-1993.2* (procedures)]. If, after a refusal to produce, the party who served the deposition subpoena seeks to impose a contempt sanction under *Code Civ. Proc. § 2020.240* without first moving for an order compelling production, he or she must present an initiating affidavit or declaration pursuant to *Code Civ. Proc. § 1211*. In this event, this form may be modified to support an opposing affidavit or declaration. For points and authorities relating generally to initiating affidavits under *Code Civ. Proc. § 1211*, see Ch. 47, *Contempt* .

Note that some cases cited in this form construe law in effect before the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that they remain consistent with current provisions [*see also § 83.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should specify the phrases used in the deposition subpoena and explain why they are too general and too broad.

[c] Related Pleading and Practice Forms

For forms and discussion related to a motion pursuant to Code Civ. Proc. § 2025.480 to compel answers or production of a writing or tangible thing, see California Forms of Pleading and Practice, Ch. 193, *Discovery: Depositions* (Matthew Bender). For general forms and discussion relating to a motion to quash or modify a subpoena under Code Civ. Proc. § 1987.1, and relating to indirect contempt proceedings initiated by an affidavit or declaration presented under Code Civ. Proc. § 1211, see California Forms of Pleading and Practice, Ch. 535 *Subpoena* and Ch. 135 *Contempt* (Matthew Bender).

[d] Related Points and Authorities

For memoranda of points and authorities relating generally to proceedings to quash or modify a subpoena and contempt proceedings, see respectively Ch. 218 *Subpoena* and Ch. 47 *Contempt* .

[3] Discussion of Authorities

[a] Subpoena Must Describe Items

Flora Crane Service, Inc. v. Superior Court *(1965) 234 Cal. App. 2d 767, 45 Cal. Rptr. 79* arose out of an action for breach of contract in which it was alleged that the individual defendant was the alter ego of the corporate defendant. Defendant filed a motion to quash a subpoena duces tecum (now termed "deposition subpoena") for a deposition. The trial court quashed the subpoena "without prejudice to the right to seek a new subpoena," and plaintiff filed a petition for a writ of mandate. The court of appeal applied the rule set out by the *Supreme Court in West Pico Furniture Co. v. Superior Court (1961) 56 Cal. 2d 407, 419-420, 15 Cal. Rptr. 119, 364 P.2d 295* , that inspection may not be had without adequate identification of the document sought to be inspected, to production of books and documents compelled by a subpoena duces tecum. The court noted, however, that the requisite identification may be defeated by generality of description, and that therefore, identification may be inadequate if the books and documents sought to be produced are identified by or included within a so called omnibus description (*234 Cal. App. 2d 767, 786)* . The unlimited characteristics of such a description may impair or destroy exactitude so that the custodian of records is not reasonably apprised of what he or she must produce (*234 Cal. App. 2d 767, 787)* .

[b] Description of Items Requested

Union Trust Co. v. Superior Court *(1938) 11 Cal. 2d 449, 81 P.2d 150* involved an action for recovery of a deficiency judgment, and a cross claim for negligence and fraud with respect to a specified trust. The SupremeCourt discussed orders for inspection under former Code Civ. Proc. § 1000, stating that an order under that section for books, papers, or documents to be inspected was required to be so specific in its terms with reference to its designation or description of the item to be inspected that the items could be readily identified (*11 Cal. 2d 449, 454)* . The Court stated that all that should be required of a party attempting to inspect records which he or she is entitled to examine, is that the party describe them with such certainty only as will or should apprise the opponent or custodian of the records of that which is desired (*11 Cal. 2d 449, 458)* . Whether the description is sufficient presents a question merely of whether under the circumstances and situation generally, considered in the light of reason and common sense, the custodian ought to recognize and be able to distinguish or identify the particular thing that is required (*11 Cal. 2d 449, 458)* .

Pacific Auto. Ins. Co. v. Superior Court *(1969) 273 Cal. App. 2d 61, 77 Cal. Rptr. 836* , arose from an action for interference with contract filed by a county against defendants for money allegedly paid by the county to one of the defendants for medical services relating to injuries which he received when he was involved in an accident with one of the other defendants. The county caused a subpoena duces tecum (now termed "deposition subpoena") to be issued and served on an investigator who investigated the accident for defendant insurance company, requiring the investigator to attend a deposition and to produce all records and correspondence between him and the insurance company prior to the filing of the complaint which concerned the accident and related settlement negotiations. The insurance company moved to quash the subpoena duces tecum and for a protective order, contending that the declaration filed as an application for the subpoena duces tecum was defective. The trial court denied the motions.

The court of appeal issued a writ of mandate requiring the court to vacate its order denying the motion to quash the subpoena duces tecum and to enter its order granting the motion, holding that the discovery request was too broad (*273 Cal. App. 2d 61, 66-70)* . In deciding whether the application for the subpoena duces tecum sufficiently identified the material to be produced (now required to be contained in deposition subpoena itself), the court relied on the discussion in *Flora Crane Service, Inc. v. Superior Court (1965) 234 Cal. App. 2d 767, 785-787, 45 Cal. Rptr. 79* (discussed in [a], *above*), that there was no reason why the standards for identification set out in *Union Trust Co.* for inspection under former Code Civ. Proc. § 1000 as well as the standards for production under its successor, former Code Civ. Proc. § 2031, should not be deemed applicable when the production of books and documents is compelled by a subpoena duces tecum. However, the court in *Pacific Auto* went farther, deciding that the description of documents in the case at bar was too broad (*273 Cal. App. 2d 61, 68-70)* .

[c] "Omnibus" Description Improper

Flora Crane Service, Inc. v. Superior Court *(1965) 234 Cal. App. 2d 767, 45 Cal. Rptr. 79* , is discussed in [a], *above*.

[d] Request for All Documents Improper

The facts and procedural background of ***Pacific Auto. Ins. Co. v. Superior Court*** *(1969) 273 Cal. App. 2d 61, 77 Cal. Rptr. 836* , are discussed in [b], *above*. In *Pacific Auto*, the court stated that the moving party had made no attempt to specify any particular documents or records, or their contents, and that in the court's opinion, the request for all correspondence, records, and documents was too broad (*273 Cal. App. 2d 61, 69-70)* .

[e] Request for Writings and Things Unnecessarily Burdensome

Stoney Brook I Homeowners Ass'n v. Superior Court *(2001) 84 Cal. App. 4th 691, 101 Cal. Rptr. 2d 67* arose out of

a personal injury action in which real party in interest alleged that he fell when a stair railing on premises controlled by petitioner homeowner association collapsed. Petitioner's orthopedic expert (also a petitioner in this proceeding) examined the real party in interest and prepared a report for petitioner homeowners association. Real party in interest then served the expert with a subpoena duces tecum, that required the expert to produce at his deposition all of his defense litigation-related billings and all of his plaintiff litigation-related billing for the preceding four years. Petitioner homeowners association filed a motion to quash the subpoena or, in the alternative, for a protective order limiting the scope of records and testimony the expert would be required to produce at this deposition. Petitioner argued that the request for billing records was overly broad, burdensome, and an invasion of both expert's and his patients' privacy rights. In response, real party in interest produced excerpts of expert's deposition and trial testimony in six separate trials, showing that expert's prior responses to efforts to determine how much of his practice was devoted to providing expert testimony for defendants in personal injury actions were sorely inadequate. Petitioner homeowners association responded to the excepts by arguing that, since expert's deposition had not even been taken, real party in interest's deposition subpoena was premature and lacked foundation. The trial court denied petitioners' motion to quash the subpoena and, instead, issued an order requiring that the expert respond to it by producing a detailed summary setting forth the total number of patients he had treated over the last four years, the total number of patients he had examined for defendants and for plaintiffs, and his total compensation from defendants and from plaintiffs. Petitioner homeowners association applied for ex parte for relief fromthe order on the grounds that the time it would take to compile the information for the required summary was unduly burdensome. In response, the trial court ordered the expert to give temporary personnel retained by real party in interest access to his patient files to compile the summary. Petitioners filed a writ of mandate, asserting that the trial court's orders unduly invaded the expert's right to privacy and, further, that they would prevent petitioner homeowners association from obtaining expert testimony from this expert, who stated he would withdraw if compelled to comply with the trial court's order (*84 Cal. App. 4th 691, 694-697)* .

The court of appeal granted the writ. Although there was no serious dispute that real party in interest was entitled to know the percentage of expert's practice involving, and his compensation, for defense work, the court advanced two reasons for its decision. First, a litigant's right to evidence of an expert's potential bias is not unfettered or unconditional. When the interest of a private litigant in discovering relevant facts conflicts with the right of others to maintain reasonable privacy regarding their financial affairs, before ordering disclosure the trial court must indulge in a careful balancing before ordering disclosure. Further, a court must not order disclosure of the private financial affairs of nonparties without a careful scrutiny of the real needs of the litigant seeking discovery (*84 Cal. App. 4th 691, 699)* . Although experts generally are required to provide information about their roles in prior proceedings that would permit an adversary a meaningful opportunity to demonstrate any bias or prejudice, precise information about the number of cases in which the expert has testified or the amount of compensation the expert has received is not required. Moreover, because the expert in this case filed a declaration to the effect that if compelled to testify with the subpoena, he would withdraw as an expert, the court was hesitant to enter an order which, as a practical matter, would exclude the designated expert from testifying. Accordingly, the court issued a writ of mandate ordering the trial court to vacate its orders and to enter a new order directing that in his deposition, expert provide real party in interest with a less obtrusive summary of his defense and plaintiff-related medical-legal work (*84 Cal. App. 4th 691, 700)* .

In ***Calcor Space Facility, Inc. v. Superior Court*** *(1997) 53 Cal. App. 4th 216, 61 Cal. Rptr. 2d 567* , the court of appeal, in denying a discovery demand on grounds it was unnecessarily burdensome, held that the express statutory provision governing motions to compel production of documents under former Code Civ. Proc. § 2031(*l*) (*now see Code Civ. Proc. 2031.310*), requiring that the party seeking discovery must supply evidence demonstrating a reasonable relationship between the material sought to be produced and the issues involved in the case, applies to motions to compel compliance with deposition subpoenas under former Code Civ. Proc. §§ 2020(d) (*now see Code Civ. Proc. §§ 2020.410-2020.440*) (*53 Cal. App. 4th 216, 218-219)* . This requirement applies eventhough it is not stated expressly within the language of former Code Civ. Proc. §§ 2020(d) (*now see Code Civ. Proc. §§ 2020.410-2020.440*). Since deposition subpoenas are used to obtain document discovery from non-party witnesses, it is unlikely that the Legislature intended to impose greater discovery burdens on non-parties than may be imposed on litigants under former Code Civ. Proc. § 2031(*l*) (*now see Code Civ. Proc. §§ 2031.310*).

Allen v. Superior Court *(1984) 151 Cal. App. 3d 447, 198 Cal. Rptr. 737* involved an action for personal injury. Plaintiff noticed a defense expert who had examined plaintiff for depositions and served the expert with a subpoena duces tecum (now termed "deposition subpoena"). The subpoena duces tecum required the expert to produce, inter alia, records pertaining to all examinations that the expert had conducted at the request of the defense over the last five years, and any records showing what proportion of the expert's income over the past five years came from the treatment of patients instead of medical evaluation of persons for personal injury defendants. Defendant moved for a protective order precluding production of these records. Defendant stated that the expert saw a great number patients annually and that his records were not organized for easy search, since they were retrievable only by names of particular patients and not by the type of work done or by the source of income. Plaintiff argued that she required the records to show bias, prejudice, and unfairness on the part of the expert and submitted evidence that the expert had testified for the defense in a large number of cases in the last five years. The trial court denied the protective order for most of the types of records requested, and ordered only that the names of the expert's patients and examinees need not be disclosed. Subsequently, the trial court denied reconsideration, and defendant petitioned for writ of mandate.

The court of appeal granted the writ. The court preliminarily stated that the issue in the case did not involve propriety of discovery of the information contained in the records, since the trial court had balanced the expert's privacy rights against plaintiff's need to show bias and had properly concluded that plaintiff's need outweighed the expert's privacy rights (*151 Cal. App. 3d 447, 452-453)* . The court stated that the issue was whether the trial court had properly weighed the burden on the expert of actually producing the records and had assured itself that the need for this means of discovery justified imposing such a burden (*151 Cal. App. 3d 447, 452)* . The court noted that plaintiff had made no showing that the information sought, or substantially equivalent information, could not be obtained through other means, such as questions at a deposition without production of records. Thus, the court held that the trial court had abused its discretion when it had failed to require a less obtrusive means of discovery (*151 Cal. App. 3d 447, 453)* .

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 83 DISCOVERY: DEPOSITIONS
PART II. FORMS
B. Motions to Compel Oral Deposition Matters

8-83 California Points & Authorities §§ 83.47-83.49

[Reserved]

§§ 83.47[Reserved]

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8-83 California Points & Authorities § 83.50

§ 83.50 Opposing Motion for Order Compelling Nonparty Testimony or Production [Code Civ. Proc. §§ 2020.410-2020.510]--Specific and Timely Objection by Nonparty Based on Privilege [Code Civ. Proc. § 2025.460(a)]

[1] FORM

[*Caption. See § 83.45.*]

THE COURT SHOULD DENY THE MOTION TO COMPEL BECAUSE THE MATTER SOUGHT IS PRIVILEGED FROM DISCLOSURE. OBJECTION BASED ON PRIVILEGE MAY BE MADE FOR THE FIRST TIME IN OPPOSITION TO A MOTION TO COMPEL, AND IS NOT WAIVED FOR FAILURE TO RAISE THE OBJECTION EARLIER, FOR EXAMPLE, IN A MOTION TO QUASH THE DEPOSITION SUBPOENA.

A. Matter Not Discoverable If Privileged. Matter is not subject to discovery if it is privileged, and a court clearly cannot compel its discovery (*Code Civ. Proc. §§ 2017.010, 2025.480*).

B. Nonparty's Timely Objection to Order Compelling Production Is Sufficient; Motion to Quash Is Not Required to Object. Nonparties who want to challenge a records only or records and testimony deposition subpoena may simply wait and object, putting the onus on the proponent to move to compel. They are not required to file a motion to quash to object to the request (*Monarch Healthcare v. Superior Court (2000) 78 Cal. App. 4th 1282, 1284, 93 Cal. Rptr. 2d 619*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities is for use in opposition to a party seeking an order to compel either records or records and testimony [*see Code Civ. Proc. §§ 2020.410-2020.510*]. The grounds for opposition are that the records or testimony, or both, are privileged and therefore notdiscoverable [*Code Civ. Proc. §§ 2017.010, 2025.480*], and that the nonparty's timely objection to the order compelling production is sufficient. For memoranda of points and authorities relating to specific grounds of evidentiary privilege or other protection from discovery, see generally Ch. 81, *Discovery: Privileges and Other Discovery Limitations* .

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. In particular, counsel should set forth facts of the case that show that the records or records and testimony sought are privileged.

[3] Discussion of Authorities

[a] Nonparty's Timely Objection to Order Compelling Production Is Sufficient; Motion to Quash Is Not Required to Object

In ***Monarch Healthcare v. Superior Court*** *(2000) 78 Cal. App. 4th 1282, 93 Cal. Rptr. 2d 619* , plaintiff physician, real party in interest, sued other physicians for unfairly competing to secure a managed care contract from petitioner. Real party in interest did not initially name petitioner as a defendant, but instead served a records only deposition subpoena on petitioner's custodian of records as a nonparty witness. Petitioner did not file a motion to quash, but produced some of the documents, raising trade secrets and privacy objections. After petitioner was named a defendant in the third amended complaint, plaintiff moved to compel production. Petitioner opposed the motion and suggested an in camera inspection because it claimed that discovery sought sensitive financial, business, and technical information unrelated to plaintiff's cause of action. At the hearing, the trial court, on its own accord, announced that petitioner, as a nonparty at the time of the discovery request, could only object via a motion to quash (*78 Cal. App. 4th 1282, 1285)* .

As a matter of first impression, the court of appeal held that the discovery rules do not discriminate against nonparty deponents: Nonparties who want to challenge a records only or records and testimony deposition subpoena may simply wait and object, putting the onus on the proponent to move to compel. They are not required to file a motion to quash to object to the request (*78 Cal. App. 4th 1282, 1284)* . The court explained that *Code Civ. Proc. § 1987.1* contains permissive, not mandatory, language regarding motions to quash (*78 Cal. App. 4th 1282, 1287-1288)* . Further, former Code Civ. Proc. § 2025 (*now see Code Civ. Proc. § 2025.010 et seq.*) does not apply only to oral depositions, but rather contains provisions pertaining to depositions for production of business records and things underformer Code Civ. Proc. § 2020(d) (*now see Code Civ. Proc. §§ 2020.410-2020.440*) (*78 Cal. App. 4th 1282, 1288-1289)* . The court also expressed concern about the potential for abuse if a harsher rule were created for nonparties than for parties (*78 Cal. App. 4th 1282, 1288-1289)* . Accordingly, the court ordered a preemptory writ of mandate directing respondent court to vacate its orders granting the motion to compel further production and to set the matter of a new hearing on the grounds stated in the motion (*78 Cal. App. 4th 1282, 1291)* .

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B. Motions to Compel Oral Deposition Matters

8-83 California Points & Authorities §§ 83.51-83.59

[Reserved]

§§ 83.51[Reserved]

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C. Motion to Quash Deposition Notice

8-83 California Points & Authorities § 83.60

§ 83.60 Supporting Motion for Order Staying Taking of Deposition and Quashing Deposition Notice [Code Civ. Proc. § 2025.410]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ORDER STAYING TAKING OF DEPOSITION AND QUASHING DEPOSITION NOTICE AND FOR MONETARY SANCTION
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	Date: _____
	)	Time: _____
	)	Location: _____
		[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

_____ [*Specify party, e.g.*, PLAINTIFF _____ (*name*)] HAS BEEN SERVED WITH A DEPOSITION NOTICE THAT DOES NOT COMPLY WITH SECTION 2025.010 ET SEQ. OF THE CODE OF CIVIL PROCEDURE, AND HAS MADE AN UNSUCCESSFUL BUT REASONABLE AND GOOD-FAITH ATTEMPT AT AN INFORMAL RESOLUTION OF THE ISSUE, AND THUS THE COURT SHOULD GRANT HIS/HER/ITS MOTION FOR AN ORDER THAT THE TAKING OF THE DEPOSITION BE STAYED AND THAT THE DEPOSITION NOTICE BE QUASHED, AND SHOULD IMPOSE A MONETARY

SANCTION.

A. Motion to Stay Deposition and Quash. When a party is served with a deposition notice that does not comply with *Sections 2025.210-2025.270 of the Code of Civil Procedure*, that party may make a motion, accompanied by a declaration stating facts showing a reasonable and good-faith attempt at an informal resolution of any issue presented by the motion, for an order staying the taking ofthe deposition and quashing the deposition notice (*Code Civ. Proc. § 2025.410*).

B. Motion May Be Made in Addition to Objection. A party who is served with a defective deposition notice may move for an order staying the taking of a deposition and quashing its notice, in addition to serving a timely written objection specifying the error or irregularity on the party seeking to take the deposition and any other attorney or party on whom the deposition notice was served (*Code Civ. Proc. § 2025.410*).

C. Stay of Taking Deposition Pending Resolution. The taking of the deposition is stayed pending the determination of the motion for stay of deposition and quashing of deposition notice (*Code Civ. Proc. § 2025.410*).

D. Court Must Impose Monetary Sanction Absent Specified Findings. The court must impose a monetary sanction under *Section 2023.030 of the Code of Civil Procedure* against any party, person, or attorney who unsuccessfully opposes a motion to quash a deposition notice, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust (*Code Civ. Proc. §§ 2023.030(a), 2025.410(d)*; *California Shellfish, Inc. v. United Shellfish Co. (1997) 56 Cal. App. 4th 16, 25-26, 64 Cal. Rptr. 2d 797* (*Code Civ. Proc. §§ 2020.410-2020.440* deposition subpoena)).

[*Add points and authorities generally supporting the imposition of monetary sanctions. See Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities is for use by a party seeking an order staying the taking of a deposition and quashing the deposition notice when the deposition notice has error or irregularity, and for a monetary sanction. The motion must be accompanied by a declaration statingfacts showing a reasonable and good-faith attempt at an informal resolution of any issue presented by the motion. Timely objection must have been served on the party seeking to take the deposition and on any other attorney or party on whom the deposition notice was served, or the error or irregularity of the deposition notice is waived [*Code Civ. Proc. § 2025.410*]. This form should be combined with general points and authorities supporting the imposition of monetary sanctions under *Code Civ. Proc. § 2023.030(a)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should state facts showing the error or irregularity in the deposition notice warranting the quashing of the notice, and otherwise show substantial justification for the motion in order to avoid a monetary sanction if the motion is denied.

However, counsel need not set forth facts showing that the party who served the deposition notice acted without substantial justification because *Code Civ. Proc. § 2023.030(a)* effectively places that burden on the person against whom the sanction is to be imposed, by requiring that court impose a monetary sanction when it is expressly authorized *unless* it finds that he or she acted with substantial justification or that other circumstances would make the monetary sanction unjust.

[c] Related Pleading and Practice Forms

For forms and discussion related to the obtaining of an order pursuant to Code Civ. Proc. § 2025.410 to stay the taking of a deposition and to quash the deposition notice, and to obtain a monetary sanction for the expenses incurred pursuant to Code Civ. Proc. §§ 2023.030(a) and 2025.410, see Ch. 193, *Discovery: Depositions* (Matthew Bender).

[d] Related Points and Authorities

For memoranda of points and authorities for use by a party seeking a protective order under *Code Civ. Proc. § 2025.420* or *2025.470*, see *§ 83.80* et seq.

[3] Discussion of Authorities

[a] Court Must Impose Monetary Sanction Absent Specific Findings

In ***California Shellfish, Inc. v. United Shellfish Co.*** *(1997) 56 Cal. App. 4th 16, 64 Cal. Rptr. 2d 797* plaintiff served a non-party witness with a deposition subpoena seeking discovery of business records before servingthe summons and complaint on the only named defendant, and without notice of the deposition to any defendant. The trial court granted the nonparty's motion to quash the deposition subpoena and imposed a monetary sanction against plaintiff.

The court of appeal affirmed. The court found that the "deposition hold" of former Code Civ. Proc. § 2025(b)(2) (*now see Code Civ. Proc. § 2025.210(b)*) applies to deposition subpoenas issued under former Code Civ. Proc. § 2020(d) (*now see Code Civ. Proc. § 2020.410 et seq.*). Thus, plaintiff's improperly served deposition subpoena was properly quashed (*56 Cal. App. 4th 16, 25)* . The court of appeal rejected plaintiff's contention that the trial court must expressly find that plaintiff acted willfully or without substantial justification in opposing the motion to quash the deposition subpoena. It explained that a trial court will impose a monetary sanction for unsuccessfully opposing such a motion unless the losing party convinces the court that it acted with substantial justification. Accordingly, plaintiff's unsuccessful opposition to the motion to quash, which consisted solely of a letter to the court, without any supporting papers such as a memorandum of points and authorities, was subject to sanctions (*56 Cal. App. 4th 16, 25-26)* .

[4] Additional Authorities

[a] Motion May Be Made in Addition to Objection

The facts and procedural background of *Monarch Healthcare v. Superior Court (2000) 78 Cal. App. 4th 1282, 93 Cal. Rptr. 2d 619* are discussed in *§ 83.50[3][a]*. As a matter of first impression, the court of appeal in *Monarch* held that the discovery rules do not discriminate against nonparty deponents: Nonparties who want to challenge a records only or records and testimony deposition subpoena may simply wait and object, putting the onus on the proponent to move to compel. They are not required to file a motion to quash to object to the request (*78 Cal. App. 4th 1282, 1284)* .

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8-83 California Points & Authorities §§ 83.61-83.69

[Reserved]

§§ 83.61[Reserved]

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C. Motion to Quash Deposition Notice

8-83 California Points & Authorities § 83.70

§ 83.70 Opposing Motion for Order Staying Taking of Deposition and Quashing Deposition Notice [Code Civ. Proc. § 2025.410]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR ORDER STAYING TAKING OF DEPOSITION AND QUASHING DEPOSITION NOTICE, AND REQUEST FOR MONETARY SANCTION
vs.	)	
_____ [*name*],	)	
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
		[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE MOVING PARTY HAS NOT COMPLIED WITH THE REQUIREMENTS OF SECTION 2025.410 OF THE CODE OF CIVIL PROCEDURE AND THUS IS NOT ENTITLED TO AN ORDER STAYING THE TAKING OF THE DEPOSITION OR QUASHING THE DEPOSITION NOTICE, AND FURTHER, A MONETARY SANCTION SHOULD BE IMPOSED ON THE MOVING PARTY FOR BRINGING THE MOTION.

[*EITHER*]

A. Only Deposition Notice With Error or Irregularity May Be Quashed. A party served with a deposition notice may move that it be quashed and that the taking of the deposition be stayed, pursuant to *Section 2025.410 of the Code of Civil Procedure*, only if the deposition notice does not comply with *Sections 2025.210-2025.270 of the Code of Civil Procedure* (*Code Civ. Proc. § 2025.410*).

[*AND/OR*]

B. Waiver of Error or Irregularity. Even if a party is served with a deposition notice that does not comply with *Sections 2025.210-2025.270 of the Code of Civil Procedure*, that party waives any error or irregularity unless that party promptly serves a written objection specifying that error or irregularity at least three calendar days prior to the date for which the deposition is scheduled, on the party seeking to take the deposition and any other attorney or party on whom the deposition notice was served. If the objection is made three calendar days before the deposition date, the objecting party is required to make personal service of that objection pursuant to *Section 1011 of the Code of Civil Procedure* on the party who gave notice of the deposition (*Code Civ. Proc. § 2025.410*).

[*AND/OR*]

C. Motion Must Be Accompanied by Declaration. A party served with a deposition notice may move that it be quashed and that the taking of the deposition be stayed, pursuant to *Section 2025.410(c) of the Code of Civil Procedure*, only if the motion is accompanied by a declaration stating facts showing a reasonable and good-faith attempt at an informal resolution of any issue presented by the motion (*Code Civ. Proc. § 2025.410(c)*).

[*AND/OR*]

D. Court Must Impose Monetary Sanction Absent Specified Findings. The court must impose a monetary sanction under *Section 2023.030 of the Code of Civil Procedure* against any party, person, or attorney who unsuccessfully makes a motion to quash a deposition notice, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust (*Code Civ. Proc. §§ 2023.030(a), 2025.410(d)*).

[*Add points and authorities generally supporting the imposition of monetary sanctions. See Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities is for use in opposition to a motion for an order staying the taking of a

deposition and quashing the deposition notice, and for a monetary sanction. It should be combined with general points and authorities supporting the imposition of monetary sanctions under *Code Civ. Proc. § 2023.030(a)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should state facts showing that the deposition notice had no error or irregularity under any of the provisions of *Code Civ. Proc. §§ 2025.210-2025.270*, any facts showing that the moving party made no timely objection to the notice and therefore waived error or irregularity, and any facts showing how the party opposing the motion has engaged in a reasonable and good-faith attempt at an informal resolution of the issues presented by the motion. However, counsel need not set forth facts showing that the moving party acted without substantial justification, because *Code Civ. Proc. § 2023.030(a)* effectively places that burden on the person against whom the sanction is to be imposed, by requiring that the court impose a monetary sanction when it is expressly authorized *unless* it finds that he or she acted with substantial justification or that other circumstances would make the monetary sanction unjust.

[c] Related Pleading and Practice Forms

For forms and discussion related to a motion for an order pursuant to Code Civ. Proc. § 2025.410 to stay the taking of a deposition and to quash the deposition notice, and to obtain a monetary sanction for the expenses incurred pursuant to Code Civ. Proc. §§ 2023.030(a) and 2025.410, see Ch. 193, *Discovery: Depositions* (Matthew Bender).

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8-83 California Points & Authorities §§ 83.71-83.79

[Reserved]

§§ 83.71[Reserved]

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8-83 California Points & Authorities § 83.80

§ 83.80 Supporting Motion for Protective Order for Deposition [Code Civ. Proc. §§ 2025.420, 2025.470]--General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR A PROTECTIVE ORDER RE DEPOSITION ON ORAL EXAMINATION AND FOR MONETARY SANCTION
vs.	)	
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD ISSUE A PROTECTIVE ORDER REGARDING THE ORAL DEPOSITION OF _____ [*name*] BECAUSE GOOD CAUSE HAS BEEN SHOWN AND THE ORDER IS REQUIRED BY JUSTICE TO PROTECT _____ [*name*], A _____ [PARTY *or* DEPONENT *or* NATURAL PERSON *or* ORGANIZATION] FROM UNWARRANTED ANNOYANCE, EMBARRASSMENT, OR OPPRESSION, OR UNDUE BURDEN AND EXPENSE. THE COURT SHOULD ALSO IMPOSE A MONETARY SANCTION.

A. Power of Court to Issue Protective Order. For good cause shown, the court may make any order concerning a deposition that justice requires to protect any party, deponent, natural person, or organization from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense (*Code Civ. Proc. § 2025.420(b)*).

B. Particular Orders Available. The protective orders that the court may issue under *Section 2025.420 of the Code of Civil Procedure* are not limited to, but include the following particular order(s):

[*EITHER*]

That the deposition not be taken at all (*Code Civ. Proc. § 2025.420(b)(1)*).

[*AND/OR*]

That the deposition be taken at a different time (*Code Civ. Proc. § 2025.420(b)(2)*).

[*AND/OR*]

That the deposition, which is a video recording of the deposition testimony of a treating physician, consulting physician, or expert witness that is intended for use at trial pursuant to *Section 2025.620(d) of the Code of Civil Procedure*, be postponed until the moving party has had an adequate opportunity to prepare for cross-examination by discovery, deposition of the deponent, or other means (*Code Civ. Proc. § 2025.420(b)(3)*).

[*AND/OR*]

That the deposition be taken at a place other than that specified in the deposition notice, if it is within a distance permitted by *Sections 2025.250* and *2025.260 of the Code of Civil Procedure* (*Code Civ. Proc. § 2025.420(b)(4)*).

[*AND/OR*]

That the deposition be taken only on certain specified terms and conditions (*Code Civ. Proc. § 2025.420(b)(5)*).

[*AND/OR*]

That the deponent's testimony be taken by written, instead of oral, examination (*Code Civ. Proc. § 2025.420(b)(6)*).

[*AND/OR*]

That the method of discovery be interrogatories to a party instead of an oral deposition (*Code Civ. Proc. § 2025.420(b)(7)*).

[*AND/OR*]

That the testimony be recorded in a manner different from that specified in the deposition notice (*Code Civ. Proc. § 2025.420(b)(8)*).

[*AND/OR*]

That certain matters not be inquired into (*Code Civ. Proc. § 2025.420(b)(9)*; *see John Z. v. Superior Court (1991) 1 Cal. App. 4th 789, 791-792, 2 Cal. Rptr. 2d 556*).

[*AND/OR*]

That the scope of the examination be limited to certain matters (*Code Civ. Proc. § 2025.420(b)(10)*).

[*AND/OR*]

That all or certain of the writings or tangible things designated in the deposition notice not be produced, inspected, or copied (*Code Civ. Proc. § 2025.420(b)(11)*).

[*AND/OR*]

That designated persons, other than the parties to the action and their officers and counsel, be excluded from attending the deposition (*Code Civ. Proc. § 2025.420(b)(12)*).

[*AND/OR*]

That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only to specified persons or only in a specified way (*Code Civ. Proc. § 2025.420(b)(13)*).

[*AND/OR*]

That the parties simultaneously file specified documents enclosed in sealed envelopes to be opened as directed by the court (*Code Civ. Proc. § 2025.420(b)(14)*).

[*AND/OR*]

That the deposition be sealed and thereafter opened only on order of the court (*Code Civ. Proc. § 2025.420(b)(15)*).

[*AND/OR*]

That the examination of the deponent be terminated (*Code Civ. Proc. § 2025.420(b)(16)*).

[*CONTINUE*]

C. Time for Motion. Before, during, or after a deposition, any party, deponent, affected natural person, or affected organization may promptly make a motion for a protective order, accompanied by a declaration stating facts showing a reasonable and good-faithattempt at an informal resolution of the issues presented (*Code Civ. Proc. § 2025.420(a)*).

D. Power to Prevent Abuse. Under *Sections 2025.420* and *2025.470 Code of Civil Procedure*, the court has the power to prevent abuse of the discovery process, provided that the requisite factual showing is made by the party seeking the protective order (*see Greyhound Corp. v. Superior Court (1961) 56 Cal. 2d 355, 373, 383, 15 Cal. Rptr. 90, 364 P.2d 266*).

E. Factual Showing of Good Cause. The good cause that is required for a protective order requires a factual exposition of a reasonable basis for the order sought (*see Goodman v. Citizens Life & Cas. Ins. Co. (1967) 253 Cal. App. 2d 807, 819, 61 Cal. Rptr. 682*).

[*Optional*] **F. Balancing Burden Against Likelihood of Discovering Admissible Evidence.** The court shall limit the scope of discovery if, pursuant to a motion for protective order, it determines that the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence (*Code Civ. Proc. § 2017.020(a)*; *see Southern California Edison Co. v. Superior Court (1972) 7 Cal. 3d 832, 842-843, 103 Cal. Rptr. 709, 500 P.2d 621* ; *Greyhound Corp. v. Superior Court (1961) 56 Cal. 2d 355, 383-384, 15 Cal. Rptr. 90, 364 P.2d 266* ; *Calcor Space Facility, Inc. v. Superior Court (1997) 53 Cal. App. 4th 216, 223* ; *61 Cal. Rptr. 2d 567*).

[*Optional*] **G. Timing as Constituting Annoyance, Embarrassment, or Oppression.** When the timing of discovery proceedings would cause unfair advantage to accrue to one of the parties, then that unfair advantage may constitute annoyance, embarrassment, or oppression which the court is empowered to prevent by means of protective orders (*see Rosemont v. Superior Court (1964) 60 Cal. 2d 709, 714, 36 Cal. Rptr. 439, 388 P.2d 671*).

[*Optional*] **H. Protection Against Disclosure of Privileged Matters.** A protective order may be issued to protect against the disclosure of privileged communications that are sought during discovery (*see Britt v. Superior Court (1978) 20 Cal. 3d 844, 862-864, 143 Cal. Rptr. 695, 574 P.2d 766*).

[*Optional*] **I. Motion During Examination.** The party conducting the deposition and the deponent may stipulate, or any party attending the deposition or the deponent may demand, that the testimony be suspended, to enable that party or deponent to make a motion, accompanied by a declaration stating facts showing a reasonableand good-faith attempt at an informal resolution of the issues presented, for a protective order on the ground that the examination is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses that party or deponent. For good cause shown, the court may terminate the examination, which may not thereafter be resumed except on order of the court, or the court may limit the scope and manner of taking the deposition as provided in *Code of Civil Procedure Section 2025.420* (*Code Civ. Proc. § 2025.470*).

J. Court Must Impose Monetary Sanction Absent Specified Findings. The court must impose a monetary sanction under *Code of Civil Procedure Section 2023.030* against any party, person, or attorney who unsuccessfully opposes a motion for a protective order under *Code of Civil Procedure Section 2025.420*, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust (*Code Civ. Proc. §§ 2023.030(a), 2025.420, 2025.470*).

[*Add supporting points and authorities for each particular type of protective order sought (see, e.g., § 83.81 et seq.). When appropriate, include specific points and authorities relating to objections, privileges, or other grounds that provide the basis for "good cause." Add points and authorities generally supporting the imposition of monetary sanctions (see, e.g., Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11).*]

Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

These points and authorities are for use in supporting a motion for a protective order concerning a deposition. The motion must be made before the court in which the action is pending [*Code Civ. Proc. § 2016.020(b)*; *see Code Civ. Proc. §§ 2025.420, 2025.470*], and must be accompanied by a declaration stating facts showing a reasonable and good-faith attempt at an informal resolution of each issue presented by the motion [*see Code Civ. Proc. § 2025.420(a)*]. This form should be combined with points andauthorities supporting the granting of the particular protective orders sought [*see § 83.81* et seq.]. It should also be combined with general points and authorities supporting the imposition of monetary sanctions under *Code Civ. Proc. § 2023.030(a)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11*]..

Note that some cases cited in this form construe law in effect before the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that they remain consistent with current provisions [*see also § 83.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should state facts showing the need for protection from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense, and otherwise show substantial justification for the motion in order to avoid a monetary sanction if the motion is denied [*see Code Civ. Proc. §§ 2025.420, 2025.470*]. Counsel should also state facts and insert argument in favor of particular protective orders that he or she desires, such as showing facts and reasons why the deposition should not be taken at all. However, counsel need not set forth facts showing that the opposing party acted without substantial justification, because *Code Civ. Proc. § 2023.030(a)* effectively places that burden on the person against whom the sanction is to be imposed, by requiring that the court impose a monetary sanction when it is expressly authorized *unless* it finds that he or she acted with substantial justification or that other circumstances would make the monetary sanction unjust.

[c] Related Pleading and Practice Forms

For forms and discussion relating to a protective order under Code Civ. Proc. §§ 2025.420 or 2025.470, see California Forms of Pleading and Practice, Ch. 193, *Discovery: Depositions* (Matthew Bender).

[d] Related Points and Authorities

For a memorandum of points and authorities for use by a party seeking to stay the taking of a deposition and quash the deposition notice under *Code Civ. Proc. § 2025.410*, see *§ 83.60*.

[3] Discussion of Authorities

[a] Particular Orders Available

In ***John Z. v. Superior Court*** *(1991) 1 Cal. App. 4th 789, 2 Cal. Rptr. 2d 556* , a utility company sued a contractor for fraud after it learneddefendant was allegedly being paid for services not rendered. While deposing a company employee, defendants learned of the existence of an informant on whose tip plaintiff had acted. When the employee refused to identify the informant, defendant moved to compel disclosure. Although the informant, who was not to be called at trial, filed a sealed declaration describing threats to his life, the trial court determined that the threat was not serious, and ordered disclosure of the informant's identity. Plaintiff appealed.

The court of appeal vacated the order and directed that all sealed documents remain under seal, holding that the trial court had abused its discretion. In so ruling, the court noted that for good cause, a court has the authority under former Code Civ. Proc. § 2025(i)(9) (*now see Code Civ. Proc. § 2025.420(b)(9)*) to issue a protective order directing that a matter not be inquired into during the taking of a deposition. This authority encompasses an order protecting the identity of an informant whose safety would be jeopardized by disclosure. The determination of whether to prohibit disclosure requires a balancing of the informant's interest in safety against the litigant's need for the information (*1 Cal. App. 4th 789, 791)* . Defendants claimed that knowledge of the informant's identity was necessary to obtain information regarding plaintiff's failure to mitigate damages and its motivation to put defendant out of business. Concluding that the informant's interests prevailed over defendant's, the court pointed out that either the informant was not an eyewitness to important events and would not be helpful, or he was an eyewitness and would be found during routine discovery (*1 Cal. App. 4th 789, 791-792)* .

[b] Power to Prevent Abuse

Greyhound Corp. v. Superior Court *(1961) 56 Cal. 2d 355, 15 Cal. Rptr. 90, 364 P.2d 266* , is the leading case construing the purposes and philosophy behind the former Discovery Act. *Greyhound* concerned a personal injury action involving an accident between plaintiffs' motor vehicle and defendant's bus. At the scene of the accident, before plaintiffs were taken to the hospital, defendant's adjusters and investigators obtained written and signed statements concerning the accident from various witnesses, many of whom were out-of-state residents. After unsuccessfully attempting to obtain these witnesses' accounts from other sources, plaintiffs made a motion to require defendant to produce and permit the inspection, copying or photographing of the witnesses' statements. Although defendant objected to the production of these statements on various grounds, the trial court ordered their production. This holding was affirmed by the Supreme Court, which denied defendant's application for a writ of prohibition (*56 Cal. 2d 355, 402)* .

In resolving the question of the propriety of the trial court's order, the Supreme Court laid down guidelines for courts to follow in ruling onobjections to discovery requests and on protective orders, setting forth the burdens of proof to be borne by the party seeking discovery and by the party resisting discovery (*56 Cal. 2d 355, 377-384)* . The Court characterized protective orders as a new method for controlling the abuse that might be occasioned by the wide latitude authorized by the newly enacted discovery statutes (*56 Cal. 2d 355, 373)* . Protective orders are thus within the power to prevent abuse bestowed on the trial court by former Code Civ. Proc. § 2019(b)(1) [*now see Code Civ. Proc. § 2025.420*], and that power of the court is tantamount to the power to exercise discretion based on the factual showing made by the parties (*56 Cal. 2d 355, 383)* .

Note that the Supreme Court has since cited its prior decision in *Greyhound* with approval, and stated that the general conclusions in *Greyhound* apply equally to the new discovery statutes enacted by the Civil Discovery Act of 1986 [*see Emerson Electric Co. v. Superior Court (1997) 16 Cal. 4th 1101, 1107-1108, 68 Cal. Rptr. 2d 883, 946 P.2d 841*)].

[c] Factual Showing of Good Cause

Goodman v. Citizens Life & Cas. Ins. Co. *(1967) 253 Cal. App. 2d 807, 61 Cal. Rptr. 682* was an action for wrongful termination of an agency contract. In that case, plaintiffs noticed the deposition of an out-of-state witness, and defendant moved for an order that plaintiffs pay defense counsel's travel expenses to Missouri where the deposition was to take

place, citing only former Code Civ. Proc. § 2019(b)(1) [*now see Code Civ. Proc. § 2025.420*] in support of this motion. The trial court granted defendant's motion for expenses.

The court of appeal reversed, stating that even assuming arguendo that the order requiring payment of travel expenses is an order protecting defendant from annoyance, embarrassment, or oppression, there still needs to be a factual exposition of reasonable grounds constituting good cause for the order (*253 Cal. App. 2d 807, 819)* . Neither the statement that it would be necessary to travel from California to Missouri, nor the statement concerning anticipated expenses made on information and belief (and therefore of no evidentiary value) was sufficient to provide grounds for the trial court's order (*253 Cal. App. 2d 807, 819-820)* .

[d] Balancing Burden Against Likelihood of Discovering Admissible Evidence

For discussion of *Southern California Edison Co. v. Superior Court (1972) 7 Cal. 3d 832, 103 Cal. Rptr. 709, 500 P.2d 621* , *Greyhound Corp. v. Superior Court (1961) 56 Cal. 2d 355, 15 Cal. Rptr. 90, 364 P.2d 266* , and *Calcor Space Facility, Inc. v. Superior Court (1997) 53 Cal. App. 4th 216, 61 Cal. Rptr. 2d 567* , see *Ch. 80, Discovery: Scope, Regulation, and Timing, § 80.80[3][a]* [*see also* discussion of *Greyhound* in [b], *above*].

[e] Timing as Constituting Annoyance, Embarrassment, or Oppression

Rosemont v. Superior Court *(1964) 60 Cal. 2d 709, 36 Cal. Rptr. 439, 388 P.2d 671* was an action for a breach of oral contract. In *Rosemont,* after plaintiff's deposition was taken, defendants moved for a protective order to stay the taking of defendants' deposition pending the disposition of a mandamus action that, if granted, would require plaintiff to produce certain recordings. The trial court granted defendants' motion for a protective order, setting forth a schedule ordering the various forms of discovery, and requiring the plaintiff to identify the recordings in question. Plaintiff sought a writ of prohibition.

The Supreme Court denied the writ, reasoning that while ordinarily parties should be required to expedite discovery, and while the mere advantage to one party that may be gained by altering the timing does not constitute good cause, nevertheless plaintiff's withholding of the recordings in this case would give him an unfair advantage. Therefore, it was reasonable for the Court to conclude that denial of the stay in these circumstances would in itself constitute annoyance, embarrassment, or harassment (*60 Cal. 2d 709, 714-715)* .

[f] Protection Against Disclosure of Privileged Matters

In ***Britt v. Superior Court*** *(1978) 20 Cal. 3d 844, 143 Cal. Rptr. 695, 574 P.2d 766* , owners of land near an airport sought compensation for diminution in land value and for personal injuries allegedly caused by the operation of a nearby airport. Defendant sought depositions of plaintiffs in order to examine any of their past political activities which were connected with opposition to the airport. Defendant also asked for production of certain documents and for interrogatories dealing with complete accounts of lifetime mental and physical health histories of all of the plaintiffs. Plaintiffs moved for a protective order, seeking to restrain defendant's inquiry into their past political associations and medical histories. They volunteered, however, to provide defendant with medical information relating to the injuries for which recovery was sought. The trial court denied the motion for a protective order.

The Supreme Court granted a writ, holding that the patient-litigant exception to the physician-patient privilege only extends to those conditions that the patient-litigant has himself disclosed by bringing an action in which they are in issue (*20 Cal. 3d 844, 863)* . The Court stated that, in order to determine the precise scope of the inquiry, on remand defendant must frame its interrogatories more narrowly so that they do not improperly impinge on privileged information (*20 Cal. 3d 844, 862, 863 n.7*).

[4] Additional Authorities

[a] Power of Court to Issue Protective Order

In *Steiny and Co. v. California Electric Supply Co. (2000) 79 Cal. App. 4th 285, 288, 93 Cal. Rptr. 2d 920* , the court of appeal found that the trial court properly barred defendants from offering damage evidence as a result of their earlier assertion of the trade secrets privilege (*79 Cal. App. 4th 285, 288)* . Defendants' invocation of the privilege, and the blanket protective order they obtained, prevented plaintiff subcontractor from examining key evidence needed to test the reasonableness of the settlement reached between defendant owner and defendant contractor. Although defendants had the right to stand on the privilege, they did not have the right to proceed on their claim while at the same time insisting on withholding key evidence from its adversary. Further, they could have agreed to a more typical and less extreme protective order that would have allowed plaintiff to obtain the needed information while strictly confining its use. Accordingly, the trial court did not err in holding that defendants forfeited the right to proceed with their claim by instead insisting on absolute withholding of all privileged information (*79 Cal. App. 4th 285, 292)* .

In *Valley Bank of Nevada v. Superior Court (1975) 15 Cal. 3d 652, 125 Cal. Rptr. 553, 542 P.2d 977* , to prove allegations of misrepresentation, defendants noticed depositions of the bank chairman to bring the banking records of certain customers. The bank sought a protective order to protect the privacy of its customers. The trial court ordered disclosure, but limited the scope of recovery to certain types of financial transactions and time periods. The Supreme Court held that because of the right to privacy in the California Constitution (*Cal. Const., art. I, § 1*), which allows a bank customer to have a reasonable expectation that matters which he or she reveals to the bank will be used by the bank only for internal banking purposes, the trial court should refashion the protective order to balance the right of civil litigants to discover relevant information, and the right of bank customers to maintain reasonable privacy regarding their finances (*15 Cal. 3d 652, 656-657)* . The Court then suggested that one type of protective order that might be used to accommodate the competing considerations of confidentiality and disclosure, when a party seeks confidential information from a bank regarding its customer accounts, is that the information be sealed, to be reopened only by further order of the court (*15 Cal. 3d 652, 657, 658)* .

In re Lifschutz (1970) 2 Cal. 3d 415, 85 Cal. Rptr. 829, 467 P.2d 557 , was a habeas corpus action brought by a psychiatrist who was imprisoned for contempt for refusing to obey a trial court order directing him to answer certain deposition questions and to produce certain records. Petitioner claimed absolute privilege to refuse to disclose all psychotherapeutic communications relating to a plaintiff in an assault action, who had beenhis patient approximately 10 years earlier, but the trial court disagreed, reasoning that by bringing the assault action and alleging severe emotional distress, plaintiff brought himself within the patient-litigant exception to the statutory psychotherapist-patient privilege [*Evid. Code § 1014*], and therefore petitioner's objections based on privilege were improper. The Supreme Court denied petitioner's application for a writ of habeas corpus, holding that there is no absolute privilege with respect to psychotherapeutic communications (*2 Cal. 3d 415, 438, 439)* . The Court noted, however, that the litigant's waiver of the privilege is limited, and only applies to those mental conditions that the patient-litigant has disclosed by virtue of bringing of an action in which they are in issue. Moreover, the patient need not sacrifice all privacy with respect to his or her personality merely because he or she is seeking recovery for an emotional injury (*2 Cal. 3d 415, 435)* , but the burden of proof is on the *patient* to show that a given confidential communication is not relevant to the issues involved in the litigation (*2 Cal. 3d 415, 436)* . Included in the list of protective orders which the Court suggested might be appropriate in safeguarding the privacy of the patient was the option that the deposition be sealed and only opened on order of the court. The Court suggested that this and other protective orders (such as limiting the scope of the inquiry) are available to protect the patient-litigant in a situation in which the confidential communication at issue is relevant to a mental condition tendered by the plaintiff and therefore not privileged (*2 Cal. 3d 415, 437-438)* .

[b] Objection on Grounds of Relevance

In *Sutter's Place Inc. v. Superior Court (2008) 161 Cal. App. 4th 1370, 75 Cal. Rptr. 3d 9* , petitioner, a card room operator, sued the real party in interest, a city, challenging an ordinance that imposed limits on the operation of card rooms. Petitioner sought extensive, open-ended discovery from the city, which the city resisted. After an in camera

review of certain documents, the superior court issued a discovery order protecting specified documents from disclosure on the ground that discovery would violate the "mental processes" principle (precluding judicial inquiry into the motivation or mental processes of legislators in enacting legislation). Petitioner sought a writ of mandate and/or prohibition to overturn the discovery order and compel discovery (*161 Cal. App. 4th 1370, 1374)* .

The court of appeal denied the writ, ruling that documents relating to individual legislators' mental processes or reasons for enacting the ordinance were irrelevant "to the judicial task" and consequently were not the proper subject of discovery requests (*161 Cal. App. 4th 1370, 1376, 1378)* . Moreover, even assuming that an ulterior purpose behind the ordinance were relevant to its validity, such discovery would violate the "mental processes principle" (*161 Cal. App. 4th 1370, 1376)* .

In *Stewart v. Colonial W. Agency, Inc. (2001) 87 Cal. App. 4th 1006, 105 Cal. Rptr. 2d 115* , a case alleging breach of contract wrongful termination, defense counsel instructed the deponent not to answer questions pertaining to defendant on the ground that they were not calculated to lead to admissible evidence (*87 Cal. App. 4th 1006, 1013)* . The court of appeal held that the only proper way to object to an interrogation into improper matters is to suspend the deposition and move for a protective order on the appropriate grounds (for example, based on privilege, or that the examination is being conducted in bad faith or with an underlying purpose to harass, annoy, embarrass, or oppress). Deponent's counsel should not even raise an objection to a question that counsel believes will elicit irrelevant testimony at a deposition. Relevance objections should be held in abeyance until an attempt is made to use the testimony at trial (*87 Cal. App. 4th 1006, 1014)* .

For additional facts and the procedural background of Stewart, see *Ch. 82, Discovery: Sanctions for Discovery Misuse, §§ 82.10[4][a], 82.11[4][a]*.

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 83 DISCOVERY: DEPOSITIONS
PART II. FORMS
D. Motion for Protective Order in Oral Deposition Matters

8-83 California Points & Authorities § 83.81

§ 83.81 Supporting Motion for Protective Order for Deposition [Code Civ. Proc. §§ 2025.420, 2025.470]--That Deposition Not Be Taken [Code Civ. Proc. § 2025.420(b)(1)]

[1] FORM

[*The following should be combined with memorandum generally supporting a motion for a protective order concerning a deposition (see, e.g., § 83.80).*]

GOOD CAUSE HAS BEEN SHOWN, AND THUS THE COURT SHOULD ISSUE A PROTECTIVE ORDER REQUIRING THAT THE DEPOSITION NOT BE TAKEN AT ALL, AND SHOULD IMPOSE A MONETARY SANCTION.

A. Order That Deposition Not Be Taken at All. The court may issue a protective order under *Code of Civil Procedure Section 2025.420* directing that the deposition not be taken at all (*Code Civ. Proc. § 2025.420(b)(1)*).

[*EITHER*]

B. Protection of Privileged Documents. If documents contain material privileged as confidential communications, the court may issue an order that the deposition of the custodian of those records not be taken (*see Grosslight v. Superior Court (1977) 72 Cal. App. 3d 502, 508, 509, 140 Cal. Rptr. 278*).

[*AND/OR*]

C. Need to Expedite Trial Balanced Against Relatively Unimportant Inquiry. The court may issue a protective order that depositions not be taken when the taking of the depositions would cause delay in the otherwise imminent starting date of the trial, when the information to be gained by the depositions is relatively unimportant, and when there has already been extensive discovery (*see Jaffe v. Albertson Co. (1966) 243 Cal. App. 2d 592, 616-617, 53 Cal. Rptr.*

25).

[*AND/OR*]

D. No Right to Discovery That Is Untimely. Except with regard to expert witnesses identified under *Code of Civil Procedure Section 2034.010 et seq.*, no party is entitled as a matter of right to complete discovery proceedings within 30 days of the date initially set for the trial of the action or to have a motion concerning discoveryheard within 15 days of that date, except as ordered at the discretion of the court on motion of a party; unless otherwise ordered, a continuance or postponement of the trial date does not operate to reopen the discovery proceedings (*Code Civ. Proc. §§ 2024.020, 2024.030*).

[*AND/OR*]

E. Protection Against Taking Depositions When Pretrial Disposition of Case Sought. In a proceeding for a pretrial disposition of a case such as a motion for summary judgment or for judgment on the pleadings, depositions should not be taken pending the outcome of the motion for pretrial disposition if the material sought is irrelevant and unlikely to lead to the discovery of admissible evidence (*see Pacific Architects Collaborative v. State of California (1979) 100 Cal. App. 3d 110, 126, 127, 166 Cal. Rptr. 184*).

[*AND/OR*]

F. Protection Against Taking of Depositions When Party Seeking Discovery Has Failed to State Cause of Action. When the party seeking discovery has failed to state a cause of action, then a protective order prohibiting that party from taking depositions is proper (*see Silver v. City of Los Angeles (1966) 245 Cal. App. 2d 673, 674, 54 Cal. Rptr. 203*).

[*AND/OR*]

G. Party May Not Take Subsequent Deposition. Once any party has taken the deposition of any natural person, including that of a party to the action, neither the party who gave, nor any other party who received, notice of the deposition may take a subsequent deposition of that deponent, unless so stipulated by the parties with the consent of the non-party deponent or by leave of court on a showing of good cause[, but one subsequent deposition may be taken of natural person previously examined (1) on behalf of organization under *Code Civ. Proc. § 2025.230*, or *(2)*, pursuant to a court order under *Code Civ. Proc. § 485.230*, for limited purpose of discovering under *Code Civ. Proc. § 485.230* the identity, location, and value of property in which deponent has an interest] (*Code Civ. Proc. § 2025.610*).

[*Add points and authorities generally supporting the imposition of monetary sanctions (see, e.g., Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11).*]

[2] Comments

[a] Use of Form

This form of points and authorities is for use in seeking a protective order that a deposition not be taken at all [*see Code Civ. Proc. § 2025.420*]. The form should be combined with the general points and authorities supporting a motion for a protective order *set out in § 83.80*. When monetary sanctions are sought, this form should also be combined with general points and authorities supporting the imposition of monetary sanctions under *Code Civ. Proc. § 2023.030(a)* [

see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11].

For memoranda of points and authorities relating to specific grounds of evidentiary privilege or other protection from discovery, see generally Ch. 81, *Discovery: Privileges and Other Discovery Limitations* .

Note that some cases cited in this form construe law in effect before the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that they remain consistent with current provisions [*see also § 83.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should state facts showing need for protection from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense, and should state facts and insert argument of the specific reasons why the deposition should not be taken at all. However, counsel need not set forth facts showing that the opposing party acted without substantial justification, because *Code Civ. Proc. § 2023.030(a)* effectively places that burden on the person against whom the sanction is to be imposed by requiring the court to impose a monetary sanction when it is expressly authorized, *unless* it finds that he or she acted with substantial justification or that other circumstances would make the monetary sanction unjust.

[c] Related Pleading and Practice Forms

For forms and discussion related to the obtaining of a protective order and monetary sanctions under Code Civ. Proc. § 2025.420, see California Forms of Pleading and Practice, Ch. 193, *Discovery: Depositions* (Matthew Bender).

[3] Discussion of Authorities

[a] Protection of Privileged Documents

Grosslight v. Superior Court *(1977) 72 Cal. App. 3d 502, 140 Cal. Rptr. 278* was an action for personal injuries brought against a 16-year-old girl.Also joined as defendants were the girl's parents, who were charged with failure to exercise adequate control over their daughter despite their knowledge of her dangerous propensities for violence. Plaintiff noticed the deposition of the custodian of records at the psychiatric hospital where the girl had been treated. The purpose of the deposition was to ascertain if there were any admissions by the parents of knowledge of their daughter's dangerous propensities. Defendant patient moved for a protective order, and the trial court issued an order for an in camera inspection of the records to determine if any records existed which contained such admissions.

The court of appeal issued a peremptory writ vacating the order granting the in camera inspection. The court held that the discovery should be prohibited altogether on the rationale that the psychotherapist-patient privilege includes all relevant communications to psychotherapists and psychiatric personnel by intimate family members of the patient (*72 Cal. App. 3d 502, 508)* , and directed the trial court to grant defendant's motion for a protective order (*72 Cal. App. 3d 502, 509)* .

[b] Need to Expedite Trial Balanced Against Relatively Unimportant Inquiry

In ***Jaffe v. Albertson Co.*** *(1966) 243 Cal. App. 2d 592, 53 Cal. Rptr. 25* , defendants sought a protective order to the effect that depositions not be taken, when the subject matter of the depositions was only marginally relevant to the action, and when the taking of the depositions would delay the starting date of the trial. The trial court's grant of a protective order was upheld on the ground that the trial court is empowered to exercise reasonable control over discovery so that it is not executed for the purposes of delay, annoyance, or harassment (*243 Cal. App. 2d 592, 617)* . Therefore, it is within the sound discretion of the trial court to order that depositions not be taken at all when the

information sought thereby is relatively unimportant, balanced against the need to expedite the trial (*243 Cal. App. 2d 592, 616-617)* .

[c] No Right to Discovery That Is Untimely

Under *Code Civ. Proc. §§ 2024.020(a)* and *2024.030*, parties are entitled to complete discovery proceedings as a matter of right only until 30 days before the date set for the trial of the case, and to have motions concerning discovery heard until 15 days before the date set for the trial of the case, unless the discovery pertains to an expert witness identified under *Code Civ. Proc. § 2034.010 et seq.* (exchange of expert witness lists). If either of those dates falls on a Saturday, Sunday, or holiday (*see Code Civ. Proc. § 10* (designated holidays)), the last day is the next court day closer to the trial date [*Code Civ. Proc. § 2016.060*]. A continuance or postponement of the trial date does not operate to reopen the discovery proceedings [Code *Civ. Proc. § 2024.020(b)*]. However, on motion by a party, the court in its discretion may grant leave to complete discovery proceedings or to have a motion concerning discovery heard closer to the initial trial date, or to reopen discovery after a new trial date has been set [*Code Civ. Proc. § 2024.050*]. For a discussion of the factors that a court may take into consideration in determining the motion, see *Ch. 80, Discovery: Scope, Regulation, and Timing, § 80.111*.

Note that the parties to the action may agree to extend the time for the completion of discovery proceedings or for the hearing of motions concerning discovery, or to reopen discovery after a new date for trial of the action has been set [*Code Civ. Proc. § 2024.060*].

[d] Protection Against Taking Depositions When Pretrial Disposition of Case Sought

Pacific Architects Collaborative v. State of California *(1979) 100 Cal. App. 3d 110, 166 Cal. Rptr. 184* was an appeal from a grant of summary judgment and judgment on the pleadings in favor of defendants. Plaintiff had sued to recover expenses and lost profits incurred in preparing mobile trailers in response to a bid solicitation sent by the state. After filing their answer denying the allegations of the complaint, defendants moved for summary judgment and for judgment on the pleadings. Defendants also moved for and obtained a protective order postponing the depositions of some state employees until after the summary judgment hearing. The trial court then granted summary judgment and judgment on the pleadings, and plaintiff appealed, claiming the trial court erred when it refused to allow it to depose the employees, and question them as to their state of mind in stating the reasons why plaintiff's contract was rejected.

The court of appeal affirmed the judgment, holding in part that, while ordinarily a trial court must not rule on summary judgment until the party resisting the motion has had time to discover facts which may be used in opposition to the motion, in the present situation, when the information sought was not relevant to a material issue in the case, the protective order limiting discovery was proper (*100 Cal. App. 3d 110, 126, 127)* . Therefore, the court held, the trial court's order was correct because plaintiff sought discovery of irrelevant information which would be neither helpful in preparation for trial, nor likely to lead to evidence admissible at trial (*100 Cal. App. 3d 110, 127)* .

[e] Protection Against Taking of Depositions When Party Seeking Discovery Has Failed to State Cause of Action

Silver v. City of Los Angeles *(1966) 245 Cal. App. 2d 673, 54 Cal. Rptr. 203* was an appeal in an action by a taxpayer to recover the salary of asuperintendent of a hospital on the ground that the superintendent had not devoted his entire time to his duties. The trial court dismissed the action for failure to state a cause of action, and plaintiff appealed.

The court of appeal affirmed the judgment. One of the grounds for appeal was that the trial court had granted a protective order to prohibit the taking of depositions. The court of appeal ruled that this protective order was correct in that the infirmity in the complaint was not one of form, and that there was no contention that the complaint could have been improved by amendment (*245 Cal. App. 2d 673, 674)* .

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CHAPTER 83 DISCOVERY: DEPOSITIONS
PART II. FORMS
D. Motion for Protective Order in Oral Deposition Matters

8-83 California Points & Authorities § 83.82

§ 83.82 Supporting Motion for Protective Order for Deposition [Code Civ. Proc. §§ 2025.420, 2025.470]--That Deposition of Opposing Counsel Not Be Taken

[1] FORM

[*The following should be combined with a memorandum of points and authorities generally supporting a motion for a protective order concerning a deposition (see, e.g., § 83.80).*]

THE COURT SHOULD GRANT A PROTECTIVE ORDER SPECIFYING THAT THE DEPOSITION OF _____ [*name*], ATTORNEY FOR _____ [*specify party, e.g.,* DEFENDANT], SHOULD NOT BE TAKEN BECAUSE _____ [*specify party, e.g.,* PLAINTIFF] HAS NOT SHOWN THE PREREQUISITES FOR SUCH A DEPOSITION.

Deposition of Opposing Counsel Permissible Only on Showing of Extremely Good Cause. The circumstances under which counsel for an opposing party may be deposed are limited to those where (1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and not privileged; and (3) the information is crucial to the preparation of the case (*Estate of Ruchti (1993) 12 Cal. App. 4th 1593, 1600-1601, 16 Cal. Rptr. 2d 151* ; *Spectra-Physics, Inc. v. Superior Court (1988) 198 Cal. App. 3d 1487, 1496, 244 Cal. Rptr. 258*).

[*Add points and authorities generally supporting the imposition of monetary sanctions (see, e.g., Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11).*]

[2] Comments

[a] Use of Form

This form of points and authorities is for use by a party in seeking a protective order that his or her attorney not be deposed by the opposing party [*see Code Civ. Proc. § 2025.420*]. The form should be combined with the general points and authorities supporting a motion for a protective order *set out in § 83.80*.

When monetary sanctions are sought, the foregoing form should also be combined with general points and authorities supporting the imposition of monetary sanctions under *Code Civ. Proc. § 2023.030(a)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11*].

For memoranda of points and authorities relating to specific grounds of evidentiary privilege or other protection from discovery, see generally Ch. 81, *Discovery: Privileges and Other Discovery Limitations* .

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case.

[c] Related Pleading and Practice Forms

For forms and discussion related to the obtaining of a protective order and monetary sanctions under Code Civ. Proc. § 2025.420, see California Forms of Pleading and Practice, Ch. 193, *Discovery: Depositions* (Matthew Bender).

[3] Discussion of Authorities

[a] Deposition of Opposing Counsel Permissible Only on Showing of Extremely Good Cause

Estate of Ruchti *(1993) 12 Cal. App. 4th 1593, 16 Cal. Rptr. 2d 151* arose out of a probate proceeding in which co-executors filed a petition to determine the nature and extent of estate property being withheld by plaintiff, a former co-executor who had been suspended from his duties. Plaintiff subsequently brought an action for fraud, declaratory relief, and assorted other causes. When plaintiff's attorney sought to depose the attorney for the co-executors, the attorney for the co-executors filed a motion for a protective order. The trial court granted the motion and imposed sanctions on plaintiff's attorney, who then appealed.

The court of appeal affirmed. Plaintiff's attorney contended that the co-executors did not have personal knowledge of the facts alleged in the petition, and that only their attorney personally knew the facts, therebynecessitating his deposition. The court noted that taking the deposition of opposing counsel disrupts the adversarial system and lowers the standard of the profession, adds to the already burdensome time and costs of litigation, and detracts from the quality of client representation. Moreover, it said such a practice would have a chilling effect on the truthful communications from the client to the attorney. The court said that the circumstances under which opposing counsel may be deposed are limited to those where (1) no other means exist to obtain the information than to depose opposing counsel, (2) the information sought is relevant and not privileged, and (3) the information is crucial to the preparation of the case (*12 Cal. App. 4th 1593, 1600)* . Ultimately concluding that this test had not been met, the court observed that the co-executors' attorney had examined a variety of public records, conducted interviews with family members and others, and consulted with various experts in developing a foundation for the petition. None of these were matters peculiarly with the attorney's personal knowledge. Moreover he had suggested that interrogatories rather than his deposition would be a proper and effective method of discovery because properly drafted interrogatories could elicit the facts upon which the co-executors based their contentions and would require the identification of witnesses and of documents (*12 Cal. App. 4th 1593, 1601)* .

In ***Spectra-Physics, Inc. v. Superior Court*** *(1988) 198 Cal. App. 3d 1487, 244 Cal. Rptr. 258* , a settling party brought a motion to determine the good faith of a settlement under *Code Civ. Proc. § 877.6* and sought to depose opposing counsel on the issue of whether opposing counsel had acted in bad faith in impeding the settlement process. The trial court ordered that opposing counsel were required to submit to discovery.

The court of appeal issued a writ of mandate ordering the trial court to vacate its order and enter a new order denying permission to take the depositions of counsel. The court initially noted that taking the deposition of opposing counsel disrupts the adversarial system, lowers the standard of the profession, and adds to the already burdensome time and

costs of litigation. The court held that the circumstances under which opposing counsel may be deposed are limited to those in which (1) no other means exist to obtain the information than to depose opposing counsel, (2) the information sought is relevant and not privileged, and (3) the information is crucial to the preparation of the case. Applying these criteria, the court found that the settling party did not satisfy the first requirement because it had other means of obtaining the information. In regard to the second requirement, the court found that it was probably satisfied in that the information sought was relevant and the fact that some of it may have been privileged would not prevent the deposition entirely. In regard to the final requirement, the court held that because the settling party did not have the burden of attacking the good faith of the settlement, the deposition of opposing counsel was not immediately crucial to the presentation of itscase. The court also noted that the information sought was not necessarily of critical importance on the issues of the case because the actions of the attorney sought to be deposed, even as alleged, did not constitute a prima facie case of bad faith (*198 Cal. App. 3d 1487, 1493-1497)* .

Note that the deposition of an opposing attorney is most likely to be allowed in an insurance bad-faith case [*see Fireman's Fund Ins. Co. v. Superior Court (1977) 72 Cal. App. 3d 786, 789-790, 140 Cal. Rptr. 677]* .

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8-83 California Points & Authorities § 83.83

§ 83.83 Supporting Motion for Protective Order for Deposition [Code Civ. Proc. §§ 2025.420, 2025.470]--That Deposition of High-Ranking Official in Defendant Corporation or Top Governmental Executive Not Be Taken

[1] FORM

[*The following should be combined with a memorandum of points and authorities generally supporting a motion for a protective order concerning a deposition (see, e.g., § 83.80).*]

THE COURT SHOULD GRANT A PROTECTIVE ORDER THAT _____ [*name*]'S DEPOSITION NOT BE TAKEN, BECAUSE HE/SHE IS A _____ [HIGH-RANKING OFFICIAL IN THE/A CORPORATE DEFENDANT *or* TOP GOVERNMENTAL EXECUTIVE] AND THE PLAINTIFF HAS NOT _____ [SHOWN GOOD CAUSE THAT THE PROPOSED DEPONENT HAS UNIQUE PERSONAL KNOWLEDGE OF DISCOVERABLE INFORMATION *and/or* EXHAUSTED LESS INTRUSIVE METHODS OF DISCOVERY].

A. When Deponent Is High-Ranking Corporate Defendant Official or Top Governmental Executive, Burden of Proof for Protective Order Is Shifted. When a plaintiff seeks to depose a president or other official at the highest level of management within a defendant corporation, or a head of a governmental agency or top governmental executive, the burden of showing good cause for a protective order that the deposition not be taken is shifted from the proposed deponent to the plaintiff (*Nagle v. Superior Court (1994) 28 Cal. App. 4th 1465, 1467-1469, 34 Cal. Rptr. 2d 281* (top governmental executives); *Liberty Mutual Ins. Co. v. Superior Court (1992) 10 Cal. App. 4th 1282, 1289, 13 Cal. Rptr. 2d 363* (high-ranking corporate official)).

B. Protective Order Will Be Granted Unless Plaintiff Meets Burden of Proof. Such a deponent's motion for a protective ordershould be granted unless the plaintiff has shown good cause that the official has unique or superior personal knowledge of discoverable information or the plaintiff has exhausted less-intrusive methods of discovery and can make a colorable showing of good cause that the official possesses information necessary to the case (*Nagle v. Superior Court (1994) 28 Cal. App. 4th 1465, 1467-1469, 34 Cal. Rptr. 2d 281* ; *Liberty Mutual Ins. Co. v. Superior Court (1992) 10 Cal. App. 4th 1282, 1289, 13 Cal. Rptr. 2d 363*).

[*Add points and authorities generally supporting the imposition of monetary sanctions (see, e.g., Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11).*]

[2] Comments

[a] Use of Form

These points and authorities are for use by a high-ranking official in a defendant corporation or a top governmental executive in seeking a protective order that his or her deposition not be taken at all [*see Code Civ. Proc. § 2025.420*]. The form should be combined with the general points and authorities supporting a motion for a protective order *set out in § 83.80*.

When monetary sanctions are sought, the foregoing form should also be combined with general points and authorities supporting the imposition of monetary sanctions under *Code Civ. Proc. § 2023.030(a)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11*].

For memoranda of points and authorities relating to specific grounds of evidentiary privilege or other protection from discovery, see generally Ch. 81, *Discovery: Privileges and Other Discovery Limitations* .

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case.

[c] Related Pleading and Practice Forms

For forms and discussion related to the obtaining of a protective order and monetary sanctions under Code Civ. Proc. § 2025.420, see California Forms of Pleading and Practice, Ch. 193, *Discovery: Depositions* (Matthew Bender).

[3] Discussion of Authorities

[a] When Deponent Is High-Ranking Corporate Defendant Official or Top Governmental Executive, Burden of Proof for Protective Order Is Shifted

In ***Nagle v. Superior Court*** *(1994) 28 Cal. App. 4th 1465, 34 Cal. Rptr. 2d 281* , an employee of the California Employment Development Department (EDD) was dismissed from his job in part because he was absent due to an illness suffered by his mother. During the disciplinary action, EDD personnel obtained the mother's records from the California Department of Health Services (DHS). The mother filed an action against personnel of these agencies, contending that confidential medical records were obtained in violation of her privacy and due process rights. Depositions of the petitioners--director of the EDD and the former director of the DHS--were noticed, and the petitioners moved for a protective order. Petitioners filed declarations denying any personal knowledge of the circumstances of the disciplinary hearing or the subpoenaing of the medical records. The superior court denied the motion.

The court of appeal issued a peremptory writ of mandate directing the trial court to vacate its order and grant the protective order. The court of appeal held that a party seeking to depose a head of a governmental agency or a top governmental executive must show that (1) the official has direct personal factual information pertaining to the material issues in the action, and (2) the information to be obtained from the deposition is not available through any other source. Here, the mother did not contend that either director had personal knowledge of the subpoenaing of her records. The mother did contend that the petitioners' declarations did not establish that they had no knowledge of either related cases or departmental requirements concerning confidentiality of records. However, the court of appeal held that these matters

could be investigated through other sources and through less burdensome methods (*28 Cal. App. 4th 1465, 1468)* .

In ***Liberty Mutual Ins. Co. v. Superior Court*** *(1992) 10 Cal. App. 4th 1282, 13 Cal. Rptr. 2d 363* , plaintiff, wife of a disabled employee, sued defendant corporation, the workers' compensation insurance carrier for her husband's employer, for fraud and intentional infliction of emotional distress based on its failure to provide needed services for her husband. After plaintiff noticed the deposition of the defendant's president, he moved for a protective order to prohibit his deposition on the ground that she had no legitimate need to depose him and was doing so only to annoy and harass him. The trial court denied the motion, and defendant corporation and its president petitioned for a writ of mandate.

The court of appeal issued a writ commanding the trial court to vacate its order and enter an order granting the protective order. The president'sonly connection to the case was counsel's act of copying him, by title only, on two letters that were automatically rerouted to a lower-level employee. The court observed that the head of a large national corporation will generally not have knowledge of a specific case handled several levels down the corporate pyramid (*10 Cal. App. 4th 1282, 1287)* . The court held that when a plaintiff seeks to depose a president or other official at the highest level of management within a defendant corporation, and that official moves for a protective order to prohibit the deposition, the trial court should first determine whether the plaintiff has shown good cause that the official has unique or superior personal knowledge of discoverable information. If not, as will often be the case with a large national or international corporation, the trial court should issue the protective order and require the plaintiff to first obtain the necessary discovery through less-intrusive methods (*10 Cal. App. 4th 1282, 1289)* . The court explained that shifting the burden in this manner will not frustrate a plaintiff's ability to penetrate high levels of corporate management in a search for information. Lower-level corporate officials, with some probable connection to the plaintiff's case, are not permitted to avoid being deposed through filing conclusory affidavits of ignorance (*10 Cal. App. 4th 1282, 1289-1290)* .

[b] Protective Order Will Be Granted Unless Plaintiff Meets Burden of Proof

The facts and procedural background of ***Nagle v. Superior Court*** *(1994) 28 Cal. App. 4th 1465, 1467-1469, 34 Cal. Rptr. 2d 281* are discussed in [a], *above*. In *Nagle,* the court of appeal held that a party seeking to depose a head of a governmental agency or a top governmental executive must show that (1) the official has direct personal factual information pertaining to the material issues in the action, and (2) the information to be obtained from the deposition is not available through any other source. The court stated that an official's ability to conduct his or her business affairs would be severely hindered if all plaintiffs filing a complaint against an agency head in his or her official capacity were permitted to take the official's oral deposition. The court added that the head of an agency typically has little or no knowledge of the facts of the case (*28 Cal. App. 4th 1465, 1468)* .

The facts and procedural background of ***Liberty Mutual Ins. Co. v. Superior Court*** *(1992) 10 Cal. App. 4th 1282, 13 Cal. Rptr. 2d 363* are discussed in [a], *above.* In *Liberty Mutual,* the court of appeal found that the burden of proof for a protective order that the deposition of a high-ranking corporate defendant official not be taken is shifted to the plaintiff. If the plaintiff does not meet that burden, the trial court should issue the protective order and require the plaintiff to first obtain the necessary discovery through less-intrusive methods (*10 Cal. App. 4th 1282, 1289)* . The court observed that it made no sense to permit a plaintiff to leap-frog to the apex of the corporate hierarchy as the first step in discovery withouthaving taken the intermediate steps of seeking discovery from lower-level employees more involved in the pertinent corporate operations. The court said that such "apex" depositions, when conducted before less-intrusive discovery methods are exhausted, raised a tremendous potential for discovery abuse and harassment. It would be unreasonable to permit a plaintiff to *begin* discovery in this manner (*10 Cal. App. 4th 1282, 1287)* . The court elaborated that such less-intrusive discovery methods include interrogatories directed to the high-level official to explore the state of his or her knowledge or involvement in the plaintiffs' case; depositions of lower-level employees with appropriate knowledge and involvement in the subject matter of the litigation; and the organizational deposition of the corporation itself, thereby requiring the organization to produce for inspection the most qualified officer or employee to testify on its behalf regarding the specified matters to be raised at the deposition (*10 Cal. App. 4th 1282,*

1289) . The court further held that should such less-intrusive methods of discovery be exhausted, and the plaintiff make a colorable showing of good cause that the high-level official possesses information necessary to the case, the trial court may then lift the protective order and allow the deposition to proceed (*10 Cal. App. 4th 1282, 1289)* .

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8-83 California Points & Authorities § 83.84

§ 83.84 Supporting Motion for Protective Order for Deposition [Code Civ. Proc. §§ 2025.420, 2025.470]--That Scope of Inquiry Be Limited to Certain Matters [Code Civ. Proc. § 2025.420(b)(10)]

[1] FORM

[*The following should be combined with memorandum of points and authorities generally supporting a motion for a protective order concerning a deposition (see, e.g., § 83.80).*]

BECAUSE GOOD CAUSE HAS BEEN SHOWN, THE COURT SHOULD ISSUE A PROTECTIVE ORDER LIMITING THE SCOPE OF INQUIRY _____ [TO _____ (*specify matter or matters to which inquiry should be limited*) *or* TO PRECLUDE _____ (*specify matter or matters on which inquiry should not be allowed*)] AND THE COURT SHOULD ALSO IMPOSE A MONETARY SANCTION.

A. Protective Order Limiting Scope of Inquiry in General. The court may issue a protective order under *Code of Civil Procedure Section 2025.420* directing that that the scope of the examination be limited to certain matters (*Code Civ. Proc. § 2025.420(b)(10)*; *see Britt v. Superior Court (1978) 20 Cal. 3d 844, 852-862, 143 Cal. Rptr. 695, 574 P.2d 766*).

[*Optional*] **B. Protective Order Limiting Scope of Inquiry Into Plaintiff's Medical History.** A protective order limiting the scope of examination into a plaintiff's medical history is proper; the scope of inquiry should include only those conditions or injuries that the plaintiff has brought before the court (*see Britt v. Superior Court (1978) 20 Cal. 3d 844, 864, 143 Cal. Rptr. 695, 574 P.2d 766*).

[*Add points and authorities generally supporting the imposition of monetary sanctions (see, e.g., Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11).*]

[2] Comments

[a] Use of Form

This form of points and authorities is for use in seeking a protective order that the scope of the examination in a deposition be limited to certain matters [*Code Civ. Proc. § 2025.420(b)(10)*]. The form should be combined with the general points and authorities supporting a motion for a protective order *set out in § 83.80*.

When monetary sanctions are sought, the foregoing form should also be combined with general points and authorities supporting the imposition of monetary sanctions under *Code Civ. Proc. § 2023.030(a)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11*].

Note that some cases cited in this form construe law in effect before the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that they remain consistent with current provisions [*see also § 83.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should state facts showing need for protection from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense, state facts and insert argument of the specific reasons why the scope of the examination should be limited, and identify those matters to which the scope should be limited. However, counsel need not set forth facts showing that the opposing party acted without substantial justification, because *Code Civ. Proc. § 2023.030(a)* effectively places that burden on the person against whom the sanction is to be imposed, by requiring the court to impose a monetary sanction when it is expressly authorized *unless* it finds that he or she acted with substantial justification or that other circumstances would make the monetary sanction unjust.

[c] Related Pleading and Practice Forms

For forms and discussion related to the obtaining of a protective order and monetary sanctions under Code Civ. Proc. § 2025.420, see California Forms of Pleading and Practice, Ch. 193, *Discovery: Depositions* (Matthew Bender).

[3] Discussion of Authorities

[a] Protective Order Limiting Scope of Inquiry in General

The facts and procedural background of ***Britt v. Superior Court*** *(1978) 20 Cal. 3d 844, 143 Cal. Rptr. 695, 574 P.2d 766* are *set out in § 83.80[3][f]*. In *Britt,* the plaintiffs had sought a protective order seeking to restrain defendant's inquiry into their past associational activities. In this regard, the Supreme Court held that such broad inquiry as defendant was attempting violated plaintiffs' *First Amendment* rights to freedom of association (*20 Cal. 3d 844, 852-855, 861-862)* . These rights were not waived by plaintiffs in bringing the lawsuit (*20 Cal. 3d 844, 857-858)* . Moreover, no compelling state interest in the discovery arose out of defendant's need for the associational information in order to prepare its defenses of statute of limitations and mitigation of damages (*20 Cal. 3d 844, 860-861)* . Therefore, although the Court did not specify what the exact scope of the discovery order should be regarding plaintiffs' associational activities, it did note that the existing order was so broad as to be constitutionally infirm, and that the order compelling disclosure must be narrowly drawn so as to assure maximum protection of the plaintiffs' constitutional interest (*20 Cal. 3d 844, 859, 862)* .

[b] Protective Order Limiting Scope of Inquiry Into Plaintiff's Medical History

The facts and procedural background of ***Britt v. Superior Court*** *(1978) 20 Cal. 3d 844, 143 Cal. Rptr. 695, 574 P.2d 766* are discussed in *§ 83.80[3][f]* and in [a], *above*. In *Britt,* the Supreme Court discussed the proper scope of an order relating to disclosure of medical histories of plaintiffs who are seeking redress for physical or mental injuries. The Court noted that although the plaintiffs may have waived the physician-patient privilege with respect to matters relating to the

pending lawsuit, that waiver extends only to injuries or conditions which the plaintiff has brought before the court (*20 Cal. 3d 844, 863-864)* . Thus the scope of the inquiry should be limited to the nature of the injuries or condition that the plaintiff-litigant has himself put in issue (*20 Cal. 3d 844, 864)* .

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8-83 California Points & Authorities § 83.85

§ 83.85 Supporting Motion for Protective Order for Deposition [Code Civ. Proc. §§ 2025.420, 2025.470]--That Deposition Be Taken by Written Questions Instead of Oral Examination [Code Civ. Proc. § 2025.420(b)(6)]

[1] FORM

[*The following should be combined with memorandum of points and authorities generally supporting a motion for a protective order concerning a deposition (see, e.g., § 83.80).*]

FOR GOOD CAUSE SHOWN, THE COURT MAY ISSUE A PROTECTIVE ORDER REQUIRING THAT A DEPOSITION BE TAKEN BY WRITTEN QUESTIONS INSTEAD OF ORAL EXAMINATION.

Protective Order Requiring Deposition by Written Questions. The court may issue a protective order directing that the deponent's testimony be taken by written, instead of oral, examination (*Code Civ. Proc. § 2025.420(b)(6)*; *see Beverly Hills Nat'l Bank & Trust Co. v. Superior Court (1961) 195 Cal. App. 2d 861, 867* , 16 Rptr. 236).

[*Add points and authorities generally supporting the imposition of monetary sanctions (see, e.g., Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11).*]

[2] Comments

[a] Use of Form

This form of points and authorities is for use in seeking a protective order directing that the deposition be taken by written questions rather than by oral examination [*Code Civ. Proc. § 2025.420(b)(6)*]. The form should be combined as directed with the general points and authorities supporting a motion for a protective order *set out in § 83.80*.

When monetary sanctions are sought, the foregoing form should also be combined with general points and authorities supporting the imposition of monetary sanctions under *Code Civ. Proc. § 2023.030(a)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11*].

Note that the case cited in this form construes law in effect before the operative date of the Civil Discovery Act. It is cited and discussed as persuasive authority to the extent that it remains consistent with current provisions [*see also § 83.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should state facts showing need for protection from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense, state facts and insert argument of the specific reasons why the examination should be by written, instead of oral, questions. However, counsel need not set forth facts showing that the opposing party acted without substantial justification, because *Code Civ. Proc. § 2023.030(a)* effectively places that burden on the person against whom the sanction is to be imposed, by requiring the court to impose a monetary sanction when it is expressly authorized *unless* it finds that he or she acted with substantial justification or that other circumstances would make the monetary sanction unjust.

[c] Related Pleading and Practice Forms

For forms and discussion related to the obtaining of a protective order and monetary sanctions under Code Civ. Proc. § 2025.420, see California Forms of Pleading and Practice, Ch. 193, *Discovery: Depositions* (Matthew Bender).

[3] Discussion of Authorities

[a] Protective Order Requiring Deposition by Written Questions

The facts and procedural background of ***Beverly Hills Nat'l Bank & Trust Co. v. Superior Court*** *(1961) 195 Cal. App. 2d 861* , 16 Rptr. 236 are discussed in *§ 83.170[4][a]*. In dictum, the court noted that while the party initiating discovery has a choice whether to take a deposition by oral or written examination, the trial court may overturn that choice, on a proper showing. Among the factors to be considered are convenience and expense (*195 Cal. App. 2d 861, 867)* .

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8-83 California Points & Authorities § 83.86

§ 83.86 Supporting Motion for Protective Order for Deposition [Code Civ. Proc. §§ 2025.420, 2025.470]--That Defendants in Class Action Be Required to Compel Attendance of Unnamed Plaintiffs at Depositions

[1] FORM

[*The following should be combined with memorandum of points and authorities generally supporting a motion for a protective order concerning a deposition (see, e.g., § 83.80).*]

FOR GOOD CAUSE SHOWN, THE COURT MAY ISSUE A PROTECTIVE ORDER REQUIRING THAT DEFENDANTS IN A CLASS ACTION BEAR THE BURDEN OF COMPELLING ATTENDANCE OF UNNAMED PLAINTIFFS AT DEPOSITIONS.

Compelling Attendance at Depositions of Unnamed Class Plaintiffs. For good cause shown, the court may issue an order requiring that defendants in a class action, brought by a plaintiff class, compel the attendance of unnamed plaintiffs at depositions (*Southern California Edison Co. v. Superior Court (1972) 7 Cal. 3d 832, 842, 103 Cal. Rptr. 709, 500 P.2d 621*).

[*Add points and authorities generally supporting the imposition of monetary sanctions (see, e.g., Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11).*]

[2] Comments

[a] Use of Form

This form of points and authorities may be used in support of a motion for a protective order requiring that class action defendants, rather than named plaintiffs, be required to bear the burden of compelling attendance of the unnamed plaintiffs at depositions. The form should be combined as directed with the general points and authorities supporting a motion for a protective order *set out in § 83.80.*

When monetary sanctions are sought, the foregoing form should also be combined with general points and authorities

supporting the imposition of monetary sanctions under *Code Civ. Proc. § 2023.030(a)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11*].

Note that the case cited in this form construes law in effect before the operative date of the Civil Discovery Act. It is cited and discussed as persuasive authority to the extent that it remains consistent with current provisions [*see also § 83.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should state facts and argument showing how this type of protective order is needed for protection from undue burden and expense.

[c] Related Pleading and Practice Forms

For forms and discussion related to the obtaining of a protective order and monetary sanctions under Code Civ. Proc. § 2025.420, see California Forms of Pleading and Practice, Ch. 193, *Discovery: Depositions* (Matthew Bender).

[3] Discussion of Authorities

[a] Compelling Attendance at Depositions of Unnamed Class Plaintiffs

In ***Southern California Edison Co. v. Superior Court*** *(1972) 7 Cal. 3d 832, 103 Cal. Rptr. 709, 500 P.2d 621* , the Supreme Court held that the plaintiff class had shown good cause under former Code Civ. Proc. § 2019(b) (*now see Code Civ. Proc. § 2025.420*) for the trial court's order that defendants, rather than named plaintiffs, be required to compel attendance at depositions of unnamed plaintiffs. Good cause for the order was based on the following factors: defendant was just as capable as named plaintiffs of compelling the attendance at depositions of the unnamed plaintiffs; the unnamed plaintiffs were members of a loosely knit class; the named plaintiffs had little, if any, control over the class; and, most importantly, it appeared that defendant was planning to move for exclusion from the class of those unnamed plaintiffs who did not appear for depositions, thus forcing named plaintiffs to expend great time and effort to round up persons with whom they have had no prior contact or risk the permanent stifling of the class action (*7 Cal. 3d 832, 841-842)* .

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8-83 California Points & Authorities §§ 83.87-83.99

[Reserved]

§§ 83.87[Reserved]

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8-83 California Points & Authorities § 83.100

§ 83.100 Opposing Motion for Protective Order for Deposition [Code Civ. Proc. §§ 2025.420, 2025.470]--General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR PROTECTIVE ORDER RE DEPOSITION ON ORAL EXAMINATION AND FOR MONETARY SANCTION
vs.	)	
_____ [*name*],	)	
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
		[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD DENY THE MOTION FOR A PROTECTIVE ORDER BECAUSE GOOD CAUSE HAS NOT BEEN SHOWN [AND OTHER EXPRESS REQUIREMENTS HAVE NOT BEEN MET].

A. Order Only as Justice Requires. The court may make an order under *Section 2025.420 of the Code of Civil Procedure* only as justice requires in order to protect a party, deponent, or other natural person or organization from unwarranted annoyance, embarrassment, or oppression, or from undue burden or expense (*Code Civ. Proc. §*

2025.420(b)).

B. Order Only on Showing of Good Cause. The court may make an order under *Section 2025.420 of the Code of Civil Procedure* to protect any party, deponent, or other natural person or organization from unwarranted annoyance, embarrassment, or oppression, or undue burden or expense, only on a showing of good cause (*Code Civ. Proc. § 2025.420(b)*; *see Armstrong v. Gates (1973) 32 Cal. App. 3d 952, 957, 108 Cal. Rptr. 604*).

[*Optional*] **C. Good Cause for Order During Examination.** A party or deponent may move for a protective order under *Section2025.470 of the Code of Civil Procedure* only on the ground that the examination is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the party or deponent, and the court may grant the order terminating the examination or limiting the scope and manner of taking the deposition only on a showing of good cause (*Code Civ. Proc. §§ 2025.420(b), 2025.470*).

D. Good Cause Defined. Good cause, as is required for a protective order under *Sections 2025.420* and *2025.470 of the Code of Civil Procedure*, generally calls for a factual exposition of a reasonable ground for the order sought (*see Goodman v. Citizens Life & Cas. Ins. Co. (1967) 253 Cal. App. 2d 807, 819, 61 Cal. Rptr. 682*).

E. Burden of Proof. The party seeking a protective order has the burden to show good cause (*see Code Civ. Proc. §§ 2025.420, 2025.470*; *Southern California Edison Co. v. Superior Court (1972) 7 Cal. 3d 832, 843, 103 Cal. Rptr. 709, 500 P.2d 621*).

[*Optional*] **F. Insufficient Showing.** The party opposing discovery fails to make a sufficient showing for a protective order under *Sections 2025.420* and *2025.470 of the Code of Civil Procedure* by asserting mere conclusory allegations without any factual basis for the allegations (*see Carlson v. Superior Court (1961) 56 Cal. 2d 431, 440, 15 Cal. Rptr. 132, 364 P.2d 308*).

[*Optional*] **G. Motion Must Be Made in Forum Court.** The only court authorized to issue a protective order under *Sections 2025.420* and *2025.470 of the Code of Civil Procedure* is the court in which the action is pending (*Code Civ. Proc. § 2016.020(b)*).

[*Optional*] **H. Motion Must Be Accompanied by Declaration.** A motion for a protective order under *Sections 2025.420* and *2025.470 of the Code of Civil Procedure* must be accompanied by a declaration stating facts showing a reasonable and good-faith attempt at an informal resolution of each issue presented by the motion (*Code Civ. Proc. § 2025.420(a)*).

I. Court Must Impose Monetary Sanction Absent Specified Findings. The court must impose a monetary sanction under *Code Civ. Proc. § 2023.030* against any party, person, or attorney who unsuccessfully makes a motion for a protective order, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust (*Code Civ. Proc. §§ 2023.030(a), 2025.420(d)*).

[*Add points and authorities generally supporting the imposition of monetary sanctions (see, e.g., Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11), as well as additional points and authorities, when appropriate, opposing a protective order on more specific grounds (see, e.g., § 83.101 et seq.).*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This form of memorandum of points and authorities is for use in opposing a motion for a protective order concerning a deposition [*see Code Civ. Proc. §§ 2025.420, 2025.470*]. This form should be combined with general points and authorities supporting the imposition of monetary sanctions under *Code Civ. Proc. § 2023.030(a)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11*].

Note that some cases cited in this form construe law in effect before the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that they remain consistent with current provisions [*see also § 83.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should show how the facts asserted by the moving party do not amount to a showing of good cause, should set forth other facts that show that justice does not require a protective order, and should otherwise demonstrate substantial justification for opposing the motion in order to avoid a monetary sanction if the motion is granted [*see Code Civ. Proc. §§ 2025.420, 2025.470*]. However, counsel need not set forth facts showing that the moving party acted without substantial justification, because *Code Civ. Proc. § 2023.030(a)* effectively places that burden on the person against whom the sanction is to be imposed, by requiring that the court impose a monetary sanction when it is expressly authorized *unless* it finds that he or she acted with substantial justification or that other circumstances would make the monetary sanction unjust.

[c] Related Pleading and Practice Forms

For forms and discussion related to the obtaining of a protective order and monetary sanctions under Code Civ. Proc. § 2025.420, see California Forms of Pleading and Practice, Ch. 193, *Discovery: Depositions* (Matthew Bender).

[3] Discussion of Authorities

[a] Order Only on Showing of Good Cause

Armstrong v. Gates *(1973) 32 Cal. App. 3d 952, 108 Cal. Rptr. 604* was an action to set aside a default judgment that was taken against defendant because of his failure to file a timely answer to a complaint for personal injuries. Defendant's motion to set aside the default was based largely on the declaration of Robert Brehm, senior claims specialist for State Farm, which was the insurance carrier for both plaintiff and defendant. The declaration stated that there had been delays in receipt of a medical breakdown from plaintiff's doctor, but that plaintiff's attorney had stated that he would not "stick you with the default." However, the default was entered, followed by an action to set it aside. In that later action, plaintiffs noticed depositions of Brehm, and defendants obtained a protective order denying plaintiffs the opportunity to depose Brehm. Some time later, the default was set aside.

The court of appeal ruled that the trial court abused its discretion in granting the protective order, because neither good cause nor a legally sufficient ground had been shown (*32 Cal. App. 3d 952, 957)* . It was improper to base the order on what were possibly a judge's remarks from the bench that no depositions were to be taken until after the hearing on the motion to set aside the default (*32 Cal. App. 3d 952, 957-958)* . Also improper was the trial court's articulated rationale for the protective order that there is almost never any need to have oral testimony in court or by depositions in motion matters, and that information in these situations is to be obtained solely from affidavits and declarations (*32 Cal. App. 3d 952, 958)* . Therefore, both the "boot strap" ground (that the deposition was improper because the judge had remarked from the bench that it was premature) and the rationale that declarations and affidavits supplant deposition

testimony in motion matters demonstrate the lack of legal justification for the court's exercise of discretion (*32 Cal. App. 3d 952, 959)* . The court also noted that the depositions were relevant to the issue of setting aside a default judgment and that plaintiffs suffered prejudice because of the denial of the depositions (*32 Cal. App. 3d 952, 959-960)* . Because of these considerations, the order setting aside the default judgment was reversed (*32 Cal. App. 3d 952, 960)* .

[b] Good Cause Defined

The facts and procedural background of ***Goodman v. Citizens Life & Cas. Ins. Co.*** *(1967) 253 Cal. App. 2d 807, 61 Cal. Rptr. 682* , are discussed in *§ 83.80[3][c]*. In *Goodman*, the court overturned a protective order requiring that plaintiffs pay defense counsel's travel expenses between California and Missouri, where depositions were to be held. The court stated that the bare statement that it would be necessary for defense counsel to travel to Missouri, coupled with a showing made on information and belief of the anticipated expenses for the trip, was insufficient as a factual exposition of a reasonable ground for the order (*253 Cal. App. 2d 807, 819-820)* . Thus, it was an abuse of discretion to grant the order in the absence of facts that would tend to prove annoyance, embarrassment, or oppression (*253 Cal. App. 2d 807, 820)* .

[c] Burden of Proof

In ***Southern California Edison Co. v. Superior Court*** *(1972) 7 Cal. 3d 832, 103 Cal. Rptr. 709, 500 P.2d 621* , the Supreme Court was urged to formulate a general rule for class actions under which defendants would be required to show good cause for deposing unnamed members of the plaintiff class. The Court declined to do so, holding that the burden of showing good cause clearly rests with the party seeking to deny discovery when that party moves for a protective order under former Code Civ. Proc. § 2019(b)(1) (*now see Code Civ. Proc. § 2025.420*; *see also Code Civ. Proc. § 2025.470*) (*7 Cal. 3d 832, 843)* . The Court did find, however, that under the particular circumstances of the case at bar, the plaintiffs had shown good cause for requiring that defendant be responsible for compelling attendance at depositions of the unnamed plaintiffs (*7 Cal. 3d 832, 841-842)* [*see § 83.86*].

[d] Insufficient Showing

In ***Carlson v. Superior Court*** *(1961) 56 Cal. 2d 431, 15 Cal. Rptr. 132, 364 P.2d 308* , an action for modification of alimony and child support, defendant wife sought to take depositions of plaintiff husband. Plaintiff moved the court for an order forbidding the depositions or, in the alternative, either limiting their scope or requiring that the depositions be taken only on written interrogatories. The grounds for his motion were that extensive depositions had already been taken, and that defendant's sole purpose was to harass, embarrass, and oppress the plaintiff. The trial court issued an order forbidding the taking of the depositions.

The Supreme Court reversed by issuing a writ of mandate that required the trial court to set aside its order prohibiting the taking of depositions (*56 Cal. 2d 431, 441)* . The Court held that defendant's declarations thatwere presented in opposition to plaintiff's motion clearly indicated sufficient grounds for taking the depositions, as opposed to a mere desire to harass or annoy. Moreover, the declarations filed by plaintiff in support of this motion contained no factual basis for the claim that defendant sought the depositions for improper purposes. Thus, because the allegations contained in plaintiff's declaration were mere statements of his opinion or conclusion, they had no probative value and could not support the protective order that plaintiff sought (*56 Cal. 2d 431, 440)* . However, counsel should note that Justice Schauer strongly dissented, stating that plaintiff's declarations set forth six legal-size pages documenting defendant's vindictiveness and her attempts to ruin him and alienate the children. In Justice Schauer's view, these charges were not mere conclusionary statements but instead constituted harassment, embarrassment, or oppression as contemplated by the statute (*56 Cal. 2d 431, 442-443)* .

[4] Additional Authorities

[a] Order Only on Showing of Good Cause

Hauk v. Superior Court (1964) 61 Cal. 2d 295, 38 Cal. Rptr. 345, 391 P.2d 825 involved an action for an accounting of profits derived from promotion of a real estate project. Defendants refused to answer deposition questions concerning gains and profits from certain business transactions, claiming that plaintiff must first establish the right to an accounting. The trial court denied plaintiff's motion requiring further answers to those particular questions. Although defendants had sought a protective order pursuant to former Code Civ. Proc. § 2019(b) (*now see Code Civ. Proc. § 2025.420*; *see also Code Civ. Proc. § 2025.470*), alleging that the questions would have subjected them to annoyance, embarrassment, or oppression, it appeared that the trial court did not base its decision on these grounds. Instead, the trial court based its order on the rationale that the orderly administration of justice required that plaintiff should establish his right to an accounting before defendants had to answer the questions relating to gains and profits.

The Supreme Court issued a writ of mandate to the trial court, directing that it require defendants to answer the relevant questions. In so doing, the Court held that the trial court had abused the discretion conferred on it by former Code Civ. Proc. § 2019(b) when it denied discovery in the absence of good cause for the denial (*61 Cal. 2d 295, 298, 299)* . The Court found no ground whatever to support the trial court's decision, in that the trial court had failed to find that the defendants would have been prejudiced in any way by having to answer plaintiff's questions immediately, as opposed to some time after plaintiff had established his right to an accounting (*61 Cal. 2d 295, 298-299)* .

[b] Burden of Proof

Kramer v. Superior Court (1965) 237 Cal. App. 2d 753, 47 Cal. Rptr. 317 involved an action for defamation in which both compensatory and punitive damages were sought. While being deposed, defendant refused to answer 86 questions, and plaintiff thereupon moved for an order to compel answers. Defendant opposed the motion on the grounds that it was not timely made, that some of the questions were not relevant, that others inquired into privileged matters, and that plaintiff had failed to show good cause for compelling answers. The trial court denied the motion on the sole ground that plaintiff had not shown good cause for the discovery within the meaning of former Code Civ. Proc. § 2036, which provided that a party who was required to show good cause to obtain discovery must show specific facts justifying discovery and that the matter is relevant to the subject matter of the action or reasonably calculated to lead to the discovery of admissible evidence (*Code Civ. Proc. § 2017.010* now uses similar language to define matter subject to discovery, but the Civil Discovery Act does not expressly define "good cause").

The court of appeal issued a writ of mandate directing the trial court to set aside its order denying the motion to compel answers, on the ground that the mere interposing of an objection does not shift the burden of good cause from the party seeking to deny discovery to the party seeking discovery without prior court intervention (*237 Cal. App. 2d 753, 758-759)* . Moreover, even if defendant's objections were considered to be a request for a protective order under former Code Civ. Proc. § 2019(b) (*now see Code Civ. Proc. § 2025.420*; *see also Code Civ. Proc. § 2025.470*), the trial court was still in error, in that the declaration filed by defendant in opposition to plaintiff's motion could not be said to have constituted good cause sufficient to have justified a protective order (*237 Cal. App. 2d 753, 759)* .

[c] Insufficient Showing

Department of Health Services v. Superior Court (1980) 104 Cal. App. 3d 80, 163 Cal. Rptr. 414 involved an action by a hospital seeking compensatory and punitive damages from the state of California, the Department of Health Services, and some individual defendants for their failure to promptly reimburse the plaintiff. In addition to the civil action filed by the hospital, there was also a formal administrative hearing on the same matter, which had been brought before hearing officer, Takashi Kanenaga. In support of its civil action, plaintiff hospital gave notice of its intention to take the oral deposition of hearing officer Kanenaga. The defendants moved for a protective order that the deposition not be taken on various grounds, including that the taking would subject the deponent to annoyance, embarrassment, or oppression, and that inquiry into the mental processes of a quasi-judicial hearing officer is improper. The trial court

deniedthe motion for a protective order, and the court of appeal denied defendants' petition for a writ of prohibition.

The court of appeal held that a protective order would be improper because plaintiff was entitled to make inquiries relevant to the factual allegations in its complaint, especially those relating to alleged conversations that some of the individual defendants had with the hearing officers (*104 Cal. App. 3d 80, 85)* . However, if the deposition questions to the hearing officer were to go beyond the bounds of propriety in seeking information relating to his mental processes, then the proper procedure would be refusal to answer such questions, which refusal could then be reviewed by the trial court on a question-by-question basis (*104 Cal. App. 3d 80, 85)* .

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8-83 California Points & Authorities § 83.101

§ 83.101 Opposing Motion for Protective Order for Deposition [Code Civ. Proc. §§ 2025.420, 2025.470]--Matter Is Discoverable and Discovery Should Be Permitted

[1] FORM

[*The following should be combined with a memorandum of points and authorities generally opposing a motion for a protective order concerning a deposition (see, e.g., § 83.100), as well as additional points and authorities, when appropriate, opposing a protective order on more specific grounds (see, e.g., § 83.102 et seq.).*]

THE DISCOVERY STATUTES SHOULD BE LIBERALLY CONSTRUED TO PERMIT DISCOVERY, THROUGH A DEPOSITION, OF MATTER THAT IS DISCOVERABLE UNDER SECTION 2017.010 OF THE CODE OF CIVIL PROCEDURE.

A. Liberal Interpretation of Discovery Rules. The discovery statutes should be liberally construed in favor of discovery so that discovery is encouraged (see *Greyhound Corp. v. Superior Court (1961) 56 Cal. 2d 355, 377-378, 383, 15 Cal. Rptr. 90, 364 P.2d 266*).

B. Matter That Is Discoverable. Unless limited by court order, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, so long as the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence. Discovery may relate to the claim or defense of the partyseeking discovery or of any other party to the action. Discovery may be obtained of the identity and location of persons having knowledge of any discoverable matter, as well as of the existence, description, nature, custody, condition, and location of any writing or other tangible thing (*Code Civ. Proc. § 2017.010*).

C. Disclosure as Matter of Right. The party seeking discovery is entitled to disclosure as a matter of right absent statutory or public policy considerations that clearly prohibit it (see *Greyhound Corp. v. Superior Court (1961) 56 Cal. 2d 355, 378, 15 Cal. Rptr. 90, 364 P.2d 266*).

[*Optional*] **D. Discovery Proper in Motion Matters.** A protective order should not be granted if it is based on the ground that discovery is improper or unnecessary in motion matters (see *Armstrong v. Gates (1973) 32 Cal. App. 3d 952, 958-959, 108 Cal. Rptr. 604*).

[*Optional*] **E. Information Available From Affidavits and Declarations.** It is improper for the court to grant a motion for a protective order preventing a party from taking a deposition on the ground that the information that would be obtained by taking the deposition may be obtained from affidavits or declarations (*see Carlson v. Superior Court (1961) 56 Cal. 2d 431, 439, 15 Cal. Rptr. 132, 364 P.2d 308* ; *Armstrong v. Gates (1973) 32 Cal. App. 3d 952, 959, 108 Cal. Rptr. 604*).

[*Add points and authorities generally supporting the imposition of monetary sanctions (see, e.g., Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11).*]

[2] Comments

[a] Use of Form

This form of points and authorities is for use in opposing a motion for a protective order on the grounds that the matter is discoverable and that the discovery statutes should be liberally construed to permit the deposition [*see Code Civ. Proc. § 2025.420*; *see also Code Civ. Proc. § 2017.010*]. The form should be combined with the general points and authorities opposing a motion for a protective order *set out in § 83.100* and, when appropriate, with points and authorities on more specific grounds [*see, e.g., § 83.102* et seq.]. When monetary sanctions are sought, this form should also be combined with general points and authorities supporting the imposition of monetary sanctions under *Code Civ. Proc. § 2023.030(a)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11*].

In an appropriate case, these points and authorities may be used to oppose the points and authorities supporting a motion for a protective order *set out in § 83.80* et seq.

Note that some cases cited in this form construe law in effect before the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that they remain consistent with current provisions [*see also § 83.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should state facts showing how the taking of the deposition will lead to the discovery of admissible evidence, and how the moving party's arguments of good cause for a protective order do not warrant a protective order.

[c] Related Pleading and Practice Forms

For forms and discussion related to the obtaining of a protective order and monetary sanctions under Code Civ. Proc. §§ 2025.420, 2025.470, see California Forms of Pleading and Practice, Ch. 193, *Discovery: Depositions* (Matthew Bender).

[3] Discussion of Authorities

[a] Liberal Interpretation of Discovery Rules

The facts and procedural background of ***Greyhound Corp. v. Superior Court*** *(1961) 56 Cal. 2d 355, 15 Cal. Rptr. 90, 364 P.2d 266* are *set out in § 83.80[3][b]* [*see also* discussion in *Ch. 80, Discovery: Scope, Regulation, and Timing, § 80.80[3][a]*]. In laying down guidelines for courts to follow when interpreting the provisions of the former Discovery

Act, the Court in *Greyhound* emphasized that courts must construe the discovery statutes liberally in favor of discovery, in order to accomplish the legislative purposes behind the former Discovery Act (*56 Cal. 2d 355, 377-378)* . These purposes are to be given effect rather than thwarted, so that discovery will be encouraged (*56 Cal. 2d 355, 383)* . The Court also discussed the standard objection that the requested discovery is a mere "fishing expedition" (*56 Cal. 2d 355, 384)* . The Court noted the fact that the Legislature, in enacting the former Discovery Act, can now be said to have authorized "fishing expeditions" (*56 Cal. 2d 355, 385)* . Improper methods of "fishing" may be controlled by the trial court under the powers granted under the discovery statutes, but the mere possibility of abuse may not in itself be grounds for prohibiting the "fishing expedition" per se (*56 Cal. 2d 355, 384-385)* .

[b] Disclosure as Matter of Right

The facts and procedural background of ***Greyhound Corp. v. Superior Court*** *(1961) 56 Cal. 2d 355, 15 Cal. Rptr. 90, 364 P.2d 266* are discussed in *§ 83.80[3][b]* and in [a], *above*. In *Greyhound,* the leading case construing the former Discovery Act, the Supreme Court held that not only is there to be liberal construction of the former Discovery Act in favor of discovery, but that disclosure of information is a matter of right, absent some statutory or public policy considerations clearly forbidding it (*56 Cal. 2d 355, 378)* .

[c] Discovery Proper in Motion Matters

The facts and procedural background of ***Armstrong v. Gates*** *(1973) 32 Cal. App. 3d 952, 108 Cal. Rptr. 604* are discussed in *§ 83.100[3][a]*. In *Armstrong,* the trial court had granted defendant's motion for a protective order on the rationale that in almost all instances, there is no need in motion matters to have oral testimony in court or by deposition. The court of appeal rejected this contention, stating that there is no question but that discovery is allowed on new factual issues in motion matters (*32 Cal. App. 3d 952, 959)* . In support of this position, the court cited *Oak Grove School Dist. v. City Title Ins. Co. (1963) 217 Cal. App. 2d 678, 711-713, 32 Cal. Rptr. 288* , in which it was held that the party seeking discovery was entitled to depositions as a matter of right on a motion to tax costs (*32 Cal. App. 3d 952, 959)* .

[d] Information Available From Affidavits and Declarations

The facts and procedural background of ***Carlson v. Superior Court*** *(1961) 56 Cal. 2d 431, 15 Cal. Rptr. 132, 364 P.2d 308* are discussed in *§ 83.100[3][d]*. In *Carlson,* one of the grounds for the order prohibiting the taking of depositions sought by plaintiff husband was that the depositions were unnecessary because all the contentions of the deponents concerning the facts were presented in declarations or affidavits that were filed by the parties. The Supreme Court held that this assertion was without merit in that it misconceived the distinction between the bilateral deposition and the unilateral affidavit. An affidavit contains only those facts supporting the affiant's contentions. A deposition, on the other hand, affords an opportunity to go beyond the facts given in affidavits by allowing the affiant's opponent to inquire into further facts with the possibility of obtaining information that might rebut the factual claims made in the affidavit or might impeach the credibility thereof (*56 Cal. 2d 431, 439)* . *Carlson* thus holds that the contention of overlap between matters sought in depositions and matters presented in declarations or affidavits will not be sufficient to support a protective order prohibiting depositions.

The facts and procedural background of ***Armstrong v. Gates*** *(1973) 32 Cal. App. 3d 952, 108 Cal. Rptr. 604* are discussed in *§ 83.100[3][a],* and in [c], *above*. In *Armstrong,* the trial court granted a protective order denying plaintiff the right to depose a key witness in an action to set aside a default, on the rationale that in motion matters the court should be able to make its decision on the basis of opposing declarations and affidavits, thus eliminating the need for taking depositions. The court of appeal rejected this reasoning, citing *Carlson v. Superior Court (1961) 56 Cal. 2d 431, 439, 15 Cal. Rptr. 132, 364 P.2d 308* (discussed *above*), for the proposition that the contention that a deposition is unnecessary if facts were previously given in affidavits misconceives the distinction between a bilateral examination and a unilateral affidavit (*32 Cal. App. 3d 952, 959)* .

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8-83 California Points & Authorities § 83.102

§ 83.102 Opposing Motion for Protective Order for Deposition [Code Civ. Proc. §§ 2025.420, 2025.470]--Partial Limitation Preferable to Outright Denial of Discovery

[1] FORM

[*The following should be combined with a memorandum of points and authorities generally opposing a motion for a protective order concerning a deposition (see, e.g., § 83.100), as well as additional points and authorities, when appropriate, opposing a protective order on more specific grounds (see, e.g., §§ 83.101, 83.103).*]

PARTIAL LIMITATIONS ON DISCOVERY ARE PREFERABLE TO PROTECTIVE ORDERS DENYING DISCOVERY OUTRIGHT[, SUCH AS ORDERS THAT DEPOSITIONS NOT BE TAKEN].

A. Discovery May Be Permitted on Just Terms and Conditions Without Protective Order. The court may deny a motion for a protective order under *Section 2025.420 of the Code of Civil Procedure* in whole or in part, and in doing so order that the deponent provide or permit the discovery against which protection was sought on those terms and conditions that are just (*Code Civ. Proc. § 2025.420(c)*).

B. Partial Limitations Preferable to Outright Denial of Discovery. Even when annoyance or oppression has been demonstrated, disclosure should not necessarily be denied. Instead, *Section 2025.420(c) of the Code of Civil Procedure* gives the court discretion to make any order that justice requires, and the court should use this discretion to impose partial limitations rather than outrightdenial of discovery (*see Greyhound Corp. v. Superior Court (1961) 56 Cal. 2d 355, 380, 383, 15 Cal. Rptr. 90, 364 P.2d 266*).

[*Optional*] **C. Partial Limitations on Disclosure of Confidential Information.** When depositions seek records or testimony relating to confidential information, then, when possible, protective orders imposing partial limitations on discovery are preferable to orders that deny discovery outright (*see Valley Bank of Nevada v. Superior Court (1975) 15 Cal. 3d 652, 658, 125 Cal. Rptr. 553, 542 P.2d 977*).

[*Add points and authorities generally supporting the imposition of monetary sanctions (see, e.g., Ch. 82, Discovery:*

Sanctions for Discovery Misuse, § 82.11).]

[2] Comments

[a] Use of Form

This form of points and authorities is for use in opposing a motion for a protective order, to argue that if the court decides to grant the protective order, it should do so only in part, so as to allow the deposition to at least a limited extent [*see Code Civ. Proc. § 2025.420*]. The form should be combined with the general points and authorities opposing a motion for a protective order *set out in § 83.100* and, when appropriate, with points and authorities on more specific grounds [*see, e.g., §§ 83.101, 83.103*]. When monetary sanctions are sought, this form should also be combined with general points and authorities supporting the imposition of monetary sanctions under *Code Civ. Proc. § 2023.030(a)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11*].

In an appropriate case, these points and authorities may be used to oppose the points and authorities supporting a motion for a protective order *set out in § 83.80* et seq.

Note that some cases cited in this form construe law in effect before the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that they remain consistent with current provisions [*see also § 83.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should state facts showing the necessity of the discovery, the relevancy of the information sought, and that at least partial discovery of the information is not outweighed by other considerations, such as the burden on the responding parties or the need to protect privacy. Counsel might also wish to suggest to the court someless onerous form of protective order, such as sealing or limited access, which may be used in lieu of an order eliminating depositions altogether.

[c] Related Pleading and Practice Forms

For forms and discussion related to the obtaining of a protective order and monetary sanctions under Code Civ. Proc. §§ 2025.420, 2025.470, see California Forms of Pleading and Practice, Ch. 193, *Discovery: Depositions* (Matthew Bender).

[3] Discussion of Authorities

[a] Partial Limitations Preferable to Outright Denial of Discovery

The facts and procedural background of ***Greyhound Corp. v. Superior Court*** *(1961) 56 Cal. 2d 355, 15 Cal. Rptr. 90, 364 P.2d 266* are *set out in § 83.80[3][b]* [*see also* discussion in *Ch. 80, Discovery: Scope, Regulation, and Timing, § 80.80[3][a]*]. In *Greyhound*, the Supreme Court gave guidelines for courts to follow in exercising their discretion in regard to discovery. The Court stated that even when annoyance or oppression is demonstrated, disclosure need not be denied in every instance. Rather, courts should attempt to make such orders as "justice requires," including, for example, imposition of costs of disclosure on the party seeking discovery, when the other party shows that discovery would cause an undue burden (*56 Cal. 2d 355, 380)* . Indeed, in exercising discretion, trial courts should remember that the Legislature has suggested that courts should impose partial limitations on discovery in lieu of outright denial of discovery, whenever possible (*56 Cal. 2d 355, 383)* .

[b] Partial Limitations on Disclosure of Confidential Information

The facts and procedural background of ***Valley Bank of Nevada v. Superior Court*** *(1975) 15 Cal. 3d 652, 125 Cal. Rptr. 553, 542 P.2d 977* are discussed in *§ 83.80[4][a]*. In *Valley Bank*, the Supreme Court spoke of the necessity for balancing the need for disclosure against the need to protect privacy and confidentiality (*15 Cal. 3d 652, 657-658)* . The Court cited *Greyhound Corp. v. Superior Court (1961) 56 Cal. 2d 355, 15 Cal. Rptr. 90, 364 P.2d 266* for the proposition that the factors that should be considered by courts in making the balance include purpose of the information sought and effect of disclosure, and that, whenever possible, partial limitations on discovery are preferable to outright denial (*15 Cal. 3d 652, 658)* .

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8-83 California Points & Authorities § 83.103

§ 83.103 Opposing Motion for Protective Order for Deposition [Code Civ. Proc. §§ 2025.420, 2025.470]--Protective Order Prohibiting Party From Attending Deposition Is Improper

[1] FORM

[*The following should be combined with a memorandum of points and authorities generally opposing a motion for a protective order concerning a deposition (see, e.g., § 83.100), as well as additional points and authorities, when appropriate, opposing a protective on more specific grounds (see, e.g., §§ 83.101, 83.102).*]

A PROTECTIVE ORDER THAT PROHIBITS A PARTY TO THE ACTION FROM ATTENDING A DEPOSITION IS IMPROPER.

Protective Order Prohibiting Party From Attending Deposition Is Improper. The provision of *Code of Civil Procedure Section 2025.420(b)(12)* that a protective order may exclude designated persons "other than the parties to the action and their officers and counsel" from attending a deposition expressly precludes an order excluding any party from attending a deposition (*see Willoughby v. Superior Court (1985) 172 Cal. App. 3d 890, 892-893, 218 Cal. Rptr. 486*).

[*Add points and authorities generally supporting the imposition of monetary sanctions (see, e.g., Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11).*]

[2] Comments

[a] Use of Form

These points and authorities are for use in opposing a motion for a protective order prohibiting a party from attending a deposition [*see Code Civ. Proc. § 2025.420(b)(12)*]. The form should be combined with the general points and authorities opposing a motion for a protective order *set out in § 83.100* and, when appropriate, with points and authorities on more specific grounds [*see, e.g., §§ 83.101, 83.102*]. When monetary sanctions are sought, this form should also be combined with general points and authorities supporting the imposition of monetary sanctions under

Code Civ. Proc. § 2023.030(a) [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11*].

In an appropriate case, these points and authorities may be used to oppose the points and authorities supporting a motion for a protective order *set out in § 83.80*.

Note that some cases cited in this form construe law in effect before the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that they remain consistent with current provisions [*see also § 83.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case.

[c] Related Pleading and Practice Forms

For forms and discussion related to the obtaining of a protective order and monetary sanctions under Code Civ. Proc. §§ 2025.420, 2025.470, see California Forms of Pleading and Practice, Ch. 193, *Discovery: Depositions* (Matthew Bender).

[3] Discussion of Authorities

[a] Protective Order Prohibiting Party From Attending Deposition Is Improper

In ***Willoughby v. Superior Court*** *(1985) 172 Cal. App. 3d 890, 892-893, 218 Cal. Rptr. 486* , a former employee brought an action against two supervisors of her former employer, alleging harassment, abuse, and intimidation. When defendants noticed plaintiff's deposition, plaintiff sought and obtained a protective order under former Code Civ. Proc. § 2019(b)(1) (*now see Code Civ. Proc. § 2025.420*) that prohibited defendants from attending plaintiff's deposition. This order was based on a showing by plaintiff that if defendants attended her deposition she would become so upset that she would not be able to "remain calm and testify with a cool head." Defendants challenged the order by a petition for writ of mandate.

The court of appeal issued the writ, directing the trial court to vacate the order (*172 Cal. App. 3d 890, 893)* . The court held that because former Code Civ. Proc. § 2019(b)(1) provides that a protective order may exclude any person from attending a deposition "except the parties to the action and their officers or counsel" (*now see Code Civ. Proc. § 2025.420(b)(12)*), the exclusion of parties from attending a deposition is expressly precluded for any reason (*172 Cal. App. 3d 890, 892-893)* .

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Volume 8 Chapters 80-89A DISCOVERY
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8-83 California Points & Authorities §§ 83.104-83.109

[Reserved]

§§ 83.104[Reserved]

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8-83 California Points & Authorities § 83.110

§ 83.110 Opposing Contention That Protective Order Sought During Deposition May Be Granted Ex Parte [Code Civ. Proc. §§ 2025.420, 2025.470]

[1] FORM

[*The following may be included in a memorandum of points and authorities, such as one used in support of a petition for a writ of mandate, or in a trial or appellate brief.*]

THE TRIAL COURT'S DISCOVERY ORDER OF _____ [*specify date*] IS IMPROPER BECAUSE A PROTECTIVE ORDER PURSUANT TO SECTION 2025.420 OF THE CODE OF CIVIL PROCEDURE MAY BE MADE ONLY ON PROPERLY NOTICED MOTION AND AFTER A HEARING.

Ex Parte Protective Order During Deposition Not Permissible. A protective order made during a deposition pursuant to *Sections 2025.420* and *2025.470 of the Code of Civil Procedure* to terminate the examination or limit the scope and manner of taking the deposition may only be made pursuant to a motion meeting the notice and hearing requirements generally applicable to motions, and may not be made by the court ex parte (see *St. Paul Fire & Marine Ins. Co. v. Superior Court (1984) 156 Cal. App. 3d 82, 86, 202 Cal. Rptr. 571*).

[2] Comments

[a] Use of Form

This form may be used by a party taking a deposition to support a contention that an ex parte protective order made during a deposition pursuant to *Code Civ. Proc. §§ 2025.420, 2025.470*, terminating the examination or limiting the scope and manner of taking the deposition, was improper. The ground of the contention is that a protective order during deposition pursuant to *Code Civ. Proc. §§ 2025.420, 2025.470* may only be made on a properly noticed motion and after a hearing.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the invalidity of the ex parte protective order. For example, it may be combined

with points and authorities supporting a petition for writ of mandate under *Code Civ. Proc. §§ 1085* and *1086*, directing the trial court to vacate the order. The foregoing points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should include argument showing that the lower court made a protective order under *Code Civ. Proc. §§ 2025.420, 2025.470* and that the propounding party was not given notice of the motion pursuant to which the order was made, or was not given an opportunity to be heard before the lower court made the order.

[c] Related Pleading and Practice Forms

For forms and discussion related to the obtaining of a protective order and monetary sanctions under Code Civ. Proc. § 2025.470, see California Forms of Pleading and Practice, Ch. 193, *Discovery: Depositions* (Matthew Bender).

[d] Related Points and Authorities

For forms of points and authorities opposing a motion for a protective order under *Code Civ. Proc. §§ 2025.420* and *2025.470*, see *§ 83.100* et seq. For forms of points and authorities generally supporting a petition for writ of mandate, see Ch. 150, *Mandate and Prohibition* .

[3] Discussion of Authorities

[a] Ex Parte Protective Order During Deposition Not Permissible

St. Paul Fire & Marine Ins. Co. v. Superior Court *(1984) 156 Cal. App. 3d 82, 202 Cal. Rptr. 571* involved an insurance bad-faith action against two corporate defendants. The parties to the action agreed that plaintiffs' depositions would be taken first, followed by the depositions of defendants' representatives noticed by plaintiffs. After deposition of the first plaintiff had continued for some 12 sessions, plaintiff's attorney notified defense counsel by telephone that he would seek a protective order terminating the deposition on the day following the telephone conversation. The following morning plaintiff's attorney filed with the court what was termed an ex parte request for a protective order. Defense counsel were given copies of this request when they appeared to oppose the request on the morning following the telephone conversation. The trial court declined to accept papers in opposition to the request offered by defense counsel, hear oral argument, permit the presence of a court reporter, or speak with defense counsel informally before ruling on plaintiff's request. An hour after plaintiff filed its request, the court handed down a protective order pursuant to former Code Civ. Proc. § 2019(d) (*now see Code Civ. Proc. § 2025.470*; *see also Code Civ. Proc. § 2025.420*) terminating the deposition of the first plaintiff until further order of the court, prohibitingdeposition of the second plaintiff, and directing that deposition of the persons noticed by plaintiff begin in sequence and without delay. Defendants then filed a petition for writ of mandate.

The court of appeal issued a peremptory writ directing the trial court to set aside its protective order (*156 Cal. App. 3d 82, 86)* . The court preliminarily noted the general rules that notice of motion must be given whenever the order sought may affect the rights of an adverse party and that a statute that is silent on the point should not be interpreted as authorizing an ex parte application for an order (*156 Cal. App. 3d 82, 85)* . The court stated that one might conclude from the language of former Code Civ. Proc. § 2019(d) that a protective order could be issued on motion of a party or of a deponent without giving opposing counsel an opportunity to be heard. However, the court interpreted the fact that former Code Civ. Proc. § 2019(d) (*now see Code Civ. Proc. § 2025.470*) refers to issuance of a protective order on motion, rather than on an ex parte application, as imposing the notice and hearing requirements generally applicable to motions. The court stated that its view was strengthened by additional language in former Code Civ. Proc. § 2019(d) (*now see Code Civ. Proc. § 2025.470*) that the deposition can be suspended for the time necessary to make a motion and

order, on demand by the opposing party. This language made the expedited ex parte proceedings used by the trial court unnecessary (*156 Cal. App. 3d 82, 85-86)* .

Note that *St. Paul Fire & Marine Ins. Co.* construed law in effect before the operative date of the Civil Discovery Act. It is cited and discussed as persuasive authority to the extent that remains consistent with current provisions [*see also § 83.02[3]*].

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8-83 California Points & Authorities §§ 83.111-83.129

[Reserved]

§§ 83.111[Reserved]

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E. Motion to Take Subsequent Deposition

8-83 California Points & Authorities § 83.130

§ 83.130 Supporting Motion for Leave to Take Subsequent Deposition [Code Civ. Proc. § 2025.610]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN SUPPORT OF MOTION FOR ORDER
vs.	)	GRANTING LEAVE TO TAKE SUBSEQUENT
_____ [*name*],	)	DEPOSITION
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

FOR GOOD CAUSE SHOWN, THE COURT MAY GRANT LEAVE TO TAKE A SUBSEQUENT DEPOSITION OF A NATURAL PERSON.

A. Court May Grant Leave on Showing of Good Cause. For good cause shown, the court may grant leave to take a subsequent deposition of a natural person, including that of a party to the action, regardless of whether the moving party was the party who gave or who received notice of the deposition of that natural person (*Code Civ. Proc. § 2025.610(b)*).

[*Optional*] **B. Subsequent Deposition When New Facts Arise.** Even though a previous deposition has already been

taken, a new deposition is necessary if it will relate to a new factual issue that is relevant. A party should not be denied the opportunity to inquire into matters relating to new factual issues merely because the previous deposition was taken before the existence of the facts that gave rise to that issue (*see Carlson v. Superior Court (1961) 56 Cal. 2d 431, 439, 15 Cal. Rptr. 132, 364 P.2d 308*).

[*Optional*] **C. Subsequent Deposition Under Statutory Exceptions.** One subsequent deposition may be taken of a natural person who has previously been examined (1) as a result of that person's designation to testify on behalf of an organization under *Code of Civil Procedure Section 2025.230*, or *(2)*, pursuant to a court order under *Code of Civil Procedure Section 485.230*, for the limited purpose of discovering under Code of Civil Procedure Section § 485.230 the identity, location, and value of property in which the deponent has an interest (*Code Civ. Proc. § 2025.610(c)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This form of memorandum of points and authorities is for use in supporting a motion for an order granting leave to take a subsequent deposition of a natural person [*see Code Civ. Proc. § 2025.610*]. Under *Code Civ. Proc. § 2025.610*, no subsequent deposition of a natural person may be taken except by stipulation or court order on a showing of good cause. This section does permit one subsequent deposition of a natural person who has previously been examined (1) as a result of that person's designation to testify on behalf of an organization, or (2) pursuant to a court order under *Code Civ. Proc. § 485.230*, for the limited purpose of discovering under *Code Civ. Proc. § 485.230* the identity, location, and value of property in which the deponent has an interest [*see* Optional Paragraph C]. With appropriate modifications, this form may used to oppose points and authorities *set out in § 83.81*, which support a motion for a protective order directing that a deposition not be taken at all on the ground that the deponent has been previously deposed.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should set forth facts establishing good cause warranting the taking of another deposition and, if possible, establishing the reasons why the examination to be taken was not taken at the original deposition--for example, if information has been newly discovered or covered up by the deponent and only recently uncovered.

[c] Related Pleading and Practice Forms

For forms and discussion related to proceedings for leave to take a subsequent deposition, see California Forms of Pleading and Practice, Ch. 193, *Discovery: Depositions* (Matthew Bender).

[3] Discussion of Authorities

[a] Subsequent Deposition When New Facts Arise

The facts and procedural background of ***Carlson v. Superior Court*** *(1961) 56 Cal. 2d 431, 15 Cal. Rptr. 132, 364 P.2d 308* are *set out in § 83.100[3][d]*. In *Carlson*, defendant wife sought depositions with respect to her motion for modification of child support and alimony based on changed circumstances. Plaintiff husband moved to prohibit the

depositions on the ground, inter alia, that there had been prior extensive depositions at the time of the original divorce trial. The Supreme Court noted that the new depositions concerned issues of fact that did not exist at the time of the original trial, and that it would be an unwarranted limitation on discovery if it were to be held that a litigant has no right to inquire into matters relating to new factual issues merely because she had taken depositions before the existence of the facts that gave rise to that issue (*56 Cal. 2d 431, 439)* .

Note that *Carlson* construed law in effect before the operative date of the Civil Discovery Act. It is cited and discussed as persuasive authority to the extent that it remains consistent with current provisions [*see also § 83.02[3]*].

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8-83 California Points & Authorities §§ 83.131-83.149

[Reserved]

§§ 83.131[Reserved]

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8-83 California Points & Authorities § 83.150

§ 83.150 Supporting Motion to Sustain Objection to Form of Written Deposition Question [Code Civ. Proc. §§ 2028.040, 2028.070(c)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ORDER SUSTAINING OBJECTION TO WRITTEN QUESTION(S) FOR DEPOSITION
vs.	)	
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE OBJECTION(S) OF _____ [*name*] TO THE FORM OF THE WRITTEN DEPOSITION QUESTION(S) BY _____ [*name*] SHOULD BE SUSTAINED, AND A MONETARY SANCTION SHOULD BE IMPOSED AGAINST _____ [*name*].

A. Party May Move for Order Sustaining Objection. After timely serving a specific objection to the form of a written deposition question on all parties entitled to notice of the deposition, a party may promptly make a motion that the court sustain the objection, accompanied by a declaration stating facts showing a reasonable and good-faith attempt

at an informal resolution of the issue presented (*Code Civ. Proc. § 2028.040*).

B. Court May Order That Objection Be Sustained. The court may order that an objection under *Section 2028.040* or *2028.050 of the Code of Civil Procedure* be sustained (*Code Civ. Proc. § 2028.070(c)*).

C. Court Must Impose Monetary Sanction Absent Specified Findings. The court must impose a monetary sanction under *Code Civ. Proc. § 2023.030* against any party, person, or attorney who unsuccessfully opposes a motion to sustain an objection to a question for a written deposition, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust (*Code Civ. Proc. §§ 2023.030(a), 2028.040(c)*).

[*Add points and authorities generally supporting the imposition of monetary sanctions (see, e.g., Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11).*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This form of memorandum of points and authorities is for use in supporting a motion for an order sustaining an objection to the form of a written deposition question and for the imposition of a monetary sanction [*Code Civ. Proc. § 2028.040, 2028.070(c)*]. The motion must be accompanied by a declaration stating facts showing a reasonable and good-faith attempt at an informal resolution of each issue presented by the motion [*see Code Civ. Proc. § 2028.040(b)*]. This form should be combined with general points and authorities supporting the imposition of monetary sanctions under *Code Civ. Proc. § 2023.030(a)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should state the reasons for the objections to the questions and any facts to support those reasons, and otherwise show substantial justification for the motion in order to avoid a monetary sanction if the motion is denied. However, counsel need not set forth facts showing that the opposing party acted without substantial justification, because *Code Civ. Proc. §§ 2023.030(a)* and *2028.040* effectively place that burden on the person against whom the sanction is to be imposed, by requiring the court to impose a monetary sanction whenit is expressly authorized *unless* it finds that he or she acted with substantial justification or that other circumstances would make the monetary sanction unjust.

[c] Objection to Form of Written Deposition Question

Under *Code Civ. Proc. § 2028.040(a)*, a party waives objection to the form of any written question for a deposition unless the party timely serves the specific objection on all parties entitled to notice of the deposition within 15 days after service of the question. This period is extended if service is made by mail [*see Code Civ. Proc. § 2016.050*]. After having made service, the objecting party may promptly move the court to sustain the objection. Unless the court sustains the objection, the deposition officer will propound to the deponent any question to which objection is made subject to that objection [*Code Civ. Proc. § 2028.040(b)*].

When an objection is made based on privilege or work product protection rather than the form of the written question, a motion to sustain is not necessary. In this event the party propounding the question must make a motion to overrule the objection [*Code Civ. Proc. § 2028.050(b)*; *see § 83.160*].

[d] Related Pleading and Practice Forms

For forms and discussion related to depositions by written questions, see California Forms of Pleading and Practice, Ch. 193, *Discovery: Depositions* (Matthew Bender).

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8-83 California Points & Authorities §§ 83.151-83.159

[Reserved]

§§ 83.151[Reserved]

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8-83 California Points & Authorities § 83.160

§ 83.160 Supporting Motion to Overrule Objection to Written Deposition Question Based on Privilege or Work Product Protection [Code Civ. Proc. §§ 2028.050, 2028.070(c)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ORDER OVERRULING OBJECTION TO WRITTEN QUESTION(S) FOR DEPOSITION
vs.	)	
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE OBJECTION(S) TO THE WRITTEN QUESTION(S) FOR THE DEPOSITION OF _____ [*name*] ON THE GROUND(S) OF _____ [PRIVILEGE *and/or* WORK PRODUCT PROTECTION] ARE WITHOUT MERIT, AND THUS THE COURT SHOULD GRANT THE MOTION OF _____ [*name of propounding party*] AND SHOULD IMPOSE A MONETARY SANCTION.

A. Party May Move for Order Overruling Objection. When a party objects to a written question for a deposition on the ground that it calls for information that is privileged or protected work product under *Section 2018.010 et seq. of the*

Code of Civil Procedure, the party propounding the question to which the objection is made may then make a motion that the court overrule the objection, accompanied by a declaration stating facts showing a reasonable and good-faith attempt at an informal resolution of the issue presented (*Code Civ. Proc. § 2028.050(b)*).

B. Court May Order That Objection Be Overruled. The court may order that an objection under *Section 2028.040* or *2028.050of the Code of Civil Procedure* be overruled (*Code Civ. Proc. § 2028.070(c)*).

[*Optional*] **C. Waiver of Objection If Objection Not Timely.** A party who objects to a written question for a deposition on the ground of privilege or work product protection waives that objection if that party does not serve a specific objection to the question on all parties entitled to notice of the deposition within 15 days after service of the question (*Code Civ. Proc. § 2028.050(a)*; *but see Code Civ. Proc. § 2016.050* (15-day period extended when service is by mail)).

D. Court Must Impose Monetary Sanction Absent Specified Findings. The court must impose a monetary sanction under *Code Civ. Proc. § 2023.030* against any party, person, or attorney who unsuccessfully opposes a motion to overrule an objection to a question for a written deposition, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust (*Code Civ. Proc. §§ 2023.030(a), 2028.050(c)*).

[*Add points and authorities generally supporting the imposition of monetary sanctions (see, e.g., Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11).*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This form of memorandum of points and authorities is for use in supporting a motion for an order overruling an objection to a written deposition question that is based on privilege or work product protection, and for the imposition of a monetary sanction [*Code Civ. Proc. § 2028.050, 2028.070(c)*]. The motion must be accompanied by a declaration stating facts showing a reasonable and good-faith attempt at an informal resolution of each issue presented by the motion [*see Code Civ. Proc. § 2028.050(b)*]. This form should be combined with general points and authorities supporting the imposition of monetary sanctions under *Code Civ. Proc. § 2023.030(a)* [*see* Ch. 82, *Discovery: Sanctions for Discovery Misuse*, § 82.11]. For memoranda of points and authorities relating to specific grounds of evidentiary privilege or other protection from discovery, see generally Ch. 81, *Discovery: Privileges and Other Discovery Limitations* .

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should state facts showing that the question does not call for information that is privileged or is protected work product, and otherwise show substantial justification for the motion in order to avoid a monetary sanction if the motion is denied. However, counsel need not set forth facts showing that the opposing party acted without substantial justification, because *Code Civ. Proc. §§ 2023.030(a)* and *2028.050* effectively place that burden on the person against whom the sanction is to be imposed, by requiring the court to impose a monetary sanction when it is expressly authorized *unless* it

finds that he or she acted with substantial justification or that other circumstances would make the monetary sanction unjust.

[c] Objection to Written Deposition Question Based on Privilege or Work Product Protection

Under *Code Civ. Proc. § 2028.050(a)*, a party who objects to a written question for a deposition on the ground of privilege or work product must serve a specific objection to the question on all parties entitled to notice of the deposition within 15 days after service of the question. This period is extended if service is by mail [*see Code Civ. Proc. § 2016.050*]. If the objecting party fails to timely serve the objection, he or she waives the objection. After being served, the propounding party may promptly move the court to overrule the objection. Unless the court overrules the objection, the deposition officer will not propound to the deponent the question to which the objection is made [*Code Civ. Proc. § 2028.050*; *cf. Code Civ. Proc. § 2028.040*]..

When an objection based on the form of the question is made, a motion to overrule the objection is not necessary. In this event the objecting party must move to sustain the objection [*Code Civ. Proc. § 2028.040(b)*; *see § 83.150*].

[d] Related Pleading and Practice Forms

For forms and discussion related to depositions by written questions, see California Forms of Pleading and Practice, Ch. 193, *Discovery: Depositions* (Matthew Bender).

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8-83 California Points & Authorities §§ 83.161-83.169

[Reserved]

§§ 83.161[Reserved]

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8-83 California Points & Authorities § 83.170

§ 83.170 Supporting Motion for Protective Order Against Written Deposition [Code Civ. Proc. § 2028.070]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR A PROTECTIVE ORDER RE DEPOSITION BY WRITTEN QUESTIONS AND FOR MONETARY SANCTION
vs.	)	
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD ISSUE A PROTECTIVE ORDER REGARDING THE DEPOSITION OF _____ [*name*] BY WRITTEN QUESTIONS BECAUSE GOOD CAUSE HAS BEEN SHOWN AND THE ORDER IS REQUIRED BY JUSTICE TO PROTECT _____ [*name*], _____ [PARTY *or* DEPONENT *or* NATURAL PERSON *or* ORGANIZATION], FROM UNWARRANTED, ANNOYANCE, EMBARRASSMENT, OR OPPRESSION, OR UNDUE BURDEN AND EXPENSE. THE COURT SHOULD ALSO IMPOSE A MONETARY SANCTION.

A. Provisions Governing Written Depositions. Except as modified by *Section 2028.010 et seq. of the Code of Civil*

Procedure, a deposition by written questions is governed by the provisions applicable to oral depositions under *Section 2025.010 et seq. of the Code of Civil Procedure* (*Code Civ. Proc. § 2028.010*).

B. Power of Court to Issue Protective Order. [*See § 83.80[1], Paragraph A.*]

[*EITHER*]

C. Deposition Taken Only on Oral Examination. In addition to any appropriate order listed in *Section 2025.420(b) of the Code ofCivil Procedure*, the court may, in the context of a deposition by written questions, issue an order directing that the deponent's testimony be taken by oral, instead of written, examination (*Code Civ. Proc. § 2028.070(a)*).

[*AND/OR*]

D. Oral Examination by Another Party. In addition to any appropriate order listed in *Section 2025.420(b) of the Code of Civil Procedure*, the court may, in the context of a deposition by written questions, issue an order directing that one or more of the parties receiving notice of the written deposition be permitted to attend in person or by attorney and to propound questions to the deponent by oral examination (*Code Civ. Proc. § 2028.070(b)*).

[*AND/OR*]

E. Change in Deposition Officer. In addition to any appropriate order listed in *Section 2025.420(b) of the Code of Civil Procedure*, the court may, in the context of a deposition by written questions, issue an order directing that the deposition be taken before an officer other than the one named or described in the deposition notice (*Code Civ. Proc. § 2028.070(d)*).

[*These points and authorities should be combined with a memorandum of points and authorities generally supporting a motion for a protective order for a deposition and a request for monetary sanctions (see, e.g., § 83.80), as well as with points and authorities generally supporting the imposition of monetary sanctions (see, e.g., Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11).*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This form of points and authorities is for use in seeking a protective order in the context of a deposition by written questions [*see Code Civ. Proc. §§ 2028.010, 2028.070*]. The motion must be made before the court in which the action is pending [*Code Civ. Proc. § 2016.020(b)*; *see Code Civ. Proc. § 2025.420*], and must be accompanied by a declaration stating factsshowing a reasonable and good-faith attempt at an informal resolution of each issue presented by the motion [*see Code Civ. Proc. § 2025.420(a)*]. The form should be combined as directed with the general points and authorities

supporting a motion for a protective order *set out in § 83.80*. When monetary sanctions are sought, this form should also be combined with general points and authorities supporting the imposition of monetary sanctions under *Code Civ. Proc. § 2023.030(a)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should state facts showing need for protection from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense, should state facts and insert argument of the specific reasons why the written deposition should be restricted by the particular protective order sought, and should otherwise show substantial justification for the motion in order to avoid a monetary sanction if the motion is denied. However, counsel need not set forth facts showing that the opposing party acted without substantial justification, because *Code Civ. Proc. § 2023.030(a)* effectively places that burden on the person against whom the sanction is to be imposed, by requiring that the court impose a monetary sanction when it is expressly authorized *unless* it finds that he or she acted with substantial justification or that other circumstances would make the monetary sanction unjust.

[c] Related Pleading and Practice Forms

For forms and discussion related to depositions by written questions and protective orders in the context of deposition proceedings, see California Forms of Pleading and Practice, Ch. 193, *Discovery: Depositions* (Matthew Bender).

[3] [Reserved]

[4] Additional Authorities

[a] Deposition Taken Only on Oral Examination

In *Beverly Hills Nat'l Bank & Trust Co. v. Superior Court (1961) 195 Cal. App. 2d 861, 16 Cal. Rptr. 236* , an action for an accounting and constructive trust, defendant sought to depose a nonresident witness on oral examination. Although defendant had stated that the person to be deposed was a material witness who could shed light on whether the property in question was separate or community in character (a principal issue), the trial court sustained plaintiff's objection to the proposed deposition, whichwas based on insufficient grounds for the deposition. Defendant petitioned for a writ of mandate.

The court of appeal granted the writ, ordering that the deposition be taken (*195 Cal. App. 2d 861, 868)* . Although the main ground for error was that the trial court placed the burden of showing good cause on the examining party rather than on the party seeking to oppose the discovery, the court also noted that if good cause is shown, the trial court may exercise its discretion to overrule the choice of the examining party whether to conduct depositions on oral examination or by written questions. Some of the factors to be considered in the exercise of this discretion are convenience and expense (*195 Cal. App. 2d 861, 867)* .

Note that *Beverly Hills* construed law in effect prior to the operative date of the Civil Discovery Act of 1986. It is cited and discussed as persuasive authority to the extent that it appears to remain consistent with current provisions.

California Points & Authorities

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 84 DISCOVERY: INTERROGATORIES

8-84 California Points & Authorities 84.syn

§ 84.syn Synopsis to Chapter 84: DISCOVERY: INTERROGATORIES

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§ 84.02 Governing Law

[1] California Civil Discovery Act and Related Law

[2] Provisions Governing Interrogatories

[3] Case Law Decided Under Prior Discovery Acts

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§ 84.04 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

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§§ 84.05-84.09 [Reserved]

§ 84.10 Supporting Motion for Order Compelling Response to Interrogatories [Code Civ. Proc. § 2030.290]--No Responses Served

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Burden of Justification on Nonresponding Party

[b] Guardian Ad Litem May Be Ordered to Verify Responses on Behalf of Ward

[4] Additional Authorities

[a] Statutory Authority

[b] Burden of Justification on Nonresponding Party

[c] Court Must Impose Monetary Sanctions Absent Specific Findings

§ 84.11 Supporting Motion for Order Compelling Further Response to Interrogatories [Code Civ. Proc. § 2030.300]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Procedural Requirements

[d] Related Pleading and Practice Forms

[e] Related Points and Authorities

[3] Discussion of Authorities

[a] Scope of Examination by Written Interrogatories

[b] Burden on Party Raising Objections

[c] Requirement of Reasonable Effort to Obtain Information

[d] Adequate Response Identifying Documents Must Include Document's Description

[4] Additional Authorities

[a] Burden on Party Raising Objections

[b] Requirement of Reasonable Effort to Obtain Information

[c] Adequate Response Identifying Documents Must Include Document's Description

[d] Court Must Impose Monetary Sanction Absent Specified Findings

§ 84.12 Supporting Motion for Discovery Sanction Following Failure to Comply With Order Compelling Answers or Further Response to Interrogatories [Code Civ. Proc. §§ 2023.030, 2030.290, 2030.300]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Sanctions

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Sanctions After Order Compelling Answers

[b] Monetary Sanctions Against Attorney

[4] Additional Authorities

[a] Sanctions After Order Compelling Answers

§§ 84.13through 84.14 [Reserved]

§ 84.15 Supporting Motion to Compel Discovery--Interrogatory Answer That Information Available From Mass of Documents Is Insufficient

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Broad Direction to Search Mass of Documents Is Improper

§§ 84.16through 84.19 [Reserved]

§ 84.20 Opposing Motion for Order Compelling Further Response to Interrogatories [Code Civ. Proc. § 2030.300]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Waiver by Untimely Notice of Motion

[b] Denying Motion Totally

[c] Number of Specially Prepared Interrogatories in Excess of 35

[4] Additional Authorities

[a] Improper Format of Questions

§ 84.21 Opposing Motion to Compel Discovery--Interrogatory Answer Requiring Responding Party to Search Records and Public Records Is Sufficient [Code Civ. Proc. § 2030.230]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] No Compilation, Abstract, Audit, or Summary Available

[b] Answers Contained in Records That Are Equally Available to Both Parties

[c] Improper to Seek Discovery of Information Contained in Public Records

§ 84.22 Opposing Motion to Compel Discovery--No Duty to Perform Opposing Party's Research in Answering Interrogatories [Code Civ. Proc. § 2030.220(c)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Answers Equally Available to Both Parties

[4] Additional Authorities

[a] Answers Equally Available to Both Parties

§§ 84.23through 84.29 [Reserved]

§ 84.30 Supporting Motion for Protective Order Regarding Interrogatories [Code Civ. Proc. § 2030.090]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Rephrasing Interrogatories

[4] Additional Authorities

[a] Rephrasing Interrogatories

§§ 84.31through 84.49 [Reserved]

§ 84.50 Supporting Motion for Relief From Waiver of Right to Produce Writings or Make Objections [Code Civ. Proc. § 2030.290]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Grounds for Relief

[d] Related Pleading and Practice Forms

[e] Opposing Points and Authorities

§§ 84.51-84.59 [Reserved]

§ 84.60 Opposing Motion for Relief From Waiver of Right to Produce Writings or Make Objections [Code Civ. Proc. § 2030.290]--Failure to Show Excuse From Delay

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Inadequate Showing of Excusable Neglect in Filing Untimely Objections

§§ 84.61-84.69 [Reserved]

§ 84.70 Supporting Motion for Order That Initial Answers to Interrogatories Be Deemed Binding [Code Civ. Proc. § 2030.310]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

§§ 84.71-84.79 [Reserved]

§ 84.80 Memorandum of Points and Authorities in Support of Motion for Order Allowing Service of Interrogatories on a Member of Class Who Is Not a Class Representative and Who Has Not Appeared [Cal. Rules of Ct., Rule 3.768(c)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 84 DISCOVERY: INTERROGATORIES
PART I. INTRODUCTION

8-84 California Points & Authorities § 84.01

§ 84.01 Scope of Chapter

This chapter includes memoranda relating to civil discovery by written interrogatories. Forms in Part II include the following:

- Subpart A has memoranda supporting [§ 84.10 et seq.] and opposing [§ 84.20 et seq.] a motion to compel matters relating to discovery by interrogatories.

- Subpart B has memoranda supporting [§ 84.30] a motion for a protective order in the context of written interrogatories.

- Subpart C has memoranda relating to miscellaneous motions in matters pertaining to interrogatories, including a motion for relief from a waiver of the right to produce writings or make objections [§ 84.50] and a motion to deem partial answers to interrogatories as binding [§ 84.70].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesUseCivil ProcedureDiscoveryMotions to CompelCivil ProcedureDiscoveryProtective Orders

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 84 DISCOVERY: INTERROGATORIES
PART I. INTRODUCTION

8-84 California Points & Authorities § 84.02

§ 84.02 Governing Law

[1] California Civil Discovery Act and Related Law

Civil discovery in California is governed primarily by the California Civil Discovery Act, codified at *Code Civ. Proc. §§ 2016.010-2036.050*. Discovery in limited civil cases is further governed by *Code Civ. Proc. §§ 94* and *95*. Statewide rules of court relating to discovery papers and discovery motions are set out in *Cal. Rules of Ct., Rules 3.1000*, 3.1345, 3.1346, 3.1347, and 3.1348.

[2] Provisions Governing Interrogatories

Civil discovery by written interrogatories is governed primarily by *Code Civ. Proc. §§ 2030.010-2030.410*. Judicial Council form interrogatories are authorized and governed by *Code Civ. Proc. §§ 2033.710-2033.740*. Limits on the use of interrogatories in limited civil cases are set out in *Code Civ. Proc. § 94(a)*.

[3] Case Law Decided Under Prior Discovery Acts

The Civil Discovery Act was passed in 2004 and became effective July 1, 2005. It repealed and renumbered the Civil Discovery Act of 1986 but did not substantively change the law of civil discovery [Stats. 2004, ch. 182 §§ 22, 23, 61]. Thus cases decided under the 1986 Act remain controlling authority.

A considerable body of case law interpreted the discovery provisions of the Discovery Act of 1956 (former Code Civ. Proc. §§ 2016-2037.9), which preceded the 1986 Act. Although the 1986 Act, which became operative July 1, 1987, implemented numerous changes in the prior law, it also continued provisions of the prior law in many other instances, or even codified decisionsinterpreting the prior law. Decisions construing this prior law are therefore cited as persuasive, rather than controlling, authority to the extent that they are consistent with current provisions [*see In re Marriage of Skelley (1976) 18 Cal. 3d 365, 369, 134 Cal. Rptr. 197, 556 P.2d 297]* .

Legal Topics:

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

Civil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesForm

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8-84 California Points & Authorities § 84.03

§ 84.03 How to Use the Forms in This Chapter

[1] Page Limits on Memoranda

One of the more significant drafting requirements to keep in mind are page limits: supporting and opposing memoranda filed in discovery motion proceedings may not exceed 15 pages. A reply or closing memorandum may not exceed 10 pages. Exhibits, declarations, attachments, the table of contents, the table of authorities, and the proof of service are excluded from these page limits. Any party must obtain leave of court to file a longer memorandum [*see Cal. Rules of Ct., Rule 3.1113(d)*]. These and other drafting requirements are discussed in further detail in Ch. 1, *Writing Legal Memoranda and Briefs* .

[2] Using the Forms to Build a Draft Memorandum

The forms included in this chapter are designed to be included in a memorandum supporting or opposing a particular type of discovery motion, such as motion to compel discovery or a motion for a protective order.

In many cases it will be appropriate to combine them with additional memoranda set out in the related discovery chapters. In particular, they may be combined with the general memoranda for limiting or regulating discovery set out in Ch. 80, *Discovery: Scope, Regulation, and Timing* , or with the memoranda for limiting discovery based on the evidentiary privileges, work product protection, or other protective provisions found in Ch. 81, *Discovery: Privileges and Other Discovery Limitations* .

It may also be appropriate to modify the memoranda this chapter for use in a different procedural context, such as in a trial or appellate brief or office memoranda relating to discovery practice.

For a detailed discussion on how to select and use the forms in the publication to build a draft memorandum and complete the draft, with detailed discussion of all drafting requirements and strategic or stylistic considerations, see Ch. 1, *Writing Legal Memoranda and Briefs* . For a skeletal form of memorandum for use in creating a properly formatted outline in which to compile relevant forms from this publication, see also Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting Memoranda

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8-84 California Points & Authorities § 84.04

§ 84.04 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

For background discussion of forms of moving papers relating to civil discovery by written interrogatories, see California Forms of Pleading and Practice, Ch. 194, *Discovery: Interrogatories* (Matthew Bender).

[2] Related Memoranda

For memoranda supporting or opposing a motion to compel discovery based on general limiting or regulatory provisions of the Discovery Act, see Ch. 80, *Discovery: Scope, Regulation, and Timing* .

For memoranda supporting or opposing a motion to compel discovery on the ground that the matter sought to be discovered is privileged or is otherwise protected from disclosure, see Ch. 81, *Discovery: Privileges and Other Discovery Limitations* .

For memoranda supporting or opposing a motion to compel discovery, or supporting or opposing a motion for protective order, in the context of another discovery method, see Ch. 83, *Discovery: Depositions* , and Ch. 85, *Discovery: Production or Inspection of Tangible Evidence* , through Ch. 88, *Discovery: Exchange of Expert Witness Information* .

For memoranda for use in seeking or opposing writs to review discovery orders, see Ch. 89A, *Discovery: Review of Discovery Orders* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMethodsWritten DepositionsCivil ProcedureDiscoveryMotions to CompelCivil ProcedureDiscoveryPrivileged MattersGeneral Overview

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8-84 California Points & Authorities §§ 84.05-84.09

[Reserved]

§§ 84.05[Reserved]

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 84 DISCOVERY: INTERROGATORIES
PART II. FORMS
A. Motion to Compel Interrogatory Matters

8-84 California Points & Authorities § 84.10

§ 84.10 Supporting Motion for Order Compelling Response to Interrogatories [Code Civ. Proc. § 2030.290]--No Responses Served

[1] FORM Supporting Motion for Order Compelling Response to Interrogatories [Code Civ. Proc. § 2030.290]--No Responses Served

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION FOR ORDER COMPELLING RESPONSE TO INTERROGATORIES AND FOR MONETARY SANCTION
vs.	)	
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD ISSUE AN ORDER COMPELLING _____ [*specify party served with interrogatories, e.g.,* DEFENDANT] TO ANSWER _____ [*specify set and numbers, e.g.,* INTERROGATORIES 1-10, PLAINTIFF'S FIRST SET], BECAUSE _____ [*specify party served with interrogatories, e.g.,* DEFENDANT] HAS FAILED TO SERVE A TIMELY RESPONSE. IF THE MOTION IS GRANTED, THE COURT SHOULD ALSO IMPOSE A MONETARY SANCTION AGAINST _____ [*name(s)*] BECAUSE THERE IS NO SHOWING THAT _____ [HE/SHE/ IT

or THEY] ACTED WITH SUBSTANTIAL JUSTIFICATION OR THAT OTHER CIRCUMSTANCES MAKE THE IMPOSITION OF THE SANCTION UNJUST.

A. Statutory Authority. If a party to whom interrogatories have been directed fails to serve a timely response, the party propounding the interrogatories may move for an order compelling response (*Code Civ. Proc. § 2030.290*).

b. Burden of Justification on Nonresponding Party. The service and filing of interrogatories pursuant to *Section 2030.010 et seq. of the Code of Civil Procedure* places the burden on the interrogated party to respond by answer, the production of writings, or objection. The obligation of response must be satisfied unless excused by a protective order obtained on a factual showing of good cause why no response should be given (*Coriell v. Superior Court (1974) 39 Cal. App. 3d 487, 492, 114 Cal. Rptr. 310*).

[*Optional*] **C. Guardian Ad Litem May Be Ordered to Verify Responses on Behalf of Ward.** If a party to whom interrogatories have been directed is incompetent and represented by a guardian ad litem, that guardian may be ordered to verify proper responses to interrogatories on behalf of the ward (*Regency Health Services, Inc. v. Superior Court (1998) 64 Cal. App. 4th 1496, 1504-1505, 76 Cal. Rptr. 2d 95*).

D. Court Must Impose Monetary Sanction Absent Specified Findings. The court must impose a monetary sanction under *Section 2023.030(a) of the Code of Civil Procedure* against any party, person, or attorney who unsuccessfully opposes a motion to compel a response to interrogatories, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust (*Code Civ. Proc. §§ 2023.030(a), 2030.290(c)*).

[*Add memoranda generally supporting the imposition of monetary sanctions (see, e.g., Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11.*]

[*Optional*] **E. Court May Impose Sanctions Despite Lack of Opposition to Motion to Compel Discovery.** The court may award sanctions under the Discovery Act in favor of a party who files a motion to compel discovery, even though no opposition to the motion was filed, or opposition to the motion was withdrawn, or the requested discovery was provided to the moving party after the motion was filed (*Cal. Rules of Ct., Rule 3.1030(a)*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum is for use by a party who has served written interrogatories on another party but has not received responses to any of them. This form may also be used in support of a motion to compel answers to specific interrogatories in a set, if no answers at all to those interrogatories have been served. If anobjection to interrogatories has been served and the propounding party wishes further answers to those interrogatories, § 84.11 should be used in lieu of this form.

This form should be combined with general memoranda supporting the imposition of monetary sanctions under *Code Civ. Proc. § 2023.030(a)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11*].

Note that some cases cited in this form construe law in effect before the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that they remain consistent with current provisions [*see also § 84.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should identify the interrogatories that were not answered by set and number, and show that the date by which responses were due has passed. Counsel's factual showing should demonstrate substantial justification for the motion in order to avoid a monetary sanction if the motion is denied [*see Code Civ. Proc. § 2030.290*]. However, counsel need not set forth facts showing that the responding party acted without substantial justification [*cf.* former Code Civ. Proc. § 2034(a)]. *Code Civ. Proc. § 2023.030(a)* effectively places that burden on the person against whom the sanction is to be imposed, by requiring the court to impose a monetary sanction when it is expressly authorized *unless* it finds that there was substantial justification or that other circumstances would make the monetary sanction unjust.

[c] Related Pleading and Practice Forms

For discussion and forms of motion for use in seeking an order compelling response to interrogatories if no responses have been served, see California Forms of Pleading and Practice, Ch. 194, *Discovery: Interrogatories* (Matthew Bender).

[3] Discussion of Authorities

[a] Burden of Justification on Nonresponding Party

Coriell v. Superior Court *(1974) 39 Cal. App. 3d 487, 114 Cal. Rptr. 310* was a class action in which plaintiffs alleged deliberate and negligent mislabeling of packaged meat sold by Safeway and sought injunctive relief and damages. In its answer, Safeway claimed that the action could not be maintained as a class action. Plaintiffs served 167 interrogatories. Safeway answered three of them and responded with motions to extend its time to answer or object and to defer its obligation to respond to the unanswered interrogatories, relating to its liability, until the trial court determined the worthiness of the class at a scheduled hearing. The court required both parties to designate the interrogatories that should be answered before the class action hearing. It ultimately entered an order that Safeway need not respond to any of the unanswered interrogatories until after the hearing to determine the worthiness of the class action, and then only as required by subsequent court order. Plaintiffs filed an application for a writ of mandate.

The court of appeal granted the writ, stating that the trial court acted in excess of its jurisdiction by (1) placing the burden on plaintiffs to demonstrate that they were entitled to answers to interrogatories, rather than on Safeway to establish factually that it was entitled to a protective order against being required to answer; and (2) denying plaintiffs discovery on issues relevant to the subject matter of class worthiness of the lawsuit (*39 Cal. App. 3d 487, 491-492)* . In discussing the burden of persuasion, the court stated that the service and filing of interrogatories pursuant to former Code Civ. Proc. § 2030 (*now see Code Civ. Proc. § 2030.010 et seq.*) places the burden on the interrogated party to respond by answer or objection (*39 Cal. App. 3d 487, 492)* . That obligation of response must be satisfied unless excused by a protective order obtained on a factual showing of good cause for not responding (*39 Cal. App. 3d 487, 492)* .

Although the court made general statements relating to answering interrogatories in the context of a protective order, the statements appear to be general enough to apply to the duty of any party to respond to interrogatories, and could

properly be used in support of a motion to compel answers to interrogatories in a situation in which there has been no response. *Coriell* interpreted Code Civ. Proc. § 2030 prior to its 1986 repeal and reenactment, which, among other changes, limits the number of specially prepared interrogatories that may be served by one party to another party as a matter of right [*see Code Civ. Proc. §§ 2030.010-2030.070*].

[b] Guardian Ad Litem May Be Ordered to Verify Responses on Behalf of Ward

Regency Health Services, Inc. v. Superior Court *(1998) 64 Cal. App. 4th 1496, 76 Cal. Rptr. 2d 95* involved a personal injury action against a nursing home brought by an incompetent plaintiff who was represented by a guardian ad litem. Plaintiff moved for a protective order that she be relieved from responding to interrogatories propounded by defendant. Part of the reasoning for plaintiff's motion was that as an incompetent, she was legally disabled from verifying interrogatory responses and that as a nonparty, the guardian was not legally competent to respond to discovery. In ruling for plaintiff, the trial court cited former Code Civ. Proc. § 2030(g) (*now see* Code Civ. Proc. § 2023.250(a)), which provides that answers to interrogatories must be under oath and signed by the party to whom they are directed. Defendant petitioned for writ of mandate.

The court of appeal issued a writ of mandate directing the trial court to vacate its order and issue a new and different order denying the motion (*64 Cal. App. 4th1496, 1505)* . The court framed the issue as whether a guardian ad litem for an incompetent plaintiff has the duty and authority to verify interrogatory responses on behalf of the plaintiff. The court said that a guardian ad litem is an officer of the court appointed to represent a ward in litigation, and to protect and promote the ward's interests. Part of that protective function involves ensuring that the ward complies with his or her legal obligations. Every litigant has a legal obligation to comply with the provisions of the Civil Discovery Act. Responding to interrogatories is one of those obligations, and no exemption is provided for litigants represented by guardians (*64 Cal. App. 4th 1496, 1497-1498)* . The court considered whether the term "party" as used in Code Civ. Proc. § 2023.250 encompasses a guardian acting on behalf of the real party in interest. It observed that no case has been found that has ruled on the precise question, opining that this may be because the answer has always been assumed (*64 Cal. App. 4th 1496, 1499)* . The court said there were two possible constructions of the term: the strictly literal and the one that would include the guardian ad litem as a substitute for the real party when the real party in interest is represented by a guardian ad litem. After a thorough discussion of the legal ramifications and consequences of each construction, the court concluded that a guardian ad litem has the authority, subject to the court's ultimate supervision, to verify proper responses to interrogatories on behalf of the ward. It said that to conclude otherwise would exempt a ward from discovery (*64 Cal. App. 4th 1496, 1499-1505)* .

[4] Additional Authorities

[a] Statutory Authority

In *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants (2007) 148 Cal. App. 4th 390, 55 Cal. Rptr. 3d 751* , a lawsuit alleging breach of contract and related causes of action, a defense attorney appealed from an order imposing a monetary sanction for failure to comply with an order compelling responses to interrogatories. After the deadline for a timely response to the discovery requests, plaintiff served motions to compel responses. However, before the motions were filed, the attorney provided responses and answered some of the questions by indicating that his clients were unable to respond because they lacked knowledge. The attorney did not file any opposition to the motions to compel responses, and the motions were granted. When no further interrogatory answers were provided, the trial court granted monetary sanctions based on failure to comply with the order compelling responses.

The court of appeal addressed whether, under *Code Civ. Proc. § 2030.290(b)*, the trial court has the authority to hear a motion to compel responses to written interrogatories when the party on whom the interrogatories were served fails to serve any response within the required time, thereby waiving all objections, but after the motion is served, provides an untimely response that the propounding party deems inadequate (*148 Cal. App. 4th 390, 390,55 Cal. Rptr. 3d 751*).

The court held that the mere service of an untimely interrogatory response, which may or may not reflect a good faith effort to comply with the party's discovery obligations, does not divest the trial court of authority to hear and grant a motion to compel responses under *Code Civ. Proc. § 2030.290(b)*. Whether the trial court should proceed with a motion to compel responses when there has been an untimely interrogatory response is within the court's "sound discretion" (*148 Cal. App. 4th 390, 408-409)* . Moreover, a response to some interrogatories does not divest a trial court of authority to compel answers to those interrogatories for which there was no appropriate response (*148 Cal. App. 4th 390, 406)* .

[b] Burden of Justification on Nonresponding Party

West Pico Furniture Co. v. Superior Court (1961) 56 Cal. 2d 407, 15 Cal. Rptr. 119, 364 P.2d 295 was an action in which plaintiff alleged that certain "sales" transactions from defendant were actually loans to plaintiff at usurious rates of interest. A counterclaim was also filed. Plaintiff propounded interrogatories and defendant answered some and filed objections to the rest. The trial court overruled some of the objections and sustained others, and plaintiff brought a proceeding in mandate to compel the trial court to set aside its order sustaining the objections. In reviewing the objections, the appellate court noted that a litigant is entitled to demand answer to its interrogatories as a matter of right and without prior showing, unless the other party objects and shows cause why the questions are not in the purview of the code section (*56 Cal. 2d 407, 422)* .

Note

that Code Civ. Proc. § 2030, as it existed at the time the order in *West Pico* was issued, required the objecting party to bring the objections on for hearing. The 1961 amendment to Code Civ. Proc. § 2030 substituted the right to state objections in lieu of responses, with the proponent of the interrogatories then able to move for an order requiring further response. The court in *West Pico* commented that this amendment had the effect of placing the burden on the proponent rather than the objector (*56 Cal. 2d 407, 414 n.1*). The Court's similar statement in *Greyhound Corp. v. Superior Court (1961) 56 Cal. 2d 355, 379, 15 Cal. Rptr. 90, 364 P.2d 266* , however, has been interpreted to mean that the burden of obtaining a judicial determination of the objections, not the burden of proof, was shifted to the party propounding the interrogatories [*see Coy v. Superior Court (1962) 58 Cal. 2d 210, 220, 23 Cal. Rptr. 393, 373 P.2d 457]* .

Although the court in *West Pico* was dealing with a situation in which responses had been made to interrogatories and the responses were unsatisfactory, its statement that the party propounding interrogatories is entitled to an answer as a matter of right appears to apply to the situation in which no responses at all have been made. Former Code Civ. Proc. §§ 2030 (*now see Code Civ. Proc.§§ 2030.010* and *2030.020*), which permit a party to serve written interrogatories on another party, does not require any showing of good cause for serving interrogatories [*see Coy v. Superior Court of Contra Costa County (1962) 58 Cal. 2d 210, 220-221, 23 Cal. Rptr. 393, 373 P.2d 457]* . Therefore, the party bringing the motion supported by the memorandum set out in the foregoing form could argue that the burden of justifying a lack of response to interrogatories is on the party on whom interrogatories were served.

Welgoss v. End (1967) 252 Cal. App. 2d 982, 61 Cal. Rptr. 52 was an action to establish paternity. Defendant served interrogatories on plaintiff and 10 months later plaintiff served the answers. After the court granted defendant's motions for further answers to those interrogatories, defendant made a motion to dismiss the action. The court dismissed under former Code Civ. Proc. § 2034(d) (*now see Code Civ. Proc. § 2030.290*) for plaintiff's failure to comply with an order that she file a further answer to one of the interrogatories. Plaintiff's attorneys filed motions under Code Civ. Proc. § 473 (*now see Code Civ. Proc. § 2030.290*, which supersedes Code Civ. Proc. § 473 with respect to interrogatories) to set aside the order and judgment of dismissal, and the court conditionally granted the motion vacating the judgment if plaintiff: (1) paid $1,000 in fees to defendant's attorney and (2) answered fully the interrogatory as previously ordered. Plaintiff appealed from the order conditionally vacating the judgment of dismissal.

The court of appeal affirmed the order except for the provision requiring the payment of fees to defendant's attorney,

which it reversed. In finding that the condition that plaintiff answer the interrogatory fully and in detail was entirely reasonable and proper, the court stated that defendant was entitled to demand answers to his interrogatories as a matter of right unless plaintiff had stated a valid objection to them (*252 Cal. App. 2d 982, 991)* .

[c] Court Must Impose Monetary Sanctions Absent Specific Findings

The facts and procedural background of *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants (2007) 148 Cal. App. 4th 390, 55 Cal. Rptr. 3d 751* are discussed in *§ 84.10[4][a]*. In that case, the court of appeal affirmed that the violation of an order compelling responses was a proper basis for a monetary sanction under *Code Civ. Proc. §§ 2030.290(c)* and *2023.030*. Neither a 45-day limit nor a meet-and-confer requirement applied to a motion for sanctions for failure to obey a court order compelling answers (*148 Cal. App. 4th 390, 411)* .

California Points & Authorities

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 84 DISCOVERY: INTERROGATORIES
PART II. FORMS
A. Motion to Compel Interrogatory Matters

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§ 84.11 Supporting Motion for Order Compelling Further Response to Interrogatories [Code Civ. Proc. § 2030.300]

[1] FORM Supporting Motion for Order Compelling Further Response to Interrogatories [Code Civ. Proc. § 2030.300]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION FOR ORDER COMPELLING FURTHER RESPONSE TO INTERROGATORIES AND FOR MONETARY SANCTION
vs.	)	
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD COMPEL FURTHER ANSWERS TO _____ [*specify set and numbers, e.g.,* INTERROGATORIES 1-10, PLAINTIFF'S FIRST SET], BECAUSE _____ [ANSWERS TO PARTICULAR INTERROGATORIES ARE _____ (EVASIVE *and/or* INCOMPLETE) *and/or* THE EXERCISE OF THE OPTION TO PRODUCE DOCUMENTS UNDER SECTION 2030.230 OF THE CODE OF CIVIL PROCEDURE IS UNWARRANTED *and/or* THE REQUIRED SPECIFICATION OF DOCUMENTS UNDER SECTION 2030.230 OF THE CODE OF CIVIL PROCEDURE IS INADEQUATE *and/or* OBJECTIONS TO THE

INTERROGATORIES ARE _____ (WITHOUT MERIT *and/or* TOO GENERAL)]. IF THE MOTION IS GRANTED, THE COURT SHOULD ALSO IMPOSE A MONETARY SANCTION AGAINST _____ [*name(s)*] BECAUSE THERE IS NO SHOWING THAT _____ [HE/SHE/IT *or* THEY] ACTED WITH SUBSTANTIAL JUSTIFICATION OR THAT OTHER CIRCUMSTANCES MAKE THE IMPOSITION OF THE SANCTION UNJUST.

A. Motion to Compel Further Response to Interrogatories. If the propounding party, on receipt of a response to interrogatories, deems that (1) an answer to a particular interrogatory is evasive or incomplete, (2) an exercise of the option to produce documents under *Section 2030.230 of the Code of Civil Procedure* isunwarranted or the required specification of those documents is inadequate, or (3) an objection to an interrogatory is without merit or too general, that party may move for an order compelling a further response (*Code Civ. Proc. § 2030.300(a)*).

B. Scope of Examination by Written Interrogatories. Any party may obtain discovery within the scope fixed by *Section 2017.010 et seq. of the Code of Civil Procedure*, and subject to the restrictions set forth in Section 2019.010 et seq. of the Code of Civil Procedure, by propounding to any other party to the action written interrogatories to be answered under oath (*Code Civ. Proc. § 2030.010(a)*). Unless otherwise limited by order of the court in accordance with *Sections 2016.010 through 2036.050 of the Code of Civil Procedure*, the Discovery Act, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence (*Code Civ. Proc. §§ 2017.010, 2030.010(a)*; *Perkins v. Superior Court (1981) 118 Cal. App. 3d 761, 765, 173 Cal. Rptr. 596*). Discovery may relate to the claim or defense of the party seeking discovery or of any other party to the action. Discovery may be obtained of the identity and location of persons having knowledge of any discoverable matter, as well as of the existence, description, nature, custody, condition, and location of any document, tangible thing, or land and other property (*Code Civ. Proc. §§ 2017.010, 2030.010(b)*).

C. Burden on Party Raising Objections. There is no requirement of a showing of good cause for serving interrogatories, and the burden is on the party raising objections to show that the objections are valid (*Coy v. Superior Court (1962) 58 Cal. 2d 210, 220-221, 23 Cal. Rptr. 393, 373 P.2d 457*).

[*Optional*] **D. Permissible Subject Matter.** An interrogatory may relate to whether another party is making a certain contention, or to the facts, witnesses, and writings on which a contention is based. An interrogatory is not objectionable because an answer to it involves an opinion or contention that relates to fact or the application of law to fact, or would be based on information obtained or legal theories developed in anticipation of litigation or in preparation for trial (*Code Civ. Proc. § 2030.010(b)*).

[*Optional*] **E. Requirement of Reasonable Effort to Obtain Information.** If the responding party does not have personal knowledge sufficient to respond fully to an interrogatory, that party must so state, but must make a reasonable and good-faith effort to obtain the information by inquiry to other natural persons or organizations, except when the information is equally available to the propounding party (*Code Civ. Proc. § 2030.220*; *see West v. Johnson & Johnson Products, Inc. (1985) 174 Cal. App. 3d 831, 874, 220 Cal. Rptr. 437*).

[*Optional*] **F. Untimely Response Waives Objection.** Unless the time has been extended or shortened by the court on motion by either party, or service is made by mail, a party must respond to interrogatories within 30 days after service of the interrogatories. In unlawful detainer proceedings, the party must respond within five days from the date of service unless the court has shortened the time for response (*Code Civ. Proc. § 2030.260(a)*; *see Code Civ. Proc. § 2016.050* (extension of time when service by mail)). If a party to whom interrogatories have been directed fails to serve a timely response, that party waives any objection to the interrogatories, including one based on privilege or on the protection for work product under *Section 2018.010 et seq. of the Code of Civil Procedure*, unless the court relieves that party from the waiver (*Code Civ. Proc. § 2030.290*).

[*Optional*] **G. Adequate Response Identifying Documents Must Include Document's Description.** If an interrogatory asks the responding party to identify a document, an adequate response must include a description of the document (*Hernandez v. Superior Court (2003) 112 Cal. App. 4th 285, 293, 4 Cal. Rptr. 3d 883*).

H. Court Must Impose Monetary Sanction Absent Specified Findings. The court must impose a monetary sanction under *Section 2023.030 of the Code of Civil Procedure* against any party, person, or attorney who unsuccessfully opposes a motion to compel further response to interrogatories, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust (*Code Civ. Proc. §§ 2023.030(a), 2030.300(d)*).

[*Add memoranda generally supporting the imposition of monetary sanctions (see, e.g., Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11).*]

[*Optional*] **I. Court May Impose Sanctions Despite Lack of Opposition to Motion to Compel Discovery.** The court may award sanctions under the Discovery Act in favor of a party who files a motion to compel discovery, even though no opposition to the motion was filed, or opposition to the motion was withdrawn, or the requested discovery was provided to the moving party after the motion was filed (*Cal. Rules of Ct., Rule 3.1030(a)*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum may be used to support a motion to compel further responseto interrogatories. It is intended to be used in support of a motion to compel further response to interrogatories if (1) an answer is evasive or incomplete; (2) an exercise of the option to produce documents under *Code Civ. Proc. § 2030.230* is unwarranted or the required specification of those documents is inadequate; or (3) an objection to an interrogatory is without merit or too general [*see Code Civ. Proc. § 2030.300*].

This form contains general points and authorities and may be combined with more specific forms, such as memoranda relating to various types of questions and objections, relevance of particular matters to the subject matter, and applicability of particular privileges, which are set forth in Part I of this form. This form should be combined with general memoranda supporting the imposition of monetary sanctions under *Code Civ. Proc. § 2023.030(a)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11*].

Note that some cases cited in this form construe law in effect before the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that they remain consistent with current provisions [*see also § 84.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should discuss the interrogatories on which the motion is based, as well as the responses, by referring to the declaration or other document in which the interrogatories and answers are set forth [*see, e.g.*, declarations in California Forms of Pleading and Practice, Ch. 194, *Discovery: Interrogatories* , (Matthew Bender)]. Counsel's factual showing should demonstrate substantial justification for the motion in order to avoid a monetary sanction if the motion is denied [*see Code Civ. Proc. § 2030.300*]. However, counsel need not set forth facts showing that the responding party acted without substantial justification [*cf.* former Code Civ. Proc. § 2034(a)]. *Code Civ. Proc. §§ 2023.030(a)* and *2030.300(d)* effectively place that burden on the person against whom the sanction is to be imposed, by requiring the court to impose a monetary sanction when it is expressly authorized *unless* it finds that there was substantial justification or that other circumstances would make the monetary sanction unjust.

[c] Procedural Requirements

A motion for an order compelling a further response must be accompanied by a declaration stating facts showing a reasonable and good-faith attempt at an informal resolution of each issue presented by it. The notice of motion must be given within 45 days of the service of the response, or any supplemental response, if served personally, or by any specific later date to which the parties have agreed in writing [*Code Civ. Proc. § 2030.300*]. When service is made by mail, the 45-day period is extended [see *Code Civ. Proc. § 2016.050* (allowing for extension of time under *Code Civ. Proc. § 1013(a)*)]. If the notice of motion is untimely, the propounding party waives any right to compel a further response to the interrogatories [*Code Civ. Proc. § 2030.300(c)*].

[d] Related Pleading and Practice Forms

For forms of a notice of motion, declaration, and order relating to a motion to compel further answers to interrogatory questions, see California Forms of Pleading and Practice, Ch. 194, *Discovery: Interrogatories* , (Matthew Bender).

[e] Related Points and Authorities

For additional points and authorities relating to monetary sanctions generally, see *Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11*.

[3] Discussion of Authorities

[a] Scope of Examination by Written Interrogatories

Perkins v. Superior Court *(1981) 118 Cal. App. 3d 761, 173 Cal. Rptr. 596* was an action for personal injuries against a manufacturer and seller of an automobile battery that exploded in plaintiff's face when he attempted to remove the battery cap. Plaintiff served interrogatories requesting information concerning any other lawsuits filed against defendants arising out of similar battery explosions. After defendants objected that the interrogatories were overly broad, the trial court granted plaintiff's motion for further answers, but restricted the scope of response to actions filed against defendants within two years prior to plaintiff's injury and to accidents involving pulling stuck battery caps. Defendants answered, stating that they had no records of the lawsuits, after which plaintiff petitioned for a writ of mandate to remove the restrictions on the scope of responses.

The court of appeal let a writ of mandate issue, holding that while the interrogatories as propounded were perhaps overly broad, the trial court's limitations too severely restricted their scope. A party to a civil action is entitled to discovery by written interrogatory of any matter not privileged that is relevant to the subject matter of the pending action [citing former Code Civ. Proc. § 2016(b) (*now see Code Civ. Proc. § 2017.010*) and Code Civ. Proc. § 2030 prior to its 1986 reenactment]. The restriction regarding filing dates was an abuse of discretion because it prevents discovery of other similar actions filed and served after the date of the alleged injury, particularly because defendants did not show

that the search would require undue effort and expense. Moreover, discovery should not have been limited to injuries caused by the pulling of a stuck battery cap, because similar if not identical forces could cause the same defect, and the causal connection is for determination by the trier of fact (*118 Cal. App. 3d 761, 765-766)* .

[b] Burden on Party Raising Objections

Coy v. Superior Court *(1962) 58 Cal. 2d 210, 23 Cal. Rptr. 393, 373 P.2d 457* , was an action for damages for abuse of process. Plaintiff alleged special, general, and punitive damages, and served interrogatories on three defendants. One defendant answered a few of the interrogatories, objected to others on the grounds that they were irrelevant or involved a privileged communication, and left several to which he neither replied nor objected. The other two defendants each answered a few of the interrogatories. They objected to others on the ground that the answers could be found in a deposition previously taken or that they were irrelevant. The trial court denied plaintiff's motions for orders requiring further response.

The Supreme Court issued a writ of mandate directing the trial court to vacate the orders denying the motions for further answers and to enter orders requiring the answers. The Court found that defendants' objections to the interrogatories were insufficient to support the trial court's order, rejecting their contention that the order should be sustained because plaintiff failed to meet the burden of proving that his interrogatories merited further answer. The only burden on the party seeking reply to his or her interrogatories despite objections is to move to require further answers. The objecting party has the burden of showing that the interrogatories were interposed for improper purposes (*58 Cal. 2d 210, 220)* . Because former Code Civ. Proc. § 2030 (*now see Code Civ. Proc. § 2030.010 et seq.*) does not require any showing of good cause for the serving of interrogatories, the burden of showing good cause required for some of the other discovery procedures does not exist in the case of interrogatories. Thus, it would be anomalous to hold that the mere interposing of an objection creates a burden when none existed before (*58 Cal. 2d 210, 220-221)* .

Coy interpreted Code Civ. Proc. § 2030 prior to its 1986 repeal and reenactment. The reenacted statute also does not require any showing of good cause for the serving of interrogatories. It does, however, limit the number of specially prepared interrogatories that may be served by one party to another party as a matter of right [*see Code Civ. Proc. §§ 2030.010-2030.070*].

[c] Requirement of Reasonable Effort to Obtain Information

In ***West v. Johnson & Johnson Products, Inc.*** *(1985) 174 Cal. App. 3d 831, 220 Cal. Rptr. 437* , plaintiff contracted toxic shock syndrome and brought an action based on strict product liability. The jury found for plaintiff. Defendant moved for a new trial and for judgment notwithstanding the verdict. The trial court denied the motion for judgment notwithstanding the verdict but granted the motion for new trial on the ground of excessive damages. Both parties appealed.

The court of appeal affirmed. In its decision it addressed defendant's claims of error regarding jury instructions, one of which was the willful suppression of evidence based on the allegation that defendant had intentionally withheld certain research notebooks. Plaintiff had made a demand for the production and inspection of documents pertaining to testing and also propounded interrogatories, one of which asked for a description of the tests performed. Defendant offered to make all the records available for inspection. Its response to the interrogatories was that it had identified and produced for plaintiff's inspection all the records pertaining to testing. During a deposition plaintiff learned of the existence of test research notebooks maintained by defendant's parent company and which were not produced for inspection, and requested an instruction on the willful suppression of evidence. In upholding the appropriateness of the instruction, the court said that a party served with interrogatories is required to make a reasonable investigation to ascertain facts when it has available to it sources of information pertaining to the matters in the interrogatories. Defendant was required to investigate in order to provide full and accurate answers to plaintiff's interrogatories. An investigation would have been neither burdensome nor unreasonable because defendant had a lot of discourse and technical interaction with its parent

company (*174 Cal. App. 3d 831, 874)* .

[d] Adequate Response Identifying Documents Must Include Document's Description

In ***Hernandez v. Superior Court*** *(2003) 112 Cal. App. 4th 285, 4 Cal. Rptr. 3d 883* , wrongful death plaintiffs in a complex case against numerous defendants disputed defendants' interrogatory requests for identification of documents, based on privilege. The trial court entered an order granting one defendant's motion to compel further responses, and issued a case-management order requiring disclosure of plaintiffs' medical experts and other facts. Plaintiffs filed petitions for writ of mandate.

The court of appeal held, in part, that if an interrogatory asks the responding party to identify a document, an adequate response must include a description of the document. Interrogatories may be used to discover the existence of documents in the other party's possession. Thus, a responding party may object to an interrogatory that seeks privileged *information* by clearly stating the objection and the particular privilege invoked. However, the *existence* of a document containing privileged information is not privileged (*112 Cal. App. 4th 285, 293)* . Accordingly, the trial court did not err in compelling further responses, even though its order incorrectly characterized the required response as a "privilege log." Although it may have used the "incorrect jargon," the court adequately explained its ruling in the oral proceedings. The court orally warned petitioners not to use a boilerplate response in order to identify documents, but to relate each document to the specific interrogatory requesting the identification (*112 Cal. App. 4th 285, 294)* .

[4] Additional Authorities

[a] Burden on Party Raising Objections

In *Southern Pac. Co. v. Superior Court (1969) 3 Cal. App. 3d 195, 83 Cal. Rptr. 231* , disapproved on other grounds in *Kadelbach v. Amaral (1973) 31 Cal. App. 3d 814, 822-823, 107 Cal. Rptr. 720* , defendant in a wrongful death action sought a writ directing the trial court to compel plaintiffs to answer four interrogatories seeking detailed facts underlying plaintiffs' allegations of negligence. Plaintiffs resisted answering on the ground that the material requested was protected as attorney's work product. In granting the writ, the court stated that, at the hearing of a motion to require answers to interrogatories, the objector bears the burden of establishing a valid objection (*3 Cal. App. 3d 195, 198)* .

Columbia Broadcasting Sys., Inc. v. Superior Court (1968) 263 Cal. App. 2d 12, 69 Cal. Rptr. 348 was an action for damages for plagiarism, breach of an implied-in-fact contract, and breach of trust and confidence. In overturning the trial court's order that defendants answer three interrogatories, and upholding the order on a fourth, the appellate court stated that at the hearing of a motion to compel under former Code Civ. Proc. § 2030 (*now see Code Civ. Proc. § 2030.300*), the burden is on the party interrogated to show facts from which the trial court might find that the interrogatories were imposed for improper purposes (*263 Cal. App. 2d 12, 18)* . Therefore, in the case before the court, the burden was on defendants to show that their objections were valid (*263 Cal. App. 2d 12, 18)* .

[b] Requirement of Reasonable Effort to Obtain Information

In *Stewart v. Colonial W. Agency, Inc. 87 Cal. App. 4th 1006, 105 Cal. Rptr. 2d 115* , an action for breach of contract wrongful termination, defendant's attorneys argued that the trial court's order compelling further responses and awarding sanctions was erroneous, in part, because plaintiff's attorney failed to engage in a good faith effort to meet and confer. At a hearing on the motion to compel, the trial court specifically found that the attorney's meet and confer efforts complied with former Code Civ. Proc. § 2025(o) (*now see Code Civ. Proc. § 2025.480*). The court of appeal agreed. Citing *Obregon v. Superior Court, (1998) 67 Cal. App. 4th 424, 431, 79 Cal. Rptr. 62* (discussed below), the court of appeal explained that determining whether an attempt at informal resolution is adequate involves the exercise of

discretion. Relevant consideration include the history of the litigation, the nature of the interaction between counsel, the nature of the issues, the type and scope of discovery requested, the prospects of success, and similar factors (*87 Cal. App. 4th 1006, 1015-1016)* . Apart from anything pertaining to the history of the litigation or the prior interaction between the parties of which the trial court may have been aware, the court of appeal noted a number of factors appearing in the record supported the finding of good faith. The objections were made during a deposition, so counsel had an opportunity to discuss the relatively simple matter face-to-face at the time the discovery dispute arose. There was need for immediate action because of the upcoming trial date and cut off dates for discovery and discovery motions. Moreover, defense attorney's announced unavailability for two long periods before trial left no time to conduct a lengthy meet and confer and file a discovery motion before the deadline. Finally, in his letter to plaintiff's attorney, the defense attorney did not himself suggest a date or time at which he would be available and did not indicate any intention to compromise. On these facts, the trial court did not err in finding that the efforts undertaken by plaintiff's counsel to meet and confer were adequate (*87 Cal. App. 4th 1006, 1015-1016)* .

In *Obregon v. Superior Court (1998) 67 Cal. App. 4th 424, 79 Cal. Rptr. 2d 62* , the court of appeal upheld the trial court's decision that a greater effort at informal resolution should have been made (*67 Cal. App. 4th 424, 433)* . In this action for sexual harassment and related claims, plaintiff's discovery request was overbroad, and responded to objections with a single brief letter late in the relevant time period. Moreover, when moving to compel, plaintiff offered no reason to justify the breadth of the request, which reasonably suggested a lack of a proper discovery objective. While a single letter, followed by a response refusing concessions, may be a sufficient effort in light of some other circumstances, in this case these facts amply supported the trial court's ruling that plaintiff should have made a greater effort, whether viewed according to the substantial evidence standard, the abuse of discretion standard, or an amalgam of the two (*67 Cal. App. 4th 424, 432-433)* . What constitutes a reasonable good faith effort to arrive at an informal resolution varies with the circumstances of each case, the consideration of which are in the trial court's discretion (*67 Cal. App. 4th 424, 432-433)* . Relevant considerations include whether the discovering party has demonstrated a legitimate discovery objective; the time available before the motion filing deadline, and the extent to which the responding party was complicit in the lapse of time; and whether, from the perspective of a reasonable person in the position of the discovering party, additional efforts appeared likely to be fruitful (*67 Cal. App. 4th 424, 432)* .

[c] Adequate Response Identifying Documents Must Include Document's Description

The factual and procedural background of *People ex rel. Lockyer v. Superior Court (2004) 122 Cal. App. 4th 1060, 19 Cal. Rptr. 3d 324* is discussed in *§ 85.10[4][a]*. In the underlying case, petitioner state of California filed an action against real parties in interest, a corporation and related entities, alleging violations of statutes governing the practice of optometry. In this writ proceeding, the state sought to overturn the superior court's order granting real party in interest's motion to compel and denying their motion to quash and for a protective order. The state argued that the court abused its discretion entering its discovery orders because the state raised timely objections under former Code Civ. Proc. § 2031 (*now see Code Civ. Proc. § 2031.010 et seq.*) on the grounds of privilege to real party in interest's request for production of documents and served a privilege log. The court of appealed granted the writ, concluding that *Best Products, Inc. v. Superior Court (2004) 119 Cal. App. 4th 1181, 15 Cal. Rptr. 3d 154* (discussed *below*) dictated that the court erred in overruling the state's privilege objections (*122 Cal. App. 4th 1060, 1075)* . Because the state timely objected on the grounds of privilege, it preserved its objections, regardless of whether the objections were sufficiently detailed in their response or privilege log. Thus, as a matter of law, the superior court could not find that the state had waived these privileges under former Code Civ. Proc. § 2031(l) (*now see Code Civ. Proc. § 2031.300*) (*122 Cal. App. 4th 1060, 1074-1075)* .

The factual and procedural background of *Best Product, Inc. v. Superior Court (2004) 119 Cal. App. 4th 1181, 15 Cal.*

Rptr. 3d 154 is discussed in *§ 85.10[4][a]*. In this commercial litigation discovery dispute, the trial court erred when it found that defendant's failure to provide a privilege log constituted a waiver of its right to assert the attorney-client and work product privileges in regard to the interrogatories propounded by plaintiff. Former Code Civ. Proc. § 2030(k) (*now see Code Civ. Proc. § 2030.290*) provides that the only method by which a claim of privilege can be waived in responding to an interrogatory: "If a party to whom interrogatories are directed fails to serve a timely response, ...#x2026; [that party] waives ...#x2026; any objection to the interrogatories, including one based on privilege or on the protection for work product under [former Code Civ. Proc. § 2018 (*now see Code Civ. Proc. § 2018.010 et seq.*)]." However, this provision was inapplicable here, because defendant filed timely responses that complied with former Code Civ. Proc. § 2030(f)(3) (*now see Code Civ. Proc. § 2030.240*). Thus, the lack of privilege log was a non-issue. The court of appeal explained, quoting *Hernandez v. Superior Court, 112 Cal. App. 4th 285, 4 Cal. Rptr. 3d 883* (discussed in [3][d], *above*): "[A] responding party may object to an interrogatory that seeks privileged *information* by clearly stating the objection and the particular privilege invoked. But the *existence* of a document containing privileged information is not privileged. ...#x2026; Interrogatories may be used to discover the existence of documents in the other party's possession. ...#x2026; If an interrogatory asks the responding party to identify a document, an adequate response must include a description of the document. ...#x2026; *[Consequently], a 'privilege log' is unnecessary with regard to answering interrogatories seeking the identification of documents*" (*119 Cal. App. 4th 1181, 1189-1190)* .

[d] Court Must Impose Monetary Sanction Absent Specified Findings

In *Sherman v. Kinetic Concepts, Inc. (1998) 67 Cal. App. 4th 1152, 79 Cal. Rptr. 2d 641* , an action for products liability based on design defect, plaintiffs served a demand for production of documents under former Code Civ. Proc. § 2031 (*now see Code Civ. Proc. § 2031.010 et seq.*), seeking records of all complaints regarding the product in issue. The defendants provided only three such complaints. During trial defendant's officers and employees testified that there were no other complaints. After a verdict for defendant, plaintiffs heard by chance from an out-of-state attorney, who was pursuing a similar claim against defendant. This attorney had been able to obtain discovery of almost 20 such complaints. Given this new information, plaintiffs sought monetary sanctions under former Code Civ. Proc. § 2023 (*now see Code Civ. Proc. § 2023.030*) in the context of a motion for a new trial. The trial court denied the request for discovery sanctions, reasoning that it could not award them "after the case [was] over." The court of appeal reversed, ruling that post-trial request for monetary discovery sanctions was not untimely (*67 Cal. App. 4th 1152, 1162-1164)* . As to the merits of plaintiffs' request, the applicable discovery statute authorizes monetary sanctions only in the context of a motion to compel further responses (*see Code Civ. Proc. § 2031.010 et seq.*). Nevertheless, the court ruled that a motion to compel was not a prerequisite for monetary sanctions in this case, when defendant's misconduct essentially precluded plaintiffs from making the motion. Due to defendant's deceptive conduct, plaintiffs did not deem defendant's original responses incomplete or evasive, and had no reason to do so until they fortuitously received information from a nonparty, by which time the case was over. At this point other sanctions were not available. It was therefore appropriate to seek monetary sanctions in connection with a motion for new trial (*67 Cal. App. 4th 1152, 1162-1164)* .

In *Obregon v. Superior Court (1998) 67 Cal. App. 4th 424, 79 Cal. Rptr. 2d 62* , the trial court, finding that the moving party had not made an adequate effort to resolve the dispute informally, denied further discovery. The court of appeal vacated the ruling and remanded for reconsideration of a more appropriate sanction for the moving party's inadequate effort at informal resolution. The appellate court stated that, in deciding on a sanction for inadequate effort to achieve an informal resolution, the trial court should not automatically deny further discovery but should consider whether it would be appropriate to specify additional efforts that will be required of the offending party before the court will turn to the merits of the request to compel. Relevant considerations would include the history of the case, past conduct of counsel as it reflects upon the good faith of their efforts, the nature and extent of actual efforts expended, the nature of the discovery requested and its importance to the case, the size and

complexity of the case, the effect of expense upon litigation of the case (including whether unfeasible levels of expense might force resolution on a basis other than merits), the margin by which the moving party deviated from a reasonable good faith effort at informal resolution under the circumstances, the predictability that an effort of the type made would be found wanting, whether supplemental responses have been served, and such other factors as are relevant under all the circumstances presented. Because the court has a duty to minimize delay and unnecessary expense, it should also consider whether further informal efforts would be fruitful (*67 Cal. App. 4th 424, 434-435)* . When appropriate, the court may assess the party whose efforts were found inadequate with monetary sanctions (*67 Cal. App. 4th 424, 435)* .

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 84 DISCOVERY: INTERROGATORIES
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A. Motion to Compel Interrogatory Matters

8-84 California Points & Authorities § 84.12

§ 84.12 Supporting Motion for Discovery Sanction Following Failure to Comply With Order Compelling Answers or Further Response to Interrogatories [Code Civ. Proc. §§ 2023.030, 2030.290, 2030.300]

[1] FORM Supporting Motion for Discovery Sanction Following Failure to Comply With Order Compelling Answers or Further Response to Interrogatories [Code Civ. Proc. §§ 2023.010 et seq., 2030.290, 2030.300]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ORDER OF SANCTIONS FOR FAILURE TO OBEY COURT ORDER COMPELLING _____ [ANSWERS *or* FURTHER RESPONSE] TO INTERROGATORIES
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	Date: _____
	)	Time: _____
	)	Location: _____
		[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD IMPOSE SANCTIONS AGAINST _____ [_____ (*name of party*), _____ (*specify, e.g.*, DEFENDANT) IN THE ABOVE-ENTITLED ACTION *and/or* _____ (*name of party's attorney*), HIS/HER ATTORNEY], BECAUSE _____ [HE/SHE *or* THEY] FAILED TO COMPLY WITH A COURT ORDER COMPELLING _____

[ANSWERS or FURTHER RESPONSE] TO _____ [*specify set and numbers, e.g.,* INTERROGATORIES 1-10, PLAINTIFF'S FIRST SET].

[*EITHER*]

A. Sanctions After Order Compelling Answers. If a party fails to obey an order compelling answers, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a termination sanction under *Section 2023.030 of the Code of Civil Procedure.* In lieu of or in addition to that sanction, the court may impose a monetary sanction pursuant to *Section 2023.030(a) of the Code of Civil Procedure* (*Code Civ. Proc. § 2030.290*; *Laguna Auto Body v. Farmers Ins. Exchange (1991) 231 Cal. App. 3d 481, 486-491, 282 Cal. Rptr. 530* , disapproved on other grounds in *Garcia v. McCutchen (1997) 16 Cal. 4th 469, 478 n.1, 66 Cal. Rptr. 2d 319, 940 P.2d 906*).

[*OR*]

A. Sanctions After Order Compelling Further Response. If a party fails to obey an order compelling further response to interrogatories, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under *Section 2023.030 of the Code of Civil Procedure.* In lieu of or in addition to that sanction, the court may impose a monetary sanction under *Section 2023.030(a) of the Code of Civil Procedure* (*Code Civ. Proc. § 2030.300(e)*).

[*CONTINUE*]

[*Optional*] **B. Monetary Sanctions Against Attorney.** The court may impose a money sanction against an attorney who advised the client to disobey a discovery order, including one to compel further answers to interrogatories (*see Corns v. Miller (1986) 181 Cal. App. 3d 195, 200, 226 Cal. Rptr. 247* (interpreting former Code Civ. Proc. § 2034(b)(2)(D), *now see Code Civ. Proc. § 2023.030(a)*).

[*Add points and authorities generally supporting the imposition of issue, evidence, terminating, and monetary sanctions (see, e.g., Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.12 et seq.).*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities is for use by a party seeking sanctions for the failure of a party to comply with an order compelling answers or further response to interrogatories [*see* Code Civ. Proc. § 2030.290, (*l*)]. Optional

Paragraph B may be used when money sanctions are sought against an attorney who advised the client to disobey a discovery order [*see Corns v. Miller (1986) 181 Cal. App. 3d 195, 200, 226 Cal. Rptr. 247* (interpreting former Code Civ. Proc. § 2034(b)(2)(D), *now see Code Civ. Proc. § 2023.030(a)*)].

This form should be combined with general points and authorities supporting the imposition of an issue sanction, evidence sanctions, or terminating sanctions under *Code Civ. Proc. § 2023.030(b)-(d)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.12* et seq.]. If a monetary sanction is sought is addition to or in lieu of these sanctions, the foregoing form should be combined with general points and authorities supporting the imposition of monetary sanctions under *Code Civ. Proc. § 2023.030(a)* [Ch. 82, *Discovery: Sanctions for Discovery Misuse*, § 82.11].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel might wish to insert argument in favor of one particular type of sanction over another. However, counsel need not set forth facts showing that the party acted without substantial justification [*cf.* former Code Civ. Proc. § 2034(a)], because *Code Civ. Proc. § 2023.030(a)* effectively places the burden on the person against whom the sanction is to be imposed, by requiring that the court impose monetary sanctions when it is expressly authorized *unless* it finds that he or she had acted with substantial justification or that other circumstances would make the monetary sanction unjust.

[c] Sanctions

The monetary sanction that may be imposed is an order that the party who failed to obey the order compelling answers or further response to interrogatories, or any attorney advising that conduct, pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct [*Code Civ. Proc. § 2023.030(a)*].

If imposing an issue sanction, the court may order that designated facts shall be taken as established in the action in accordance with the claim of the party adversely affected by the misuse of the discovery process, or the court may issue an order prohibiting the party engaging in the misuse of the discovery process from supporting or opposing designated claims or defenses [*see Code Civ. Proc. § 2023.030(b)*]. If imposing an evidence sanction, the court may issue an order prohibiting the party engaging in the misuse of the discovery process from introducing designated matters in evidence [*see Code Civ. Proc. § 2023.030(c)*]. If imposing a terminating sanction, the court may issue one of the following orders: (A) an order striking out pleadings or parts thereof of the party engaging in the misuse of the discovery process, (B) an order staying further proceedings by that party until the order compelling discovery is obeyed, (C) an order dismissing the action, or any part of the action, of that party, or (D) an order rendering a judgment by default against that party [*see Code Civ. Proc. § 2023.030(d)*].

[d] Related Pleading and Practice Forms

For discussion and forms related to obtaining sanctions for failure to comply with an order issued pursuant to Code Civ. Proc. § 2030.290 or 2030.300, see California Forms of Pleading and Practice, Ch. 194, *Discovery: Interrogatories* (Matthew Bender). For discussion and forms regarding sanctions for discovery generally, see California Forms of Pleading and Practice, Ch. 192, *Discovery: Sanctions for Discovery Misuse* (Matthew Bender).

[3] Discussion of Authorities

[a] Sanctions After Order Compelling Answers

In ***Laguna Auto Body v. Farmers Ins. Exchange*** *(1991) 231 Cal. App. 3d 481, 282 Cal. Rptr. 530* , disapproved on other grounds in *Garcia v. McCutchen (1997) 16 Cal. 4th 469, 478 n.1, 66 Cal. Rptr. 2d 319, 940 P.2d 906* , as part of discovery in plaintiffs' action against it, defendant insurance company served a set of form interrogatories, a request for admissions, and a demand for production of documents on plaintiffs. When plaintiffs did not respond, defendants filed a

motion to compel answers to interrogatories. The trial court made an order formalizing a stipulation between the parties that provided for plaintiffs' complete compliance with the requested discovery. Plaintiffs were late in providing the discovery, and when responses were made to the interrogatories, they took the form of objections. After several additional time concessions were granted by defendant, plaintiffs still had not complied with the requested discovery, and defendants filed a motion to dismiss, or in the alternative, for sanctions pursuant to former Code Civ. Proc. §§ 2023(a)(7), 2030(k) and 2033(k) (*now see Code Civ. Proc. §§ 2023.010(g), 2030.290*, and *2033.280*). Plaintiffs filed no opposition to the motion, and the trial court granted dismissal. Plaintiffs appealed.

The court of appeal affirmed and awarded costs to defendant. The court observed that the dismissal sanction was not imposed for plaintiffs' first misuse of discovery. Rather, it was imposed in response to the culmination of a history of acts in which plaintiffs had obstructed discovery. The lack of prior monetary sanctions did not invalidate the appropriateness of dismissal (*231 Cal. App. 3d 481, 486)* . The court said that the trial court order is presumed correct and all presumptions are indulged to support the order on matters on which the record is silent (*231 Cal. App. 3d 481, 487)* . It went on to say that a prerequisite to the imposition of the dismissal sanction is the failure to comply with a court order. Although plaintiffs argued that their response consisting of objections to the interrogatories constituted compliance with the trial court order, the court was not persuaded. It said that even though plaintiffs changed their responses to unverified answers of "no," the simplicity of those responses belies plaintiffs' assertion that there were ever grounds for objection to the questions. The trial court could reasonably infer that plaintiffs were merely obstructing and delaying discovery. Moreover, plaintiffs' responses were legally invalid because they were unverified. Plaintiffs were aware of the potential consequences of violating the court's order and, in light of their continued defiance of discovery and the court order, repeated warnings would have been futile. The court concluded that it would be unjust to require defendant to file another motion to compel further answers when the responses given were patently defective and merely served to further delay discovery (*231 Cal. App. 3d 481, 489)* . It concluded that substantial evidence supports the trial court's conclusion that plaintiffs obstructed discovery, failed to honor their stipulation with counsel that they would comply with discovery, and defied the court's order (*231 Cal. App. 3d 481, 491)* .

[b] Monetary Sanctions Against Attorney

In ***Corns v. Miller*** *(1986) 181 Cal. App. 3d 195, 226 Cal. Rptr. 247* , an action to quiet title to a parcel of real property, after defendants failed to obey an order compelling answers to interrogatories, their answer to the complaint was struck and a default was entered against them. The court ordered defendants and their attorney to pay sanctions. The attorney moved for reconsideration of the portion of the order imposing sanctions against him. The order was denied and the attorney appealed.

The court of appeal affirmed, citing former Code Civ. Proc. § 2034(b)(2)(D) (now see *Code Civ. Proc. § 2030.290*) as authority for its decision. With regard to its applicability to the attorney, the court noted that it could only penalize an attorney who had advised his or her client to disobey a discovery order. Although there was nothing in the moving papers establishing that the attorney had advised disobedience, in a motion for attorney sanctions, it is the attorney rather than the party seeking sanctions who has the burden of proof (*181 Cal. App. 3d 195, 200)* . Because an attorney's advice to a client is a fact peculiarly within the knowledge of the attorney and client, to place the burden of proof on the moving party would effectually nullify the statutory language and frustrate the statutory purpose. The attorney neither submitted any opposition to the sanction motion nor appeared at the hearing, and failed to discharge his burden of proof (*181 Cal. App. 3d 195, 201)* .

Note that *Corns* construed law in effect prior to the operative date of the Civil Discovery Act of 1986. It is cited and discussed as persuasive authority to the extent that it remains consistent with current provisions.

[4] Additional Authorities

[a] Sanctions After Order Compelling Answers

In *Biles v. Exxon Mobil Corp. (2004) 124 Cal. App. 4th 1315, 22 Cal. Rptr. 3d 282* , plaintiff, a contractor's employee, appealed a summary judgment in favor of defendant property owner in a premises liability action arising from asbestos exposure. In opposition to the summary judgment motion, the contractor's employee submitted a declaration from one of his former coworkers, stating that while they were working on the property owner's premises, employees of the property owner used air hoses to blow asbestos dust in their direction. The property owner objected to the declaration, and the trial court excluded it, on the ground that the coworker had not been identified in an answer to a previous interrogatory and that the answer had not been supplemented to include the name. The court of appeal reversed. A responding party has no duty to supplement his or her responses to interrogatories on the receipt of new information, absent an order compelling further answers, regardless of whether the party reserved the right to amend or supplement his or her earlier responses. Thus, the contractor's failure to supplement its interrogatory answer promptly did not constitute grounds for excluding the declaration under former Code Civ. Proc. § 2030(k), (l) (*now see Code Civ. Proc. §§ 2030.290, 2030.300*) when no order compelling further answers had been sought or entered, and the trial court made no finding that the initial responses were willfully false (*124 Cal. App. 4th 1315, 1328)* .

The factual and procedural background of *Best Product, Inc. v. Superior Court (2004) 119 Cal. App. 4th 1181, 15 Cal. Rptr. 3d 154* is discussed in *§ 85.10[4][a]*. In this commercial litigation discovery dispute, the trial court erred when it issued, as a sanction, a judicial order that the attorney-client and work product privileges had been waived, based on defendant's failure to provide a privilege log in regard to the interrogatories propounded by plaintiff. Former Code Civ. Proc. § 2030(k) (*now see Code Civ. Proc. § 2030.290(a)*) provides the only method by which a claim of privilege can be waived in responding to an interrogatory: "If a party to whom interrogatories are directed fails to serve a timely response, ...#x2026; [that party] waives ...#x2026; any objection to the interrogatories, including one based on privilege or on the protection for work product under [former Code Civ. Proc. § 2018 (*now see Code Civ. Proc. § 2018.010 et seq.*)]." This provision was inapplicable here, however, because defendant filed timely responses that complied with former Code Civ. Proc. § 2030(f)(3) (*now see Code Civ. Proc. § 2030.240*). Thus, the lack of a privilege log was a non-issue (*119 Cal. App. 4th 1181, 1189-1190)* . If plaintiff's complaint was that defendant tendered boiler-plate responses lacking any specificity to its interrogatories, plaintiff could have sought relief under former Code Civ. Proc. § 2030(l) (*now see Code Civ. Proc. § 2030.300*). However, plaintiff's motion to compel answers to its interrogatories did *not* cite or discuss that statutory provision (*119 Cal. App. 4th 1181, 1190)* .

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8-84 California Points & Authorities §§ 84.13through 84.14

[Reserved]

§§ 84.13[Reserved]

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8-84 California Points & Authorities § 84.15

§ 84.15 Supporting Motion to Compel Discovery--Interrogatory Answer That Information Available From Mass of Documents Is Insufficient

[1] FORM Supporting Motion to Compel Discovery--Interrogatory Answer That Information Available From Mass of Documents Is Insufficient

[*The following may be combined, when appropriate, with a general form of memorandum of points and authorities supporting a motion compelling further response to interrogatory questions (see, e.g., § 84.10).*]

FURTHER RESPONSE MAY BE COMPELLED WHEN A PARTY HAS ANSWERED AN INTERROGATORY WITH A BROAD STATEMENT THAT THE INFORMATION IS AVAILABLE FROM A MASS OF DOCUMENTS.

Broad Direction to Search Mass of Documents Is Improper. An answer to an interrogatory consisting of a broad statement that the information is available from a mass of documents is insufficient (*see Deyo v. Kilbourne (1978) 84 Cal. App. 3d 771, 784, 149 Cal. Rptr. 499*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a motion compelling further answers to interrogatories when a previous request for information has been met by a broad direction to search a mass of documents for the answer to the question. The foregoing form may be combined with general memoranda of points and authorities in support of a motion to compel further response to interrogatories [*see § 84.10*].

Note that, under certain narrowly prescribed circumstances, it is proper to direct the propounder of interrogatories to search through documents for the information that is sought [*see Code Civ. Proc. § 2030.230*]. This exception is developed further in § 84.21, which in an appropriate case may be use to oppose these points and authorities.

Note also that the case cited in this form construes law in effect before the operative date of the Civil Discovery Act. It is cited and discussed as persuasive authority to the extent that it remains consistent with current provisions [*see also § 84.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Broad Direction to Search Mass of Documents Is Improper

Deyo v. Kilbourne *(1978) 84 Cal. App. 3d 771, 149 Cal. Rptr. 499* was an appeal from a default judgment rendered against defendant as a sanction for failing to properly answer interrogatories. The original action was one for money owed for legal services rendered. Defendant was ill and was hospitalized during much of the time after interrogatories were propounded to him. When defendant did not serve timely answers to the interrogatories, plaintiff initially moved for sanctions, which the trial court denied. It did, however, order defendant to answer by a certain date and ruled that defendant's answer to the complaint would be stricken if answers were not forthcoming. Defendant then filed some answers, most of which were clearly not fully responsive. On plaintiff's motion, the trial court then awarded sanctions against defendant, including the striking of his answer. Defendant appealed, and the court of appeal reversed the judgment of default.

In its opinion, the court of appeal laid down guidelines for trial courts to follow in ruling on the propriety of responses to interrogatories, and in deciding whether or not sanctions are to be imposed. The court discussed the fact that while it may be a valid response to an interrogatory to direct the propounding party to search through some records, this is only true if a summary is not available, and if the responding party specifies the records from which the information may be ascertained (*84 Cal. App. 3d 771, 784)* . Moreover, the court held that the propounding party must be given a reasonable opportunity to examine all pertinent records, and that it is not sufficient to merely state that the information is available from a mass of documents (*84 Cal. App. 3d 771, 784, 785)* . See also *Kaiser Foundation Hospitals v. Superior Court (1969) 275 Cal. App. 2d 801, 804, 805, 80 Cal. Rptr. 263* (discussed in *§ 84.21[3][a]*), in which the court stated that if the records turned out to be deficient or ambiguous, then a motion to compel further answers might be in order.

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[Reserved]

§§ 84.16[Reserved]

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8-84 California Points & Authorities § 84.20

§ 84.20 Opposing Motion for Order Compelling Further Response to Interrogatories [Code Civ. Proc. § 2030.300]

[1] FORM Opposing Motion for Order Compelling Further Response to Interrogatories [Code Civ. Proc. § 2030.300]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO COMPEL FURTHER RESPONSE TO INTERROGATORIES, AND FOR MONETARY SANCTION
vs.	)	
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD DENY THE MOTION TO COMPEL FURTHER RESPONSE TO _____ [*specify, e.g.,* INTERROGATORIES 1-10 OF PLAINTIFF'S FIRST SET] BECAUSE FURTHER RESPONSE _____ [*specify, e.g.,* WOULD COMPEL DISCLOSURE OF PRIVILEGED INFORMATION *or* WOULD LEAD TO THE DISCOVERY OF MATERIAL THAT IS NOT RELEVANT TO THE SUBJECT MATTER OF THE ACTION *or specify other reason*]. IF THE MOTION IS DENIED, THE COURT SHOULD ALSO IMPOSE A MONETARY SANCTION AGAINST _____ [*name(s)*] BECAUSE THERE IS NO SHOWING

THAT _____ [HE/SHE/IT *or* THEY] ACTED WITH SUBSTANTIAL JUSTIFICATION OR THAT OTHER CIRCUMSTANCES MAKE THE IMPOSITION OF THE SANCTION UNJUST.

A. Scope of Examination by Written Interrogatories. [*See § 84.11[1], Paragraph B*].

[*Optional*] **B. Waiver by Untimely Notice of Motion.** The notice of motion for an order compelling a further response to interrogatories must be given within 45 days of the service of the response, or any supplemental response, if served personally, within the period applicable under *Section 2016.050 of the Code of Civil Procedure* if served by mail, or by any specific later date to which the parties have agreed in writing. If the notice of motion is untimely, the propounding party waives any right to compel a further response to the interrogatories (*Code Civ. Proc. § 2030.300*; *see Code Civ. Proc. § 2016.050*; *Professional Career Colleges, Magna Institute, Inc. v. Superior Court (1989) 207 Cal. App. 3d 490, 493-494, 255 Cal. Rptr. 5*).

[*Optional*] **C. Denying Motion Totally.** The court may deny a motion to compel answers to interrogatories in toto if the questions are objectionable in their entirety. The court is not under any obligation to redraft interrogatories so that proper questions would be presented for consideration (*Deaile v. General Telephone Co. of California (1974) 40 Cal. App. 3d 841, 851, 115 Cal. Rptr. 582*).

[*Optional*] **D. Number of Specially Prepared Interrogatories in Excess of 35.** Absent a declaration that satisfies the requirements of *Section 2030.050 of the Code of Civil Procedure*, and except for supplemental interrogatories, no party shall, as a matter of right, propound to any other party more than 35 specially prepared interrogatories (*see Code Civ. Proc. §§ 2030.030-2030.050*; *Catanese v. Superior Court (1996) 46 Cal. App. 4th 1159, 1164, 54 Cal. Rptr. 2d 280* , disapproved on other grounds in *Lewis v. Superior Court (1999) 19 Cal. 4th 1232, 1243-1244, 82 Cal. Rptr. 2d 85, 970 P.2d 872*).

[*Optional*] **E. Improper Format of Questions.** No set of interrogatories may contain a preface or instruction, unless it has been approved under *Section 2033.710 et seq. of the Code of Civil Procedure*. No specially prepared interrogatory may contain subparts, or a compound, conjunctive, or disjunctive question (*Code Civ. Proc. § 2030.060(f)*).

[*Optional*] **F. Continuing Interrogatory Prohibited.** An interrogatory may not be made a continuing one so as to impose on the party responding to it a duty to supplement an answer that was initially correct and complete with later-acquired information (*Code Civ. Proc. § 2030.060(g)*).

[*Optional*] **G. Lack of Personal Knowledge.** A responding party who lacks personal knowledge sufficient to respond to an interrogatory need not attempt to obtain the information if the information is equally available to the propounding party (*Code Civ. Proc. § 2030.220(c)*).

[*Optional*] **H. Reference to Writings.** If the answer to an interrogatory would necessitate the preparation or the making of a compilation, abstract, audit, or summary of or from the documents of the party to whom the interrogatory is directed, and if the burden or expense of preparing or making it would be substantially the same for both the propounding and responding party, the responding party may specify the writings from which the answer may be derived or ascertained (*Code Civ. Proc. § 2030.230*).

I. Court Must Impose Monetary Sanction Absent Specified Findings. The court must impose a monetary sanction under *Section 2023.030 of the Code of Civil Procedure* against any party, person, or attorney who unsuccessfully makes a motion to compel further response to interrogatories, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust (*Code Civ. Proc. §§ 2023.030(a), 2030.300(d)*).

[*Add points and authorities supporting objections to particular interrogatories (see, e.g., § 84.21 et seq. and general*

objections based on privilege or other protections against disclosure set out in Ch. 81, Discovery: Privileges and Other Discovery Limitations). If a protective order is sought, combine with § 84.30. Also add points and authorities generally supporting the imposition of monetary sanctions (see, e.g., Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11).]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This form of memorandum of points and authorities may be submitted in opposition to a motion to compel further response to interrogatories, such as the one *set out in § 84.11*. It provides general points to be used by a party who is resisting discovery sought by written interrogatories. It may be combined with specific points and authorities relating to particular privileges or other limitations on the scope of discovery raised by the opposing party as grounds for not responding [*see* Ch. 81, *Discovery: Privileges and Other Discovery Limitations*].

Optional Paragraph C may be used by a party who is contending that the interrogatories are objectionable in their entirety, and that the motion to compel answers should be denied in toto. This point should be used with caution due to the trial court's discretion to fashion just and equitable orders short of denying the discovery totally [*see Coy v. Superior Court (1962) 58 Cal. 2d 210, 221-222, 23 Cal. Rptr. 393, 373 P.2d 457* ; *West Pico Furniture Co. v. Superior Court (1961) 56 Cal. 2d 407, 418-419, 15 Cal. Rptr. 119, 364 P.2d 295]* .

The memorandum of points and authorities in opposition to a motion to compel further response must be tailored to the particular questions and responses involved, which are usually set out in the moving party's supporting declaration. Counsel should insert argument in this form, relating the points of law to the particular facts and questions involved, cross referring to any appropriate declarations.

Note that some cases cited in this form construe law in effect before the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that they remain consistent with current provisions [*see also § 84.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Waiver by Untimely Notice of Motion

In ***Professional Career Colleges, Magna Institute, Inc. v. Superior Court*** *(1989) 207 Cal. App. 3d 490, 255 Cal. Rptr. 5* , plaintiff, a former student at defendant school, filed an action against it for fraud and breach of contract. He served a first set of interrogatories on defendant. In its response defendant objected to one of the questions. At that time

plaintiff made no motion to compel further response, but more than 45 days later served a second set of interrogatories which included the same question to which defendant objected. When defendant objected that it was the same question, plaintiff filed a motion to compel a further response pursuant to former Code Civ. Proc. § 2033(l) (*now see Code Civ. Proc. § 2030.300*). When the trial court granted that motion, defendant petitioned for a writ of mandate.

The court of appeal granted the petition and issued a peremptory writ. The court discussed the Civil Discovery Act, observing that its pattern of restrictions, sanctions, and its attempt to force cooperation clearly evinces the legislative intent that discovery proceed not only smoothly, but swiftly as well (*207 Cal. App. 3d 490, 493)* . The court said it would be an absurdity to allow a party who fails to meet specified time limits to avoid the consequences of his or her delay and lack of diligence by propounding the same questions again. It opined that such a construction of the statute would obviously encourage delay and provide no incentive to attempt to resolve any dispute with the opposing party. The Legislature explicitly stated that unless a party moves to compel further response within 45 days of the unsatisfactory response, he or she waives any right to compel a further response. Thus, the court held plaintiff's motion to be untimely (*207 Cal. App. 3d 490, 494)* .

[b] Denying Motion Totally

Deaile v. General Telephone Co. of California *(1974) 40 Cal. App. 3d 841, 115 Cal. Rptr. 582* was an action for defamation, intentional infliction of emotional distress, and wrongful discharge from employment. Plaintiff brought a motion to compel answers to two interrogatories that she had propounded to defendant, one of which requested the names and addresses of each woman employed by defendant when plaintiff was forced to retire. The second interrogatory asked defendant to state which women were still employed by defendant, and where they were employed. Defendant objected that the interrogatories were oppressive, burdensome, unreasonable, and unlikely to lead to discovery of relevant evidence. During the hearing on the motion to compel answers, the trial court suggested that the interrogatories be modified, but the parties were unable to agree on a modification, and the trial court denied the motion. The trial court awarded plaintiff nothing, but ordered costs for defendant. Plaintiff appealed, alleging, among other errors, the denial of her motion to compel.

The court of appeal affirmed the judgment. With regard to the motion to compel, it noted that plaintiff had requested both relevant and irrelevant information and that each of the original questions was subject to objection because it called for information not likely to lead to the discovery of admissible evidence (*40 Cal. App. 3d 841, 850-851)* . The trial court had not abused its discretion by denying in toto the motion to compel further answers. Generally, a court should tailor its discovery orders to the needs of the particular case; it ordinarily constitutes an abuse of discretion to deny in toto a motion to compel further answers merely because some of the interrogatories are objectionable [*see Coy v. Superior Court (1962) 58 Cal. 2d 210, 23 Cal. Rptr. 393, 373 P.2d 457* (discussed in *§ 84.11[3*][b]); *West Pico Furniture Co. v. Superior Court (1961) 56 Cal. 2d 407, 15 Cal. Rptr. 119, 364 P.2d 295]* . However, the questions before the trial court were objectionable in their entirety, because they related to *all* women employees and were of a type that had been previously disapproved. The trial court was not under any obligation to redraft plaintiff's interrogatories so that proper questions would be presented for consideration (*40 Cal. App. 3d 841, 851)* .

[c] Number of Specially Prepared Interrogatories in Excess of 35

In ***Catanese v. Superior Court*** *(1996) 46 Cal. App. 4th 1159, 1164-1165, 54 Cal. Rptr. 2d 280* , disapproved on other grounds in *Lewis v. Superior Court (1999) 19 Cal. 4th 1232, 1243-1244, 82 Cal. Rptr. 2d 85, 970 P.2d 872* , defendant sought a writ of mandate directing the superior court to set aside its order that he provide further answers to interrogatories propounded by the plaintiff.

Granting the writ, the court of appeal found that the plaintiff violated the "rule of 35" set forth in former Code Civ. Proc. § 2030(c)(1) (*now see Code Civ. Proc. § 2030.030*) when her interrogatories referred to eight volumes of deposition testimony and, as worded, effectively posed upward of 10,000 separately worded questions and when she filed no

former section 2030(c)(3) (*now see* section 2030.050) declaration, but instead treated the interrogatories as consisting of five questions only (*46 Cal. App. 4th 1159, 1164-1165)* .

[4] Additional Authorities

[a] Improper Format of Questions

In *Clement v. Alegre (2009) 177 Cal. App. 4th 1277, 99 Cal. Rptr. 3d 791* , plaintiffs appealed a superior court order imposing monetary sanctions against them for interposing frivolous objections to special interrogatories propounded by defendant in a dispute arising out of the sale of real property. Plaintiffs' objections to most of the interrogatories propounded by defendant were based on the assertion that an interrogatory failed to comply with the statutory requirement that each be "full and complete in and of itself," as required by *Code Civ. Proc. § 2030.060(d)*, when it referred to a previous interrogatory. Plaintiffs did not contend that any of the interrogatories to which they objected on this basis were unclear, or that the interrogatories undermined or violated *Code Civ. Proc. 2030.030(b)*'s numerical limitation. Rather, plaintiffs objected on the grounds that the interrogatory was not "self-contained," because it violated (1) the requirement of *Code Civ. Proc. § 2030.060(d)* that questions be full and complete, by referring to a response in an earlier special interrogatory, and (2) the prohibition of *Code Civ. Proc. § 2030.060(f)*, against compound, conjunctive, or disjunctive questions (*177 Cal. App. 4th 1277, 1287)* . The court of appeal concluded that because the interrogatories did not arguably exceed the limit of 35 specified in *Code Civ. Proc. § 2030.030(b)*, referring to another answer violated neither *Code Civ. Proc. § 2030.060(d)*, nor *Code Civ. Proc. § 2030.060(f)* (*177 Cal. App. 4th 1277, 1287)* . Plaintiffs "seized on what might have been at most an arguable technical violation of the rule to object to interrogatories that were clear and concise where the interrogatories did not even arguably violate the presumptive numerical limitation set by statute. In so doing, plaintiffs themselves engaged in the type of gamesmanship and delay decried by the drafters of the Act," meriting sanctions (*177 Cal. App. 4th 1277, 1287, 1293)* .

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A. Motion to Compel Interrogatory Matters

8-84 California Points & Authorities § 84.21

§ 84.21 Opposing Motion to Compel Discovery--Interrogatory Answer Requiring Responding Party to Search Records and Public Records Is Sufficient [Code Civ. Proc. § 2030.230]

[1] FORM Opposing Motion to Compel Discovery--Interrogatory Answer Requiring Responding Party to Search Records and Public Records Is Sufficient [Code Civ. Proc. § 2030.230]

[*The following may be combined, when appropriate, with a general memorandum in opposition to a motion to compel further responses to interrogatories (see, e.g., § 84.20).*]

FURTHER DISCOVERY MAY NOT BE COMPELLED WHEN _____ [PRIOR ANSWERS TO INTERROGATORIES INDICATE THAT THE INFORMATION IS AVAILABLE IN SPECIFIED RECORDS *and/or* AN INTERROGATORY CALLS FOR INFORMATION WHICH IS IN PUBLIC RECORDS].

[*EITHER*]

A. No Compilation, Abstract, Audit, or Summary Available. When an answer to an interrogatory would necessitate the responding party to make a compilation, abstract, audit, or summary of that party's documents, and if the burden or expense of preparing or making it would be substantially the same for the party propounding the interrogatory as for the responding party, it is a sufficient answer to the interrogatory to refer to *Section 2030.230 of the Code of Civil Procedure* and to specify the documents from which the answer may be derived or ascertained (*Code Civ. Proc. § 2030.230*; *see also Kaiser Foundation Hospitals v. Superior Court (1969) 275 Cal. App. 2d 801, 804-805, 80 Cal. Rptr. 263*).

[*AND/OR*]

B. Answers Contained in Records That Are Equally Available to Both Parties. When each party has equal access to records that contain information sought by the party propounding interrogatories, it is a proper answer to the

interrogatories to refer that party to the documents and records from which the information may be gleaned (*Bunnell v. Superior Court (1967) 254 Cal. App. 2d 720, 723-724, 62 Cal. Rptr. 458*).

[*AND/OR*]

C. Improper to Seek Discovery of Information Contained in Public Records. Discovery is improper if it seeks information contained in public records, since the information is equally available to the propounding party and the answering party (*Alpine Mut. Water Co. v. Superior Court (1968) 259 Cal. App. 2d 45, 53-54, 66 Cal. Rptr. 250*).

[2] Comments

[a] Use of Form

This form is for use in opposing a motion to compel discovery when (1) answers have previously been given directing the propounding party to search specified documents for which no compilation, abstract, audit, or summary is available but which will give the propounding party all the information sought; (2) answers have previously been given directing the propounding party to search some records that are equally available to both parties; or (3) discovery of information contained in public records is sought. This form may be used in opposition to points and authorities compelling further answers on the general basis of the impropriety of an answer that requires the propounding party to search through a broadly described mass of records [*see § 84.15*]. This form may also be combined with a general form of memorandum opposing a motion to compel further response to interrogatories [*see, e.g., § 84.20*].

Note that some cases cited in this form construe law in effect before the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that they remain consistent with current provisions [*see also § 84.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] No Compilation, Abstract, Audit, or Summary Available

If a party responding to interrogatories specifies the documents from which an answer may be derived or ascertained, the specification must be in sufficient detail to permit the propounding party to locate and to identify, as readily as the responding party can, the documents from which the answer may be ascertained. The responding party must then afford to the propounding party a reasonable opportunity to examine, audit, or inspect these documents and to make copies, compilations, abstracts, or summaries of them [*Code Civ. Proc. § 2030.230*].

Kaiser Foundation Hospitals v. Superior Court *(1969) 275 Cal. App. 2d 801, 80 Cal. Rptr. 263* , arose out of a medical malpractice action in which plaintiff propounded interrogatories inquiring into the circumstances leading up to the medical procedure that was the subject of the lawsuit. Defendant responded that the answers to plaintiff's questions might be found by an inspection of defendant's medical records. The trial court ordered further answers, and defendant petitioned for a writ of prohibition.

The court of appeal granted the writ, holding that the answers were presumptively proper and responsive under former Code Civ. Proc. § 2030(c) (now see *Code Civ. Proc. § 2030.230*) (*275 Cal. App. 2d 801, 804-805)* , but that once plaintiff had inspected the records, a motion for further answers might be in order if he should find deficiencies or ambiguities in the records (*275 Cal. App. 2d 801, 805)* .

[b] Answers Contained in Records That Are Equally Available to Both Parties

Bunnell v. Superior Court *(1967) 254 Cal. App. 2d 720, 62 Cal. Rptr. 458* , arose out of a defamation action that had previously been tried twice. The first time, a new trial was granted, and the second time a mistrial was declared. In response to interrogatories propounded to plaintiff regarding any witnesses who had allegedly heard the defamatory statements, plaintiff responded that defendant should see the testimony given in prior depositions and trials. Defendant then made a motion to compel further answers, which was granted. Plaintiff's further answers were essentially the same as those given earlier.

Defendant moved again for an order requiring further answers, and this time the trial court granted an order that provided, in effect, that if further answers were not forthcoming within five days, plaintiff would not be permitted to present any witnesses at trial. Plaintiff then petitioned for a writ of prohibition.

The court of appeal granted the writ, noting that plaintiff was correct in refusing to give any other answer than the one that he had given (*254 Cal. App. 2d 720, 723)* . The court held that there was really nothing to discover except for statements and facts contained in the old transcripts that each party had in his possession. Hence it was just a question of which party would have to go to the trouble of researching the transcripts (*254 Cal. App. 2d 720, 723)* . The court went on to hold that because former Code Civ. Proc. § 2030(c) (now see *Code Civ. Proc. § 2030.230*) may be seen by analogy as placing the burden of research on the propounder of interrogatories when the answer is to be found in various records, the trial court abused its discretion in ordering further answers and imposing sanctions (*254 Cal. App. 2d 720, 724)* .

[c] Improper to Seek Discovery of Information Contained in Public Records

In ***Alpine Mut. Water Co. v. Superior Court*** *(1968) 259 Cal. App. 2d 45, 66 Cal. Rptr. 250* , some of the plaintiffs objected to a number of the interrogatories propounded by defendant on the ground that they sought information (such as who were the owners of record of various lots) that was contained in public records. In this regard, the court of appeal held that to the extent that the trial court required plaintiffs to answer interrogatories calling for information contained in public records, it was pro tanto invalid, since the information was as readily available to the propounding party as to the answering party (*259 Cal. App. 2d 45, 53-54)* .

Note, however, that in ***City of Alhambra v. Superior Court*** *(1980) 110 Cal. App. 3d 513, 521, 168 Cal. Rptr. 49* , the court of appeal held that the trial court had not abused its discretion in ordering petitioners to share its own records, which were more easily accessible to it than public records of the same lawsuits.

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8-84 California Points & Authorities § 84.22

§ 84.22 Opposing Motion to Compel Discovery--No Duty to Perform Opposing Party's Research in Answering Interrogatories [Code Civ. Proc. § 2030.220(c)]

[1] FORM Opposing Motion to Compel Discovery--No Duty to Perform Opposing Party's Research in Answering Interrogatories [Code Civ. Proc. § 2030.220(c)]

[*The following may be combined, when appropriate, with a general form of memorandum of points and authorities in opposition to a motion to compel further responses to interrogatories (see, e.g., § 84.20).*]

THE RESPONDING PARTY IS UNDER NO DUTY TO PERFORM RESEARCH FOR THE PROPOUNDING PARTY IN ORDER TO PROVIDE ANSWERS TO INTERROGATORIES.

Answers Equally Available to Both Parties. If a party responding to interrogatories does not have personal knowledge sufficient to respond fully to an interrogatory, that party shall so state, but does not have to make a reasonable and good faith effort to obtain the information by inquiry to other natural persons or organizations when the information is equally available to the propounding party (*Code Civ. Proc. § 2030.220(c)*; *see Bunnell v. Superior Court (1967) 254 Cal. App. 2d 720, 723-724, 62 Cal. Rptr. 458* ; *see also Schaefer v. Manufacturers Bank (1980) 104 Cal. App. 3d 70, 75, 163 Cal. Rptr. 402*).

[2] Comments

[a] Use of Form

This form of points and authorities is for use in opposition to a motion to compel discovery when discovery is sought concerning matters not within the personal knowledge of the responding party but that are equally available to both parties, and when the responding party has so stated in answers to interrogatories. This form may be combined with a general form of memorandum of points and authorities in opposition to a motion to compel further answers to interrogatories [*see, e.g., § 84.20*].

Note that some cases cited in this form construe law in effect before the operative date of the Civil Discovery Act. They

are cited and discussed as persuasive authority to the extent that they remain consistent with current provisions [*see also § 84.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Answers Equally Available to Both Parties

Bunnell v. Superior Court *(1967) 254 Cal. App. 2d 720, 62 Cal. Rptr. 458* , is discussed in *§ 84.21[3][b]*.

Schaefer v. Manufacturers Bank *(1980) 104 Cal. App. 3d 70, 163 Cal. Rptr. 402* was an appeal from a summary judgment in favor of defendant escrow holder in a suit for losses sustained in a real estate sale. Plaintiffs had propounded interrogatories requesting such items as the name, address, and phone number of the person who had prepared Exhibit 1 to plaintiffs' complaint. The document in question had never been made a part of the escrow and there was no showing that defendant had anything to do with its preparation. However, plaintiffs themselves were signatories to the document in question. Accordingly, defendant's reply to the interrogatory stated that it had no personal knowledge of the answer and, after making a reasonable inquiry, it found that the information obtained was insufficient to allow it to answer. Plaintiffs' discovery motions were denied.

The court of appeal affirmed the denial of the discovery motions, holding that when information is sought that is either equally available to both parties or more readily available to the party seeking discovery, then a denial of a motion to compel further discovery is correct (*104 Cal. App. 3d 70, 75)* .

[4] Additional Authorities

[a] Answers Equally Available to Both Parties

Holguin v. Superior Court (1972) 22 Cal. App. 3d 812, 99 Cal. Rptr. 653 arose out of an action against some physicians for wrongful death of a mother who died in childbirth. Plaintiffs, husband and children of decedent, propounded interrogatories, some of which related to the autopsy. Defendants responded that they could not answer because they were not present at that event. The trial court refused to compel further answers, and the court of appeal declined to issue a writ of mandate. In its opinion, the court held that defendants' response to the interrogatories was correct, and that responding parties are under no duty to start an investigation that will aid in preparation of his opponent's case (*22 Cal. App. 3d 812, 821)* .

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[Reserved]

§§ 84.23[Reserved]

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B. Motion for Protective Order in Interrogatory Matters

8-84 California Points & Authorities § 84.30

§ 84.30 Supporting Motion for Protective Order Regarding Interrogatories [Code Civ. Proc. § 2030.090]

[1] FORM Supporting Motion for Protective Order Regarding Interrogatories [Code Civ. Proc. § 2030.090]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PROTECTIVE ORDER RE INTERROGATORIES AND FOR MONETARY SANCTION
vs.	)	
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD ISSUE A PROTECTIVE ORDER _____ [*specify, e.g.,* THAT INTERROGATORIES 5-10 OF PLAINTIFF'S FIRST SET SHOULD NOT BE ANSWERED], BECAUSE GOOD CAUSE HAS BEEN SHOWN FOR THE ORDER AND BECAUSE _____ [*specify, e.g.,* DEFENDANT WOULD SUFFER UNWARRANTED ANNOYANCE, EMBARRASSMENT, OR OPPRESSION *or specify other reason*]. IF THE MOTION IS GRANTED, THE COURT SHOULD ALSO IMPOSE A MONETARY SANCTION AGAINST _____ [*name(s)*] BECAUSE THERE IS NO SHOWING THAT _____ [HE/SHE/IT *or* THEY] ACTED WITH SUBSTANTIAL JUSTIFICATION OR THAT OTHER CIRCUMSTANCES MAKE THE IMPOSITION OF THE SANCTION UNJUST.

A. Protective Orders. When interrogatories have been propounded, the responding party, and any other party or affected natural person or organization, may promptly move for a protective order. The court, for good cause shown, may make any order that justice requires to protect any party or any other natural person or organization from unwarranted annoyance, embarrassment, or oppression, or undue burden or expense (*Code Civ. Proc. § 2030.090*).

B. Types of Orders. The protective orders that the court may make under *Section 2030.090 of the Code of Civil Procedure* may include, but are not limited to, one or more of the following directions:

[*EITHER*]

That the set of interrogatories, or particular interrogatories in the set, need not be answered (*Code Civ. Proc. § 2030.090(b)(1)*).

[*AND/OR*]

That contrary to the representations made in a declaration for additional discovery submitted under *Section 2030.050 of the Code of Civil Procedure*, the number of specially prepared interrogatories is unwarranted (*Code Civ. Proc. § 2030.090(b)(2)*).

[*AND/OR*]

That the time specified in *Section 2030.260 of the Code of Civil Procedure* to respond to the set of interrogatories, or to particular interrogatories in the set, be extended (*Code Civ. Proc. § 2030.090(b)(3)*).

[*AND/OR*]

That the response be made only on specified terms and conditions (*Code Civ. Proc. § 2030.090(b)(4)*).

[*AND/OR*]

That the method of discovery be an oral deposition instead of interrogatories to a party (*Code Civ. Proc. § 2030.090(b)(5)*).

[*AND/OR*]

That a trade secret or other confidential research development or commercial information not be disclosed or be disclosed only in a certain way (*Code Civ. Proc. § 2030.090(b)(6)*).

[*AND/OR*]

That some or all of the answers to interrogatories be sealed and thereafter opened only on order of the court (*Code Civ. Proc. § 2030.090(b)(7)*).

[*CONTINUE*]

[*Optional*] **C. Rephrasing Interrogatories.** In order to protect a party from annoyance, expense, embarrassment, or oppression, the court may issue an order that interrogatories be rephrased (*West Pico Furniture Co. v. Superior Court (1961) 56 Cal. 2d 407, 417-419, 15 Cal. Rptr. 119, 364 P.2d 295*).

D. Court Must Impose Monetary Sanction Absent Specified Findings. The court must impose a monetary sanction under *Section 2023.030 of the Code of Civil Procedure* against any party, person, or attorney who unsuccessfully opposes a motion for a protective order, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust (*Code Civ. Proc. §§ 2023.030(a), 2030.090(d)*).

[*When appropriate, include specific points and authorities relating to objections, privileges, or other grounds that provide the basis for "good cause." Add points and authorities generally supporting the imposition of monetary sanctions (see, e.g., Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11).*]

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form of memorandum of points and authorities is for use by the responding party in support of a motion for a protective order after interrogatories have been propounded [*see Code Civ. Proc. § 2030.090*]. The motion must be accompanied by a declaration stating facts showing a reasonable and good-faith attempt at an informal resolution of each issue presented by it. If the motion for a protective order is denied in whole or in part, the court may order that the party provide or permit the discovery against which protection was sought on terms and conditions that are just [*see Code Civ. Proc. § 2030.090*]. This form should be combined with general points and authorities supporting the imposition of monetary sanctions under *Code Civ. Proc. § 2023.030(a)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11*.].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should therefore specify the material sought to be discovered, and explain which of the grounds applies to limit or prevent disclosure. Counsel's factual showing should demonstrate substantial justification for the motion in order to avoid a monetary sanction if the motion is denied [*see Code Civ. Proc. § 2030.090*]. However, counsel need not set forth facts showing that the party seeking discovery acted without substantial justification [*cf.* former Code Civ. Proc. § 2034(a)]. *Code Civ. Proc. §§ 2023.030(a)* and *2030.090(d)* effectively place that burden on the person against whom the sanction is to be imposed, by requiring the court to impose a monetary sanction when it is expressly authorized *unless* it finds that there was substantial justification or that other circumstances would make the monetary sanction unjust.

[c] Related Pleading and Practice Forms

For discussion and forms relating to protective orders in the context of discovery by interrogatories, see California Forms of Pleading and Practice, Ch. 194, *Discovery: Interrogatories* (Matthew Bender).

[3] Discussion of Authorities

[a] Rephrasing Interrogatories

In ***West Pico Furniture Co. v. Superior Court*** *(1961) 56 Cal. 2d 407, 15 Cal. Rptr. 119, 364 P.2d 295* , plaintiff alleged that certain sales transactions were actually loans at usurious interest rates. Defendants cross-complained for money owed; plaintiff counterclaimed for violation of the Financial Code. During the course of discovery, plaintiff propounded a number of interrogatories, some of which were answered by defendant. Objections were made to the remainder of the interrogatories on various grounds, including irrelevance, burden, and oppression. The trial court sustained some objections and overruled others.

The Supreme Court issued a writ of mandate, ordering the trial court to set aside its order sustaining the objections (*56 Cal. 2d 407, 422)* . The Court noted that former Code Civ. Proc. § 2030(b) (*now see Code Civ. Proc. § 2030.090*) allowed a court to protect a party from annoyance, expense, embarrassment, or oppression. Although the word "expense" was omitted, the Court stated that burden was not a valid ground for objection (*56 Cal. 2d 407, 417, 418)* . The Court added that the interrogatories themselves, because of their "shotgun" nature, might constitute a burden in themselves, as opposed to a burden in answering them. This still does not constitute a valid ground for sustaining an objection in toto, however, although the burdensome nature of the interrogatories may be a fact to be considered by the trial court in exercising its discretion to regulate the discovery. One way in which it may do this is to require that the interrogatories be rephrased (*56 Cal. 2d 407, 419)* .

West Pico was decided prior to the 1986 repeal and reenactment of Code Civ. Proc. § 2030, which precludes specially prepared interrogatories from containing subparts and compound, conjunctive, or disjunctive questions. It should also be noted that *Code Civ. Proc. § 2030.090(b)* presently includes "undue burden and expense" among grounds for obtaining a protective order.

[4] Additional Authorities

[a] Rephrasing Interrogatories

In *Jones v. Holy Cross Hospital Silver Spring, Inc. (D. Md. 1974) 64 F.R.D. 586* , an action for racial discrimination in employment, plaintiff propounded 70 interrogatories, which contained between two and 23 subparts. The interrogatories sought information relating to sex of employees as well as to race, and involved periods of time before the incorporation or operation of defendant hospital. Defendant sought a protective order under *Fed. R. Civ. P., Rule 26(c)* (which is substantially similar to former Code Civ. Proc. § 2019(b), *now see Code Civ. Proc. § 2025.010 et seq.*), and the court held that defendant was clearly entitled to an order protecting it from having to answer overbroad interrogatories. Thus, the court ordered plaintiff's attorney to review the interrogatories, and then to rephrase and reduce them (*64 F.R.D. 586, 591)* .

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[Reserved]

§§ 84.31[Reserved]

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C. Miscellaneous Procedures in Interrogatory Matters

8-84 California Points & Authorities § 84.50

§ 84.50 Supporting Motion for Relief From Waiver of Right to Produce Writings or Make Objections [Code Civ. Proc. § 2030.290]

[1] FORM Supporting Motion for Relief From Waiver of Right to Produce Writings or Make Objections [Code Civ. Proc. § 2030.290(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN SUPPORT OF MOTION FOR RELIEF
vs.	)	FROM WAIVER TO PRODUCE WRITINGS AND/
_____ [*name*],	)	OR MAKE OBJECTIONS
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD RELIEVE _____ [*specify party, e.g.,* DEFENDANT] FROM WAIVER OF THE RIGHT TO _____ [PRODUCE WRITINGS *and/or* MAKE OBJECTIONS] AFTER FAILURE TO SERVE TIMELY RESPONSES TO _____ [*specify, e.g.,* PLAINTIFF'S FIRST SET OF INTERROGATORIES] BECAUSE HE/SHE/IT HAS SUBSEQUENTLY SERVED A RESPONSE THAT IS IN SUBSTANTIAL COMPLIANCE WITH SECTION 2030.210-2030.240 OF THE CODE OF CIVIL PROCEDURE, AND HIS/HER/ITS FAILURE TO SERVE A TIMELY RESPONSE WAS THE RESULT OF

_____ [MISTAKE *and/or* INADVERTENCE *and/or* EXCUSABLE NEGLECT].

Relief From Waiver. The court, on motion, may relieve a party from the waiver of the right to produce writings under *Section 2030.230 of the Code of Civil Procedure* and the right to make objections after failure to serve a timely response to interrogatories, if it determines that (1) the party has subsequently served a response to the interrogatories that is in substantial compliance with *Sections 2030.210-2030.240 of the Code of Civil Procedure*, and *(2)* the party's failure to serve a timely response to the interrogatories was the result of mistake, inadvertence, or excusable neglect (*Code Civ. Proc. § 2030.290(a)*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities is for use by a party on whom interrogatories have been served, but who failed to serve timely response to them, to obtain an order for relief from waiver of the rights to produce writings under *Code Civ. Proc. § 2030.230* and to object to interrogatories [*see Code Civ. Proc. § 2030.290(a)*]. If the propounding party has served a notice of motion to compel response and for a monetary sanction, counsel should set the motion for relief from waivers for hearing either prior to or concurrent with the propounding party's motion.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[c] Grounds for Relief

The grounds for relief from waiver under *Code Civ. Proc. § 2030.290* are similar to some of the grounds for relief from default judgment under *Code Civ. Proc. § 473(b)*, that is, that the party's failure to serve a timely response to the interrogatories was the result of mistake, inadvertence, or excusable neglect. Counsel may wish to use authority supporting a motion under *Code Civ. Proc. § 473(b)* that interprets those grounds, bearing in mind that *Code Civ. Proc. § 473(b)* allows relief under the additional ground of surprise. For memoranda of points and authorities regarding relief under *Code Civ. Proc. § 473*, see Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders* .

[d] Related Pleading and Practice Forms

For discussion and forms relating to motions for relief from waiver, see California Forms of Pleading and Practice, Ch. 194, *Discovery: Interrogatories* (Matthew Bender). For discussion and forms relating to relief under Code Civ. Proc. § 473, see Ch. 489, *Relief From Judgments and Orders* , in that publication.

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 84.60* may be used to oppose the motion supported by these

points and authorities.

California Points & Authorities

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 84 DISCOVERY: INTERROGATORIES
PART II. FORMS
C. Miscellaneous Procedures in Interrogatory Matters

8-84 California Points & Authorities §§ 84.51-84.59

[Reserved]

§§ 84.51[Reserved]

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8-84 California Points & Authorities § 84.60

§ 84.60 Opposing Motion for Relief From Waiver of Right to Produce Writings or Make Objections [Code Civ. Proc. § 2030.290]--Failure to Show Excuse From Delay

[1] FORM Opposing Motion for Relief From Waiver of Right to Produce Writings or Make Objections [Code Civ. Proc. § 2030.290]--Failure to Show Excuse From Delay

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR RELIEF FROM WAIVER TO PRODUCE WRITINGS AND MAKE OBJECTIONS
vs.	)	
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

_____ [*Specify party, e.g.,* DEFENDANT] IS NOT ENTITLED TO RELIEF FROM WAIVER OF THE RIGHT TO _____ [PRODUCE WRITINGS *and/or* MAKE OBJECTIONS] FOR FAILURE TO SERVE TIMELY RESPONSES TO _____ [*specify, e.g.,* PLAINTIFF'S FIRST SET OF INTERROGATORIES], BECAUSE HE/SHE/IT FAILED TO SHOW A _____ [REASONABLE EXCUSE FOR THE DELAY *and/or* A REASONABLE EXPLANATION FOR THE FAILURE TO SEEK A FURTHER EXTENSION FROM COUNSEL OR AN ENLARGEMENT OF TIME FROM THE COURT].

Inadequate Showing of Excusable Neglect in Filing Untimely Objections. A showing of excusable neglect after counsel has knowingly allowed the time to respond to interrogatories to expire must include not only a reasonable excuse for the delay, but also a reasonable explanation for the failure to seek a further extension from counsel or an enlargement of time from the court (*see Mannino v. Superior Court (1983) 142 Cal. App. 3d 776, 779, 191 Cal. Rptr. 163*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities is for use to oppose a motion for relief from waiver after failure to serve timely response, on the ground that the responding party failed to show a reasonable excuse for the delay, but also a reasonable explanation for the failure to seek a further extension from counsel or an enlargement of time from the court [*see Mannino v. Superior Court (1983) 142 Cal. App. 3d 776, 779, 191 Cal. Rptr. 163]* . For discussion of the grounds for relief from waiver, see *§ 84.50*.

In an appropriate case, these points and authorities may be submitted in opposition to the motion supported by the points and authorities *set out in § 84.50*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Inadequate Showing of Excusable Neglect in Filing Untimely Objections

In ***Mannino v. Superior Court*** *(1983) 142 Cal. App. 3d 776, 191 Cal. Rptr. 163* , a personal injury action, plaintiff propounded a sixth set of interrogatories consisting of 190 questions. At defendant's request, plaintiff's counsel granted one extension to respond. Six days after the time on the extension had passed, defendant filed a verified response containing objections to 151 of the 190 questions, on the grounds that the questions were vague and ambiguous, the answers would be remote and irrelevant, and the efforts required to answer were overly burdensome. After attempting unsuccessfully to resolve the matter pursuant to former Cal. Rules of Ct., Rule 222.1 (now see *Code Civ. Proc. § 2030.300*), plaintiff filed a motion to compel further answers without objection and for sanctions. Defendant did not seek relief from default after failing to respond to the interrogatories within the statutory time period, but submitted a declaration in opposition to plaintiff's motion to compel. In the declaration, defendant's counsel stated that he had not received an executed verification until five days after the extended deadline for responding to the interrogatories had passed, but did not explain if he made efforts to obtain a timely verification. The trial court denied the motions, and plaintiff petitioned the court of appeal for issuance of a writ of mandate.

The court of appeal let a peremptory writ of mandate issue, directing the trial court to grant the motion to compel and to consider the request for sanctions. A party who fails to respond to interrogatories within the relevant period for response waives the right to interpose objections. Belated objections are not valid unless the defaulting party demonstrates good cause to grant relief from default, and the burden is on the defaulting party to seek and justify relief (*142 Cal. App. 3d 776, 778)* . Counsel could easily have arranged a substituted verification by messenger because the place of verification and counsel's office were in close proximity. Furthermore, it does not require more than 60 days to raise the familiar objections that defendant finally interposed. A showing of excusable neglect after counsel has knowingly allowed the time to respond to interrogatories to expire must include not only a reasonable excuse for the delay, but also a reasonable explanation for the failure to seek a further extension from counsel or an enlargement of time from the court (*142 Cal. App. 3d 776, 779)* .

Note that *Mannino* construed law in effect prior to the operative date of the Civil Discovery Act of 1986. It is cited and discussed as persuasive authority to the extent that it appears to remain consistent with current provisions. *Code Civ. Proc. § 2030.290* now provides a procedure for relief from the waiver after failure to serve timely response, superseding *Code Civ. Proc. § 473* with respect to interrogatories [*see also § 84.50[2][c]*].

California Points & Authorities

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8-84 California Points & Authorities §§ 84.61-84.69

[Reserved]

§§ 84.61[Reserved]

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8-84 California Points & Authorities § 84.70

§ 84.70 Supporting Motion for Order That Initial Answers to Interrogatories Be Deemed Binding [Code Civ. Proc. § 2030.310]

[1] FORM Supporting Motion for Order That Initial Answers to Interrogatories Be Deemed Binding [Code Civ. Proc. § 2030.310]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ORDER THAT INITIAL ANSWERS TO INTERROGATORIES BE DEEMED BINDING AND FOR MONETARY SANCTION
vs.	)	
_____ [*name*],	)	
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE INITIAL ANSWER OF _____ [*specify, e.g.,* DEFENDANT] TO _____ [*specify interrogatory, e.g.,* PLAINTIFF'S FIRST SET OF INTERROGATORIES TO DEFENDANT, INTERROGATORY NUMBER _____] SHOULD BE DEEMED BINDING ON HIM/HER/IT FOR PURPOSES OF THE PENDING ACTION BECAUSE HE/SHE/IT HAS FAILED TO SHOW SUBSTANTIAL JUSTIFICATION FOR THE INITIAL ANSWER, AND _____ [*specify, e.g.,* PLAINTIFF] HAS

BEEN SUBSTANTIALLY PREJUDICED BY HIS/HER/ITS INITIAL FAILURE TO ANSWER CORRECTLY, WHICH CANNOT BE CURED BY EITHER A CONTINUANCE FOR FURTHER DISCOVERY OR USE OF THE INITIAL ANSWER PURSUANT TO SECTION 2030.410 OF THE CODE OF CIVIL PROCEDURE. IF THE MOTION IS GRANTED, THE COURT SHOULD ALSO IMPOSE A MONETARY SANCTION AGAINST _____ [*name(s)*] BECAUSE THERE IS NO SHOWING THAT _____ [HE/SHE/IT *or* THEY] ACTED WITH SUBSTANTIAL JUSTIFICATION OR THAT OTHER CIRCUMSTANCES MAKE THE IMPOSITION OF THE SANCTION UNJUST.

A. Initial Answer Deemed Binding. The party who propounded an interrogatory to which an amended answer has been served may move for an order that the initial answer to that interrogatory be deemed binding on the responding party for the purpose of the pending action. The court shall grant this motion if it determines that (1) the initial failure of the responding party to answer the interrogatory correctly has substantially prejudiced the party who propounded the interrogatory, (2) the responding party has failed to show substantial justification for the initial answer to that interrogatory, and (3) the prejudice to the propounding party cannot be cured either by a continuance to permit further discovery or by the use of the initial answer pursuant to *Section 2030.410 of the Code of Civil Procedure* (*Code Civ. Proc. § 2030.310*).

B. Court Must Impose Monetary Sanction Absent Specified Findings. The court must impose a monetary sanction under *Section 2023.030 of the Code of Civil Procedure* against any party, person, or attorney who unsuccessfully opposes a motion to deem binding an initial answer to an interrogatory, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust (*Code Civ. Proc. §§ 2023.030(a), 2030.310(d)*).

[*Add points and authorities generally supporting the imposition of monetary sanctions (see, e.g., Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11).*] Respectfully submitted, [*firm name, if any*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities is for use by the propounding party after the responding party has served an amended answer, to support a motion to obtain an order that the initial answer be deemed binding and for a monetary sanction.

The motion must be accompanied by a declaration stating facts showing a reasonable and good-faith attempt at an informal resolution of each issue presented by the motion [*see Code Civ. Proc. § 2030.310*]. This form should be combined with general points and authorities supporting the imposition of monetary sanctions under *Code Civ. Proc. § 2023.030(a)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should show how the initial failure of the responding party to answer the interrogatory correctly has substantially prejudiced the propounding party, why the responding party's reasons for the failure do not constitute substantial justification for the initial answer, why the prejudice to the propounding party cannot be cured by a continuance or by use of the initial answer at trial against the responding party, and otherwise show substantial justification for the motion in order to avoid a monetary sanction if the motion is denied [*see Code Civ. Proc. § 2030.310*]. However, counsel need not set forth facts showing that the responding party acted without substantial justification [*cf.* former Code Civ. Proc. § 2034(a)]. *Code Civ. Proc. §§ 2023.030(a)* and *2030.310(d)* effectively place that burden on the person against whom the sanction is to be imposed, by requiring the court to impose a monetary sanction when it is expressly authorized *unless* it finds that there was substantial justification or that other circumstances would make the monetary sanction unjust.

[c] Related Pleading and Practice Forms

For a form of motion to obtain an order that the initial answer to an interrogatory be deemed binding, see California Forms of Pleading and Practice, Ch. 194, *Discovery: Interrogatories* (Matthew Bender).

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8-84 California Points & Authorities §§ 84.71-84.79

[Reserved]

§§ 84.71[Reserved]

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8-84 California Points & Authorities § 84.80

§ 84.80 Memorandum of Points and Authorities in Support of Motion for Order Allowing Service of Interrogatories on a Member of Class Who Is Not a Class Representative and Who Has Not Appeared [Cal. Rules of Ct., Rule 3.768(c)]

[1] FORM Memorandum of Points and Authorities in Support of Motion for Order Allowing Service of Interrogatories on a Member of Class Who Is Not a Class Representative and Who Has Not Appeared [Cal. Rules of Ct., Rule 3.768(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION FOR ORDER ALLOWING SERVICE OF INTERROGATORIES ON A MEMBER OF CLASS WHO IS NOT A CLASS REPRESENTATIVE AND WHO HAS NOT APPEARED
vs.	)	
_____ [*name*],	)	
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD ENTER AN ORDER ALLOWING SERVICE OF INTERROGATORIES ON _____, WHO IS A CLASS MEMBER, BUT NOT A CLASS REPRESENTATIVE, AND WHO HAS NOT APPEARED.

A. Rule. A court order is required in order to serve interrogatories on a member of a class who is not a party representative, and who has not appeared (*Cal. Rules of Ct., Rule 3.768(c)*).

B. Factors to Be Considered. Under [*Cal. Rules of Ct., Rule 3.768(c)*], the court must consider, among other relevant factors, the following factors, before issuing an order allowing interrogatories to be served upon a class member who is not a party representative, and who has not appeared:

(1) The timing of the request;

(2) The subject matter to be covered;

(3) The materiality of the information being sought;

(4) The likelihood that class members have such information;

(5) The possibility of reaching factual stipulations that eliminate the need for such discovery;

(6) Whether class representatives are seeking discovery on the subject to be covered; and

(7) Whether discovery will result in annoyance, oppression, or undue burden or expense for the members of the class.

[*Address factors as they pertain to facts and circumstances of the case, stressing the importance of information sought to the full and fair determination of the issues.*]

[*Optional*] **C. Additional Factors.** [*Discuss other factors bearing on how obtaining the requested information will serve the interests of justice.*]

[2] Comments

[a] Use of Form

This form of memorandum is for use in support of a motion to allow a class member who is not a class representative, and who has not appeared in the case to be served with interrogatories in the action.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should state facts and argument showing how this order is needed for full and fair determination of the issues in the case, and how the information requested is not available from class representatives or other members of the class who have appeared.

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 85 DISCOVERY: PRODUCTION OR INSPECTION OF TANGIBLE EVIDENCE

8-85 California Points & Authorities 85.syn

§ 85.syn Synopsis to Chapter 85: DISCOVERY: PRODUCTION OR INSPECTION OF TANGIBLE EVIDENCE

§ 85.01 Scope of Chapter

§ 85.02 Governing Law

[1] California Civil Discovery Act and Related Law

[2] Provisions Governing Demand for Inspection, Copying, Testing, or Sampling of Documents, Tangible Things, Land or Other Property, or Electronically Stored Information

[3] Case Law Decided Under Prior Discovery Acts

§ 85.03 How to Use the Forms in This Chapter

[1] Page Limits on Memoranda

[2] Using the Forms to Build a Draft Memorandum

§ 85.04 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

[2] Related Memoranda

§§ 85.05-85.09 [Reserved]

§ 85.10 Supporting Motion for Order Compelling Response to Demand for Inspection, Copying, Testing, or Sampling of Documents, Tangible Things, Land or Other Property, or Electronically Stored Information [Code Civ. Proc. § 2031.300]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Timely Response

[d] Related Pleading and Practice Forms

[3] [Reserved]

[4] Additional Authorities

[a] Waiver of Objection to Demand

§ 85.11 Supporting Motion for Order Compelling Further Response to Demand for Inspection, Copying, Testing, or Sampling of Documents, Tangible Things, Land or Other Property, or Electronically Stored Information [Code Civ. Proc. § 2031.310]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Matter Is Discoverable If Not Privileged and If Relevant to Subject Matter

[b] Inconvenience No Bar to Production and Inspection

[c] Photographing of Face and Body

[4] Additional Authorities

[a] Matter Is Discoverable If Not Privileged and If Relevant to Subject Matter

[b] Court Must Impose Monetary Sanctions Absent Specified Findings

§ 85.12 Supporting Motion for Order of Sanctions [Code Civ. Proc. § 2023.030]--Failure to Obey Order Compelling Response or Further Response to Demand for Inspection, Copying, Testing, or Sampling of Documents,

Tangible Things, Land or Other Property, or Electronically Stored Information [Code Civ. Proc. §§ 2031.300, 2031.310]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Sanctions

[d] Related Pleading and Practice Forms

[e] Opposing Points and Authorities

§§ 85.13-85.19 [Reserved]

§ 85.20 Supporting Motion for Order Compelling Compliance With Demand for Inspection, Copying, Testing, or Sampling of Documents, Tangible Things, Land or Other Property, or Electronically Stored Information [Code Civ. Proc. § 2031.320]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Responses to Demand

[d] Monetary Sanctions

[e] Related Pleading and Practice Forms

[3] [Reserved]

[4] Additional Authorities

[a] Responses to Demand

§ 85.21 Supporting Motion for Order of Sanctions [Code Civ. Proc. § 2023.030]--Failure to Obey Order Compelling Compliance With Demand for Inspection, Copying, Testing, or Sampling of Documents, Tangible Things, Land or Other Property, or Electronically Stored Information [Code Civ. Proc. § 2031.320]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Sanctions

[d] Related Pleading and Practice Forms

[e] Opposing Points and Authorities

§§ 85.22-85.29 [Reserved]

§ 85.30 Opposing Motion for Order Compelling Further Response to Demand for Inspection, Copying, Testing, or Sampling of Documents, Tangible Things, Land or Other Property, or Electronically Stored Information [Code Civ. Proc. § 2031.310]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Waiver of Right to Compel Further Response

[b] Failure to Comply With Procedure

[c] Informal Interviews Are Improper

[4] Additional Authorities

[a] Waiver of Right to Compel Further Response

[b] Court Must Impose Monetary Sanctions Absent Specified Findings

§ 85.31 Opposing Motion for Order of Sanctions [Code Civ. Proc. § 2023.030]--Failure to Obey Order Compelling Response to, Further Response to, or Compliance With Demand for Inspection, Copying, Testing, or Sampling of Documents, Tangible Things, Land or Other Property, or Electronically Stored Information [Code Civ. Proc. §§ 2031.300, 2031.310, 2031.320]--Sanctions Are Punitive Rather Than Remedial

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Purpose of Sanctions

[b] Inappropriateness of Type and Severity of Sanctions

[c] Limitation on Use of Sanctions

[d] Terminating Sanction Should Not Be Imposed if Responding Party Unable to Comply and Lesser Sanction Available

§§ 85.32-85.49 [Reserved]

§ 85.50 Supporting Motion for Protective Order Concerning Demand for Production, Inspection, Copying, Testing, or Sampling of Documents, Tangible Things, Land or Other Property, or Electronically Stored Information [Code Civ. Proc. § 2031.060]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Power of Court to Issue Protective Order

[b] Types of Protective Order

[c] Factual Showing of Good Cause

[d] Balancing Burden Against Likelihood of Discovering Admissible Evidence

[e] Protection Against Nonlitigation Use of Discovered Information

[4] Additional Authorities

[a] Power of Court to Issue Protective Order

[b] Types of Protective Order

§§ 85.51-85.59 [Reserved]

§ 85.60 Opposing Motion for Protective Order Concerning Demand for Production, Inspection, Copying, Testing, or Sampling of Documents, Tangible Things, Land or Other Property, or Electronically Stored Information [Code Civ. Proc. § 2031.060]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Transporting of Records to Allow for Inspection

§§ 85.61-85.69 [Reserved]

§ 85.70 Supporting Motion for Relief From Waiver of Objection to Demand for Inspection, Copying, Testing, or Sampling of Documents, Tangible Things, Land or Other Property, or Electronically Stored Information [Code Civ. Proc. § 2031.300]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

§§ 85.71-85.79 [Reserved]

§ 85.80 Opposing Motion for Relief From Waiver of Objection to Demand for Inspection, Copying, Testing, or Sampling of Documents, Tangible Things, Land or Other Property, or Electronically Stored Information [Code Civ. Proc. § 2031.300]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Waiver Resulting From Tactical Choice by Counsel Does Not Warrant Relief

§§ 85.81-85.89 [Reserved]

§ 85.90 Supporting Contention That No Cause of Action Exists for Spoliation of Evidence--Availability of Discovery Sanctions and Other Litigation Remedies Preclude Cause of Action

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[3] Discussion of Authorities

[a] No Cause of Action for First-Party Intentional Spoliation of Evidence

[b] No Cause of Action for Third-Party Spoliation of Evidence

[c] No Cause of Action for First-Party Negligent Spoliation of Evidence

[d] No Cause of Action for Third-Party Negligent Spoliation of Evidence

[e] Contractual Duty to Preserve Evidence

[f] Statutory Duty to Preserve Evidence

[4] Additional Authorities

[a] No Cause of Action for First-Party Intentional Spoliation of Evidence

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 85 DISCOVERY: PRODUCTION OR INSPECTION OF TANGIBLE EVIDENCE
PART I. INTRODUCTION

8-85 California Points & Authorities § 85.01

§ 85.01 Scope of Chapter

This chapter includes memoranda relating to civil discovery by demand for the inspection, copying, testing, or sampling of documents, tangible things, land or other property, and electronically stored information--specifically, to inspect and to photograph, test, or sample any tangible things that are in the possession, custody, or control of the party on whom the demand is made; to enter on any land or other property that is in the possession, custody, or control of the party on whom the demand is made, and to inspect and to measure, survey, photograph, test, or sample the land or other property, or any designated object or operation on it; and to inspect, copy, test, or sample electronically stored information in the possession, custody, or control of the party on whom demand is made [*see Code Civ. Proc. § 2031.010*]. Forms in Part II include the following:

- Subpart A has memoranda supporting a motion to compel a response to a demand for inspection, copying, testing, or sampling documents, tangible things, land or other property or electronically stored information [§ 85.10 et seq.] or a motion to compel compliance with such a demand [§ 85.20 et seq.], as well as memoranda opposing these motions [§ 85.30 et seq.].

- Subpart B has memoranda supporting [§ 85.50] and opposing [§ 85.60] a motion for a protective order in the context of a demand for the inspection, copying, testing, or sampling documents, tangible things, land or other property or electronically stored information.

- Subpart C has memoranda relating to miscellaneous motions in matters pertaining to a demand for the inspection, copying, testing, or sampling documents, tangible things, land or other property or electronically stored information, including those supporting [§ 85.70] and opposing [§ 85.80] a motion for relief from a waiver of an objection to such a demand. Subpart also includes memoranda supporting the contention that, because of availability of discovery sanctions in the context of a demand for the inspection, copying, testing, or sampling documents, tangible things, land or other property or electronically stored information, as well as other public policy considerations, there is no tort cause of action for the spoliation of tangible evidence [§ 85.90].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMotions to CompelCivil ProcedureDiscoveryProtective Orders

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CHAPTER 85 DISCOVERY: PRODUCTION OR INSPECTION OF TANGIBLE EVIDENCE
PART I. INTRODUCTION

8-85 California Points & Authorities § 85.02

§ 85.02 Governing Law

[1] California Civil Discovery Act and Related Law

Civil discovery in California is governed primarily by the California Civil Discovery Act, codified at *Code Civ. Proc. §§ 2016.010-2036.050*. Discovery in limited civil cases is further governed by *Code Civ. Proc. §§ 94* and *95*. Statewide rules of court relating to discovery papers and discovery motions are set out in *Cal. Rules of Ct., Rules 3.1000*, 3.1345, 3.1346, 3.1347, and 3.1348.

[2] Provisions Governing Demand for Inspection, Copying, Testing, or Sampling of Documents, Tangible Things, Land or Other Property, or Electronically Stored Information

Civil discovery by demand to a party for the inspection, copying, testing, or sampling of documents, tangible things, land or other property, and electronically stored information is governed primarily by *Code Civ. Proc. §§ 2031.010-2031.320*. A specific duty to disclose nonprivileged relevant written evidence pertaining to the boundaries of land patented or granted by the state, or to the validity of a state patent or land grant prior to 1950, in an action involving a dispute as to such boundaries or validity, is set out in *Code Civ. Proc. § 2031.510*. Limits on the use of inspection demands in limited civil cases are set out in *Code Civ. Proc. § 94(a)*.

Code Civ. Proc. § 2031.010 et seq. does not authorize a party to make a demand for inspection, copying, testing, or sampling of documents, tangible things, land or other property, and electronically stored information on a nonparty. The proper procedural device to be employed in this situation is the deposition subpoena duces tecum, governed by *Code Civ. Proc. §§ 2020.010 et seq.* and *2025.280(b)*. Points and authorities relating to depositions generally are set out in Ch. 83, *Discovery: Depositions* .

Production of electronic information presents thorny issues, often based on the Sheer volume of information or on the fact that the data is not readily accessible because of undue burden or cost [*see Playboy Enters. v. Welles (S.D. Cal 1999) 60 F. Supp. 2d 1050, 1055* ; *Maldonado v. Superior Court (2002) 94 Cal. App. 4th 1390, 1396, 115 Cal. Rptr. 2d 137*]. For discussion of e-discovery, including the duty to preserve and produce electronic evidence, see Ch. 85A, *Discovery : E-Discovery*. For discussion and forms relating to electronically stored evidence, see California Forms of Pleading and Practice, Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)* (Matthew

Bender). For detailed coverage of the California e-discovery process, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence.

[3] Case Law Decided Under Prior Discovery Acts

The Civil Discovery Act was passed in 2004 and became effective July 1, 2005. It repealed and renumbered the Civil Discovery Act of 1986 but did not substantively change the law of civil discovery [Stats. 2004, ch. 182 §§ 22, 23, 61]. Thus cases decided under the 1986 Act remain controlling authority. A considerable body of case law interpreted the discovery provisions of the Discovery Act of 1956 (former Code Civ. Proc. §§ 2016-2037.9), which preceded the 1986 Act. Although the 1986 Act, which became operative July 1, 1987, implemented numerous changes in the prior law, it also continued provisions of the prior law in many other instances, or even codified decisions interpreting the prior law. Decisions construing this prior law are therefore cited as persuasive, rather than controlling, authority to the extent that they are consistent with current provisions [*see In re Marriage of Skelley (1976) 18 Cal. 3d 365, 369, 134 Cal. Rptr. 197, 556 P.2d 297]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

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8-85 California Points & Authorities § 85.03

§ 85.03 How to Use the Forms in This Chapter

[1] Page Limits on Memoranda

One of the more significant drafting requirements to keep in mind is page limits: supporting and opposing memoranda filed in discovery motion proceedings may not exceed 15 pages. A reply or closing memorandum may not exceed 10 pages. Exhibits, declarations, attachments, the table of contents, the table of authorities, and the proof of service are excluded from these page limits. Any party must obtain leave of court to file a longer memorandum [*see Cal. Rules of Ct., Rule 3.1113(d)*]. These and other drafting requirements are discussed in further detail in Ch. 1, *Writing Legal Memoranda and Briefs* .

[2] Using the Forms to Build a Draft Memorandum

The forms in this chapter are designed to be included in a memorandum supporting or opposing a particular type of discovery motion, such as motion to compel discovery or a motion for a protective order.

In many cases it will be appropriate to combine them with additional memoranda set out in the related discovery chapters. In particular, they may be combined with the general memoranda for limiting or regulating discovery set out in Ch. 80, *Discovery: Scope, Regulation, and Timing* , or with the memoranda for limiting discovery based on the evidentiary privileges, work product protection, or other protective provisions found in Ch. 81, *Discovery: Privileges and Other Discovery Limitations* .

It may also be appropriate to modify the memoranda in this chapter for use in a different procedural context, such as in a trial or appellate brief or office memoranda relating to discovery practice.

For a detailed discussion on how to select and use the forms in the publication to build a draft memorandum and complete the draft, with detailed discussion of all drafting requirements and strategic or stylistic considerations, see Ch. 1, *Writing Legal Memoranda and Briefs* . For a skeletal form for a memorandum for use in creating a properly formatted outline in which to compile relevant forms from this publication, see also Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting Memoranda

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8-85 California Points & Authorities § 85.04

§ 85.04 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

For background discussion of forms of moving papers relating to civil discovery by demand for the production or inspection of tangible evidence, see California Forms of Pleading and Practice, Ch. 195, *Discovery: Inspection of Tangible Evidence* (Matthew Bender). For a detailed discussion of discovery of electronically stored information (e-discovery), see Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)*; see also Matthew Bender(R) Practice Guide: California E-Discovery and Evidence.

[2] Related Memoranda

For memoranda supporting or opposing a motion to compel discovery based on general limiting or regulatory provisions of the Discovery Act, see Ch. 80, *Discovery: Scope, Regulation, and Timing* .

For memoranda supporting or opposing a motion to compel discovery on the ground that the matter sought to be discovered is privileged or is otherwise protected from disclosure, see Ch. 81, *Discovery: Privileges and Other Discovery Limitations* .

For memoranda supporting or opposing a motion to compel discovery, or supporting or opposing a motion for protective order, in the context of another discovery method, see Ch. 83, *Discovery: Depositions* , Ch. 84, *Discovery: Interrogatories* , and Ch. 86, *Discovery: Requests for Admissions* , through Ch. 88, *Discovery: Exchange of Expert Witness Information* .

For memoranda relating to the use of demands for the production, inspection, copying, testing, or sampling of documents, tangible things, land or other property, and electronically stored information in order to preserve evidence before an action is commenced or pending an appeal, see Ch. 89, *Discovery: Preservation of Evidence* .

For memoranda for use in seeking or opposing writs to review discovery orders, see Ch. 89A, *Discovery: Review of Discovery Orders* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsExpert Witness DiscoveryCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMotions to CompelCivil ProcedureDiscoveryPrivileged MattersGeneral Overview

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8-85 California Points & Authorities §§ 85.05-85.09

[Reserved]

§§ 85.05[Reserved]

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8-85 California Points & Authorities § 85.10

§ 85.10 Supporting Motion for Order Compelling Response to Demand for Inspection, Copying, Testing, or Sampling of Documents, Tangible Things, Land or Other Property, or Electronically Stored Information [Code Civ. Proc. § 2031.300]

[1] FORM Supporting Motion for Order Compelling Response to Demand for Production or Inspection of Tangible Evidence [Code Civ. Proc. § 2031.300]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION FOR ORDER COMPELLING RESPONSE TO DEMAND FOR _____ [INSPECTION *and/or* COPYING *and/or* TESTING *and/or* SAMPLING *and/or* ENTRY ON PROPERTY] AND FOR MONETARY SANCTION
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	Date: _____
	)	Time: _____
	)	Location: _____
		[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

_____ [*Specify party on whom demand was served, e.g.,* DEFENDANT] HAS FAILED TO SERVE A TIMELY RESPONSE TO _____ [*specify party who served demand, e.g.,* PLAINTIFF]'S DEMAND FOR _____ [INSPECTION *and/or* COPYING *and/or* TESTING *and/or* SAMPLING] OF

_____ [DOCUMENTS *and/or* TANGIBLE THINGS *and/or* LAND OR OTHER PROPERTY *and/or* ELECTRONICALLY STORED INFORMATION], _____ [*identify set number*, *e.g.*, PLAINTIFF'S FIRST SET], AND THUS THE COURT SHOULD MAKE AN ORDER COMPELLING A RESPONSE AND IMPOSING A MONETARY SANCTION FOR THE FAILURE TO RESPOND.

A. Party May Move for Order Compelling Response and for Monetary Sanction. When a party makes a demand for inspection, copying, testing, or sampling under *Code of Civil Procedure Section 2031.010* and the party to whom the demand is directed fails to respond, the demanding party may move for an order compelling response and for a monetary sanction under *Code of Civil Procedure Section 2023.030* (*Code Civ. Proc. § 2031.300*).

B. Waiver of Objection to Demand. When the party to whom a demand has been directed fails to serve a timely response to it, that party waives any objection to the demand, including one based on privilege or on the protection for work product under *Code of Civil Procedure Section 2018.010 et seq.* (*Code Civ. Proc. § 2031.300(a)*).

C. Court Must Impose Monetary Sanction Absent Specified Findings. The court must impose a monetary sanction under *Code of Civil Procedure Section 2023.030* against any party, person, or attorney who unsuccessfully opposes a motion to compel a response to a demand for inspection, copying, testing, or sampling, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust (*Code Civ. Proc. §§ 2023.030(a), 2031.300(c)*).

[*Add memoranda generally supporting the imposition of monetary sanctions (see, e.g., Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11).*]

[*Optional*] **D. Court May Impose Sanctions Despite Lack of Opposition to Motion to Compel Discovery.** The court may award sanctions under the Discovery Act in favor of a party who files a motion to compel discovery, even though no opposition to the motion was filed, or opposition to the motion was withdrawn, or the requested discovery was provided to the moving party after the motion was filed (*Cal. Rules of Ct., Rule 3.1030(a)*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This form is for use in support of a motion by a party for an order compelling response to a demand for inspection, copying, testing, or sampling and for a monetary sanction [*see Code Civ. Proc. § 2031.300*].

This form should be combined with general memoranda supporting the imposition of monetary sanctions under *Code Civ. Proc. § 2023.030(a)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should set forth facts showing when the demand was made and the failure of the other party to respond, and otherwise show substantial justification for the motion in order to avoid a monetary sanction if the motion is denied [*see Code Civ. Proc. § 2031.300*]. However, counsel need not set forth facts showing that the responding party acted without substantial justification [*cf.* former Code Civ. Proc. § 2034(a)]. *Code Civ. Proc. §§ 2023.030(a)* and *2031.300(c)* effectively place that burden on the person against whom the sanction is to be imposed, by requiring the court to impose a monetary sanction when it is expressly authorized *unless* it finds that there was substantial justification or that other circumstances would make the monetary sanction unjust. However, *Code Civ. Proc. § 2031.300(c)* notwithstanding, absent exceptional circumstances, the court may not impose sanctions on a party or any attorney of a party for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as the result of the routine, good faith operation of an electronic information system [*Code Civ. Proc. § 2031.300(d)(1)*].

For further discussion of e-discovery, see Ch. 85A, *Discovery : E-Discovery.*

[c] Timely Response

Code Civ. Proc. § 2031.010 et seq. governs discovery by inspection, copying, testing, or sampling of documents, tangible things, land or other property, and electronically stored information in the possession, custody, or control of any other party. The party on whom a demand is made is required to respond separately to each item or category of item in the demand [*see Code Civ. Proc. § 2031.210(a)*], and make certain statements [*see Code Civ. Proc. §§ 2031.220-2031.240, 2031.280*]. The response must be served on all parties who have appeared in the action within 30 days after service of the demand, or in unlawful detainer proceedings within five days of the demand, with certain extensions of time when service is by mail [*Code Civ. Proc. § 2031.260*; *see Code Civ. Proc. § 1013(a)* (requirements for service by mail; extensions of time); *Code Civ. Proc. § 1013(c), (e)* (requirements for service by express mail or fax; extensions of time); *see also Code Civ. Proc. § 2016.050* (service generally)]. The period for service of the response may also be extended or shortened by the court on motion by the demanding or responding party [*Code Civ. Proc. § 2031.260*], or extended pursuant to a written agreement of the demanding and responding parties [*Code Civ. Proc. § 2031.270*].

[d] Related Pleading and Practice Forms

For forms and discussion related to an order compelling response to a demand for inspection, copying, testing, or sampling, see California Forms of Pleading and Practice, Ch. 195, *Discovery: Inspection of Tangible Evidence* (Matthew Bender). For detailed discussion of discovery of electronically stored evidence (e-discovery), see Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery).*

[3] [Reserved]

[4] Additional Authorities

[a] Waiver of Objection to Demand

In the underlying case in *People ex rel. Lockyer v. Superior Court (2004) 122 Cal. App. 4th 1060, 19 Cal. Rptr. 3d 324* , petitioner state of California filed an action against real parties in interest, a corporation and related entities, alleging violations of statutes governing the practice of optometry. In this writ proceeding, the state sought to overturn the superior court's order granting real party in interest's motion to compel and denying their motion to quash and for a protective order. The state argued that the court abused its discretion entering its discovery orders because the state raised timely objections under former Code Civ. Proc. § 2031 (*now see Code Civ. Proc. § 2031.240*) on the grounds of privilege to real party in interest's request for production of documents and served a privilege log. The court of appeal granted the writ, concluding that *Best Product, Inc. v. Superior Court (2004) 119 Cal. App. 4th 1181, 15 Cal. Rptr. 3d 154* (discussed *below*) dictated that the court erred in overruling the state's privilege objections (*122 Cal. App. 4th*

1060, 1074) . Because the state timely objected on the grounds of privilege, it preserved its objections, regardless of whether the objections were sufficiently detailed in their response or privilege log. Thus, as a matter of law, the superior court could not find that the state had waived these privileges under former Code Civ. Proc. § 2031(*l*) (*now see Code Civ. Proc. § 2031.300(a)*) (*122 Cal. App. 4th 1060, 1075)* .

In *Best Product, Inc. v. Superior Court (2004) 119 Cal. App. 4th 1181, 15 Cal. Rptr. 3d 154* , commercial litigation plaintiff served a set of requests for inspection and production of documents and propounded a set of interrogatories. Defendant responded, in part, with boilerplate objections of attorney-client privilege and work product privilege. Plaintiff brought motions to compel and to preclude defendant from making any further objections. The trial court effectively held that defendant had waived its right to assert the attorney-client and work product privileges because it had failed to file a privilege log in regard to plaintiff's request to inspect and produce.

The court of appeal found this ruling was error. Statutory law recognizes only three ways in which a party can waive a privilege, only one of which was applicable in this case. Former Code Civ. Proc. § 2031(*l*) (*now see Code Civ. Proc. § 2031.300*) stated: "If a party to whom an inspection demand is directed fails to serve a timely response to it, ... [that party] waives any objection to the demand, including one based on privilege or on the protection for work product under [former section 2018 (*now see* section 2018.010 et seq.)]." Consequently, the court could find a waiver of privilege only if defendant had failed to file a timely response to plaintiff's demand. "There is absolutely no requirement that a privilege log be tendered at this point of the discovery proceedings." Because defendant did assert the attorney-client and work product privileges in a timely manner, albeit in a boiler-plate fashion, the trial court erred in finding a waiver of privileges (*119 Cal. App. 4th 1181, 1187-1188)* .

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8-85 California Points & Authorities § 85.11

§ 85.11 Supporting Motion for Order Compelling Further Response to Demand for Inspection, Copying, Testing, or Sampling of Documents, Tangible Things, Land or Other Property, or Electronically Stored Information [Code Civ. Proc. § 2031.310]

[1] FORM Supporting Motion for Order Compelling Further Response to Demand for Production or Inspection of Tangible Evidence [Code Civ. Proc. § 2031.310]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF MOTION FOR
Plaintiff,	)	ORDER COMPELLING FURTHER RESPONSE TO
vs.	)	DEMAND FOR _____
_____ [*name*],	)	[INSPECTION *and/or* COPYING *and/or* TESTING
Defendant.	)	*and/or* SAMPLING *and/or* ENTRY ON PROP-
	)	ERTY] AND FOR MONETARY SANCTION
	)	Date: _____
	)	Time: _____
		Location: _____
		[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE RESPONSE OF _____ [*specify responding party, e.g.,* DEFENDANT] TO THE DEMAND FOR _____ [INSPECTION *and/or* COPYING *and/or* TESTING *and/or* SAMPLING] OF _____ [DOCUMENTS *and/or* TANGIBLE THINGS *and/or* LAND OR OTHER PROPERTY *and/or*

ELECTRONICALLY STORED INFORMATION], _____ [*identify set number, e.g.,* PLAINTIFF'S FIRST SET], IS _____ [INCOMPLETE *and/or* INADEQUATE *and/or* EVASIVE *and/or* WITHOUT MERIT *and/or* TOO GENERAL], AND THUS THE COURT SHOULD ISSUE AN ORDER COMPELLING FURTHER RESPONSE AND IMPOSING A MONETARY SANCTION ON THE RESPONDING PARTY.

A. Party May Move for Order Compelling Further Response. The party demanding an inspection under *Code Civil Procedure Section 2031.010 et seq.* may make a motion, supported by specific facts showing good cause justifying the discovery sought by the demand, for an order compelling further response to the demand when, on receipt of a response to the demand, the party deems that _____ [a statement of compliance with the demand is incomplete *and/or* a representation of inability to comply is inadequate, incomplete, or evasive *and/or* an objection in the response is without merit or too general] (*Code Civ. Proc. § 2031.310*).

[*Optional*] **B. Matter Is Discoverable If Not Privileged and If Relevant to Subject Matter.** Any matter is discoverable if it is not privileged and is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, and if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence (*Code Civ. Proc. § 2017.010*). [The "subject matter" of the action includes the facts and circumstances out of which the cause of action arises (*see Darbee v. Superior Court (1962) 208 Cal. App. 2d 680, 688, 25 Cal. Rptr. 520*).] [Thus, relevant and unprivileged matter sought under *Section 2031.010 et seq. of the Code of Civil Procedure* that is "reasonably calculated to lead to the discovery of admissible evidence" need meet only that requirement, and need not itself be admissible at trial (*see Associated Brewers Distr. Co. v. Superior Court (1967) 65 Cal. 2d 583, 587, 55 Cal. Rptr. 772, 422 P.2d 332* .)]

[*Optional*] **C. Inconvenience No Bar to Inspection, Copying, Testing, or Sampling.** Although a party complying with an inspection demand might be put to inconvenience and trouble, this is not a valid objection to a request for production and inspection (*see Milton Kauffman, Inc. v. Superior Court (1949) 94 Cal. App. 2d 8, 19, 210 P.2d 88*).

[*Optional*] **D. Photographing of Face and Body.** A party may demand that any other party produce and permit the demanding party to inspect and to photograph any tangible thing that is in the possession, custody, or control of the party on whom the demand is made (*Code Civ. Proc. § 2031.010(c)*). "Tangible thing" includes the face and body of a person, and thus the demand may be for the photographing of the face and body of a person (*see Shepherd v. Superior Court (1976) 17 Cal. 3d 107, 118, 130 Cal. Rptr. 257, 550 P.2d 161*).

E. Court Must Impose Monetary Sanction Absent Specified Findings. The court must impose a monetary sanction under *Code of Civil Procedure Section 2023.030* against any party, person, or attorney who unsuccessfully opposes a motion to compel further responses to an inspection demand, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust (*Code Civ. Proc. §§ 2023.030(a)*, 2031.310(h)).

[*Add memoranda generally supporting the imposition of monetary sanctions (see, e.g., Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11).*]

[*Optional*] **F. Court May Impose Sanctions Despite Lack of Opposition to Motion to Compel Discovery.** The court may award sanctions under the Discovery Act in favor of a party who files a motion to compel discovery, even though no opposition to the motion was filed, or opposition to the motion was withdrawn, or the requested discovery was provided to the moving party after the motion was filed (*Cal. Rules of Ct., Rule 3.1030(a)*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum is for use in support of a motion by a party for an order compelling further response to a demand for inspection, copying, testing, or sampling and for a monetary sanction [*see Code Civ. Proc. § 2031.310*]. The motion must set forth specific facts showing good cause justifying the discovery sought by the demand, and must be accompanied by a declaration stating facts showing a reasonable and good-faith attempt at an informal resolution of any issue presented by it [*Code Civ. Proc. § 2031.310(b)*].

This form should be combined with general memoranda supporting the imposition of monetary sanctions under *Code Civ. Proc. § 2023.030(a)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11*].

Note that some cases cited in this form construe law in effect before the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that they remain consistent with current provisions [*see also § 85.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should set forth facts showing how the responding party's statement of compliance is incomplete, how the representation of inability to comply is inadequate, incomplete, or evasive, or how the objection is without merit or is too general, and otherwise show substantial justification for the motion in order to avoid a monetary sanction if the motion is denied [*see Code Civ. Proc. § 2031.310*]. However, counsel need not set forth facts showing that the responding party acted without substantial justification [*cf.* former Code Civ. Proc. § 2034(a)]. *Code Civ. Proc. §§ 2023.030(a)* and 2031.310(h) effectively place that burden on the person against whom the sanction is to be imposed, by requiring the court to impose a monetary sanction when it is expressly authorized *unless* it finds that there was substantial justification or that other circumstances would make the monetary sanction unjust. However, in a motion for an order compelling further response to a demand under *Code Civ. Proc. § 2031.310(a)* relating to the production of electronically stored information, the court may not impose sanctions on a party or any attorney of a party for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as the result of the routine, good faith operation of an electronic information system, absent exceptional circumstances [*Code Civ. Proc. § 2031.310(j)(1)*].

For further discussion of e-discovery, see Ch. 85A, *Discovery : E-Discovery*.

[c] Related Pleading and Practice Forms

For forms and discussion related to an order compelling response to a demand for inspection, copying, testing, or sampling, see California Forms of Pleading and Practice, Ch. 195, *Discovery: Inspection of Tangible Evidence* (Matthew Bender). For detailed discussion of discovery of electronically stored evidence (e-discovery), see Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)*; see also Matthew Bender(R) Practice Guide: California E-Discovery and Evidence).

[d] Opposing Memoranda

In an appropriate case, the memorandum *set out in § 85.30* may be used to oppose the motion supported by this memorandum.

[3] Discussion of Authorities

[a] Matter Is Discoverable If Not Privileged and If Relevant to Subject Matter

Darbee v. Superior Court *(1962) 208 Cal. App. 2d 680, 25 Cal. Rptr. 520* was an action for specific performance of an option contract for the purchase of land and for declaratory relief. Defendant took plaintiff's deposition and asked questions, including whether anyone had agreed to buy the property from plaintiff at the time he exercised the option and thereafter, and whether he had agreed to sell the property. Plaintiff refused to answer these questions, and the trial court ruled that questions relating to whether plaintiff had agreed to sell the property at or about the time he attempted to exercise the option were relevant to the subject matter of the action and that plaintiff must answer them. On further deposition, plaintiff refused to answer similar questions relating to a different time period, and another judge denied a motion to compel answers to these questions. Defendant then posed similar questions on written interrogatories; plaintiff objected, and defendant moved for an order requiring further response, which was denied by the trial court. Defendant filed a petition for a writ of mandate to compel the trial court to order plaintiff to answer the interrogatories.

In finding that the trial court had abused its discretion, the court of appeal stated that there was little doubt that the information sought was relevant to the subject matter of the action. The "subject matter of the action" is the circumstances and facts out of which the cause of action arises; it is the property, contract, or other thing involved in the dispute. The subject matter is not the act or acts that constitute the cause of action, but it describes physical facts in relation to which the suit is prosecuted. The court stated that the thing involved in the present case was the option agreement and its enforceability. Any of the physical facts and circumstances bearing on or touching that agreement would be proper matters for inquiry in the search for facts which might lead to admissible evidence (*208 Cal. App. 2d 680, 688)* .

Associated Brewers Distr. Co. v. Superior Court *(1967) 65 Cal. 2d 583, 587, 55 Cal. Rptr. 772, 422 P.2d 332* involved an action for recovery of amounts allegedly due for goods delivered under a distributorship contract. Defendant counterclaimed for breach of an oral distribution agreement. During the course of discovery, defendant moved for production and inspection of some documents under former Code Civ. Proc. §§ 2031 and 2036, contending that it had good cause to support its motion (*now see Code Civ. Proc. § 2031.010*, which does not require good cause for an inspection demand). The trial court denied discovery and the court of appeal denied defendant's petition for a writ of mandate, but the Supreme Court issued an alternative writ to decide the question of good cause and then issued a peremptory writ to require the trial court to set aside its order (*65 Cal. 2d 583, 585, 589)* .

In resisting discovery, plaintiff had contended that defendant had failed to show good cause in that it failed to show that the documents sought would have been admissible in evidence. The Supreme Court noted that the purpose of discovery is not only the discovery of admissible evidence, but is also to enable the parties to effectively prepare for trial. Therefore, when discovery was requested pursuant to former Code Civ. Proc. § 2031, it was not necessary that the material sought be admissible in evidence (*65 Cal. 2d 583, 587)* . This principle has been incorporated into Code Civ. Proc. § 2017.010 of the California Civil Discovery Act.

[b] Inconvenience No Bar to Production and Inspection

Milton Kauffman, Inc. v. Superior Court *(1949) 94 Cal. App. 2d 8, 210 P.2d 88* arose out of an action for an accounting, for damages for breach of a letter agreement, and for money held in constructive trust. Plaintiff sought an order for production of (1) the books and records relating to defendant's profits, receipts, and disbursements, (2) records showing salaries and loans given to and withdrawals made by defendant's officers and directors, (3) tax returns of

defendant, and (4) all records of transactions between defendant and its president during the relevant time period. Defendant opposed the motion for production as a violation of the constitutional guaranty against unreasonable searches and seizures, and argued that plaintiff should first have to establish his right to an accounting. The trial court granted plaintiff the order for production, and defendant petitioned for a writ of prohibition.

The court of appeal declined to issue the writ, holding that former Code Civ. Proc. § 1000 (the predecessor to both the pre-1986 and post-1986 Code Civ. Proc. § 2031, now divided without substantive change into *Code Civ. Proc. §§ 2031.010-2031.320*) was to be liberally construed and that the right of inspection is to be encouraged (*94 Cal. App. 2d 8, 15)* . The court held further that there was no authority to support the proposition that the right to an accounting must be established before an order for inspection may be granted (*94 Cal. App. 2d 8, 16)* . Finally, the court held that defendant's contention that it would be put to great inconvenience and trouble if it were to comply with the trial court's order was not a valid objection to an order for production and inspection of documents (*94 Cal. App. 2d 8, 19)* .

[c] Photographing of Face and Body

Shepherd v. Superior Court *(1976) 17 Cal. 3d 107, 130 Cal. Rptr. 257, 550 P.2d 161* concerned a wrongful death action against a city and some police officers. Among the items that plaintiff sought to discover were photographs of defendant police officers in the clothes they wore on the night of the incident; plaintiff wanted to use those photographs in interviewing witnesses. On defendants' refusal to comply with this request, plaintiff moved for an order under former Code Civ. Proc. § 2034(a) (*now see Code Civ. Proc. § 2034.210*) for production and also for sanctions. The trial court denied all relief, and plaintiff petitioned the Supreme Court for a writ of mandate.

The Supreme Court granted the writ, holding that because the photographing of objects or tangible things was within the purview of former Code Civ. Proc. § 2031 (*now see Code Civ. Proc. § 2031.010(c)*), and because the discovery statutes are to be liberally construed, "photographing of tangible things" was construed to permit the photographing of the face and body of a person (*17 Cal. 3d 107, 118)* .

[4] Additional Authorities

[a] Matter Is Discoverable If Not Privileged and If Relevant to Subject Matter

In *TBG Ins. Serv. Corp. v. Superior Court (2002) 96 Cal. App. 4th 443, 117 Cal. Rptr. 2d 155* , petitioner employer filed for a writ of mandate directing the superior court to vacate its order refusing to compel production of an employer-provided home computer used by the real party in interest, an employee, who filed suit for wrongful termination. The court of appeal granted the writ, holding that the trial court erred in denying production. Under former Code Civ. Proc. § 2017(a) (*now see Code Civ. Proc. § 2017.010*), a "party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action ... if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." In the discovery context, evidence is "relevant" if it might reasonably assist a party in evaluating its case, preparing for trial, or facilitating a settlement. "Admissibility is *not* the test, and it is sufficient if the information sought might reasonably lead to other, admissible evidence" (*96 Cal. App. 4th 443, 448-449)* . In the more specific context of a demand for production of a tangible thing under former Code Civ. Proc. § 2017(a) (*now see Code Civ. Proc. § 2031.010(c)*), the party who asks the trial court to compel production must show good cause for the request; however, the party meets its burden simply by a fact-specific showing of relevance, unless there is a legitimate privilege issue or claim of attorney work product. Here, the court found that the home computer was "indisputably relevant." The court rejected the superior court's reasoning that defendant was not entitled to production because the information on the computer merely corroborated facts already in defendant's possession. Rather, defendant was entitled to discover any non-privileged information, cumulative or not, that might reasonably assist it in evaluating its defense, preparing for trial, or facilitating a settlement (*96 Cal. App. 4th 443, 448-449)* . Moreover, the court found that, in light of the employee's consent to his employer's monitoring of both computers, the employee had no reasonable expectation of privacy when he used the

home computer for personal matters (*96 Cal. App. 4th 443, 454-455)* .

Atchison, T. & S. F. R. Co. v. Superior Court of Los Angeles County (1961) 191 Cal. App. 2d 489, 12 Cal. Rptr. 783 involved a personal injury action in which defendant petitioned for a writ of mandate to compel the trial court to grant its motion for inspection of a record of plaintiff's statement of facts surrounding the accident, made at the behest of and typed by defendant's agent. The agent, who claimed to have forgotten the contents of the statement, had left the original and the only copy of the statement with plaintiff. The court of appeal granted the writ, holding that defendant had a right to production and inspection of plaintiff's statement, even though the statement might not be admissible in evidence (*191 Cal. App. 2d 489, 492)* .

Note

that the decision in *Atchison* was disapproved on other grounds in *Greyhound Corp. v. Superior Court (1961) 56 Cal. 2d 355, 378 n.6, 15 Cal. Rptr. 90, 364 P.2d 266* .

[b] Court Must Impose Monetary Sanctions Absent Specified Findings

In *London v. Dri-Honing Corp. (2004) 117 Cal. App. 4th 999, 12 Cal. Rptr. 3d 240* , an employee sued his former employer for wrongful termination, age and physical handicap discrimination, fraud, and other causes of action. The trial court granted the employee's motion for discovery monetary sanctions after he had successfully litigated the underlying motion to compel further response to his inspection demand. The employer appealed, arguing, in part, that employee's motion was untimely because it was not set forth in the motion to compel further response under former Code Civ. Proc. § 2031(m) (*now see Code Civ. Proc. § 2031.310*).

The court of appeal disagreed. Plaintiff's separate motion for discovery monetary sanctions, made after an underlying motion to compel further response to an inspection demand was litigated, was legally authorized, properly noticed, and timely made (*117 Cal. App. 4th 999, 1008)* . The court found support for its decision in *Sherman v. Kinetic Concepts (1998) 67 Cal. App. 4th 1152, 79 Cal. Rptr. 2d 641* (discussed in *Ch. 82, Sanctions for Discovery Misuse, § 82.11[4][b]*), in which the court of appeal concluded that a motion for discovery monetary sanctions was appropriate even after the verdict. "[C]ommon sense dictates sanctions cannot be pursued before the affected party finds out about the alleged discovery dereliction of his or her opponent. The true facts may not emerge until the end of trial" (*117 Cal. App. 4th 999, 1007)* . While the better practice may be to include the request for monetary sanctions in the motion to compel further response, there is no legal requirement to do so (*117 Cal. App. 4th 999, 1008)* . Further, the timeliness of a separate motion for sanctions is subject to the trial court's discretion, rather than the 45-day limit from the time of the initial service of the response under former Code Civ. Proc. § 2031(m) (*now see Code Civ. Proc. § 2031.310*) (*117 Cal. App. 4th 999, 1009)* .

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8-85 California Points & Authorities § 85.12

§ 85.12 Supporting Motion for Order of Sanctions [Code Civ. Proc. § 2023.030]--Failure to Obey Order Compelling Response or Further Response to Demand for Inspection, Copying, Testing, or Sampling of Documents, Tangible Things, Land or Other Property, or Electronically Stored Information [Code Civ. Proc. §§ 2031.300, 2031.310]

[1] FORM Supporting Motion for Order of Sanctions [Code Civ. Proc. § 2023.030]--Failure to Obey Order Compelling Response or Further Response to Demand for Inspection, Copying, Testing, or Sampling of Documents, Tangible Things, Land or Other Property, or Electronically Stored Information [Code Civ. Proc. §§ 2031.300, 2031.310]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION FOR ORDER IMPOSING SANCTIONS FOR FAILURE TO OBEY ORDER COMPELLING [FURTHER] RESPONSE TO DEMAND FOR _____ [INSPECTION *and/or* COPYING *and/or* TESTING *and/or* SAMPLING *and/or* ENTRY ON PROPERTY]
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THE COURT SHOULD IMPOSE _____ [*specify, e.g.,* ISSUE AND MONETARY SANCTIONS] AGAINST _____ [*specify party who failed to obey order to compel, e.g.,* DEFENDANT] BECAUSE HE/SHE/IT FAILED TO COMPLY WITH THE COURT ORDER ISSUED PURSUANT TO CODE OF CIVIL PROCEDURE SECTION _____ [2031.300 *or* 2031.310] COMPELLING [FURTHER] RESPONSE TO THE DEMAND FOR _____ [INSPECTION *and/or* COPYING *and/or* TESTING *and/or* SAMPLING, *and/or* ENTRY ON PROPERTY], _____ [*identify set number, e.g.,* PLAINTIFF'S FIRST SET].

A. Court May Make Orders That Are Just. If the court issues an order under Code of Civil Procedure Section _____ [2031.300 *or* 2031.310] compelling a [further] response from a party to a demand for _____ [inspection *and/or* copying *and/or* testing *and/or* sampling *and/or* entry on property], and that party fails to obey that order, the court may make those orders that are just against the party (Code Civ. Proc. § _____ [2031.300 or 2031.310]).

B. Court May Impose Issue, Evidence, or Terminating Sanction. In making those orders that it deems just under Code of Civil Procedure Section _____ [2031.300 *or* 2031.310] against a party who has failed to comply with an order compelling a [further] response to an inspection demand, the court may include the imposition of an issue sanction, an evidence sanction, or a terminating sanction under *Code of Civil Procedure Section 2023.030(b)-(d)* (Code Civ. Proc. § _____ [2031.300(c) *or* 2031.310(i)]).

C. Court May Impose Monetary Sanction. In lieu of or in addition to the imposition under *Code of Civil Procedure Sections 2023.030* and _____ [2031.300(c) *or* 2031.310(i)] of an issue sanction, an evidence sanction, or a terminating sanction, the court may impose a monetary sanction under *Code of Civil Procedure Section 2023.030(a)* against the party who has failed to comply with an order compelling a [further] response to an inspection demand (Code Civ. Proc. § _____ [2031.300(c) *or* 2031.310(h)]).

[*Add memoranda generally supporting the imposition of issue, evidence, terminating, and monetary sanctions (see, e.g., Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11).*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum is for use by a party seeking sanctions for the failure of a party to comply with an order compelling a response [*see Code Civ. Proc. § 2031.300*] or a further response [*see Code Civ. Proc. § 2031.310*] to a demand for inspection, copying, testing, sampling, or entry on property. For memoranda to use in support of the motion to compel, see *§§ 85.10* and *85.11*.

This form should be combined with general memoranda supporting the imposition of an issue sanction, an evidence

sanction, or a terminating sanction under *Code Civ. Proc. § 2023.030(b)-(d)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.12* et seq.]. If a monetary sanction is sought in addition to or in lieu of these sanctions, this form should be combined with general memoranda supporting the imposition of monetary sanctions under *Code Civ. Proc. § 2023.030(a)* [Ch. 82, *Discovery: Sanctions for Discovery Misuse*, § 82.11].

Although the better practice may be to include the request for monetary sanctions in the motion to compel further response, a separate motion for discovery monetary sanctions may be made after an underlying motion to compel further response to an inspection demand is litigated [*London v. Dri-Honing Corp. (2004) 117 Cal. App. 4th 999, 1001, 1008, 12 Cal. Rptr. 3d 240* ; *see § 85.11[4][b]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel might wish to insert argument in favor of one particular type of sanction over another. However, counsel need not set forth facts showing that the responding party acted without substantial justification [*cf.* former Code Civ. Proc. § 2034(a)]. *Code Civ. Proc. § 2023.030(a)* effectively places that burden on the person against whom the sanction is to be imposed, by requiring the court to impose a monetary sanction when it is expressly authorized *unless* it finds that there was substantial justification or that other circumstances would make the monetary sanction unjust.

[c] Sanctions

When a party to whom a demand for inspection, copying, testing, or sampling has been made fails to comply with an order compelling a response to the demand pursuant to *Code Civ. Proc. § 2031.300*, or fails to comply with an order compelling a further response to the demand pursuant to *Code Civ. Proc. § 2031.310*, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction [*see Code Civ. Proc. §§ 2031.300(c)*, 2031.310(i)]. However, in a motion for an order compelling response to a demand or further response to a demand under *Code Civ. Proc. §§ 2031.300(b)* or *2031.310(a)* relating to the production of electronically stored information, the court may not impose sanctions on a party or any attorney of a party for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as the result of the routine, good faith operation of an electronic information system, absent exceptional circumstances [*Code Civ. Proc. §§ 2031.300(d)(1), 2031.310(j)(1)*].

For further discussion of e-discovery, see Ch. 85A, *Discovery : E-Discovery*.

If imposing an issue sanction, the court may order that designated facts be taken as established in the action in accordance with the claim of the demanding party who was adversely affected by the misuse of the discovery process by the party to whom the demand was made, or the court may issue an order prohibiting the party to whom the demand was made from supporting or opposing designated claims or defenses [*see Code Civ. Proc. § 2023.030(b)*]. If imposing an evidence sanction, the court may issue an order prohibiting the party to whom the demand was made from introducing designated matters into evidence [*see Code Civ. Proc. § 2023.030(c)*]. If imposing a terminating sanction, the court may issue one of the following orders: (1) an order striking out pleadings or parts thereof of the party to whom the demand was made, (2) an order staying further proceedings by that party until the discovery order is obeyed, (3) an order dismissing the action, or any part thereof, of that party, or (4) an order rendering a judgment by default against that party [*see Code Civ. Proc. § 2023.030(d)*].

Code Civ. Proc. §§ 2031.300 and *2031.310* set forth the *exclusive* remedies available to the court at this juncture of the proceeding. For example, in a commercial litigation discovery dispute, the trial court erred when it entered an order overruling defendant's boilerplate privilege objections to plaintiff's requests for inspection and production of documents and interrogatories, based on defendant's failure to produce a privilege log. Former Code Civ. Proc. § 2031 (*now see Code Civ. Proc. § 2031.310*) authorized the court to make orders compelling further responses that adequately identify

and describe documents for which a party has raised boilerplate assertions of the attorney-client and work product privileges. If defendant fails to comply with such an order, the trial court can "make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under Section 2023 [now *Code Civ. Proc. § 2023.030*]. In lieu of or in addition to that sanction, the court [could] impose a monetary sanction under Section 2023 [now *Code Civ. Proc. § 2023.030(a)*]." However, the statute does *not* include as an authorized sanction a judicial order that a privilege has been waived [*Best Product, Inc. v. Superior Court (2004) 119 Cal. App. 4th 1181, 1189, 15 Cal. Rptr. 3d 154* ; *see People ex rel. Lockyer v. Superior Court (2004) 122 Cal. App. 4th 1060, 1074-1075, 19 Cal. Rptr. 3d 324* (in discovery disputes, deficient objections or claims of privilege are not grounds for waiver, so long as party raised timely objections under former Code Civ. Proc. § 2031 (*now see Code Civ. Proc. § 2031.240*) on grounds of privilege in its original response)]. For further discussion, see *§ 85.10[4][a]*.

[d] Related Pleading and Practice Forms

For forms and discussion related to the imposition of sanctions for failure to comply with an order issued pursuant to Code Civ. Proc. §§ 2031.300 or 2031.310, see California Forms of Pleading and Practice, Ch. 195, *Discovery: Inspection of Tangible Evidence* (Matthew Bender). For detailed discussion of discovery of electronically stored evidence (e-discovery), see Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)*.

[e] Opposing Points and Authorities

In an appropriate case, the memorandum *in § 85.31* may be used to oppose the motion supported by this memorandum.

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[Reserved]

§§ 85.13[Reserved]

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8-85 California Points & Authorities § 85.20

§ 85.20 Supporting Motion for Order Compelling Compliance With Demand for Inspection, Copying, Testing, or Sampling of Documents, Tangible Things, Land or Other Property, or Electronically Stored Information [Code Civ. Proc. § 2031.320]

[1] FORM Supporting Motion for Order Compelling Compliance With Demand for Inspection, Copying, Testing, or Sampling of Documents, Tangible Things, Land or Other Property, or Electronically Stored Information [Code Civ. Proc. § 2031.320]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION FOR
vs.	)	ORDER COMPELLING COMPLIANCE WITH DE-
_____ [*name*],	)	MAND FOR _____ [INSPECTION
Defendant.	)	*and/or* COPYING *and/or* TESTING *and/or*
	)	SAMPLING *and/or* ENTRY ON PROPERTY] AND
	)	FOR MONETARY SANCTION
	)	Date: _____
	)	Time: _____
		Location: _____
		[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD ISSUE AN ORDER COMPELLING _____ [*specify responding party, e.g.,* DEFENDANT] TO COMPLY WITH _____ [*specify moving party, e.g.,* PLAINTIFF]'S DEMAND

FOR _____ [INSPECTION *and/or* COPYING *and/or* TESTING *and/or* SAMPLING] OF _____ [DOCUMENTS *and/or* TANGIBLE THINGS *and/or* LAND OR OTHER PROPERTY *and/or* ELECTRONICALLY STORED INFORMATION], _____ [*identify set number, e.g.,* PLAINTIFF'S FIRST SET] AND IMPOSING A MONETARY SANCTION BECAUSE _____ [*specify responding party, e.g.,* DEFENDANT] HAS FAILED TO PERMIT THE INSPECTION IN ACCORDANCE WITH HIS/HER/ITS STATEMENT OF COMPLIANCE IN HIS/HER/ITS RESPONSE.

A. Party May Move for Order Compelling Compliance. When a party to whom a demand under *Code of Civil Procedure Section 2031.010 et seq.* has been made files a response to the demand, but thereafter fails to permit the inspection, copying, testing, or sampling in accordance with that party's statement of compliance, the demanding party may move for an order compelling compliance (*Code Civ. Proc. § 2031.320*).

B. Court Must Impose Monetary Sanction Absent Specified Findings. The court must impose a monetary sanction under *Code of Civil Procedure Section 2023.030* against any party, person, or attorney who unsuccessfully opposes a motion to compel compliance with a demand for inspection, copying, testing, or sampling, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust (*Code Civ. Proc. §§ 2023.030(a), 2031.320(b)*).

[*Add memoranda generally supporting the imposition of monetary sanctions (see, e.g., Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11).*]

[*Optional*] **C. Court May Impose Sanctions Despite Lack of Opposition to Motion to Compel Discovery.** The court may award sanctions under the Discovery Act in favor of a party who files a motion to compel discovery, even though no opposition to the motion was filed, or opposition to the motion was withdrawn, or the requested discovery was provided to the moving party after the motion was filed (*Cal. Rules of Ct., Rule 3.1030(a)*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This form is for use in support of a motion by a party for an order compelling compliance with a response to a demand for inspection, copying, testing, or sampling and for a monetary sanction [*see Code Civ. Proc. § 2031.320*].

This form should also be combined with general memoranda supporting the imposition of monetary sanctions under *Code Civ. Proc. § 2023.030(a)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11*].

For a form for a supporting motion for an order compelling response to a demand for the inspection, copying, testing, or sampling of electronically stored information, see *§ 85A.20*. For a discussion of e-discovery generally, see Ch. 85A, *Discovery : E-Discovery*, § 85A.03 et seq.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should set forth the demand (identifying the demand by set and number), the responding party's statement of compliance in that party's response, explain how the responding party nevertheless failed to permit the inspection, and otherwise show substantial justification for the motion in order to avoid a monetary sanction if the motion is denied [*see Code Civ. Proc. § 2031.320*]. However, counsel need not set forth facts showing that the responding party acted without substantial justification [*cf.* former Code Civ. Proc. § 2034(a)]. *Code Civ. Proc. §§ 2023.030(a)* and *2031.320(b)* effectively place that burden on the person against whom the sanction is to be imposed, by requiring the court to impose a monetary sanction when it is expressly authorized *unless* it finds that there was substantial justification or that other circumstances would make the monetary sanction unjust.

[c] Responses to Demand

When a party serves a demand for inspection, copying, testing, or sampling on another party, that other party is required to serve a response on all parties who have appeared in the action [*Code Civ. Proc. § 2031.260*]. The party must respond separately to each item or category of item by any of the following: (1) a statement that the party will comply with the particular demand and any related activities, (2) a representation that the party lacks the ability to comply with the demand for inspection, copying, testing, or sampling of a particular item or category of item, or (3) an objection to the particular demand [*Code Civ. Proc. § 2031.210(a)*].

If a party objects to the discovery of electronically stored information on the grounds that it is from a source that is not reasonably accessible because of undue burden or expense and that the responding party will not search the source in the absence of an agreement with the demanding party or court order, the responding party must identify in its response the types or categories of sources of electronically stored information that it asserts are not reasonably accessible. By objecting and identifying information of a type or category of source or sources that are not reasonably accessible, the responding party preserves any objections it may have relating to that electronically stored information [*Code Civ. Proc. § 2031.210(d)*].

If the response contains a statement that the responding party will comply with the particular demand, that statement must include all of the following: (1) that the production, inspection, copying, testing, or sampling, and related activity demanded will be allowed either in whole or in part, and (2) that all documents or things in a demanded category that are in the possession, custody, or control of that party and to which no objection is being made will be included in the production [*Code Civ. Proc. § 2031.220*]. Any documents demanded must either be produced as they are kept in the usual course of business, or be organized and labeled to correspond with the categories in the demand [*Code Civ. Proc. § 2031.280(a)*]. If a party responding to a demand for production of electronically stored information objects to a specified form for producing the information, or if no form is specified in the demand, the responding party shall state in its response the form in which it intends to produce each type of information [*Code Civ. Proc. § 2031.280(c)*]. Unless the parties otherwise agree or the court otherwise orders, if a demand for production does not specify a form or forms for producing a type of electronically stored information, the responding party must produce the information in the form or forms in which it is ordinarily maintained or in a form that is reasonably usable [*Code Civ. Proc. § 2031.280(d)(1)*]. Further, a party need not produce the same electronically stored information in more than one form [*Code Civ. Proc. § 2031.280(d)(2)*]. If necessary, the responding party at the reasonable expense of the demanding party must, through detection devices, translate any data compilations included in the demand into reasonably usable form [Code Civ. Proc. § 2031.280(e)]. When there is no dispute about the application of former Code Civ. Proc. § 2031(g)(1), now see *Code Civ. Proc. § 2031.280(b)*, the statute automatically shifts the reasonable expense of a necessary translation of a data compilation into usable form to the demanding party [*Toshiba America Electronic Components, Inc. v. Superior Court (2004) 124 Cal. App. 4th 762, 772, 21 Cal. Rptr. 3d 532* (discussed in [4][a], *below*); decided prior to statutory revision].

When the responding party serves a response that contains a statement of compliance pursuant to *Code Civ. Proc. § 2031.220*, but the responding party thereafter fails to permit the inspection, copying, testing, or sampling in accordance with the statement of compliance, the demanding party may move for an order compelling compliance [*Code Civ. Proc. § 2031.320(a)*].

For additional discussion of the discovery of electronically stored information in California, see Ch. 85A, *Discovery : E-Discovery*

[d] Monetary Sanctions

In most circumstances, the court must impose a monetary sanction [*see Code Civ. Proc. § 2023.010*] against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel further response to a demand, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*Code Civ. Proc. 2031.320(b)*; *see Code Civ. Proc. 2031.320(c)* (issue, evidence, or terminating sanctions)]. Absent exceptional circumstances, the court may not impose sanctions on a party or any attorney of a party for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as the result of the routine, good faith operation of an electronic information system [*Code Civ. Proc. 2031.320(d)(1)*].

[e] Related Pleading and Practice Forms

For forms and discussion related to the inspection, copying, testing, or sampling of documents, tangible things, land or other property, and electronically stored information, see California Forms of Pleading and Practice, Ch. 195, *Discovery: Inspection of Tangible Evidence* (Matthew Bender). For additional discussion of the discovery of electronically stored information in California, see Ch. 85A, *Discovery : E-Discovery*; see also California Forms Of Pleading And Practice, Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)* (Matthew Bender). For detailed discussion, forms, checklists, and practice tips relating to e-discovery, see Matthew Bender(R) Practice Guide: California E-Discovery And Evidence.

[3] [Reserved]

[4] Additional Authorities

[a] Responses to Demand

Toshiba America Electronics Components v. Superior Court (2004) 124 Cal. App. 4th 762, 21 Cal. Rptr. 3d 532 arose from a dispute, in trade secret litigation, over which party should pay the expense of recovery of a large quantity of additional responsive material stored on computer backup tapes. The trial court did not require the demanding party to pay any part of the cost of restoring and searching the backup tapes. The court of appeal granted relief, holding, as a matter of first impression, that when there is no dispute about the application of former Code Civ. Proc. § 2031(g)(1) (*now see Code Civ. Proc. § 2031.280(b)*), the statute automatically shifts the expense of translating a data compilation into usable form to the demanding party (*124 Cal. App. 4th 762, 772)* . However, the demanding party is expected to pay only the reasonable expense for a necessary translation (*124 Cal. App. 4th 762, 773)* . Reasonableness and necessity are factual issues, which, when disputed, are to be determined by the trial court. If a demanding party is asked to pay for translations that the party does not believe are necessary, or when the party disputes the reasonableness of the expenses alleged, the party may seek a protective order or move to compel production, and the trial court may then make whatever orders justice requires (*124 Cal. App. 4th 762, 772-773, 21 Cal. Rptr. 3d 532* ; see *Code Civ. Proc. §§ 2031.060, 2031.320*).

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8-85 California Points & Authorities § 85.21

§ 85.21 Supporting Motion for Order of Sanctions [Code Civ. Proc. § 2023.030]--Failure to Obey Order Compelling Compliance With Demand for Inspection, Copying, Testing, or Sampling of Documents, Tangible Things, Land or Other Property, or Electronically Stored Information [Code Civ. Proc. § 2031.320]

[1] FORM Supporting Motion for Order of Sanctions [Code Civ. Proc. § 2023.030]--Failure to Obey Order Compelling Compliance With Demand for Inspection, Copying, Testing, or Sampling of Documents, Tangible Things, Land or Other Property, or Electronically Stored Information [Code Civ. Proc. § 2031.320]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF IN SUPPORT OF MOTION
vs.	)	FOR ORDER IMPOSING SANCTIONS FOR FAIL-
_____ [*name*],	)	URE TO OBEY ORDER COMPELLING COMPLI-
Defendant.	)	ANCE WITH DEMAND FOR
	)	_____ [INSPECTION *and/or*
	)	COPYING *and/or* TESTING *and/or* SAMPLING
	)	*and/or* ENTRY ON PROPERTY]
	)	Date: _____
		Time: _____
		Location: _____
		[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD IMPOSE _____ [*specify, e.g.,* ISSUE AND MONETARY] SANCTIONS

AGAINST _____ [*specify responding party, e.g.,* DEFENDANT] BECAUSE HE/SHE/IT FAILED TO COMPLY WITH A COURT ORDER PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 2031.320 COMPELLING COMPLIANCE WITH A DEMAND FOR INSPECTION *and/or* COPYING *and/or* TESTING *and/or* SAMPLING] OF _____ [DOCUMENTS *and/or* TANGIBLE THINGS *and/or* LAND OR OTHER PROPERTY *and/or* ELECTRONICALLY STORED INFORMATION], _____ [*identify set number, e.g.,* PLAINTIFF'S FIRST SET].

A. Court May Make Orders That Are Just. If the court issues an order under Code of Civil Procedure Section 201.320 compelling compliance by a party who has filed a response to a demand for inspection but has failed to permit the inspection, copying, testing, or sampling in accordance with that party's statement of compliance, and that party then fails to obey that order compelling compliance, the court may make those orders that are just against the party (*Code Civ. Proc. § 2031.320(c)*).

B. Court May Impose Issue, Evidence, or Terminating Sanction. In making those orders that it deems just under *Code of Civil Procedure Section 2031.320* against a party who has failed to comply with an order compelling compliance with a demand for inspection, copying, testing, or sampling, the court may order the imposition of an issue sanction, an evidence sanction, or a terminating sanction under *Code of Civil Procedure Section 2023.030* (*Code Civ. Proc. § 2031.320(c)*).

C. Court May Impose Monetary Sanction. In lieu of or in addition to the imposition under *§§ 2023.030* and *2031.320 of the Code of Civil Procedure* of an issue, evidence, or terminating sanction, the court may impose a monetary sanction under *Code of Civil Procedure Section 2023.030(a)* against the party who has failed to comply with an order compelling compliance with a demand for inspection, copying, testing, or sampling, (*Code Civ. Proc. § 2031.320(c)*).

[*Add memorandum generally supporting the imposition of issue, evidence, terminating, and monetary sanctions (see, e.g., Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11).*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This form is for use by a party seeking sanctions for the failure of the other party to comply with an order compelling compliance with a demand for inspection, copying, testing, or sampling, [*see Code Civ. Proc. § 2031.320*]. For memoranda to use in support of the motion to compel compliance, see *§ 85.20*.

This form should be combined with general memoranda supporting the imposition of an issue sanction, an evidence sanction, or a terminating sanction under *Code Civ. Proc. § 2023.030(b)-(d)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.12* et seq.]. If a monetary sanction is sought in addition to or in lieu of these sanctions, this form should be combined with general memoranda supporting the imposition of monetary sanctions under *Code Civ. Proc. §*

2023.030(a) [Ch. 82, *Discovery: Sanctions for Discovery Misuse*, § 82.11].

For forms supporting motions for an order compelling response to a demand for the inspection, copying, testing, or sampling of electronically stored information, see Ch. 85A, *Discovery: E-Discovery* , §§ 85A.20-85A.22.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel might wish to insert argument in favor of one particular type of sanction over another. However, counsel need not set forth facts showing that the party to whom the demand was made acted without substantial justification [*cf.* former Code Civ. Proc. § 2034(a)]. *Code Civ. Proc. § 2023.030(a)* effectively places that burden on the person against whom the sanction is to be imposed, by requiring the court to impose a monetary sanction when it is expressly authorized *unless* it finds that there was substantial justification or that other circumstances would make the monetary sanction unjust [*see § 85.20[2][d]*].

[c] Sanctions

If a party fails to obey an order compelling inspection, copying, testing, or sampling, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction [*Code Civ. Proc. § 2031.320(c)*; *see Code Civ. Proc. § 2023.010 et seq.* (sanctions)]. In lieu of or in addition to that sanction, the court may impose a monetary sanction [*Code Civ. Proc. § 2031.320(c)*; *see Code Civ. Proc. § 2023.010 et seq.* (monetary sanctions)].

Absent exceptional circumstances, the court may not impose sanctions on a party or any attorney of a party for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as the result of the routine, good faith operation of an electronic information system [*Code Civ. Proc. § 2031.320(d)(1)*; *see* Ch. 85A, *Discovery : E-Discovery*, § 85A.09].

[d] Related Pleading and Practice Forms

For forms and discussion related to the obtaining of sanctions for failure to comply with an order issued pursuant to Code Civ. Proc. § 2031.320, see California Forms of Pleading and Practice, Ch. 195, *Discovery: Inspection of Tangible Evidence* (Matthew Bender). For additional discussion of the discovery of electronically stored information in California, see Ch. 85A, *Discovery : E-Discovery*; see also California Forms Of Pleading And Practice, Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)* (Matthew Bender). For detailed discussion, forms, checklists, and practice tips relating to e-discovery, see Matthew Bender(R) Practice Guide: California E-Discovery And Evidence.

[e] Opposing Points and Authorities

In an appropriate case, the memorandum *set out in § 85.31* may be used to oppose the motion supported by this memorandum.

California Points & Authorities

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 85 DISCOVERY: PRODUCTION OR INSPECTION OF TANGIBLE EVIDENCE
PART II. FORMS
A. Motion to Compel Inspection, Copying, Testing, or Sampling

8-85 California Points & Authorities §§ 85.22-85.29

[Reserved]

§§ 85.22[Reserved]

California Points & Authorities

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 85 DISCOVERY: PRODUCTION OR INSPECTION OF TANGIBLE EVIDENCE
PART II. FORMS
A. Motion to Compel Inspection, Copying, Testing, or Sampling

8-85 California Points & Authorities § 85.30

§ 85.30 Opposing Motion for Order Compelling Further Response to Demand for Inspection, Copying, Testing, or Sampling of Documents, Tangible Things, Land or Other Property, or Electronically Stored Information [Code Civ. Proc. § 2031.310]

[1] FORM Opposing Motion for Order Compelling Further Response to Demand for Inspection, Copying, Testing, or Sampling of Documents, Tangible Things, Land or Other Property, or Electronically Stored Information [Code Civ. Proc. § 2031.310]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN OPPOSITION TO MOTION
vs.	)	FOR ORDER COMPELLING FURTHER RE-
_____ [*name*],	)	SPONSE TO DEMAND FOR
Defendant.	)	_____ [INSPECTION *and/or*
	)	COPYING *and/or* TESTING *and/or* SAMPLING
	)	*and/or* ENTRY ON PROPERTY] AND FOR MON-
	)	ETARY SANCTION
	)	Date: _____
		Time: _____
		Location: _____
		[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE DEMANDING PARTY IS NOT ENTITLED TO AN ORDER COMPELLING FURTHER RESPONSE AND

THEREFORE THE MOTION SHOULD BE DENIED AND THE RESPONDING PARTY AWARDED A MONETARY SANCTION.

[*EITHER*]

A. Demanding Party May Move Only When Response Is Incomplete, Inadequate, Evasive, Without Merit, or Too General. The party demanding an inspection under *Code of Civil Procedure Section 2031.010 et seq.* may move for an order compelling further response to the demand only when the response contains a statement of compliance that is incomplete, a representation of inability to comply is inadequate, incomplete, or evasive, or an objection that is without merit or is too general (*Code Civ. Proc. § 2031.310*).

[*AND/OR*]

B. Motion Must Show Good Cause Justifying Discovery Sought. The party demanding an inspection under *Code of Civil Procedure Section 2031.010 et seq.* may move for an order compelling further response to the demand only if the motion sets forth specific facts showing good cause justifying the discovery sought by the demand (*Code Civ. Proc. § 2031.310*).

[*AND/OR*]

C. Motion Must Be Accompanied by Declaration. The party demanding an inspection, copying, testing, or sampling under *Code of Civil Procedure Section 2031.010 et seq.* may move for an order compelling further response to the demand only if the motion is accompanied by a declaration stating facts showing a reasonable and good-faith attempt at an informal resolution of any issue presented by it (*Code Civ. Proc. § 2031.310(b)*).

[*AND/OR*]

D. Waiver of Right to Compel Further Response. The party demanding an inspection under *Code of Civil Procedure Section 2031.010 et seq.* waives any right to compel a further response to the demand, unless notice of the motion to compel is given within 45 days of the service of the response, or any supplemental response, or within any extended period if service of the response was by mail[, or within any specific later date to which the parties have agreed in writing] (*Code Civ. Proc. § 2031.310(c)*; *see Code Civ. Proc. §§ 1013(a), 2016.050*; *Sexton v. Superior Court (1997) 58 Cal. App. 4th 1403, 1408-1410, 68 Cal. Rptr. 2d 708* ; *see Standon Co. v. Superior Court (1990) 225 Cal. App. 3d 898, 902-903, 275 Cal. Rptr. 833*).

[*AND/OR*]

E. Failure to Comply With Procedure. When the party demanding an inspection, copying, testing, or sampling under *Code of Civil Procedure Section 2031.010 et seq.* fails to comply with the procedures outlined by that statute, the court has no basis on which to issue an order compelling compliance (*see People ex rel. Dept. of Transportation v. Superior Court (1976) 60 Cal. App. 3d 352, 358, 131 Cal. Rptr. 476 , disapproved on other grounds* in *Davies v. Superior Court (1984) 36 Cal. 3d 291, 300-301, 204 Cal. Rptr. 154, 682 P.2d 349* ; *Field Research Corp. v. Patrick (1973) 30 Cal. App. 3d 603, 612, 106 Cal. Rptr. 473*).

[*AND/OR*]

F. Matter Not Discoverable if Privileged or Irrelevant or Subject to Work Product Rule. Matter is not subject to discovery if it is privileged or if it is not relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, or if it is subject to the work product limitations of *Code of Civil Procedure Section 2018.010 et seq.* (*Code Civ. Proc. § 2017.010*).

[*AND/OR*]

G. Matter Not Discoverable if Inadmissible or Does Not Lead to Admissible Evidence. Matter is not subject to discovery if it is neither itself admissible in evidence nor appears reasonably calculated to lead to the discovery of admissible evidence (*Code Civ. Proc. § 2017.010*).

[*AND/OR*]

H. Informal Interviews Are Improper. Compelling the opposing party to give the moving party access to its employees for the purpose of conducting informal interviews is not among the demands for inspection, copying, testing, or sampling expressly authorized under *Code of Civil Procedure Section 2031.010* (*see Code Civ. Proc. § 2031.010*; *see also Volkswagenwerk Aktiengesellschaft v. Superior Court (1981) 123 Cal. App. 3d 840, 849, 176 Cal. Rptr. 874 , overruled on other grounds, American Home Assurance Co. v. Societe Commerciale Toutelectric (2002) 104 Cal. App. 4th 406, 128 Cal. Rptr. 2d 430*).

[*AND/OR*]

I. Valid Claim to Protective Order. When a party has a valid claim of a right to a protective order with respect to unproduced documents that were alleged to be proprietary and confidential, it has substantial justification, as a matter of law, for withholding these documents until the motion for the protective order is determined, and for opposing the motion to compel (*Foothill Properties v. Lyon/Copley Corona Assoc. (1996) 46 Cal. App. 4th 1542, 1558, 54 Cal. Rptr. 2d 488*).

[*CONTINUE*]

J. Court Must Impose Monetary Sanction Absent Specified Findings. The court must impose a monetary sanction under *Code of Civil Procedure Section 2023.030* against any party, person, or attorney who unsuccessfully makes a motion to compel further response to a demand for inspection, copying, testing, or sampling, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust (*Code Civ. Proc. §§ 2023.030(a)*, 2031.310(h)).

[*Add memoranda generally supporting the imposition of monetary sanctions (see, e.g., Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11).*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum is for use in opposition to a motion by a party for an order compelling further response to a demand for inspection, copying, testing, or sampling and for a monetary sanction [*see Code Civ. Proc. § 2031.310*]. For memoranda relating to specific grounds of evidentiary privilege or other protection from discovery, see generally Ch. 81, *Discovery: Privileges and Other Discovery Limitations* .

This form should be combined with general memoranda supporting the imposition of monetary sanctions under *Code Civ. Proc. § 2023.030(a)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11*].

In an appropriate case, this memorandum may be submitted in opposition to the motion supported by the memorandum *set out in § 85.11*.

For additional memoranda opposing orders to compel further responses to demands for production of electronically stored information (ESI), and discussion of the grounds for seeking or opposing orders to compel in the context of e-discovery, see Ch. 85A, *Discovery : E-Discovery*, §§ 85A.30, 85A.31.

Note that some cases cited in this form construe law in effect before the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that they remain consistent with current provisions [*see also § 85.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel might set forth facts showing that the statement of compliance is complete; that the representation of inability to comply is adequate, complete, and not evasive; and that objections have merit and are not too general. These facts should help show that the responding party had substantial justification for his or her actions, or that a monetary sanction against the responding party would be unjust [*see, e.g., Standon Co. v. Superior Court (1990) 225 Cal. App. 3d 898, 904, 275 Cal. Rptr. 833* (case sent back for reconsideration because it was not clear that trial court considered these exceptions)]. However, counsel need not set forth facts showing that the moving party acted without substantial justification [*cf.* former Code Civ. Proc. § 2034(a)]. *Code Civ. Proc. §§ 2023.030(a)* and 2031.310(h) effectively place that burden on the person against whom the sanction is to be imposed, by requiring the court to impose a monetary sanction when it is expressly authorized *unless* it finds that there was substantial justification or that other circumstances would make the monetary sanction unjust.

Absent exceptional circumstances, the court may not impose sanctions on a party or any attorney of a party for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as the result of the routine, good faith operation of an electronic information system [*Code Civ. Proc. § 2031.310(j)(1) see* Ch. 85A, *Discovery: E-Discovery* , § 85A.09].

[c] Related Pleading and Practice Forms

For forms and discussion related to the inspection, copying, testing, or sampling of documents, tangible things, land or

other property, and electronically stored information, see California Forms of Pleading and Practice, Ch. 195, *Discovery: Inspection of Tangible Evidence* (Matthew Bender). For additional discussion of the discovery of electronically stored information in California, see Ch. 85A, *Discovery : E-Discovery*; see also California Forms Of Pleading And Practice, Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)* (Matthew Bender). For detailed discussion, forms, checklists, and practice tips relating to e-discovery, see Matthew Bender(R) Practice Guide: California E-Discovery And Evidence.

[3] Discussion of Authorities

[a] Waiver of Right to Compel Further Response

In ***Sexton v. Superior Court*** *(1997) 58 Cal. App. 4th 1403, 68 Cal. Rptr. 2d 708* , plaintiff sued defendant medical center for negligence. In his response to defendant's demand for production of documents, plaintiff objected to 16 of the demands. Although defendant attempted to resolve the disagreement with plaintiff, it never requested an extension of time in which to file a motion to compel, and none was granted. Over two months after receipt of plaintiff's response, defendant filed a motion to compel compliance. Plaintiff filed written opposition papers to the motion, but did not raise the untimeliness of motion until the commencement of hearing on motion. When it became clear that the trial court did not and would not deny or dismiss the motion on the ground that it was not timely filed, plaintiff applied for a writ of mandate.

The court of appeal issued a writ of mandate compelling the trial court to deny as untimely defendant's motion to compel (*58 Cal. App. 4th 1403, 1411)* . The court examined the legislative history of Code Civ. Proc. § 2031(*l*) (*now see Code Civ. Proc. § 2031.310*). It found those changes indicative of a Legislative intent to not vest any authority in the court to permit discovery that is not timely made, furthering the policy that discovery proceed not only smoothly, but swiftly as well. Thus, the court concluded that the 45-day limitation period of Code Civ. Proc. § 2031(*l*) (*now see Code Civ. Proc. § 2031.310(c)*) is mandatory and jurisdictional in that it renders the court without authority to rule on an untimely motion other than to deny it (*58 Cal. App. 4th 1403, 1408-1410)* .

In ***Standon Co. v. Superior Court*** *(1990) 225 Cal. App. 3d 898, 275 Cal. Rptr. 833* , defendants in a personal injury action served on plaintiff a demand for inspection and production of documents on May 9, 1990. Plaintiff responded on May 31, 1990, objecting to some of the requests as privileged, but agreeing to produce some of the other documents requested. The documents about which plaintiff had no objections were produced on June 13, 1990, at which time plaintiff repeated his objections to the remaining documents that were not produced. On August 8, 1990, defendants filed a motion to compel further response, directed only at the documents that were not produced. The trial court found the motion untimely and imposed sanctions of $1 against each defendant. Defendants petitioned for a writ of mandate.

Although the court of appeal issued a peremptory writ directing the trial court to vacate its order awarding sanctions, in all other respects the petition was denied. The court explained that Code Civ. Proc. § 2031(*l*) (*now see Code Civ. Proc. § 2031.310*) requires that a motion to compel further response to a demand for production be made within 45 days of the service of the response. Failure to so move within that specified time constitutes a waiver of any right to compel a further response. It said that defendants' motion was made less than 45 days after the date for *production*, but more than 45 days after the *response* date. Thus, the motion was untimely (*225 Cal. App. 3d 898, 902)* . The court further explained that this means that nonmeritorious objections in the response must be attacked by a motion made within 45 days. If the court finds that the objections are unfounded, it will order a further response that completely identifies the available, nonprivileged documents and agrees to produce them. This ensures that the validity of any privilege objections raised by the responding party is resolved by the court. An adequate response ends any dispute over the right to inspect the documents or objects. If later the responding party actually refuses to produce the items promised, the party demanding inspection should bring a motion to compel compliance. The court emphasized that these are different motions and are not interchangeable (*225 Cal. App. 3d 898, 902-903)* . The court of appeal also addressed the propriety of the $1 sanctions, saying that the trial court is not required to award monetary sanctions against the

unsuccessful party. The trial court should exercise its discretion and consider whether the losing party acted with "substantial justification," or whether "other circumstances make the imposition of the sanction unjust." Because it was unclear whether the trial court had made these considerations, the issue was sent back for reconsideration (*225 Cal. App. 3d 898, 904-905)* .

[b] Failure to Comply With Procedure

People ex rel. Dept. of Transportation v. Superior Court *(1976) 60 Cal. App. 3d 352, 358, 131 Cal. Rptr. 476 , disapproved on other grounds in Davies v. Superior Court (1984) 36 Cal. 3d 291, 300-301, 204 Cal. Rptr. 154, 682 P.2d 349* , arose out of a wrongful death action in which a pretrial conference order directed that all discovery and law and motion matters were to close 30 days before trial. However, 12 days before the scheduled trial, and in the absence of a prior request to defendant, plaintiff moved for an order directing the state to produce certain accident reports for inspection and copying. The trial court granted the motion and continued the trial date.

The court of appeal issued a writ of mandate directing the trial court to set aside its discovery order (*60 Cal. App. 3d 352, 361)* . In so doing, it held that the 1974 amendments to former Code Civ. Proc. § 2031 [*now see Code Civ. Proc. § 2031.010 et seq.*] providing for a request procedure for inspection and production were designed to lighten the trial court's burden of hearing motions in every case in which documentary evidence is sought. Because of this, compliance with the request procedures outlined in former Code Civ. Proc. § 2031 was a mandatory prerequisite to the seeking of a court order for production of documents (*60 Cal. App. 3d 352, 358)* .

Field Research Corp. v. Patrick *(1973) 30 Cal. App. 3d 603, 106 Cal. Rptr. 473* is an appeal from a judgment in favor of plaintiff for compensatory and punitive damages in a libel action. Among defendant's assignments of error was that the trial court erred in failing to order production of 1,042 completed questionnaires on which plaintiff's poll was based. Defendant had made his demand for production midway through the trial. The trial court denied the motion on the ground that there was no basis for such an order, and the court of appeal affirmed, holding that defendant had not complied with the requirement of former Code Civ. Proc. § 2031 (*now see Code Civ. Proc § 2031.010 et seq.*) providing for 10 days notice to all parties, and no excuse had been offered for the noncompliance (*30 Cal. App. 3d 603, 612)* .

[c] Informal Interviews Are Improper

In ***Volkswagenwerk Aktiengesellschaft v. Superior Court*** *(1981) 123 Cal. App. 3d 840, 176 Cal. Rptr. 874 , overruled on other grounds, American Home Assurance Co. v. Societe Commerciale Toutelectric (2002) 104 Cal. App. 4th 406, 128 Cal. Rptr. 2d 430* , an action for personal injuries against an automobile manufacturer and other defendants, plaintiffs moved for and obtained a complex discovery order that included a provision granting plaintiffs' representative permission, during normal working hours, to question any of defendant's employees in West Germany, not under oath, to identify persons who possess knowledge for purposes of selecting persons for depositions and locating documents. Defendant was permitted to have counsel present and to tape record, and was required to minimize inconvenience and to advise and request cooperation from its employees. Defendant petitioned for mandate or prohibition to vacate the discovery order on multiple grounds, including that the order permitting informal interviews was not authorized by California law.

The court of appeal ordered that a writ of mandate be issued directing the trial court to set aside its discovery order. Concerning that part of the order permitting informal interviews, the court held that the interviews could not be brought within the former Discovery Act by simple construction, no matter how liberal, and that to validate the interviews it would be required to extend the former Discovery Act beyond its statutory text. Although a party to litigation is entitled to unimpeded access to persons who may have relevant information, and may if necessary have court orders to forestall interference with such access, the discovery order in question went farther, requiring petitioner not only to permit plaintiffs to interview its employee within its plant during working hours but also to advise and request that the

employees cooperate with plaintiffs (*123 Cal. App. 3d 840, 849)* .

In ***Foothill Properties v. Lyon/Copley Corona Assoc.*** *(1996) 46 Cal. App. 4th 1542, 54 Cal. Rptr. 2d 488* , the court of appeal held that the trial court abused its discretion in imposing sanctions on a party that had a valid claim of a right to a protective order with respect to unproduced documents that were alleged to be proprietary and confidential, and had substantial justification, as a matter of law, for withholding these documents until the motion for the protective order was determined, and for opposing the motion to compel (*46 Cal. App. 4th 1542, 1557)* .

[4] Additional Authorities

[a] Waiver of Right to Compel Further Response

The factual and procedural background of *Best Product, Inc. v. Superior Court (2004) 119 Cal. App. 4th 1181, 15 Cal. Rptr. 3d 154* is discussed in *§ 85.10[4][a]*. In this commercial litigation discovery dispute, the trial court erred when it issued, as a sanction, a judicial order that the attorney-client and work product privileges had been waived, based on defendant's failure to provide a privilege log in response to plaintiff's requests to inspect and produce. Former Code Civ. Proc. § 2031(*l*) (*now see Code Civ. Proc. § 2031.300*) provides the only method by which a claim of privilege can be waived in these circumstances Under that section, if a party to whom interrogatories have been directed fails to serve a timely response, that party waives any objection to the interrogatories, including one based on privilege or on the protection for work product under former Code Civ. Proc. § 2018 (*now see Code Civ. Proc. § 2018.010 et seq.*). This provision was inapplicable in this case, however, because defendant filed timely responses, albeit boilerplate responses. Thus, the lack of a privilege log was a non-issue (*119 Cal. App. 4th 1181, 1189-1190)* . If plaintiff had properly moved to compel further responses to contest defendant's conclusory attorney-client and work product objections under former Code Civ. Proc. § 2031(m) (*now see Code Civ. Proc. § 2031.310*), defendant could have been required to produce a privilege log that was sufficiently specific so the trial court could determine whether a particular document was or was not privileged. However, plaintiff did not rely on that statutory provision in bringing its motion. Moreover, even if plaintiff had brought and prevailed on a motion on that statutory ground, the court could not have found a waiver of privilege. Former Code Civ. Proc. § 2031(m) (*now see Code Civ. Proc. § 2031.310*) sets forth the exclusive remedies available to the court. The trial court can "make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under Section 2023 [*now see* Section 2023.030]. In lieu of or in addition to that sanction, the court [could] impose a monetary sanction under Section 2023 [*now see* Section 2023.030(a)]." However, "even at that juncture, the statute does *not* include as an authorized sanction a judicial order that a privilege has been waived" (*119 Cal. App. 4th 1181, 1189-1190)* .

In *Sperber v. Robinson (1994) 26 Cal. App. 4th 736, 31 Cal. Rptr. 2d 659* , the defendant served a response to the plaintiff's request for production of documents on May 29, 1991. Allowing five days for mail service pursuant to *Code Civ. Proc. § 1013(a)* (requiring 5 calendar days as of January 1, 2002), the last date on which the plaintiff could have filed a timely motion to compel under former Code Civ. Proc. § 2031(*l*) (*now see Code Civ. Proc. § 2031.310*) was July 18, 1991. The plaintiff did not file a motion to compel until September 23, 1991.

The court of appeal held that the plaintiff's failure to make the motion within the 45-day period prescribed by former Code Civ. Proc. § 2031(*l*) (*now see Code Civ. Proc. § 2031.310(c)*) (in this case by July 18, 1991) constituted a waiver of any right to compel a further discovery response. The court noted that the plaintiff could take no solace from the fact that he filed an earlier motion to compel giving notice that a hearing on the motion would be heard on August 27, 1991. The plaintiff effectively withdrew that motion by unilaterally requesting that it be placed off calendar, and then filed an entirely new motion on September 23, 1991, that gave notice for hearing on November 4, 1991 (*26 Cal. App. 4th 736, 745-746)* .

[b] Court Must Impose Monetary Sanctions Absent Specified Findings

The factual and procedural background of *London v. Dri-Honing Corp. (2004) 117 Cal. App. 4th 999, 12 Cal. Rptr. 3d 240* is discussed in *§ 85.11[4][b]*. In a case arising out of a discovery dispute in a wrongful termination suit, the court of appeal held that a separate motion for discovery monetary sanctions may be made after an underlying motion to compel further response to an inspection demand is litigated (*117 Cal. App. 4th 999, 1001)* . The timeliness of the request is subject to the trial court's discretion, rather than the 45-day limit from the time of the initial service of the response under former Code Civ. Proc. § 2031(m) (*now see Code Civ. Proc. § 2031.310(c)*) (*117 Cal. App. 4th 999, 1009)* .

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Volume 8 Chapters 80-89A DISCOVERY
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A. Motion to Compel Inspection, Copying, Testing, or Sampling

8-85 California Points & Authorities § 85.31

§ 85.31 Opposing Motion for Order of Sanctions [Code Civ. Proc. § 2023.030]--Failure to Obey Order Compelling Response to, Further Response to, or Compliance With Demand for Inspection, Copying, Testing, or Sampling of Documents, Tangible Things, Land or Other Property, or Electronically Stored Information [Code Civ. Proc. §§ 2031.300, 2031.310, 2031.320]--Sanctions Are Punitive Rather Than Remedial

[1] FORM Opposing Motion for Order of Sanctions [Code Civ. Proc. § 2023.030]--Failure to Obey Order Compelling Response to, Further Response to, or Compliance With Demand for Inspection, Copying, Testing, or Sampling of Documents, Tangible Things, Land or Other Property, or Electronically Stored Information [Code Civ. Proc. §§ 2031.300, 2031.310, 2031.320]--Sanctions Are Punitive Rather Than Remedial

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN OPPOSITION TO MOTION
vs.	)	FOR ORDER IMPOSING SANCTIONS FOR FAIL-
_____ [*name*],	)	URE TO OBEY ORDER COMPELLING
Defendant.	)	_____
	)	[RESPONSE TO *or* FURTHER RESPONSE TO *or*
	)	COMPLIANCE WITH] DEMAND FOR
	)	_____ [INSPECTION *and/or*
	)	COPYING *and/or* TESTING *and/or* SAMPLING
	)	*and/or* ENTRY ON PROPERTY]
		Date: _____
		Time: _____
		Location: _____
		[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT MAY ONLY MAKE THOSE ORDERS OF SANCTIONS THAT ARE JUST, AND MAY NOT IMPOSE A SANCTION THAT IS TOO HARSH UNDER THE CIRCUMSTANCES BECAUSE THAT SANCTION WOULD BE PUNITIVE RATHER THAN REMEDIAL AND WOULD GO BEYOND WHAT IS NECESSARY TO SECURE THE RESULTS OF THE INSPECTION DEMAND THAT WAS SOUGHT.

A. Court May Only Make Orders That Are Just. When a party fails to obey an order compelling _____ [response to *or* further response to *or* compliance with] a demand for inspection, copying, testing, or sampling, the court may only make those orders that are just (Code Civ. Proc. §_____ [2031.300 *or* 2031.310 *or* 2031.320]).

B. Purpose of Sanctions. The purpose of sanctions is to accomplish the object sought by the discovery process and to secure the just and expeditious resolution of actions, rather than to punish the party who has engaged in conduct constituting a misuse of the discovery process (*see McGinty v. Superior Court (1994) 26 Cal. App. 4th 204, 210-216, 31 Cal. Rptr. 2d 292* ; *Caryl Richards, Inc. v. Superior Court (1961) 188 Cal. App. 2d 300, 304, 10 Cal. Rptr. 377* ; *Crummer v. Beeler (1960) 185 Cal. App. 2d 851, 858, 8 Cal. Rptr. 698*).

C. Inappropriateness of Type and Severity of Sanctions. Sanctions are improper if they are not appropriate to the dereliction, and if they exceed that which is necessary to protect the interests of the party adversely affected by the misuse of the discovery process (*see Motown Record Corp. v. Superior Court (1984) 155 Cal. App. 3d 482, 492, 202 Cal. Rptr. 227* ; *Deyo v. Kilbourne (1978) 84 Cal. App. 3d 771, 793, 149 Cal. Rptr. 499*).

D. Limitation on Use of Sanctions. The chief limitation on the use of sanctions is that the sanction may not be used to put the prevailing party in a better position than that party might have been in had the misuse of the discovery process not been engaged in, and had the results of the discovery process been totally favorable to the prevailing party (*see Wilson v. Jefferson (1985) 163 Cal. App. 3d 952, 958-959, 210 Cal. Rptr. 464* ; *Stein v. Hassen (1973) 34 Cal. App. 3d 294, 303, 109 Cal. Rptr. 321*).

[*Optional*] **E. Terminating Sanction Should Not Be Imposed If Responding Party Unable to Comply and Lesser Sanction Available.** A terminating sanction or other sanction equivalent to dismissal is too harsh and an abuse of discretion for a party's failure to obey an order compelling _____ [response to *or* further response to *or* compliance with] a demand for inspection, copying, testing, or sampling, if the refusal to obey was due to an inability rather than a willful refusal to comply, and if another lesser sanction could be imposed that would be proper (*see Puritan Ins. Co. v. Superior Court (1985) 171 Cal. App. 3d 877, 884-885, 217 Cal. Rptr. 602*).

[*Optional*] **F. Limitations on Use of Sanctions Relating to Production of Electronically Stored Information.** Notwithstanding the authority to impose sanctions under Code of Civil Procedure Section _____ [2031.300(c) *or* 2031.310(h), (i) *or* 2031.320(b), (c)], absent exceptional circumstances, the court may not impose sanctions on a party or any attorney of a party for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as the result of the routine, good faith operation of an electronic information system (_____ [*Code Civ. Proc. § 2031.300(d)(1) or Code Civ. Proc. § 2031.310(j)(1) or Code Civ. Proc. § 2031.320(d)(1)*]).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum is for use in opposition to a motion for an order for sanctions against a party for his or her failure to obey an order compelling a response or further response to, or compliance with, a demand for inspection, copying, testing, or sampling [*see Code Civ. Proc. §§ 2031.300-2031.320*].

An issue, evidence, or terminating sanction is available only after an order compelling compliance with discovery has been issued by the court, and disobeyed by the party to be sanctioned [*Ruvalcaba v. Government Employees Ins. Co. (1990) 222 Cal. App. 3d 1579, 1581-1583, 272 Cal. Rptr. 541* ; *see Code Civ. Proc. §§ 2031.300-2031.320*]. Thus, in the absence of such an order, counsel may argue that the imposition of any of these sanctions is premature. For further discussion of the available sanctions for failing to obey an order compelling responses, further responses, or compliance with a demand for inspection, copying, testing, or sampling, see *§ 85.12[2][c]*.

In an appropriate case, this memorandum may be submitted in opposition to the motions supported by the memoranda in §§ 85.12 and *85.21*.

Note that some cases cited in this form construe law in effect before the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that they remain consistent with current provisions [*see also § 85.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel might set forth facts showing that the sanction being sought is too harsh for the circumstances, and that certain lesser sanctions could be imposed that would put the moving party in the position he or she would have been in had the order been obeyed but that would not punish the disobedient party.

[c] Related Pleading and Practice Forms

For forms and discussion related to the obtaining of sanctions for failure to comply with an order issued pursuant to Code Civ. Proc. § 2031.320, see California Forms of Pleading and Practice, Ch. 195, *Discovery: Inspection of Tangible Evidence* (Matthew Bender). For additional discussion of the discovery of electronically stored information in California, see Ch. 85A, *Discovery : E-Discovery*; see also California Forms Of Pleading And Practice, Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)* (Matthew Bender). For detailed discussion of sanctions in the e-discovery context, see Matthew Bender(R) Practice Guide: California E-Discovery And Evidence, Ch. 13, *Seeking or Opposing Sanctions for Noncompliance*.

[3] Discussion of Authorities

[a] Purpose of Sanctions

McGinty v. Superior Court *(1994) 26 Cal. App. 4th 204, 31 Cal. Rptr. 2d 292* involved a wrongful death action arising from an airplane crash. The plaintiffs alleged that the crash was caused by a defective airplane engine, and intended to call an expert witness to testify as to the cause of the engine failure. The expert inadvertently forwarded materials to the plaintiffs' attorney that were subject to a protective order in another action.

The court of appeal held that the trial court abused its discretion by precluding the plaintiffs from using their expert witness because he had inadvertently forwarded the protected materials to their attorney. The attorney's conduct was not willful, the defendant was not prejudiced as these materials would have been discoverable through normal discovery, and the order was tantamount to a dismissal of the case. The sanctions were pure punishment to deter violation of court orders, which is not an appropriate aim of discovery sanctions (*26 Cal. App. 4th 204, 210-216)* .

In ***Caryl Richards, Inc. v. Superior Court*** *(1961) 188 Cal. App. 2d 300, 10 Cal. Rptr. 377* , plaintiffs husband and wife sought damages against defendant for injuries to the wife's eyes allegedly received as a result of use of hair spray manufactured by defendant. During pretrial discovery proceedings, the trial court ordered a further answer to an interrogatory that had been propounded by plaintiffs. Defendant provided a further answer, but did not state the exact proportions of each ingredient in the formula as requested in the interrogatory. Plaintiffs then moved the court for an order imposing sanctions either by striking defendant's answer and entering a default, or by an order that certain facts specified by plaintiff be established. The court denied the motion to strike the answer, but entered an order that certain facts be established unless defendant gave further answers within 15 days giving details of the proportions of the ingredients with their common chemical names. Defendant provided a statement with certain information, and plaintiffs made a motion asking for the same sanctions they had previously requested. Another judge heard the motion, found that the answer was not sufficient and that defendant had willfully failed to comply with the court's order, and ordered that the answer be stricken and a default entered. Defendant sought a writ of mandate from the court of appeal requiring the trial court to vacate its order.

In granting defendant's petition, the court of appeal held that the trial court abused its discretion in entering the default. The court said that one of the principal purposes of discovery statutes is to enable a party to obtain evidence in the control of the adversary party in order to further the efficient, economical disposition of cases in accordance with right and justice on the merits (*188 Cal. App. 2d 300, 303, 307)* . The statutes are to be liberally interpreted so that they may accomplish their purpose (*188 Cal. App. 2d 300, 303)* . The sanctions the court could impose pursuant to former Code Civ. Proc. § 2034(b)(2) (*now see Code Civ. Proc. § 2023.030*) were such as were suitable and necessary to enable the party seeking discovery to obtain the objects of discovery being sought (*188 Cal. App. 2d 300, 304)* . However, the court emphasized that the trial court may not impose sanctions that are designed not to accomplish the objects of the discovery but to impose punishment instead (*188 Cal. App. 2d 300, 304)* . The court held that by striking defendant's answer and entering a default judgment, the trial court deprived defendant of due process because the judgment precluded trial on other facts and issues in the case (*188 Cal. App. 2d 300, 305)* . The court went on to state that an order under former Code Civ. Proc. § 2034(b)(2)(i) (*now see Code Civ. Proc. § 2023.030(b)*) that the facts sought to be proven by the interrogatories be taken as established for the purpose of the action would have secured the results that plaintiff had sought, while not depriving defendant of due process on the other issues in the action (*188 Cal. App. 2d 300, 305-306)* .

Crummer v. Beeler *(1960) 185 Cal. App. 2d 851, 8 Cal. Rptr. 698* , involved a suit for money had and received. The trial court granted plaintiff's motion to strike defendant's answer based on former Code Civ. Proc. § 2034(d) (*now see Code Civ. Proc. § 2023.030(d)(1)*) and on defendant's allegedly willful failure to appear for a noticed deposition. Defendant then moved to set aside the default under *Code Civ. Proc. § 473*, based on the fact that he was living in Canada and that, through his attorneys, he had attempted to move the depositions to a time that would have been convenient for him, but that plaintiff had adamantly refused. The motion to set aside the default was denied, and defendant appealed.

The court of appeal reversed the trial court's decision, holding that the purpose of former Code Civ. Proc. § 2034(d) (*now see Code Civ. Proc. § 2023.030*) was not punishment, but the just and expeditious resolution of actions (*185 Cal. App. 2d 851, 858, 860)* . In support of this statement, the court cited federal authority construing *Fed. R. Civ. P., Rule 37*, which was substantially similar to the California sanctions statute. The court also noted that, under federal authority, imposition of sanctions was held to be improper unless the party who was not in compliance with discovery obligations

was given an additional opportunity to comply (*185 Cal. App. 2d 851, 858-859)* . Counsel should note that *Code Civ. Proc. § 2023.030* is derived in part from both former Code Civ. Proc. § 2034 and *Fed. R. Civ. P., Rule 37*.

[b] Inappropriateness of Type and Severity of Sanctions

In ***Motown Record Corp. v. Superior Court*** *(1984) 155 Cal. App. 3d 482, 202 Cal. Rptr. 227* , an action on a personal service contract, defendant served plaintiffs with a request for production of documents. Plaintiffs objected that the documents sought were protected by the attorney-client privilege. There followed a protracted series of discovery proceedings in which plaintiffs served and filed several supplementary responses to their objections purportedly providing a factual basis for their claim of privilege, and defendants twice moved to strike plaintiffs' pleadings for plaintiffs' failure to verify that they had provided all nonprivileged material. The trial court on two separate occasions determined that plaintiffs' factual showings were inadequate to verify that the materials sought were privileged, and ordered plaintiffs to provide further factual basis for their claim of privilege and imposed monetary sanctions on plaintiffs. Plaintiffs eventually served and filed a final and much-expanded set of descriptions of the documents and declarations to establish their privilege. Service of these materials occurred one whole day after the deadline that the trial court had set in its final order to plaintiffs to produce a factual basis for their claim. These materials suggested a tenuous basis for a claim of the attorney-client privilege. After further proceedings the trial court imposed monetary sanctions of $1,000 on plaintiffs for their tardiness in providing the final set of descriptions, held that plaintiffs' delay in providing these materials constituted a waiver of any attorney-client privilege, and ordered plaintiffs to produce all of the documents sought. Plaintiffs petitioned for a writ of mandate.

The court of appeal granted the writ. The court restated from earlier case law that the sanctions that a court could impose under former Code Civ. Proc. § 2034(b)(2) (*now see Code Civ. Proc. § 2023.030*) were such as were suitable and necessary to enable the party seeking discovery to obtain the object of the discovery, but that the court could not impose sanctions that were designed to punish (*155 Cal. App. 3d 482, 489)* . Responding to defendant's argument that plaintiffs' prior acts of delay and avoidance in providing the factual basis should be taken into account in reviewing the appropriateness of the sanctions imposed, the court noted that sanctions had already been imposed on plaintiffs for their prior insufficient factual showings. The court noted further that the sanctions at issue in the case were imposed not for insufficiency of the factual showing made, but for their tardiness, and stated that the minimal delay caused by this tardiness did not prejudice defendant (*155 Cal. App. 3d 482, 491)* . The court held that the sanctions imposed by the trial court were excessive in that they were not reasonably calculated to achieve the purpose of affecting compliance with discovery and were punitive in nature. The court also held that if the compelled waiver was part of the sanction, it too was excessive (*155 Cal. App. 3d 482, 490)* .

In ***Deyo v. Kilbourne*** *(1978) 84 Cal. App. 3d 771, 149 Cal. Rptr. 499* , an attorney sued a former client for services rendered and the defendant, representing himself, filed an answer denying liability. Plaintiff served defendant with interrogatories, which were received by defendant while he was hospitalized with serious health problems that continued for the duration of the legal proceedings. After 60 days, during which time plaintiff granted defendant, through his wife, one extension to answer the interrogatories, the plaintiff brought a motion to strike defendant's answer for failure to answer, and the motion was denied. However, the court directed defendant to file answers by a specified date and ordered that his answers would be stricken if this was not done. Defendant filed answers by the date ordered, and although there was some response to each question and the answers did suggest a dispute existed concerning the amount of the fees, most of the answers were not fully responsive to the questions propounded. One month later, plaintiff filed a second motion for an order either compelling further answers to the interrogatories pursuant to former Code Civ. Proc. § 2030 (*now see Code Civ. Proc. § 2030.300*), or to have the answer stricken and default judgment entered pursuant to former Code Civ. Proc. § 2034(b)(2) or (d) (*now see Code Civ. Proc. § 2023.030(d)(1), (4)*). The trial court granted the motion to strike the answer and to enter a default judgment, including reasonable expenses and attorney's fees, as a result of the motion. Defendant finally employed counsel and requested a new trial, which was denied. Defendant then appealed.

In reversing, the court of appeal discussed what sanctions are proper when a party fails to fully answer interrogatories, and provided general guidelines for trial courts to follow in imposing sanctions. The court said that interrogatories expedite the resolution of lawsuits and enable counsel to evaluate the reasonable value of claims and defenses, thereby encouraging prompt settlements or serving to facilitate trial preparation (*84 Cal. App. 3d 771, 779, 798)* . Answers must be complete and responsive (*84 Cal. App. 3d 771, 783)* . When the party desires a further response, he or she was then required to make a timely motion to compel further answers pursuant to former Code Civ. Proc. § 2030(a) (*now see Code Civ. Proc. § 2030.300*) (*84 Cal. App. 3d 771, 786-787)* . Attorney's fees and expenses could only be awarded when a motion pursuant to former Code Civ. Proc. § 2030(a) to compel was granted, and no other sanctions were authorized at that time (*84 Cal. App. 3d 771, 789)* . The sanctions provided in former Code Civ. Proc. § 2034(b)(2) (*now see Code Civ. Proc. § 2023.030(b)*) applied only when the party refuses to obey an order made requiring further responses (*84 Cal. App. 3d 771, 789)* . (Counsel should note that under the California Civil Discovery Act, this procedure is specifically codified in *Code Civ. Proc. § 2030.300*, which provides for the imposition of a monetary sanction to the prevailing party of a motion to compel, and provides for the imposition of an issue, evidence, or terminating sanction only if a party fails to obey an order compelling further response to interrogatories.) The court of appeal in *Deyo* went on to explain that when a party has refused to supply information relevant to a particular claim or defense, an order establishing certain facts or precluding designated claims or defenses pursuant to former Code Civ. Proc. § 2034(b)(2) (*now see Code Civ. Proc. § 2023.030(b)*) may be the appropriate sanction (*84 Cal. App. 3d 771, 792)* . When a motion to compel has previously been granted, the court stated that the sanction should be appropriate to the dereliction and should not exceed that which is required to protect the interests of the party entitled to but denied discovery (*84 Cal. App. 3d 771, 793)* . The court then ruled that since answers had been made to interrogatories, although they might not have been fully responsive, and the plaintiff had also made a motion to compel, the trial court had jurisdiction to direct the defendant to file further answers, but did not have the jurisdiction at that time to strike the answer and enter a default judgment (*84 Cal. App. 3d 771, 797-798)* .

[c] Limitation on Use of Sanctions

In ***Wilson v. Jefferson*** *(1985) 163 Cal. App. 3d 952, 210 Cal. Rptr. 464* , plaintiff brought a legal malpractice action against defendant, seeking actual and punitive damages for defendant's alleged negligence and fraud in failing to file plaintiff's personal injury action within the applicable statutory limitation period. The trial court, on plaintiff's motion, ordered defendant to produce documents relating to his office procedure to insure timely filings. Defendant failed to comply with this order and the trial court, under former Code Civ. Proc. § 2034(b)(2)(C) (*now see Code Civ. Proc. § 2023.030(d)(1), (4)*), ordered defendant's answer stricken and a default judgment entered. Defendant appealed.

The court of appeal reversed, holding that a sanction should not exceed that which is required to protect the interests of the party seeking discovery by placing that party in a position better than that which he or she would have enjoyed if he or she had obtained the discovery sought and it had been completely favorable to his or her cause. In the case at bar, defendant's conduct was an attempt to avoid inquiry into the merit of an affirmative defense that he had no duty to file the action because plaintiff had agreed first to pay filing fees but had failed to do so. The court held that this conduct was not dispositive of all the issues present in the case, such as the question of fraud or punitive damages, and to enter a default judgment based on this conduct erroneously placed plaintiff in a better position than that necessary to protect her interests in obtaining the discovery sought (*163 Cal. App. 3d 952, 958-959)* .

In ***Stein v. Hassen*** *(1973) 34 Cal. App. 3d 294, 109 Cal. Rptr. 321* , the court of appeal upheld the sanction of default, noting that had proper discovery been conducted, it would have tended to support plaintiff's cause of action. Thus the sanction of dismissal was within the trial court's discretion, as limited by the rule that sanctions may not be used to put the prevailing party in a better position than that party might have been in had the discovery order been entirely favorable to the prevailing party. In support of this proposition, the *Stein* court cited Thompson, *Sanctions in California Civil Discovery* (1968) *8 Santa Clara L. Rev. 185* (*34 Cal. App. 3d 294, 303)* .

[d] Terminating Sanction Should Not Be Imposed if Responding Party Unable to Comply and Lesser

Sanction Available

Puritan Ins. Co. v. Superior Court *(1985) 171 Cal. App. 3d 877, 217 Cal. Rptr. 602* involved an action for damages resulting from the failure of a drive shaft repaired by defendant. Plaintiff's expert lost the shaft after conducting an inspection. Consequently, plaintiff was unable to comply with an order compelling its production. Defendant sought and obtained an order of sanctions under former Code Civ. Proc. § 2034(b)(2) (*now see Code Civ. Proc. § 2031.320*), which excluded from evidence the shaft, photographs of the shaft, and any expert testimony based on examination of the shaft or photographs. Plaintiff petitioned for a writ of mandate to vacate the order.

The court of appeal granted the writ, directing the trial court to vacate its order to the extent that it excluded photographs of the shaft and testimony based on the shaft (*171 Cal. App. 3d 877, 888)* . The court equated the order with one for dismissal because its effect was to preclude proof of an essential element of plaintiff's action (*171 Cal. App. 3d 877, 884-885)* . A sanction equivalent to dismissal was too harsh in this case, since the failure to produce the shaft was not willful and did not justify an inference that plaintiff's case lacked merit (*171 Cal. App. 3d 877, 885)* . It was proper to exclude the lost shaft and related testimony because defendant never had a chance to inspect the shaft. However, defendant was able to inspect any photographs. The court therefore held that it was an abuse of discretion under former Code Civ. Proc. § 2034(b)(2) to exclude photographs of the shaft and related testimony (*171 Cal. App. 3d 877, 885-887)* .

Note that the court of appeal in *Puritan* discussed whether the failure to obey the discovery in question needed to be "willful" in deciding whether the sanction was appropriate under former Code Civ. Proc. § 2034(b). The court decided that the fact of noncompliance, not the willfulness or good faith of the responding party, was the important factor in deciding whether to impose a sanction (*171 Cal. App. 3d 877, 882-884)* . Similarly, neither former Code Civ. Proc. § 2023 (*now see Code Civ. Proc. § 2023.010 et seq.*) nor any of the code sections governing individual methods of discovery include "willfulness" as a requirement for the imposition of sanctions. Nevertheless, it could still be argued that willfulness may still be considered in deciding which sanction is appropriate, as was apparently done by the *Puritan* court (*see 171 Cal. App. 3d 877, 885)* . Until this point is further clarified by the courts, counsel should proceed with caution in asserting willfulness as a factor to be considered in deciding the appropriateness of a sanction.

41 of 190 DOCUMENTS

California Points & Authorities

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 85 DISCOVERY: PRODUCTION OR INSPECTION OF TANGIBLE EVIDENCE
PART II. FORMS
A. Motion to Compel Inspection, Copying, Testing, or Sampling

8-85 California Points & Authorities §§ 85.32-85.49

[Reserved]

§§ 85.32[Reserved]

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 85 DISCOVERY: PRODUCTION OR INSPECTION OF TANGIBLE EVIDENCE
PART II. FORMS
B. Motion for Protective Order in Matters Relating to Inspection, Copying, Testing, or Sampling

8-85 California Points & Authorities § 85.50

§ 85.50 Supporting Motion for Protective Order Concerning Demand for Production, Inspection, Copying, Testing, or Sampling of Documents, Tangible Things, Land or Other Property, or Electronically Stored Information [Code Civ. Proc. § 2031.060]

[1] FORM Supporting Motion for Protective Order Concerning Demand for Production, Inspection, Copying, Testing, or Sampling of Documents, Tangible Things, Land or Other Property, or Electronically Stored Information [Code Civ. Proc. § 2031.060]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF IN SUPPORT OF MOTION
vs.	)	FOR A PROTECTIVE ORDER RE DEMAND FOR
_____ [*name*],	)	_____ [INSPECTION *and/or*
Defendant.	)	COPYING *and/or* TESTING *and/or* SAMPLING
	)	*and/or* ENTRY ON PROPERTY] AND FOR MON-
	)	ETARY SANCTION
	)	Date: _____
	)	Time: _____
		Location: _____
		[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD GRANT _____ [*specify moving party or affected person, e.g.,* DEFENDANT] A PROTECTIVE ORDER REGARDING _____ [*specify demanding party, e.g.,*

PLAINTIFF]'S DEMAND FOR _____ [INSPECTION *and/or* COPYING *and/or* TESTING *and/or* SAMPLING] OF _____ [DOCUMENTS *and/or* TANGIBLE THINGS *and/or* LAND OR OTHER PROPERTY *and/or* ELECTRONICALLY STORED INFORMATION], _____ [*identify set number, e.g.,* PLAINTIFF'S FIRST SET], AND A MONETARY SANCTION, BECAUSE GOOD CAUSE HAS BEEN SHOWN AND THE ORDER IS REQUIRED BY JUSTICE TO PROTECT _____ [*specify moving party or affected person or organization, e.g.,* DEFENDANT] FROM _____ [UNWARRANTED ANNOYANCE *and/or* EMBARRASSMENT *and/or* OPPRESSION *and/or* UNDUE BURDEN AND EXPENSE].

A. Motion for Protective Order. When an inspection, copying, testing, or sampling of documents, tangible things, land or other property, or electronically stored information has been demanded, _____ [the party to whom the demand has been directed *or* any other party *or* any affected person] may promptly make a motion, accompanied by a declaration stating facts showing a reasonable and good-faith attempt at an informal resolution of each issue presented by the motion, for a protective order (*Code Civ. Proc. § 2031.060*).

B. Power of Court to Issue Protective Order. For good cause shown, the court may make any order concerning the demand that justice requires to protect any _____ [party *or* other person] from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense (*Code Civ. Proc. § 2031.060(b)*; *see Shepherd v. Superior Court (1976) 17 Cal. 3d 107, 119 n.4, 130 Cal. Rptr. 257, 550 P.2d 161*).

C. Types of Protective Order. The protective order that the court may issue pursuant to *Code of Civil Procedure Section 2031.060* may include, but is not limited to, [one or more of] the following direction(s):

[*EITHER*]

That all or some of the items or categories of items in the inspection demand not be produced or made available at all (*Code Civ. Proc. § 2031.060(b)(1)*).

[*AND/OR*]

That the time specified in *Code of Civil Procedure Section 2031.260* to respond to the set of demands for inspection, copying, testing, or sampling, or to a particular item or category in the set, be extended (*Code Civ. Proc. § 2031.060(b)(2)*).

[*AND/OR*]

That the place of production be other than that specified in the inspection demand (*Code Civ. Proc. § 2031.060(b)(3)*).

[*AND/OR*]

That the inspection, copying, testing, or sampling be made only on specified terms and conditions (*Code Civ. Proc. § 2031.060(b)(4)*).

[*AND/OR*]

That a trade secret or other confidential research, development, or commercial information not be disclosed, or be

disclosed only to specified persons or only in a specified way (*Code Civ. Proc. § 2031.060(b)(5)*; *see Stadish v. Superior Court (1999) 71 Cal. App. 4th 1130, 1144, 84 Cal. Rptr. 2d 350* ; *Fireman's Fund Insurance Co. v. Superior Court (1991) 233 Cal. App. 3d 1138, 1141, 286 Cal. Rptr. 50*).

[*AND/OR*]

That the items produced be sealed and thereafter opened only on order of the court (*Code Civ. Proc. § 2031.060(b)(6)*).

[*If party or affected person seeks protective order regarding production, inspection, copying, testing, or sampling of electronically stored information, add:*]

[*EITHER*]

D. Power of Court to Issue Protective Order When Electronically Stored Information Is Not Reasonably Accessible Because of Undue Burden [*and/or* Expense]. If the _____ [moving party *or* affected person] demonstrates that the requested electronically stored information is not reasonably accessible because of undue burden or expense, the court may issue a protective order (*Code Civ. Proc. § 2031.060(c)*).

[*AND/OR*]

E. Limitations on Production of Electronically Stored Information That Is Not Reasonably Accessible Because of Undue Burden *and/or* Expense. If the court finds good cause for the production of electronically stored information from a source that is not readily accessible, the court's protective order may include, but is not limited to, the following condition(s) for the discovery: _____ [*specify limitations of frequency and extent of discovery of electronically stored information and/or allocation of expense of discovery*] (*Code Civ. Proc. § 2031.060(e)*; *see Code Civ. Proc. § 2031.060(f)*).

[*CONTINUE*]

F. Factual Showing of Good Cause. The good cause that is required for a protective order requires a factual exposition of a reasonable basis for the order sought (*see Goodman v. Citizens Life & Cas. Ins. Co. (1967) 253 Cal. App. 2d 807, 819, 61 Cal. Rptr. 682*).

[*Optional*] **G. Balancing Burden Against Likelihood of Discovering Admissible Evidence.** The court must limit the scope of discovery if, pursuant to a motion for protective order, it determines that the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence (*Code Civ. Proc. § 2017.020*; *see Southern California Edison Co. v. Superior Court (1972) 7 Cal. 3d 832, 842-843, 103 Cal. Rptr. 709, 500 P.2d 621* ; *Greyhound Corp. v. Superior Court (1961) 56 Cal. 2d 355, 383-384, 15 Cal. Rptr. 90, 364 P.2d 266* ; *Calcor Space Facility, Inc. v. Superior Court (1997) 53 Cal. App. 4th 216, 223, 61 Cal. Rptr. 2d 567*).

[*Optional*] **H. Protection Against Nonlitigation Use of Discovered Information.** A protective order that prohibits a litigant from using, publishing, or disseminating information obtained by discovery for any purpose other than the litigation does not offend the right of freedom of speech guaranteed under the *United States Constitution, Amendment I*, when the order is issued on a showing of good cause, is limited to context of pretrial civil discovery, and does not restrict the dissemination of information gained from other sources (*Seattle Times Co. v. Rhinehart (1984) 467 U.S.*

20, 37, 104 S. Ct. 2199, 81 L. Ed. 2d 17 ; *Coalition Against Police Abuse v. Superior Court (1985) 170 Cal. App. 3d 888, 896-906, 216 Cal. Rptr. 614*).

I. Court Must Impose Monetary Sanction Absent Specified Findings. The court must impose a monetary sanction under *Code of Civil Procedure Section 2023.030* against any party, person, or attorney who unsuccessfully opposes a motion for a protective order, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust (*Code Civ. Proc. §§ 2023.030(a)*, 2031.060(h)).

[*Add supporting memoranda for each particular type of protective order sought. When appropriate, include specific memoranda relating to objections, privileges, or other grounds that provide the basis for "good cause." Add memoranda generally supporting the imposition of monetary sanctions (see, e.g., Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11).*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum is for use in supporting a motion for a protective order concerning a demand for inspection, copying, testing, or sampling [*see Code Civ. Proc. § 2031.060*].

Optional Paragraph H is for use when protection is sought to prevent nonlitigation uses of the matters discovered, such as when the discovering party has indicated an intent to publish discovered matter before trial.

The motion for a protective order must be accompanied by a declaration stating facts showing a reasonable and good-faith attempt at an informal resolution of each issue presented by the motion [*see Code Civ. Proc. § 2031.060(a)*]. This form should be combined with general memoranda supporting the imposition of monetary sanctions under *Code Civ. Proc. § 2023.030(a)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11*].

Note that some cases cited in this form construe law in effect before the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that they remain consistent with current provisions [*see also § 85.02[3]*].

For a memorandum supporting a motion for a protective order in the context of e-discovery, see Ch. 85A, *Discovery : E-Discovery*, § 85A.40. For a discussion of e-discovery generally, see Ch. 85A, *Discovery : E-Discovery*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should state facts showing a need for protection from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense, and otherwise show substantial justification for the motion in order to avoid a monetary sanction if the

motion is denied [*see Code Civ. Proc. § 2031.060(b)*]. Counsel should state facts and insert argument in favor of particular protective orders that are desired, such as showing facts and reasons why certain or all items or categories of items in the demand should not be produced at all. However, counsel need not set forth facts showing that the opposing party acted without substantial justification [*cf.* former Code Civ. Proc. § 2034(a)]. *Code Civ. Proc. §§ 2023.030(a)* and 2031.060(h) effectively place that burden on the person against whom the sanction is to be imposed, by requiring the court to impose a monetary sanction when it is expressly authorized *unless* it finds that there was substantial justification or that other circumstances would make the monetary sanction unjust.

Note, however, that despite *Code Civ. Proc. § 2031.060(h)*, absent exceptional circumstances, the court may not impose sanctions on a party or any attorney of a party for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as the result of the routine, good faith operation of an electronic information system [*Code Civ. Proc. § 2031.060(i)(1)*].

[c] Related Pleading and Practice Forms

For forms and discussion related to obtaining a protective order concerning a demand for inspection, copying, testing, or sampling pursuant to Code Civ. Proc. § 2031.060, see California Forms of Pleading and Practice, Ch. 195, *Discovery: Inspection of Tangible Evidence* (Matthew Bender). For additional discussion of the discovery of electronically stored information in California, see Ch. 85A, *Discovery : E-Discovery*; see also California Forms Of Pleading And Practice, Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)* (Matthew Bender). For detailed discussion, forms, checklists, and practice tips relating to e-discovery, see Matthew Bender(R) Practice Guide: California E-Discovery And Evidence.

[d] Opposing Memoranda

In an appropriate case, the memorandum *set out in § 85.60* may be used to oppose the motion supported by this memorandum.

[3] Discussion of Authorities

[a] Power of Court to Issue Protective Order

Shepherd v. Superior Court *(1976) 17 Cal. 3d 107, 130 Cal. Rptr. 257, 550 P.2d 161* was a wrongful death action against a city and some individual police officers. Among plaintiff's discovery requests was a request under former Code Civ. Proc. § 2034 (*now see Code Civ. Proc. §§ 2031.010-2031.320*) to photograph the individual defendants in the clothes they wore the night of the shooting of plaintiff's son. Plaintiff claimed that such photographs would facilitate the interviewing of potential witnesses. When defendants refused to comply with this request for photographing, plaintiff made a motion pursuant to former Code Civ. Proc. § 2034 (*now see Code Civ. Proc. § 2031.300*), for an order requiring defendants to be photographed in the clothing they wore on the night of the incident. Believing that it lacked the authority to make the requested order, the trial court denied plaintiff's motion.

The Supreme Court issued a writ of mandate, requiring the trial court to make a determination of whether good cause was present, as was required by former Code Civ. Proc. § 2034 for the granting of an order compelling the photographing of the officers in the specified clothing (*17 Cal. 3d 107, 119)* . In response to defendants' objections that such photographs would jeopardize their usefulness in undercover assignments, or would put their own safety and that of their families at risk, the Supreme Court noted that the court should consider plaintiff's need for the photographs, the adverse effects on defendants from such photographs, and alternative methods of procedure. In this regard, the Court stated that the trial court is free to make use of appropriate protective orders pursuant to former Code Civ. Proc. § 2019 when fashioning orders under former Code Civ. Proc. § 2034 (*now see Code Civ. Proc. § 2031.060*) (*17 Cal. 3d 107, 119 n.4*).

[b] Types of Protective Order

In ***Stadish v. Superior Court*** *(1999) 71 Cal. App. 4th 1130, 84 Cal. Rptr. 2d 350* , plaintiff sued defendant alleging injuries from exposure to toxic chemicals while living near an underground natural gas storage field owned by defendant. Plaintiff served a demand for production of documents and then agreed to an extension of time to respond; and defendant responded within this extended period. In response to further demands, defendant advised plaintiff that it would fully produce and allow inspection of further documents if plaintiff signed a confidentiality agreement designed to protect defendant's trade secrets. Plaintiff objected to the proposed agreement and to a modified agreement and filed a motion to compel. The trial court denied plaintiff's motion and issued a protective order, finding that defendant's responses to plaintiff's document demands were timely and impliedly finding that defendant had not waived its right to assert the trade secret privilege as a basis for its request for a protective order (*71 Cal. App. 4th 1130, 1136-1138)* . A petition for writ of mandate followed (*71 Cal. App. 4th 1130, 1139)* .

The court of appeal found that the record showed that plaintiff's counsel agreed to an extension of time to respond and that defendant responded within this extended period and therefore did not waive under former Code Civ. Proc. § 2031(k) [*now see Code Civ. Proc. § 2031.300*] the objections to the demand stated within in its response (*71 Cal. App. 4th 1130, 1140)* . Although the court of appeal determined that defendant waived the trade secret privilege by failing to assert it in response to the demand, it held that defendant was still entitled to seek a protective order under former Code Civ. Proc. § 2031(e)(5) [*now see Code Civ. Proc. § 2031.060*] to limit the manner in which trade secrets subject to discovery would be disclosed (*71 Cal. App. 4th 1130, 1141, 1144)* . The court reasoned that former Code Civ. Proc. § 2031(e) has no time limit for the application for a protective order against "unwarranted ... undue burden and expense." Accordingly, the party who has otherwise waived the right to object to the production of documents and has produced most of the documents requested may still seek a protective order under former Code Civ. Proc. § 2031(e)(5) (that trade secret be disclosed only to specified persons or only in a specified way), restricting dissemination of documents previously produced (*71 Cal. App. 4th 1130, 1144)* .

For discussion of whether good cause exists for a protective order under *Code Civ. Proc. § 2031.060(b)(5)*, see the discussion of this case in [4][a], *below*.

In ***Fireman's Fund Insurance Company v. Superior Court*** *(1991) 233 Cal. App. 3d 1138, 286 Cal. Rptr. 50* , plaintiff insured sued defendant insurance company for bad faith failure to contribute to a settlement after defendant, which provided it with excess insurance coverage, refused to contribute to a settlement between plaintiff and a third party. Plaintiff sought from defendant production of all documents related to any reinsurance agreement covering plaintiff's policy, and all documents and communications related to reinsurance of the particular claims arising out of the action against plaintiff. When defendant refused the requested production, plaintiff moved to compel the production. The trial court granted the motion. Defendant petitioned for a writ of mandate.

The court of appeal found that the blanket order of production was in error. It said that the reinsurance agreement should not be disclosed because it contained highly sensitive commercial information (*233 Cal. App. 3d 1138, 1141)* . Citing both former Code Civ. Proc. § 2031(e)(5) [*now see Code Civ. Proc. § 2031.060(b)(5)*], which specifically authorizes a court to make any order for good cause shown that protects confidential commercial information from unwarranted disclosure, and former Code Civ. Proc. § 2031(e)(6) [*now see Code Civ. Proc. § 2031.060(b)(6)*], which allows a court to order potentially sensitive documents produced under seal and opened only after conducting an in camera review, the court found the trial court abused its discretion in ordering disclosure of the other requested materials without first reviewing the materials in camera to determine their value and to excise any sensitive matter before ordering disclosure (*233 Cal. App. 3d 1138, 1140-1141)* .

[c] Factual Showing of Good Cause

Goodman v. Citizens Life & Cas. Ins. Co. *(1967) 253 Cal. App. 2d 807, 61 Cal. Rptr. 682* was an action for wrongful

termination of an agency contract. In that case, plaintiffs noticed the deposition of an out-of-state witness, and defendant moved for an order that plaintiffs pay defense counsel's travel expenses to Missouri where the deposition was to take place, citing only former Code Civ. Proc. § 2019(b)(1) [*now see Code Civ. Proc. § 2025.420*] in support of this motion. The trial court granted defendant's motion for expenses.

The court of appeal reversed, stating that even assuming arguendo that the order requiring payment of travel expenses is an order protecting defendant from annoyance, embarrassment, or oppression, there still needs to be a factual exposition of reasonable grounds constituting good cause for the order (*253 Cal. App. 2d 807, 819)* . Neither the statement that it would be necessary to travel from California to Missouri, nor the statement concerning anticipated expenses made on information and belief (and therefore of no evidentiary value) was sufficient to provide grounds for the trial court's order (*253 Cal. App. 2d 807, 819-820)* .

[d] Balancing Burden Against Likelihood of Discovering Admissible Evidence

Code Civ. Proc. § 2017.020 codifies the holding in ***Greyhound Corp. v. Superior Court*** *(1961) 56 Cal. 2d 355, 383-384, 15 Cal. Rptr. 90, 364 P.2d 266* and its progeny, discussed *below*, that in exercising their discretion in considering requests for discovery, courts should weigh the relative importance of the information sought against the hardship entailed by its production. The Reporter's Note to Proposed [former] Code Civ. Proc. § 2017(c) (*now see Code Civ. Proc. § 2017.020*) explains that in drafting Code Civ. Proc. § 2017(c), the State Bar-Judicial Council Joint Commission on Discovery "concluded that this discretion was so important as a counter-balance to the broad standard of discovery relevance, that it should be written into the statute, and not left to implication."

Southern California Edison Co. v. Superior Court *(1972) 7 Cal. 3d 832, 103 Cal. Rptr. 709, 500 P.2d 621* was a class action suit in nuisance and/or trespass, in which the class consisted of five named plaintiffs. In the course of discovery proceedings, defendant received the names of some unnamed plaintiffs and sought to depose 20 of them at random. When plaintiffs' attorney could only produce two, defendant sought depositions of 20 others, stating its intention to exclude from the class those who did not appear for depositions. On plaintiff's motion, the trial court issued a protective order which required defendant to subpoena the unnamed plaintiffs.

The Supreme Court upheld this order, denying defendant's petition for a writ of mandate (*7 Cal. 3d 832, 843)* . The Court noted that without the protective order, which shifts from plaintiffs to defendant the onus of compelling attendance of unnamed class members at depositions, the hardship on plaintiffs in class actions would be great (*7 Cal. 3d 832, 842)* . First of all, there is no particular reason for plaintiffs to be required to compel attendance; they have little control over the loosely knit class, and the defendants are just as capable as the named plaintiffs of compelling deponents' attendance (*7 Cal. 3d 832, 841-842)* . More importantly, however, the burden on the class in the absence of this particular type of protective order is severe in that plaintiffs' attorneys would be forced to expend extraordinary time and trouble to round up persons with whom they have had no prior contact. The risk they take if they fail to compel the attendance of these persons is that the prospective deponents will be excluded from the class. Therefore, a defendant would effectively be able to stifle a class action at the discovery stage (*7 Cal. 3d 832, 842)* . The Supreme Court thus went on to hold that in fashioning this particular protective order, the trial court wisely balanced defendant's right to discovery against the hardships which would be imposed on plaintiffs in the absence of the protective order (*7 Cal. 3d 832, 842-843)* .

Greyhound Corp. v. Superior Court *(1961) 56 Cal. 2d 355, 15 Cal. Rptr. 90, 364 P.2d 266* is the leading case construing the purposes and philosophy behind the former Discovery Act. *Greyhound* concerned a personal injury action involving an accident between plaintiffs' motor vehicle and defendant's bus. At the scene of the accident, before plaintiffs were taken to the hospital, defendant's adjusters and investigators obtained written and signed statements concerning the accident from various witnesses, many of whom were out-of-state residents. After unsuccessfully attempting to obtain these witnesses' accounts from other sources, plaintiffs moved to require defendant to produce and permit the inspection, copying, or photographing of the witnesses' statements. Although defendant objected to the

production of these statements on various grounds, the trial court ordered their production. This holding was affirmed by the Supreme Court, which denied defendant's application for a writ of prohibition (*56 Cal. 2d 355, 402)* .

In discussing factors which courts should apply in deciding whether to uphold or deny discovery, the *Greyhound* Court stated that courts should weigh the relative importance of the information sought against the hardship entailed by its production in exercising their discretion (*56 Cal. 2d 355, 383-384)* . Thus if great hardship would be imposed on the party whose depositions are sought, and if relatively unimportant information would be elicited from the depositions, then it is reasonable to infer that a protective order is proper.

Calcor Space Facility, Inc. v. Superior Court *(1997) 53 Cal. App. 4th 216, 61 Cal. Rptr. 2d 567* arose from a dispute over a contract to supply gun mounts for military aircraft. The defendant in the contract action had allegedly repudiated its original contract with the plaintiff and had arranged to obtain the gun mounts from Calcor, one of the contract plaintiff's competitors. The contract plaintiffs had served a deposition subpoena on Calcor's custodian of records, seeking production of extensive documentation regarding all of Calcor's gun mount business, including any dealings with the contract defendant.

In this opinion, the court of appeal reversed the trial court's denial of Calcor's motion for a protective order because the 12-page demand, which included six pages of instructions and definitions was burdensome in the extreme, was overly general and failed to demonstrate any reasonable relationship between the materials sought to be produced and the issues in the case (*53 Cal. App. 4th 216, 218-219)* . The court observed that in ruling on discovery motions, trial judges must carefully weight the cost, time, expense, and disruption of normal business resulting from an order compelling the discovery against the probative value of the material which might be disclosed (*53 Cal. App. 4th 216, 223)* .

[e] Protection Against Nonlitigation Use of Discovered Information

In ***Seattle Times Co. v. Rhinehart*** *(1984) 467 U.S. 20, 104 S. Ct. 2199, 81 L. Ed. 2d 17* , plaintiffs, a spiritual leader, his religious group, and individual members of the group, brought an action in a Washington state court, alleging that defendant had published several defamatory articles concerning plaintiffs. To prepare against allegations that the articles had resulted in diminished donations and membership, defendant sought discovery of donor and membership lists and amounts of donations. Plaintiffs resisted a motion by defendant to compel discovery of this information and also sought a protective order barring defendant from disseminating any discovered information. Plaintiffs declared that defendant had expressed intent to continue publishing articles about plaintiffs, including information gained through discovery. The trial court granted defendant's motion to compel discovery and denied plaintiffs' motion for a protective order. Plaintiffs sought reconsideration of their motion, describing incidents of harassment and declaring that public release of donor and membership lists would adversely affect membership and income of the religious group, and would subject members to further harassment and reprisals. Based on this showing of good cause, the trial court issued a protective order covering discovered matter that pertained to the financial affairs of plaintiffs and to the identity of the religious group's members and donors. The order expressly did not cover any information gained by means other than discovery. The order prohibited defendant from publishing, disseminating, or using the covered matter in any way except as necessary to prepare for and to try the case. The state supreme court upheld both orders on separate appeals by the parties. Defendant petitioned the United States Supreme Court for a writ of certiorari, arguing that the protective order infringed its right of freedom of speech guaranteed by the *U.S. Const., amend. I.*

The Court granted certiorari to resolve a conflict between the federal courts of appeals, and affirmed the judgment. The Court stated that the critical question was whether a litigant's freedom of speech includes the right to disseminate information obtained under a court order that both granted access to that information and placed restraints on the way in which the information might be used. The applicable test is whether the practice in question furthers an important governmental interest unrelated to the suppression of speech, and whether the restraint on *First Amendment* freedoms is no greater than that necessary to protect that governmental interest. Applying this test, the Court first determined that judicial restraint on a litigant's ability to disseminate discovered information implicates *First Amendment* rights to a far

lesser degree than restraints on dissemination of information in other contexts. There is no *First Amendment* right of access to information that is made available pursuant to state statutes only for purposes of litigating an action. Moreover, restraint on discovered, but not yet admitted, information does not restrict a traditionally public source of information, because discovery proceedings are not a public component of a civil trial and are generally conducted in private. Finally, an order prohibiting dissemination of discovered information before trial is not a classic type of prior restraint that requires exacting *First Amendment* scrutiny, because it does not prevent dissemination of the same information gained through means independent of the court's processes. The Court then determined that the discovery rule in question, modeled on *Fed. R. Civ. P., Rule 26(c)*, furthers a substantial governmental interest unrelated to the suppression of speech. Because the rule permits liberal discovery solely for litigation purposes, there is a significant potential for abuse, including that which seriously implicates privacy interests of litigants and third parties. The prevention of abuse that can attend compulsory production of information is sufficient to justify a rule that gives the trial court broad discretion to fashion protective orders (*467 U.S. 20, 34-35)* . The Court therefore held that, when, as in this case, a protective order is entered on a showing of good cause as required under *Fed. R. Civ. P., Rule 26(c)*, is limited to the context of pretrial discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the *First Amendment* (*467 U.S. 20, 32-34, 37)* .

Note that the showing of good cause required under *Fed. R. Civ. P. 26(c)(1)* is substantially similar to that required under *Code Civ. Proc. § 2031.060*.

Coalition Against Police Abuse v. Superior Court *(1985) 170 Cal. App. 3d 888, 216 Cal. Rptr. 614* involved actions by plaintiffs against a city challenging certain practices of the city's police department. The parties reached a settlement agreement after extensive discovery but before trial, and a consent judgment was filed accordingly. Plaintiffs retained numerous documents that they had obtained through discovery, many of which had been produced subject to protective orders that limited their copying, use, and dissemination. Defendant sought and obtained an order that required the return of all documents subject to the protective orders, and gave plaintiffs limited access to the documents pursuant to court order. Plaintiffs petitioned for a writ of mandate directing the trial court to vacate this order, arguing among other things that it violated their freedom of speech under *U.S. Const., amend. I* and *Cal. Const., art. I, § 2(a)*.

The court of appeal granted the writ, directing modification of the return order in some respects, but otherwise denying relief (*170 Cal. App. 3d 888* , 906). The court first noted that the protective orders, subject to which the documents in issue had been discovered, had been entered on a showing of good cause and did not prohibit dissemination of information received from sources other than the discovered documents (*170 Cal. App. 3d 888, 896)* . Citing the reasoning and holding in *Seattle Times Co. v. Rhinehart (1984) 467 U.S. 20, 104 S. Ct. 2199, 81 L. Ed. 2d 17* , the court held that these protective orders, and, in turn, the return order, did not offend the *First Amendment* (*170 Cal. App. 3d 888, 900-901)* . In addition, the court found no abuse of discretion in fashioning the return order. The court did, however, hold that the return order was not valid to the extent that it prevented dissemination of documents that had already been released to the public, either pursuant to the terms of the protective orders or by defendant's consent (*170 Cal. App. 3d 888, 902-904)* . The court therefore directed the trial court to modify its order in this respect (*170 Cal. App. 3d 888, 906)* .

[4] Additional Authorities

[a] Power of Court to Issue Protective Order

The facts and procedural background of *Stadish v. Superior Court (1999) 71 Cal. App. 4th 1130, 1145, 84 Cal. Rptr. 2d 350* are discussed in [3][b], *above*. The *Stadish* court held that, when determining good cause for a protective order under former Code Civ. Proc. § 2031(e)(5) [*now see Code Civ. Proc. § 2031.060(b)(5)*] setting conditions for disclosure of a trade secret, a trial court should refer to the procedures for a protective order set out in *Evid. Code § 1061*. These detailed procedures, although applicable to the disclosure of trade secrets in a criminal proceeding, have a utility in a civil action and should be followed (*71 Cal. App. 4th 1130, 1145)* . For discussion of *Evid. Code § 1061*, see

California Forms of Pleading and Practice, Ch. 191, *Discovery: Privileges and Other Discovery Limitations* (Matthew Bender).

[b] Types of Protective Order

In *Raymond Handling Concepts Corp. v. Superior Court (1995) 39 Cal. App. 4th 584, 45 Cal. Rptr. 2d 885* , plaintiff was injured while operating a forklift manufactured by defendants. The superior court issued a protective order providing that certain discovery produced by defendants (1) may be designated by defendants as confidential or a trade secret, (2) may be used by plaintiffs solely for the purposes of this litigation, and (3) may be disclosed by plaintiff's counsel to counsel in other pending similar litigation; however, the other counsel must execute a stipulation agreeing to be bound the protective order, and plaintiff's counsel must notify defense counsel when the disclosure is made. The defendants challenged the protective order in a mandamus proceeding.

The court of appeal denied the petition and held that the court did not abuse its discretion in entering the protective order. The court said that the issuance of protective orders is largely discretionary (*39 Cal. App. 4th 584, 588)* . The court held that by disclosing the information in this case and seeking a protective order, defendants have conceded that the information was discoverable in this case. Because plaintiff's attorney may share the discovery only with counsel in other similar cases, the information is assumed discoverable in those cases as well. The court also said that the order's requirement that plaintiff's counsel notify defense counsel when disclosure is made affords defense counsel an opportunity to argue that the cases are not similar enough to warrant discovery (*39 Cal. App. 4th 584, 590)* .

California Points & Authorities

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 85 DISCOVERY: PRODUCTION OR INSPECTION OF TANGIBLE EVIDENCE
PART II. FORMS
B. Motion for Protective Order in Matters Relating to Inspection, Copying, Testing, or Sampling

8-85 California Points & Authorities §§ 85.51-85.59

[Reserved]

§§ 85.51[Reserved]

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 85 DISCOVERY: PRODUCTION OR INSPECTION OF TANGIBLE EVIDENCE
PART II. FORMS
B. Motion for Protective Order in Matters Relating to Inspection, Copying, Testing, or Sampling

8-85 California Points & Authorities § 85.60

§ 85.60 Opposing Motion for Protective Order Concerning Demand for Production, Inspection, Copying, Testing, or Sampling of Documents, Tangible Things, Land or Other Property, or Electronically Stored Information [Code Civ. Proc. § 2031.060]

[1] FORM Opposing Motion for Protective Order Concerning Demand for Production, Inspection, Copying, Testing, or Sampling of Documents, Tangible Things, Land or Other Property, or Electronically Stored Information [Code Civ. Proc. § 2031.060]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN OPPOSITION TO MOTION
vs.	)	FOR PROTECTIVE ORDER RE DEMAND FOR
_____ [*name*],	)	_____ [INSPECTION *and/or*
Defendant.	)	COPYING *and/or* TESTING *and/or* SAMPLING
	)	*and/or* ENTRY ON PROPERTY] AND FOR MON-
	)	ETARY SANCTION
	)	Date: _____
	)	Time: _____
		Location: _____
		[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD DENY THE MOTION FOR A PROTECTIVE ORDER BECAUSE GOOD CAUSE HAS NOT BEEN SHOWN AND THE ORDER IS NOT REQUIRED BY JUSTICE TO PROTECT THE MOVING

_____ [PARTY *or* PERSON *or* ORGANIZATION] FROM UNWARRANTED ANNOYANCE, EMBARRASSMENT, OPPRESSION, or UNDUE BURDEN AND EXPENSE.

A. Order Only to Protect and Only as Justice Requires. The court may make an order under *Code of Civil Procedure Section 2031.060* only to protect _____ [a party *or* affected person] from unwarranted annoyance, embarrassment, or oppression, or undue burden or expense, and only as justice requires (*Code Civ. Proc. § 2031.060(b)*).

B. Order Only on Showing of Good Cause. The court may make an order under *Code of Civil Procedure Section 2031.060* to protect [a party *or* other person] from unwarranted annoyance, embarrassment, or oppression, or undue burden or expense, only on a showing of good cause (*Code Civ. Proc. § 2031.060(b)*).

[*If party or affected person opposes a motion for a protective order regarding production, inspection, copying, testing, or sampling of electronically stored information, add:*]

[*EITHER*]

C. Party [or Affected Person] Seeking Protective Order on Basis That Electronically Stored Information Is Not Reasonably Accessible Because of Undue Burden [and/or Expense] Has Burden of Making That Showing. A party or affected person who seeks a protective order regarding the production, inspection, copying, testing, or sampling of electronically stored information on the basis that the information is from a source that is not reasonably accessible because of undue burden or expense bears the burden of demonstrating that the information is from a source that is not reasonably accessible because of undue burden or expense (*Code Civ. Proc. § 2031.060(c)*).

[*AND/OR*]

D. Court May Order Discovery of Electronically Stored Information Even if Party Moving for Protective Order Shows That Information Is Not Reasonably Accessible Because of Undue Burden [and/or Expense]. If the demanding party shows good cause, the court may order production of electronically stored information from a source that is not readily accessible (*Code Civ. Proc. § 2031.060(d)*).

[*CONTINUE*]

[*Optional*] **E. Motion Must Be Accompanied by Declaration.** A motion for a protective order under *Code Civ. Proc. § 2031.060* made by _____ [a party to whom a demand for inspection, copying, testing, or sampling has been directed *or* a party *or* an affected person *or* an affected organization] must be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion (*Code Civ. Proc. § 2031.060(a)*).

[*Optional*] **F. Motion Must Be Made Promptly.** A motion for a protective order in response to a demand for inspection, copying, testing, or sampling must be made promptly after receipt of the demand (*Code Civ. Proc. § 2031.060(a)*).

[*Optional*] **G. Discovery May Be Permitted on Just Terms and Conditions Without Protective Order.** The court may deny a motion for a protective order under *Code Civ. Proc. § 2031.060* in whole or in part, and in doing so order that the party to whom the demand was directed provide or permit the discovery against which protection was sought on those terms and conditions that are just (*Code Civ. Proc. § 2031.060(g)*).

[*Optional*] **H. Matter Is Discoverable If Not Privileged and if Relevant to Subject Matter.** [*See § 85.11[1], Paragraph B.*]

[*Optional*] **I. Inconvenience No Bar to Production and Inspection.** [*See § 85.11[1], Paragraph C.*]

[*Optional*] **J. Photographing of Face and Body.** [*See § 85.11[1], Paragraph D.*]

[*Optional*] **K. Transporting of Records to Allow for Inspection.** Although ordinarily inspection, copying, testing, or sampling should take place at the place where the documents or records are kept by the party in possession, it is nevertheless proper to require the records to be moved from one place within the state to another for the purpose of allowing inspection, copying, testing, or sampling (*see Transbay Constr. Co. v. Superior Court (1936) 12 Cal. App. 2d 565, 568-569, 55 P.2d 1237*).

L. Court Must Impose Monetary Sanction Absent Specified Findings. The court must impose a monetary sanction under *Code Civ. Proc. § 2023.030* against any party, person, or attorney who unsuccessfully makes a motion for a protective order, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust (*Code Civ. Proc. §§ 2023.030(a)*, 2031.060(h)).

[*Add opposing memoranda for each particular type of protective order sought. When appropriate, include specific memoranda opposing objections, privileges, or other grounds that the moving party argued constituted "good cause." Add memoranda generally supporting the imposition of monetary sanctions (see, e.g., Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11).*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum is for use in opposing a motion for a protective order concerning a demand for inspection, copying, testing, or sampling [*see Code Civ. Proc. § 2031.060*].

This form should be combined with general memoranda supporting the imposition of monetary sanctions under *Code Civ. Proc. § 2023.030(a)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11*].

Note that some cases cited in this form construe law in effect before the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that they remain consistent with current provisions [*see also § 85.02[3]*].

For a memorandum in support of a motion specifically opposing a protective order in the context of e-discovery, see Ch. 85A, *Discovery : E-Discovery* § 85A.41. For a discussion of e-discovery generally, see Ch. 85A, *Discovery :*

E-Discovery.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel might state facts showing that under the terms of the demand, no person or organization would suffer unwarranted annoyance, embarrassment, or oppression, or undue burden and expense; that no good cause has been shown for a protective order; or that the protective order being sought is not required by justice. If the party seeking a protective order is seeking monetary sanctions, such facts should help show that the demanding party had substantial justification for his or her actions, or that a monetary sanction against the demanding party would be unjust. However, counsel need not set forth facts showing that the moving party acted without substantial justification [*cf.* former Code Civ. Proc. § 2034(a)]. *Code Civ. Proc. §§ 2023.030(a)* and 2031.060(h) effectively place that burden on the person against whom the sanction is to be imposed, by requiring the court to impose a monetary sanction when it is expressly authorized *unless* it finds that there was substantial justification or that other circumstances would make the monetary sanction unjust.

Note, however, that despite *Code Civ. Proc. § 2031.060(h)*, absent exceptional circumstances, the court may not impose sanctions on a party or any attorney of a party for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as the result of the routine, good faith operation of an electronic information system [*Code Civ. Proc. § 2031.060(i)(1)*].

[c] Related Pleading and Practice Forms

For forms and discussion related to obtaining a protective order concerning a demand for inspection, copying, testing, or sampling pursuant to Code Civ. Proc. § 2031.060, see California Forms of Pleading and Practice, Ch. 195, *Discovery: Inspection of Tangible Evidence* (Matthew Bender). For additional discussion of the discovery of electronically stored information in California, see Ch. 85A, *Discovery : E-Discovery*; see also California Forms Of Pleading And Practice, Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)* (Matthew Bender). For detailed discussion, forms, checklists, and practice tips relating to e-discovery, see Matthew Bender(R) Practice Guide: California E-Discovery And Evidence.

[3] Discussion of Authorities

[a] Transporting of Records to Allow for Inspection

Transbay Constr. Co. v. Superior Court *(1936) 12 Cal. App. 2d 565, 55 P.2d 1237* arose out of an action to recover wages earned for work on the substructure of the Oakland-San Francisco Bay Bridge. On plaintiff's motion, made under former Code Civ. Proc. § 1000 (*now see Code Civ. Proc. § 2031.010 et seq.*), the trial court ordered inspection in San Francisco of records that were kept at Hetch Hetchy. Defendant was adjudged in contempt when it refused to permit inspection within the City and County of San Francisco; it then petitioned the court of appeal for a writ of review.

The court of appeal affirmed the trial court order, holding that records may properly be transported from one place within the state to another for the purpose of allowing inspection (*12 Cal. App. 2d 565, 568)* , although ordinarily an inspection made under former Code Civ. Proc. § 1000 should be made at the place where the documents or records are kept by the party in possession (*12 Cal. App. 2d 565, 569)* .

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B. Motion for Protective Order in Matters Relating to Inspection, Copying, Testing, or Sampling

8-85 California Points & Authorities §§ 85.61-85.69

[Reserved]

§§ 85.61[Reserved]

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8-85 California Points & Authorities § 85.70

§ 85.70 Supporting Motion for Relief From Waiver of Objection to Demand for Inspection, Copying, Testing, or Sampling of Documents, Tangible Things, Land or Other Property, or Electronically Stored Information [Code Civ. Proc. § 2031.300]

[1] FORM Opposing Motion for Protective Order Concerning Demand for Production, Inspection, Copying, Testing, or Sampling of Documents, Tangible Things, Land or Other Property, or Electronically Stored Information [Code Civ. Proc. § 2031.060]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION FOR
vs.	)	ORDER OF RELIEF FROM WAIVER OF OBJEC-
_____ [*name*],	)	TION TO DEMAND FOR _____
Defendant.	)	[INSPECTION *and/or* COPYING *and/or* TESTING
	)	*and/or* SAMPLING *and/or* ENTRY ON PROP-
	)	ERTY]
	)	Date: _____
	)	Time: _____
		Location: _____
		[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD RELIEVE _____ [*specify moving party, e.g.,* DEFENDANT] FROM HIS/HER/ITS WAIVER OF OBJECTIONS TO _____ [*specify demands, e.g.,* PLAINTIFF'S FIRST

SET OF DEMANDS] FOR _____ [INSPECTION *and/or* COPYING *and/or* TESTING *and/or* SAMPLING] OF _____ [DOCUMENTS*and/or* TANGIBLE THINGS *and/or* LAND OR OTHER PROPERTY *and/or* ELECTRONICALLY STORED INFORMATION], BECAUSE THE FAILURE TO SERVE A TIMELY RESPONSE WAS DUE TO _____ [MISTAKE *and/or* INADVERTANCE *and/or* EXCUSABLE NEGLECT], AND BECAUSE _____ [*specify moving party, e.g.,* DEFENDANT] HAS SUBSEQUENTLY SERVED A PROPER RESPONSE.

A. Court May Order Relief From Waiver. When a party fails to serve a timely response to a demand for inspection, copying, testing, or sampling under *Code of Civil Procedure Section 2031.260* as the result of mistake, inadvertence, or excusable neglect, and that party subsequently serves a response that is in substantial compliance with *Code of Civil Procedure Sections 2031.210-2031.240* and *2031.280*, the court on motion may relieve that party from any waiver of objections to the demand (*Code Civ. Proc. § 2031.300(a)*).

[*Optional*] **B. Relief May Be From Waiver of Privilege.** The waiver from which the party may be relieved under *Code of Civil Procedure Section 2031.300* includes that based on privilege (*Code Civ. Proc. § 2031.300(a)*).

[*Optional*] **C. Relief May Be From Waiver of Work Product Protection.** The waiver from which the party may be relieved under *Code of Civil Procedure Section 2031.300* includes that based on the protection for work product under *Code of Civil Procedure Section 2018.010 et seq.* (*Code Civ. Proc. § 2031.300(a)*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum is for use in support of a motion by a party for relief from waiver of objection to a demand for inspection, copying, testing, or sampling because of failure to serve a timely response to it [*see Code Civ. Proc. § 2031.300*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should set forth facts showing mistake, inadvertence, or excusable neglect, and showing that the party's response that was subsequently served was in substantial compliance with *Code Civ. Proc. §§ 2031.210-2031.240* and *2031.280*.

[c] Related Pleading and Practice Forms

For forms and discussion related to waiver of objection to a demand for inspection, copying, testing, or sampling, see California Forms of Pleading and Practice, Ch. 195, *Discovery: Inspection of Tangible Evidence* (Matthew Bender). For a detailed discussion of discovery of electronically stored evidence (e-discovery), see Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)*; see also Matthew Bender(R) Practice Guide: California E-Discovery and Evidence.

[d] Related Points and Authorities

For memoranda relating to specific grounds of evidentiary privilege or other protection from discovery, see generally Ch. 81, *Discovery: Privileges and Other Discovery Limitations* .

For a memorandum supporting relief from a default judgment under *Code Civ. Proc. § 473*, that may provide some examples of situations when relief may be appropriate under *Code Civ. Proc. § 2031.300(a)* (excluding relief on the ground of surprise), see Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders* .

[e] Opposing Points and Authorities

In an appropriate case, the memorandum *set out in § 85.80* may be used to oppose the motion supported by this memorandum.

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8-85 California Points & Authorities §§ 85.71-85.79

[Reserved]

§§ 85.71[Reserved]

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8-85 California Points & Authorities § 85.80

§ 85.80 Opposing Motion for Relief From Waiver of Objection to Demand for Inspection, Copying, Testing, or Sampling of Documents, Tangible Things, Land or Other Property, or Electronically Stored Information [Code Civ. Proc. § 2031.300]

[1] FORM Opposing Motion for Relief From Waiver of Objection to Demand for Inspection, Copying, Testing, or Sampling of Documents, Tangible Things, Land or Other Property, or Electronically Stored Information [Code Civ. Proc. § 2031.300]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN OPPOSITION TO MOTION
vs.	)	FOR ORDER OF RELIEF FROM WAIVER OF OB-
_____ [*name*],	)	JECTION TO DEMAND FOR
Defendant.	)	_____ [INSPECTION *and/or*
	)	COPYING *and/or* TESTING *and/or* SAMPLING
	)	*and/or* ENTRY ON PROPERTY]
	)	Date: _____
	)	Time: _____
		Location: _____
		[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD NOT RELIEVE _____ [*specify moving party, e.g.,* DEFENDANT] FROM HIS/HER/ITS WAIVER OF OBJECTIONS TO _____ [*specify demands, e.g.,* PLAINTIFF'S FIRST

SET OF DEMANDS] FOR _____ [INSPECTION *and/or* COPYING *and/or* TESTING *and/or* SAMPLING] OF _____ [DOCUMENTS *and/or* TANGIBLE THINGS *and/or* LAND OR OTHER PROPERTY *and/or* ELECTRONICALLY STORED INFORMATION], BECAUSE THE FAILURE TO SERVE A TIMELY RESPONSE WAS DUE TO TACTICAL CHOICES RATHER THAN A MISTAKE OF LAW.

Waiver Resulting From Tactical Choice by Counsel Does Not Warrant Relief. A waiver that is the result of a tactical choice by counsel rather than a mistake of law does not warrant relief under *Code of Civil Procedure Section 2031.300*. For example, counsel's failure to assert the attorney-client privilege in reliance on the potential relief from an ultimately unsuccessful motion for a protective order was inexcusable neglect (*Scottsdale Ins. Co. v. Superior Court (1997) 59 Cal. App. 4th 263, 274-276, 69 Cal. Rptr. 2d 112*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum is for use in opposing a motion for relief from waiver of an objection to a demand for inspection, copying, testing, or sampling [*see Code Civ. Proc. § 2031.300*].

This form should be combined with general memoranda supporting the imposition of monetary sanctions under *Code Civ. Proc. § 2023.030(a)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11*].

This memorandum may be submitted in opposition to the motion supported by the memorandum in § 85.70.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[c] Related Pleading and Practice Forms

For forms and discussion relating to waiver of objection to a demand for inspection, copying, testing, or sampling, see California Forms of Pleading and Practice, Ch. 195, *Discovery: Inspection of Tangible Evidence* (Matthew Bender).

[3] Discussion of Authorities

[a] Waiver Resulting From Tactical Choice by Counsel Does Not Warrant Relief

In ***Scottsdale Ins. Co. v. Superior Court*** *(1997) 59 Cal. App. 4th 263, 69 Cal. Rptr. 2d 112* , an action for declaratory relief pertaining to insurance coverage for a landslide, plaintiff served an unverified response to defendant's demand for production of documents which contained several objections that the requests were overbroad, oppressive, and burdensome, as well as objections that the discovery fell within the scope of a requested protective order. Disagreeing with the asserted objections, and contending that under former Code of Civ. Proc. § 2031(f) (*now see Code Civ. Proc.*

§§ 2031.210-2031.240 and *2031.280*), all objections other than those asserted, were waived, defendant moved to compel production. After the trial court granted the motion, plaintiff brought an ex parte application for relief from waiver of its attorney-client privilege pursuant to former Code of Civ. Proc. § 2031(k) (*now see Code Civ. Proc. § 2031.300*).

The court of appeal denied the writ (*59 Cal. App. 4th 263, 276)* . Beginning with the issue of waiver, the court explained that failure to include an objection expressly based on a privilege in the initial response resulted in a waiver of that privilege. Thus, plaintiff's objection that the requests were overbroad, oppressive, and burdensome did not preserve the attorney-client privilege (*59 Cal. App. 4th 263, 272-274)* . The court said that former Code Civ. Proc. § 2031(k) provided the sole remedy for relief from the waiver of an objection. Plaintiff sought relief based on counsel's alleged mistake of law. The court disagreed with plaintiff's argument, characterizing the "mistake" as insufficient to qualify for relief. It said that plaintiff's counsel made tactical choices that did not yield the results he expected. To the extent that counsel's alleged mistake may have resulted from his negligence, it is not the type of negligence upon which relief can be granted. The court said this was not a mistake of law on a point that is debatable and unsettled. Rather, counsel ignored the clear requirement of former Code Civ. Proc. § 2031(f) that specific responses and objections must be made to each item listed in a request, and chose to file blanket objections. He justified this approach by relying on the potential relief plaintiff might receive from its motion for a protective order. There was no suggestion indicating counsel mistakenly interpreted former Code Civ. Proc. § 2031(k) and thus failed to assert the attorney-client privilege. Instead, the issue was not timely raised because plaintiff's attorney made no attempt to review the documents sought to be produced until after he served the response and after the court denied the motion for a protective order. It was only then that he discovered some of the documents fell within the attorney-client privilege. The court concluded that such neglect was inexcusable (*59 Cal. App. 4th 263, 274-276)* .

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8-85 California Points & Authorities §§ 85.81-85.89

[Reserved]

§§ 85.81[Reserved]

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8-85 California Points & Authorities § 85.90

§ 85.90 Supporting Contention That No Cause of Action Exists for Spoliation of Evidence--Availability of Discovery Sanctions and Other Litigation Remedies Preclude Cause of Action

[1] FORM Supporting Contention That No Cause of Action Exists for Spoliation of Evidence--Availability of Discovery Sanctions and Other Litigation Remedies Preclude Cause of Action

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE COURT SHOULD GRANT/SUSTAIN DEFENDANT'S _____ [DEMURRER *or* MOTION FOR SUMMARY JUDGMENT *or* MOTION TO STRIKE *or other as appropriate*] AS TO PLAINTIFF'S ACTION FOR INTENTIONAL SPOLIATION OF EVIDENCE, BECAUSE CALIFORNIA DOES NOT RECOGNIZE SUCH A TORT CAUSE OF ACTION WHEN LITIGATION REMEDIES SUCH AS A MOTION FOR DISCOVERY SANCTIONS ARE AVAILABLE.

A. No Cause of Action for First-Party Intentional Spoliation of Evidence. California does not recognize a tort of cause of action for intentional spoliation of evidence when the plaintiff knew or should have known of the loss or destruction of evidence during the course of the litigation to which that evidence was allegedly pertinent, and the action is against one who was/is a party to that same litigation. In this situation, the availability of litigation remedies, such as a motion for discovery sanctions, among other policy considerations, preclude the recognition of any such cause of action (*Cedars-Sinai Medical Center v. Superior Court (1998) 18 Cal. 4th 1, 17-18, 74 Cal. Rptr. 2d 248, 954 P.2d 511*).

[*AND/OR*]

B. No Cause of Action for Third-Party Spoliation of Evidence. California does not recognize a tort cause of action for intentional spoilation of evidence by a third party, that is, by a person not a party to the underlying litigation to which the spoliated evidence is related (*Temple Community Hospital v. Superior Court (1999) 20 Cal. 4th 464, 466, 84 Cal. Rptr. 2d 852, 976 P.2d 223*).

[*AND/OR*]

C. No Cause of Action for First-Party Negligent Spoliation of Evidence. There is no tort cause of action for negligent first party spoliation of evidence. The same policy considerations that weigh against providing a tort remedy for intentional spoliation of evidence, including the burden and costs to litigants, the judicial system, and others, also weigh against providing a tort remedy for negligent spoliation of evidence. Moreover, it would be anomalous to impose liability for negligence with respect to conduct that would not give rise to liability if committed intentionally. In this situation, the party claiming negligent spoliation may mitigate the effect of the missing evidence by demonstrating why it is missing or make use of available discovery sanctions (*Lueter v. State (2002) 94 Cal. App. 4th 1285, 1301, 115 Cal. Rptr. 2d 68* ; *Coprich v. Superior Court (2000) 80 Cal. App. 4th 1081, 1089-1090, 95 Cal. Rptr. 2d 884*).

[*AND/OR*]

D. No Cause of Action for Third-Party Negligent Spoliation of Evidence. There is no tort cause of action for negligent third-party spoliation of evidence, that is, by a person not a party to the underlying litigation to which the spoliated evidence is related (*Coprich v. Superior Court (2000) 80 Cal. App. 4th 1081, 1089-1090, 95 Cal. Rptr. 2d 884* ; *Farmers Ins. Exchange v. Superior Court (2000) 79 Cal. App. 4th 1400, 1407, 95 Cal. Rptr. 2d 51* ; *see* *Lueter v. State (2002) 94 Cal. App. 4th 1285, 1299 n.3, 115 Cal. Rptr. 2d 68*).

[*Optional*] **E. Contractual Duty to Preserve Evidence.** A cause of action for breach of a contractual duty to preserve evidence exists, only if based on [mutual agreement *or* promissory estoppel], and absent a showing that such a contract would be illegal, unconscionable, or otherwise unenforceable (*Coprich v. Superior Court (2000) 80 Cal. App. 4th 1081, 1091-1092, 95 Cal. Rptr. 2d 884*).

[*Optional*] **F. Statutory Duty to Preserve Evidence.** The fact that a public entity has a statutory duty to preserve evidence is not, by itself, enough to create tort liability for a violation of that duty. Instead, the plaintiff also must show the resulting injury would be actionable against a private person (*Forbes v. County of San Bernardino (2002) 101 Cal. App. 4th 48, 58-59, 123 Cal. Rptr. 2d 721* ; *Lueter v. State (2002) 94 Cal. App. 4th 1285, 1300, 115 Cal. Rptr. 2d 68*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of the contention that a plaintiff who is alleging intentional spoliation of evidence cannot maintain the cause of action because it is not a recognized tort in California when brought by one party to an action against another, and the plaintiff knew or should have known of the alleged loss or destruction of evidence during the litigation of the action between those actions.

This memorandum should be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue. For example, they may be used to support a general demurrer by defendant or a motion by defendant for summary judgment, judgment on the pleadings, order striking the cause of action, or other pretrial disposition of the cause of action. This memorandum may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

Any statement of fact should be supported by adequate reference to the pleading (or to matters subject to judicial notice), if the form is used in a memorandum supporting a demurrer or another challenge to the sufficiency of the pleading. Similarly, any statement of fact should be supported by adequate reference to evidence admitted or otherwise cognizable by the court, if the form is used in support of a motion challenging the adequacy of proof. For example, a memorandum supporting a motion for summary judgment may refer to affidavits or declarations based on personal knowledge or matters subject to judicial notice [*see Code Civ. Proc. §§ 2009, 2015.5* (affidavits and declarations); *Evid. Code § 450 et seq.* (judicial notice)]. For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Forms

For further discussion relating to spoliation of evidence, see California Forms of Pleading and Practice, Ch. 195, *Discovery: Inspection of Tangible Evidence* (Matthew Bender).

For detailed discussion of discovery of electronically stored evidence (e-discovery), see Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)*; see also Matthew Bender(R) Practice Guide: California E-Discovery And Evidence.

See also discussion and forms relating to the more common procedural contexts in which this form may be used, including, for example, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*, in California Forms of Pleading and Practice.

[d] Related Memoranda

For memoranda relating to the more common procedural contexts in this form may be used, see, for example, Ch. 71, *Demurrers and Motions for Judgment on the Pleadings*, and Ch. 221, *Summary Judgments*.

[3] Discussion of Authorities

[a] No Cause of Action for First-Party Intentional Spoliation of Evidence

In ***Cedars-Sinai Medical Center v. Superior Court*** *(1998) 18 Cal. 4th 1, 74 Cal. Rptr. 2d 248, 954 P.2d 511* , plaintiff, a child injured during birth, brought a medical malpractice action through his guardian ad litem against defendant hospital. During pretrial discovery, plaintiff's attorney sought from defendant hospital copies of plaintiff's medical records; defendant hospital was unable to locate certain records, including fetal monitoring strips recording plaintiff's heartbeat during labor.

Plaintiff's attorney then filed an amended complaint adding a cause of action for intentional spoliation of evidence and alleging that the hospital had intentionally destroyed the missing records to prevent plaintiff from prevailing in his malpractice action. The complaint sought punitive damages on the cause of action for intentional spoliation. Defendant moved to strike plaintiff's punitive damages claim on the ground that plaintiff had not complied with *Code Civ. Proc. § 425.13* (requiring that a plaintiff may not file a complaint seeking punitive damages in an action arising out of the professional negligence of a health care provider unless the court grants an order permitting the complaint to be filed), and the trial court granted the motion. Plaintiff then moved under *Code Civ. Proc. § 425.13* for leave to file a third amended complaint seeking punitive damages. The trial court granted plaintiff's motion. Defendant petitioned the court of appeal for a writ of mandate, and the court of appeal denied defendant's petition, holding that *Code Civ. Proc. § 425.13* did not apply to plaintiff's claim of intentional spoliation because the alleged spoliation did not occur while defendant hospital was rendering professional medical services to plaintiff.

The Supreme Court granted review to decide it should recognize a tort remedy for the intentional destruction or

suppression of evidence by a party to the underlying litigation and, if so, whether *Code Civ. Proc. § 425.13* applies to claims for punitive damages for acts of intentional spoliation by a health care provider. The Court reversed, and remanded with directions to the court of appeal to issue a writ directing the trial court to vacate its order granting plaintiff leave to file his amended complaint (*18 Cal. 4th 1, 18)* .

The Court did not reach the issue concerning *Code Civ. Proc. § 425.13*, because after considering the threshold issue, it concluded that there was no tort remedy in California for intentional spoliation of evidence by a party to the underlying cause of action to which the evidence is relevant (what the Court termed a "first party" spoliator) when, as in this case, the spoliation was or reasonably should have been discovered before the trial or other decision on the merits of the underlying cause of action (*18 Cal. 4th 1, 17-18)* .

The Court noted that intentional destruction of evidence should be condemned; that alone, however, was not sufficient policy reason for creating tort liability for the conduct. Three concerns stand out against imposing such liability: the conflict between a tort remedy for intentional first party spoliation and the policy against creating derivative tort remedies for litigation-related misconduct; the strength of existing nontort remedies for spoliation; and the uncertainty of the fact of harm in spoliation cases (*18 Cal. 4th 1, 8)* .

The Court discussed other situations in which courts refused to impose tort liability for litigation-related misconduct, such a perjury, and concluded that the reasoning underlying those decisions applied in this case as well. In those cases, the courts held that using tort law to correct misconduct arising during litigation raised policy considerations not present in deciding whether to create tort remedies for harms arising in other contexts. Courts favored remedying litigation-related misconduct by sanctions imposed within the underlying lawsuit rather than by creating new derivative torts, because to do otherwise would have led to repetitious, unending litigation, undermining the finality of judicial decisions (*18 Cal. 4th 1, 9-11)* .

The Court also concluded that tort liability was outweighed by the strong policy favoring use of nontort remedies to punish and correct litigation misconduct, and that such remedies already exist to punish and deter intentional spoliation of evidence. For example, an inference arises under Evid. Code. Code § 413, when one party has destroyed or rendered unavailable evidence, that the evidence was unfavorable to that party (*18 Cal. 4th 1, 11-12)* .

In addition, the provision for discovery sanctions under former Code Civ. Proc. § 2023 (*now see Code Civ. Proc. § 2023.030*) may be brought to bear for misuses of the discovery process that include "[f]ailing to respond or to submit to an authorized method of discovery." The Court held that destroying evidence in response to a discovery request after litigation has commenced would surely be a misuse of discovery within the meaning of former Code Civ. Proc. § 2023 (*now see Code Civ. Proc. § 2023.010*), as would such destruction in anticipation of a discovery request. The Court noted that sanctions under former Code Civ. Proc. § 2023 (*now see Code Civ. Proc. § 2023.030*) are potent, and a party, such as plaintiff in this case, may seek remedies under that section rather than seeking tort damages (*18 Cal. 4th 1, 12)* . Another remedy is State Bar disciplinary sanctions that can be imposed on attorneys who participate in the spoliation of evidence (*18 Cal. 4th 1, 12-13)* . Finally, *Penal Code § 135* creates criminal penalties for spoliation (*18 Cal. 4th 1, 13)* . The Court concluded that these nontort remedies for spoliation are both extensive and apparently effective, precluding a need for establishing tort liability (*18 Cal. 4th 1, 13)* .

The Court held finally that tort liability was not appropriate because of the inherent uncertainty of the fact of harm in spoliation cases, a factor which, by itself, can be sufficient refuse to impose tort liability (*18 Cal. 4th 1, 13-14)* .

The Court thus concluded that there is no tort remedy for the intentional spoliation of evidence by a party to the cause of action to which the spoliated evidence is relevant, in cases in which, as here, the spoliation victim knows or should have known of the alleged spoliation before the trial or other decision on the merits of the underlying action (*18 Cal. 4th 1, 17-18)* . The Court disapproved of *Willard v. Caterpillar, Inc. (1995) 40 Cal. App. 4th 892, 48 Cal. Rptr. 2d 607* and *Smith v. Superior Court (1984) 151 Cal. App. 3d 491, 198 Cal. Rptr. 829* , to the extent these decisions were

inconsistent (*18 Cal. 4th 1, 18 n.4*).

[b] No Cause of Action for Third-Party Spoliation of Evidence

In ***Temple Community Hospital v. Superior Court*** *(1999) 20 Cal. 4th 464, 466, 84 Cal. Rptr. 2d 852, 976 P.2d 223* , plaintiff was injured during a surgical procedure, when an electrocautery tool sparked and ignited the oxygen with which the anaesthesia was being delivered, burning plaintiff's face. Plaintiff sued the physicians and the hospital for medical malpractice, and the tool manufacturer for products liability.

Plaintiff alleged in the cause of action for intentional spoliation that defendant hospital knew of the existence of evidence such as the oxygen tank and mask, and the electrocautery tool used in the surgery, as well as related written records, knew that these items might constitute relevant evidence in potential litigation, knew of plaintiff's potential products liability claims, and knew that defendant hospital was engaging in acts likely to cause the loss or concealment of such evidence. Plaintiff also alleged that defendant hospital caused the loss or concealment of this potential evidence by failing to provide plaintiff with timely access to this evidence, despite numerous requests by counsel, and that it disposed of the oxygen tank that was the source of the explosion. The trial court subsequently granted summary judgment in favor of the tool manufacturer because there was no evidence the electrosurgical device was defective, and because the manufacturer had provided adequate warnings regarding the use of the device. After the trial court denied defendant hospital's motion to strike portions of the complaint, the hospital petitioned for a writ of mandate to compel the trial court to grant its motion to strike a claim for punitive damages in connection with plaintiff's spoliation claim (*20 Cal. 4th 464, 466-468)* . The Supreme Court granted review of the court of appeal's denial of hospital's petition (*20 Cal. 4th 464, 469)* .

The Court first noted that plaintiff's spoliation claim was a hybrid in that it accused defendant hospital of destroying evidence relevant both to a malpractice claim to which it was a party, as well as to a product liability claim to which it was not a party. To the extent it concerned the hospital as a first-party spoliator, the claim for intentional spoliation would not lie in light of the Court's recent decision in *Cedars-Sinai Medical Center v. Superior Court (1998) 18 Cal. 4th 1, 74 Cal. Rptr. 2d 248, 954 P.2d 511* , discussed in [a], *above* (*20 Cal. 4th 464, 469)* .

The Court then addressed the extent to which the claim would lie against the hospital as a third-party or nonparty spoliator. The Court held that no tort remedy should be available in such a case, in consideration of many of the factors that influenced it previous decision in *Cedars-Sinai*. The Court held that, in third party as well as with first party claims, there is too much potential for endless litigation derivative of the underlying cause of action, which would undermine the recognized need for "finality of adjudication." The Court expressed reluctance to provide disappointed litigants a second opportunity to seek the compensation they sought in the original lawsuit, even if they seek it against a party not involved in the original lawsuit, as well as reluctance to require courts to provide a forum for parties who seek to avoid the effect of a prior judgment by asserting that a collateral wrong improperly affected the verdict. The spoliation tort not only would provide the disappointed litigant a second opportunity to seek compensation, it would require retrial of the first case in order to permit the plaintiff to demonstrate in what respect the alleged spoliation altered the outcome of the first trial. Indeed, the matter might still continue, for spoliation in the second trial might give rise to yet a third lawsuit (*20 Cal. 4th 464, 472-473)* . Although these considerations apply primarily to actions brought after the conclusion of the underlying litigation, the Court noted that different problems would occur in the event the spoliation claim were to be tried concurrently with the underlying litigation. Such a claim would have to be alleged, as in the present case, before discovery had disclosed whether the allegedly spoliated evidence actually had been destroyed or whether its loss is significant. These circumstances would lead to the bringing of premature and meritless claims--a situation that in turn might lead to later derivative claims of malicious prosecution. Further, concurrent litigation of the claims would give rise to a "significant potential for jury confusion and inconsistency" (*20 Cal. 4th 464, 470-471)* .

To the extent that a real problem of intentional spoliation by third parties exists, the Court explained that it often will be the case that such spoliation will be exposed in the trial of the underlying action (*20 Cal. 4th 464, 474)* .

Moreover, the Court was reluctant to have courts provide compensation when it is so difficult to determine who has suffered the loss (*20 Cal. 4th 464, 474)* . The Court explained that without knowing the content and weight of the spoliated evidence, it would be impossible for the jury to meaningfully assess what role the missing evidence would have played in the determination of the underlying action. In addition, it may be difficult to identify whether the spoliation caused damage to the defendant or to the plaintiff in the underlying litigation, because when the spoliator is not acting on behalf of a party, both parties in the underlying litigation may be victimized by the destruction of evidence (*20 Cal. 4th 464, 474)* .

The Court recognized that the salient distinction between first-party and third-party spoliation of evidence is the disparity in sanctions available within the confines of the underlying litigation. The Court explained that if existing remedies appear limited in the context of third-party spoliation, that may well be because third-party spoliation has not appeared to be a significant problem in the courts (*20 Cal. 4th 464, 476)* . The Court noted, however, that the victim of third-party spoliation is not entirely helpless: Some discovery sanctions are available to punish third-party spoliation, including monetary and contempt sanctions against persons who flout the discovery process by suppressing or destroying evidence (citing former Code Civ. Proc. § 2020(h) (*now see Code Civ. Proc. § 2020.240*) (contempt sanction for disobeying deposition subpoena), former Code Civ. Proc. § 2023(b)(1) (*now see Code Civ. Proc. § 2023.030(a), (e)*) (monetary and contempt sanctions for misuse of discovery generally), former Code Civ. Proc. § 2025(j), (o) (*now see Code Civ. Proc. §§ 2025.450, 2025.480*) (contempt and monetary sanctions for disobeying order compelling response or production at deposition); *Brun v. Bailey (1994) 27 Cal. App. 4th 641, 658-659, 32 Cal. Rptr. 2d 624* (reference to "any person" in statute imposing discovery sanctions permits sanctions against nonparty); a criminal sanction remains available under *Penal Code § 135*; and disciplinary sanctions are available against attorneys who may be involved in spoliation (*20 Cal. 4th 464, 477)* . The victim of third-party spoliation also may deflect the impact of the spoliation on his or her case by demonstrating why the spoliated evidence is missing [*see Evid. Code § 412*] (*20 Cal. 4th 464, 477)* . It also may be possible to establish a connection between the spoliator and a party to the litigation sufficient to invoke the sanctions applicable to spoliation by a party [*see Code Civ. Proc. §§ 2025.450, 2025.480*] (*20 Cal. 4th 464, 477)* . The Court concluded that the distinction between the sanctions available to victims of first party and third-party spoliation did not justify employing the burdensome and inaccurate instrument of derivative tort litigation in the case of third-party spoliation (*20 Cal. 4th 464, 477)* .

Finally, the Court explained that it would be anomalous to impose liability--including potential punitive damages--on spoliators who are third parties to litigation, when such liability is not imposed on first party spoliators. In the present case, for example, it would be a strange outcome to hold that the hospital may not be held liable as a defendant in a tort action for destroying evidence relevant to plaintiff's medical malpractice claim against the hospital, but that it might be liable in punitive damages as a third party for the same act of destruction, because the evidence in question also was relevant to plaintiff's separate products liability claim against the equipment manufacturer (*20 Cal. 4th 464, 477-478)* .

The Court concluded that the benefits of recognizing a tort cause of action, in order to deter third-party spoliation of evidence and compensate victims of such misconduct, are outweighed by the burden to litigants, witnesses, and the judicial system that would be imposed by potentially endless litigation over a speculative loss, and by the cost to society of promoting onerous record and evidence retention policies (*20 Cal. 4th 464, 478)* .

Although the issue of the existence of a cause of action for negligent spoliation was not presented in *Cedars-Sinai* and *Temple*, the reasons on which the Supreme Court relied to deny liability for intentional spoliation, particularly the policy against imposing tort liability in cases in which there is such inherent uncertainty with respect to causation and damages, arguably apply to preclude negligent spoliation. Subsequent decisions addressing this issue are discussed in [c] and [d], *below*.

[c] No Cause of Action for First-Party Negligent Spoliation of Evidence

Lueter v. State *(2002) 94 Cal. App. 4th 1285, 115 Cal. Rptr. 2d 68* arose from a chain reaction collision after a left front tire on an oil tanker blew out, and driver lost control. The driver and the owner of the tanker wanted the tread as evidence for a lawsuit filed against them by motorists who were injured as a result of the crash. However, the piece of tread had been taken from the scene of the crash, and later discarded, by employees of the law enforcement agency that investigated the accident. The driver and the owner of the tanker, plaintiffs in this case, sued the investigating agency and some of its employees for discarding the evidence. A jury awarded plaintiffs damages of $195,264.85 for negligent spoliation of the evidence and $1.50 for its conversion. Defendants appealed, arguing that the California Supreme Court's rationale in precluding tort causes of action for intentional spoliation of evidence must be extended to preclude a tort cause of action for negligent spoliation of evidence, citing *Temple Community Hospital v. Superior Court (1999) 20 Cal. 4th 464, 84 Cal. Rptr. 2d 852, 976 P.2d 223* (discussed in [b], *above*) and *Cedars-Sinai Medical Center v. Superior Court (1998) 18 Cal. 4th 1,74 Cal. Rptr. 2d 248, 954 P.2d 511* (discussed in [a], *above*). Having prevailed at trial on a tort claim of negligent spoliation, plaintiffs responded by asserting that "negligent spoliation is alive and well in the Third [Appellate] District," citing *Johnson v. United Services Automobile Assn. (1998) 67 Cal. App. 4th 626, 79 Cal. Rptr. 2d 234* . (recognizing a limited cause of action for negligent spoliation of evidence). The appellate court's "short answer" was "not any more" (*94 Cal. App. 4th 1285, 1288)* .

The court of appeal noted that although the Supreme Court did not address the issue of negligent spoliation in either *Cedars-Sinai* and *Temple Community*, other courts of appeal have. Prior to *Temple Community*, this court, in *Johnson v. United Services Automobile Assn.*, recognized "a limited cause of action for negligent spoliation of evidence by a third-party spoliator," based on a special relationship that arises out of such things as an undertaking to preserve the evidence, an agreement to preserve the evidence, a specific request to preserve the evidence, or a relationship based on contract, statute, or regulation (*94 Cal. App. 4th 1285, 1295)* . The Fourth Appellate District disagreed with *Johnson's* holding in *Farmers Ins. Exchange v. Superior Court (2000) 79 Cal. App. 4th 1400, 95 Cal. Rptr. 2d 51* (discussed in detail in [d], *below*). Considering the policy factors identified in *Temple Community*, the *Farmers Ins. Exchange* court concluded that the fact the tort "is for negligent rather [than] intentional spoliation carries no significant weight in the balancing process," and "declined to recognize a tort for negligent third-party spoliation of evidence" (*94 Cal. App. 4th 1285, 1295)* . Similarly, the *Second Appellate District in Coprich v. Superior Court (2000) 80 Cal. App. 4th 1081, 95 Cal. Rptr. 2d 884* (discussed in detail *below*) concluded that the policy considerations concerning intentional spoliation identified in *Cedars-Sinai* and *Temple Community* apply equally to negligent spoliation (*94 Cal. App. 4th 1285, 1295)* .

This court agree with the results in *Farmers Ins. Exchange* and *Coprich*, finding that the circumstances of this case "amply demonstrated" that the factors identified by the Supreme Court in *Temple Community*, in rejecting a tort of intentional third-party spoliation, militated against the recognition of a tort of negligent spoliation of evidence (*94 Cal. App. 4th 1285, 1295)* .

The appellate court explained that it would anomalous to impose tort liability upon a negligent spoliator whose conduct is not nearly so egregious as that of an intentional spoliator (*94 Cal. App. 4th 1285, 1295-1296)* . Further, recognizing a negligent spoliation cause of action would provide a loophole that effectively could swallow the holdings of *Cedars-Sinai* and *Temple Community*, because most types of conduct that could be called intentional also can be rephrased in terms of negligence (*94 Cal. App. 4th 1285, 1296)* . Moreover, the burden of increased litigation of meritless claims, unnecessary and expensive evidence retention policies, and the uncertainty of the fact of harm and causation also militated against recognizing a tort of negligent spoliation. The court acknowledged that a special-relationship limitation on a tort of negligent spoliation, as espoused in *Johnson v. United Services Automobile Assn.*, might tend to restrain the "endless spiral of lawsuits" that *Temple Community* feared, but the appellate court found the amorphous requirement of a "special relationship" insufficient to overcome those concerns (*94 Cal. App. 4th 1285, 1296-1297)* .

For the reasons stated above, the court of appeal refused to recognize the tort of negligent spoliation of evidence against a private party. The court accordingly rejected plaintiffs' argument that defendant California Highway Patrol, as a state

agency that "prevented [them] from taking [their] own tire tread from the accident scene" had a duty to preserve the evidence. The court found that absent a statute specifically imposing liability, a public entity and its employees are not liable for causes of action in tort that could not be pursued against a private party. Thus, any liability for spoliation against a public entity and its employees would have to be created statutorily rather than judicially (*94 Cal. App. 4th 1285, 1300)* .

In ***Coprich v. Superior Court*** *(2000) 80 Cal. App. 4th 1081, 95 Cal. Rptr. 2d 884* , plaintiffs sued defendants for injuries sustained in an automobile accident. Plaintiffs asserted, among other things, a cause of action for negligent spoliation of evidence against defendant insurance company and defendant automobile manufacturer, as a result of the destruction of the automobile involved in the accident. The trial court granted judgment on the pleadings in favor of defendants against the cause of action for negligent spoliation of evidence, and plaintiffs appealed. The court of appeal affirmed the trial court on that claim; however, the court directed the trial court to grant plaintiffs leave to amend their complaint to allege a cause of action for breach of a contractual duty to preserve evidence (*80 Cal. App. 4th 1081, 1083)* .

The court of appeal held that there is no tort remedy for negligent spoliation of evidence (*80 Cal. App. 4th 1081, 1085)* . The court noted that the issue of the existence of such a cause of action was not presented in *Cedar-Sinai Medical Center v. Superior Court (1998) 18 Cal. 4th 1, 74 Cal. Rptr. 2d 248, 954 P.2d 511* (discussed in [a], *above*) and *Temple Community Hospital v. Superior Court (1999) 20 Cal. 4th 464, 84 Cal. Rptr. 2d 852, 976 P.2d 223* (discussed in [b], *above*). The court concluded, however, that the policy considerations concerning intentional spoliation discussed by the Court in *Cedars-Sinai* and *Temple* apply equally to negligent spoliation (*80 Cal. App. 4th 1081, 1085)* .

The court explained that to recognize a cause of action for negligent spoliation would lead to potentially endless derivative litigation by parties to the underlying action against other parties and third parties. Such litigation is contrary to the policy against creating derivative tort remedies for litigation-related misconduct and favoring the resolution of a dispute in a single lawsuit (*80 Cal. App. 4th 1081, 1088)* . Moreover, the potential for jury confusion and inconsistent results would be great, whether the spoliation claim were tried in the same lawsuit as the underlying cause of action, or in another lawsuit (*80 Cal. App. 4th 1081, 1088-1089)* .

The court noted that the risk of meritless claims for negligent spoliation was particularly troublesome in light of the uncertainty concerning the nature of the missing evidence and its potential effect in the underlying litigation and the fact that documents and other evidence often are destroyed without fault in the ordinary course of events. Potential liability for negligent spoliation could cause individuals and entities to take extraordinary measures to retain documents and other things, at substantial costs (*80 Cal. App. 4th 1081, 1089)* .

The court concluded that although the nontort remedies available to a victim of negligent spoliation appear to be very limited, even more so than the remedies available to a victim of third-party intentional spoliation, that circumstance alone did not override the other policy considerations that weighed against providing a tort remedy for negligent spoliation (*80 Cal. App. 4th 1081, 1089)* .

Finally, the court recognized that it would be anomalous to impose liability for negligence with respect to conduct that would not give rise to liability if committed intentionally (*80 Cal. App. 4th 1081, 1089)* .

The court distinguished prior appellate court opinions, most of which predated *Cedars-Sinai* and *Temple Community*, that recognized a limited cause of action for negligent spoliation against a third party. Examples cited were *Johnson v. United Services Automobile Assn. (1998) 67 Cal. App. 4th 626, 79 Cal. Rptr. 2d 234* (negligent spoliation not precluded by *Cedars-Sinai*), *Velasco v. Commercial Bldg. Maintenance Co. (1985) 169 Cal. App. 3d 874, 876-877, 215 Cal. Rptr. 504* (assuming, without deciding, that negligent spoliation survives as tort cause of action and holding that janitorial service had no duty to preserve evidence), *Hernandez v. Garcetti (1998) 68 Cal. App. 4th 675, 680, 80 Cal. Rptr. 2d 443* (assuming, without deciding, that negligent spoliation survives as tort cause of action and holding that

government tort claim for negligent spoliation was untimely), *Galanek v. Wismar (1999) 68 Cal. App. 4th 1417, 1425, 81 Cal. Rptr. 2d 236* (legal malpractice claim based on negligent spoliation of evidence). The court declined to follow *Velasco* and the cases it cited because they did not adequately address the compelling policy considerations discussed in *Cedars-Sinai* and *Temple* (*80 Cal. App. 4th 1081, 1090-1091)* . The court also found inapposite cases, such as *Hernandez*, in which the court assumed without deciding that a cause of action for negligent spoliation exists, and those, such as *Galanek*, premised on the breach of a fiduciary duty (*80 Cal. App. 4th 1081, 1091)* . Finally, the court rejected the conclusions in the appellate court in *Johnson v. United Services Automobile Assn. (1998) 67 Cal. App. 4th 626, 631-632, 79 Cal. Rptr. 2d 234* , *overruled by* *Lueter v. State (2002) 94 Cal. App. 4th 1285, 115 Cal. Rptr. 2d 68* (discussed *above*), that the burdens and costs of a tort remedy for third-party spoliation did not justify precluding such a cause of action, as contrary to the California Supreme Court's decision in *Temple*, which emphasized the need for "finality of adjudication" in the third-party context, the uncertainty of the fact of harm and causation, the potential for arbitrary and inconsistent results, and other costs and burdens (*80 Cal. App. 4th 1081, 1091)* .

The court also concluded that the policy considerations that apply to negligent spoliation do not preclude a cause of action for breach of a contractual duty to preserve evidence, absent a showing that a contract to preserve evidence would be illegal, unconscionable, or otherwise unenforceable (*80 Cal. App. 4th 1081, 1091-1092)* .

[d] No Cause of Action for Third-Party Negligent Spoliation of Evidence

The facts and procedural background of ***Coprich v. Superior Court*** *(2000) 80 Cal. App. 4th 1081, 95 Cal. Rptr. 2d 884* are discussed in [c], *above*. The court concluded that the burdens and costs to litigants, the judicial system, and others if the courts were to allow a tort remedy for negligent spoliation of evidence would outweigh the limited benefits. The court therefore held that there is no tort remedy for first-party or third-party negligent spoliation of evidence (*80 Cal. App. 4th 1081, 1089-1090)* .

In ***Farmers Ins. Exchange v. Superior Court*** *(2000) 79 Cal. App. 4th 1400, 95 Cal. Rptr. 2d 51* , plaintiff, injured in a car accident, claimed that the accident was caused by a defective tire. Plaintiff sued her insurance company, alleging, among other things, that the company negligently lost or destroyed the tire. Petitioner insurance company moved for judgment on the pleadings, but respondent trial court denied the motion. The court of appeal issued a writ on mandate directing the trial court to set aside its order denying petitioner's motion and to enter a new order granting the motion (*79 Cal. App. 4th 1400, 1401)* .

The court declined to recognize a tort for negligent third-party spoliation of evidence. The court reasoned that the same policy considerations that led the California Supreme Court to refuse to recognize both first party and third-party intentional spoliation in *Cedar-Sinai Medical Center v. Superior Court (1998) 18 Cal. 4th 1, 74 Cal. Rptr. 2d 248, 954 P.2d 511* (discussed in [a], *above*) and in *Temple Community Hospital v. Superior Court (1999) 20 Cal. 4th 464, 84 Cal. Rptr. 2d 852, 976 P.2d 223* (discussed in [b], *above*) applied with equal force when the loss or destruction of evidence was the result of negligence (*79 Cal. App. 4th 1400, 1404)* . The court concluded that the benefits of recognizing a tort cause of action in order to deter third-party spoliation of evidence and to compensate spoliation victims was outweighed by the burden to litigants, witnesses, and the judicial system. These burdens include potentially endless litigation over a speculative loss, the significant potential for jury confusion and inconsistency as a result of trying a spoliation claim, either jointly with the underlying action or in a separate action, and the cost to society of promoting onerous record and evidence retention policies (*79 Cal. App. 4th 1400, 1406-1407)* . Finally, the court noted the absurdity of holding a party liable for negligent conduct when the same party could not be held liable if he or she acted intentionally (*79 Cal. App. 4th 1400, 1407)* .

The court added that plaintiff's attempt to distinguish her cause of action for negligent interference with prospective business advantage from negligent spoliation of evidence was unavailing. The cause of action for negligent interference with prospective business advantage was virtually identical to her claim of intentional spoliation of evidence, differing only in the allegation that her insurance company negligently, rather than intentionally, lost or destroyed the car and tire

(*79 Cal. App. 4th 1400, 1405-1407)* .

[e] Contractual Duty to Preserve Evidence

The facts and procedural background of ***Lueter v. State*** *(2002) 94 Cal. App. 4th 1285, 115 Cal. Rptr. 2d 68* are discussed in [c], *above*. Although this case was concerned solely with the question of a cause of action in tort, the court of appeal noted that "the decisional authorities do not foreclose an action in contract where the defendant is under a contractual obligation to preserve evidence" (*94 Cal. App. 4th 1285, 1299)* .

The facts and procedural background of ***Coprich v. Superior Court*** *(2000) 80 Cal. App. 4th 1081, 95 Cal. Rptr. 2d 884* are discussed in [c], *above*. The court's conclusion that there is not tort remedy for negligent spoliation did not preclude its finding the existence of a duty based on contract (*80 Cal. App. 4th 1081, 1091)* . The court explained that while the existence of a tort duty in certain circumstances depends on policy considerations, those policy considerations do not negate the existence of a contractual obligation created by mutual agreement or promissory estoppel. The court concluded that it could not negate a contractual obligation based on policy considerations other than on specific grounds such as illegality and unconscionability (*80 Cal. App. 4th 1081, 1092)* .

The court added that the potential uncertainty of the fact of harm and other difficulties as to proof were matters of proof, not pleading; therefore, they could not be decided at the pleading stage and did not preclude the existence of a cause of action based on a contractual duty (*80 Cal. App. 4th 1081, 1092)* .

[f] Statutory Duty to Preserve Evidence

Forbes v. County of San Bernardino *(2002) 101 Cal. App. 4th 48, 123 Cal. Rptr. 2d 721* was the second appeal arising from an underlying contractual dispute. The plaintiffs and defendants in the original civil action appealed the trial court's decision. The prior court of appeal vacated the judgment and granted a new trial, in accordance with *Code Civ. Proc. § 914*, because virtually all of the prior trial court transcripts were unavailable. In this consolidated action, the plaintiffs, who were adversaries in the original civil action, sued defendants, county and state, for intentional and negligent destruction of court records relating to the prior action and for denial of civil and constitutional rights.

The Fourth Appellate District panel held that plaintiffs had no tort cause of action against the county or the state for intentional or negligent destruction of trial records from the prior civil action. The court of appeal panel concluded that the statutory duty to preserve evidence is not enough by itself to warrant tort liability (*101 Cal. App. 4th 48, 57)* . In reaching its decision, the panel relied on the Supreme Court's decisions in *Cedars-Sinai* and *Temple Community*, as well as on *Coprich*, *Lueter*, and its own decision in *Farmers Ins.*, all of which establish "beyond reasonable dispute" that there is no tort cause of action against a litigant or third party for intentional or negligent destruction of evidence (*101 Cal. App. 4th 48, 57)* . The court rejected plaintiffs' argument that the spoliation cases were inapposite because they involved parties who, unlike defendants here, had no statutory duty to maintain records. Rather, under California law, the fact a public entity has a statutory duty to act or refrain from acting is not enough to create tort liability for a violation of that duty. Instead, the plaintiff also must show the resulting injury would be actionable against a private person. The spoliation cases established that the plaintiffs' alleged injuries for intentional destruction of court records and negligence did not meet that requirement (*101 Cal. App. 4th 48, 58)* . The *Lueter* decision (discussed in detail *below*) further supported the conclusion there should be no tort liability, notwithstanding a public entity's duty to preserve evidence. This court of appeal panel agreed with the *Lueter* court that the existence of a statutory duty is an inadequate basis for tort liability in the absence of a statute expressly creating that liability when the injury giving rise to the claim would not be actionable against a private party (*101 Cal. App. 4th 48, 58-59)* . Finally, this court observed that it would have reached the same conclusion based on the public policy considerations that led the Supreme Court to reject tort liability in *Cedars-Sinai* and *Temple Community* (*see* [a], [b], *above*). Most of those considerations applied fully to this case: potentially endless litigation, the existence of non-tort remedies (*Code Civ. Proc. § 914* and *Penal Code § 135*) to address the problem of destruction of records, and the impossibility of proving causation and damages (

101 Cal. App. 4th 48, 59) .

The facts and procedural background of ***Lueter v. State*** *(2002) 94 Cal. App. 4th 1285, 115 Cal. Rptr. 2d 68* are discussed in [c], *above*. The plaintiffs were sued when a tire on their tanker truck blew out and caused an accident. The plaintiffs alleged the California Highway Patrol (CHP) took a piece of the tire from the scene as potential evidence but later negligently threw it away, preventing the plaintiffs from proving the tire was defective. The appellate court held the plaintiffs could not assert a claim for negligent spoliation. The court reached this conclusion despite the plaintiffs' argument that the CHP, as a state agency, had a duty to preserve the evidence. The court noted that under *Gov. Code § 815.2(a)*, a public entity is liable for injury proximately caused by its employee if the employee would be liable. *Gov. Code 820(a)* also provides that a public employee "is liable for injury caused by his act or omission to the same extent as a private person." Consequently, "absent a statute specifically imposing liability, a public entity and its employees are not liable for causes of action in tort that could not be pursued against a private party" (*94 Cal. App. 4th 1285, 1300)* . Since the tort of negligent spoliation cannot be pursued against a private party, "it follows that any liability for spoliation against a public entity and its employees must be created statutorily rather than judicially" (*94 Cal. App. 4th 1285, 1300)* . The court of appeal further held that "in order to find a statutorily based cause of action for negligent spoliation, it is not enough to find that the public entity had a legal duty with respect to property. Even though a person may have a duty to preserve evidence, countervailing considerations dictate against an expansive, speculative tort of spoliation ... . Instead, a duty to preserve evidence should be addressed through other means, such as effective sanctions devised by the Legislature or by regulatory bodies ... . It follows that in order to establish a tort for spoliation of evidence, a statute must expressly impose a spoliation remedy" (*94 Cal. App. 4th 1285, 1300)* .

[4] Additional Authorities

[a] No Cause of Action for First-Party Intentional Spoliation of Evidence

In *Hassoldt v. Patrick Media Group, Inc. (2000) 84 Cal. App. 4th 153, 100 Cal. Rptr. 2d 662* , appellant, an outdoor advertising company was sued for tortiously trimming respondents' tree and destroying evidence. The jury awarded compensatory and punitive damages. The jury verdict form did not indicate the cause or causes of action that formed the basis of the compensatory damages award; the award of punitive damages related only to the spoliation claim. Appellants challenged the awards, based on the retroactive application of *Cedar-Sinai Medical Center v. Superior Court (1998) 18 Cal. 4th 1, 74 Cal. Rptr. 2d 248, 954 P.2d 511* (discussed in [3][a], *above*), which was decided after the trial in this case and while the appeal was pending (*84 Cal. App. 4th 153, 159)* . The court of appeal held that retroactive application of *Cedars-Sinai* mandated that the verdict be overturned (*84 Cal. App. 4th 153, 159)* . The court reasoned that respondents did not have a reasonable belief in the continued existence of a spoliation of evidence as a tort remedy, because the Supreme Court granted a hearing in *Cedars-Sinai* almost a year before this case went to trial. Moreover, retroactive application did not divest respondents of any property or contract right, or leave them without remedy (*84 Cal. App. 4th 153, 161)* . The court remanded the case for a new trial on the remaining causes of action for trespass, conversion, and negligence (*84 Cal. App. 4th 153, 162-163)* .

California Points & Authorities

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CHAPTER 85A DISCOVERY: E-DISCOVERY

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[b] Argument

[c] Related Forms and Discussion

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[e] Opposing Memoranda

§§ 85A.23-85A.29 [Reserved]

§ 85A.30 Opposing Motion for Order Compelling Response to Demand for Inspection, Copying, Testing or Sampling of Electronically Stored Information--Form(s) of Production [Code Civ. Proc. § 2031.280(c), (d)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Forms and Discussion

§ 85A.31 Opposing Motion for Order Compelling Further Response to Demand for Inspection, Copying, Testing or Sampling of Electronically Stored Information--Information Is Not From Source That Is Reasonably Accessible [Code Civ. Proc. § 2031.310(d)] and No Good Cause Exists for Production of Information [Code Civ. Proc. § 2031.310(e)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Cost-Shifting

[d] Limits on Extent or Frequency of Discovery

[e] Related Forms and Discussion

[f] Opposing Memoranda

§§ 85A.32-85A.39 [Reserved]

§ 85A.40 Supporting Motion for Protective Order Concerning Demand for Production, Inspection, Copying, Testing, or Sampling of Electronically Stored Information [Code Civ. Proc. § 2031.060]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Protection from Annoyance or Undue Burden

[d] Limits on Extent or Frequency of Discovery

[e] Related Forms and Discussion

[f] Opposing Memorandum

§ 85A.41 Opposing Motion for Protective Order Concerning Demand for Production, Inspection, Copying, Testing, or Sampling of Electronically Stored Information [Code Civ. Proc. § 2031.060]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Forms and Discussion

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§ 85A.01 Scope of Chapter

This chapter includes a discussion of, and memoranda relating to, the provisions of the Electronic Discovery Act [*Code Civ. Proc. §§ 1985.8, 2031.010-2031.510*].

Subpart IIA has memoranda supporting a motion to compel a response to a demand for the inspection, copying, testing, or sampling of electronically stored information [§ 85A.20 et seq.], as well as memoranda opposing those motions [§ 85A.30 et seq.].

Subpart IIB has memoranda supporting [§ 85A.40] and opposing [§ 85A.41] a motion for a protective order in the context of a demand for the production, inspection, copying, testing, or sampling of ESI.

This chapter is intended to be used in conjunction with Ch. 85, *Discovery: Production or Inspection of Tangible Evidence.* Chapter 85 contains general forms relating to production or inspection demands. Most of these forms are also usable in the e-discovery context, and some contain specific alternatives relevant to electronically stored information. Users of this publication should consult Chapter 85 for relevant forms that are not contained in this chapter.

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§ 85A.02 Governing Law

[1] California Civil Discovery Act and Related Law

Civil discovery in California is governed primarily by the California Civil Discovery Act, codified in *Code Civ. Proc. §§ 2016.010-2036.050*. Discovery in limited civil cases is further governed by *Code Civ. Proc. §§ 94* and *95*. Statewide rules of court relating to discovery papers and discovery motions are set out in *Cal. Rules of Ct., Rules 3.1000, 3.1345, 3.1346, 3.1347*, and *3.1348*.

[2] Provisions Governing Electronic Discovery

Discovery of electronically stored information under the Civil Discovery Act (*Code Civ. Proc. §§ 2016.010-2036.050*) is governed specifically by the Electronic Discovery Act [*Code Civ. Proc. §§ 1985.8, 2031.010-2031.510*], which became effective as an urgency measure on June 29, 2009 [*see* Stats. 2009, ch. 5]. Related provisions of the Civil Discovery Act include the provisions governing discovery generally, set out in *Code Civ. Proc. §§ 2016.010-2019.030, 2023.010-2023.040*. The Electronic Discovery Act is further discussed in *§§ 85A.03 -85A.11*.

The extent of discovery permitted under the Civil Discovery Act is restricted in limited civil cases by the economic litigation provisions of *Code Civ. Proc. §§ 94* and *95* [*see* California Forms of Pleading and Practice, Ch. 345A, *Limited Civil Cases* (Matthew Bender)]. The use of demands for the production or inspection of tangible evidence is limited specifically by *Code Civ. Proc. § 94(a)*.

"Meet and confer" requirements regarding discovery of electronically stored information are set out in *California Rules of Court, Rules 3.724(8)* [*see § 85A.05*]. Statewide rule provisions relating to the format, content, and service of discovery papers and motions, and to discovery sanctions, are contained in *Cal. Rules of Ct., Rules 3.1000, 3.1020, 3.1025*, and *3.1030*.

[3] Cases Decided Under Prior Discovery Acts

The Civil Discovery Act was passed in 2004 and became effective July 1, 2005. It repealed and renumbered the Civil Discovery Act of 1986, but did not substantively change the law of civil discovery [Stats. 2004, ch. 182 §§ 22, 23, 61].

Thus cases decided under the 1986 Act remain controlling authority. A considerable body of case law interpreted the discovery provisions of the Discovery Act of 1956 (former Code Civ. Proc. §§ 2016-2037.9), which preceded the 1986 Act. Although the 1986 Act, which became operative July 1, 1987, implemented numerous changes in the prior law, it also continued provisions of the prior law in many other instances, or even codified decisions interpreting the prior law. Decisions construing this prior law therefore are cited as persuasive rather than controlling authority to the extent that they are consistent with current provisions [*see In re Marriage of Skelley (1976) 18 Cal. 3d 365, 369, 134 Cal. Rptr. 197, 556 P.2d 297]* .

[4] Federal Authority

California's Electronic Discovery Act generally is modeled on federal rules governing e-discovery [*see Fed. R. Civ. P. 16(b)(3)(B)(iii), (iv), 26(b)(2)(B), (b)(5), (f)(3)(c), 34(b)(1)(C), (b)(2)(D), (b)(2)(E), 37(e)*]. The federal rules were revised to address e-discovery issues, effective December 1, 2006--before most states (including California) had enacted their own rules governing e-discovery in state proceedings. As a result, state courts throughout the United States frequently look to federal judicial decisions dealing with e-discovery issues under the federal rules--primarily in the federal district courts--for guidance on how to deal with similar e-discovery issues under state law. Because the California electronic discovery statutes are new, and e-discovery issues were considered only infrequently in published California court opinions prior to enactment of the Electronic Discovery Act [*see, e.g., People v. Lugashi (1988) 205 Cal. App. 3d 632, 640, 252 Cal. Rptr. 434* (allowing admission of bank computer records); *R.S. Creative v. Creative Cotton (1999) 75 Cal. App. 4th 486, 89 Cal. Rptr. 2d 353* (terminating sanctions for actions including spoliation of evidence on computers)], California courts may be expected to look to federal decisions construing the federal rules, and to out-of-state authority, for guidance on the treatment of e-discovery issues.

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§ 85A.03 "Electronically Stored Information" (ESI) Defined

The Electronic Discovery Act broadly defines "electronically stored information" (ESI) as "information that is stored in an electronic medium" [*see Code Civ. Proc. § 2016.020(e)*]. "Electronic" is defined as "relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities [*see Code Civ. Proc. § 2016.020(d)*]. Some common types of electronically stored information are e-mail, word processing documents or spreadsheets, instant messages, text messages, database information, digital photographs, digital video, electronic voice mail, temporary files, metadata, and even fragments of deleted files. ESI can be found in many locations, including (but not limited to) computer hard drives, network servers, cell phones, personal digital assistants (PDAs), back-up tapes, CD-ROMs, DVD ROMs, digital cameras, and internet websites.

For further discussion of the nature and sources of ESI, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 1, *Understanding Electronic Evidence*.

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§ 85A.04 Duty to Preserve Electronic Evidence

A party to a lawsuit, or anyone who anticipates being a party, has an obligation to not destroy evidence [*see Cedars-Sinai Med. Ctr. v. Superior Court (1998) 18 Cal. 4th 1, 74 Cal. Rptr. 2d 248, 954 P.2d 511]* . Failure to do so can result in negative evidentiary inferences [*see Evid. Code § 413*], sanctions for misuse of the discovery process [*see Code Civ. Proc. § 2023(b)*], disciplinary action against the party's attorney [*see Bus. & Prof. Code, § 6106*; *Cal Rules Prof. Conduct, Rule 5-220* ("[a] member shall not suppress any evidence that the member or the member's client has a legal obligation to reveal or to produce")], and criminal penalties for spoliation [*Pen. Code § 135*; *see Cedars-Sinai Med. Ctr. v. Superior Court (1998) 18 Cal. 4th 1, 11-13, 74 Cal. Rptr. 2d 248, 954 P.2d 511]* .

Under federal law, a party's duty to preserve electronic evidence is triggered when the party has notice that the evidence is relevant to litigation or when the party should have known that the evidence might be relevant to litigation [*Zubulake v. UBS Warburg LLC (S.D.N.Y. 2003) 220 F.R.D. 212, 216]* . Under California law, the precise point at which the duty to preserve documents comes into existence is not yet clear. Commentators have suggested that it is likely that California case law may develop along lines similar to federal law [*see* Kiesel & Williams, California's 2009 E-Discovery Laws--Text and Analysis (LexisNexis 2009), § 4[3]]. The California Supreme Court, in discussing spoliation of evidence, has stated that "[d]estroying evidence in response to a discovery request *after litigation has commenced* would surely be a misuse of discovery within the meaning of *Code Civ. Proc. § 2023*, as would such destruction *in anticipation of a discovery request*" [*Cedars-Sinai Med. Ctr. v. Superior Court (1998) 18 Cal. 4th 1, 12, 74 CR2d 248, 954 P2d 511* (emphasis added); *see Dodge, Warren & Peters Ins. Services, Inc. v. Riley (2003) 105 Cal. App. 4th 1414, 1418-1420, 130 Cal. Rptr. 2d 385* (injunction was appropriate remedy to prevent defendants from destroying potentially discoverable evidence)]. However, the decision did not deal with the question of the earliest point at which the duty to preserve evidence could initially arise.

The Electronic Discovery Act created a safe harbor for parties and counsel for failure to preserve evidence that has been "lost, damaged, altered, or overwritten as the result of the routine, good-faith operation of an electronic information system" [*Code Civ. Proc. § 2031.060(i)*].

Informal agreements regarding preservation of electronic evidence will sufficiently preserve a party's right to seek spoliation sanctions against the opposing party if that party breaches the agreements [*R.S. Creative v. Creative Cotton*

(1999) 75 Cal. App. 4th 486, 497-498, 89 Cal. Rptr. 2d 353 (sanctions for destroying evidence of forgery contained on plaintiffs' computer); *see* Ch. 84, *Discovery: Interrogatories*, § 84.14[3][a]].

For discussion of guidelines for preserving electronic evidence, see California Forms of Pleading and Practice, Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)* (Matthew Bender). For further discussion of the preservation of evidence generally, see California Forms of Pleading and Practice, Ch. 199, *Discovery: Preservation of Evidence* (Matthew Bender).

For a form for a preliminary injunction to preserve electronic evidence pending a discovery order, see *Ch. 116, Injunctions, § 116.31*; see also Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 7, *Obtaining Injunction to Protect Against Destruction of Electronic Evidence pending Discovery*. For a sample preservation demand, related forms, and discussion, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 5, *Initial procedures in E-Discovery: Notice, Document Preservation, Meeting and Conferring, and Case Management Conference.*

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§ 85A.05 Meet and Confer Requirement

At least 30 calendar days before the date set for the initial case management conference, all parties must meet and confer, in person or by telephone, to consider the following [*Cal. Rules of Ct., Rule 3.724(8)*]:

- Issues relating to the preservation of discoverable ESI.
- The form or forms in which information will be produced.
- The time within which the information will be produced.
- The scope of discovery of the information.
- The method for asserting or preserving claims of privilege or attorney work product, including whether such claims may be asserted after production.
- The method for asserting or preserving the confidentiality, privacy, trade secrets, or proprietary status of information relating to a party or person not a party to the civil proceedings.
- How the cost of production of ESI is to be allocated among the parties.
- Any other issues relating to the discovery of ESI, including developing a proposed plan relating to the discovery of the information.

The court's case management order may include appropriate orders relating to the discovery of ESI [*see Cal. Rules of Ct., Rules 3.728(13), 3.724(8)*].

For a sample ESI protocol addressing issues related to the preservation of discoverable electronically stored information, see California Forms of Pleading and Practice, Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)*. For a detailed discussion of meet and confer requirements, including a checklist of issues to

be considered in connection with the obligation to meet and confer, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 5, *Initial Procedures in E-Discovery--Notice, Document Preservation, Meeting and Conferring, and Case Management Conference*.

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§ 85A.06 Demand for Electronically Stored Information

[1] Right to Demand Discovery of Electronically Stored Information

Any party may demand that any other party produce ESI for inspecting, copying, testing, or sampling under *Code Civ. Proc. § 2031.010(a), (e)*. A party may also subpoena production of ESI from nonparties under *Code Civ. Proc. § 1985.8(a)(1)*, or may demand production of ESI from any person, including a party to the action, using a request for documents in a deposition notice under *Code Civ. Proc. § 2025.010 et seq.* For a memorandum supporting a motion for an order compelling response to a demand for production of ESI, see *§ 85A.20*. For memoranda supporting motions directing compliance with, or quashing or modifying, a subpoena under *Code Civ. Proc. § 1985.8*, see *Ch. 218, Subpoena, §§ 218.26A, 218.26B, 218.30A, 218.30B*. For general forms relating to production or inspection demands in California discovery, see Ch. 85, *Discovery: Production or Inspection of Tangible Evidence* .

Whatever method is used, demands for production of ESI should be specific and drawn as narrowly as possible under the circumstances. Discovery of ESI will not be permitted if it is duplicative, unreasonably burdensome or expensive, or is designed to harass the other side [*see Code Civ. Proc. §§ 2017.020, 2019.030*].

A party demanding the production of ESI may specify the form or forms in which each type of ESI is to be produced [*Code Civ. Proc. §§ 2031.030(a)(2), 1985.8(b)*]; see *Daewoo Electronics Co., Ltd. v. United States (Ct. Int'l Trade 1986) 650 F. Supp. 1003, 1006* (plaintiff sought specific data sets that were utilized in administrative review that resulted in challenged governmental order); see *§ 85A.21* (demanding party may specify form). For discussion of the responding party's options for producing ESI, see *§ 85A.07*.

The requesting party should work with the responding party to ensure minimal disruption to the responding party's business in complying with an electronic discovery request [*see Playboy Enters. v. Welles (S.D. Cal 1999) 60 F. Supp. 2d 1050, 1055* (finding need for requested emails outweighed burden on defendant); *Dodge, Warren & Peters Ins. Servs., Inc. v. Riley (2003) 105 Cal. App. 4th 1414, 1421, 130 Cal. Rptr. 2d 385* (approving temporary injunction to prevent spoliation); *Code Civ. Proc. § 2031.010(c), (d)* (inspection demand)].

For a discussion of the production of ESI in the possession of nonparties, see *California Forms of Pleading and*

Practice, Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)*. For a detailed discussion of the demands for production of ESI, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 6, *Demanding Production of Electronically Stored Evidence in California Court*.

[2] Testing and Sampling

Inspection and copying were the traditional means of obtaining information from documents under the Civil Discovery Act. As amended in 2009, the Civil Discovery Act also allows a party to test and sample electronically stored information in addition to inspecting and copying it [*see Code Civ. Proc. § 2031.010(a), (e)*]. Under this provision, a party may review a small sample of electronically stored information for relevant information and based on the results, request broader access [*see, e.g., AAB Joint Venture v. United States (Fed. Cl. 2007) 75 Fed. Cl. 432, 444* (court ordered defendant to restore portion of backup tapes from time periods specified by plaintiff, after which parties would have an opportunity to argue whether or not additional restoration of back-up tapes was likely to lead to production of relevant evidence); *Toshiba America Electronics Components v. Superior Court (2004) 124 Cal. App. 4th 762, 21 Cal. Rptr. 3d 532* (court suggested sampling to determine if backup tapes contained relevant data)].

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§ 85A.07 Response to Demand for Production

[1] General Discovery Rules

The responding party has a duty to produce electronic evidence unless the court determines that production would impose burden, expense, or intrusiveness that clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence [*Code Civ. Proc. § 2017.020(a)*; *see Ch. 80, Discovery: Scope, Regulation, and Timing, § 80.02[2]*; *see also § 85A.40* (supporting motion for protective order under *Code Civ. Proc. §§ 2017.020, 2031.060*; Ch. 80, *Discovery: Scope, Regulation, and Timing*, § 80.80 (supporting motion for protective order under *Code Civ. Proc. § 2017.020*)].

In response to a demand for inspection, copying, testing, or sampling under *Code Civ. Proc. § 2031.010 et seq.*, the responding party must respond to each item or category of item [*see Code Civ. Proc. § 2031.210(a)*]. The responding party must respond with any of the following:

- A statement that the party will comply, in whole or part, with the particular demand and any related activities, by a reasonable time that is at least 30 days after service of the demand, unless the court, for good cause shown, has approved an earlier date [*Code Civ. Proc. § 2031.210(a)(1)*; *see Code Civ. Proc § 2031.030(2)(c)* (for unlawful detainer actions, at least five days after service of demand)].

- A representation that the party lacks the ability to comply with the demand for inspection, copying, testing, or sampling of a particular item or category of item [*Code Civ. Proc. § 2031.210(a)(2)*]. A representation of inability to comply with a particular demand must affirm that a diligent search and reasonably inquiry was made [*see § 85A.07[2]*] and must specify whether the inability to comply is because the particular item or category never existed, has been destroyed, has been lost, misplaced, or stolen, or has never been or no longer is in possession of the responding party. If the natural person knows or believes that another person or organization has possession, custody, or control of that item or category, the name and address of that person or organization must be given [*Code Civ. Proc. § 2031.230*].

- An objection to the particular demand [*Code Civ. Proc. § 2031.210(a)(3)*].

In practice, a response to an e-discovery demand often involves a combination of all of the above options.

For a detailed discussion of responses to demands for production of ESI, for forms for a response to a California e-discovery demand, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 8, *Responding to Electronic Discovery Demands in California Court.*

[2] Diligent Search

The responding party must perform a diligent search and a reasonable inquiry in order to comply with a demand for production of electronically stored information [*Code Civ. Proc. § 2031.230*]. The governing statute does not specify what constitutes a diligent search and reasonable inquiry for this purpose, but federal case law has held that such a search must include electronic storage devices, including computer hard drives, disks, peripheral storage devices, and networks [*see Playboy Enters. v. Welles (S.D. Cal. 1999) 60 F. Supp. 2d 1050, 1054* ; *see also Maldonado v. Superior Court (2002) 94 Cal. App. 4th 1390, 1396, 115 Cal. Rptr. 2d 137]* . In recognition of the fact that there are many ways to manage electronic data, litigants are free to choose how this task is accomplished [*see Zubulake v. UBS Warburg LLC (S.D.N.Y. 2003) 220 F.R.D. 212, 218* (commenting that presumably there are "a multitude of" ways to create a complete set of relevant documents)]. However, the responding party cannot refuse inspection and copying, or condition access to records by not preparing a record when the raw data is available to do so [*Person v. Farmers Ins. Group of Cos. (1997) 52 Cal. App. 4th 813, 818, 61 Cal. Rptr. 2d 30* (access to medical records)].

[3] Source Not Reasonably Accessible

In its response to a demand for discovery of electronically stored information, a party may object on the grounds that the ESI is from a source that is not reasonably accessible because of undue burden or expense. The responding party must identify in its response the types or categories of sources of ESI that it asserts are not reasonably accessible. By objecting and identifying the type or category of sources that are not reasonably accessible, the responding party preserves its objections relating to that ESI [*Code Civ. Proc. § 2031.210(d)*].

Whether a source is "reasonably accessible" is a factual question for the court that depends upon many factors, including the media on which the ESI is stored, the volume of the ESI, the time and cost required to restore, search and review the ESI, the amount at issue in the case, whether the ESI is cumulative and/or available from other sources, and the relevance of the ESI to key issues in the case [*Best Buy Stores, L.P. v. Developers Diversified Realty Corp. (D. Minn. 2007) 247 F.R.D. 567, 570* (database was not reasonably accessible because it would have to be restored from original sources at minimum cost of $124,000, plus monthly storage cost over $27,000); *see Parkdale Am., LLC v. Travelers Cas. & Sur. Co. of Am. (W.D.N.C. Nov. 2007) 2007 U.S. Dist. LEXIS 88820, at *34* (e-mails in LotusNotes format were reasonably accessible when cost of producing them was no more than $20,000)].

For discussion of the specific issue of whether backup tapes and other archived data are "reasonably accessible," see *Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 1, Understanding Electronic Evidence, § 1.22[6],* and Ch. 5, *Initial Procedures in E-Discovery--Notice, Document Preservation, Meeting and Conferring, and Case Management Conference,* § 5.06[7].

[4] Specified Form of Production

The party demanding the production of electronically stored information may specify the form of production for each type of electronically stored information [*Code Civ. Proc. § 2031.030(a)(2)*], but is not required to do so. If the responding party objects to the form of production specified in the demand, it may state in its response the form in which it intends to produce each type of information [*Code Civ. Proc. § 2031.280(c)*].

If the demand does not specify a particular form of production, the responding party must state the form in which it intends to produce the information [*Code Civ. Proc. § 2031.280(c)*]. The information must be produced in the form or forms in which it is ordinarily maintained, or in a form that is reasonably usable [*Code Civ. Proc. § 2031.280(d)(1)*]. "Reasonably usable" likely requires that the ability to search and sort the ESI is maintained in the form in which it is produced [*see, e.g., L.H. v. Schwarzenegger (C.D. Cal. 2008) 2008 U.S. Dist. LEXIS 86829, at *10-*14* (sanctions for converting electronic documents from their original searchable and sortable format and producing non-searchable PDF versions of those documents)].

A party may not be required to produce the same ESI in more than one form [*Code Civ. Proc. § 2031.280(d)(2)*].

For a detailed discussion of the process of producing ESI, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 9, *Gathering and Producing Electronically Stored Evidence*. For discussion of privacy and privilege in e-discovery, see *§ 85A.10*.

[5] Translation of Data Compilations

If necessary, the responding party, at the reasonable expense of the demanding party, must use detection devices to translate any data compilations included in the demand into reasonably usable form [*Code Civ. Proc. § 2031.280(e)*; *Toshiba America Electronics Components v. Superior Court (2004) 124 Cal. App. 4th 762, 772, 21 Cal. Rptr. 3d 532* (former *Code Civ. Proc. § 2031(g)(1)* (now *Code Civ. Proc. § 2031.280(b)*) is "a legislatively determined exception to the general rule that the responding party bear the cost of responding to discovery")]. In some circumstances, the entire computer or hard drive must be produced if requested [*see, e.g., TBG Ins. Servs. Corp. v. Superior Court (2002) 96 Cal. App. 4th 443, 448-449, 117 Cal. Rptr. 2d 155* (defendant employee had diminished expectation of privacy in data found on company-owned computer and waived any expectation of privacy by agreeing to allow company to inspect computer at any time), discussed in *Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.11[4][a]*; *R.S. Creative v. Creative Cotton (1999) 75 Cal. App. 4th 486, 496, 89 Cal. Rptr. 2d 353* (terminating sanction for repeated violations of stipulations and court orders, including deliberate destruction of electronic evidence pertinent to exposing forgery), discussed in Ch. 84, *Discovery: Interrogatories*, § 84.14[3][a]].

Reasonableness and necessity are factual issues that, if disputed, are left to the trial court's discretion. When a demanding party is asked to pay for translations that the party does not believe are necessary, or when the party disputes the reasonableness of the expenses alleged, the party may seek a protective order or move to compel production, and the trial court then may make whatever orders justice requires [*see Toshiba Am. Electronics Components, Inc. v. Superior Court (2004) 124 Cal. App. 4th 762, 772-773, 21 Cal. Rptr. 3d 532* ; *Code Civ. Proc. §§ 2031.060(a), 2031.300(b)*].

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§ 85A.08 Cost-Shifting in Electronic Discovery

As with discovery generally, each party to litigation is expected to bear the ordinary burden and expenses typically involved in responding to e-discovery requests, such as the expense of producing documents, answering interrogatories, or submitting to depositions [*see San Diego Unified Port Dist. v. Douglas E. Barnhart, Inc. (2002) 95 Cal. App. 4th 1400, 1404, 116 Cal. Rptr. 2d 65* ("[t]hat principle is violated when a party is ordered to pay for discovery sought by another party")].

However, when responding to a discovery request requires the responding party to translate electronic data compilations in order to produce information in reasonably useable form, the expense of translation shifts to the demanding party [*Code Civ. Proc. § 2031.280(b)*; *Toshiba Am. Electronics Components, Inc. v. Superior Court (2004) 124 Cal. App. 4th 762, 772, 21 Cal. Rptr. 3d 532* (former *Code Civ. Proc. § 2031(g)(1)*; *now see Code Civ. Proc. § 2031.280(b)*) is "a legislatively determined exception to the general rule that the responding party bear the cost of responding to discovery")]. The demanding party is expected to pay only its reasonable expense for a necessary translation [*Toshiba Am. Electronics Components, Inc. v. Superior Court (2004) 124 Cal. App. 4th 762, 773, 21 Cal. Rptr. 3d 532* ; *see Code Civ. Proc. § 2031.280(b)*; for further discussion of *Toshiba, see Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.20[4][a]*].

Furthermore, in ruling on a motion for a protective order [*see Code Civ. Proc. § 2031.060*], or a motion to compel further response to the demand [*see Code Civ. Proc. § 2031.310*], if the court finds that good cause exists for the production of electronically stored information from a source that is not reasonably accessible, the court has broad authority to set conditions for the discovery of ESI, including allocation of the expense of discovery [*Code Civ. Proc. § 2031.060(e)*].

For further discussion of cost-shifting in e-discovery, see California Forms of Pleading and Practice, Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)* (Matthew Bender).

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§ 85A.09 Sanctions for Electronic Discovery Abuses

Sanctions are available for "misuses of discovery," including altering or destroying electronic evidence [*see Code Civ. Proc. § 2023.030*; *Hassoldt v. Patrick Media Group (2000) 84 Cal. App. 4th 153, 169, 100 Cal. Rptr. 2d 662* (on remand, plaintiffs were free to apply to trial court for issue or evidentiary sanctions based on defendant's spoliation of evidence); *see also Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.90[4][a]*]. E-discovery sanctions may include money, issue, evidence, and terminating sanctions [*Code Civ. Proc. § 2023.030*; *Cedars-Sinai Med. Ctr. v. Superior Court (1998) 18 Cal. 4th 1, 11, 74 Cal. Rptr. 2d 248, 954 P.2d 511* (discussed in *Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.90[3][a]*); *Electronic Funds Solutions, LLC v. Murphy (2005) 134 Cal. App. 4th 1161, 1183-1184, 36 Cal. Rptr. 3d 663* ; *R.S. Creative, Inc. v. Creative Cotton, Ltd. (1999) 75 Cal. App. 4th 486, 89 Cal. Rptr. 2d 353* (discussed in Ch. 84, *Discovery: Interrogatories,* § 84.14[3][a])]. For example, in a case involving destruction of electronic data, the court held that a terminating sanction was appropriate under former *Code Civ. Proc. § 2023(b)(4)(A)* (*now see Code Civ. Proc. § 2023.030(d)(1)*) for "pervasive and consistent" misuse of the discovery process, including failure to comply with any discovery orders regarding plaintiffs' document inspection demands and specially prepared interrogatories, and the intentional, "brazen" destruction of data on the hard drives of several computers [*Electronic Funds Solutions, LLC v. Murphy (2005) 134 Cal. App. 4th 1161, 1183-1184, 36 Cal. Rptr. 3d 663]* .

The Electronic Discovery Act contains a "safe harbor" provision, however, under which, absent "exceptional circumstances," the court is not permitted to impose sanctions against a party for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as the result of the routine, good faith operation of an electronic information system [*Code Civ. Proc. § 2031.060[i]*].

For motions supporting and opposing motions for discovery sanctions, including sanctions in the context of e-discovery, see Ch. 82, *Discovery: Sanctions for Discovery Misuse* . For a detailed discussion of monetary, issue, evidence, and terminating sanctions, see California Forms of Pleading and Practice, Ch. 192, *Discovery: Sanctions* (Matthew Bender). For more detailed coverage of sanctions in the specific context of e-discovery, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch.13, *Seeking or Opposing Sanctions for Noncompliance*.

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8-85A California Points & Authorities § 85A.10

§ 85A.10 Protecting Confidentiality and Privilege

E-discovery activity may involve requests for production of confidential, proprietary, or privileged information. The same considerations of confidentiality and privilege that apply to other types of communications apply equally to electronically stored information [*see Playboy Enters. v. Welles (S.D. Cal 1999) 60 F. Supp. 2d 1050, 1054-1055* ; *Dodge, Warren & Peters Ins. Services, Inc. v. Riley (2003) 105 Cal. App. 4th 1414, 1421, 130 Cal. Rptr. 2d 385]* . Further, a communication between a client and his or her attorney does not lack confidentiality solely because the communication is transmitted by facsimile, cellular telephone, or other electronic means [*Evid. Code § 917*; *see Ch. 81, Discovery: Privileges and Other Discovery Limitations, § 81.80[1]* (no presumption of confidentiality for electronic communications)].

Courts addressing privacy or privilege considerations in the context of e-discovery generally rely on agreement of the parties or on a protective order to minimize these concerns [*see, e.g., Playboy Enters. v. Welles (S.D. Cal 1999) 60 F. Supp. 2d 1050, 1054-1055* ("[d]efendant's attorney-client privilege and privacy concerns will be protected by the protective order, which will be signed by the expert, and this Court's Order finding that this process will not waive any attorney-client privilege"); *Dodge, Warren & Peters Ins. Services, Inc. v. Riley (2003) 105 Cal. App. 4th 1414, 1421, 130 Cal. Rptr. 2d 385* ("[t]he copied material [from defendant's computer and electronic storage media] would be unavailable to anyone except upon agreement of the parties or order of the court. Thus, concerns over privacy and privilege were minimized to the point of nonexistence"); *see also Code Civ. Proc. § 2031.060* (protective order)]. However, failure of a party to seek a protective order waives the privacy rights to electronic information that is not otherwise privileged [*see R.S. Creative v. Creative Cotton (1999) 75 Cal. App. 4th 486, 498, 89 Cal. Rptr. 2d 353* ; *Code Civ. Proc. § 2031.060(a)*].

In *City of Ontario v. Quon (2010) ___ U.S. ___, 130 S. Ct. 2619, 177 L. Ed. 2d 216* , the United States Supreme Court reversed a Ninth Circuit decision that had previously upheld plaintiff police officers' claims that a search of their text messages violated their *Fourth Amendment* and California constitutional privacy rights. They claimed a reasonable expectation of privacy in the content of those messages, in light of the employer's informal policy of not auditing messages on payment of usage overages (*see Quon v. Arch Wireless Operating Co., Inc. (9th Cir. 2008) 529 F.3d 892, 907 , overruled by City of Ontario v. Quon (2010) ___ U.S. ___, 177 L. Ed. 2d 216*). The Supreme Court sidestepped the parties' disagreement over the officers' privacy expectation, finding it preferable to dispose of the case on narrower

grounds (*177 L. Ed. 2d 216, 227-228*). Prudence counseled caution, the Court stated, before the facts in this case were used to establish "far-reaching premises that define the existence, and extent, of privacy expectations" of employees using employer-provided communication devices (177 L. Ed. 2d 216, 227). The Court observed that rapid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior. For example, many employers expect or at least tolerate personal use of that equipment by employees because it often increases worker efficiency. Further, the law is beginning to respond to these developments, as some States have recently passed statutes requiring employers to notify employees when monitoring their electronic communications. The fact that cell phone and text message communications are so pervasive that some may consider them to be "essential means or necessary instruments for self-expression, even self-identification" might strengthen the case for an expectation of privacy. On the other hand, the ubiquity of those devices has made them generally affordable, so that employees who need cell phones or similar devices for personal matters can purchase and pay for their own. At present, however, it is uncertain how workplace norms, and the law's treatment of them, will evolve (*177 L. Ed. 2d 216, 227)* .

For supporting and opposing motions to compel discovery based on the right to privacy, see Ch. 81, *Privileges and Other Discovery Limitations* . For further discussion of privilege and privacy considerations in e-discovery, see California Forms of Pleading and Practice, Ch. 191, *Discovery: Privileges and Other Discovery Limitations* (Matthew Bender). For detailed discussion of privilege objections to requests for the production of ESI, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 10, *Opposing Demands for the Production of Electronic Evidence in California Court*.

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8-85A California Points & Authorities § 85A.11

§ 85A.11 Inadvertent Disclosure of Protected or Privileged Information

The Electronic Discovery act contains a so-called "claw back" provision that allows a party who inadvertently produces an electronic document to take it back after production without regard to waiver issues. The party seeking return of the material may notify any party that received the information of the claim and the basis for the claim [*Code Civ. Proc. § 2031.285(a)*]. Upon receipt of notice, the recipient is required to immediately sequester the information and either return the information and any copies that exist, or present the information to the court under seal for a determination of the claim [*Code Civ. Proc. § 2031.285(b)*]. The recipient has 30 days from receipt of the claim and presentation of the information to the court conditionally under seal within which to file a motion seeking determination of the claim [*Code Civ. Proc. § 2031.285(d)(1)*].

The recipient is prohibiting from using or disclosing the information until the claim is resolved [*Code Civ. Proc. § 2031.285(c)(1), (d)(2)*]. A receiving party who disclosed the information prior to receiving the notice of the claim of privilege must immediately take "reasonable steps" to retrieve the information [*Code Civ. Proc. § 2031.285(c)(2)*].

Wholly aside from the procedure established by the "claw back" rule, an attorney has additional affirmative obligations upon receiving information that is obviously privileged when it is reasonably apparent that the materials were provided or made available through inadvertence. In this situation, the recipient has an affirmative duty to refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and must immediately notify the sender that the recipient possesses material that appears to be privileged. The parties then may proceed to resolve the situation by agreement of may resort to the court for guidance and resolution of the issue [*Rico v. Mitsubishi Motors Corp. (2007) 42 Cal. 4th 807, 817, 68 Cal. Rptr. 3d 758, 171 P.3d 1092* ; *see Ch. 81, Discovery: Privileges and Other Discovery Limitations, § 81.220[3][a]*].

The responding party may consider asking the requesting party to stipulate to procedures designed to prevent waiver of privilege through inadvertent disclosure of electronic information [*see, e.g., Fed. R. Civ. P. 26(b)(5)* (allowing a party to claim a privilege for information already produced in discovery and requiring notified party to return, sequester, or destroy the information); see also California Forms of Pleading and Practice, Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)* (Matthew Bender)].

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8-85A California Points & Authorities § 85A.12

§ 85A.12 How to Use the Forms in This Chapter

[1] Page Limits on Memoranda

Among the more significant drafting requirements to keep in mind are the page limits: supporting and opposing memoranda filed in discovery motion proceedings may not exceed 15 pages. A reply or closing memorandum may not exceed 10 pages. Exhibits, declarations, attachments, the table of contents, the table of authorities, and the proof of service are excluded from these page limits. Any party must obtain leave of court to file a longer memorandum [*see Cal. Rules of Ct., Rule 3.1113(d)*]. These and other drafting requirements are discussed in further detail in Ch. 1, *Writing Legal Memoranda and Briefs* .

[2] Using the Forms to Build a Draft Memorandum

The forms included in this chapter are designed to be included in a memorandum supporting or opposing a particular type of discovery motion, such as motion to compel discovery or a motion for a protective order.

In many cases it will be appropriate to combine these forms with additional memoranda set out in the related discovery chapters. In particular, they may be combined with the general points and authorities for limiting or regulating discovery set out in Ch. 80, *Discovery: Scope, Regulation, and Timing* , or with the points and authorities for limiting discovery based on the evidentiary privileges, work product protection, or other protective provisions found in Ch. 81, *Discovery: Privileges and Other Discovery Limitations* .

It may also be appropriate to modify the memoranda in this chapter for use in a different procedural context, such as in a trial or appellate brief or office memoranda relating to discovery practice.

For a detailed discussion on how to select and use the forms in the publication to build a draft memorandum and complete the draft, with detailed discussion of all drafting requirements and strategic or stylistic considerations, see Ch. 1, *Writing Legal Memoranda and Briefs* . For a skeletal form for a memorandum for use in creating a properly formatted outline in which to compile relevant forms from this publication, see also Ch. 1, *Writing Legal Memoranda and Briefs* .

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8-85A California Points & Authorities § 85A.13

§ 85A.13 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

For background discussion of forms of moving papers relating to civil discovery by demand for the production or inspection of tangible evidence, see California Forms of Pleading and Practice, Ch. 195, *Discovery: Inspection of Tangible Evidence* (Matthew Bender). For a more detailed discussion of e-discovery, see California Forms of Pleading and Practice, Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)* (Matthew Bender).

[2] Related Memoranda

For memoranda supporting or opposing a motion to compel discovery based on general limiting or regulatory provisions of the Discovery Act, see Ch. 80, *Discovery: Scope, Regulation, and Timing* .

For memoranda supporting or opposing a motion to compel discovery on the ground that the matter sought to be discovered is privileged or is otherwise protected from disclosure, see Ch. 81, *Discovery: Privileges and Other Discovery Limitations* .

For memoranda supporting or opposing a motion to compel discovery, or supporting or opposing a motion for protective order, in the context of another discovery method, see Ch. 83, *Discovery: Depositions* , Ch. 84, *Discovery: Interrogatories* , Ch. 85, *Discovery: Production or Inspection of Tangible Evidence* , Ch. 86, *Discovery: Requests for Admissions* , Ch. 87, *Discovery: Physical and Mental Examinations* , and Ch. 88, *Discovery: Exchange of Expert Witness Information* .

For memoranda relating to the use of demands for the production or inspection of tangible evidence in order to preserve evidence before an action is commenced or pending an appeal, see Ch. 89, *Discovery: Preservation of Evidence* .

For memoranda for use in seeking or opposing writs to review discovery orders, see Ch. 89A, *Discovery: Review of Discovery Orders* .

[3] Other Discussion and Forms

For detailed discussion of the discovery of electronically stored information under the California Electronic Discovery Act, including forms, checklists, and practice tips, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence.

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[Reserved]

§§ 85A.14[Reserved]

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§ 85A.20 Supporting Motion for Order Compelling Response to Demand for Inspection, Copying, Testing or Sampling of Electronically Stored Information [Code Civ. Proc. § 2031.010(a), (e)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION FOR
	)	ORDER COMPELLING RESPONSE TO DEMAND
vs.	)	FOR _____ [INSPECTION *and/or* COPYING *and/or* TESTING *and/or* SAMPLING
_____ [*name*],	)	OF ELECTRONICALLY STORED INFORMA-
Defendant.	)	TION] AND FOR MONETARY SANCTION
	)	Date: _____
	)	Time: _____
	)	Location: _____
		[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

_____ [*Specify party on whom demand was served, e.g.,* DEFENDANT] HAS FAILED TO SERVE A TIMELY RESPONSE TO _____ [*specify party who served demand, e.g.,* PLAINTIFF]'S DEMAND FOR _____ [INSPECTION *and/or* COPYING *and/or* TESTING *and/or* SAMPLING] OF ELECTRONICALLY STORED INFORMATION, _____ [*identify set number, e.g.,* PLAINTIFF'S FIRST SET], AND THUS THE COURT SHOULD MAKE AN ORDER COMPELLING A RESPONSE AND

IMPOSING A MONETARY SANCTION FOR THE FAILURE TO RESPOND.

A. Party Has Right to Inspect, Copy, Test, or Sample Electronically Stored Information. A party may demand that another party produce and permit the demanding party, or someone acting on that party's behalf, to inspect, copy, test, or sample electronically stored information in the possession, custody, or control of the party on whom demand is made (*Code Civ. Proc. § 2031.010(a), (e)*).

[*EITHER*]

B. Plaintiff May Make Demand for Inspection, Copying, Testing, or Sampling Electronically Stored Information Within Time Limit Provided by Statute. A plaintiff may make a demand for inspection, copying, testing, or sampling electronically stored information without leave of court at any time that is _____ [10 *or, in unlawful detainer action or other proceeding under Code Civ. Proc. § 1159 et seq.,* five] days after the service of the summons on, or appearance by, the party to whom the demand is directed, whichever occurs first (*Code Civ. Proc. § 2031.020(b), (c)*).

[*OR*]

B. Defendant May Make Demand for Inspection, Copying, Testing, or Sampling Electronically Stored Information Without Leave of Court. A defendant may make a demand for inspection, copying, testing, or sampling electronically stored information without leave of court at any time (*Code Civ. Proc. § 2031.020(a)*).

[*CONTINUE*]

C. Party May Move for Order Compelling Response and for Monetary Sanction. When a party makes a demand for inspection, copying, testing, or sampling of electronically stored information under *Code of Civil Procedure Section 2031.010* and the party to whom the demand is directed fails to respond, the demanding party may move for an order compelling response and for a monetary sanction under *Code of Civil Procedure Section 2023.030* (*Code Civ. Proc. § 2031.300*).

D. Waiver of Objection to Demand. When the party to whom an inspection demand has been directed fails to serve a timely response to it, that party waives any objection to the demand, including one based on privilege or on the protection for work product under *Code of Civil Procedure Section 2018.010* (*Code Civ. Proc. § 2031.300(a)*).

E. Court Must Impose Monetary Sanction Absent Specified Findings. With exceptions not relevant here, the court must impose a monetary sanction under *Code of Civil Procedure Section 2023.030* against any party, person, or attorney who unsuccessfully opposes a motion to compel a response to an inspection demand, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust (*Code Civ. Proc. §§ 2023.030(a), 2031.300(c)*; *see Code Civ. Proc. § 2031.300(d)*).

[*Add memoranda generally supporting the imposition of monetary sanctions (see, e.g., Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11).*]

[*Optional*] **F. Court May Impose Sanctions Despite Lack of Opposition to Motion to Compel Discovery.** The court may award sanctions under the Discovery Act in favor of a party who files a motion to compel discovery, even though no opposition to the motion was filed, or opposition to the motion was withdrawn, or the requested discovery was provided to the moving party after the motion was filed (*Cal. Rules of Ct., Rule 3.1030(a)*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This form is for use in support of a motion by a party for an order compelling response to a demand for inspection, copying, testing, or sampling of electronically stored information and for a monetary sanction [*see Code Civ. Proc. §§ 2031.010*, *2031.020*, *2031.300*].

This form should be combined with general memoranda supporting the imposition of monetary sanctions under *Code Civ. Proc. § 2023.030(a)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should set forth facts showing when the demand was made and the failure of the other party to respond, and otherwise show substantial justification for the motion in order to avoid a monetary sanction if the motion is denied [*see Code Civ. Proc. § 2031.300*]. However, counsel need not set forth facts showing that the responding party acted without substantial justification [*compare* former *Code Civ. Proc. § 2034(a)*]. *Code Civ. Proc. §§ 2023.030(a)* and *2031.300(c)* effectively place that burden on the person against whom the sanction is to be imposed, by requiring the court to impose a monetary sanction when it is expressly authorized unless it finds that there was substantial justification or that other circumstances would make the monetary sanction unjust.

Note that despite *Code Civ. Proc. § 2031.300(c)*, absent exceptional circumstances the court may not impose sanctions on a party or any attorney of a party for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as the result of the *routine, good faith operation* of an electronic information system [*Code Civ. Proc. § 2031.300(d)(1)*]. This exception, however, does not alter any obligation to preserve discoverable evidence [*Code Civ. Proc. § 2031.300(d)(2)*].

[c] Timely Response

Code Civ. Proc. § 2031.010 et seq. govern discovery by inspection, copying, testing, or sampling ESI in the possession, custody, or control of any other party. *Code Civ. Proc. § 2031.020* governs the timing of a demand.

The party on whom a demand for inspection is made is required to respond separately to each item or category of item in the demand [*see Code Civ. Proc. § 2031.210(a)*], and make certain statements [*see Code Civ. Proc. §§ 2031.220-2031.240*], 2031.280]. The response must be served on all parties who have appeared in the action within 30 days after service of the demand, or in unlawful detainer proceedings within five days of the demand, with certain extensions of time when service is by mail [*Code Civ. Proc. § 2031.260*; *see Code Civ. Proc. § 1013(a)* (requirements for service by mail; extensions of time); *Code Civ. Proc. § 1013(c), (e)* (requirements for service by express mail or fax; extensions of time); *see also Code Civ. Proc. § 2016.050* (service generally)]. The period for service of the response may also be extended or shortened by the court on motion by the demanding or responding party [*Code Civ. Proc. §*

2031.260], or extended pursuant to a written agreement of the demanding and responding parties [*Code Civ. Proc. § 2031.270*].

[d] Related Forms and Discussion

For forms and discussion related to an order compelling response to an inspection demand, see California Forms of Pleading and Practice, Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)* (Matthew Bender).

For detailed discussion to compel response to a demand for the discovery of electronically stored information under the California Electronic Discovery Act, with checklists, forms, and practice tips, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 12, *Obtaining or Opposing Motion to Compel*.

[e] Opposing Memoranda

In the appropriate case, the forms *set out in §§ 85A.30* and *85A.31* may be used to oppose the motion supported by this form.

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8-85A California Points & Authorities § 85A.21

§ 85A.21 Supporting Motion for Order Compelling Response to Demand for Inspection, Copying, Testing or Sampling of Electronically Stored Information--Demanding Party May Specify Form(s) of Production [Code Civ. Proc. § 2031.030(a)(2)]

[1] FORM Supporting Motion for Order Compelling Response to Demand for Inspection, Copying, Testing or Sampling of Electronically Stored Information--Demanding Party May Specify Form(s) of Production [Code Civ. Proc. § 2031.030(a)(2)]

[*The following may be combined, when appropriate, with a general memorandum in support of a motion compelling response to a demand for ESI (see, e.g., § 85A.20).*]

A PARTY DEMANDING THE _____ [INSPECTION *and/or* COPYING *and/or* TESTING *and/or* SAMPLING] OF ELECTRONICALLY STORED INFORMATION MAY SPECIFY THE FORM OR FORMS IN WHICH EACH TYPE OF ELECTRONICALLY STORED INFORMATION IS TO BE PRODUCED.

Demanding Party May Specify Form or Forms of Production. A party demanding the inspection, copying, testing, or sampling of electronically stored information may specify the form or forms in which each type of electronically stored information is to be produced (*Code Civ. Proc. § 2031.030(a)(2)*).

[2] Comments

[a] Use of Form

This memorandum is for use in support of a motion compelling response to a demand for inspection, copying, testing, or sampling electronically stored information, when the demanding party wants to specify the form or forms in which each type of ESI is to be produced. Typically, such an argument will follow an attempt by the responding party to produce the information in a form that is different than that specified in the demand and that is unacceptable to the demanding party, or following an objection by the responding party to the form requested. This form is intended to be combined with a general memorandum supporting a motion compelling response [*see § 85A.20*]. If the party responding to the e-discovery request contends that the information in question is not "reasonably accessible," this form should also

be combined with the memorandum in § 85A.22[1].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Specifically, counsel should show that the demanded requested production in a specific form, and the responding party produced it in some other form, or did not produce it at all.

[c] Related Forms and Discussion

For forms and discussion related to an order compelling response to an inspection demand, see California Forms of Pleading and Practice, Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)* (Matthew Bender).

For detailed discussion of motions for orders to compel response to a demand for the discovery of electronically stored information under the California Electronic Discovery Act, with checklists, forms, and practice tips, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 12, *Obtaining or Opposing Motion to Compel*. For general guidance to the preparation of e-discovery demands, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 6, *Demanding Production of Electronically Stored Information in California Court*.

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8-85A California Points & Authorities § 85A.22

§ 85A.22 Supporting Motion for Order Compelling Further Response to Demand for Inspection, Copying, Testing or Sampling of Electronically Stored Information--Information Is From Source That Is Reasonably Accessible [Code Civ. Proc. § 2031.310(d)] or There Is Good Cause for Production of Information From Source That Is Not Reasonably Accessible [Code Civ. Proc. § 2031.310(e)]

[1] FORM Supporting Motion for Order Compelling Further Response to Demand for Inspection, Copying, Testing or Sampling of Electronically Stored Information--Information Is From Source That Is Reasonably Accessible [Code Civ. Proc. § 2031.310(d)] or There Is Good Cause for Production of Information From Source That Is Not Reasonably Accessible [Code Civ. Proc. § 2031.310(e)]

[*The following should be combined with a general memorandum in support of a motion for an order compelling further response to a demand for production, inspection, copying, testing or sampling of electronically stored information (see § 85A.21).*]

THE RESPONSE OF _____ [*specify responding party, e.g.,* DEFENDANT] TO THE DEMAND FOR _____ [INSPECTION *and/or* COPYING *and/or* TESTING *and/or* SAMPLING] OF ELECTRONICALLY STORED INFORMATION _____ [*identify set number, e.g.,* PLAINTIFF'S FIRST SET], IS _____ [INCOMPLETE *and/or* INADEQUATE *and/or* EVASIVE *and/or* WITHOUT MERIT *and/or* TOO GENERAL] BECAUSE _____ [THE INFORMATION CLAIMED TO BE INACCESSIBLE IS REASONABLY ACCESSIBLE *or* THERE IS GOOD CAUSE FOR PRODUCTION OF INFORMATION FROM A SOURCE THAT IS NOT REASONABLY ACCESSIBLE].

[*EITHER*]

A. Party [*or* Affected Person] Opposing Production of Electronically Stored Information Bears Burden of Demonstrating That Information Is From Source That Is Not Reasonably Accessible. The party [*or* affected person] opposing the production, inspection, copying, testing, or sampling of electronically stored information on the basis that the information is from a source that is not reasonably accessible because of undue burden or expense bears

the burden of demonstrating that inaccessibility (*Code Civ. Proc. § 2031.310(d)*).

[*AND/OR*]

B. Court May Order Discovery of Electronically Stored Information From Source That Is Not Reasonably Accessible If Demanding Party Shows Good Cause. The court may order production of electronically stored information from a source that is not reasonably accessible if the demanding party shows good cause (*Code Civ. Proc. § 2031.310(e)*).

[2] Comments

[a] Use of Form

This form may be used in combination with the *form in § 85A.21* to support a motion for an order compelling further response to a demand for production, inspection, copying, testing, or sampling of electronically stored information, when the party or person opposing inspection, copying, testing, or sampling of the ESI objects on the ground that the information is from a source that is not reasonably accessible because of undue burden or expense. It may be used to support either or both of the following contentions:

- The party opposing production has not met its burden of demonstrating that the information is not reasonably accessible [*see Code Civ. Proc. § 2031.310 (d)*], and/or

- Even if the information is found to be reasonably accessible, the demanding party has shown good cause for the production of the information [*see Code Civ. Proc. § 2031.310(e)*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

In its response to a demand for discovery of electronically stored information, the responding party may object on the grounds that the ESI is from a source that is not reasonably accessible because of undue burden or expense [*Code Civ. Proc. § 2031.210(d)*; *see Code Civ. Proc § 2031.280(c)* (objecting party must state form in which it does intend to supply the information)]. The law in this area is developing. Whether a source is "reasonably accessible" is a factual question for the court that depends upon many factors, including the media on which the ESI is stored, the volume of the ESI, the time and cost required to restore, search and review the ESI, the amount at issue in the case, whether the ESI is cumulative and/or available from other sources, and the relevance of the ESI to key issues in the case [*Best Buy Stores, L.P. v. Developers Diversified Realty Corp. (D. Minn. 2007) 247 F.R.D. 567, 570* (database was not reasonably accessible because it would have to be restored from original sources at minimum cost of $124,000, plus monthly storage cost over $27,000); *see Parkdale Am., LLC v. Travelers Cas. & Sur. Co. of Am. (W.D.N.C. Nov. 2007) 2007 U.S. Dist. LEXIS 88820, at *34* (e-mails in LotusNotes format were reasonably accessible when cost of producing them was no more than $20,000)]. Thus, counsel may find it necessary to include argument that the requested information was in fact "reasonably accessible" under the factors noted above.

The party or person objecting to production of the electronically stored information has the burden of demonstrating that the information is from a source that is not reasonably accessible [*Code Civ. Proc. §2031.310(d)*].

For discussion of the issues relating to whether or not electronically stored information is "reasonably accessible," see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 10, *Opposing Demands for Production of Electronic Evidence in California Court*, § 10.07[1], Ch. 11, *Seeking or Opposing Protective Order*, § 11.06[2].

[c] Limits on Extent or Frequency of Discovery

The court may require the production of the information even if it is from a source that is not reasonably accessible, if the court finds that good cause exists for the production of the evidence. In this situation, the court may set conditions for the discovery of the information, including allocation of the expense of discovery (cost shifting) [*Code Civ. Proc. § 2031.310(f)*; *see Code Civ. Proc. § 2031.310(g)*; *see also § 85A.31[2][c]*].

[d] Related Forms and Discussion

For forms and discussion relating to an order compelling response to a demand for inspection, copying, testing, or sampling, see California Forms of Pleading and Practice, Ch. 195, *Discovery: Inspection of Tangible Evidence* (Matthew Bender). For forms and discussion related to an order compelling response to an inspection demand, see California Forms of Pleading and Practice, Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)* (Matthew Bender).

For detailed discussion to of motions for orders to compel response to a demand for the discovery of electronically stored information under the California Electronic Discovery Act, with checklists, forms, and practice tips, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 12, *Obtaining or Opposing Motion to Compel*. For general guidance to the preparation of e-discovery demands, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 6, *Demanding Production of Electronically Stored Information in California Court*.

[e] Opposing Memoranda

In an appropriate case, the *form in § 85A.31* may be used to oppose the motion supported by this form.

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 85A DISCOVERY: E-DISCOVERY
PART II. FORMS
A. Motions to Compel Production or Inspection, Copying, Testing, or Sampling

8-85A California Points & Authorities §§ 85A.23-85A.29

[Reserved]

§§ 85A.23[Reserved]

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 85A DISCOVERY: E-DISCOVERY
PART II. FORMS
A. Motions to Compel Production or Inspection, Copying, Testing, or Sampling

8-85A California Points & Authorities § 85A.30

§ 85A.30 Opposing Motion for Order Compelling Response to Demand for Inspection, Copying, Testing or Sampling of Electronically Stored Information--Form(s) of Production [Code Civ. Proc. § 2031.280(c), (d)]

[1] FORM Opposing Motion for Order Compelling Response to Demand for Inspection, Copying, Testing or Sampling of Electronically Stored Information--Form(s) of Production [Code Civ. Proc. § 2031.280(c), (d)]

[*The following may be combined, when appropriate, with a general memorandum opposing a motion for an order compelling response (or further response) to a demand for ESI (see, e.g., Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30)*]

A PARTY RESPONDING TO A DEMAND FOR THE _____ [INSPECTION *and/or* COPYING *and/or* TESTING *and/or* SAMPLING] OF ELECTRONICALLY STORED INFORMATION MAY SPECIFY THE FORM IN WHICH IT INTENDS TO PRODUCE EACH TYPE OF INFORMATION _____ [IF THE PARTY OBJECTS TO THE FORM FOR PRODUCING THE INFORMATION SPECIFIED BY THE DEMANDING PARTY *or* IF THE DEMAND DOES NOT SO SPECIFY].

[*EITHER*]

A. Responding Party Must Specify Form of Production if Responding Party Objects to Form Specified by Demanding Party. If a party responding to a demand for production of electronically stored information objects to a specified form stated in the demand for producing the information, the responding party must state the form in which it intends to produce each type of information (*Code Civ. Proc. § 2031.280(c)*).

[*OR*]

A. Responding Party Must Specify Form of Production if No Form Is Specified in Demand. If a demand for production does not specify a form or forms for producing a type of electronically stored information, the responding

party must state in its response the form in which it intends to produce each type of information. Unless the parties otherwise agree or the court otherwise orders, the responding party must produce the information in the form or forms in which it is ordinarily maintained or in a form that is reasonably usable (*Code Civ. Proc. § 2031.280(c), (d)(1)*).

[*CONTINUE*]

B. Electronically Stored Information Need Not Be Produced in More than One Form. Unless the parties otherwise agree or the court otherwise orders, a party need not produce the same electronically stored information in more than one form (*Code Civ. Proc. § 2031.280(d)(2)*).

[2] Comments

[a] Use of Form

This memorandum is for use in opposition to a motion compelling response to a demand for inspection, copying, testing, or sampling electronically stored information, if:

- The responding party objects to a specified form for producing ESI [*Code Civ. Proc. § 2031.280(c)*, or

- The demand for production does not specify a form or forms stated in the demand for producing a type of ESI, and the responding party specifies that it will produce the information in the form or forms in which it is ordinarily maintained or in a form that is reasonably usable [*Code Civ. Proc. § 2031.280(c), (d)(1)*].

The form also states that a party need not produce the same ESI in more than one form [*Code Civ. Proc. § 2031.280(d)(2)*].

This form is intended to be combined with a general memorandum opposing a motion compelling response (or further response) [*see Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[c] Related Forms and Discussion

For forms and discussion relating to responding to a demand for ESI, see California Forms of Pleading and Practice, Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)* (Matthew Bender).

For further guidance on demanding electronically stored evidence, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 6, *Demanding Production of Electronically Stored Evidence in California Court.* For a more detailed discussion of counsel's duties in the context of production of ESI, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 3, *Ethical Issues for Attorneys in E-Discovery.*

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 85A DISCOVERY: E-DISCOVERY
PART II. FORMS
A. Motions to Compel Production or Inspection, Copying, Testing, or Sampling

8-85A California Points & Authorities § 85A.31

§ 85A.31 Opposing Motion for Order Compelling Further Response to Demand for Inspection, Copying, Testing or Sampling of Electronically Stored Information--Information Is Not From Source That Is Reasonably Accessible [Code Civ. Proc. § 2031.310(d)] and No Good Cause Exists for Production of Information [Code Civ. Proc. § 2031.310(e)]

[1] FORM Opposing Motion for Order Compelling Further Response to Demand for Inspection, Copying, Testing or Sampling of Electronically Stored Information--Information Is Not From Source That Is Reasonably Accessible [Code Civ. Proc. § 2031.310(d)] and No Good Cause Exists for Production of Information [Code Civ. Proc. § 2031.310(e)]

[*The following may be combined, when appropriate, with a general memorandum opposing a motion for an order compelling response (or further response) to a demand for ESI (see, e.g., Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.30).*]

THE DEMANDING PARTY IS NOT ENTITLED TO AN ORDER COMPELLING FURTHER RESPONSE BECAUSE THE ELECTRONICALLY STORED INFORMATION DEMANDED IS FROM A SOURCE THAT IS NOT REASONABLY ACCESSIBLE [AND NO GOOD CAUSE EXISTS FOR PRODUCTION OF THE INFORMATION].

A. Party [or Affected Person] May Object to Production of Electronically Stored Information on Ground That It Is Not Reasonably Accessible. In its response to a demand for discovery of electronically stored information, a party may object to discovery on the grounds that the information is from a source that is not reasonably accessible because of undue burden or expense, and state in its response that the responding party will not search the source in the absence of an agreement with the demanding party or a court order (*Code Civ. Proc. § 2031.210(a)(3), (d)*).

B. Demanding Party Must Show Good Cause for Discovery of Electronically Stored Information From Source That Is Not Reasonably Accessible. Once the objecting party has met its burden of demonstrating that electronically stored information is from a source that is not reasonably accessible because of undue burden or expense, the demanding party must show good cause in order to obtain a court order compelling the production of that information (

Code Civ. Proc. § 2031.310(d), (e)).

[*Optional*] **C. Court May Set Conditions [and Allocate Expense] of Discovery of Information That Is Not Reasonably Accessible.** If the court finds that good cause exists for the production of electronically stored information from a source that is not reasonably accessible, the court may set conditions for discovery of the electronically stored information [, including allocation of the expense of discovery] (*Code Civ. Proc. § 2031.310(f)*).

[*Optional*] **D. Court Must Limit Frequency and Extent of Electronic Discovery in Accordance If Specified Conditions Exist.** The court must limit the frequency and extent of discovery of electronically stored information, even from a source that is reasonably accessible, if the court determines that any of the following conditions exist: (1) it is possible to obtain the information from some other source that is more convenient, less burdensome, or less expensive; (2) the discovery sought is unreasonably cumulative or duplicative; (3) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (4) the likely burden or expense of the proposed discovery outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues in the litigation, and the importance of the requested discovery in resolving the issues (*Code Civ. Proc. § 2031.310(g)*).

[2] Comments

[a] Use of Form

This form may be used in combination with the *form in § 85A.30* in support of a motion opposing an order to compel further response to a demand for production, inspection, copying, testing, or sampling of electronically stored information when the responding party asserts that (1) the information is from a source that is not reasonably accessible because of undue burden or expense; (2) the responding party has met its burden of demonstrating that the information is not reasonably accessible; and (3) the demanding party has not shown that good cause exists for the production of the ESI despite its inaccessibility [*see Code Civ. Proc. § 2031.310(d), (e)*]. Optional Paragraph C states the court's authority to impose cost-shifting when ordering discovery of ESI that is not reasonably accessible [*Code Civ. Proc. § 2031.310(f)*], thereby shifting some or all of the expense of production to the demanding party. Optional Paragraph D may used when the responding party seeks to have the court limit discovery because the information may be obtained more conveniently or less expensively, the information is duplicative, the other party already has had ample opportunity to obtain the information, or the burden of producing it outweighs the likely benefit [*Code Civ. Proc. § 2031.310(g)*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should state that responding party objected to production on the basis of inaccessibility, show that the information in fact was not reasonably accessible, and, if appropriate, show that no good cause exists for the court to order production of the inaccessible information.

[c] Cost-Shifting

If the court finds good cause for the production of ESI from a source that is not reasonably accessible, the court may set conditions for the discovery of the information, including allocation of the expense of discovery [*Code Civ. Proc. § 2031.310(f)*]. As a practical matter, the expense of e-discovery is likely to be one of the principal concerns of the responding party, and cost-shifting may be a major reason for that party to argue inaccessibility. Conversely, the party seeking the information may think twice about the necessity of obtaining the information if the court will require that party to assume all or part of the substantial production costs.

[d] Limits on Extent or Frequency of Discovery

The court must limit the frequency or extent of discovery of electronically stored information, even from a source that is reasonably accessible, if the court determines that any of the following conditions exists [*Code Civ. Proc. § 2031.310(g)*]:

- It is possible to obtain the information from some other source that is more convenient, less burdensome, or less expensive.

- The discovery sought is unreasonably cumulative or duplicative.

- The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought.

- The likely burden or expense of the proposed discovery outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues in the litigation, and the importance of the requested discovery in resolving the issues.

Each of the grounds specified above may be an independent basis for opposing an order to compel further response.

[e] Related Forms and Discussion

For forms and discussion relating to inspection, copying, testing, sampling of documents, tangible things, land or other property, and electronically stored information generally, see California Forms of Pleading and Practice, Ch. 195, *Discovery: Inspection of Tangible Evidence* (Matthew Bender). For forms and discussion related to demands for production of electronically stored evidence, and responses to those demand, see California Forms of Pleading and Practice, Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)* (Matthew Bender).

For detailed coverage of opposing the production of electronic evidence, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 10, *Opposing Demands for Production of Electronic Evidence in California Court*; see also Ch. 8, *Responding to Electronic Discovery Demands in California Court* . For detailed coverage and forms relating to motions to compel further production of electronically stored information, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch.12, *Obtaining or Opposing Motion to Compel*. For discussion of the issue of whether backup tapes and other archived data are "reasonably accessible," see *Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 1, Understanding Electronic Evidence, § 1.22[6]*, and Ch. 5, *Initial Procedures in E-Discovery--Notice, Document Preservation, Meeting and Conferring, and Case Management Conference*, § 5.06[7].

[f] Opposing Memoranda

In an appropriate case, the *form in § 85A.22* may be used to oppose the motion supported by this form.

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 85A DISCOVERY: E-DISCOVERY
PART II. FORMS
A. Motions to Compel Production or Inspection, Copying, Testing, or Sampling

8-85A California Points & Authorities §§ 85A.32-85A.39

[Reserved]

§§ 85A.32[Reserved]

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 85A DISCOVERY: E-DISCOVERY
PART II. FORMS
B. Motions for Protective Order in Production of Electronically Stored Information

8-85A California Points & Authorities § 85A.40

§ 85A.40 Supporting Motion for Protective Order Concerning Demand for Production, Inspection, Copying, Testing, or Sampling of Electronically Stored Information [Code Civ. Proc. § 2031.060]

[1] FORM Supporting Motion for Protective Order Concerning Demand for Production, Inspection, Copying, Testing, or Sampling of Electronically Stored Information [Code Civ. Proc. § 2031.060]

[*The following may be combined, when appropriate, with a general memorandum in support of a motion for a protective order for production, inspection, copying, testing, or sampling electronically stored information (see, e.g., Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.50).*]

THE COURT SHOULD GRANT _____ [*specify moving party or affected person, e.g.,* DEFENDANT] A PROTECTIVE ORDER REGARDING _____ [*specify demanding party, e.g.,* PLAINTIFF]'S DEMAND FOR _____ [INSPECTION *and/or* COPYING *and/or* TESTING *and/or* SAMPLING OF ELECTRONICALLY STORED INFORMATION], _____ [*identify set number, e.g.,* PLAINTIFFS FIRST SET], BECAUSE GOOD CAUSE HAS BEEN SHOWN AND JUSTICE REQUIRES THE ORDER TO PROTECT _____ [*specify moving party or affected person, e.g.,* DEFENDANT] FROM _____ [UNWARRANTED ANNOYANCE *and/or* EMBARRASSMENT *and/or* OPPRESSION *and/or* UNDUE BURDEN AND EXPENSE].

A. Power of Court to Issue Protective Order. For good cause shown, the court may make any order concerning an inspection demand that justice requires to protect any _____ [party *or* affected person] from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense (*Code Civ. Proc. 2031.060(b)*; *see Code Civ. Proc. § 2017.020*; *Cal Rules of Ct., Rule 3.728(13)*).

B. Types of Protective Order. The court is empowered to issue a protective order that may include, but is not limited to, [one or more of] the following direction(s):

[*EITHER*]

That all or some of the items or categories of items in the demand for inspection, copying, testing or sampling of electronically stored information not be produced or made available at all (*Code Civ. Proc. § 2031.060(b)(1)*).

[*AND/OR*]

That _____ [*specify moving party or affected person, e.g.,* Defendant] has met its burden of showing that the electronically stored information demanded is from a source that is not reasonably accessible because of undue burden or expense (Code Civ. Prov. § 2031.060(c)).

[*AND/OR*]

That the frequency and extent of discovery of electronically stored information be limited, even if the court finds good cause for production of electronically stored information from a source that is not reasonably accessible, if the court determines that any of the following conditions exist: (1) it is possible to obtain the information from some other source that is more convenient, less burdensome, or less expensive; (2) the discovery sought is unreasonably cumulative or duplicative; (3) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (4) the likely burden or expense of the proposed discovery outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues in the litigation, and the importance of the requested discovery in resolving the issues (*Code Civ. Proc. § 2031.060(d), (f)*).

[*Optional*] **C. Court May Allocate Expense of Electronic Discovery.** If the court finds good cause for the production of electronically stored information from a source that is not reasonably accessible, the court may set conditions for discovery of the electronically stored information [, including allocation of the expense of discovery] [*Code Civ. Proc. § 2031.060(e)*].
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum is for use in supporting a motion by the recipient of an e-discovery demand for a protective order concerning a demand for inspection, copying, testing, or sampling of electronically stored information [*see Code Civ. Proc. 2031.060*].

Optional Paragraph C provides for additional court-mandated conditions, including the allocation of the expense of e-discovery, if the court finds good cause of the production of electronically stored evidence from a source that is not reasonably accessible [*see Code Civ. Proc. § 2031.310(f)*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should state facts showing that the requested information is not reasonably accessible, and/or that there is a need for protection from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense [*see Code Civ. Proc. 2031.060*].

A party claiming that ESI is inaccessible must present the court with detailed information demonstrating undue burden or cost; a mere cost estimate and conclusory characterizations of their ESI as inaccessible will not suffice [*see Mikron Indus. v. Hurd Windows & Doors, Inc. (W.D. Wash. Apr. 21, 2008) 2008 U.S. Dist. LEXIS 35166, *6* ; *OpenTV v. Liberate Techs. (N.D. Cal. 2003) 219 F.R.D. 474* (in cost shifting analysis, criticizing conclusory statements without supporting evidence on cost of production)].

[c] Protection from Annoyance or Undue Burden

The court, for good cause shown, may make any order that justice requires to protect any party or other person from unwarranted annoyance, embarrassment, or oppression, or undue burden or expense, in the face of a demand for inspection, copying, testing, or sampling of electronically stored information [*Code Civ. Proc. § 2031.060(b)*]. This power is in addition to the court's general power to limit discovery [*see Code Civ. Proc. § 2017.020*] and the court's power to make case management orders relating to the discovery of electronically stored information [*see Cal. Rules of Ct., Rule 3.728(13)*].

[d] Limits on Extent or Frequency of Discovery

The court must limit the frequency or extent of discovery of ESI, even from a source that is reasonably accessible, if the court determines that any of the following conditions exists [*Code Civ. Proc. § 2031.060(f)*]:

- It is possible to obtain the information from some other source that is more convenient, less burdensome, or less expensive.
- The discovery sought is unreasonably cumulative or duplicative.
- The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought.
- The likely burden or expense of the proposed discovery outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues in the litigation, and the importance of the requested discovery in resolving the issues.

Each of the grounds specified above may be an independent basis for a protective order.

[e] Related Forms and Discussion

For discussion of other general grounds for making or opposing protective orders in discovery, see Ch. 85, *Discovery: Production or Inspection of Tangible Evidence* .

For forms and discussion related to obtaining a protective order concerning a demand for inspection, copying, testing, or sampling pursuant to *Code Civ. Proc. 2031.060*, see California Forms of Pleading and Practice, Ch. 195, *Discovery: Inspection of Tangible Evidence* (Matthew Bender). For additional discussion of e-discovery, see California Forms of Pleading and Practice, Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)* (Matthew

Bender). For detailed coverage of protective orders in California e-discovery, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 11, *Seeking or Opposing Protective Order*.

[f] Opposing Memorandum

In the appropriate case, the *form in § 85A.41* may be used to oppose the motion supported by this form.

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 85A DISCOVERY: E-DISCOVERY
PART II. FORMS
B. Motions for Protective Order in Production of Electronically Stored Information

8-85A California Points & Authorities § 85A.41

§ 85A.41 Opposing Motion for Protective Order Concerning Demand for Production, Inspection, Copying, Testing, or Sampling of Electronically Stored Information [Code Civ. Proc. § 2031.060]

[1] FORM Opposing Motion for Protective Order Concerning Demand for Production, Inspection, Copying, Testing, or Sampling of Electronically Stored Information [Code Civ. Proc. § 2031.060]

[*The following may be combined, when appropriate, with a general memorandum opposing a motion for a protective order for production, inspection, copying, testing, or sampling electronically stored information (see, e.g., Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.60).*]

THE COURT SHOULD DENY THE MOTION FOR A PROTECTIVE ORDER BECAUSE _____ [_____ (*name of party, e.g.,* DEFENDANT) HAS FAILED TO MEET ITS BURDEN OF DEMONSTRATING THAT THE INFORMATION IS FROM A SOURCE THAT IS NOT REASONABLY ACCESSIBLE *and/or* GOOD CAUSE HAS BEEN SHOWN TO EXIST FOR PRODUCTION OF THE INFORMATION].

[*EITHER*]

A. Party [or Affected Person] Seeking Protective Order on Basis That Electronically Stored Information Is Not Reasonably Accessible Because of Undue Burden or Expense Has Burden of Making That Showing. A party or affected person who seeks a protective order regarding the production, inspection, copying, testing, or sampling of electronically stored information on the basis that the information is from a source that is not reasonably accessible because of undue burden or expense bears the burden of demonstrating that inaccessibility (Code Civ. Prov. § 2031.060(c)).

[*AND/OR*]

B. Court May Order Discovery of Electronically Stored Information Even if Party Moving for Protective Order Shows That Information Is Not Reasonably Accessible Because of Undue Burden [and/or Expense]. The court may order production of electronically stored information that is not reasonably accessible if the demanding party shows good cause (*Code Civ. Proc. § 2031.060(d)*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum is for use in opposing a motion for a protective order concerning a demand for inspection, copying, testing, or sampling of electronically stored information under *Code Civ. Proc. § 2031.060*. The grounds for opposing the demand are (1) that the person seeking a protective order on the basis that the information in question is not reasonably accessible has the burden of demonstrating inaccessibility (and, arguably, has failed to meet that burden) and/or (2) that even if the party seeking the order can successfully make a showing of inaccessibility, the court still has the power to order discovery of the information if good cause exists [*Code Civ. Proc. § 2031.060(c), (d)*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should state facts showing that the information in question is in fact reasonably accessible within the meaning of the statute, and/or that even if it is not reasonably accessible, the information is sufficiently important to the litigation to warrant a finding that good cause exists to order discovery. For example, counsel might argue, in an appropriate case, that the party seeking the order has given a mere unsupported cost estimate and conclusory characterizations of its ESI as inaccessible, and has failed to provide the court with detailed information demonstrating undue burden or cost [*see Mikron Indus. v. Hurd Windows & Doors, Inc. (W.D. Wash. Apr. 21, 2008) 2008 U.S. Dist. LEXIS 35166, *6* ; *OpenTV v. Liberate Techs. (N.D. Cal. 2003) 219 F.R.D. 474* (in cost shifting analysis, criticizing conclusory statements without supporting evidence on cost of production)].

A party also may seek a protective order from discovery of electronically stored information on the grounds that the information may be obtained more conveniently or less expensively from some other source, that the information is duplicative, that the other party already has had ample opportunity to obtain the information, or that the burden of producing it outweighs the likely benefit [*see Code Civ. Proc. 2031.060(f)*; for discussion, *see § 85A.40[2][d]*. If the party seeking the order relies on any of those grounds, counsel should add argument showing that those grounds are not supported by the facts of the case.

[c] Related Forms and Discussion

For discussion of other general grounds for making or opposing protective orders, see Ch. 85, *Discovery: Production or Inspection of Tangible Evidence* .

For forms and discussion related to obtaining a protective order concerning a demand for inspection, copying, testing, or

sampling pursuant to *Code Civ. Proc. 2031.060*, see California Forms of Pleading and Practice, Ch. 195, *Discovery: Inspection of Tangible Evidence* (Matthew Bender). For additional discussion of e-discovery, see California Forms of Pleading and Practice, Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)* (Matthew Bender). For detailed coverage of protective orders in California e-discovery, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 11, *Seeking or Opposing Protective Order*.

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 86 DISCOVERY: REQUESTS FOR ADMISSIONS

8-86 California Points & Authorities 86.syn

§ 86.syn Synopsis to Chapter 86: DISCOVERY: REQUESTS FOR ADMISSIONS

§ 86.01 Scope of Chapter

§ 86.02 Governing Law

[1] California Civil Discovery Act and Related Law

[2] Provisions Governing Requests for Admissions

[3] Case Law Decided Under Prior Discovery Acts

§ 86.03 How to Use the Forms in This Chapter

[1] Page Limits on Memoranda

[2] Using the Forms to Build a Draft Memorandum

§ 86.04 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

[2] Related Memoranda

§§ 86.05-86.09 [Reserved]

§ 86.10 Supporting Motion for Order Compelling Further Response to Requests for Admission [Code Civ. Proc. § 2033.290]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Notice

[d] Related Pleading and Practice Forms

[e] Opposing Memoranda

§ 86.11 Supporting Motion for Order Compelling Further Response to Requests for Admission [Code Civ. Proc. § 2033.290]--Response That Party Lacks Information or Knowledge Is Insufficient [Code Civ. Proc. § 2033.220(c)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Reasonable Inquiry Required

§ 86.12 Supporting Motion for Order Compelling Further Response to Requests for Admission [Code Civ. Proc. § 2033.290]--Objection That Request Calls for Opinion or Relates to Controversial or Complex Matter Is Improper [Code Civ. Proc. § 2033.010]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Opinions or Controversial or Complex Matters of Fact

[4] Additional Authorities

[a] Scope of Requests for Admission

§ 86.13 Supporting Motion for Order Compelling Further Response to Requests for Admission [Code Civ. Proc. § 2033.290]--Response That Requesting Party Was Previously Deposed on Same Subject Matter Is Inadequate

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Requesting Party Previously Deposed on Same Subject Matter

§ 86.14 Supporting Motion for Order of Sanctions [Code Civ. Proc. § 2023.030]--Failure to Comply With Order Compelling Further Response to Requests for Admission [Code Civ. Proc. § 2033.290(e)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

§§ 86.15-86.19 [Reserved]

§ 86.20 Opposing Motion for Order Compelling Further Response to Requests for Admission [Code Civ. Proc. §§ 2033.220, 2033.290]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Protective Order

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Joint Response by Coparties Is Proper Response to Identical Requests for Admission

§ 86.21 Opposing Motion for Order Compelling Further Response to Requests for Admission [Code Civ. Proc. § 2033.010, 2033.220, 2033.290]--Subject of Requested Admission Not Relevant to Pending Action

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Objection on Ground of Irrelevance

§ 86.22 Opposing Motion for Order Compelling Further Response to Requests for Admission [Code Civ. Proc. §§ 2033.220, 2033.290]--Responding Party's Denial Not Ground for Compelling Further Response

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Request for Further Response Based on Denial

§ 86.23 Opposing Motion for Order Compelling Further Response to Requests for Admission [Code Civ. Proc. §§ 2033.220, 2033.290]--Improper Inquiry Into Decision-Making Process of Administrative Agency

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Improper Inquiry Into Decision-Making Processes

[4] Additional Authorities

§§ 86.24-86.29 [Reserved]

§ 86.30 Supporting Motion for Protective Order Regarding Requests for Admission [Code Civ. Proc. § 2033.080]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Order Allowing Discovery

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Rephrasing Requests for Admission

§§ 86.31-86.49 [Reserved]

§ 86.50 Supporting Motion for Order for Deemed Admissions--Failure to Serve Timely Response [Code Civ. Proc. § 2033.280]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Comparison to Prior Law

[d] Relief From Waiver of Objections to Requests

[e] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Unsworn Response Is Deemed No Response

[b] Order on Motion After Failure to Serve Timely Response

[c] Mandatory Monetary Sanction

§ 86.51 Supporting Motion to Amend or Withdraw Response to Request for Admission [Code Civ. Proc. § 2033.300]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] When Withdrawal or Amendment of Admission Is Permitted

[d] Notice

[e] Conditions on Granting of Motion

[3] Discussion of Authorities

[a] Court May Permit Amendment or Withdrawal of Admission

[b] Doubts Must Be Resolved In Favor of Moving Party

[4] Additional Authorities

[a] Amendment or Withdrawal of Admission

§ 86.52 Supporting Motion for Order Requiring Payment of Expenses of Proof After Responding Party Failed to Make Admission When Requested [Code Civ. Proc. § 2033.420]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Only Expenses Incurred in Proving Matters Denied by Opposing Party Are Recoverable

[b] Substantial Importance of Requested Admission

[c] Denial Given for Delaying Purposes

[d] Standing to Recover Expenses

§ 86.53 Supporting Motion for Relief From Waiver of Right to Make Objections to Requests for Admission [Code Civ. Proc. § 2033.280]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Grounds for Relief

§§ 86.54-86.59 [Reserved]

§ 86.60 Opposing Motion for Order for Deemed Admissions--Substantially Complying Proposed Response Served Before Hearing [Code Civ. Proc. § 2033.280]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Admission Should Not Be Deemed When Substantially Complying Response Is Served

[b] Admission Should Not Be Deemed Automatically When Responses Are Verified by Defendant's Counsel Because Defendant Cannot Be Located

[4] Additional Authorities

[a] Admission Should Not Be Deemed When Substantially Complying Response Is Served

§ 86.61 Opposing Motion for Order Requiring Payment of Expenses of Proof [Code Civ. Proc. § 2033.420]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Good Reason for Failure to Admit

[b] Limitation on Amount of Recoverable Expenses

[c] Moving Party Must Prove Truth of Matters

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 86 DISCOVERY: REQUESTS FOR ADMISSIONS
PART I. INTRODUCTION

8-86 California Points & Authorities § 86.01

§ 86.01 Scope of Chapter

This chapter includes memoranda relating to civil discovery by means of requests to another party to admit the genuineness of specified documents, the truth of specified matters of fact, or the truth of specified opinions relating to fact or the application of law to fact. Forms in Part II include the following:

- Subpart A has memoranda supporting [§ 86.10 et seq.] and opposing [§ 86.20 et seq.] a motion to compel a response for further response to a request for an admission.

- Subpart B has memoranda relating to motions for protective orders in the context of a request for admissions [§ 86.30].

- Subpart C has memoranda relating to miscellaneous motions in matters pertaining to a requests for admissions, including those supporting [§ 86.50] and opposing [§ 86.60] a motion that specified matters be deemed admitted, supporting a motion to withdraw or amend a response to a request for an admission [§ 86.51], supporting [§ 86.52] and opposing [§ 86.61] a motion for expenses relating to proof of a matter following a failure to respond, and supporting a motion for relief from a waiver of the right to object to a request for admissions [§ 86.53].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMotions to CompelCivil ProcedureDiscoveryProtective Orders

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8-86 California Points & Authorities § 86.02

§ 86.02 Governing Law

[1] California Civil Discovery Act and Related Law

Civil discovery in California is governed primarily by the California Civil Discovery Act, codified at *Code Civ. Proc. §§ 2016.010-2036.050*. Discovery in limited civil cases is further governed by *Code Civ. Proc. §§ 94* and *95*. Statewide rules of court relating to discovery papers and discovery motions are set out in *Cal. Rules of Ct., Rules 3.1000*, 3.1345, 3.1346, 3.1347, and 3.1348.

[2] Provisions Governing Requests for Admissions

Civil discovery by requests to a party for admissions is governed primarily by *Code Civ. Proc. §§ 2033.010-2033.420*. Judicial Council forms of requests for admissions are authorized and governed by *Code Civ. Proc. §§ 2033.710-2033.740*. Limits on the use of requests for admissions in limited civil cases are set out in *Code Civ. Proc. § 94(a)*.

[3] Case Law Decided Under Prior Discovery Acts

The Civil Discovery Act was passed in 2004 and became effective July 1, 2005. It repealed and renumbered the Civil Discovery Act of 1986 but did notsubstantively change the law of civil discovery [Stats. 2004, ch. 182 §§ 22, 23, 61]. Thus cases decided under the 1986 Act remain controlling authority. A considerable body of case law interpreted the discovery provisions of the Discovery Act of 1956 (former Code Civ. Proc. §§ 2016-2037.9), which preceded the 1986 Act. Although the 1986 Act, which became operative July 1, 1987, implemented numerous changes in the prior law, it also continued provisions of the prior law in many other instances, or even codified decisions interpreting the prior law. Decisions construing this prior law are therefore cited as persuasive, rather than controlling, authority to the extent that they are consistent with current provisions [*see In re Marriage of Skelley (1976) 18 Cal. 3d 365, 369, 134 Cal. Rptr. 197, 556 P.2d 297]* .

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8-86 California Points & Authorities § 86.03

§ 86.03 How to Use the Forms in This Chapter

[1] Page Limits on Memoranda

One of the more significant drafting requirements to keep in mind are page limits: supporting and opposing memoranda filed in discovery motion proceedings may not exceed 15 pages. A reply or closing memorandum may not exceed 10 pages. Exhibits, declarations, attachments, the table of contents, the table of authorities, and the proof of service are excluded from these page limits. Any party must obtain leave of court to file a longer memorandum [*see Cal. Rules of Ct., Rule 3.1113(d)*]. These and other drafting requirements are discussed in further detail in Ch. 1, *Writing Legal Memoranda and Briefs* .

[2] Using the Forms to Build a Draft Memorandum

The forms included in this chapter are designed to be included in a memorandum supporting or opposing a particular type of discovery motion, such as motion to compel discovery or a motion for a protective order.

In many cases it will be appropriate to combine them with additional memoranda set out in the related discovery chapters. In particular, they may be combined with the general memoranda for limiting or regulating discovery set out in Ch. 80, *Discovery: Scope, Regulation, and Timing* , or with the points and authorities for limiting discovery based on the evidentiary privileges, work product protection, or other protective provisions found in Ch. 81, *Discovery: Privileges and Other Discovery Limitations* .

It may also be appropriate to modify the memoranda in this chapter for use in a different procedural context, such as in a trial or appellate brief or office memoranda relating to discovery practice.

For a detailed discussion on how to select and use the forms in the publication to build a draft memorandum and complete the draft, with detailed discussion of all drafting requirements and strategic or stylistic considerations, see Ch. 1, *Writing Legal Memoranda and Briefs* . For a skeletal form of memorandum for use in creating a properly formatted outline in which to compile relevant forms from this publication, see also Ch. 1, *Writing Legal Memoranda and Briefs* .
detailed discussion of all drafting requirements and strategic or stylistic considerations, see Ch. 1, *Writing Legal Memoranda and Briefs* . For a skeletal form of memorandum for use in creating a properly formatted outline in which

to compile relevant forms from this publication, see also Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting Memoranda

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8-86 California Points & Authorities § 86.04

§ 86.04 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

For background discussion of forms of moving papers relating to civil discovery by requests for admissions, see California Forms of Pleading and Practice, Ch. 196, *Discovery: Requests for Admissions* (Matthew Bender).

[2] Related Memoranda

For memoranda supporting or opposing a motion to compel discovery based on general limiting or regulatory provisions of the Discovery Act, see Ch. 80, *Discovery: Scope, Regulation, and Timing* .

For memoranda supporting or opposing a motion to compel discovery on the ground that the matter sought to be discovered is privileged or is otherwise protected from disclosure, see Ch. 81, *Discovery: Privileges and Other Discovery Limitations* .

For memoranda supporting or opposing a motion to compel discovery, or supporting or opposing a motion for protective order, in the context of another discovery method, see Ch. 83, *Discovery: Depositions* , Ch. 84, *Discovery: Interrogatories* , Ch. 85, *Discovery: Production or Inspection of Tangible Evidence* , Ch. 87, *Discovery: Physical and Mental Examinations* , and Ch. 88, *Discovery: Exchange of Expert Witness Information* .

For memoranda relating to the use of demands for the production or inspection of tangible evidence in order to preserve evidence before an action is commenced or pending an appeal, see Ch. 89, *Discovery: Preservation of Evidence* .

For memoranda for use in seeking or opposing writs to review discovery orders, see Ch. 89A, *Discovery: Review of Discovery Orders* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsExpert Witness

DiscoveryCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMotions to CompelCivil ProcedureDiscoveryProtective Orders

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8-86 California Points & Authorities §§ 86.05-86.09

[Reserved]

§§ 86.05[Reserved]

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PART II. FORMS
A. Motions to Compel Response to Request for Admission

8-86 California Points & Authorities § 86.10

§ 86.10 Supporting Motion for Order Compelling Further Response to Requests for Admission [Code Civ. Proc. § 2033.290]--General Form

[1] FORM Supporting Motion for Order Compelling Further Response to Requests for Admission [Code Civ. Proc. § 2033.290]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF MOTION FOR
Plaintiff,	)	ORDER COMPELLING FURTHER RESPONSE TO
vs.	)	REQUESTS FOR ADMISSION AND FOR MON-
_____ [*name*],	)	ETARY SANCTION
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD COMPEL FURTHER RESPONSE TO _____ [*identify set, e.g.,* PLAINTIFF'S FIRST SET OF] REQUESTS FOR ADMISSION [*identify individual requests if appropriate, e.g.,* REQUESTS 1-5], BECAUSE _____ [THE ANSWER(S) TO THE REQUEST(S) _____ (IS *or* ARE) _____ (EVASIVE *and/or* INCOMPLETE) *and/or* THE

OBJECTION(S) _____ (IS *or* ARE) _____ (WITHOUT MERIT *or* TOO GENERAL)].

IF THE MOTION IS GRANTED, THE COURT SHOULD ALSO IMPOSE A MONETARY SANCTION AGAINST _____ [*name(s)*] BECAUSE THERE IS NO SHOWING THAT _____ [HE/SHE/IT *or* THEY] ACTED WITH SUBSTANTIAL JUSTIFICATION OR THAT OTHER CIRCUMSTANCES MAKE THE IMPOSITION OF THE SANCTION UNJUST.

A. Inadequate Answer. If the party requesting admissions, on receipt of a response to them, deems that (1) an answer to a particular request is evasive or incomplete, or (2) an objection to a particular request is without merit or too general, that party may bring a motion, accompanied by a declaration stating facts showing a reasonable and good-faith attempt at an informal resolution of the disputed answers, for an order compelling a further response (*Code Civ. Proc. § 2033.290*).

B. Court Must Impose Monetary Sanction Absent Specified Findings. The court must impose a monetary sanction under *Section 2023.030 of the Code of Civil Procedure* against any party, person, or attorney who unsuccessfully opposes a motion to compel further response, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust (*Code Civ. Proc. §§ 2023.030(a), 2033.290(d)*).

[*Add memoranda generally supporting the imposition of monetary sanctions (see, e.g., Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11).*]

[*Optional*] **C. Court May Impose Sanctions Despite Lack of Opposition to Motion to Compel Discovery.** The court may award sanctions under the Discovery Act in favor of a party who files a motion to compel discovery, even though no opposition to the motion was filed, or opposition to the motion was withdrawn, or the requested discovery was provided to the moving party after the motion was filed (*Cal. Rules of Ct., Rule 3.1030(a)*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This form is for use in support of a motion for an order compelling a further response to a request for admission [*see* Code *Civ. Proc. § 2033.290*]. The motion must be accompanied by a declaration stating facts showing a reasonable and good-faith attempt at an informal resolution of each issue presented by the motion [*see Code Civ. Proc. § 2033.290(b)*]. This form should be combined with general points and authorities supporting the imposition of monetary sanctions under *Code Civ. Proc. § 2023.030(a)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11*].

[b] Argument

Counsel should add argument linking the points in this form with the facts ofhis or her case. For example, if counsel contends that an answer is inadequate, counsel should show particular reasons why the answer is evasive or incomplete. Counsel's factual showing should demonstrate substantial justification for the motion in order to avoid a monetary sanction if the motion is denied [*see Code Civ. Proc. § 2033.290*]. However, counsel need not set forth facts showing that the responding party acted without substantial justification [*cf.* former Code Civ. Proc. § 2034(a)]. *Code Civ. Proc. §§ 2023.030(a)* and *2033.290(d)* effectively places that burden on the person against whom the sanction is to be imposed, by requiring the court to impose a monetary sanction when it is expressly authorized *unless* it finds that there was substantial justification or that other circumstances would make the monetary sanction unjust.

[c] Notice

Unless notice of the motion for an order compelling a further response is given within 45 days of the service of the response, or any supplemental response, (or later if service is by mail), or any specific later date to which requesting party and the responding party have agreed in writing, the party requesting admissions waives any right to compel further response to the requests for admission [*see Code Civ. Proc. § 2033.290(c)*; *see also Code Civ. Proc. § 2016.050* (extension of time for service by mail)].

[d] Related Pleading and Practice Forms

For forms and discussion related to requests for admissions, see California Forms of Pleading and Practice, Ch. 196, *Discovery: Requests for Admissions* (Matthew Bender).

[e] Opposing Memoranda

In an appropriate case, the memoranda *set out in § 86.20* et seq. may be used to oppose the contention supported by these points and authorities.

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PART II. FORMS
A. Motions to Compel Response to Request for Admission

8-86 California Points & Authorities § 86.11

§ 86.11 Supporting Motion for Order Compelling Further Response to Requests for Admission [Code Civ. Proc. § 2033.290]--Response That Party Lacks Information or Knowledge Is Insufficient [Code Civ. Proc. § 2033.220(c)]

[1] FORM Supporting Motion for Order Compelling Further Response to Requests for Admission [Code Civ. Proc. § 2033.290]--Response That Party Lacks Information or Knowledge Is Insufficient [Code Civ. Proc. § 2033.220(c)]

[*The following may be combined, when appropriate, with a general memorandum in support of a motion compelling further response (see, e.g., § 86.10).*]

IT IS PROPER FOR THE COURT TO COMPEL FURTHER RESPONSE TO _____ [*identify set, e.g.,* PLAINTIFF'S FIRST SET OF] REQUESTS FOR ADMISSION [*identify individual requests if appropriate, e.g.,* REQUESTS 1-5], BECAUSE _____ [*specify, e.g.,* PLAINTIFF] FAILED TO ADMIT _____ [ALL *or* PART] OF THE REQUEST(S) ON THE GROUND OF LACK OF _____ [INFORMATION *and/or* KNOWLEDGE], BUT DID NOT STATE THAT _____ [A REASONABLE INQUIRY CONCERNING THE MATTER IN THE PARTICULAR REQUEST(S) HAS BEEN MADE *and/or* THE INFORMATION KNOWN OR READILY OBTAINABLE IS INSUFFICIENT TO ENABLE THAT PARTY TO ADMIT THE MATTER].

Reasonable Inquiry Required. If a responding party gives lack of information or knowledge as a reason for a failure to admit all or part of a request for admission, that party must state in the answer that a reasonable inquiry concerning the matter in the particular request has been made, and that the information known or readily obtainable is insufficient to enable that party to admit the matter (*Code Civ. Proc. § 2033.220(c)*; *Chodos v. Superior Court (1963) 215 Cal. App. 2d 318, 323, 30 Cal. Rptr. 303*).

[2] Comments

[a] Use of Form

This form is for use in support of a motion compelling further response if the responding party gives lack of information or knowledge as a reason for failure to admit all or part of a request for admission but fails to state that either a reasonable inquiry concerning the matter has been made, or the available information provides an insufficient basis for admission, or both [*see Code Civ. Proc. § 2033.220(c)*]. This form is intended to be combined with a general form of memorandumof points and authorities supporting a motion compelling further response [*see § 86.10*].

Note that the case cited in this form construes law in effect before the operative date of the Civil Discovery Act. It is cited and discussed as persuasive authority to the extent that it remains consistent with current provisions [*see also § 86.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should make a showing, supported by a declaration if appropriate, that the responding party has access to available sources of information.

[3] Discussion of Authorities

[a] Reasonable Inquiry Required

In ***Chodos v. Superior Court*** *(1963) 215 Cal. App. 2d 318, 30 Cal. Rptr. 303* , an action for damages involving a landslide, defendants claimed that they could neither truthfully admit nor deny certain technical matters regarding landfill construction, because they lacked independent information; the trial court sustained defendants' objections. The court of appeal let a peremptory writ of mandate issue, ordering the trial court to vacate its order, and order defendants to respond. Since plaintiffs' declaration set forth facts from which it may have been inferred that defendants had sources available to them regarding the matters involved, it was neither unfair nor improper to require defendants to make a reasonable investigation in order to determine whether or not they would dispute the matters involved at time of trial (*215 Cal. App. 2d 318, 323)* .

Note

that *Chodos* was cited with approval by the court of appeal in *Lindgren v. Superior Court (1965) 237 Cal. App. 2d 743, 748, 47 Cal. Rptr. 298* , which held, however, that in certain burdensome circumstances a responding party is not required to investigate [*see Holguin v. Superior Court (1972) 22 Cal. App. 3d 812, 821, 99 Cal. Rptr. 653* (respondent to interrogatories in wrongful death case not required to start an investigation constituting preparation of opponent's case and stipulation of own case); *see also Smith v. Circle P Ranch Co. (1978) 87 Cal. App. 3d 267, 273, 150 Cal. Rptr. 828* (discussed in *§ 86.51[3*][d])].

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A. Motions to Compel Response to Request for Admission

8-86 California Points & Authorities § 86.12

§ 86.12 Supporting Motion for Order Compelling Further Response to Requests for Admission [Code Civ. Proc. § 2033.290]--Objection That Request Calls for Opinion or Relates to Controversial or Complex Matter Is Improper [Code Civ. Proc. § 2033.010]

[1] FORM Supporting Motion for Order Compelling Further Response to Requests for Admission [Code Civ. Proc. § 2033.290]--Objection That Request Calls for Opinion or Relates to Controversial or Complex Matter Is Improper [Code Civ. Proc. § 2033.010]

[*The following may be combined, when appropriate, with a general form of memorandum of points and authorities in support of a motion compelling further response (see, e.g., § 86.10).*]

THE OBJECTION TO _____ [*identify set, e.g.,* PLAINTIFF'S FIRST SET OF] REQUESTS FOR ADMISSION [*identify individual requests if appropriate, e.g.,* REQUESTS 1-5], IS IMPROPERLY BASED ON THE GROUND THAT THE REQUESTS DEAL WITH CONTROVERSIAL OR COMPLEX MATTERS AND CALL FOR AN OPINION, BECAUSE A REQUEST FOR ADMISSION MAY RELATE TO A MATTER THAT IS IN CONTROVERSY OR IS COMPLEX, AND MAY CALL FOR OPINIONS RELATING TO FACT OR THE APPLICATION OF LAW TO FACT.

A. Scope of Requests for Admission. Any party may obtain discovery within the scope fixed by *Section 2017.010 et seq. of the Code of Civil Procedure*, and subject to the restrictions set forth in Section 2019.010 et seq. of the Code of Civil Procedure, by a written request that any other party to the action admit the genuineness of specified documents, or the truth of specified matters of fact, opinion relating to fact, or application of law to fact. A request for admission may relate to a matter that is in controversy between the parties (*Code Civ. Proc. § 2033.010*).

B. Opinions or Controversial or Complex Matters of Fact. An objection to a request for admission is improper if it is based on the ground that the request calls for an opinion or deals with controversial or complex matters of fact (*see Cembrook v. Superior Court (1961) 56 Cal. 2d 423, 429, 15 Cal. Rptr. 127, 364 P.2d 303*).

[2] Comments

[a] Use of Form

This form of points and authorities is for use in support of a motion compelling further response to requests for admission when the responding party has objected to a request on the ground that it calls for opinions or relates to a matter in controversy. The foregoing form is intended to becombined with a general form of memorandum of points and authorities supporting a motion compelling further response [*see § 86.10*].

Note that the case cited in this form construes law in effect before the operative date of the Civil Discovery Act. It is cited and discussed as persuasive authority to the extent that it remains consistent with current provisions [*see also § 86.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case.

[3] Discussion of Authorities

[a] Opinions or Controversial or Complex Matters of Fact

Cembrook v. Superior Court *(1961) 56 Cal. 2d 423, 15 Cal. Rptr. 127, 364 P.2d 303* was a personal injury action against, inter alia, a drug manufacturer, seeking damages allegedly caused by long-term ingestion of defendant's product. Plaintiff served defendant with requests for admission concerning several matters, including defendant's advertising and marketing policies, side effects caused by ingestion of defendant's product, and defendant's knowledge of the harmful effects caused by use of its product. Defendant objected to the requested admissions, asserting, inter alia, that various requests (1) were irrelevant; (2) called for conclusions; (3) involved matters that were both complex and controversial; (4) could not be clearly either admitted or denied; and (5) overlapped answers previously given in depositions. The trial court sustained the objections, and plaintiff brought a petition for writ of mandate to compel the trial court to set aside its order.

The Supreme Court let the writ of mandate issue, requiring the trial court to set aside its order sustaining objections and reconsider the objections to the requests for admission. Former Code Civ. Proc. § 2033 (*now see Code Civ. Proc. § 2033.010 et seq.*) required more than objections to the requests as a whole, and defendant should have been required to admit, deny, or explain many of the matters to which it made blanket objection. By not explaining its inability to admit or deny when appropriate, defendant failed to show the good faith required by the statute (*56 Cal. 2d 423, 430)* . With respect to the objections that the requests called for conclusions, or involved matters that were both complex and controversial, the Court stated that the fact that a request is for the admission of a controversial matter, involves complex facts, or calls for an opinion is inconsequential (*56 Cal. 2d 423, 429)* . Contrary to most of the other discovery procedures, which are aimed primarily at assisting counsel to prepare for trial, requests for admission are primarily aimed at settling triable issues so that they will not have to be tried (*56 Cal. 2d 423, 429)* .

Note that *Cembrook* was decided before the 1986 repeal and reenactment of Code Civ. Proc. § 2033 (now see §§ 2033.010 -2033.420). However, with respect to the foregoing issues, the Legislature intended by its reenactment to codify the holding in *Cembrook* [*see* Reporter's Notes to the Proposed California Civil Discovery Act of 1986, Note to § 2033(a)].

[4] Additional Authorities

[a] Scope of Requests for Admission

The facts and procedural background of *Cembrook v. Superior Court (1961) 56 Cal. 2d 423, 15 Cal. Rptr. 127, 364 P.2d 303* , are discussed in [3][a], *above.* In *Cembrook,* the Supreme Court held that

a request for admission cannot be objected to on the ground that it regards a controversial matter, or one involving complex facts, or calls for an opinion (*56 Cal. 2d 423, 429)* . The controlling statute, former Code Civ. Proc. § 2033(a) (*now see Code Civ. Proc. § 2033.010*), permitted requests for admission of "relevant" documents and matters of fact. Interpreting the entire Discovery Act as a whole, the Court found that the Legislature intended to authorize discovery in regard to all matters relevant to the subject matter. All of petitioner's requests were relevant to the subject matter or reasonably calculated to lead to admissible evidence (*56 Cal. 2d 423, 429)* .

Note

that *Code Civ. Proc. § 2033.010* now omits the term "relevant," and authorizes discovery within the scope fixed by *Code Civ. Proc. § 2017.010 et seq.* and subject to the restrictions under *Code Civ. Proc. § 2019.010 et seq.* In doing so, the Legislature intended to codify the interpretation in *Cembrook* of the expansive definition of relevance with respect to requests for admission [*see* Reporter's Notes to the Proposed California Civil Discovery Act of 1986, Note to § 2033(a)].

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8-86 California Points & Authorities § 86.13

§ 86.13 Supporting Motion for Order Compelling Further Response to Requests for Admission [Code Civ. Proc. § 2033.290]--Response That Requesting Party Was Previously Deposed on Same Subject Matter Is Inadequate

[1] FORM Supporting Motion for Order Compelling Further Response to Requests for Admission [Code Civ. Proc. § 2033.290]--Response That Requesting Party Was Previously Deposed on Same Subject Matter Is Inadequate

[*The following may be combined, when appropriate, with a general form of memorandum of points and authorities in support of a motion compelling further response (see, e.g., § 86.10).*]

THE OBJECTION TO _____ [*identify set, e.g.,* PLAINTIFF'S FIRST SET OF] REQUESTS FOR ADMISSION [*identify individualrequests if appropriate, e.g.,* REQUEST 5] IS IMPROPERLY BASED ON THE GROUND THAT THE REQUESTING PARTY WAS PREVIOUSLY DEPOSED ON THE SAME SUBJECT MATTER IN THE REQUESTS.

Requesting Party Previously Deposed on Same Subject Matter. The fact that one party is unilaterally bound by deposition answers does not excuse the other party from being required to make an admission regarding the same facts (*see Cembrook v. Superior Court (1961) 56 Cal. 2d 423, 429, 15 Cal. Rptr. 127, 364 P.2d 303*).

[2] Comments

[a] Use of Form

This form of points and authorities is for use in support of a motion compelling further response when the party receiving the requests objects on the ground that the requesting party already knows the answer, as evidenced by the fact that he or she has previously given testimony during depositions on the same matters [*see Cembrook v. Superior Court (1961) 56 Cal. 2d 423, 429, 15 Cal. Rptr. 127, 364 P.2d 303]* . This form is intended to be combined with a general form of memorandum of points and authorities supporting a motion compelling further response [*see § 86.10*].

Note that the case cited in this form construes law in effect before the operative date of the Civil Discovery Act. It is cited and discussed as persuasive authority to the extent that it remains consistent with current provisions [*see also §*

86.02[3]].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case.

[3] Discussion of Authorities

[a] Requesting Party Previously Deposed on Same Subject Matter

The facts and procedural background of ***Cembrook v. Superior Court*** *(1961) 56 Cal. 2d 423, 15 Cal. Rptr. 127, 364 P.2d 303* , are discussed in *§ 86.12[3][a]*. In *Cembrook*, the Supreme Court held that a request for admission cannot be objected to on the ground that it regards a controversial matter, or one involving complex facts, or calls for an opinion. The responding party also objected on the ground that the requesting party had already been deposed on the same subject matter. However, the fact thatone party has unilaterally bound itself, through deposition, does not excuse the other party from being required to make an admission regarding the same facts. The issue is not fully determined until both parties are heard (*56 Cal. 2d 423, 429)* .

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8-86 California Points & Authorities § 86.14

§ 86.14 Supporting Motion for Order of Sanctions [Code Civ. Proc. § 2023.030]--Failure to Comply With Order Compelling Further Response to Requests for Admission [Code Civ. Proc. § 2033.290(e)]

[1] FORM Supporting Motion for Order of Sanctions [Code Civ. Proc. § 2023.030]--Failure to Comply With Order Compelling Further Response to Requests for Admission [Code Civ. Proc. § 2033.290(e)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SANCTIONS FOR FAILURE TO COMPLY WITH ORDER COMPELLING FURTHER RESPONSES TO REQUEST(S) FOR ADMISSION
vs.	)	
_____ [*name*],	)	
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

THE COURT SHOULD ORDER THAT THE _____ [GENUINENESS OF THE DOCUMENTS *and/or* THE TRUTH OF ALL MATTERS] SPECIFIED IN _____ [*identify set, e.g.,* PLAINTIFF'S FIRST SET OF] REQUESTS FOR ADMISSION, _____ [*identify individual requests, e.g.,*

REQUESTS 1-5], BE DEEMED ADMITTED, BECAUSE _____ [PLAINTIFF *or* DEFENDANT] HAS FAILED TO OBEY AN ORDER COMPELLING FURTHER RESPONSE TO THE REQUEST(S).

Failure to Comply With Order. If a party fails to obey an order compelling further response to requests for admission, the court may order that the matters involved in the requests be deemed admitted. In lieu of or in addition to this order, the court may impose a monetary sanction under *Section 2023.030 of the Code of Civil Procedure* [*Code Civ. Proc. § 2033.290(e)*].

[*Add points and authorities generally supporting the imposition of any sanctions that are just, such as an issue or monetary sanction(see, e.g., Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11).*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This form of memorandum of points and authorities is for use in support of a motion for an order for deemed admissions and monetary sanction, when the moving party has served requests for admission on the opposing party, and the opposing party has failed to obey an order compelling further response [*see Code Civ. Proc. § 2033.290(e)*]. This form should be combined with general points and authorities supporting the imposition of monetary sanctions under *Code Civ. Proc. § 2023.030(a)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case.

[c] Related Pleading and Practice Forms

For forms and discussion relating to compelling responses to requests for admission, see California Forms of Pleading and Practice, Ch. 196, *Discovery: Requests for Admissions* (Matthew Bender).

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8-86 California Points & Authorities §§ 86.15-86.19

[Reserved]

§§ 86.15[Reserved]

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8-86 California Points & Authorities § 86.20

§ 86.20 Opposing Motion for Order Compelling Further Response to Requests for Admission [Code Civ. Proc. §§ 2033.220, 2033.290]--General Form

[1] FORM Opposing Motion for Order Compelling Further Response to Requests for Admission [Code Civ. Proc. §§ 2033.220, 2033.290]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR ORDER COMPELLING FURTHER RESPONSE TO REQUESTS FOR ADMISSION
vs.	)	
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

FURTHER RESPONSE TO _____ [*identify set, e.g.*, PLAINTIFF'S FIRST SET OF] REQUESTS FOR ADMISSION, _____ [*identify individual requests, e.g.*, REQUESTS 1-5], IS NOT REQUIRED, BECAUSE _____ [*specify responding party, e.g.*, DEFENDANT] HAS PROPERLY _____ [ADMITTED AS MUCH OF THE MATTER AS IS TRUE IN *and/or* DENIED AS MUCH OF

THE MATTER AS IS UNTRUE IN *and/or* SPECIFIED THAT HE/SHE LACKS SUFFICIENT INFORMATION OR KNOWLEDGE REGARDING THE TRUTH OF *and/or* OBJECTED TO] THE REQUESTS IN CONTROVERSY. IF THE MOTION IS DENIED, THE COURT SHOULD ALSO IMPOSE A MONETARY SANCTION AGAINST _____ [*name(s)*] BECAUSE THERE IS NO SHOWING THAT _____ HE/SHE/IT/THEY ACTED WITH SUBSTANTIAL JUSTIFICATION OR THAT OTHER CIRCUMSTANCES MAKE THE IMPOSITION OF THE SANCTION UNJUST.

[*EITHER*]

A. Permissible Answers. Each answer in the response shall be as complete and straightforward as the information reasonably available to the responding party permits. Each answer shall (1)admit so much of the matter involved in the request as is true, either as expressed in the request itself or as reasonably and clearly qualified by the responding party, (2) deny so much of the matter involved in the request as is untrue, and (3) specify so much of the matter involved in the request as to the truth of which the responding party lacks sufficient information or knowledge. If a responding party gives lack of information or knowledge as a reason for a failure to admit all or part of a request for admission, that party shall state in the answer that a reasonable inquiry concerning the matter in the particular request has been made, and that the information known or readily obtainable is insufficient to enable that party to admit the matter (*Code Civ. Proc. § 2033.220*).

[*AND/OR*]

B. Number of Requests Not Pertaining to Genuineness of Documents Exceeds Limit. If no declaration for additional discovery has been made, a respondent need only respond to the first 35 admission requests that do not relate to the genuineness of documents and state an objection to the balance on the ground that the limit has been exceeded (*Code Civ. Proc. § 2033.030(b), 2033.230*).

[*AND/OR*]

C. Number of Requests Regarding Genuineness of Documents. The number of requests for admission regarding the genuineness of documents may be limited in the interests of justice in order to protect the responding party from unwarranted annoyance, embarrassment, oppression, or undue burden and expense (*Code Civ. Proc. § 2033.030(c)*).

[*AND/OR*]

D. Claim of Privilege. The responding party may object to a request for admission on a claim of privilege if he or she clearly states the particular privilege invoked (*see Code Civ. Proc. § 2033.230(b)*).

[*AND/OR*]

E. Protected Work Product. The responding party may object to a request for admission by expressly asserting that the matter in controversy is protected work product under *Code of Civil Procedure Section 2018.010 et seq.* (*see Code Civ. Proc. § 2033.230(b)*).

[*AND/OR*]

F. Joint Response by Coparties Is Proper Response to Identical Requests for Admission. Coparties who have been served withidentical, but separate, sets of requests for admission may respond with a single, joint document containing identical responses, so long as it is verified under penalty of perjury by both of them (*Tobin v. Oris (1992) 3 Cal. App. 4th 814, 829, 4 Cal. Rptr. 2d 736 , disapproved on other grounds* in *Wilcox v. Birtwhistle (1999) 21 Cal. 4th 973, 983 n.12, 90 Cal. Rptr. 2d 260, 267, 987 P.2d 727*).

[*CONTINUE*]

G. Court Must Impose Monetary Sanction Absent Specified Findings. The court must impose a monetary sanction under *Code of Civil Procedure Section 2023.030* against any party, person, or attorney who unsuccessfully makes a motion to compel further response, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust (*Code Civ. Proc. §§ 2023.030(a), 2033.290(d)*).

[*Add points and authorities generally supporting the imposition of monetary sanctions (see, e.g., Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11).*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This form of points and authorities is a general form for use in opposition to a motion for an order compelling further answers to requests for admission, on the ground that the respondent has properly provided an answer or objection to the request [*see Code Civ. Proc. §§ 2033.220, 2033.290*]. This form should be combined with general points and authorities supporting the imposition of monetary sanctions under *Code Civ. Proc. § 2023.030(a)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11*].

This form may be combined with forms of points and authorities for specific objections, such as those *set out in § 86.21* et seq. For memoranda of points and authorities relating to specific grounds of evidentiary privilege or other protection from discovery, see generally Ch. 81, *Discovery: Privileges and Other Discovery Limitations* .

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in §§ 86.10* and *86.11*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, if counsel for the moving party has contended that the responding party's objection to a response is too general, counsel should discuss facts showing that the objection is sufficiently specific. Counsel should also argue how the answers are clear

and complete. If more than 35 requests for admission have been propounded, counsel should argue, if appropriate, that the greater number is not warranted by the complexity or quantity of the existing and potential issues [*see Code Civ. Proc. § 2033.040*]. Counsel's factual showing should demonstrate substantial justification for opposing the motion in order to avoid a monetary sanction if the motion is granted. However, counsel need not set forth facts showing that the moving party acted without substantial justification [*cf.* former Code Civ. Proc. § 2034(a)]. *Code Civ. Proc. §§ 2023.030(a)* and *2033.290(d)* effectively place that burden on the person against whom the sanction is to be imposed, by requiring the court to impose a monetary sanction when it is expressly authorized *unless* it finds that there was substantial justification or that other circumstances would make the monetary sanction unjust.

[c] Protective Order

Note that, if requests cause annoyance, embarrassment, oppression, or undue burden and expense, the responding party may apply for a protective order under *Code Civ. Proc. § 2033.080* [*see § 86.30*].

[d] Related Pleading and Practice Forms

For forms and discussion related to requests for admissions, see California Forms of Pleading and Practice, Ch. 196, *Discovery: Requests for Admissions* (Matthew Bender).

[3] Discussion of Authorities

[a] Joint Response by Coparties Is Proper Response to Identical Requests for Admission

The facts and procedural background of ***Tobin v. Oris*** *(1992) 3 Cal. App. 4th 814, 4 Cal. Rptr. 2d 736 , disapproved on other grounds* in *Wilcox v. Birtwhistle (1999) 21 Cal. 4th 973, 983 n.12, 90 Cal. Rptr. 2d 260, 267, 987 P.2d 727* , are discussed in *§ 86.60[3][a]*. In *Tobin*, plaintiff served two identical, but separate, sets of requests for admission to a husband andwife codefendants represented by the same counsel. Codefendants responded with a single document containing identical responses, but which was verified under penalty of perjury by both of them. The court of appeal upheld the validity of the joint response. Such a response does not violate the statutory requirement of a "separate" response. The court reasoned that plaintiff received all that he was entitled to receive. Each defendant responded, each verified his or her response, and each could be held separately accountable for the response. To require them to have done so on separate pieces of paper would have added nothing but another triumph of form over substance (*3 Cal. App. 4th 814, 829)* .

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8-86 California Points & Authorities § 86.21

§ 86.21 Opposing Motion for Order Compelling Further Response to Requests for Admission [Code Civ. Proc. § 2033.010, 2033.220, 2033.290]--Subject of Requested Admission Not Relevant to Pending Action

[1] FORM Opposing Motion for Order Compelling Further Response to Requests for Admission [Code Civ. Proc. §§ 2033.010, 2033.220, 2033.290]--Subject of Requested Admission Not Relevant to Pending Action

[*The following may be combined, when appropriate, with a general form of memorandum of points and authorities opposing a motion compelling further response (see, e.g., § 86.20).*]

THE OBJECTION TO THE REQUESTED ADMISSION IS PROPER BECAUSE THE SUBJECT OF THE REQUEST IS NOT RELEVANT TO THE PENDING ACTION NOR REASONABLY CALCULATED TO LEAD TO ADMISSIBLE EVIDENCE.

A. Relevance to Subject Matter of Pending Action. Unless otherwise limited by order of the court, any party may obtain discovery regarding any matter not privileged, but it must be relevant to the subject matter involved in the pending action or to the determination of any motion made in that action and be admissible in evidence or appear reasonably calculated to lead to the discovery of admissible evidence (*Code Civ. Proc. § 2017.010*).

B. Objection on Ground of Irrelevance. If the subject of the requested admission is neither relevant to the subject matter involved in the pending action, nor reasonably calculated to lead to admissible evidence, then an objection on the ground of irrelevance is proper (see *Cembrook v. Sterling Drug Inc. (1964) 231 Cal. App. 2d 52, 62, 41 Cal. Rptr. 492*).

[2] Comments

[a] Use of Form

This form of points and authorities is for use in opposition to a motion for an order compelling further response if the subject matter of the requested admission is irrelevant to the pending action. This form is intended to be combined with a general memorandum of points and authorities opposing a motion compelling further response [*see § 86.20*].

Note that the case cited in this form construes law in effect before the operative date of the Civil Discovery Act. It is cited and discussed as persuasive authority to the extent that it remains consistent with current provisions [*see also § 86.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should discuss the issues in the pending action and explain why the subject of the request is irrelevant.

[3] Discussion of Authorities

[a] Objection on Ground of Irrelevance

In ***Cembrook v. Sterling Drug Inc.*** *(1964) 231 Cal. App. 2d 52, 41 Cal. Rptr. 492* , a consumer of a drug manufactured by defendant brought an action for damages for personal injuries allegedly arising from plaintiff's use of defendant's drug. Plaintiff requested that defendant admit that it conspired with the news media not to publicize the court proceedings, and that the public was therefore wrongfully denied access to knowledge of the ill effects of defendant's product. The trial court sustained defendant's objections on the ground of irrelevance. Defendant prevailed, and plaintiff appealed on the ground that he was denied a fair trial because of lack of media publicity.

The court of appeal affirmed. The right to a public trial does not include the right to publicity thereof by the news media; nor is the subject of media publicity a triable issue in the instant case. The subject of the requested admission was not, therefore, relevant to the instant action, nor was it reasonably calculated to lead to admissible evidence. Accordingly, the trial court did not abuse its discretion in sustaining defendant's objections to the disputed requests (*231 Cal. App. 2d 52, 62)* . (This case is related to *Cembrook v. Superior Court (1961) 56 Cal. 2d 423, 15 Cal. Rptr. 127, 364 P.2d 303* , discussed in *§ 86.12[3][a]*.)

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8-86 California Points & Authorities § 86.22

§ 86.22 Opposing Motion for Order Compelling Further Response to Requests for Admission [Code Civ. Proc. §§ 2033.220, 2033.290]--Responding Party's Denial Not Ground for Compelling Further Response

[1] FORM Opposing Motion for Order Compelling Further Response to Requests for Admission [Code Civ. Proc. §§ 2033.220, 2033.290]--Responding Party's Denial Not Ground for Compelling Further Response

[*The following may be combined, when appropriate, with a general form of memorandum of points and authorities opposing a motion compelling further response (see, e.g., § 86.20).*]

FURTHER RESPONSE SHOULD NOT BE COMPELLED, BECAUSE _____ [PLAINTIFF *or* DEFENDANT] HAS DENIED _____ [*identify set, e.g.,* PLAINTIFF'S FIRST SET OF] REQUESTS FOR ADMISSION, _____ [*identify individual requests, e.g.,* REQUESTS 1-5], AND MAY NOT THEREFORE BE COMPELLED TO SUBMIT FURTHER RESPONSE, EVEN IF THE DENIAL IS UNFOUNDED.

Request for Further Response Based on Denial. If a responding party has denied requested admissions, the requesting party may not move for further answers requiring the responding party to change the response, even if the denials are entirely unwarranted (see *Holguin v. Superior Court (1972) 22 Cal. App. 3d 812, 820, 99 Cal. Rptr. 653*).

[2] Comments

[a] Use of Form

This form of points and authorities is for use in opposition to a motion for an order compelling further response if the responding party has denied the requested admissions and the requesting party seeks further response on the ground that the denials were unjustified. This form is intended to be combined with a general memorandum of points and authorities opposing a motion for an order compelling further response [*see § 86.20*].

Note that if the party requesting an admission about the genuineness of a document or the truth of a matter thereafter proves the matter, he or she may move for an order requiring the responding party to pay the reasonable expenses incurred in making the proof [*see Code Civ. Proc. § 2033.420* and § 86.52].

Note that the case cited in this form construes law in effect before the operative date of the Civil Discovery Act. It is cited and discussed as persuasive authority to the extent that it remains consistent with current provisions [*see also § 86.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should indicate that the responding party has already denied the requests in controversy.

[3] Discussion of Authorities

[a] Request for Further Response Based on Denial

In ***Holguin v. Superior Court*** *(1972) 22 Cal. App. 3d 812, 99 Cal. Rptr. 653* , an action for wrongful death during childbirth, plaintiffs sought requested admissions from defendant doctors concerning placement of the anesthesia injection, decedent's height and weight, and various facts relating to the autopsy. Defendants denied all the requests. Plaintiffs then filed for an order compelling further response, on the ground that certain matters that defendants had denied were so unquestionably true that they could not be denied. The trial court denied plaintiff's motion, and plaintiff brought a petition for writ of mandate to compel reversal of the court's order.

The court of appeal denied the petition (*22 Cal. App. 3d 812, 822)* . A litigant cannot be forced to admit any particular fact if that litigant is willing to risk financial sanctions or a perjury prosecution (*22 Cal. App. 3d 812, 820)* . When, as in *Holguin*, the responding parties have clearly denied the requested admissions, the holding in *Cembrook v. Superior Court (1961) 56 Cal. 2d 423, 15 Cal. Rptr. 127, 364 P.2d 303* , that the responding party is required to give further answers when he or she has improperly refused to admit or deny, is inapplicable (*22 Cal. App. 3d 812, 820)* .

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8-86 California Points & Authorities § 86.23

§ 86.23 Opposing Motion for Order Compelling Further Response to Requests for Admission [Code Civ. Proc. §§ 2033.220, 2033.290]--Improper Inquiry Into Decision-Making Process of Administrative Agency

[1] FORM Opposing Motion for Order Compelling Further Response to Requests for Admission [Code Civ. Proc. §§ 2033.220, 2033.290]--Improper Inquiry Into Decision-Making Process of Administrative Agency

[*The following may be combined, when appropriate, with a general form of memorandum of points and authorities in opposition to a motion for an order compelling further response (see, e.g., § 86.20).*]

FURTHER RESPONSE SHOULD NOT BE COMPELLED FROM _____ [PLAINTIFF *or* DEFENDANT] BECAUSE _____ [*identify number of each contested request, e.g.,* REQUESTS 2-4] OF _____ [*identify set, e.g.,* PLAINTIFF'S FIRSTSET] OF REQUESTS FOR ADMISSION IMPROPERLY CALL FOR AN INQUIRY INTO THE DECISION-MAKING PROCESS OF AN ADMINISTRATIVE AGENCY.

Improper Inquiry Into Decision-Making Processes. When the subject of requests for admission is the decision-making process of an administrative agency and its members, the requests are improper, and the responding party is not required to provide answers (*Board of Administration v. Superior Court (1975) 50 Cal. App. 3d 314, 319, 323, 123 Cal. Rptr. 530*).

[2] Comments

[a] Use of Form

These points and authorities are for use in opposition to a motion for an order compelling further response if the subject matter of requested admissions concerns the decision-making process of an administrative agency and its members. This form is intended to be combined with a general memorandum opposing a motion for an order compelling further response [*see § 86.20*].

Note that the case cited in this form construes law in effect before the operative date of the Civil Discovery Act. It is

cited and discussed as persuasive authority to the extent that it remains consistent with current provisions [*see also § 86.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should discuss facts showing that the subject matter of the requests necessarily involves the decision-making process of a particular administrative agency.

[3] Discussion of Authorities

[a] Improper Inquiry Into Decision-Making Processes

Board of Administration v. Superior Court *(1975) 50 Cal. App. 3d 314, 123 Cal. Rptr. 530* involved actions for wrongful denial of disability retirement benefits brought by a police officer against a city and by the city against the administrative board of the Public Retirement System. The city propounded requests for admission to the board concerning the mechanics of the board's decision denying the retirement benefits. The trial court, over the board's objections, ordered the board to answer the disputed requests. The board brought a petition for writ of prohibition seeking, inter alia, to restrain the court from enforcing its order on the ground that it could not compel disclosure of an administrative decision-making process.

The court of appeal let issue a peremptory writ of prohibition, which, inter alia, restrained the trial court from enforcing the order compelling response to requests for admission concerning the administrative decision-making process (*50 Cal. App. 3d 314, 324)* . A reviewing court may not inquire into the physical and mental processes by which an administrative agency and its members arrived at a decision. Judicial action, not judicial reasoning, is subject to review (*50 Cal. App. 3d 314, 319)* . Therefore, when an administrative agency is acting in a quasi-judicial capacity, there can be no inquiry into the process by which it and its individual members arrive at decisions (*50 Cal. App. 3d 314, 323)* .

[4] Additional Authorities

In *San Joaquin Cty. Local Agency Formation Comm'n v. Superior Court (2008) 162 Cal. App. 4th 159, 76 Cal. Rptr. 3d 93* , the real party in interest, an irrigation district, challenged a local agency formation commission's denial of the district's application to provide retail electric service. At issue on appeal was whether the irrigation district could take the depositions of the commissioners to learn what extra-record information the commissioners had when they denied the application, and what additional information was needed to change their minds. The court of appeal held that the "deliberative process privilege" protected from discovery the commissioners' decisionmaking process and the evidence they relied on in rejecting the district's application (*162 Cal. App. 4th 159, 172)* . Under this privilege, senior officials of all three branches of government enjoy a qualified privilege not to disclose or be examined concerning the mental processes by which a decision was reached, as well as the substance of conversations, discussions, or deliberations reflecting advice, opinions, and recommendations that underlie government policy (*162 Cal. App. 4th 159, 170)* . Accordingly, the trial court erred by not granting the commission's motion for a protective order in its entirety (*162 Cal. App. 4th 159, 173)* . For further discussion of this case, see *§ 81.276[4][b]*.

In *Sutter's Place Inc. v. Superior Court (2008) 161 Cal. App. 4th 1370, 75 Cal. Rptr. 3d 9* , petitioner, a card room operator, sued real the party in interest, a city, challenging an ordinance that imposed limits on the operation of card rooms. The superior court issued a discovery order protecting specified documents from disclosure on the ground that their discovery would violate the "mental processes" principle (precluding judicial inquiry into the motivation or mental processes of legislators in enacting legislation). Petitioner sought a writ of mandate and or prohibition to overturn the discovery order and compel the discovery (*161 Cal. App. 4th 1370, 1374*). The court of appeal denied the writ, ruling that documents relating to individual legislators' mental processes or reasons for enacting the ordinance were irrelevant and not discoverable. Even assuming that an ulterior purpose behind the ordinance were relevant to its validity, such

discovery would violate the "mental processes principle" (*161 Cal. App. 4th 1370, 1376)* . The court added that the "common law privilege protecting the "mental processes of legislators" is to be distinguished from the analogous "common law privilege that attached to confidential intraagency advisory opinions," which is now codified and sometimes referred to as the "deliberative process" or "executive" privilege (*161 Cal. App. 4th 1370, 1377-1378)* . For additional facts and procedural background, see *§ 83.80[4][b]*.

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 86 DISCOVERY: REQUESTS FOR ADMISSIONS
PART II. FORMS
A. Motions to Compel Response to Request for Admission

8-86 California Points & Authorities §§ 86.24-86.29

[Reserved]

§§ 86.24[Reserved]

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CHAPTER 86 DISCOVERY: REQUESTS FOR ADMISSIONS
PART II. FORMS
B. Motion for Protective Order Relating to Requests for Admissions

8-86 California Points & Authorities § 86.30

§ 86.30 Supporting Motion for Protective Order Regarding Requests for Admission [Code Civ. Proc. § 2033.080]

[1] FORM Supporting Motion for Protective Order Regarding Requests for Admission [Code Civ. Proc. § 2033.080]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PROTECTIVE ORDER RE REQUEST FOR ADMISSION AND FOR MONETARY SANCTION
vs.	)	
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

THE COURT SHOULD GRANT A PROTECTIVE ORDER PURSUANT TO SECTION 2033.080 OF THE CODE OF CIVIL PROCEDURE IN ORDER TO PROTECT _____ [PLAINTIFF *or* DEFENDANT] FROM _____ [UNWARRANTED ANNOYANCE *and/or* EMBARRASSMENT *and/or* OPPRESSION *and/or* UNDUE BURDEN AND EXPENSE][, AND SHOULD ALSO GRANT AN ORDER REQUIRING THAT REQUESTS _____ (*specify numbers, e.g.,* 1-5) OF _____ (*identify set, e.g.,*

PLAINTIFF'S FIRST SET) OF REQUESTS FOR ADMISSION BE REPHRASED BECAUSE THE REQUESTS ARE AMBIGUOUS].

A. Grounds for Protective Order. When requests for admission have been made, the court, for good cause shown, may make any order that justice requires to protect any party from unwarranted annoyance, embarrassment, oppression, or undue burden and expense (*Code Civ. Proc. § 2033.080*).

B. Scope of Protective Order. The protective order regarding requests for admission may include, but is not limited to, [one or more of] the following direction(s):

[*EITHER*]

That the set of admission requests, or particular requests in the set, need not be answered at all (*Code Civ. Proc. § 2033.080(b)(1)*).

[*AND/OR*]

That, contrary to the representations made in a declaration for additional discovery submitted under *Section 2033.050 of the Code of Civil Procedure*, the number of admission requests is unwarranted (*Code Civ. Proc. § 2033.080(b)(2)*).

[*AND/OR*]

That the time specified in *Section 2033.250 of the Code of Civil Procedure* to respond to the set of admission requests, or to particular requests in the set, be extended (*Code Civ. Proc. § 2033.080(b)(3)*).

[*AND/OR*]

That a trade secret or other confidential research, development, or commercial information not be admitted or be admitted only in a certain way (*Code Civ. Proc. § 2033.080(b)(4)*).

[*AND/OR*]

That some or all of the answers to requests for admission be sealed and thereafter opened only on order of the court (*Code Civ. Proc. § 2033.080(b)(5)*).

[*CONTINUE*]

[*Optional*] **C. Number of Requests Regarding Genuineness of Documents.** [*See § 86.20[1], Paragraph C*].

[*Optional*] **D. Rephrasing Requests for Admission.** The court has the power to order the requesting party to rephrase requests if they are too ambiguous to allow for intelligent reply (*see Cembrook v. Superior Court (1961) 56 Cal. 2d 423, 430, 15 Cal. Rptr. 127, 364 P.2d 303*).

E. Court Must Impose Monetary Sanction Absent Specified Findings. The court must impose a monetary sanction

under *Section 2023.030 of the Code of Civil Procedure* against any party, person, or attorney who unsuccessfully opposes a motion for a protective order, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstancesmake the imposition of the sanction unjust (*Code Civ. Proc. §§ 2023.030(a), 2033.080(d)*).

[*Add points and authorities generally supporting the imposition of monetary sanctions (see, e.g., Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11).*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This form of memorandum of points and authorities is for use in support of a motion for a protective order regarding requests for admission, on the ground that responding to the requests would cause unwarranted annoyance, embarrassment, oppression, or undue burden and expense [*see Code Civ. Proc. § 2033.080*]. Optional Paragraph D is for use to obtain an order requiring the requesting party to rephrase ambiguous requests for admissions [*see Cembrook v. Superior Court (1961) 56 Cal. 2d 423, 430, 15 Cal. Rptr. 127, 364 P.2d 303]* .

The motion must be accompanied by a declaration stating facts showing a reasonable and good-faith attempt at an informal resolution of each issue presented by the motion [*see Code Civ. Proc. § 2033.080(a)*]. This form should also be combined with general points and authorities supporting the imposition of monetary sanctions under *Code Civ. Proc. § 2023.030(a)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11*].

Note that the case cited in this form construes law in effect before the operative date of the Civil Discovery Act. It is cited and discussed as persuasive authority to the extent that it remains consistent with current provisions [*see also § 86.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should specify which of the grounds for a protective order are relevant and discuss facts supporting those grounds. If appropriate, counsel should specify how answering the requests would subject the responding party to undue burden and expense, and should show substantial justification for the motion in order to avoid a monetary sanction if the motion is denied [*see* Code Civ. Proc.§ 2033.080]. However, counsel need not set forth facts showing that the party propounding the requests acted without substantial justification [*cf.* former Code Civ. Proc. § 2034(a)]. *Code Civ. Proc. §§ 2023.030(a)* and *2033.080(d)* effectively place that burden on the person against whom the sanction is to be imposed, by requiring the court to impose a monetary sanction when it is expressly authorized *unless* it finds that there was substantial justification or that other circumstances would make the monetary sanction unjust.

[c] Order Allowing Discovery

If the motion for a protective order is denied in whole or in part, the court may order that the responding party provide or permit the discovery against which protection was sought on terms and conditions that are just [*see Code Civ. Proc. § 2033.080(c)*].

[d] Related Pleading and Practice Forms

For forms and discussion related to protective orders in the context of requests for admissions, see California Forms of Pleading and Practice, Ch. 196, *Discovery: Requests for Admissions* (Matthew Bender).

[3] Discussion of Authorities

[a] Rephrasing Requests for Admission

The facts and procedural background of ***Cembrook v. Superior Court*** *(1961) 56 Cal. 2d 423, 15 Cal. Rptr. 127, 364 P.2d 303* , are discussed in *§ 86.12[3][a]*. In *Cembrook*, the Supreme Court held that a request for admission cannot be objected to on the ground that it regards a controversial matter, or one involving complex facts, or calls for an opinion (*56 Cal. 2d 423, 429)* . With regard to the ambiguity objection, the Supreme Court stated that if the trial court should find that certain requests are too ambiguous to allow for intelligent reply, it may order that those requests be rephrased. The Court found authority for the order in former Code Civ. Proc. §§ 2019 and 2033 (*see now Code Civ. Proc. § 2033.080*), which gave the trial court ample power to correct any abuses that may exist in the requests without sustaining the objections in toto (*56 Cal. 2d 423, 430)* .

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 86 DISCOVERY: REQUESTS FOR ADMISSIONS
PART II. FORMS
B. Motion for Protective Order Relating to Requests for Admissions

8-86 California Points & Authorities §§ 86.31-86.49

[Reserved]

§§ 86.31[Reserved]

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CHAPTER 86 DISCOVERY: REQUESTS FOR ADMISSIONS
PART II. FORMS
C. Miscellaneous Procedures Relating to Requests for Admissions

8-86 California Points & Authorities § 86.50

§ 86.50 Supporting Motion for Order for Deemed Admissions--Failure to Serve Timely Response [Code Civ. Proc. § 2033.280]

[1] FORM Supporting Motion for Order for Deemed Admissions--Failure to Serve Timely Response [Code Civ. Proc. § 2033.280]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR DEEMED ADMISSIONS AND FOR MONETARY SANCTION
vs.	)	
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

THE COURT SHOULD ORDER THAT THE _____ [GENUINENESS OF THE DOCUMENTS *and/or* TRUTH OF ALL MATTERS] SPECIFIED IN _____ [*identify requests, e.g.,* PLAINTIFF'S FIRST SET OF REQUESTS FOR ADMISSION] BE DEEMED ADMITTED BECAUSE _____ [PLAINTIFF *or* DEFENDANT] HAS FAILED TO SERVE A TIMELY RESPONSE TO THEM.

A. Failure to Serve Timely Response. If a party to whom requests for admission have been directed fails to serve a timely response, the requesting party may move for an order that the genuineness of any documents and the truth of any matters specified in the requests be deemed admitted, as well as for a monetary sanction pursuant to *Section 2023.030 of the Code of Civil Procedure* (*Code Civ. Proc. § 2033.280(b)*).

[*Optional*] **B. Unsworn Response Is Deemed No Response.** Unsworn responses are tantamount to no responses at all (*Allen-Pacific, Ltd. v. Superior Court (1997) 57 Cal. App. 4th 1546, 1550-1551, 67 Cal. Rptr. 2d 804 , disapproved on other grounds* in *Wilcox v. Birtwhistle (1999) 21 Cal. 4th 973, 983 n.12, 90 Cal. Rptr. 2d 260, 267, 987 P.2d 727* ; *Appleton v. Superior Court (1988) 206 Cal. App. 3d 632, 636, 253 Cal. Rptr. 762*).

C. Order on Motion After Failure to Serve Timely Response. If a party to whom requests for admission have been directed fails to serve a timely response, on motion by the requesting party, the court shall make the requested order for deemed admissions, unless it finds that before the hearing on the motion the party to whom the requests for admission have been directed has served a proposed response to the requests for admission that is in substantial compliance with *Sections 2033.210-2033.230 of the Code of Civil Procedure* (*Code Civ. Proc. § 2033.280*; *Allen-Pacific, Ltd. v. Superior Court (1997) 57 Cal. App. 4th 1546, 1550-1552, 1556-1557, 67 Cal. Rptr. 2d 804 , disapproved on other grounds* in *Wilcox v. Birtwhistle (1999) 21 Cal. 4th 973, 983 n.12, 90 Cal. Rptr. 2d 260, 267, 987 P.2d 727* ; *Courtesy Claims Service, Inc. v. Superior Court (1990) 219 Cal. App. 3d 52, 55, 268 Cal. Rptr. 30 , disapproved on other grounds* in *Wilcox v. Birtwhistle (1999) 21 Cal. 4th 973, 983 n.12, 90 Cal. Rptr. 2d 260, 267, 987 P.2d 727* .

D. Waiver of Objection to Requests. If a party to whom requests for admissions have been directed fails to serve a timely response, that party thereby waives any objection to the requests, including one based on privilege or on the protection for work product under *Section 2018.010 et seq. of the Code of Civil Procedure* (*Code Civ. Proc. § 2033.280(a)*).

E. Mandatory Monetary Sanction. It is mandatory that the court impose a monetary sanction under *Section 2023.030 of the Code of Civil Procedure* on the party, or attorney, or both, whose failure to serve a timely response to requests for admission necessitated the motion for deemed admissions (*Code Civ. Proc. § 2033.280(c)*; *Appleton v. Superior Court (1988) 206 Cal. App. 3d 632, 635-636, 253 Cal. Rptr. 762*).

[*Add points and authorities generally supporting the imposition of monetary sanctions (see, e.g., Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11).*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This form of memorandum of points and authorities is for use in support of a motion for an order for deemed admissions and a monetary sanction when the moving party has served requests for admission but the party on whom

they were served has failed to serve a timely response [*see Code Civ. Proc. § 2033.280*]. Optional Paragraph B may be used when the party to whom the requests for admission have been served does not verify his or her response. This form should be combined with general points and authorities supporting the imposition of monetary sanctions under *Code Civ. Proc. § 2023.030(a)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11*].

Use § 86.10 instead of this form to support a motion for an order compelling further response.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should show that the opposing party has failed to serve a timely response to the requests for admission.

[c] Comparison to Prior Law

Under former Code Civ. Proc. § 2033(a), on a party's failure to respond to requests for admission, each of the matters of which an admission was requested was deemed admitted if the original request contained a sufficient warning to that effect. Under current law, however, there is no provision for a warning, and to obtain deemed admissions, the requesting party must move the court for an order. The burden regarding deemed admissions is therefore now on the requesting party [*see Code Civ. Proc. § 2033.280(b)*].

[d] Relief From Waiver of Objections to Requests

Note that when a party has failed to serve a timely response to requests for admission, the court, on motion, may relieve that party from the waiver of objections to the requests on its determination that (1) the party has subsequently served a response that is in substantial compliance with *Code Civ. Proc. §§ 2033.210-2033.230* and *(2)* the party's failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect [*Code Civ. Proc. § 2033.280(a)*; *see § 86.53*].

[e] Related Pleading and Practice Forms

For forms and discussion related to deemed admissions, see California Forms of Pleading and Practice, Ch. 196, *Discovery: Requests for Admissions* (Matthew Bender).

[3] Discussion of Authorities

[a] Unsworn Response Is Deemed No Response

In ***Allen-Pacific, Ltd. v. Superior Court*** *(1997) 57 Cal. App. 4th 1546, 67 Cal. Rptr. 2d 804 , disapproved on other grounds* in *Wilcox v. Birtwhistle (1999) 21 Cal. 4th 973, 983 n.12, 90 Cal. Rptr. 2d 260, 267, 987 P.2d 727* , an action for fraud and conversion, plaintiff served defendant Chan with requests for admission. When no response was served, plaintiff moved to deem the truth of the matters specified and for monetary sanctions. Before the hearing, defendants served a response that was signed by counsel and not made under oath. After the trial court denied its motion, plaintiff petitioned for writ of mandate.

The court of appeal granted plaintiff's petition and issued a peremptory writ of mandate directing the trial court to vacate the order denying plaintiff's motion to deem admitted matters covered in its requests for admission and for monetary sanctions, and to enter a new appropriate order (*57 Cal. App. 4th 1546, 1556-1557)* . Citing *Appleton* (discussed *below*), the court said that an unsworn response is tantamount to no response at all (*57 Cal. App. 4th 1546, 1550-1551)* .

In ***Appleton v. Superior Court*** *(1988) 206 Cal. App. 3d 632, 253 Cal. Rptr. 762* , plaintiffs, insureds under a policy

issued by defendant insurance company, brought an action against defendant insurer and defendant individual for fraud in connection with the sale of that policy. Defendant individual served on plaintiffs a set of three requests for admissions. Plaintiffs objected, did not provide any answers, and did not verify their response. After unsuccessful attempts to obtain more complete answers and a verification, defendant moved to have the requests deemed admitted and for sanctions pursuant to former Code Civ. Proc. § 2033(k) (*now see Code Civ. Proc. § 2033.280*). The trial court ordered that defendant's requests be deemed admitted but denied sanctions. Defendant filed a petition for writ of mandate.

The court of appeal issued a peremptory writ of mandate directing the trial court to vacate the portion of its order denying sanctions and to enter a new order granting sanctions in the appropriate amount. The court said that unsworn responses are tantamount to no responses at all. Thus, it held that former Code Civ. Proc. § 2033(k) (*now see Code Civ. Proc. § 2033.280*), the provision governing the failure to serve a response, is applicable (*206 Cal. App. 3d 632, 636)* .

[b] Order on Motion After Failure to Serve Timely Response

The facts and procedural background of ***Allen-Pacific, Ltd. v. Superior Court*** *(1997) 57 Cal. App. 4th 1546, 67 Cal. Rptr. 2d 804* , *disapproved on other grounds* in *Wilcox v. Birtwhistle (1999) 21 Cal. 4th 973, 983 n.12, 90 Cal. Rptr. 2d 260, 267, 987 P.2d 727* , are discussed in [a], *above*. The court of appeal issued a peremptory writ of mandate directing the trial court to vacate its order and to enter a new appropriate one (*57 Cal. App. 4th 1546, 1556-1557)* . The court of appeal said that the sole question was whether the trial court had discretion to deny plaintiff's motion. It noted that defendants admitted that the initial response failed to conform to the prescription of former Code Civ. Proc. § 2033(g) (*now see Code Civ. Proc. § 2033.240*), and was tantamount to no response at all (*57 Cal. App. 4th 1546, 1550-1551)* . The court said that the language of former Code Civ. Proc. § 2033(k) (*now see Code Civ. Proc. § 2033.280*), which controlled the case, was very clear: a trial court must grant a motion to have admission requests deemed admitted when responses have not been served before the hearing or, if responses were served, they were not in substantial compliance. Further, the trial court must impose monetary sanctions (*57 Cal. App. 4th 1546, 1550-1552, 1556-1557)* .

In ***Courtesy Claims Service, Inc. v. Superior Court*** *(1990) 219 Cal. App. 3d 52, 268 Cal. Rptr. 30* , *disapproved on other grounds* in *Wilcox v. Birtwhistle (1999) 21 Cal. 4th 973, 983 n.12, 90 Cal. Rptr. 2d 260, 267, 987 P.2d 727* , after plaintiffs sued an individual for personal injuries and property damages sustained in an automobile accident, and received partial payment of a default judgment by his insurance company, they and the insured individual brought a bad-faith action against the insurance company and its adjuster. The adjuster served identical sets of requests for admission on each plaintiff. The insurance company served similar requests two months later. Plaintiffs did not respond to either set of requests. The insurance company filed a motion to deem matters contained in its requests admitted. Before the hearing, a response was filed with the insurer on behalf of one plaintiff only. Later, all plaintiffs responded to the adjuster's requests. The trial court denied the insurance company's motion "in the interest of justice," gave the remaining plaintiffs 20 days to submit their responses, and imposed sanctions against plaintiffs and their attorney. Defendants filed a petition for a writ of mandate directing the trial court to grant its motion.

The court of appeal granted the petition. It said the trial court's ruling was contrary to the mandatory language of former Code Civ. Proc. § 2033(k) (*now see Code Civ. Proc. § 2033.280*). It explained that Code Civ. Proc. § 2033(k) makes no exception for "the interest of justice"; rather, it specifically provides that if proposed responses are not served before the hearing on the motion, the court shall make an order that the matters raised inthe requests be deemed admitted (*219 Cal. App. 3d 52, 55)* . The court also rejected plaintiffs' argument that they be allowed to amend their responses, observing that there was nothing to amend in that the responses were made to a different party (*219 Cal. App. 3d 52, 56)* .

[c] Mandatory Monetary Sanction

The facts and procedural background of ***Appleton v. Superior Court*** *(1988) 206 Cal. App. 3d 632, 253 Cal. Rptr. 762* , are discussed in [a], *above.* In *Appleton,* the court of appeal found monetary sanctions were mandatory and ordered the trial court to grant them. The court quoted the language of former Code Civ. Proc. § 2033(k) (*now see Code Civ. Proc. § 2033.280*), emphasizing the words, "[i]t is mandatory that the court impose a monetary sanction." The court pointed out that the burden is on the propounding party to file the motion to have requests deemed admitted, and that whenever an opponent's failure to serve answers necessitates such a motion, the moving party is entitled to sanctions. It concluded that by the clear language of Code Civ. Proc. § 2033(k), sanctions are mandatory (*206 Cal. App. 3d 632, 634-635)* . The court stated that the trial court, in holding that it had the discretion to decide whether or not to impose sanctions, had acted under former Code Civ. Proc. § 2033(*l*) (*now see Code Civ. Proc. § 2033.290*) and its exculpatory language, which provides that sanctions are to be imposed "unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." The court found a distinction between former Code Civ. Proc. §§ 2033(k) and 2033(*l*). It explained that although former Code Civ. Proc. § 2033(*l*) (*now see Code Civ. Proc. § 2033.290*) allows the court to use its discretion in imposing sanctions, it applies only when incomplete responses have been given. When no response is given, former Code Civ. Proc. § 2033(k) (*now see Code Civ. Proc. § 2033.280*) applies, and sanctions are mandatory (*206 Cal. App. 3d 632, 635-636)* .

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8-86 California Points & Authorities § 86.51

§ 86.51 Supporting Motion to Amend or Withdraw Response to Request for Admission [Code Civ. Proc. § 2033.300]

[1] FORM Supporting Motion to Amend or Withdraw Response to Request for Admission [Code Civ. Proc. § 2033.300]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION TO
vs.	)	_____ [AMEND *and/or* WITH-
_____ [*name*],	)	DRAW] RESPONSES TO REQUEST FOR ADMIS-
Defendant.	)	SION
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

THE COURT SHOULD ALLOW _____ [PLAINTIFF *or* DEFENDANT] TO _____ [AMEND *and/or* WITHDRAW] HIS/HER RESPONSES TO _____ [*specify, e.g.,* PLAINTIFF'S FIRST SET OF REQUESTS FOR ADMISSION] BECAUSE THE RESPONSES WERE THE RESULT OF MISTAKE, INADVERTENCE, OR EXCUSABLE NEGLECT, AND _____ [PLAINTIFF *or* DEFENDANT] WILL NOT BE SUBSTANTIALLY PREJUDICED IN MAINTAINING HIS/HER _____ [ACTION *or* DEFENSE] ON THE MERITS.

A. Court May Permit Amendment or Withdrawal of Admission. The court may permit a party to amend or withdraw an admission made in response to a request for admission only if it determines that the admission was the result of mistake, inadvertence, or excusable neglect, and the party who obtained the admission will not be substantially prejudiced in maintaining that party's action or defense on the merits (*Code Civ. Proc. § 2033.300*; *see Burch v. Gombos (2000) 82 Cal. App. 4th 352, 359-360*).

[*Optional*] **B. Doubts Must Be Resolved In Favor of Moving Party.** Any doubts in ruling on a motion to withdraw or amend an admission must be resolved in favor of the moving party (*New Albertsons, Inc. v. Superior Court (2008) 168 Cal. App. 4th 1403, 1408, 1420, 86 Cal. Rptr. 3d 457*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum is for use in support of a motion for permission to amend or withdraw an admission made in response to a request for admission on the ground of mistake, inadvertence, or excusable neglect [*see Code Civ. Proc. § 2033.300*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should show facts supporting a finding of mistake, inadvertence, or excusable neglect, and that the other party's action or defense will not be substantially prejudiced.

[c] When Withdrawal or Amendment of Admission Is Permitted

Relief under former Code Civ. Proc. § 2033(m) (*now see Code Civ. Proc. § 2033.300*) is available for all admissions, and thus permits withdrawal or amendment of admissions deemed admitted for failure to respond as well as of admissions contained in an actual response [*Wilcox v. Birtwhistle (1999) 21 Cal. 4th 973, 983, 90 Cal. Rptr. 2d 260, 987 P.2d 727]* . Rejecting the decisions of the majority of courts of appeals, which held that former Code Civ. Proc. § 2033(m) (*now see Code Civ. Proc. § 2033.300*) applies only to admissions contained in an actual response [*see, e.g., Courtesy Claims Service, Inc. v. Superior Court (1990) 219 Cal. App. 3d 52, 268 Cal. Rptr. 30* , *disapproved* in *Wilcox v. Birtwhistle (1999) 21 Cal. 4th 973, 983 n.12, 90 Cal. Rptr. 2d 260, 987 P.2d 727]* , the California Supreme Court in *Wilcox* found that applying former Code Civ. Proc. § 2033(m) (*now see Code Civ. Proc. § 2033.300*) to all admissions, including deemed admissions, is more consistent with both the statutory language and legislative history of former Code Civ. Proc. § 2033(m) (*now see Code Civ. Proc. § 2033.010 et seq.*) [*Wilcox v. Birtwhistle (1999) 21 Cal. 4th 973 979-983, 90 Cal. Rptr. 2d 260, 987 P.2d 727]* . The Court acknowledged that the plain meaning of the rule is not helpful. However, the Court found that reading former Code Civ. Proc. § 2033(m) in light of other relevant subdivisions compelled the conclusion that former Code Civ. Proc. § 2033(m) (*now see Code Civ. Proc. § 2033.300*) provides relief from deemed admissions. The Court explained that former Code Civ. Proc. § 2033(n) (*now see Code*

Civ. Proc. § 2033.410) codified the case law existing at the time of its enactment, which held that matters deemed admitted in an actual response or deemed admitted for failure to respond constitute binding judicial admissions [*Wilcox v. Birtwhistle (1999) 21 Cal. 4th 973, 979, 90 Cal. Rptr. 2d 260, 987 P.2d 727* ; *see Code Civ. Proc. § 2033.410*]. Because the admissions referred to in former Code Civ. Proc. § 2033(n) encompass deemed admissions, the court concluded that in order to harmonize these subdivisions, it must give the same meaning to the word "admission" found in former Code Civ. Proc. § 2033(m) [*Wilcox v. Birtwhistle (1999) 21 Cal. 4th 973, 979, 90 Cal. Rptr. 2d 260, 987 P.2d 727]* . The Court further held that this interpretation is consistent with the legislative intent underlying the statute's enactment, which was, in part, to remedy previous "draconian" sanctions for nonresponse or tardy response [*Wilcox v. Birtwhistle (1999) 21 Cal. 4th 973, 979-980, 90 Cal. Rptr. 2d 260, 987 P.2d 727]* . Former Code Civ. Proc. § 2033(m) (*now see Code Civ. Proc. § 2033.300*) achieved this result by eliminating the prior time limits on obtaining relief. The Court observed that precluding the withdrawal or amendment of deemed admissions is arguably more draconian than the previous practice [*Wilcox v. Birtwhistle (1999) 21 Cal. 4th 973, 980, 90 Cal. Rptr. 2d 260, 987 P.2d 727]* .

[d] Notice

A party may amend or withdraw an admission made in response to a request for admission only on leave of court granted after notice to all parties [*see Code Civ. Proc. § 2033.300*].

[e] Conditions on Granting of Motion

The court may impose conditions on the granting of the motion that are just, including, but not limited to, an order that (1) the party who obtained the admission be permitted to pursue additional discovery related to the matter involved in the withdrawn or amended admission, and (2) the costs of any additional discovery be borne in whole or in part by the party amending or withdrawing the admission [*see Code Civ. Proc. § 2033.300*].

[3] Discussion of Authorities

[a] Court May Permit Amendment or Withdrawal of Admission

In *Burch v. Gombos (2000) 82 Cal. App. 4th 352, 98 Cal. Rptr. 2d 119* , appellants sued to prevent respondents from using a portion of the road that crossed their property to conduct logging operations. The trial court found that the portion of the road in issue had been impliedly dedicated to the public as a result of earlier public recreational use. The court enjoined appellants from interfering with respondents' use of the road, and denied appellants' cross-request for injunctive relief.

Appellants contended, among other things, that the trial court erred in permitting respondents to introduce evidence of public use of the roadway, because respondents had previously responded to a request for admission by admitting they had no such evidence, which was true at the time (*82 Cal. App. 4th 352, 355)* . The court of appeal affirmed the trial court's ruling that respondent's admission was limited to its knowledge as of the time its admission was made. The appellate court held that respondents had no duty to update their response to the request for admission when they subsequently discovered such evidence (*82 Cal. App. 4th 352, 359)* . The court explained that nothing in the text of former Code Civ. Proc. § 2033 (*now see Code Civ. Proc. § 2033.010 et seq.*) creates any ongoing duty to update responses. In fact, the statute authorizes amending or withdrawing a response only in cases in which a court finds the original admission "was the result of mistake, inadvertence, or excusable neglect" (*82 Cal. App. 4th 352, 359)* . Moreover, although an admission is dispositive in most cases, a trial court retains discretion to determine its scope and effect so that it accurately reflects what facts are admitted in light of other evidence. Here, there was nothing in the record to demonstrate any intent to mislead on the part of respondents, nor any indication of real prejudice to appellants (*82 Cal. App. 4th 352, 359-360)* . The court added, as an aside to practitioners, that appellant could have avoided this issue if she had used a more typical request for admission, addressing a matter of historical fact, rather than using a request for admission regarding a matter of a party's present knowledge (*82 Cal. App. 4th 352, 360)* .

[b] Doubts Must Be Resolved In Favor of Moving Party

In ***New Albertsons, Inc. v. Superior Court*** *(2008) 168 Cal. App. 4th 1403, 86 Cal. Rptr. 3d 457* , real parties in interest, a customer and his wife, filed suit against a supermarket operator for negligence and premises liability. The supermarket operator filed a petition for a writ of mandate after the trial court denied its motion to withdraw an admission made in response to a request for admission and imposed evidence and issue sanctions for misuse of the discovery process.

The court of appeal held that any doubts in ruling on a motion to withdraw or amend an admission under *Code Civ. Proc. § 2033.300* had to be resolved in favor of the moving party (*168 Cal. App. 4th 1403, 1408, 1420)* . Because the record did not clearly establish that the supermarket operator's mistake in admitting the matter was inexcusable, or show that the withdrawal of the admission would substantially prejudice the real parties, the policy in favor of trial on the merits required granting the motion to withdraw admission (*168 Cal. App. 4th 1403, 1421)* .

[4] Additional Authorities

[a] Amendment or Withdrawal of Admission

In *Valerio v. Andrew Youngquist Constr. (2002) 103 Cal. App. 4th 1264, 127 Cal. Rptr. 2d 436* , a general contractor appealed from the trial court's judgment in favor of a subcontractor, in the subcontractor's suit for breach of express written contract and quantum meruit. The contractor contended that the trial court failed to give conclusive effect to the subcontractor's judicial admissions regarding the existence of a written contract. The court of appeal agreed. It found that the subcontractor admitted the existence of a written contract in his answer to the cross-complaint. This admission had the effect of establishing the truth of the existence of the written contract.

Although a court has inherent power to relieve a party from the effects of judicial admissions by amendment to the pleadings under *Code Civ. Proc. § 473*, the subcontractor never sought to amend his answer to the cross-complaint. He did not request to amend his answer orally at the timethe cross-complaint was filed nor did he request a continuance to file an amended answer (*103 Cal. App. 4th 1264, 1271-1272)* .

The appellate court also found former Code Civ. Proc. § 2033(m) (*now see Code Civ. Proc. § 2033.300*), permitting a party to withdraw or amend an admission with leave of court, inapplicable. Under former Code Civ. Proc. § 2033(m), the court may grant leave if it determines the admission was the result of mistake, inadvertence, or excusable neglect and that the party who obtained the admission will not be substantially prejudiced by the withdrawal or amendment. Here, there was no ambiguity in the subcontractor's understanding at the time he responded to the requests for admissions; he believed that a written contract existed. Accordingly, there was no reason for the court to interpret the admission in order to resolve an ambiguity or to reflect the subcontractor's reasonable understanding of the facts (*103 Cal. App. 4th 1264, 1272-1273)* . The appellate court observed that if the subcontractor disagreed that a written contract existed, he was required under former Code Civ. Proc. § 2033(f)(1)(B) (*now see Code Civ. Proc. § 2033.220(b)(2)*) to deny the portion of the requested admission that he considered untrue. "Simply put, [the subcontractor] filed a mistaken response that he never later moved to amend or withdraw" (*103 Cal. App. 4th 1264, 1273)* . In sum, the subcontractor failed to take the necessary procedural steps to remove his conclusive judicial admissions; and his "informal notification to the opposing party of a change in case theory" did not obviate their conclusive effect (*103 Cal. App. 4th 1264, 1274)* .

In *Jahn v. Brickey (1985) 168 Cal. App. 3d 399, 214 Cal. Rptr. 119* , plaintiff initially admitted the validity of his signature on certain documents, then sought to amend the responses and deny the validity of his signature on some of the documents, on the ground that he discovered during trial that some of the signatures were forged. The trial court granted the motion, and defendant appealed. The court of appeal affirmed, holding, inter alia, that the trial court had not abused its discretion in permitting amendment of plaintiff's responses to the requests for admissions, because the

responding party demonstrated good cause therefor, and the requesting party failed to show legally cognizable prejudice (*168 Cal. App. 3d 399, 405, 409)* .

Note

that *Jahn* was decided before the 1986 repeal and reenactment of Code Civ. Proc. § 2033. The motion for relief in *Jahn* was brought under *Code Civ. Proc. § 473*, which provides general relief from judgments on the grounds of mistake, inadvertence, surprise, or excusable neglect. *Code Civ. Proc. § 2033.300*, codifying in part the holding in *Jahn*, now specifically allows withdrawal and amendment of responses on the grounds of mistake, inadvertence, or excusable neglect, thereby superseding the general statute with respect to responses to requests for admission.

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CHAPTER 86 DISCOVERY: REQUESTS FOR ADMISSIONS
PART II. FORMS
C. Miscellaneous Procedures Relating to Requests for Admissions

8-86 California Points & Authorities § 86.52

§ 86.52 Supporting Motion for Order Requiring Payment of Expenses of Proof After Responding Party Failed to Make Admission When Requested [Code Civ. Proc. § 2033.420]

[1] FORM Supporting Motion for Order Requiring Payment of Expenses of Proof After Responding Party Failed to Make Admission When Requested [Code Civ. Proc. § 2033.420]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ORDER REQUIRING PAYMENT FOR EXPENSES OF PROOF FOR FAILURE TO MAKE ADMISSION
vs.	)	
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD ORDER _____ [*specify responding party, e.g.,* PLAINTIFF] TO PAY THE REASONABLE EXPENSES INCURRED BY _____ [*specify propounding party, e.g.,* DEFENDANT] IN PROVING _____ [THE GENUINENESS OF A DOCUMENT *and/or* THE TRUTH OF MATTERS] THAT _____ [*specify responding party, e.g.,* PLAINTIFF] REFUSED TO

ADMIT WHEN REQUESTED TO DO SO.

A. Payment of Expenses. If a party fails to admit the genuineness of any document or the truth of any matter when requested to do so under *Code of Civil Procedure Section 2033.010 et seq.*, and if the party requesting that admission thereafter proves the genuineness of that document or the truth of that matter, the party requesting the admission may move the court for an order requiring the party to whom the request was directed to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees (*Code Civ. Proc. § 2033.420(a)*).

B. Order Required in Absence of Specific Conditions. The court should make the order unless it finds that (1) an objection to the request was sustained or a response to it was waived under *Code of Civil Procedure Section 2033.290*; (2) the admission sought was of no substantial importance; (3) the party failing to make the admission had reasonable ground to believe that that party would prevail on the matter; or (4) there was other good reason for the failure to admit (*Code Civ. Proc. § 2033.420(b)*).

[*Optional*] **C. Only Expenses Incurred in Proving Matters Denied by Opposing Party Are Recoverable.** A party may recover only expenses incurred in proving the matters denied by the opposing party, and not expenses incurred in trial preparation prior to the opposing party's denial of admission requests (*Wimberly v. Derby Cycle Corp. (1997) 56 Cal. App. 4th 618, 638, 65 Cal. Rptr. 2d 532* ; *Garcia v. Hyster Co. (1994) 28 Cal. App. 4th 724, 736-737, 34 Cal. Rptr. 2d 283*); *see* *Stull v. Sparrow (2001) 92 Cal. App. 4th 860, 866, 112 Cal. Rptr. 2d 239*).

[*Optional*] **D. Substantial Importance of Requested Admission.** A requested admission is of substantial importance when the matter requested for admission is central to disposition of the case (*Wimberly v. Derby Cycle Corp. (1997) 56 Cal. App. 4th 618, 634-635, 65 Cal. Rptr. 2d 532* ; *see* *Brooks v. American Broadcasting Co. (1986) 179 Cal. App. 3d 500, 509, 224 Cal. Rptr. 838*).

[*Optional*] **E. Denial Given for Delaying Purposes.** When the respondent to requests for admission files false denials as part of a course of conduct for the purpose of delay, the award of expenses incurred to prove the truth of the subject matter of the request is appropriate (*see* *Hillman v. Stults (1968) 263 Cal. App. 2d 848, 883, 888, 70 Cal. Rptr. 295*).

[*Optional*] **F. Standing to Recover Expenses.** A party need not be the prevailing party in the action in order to recover expenses incurred in making proof of the genuineness of any document or the truth of any matter after the responding party failed to do so when requested (*see* *Smith v. Circle P Ranch Co. (1978) 87 Cal. App. 3d 267, 274-275, 150 Cal. Rptr. 828*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[A] Use of Form

These points and authorities are for use in support of a motion by a party who proved the genuineness of documents or the truth of matters that the opposing party failed to admit when requested to so, to seek an order requiring the opposing

party to pay the costs of proof [*see Code Civ. Proc. § 2033.420*]. Since the motion seeks reimbursement of costs of proof, it is typically made after trial [*see, e.g., Smith v. Circle P Ranch Co. (1978) 87 Cal. App. 3d 267, 271, 150 Cal. Rptr. 828* (discussed in [3][d], *below*)].

The expenses imposed by *Code Civ. Proc. § 2033.420* are awarded only against the party, and not against the attorney who advises that party [*compare Code Civ. Proc. § 2023.030(a)*]. In addition, a party may recover only expenses incurred in proving the matters denied by the opposing party, and not expenses incurred in trial preparation prior to the opposing party's denial of admission requests [*Garcia v. Hyster Co. (1994) 28 Cal. App. 4th 724, 736-737, 34 Cal. Rptr. 2d 283* (discussed in [3][a], *below*)].

Former Code Civ. Proc. § 2033(c) required the moving party to show, inter alia, that the admissions sought were of substantial importance. Note that under *Code Civ. Proc. § 2033.420*, the order is mandatory absent a finding that for each request in issue (1) an objection was sustained or response was waived; (2) the admission sought was not substantially important; (3) the responding party had reasonable ground to believe it would prevail on that matter, or (4) there was good cause for the failure to admit [*see Code Civ. Proc. § 2033.420(b)*]. Consequently, the moving party in a motion for expenses need not show a lack of substantial importance unless the responding party opposes the motion on that ground [*see § 86.61*]. However, counsel may wish to discuss facts showing the absence of the circumstances enumerated above. For convenience of counsel, Optional Paragraph D has been included for guidance regarding the issue of substantial importance.

Note that some of the cases cited in this form construe law in effect before the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that they remain consistent with current provisions [*see also § 86.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case.

[c] Related Pleading and Practice Forms

For forms and discussion related to the recovery of expenses of proof, see California Forms of Pleading and Practice, Ch. 196, *Discovery: Requests for Admissions* (Matthew Bender).

[d] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 86.61* may be used to oppose the contention supported by the foregoing points and authorities.

[3] Discussion of Authorities

[a] Only Expenses Incurred in Proving Matters Denied by Opposing Party Are Recoverable

Stull v. Sparrow *(2001) 92 Cal. App. 4th 860, 866, 112 Cal. Rptr. 2d 239* arose from a traffic accident. Plaintiff served defendants, owners and driver of the vehicle involved in the accident, several requests for admissions of liability. Immediately before trial, defendants admitted fault for the accident. A jury returned a verdict in plaintiff's favor. Plaintiff then moved for expenses incurred in proving matters that defendants did not admit, under former Code Civ. Proc. § 2033(o) (*now see Code Civ. Proc. § 2033.420*). The trial court denied the motion, holding that former Code Civ. Proc. § 2033(o) did not authorize the requested order because plaintiff did not prove the truth of the matters that were not admitted. Plaintiff appealed.

The court of appeal panel affirmed the trial court's order denying plaintiff's motion for costs. The purpose of former

Code Civ. Proc. § 2033(o) (*now see Code Civ. Proc. § 2033.420*) is to expedite trial. "Proof" for purposes of the statute is "the establishment of a fact in the mind of a judge or jury by way of evidence" (*92 Cal. App. 4th 860, 865)* . Defendants' admission of liability before the trial obviated the need for plaintiff to produce any proof on that element of her case and served the purpose of the statute by expediting the trial (*92 Cal. App. 4th 860, 865)* . Plaintiff, in this case, merely prepared to offer proof of liability. Because plaintiff did not put on any evidence regarding defendants' liability, whether she would have been able to prove liability was "pure speculation" (*92 Cal. App. 4th 860, 865)* . Accordingly, the trial court did not abuse its discretion in determining that plaintiff was not entitled to an order of costs and fees under former Code Civ. Proc. § 2033(o) (*now see Code Civ. Proc. § 2033.420*) on the ground that the issue had not been proved (*92 Cal. App. 4th 860, 866)* .

The facts and procedural background of ***Wimberly v. Derby Cycle Corp.*** *(1997) 56 Cal. App. 4th 618, 65 Cal. Rptr. 2d 532* are discussed in [b], *below*. In *Wimberly*, the court of appeal reversed the trial court's denialof plaintiff's motion for expenses incurred in proving the matters denied by defendant. The court remanded the matter to the trial court for its determination of an appropriate cost award, noting that plaintiff's request appeared to include expenses incurred before defendant denied the requests for admission. It said that the award may only include expenses incurred in proving matters denied; it may not include expenses incurred before the request for admission was denied (*56 Cal. App. 4th 618, 638)* .

In ***Garcia v. Hyster Co.*** *(1994) 28 Cal. App. 4th 724, 34 Cal. Rptr. 2d 283* , plaintiffs sought damages for injuries and medical expenses, lost earnings, and loss of consortium resulting from the use of equipment designed and manufactured by defendant. Additionally, plaintiff-in-intervention/appellant, an insurance company, sought reimbursement for workers' compensation benefits it paid to plaintiff as a result of defendant's negligence, as well as reasonable litigation expenses and attorney's fees. Defendant served on the insurance company a request for admissions regarding the employer's negligence and the extent of the employee's resulting damages. The insurance company denied all the requests. Subsequently, defendant obtained nonsuit on the insurance company's complaint in intervention, then moved for an award of costs and attorney's fees, including fees and costs incurred before the insurance company's denial of the admission requests. Based solely on the declarations of defendant's counsel, the lower court granted the motion in the amount requested by defendant.

The court of appeal reversed and remanded, holding that a party may recover only expenses incurred in proving the matters denied by the opposing party, and not expenses incurred in trial preparation prior to the opposing party's denial of admission requests (*28 Cal. App. 4th 724, 736-738)* .

[b] Substantial Importance of Requested Admission

In ***Wimberly v. Derby Cycle Corp.*** *(1997) 56 Cal. App. 4th 618, 65 Cal. Rptr. 2d 532* , after the fork assembly on his mountain bike broke and he sustained grievous injuries, plaintiff brought suit for several causes of action, including strict product liability, against various defendants. In the strict liability action against defendant, plaintiff propounded requests for admissions seeking defendant's admissions that the product was defectively manufactured and that the defect was a proximate cause of plaintiff's injuries. Defendant denied those requests, but failed to produce any witness at trial regarding those issues. Plaintiff prevailed on those issues, and sought an award of the expenses incurred in making such proof. When the trial court denied that motion, plaintiff appealed.

The court of appeal reversed that order, and remanded for redetermination, finding that the trial court had abused its discretion in denying plaintiff's motion for expenses (*56 Cal. App. 4th 618, 638)* . The courtreviewed the circumstances under which an award for payment of expenses of proof under former Code Civ. Proc. § 2033(o) (*now see Code Civ. Proc. § 2033.420*) is appropriate. It said that a request for admission will be of substantial importance when the subject of the matter requested for admission has at least some direct relationship to one of the central issues in the case. A central issue in the case is one that, if not proven, would have altered the results in the case (*56 Cal. App. 4th 618, 634-635)* . The court observed that it was obvious that plaintiff's requests for admissions that the product was

defectively manufactured and that the defect was a proximate cause of his injuries involved issues of substantial importance in a product liability action. Thus, when defendant denied those requests, but failed to produce any witness at trial regarding those issues, plaintiff should be awarded the expenses in proving those issues (*56 Cal. App. 4th 618, 638)* .

The court was not persuaded by defendant's claim that it had a reasonable belief that it could prevail on those issues, noting that defendant's misunderstanding of the law regarding testimony of experts did not provide reasonable grounds for denying the admissions (*56 Cal. App. 4th 618, 638)* .

Brooks v. American Broadcasting Co. *(1986) 179 Cal. App. 3d 500, 224 Cal. Rptr. 838* was an action for damages for personal injuries suffered in a motor vehicle accident by the driver of a truck/semitrailer rig. Plaintiff contended that he was forced to swerve off the highway to avoid defendants' oncoming bus, which was over the centerline of the road in his lane. The Highway Patrol report had concluded that plaintiff's truck had to have been over the centerline of the road because of the tire marks it had made on the pavement. Defendants served plaintiff with requests for admission, including the admission that his rig was a certain number of feet in the bus's lane of the highway at a certain point from its final location. Plaintiff denied the fact. At trial, defendants introduced evidence proving the fact, and plaintiff's counsel did not dispute it. The jury returned a special verdict finding that defendants were not negligent. Implicit in the jury's verdict was its finding that plaintiff's rig, and not the bus, was over the centerline. The trial court granted defendants' motion for an order awarding them reasonable expenses incurred in proving the fact. Plaintiff appealed.

The court of appeal affirmed the judgment, including the order awarding defendants reasonable expenses incurred in proving the matter denied. With regard to whether an issue is of substantial importance, the court noted that former Code Civ. Proc. § 2034(c) (*now see Code Civ. Proc. § 2033.420*) was derived from former Fed. R. Civ. Proc., Rule 37(c). The court approved of the federal courts' general view that an issue is substantially important when it is central to the disposition of the case (*179 Cal. App. 3d 500, 508-509)* . The location of the truck was a central issue because plaintiff alleged that his swerving to miss the oncoming buscaused the accident. The trial court was therefore well within its discretion in determining that the requested admission was of substantial importance (*179 Cal. App. 3d 500, 511-512)* .

Note that expenses were allowed under the former statute only after the responding party wrongfully served "a sworn denial." *Code Civ. Proc. § 2033.420(a)* now provides recovery of expenses if a party "fails to admit the genuineness of any document or the truth of any matter," i.e., on all unjustified failures to admit, and not only after sworn denials [*see* Reporter's Notes to the Proposed California Civil Discovery Act of 1986, Note to § 2033(o)].

[c] Denial Given for Delaying Purposes

In ***Hillman v. Stults*** *(1968) 263 Cal. App. 2d 848, 70 Cal. Rptr. 295* , plaintiff brought an action against his relative (and later the administrator of her estate), to establish the existence of a trust and require an accounting. Plaintiff had transferred his property to his relative in trust at the time of his incarceration. Before trial, plaintiff propounded requests for admission concerning the genuineness of certain documents, *e.g.,* the initial trust letter allegedly signed by his relative, and concerning various matters of fact. Defendants denied both the truth of the facts and the genuineness of the documents. Plaintiff prevailed at trial and also prevailed on his motion under former Code Civ. Proc. § 2034(c) (*see now Code Civ. Proc. § 2033.420*) to recover the costs of proof of matters that defendants had wrongfully denied. The trial court noted that the totally unjustified denials were part of a continuing course of conduct by defendants to delay the course of the litigation and to force plaintiff to settle. Defendants appealed.

The court of appeal affirmed, modifying the amount of sanctions. The award of sanctions was proper because defendants' denials were dilatory and evasive and resulted in both an obstruction of justice and a depletion of the trust property (*263 Cal. App. 2d 848, 883-885)* . Former Code Civ. Proc. § 2034 does not provide for penalties, but for reimbursement of expenses for going to trial as a result of the unfounded and unjustified denials. The trial court

properly awarded reimbursement or compensation (*263 Cal. App. 2d 848, 884)* .

[d] Standing to Recover Expenses

In ***Smith v. Circle P Ranch Co.*** *(1978) 87 Cal. App. 3d 267, 150 Cal. Rptr. 828* , a personal injury action, the jury returned a special verdict of lack of negligence against certain defendants, and a general verdict for plaintiff against the remaining defendants. Plaintiff moved for an award against all defendants of expenses of proof for wrongful denial of requests for admission. The trial court granted the motion only in regard to the prevailing defendants, who appealed on the ground that the trial court erred in imposing expenses on a prevailing party.

The court of appeal reversed the order imposing sanctions because the dollar amount was erroneously calculated, and remanded the matter for redetermination regarding expenses and attorney's fees (*87 Cal. App. 3d 267, 279-280)* [*see* discussion in *§ 86.61[3][b]*]. With regard to the issue of awarding sanctions against a prevailing party, however, the court held that the burden of proof on negligence is not coextensive with the showing required to prevail on a motion under former Code Civ. Proc. § 2034(c) (*see now Code Civ. Proc. § 2033.420*). A party may prevail in the case in chief, while still contravening the admissions statutes by denying matters of substantial importance without any good reasons. One need not be a prevailing party to recover expenses of proof (*87 Cal. App. 3d 267, 274-275)* .

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CHAPTER 86 DISCOVERY: REQUESTS FOR ADMISSIONS
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8-86 California Points & Authorities § 86.53

§ 86.53 Supporting Motion for Relief From Waiver of Right to Make Objections to Requests for Admission [Code Civ. Proc. § 2033.280]

[1] FORM Supporting Motion for Relief From Waiver of Right to Make Objections to Requests for Admission [Code Civ. Proc. § 2033.280]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR RELIEF FROM WAIVER OF RIGHT TO MAKE OBJECTIONS TO REQUESTS FOR ADMISSION
vs.	)	
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

THE COURT SHOULD RELIEVE _____ [*specify party, e.g.,* DEFENDANT] FROM WAIVER OF THE RIGHT TO MAKE OBJECTIONS AFTER FAILURE TO SERVE TIMELY RESPONSES TO _____ [*specify, e.g.,* PLAINTIFF'S FIRST SET OF REQUESTS FOR ADMISSION] BECAUSE HE/SHE/IT HAS SUBSEQUENTLY SERVED A RESPONSE THAT IS IN SUBSTANTIAL COMPLIANCE WITH

SECTIONS 2033.210-2033.230 OF THE CODE OF CIVIL PROCEDURE, AND HIS/HER/ITS FAILURE TO SERVE A TIMELY RESPONSE WAS THE RESULT OF _____ [MISTAKE *and/or* INADVERTENCE *and/or* EXCUSABLE NEGLECT].

Relief From Waiver. The court, on motion, may relieve a party from the waiver of the right to make objections after failure to serve a timely response to requests for admission, if it determines that (1) the party has subsequently served a response that is in substantial compliance with *Sections 2033.210-2033.230 of the Code of Civil Procedure*, and *(2)* the party's failure to serve a timely response to the request was the result of mistake, inadvertence, or excusable neglect (*Code Civ. Proc. § 2033.280(a)*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities is for use by a party on whom requests for admission have been served, but who failed to serve timely response to them, to obtain an order for relief from waiver of the right to object to the requests [see *Code Civ. Proc. § 2033.280*]. If the propounding party has served a notice of motion to compel response and for a monetary sanction, counsel should set the motion for relief from waiver for hearing either prior to or concurrent with the propounding party's motion.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case.

[c] Grounds for Relief

The grounds for relief from waiver under *Code Civ. Proc. § 2033.280* are similar to some of the grounds for relief from default judgment under *Code Civ. Proc. § 473(b)*, i.e., that the party's failure to serve a timely response to the requests was the result of mistake, inadvertence, or excusable neglect. Counsel may wish to use authority supporting a motion under *Code Civ. Proc. § 473(b)* that interprets those grounds, bearing in mind that *Code Civ. Proc. § 473* allows relief under the additional ground of surprise. For memoranda of points and authorities regarding relief under *Code Civ. Proc. § 473*, see Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders* .

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 86 DISCOVERY: REQUESTS FOR ADMISSIONS
PART II. FORMS
C. Miscellaneous Procedures Relating to Requests for Admissions

8-86 California Points & Authorities §§ 86.54-86.59

[Reserved]

§§ 86.54[Reserved]

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Volume 8 Chapters 80-89A DISCOVERY
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8-86 California Points & Authorities § 86.60

§ 86.60 Opposing Motion for Order for Deemed Admissions--Substantially Complying Proposed Response Served Before Hearing [Code Civ. Proc. § 2033.280]

[1] FORM Opposing Motion for Order for Deemed Admissions--Substantially Complying Proposed Response Served Before Hearing [Code Civ. Proc. § 2033.280]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM OF POINTS
_____ [*name*],	)	AND AUTHORITIES IN
Plaintiff,	)	OPPOSITION TO MOTION FOR DEEMED AD-
vs.	)	MISSIONS
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

THE COURT SHOULD NOT GRANT _____ [PLAINTIFF *or* DEFENDANT]'S MOTION THAT THE _____ [GENUINENESS OF THE DOCUMENTS *and/or* TRUTH OF ALL MATTERS] SPECIFIED IN _____ [*identify requests, e.g.,* PLAINTIFF'S FIRST SET OF REQUESTS FOR ADMISSION] BE DEEMED ADMITTED BECAUSE _____ [PLAINTIFF *or* DEFENDANT] SERVED A PROPOSED RESPONSE BEFORE THE HEARING ON THE MOTION THAT IS IN SUBSTANTIAL COMPLIANCE WITH CODE OF CIVIL PROCEDURE SECTIONS 2033.210-2033.240.

A. Admission Should Not Be Deemed When Substantially Complying Response Is Served. A motion to have the genuineness of any documents and the truth of any matters specified in the request for admission deemed admitted should not be granted when (1) proposed responses to the requests are served before the hearing date and (2) those responses are in substantial compliance with *Code of Civil Procedure Sections 2033.210-2033.240* (*Tobin v. Oris (1992) 3 Cal. App. 4th 814, 828, 4 Cal. Rptr. 2d 736 , disapproved on other grounds* in *Wilcox v. Birtwhistle (1999) 21 Cal. 4th 973, 983 n.12, 90 Cal. Rptr. 2d 260, 267, 987 P.2d 727*).

B. Admission Should Not Be Deemed Automatically When Responses Are Verified by Defendant's Counsel Because Defendant Cannot Be Located. A motion to have the genuineness of any documents and the truth of any matters specified in the requests for admission deemed admitted should not be granted automatically when the responses were verified by defendant's counsel because the defendant could not be located (*Brigante v. Huang (1993) 20 Cal. App. 4th 1569, 1582-1588, 25 Cal. Rptr. 2d 354 , disapproved on other grounds* in *Wilcox v. Birtwhistle (1999) 21 Cal. 4th 973, 983 n.12, 90 Cal. Rptr. 2d 260, 267, 987 P.2d 727*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This form of points and authorities is for use in opposition to a motion for an order for that the genuineness of any documents and the truth of any matters specified in the request for admission be deemed admitted [*see Code Civ. Proc. § 2033.280*].

In an appropriate case, the foregoing points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 86.50*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case.

[c] Related Pleading and Practice Forms

For a general discussion and forms relating to deemed admissions to requests for admission, see California Forms of Pleading and Practice, Ch. 196, *Discovery: Requests for Admissions* (Matthew Bender).

[3] Discussion of Authorities

[a] Admission Should Not Be Deemed When Substantially Complying Response Is Served

In ***Tobin v. Oris*** *(1992) 3 Cal. App. 4th 814, 4 Cal. Rptr. 2d 736 , disapproved on other grounds* in *Wilcox v. Birtwhistle (1999) 21 Cal. 4th 973, 983 n.12, 90 Cal. Rptr. 2d 260, 267, 987 P.2d 727* , plaintiff filed a complaint for

property damage against defendants. After defendants failed to respond in a timely fashion to plaintiff's request for admissions, plaintiff moved to have the requests deemed admitted. Defendants opposed the motion, and served proposed responses to the requests. After the hearing on the motion the trial court ordered that the requests be deemed admitted. Plaintiff filed a motion for summary judgment based entirely on the matters deemed admitted. The trial court granted the motion and entered judgment accordingly. Defendants appealed.

The court of appeal reversed. It said that the obvious implication of former Code Civ. Proc. § 2033(k) (*now see Code Civ. Proc. § 2033.280*) is that when a proposed response is served prior to the hearing on a motion to deem admissions and there is no finding that the substantial compliance requirement has not been met, then the motion may not be granted. Thus, a motion to have admission requests deemed admitted may not be granted when the record establishes that (1) proposed responses to the requests have been served prior to the hearing date, and (2) those responses are in substantial compliance with former Code Civ. Proc. § 2033(f)(1) (*now see Code Civ. Proc. §§ 2033.220-2033.240*), which governs the form and content of the responses (*3 Cal. App. 4th 814, 827-828)* . Plaintiff had received defendants' responses over 30 days prior to the hearing. Although it criticized the proposed responses, characterizing them as unintelligible, and faulting them for not originally including signed verifications and containing errors in the proof of service, the trial court did not make any finding that the responses were not in substantial compliance. After examining the record, the court of appeal said that essentially all of the responses were in substantial, if not literal, compliance. That some of the responses were less than clear or complete did not change that conclusion. Thus, the trial court erred in granting the motion for deemed admissions (*3 Cal. App. 4th 814, 827)* . Moreover, the summary judgment, based on the deemed admissions, was also in error (*3 Cal. App. 4th 814, 829)* .

[b] Admission Should Not Be Deemed Automatically When Responses Are Verified by Defendant's Counsel Because Defendant Cannot Be Located

In ***Brigante v. Huang*** *(1993) 20 Cal. App. 4th 1569, 25 Cal. Rptr. 2d 354 , disapproved on other grounds* in *Wilcox v. Birtwhistle (1999) 21 Cal. 4th 973, 983 n.12, 90 Cal. Rptr. 2d 260, 267, 987 P.2d 727* , the reviewing court held that if responses to requests for admission are verified by defendant's counsel because the defendant cannot be located, a court should not automatically deem all of the requests to be admitted without exercising its discretion to determine whether a less drastic remedy is appropriate. In such a case, the court has the power to fashion a remedy that will do justice, such as deeming only some requests admitted or relieving the defense from admitting or denying requests on a showing of efforts made to locate the defendant (*20 Cal. App. 4th 1569, 1583)* . Thus, in a personal injury action involving a defendant who could not be located, when the complaint had been served by publication, and defendant's insurer had assigned counsel to represent defendant, the trial court erred in deeming all of plaintiff's requests for admissions to be admitted, thereby establishing plaintiff's entire case, including $500,000 damages, for purposes of summary judgment (*20 Cal. App. 4th 1569, 1571-1572)* . On plaintiff's motion to have his or her requests for admissions deemed admitted on the ground that defendant's counsel, rather than defendant, verified the responses, defendant's counsel adequately raised the issue of oppression by opposing plaintiff's motion, and need not have filed a separate motion for a protective order (*20 Cal. App. 4th 1569, 1585-1586)* .

[4] Additional Authorities

[a] Admission Should Not Be Deemed When Substantially Complying Response Is Served

In *Demyer v. Costa Mesa Mobile Home Estates (1995) 36 Cal. App. 4th 393, 42 Cal. Rptr. 2d 260 , disapproved on other grounds* in *Wilcox v. Birtwhistle (1999) 21 Cal. 4th 973, 983 n.12, 90 Cal. Rptr. 2d 260, 267, 987 P.2d 727* , residents sued mobilehome park owners. Three defendants served requests for admissions on each plaintiff. Plaintiff's counsel missed the deadline for response to the requests. Defendants filed a motion to deem certain matters admitted. The discovery referee shortened the time for the hearing. Plaintiffs served proposed responses to the requests for admissions after the shortened time, but before the time the hearing would have been scheduled absent the shortening of time. The referee recommended that the motion to deem the matters admitted be granted, and the trial court confirmed the

decision and subsequently granted summary judgment for defendants.

The court of appeal reversed the judgment. Under former Code Civ. Proc. § 2033(k) (*now see Code Civ. Proc. § 2033.280*), the trial court must order that requests for admission be deemed admitted unless the party to whom the requests have been directed has served a proposed response before the hearing on the motion. The court of appeal concluded that a "hearing on the motion" does not include a hearing on shortened time (*36 Cal. App.4th 393, 399-400)* . Because plaintiffs served their responses within 20 days of the notice of the motion to deem matters admitted, the trial court had to deny the motion. Thus, the summary judgment motion, which was predicated on the admission, was reversed (*36 Cal. App. 4th 393, 402-403)* .

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8-86 California Points & Authorities § 86.61

§ 86.61 Opposing Motion for Order Requiring Payment of Expenses of Proof [Code Civ. Proc. § 2033.420]

[1] FORM Opposing Motion for Order Requiring Payment of Expenses of Proof [Code Civ. Proc. § 2033.420]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR ORDER REQUIRING PAYMENT FOR EXPENSES OF PROOF FOR FAILURE TO MAKE ADMISSION
vs.	)	
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

THE COURT SHOULD NOT ORDER _____ [PLAINTIFF *or* DEFENDANT] TO PAY EXPENSES INCURRED IN PROVING MATTERS THAT HE/SHE REFUSED TO ADMIT, BECAUSE _____ [AN OBJECTION TO THE REQUEST FOR ADMISSION WAS SUSTAINED *or* FURTHER RESPONSE TO THE REQUEST WAS WAIVED UNDER SECTION 2033.290 OF THE CODE OF CIVIL PROCEDURE *or* THE ADMISSION SOUGHT WAS OF NO SUBSTANTIAL IMPORTANCE *or* _____ (*specify party failing to make admission, e.g.,* PLAINTIFF) HAD REASONABLE GROUND

TO BELIEVE THAT HE/SHE WOULD PREVAIL ON THE MATTER *and/or* THERE WAS (OTHER) GOOD REASON FOR THE FAILURE TO ADMIT *and/or*_____*specify moving party, e.g.,* PLAINTIFF) DID NOT PROVE THE TRUTH OF THESE MATTERS BUT MERELY PREPARED TO DO SO].

A. Grounds for Denial of Order. The court may deny an order requiring the responding party to pay expenses incurred in making proof of a matter not admitted if (1) an objection to the request was sustained or a response to it was waived under *Section 2033.290 of the Code of Civil Procedure*; (2) the admission sought was of no substantial importance; (3) the party failing to make the admissionhad reasonable ground to believe that that party would prevail on the matter; or (4) there was other good reason for the failure to admit (*Code Civ. Proc. § 2033.420*).

[*Optional*] **B. Good Reason for Failure to Admit.** If the party failing to admit the request for admissions has good cause in that the issues that were presented by the requested admissions were strenuously contested and difficult to resolve, the party propounding the requests may not recover the statutory costs of proving the truth of the matters therein, even if the matters were eventually proved to be true by uncontroverted evidence (*see Haseltine v. Haseltine (1962) 203 Cal. App. 2d 48, 60-61, 21 Cal. Rptr. 238*).

[*Optional*] **C. Limitation on Amount of Recoverable Expenses.** Expenses of proof of matters wrongfully denied in response to requests for admission must bear a reasonable relationship to the costs incurred (*see Smith v. Circle P Ranch Co. (1978) 87 Cal. App. 3d 267, 279 n.4, 150 Cal. Rptr. 828*).

[*Optional*] **D. Moving Party Must Prove Truth of Matters.** Expenses are recoverable under *Code Civ. Proc. § 2033.420* only if the party requesting the admission "proved" the truth of the matter, not if the party merely prepared to do so (*Wagy v. Brown (1994) 24 Cal. App. 4th 1, 4-6, 29 Cal. Rptr. 2d 48*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This form of points and authorities is for use in opposition to a motion for an order awarding expenses of proof against the party that denied requested admissions that were subsequently proved to be true [*see Code Civ. Proc. § 2033.420*; *see also § 86.52[2][a]*].

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 86.52*.

Note that some of the cases cited in this form construe law in effect before the operative date of the Civil Discovery Act. They are cited and discussedas persuasive authority to the extent that they remain consistent with current provisions [*see also § 86.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, if appropriate, counsel should discuss facts showing that responding party had reasonable ground to believe that he or she would prevail in the matter.

[c] Related Pleading and Practice Forms

For a general discussion and forms relating to expenses of proof of matters that were denied, see California Forms of Pleading and Practice, Ch. 196, *Discovery: Requests for Admissions* (Matthew Bender).

[3] Discussion of Authorities

[a] Good Reason for Failure to Admit

In ***Haseltine v. Haseltine*** *(1962) 203 Cal. App. 2d 48, 21 Cal. Rptr. 238* , an action for divorce and property division, defendant husband submitted requests for admissions to plaintiff wife. Plaintiff admitted the truth of a few of the requests and denied the remainder. After the matters involved in some of the denied requests were proved true at trial, defendant moved for an order awarding him the expenses of proof pursuant to former Code Civ. Proc. § 2034(c) (*see now Code Civ. Proc. § 2033.420*). The trial court denied defendant's motion on the ground that good cause existed for the denials and ultimately awarded plaintiff a divorce decree. Defendant appealed from that portion of the judgment regarding money and property distribution on the ground, inter alia, that his motion for expenses of proof was improperly denied.

The court of appeal affirmed, holding, inter alia, that the trial court acted within its discretion in finding that good cause existed for denials of the disputed requests for admission (*203 Cal. App. 2d 48, 60)* . The fact that matters denied were subsequently proved by uncontradicted evidence does not make the denial unreasonable per se in retrospect (*203 Cal. App. 2d 48, 61)* . Denial of a motion for expenses of proof is appropriate when, as in the instant case, the responding party did not have access to all the necessary facts; and the key issues embodied in the requests for admissions were hotly contested and difficult to resolve (*203 Cal. App. 2d 48, 60-61)* [*see also* dicta in *Chodos v. Superior Court (1963) 215 Cal. App. 2d 318, 324, 30 Cal. Rptr. 303* ; *Hillman v. Stults (1968) 263 Cal. App. 2d 848, 886, 70 Cal. Rptr. 295* ("good cause" synonymous with whether issues were strenuously contested and difficult to resolve; discussed for another issue in § 86.52[3][c])].

Note that the above holding in *Haseltine* was criticized by the court in *Brooks v. American Broadcasting Co. (1986) 179 Cal. App. 3d 500, 511, 224 Cal. Rptr. 838* (discussed for another issue in § 86.52[3][b]). In *Brooks,* the court of appeal listed factors relevant to whether a party had good reasons to deny a request for admission and disagreed with "the suggestion" in *Haseltine* that "it is enough for the party making the denial to 'hotly contest' the issue." However, as can be seen from the discussion in this form, *Haseltine* did not hold that it was enough to justify a denial that the issue be hotly contested. *Haseltine* required two conditions: that the issues be (1) hotly contested, and (2) difficult to resolve. Moreover, in *Haseltine,* the responding party did not have access to all of the facts necessary to answer the questions. In *Brooks,* although the plaintiff denied a substantially important requested admission, plaintiff had ignored the accident report, which stated as a fact the matter sought to be admitted; the issue was not hotly contested at trial; and plaintiff's counsel did not contest the issue at all (*179 Cal. App. 3d 500, 512)* . Finally, note that neither case involved a reversal but, rather, an affirmance of the order under review.

[b] Limitation on Amount of Recoverable Expenses

The facts and procedural background of ***Smith v. Circle P Ranch Co.*** *(1978) 87 Cal. App. 3d 267, 150 Cal. Rptr. 828* are discussed in *§ 86.52[3][d]*. In *Smith,* the court of appeal held that one need not be a prevailing party in order to recover expenses of proof (*87 Cal. App. 3d 267, 274-275)* . Plaintiff had requested expenses in the amount of $61,000 against all defendants. The trial court granted plaintiff's request against only the prevailing defendants, in the amount of

$30,500, apparently by dividing the amount requested in half. The court of appeal noted that it was not reasonable simply to divide the requested amount in half to arrive at the portion attributable to the defendants against whom sanctions were warranted, because the amount of the sanctions must bear a reasonable relationship to the costs incurred in proving matters that were wrongfully denied (*87 Cal. App. 3d 267, 279 n.4*). The amount that may properly be assessed as sanctions is limited to those fees and expenses related to a particular abuse of discovery; there may be no assessment for expenses that are unrelated to the specific grounds of the motion before the court (*87 Cal. App. 3d 267, 279)* .

[c] Moving Party Must Prove Truth of Matters

In ***Wagy v. Brown*** *(1994) 24 Cal. App. 4th 1, 29 Cal. Rptr. 2d 48* , a personal injury action that was the subject of judicial arbitration, the arbitrator awarded damages to the plaintiff and ordered the parties to bear their own costs. Neither party requested a trial de novo, and a judgment was entered on the award. Thereafter, plaintiff filed a motion for attorney's fees pursuant to former Code Civ. Proc. § 2033(o) (*now see* Code Civ. Proc.§ 2033.420) based on the defendants' denial of a request for admission that they were negligent. The trial court granted plaintiff's motion.

The court of appeal reversed holding that the plaintiff was not entitled to an award of expenses under former Code Civ. Proc. § 2033(o) (*now see Code Civ. Proc. § 2033.420*) based on the defendants' denial of a request for admission that they were negligent. The defendants had subsequently admitted, for purposes of arbitration only, that they were negligent, which obviated the necessity for proof on that issue. Thus, the attorney's fees paid by the plaintiff in preparation for trial or arbitration were not incurred to prove the truth of the defendant's negligence so as to authorize an award of attorney's fees under former Section 2033(o). Expenses are recoverable under that section only if the party requesting the admission "proves" the truth of the matter, not if the party merely prepares to do so (*24 Cal. App. 4th 1, 4-6)* .

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 87 DISCOVERY: PHYSICAL AND MENTAL EXAMINATIONS

8-87 California Points & Authorities 87.syn

§ 87.syn Synopsis to Chapter 87: DISCOVERY: PHYSICAL AND MENTAL EXAMINATIONS

§ 87.01 Scope of Chapter

§ 87.02 Governing Law

[1] California Civil Discovery Act and Related Law

[2] Provisions Governing Demands for Physical or Mental Examinations

[3] Case Law Decided Under Prior Discovery Acts

§ 87.03 How to Use the Forms in This Chapter

[1] Page Limits on Memoranda

[2] Using the Forms to Build a Draft Memorandum

§ 87.04 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

[2] Related Memoranda

§§ 87.05-87.09 [Reserved]

§ 87.10 Supporting Motion for Order That Personal Injury Plaintiff Respond to and/or Comply With Demand for Physical Examination [Code Civ. Proc. §§ 2032.240, 2032.250]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] General Procedures for Examination of Personal Injury Plaintiff

[d] Related Pleading and Practice Forms

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Physical Examination May Be Ordered When It Is Not Painful, Protracted, or Intrusive

§ 87.11 Supporting Motion for Order of Physical or Mental Examination [Code Civ. Proc. § 2032.310]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] General Procedures for Motion to Take Physical or Mental Examination

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Condition in Controversy Is Raised by Pleadings

[b] Condition in Controversy Is Not Raised by Pleadings

[c] More Than One Examination May Be Ordered

[4] Additional Authorities

[a] Condition in Controversy Is Raised by Pleadings

§ 87.12 Supporting Motion for Order of Sanctions [Code Civ. Proc. § 2023.030]--Failure to Submit to or Produce Another for Physical or Mental Examination [Code Civ. Proc. §§ 2032.410, 2032.420]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

§ 87.13 Supporting Motion for Order of Sanctions [Code Civ. Proc. § 2023.030]--Failure to Obey Order Requiring Response to and Compliance With Demand for Physical Examination of Personal Injury Plaintiff [Code Civ. Proc. § 2032.240]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

§§ 87.14-87.19 [Reserved]

§ 87.20 Opposing Motion for Order That Personal Injury Plaintiff Respond to and/or Comply With Demand for Examination [Code Civ. Proc. §§ 2032.240, 2032.250]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Examiner's Qualifications

[d] Related Pleading and Practice Forms

§ 87.21 Opposing Motion for Order of Physical or Mental Examination [Code Civ. Proc. § 2032.310]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Examiner's Qualifications

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Good Cause Must Be Shown

[b] Balancing Burden Against Likelihood of Discovering Admissible Evidence

[c] Examination Must Only Be of Party, Party's Agent, or Person Under Party's Custody or Control

[d] Examination Must Be of Condition That Is in Controversy

[e] Examination Must Be of Living Person

[4] Additional Authorities

[a] Good Cause Must Be Shown

[b] Motion Must Specify Certain Information

§ 87.22 Opposing Motion for Order of Physical or Mental Examination [Code Civ. Proc. § 2032.320]--Terms and Conditions to Safeguard Examinee

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Conduct of Examination

[3] Discussion of Authorities

[a] Attorney or Attorney's Representative Must Be Allowed to Attend, Observe, and Record Examination

[4] Additional Authorities

[a] Mental Examinee Has Right to Record Examination

§§ 87.23-87.29 [Reserved]

§ 87.30 Supporting Motion for Protective Order During Physical Examination [Code Civ. Proc. § 2032.510(d)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Protective Order Regarding Conduct at Examination

[d] Related Pleading and Practice Forms

§§ 87.31-87.49 [Reserved]

§ 87.50 Supporting Motion for Order Compelling Delivery of Demanded Medical Reports [Code Civ. Proc. § 2032.620]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Procedures for and Effect of Demand for Reports

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Party Is Entitled to Report Even If Written Report Does Not Exist

[b] Party Is Entitled to Depose Examining Physician Even After Withdrawal as Expert

§ 87.51 Supporting Motion for Order of Sanctions [Code Civ. Proc. § 2023.030]--Failure to Obey Order Compelling Delivery of Demanded Medical Reports [Code Civ. Proc. § 2032.620]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

§ 87.52 Supporting Motion for Order Compelling Delivery of Existing and Later Medical Reports in Exchange for Delivery of Reports Under Code Civ. Proc. § 2032.610 [Code Civ. Proc. § 2032.640]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Waiver of Privileges and Work Product Protection

[d] Related Pleading and Practice Forms

§ 87.53 Supporting Motion for Order of Sanctions [Code Civ. Proc. § 2023.030]--Failure to Obey Order Compelling Delivery of Existing and Later Medical Reports in Exchange for Delivery of Reports Under Code Civ. Proc. § 2032.610 [Code Civ. Proc. § 2032.650]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

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PART I. INTRODUCTION

8-87 California Points & Authorities § 87.01

§ 87.01 Scope of Chapter

This chapter includes memoranda relating to civil discovery by means of demands to another party for physical or mental examinations. Forms in Part II include the following:

- Subpart A has memoranda supporting [§ 87.10 et seq.] and opposing [§ 87.20 et seq.] a motion to respond to or to comply with a demand for a physical or mental examination.

- Subpart B has memoranda relating to motions for protective orders in the context of a demand for physical or mental examination [§ 87.30].

- Subpart C has memoranda relating to motions to compel delivery of examination reports [§ 87.50 et seq.].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMotions to CompelCivil ProcedureDiscoveryProtective Orders

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PART I. INTRODUCTION

8-87 California Points & Authorities § 87.02

§ 87.02 Governing Law

[1] California Civil Discovery Act and Related Law

Civil discovery in California is governed primarily by the California Civil Discovery Act, codified at *Code Civ. Proc. §§ 2016.010 et seq.*-2036.010 et seq. Discovery in limited civil cases is further governed by *Code Civ. Proc. §§ 94* and *95*. Statewide rules of court relating to discovery papers and discovery motions are set out in *Cal. Rules of Ct., Rules 3.1000*, 3.1345, 3.1346, 3.1347, and 3.1348.

[2] Provisions Governing Demands for Physical or Mental Examinations

Civil discovery by requests to a party for admissions is governed primarily by *Code Civ. Proc. § 2032.010 et seq.* Physical or mental examinations under this code section are authorized in limited civil cases under *Code Civ. Proc. § 94(d)*.

Code Civ. Proc. § 2032.010 et seq. does not affect tests under the Uniform Act on Blood Tests to Determine Paternity (*Fam. Code § 7550 et seq.*) [*see Code Civ. Proc. § 2032.010(a)*].

[3] Case Law Decided Under Prior Discovery Acts

The Civil Discovery Act was passed in 2004 and became effective July 1, 2005. It repealed and renumbered the Civil Discovery Act of 1986 but did not substantively change the law of civil discovery [Stats. 2004, ch. 182 §§ 22, 23, 61]. Thus cases decided under the 1986 Act remain controlling authority.

A considerable body of case law interpreted the discovery provisions of the Discovery Act of 1956 (former Code Civ. Proc. §§ 2016-2037.9), which preceded the 1986 Act. Although the 1986 Act, which became operative July 1,1987, implemented numerous changes in the prior law, it also continued provisions of the prior law in many other instances, or even codified decisions interpreting the prior law. Decisions construing this prior law are therefore cited as persuasive, rather than controlling, authority to the extent that they are consistent with current provisions [*see In re Marriage of Skelley (1976) 18 Cal. 3d 365, 369, 134 Cal. Rptr. 197, 556 P.2d 297]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical ExaminationsFamily LawPaternity & SurrogacyProof of PaternityEvidenceBlood Tests

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8-87 California Points & Authorities § 87.03

§ 87.03 How to Use the Forms in This Chapter

[1] Page Limits on Memoranda

One of the more significant drafting requirements to keep in mind are page limits: supporting and opposing memoranda filed in discovery motion proceedings may not exceed 15 pages. A reply or closing memorandum may not exceed 10 pages. Exhibits, declarations, attachments, the table of contents, the table of authorities, and the proof of service are excluded from these page limits. Any party must obtain leave of court to file a longer memorandum [*see Cal. Rules of Ct., Rule 3.1113(d)*]. These and other drafting requirements are discussed in further detail in Ch. 1, *Writing Legal Memoranda and Briefs* .

[2] Using the Forms to Build a Draft Memorandum

The forms included in this chapter are designed to be included in a memorandum supporting or opposing a particular type of discovery motion, such as motion to compel discovery or a motion for a protective order.

In many cases it will be appropriate to combine them with additional memoranda set out in the related discovery chapters. In particular, they may be combined with the general points and authorities for limiting or regulating discovery set out in Ch. 80, *Discovery: Scope, Regulation, and Timing* , or with the points and authorities for limiting discovery based on the evidentiary privileges, work product protection, or other protective provisions found in Ch. 81, *Discovery: Privileges and Other Discovery Limitations* .

It may also be appropriate to modify the points and authorities in this chapter for use in a different procedural context, such as in a trial or appellate brief or office memoranda relating to discovery practice.

For a detailed discussion on how to select and use the forms in the publication to build a draft memorandum and complete the draft, with detailed discussion of all drafting requirements and strategic or stylistic considerations, see Ch. 1, *Writing Legal Memoranda and Briefs* . For a skeletal form of memorandum for use in creating a properly formatted outline in which to compile relevant forms from this publication, see also Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting Memoranda

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 87 DISCOVERY: PHYSICAL AND MENTAL EXAMINATIONS
PART I. INTRODUCTION

8-87 California Points & Authorities § 87.04

§ 87.04 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

For background discussion of forms of moving papers relating to civil discovery by demands for physical or mental examinations, see California Forms of Pleading and Practice, Ch. 197, *Discovery: Physical and Mental Examinations* (Matthew Bender).

[2] Related Memoranda

For memoranda supporting or opposing a motion to compel discovery based on general limiting or regulatory provisions of the Discovery Act, see Ch. 80, *Discovery: Scope, Regulation, and Timing* .

For memoranda supporting or opposing a motion to compel discovery on the ground that the matter sought to be discovered is privileged or is otherwise protected from disclosure, see Ch. 81, *Discovery: Privileges and Other Discovery Limitations* .

For memoranda supporting or opposing a motion to compel discovery, or supporting or opposing a motion for protective order, in the context of another discovery method, see Ch. 83, *Discovery: Depositions* , through Ch. 86, *Discovery: Requests for Admissions* , and Ch. 88, *Discovery: Exchange of Expert Witness Information* .

For memoranda relating to the use of demands for the production or inspection of tangible evidence in order to preserve evidence before an action is commenced or pending an appeal, see Ch. 89, *Discovery: Preservation of Evidence* .

For memoranda for use in seeking or opposing writs to review discovery orders, see Ch. 89A, *Discovery: Review of Discovery Orders* .

For forms of memoranda for use in requesting and opposing blood tests in paternity actions pursuant to the Uniform Act on Blood Tests to Determine Paternity, see Ch. 171, *Paternity* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryPrivileged MattersGeneral Overview

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[Reserved]

§§ 87.05[Reserved]

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8-87 California Points & Authorities § 87.10

§ 87.10 Supporting Motion for Order That Personal Injury Plaintiff Respond to and/or Comply With Demand for Physical Examination [Code Civ. Proc. §§ 2032.240, 2032.250]

[1] FORM Supporting Motion for Order That Personal Injury Plaintiff Respond to and/or Comply With Demand for Physical Examination [Code Civ. Proc. §§ 2032.240, 2032.250]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION FOR ORDER THAT PLAINTIFF _____ [RESPOND TO *and/or* COMPLY WITH] DEMAND FOR PHYSICAL EXAMINATION AND FOR MONETARY SANCTION
vs.	)	
_____ [*name*],	)	
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD ISSUE AN ORDER COMPELLING [RESPONSE AND] COMPLIANCE WITH DEFENDANT'S DEMAND FOR PHYSICAL EXAMINATION OF PLAINTIFF BECAUSE PLAINTIFF IS SEEKING RECOVERY FOR PERSONAL INJURIES AND _____ [PLAINTIFF HAS FILED TO

SERVE A TIMELY RESPONSE *or* PLAINTIFF'S RESPONSE TO THE DEMAND IS UNWARRANTED]. IF THE MOTION IS GRANTED, THE COURT SHOULD ALSO IMPOSE A MONETARY SANCTION AGAINST _____ [*name(s)*] BECAUSE THERE IS NO SHOWING THAT _____ [HE/SHE/IT *or* THEY] ACTED WITH SUBSTANTIAL JUSTIFICATION OR THAT OTHER CIRCUMSTANCES MAKE THE IMPOSITION OF THE SANCTION UNJUST.

[*EITHER, if plaintiff has not filed any response*]

A. Defendant May Move for Order Compelling Response and Compliance. A defendant may make a motion for an order compelling response and compliance with a demand for physical examination of a personal injury plaintiff to whom demand for physical examination under *Section 2032.220 of the Code of Civil Procedure* has been directed if that plaintiff fails to serve a timely response to the demand (*Code Civ. Proc. § 2032.240(b)*).

B. Plaintiff May Not Object to Demand. By failing to serve a timely response to a demand for physical examination under *Section 2032.220 of the Code of Civil Procedure*, the personal injury plaintiff to whom the demand was directed waives any objection to the demand (*Code Civ. Proc. § 2032.240(a)*).

C. Court Must Impose Monetary Sanction Absent Specified Findings. The court must impose a monetary sanction under *Section 2023.010 et seq. of the Code of Civil Procedure* against any party, person, or attorney who unsuccessfully opposes a motion to compel response and compliance with a demand for a physical examination, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust (*Code Civ. Proc. §§ 2023.030(a), 2032.240(c)*).

[*Optional*] **D. Court May Impose Sanctions Despite Lack of Opposition to Motion to Compel Discovery.** The court may award sanctions under the Discovery Act in favor of a party who files a motion to compel discovery, even though no opposition to the motion was filed, or opposition to the motion was withdrawn, or the requested discovery was provided to the moving party after the motion was filed (*Cal. Rules of Ct., Rule 3.1030(a)*).

[*OR, if plaintiff has responded*]

A. Defendant May Move for Order Compelling Compliance. A defendant may make a motion, accompanied by a declaration stating facts showing a reasonable and good-faith attempt at an informal resolution of each issue presented by it, for an order compelling compliance with a demand for a physical examination of a personal injury plaintiff, when the defendant has demanded the examination pursuant to *Section 2032.220 of the Code of Civil Procedure*, and the plaintiff's response to the demand includes a [modification of the demand *and/or* refusal to submit to the examination] that is unwarranted (*Code Civ. Proc. § 2032.250(a)*).

[*Optional*] **B. Physical Examination May Be Ordered When It Is Not Painful, Protracted, or Intrusive.** A physical examination may be ordered when it does not involve a procedure that is painful, protracted, or intrusive. For example, when a procedure is necessary to make a medical determination of the etiology of a condition, and involves little cosmetic damage, and minimal painand risks, that procedure is not painful, protracted, or intrusive (*Abex Corp. v. Superior Court (1989) 209 Cal. App. 3d 755, 757-758, 257 Cal. Rptr. 498* ; *see Code Civ. Proc. § 2032.220(a)(1)*).

C. Court Must Impose Monetary Sanction Absent Specified Findings. The court must impose a monetary sanction under *Section 2023.010 et seq. of the Code of Civil Procedure* against any party, person, or attorney who unsuccessfully opposes a motion to compel compliance with a demand for a physical examination, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust (*Code Civ. Proc. §§ 2023.030(a), 2032.250(b)*).

[*Add memoranda generally supporting the imposition of monetary sanctions (see, e.g., Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11).*]

[*Optional*] **D. Court May Impose Sanctions Despite Lack of Opposition to Motion to Compel Discovery.** The court may award sanctions under the Discovery Act in favor of a party who files a motion to compel discovery, even though no opposition to the motion was filed, or opposition to the motion was withdrawn, or the requested discovery was provided to the moving party after the motion was filed (*Cal. Rules of Ct., Rule 3.1030(a)*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum is for use in support of a motion by defendant for an order compelling response to and/or compliance with a demand for a physical examination of a personal injury plaintiff [*see Code Civ. Proc. §§ 2032.240* (response and compliance), 2032.250 (compliance)]. If the plaintiff has responded and defendant seeks only an order for compliance, the motion must be accompanied by a declaration stating facts showing a reasonable and good-faith attempt at an informal resolution of each issue presented by the motion [*Code Civ. Proc. § 2032.250(a)*].

This form should be combined with general memoranda supporting the imposition of monetary sanctions under *Code Civ. Proc. § 2023.030(a)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should set forth facts showing either that plaintiff never responded or how and why the modification or refusal to submit to the demand for examination contained in the plaintiff's response is unwarranted, and otherwise show substantial justification for the motion in order to avoid a monetary sanction if the motion is denied. However, counsel need not set forth facts showing that plaintiff acted without substantial justification [*cf.* former Code Civ. Proc. § 2034(a)]. *Code Civ. Proc. §§ 2023.030(a), 2032.240(c)* and *2032.250(b)* effectively place that burden on the person against whom the sanction is to be imposed, by requiring the court to impose a monetary sanction when it is expressly authorized *unless* it finds that there was substantial justification or that other circumstances would make the monetary sanction unjust.

[c] General Procedures for Examination of Personal Injury Plaintiff

Code Civ. Proc. § 2032.220 provides a new procedure for obtaining one physical examination, on demand and without a court order, of a plaintiff who seeks recovery for personal injury. Former Code Civ. Proc. § 2032(a) required a court order on a showing of good cause for all physical examinations. Counsel should note that in lieu of the procedures and restrictions specified in *Code Civ. Proc. § 2032.220*, the physical examination may be arranged by and carried out under a written agreement of the parties [*Code Civ. Proc. § 2016.030*].

Specifically, any defendant may demand one physical examination of a personal injury plaintiff, provided the examination does not include any diagnostic test or procedure that is painful, protracted, or intrusive, and is conducted at a location within 75 miles of the residence of the examinee. The defendant may make the demand without leave of court after the defendant has been served or has appeared in the action, whichever occurs first. The demand is required to specify the time, place, manner, conditions, scope, and nature of the examination, and the identity and specialty, if any, of the physician who will perform the examination [*Code Civ. Proc. § 2032.220(a)-(c)*]. The demand must be scheduled for a date that is at least 30 days after service of the demand, with certain extensions of time when service is by mail, unless shortened by the court on motion of the demanding defendant [*Code Civ. Proc. § 2032.220(d)*; *see Code Civ. Proc. § 1013(a)* (requirements for service by mail; extensions of time); *Code Civ. Proc. § 1013(c), (e)* (requirements for service by Express Mail or fax; extensions of time); *see also Code Civ. Proc. § 2016.050* (service generally)]. The demand is served on the plaintiff and on all other parties who have appeared in the action [*Code Civ. Proc. § 2032.220(e)*]. The demand is not filed with the court, but is retained by the demanding defendant [*Code Civ. Proc. § 2032.260*].

The plaintiff to whom the demand is directed is required to respond to the demand by a written statement that he or she (1) will comply with the demand as stated, (2) will comply with the demand as specifically modified by the plaintiff, or (3) will refuse, for reasons specified, to submit to the demand. The responsemust be served on all parties who have appeared in the action within 20 days after service of the demand, with certain extensions of time when service is by mail [*see Code Civ. Proc. §§ 1013(a), 2016.050*; *see also Code Civ. Proc. § 1013(c), (e)* (service by Express Mail or fax)], unless extended by the court on motion by the plaintiff [*Code Civ. Proc. § 2032.230*].

If a plaintiff to whom the demand for physical examination has been directed fails to respond to it, that plaintiff waives any objection to the demand, and the defendant may move for an order compelling response and compliance. However, the court, on motion, may relieve the plaintiff of the waiver, in the circumstances discussed in *§ 87.20* [*Code Civ. Proc. § 2032.240(a)*].

[d] Related Pleading and Practice Forms

For forms and discussion related to taking physical and mental examinations, see California Forms of Pleading and Practice, Ch. 197, *Discovery: Physical and Mental Examinations* (Matthew Bender).

[e] Opposing Memoranda

In an appropriate case, the memorandum *set out in § 87.20* may be used to oppose the contention supported by this memorandum.

[3] Discussion of Authorities

[a] Physical Examination May Be Ordered When It Is Not Painful, Protracted, or Intrusive

In ***Abex Corp. v. Superior Court*** *(1989) 209 Cal. App. 3d 755, 257 Cal. Rptr. 498* , a personal injury action alleging asbestos skin disease, plaintiff refused to permit an histopathologic examination, or biopsy, of the warts scattered over his hands, claiming that the procedure was painful, protracted, and intrusive. Defendants' dermatologist had performed a visual examination of plaintiff's warts, and concluded that they were ordinary viral warts, but a biopsy was necessary to be certain. The trial court denied defendants' motion to compel the biopsy and imposed sanctions in the form of reasonable attorney's fees against defendants. Defendants filed a writ of mandate.

The court of appeal issued a writ of mandate directing the trial court to vacate its order denying the motion and imposing sanctions. The court pointed out that when defendants filed their motion, they included a dermatologist's declaration stating that the procedure was necessary to determine the warts' etiology, and that there would be little cosmetic damage, and minimal pain and risks. Also, plaintiff did not provide any documentation regarding the danger or

the discomfort of the proposed biopsy, and in fact, had himself scraped warts off with a pocket knife, essentially the same procedure that defendants sought to compel. The court concluded that to believe that the procedure qualified as being painful, protracted, or intrusive, within the meaning of former Code Civ. Proc. § 2032(c)(2) (*now see Code Civ. Proc. § 2032.220(a)(1)*) strained credulity past the breaking point (*209 Cal. App. 3d 755, 757-758)* .

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8-87 California Points & Authorities § 87.11

§ 87.11 Supporting Motion for Order of Physical or Mental Examination [Code Civ. Proc. § 2032.310]

[1] FORM Supporting Motion for Order of Physical or Mental Examination [Code Civ. Proc. § 2032.310]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION FOR
	)	ORDER OF _____ [PHYSICAL *or*
vs.	)	MENTAL] EXAMINATION
	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD ORDER THE _____ [PHYSICAL *or* MENTAL] EXAMINATION OF [_____ (AN AGENT OF *or* A NATURAL PERSON IN THE CUSTODY OR UNDER THE LEGAL CONTROL OF)] _____ [*specify party, e.g.*, PLAINTIFF] BECAUSE GOOD CAUSE HAS BEEN SHOWN AND THE _____ [PHYSICAL *or* MENTAL] CONDITION OF THAT _____ [PARTY *or* PERSON] IS IN CONTROVERSY IN THE ACTION.

A. Court May Order Examination. On noticed motion, accompanied by a declaration stating facts showing a

reasonable and good-faith attempt to arrange for the examination by an agreement under *Section 2016.030 of the Code of Civil Procedure*, and for good cause shown, the court may order the _____ [physical *or* mental] examination of [_____ (an agent of *or* a natural person in the custody or under the legal control of)] a party to an action in which the _____ [physical *or* mental] condition[, including the blood group], of that _____ [party *or* person] is in controversy in the action (*Code Civ. Proc. § 2032.020(a), 2032.320*).

[*EITHER*]

B. Condition in Controversy Is Raised by Pleadings. The _____ [physical *or* mental] condition of [_____ (an agent of *or* a natural person in the custody or under the legal control of)] a party to an action is placed in controversy as required by *Sections 2032.020(a)* and *2032.320(a) of the Code of Civil Procedure* when the complaint contains allegations of _____ [physical *or* mental] injury, and a denial of the injury or the extent of the injury is contained in the answer, or when the answer asserts a defendant's own _____ [physical *or* mental] condition as a defense to the action (*see Reuter v. Superior Court (1979) 93 Cal. App. 3d 332, 341, 155 Cal. Rptr. 525* (interpreting former Code Civ. Proc. § 2032); *see also Schlagenhauf v. Holder (1964) 379 U.S. 104, 119, 85 S. Ct. 234, 13 L. Ed. 2d 152* (interpreting *Fed. R. Civ. P., Rule 35*).

[*OR*]

B. Condition in Controversy Is Not Raised by Pleadings. When a party's _____ [physical *or* mental] condition is sought to be placed in issue and the pleadings have not placed the condition in controversy, the party seeking the examination must produce sufficient information to show that the condition is in controversy, but the moving party need not prove his or her case on the merits and an evidentiary hearing is not required to be held by the court in all cases, since the showing of a condition in controversy can be made by affidavits or other usual methods short of a formal hearing (*see Schlagenhauf v. Holder (1964) 379 U.S. 104, 119-120, 85 S. Ct. 234, 13 L. Ed. 2d 152* (interpreting *Fed. R. Civ. P., Rule 35*).

[*Optional*] **C. Showing of Exceptional Circumstances for Mental Examination of Personal Injury Plaintiff.** On a showing of exceptional circumstances, the court may order a personal injury plaintiff to submit to a mental examination under *Section 2032.320(b) of the Code of Civil Procedure*, even though that plaintiff has stipulated that no claim is being made for an unusual or particularly serious component of mental and emotional distress over and above that usually associated with such physical injuries, and that no psychiatric testimony will be presented at trial in support of the claim for damages for this usual mental and emotional distress (*Code Civ. Proc. § 2032.320(c)*).

[*Optional*] **D. Examination More Than 75 Miles From Residence.** On a showing of good cause for the travel involved and conditioned on the advancement by the moving party of the reasonable expenses and costs to the examinee for travel to the place of examination, the court may order a _____ [party *or* person] to submit to a _____ [physical *or* mental] examination at a place more than 75 miles from the residence of the person to be examined (*Code Civ. Proc. § 2032.320(e)*).

[*Optional*] **E. More Than One Examination May Be Ordered.** There is nothing in the language of *Code of Civil Procedure Section 2032.010 et seq.* that expressly limits the number of mental or physical examinations. When good cause is shown, multiple defense examinations of the personal injury plaintiff may be permitted (*see Shapira v. Superior Court (1990) 224 Cal. App. 3d 1249, 1254-1256, 274 Cal. Rptr. 516* (mental examination; interpreting former Code Civ. Proc. § 2032).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities is for use in support of a motion by a party seeking a physical or mental examination of another party, an agent of that party, or person in the custody or under the legal control of that party [*see Code Civ. Proc. § 2032.020(a), (d)*]. The motion must be accompanied by a declaration stating facts showing a reasonable and good-faith attempt to arrange for the examination by an agreement under *Code Civ. Proc. § 2016.030* [*see Code Civ. Proc. § 2017.020(a)*; *see also Ch. 80, Discovery: Scope, Regulation, and Timing, § 80.80* (discovery to be limited when intrusiveness or burden outweighs likelihood that admissible evidence will be discovered)].

This motion procedure is unnecessary if defendant is seeking a physical examination of a personal injury plaintiff. Under these circumstances, defendant should serve a demand for the physical examination on plaintiff, rather than move the court for an order [*see Code Civ. Proc. § 2032.220*]. For further discussion, see *§ 87.10*.

Note that some of the cases cited in this form construe law in effect before the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that they remain consistent with current provisions [*see also § 87.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should set forth facts showing good cause for the examination, or exceptional circumstances if a mental examination of a personal injury plaintiff who has made certain stipulations is sought, and that the physical or mental condition of the person to be examined is in controversy. If the pleadings do not place the condition in controversy, counsel should submit affidavits or declarations to the court presenting facts that show that the person's condition is in controversy.

[c] General Procedures for Motion to Take Physical or Mental Examination

The motion for examination is required to specify the time, place, manner, conditions, scope, and nature of the examination, and the identity and the specialty, if any, of the person or persons who will perform the examination [*Code Civ. Proc. § 2032.310(b)*]. A physical examination must be performed only by a licensed physician or other appropriate licensed health care practitioner; a mental examination must be performed only by a licensed physician, or by a licensed clinical psychologist who holds a doctoral degree in psychology and has had at least five years of postgraduate experience in the diagnosis of emotional and mental disorders [*Code Civ. Proc. § 2032.020(b), (c)*].

The order granting a physical or mental examination must specify the person or persons who may perform the examination, and the time, place, manner, diagnostic tests and procedures, conditions, scope, and nature of the examination [*Code Civ. Proc. § 2032.320(d)*].

[d] Related Pleading and Practice Forms

For forms and discussion related to demands for physical and mental examinations, see California Forms of Pleading

and Practice, Ch. 197, *Discovery: Physical and Mental Examinations* (Matthew Bender).

[3] Discussion of Authorities

[a] Condition in Controversy Is Raised by Pleadings

In ***Reuter v. Superior Court*** *(1979) 93 Cal. App. 3d 332, 155 Cal. Rptr. 525* , a mother brought an action on behalf of herself and her son for damages sustained in an automobile accident in which her husband, the son's father, was killed. She sued in the capacity of guardian ad litem for her son in his cause of action for personal injuries, individually for the wrongful death of her husband [*see now Code Civ. Proc. § 377.60 et seq.*], and as executrix of her husband's estate [*see now Code Civ. Proc. § 377.20 et seq.*]. The trial court granted defendant's motion for an order pursuant to former Code Civ. Proc. § 2032 [*now see Code Civ. Proc. § 2032.310*] compelling the mother and son to submit to a battery of psychological tests administered by a psychologist and interviews with a child psychiatrist. Plaintiff petitioned the court of appeal for a writ of mandate on the grounds that a psychologist was not included in the statutory term "physician" in former Code Civ. Proc. § 2032 [*but now see Code Civ. Proc. § 2032.020(c)*], providing that mental examination shall be performed only by licensed physician or licensed clinical psychologist with certain qualifications] and that the mother's mental state was not in controversy as required by former Code Civ. Proc. § 2032.

In issuing a writ requiring the trial court to modify its order requiring the mother to submit to psychological tests, the court of appeal said that there was no doubt that the son's mental condition was in controversy, since the condition was placed in controversy by the son's complaint, which alleged that he suffered great mental pain and suffering as a result of the accident (*93 Cal. App. 3d 332, 340)* [*but now compare Code Civ. Proc. § 2032.320(b)*, requiring showing of exceptional circumstances for ordering mental examination of personal injury plaintiff who has made certain stipulations regarding mental and emotional distress damages claim]. Citing *Schlagenhauf v. Holder (1964) 379 U.S. 104, 85 S. Ct. 234, 13 L. Ed. 2d 152* (discussed *below*), which interpreted *Fed. R. Civ. P., Rule 35*, on which former Code Civ. Proc. § 2032 was originally based, the court stated that allegations of physical or mental injury in a complaint and a denial of the injury or the extent of such injury places a party's condition in controversy. However, for a party's condition to be in controversy, the court said, the condition need not be first raised in the pleadings and may be placed in controversy in ways other than through the pleadings (*93 Cal. App. 3d 332, 341)* .

In ***Schlagenhauf v. Holder*** *(1964) 379 U.S. 104, 85 S. Ct. 234, 13 L. Ed. 2d 152* , the United States Supreme Court interpreted the meaning of "condition in controversy" as stated by *Fed. R. Civ. P., Rule 35*, on which former Code Civ. Proc. § 2032 [*see now Code Civ. Proc. § 2032.020(a)*] was based. The case involved an action, brought by bus passengers who were injured when the bus in which they were riding rear-ended a tractor-trailer, against the bus company, the bus driver, the tractor-trailer owners, and the tractor driver. The tractor-trailer owners requested, and the district court granted, without a hearing, a motion for examination of the bus driver by specialists in internal medicine, ophthalmology, neurology, and psychiatry. The order rested on allegations in a cross complaint that the bus driver was not mentally or physically capable of driving the bus because the bus driver's eyes and vision were impaired and deficient. The bus driver's appeal to the court of appeal was denied.

The United States Supreme Court granted certiorari, and reversed and remanded the case. The reversal was based, in part, on the fact that no showing had been made of the bus driver's physical or mental condition, or of good cause for the examination as required by Fed. R. Civ. P., Rule 35. The Court stated that *Fed. R. Civ. P., Rule 35* requires discriminating application by the trial judge, who must decide, as an initial matter in every case, whether the party requesting a mental or physical examination has adequately demonstrated the existence of the Rule's "in controversy" and "good cause" requirements, which are necessarily related. This does not mean that the party requesting the examinations must prove his or her case on the merits in order to meet the requirements for a mental or physical examination. It also does not mean that an evidentiary hearing is required in all cases. The Court said that such a hearing may be necessary in some cases, but in other cases the showing could be made by affidavits or other usual methods short of a formal hearing. However, it does mean that the party requesting the examination must produce

sufficient information, by whatever means, so that a trial judge can fulfill his or her function mandated by the Rule to prove a condition is in controversy. The Court stated that there are situations in which the pleadings alone are sufficient to meet these requirements in showing that the condition is "in controversy." For instance, a plaintiff in a negligence action who asserts mental or physical injury in the complaint places that mental or physical injury clearly in controversy and provides the defendant with good cause for an examination to determine the existence and extent of such asserted injury. This applies equally to a defendant who asserts his mental or physical condition as a defense to an action, where, for example, insanity is asserted as a defense to the action (*379 U.S. 104, 118-119)* .

[b] Condition in Controversy Is Not Raised by Pleadings

Schlagenhauf v. Holder *(1964) 379 U.S. 104, 85 S. Ct. 234, 13 L. Ed. 2d 152* , is discussed in [a], *above.*

[c] More Than One Examination May Be Ordered

In ***Shapira v. Superior Court*** *(1990) 224 Cal. App. 3d 1249, 274 Cal. Rptr. 516* , a dental malpractice action, plaintiff alleged organic brain damage due to the malpractice. Plaintiff submitted to two defense examinations: a physical examination by a neurologist and a mental examination by a neuropsychologist. When defendant requested an additional mental examination by a psychiatrist, plaintiff refused to cooperate, and defendant brought a motion to compel the examination. The trial court denied the motion on the ground that former Code Civ. Proc. § 2032 (*now see Code Civ. Proc. § 2032.220*) provides only for one mental examination. Defendant petitioned for a writ of mandate.

The court of appeal issued a peremptory writ of mandate directing the trial court to reconsider its denial of the motion. The court held that former Code Civ. Proc. § 2032 does not restrict the number of mental examinations that may be ordered on a showing of good cause, and found that the trial court should have exercised its discretion to determine whether another examination was authorized by good cause. The court explained that there is nothing in the language of former Code Civ. Proc. § 2032 that expressly limits the number of mental or physical examinations. However, former Code Civ. Proc. § 2032(d) (*now see Code Civ. Proc. § 2032.320*) provides that mental examinations and physical examinations, other than the initial one specific to a personal injury plaintiff, require leave of court based on a showing of good cause. The court reasoned that when good cause is shown, multiple defense examinations of the personal injury plaintiff may be permitted. Indeed, depending on the injury alleged by the plaintiff, multiple examinations by medical specialists in different fields pertinent to a plaintiff's injury may be very appropriate. The court cautioned that even though permissible, multiple examinations should not be ordered routinely. However, the court found that the potential for harassment of plaintiffs by repetitive examinations should be eliminated by the good-cause requirement. It also observed additional protection was afforded by the language in former Code Civ. Proc. § 2032(a) (*now see Code Civ. Proc. § 2032.020(a)*) specifically subjecting examinations to former Code Civ. Proc. § 2019 (*now see Code Civ. Proc. § 2019.010 et seq.*), which provides for protective orders against discovery abuse (*224 Cal. App. 3d 1249, 1255-1256)* .

[4] Additional Authorities

[a] Condition in Controversy Is Raised by Pleadings

In *Vinson v. Superior Court (1987) 43 Cal. 3d 833, 239 Cal. Rptr. 292, 740 P.2d 404* , an action for damages for sexual harassment, the Supreme Court held that plaintiff placed her mental condition in issue by alleging ongoing mental and emotional distress (*43 Cal. 3d 833, 839)* .

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8-87 California Points & Authorities § 87.12

§ 87.12 Supporting Motion for Order of Sanctions [Code Civ. Proc. § 2023.030]--Failure to Submit to or Produce Another for Physical or Mental Examination [Code Civ. Proc. §§ 2032.410, 2032.420]

[1] FORM Supporting Motion for Order of Sanctions [Code Civ. Proc. § 2023.030]--Failure to Submit to or Produce Another for Physical or Mental Examination [Code Civ. Proc. §§ 2032.410, 2032.420]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ORDER OF SANCTIONS FOR FAILURE TO _____ [SUBMIT TO *or* PRODUCE ANOTHER FOR] _____ [PHYSICAL *or* MENTAL] EXAMINATION
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	Date: _____
	)	Time: _____
		Location: _____
		[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD IMPOSE ON _____ [*specify party failing to submit to examination, e.g.*, PLAINTIFF] _____ [*specify, e.g.*, ISSUE AND MONETARY] SANCTIONS BECAUSE HE/SHE

WAS REQUIRED BY SECTION [2032.220 *or* 2032.320 *or* 2016.030] OF THE CODE OF CIVIL PROCEDURE TO _____ [SUBMIT TO *or* PRODUCE ANOTHER FOR] _____ A [PHYSICAL *or* MENTAL EXAMINATION], BUT HAS FAILED TO DO SO.

[*EITHER, if party fails to submit to examination*]

A. Court May Make Orders That Are Just. When a party is required by [Section 2032.220 *or* 2032.320 *or* 2016.030] of the Code of Civil Procedure to submit to a _____ [physical *or* mental] examination, and that party fails to do so, the court, on motion of the party entitled to the examination, may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under *Section 2023.010 et seq. of the Code of Civil Procedure* (*Code Civ. Proc. § 2032.410*).

[*OR, if party fails to produce another for examination*]

A. Court May Make Orders That Are Just. When a party is required by [Section 2032.220 *or* 2032.320 *or* 2016.030] of the Code of Civil Procedure to produce another for a [physical *or* mental] examination, and that party fails to do so and does not demonstrate an inability to produce that person for examination, the court, on motion of the party entitled to the examination, may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under *Section 2023.010 et seq. of the Code of Civil Procedure* (*Code Civ. Proc. § 2032.420*).

[*CONTINUE*]

B. Imposition of Monetary Sanction. In lieu of or in addition to any other sanction imposed pursuant to Sections 2023.010 et seq. and 2032.410-2032.420 of the Code of Civil Procedure, the court may impose a monetary sanction under *Section 2023.010 et seq. of the Code of Civil Procedure* (*Code Civ. Proc. §§ 2032.410, 2032.420*).

[*Add points and authorities generally supporting the imposition of issue, evidence, terminating, and monetary sanctions (see, e.g., Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11).*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities is for use in support of a motion by a party for sanctions for failure of another party to submit to or produce another for a physical examination, as required to do so by *Code Civ. Proc. § 2032.220, 2032.320,* or *2016.030* [*see Code Civ. Proc. §§ 2032.410, 2032.420*]. For forms for motions for

examinations, see *§§ 87.10* and *87.11*. For a form of memorandum in support of sanctions for failure of a personal injury plaintiff to obey an order requiring response to and/or compliance with a demand for physical examination under *Code Civ. Proc. § 2032.240*, see *§ 87.13*.

This form should be combined with general points and authorities supporting the imposition of an issue sanction, an evidence sanction, or a terminating sanction under *Code Civ. Proc. § 2023.030(b)-(d)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.12* et seq.]. If a monetary sanction is sought is addition to or in lieu of these sanctions, this form should be combined with general points and authorities supporting the imposition of monetary sanctions under *Code Civ. Proc. § 2023.030(a)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel might wish to insert argument in favor of one particular type of sanction over another. However, counsel need not set forth facts showing that the party against whom the monetary sanction is to be imposed acted without substantial justification [*cf.* former Code Civ. Proc. § 2034(a)]. *Code Civ. Proc. §§ 2023.030(a)* and *2032.250(b)* effectively place that burden on the person against whom the sanction is to be imposed, by requiring the court to impose a monetary sanction when it is expressly authorized *unless* it finds that there was substantial justification or that other circumstances would make the monetary sanction unjust.

[c] Related Pleading and Practice Forms

For forms and discussion related to the imposition of sanctions for failure to submit to or produce another for a physical or mental examination, see California Forms of Pleading and Practice, Ch. 197, *Discovery: Physical and Mental Examinations* (Matthew Bender).

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8-87 California Points & Authorities § 87.13

§ 87.13 Supporting Motion for Order of Sanctions [Code Civ. Proc. § 2023.030]--Failure to Obey Order Requiring Response to and Compliance With Demand for Physical Examination of Personal Injury Plaintiff [Code Civ. Proc. § 2032.240]

[1] FORM Supporting Motion for Order of Sanctions [Code Civ. Proc. § 2023.030]--Failure to Obey Order Requiring Response to and Compliance With Demand for Physical Examination of Personal Injury Plaintiff [Code Civ. Proc. § 2032.240]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ORDER IMPOSING SANCTIONS AGAINST PLAINTIFF FOR FAILURE TO OBEY ORDER COMPELLING RESPONSE AND COMPLIANCE WITH DEMAND FOR PHYSICAL EXAMINATION
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	Date: _____
	)	Time: _____
		Location: _____
		[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD IMPOSE ON PLAINTIFF _____ [*specify, e.g.*, ISSUE AND MONETARY] SANCTIONS BECAUSE HE/SHE WAS REQUIRED BY ORDER OF THIS COURT TO RESPOND TO AND COMPLY WITH THIS DEFENDANT'S DEMAND FOR PHYSICAL EXAMINATION, BUT HAS FAILED TO DO SO.

A. Court May Make Orders That Are Just. If a personal injury plaintiff to whom a demand for physical examination has been directed fails to serve a timely response to the demand and, on motion of the defendant, was ordered to respond to and comply with the demand, and then failed to obey the order, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under *Section 2023.010 et seq. of the Code of Civil Procedure* (*Code Civ. Proc. § 2032.240(d)*).

B. Imposition of Monetary Sanction. In lieu of or in addition to any other sanction imposed pursuant to Sections 2023.010 et seq. *and 2032.240(d) of the Code of Civil Procedure*, the court may impose a monetary sanction under *Section 2023.010 et seq. of the Code of Civil Procedure* against a personal injury plaintiff who has failed to obey the order compelling response to and compliance with the demand (*Code Civ. Proc. § 2032.240(d)*).

[*Add points and authorities generally supporting the imposition of issue, evidence, terminating, and monetary sanctions (see, e.g., Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11).*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities is for use in support of a motion by a defendant in a personal injury action for sanctions against a plaintiff who failed to obey an order under *Code Civ. Proc. § 2032.240* requiring him or her to respond to and comply with a demand for physical examination [*see Code Civ. Proc. § 2032.240(d)*]. *Code Civ. Proc. § 2032.410* also authorizes sanctions for failure to submit to a physical examination when required by *Code Civ. Proc. § 2032.220* to do so, but *Code Civ. Proc. § 2032.240(d)* is the only authority for imposition of these sanctions for failure to obey the order requiring response to the demand [*see Code Civ. Proc. §§ 2023.010(d), (g), 2032.240, 2032.410*; *see also § 87.12* regarding sanctions under *Code Civ. Proc. §§ 2032.410, 2032.420*]. For forms for motions for response and examinations, see *§ 87.10*.

This form should be combined with general points and authorities supporting the imposition of an issue sanction, an evidence sanction, or a terminating sanction under *Code Civ. Proc. § 2023.030(b)-(d)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.12* et seq.]. If a monetary sanction is sought in addition to or in lieu of these sanctions, this form should be combined with general points and authorities supporting the imposition of monetary sanctions under *Code Civ. Proc. § 2023.030(a)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.12* et seq.].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should refer specifically to the order and the time provided for response or compliance. Counsel might wish to insert argument in favor of one particular type of sanction over another. However, counsel need not set forth facts showing that the party against whom the monetary sanction is to be imposed acted without substantial justification [*cf.* former Code Civ. Proc. § 2034(a)]. *Code Civ. Proc. § 2023.030(a)* effectively places that burden on the person against whom the sanction is to be imposed, by requiring the court to impose a monetary sanction when it is expressly authorized *unless* it finds that there was substantial justification or that other circumstances would make the monetary sanction unjust.

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8-87 California Points & Authorities §§ 87.14-87.19

[Reserved]

§§ 87.14[Reserved]

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8-87 California Points & Authorities § 87.20

§ 87.20 Opposing Motion for Order That Personal Injury Plaintiff Respond to and/or Comply With Demand for Examination [Code Civ. Proc. §§ 2032.240, 2032.250]

[1] FORM Opposing Motion for Order That Personal Injury Plaintiff Respond to and/or Comply With Demand for Examination [Code Civ. Proc. §§ 2032.240, 2032.250]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORIT-
	)	IES IN OPPOSITION TO MOTION FOR ORDER
vs.	)	THAT PLAINTIFF _____
	)	[RESPOND TO *and/or* COMPLY WITH] DEMAND
_____ [*name*],	)	FOR EXAMINATION AND FOR MONETARY
Defendant.	)	SANCTION
	)	Date: _____
	)	Time: _____
		Location: _____
		[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

RESPONDING PARTY'S _____ [FAILURE TO TIMELY RESPOND TO THE DEMAND FOR *and/or* MODIFICATION OF THE DEMAND FOR *and/or* REFUSAL TO SUBMIT TO] A PHYSICAL

EXAMINATION PURSUANT TO SECTION 2032.220 OF THE CODE OF CIVIL PROCEDURE _____ [IS *or* ARE] _____ [EXCUSABLE *and/or* WARRANTED (, RESPECTIVELY)], AND MOVING PARTY IS NOT ENTITLED TO AN ORDER COMPELLING _____ [RESPONSE TO *and/or* COMPLIANCE WITH] THE DEMAND FOR EXAMINATION. IF THE MOTION IS DENIED, THE COURT SHOULD IMPOSE A MONETARY SANCTION AGAINST _____ [*name(s)*] BECAUSE THERE IS NO SHOWING THAT _____ [HE/SHE/IT *or* THEY] ACTED WITH SUBSTANTIAL JUSTIFICATION OR THAT OTHER CIRCUMSTANCES MAKE THE IMPOSITION OF THE SANCTION UNJUST.

[*EITHER, if no response was timely served*]

A. Relief from Waiver. A personal injury plaintiff who has failed to file a timely response to a demand for a physical examination under *Section 2032.220 of the Code of Civil Procedure* may be relieved by the court from the resulting waiver of any objections to the demand if the court, on motion, determines that the plaintiff has subsequently served a response that is in substantial compliance with *Section 2032.230 of the Code of Civil Procedure*, and that plaintiff's failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect (*Code Civ. Proc. § 2032.240(a)*).

[*AND/OR, if reasonableness of response is at issue*]

B. Order Only if Response Unwarranted. A defendant may move for an order compelling compliance with a demand for examination under *Code Civ. Proc. § 2032.220* only if the responding party's response to the demand has included _____ [modification of the demand for *or* a refusal to submit to] the examination that is unwarranted (*Code Civ. Proc. § 2032.250(a)*).

[*Optional*] **C. Motion Must Be Accompanied by Declaration.** A defendant's motion for an order compelling compliance with a demand for examination under *Code Civ. Proc. § 2032.220* must be accompanied by a declaration stating facts showing a reasonable and good-faith attempt at an informal resolution of each issue presented by it (*Code Civ. Proc. § 2032.250(a)*).

[*Optional*] **D. Demand Must Be by Defendant for One Physical Examination of Personal Injury Plaintiff.** The demand procedure of *Section 2032.220 of the Code of Civil Procedure* may only be initiated by a defendant in a case in which a plaintiff is seeking recovery for personal injuries. The demand may only be made by the defendant on that plaintiff. The demand may only be made for one examination, which may only be a physical and not a mental examination (*Code Civ. Proc. § 2032.220(a)*).

[*Optional*] **E. Examination May Not Be Painful, Protracted, or Intrusive.** A defendant may not demand a physical examination of a personal injury plaintiff pursuant to *Section 2032.220 of the Code of Civil Procedure* if that examination includes any diagnostic test or procedure that is painful, protracted, or intrusive (*Code Civ. Proc. § 2032.220(a)(1)*).

[*Optional*] **F. Examination Must Be at Location Within 75 Miles of Residence of Examinee.** A defendant may not demand a physical examination of a personal injury plaintiff pursuant to *Section 2032.220 of the Code of Civil Procedure* if that examination is to be conducted at a location that is not within 75 miles of the residence of the examinee (*Code Civ. Proc. § 2032.220(a)(2)*).

[*Optional*] **G. Examination Must Be Ordered by Court or Agreed To by Parties.** When a party desires to obtain discovery by a physical examination other than that described in *Section 2032.220 of the Code of Civil Procedure*, or by

a mental examination, that party must either obtain leave of court pursuant to *Section 2032.310 of the Code of Civil Procedure*, or enter into a written agreement of the parties arranging the examination pursuant to *Section 2016.030 of the Code of Civil Procedure* (*Code Civ. Proc. §§ 2032.310, 2016.030*).

[*Optional*] **H. Demand Must Specify Information.** A demand for physical examination of a personal injury plaintiff pursuant to *Section 2032.310 of the Code of Civil Procedure* is required to specify the time, place, manner, conditions, scope, and nature of the examination, as well as the identity and the specialty, if any, of the physician who will perform the examination (*Code Civ. Proc. § 2032.220(c)*).

[*Optional*] **I. Examination Must Be Conducted by Licensed Physician or Practitioner.** A physical examination conducted pursuant to *Section 2032.010 et seq. of the Code of Civil Procedure* shall be performed only by a licensed physician or other appropriate licensed health care practitioner (*Code Civ. Proc. § 2032.020(b)*).

[*Optional*] **J. Physical Condition Must Be in Controversy in Action.** A defendant may not obtain discovery by means of a physical examination pursuant to *Section 2032.010 et seq. of the Code of Civil Procedure* unless the physical condition of that plaintiff is in controversy in the action (*Code Civ. Proc. § 2032.020(a)*).

K. Court Must Impose Monetary Sanction Absent Specified Findings. The court must impose a monetary sanction under *Section 2023.010 et seq. of the Code of Civil Procedure* against any party, person, or attorney who unsuccessfully makes a motion to compel [response and] compliance with a demand for a physical examination, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust (*Code Civ. Proc. §§ 2023.030(a),* [2032.240(c) *or* 2032.250(b)]).

[*Add points and authorities generally supporting the imposition of monetary sanctions (see, e.g., Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11).*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities is for use in opposition to a motion for an order compelling response to and compliance with a demand for physical examination under *Code Civ. Proc. § 2032.240* or, if a timely response has been filed, for an order compelling compliance with a demand for examination pursuant to *Code Civ. Proc. § 2032.250*.

This form should be combined with general points and authorities supporting the imposition of monetary sanctions under *Code Civ. Proc. § 2023.030(a)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11*].

In an appropriate case, these points and authorities may be submitted in opposition to the motion supported by the points and authorities *set out in § 87.10*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should set forth facts showing specific reasons justifying the modification or refusal to submit to the demand for examination, such as that the opposing party is not a personal injury plaintiff, that the examination will involve a painful and protracted procedure, or that the demand has not specified the identity of the physician to perform the examination. If no timely response was served, facts demonstrating that the late response was the result of mistake, inadvertence, or excusable neglect must be set forth in order to reestablish plaintiff's right to object to the demand [*Code Civ. Proc. § 2032.240*]. If the moving party is seeking monetary sanctions, counsel should demonstrate a reasonable and good-faith attempt at an informal resolution of the disputed issues. All these facts should help show that plaintiff party had substantial justification for his or her actions, or that a monetary sanction against plaintiff would be unjust. However, counsel need not set forth facts showing that the moving party acted without substantial justification [*cf.* former Code Civ. Proc. § 2034(a)]. *Code Civ. Proc. §§ 2023.030(a), 2032.240(c)* and *2032.250(b)* effectively place that burden on the person against whom the sanction is to be imposed, by requiring the court to impose a monetary sanction when it is expressly authorized *unless* it finds that there was substantial justification or that other circumstances would make the monetary sanction unjust.

[c] Examiner's Qualifications

The physical examination must be performed only by a licensed physician or other appropriate licensed health care practitioner [*Code Civ. Proc. § 2032.020(b)* (codifying and expanding holding in *Reuter v. Superior Court (1979) 93 Cal. App. 3d 332, 338-339, 155 Cal. Rptr. 525* that former Code Civ. Proc. § 2032's designation of "physician" meant only a person licensed as a physician and surgeon)].

[d] Related Pleading and Practice Forms

For forms and discussion related to demands for physical and mental examinations, see California Forms of Pleading and Practice, Ch. 197, *Discovery: Physical and Mental Examinations* (Matthew Bender).

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8-87 California Points & Authorities § 87.21

§ 87.21 Opposing Motion for Order of Physical or Mental Examination [Code Civ. Proc. § 2032.310]--General Form

[1] FORM Opposing Motion for Order of Physical or Mental Examination [Code Civ. Proc. § 2032.310]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR ORDER OF _____ [PHYSICAL *or* MENTAL] EXAMINATION
vs.	)	
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD NOT GRANT THE MOTION FOR _____ [PHYSICAL *or* MENTAL] EXAMINATION OF _____ [*specify party or person, e.g.*, PLAINTIFF] BECAUSE THE MOVING PARTY HAS FAILED TO SHOW GOOD CAUSE [AND EXCEPTIONAL CIRCUMSTANCES][, AND HAS FAILED TO MEET OTHER STATUTORY REQUIREMENTS].

A. Good Cause Must Be Shown. The court may grant a motion for a _____ [physical *or* mental]

examination only on a showing of good cause (*Code Civ. Proc. § 2032.320(a)*; *see also In re Marriage of Halpern (1982) 133 Cal. App. 3d 297, 315-316, 184 Cal. Rptr. 740*).

[*Optional*] **B. Exceptional Circumstances Must Be Shown for Mental Examination.** Unless the moving party shows exceptional circumstances, the court shall not order a person for whose personal injuries a recovery is being sought to submit to a mental examination under *Section 2032.310 of the Code of Civil Procedure* when the party seeking recovery has stipulated that no claim is being made for mental and emotional distress over and above that usually associated with such physical injuries, and that no expert testimony regarding this usual mental and emotional distress will be presented at trial in support of the claim for damages (*Code Civ. Proc. § 2032.320(b)*).

[*Optional*] **C. Motion Must Be Accompanied by Declaration.** A party's motion for a [physical *or* mental] examination under *Code Civ. Proc. § 2032.310* must be accompanied by a declaration stating facts showing a reasonable and good-faith attempt to arrange for the examination by an agreement under *Section 2016.030 of the Code of Civil Procedure* (*Code Civ. Proc. § 2032.310(b)*).

[*Optional*] **D. Balancing Burden Against Likelihood of Discovering Admissible Evidence.** The court shall limit the scope of discovery if, pursuant to a motion for protective order, it determines that the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence (*Code Civ. Proc. § 2017.020(a)*; *see Southern California Edison Co. v. Superior Court (1972) 7 Cal. 3d 832, 842-843, 103 Cal. Rptr. 709, 500 P.2d 621* ; *Greyhound Corp. v. Superior Court (1961) 56 Cal. 2d 355, 383-384, 15 Cal. Rptr. 90, 364 P.2d 266* ; *Calcor Space Facility, Inc. v. Superior Court (1997) 53 Cal. App. 4th 216, 223, 61 Cal. Rptr. 2d 567*).

[*Optional*] **E. Examination Must Only Be of Party, Party's Agent, or Person Under Party's Custody or Control.** A party may obtain discovery by means of a _____ [physical *or* mental] examination only if the examination is of (1) a party to the action, (2) an agent of any party, or (3) a natural person in the custody or under the legal control of a party (*Code Civ. Proc. § 2032.020(a)*). An order of examination of any other person may violate the person's constitutionally protected right of privacy under *Article I, Section 1 of the California Constitution* and the *Fourteenth Amendment to the United States Constitution* (*see Reuter v. Superior Court (1979) 93 Cal. App. 3d 332, 343, 155 Cal. Rptr. 525*).

[*Optional*] **F. Examination Must Be of Condition That Is in Controversy.** A party may not obtain discovery by means of a _____ [physical *or* mental] examination unless the _____ [physical *or* mental] condition of the person to be examined is in controversy in the action (*Code Civ. Proc. § 2032.020(a)*; *Doyle v. Superior Court (1996) 50 Cal. App. 4th 1878, 1886, 58 Cal. Rptr. 2d 476*). [The condition of the person is not placed in controversy by the mere fact that he or she has instituted the action on behalf of a minor as a guardian ad litem of the child and is therefore a party to the action (see *Reuter v. Superior Court (1979) 93 Cal. App. 3d 332, 343-344, 155 Cal. Rptr. 525*)].

[*Optional*] **G. Examination More Than 75 Miles From Residence.** The court may not order a _____ [party *or* person] to submit to a _____ [physical *or* mental] examination at a place more than 75 miles from the residence of the person to be examined, unless the moving party shows good cause for the travel involved and the court conditions the order on the advancement by the moving party of the reasonable expenses and costs to the examinee for travel to the place of examination (*Code Civ. Proc. § 2032.320(e)*).

[*Optional*] **H. Motion Must Specify Certain Information.** A motion for a _____ [physical *or* mental] examination is required to specify the time, place, manner, conditions, scope, and nature of the examination, as well as the identity and the specialty, if any, of the person or persons who will perform the examination (*Code Civ. Proc. § 2032.320(d)*).

[*EITHER, if physical examination*]

[*Optional*] **I. Physical Examination Must Be Conducted by Licensed Physician or Practitioner.** A physical examination conducted pursuant to *Section 2032.010 et seq. of the Code of Civil Procedure* shall be performed only by a licensed physician or other appropriate licensed health care practitioner (*Code Civ. Proc. § 2032.020(b)*).

[*OR, if mental examination*]

[*Optional*] **I. Mental Examination Must Be Conducted by Licensed Physician or Psychologist.** A mental examination conducted pursuant to *Section 2032.010 et seq. of the Code of Civil Procedure* shall be performed only by a licensed physician, or by a licensed clinical psychologist who holds a doctoral degree in psychology and has had at least five years of postgraduate experience in the diagnosis of emotional and mental disorders (*Code Civ. Proc. § 2032.020(c)*).

[*Optional*] **J. Examination Must Be of Living Person.** *Section 2032.010 et seq. of the Code of Civil Procedure* only authorizes the examination of a living person; it does not authorize the examination of the remains of a deceased person (*Holm v. Superior Court (1986) 187 Cal. App. 3d 1241, 1248, 232 Cal. Rptr. 432* (interpreting former Code Civ. Proc. § 2032).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

These points and authorities are for use in opposition to a motion for an order of physical or mental examination pursuant to *Code Civ. Proc. § 2032.310*.

Optional Paragraph D sets forth the court's authority under *Code Civ. Proc. § 2017.020(a)* to limit discovery when the burden or intrusiveness of the particular method outweighs the likelihood that it will lead to discovery of admissible evidence. This may be used, for example, in opposition to a motion for a physical or mental examination under *Code Civ. Proc. § 2032.310* that involves the performance of unusual, painful, protracted, dangerous, or intrusive diagnostic procedures that are not likely to be conclusive or outweigh the likelihood of leading to admissible evidence. It is recommended that a party opposing an examination submit a physician's declaration that supports the opposition, for example, indicating that the procedure is dangerous or intrusive but is not likely to be conclusive; this may be particularly persuasive when the party seeking the examination has not submitted a physician's declaration supporting its necessity or usefulness.

In an appropriate case, these points and authorities may be submitted in opposition to the motion supported by the points and authorities *set out in § 87.11*.

Note that some of the cases cited in this form construe law in effect before the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that they remain consistent with current provisions [*see also § 87.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should set forth facts showing that the moving party has not made a sufficient showing of good cause, or of exceptional circumstances, if a mental examination is being sought of a person and the party seeking recovery has made specified stipulations [see Optional Paragraph B] or that the motion has not specified the identity of the physician to perform the examination, or otherwise does not conform to the statutory requirements of *Code Civ. Proc. § 2032.320*. If appropriate, counsel should also demonstrate any attempts to arrange for the examination pursuant to *Code Civ. Proc. § 2016.030*.

[c] Examiner's Qualifications

A physical examination must be performed only by a licensed physician or other appropriate licensed health care practitioner; a mental examination must be performed only by a licensed physician, or by a licensed clinical psychologist who holds a doctoral degree in psychology and has had at least five years of postgraduate experience in the diagnosis of emotional and mental disorders [*Code Civ. Proc. § 2032.020(b), (c)* (codifying and expanding holding in *Reuter v. Superior Court (1979) 93 Cal. App. 3d 332, 338-339, 155 Cal. Rptr. 525* , that former Code Civ. Proc. § 2032's designation of "physician" meant only a person licensed as a physician and surgeon)].

[d] Related Pleading and Practice Forms

For forms and discussion related to demands for physical and mental examinations, see California Forms of Pleading and Practice, Ch. 197, *Discovery: Physical and Mental Examinations* (Matthew Bender).

[3] Discussion of Authorities

[a] Good Cause Must Be Shown

In re Marriage of Halpern *(1982) 133 Cal. App. 3d 297, 184 Cal. Rptr. 740* , was a marriage dissolution proceeding in which the husband sought joint custody of a child and reasonable visitation rights. The mother's amended petition for dissolution denied that the child was of the marriage. The husband sought an order requiring the mother and child to be examined by the husband's psychiatric witness to establish the elements of psychological parenthood, to show that visitation was in the child's best interests, and to establish estoppel. A tissue test showed that the husband was not the biological father. The trial court denied the order, and the husband appealed portions of the interlocutory judgment.

The court of appeal affirmed the interlocutory judgment, upholding the trial court's denial of the husband's request that the child submit to a psychiatric examination. The court of appeal observed that former Code Civ. Proc. § 2032(a) (*now see Code Civ. Proc. § 2032.320*) places in the trial court's discretion whether to order a psychiatric examination, and saw no reason to override the trial court's exercise of discretion. The trial court had considered the burden and inconvenience of examining the child, the probable irrelevance of the examination since the husband was not the natural father of the child, and the doubtful benefit of examining a child under two years of age (*133 Cal. App. 3d 297, 316)* .

[b] Balancing Burden Against Likelihood of Discovering Admissible Evidence

Code Civ. Proc. § 2017.020(a) codifies the holding in ***Greyhound Corp. v. Superior Court*** *(1961) 56 Cal. 2d 355, 383-384, 15 Cal. Rptr. 90, 364 P.2d 266* and its progeny, discussed *below*, that in exercising their discretion in considering requests for discovery, courts should weigh the relative importance of the information sought against the

hardship entailed by its production. The Reporter's Note to Proposed Code Civ. Proc. § 2017(c) explains that in drafting former Code Civ. Proc. § 2017(c) (now *Code Civ. Proc. § 2017.020(a)*), the State Bar-Judicial Council Joint Commission on Discovery "concluded that this discretion was so important as a counter-balance to the broad standard of discovery relevance, that it should be written into the statute, and not left to implication."

Southern California Edison Co. v. Superior Court *(1972) 7 Cal. 3d 832, 103 Cal. Rptr. 709, 500 P.2d 621* was a class action suit in nuisance and/or trespass, in which the class consisted of five named plaintiffs. In the course of discovery proceedings, defendant received the names of some unnamed plaintiffs and sought to depose 20 of them at random. When plaintiffs' attorney could only produce two, defendant sought depositions of 20 others, stating its intention to exclude from the class those who did not appear for depositions. On plaintiff's motion, the trial court issued a protective order which required defendant to subpoena the unnamed plaintiffs.

The Supreme Court upheld this order, denying defendant's petition for a writ of mandate (*7 Cal. 3d 832, 843)* . The Court noted that without the protective order, which shifts from plaintiffs to defendant the onus of compelling attendance of unnamed class members at depositions, the hardship on plaintiffs in class actions would be great *7 Cal. 3d 832, 842)* . First of all, there is no particular reason for plaintiffs to be required to compel attendance; they have little control over the loosely knit class, and the defendants are just as capable as the named plaintiffs of compelling deponents' attendance (*7 Cal. 3d 832, 841-842)* . More importantly, however, the burden on the class in the absence of this particular type of protective order is severe in that plaintiffs' attorneys would be forced to expend extraordinary time and trouble to round up persons with whom they have had no prior contact. The risk they take if they fail to compel the attendance of these persons is that the prospective deponents will be excluded from the class. Therefore, a defendant would effectively be able to stifle a class action at the discovery stage (*7 Cal. 3d 832, 842)* . The Supreme Court thus went on to hold that in fashioning this particular protective order, the trial court wisely balanced defendant's right to discovery against the hardships which would be imposed on plaintiffs in the absence of the protective order (*7 Cal. 3d 832, 842-843)* .

Greyhound Corp. v. Superior Court *(1961) 56 Cal. 2d 355, 15 Cal. Rptr. 90, 364 P.2d 266* , is the leading case construing the purposes and philosophy behind the former Discovery Act. *Greyhound* concerned a personal injury action involving an accident between plaintiffs' motor vehicle and defendant's bus. At the scene of the accident, before plaintiffs were taken to the hospital, defendant's adjusters and investigators obtained written and signed statements concerning the accident from various witnesses, many of whom were out-of-state residents. After unsuccessfully attempting to obtain these witnesses' accounts from other sources, plaintiffs made a motion to require defendant to produce and permit the inspection, copying, or photographing of the witnesses' statements. Although defendant objected to the production of these statements on various grounds, the trial court ordered their production. This holding was affirmed by the Supreme Court, which denied defendant's application for a writ of prohibition (*56 Cal. 2d 355, 402)* .

In discussing factors which courts should apply in deciding whether to uphold or deny discovery, the *Greyhound* Court stated that courts should weigh the relative importance of the information sought against the hardship entailed by its production in exercising their discretion (*56 Cal. 2d 355, 383-384)* . Thus if great hardship would be imposed on the party whose depositions are sought, and if relatively unimportant information would be elicited from the depositions, then it is reasonable to infer that a protective order is proper.

Calcor Space Facility, Inc. v. Superior Court *(1997) 53 Cal. App. 4th 216, 61 Cal. Rptr. 2d 567* arose from a dispute over a contract to supply gun mounts for military aircraft. The defendant in the contract action had allegedly repudiated its original contract with the plaintiff and had arranged to obtain the gun mounts from Calcor, one of the contract plaintiff's competitors. The contract plaintiffs had served a deposition subpoena on Calcor's custodian of records, seeking production of extensive documentation regarding all of Calcor's gun mount business, including any dealings with the contract defendant.

In this opinion, the court of appeal reversed the trial court's denial of Calcor's motion for a protective order because the

12-page demand, which included six pages of instructions and definitions was burdensome in the extreme, was overly general and failed to demonstrate any reasonable relationship between the materials sought to be produced and the issues in the case (*53 Cal. App. 4th 216, 218-219)* . The court observed that in ruling on discovery motions, trial judges must carefully weight the cost, time, expense, and disruption of normal business resulting from an order compelling the discovery against the probative value of the material which might be disclosed (*53 Cal. App. 4th 216, 223)* .

[c] Examination Must Only Be of Party, Party's Agent, or Person Under Party's Custody or Control

The facts and procedural background of ***Reuter v. Superior Court*** *(1979) 93 Cal. App. 3d 332, 155 Cal. Rptr. 525* , are discussed in *§ 87.11[3][a]*. In *Reuter*, the court of appeal reversed the lower court's order requiring the mother to submit to a battery of psychological tests to be administered by a psychologist under the direction of a psychiatrist, on the grounds that the mother's mental condition was legally not in controversy (*see* discussion of *Reuter* in Examination Must Be of Condition That Is in Controversy, *below*). Therefore, the examination had been ordered outside the scope of former Code Civ. Proc. § 2032 (*now see Code Civ. Proc. § 2032.320*). The court stated that although an examination properly ordered pursuant to former Code Civ. Proc. § 2032 would not violate the person's right of privacy or constitutional rights under *U.S. Const., Amends. IV, V*, and *XIII*, an examination ordered outside the scope of former Code Civ. Proc. § 2032, and unsupported by other authority, possibly would violate a person's constitutionally protected right of privacy under *Cal. Const., art. I, § 1* and *U.S. Const., Amend. XIV* (*93 Cal. App. 3d 332, 343)* .

For points and authorities pertaining to the right to privacy, see *Ch. 81, Discovery: Privileges and Other Discovery Limitations, § 81.240* et seq.

[d] Examination Must Be of Condition That Is in Controversy

In ***Doyle v. Superior Court*** *(1996) 50 Cal. App. 4th 1878, 58 Cal. Rptr. 2d 476* , a suit for sexual harassment in employment, the plaintiff made a claim for emotional distress. The plaintiff alleged that she had suffered distress for a period of about six months after the harassment occurred and that her distress had not continued after that time. The court denied the defendant's motion to compel a mental examination of the plaintiff, holding that a party's mental condition is not "in controversy" for purposes of former Code Civ. Proc. § 2032(a) (*see now Code Civ. Proc. § 2032.020(a)*) where the party alleges suffering mental distress in the past (*50 Cal. App. 4th 1878, 1886)* .

The facts and procedural background of ***Reuter v. Superior Court*** *(1979) 93 Cal. App. 3d 332, 155 Cal. Rptr. 525* , are discussed in *§ 87.11[3][a]*. In reversing the lower court's order requiring the mother to submit to a battery of psychological tests to be administered by a psychologist under the direction of a psychiatrist, the court said that it agreed with all parties to the action that the mother's mental condition was legally not in controversy (*93 Cal. App 3d 332, 340)* . However, the party seeking the examination contended that the mother's condition was "collaterally" in controversy since her examination was collateral to that of the son. In rejecting this view, the court said that the argument of a condition being collaterally in controversy suggests that a court has the power to order anyone to submit to examinations regardless of whether their mental state was in controversy or they were one of the persons defined by former Code Civ. Proc. § 2032 (*now see Code Civ. Proc. § 2032.020(a)*) (*93 Cal. App 3d 332, 341)* . According to the declaration of the psychiatrist submitted in support of an examination of the mother, the mother's examination was required because child psychiatrists normally interview parents when diagnosing a child. The mother was not needed because of any of her three roles as a party in the case as guardian ad litem for her son in his cause of action for personal injuries, as an individual suing for wrongful death of her husband [*see* former Code Civ. Proc. § 377], or as executrix of her husband's estate [*see* former Prob. Code § 573]. Rather, she was needed because she was the mother of her son and may have influenced his mental state. This influence needed to be separated from the influence of the accident in appropriately assessing what damages were allocable to any provable negligence of the defendant (*93 Cal. App. 3d 332, 341-342)* . In addition to the parent, many different parties could have been the main influence in any particular child's mental state, such as a parent, a priest, a teacher, or a little league coach. The court said that former Code Civ. Proc. § 2032 does not create a power broad enough to allow the court to order all those parties to submit to a battery of

tests to determine the extent of their influence on a child's mental state, merely on a psychiatrist's declaration that they were needed for his or her examination of the child (*93 Cal. App. 3d 332, 342)* . In rejecting the argument that the mother's examination was "collateral" to the son's, the court also noted that the argument could also have been interpreted as presenting the contention that the mother was a party whose mental condition was in controversy in her capacity as guardian ad litem of the son. However, since a guardian ad litem would not necessarily be a parent of the minor in all cases, the legal incapacity of a minor that requires him or her to have an adult representative to pursue his or her interests offers no justification for ordering such a guardian to submit to the invasion of his or her body or intimate mental processes (*93 Cal. App. 3d 332, 343-344)* .

[e] Examination Must Be of Living Person

Holm v. Superior Court *(1986) 187 Cal. App. 3d 1241, 232 Cal. Rptr. 432* was a probate case in which the real parties in interest were contesting decedent's will, alleging that the decedent lacked testamentary capacity and that the will was the product of fraud and undue influence. They requested permission to exhume decedent's corpse so that an autopsy could be performed on the brain to determine whether he had suffered from any organic brain disorder. The probate court issued the requested order. Petitioners filed a writ of mandate and requested a stay of disinterment and autopsy pending review.

The court of appeal issued the stay and issued a writ directing the probate court to vacate its order (*187 Cal. App. 3d 1241, 1244, 1249)* . The court reviewed the various arguments raised by real parties, including the argument that an exhumation and autopsy was permitted by former Code Civ. Proc. § 2032 (*now see Code Civ. Proc. § 2032.020(a)*). The court did not agree that the remains of a deceased person were included within the words "party" or "person." It said that those words must be construed in their ordinary and commonsense meaning, and that former Code Civ. Proc. § 2032 applied to requests for examinations of living persons. It went on to note that the body of a decedent is neither a party to the probate court action nor a person (*187 Cal. App. 3d 1241, 1248)* .

[4] Additional Authorities

[a] Good Cause Must Be Shown

In *Sporich v. Superior Court (2000) 77 Cal. App. 4th 422, 91 Cal. Rptr. 2d 752* , petitioner, a recidivist child molester, sought a writ of mandate commanding respondent court to set aside its order requiring him to undergo additional psychiatrist interviews for purposes of his civil commitment trial under the Sexually Violent Predators Act (*Welf. & Inst. Code § 6600 et seq.*). Petitioner had undergone two psychological evaluations in 1996, after the Director of Corrections determined petitioner might be a sexually violent predator within the meaning of the newly enacted statutory scheme. The court of appeal issued the writ. Assuming, but not deciding, that the 1986 Civil Discovery Act had application in the sexually violent predator context, the court found that under former Code Civ. Proc. § 2032(d) (now see *Code Civ. Proc. § 2032.320(a)*) the district attorney was required to come forward with compelling proof of good cause for additional mental examinations. This he did not do. The passage of time did not itself establish good cause for further mental examinations when there was no showing otherwise that petitioner's mental status had changed (*77 Cal. App. 4th 422, 427-428)* . The court noted that additional psychological interviews impinged petitioner's constitutional right of privacy (*77 Cal. App. 4th 422, 428)* .

[b] Motion Must Specify Certain Information

In *Carpenter v. Superior Court (2006) 141 Cal. App. 4th 249, 45 Cal. Rptr. 3d 821* , plaintiff was injured in a motorcycle accident. He alleged that the motorcycle was defective and that, as a result of the accident, he sustained brain damage. The manufacturer requested physical and mental examinations, but did not identify the specific diagnostic tests and procedures to be used during the mental examination. Plaintiff did not dispute that the manufacturer was entitled to a mental examination, but argued that the court could not issue an order comporting with *Code Civ. Proc. § 2032.320,* because the manufacturer never identified, with specificity, the diagnostic tests and procedures to be

used. The trial court ordered plaintiff to submit to standardized written psychological tests of his emotional and cognitive functioning. Plaintiff filed a writ petition, seeking to vacate the court's order. The court of appeal held that the trial court's order did not comply with *Code Civ. Proc. § 2032.320* because it did not describe the "diagnostic tests and procedures--*fully* and *in detail*--[...#x2026; by] list[ing] them by name (*141 Cal. App. 4th 249, 260)* . The court of appeal rejected the manufacturer's argument that *Code Civ. Proc. § 2032.320* is "arguably ambiguous" because it requires the order for a mental examination to specify more information than is required for the motion under *Code Civ. Proc. § 2032.310*. "We fail to see how a statutory requirement to 'specify the ...#x2026; diagnostic tests and procedures' in an order can be properly ignored by the court merely because the moving party has omitted the information the court needs to issue the order. The court's duty in this instance is not to turn a blind eye to the legislative mandate, but to deny the motion. The prudent defendant, cognizant of the requirements of section 2032.320, will include the necessary information in its motion, whether expressly required to do so by section 2032.310 or not" (*141 Cal. App. 4th 249, 264 n.5*).

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 87 DISCOVERY: PHYSICAL AND MENTAL EXAMINATIONS
PART II. FORMS
A. Motions for Physical or Mental Examination

8-87 California Points & Authorities § 87.22

§ 87.22 Opposing Motion for Order of Physical or Mental Examination [Code Civ. Proc. § 2032.320]--Terms and Conditions to Safeguard Examinee

[1] FORM Opposing Motion for Order of Physical or Mental Examination [Code Civ. Proc. § 2032.320]--Terms and Conditions to Safeguard Examinee

[*The following should be combined with the memorandum of points and authorities opposing a motion for order of physical or mental examination (see § 87.21).*]

IF THE COURT ORDERS [_____ (AN AGENT OF *or* A NATURAL PERSON IN THE CUSTODY OR UNDER THE LEGAL CONTROL OF)] _____ [*specify opposing party, e.g.,* PLAINTIFF] TO SUBMIT TO A _____ [PHYSICAL *or* MENTAL] EXAMINATION PURSUANT TO SECTION 2032.320 OF THE CODE OF CIVIL PROCEDURE, THE COURT SHOULD INCLUDE, AS PART OF THAT ORDER, TERMS AND CONDITIONS TO SAFEGUARD THE RIGHTS OF THE PERSON BEING EXAMINED.

A. Order for Examination to Specify Terms and Conditions of Examination. An order issued by a court pursuant to *Section 2032.320 of the Code of Civil Procedure*, compelling [_____ (an agent of *or* a natural person in the custody or under the legal control of)] a party to submit to a _____ [physical *or* mental] examination is required to specify the person or persons who may perform the examination, and the time, place, manner, diagnostic tests and procedures, conditions, scope, and nature of the examination (*Code Civ. Proc. § 2032.320(d)*).

[*EITHER, if physical examination*]

B. Attorney or Attorney's Representative Must Be Allowed to Attend, Observe, and Record Examination. The attorney for [the party producing] the examinee, or the attorney's representative, must be permitted to attend and observe a physical examination conducted for discovery purposes under *Section 2032.010 et seq. of the Code of Civil Procedure*, and to record stenographically or by audiotape any words spoken to or by the examinee during any phase of

the examination (*Code Civ. Proc. § 2032.510(a)*). [The right to record stenographically should include being permitted to have the examination conducted in the presence of a court reporter (*see Gonzi v. Superior Court (1959) 51 Cal. 2d 586, 589, 335 P.2d 97* ; *see also Code Civ. Proc. § 2032.530(b)* (nothing in article shall be construed to alter, amend, or affect existing case law with respect to presence of counsel or other persons during examination by agreement or court order))].

[*OR, if mental examination*]

B. Mental Examinee Has Right to Record Examination. The mental examinee has the right to record the examination on audiotape (*Code Civ. Proc. § 2032.530(a)*).

[2] Comments

[a] Use of Form

This memorandum is for use in opposition to a motion for an order of physical or mental examination pursuant to *Code Civ. Proc. § 2032.320*. It supports the use of certain terms and conditions in an order for examination to safeguard the party to be examined. One safeguard that may be included in the order is a direction that the party moving for the examination not interfere with the statutory right of the party submitting to or producing another for the examination to record the examination, and if desired at a physical examination, to be permitted to have a court reporter present to stenographically record that examination (see Alternative Paragraphs B). This memorandum of points and authorities should be combined and used in conjunction with those *set forth in § 87.21*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, if particular safeguards are desired regarding the conduct of and scope of the examination, counsel should set those forth in detail, and should set forth facts justifying the inclusion of those safeguards in the order. If the moving party has indicated that he or she intends to interfere with the opposing party's right to record the examination, that fact should be set forth and argument made with regard to Alternative Paragraphs B of this form.

[c] Conduct of Examination

Code Civ. Proc. § 2032.320 derives from former Code Civ. Proc. § 2032(a) insofar as it provides that the order granting a physical or mental examination shall specify the person or persons who may perform the examination, and the time, place, manner, diagnostic tests and procedures, conditions, scope, and nature of the examination [*see Carpenter v. Superior Court (2006) 141 Cal. App. 4th 249, 260-262* (under *Code Civ. Proc. § 2032.320*, trial court must "specify the ... ; diagnostic tests and procedures" of mental examination by naming tests and procedures to be performed; *see § 87.21[4][b]*].

However, *Code Civ. Proc. § 2032.530* differs from former law in that it provides for the right to record the examination without prior court order, as was required under former case law [*see, e.g., Ebel v. Superior Court (1974) 39 Cal. App. 3d 934, 937, 114 Cal. Rptr. 722* (requiring prior court order for use of recording device at physical examination)]. Specifically, a mental examinee now has the right to record the examination on audiotape [*Code Civ. Proc. § 2032.530(a)*].

Additionally, the attorney for a party submitting to or producing another for a physical examination, or the attorney's representative, is now permitted to attend and observe the examination, and to record stenographically or by audiotape any words spoken to or by the examinee during any phase of the examination [*Code Civ. Proc. § 2032.510(a)*; *see also Munoz v. Superior Court (1972) 26 Cal. App. 3d 643, 645, 102 Cal. Rptr. 686* (court reporter may be present in addition

to attorney)]. A representative of the attorney may serve as observer, if the attorney has provided written authorization identifying that individual as his or her representative [*see Code Civ. Proc. § 2032.510(c)*]. *Code Civ. Proc. § 2032.530(b)* also provides that nothing in the Civil Discovery Act shall be construed to alter, amend, or affect existing case law with respect to the presence of counsel or other persons during the examination by agreement or court order. Thus, for example, it appears counsel and a court reporter may be present at a physical examination [*see Gonzi v. Superior Court (1959) 51 Cal. 2d 586, 589, 335 P.2d 97* (discussed in [3][a], *below*)], while counsel may not be present at a psychiatric examination [*see Vinson v. Superior Court (1987) 43 Cal. 3d 833, 844-845, 239 Cal. Rptr. 292, 740 P.2d 404* ; *Edwards v. Superior Court (1976) 16 Cal. 3d 905, 909-912, 130 Cal. Rptr. 14, 549 P.2d 846]* .

For further discussion of a motion for physical or mental examination pursuant to *Code Civ. Proc. § 2032.310*, see *§ 87.11* and *§ 87.21*. For discussion of a motion for a protective order during a physical examination, see *§ 87.30*.

[3] Discussion of Authorities

[a] Attorney or Attorney's Representative Must Be Allowed to Attend, Observe, and Record Examination

In ***Gonzi v. Superior Court*** *(1959) 51 Cal. 2d 586, 335 P.2d 97* , a minor, through a guardian ad litem, sued defendants for injuries sustained in an automobile accident and was ordered by the trial court to submit to a physical examination by defendants' doctor. Plaintiff brought a petition for a writ of mandate when the trial court refused his request that the examination be conducted in the presence of a certified court reporter.

In reversing the trial court and ordering that the examination be conducted in the presence of a court reporter, the Supreme Court reaffirmed its holding in *Sharff v. Superior Court (1955) 44 Cal. 2d 508, 282 P.2d 896* , that a person is entitled to have an attorney present when submitting to a court-ordered physical examination (now see *Code Civ. Proc. § 2032.510(a)*), and said that its reasoning in that case was applicable to the instant case. It stated that if an injured plaintiff is not permitted to have a court reporter present at the court-ordered examination by defendants' doctors, there is no disinterested person present to report and later testify about what occurred during the examination. If the defense-employed doctor is called on to testify at the trial on the issue of the plaintiff's injuries, his or her version of the questions and answers elicited at the examination might differ materially from the plaintiff's counsel's version of the same questions and answers. Orderly procedure in the administration of justice requires that permission be granted at the request of either party for a reporter's presence at the physical examination. This holding in *Gonzi* probably remains good law, and is further supported by *Code Civ. Proc. § 2032.510(a)*, which provides for the right of the examinee's attorney to "record stenographically" the physical examination. However, in *Gonzi*, the Court rejected plaintiff's request that the examination be conducted in the presence of a "certified" court reporter on the grounds that the orderly procedure in the administration of justice requires only that such an examination be conducted in the presence of any reporter if a report thereof is requested by either party. The Court also rejected defendants' contention that a court reporter should not be allowed at such an examination because former Code Civ. Proc. § 2032(a) provided that a party subjected to such an examination may demand a copy of the examining physician's report. The Court said that such a report, made by defendants' doctor, would not be a sufficient substitute for a transcript of the proceedings made by a court reporter (*51 Cal. 2d 586, 589)* .

Note that *Gonzi* construed law in effect before the operative date of the Civil Discovery Act. It is cited and discussed as persuasive authority to the extent that it remains consistent with current provisions [*see § 87.02[3]*].

[4] Additional Authorities

[a] Mental Examinee Has Right to Record Examination

In *Vinson v. Superior Court (1987) 43 Cal. 3d 833, 239 Cal. Rptr. 292, 740 P.2d 404* , the Supreme Court held that a plaintiff in a sexual harassment suit is subject to a mental examination, properly limited by privacy concerns, not by virtue of the nature of the suit, but by alleging ongoing

mental and emotional damages (*43 Cal. 3d 833, 840-841)* . The Court also held that former Code Civ. Proc. § 2017(d) (now *Code Civ. Proc. § 2017.220(a)*) allows a defendant in a sexual harassment suit to question the plaintiff regarding sexual conduct with other individuals only after a very strong showing of good cause, a standard more stringent than that required for an ordinary mental examination under former Code Civ. Proc. § 2032 (*now see Code Civ. Proc. § 2032.320(a)*)(*43 Cal. 3d 833, 843 n.8*). The Court rejected plaintiff's request for her attorney's presence at the mental examination, holding that plaintiff's rights are otherwise amply safeguarded. Among the protections afforded the subject of a mental examination is the option to record the examination on audiotape, an unobtrusive measure that will permit evidence of abuse to be presented to the court in any motion for sanctions (*43 Cal. 3d 833, 846)* .

In *Golfland Entertainment Ctrs., Inc. v. Superior Court (2003) 108 Cal. App. 4th 739, 133 Cal. Rptr. 2d 828* , the court of appeal held that an attorney's presence is not required during a mental examination, although "trial courts retain the power to permit the presence of counsel or to take other prophylactic measures when needed." In this case, however, the appellate court found no evidence to justify an exception to the standard rule barring counsel. The court concluded that plaintiffs' rights in general, and the minor examinee's rights in particular, were adequately safeguarded by the trial court order and this decision specifying the conditions and scope of the mental examination and by audio-taping the examination (*108 Cal. App. 4th 739, 748)* . In reaching its decision, the court of appeal relied on *Edwards v. Superior Court (1976) 16 Cal. 3d 905, 130 Cal. Rptr. 14, 549 P.2d 846* and *Vinson v. Superior Court (1987) 43 Cal. 3d 833, 239 Cal. Rptr. 292, 740 P.2d 404* (discussed *above*) (*108 Cal. App. 4th 739, 748-749)* .

In addition to barring the presence of counsel, the court of appeal also barred the presence of a court reporter. The court reasoned that the differences between physical examination statute, allowing the presence of counsel or counsel's representative to record the examination by audio technology or stenography as matter of right, former Code Civ. Proc. § 2032(g)(1) (*now see Code Civ. Proc. § 2032.510(a)*), and mental examination statute, permitting the presence of counsel or counsel's representative only by agreement or court order, and providing only for the right of examiner or examinee to record the examination by means of audio technology, former Code Civ. Proc. § 2032(g)(2) (*now see Code Civ. Proc. § 2032.530(a)*), indicated the legislature's intent that court reporters should not attend mental examinations and that those examinations should be audio-recorded (*108 Cal. App. 4th 739, 750-751)* .

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[Reserved]

§§ 87.23[Reserved]

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CHAPTER 87 DISCOVERY: PHYSICAL AND MENTAL EXAMINATIONS
PART II. FORMS
B. Motion for Protective Order Relating to Demand for Physical or Mental Examination

8-87 California Points & Authorities § 87.30

§ 87.30 Supporting Motion for Protective Order During Physical Examination [Code Civ. Proc. § 2032.510(d)]

[1] FORM Supporting Motion for Protective Order During Physical Examination [Code Civ. Proc. § 2032.510(d)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PROTECTIVE ORDER RE PHYSICAL EXAMINATION AND FOR MONETARY SANCTION
vs.	)	
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

[*EITHER, when observer seeks to suspend examination*]

THE COURT SHOULD ISSUE A PROTECTIVE ORDER TO PREVENT THE EXAMINER IN THE PHYSICAL EXAMINATION OF _____ [*name*] FROM _____ [BEING ABUSIVE *and/or* UNDERTAKING TO ENGAGE IN UNAUTHORIZED DIAGNOSTIC TESTS AND PROCEDURES]. IF THE MOTION IS GRANTED, THE COURT SHOULD ALSO IMPOSE A MONETARY SANCTION AGAINST _____ [*name(s)*] BECAUSE THERE IS NO SHOWING THAT _____

HE/SHE/IT/THEY ACTED WITH SUBSTANTIAL JUSTIFICATION OR THAT OTHER CIRCUMSTANCES MAKE THE IMPOSITION OF THE SANCTION UNJUST.

A. Observer May Suspend Examination and Party May Move for Protective Order. [The attorney for the (party producing) the examinee having provided written authorization identifying a representative], [T]he [representative of the] attorney for [the party producing] the examinee, is permitted to attend and observe a physical examination conducted for discovery purposes under *Code of Civil Procedure Section 2032.010 et seq.* and who may monitor the examination, and may suspend the examination if he or she determines that the examiner has _____ [become abusive to the examinee *and/or* undertaken to engage in unauthorized diagnostic tests and procedures], and the party _____ [being examined *or* producing the examinee] may make a motion for a protective order (*Code Civ. Proc. § 2032.510(d)*).

[*OR, when examiner seeks to suspend examination*]

THE COURT SHOULD ISSUE A PROTECTIVE ORDER TO PREVENT THE OBSERVER _____ [*name*] FROM _____ [PARTICIPATING IN *and/or* DISRUPTING] THE PHYSICAL EXAMINATION. IF THE MOTION IS GRANTED, THE COURT SHOULD ALSO IMPOSE A MONETARY SANCTION AGAINST _____ [*name(s)*] BECAUSE THERE IS NO SHOWING THAT _____ HE/SHE/IT/THEY ACTED WITH SUBSTANTIAL JUSTIFICATION OR THAT OTHER CIRCUMSTANCES MAKE THE IMPOSITION OF THE SANCTION UNJUST.

A. Examiner May Suspend Examination and Party May Move for Protective Order. When the [representative of the] attorney for the [party producing] the examinee who is permitted to attend and observe a physical examination conducted for discovery purposes under *Code of Civil Procedure Section 2032.010 et seq.*, as observer, begins to _____ [participate in *and/or* disrupt] the examination, the person conducting the physical examination may suspend the examination, and the party at whose instance the examination is being conducted may make a motion for a protective order (*Code Civ. Proc. § 2032.510(e)*).

[*CONTINUE*]

[*Optional*] **B. Observer Must Be Allowed to Attend, Observe, and Record Examination.** [The attorney for the (party producing) the examinee having provided written authorization identifying a representative], [T]he [representative of the] attorney for the [party producing] the examinee must be permitted to attend and observe a physical examination conducted for discovery purposes under *Code of Civil Procedure Section 2032.010 et seq.*, and to record stenographically or by audiotape any words spoken to or by the examinee during any phase of the examination (*Code Civ. Proc. § 2032.510(a)*).

[*Optional*] **C. No Additional X-Rays May Be Taken.** When the examinee in a physical examination conducted pursuant to Code of *Civil Procedure Section 2032.010 et seq.* submits or authorizes access to X-rays of any area of his or her body for inspection by the examining physician, no additional X-rays of that area may be taken by the examining physician without consent of the examinee or order of the court for good cause shown (*Code Civ. Proc. § 2032.520*).

D. Court Must Impose Monetary Sanction Absent Specified Findings. The court must impose a monetary sanction under *Code of Civil Procedure Section 2023.010 et seq.* against any party, person, or attorney who unsuccessfully opposes a motion for a protective order, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust (*Code Civ. Proc. §§ 2023.030(a), 2032.510(f)*).

[*Add points and authorities generally supporting the imposition of monetary sanctions (see, e.g., Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11).*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities is for use in support of a motion by a party for a protective order either to prevent the examiner in a physical examination from being abusive to the examinee or undertaking to engage in unauthorized diagnostic tests and procedures, or to prevent the observer of a physical examination from participating or disrupting the examination [*see Code Civ. Proc. § 2032.510(d), (e)*].

This form should be combined with general points and authorities supporting the imposition of monetary sanctions under *Code Civ. Proc. § 2023.030(a)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should set forth facts showing that the examiner is being abusive or is conducting unauthorized diagnostic tests and procedures, or that the observer is participating in or disrupting the examination. Counsel's factual showing should demonstrate substantial justification for the motion in order to avoid a monetary sanction if the motion is denied [*see Code Civ. Proc. § 2032.510(f)*]. However, counsel need not set forth facts showing that the person against whom the monetary sanction is to be imposed acted without substantial justification [*cf.* former Code Civ. Proc. § 2034(a)]. *Code Civ. Proc. §§ 2023.030(a)* and *2032.510(f)* effectively place that burden on the person against whom the sanction is to be imposed, by requiring the court to impose a monetary sanction when it is expressly authorized *unless* it finds that there was substantial justification or that other circumstances would make the monetary sanction unjust.

[c] Protective Order Regarding Conduct at Examination

Code Civ. Proc. § 2032.510, which governs protective orders concerning physical examinations, derives in part from former Code Civ. Proc. § 2019(b)(1) and case law. The attorney for the examinee or for a party producing the examinee, or that attorney's representative, if that attorney has provided written authorization identifying that individual as his or her representative, must be permitted to attend and observe any physical examination conducted for discovery purposes [*Code Civ. Proc. § 2032.510(a)*]. The observer must be permitted to record stenographically or by audiotape any words spoken to or by the examinee during any phase of the examination [*Code Civ. Proc. § 2032.510(a)*; *compare Ebel v. Superior Court (1974) 39 Cal. App. 3d 934, 937, 114 Cal. Rptr. 722* (decided under former law, requiring prior court order approving use of recording device at examination)]. The observer may monitor the examination, but is not permitted to participate in or disrupt it [*Code Civ. Proc. § 2032.510(b)*].

If in the judgment of the observer the examiner becomes abusive to the examinee or undertakes to engage in unauthorized diagnostic tests and procedures, the observer may suspend the examination to enable the party being

examined or producing the examinee to make a motion for a protective order. Conversely, if the observer begins to participate in or disrupt the examination, the person conducting the physical examination may suspend the examination to enable the party at whose instance it is being conducted to move for a protective order [*Code Civ. Proc. § 2032.510(d), (e)*].

[d] Related Pleading and Practice Forms

For forms and discussion related to protective orders in the context of a demand for a physical or mental examination, see California Forms of Pleading and Practice, Ch. 197, *Discovery: Physical and Mental Examinations* (Matthew Bender).

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 87 DISCOVERY: PHYSICAL AND MENTAL EXAMINATIONS
PART II. FORMS
B. Motion for Protective Order Relating to Demand for Physical or Mental Examination

8-87 California Points & Authorities §§ 87.31-87.49

[Reserved]

§§ 87.31[Reserved]

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CHAPTER 87 DISCOVERY: PHYSICAL AND MENTAL EXAMINATIONS
PART II. FORMS
C. Motion to Compel Delivery of Examination Reports

8-87 California Points & Authorities § 87.50

§ 87.50 Supporting Motion for Order Compelling Delivery of Demanded Medical Reports [Code Civ. Proc. § 2032.620]

[1] FORM Supporting Motion for Order Compelling Delivery of Demanded Medical Reports [Code Civ. Proc. § 2032.620]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ORDER COMPELLING DELIVERY OF DEMANDED MEDICAL REPORTS AND FOR MONETARY SANCTION
vs.	)	
_____ [*name*],	)	
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD ORDER THAT _____ [*name*], THE PARTY AT WHOSE INSTANCE THE _____ [PHYSICAL *or* MENTAL] EXAMINATION OF _____ [*name*] WAS MADE, COMPLY WITH THE DEMAND OF _____ [*name*] MADE PURSUANT TO SECTION

2032.610 OF THE CODE OF CIVIL PROCEDURE, AND DELIVER TO THE DEMANDING PARTY A COPY OF THE MEDICAL REPORTS OF THE EXAMINEE RESULTING FROM THE EXAMINATION, AND FROM ALL EARLIER EXAMINATIONS OF THE SAME CONDITION OF THE EXAMINEE. IF THE MOTION IS GRANTED, THE COURT SHOULD ALSO IMPOSE A MONETARY SANCTION AGAINST _____ [*name(s)*] BECAUSE THERE IS NO SHOWING THAT _____ [HE/SHE/IT *or* THEY] ACTED WITH SUBSTANTIAL JUSTIFICATION OR THAT OTHER CIRCUMSTANCES MAKE THE IMPOSITION OF THE SANCTION UNJUST.

A. Party Entitled to Reports. A party who _____ [submits to *or* produces another for] a _____ [physical *or* mental]

examination in compliance with _____ [a demand under *Section 2032.220 of the Code of Civil Procedure or* an order of the court under *Section 2032.310 of the Code of Civil Procedure or* an agreement under *Section 2016.030 of the Code of Civil Procedure*] has the option of making a written demand that the party at whose instance the examination was made deliver to the demanding party the following (*Code Civ. Proc. § 2032.610*):

1. A copy of a detailed written report setting out the history, examinations, findings, including the results of all tests made, diagnoses, prognoses, and conclusions of the examiner; and

2. A copy of reports of all earlier examinations of the same condition of the examinee made by that or any other examiner.

B. Party May Move for Order Compelling Delivery. When the party at whose instance a _____ [physical *or* mental] examination was made in compliance with Section [2032.220 *or* 2032.310 *or* 2016.030] of the Code of Civil Procedure fails to make a timely delivery of the reports demanded by a party who _____ [submitted to *or* produced another for] that examination pursuant to *Section 2032.610 of the Code of Civil Procedure*, the demanding party may make a motion, accompanied by a declaration stating facts showing a reasonable and good-faith attempt at an informal resolution of any issue presented by the motion, for an order compelling the delivery of those reports (*Code Civ. Proc. § 2032.620(a)*).

[*Optional*] **C. Party Is Entitled to Report Even If Written Report Does Not Exist.** A party who has submitted to a _____ [physical *or* mental] examination pursuant to *Section 2032.220 of the Code of Civil Procedure* is entitled to a report of that examination on demand even if the examining physician has not prepared one (*Code Civ. Proc. § 2032.610*; *Kennedy v. Superior Court (1998) 64 Cal. App. 4th 674, 678, 75 Cal. Rptr. 2d 373* (interpreting former Code Civ. Proc. § 2032).

[*Optional*] **D. Party Is Entitled to Depose Examining Physician Even After Withdrawal as Expert.** A party who has submitted to a _____ [physical *or* mental] examination pursuant to *Section 2032.220 of the Code of Civil Procedure* is entitled to depose the examining physician with regard to the physical examination whether or not the party requesting the examination has withdrawn the physician as an expert witness (*Code Civ. Proc. § 2032.610(c)*; *Kennedy v. Superior Court (1998) 64 Cal. App. 4th 674, 678-679, 75 Cal. Rptr. 2d 373* (interpreting former Code Civ. Proc. § 2032).

E. Court Must Impose Monetary Sanction Absent Specified Findings. The court must impose a monetary sanction under *Section 2023.010 et seq. of the Code of Civil Procedure* against any party, person, or attorney who unsuccessfully opposes a motion to compel delivery of medical reports, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust (*Code Civ. Proc. §§ 2023.030(a), 2032.620(b)*).

[*Add memoranda generally supporting the imposition of monetary sanctions (see, e.g., Ch. 82, Discovery: Sanctions for*

Discovery Misuse, § 82.11).]

[*Optional*] **F. Court May Impose Sanctions Despite Lack of Opposition to Motion to Compel Discovery.** The court may award sanctions under the Discovery Act in favor of a party who files a motion to compel discovery, even though no opposition to the motion was filed, or opposition to the motion was withdrawn, or the requested discovery was provided to the moving party after the motion was filed (*Cal. Rules of Ct., Rule 3.1030(a)*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum is for use in support of a motion by a party for an order compelling compliance with the party's demand that a party at whose instance a physical or mental examination was made deliver to the demanding party a copy of the medical reports of the examinee [*see Code Civ. Proc. § 2032.620*]. The motion must be accompanied by a declaration stating facts showing a reasonable and good-faith attempt at an informal resolution of any issue presented by the motion [*Code Civ. Proc. § 2032.620(a)*].

This form should be combined with general memoranda supporting the imposition of monetary sanctions under Code Civ. Proc. § 2023.030(a) [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should set forth facts showing the date on which the demand was made and the contents of that demand, and that the party on whom the demand was made failed to timely deliver the demanded medical reports. Counsel's factual showing should demonstrate substantial justification for the motion in order to avoid a monetary sanction if the motion is denied [*see Code Civ. Proc. § 2032.620(b)*]. However, counsel need not set forth facts showing that the party on whom the demand was made acted without substantial justification [*cf.* former Code Civ. Proc. § 2034(a)]. *Code Civ. Proc. §§ 2023.030(a)* and *2032.620(b)* effectively place that burden on the person against whom the sanction is to be imposed, by requiring the court to impose a monetary sanction when it is expressly authorized *unless* it finds that there was substantial justification or that other circumstances would make the monetary sanction unjust.

[c] Procedures for and Effect of Demand for Reports

The party who submits to or produces another for a physical or mental examination has the option to demand that the party at whose instance the examination was made deliver to the demanding party a copy of the medical reports of the examinee [*Code Civ. Proc. § 2032.610(a)*]. By exercising this option, however, the party who submitted to or produced another for the examination waives in the pending action, and in any other action involving the same controversy, any privilege and any protection for work product under *Code Civ. Proc. § 2018.010 et seq.* that the party or other examinee may have regarding the testimony of every other physician, psychologist, or licensed health care practitioner who has examined or may thereafter examine the party, in respect of the same physical or mental condition [*Code Civ. Proc. §*

2032.630 (also waived by taking deposition of examiner other than under *Code Civ. Proc. §§ 2034.410-2034.470*)]. Additionally, if the option is exercised, the party receiving the demand is entitled to an exchange of a copy of any existing report of any examination of the same condition by any other physician, psychologist, or licensed health care practitioner, as well as later reports of previous or subsequent examinations [*Code Civ. Proc. § 2032.640*; *see § 87.52*].

If the option is exercised, the copy of the reports must be delivered within 30 days after service of the demand, with certain extensions of time when service is by mail [*see Code Civ. Proc. §§ 1013(a), 2016.050*], or within 15 days of trial, whichever is earlier [*Code Civ. Proc. § 2032.610(b)*; *see also Code Civ. Proc. § 1013(c), (e)* (service by Express Mail or fax)]. If the party at whose instance the examination was made fails to make a timely delivery of the reports demanded, the demanding party may move for an order compelling their delivery [*Code Civ. Proc. § 2032.620(a)*]. This form of points and authorities supports this motion.

For discussion and a form for use in obtaining sanctions when a party fails to comply with an order compelling the production of the examinee's records, see *§ 87.51*.

[d] Related Pleading and Practice Forms

For forms and discussion related to demands for delivery of reports after the taking of physical and mental examinations, see California Forms of Pleading and Practice, Ch. 197, *Discovery: Physical and Mental Examinations* (Matthew Bender).

[3] Discussion of Authorities

[a] Party Is Entitled to Report Even If Written Report Does Not Exist

In ***Kennedy v. Superior Court*** *(1998) 64 Cal. App. 4th 674, 75 Cal. Rptr. 2d 373* , plaintiff brought a personal injury action against defendant corporation after she slipped and fell in one of its stores and required plastic surgery. After plaintiff complied with defendant's demand that she submit to a medical examination pursuant to former Code Civ. Proc. § 2032(c) (*now see Code Civ. Proc. § 2032.220*), she demanded a report of the examination, to which she was entitled under former Code Civ. Proc. § 2032(h) (*now see Code Civ. Proc. § 2032.610*). Defendant refused, claiming the examining physician had not prepared a report, and designated that physician as an expert. Defendant withdrew the physician as an expert, and designated him a defense "consultant" after plaintiff noticed his deposition. It then canceled his deposition on the ground that he had been withdrawn as an expert. The trial court denied plaintiff's motion to compel defendant to produce a physician's report of the examination as well as her motion to produce the examining physician for deposition. Plaintiff sought writ review.

The court of appeal issued a peremptory writ of mandate commanding the trial court to vacate its order denying the motion to compel, and to enter a new and different order granting the motion. It noted that it had no authority to directly order the physician, a nonparty, to prepare a report, but assumed that defendant could obtain a report from him (*64 Cal. App. 4th 674, 679, fn. 2*). Defendant argued that former Code Civ. Proc. § 2032(h) only requires disclosure of a defense examiner's report if the examiner actually made one. The court noted that although there is a general reluctance to order parties to produce reports not in existence, former Code Civ. Proc. § 2032(h) clearly provides that a party who submits to a physical examination is entitled to a report of that examination, which must contain certain specified information. The court said the trade off is clear: if one party to a personal injury litigation is required by an opponent to submit to a medical examination, at the very least that party is are entitled to a report of the information obtained by the adversary in litigation (*64 Cal. App. 4th 674, 678)* . The court also noted that in former Code Civ. Proc. § 2032(j) (*now see Code Civ. Proc. § 2032.640*), the Legislature provides for reciprocal disclosure of any "existing" reports of the examinee. This suggests that by not using the word "existing" in former Code Civ. Proc. § 2032(h) (*now see Code Civ. Proc. § 2032.610*), the Legislature expected a written report be prepared for the examinee whenever requested, even if one did not exist. The court concluded that had the Legislature been concerned only with "existing" reports when it

drafted former Section 2032(h), it could have so specified (*64 Cal. App. 4th 674, 678)* .

[b] Party Is Entitled to Depose Examining Physician Even After Withdrawal as Expert

The facts and procedural background of ***Kennedy v. Superior Court*** *(1998) 64 Cal. App. 4th 674, 75 Cal. Rptr. 2d 373* , are discussed in [a], *above*. In *Kennedy*, the court of appeal issued a peremptory writ of mandate commanding the trial court to vacate its order denying plaintiff's motion to produce the examining physician for deposition. The court said that withdrawing the physician as an expert did not entitle defendant to shield him from deposition with regard to the examination. By the explicit terms of former Code Civ. Proc. § 2032(h) (*now see Code Civ. Proc. § 2032.610(c)*), the work product protection with regard to examination is waived. A party may generally "hide" an expert from deposition by withdrawing him and dubbing him a "consultant," thereby reinstating work product protection, but when the expert is also the examining physician under former Code Civ. Proc. § 2032 (*now see Code Civ. Proc. § 2032.010 et seq.*), its specific terms control. Despite the withdrawal, the court said that plaintiff was entitled to depose the surgeon with regard to the physical examination (*64 Cal. App. 4th 674, 678-679)* .

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8-87 California Points & Authorities § 87.51

§ 87.51 Supporting Motion for Order of Sanctions [Code Civ. Proc. § 2023.030]--Failure to Obey Order Compelling Delivery of Demanded Medical Reports [Code Civ. Proc. § 2032.620]

[1] FORM Supporting Motion for Order of Sanctions [Code Civ. Proc. § 2023.030]--Failure to Obey Order Compelling Delivery of Demanded Medical Reports [Code Civ. Proc. § 2032.620]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ORDER OF SANCTIONS FOR FAILURE TO OBEY ORDER COMPELLING DELIVERY OF DEMANDED MEDICAL REPORTS
vs.	)	
_____ [*name*],	)	
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD IMPOSE _____ [*specify sanctions sought, e.g.,* ISSUE AND MONETARY] SANCTIONS AGAINST _____ [*name*] FOR HIS/HERS/ITS FAILURE TO OBEY THE ORDER COMPELLING HIM/HER/IT TO DELIVER DEMANDED MEDICAL REPORTS PURSUANT TO SECTION

2032.610 OF THE CODE OF CIVIL PROCEDURE, AND SHOULD EXCLUDE AT TRIAL THE TESTIMONY OF THE EXAMINER WHOSE REPORT HAS NOT BEEN PROVIDED.

A. Court May Make Orders That Are Just. When a party is ordered by the court to deliver medical reports to a demanding party pursuant to *Section 2032.610 of the Code of Civil Procedure*, and the party fails to obey that court order, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under *Section 2023.010 et seq. of the Code of Civil Procedure* (*Code Civ. Proc. § 2032.620(c)*).

[*Optional*] **B. Exclusion of Trial Testimony of Examiner.** When a party fails to provide a report of an examination conducted under *Section 2032.010 et seq. of the Code of Civil Procedure* after having been ordered to do so by the court, the court shall exclude that examiner's testimony at trial (*Code Civ. Proc. § 2032.620(c)*).

C. Imposition of Monetary Sanction. In lieu of or in addition to any other sanction imposed pursuant to Sections 2023.010 et seq. *and 2032.620(c) of the Code of Civil Procedure*, the court may impose a monetary sanction under *Section 2023.010 et seq. of the Code of Civil Procedure* (*Code Civ. Proc. § 2032.620(c)*).

[*Add points and authorities generally supporting the imposition of issue, evidence, terminating, contempt, and monetary sanctions (see, e.g., Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11).*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities is for use in support of a motion for sanctions for failure of a party to obey a court order compelling him or her to deliver medical reports demanded by the moving party pursuant to *Code Civ. Proc. § 2032.610* [*see Code Civ. Proc. § 2032.620*]. For a form of motion for an order compelling delivery, see *§ 87.50*.

This form should be combined with general points and authorities supporting the imposition of an issue, evidence, or terminating sanction under *Code Civ. Proc. § 2023.030(b)-(d)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.12* et seq.]. If a monetary sanction is sought in addition to or in lieu of these sanctions, this form should be combined with general points and authorities supporting the imposition of monetary sanctions under *Code Civ. Proc. § 2023.030(a)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel might wish to insert argument in favor of one particular type of sanction over another. However, counsel need not set forth facts showing that the party against whom the monetary sanction is to be imposed acted without substantial justification [*cf.* former Code Civ. Proc. § 2034(a)]. *Code Civ. Proc. §§ 2023.030(a)* and *2032.620(b)* effectively place

that burden on the person against whom the sanction is to be imposed, by requiring the court to impose a monetary sanction when it is expressly authorized *unless* it finds that there was substantial justification or that other circumstances would make the monetary sanction unjust.

[c] Related Pleading and Practice Forms

For forms and discussion related to the imposition of sanctions for failure to obey an order compelling delivery of demanded medical reports, see California Forms of Pleading and Practice, Ch. 197, *Discovery: Physical and Mental Examinations* (Matthew Bender).

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8-87 California Points & Authorities § 87.52

§ 87.52 Supporting Motion for Order Compelling Delivery of Existing and Later Medical Reports in Exchange for Delivery of Reports Under Code Civ. Proc. § 2032.610 [Code Civ. Proc. § 2032.640]

[1] FORM Supporting Motion for Order Compelling Delivery of Existing and Later Medical Reports in Exchange for Delivery of Reports Under Code Civ. Proc. § 2032.610 [Code Civ. Proc. § 2032.640]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ORDER COMPELLING DELIVERY OF EXISTING AND LATER MEDICAL REPORTS AND FOR MONETARY SANCTION
vs.	)	
_____ [*name*],	)	
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD COMPEL DELIVERY OF ALL EXISTING AND LATER MEDICAL REPORTS OF PREVIOUS AND SUBSEQUENT EXAMINATIONS OF _____ [*name of examinee*] PERTAINING TO THE CONDITION(S) IN ISSUE BECAUSE _____ [*name of moving party*] HAS DELIVERED

COPIES OF ALL THE MEDICAL REPORTS DEMANDED BY _____ [*name*] PURSUANT TO SECTION 2032.610 OF THE CODE OF CIVIL PROCEDURE.

A. Party Entitled to Exchange of Reports. A party who has received a demand for a medical report under *Section 2032.610 of the Code of Civil Procedure* is entitled at the time of compliance to receive in exchange a copy of any existing written report of any examination of the same condition by any other physician, psychologist, or licensed health care practitioner. In addition, that party is entitled to receive promptly any later report of any previous or subsequent examination of that condition by any physician, psychologist, or licensed health care practitioner (*Code Civ. Proc. § 2032.640*).

B. Party May Move for Order Compelling Delivery. When the party who has demanded and received delivery of medical reports under *Section 2032.610 of the Code of Civil Procedure* fails to deliver existing or later reports of previous or subsequent examinations to the party who has complied with *Section 2032.610 of the Code of Civil Procedure*, the party who has complied may make a motion, accompanied by a declaration stating facts showing a reasonable and good-faith attempt at an informal resolution of each issue presented by the motion, for an order compelling delivery of the medical reports (*Code Civ. Proc. § 2032.650(a)*).

[*Optional*] **C. Waiver of Privilege or Work Product.** By demanding and obtaining a report of a _____ [physical *or* mental] examination under *Section 2032.610 of the Code of Civil Procedure*, the party who submitted to, or produced another for, the examination waives in the pending action, and in any other action involving the same controversy, any privilege, as well as any protection for work product under *Section 2018.010 et seq. of the Code of Civil Procedure*, that the party or other examinee may have regarding reports and writings as well as the testimony of every other physician, psychologist, or licensed health care practitioner who has examined, or may thereafter examine the party or other examinee, in respect of the same physical or mental condition (*Code Civ. Proc. § 2032.630*).

D. Court Must Impose Monetary Sanction Absent Specified Findings. The court must impose a monetary sanction under *Section 2023.010 et seq. of the Code of Civil Procedure* against any party, person, or attorney who unsuccessfully opposes a motion to compel delivery of medical reports, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust (*Code Civ. Proc. §§ 2023.030(a), 2032.650(b)*).

[*Add points and authorities generally supporting the imposition of monetary sanctions (see, e.g., Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11).*]

[*Optional*] **E. Court May Impose Sanctions Despite Lack of Opposition to Motion to Compel Discovery.** The court may award sanctions under the Discovery Act in favor of a party who files a motion to compel discovery, even though no opposition to the

motion was filed, or opposition to the motion was withdrawn, or the requested discovery was provided to the moving party after the motion was filed (*Cal. Rules of Ct., Rule 3.1030(a)*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum is for use in support of a motion by a party for an order compelling compliance with a demand for delivery of medical reports and identification of examiners pursuant to *Code Civ. Proc. § 2032.650*, after that party has complied with a demand for delivery of medical reports pursuant to *Code Civ. Proc. § 2032.610*. The motion must be accompanied by a declaration stating facts showing a reasonable and good-faith attempt at an informal resolution of each issue presented by the motion [*Code Civ. Proc. § 2032.650(a)*].

This form should be combined with general points and authorities supporting the imposition of monetary sanctions under *Code Civ. Proc. § 2023.030(a)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should set forth facts showing the date on which the opposing party's demand was made, the date on which the moving party complied with the demand, the date on which the moving party demanded the exchange of reports and that the opposing party failed to deliver the demanded reports. Counsel's factual showing should demonstrate substantial justification for the motion in order to avoid a monetary sanction if the motion is denied [*see Code Civ. Proc. § 2032.650(b)*]. However, counsel need not set forth facts showing that the opposing party acted without substantial justification [*cf.* former Code Civ. Proc. § 2034(a)]. *Code Civ. Proc. §§ 2023.030(a)* and *2032.650(b)* effectively place that burden on the person against whom the sanction is to be imposed, by requiring the court to impose a monetary sanction when it is expressly authorized *unless* it finds that there was substantial justification or that other circumstances would make the monetary sanction unjust.

[c] Waiver of Privileges and Work Product Protection

The party from whom the exchange is sought may not refuse to comply with the exchange on the grounds of privilege or work product, because by demanding and obtaining a report of a physical or mental examination under *Code Civ. Proc. § 2032.610*, that party waives in the pending action, and in any other action involving the same controversy, any privilege, as well as any protection for work product under *Code Civ. Proc. § 2018.010 et seq.* that the party or other examinee may have regarding reports and writings as well as the testimony of every other physician, psychologist, or licensed health care practitioner who has examined or may thereafter examine the party or other examinee. Privileges and work product protection are also waived by taking the deposition of the examiner other than under *Code Civ. Proc. §§ 2034.410-2034.470* (expert witness list) [*Code Civ. Proc. § 2032.630*]. However, nothing in *Code Civ. Proc. § 2032.010 et seq.* requires the party to disclose the identity of an expert consulted by an attorney in order to make the certification required in an action for professional negligence under *Code Civ. Proc. § 411.30* or *411.35* [*Code Civ. Proc. § 2032.010(b)*]. For memoranda relating to privilege and work product protection, see Ch. 81, *Discovery: Privileges and Other Discovery Limitations* .

[d] Related Pleading and Practice Forms

For forms and discussion related to demands for and exchange of reports after the taking of physical and mental examinations, see California Forms of Pleading and Practice, Ch. 197, *Discovery: Physical and Mental Examinations* (Matthew Bender).

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 87 DISCOVERY: PHYSICAL AND MENTAL EXAMINATIONS
PART II. FORMS
C. Motion to Compel Delivery of Examination Reports

8-87 California Points & Authorities § 87.53

§ 87.53 Supporting Motion for Order of Sanctions [Code Civ. Proc. § 2023.030]--Failure to Obey Order Compelling Delivery of Existing and Later Medical Reports in Exchange for Delivery of Reports Under Code Civ. Proc. § 2032.610 [Code Civ. Proc. § 2032.650]

[1] FORM Supporting Motion for Order of Sanctions [Code Civ. Proc. § 2023.030]--Failure to Obey Order Compelling Delivery of Existing and Later Medical Reports in Exchange for Delivery of Reports Under Code Civ. Proc. § 2032.610 [Code Civ. Proc. § 2032.650]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ORDER OF SANCTIONS FOR FAILURE TO OBEY ORDER COMPELLING DELIVERY OF EXISTING AND LATER MEDICAL REPORTS
vs.	)	
_____ [*name*],	)	
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD IMPOSE _____ [*specify sanctions sought, e.g.,* ISSUE AND MONETARY]

SANCTIONS AGAINST _____ [*name*] FOR HIS/HERS/ITS FAILURE TO OBEY THE ORDER COMPELLING HIM/HER/IT TO DELIVER ALL EXISTING AND LATER MEDICAL REPORTS OF PREVIOUS AND SUBSEQUENT EXAMINATIONS OF _____ [*name of examinee*] PERTAINING TO THE CONDITION(S) IN ISSUE PURSUANT TO SECTION 2032.650 OF THE CODE OF CIVIL PROCEDURE, AND SHOULD EXCLUDE AT TRIAL THE TESTIMONY OF ANY HEALTH CARE PRACTITIONER WHOSE REPORT HAS NOT BEEN PROVIDED.

A. Court May Make Orders That Are Just. When a party has demanded a medical report under *Section 2032.610 of the Code of Civil Procedure*, but fails in exchange to deliver to the other party on whom the demand is made a copy of any existing or later report of any examination of the same condition by any other physician, psychologist, or licensed health care practitioner, and the court thereafter orders the failing party to deliver the existing and later reports pursuant to *Section 2032.640 of the Code of Civil Procedure*, and the failing party fails to obey the order compelling delivery, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under *Section 2023.010 et seq. of the Code of Civil Procedure* (*Code Civ. Proc. § 2032.650(c)*).

B. Exclusion of Trial Testimony of Examiner. The court shall exclude at trial the testimony of any health care practitioner whose report has not been provided by a party ordered to do so by the court (*Code Civ. Proc. § 2032.650(c)*).

C. Imposition of Monetary Sanction. In lieu of or in addition to any other sanction imposed pursuant to Sections 2023.010 et seq. *and 2032.650(c) of the Code of Civil Procedure*, the court may impose a monetary sanction under *Section 2023.010 et seq. of the Code of Civil Procedure* (*Code Civ. Proc. § 2032.650(c)*).

[*Add points and authorities generally supporting the imposition of issue, evidence, terminating, and monetary sanctions (see, e.g., Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11).*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities is for use in support of a motion for sanctions for failure of a party to obey a court order compelling him or her to deliver medical reports pursuant to *Code Civ. Proc. § 2032.640*, after that party has complied with a demand for delivery of medical reports pursuant to *Code Civ. Proc. § 2032.610* [*see Code Civ. Proc. § 2032.650*]. For a form of motion for an order compelling delivery, see *§ 87.52*.

This form should be combined with general points and authorities supporting the imposition of an issue sanction, evidence sanction, or terminating sanction under *Code Civ. Proc. § 2023.030(b)-(d)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.12* et seq.]. If a monetary sanction is sought is addition to or in lieu of these sanctions, the foregoing form should be combined with general points and authorities supporting the imposition of monetary sanctions under *Code Civ. Proc. § 2023.030(a)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel might wish to insert argument in favor of one particular type of sanction over another. However, counsel need not set forth facts showing that the party against whom the monetary sanction is to be imposed acted without substantial justification [*cf.* former Code Civ. Proc. § 2034(a)]. *Code Civ. Proc. § 2023.030(a)* effectively places that burden on the person against whom the sanction is to be imposed, by requiring the court to impose a monetary sanction when it is expressly authorized *unless* it finds that there was substantial justification or that other circumstances would make the monetary sanction unjust.

For a discussion of the demand for delivery of medical reports pursuant to *Code Civ. Proc. § 2032.610*, see *§ 87.50[2][c]*.

[c] Related Pleading and Practice Forms

For forms and discussion related to the imposition of sanctions for failure to obey an order compelling delivery of medical reports and identification of examiners, see California Forms of Pleading and Practice, Ch. 197, *Discovery: Physical and Mental Examinations* (Matthew Bender).

California Points & Authorities

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 88 DISCOVERY: EXCHANGE OF EXPERT WITNESS INFORMATION

8-88 California Points & Authorities 88.syn

§ 88.syn Synopsis to Chapter 88: DISCOVERY: EXCHANGE OF EXPERT WITNESS INFORMATION

§ 88.01 Scope of Chapter

§ 88.02 Governing Law

[1] California Civil Discovery Act and Related Law

[2] Provisions Governing Exchange of Expert Witness Information

[3] Case Law Decided Under Prior Discovery Acts

§ 88.03 Discovery of Experts Other Than Through Exchange Procedures Under Discovery Act

§ 88.04 How to Use the Forms in This Chapter

[1] Page Limits on Memoranda

[2] Using the Forms to Build a Draft Memorandum

§ 88.05 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

[2] Related Memoranda

§§ 88.06-88.09 [Reserved]

§ 88.10 Supporting Motion for Protective Order Regarding Expert Witness Exchange [Code Civ. Proc. § 2034.250]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

§ 88.11 Supporting Motion for Order Setting Compensation of Expert Witness Providing Deposition Testimony When Expert's Customary Fee is Unreasonable [Code Civ. Proc. § 2034.470]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Amount of Fee

[d] Related Pleading and Practice Forms

§ 88.12 Supporting Motion for Order Allowing Party to Augment or Amend Expert Witness List or Declaration [Code Civ. Proc. § 2034.610]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Procedures If Order Granted

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Motion to Augment or Amend Expert Witness List or Declaration

[b] Augmentation Permitted to Cure Mistake, Surprise, or Excusable Neglect If Opposing Party Will Not Be Prejudiced and Statutory Procedures Are Satisfied

[c] Augmentation Permitted After Motion for New Trial Is Granted

§ 88.13 Supporting Motion for Order Allowing Party to Submit Tardy Expert Witness Information [Code Civ. Proc. § 2034.710]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Terms of Order

[d] Related Pleading and Practice Forms

§ 88.14 Supporting Motion for Order for Relief When Party Makes Untimely Demand for Exchange of Expert Witnesses Information Through Mistake, Inadvertence, Surprise or Excusable Neglect [Code Civ. Proc. § 473(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Relief Pursuant to Code of Civil Procedure Section 473 Is Available in Discovery Proceedings

[b] Trial Court's Order Will Be Upheld If There Has Been No Abuse of Discretion

[c] Objection Is Not Proper Response to Untimely Demand for Exchange of Expert Witness Information

[4] Additional Authorities

[a] Relief Pursuant to Code of Civil Procedure Section 473 Is Available in Discovery Proceedings

§§ 88.15through 88.19 [Reserved]

§ 88.20 Opposing Motion to Compel Discovery--Discovery of Writings and Reports of Expert Witness Improper Under Specified Conditions [Code Civ. Proc. §§ 2034.210, 2034.270]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Discovery of Expert's Reports and Writings That Are Not Relevant Is Not Permitted

[4] Additional Authorities

[a] Discovery of Expert's Reports and Writings Not Available Under Exchange Procedure If Expert Not Designated as Trial Witness

§ 88.21 Opposing Motion for Order Setting Compensation of Expert Witness--Reasonable and Customary Fee for Testimony by Expert Witness Is Not Limited by Fee Charged Retaining Party for Nontestimonial Services [Code Civ. Proc. § 2034.470]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Fee Charged for Deposition Testimony of Expert Witness May Exceed Fee Charged Retaining Party for Consultative Services by That Expert

§ 88.22 Opposing Motion For Payment of Opponent's Treating Physician's Deposition Fees As Costs Under Code of Civil Procedure Section 1033.5(a)(7)--Treating Physician's Fees Must Be Paid Under Code of Civil Procedure Section 2034.430

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Witness Fees Incurred in Deposing Opponent's Treating Physicians Are Not Recoverable As Costs Under Code of Civil Procedure Section 1033.5(a)(7)

[b] Treating Physician's Deposition Fees Must Be Paid Under Code of Civil Procedure Section 2034.430

§ 88.23 Opposing Motion for Protective Order--Timely Demand for Exchange of Expert Witness Information After Action Reset for Trial Following Mistrial [Code Civ. Proc. § 2034.220]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Demand Served More Than 70 Days Before Second Trial Date Is Timely

§§ 88.24through 88.29 [Reserved]

§ 88.30 Supporting Contention That Expert Be Permitted to Testify--Exception to General Rule Barring Testimony of Undisclosed Expert [Code Civ. Proc. § 2034.310]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Undisclosed Expert Who Was Designated by Another Party and Deposed May Testify

§ 88.31 Supporting Contention That Expert Be Permitted to Testify--Sufficient Compliance With Requirements of Code Civ. Proc. § 2034.010 et seq. or Additional Procedures Available

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Expert Witness List Providing Brief Statement of General Substance of Expert's Opinion Is Sufficient

[b] Exclusion of Expert Testimony Is Not Mandatory When Failure to Comply With Statutory Requirements Is Not "Unreasonable"

[c] Expert May Testify Regarding Undisclosed Substance If Opposing Counsel Refuses Court's Offer of Recess to Depose Expert

[4] Additional Authorities

[a] Expert Witness List Providing Brief Statement of General Substance of Expert's Opinion Is Sufficient

§ 88.32 Supporting Contention That Expert Be Permitted to Testify--Failure to File Expert Declaration Does Not Preclude Testimony of Designated Expert Who Is Treating Physician

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] No Expert Witness Declaration Is Required for Treating Physician Who Is Not Retained Expert Witness

[b] Treating Physician Testifying as Percipient Witness May Provide Expert Opinion Testimony

[4] Additional Authorities

[a] No Expert Witness Declaration Is Required for Treating Physician Who Is Not Retained Expert Witness

§ 88.33 Supporting Contention That Evidence From Nondesignated Expert Witness Be Admissible in Pretrial Proceeding

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Exclusion for Failure to Designate Expert Is Not Applicable to Pretrial Proceedings

§§ 88.34through 88.39 [Reserved]

§ 88.40 Opposing Contention That Expert Be Permitted to Testify [Code Civ. Proc. § 2034.300]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Undisclosed Expert May Not Testify

[b] Expert May Not Testify If No Expert Witness Declaration Provided

[c] Expert May Not Testify Beyond Scope of Testimony Described in Expert Witness Declaration

[d] Expert Listed on Supplemental List May Not Be Substituted

[4] Additional Authorities

[a] Expert May Not Testify Beyond Scope of Testimony Described in Expert Witness Declaration

§ 88.41 Opposing Contention That Expert Be Permitted to Testify--Exception to General Rule Barring Testimony of Undisclosed Expert [Code Civ. Proc. § 2034.310(b)] Is Not Applicable--Party May Not Offer Contrary Opinion As Impeachment

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Non-Designated Expert May Testify Concerning Facts Underlying Another Expert's Opinion but May Not Express Contrary Opinion

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 88 DISCOVERY: EXCHANGE OF EXPERT WITNESS INFORMATION
PART I. INTRODUCTION

8-88 California Points & Authorities § 88.01

§ 88.01 Scope of Chapter

This chapter includes memoranda relating to civil discovery by means of demands to another party for an exchange of information relating to expert witnesses. Forms in Part II include the following:

- Subpart A has memoranda relating to various motions arising in the context of an exchange of expert witness information, including those supporting [*§ 88.10*] and opposing [*§ 88.22*] a motion for a protective order, supporting [*§ 88.11*] and opposing [*§ 88.21*] a motion to set compensation of an expert witness, supporting motions to augment or amend expert witness information [*§ 88.12*] or to submit tardy expert witness information [§ 88.13], supporting a motion for relief when an untimely demand for an exchange of information is due to mistake, inadvertence, surprise, or excusable neglect [*§ 88.14*], and opposing a motion to compel discovery of certain expert witness information [*§ 88.20*].

- Subpart B has memoranda relating to the effect of noncompliance with information exchange procedures, supporting [§ 88.30 et seq]. and opposing [*§ 88.40*] the contention that an expert be permitted to testify at trial, and supporting [*§ 88.33*] a contention that an expert witness's testimony be admissible in a pretrial proceeding.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsExpert Witness DiscoveryCivil ProcedureDiscoveryMotions to CompelCivil ProcedureDiscoveryProtective Orders

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 88 DISCOVERY: EXCHANGE OF EXPERT WITNESS INFORMATION
PART I. INTRODUCTION

8-88 California Points & Authorities § 88.02

§ 88.02 Governing Law

[1] California Civil Discovery Act and Related Law

Civil discovery in California is governed primarily by the California Civil Discovery Act, codified at *Code Civ. Proc. §§ 2016.010 et seq.*-2036.010 et seq. Discovery in limited civil cases is further governed by *Code Civ. Proc. §§ 94* and *95*. Statewide rules of court relating to discovery papers and discovery motions are set out in *Cal. Rules of Ct., Rules 3.1000*, 3.1345, 3.1346, 3.1347, and 3.1348.

[2] Provisions Governing Exchange of Expert Witness Information

Civil discovery by demand to a party for an exchange of expert witness information is governed primarily by Code Civ. Proc. *§ 2034.010 et seq. Code Civ. Proc.* § 2034.010 et seq. provides for a simultaneous, mutual exchange of expert witness information; it does not permit a unilateral exchange (*see Code Civ. Proc. §§ 2034.230, 2034.250, 2019.010(f)*; *Hernandez v. Superior Court (2003) 112 Cal. App. 4th 285, 297, 4 Cal. Rptr. 3d 883* (case management order requiring unilateral disclosure of identity, curriculum vitae, and opinion concerning causation of each medical expert who would support plaintiffs' wrongful deathclaims was not proper exercise of trial court's power to manage complex litigation)). The exchange of such information under this code section is authorized in limited civil cases pursuant to *Code Civ. Proc. § 94(e)*.

Discovery relating to expert witnesses may raise issues relating to the attorney-client privilege set out in *Evid. Code § 950 et seq.* and the attorney work product protection set out in *Code Civ. Proc. § 2018.010 et seq.* Points and authorities relating to the attorney-client privilege and the work product protection are set out in Ch. 81, *Discovery: Privileges and Other Discovery Limitations* , Subparts B (§ 81.60 et seq.) and F (§ 81.200 et seq.).

In addition, *Code Civ. Proc. §§ 2034.410-2034.470* with specified exceptions, incorporates the procedures of *Code Civ. Proc. §§ 2025.010 et seq.*-2028.010 et seq. for taking oral and written depositions of a listed trial expert witness. For points and authorities relating to deposition procedures generally, see Ch. 83, *Discovery: Depositions* .

Code Civ. Proc. § 2034.010 et seq. does not apply to exchanges of lists of experts and valuation data in eminent domain proceedings under *Code Civ. Proc. § 1258.010 et seq.* [*see Code Civ. Proc. § 2034.010*]. For points and

authorities relating to eminent domain proceedings generally, see Ch. 95, *Eminent Domain* .

[3] Case Law Decided Under Prior Discovery Acts

The Civil Discovery Act was passed in 2004 and became effective July 1, 2005. It repealed and renumbered the Civil Discovery Act of 1986 but did not substantively change the law of civil discovery [Stats. 2004, ch. 182 §§ 22, 23, 61]. Thus cases decided under the 1986 Act remain controlling authority. A considerable body of case law interpreted the discovery provisions of the Discovery Act of 1956 (former Code Civ. Proc. §§ 2016-2037.9), which preceded the 1986 Act. Although the 1986 Act, which became operative July 1, 1987, implemented numerous changes in the prior law, it also continued provisions of the prior law in many other instances, or even codified decisions interpreting the prior law. Decisions construing this prior law are therefore cited as persuasive, rather than controlling, authority to the extent that they are consistent with current provisions [*see In re Marriage of Skelley (1976) 18 Cal. 3d 365, 369, 134 Cal. Rptr. 197, 556 P.2d 297]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsExpert Witness DiscoveryCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsWritten DepositionsCivil ProcedureDiscoveryPrivileged MattersAttorney-Client PrivilegeCivil ProcedureDiscoveryPrivileged MattersWork ProductGeneral Overview

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 88 DISCOVERY: EXCHANGE OF EXPERT WITNESS INFORMATION
PART I. INTRODUCTION

8-88 California Points & Authorities § 88.03

§ 88.03 Discovery of Experts Other Than Through Exchange Procedures Under Discovery Act

Code Civ. Proc. § 2034.010 et seq. provides a comprehensive system that may be used by parties to a civil action who wish to discover information concerning the opposing party's expert trial witnesses. However, this provision does not provide the exclusive means by which discovery of expert witness information may be obtained. Presumably, if neither party initiates a demand for an exchange of expert trial witness information, normal discovery procedures, such as those applying to depositions in general, will apply. Under rules developed prior to the advent of the expert exchange procedure, a party was generally entitled to depose an opposing party's expert if the opposing side planned to use the expert to testify at trial [*see Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 781, 174 Cal. Rptr. 348* ; *Bolles v. Superior Court (1971) 15 Cal. App. 3d 962, 963, 93 Cal. Rptr. 719]* . Nevertheless, it is probably preferable to use the procedures established by *Code Civ. Proc. § 2034.010 et seq.* to ensure a mutual exchange of information, especially in cases that may involve more than a minimum amount of expert testimony by either party.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsExpert Witness DiscoveryCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsWritten Depositions

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CHAPTER 88 DISCOVERY: EXCHANGE OF EXPERT WITNESS INFORMATION
PART I. INTRODUCTION

8-88 California Points & Authorities § 88.04

§ 88.04 How to Use the Forms in This Chapter

[1] Page Limits on Memoranda

One of the more significant drafting requirements to keep in mind are page limits: supporting and opposing memoranda filed in discovery motion proceedings may not exceed 15 pages. A reply or closing memorandum may not exceed 10 pages. Exhibits, declarations, attachments, the table of contents, the table of authorities, and the proof of service are excluded from these page limits. Any party must obtain leave of court to file a longer memorandum [*see Cal. Rules of Ct., Rule 3.1113(d)*]. These and other drafting requirements are discussed in further detail in Ch. 1, *Writing Legal Memoranda and Briefs* .

[2] Using the Forms to Build a Draft Memorandum

The forms included in Subpart A of this chapter are designed to be included in a memorandum supporting or opposing a particular type of discovery motion, such as motion to compel discovery or a motion for a protective order.

In many cases it will be appropriate to combine the forms in Subpart A with additional memoranda set out in the related discovery chapters. In particular, they may be combined with the general memoranda for limiting or regulating discovery set out in Ch. 80, *Discovery : Scope, Regulation, and Timing*, or with the memoranda for limiting discovery based on the evidentiary privileges, work product protection, or other protective provisions found in Ch. 81, *Discovery: Privileges and Other Discovery Limitations* . It may also be appropriate to modify these memoranda for use in a different procedural context, such as in a trial or appellate brief or office memoranda relating to discovery practice.

The forms included in Subpart B of this chapter are contention forms designed to be combined with other memoranda in a particular procedural context, such as memoranda supporting or opposing a motion in limine to exclude certain evidence at trial.

For a detailed discussion on how to select and use the forms in the publicationto build a draft memorandum and complete the draft, with detailed discussion of all drafting requirements and strategic or stylistic considerations, see Ch. 1, *Writing Legal Memoranda and Briefs* . For a skeletal form of memorandum for use in creating a properly formatted outline in which to compile relevant forms from this publication, see also Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting Memoranda

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PART I. INTRODUCTION

8-88 California Points & Authorities § 88.05

§ 88.05 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

For background discussion of forms of moving papers relating to civil discovery by demands for an exchange of expert witness information, see California Forms of Pleading and Practice, Ch. 198, *Discovery: Exchange of Expert Witness Information* (Matthew Bender).

[2] Related Memoranda

For memoranda supporting or opposing a motion to compel discovery based on general limiting or regulatory provisions of the Discovery Act, see Ch. 80, *Discovery: Scope, Regulation, and Timing* .

For memoranda supporting or opposing a motion to compel discovery on the ground that the matter sought to be discovered is privileged or is otherwise protected from disclosure, see Ch. 81, *Discovery: Privileges and Other Discovery Limitations* .

For memoranda supporting or opposing a motion to compel discovery, or supporting or opposing a motion for protective order, in the context of another discovery method, see Ch. 83, *Discovery: Depositions* , through Ch. 87, *Discovery: Physical and Mental Examinations* .

For memoranda relating to the use of demands for the production or inspection of tangible evidence in order to preserve evidence before an action is commenced or pending an appeal, see Ch. 89, *Discovery: Preservation of Evidence* .

For memoranda for use in seeking or opposing writs to review discovery orders, see Ch. 89A, *Discovery: Review of Discovery Orders* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsExpert Witness DiscoveryCivil ProcedureDiscoveryMethodsOral DepositionsCivil

ProcedureDiscoveryMethodsPerpetuation of TestimonyCivil ProcedureDiscoveryMotions to CompelCivil ProcedureDiscoveryProtective Orders

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8-88 California Points & Authorities §§ 88.06-88.09

[Reserved]

§§ 88.06[Reserved]

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CHAPTER 88 DISCOVERY: EXCHANGE OF EXPERT WITNESS INFORMATION
PART II. FORMS
A. Motions Relating to Expert Witness Exchange Procedure

8-88 California Points & Authorities § 88.10

§ 88.10 Supporting Motion for Protective Order Regarding Expert Witness Exchange [Code Civ. Proc. § 2034.250]

[1] FORM Supporting Motion for Protective Order Regarding Expert Witness Exchange [Code Civ. Proc. § 2034.250]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION FOR PROTECTIVE ORDER RE EXPERT WITNESS EXCHANGE AND FOR MONETARY SANCTION [*Code Civ. Proc. §§ 2023.030(a), 2034.250*]
vs.	)	
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

THE COURT SHOULD ISSUE A PROTECTIVE ORDER _____ [*specify order sought, e.g.,* THAT PLAINTIFF REDUCE THE LIST OF EMPLOYED OR RETAINED EXPERTS DESIGNATED ON HIS/HER/ITS LIST] BECAUSE GOOD CAUSE HAS BEEN SHOWN FOR THE ORDER AND BECAUSE _____ [*specify grounds, e.g.,* DEFENDANT WOULD SUFFER UNWARRANTED ANNOYANCE AND OPPRESSION,

AND UNDUE BURDEN AND EXPENSE *or specify other reason*]. IF THE MOTION IS GRANTED, THE COURT SHOULD IMPOSE A MONETARY SANCTION AGAINST _____ [*name(s)*] BECAUSE THERE IS NO SHOWING THAT _____ [HE/SHE/IT *or* THEY] ACTED WITH SUBSTANTIAL JUSTIFICATION OR THAT OTHER CIRCUMSTANCES MAKE THE IMPOSITION OF THE SANCTION UNJUST.

A. Protective Orders. A party who has been served with a demand to exchange information concerning expert trial witnesses may promptly move for a protective order. The court, for good cause shown, may make any order that justice requires to protect from unwarranted annoyance, embarrassment, oppression, or undue burden or expense (*Code Civ. Proc. § 2034.250*).

B. Types of Orders. The protective orders that the court may make under *Section 2034.250 of the Code of Civil Procedure* may include, but are not limited to, [one or more of] the following direction(s):

[*EITHER*]

That the demand be quashed because it was not timely served (*Code Civ. Proc. § 2034.250(b)(1)*).

[*AND/OR*]

That the date of exchange be earlier or later than that specified in the demand (*Code Civ. Proc. § 2034.250(b)(2)*).

[*AND/OR*]

That the exchange be made only on specified terms and conditions (*Code Civ. Proc. § 2034.250(b)(3)*).

[*AND/OR*]

That the production and exchange of any reports and writings of experts be made at a different place or at a different time than that specified in the demand (*Code Civ. Proc. § 2034.250(b)(4)*).

[*AND/OR*]

That, on a showing of exceptional hardship, the deposition of an expert, as described in *Section 2034.210(b) of the Code of Civil Procedure*, be taken at a place over 75 miles from the courthouse where the action is pending (*Code Civ. Proc. § 2034.420*).

[*AND/OR*]

That some or all of the parties be divided into sides on the basis of their identity of interest in the issues in the action, and that the designation of any experts as described in *Section 2034.210(b) of the Code of Civil Procedure* be made by any side so created (*Code Civ. Proc. § 2034.250(b)(5)*).

[*AND/OR*]

That a party or a side reduce the list of employed or retained experts designated by that party or side under *Section 2034.210(b) of the Code of Civil Procedure* (*Code Civ. Proc. § 2034.250(b)(6)*).

[*CONTINUE*]

C. Court Must Impose Monetary Sanction Absent Specified Findings. The court must impose a monetary sanction under *Section 2023.010 et seq. of the Code of Civil Procedure* against any party, person, or attorney who unsuccessfully opposes a motion for a protective order, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust (*Code Civ. Proc. §§ 2023.030(a), 2034.470(g)*).

[*When appropriate, include specific points and authorities relating to objections, privileges, or other grounds that provide the basis for "good cause." Add points and authorities generally supporting the imposition of monetary sanctions (see, e.g., Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11).*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This form of memorandum of points and authorities is for use by a party who has been served with a demand to exchange information concerning expert trial witnesses to support a motion for a protective order [*see Code Civ. Proc. § 2034.250*]. The motion must be accompanied by a declaration stating facts showing a reasonable and good-faith attempt at an informal resolution of each issue presented by it [*Code Civ. Proc. § 2034.250(a)*]. This form should also be combined with general points and authorities supporting the imposition of monetary sanctions under *Code Civ. Proc. § 2023.030(a)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11*].

If the motion for a protective order is denied in whole or in part, the court may order that the party provide or permit the discovery against which protection was sought on terms and conditions that are just [*see Code Civ. Proc. § 2034.250(c)*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel's factual showing should demonstrate substantial justification for the motion in order to avoid a monetary sanction if the motion is denied [*see Code Civ. Proc. § 2034.250(d)*].

[c] Related Pleading and Practice Forms

For discussion and forms of motion relating to protective orders regarding exchanges of expert witness information, see California Forms of Pleading and Practice, Ch. 198, *Discovery: Exchange of Expert Witness Information* (Matthew Bender).

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8-88 California Points & Authorities § 88.11

§ 88.11 Supporting Motion for Order Setting Compensation of Expert Witness Providing Deposition Testimony When Expert's Customary Fee is Unreasonable [Code Civ. Proc. § 2034.470]

[1] FORM Supporting Motion for Order Setting Compensation of Expert Witness Providing Deposition Testimony [Code Civ. Proc. § 2034.470]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION SETTING COMPENSATION OF EXPERT WITNESS SOUGHT TO BE DEPOSED
vs.	)	
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

THE COURT SHOULD ISSUE AN ORDER SETTING THE FEE OF _____ [*name*], AN EXPERT DESIGNATED ON THE EXPERT WITNESS LIST OF _____ [*specify party, e.g.*, PLAINTIFF], FOR PROVIDING DEPOSITION TESTIMONY BECAUSE THE EXPERT'S CUSTOMARY FEE IS UNREASONABLE. IF THE MOTION IS GRANTED, THE COURT SHOULD IMPOSE A MONETARY SANCTION AGAINST _____ [*name(s)*] BECAUSE THERE IS NO SHOWING THAT _____ [HE/SHE/IT *or* THEY] ACTED WITH SUBSTANTIAL JUSTIFICATION OR THAT

OTHER CIRCUMSTANCES MAKE THE IMPOSITION OF THE SANCTION UNJUST.

A. Court May Set Expert's Compensation. The court is required to set the fee of the expert for providing deposition testimony pursuant to *Sections 2034.410-2034.470 of the Code of Civil Procedure* if it determines that the hourly or daily fee demanded by that expert is unreasonable, and if the moving party has made a reasonable and good-faith attempt at informally resolving the issue of the expert's fee (*Code Civ. Proc. § 2034.470*).

B. Court Must Impose Monetary Sanction Absent Specified Findings. The court must impose a monetary sanction under *Code Civ. Proc. § 2023.010 et seq.* against any party, person, or attorney who unsuccessfully opposes a motion to set the fee of an expert witness, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust (*Code Civ. Proc. §§ 2023.030(a), 2034.250(d)*).

[*Add points and authorities generally supporting the imposition of monetary sanctions (see, e.g., Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11).*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This form of memorandum of points and authorities is for use by a party participating in an exchange of information concerning expert trial witnesses pursuant to *Code Civ. Proc. § 2034.010 et seq.* who wishes to depose a designated expert of the opposing party and deems that the expert's fee is unreasonable. The hourly and daily fee of an expert trial witness will be found in the expert witness declaration [*see Code Civ. Proc. § 2034.260(c)(5)*].

The motion must be accompanied by a declaration stating facts showing a reasonable and good-faith attempt at an informal resolution of the fee dispute [*Code Civ. Proc. § 2034.470(b)*]. This form should also be combined with general points and authorities supporting the imposition of monetary sanctions under *Code Civ. Proc. § 2023.030(a)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11*].

In any attempt at an informal resolution, either the party or the expert must provide the other with (1) proof of the ordinary and customary fee actually charged and received by that expert for similar services provided outside the subject litigation, (2) the total number of times the presently demanded fee has ever been charged and received by that expert, and (3) the frequency and regularity with which the presently demanded fee has been charged and received by that expert within the two-year period preceding the hearing on the motion [*Code Civ. Proc. § 2034.470(b)*].

In addition to any other facts or evidence, the expert or the party designating the expert must provide, and the court's determination of the reasonableness of the fee must be based on, the proof described in the preceding paragraph. The court may also consider the ordinary and customary fees charged by similar experts for similar services within the relevant community, and any other factors the court deems necessary or appropriate to make its determination [*Code Civ. Proc. § 2034.470(e)*].

On determining that the fee demanded by the expert is unreasonable, and based on the evidence and factors considered, the court must set the expert's fee [*Code Civ. Proc. § 2034.470(f)*].

Notice of the motion supported by this form must be given to the expert [*Code Civ. Proc. § 2034.470(a)*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Counsel should therefore specify the reasons why the expert's customary fee is unreasonable, for example, by demonstrating the customary fees in the area or county for obtaining expert opinions in the particular field of expertise in question. Counsel's factual showing should demonstrate substantial justification for the motion in order to avoid a monetary sanction if the motion is denied [*see Code Civ. Proc. § 2034.470(g)*].

[c] Amount of Fee

> An expert witness's "customary" fee is not necessarily the "reasonable" fee a deposing party must pay for deposing another party's expert witness. When the deposing party believes the expert's fee is unreasonable, *Code Civ. Proc. § 2034.470* provides a mechanism for the court to resolve the dispute and set the fee. However, nothing in *Code Civ. Proc. § 2034.470* provides that the court's determination precludes that expert witness from charging or receiving from his or her client any balance or "unreasonable" portion of his or her fee. Accordingly, *Code Civ. Proc. § 2034.430 et seq.* transfers to the deposing party only those fees of the expert that are "reasonable." Any excess fees remain a matter of negotiation and agreement between the expert and the party who designated that expert [*Marsh v. Mountain Zephyr (1996) 43 Cal. App. 4th 289, 304, 50 Cal. Rptr. 2d 493]* .

[d] Related Pleading and Practice Forms

For discussion and forms of motion relating to exchanges of expert witness information, see California Forms of Pleading and Practice, Ch. 198, *Discovery: Exchange of Expert Witness Information* (Matthew Bender).

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8-88 California Points & Authorities § 88.12

§ 88.12 Supporting Motion for Order Allowing Party to Augment or Amend Expert Witness List or Declaration [Code Civ. Proc. § 2034.610]

[1] FORM Supporting Motion for Order Allowing Party to Augment or Amend Expert Witness List or Declaration [Code Civ. Proc. § 2034.610]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO _____ [AUGMENT *and/or* AMEND] EXPERT _____ [WITNESS LIST *and/or* DECLARATION]
vs.	)	
_____ [*name*],	)	
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD GRANT _____ [*specify party, e.g.,* PLAINTIFF]'S MOTION TO _____ [AUGMENT *or* AMEND] _____ [HIS/HER/ITS EXPERT WITNESS LIST *or* THE DECLARATION OF _____ (*name of expert*)] BECAUSE _____ [*specify party, e.g.,* PLAINTIFF] ENGAGED IN A TIMELY EXCHANGE OF EXPERT WITNESS INFORMATION, THE _____ [ACTION *or* DEFENSE] OF THE OPPOSING PARTY WILL NOT BE PREJUDICED, THE

ADDITIONAL INFORMATION WAS EXCLUDED FROM THE ORIGINAL EXCHANGE DUE TO _____ [MISTAKE *and/or* INADVERTENCE *and/or* SURPRISE *and/or* NEGLECT *or* THE FACT THAT _____ (*specify party, e.g.,* PLAINTIFF) WOULD NOT, IN THE EXERCISE OF REASONABLE DILIGENCE, HAVE INCLUDED THE ADDITIONAL INFORMATION IN THE ORIGINAL EXCHANGE], AND ALL THE OTHER CONDITIONS FOR _____ [AUGMENTING *or* AMENDING] AN EXPERT _____ [WITNESS LIST *or* DECLARATION] HAVE BEEN SATISFIED. IF THE MOTION IS GRANTED, THE COURT SHOULD IMPOSE A MONETARY SANCTION AGAINST _____ [*name(s)*] BECAUSE THERE IS NO SHOWING THAT _____ [HE/SHE/IT *or* THEY] ACTED WITH SUBSTANTIAL JUSTIFICATION OR THAT OTHER CIRCUMSTANCES MAKE THE IMPOSITION OF THE SANCTION UNJUST.

A. Motion to Augment or Amend Expert Witness List or Declaration. On motion of any party who has engaged in a timely exchange of expert witness information, the court may grant leave to (1) augment that party's expert witness list and declaration by adding the name and address of any expert witness whom that party has subsequently retained, or (2) amend that party's expert witness declaration with respect to the general substance of the testimony that an expert previously designated is expected to give (*Code Civ. Proc. § 2034.610(a)*; *Richaud v. Jennings (1993) 16 Cal. App. 4th 81, 87-91, 19 Cal. Rptr. 2d 790*).

[*EITHER*]

B. Augmentation Permitted If Moving Party Did Not Fail to Exercise Reasonable Diligence, Opposing Party Will Not Be Prejudiced, and Statutory Procedures Satisfied. The court shall grant leave to augment or amend an expert witness list or declaration if it determines that any party opposing the motion will not be prejudiced in maintaining the party's action or defense on the merits, and that the moving party (1) would not in the exercise of reasonable diligence have determined to call that expert witness or decided to offer the different or additional testimony of the expert, (2) has sought leave to augment or amend promptly after deciding to call the expert or to offer the different or additional testimony, and (3) has promptly thereafter served a copy of the proposed expert witness information concerning the expert or the testimony described in *Code of Civil Procedure Section 2034.260* on all other parties who have appeared in the action (*Code Civ. Proc. § 2034.260*).

[*AND/OR*]

C. Augmentation Permitted to Cure Mistake, Surprise, or Excusable Neglect If Opposing Party Will Not Be Prejudiced and Statutory Procedures Are Satisfied. The court shall grant leave to augment or amend an expert witness list or declaration if it determines that any party opposing the motion will not be prejudiced in maintaining the party's action or defense on the merits, and that the moving party (1) failed to determine to call that expert witness or to offer the different or additional testimony of the expert as a result of mistake, inadvertence, surprise, or excusable neglect, (2) has sought leave to augment or amend promptly after deciding to call the expert or to offer the different or additional testimony, and (3) has promptly thereafter served a copy of the proposed expert witness information concerning the expert or the testimony, described in *Code of Civil Procedure Section 2034.260*, on all other parties who have appeared in the action (*Code Civ. Proc. § 2034.260*; *Dickison v. Howen (1990) 220 Cal. App. 3d 1471, 1476-1480, 270 Cal. Rptr. 188* (construing former Code Civ. Proc. § 2034(f), (k)).

[*CONTINUE*]

[*Optional*] **D. Augmentation Permitted After Motion for New Trial Is Granted.** If the trial court grants a defendant's motion for a new trial after the plaintiff has rejected a reduction in damages, the court must grant the plaintiff's motion

to designate new expert witnesses, provided the motion is made a sufficient time before the new trial to afford the defendant the opportunity to depose the new experts (*Guzman v. Superior Court (1993) 19 Cal. App. 4th 705, 708, 23 Cal. Rptr. 2d 585*).

E. Court Must Impose Monetary Sanction Absent Specified Findings. The court must impose a monetary sanction under *Code of Civil Procedure Section 2023.010 et seq.* against any party, person, or attorney who unsuccessfully opposes a motion to augment or amend expert witness information, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust (*Code Civ. Proc. §§ 2023.030(a), 2034.630*).

[*Add points and authorities generally supporting the imposition of monetary sanctions (see, e.g., Forms Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11).*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This form is for use by a party in support of a motion to augment or amend an expert witness list under *Code Civ. Proc. § 2034.610*. This provision allows augmentation or amendment only when the moving party has engaged in a timely exchange of expert witness information. For a form supporting the submission of tardy expert witness information, see *§ 88.13*.

The motion must be accompanied by a declaration stating facts showing a reasonable and good-faith attempt at an informal resolution of the issues presented by the motion [*Code Civ. Proc. § 2034.610(c)*]. The foregoing form should also be combined with general points and authorities supporting the imposition of monetary sanctions under *Code Civ. Proc. § 2023.030(a)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. In particular, facts showing lack of prejudice to the opposing party, facts showing reasonable diligence on the part of the moving party, and facts showing that the moving party did not originally include the information due to mistake, inadvertence, surprise, or excusable neglect should be set forth. Counsel should also demonstrate compliance with all the other conditions of *Code Civ. Proc. § 2034.620*, as set forth in Paragraphs B and C. Counsel's factual showing should demonstrate substantial justification for the motion in order to avoid a monetary sanction if the motion is denied [*see Code Civ. Proc. § 2034.630*].

[c] Procedures If Order Granted

Leave shall be conditioned on the moving party making the expert available immediately for a deposition pursuant to *Code Civ. Proc. §§ 2034.410-2034.470*, and may include leave to any party opposing the motion to designate additional

expert witnesses or to elicit additional opinions from those previously designated. Additionally, the court may impose other conditions that are just, including a continuance, and it may award costs and litigation expenses to the opposing party [*Code Civ. Proc. § 2034.620(d)*].

[d] Related Pleading and Practice Forms

For discussion and forms of motion relating to exchanges of expert witness information, see California Forms of Pleading and Practice, Ch. 198, *Discovery: Exchange of Expert Witness Information* (Matthew Bender).

[3] Discussion of Authorities

[a] Motion to Augment or Amend Expert Witness List or Declaration

In ***Richaud v. Jennings*** *(1993) 16 Cal. App. 4th 81, 19 Cal. Rptr. 2d 790* , the court of appeal noted that former Code Civ. Proc. § 2034(k) (*now see Code Civ. Proc. § 2034.610*) provides a procedure for augmentation of a party's expert witness list when for some good reason an expert was not listed on a party's original expert witness list. A party who wishes to substitute an expert for one already designated must make a motion to augment that party's list of experts as required by former Code Civ. Proc. § 2034(k). A court's order that discovery is closed except for experts who are allowed to be designated late does not constitute permission for a party to augment that party's list of experts without bringing the statutory motion (*16 Cal. App. 4th 81, 87-91)* .

[b] Augmentation Permitted to Cure Mistake, Surprise, or Excusable Neglect If Opposing Party Will Not Be Prejudiced and Statutory Procedures Are Satisfied

In ***Dickison v. Howen*** *(1990) 220 Cal. App. 3d 1471, 270 Cal. Rptr. 188* , a medical malpractice action, defendant physician listed Dr. Smith as an expert witness who would testify on his behalf. Although, as a designated expert, Dr. Smith met with defendant's counsel twice, opining that the case was defensible because defendant's care and treatment were not negligent, at deposition Dr. Smith changed his testimony and said that defendant had breached the standard of care. Defendant's motion to augment his expert witness list by substituting another physician expert in place of Dr. Smith was granted, subject to certain conditions, by the trial court. After the trial court entered judgment on the jury verdict in favor of defendant, plaintiff appealed.

The court of appeal affirmed, concluding that the trial court had not abused its discretion in granting defendant's motion. Plaintiff contended that defendant had not made the requisite showing of surprise, claiming that an expert's failure to stand up under cross-examination is not the type of surprise encompassed by former Code Civ. Proc. § 2034(k) (*now see Code Civ. Proc. § 2034.620(c)(2)*). The court said it would not question the trial court's belief of defendant's "shock" at the expert's deposition testimony and, by way of analogy with the showing required for a new trial, said that a change of testimony by a witness is a sufficient showing of surprise when the attorney had previously interviewed the witness to determine the testimony expected (*220 Cal. App. 3d 1471, 1478)* . The court also concluded that permitting defendant to augment his expert witness list did not prejudice plaintiff. It said that a party is prejudiced when, because of its reliance on the previous list of experts, it is not prepared for the new testimony and cannot be prepared to respond to the new testimony in time for trial. The fact that the new expert will give testimony that is adverse or not cumulative of other testimony does not establish prejudice to the party opposing augmentation. The court also pointed out that the newly designated expert testified on exactly the same issue on which Dr. Smith was to testify, so plaintiff was prepared for the technical aspects of his testimony, and further, that the trial court granted all the conditions requested by plaintiff's counsel to reduce the burden of preparing for a new witness (*220 Cal. App. 3d 1471, 1478-1480)* .

Although both parties and the court discussed the issue as augmentation, which is governed by former Code Civ. Proc. § 2034(k) (*now see Code Civ. Proc. § 2034.620*), in the middle of its analysis the court discussed former Code Civ. Proc. § 2034(*l*) (*now see Code Civ. Proc. §§ 2034.710-2034.730*), which governs the submission of tardy expert witness information. The language of the two subsections regarding when leave of court will be granted is almost identical, and

the discussion of former Code Civ. Proc. § 2034(*l*) may be simply a typographical error.

[c] Augmentation Permitted After Motion for New Trial Is Granted

In ***Guzman v. Superior Court*** *(1993) 19 Cal. App. 4th 705, 23 Cal. Rptr. 2d 585* , the appellate court held that if a trial court grants a defendant's motion for a new trial after the plaintiff has rejected a reduction in damages, the court must grant the plaintiff's motion to designate new expert witnesses, provided the motion is made a sufficient time before the new trial to afford the defendant the opportunity to depose the new experts (*19 Cal. App. 4th 705, 708)* .

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8-88 California Points & Authorities § 88.13

§ 88.13 Supporting Motion for Order Allowing Party to Submit Tardy Expert Witness Information [Code Civ. Proc. § 2034.710]

[1] FORM Supporting Motion for Order Allowing Party to Submit Tardy Expert Witness Information [Code Civ. Proc. § 2034.710]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO SUBMIT TARDY INFORMATION CONCERNING EXPERT WITNESS LIST
vs.	)	
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD GRANT _____ [*specify party, e.g.,* PLAINTIFF]'S MOTION TO SUBMIT TARDY EXPERT WITNESS INFORMATION BECAUSE THE _____ [ACTION *or* DEFENSE] OF THE OPPOSING PARTY WILL NOT BE PREJUDICED, THE INFORMATION WAS NOT TIMELY SUBMITTED DUE TO _____ [MISTAKE *and/or* INADVERTENCE *and/or* SURPRISE *and/or* NEGLECT], AND ALL THE OTHER CONDITIONS FOR SUBMITTING TARDY EXPERT WITNESS INFORMATION HAVE BEEN SATISFIED. IF THE MOTION IS GRANTED, THE COURT SHOULD IMPOSE A MONETARY SANCTION

AGAINST _____ [*name(s)*] BECAUSE THERE IS NO SHOWING THAT _____ [HE/SHE/IT *or* THEY] ACTED WITH SUBSTANTIAL JUSTIFICATION OR THAT OTHER CIRCUMSTANCES MAKE THE IMPOSITION OF THE SANCTION UNJUST.

A. Motion to Submit Tardy Expert Witness Information. On motion of any party who has failed to submit expert witness information on a date specified in a demand for that exchange, the court may grant leave to submit that information on a later date (*Code Civ. Proc. § 2034.710(a)*).

B. Tardy Submission Permitted to Cure Mistake, Surprise, or Excusable Neglect If No Prejudice to Opposing Party and Statutory Procedures Satisfied. The court shall grant leave to submit tardy expert witness information if it determines, after taking into account the extent to which the opposing party has relied on the absence of a list of expert witnesses, that any party opposing the motion will not be prejudiced in maintaining the party's action or defense on the merits, and that the moving party (1) failed to submit that information as a result of mistake, inadvertence, surprise, or excusable neglect, (2) sought that leave promptly after learning of the mistake, inadvertence, surprise, or excusable neglect, and (3) has promptly thereafter served a copy of the proposed expert witness information concerning the expert or the testimony, described in *Section 2034.260 of the Code of Civil Procedure*, on all other parties who have appeared in the action (*Code Civ. Proc. § 2034.720*).

C. Court Must Impose Monetary Sanction Absent Specified Findings. The court must impose a monetary sanction under *Code Civ. Proc. § 2023.010 et seq.* against any party, person, or attorney who unsuccessfully opposes a motion to submit tardy expert witness information, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust (*Code Civ. Proc. §§ 2023.030(a), 2034.730*).

[*Add points and authorities generally supporting the imposition of monetary sanctions (see, e.g., Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11).*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This form is for use by a party supporting a motion to submit tardy expert witness information [*see Code Civ. Proc. § 2034.710*]. For a form supporting the augmentation or amendment of expert witness information when the moving party initially submitted a timely list, see *§ 88.12*.

The motion should be made a sufficient time in advance of the time limit for the completion of discovery under *Code Civ. Proc. § 2024.010 et seq.* to permit the deposition of any expert to whom the motion relates to be taken within that time limit. However, under exceptional circumstances, the court may permit the motion to be made at a later time [*Code Civ. Proc. § 2034.710(b)*].

The motion must be accompanied by a declaration stating facts showing a reasonable and good-faith attempt at an informal resolution of the issues presented by the motion [*Code Civ. Proc. § 2034.710(c)*]. This form should also be combined with general points and authorities supporting the imposition of monetary sanctions under *Code Civ. Proc. § 2023.030(a)* [*see Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. In particular, facts showing lack of prejudice to the opposing party and facts showing that the moving party did not originally submit the information due to mistake, inadvertence, surprise, or excusable neglect should be set forth. Counsel should also demonstrate compliance with all the other conditions of *Code Civ. Proc. § 2034.720*, as set forth in Paragraph B. Counsel's factual showing should demonstrate substantial justification for the motion in order to avoid a monetary sanction if the motion is denied [*see Code Civ. Proc. § 2034.730*].

[c] Terms of Order

An order allowing tardy submission of expert witness information must be conditioned on the moving party making that expert available immediately for a deposition under *Code Civ. Proc. §§ 2034.410-2034.470*, and the order may include leave to any party opposing the motion to designate additional expert witnesses or to elicit additional opinions from those previously designated. In addition, the court may impose other conditions that are just including a continuance, and it may award costs and litigation expenses to the opposing party [*Code Civ. Proc. § 2034.720(d)*].

[d] Related Pleading and Practice Forms

For discussion and forms of motion relating to exchanges of expert witness information, see California Forms of Pleading and Practice, Ch. 198, *Discovery: Exchange of Expert Witness Information* (Matthew Bender).

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§ 88.14 Supporting Motion for Order for Relief When Party Makes Untimely Demand for Exchange of Expert Witnesses Information Through Mistake, Inadvertence, Surprise or Excusable Neglect [Code Civ. Proc. § 473(b)]

[1] FORM Supporting Motion for Order for Relief When Party Makes Untimely Demand for Exchange of Expert Witnesses Information Through Mistake, Inadvertence, Surprise or Excusable Neglect [Code Civ. Proc. § 473(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM OF POINTS
_____ [*name*],	)	AND AUTHORITIES IN
Plaintiff,	)	SUPPORT OF RELIEF FROM UNTIMELY DE-
vs.	)	MAND FOR EXCHANGE OF EXPERT WITNESS
_____ [*name*],	)	INFORMATION
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD GRANT _____ [*specify party, e.g.,* PLAINTIFF]'S MOTION FOR RELIEF AND _____ [*specify relief desired, e.g.,* SET ANOTHER DATE FOR THE EXCHANGE OF

WITNESS LISTS AND COMPEL DISCOVERY ON THAT DATE] BECAUSE _____ [*specify party, e.g.,* PLAINTIFF]'S FAILURE TO MAKE THE DEMAND FOR EXCHANGE OF EXPERT WITNESS LISTS IN A TIMELY FASHION WAS DUE TO _____ [MISTAKE *and/or* INADVERTENCE *and/or* SURPRISE *and/or* EXCUSABLE NEGLECT]. GOOD CAUSE FOR THE RELIEF REQUESTED EXISTS IN THAT _____ [*state facts that demonstrate good cause, e.g.,* PLAINTIFF MADE AN INFORMAL ATTEMPT TO CORRECT THE ERROR *and/or* NO PREJUDICE TO DEFENDANT RESULTED FROM THE ERROR].

A. Relief Pursuant to *Code of Civil Procedure Section 473* Is Available in Discovery Proceedings. A demand for discovery is a proceeding for which the court may order relief under *Code of Civil Procedure Section 473(b)* from the consequences taken against a party through his or her mistake, inadvertence, surprise, or excusable neglect, so long as the applicable discovery statute does not provide analogous relief. *Code of Civil Procedure Section 2034.210*, governing the date for the demand, does not specify any relief. *Code of Civil Procedure Section 2034.230(b)* permits the trial court to order an earlier or later date for the exchange of expert trial witness information, on motion and a showing of good cause. The trial court may therefore change the date of the exchange for good cause (*Zellerino v. Brown (1991) 235 Cal. App. 3d 1097, 1104-1109, 1 Cal. Rptr. 2d 222* (construing former Code Civ. Proc. § 2034).

[*Optional*] **B. Trial Court's Order Will Be Upheld If There Has Been No Abuse of Discretion.** An order granting relief from an untimely demand for exchange of expert trial witness information will be upheld when there is no abuse of discretion by the trial court. Accordingly, when the mistake by the demanding party is innocent, the steps taken to correct it are reasonable, and there is no prejudice to the other party, an order compelling the requested discovery for a later date is proper (*Zellerino v. Brown (1991) 235 Cal. App. 3d 1097, 1104-1109, 1 Cal. Rptr. 2d 222*).

[*Optional*] **C. Objection Is Not Proper Response to Untimely Demand for Exchange of Expert Witness Information.** A challenge to a demand for the exchange of expert witnesses information is properly made by filing a motion for a protective order. An objection is not the proper response to a defective demand, such as one that is untimely (*Zellerino v. Brown (1991) 235 Cal. App. 3d 1097, 1109-1112, 1 Cal. Rptr. 2d 222* ; *see Code Civ. Proc. § 2034.250*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This form is for use by a party in support of a motion for relief from an untimely demand for the exchange of expert witness information. The relief, in the form of a court order for an earlier or later date of exchange than originally requested, is based on *Code Civ. Proc. § 473(b)*. The party seeking such relief must show that the untimely demand was the result of mistake, inadvertence, surprise, or excusable neglect, and that there is good cause for the requested relief [*see Code Civ. Proc. §§ 473(b), 2034.230*].

The motion must be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an

informal resolution of the issues presented by the motion, that the moving party's error was innocent, and that the error did not cause prejudice to the opposing party [*Zellerino v. Brown (1991) 235 Cal. App. 3d 1097, 1109, 1 Cal. Rptr. 2d 222]* .

For additional memoranda of points and authorities regarding relief under *Code Civ. Proc. § 473*, see Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders* .

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. In particular, facts showing lack of prejudice to the opposing party, facts showing reasonable diligence on the part of the moving party, and facts showing that the moving party did not serve the demand in a timely fashion due to mistake, inadvertence, surprise, or excusable neglect should be set forth [*Zellerino v. Brown (1991) 235 Cal. App. 3d 1097, 1109, 1 Cal. Rptr. 2d 222]* .

[c] Related Pleading and Practice Forms

For discussion and forms of motion relating to exchanges of expert witness information, see California Forms of Pleading and Practice, Ch. 198, *Discovery: Exchange of Expert Witness Information* (Matthew Bender).

[3] Discussion of Authorities

[a] Relief Pursuant to Code of Civil Procedure Section 473 Is Available in Discovery Proceedings

In ***Zellerino v. Brown*** *(1991) 235 Cal. App. 3d 1097, 1 Cal. Rptr. 2d 222* , plaintiff brought a medical malpractice action based on treatment received while a prisoner. A trial date of January 8, 1990, was set at the trial setting conference of October 10, 1989. Based on its mistaken belief that the case was governed by the rules of a local Accelerated Civil Trial project, which required that a demand for exchange of expert witness lists be sent within 15 days of the mailing of notice of the trial setting conference, one defendant served a demand for exchange on October 6, 1989. After that defendant discovered his mistake, both defendants sought to resolve the matter informally by contacting plaintiff's attorney. When they were unable to get through, they spoke with his secretary who informed them that the exchange was calendared, and that the attorney would call them if he did not intend to make the disclosure. Instead, plaintiff filed an objection to the demand for exchange, citing former Code Civ. Proc. § 2034(a) (*now see Code Civ. Proc. § 2034.210*), which permits a demand to be served after the setting of the initial trial date, and claimed that the demand was premature. After defendants missed the last day to serve the demand, they filed a motion for relief from the mistake pursuant to former Code Civ. Proc. § 473 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*), and moved to compel the exchange of the expert witness information. Defendants claimed the only reason they did not file a timely demand was that they were lulled into believing that plaintiff had agreed to the exchange. Plaintiff opposed defendants' motion, claiming that they knew of the mistake and could have filed a timely motion, that *Code Civ. Proc. § 473* did not authorize relief, and that she would be prejudiced by the requested relief. The trial court found no prejudice to plaintiff, granted defendants the requested relief, and ordered an immediate exchange of expert witness information. Plaintiff refused to make disclosure, and at the mandatory settlement conference refused to say whether she had retained any experts. Plaintiff mailed her list of experts six days before trial, provided declarations for two of the 13 experts, and provided no reports or writings. On the day of trial, defendants moved to preclude plaintiff from introducing expert testimony on the ground she violated the court order. The trial court granted the motion and subsequently granted a nonsuit based on the deficient offer of proof due to no evidence of the standard of care. Plaintiff appealed.

The court of appeal affirmed. Under former Code Civ. Proc. § 473, 3rd Paragraph, a trial court may fashion relief from a judgment, order, or other proceeding taken against a party through his or her mistake, inadvertence, surprise, or excusable neglect. The court determined that a demand for exchange of expert trial witness information is a "proceeding" within the meaning of § 473. It was persuaded by the very broad construction given to that term in the

cases, which have held that a proceeding is any step or measure taken in a case by either the court or one of the parties. The court was also persuaded by the Legislature's use of language similar to § 473 in several sections of the Discovery Act that provide for relief, including former Code Civ. Proc. § 2034(k) (*now see Code Civ. Proc. § 2034.430(c)(2)*) (*235 Cal. App. 3d 1097, 1105-1107)* . It concluded that the Legislature intended to incorporate the principles of § 473 into those provisions of the Act that employ similar language. Relief under § 473 is unavailable if the Act provides analogous, if more limited relief. Since nothing in former Code Civ. Proc. § 2034 provides for relief from failure to file a timely demand, relief is available under *Code Civ. Proc. § 473*, and the trial court was authorized to grant relief under it (*235 Cal. App. 3d 1097, 1107)* .

[b] Trial Court's Order Will Be Upheld If There Has Been No Abuse of Discretion

The facts and procedural background of ***Zellerino v. Brown*** *(1991) 235 Cal. App. 3d 1097, 1 Cal. Rptr. 2d 222* are discussed in [a], *above*. To determine whether relief under former Code Civ. Proc. § 473 3rd Paragraph (*now see Code Civ. Proc. § 473(b)*) was properly granted, the court of appeal said it must apply the abuse of discretion standard. It said a motion for relief under § 473 could be granted in a discovery proceeding only if the facts satisfied the grounds for relief stated in the Discovery Act. It cited as an example former Code Civ. Proc. § 2034(c) (*now see Code Civ. Proc. § 2034.230*), which permits a court on a showing of good cause to order an earlier or later date of exchange of expert witnesses information than that otherwise specified (*235 Cal. App. 3d 1097, 1107-1108)* . Although former Code Civ. Proc. § 2034(a) (*now see Code Civ. Proc. § 2034.210*) permits a demand for exchange after the trial date is set, it does not state that an internally defective demand cannot be amended. The court accepted the premise that while there is no right to discovery if the demand is premature, if exceptional circumstances are shown, the court should be able to compel disclosure of opposing experts at any time by granting a protective order against use of their testimony at trial unless presently disclosed. The court held that good cause had been shown and that the trial court had not abused its discretion in ordering a later date of exchange than that specified in defendant's demand. In so ruling, the court observed that defendant's error in misapplying the local rule was innocent and the steps taken to correct it were reasonable. Counsel attempted to reach an informal accord, and when that failed, moved for relief from the mistake. Additionally, there was no prejudice to plaintiff. The court explained that prejudice does not mean an unfavorable result, it means an unfair resolution. The court also addressed the background of the case, noting that defendants had no idea what type of malpractice would be laimed at trial, which was set over five years from the date of the complaint. The court characterized plaintiff's failure to retain experts in a timely fashion as an arrogant disregard of the court system (*235 Cal. App. 3d 1097, 1108-1109)* .

[c] Objection Is Not Proper Response to Untimely Demand for Exchange of Expert Witness Information

The facts and procedural background of ***Zellerino v. Brown*** *(1991) 235 Cal. App. 3d 1097, 1 Cal. Rptr. 2d 222* are discussed in [a], *above*. In *Zellerino*, plaintiff filed an objection after defendant made an untimely demand for exchange of expert witness information. The court examined former Code Civ. Proc. § 2034(e) (*now see Code Civ. Proc. § 2034.250*), and concluded that its use of the word "may" does not mean that a protective order is only one of several avenues of protest to a demand for the exchange of expert witnesses information. Rather, a motion for a protective order is the sole method of challenging such a demand. An objection is an improper method of challenge. Thus, plaintiff's objection to defendant's clearly prematurely filed demand was improper (*235 Cal. App. 3d 1097, 1109-1112)* . The court went on to articulate several reasons why only a protective order is appropriate. First, the governing statute provides for a prompt motion for a protective order, but does not provide for the filing of an objection. If an objection were permitted, it could be filed at any time, which would interfere with the orderly flow of discovery. Second, an objection carries none of the procedural disincentives built into the protective order motion, such as a good faith effort to resolve the dispute and monetary sanctions for an unsuccessful position on the motion. Third, an objection consumes needless time, since it invites a motion to compel, unlike motions for protective orders which are self-executing. Fourth, a motion for a protective order, unlike an objection, permits the court broad authority to fashion particularized relief for each individual case, which expedites discovery. Fifth, many other procedures in the Discovery Act specifically authorize objections, and its exclusion from the demand for exchange is probably intentional. Sixth, it is commonly

understood that a motion for a protective order is the only proper challenge to a demand (*235 Cal. App. 3d 1097, 1110-1112)* .

[4] Additional Authorities

[a] Relief Pursuant to Code of Civil Procedure Section 473 Is Available in Discovery Proceedings

In *Gotschall v. Daley (2002) 96 Cal. App. 4th 479, 116 Cal. Rptr. 2d 882* , plaintiff brought an action against defendant homeowner for assault, battery, and conspiracy. Plaintiff's attorney did not name treating physicians who would give opinion testimony as experts in the expert witness disclosure. The trial court held that this lack of specificity constituted an improper disclosure of expert witnesses under former Code Civ. Proc. § 2034 (*now see Code Civ. Proc. § 2034.010 et seq.*). Accordingly, the trial court dismissed the case for lack of proof of causation. Plaintiff moved to vacate the dismissal based on the mandatory provision of *Code Civ. Proc. § 473(b)*, dealing with attorney errors leading to dismissal or default, and to augment the expert witness list to include a witness who would establish causation. Plaintiff argued that counsel mistakenly believed it was unnecessary to name treating physicians who would give expert opinion testimony in the expert witness disclosure. Plaintiff asserted this was a valid mistake of law, which caused him to lose his day in court, as his case was dismissed prior to adjudication on the merits. The trial court granted both motions and ordered a new trial. Defendant appealed.

The court of appeal reversed. The court held that the mandatory provision of *Code Civ. Proc. § 473(b)* applies only to those situations in which the attorney's mistake causes a total failure to oppose a dismissal motion or a failure to appear (*96 Cal. App. 4th 479, 484)* . The court observed that applying *Code Civ. Proc. § 473(b)* to this case, in which counsel simply failed to present evidence of causation properly, would allow plaintiffs to circumvent the expert witness disclosure requirements, knowing any resulting dismissal could be undone. Such an approach would be contrary to public policy considerations and would provide attorneys with a "perfect escape hatch" for any and all tactical errors and mistaken judgments (*96 Cal. App. 4th 479, 484-485)* .

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PART II. FORMS
A. Motions Relating to Expert Witness Exchange Procedure

8-88 California Points & Authorities §§ 88.15through 88.19

[Reserved]

§§ 88.15[Reserved]

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8-88 California Points & Authorities § 88.20

§ 88.20 Opposing Motion to Compel Discovery--Discovery of Writings and Reports of Expert Witness Improper Under Specified Conditions [Code Civ. Proc. §§ 2034.210, 2034.270]

[1] FORM Opposing Motion to Compel Discovery--Discovery of Writings and Reports of Expert Witness Improper Under Specified Conditions [Code Civ. Proc. §§ 2034.210, 2034.270]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO COMPEL DISCOVERY OF EXPERT'S REPORTS AND WRITINGS
vs.	)	
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

DISCOVERY OF THE EXPERT WITNESS REPORTS AND WRITINGS OF _____ [*name*] SHOULD NOT BE COMPELLED BECAUSE _____ [THE EXPERT IS NOT A PARTY, AN EMPLOYEE OF A PARTY, OR RETAINED IN ANTICIPATION OF LITIGATION OR FOR TRIAL PREPARATION *and/or* THE EXPERT HAS NOT BEEN DESIGNATED AS A TRIAL WITNESS *and/or* THE REPORTS AND WRITINGS ARE NOT RELEVANT TO THE SUBJECT MATTER OF THE ACTION].

[*EITHER*]

A. Discovery of Expert's Reports and Writings Not Available Under Exchange Procedure If Expert Not Party, Employee of Party, or Not Retained for Trial Preparation or in Anticipation of Litigation. Reports and writings of an expert who is not a party, an employee of a party, or who has not been retained by a party for the purpose of forming and expressing an opinion in anticipation of the litigation or in preparation for the trial of the action, are not discoverable (*Code Civ. Proc. §§ 2034.210(b), 2034.270*).

[*AND/OR*]

B. Discovery of Expert's Reports and Writings Not Available Under Exchange Procedure If Expert Not Designated as Trial Witness. Discovery of an expert's reports and writings is not available under the expert reports exchange procedure unless the expert has been designated as a trial witness (*Code Civ. Proc. § 2034.210(a)*).

[*AND/OR*]

C. Discovery of Expert's Reports and Writings That Are Not Relevant Is Not Permitted. Reports and writings of expert witnesses are not subject to discovery if they are not relevant to the subject matter of the litigation (*Code Civ. Proc. §§ 2017.010, 2034.210(c), 2034.270*; see *National Steel Products Co. v. Superior Court (1985) 164 Cal. App. 3d 476, 492, 210 Cal. Rptr. 535*).

[*Combine the foregoing points and authorities, when appropriate, with points and authorities opposing discovery on the grounds of irrelevance (see, e.g., Ch. 83, Discovery: General Scope, Regulation, and Timing, § 80.40), and opposing a motion to compel a particular discovery method (see, e.g., Ch. 83, Discovery: Depositions, §§ 83.45, 84.50 (opposing motion to compel deposition).*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This form is for use by a party seeking to oppose discovery of the writings and reports of an expert witness when the opposing party is seeking discovery under the expert reports exchange procedure of *Code Civ. Proc. § 2034.010 et seq.* Normally, such a motion will arise after a party has attempted to depose an expert under the general deposition procedures of *Code Civ. Proc. §§ 2025.010 et seq.*-2028.010 et seq., which are incorporated by reference in *Code Civ. Proc. § 2034.410*. For a form that may be used in opposition to a motion to compel discovery on the ground that designation of a party as an expert trial witness is not itself an implied waiver of the privilege, if the designation is withdrawn before the party discloses a significant part of a privileged communication, or before it is known with

reasonable certainty that the party will actually testify as an expert, refer to Ch. 81, *Discovery: Privileges and Other Discovery Limitations*, § 81.90. For a discussion and forms relating to depositions generally, which may be used in conjunction with this form, see Ch. 83, *Discovery: Depositions* .

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case.

[3] Discussion of Authorities

[a] Discovery of Expert's Reports and Writings That Are Not Relevant Is Not Permitted

In ***National Steel Products Co. v. Superior Court*** *(1985) 164 Cal. App. 3d 476, 210 Cal. Rptr. 535* , plaintiff brought suit against a steel manufacturer, alleging that the manufacturer had supplied defective components for plaintiff's metal building. After the parties exchanged expert witness lists, plaintiff brought a motion to discover the reports of one of defendant's designated experts concerning a report the expert had prepared in connection with prior litigation against the defendant. After the trial court granted plaintiff's motion for discovery of the report, defendant petitioned the court of appeal for a writ of mandate prohibiting the discovery.

The court of appeal issued a writ of mandate directing the trial court to conduct an *in camera* inspection of the expert's report to determine its relevance. In so doing the court noted the broad discretion of the trial court in determining the issue of relevance (*164 Cal. App. 3d 476, 492-493)* .

Note that *National Steel* construed law in effect prior to the operative date of the Civil Discovery Act of 1986. It is cited and discussed as persuasive authority to the extent that it remains consistent with current provisions.

[4] Additional Authorities

[a] Discovery of Expert's Reports and Writings Not Available Under Exchange Procedure If Expert Not Designated as Trial Witness

In *Fairfax v. Lords (2006) 138 Cal. App. 4th 1019, 41 Cal. Rptr. 3d 850* , a medical malpractice action, plaintiff appealed the trial court's decision permitting defendant physician to delay his designation of retained expert witnesses unilaterally under former Code Civ. Proc. § 2034 (*now see Code Civ. Proc. § 2034.210(a)*), until 20 days after the patient had designated his own expert. Defendant's initial list did not include "a single name" of any witness he expected to call. However, once defendant saw that plaintiff's expert list included one retained witness, defendant responded with his own "rebuttal" list of two retained experts.

The court of appeal concluded that § 2034 (*now see* § 2034.210(a)) expressly contemplated a mutual and simultaneous exchange by all parties of a list containing the name and address of any natural person whose expert opinion any party expected to offer in evidence at the trial. In light of this "clear statutory requirement of a 'simultaneous' exchange," defendant had no right to simply delay his designation of retained experts until after he had the opportunity to view the designation timely served by plaintiff (*138 Cal. App. 4th 1019, 1027*). Moreover, the trial court's error was prejudicial because defendant's belated designation of retained experts likely had an impact on the verdict (*138 Cal. App. 4th 1019, 1028*).

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8-88 California Points & Authorities § 88.21

§ 88.21 Opposing Motion for Order Setting Compensation of Expert Witness--Reasonable and Customary Fee for Testimony by Expert Witness Is Not Limited by Fee Charged Retaining Party for Nontestimonial Services [Code Civ. Proc. § 2034.470]

[1] FORM Opposing Motion for Order Setting Compensation of Expert Witness--Reasonable and Customary Fee for Testimony by Expert Witness Is Not Limited by Fee Charged Retaining Party for Nontestimonial Services [Code Civ. Proc. § 2034.470]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN OPPOSITION TO MOTION FOR ORDER
vs.	)	SETTING COMPENSATION OF EXPERT WIT-
_____ [*name*],	)	NESS
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

NO ORDER SETTING THE COMPENSATION OF _____ [*name*], AN EXPERT WITNESS, IS NECESSARY BECAUSE THE FEE HE/SHE IS CHARGING _____ [*name of opposing party*] FOR

TESTIFYING AT THE DEPOSITION IS THE SAME FEE HE/SHE WOULD CHARGE _____ [*name of retaining party*] FOR RENDERING TESTIMONIAL SERVICES. IF THE MOTION FOR THE ORDER IS NOT GRANTED, THE COURT SHOULD IMPOSE A MONETARY SANCTION AGAINST _____ [*name(s)*] BECAUSE THERE IS NO SHOWING THAT HE/SHE/IT/THEY ACTED WITH SUBSTANTIAL JUSTIFICATION OR THAT OTHER CIRCUMSTANCES MAKE THE IMPOSITION OF THE SANCTION UNJUST.

Fee Charged for Deposition Testimony of Expert Witness May Exceed Fee Charged Retaining Party for Consultative Services by That Expert. The party taking the deposition of an expert witness for the opposing party must pay the expert his or her regular fee for testimonial services even when that fee exceeds the fee for consultative services, so long as that fee is reasonable and does not exceed the fee the expert would charge the retaining party for testimonial services (*Code Civ. Proc. § 2034.430*; *Rancho Bernardo Development Co. v. Superior Court (1992) 2 Cal. App. 4th 358, 363, 2 Cal. Rptr. 2d 878*).

[*Add points and authorities generally supporting the imposition of monetary sanctions (see, e.g., Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11).*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This form is for use by a party who has retained an expert witness who is deposed by the opposing party in opposing a motion for an order setting the compensation of that expert. It is for use when the opposing party seeks to limit the fee to the rate charged the retaining party for nontestimonial services, such as investigative work or technical consultation.

A daily fee may only be charged for a full day of attendance at a deposition, or when the expert was required by the deposing party to be available for a full day and the expert necessarily had to forego all business he or she would have otherwise conducted that day but for the request that he or she be available all day for the scheduled deposition [*Code Civ. Proc. § 2034.430*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case.

[3] Discussion of Authorities

[a] Fee Charged for Deposition Testimony of Expert Witness May Exceed Fee Charged Retaining Party for Consultative Services by That Expert

In ***Rancho Bernardo Development Co. v. Superior Court*** *(1992) 2 Cal. App. 4th 358, 2 Cal. Rptr. 2d 878* , an action by a condominium homeowners' association against developers and builders for alleged construction defects, plaintiff

retained the services of an architect who charged $200 per hour for ordinary services and technical consultation and $250 per hour for depositions and court appearances. When deposed by defendants, the architect charged them $250 per hour. After plaintiff and the architect refused to accept the lower rate of $200 per hour offered by defendants, defendants moved for relief from the requested fee. The trial court denied the motion. Defendants' petitioned for a writ of mandate.

The court of appeal denied the petition. The court observed that it is customary for experts to establish a multitiered fee schedule in which more is charged for testimonial services than for investigative or consultative work. The higher rate for testimonial service is justified by the fact that it is a more stressful, and a more valuable, type of service than nontestimonial services (*2 Cal. App. 4th 358, 362)* . The court found that nothing in former Code Civ. Proc. § 2034(i)(2) (*now see Code Civ. Proc. § 2034.430*), which sets forth the payment of the opposing party's expert witness, precludes the use of variable fee schedules or indicates that the fee for deposition services is limited to the lower fee charged for nontestimonial services (*2 Cal. App. 4th 358, 362-363)* . It explained that the entire focus of former section 2034(i)(2) is the deposing of an opposing party's expert witness. The fee provision means that payment must be at the rate charged by the expert for deposition testimony. The limitation that the fee not exceed the fee charged the retaining party must be read with the presumption that the Legislature knew that experts customarily charge more for testimonial services (*2 Cal. App. 4th 358, 363)* . Thus, an expert may charge more for testifying at the opposing party's deposition than it charged the retaining party for nontestimonial services, so long as the rate charged is the same it would charge the retaining party for testimonial services (*2 Cal. App. 4th 358, 361-363)* .

The court noted that it was not considering whether the fee the architect had charged for his deposition testimony was reasonable (*2 Cal. App. 4th 358, 362)* . It held only that the fee charged an opposing party for deposition testimony could not exceed the fee charged the retaining party for testimonial services, and that such fee in any case must be reasonable (*2 Cal. App. 4th 358, 362-363)* .

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8-88 California Points & Authorities § 88.22

§ 88.22 Opposing Motion For Payment of Opponent's Treating Physician's Deposition Fees As Costs Under Code of Civil Procedure Section 1033.5(a)(7)--Treating Physician's Fees Must Be Paid Under Code of Civil Procedure Section 2034.430

[1] FORM Opposing Motion For Payment of Opponent's Treating Physician's Deposition Fees As Costs Under Code of Civil Procedure Section 1033.5(a)(7)--Treating Physician's Fees Must Be Paid Under Code of Civil Procedure Section 2034.430

[*Caption. See § 88.21[1].*]

TREATING PHYSICIAN'S DEPOSITION FEES MUST BE PAID UNDER CODE OF CIVIL PROCEDURE SECTION 2034.430

A. Witness Fees Incurred in Deposing Opponent's Treating Physicians Are Not Recoverable As Costs Under *Code of Civil Procedure Section 1033.5(a)(7)*. Witness fees incurred in deposing an opponent's treating physicians are not costs recoverable under *Code of Civil Procedure Section 1033.5(a)(7)* by the prevailing party because fees paid to physicians are not ordinary witness fees. Deposition fees paid to an opponent's treating physician are recoverable as costs under *Code of Civil Procedure Section 1033.5(a)(8)* only if the expert was ordered by the court (*Baker-Hoey v. Lockheed Martin Corp. (2003) 111 Cal. App. 4th 592, 595-596, 3 Cal. Rptr. 3d 593*).

B. Treating Physician's Deposition Fees Must Be Paid Under *Code of Civil Procedure Section 2034.430*. A treating physician's reasonable and customary hourly or daily fees must be paid by the opposing party under *Code of Civil Procedure Section 2034.430* in order to take the treating physician's deposition (*Code of Civil Procedure Section 2034.430*; *Baker-Hoey v. Lockheed Martin Corp. (2003) 111 Cal. App. 4th 592, 600, 3 Cal. Rptr. 3d 593* (construing former Code Civ. Proc. § 2034(i)(2)).

[2] Comments

[a] Use of Form

This form of points and authorities may be used to oppose a motion for an order providing for the payment of witness fees incurred in deposing an opponent's treating physicians as costs recoverable under *Code Civ. Proc. § 1033.5(a)(7)* by the prevailing party, when the expert was not ordered by the court.

Code Civ. Proc. § 1033.5(a)(7) provides that prevailing party in tort litigation may recover as costs the ordinary witness fees (as defined in *Gov. Code § 68093* and *Code Civ. Proc. § 1986.5*) incurred in deposing a witness. *Code Civ. Proc. § 1033.5(a)(8)* allows payment of fees of expert witnesses ordered by the court. Under *Code Civ. Proc. § 2034.430*, the treating physician is entitled to be paid "the expert's reasonable and customary hourly or daily fee for any time spent at the deposition."

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case.

[c] Related Pleading and Practice Forms

For discussion and forms of motion relating to exchanges of expert witness information, see California Forms of Pleading and Practice, Ch. 198, *Discovery: Exchange of Expert Witness Information* (Matthew Bender).

[3] Discussion of Authorities

[a] Witness Fees Incurred in Deposing Opponent's Treating Physicians Are Not Recoverable As Costs Under Code of Civil Procedure Section 1033.5(a)(7)

In ***Baker-Hoey v. Lockheed Martin Corp.*** *(2003) 111 Cal. App. 4th 592, 3 Cal. Rptr. 3d 593* , residents brought a class action against a corporation that had allegedly discharged dangerous chemicals and contaminated the city's groundwater. Following denial of class certification and grant of corporation's motion for summary judgment against eight residents based on statute of limitations, defendant corporation brought a motion to tax costs, including costs for taking depositions of the residents' treating physicians. The trial court ruled that defendant could not recover the full costs of taking the deposition of the treating physicians for each of the eight plaintiffs. Defendant appealed, contending, among other things, that the trial court erred in allowing only $35 a day under *Gov. Code § 68093*. That statute provides: "Except as otherwise provided by law, witness' fees for each day's actual attendance, when legally required to attend a civil action or proceeding in the superior courts, are thirty-five dollars ($35) a day and mileage actually traveled, both ways, twenty cents ($0.20) a mile."

On appeal, defendant invoked the "otherwise provided by law" clause and argued that the witness fees for depositions of treating physicians is otherwise provided in former Code Civ. Proc. § 2034(i)(2) (*now see Code Civ. Proc. § 2034.430*). Under that subdivision, the treating physician is entitled to be paid "the expert's reasonable and customary hourly or daily fee for any time spent at the deposition." Since former Code Civ. Proc. § 2034(i)(2) sets ordinary witness fees for treating physicians at the amounts defendant was required to pay to depose them, it therefore follows that those fees are recoverable as costs under *Code Civ. Proc. § 1033.5(a)(7)*, because the ordinary witness fee for a treating physician is statutorily set as the physician's ordinary witness fee (*111 Cal. App. 4th 592, 598-599)* .

The court of appeal rejected defendant's argument for two reasons. First, not all costs required to be paid by the prevailing party are recoverable costs under *Code Civ. Proc. §§ 1032* and *1033.5*. Second, *Code Civ. Proc. § 1033.5(b)(1)* specifically disallows expert fees as costs unless the court has ordered the fees to be incurred. Moreover, the introductory clause of *Gov. Code § 68093* refers to fees which are recoverable costs under other statutes. former Code Civ. Proc. § 2034(i)(2) only requires the person taking the treating physician's deposition to pay the physician's reasonable and customary hourly or daily fee in order to take the deposition; it does not provide that the fee is a recoverable cost (*111 Cal. App. 4th 592, 599-600)* . In sum, "[o]nly those costs which are specified in the statute are allowable as a matter of right under section 1033.5, subdivision (a). Under section 1033.5, subdivision (a)(8), the fees or

expert witness fees ordered by the court are recoverable. The corollary, provided by section 1033.5, subdivision (b)(1), is that fees of experts not ordered by the court are not recoverable in the absence of a specific authorizing statute. "We find that section 2034, subdivision (i)(2) is not such a statute" (*111 Cal. App. 4th 592, 600)* . Accordingly, absent statutory authority making the costs incurred in deposing treating physicians recoverable by the prevailing party, the trial court correctly concluded that those costs are not recoverable (*111 Cal. App. 4th 592, 602)* .

[b] Treating Physician's Deposition Fees Must Be Paid Under Code of Civil Procedure Section 2034.430

The facts and procedural background of ***Baker-Hoey v. Lockheed Martin Corp.*** *(2003) 111 Cal. App. 4th 592, 3 Cal. Rptr. 3d 593* are discussed in [a], *above*. There, treating physicians' fees that defendant corporation had to pay under former Code Civ. Proc. § 2034(i)(2) (*now see Code Civ. Proc. § 2034.430*) when deposing the physicians in connection with plaintiff residents' claims against the corporation for groundwater contamination were not recoverable as costs under *Code Civ. Proc. § 1033.5,* although the corporation was prevailing party at trial. Recovery was not available under *Code Civ. Proc. § 1033.5(a)(8)* because the physicians were not court-ordered experts. Recovery was also unavailable under *Code Civ. Proc. § 1033.5(a)(7)* because the fees paid to physicians were not ordinary witness fees. Accordingly, a treating physician's reasonable and customary hourly or daily fees must be paid by the opposing party under former Code Civ. Proc. § 2034(i)(2) in order to take the treating physician's deposition (*111 Cal. App. 4th 592, 597-600)* .

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 88 DISCOVERY: EXCHANGE OF EXPERT WITNESS INFORMATION
PART II. FORMS
A. Motions Relating to Expert Witness Exchange Procedure

8-88 California Points & Authorities § 88.23

§ 88.23 Opposing Motion for Protective Order--Timely Demand for Exchange of Expert Witness Information After Action Reset for Trial Following Mistrial [Code Civ. Proc. § 2034.220]

[1] FORM Opposing Motion for Protective Order--Timely Demand for Exchange of Expert Witness Information After Action Reset for Trial Following Mistrial [Code Civ. Proc. § 2034.220]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR PROTECTIVE ORDER RE EXPERT WITNESS EXCHANGE AFTER ACTION RESET FOR TRIAL
vs.	)	
_____ [*name*],	)	
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

THE COURT SHOULD NOT GRANT _____ [*specify moving party, e.g.,* DEFENDANT]'S MOTION FOR A PROTECTIVE ORDER BECAUSE _____ [*specify party opposing, e.g.,* PLAINTIFF]'S SECOND DEMAND FOR EXCHANGE OF EXPERT WITNESS INFORMATION WAS TIMELY BECAUSE IT WAS SERVED MORE THAN 70 DAYS BEFORE THE SECOND TRIAL DATE AFTER THE ACTION WAS RESET FOR TRIAL FOLLOWING THE DECLARATION OF A MISTRIAL.

Demand Served More Than 70 Days Before Second Trial Date Is Timely. When an action is reset for trial after a mistrial, a party's second demand for the exchange of expert witness information, served more than 70 days before the second trial date, is timely under *Code of Civil Procedure Section 2034.220* (*Beverly Hospital v. Superior Court (1993) 19 Cal. App. 4th 1289, 1292-1296, 24 Cal. Rptr. 2d 238* ; *see Fairmont Ins. Co. v. Superior Court (2000) 22 Cal. 4th 245, 247*).

[2] Comments

[a] Use of Form

This form is for use by a party seeking to oppose an adverse party's motion for a protective order when the adverse party argues that the party's demand for exchange of expert witness information is untimely following the setting of a second trial date for the action after a mistrial was declared at the conclusion of the first trial.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case.

[3] Discussion of Authorities

[a] Demand Served More Than 70 Days Before Second Trial Date Is Timely

In ***Beverly Hospital v. Superior Court*** *(1993) 19 Cal. App. 4th 1289, 24 Cal. Rptr. 2d 238* , the parties engaged in a timely exchange of information concerning expert witnesses pursuant to former Code Civ. Proc. § 2034. The case was tried before a jury, which was unable to reach a verdict, and, therefore, the court declared a mistrial. The case was reset for trial, and plaintiff served defendants with a new demand for exchange of expert witness information. Defendants moved for a protective order, arguing that the 70-day time limit of former Code Civ. Proc. § 2034(b) (*now see Code Civ. Proc. § 2034.220*) (party must demand disclosure of expert witnesses no later than 10 days after initial trial date has been set or 70 days before that trial date, whichever is closer to trial date) was required to be calculated with reference to the original trial date, and that plaintiff's demand, served five months later, was untimely. Defendants contended that although an action can have more than one trial, it can only have one "initial trial date," and that is the first trial date set in the action. The trial court denied the motion, and defendants petitioned for a writ of mandate.

The court of appeal denied defendants' petition, holding that plaintiff's second demand was timely under former Code Civ. Proc. § 2034(b) in that it was served more than 70 days before the second trial date. The court found that the legislative history of former § 2034 indicates that the phrase "initial trial date" was intended to prevent litigants from extending discovery by obtaining continuances. The legislative history does not reflect an intent to prohibit additional discovery following a mistrial, order granting a new trial, or a reversal on appeal. Allowing additional discovery in these cases is consistent with the overall purpose of the discovery rules, which is to facilitate trial preparation, expedite trial, and encourage settlement (*19 Cal. App. 4th 1289, 1292-1296)* .

In ***Fairmont Ins. Co. v. Superior Court*** *(2000) 22 Cal. 4th 245* , the Supreme Court approved and adopted the construction given to former Code Civ. Proc. § 2024(a) (*now see Code Civ. Proc. § 2024.020*) by the court of appeal in *Beverly Hospital, above*, holding that, in a new trial following mistrial, grant of a new trial, or retrial after a reversal on appeal, the time limits for completing discovery under former Code Civ. Proc. § 2024(a) (*now see Code Civ. Proc. § 2024.020*) are determined by reference to the date initially set for the *new* trial, not the date initially set for the original trial (*22 Cal. 4th 245, 247, 249*).

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[Reserved]

§§ 88.24[Reserved]

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8-88 California Points & Authorities § 88.30

§ 88.30 Supporting Contention That Expert Be Permitted to Testify--Exception to General Rule Barring Testimony of Undisclosed Expert [Code Civ. Proc. § 2034.310]

[1] FORM Supporting Contention That Expert Be Permitted to Testify--Exception to General Rule Barring Testimony of Undisclosed Expert [Code Civ. Proc. § 2034.310]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

_____ [*Name*], AN UNDISCLOSED EXPERT WITNESS, _____ [MAY BE *or* SHOULD HAVE BEEN] ALLOWED TO TESTIFY BECAUSE _____ [HE/SHE WAS DESIGNATED AS AN EXPERT AND SUBSEQUENTLY DEPOSED BY ANOTHER PARTY *or* HE/SHE IS ONLY BEING CALLED AS A REBUTTAL WITNESS].

[*EITHER*]

Undisclosed Expert Who Was Designated by Another Party and Deposed May Testify. A party may call as a witness an expert who was not listed on that party's expert witness list if the expert was designated by another party and was subsequently deposed by the party calling the expert as a witness (*Code Civ. Proc. § 2034.310(a)*; *Powell v. Superior Court (1989) 211 Cal. App. 3d 441, 443, 259 Cal. Rptr. 390*).

[*OR*]

Undisclosed Expert May Testify to Impeach Testimony of Opposing Party's Expert. A party may call as a witness an expert who was not listed on that party's expert witness list if the expert is called as a witness to impeach the testimony of an expert witness offered by any other party at the trial (*Code Civ. Proc. § 2034.310(b)*).

[2] Comments

[a] Use of Form

This form is for use when the parties to an action have exchanged lists of experts pursuant to *Code Civ. Proc. § 2034.010 et seq.* It supports the contention of a party that an undisclosed expert witness may be called to testify, or should have been allowed to testify. The form contains points and authorities which apply when the contending party wishes to assert the right to call an expert witness under an exception to the general rule of *Code Civ. Proc. § 2034.300*, which prohibits a party from introducing the testimony of an expert witness if the party has failed to list the expert.

It should be noted that when an undesignated expert is called to impeach the testimony of another expert witness, that impeachment may include testimony about the falsity or nonexistence of any fact used as the foundation for any opinion by the other expert witness, but may not include testimony that contradicts the opinion [*Code Civ. Proc. § 2034.310(b)*]. For further discussion of this issue, see *§ 88.41*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 88.40* and *88.41* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Undisclosed Expert Who Was Designated by Another Party and Deposed May Testify

Powell v. Superior Court *(1989) 211 Cal. App. 3d 441, 259 Cal. Rptr. 390* was a civil action in which defendant hospital disclosed two witnesses, including a physician who had performed a defense medical examination of plaintiff. Plaintiff disclosed nine expert witnesses, and stated she would subpoena and call the defense's examining physician, but did not formally disclose him as an expert witness. After plaintiff deposed the physician pursuant to former Code Civ. Proc. § 2034(i) (*now see Code Civ. Proc. §§ 2034.410-2034.470*), defendant moved for a protective order to prevent her from calling the physician as a witness. The trial court granted the order, finding that plaintiff failed to comply with the disclosure requirements of former Code Civ. Proc. § 2034 (*now see Code Civ. Proc. § 2034.010 et seq.*), and was barred from presenting the physician's expert opinion. Plaintiff petitioned for extraordinary relief.

The court of appeal issued a peremptory writ of mandate directing the trial court to vacate its protective order. The court found that former Code Civ. Proc. § 2034(m) (*now see Code Civ. Proc. § 2034.310*) clearly authorized plaintiff to call the physician as an expert witness (*211 Cal. App. 3d 441, 443)* . In responding to an argument by defendant, the court went on to observe that former Code Civ. Proc. § 2034(m) does not restrict its permission to experts who are not called by the disclosing party or to when coparties agree to share an expert and the disclosing coparty leaves the case (*211 Cal. App. 3d 441, 445)* .

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8-88 California Points & Authorities § 88.31

§ 88.31 Supporting Contention That Expert Be Permitted to Testify--Sufficient Compliance With Requirements of Code Civ. Proc. § 2034.010 et seq. or Additional Procedures Available

[1] FORM Supporting Contention That Expert Be Permitted to Testify--Sufficient Compliance With Requirements of Code Civ. Proc. § 2034.010 et seq. or Additional Procedures Available

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Name*], AN EXPERT WITNESS, _____ [MAY BE *or* SHOULD HAVE BEEN] ALLOWED TO TESTIFY BECAUSE _____ [THERE WAS SUFFICIENT COMPLIANCE WITH THE REQUIREMENTS OF CODE OF CIVIL PROCEDURE SECTION 2034.010 et seq.*or specify other ground*].

[*EITHER*]

A. Expert Witness List Providing Brief Statement of General Substance of Expert's Opinion Is Sufficient. The declaration required in an expert witness list by *Code of Civil Procedure Section 2034.260(c)(2)*, concerning the general substance of the testimony an expert is expected to give, is not insufficient for failing to disclose specific facts and opinions (*see Code Civ. Proc. § 2034.300(b)*; *Williams v. Volkswagenwerk Aktiengesellschaft (1986) 180 Cal. App. 3d 1244, 1257, 226 Cal. Rptr. 306* (construing former Code Civ. Proc. § 2034(f)(2)(B)).

[*AND/OR*]

B. Exclusion of Expert Testimony Is Not Mandatory When Failure to Comply With Statutory Requirements Is Not "Unreasonable." *Code of Civil Procedure Section 2034.300* requires exclusion of the expert opinion of a witness only if the party offering the witness has "unreasonably" failed to fulfill the requirements of the statute (*Stanchfield v. Hamer Toyota, Inc. (1995) 37 Cal. App. 4th 1495, 1503-1504, 44 Cal. Rptr. 2d 565* (construing former Code Civ. Proc.

§ 2034(j)).

[*AND/OR*]

C. Expert May Testify Regarding Undisclosed Substance If Opposing Counsel Refuses Court's Offer of Recess to Depose Expert. If a party has called an expert witness to testify concerning a matter that is beyond the scope of the party's statement of general substance of the expert's proposed testimony, and the court offers to recess the trial in order for the opposing counsel to depose the expert, but counsel refuses to accept the offer, no prejudice will be found (*see Whitehill v. United States Lines, Inc. (1986) 177 Cal. App. 3d 1201, 1210, 223 Cal. Rptr. 452*).

[2] Comments

[a] Use of Form

This form is for use when the parties to an action have exchanged lists of experts pursuant to *Code Civ. Proc. § 2034.010 et seq.* It supports the contention of a party that an expert witness may be called to testify, or should have been allowed to testify, because either the contending party sufficiently complied with the requirements of *Code Civ. Proc. § 2034.300* or, although compliance was deficient, the ultimate sanction of barring testimony should not be, or should not have been, applied. *Code Civ. Proc. § 2034.300* prohibits a party from introducing the testimony of an expert witness if the party has unreasonably failed to (1) list that witness as an expert under *Code Civ. Proc. § 2034.260, (2)* submit an expert witness declaration, (3) produce reports and writings of expert witnesses as required by *Code Civ. Proc. § 2034.270*, or *(4)* make that expert available for a deposition under *Code Civ. Proc. §§ 2034.410-2034.470*.

Note that some cases cited in this form construe law in effect prior to the operative date of the Civil Discovery Act of 1986. They are cited and discussed as persuasive authority to the extent that they remain consistent with current provisions.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 88.40* may be used to oppose the contention supported by the foregoing points and authorities.

[3] Discussion of Authorities

[a] Expert Witness List Providing Brief Statement of General Substance of Expert's Opinion Is Sufficient

Code Civ. Proc. § 2034.300 provides that unless a party has moved to augment or add information to his or her expert witness list under *Code Civ. Proc. §§ 2034.610-2034.630* or *2034.710-2034.730* or unless one of the limited exceptions of *Code Civ. Proc. § 2034.310* applies, the trial court must exclude from evidence the expert opinion of any expert that is offered by any party who unreasonably has failed to submit an expert witness declaration. *Code Civ. Proc. § 2034.260(c)(2)* provides that if any witness on the list is an expert described in *Code Civ. Proc. § 2034.210(b)* (party, employee of party, or expert retained in anticipation of litigation or for trial preparation), the exchange must also include or be accompanied by an expert witness declaration signed by that party's attorney. This declaration must contain a brief narrative statement of the general substance of the testimony that the expert is expected to give.

In ***Williams v. Volkswagenwerk Aktiengesellschaft*** *(1986) 180 Cal. App. 3d 1244, 226 Cal. Rptr. 306* , plaintiff, who

was injured in an automobile accident, brought an action against the automobile manufacturer, the distributor, and the dealer. The parties engaged in an expert witness exchange pursuant to former Code Civ. Proc. §§ 2037-2037.6 (*now see Code Civ. Proc. § 2034.010 et seq.*). After plaintiff prevailed at trial, defendant appealed, contending that plaintiff's experts had testified concerning matters outside the scope of the statement of general substance of the testimony that the experts were expected to give as found in plaintiff's witness list.

The court of appeal affirmed, holding that plaintiff's declaration concerning the general substance of one of her expert's testimony was sufficient when it stated: "[Name of expert] is expected to testify regarding metallurgical issues concerning the trailing arm in question and cause of accident herein" (*180 Cal. App. 3d 1244, 1258 n.5*). In so holding, the court noted that specific facts and opinions are not required (*180 Cal. App. 3d 1244, 1257)* . The clear implication of *Williams* is that a short statement of the general issue on which the expert will testify is sufficient.

[b] Exclusion of Expert Testimony Is Not Mandatory When Failure to Comply With Statutory Requirements Is Not "Unreasonable"

In ***Stanchfield v. Hamer Toyota, Inc.*** *(1995) 37 Cal. App. 4th 1495, 44 Cal. Rptr. 2d 565* , plaintiff sought damages for breach of an employment agreement and specific performance of a stock purchase agreement. The defendant declared that its damages expert would be prepared for deposition after review of the conclusions and opinions reached by plaintiff's expert witness. Plaintiff's expert was deposed in the morning and, that afternoon, at the deposition of defendant's expert, the expert testified that he needed more time to develop his opinions. Plaintiff never requested a follow-up deposition. When defendant's expert was about to take the stand, plaintiff moved to exclude the expert's testimony, which the trial court denied.

The court of appeal affirmed, holding that the trial court must exclude the expert opinion of a witness only if the party offering the witness has *unreasonably* failed to fulfill the requirements of former Code Civ. Proc. § 2034(j) (*now see Code Civ. Proc. § 2034.300*). Here, because (1) the defendant expert's lack of readiness was attributable to the brief time period between the depositions and was thus reasonable, and (2) plaintiff failed to object until two weeks into the trial, the defendant did not act unreasonably (*37 Cal. App. 4th 1495, 1503-1504)* .

[c] Expert May Testify Regarding Undisclosed Substance If Opposing Counsel Refuses Court's Offer of Recess to Depose Expert

In ***Whitehill v. United States Lines, Inc.*** *(1986) 177 Cal. App. 3d 1201, 223 Cal. Rptr. 452* , plaintiff brought an action against a shipowner for personal injuries. At trial, the shipowner's expert testified regarding a visit he made to the ship three weeks after the trial began. Plaintiff objected to the testimony on the grounds that he had no notice of the expert's testimony, in violation of former Code Civ. Proc. §§ 2037.3 and 2037.5 (*now see Code Civ. Proc. § 2034.300*). Defendant prevailed at trial and plaintiff appealed.

The court of appeal affirmed, holding that plaintiff was not prejudiced by the testimony. The court noted that plaintiff was entitled to be informed of the general substance of opposing party's expert's testimony under the expert witness exchange procedure. The court held, however, that prejudice did not exist because the trial court offered plaintiff a recess in order to depose the expert and obtain rebuttal evidence but plaintiff refused the offer (*177 Cal. App. 3d 1201, 1210)* .

[4] Additional Authorities

[a] Expert Witness List Providing Brief Statement of General Substance of Expert's Opinion Is Sufficient

The facts and procedural background of *Muller v. Fresno Community Hospital & Medical Ct. (2009) 172 Cal. App. 4th 887, 91 Cal. Rptr. 3d 617* are discussed in *§ 88.40[4][a]*. In this medical negligence action, the court found no statutory authority to impose monetary sanctions for disclosing for the first time during trial a theory that the expert did

not disclose in the expert witness declaration (*172 Cal. App. 4th 887, 905-906)* .

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8-88 California Points & Authorities § 88.32

§ 88.32 Supporting Contention That Expert Be Permitted to Testify--Failure to File Expert Declaration Does Not Preclude Testimony of Designated Expert Who Is Treating Physician

[1] FORM Supporting Contention That Expert Be Permitted to Testify--Failure to File Expert Declaration Does Not Preclude Testimony of Designated Expert Who Is Treating Physician

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE TESTIMONY OF _____ [*name*], AN EXPERT WITNESS, _____ [SHOULD BE *or* SHOULD HAVE BEEN] ALLOWED. THIS TESTIMONY MAY NOT BE EXCLUDED UNDER SECTION 2034.300(b) OF THE CODE OF CIVIL PROCEDURE, FOR FAILURE TO FILE AN EXPERT WITNESS DECLARATION UNDER SECTION 2034.260(c) OF THE CODE OF CIVIL PROCEDURE, BECAUSE THIS WITNESS IS A TREATING PHYSICIAN FOR WHOM NO SUCH DECLARATION IS REQUIRED TO BE FILED.

A. No Expert Witness Declaration Is Required for Treating Physician Who Is Not Retained Expert Witness. When a party designates as an expert witness a treating physician, that party is not required to file an expert witness declaration under *Code Civ. Proc. § 2034.260(c)*. A treating physician is a percipient witness and not a retained expert under *Code Civ. Proc. § 2034.210(b)* for whom a declaration is required (*Schreiber v. Estate of Kiser (1999) 22 Cal. 4th 31, 34-35, 91 Cal. Rptr. 2d 293, 989 P.2d 720* (construing former Code Civ. Proc. § 2034(a)(2), (f)(2)).

B. Treating Physician Testifying as Percipient Witness May Provide Expert Opinion Testimony. A treating physician, testifying as a percipient witness, may testify as to any opinions formed on basis of facts independently acquired and informed by physician's training, skill, and experience, including opinions regarding causation and standard of care (*Schreiber v. Estate of Kiser (1999) 22 Cal. 4th 31, 34-35, 91 Cal. Rptr. 2d 293, 989 P.2d 720* ; *Fatica v. Superior Court (2002) 99 Cal. App. 4th 350, 353, 120 Cal. Rptr. 2d 904*).

[2] Comments

[a] Use of Form

This form is for use when the parties to an action have exchanged lists of experts pursuant to *Code Civ. Proc. § 2034.010 et seq.* It supports the contention that a party may designate a treating physician as an expert witness, but is not required to file an expert witness declaration for such a witness under *Code Civ. Proc. § 2034.260(c)*, because that declaration requirement applies only to retained experts as described under *Code Civ. Proc. § 2034.210(b)*, and not to a treating physician who testifies as a percipient witness. While testifying as a percipient witness, a treating physician is entitled to give expert opinion testimony formed on the basis of facts acquired through his or her own experience, including opinions relating to causation and standard of care, and such testimony is not precluded under *Code Civ. Proc. § 2034.300(b)* for failure to file an expert witness declaration [*see Schreiber v. Estate of Kiser (1999) 22 Cal. 4th 31, 34-35, 91 Cal. Rptr. 2d 293, 989 P.2d 720]* .

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case.

[3] Discussion of Authorities

[a] No Expert Witness Declaration Is Required for Treating Physician Who Is Not Retained Expert Witness

In ***Schreiber v. Estate of Kiser*** *(1999) 22 Cal. 4th 31, 91 Cal. Rptr. 2d 293, 989 P.2d 720* , a personal injury case, plaintiff designated as expert witnesses, but did not submit expert witness declarations for, seven treating physicians. In response to a motion in limine at trial, the trial court ruled the physicians could "testify as percipient witnesses, not as experts." As a result of the court's ruling, the two physicians called by plaintiff were precluded from giving expert opinion testimony concerning causation, that is, that plaintiff's injuries were caused by the accident. The defense stipulated to defendant's negligence. The jury returned a defense verdict, specifically finding that defendant's negligence did not cause plaintiff's damages. The court of appeal affirmed, stating that once a treating physician offers opinion testimony regarding causation, he or she exceeds the ordinary role of a treating physician, which is to give percipient testimony regarding what he or she observed, concluded, and did, and becomes a retained expert within the meaning of former Code Civ. Proc. § 2034(a)(2) (*now see Code Civ. Proc. § 2034.210(b)*). Thus, an expert witness declaration must be filed under Code Civ. Proc. § 2034(f)(2) (*now see Code Civ. Proc. § 2034.260(c)*), and if it is not, the expert testimony is subject to exclusion under former Code Civ. Proc. § 2034(j) (*now see Code Civ. Proc. § 2034.300*).

The Supreme Court granted review and reversed, holding that former Code Civ. Proc. § 2034(f)(2) (*now see Code Civ. Proc. § 2034.260(c)*) does not require the submission of an expert witness declaration for a treating physician (*22 Cal. 4th 31, 33)* .

Citing *Bonds v. Roy, 20 Cal. 4th 140, 144, 83 Cal. Rptr. 2d 289, 973 P.2d 66* (discussed in *§ 88.40[3][c]*), the Court explained that the declaration requirement of former Code Civ. Proc. § 2034(f)(2) (*now see Code Civ. Proc. § 2034.260(c)*) applies only to "certain" expert witnesses, that is, those who are parties, employees of parties, or, as was relevant in this case, those who are "retained by a party for the purpose of forming and expressing an opinion in anticipation of the litigation or in preparation for the trial" (*22 Cal. 4th 31, 34-35)* . The Court concluded that a treating physician does not fall into the categories of witnesses described in former Code Civ. Proc. § 2034(a)(2) (*now see Code Civ. Proc. § 2034.210(c)*) whenever he or she gives expert opinion testimony (*22 Cal. 4th 31, 34-35)* .

In reaching this conclusion, the Court relied on the plain meaning of the language of former Code Civ. Proc. § 2034 (*now see Code Civ. Proc. § 2034.010 et seq.*) and on its legislative history. The Court noted that, in this case, the plaintiff had designated the treating physicians as *expert* witnesses. This was in compliance with former Code Civ. Proc. § 2034(f)(1)(A) (*now see Code Civ. Proc. § 2034.260(c)*), which requires a list setting forth the name and address of any person whose expert opinion that party expects to offer in evidence at the trial. Thus, defendants were on notice at the time of the designation that plaintiff intended to offer expert opinion testimony by her treating physicians. By definition, an expert witness is entitled to give opinion testimony. Under *Evid. Code § 801*, an expert's opinion must

generally be related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact, and it must also be based on matter, including the expert's special knowledge, skill, experience, training, and education, perceived by or personally known to the expert or made known to expert. Thus, a treating physician does not *become* an expert only when he or she is called upon to give nonpercipient opinion testimony (*22 Cal. 4th 31, 34)* .

The Court found that treating physicians generally fall into none of the categories of expert witnesses set out in former Code Civ. Proc. § 2034(a)(2) (*now see Code Civ. Proc. § 2034.210(b)*), to whom the expert witness declaration requirement applies under former Code Civ. Proc. § 2034(f)(2) (*now see Code Civ. Proc. § 2034.260(c)*). This is explained in Section 2034's legislative history, which limited the additional disclosure duty of former Code Civ. Proc. § 2034(a)(2) and (f)(2) (*now see Code Civ. Proc. §§ 2034.210(b), 2034.260(c)*) to employed or retained experts, and did not include percipient experts. Since a percipient expert acquires his information independently of the party that expects to be calling him, such an expert is more like a fact witness, and the compelled disclosure of the anticipated testimony of fact witnesses constitutes an invasion of the absolute protection given by the work product doctrine to the thought processes of an attorney in preparation for trial. The Court noted that such an expert would be someone who has acquired, independently of the litigation, personal knowledge of relevant facts, and whose training, skill, and experience enable him or her to form an opinion about those facts (*22 Cal. 4th 31, 35)* .

The Court concluded that although a treating physician is a percipient expert, his or her testimony is not limited only to personal observations. Rather, like any other expert, the treating physician may provide both fact and opinion testimony (*22 Cal. 4th 31, 35)* . In other words, although no expert witness declaration need be filed for a treating physician, he or she may testify as to any opinions formed on the basis of facts independently acquired and informed by his or her training, skill, and experience. This may include opinions regarding causation and standard of care because such issues are inherent in a physician's work. Thus, an opposing party would be prudent to ask a treating physician at his or her deposition whether he or she holds any opinions on these subjects, and if so, in what manner he or she obtained the factual underpinning of those opinions (*22 Cal. 4th 31, 39)* .

In so concluding the Court relied again on the legislative history of former Code Civ. Proc. § 2034 (*now see Code Civ. Proc. § 2034.010 et seq.*), which clarifies that what distinguishes a treating physician from a retained expert is not the content of the testimony, but the context in which the treating physician became familiar with the plaintiff's injuries that were ultimately the subject of litigation, and which form the basis for the medical opinion. The contextual nature of this inquiry is implicit in the language of former Code Civ. Proc. § 2034(a)(2) (*now see Code Civ. Proc. § 2034.210(b)*), which describes a retained expert as one retained by a party for the purpose of forming an opinion in anticipation of litigation or in preparation for the trial of the action (*22 Cal. 4th 31, 35-36)* . A treating physician is not consulted for litigation purposes, but rather learns of the plaintiff's injuries and medical history because of the underlying physician-patient relationship (*22 Cal. 4th 31, 36)* .

The Court noted that this conclusion was consistent with former Code Civ. Proc. § 2034(i)(2) (*now see Code Civ. Proc. § 2034.430*) and *Gov. Code § 68092.5(a)* (which refer to treating physicians as experts differentiated from retained experts), and with the discovery statutes as a whole (*22 Cal. 4th 31, 36-39)* . Finally, the Court noted that its interpretation avoids assigning trial judges the nearly impossible task of determining whether an expert witness treating physician is providing percipient or opinion testimony (*22 Cal. 4th 31, 39)* .

Defendants had relied on *Plunkett v. Spaulding (1997) 52 Cal. App. 4th 114, 60 Cal. Rptr. 2d 377* in arguing that a treating physician becomes a retained expert for whom an expert witness declaration is required whenever he or she attempts to testify as to issues such as standard of care. The Court accordingly disapproved of *Plunkett* to the extent it concluded that a treating physician could never testify as to standard of care without an expert witness declaration, regardless of the manner in which he or she obtained the factual basis for the opinion (*22 Cal. 4th 31, 39-40)* .

Note that the Court in *Schreiber* declined to decide whether a treating physician or any other percipient witness could

later become an expert retained by a party for the purpose of forming and expressing an opinion in anticipation of the litigation or in preparation for the trial of the action. The defendants in this case did not raise that issue, but had rather contended that causation opinion was outside the role of treating physician because it requires information from patient or other sources, and is not based solely on physician's personal observations (*22 Cal. 4th 31, 38 n.5*).

[b] Treating Physician Testifying as Percipient Witness May Provide Expert Opinion Testimony

Schreiber v. Estate of Kiser *(1999) 22 Cal. 4th 31, 91 Cal. Rptr. 2d 293, 989 P.2d 720* is discussed in [a], *above*.

Fatica v. Superior Court *(2002) 99 Cal. App. 4th 350, 120 Cal. Rptr. 2d 904* arose from a personal injury action for injuries sustained in an automobile accident. In accordance with former Code Civ. Proc. § 2034 (*now see Code Civ. Proc. § 2034.260*), petitioners timely designated their treating orthopedic surgeon as one of the expert witnesses they intended to call at trial. At the beginning of his deposition, petitioners' expert conceded he had not reviewed any of petitioners' records regarding prior medical treatment. He admitted receiving those documents and stated he intended to review them for trial. However, he pointed out that he testified "as little as possible" for his patients and had not had sufficient opportunity to review them. Opposing counsel did not request that the deposition be continued, or that he be allowed to further depose the expert after the expert had reviewed the relevant documents. Instead, opposing counsel waited until the day of trial to file a motion in limine to prohibit petitioners' expert from testifying at all. Counsel argued that he was "unable to obtain complete and meaningful expert witness testimony" from the expert "due to his failure to review plaintiffs' medical records." Before ruling on the motion, the trial court held a hearing, in which petitioners' expert testified that he "reviewed the same additional documents after his deposition that he said he would," that after this review "none of his opinions expressed at the deposition had changed or been affected as a result of the additional review," and that "his testimony would not differ from his deposition testimony as a result of the review." Following the hearing, the court ruled that the expert would not be allowed to testify concerning any opinions expressed at his deposition; he could only testify as a percipient witness. The court limited the expert's testimony "to what he heard, saw and did." Petitioners filed this petition for writ of mandate, after the trial court denied both their request for a temporary stay to permit writ review of the court's order and their request for a short adjournment to permit the expert to be further deposed (*99 Cal. App. 4th 350, 351-353)* .

The court of appeal ordered the trial court to vacate its order granting the motion in limine and to enter a different order denying it. Petitioners' expert was clearly a treating physician. *Under Schreiber v. Estate of Kiser (1999) 22 Cal. 4th 31, 91 Cal. Rptr. 2d 293, 989 P.2d 720* (discussed in [a], *above*), the trial court's order prohibiting the expert, a treating physician, from testifying concerning his opinions was wrong as a matter of law (*99 Cal. App. 4th 350, 353)* . Although a treating physician is a percipient expert, his or her testimony is not limited to personal observations. Rather, like any other expert, the treating physician may provide both fact and opinion testimony. He or she may testify as to any opinions formed on the basis of facts independently acquired and informed by his or her training, skill, and experience. This may include opinions regarding causation and standard of care because those issues are inherent in a physician's work. Thus, an opposing party would be prudent to ask a treating physician at his or her deposition whether he or she holds any opinions on these subjects, and if so, in what manner he or she obtained the factual underpinning of those opinions (*99 Cal. App. 4th 350, 353)* .

[4] Additional Authorities

[a] No Expert Witness Declaration Is Required for Treating Physician Who Is Not Retained Expert Witness

The facts and procedural background of *Kalaba v. Gray (2002) 95 Cal. App. 4th 1416, 116 Cal. Rptr. 2d 570* are discussed in *§ 88.40[3][a]*. In this medical malpractice case, the appellate court reiterated the rule enunciated in *Schreiber v. Estate of Kiser (1999) 22 Cal. 4th 31, 91 Cal. Rptr. 2d 293, 989 P.2d 720* (discussed in [3][a], *above*) and in *Bonds v. Roy (1999) 20 Cal. 4th 140, 83 Cal. Rptr. 2d 289, 973 P.2d 66* (discussed in *§ 88.40[3][a]*) that no expert declaration is required for a treating physician who will be called to testify at trial as an expert witness, even though a

designation of retained experts must be accompanied by the expert witness declaration described in former Code Civ. Proc. § 2034(f) (*now see Code Civ. Proc. § 2034.260(c)*). However, the court of appeals explained that "the transformation from treating physician to expert" does not occur unless the treating physician is identified by name and address in the proponent's designation. Thus, the court held that plaintiff complied with neither the letter nor the spirit of former Code Civ. Proc. § 2034 (*now see Code Civ. Proc. § 2034.010 et seq.*), when she failed to list or identify her treating physicians by name (as required by former Code Civ. Proc. § 2034(j)(1), *now see Code Civ. Proc. § 2034.300(a)*), but simply referred to them in the designation as "all past or present examining and/or treating physicians" (*95 Cal. App. 4th 1416, 1423-1424)* .

California Points & Authorities

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 88 DISCOVERY: EXCHANGE OF EXPERT WITNESS INFORMATION
PART II. FORMS
B. Subsequent Testimony by Expert Witnesses

8-88 California Points & Authorities § 88.33

§ 88.33 Supporting Contention That Evidence From Nondesignated Expert Witness Be Admissible in Pretrial Proceeding

[1] FORM Supporting Contention That Evidence From Nondesignated Expert Witness Be Admissible in Pretrial Proceeding

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [A DECLARATION BY *or* TESTIMONY BY] _____ [*name*], AN UNDISCLOSED EXPERT WITNESS, _____ [MAY BE *or* SHOULD HAVE BEEN] PERMITTED BECAUSE THE EXCLUSION OF EVIDENCE FOR FAILURE TO COMPLY WITH THE REQUIREMENTS OF CODE OF CIVIL PROCEDURE SECTION 2034.010 ET SEQ. DOES NOT APPLY TO PRETRIAL PROCEEDINGS.

Exclusion for Failure to Designate Expert Is Not Applicable to Pretrial Proceedings. The exclusion mandated by *Code of Civil Procedure Section 2034.300* is applicable only to trial proceedings, and does not apply to pretrial proceedings. Thus, in a summary judgment proceeding, declarations of experts who were not properly designated as experts may not be excluded from consideration by the trial court (*Kennedy v. Modesto City Hospital (1990) 221 Cal. App. 3d 575, 582, 270 Cal. Rptr. 544* (construing former Code Civ. Proc. § 2034(j)).

[2] Comments

[a] Use of Form

This form is for use when the parties to an action have exchanged lists of experts pursuant to *Code Civ. Proc. § 2034.010 et seq.* It supports the contention of a party that a nondesignated, or improperly designated, expert may not be prohibited from submitting evidence, either through a declaration or through testifying, in a pretrial proceeding, because the exclusion of testimony from a nondesignated expert mandated by *Code Civ. Proc. § 2034.300* applies only to trial proceedings and has no application to pretrial proceedings.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 88.40* may be used to oppose the contention supported by the foregoing points and authorities.

[3] Discussion of Authorities

[a] Exclusion for Failure to Designate Expert Is Not Applicable to Pretrial Proceedings

In ***Kennedy v. Modesto City Hospital*** *(1990) 221 Cal. App. 3d 575, 270 Cal. Rptr. 544* , a medical malpractice action, defendants hospital and physician moved for summary judgment, claiming there was no triable question on the issue of negligence. Plaintiff's opposition to the motion was based on the theory of res ipsa loquitur and was supported by the declarations of two physicians, one of whom had not been designated as an expert witness and the other of whom had been improperly designated. The trial court refused to consider the physicians' declarations and granted the motion for summary judgment.

The court of appeal reversed. The court said that the trial court's refusal to consider the declarations was decisive, because had it considered them, it would have properly denied the motion. The court noted that the exclusion was based solely on the procedural bar posed by former Code Civ. Proc. § 2034 (*now see Code Civ. Proc. § 2034.010 et seq.*), and was unrelated to any evidentiary objection under the Evidence Code (*221 Cal. App. 3d 575, 580)* . The court said that this was a case of first impression, observing that absent a trial court order, the timing provisions of *Code Civ. Proc. § 437c* and former Code Civ. Proc. § 2034 make it unlikely that summary judgment proceedings would overlap the exchange of expert witness information (*221 Cal. App. 3d 575, 581)* . In finding that testimony will not be excluded from pretrial proceedings for failure to comply with former Code Civ. Proc. § 2034, the court examined the statutory language, finding that by use of terms such as "trial date," "trial witness," "evidence at trial," and "trial of the action," the Legislature intended that former Code Civ. Proc. § 2034 apply only to the actual trial, and not to pretrial proceedings. Additionally, the court noted that admissibility at trial is not necessarily the same as admissibility at a pretrial proceeding such as a summary judgment proceeding, citing as an example the fact that a declaration is not admissible at trial but is expressly admissible in a summary judgment proceeding. Accordingly, evidence made inadmissible at trial by reason of the express procedural bar contained in former Code Civ. Proc. § 2034(j) (*now see Code Civ. Proc. § 2034.300*) is not necessarily made inadmissible in a summary judgment proceeding (*221 Cal. App. 3d 575, 582)* . Moreover, the court opined that excluding the physicians' declarations would not further the purpose of summary judgment, which is to eliminate the necessity of trying sham and meritless cases. It said that summary judgment is not intended to stop facially meritorious cases by reason of a procedural bar that at trial may be overcome, and cited motions to augment or amend and to submit tardy information under former Code Civ. Proc. § 2034(k), (*l*) (*now see Code Civ. Proc. §§ 2034.610, 2034.710*) as mechanisms that might be used at trial to admit that evidence (*221 Cal. App. 3d 575, 582-583)* .

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CHAPTER 88 DISCOVERY: EXCHANGE OF EXPERT WITNESS INFORMATION
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8-88 California Points & Authorities §§ 88.34through 88.39

[Reserved]

§§ 88.34[Reserved]

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 88 DISCOVERY: EXCHANGE OF EXPERT WITNESS INFORMATION
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B. Subsequent Testimony by Expert Witnesses

8-88 California Points & Authorities § 88.40

§ 88.40 Opposing Contention That Expert Be Permitted to Testify [Code Civ. Proc. § 2034.300]

[1] FORM Opposing Contention That Expert Be Permitted to Testify [Code Civ. Proc. § 2034.300]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

_____ [*Name of expert*] SHOULD NOT _____ [BE *or* HAVE BEEN] PERMITTED TO TESTIFY BECAUSE _____ [HE/SHE IS AN UNDISCLOSED EXPERT *and/or* NO EXPERT WITNESS DECLARATION CONCERNING THE SUBSTANCE OF HIS/HER EXPECTED TESTIMONY WAS PROVIDED *and/or* HIS/HER DISCOVERABLE REPORTS AND WRITINGS HAVE NOT BEEN PRODUCED *and/or* HE/SHE HAS NOT BEEN MADE AVAILABLE FOR A DEPOSITION].

[*EITHER*]

A. Undisclosed Expert May Not Testify. Except as provided in *Code of Civil Procedure Sections 2034.610-2034.630, 2034.710-2034.730,* or *2034.310,* on objection of any party who has made a complete and timely compliance with *Code of Civil Procedure Section 2034.260,* the trial court is required to exclude from evidence the expert opinion of any witness that is offered by any party who has unreasonably failed to list that witness as an expert on his or her expert trial witness list (*Code Civ. Proc. § 2034.300(a)*; *see Kalaba v. Gray (2002) 95 Cal. App. 4th 1416, 1419, 116 Cal. Rptr. 2d 570, 572* (decided under former Code Civ. Proc. § 2034); *Sprague v. Equifax, Inc. (1985) 166 Cal. App. 3d 1012, 1037-1039, 213 Cal. Rptr. 69* (same); *Gallo v. Peninsula Hospital (1985) 164 Cal. App. 3d 899, 905, 211 Cal. Rptr. 27* (same)).

[*AND/OR*]

B. Expert May Not Testify If No Expert Witness Declaration Provided. Except as provided in Code of Civil Procedure Sections 2034.610-2034.630, 2034.710-2034.730, or 2034.310, on objection of any party who has made a

complete and timely compliance with *Code of Civil Procedure Section 2034.260*, the trial court is required to exclude from evidence the expert opinion of any witness that is offered by any party who has unreasonably failed to submit an expert witness declaration (*Code Civ. Proc. § 2034.300(b)*; *see Zellerino v. Brown (1991) 235 Cal. App. 3d 1097, 1116, 1 Cal. Rptr. 2d 222* (decided under former Code Civ. Proc. § 2034).

[*AND/OR*]

C. Expert May Not Testify Beyond Scope of Testimony Described in Expert Witness Declaration. Except as provided in *Code of Civil Procedure Sections 2034.610-2034.630*, *2034.710-2034.730*, or *2034.310*, on the objection of any party who has made a complete and timely compliance with *Code of Civil Procedure Section 2034.260*, the trial court is required to exclude from evidence the expert opinion of any witness that is offered by any party who has unreasonably failed to submit an expert witness declaration (*Code Civ. Proc. § 2034.300(b)*). The trial court, under this provision may exclude testimony not only when there is a failure to submit an expert witness declaration altogether, but also when there is a failure to submit a complete expert witness declaration; thus it is proper to preclude an expert witness from testifying at trial on a subject whose general substance was not previously described or included in the expert witness declaration (*Bonds v. Roy (1999) 20 Cal. 4th 140, 142-143, 145-146, 149, 83 Cal. Rptr. 2d 289, 973 P.2d 66* (decided under former Code Civ. Proc. § 2034).

[*AND/OR*]

D. Expert May Not Testify If Discoverable Reports and Writings Are Not Produced. Except as provided in *Code of Civil Procedure Sections 2034.610-2034.630*, *2034.710-2034.730*, or *2034.310*, on objection of any party who has made a complete and timely compliance with *Code of Civil Procedure Section 2034.260*, the trial court is required to exclude from evidence the expert opinion of any witness that is offered by any party who has unreasonably failed to produce reports and writings of expert witnesses under *Code of Civil Procedure Section 2034.270* (*Code Civ. Proc. § 2034.300(c)*).

[*AND/OR*]

E. Expert May Not Testify If Not Made Available for Deposition. Except as provided in Code of Civil Procedure Sections 2034.610-2034.630, 2034.710-2034.730, or 2034.310, on objection of any party who has made a complete and timely compliance with *Code of Civil Procedure Section 2034.260*, the trial court is required to exclude from evidence the expert opinion of any witness that is offered by any party who has unreasonably failed to make that expert available for a deposition under *Code of Civil Procedure Sections 2034.410-2034.470* (*Code Civ. Proc. § 2034.300(d)*).

[*AND/OR*]

F. Expert Listed on Supplemental List May Not Be Substituted. A party who has designated an expert to testify on a particular subject may not replace that expert with one stated on a supplemental list. A party may submit a supplemental expert witness list within 20 days after the simultaneous exchange of information concerning each other's expert trial witnesses (*Code Civ. Proc. § 2034.280(a)*), but only if the party supplementing the expert witness list has not previously retained an expert to testify on that subject (*Code Civ. Proc. § 2034.280(a)*; *Basham v. Babcock (1996) 44 Cal. App. 4th 1717, 1718, 52 Cal. Rptr. 2d 456* (decided under former Code Civ. Proc. § 2034).

[2] Comments

[a] Use of Form

This form is for use when the parties to an action have exchanged lists of experts pursuant to *Code Civ. Proc. § 2034.010 et seq.* It opposes the contention that an undesignated expert may be called to testify or was properly allowed to testify [*see Code Civ. Proc. § 2034.300*].

In an appropriate case, these points and authorities may be submitted in opposition to the contentions supported by the points and authorities *set out in § 88.30* et seq.

Note that some cases cited in this form construe law in effect prior to the operative date of the Civil Discovery Act of 1986. They are cited and discussed as persuasive authority to the extent that they remain consistent with current provisions.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. In addition, counsel may wish to allege compliance with *Code Civ. Proc. § 2034.260*, as a prerequisite to prohibiting the testimony of an undisclosed expert.

[3] Discussion of Authorities

[a] Undisclosed Expert May Not Testify

In ***Kalaba v. Gray*** *(2002) 95 Cal. App. 4th 1416, 116 Cal. Rptr. 2d 570* , a medical malpractice action, plaintiff identified two medical experts and "reserved the right to call as potential experts any and all [of her] past or present examining and/or treating physicians." Neither the designation nor the accompanying declaration (describing the experts' qualifications, general scope of testimony, and their fees) identified any of plaintiff's past or present treating physicians. At trial plaintiff attempted to call three of her treating physicians to testify about the standard of care. The trial court granted defendant's motion to exclude the expert testimony of the three doctors on the ground that they had not been designated as required by former Code Civ. Proc. § 2034(j)(1) (*now see Code Civ. Proc. § 2034.300(a)*), and ultimately granted defendant's motion for nonsuit. Plaintiff appealed.

The court of appeal affirmed the trial court's judgment. The appellate court reviewed the California Supreme court's holdings in *Bonds v. Roy (1999) 20 Cal. 4th 140, 83 Cal. Rptr. 2d 289, 973 P.2d 66* (discussed in [c], *below*) and *Schreiber v. Estate of Kiser (1999) 22 Cal. 4th 31, 91 Cal. Rptr. 2d 293, 989 P.2d 720* (discussed in *§ 88.32[3][a]*) and distilled the following rule: Retained experts must be designated, and the designation must be accompanied by the "expert witness declaration" described in former Code Civ. Proc. § 2034(f) (*now see Code Civ. Proc. § 2034.260*). However, treating physicians are not "retained experts" within the meaning of former Code Civ. Proc. § 2034, and no expert declaration is required when a party intends to call a treating physician for the purpose of eliciting expert testimony. It is sufficient if a treating physician is identified by name and address in the proponent's designation of expert witnesses. When, as here, the treating physicians were not listed or identified by name but simply referred to in the designation as "all past or present examining and/or treating physicians," there was no compliance with the "letter or the spirit" of former Code Civ. Proc. § 2034 (*95 Cal. App. 4th 1416, 1423-1424)* .

The appellate court found no authority to support plaintiff's contention that her discovery responses ought to be viewed as "substantial compliance" with the specific requirements of former Code Civ. Proc. § 2034. Although the Supreme Court suggested in *Schreiber* that an opposing party would be prudent to ask a treating physician at his or her deposition whether he holds any opinions on the matters about which expert testimony will be required at trial, and if so, the manner in which he or she obtained the factual underpinning of those opinions, the Supreme Court did not suggest that, to be prudent, defense counsel ought to depose every treating physician without regard to whether the treating physician

had been designated as an expert (*95 Cal. App. 4th 1416, 1423-1424* , *116 Cal. Rptr. 2d 570, 576)* . Expressing concern that medical malpractice cases are already particularly complex and expensive to prosecute and to defend, the appellate court found nothing in *Schreiber* to suggest that the Supreme Court intended to impose further unnecessary economic burdens on either side by encouraging more depositions than reasonably necessary in any particular case (*95 Cal. App. 4th 1416, 1423-1424)* .

In ***Sprague v. Equifax, Inc.*** *(1985) 166 Cal. App. 3d 1012, 213 Cal. Rptr. 69* , plaintiff brought an action against his disability insurer and its agents alleging that defendants engaged in a conspiracy to fraudulently deny him insurance benefits. The parties engaged in an exchange of expert witness lists under former Code Civ. Proc. § 2037 (*now see Code Civ. Proc. § 2034.010 et seq.*). At trial, the court denied defendants' request to introduce the testimony of the expert medical witness who was not listed. Apparently the witness was not listed because another defendant, who settled with plaintiff a month prior to trial, and who had not been served with a demand for an exchange of experts, was scheduled to introduce that expert's testimony. The trial court based its decision on the grounds that under former Code Civ. Proc. § 2037.6 (*now see Code Civ. Proc. § 2034.300*) defendants had not made a good-faith effort to comply with the witness exchange procedure since they deliberately relied on the settling defendant to introduce the testimony of the expert in a tactical decision to avoid disclosing the name of the expert to plaintiff. After plaintiff prevailed at trial, defendant appealed, contending that the trial court improperly refused permission to call the expert witness.

The court of appeal affirmed. It held that under the facts presented the trial court did not abuse its discretion (*166 Cal. App. 3d 1012, 1039)* .

In ***Gallo v. Peninsula Hospital*** *(1985) 164 Cal. App. 3d 899, 211 Cal. Rptr. 27* , plaintiff brought a wrongful death action against a hospital and two doctors. The parties engaged in an exchange of expert witness lists pursuant to former Code Civ. Proc. § 2037 (*now see Code Civ. Proc. § 2034.010 et seq.*). Following the exchange but prior to trial, one doctor settled and the other was voluntarily dismissed, leaving the hospital the sole remaining defendant. At trial defendant was permitted, over plaintiff's objection, to introduce the testimony of an expert even though defendant's expert witness list did not mention the expert. Defendant's list did state, however, that it reserved the right "to call any experts identified by all parties who were not called by the parties." The expert in question had been listed by one of the doctors. After defendant prevailed at trial, plaintiff appealed, contending that the trial court erred in allowing the expert to testify.

Although the court of appeal agreed with plaintiff's basic contention, it affirmed on the grounds that the error was harmless. The court stated that defendant's list was insufficient and that the trial court's decision to allow the expert to testify could not be sustained in light of the fact that the trial court made no record to support the exercise of its discretion. The court found the error harmless, however, because the expert's testimony was not necessary to the jury's verdict (*164 Cal. App. 3d 899, 905)* .

Code Civ. Proc. § 2034.310(a) now permits an undisclosed expert to testify if he or she was designated in another party's expert witness list, and if the expert was subsequently deposed pursuant to *Code Civ. Proc. §§ 2034.410-2034.470* [*see § 88.30*].

[b] Expert May Not Testify If No Expert Witness Declaration Provided

The facts and procedural background of ***Zellerino v. Brown*** *(1991) 235 Cal. App. 3d 1097, 1 Cal. Rptr. 2d 222* are discussed in *§ 88.14[3][a]*. In *Zellerino,* the court of appeal upheld a motion in limine excluding the testimony of plaintiff's expert witnesses as a sanction for her failure to submit expert witness declarations. The court explained that a party must provide an expert witness declaration for any expert "designated" as an expert witness, whether or not the expert is retained by that party. "Designation" of an expert occurs when a party lists an expert whose testimony in the form of an expert opinion is that which any party expects to offer in evidence at trial. If the designating party intends to rely on experts produced by other parties, he or she must furnish an expert witness declaration for those experts.

Plaintiff listed defendants' experts in her list of witnesses, but failed to furnish the required expert witness declaration. The court explained that plaintiff was required to submit declarations for all experts whom she planned to call as experts, even though they had been retained by defendant (*235 Cal. App. 3d 1097, 1116)* .

[c] Expert May Not Testify Beyond Scope of Testimony Described in Expert Witness Declaration

In ***Bonds v. Roy*** *(1999) 20 Cal. 4th 140, 83 Cal. Rptr. 2d 289, 973 P.2d 66* , plaintiff sued defendant for medical malpractice. In the exchange of expert witness information, defendant designated two experts. Defendant's expert witness declaration provided that one of the two experts, Dr. Duncan, was expected to testify only as to damages. At trial, however, defense counsel sought to expand the scope of Dr. Duncan's testimony beyond the issue of damages, requesting that the expert be permitted to testify concerning the applicable "standard of care." The trial court denied this request as unfair at that stage in the proceedings. Defendant appealed a jury verdict in plaintiff's favor, contesting this ruling. The court of appeal affirmed, expressly disagreeing with contrary holdings in two other court of appeal decisions. The Supreme Court granted review to resolve the conflict, and affirmed the decision of the court of appeal (*20 Cal. 4th 140, 142-143, 149)* .

Defendant argued that, since he had submitted an expert witness declaration, there was no unreasonable failure to "submit" a declaration within the meaning of former Code Civ. Proc. § 2034(j)(2), and therefore the trial court was powerless to limit the scope of Dr. Duncan's testimony. The Supreme Court disagreed, however, and contrued the failure to "submit" a declaration under former Code Civ. Proc. § 2034(j)(2) to be not only a failure to submit a declaration altogether, but also a failure to submit an expert witness declaration that complies fully with the *content requirements* of former Code Civ. Proc. § 2034(f)(2) (noted *above*) (*20 Cal. 4th 140, 145-146)* . Thus, if a submitted declaration does not adequately provide the "general substance of the testimony that the expert is expected to give," the submission of that declaration is defective under former Code Civ. Proc. § 2034(j)(2). If, prior to the completion of discovery, a party wishes to expand the scope of an expert's testimony beyond that stated in a previously submitted declaration, that party must move to amend the declaration in accordance with the requirements of former Code Civ. Proc. § 2034(k) (*20 Cal. 4th 140, 145)* .

The Court reasoned that any other construction of former Code Civ. Proc. § 2034(j)(2) would render meaningless the amendment procedure of former Code Civ. Proc. § 2034(k) and other provisions of former Code Civ. Proc. § 2034. It would also controvert the very purpose of the statute--to give fair notice of what an expert will say at trial, and to allow other parties time to depose the expert, research the relevant subject area, and otherwise make the special preparations needed to cross examine an expert witness (*20 Cal. 4th 140, 146-147)* . An inaccurate expert witness declaration is, in this regard, as defective as no declaration at all (*20 Cal. 4th 140, 147)* .

The Court noted the two contrary court of appeal decisions, in *Castaneda v. Bornstein (1995) 36 Cal. App. 4th 1818, 1828-1830, 43 Cal. Rptr. 2d 10* and *Martinez v. City of Poway (1993) 12 Cal. App. 4th 425, 429-430, 15 Cal. Rptr. 2d 644* . The Court held that these decisions gave misplaced reliance to a 1987 amendment to former Code Civ. Proc. § 2034(j)(2); the Court concluded that this amendment, as part of the technical "clean-up" legislation to the 1986 Discovery Act, was not intended to thus limit the trial court's power to exclude testimony (*20 Cal. 4th 140, 147-149)* . The Court disapproved *Castaneda* and *Martinez* to the extent they are inconsistent with its opinion in this case (*20 Cal. 4th 140, 149, n.4*).

In this case, defendant admitted that he made no motion under former Code Civ. Proc. § 2034(k) to amend his expert declaration in order to expand the scope of Dr. Duncan's testimony. If defense counsel's request to expand the scope, made just before Dr. Duncan was called as the last defense witness, were considered to be such a motion, the trial court was well within its discretion to deny it, given the lack of excuse for the delay in making the motion, and the prejudice to plaintiff's efforts to present any effective rebuttal. The trial court, on these facts, properly limited the scope of Dr. Duncan's testimony to that previously described in defendant's expert witness declaration (*20 Cal. 4th 140, 149)* .

[d] Expert Listed on Supplemental List May Not Be Substituted

In ***Basham v. Babcock*** *(1996) 44 Cal. App. 4th 1717, 52 Cal. Rptr. 2d 456* , the plaintiff sued for personal injury damages resulting from an automobile accident. Plaintiff was sitting in his parked car when defendant's car struck the side of it. At trial, defendant initially designated an expert witness to testify to the extent of plaintiff's injuries and any pre-existing condition, an annular tear. In a supplemental designation, defendant named another expert witness who would testify as to the physical condition of the plaintiff before and after the accident. During plaintiff's deposition of the initial expert witness the expert stated that, in his opinion, he was unable to diagnose whether plaintiff had suffered from the pre-existing condition of an annular tear. Plaintiff did not depose the substitute expert witness. At trial defendant had the substituted expert testify. Plaintiff's attempts to exclude the second expert's testimony, compel the initially designated expert to testify and read portions of the initial expert's testimony were all denied by the trial court. The jury found for the defendant and plaintiff appealed.

The court of appeal reversed and ordered a new trial. The court ruled that a party may not use a list of supplemental designees as substitutions for experts who have already been retained to testify on particular subject matter (*44 Cal. App. 4th 1717, 1718)* .

[4] Additional Authorities

[a] Expert May Not Testify Beyond Scope of Testimony Described in Expert Witness Declaration

In *Muller v. Fresno Community Hospital & Medical Ct. (2009) 172 Cal. App. 4th 887, 91 Cal. Rptr. 3d 617* , a medical negligence action, the trial court granted plaintiffs' motion for a new trial, but denied their motion for sanctions based on alleged discovery abuses by defendants in connection with plaintiffs' failed attempt to call their medical expert as a rebuttal witness. Both sides appealed. The court of appeal concluded that *Code Civ. Proc. § 2034.300(b)*--providing for the exclusion of testimony as a sanction for the failure to submit a witness declaration, which under *Bonds v. Roy* (discussed in *§ 88.40[3][c]*) includes an inaccurate declaration--did not provide the statutory authority to impose monetary sanctions against defendants for disclosing for the first time during the trial a theory that the expert did not disclose in the expert witness declaration (*172 Cal. App. 4th 887, 905-906)* .

In *Jones v. Moore (2000) 80 Cal. App. 4th 557, 95 Cal. Rptr. 2d 216* , plaintiff appealed from a judgment in favor of defendant in a legal malpractice action, contending, among other things, that the trial court erred in excluding certain testimony of her expert witness (*80 Cal. App. 4th 557, 561)* . The court of appeal affirmed the exclusion, under former Code Civ. Proc. § 2034(j)(4) (*now see Code Civ. Proc. § 2034.300(d)*), of expert testimony going beyond the opinions the expert expressed during his deposition. Even though the expert witness declaration regarding this expert arguably was broad enough to encompass the additional testimony, in his deposition the expert testified as to specific opinions, affirmatively stated that these are the only opinions he intended to offer at trial, and promised to notify defendant if he later formulated others. This he did not do. The court reasoned that this case did not turn on the adequacy of the expert witness declaration, but rather on a party's right to rely on the other party's expert's express representation that the opinions expressed during an expert deposition were the only ones that needed be met at trial. The court concluded that it would be grossly unfair and prejudicial to hold otherwise. The court acknowledged that this case did not present precisely the situation described in former Code Civ. Proc. § 2034(j)(4), but was sufficiently similar in that the expert in this case was, in effect, not made available for deposition as to the further opinions he offered at trial--opinions which during deposition he assured defense counsel he did not have. The court found support for its holding in *Roy v. Bonds, (1999) 20 Cal. 4th 140, 83 Cal. Rptr. 2d 289, 973 P.2d 66* , discussed in [3][a], which recognized that an important goal of former Code Civ. Proc. § 2034 (*now see Code Civ. Proc. § 2034.010 et seq.*) is to enable parties to properly prepare for trial, and allowing new ad unexpected testimony for the first time at trial is contrary to that purpose. The court noted that plaintiff did not make a timely motion to amend the expert witness declaration under former Code Civ. Proc. § 2034(k) (*now see Code Civ. Proc. § 2034.610*) (*80 Cal. App. 4th 557, 564-565)* .

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 88 DISCOVERY: EXCHANGE OF EXPERT WITNESS INFORMATION
PART II. FORMS
B. Subsequent Testimony by Expert Witnesses

8-88 California Points & Authorities § 88.41

§ 88.41 Opposing Contention That Expert Be Permitted to Testify--Exception to General Rule Barring Testimony of Undisclosed Expert [Code Civ. Proc. § 2034.310(b)] Is Not Applicable--Party May Not Offer Contrary Opinion As Impeachment

[1] FORM Opposing Contention That Expert Be Permitted to Testify-Exception to General Rule Barring Testimony of Undisclosed Expert [Code Civ. Proc. § 2034.310(b)] Is Not Applicable-Party May Not Offer Contrary Opinion As Impeachment

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

_____ [*Name of expert*] SHOULD NOT BE PERMITTED TO TESTIFY BECAUSE HIS/HER EXPRESSION OF OPINION CONTRARY TO THAT EXPRESSED BY _____ [*Name of other party's expert*] IS NOT THE "IMPEACHMENT" CONTEMPLATED BY CODE OF CIVIL PROCEDURE SECTION 2034.310(b)

Non-Designated Expert May Testify Concerning Facts Underlying Another Expert's Opinion but May Not Express Contrary Opinion. Under *Code of Civil Procedure Section 2034.310(b)*, an undisclosed expert witness called for impeachment purposes is permitted to testify that a foundational fact relied upon by another expert is either incorrect or nonexistent. However, calling an expert witness to express an opinion contrary to that expressed by another expert witness is not impeachment under the rule, and is not permitted (*Code Civ. Proc. § 2034.310(b)*; *Mizel v. City of Santa Monica (2001) 93 Cal. App. 4th 1059, 1067-1068, 113 Cal. Rptr. 2d 649* (decided under former Code Civ. Proc. § 2034)).

[2] Comments

[a] Use of Form

This form is for use when the parties to an action have exchanged lists of experts pursuant to *Code Civ. Proc. § 2034.300*. It opposes the contention that an undesignated expert may be called to testify or was properly allowed to testify. When an undesignated expert is called to impeach the testimony of another witness, that impeachment may

include testimony about the falsity or nonexistence of any fact used as the foundation for any opinion by the other expert witness, but may not include testimony that contradicts the opinion (*Code Civ. Proc. § 2034.310(b)*).

In an appropriate case, these points and authorities may be submitted in opposition to the contentions supported by the points and *authorities in § 88.30*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. In addition, counsel may wish to allege compliance with *Code Civ. Proc. § 2034.260*, as a prerequisite to prohibiting the testimony of an undisclosed expert.

[3] Discussion of Authorities

[a] Non-Designated Expert May Testify Concerning Facts Underlying Another Expert's Opinion but May Not Express Contrary Opinion

In ***Mizel v. City of Santa Monica*** *(2001) 93 Cal. App. 4th 1059, 113 Cal. Rptr. 2d 649* , plaintiff pedestrian slipped and fell on a uni-directional access ramp, suffering severe and permanent injuries. He sued the defendant city and defendant hotel for personal injuries and damages. The jury returned a judgment for plaintiff, and defendants appealed, challenging, in part, the trial's court refused to permit defendants' undisclosed expert to testify for impeachment purposes under former Code Civ. Proc. § 2034(m) (*now see Code Civ. Proc. § 2034.310(b)*). In cross examination, plaintiff's expert witness (his emergency room physician) testified that he and emergency room medical personnel noted in plaintiff's medical records that he had a strong smell of alcohol. Defendants' counsel asked plaintiff's expert a series of questions relating to how much a person would have to drink in order to smell of alcohol. The questions elicited responses based on the expert's medical school training. The expert rejected the suggestion that just because someone smelled of alcohol, that person had to have drunk a significant amount of alcohol. He denied that he was aware of published studies concluding that "the smell of alcohol can't be reliably detected until you are approaching .08" (*93 Cal. App. 4th 1059, 1066-1067)* . Defendants sought to call an expert, pursuant to former Code Civ. Proc. § 2034(m), who had conducted studies relating to the consumption of alcohol, to impeach plaintiff's expert's testimony. Defendant's expert was to testify, based upon his training, research, and studies, including his experience with professionals in the field, that alcohol can only be detected through smell when there has been a consumption level in the range of .08. The trial court excluded this testimony on the ground that it was an expression of opinion, and thus did not qualify under the exception of former Code Civ. Proc. § 2034(m) (*93 Cal. App. 4th 1059, 1068)* .

The appellate court found the trial court did not err in excluding the testimony of defendants' rebuttal expert witness, because the proposed testimony would not have challenged the foundational facts of the pedestrian's expert's testimony (*93 Cal. App. 4th 1059, 1067)* . Under former Code Civ. Proc. § 2034(m), an undisclosed expert witness called for impeachment purposes is permitted to testify that a foundational fact relied on by a prior expert is either incorrect or nonexistent. This testimony may be elicited either by cross-examining the expert or by calling other witnesses to offer evidence showing the nonexistence or error in the data on which the first expert based his opinion. Thus, a non-designated expert may testify as to the *facts* underlying the expert's opinion (*93 Cal. App. 4th 1059, 1067)* . However, under former Code Civ. Proc. § 2034(m), "calling an expert witness to express an opinion contrary to that expressed by another expert witness is not the 'impeachment' contemplated by [former] section [2034, subdivision (m)]" (*93 Cal. App. 4th 1059, 1067-1068)* . The appellate court noted that "although the distinction between a 'fact' and 'opinion' may be thin, it has to be made." The court admonished trial courts to strictly construe the term "foundational fact" in order to prevent a party from offering a contrary opinion of his or her expert under the guise of impeachment (*93 Cal. App. 4th 1059, 1068)* .

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 89 DISCOVERY: PRESERVATION OF EVIDENCE

8-89 California Points & Authorities 89.syn

§ 89.syn Synopsis to Chapter 89: DISCOVERY: PRESERVATION OF EVIDENCE

§ 89.01 Scope of Chapter

§ 89.02 Governing Law

[1] California Civil Discovery Act and Related Law

[2] Provisions Governing Preservation of Evidence

[3] Case Law Decided Under Prior Discovery Acts

§ 89.03 How to Use the Forms in This Chapter

[1] Page Limits on Memoranda

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§ 89.04 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

[2] Related Memoranda

§§ 89.05-89.09 [Reserved]

§ 89.10 Supporting Petition for Perpetuation of Testimony and/or Preservation of Evidence Prior to Action [Code Civ. Proc. § 2035.030]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Uses

[d] Related Pleading and Practice Forms

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Likelihood of Litigation

[b] Methods of Discovery

[4] Additional Authorities

[a] Standing to Bring Petition

[b] Likelihood of Litigation

[c] Prevention of Failure or Delay of Justice

§ 89.11 Supporting Petition for Preservation of Evidence Prior to Action--Trial Court Has Inherent Power to Order Preservation of Evidence Pending Discovery When There Is No Adequate Remedy at Law

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Trial Court Has Inherent Power to Order Preservation of Evidence Pending Discovery, Absent a Statutory Remedy

§§ 89.12-89.19 [Reserved]

§ 89.20 Opposing Petition for Perpetuation of Testimony and/or Preservation of Evidence Prior to Action [Code Civ. Proc. § 2035.030]--Use of Procedure for Improper Purpose [Code Civ. Proc. § 2035.010(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Perpetuation Not Designed Primarily for Discovery

[4] Additional Authorities

[a] Perpetuation Provision Not Designed Primarily for Discovery

[b] Limitations on Use of Perpetuation of Testimony

§ 89.21 Opposing Petition for Perpetuation of Testimony and/or Preservation of Evidence Prior to Action [Code Civ. Proc. § 2035.030]--Petitioner or Petitioner's Successor in Interest Failed to Show Inability to Bring Action [Code Civ. Proc. § 2035.030(b)(2)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

§ 89.22 Opposing Petition for Perpetuation of Testimony and/or Preservation of Evidence Prior to Action [Code Civ. Proc. § 2035.030]--Testimony or Evidence Sought to Be Preserved Would Not Be Usable in Subsequent Legal Action

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Testimony or Evidence Must Be Usable in Action

§§ 89.23-89.29 [Reserved]

§ 89.30 Supporting Motion to Exclude Deposition Testimony--Notice of Deposition Under Code Civ. Proc. § 2035.040 Was Inadequate [Code Civ. Proc. § 2035.040]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Inadequate Notice of Deposition to Potential Adverse Party

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 89 DISCOVERY: PRESERVATION OF EVIDENCE
PART I. INTRODUCTION

8-89 California Points & Authorities § 89.01

§ 89.01 Scope of Chapter

This chapter includes memoranda relating to use of discovery methods in order to perpetuate testimony or otherwise preserve evidence before the commencement of an action or pending an appeal. Forms in Part II include memoranda supporting [§ 89.10] and opposing [§ 89.20 et seq.] a petition for leave to utilize one or more discovery methods to preserve evidence prior to the commencement of an action. Also included is a form supporting a motion to exclude deposition testimony that was not acquired in conformity with the notice requirements for preserving evidence [§ 89.30].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsPerpetuation of Testimony

California Points & Authorities

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 89 DISCOVERY: PRESERVATION OF EVIDENCE
PART I. INTRODUCTION

8-89 California Points & Authorities § 89.02

§ 89.02 Governing Law

[1] California Civil Discovery Act and Related Law

Civil discovery in California is governed primarily by the California Civil Discovery Act, codified at *Code Civ. Proc. §§ 2016.010-2036.050*. Discovery in limited civil cases is further governed by *Code Civ. Proc. §§ 94* and *95*. Statewide rules of court relating to discovery papers and discovery motions are set out in *Cal. Rules of Ct., Rules 3.1000*, 3.1345, 3.1346, 3.1347, and 3.1348.

[2] Provisions Governing Preservation of Evidence

The use of civil discovery methods to perpetuate testimony or preserve evidence prior to the commencement of an action or pending an appeal is governed primarily by *Code Civ. Proc. § 2035.010 et seq.* (prior to commencement of action) and *Code Civ. Proc. § 2036.010 et seq.* (pending appeal).

The methods of perpetuating testimony or preserving evidence prior to the commencement of an action or pending appeal are (1) oral or written depositions, (2) inspections of documents, things, and places, and (3) physical and mental examinations [*see Code Civ. Proc. §§ 2035.020, 2036.020*]. For memoranda relating to the specific procedures for each of these discovery methods, see respectively, Ch. 83, *Discovery: Depositions* , Ch. 85, *Discovery: Production or Inspection of Tangible Evidence* , and Ch. 87, *Discovery: Physical and Mental Examinations* .

For discussion of the duty to preserve electronic evidence and sanctions for abuses relating to discovery involving electronic evidence, as well as other issues arising in e-discovery, see Ch. 85A, *Discovery : E-Discovery*. For a form for a preliminary injunction to preserve electronic evidence pending a discovery order, see *Ch. 116, Injunctions, § 116.31*.

[3] Case Law Decided Under Prior Discovery Acts

The Civil Discovery Act was passed in 2004 and became effective July 1, 2005. It repealed and renumbered the Civil Discovery Act of 1986 but did not substantively change the law of civil discovery [Stats. 2004, ch. 182 §§ 22, 23, 61]. Thus cases decided under the 1986 Act remain controlling authority.

A considerable body of case law interpreted the discovery provisions of the Discovery Act of 1956 (former Code Civ. Proc. §§ 2016-2037.9), which preceded the 1986 Act. Although the 1986 Act, which became operative July 1, 1987, implemented numerous changes in the prior law, it also continued provisions of the prior law in many other instances, or even codified decisions interpreting the prior law. Decisions construing this prior law are therefore cited as persuasive, rather than controlling, authority to the extent that they are consistent with current provisions [*see In re Marriage of Skelley (1976) 18 Cal. 3d 365, 369, 134 Cal. Rptr. 197, 556 P.2d 297]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsPerpetuation of Testimony

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8-89 California Points & Authorities § 89.03

§ 89.03 How to Use the Forms in This Chapter

[1] Page Limits on Memoranda

One of the more significant drafting requirements to keep in mind are page limits: supporting and opposing memoranda filed in discovery motion proceedings may not exceed 15 pages. A reply or closing memorandum may not exceed 10 pages. Exhibits, declarations, attachments, the table of contents, the table of authorities, and the proof of service are excluded from these page limits. Any party must obtain leave of court to file a longer memorandum [*see Cal. Rules of Ct., Rule 3.1113(d)*]. These and other drafting requirements are discussed in further detail in Ch. 1, *Writing Legal Memoranda and Briefs* .

[2] Using the Forms to Build a Draft Memorandum

The forms included in this chapter are designed to be included in a memorandum supporting or opposing a petition for leave to conduct discovery before the commencement of an action. The grounds for a motion to perpetuate testimony or preserve evidence prior to an appeal or while an appeal is pending are substantially the same as that applicable to petitions to perpetuate testimony or preserve evidence prior to an action [*cf. Code Civ. Proc. § 2035.050* and *Code Civ. Proc. § 2036.040*]. Therefore, it may be appropriate to modify these forms for use in supporting or opposing a petition to preserve evidence pending appeal.

In some cases it will also be appropriate to combine these forms with additional memoranda set out in the related discovery chapters. In particular, they may be combined with the general memoranda for limiting or regulating discovery set out in Ch. 80, *Discovery: Scope , Regulation, and Timing*, or with the memoranda for limiting discovery based on the evidentiary privileges, work product protection, or other protective provisions found in Ch. 81, *Discovery: Privileges and Other Discovery Limitations* . It may also be appropriate to modify these memoranda for use in a different procedural context, such as in a trial or appellate brief or office memoranda.

For a detailed discussion on how to select and use the forms in the publication to build a draft memorandum and complete the draft, with detailed discussion of all drafting requirements and strategic or stylistic considerations, see Ch. 1, *Writing Legal Memoranda and Briefs* . For a skeletal form for a memorandum for use in creating a properly formatted outline in which to compile relevant forms from this publication, see also Ch. 1, *Writing Legal Memoranda*

and Briefs .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureDiscoveryMethodsPerpetuation of Testimony

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8-89 California Points & Authorities § 89.04

§ 89.04 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

For background discussion of forms for moving papers relating to the use of civildiscovery methods to perpetuate testimony or preserve evidence before the commencement of an action or pending appeal, California Forms of Pleading and Practice, Ch. 199, *Discovery: Preservation of Evidence* (Matthew Bender).

For detailed discussion, checklists, and forms for electronic discovery or "e-discovery," see Matthew Bender(R) Practice Guide: California Civil Discovery, Ch. 5, *Discovery of Electronic Information* .

[2] Related Memoranda

For memoranda supporting or opposing a motion to compel discovery based on general limiting or regulatory provisions of the Discovery Act, see Ch. 80, *Discovery: Scope, Regulation, and Timing* .

For memoranda supporting or opposing a motion to compel discovery on the ground that the matter sought to be discovered is privileged or is otherwise protected from disclosure, see Ch. 81, *Discovery: Privileges and Other Discovery Limitations* .

For memoranda relating to proceedings involving the particular discovery methods authorized under *Code Civ. Proc. §§ 2035.010 et seq.* and *2036.010 et seq.*, that is, depositions, inspection of documents, things, and places, and physical and mental examinations, see respectively Ch. 83, *Discovery: Depositions* , Ch. 85, *Discovery: Production or Inspection of Tangible Evidence* , and Ch. 87, *Discovery: Physical and Mental Examinations* .

For memoranda for use in seeking or opposing writs to review discovery orders, see Ch. 89A, *Discovery: Review of Discovery Orders* .

Legal Topics:

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

Civil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsPerpetuation of TestimonyCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryPrivileged MattersGeneral Overview

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8-89 California Points & Authorities §§ 89.05-89.09

[Reserved]

§§ 89.05[Reserved]

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8-89 California Points & Authorities § 89.10

§ 89.10 Supporting Petition for Perpetuation of Testimony and/or Preservation of Evidence Prior to Action [Code Civ. Proc. § 2035.030]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Petition of _____ [*name*],	)	MEMORANDUM IN SUPPORT OF PETITION
Petitioner,	)	FOR _____ [PERPETUATION OF
	)	TESTIMONY *and/or* PRESERVATION OF EVID-
to _____ [Perpetuate	)	ENCE]
Testimony of _____	)	Date: _____
(*name*(*s*)) *and/or* Preserve Evidence] Prior to Filing	)	Time: _____
of Action.	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THIS COURT SHOULD GRANT AN ORDER _____ [FOR THE PERPETUATION OF THE TESTIMONY OF _____ (*name*(*s*)) BY _____ (ORAL *or* WRITTEN) DEPOSITION *and/or* REQUIRING _____ (*name*(*s*)) TO PRODUCE AND PERMIT INSPECTION OF DOCUMENTS AND OTHER THINGS AS SPECIFIED IN THE ACCOMPANYING PETITION *and/or* REQUIRING _____ (*name*(*s*)) TO SUBMIT TO A _____ (PHYSICAL *and/or* MENTAL) EXAMINATION] IN ORDER TO PREVENT A FAILURE OR DELAY OF JUSTICE.

A. Standing to Bring Petition. One who expects to be a party or expects a successor in interest to be a party to any

action that may be cognizable in any court of the State of California, whether as a plaintiff or as a defendant, or in any other capacity, may obtain discovery within the scope delimited by *Code of Civil Procedure Section 2017.010 et seq.*, and subject to the restrictions of *Code of Civil Procedure Section 2019.010 et seq.*, for the purpose of perpetuating that person's own testimony or that of another natural person or organization, or of preserving evidence for use in the event an action is subsequently filed (*Code Civ. Proc. § 2035.010(a)*).

B. Inability to Bring Action. The verified petition must include a showing that the petitioner and, if applicable, the petitioner's successor in interest expects to be a party to an action cognizable in a California court, and is presently unable to bring the action or cause it to be brought (*Code Civ. Proc. §§ 2035.010(a), 2035.030(a), (b)(1), (b)(2)*).

C. Likelihood of Litigation. Whether there is a sufficient likelihood that theexpected litigation will result is a matter for the sound discretion of the court (*see Block v. Superior Court (1963) 219 Cal. App. 2d 469, 478, 33 Cal. Rptr. 205* (decided under former Code Civ. Proc. § 2017; *now see Code Civ. Proc. §§ 2035.010, 2035.030*).

D. Methods of Discovery. The methods available for discovery conducted for the purposes set forth in *Code of Civil Procedure Section 2035.010* are (1) oral and written depositions, (2) inspections of documents, things, and places, and (3) physical and mental examinations (*Code Civ. Proc. § 2035.020*).

E. Prevention of Failure or Delay of Justice. If the court determines that all or part of the discovery requested may prevent a failure or delay of justice, it must make an order authorizing that discovery (*Code Civ. Proc. § 2035.050*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

These points and authorities may be used in support of a petition for an order permitting discovery before an action is filed for the purpose of (1) perpetuating the petitioner's own testimony or the testimony of the petitioner's successor in interest or that of another natural person or organization, and/or (2) preserving evidence for use in the event that an action is subsequently filed by means of a request for inspection of documents or other things, or a request for a physical or mental examination [*see Code Civ. Proc. §§ 2035.010, 2035.020*]. The court must grant the petition if it finds that all or part of the discovery requested may prevent a failure or delay of justice [*Code Civ. Proc. § 2035.050(a)*]. In determining whether to authorize discovery by a petitioner who expects a successor in interest to be a party to the action, the court must consider, in addition to other appropriate factors, whether the requested discovery could be conducted by the petitioner's successor in interest, instead of by the petitioner [*Code Civ. Proc. § 2035.050(a)*].

The procedures of *Code Civ. Proc. § 2035.010 et seq.* may not be used for the purpose either of ascertaining the possible existence of a cause of action or a defense to it, or of identifying those who might be made parties to an action not yet filed [*Code Civ. Proc. § 2035.010(b)*]. For points and authorities for use in opposing the petition on this ground, see *§ 89.20*.

Note that some cases cited in this form construe law in effect prior to the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that they remain consistent with current provisions.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. In particular, counsel should refer to the reasons for requesting discovery as set forth in the verified petition [*see Code Civ. Proc. § 2035.030(b)(6)*], and show why the requested discovery may prevent a failure or delay of justice. For example, if appropriate, counsel may wish to refer to facts indicating that the person whose testimony is sought is gravely ill and unlikely to survive the time period estimated for commencement of litigation [*see, e.g., DeWagenknecht v. Stinnes (D.C. Cir. 1957) 250 F.2d 414* , discussed in *§ 89.10[4][b]*].

If the validity or construction of a written instrument may be called into question or is connected to the subject matter of the proposed discovery, counsel must attach to the petition a copy of that written instrument [*see Code Civ. Proc. § 2035.030(b)(3)*].

[c] Related Uses

Since the requirements and grounds for requesting discovery prior to an action are similar to those for requesting discovery pending an appeal [*cf. Code Civ. Proc. §§ 2035.020, 2035.050* and *Code Civ. Proc. §§ 2036.020, 2036.040*], counsel in an appropriate case may adapt this for use in support of a motion for discovery pending appeal [*see Code Civ. Proc. § 2036.010 et seq.*].

[d] Related Pleading and Practice Forms

For background discussion of forms of moving papers relating to the use of civil discovery methods to perpetuate testimony or preserve evidence before the commencement of an action or pending appeal, see California Forms of Pleading and Practice, Ch. 199, *Discovery: Preservation of Evidence* (Matthew Bender).

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 89.20* et seq. may be used to oppose a petition supported by the points and authorities in this form.

[3] Discussion of Authorities

[a] Likelihood of Litigation

In ***Block v. Superior Court*** *(1963) 219 Cal. App. 2d 469, 33 Cal. Rptr. 205* , petitioner sought to perpetuate testimony and require physical examination of a certain minor. Included in the petition were allegations that (1) an automobile accident had occurred involving petitioner's vehicle and the minor; (2) the minor had made a claim against petitioner; (3) petitioner expected to be a defendant in a personal injury action arising from the incident; (4) petitioner was unable to bring or cause the action to be brought; and (5) the facts that petitioner desired to establish by the proposed testimony were the true extent and nature of the injuries, if any, sustained by the minor. Petitioner's attorney filed an affidavit stating, inter alia, that he did not know how long the minor's attorney would wait until filing the lawsuit, and that the delay might be several years due to the minor's age. None of the allegations were denied. The trial court granted the petition and ordered the minor to appear for a physical examination. No order was made concerning the requested deposition. The minor's guardian filed a petition for a writ of prohibition restraining the superior court from enforcing its order.

The court of appeal affirmed, holding that the contents of the petition appeared to comply with the requirements of former Code Civ. Proc. § 2017 (*now see Code Civ. Proc. § 2035.030*). The court cited *De Wagenknecht v. Stinnes (D.C. Cir. 1957) 250 F.2d 414, 417* (discussed in *§ 89.10[4][b]*), to the effect that whether there is sufficient likelihood that the expected litigation will result is a matter for the sound discretion of the trial court (*219 Cal. App. 2d 469, 478)* .

[b] Methods of Discovery

Code Civ. Proc. § 2035.020 specifically provides that there are three methods for discovery prior to an action: (1) oral and written depositions, (2) inspection of documents, things, and places, and (3) physical and mental examinations. This codifies the previous case law interpretation of former Code Civ. Proc. § 2017 [*see Block v. Superior Court (1963) 219 Cal. App. 2d 469, 477, 33 Cal. Rptr. 205* (on proper showing, trial court may order inspection or physical examination without taking a deposition)].

For points and authorities relating to oral and written depositions, inspection of documents, things, and places, and physical and mental examinations, see respectively Ch. 83, *Discovery: Depositions* , Ch. 85, *Discovery: Production or Inspection of Tangible Evidence* , and Ch. 87, *Discovery: Physical and Mental Examinations* .

[4] Additional Authorities

[a] Standing to Bring Petition

In *Martin v. Reynolds Metals Corp. (9th Cir. 1961) 297 F.2d 49* , petitioner sought perpetuation of evidence, under *Fed. R. Civ. P., Rules 27* and *34*, claiming that fluorides from a plant had been discharged on his property injuring his cattle, and requesting an order to permit a deposition of petitioner and examinations of the affected land and cattle. The federal court of appeals affirmed the district court's order for inspection, but directed the court to redraft its order relating to the deposition to specify the subject matter of the examination and whether the depositions were to be on oral or written interrogatories. *Fed. R. Civ. P., Rule 27* requires that the party seeking the deposition be unable to bring the suit or cause it to be brought, and a defendant is entitled to use the procedure, on a proper showing, to preserve important testimony that might otherwise be lost (*297 F.2d 49, 55)* . (Note that the present controlling state statute, *Code Civ. Proc. § 2035.030(b)(4)*, requires that the petition set forth the particular discovery method that the petitioner wishes to employ; moreover, it specifically enumerates a potential defendant as having standing to bring the petition.)

[b] Likelihood of Litigation

In *De Wagenknecht v. Stinnes (D.C. Cir. 1957) 250 F.2d 414* , petitioner sought an order under *Fed. R. Civ. P., Rule 27(a)(1), (2)*, to authorize the taking of a deposition of a 74-year-old witness regarding petitioner's claim to certain property vested by the Attorney General. Petitioner alleged that she or her successors in interest intended to bring one or more actions for the wrongful withholding of her property, but that she was unable at that time to bring them for various specified reasons. The federal court of appeals affirmed the district court's order granting the petition, holding that in the event of either of two contingencies, petitioner would be a party to litigation to try the issue of her ownership of the property in question. The question of whether there is a sufficient likelihood that the expected litigation will result is a matter for the sound discretion of the trial court (*250 F.2d 414, 417)* .

Note that Code Civ. Proc. § 2017, the predecessor statute of *Code Civ. Proc. § 2035.010 et seq.*, was based on *Fed. R. Civ. P., Rule 27* [*see Block v. Superior Court (1963) 219 Cal. App. 2d 469, 475, 33 Cal. Rptr. 205* (citing *DeWagenknecht* for the rule set out in this point)]. *DeWagenknecht* may therefore be used as persuasive authority in interpreting *Code Civ. Proc. § 2035.010 et seq.* [*see Gorman Rupp Indus., Inc. v. Superior Court (1971) 20 Cal. App. 3d 28, 30, 97 Cal. Rptr. 377* (use of case law interpreting federal rules)].

[c] Prevention of Failure or Delay of Justice

In *Arizona v. California (1934) 292 U.S. 341, 54 S. Ct. 735, 78 L. Ed. 1298* , an equitable proceeding to perpetuate testimony (prior to the adoption of the Federal Rules of Civil Procedure), the United States Supreme Court held that to sustain a bill to perpetuate testimony it must appear, among other things, that (1) the facts expected to be proved by the testimony of the witnesses sought to be examined would be material in the determination of the matter in controversy; (2) the testimony would be competent evidence; (3) if no suit is pending, plaintiff is not in a position to start one in

which the issue might be determined; and (4) the taking of the testimony is made necessary by the danger that it might be lost by delay (*292 U.S. 341, 347-348)* . The Court denied the bill on the ground that Arizona failed to show that the testimony sought could be material or competent evidence in any action that might thereafter be sought (*292 U.S. 341, 360)* .

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 89 DISCOVERY: PRESERVATION OF EVIDENCE
PART II. FORMS

8-89 California Points & Authorities § 89.11

§ 89.11 Supporting Petition for Preservation of Evidence Prior to Action--Trial Court Has Inherent Power to Order Preservation of Evidence Pending Discovery When There Is No Adequate Remedy at Law

[1] FORM

[*Caption. See § 89.20[1].*]

TRIAL COURT HAS INHERENT POWER TO ORDER THE PRESERVATION OF EVIDENCE PENDING DISCOVERY WHEN THERE IS NO ADEQUATE REMEDY AT LAW FOR PRESERVATION.

Trial Court Has Inherent Power to Order Preservation of Evidence Pending Discovery, Absent a Statutory Remedy. The trial court has the inherent power to issue an injunction to prevent the potential destruction of evidence pending discovery, based on the trial court's inherent power to make orders facilitating discovery and the presentation of evidence, when the Civil Discovery Act does not provide an adequateremedy at law (*Dodge, Warren & Peters Ins. Serv., Inc. v. Riley (2003) 105 Cal. App. 4th 1414, 1419-1420, 130 Cal. Rptr. 2d 385*).

[2] Comments

[a] Use of Form

These points and authorities may be used to support a petition for preservation of evidence, based on the trial court's broad discretion to make orders facilitating discovery and the presentation of evidence, when there is not an adequate remedy at law that would prevent destruction of potentially discoverable evidence.

These points and authorities may be combined with the points and *authorities in § 89.10* in an appropriate case.

For further discussion of the duty to preserve electronically stored information and sanctions for e-discovery abuses, as well as other issues arising in e-discovery, see generally Ch. 85A, *Discovery : E-Discovery*. For a form for a preliminary injunction to preserve electronically stored information a discovery order, see *Ch. 116, Injunctions, § 116.31*. For forms supporting and opposing motions in the context of the discovery of electronically stored information, see Ch. 85A, *Discovery : E-Discovery*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should explain the reasons it is appropriate for the trial court to issue an injunction to prevent the potential destruction of evidence pending discovery and show why the requested preservation may prevent a failure or delay of justice.

[c] Related Pleading and Practice Forms

For background discussion of forms for moving papers related to the use of civil discovery methods to preserve evidence before the commencement of an action or pending appeal, *see* California Forms of Pleading and Practice, Ch. 199, *Discovery: Preservation of Evidence* (Matthew Bender).

[3] Discussion of Authorities

[a] Trial Court Has Inherent Power to Order Preservation of Evidence Pending Discovery, Absent a Statutory Remedy

In ***Dodge, Warren & Peters Ins. Serv., Inc. v. Riley*** *(2003) 105 Cal. App. 4th 1414, 130 Cal. Rptr. 2d 385* , plaintiff former employer sued defendant former employees for misappropriation of trace secrets and unfair business practices.

Before leaving their employment to open a competing insurance brokerage firm, defendants copied documents maintained in plaintiff's files and computer storage media. Plaintiff obtained an preliminary injunction against defendants, requiring the preservation of electronic evidence by prohibiting defendants from destroying, deleting or secreting from discovery any of their electronic storage media and by requiring them to allow a court-appointed expert to copy all of it, including computer hard drives and discs, to recover lost or deleted files, and to perform automated searches of that evidence under guidelines agreed to by the parties or established by the court. Defendants appealed, claiming that the trial court erred in issuing the injunction because an adequate remedy at law existed and because plaintiff provided no evidence in support of its issuance.

At issue was whether it was appropriate for the trial court to issue an injunction to prevent the potential destruction of evidence pending discovery. Plaintiff's application for the injunction stated that defendants, "innocently or not," violated plaintiff's right to discovery by destroying potentially discoverable evidence. By doing so, defendants rendered plaintiff's right to discovery ineffectual. The application further requested that the status quo be preserved pending a determination of the question whether certain evidence would be subject to discovery. The court of appeal "[could] not conceive, as a matter of policy, given the broad discretion possessed of the trial court to ensure the effective administration of justice, why injunctive relief should not be available under circumstances such as these, should it otherwise be merited" (*105 Cal. App. 4th 1414, 1418-1419)* .

The appellate court rejected defendants' claim that the injunction was not properly issued because the Civil Discovery Act of 1986 (Discovery Act) provided plaintiff with an adequate remedy at law. In effect, defendants argued that the Discovery Act provided "an exclusive framework for dealing with evidence in a legal action." However, they provided no authority for this proposition. Further, they failed to establish that the Discovery Act provided *any* protection under the circumstances. The court observed that neither former Code Civ. Proc. § 2017(e) (*now see Code Civ. Proc. § 2017.010 et seq.*) nor former Code Civ. Proc. § 2019 (*now see Code Civ. Proc. § 2019.010 et seq.*) provided a mechanism to preserve evidence. Moreover, former Code Civ. Proc. § 2031(f) (*now see Code Civ. Proc. § 2031.060*) authorized the trial court to issue orders protecting a party from producing evidence. It did not specifically authorize the trial court to act on behalf of the party seeking evidence. Rather, a party seeking to preserve evidence must obtain an injunction, not a protective order under the discovery statutes (*105 Cal. App. 4th 1414, 1419)* .

The appellate court also rejected defendants' contention that the availability of sanctions for misuse of the discovery

statutes established an adequate remedy at law for the preservation of evidence. Based on the Supreme Court's decision in *Cedars-Sinai Medical Center v. Superior Court (1998) 18 Cal. 4th 1, 74 Cal. Rptr. 2d 248, 954 P.2d 511* (discussed in *§ 85.90[3][a]*), that there is no separate tort cause of action for intentional spoliation of evidence, in part because other remedies exist, defendants argued that other sanctions are adequate to protect a litigant's rights. This court declined to read the *Cedars-Sinai* so narrowly. The appellate court explained that a primary reason for denying the existence of a separate tort remedy was to prevent an endless cycle of litigation. In support of its conclusion, the Supreme Court also cited to the existence of non-tort remedies, including evidentiary and monetary sanctions, as well as criminal penalties, which act as deterrents to intentional acts of spoliation. However, the Supreme Court did not disapprove of injunctive relief as another non-tort alternative. Further, in deciding not to allow a new tort cause of action, the Supreme Court "certainly did not suggest that a litigant could do nothing to prevent spoliation from occurring, but could only react after the fact." Finally, in recognizing the difficulty in proving damages for intentional evidence spoliation, the Supreme Court in *Cedars-Sinai* also recognized that irreparable harm is likely to result when evidence is destroyed (*105 Cal. App. 4th 1414, 1419-1420)* .

Because plaintiff could lose the evidence if the injunction was not issued, and defendants admitted to copying information from plaintiff's computer discs, the trial court did not abuse its discretion in finding irreparable harm and the likelihood that the plaintiff would have success on the merits of the injunction (*105 Cal. App. 4th 1414, 1419-1420)* .

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8-89 California Points & Authorities §§ 89.12-89.19

[Reserved]

§§ 89.12[Reserved]

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 89 DISCOVERY: PRESERVATION OF EVIDENCE
PART II. FORMS

8-89 California Points & Authorities § 89.20

§ 89.20 Opposing Petition for Perpetuation of Testimony and/or Preservation of Evidence Prior to Action [Code Civ. Proc. § 2035.030]--Use of Procedure for Improper Purpose [Code Civ. Proc. § 2035.010(b)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

Petition of _____ [*name*], Petitioner, to _____ [Perpetuate Testimony of _____ (*name*(*s*)) *and/or* Preserve Evidence] Prior to Filing of Action.	)))))))))	NO. _____ MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PETITION FOR _____ [PERPETUATION OF TESTIMONY *and/or* PRESERVATION OF EVIDENCE] Date:_____ Time:_____ Location:_____ [Judge:_____] Date Action Filed:_____ [Trial Date:_____]

_____

_____'S [*petitioner's name*] PETITION FOR _____ [PERPETUATION OF THE TESTIMONY OF _____ (*name*) *or* PRESERVATION OF EVIDENCE] IS IMPROPER BECAUSE THE PETITION HAS BEEN BROUGHT FOR THE PURPOSE OF _____ [ASCERTAINING THE POSSIBLE EXISTENCE OF A CAUSE OF ACTION OR A DEFENSE TO IT *and/or* IDENTIFYING THOSE WHO MIGHT BE MADE PARTIES TO AN ACTION NOT YET FILED].

A. Limitation on Use of Perpetuation of Testimony. The procedures of *Section 2035.010 et seq. of the Code of Civil*

Procedure may not be employed for the purpose either of ascertaining the possible existence of a cause of action or a defense to it, or of identifying those who might be made parties to an action not yet filed (*Code Civ. Proc. § 2035.010(b)*).

B. Perpetuation Not Designed Primarily for Discovery. Perpetuation of testimony is allowed solely to preserve evidence for use in a probable future court case, and the statute providing for it was not designed for discovery. Thus, even though discovery may properly be a by-product of a perpetuation proceeding, discovery should not be the sole purpose (*Hunt-Wesson Foods, Inc. v. County of Stanislaus (1969) 273 Cal. App. 2d 92, 98, 77 Cal. Rptr. 832*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

These points and authorities may be used to oppose a petition for perpetuation of testimony or preservation of evidence on the ground that the petitioner is improperly seeking to ascertain the possible existence of a cause of action or defense, or to identify those who might be made parties to an action not yet filed [*see Code Civ. Proc. § 2035.010(b)* (limiting use of discovery before action is filed)].

In an appropriate case, the points and authorities in this form may be combined with those in §§ 89.21 and 89.22 when counsel also wishes to contend that the petition fails to show the present inability of petitioner either to bring the action or to cause the action to be brought, or when the petition seeks to preserve evidence that cannot be used in a subsequent action.

In an appropriate case, these points and authorities may be submitted in opposition to the petition supported by the points and authorities *set out in § 89.10*.

Note that some cases cited in this form construe law in effect prior to the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that they remain consistent with current provisions.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should show facts supporting the contention that petitioner is attempting to ascertain the possible existence of a cause of action, or defense to it; or identify those who might be made parties to a possible future action; or both. If appropriate, counsel should show why there is no sufficient likelihood that litigation will occur.

[3] Discussion of Authorities

[a] Perpetuation Not Designed Primarily for Discovery

In ***Hunt-Wesson Foods, Inc. v. County of Stanislaus*** *(1969) 273 Cal. App. 2d 92, 77 Cal. Rptr. 832* , petitioner planned to file an application with the county supervisors (sitting as the board of equalization) for reduction of an assessment on its inventory, and initiated proceedings pursuant to former Code Civ. Proc. § 2017 (*now see Code Civ. Proc. § 2035.010 et seq.*) for an order permitting it to take depositions of the assessor and three of his deputies. The

county resisted on the grounds that the depositions would not be admissible evidence either at the equalization hearing [*see Rev. & Tax. Code § 1609*] or at the trial of any possible court action thereafter, and that depositions under the perpetuation statute cannot be taken for discovery purposes only. The superior court denied the petition, and petitioner appealed from that order.

The court of appeal affirmed the order denying the petition, finding that if the depositions had been permitted, they could not have been used by direct introduction at the hearing before the board of supervisors. Furthermore, if petitioner were unsuccessful before the board, it could not introduce the depositions in any suit to attack the assessment and the board's determination (*273 Cal. App. 2d 92, 93-94)* . Petitioner conceded the point, but contended that it was entitled to the depositions for discovery purposes. The court of appeal held that former Code Civ. Proc. § 2017 (*now see Code Civ. Proc. § 2035.010 et seq.*) was designed for the perpetuation of testimony and that its utility is in the preservation of evidence for introduction in a probable future court case. It was not designed for discovery in the usual sense, which was the sole purpose in the case before the court. When a deposition is ordered under the statute, there may be inquiries that would incidentally constitute discovery. However, if there is no opportunity to use the perpetuated testimony in an actual legal action, the function and purpose of the statute is thwarted and its use to obtain collateral information only should be denied (*273 Cal. App. 2d 92, 98)* .

[4] Additional Authorities

[a] Perpetuation Provision Not Designed Primarily for Discovery

In *Campbell Chain Co. v. County of Alameda (1970) 12 Cal. App. 3d 248, 90 Cal. Rptr. 501* , an action by corporate taxpayers seeking to recover taxes paid under protest, plaintiffs contended on appeal that the trial court had erred in excluding depositions of the assessor and his deputies taken to perpetuate testimony. The court of appeal affirmed, holding, inter alia, that former Code Civ. Proc. § 2017 (*now see Code Civ. Proc. § 2035.010 et seq.*) was designed for the perpetuation of testimony, even though discovery might be a by-product, and that if there is no opportunity to use perpetuated testimony in an actual legal action, the function and purpose of the statutory device is thwarted and its use to obtain only collateral information should be denied [citing *Hunt-Wesson Foods, Inc. v. County of Stanislaus (1969) 273 Cal. App. 2d 92, 77 Cal. Rptr. 832* , discussed in *§ 89.20[3][a]*] (*12 Cal. App. 3d 248, 257)* .

The facts and procedural background of *Block v. Superior Court (1963) 219 Cal. App. 2d 469, 33 Cal. Rptr. 205* , are discussed in *§ 89.10[3][a]*. In *Block*, the court of appeal held that it is the province of the trial court to determine whether there is sufficient likelihood that the expected litigation will occur (*219 Cal. App. 2d 469, 478)* . The court also noted that the then controlling perpetuation statute (former Code Civ. Proc. § 2017, comparable to the present *Code Civ. Proc. § 2035.010 et seq.*) restricted its use to perpetuation purposes and eliminated its use for the discovery purposes adequately covered by other statutes (*219 Cal. App. 2d 469, 477, n.5*).

[b] Limitations on Use of Perpetuation of Testimony

In *Orr v. City of Stockton (2007) 150 Cal. App. 4th 622, 630-631, 58 Cal. Rptr. 3d 662* , defendant city appealed a judgment for plaintiff, who was involved in an automobile accident with a city police officer driving a patrol car. On appeal, defendant renewed its argument that plaintiff failed to satisfy the California Tort Claims Act's six month statute of limitations in *Gov. Code § 945.6(a)(1)*. Plaintiff countered that his petition to preserve evidence under *Code Civ. Proc. § 2035.010 et seq.* constituted an "action" that satisfied the statute of limitations. The court of appeal reversed, holding that the filing of a petition to perpetuate testimony or preserve evidence did not constitute filing "suit" for purposes of satisfying the applicable statute of limitations, because it was not an adversarial proceeding to enforce a right or redress an injury. The procedure to perpetuate testimony or to preserve evidence under *Code Civ. Proc. § 2035.010 et seq.* "does not provide the petitioner with any further relief beyond obtaining discovery materials" [*150 Cal. App. 4th 622, 630-631]* .

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8-89 California Points & Authorities § 89.21

§ 89.21 Opposing Petition for Perpetuation of Testimony and/or Preservation of Evidence Prior to Action [Code Civ. Proc. § 2035.030]--Petitioner or Petitioner's Successor in Interest Failed to Show Inability to Bring Action [Code Civ. Proc. § 2035.030(b)(2)]

[1] FORM

[*Caption. See § 89.20[1].*]

THE PETITION FOR _____ [PERPETUATION OF THE TESTIMONY OF _____ (*name*) *and/or* PRESERVATION OF EVIDENCE] IS IMPROPER BECAUSE PETITIONER [*OR* PETITIONER'S SUCCESSOR IN INTEREST] DID NOT SUFFICIENTLY SET FORTH HIS/HER PRESENT INABILITY EITHER TO BRING THE ACTION TO WHICH PETITIONEREXPECTS TO BE A PARTY, OR CAUSE THAT ACTION TO BE BROUGHT.

Necessity to Show Inability to Bring Action. A petition to obtain discovery under *Code of Civil Procedure Section 2035.010 et seq.* must set forth the present inability of the petitioner and, if applicable, the petitioner's successor in interest either to bring that action or to cause it to be brought (*Code Civ. Proc. § 2035.030(b)(2)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

These points and authorities may be used to oppose a petition for perpetuation of testimony or preservation of evidence on the ground that petitioner and, if applicable, the petitioner's successor in interest failed to show a present inability to

bring the action to which he or she expects to be a party, or to cause that action to be brought [*see Code Civ. Proc. § 2035.030(b)(2)*].

The points and authorities in this form may be combined with the points and *authorities in § 89.20* when counsel wishes to contend that the perpetuation of testimony is generally improper because the petitioner is attempting to ascertain the possible existence of a cause of action, or defense to it; or to identify those who might be made parties to a possible future action [*see Code Civ. Proc. § 2035.010*]. This form may be combined with the points and *authorities in § 89.22* if counsel wishes to contend that the petition is improper because the testimony or evidence sought to be preserved will not be usable in any subsequent legal action.

In an appropriate case, these points and authorities may be submitted in opposition to the petition supported by the points and authorities *set out in § 89.10*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Counsel therefore should explain how petitioner and, if applicable, the petitioner's successor in interest failed to show, either categorically or adequately, an inability to bring the action or cause the action to be brought. Counsel also should show, if possible, why petitioner would be able either to bring the action, or cause the action to be brought. For example, if appropriate, counsel should show that petitioner or petitioner's successor in interest is able to bring an action for declaratory relief regarding the underlying subject matter.

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8-89 California Points & Authorities § 89.22

§ 89.22 Opposing Petition for Perpetuation of Testimony and/or Preservation of Evidence Prior to Action [Code Civ. Proc. § 2035.030]--Testimony or Evidence Sought to Be Preserved Would Not Be Usable in Subsequent Legal Action

[1] FORM

[*Caption. See § 89.20[1].*]

THE PETITION FOR _____ [PERPETUATION OF THE TESTIMONY OF _____ (*name*) *and/or* PRESERVATION OF EVIDENCE] SHOULD BE DENIED BECAUSE THE _____ [TESTIMONY *and/or* EVIDENCE] SOUGHT TO BE PRESERVED CANNOT BE USED IN ANY SUBSEQUENT LEGAL ACTION.

Testimony or Evidence Must Be Usable in Action. If there is no opportunity to use perpetuated testimony (or preserved evidence) in a legal action, the function and purpose of the statutory device would be thwarted, and the use of the perpetuation procedure for obtaining only collateral information should be denied (*Hunt-Wesson Foods, Inc. v. County of Stanislaus (1969) 273 Cal. App. 2d 92, 98, 77 Cal. Rptr. 832*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

These points and authorities may be used to oppose a petition for perpetuation of testimony or preservation of evidence on the ground that the testimony or evidence sought to be preserved cannot be used in any subsequent legal action.

The points and authorities in this form may be combined with the points and *authorities in §§ 89.20* and *89.21* in an appropriate case.

In an appropriate case, these points and authorities may be submitted in opposition to the petition supported by the points and authorities *set out in § 89.10*.

Note that some cases cited in this form construe law in effect prior to the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that they remain consistent with current provisions.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Counsel should thus refer to facts demonstrating that the particular testimony or evidence sought would not be usable in a subsequent legal proceeding and that the petition should therefore be denied.

[3] Discussion of Authorities

[a] Testimony or Evidence Must Be Usable in Action

Hunt-Wesson Foods, Inc. v. County of Stanislaus *(1969) 273 Cal. App. 2d 92, 77 Cal. Rptr. 832* is discussed in *§ 89.20[3][a]*. In that case, the court of appeal had noted that the public officials' testimony that petitioner sought to perpetuate would not be usable in any subsequent legal action by petitioner. The court held that former Code Civ. Proc. § 2017 (*now see Code Civ. Proc. § 2035.010 et seq.*) was designed for the perpetuation of testimony and that its utility is in the preservation of evidence for introduction in a probable future court case. It was not designed for discovery in the usual sense, which was the sole purpose in the case before the court. When a deposition is ordered under the statute, there may be inquiries that would incidentally constitute discovery. However, if there is no opportunity to use the perpetuated testimony in an actual legal action, the function and purpose of the statute is thwarted and its use to obtain collateral information only should be denied (*273 Cal. App. 2d 92, 98)* .

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8-89 California Points & Authorities §§ 89.23-89.29

[Reserved]

§§ 89.23[Reserved]

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8-89 California Points & Authorities § 89.30

§ 89.30 Supporting Motion to Exclude Deposition Testimony--Notice of Deposition Under Code Civ. Proc. § 2035.040 Was Inadequate [Code Civ. Proc. § 2035.040]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES SUPPORTING MOTION IN LIMINE OF _____ [*status and name of moving party*]
vs.	)	
_____ [*name*],	)	
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

THE COURT SHOULD GRANT THE MOTION TO EXCLUDE THE DEPOSITION TESTIMONY OF _____ [*name*], BECAUSE THE DEPOSITION WAS TAKEN PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 2035.010 et seq., BUT WITHOUT ADEQUATE NOTICE OF THE DEPOSITION TO THE MOVING PARTY AS A POTENTIAL ADVERSE PARTY.

Inadequate Notice of Deposition to Potential Adverse Party. Notice of a petition to obtain discovery under *Code of Civil Procedure Section 2035.040* must be served on each natural person or organization named in the petition as an expected adverse party. If petitioner is unable to cause service to be made on any expected adverse party named in the

petition, after a court order for service by publication, petitioner must serve those adverse parties by publication. Thus, notice is inadequate when it is not served on the party (or the party's attorney) or is not served by publication [*see Code. Civ. Proc. § 2035.040*; *N.N.V. v. American Association of Blood Banks (1999) 75 Cal. App. 4th 1358, 1395-1396, 89 Cal. Rptr. 2d 885]* .
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a motion, for example, a motion in limine, to exclude deposition testimony taken pursuant to *Code Civ. Proc. § 2035.040*, on the ground that the moving party, against whom the testimony is sought to be introduced, was not given adequate notice of the deposition under *Code Civ. Proc. § 2035.040*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. In particular, facts of the case that show that the adverse party was not served in accordance with the prescribed procedure, or that the manner of service was defective, should be brought out [*see Code Civ. Proc. § 2035.040*].

[c] Related Pleading and Practice Forms

For a general form of motion in limine to exclude specified evidence at trial, see California Forms of Pleading and Practice, Ch. 373, *Motions in Limine* (Matthew Bender).

[3] Discussion of Authorities

[a] Inadequate Notice of Deposition to Potential Adverse Party

In ***N.N.V. v. American Association of Blood Banks*** *(1999) 75 Cal. App. 4th 1358, 89 Cal. Rptr. 2d 885* , the representative of a deceased minor child appealed a court order granting judgment in favor of defendant blood bank and defendant nurse on a complaint seeking damages for developing acquired immune deficiency syndrome (AIDS) as a result of a blood transfusion (*75 Cal. App. 4th 1358, 1363)* . Among other things, plaintiff contended that the court should grant a new trial because it erred in ruling that the deposition testimony of the child's father, taken pursuant to former Code Civ. Proc. § 2035 (*now see Code Civ. Proc. § 2035.010* etseq.), was inadmissible (*75 Cal. App. 4th 1358, 1395)* . The court of appeal disagreed, upholding the trial court's exclusion of the deposition in the trial against defendant nurse (*75 Cal. App. 4th 1358, 1396)* .

Former Code Civ. Proc. § 2035 provides a procedure for perpetuating deposition testimony before the filing of the complaint. It requires the filing of a petition in the superior court of the county of residence of at least one of the adverse parties and notice to the adverse parties. A deposition taken pursuant to former Code Civ. Proc. § 2035 may be used in any action involving the same subject matter that is brought in a California court, in accordance with former Code Civ. Proc. § 2025(u) (*now see Code Civ. Proc. § 2025.620*) against any party, or that party's successor in interest, named in the petition as an expected adverse party (*75 Cal. App. 4th 1358, 1396)* . In this case, defendant nurse was not given

proper notice of the hearing on the deposition. The record showed that two hospitals and a blood bank were given notice of and appeared at the deposition. Plaintiff's notice of the deposition to defendant nurse gave notice to her in care of the attorneys for the two defendant hospitals, neither of which was her employer; and she did not appear at the deposition either personally or through an attorney. The court concluded that notice was inadequate (*75 Cal. App. 4th 1358, 1396)* . The court rejected plaintiff's argument that counsel for the other defendants who were present at the deposition covered matters that defendant nurse would have covered. Since the nurse was not an employee of any of the defendants present at the deposition, none had the motive to question the deponent as to the reliability and credibility of his identification of defendant nurse as the nurse who failed to communicate to the doctors his request for directed blood donation for his son (*75 Cal. App. 4th 1358, 1396)* . The court noted that, if anything, the hospital defendants had an interest adverse to that of defendant nurse's, that is, an interest in establishing that if any nurse failed to communicate a request for directed donation, that nurse was the defendant and not one of the nurses employed by the hospitals (*75 Cal. App. 4th 1358, 1396-1397)* . Moreover, the court added that even if notice were deemed adequate, the deposition testimony at issue was inadmissible hearsay (*75 Cal. App. 4th 1358, 1396)* .

California Points & Authorities

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 89A DISCOVERY: REVIEW OF DISCOVERY ORDERS

8-89A California Points & Authorities 89A.syn

§ 89A.syn Synopsis to Chapter 89A: DISCOVERY: REVIEW OF DISCOVERY ORDERS

§ 89A.01 Scope of Chapter

§ 89A.02 Governing Law

§ 89A.03 Review by Extraordinary Writ

§ 89A.04 How to Use the Forms in This Chapter

[1] Page Limits on Memoranda

[2] Using the Forms to Build a Draft Memorandum

§ 89A.05 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

[2] Related Memoranda

§§ 89A.06-89A.09 [Reserved]

§ 89A.10 Caption for Memorandum in Support of or in Opposition to Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] or Prohibition [Code Civ. Proc. §§ 1102, 1103]

[1] FORM

[2] Comments

[a] Use of Form

§§ 89A.11-89A.19 [Reserved]

§ 89A.20 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Trial Court Improperly Denied Discovery--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Inadequate Remedy at Law

[b] Writ of Mandate Proper to Review Discovery Orders

[c] Questions of General Importance

[d] Abuse of Discretion

[e] Absence of Sufficient Showing to Sustain Trial Court Order

[f] Failure to Consider Legal Concepts

[g] Misconception of Law

[h] Both Writs of Mandate and Prohibition May Be Granted

[4] Additional Authorities

[a] Questions of General Importance

§ 89A.21 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Trial Court Improperly Denied Discovery--Mandate Proper to Compel Answers to Written Interrogatories

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Writ of Mandate to Compel Answers to Interrogatories

[b] Matters Subject to Discovery by Interrogatories

[c] Liberal Construction of Statute Favored for Disclosure

[d] Abuse of Discretion in Denying Interrogatories

§ 89A.22 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Trial Court Improperly Denied Discovery--Mandate Proper to Compel Response to Requests for Admissions

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Writ of Mandate to Compel Admissions

[b] Liberal Construction of Statute Favored for Discovery

[c] Abuse of Discretion in Totally Denying Requests for Admissions

§ 89A.23 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Trial Court Improperly Denied Discovery--Mandate Proper to Compel Deposition Testimony

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Writ of Mandate to Compel Answers at Deposition

[b] Writ of Mandate to Compel Testimony at Deposition

[c] Urgency of Case Requiring Issuance of Peremptory Writ Without Alternative Writ of Mandate

[4] Additional Authorities

[a] Writ of Mandate to Compel Answers at Deposition

§ 89A.24 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Trial Court Improperly Denied Discovery--Mandate Proper to Compel Inspection, Copying, Testing, of Sampling of Documents, Tangible Things, Land or Other Property, or Electronically Stored Evidence [Code Civ. Proc. § 2031.010 et seq.]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Mandate When Production Improperly Denied

[4] Additional Authorities

[a] Mandate When Production Improperly Denied

§ 89A.25 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Trial Court Improperly Denied Discovery--Mandate Proper to Compel Physical or Mental Examination

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Mandate to Compel Examination or Conditions of Examination

§§ 89A.26-89A.29 [Reserved]

§ 89A.30 Supporting Petition for Writ of Prohibition [Code Civ. Proc. §§ 1102, 1103]--Trial Court Improperly Permitted Discovery--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Availability of Writs to Review Grant of Discovery

[d] Related Pleading and Practice Forms

[e] Related Points and Authorities

[f] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Writ of Prohibition Proper to Review Discovery Orders

[b] Questions of General Importance

[c] Remedy at Law Inadequate

[d] Abuse of Discretion

[e] Failure to Apply Proper Legal Concepts

[4] Additional Authorities

[a] Questions of General Importance

§ 89A.31 Supporting Petition for Writ of Prohibition [Code Civ. Proc. §§ 1102, 1103]--Trial Court Improperly Permitted Discovery--Prohibition Proper to Prevent Improper Questions or Improper Conditions at Deposition

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Writ of Prohibition to Restrain Enforcement of Order Requiring Deponent to Answer Improper Deposition Questions

[b] Writ of Prohibition to Restrain Enforcement of Improper Conditions for Deposition

[c] Writ of Prohibition to Restrain Enforcement of Order Requiring Deponent to Disclose Privileged Information

§ 89A.32 Supporting Petition for Writ of Prohibition [Code Civ. Proc. §§ 1102, 1103]--Trial Court Improperly Permitted Discovery--Prohibition Proper When Court Improperly Ordered Party to Answer Interrogatories

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Writ of Prohibition to Restrain Answers to Interrogatories

[b] Prohibition Proper When Time Limit Has Expired

§ 89A.33 Supporting Petition for Writ of Prohibition [Code Civ. Proc. §§ 1102, 1103]--Trial Court Improperly Permitted Discovery--Prohibition Proper When Court Ordered Disclosure of Privileged Material

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Writ of Prohibition to Prevent Disclosure of Privileged Material

[b] Written Interrogatories

[c] Production of Documents or Records for Inspection

[4] Additional Authorities

[a] Writ of Prohibition to Prevent Disclosure of Privileged Material

[b] Production of Documents or Records for Inspection

§ 89A.34 Supporting Petition for Writ of Prohibition [Code Civ. Proc. §§ 1102, 1103]--Trial Court Improperly Permitted Discovery--Prohibition Proper When Court Ordered Disclosure That Intrudes on Constitutionally Protected Interest

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Constitutionally Protected Interests

[4] Additional Authorities

[a] Constitutionally Protected Interests

§ 89A.35 Supporting Petition for Writ of Prohibition [Code Civ. Proc. §§ 1102, 1103]--Trial Court Improperly Permitted Discovery--Prohibition Proper When Certain Sanctions Imposed for Not Complying With Discovery Order

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Writ of Prohibition to Restrain Enforcement of Sanctions

[b] Ultimate Possibility of Appeal No Bar to Writ of Prohibition

§§ 89A.36-89A.39 [Reserved]

§ 89A.40 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Extraordinary Writs Generally Improper for Review of Discovery Orders

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Prerogative Writ Is Disfavored Method of Reviewing Discovery Order

[b] No Abuse of Discretion

[c] Issues of First Impression

[d] Discovery as Matter of Right

[4] Additional Authorities

[a] Issues of First Impression

§ 89A.41 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Request for Sanctions [Code Civ. Proc. §§ 907, 1109; Cal. Rules of Ct., Rules 8.276(a), 8.764(a)]--Frivolous Petition Objecting to Legitimate Demand for Discovery

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] Sanctions Appropriate for Frivolous Mandate Petition Objecting to Legitimate Demand for Inspection

§§ 89A.42-89A.49 [Reserved]

§ 89A.50 Opposing Petition for Writ of Prohibition [Code Civ. Proc. §§ 1102, 1103]--Extraordinary Writs Generally Improper for Review of Discovery Orders

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] No Abuse of Discretion by Trial Court

[b] Discovery Statutes to Be Liberally Construed

[c] Relevancy Standard

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8-89A California Points & Authorities § 89A.01

§ 89A.01 Scope of Chapter

This chapter includes memoranda relating to review of discovery orders by extraordinary writ. Forms in Part II include the following:

- A form for a caption for memorandum supporting a petition for writ of mandate or prohibition [§ 89A.10].
- Forms supporting a petition for writ of mandate [§ 89A.20 et seq.] and writ of prohibition [§ 89A.30 et seq.].
- Forms opposing a petition for writ of mandate [§ 89A.40 et seq.] and writ of prohibition [§ 89A.50].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsProhibition

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8-89A California Points & Authorities § 89A.02

§ 89A.02 Governing Law

Civil discovery in California is governed primarily by the California Civil Discovery Act, codified at *Code Civ. Proc. §§ 2016.010 et seq.*-2036.010 et seq. Discovery in limited civil cases is further governed by *Code Civ. Proc. §§ 94* and *95*. Statewide rules of court relating to discovery papers and discovery motions are set out in *Cal. Rules of Ct., Rules 3.1000*, 3.1345, 3.1346, 3.1347, and 3.1348.

Provisions generally governing the appealability of interlocutory orders are set out in *Code Civ. Proc. § 904.1 et seq.* Review of nonappealable orders, by extraordinary writ of mandate or prohibition, are governed generally by *Code Civ. Proc. §§ 1084-1108* and *Cal. Rules of Ct., Rule 8.486* (writ proceedings in appellate courts).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsProhibitionCivil ProcedureAppealsAppellate JurisdictionInterlocutory Orders

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8-89A California Points & Authorities § 89A.03

§ 89A.03 Review by Extraordinary Writ

A writ of mandate pursuant to *Code Civ. Proc. § 1085* normally is used to compel an inferior court to perform an act that the law requires that inferior court to perform. The writ of prohibition is the counterpart of mandate, and pursuant to *Code Civ. Proc. § 1102* is used to arrest, restrain, and prevent proceedings of an inferior court that has exceeded its jurisdiction [*American Mut. Liab. Ins. Co. v. Superior Court (1974) 38 Cal. App. 3d 579, 588, 113 Cal. Rptr. 561]* . Therefore, mandate is usually the appropriate remedy for an improper denial of discovery, while prohibition is the proper remedy to prevent improper discovery [*see* *Burke v. Superior Court (1969) 71 Cal. 2d 276, 277-278 n.1, 78 Cal. Rptr. 481, 455 P.2d 409]* . Despite the different purposes of the two prerogative writs, courts have often used mandate to prohibit actions of trial courts [*Morris Stulsaft Foundation v. Superior Court (1966) 245 Cal. App. 2d 409, 415, 54 Cal. Rptr. 12]* , which has had the effect of changing the test for the writ of prohibition from one of excess of jurisdiction to one of abuse of discretion [*American Mut. Liab. Ins. Co. v. Superior Court (1974) 38 Cal. App. 3d 579, 589, 113 Cal. Rptr. 561]* .

Although counsel should attempt to choose the appropriate writ, a mistake is not fatal if the allegations and prayers of the petition are broad enough to encompass the appropriate remedy, in which case the petition may be treated as one for such relief, and the appropriate writ granted [*O'Brien v. Superior Court (1965) 233 Cal. App. 2d 388, 392, 43 Cal. Rptr. 815]* . If a single writ will not provide all of the relief required, the court may grant both the writ of prohibition to prevent the lower court from acting in excess of its jurisdiction, and mandate to compel a mandatory act [*O'Brien v. Superior Court (1965) 233 Cal. App. 2d 388, 392, 43 Cal. Rptr. 815]* . Therefore, if it is not clear which writ is appropriate, counsel may wish to petition the court for both, in the alternative [*Peck's Liquors, Inc. v. Superior Court (1963) 221 Cal. App. 2d 772, 775, 34 Cal. Rptr. 735]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsProhibition

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8-89A California Points & Authorities § 89A.04

§ 89A.04 How to Use the Forms in This Chapter

[1] Page Limits on Memoranda

One of the more significant drafting requirements to keep in mind, particularly with respect to petitions filed in a trial court, are page limits. Supporting and opposing memoranda filed in law and motion proceedings generally may not exceed 15 pages. A reply or closing memorandum may not exceed 10 pages. Exhibits, declarations, attachments, the table of contents, the table of authorities, and the proof of service are excluded from these page limits. Any party must obtain leave of court to file a longer memorandum [*see Cal. Rules of Ct., Rule 3.1113(d)*; *see also Cal. Rules of Ct., Rule 3.1103(a)(2)* (application of law and motion rules to writ petitions in trial court)]. These and other drafting requirements are discussed in further detail in Ch. 1, *Writing Legal Memoranda and Briefs* .

Writ petitions in reviewing court are subject to the page limits and other format requirements applicable to appellate briefs generally [*see Cal. Rules of Ct., Rule 8.486(a)(6)* (petitions subject generally to Cal. Rules of Ct., Rule 15, *now see Cal. Rules of Ct., Rule 8.204* (content and forms of appellate briefs); *see also Cal. Rules of Ct., Rule 8.486(b)(1)(B)* (memoranda supporting or opposing writ petitions in reviewing court)]. Thus, the 50-page limit applicable to appellate briefs applies to writs petitions and their supporting memoranda, as well to memoranda opposing a petition [*see Cal. Rules of Ct., Rule 8.204(c)(2)*].

[2] Using the Forms to Build a Draft Memorandum

The memoranda in this chapter are drafted to be used to support or oppose a petition for a writ of mandate in situations in which discovery has been improperly denied, or to support or oppose a writ of prohibition if discovery has improperly been granted. Counsel should note, however, that the relief granted by courts sometimes varies from this rule [*see, e.g.,* *Britt v. Superior Court (1978) 20 Cal. 3d 844, 865, 143 Cal. Rptr. 695, 574 P.2d 766* (mandate vacating order compelling discovery)].

They should be combined, whenever appropriate, with memoranda relating generally to review proceedings by writ of mandate or prohibition [*see* Ch. 150, *Mandate and Prohibition*]. Often it will also be appropriate to combine them with additional memoranda set out in the related discovery chapters. For example, review of the propriety of an order compelling discovery or a protective order limiting discovery may turn on issues relating to the general limits and

timing of discovery, set out in Ch. 80, *Discovery: Scope, Regulation, and Timing* , or on issues relating to evidentiary privileges, work product protection, or other protective provisions found in Ch. 81, *Discovery: Privileges and Other Discovery Limitations* .

It may also be appropriate to modify the memoranda in this chapter for use in a different procedural context, such as an appellate brief or an office memorandum.

For a detailed discussion on how to select and use the forms in the publication to build a draft memorandum and complete the draft, with detailed discussion of all drafting requirements and strategic or stylistic considerations, see Ch. 1, *Writing Legal Memoranda and Briefs* . For a skeletal form of memorandum for use in creating a properly formatted outline in which to compile relevant forms from this publication, see also Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPleading & PracticeMotion PracticeSupporting Memoranda

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8-89A California Points & Authorities § 89A.05

§ 89A.05 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

For a discussion and forms for use in writ proceedings to review discovery orders, see California Forms of Pleading and Practice, Ch. 200, *Discovery: Review of Discovery Orders* (Matthew Bender). For discussion and forms relating to writs proceedings for mandate or prohibition generally, see Ch. 358, *Mandate and Prohibition* in that publication.

[2] Related Memoranda

For memoranda relating to writ proceedings for mandate or prohibition generally, see Ch. 150, *Mandate and Prohibition* . For memoranda relating to discovery orders generally, see Ch. 80, *Discovery : Scope, Regulation, and Timing*, through Ch. 89, *Discovery: Preservation of Evidence*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsProhibition

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[Reserved]

§§ 89A.06[Reserved]

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8-89A California Points & Authorities § 89A.10

§ 89A.10 Caption for Memorandum in Support of or in Opposition to Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] or Prohibition [Code Civ. Proc. §§ 1102, 1103]

[1] FORM Caption for Memorandum of Points and Authorities in Support of or in Opposition to Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] or Prohibition [Code Civ. Proc. §§ 1102, 1103]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
[*OR*]
IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA,
_____ APPELLATE DISTRICT
[DIVISION _____]
[*OR*]
THE SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	[CIVIL] NO. _____
Petitioner,	)	MEMORANDUM IN _____
	)	[SUPPORT OF *or* OPPOSITION TO] WRIT OF
vs.	)	_____
	)	[MANDATE *and/or* PROHIBITION]
THE SUPERIOR COURT OF THE STATE OF	)	[Code Civ. Proc. §§ _____
CALIFORNIA, COUNTY OF	)	(1085, 1086 *and/or* 1102, 1103); *Cal. Rules of Ct., Rule 8.486*]
_____	)	Date: _____
Respondent,	)	Time: _____
_____ [*name*],	)	Location: _____
Real Party in Interest.	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

[2] Comments

[a] Use of Form

This form is a standard caption for use in filing a memorandum either in support of or in opposition to a petition for a writ of mandate or prohibition if the petition is filed as a separate document. The memorandum may also be attached to a petition for writ of mandate under the brief caption "Memorandum in Support of Petition" when the petition itself is introduced by a full caption which lists the memorandum.

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8-89A California Points & Authorities §§ 89A.11-89A.19

[Reserved]

§§ 89A.11[Reserved]

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8-89A California Points & Authorities § 89A.20

§ 89A.20 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Trial Court Improperly Denied Discovery--General Form

[1] FORM Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Trial Court Improperly Denied Discovery--General Form

[*Caption. See § 89A.10[1]*.]

A WRIT OF MANDATE IS PROPER TO REVIEW A LOWER COURT ORDER DENYING DISCOVERY.

A. Statutory Basis for Writ of Mandate. A writ of mandate may be issued by any court to any inferior court, to compel the performance of an act that the law specially enjoins as a duty resulting from an office, or to compel the admission of a party to the use and enjoyment of a right to which he or she is entitled, and from which he or she is unlawfully precluded by such inferior tribunal (*Code Civ. Proc. § 1085(a)*).

B. Inadequate Remedy at Law. The writ of mandate must be issued in all cases when there is not a plain, speedy, and adequate remedy in the ordinary course of law (*Code Civ. Proc. § 1086*), including situations in which the remedy of direct appeal would be inadequate (*see Browne v. Superior Court (1979) 98 Cal. App. 3d 610, 613, 159 Cal. Rptr. 669*).

C. Writ of Mandate Proper to Review Discovery Orders. A writ of mandate is an adequate remedy for reviewing an improper denial of discovery (*see Rudnick v. Superior Court (1974) 11 Cal. 3d 924, 928, 114 Cal. Rptr. 603, 523 P.2d 643* ; *Burke v. Superior Court (1969) 71 Cal. 2d 276, 277-278 n.1, 78 Cal. Rptr. 481, 455 P.2d 409*).

D. Questions of General Importance. A writ of mandate may be used in discovery matters to review questions of first impression that are of general importance to the trial courts and to the profession, and that may result in the establishment of general guidelines for future cases (*Rudnick v. Superior Court (1974) 11 Cal. 3d 924, 928, 114 Cal. Rptr. 603, 523 P.2d 643* ; *Burke v. Superior Court (1969) 71 Cal. 2d 276, 278 n.2, 78 Cal. Rptr. 481, 455 P.2d 409*).

[*Optional*] **E. Abuse of Discretion.** While a trial court bears primary responsibility for the conduct of civil discovery and possesses a concomitant widediscretion in ruling on discovery matters, an order of the trial court denying discovery

will be subject to a writ of mandate and overturned on a prerogative writ if there is no substantial basis for the manner in which trial court discretion was exercised or if the trial court applied a patently improper standard of decision (*Coriell v. Superior Court (1974) 39 Cal. App. 3d 487, 491 n.1, 114 Cal. Rptr. 310* ; *see also Babb v. Superior Court (1971) 3 Cal. 3d 841, 851, 92 Cal. Rptr. 179, 479 P.2d 379*).

[*Optional*] **F. Absence of Sufficient Showing to Sustain Trial Court Order.** A writ of mandate will issue when the absence of a sufficient showing to sustain the trial court's order and the absence of any reasons or grounds on the part of the trial court for sustaining the objections compel the conclusion that there was an abuse of discretion on the part of the trial court (*Darbee v. Superior Court (1962) 208 Cal. App. 2d 680, 687, 25 Cal. Rptr. 520*).

[*Optional*] **G. Failure to Consider Legal Concepts.** Any record that indicates failure of a trial court to give adequate consideration to the legal concepts involved on a request for discovery is subject to the attack of abuse of discretion by writ of mandate (*Poeschl v. Superior Court (1964) 229 Cal. App. 2d 383, 387, 40 Cal. Rptr. 697*).

[*Optional*] **H. Misconception of Law.** If a trial court's decision denying discovery is predicated on a misconception of the law, it is subject to reversal by a writ of mandate (*Henard v. Superior Court (1972) 26 Cal. App. 3d 129, 133, 102 Cal. Rptr. 721*).

[*Optional*] **I. Both Writs of Mandate and Prohibition May Be Granted.** If a single writ will not grant all of the relief required, an appellate court may grant both a writ of prohibition to prevent the lower court from acting in excess of its jurisdiction and a writ of mandate to compel a mandatory act (*O'Brien v. Superior Court (1965) 233 Cal. App. 2d 388, 392, 43 Cal. Rptr. 815*).

[*Add specific memoranda relating to the particular discovery issues and fact situations in question (see, e.g., § 89A.21 et seq.).*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum is a general form that may be submitted in support of a petition for a writ of mandate seeking to review a discovery order pursuant to *Code Civ. Proc. §§ 1084-1097*. It should be combined with specific memoranda relating to the particular discovery issues and fact situations on review [*see § 89A.21* et seq.]. It may also be combined with a memorandum in support of a petition for a writ of prohibition [*see § 89A.30* et seq.] pursuant to *Code Civ. Proc. §§ 1102-1105* if both types of relief are desired [*O'Brien v. Superior Court (1965) 233 Cal. App. 2d 388, 392, 43 Cal. Rptr. 815* ; *see* Optional Paragraph I].

Note that some cases cited in this form construe law in effect before the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that they remain consistent with current provisions [*see § 89.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case.

[c] Related Pleading and Practice Forms

For a discussion and forms for use in writ proceedings to review discovery orders, see California Forms of Pleading and Practice, Ch. 200, *Discovery: Review of Discovery Orders* (Matthew Bender). For discussion and forms relating to writs proceedings for mandate or prohibition generally, see Ch. 358, *Mandate and Prohibition* in that publication.

[d] Related Memoranda

For memoranda in support of petitions for writs of mandate generally, see Ch. 150, *Mandate and Prohibition* .

[e] Opposing Memoranda

In an appropriate case, the memorandum *set out in § 89A.40* et seq. may be used to oppose the petition supported by these points and authorities.

[3] Discussion of Authorities

[a] Inadequate Remedy at Law

Browne v. Superior Court *(1979) 98 Cal. App. 3d 610, 159 Cal. Rptr. 669* concerned a personal injury action, in which plaintiff refused to be medically examined by a vocational rehabilitation expert who was not a licensed physician. On defendants' motion, the trial court granted an order under former Code Civ. Proc. § 2032(a) to require plaintiff to submit to such an examination (*but see now Code Civ. Proc. § 2032.020(b)* (physical examination by licensed physician or other appropriate licensed health care practitioner), 2032.220 (demand for physical examination of personal injury plaintiff, without court order), 2032.310(motion for order of physical examination)).

The court of appeal issued a writ of mandate, noting that while the use of the prerogative writ to review discovery orders is ordinarily disfavored, it is a proper method of review when the aggrieved party is confronted with the Hobsonian choice of either submitting to the intrusive procedure, or exposing himself or herself to the possibility of sanctions for noncompliance. In support of its position, the court of appeal held further that the *Browne* petition for a writ of mandate presented a question of first impression for which clear guidelines had been established. In addition, the court noted that the use of the prerogative writ was an appropriate one in that the remedy afforded by direct appeal would be inadequate (*98 Cal. App. 3d 610, 613)* . Thus the court issued the writ, compelling the trial court to vacate its discovery order (*98 Cal. App. 3d 610, 616)* .

Note that the court of appeal in *Browne* issued a writ of mandate, although the trial court error lay in its issuance of an improper order, and not its failure to act, which is the usual ground for a writ of mandate. For a discussion of the interchangeability of the two types of writs, see *§ 89A.03*.

[b] Writ of Mandate Proper to Review Discovery Orders

In ***Rudnick v. Superior Court*** *(1974) 11 Cal. 3d 924, 114 Cal. Rptr. 603, 523 P.2d 643* , plaintiff sued the manufacturers of a drug for damages for injuries allegedly caused by her use of the drug. She notified defendants to produce all of their records of reports of adverse effects of the drug on other users in conjunction with a deposition of their custodian of record, but defendants refused on the ground that the production of such records would violate the physician-patient privilege with respect to the patients involved and their physicians, who had submitted the reports to the manufacturers. Plaintiff then moved pursuant to former Code Civ. Proc. § 2031 (*see now Code Civ. Proc. §§*

2031.300 (order compelling response to demand for inspection, copying, testing, or sampling), 2031.320 (order compelling compliance with demand for inspection, copying, testing, or sampling)) for an order to produce the records, which the court granted, but only with respect to the names and addresses of the physicians involved. The court of appeal denied plaintiff's application for a writ of mandate, but the Supreme Court granted a hearing and issued an alternative writ. In granting a peremptory writ of mandate after the hearing, the Court said that a writ of mandate is a proper remedy for reviewing discovery procedures and that the Court was compelled to issue the alternative writ because it was presented with a question of first impression that was of general importance to the trial courts and to the profession, and in conjunction with which general guidelines could be laid down for future cases (*11 Cal. 3d 924, 928)* .

In ***Burke v. Superior Court*** *(1969) 71 Cal. 2d 276, 78 Cal. Rptr. 481, 455 P.2d 409* , plaintiffs filed an action for wrongful attachment and initiated discovery proceedings. They first propounded requests for admissions that the levy of the attachment was regular and valid on its face, that there had been no motion or proceeding to dissolve or discharge the attachment, that such a motion or proceeding would have been unsuccessful, idle, and futile, and that a successful defense of the underlying action was the only way the attachment would be dissolved. The bonding company objected to these requests for admissions by stating that they called for legal conclusions, not admissions of fact. The lower court sustained the objections.

The plaintiffs then propounded written interrogatories to the bonding company, asking whether it contended that the levy of attachment was not valid and regular on its face, or that plaintiffs could successfully have moved or otherwise proceeded to dissolve the attachment prior to defending the underlying action. The interrogatories requested that if the bonding company did make such contentions, it state all facts on which the denial of all the allegations in the complaint were based. The lower court sustained the bonding company's objections to the interrogatories on the ground that they called for the legal opinion and conclusions of the defendant. It sustained the objection to the general interrogatory on the ground that it was a shotgun question and in effect sought to have the defendant divulge its entire theory of defense. Plaintiffs sought a writ of mandate from the Supreme Court to compel the lower court to set aside the orders sustaining defendants' objections and denying plaintiffs' motion for further responses to written interrogatories.

In issuing a peremptory writ of mandate requiring the lower court to vacate its order sustaining the objections to the requests for admissions and sustaining the lower court's order denying further responses to written interrogatories, the Court in *Burke,* in discussing the function of discovery proceedings, distinguished the purposes for which a writ of mandate and a writ of prohibition are issued. It stated that mandate is ordinarily the sufficient and appropriate remedy for an improper denial of discovery, while prohibition is the remedy ordinarily employed to prevent improper discovery (*71 Cal. 2d 276, 277-278 n.1*). Citing *Oceanside Union School Dist. v. Superior Court (1962) 58 Cal. 2d 180, 23 Cal. Rptr. 375, 373 P.2d 439* (discussed in *§ 89A.30[3][a]*), the Court said that in most cases, the parties must be relegated to a review of an interim discovery order on appeal from the final judgment. Prerogative writs, such as a writ of mandate, should only be used in discovery matters to review questions of first impression that are of general importance to the trial courts and to the profession, and when general guidelines can be laid down for future cases (*71 Cal. 2d 276, 278 n.2*). The Court found the case before it to be an appropriate case for review by writ (*71 Cal. 2d 276, 277-278)* .

[c] Questions of General Importance

Rudnick v. Superior Court *(1974) 11 Cal. 3d 924, 114 Cal. Rptr. 603, 523 P.2d 643* and ***Burke v. Superior Court*** *(1969) 71 Cal. 2d 276, 78 Cal. Rptr. 481, 455 P.2d 409* are discussed in [b], *above.*

[d] Abuse of Discretion

In ***Coriell v. Superior Court*** *(1974) 39 Cal. App. 3d 487, 114 Cal. Rptr. 310* , plaintiffs filed a class action against a major grocery store chain, alleging that defendant had deliberately and negligently mislabeled packaged meat sold in its

stores, thereby damaging its customers who purchased such meat. Plaintiffs submitted written interrogatories to defendant, which answered three of the interrogatories seeking the factual basis for its affirmative defenses, and then moved the court for an order deferring discovery until after a court determination on the class worthiness of the action. The court granted the motion.

In determining the motion, the trial court, in effect, placed the burden on plaintiffs to demonstrate that they were entitled to answers to the interrogatories rather than on defendant to establish factually that it was entitled to a protective order against being required to answer. In issuing a peremptory writ of mandate directing the trial court to vacate its order and hold a new hearing, the court of appeal said that while the trial court bears primary responsibility for the conduct of civil discovery and possesses a concomitant wide discretion in ruling on discovery matters, an order of the trial court denying discovery will be overturned by a prerogative writ if there is no substantial basis for the manner in which the trial court's discretion was exercised or if the trial court applied a patently improper standard of decision (*39 Cal. App. 3d 487, 491 n.1*).

In ***Babb v. Superior Court*** *(1971) 3 Cal. 3d 841, 92 Cal. Rptr. 179, 479 P.2d 379* , which did not involve pretrial discovery, plaintiff sued defendant for medical malpractice. Defendant, by way of a cross complaint in declaratory relief against plaintiff and her attorney, sought a judgment declaring that in the event the malpractice action terminated in his favor, such action would have been prosecuted maliciously and without proper cause. Plaintiff's demurrer to the cross complaint was overruled with the trial court relying not only on dictum in a case that appeared to approve the grant of a declaratory judgment for malicious prosecution before the prior suit is terminated, but also on the indemnity analogy whereby a defendant is allowed to file a cross complaint seeking a declaration of his or her right to indemnity from third persons as part of the very suit in which his or her own liability is being determined.

On plaintiff's application for a writ of prohibition, which the court treated as one for a writ of mandate, the Supreme Court granted a peremptory writ commanding the trial court to vacate its order and sustain the demurrer without leave to amend. The Court stated that although it is well established that mandamus cannot be issued to control a court's discretion, in unusual circumstances the writ will lie when, under the facts, that discretion can be exercised in only one way (*3 Cal. 3d 841, 851)* . The Court said that in this case the trial court had no discretion to overrule plaintiff's demurrer to the cross complaint, which was legally defective on its face (*3 Cal. 3d 841, 851)* . The Court stated, however, that its action on the matter should not be understood to indicate a willingness to employ the prerogative writs to review rulings on pleadings, but that on occasion, attention is drawn to instances of such grave nature, or of such significant legal impact, that a court feels compelled to intervene through the issuance of an extraordinary writ (*3 Cal. 3d 841, 851)* .

[e] Absence of Sufficient Showing to Sustain Trial Court Order

In ***Darbee v. Superior Court*** *(1962) 208 Cal. App. 2d 680, 25 Cal. Rptr. 520* , plaintiff brought an action for specific performance of an option in a land contract and for a declaratory judgment to determine which party to the action had the obligation to ascertain the number of acres subject to the option agreement. Defendants took plaintiff's deposition, and then on several occasions attempted to obtain a trial court order compelling plaintiff to answer certain questions which he had refused to answer. Finally, defendants submitted written interrogatories to plaintiff, who objected to the same questions in written form, and the trial court denied defendants' motion to compel plaintiff to answer those written questions. Defendants sought a writ of mandate from the court of appeal to compel the trial court to order plaintiff to answer the written interrogatories. In issuing a peremptory writ of mandate, the court said that the trial court made no assignment of its reasons for denying the motion. The absence of a sufficient showing to sustain a trial court's order, and the absence of any reasons or grounds on the part of the trial court for sustaining the objections, compelled the conclusion that there was an abuse of discretion on the part of the trial court, since there could be little doubt that the information sought by the interrogatories was relevant to the subject matter of the pending action (*208 Cal. App. 2d 680, 687-688)* .

[f] Failure to Consider Legal Concepts

In ***Poeschl v. Superior Court*** *(1964) 229 Cal. App. 2d 383, 40 Cal. Rptr. 697* , plaintiff sued defendant for damages for an alleged breach of an employment contract. Both sides scheduled depositions by stipulation. Prior to the deposition of plaintiff, defendant moved the trial court to direct plaintiff to produce all recordings taken or possessed by him of conversations between him and defendant relating to his employment or discharge by defendant, which the trial court denied. Defendant sought a writ of mandate from the court of appeal to compel production of the tape recordings for his inspection prior to the taking of plaintiff's deposition on the ground that the trial court abused its discretion in refusing to allow discovery of the recordings. In issuing a peremptory writ of mandate, the court of appeal said that in the record before it, it could see no justification for denying the discovery order of defendant. The court said that any record that indicates failure to give adequate consideration to the legal concepts involved on a request for discovery is subject to the attack of abuse of discretion (*229 Cal. App. 2d 383, 386-387)* .

[g] Misconception of Law

In ***Henard v. Superior Court*** *(1972) 26 Cal. App. 3d 129, 102 Cal. Rptr. 721* , plaintiffs, who were husband and wife, sued a drug manufacturer for damages for injuries consisting of cerebral thrombosis allegedly sustained by the wife as a result of the side effects of an oral contraceptive manufactured by defendant and taken by the wife. During discovery proceedings, defendant furnished plaintiffs with copies of drug reaction reports prepared by doctors who had prescribed the drug for their patients, but defendant refused to give plaintiffs the names and addresses of such doctors, who were identified in the reports only by their initials. The trial court denied a motion by plaintiffs requiring defendants to supply such information.

In granting plaintiffs' request for a writ of mandate, the court of appeal said that the trial court apparently agreed with defendant that disclosure of the doctors' identities was prohibited under federal law by the Freedom of Information Act [*see 5 U.S.C. § 552*], requiring that agencies of the federal government make information available to the public, but making certain exceptions to the mandatory disclosure of such information. The court said that this law had no application to information voluntarily supplied by medical doctors to private companies and only applied to the affected governmental agencies, and therefore had no effect on the information requested by discovery in this case. If a trial court's decision denying discovery is predicated on a misconception of the law, it cannot be permitted to stand (*26 Cal. App. 3d 129, 133)* . The court issued a peremptory writ requiring the trial court to vacate its order denying plaintiffs' motion, and directing the trial court to enter a new order consistent with the views expressed in the opinion (*26 Cal. App. 3d 129, 134)* .

[h] Both Writs of Mandate and Prohibition May Be Granted

In ***O'Brien v. Superior Court*** *(1965) 233 Cal. App. 2d 388, 43 Cal. Rptr. 815* , plaintiff sued defendant to recover damages for personal injuries allegedly incurred in an automobile accident. Plaintiff served defendant with written interrogatories, which defendant answered. Plaintiff then brought a motion to compel further answers to the interrogatories. The motion was made after expiration of the time period specified for such further answers in former Code Civ. Proc. § 2030 (*see now Code Civ. Proc. §§ 2016.050, 2030.300*; notice of motion to compel further response must be made within 45 days of service of response, or any supplemental response, or longer if service is by mail or if parties agreed in writing). The court granted the motion compelling defendant to further answer the interrogatories. Defendant sought a writ of prohibition from the court of appeal to restrain the trial court from enforcing its order.

In issuing a peremptory writ of prohibition and a peremptory writ of mandate, the court of appeal said that the language of former Code Civ. Proc. § 2030 was mandatory and the failure of plaintiff to move for further answers within the statutory time foreclosed further relief (*233 Cal. App. 2d 388, 391)* . The court also said that when the allegations and prayers of a petition for a prerogative writ were broad enough to encompass the appropriate remedy, the petition could be treated as a petition for such relief and the proper order could be granted. If a single writ will not grant all of the

relief required, the court may grant prohibition to prevent the lower court from acting in excess of its jurisdiction and mandamus to compel a mandatory act (*233 Cal. App. 2d 388, 392)* .

[4] Additional Authorities

[a] Questions of General Importance

Holm v. Superior Court (1986) 187 Cal. App. 3d 1241, 232 Cal. Rptr. 432 was a probate case in which the real parties in interest were contesting decedent's will, alleging that the decedent lacked testamentary capacity and that the will was the product of fraud and undue influence. They requested permission to exhume decedent's corpse so that an autopsy could be performed on the brain to determine whether he had suffered from any organic brain disorder. The probate court issued the requested order. Petitioners filed a writ of mandate and requested a stay of disinterment and autopsy pending review. The court of appeal issued the stay and issued a writ directing the probate court to vacate its order (*187 Cal. App. 3d 1241, 1244, 1249)* . The court acknowledged that review of discovery orders by way of extraordinary writ is not favored, and is generally granted only when the order threatens to infringe on a privilege, or when the case involves significant issues. The court found the case to involve significant issues in light of the especially sensitive nature of the interests affected by the probate court's order, and because the issue was apparently one of first impression. It concluded that the case was within the exception of nonreview (*187 Cal. App. 3d 1241, 1244)* .

In *Mavroudis v. Superior Court (1980) 102 Cal. App. 3d 594, 162 Cal. Rptr. 724* , the court of appeal stated that the writ of mandate is a proper remedy for the review of discovery orders, but is not normally granted in such cases. The court, however, had been compelled to issue the alternative writ in the case before it because it was presented with a question of first impression of general importance to the legal community and in conjunction with which general guidelines could be laid down for future cases (*102 Cal. App. 3d 594, 599)* .

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 89A DISCOVERY: REVIEW OF DISCOVERY ORDERS
PART II. FORMS

8-89A California Points & Authorities § 89A.21

§ 89A.21 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Trial Court Improperly Denied Discovery--Mandate Proper to Compel Answers to Written Interrogatories

[1] FORM Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Trial Court Improperly Denied Discovery--Mandate Proper to Compel Answers to Written Interrogatories

[*The following may be combined, when appropriate, with a general form of memorandum of points and authorities in support of a petition for a writ of mandate (see, e.g., § 89A.20).*]

MANDATE IS PROPER TO DIRECT A LOWER COURT TO COMPEL ANSWERS TO WRITTEN INTERROGATORIES.

A. Writ of Mandate to Compel Answers to Interrogatories. A writ of mandate is proper to compel answers to written interrogatories when a lower court improperly denied a party's request for answers to such interrogatories (*see Burke v. Superior Court (1969) 71 Cal. 2d 276, 282-286, 78 Cal. Rptr. 481, 455 P.2d 409* ; *West Pico Furniture Co. v. Superior Court (1961) 56 Cal. 2d 407, 422, 15 Cal. Rptr. 119, 364 P.2d 295*).

B. Matters Subject to Discovery by Interrogatories. Any party may obtain discovery by interrogatories to a party, pursuant to *Section 2030.010 et seq. of the Code of Civil Procedure*, regarding any matter not privileged that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if that matter is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence. The discovery may relate to the claim or defense of the party seeking discovery or of any other party to the action. The discovery may be obtained of the identity and location of persons having knowledge of any discoverable matter, as well as of the existence, description, nature, custody, condition, and location of any document, tangible thing, or land or other property (*Code Civ. Proc. §§ 2017.010, 2019.010(b)*; *see Code Civ. Proc. § 2030.010 et seq.*; *Darbee v. Superior Court (1962) 208 Cal. App. 2d 680, 685, 25 Cal. Rptr. 520* (construing former Code Civ. Proc. § 2016).

[*Optional*] **C. Liberal Construction of Statute Favored for Disclosure.** In determining the question of relevancy with regard to discovery of information by interrogatories pursuant to Sections 2017.010 and 2030.010 et seq. of the Code of Civil Procedure, the discovery statutes should be construed liberally in favor of disclosure unless the request is clearly

improper by virtue of well established causes of denial (*see Darbee v. Superior Court (1962) 208 Cal. App. 2d 680, 685, 25 Cal. Rptr. 520*).

[*Optional*] **D. Abuse of Discretion in Denying Interrogatories.** The absence of a showing sufficient to sustain a trial court's order denying a motion to compel a party to answer certain questions on written interrogatories, and the failure of the trial court to assign any reasons or grounds for sustaining objections to the interrogatories, compel the conclusion that there was an abuse of the trial court's discretion that may be corrected on a writ of mandate (*see Darbee v. Superior Court (1962) 208 Cal. App. 2d 680, 687, 25 Cal. Rptr. 520*).

[*When appropriate, add points and authorities showing that the particular questions are proper and that answers to them should be ordered (see generally Ch. 80, Discovery: Scope, Regulation, and Timing, Ch. 81, Discovery: Privileges and Other Discovery Limitations, and Ch. 84, Discovery: Interrogatories).*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a petition for a writ of mandate, pursuant to *Code Civ. Proc. §§ 1084-1097*, seeking to compel answers to written interrogatories when a lower court improperly denied a party's motion to compel answers or further answers to such interrogatories. They should be combined with the general form of points and authorities in support of a petition for a writ of mandate contained in § 89A.20, and with any other specific points and authorities relating to other particular discovery issues and fact situations on review [*see § 89A.22* et seq.].

For memoranda of points and authorities relating to motions to compel answers to interrogatories, see Ch. 84, *Discovery: Interrogatories* . For points and authorities relating to the propriety of discovery of particular matters, see Ch. 81, *Discovery: Privileges and Other Discovery Limitations* [*see also* Ch. 80, *Discovery: Scope, Regulation, and Timing*]. Counsel may wish to combine points and authorities from those chapters that relate to the particular factual situation in question with the points and authorities set out in this form.

Note that some cases cited in this form construe law in effect before the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that they remain consistent with current provisions [*see § 89.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case.

[3] Discussion of Authorities

[a] Writ of Mandate to Compel Answers to Interrogatories

Burke v. Superior Court *(1969) 71 Cal. 2d 276, 78 Cal. Rptr. 481, 455 P.2d 409* is discussed in *§ 89A.20[3][b]*.

In ***West Pico Furniture Co. v. Superior Court*** *(1961) 56 Cal. 2d 407, 15 Cal. Rptr. 119, 364 P.2d 295* , plaintiff sued a finance company, alleging that certain transactions between them in the form of sales were actually loans made at usurious rates of interest. Plaintiff served the finance company with written interrogatories. It answered some and filed objections to others with the court (at that time and before its amendment, former Code Civ. Proc. § 2030 required the objecting party to file the objections for a court hearing; but now see *Code Civ. Proc. §§ 2030.090* (protective order regarding interrogatories), 2030.210 (response to interrogatories)). The court sustained some of the objections, and ordered the finance company to answer the remaining interrogatories. In granting plaintiff a peremptory writ of mandate

directing the trial court to order the finance company to answer the remaining interrogatories, the Supreme Court said that in this case, a writ of mandate was the proper method to compel answers to the interrogatories because petitioner had alleged sufficient facts to make a prima facie showing of an abuse of discretion (*56 Cal. 2d 407, 415)* .

[b] Matters Subject to Discovery by Interrogatories

Darbee v. Superior Court *(1962) 208 Cal. App. 2d 680, 25 Cal. Rptr. 520* is discussed in *§ 89A.20[3][e]*. In ordering the issuance of a peremptory writ of mandate, the court of appeal said that discovery by interrogatories could be had pursuant to former Code Civ. Proc. §§ 2016 and 2030 (*now see Code Civ. Proc. §§ 2017.010, 2019.010(b), 2030.010 et seq.*) as to any matter relevant to the subject matter involved in the pending action that is not privileged. It is not necessary that such matter be relevant to an issue in the case, and thus admissible at the trial, as long as the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence (*208 Cal. App. 2d 680, 685)* .

In determining the question of relevancy with regard to discovery of information by interrogatories, the discovery statutes must be construed liberally in favor of disclosure unless the request is clearly improper by virtue of well established causes of denial (*208 Cal. App. 2d 680, 685)* . The court concluded by stating that the absence of a sufficient showing to sustain the trial court's order denying the motion to compel petitioner to answer certain questions on written interrogatories, and the failure of the trial court to assign any reasons or grounds for sustaining objections to the interrogatories, compelled the conclusion that there was an abuse of the trial court's discretion that could be corrected on a writ of mandate (*208 Cal. App. 2d 680, 686-687, 689)* . The mere fact that the same question had been answered in a previous deposition did not preclude the request for a reply to an interrogatory in the absence of a showing that the requirement of a reply would be unjust, inequitable, oppressive, or burdensome (*208 Cal. App. 2d 680, 687)* .

[c] Liberal Construction of Statute Favored for Disclosure

Darbee v. Superior Court *(1962) 208 Cal. App. 2d 680, 25 Cal. Rptr. 520* is discussed in *§ 89A.20[3][e]*, and in [b], *above.*

[d] Abuse of Discretion in Denying Interrogatories

Darbee v. Superior Court *(1962) 208 Cal. App. 2d 680, 25 Cal. Rptr. 520* is discussed in *§ 89A.20[3][e]*, and in [b], *above.*

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8-89A California Points & Authorities § 89A.22

§ 89A.22 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Trial Court Improperly Denied Discovery--Mandate Proper to Compel Response to Requests for Admissions

[1] FORM Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Trial Court Improperly Denied Discovery--Mandate Proper to Compel Response to Requests for Admissions

[*The following may be combined, when appropriate, with a general form of memorandum of points and authorities in support of a petition for a writ of mandate (see, e.g., § 89A.20).*]

MANDATE IS PROPER TO DIRECT A LOWER COURT TO COMPEL A PARTY TO RESPOND TO REQUESTS FOR ADMISSIONS.

A. Writ of Mandate to Compel Admissions. A writ of mandate is proper to compel a party to respond to requests for admissions of factual issues and of legal questions properly raised in the pleadings (*see Burke v. Superior Court (1969) 71 Cal. 2d 276, 282, 78 Cal. Rptr. 481, 455 P.2d 409* ; *Cembrook v. Superior Court (1961) 56 Cal. 2d 423, 426-430, 15 Cal. Rptr. 127, 364 P.2d 303*).

B. Liberal Construction of Statute Favored for Discovery. In determining whether a party objecting to requests for admissions pursuant to *Section 2033.010 et seq. of the Code of Civil Procedure* has met the burden of showing that the requests do not fall within the purview of that statute, courts should adopt a liberal construction in favor of discovery (*see Cembrook v. Superior Court (1961) 56 Cal. 2d 423, 427, 15 Cal. Rptr. 127, 364 P.2d 303*).

[*Optional*] **C. Abuse of Discretion in Totally Denying Requests for Admissions.** While a trial court is vested with wide discretion in deciding the propriety of requests for admissions, that discretion does not authorize the trial court to act on grounds not contemplated by *Section 2033.010 et seq. of the Code of Civil Procedure* or to make blanket orders barring disclosure in toto when the factual situation indicates that a just and equitable order could be made that would authorize disclosure with limitations (*see Cembrook v. Superior Court (1961) 56 Cal. 2d 423, 427, 15 Cal. Rptr. 127, 364 P.2d 303*).

[*When appropriate, add points and authorities showing that the particular requests are proper and that responses to*

them should be ordered (see generally Ch. 80, Discovery: Scope, Regulation, and Timing, Ch. 81, Discovery: Privileges and Other Discovery Limitations, and Ch. 86, Discovery: Requests for Admissions).]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a petition for a writ of mandate pursuant to *Code Civ. Proc. §§ 1084-1097* requesting the court to compel a party to respond to requests for admissions. They should be combined with the general form of points and authorities in support of a petition for a writ of mandate contained in § 89A.20 and with any other specific points and authorities relating to other discovery issues and fact situations on review [*see §§ 89A.21, 89A.23* et seq.].

For memoranda of points and authorities relating to motions to compel responses to requests for admissions, see Ch. 86, *Discovery: Requests for Admissions* . For points and authorities relating to the propriety of discovery of particular matters, see Ch. 81, *Discovery: Privileges and Other Discovery Limitations* [*see also* Ch. 80, *Discovery: Scope, Regulation, and Timing*]. Counsel may wish to combine points and authorities from those chapters that relate to the particular factual situation in question with the points and authorities set out in this form.

Note that some cases cited in this form construe law in effect before the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that they remain consistent with current provisions [*see § 89.02[3*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case.

[3] Discussion of Authorities

[a] Writ of Mandate to Compel Admissions

Burke v. Superior Court *(1969) 71 Cal. 2d 276, 78 Cal. Rptr. 481, 455 P.2d 409* is discussed in *§ 89A.20[3][b]*. The Court stated that in California, a party may be required through discovery to disclose not only the evidentiary facts underlying affirmative defenses and denials, but also whether or not he or she makes a particular contention, either regarding the facts or regarding the possible issues in the case (*71 Cal. 2d 276, 281)* . Similarly, when a party is served with a request for admission concerning a legal question properly raised in the pleadings, he or she cannot object simply by asserting that the request calls for a conclusion of law. The party should make the admission if he or she is able to do so and does not in good faith intend to contest the issue at trial, thereby setting at rest a triable issue. Otherwise, he or she should set forth in detail the reasons why he or she cannot truthfully admit or deny the request (*71 Cal. 2d 276, 282)* .

In ***Cembrook v. Superior Court*** *(1961) 56 Cal. 2d 423, 15 Cal. Rptr. 127, 364 P.2d 303* , plaintiff filed a complaint seeking damages for personal injuries alleged to have been incurred by ingestion of defendants' product and in the manner recommended or suggested in defendants' advertising. Plaintiff served defendants with a request for the admission of the truth of certain matters of fact, and defendants made a motion to strike the request, which the trial court granted in its entirety.

The Supreme Court granted plaintiff a writ of mandate ordering the trial court to require defendants to answer the request for admissions. The Court said that pursuant to former Code Civ. Proc. § 2033 (*now see Code Civ. Proc. § 2033.020*), requests for admission may be made without first obtaining an order of the court. They thus constitute a vehicle of discovery to which a litigant is entitled as a matter of right, unless the opposing party successfully bears the

burden of showing that the request does not fall within the purview of the statute. In determining whether a party objecting to requests for admission has met the burden of showing that such requests do not fall within the purview of such statute, courts must adopt a liberal construction in favor of discovery. When the objections are predicated on annoyance, expense, embarrassment, oppression, or any other ground based on justice and equity, the trial court is vested with wide discretion, the exercise of which will not be disturbed by the appellate courts in the absence of an abuse. Such discretion, however, does not authorize the trial court to act on grounds not contemplated by the statute, nor to make blanket orders barring disclosure in toto when the factual situation indicates that a just and equitable order could be made that would authorize disclosure with limitations. Tested by the standards, the record in the case showed a clear abuse of discretion on the part of the trial court in denying the request for admissions in toto (*56 Cal. 2d 423, 427)* .

[b] Liberal Construction of Statute Favored for Discovery

Cembrook v. Superior Court *(1961) 56 Cal. 2d 423, 15 Cal. Rptr. 127, 364 P.2d 303* is discussed in [a], *above.*

[c] Abuse of Discretion in Totally Denying Requests for Admissions

Cembrook v. Superior Court *(1961) 56 Cal. 2d 423, 15 Cal. Rptr. 127, 364 P.2d 303* is discussed in [a], *above.*

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8-89A California Points & Authorities § 89A.23

§ 89A.23 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Trial Court Improperly Denied Discovery--Mandate Proper to Compel Deposition Testimony

[1] FORM Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Trial Court Improperly Denied Discovery--Mandate Proper to Compel Deposition Testimony

[*The following may be combined, when appropriate, with a general form of memorandum of points and authorities in support of a petition for a writ of mandate (see, e.g., § 89A.20).*]

MANDATE IS PROPER TO DIRECT A LOWER COURT TO COMPEL A WITNESS TO _____ [TESTIFY AT A DEPOSITION *or* ANSWER SPECIFIC DEPOSITION QUESTIONS].

[*EITHER*]

A. Writ of Mandate to Compel Answers at Deposition. A writ of mandate is proper to obtain an order compelling a party to answer particular questions at a deposition (*see Regents of University of California v. Superior Court (1962) 200 Cal. App. 2d 787, 788, 789, 19 Cal. Rptr. 568* ; *Morris Stulsaft Foundation v. Superior Court (1966) 245 Cal. App. 2d 409, 415-416, 54 Cal. Rptr. 12*).

[*OR*]

A. Writ of Mandate to Compel Testimony at Deposition. A writ of mandate is proper to obtain an order to compel a party or another witness to attend and testify at a deposition (*see Bolles v. Superior Court (1971) 15 Cal. App. 3d 962, 963-964, 93 Cal. Rptr. 719*).

[*Optional*] **B. Urgency of Case Requiring Issuance of Peremptory Writ Without Alternative Writ.** When an impending trial creates a situation of urgency, a court may issue a peremptory writ of mandate in the first instance, without the issuance of an alternative writ, to compel a witness to testify at a deposition (*see Bolles v. Superior Court*

(1971) 15 Cal. App. 3d 962, 963-964, 93 Cal. Rptr. 719).

[*When appropriate, add points and authorities showing that the particular questions are proper and answers should be ordered or that the particular person may be deposed and should be ordered to attend (see generally Ch. 80, Discovery: Scope, Regulation, and Timing, Ch. 81, Discovery: Privileges and Other Discovery Limitations, and Ch. 83, Discovery: Depositions).*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a petition for a writ of mandate pursuant to *Code Civ. Proc. §§ 1084-1097* requesting the court to compel a party or witness to answer certain questions that he or she has not answered at a deposition, or to appear and testify at a deposition. It should be combined with the general form of points and authorities in support of a petition for a writ of mandate contained in § 89A.20, and with other specific points and authorities relating to any other particular discovery issues and fact situations on review [*see §§ 89A.21*, *89A.22*, and *89A.23* et seq.].

For memoranda of points and authorities relating to motions to compel testimony, etc., in a deposition, see Ch. 83, *Discovery: Depositions* . For points and authorities relating to the propriety of discovery of particular matters, see Ch. 81, *Discovery: Privileges and Other Discovery Limitations* [*see also* Ch. 80, *Discovery: Scope, Regulation, and Timing*]. Counsel may wish to combine points and authorities from those chapters that relate to the particular factual situation in question with the points and authorities set out in this form.

Note that some cases cited in this form construe law in effect before the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that they remain consistent with current provisions [*see § 89.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case.

[3] Discussion of Authorities

[a] Writ of Mandate to Compel Answers at Deposition

Regents of University of California v. Superior Court *(1962) 200 Cal. App. 2d 787, 19 Cal. Rptr. 568* involved an action for false arrest, false imprisonment, and malicious prosecution, in which plaintiff refused to answer various deposition questions, claiming privilege and lack of relevance. Defendants moved the trial court for an order to compel plaintiff to answer the deposition questions, and the trial court denied the motion. Defendants sought a writ of mandate to command the trial court to compel answers to the questions propounded to plaintiff at his deposition.

The court of appeal granted the writ, holding that the mandate procedure is a proper method for obtaining relief in the discovery context, since there is no review by appeal from an order denying discovery (*200 Cal. App. 2d 787, 789)* . Because the court found that plaintiff's reliance on the privilege against self-incrimination was misplaced and that the answers to the proposed questions were relevant to the subject matter of the action (*200 Cal. App. 2d 787, 792, 793)* , the court granted a peremptory writ of mandate, which required the trial court to vacate its order denying defendants' motion to compel answers to the deposition questions, and which ordered the discovery sought by defendants (*200 Cal. App. 2d 787, 796)* .

Morris Stulsaft Foundation v. Superior Court *(1966) 245 Cal. App. 2d 409, 54 Cal. Rptr. 12* arose from a will

contest. A witness to one of the wills in question refused to answer certain questions at his deposition, and the trial court denied a motion to compel answers to those questions. Contestants to the will filed a writ of mandate.

The court of appeal stated that the writ of mandate is a proper remedy when the trial court has abused its discretion in restraining discovery sought by deposition (*245 Cal. App. 2d 409, 415-416)* . In support of this statement, the court relied on several cases, including *Regents of University of California v. Superior Court (1962) 200 Cal. App. 2d 787, 789, 19 Cal. Rptr. 568* (discussed *above*). The court found the questions to be reasonably calculated to lead to the discovery of admissible evidence or to be relevant, and ordered issuance of a peremptory writ of mandate requiring the trial court to vacate its order and to grant the motion to compel answers and to order the discovery requested (*245 Cal. App. 2d 409, 424)* .

[b] Writ of Mandate to Compel Testimony at Deposition

In ***Bolles v. Superior Court*** *(1971) 15 Cal. App. 3d 962, 93 Cal. Rptr. 719* , petitioner sought to depose a witness who was expected to testify for another party in an impending trial in which petitioner was involved. When the trial court refused to grant an order compelling the witness to testify, petitioner sought a writ of mandate from the court of appeal. In granting the writ, the court said that although good cause is required to depose an expert witness, petitioner satisfied the requirement and was entitled to the discovery sought, and that a writ of mandate was proper for that purpose. When good cause is required, the showing must be liberally construed. The moving party is entitled to discovery on a showing that the information sought is necessary for the preparation of its case, and the request may be granted without abuse of the rights of the adversary. There is no requirement that the moving party show that it does not have equal access to the facts on which the expert's opinion is based. The court concluded that when an impending trial creates a situation of urgency, a court may issue a peremptory writ of mandate in the first instance to compel a witness to testify at a deposition, without the prior issuance of an alternative writ (*15 Cal. App. 3d 962, 963)* .

[c] Urgency of Case Requiring Issuance of Peremptory Writ Without Alternative Writ of Mandate

Bolles v. Superior Court *(1971) 15 Cal. App. 3d 962, 93 Cal. Rptr. 719* is discussed in [b], *above.*

[4] Additional Authorities

[a] Writ of Mandate to Compel Answers at Deposition

Pember v. Superior Court (1966) 240 Cal. App. 2d 888, 50 Cal. Rptr. 24 was an action for damages for injuries sustained in an automobile accident. Plaintiff took defendant's deposition, and defendant refused to answer a question that was identical to an interrogatory propounded by plaintiff, which defendant had answered. The trial judge refused to compel defendant to answer on a proceeding in the trial court. Plaintiff brought a petition for a writ of mandate to compel defendant to answer. The court of appeal found that the trial court's refusal to require defendant to answer was an abuse of discretion, since there was no sound basis on which to justify the denial of plaintiff's request for an order that defendant answer (*240 Cal. App. 2d 888, 890)* . The court of appeal ordered that a peremptory writ of mandate issue requiring the superior court to set aside its order, and enter an order that defendant answer (*240 Cal. App. 2d 888, 890)* .

In *Kramer v. Superior Court (1965) 237 Cal. App. 2d 753, 47 Cal. Rptr. 317* , plaintiff sought compensatory and exemplary damages in an action for libel and defamation. Defendant refused to answer deposition questions relating to conversations and discussions he had concerning plaintiff, the meaning of words used by defendant, defendant's subjective opinion of plaintiff, and defendant's financial status or condition. Plaintiff moved the court for an order compelling answers pursuant to former Code Civ. Proc. § 2034(a) (*now see Code Civ. Proc. § 2025.450* (motion to compel testimony at deposition)), and the court denied the motion for a lack of a showing of good cause. Plaintiff filed a

petition for a writ of mandate, and the court of appeal granted the writ. The court directed the trial court to vacate its order denying the motion and to determine the motion in accordance with the appellate court's ruling that a party who seeks a court order compelling a nonexpert witness to answer questions on oral deposition relating to relevant and nonprivileged matters is not required to show good cause, as was defined in former Code Civ. Proc. § 2036 (*237 Cal. App. 2d 753, 755)* .

Note

that the courts in *Pember* and *Kramer* did not discuss the propriety of the use of a writ of mandate to obtain an order compelling answers to deposition questions. These cases, however, serve as examples of the use of a writ of mandate for that purpose.

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8-89A California Points & Authorities § 89A.24

§ 89A.24 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Trial Court Improperly Denied Discovery--Mandate Proper to Compel Inspection, Copying, Testing, of Sampling of Documents, Tangible Things, Land or Other Property, or Electronically Stored Evidence [Code Civ. Proc. § 2031.010 et seq.]

[1] FORM Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Trial Court Improperly Denied Discovery--Mandate Proper to Compel Inspection, Copying, Testing, of Sampling of Documents, Tangible Things, Land or Other Property, or Electronically Stored Evidence [Code Civ. Proc. § 2031.010 et seq.]

[*The following may be combined, when appropriate, with a general memorandum in support of a petition for a writ of mandate (see, e.g., § 89A.20).*]

MANDATE IS PROPER TO REVIEW A TRIAL COURT'S ORDER DENYING PRODUCTION AND INSPECTION OF DOCUMENTS OR OTHER THINGS.

Mandate When Production Improperly Denied. Mandate is a proper remedy when the trial court has improperly denied a motion for inspection, copying, testing, or sampling of documents, tangible things, land or other property, or electronically stored information (*see Shepherd v. Superior Court (1976) 17 Cal. 3d 107, 118-119, 130 Cal. Rptr. 257, 550 P.2d 161* ; *Associated Brewers Distr. Co. v. Superior Court (1967) 65 Cal. 2d 583, 588-589, 55 Cal. Rptr. 772, 422 P.2d 332*).

[*When appropriate, add memoranda showing that identification and production of the particular items is proper and should be ordered (see generally Ch. 80, Discovery: Scope, Regulation, and Timing, Ch. 81, Discovery: Privileges and Other Discovery Limitations, and Ch. 85, Discovery: Production or Inspection of Tangible Evidence).*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for a writ of mandate, pursuant to *Code Civ. Proc. §§ 1084-1097,* by a party seeking to overturn a lower court's order denying a motion for the inspection, copying, testing, or sampling of documents, tangible things, land or other property, or electronically stored information. It should be

combined with the general memorandum in support of a petition for a writ of mandate contained in § 89A.20, and with other specific memoranda relating to any other particular discovery issues and fact situations on review [*see §§ 89A.21 -89A.23, 89A.25*].

For memoranda of relating to motions to compel testimony, etc., in a deposition, see Ch. 85, *Discovery: Production or Inspection of Tangible Evidence* . For memoranda relating to the propriety of discovery of particular matters, see Ch. 81, *Discovery: Privileges and Other Discovery Limitations* [*see also* Ch. 80, *Discovery: Scope, Regulation, and Timing*]. Counsel may wish to combine memoranda from those chapters that relate to the particular factual situation in question with this form.

Note that some cases cited in this form construe law in effect before the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that they remain consistent with current provisions [*see § 89.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Mandate When Production Improperly Denied

Shepherd v. Superior Court *(1976) 17 Cal. 3d 107, 130 Cal. Rptr. 257, 550 P.2d 161* was a wrongful death action against a city and some individual police officers. Among plaintiff's discovery requests was a request under former Code Civ. Proc. § 2031 (*see now Code Civ. Proc. § 2031.010*) to photograph the individual defendants in the clothes they wore the night plaintiff's son was shot. Plaintiff claimed that the photographs would facilitate the interviewing of potential witnesses. Defendants refused to comply with the request, and plaintiff made a motion pursuant to former Code Civ. Proc. § 2034 (*see now Code Civ. Proc. §§ 2031.300-2031.320*) for an order requiring defendants to be photographed as requested. The trial court believed that it lacked authority under former Code Civ. Proc. §§ 2031 or 2034 to make the requested order and denied plaintiff's motion.

Plaintiff petitioned the Supreme Court for a writ of mandate. The Court held that photographing of the face and body of a person was well within the contemplation of former Code Civ. Proc. § 2031 when the words "objects and tangible things" (*see now Code Civ. Proc. § 2031.010(c)* ("tangible things")) in that statute were liberally construed (*17 Cal. 3d 107, 118)* . The Court stated that when the trial court denied the motion it was under the erroneous impression that it had no authority under former Code Civ. Proc. §§ 2031 and 2034 to make an order requiring defendants to be photographed in the clothing they wore the night of the incident in question, and that the trial court had therefore denied the motion without making the discretionary determination of good cause that was then required by former Code Civ. Proc. § 2034 (*17 Cal. 3d 107, 119)* (*but now see Code Civ. Proc. §§ 2031.300-2031.320*, which do not require showing of good cause). While mandate normally does not lie to control the exercise of discretion, it is appropriate to compel an officer both to exercise his or her discretion and to exercise it under a proper interpretation of the law (*17 Cal. 3d 107, 118)* . The Court therefore issued a writ of mandate to require the trial court to determine whether good cause existed for the order sought (*17 Cal. 3d 107, 119)* .

In ***Associated Brewers Distr. Co. v. Superior Court*** *(1967) 65 Cal. 2d 583, 55 Cal. Rptr. 772, 422 P.2d 332* , plaintiff brewing company sued defendant distributing company for goods sold and delivered, but not paid for, and defendant counterclaimed that plaintiff had breached its oral distribution agreement, and the amount owed to it was offset against the damages resulting from the breach. The trial court overruled plaintiff's demurrer to the counterclaim on the grounds the oral agreement was barred by the parol evidence rule. Through interrogatories, defendant became aware of documents in the plaintiff's possession that tended to show the oral agreement. Defendant moved for the production and

inspection of the documents pursuant to former Code Civ. Proc. § 2031 (prior to its 1974 amendment), and the motion was denied by the trial court (*see now Code Civ. Proc. § 2031.010 et seq.*). After the court of appeal denied defendant's request for a writ of mandate compelling the production of the documents, defendant requested a writ of mandate from the Supreme Court, which granted an alternative writ of mandate.

In granting a peremptory writ of mandate, the Supreme Court said that this was an appropriate case for the issuance of such a writ because it offered the court the opportunity to consider a question of first impression and to lay down guidelines for future cases about what the meaning of "good cause" was pursuant to former Code Civ. Proc. § 2036 (*but see now Code Civ. Proc. §§ 2031.300-2031.320*, which do not require showing of good cause) (*65 Cal. 2d 583, 585)* . The Court said that although the trial court held that defendant did not need the information in the requested documents to prepare for trial, it had erred, since the objective of discovery is to prevent surprise at trial and to allow proper preparation, and this aim would be defeated by denial of the defendant's motion (*65 Cal. 2d 583, 588)* .

[4] Additional Authorities

[a] Mandate When Production Improperly Denied

In *Dowell v. Superior Court (1956) 47 Cal. 2d 483, 304 P.2d 1009* , plaintiff sued defendant for personal injuries resulting from defendant's alleged negligence. While plaintiff was hospitalized, a claims investigator for defendant took a written statement from plaintiff concerning the circumstances of the accident, but did not give plaintiff a copy of the statement. After suit was instituted, plaintiff moved the court under former Code Civ. Proc. § 1000 (*see now Code Civ. Proc. § 2031.010 et seq.*) to require defendant to produce the statement for inspection and copying, but the trial court denied the motion. Plaintiff sought a writ of mandate from the Supreme Court requiring the trial court to order the production of the statement.

In issuing a peremptory writ of mandate, the Court stated that whether a motion for the production of a document or record for inspection should be granted or denied under former Code Civ. Proc. § 1000 is within the sound discretion of the trial court; a trial court's decision will only be disturbed by an appellate court if the trial court has abused its discretion. Since a trial court's order denying a request for the production and inspection of documents or records is not appealable, there is no plain, speedy, or adequate remedy in the ordinary course of law, and a writ of mandate is the appropriate remedy to obtain relief from the trial court's order (*47 Cal. 2d 483, 486)* . The Court concluded that although the issuance of a writ of mandate to compel the production of documents is not necessarily a matter of right, but lies within the discretion of an appellate court, a petitioner is entitled to such a writ as a matter of right, and it would be an abuse of discretion to refuse it when (1) a prima facie showing has been demonstrated for such inspection, (2) there is no adequate showing to the contrary, (3) the petitioner has a substantial right to protect or enforce, and (4) there is not another plain, speedy, or adequate remedy available but the issuance of such a writ (*47 Cal. 2d 483, 486-487)* .

Note

that *Dowell* was decided prior to the adoption of former Code Civ. Proc. § 2031 (*now see Code Civ. Proc. § 2031.010 et seq.*), the section providing for inspection, copying, testing, or sampling. *Code Civ. Proc. § 2031.010 et seq.* now provides for demand for inspection, copying, testing, or sampling without leave of court [*see Code Civ. Proc. § 2031.020(a), (b)*].

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8-89A California Points & Authorities § 89A.25

§ 89A.25 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Trial Court Improperly Denied Discovery--Mandate Proper to Compel Physical or Mental Examination

[1] FORM Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Trial Court Improperly Denied Discovery--Mandate Proper to Compel Physical or Mental Examination

[*The following may be combined, when appropriate, with a general memorandum in support of a petition for a writ of mandate (see, e.g., § 89A.20).*]

MANDATE IS PROPER TO DIRECT A LOWER COURT TO COMPEL A PARTY, A PARTY'S AGENT, OR A PERSON IN THE CUSTODY OR UNDER THE LEGAL CONTROL OF A PARTY TO SUBMIT TO A _____ [PHYSICAL *or* MENTAL] EXAMINATION AND TO SET CONDITIONS FOR THE CONDUCT OF SUCH EXAMINATION.

Mandate to Compel Examination or Conditions of Examination. A writ of mandate is proper to enforce discovery rights, such as those granted by *Section 2032.010 et seq. of the Code of Civil Procedure* relating to _____ [physical *or* mental] examinations (*see Gonzi v. Superior Court (1959) 51 Cal. 2d 586, 588-589, 335 P.2d 97* ; Harabedian v. Superior Court (1961) 195 Ca1 App. 2d 26, 30, *15 Cal. Rptr. 420*).

[*When appropriate, add memoranda showing why particular examination is proper and should be ordered (see Ch. 87, Discovery: Physical and Mental Examinations).*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for a writ of mandate, pursuant to *Code Civ. Proc. §§ 1084-1097*, requesting the court to compel a party, a party's agent, or a person in the custody or under the legal control of a party to submit to a physical or mental examination and set conditions for the conduct of such examination pursuant to *Code Civ. Proc. § 2032.020(a)*. It should be combined with the general memorandum in support of a petition for a writ of mandate contained in § 89A.20, and with any other appropriate specific memoranda relating to particular

discovery issues and fact situations on review [*see §§ 89A.21 -89A.24*].

For memoranda of points and authorities relating to motions to compel physical or mental examinations, and the conditions of those examinations, see Ch. 87, *Discovery: Physical and Mental Examinations* . Counsel may wish to combine memoranda from that chapter which relate to the particular factual situation in question, with this form.

Note that some cases cited in this form construe law in effect before the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that they remain consistent with current provisions [*see § 89.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Mandate to Compel Examination or Conditions of Examination

In ***Gonzi v. Superior Court*** *(1959) 51 Cal. 2d 586, 335 P.2d 97* , a minor brought an action, through her guardian ad litem, for injuries sustained in an automobile accident. The trial court ordered plaintiff to submit to a physical examination, refusing plaintiff's request that the examination be conducted in the presence of a certified court reporter. Plaintiff brought a petition for a writ of mandate, and the court of appeal issued the writ directing the lower court to permit plaintiff to have a reporter present when she submitted to the examination. The Court cited its holding in *Sharff v. Superior Court (1955) 44 Cal. 2d 508, 509, 510, 282 P.2d 896* , a case relating to physical examinations but decided prior to the enactment of former Code Civ. Proc. § 2032 (*now see Code Civ. Proc. § 2032.010 et seq.*)(physical and mental examinations) or its predecessor (former Code Civ. Proc. § 2032 of the former Discovery Act), that mandate would issue where there is no plain, speedy, and adequate remedy in the ordinary course of law for a party to obtain use of a right to which he or she is entitled and has been unlawfully precluded from using (*51 Cal. 2d 586, 588)* .

Harabedian v. Superior Court of Los Angeles County *(1961) 195 Ca1 App. 2d 26, 15 Cal. Rptr. 420* was a personal injury action. In its pretrial order, the trial court ordered defendant to submit to an ophthalmological examination. The court denied defendant's motion to modify the pretrial order, and defendant filed a petition for a writ of prohibition or mandate. The court of appeal issued a writ of mandate directing the trial court to delete its order and enter an order that complied with the former version of *Code Civ. Proc. § 2032.010 et seq.* In discussing issuance of the writ, the court stated that a writ of mandamus may issue not only to enforce a proper discovery right, but also to prevent improper discovery proceedings, including physical examinations (*195 Cal App. 2d 26, 30)* .

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[Reserved]

§§ 89A.26[Reserved]

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8-89A California Points & Authorities § 89A.30

§ 89A.30 Supporting Petition for Writ of Prohibition [Code Civ. Proc. §§ 1102, 1103]--Trial Court Improperly Permitted Discovery--General Form

[1] FORM Supporting Petition for Writ of Prohibition [Code Civ. Proc. §§ 1102, 1103]--Trial Court Improperly Permitted Discovery--General Form

[*Caption. See § 89A.10[1]*.]

A WRIT OF PROHIBITION IS PROPER TO REVIEW A LOWER COURT ORDER GRANTING DISCOVERY.

A. Statutory Basis for Writ of Prohibition. A writ of prohibition may be issued by any court to an inferior tribunal in all cases when there is no plain, speedy, and adequate remedy in the ordinary course of the law (*Code Civ. Proc. § 1103*).

B. Statutory Nature and Effect of Writ of Prohibition. A writ of prohibition arrests the proceedings of any tribunal when such proceedings are without or in excess of the jurisdiction of such tribunal (*Code Civ. Proc. § 1102*).

C. Writ of Prohibition Proper to Review Discovery Orders. A writ of prohibition may be a proper remedy for reviewing improperly permitted discovery (*see Oceanside Union School Dist. v. Superior Court (1962) 58 Cal. 2d 180, 185-186 n.4, 23 Cal. Rptr. 375, 373 P.2d 439*).

D. Questions of General Importance. A writ of prohibition may be used in discovery matters to review questions of first impression that are of general importance to the trial court and to the profession, and when general guidelines can be laid down for future cases (*see Oceanside Union School Dist. v. Superior Court (1962) 58 Cal. 2d 180, 185-186 n.4, 23 Cal. Rptr. 375, 373 P.2d 439*).

E. Remedy at Law Inadequate. A petitioner's remedy of appeal from the final judgment is inadequate when petitioner will be subject to sanctions for failure to obey the order that was in excess of jurisdiction (*see O'Brien v. Superior Court (1965) 233 Cal. App. 2d 388, 391-392, 43 Cal. Rptr. 815*).

[*Optional*] **F. Abuse of Discretion.** A writ of prohibition is a proper remedy when a lower court has abused its

discretion in permitting or ordering discovery (*see Bunnell v. Superior Court (1967) 254 Cal. App. 2d 720, 721 n.1, 62 Cal. Rptr. 458* ; *O'Brien v. Superior Court (1965) 233 Cal. App. 2d 388, 391, 43 Cal. Rptr. 815*).

[*Optional*] **G. Failure to Apply Proper Legal Concepts.** Any record of a trial court that indicates a failure to give adequate consideration to proper legal concepts when granting discovery orders is subject to the attack of abuse of discretion regardless of the fact that the order shows no such abuse on its face (*see Greyhound Corp. v. Superior Court (1961) 56 Cal. 2d 355, 384, 15 Cal. Rptr. 90, 364 P.2d 266*).

[*Optional*] **H. Both Writs of Mandate and Prohibition May Be Granted.** [*See § 89A.20[1], Paragraph I.*]

[*Add specific points and authorities relating to the particular discovery issues and fact situations in question (see, e.g., § 89A.31 et seq.).*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities is a general form that may be submitted in support of a petition for a writ of prohibition seeking to review a discovery order pursuant to *Code Civ. Proc. §§ 1102-1105*. It should be combined with specific points and authorities relating to the particular discovery issues and fact situations on review [*see § 89A.31* et seq.]. It may also be combined with a memorandum of points and authorities in support of a petition for a writ of mandate [*see § 89A.20* et seq.] pursuant to *Code Civ. Proc. §§ 1084-1097* when both types of relief are desired [*see O'Brien v. Superior Court (1965) 233 Cal. App. 2d 388, 392, 43 Cal. Rptr. 815]* .

Note that some cases cited in this form construe law in effect before the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that they remain consistent with current provisions [*see § 89.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case.

[c] Availability of Writs to Review Grant of Discovery

Note that the Supreme Court has stated that the proper rule is that one of the prime purposes of the former Discovery Act, expediting the trial of an action, would be defeated if appellate courts entertained petitions for prerogative writs that did not clearly demonstrate a violation of privilege or of former Cal. Const., art. I, § 19 (unreasonable search and seizure; *now see Cal. Const., art. I, § 13*) when discovery had been granted, and that the court would not entertain petitions for writs in discovery matters that did not contain facts showing that the petitioner was entitled to relief under these principles [*see West Pico Furniture Co. v. Superior Court (1961) 56 Cal. 2d 407, 415, 15 Cal. Rptr. 119, 364 P.2d 295* ; *see also § 89A.34*]. The Court has also stated that as inadequate as review by appeal may be, prerogative

writs should only be used in discovery matters to review questions of first impression that are of general importance to the trial courts and to the profession and when general guidelines can be laid down for future cases [*see Oceanside Union School Dist. v. Superior Court (1962) 58 Cal. 2d 180, 185-186 n.4, 23 Cal. Rptr. 375, 373 P.2d 439* (Court issued alternative writ of prohibition to review propriety of order that plaintiff answer interrogatories)].

The rule in *West Pico* permitted a person to seek a prerogative writ when an order granting discovery violated a privilege or intruded on a constitutionally secured right to privacy [*see Pacific Tel. & Tel. Co. v. Superior Court (1970) 2 Cal. 3d 161, 171 n.11, 84 Cal. Rptr. 718, 465 P.2d 854]* . Although *Pacific Tel. & Tel.* was decided before the adoption of *Cal. Const., art. I, § 1*, which guarantees the right to privacy, the Court's statement would seem to apply to seeking a prerogative writ to protect this right as well as the rights protected by *Cal. Const., art. I, § 13* as set out in *West Pico* [*see § 89A.34[3][a]*]. In *Britt v. Superior Court (1978) 20 Cal. 3d 844, 851, 143 Cal. Rptr. 695, 574 P.2d 766* , the Court issued an alternative writ of mandate directing the trial court to vacate a discovery order compelling disclosure of extensive information about the private associational activities of plaintiffs and numerous nonparties and raised significant and novel constitutional issues of general importance.

[d] Related Pleading and Practice Forms

For a discussion and forms for use in writ proceedings to review discovery orders, see California Forms of Pleading and Practice, Ch. 200, *Discovery: Review of Discovery Orders* (Matthew Bender). For discussion and forms relating to writs proceedings for mandate or prohibition generally, including discussion of the elements of the record necessary for a reviewing court to consider a petition for writ of prohibition, see Ch. 358, *Mandate and Prohibition* in that publication.

[e] Related Points and Authorities

For forms of memoranda of points and authorities in support of petitions for writs of mandate generally, see Ch. 150, *Mandate and Prohibition* .

[f] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 89A.50* may be used to oppose the petition supported by these points and authorities.

[3] Discussion of Authorities

[a] Writ of Prohibition Proper to Review Discovery Orders

In ***Oceanside Union School Dist. v. Superior Court*** *(1962) 58 Cal. 2d 180, 23 Cal. Rptr. 375, 373 P.2d 439* , plaintiff school district brought eminent domain proceedings to condemn certain parcels of land belonging to various defendants. In preparation for trial, defendants filed and served on plaintiff written interrogatories calling for the names and addresses of each person who had rendered an opinion to plaintiff regarding the market value or severance damages to each individual parcel of land owned by defendants, together with their opinions, and the area contained in each parcel. No request was made for the written reports of the appraisers. Plaintiff answered all but the two interrogatories calling for the opinions of its appraisers regarding market value and severance damages, and it filed objections with the court regarding the two remaining interrogatories. After a hearing, the trial court overruled plaintiff's objections and ordered it to answer the interrogatories.

Plaintiff was granted an alternative writ of prohibition by the Supreme Court to conduct a hearing on the issues raised by the case, although after the hearing, the alternative writ was discharged and a peremptory writ of prohibition was denied. The Court said that the case was a proper one for the use of an alternative writ of prohibition. The prerogative writs have been used frequently to review interim orders in discovery cases, but this does not mean that these

discretionary writs will or should issue as a matter of course in all cases when the court may be of the opinion that the interim order of the trial court was erroneous (*58 Cal. 2d 180, 185-186 n.4*). In most such cases, as with most other interim orders, the parties must be relegated to a review of the order on appeal from the final judgment (*58 Cal. 2d 180, 185-186 n.4*). As inadequate as such review may be in some cases, the prerogative writs should only be used in discovery matters to review questions of first impression that are of general importance to the trial courts and to the profession, and when general guidelines can be laid down for future cases (*58 Cal. 2d 180, 185-186 n.4*). The present case falls within this category, as it involves an issue of great importance that is present in practically all eminent domain cases (*58 Cal. 2d 180, 185-186 n.4*). Guidelines established in *Oceanside* would be of great benefit in many such cases, so the case was a proper case for the use of the writ of prohibition (*58 Cal. 2d 180, 185-186 n.4*).

[b] Questions of General Importance

Oceanside Union School Dist. v. Superior Court *(1962) 58 Cal. 2d 180, 23 Cal. Rptr. 375, 373 P.2d 439* is discussed in [a], *above.*

[c] Remedy at Law Inadequate

The facts and procedural background of ***O'Brien v. Superior Court*** *(1965) 233 Cal. App. 2d 388, 43 Cal. Rptr. 815* are discussed in *§ 89A.20[3][h]*. In discussing the propriety of the writ of prohibition, the court of appeal stated that petitioner's remedy at law, appeal from the final judgment, was not adequate because petitioner would be subject to sanctions for failure to further answer the interrogatories (*233 Cal. App. 2d 388, 392-393)* .

[d] Abuse of Discretion

Bunnell v. Superior Court *(1967) 254 Cal. App. 2d 720, 62 Cal. Rptr. 458* arose from an action for defamation that had previously been tried twice. A new trial was granted after the first trial, and a mistrial was declared after the second trial. In preparing for the third trial, defendant submitted interrogatories, including two requesting information concerning witnesses. Plaintiff first responded by referring to testimony and depositions in the prior trials. Defendant's motion for further answers was granted, and plaintiff submitted supplemental answers. A motion to compel further answers was again granted, along with attorney's fees. The trial court's order further stated that if the answers were not filed within five days, plaintiff could not present any witnesses at trial.

Plaintiff filed a petition for a writ of mandate, and the court of appeal issued an alternative writ. The court stated, however, that prohibition rather than mandate is the proper remedy when the lower court allegedly abused its discretion in permitting or ordering further discovery (*254 Cal. App. 2d 720, 721 n.1*). If the allegations of a petition are broad enough to encompass the appropriate relief, the court treats a petition as one for such relief (*254 Cal. App. 2d 720, 721 n.1*). The court of appeal concluded that the trial court abused its discretion in requiring further answers and in imposing sanctions for the failure to do so, and issued a writ of prohibition (*254 Cal. App. 2d 720, 724)* .

The facts and procedural background of ***O'Brien v. Superior Court*** *(1965) 233 Cal. App. 2d 388, 43 Cal. Rptr. 815* are discussed in *§ 89A.20[3][h]*. In discussing authority for the use of prerogative writs to review interim orders in discovery cases, the court, citing *Oceanside Union School Dist. v. Superior Court (1962) 58 Cal. 2d 180, 185, 23 Cal. Rptr. 375, 373 P.2d 439* , *Greyhound Corp. v. Superior Court (1961) 56 Cal. 2d 355, 368 n.1, 15 Cal. Rptr. 90, 364 P.2d 266* , and *Twin Lock, Inc. v. Superior Court (1959) 52 Cal. 2d 754, 758, 344 P.2d 788* , stated that prohibition has been sought when it is alleged that the lower court has abused its discretion in permitting or ordering further discovery (*233 Cal. App. 2d 388, 391)* .

[e] Failure to Apply Proper Legal Concepts

In ***Greyhound Corp. v. Superior Court*** *(1961) 56 Cal. 2d 355, 15 Cal. Rptr. 90, 364 P.2d 266* , the petitioner was ordered by the trial court, pursuant to a motion by the plaintiffs, to produce and permit the inspection and copying or

photographing of certain described documents. The Supreme Court granted the petitioner an alternative writ of prohibition to review the discovery order, but later discharged the writ and denied an application for a peremptory writ of prohibition. In doing so, the Court said that any record of a trial court that indicates a failure to give adequate consideration to proper legal concepts when granting discovery orders is subject to the attack of abuse of discretion by writ of prohibition, regardless of the fact that the order shows no such abuse on its face (*56 Cal. 2d 355, 384)* . The Court stated that to constitute a proper exercise of discretion, the factual determination of the trial court should clearly and unequivocally be based on the following legal concepts:

(1) The legislative purposes of discovery statutes are not to be subverted under the guise of the exercise of discretion.

(2) Those purposes are to be given effect rather than thwarted, so that discovery is encouraged.

(3) When disputed facts provide a basis for the exercise of discretion, those facts should be liberally construed in favor of discovery, rather than in the most limited and restricted manner possible.

(4) Although the statutory limitations on discovery must be applied when the facts so warrant, exercise of discretion does not authorize extension beyond these limits.

(5) There is no room for judicial discretion in those situations not included in the statutes but asserted as general limitations of privileges conferred. Such situations, however, may be subject to judicial discretion under the statutory power to prevent abuse and advance the ends of justice.

(6) The power to prevent abuse that is bestowed on the court by the provisions of former Code Civ. Proc. § 2019(b)(1) (protective orders concerning deposition; *now see Code Civ. Proc. §§ 2025.260, 2025.420, 2028.070*; *see also Code Civ. Proc. § 2030.090* (protective orders concerning interrogatories), 2031.060 (protective orders concerning inspection demands), 2032.510(d), (e) (protective orders concerning physical and mental examinations), 2033.080(b) (protective orders concerning requests for admissions), 2034.250 (protective orders concerning exchanges of expert witness lists)) is the power to exercise discretion based on the factual showing made. When the record indicates facts on which the court exercised its discretion, that exercise will not be disturbed on appeal. When the facts are undisputed, or there is but one reasonable interpretation of them, the question is not one of fact but of law.

(7) The trial courts, in exercising their discretion, should keep in mind that the Legislature has suggested that, when possible, the courts should impose partial limitations rather than outright denial of discovery.

(8) In the exercise of its discretion, the court should weigh the relative importance of the information sought against the hardship that its production might entail; it must weigh the relative ability of the parties to obtain the information before requiring the adversary to bear the burden or cost of production, keeping in mind the statutory admonition of entering an order consistent with justice (*56 Cal. 2d 355, 383-384)* .

[4] Additional Authorities

[a] Questions of General Importance

In *Volkswagenwerk Aktiengesellschaft v. Superior Court (1981) 123 Cal. App. 3d 840, 176 Cal. Rptr. 874* , *overruled on other grounds,* *American Home Assurance Co. v. Societe Commerciale Toutelectric (2002) 104 Cal. App. 4th 406, 128 Cal. Rptr. 2d 430* , defendant applied for a writ of mandate and/or prohibition to vacate the respondent court's discovery orders permitting international discovery. The court of appeal held that this unusual and difficult issue may properly be raised by writ petition (*123 Cal. App. 3d 840, 846)* .

In *South Tahoe Public Utility Dist. v. Superior Court (1979) 90 Cal. App. 3d 135, 154 Cal. Rptr. 1* ,

plaintiff applied for a writ of mandate and/or prohibition to compel the trial court to vacate its order compelling plaintiff to answer an interrogatory calling for the disclosure of names and addresses of experts with whom it had consulted, and who might be called to testify. The court of appeal granted a writ of mandate, noting that while ordinarily the prerogative writ is not the favored method of reviewing discovery orders, such a method may be used to review questions of general importance. Because the trial court order in *South Tahoe* involved a matter of first impression about the scope of the work product privilege, the court held that it was indeed cognizable in a prerogative writ proceeding (*90 Cal. App. 3d 135, 137)* .

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8-89A California Points & Authorities § 89A.31

§ 89A.31 Supporting Petition for Writ of Prohibition [Code Civ. Proc. §§ 1102, 1103]--Trial Court Improperly Permitted Discovery--Prohibition Proper to Prevent Improper Questions or Improper Conditions at Deposition

[1] FORM Supporting Petition for Writ of Prohibition [Code Civ. Proc. §§ 1102, 1103]--Trial Court Improperly Permitted Discovery--Prohibition Proper to Prevent Improper Questions or Improper Conditions at Deposition

[*The following may be combined, when appropriate, with a general form of memorandum of points and authorities in support of a petition for a writ of prohibition (see, e.g., § 89A.30)*].

A WRIT OF PROHIBITION MAY BE PROPER TO RESTRAIN A LOWER COURT FROM ENFORCING AN ORDER REQUIRING A PARTY OR WITNESS TO _____ [ANSWER IMPROPER DEPOSITION QUESTIONS *or* TESTIFY AT A DEPOSITION UNDER IMPROPER CONDITIONS].

[*EITHER*]

A. Writ of Prohibition to Restrain Enforcement of Order Requiring Deponent to Answer Improper Deposition Questions. A writ of prohibition may be a proper remedy to restrain a lower court from ordering a deponent to answer improper deposition questions (*see Peck's Liquors, Inc. v. Superior Court (1963) 221 Cal. App. 2d 772, 775, 776, 34 Cal. Rptr. 735*).

[*AND/OR*]

B. Writ of Prohibition to Restrain Enforcement of Improper Conditions for Deposition. A writ of prohibition may be proper to restrain a lower court from enforcing an order requiring a deponent to testify at a deposition when the conditions of the deposition are improper (*see Bailey v. Superior Court (1977) 19 Cal. 3d 970, 971, 140 Cal. Rptr. 669, 568 P.2d 394*).

[*Optional*] **C. Writ of Prohibition to Restrain Enforcement of Order Requiring Deponent to Disclose Privileged**

Information. A writ of prohibition may be a proper remedy to restrain a lower court from ordering a deponent to answer questions requiring disclosure of privileged information (*see Peck's Liquors, Inc. v. Superior Court (1963) 221 Cal. App. 2d 772, 775-776, 34 Cal. Rptr. 735*).

[*When appropriate, add points and authorities showing that the particular deposition questions or conditions are improper (see generally Ch. 80, Discovery: Scope, Regulation, and Timing, Ch. 81, Discovery: Privileges and Other Discovery Limitations, and Ch. 83, Discovery: Depositions).*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a petition for a writ of prohibition pursuant to *Code Civ. Proc. §§ 1102-1105* seeking to restrain a lower court from enforcing an order requiring a party to testify at a deposition when the questions or the conditions of the deposition are improper. It should be combined with the general form of points and authorities in support of a petition for a writ of prohibition contained in § 89A.30, and with any other specific points and authorities relating to particular discovery issues and fact situations in question on review [*see § 89A.32* et seq.].

For memoranda of points and authorities relating to motions to compel testimony, etc., in a deposition, see Ch. 83, *Discovery: Depositions* . For points and authorities relating to the propriety of discovery of particular matters, see Ch. 81, *Discovery: Privileges and Other Discovery Limitations* [*see also* Ch. 80, *Discovery: Scope, Regulation, and Timing*]. Counsel may wish to combine points and authorities from those chapters that relate to the particular factual situation in question with the points and authorities set out in this form.

Note that some cases cited in this form construe law in effect before the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that they remain consistent with current provisions [*see § 89.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case.

[3] Discussion of Authorities

[a] Writ of Prohibition to Restrain Enforcement of Order Requiring Deponent to Answer Improper Deposition Questions

Peck's Liquors, Inc. v. Superior Court *(1963) 221 Cal. App. 2d 772, 34 Cal. Rptr. 735* arose out of an action against a liquor store, in which plaintiff contended that defendants sold alcoholic beverages at less than the fair trade prices, thereby damaging plaintiff. During depositions of various employees of defendant, the deponents refused to answer certain questions on the grounds of self-incrimination. On plaintiff's motion, the trial court ordered them to answer.

Seeking to prevent enforcement of that order, defendant petitioned the court of appeal for a writ of certiorari, prohibition, mandamus, or any other alternative writ. The court held that this procedure was correct, stating that when a pleader is in doubt regarding the type of writ to seek, it is proper to state the prayer in the alternative. The court also held that a writ of prohibition may be a proper remedy for seeking review of the propriety of a lower court order (*221 Cal. App. 2d 772, 775)* . Additionally, when a lower court issues an order compelling a witness to answer a question which is allegedly incriminating, the propriety of that order may be reviewed on application for a writ of prohibition, in the same manner as if the court had ordered the witness to give answers which would violate the attorney-client privilege (*221 Cal. App. 2d 772, 776)* .

Note that the *Supreme Court in Pacific Tel. & Tel. Co. v. Superior Court (1970) 2 Cal. 3d 161, 169, 84 Cal. Rptr. 718, 465 P.2d 854* criticized *Peck's Liquors* as being an example of a situation in which an appellate court has apparently erroneously considered prerogative writs as the normal (rather than as extraordinary) instruments for reviewing discovery orders. Nevertheless, it appears that *Peck's Liquors* may be cited for the proposition that when a court issues an order requiring a deponent to answer improper deposition questions, then a petition for a writ of prohibition may be an appropriate vehicle for reviewing the improper order. Indeed, the *Pacific Tel.* Court has pointed out that under the facts of the case before it, the petition for the writ of prohibition rested on the ground of irrelevancy, and not on the assertion of a privilege (*2 Cal. 3d 161, 170 n.11*). This is to be distinguished from the facts in *Peck's Liquors,* in which the claimed impropriety was based on violation of a privilege. The Court in *Pacific Tel.* went on to note that if the impropriety in the questions rested on claims of privilege or the violation of a constitutional right, then a writ of prohibition might well be in order (*2 Cal. 3d 161, 170 n.11*). See also the discussion in *§ 89A.34[3][a]*.

[b] Writ of Prohibition to Restrain Enforcement of Improper Conditions for Deposition

In ***Bailey v. Superior Court*** *(1977) 19 Cal. 3d 970, 140 Cal. Rptr. 669, 568 P.2d 394* , plaintiff in a personal injury action was required by the trial court to testify at a deposition. The court order specified that there would be a videotaped reenactment of the circumstances of the accident to supplement plaintiff's oral deposition about how he lost four fingers through the allegedly negligent design and construction of defendant's power saw. The Supreme Court directed that a writ of prohibition be issued to restrain the trial court from enforcing the videotaping provisions of its order. The Court said that in the absence of a stipulation between the parties concerning the videotaping of the deposition, a writ of prohibition is proper to restrain a lower court from enforcing an order requiring a witness to testify at a deposition that would be videotaped since former Code Civ. Proc. § 2019(c) required the deposition to be stenographically transcribed, and *Code Civ. Proc. § 2004* defines a deposition as a written declaration. Thus, it was apparent that a deposition is meant by the Legislature to be in written form (*19 Cal. 3d 970, 974)* .

Note, however, that under new *Code Civ. Proc. § 2025.010 et seq.*, a deposition may now be recorded by audio or video technology by any party who has provided notice of an intention to record using audio or video technology, or by stipulation of the parties [*see Code Civ. Proc. § 2025.220(a)(5), 2025.330(c)*; *Cal. Rules of Ct., Rule 3.1010* (oral depositions by telephone, videoconference, or other remote electronic means); *Green v. GTE California, Inc. (1994) 29 Cal. App. 4th 407, 410, 34 Cal. Rptr. 2d 517* (sanctions order upheld against plaintiff's counsel, who failed to provide three-day notice of use of video camera at deposition); *see also Code Civ. Proc. § 2025.420(b)(8)* (protective order that testimony be recorded in manner different from that specified in deposition notice)]. Thus, it is no longer true that the videotaping of a deposition is automatically improper. However, if the conditions of a deposition are otherwise improper, then a writ of prohibition should be available to correct a trial court order enforcing the taking of the deposition under the improper conditions.

[c] Writ of Prohibition to Restrain Enforcement of Order Requiring Deponent to Disclose Privileged Information

Peck's Liquors, Inc. v. Superior Court *(1963) 221 Cal. App. 2d 772, 775-776, 34 Cal. Rptr. 735* is discussed in [b], *above.*

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8-89A California Points & Authorities § 89A.32

§ 89A.32 Supporting Petition for Writ of Prohibition [Code Civ. Proc. §§ 1102, 1103]--Trial Court Improperly Permitted Discovery--Prohibition Proper When Court Improperly Ordered Party to Answer Interrogatories

[1] FORM Supporting Petition for Writ of Prohibition [Code Civ. Proc. §§ 1102, 1103]--Trial Court Improperly Permitted Discovery--Prohibition Proper When Court Improperly Ordered Party to Answer Interrogatories

[*The following may be combined, when appropriate, with a general form of memorandum in support of a petition for a writ of prohibition (see, e.g., § 89A.30*)].

A WRIT OF PROHIBITION IS PROPER TO RESTRAIN A LOWER COURT FROM ENFORCING AN ORDER REQUIRING A PARTY TO ANSWER WRITTEN INTERROGATORIES.

A. Writ of Prohibition to Restrain Answers to Interrogatories. A petition for a writ of prohibition is proper to restrain a lower court from enforcing an order requiring a party to answer written interrogatories (*see Sav-On Drugs, Inc. v. Superior Court (1975) 15 Cal. 3d 1, 7, 123 Cal. Rptr. 283, 538 P.2d 739*).

[*Optional*] **B. Prohibition Proper When Time Limit Has Expired.** When a party requests further responses to written interrogatories after the time period set by *Section 2030.300 of the Code of Civil Procedure* has expired and the lower court orders a further response, a writ of prohibition is proper to restrain enforcement of the lower court's order compelling a response. The time period for moving for an order compelling a further response to interrogatories is mandatory and, if not met, the party seeking the further response waives his or her right to move for the order (*Code Civ. Proc. § 2030.300(c)*). Thus, under these circumstances, a trial court cannot order that the response be made or impose sanctions for a party's failure to so respond (*see O'Brien v. Superior Court (1965) 233 Cal. App. 2d 388, 390-392, 43 Cal. Rptr. 815*).

[*When appropriate, add points and authorities showing that the particular interrogatories are improper (see generally Ch. 80, Discovery: Scope, Regulation, and Timing, Ch. 81, Discovery: Privileges and Other Discovery Limitations, and Ch. 84, Discovery: Interrogatories).*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a petition for a writ of prohibition pursuant to *Code Civ. Proc. §§ 1102-1105* seeking to restrain a lower court from enforcing an order requiring a party to answer written interrogatories. It should be combined with the general form of points and authorities in support of a petition for a writ of prohibition contained in § 89A.30, and with any other specific points and authorities relating to particular discovery issues and fact situations in question on review [*see §§ 89A.31, 89A.33* et seq.].

For memoranda of points and authorities relating to motions to compel answers to interrogatories, see Ch. 84, *Discovery: Interrogatories* . For points and authorities relating to the propriety of discovery of particular matters, see Ch. 81, *Discovery: Privileges and Other Discovery Limitations* [*see also* Ch. 80, *Discovery: Scope, Regulation, and Timing*]. Counsel may wish to combine points and authorities from those chapters that relate to the particular factual situation in question with the points and authorities set out in this form.

Note that some cases cited in this form construe law in effect before the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that they remain consistent with current provisions [*see § 89.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case.

[3] Discussion of Authorities

[a] Writ of Prohibition to Restrain Answers to Interrogatories

In ***Sav-On Drugs, Inc. v. Superior Court*** *(1975) 15 Cal. 3d 1, 123 Cal. Rptr. 283, 538 P.2d 739* , a class action brought against defendant-retailer alleging it had charged excess sales tax, the trial court granted plaintiff's motion for an order compelling defendant to answer certain interrogatories concerning defendant's sales tax returns. On defendant's application, the Supreme Court issued a writ of prohibition restraining the trial court from enforcing its order regarding one of the challenged interrogatories, but refused the writ regarding the other interrogatories. The Court said that the writ of prohibition is not the favored method of reviewing discovery orders. Ordinarily, the aggrieved party must raise the issue on direct appeal from a final judgment because, in the great majority of cases, the delay due to interim review of discovery orders is likely to result in greater harm to the judicial process by the protracted delay than is the enforcement of a possibly improper discovery order. Nevertheless, this was a proper case for a writ of prohibition restraining the trial court from compelling answers to written interrogatories, because it fell into an exception that a court may properly entertain a petition for extraordinary relief when the petitioning party asserts that to compel an answer to an interrogatory would violate a privilege (*15 Cal. 3d 1, 5)* .

[b] Prohibition Proper When Time Limit Has Expired

O'Brien v. Superior Court *(1965) 233 Cal. App. 2d 388, 43 Cal. Rptr. 815* is discussed in *§ 89A.20[3][h]*. The court concluded that failure to move for further answers within the statutory time forecloses further relief, and stated that in the absence of any showing to the contrary, it is unnecessary to decide whether or not a party may be relieved of failure to make a timely motion (*233 Cal. App. 2d 388, 391)* . The court ordered issuance of a peremptory writ of mandate and prohibition directing the trial court to vacate its order compelling defendant to make further responses to interrogatories and prohibiting the court from taking any proceedings in connection with notices of motions for further answers (*233 Cal. App. 2d 388, 392)* .

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8-89A California Points & Authorities § 89A.33

§ 89A.33 Supporting Petition for Writ of Prohibition [Code Civ. Proc. §§ 1102, 1103]--Trial Court Improperly Permitted Discovery--Prohibition Proper When Court Ordered Disclosure of Privileged Material

[1] FORM Supporting Petition for Writ of Prohibition [Code Civ. Proc. §§ 1102, 1103]--Trial Court Improperly Permitted Discovery--Prohibition Proper When Court Ordered Disclosure of Privileged Material

[*The following may be combined, when appropriate, with a general form of memorandum of points and authorities in support of a petition for a writ of prohibition (see,e.g.,§ 89A.30).*]

A PETITION FOR A WRIT OF PROHIBITION IS PROPER TO RESTRAIN A LOWER COURT FROM ENFORCING A DISCOVERY ORDER REQUIRING THE DISCLOSURE OF PRIVILEGED MATERIAL.

A. Writ of Prohibition to Prevent Disclosure of Privileged Material. A petition for a writ of prohibition is proper to restrain a lower court from enforcing a discovery order requiring the disclosure of privileged material (*see Sav-On Drugs, Inc. v. Superior Court (1975) 15 Cal. 3d 1, 7, 123 Cal. Rptr. 283, 538 P.2d 739* ; *Roberts v. Superior Court (1973) 9 Cal. 3d 330, 336, 107 Cal. Rptr. 309, 508 P.2d 309*).

[*Optional*] **B. Written Interrogatories.** A petition for a writ of prohibition is proper to restrain a lower court from requiring a party to answer written interrogatories when there will be a disclosure of privileged material (*see Sav-On Drugs, Inc. v. Superior Court (1975) 15 Cal. 3d 1, 5-8, 123 Cal. Rptr. 283, 538 P.2d 739*).

[*Optional*] **C. Production of Documents or Records for Inspection.** A petition for a writ of prohibition is proper to restrain a lower court from enforcing an order requiring the production of documents or records for inspection when there will be a disclosure of privileged material (*see Roberts v. Superior Court (1973) 9 Cal. 3d 330, 336, 343-344, 107 Cal. Rptr. 309, 508 P.2d 309* ; *Glade v. Superior Court (1978) 76 Cal. App. 3d 738, 742-747, 143 Cal. Rptr. 119*).

[*Optional*] **D. Writ of Prohibition to Restrain Enforcement of Order Requiring Deponent to Disclose Privileged Information.** [*See § 89A.31[1], Paragraph C.*]

[*When appropriate, add points and authorities showing that the particular material sought is privileged (see Ch. 81,*

Discovery: Privileges and Other Discovery Limitations).]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a petition for a writ of prohibition, pursuant to *Code Civ. Proc. §§ 1102-1105* seeking to restrain a lower court from enforcing a discovery order requiring the disclosure of privileged material. It should be combined with the general form of points and authorities in support of a petition for a writ of prohibition contained in § 89A.30, and with other specific points and authorities relating to any other particular discovery issues and fact situations in question on review [*see §§ 89A.31, 89A.32, 89A.34* et seq.].

For points and authorities relating to motions to compel discovery involving privileges and to the propriety of discovery of particular matters, see Ch. 81, *Discovery: Privileges and Other Discovery Limitations* . Counsel may wish to combine forms from that chapter which relate to the particular factual situation with the points and authorities set out in this form.

Note that some cases cited in this form construe law in effect before the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that they remain consistent with current provisions [*see § 89.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case.

[3] Discussion of Authorities

[a] Writ of Prohibition to Prevent Disclosure of Privileged Material

The facts and procedural background of ***Sav-On Drugs, Inc. v. Superior Court*** *(1975) 15 Cal. 3d 1, 123 Cal. Rptr. 283, 538 P.2d 739* are discussed in *§ 89A.32[3][a]*. The Court issued a writ of prohibition restraining the trial court from compelling defendant to answer an interrogatory which called for privileged information (*15 Cal. 3d 1, 7, 8)* .

In ***Roberts v. Superior Court*** *(1973) 9 Cal. 3d 330, 107 Cal. Rptr. 309, 508 P.2d 309* , plaintiff sued defendants for injuries suffered in an automobile accident. Defendants subpoenaed the records of plaintiff's psychotherapist concerning plaintiff, but the psychotherapist refused on the ground of privilege to surrender the records unless ordered to do so by the trial court. Following a hearing, the trial court ordered that the records be deposited with the court clerk to be open to inspection only by counsel accompanied by medical examiners.

In granting plaintiff a writ of prohibition barring the production and inspection of the records as ordered by the trial court, the Supreme Court said that the case was an appropriate one for the use of such a writ. The need for the availability of the prerogative writs in discovery cases when an order of the trial court granting discovery allegedly violates a privilege of the party against whom discovery is granted is obvious. The person seeking to exercise the privilege must either succumb to the court's order and disclose the privileged information, or subject himself or herself to a charge of contempt for refusal to obey the court's order pending appeal. The first of these alternatives is hardly an adequate remedy and could lead to disruption of a confidential relationship. The second is clearly inadequate as it would involve the possibility of a jail sentence and additional delay in the principal litigation during review of the contempt order. Thus, the Court said, the use of the prerogative writ in such a case is proper (*9 Cal. 3d 330, 336)* .

[b] Written Interrogatories

Sav-On Drugs, Inc. v. Superior Court *(1975) 15 Cal. 3d 1, 123 Cal. Rptr. 283, 538 P.2d 739* is discussed in *§ 89A.32[3][a]*, and in [a], *above.*

[c] Production of Documents or Records for Inspection

Roberts v. Superior Court *(1973) 9 Cal. 3d 330, 107 Cal. Rptr. 309, 508 P.2d 309* is discussed in [a], *above.*

In ***Glade v. Superior Court*** *(1978) 76 Cal. App. 3d 738, 143 Cal. Rptr. 119* , an attorney sought a writ of prohibition from the court of appeal to bar the trial court from enforcing its order for the production and inspection of records of confidential attorney-client communications contained in the attorney's files. The attorney was one of several defendants in an action for declaratory relief and damages. The court of appeal said that although resort to prerogative writs during pretrial proceedings is disfavored, they may be employed to review discovery orders challenged by the assertion of a privilege if the procedural situation and the remedies sought justify their application. The instant case was such a case because the discovery order compelled disclosure of confidential communications of defendant's clients who were not parties to the underlying action and would lack standing to assert erroneous disclosure on appeal (*76 Cal. App. 3d 738, 742)* . The court issued a writ of prohibition to restrain the trial court from requiring the defendant to produce documents and records for inspection to prevent disclosure of privileged communications (*76 Cal. App. 3d 738, 747)* .

[4] Additional Authorities

[a] Writ of Prohibition to Prevent Disclosure of Privileged Material

In *Schlumberger Limited v. Superior Court (1981) 115 Cal. App. 3d 386, 171 Cal. Rptr. 413* , the court stated that a prerogative writ is available in discovery cases when an order of the trial court granting discovery purportedly violates a privilege (*115 Cal. App. 3d 386, 391)* . The court of appeal found that all communications and memoranda ordered produced by the trial court were privileged (attorney-client privilege) and protected from disclosure (attorney's work product). The court ordered the issuance of a peremptory writ of mandate directing the trial court to vacate its order granting the motion to compel production of documents and to enter a new order denying the motion (*115 Cal. App. 3d 386, 394)* .

In *Willis v. Superior Court (1980) 112 Cal. App. 3d 277, 169 Cal. Rptr. 301* , discussed in *§ 89A.34[3][a]*, plaintiff brought a petition for a writ of prohibition against enforcement of an order made by the trial court directing plaintiff to answer certain interrogatories. Plaintiff claimed that the information requested was protected by the attorney-client privilege and the right to privacy under *Cal. Const., art. I, § 1*. The court stated that an application for a prerogative writ is appropriate in discovery cases when an order of the trial court purportedly violates a privilege involving the attorney-client relationship or constitutes an invasion of the constitutional right of privacy (*112 Cal. App. 3d 277, 289)* . The court found that discovery was warranted, although due to the nature of the information plaintiff might wish to seek a protective order to prevent dissemination of the information. The court discharged the alternative writ, and denied the petition for the writ of prohibition (*112 Cal. App. 3d 277, 298-299)* .

In *Alhambra v. Superior Court (1980) 110 Cal. App. 3d 513, 168 Cal. Rptr. 49* , the trial court granted plaintiffs' motion to compel further answers to interrogatories in an action against police officers for assault and battery, intentional infliction of mental distress, false imprisonment, and violation of the federal Civil Rights Act. The court stated that although pretrial review of discovery orders by means of extraordinary writ is generally disfavored, an exception to this general rule exists when the objection raised is that the information sought is protected from disclosure by a statutory privilege, since redress after disclosure would be impossible (*110 Cal. App. 3d 513, 517-518)* . Since some of the interrogatories involved presented an issue involving the patient-psychotherapist privilege, the court

found review on a petition for writ of mandate to be appropriate (*110 Cal. App. 3d 513, 518)* . The court ordered issuance of a peremptory writ of mandate directing the lower court to vacate the portion of its order compelling further answers to interrogatories relating to privileged material (*110 Cal. App. 3d 513, 521-522)* .

[b] Production of Documents or Records for Inspection

In *Hiott v. Superior Court (1993) 16 Cal. App. 4th 712, 20 Cal. Rptr. 2d 157* , the appellate court noted that trial court rulings concerning discovery sanctions are generally not subject to review by extraordinary writ, but are reviewable on appeal after judgment. An exception to this general rule exists when compelled disclosure of a claimed privilege is threatened. Thus, the court concluded that an alternative writ was appropriate in this case in which the challenged order compelled the disclosure of a videotape as to which the attorney-client privilege was claimed (*16 Cal. App. 4th 712, 716)* .

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CHAPTER 89A DISCOVERY: REVIEW OF DISCOVERY ORDERS
PART II. FORMS

8-89A California Points & Authorities § 89A.34

§ 89A.34 Supporting Petition for Writ of Prohibition [Code Civ. Proc. §§ 1102, 1103]--Trial Court Improperly Permitted Discovery--Prohibition Proper When Court Ordered Disclosure That Intrudes on Constitutionally Protected Interest

[1] FORM Supporting Petition for Writ of Prohibition [Code Civ. Proc. §§ 1102, 1103]--Trial Court Improperly Permitted Discovery--Prohibition Proper When Court Ordered Disclosure That Intrudes on Constitutionally Protected Interest

[*The following may be combined, when appropriate, with a general form of memorandum of points and authorities in support of a petition for a writ of prohibition (see, e.g., § 89A.30*)].

A WRIT OF PROHIBITION IS PROPER WHEN A TRIAL COURT'S ORDER GRANTING DISCOVERY INTRUDES ON A CONSTITUTIONALLY SECURED RIGHT TO PRIVACY OR RAISES SIGNIFICANT AND NOVEL CONSTITUTIONAL ISSUES OF GENERAL IMPORTANCE.

Constitutionally Protected Interests. A prerogative writ is the proper remedy when an order granting discovery intrudes on a constitutionally secured right to privacy (*see Willis v. Superior Court (1980) 112 Cal. App. 3d 277, 289, 169 Cal. Rptr. 301* ; *see also Pacific Tel. & Tel. Co. v. Superior Court (1970) 2 Cal. 3d 161, 171 n.11, 84 Cal. Rptr. 718, 465 P.2d 854*) or raises significant and novel constitutional issues of general importance (*see Britt v. Superior Court (1978) 20 Cal. 3d 844, 851-852, 143 Cal. Rptr. 695, 574 P.2d 766*).

[*When appropriate, add points and authorities showing that the particular discovery sought intrudes on constitutional rights (see, e.g., Ch. 81, Discovery: Privileges and Other Discovery Limitations, § 240 et seq.).*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a petition for a writ of prohibition pursuant to *Code Civ. Proc. §§ 1102-1105* restraining a lower court from enforcing a discovery order requiring the disclosure of material that is constitutionally protected. They should be combined with the general form of points and authorities in support of a

petition for a writ of prohibition contained in § 89A.30, and with other specific points and authorities relating to any other particular discovery issues and fact situations in question on review [*see §§ 89A.31 -89A.33, 89A.35*].

For points and authorities relating to motions to compel discovery involving privileges and to the propriety of discovery of particular matters, see Ch. 81, *Discovery: Privileges and Other Discovery Limitations* . Counsel may wish to combine forms from that chapter which relate to the particular factual situation with the points and authorities set out in this form.

Note that some cases cited in this form construe law in effect before the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that they remain consistent with current provisions [*see § 89.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case.

[3] Discussion of Authorities

[a] Constitutionally Protected Interests

Willis v. Superior Court *(1980) 112 Cal. App. 3d 277, 169 Cal. Rptr. 301* involved an action between two attorneys arising from the termination of their association for the practice of law. Through objections and a motion for a protective order (all involving various procedural deficiencies), plaintiff refused to answer certain interrogatories on the grounds of attorney-client privilege and his clients' constitutional right to privacy under *Cal. Const., art. I, § 1*. The trial court denied the motion for a protective order and ordered plaintiff to answer all of the interrogatories without objections. Plaintiff failed to answer, was again ordered to answer, and filed a petition for a writ of prohibition. The court of appeal denied the petition, but the Supreme Court granted an alternative writ of prohibition and retransferred the cause to the court of appeal for hearing on the matter.

On the retransfer, the court of appeal again denied the writ petition. The court of appeal stated that an application for a prerogative writ is appropriate in discovery cases when an order of the trial court granting discovery purportedly constitutes an invasion of the constitutional right of privacy (*112 Cal. App. 3d 277, 289)* . However, in this instance, the discovery order did not violate the right of privacy of third-party litigants, thus the court discharged the alternative writ and denied the petition (*112 Cal. App. 3d 277, 298-299)* .

In ***Pacific Tel. & Tel. Co. v. Superior Court*** *(1970) 2 Cal. 3d 161, 84 Cal. Rptr. 718, 465 P.2d 854* , plaintiff brought an action based on an alleged invasion of privacy through unauthorized wiretapping. Two defendants and a nonparty deponent refused to answer certain questions posed by plaintiff's attorney at a deposition on the ground that the questions were irrelevant to the subject matter of the action. The trial court granted plaintiff's motion for an order compelling answers to the questions and defendants sought a writ of prohibition to restrain the trial court from enforcing its order, which they claimed exceeded its jurisdiction. The Supreme Court noted that the lack of general import of the objections might in itself have presented a persuasive ground for an immediate denial of the writ sought (*2 Cal. 3d 161, 170)* . However, because the court of appeal had issued an order to show cause, plaintiff had not raised the point, and the case had been fully briefed on the merits, the court proceeded to evaluate the contention raised (*2 Cal. 3d 161, 170-171)* .

In noting that the writ might have been immediately denied, the Court in *Pacific Tel.* discussed in a footnote an additional objection which might have been raised against granting an extraordinary writ when a deponent refuses to testify solely on the ground that the questions were irrelevant to the subject matter (*2 Cal. 3d 161, 170 n.11*). The Court quoted its statement in *West Pico Furniture Co. v. Superior Court (1961) 56 Cal. 2d 407, 415, 15 Cal. Rptr.*

119, 364 P.2d 295 , that the proper rule is that the purpose of the former Discovery Act to expedite the trial of the action would be defeated if appellate courts entertained petitions for prerogative writs seeking a review of trial court discovery orders which did not clearly demonstrate an abuse of discretion when discovery was denied, or a violation of privilege or of the provisions of then Cal. Const., art. I, § 19 (search and seizure; *now see Cal. Const., art. I, § 13*) (*2 Cal. 3d 161, 170 n.11*). The Court stated that the procedural guidelines of *West Pico* permit a deponent to seek a prerogative writ when an order granting discovery intrudes on a constitutionally secured right to privacy (*2 Cal. 3d 161, 171 n.11*).

It is not clear whether the Court in *Pacific Tel.* intended to extend the *West Pico* rule beyond orders for discovery intruding on the constitutional right against unreasonable search and seizure. Although *Cal. Const., art. I, § 1*, which guarantees a right to privacy, was not enacted until after the Court's opinion in *Pacific Tel.* it appears that the language in *Pacific Tel.* could be applied to discovery orders intruding on that right as well.

Britt v. Superior Court *(1978) 20 Cal. 3d 844, 143 Cal. Rptr. 695, 574 P.2d 766* was an action for damages allegedly caused by the operation of a facility for jet aircraft. The trial court issued a discovery order which compelled numerous plaintiffs to disclose extensive and intimate details of both their own and others' activities in various local political associations, refusing to honor plaintiffs' request for a protective order to safeguard their associational privacy. Plaintiffs filed a petition seeking extraordinary relief.

The Supreme Court issued an alternative writ, after concluding that the trial court's order raised significant and novel constitutional issues of great importance, citing as example *Oceanside Union School Dist. v. Superior Court (1962) 58 Cal. 2d 180, 185-186 n.4, 23 Cal. Rptr. 375, 373 P.2d 439* and *Pacific Tel. & Tel. Co. v. Superior Court (1970) 2 Cal. 3d 161, 169, 171 n.11, 84 Cal. Rptr. 718, 465 P.2d 854* (*20 Cal. 3d 844, 851)* . The Court stated that review by extraordinary writ was appropriate in the case before it (*20 Cal. 3d 844, 851-852)* .

Note that the Court in *Britt* issued a writ of mandate, not prohibition. However, it has been stated that prohibition is the proper remedy to prevent improper discovery [*see Burke v. Superior Court (1969) 71 Cal. 2d 276, 276-277 n.1, 78 Cal. Rptr. 481, 455 P.2d 409* ; *see also Petterson v. Superior Court (1974) 39 Cal. App. 3d 267, 269, 114 Cal. Rptr. 20]* . Since the Court's statements relating to the proper use of writs for review in the situation before it referred to "review by extraordinary writ" (*20 Cal. 3d 844, 851-852)* , this case appears to be good authority for supporting a petition for a writ of prohibition as well. Counsel, however, may wish to petition in the alternative for both types of writs [*see § 89A.03*].

[4] Additional Authorities

[a] Constitutionally Protected Interests

In *Hofmann Corp. v. Superior Court (1985) 172 Cal. App. 3d 357, 218 Cal. Rptr. 355* , the court of appeal issued a writ of mandate directing the trial court to vacate an order compelling discovery of a business' confidential customer lists (*172 Cal. App. 3d 357, 365)* . The court held that the list was equivalent to "sensitive information," which in cited cases had been held to be protected under the constitutional right of privacy (*172 Cal. App. 3d 357, 362-363)* . The court determined that the issuance of the prerogative writ was justified to review an order that allegedly violated the protection afforded to such information (*172 Cal. App. 3d 357, 362-363 n.2*).

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8-89A California Points & Authorities § 89A.35

§ 89A.35 Supporting Petition for Writ of Prohibition [Code Civ. Proc. §§ 1102, 1103]--Trial Court Improperly Permitted Discovery--Prohibition Proper When Certain Sanctions Imposed for Not Complying With Discovery Order

[1] FORM Supporting Petition for Writ of Prohibition [Code Civ. Proc. §§ 1102, 1103]--Trial Court Improperly Permitted Discovery--Prohibition Proper When Certain Sanctions Imposed for Not Complying With Discovery Order

[*The following may be combined, when appropriate, with a general form of memorandum of points and authorities in support of a petition for a writ of prohibition (see,e.g.,§ 89A.30*)].

A PETITION FOR A WRIT OF PROHIBITION IS PROPER TO RESTRAIN A LOWER COURT FROM ENFORCING AN ORDER IMPOSING SANCTIONS FOR REFUSAL TO COMPLY WITH A DISCOVERY ORDER.

A. Writ of Prohibition to Restrain Enforcement of Sanctions. A petition for a writ of prohibition is a proper remedy to circumvent the imposition of sanctions applied in excess of a lower court's jurisdiction for refusal to comply with a discovery order (*see Lund v. Superior Court (1964) 61 Cal. 2d 698, 708-710, 39 Cal. Rptr. 891, 394 P.2d 707* ; *Twin Lock, Inc. v. Superior Court (1959) 52 Cal. 2d 754, 758, 344 P.2d 788*).

[*Optional*] **B. Ultimate Possibility of Appeal No Bar to Writ of Prohibition.** A petition for a writ of prohibition to restrain enforcement of an order imposing sanctions involving a discovery order is proper, regardless of the ultimate possibility of an appeal from the lower court's order, when the sanctions were imposed in excess of the lower court's jurisdiction (*see Lund v. Superior Court (1964) 61 Cal. 2d 698, 709-710, 39 Cal. Rptr. 891, 394 P.2d 707*).

[*When appropriate, add points and authorities showing that the particular sanctions ordered are improper (see Ch. 82, Discovery: Sanctions for Discovery Misuse*)].

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a petition for a writ of prohibition pursuant to *Code Civ. Proc. §§ 1102-1105* seeking to restrain a lower court from enforcing an order imposing certain sanctions for refusal to comply with a discovery order. It would not be used if an immediate appeal is available, such as from a default judgment or dismissal entered as a discovery sanction. This form should be combined with the general form of points and authorities in support of a petition for a writ of prohibition contained in § 89A.30, and with other specific points and authorities relating to any other particular discovery issues and fact situations in question on review [*see §§ 89A.31 -89A.34*].

For memoranda of points and authorities generally relating to motions for sanctions generally, see Ch. 82, *Discovery: Sanctions for Discovery Misuse* . The chapters dealing with particular discovery methods, Ch. 83, *Discovery: Depositions*, through Ch. 88, *Discovery: Exchange of Expert Witness Information*, also include points and authorities relating to the propriety of discovery sanctions in the context of particular proceedings. Counsel may wish to combine forms from that chapter which relate to the particular factual situation in question with the points and authorities set out in this form.

Note that some cases cited in this form construe law in effect before the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that they remain consistent with current provisions [*see § 89.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case.

[3] Discussion of Authorities

[a] Writ of Prohibition to Restrain Enforcement of Sanctions

In ***Lund v. Superior Court*** *(1964) 61 Cal. 2d 698, 39 Cal. Rptr. 891, 394 P.2d 707* , the Supreme Court issued an alternative writ of prohibition restraining the lower court from proceeding further to enforce its order requiring petitioners to make payment to several other parties in the case, and restraining a sheriff from making a levy under that order, when the petitioners refused to testify at a deposition and the trial court assessed costs and other sanctions against them for their failure to appear. In granting a peremptory writ of prohibition, the Supreme Court said that the sanctions imposed were beyond the jurisdiction and power of the trial court because it did not have personal jurisdiction over the petitioners in the first instance. Since there was a question regarding whether the petitioners could appeal the order, the better view was that an order made for the purposes of furthering discovery proceedings, or granting sanctions for refusal to make discovery, is not appealable. The Court said that regardless of the ultimate ability to appeal, if appeal would be an inadequate remedy, prohibition is an appropriate remedy to circumvent the imposition of sanctions applied in excess of a lower court's jurisdiction (*61 Cal. 2d 698, 709)* .

In ***Twin Lock, Inc. v. Superior Court*** *(1959) 52 Cal. 2d 754, 344 P.2d 788* , petitioners, who were officers of defendant corporation and residents of New York, failed to appear in California for depositions, claiming that such depositions were scheduled in violation of the 150-mile limit set by the discovery statutes [former *Code Civ. Proc. § 1989* (*now see Code Civ. Proc. §§ 2025.250, 2026.010*]. The trial court imposed sanctions against the defendant corporation for their failure to appear as ordered. In granting a peremptory writ of prohibition to restrain the trial court from enforcing such sanctions, the Supreme Court said that prohibition is available if the imposition of sanctions by a trial court would constitute an excess of the power of the court as defined by statute. The Court concluded that the lower court had exceeded its power and stated this was a proper case for the use of the writ of prohibition to restrain the imposition of sanctions (*52 Cal. 2d 754, 758)* .

[b] Ultimate Possibility of Appeal No Bar to Writ of Prohibition

Lund v. Superior Court *(1964) 61 Cal. 2d 698, 39 Cal. Rptr. 891, 394 P.2d 707* is discussed in [a], *above.*

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[Reserved]

§§ 89A.36[Reserved]

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8-89A California Points & Authorities § 89A.40

§ 89A.40 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Extraordinary Writs Generally Improper for Review of Discovery Orders

[1] FORM Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Extraordinary Writs Generally Improper for Review of Discovery Orders

[*Caption. See § 89A.10[1]*].

A PETITION FOR A WRIT OF MANDATE IS GENERALLY NOT A PROPER METHOD FOR REVIEWING A DISCOVERY ORDER.

A. Prerogative Writ Is Disfavored Method of Reviewing Discovery Order. Generally, the party aggrieved by a trial court's court discovery order, or by its failure to grant a discovery order, must seek review by way of direct appeal from a final judgment, since prerogative writs are not favored methods of reviewing discovery orders (*see Sav-On Drugs, Inc. v. Superior Court (1975) 15 Cal. 3d 1, 5, 123 Cal. Rptr. 283, 538 P.2d 739* ; *Pacific Tel. & Tel. Co. v. Superior Court (1970) 2 Cal. 3d 161, 169-170, 84 Cal. Rptr. 718, 465 P.2d 854*).

[*Optional*] **B. No Abuse of Discretion.** Appellate courts should not entertain petitions for prerogative writs to review trial court orders denying discovery unless the orders clearly demonstrate abuse of discretion by the trial court (*see West Pico Furniture Co. v. Superior Court (1961) 56 Cal. 2d 407, 415, 15 Cal. Rptr. 119, 364 P.2d 295*).

[*Optional*] **C. Other Remedy Available.** A writ of mandate will not issue when there is a plain, speedy, and adequate remedy in the ordinary course of the law (*see Code Civ. Proc. § 1086*).

[*Optional*] **D. Issues of First Impression.** Prerogative writs should only be used in discovery matters to review questions of first impression that are of general importance to the trial courts and to the profession, and when general guidelines can be laid down for future cases (*see Catanese v. Superior Court (1996) 46 Cal. App. 4th 1159, 1163, 54 Cal. Rptr. 2d 280* ; *Oceanside Union School Dist. v. Superior Court (1962) 58 Cal. 2d 180, 185-186 n.4, 23 Cal. Rptr. 375, 373 P.2d 439*).

[*Optional*] **E. Discovery as Matter of Right.** Disclosure by means of discovery is a matter of right unless statutory or

public policy considerations clearly prohibit it (*see Greyhound Corp. v. Superior Court (1961) 56 Cal. 2d 355, 378, 15 Cal. Rptr. 90, 364 P.2d 266*).

[*Add specific points and authorities relating to the particular discovery issues and fact situations in question*].
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities is a general form which may be submitted in opposition to a petition for a writ of mandate brought pursuant to *Code Civ. Proc. §§ 1084-1097* to attack a trial court order denying a discovery motion [*see § 89A.20*].

Memoranda of points and authorities relating to motions to obtain various types of discovery are set out in the chapters that Ch. 83, *Discovery: Depositions*, through Ch. 88, *Discovery: Exchange of Expert Witness Information*. Those dealing with the propriety of discovery of various matters are set out in Ch. 81, *Discovery: Privileges and Other Discovery Limitations* [*see also* Ch. 80, *Discovery: Scope, Regulation, and Timing*]. Counsel should combine this form with those memoranda of points and authorities relating to the particular discovery issue in question.

Note that some cases cited in this form construe law in effect before the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that they remain consistent with current provisions [*see § 89.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case.

[c] Related Points and Authorities

For forms of memoranda of points and authorities in opposition to petitions for writs of mandate, generally, see Ch. 150, *Mandate and Prohibition* .

[3] Discussion of Authorities

[a] Prerogative Writ Is Disfavored Method of Reviewing Discovery Order

The facts and procedural background of ***Sav-On Drugs, Inc. v. Superior Court*** *(1975) 15 Cal. 3d 1, 123 Cal. Rptr. 283, 538 P.2d 739* are *set out in § 89A.32[3][a]*. Although the specific procedural context of *Sav-On* was a writ of prohibition, the Court referred to prerogative writs in general as being not favored methods for reviewing discovery orders (*15 Cal. 3d 1, 5)* .

In ***Pacific Tel. & Tel. Co. v. Superior Court*** *(1970) 2 Cal. 3d 161, 84 Cal. Rptr. 718, 465 P.2d 854* , plaintiff brought an action against a telephone company and two of its employees, alleging that they intercepted his telephone conversations without his knowledge or consent and that, by furnishing information so acquired to the police, they caused his arrest. Plaintiff took the depositions of defendant employees and others, and on the advice of defense counsel, defendants refused to answer general questions relating to the procedures used in making unauthorized taps, knowledge of illegality involved, relationship between the policy and the company, and the monitoring of calls of other subscribers. The trial court granted plaintiff's motions to compel answers to many of the challenged inquiries, and defendants sought a writ of prohibition from the Supreme Court to restrain the lower court from enforcing its orders.

In denying the writ of prohibition, the Supreme Court quoted from *Oceanside Union School Dist. v. Superior Court (1962) 58 Cal. 2d 180, 185-186 n.4, 23 Cal. Rptr. 375, 373 P.2d 439* , in which it had stated that prerogative writs, such as those for mandate or prohibition, have been used frequently to review interim orders in discovery cases, but this does not mean that these discretionary writs will or should issue as a matter of course in all cases in which a court may be of the opinion that the interim order of the trial court was erroneous (*2 Cal. 3d 161, 169)* . As inadequate as such review may be in some cases, the prerogative writs should only be used in discovery matters to review questions of first impression that are of general importance to the trial courts and to the profession, and when general guidelines can be laid down for future cases (*2 Cal. 3d 161, 169)* . The Court noted that despite this express declaration of the necessary limitations on the availability of prerogative writs, at least some appellate courts have apparently continued to consider prerogative writs as the normal instruments for reviewing discovery orders, a practice which rests primarily on a legitimate concern with the inadequacies of a review of discovery orders after trial (*2 Cal. 3d 161, 169-170)* . The Court said that appellate courts must nevertheless keep in mind that too lax a view of the extraordinary nature of such writs, rendering substantial pretrial appellate delay a usual hazard of discovery, is likely to result in more harm to the judicial process than the denial of immediate relief from less significant errors (*2 Cal. 3d 161, 170)* .

The Court stated that in reviewing an order of a lower court granting discovery, it must be recognized that the discovery statutes vest a wide discretion in the trial court in granting or denying discovery, and such exercise of discretion may only be disturbed when it can be said that there has been an abuse of discretion. In this context, absent a showing by a petitioner that a substantial interest will be impaired by the discovery, the liberal policies of the discovery rules will generally counsel against overturning a trial court's decision granting discovery (*2 Cal. 3d 161, 171)* .

[b] No Abuse of Discretion

West Pico Furniture Co. v. Superior Court *(1961) 56 Cal. 2d 407, 15 Cal. Rptr. 119, 364 P.2d 295* arose from an action in which plaintiff alleged that certain sales transactions were really disguised loans at usurious interest rates. Defendants cross complained for money owed, and plaintiff then counterclaimed for violations of the Financial Code. During the course of discovery, plaintiff propounded a number of interrogatories on various grounds, including irrelevance, burden, and oppression. The trial court sustained some of the objections and overruled others. Plaintiff filed a petition for a writ of mandate seeking to compel the court to set aside its order sustaining the objections.

In considering the contention made by real party in interest that petitioner failed to show that the trial court abused its discretion, the Supreme Court stated that the proper rule had been stated in *Ryan v. Superior Court (1960) 186 Cal. App. 2d 813, 816-817, 9 Cal. Rptr. 147* . The court in *Ryan* stated that the purposes of the former Discovery Act would be defeated if appellate courts entertained petitions for prerogative writs reviewing trial court orders denying discovery unless the petition clearly demonstrated an abuse of discretion by the trial court. The *Ryan* court stated its intent to refuse to entertain petitions for prerogative writs in discovery matters which did not allege facts which would entitle the petitioner to the relief sought under the principles the court had set forth (*56 Cal. 2d 407, 415)* .

The Court in *West Pico* then went on to state that the language in *Ryan* does not require a petitioner seeking to show an abuse of discretion to allege specifically that the trial court has committed such abuse, but the petitioner may allege the facts which show that abuse. The Court in *West Pico,* by issuing the alternative writ, indicated its belief that petitioner

had alleged sufficient facts to show, prima facie, an abuse (*56 Cal. 2d 407, 415)* .

[c] Issues of First Impression

In ***Catanese v. Superior Court*** *(1996) 46 Cal. App. 4th 1159, 54 Cal. Rptr. 2d 280* , the court of appeal held that interim writ review should be limited to matters of first impression, which have importance to the courts and the profession, and to situations where general guidelines can be established. Writ review is not the favored method for reviewing discovery orders, since in the majority of cases, the delay caused by such review would result in greater harm than enforcement of an improper order (*46 Cal. App. 4th 1159, 1163)* .

Oceanside Union School Dist. v. Superior Court *(1962) 58 Cal. 2d 180, 23 Cal. Rptr. 375, 373 P.2d 439* is discussed in *§ 89A.30[3][a]*.

[d] Discovery as Matter of Right

The facts and procedural background of ***Greyhound Corp. v. Superior Court*** *(1961) 56 Cal. 2d 355, 15 Cal. Rptr. 90, 364 P.2d 266* are discussed in *§ 89A.30[3][e]*. The Court stated that for the guidance of the trial courts the proper rule is not only one of liberal interpretation of the former Discovery Act, but one that also recognizes that disclosure is a matter of right unless statutory or public policy considerations clearly prohibit it (*56 Cal. 2d 355, 378)* .

[4] Additional Authorities

[a] Issues of First Impression

The facts and procedural background of *South Tahoe Public Utility Dist. v. Superior Court (1979) 90 Cal. App. 3d 135, 154 Cal. Rptr. 1* are discussed in *§ 89A.30[4][a]*. In *South Tahoe*, the court held that because the question raised by the petition for a writ of mandate and/or prohibition was one concerning the hitherto undelineated scope of work product protection, this was a proper instance for use of the writ. However, in ordinary circumstances, the favored method is to test the discovery order, or the trial court's failure to make a discovery order, by way of direct appeal from a final judgment (*90 Cal. App. 3d 135, 137)* .

California Points & Authorities

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 89A DISCOVERY: REVIEW OF DISCOVERY ORDERS
PART II. FORMS

8-89A California Points & Authorities § 89A.41

§ 89A.41 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Request for Sanctions [Code Civ. Proc. §§ 907, 1109; Cal. Rules of Ct., Rules 8.276(a), 8.764(a)]--Frivolous Petition Objecting to Legitimate Demand for Discovery

[1] FORM Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Request for Sanctions [Code Civ. Proc. §§ 907, 1109; Cal. Rules of Ct., Rules 26(a), 135(a)]--Frivolous Petition Objecting to Legitimate Demand for Discovery

[*Caption. See § 89A.10[1]*.]

SANCTIONS SHOULD BE IMPOSED AGAINST PETITIONER'S ATTORNEY FOR FILING A FRIVOLOUS PETITION FOR A WRIT OF MANDATE IN RESPONSE TO A LEGITIMATE DEMAND FOR INSPECTION THAT WAS CLEARLY AND CORRECTLY RESOLVED [TWICE] BY THE TRIAL COURT.

Sanctions Appropriate for Frivolous Mandate Petition Objecting to Legitimate Demand for Inspection. Sanctions are properly imposed by an appellate court on petitioner's attorney for filing [two] frivolous mandate petitions that objected to a legitimate demand for inspection [of property] that should have been disposed of informally and that was clearly and correctly resolved [twice] by the trial court (*Manzetti v. Superior Court (1993) 21 Cal. App. 4th 373, 378-381, 25 Cal. Rptr. 2d 857*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum may be used to support a request for sanctions against a petitioner pursuant to *Code Civ. Proc. §§ 907* and *1109* and *Cal. Rules of Ct., Rules 8.276(a)* and *8.764* for filing a frivolous petition for a writ of mandate that objected to a legitimate demand for inspection.

Memoranda relating to motions to obtain various types of discovery are set out in the chapters that Ch. 83, *Discovery: Depositions*, through Ch. 88, *Discovery: Exchange of Expert Witness Information*. Those dealing with the propriety of discovery of various matters are set out in Ch. 81, *Discovery: Privileges and Other Discovery Limitations* [*see also* Ch. 80, *Discovery: Scope, Regulation, and Timing*]. Counsel should combine this form with those memoranda relating to the particular discovery issue in question.

Note that some cases cited in this form construe law in effect before the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that they remain consistent with current provisions [*see § 89.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case.

[c] Related Memoranda

For forms of memoranda in opposition to petitions for writs of mandate, generally, see Ch. 150, *Mandate and Prohibition* .

[3] Discussion of Authorities

[a] Sanctions Appropriate for Frivolous Mandate Petition Objecting to Legitimate Demand for Inspection

In ***Manzetti v. Superior Court*** *(1993) 21 Cal. App. 4th 373, 25 Cal. Rptr. 2d 857* , the trial court granted defendants' motion to compel access to property that was the subject of the case, in order to conduct an inspection of that property pursuant to former Code Civ. Proc. § 2031(a)(3) (*now see Code Civ. Proc. § 2031.010(d)*). Plaintiff filed two petitions for a writ of mandate with respect to the inspection, both of which were denied. The court of appeal imposed sanctions of $1,500 on plaintiff's attorney with respect to the second petition, noting that both petitions focused on an objection to a legitimate demand for the inspection of property that should have been disposed of informally and that was clearly and correctly resolved twice by the trial court. The court found that plaintiff's reliance on former Code Civ. Proc. § 2031(c)(4) (*now see Code Civ. Proc. § 2031.030(c)(4)*), relating to specification of related activity being demanded in addition to inspection, was without merit and that plaintiff's motivation was to delay the proceedings.

In imposing sanctions, the court of appeal held that plaintiff and his attorney had engaged in a pattern of unwarranted procedural maneuvers designed to delay and prevent the legitimate exercise of a discovery right. The mandate petition was frivolous when considered in connection with plaintiff's prior conduct with respect to the discovery dispute, which the court properly considered. The second mandate petition raised issues that indisputably had no merit. Thus, sanctions were appropriate pursuant to *Code Civ. Proc. §§ 907* and 1190 and Cal. Rules of Ct., Rules 26 (*now see Cal. Rules of Ct., Rule 8.276(a)* and 8.764) (*21 Cal. App. 4th 373, 378-381)* .

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8-89A California Points & Authorities §§ 89A.42-89A.49

[Reserved]

§§ 89A.42[Reserved]

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8-89A California Points & Authorities § 89A.50

§ 89A.50 Opposing Petition for Writ of Prohibition [Code Civ. Proc. §§ 1102, 1103]--Extraordinary Writs Generally Improper for Review of Discovery Orders

[1] FORM Opposing Petition for Writ of Prohibition [Code Civ. Proc. §§ 1102, 1103]--Extraordinary Writs Generally Improper for Review of Discovery Orders

[*Caption. See § 89A.10[1]*.]

A PETITION FOR A WRIT OF PROHIBITION IS GENERALLY NOT A PROPER METHOD FOR REVIEWING A DISCOVERY ORDER.

A. Prerogative Writ Is Disfavored Method of Reviewing Discovery Order. [*See § 89A.40[1], Paragraph A.*]

[*Optional*] **B. Other Remedy Available.** A writ of prohibition will not issue when there is a plain, speedy, and adequate remedy in the ordinary course of the law (*Code Civ. Proc. § 1103*).

[*Optional*] **C. No Abuse of Discretion by Trial Court.** The discovery statutes vest a wide discretion in the trial court in granting or denying discovery, and such exercise of discretion may only be disturbed when it can be said that there has been an abuse of discretion by the trial court (*see Pacific Tel. & Tel. Co. v. Superior Court (1970) 2 Cal. 3d 161, 171, 84 Cal. Rptr. 718, 465 P.2d 854* ; *Greyhound Corp. v. Superior Court (1961) 56 Cal. 2d 355, 380, 15 Cal. Rptr. 90, 364 P.2d 266*).

[*Optional*] **D. Issues of First Impression.** [*See § 89A.40[1], Paragraph D*].

[*Optional*] **E. Discovery Statutes to Be Liberally Construed.** Discovery statutes are to be liberally construed and, absent a showing that a substantial interest will be impaired by discovery, the liberal policies of the discovery rules will generally counsel against overturning a trial court's decision granting discovery (*see Pacific Tel. & Tel. Co. v. Superior Court (1970) 2 Cal. 3d 161, 171, 84 Cal. Rptr. 718, 465 P.2d 854*).

[*Optional*] **F. Relevancy Standard.** An objection on irrelevancy grounds to the trial court's grant of discovery will generally not support the issuance of an extraordinary writ. Furthermore, an appellate court cannot reverse a trial court's

grant of discovery under a relevancy attack unless it concludes that theinformation sought by the discovery method cannot as a reasonable possibility lead to the discovery of admissible evidence or be helpful in preparation for trial (*see Pacific Tel. & Tel. Co. v. Superior Court (1970) 2 Cal. 3d 161, 170 n.11, 173, 84 Cal. Rptr. 718, 465 P.2d 854*).

[*Add specific points and authorities relating to the particular discovery issues and fact situations in question*].
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum is a general form that may be submitted in opposition to a petition for a writ of prohibition brought pursuant to *Code Civ. Proc. §§ 1102-1105* to attack a trial court order granting discovery [*see § 89A.30*].

Memoranda relating to motions to obtain various types of discovery are set out in the chapters that Ch. 83, *Discovery: Depositions*, through Ch. 88, *Discovery: Exchange of Expert Witness Information*. Those dealing with the propriety of discovery of various matters are set out in Ch. 81, *Discovery: Privileges and Other Discovery Limitations* [*see also* Ch. 80, *Discovery: Scope, Regulation, and Timing*]. Counsel should combine this form with those memoranda relating to the particular discovery issue in question.

Note that some cases cited in this form construe law in effect before the operative date of the Civil Discovery Act. They are cited and discussed as persuasive authority to the extent that they remain consistent with current provisions [*see § 89.02[3]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case.

[3] Discussion of Authorities

[a] No Abuse of Discretion by Trial Court

The facts and procedural background of ***Pacific Tel. & Tel. Co. v. Superior Court*** *(1970) 2 Cal. 3d 161, 84 Cal. Rptr. 718, 465 P.2d 854* are discussed in *§ 89A.40[3][a]*. In that case, the Court stated that in reviewing a trial court order granting discovery, it must be recognized that the discovery statutes vest a wide discretion in the trial court in granting or denying discovery, and such exercise of discretion may only be disturbed when it can be said that there has been an abuse of discretion. In this context, absent a showing by the aggrieved party that a substantial interest will be impaired by the discovery, the liberal policies of the discovery rules will generally counsel against overturning a trial court's decision granting discovery (*2 Cal. 3d 161, 171)* .

The facts and procedural background of ***Greyhound Corp. v. Superior Court*** *(1961) 56 Cal. 2d 355, 15 Cal. Rptr. 90, 364 P.2d 266* are discussed in *§ 89A.30[3][e]*. In discussing several opinions of the court of appeal relating to

discovery, the Court stated that those courts properly held that the trial court's discretion in discovery matters may only be disturbed when it can be said that there has been an abuse of discretion (*56 Cal. 2d 355, 380)* .

[b] Discovery Statutes to Be Liberally Construed

The facts and procedural background of ***Pacific Tel. & Tel. Co. v. Superior Court*** *(1970) 2 Cal. 3d 161, 84 Cal. Rptr. 718, 465 P.2d 854* are discussed in *§ 89A.40[3][a]*. The Court discussed the statements of the *Court in Greyhound Corp. v. Superior Court (1961) 56 Cal. 2d 355, 378-379, 15 Cal. Rptr. 90, 364 P.2d 266* regarding the liberal policies of the discovery statute. The Court stated in *Pacific Tel.* that absent a showing by the petitioner that a substantial interest will be impaired by the discovery, the liberal policies of the discovery rules will generally counsel against overturning the trial court's decision granting discovery (*2 Cal. 3d 161, 171)* .

[c] Relevancy Standard

The facts and procedural background of ***Pacific Tel. & Tel. Co. v. Superior Court*** *(1970) 2 Cal. 3d 161, 84 Cal. Rptr. 718, 465 P.2d 854* are discussed in *§ 89A.40[3][a]*. The Court noted that an objection might properly have been made against the granting of an extraordinary writ to prohibit discovery when the only objection raised to the discovery was the irrelevancy of the information sought to the litigation. The Court stated that an objection on "irrelevancy" grounds to the trial court's grant of discovery will generally not support the issuance of an extraordinary writ (*2 Cal. 3d 161, 170 n.11*). The Court did, however, consider the question despite the lack of general import of defendant's objections because the court of appeal had issued an order to show cause, plaintiff did not raise the point, and the case had been fully briefed (*2 Cal. 3d 161, 170-171)* .

The Court stated that a question of relevancy must be determined in each case according to the teachings of reason and judicial experience. Past cases made clear that the relevancy of the subject matter criterion is a broader concept than relevancy to the issues (*2 Cal. 3d 161, 172)* . In sum, the relevance of the subjectmatter standard must be reasonably applied. In accordance with the liberal policies underlying the discovery procedures, doubts concerning relevance should generally be resolved in favor of permitting discovery. Given this very liberal and flexible standard of relevancy, a party attempting to show that a court abused its discretion in finding material relevant for purposes of discovery bears an extremely heavy burden. An appellate court cannot reverse a trial court's grant of discovery under a relevancy attack unless it concludes that the answers sought by a given line of questioning cannot as a reasonable possibility lead to the discovery of admissible evidence or be helpful in preparation for trial (*2 Cal. 3d 161, 173)* .

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8-89B California Points & Authorities 89B.syn

§ 89B.syn Synopsis to Chapter 89B: DISCOVERY ACT CORRELATION TABLES (July 1, 2005)

CT.01 Former Civil Discovery Act of 1986 to Civil Discovery Act (July 1, 2005)

CT.02 Civil Discovery Act (July 1, 2005) to Former Civil Discovery Act of 1986

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8-89B California Points & Authorities CT.01

CT.01 Former Civil Discovery Act of 1986 to Civil Discovery Act (July 1, 2005)

[All references are to the California Code of Civil Procedure]

Former Provision _____ New Provision

Code Civ. Proc. 2016(a) now see Code Civ. Proc. 2016.010

Code Civ. Proc. 2016(b) now see Code Civ. Proc. 2016.020

Code Civ. Proc. 2016(c) now see Code Civ. Proc. 2016.070

Code Civ. Proc. 2017(a) now see Code Civ. Proc. 2017.010

Code Civ. Proc. 2017(b) now see Code Civ. Proc. 2017.210

Code Civ. Proc. 2017(c), 1st P now see Code Civ. Proc. 2017.020(a)

Code Civ. Proc. 2017(c), 2d P now see Code Civ. Proc. 2017.020(b)

Code Civ. Proc. 2017(d), 1st P now see Code Civ. Proc. 2017.220(a)

Code Civ. Proc. 2017(d), 2d P now see Code Civ. Proc. 2017.220(b)

Code Civ. Proc. 2017(e)(1), 1st snt. now see Code Civ. Proc. 2017.730(a)

Code Civ. Proc. 2017(e)(1), 2d snt. now see Code Civ. Proc. 2017.730(b)

Code Civ. Proc. 2017(e)(2) now see Code Civ. Proc. 2017.730(c)

Code Civ. Proc. 2017(e)(3), 1st & 2d snt. now see Code Civ. Proc. 2017.730(d)

Code Civ. Proc. 2017(e)(3), 3d snt. now see Code Civ. Proc. 2017.730(e)

Code Civ. Proc. 2017(e)(4) now see Code Civ. Proc. 2017.720(a)

Code Civ. Proc. 2017(e)(5), 1st-4th snt. now see Code Civ. Proc. 2017.740(a)

Code Civ. Proc. 2017(e)(5), 5th-7th snt. now see Code Civ. Proc. 2017.740(b)

Code Civ. Proc. 2017(e)(6) now see Code Civ. Proc. 2017.710

Code Civ. Proc. 2017(e)(7) now see Code Civ. Proc. 2017.720(b)

Code Civ. Proc. 2017(e)(8) now see Code Civ. Proc. 2017.720(c)

Code Civ. Proc. 2018(a) now see Code Civ. Proc. 2018.020

Code Civ. Proc. 2018(b) now see Code Civ. Proc. 2018.030(b)

Code Civ. Proc. 2018(c) now see Code Civ. Proc. 2018.030(a)

Code Civ. Proc. 2018(d), 1st & 2d snt. now see Code Civ. Proc. 2018.040

Code Civ. Proc. 2018(d), 3d snt. now see Code Civ. Proc. 2018.050

Code Civ. Proc. 2018(d), 4th snt. now see Code Civ. Proc. 2018.060

Code Civ. Proc. 2018(e), 1st snt. now see Code Civ. Proc. 2018.070(a)-(b)

Code Civ. Proc. 2018(e), 2d snt. now see Code Civ. Proc. 2018.070(c)

Code Civ. Proc. 2018(f), 1st P now see Code Civ. Proc. 2018.080

Code Civ. Proc. 2018(f), 2d P now see Code Civ. Proc. 2018.010

Code Civ. Proc. 2019(a) now see Code Civ. Proc. 2019.010

Code Civ. Proc. 2019(b), intro. clause now see Code Civ. Proc. 2019.030(a), intro. clause

Code Civ. Proc. 2019(b)(1) now see Code Civ. Proc. 2019.030(a)(1)

Code Civ. Proc. 2019(b)(2) now see Code Civ. Proc. 2019.030(a)(2)

Code Civ. Proc. 2019(b), next-to-last P now see Code Civ. Proc. 2019.030(b)

Code Civ. Proc. 2019(b), last P now see Code Civ. Proc. 2019.030(c)

Code Civ. Proc. 2019(c), 1st snt. now see Code Civ. Proc. 2019.020(a)

Code Civ. Proc. 2019(c), 2d snt. now see Code Civ. Proc. 2019.020(b)

Code Civ. Proc. 2019(d) now see Code Civ. Proc. 2019.210

Code Civ. Proc. 2019(e) now see Code Civ. Proc. 2016.050

Code Civ. Proc. 2020(a), 1st snt. now see Code Civ. Proc. 2020.010(a)

Code Civ. Proc. 2020(a), 2d snt. now see Code Civ. Proc. 2020.010(b)

Code Civ. Proc. 2020(a), 3d snt. (including items (1)-(3)) now see Code Civ. Proc. 2020.020

Code Civ. Proc. 2020(a), last P now see Code Civ. Proc. 2020.030

Code Civ. Proc. 2020(b), 1st snt. now see Code Civ. Proc. 2020.210(a)

Code Civ. Proc. 2020(b), 2d snt. now see Code Civ. Proc. 2020.210(b)

Code Civ. Proc. 2020(c) now see Code Civ. Proc. 2020.310

Code Civ. Proc. 2020(d)(1), 1st snt. now see Code Civ. Proc. 2020.410(a)-(b)

Code Civ. Proc. 2020(d)(1), 2d-4th snt. now see Code Civ. Proc. 2020.410(c)

Code Civ. Proc. 2020(d)(2) now see Code Civ. Proc. 2020.410(d)

Code Civ. Proc. 2020(d)(3) now see Code Civ. Proc. 2020.420

Code Civ. Proc. 2020(d)(4), 1st snt. now see Code Civ. Proc. 2020.430(a), (e)

Code Civ. Proc. 2020(d)(4), 2d snt. now see Code Civ. Proc. 2020.430(b)

Code Civ. Proc. 2020(d)(4), 3d & 4th snt. now see Code Civ. Proc. 2020.430(c)

Code Civ. Proc. 2020(d)(4), 5th & 6th snt. now see Code Civ. Proc. 2020.430(d)

Code Civ. Proc. 2020(d)(5) now see Code Civ. Proc. 2020.440

Code Civ. Proc. 2020(d)(6) now see Code Civ. Proc. 2020.430(f)

Code Civ. Proc. 2020(e), 1st snt. now see Code Civ. Proc. 2020.510(a)

Code Civ. Proc. 2020(e), 2d snt. now see Code Civ. Proc. 2020.510(b)

Code Civ. Proc. 2020(e), 2d P now see Code Civ. Proc. 2020.510(c)

Code Civ. Proc. 2020(f), 1st snt. now see Code Civ. Proc. 2020.220(a)

Code Civ. Proc. 2020(f), 2d snt. now see Code Civ. Proc. 2020.220(b)

Code Civ. Proc. 2020(f), 2d P now see Code Civ. Proc. 2020.230(a)

Code Civ. Proc. 2020(f), 3d P now see Code Civ. Proc. 2020.230(b)

Code Civ. Proc. 2020(g) now see Code Civ. Proc. 2020.220(c)

Code Civ. Proc. 2020(h) now see Code Civ. Proc. 2020.240

Code Civ. Proc. 2021 now see Code Civ. Proc. 2016.030

Code Civ. Proc. 2023(a)(1)-(8) & (9), 1st snt. now see Code Civ. Proc. 2023.010

Code Civ. Proc. 2023(a)(9), 2d snt. now see Code Civ. Proc. 2023.020

Code Civ. Proc. 2023(b), intro. clause now see Code Civ. Proc. 2023.030, intro. clause

Code Civ. Proc. 2023(b)(1) now see Code Civ. Proc. 2023.030(a)

Code Civ. Proc. 2023(b)(2) now see Code Civ. Proc. 2023.030(b)

Code Civ. Proc. 2023(b)(3) now see Code Civ. Proc. 2023.030(c)

Code Civ. Proc. 2023(b)(4) now see Code Civ. Proc. 2023.030(d)

Code Civ. Proc. 2023(b)(5) now see Code Civ. Proc. 2023.030(e)

Code Civ. Proc. 2023(c) now see Code Civ. Proc. 2023.040

Code Civ. Proc. 2024(a), 1st snt. now see Code Civ. Proc. 2024.020(a)

Code Civ. Proc. 2024(a), 2d snt. Not continued (redundant). See Code Civ. Proc. 2016.060.

Code Civ. Proc. 2024(a), 3d snt. now see Code Civ. Proc. 2024.010

Code Civ. Proc. 2024(a), 4th snt. now see Code Civ. Proc. 2024.020(b)

Code Civ. Proc. 2024(b) now see Code Civ. Proc. 2024.040(a)

Code Civ. Proc. 2024(c) now see Code Civ. Proc. 2024.040(b)

Code Civ. Proc. 2024(d) (excluding 2d snt.) now see Code Civ. Proc. 2024.030

Code Civ. Proc. 2024(d), 2d snt. now see Code Civ. Proc. 2016.060

Code Civ. Proc. 2024(e), 1st P now see Code Civ. Proc. 2024.050(a)

Code Civ. Proc. 2024(e), 2d P (including items (1)-(4)) now see Code Civ. Proc. 2024.050(b)

Code Civ. Proc. 2024(e), last P now see Code Civ. Proc. 2024.050(c)

Code Civ. Proc. 2024(f) now see Code Civ. Proc. 2024.060

Code Civ. Proc. 2024(g) now see Code Civ. Proc. 2016.060

Code Civ. Proc. 2025(a) now see Code Civ. Proc. 2025.010

Code Civ. Proc. 2025(b) now see Code Civ. Proc. 2025.210

Code Civ. Proc. 2025(c), 1st snt. now see Code Civ. Proc. 2025.220(a), intro. clause

Code Civ. Proc. 2025(c), 2d snt. now see Code Civ. Proc. 2025.220(b)

Code Civ. Proc. 2025(c), 3d & 4th snt. now see Code Civ. Proc. 2025.240(a)

Code Civ. Proc. 2025(c), 2d P now see Code Civ. Proc. 2025.240(b)

Code Civ. Proc. 2025(d), intro. clause now see Code Civ. Proc. 2025.220(a), intro. clause

Code Civ. Proc. 2025(d)(1) now see Code Civ. Proc. 2025.220(a)(1)

Code Civ. Proc. 2025(d)(2) now see Code Civ. Proc. 2025.220(a)(2)

Code Civ. Proc. 2025(d)(3) now see Code Civ. Proc. 2025.220(a)(3)

Code Civ. Proc. 2025(d)(4) now see Code Civ. Proc. 2025.220(a)(4)

Code Civ. Proc. 2025(d)(5) now see Code Civ. Proc. 2025.220(a)(5)

Code Civ. Proc. 2025(d)(6), 1st P now see Code Civ. Proc. 2025.220(a)(6)

Code Civ. Proc. 2025(d)(6), 2d P, 1st snt. now see Code Civ. Proc. 2025.230

Code Civ. Proc. 2025(d)(6), 2d P, 2d snt. Not continued (redundant). See Code Civ. Proc. 2020.310(e), 2020.510(a)(1).

Code Civ. Proc. 2025(d)(6), 3d P now see Code Civ. Proc. 2025.240(c)

Code Civ. Proc. 2025(e)(1) now see Code Civ. Proc. 2025.250(a)

Code Civ. Proc. 2025(e)(2), 1st snt. now see Code Civ. Proc. 2025.250(b)

Code Civ. Proc. 2025(e)(2), 2d & 3d snt. now see Code Civ. Proc. 2025.250(c)

Code Civ. Proc. 2025(e)(3), 1st P now see Code Civ. Proc. 2025.260(a)

Code Civ. Proc. 2025(e)(3), 2d P (including items (A)-(F)) now see Code Civ. Proc. 2025.260(b)

Code Civ. Proc. 2025(e)(3), next-to-last P now see Code Civ. Proc. 2025.260(c)

Code Civ. Proc. 2025(e)(3), last P now see Code Civ. Proc. 2025.260(d)

Code Civ. Proc. 2025(f), 1st & 2d snt. now see Code Civ. Proc. 2025.270(a)

Code Civ. Proc. 2025(f), 3d snt. now see Code Civ. Proc. 2025.270(b)

Code Civ. Proc. 2025(f), 2d P now see Code Civ. Proc. 2025.270(c)

Code Civ. Proc. 2025(g), 1st snt. now see Code Civ. Proc. 2025.410(a)

Code Civ. Proc. 2025(g), 2d & 3d snt. now see Code Civ. Proc. 2025.410(b)

Code Civ. Proc. 2025(g), 2d P now see Code Civ. Proc. 2025.410(c)

Code Civ. Proc. 2025(g), 3d P now see Code Civ. Proc. 2025.410(d)

Code Civ. Proc. 2025(h)(1) now see Code Civ. Proc. 2025.280(a)

Code Civ. Proc. 2025(h)(2) now see Code Civ. Proc. 2025.280(b)

Code Civ. Proc. 2025(h)(3), 1st snt. now see Code Civ. Proc. 2025.310(a)

Code Civ. Proc. 2025(h)(3), 2d & 3d snt. now see Code Civ. Proc. 2025.310(b)

Code Civ. Proc. 2025(h)(3), 4th snt. now see Code Civ. Proc. 2025.310(c)

Code Civ. Proc. 2025(i), 1st P now see Code Civ. Proc. 2025.420(a)

Code Civ. Proc. 2025(i), 2d P (including items (1)-(15)) now see Code Civ. Proc. 2025.420(b)

Code Civ. Proc. 2025(i), next-to-last P now see Code Civ. Proc. 2025.420(c)

Code Civ. Proc. 2025(i), last P now see Code Civ. Proc. 2025.420(d)

Code Civ. Proc. 2025(j)(1) now see Code Civ. Proc. 2025.430

Code Civ. Proc. 2025(j)(2), 1st P now see Code Civ. Proc. 2025.440(a)

Code Civ. Proc. 2025(j)(2), 2d P now see Code Civ. Proc. 2025.440(b)

Code Civ. Proc. 2025(j)(3), 1st snt. now see Code Civ. Proc. 2025.450(a)

Code Civ. Proc. 2025(j)(3), 2d snt. now see Code Civ. Proc. 2025.450(b)

Code Civ. Proc. 2025(j)(3), 3d & 4th snt. now see Code Civ. Proc. 2025.450(c)

Code Civ. Proc. 2025(j)(3), 2d P now see Code Civ. Proc. 2025.450(d)

Code Civ. Proc. 2025(k), intro. clause now see Code Civ. Proc. 2025.320, intro. clause

Code Civ. Proc. 2025(k)(1) now see Code Civ. Proc. 2025.320(a)

Code Civ. Proc. 2025(k)(2) now see Code Civ. Proc. 2025.320(b)

Code Civ. Proc. 2025(k)(3) now see Code Civ. Proc. 2025.320(c)

Code Civ. Proc. 2025(k)(4) now see Code Civ. Proc. 2025.320(d)

Code Civ. Proc. 2025(k)(5) now see Code Civ. Proc. 2025.320(e)

Code Civ. Proc. 2025(*l*)(1), 1st snt. now see Code Civ. Proc. 2025.330(a)

Code Civ. Proc. 2025(*l*)(1), 2d snt. now see Code Civ. Proc. 2025.330(b)

Code Civ. Proc. 2025(*l*)(1), 3d-5th snt. now see Code Civ. Proc. 2025.330(c)

Code Civ. Proc. 2025(*l*)(1), 6th snt. now see Code Civ. Proc. 2025.330(d)

Code Civ. Proc. 2025(*l*)(2), intro. clause now see Code Civ. Proc. 2025.340, intro. clause

Code Civ. Proc. 2025(*l*)(2)(A) now see Code Civ. Proc. 2025.340(a)

Code Civ. Proc. 2025(*l*)(2)(B), 1st & 2d snt. now see Code Civ. Proc. 2025.340(b)

Code Civ. Proc. 2025(*l*)(2)(B), 3d snt. now see Code Civ. Proc. 2025.340(c)

Code Civ. Proc. 2025(*l*)(2)(B), 4th-6th snt. now see Code Civ. Proc. 2025.340(d)

Code Civ. Proc. 2025(*l*)(2)(B), 7th & 8th snt. now see Code Civ. Proc. 2025.340(e)

Code Civ. Proc. 2025(*l*)(2)(B), 9th & 10th snt. now see Code Civ. Proc. 2025.340(f)

Code Civ. Proc. 2025(*l*)(2)(C) now see Code Civ. Proc. 2025.340(g)

Code Civ. Proc. 2025(*l*)(2)(D) now see Code Civ. Proc. 2025.340(h)

Code Civ. Proc. 2025(*l*)(2)(E) now see Code Civ. Proc. 2025.340(i)

Code Civ. Proc. 2025(*l*)(2)(F) now see Code Civ. Proc. 2025.340(j)

Code Civ. Proc. 2025(*l*)(2)(G) now see Code Civ. Proc. 2025.340(k)

Code Civ. Proc. 2025(*l*)(2)(H) now see Code Civ. Proc. 2025.340(*l*)

Code Civ. Proc. 2025(*l*)(2)(I) now see Code Civ. Proc. 2025.340(m)

Code Civ. Proc. 2025(*l*)(3) now see Code Civ. Proc. 2025.330(e)

Code Civ. Proc. 2025(m)(1) now see Code Civ. Proc. 2025.460(a)

Code Civ. Proc. 2025(m)(2) now see Code Civ. Proc. 2025.460(b)

Code Civ. Proc. 2025(m)(3) now see Code Civ. Proc. 2025.460(c)

Code Civ. Proc. 2025(m)(4) now see Code Civ. Proc. 2025.460(d)

Code Civ. Proc. 2025(n), 1st & 2d snt. now see Code Civ. Proc. 2025.470

Code Civ. Proc. 2025(n), 3d & 4th snt. now see Code Civ. Proc. 2025.420(b)(16)

Code Civ. Proc. 2025(n), 2d P now see Code Civ. Proc. 2025.470

Code Civ. Proc. 2025(o), 1st snt. now see Code Civ. Proc. 2025.480(a)

Code Civ. Proc. 2025(o), 2d snt. now see Code Civ. Proc. 2025.480(b)

Code Civ. Proc. 2025(o), 3d & 4th snt. now see Code Civ. Proc. 2025.480(c)

Code Civ. Proc. 2025(o), 5th & 6th snt. now see Code Civ. Proc. 2025.480(d)

Code Civ. Proc. 2025(o), 7th snt. now see Code Civ. Proc. 2025.480(e)

Code Civ. Proc. 2025(o), 2d P now see Code Civ. Proc. 2025.480(f)

Code Civ. Proc. 2025(o), 3d P now see Code Civ. Proc. 2025.480(g)

Code Civ. Proc. 2025(p), 1st snt. now see Code Civ. Proc. 2025.510(a)

Code Civ. Proc. 2025(p), 2d snt. now see Code Civ. Proc. 2025.510(b)

Code Civ. Proc. 2025(p), 3d snt. now see Code Civ. Proc. 2025.510(c)

Code Civ. Proc. 2025(p), 4th snt. now see Code Civ. Proc. 2025.510(d)

Code Civ. Proc. 2025(p), 5th & 6th snt. now see Code Civ. Proc. 2025.510(e)

Code Civ. Proc. 2025(p), 7th snt. now see Code Civ. Proc. 2025.510(f)

Code Civ. Proc. 2025(p), 2d P now see Code Civ. Proc. 2025.510(g)

Code Civ. Proc. 2025(q)(1), 1st snt. now see Code Civ. Proc. 2025.520(a)

Code Civ. Proc. 2025(q)(1), 2d snt. now see Code Civ. Proc. 2025.520(b)

Code Civ. Proc. 2025(q)(1), 2d P, 1st & 2d snt. now see Code Civ. Proc. 2025.520(c)

Code Civ. Proc. 2025(q)(1), 2d P, 3d snt. now see Code Civ. Proc. 2025.520(d)

Code Civ. Proc. 2025(q)(1), 3d P, 1st & 2d snt. now see Code Civ. Proc. 2025.520(e)

Code Civ. Proc. 2025(q)(1), 3d P, 3d snt. now see Code Civ. Proc. 2025.520(f)

Code Civ. Proc. 2025(q)(1), 3d P, 4th snt. now see Code Civ. Proc. 2025.520(g)

Code Civ. Proc. 2025(q)(1), 4th P now see Code Civ. Proc. 2025.520(h)

Code Civ. Proc. 2025(q)(2), 1st snt. now see Code Civ. Proc. 2025.530(a)

Code Civ. Proc. 2025(q)(2), 2d snt. now see Code Civ. Proc. 2025.530(b)

Code Civ. Proc. 2025(q)(2), 2d P, 1st snt. now see Code Civ. Proc. 2025.530(c)

Code Civ. Proc. 2025(q)(2), 2d P, 2d snt. now see Code Civ. Proc. 2025.530(d)

Code Civ. Proc. 2025(q)(2), 2d P, 3d snt. now see Code Civ. Proc. 2025.530(e)

Code Civ. Proc. 2025(q)(2), 3d P now see Code Civ. Proc. 2025.530(f)

Code Civ. Proc. 2025(r)(1) now see Code Civ. Proc. 2025.540(a)

Code Civ. Proc. 2025(r)(2) now see Code Civ. Proc. 2025.540(b)

Code Civ. Proc. 2025(s)(1), 1st P now see Code Civ. Proc. 2025.550(a)

Code Civ. Proc. 2025(s)(1), 2d P now see Code Civ. Proc. 2025.550(b)

Code Civ. Proc. 2025(s)(2), 1st P now see Code Civ. Proc. 2025.560(a)

Code Civ. Proc. 2025(s)(2), 2d P now see Code Civ. Proc. 2025.560(b)

Code Civ. Proc. 2025(s)(2), 3d P now see Code Civ. Proc. 2025.560(c)

Code Civ. Proc. 2025(t), 1st snt. now see Code Civ. Proc. 2025.610(a)

Code Civ. Proc. 2025(t), 2d snt. now see Code Civ. Proc. 2025.610(b)

Code Civ. Proc. 2025(t), 3d snt. now see Code Civ. Proc. 2025.610(c)

Code Civ. Proc. 2025(t), 4th snt. now see Code Civ. Proc. 2025.610(d)

Code Civ. Proc. 2025(u), intro. clause now see Code Civ. Proc. 2025.620, intro. clause

Code Civ. Proc. 2025(u)(1) now see Code Civ. Proc. 2025.620(a)

Code Civ. Proc. 2025(u)(2) now see Code Civ. Proc. 2025.620(b)

Code Civ. Proc. 2025(u)(3) now see Code Civ. Proc. 2025.620(c)

Code Civ. Proc. 2025(u)(4) now see Code Civ. Proc. 2025.620(d)

Code Civ. Proc. 2025(u)(5) now see Code Civ. Proc. 2025.620(e)

Code Civ. Proc. 2025(u)(6) now see Code Civ. Proc. 2025.620(f)

Code Civ. Proc. 2025(u)(7) now see Code Civ. Proc. 2025.620(g)

Code Civ. Proc. 2025(v) now see Code Civ. Proc. 2025.320(f)

Code Civ. Proc. 2025.5(a) now see Code Civ. Proc. 2025.570(a)

Code Civ. Proc. 2025.5(b), 1st snt. now see Code Civ. Proc. 2025.570(b)

Code Civ. Proc. 2025.5(b), 2d snt. now see Code Civ. Proc. 2025.570(c)

Code Civ. Proc. 2025.5(c) now see Code Civ. Proc. 2025.570(d)

Code Civ. Proc. 2026(a) now see Code Civ. Proc. 2026.010(a)

Code Civ. Proc. 2026(b)(1) now see Code Civ. Proc. 2026.010(b)

Code Civ. Proc. 2026(b)(2) now see Code Civ. Proc. 2026.010(c)

Code Civ. Proc. 2026(c), 1st snt. now see Code Civ. Proc. 2026.010(d)

Code Civ. Proc. 2026(c), 2d snt. now see Code Civ. Proc. 2026.010(e)

Code Civ. Proc. 2026(c), 3d-7th snt. now see Code Civ. Proc. 2026.010(f)

Code Civ. Proc. 2027(a) now see Code Civ. Proc. 2027.010(a)

Code Civ. Proc. 2027(b)(1) now see Code Civ. Proc. 2027.010(b)

Code Civ. Proc. 2027(b)(2) now see Code Civ. Proc. 2027.010(c)

Code Civ. Proc. 2027(c), 1st P now see Code Civ. Proc. 2027.010(d)

Code Civ. Proc. 2027(c), 2d P now see Code Civ. Proc. 2027.010(e)

Code Civ. Proc. 2028(a) now see Code Civ. Proc. 2028.010

Code Civ. Proc. 2028(b) now see Code Civ. Proc. 2028.020

Code Civ. Proc. 2028(c), 1st P now see Code Civ. Proc. 2028.030(a)

Code Civ. Proc. 2028(c), 2d P now see Code Civ. Proc. 2028.030(b)

Code Civ. Proc. 2028(c), 3d P now see Code Civ. Proc. 2028.030(c)

Code Civ. Proc. 2028(c), 4th P now see Code Civ. Proc. 2028.030(d)

Code Civ. Proc. 2028(c), 5th P now see Code Civ. Proc. 2028.030(e)

Code Civ. Proc. 2028(d)(1), 1st & 2d snt. now see Code Civ. Proc. 2028.040(a)

Code Civ. Proc. 2028(d)(1), 3d-5th snt. now see Code Civ. Proc. 2028.040(b)

Code Civ. Proc. 2028(d)(1), 2d P now see Code Civ. Proc. 2028.040(c)

Code Civ. Proc. 2028(d)(2), 1st & 2d snt. now see Code Civ. Proc. 2028.050(a)

Code Civ. Proc. 2028(d)(2), 3d-5th snt. now see Code Civ. Proc. 2028.050(b)

Code Civ. Proc. 2028(d)(2), 2d P now see Code Civ. Proc. 2028.050(c)

Code Civ. Proc. 2028(e), 1st snt. now see Code Civ. Proc. 2028.060(a)

Code Civ. Proc. 2028(e), 2d snt. now see Code Civ. Proc. 2028.060(b)

Code Civ. Proc. 2028(f) now see Code Civ. Proc. 2028.070

Code Civ. Proc. 2028(g) now see Code Civ. Proc. 2028.080

Code Civ. Proc. 2029 now see Code Civ. Proc. 2029.010

Code Civ. Proc. 2030(a) now see Code Civ. Proc. 2030.010(a)

Code Civ. Proc. 2030(b), 1st snt. now see Code Civ. Proc. 2030.020(a)

Code Civ. Proc. 2030(b), 2d snt. now see Code Civ. Proc. 2030.020(b)

Code Civ. Proc. 2030(b), 3d snt. now see Code Civ. Proc. 2030.020(c)

Code Civ. Proc. 2030(c)(1), 1st snt. now see Code Civ. Proc. 2030.030(a)

Code Civ. Proc. 2030(c)(1), 2d & 3d snt. now see Code Civ. Proc. 2030.030(b)

Code Civ. Proc. 2030(c)(1), 4th snt. now see Code Civ. Proc. 2030.030(c)

Code Civ. Proc. 2030(c)(2), 1st P (including items (A)-(C)) now see Code Civ. Proc. 2030.040(a)

Code Civ. Proc. 2030(c)(2), last P now see Code Civ. Proc. 2030.040(b)

Code Civ. Proc. 2030(c)(3) now see Code Civ. Proc. 2030.050

Code Civ. Proc. 2030(c)(4), 1st snt. now see Code Civ. Proc. 2030.060(a)

Code Civ. Proc. 2030(c)(4), 2d snt. now see Code Civ. Proc. 2030.060(b)

Code Civ. Proc. 2030(c)(4), 3d snt. now see Code Civ. Proc. 2030.060(c)

Code Civ. Proc. 2030(c)(5), 1st & 2d snt. now see Code Civ. Proc. 2030.060(d)

Code Civ. Proc. 2030(c)(5), 3d snt. now see Code Civ. Proc. 2030.060(e)

Code Civ. Proc. 2030(c)(5), 4th snt. now see Code Civ. Proc. 2030.060(f)

Code Civ. Proc. 2030(c)(6) now see Code Civ. Proc. 2030.010(b)

Code Civ. Proc. 2030(c)(7) now see Code Civ. Proc. 2030.060(g)

Code Civ. Proc. 2030(c)(8), 1st snt. now see Code Civ. Proc. 2030.070(a)-(b)

Code Civ. Proc. 2030(c)(8), 2d snt. now see Code Civ. Proc. 2030.070(c)

Code Civ. Proc. 2030(d) now see Code Civ. Proc. 2030.080

Code Civ. Proc. 2030(e), 1st P now see Code Civ. Proc. 2030.090(a)

Code Civ. Proc. 2030(e), 2d P (including items (1)-(7)) now see Code Civ. Proc. 2030.090(b)

Code Civ. Proc. 2030(e), next-to-last P now see Code Civ. Proc. 2030.090(c)

Code Civ. Proc. 2030(e), last P now see Code Civ. Proc. 2030.090(d)

Code Civ. Proc. 2030(f), 1st snt. now see Code Civ. Proc. 2030.210(a)

Code Civ. Proc. 2030(f), 2d snt. now see Code Civ. Proc. 2030.210(b)

Code Civ. Proc. 2030(f), 3d snt. now see Code Civ. Proc. 2030.210(c)

Code Civ. Proc. 2030(f)(1), 1st snt. now see Code Civ. Proc. 2030.220(a)

Code Civ. Proc. 2030(f)(1), 2d snt. now see Code Civ. Proc. 2030.220(b)

Code Civ. Proc. 2030(f)(1), 3d snt. now see Code Civ. Proc. 2030.220(c)

Code Civ. Proc. 2030(f)(2) now see Code Civ. Proc. 2030.230

Code Civ. Proc. 2030(f)(3), 1st snt. now see Code Civ. Proc. 2030.240(a)

Code Civ. Proc. 2030(f)(3), 2d-4th snt. now see Code Civ. Proc. 2030.240(b)

Code Civ. Proc. 2030(g), 1st snt. now see Code Civ. Proc. 2030.250(a)

Code Civ. Proc. 2030(g), 2d & 3d snt. now see Code Civ. Proc. 2030.250(b)

Code Civ. Proc. 2030(g), 4th snt. now see Code Civ. Proc. 2030.250(c)

Code Civ. Proc. 2030(h), 1st & 2d snt. now see Code Civ. Proc. 2030.260(a)

Code Civ. Proc. 2030(h), 3d snt. now see Code Civ. Proc. 2030.260(b)

Code Civ. Proc. 2030(i), 1st snt. now see Code Civ. Proc. 2030.270(a)

Code Civ. Proc. 2030(i), 2d snt. now see Code Civ. Proc. 2030.270(b)

Code Civ. Proc. 2030(i), 3d snt. now see Code Civ. Proc. 2030.270(c)

Code Civ. Proc. 2030(j), 1st snt. now see Code Civ. Proc. 2030.280(a)

Code Civ. Proc. 2030(j), 2d & 3d snt. now see Code Civ. Proc. 2030.280(b)

Code Civ. Proc. 2030(k), 1st P now see Code Civ. Proc. 2030.290(a)

Code Civ. Proc. 2030(k), 2d P, 1st snt. now see Code Civ. Proc. 2030.290(b)

Code Civ. Proc. 2030(k), 2d P, 2d-4th snt. now see Code Civ. Proc. 2030.290(c)

Code Civ. Proc. 2030(*l*), 1st snt. now see Code Civ. Proc. 2030.300(a)

Code Civ. Proc. 2030(*l*), 2d snt. now see Code Civ. Proc. 2030.300(b)

Code Civ. Proc. 2030(*l*), 2d P now see Code Civ. Proc. 2030.300(c)

Code Civ. Proc. 2030(*l*), 3d P now see Code Civ. Proc. 2030.300(d)

Code Civ. Proc. 2030(*l*), 4th P now see Code Civ. Proc. 2030.300(e)

Code Civ. Proc. 2030(m), 1st P now see Code Civ. Proc. 2030.310(a)

Code Civ. Proc. 2030(m), 2d P, 1st & 2d snt. now see Code Civ. Proc. 2030.310(b)

Code Civ. Proc. 2030(m), 2d P, 3d snt. now see Code Civ. Proc. 2030.310(c)

Code Civ. Proc. 2030(m), 3d P now see Code Civ. Proc. 2030.310(d)

Code Civ. Proc. 2030(n) now see Code Civ. Proc. 2030.410

Code Civ. Proc. 2031(a), intro. P now see Code Civ. Proc. 2031.010(a)

Code Civ. Proc. 2031(a)(1) now see Code Civ. Proc. 2031.010(b)

Code Civ. Proc. 2031(a)(2) now see Code Civ. Proc. 2031.010(c)

Code Civ. Proc. 2031(a)(3) now see Code Civ. Proc. 2031.010(d)

Code Civ. Proc. 2031(b), 1st snt. now see Code Civ. Proc. 2031.020(a)

Code Civ. Proc. 2031(b), 2d snt. now see Code Civ. Proc. 2031.020(b)

Code Civ. Proc. 2031(b), 3d snt. now see Code Civ. Proc. 2031.020(c)

Code Civ. Proc. 2031(c), 1st snt. now see Code Civ. Proc. 2031.030(a)

Code Civ. Proc. 2031(c), 2d snt. now see Code Civ. Proc. 2031.030(b)

Code Civ. Proc. 2031(c), 3d snt. (including items (1)-(4)) now see Code Civ. Proc. 2031.030(c)

Code Civ. Proc. 2031(d) now see Code Civ. Proc. 2031.040

Code Civ. Proc. 2031(e), 1st snt. now see Code Civ. Proc. 2031.050(a)-(b)

Code Civ. Proc. 2031(e), 2d snt. now see Code Civ. Proc. 2031.050(c)

Code Civ. Proc. 2031(f), 1st P now see Code Civ. Proc. 2031.060(a)

Code Civ. Proc. 2031(f), 2d P (including items (1)-(6)) now see Code Civ. Proc. 2031.060(b)

Code Civ. Proc. 2031(f), next-to-last P now see Code Civ. Proc. 2031.060(c)

Code Civ. Proc. 2031(f), last P now see Code Civ. Proc. 2031.060(d)

Code Civ. Proc. 2031(g), 1st P now see Code Civ. Proc. 2031.210(a)

Code Civ. Proc. 2031(g), 2d P, 1st snt. now see Code Civ. Proc. 2031.210(b)

Code Civ. Proc. 2031(g), 2d P, 2d snt. now see Code Civ. Proc. 2031.210(c)

Code Civ. Proc. 2031(g)(1), 1st P now see Code Civ. Proc. 2031.220

Code Civ. Proc. 2031(g)(1), 2d P, 1st snt. now see Code Civ. Proc. 2031.280(a)

Code Civ. Proc. 2031(g)(1), 2d P, 2d snt. now see Code Civ. Proc. 2031.280(b)

Code Civ. Proc. 2031(g)(2) now see Code Civ. Proc. 2031.230

Code Civ. Proc. 2031(g)(3), 1st snt. now see Code Civ. Proc. 2031.240(a)

Code Civ. Proc. 2031(g)(3), 2d-4th snt. now see Code Civ. Proc. 2031.240(b)

Code Civ. Proc. 2031(h), 1st snt. now see Code Civ. Proc. 2031.250(a)

Code Civ. Proc. 2031(h), 2d & 3d snt. now see Code Civ. Proc. 2031.250(b)

Code Civ. Proc. 2031(h), 4th snt. now see Code Civ. Proc. 2031.250(c)

Code Civ. Proc. 2031(i) now see Code Civ. Proc. 2031.260

Code Civ. Proc. 2031(j), 1st snt. now see Code Civ. Proc. 2031.270(a)

Code Civ. Proc. 2031(j), 2d snt. now see Code Civ. Proc. 2031.270(b)

Code Civ. Proc. 2031(j), 3d snt. now see Code Civ. Proc. 2031.270(c)

Code Civ. Proc. 2031(k), 1st snt. now see Code Civ. Proc. 2031.290(a)

Code Civ. Proc. 2031(k), 2d & 3d snt. now see Code Civ. Proc. 2031.290(b)

Code Civ. Proc. 2031(*l*), 1st P now see Code Civ. Proc. 2031.300, intro. cl. & (a)

Code Civ. Proc. 2031(*l*), 2d P, 1st snt. now see Code Civ. Proc. 2031.300(b)

Code Civ. Proc. 2031(*l*), 2d P, 2d-4th snt. now see Code Civ. Proc. 2031.300(c)

Code Civ. Proc. 2031(m), 1st snt. now see Code Civ. Proc. 2031.310(a)

Code Civ. Proc. 2031(m), 2d snt. now see Code Civ. Proc. 2031.310(b)

Code Civ. Proc. 2031(m), 2d P now see Code Civ. Proc. 2031.310(c)

Code Civ. Proc. 2031(m), 3d P now see Code Civ. Proc. 2031.310(d)

Code Civ. Proc. 2031(m), 4th P now see Code Civ. Proc. 2031.310(e)

Code Civ. Proc. 2031(n), 1st P now see Code Civ. Proc. 2031.320(a)

Code Civ. Proc. 2031(n), 2d P now see Code Civ. Proc. 2031.320(b)

Code Civ. Proc. 2031(n), 3d P now see Code Civ. Proc. 2031.320(c)

Code Civ. Proc. 2031.1 now see Code Civ. Proc. 2017.310

Code Civ. Proc. 2031.2 now see Code Civ. Proc. 2017.320

Code Civ. Proc. 2031.5, 1st snt. now see Code Civ. Proc. 2031.510(a)

Code Civ. Proc. 2031.5, 2d & 3d snt. now see Code Civ. Proc. 2031.510(b)

Code Civ. Proc. 2032(a) now see Code Civ. Proc. 2032.020(a)

Code Civ. Proc. 2032(b), 1st snt. now see Code Civ. Proc. 2032.020(b)

Code Civ. Proc. 2032(b), 2d snt. now see Code Civ. Proc. 2032.020(c)

Code Civ. Proc. 2032(b), 3d snt. now see Code Civ. Proc. 2032.010(a)

Code Civ. Proc. 2032(c)(1) now see Code Civ. Proc. 2032.210

Code Civ. Proc. 2032(c)(2), 1st snt. now see Code Civ. Proc. 2032.220(a)

Code Civ. Proc. 2032(c)(2), 2d snt. now see Code Civ. Proc. 2032.220(b)

Code Civ. Proc. 2032(c)(2), 3d snt. now see Code Civ. Proc. 2032.220(c)

Code Civ. Proc. 2032(c)(3) now see Code Civ. Proc. 2032.220(d)

Code Civ. Proc. 2032(c)(4) now see Code Civ. Proc. 2032.220(e)

Code Civ. Proc. 2032(c)(5), 1st snt. now see Code Civ. Proc. 2032.230(a)

Code Civ. Proc. 2032(c)(5), 2d snt. now see Code Civ. Proc. 2032.230(b)

Code Civ. Proc. 2032(c)(6), 1st P now see Code Civ. Proc. 2032.240(a)

Code Civ. Proc. 2032(c)(6), 2d P, 1st snt. now see Code Civ. Proc. 2032.240(b)

Code Civ. Proc. 2032(c)(6), 2d P, 2d snt. now see Code Civ. Proc. 2032.240(c)

Code Civ. Proc. 2032(c)(6), 3d P now see Code Civ. Proc. 2032.240(d)

Code Civ. Proc. 2032(c)(7), 1st P now see Code Civ. Proc. 2032.250(a)

Code Civ. Proc. 2032(c)(7), 2d P now see Code Civ. Proc. 2032.250(b)

Code Civ. Proc. 2032(c)(8), 1st snt. now see Code Civ. Proc. 2032.260(a)

Code Civ. Proc. 2032(c)(8), 2d snt. now see Code Civ. Proc. 2032.260(b)

Code Civ. Proc. 2032(d), 1st snt. now see Code Civ. Proc. 2032.310(a)

Code Civ. Proc. 2032(d), 2d & 3d snt. now see Code Civ. Proc. 2032.310(b)

Code Civ. Proc. 2032(d), 4th snt. now see Code Civ. Proc. 2032.310(c)

Code Civ. Proc. 2032(d), 2d P, 1st snt. now see Code Civ. Proc. 2032.320(a)

Code Civ. Proc. 2032(d), 2d P, 2d snt. now see Code Civ. Proc. 2032.320(b)-(c)

Code Civ. Proc. 2032(d), 2d P, 3d snt. now see Code Civ. Proc. 2032.320(d)

Code Civ. Proc. 2032(d), 2d P, 4th snt. now see Code Civ. Proc. 2032.320(e)

Code Civ. Proc. 2032(e). Not continued (redundant). See Code Civ. Proc. 2016.030.

Code Civ. Proc. 2032(f), 1st P now see Code Civ. Proc. 2032.410

Code Civ. Proc. 2032(f), 2d P now see Code Civ. Proc. 2032.420

Code Civ. Proc. 2032(g)(1), 1st snt. now see Code Civ. Proc. 2032.510(a)

Code Civ. Proc. 2032(g)(1), 2d snt. now see Code Civ. Proc. 2032.510(b)

Code Civ. Proc. 2032(g)(1), 3d snt. now see Code Civ. Proc. 2032.510(c)

Code Civ. Proc. 2032(g)(1), 2d P, 1st snt. now see Code Civ. Proc. 2032.510(d)

Code Civ. Proc. 2032(g)(1), 2d P, 2d snt. now see Code Civ. Proc. 2032.510(e)

Code Civ. Proc. 2032(g)(1), 3d P now see Code Civ. Proc. 2032.510(f)

Code Civ. Proc. 2032(g)(1), 4th P now see Code Civ. Proc. 2032.520

Code Civ. Proc. 2032(g)(2), 1st snt. now see Code Civ. Proc. 2032.530(a)

Code Civ. Proc. 2032(g)(2), 2d snt. now see Code Civ. Proc. 2032.530(b)

Code Civ. Proc. 2032(h), 1st snt. now see Code Civ. Proc. 2032.610(a)

Code Civ. Proc. 2032(h), 2d snt. now see Code Civ. Proc. 2032.610(b)

Code Civ. Proc. 2032(h), 3d snt. now see Code Civ. Proc. 2032.610(c)

Code Civ. Proc. 2032(h), 2d P now see Code Civ. Proc. 2032.620(a)

Code Civ. Proc. 2032(h), 3d P now see Code Civ. Proc. 2032.620(b)

Code Civ. Proc. 2032(h), 4th P now see Code Civ. Proc. 2032.620(c)

Code Civ. Proc. 2032(i) now see Code Civ. Proc. 2032.630

Code Civ. Proc. 2032(j), 1st P now see Code Civ. Proc. 2032.640

Code Civ. Proc. 2032(j), 2d P now see Code Civ. Proc. 2032.650(a)

Code Civ. Proc. 2032(j), 3d P now see Code Civ. Proc. 2032.650(b)

Code Civ. Proc. 2032(j), 4th P now see Code Civ. Proc. 2032.650(c)

Code Civ. Proc. 2032(k) now see Code Civ. Proc. 2032.010(b)

Code Civ. Proc. 2033(a) now see Code Civ. Proc. 2033.010

Code Civ. Proc. 2033(b), 1st snt. now see Code Civ. Proc. 2033.020(a)

Code Civ. Proc. 2033(b), 2d snt. now see Code Civ. Proc. 2033.020(b)

Code Civ. Proc. 2033(b), 3d snt. now see Code Civ. Proc. 2033.020(c)

Code Civ. Proc. 2033(c)(1), 1st snt. now see Code Civ. Proc. 2033.030(a)

Code Civ. Proc. 2033(c)(1), 2d snt. now see Code Civ. Proc. 2033.030(b)

Code Civ. Proc. 2033(c)(1), 2d P now see Code Civ. Proc. 2033.030(c)

Code Civ. Proc. 2033(c)(2), 1st P now see Code Civ. Proc. 2033.040(a)

Code Civ. Proc. 2033(c)(2), 2d P now see Code Civ. Proc. 2033.040(b)

Code Civ. Proc. 2033(c)(3) now see Code Civ. Proc. 2033.050

Code Civ. Proc. 2033(c)(4), 1st snt. now see Code Civ. Proc. 2033.060(a)

Code Civ. Proc. 2033(c)(4), 2d snt. now see Code Civ. Proc. 2033.060(b)

Code Civ. Proc. 2033(c)(4), 3d snt. now see Code Civ. Proc. 2033.060(c)

Code Civ. Proc. 2033(c)(5), 1st & 2d snt. now see Code Civ. Proc. 2033.060(d)

Code Civ. Proc. 2033(c)(5), 3d snt. now see Code Civ. Proc. 2033.060(e)

Code Civ. Proc. 2033(c)(5), 4th snt. now see Code Civ. Proc. 2033.060(f)

Code Civ. Proc. 2033(c)(6) now see Code Civ. Proc. 2033.060(g)

Code Civ. Proc. 2033(c)(7) now see Code Civ. Proc. 2033.060(h)

Code Civ. Proc. 2033(d) now see Code Civ. Proc. 2033.070

Code Civ. Proc. 2033(e), 1st P now see Code Civ. Proc. 2033.080(a)

Code Civ. Proc. 2033(e), 2d P (including items (1)-(5)) now see Code Civ. Proc. 2033.080(b)

Code Civ. Proc. 2033(e), next-to-last P now see Code Civ. Proc. 2033.080(c)

Code Civ. Proc. 2033(e), last P now see Code Civ. Proc. 2033.080(d)

Code Civ. Proc. 2033(f), intro. P, 1st snt. now see Code Civ. Proc. 2033.210(a)

Code Civ. Proc. 2033(f), intro. P, 2d snt. now see Code Civ. Proc. 2033.210(b)

Code Civ. Proc. 2033(f), intro. P, 3d snt. now see Code Civ. Proc. 2033.210(c)

Code Civ. Proc. 2033(f), intro. P, 4th snt. now see Code Civ. Proc. 2033.210(d)

Code Civ. Proc. 2033(f)(1), 1st snt. now see Code Civ. Proc. 2033.220(a)

Code Civ. Proc. 2033(f)(1), 2d snt. now see Code Civ. Proc. 2033.220(b)

Code Civ. Proc. 2033(f)(1), 3d snt. now see Code Civ. Proc. 2033.220(c)

Code Civ. Proc. 2033(f)(2), 1st snt. now see Code Civ. Proc. 2033.230(a)

Code Civ. Proc. 2033(f)(2), 2d-4th snt. now see Code Civ. Proc. 2033.230(b)

Code Civ. Proc. 2033(g), 1st snt. now see Code Civ. Proc. 2033.240(a)

Code Civ. Proc. 2033(g), 2d & 3d snt. now see Code Civ. Proc. 2033.240(b)

Code Civ. Proc. 2033(g), 4th snt. now see Code Civ. Proc. 2033.240(c)

Code Civ. Proc. 2033(h) now see Code Civ. Proc. 2033.250

Code Civ. Proc. 2033(i), 1st snt. now see Code Civ. Proc. 2033.260(a)

Code Civ. Proc. 2033(i), 2d snt. now see Code Civ. Proc. 2033.260(b)

Code Civ. Proc. 2033(i), 3d snt. now see Code Civ. Proc. 2033.260(c)

Code Civ. Proc. 2033(i), 4th snt. now see Code Civ. Proc. 2033.260(d)

Code Civ. Proc. 2033(j), 1st snt. now see Code Civ. Proc. 2033.270(a)

Code Civ. Proc. 2033(j), 2d & 3d snt. now see Code Civ. Proc. 2033.270(b)

Code Civ. Proc. 2033(k), 1st P now see Code Civ. Proc. 2033.280(a)

Code Civ. Proc. 2033(k), 2d P, 1st snt. now see Code Civ. Proc. 2033.280(b)

Code Civ. Proc. 2033(k), 2d P, 2d & 3d snt. now see Code Civ. Proc. 2033.280(c)

Code Civ. Proc. 2033(*l*), 1st snt. now see Code Civ. Proc. 2033.290(a)

Code Civ. Proc. 2033(*l*), 2d snt. now see Code Civ. Proc. 2033.290(b)

Code Civ. Proc. 2033(*l*), 2d P now see Code Civ. Proc. 2033.290(c)

Code Civ. Proc. 2033(*l*), 3d P now see Code Civ. Proc. 2033.290(d)

Code Civ. Proc. 2033(*l*), 4th P now see Code Civ. Proc. 2033.290(e)

Code Civ. Proc. 2033(m), 1st snt. now see Code Civ. Proc. 2033.300(a)

Code Civ. Proc. 2033(m), 2d snt. now see Code Civ. Proc. 2033.300(b)

Code Civ. Proc. 2033(m), 3d snt. now see Code Civ. Proc. 2033.300(c)

Code Civ. Proc. 2033(n), 1st snt. now see Code Civ. Proc. 2033.410(a)

Code Civ. Proc. 2033(n), 2d & 3d snt. now see Code Civ. Proc. 2033.410(b)

Code Civ. Proc. 2033(o), 1st snt. now see Code Civ. Proc. 2033.420(a)

Code Civ. Proc. 2033(o), 2d snt. now see Code Civ. Proc. 2033.420(b)

Code Civ. Proc. 2033.5(a), 1st snt. now see Code Civ. Proc. 2033.710

Code Civ. Proc. 2033.5(a), 2d snt. now see Code Civ. Proc. 2033.740(a)

Code Civ. Proc. 2033.5(b), 1st snt. now see Code Civ. Proc. 2033.730(a)

Code Civ. Proc. 2033.5(b), 2d snt., 1st clause now see Code Civ. Proc. 2033.730(b)

Code Civ. Proc. 2033.5(b), 2d snt., 2d clause now see Code Civ. Proc. 2033.740(b)

Code Civ. Proc. 2033.5(c) now see Code Civ. Proc. 2033.740(c)

Code Civ. Proc. 2033.5(d) now see Code Civ. Proc. 2033.720(a)

Code Civ. Proc. 2033.5(e) now see Code Civ. Proc. 2033.720(b)

Code Civ. Proc. 2033.5(f). Not continued (obsolete).

Code Civ. Proc. 2034(a), intro. clause now see Code Civ. Proc. 2034.210, intro. clause

Code Civ. Proc. 2034(a)(1) now see Code Civ. Proc. 2034.210(a)

Code Civ. Proc. 2034(a)(2) now see Code Civ. Proc. 2034.210(b)

Code Civ. Proc. 2034(a)(3) now see Code Civ. Proc. 2034.210(c)

Code Civ. Proc. 2034(a), last P now see Code Civ. Proc. 2034.010

Code Civ. Proc. 2034(b) (excluding 3d snt.) now see Code Civ. Proc. 2034.220

Code Civ. Proc. 2034(b), 3d snt. now see Code Civ. Proc. 2016.060

Code Civ. Proc. 2034(c), 1st P now see Code Civ. Proc. 2034.230(a)

Code Civ. Proc. 2034(c), 2d P (excluding 3d snt.) now see Code Civ. Proc. 2034.230(b)

Code Civ. Proc. 2034(c), 2d P, 3d snt. now see Code Civ. Proc. 2016.060

Code Civ. Proc. 2034(d) now see Code Civ. Proc. 2034.240

Code Civ. Proc. 2034(e), 1st P now see Code Civ. Proc. 2034.250(a)

Code Civ. Proc. 2034(e), 2d P (including items (1)-(6)) now see Code Civ. Proc. 2034.250(b)

Code Civ. Proc. 2034(e), next-to-last P now see Code Civ. Proc. 2034.250(c)

Code Civ. Proc. 2034(e), last P now see Code Civ. Proc. 2034.250(d)

Code Civ. Proc. 2034(f), intro. P now see Code Civ. Proc. 2034.260(a)

Code Civ. Proc. 2034(f)(1) (including items (A) and (B)) now see Code Civ. Proc. 2034.260(b)

Code Civ. Proc. 2034(f)(2) (including items (A)-(E)) now see Code Civ. Proc. 2034.260(c)

Code Civ. Proc. 2034(g) now see Code Civ. Proc. 2034.270

Code Civ. Proc. 2034(h), 1st snt. now see Code Civ. Proc. 2034.280(a)

Code Civ. Proc. 2034(h), 2d snt. now see Code Civ. Proc. 2034.280(b)

Code Civ. Proc. 2034(h), 3d snt. now see Code Civ. Proc. 2034.280(c)

Code Civ. Proc. 2034(i), intro. P now see Code Civ. Proc. 2034.410

Code Civ. Proc. 2034(i)(1) now see Code Civ. Proc. 2034.420

Code Civ. Proc. 2034(i)(2), 1st P, 1st snt. now see Code Civ. Proc. 2034.430(a)-(b)

Code Civ. Proc. 2034(i)(2), 1st P, 2d snt. now see Code Civ. Proc. 2034.430(c)

Code Civ. Proc. 2034(i)(2), 1st P, 3d snt. now see Code Civ. Proc. 2034.430(d)

Code Civ. Proc. 2034(i)(2), 1st P, 4th snt. now see Code Civ. Proc. 2034.430(e)

Code Civ. Proc. 2034(i)(2), 1st P, 5th snt. now see Code Civ. Proc. 2034.430(f)

Code Civ. Proc. 2034(i)(2), 2d P, 1st snt. now see Code Civ. Proc. 2034.450(a)

Code Civ. Proc. 2034(i)(2), 2d P, 2d snt. now see Code Civ. Proc. 2034.450(b)

Code Civ. Proc. 2034(i)(2), 2d P, 3d snt. now see Code Civ. Proc. 2034.450(c)

Code Civ. Proc. 2034(i)(2), 2d P, 4th snt. now see Code Civ. Proc. 2034.440

Code Civ. Proc. 2034(i)(3), 1st snt. now see Code Civ. Proc. 2034.460(a)

Code Civ. Proc. 2034(i)(3), 2d snt. now see Code Civ. Proc. 2034.460(b)

Code Civ. Proc. 2034(i)(4), 1st P, 1st & 3d snt. now see Code Civ. Proc. 2034.470(a)

Code Civ. Proc. 2034(i)(4), 1st P, 2d & 4th snt. now see Code Civ. Proc. 2034.470(b)

Code Civ. Proc. 2034(i)(4), 2d P, 1st & 2d snt. now see Code Civ. Proc. 2034.470(c)-(d)

Code Civ. Proc. 2034(i)(4), 2d P, 3d snt. now see Code Civ. Proc. 2034.470(e)

Code Civ. Proc. 2034(i)(4), 3d P now see Code Civ. Proc. 2034.470(f)

Code Civ. Proc. 2034(i)(4), 4th P now see Code Civ. Proc. 2034.470(g)

Code Civ. Proc. 2034(j) now see Code Civ. Proc. 2034.300

Code Civ. Proc. 2034(k), 1st P, 1st snt. now see Code Civ. Proc. 2034.610(a)

Code Civ. Proc. 2034(k), 1st P, 2d & 3d snt. now see Code Civ. Proc. 2034.610(b)

Code Civ. Proc. 2034(k), 1st P, 4th snt. now see Code Civ. Proc. 2034.610(c)

Code Civ. Proc. 2034(k), 1st P, 5th snt. now see Code Civ. Proc. 2034.290(c)

Code Civ. Proc. 2034(k), 1st P, 6th snt. now see Code Civ. Proc. 2034.620, intro. cl. & (a)-(c)

Code Civ. Proc. 2034(k), 1st P, 7th snt. now see Code Civ. Proc. 2034.620(d)

Code Civ. Proc. 2034(k), 2d P now see Code Civ. Proc. 2034.630

Code Civ. Proc. 2034(*l*), 1st snt. now see Code Civ. Proc. 2034.710(a)

Code Civ. Proc. 2034(*l*), 2d & 3d snt. now see Code Civ. Proc. 2034.710(b)

Code Civ. Proc. 2034(*l*), 4th snt. now see Code Civ. Proc. 2034.710(c)

Code Civ. Proc. 2034(*l*), 2d P, 1st snt. now see Code Civ. Proc. 2034.720, intro. cl. & (a)-(c)

Code Civ. Proc. 2034(*l*), 2d P, 2d snt. now see Code Civ. Proc. 2034.720(d)

Code Civ. Proc. 2034(*l*), 3d P now see Code Civ. Proc. 2034.730

Code Civ. Proc. 2034(m) now see Code Civ. Proc. 2034.310

Code Civ. Proc. 2034(n), 1st snt. now see Code Civ. Proc. 2034.290(a)

Code Civ. Proc. 2034(n), 2d & 3d snt. now see Code Civ. Proc. 2034.290(b)

Code Civ. Proc. 2035(a), 1st snt. now see Code Civ. Proc. 2035.010(a)

Code Civ. Proc. 2035(a), 2d snt. now see Code Civ. Proc. 2035.010(b)

Code Civ. Proc. 2035(b) now see Code Civ. Proc. 2035.020

Code Civ. Proc. 2035(c) now see Code Civ. Proc. 2035.030(a)

Code Civ. Proc. 2035(d), 1st P (including items (1)-(9)) now see Code Civ. Proc. 2035.030(b)

Code Civ. Proc. 2035(d), last P now see Code Civ. Proc. 2035.030(c)

Code Civ. Proc. 2035(e), 1st & 2d snt. now see Code Civ. Proc. 2035.040(a)

Code Civ. Proc. 2035(e), 3d & 4th snt. now see Code Civ. Proc. 2035.040(b)

Code Civ. Proc. 2035(e), 5th snt. now see Code Civ. Proc. 2035.040(c)

Code Civ. Proc. 2035(e), 2d P, 1st snt. now see Code Civ. Proc. 2035.040(d)

Code Civ. Proc. 2035(e), 2d P, 2d & 3d snt. now see Code Civ. Proc. 2035.040(e)

Code Civ. Proc. 2035(f), 1st snt. now see Code Civ. Proc. 2035.050(a)

Code Civ. Proc. 2035(f), 2d snt. now see Code Civ. Proc. 2035.050(b)

Code Civ. Proc. 2035(f), 3d snt. now see Code Civ. Proc. 2035.050(c)

Code Civ. Proc. 2035(g) now see Code Civ. Proc. 2035.060

Code Civ. Proc. 2036(a) now see Code Civ. Proc. 2036.010

Code Civ. Proc. 2036(b) now see Code Civ. Proc. 2036.020

Code Civ. Proc. 2036(c) now see Code Civ. Proc. 2036.030(a)

Code Civ. Proc. 2036(d) now see Code Civ. Proc. 2036.030(b)

Code Civ. Proc. 2036(e), 1st snt. now see Code Civ. Proc. 2036.040(a)

Code Civ. Proc. 2036(e), 2d snt. now see Code Civ. Proc. 2036.040(b)

Code Civ. Proc. 2036(e), 3d snt. now see Code Civ. Proc. 2036.040(c)

Code Civ. Proc. 2036(f) now see Code Civ. Proc. 2036.050

California Points & Authorities

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Volume 8 Chapters 80-89A DISCOVERY
CHAPTER 89B DISCOVERY ACT CORRELATION TABLES (July 1, 2005)

8-89B California Points & Authorities CT.02

CT.02 Civil Discovery Act (July 1, 2005) to Former Civil Discovery Act of 1986

[All references are to the California Code of Civil Procedure]

New Provision _____ Former Provision

Code Civ. Proc. 2016.010 now see Code Civ. Proc. 2016(a)

Code Civ. Proc. 2016.020 now see Code Civ. Proc. 2016(b)

Code Civ. Proc. 2016.060 now see Code Civ. Proc. 2024(d), 2d snt.; 2034(b), 3d snt.; 2034(c), 2d P 3d snt.

Code Civ. Proc. 2016.070 now see Code Civ. Proc. 2016(c)

Code Civ. Proc. 2017.010 now see Code Civ. Proc. 2017(a)

Code Civ. Proc. 2017.210 now see Code Civ. Proc. 2017(b)

Code Civ. Proc. 2017.020(a) now see Code Civ. Proc. 2017(c), 1st P

Code Civ. Proc. 2017.020(b) now see Code Civ. Proc. 2017(c), 2d P

Code Civ. Proc. 2017.220(a) now see Code Civ. Proc. 2017(d), 1st P

Code Civ. Proc. 2017.220(b) now see Code Civ. Proc. 2017(d), 2d P

Code Civ. Proc. 2017.730(a) now see Code Civ. Proc. 2017(e)(1), 1st snt.

Code Civ. Proc. 2017.730(b) now see Code Civ. Proc. 2017(e)(1), 2d snt.

Code Civ. Proc. 2017.730(c) now see Code Civ. Proc. 2017(e)(2)

Code Civ. Proc. 2017.730(d) now see Code Civ. Proc. 2017(e)(3), 1st & 2d snt.

Code Civ. Proc. 2017.730(e) now see Code Civ. Proc. 2017(e)(3), 3d snt.

Code Civ. Proc. 2017.720(a) now see Code Civ. Proc. 2017(e)(4)

Code Civ. Proc. 2017.740(a) now see Code Civ. Proc. 2017(e)(5), 1st-4th snt.

Code Civ. Proc. 2017.740(b) now see Code Civ. Proc. 2017(e)(5), 5th-7th snt.

Code Civ. Proc. 2017.710 now see Code Civ. Proc. 2017(e)(6)

Code Civ. Proc. 2017.720(b) now see Code Civ. Proc. 2017(e)(7)

Code Civ. Proc. 2017.720(c) now see Code Civ. Proc. 2017(e)(8)

Code Civ. Proc. 2018.020 now see Code Civ. Proc. 2018(a)

Code Civ. Proc. 2018.030(b) now see Code Civ. Proc. 2018(b)

Code Civ. Proc. 2018.030(a) now see Code Civ. Proc. 2018(c)

Code Civ. Proc. 2018.040 now see Code Civ. Proc. 2018(d), 1st & 2d snt.

Code Civ. Proc. 2018.050 now see Code Civ. Proc. 2018(d), 3d snt.

Code Civ. Proc. 2018.060 now see Code Civ. Proc. 2018(d), 4th snt.

Code Civ. Proc. 2018.070(a)-(b) now see Code Civ. Proc. 2018(e), 1st snt.

Code Civ. Proc. 2018.070(c) now see Code Civ. Proc. 2018(e), 2d snt.

Code Civ. Proc. 2018.080 now see Code Civ. Proc. 2018(f), 1st P

Code Civ. Proc. 2018.010 now see Code Civ. Proc. 2018(f), 2d P

Code Civ. Proc. 2019.010 now see Code Civ. Proc. 2019(a)

Code Civ. Proc. 2019.030(a), intro. clause now see Code Civ. Proc. 2019(b), intro. clause

Code Civ. Proc. 2019.030(a)(1) now see Code Civ. Proc. 2019(b)(1)

Code Civ. Proc. 2019.030(a)(2) now see Code Civ. Proc. 2019(b)(2)

Code Civ. Proc. 2019.030(b) now see Code Civ. Proc. 2019(b), next-to-last P

Code Civ. Proc. 2019.030(c) now see Code Civ. Proc. 2019(b), last P

Code Civ. Proc. 2019.020(a) now see Code Civ. Proc. 2019(c), 1st snt.

Code Civ. Proc. 2019.020(b) now see Code Civ. Proc. 2019(c), 2d snt.

Code Civ. Proc. 2019.210 now see Code Civ. Proc. 2019(d)

Code Civ. Proc. 2016.050 now see Code Civ. Proc. 2019(e)

Code Civ. Proc. 2020.010(a) now see Code Civ. Proc. 2020(a), 1st snt.

Code Civ. Proc. 2020.010(b) now see Code Civ. Proc. 2020(a), 2d snt.

Code Civ. Proc. 2020.020 now see Code Civ. Proc. 2020(a), 3d snt. (including items (1)-(3))

Code Civ. Proc. 2020.030 now see Code Civ. Proc. 2020(a), last P

Code Civ. Proc. 2020.210(a) now see Code Civ. Proc. 2020(b), 1st snt.

Code Civ. Proc. 2020.210(b) now see Code Civ. Proc. 2020(b), 2d snt.

Code Civ. Proc. 2020.310 now see Code Civ. Proc. 2020(c)

Code Civ. Proc. 2020.410(a)-(b) now see Code Civ. Proc. 2020(d)(1), 1st snt.

Code Civ. Proc. 2020.410(c) now see Code Civ. Proc. 2020(d)(1), 2d-4th snt.

Code Civ. Proc. 2020.410(d) now see Code Civ. Proc. 2020(d)(2)

Code Civ. Proc. 2020.420 now see Code Civ. Proc. 2020(d)(3)

Code Civ. Proc. 2020.430(a), (e) now see Code Civ. Proc. 2020(d)(4), 1st snt.

Code Civ. Proc. 2020.430(b) now see Code Civ. Proc. 2020(d)(4), 2d snt.

Code Civ. Proc. 2020.430(c) now see Code Civ. Proc. 2020(d)(4), 3d & 4th snt.

Code Civ. Proc. 2020.430(d) now see Code Civ. Proc. 2020(d)(4), 5th & 6th snt.

Code Civ. Proc. 2020.440 now see Code Civ. Proc. 2020(d)(5)

Code Civ. Proc. 2020.430(f) now see Code Civ. Proc. 2020(d)(6)

Code Civ. Proc. 2020.510(a) now see Code Civ. Proc. 2020(e), 1st snt.

Code Civ. Proc. 2020.510(b) now see Code Civ. Proc. 2020(e), 2d snt.

Code Civ. Proc. 2020.510(c) now see Code Civ. Proc. 2020(e), 2d P

Code Civ. Proc. 2020.220(a) now see Code Civ. Proc. 2020(f), 1st snt.

Code Civ. Proc. 2020.220(b) now see Code Civ. Proc. 2020(f), 2d snt.

Code Civ. Proc. 2020.230(a) now see Code Civ. Proc. 2020(f), 2d P

Code Civ. Proc. 2020.230(b) now see Code Civ. Proc. 2020(f), 3d P

Code Civ. Proc. 2020.220(c) now see Code Civ. Proc. 2020(g)

Code Civ. Proc. 2020.240 now see Code Civ. Proc. 2020(h)

Code Civ. Proc. 2016.030 now see Code Civ. Proc. 2021

Code Civ. Proc. 2023.010 now see Code Civ. Proc. 2023(a)(1)-(8) & (9), 1st snt.

Code Civ. Proc. 2023.020 now see Code Civ. Proc. 2023(a)(9), 2d snt.

Code Civ. Proc. 2023.030, intro. clause now see Code Civ. Proc. 2023(b), intro. clause

Code Civ. Proc. 2023.030(a) now see Code Civ. Proc. 2023(b)(1)

Code Civ. Proc. 2023.030(b) now see Code Civ. Proc. 2023(b)(2)

Code Civ. Proc. 2023.030(c) now see Code Civ. Proc. 2023(b)(3)

Code Civ. Proc. 2023.030(d) now see Code Civ. Proc. 2023(b)(4)

Code Civ. Proc. 2023.030(e) now see Code Civ. Proc. 2023(b)(5)

Code Civ. Proc. 2023.040 now see Code Civ. Proc. 2023(c)

Code Civ. Proc. 2024.020(a) now see Code Civ. Proc. 2024(a), 1st snt.

Not continued (redundant). See Code Civ. Proc. 2016.060. Code Civ. Proc. 2024(a), 2d snt.

Code Civ. Proc. 2024.010 now see Code Civ. Proc. 2024(a), 3d snt.

Code Civ. Proc. 2024.020(b) now see Code Civ. Proc. 2024(a), 4th snt.

Code Civ. Proc. 2024.040(a) now see Code Civ. Proc. 2024(b)

Code Civ. Proc. 2024.040(b) now see Code Civ. Proc. 2024(c)

Code Civ. Proc. 2024.030 now see Code Civ. Proc. 2024(d) (excluding 2d. snt.)

Code Civ. Proc. 2024(d), 2d. snt. now see Code Civ. Proc. 2016.060

Code Civ. Proc. 2024.050(a) now see Code Civ. Proc. 2024(e), 1st P

Code Civ. Proc. 2024.050(b) now see Code Civ. Proc. 2024(e), 2d P (including items (1)-(4))

Code Civ. Proc. 2024.050(c) now see Code Civ. Proc. 2024(e), last P

Code Civ. Proc. 2024.060 now see Code Civ. Proc. 2024(f)

Not continued (redundant) See Code Civ. Proc. 2016.060. Code Civ. Proc. 2024(g)

Code Civ. Proc. 2025.010 now see Code Civ. Proc. 2025(a)

Code Civ. Proc. 2025.210 now see Code Civ. Proc. 2025(b)

Code Civ. Proc. 2025.220(a), intro. clause now see Code Civ. Proc. 2025(c), 1st snt.

Code Civ. Proc. 2025.220(b) now see Code Civ. Proc. 2025(c), 2d snt.

Code Civ. Proc. 2025.240(a) now see Code Civ. Proc. 2025(c), 3d & 4th snt.

Code Civ. Proc. 2025.240(b) now see Code Civ. Proc. 2025(c), 2d P

Code Civ. Proc. 2025.220(a), intro. clause now see Code Civ. Proc. 2025(d), intro. clause

Code Civ. Proc. 2025.220(a)(1) now see Code Civ. Proc. 2025(d)(1)

Code Civ. Proc. 2025.220(a)(2) now see Code Civ. Proc. 2025(d)(2)

Code Civ. Proc. 2025.220(a)(3) now see Code Civ. Proc. 2025(d)(3)

Code Civ. Proc. 2025.220(a)(4) now see Code Civ. Proc. 2025(d)(4)

Code Civ. Proc. 2025.220(a)(5) now see Code Civ. Proc. 2025(d)(5)

Code Civ. Proc. 2025(d)(6), 1st P now see Code Civ. Proc. 2025.220(a)(6)

Code Civ. Proc. 2025.230 now see Code Civ. Proc. 2025(d)(6), 2d P, 1st snt.

Not continued (redundant). See Code Civ. Proc. 2020.310(e), 2020.510(a)(1). Code Civ. Proc. 2025(d)(6), 2d P, 2d snt.

Code Civ. Proc. 2025.240(c) now see Code Civ. Proc. 2025(d)(6), 3d P

Code Civ. Proc. 2025.250(a) now see Code Civ. Proc. 2025(e)(1)

Code Civ. Proc. 2025.250(b) now see Code Civ. Proc. 2025(e)(2), 1st snt.

Code Civ. Proc. 2025.250(c) now see Code Civ. Proc. 2025(e)(2), 2d & 3d snt.

Code Civ. Proc. 2025.260(a) now see Code Civ. Proc. 2025(e)(3), 1st P

Code Civ. Proc. 2025.260(b) now see Code Civ. Proc. 2025(e)(3), 2d P (including items (A)-(F))

Code Civ. Proc. 2025.260(c) now see Code Civ. Proc. 2025(e)(3), next-to-last P

Code Civ. Proc. 2025.260(d) now see Code Civ. Proc. 2025(e)(3), last P

Code Civ. Proc. 2025.270(a) now see Code Civ. Proc. 2025(f), 1st & 2d snt.

Code Civ. Proc. 2025.270(b) now see Code Civ. Proc. 2025(f), 3d snt.

Code Civ. Proc. 2025.270(c) now see Code Civ. Proc. 2025(f), 2d P

Code Civ. Proc. 2025.410(a) now see Code Civ. Proc. 2025(g), 1st snt.

Code Civ. Proc. 2025.410(b) now see Code Civ. Proc. 2025(g), 2d & 3d snt.

Code Civ. Proc. 2025.410(c) now see Code Civ. Proc. 2025(g), 2d P

Code Civ. Proc. 2025.410(d) now see Code Civ. Proc. 2025(g), 3d P

Code Civ. Proc. 2025.280(a) now see Code Civ. Proc. 2025(h)(1)

Code Civ. Proc. 2025.280(b) now see Code Civ. Proc. 2025(h)(2)

Code Civ. Proc. 2025.310(a) now see Code Civ. Proc. 2025(h)(3), 1st snt.

Code Civ. Proc. 2025.310(b) now see Code Civ. Proc. 2025(h)(3), 2d & 3d snt.

Code Civ. Proc. 2025.310(c) now see Code Civ. Proc. 2025(h)(3), 4th snt.

Code Civ. Proc. 2025.420(a) now see Code Civ. Proc. 2025(i), 1st P

Code Civ. Proc. 2025.420(b) now see Code Civ. Proc. 2025(i), 2d P (including items (1)-(15))

Code Civ. Proc. 2025.420(c) now see Code Civ. Proc. 2025(i), next-to-last P

Code Civ. Proc. 2025.420(d) now see Code Civ. Proc. 2025(i), last P

Code Civ. Proc. 2025.430 now see Code Civ. Proc. 2025(j)(1)

Code Civ. Proc. 2025.440(a) now see Code Civ. Proc. 2025(j)(2), 1st P

Code Civ. Proc. 2025.440(b) now see Code Civ. Proc. 2025(j)(2), 2d P

Code Civ. Proc. 2025.450(a) now see Code Civ. Proc. 2025(j)(3), 1st snt.

Code Civ. Proc. 2025.450(b) now see Code Civ. Proc. 2025(j)(3), 2d snt.

Code Civ. Proc. 2025.450(c) now see Code Civ. Proc. 2025(j)(3), 3d & 4th snt.

Code Civ. Proc. 2025.450(d) now see Code Civ. Proc. 2025(j)(3), 2d P

Code Civ. Proc. 2025.320, intro. clause now see Code Civ. Proc. 2025(k), intro. clause

Code Civ. Proc. 2025.320(a) now see Code Civ. Proc. 2025(k)(1)

Code Civ. Proc. 2025.320(b) now see Code Civ. Proc. 2025(k)(2)

Code Civ. Proc. 2025.320(c) now see Code Civ. Proc. 2025(k)(3)

Code Civ. Proc. 2025.320(d) now see Code Civ. Proc. 2025(k)(4)

Code Civ. Proc. 2025.320(e) now see Code Civ. Proc. 2025(k)(5)

Code Civ. Proc. 2025.330(a) now see Code Civ. Proc. 2025(*l*)(1), 1st snt.

Code Civ. Proc. 2025.330(b) now see Code Civ. Proc. 2025(*l*)(1), 2d snt.

Code Civ. Proc. 2025.330(c) now see Code Civ. Proc. 2025(*l*)(1), 3d-5th snt.

Code Civ. Proc. 2025.330(d) now see Code Civ. Proc. 2025(*l*)(1), 6th snt.

Code Civ. Proc. 2025.340, intro. clause now see Code Civ. Proc. 2025(*l*)(2), intro. clause

Code Civ. Proc. 2025.340(a) now see Code Civ. Proc. 2025(*l*)(2)(A)

Code Civ. Proc. 2025.340(b) now see Code Civ. Proc. 2025(*l*)(2)(B), 1st & 2d snt.

Code Civ. Proc. 2025.340(c) now see Code Civ. Proc. 2025(*l*)(2)(B), 3d snt.

Code Civ. Proc. 2025.340(d) now see Code Civ. Proc. 2025(*l*)(2)(B), 4th-6th snt.

Code Civ. Proc. 2025.340(e) now see Code Civ. Proc. 2025(*l*)(2)(B), 7th & 8th snt.

Code Civ. Proc. 2025.340(f) now see Code Civ. Proc. 2025(*l*)(2)(B), 9th & 10th snt.

Code Civ. Proc. 2025.340(g) now see Code Civ. Proc. 2025(*l*)(2)(C)

Code Civ. Proc. 2025.340(h) now see Code Civ. Proc. 2025(*l*)(2)(D)

Code Civ. Proc. 2025.340(i) now see Code Civ. Proc. 2025(*l*)(2)(E)

Code Civ. Proc. 2025.340(j) now see Code Civ. Proc. 2025(*l*)(2)(F)

Code Civ. Proc. 2025.340(k) now see Code Civ. Proc. 2025(*l*)(2)(G)

Code Civ. Proc. 2025.340(*l*) now see Code Civ. Proc. 2025(*l*)(2)(H)

Code Civ. Proc. 2025.340(m) now see Code Civ. Proc. 2025(*l*)(2)(I)

Code Civ. Proc. 2025.330(e) now see Code Civ. Proc. 2025(*l*)(3)

Code Civ. Proc. 2025.460(a) now see Code Civ. Proc. 2025(m)(1)

Code Civ. Proc. 2025.460(b) now see Code Civ. Proc. 2025(m)(2)

Code Civ. Proc. 2025.460(c) now see Code Civ. Proc. 2025(m)(3)

Code Civ. Proc. 2025.460(d) now see Code Civ. Proc. 2025(m)(4)

Code Civ. Proc. 2025.470 now see Code Civ. Proc. 2025(n), 1st & 2d snt.

Code Civ. Proc. 2025.420(b)(16) now see Code Civ. Proc. 2025(n), 3d & 4th snt.

Code Civ. Proc. 2025.470 now see Code Civ. Proc. 2025(n), 2d P

Code Civ. Proc. 2025.480(a) now see Code Civ. Proc. 2025(o), 1st snt.

Code Civ. Proc. 2025.480(b) now see Code Civ. Proc. 2025(o), 2d snt.

Code Civ. Proc. 2025.480(c) now see Code Civ. Proc. 2025(o), 3d & 4th snt.

Code Civ. Proc. 2025.480(d) now see Code Civ. Proc. 2025(o), 5th & 6th snt.

Code Civ. Proc. 2025.480(e) now see Code Civ. Proc. 2025(o), 7th snt.

Code Civ. Proc. 2025.480(f) now see Code Civ. Proc. 2025(o), 2d P

Code Civ. Proc. 2025.480(g) now see Code Civ. Proc. 2025(o), 3d P

Code Civ. Proc. 2025.510(a) now see Code Civ. Proc. 2025(p), 1st snt.

Code Civ. Proc. 2025.510(b) now see Code Civ. Proc. 2025(p), 2d snt.

Code Civ. Proc. 2025.510(c) now see Code Civ. Proc. 2025(p), 3d snt.

Code Civ. Proc. 2025.510(d) now see Code Civ. Proc. 2025(p), 4th snt.

Code Civ. Proc. 2025.510(e) now see Code Civ. Proc. 2025(p), 5th & 6th snt.

Code Civ. Proc. 2025.510(f) now see Code Civ. Proc. 2025(p), 7th snt.

Code Civ. Proc. 2025.510(g) now see Code Civ. Proc. 2025(p), 2d P

Code Civ. Proc. 2025.520(a) now see Code Civ. Proc. 2025(q)(1), 1st snt.

Code Civ. Proc. 2025.520(b) now see Code Civ. Proc. 2025(q)(1), 2d snt.

Code Civ. Proc. 2025.520(c) now see Code Civ. Proc. 2025(q)(1), 2d P, 1st & 2d snt.

Code Civ. Proc. 2025.520(d) now see Code Civ. Proc. 2025(q)(1), 2d P, 3d snt.

Code Civ. Proc. 2025.520(e) now see Code Civ. Proc. 2025(q)(1), 3d P, 1st & 2d snt.

Code Civ. Proc. 2025.520(f) now see Code Civ. Proc. 2025(q)(1), 3d P, 3d snt.

Code Civ. Proc. 2025.520(g) now see Code Civ. Proc. 2025(q)(1), 3d P, 4th snt.

Code Civ. Proc. 2025.520(h) now see Code Civ. Proc. 2025(q)(1), 4th P

Code Civ. Proc. 2025.530(a) now see Code Civ. Proc. 2025(q)(2), 1st snt.

Code Civ. Proc. 2025.530(b) now see Code Civ. Proc. 2025(q)(2), 2d snt.

Code Civ. Proc. 2025.530(c) now see Code Civ. Proc. 2025(q)(2), 2d P, 1st snt.

Code Civ. Proc. 2025.530(d) now see Code Civ. Proc. 2025(q)(2), 2d P, 2d snt.

Code Civ. Proc. 2025.530(e) now see Code Civ. Proc. 2025(q)(2), 2d P, 3d snt.

Code Civ. Proc. 2025.530(f) now see Code Civ. Proc. 2025(q)(2), 3d P

Code Civ. Proc. 2025.540(a) now see Code Civ. Proc. 2025(r)(1)

Code Civ. Proc. 2025.540(b) now see Code Civ. Proc. 2025(r)(2)

Code Civ. Proc. 2025.550(a) now see Code Civ. Proc. 2025(s)(1), 1st P

Code Civ. Proc. 2025.550(b) now see Code Civ. Proc. 2025(s)(1), 2d P

Code Civ. Proc. 2025.560(a) now see Code Civ. Proc. 2025(s)(2), 1st P

Code Civ. Proc. 2025.560(b) now see Code Civ. Proc. 2025(s)(2), 2d P

Code Civ. Proc. 2025.560(c) now see Code Civ. Proc. 2025(s)(2), 3d P

Code Civ. Proc. 2025.610(a) now see Code Civ. Proc. 2025(t), 1st snt.

Code Civ. Proc. 2025.610(b) now see Code Civ. Proc. 2025(t), 2d snt.

Code Civ. Proc. 2025.610(c) now see Code Civ. Proc. 2025(t), 3d snt.

Code Civ. Proc. 2025.610(d) now see Code Civ. Proc. 2025(t), 4th snt.

Code Civ. Proc. 2025.620, intro. clause now see Code Civ. Proc. 2025(u), intro. clause

Code Civ. Proc. 2025.620(a) now see Code Civ. Proc. 2025(u)(1)

Code Civ. Proc. 2025.620(b) now see Code Civ. Proc. 2025(u)(2)

Code Civ. Proc. 2025.620(c) now see Code Civ. Proc. 2025(u)(3)

Code Civ. Proc. 2025.620(d) now see Code Civ. Proc. 2025(u)(4)

Code Civ. Proc. 2025.620(e) now see Code Civ. Proc. 2025(u)(5)

Code Civ. Proc. 2025.620(f) now see Code Civ. Proc. 2025(u)(6)

Code Civ. Proc. 2025.620(g) now see Code Civ. Proc. 2025(u)(7)

Code Civ. Proc. 2025.320(f) now see Code Civ. Proc. 2025(v)

Code Civ. Proc. 2025.570(a) now see Code Civ. Proc. 2025.5(a)

Code Civ. Proc. 2025.570(b) now see Code Civ. Proc. 2025.5(b), 1st snt.

Code Civ. Proc. 2025.570(c) now see Code Civ. Proc. 2025.5(b), 2d snt.

Code Civ. Proc. 2025.570(d) now see Code Civ. Proc. 2025.5(c)

Code Civ. Proc. 2026.010(a) now see Code Civ. Proc. 2026(a)

Code Civ. Proc. 2026.010(b) now see Code Civ. Proc. 2026(b)(1)

Code Civ. Proc. 2026.010(c) now see Code Civ. Proc. 2026(b)(2)

Code Civ. Proc. 2026.010(d) now see Code Civ. Proc. 2026(c), 1st snt.

Code Civ. Proc. 2026.010(e) now see Code Civ. Proc. 2026(c), 2d snt.

Code Civ. Proc. 2026.010(f) now see Code Civ. Proc. 2026(c), 3d-7th snt.

Code Civ. Proc. 2027.010(a) now see Code Civ. Proc. 2027(a)

Code Civ. Proc. 2027.010(b) now see Code Civ. Proc. 2027(b)(1)

Code Civ. Proc. 2027.010(c) now see Code Civ. Proc. 2027(b)(2)

Code Civ. Proc. 2027.010(d) now see Code Civ. Proc. 2027(c), 1st P

Code Civ. Proc. 2027.010(e) now see Code Civ. Proc. 2027(c), 2d P

Code Civ. Proc. 2028.010 now see Code Civ. Proc. 2028(a)

Code Civ. Proc. 2028.020 now see Code Civ. Proc. 2028(b)

Code Civ. Proc. 2028.030(a) now see Code Civ. Proc. 2028(c), 1st P

Code Civ. Proc. 2028.030(b) now see Code Civ. Proc. 2028(c), 2d P

Code Civ. Proc. 2028.030(c) now see Code Civ. Proc. 2028(c), 3d P

Code Civ. Proc. 2028.030(d) now see Code Civ. Proc. 2028(c), 4th P

Code Civ. Proc. 2028.030(e) now see Code Civ. Proc. 2028(c), 5th P

Code Civ. Proc. 2028.040(a) now see Code Civ. Proc. 2028(d)(1), 1st & 2d snt.

Code Civ. Proc. 2028.040(b) now see Code Civ. Proc. 2028(d)(1), 3d-5th snt.

Code Civ. Proc. 2028.040(c) now see Code Civ. Proc. 2028(d)(1), 2d P

Code Civ. Proc. 2028.050(a) now see Code Civ. Proc. 2028(d)(2), 1st & 2d snt.

Code Civ. Proc. 2028.050(b) now see Code Civ. Proc. 2028(d)(2), 3d-5th snt.

Code Civ. Proc. 2028.050(c) now see Code Civ. Proc. 2028(d)(2), 2d P

Code Civ. Proc. 2028.060(a) now see Code Civ. Proc. 2028(e), 1st snt.

Code Civ. Proc. 2028.060(b) now see Code Civ. Proc. 2028(e), 2d snt.

Code Civ. Proc. 2028.070 now see Code Civ. Proc. 2028(f)

Code Civ. Proc. 2028.080 now see Code Civ. Proc. 2028(g)

Code Civ. Proc. 2029.010 now see Code Civ. Proc. 2029

Code Civ. Proc. 2030.010(a) now see Code Civ. Proc. 2030(a)

Code Civ. Proc. 2030.020(a) now see Code Civ. Proc. 2030(b), 1st snt.

Code Civ. Proc. 2030.020(b) now see Code Civ. Proc. 2030(b), 2d snt.

Code Civ. Proc. 2030.020(c) now see Code Civ. Proc. 2030(b), 3d snt.

Code Civ. Proc. 2030.030(a) now see Code Civ. Proc. 2030(c)(1), 1st snt.

Code Civ. Proc. 2030.030(b) now see Code Civ. Proc. 2030(c)(1), 2d & 3d snt.

Code Civ. Proc. 2030.030(c) now see Code Civ. Proc. 2030(c)(1), 4th snt.

Code Civ. Proc. 2030.040(a) now see Code Civ. Proc. 2030(c)(2), 1st P (including items (A)-(C))

Code Civ. Proc. 2030.040(b) now see Code Civ. Proc. 2030(c)(2), last P

Code Civ. Proc. 2030.050 now see Code Civ. Proc. 2030(c)(3)

Code Civ. Proc. 2030.060(a) now see Code Civ. Proc. 2030(c)(4), 1st snt.

Code Civ. Proc. 2030.060(b) now see Code Civ. Proc. 2030(c)(4), 2d snt.

Code Civ. Proc. 2030.060(c) now see Code Civ. Proc. 2030(c)(4), 3d snt.

Code Civ. Proc. 2030.060(d) now see Code Civ. Proc. 2030(c)(5), 1st & 2d snt.

Code Civ. Proc. 2030.060(e) now see Code Civ. Proc. 2030(c)(5), 3d snt.

Code Civ. Proc. 2030.060(f) now see Code Civ. Proc. 2030(c)(5), 4th snt.

Code Civ. Proc. 2030.010(b) now see Code Civ. Proc. 2030(c)(6)

Code Civ. Proc. 2030.060(g) now see Code Civ. Proc. 2030(c)(7)

Code Civ. Proc. 2030.070(a)-(b) now see Code Civ. Proc. 2030(c)(8), 1st snt.

Code Civ. Proc. 2030.070(c) now see Code Civ. Proc. 2030(c)(8), 2d snt.

Code Civ. Proc. 2030.080 now see Code Civ. Proc. 2030(d)

Code Civ. Proc. 2030.090(a) now see Code Civ. Proc. 2030(e), 1st P

Code Civ. Proc. 2030.090(b) now see Code Civ. Proc. 2030(e), 2d P (including items (1)-(7))

Code Civ. Proc. 2030.090(c) now see Code Civ. Proc. 2030(e), next-to-last P

Code Civ. Proc. 2030.090(d) now see Code Civ. Proc. 2030(e), last P

Code Civ. Proc. 2030.210(a) now see Code Civ. Proc. 2030(f), 1st snt.

Code Civ. Proc. 2030.210(b) now see Code Civ. Proc. 2030(f), 2d snt.

Code Civ. Proc. 2030.210(c) now see Code Civ. Proc. 2030(f), 3d snt.

Code Civ. Proc. 2030.220(a) now see Code Civ. Proc. 2030(f)(1), 1st snt.

Code Civ. Proc. 2030.220(b) now see Code Civ. Proc. 2030(f)(1), 2d snt.

Code Civ. Proc. 2030.220(c) now see Code Civ. Proc. 2030(f)(1), 3d snt.

Code Civ. Proc. 2030.230 now see Code Civ. Proc. 2030(f)(2)

Code Civ. Proc. 2030.240(a) now see Code Civ. Proc. 2030(f)(3), 1st snt.

Code Civ. Proc. 2030.240(b) now see Code Civ. Proc. 2030(f)(3), 2d-4th snt.

Code Civ. Proc. 2030.250(a) now see Code Civ. Proc. 2030(g), 1st snt.

Code Civ. Proc. 2030.250(b) now see Code Civ. Proc. 2030(g), 2d & 3d snt.

Code Civ. Proc. 2030.250(c) now see Code Civ. Proc. 2030(g), 4th snt.

Code Civ. Proc. 2030.260(a) now see Code Civ. Proc. 2030(h), 1st & 2d snt.

Code Civ. Proc. 2030.260(b) now see Code Civ. Proc. 2030(h), 3d snt.

Code Civ. Proc. 2030.270(a) now see Code Civ. Proc. 2030(i), 1st snt.

Code Civ. Proc. 2030.270(b) now see Code Civ. Proc. 2030(i), 2d snt.

Code Civ. Proc. 2030.270(c) now see Code Civ. Proc. 2030(i), 3d snt.

Code Civ. Proc. 2030.280(a) now see Code Civ. Proc. 2030(j), 1st snt.

Code Civ. Proc. 2030.280(b) now see Code Civ. Proc. 2030(j), 2d & 3d snt.

Code Civ. Proc. 2030.290(a) now see Code Civ. Proc. 2030(k), 1st P

Code Civ. Proc. 2030.290(b) now see Code Civ. Proc. 2030(k), 2d P, 1st snt.

Code Civ. Proc. 2030.290(c) now see Code Civ. Proc. 2030(k), 2d P, 2d-4th snt.

Code Civ. Proc. 2030.300(a) now see Code Civ. Proc. 2030(*l*), 1st snt.

Code Civ. Proc. 2030.300(b) now see Code Civ. Proc. 2030(*l*), 2d snt.

Code Civ. Proc. 2030.300(c) now see Code Civ. Proc. 2030(*l*), 2d P

Code Civ. Proc. 2030.300(d) now see Code Civ. Proc. 2030(*l*), 3d P

Code Civ. Proc. 2030.300(e) now see Code Civ. Proc. 2030(*l*), 4th P

Code Civ. Proc. 2030.310(a) now see Code Civ. Proc. 2030(m), 1st P

Code Civ. Proc. 2030.310(b) now see Code Civ. Proc. 2030(m), 2d P, 1st & 2d snt.

Code Civ. Proc. 2030.310(c) now see Code Civ. Proc. 2030(m), 2d P, 3d snt.

Code Civ. Proc. 2030.310(d) now see Code Civ. Proc. 2030(m), 3d P

Code Civ. Proc. 2030.410 now see Code Civ. Proc. 2030(n)

Code Civ. Proc. 2031.010(a) now see Code Civ. Proc. 2031(a), intro. P

Code Civ. Proc. 2031.010(b) now see Code Civ. Proc. 2031(a)(1)

Code Civ. Proc. 2031.010(c) now see Code Civ. Proc. 2031(a)(2)

Code Civ. Proc. 2031.010(d) now see Code Civ. Proc. 2031(a)(3)

Code Civ. Proc. 2031.020(a) now see Code Civ. Proc. 2031(b), 1st snt.

Code Civ. Proc. 2031.020(b) now see Code Civ. Proc. 2031(b), 2d snt.

Code Civ. Proc. 2031.020(c) now see Code Civ. Proc. 2031(b), 3d snt.

Code Civ. Proc. 2031.030(a) now see Code Civ. Proc. 2031(c), 1st snt.

Code Civ. Proc. 2031.030(b) now see Code Civ. Proc. 2031(c), 2d snt.

Code Civ. Proc. 2031.030(c) now see Code Civ. Proc. 2031(c), 3d snt. (including items (1)-(4))

Code Civ. Proc. 2031.040 now see Code Civ. Proc. 2031(d)

Code Civ. Proc. 2031.050(a)-(b) now see Code Civ. Proc. 2031(e), 1st snt.

Code Civ. Proc. 2031.050(c) now see Code Civ. Proc. 2031(e), 2d snt.

Code Civ. Proc. 2031.060(a) now see Code Civ. Proc. 2031(f), 1st P

Code Civ. Proc. 2031.060(b) now see Code Civ. Proc. 2031(f), 2d P (including items (1)-(6))

Code Civ. Proc. 2031.060(c) now see Code Civ. Proc. 2031(f), next-to-last P

Code Civ. Proc. 2031.060(d) now see Code Civ. Proc. 2031(f), last P

Code Civ. Proc. 2031.210(a) now see Code Civ. Proc. 2031(g), 1st P

Code Civ. Proc. 2031.210(b) now see Code Civ. Proc. 2031(g), 2d P, 1st snt.

Code Civ. Proc. 2031.210(c) now see Code Civ. Proc. 2031(g), 2d P, 2d snt.

Code Civ. Proc. 2031.220 now see Code Civ. Proc. 2031(g)(1), 1st P

Code Civ. Proc. 2031.280(a) now see Code Civ. Proc. 2031(g)(1), 2d P, 1st snt.

Code Civ. Proc. 2031.280(b) now see Code Civ. Proc. 2031(g)(1), 2d P, 2d snt.

Code Civ. Proc. 2031.230 now see Code Civ. Proc. 2031(g)(2)

Code Civ. Proc. 2031.240(a) now see Code Civ. Proc. 2031(g)(3), 1st snt.

Code Civ. Proc. 2031.240(b) now see Code Civ. Proc. 2031(g)(3), 2d-4th snt.

Code Civ. Proc. 2031.250(a) now see Code Civ. Proc. 2031(h), 1st snt.

Code Civ. Proc. 2031.250(b) now see Code Civ. Proc. 2031(h), 2d & 3d snt.

Code Civ. Proc. 2031.250(c) now see Code Civ. Proc. 2031(h), 4th snt.

Code Civ. Proc. 2031.260 now see Code Civ. Proc. 2031(i)

Code Civ. Proc. 2031.270(a) now see Code Civ. Proc. 2031(j), 1st snt.

Code Civ. Proc. 2031.270(b) now see Code Civ. Proc. 2031(j), 2d snt.

Code Civ. Proc. 2031.270(c) now see Code Civ. Proc. 2031(j), 3d snt.

Code Civ. Proc. 2031.290(a) now see Code Civ. Proc. 2031(k), 1st snt.

Code Civ. Proc. 2031.290(b) now see Code Civ. Proc. 2031(k), 2d & 3d snt.

Code Civ. Proc. 2031.300, intro. cl. & (a) now see Code Civ. Proc. 2031(*l*), 1st P

Code Civ. Proc. 2031.300(b) now see Code Civ. Proc. 2031(*l*), 2d P, 1st snt.

Code Civ. Proc. 2031.300(c) now see Code Civ. Proc. 2031(*l*), 2d P, 2d-4th snt.

Code Civ. Proc. 2031.310(a) now see Code Civ. Proc. 2031(m), 1st snt.

Code Civ. Proc. 2031.310(b) now see Code Civ. Proc. 2031(m), 2d snt.

Code Civ. Proc. 2031.310(c) now see Code Civ. Proc. 2031(m), 2d P

Code Civ. Proc. 2031.310(d) now see Code Civ. Proc. 2031(m), 3d P

Code Civ. Proc. 2031.310(e) now see Code Civ. Proc. 2031(m), 4th P

Code Civ. Proc. 2031.320(a) now see Code Civ. Proc. 2031(n), 1st P

Code Civ. Proc. 2031.320(b) now see Code Civ. Proc. 2031(n), 2d P

Code Civ. Proc. 2031.320(c) now see Code Civ. Proc. 2031(n), 3d P

Code Civ. Proc. 2017.310 now see Code Civ. Proc. 2031.1

Code Civ. Proc. 2017.320 now see Code Civ. Proc. 2031.2

Code Civ. Proc. 2031.510(a) now see Code Civ. Proc. 2031.5, 1st snt.

Code Civ. Proc. 2031.510(b) now see Code Civ. Proc. 2031.5, 2d & 3d snt.

Code Civ. Proc. 2032.020(a) now see Code Civ. Proc. 2032(a)

Code Civ. Proc. 2032.020(b) now see Code Civ. Proc. 2032(b), 1st snt.

Code Civ. Proc. 2032.020(c) now see Code Civ. Proc. 2032(b), 2d snt.

Code Civ. Proc. 2032.010(a) now see Code Civ. Proc. 2032(b), 3d snt.

Code Civ. Proc. 2032.210 now see Code Civ. Proc. 2032(c)(1)

Code Civ. Proc. 2032.220(a) now see Code Civ. Proc. 2032(c)(2), 1st snt.

Code Civ. Proc. 2032.220(b) now see Code Civ. Proc. 2032(c)(2), 2d snt.

Code Civ. Proc. 2032.220(c) now see Code Civ. Proc. 2032(c)(2), 3d snt.

Code Civ. Proc. 2032.220(d) now see Code Civ. Proc. 2032(c)(3)

Code Civ. Proc. 2032.220(e) now see Code Civ. Proc. 2032(c)(4)

Code Civ. Proc. 2032.230(a) now see Code Civ. Proc. 2032(c)(5), 1st snt.

Code Civ. Proc. 2032.230(b) now see Code Civ. Proc. 2032(c)(5), 2d snt.

Code Civ. Proc. 2032.240(a) now see Code Civ. Proc. 2032(c)(6), 1st P

Code Civ. Proc. 2032.240(b) now see Code Civ. Proc. 2032(c)(6), 2d P, 1st snt.

Code Civ. Proc. 2032.240(c) now see Code Civ. Proc. 2032(c)(6), 2d P, 2d snt.

Code Civ. Proc. 2032.240(d) now see Code Civ. Proc. 2032(c)(6), 3d P

Code Civ. Proc. 2032.250(a) now see Code Civ. Proc. 2032(c)(7), 1st P

Code Civ. Proc. 2032.250(b) now see Code Civ. Proc. 2032(c)(7), 2d P

Code Civ. Proc. 2032.260(a) now see Code Civ. Proc. 2032(c)(8), 1st snt.

Code Civ. Proc. 2032.260(b) now see Code Civ. Proc. 2032(c)(8), 2d snt.

Code Civ. Proc. 2032.310(a) now see Code Civ. Proc. 2032(d), 1st snt.

Code Civ. Proc. 2032.310(b) now see Code Civ. Proc. 2032(d), 2d & 3d snt.

Code Civ. Proc. 2032.310(c) now see Code Civ. Proc. 2032(d), 4th snt.

Code Civ. Proc. 2032.320(a) now see Code Civ. Proc. 2032(d), 2d P, 1st snt.

Code Civ. Proc. 2032.320(b)-(c) now see Code Civ. Proc. 2032(d), 2d P, 2d snt.

Code Civ. Proc. 2032.320(d) now see Code Civ. Proc. 2032(d), 2d P, 3d snt.

Code Civ. Proc. 2032.320(e) now see Code Civ. Proc. 2032(d), 2d P, 4th snt.

Not continued (redundant). See Code Civ. Proc. 2016.030. Code Civ. Proc. 2032(e)

Code Civ. Proc. 2032.410 now see Code Civ. Proc. 2032(f), 1st P

Code Civ. Proc. 2032.420 now see Code Civ. Proc. 2032(f), 2d P

Code Civ. Proc. 2032.510(a) now see Code Civ. Proc. 2032(g)(1), 1st snt.

Code Civ. Proc. 2032.510(b) now see Code Civ. Proc. 2032(g)(1), 2d snt.

Code Civ. Proc. 2032.510(c) now see Code Civ. Proc. 2032(g)(1), 3d snt.

Code Civ. Proc. 2032.510(d) now see Code Civ. Proc. 2032(g)(1), 2d P, 1st snt.

Code Civ. Proc. 2032.510(e) now see Code Civ. Proc. 2032(g)(1), 2d P, 2d snt.

Code Civ. Proc. 2032.510(f) now see Code Civ. Proc. 2032(g)(1), 3d P

Code Civ. Proc. 2032.520 now see Code Civ. Proc. 2032(g)(1), 4th P

Code Civ. Proc. 2032.530(a) now see Code Civ. Proc. 2032(g)(2), 1st snt.

Code Civ. Proc. 2032.530(b) now see Code Civ. Proc. 2032(g)(2), 2d snt.

Code Civ. Proc. 2032.610(a) now see Code Civ. Proc. 2032(h), 1st snt.

Code Civ. Proc. 2032.610(b) now see Code Civ. Proc. 2032(h), 2d snt.

Code Civ. Proc. 2032.610(c) now see Code Civ. Proc. 2032(h), 3d snt.

Code Civ. Proc. 2032.620(a) now see Code Civ. Proc. 2032(h), 2d P

Code Civ. Proc. 2032.620(b) now see Code Civ. Proc. 2032(h), 3d P

Code Civ. Proc. 2032.620(c) now see Code Civ. Proc. 2032(h), 4th P

Code Civ. Proc. 2032.630 now see Code Civ. Proc. 2032(i)

Code Civ. Proc. 2032.640 now see Code Civ. Proc. 2032(j), 1st P

Code Civ. Proc. 2032.650(a) now see Code Civ. Proc. 2032(j), 2d P

Code Civ. Proc. 2032.650(b) now see Code Civ. Proc. 2032(j), 3d P

Code Civ. Proc. 2032.650(c) now see Code Civ. Proc. 2032(j), 4th P

Code Civ. Proc. 2032.010(b) now see Code Civ. Proc. 2032(k)

Code Civ. Proc. 2033.010 now see Code Civ. Proc. 2033(a)

Code Civ. Proc. 2033.020(a) now see Code Civ. Proc. 2033(b), 1st snt.

Code Civ. Proc. 2033.020(b) now see Code Civ. Proc. 2033(b), 2d snt.

Code Civ. Proc. 2033.020(c) now see Code Civ. Proc. 2033(b), 3d snt.

Code Civ. Proc. 2033.030(a) now see Code Civ. Proc. 2033(c)(1), 1st snt.

Code Civ. Proc. 2033.030(b) now see Code Civ. Proc. 2033(c)(1), 2d snt.

Code Civ. Proc. 2033.030(c) now see Code Civ. Proc. 2033(c)(1), 2d P

Code Civ. Proc. 2033.040(a) now see Code Civ. Proc. 2033(c)(2), 1st P

Code Civ. Proc. 2033.040(b) now see Code Civ. Proc. 2033(c)(2), 2d P

Code Civ. Proc. 2033.050 now see Code Civ. Proc. 2033(c)(3)

Code Civ. Proc. 2033.060(a) now see Code Civ. Proc. 2033(c)(4), 1st snt.

Code Civ. Proc. 2033.060(b) now see Code Civ. Proc. 2033(c)(4), 2d snt.

Code Civ. Proc. 2033.060(c) now see Code Civ. Proc. 2033(c)(4), 3d snt.

Code Civ. Proc. 2033.060(d) now see Code Civ. Proc. 2033(c)(5), 1st & 2d snt.

Code Civ. Proc. 2033.060(e) now see Code Civ. Proc. 2033(c)(5), 3d snt.

Code Civ. Proc. 2033.060(f) now see Code Civ. Proc. 2033(c)(5), 4th snt.

Code Civ. Proc. 2033.060(g) now see Code Civ. Proc. 2033(c)(6)

Code Civ. Proc. 2033.060(h) now see Code Civ. Proc. 2033(c)(7)

Code Civ. Proc. 2033.070 now see Code Civ. Proc. 2033(d)

Code Civ. Proc. 2033.080(a) now see Code Civ. Proc. 2033(e), 1st P

Code Civ. Proc. 2033.080(b) now see Code Civ. Proc. 2033(e), 2d P (including items (1)-(5))

Code Civ. Proc. 2033.080(c) now see Code Civ. Proc. 2033(e), next-to-last P

Code Civ. Proc. 2033.080(d) now see Code Civ. Proc. 2033(e), last P

Code Civ. Proc. 2033.210(a) now see Code Civ. Proc. 2033(f), intro. P, 1st snt.

Code Civ. Proc. 2033.210(b) now see Code Civ. Proc. 2033(f), intro. P, 2d snt.

Code Civ. Proc. 2033.210(c) now see Code Civ. Proc. 2033(f), intro. P, 3d snt.

Code Civ. Proc. 2033.210(d) now see Code Civ. Proc. 2033(f), intro. P, 4th snt.

Code Civ. Proc. 2033.220(a) now see Code Civ. Proc. 2033(f)(1), 1st snt.

Code Civ. Proc. 2033.220(b) now see Code Civ. Proc. 2033(f)(1), 2d snt.

Code Civ. Proc. 2033.220(c) now see Code Civ. Proc. 2033(f)(1), 3d snt.

Code Civ. Proc. 2033.230(a) now see Code Civ. Proc. 2033(f)(2), 1st snt.

Code Civ. Proc. 2033.230(b) now see Code Civ. Proc. 2033(f)(2), 2d-4th snt.

Code Civ. Proc. 2033.240(a) now see Code Civ. Proc. 2033(g), 1st snt.

Code Civ. Proc. 2033.240(b) now see Code Civ. Proc. 2033(g), 2d & 3d snt.

Code Civ. Proc. 2033.240(c) now see Code Civ. Proc. 2033(g), 4th snt.

Code Civ. Proc. 2033.250 now see Code Civ. Proc. 2033(h)

Code Civ. Proc. 2033.260(a) now see Code Civ. Proc. 2033(i), 1st snt.

Code Civ. Proc. 2033.260(b) now see Code Civ. Proc. 2033(i), 2d snt.

Code Civ. Proc. 2033.260(c) now see Code Civ. Proc. 2033(i), 3d snt.

Code Civ. Proc. 2033.260(d) now see Code Civ. Proc. 2033(i), 4th snt.

Code Civ. Proc. 2033.270(a) now see Code Civ. Proc. 2033(j), 1st snt.

Code Civ. Proc. 2033.270(b) now see Code Civ. Proc. 2033(j), 2d & 3d snt.

Code Civ. Proc. 2033.280(a) now see Code Civ. Proc. 2033(k), 1st P

Code Civ. Proc. 2033.280(b) now see Code Civ. Proc. 2033(k), 2d P, 1st snt.

Code Civ. Proc. 2033.280(c) now see Code Civ. Proc. 2033(k), 2d P, 2d & 3d snt.

Code Civ. Proc. 2033.290(a) now see Code Civ. Proc. 2033(*l*), 1st snt.

Code Civ. Proc. 2033.290(b) now see Code Civ. Proc. 2033(*l*), 2d snt.

Code Civ. Proc. 2033.290(c) now see Code Civ. Proc. 2033(*l*), 2d P

Code Civ. Proc. 2033.290(d) now see Code Civ. Proc. 2033(*l*), 3d P

Code Civ. Proc. 2033.290(e) now see Code Civ. Proc. 2033(*l*), 4th P

Code Civ. Proc. 2033.300(a) now see Code Civ. Proc. 2033(m), 1st snt.

Code Civ. Proc. 2033.300(b) now see Code Civ. Proc. 2033(m), 2d snt.

Code Civ. Proc. 2033.300(c) now see Code Civ. Proc. 2033(m), 3d snt.

Code Civ. Proc. 2033.410(a) now see Code Civ. Proc. 2033(n), 1st snt.

Code Civ. Proc. 2033.410(b) now see Code Civ. Proc. 2033(n), 2d & 3d snt.

Code Civ. Proc. 2033.420(a) now see Code Civ. Proc. 2033(o), 1st snt.

Code Civ. Proc. 2033.420(b) now see Code Civ. Proc. 2033(o), 2d snt.

Code Civ. Proc. 2033.710 now see Code Civ. Proc. 2033.5(a), 1st snt.

Code Civ. Proc. 2033.740(a) now see Code Civ. Proc. 2033.5(a), 2d snt.

Code Civ. Proc. 2033.730(a) now see Code Civ. Proc. 2033.5(b), 1st snt.

Code Civ. Proc. 2033.730(b) now see Code Civ. Proc. 2033.5(b), 2d snt., 1st clause

Code Civ. Proc. 2033.740(b) now see Code Civ. Proc. 2033.5(b), 2d snt., 2d clause

Code Civ. Proc. 2033.740(c) now see Code Civ. Proc. 2033.5(c)

Code Civ. Proc. 2033.720(a) now see Code Civ. Proc. 2033.5(d)

Code Civ. Proc. 2033.720(b) now see Code Civ. Proc. 2033.5(e)

Not continued (obsolete) now see Code Civ. Proc. 2033.5(f)

Code Civ. Proc. 2034.210, intro. clause now see Code Civ. Proc. 2034(a), intro. clause

Code Civ. Proc. 2034.210(a) now see Code Civ. Proc. 2034(a)(1)

Code Civ. Proc. 2034.210(b) now see Code Civ. Proc. 2034(a)(2)

Code Civ. Proc. 2034.210(c) now see Code Civ. Proc. 2034(a)(3)

Code Civ. Proc. 2034.010 now see Code Civ. Proc. 2034(a), last P

Code Civ. Proc. 2034.220 now see Code Civ. Proc. 2034(b) (excluding 3d. snt.)

Not continued (redundant). See Code Civ. Proc. 2016.060. Code Civ. Proc. 2034(b), 3d. snt.

Code Civ. Proc. 2034.230(a) now see Code Civ. Proc. 2034(c), 1st P

Code Civ. Proc. 2034.230(b) now see Code Civ. Proc. 2034(c), 2d P (excluding 3d. snt.)

Not continued (redundant). See Code Civ. Proc. 2016.060. Code Civ. Proc. 2034(c), 2d. P, 3d. snt.

Code Civ. Proc. 2034.240 now see Code Civ. Proc. 2034(d)

Code Civ. Proc. 2034.250(a) now see Code Civ. Proc. 2034(e), 1st P

Code Civ. Proc. 2034.250(b) now see Code Civ. Proc. 2034(e), 2d P (including items (1)-(6))

Code Civ. Proc. 2034.250(c) now see Code Civ. Proc. 2034(e), next-to-last P

Code Civ. Proc. 2034.250(d) now see Code Civ. Proc. 2034(e), last P

Code Civ. Proc. 2034.260(a) now see Code Civ. Proc. 2034(f), intro. P

Code Civ. Proc. 2034.260(b) now see Code Civ. Proc. 2034(f)(1) (including items (A) and (B))

Code Civ. Proc. 2034.260(c) now see Code Civ. Proc. 2034(f)(2) (including items (A)-(E))

Code Civ. Proc. 2034.270 now see Code Civ. Proc. 2034(g)

Code Civ. Proc. 2034.280(a) now see Code Civ. Proc. 2034(h), 1st snt.

Code Civ. Proc. 2034.280(b) now see Code Civ. Proc. 2034(h), 2d snt.

Code Civ. Proc. 2034.280(c) now see Code Civ. Proc. 2034(h), 3d snt.

Code Civ. Proc. 2034.410 now see Code Civ. Proc. 2034(i), intro. P

Code Civ. Proc. 2034.420 now see Code Civ. Proc. 2034(i)(1)

Code Civ. Proc. 2034.430(a)-(b) now see Code Civ. Proc. 2034(i)(2), 1st P, 1st snt.

Code Civ. Proc. 2034.430(c) now see Code Civ. Proc. 2034(i)(2), 1st P, 2d snt.

Code Civ. Proc. 2034.430(d) now see Code Civ. Proc. 2034(i)(2), 1st P, 3d snt.

Code Civ. Proc. 2034.430(e) now see Code Civ. Proc. 2034(i)(2), 1st P, 4th snt.

Code Civ. Proc. 2034.430(f) now see Code Civ. Proc. 2034(i)(2), 1st P, 5th snt.

Code Civ. Proc. 2034.450(a) now see Code Civ. Proc. 2034(i)(2), 2d P, 1st snt.

Code Civ. Proc. 2034.450(b) now see Code Civ. Proc. 2034(i)(2), 2d P, 2d snt.

Code Civ. Proc. 2034.450(c) now see Code Civ. Proc. 2034(i)(2), 2d P, 3d snt.

Code Civ. Proc. 2034.440 now see Code Civ. Proc. 2034(i)(2), 2d P, 4th snt.

Code Civ. Proc. 2034.460(a) now see Code Civ. Proc. 2034(i)(3), 1st snt.

Code Civ. Proc. 2034.460(b) now see Code Civ. Proc. 2034(i)(3), 2d snt.

Code Civ. Proc. 2034.470(a) now see Code Civ. Proc. 2034(i)(4), 1st P, 1st & 3d snt.

Code Civ. Proc. 2034.470(b) now see Code Civ. Proc. 2034(i)(4), 1st P, 2d & 4th snt.

Code Civ. Proc. 2034.470(c)-(d) now see Code Civ. Proc. 2034(i)(4), 2d P, 1st & 2d snt.

Code Civ. Proc. 2034.470(e) now see Code Civ. Proc. 2034(i)(4), 2d P, 3d snt.

Code Civ. Proc. 2034.470(f) now see Code Civ. Proc. 2034(i)(4), 3d P

Code Civ. Proc. 2034.470(g) now see Code Civ. Proc. 2034(i)(4), 4th P

Code Civ. Proc. 2034.300 now see Code Civ. Proc. 2034(j)

Code Civ. Proc. 2034.610(a) now see Code Civ. Proc. 2034(k), 1st P, 1st snt.

Code Civ. Proc. 2034.610(b) now see Code Civ. Proc. 2034(k), 1st P, 2d & 3d snt.

Code Civ. Proc. 2034.610(c) now see Code Civ. Proc. 2034(k), 1st P, 4th snt.

Code Civ. Proc. 2034.290(c) now see Code Civ. Proc. 2034(k), 1st P, 5th snt.

Code Civ. Proc. 2034.620, intro. cl. & (a)-(c) now see Code Civ. Proc. 2034(k), 1st P, 6th snt.

Code Civ. Proc. 2034.620(d) now see Code Civ. Proc. 2034(k), 1st P, 7th snt.

Code Civ. Proc. 2034.630 now see Code Civ. Proc. 2034(k), 2d P

Code Civ. Proc. 2034.710(a) now see Code Civ. Proc. 2034(*l*), 1st snt.

Code Civ. Proc. 2034.710(b) now see Code Civ. Proc. 2034(*l*), 2d & 3d snt.

Code Civ. Proc. 2034.710(c) now see Code Civ. Proc. 2034(*l*), 4th snt.

Code Civ. Proc. 2034.720, intro. cl. & (a)-(c) now see Code Civ. Proc. 2034(*l*), 2d P, 1st snt.

Code Civ. Proc. 2034.720(d) now see Code Civ. Proc. 2034(*l*), 2d P, 2d snt.

Code Civ. Proc. 2034.730 now see Code Civ. Proc. 2034(*l*), 3d P

Code Civ. Proc. 2034.310 now see Code Civ. Proc. 2034(m)

Code Civ. Proc. 2034.290(a) now see Code Civ. Proc. 2034(n), 1st snt.

Code Civ. Proc. 2034.290(b) now see Code Civ. Proc. 2034(n), 2d & 3d snt.

Code Civ. Proc. 2035.010(a) now see Code Civ. Proc. 2035(a), 1st snt.

Code Civ. Proc. 2035.010(b) now see Code Civ. Proc. 2035(a), 2d snt.

Code Civ. Proc. 2035.020 now see Code Civ. Proc. 2035(b)

Code Civ. Proc. 2035.030(a) now see Code Civ. Proc. 2035(c)

Code Civ. Proc. 2035.030(b) now see Code Civ. Proc. 2035(d), 1st P (including items (1)-(9))

Code Civ. Proc. 2035.030(c) now see Code Civ. Proc. 2035(d), last P

Code Civ. Proc. 2035.040(a) now see Code Civ. Proc. 2035(e), 1st & 2d snt.

Code Civ. Proc. 2035.040(b) now see Code Civ. Proc. 2035(e), 3d & 4th snt.

Code Civ. Proc. 2035.040(c) now see Code Civ. Proc. 2035(e), 5th snt.

Code Civ. Proc. 2035.040(d) now see Code Civ. Proc. 2035(e), 2d P, 1st snt.

Code Civ. Proc. 2035.040(e) now see Code Civ. Proc. 2035(e), 2d P, 2d & 3d snt.

Code Civ. Proc. 2035.050(a) now see Code Civ. Proc. 2035(f), 1st snt.

Code Civ. Proc. 2035.050(b) now see Code Civ. Proc. 2035(f), 2d snt.

Code Civ. Proc. 2035.050(c) now see Code Civ. Proc. 2035(f), 3d snt.

Code Civ. Proc. 2035.060 now see Code Civ. Proc. 2035(g)

Code Civ. Proc. 2036.010 now see Code Civ. Proc. 2036(a)

Code Civ. Proc. 2036.020 now see Code Civ. Proc. 2036(b)

Code Civ. Proc. 2036.030(a) now see Code Civ. Proc. 2036(c)

Code Civ. Proc. 2036.030(b) now see Code Civ. Proc. 2036(d)

Code Civ. Proc. 2036.040(a) now see Code Civ. Proc. 2036(e), 1st snt.

Code Civ. Proc. 2036.040(b) now see Code Civ. Proc. 2036(e), 2d snt.

Code Civ. Proc. 2036.040(c) now see Code Civ. Proc. 2036(e), 3d snt.

Code Civ. Proc. 2036.050 now see Code Civ. Proc. 2036(f)

California Points & Authorities

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CHAPTER 90 DISMISSAL

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§ 90.30 Supporting Motion for Voluntary Dismissal by Plaintiff Before or During Trial [Code Civ. Proc. § 581]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Right to Voluntary Dismissal Without Prejudice Before Trial

[4] Additional Authorities

[a] Right to Voluntary Dismissal Without Prejudice Before Trial

§ 90.31 Supporting Motion for Dismissal on Ground of Abandonment [Code Civ. Proc. § 581(d)]--Plaintiff's Intent to Abandon Demonstrated

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Plaintiff's Intent to Abandon Demonstrated

§ 90.32 Opposing Motion for Voluntary Dismissal by Plaintiff Before or During Trial [Code Civ. Proc. § 581]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] No Voluntary Dismissal if Cross Complaint Filed

[b] No Voluntary Dismissal if Demurrer or Motion to Strike Granted Without Leave to Amend

[c] No Voluntary Dismissal if Failure to Amend After Demurrer or Motion to Strike Granted With Leave to Amend

[d] No Voluntary Dismissal If Moving Papers In Summary Judgment Motion Negate Plaintiff's Claims Entitling Defendant to Judgment as a Matter of Law and Time to File Opposition Has Elapsed

[e] No Voluntary Dismissal After Adverse Tentative Summary Judgment Ruling Announced and a Hearing Has Been Commenced Which is Continued to Permit Gathering of Previous Unavailable Opposition Evidence

§ 90.33 Opposing Motion for Dismissal for Abandonment [Code Civ. Proc. § 581(d)]--Insufficient Showing of Intent to Abandon

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Intent to Abandon Required

§ 90.34 Opposing Voluntary Dismissal by Plaintiff Before or During Trial [Code Civ. Proc. § 581(b)(1)]--Dismissal Requested After Ruling of Mandatory Dismissal

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] No Right to Voluntary Dismissal After Court Grants Motion for Mandatory Dismissal

[b] Defendant's Right to Mandatory Dismissal Prevails Over Plaintiff's Right to Voluntary Dismissal

§§ 90.35-90.49 [Reserved]

§ 90.50 Supporting Motion for Mandatory Dismissal for Failure to Serve Summons and Complaint and File Proof

of Service of Summons [Code Civ. Proc. §§ 583.210, 583.250]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Mandatory Period for Completing Service

[c] Computation of Period for Does and Defendants Added by Amendment

[d] Effect of Defendant's General Appearance After Three Years

[e] Effect of Authority Decided Under Former Dismissal Statutes

[f] Related Pleading and Practice Forms

[g] Opposing Memoranda

[3] Discussion of Authorities

[a] Dismissal for Failure to Complete Service or File Proof of Service Within Statutory Period

[b] Dismissal Mandatory

[c] Statutory Periods for Service and Proof of Service Not Extended by Filing Amended Complaint

[d] General Appearance After Three Years Does Not Make Statutory Periods for Service and Proof of Service Inapplicable

[e] Defendant Not Estopped to Move for Dismissal by Requesting Extension of Time to Respond

[4] Additional Authorities

[a] Dismissal Mandatory

§ 90.51 Supporting Motion for Discretionary Dismissal for Failure to Serve Summons and Complaint and File Proof of Service of Summons [Code Civ. Proc. §§ 583.410, 583.420(a)(1); Cal. Rules of Ct., Rule 3.1342]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Effect of Authority Decided Under Former Dismissal Statutes

[c] Related Pleading and Practice Forms

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Discretion to Dismiss After Two Years

[b] Factors Considered

[c] Two-Year Period Applicable to Doe Defendants

[4] Additional Authorities

[a] Discretion to Dismiss After Two Years

§ 90.52 Opposing Motion for Mandatory Dismissal for Failure to Serve Summons and Complaint and File Proof of Service of Summons [Code Civ. Proc. §§ 583.210, 583.250]--Statutory Time Limits Excused by Defendant's General Appearance [Code Civ. Proc. § 583.220]

[1] FORM

[2] Comments

[a] Use of Form

[b] General Appearance Must Be Made Within Three Years and Sixty Days

[c] Effect of Authority Decided Under Former Dismissal Statutes

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] General Appearance Defined

[b] Period During Which General Appearance Must Be Made

[c] Action Indicating Status as Party

[d] Written Stipulation Constituting Appearance

[e] Complaint in Intervention Not Separate Action From Original Complaint

§ 90.53 Opposing Motion for Mandatory Dismissal for Failure to Serve Summons and Complaint and File Proof of Service of Summons [Code Civ. Proc. §§ 583.210, 583.250]--Service and Proof of Service Completed Within Statutory Time Period [Code Civ. Proc. §§ 583.210, 583.250(a)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Effect of Authority Decided Under Former Dismissal Statutes

[c] Holiday Defined

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Service by Mail Complete at Time of Mailing

[b] Statutory Period Extended When Last Day Is Holiday

§ 90.54 [Reserved]

§ 90.55 Opposing Motion for Mandatory Dismissal for Failure to Serve Summons and Complaint and File Proof of Service of Summons [Code Civ. Proc. §§ 583.210, 583.250]--Time for Service and Proof of Service Extended by Stipulation of Parties [Code Civ. Proc. §§ 583.220, 583.230]

[1] FORM

[2] Comments

[a] Use of Form

[b] Effect of Authority Decided Under Former Dismissal Statutes

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Construction of Dismissal Statutes

[b] Extension to Time Beyond Statutory Period or Waiver of Right to Dismissal

§ 90.56 Opposing Motion for Mandatory Dismissal for Failure to Serve Summons and Complaint and File Proof of Service of Summons [Code Civ. Proc. §§ 583.210, 583.250]--Time for Service and Proof of Service Tolled by Statutory Exclusion [Code Civ. Proc. § 583.240]--Time During Which Defendant Was Not Amenable to Process [Code Civ. Proc. § 583.240(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Effect of Authority Decided Under Former Dismissal Statutes

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Amenability to Process

[4] Additional Authorities

[a] Amenability to Process

§ 90.57 Opposing Motion for Mandatory Dismissal for Failure to Serve Summons and Complaint and File Proof of Service of Summons [Code Civ. Proc. §§ 583.210, 583.250]--Time for Service and Proof of Service Tolled by Statutory Exclusion [Code Civ. Proc. § 583.240]--Time During Which Proceedings Were Stayed [Code Civ. Proc. § 583.240(b)] or During Which Service Was Being Litigated [Code Civ. Proc. § 583.240(c)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Effect of Authority Decided Under Former Dismissal Statutes

[3] Discussion of Authorities

[a] Time During Stay Is Not Included

§ 90.58 Opposing Motion for Mandatory Dismissal for Failure to Serve Summons and Complaint and File Proof of Service of Summons [Code Civ. Proc. §§ 583.210, 583.250]--Time for Service and Proof of Service Tolled by Statutory Exclusion [Code Civ. Proc. § 583.240]--Time During Which Service Was Impossible, Impracticable, or Futile [Code Civ. Proc. § 583.240(d)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Effect of Authority Decided Under Former Dismissal Statutes

[3] Discussion of Authorities

[a] Service Impossible, Impracticable, or Futile

[b] Compliance With Facially Valid but Void Stay Order

[4] Additional Authorities

[a] Service Impossible, Impracticable, or Futile

§ 90.59 Opposing Motion for Mandatory Dismissal for Failure to Serve Summons and Complaint and File Proof of Service of Summons [Code Civ. Proc. §§ 583.210, 583.250]--Time for Service and Proof of Service Tolled by Statutory Exclusion [Code Civ. Proc. § 583.240]--Defendant Is Estopped From Requesting Dismissal [Code Civ. Proc. § 583.140]

[1] FORM

[2] Comments

[a] Use of Form

[b] Effect of Authority Decided Under Former Dismissal Statutes

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Party Is Estopped From Asserting Compliance With Service Deadlines

[b] Estoppel Arising From Defendant's Request for Extension of Time to Plead

[4] Additional Authorities

[a] Party Is Estopped From Asserting Compliance With Service Deadlines

§ 90.60 Opposing Motion for Discretionary Dismissal for Failure to Serve Summons and Complaint and File Proof of Service of Summons [Code Civ. Proc. §§ 583.410, 583.420(a)(1); Cal. Rules of Ct., Rule 3.1342]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Excuse for Delay

[c] Actual Prejudice by the Delay

[d] Effect of Authority Decided Under Former Dismissal Statutes

[e] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Discretion to Dismiss Not Arbitrary

[b] Plaintiff's Proof of Good Cause Is Sufficient to Preclude Discretionary Dismissal

[c] Plaintiff's Excuse That Is Credible and Not Clearly Unreasonable Under the Circumstances Constitutes Good Cause

[d] Factors Set Out in Court Rule Reveal Good Cause for Delay

[e] No Injustice Has Resulted From the Delay

[f] Conditional Denial of Discretionary Dismissal

§ 90.61 Reply Memorandum Supporting Motion for Mandatory Dismissal for Failure to Serve Summons and Complaint and File Proof of Service of Summons [Code Civ. Proc. §§ 583.210, 583.250]--Defendant Has Not Made General Appearance [Code Civ. Proc. § 583.220]

[1] FORM

[2] Comments

[a] Use of Form

[b] Effect of Authority Decided Under Former Dismissal Statutes

[c] Related Pleading and Practice Forms

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] General Appearance by Defendant After Period Expired

[b] General Appearance by Defendant in Cross Action

[c] General Appearance by Codefendant

[d] General Appearance in Separate Action

[e] General Appearance in Complaint in Intervention

[4] Additional Authorities

[a] General Appearance by Defendant After Period Expired

§ 90.62 Reply Memorandum Supporting Motion for Mandatory Dismissal for Failure to Serve Summons and Complaint and File Proof of Service of Summons [Code Civ. Proc. §§ 583.210, 583.250]--Defendant Was Amenable to Process [Code Civ. Proc. § 583.240(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Effect of Authority Decided Under Former Dismissal Statutes

[c] Related Pleading and Practice Forms

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Defendant Amenable to Process

[b] Plaintiff Bears the Burden of Proof Regarding Defendant's Nonamenability to the Process of the Court

[c] Defendant Amenable to Process When Served by Publication

[4] Additional Authorities

[a] Defendant Amenable to Process

§ 90.63 Reply Memorandum Supporting Motion for Mandatory Dismissal for Failure to Serve Summons and Complaint and File Proof of Service of Summons [Code Civ. Proc. §§ 583.210, 583.250]--Plaintiff Has Not Shown That Service Was Impossible, Impracticable, or Futile Due to Causes Beyond Plaintiff's Control [Code Civ. Proc. § 583.240(d)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Effect of Authority Decided Under Former Dismissal Statutes

[c] Related Pleading and Practice Forms

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] When Exclusion for Impossibility, Impracticability, or Futility Applies

[b] Plaintiff Has Burden of Proof Regarding Excuses of Impossibility, Impracticability, or Futility

[c] Exclusion Is Strictly Construed

[d] Failure to Serve Defendant After Default Was Not Due to Causes Beyond Plaintiff's Control

[e] Failure to Serve Defendants During Pendency of Federal Court Action Between Same Parties on Same Cause Was Not Due to Causes Beyond Plaintiffs' Control

[f] Failure to Serve Defendants Not Subject to Stay Was Not Due to Causes Beyond Plaintiffs' Control.

[g] Actuality of Service Is Question of Fact

[4] Additional Authorities

[a] Plaintiff Has Burden of Proof Regarding Excuses of Impossibility, Impracticability, or Futility

§ 90.64 Reply Memorandum Supporting Motion for Mandatory Dismissal for Failure to Serve Summons and Complaint and File Proof of Service of Summons [Code Civ. Proc. §§ 583.210, 583.250]--Plaintiff's Legal Incompetency Does Not Toll Periods for Service Specified in Code Civ. Proc. § 583.210

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Dismissal of Action for Nonservice of Summons

[b] Legal Incompetency of Plaintiff Is No Exception

§ 90.65 Supplemental Memorandum [Cal. Rules of Ct., Rule 3.1342(c)] Supporting Motion for Discretionary Dismissal for Failure to Serve Summons and Complaint and File Proof of Service of Summons [Code Civ. Proc. §§ 583.410, 583.420(a)(1)]--Plaintiff Has Not Shown Good Cause for Delay in Service

[1] FORM

[2] Comments

[a] Use of Form

[b] Inference of Prejudice

[c] Effect of Authority Decided Under Former Dismissal Statutes

[d] Related Pleading and Practice Forms

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Legislative Intent and Purpose

[b] Investigation and Procurement of Evidence Is No Excuse for Delay in Service

[c] Financial Inability to Conduct Discovery or Prosecute Lawsuit Is No Excuse for Delay in Service

[d] Unreasonable Delay in Service May Give Rise to Inference of Prejudice

[e] Dismissal Statutes Apply When Defendant Is a Public Entity

[f] Denial of Motion as Abuse of Discretion

[4] Additional Authorities

[a] Unreasonable Delay in Service May Give Rise to Inference of Prejudice

[b] Denial of Motion as Abuse of Discretion

§§ 90.66-90.79 [Reserved]

§ 90.80 Supporting Motion for Mandatory Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.310, 583.320, 583.360]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Effect of Authority Decided Under Former Dismissal Statutes

[c] Related Pleading and Practice Forms

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Dismissal Mandatory

[b] Beginning of Period for Bringing Action to Trial

[c] Beginning of Period for Bringing Action to New Trial After Appeal

[d] When Action Is Deemed to Have Been Brought to Trial or New Trial

[e] No Exceptions to Mandatory Dismissal Apply

[f] Equitable Estoppel Does Not Bar Mandatory Dismissal for Failure to Bring Action to Trial Within Five Years.

[4] Additional Authorities

[a] When Action Is Deemed to Have Been Brought to Trial or New Trial

§ 90.81 Supporting Motion for Mandatory Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.310, 583.320, 583.360]--Judgment Not Yet Entered on Settlement Agreement

[1] FORM

[2] Comments

[a] Use of Form

[b] Effect of Authority Decided Under Former Dismissal Statutes

[c] Related Pleading and Practice Forms

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Action Must Be Dismissed if Not Brought to Trial and Settlement Agreement Not Yet Enforced

§ 90.82 Supporting Motion for Mandatory Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.310, 583.320, 583.360]--Expiration of Special Extension After Statutory Tolling [Code Civ. Proc. § 530.350]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Mandatory Dismissal for Failure to Bring to Trial Within Special Exception After Statutory Tolling

§ 90.83 Supporting Motion for Discretionary Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.410, 583.420(a)(2), (3); Cal. Rules of Ct., Rules 3.1340, 3.1342]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Effect of Authority Decided Under Former Dismissal Statutes

[c] Related Pleading and Practice Forms

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Lapse of Minimum Period

[b] Other Criteria to Be Considered

[c] Dismissal Proper Absent Good Cause for Delay

[d] Burden of Showing Good Cause Increases Over Time

[e] Prejudice Inherent in Delay

[f] Prejudice to Defendant Not Necessary Factor

[4] Additional Authorities

[a] Other Criteria to Be Considered

[b] Dismissal Proper Absent Good Cause for Delay

[c] Prejudice Inherent in Delay

[d] Prejudice to Defendant Not Necessary Factor

§ 90.84 Supporting Motion for Discretionary Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.410, 583.420(a)(2), (3); Cal. Rules of Ct., Rule 3.1340, 3.1342]--Motion Made While Case Is Submitted to Judicial Arbitration

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

[3] Discussion of Authorities

[a] Court Retains Jurisdiction to Exercise Discretion to Dismiss Action Submitted to Judicial Arbitration

[b] Court May Consider Plaintiff's Lack of Diligence While Matter Is Submitted to Judicial Arbitration

[c] Court May Consider Plaintiff's Lack of Diligence Prior to Submission of Case to Judicial Arbitration

[d] Submission of Action to Judicial Arbitration Does Not Suspend Running of Time Periods Applicable to Discretionary Dismissal

§ 90.85 Supporting Motion for Discretionary Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.410, 583.420(a)(2), (3); Cal. Rules of Ct., Rule 3.1340, 3.1342]--Dismissal After Request for Trial de Novo Following Judicial Arbitration

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Undergoing Judicial Arbitration Does Not Immunize Plaintiff Against Discretionary Dismissal

§ 90.86 Opposing Motion for Mandatory Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.310, 583.320, 583.360]--Action Was Brought to Trial or New Trial Within Statutory Period

[1] FORM

[2] Comments

[a] Use of Form

[b] Effect of Authority Decided Under Former Dismissal Statutes

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Definition of Trial

[b] Impaneling of Jury

[c] Swearing and Testimony of Witness

[d] Ruling on Demurrer

[e] Dismissal Not Authorized if Partial Trial Occurs Within Statutory Period

[f] Bifurcated Marital Dissolution Proceeding

[4] Additional Authorities

[a] Dismissal Not Authorized if Partial Trial Occurs Within Statutory Period

§ 90.87 Opposing Motion for Mandatory Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.310, 583.320, 583.360]--Time for Bringing Action to Trial or New Trial Extended by Stipulation of Parties [Code Civ. Proc. § 583.330]

[1] FORM

[2] Comments

[a] Use of Form

[b] Effect of Authority Decided Under Former Dismissal Statutes

[c] Construction of Stipulation

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Written Stipulation

[b] Oral Agreement

[c] Extension to Time Beyond Statutory Period or Waiver of Right to Dismissal

[d] Trial Precluded by Indefinite Extension

[e] Acceptable Writings

[4] Additional Authorities

[a] Oral Agreement

[b] Trial Precluded by Indefinite Extension

§ 90.88 Opposing Motion for Mandatory Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.310, 583.320, 583.360]--Action Was Settled Within Statutory Period

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Oral Settlement of Case in Open Court Within Five-Year Mandatory Period for Bringing Action to Trial Precludes Dismissal of Action

[b] Settlement Agreement Reached Before, But Partially Executed After, Expiration of Five-Year Period Precludes Dismissal

§ 90.89 Opposing Motion for Mandatory Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.310, 583.320, 583.360]--Time for Bringing Action to Trial or New Trial Tolled by Statutory Exclusion--Court's Jurisdiction to Try Action Was Suspended [Code Civ. Proc. § 583.340(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Effect of Authority Decided Under Former Dismissal Statutes

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Jurisdiction Suspended

[b] Reasonable Diligence Is Not Required Under Code of Civil Procedure Section 583.340(a)

[4] Additional Authorities

[a] Jurisdiction Suspended

§ 90.90 Opposing Motion for Mandatory Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.310, 583.320, 583.360]--Time for Bringing Action to Trial or New Trial Tolled by Statutory Exclusion--Prosecution or Trial of Action Was Stayed or Enjoined [Code Civ. Proc. § 583.340(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Effect of Authority Decided Under Former Dismissal Statutes

[c] Stay of Action Submitted to Arbitration

[i] Contractual Arbitration

[ii] Judicial Arbitration

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Prosecution or Trial Stayed or Enjoined

[b] Reasonable Diligence Is Not Required Under Code of Civil Procedure Section 583.340(a)

[c] "Continuance" Having Legal Effect of "Stay"

[4] Additional Authorities

[a] Prosecution or Trial Stayed or Enjoined

§ 90.91 Opposing Motion for Mandatory Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.310, 583.320, 583.360]--Time for Bringing Action to Trial or New Trial Tolled by Statutory Exclusion--Bringing Action to Trial Was Impossible [Code Civ. Proc. § 583.340(c)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Effect of Authority Decided Under Former Dismissal Statutes

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Failure to Comply Excused by Impossibility

[b] Impossibility Defined

[c] Extraordinary Delay

[d] Default

[e] No Courtroom Available

[f] Application of Code Civ. Proc. § 583.340(c) After Judicial Arbitration

[4] Additional Authorities

[a] Failure to Comply Excused by Impossibility

[b] Impossibility Defined

[c] Extraordinary Delay

[d] No Courtroom Available

§ 90.92 Opposing Motion for Mandatory Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.310, 583.320, 583.360]--Time for Bringing Action to Trial or New Trial Tolled by Statutory Exclusion--Bringing Action to Trial Was Impracticable or Futile [Code Civ. Proc. § 583.340(c)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Effect of Authority Decided Under Former Dismissal Statutes

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Failure to Comply Excused by Impracticability or Futility

[b] Impracticability and Futility Defined

[c] Multiple Defendants

[d] When Severance Is Impracticable

[e] Appeal of Separate Action

[f] Pending Interlocutory Appeal

[g] Pending Successful Review by Writ of Trial Court's Summary Adjudication of Issues

[h] Unsuccessful Writ Proceeding to Overturn Denial of Summary Judgment Motion

[i] Time Needed for Consolidation

[j] Pending Assignment of New Judge Following Successful Peremptory Challenge

[k] Time Between Death of Claimant and Appointment of Personal Representative

[l] Illness of Plaintiff's Counsel

[m] Period of Excuse Excluded Regardless of Time Remaining

[4] Additional Authorities

[a] Failure to Comply Excused by Impracticability or Futility

[b] Appeal of Separate Action

[c] Pending Assignment of New Judge Following Successful Peremptory Challenge

[d] Period of Excuse Excluded Regardless of Time Remaining

§ 90.93 Opposing Motion for Mandatory Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.310, 583.320, 583.360]--Defendant Is Estopped From Requesting Dismissal [Code Civ. Proc. § 583.140]

[1] FORM

[2] Comments

[a] Use of Form

[b] Effect of Authority Decided Under Former Dismissal Statutes

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Estoppel

[b] Dismissal for Not Commencing Trial Estopped by Request for Extension

[c] Dismissal for Not Commencing Trial Estopped by Defendant's Willingness to Go to Trial

[4] Additional Authorities

[a] Estoppel

§ 90.94 Opposing Motion for Mandatory Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.310, 583.320, 583.360]--Court Is Estopped to Dismiss Action for Failure to Bring It to Trial Within Five Years [Code Civ. Proc. § 583.140]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Estoppel Applies to Motion to Dismiss

[b] Assertion of Estoppel Against Government

[c] Applicable Principle

§ 90.95 Opposing Motion for Mandatory Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.310, 583.320, 583.360]--No Failure to Bring Action to New Trial After Mistrial When No Order Declaring Mistrial Was Entered [Code Civ. Proc. § 583.320(a)(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Effect of Authority Decided Under Former Dismissal Statutes

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Order Declaring Mistrial Required

§ 90.96 Opposing Motion for Mandatory Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.310, 583.320, 583.360]--Action Submitted to Judicial Arbitration [Code Civ. Proc. § 1141.10 et seq.]--Time for Bringing Action to Trial Is Extended Under Code Civ. Proc. § 1141.17(b)

[1] FORM

[2] Comments

[a] Use of Form

[b] Actions Submitted to Civil Action Mediation

[c] Computation of Time Remaining to Bring Action to Trial

[d] Reasonable Diligence

[e] Effect of Authority Decided Under Former Dismissal Statutes

[f] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Exclusion Under Code Civ. Proc. § 1141.17

[b] Reasonable Diligence Is Not Required Under Code Civ. Proc. § 1141.17

§ 90.97 Opposing Motion for Mandatory Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.310, 583.320, 583.360]--Action Submitted to Judicial Arbitration [Code Civ. Proc. § 1141.10 et seq.]--Post-Arbitration Tolling Under Code Civ. Proc. § 1141.20

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Calendaring Case After Judicial Arbitration to Avoid Penalizing Plaintiff

[b] Duty of Court to Calendar Case After Arbitration

[c] Post-Arbitration Tolling of Five-Year Period to Bring Case to Trial

§ 90.98 Opposing Motion for Discretionary Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.410, 583.420(a)(2), (3); Cal. Rules of Ct., Rule 3.1342]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Absence of Actual Prejudice Not Determinative

[c] Effect of Authority Decided Under Former Dismissal Statutes

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Statutory Grounds for Discretionary Dismissal

[b] Discretion Not Arbitrary

[c] Any Basis for Good Cause Is Sufficient

[d] Plaintiff's Lack of Showing of Good Cause Not Controlling

[e] Factors Relevant to Ruling on Motion

[f] Counsel's Workload Is Sufficient Excuse

[4] Additional Authorities

[a] Discretion Not Arbitrary

[b] Any Basis for Good Cause Is Sufficient

[c] Counsel's Workload Is Sufficient Excuse

§ 90.99 Supplemental Memorandum [Cal. Rules of Ct., Rule 3.1342(c)] Supporting Motion for Mandatory Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.310, 583.320, 583.360]--Exclusion Based on Impossibility Does Not Apply [Code Civ. Proc. § 583.340(c)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Effect of Authority Decided Under Former Dismissal Statutes

[c] Related Pleading and Practice Forms

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Normal Delays in Court Proceedings Are No Basis for Impossibility Exception

[b] Illness of Plaintiff's Counsel Is No Basis for Impossibility Exception When Failure to Bring to Trial Did Not Result From Illness

[c] Plaintiff's Illness Is No Basis for Impossibility Exeption

[d] Plaintiff's Bankruptcy Is No Basis for Impossibility Exception

[e] Death of Coplaintiff Is No Basis for Impossibility Exception

[f] Plaintiff's Lack of Representation by Guardian Ad Litem Is No Basis for Impossibility Exception

[g] Plaintiff's Inadvertence in Selecting Trial Date Is No Basis for Impossibility Exception.

[h] Impossibility Exception Is Inapplicable When Setting of Trial Date Beyond Five-Year Period Resulted From Plaintiff's Failure to Advise Trial Court of Chronology of Case or to Move to Set Case Specially for Trial

[i] Impossibility Exception Not Applicable Absent Showing by Plaintiff of Due Diligence

[4] Additional Authorities

[a] Normal Delays in Court Proceedings Are No Basis for Impossibility Exception

[b] Plaintiff's Illness Is No Basis for Impossibility Exception

[c] Plaintiff's Inadvertence in Selecting Trial Date Is No Basis for Impossibility Exception

[d] Impossibility Exception Not Applicable Absent Showing by Plaintiff of Due Diligence

§ 90.100 Supplemental Memorandum [Cal. Rules of Ct., Rule 3.1342(c)] Supporting Motion for Mandatory Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.310, 583.320, 583.360]--Exclusion Based on Impracticability or Futility Does Not Apply [Code Civ. Proc. § 583.340(c)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Effect of Authority Decided Under Former Dismissal Statutes

[c] Related Pleading and Practice Forms

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Normal Delays in Court Proceedings Are No Basis for Impracticability or Futility Exception

[b] Plaintiff's Illness Is No Basis for Impracticability or Futility Exception

[c] Pending Appeal of Related Action Is No Basis for Impracticability or Futility Exception

[d] Separate Action by Plaintiff Is No Basis for Impracticability or Futility Exception

[e] Plaintiff's Inadvertence in Selecting Trial Date Is Not Basis for Impracticability Exception

[f] Failure to Advise Trial Court of Chronology of Case or to Move to Set Case Specially for Trial

[g] Plaintiff's Alleged Inability to Fulfill Requirements for Certificate of Merit Is No Basis for Impracticability Exception

[h] Impracticability and Futility Exception Not Applicable Absent Showing by Plaintiff of Due Diligence

[i] Impracticability or Futility Exception Not Available if Time Remains

[4] Additional Authorities

[a] Separate Action by Plaintiff Is No Basis for Impracticability or Futility Exception

[b] Plaintiff's Inadvertence in Selecting Trial Date Is No Basis for Impracticability Exception

[c] Impracticability and Futility Exception Not Applicable Absent Showing by Plaintiff of Due Diligence

§ 90.101 Supplemental Memorandum [Cal. Rules of Ct., Rule 3.1342(c)] Supporting Motion for Mandatory Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.310, 583.320, 583.360]--Delay Based on Factual Error by Plaintiff's Counsel Is Not Excused

[1] FORM

[2] Comments

[a] Use of Form

[b] Effect of Authority Decided Under Former Dismissal Statutes

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Factual Error by Counsel No Excuse

[4] Additional Authorities

[a] Factual Error by Counsel No Excuse

§ 90.102 Supplemental Memorandum [Cal. Rules of Ct., Rule 3.1342(c)] Supporting Motion for Mandatory Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.310, 583.320, 583.360]--Principles

of Waiver and Estoppel Do Not Apply [Code Civ. Proc. § 583.140]--No Estoppel When Sufficient Time Remains to Bring Action to Trial

[1] FORM

[2] Comments

[a] Use of Form

[b] Effect of Authority Decided Under Former Dismissal Statutes

[c] Related Pleading and Practice Forms

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Estoppel Not Available if Time for Bringing Action to Trial Remains

§ 90.103 Supplemental Memorandum [Cal. Rules of Ct., Rule 3.1342(c)] Supporting Motion for Mandatory Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.310, 583.320, 583.360]--Principles of Waiver and Estoppel Do Not Apply [Code Civ. Proc. § 583.140]--No Waiver Based on Open Extension to File Responsive Pleading When Sufficient Time Remains to Bring Action to Trial

[1] FORM

[2] Comments

[a] Use of Form

[b] Effect of Authority Decided Under Former Dismissal Statutes

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Time Limit Not Waived if Time for Bringing Action to Trial Remains After Defendant Has Filed Pleading

§ 90.104 Supplemental Memorandum [Cal. Rules of Ct., Rule 3.1342(c)] Supporting Motion for Mandatory Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.310, 583.320, 583.360]--Principles of Waiver and Estoppel Do Not Apply [Code Civ. Proc. § 583.140]--No Estoppel or Waiver Based on Defendant's Failure to Attend Trial Setting Conference or to Notify Plaintiff of Continued Trial Date

[1] FORM

[2] Comments

[a] Use of Form

[b] Effect of Authority Decided Under Former Dismissal Statutes

[c] Related Pleading and Practice Forms

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Defendant's Failure to Attend Trial Setting Conference Does Not Constitute Waiver or Estoppel

[b] Defendant's Failure to Notify Plaintiff of Continued Trial Date or to Appear at Continued Trial Does Not Constitute Waiver or Estoppel

§ 90.105 Supplemental Memorandum [Cal. Rules of Ct., Rule 3.1342(c)] Supporting Motion for Mandatory Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.310, 583.320, 583.360]--Action Submitted to Judicial Arbitration [Code Civ. Proc. §§ 1141.10-1141.31]--No Extension of Time Under Code Civ. Proc. § 1141.20(b) Absent Showing of Reasonable Diligence

[1] FORM

[2] Comments

[a] Use of Form

[b] Effect of Authority Decided Under Former Dismissal Statutes

[c] Exclusion Under Moran

[i] Statement of Rule

[ii] Diligence Requirement

[iii] Former Split Among Courts of Appeal

[d] Exclusion Under Code Civ. Proc. § 1141.17

[e] Related Pleading and Practice Forms

[f] Opposing Memoranda

[3] Discussion of Authorities

[a] Reasonable Diligence Is Required Under Moran

[4] Additional Authorities

[a] Reasonable Diligence Is Required Under Moran

§ 90.106 Reply Memorandum Supporting Motion for Discretionary Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. § 583.410]--No Waiver or Estoppel Based on Open Extension to File Responsive Pleading When Extension Was for Plaintiff's Benefit

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Open Extension for Plaintiff's Benefit Does Not Act as Estoppel or Waiver of Dismissal

[4] Additional Authorities

[a] Open Extension for Plaintiff's Benefit Does Not Act as Estoppel or Waiver of Dismissal

§§ 90.107-90.119 [Reserved]

§ 90.120 Supporting Motion for Nonstatutory Dismissal for Delay in Prosecution

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Inherent Power to Dismiss

[b] Power Applicable if Statute Absent

[c] Power Applicable if Statutory Period Unexpired

[4] Additional Authorities

[a] Power Applicable if Statute Absent

§ 90.121 Supporting Motion for Dismissal for Failure to Amend Complaint After Successful Demurrer or Motion to Strike [Code Civ. Proc. § 581(f)(2), (4)]--Dismissal Required

[1] FORM

[2] Comments

[a] Use of Form

[b] Motion to Strike Untimely Amended Pleading Required

[c] Ex Parte Motion

[d] Related Pleading and Practice Forms

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Statutory Requirements

[b] Dismissal Required

[4] Additional Authorities

[a] Dismissal Required

§ 90.122 Supporting Motion for Dismissal for Failure to Prosecute Special Proceeding--Dismissal Statutes Apply [Code Civ. Proc. § 583.120]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Administrative Mandate

§ 90.123 Opposing Motion for Dismissal Based on Court's Inherent Powers Inherent Power to Dismiss Unavailable

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Inherent Power to Dismiss Unavailable

§ 90.124 Opposing Motion for Nonstatutory Dismissal for Delay in Prosecution--Inherent Power to Dismiss

Unavailable

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Inherent Power to Dismiss Unavailable

§ 90.124A Opposing Motion for Nonstatutory Dismissal for Failure to Appeal Telephonically

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Plaintiff Did Not Wilfully Fail to Appear Telephonically at Proceedings in the Case.

§ 90.125 Opposing Motion for Dismissal for Failure to Amend Complaint After Successful Demurrer or Motion to Strike [Code Civ. Proc. § 581(f)(2), (4)]--Amendment Filed Before Motion for Dismissal

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Amendment Filed Before Defendant's Motion

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§ 90.126 Supporting Motion to Set Aside and Vacate Judgment of Dismissal--Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. § 473(b)]

[1] FORM

[2] Comments

[a] Use of Form

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[a] Vacating Judgment of Dismissal Proper

[b] When Motion to Set Aside and Vacate Made

[c] Counsel's Neglect

§ 90.127 Opposing Motion to Set Aside and Vacate Judgment of Dismissal--Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. § 473(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

[3] Discussion of Authorities

[a] Relief Under Code Civ. Proc. § 473 Available Only From Failure to Oppose Dismissal Motion

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§ 90.01 Scope of Chapter

This chapter contains memoranda supporting [*see §§ 90.30, 90.31*] and opposing [*see §§ 90.32 -90.34*] motions for voluntary dismissal of a civil action before and during trial.

This chapter also includes memoranda relating to involuntary dismissal. It includes memoranda supporting [*see §§ 90.50, 90.61 -90.64*] and opposing [*see §§ 90.52 -90.59*] a motion for mandatory dismissal for failure to serve the summons and complaint and file proof of service of summons. It also includes memoranda supporting [*see §§ 90.51, 90.65*] and opposing [*see § 90.60*] a motion for discretionary dismissal on the same ground.

This chapter also includes memoranda supporting [*see §§ 90.80 -90.82, 90.99 -90.106*] and opposing [*see §§ 90.86 -90.97*] a motion for mandatory dismissal for failure to bring an action to trial or a new trial. It also includes memoranda supporting [*see §§ 90.83 -90.85*] and opposing [*see § 90.98*] a motion for discretionary dismissal on the same ground.

This chapter also includes memoranda supporting [*see § 90.120*] and opposing [*see § 90.124*] a nonstatutory motion for involuntary dismissal. It also includes memoranda supporting [*see § 90.121*] and opposing [*see § 90.125*] a motion for dismissal for failure to amend a complaint after a demurrer is sustained, supporting a motion to vacate a judgment of dismissal [*see § 90.126*], and supporting a motion to dismiss a special proceeding [*see § 90.122*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 90.02 Governing Statutes

The principal statutes governing voluntary dismissal of actions are *Code Civ. Proc. §§ 581* and *581d*.

The principal court rules governing voluntary dismissal of actions are Cal. Rules of Ct., Rules 3.770 (class actions) and *3.1390* (notice of entry of dismissal).

The principal statutes governing involuntary dismissal of actions are *Code Civ. Proc. §§ 583.110-583.430*, which pertain to mandatory and discretionary dismissal for delay in prosecution. Court rules governing involuntary dismissal for delay in prosecution are *Cal. Rules of Ct., Rules 3.1340, and 3.1342*.

Dismissals under *Code Civ. Proc. §§ 583.110-583.430* are also governed by *Code Civ. Proc. § 581(b)(4)* and *(g)* and, in cases that have been submitted to judicial arbitration, by *Code Civ. Proc. §§ 1141.17* and *1141.20(b)*. Dismissals under *Code Civ. Proc. § 583.110 et seq.* are also governed by *Code Civ. Proc. § 418.10* when made within the defendant's time to respond to a pleading.

Other statutes relating to involuntary dismissal on other grounds include *Code Civ. Proc. §§ 399* (failure to pay costs on transfer of action), 410.30, 418.10 (inconvenient forum), 581(b)(3), (5), (*l*) (nonappearance of party at trial), and 581(f) (following order sustaining demurrer).

The entry of court-ordered dismissals are governed by *Code Civ. Proc. § 581d* and *Cal. Rules of Ct., Rule 3.1390*.

In the absence of statutory authority, a court also has inherent power to dismiss an action for lack of diligent prosecution [*see, e.g., Overaa v. Keeney (1915) 169 Cal. 628, 630-631, 147 P. 466]* . *Code Civ. Proc. § 581* expressly provides that its provisions are not to be deemed to be an exclusive enumeration of the court's power to dismiss an action or complaint as to a defendant [*Code Civ. Proc. § 581(m)*].

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§ 90.03 Right to Voluntary Dismissal

A plaintiff may voluntarily dismiss an action without prejudice at any time before the actual commencement of trial if affirmative relief has not been sought by cross complaint and if no motion is pending for an order transferring the action to another court under *Code Civ. Proc. § 396b* [*see Code Civ. Proc. § 581(a)*; *Wells v. Marina City Properties, Inc. (1981) 29 Cal. 3d 781, 784, 176 Cal. Rptr. 104, 632 P.2d 217]* . Voluntary dismissal without prejudice may also be obtained at any time before a decision is rendered if the opposing party consents in writing to it, or if a showing of just cause is made [*see Code Civ. Proc. § 581(b), (e)*]. In addition, a plaintiff may voluntarily dismiss an action with prejudice at any time before a decision is rendered by the court, but any such dismissal with prejudice does not dismiss a cross complaint filed in the action [*Code Civ. Proc. § 581(e)*]. Furthermore, a plaintiff may, in effect, voluntarily cause the court to dismiss the action by deliberately abandoning it after trial has commenced and before final submission of the case [*Code Civ. Proc. § 581(d)*; *see §§ 90.31, 90.33*].

A plaintiff may not voluntarily dismiss an action without prejudice pursuant to *Code Civ. Proc. § 581(b)(1)* if a demurrer to the complaint has been sustained without leave to amend, or if a demurrer has been sustained with leave to amend and plaintiff has failed to amend within the time allowed [*Wells v. Marina City Properties, Inc. (1981) 29 Cal. 3d 781, 789, 176 Cal. Rptr. 104, 632 P.2d 217* (demurrer sustained with leave to amend and plaintiff failed to amend); *Goldtree v. Spreckels (1902) 135 Cal. 666, 668-673, 67 P. 1091* (demurrer sustained without leave to amend); *Bell v. Hummel (1982) 136 Cal. App. 3d 1009, 1015, 186 Cal. Rptr. 688* (demurrer sustained without leave to amend)]. Plaintiff may voluntarily dismiss an action without prejudice if the dismissal is filed within thetime period the court has allowed for an amendment to a complaint following the sustaining of a demurrer [*Parsons v. Umansky (1994) 28 Cal. App. 4th 867, 870-872, 34 Cal. Rptr. 2d 144]* . Also, if leave to amend is granted, plaintiff may amend the complaint and then voluntarily dismiss the amended complaint without prejudice [*Christensen v. Dewor Developments (1983) 33 Cal. 3d 778, 785, 191 Cal. Rptr. 8, 661 P.2d 1088]* .

A plaintiff who attempts to dismiss the complaint after a motion for summary judgment has been filed and the time for opposition has passed is subject to the trial court's continuing jurisdiction to hear and rule on the pending motion. A plaintiff may not frustrate the summary judgment statute by interposing a voluntary dismissal without prejudice in lieu of opposition to a defendant's motion [*Cravens v. State Bd. of Equalization (1997) 52 Cal. App. 4th 253, 255, 60 Cal. Rptr. 2d 436]* . Thus, a trial court has the power to grant an unopposed defense motion for summary judgment when the

defendants' moving papers have met their burden of negating the plaintiff's claims, entitling them to judgment as a matter of law if no issues of disputed fact are raised, and plaintiff, rather than filing opposition papers within the requisite time, files a request for dismissal without prejudice one day before the scheduled hearing date [*Cravens v. State Bd. of Equalization (1997) 52 Cal. App. 4th 253, 255, 257, 60 Cal. Rptr. 2d 436]* .

Moreover, a plaintiff may not voluntarily dismiss an action without prejudice after an adverse tentative summary judgment ruling has been announced and a hearing has commenced which is thereafter continued for the express and exclusive purpose of permitting the plaintiff the opportunity to present opposition evidence that plaintiff claims was previously unavailable [*Mary Morgan, Inc. v. Melzark (1996) 49 Cal. App. 4th 765, 767, 57 Cal. Rptr. 2d 4]* . Furthermore, a summary judgment order bars voluntary dismissal [*Sweat v. Hollister (1995) 37 Cal. App. 4th 603, 614-615, 43 Cal. Rptr. 2d 399* ; *see Mary Morgan, Inc. v. Melzark (1996) 49 Cal. App. 4th 765, 769, 57 Cal. Rptr. 2d 4]* .

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§ 90.04 Use of Memoranda

Generally, points and authorities are not required for dismissal without prejudice before trial commences [*Code Civ. Proc. § 581(b)(1)*], dismissal by consent [*Code Civ. Proc. § 581(b)(2), (e)*], or dismissal with prejudice pursuant to *Code Civ. Proc. § 581(e)*, because instead of a motion to dismiss, use of the Judicial Council Request for Dismissal form [*see Cal. Rules of Ct., Rule 1.31* and Appendix A] is mandatory. Furthermore, except for narrow limitations, voluntary dismissal before trial is a matter of right and may be exercised by the plaintiff without the knowledge of the other parties or the consent of the court [*Roski v. Superior Court (1971) 17 Cal. App. 3d 841, 845, 95 Cal. Rptr. 312]* .

A notice of motion with points and authorities is not strictly required for dismissals on the grounds of nonappearance or abandonment at trial under *Code Civ. Proc. § 581(d), (l)* [*see also Code Civ. Proc. § 594(a)* (dismissal in absence of adverse party)]. Some cases have held that dismissal on these grounds is not invalidated by lack of notice to the plaintiff, because the court must dismiss the action if factors necessitating dismissal are brought to the court's attention [*see, e.g., Dumm v. Pacific Valves (1956) 146 Cal. App. 2d 792, 795-796, 304 P.2d 738* (notice of motion to dismiss under former Code Civ. Proc. § 581(3) after successful demurrer and plaintiff's failure to amend not required); *see also Code Civ. Proc. § 594(a)* (permitting dismissal at trial in absence of opposing party after proof of notice of trial submitted)].

Nevertheless, the right to voluntarily dismiss is sometimes contested [*see, e.g., Herbert Hawkins Realtors, Inc. v. Milheiser (1983) 140 Cal. App. 3d 334, 337-340, 189 Cal. Rptr. 450* (dismissal request after arbitration)], and even when not required, notice of the motion accompanied by points and authorities is strongly advised [*see Consolidated Constr. Co. v. Pacific E. Ry. Co. (1920) 184 Cal. 244, 246, 193 P. 238* (cautioning against dismissal without notice when determination of motion required consideration of extrajudicial matters)].

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§ 90.05 Statutory Dismissal for Delay in Prosecution

[1] Failure to Effect Service

The court or any person interested in the action, whether named as a party or not, may move for mandatory dismissal pursuant to *Code Civ. Proc. § 583.250* for failure to effect service of summons and complaint within three years after the action is commenced against the defendant [*see Code Civ. Proc. §§ 583.210(a), 583.250(a)(2)*]. However, *Code Civ. Proc. § 583.210(b)* provides an additional 60 days within which proof of service of summons must be filed with the court. 2005 amendments to *Code Civ. Proc. § 583.210* eliminated the requirement that the original summons be returned to the court; instead, the court retains the original summons, issues copies, and the plaintiff files a proof of service of summons [2005 Stats. 300].

The defendant or the court may move for discretionary dismissal for failure to effect service prior to trial pursuant to *Code Civ. Proc. § 583.410* if service is not made within two years after the action is commenced against the defendant [*Code Civ. Proc. § 583.420(a)(1)*].

Exceptions to these time periods are contained in *Code Civ. Proc. §§ 583.220-583.240* and apply to both mandatory and discretionary dismissals [*Code Civ. Proc. §§ 583.250(b)* (mandatory), 583.420(b) (discretionary)].

The statutory provisions tolling the running of the statute of limitations do not toll the time within which service must be made once an action is commenced. The purpose of the statute of limitations is distinct and apart from that of the time limitations in *Code Civ. Proc. § 583.210* [*Tzolov v. International Jet Leasing, Inc.(1989) 214 Cal. App. 3d 325, 327, 262 Cal. Rptr. 606]* .

Points and authorities in support of a motion to dismiss for failure to effect service are *set out in §§ 90.50, 90.61 -90.64* (mandatory), and 90.51, 90.65 (discretionary). Points and authorities in opposition to such motions are *set out in §§ 90.52 -90.59* (mandatory) and 90.60 (discretionary).

[2] Failure to Bring Action to Trial

[a] In General

The defendant or the court may move pursuant to *Code Civ. Proc. § 583.360* for mandatory dismissal of an action that is not brought to trial within five years after it is commenced against the defendant [*Code Civ. Proc. § 583.310*; *see Gray v. Firthe (1987) 194 Cal. App. 3d 202, 209, 239 Cal. Rptr. 389* (action is commenced against defendant named in original complaint, either expressly or by fictitious name, on date complaint is filed, but action is commenced in regard to defendant subsequently added to action on date of order adding him or her as party, or on date pleading naming him or her as new party is filed)].

The court has the discretion, however, to dismiss the action pursuant to *Code Civ. Proc. § 583.410* if it is not brought to trial within three years after the action is commenced against the defendant [*Code Civ. Proc. § 583.420(a)(2)(A)*], or, pursuant to a rule adopted by Judicial Council effective January 1, 1990, if it is not brought to trial or conditionally settled within two years after the action is commenced [*Cal. Rules of Ct., Rule 3.1340*; *see Code Civ. Proc. § 583.420(a)(2)(B)* (authorizing adoption of rule)].

Following the grant of a new trial the action is subject to mandatory dismissal if it is not brought again to trial within three years after any of the following: (1) the order of the court declaring a mistrial or disagreement of a jury is entered, if a trial is commenced but no judgment is entered because of a mistrial or inability of a jury to reach a decision; (2) the order granting a new trial is entered, if after a judgment a new trial is granted and no appeal is taken; or (3) the remittitur is filed by the clerk of the trial court, if on appeal an order granting a new trial is affirmed or judgment reversed and the action is remanded for a new trial [*Code Civ. Proc. § 583.320*]. However, the court has the discretion to dismiss the action if it is not brought to a new trial within two years after the occurrence of each of the foregoing events [*Code Civ. Proc. § 583.420(a)(3)*].

Exceptions to these time periods for bringing an action to an original or new trial are contained in *Code Civ. Proc. §§ 583.330-583.350* and apply to both mandatory and discretionary dismissals [*Code Civ. Proc. §§ 583.360(b)* (mandatory), 583.420(b) (discretionary)].

Certain proceedings are completely excluded from the dismissal requirements of *Code Civ. Proc. §§ 583.310-583.430*. Specifically, a court may not dismiss a dissolution or legal separation proceeding for delay in prosecution if an order for child or spousal support has been issued in the proceeding and is still in force or, in the case of dissolution, if a separate trial on the status of the marriage has been conducted [*see Code Civ. Proc. § 583.161*].

Points and authorities in support of a motion to dismiss for failure to bring an action to trial are *set out in §§ 90.80, 90.81, 90.99 -90.105* (mandatory), and § 490.83 (discretionary). Points and authorities in opposition to such motions are *set out in §§ 90.86 -90.96* (mandatory) and § 90.98 (discretionary).

[b] Dismissal on Motion Seeking to Avoid Mandatory Dismissal

Whenever a plaintiff makes any motion seeking to avoid mandatory dismissal for failure to bring the action to trial within five years, the trial court, before entering any order on the merits of the motion, should consider the factors relevant to a motion to dismiss under the discretionary dismissal provisions of *Code Civ. Proc. §§ 583.410-583.430* [*see Sisler v. Superior Court (1988) 205 Cal. App. 3d 864, 868, 252 Cal. Rptr. 665]* . This rule applies, for example, when a plaintiff seeks to avoid mandatory dismissal by making a motion to refer the case to judicial arbitration [*Sisler v. Superior Court (1988) 205 Cal. App. 3d 864, 868, 252 Cal. Rptr. 665* (holding trial court erred in granting plaintiff's motion to refer matter to arbitration when order was entered on last day of five-year period and trial court based its ruling solely on imminent expiration of that period)]. Most frequently, however, the rule is applied when a plaintiff makes a motion to set his or her case specially for trial in order to avoid mandatory dismissal [*see, e.g., Salas v. Sears, Roebuck & Co. (1986) 42 Cal. 3d 342, 349, 228 Cal. Rptr. 504, 721 P.2d 590* ; *Parlen v. Golden State Sanwa Bank (1987) 194 Cal. App. 3d 906, 912, 240 Cal. Rptr. 73]* . For memoranda supporting and opposing a motion to specially set a case for trial in order to avoid mandatory dismissal, see Ch. 180, *Pretrial Proceedings* .

[c] Dismissal of Contractual Arbitration Proceeding

Courts have held that the statutes governing mandatory dismissal for failure to bring an action to trial apply indirectly in determining whether a contractual arbitration proceeding should be dismissed for failure to prosecute the proceeding diligently [*see Byerly v. Sale (1988) 204 Cal. App. 3d 1312, 1315, 251 Cal. Rptr. 749* ; *Kuzmanoff v. Kron (1988) 207 Cal. App. 3d Supp. 1, 3 , 255 Cal. Rptr. 168]* . For memoranda relating to dismissal for delay in prosecuting a contractual arbitration proceeding, see Ch. 20, *Arbitration: Compelling* .

[d] Dismissal of Action Submitted to Judicial Arbitration

With two exceptions, submission of an action to judicial arbitration under *Code Civ. Proc. §§ 1141.10-1141.31* does not suspend the running of the time periods specified in *Code Civ. Proc. §§ 583.110-583.430* [*see Code Civ. Proc.§ 1141.17(a)*; *see also § 90.84*]. The first exception is set out under *Code Civ. Proc. § 1141.17(a)*, while the second is recognized by case law construing *Code Civ. Proc. § 1141.20(b)* [*see Moran v. Superior Court (1983) 35 Cal. 3d 229, 240-242, 197 Cal. Rptr. 546, 673 P.2d 216]* . Memoranda of points and authorities relating to these exceptions are *set out in §§ 90.96* and *90.105*.

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§ 90.06 Nonstatutory Dismissal

A trial court has the inherent power, limited only by its sound discretion, to control its own calendar, without the aid of legislation, by dismissing an action if delay in prosecution is inexcusable. Discretionary dismissal is available if the situation is not governed by a dismissal statute [*see Overaa v. Keeney (1915) 169 Cal. 628, 630-631, 147 P. 466* ; *Blue Chip Enterprises, Inc. v. Brentwood Sav. & Loan Assn. (1977) 71 Cal. App. 3d 706, 712-713, 139 Cal. Rptr. 651* ; *see also Code Civ. Proc. § 581(m)* (Section 581 grounds for dismissal not to be deemed to be an exclusive enumeration of court's power to dismiss); Pearlson v. Does 1 to 646 *(1999) 76 Cal. App. 4th 1005, 1010-1012, 90 Cal. Rptr. 2d 787* (inherent discretionary power to dismiss action when complaint shown to be fictitious or sham such that plaintiff has no valid cause of action)]. Points and authorities in support of a nonstatutory dismissal motion are *set out in § 90.120*; points and authorities in opposition to such a motion are *set out in § 90.124*.

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§ 90.07 Dismissal Following Successful Demurrer

Points and authorities in support of dismissal on the ground of failure to amend a complaint after a successful demurrer or motion to strike [*see Code Civ. Proc. § 581(f)(2), (4)*] are *set out in § 90.121*; opposing points and authorities are *set out in § 90.125*.

Legal Topics:

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§ 90.08 Dismissal for Inconvenient Forum

For memoranda in support of dismissal on the ground of inconvenient forum under *Code Civ. Proc. §§ 410.30, 418.10,* see *Ch. 132, Jurisdiction: Personal Jurisdiction and Inconvenient Forum, § 132.130* et seq.

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§ 90.09 Types of Dismissals

Dismissal of an action is a termination of the court's consideration of the case prior to completion of a full trial of the issues [*Schisler v. Mitchell (1959) 174 Cal. App. 2d 27, 29, 344 P.2d 61* ; *Guardianship of Lyle (1946) 77 Cal. App. 2d 153, 156, 174 P.2d 906]* . A dismissal that is not rendered on the merits does not operate as a bar to the filing of a subsequent action based on the same facts [*Stephan v. American Home Builders (1971) 21 Cal. App. 3d 402, 406, 98 Cal. Rptr. 354]* and is said to be without prejudice [*see Kinley v. Alexander (1955) 137 Cal. App. 2d 382, 387, 290 P.2d 287]* .

If the dismissal is with prejudice, it is a final judgment on the merits and bars a subsequent action on the same cause [*Gagnon Co., Inc. v. Nevada Desert Inn (1955) 45 Cal. 2d 448, 455, 289 P.2d 466* ; *Roybal v. University Ford (1989) 207 Cal. App. 3d 1080, 1085-1087, 255 Cal. Rptr. 469* (voluntary dismissal with prejudice of municipal court action held to bar identical action in superior court)]. A dismissal with prejudice is the modern name for a common-law retraxit. A retraxit has always been deemed a judgment on the merits against the plaintiff, estopping him or her from subsequently maintaining an action for the cause renounced [*Rice v. Crow (2000) 81 Cal. App. 4th 725, 733-736, 97 Cal. Rptr. 2d 110* ; *Torrey Pines Bank v. Superior Court (1989) 216 Cal. App. 3d 813, 820, 265 Cal. Rptr. 217]* . A dismissal that does not specify whether it was with or without prejudice should be deemed to be with prejudice absent a contrary contention by the plaintiff [*Tudor Ranches, Inc. v. State Comp. Ins. Fund (1998) 65 Cal. App. 4th 1422, 1429, 77 Cal. Rptr. 2d 574]* .

Dismissals, with or without prejudice, may be voluntary, by the party filing the action [*see Code Civ. Proc. § 581(b), (c), (e)*; *see also Code Civ. Proc. § 581(d)* (abandonment, treated as voluntary in this chapter if plaintiff's inaction deliberate)], or involuntary, by the court [*see Code Civ. Proc. §§ 581(b), (f), (g), (h), 583.110 et seq.*]. A voluntary dismissal with prejudice under *Code Civ. Proc. § 581* has the same effect as a common-law retraxit and bars any future action on the same subject matter. A dismissal with prejudice is determinative of the issues in the action and precludes the dismissing party from litigating those issues again [*Torrey Pines Bank v. Superior Court (1989) 216 Cal. App. 3d 813, 820, 265 Cal. Rptr. 217]* . Involuntary dismissals are either discretionary [*see, e.g., Code Civ. Proc. §§ 583.410-583.430*] or mandatory [*see Code Civ. Proc. §§ 583.250, 583.360*] in the sense that dismissal is required unless some statutory exception applies [*see Code Civ. Proc. §§ 583.250(b), 583.360(b)*].

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§ 90.10 Trial Court Delay Reduction Act

All California trial courts are required to implement delay reduction programs [*Gov. Code § 68605.5*].

In order to enforce the requirements of a delay reduction program, courts are expressly vested with power to impose sanctions. These sanctions may include orders striking pleadings or dismissing actions, if it appears that less severe sanctions would not be effective, after taking into account the effect of previous sanctions or previous lack of compliance in the case [*Gov. Code § 68608(b)*; *see also Code Civ. Proc. § 583.150* (authority of court to dismiss action pursuant to local rule)]. Accordingly, several counties have adopted rules authorizing dismissal as a sanction for any failure to comply with the rules [*see, e.g.,* Orange Co. Super. Ct. Rules, Rule 454; Sacramento Co. Super. Ct. Rules, Rule 11.12].

Gov. Code § 68616 restricts the extent to which local delay reduction rules may shorten time periods. Among other things, Section 68616 provides that unnamed (DOE) defendants must not be dismissed before the conclusion of the introduction of evidence at trial, except on stipulation or motion of the parties [*Gov. Code § 68616(h)*]. The section also bars courts from requiring service of a complaint less than 60 days after filing [*Gov. Code § 68616(a)*]. Local rules generally do require that the complaint be served and proof of service filed within 60 days after the complaint has been filed [*see, e.g.,* Alameda Co. Unified Super. Ct. Rules, Rule 4.2(2) (60 days); San Diego Co. Super. Ct. Rules, Div. II, Rule 5.6 (60 days)], but longer periods of time must be granted on a showing that service could not reasonably be achieved within the time required with the exercise of due diligence consistent with the amount in controversy [*Gov. Code § 68616(a)*].

Failure of the plaintiff to meet the local deadline for service of the complaint does not constitute grounds for mandatory or discretionary dismissal of the action for failure to effect service under *Code Civ. Proc. § 583.210* or *583.420*. However, failure to meet the local deadline may result in the imposition of sanctions [*see* Sacramento Co. Super. Ct. Rules, Rules 11.03(C), 11.12].

Given the importance of trial delay reduction rules, counsel in cases governed by the trial delay reduction programs should consult the rules to determine how they may affect dismissal.

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9-90 California Points & Authorities § 90.11

§ 90.11 Page Limits on Memoranda

Generally, a memorandum must not exceed 15 pages, or, in the case of a motion for summary judgment or summary adjudication, 20 pages. A reply or closing memorandum may not exceed 10 pages [*see Cal. Rules of Ct., Rule 3.1113(d)*]. Any party desiring to file a longer memorandum must obtain leave of court [*see Cal. Rules of Ct., Rule 3.1113(d)*]. For further discussion of the page limitations under *Cal. Rules of Ct., Rule 3.1113*, and of other basic format requirements of memoranda, see *Ch. 1, Writing Legal Memoranda and Briefs, § 1.05*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentSupporting MaterialsMemoranda of Law

California Points & Authorities

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9-90 California Points & Authorities § 90.12

§ 90.12 When Memoranda Are Required

A memorandum must be served and filed with motions requiring notice to parties, except motions for a new trial [*Cal. Rules of Ct., Rule 3.1113(a)*]. Notice of a motion for dismissal is expressly required by certain statutes. A motion for mandatory dismissal for delay in bringing an action to trial or a new trial [*see Code Civ. Proc. §§ 583.310-583.360*] requires notice to the parties [*Code Civ. Proc. § 583.360(a)*; *see Code Civ. Proc. §§ 1005, 1005.5*]. Similarly, notice is required for a dismissal motion under *Code Civ. Proc. §§ 583.210-583.250* for failure to make timely service of the summons and complaint, or return of the summons or other proof of service [*Code Civ. Proc. § 583.250(a)(2)*]. A 45-day notice requirement applies to discretionary dismissals under *Code Civ. Proc. §§ 583.410-583.430* [*Cal. Rules of Ct., Rule 3.1113(a)*]. In addition, points and authorities are expressly required to support motions for discretionary dismissal [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. § 583.410(b)*; *Maguire v. Collier (1975) 49 Cal. App. 3d 309, 314, 122 Cal. Rptr. 510]* .

Even when not required, however, notice of the motion accompanied by points and authorities is strongly advised [*see Consolidated Constr. Co. v. Pacific E. Ry. Co. (1920) 184 Cal. 244, 246, 193 P. 238* (cautioning against dismissal without notice if determination of motion requires consideration of extrajudicial matters)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeGeneral OverviewCivil ProceduresDismissalsGeneral Overview

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§ 90.13 Related Pleadings and Practice Chapters

For discussion, a procedural guide, and forms relating to dismissal generally, see Ch. 212, *Dismissal* in California Forms of Pleading and Practice. Additional discussion and forms relating to motions for dismissal may be found in the following chapters in that publication:

- Ch. 3, *Abatement of Actions.*
- Ch. 12A, *Adoptions: Termination of Parental Rights.*
- Ch. 12B, *Adoptions: Unmarried Minors.*
- Ch. 12E, *Adoptions: Attack on Decree.*
- Ch. 48, *Appeal: Abandonment, Dismissal, and Stipulated Reversal.*
- Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration.*
- Ch. 36, *Judicial Arbitration.*
- Ch. 37, *Judicially Mandated Civil Action Mediation.*
- Ch. 72, *Attorney Practice and Ethics.*
- Ch. 76, *Attorney Professional Liability.*
- Ch. 120, *Class Actions.*
- Ch. 160, *Corporations.*

- Ch. 174, *Costs and Attorney's Fees.*
- Ch. 192, *Discovery: Sanctions for Discovery Misuse.*
- Ch. 206, *Demurrers and Motions for Judgment on the Pleadings.*
- Ch. 220, *Dissolution of Marriage and Related Proceedings.*
- Ch. 247, *Eminent Domain.*
- Ch. 265, *Federal Courts: Jurisdiction and Removal.*
- Ch. 318, *Judgments.*
- Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances.*
- Ch. 324, *Jurisdiction: Subject Matter Jurisdiction*.
- Ch. 492, *Review (Certiorari), Writ of.*
- Ch. 520, *Settlement and Release.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedureDismissalsGeneral Overview

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§ 90.14 Related Memoranda Chapters

For memoranda relating to dismissal for delay in prosecuting a contractual arbitration proceeding, see Ch. 20, *Arbitration: Compelling* . For a memorandum relating to dismissal as a discovery sanction, see Ch. 82, *Discovery: Sanctions for Discovery Misuse* . For memoranda in support of dismissal on the ground of inconvenient forum, see *Ch. 132, Jurisdiction: Personal Jurisdiction and Inconvenient Forum, § 132.130 et seq.* For memoranda supporting and opposing a motion to set a case specially for trial in order to avoid mandatory dismissal, see Ch. 180, *Pretrial* .

For additional related memoranda concerning dismissal that may be useful in particular civil matters, see the following chapters:

- Ch. 24, *Attorneys at Law: Substitution, Withdrawal, Disqualification, and Authority to Appear*.
- Ch. 41, *Class and Representative Actions.*
- Ch. 56, *Corporations*.
- Ch. 95, *Eminent Domain.*
- Ch. 123, *Interpleader.*
- Ch. 133, *Jurisdiction: Subject Matter Jurisdiction*.
- Ch. 150, *Mandate and Prohibition.*
- Ch. 158, *Motions to Reconsider and Renewed Motions.*

For discussion of relief from judgments of dismissal, see Ch. 70, *Defaults, Default Judgments, and Relief from Judgments and Orders* .

For discussion of the use of memoranda generally and how to use the forms to draft complete memoranda or briefs, as well as an illustration of a completed memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

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

§§ 90.15[Reserved]

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A. Voluntary Dismissal

9-90 California Points & Authorities § 90.30

§ 90.30 Supporting Motion for Voluntary Dismissal by Plaintiff Before or During Trial [Code Civ. Proc. § 581]--General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION TO
vs.	)	DISMISS
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Trial Date: _____]

_____

THE COURT SHOULD GRANT PLAINTIFF'S MOTION TO DISMISS WITHOUT PREJUDICE BECAUSE _____ [TRIAL HAS NOT COMMENCED, NO AFFIRMATIVE RELIEF IS SOUGHT BY CROSS COMPLAINT, AND NO CODE OF CIVIL PROCEDURE SECTION 396b MOTION FOR TRANSFER IS PENDING *or* ALL AFFECTED PARTIES TO THE TRIAL CONSENT TO THE DISMISSAL WITHOUT PREJUDICE *or* GOOD CAUSE EXISTS WHY THE COURT SHOULD DISMISS WITHOUT PREJUDICE EVEN THOUGH TRIAL HAS COMMENCED].

[*EITHER, if dismissal before trial*]

Right to Voluntary Dismissal Without Prejudice Before Trial. A plaintiff may dismiss an action with or without prejudice at any time before the actual commencement of trial if affirmative relief has not been sought by cross complaint and no motion is pending for an order transferring the action to another court under *Section 396b of the Code of Civil Procedure* (*Code Civ. Proc. § 581(b)(1), (i)*; see *Lewis C. Nelson & Sons, Inc. v. Lynx Iron Corp. (2009) 174 Cal. App. 4th 67, 94 Cal. Rptr. 3d 468* ; *Franklin Capital Corp. v. Wilson (2007) 148 Cal. App. 4th 187, 219, 55 Cal. Rptr. 3d 424* ; *In re Mercantile Guaranty Co. (1968) 263 Cal. App. 2d 346, 350, 69 Cal. Rptr. 361* ; see also *Wells v. Marina City Properties, Inc. (1981) 29 Cal. 3d 781, 789-790, 176 Cal. Rptr. 104, 632 P.2d 217*).

[*OR, if dismissal without prejudice during trial*]

Right to Voluntary Dismissal Without Prejudice During Trial. A plaintiff may voluntarily dismiss an action without prejudice after the commencement of trial and before a decision is rendered by the court if all affected parties to the trial consent in writing, or by order of the court on a showing of just cause (*Code Civ. Proc. § 581(e)*; *see Code Civ. Proc. § 581(b)(2)*).

[*Add further points and authorities, as necessary, to expand the grounds for the motion or to anticipate objections of the opposing party (see, e.g., § 90.31).*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be used by plaintiff to support a motion for voluntary dismissal of an action. While voluntary dismissals are less frequently litigated than involuntary dismissals and are not usually the subject of a motion, the issue may arise, for example, if there is disagreement between the parties over the time of commencement of trial, or if a cross complaint was filed [*see Code Civ. Proc. § 581(a)(6)* (commencement of trial)].

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. For example, if defendant contends that dismissal before trial is precluded because a cross complaint has been filed, plaintiff should state the dates on which the dismissal was requested and entered of record in relation to the dates the cross complaint was served and filed.

[b] Related Pleading and Practice Forms

For discussion relating to, and a form requesting voluntary dismissal of, an action pursuant to Code Civ. Proc. § 581(i), see Ch. 212, *Dismissal* in California Forms of Pleading and Practice (Matthew Bender).

[c] Opposing Memoranda

The points and authorities *set out in § 90.32* may be used in an appropriate case to oppose a motion for dismissal supported by the foregoing memorandum.

[3] Discussion of Authorities

[a] Right to Voluntary Dismissal Without Prejudice Before Trial

In ***Lewis C. Nelson & Sons, Inc. v. Lynx Iron Corp.*** *(2009) 174 Cal. App. 4th 67, 94 Cal. Rptr. 3d 468* , plaintiff, the general contractor on a middle school project, filed suit against its structural steel subcontractor for breach of contract resulting in delay damages. Shortly after plaintiff filed its complaint, but before the complaint was served, a settlement meeting took place, and an agreement was reached whereby defendant released claims against plaintiff in exchange for payment of a certain amount, but plaintiff did not release any claims against defendant. Plaintiff thereafter served its complaint on defendant, and defendant filed a motion to enforce the settlement, arguing that the settlement agreement was intended as a global resolution. Plaintiff did not oppose the motion, but rather filed a request for voluntary dismissal of the action without prejudice, which was duly entered. Shortly thereafter, plaintiff filed the same lawsuit in a different court. Defendants again moved to enforce the settlement, but the court denied the motion on the basis that the prior court had jurisdiction. Defendants then returned to the original court and filed a motion to vacate plaintiff's voluntary dismissal on the ground that their motion to enforce settlement was a dispositive motion. The trial court granted the motion to vacate, stating that the dismissal was a tactical maneuver and that the defendants were likely to have prevailed on their motion to enforce settlement. Thereafter, the trial court granted defendants' new motion to enforce settlement and dismissed the action with prejudice. Plaintiff appealed.

The court of appeals reversed. *Code Civ. Proc. § 581* allows a plaintiff to voluntarily dismiss an action at any time before the actual commencement of trial. The California Supreme Court has stated that this right is absolute. However, commencement of trial includes pretrial proceedings that effectively dispose of the case, such as a general demurrer sustained without leave to amend. In this case, when plaintiff voluntarily dismissed its action, there had not yet been a ruling or other indication as to how the court would rule on the motion to enforce settlement, and therefore a final disposition of the case in defendant's favor was not a foregone conclusion. There had therefore been no "commencement of trial" and plaintiff was entitled to voluntarily dismiss its action (*174 Cal. App. 4th 67, 78-79)* .

In ***Franklin Capital Corp. v. Wilson*** *(2007) 148 Cal. App. 4th 187, 55 Cal. Rptr. 3d 424* , plaintiff's attorney failed to appear for a mandatory settlement conference, and the trial court set an order to show cause hearing re: dismissal or sanctions. The day before the scheduled hearing, plaintiff's attorney filed a voluntary dismissal without prejudice. At the hearing the next day, in the absence of plaintiff's counsel, the court dismissed the case with prejudice. Although the court did not cite any authority for its action, it indicated in the hearing that the dismissal was based on failure to prosecute the action. Plaintiff's attorney subsequently filed a motion to vacate the dismissal, and the trial court denied that motion. Plaintiff appealed.

The court of appeal reversed, holding that the trial court was stripped of jurisdiction to dismiss once plaintiff filed its voluntary dismissal. Under *Code Civ. Proc. § 581(b)(1)*, a plaintiff may voluntarily dismiss an action, with or without prejudice, at any time before the actual commencement of trial. "Actual commencement of trial" is defined in *Code Civ. Proc. § 581(a)(6)* as "the beginning of the opening statement or argument of any party or his or her counsel ... ." However, the California Supreme Court held in *Wells v. Marina City Properties, Inc. (1981) 29 Cal. 3d 781, 176 Cal. Rptr. 104, 632 P.2d 217* that this definition of commencement of trial is not exclusive; the right to dismiss can be cut off by other dispositive procedures. In *Wells*, the court held that a plaintiff did not have a statutory right to dismiss after the court sustained a demurrer with leave to amend and the time for amending had expired. The court discussed post-*Wells* appellate court cases and summarized them by stating that a plaintiff's dismissal has been held to be ineffective when either (a) there had been a public and formal indication by the trial court of the legal merits of the case, or (b) there was some procedural dereliction by the plaintiff making dismissal inevitable. Stated another way, voluntary dismissal is effective at any time before the case reaches a stage where disposition is a "mere formality" (*148 Cal. App. 4th 187, 201-202* , quoting *Zapanta v. Universal Care, Inc. (2003) 107 Cal. App. 4th 1167, 1173-1174, 132 Cal. Rptr. 2d 842*). Applied to the case at hand, disposition was not a mere formality because the looming OSC hearing contemplated dismissal **or** sanctions, not just dismissal. Therefore, the trial court had been without jurisdiction to dismiss the case

with prejudice because plaintiff had validly dismissed the case without prejudice the day before (*148 Cal. App. 4th 187, 219)* .

In re Mercantile Guaranty Co. *(1968) 263 Cal. App. 2d 346, 69 Cal. Rptr. 361* , involved voluntary dissolution of a foreign corporation. After the state intervened, the corporation requested a voluntary dismissal. The state (plaintiff in intervention) moved to strike the voluntary dismissal and to compel defendant (in intervention) corporation to answer interrogatories. The trial court denied plaintiff's motion and ordered entry of the dismissal. Plaintiff appealed.

The court of appeal affirmed, holding that plaintiff's complaint in intervention did not seek affirmative relief. However, it recognized the statutory basis for voluntary dismissal under *Code Civ. Proc. § 581,* and set forth definitions of "affirmative relief" and "defendant" for purposes of that statute. Under former Code Civ. Proc. § 581(1), (5) [*now see Code Civ. Proc. § 581(i)*], a plaintiff may not dismiss an action, with or without prejudice, if a defendant has requested affirmative relief. The term "defendant" includes an intervenor if the intervenor has sought affirmative relief against a party to the action (*263 Cal. App. 2d 346, 350)* . An answer or complaint in intervention, however, does not seek affirmative relief unless it contains affirmative allegations or introduces new affirmative matter entitling the pleader to relief. Here, plaintiff's complaint in intervention appeared to be nothing more than a denial of defendant's claim concerning liquidation of certain distributions (*263 Cal. App. 2d 346, 351)* .

In ***Wells v. Marina City Properties, Inc.*** *(1981) 29 Cal. 3d 781, 176 Cal. Rptr. 104, 632 P.2d 217* , plaintiff attempted to voluntarily dismiss its action after expiration of a period authorized for amendment of its complaint, following a successful general demurrer. Defendants moved to dismiss with prejudice pursuant to former Code Civ. Proc. § 581(3) [*now see Code Civ. Proc. § 581(f)(2)*] after the period expired. However, prior to the hearing on defendants' motion plaintiff requested and was granted a voluntary dismissal without prejudice pursuant to former Code Civ. Proc. § 581(1) [*now see Code Civ. Proc. § 581(b)(1)*] by the court clerk. After a hearing on defendants' motion the trial court initially dismissed the action with prejudice under former Code Civ. Proc. § 581(3), but later reversed itself, and set aside that dismissal on the ground that plaintiff's voluntary dismissal divested the court of jurisdiction to act. Defendants appealed.

The Supreme Court reversed the order. It held that once a general demurrer to a complaint is sustained with leave to amend and the plaintiff does not amend within the time authorized by the court or within the time otherwise extended by stipulation or appropriate order, the plaintiff can no longer voluntarily dismiss the action pursuant to former Code Civ. Proc. § 581(1), even if the trial court has not yet entered a judgment of dismissal on the sustained demurrer (*29 Cal. 3d 781, 789)* . The Court cited *Goldtree v. Spreckels (1902) 135 Cal. 666, 67 P. 1091* (discussed § 90.32[3][b]) for the proposition that the term "trial," as used in former Code Civ. Proc. § 581(1), includes the act of sustaining a general demurrer without leave to amend, as well as the failure to amend within the time permitted after a general demurrer (*29 Cal. 3d 781, 785)* . However, the Court noted that the right to voluntarily dismiss under that section is not barred until expiration of plaintiff's time to amend after a demurrer is sustained, nor is the right barred before a decision sustaining the demurrer (*29 Cal. 3d 781, 789-790)* .

[4] Additional Authorities

[a] Right to Voluntary Dismissal Without Prejudice Before Trial

Cardiff Equities, Inc. v. Superior Court (2008) 166 Cal. App. 4th 1541, 83 Cal. Rptr. 3d 699 was a breach of contract action arising out of a partnership agreement and a guaranty pertaining to the partnership agreement. In response to plaintiff's complaint, defendants moved to compel arbitration. The trial court granted the motion to compel arbitration and stayed the court proceedings. Plaintiff then sought leave to lift the stay to file a first amended complaint, deleting the claims that were subject to arbitration. Plaintiff's motion was granted, and plaintiff dismissed the original complaint without filing an amended complaint. Plaintiff then filed a new complaint, identical to the proposed first amended complaint. Defendant moved to stay the second case, and the trial court granted that motion, staying the case pending the arbitration of the original case. Plaintiff petitioned the court of appeals for a writ of mandate. On appeal, plaintiff

argued that the voluntary dismissal of the first case divested the court of jurisdiction with respect to the original case. The court of appeals considered the issue of whether a plaintiff may voluntarily dismiss a case after a motion to compel arbitration is granted, but before the arbitration has commenced. The voluntary dismissal statute states that a plaintiff may dismiss a complaint at any time before the actual commencement of trial. Assuming an arbitration can be considered a "trial" within the meaning of the statute, the trial had not yet commenced. Therefore, plaintiff had an absolute right to dismiss the original complaint even after the trial court granted the motion to compel arbitration (*166 Cal. App. 4th 1541, 1549-1550)* .

In *Sanabria v. Embrey (2001) 92 Cal. App. 4th 422, 111 Cal. Rptr. 2d 837* , the plaintiff filed with the clerk a request for voluntary dismissal without prejudice of his complaint against the defendant. Dismissal was entered by the clerk and the defendant was served with the notice of entry of dismissal. At the time of the plaintiff's voluntary dismissal of his complaint, a third party complaint-in-intervention and the plaintiff's cross-complaint against the third party will still pending, however the original defendants were no longer parties to the action. The complaint-in-intervention and the cross-complaint were subsequently resolved. On appeal of an award of costs and attorney fees for the defendant, the court found that while a plaintiff may not unilaterally dismiss *the entire action* if a cross-complaint or complaint-in-intervention is pending [*Code Civ. Proc. § 581(i)*], the court held that a plaintiff may unilaterally dismiss *the complaint* before trial regardless of the pendency of such other pleadings [*Code Civ. Proc. § 581(c)*]. Entry of dismissal is entered in the clerk's register and is effective when entered [*Code Civ. Proc. § 581d*]. Entry of dismissal terminates the action against the dismissed defendants and the action then proceeds as to other parties [*Code Civ. Proc. § 579*] (*92 Cal. App. 4th 422, 425)* .

In *Roski v. Superior Court (1971) 17 Cal. App. 3d 841, 95 Cal. Rptr. 312* , the court of appeal reinstated the dismissal of a personal injury action that had been settled without trial by a worker's compensation insurance carrier and the owner of a building where an injury occurred. In directingthe trial court to vacate its order permitting intervention by an injured employee after the suit had been voluntarily dismissed with prejudice, the court held that the carrier had an absolute right to dismiss when it did, under former Code Civ. Proc. § 581(1) and (5) [*now see Code Civ. Proc. § 581(b)(1), (i)*], since there was no pleading on file seeking affirmative relief. Once the dismissal was entered, the trial court was without jurisdiction to vacate it. The court noted that if no affirmative relief has been sought in the pleadings by the opposing party, the privilege of dismissal belongs to the plaintiff and may be exercised by the plaintiff without the knowledge of the other parties or the consent of the court (*17 Cal. App. 3d 841, 845)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsGeneral Overview

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A. Voluntary Dismissal

9-90 California Points & Authorities § 90.31

§ 90.31 Supporting Motion for Dismissal on Ground of Abandonment [Code Civ. Proc. § 581(d)]--Plaintiff's Intent to Abandon Demonstrated

[1] FORM

[*Caption. See § 90.30.*]

THE ACTION SHOULD BE DISMISSED ON THE GROUND OF ABANDONMENT PURSUANT TO SECTION 581(d) OF THE CODE OF CIVIL PROCEDURE BECAUSE PLAINTIFF HAS DEMONSTRATED AN INTENT TO ABANDON THE ACTION.

A. Statutory Requirements for Dismissal After Abandonment. After the actual commencement of trial, the court shall dismiss the complaint, or any causes of action asserted in it, in its entirety or as to any defendant, with prejudice, when on the trial and before the final submission of the case, the plaintiff abandons it (*Code Civ. Proc. § 581(d)*).

B. Plaintiff's Intent to Abandon Demonstrated. Dismissal of an action on the ground of abandonment pursuant to *Section 581(d) of the Code of Civil Procedure* is proper if plaintiff demonstrates an intent to abandon the action (*see Burnett v. Burnett (1948) 88 Cal. App. 2d 805, 807, 199 P.2d 685*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be used in support of a motion for dismissal pursuant to *Code Civ. Proc. § 581(d)* if counsel alleges that plaintiff has demonstrated an intention to abandon the action. The memorandum is drafted to support a motion by the plaintiff because case law has stated that former Code Civ. Proc. § 581(4) [*now see Code Civ. Proc. § 581(d)*] is a vehicle for dismissal by the plaintiff [*see, e.g., Kaufman & Broad Bldg. Co. v. City & Suburban Mortg. Co. (1970) 10 Cal. App. 3d 206, 212-213, 88 Cal. Rptr. 858]* . Nevertheless, it appears that this type of motion could also be brought by a defendant, as well as the court.

The foregoing memorandum may be combined, if appropriate, with the general form of points and authorities in support of voluntary dismissal [*see § 90.30*].

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Abandonment of the case should be shown by reference to the commencement of trial and the specific actions taken by plaintiff prior to any final submission.

[b] Opposing Memoranda

The points and authorities *set out in § 90.33* may be used in an appropriate case to oppose a motion for dismissal supported by the foregoing memorandum.

[3] Discussion of Authorities

[a] Plaintiff's Intent to Abandon Demonstrated

In ***Burnett v. Burnett*** *(1948) 88 Cal. App. 2d 805, 199 P.2d 685* , plaintiff, after commencement of trial, moved to dismiss the action without prejudice, but the trial court dismissed with prejudice.

The court of appeal affirmed dismissal of plaintiff's action with prejudice, holding that after trial begins the court may dismiss the action with prejudice pursuant to former Code Civ. Proc. § 581(4) [now see *Code Civ. Proc. § 581(d)*] if plaintiff abandons the action before final submission. A court has discretionary power to dismiss an action without prejudice if the parties consent or just cause is shown. There was no consent or showing of just cause in this case, and defendant's insistence on proceeding was sufficient evidence to support the implied finding of abandonment. The court's only proper order was one of dismissal with prejudice (*88 Cal. App. 2d 805, 807)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsGeneral Overview

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A. Voluntary Dismissal

9-90 California Points & Authorities § 90.32

§ 90.32 Opposing Motion for Voluntary Dismissal by Plaintiff Before or During Trial [Code Civ. Proc. § 581]--General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN OPPOSITION TO MOTION
vs.	)	TO DISMISS
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Trial Date: _____

_____

THE COURT SHOULD DENY PLAINTIFF'S MOTION TO DISMISS WITHOUT PREJUDICE BECAUSE _____ [DEFENDANT HAS SOUGHT AFFIRMATIVE RELIEF BY CROSS COMPLAINT *or* A MOTION TO TRANSFER THE ACTION PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 396b IS PENDING *or* A _____ (DEMURRER *or* MOTION TO STRIKE) HAS BEEN SUSTAINED WITH LEAVE TO AMEND AND PLAINTIFF FAILED TO AMEND *or* A MOTION FOR SUMMARY JUDGMENT HAS BEEN FILED AND THE TIME FOR OPPOSITION HAS PASSED WITHOUT OPPOSITION PAPERS HAVING BEEN FILED or AN ADVERSE TENTATIVE SUMMARY JUDGMENT RULING HAS BEEN ANNOUNCED AND A HEARING HAS COMMENCED WHICH HAS BEEN CONTINUED FOR THE EXPRESS AND EXCLUSIVE PURPOSE OF PERMITTING THE PLAINTIFF THE OPPORTUNITY TO PRESENT

OPPOSITION EVIDENCE THAT PLAINTIFF CLAIMS WAS PREVIOUSLY UNAVAILABLE] AND DEFENDANT DOES NOT CONSENT TO THE DISMISSAL.

[*EITHER, if cross complaint filed*]

No Voluntary Dismissal if Cross Complaint Filed. A plaintiff may not voluntarily dismiss an action without prejudice before trial, without consent of the defendant, if the defendant has sought affirmative relief by cross complaint (*Code Civ. Proc. § 581(b)(1), (i)*; *see also In re Mercantile Guaranty Co. (1968) 263 Cal. App. 2d 346, 350, 69 Cal. Rptr. 361*).

[*OR, if motion to transfer pending*]

No Voluntary Dismissal if Motion to Transfer Pending. A plaintiff may not voluntarily dismiss an action without prejudice before trial, without consent of the defendant, if there is pending a motion to transfer the action pursuant to *Section 396b of the Code of Civil Procedure* (*Code Civ. Proc. § 581(b)(1), (i)*).

[*OR, if demurrer or motion to strike sustained without leave to amend*]

No Voluntary Dismissal if Demurrer or Motion to Strike Granted Without Leave to Amend. A plaintiff may not voluntarily dismiss an action without prejudice if a _____ [demurrer *or* motion to strike] has been sustained without leave to amend, unless defendant consents to the dismissal (*Code Civ. Proc. § 581(b)(2), (f)(2), (4)*; *Goldtree v. Spreckels (1902) 135 Cal. 666, 668-673, 67 P. 1091* ; *Bell v. Hummel (1982) 136 Cal. App. 3d 1009, 1015, 186 Cal. Rptr. 688*).

[*OR, if leave to amend granted but plaintiff fails to amend*]

No Voluntary Dismissal if Failure to Amend After Demurrer or Motion to Strike Granted With Leave to Amend. A plaintiff may not voluntarily dismiss an action without prejudice if a _____ [demurrer *or* motion to strike all or a portion of the complaint] has been sustained with leave to amend, but plaintiff fails to amend within the time allowed, unless defendant consents to the dismissal (*Code Civ. Proc. § 581(b)(2), (f)(2), (4)*; *Wells v. Marina City Properties, Inc. (1981) 29 Cal. 3d 781, 789, 176 Cal. Rptr. 104, 632 P.2d 217*).

[*OR, if a summary judgment motion has been filed and the time to file opposition papers has expired*]

No Voluntary Dismissal If Moving Papers in Summary Judgment Motion Negate Plaintiff's Claims Entitling Defendant to Judgment as a Matter of Law and Time to File Opposition Has Elapsed. A plaintiff who seeks to dismiss the complaint after a motion for summary judgment has been filed and the time for opposition has passed is subject to the trial court's continuing jurisdiction to hear and rule on the pending motion. A plaintiff may not frustrate the summary judgment statute by interposing a voluntary dismissal without prejudice in lieu of opposition to a defendant's motion [*Cravens v. State Bd. of Equalization (1997) 52 Cal. App. 4th 253, 255, 60 Cal. Rptr. 2d 436]* .

[*OR, if after tentative ruling hearing on summary judgment motion continued to permit gathering of unavailable evidence*]

No Voluntary Dismissal After Adverse Tentative Summary Judgment Ruling Announced and a Hearing Has Been Commenced Which is Continued to Permit Gathering of Previous Unavailable Opposition Evidence. A plaintiff may not voluntarily dismiss an action without prejudice after an adverse tentative summary judgment ruling has been announced and a hearing has commenced which is thereafter continued for the express and exclusive purpose of permitting the plaintiff the opportunity to present opposition evidence that plaintiff claims was previously unavailable [*Mary Morgan, Inc. v. Melzark (1996) 49 Cal. App. 4th 765, 767, 57 Cal. Rptr. 2d 4]* .

[*OR, if class action*]

No Voluntary Dismissal if Class Action. No action may be dismissed which has been determined to be a class action under the provisions of the Code of Civil Procedure unless and until notice that the court deems adequate has been given, and the court orders the dismissal (*Code Civ. Proc. § 581(k)*).

[*Add further points and authorities, as necessary, to expand the grounds for the motion or to anticipate objections of the opposing party (see, e.g., § 90.33).*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be used to oppose a motion for voluntary dismissal made by plaintiff pursuant to *Code Civ. Proc. § 581*. The point "No Voluntary Dismissal if Cross Complaint Filed" in the foregoing memorandum, however, will need to be modified if a partition action is involved. In a partition action, contrary to normal pleading procedure, a defendant may seek affirmative relief in his or her answer which avoids the need for the defendant to file a cross-complaint seeking such relief [*Code Civ. Proc. § 872.430*; *Gray v. Superior Court (1997) 52 Cal. App. 4th 165, 168 fn. 2, 60 Cal. Rptr. 2d 428]* . Dismissal has been held inappropriate when a defendant has requested affirmative relief in its answer [*Gray v. Superior Court (1997) 52 Cal. App. 4th 165, 174, 60 Cal. Rptr. 2d 428]* .

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, if a demurrer has been sustained with leave to amend [see *Wells v. Marina City Properties, Inc. (1981) 29 Cal. 3d 781, 789, 176 Cal. Rptr. 104, 632 P.2d 217]* , defendant should set forth the date by which amendment was to have occurred.

In an appropriate case, this form may be submitted in opposition to a motion to dismiss supported by the points and authorities *set out in § 90.30*.

[b] Related Pleading and Practice Forms

For discussion of voluntary dismissals under Code Civ. Proc. § 581, see Ch. 212, *Dismissal* in California Forms of Pleading and Practice. For a form of a notice of motion requesting dismissal of an action under Code Civ. Proc. § 581(f)(2) for failure to amend a complaint after a demurrer has been sustained with leave to amend, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , in California Forms of Pleading and Practice.

[3] Discussion of Authorities

[a] No Voluntary Dismissal if Cross Complaint Filed

The facts and procedural background of ***In re Mercantile Guaranty Co.*** *(1968) 263 Cal. App. 2d 346, 69 Cal. Rptr. 361* , are discussed in *§ 90.30[3][a]*. In *In re Mercantile Guaranty Co.*, the court of appeal held that plaintiff's complaint in intervention did not seek affirmative relief. However, it recognized the statutory basis for voluntary dismissal under *Code Civ. Proc. § 581*, and set forth definitions of "affirmative relief" and "defendant" for purposes of that statute. Under former Code Civ. Proc. § 581(1), (5) [now see *Code Civ. Proc. § 581(b)(1), (i)*] a plaintiff may not dismiss an action, with or without prejudice, if a defendant has requested affirmative relief. The term "defendant" includes an intervenor if the intervenor has sought affirmative relief against a party to the action (*263 Cal. App. 2d 346, 350)* . An answer or complaint in intervention, however, does not seek affirmative relief unless it contains affirmative allegations or introduces new affirmative matter entitling the pleader to relief. Here, plaintiff's complaint in intervention appeared to be nothing more than a denial of defendant's claim concerning liquidation of certain distributions (*263 Cal. App. 2d 346, 351)* .

[b] No Voluntary Dismissal if Demurrer or Motion to Strike Granted Without Leave to Amend

Goldtree v. Spreckels *(1902) 135 Cal. 666, 67 P. 1091* , was an action to quiet title and to restrain a person from obtaining a deed to certain real property. Defendant's general demurrer was sustained for all but one cause. Plaintiff did not request leave to amend. At trial, plaintiff requested dismissal of the causes to which demurrer was made. The trial court denied the request on the ground that in sustaining the demurrer, trial had occurred. Plaintiff then obtained a dismissal from the court clerk, but the court vacated this entry on the ground that the clerk lacked authority to enter a dismissal. Plaintiff moved to dismiss its remaining cause without prejudice, and this motion was granted. Defendants successfully moved for judgment on the causes for which the demurrer was sustained. Plaintiff appealed.

The Supreme Court affirmed the order canceling entry of the clerk's dismissal, but reversed the judgment on the demurrer. The Court held that for the purpose of *Code Civ. Proc. § 581* (in its 1902 version), a "trial" occurs if a general demurrer to an action is sustained and no amendment to the complaint is made. Once the demurrer is sustained, the plaintiff stands on the pleading and submits to judgment on the demurrer. This cuts off the right of dismissal, unless it was first set aside or leave was given to amend. Here, after the demurrer was sustained the court clerk had no authority to enter the dismissal, and, since it was void, the trial court rightly set it aside. However, the allegations stated a cause of action on the basis of another case decided the same day by the Court. Therefore, the demurrer should have been overruled (*135 Cal. 666, 672-673)* .

The holding of *Goldtree* was questioned in *United Shippers, Inc. v. Superior Court (1980) 104 Cal. App. 3d 359, 362-363, 162 Cal. Rptr. 871* , on the ground that the 1947 amendment to former Code Civ. Proc. § 581 changed the language concerning commencement of trial and must have been intended to change *Goldtree*. However, in light of the holdings in *Bell v. Hummel (1982) 136 Cal. App. 3d 1009, 1015, 186 Cal. Rptr. 688* (discussed below), and *Wells v. Marina City Properties, Inc. (1981) 29 Cal. 3d 781, 789, 176 Cal. Rptr. 104, 632 P.2d 217* (discussed under Failure to Amend After Demurrer or Motion to Strike Granted With Leave to Amend, infra), it appears that *Goldtree* is valid for the proposition stated. Furthermore, the court in *United Shippers, Inc.*, acknowledged that Witkin accepts the *Goldtree* holding as still valid (*104 Cal. App. 3d 359, 363)* .

Bell v. Hummel *(1982) 136 Cal. App. 3d 1009, 186 Cal. Rptr. 688* , was an action for legal malpractice, originally brought by a married couple, arising from another action. Defendants demurred to plaintiffs' second amended complaint, which was filed after the death of plaintiff wife, on the ground of the statute of limitations. The demurrer was sustained without leave to amend. Plaintiff husband filed a request for voluntary dismissal thereafter, but the trial court dismissed the action with prejudice. Plaintiff husband appealed.

The court of appeal affirmed the dismissal. It held that plaintiff's attempted voluntary dismissal of the action was improper, since the trial court had previously sustained the demurrer and had filed and entered the dismissal order. Under former Code Civ. Proc. § 581(1) [*now see Code Civ. Proc. § 581(b)(1)*] a voluntary dismissal must be made at any time before actual commencement of trial, but the right to dismiss ends when a trial court sustains a general demurrer without leave to amend. That ruling is a conclusive determination of the litigation on its merits and is therefore a trial (*136 Cal. App. 3d 1009, 1015*). While plaintiff had the right to appeal the order dismissing the action with prejudice, the action was barred by the statute of limitations (*136 Cal. App. 3d 1009, 1018*).

[c] No Voluntary Dismissal if Failure to Amend After Demurrer or Motion to Strike Granted With Leave to Amend

The facts and procedural background of ***Wells v. Marina City Properties, Inc.*** *(1981) 29 Cal. 3d 781, 176 Cal. Rptr. 104, 632 P.2d 217* , are discussed in *§ 90.30[3][a]*. In *Wells,* the Supreme Court held that once a general demurrer to a complaint is sustained with leave to amend and the plaintiff does not amend within the time authorized by the court, or within the time otherwise extended by stipulation or appropriate order, the plaintiff can no longer voluntarily dismiss the action pursuant to former Code Civ. Proc. § 581(1) [*now see Code Civ. Proc. § 581(b)(1)*], even if the trial court has not yet entered a judgment of dismissal on the sustained demurrer (*29 Cal. 3d 781, 789)* . The Court cited *Goldtree v. Spreckels (1902) 135 Cal. 666, 67 P. 1091 , discussed under § 90.32[3][b]* for the proposition that the term "trial," as used in former Code Civ. Proc. § 581(1), includes the act of sustaining a general demurrer without leave to amend, as well as the failure to amend within the time permitted after a general demurrer (*29 Cal. 3d 781, 785)* .

[d] No Voluntary Dismissal If Moving Papers In Summary Judgment Motion Negate Plaintiff's Claims Entitling Defendant to Judgment as a Matter of Law and Time to File Opposition Has Elapsed

Cravens v. State Bd. of Equalization *(1997) 52 Cal. App. 4th 253, 60 Cal. Rptr. 2d 436* , involved the issue of whether a trial court has the power to grant an unopposed defense motion for summary judgment when a request for dismissal has been filed by the plaintiff and entered on the day before the schedule hearing date. The trial court rejected the plaintiff'sargument that under *Code Civ. Proc. § 581(c),* a claimant's power to voluntarily the action before the commencement of trial is absolute, and entered judgment in favor of the defendants in accordance with an order granting summary judgment. Plaintiff appealed.

The court of appeal affirmed. The court held that a plaintiff who waits until a motion for summary judgment has been filed and the time for opposition has passed to attempt to dismiss the complaint is subject to the trial court's continuing jurisdiction to hear and rule on the pending motion. A plaintiff may not frustrate the summary judgment statute by interposing a voluntary dismissal without prejudice in lieu of opposition to a defendant's motion (*52 Cal. App. 4th 253, 255)* . Thus, a trial court has the power to grant an unopposed defense motion for summary judgment when the defendants' moving papers have met their burden of negating the plaintiff's claims, entitling them to judgment as a matter of law if no issues of disputed fact are raised, and plaintiff, rather than filing opposition papers within the requisite time, files a request for dismissal without prejudice one day before the scheduled hearing date (*52 Cal. App. 4th 253, 257)* .

[e] No Voluntary Dismissal After Adverse Tentative Summary Judgment Ruling Announced and a Hearing Has Been Commenced Which is Continued to Permit Gathering of Previous Unavailable Opposition Evidence

Mary Morgan, Inc. v. Melzark *(1996) 49 Cal. App. 4th 765, 57 Cal. Rptr. 2d 4* , involved an action to cancel a deed of trust attached to real property that had been acquired in settlement of litigation. Defendants filed separate summary judgment motions. Plaintiff filed written opposition to one of defendant's motions and formally requested a continuance as to the other defendants' motions. The trial court issued a tentative ruling granting the summary judgment motions, and commenced a hearing at which time plaintiff claimed certain deposition transcripts had only recently become available. Plaintiff requested a continuance to permit filing of opposition to one of the motions and further opposition to

the other motions. The court granted the continuance. Plaintiff never filed any papers on the summary judgment motions, but instead filed a request without prejudice. The plaintiff did not attend the hearing on the reconvened hearing date, and defendants requested the court to adopt the court's tentative ruling. Ultimately, the trial court found that plaintiff was not entitled to dismiss without prejudice, and judgment was entered in defendants' favor. Following an unsuccessful plea for reconsideration, plaintiff appealed.

The court of appeal affirmed the judgment. The court held that a plaintiff may not voluntarily dismiss an action without prejudice after an adverse tentative summary judgment ruling has been announced and a hearing has commenced which is thereafter continued for the express and exclusive purpose of permitting the plaintiff the opportunity to present opposition evidence that plaintiff claims was previously unavailable (*49 Cal. App. 4th 765, 767)* . Citing *Code Civ. Proc. § 437c(h),* the court noted that an opposing party on a summary judgment motion can compel a continuance, but it is for a particular purpose, *i.e.*, for production of opposition evidence. The continuance does not entitle the opposing party to defeat the motion by collateral maneuvers (*49 Cal. App. 4th 765, 771)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsGeneral Overview

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A. Voluntary Dismissal

9-90 California Points & Authorities § 90.33

§ 90.33 Opposing Motion for Dismissal for Abandonment [Code Civ. Proc. § 581(d)]--Insufficient Showing of Intent to Abandon

[1] FORM

[*Caption. See § 90.32.*]

DISMISSAL OF THE ACTION PURSUANT TO SECTION 581(d) OF THE CODE OF CIVIL PROCEDURE ON THE GROUND OF ABANDONMENT IS IMPROPER BECAUSE PLAINTIFF HAS NOT, ON THE RECORD, DEMONSTRATED TO THE COURT A CLEAR INTENT TO ABANDON THE ACTION.

A. Statutory Requirements for Dismissal After Abandonment. [*See § 90.31, Paragraph A.*]

B. Intent to Abandon Required. Dismissal of an action pursuant to *Section 581(d) of the Code of Civil Procedure* on the ground of plaintiff's abandonment is improper unless on the record plaintiff demonstrates to the court a clear, unequivocal, and express intent to abandon the action (*Kaufman & Broad Bldg. Co. v. City & Suburban Mortg. Co. (1970) 10 Cal. App. 3d 206, 212-213, 88 Cal. Rptr. 858*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be used in opposition to a dismissal motion pursuant to *Code Civ. Proc. § 581(d)*

onthe ground of plaintiff's abandonment if plaintiff has not expressly indicated an intent to abandon the action. It may also be combined, if appropriate, with a general memorandum in opposition to a voluntary dismissal by plaintiff under *Code Civ. Proc. § 581*[*see § 90.32*].

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Specific facts showing plaintiff's lack of intent to abandon should be set forth, including facts appearing on the record in the action.

In an appropriate case, the foregoing memorandum may be submitted in opposition to a motion to dismiss supported by the points and authorities *set out in § 90.31*.

[3] Discussion of Authorities

[a] Intent to Abandon Required

In ***Kaufman & Broad Bldg. Co. v. City & Suburban Mortg. Co.*** *(1970) 10 Cal. App. 3d 206, 88 Cal. Rptr. 858* , the trial court granted a directed verdict for defendant on the theory that plaintiff had abandoned the second cause of action and thus, pursuant to former Code Civ. Proc. § 581(4) [now see *Code Civ. Proc. § 581(d)*], a dismissal with prejudice would have been proper.

On appeal, the court of appeal reversed. Although former Code Civ. Proc. § 581(4) appeared to grant to the court a power to dismiss, the section had traditionally been a mechanism by which a plaintiff, and not the court, might voluntarily dismiss an action which had been expressly and intentionally abandoned (*10 Cal. App. 3d 206, 212-213)* . However, the court of appeal did not find sufficient intent here to sustain the trial court's action. A dismissal pursuant to former Code Civ. Proc. § 581(4) is improper unless there is a clear, unequivocal, and express intent to abandon the action by plaintiff that is demonstrated to the court by way of a motion to dismiss, stipulation of the parties, or some other form of express intent on the record. In this case, the record was devoid of any statement that could be taken as an unequivocal and voluntary motion to dismiss that demonstrated to the court an express intent to abandon the cause of action (*10 Cal. App. 3d 206, 213)* .

Legal Topics:

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

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9-90 California Points & Authorities § 90.34

§ 90.34 Opposing Voluntary Dismissal by Plaintiff Before or During Trial [Code Civ. Proc. § 581(b)(1)]--Dismissal Requested After Ruling of Mandatory Dismissal

[1] FORM

[*Caption. See § 90.32.*]

PLAINTIFF'S VOLUNTARY DISMISSAL IS INVALID BECAUSE IT WAS REQUESTED AFTER THE COURT GRANTED DEFENDANT'S MOTION FOR MANDATORY DISMISSAL.

A. No Right to Voluntary Dismissal After Court Grants Motion for Mandatory Dismissal. A plaintiff has no right to voluntary dismissal of an action after the court has granted a motion to dismiss the action involuntarily, but before the order for involuntary dismissal has been filed (*M & R Properties v. Thomson (1992) 11 Cal. App. 4th 899, 900-901, 14 Cal. Rptr. 2d 579*).

B. Defendant's Right to Mandatory Dismissal Prevails Over Plaintiff's Right to Voluntary Dismissal. When there is a conflict between a plaintiff's right to voluntary dismissal and a defendant's right to a mandatory dismissal, the defendant's right prevails (*M & R Properties v. Thomson (1992) 11 Cal. App. 4th 899, 905, 14 Cal. Rptr. 2d 579*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be used in opposition to a dismissal motion pursuant to *Code Civ. Proc. § 581(d)* on the ground that plaintiff's request for voluntary dismissal is invalid because it occurred after a ruling of involuntary dismissal but before an order of involuntary dismissal was filed. In an appropriate case, these points and authorities may be submitted in opposition to the motion supported by the points and authorities *set out in § 90.30*.

Because voluntary dismissals are not ordinarily handled as motions, the defendant may not learn of the dismissal in time to oppose it. In that case,this form may also be used to support a motion by a defendant to vacate a plaintiff's voluntary dismissal [*see M & R Properties v. Thomson (1992) 11 Cal. App. 4th 899, 901, 14 Cal. Rptr. 2d 579]* .

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. In particular, counsel should tie in the specific facts showing the timing of the plaintiff's request for dismissal and the ruling of involuntary dismissal.

[3] Discussion of Authorities

[a] No Right to Voluntary Dismissal After Court Grants Motion for Mandatory Dismissal

In ***M & R Properties v. Thomson*** *(1992) 11 Cal. App. 4th 899, 14 Cal. Rptr. 2d 579* , plaintiff filed a complaint for breach of contract which included a clause entitling the prevailing party to its attorney fees. When the plaintiffs did not bring the matter to trial within five years, defendants moved under *Code Civ. Proc. §§ 583.310, 583.360*, for mandatory dismissal of the action, a procedure which would be a determination on the merits, entitling defendants to their attorney fees. The afternoon before the hearing on the defendants' motion, the court issued a tentative ruling granting the motion and giving the time in the morning when any oral argument on the matter would be heard. Under local court rules, plaintiffs waived their right to the hearing by failing to notify the court and the defendants of their request for oral argument by 4:30 p.m. that afternoon. The next morning plaintiffs filed a request for dismissal of the action without prejudice, which the clerk entered that day. The defendants discovered the voluntary dismissal when they sent plaintiffs a proposed order granting the motion for mandatory dismissal. The defendants moved under former Code Civ. Proc. § 473, 3rd Paragraph [*now see Code Civ. Proc. § 473(b)*], to vacate the voluntary dismissal based on surprise, inadvertence, or excusable neglect. The trial court vacated the voluntary dismissal and entered an order of mandatory dismissal (*11 Cal. App. 4th 899, 901)* .

The court of appeal affirmed, holding that the tentative ruling became the ruling of the court when plaintiffs failed to act by 4:30 p.m. to request a hearing. Distinguishing between the order granting the motion to dismissal and the order of dismissal, the court held that the matter was, however, still pending the next morning because no order of dismissal had been entered as required by *Code Civ. Proc. § 581d*. The court then held that a plaintiffs' right to seek a voluntary dismissal is cut off by a ruling granting a defendant's motion to dismiss the action for lack of prosecution (*11 Cal. App. 4th 899, 902)* .

[b] Defendant's Right to Mandatory Dismissal Prevails Over Plaintiff's Right to Voluntary Dismissal

The facts and procedural background of ***M & R Properties v. Thomson*** *(1992) 11 Cal. App. 4th 899, 14 Cal. Rptr. 2d 579* , are *discussed under § 90.34[3][a]*. In *M & R Properties* the court characterized the case as involving the conflicting rights of defendant to a mandatory dismissal, which is intertwined with the trial court's duty to dismiss an action for lack of prosecution, and of a plaintiff to a voluntary dismissal. The court concluded that the defendant's right to a mandatory dismissal is the stronger, and declined to balance the competing rights in such a fashion as to render a defendant's motion for mandatory dismissal pointless, and the ruling of the court on that motion a nullity (*11 Cal. App. 4th 899, 902-903)* .

Legal Topics:

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

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9-90 California Points & Authorities §§ 90.35-90.49

[Reserved]

§§ 90.35[Reserved]

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B. Involuntary Dismissal
1. Dismissal For Failure To Serve Summons and Complaint and File Proof of Service of Summons

9-90 California Points & Authorities § 90.50

§ 90.50 Supporting Motion for Mandatory Dismissal for Failure to Serve Summons and Complaint and File Proof of Service of Summons [Code Civ. Proc. §§ 583.210, 583.250]--General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION TO
vs.	)	DISMISS
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Trial Date: _____]

_____

PLAINTIFF'S ACTION AGAINST DEFENDANT _____ [*name*] MUST BE DISMISSED PURSUANT TO SECTION 583.250 OF THE CODE OF CIVIL PROCEDURE BECAUSE _____ [THE SUMMONS AND COMPLAINT WERE NOT SERVED ON DEFENDANT WITHIN THREE YEARS AFTER THE ACTION WAS COMMENCED AGAINST DEFENDANT *and/or* PROOF OF SERVICE OF SUMMONS WAS NOT FILED WITHIN 60 DAYS AFTER THE THREE-YEAR PERIOD FOR SERVICE OF THE SUMMONS AND COMPLAINT EXPIRED] IN ACCORDANCE WITH SECTION 583.210 OF THE CODE OF CIVIL PROCEDURE.

A. Dismissal for Failure to Complete Service or File Proof of Service Within Statutory Period. An action must not

be prosecuted or proceed further, and must be dismissed by the court on motion of any interested person, whether or not a named party, after notice to the parties, if service of the summons and complaint on the defendant is not made within three years after the action is commenced against defendant, and filing of the proof of service of summons not made within three years and 60 days after commencement of that action; an action is commenced for this purpose at the time the complaint is filed (*Code Civ. Proc. §§ 583.210, 583.250(a)*; *see Elling Corp. v. Superior Court (1975) 48 Cal. App. 3d 89, 93-94, 123 Cal. Rptr. 734*).

B. Dismissal Mandatory. Dismissal of an action for failure to complete service and file proof of service of summons within the period required under *Section 583.210 of the Code of Civil Procedure* is mandatory and is not subject to exception, extension, or excuse except as expressly provided by statute (*Code Civ. Proc. § 583.250(b)*; *see Busching v. Superior Court (1974) 12 Cal. 3d 44, 50, 115 Cal. Rptr. 241, 524 P.2d 369* ; *Floyd Neal & Associates, Inc. v. Superior Court (1977) 72 Cal. App. 3d 734, 738-739, 140 Cal. Rptr. 301*).

[*Optional*] **C. Statutory Periods for Service and Proof of Service Not Extended by Filing Amended Complaint.** The statutory periods for completing service and filing proof of service described in *Section 583.210 of the Code of Civil Procedure* run from the date of filing of the original complaint against defendants named in the complaint and are not affected regarding named defendants by the filing of an amended complaint (*Code Civ. Proc. § 583.210*; *see Elling Corp. v. Superior Court (1975) 48 Cal. App. 3d 89, 94-95, 123 Cal. Rptr. 734* ; *Perati v. Atkinson (1964) 230 Cal. App. 2d 251, 252-253, 40 Cal. Rptr. 835*).

[*Optional*] **D. General Appearance After Three Years Does Not Make Statutory Periods for Service and Proof of Service Inapplicable.** When a defendant makes a general appearance only after three years have elapsed from the date the complaint was filed, that appearance does not make inapplicable the requirement that plaintiff complete service within three years and file proof of service of summons within 60 days thereafter (*Weatherby v. Van Diest (1991) 233 Cal. App. 3d 506, 508-511*).

[*Optional*] **E. Defendant Not Estopped to Move for Dismissal by Requesting Extension of Time to Respond.** Defendant's request for an extension of time to respond does not equitably estop the defendant from moving to dismiss when the defendant does not file an answer within the extended time and when that time expires

the time within which plaintiff must file a return of service of summons has not expired (*Biss v. Bohr (1995) 40 Cal. App. 4th 1246, 1252-1253, 47 Cal. Rptr. 2d 692*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be used by a defendant in support of a motion for mandatory dismissal on the ground that service of the summons and complaint on defendant was not completed within three years after the action was commenced against defendant, or that proof of service of summons within 60 days thereafter [*see Code Civ. Proc. §§ 583.210, 583.250*].

Optional Paragraph C may be used if there is a question of law whether the statutory requirements have been met.

Optional Paragraph D may be used if defendant made a general appearance more than three years after the action was commenced but plaintiff had not completed service and return within the required periods.

Optional Paragraph E may be used if the defendant had asked for an extension of time to respond to the complaint, but did not respond, and the plaintiff still had time to file the proof of service of summons prior to the expiration of the three-year, sixty-day limit of *Code Civ. Proc. § 583.250*.

Additional memoranda supporting a motion for mandatory dismissal for delay in service are *set out in §§ 90.61 -90.63*. These memoranda are intended for use as supplemental points and authorities, to be submitted in response to any opposition to the motion for dismissal. Supplemental memoranda are expressly authorized in analogous motions for discretionary dismissal [*see Cal. Rules of Ct., Rule 3.1342(c)*]. Alternatively, this memorandum may be combined with these additional memoranda, when counsel wishes to anticipate any known ground for opposition.

If there is a possibility that the mandatory period may be inapplicable, counsel may wish to combine these points and authorities with others that support a motion for discretionary dismissal for failure to serve and return a summons within two years after commencement of an action against defendant [*see § 90.51*]. Similarly, counsel may also wish to combine these points and authorities with others that support an alternative motion for discretionary dismissal for failure to bring the action to trial within the periods specified under *Code Civ. Proc. § 583.420(a)(2)* [*see § 90.83*].

This memorandum supports a defendant's motion for dismissal of a plaintiff's complaint, and should be modified as necessary when it is used in another context, such as in support of a motion for dismissal of a cross complaint [*see Code Civ. Proc. § 583.110(a), (b), (d), (e)*].

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. The exact dates of filing and service of the summons and complaint and of return of the summons or other proof of service should be alleged, to establish noncompliance with the service requirements of *Code Civ. Proc. § 583.210* [*see Code Civ. Proc. §§ 583.210, 583.250*].

[b] Mandatory Period for Completing Service

Service of the summons and complaint must be made within three years after the commencement of the action against the defendant. The proof of service of summons must be filed within 60 days after the time for service, that is, three years and 60 days from commencement of the action against the defendant [*Code Civ. Proc. § 583.210*]. 2005 amendments to *Code Civ. Proc. § 583.210* eliminated the requirement that the original summons be returned to the court; instead, the court retains the original summons, issues copies, and the plaintiff files a proof of service of summons [2005 Stats. 300].

[c] Computation of Period for Does and Defendants Added by Amendment

Some courts have held that the mandatory period for completing service on a fictitiously named defendant begins to run from commencement of the action [*Nelson v. A.H. Robins Co. (1983) 149 Cal. App. 3d 862, 866, 197 Cal. Rptr. 179* ; *Watson v. Superior Court (1972) 24 Cal. App. 3d 53, 61, 100 Cal. Rptr. 684* (discussed in *§ 90.61[3][c]*)]. If a defendant is added as a party to the complaint by amendment, one court of appeal has held that the action is commenced regarding the added defendant as of the time of filing the amended complaint [*Warren v. Atchison, Topeka & Santa Fe Ry. Co. (1971) 19 Cal. App. 3d 24, 38, 96 Cal. Rptr. 317]* .

Other courts, however, have shifted the focus of analysis to whether the amended complaint would "relate back" to the original complaint under the doctrine governing whether amendments are barred by the statute of limitations [*see Smeltzley v. Nicholson Mfg. Co. (1977) 18 Cal. 3d 932, 936-937, 136 Cal. Rptr. 269, 559 P.2d 624* ; *Coronet*

Manufacturing Co. v. Superior Court (1979) 90 Cal. App. 3d 342, 345-347, 153 Cal. Rptr. 366 (factors involved in determiningrelation back)]. If a cause of action in an amended complaint does not relate back to the original complaint for purposes of determining the statute of limitations, the three-year period commences as to that cause of action at the time when it is first alleged in an amended complaint [*see Barrington v. A.H. Robins Co. (1985) 39 Cal. 3d 146, 150, 151-158, 216 Cal. Rptr. 405, 702 P.2d 563* (decided under prior law, but stating its applicability to current law in dicta; relation back)]. This rule applies both to defendants named by a fictitious name in the original complaint [*see Barrington v. A.H. Robins Co. (1985) 39 Cal. 3d 146, 150, 151-158, 216 Cal. Rptr. 405, 702 P.2d 563]* , and to defendants added by the amended complaint [*see Hennessey's Tavern, Inc. v. American Air Filter Co. (1988) 204 Cal. App. 3d 1351, 1354, 1360-1361, 251 Cal. Rptr. 859]* . Similarly, the three-year period has been held to have commenced at the time the original complaint was filed because the amended complaint involved the same accident and the same offending instrumentality as alleged in the original complaint, and thus related back for purposes of avoiding a bar of a statute of limitations [*Nelson v. A.H. Robins Co. (1983) 149 Cal. App. 3d 862, 866-868, 197 Cal. Rptr. 179* ; *but see Hennessey's Tavern, Inc. v. American Air Filter Co. (1988) 204 Cal. App. 3d 1351, 1354, 1357-1360, 251 Cal. Rptr. 859* (three-year period commences s to allege alter ego of corporate defendant at time when amended complaint is filed first naming that defendant)].

[d] Effect of Defendant's General Appearance After Three Years

The majority in *Weatherby v. Van Diest (1991) 233 Cal. App. 3d 506, 508-511 (Fourth App. Dist., Div. Two)* , held that a defendant's general appearance after three years from the date the complaint was filed does not make inapplicable the mandatory requirements for service and return [*see § 90.50[3][d]*]. This holding conflicts with *Wong v. Armstrong World Industries, Inc. (1991) 232 Cal. App. 3d 1032, 1034, 283 Cal. Rptr. 870 (First App. Dist., Div. Three)* , and has been strongly criticized by *Biss v. Bohr (1995) 40 Cal. App. 4th 1246, 1250-1251, 47 Cal. Rptr. 2d 692 (Fourth App. Dist., Div. Three)* , in which the court reasoned that an answer filed during the three year period excuses failure to serve summons within that time, while an answer filed during the three-year, sixty-day period excuses failure to return summons within that time [*Biss v. Bohr (1995) 40 Cal. App. 4th 1246, 1250-1251, 47 Cal. Rptr. 2d 692* ; *see § 90.52[3][b]*].

[e] Effect of Authority Decided Under Former Dismissal Statutes

In 1984, former Code Civ. Proc. § 581a was repealed and replaced by *Code Civ. Proc. §§ 583.210-583.250*. Decisions interpreting the former statute have been cited in the form as persuasive rather than controlling authority to the extent that the revised statutes codify former case law or continue former substantive principles. 2005 amendments to *Code Civ. Proc. § 583.210* eliminated the requirement that the original summons be returned to the court; instead, the court retains the original summons, issues copies, and the plaintiff files a proof of service of summons [2005 Stats. 300].

[f] Related Pleading and Practice Forms

For forms of a notice of motion and order relating to a motion to dismiss an action pursuant to Code Civ. Proc. §§ 583.210 and 583.250, see Ch. 212, *Dismissal* , in California Forms of Pleading and Practice (Matthew Bender).

[g] Opposing Memoranda

The memoranda *set out in §§ 90.52 -90.59* may be used in an appropriate case to oppose a motion for dismissal supported by this memorandum.

[3] Discussion of Authorities

[a] Dismissal for Failure to Complete Service or File Proof of Service Within Statutory Period

In ***Elling Corp. v. Superior Court*** *(1975) 48 Cal. App. 3d 89, 123 Cal. Rptr. 734* , the trial court denied a motion to

dismiss an action for failure to effect service within the period of former Code Civ. Proc. § 581a(a) [*now see Code Civ. Proc. §§ 583.210, 583.250*]. The court of appeal issued a writ of mandate requiring entry of dismissal, holding that dismissal is mandatory as to a party who has not been served within three years from the commencement of the action unless the case comes within one of the exceptions expressly stated in the statute or implied by case law (*48 Cal. App. 3d 89, 93)* . Dismissal was proper because defendants were parties to the original complaint (*48 Cal. App. 3d 89, 96)* , plaintiff could not show that he came under an implied exception to the statutory requirements, and there was nothing in the statute suggesting that notice or knowledge of the pendency of the action would be a substitute for service and return (*48 Cal. App. 3d 89, 96-98)* .

[b] Dismissal Mandatory

In ***Busching v. Superior Court*** *(1974) 12 Cal. 3d 44, 115 Cal. Rptr. 241, 524 P.2d 369* , an action was brought on March 12, 1970, against a corporation, an employee, and others for damages under an insurance contract. On March 15, 1973, an officer of the corporation, by then dissolved, wrote plaintiff a letter in which he acknowledged that "it would appear that service has been made on" an officer of the former corporation on the previous day and noted plaintiff's agreement that the corporation have an extension of time in which to answer or otherwise plead. Subsequently, on August 3, 1973, the former corporation and its employee filed a notice of motion to dismiss pursuant to former Code Civ. Proc. § 581a(a). The motion was denied and the moving parties petitioned the Supreme Court for a writ of mandate to compel dismissal of the action.

The Court issued the writ, holding that unless the actions of plaintiff came within the exceptions expressly or impliedly stated in former Code Civ. Proc. § 581a(a), dismissal of the action was mandatory where the summons on the complaint was not served and return made within three years after commencement of the action (*12 Cal. 3d 44, 50)* . One of the exceptions considered by the Court was whether the letter by the corporation's officer constituted a general appearance. The Court found that it did not. It merely acknowledged that service might have been made, but did not purport to waive any of the requirements of former Code Civ. Proc. § 581a(a) regarding timely service. Moreover, merely seeking an extension of time to plead cannot be deemed to indicate an intention to submit to the jurisdiction of the court for a ruling going to the merits, because the purpose may be only to obtain adequate time to determine whether or not to object to the court's jurisdiction. Even if the party's action did constitute a general appearance, it took place after expiration of the three-year period, and a general appearance after the three years have run did not operate to deprive a defendant of the right to dismissal (*12 Cal. 3d 44, 50-53)* .

Code Civ. Proc. § 583.220 now provides that a general appearance is not made by a stipulation pursuant to *Code Civ. Proc. § 583.230* extending the time within which service must be made, by a motion to dismiss pursuant to *Code Civ. Proc. §§ 583.110-583.430*, or by an extension of time to plead after a motion to dismiss is made pursuant to *Code Civ. Proc. §§ 583.110-583.430*.

In ***Floyd Neal & Associates, Inc. v. Superior Court*** *(1977) 72 Cal. App. 3d 734, 140 Cal. Rptr. 301* , plaintiff failed to serve and return service within three years after the action was filed. After expiration of the three-year period but before dismissal of the action, a complaint in intervention was filed. Subsequently, the trial court dismissed the complaint under former Code Civ. Proc. § 581a(a) but refused to dismiss the complaint in intervention. Defendant petitioned for a writ of mandate to compel dismissal.

The court of appeal granted the petition. The court reasoned that the language of former Code Civ. Proc. § 581a was mandatory and jurisdictional in that if no express or implied exception to the statute exists, the court has power only to order a dismissal. Since former Code Civ. Proc. § 581a(a) provided that if its requirements were not met, then no further proceedings could be had, and in the instant case no express or implied exception was applicable, the trial court specifically lacked power to order the filing of a complaint in intervention (*72 Cal. App. 3d 734, 738-739)* .

[c] Statutory Periods for Service and Proof of Service Not Extended by Filing Amended Complaint

The facts and procedural background of ***Elling Corp. v. Superior Court*** *(1975) 48 Cal. App. 3d 89, 123 Cal. Rptr. 734* , are *discussed under § 90.50[3][a]*. In *Elling,* plaintiff contended that dismissal was improper because, although the defendants were named in the caption, the statutory period did not commence until the complaint was amended almost one year later to state a cause of action against them. In response, the court held that the period commences on the date of filing of the original complaint for all parties named in that complaint. Persons named in the title of the action are thereby made parties and eligible for service of process, even if a cause of action is not stated against them (*48 Cal. App. 3d 89, 94-95)* .

In ***Perati v. Atkinson*** *(1964) 230 Cal. App. 2d 251, 40 Cal. Rptr. 835* , plaintiff contended on appeal that the trial court had erred in dismissing the action under former Code Civ. Proc. § 581a for failure to return the summons within three years, because the period commenced running on the filing of the third amended complaint rather than the original complaint. The court held that the period was not extended by the filing of an amended or supplementary complaint (*230 Cal. App. 2d 251, 253)* . Not only would a contrary rule conflict with interpretations of when the period commences under former Code Civ. Proc. § 583(a) and (b), but to construe the word "complaint" to mean the "last amended complaint" would violate the plain meaning of the statute and utterly defeat its purpose (*230 Cal. App. 2d 251, 253)* .

Code Civ. Proc. § 583.210(a), enacted in 1984, provides that an action is commenced at the time the complaint is filed.

[d] General Appearance After Three Years Does Not Make Statutory Periods for Service and Proof of Service Inapplicable

In ***Weatherby v. Van Diest*** *(1991) 233 Cal. App. 3d 506* , plaintiff completed service within the three-year period, but failed to return summons within three years and 60 days. Defendant, meanwhile, made a general appearance after the three-year period but within three years and 60 days. The Fourth District Court of Appeal, Division Two, affirmed the trial court's dismissal for plaintiff's failure to satisfy the mandatory requirements of *Code Civ. Proc. § 583.210(b)*.

In a majority opinion, two members of the appellate panel rejected plaintiff's argument that, pursuant to *Code Civ. Proc. §§ 583.110(f)* ("service" includes return of summons unless provision or context otherwise requires) and 583.220 (time within which "service" must be made does not apply if defendant makes general appearance), defendant's general appearance within three years and 60 days after the filing of the complaint made inapplicable the requirement for return of summons during that period. The majority reasoned that the additional sixty days was intended by the Legislature to provide only that notice of the lawsuit could be filed sixty days after the three-year period had run within which service must be accomplished. The court applied the rule in *Busching v. Superior Court (1974) 12 Cal. 3d 44, 52, 115 Cal. Rptr. 241* (decided under former Code Civ.Proc. § 581(a), and *discussed under § 90.50[3][b]*), that a general appearance after the lapse of the three-year mandatory period for completing service did not operate to deprive a defendant of his right to dismissal (*233 Cal. App. 3d 506, 509-511)* .

The reasoning of *Weatherby* has been criticized by *Biss v. Bohr (1995) 40 Cal. App. 4th 1246, 1250-1251, 47 Cal. Rptr. 2d 692 (Fourth App. Dist., Div. Three)* , discussed in *§ 90.52[3][b]*. *Biss,* in criticizing *Weatherby,* reasoned that an answer filed during the three-year period excuses failure to serve summons within that time, while an answer filed during the three-year, sixty-day period excuses failure to return summons within that time [*Biss v. Bohr (1995) 40 Cal. App. 4th 1246, 1250-1251, 47 Cal. Rptr. 2d 692* ; *see Wong v. Armstrong World Industries, Inc. (1991) 232 Cal. App. 3d 1032, 1034, 283 Cal. Rptr. 870* (reaching opposite result from *Weatherby*), both discussed in *§ 90.52[3*][b]; *see also Weatherby v. Van Diest (1991) 233 Cal. App. 3d 506, 514* (dissenting opinion)].

2005 amendments to *Code Civ. Proc. § 583.210* eliminated the requirement that the original summons be returned to the court; instead, the court retains the original summons, issues copies, and the plaintiff files a proof of service of summons [2005 Stats. 300].

[e] Defendant Not Estopped to Move for Dismissal by Requesting Extension of Time to Respond

In ***Biss v. Bohr*** *(1995) 40 Cal. App. 4th 1246, 47 Cal. Rptr. 2d 692* , a medical malpractice action, the trial court dismissed a defendant on the ground that service had not been timely made. Plaintiff had served the summons and complaint, but had not completed service by effecting return of summons in a timely manner.

On appeal, plaintiff raised the doctrine of equitable estoppel, contending that communication by defendant's attorney suggested that it was unnecessary to make a return of service. The attorney had asked for an extension of time to answer, but had then failed to file an answer during the extension period. Although recognizing that the doctrines of equitable estoppel and waiver are preserved by *Code Civ. Proc. § 583.140* (*40 Cal. App. 4th 1246, 1251)* , the court of appeal held that, even accepting all the plaintiff's allegations, plaintiff could not prevail. After reviewing the elements of estoppel (*40 Cal. App. 4th 1246, 1252)* , the court concluded that even if some reliance had been engendered by the request for an extension, the reasonableness of that reliance ended when the defendant did not file an answer. The court noted that the plaintiff still had time at that point to file a timely return of summons, but failed to do so. Since that failure was not attributable to any conduct by defendant's attorney, plaintiff could not claim that defendant's attorney's conduct prevented timely filing of the return of summons (*40 Cal. App. 4th 1246, 1253)* . The court thus affirmed the judgment of dismissal.

Note that the court did reverse the dismissal as to two other defendants who filed answers. That result conflicts with and included criticism of *Weatherby v. Van Diest (1991) 233 Cal. App. 3d 506, 284 Cal. Rptr. 622* , which is the authority for Optional Paragraph D of this form. For discussion, see *§ 90.50[3][d]*.

[4] Additional Authorities

[a] Dismissal Mandatory

In *Tires Unlimited v. Superior Court (1986) 180 Cal. App. 3d 974, 226 Cal. Rptr. 25* , the court of appeal issued a writ of mandate to compel the trial court to dismiss the action for failure to serve and return summons within three years. The court stated that because of the mandatory statutory language of former Code Civ. Proc. § 581a, a trial court has no discretionary power to decline to dismiss a case in which the service has not been made and the summons has not been returned within the statutory time limit, unless the circumstances fall within the narrow statutory exceptions. The court stated that no such statutory exceptions applied in this case (*180 Cal. App. 3d 974, 983)* .

The facts and procedural background of *Republic Corp. v. Superior Court (1984) 160 Cal. App. 3d 1253, 207 Cal. Rptr. 241* , are discussed in *§ 90.63[3][b]*. In *Republic*, the court of appeal held that the time provisions of former Code Civ. Proc. § 581a [*now see Code Civ. Proc. § 583.210*] are mandatory and not excusable, unless one of the exceptions in former Code Civ. Proc. § 581a(f) exists. The court found that belated service on a defendant more than four years after commencement of an action was unexcused under former Code Civ. Proc. § 581a(f), and granted a writ of mandate that the action be dismissed (*160 Cal. App. 3d 1253, 1258)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsGeneral Overview

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Volume 9 Chapters 90-99 DISMISSAL---to---EMINENT DOMAIN
CHAPTER 90 DISMISSAL
PART II. FORMS
B. Involuntary Dismissal
1. Dismissal For Failure To Serve Summons and Complaint and File Proof of Service of Summons

9-90 California Points & Authorities § 90.51

§ 90.51 Supporting Motion for Discretionary Dismissal for Failure to Serve Summons and Complaint and File Proof of Service of Summons [Code Civ. Proc. §§ 583.410, 583.420(a)(1); Cal. Rules of Ct., Rule 3.1342]--General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION TO
vs.	)	DISMISS ACTION
	)	[*Code Civ. Proc. §§ 583.410, 583.420(a)(1)*; *Cal.*
_____ [*name*],	)	*Rules of Ct., Rule 3.1342*]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
		[Trial Date: _____]

_____

PLAINTIFF'S ACTION AGAINST DEFENDANT _____ [*name*] SHOULD BE DISMISSED PURSUANT TO THE COURT'S DISCRETIONARY POWER UNDER SECTION 583.410 OF THE CODE OF CIVIL PROCEDURE BECAUSE SERVICE AND PROOF OF SERVICE OF SUMMONS HAVE NOT BEEN MADE WITHIN TWO YEARS AFTER THE ACTION WAS COMMENCED AGAINST DEFENDANT AND DISMISSAL IS APPROPRIATE UNDER THE CIRCUMSTANCES.

A. Discretion to Dismiss After Two Years. The court has the discretionary power to dismiss an action pursuant to *Section 583.410 of the Code of Civil Procedure* for delay in prosecution, on the defendant's motion, if service and proof of service of summons are not made within two years after the action is commenced against the defendant and dismissal appears appropriate to the court under the circumstances (*Code Civ. Proc. §§ 583.410(a), 583.420(a)(1)*; *see Brown v. Pacific Tel. & Tel. Co. (1980) 105 Cal. App. 3d 482, 487, 164 Cal. Rptr. 445* ; *Lopez v. Larson (1979) 91 Cal. App. 3d 383, 398, 153 Cal. Rptr. 912* ; *see also Code Civ. Proc. § 583.110(f)* ("service" defined to include return of summons).

B. Factors Considered. In exercising its discretion regarding dismissal under *Section 583.410 of the Code of Civil Procedure* for failure to effect service and return of summons within two years as provided in Section 583.420(a)(1), the trial court must consider the factors set forth in *Rule 3.1342(e) of the California Rules of Court*, including the diligence used in seeking to effect service of process (*Cal. Rules of Ct., Rule 3.1342(a), (e)*; *see Brown v. Pacific Tel. & Tel. Co. (1980) 105 Cal. App. 3d 482, 487, 164 Cal. Rptr. 445* ; *Lopez v. Larson (1979) 91 Cal. App. 3d 383, 407-408, 153 Cal. Rptr. 912*).

[*Optional*] **C. Two-Year Period Applicable to Doe Defendants.** The court's discretion to dismiss an action for failure to effect service and return summons within two years pursuant to the provisions of *Section 583.420(a)(1) of the Code of Civil Procedure* is not limited by *Section 474 of the Code of Civil Procedure*, which allows amendment of a pleading to set forth the true name of a fictitiously named defendant. The requirement of reasonable diligence in effecting service within two years of the commencement of an action to avoid discretionary dismissal is applicable to both named and fictitious defendants (*Clark v. Stabond Corporation (1987) 197 Cal. App. 3d 50, 58, 242 Cal. Rptr. 676*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be used by a defendant in support of a motion for discretionary dismissal based on a failure to serve and return a summons within two years after commencement of an action against defendant [*see Code Civ. Proc. §§ 583.410, 583.420(a)(1)*].

An additional memorandum supporting a motion for discretionary dismissal for delay in service is *set out in § 90.65*. This memorandum is intended for use as supplemental points and authorities, to be submitted in response to any opposition to the motion for dismissal. Supplemental memoranda are expressly authorized in analogous motions for discretionary dismissal [*see Cal. Rules of Ct., Rule 3.1342(c)*]. Alternatively, the foregoing memorandum may be combined with the additional memorandum, when counsel wishes to anticipate any known ground for opposition.

In an appropriate case, the foregoing points and authorities may be combined with others supporting a motion for mandatory dismissal for failure serve thesummons and complaint within three years and return the summons within 60 days thereafter [*see § 90.50*].

The principles applicable in determining whether the discretionary period has lapsed are the same as those applicable in determining whether the mandatory period has lapsed [*see Code Civ. Proc. § 583.420(b)*]. Thus, §§ 90.52-90.59, which set out points and authorities opposing a motion for mandatory dismissal for delay in service, may also be used in an

appropriate case to oppose a motion for discretionary dismissal supported by the foregoing form. Conversely, the foregoing points and authorities may be supplemented by, or combined with, the points and authorities *set out in §§ 90.61 -90.63*, which respond to various grounds for opposition *set out in §§ 90.52 -90.59*.

The foregoing memorandum supports a defendant's motion for dismissal of a plaintiff's complaint, and should be modified as necessary when it is used in another context, such as in support of a motion for dismissal of a cross complaint [*see Code Civ. Proc. § 583.110(a), (b), (d), (e)*].

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated. For example, the date the action was filed and facts showing no apparent reason for delay in service should be included, along with facts showing any prejudice to defendant in failing to dismiss [*see, e.g., Brown v. Pacific Tel. & Tel. Co. (1980) 105 Cal. App. 3d 482, 487-488, 164 Cal. Rptr. 445]* .

[b] Effect of Authority Decided Under Former Dismissal Statutes

In 1984, the provision for involuntary dismissal for delay in service and return, former Code Civ. Proc. § 581a, was repealed and replaced by *Code Civ. Proc. §§ 583.210-583.250*. The provision for discretionary dismissal for failure to serve and return a summons contained in *Code Civ. Proc. § 583.420(a)(1)* was not previously codified. Former Code Civ. Proc. § 583(a) provided that the court, in its discretion, might dismiss an action for want of prosecution if it was not brought to trial within two years after it was filed. This section was interpreted to include the failure to serve a summons [*see, e.g., Brown v. Pacific Tel. & Tel. Co. (1980) 105 Cal. App. 3d 482, 487, 164 Cal. Rptr. 445* ; *Lopez v. Larson (1979) 91 Cal. App. 3d 383, 398, 153 Cal. Rptr. 912]* . Decisions interpreting former Code Civ. Proc. § 583(a) in this way have been cited in the form as persuasive rather than controlling authority.

[c] Related Pleading and Practice Forms

For forms of a notice of motion and order relating to a motion to dismiss an action pursuant to Code Civ. Proc. §§ 583.410-583.430, see Ch. 212, *Dismissal* in California Forms of Pleading and Practice.

[d] Opposing Memoranda

The memorandum *set out in § 90.60* may be used in an appropriate case to oppose a motion for dismissal supported by the foregoing memorandum.

[3] Discussion of Authorities

[a] Discretion to Dismiss After Two Years

Brown v. Pacific Tel. & Tel. Co. *(1980) 105 Cal. App. 3d 482, 164 Cal. Rptr. 445* , involved a complaint for personal injuries arising out a slip-and-fall accident on defendant's premises. Plaintiff did not complete service of process until two and one-half years after filing suit. After receiving an extension of time to plead, defendant filed a motion to dismiss pursuant to former Code Civ. Proc. § 583(a) [*now see Code Civ. Proc. § 583.420*]. Prior to the hearing on the motion, plaintiff obtained entry of default, which was later vacated because of clerical error. In the interim, defendant filed an answer. The trial court granted the motion to dismiss and plaintiff appealed.

The court of appeal affirmed the dismissal. After rejecting the argument that it was improper to vacate the clerk's entry of default, the court addressed the issue of discretion in dismissing the action. The court held that in opposing the dismissal motion, plaintiff had the burden of showing excusable delay. A trial court exercises its discretion by reference to the factors set forth in former Cal. Rules of Ct., Rule 203.5(e) [*now see Cal. Rules of Ct., Rule 3.1342(e), discussed under § 90.51[3][b]*], and its rulings will be disturbed only in cases of manifest abuse. Here, plaintiff's principal explanation of delay was the press of other business, coupled with disruption of office personnel. Although an

exceptional press of business has sometimes been cited as a factor militating against dismissal, this has only been one of several factors justifying a delay in service. The court concluded that a long delay in serving a summons and complaint poses an especially great potential for prejudice to a defendant because the passage of time may preclude defendant from adequately preparing a defense, particularlyin a slip-and-fall case, in which the condition of the defendant's premises at the time of the injury is at issue. The court relied largely on *Lopez v. Larson (1979) 91 Cal. App. 3d 383, 399-400, 153 Cal. Rptr. 912* (discussed *below*), in reaching its conclusion (*105 Cal. App. 3d 482, 487-488)* .

Lopez v. Larson *(1979) 91 Cal. App. 3d 383, 153 Cal. Rptr. 912* , was an action for wrongful employment termination. Plaintiff did not complete service of process for almost two years and four months after filing suit, and took no further action for two additional months. After filing suit, plaintiff's attorneys reassigned the case to other staff members and were involved in extensive litigation for other clients. Defendant moved to dismiss pursuant to former Code Civ. Proc. § 583(a) [*now see Code Civ. Proc. § 583.420*], but his motion was initially denied. After granting a later motion for reconsideration, the court reheard the dismissal motion and granted it on the basis that plaintiff had not shown good cause for the long delay. Plaintiff appealed.

The court of appeal affirmed the dismissal. After upholding the propriety of granting the motion for reconsideration, the court held that if in the exercise of its discretion a trial court determines that insufficient cause or justification has been shown for protracted delay, it may grant the motion to dismiss. Here, the sole justification advanced was that plaintiff's attorneys were so busy in representing other clients and legislative advocacy that they had no time to serve the sole defendant or otherwise pursue the lawsuit. While the press of business was a factor to be considered by the trial court, the court of appeal reasoned, it did not constitute good cause for failure to serve defendant or otherwise bring the case to trial (*91 Cal. App. 3d 383, 399-400)* . The court further reasoned that although several cases have rejected the view that prejudice to a defendant is presumed because of a long delay in prosecuting an action, the concept of presumed prejudice had a sound basis in a case of this nature. The factors in this case included plaintiff's request for injunctive relief and per diem damages for employment loss. The court termed the delay in service a particularly pernicious form of delay in terms of potential prejudice because the defendant may be unaware of the action and not alerted to the necessity of conducting discovery, interviewing witnesses, and preserving evidence. While here the adverse effects on defendant from the delay were not overwhelming, the court concluded that there were some adverse effects. Considering the nature of the case, the relief sought, the nature and length of the delay, and the lack of justification for it, the trial court did not abuse its discretion in dismissing the action (*91 Cal. App. 3d 383, 401-405)* .

[b] Factors Considered

California Rules of Court, Rule 3.1342(e) sets out factors that must be considered by the court in ruling on a motion for discretionary dismissal brought either for failure to serve and return the summons or for failure to bring the case to trial or new trial [*Cal. Rules of Ct. 3.1342(e)*; *see Code Civ. Proc. § 583.420(a)(1), (2), (3)*]. The rule requires the court to consider all matters relevant to a proper determination of the motion, including the court's file in the case and the affidavits and declarations and supporting data submitted by the parties. When applicable, the court must also consider (1) the availability of the moving party and other essential parties for service of process; (2) the diligence in seeking to effect service of process; (3) the extent to which the parties engaged in any settlement negotiations or discussions; (4) the diligence of the parties in pursuing discovery or other pretrial proceedings, including any extraordinary relief sought by either party; (5) the nature and complexity of the case; (6) the law applicable to the case, including the pendency of other litigation under a common set of facts or determinative of the legal or factual issues in the case; (7) the nature of any extensions of time or other delay attributable to either party; (8) the condition of the court's calendar and the availability of an earlier trial date if the matter was ready for trial; (9) whether the interests of justice are best served by dismissal or trial of the case; and (10) any other fact or circumstance relevant to a fair determination of the issue.

Cal. Rules of Ct. 3.1342(e) further provides that the court shall be guided by the policies set forth in *Code Civ. Proc. 583.130*. Under that statute, it is the policy of the state that a plaintiff shall proceed with reasonable diligence in the prosecution of an action but that all parties shall cooperate in bringing the action to trial or other disposition. Except as

otherwise provided by statute or rule, the policy favoring the right of the parties to make stipulations in their own interests and the policy favoring trial or other disposition of an action on the merits are generally to be preferred over the policy that requires dismissal for failure to proceed with reasonable diligence in the prosecution of an action.

The facts and procedural background of ***Brown v. Pacific Tel. & Tel. Co.*** *(1980) 105 Cal. App. 3d 482, 164 Cal. Rptr. 445* , are *discussed under § 90.51[3][a]*. In *Brown,* the court of appeal held that the trial court exercises its discretion by reference to the factors set forth in former Cal. Rules of Ct., Rule 203.5(e) [*now see Cal. Rules of Ct., Rule 3.1342(e)*], and its rulings will be disturbed only in cases of manifest abuse (*105 Cal. App. 3d 482, 487)* .

The facts and procedural background of ***Lopez v. Larson*** *(1979) 91 Cal. App. 3d 383, 153 Cal. Rptr. 912* , are *discussed under § 90.51[3][a]*. In *Lopez,* the court of appeal held that former Cal. Rules of Ct., Rule 203.5(e) [*now see Cal. Rules of Ct., Rule 3.1342(e)*], was promulgated pursuant to authority granted by an amendment to former Code Civ. Proc. § 583(a) and enumerates factors the court must consider on a motion for dismissal under former Code Civ. Proc. § 583(a). The court rejected the argument that the trial court had failed to consider one of those factors, namely,whether the interests of justice would be served by imposing a sanction less dire than dismissal. The trial court had seriously considered the decision to dismiss and nothing in the record indicated that plaintiff suggested to the court any specific alternative or that the court failed to consider the possibility of imposing a lesser sanction (*91 Cal. App. 3d 383, 407-408)* .

[c] Two-Year Period Applicable to Doe Defendants

Clark v. Stabond Corporation *(1987) 197 Cal. App. 3d 50, 242 Cal. Rptr. 676* , was an action for wrongful death against five named defendants and unknown defendants fictitiously named as Does 1 through 1,000. Two defendants, Stabond Corporation and Fiber Resin Corporation, were subsequently named in place of two Doe defendants over two years later. They moved to dismiss the action for failure to serve the complaint within two years pursuant to *Code Civ. Proc. 583.420(a)(1),* and the trial court granted the motion. The trial court found that, in regard to Stabond, plaintiffs had failed to pursue timely discovery that presumably would have led to Stabond's identity and service within two years of the filing of the action, that Stabond was available for service during the entire period of delay, that the case was relatively simple and could have been tried if the complaint had been timely served, and that, under all the circumstances of the case, it would have been an injustice to deny the motion. Plaintiffs appealed.

The court of appeal affirmed. The court rejected the plaintiffs' argument that absent an abuse of the fictitious name procedures, a complaint should never be dismissed before the three-year limitations period set forth in *Code Civ. Proc. § 583.210*. Instead, the court noted that neither *Code Civ. Proc. § 583.420* or *Cal. Rules of Ct., Rule 3.1342(e)* make any distinction between service on named or fictitious defendants. Rather, *Cal. Rules of Ct., Rule 3.1342(e)* requires consideration of the availability of the moving party for service of process and "the diligence in seeking to effect service of process." Finally, the court noted that one of the purposes of the discretionary dismissal statutes that is particularly significant when delay is caused by failure to effect service is to avoid prejudice to the defendant caused by the dissipation of material evidence, thus limiting the defendant's ability to defend. The court concluded that this purpose would be frustrated by carving out an exception based on how a defendant is identified in the complaint (*197 Cal. App. 3d 50, 58)* .

[4] Additional Authorities

[a] Discretion to Dismiss After Two Years

In *A. Groppe & Sons Glass Co. Inc. v. Fireman's Fund Ins. Co. (1991) 232 Cal. App. 3d 220, 283 Cal. Rptr. 352* , the court of appeal upheld a dismissal for failure to serve defendant within two years of commencing the action, following *Danielson v. ITT Industrial Credit Co. (1988) 199 Cal. App. 3d 645, 245 Cal. Rptr. 126* . Plaintiff argued that it was impossible to serve the complaint during a 17-month period while the Chapter 11 bankruptcy trustee controlled

plaintiff's action. The court disagreed, stating that plaintiff could have sought an order compelling the trustee to maintain the action, and failed otherwise to demonstrate that service was impossible, impracticable or futile (*232 Cal. App. 3d 220, 225-226)* .

Kuchins v. Hawes (1990) 226 Cal. App. 3d 535, 276 Cal. Rptr. 281 , was an action for damages for injuries sustained in an automobile accident. The summons was not served until more than two and one-half years after the complaint was filed. The only attempt at prosecution of the action during that period was the writing of a letter by plaintiff's counsel confirming a telephone conversation. After the summons was served, plaintiff did conduct some discovery. The defendants' motion for discretionary dismissal under *Code Civ. Proc. §§ 583.410(a)* and *583.420(a)(1)* for failure to serve summons within two years was granted, and plaintiff appealed. The court of appeal affirmed, stating that a belated manifestation of diligence does not operate to justify an earlier unjustified protracted delay, and that the policy that the interests of justice weigh against disposing of litigation on procedural grounds will prevail only if a plaintiff makes some showing of excusable delay. No such showing had been made (*226 Cal. App. 3d 535, 541)* .

In *Hilliard v. Lobley (1989) 216 Cal. App. 3d 638, 265 Cal. Rptr. 5* , the court of appeal affirmed dismissal of the action on the ground plaintiff had failed to serve the complaint within two years from the filing of the action. Plaintiff filed a medical malpractice action on August 22, 1985. An amended complaint was filed by a substituted attorney on March 18, 1986, and on May 14, 1987, plaintiff retained her present attorney, who had the amended complaint served on defendant on October 8, 1987. Defendant answered the complaint and moved to dismiss. In affirming the dismissal, the appellate court held that actual prejudice need not be established before a court may dismiss an action, since the legislative policy underlying the dismissal statutes is not solely to avoid prejudice to the defendant but is also to expedite the administration of justice by requiring every person to prosecute his or her action promptly and diligently. Even assuming plaintiff's contention were correct, plaintiff made no showing of justifiable delay or diligence in prosecution. While plaintiff did offer some explanation for the delay from May 1987 when her present attorney was hired until October when service was effectuated, there was an insufficient explanation for the delay before May 1987 (*216 Cal. App. 3d 638, 641-642)* . It is incumbent on plaintiff to establish reasonable or excusable delay in service. In the absence of such a showing the court may dismiss the action in its discretion even if defendant fails to establish actual prejudice (*216 Cal. App. 3d 638, 642)* .

In *Danielson v. ITT Industrial Credit Co. (1988) 199 Cal. App. 3d 645, 245 Cal. Rptr. 126* , the court of appeal upheld a dismissal for failure to serve the summons and complaint for nearly three years after the action was filed. The action was based on the failure of defendants, a tractor-trailer company, a credit company, and others, to lease a tractor-trailer under an oral agreement to an employee of a trucking company. After the defendants refused to change title to the employee and repossessed the tractor-trailer, the employee filed for bankruptcy in federal court, listing potential state court litigation claims against defendants as assets of the estate. The bankruptcy court discharged the employee's debts, but the trustee did not close the case or pursue the litigation claims. The employee then filed the action against the defendants in state court, and waited nearly three years to serve the defendants. After opposing the motion to dismiss, the employee moved the bankruptcy court for an order that the trustee had abandoned the state court claims, which was denied. The court of appeal found that the trial court did not abuse its discretion in dismissing the case pursuant to *Code Civ. Proc. §§ 583.410* and *583.420(a)(1)*. The court held that the prosecution of the action was not stayed by the bankruptcy proceedings, and that the employee could have petitioned the bankruptcy court for relief. Furthermore, the appellate court stated that the trial court could have reasonably concluded that service was not beyond the employee's control during the three years in which he sat on his rights, and that defendants demonstrated actual prejudice caused by the delay (*199 Cal. App. 3d 645, 658-660)* .

House v. State of California (1981) 119 Cal. App. 3d 861, 174 Cal. Rptr. 279 , was an action for false imprisonment against various police officers and their employers. In affirming the dismissal of the action pursuant to former Code Civ. Proc. § 583(a) against certain individual defendants and a public entity, who were served with process almost three years after suit was filed, the court of appeal held that the plaintiff was not excused for the delay in service. The claim of plaintiff's attorney that his father's nine-month illness prevented him from attending to his law practice did not

adequately explain the failure to effect service (*119 Cal. App. 3d 861, 880-882)* .

Feingersh v. Lutheran Hosp. Society (1977) 66 Cal. App. 3d 406, 136 Cal. Rptr. 155 , was a medical malpractice action in which two groups of defendants were served with process. The first was served two years and seven months after suit was filed, and the second some four months later. Plaintiff claimed that delays in service resulted from his desire to adjudicate a worker's compensation claim and to see the outcome of a similar appellate case. The court of appeal held that neither the pendency of a worker's compensation case or an appeal in a similar case between different parties is a valid excuse for not pressing a tort action against a third party. Although the trial court had denied one motion for dismissal after service had been made on the first group of defendants, that denial did not bar a later dismissal regarding both groups under former Code Civ. Proc. § 583(a). The court reasoned that as the time for mandatory dismissal for failure to bring a case to trial draws closer, the showing required to excuse a failure to bring a case to trial grows ever greater, and a trial court, in exercising its discretion, must consider the length of this interval. The court also noted that trial court's have inherent power to dismiss actions for unreasonable delay in prosecution (*66 Cal. App. 3d 406, 410-411)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsGeneral Overview

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Volume 9 Chapters 90-99 DISMISSAL---to---EMINENT DOMAIN
CHAPTER 90 DISMISSAL
PART II. FORMS
B. Involuntary Dismissal
1. Dismissal For Failure To Serve Summons and Complaint and File Proof of Service of Summons

9-90 California Points & Authorities § 90.52

§ 90.52 Opposing Motion for Mandatory Dismissal for Failure to Serve Summons and Complaint and File Proof of Service of Summons [Code Civ. Proc. §§ 583.210, 583.250]--Statutory Time Limits Excused by Defendant's General Appearance [Code Civ. Proc. § 583.220]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN OPPOSITION TO MOTION
Plaintiff,	)	TO DISMISS
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

DEFENDANT'S MOTION TO DISMISS THE ABOVE-ENTITLED ACTION SHOULD BE DENIED BECAUSE HE/SHE GENERALLY APPEARED IN THE ACTION, AND THUS THE TIME WITHIN WHICH SERVICE IS MADE AND PROOF OF SERVICE OF SUMMONS IS FILED PURSUANT TO SECTION 583.210 OF THE CODE OF CIVIL PROCEDURE DOES NOT APPLY.

A. Effect of General Appearance. Compliance with the statutory time requirements for service and proof of service of summons in *Section 583.210 of the Code of Civil Procedure* is excused if the defendant has made a general appearance

(*Code Civ. Proc. § 583.220*).

B. General Appearance Defined. A defendant makes a general appearance when the defendant answers, demurs, files a notice of motion to strike, files a notice of motion pursuant to *Section 396b of the Code of Civil Procedure*, moves for reclassification pursuant to *Section 403.040 of the Code of Civil Procedure*, gives the plaintiff written notice of appearance, or when an attorney gives notice of appearance for the defendant, or when the defendant does any act that indicates an intention to submit to the jurisdiction of the court (*Code Civ. Proc. § 1014*; *see General Ins. Co. v. Superior Court (1975) 15 Cal. 3d 449, 453, 124 Cal. Rptr. 745, 541 P.2d 289*).

[*Optional*] **C. Period During Which General Appearance Must Be Made.** The time limitation within which service of summons is made and proof of service is filed must be made is inapplicable when a defendant makes a general appearance within three years and sixty days of commencement of the action (*Biss v. Bohr (1995) 40 Cal. App. 4th 1246, 1251, 47 Cal. Rptr. 2d 692* ; *Wong v. Armstrong World Industries, Inc. (1991) 232 Cal. App. 3d 1032, 1034, 283 Cal. Rptr. 870*).

[*Optional*] **D. Action Indicating Status as Party.** A request by a defendant for relief that could only be given to a party on appearance in what would be a regular proceeding in the case constitutes a general appearance (*see Slaybaugh v. Superior Court (1977) 70 Cal. App. 3d 216, 222, 138 Cal. Rptr. 628*).

[*Optional*] **E. Written Stipulation Constituting Appearance.** A written stipulation between attorneys which expressly or by implication establishes an intent to accept service or appear constitutes a general appearance (*see Knapp v. Superior Court (1978) 79 Cal. App. 3d 799, 802-803, 145 Cal. Rptr. 154* ; *RCA Corp. v. Superior Court (1975) 47 Cal. App. 3d 1007, 1009-1010, 121 Cal. Rptr. 441*).

[*Optional*] **F. Complaint in Intervention Not Separate Action From Original Complaint.** A complaint and complaint in intervention are not independent actions, because the latter simply joins the intervenor in an action already instituted; thus, a general appearance in defending the complaint will preclude obtaining dismissal of the complaint in intervention (*Rhode v. National Medical Hosp. (1979) 93 Cal. App. 3d 528, 537-538, 155 Cal. Rptr. 797*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be used by a plaintiff to oppose a motion for mandatory dismissal of an action for failure to complete service and file proof of service of summons. The ground for opposition is that the defendant made a general appearance in the action [*see Code Civ. Proc. § 583.220*].

In an appropriate case, these points and authorities may be combined with additional points and authorities setting forth further grounds in opposition to a motion for mandatory dismissal for failure to serve and return the summons within the statutory time period [*see §§ 90.53 -90.59*].

The form may, in addition, be adapted for use in opposing a motion for discretionary dismissal [*see § 90.60*]. The principles applicable in determining whether the discretionary period has lapsed are the same as those applicable in

determining whether the mandatory period has lapsed [*see Code Civ. Proc. § 583.420(b)*].

The memorandum opposes a defendant's motion for dismissal of the complaint, and should be modified as necessary when it is used in another context, such as in opposition to a motion for dismissal of a cross complaint [*see Code Civ. Proc. § 583.110(a), (b), (d), (e)*].

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. For example, if it is alleged by plaintiff that defendant appeared by filing an answer, counsel should state the date or dates of filing and service of the answer in relation to the time required for plaintiff's service under *Code Civ. Proc. § 583.210*.

These points and authorities may be submitted in opposition to a motion for mandatory dismissal supported by the general points and authorities *set out in § 90.50*. The points and authorities *set out in § 90.61* may, in turn, be used in response to, or in anticipation of, the opposition set out in the foregoing form.

[b] General Appearance Must Be Made Within Three Years and Sixty Days

In *Wong v. Armstrong World Industries, Inc. (1991) 232 Cal. App. 3d 1032, 1034, 283 Cal. Rptr. 870 (First App. Dist., Div. Three)* , the court held that a defendant's general appearance within three years and 60 days from the date the complaint was filed makes inapplicable the mandatory requirements for service and return [*see now* proof of service of summons] [*see § 90.52[3][b]*]. This holding conflicts with *Weatherby v. Van Diest (1991) 233 Cal. App. 3d 506, 233 Cal. Rptr. 506 (Fourth App. Dist., Div. Two)* , in which another court of appeal held that the mandatory requirements still apply when a defendant makes a general appearance after three years but within three years and 60 days [*see § 90.50[3][d]*]. *Weatherby* has subsequently been criticized by *Biss v. Bohr (1995) 40 Cal. App. 4th 1246, 1250-1251, 47 Cal. Rptr. 2d 692 (Fourth App. Dist., Div. Three) , discussed under § 90.52[3][b]. Biss,* in criticizing *Weatherby,* reasoned that an answer filed during the three-year period excuses failure to serve summons within that time, while an answer filed during the three-year, sixty-day period excuses failure to return summons within that time [*Biss v. Bohr (1995) 40 Cal. App. 4th 1246, 1250-1251, 47 Cal. Rptr. 2d 692]* .

[c] Effect of Authority Decided Under Former Dismissal Statutes

In 1984, the provision for involuntary dismissal for delay in service and return, former Code Civ. Proc. § 581a, was repealed and replaced by *Code Civ. Proc. §§ 583.210-583.250*. Decisions interpreting former Code Civ. Proc. § 581a have been cited in the form as persuasive rather than controlling authority to the extent that the revised statutes codify former case law or continue former substantive principles.

2005 amendments to *Code Civ. Proc. § 583.210* eliminated the requirement that the original summons be returned to the court; instead, the court retains the original summons, issues copies, and the plaintiff files a proof of service of summons [2005 Stats. 300].

[d] Related Pleading and Practice Forms

For forms of a notice of motion and order relating to a motion to dismiss an action pursuant to Code Civ. Proc. §§ 583.210 and 583.250, see Ch. 212, *Dismissal* , in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] General Appearance Defined

In ***General Ins. Co. v. Superior Court*** *(1975) 15 Cal. 3d 449, 124 Cal. Rptr. 745, 541 P.2d 289* , plaintiff's attorney mailed a summons and complaint to defendant's designated agent and thereafter granted defendant's attorney several

written extensions of time in which to answer or otherwise respond. Defendant's attorney in turn agreed to accept service. Subsequently, defendant moved for dismissal pursuant to former Code Civ. Proc. § 581a(a) [*now see Code Civ. Proc. § 583.210*] and former Code Civ. Proc. § 581a(c) (repealed with no succeeding statute), and after denial of the motion, petitioned for a writ of mandate to compel dismissal.

The Supreme Court denied the petition. On the issue of whether defendant had made a general appearance, the Supreme Court held that whether a particular act of the defendant reflects an intent to submit to the jurisdiction of the court depends on the circumstances. The Court held that the written stipulation between the parties' attorneys recognized jurisdiction of the court over the parties and constituted a general appearance by defendant (*15 Cal. 3d 449, 453)* .

[b] Period During Which General Appearance Must Be Made

In ***Biss v. Bohr*** *(1995) 40 Cal. App. 4th 1246, 47 Cal. Rptr. 2d 692* , a medical malpractice action, the trial court dismissed two defendants on the ground that service had not been timely made. Plaintiff had served the summons and complaint on these defendants within the three-year period required by *Code Civ. Proc. § 583.210*, but had not completed service by effecting return of summons [*see now* proof of service of summons] in a timely manner within the three years, sixty days required by that section.

On appeal, plaintiff contended that the time limitation was made inapplicable because the defendants had answered the complaint within three years and sixty days after the complaint was filed. The court of appeal noted that the purpose of a return of service is to inform the court that the defendant received jurisdictional notice, and that this purpose is fulfilled where the defendant files an answer (*40 Cal. App. 4th 1246, 1250)* . The court recognized the conflict between *Wong v. Armstrong World Industries (1991) 232 Cal. App. 3d 1032, 283 Cal. Rptr. 870* , and *Weatherby v. Van Diest (1991) 233 Cal. App. 3d 506, 284 Cal. Rptr. 622* (both discussed *below*). In criticizing the *Weatherby* reasoning with regard to the applicable time period, the court distinguished between the time periods for the service of the complaint and return of summons (*40 Cal. App. 4th 1246, 1250-1251)* . Thus, the court concluded that an answer will excuse the requirement that summons be served within three years only if the answer is filed within the three-year period. However, because the time requirement for a return of summons is three years, sixty days, an answer filed during that period excuses compliance with respect to the return. Since the defendants had answered within three years, sixty days, they were not entitled to a dismissal on the ground that the summons had not been returned (*40 Cal. App. 4th 1246, 1251)* . The court thus reversed the judgment as to these defendants with directions to deny their motion to dismiss the complaint.

In ***Wong v. Armstrong World Industries, Inc.*** *(1991) 232 Cal. App. 3d 1032, 283 Cal. Rptr. 870* , plaintiff completed service within the three-year period, but failed to return summons within three years and 60 days. Defendant made a general appearance after the three-year period but within three years and 60 days. The First District Court of Appeal, Division Three, reversed the trial court's dismissal for plaintiff's failure to satisfy the mandatory requirements of *Code Civ. Proc. § 583.210(b)*. The court reasoned that a general appearance during the period for return of summons eliminates the provision for mandatory dismissal because the filing of an answer serves the same purpose as the return of summons of informing the court that the defendant has received jurisdictional notice (*232 Cal. App. 3d 1032, 1033-1037)* [2005 amendments to *Code Civ. Proc. § 583.210* eliminated the requirement that the original summons be returned to the court; instead, the court retains the original summons, issues copies, and the plaintiff files a proof of service of summons [2005 Stats. 300]].

Another court of appeal has held that defendant's general appearance after three years from the date the complaint was filed, but within the three years and sixty days period for return of summons, does not render inapplicable the requirement that return of summons must be made within three years and sixty days [*Weatherby v. Van Diest (1991) 233 Cal. App. 3d 506, 508-511, 233 Cal. Rptr. 506* , discussed in *§ 90.50[3][d]*].

[c] Action Indicating Status as Party

In ***Slaybaugh v. Superior Court*** *(1977) 70 Cal. App. 3d 216, 138 Cal. Rptr. 628* , the court of appeal was asked to issue a writ of mandate directing the trial court to dismiss an action under former Code Civ. Proc. § 581a(a) [*now see Code Civ. Proc. § 583.210*]. The basic issue was whether the party seeking dismissal had made a general appearance. The established test applied by the court was that if a party appears and asks for any relief which could be given only to a party in a pending case or for relief which itself would be a regular proceeding in the case, it is a general appearance regardless of how adroitly, carefully, or directly the appearance may be denominated or characterized as special (*70 Cal. App. 3d 216, 222)* . On the facts of the case, however, the party seeking dismissal had not made a general appearance, because voluntary participation as a witness is not sufficient (*70 Cal. App. 3d 216, 223-224)* .

[d] Written Stipulation Constituting Appearance

In ***Knapp v. Superior Court*** *(1978) 79 Cal. App. 3d 799, 145 Cal. Rptr. 154* , defendant attempted to dismiss the action under former Code Civ. Proc. § 581a(a) [*now see Code Civ. Proc. § 583.210*] on the ground that plaintiffs had failed to return the summons within three years. Plaintiffs defended on the theory that defendant's acceptance of a written agreement, terminable on ten days' notice, providing defendant with an open extension of time in which to plead, constituted a general appearance. The trial court denied the motion. Defendant petitioned for a writ of mandate to compel dismissal.

The court of appeal denied the petition. It held, in part, that the request for extension of time constituted a general appearance. The court cited *General Ins. Co. v. Superior Court (1975) 15 Cal. 3d 449, 453-454, 124 Cal. Rptr. 745, 541 P.2d 289* (*discussed under § 90.52[3][a]*) for the rule that a written stipulation between attorneys which recognizes jurisdiction of the court over the parties constitutes a general appearance (*79 Cal. App. 3d 799, 802-803)* . In *Knapp,* unlike *General Ins. Co.,* defendant did not explicitly submit to the court's jurisdiction by agreeing to acceptance of service. However, the declaration of plaintiff's counsel indicated that defendant never questioned or challenged the personal service and custom of the insurance company litigants involved in the case regarding such stipulations (*79 Cal. App. 3d 799, 804-805)* .

Knapp may be distinguished from two cases holding that an extension of time to plead does not constitute a general appearance: *Busching v. Superior Court (1974) 12 Cal. 3d 44, 50-51, 115 Cal. Rptr. 241, 524 P.2d 369* (discussed in *§ 90.50[3][b]*), in which defendant explicitly did not accept service; and *Woodruff v. McDonald's Restaurants (1977) 75 Cal. App. 3d 655, 657-658, 142 Cal. Rptr. 367* , in which the extension agreement was not between attorneys. In *Knapp* the stipulation was between attorneys, and although its language did not explicitly accept jurisdiction by agreeing to acceptance of service, the trial court's decision accepted plaintiff's contention that such stipulations implied acceptance of service according to the custom in the insurance industry (*79 Cal. App. 3d 799, 803-804)* . It should be noted, however, that an extension of time to plead after a motion to dismiss pursuant to *Code Civ. Proc. §§ 583.110-583.430* is not a general appearance [*Code Civ. Proc. § 583.220(c)*]. Furthermore, a stipulation to extend the time for service does not itself constitute a general appearance [*Code Civ. Proc. § 583.220(a)*].

In ***RCA Corp. v. Superior Court*** *(1975) 47 Cal. App. 3d 1007, 121 Cal. Rptr. 441* , plaintiff served but failed to return the summons within the three years allowed by former Code Civ. Proc. § 581a(a) [*now see Code Civ. Proc. § 583.210*]. However, before the statutory period expired, the parties stipulated in writing that defendant's time within which to appear in the action would be extended to a date within the period. Defendant petitioned for a writ of prohibition to prevent the trial court from continuing with the trial.

The court of appeal denied defendant's petition. The court held that the stipulation was tantamount to a general appearance for the purpose of former Code Civ. Proc. § 581a (*47 Cal. App. 3d 1007, 1009-1010)* .

[e] Complaint in Intervention Not Separate Action From Original Complaint

Rhode v. National Medical Hosp. *(1979) 93 Cal. App. 3d 528, 155 Cal. Rptr. 797* , involved an action for personal injuries arising out of an industrial accident. The workers' compensation insurance carrier for plaintiff's employer intervened in the action, seeking reimbursement from defendants for amounts paid because of the injuries. Following a judgment for plaintiffs, one of the defendants appealed on the ground that the trial court should have dismissed the carrier's complaint in intervention for failure to effect service of summons within three years.

The court of appeal affirmed the judgment. The court held that because defendant had already made a general appearance in the action by answering an amended version of the principal complaint, it could not obtain dismissal of the complaint in intervention. An intervention is not to be treated as a separate action, but rather is to be viewed as coming within the original, main action. The concept of intervention, including the rule that an intervenor joining on the side of a plaintiff does so in subordination to the plaintiff's right to control the action, supports that conclusion. Furthermore, dismissal of the complaint in intervention would not advance the purpose of the dismissal statute: to compel reasonable diligence in the prosecution of an action and expedite litigation. Prosecution by the original plaintiff, in which defendant appeared, was sufficient to ensure that the action in intervention would be diligently prosecuted. The court also noted that permitting dismissal could lead to anomalous results (*93 Cal. App. 3d 528, 537-539)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsGeneral Overview

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Volume 9 Chapters 90-99 DISMISSAL---to---EMINENT DOMAIN
CHAPTER 90 DISMISSAL
PART II. FORMS
B. Involuntary Dismissal
1. Dismissal For Failure To Serve Summons and Complaint and File Proof of Service of Summons

9-90 California Points & Authorities § 90.53

§ 90.53 Opposing Motion for Mandatory Dismissal for Failure to Serve Summons and Complaint and File Proof of Service of Summons [Code Civ. Proc. §§ 583.210, 583.250]--Service and Proof of Service Completed Within Statutory Time Period [Code Civ. Proc. §§ 583.210, 583.250(a)]--General Form

[1] FORM

[*Caption. See § 90.52.*]

DEFENDANT'S MOTION TO DISMISS THE ABOVE-ENTITLED ACTION SHOULD BE DENIED BECAUSE SERVICE AND PROOF OF SERVICE OF THE SUMMONS WERE COMPLETED WITHIN THE TIME REQUIREMENTS OF SECTION 583.210 OF THE CODE OF CIVIL PROCEDURE.

A. Statutory Grounds for Mandatory Dismissal. The court is required to grant a properly noticed motion to dismiss an action only if service of the summons and complaint on the defendant is not made within three years after the action is commenced against defendant, and proof of service of summons is not made within threeyears and 60 days after commencement of that action against defendant; an action is commenced for this purpose at the time the complaint is filed (*see Code Civ. Proc. §§ 583.210, 583.250(a)(2)*).

[*Optional*] **B. Service by Mail Complete at Time of Mailing.** The requirement of *Section 583.210(a) of the Code of Civil Procedure* that service of summons be made within three years after the action is commenced against a defendant is satisfied if service is by mail pursuant to a statute authorizing mailing as a manner of service and the mailing occurs within the three-year period, even though authorizing statute does not deem service complete at the time of mailing (*see Johnson & Johnson v. Superior Court (1985) 38 Cal. 3d 243, 252, 211 Cal. Rptr. 517, 695 P.2d 1058* ; *Billings v. Edwards (1979) 91 Cal. App. 3d 826, 830, 154 Cal. Rptr. 453*).

[*Optional*] **C. Statutory Period Extended When Last Day Is Holiday.** If the last day in the time period set forth in *Code Civ. Proc. § 583.210* for service or proof of service of the summons would otherwise fall on a holiday, then the period is extended to and including the next day which is not a holiday; holidays include Saturdays, all holidays specified in Sections 6700 (except Section 6700(c)) and *6701 of the Government Code*, and days on which any city,

county, state, or public office, other than a branch office, is closed for the whole of any day (*Code Civ. Proc. §§ 12a, 12b*; *see Ystrom v. Handel (1988) 205 Cal. App. 3d 144, 152, 252 Cal. Rptr. 110* (service of summons)).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in opposition to a motion for mandatory dismissal made by the court, defendant, or any other person interested in the action based on plaintiff's failure to serve and return the summons within the statutory period set out in *Code Civ. Proc. § 583.210*. The ground for opposition is that the service and proof of service were completed within the required time periods. Optional Paragraph B is for use when plaintiff mailed the summons and complaint before the statutory time period expired but the statute authorizing service by mail deems service complete on a date after the period expired. Optional Paragraph C may be used when the last day of the period for service or proof of service calculated under *Code Civ. Proc. § 583.210* fell on a weekend or holiday, and the service or return was completed by the next day that was not a weekend day or holiday.

In an appropriate case, the foregoing points and authorities may be combined with additional points and authorities setting forth further grounds in opposition to a motion for mandatory dismissal for failure to serve and return the summons with the statutory time period [*see §§ 90.52, 90.54 -90.56*].

The foregoing form may, in addition, be adapted for use in opposing a motion for discretionary dismissal [*see § 90.60*]. The principles applicable in determining whether the discretionary period has lapsed are the same as those applicable in determining whether the mandatory period has lapsed [*see Code Civ. Proc. § 583.420(b)*].

This memorandum opposes a defendant's motion for dismissal of the complaint, and should be modified as necessary when it is used in another context, such as in opposition to a motion for dismissal of a cross complaint [*see Code Civ. Proc. § 583.110(a), (b), (d), (e)*].

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, when using Optional Paragraph B, counsel should state the date of service of the summons and complaint and identify the holiday that coincided with the last day for service under the statute. If the last day for service fell on a Saturday, counsel should show that service was made on the following Monday, or on the following Tuesday if Monday was a holiday.

In an appropriate case, the memorandum may be submitted in opposition to a motion to dismiss supported by the points and authorities *set out in § 90.50*.

[b] Effect of Authority Decided Under Former Dismissal Statutes

In 1984, the provision for involuntary dismissal for delay in service and return, former Code Civ. Proc. § 581a, was repealed and replaced by *Code Civ. Proc. §§ 583.210-583.250*. Decisions interpreting the former statute have been cited in the form as persuasive rather than controlling authority to the extent that the revised statutes codify former case law or continue former substantive principles.

2005 amendments to *Code Civ. Proc. § 583.210* eliminated the requirement that the original summons be returned to the court; instead, the court retains the original summons, issues copies, and the plaintiff files a proof of service of summons [2005 Stats. 300].

[c] Holiday Defined

The term "holiday," for purposes of computation of time, includes every Saturday and Sunday and most holidays specified in *Gov. Code §§ 6700* and *6701* [*Code Civ. Proc. §§ 10, 12a*]. One holiday listed in *Gov. Code § 6700* but excluded from the meaning of "holiday" under *Code Civ. Proc. §§ 10* and *12a* is September 9, known as "Admission Day" [*Code Civ. Proc. §§ 10, 12a, 135*; *Gov. Code § 6700*]. Insofar as the business of any city, county, state, or public office other than a branch office is concerned, any day when the office is closed for the whole day is considered a holiday [*Code Civ. Proc. § 12b*].

[d] Related Pleading and Practice Forms

For forms of a notice of motion and order relating to a motion to dismiss an action pursuant to Code Civ. Proc. §§ 583.210 and 583.250, see Ch. 212, *Dismissal* , in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Service by Mail Complete at Time of Mailing

Johnson & Johnson v. Superior Court *(1985) 38 Cal. 3d 243, 211 Cal. Rptr. 517, 695 P.2d 1058* , involved separate actions against an out-of-state drug manufacturer, arising out of injuries allegedly caused by a drug. Plaintiffs served defendant by mail pursuant to *Code Civ. Proc. § 415.40* (service on person outside of state) by mailing a copy of the summons and complaint one day before expiration of the three-year period for service under former Code Civ. Proc. § 581a(a) [*now see Code Civ. Proc. § 583.210*]. The following day plaintiffs filed a return of service consisting of the original summons and a copy of the complaint with an affidavit showing the time and place of mailing. Subsequently, the trial court permitted a nunc pro tunc amendment to the return to include a copy of the return receipt, which had been signed after the three-year period expired. Defendant filed a motion to quash service of process and to dismiss pursuant to former Code Civ. Proc. § 581a. These motions were denied and defendant petitioned for a writ of mandate.

The Supreme Court denied the petition, holding that service was timely. Although *Code Civ. Proc. § 415.40* states that service by mail is not complete until the tenth day after mailing, the 10-day period is a "grace" period provided by statute to allow actual notice to the defendant before the beginning of the period allowed for filing a responsive pleading. For purposes of former Code Civ. Proc. § 581a(a) service by mail is complete on the date of mailing, which was before expiration of the mandatory three-year service period. The Court analogized the 10-day period of *Code Civ. Proc. § 415.40* to the 10-day service period of *Code Civ. Proc. § 415.20*, which was similarly held to be a grace period in *Ginns v. Shumate (1977) 65 Cal. App. 3d 802, 805, 135 Cal. Rptr. 604* (*38 Cal. 3d 243, 248-250)* .

In ***Billings v. Edwards*** *(1979) 91 Cal. App. 3d 826, 154 Cal. Rptr. 453* , the trial court dismissed plaintiff's action for failure to serve and return summons within three years. Plaintiff had mailed copies of the summons and made a return to the trial court within the statutory period, but *Code Civ. Proc. § 415.20* provides that a summons served in the manner used by plaintiff would not be complete until the tenth day after the mailing. Thus service was not technically complete until after the period had expired. The court dismissed the action under former Code Civ. Proc. 581a [*now see Code Civ. Proc. § 583.210*] and plaintiff appealed.

The court of appeal reversed, holding that this flaw, as well as variances in nomenclature, which could be corrected by an amended return, were not fatal to proper completion of service within the former three-year period (*91 Cal. App. 3d 826, 830-831)* .

[b] Statutory Period Extended When Last Day Is Holiday

In ***Ystrom v. Handel*** *(1988) 205 Cal. App. 3d 144, 252 Cal. Rptr. 110* , plaintiffs served defendants with the summons and complaint three years and two days after filing their complaint. The day three years after the filing date was a Saturday, and service was made on the following Monday. Defendants moved to dismiss the action for failure to serve the complaint within three years under *Code Civ. Proc. §§ 583.210, 583.250* (mandatory dismissal) and within two years under *Code Civ. Proc. §§ 583.410, 583.420* (discretionary dismissal). The trial court granted the motion for mandatory dismissal and plaintiffs appealed.

The court of appeal reversed, holding that the three-year time period prescribed by *Code Civ. Proc. § 583.210* is to be calculated with reference to *Code Civ. Proc. § 12a*. *Code Civ. Proc. § 12a* provides that if the last day for the performance of any act provided or required by law to be performed within a specified period of time shall be a holiday, then such period is extended to and including the next day which is not a holiday (*205 Cal. App. 3d 144, 147-148)* . Because service of process within the three-year period allotted by *Code Civ. Proc. § 583.210* is plainly an act required by law, the court held, *Code Civ. Proc. § 12a* operates to extend the three-year period when the last day would otherwise fall on a Saturday or holiday (*205 Cal. App. 3d 144, 152)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsGeneral Overview

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[Reserved]

§ 90.54[Reserved]

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9-90 California Points & Authorities § 90.55

§ 90.55 Opposing Motion for Mandatory Dismissal for Failure to Serve Summons and Complaint and File Proof of Service of Summons [Code Civ. Proc. §§ 583.210, 583.250]--Time for Service and Proof of Service Extended by Stipulation of Parties [Code Civ. Proc. §§ 583.220, 583.230]

[1] FORM

[*Caption. See § 90.52.*]

DEFENDANT'S MOTION TO DISMISS THE ABOVE-ENTITLED ACTION SHOULD BE DENIED BECAUSE THE PARTIES IN THE ACTION EXTENDED THE TIME WITHIN WHICH SERVICE HAD TO BE MADE BY _____ [A WRITTEN STIPULATION *or* AN ORAL AGREEMENT MADE IN OPEN COURT].

A. Construction of Dismissal Statutes. It is state policy that a plaintiff must proceed with reasonable diligence in prosecuting an action, but that all parties must cooperate in bringing it to trial or other disposition (*Code Civ. Proc. § 583.130*; *see Code Civ. Proc. § 583.110(e)*). In construing the dismissal provisions of *Sections 583.110-583.430 of the Code of Civil Procedure*, the policies favoring the right of parties to stipulate in their own interests and favoring trial or other disposition of an action on the merits are generally preferred over the policy requiring dismissal for failure to proceed with reasonable diligence, except as provided otherwise by statute or court rule (*Code Civ. Proc. § 583.130*; *see General Ins. Co. v. Superior Court (1975) 15 Cal. 3d 449, 454, 124 Cal. Rptr. 745, 541 P.2d 289*).

[*EITHER*]

B. Written Stipulation. The time within which service must be made pursuant to *Section 583.210 of the Code of Civil Procedure* does not apply if the defendant enters into a written stipulation with the plaintiff that time may be extended (*Code Civ. Proc. § 583.230(a)*; *see Code Civ. Proc. § 583.220*).

[*AND/OR*]

C. Oral Agreement in Open Court. The parties may extend the time within which service must be made pursuant to *Section 583.210 of the Code of Civil Procedure* by oral agreement made in open court, if entered in the minutes of the court or a transcript is made (*Code Civ. Proc. § 583.230(b)*).

[*CONTINUE*]

[*Optional*] **D. Extension to Time Beyond Statutory Period or Waiver of Right to Dismissal.** A stipulation is adequate to extend time for performance of an act required to avoid dismissal if it expressly waives the right to dismissal or extends the time for performance of the act to a time beyond the statutory period (*see General Ins. Co. v. Superior Court (1975) 15 Cal. 3d 449, 455, 124 Cal. Rptr. 745, 541 P.2d 289*).

[*Optional*] **E. Stipulation Embodied in Letters Between Counsel Adequate.** The provision that a stipulation to extend time may be in writing is satisfied by a stipulation embodied in correspondence between counsel (*see Regan Distributors, Inc. v. Yurosek & Son, Inc. (1979) 88 Cal. App. 3d 924, 928 fn. 5, 152 Cal. Rptr. 127*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in opposition to defendant's motion for mandatory dismissal based on plaintiff's failure to serve and file proof of service of summons within the statutory period set out in *Code Civ. Proc. § 583.210*. The ground for opposition is that the parties entered into a written stipulation or oral agreement to extend the time for service. It should be noted that a stipulation need not be filed, but if it is not filed, it must be brought to the court's attention if relevant to a dismissal motion [*Code Civ. Proc. § 583.230(a)*].

In an appropriate case, the foregoing points and authorities may be combined with additional points and authorities setting forth further grounds in opposition to a motion for mandatory dismissal for failure to serve and return the summons within the statutory time period [*see* §§ 90.72 -90.74, 90.76 -90.79].

The foregoing form may, in addition, be adapted for use in opposing a motion for discretionary dismissal [*see § 90.60*]. The principles applicable in determining whether the discretionary period has lapsed are the sameas those applicable in determining whether the mandatory period has lapsed [*see Code Civ. Proc. § 583.420(b)*].

The foregoing memorandum opposes a defendant's motion for dismissal of the complaint, and should be modified as necessary when it is used in another context, such as in opposition to a motion for dismissal of a cross complaint [*see Code Civ. Proc. § 583.110(a), (b), (d), (e)*].

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. For example, if it is claimed that the statutory period for service should be extended because an oral agreement to extend time for service was made by the parties in open court, counsel should state the date, time, and place of the stipulation, by whom it was made, before which judge it was made, and whether it was entered in the court

minutes or a transcript was made, along with the content of the stipulation [*see Code Civ. Proc. § 583.230(b)*]. If it is claimed that the parties extended the time for service by written stipulation, and the stipulation was not filed, counsel should submit the original or a true and correct copy of the stipulation with the foregoing form [*see Code Civ. Proc. § 583.230(a)*].

In an appropriate case, the foregoing memorandum may be submitted in opposition to a motion to dismiss supported by the points and authorities *set out in § 90.50*.

[b] Effect of Authority Decided Under Former Dismissal Statutes

In 1984, the provision for involuntary dismissal for delay in service and return, former Code Civ. Proc. § 581a, was repealed and replaced by *Code Civ. Proc. §§ 583.210-583.250*. Decisions interpreting the former statute have been cited in the form as persuasive rather than controlling authority to the extent that the revised statutes codify former case law or continue former substantive principles.

2005 amendments to *Code Civ. Proc. § 583.210* eliminated the requirement that the original summons be returned to the court; instead, the court retains the original summons, issues copies, and the plaintiff files a proof of service of summons [2005 Stats. 300].

[c] Related Pleading and Practice Forms

For forms of a notice of motion and order relating to a motion to dismiss an action pursuant to Code Civ. Proc. §§ 583.210 and 583.250, see Ch. 212, *Dismissal* in California Forms of Pleading and Practice.

[3] Discussion of Authorities

[a] Construction of Dismissal Statutes

The facts and procedural background of ***General Ins. Co. v. Superior Court*** *(1975) 15 Cal. 3d 449, 124 Cal. Rptr. 745, 541 P.2d 289* are discussed in *§ 90.52[3][a]*. After reviewing several written extensions granted by plaintiff in exchange for defendant's agreement to accept service, the Supreme Court refused to compel dismissal under former Code Civ. Proc. § 581a [*now see Code Civ. Proc. § 583.210*], which required that the summons be served and return made within three years. The Court stated that the purpose of former Code Civ. Proc. § 581a, like the five-year requirement of former Code Civ. Proc. § 583(b) (mandatory dismissal), was to encourage diligence in the prosecution of an action once it has been filed. However, defendant by written stipulation had precluded plaintiff from taking a default judgment prior to the expiration of the three-year period. Therefore, the Court held, defendant could not rely on plaintiff's failure to take a default to obtain dismissal of the action (*15 Cal. 3d 449, 454-455)* .

[b] Extension to Time Beyond Statutory Period or Waiver of Right to Dismissal

The facts and procedural background of ***General Ins. Co. v. Superior Court*** *(1975) 15 Cal. 3d 449, 124 Cal. Rptr. 745, 541 P.2d 289* , are discussed in *§ 90.52[3][a]*. In *General Ins. Co.,* the Supreme Court reviewed the adequacy of a stipulation between the parties to extend time. The general principle, as described in *J.C. Penney Co. v. Superior Court (1959) 52 Cal. 2d 666, 669, 343 P.2d 919* , is that a stipulation is adequate if it expressly either waives the right to dismissal or extends the time for performance of the act necessary to avoid dismissal to a date beyond the statutory period. A mere extension of time within the period does not extend the deadline absent a showing that the parties intended such an extension (*15 Cal. 3d 449, 455)* .

J.C. Penney Co. involved a motion for mandatory dismissal for failure to bring the action to trial within five years. The Court held that an extension for a specific period of time within the statutory period for a pretrial activity did not extend the five-year period, because time necessarily consumed by ordinary proceedings is not usually excluded (*52 Cal. 2d*

666, 666, 669-670) . However, subsequent appellate rulings appear to have limited the effect of *J.C. Penney Co.* by holding that an indefinite extension of time for pretrial activities does extend the period [*see, e.g., Regan Distributors, Inc. v. Yurosek & Son, Inc. (1979) 88 Cal. App. 3d 924, 928-929, 152 Cal. Rptr. 127* , discussed in *§ 90.87[3][d]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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9-90 California Points & Authorities § 90.56

§ 90.56 Opposing Motion for Mandatory Dismissal for Failure to Serve Summons and Complaint and File Proof of Service of Summons [Code Civ. Proc. §§ 583.210, 583.250]--Time for Service and Proof of Service Tolled by Statutory Exclusion [Code Civ. Proc. § 583.240]--Time During Which Defendant Was Not Amenable to Process [Code Civ. Proc. § 583.240(a)]

[1] FORM

[*Caption. See § 90.52.*]

DEFENDANT'S MOTION TO DISMISS THE ABOVE-ENTITLED ACTION SHOULD BE DENIED BECAUSE HE/SHE WAS NOT AMENABLE TO PROCESS FROM _____ [*date*], UNTIL _____ [*date*], AND THIS TIME IS EXCLUDED FROM CALCULATION OF THE TIME PERIODS FOR SERVICE SPECIFIED IN SECTION 583.210 OF THE CODE OF CIVIL PROCEDURE.

Amenability to Process. The time during which a defendant was not amenable to service of process is excluded from the calculation of the time periods specified in *Section 583.210 of the Code of Civil Procedure* for completing service and filing proof of service (*Code Civ. Proc. § 583.240(a)*; *see Polony v. White (1974) 43 Cal. App. 3d 44, 48, 117 Cal. Rptr. 341*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in opposition to defendant's motion for mandatory dismissal based on plaintiff's failure to serve and return the summons within the statutory period set out in *Code Civ. Proc. § 583.210*. The ground for opposition is that the time when defendant was not amenable to process must be excluded when computing the time within which service must be made [*see Code Civ. Proc. § 583.240(a)*], and that service was therefore timely, taking this exclusion into account.

In an appropriate case, the foregoing points and authorities may be combined with additional points and authorities setting forth further grounds in opposition to a motion for mandatory dismissal for failure to serve and file proof of service of summons within the statutory time period [*see §§ 90.52 -90.55, 90.57 -90.59*].

The foregoing form may, in addition, be adapted for use in opposing a motion for discretionary dismissal [*see § 90.60*]. The principles applicable in determining whether the discretionary period has lapsed are the same as those applicable in determining whether the mandatory period has lapsed [*see Code Civ. Proc. § 583.420(b)*].

The foregoing memorandum opposes a defendant's motion for dismissal of the complaint, and should be modified as necessary when it is used in another context, such as in opposition to a motion for dismissal of a cross complaint [*see Code Civ. Proc. § 583.110(a), (b), (d), (e)*].

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. For example, if defendant died and was thereby unamenable to service of process, counsel should state the date of death and when, if at all, a personal representative was appointed for the decedent [*see, e.g., Polony v. White (1974) 43 Cal. App. 3d 44, 48, 117 Cal. Rptr. 341]* .

In an appropriate case, the foregoing memorandum may be submitted in opposition to a motion to dismiss supported by the points and authorities *set out in § 90.50*. The points and authorities *set out in § 90.62* may, in turn, be used in response to, or in anticipation of, the opposition set out in foregoing form.

[b] Effect of Authority Decided Under Former Dismissal Statutes

In 1984, the provision for involuntary dismissal for delay in service and return, former Code Civ. Proc. § 581a, was repealed and replaced by *Code Civ. Proc. §§ 583.210-583.250*. Decisions interpreting former Code Civ. Proc. § 581a have been cited in the form as persuasive rather than controlling authority to the extent that the revised statutes codify former case law or continue former substantive principles.

2005 amendments to *Code Civ. Proc. § 583.210* eliminated the requirement that the original summons be returned to the court; instead, the court retains the original summons, issues copies, and the plaintiff files a proof of service of summons [2005 Stats. 300].

[c] Related Pleading and Practice Forms

For forms of a notice of motion and order relating to a motion to dismiss an action pursuant to Code Civ. Proc. §§ 583.210 and 583.250, see Ch. 212, *Dismissal* in California Forms of Pleading and Practice.

[3] Discussion of Authorities

[a] Amenability to Process

In ***Polony v. White*** *(1974) 43 Cal. App. 3d 44, 117 Cal. Rptr. 341* , the trial court dismissed plaintiff's complaint pursuant to former Code Civ. Proc. § 581a(a) [*now see Code Civ. Proc. § 583.210*] for failure to serve and return summons [*now see Code Civ. Proc. § 583.210* requiring only filing proof of service of summons] within three years.

Plaintiff appealed, contending that the time between defendant's death and appointment of a personal representative must be excluded from the calculation.

The court of appeal agreed and reversed the judgment. It noted that former Code Civ. Proc. § 581a(d) excluded time during which a defendant was not amenable to process, and the section meant precisely what it said. Since defendant died prior to service, there was no one in existence on whom process could be served until the personal representative was appointed. Thus, defendant was not amenable to process, because service of process was not possible (*43 Cal. App. 3d 44, 48)* .

[4] Additional Authorities

[a] Amenability to Process

In *Quaranta v. Merlini (1987) 192 Cal. App. 3d 22, 237 Cal. Rptr. 179* , the court of appeal reversed a judgment of dismissal under former Code Civ. Proc. § 581a [*now see Code Civ. Proc. § 583.210*]. Plaintiffs had unsuccessfully attempted to locate defendant by consulting voter registries, city directories, tax rolls, and telephone directories. After learning that defendant was a seaman residing in Italy, they attempted to serve him personally following the procedures outlined in the Hague Service Convention. Under these circumstances, the court of appeal held that the statute of limitations for service was tolled because defendant was not amenable to service (*192 Cal. App. 3d 22, 30)* . The court also held that the judgment of dismissal was improper because another trial judge had granted an order for service by publication, and the implied finding in making the order for publication that respondent was not amenable to process stood as a binding adjudication (*192 Cal. App. 3d 22, 29)* . *Quaranta* was disapproved in *Watts v. Crawford (1995) 10 Cal. 4th 743, 761, 42 Cal. Rptr. 2d 81, 896 P.2d 807* , which held that a finding under *Code Civ. Proc. § 415.50* that a defendant was not reasonably available for service of process other than by publication is not the equivalent of a finding that a defendant is not amenable to process within the meaning of *Code Civ. Proc. § 583.240(a)*. *Watts* also held that a court's finding that a defendant could not with reasonable diligence be served other than by publication does not constitute a binding adjudication that the defendant was not amenable to process for purposes of Section 583.240(a). For discussion of *Watts,* see *§ 90.62[3][c]*.

In *Herring v. Peterson (1981) 116 Cal. App. 3d 608, 172 Cal. Rptr. 240* , defendant died approximately three years after the complaint was filed. Three years after her death, the trial court dismissed the complaint pursuant to former Code Civ. Proc. § 583(b) [*now see Code Civ. Proc. §§ 583.310, 583.360*] for failure to bring the case to trial within five years of filing. Despite the continued presence of defendant's counsel, and the fact that almost seven years had passed since the filing of the action, the dismissal was reversed on appeal. The appellate court noted that a personal representative for defendant had not been appointed. Since defendant's death rendered her not amenable to service of process, the three years since her death were excluded from the statutory period and it was not proper to dismiss the action (*116 Cal. App. 3d 608, 612, 615-616)* .

While *Herring* construed amenability to process in the context of failure to bring a case to trial rather than failure to serve and return summons [*now see Code Civ. Proc. § 583.210* requiring only filing proof of service of summons] it appears that its reasoning is consistent with *Polony v. White (1974) 43 Cal. App. 3d 44, 48, 117 Cal. Rptr. 341* , discussed *above,* and may lend further authority in opposition to a dismissal motion.

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For related research and practice materials, see the following legal topics:
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9-90 California Points & Authorities § 90.57

§ 90.57 Opposing Motion for Mandatory Dismissal for Failure to Serve Summons and Complaint and File Proof of Service of Summons [Code Civ. Proc. §§ 583.210, 583.250]--Time for Service and Proof of Service Tolled by Statutory Exclusion [Code Civ. Proc. § 583.240]--Time During Which Proceedings Were Stayed [Code Civ. Proc. § 583.240(b)] or During Which Service Was Being Litigated [Code Civ. Proc. § 583.240(c)]

[1] FORM

[*Caption. See § 90.52.*]

THE COURT SHOULD DENY DEFENDANT'S MOTION TO DISMISS THIS ACTION BECAUSE _____ [PROSECUTION OF THE ACTION OR PROCEEDINGS IN THE ACTION WAS STAYED AND THE STAY AFFECTED SERVICE *and/or* THE VALIDITY OF SERVICE WAS LITIGATED BY THE PARTIES], AND THE TIME DURING WHICH _____ [THIS *or* THESE] CONDITION(S) EXISTED MUST BE EXCLUDED FROM THE PERIOD WITHIN WHICH SERVICE MUST BE MADE.

[*EITHER*]

A. Time During Stay Is Not Included. In computing the time within which service must be made pursuant to *Section 583.210 of the Code of Civil Procedure*, the time during which the prosecution of an action or proceedings in the action was stayed, if the stay affected service, must be excluded (*Code Civ. Proc. § 583.240(b)*; *see Highland Stucco & Lime, Inc. v. Superior Court (1990) 222 Cal. App. 3d 637, 643-644, 272 Cal. Rptr. 60*).

[*AND/OR*]

B. Validity of Service Litigated. In computing the time within which service must be made pursuant to *Section 583.210 of the Code of Civil Procedure*, the time during which the validity of service was the subject of litigation by the parties must be excluded (*Code Civ. Proc. § 583.240(c)*).

Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in opposition to defendant's motion for mandatory dismissal based on plaintiff's failure to serve and file proof of service of summons within the statutory period set out in *Code Civ. Proc. § 583.210*. The ground for opposition is that the time during which the action was stayed and the stay affected service, or the time during which the validity of the service was being litigated by the parties, must be excluded when computing the time within which service must be made [*see Code Civ. Proc. § 583.240(b), (c)*], and that service was therefore timely, taking this exclusion into account.

In an appropriate case, the foregoing points and authorities may be combined with additional points and authorities setting forth further grounds in opposition to a motion for mandatory dismissal for failure to serve and file proof of service of summons within the statutory time period [*see §§ 90.52 -90.56, 90.58, 90.59*].

The foregoing form may, in addition, be adapted for use in opposing a motion for discretionary dismissal [*see § 90.60*]. The principles applicable in determining whether the discretionary period has lapsed are the same as those applicable in determining whether the mandatory period has lapsed [*see Code Civ. Proc. § 583.420(b)*].

The foregoing memorandum opposes a defendant's motion for dismissal of the complaint, and should be modified as necessary when it is used in another context, such as in opposition to a motion for dismissal of a cross complaint [*see Code Civ. Proc. § 583.110(a), (b), (d), (e)*].

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. For example, if counsel claims that defendant litigated the validity of service with a motion to quash service, counsel should set out the dates on which the relevant motion, hearing, and order on the motion occurred and relate those dates to the statutory time periods for service and return of the summons.

In an appropriate case, the foregoing points and authorities may be submitted in opposition to a motion to dismiss supported by the points and authorities *set out in § 90.50*.

[b] Effect of Authority Decided Under Former Dismissal Statutes

In 1984, the provision for involuntary dismissal for delay in service and return, former Code Civ. Proc. § 581a, was repealed and replaced by *Code Civ. Proc. §§ 583.210-583.250*. Decisions interpreting the former statute have been cited in the form as persuasive rather than controlling authority to the extent that the revised statutes codify former case law or continue former substantive principles. *Code Civ. Proc. § 583.240(c)*, concerning litigation of the validity of service of process, is new and applies if the person to be served is aware of the action but challenges jurisdiction of the court or sufficiency of service [Law Revision Commission Comment to *Code Civ. Proc. § 583.240(c)*].

[3] Discussion of Authorities

[a] Time During Stay Is Not Included

Highland Stucco & Lime, Inc. v. Superior Court *(1990) 222 Cal. App. 3d 637, 272 Cal. Rptr. 60* , arose out of an action, commenced in January 1983, by a school district against numerous defendants, including "Doe" defendants, for property damages resulting from asbestos products used in about 10,000 school buildings on more than 700 separate campuses in defendant school district. The action was "complex litigation," within the definition set forth in the standards issued by the Judicial Council (Cal. Rules of Ct., Appen., Div. I, § 19), and pursuant to those standards, the trial court, in January 1984, ordered that issues concerning abatement and statutes of limitation were to be resolved first and stayed all otherproceedings in the case. In March 1984, the trial court ordered that from and after January 20, 1984, plaintiff was prohibited from serving any defendant not served on or before January 24, 1984. The stay was lifted in January 1988, and plaintiff served one of the Doe defendants in November 1989, almost seven years after the action was filed. The Doe defendant moved to quash service of process and to dismiss for failure to serve process within three years after the action was commenced (*Code Civ. Proc. §§ 583.210(a), 583.250*), or, in the alternative, for discretionary dismissal for failure to serve the summons within two years (*Code Civ. Proc. §§ 583.410, 583.420(a)(1)*). The motion was denied, and the Doe defendant petitioned for a writ of mandate seeking to compel the trial court to grant the motion. The court of appeal denied the writ. The court said that the March 28, 1985, order affected and precluded service of additional defendants by plaintiff from and after January 20, 1984, for the purposes of computing the time periods set forth in *Code Civ. Proc. §§ 581(a)* and *583.210 through 583.250* (*222 Cal. App. 3d 637, 641)* . The court pointed out that *Code Civ. Proc. § 583.240* provides that in computing the time within which service must be made, the time during which prosecution of the action or proceedings in the action was stayed and the stay affected service is excluded (*222 Cal. App. 3d 637, 643-644)* . The court said that the stay clearly affected the service of process and was in effect from January 20, 1984, through January 26, 1988, a period of four years and six days, which time had to be excluded in computing the three-year time for service prescribed by *Code Civ. Proc. § 583.210(a),* and that, when that is done, the defendant was served with the summons and complaint approximately two years, nine months, and fourteen days after the action was commenced against it, well within the required three years (*222 Cal. App. 3d 637, 644)* . The court further held that the trial court did not abuse its discretion in denying the motion insofar as it was based on the court's discretionary power, in that the plaintiff had acted diligently from the outset of the action and no prejudice to the defendant from the delay had been shown (*222 Cal. App. 3d 637, 645-646)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsGeneral Overview

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1. Dismissal For Failure To Serve Summons and Complaint and File Proof of Service of Summons

9-90 California Points & Authorities § 90.58

§ 90.58 Opposing Motion for Mandatory Dismissal for Failure to Serve Summons and Complaint and File Proof of Service of Summons [Code Civ. Proc. §§ 583.210, 583.250]--Time for Service and Proof of Service Tolled by Statutory Exclusion [Code Civ. Proc. § 583.240]--Time During Which Service Was Impossible, Impracticable, or Futile [Code Civ. Proc. § 583.240(d)]

[1] FORM

[*Caption. See § 90.52.*]

DEFENDANT'S MOTION TO DISMISS THE ABOVE-ENTITLED ACTION SHOULD BE DENIED BECAUSE SERVICE WAS _____ [IMPOSSIBLE *and/or* IMPRACTICABLE *and/or* FUTILE], AND THE TIME DURING WHICH _____ [THIS *or* THESE] CONDITION(S) EXISTED MUST BE EXCLUDED FROM THE PERIOD WITHIN WHICH SERVICE MUST BE MADE.

A. Service Impossible, Impracticable, or Futile. In computing the time within which service must be made pursuant to *Section 583.210 of the Code of Civil Procedure*, the time during which service was impossible, impracticable, or futile because of causes beyond the plaintiff's control must be excluded (*Code Civ. Proc. § 583.240(d)*; *see Wyoming Pacific Oil Co. v. Preston (1958) 50 Cal. 2d 736, 740-741, 329 P.2d 489* ; *Deas v. Knapp (1982) 129 Cal. App. 3d 443, 451-452, 181 Cal. Rptr. 76*).

[*Optional*] **B. Compliance With Facially Valid but Void Stay Order.** Compliance with a facially valid order is mandatory, and therefore, the legal effect of plaintiff's compliance with a facially valid stay order renders service during the period of the stay impossible, impracticable, or futile for reasons beyond the plaintiff's control within the meaning of *Code of Civil Procedure Section 583.240(d)* (*Highland Stucco & Lime, Inc. v. Superior Court (1990) 222 Cal. App. 3d 637, 644, 272 Cal. Rptr. 60*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]

By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in opposition to defendant's motion for mandatory dismissal based on plaintiff's failure to serve and file proof of service of summons within the statutory period set out in *Code Civ. Proc. § 583.210*. The ground for opposition is that the time during which service was impossible, impracticable, or futile must be excluded when computing the time within which service must be made [*see Code Civ. Proc. § 583.240(d)*], and that service was therefore timely, taking this exclusion into account. Optional Paragraph B should be included if the trial court ordered a stay of the action and the stay affected service, but the defendant contends that the order was void, that the period of the stay was, therefore, not to be excluded, and that service should have been effected during that period.

In an appropriate case, the foregoing points and authorities may be combined with additional points and authorities setting forth further grounds in opposition to a motion for mandatory dismissal for failure to serve and file proof of service of summons within the statutory time period [*see §§ 90.52 -90.57, 90.59*].

The foregoing form may, in addition, be adapted for use in opposing a motion for discretionary dismissal [*see § 90.60*]. The principles applicable in determining whether the discretionary period has lapsed are the same as those applicable in determining whether the mandatory period has lapsed [*see Code Civ. Proc. § 583.420(b)*].

The foregoing memorandum opposes a defendant's motion for dismissal of the complaint, and should be modified as necessary when it is used in another context, such as in opposition to a motion for dismissal of a cross complaint [*see Code Civ. Proc. § 583.110(a), (b), (d), (e)*].

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. For example, if it is claimed that service could not be effected because defendant concealed himself or herself, counsel should state the facts of the concealment and the means by which plaintiff sought to locate defendant [*see, e.g., Wyoming Pacific Oil Co. v. Preston (1958) 50 Cal. 2d 736, 740-741, 329 P.2d 489* ; *Adelson v. Hertz Rent-A-Car (1982) 133 Cal. App. 3d 221, 228, 183 Cal. Rptr. 779* (diligence required)].

In an appropriate case, the foregoing memorandum may be submitted in opposition to a motion to dismiss supported by the points and authorities *set out in § 90.50*. The points and authorities *set out in § 90.63* may, in turn, be used in response to, or in anticipation of, the opposition set out in foregoing form.

[b] Effect of Authority Decided Under Former Dismissal Statutes

In 1984, former Code Civ. Proc. § 581a was repealed and replaced by *Code Civ. Proc. §§ 583.210-583.250*. Decisions interpreting the former statutes have been cited in the form as persuasive rather than controlling authority to the extent that the revised statutes codify former case law or continue former substantive principles.

[3] Discussion of Authorities

[a] Service Impossible, Impracticable, or Futile

In ***Wyoming Pacific Oil Co. v. Preston*** *(1958) 50 Cal. 2d 736, 329 P.2d 489* , defendant obtained a dismissal for failure to serve and return the summons within the three-year period of former Code Civ. Proc. § 581a [*now see Code Civ. Proc. § 583.210*]. Plaintiff appealed.

The Supreme Court reversed. The Court reasoned that despite its mandatory language, former Code Civ. Proc. § 581a vested the trial court with discretion in applying exceptions, which was comparable to the discretion accorded to the trial court under former Code Civ. Proc. § 583. One of the exceptions was the impracticability and futility of bringing the case to trial within the statutory period (*50 Cal. 2d 736, 740)* . The trial court's order authorizing service by publication established, as a finding of fact, that defendant had concealed himself to avoid service, and thus it would have been impracticable and futile to attempt service (*50 Cal. 2d 736, 741)* . The Court did not discuss impossibility as part of the exception, but its comments indicate that the exception is comparable to one applied to former Code Civ. Proc. § 583 that encompassed impossibility or impracticability and futility.

Deas v. Knapp *(1982) 129 Cal. App. 3d 443, 181 Cal. Rptr. 76* , was a class action to set aside allegedly fraudulent conveyances. In a prior action, defendant was adjudicated indebted to plaintiff and the class members, which defendant appealed. The two proceedings were pending for about 18 months, until the earlier judgment became final on dismissal of the appeal. Plaintiff did not attempt service of the summons during that period. He later attempted service but could not personally serve defendant, because defendant had concealed himself. Substituted service and service by mail were completed pursuant to *Code Civ. Proc. § 415.20* more than two weeks before the three-year period specified in former Code Civ. Proc. § 581a(a) [*now see Code Civ. Proc. § 583.210*] had run, but proof of service was not filed until a month after that period had run. Defendant's motion to quash service of summons was denied, and the conveyances were set aside. Defendant appealed, contending that because plaintiff had failed to return the summons within three years, the trial court lacked jurisdiction to do other than quash service of summons and dismiss the action.

The court of appeal rejected this contention and affirmed the judgment. It said that despite the mandatory language of former Code Civ. Proc. § 581a, the statute was subject to implied exceptions, such as impracticability and futility, and held that the trial court is vested with discretion in applying the exceptions (*129 Cal. App. 3d 443, 450-451)* . The court explained that cases have held that futility or impracticability sufficient to extend the time under former Code Civ. Proc. § 581a may be created by concurrent and collateral litigation, such as related appeals. The rule particularly applies when the collateral action or appeal was, in effect, a step in the same action sought to be dismissed, or in litigation involving the very basis of the action sought to be dismissed, or in other litigation between the same parties or their privies. The time during which it was impracticable, or futile, to bring the action to trial because of the collateral proceeding would ordinarily be deducted from the statutory period of time for returning summons (*129 Cal. App. 3d 443, 451)* . The court concluded that the case came within this rule and held that the trial court did not abuse its discretion in denying the motion to quash service of the summons (*129 Cal. App. 3d 443, 451-452)* .

Counsel should note that the court of appeal in *Valerio v. Boise Cascade Corp. (1986) 177 Cal. App. 3d 1212, 1220, 223 Cal. Rptr. 592* (discussed in *§ 90.63[3][e]*) declined to follow *Deas* to the extent that the *Deas* court would excuse a plaintiff's delay in *service or return* when it was impracticable or futile for plaintiff to bring the case to *trial. Code Civ. Proc. § 583.240(d)*, which was not interpreted by either the *Deas* or *Valerio* courts, now makes clear that delay in service and return is excused only when *service* was impossible, impracticable, or futile due to causes beyond plaintiff's control [*see Code Civ. Proc. § 583.250(b)* (making applicable only those excuses expressly provided by statute)].

[b] Compliance With Facially Valid but Void Stay Order

The facts and procedural background of ***Highland Stucco & Lime, Inc. v. Superior Court*** *(1990) 222 Cal. App. 3d 637, 272 Cal. Rptr. 60* , are discussed in *§ 90.57[3][a]*. In denying the petition for a writ of mandate sought to compel the trial court to quash service of summons, the court of appeal held, as an alternate basis for denying the petition and thereby affirming the trial court's order, that even if the trial court's stay order were not valid, the legal effect of the court order staying all proceedings except for abatement and statute of limitations issues was to render service impossible, impracticable, or futile for reasons beyond plaintiff's control within the meaning of *Code Civ. Proc. § 583.240(d)* (*222 Cal. App. 3d 637, 644)* . The court said that compliance with a facially valid court order is mandatory and, thus, a cause beyond the plaintiff's control, and that to hold otherwise would invite wholesale disobedience to court

orders (*222 Cal. App. 3d 637, 644)* .

[4] Additional Authorities

[a] Service Impossible, Impracticable, or Futile

In *Highlanders, Inc. v. Olsan (1978) 77 Cal. App. 3d 690, 143 Cal. Rptr. 679* , plaintiffs sued certain defendants, who successfully demurred. One plaintiff appealed and the court of appeal reversed. The plaintiffs amended their complaint and brought in new defendants, who obtained a dismissal pursuant to former Code Civ. Proc. § 581a(a) [*now see Code Civ. Proc. § 583.210*]. On appeal, plaintiff contended that although the three-year period is to be computed from the time the first complaint is filed, the period of time while the case was first on appeal should not be counted, and the court agreed. However, the court affirmed the dismissal, since the time between filing the original complaint and the notice of appeal was two years and 11 months; plaintiff had only one additional month in which to act, and the return of service on the third amended complaint occurred long after the statutory period had expired (*77 Cal. App. 3d 690, 695-696)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsGeneral Overview

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9-90 California Points & Authorities § 90.59

§ 90.59 Opposing Motion for Mandatory Dismissal for Failure to Serve Summons and Complaint and File Proof of Service of Summons [Code Civ. Proc. §§ 583.210, 583.250]--Time for Service and Proof of Service Tolled by Statutory Exclusion [Code Civ. Proc. § 583.240]--Defendant Is Estopped From Requesting Dismissal [Code Civ. Proc. § 583.140]

[1] FORM

[*Caption. See § 90.52.*]

DEFENDANT'S MOTION TO DISMISS THE ABOVE-ENTITLED ACTION SHOULD BE DENIED BECAUSE PLAINTIFF REASONABLY RELIED ON DEFENDANT'S CONDUCT IN FORGOING COMPLIANCE WITH THE REQUIREMENTS OF SECTION 583.210 OF THE CODE OF CIVIL PROCEDURE FOR SERVICE, AND THE TIME OF REASONABLE RELIANCE IS EXCLUDED FROM THE PERIOD WITHIN WHICH SERVICE MUST BE MADE ON THE GROUND OF ESTOPPEL.

A. Principles of Waiver and Estoppel May Be Applied. Nothing in *Sections 583.110 through 583.430 of the Code of Civil Procedure* abrogates or otherwise affects the principles of waiver and estoppel (*Code Civ. Proc. § 583.140*).

B. Party Is Estopped From Asserting Compliance With Service Deadlines. If a plaintiff reasonably relies on the defendant's actsor omissions to act and is thereby lulled into a false sense of security or caused to forbear completing service within the time requirements of *Section 583.210 of the Code of Civil Procedure*, defendant is estopped from including the time of plaintiff's reliance in calculating when service must be completed (*see Tresway Aero, Inc. v. Superior Court (1971) 5 Cal. 3d 431, 437-438, 96 Cal. Rptr. 571, 487 P.2d 1211* ; *State Air Resources Bd. v. Superior Court (1979) 93 Cal. App. 3d 803, 808, 155 Cal. Rptr. 726*).

[*Optional*] **C. Estoppel Arising From Defendant's Request for Extension of Time to Plead.** If a defendant's request for a time extension in which to answer or plead causes plaintiff reasonably to forbear correcting or completing service of process, the defendant is estopped from including the time of reliance in the calculation of the period specified in *Section 583.210 of the Code of Civil Procedure* (*see Tresway Aero, Inc. v. Superior Court (1971) 5 Cal. 3d 431,*

437-439, 96 Cal. Rptr. 571, 487 P.2d 1211 ; *Knapp v. Superior Court (1978) 79 Cal. App. 3d 799, 804, 145 Cal. Rptr. 154*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in opposition to defendant's motion for mandatory dismissal based on plaintiff's failure to serve and file proof of service of summons within the statutory period set out in *Code Civ. Proc. § 583.210*. The ground for opposition is that defendant is estopped from asserting timeliness of service for the period during which plaintiff reasonably relied on defendant's conduct in not completing service [*see Code Civ. Proc. § 583.140*], and that service was therefore timely taking this exclusion into account.

In an appropriate case, the foregoing points and authorities may be combined with additional points and authorities setting forth further grounds in opposition to a motion for mandatory dismissal for failure to serve and file proof of service of summons within the statutory time period [*see §§ 90.52 -90.58*].

The foregoing form may, in addition, be adapted for use in opposing a motion for discretionary dismissal [*see § 90.60*]. The principles applicable in determining whether the discretionary period has lapsed are the same as those applicable in determining whether the mandatory period has lapsed [*see Code Civ. Proc. § 583.420(b)*].

The foregoing memorandum opposes a defendant's motion for dismissal of the complaint, and should be modified as necessary when it is used in another context, such as in opposition to a motion for dismissal of a cross complaint [*see Code Civ. Proc. § 583.110(a), (b), (d), (e)*].

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. For example, if plaintiff claims that defendant lulled plaintiff into believing that it would not oppose service of summons, plaintiff should recite facts demonstrating defendant's actions [*see Tresway Aero, Inc. v. Superior Court (1971) 5 Cal. 3d 431, 434, 96 Cal. Rptr. 571, 487 P.2d 1211* (defendant requested 20-day time extension to plead after service of process, then moved to dismiss on ground of improper service)].

In an appropriate case, the foregoing memorandum may be submitted in opposition to a motion to dismiss supported by the points and authorities *set out in § 90.50*.

[b] Effect of Authority Decided Under Former Dismissal Statutes

In 1984, former Code Civ. Proc. § 581a and former Code Civ. Proc. § 583, which governed involuntary dismissal for delay in bringing an action to trial, were repealed and replaced by *Code Civ. Proc. §§ 583.110-583.430*. Decisions interpreting the former statutes have been cited in the form as persuasive rather than controlling authority to the extent that the revised statutes codify former case law or continue former substantive principles.

[c] Related Pleading and Practice Forms

For forms of a notice of motion and order relating to a motion to dismiss an action pursuant to Code Civ. Proc. §§

583.210 and 583.250, see Ch. 212, *Dismissal* in California Forms of Pleading and Practice.

[3] Discussion of Authorities

[a] Party Is Estopped From Asserting Compliance With Service Deadlines

In ***Tresway Aero, Inc. v. Superior Court*** *(1971) 5 Cal. 3d 431, 96 Cal. Rptr. 571, 487 P.2d 1211* , defendant sought a writ of mandamus to compel dismissal of an action against it pursuant to the first paragraph of former Code Civ. Proc. § 581a (later amended to former Code Civ. Proc. § 581a(a) [*now see Code Civ. Proc. § 583.210*]) because it had not been served witha summons. Plaintiff had served process on defendant approximately 12 days before expiration of the three-year period then required. Although service was fatally defective, defendant neither moved to quash service of summons nor filed an answer or demurrer, but instead requested a 20-day extension of time in which to answer the complaint.

The Supreme Court denied the writ insofar as it sought dismissal. The Court reasoned that unless the doctrine of estoppel were recognized in cases involving former Code Civ. Proc. § 581a, the statute could not be applied to serve rather than defeat the ends of substantial justice. The Court added that, although the earlier precedents were in conflict, its most recent decision, *Woley v. Turkus (1958) 51 Cal. 2d 402, 408, 334 P.2d 12* (discussed in *§ 90.93[3][b]*) upheld the application of the doctrine of estoppel to dismissals for failure to bring an action to trial within five years pursuant to former Code Civ. Proc. § 583 (*5 Cal. 3d 431, 438)* . In the former Code Civ. Proc. § 581a situation, whenever a defendant induces the plaintiff to delay service of summons or to overlook errors in service, and plaintiff's reliance is reasonable, an estoppel is essential to prevent the defendant from profiting by deception (*5 Cal. 3d 431, 439-440)* . By requesting the time extension, defendant led plaintiff to believe that further service of process would be duplicative and prevented plaintiff from discovering the error and effecting valid service within the statutory period (*5 Cal. 3d 431, 441-442)* .

In ***State Air Resources Bd. v. Superior Court*** *(1979) 93 Cal. App. 3d 803, 155 Cal. Rptr. 726* , the trial court found that defendant was estopped from seeking dismissal under former Code Civ. Proc. § 581a(a) [*now see Code Civ. Proc. § 583.210*]. Defendant petitioned for a writ of mandate.

The court of appeal denied the writ of mandate, upholding the trial court. It held that the assumption by both plaintiff's and defendant's counsel that defendant's counsel was authorized to accept service on behalf of defendant, causing plaintiff to forgo the legally correct procedure for service of process, created a sufficient legal basis for estoppel (*93 Cal. App. 3d 803, 808)* .

[b] Estoppel Arising From Defendant's Request for Extension of Time to Plead

Tresway Aero, Inc. v. Superior Court *(1971) 5 Cal. 3d 431, 96 Cal. Rptr. 571, 487 P.2d 1211* , is *discussed under § 90.59[3][a]*.

The facts and procedural background of ***Knapp v. Superior Court*** *(1978) 79 Cal. App. 3d 799, 145 Cal. Rptr. 154* are discussed in *§ 90.52[3][d]*. In refusing to compel dismissal of the action under former Code Civ. Proc. § 581a(a) [*now see Code Civ. Proc. § 583.210*] for delay in return of the summons, the court of appeal held, in part, that defendant's request for an extension of time to answer estopped the defendant from seeking dismissal for failure to return the summons within three years, as required by former Code Civ. Proc. § 581a(a). The court reasoned that the request for an extension had induced plaintiff's attorney to overlook the return of service, and in view of the well-known custom of the insurance industry of honoring such extensions, the attorney's reliance was reasonable (*79 Cal. App. 3d 799, 804)* [*now see Code Civ. Proc. § 583.210* requiring only filing proof of service of summons].

It should be noted that in *Owen v. Niagara Machine & Tool Works (1977) 68 Cal. App. 3d 566, 568-569, 137 Cal.*

Rptr. 378 , the court held that an extension of time merely to plead was not sufficient to excuse plaintiff's failure to make a return after service, but *Owen* may be distinguishable from *Knapp* in that the reliance of counsel in the latter decision was supported by custom in the industry.

[4] Additional Authorities

[a] Party Is Estopped From Asserting Compliance With Service Deadlines

In *Brookview Condominium Owners' Assn. v. Heltzer Enterprises-Brookview (1990) 218 Cal. App. 3d 502, 267 Cal. Rptr. 76* , the court of appeal, although it affirmed the order dismissing the complaint on the ground the trial court did not abuse its discretion in finding defendant was not estopped to seek dismissal, ruled that the doctrine of estoppel is applicable to motions to dismiss for failure to effectuate service within three years as required by *Code Civ. Proc. § 583.210*. The court said that if a trial court finds statements or conduct by a defendant that lulls the plaintiff into a false sense of security resulting in inaction, and there is reasonable reliance, estoppel must be available to prevent defendant from profiting from his or her deception. The court also distinguished waiver and estoppel, explaining that waiver refers to the act, or the consequences of the act, of one side only, while estoppel is applicable when the conduct of one side has induced the other to take such a position that it would be injured if the first should be permitted to repudiate its acts (*218 Cal. App. 3d 502, 512)* .

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§ 90.60 Opposing Motion for Discretionary Dismissal for Failure to Serve Summons and Complaint and File Proof of Service of Summons [Code Civ. Proc. §§ 583.410, 583.420(a)(1); Cal. Rules of Ct., Rule 3.1342]--General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN OPPOSITION TO MOTION
vs.	)	TO DISMISS ACTION
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Dept: _____
	)	Trial Date: _____

_____

DEFENDANT'S MOTION TO DISMISS THIS ACTION SHOULD BE DENIED BECAUSE _____ [*specify, e.g.,* THERE IS GOOD CAUSE FOR PLAINTIFF'S DELAY AND NO INJUSTICE WILL RESULT FROM DENYING DISMISSAL] AND, THEREFORE, DISMISSAL BY THE COURT UNDER THE DISCRETIONARY POWER OF CODE OF CIVIL PROCEDURE SECTION 583.410 IS NOT APPROPRIATE UNDER THE CIRCUMSTANCES.

A. Statutory Grounds for Discretionary Dismissal. The court may not dismiss an action pursuant to *Code of Civil*

Procedure Section 583.410 for failure to effect service unless service and the filing of proof of service of summons are not made within two years after the action is commenced against the defendant and dismissal appears appropriate to the court under the circumstances (*Code Civ. Proc. §§ 583.410(a), 583.420(a)(1)*).

B. Discretion to Dismiss Not Arbitrary. The trial court's discretion to dismiss an action pursuant to *Code of Civil Procedure Section 583.410* for failure to effect service as provided in *Code of Civil Procedure Section 583.420(a)(1)* is not unfettered and cannot be exercised arbitrarily, but must be an impartial discretion exercised in conformity with the spirit of the law and in a manner to subserve the ends of substantial justice (*see Putnam v. Clague (1992) 3 Cal. App. 4th 542, 547, 5 Cal. Rptr. 2d 25*).

[*Optional*] **C. Plaintiff's Proof of Good Cause Is Sufficient to Preclude Discretionary Dismissal.** Discretionary dismissal pursuant to *Code of Civil Procedure Sections 583.410* and *583.420(a)(1)* for failure to effect service is not proper if there is a showing of good cause by plaintiff for the delay and no injustice will result from denying dismissal (*see Denham v. Superior Court (1970) 2 Cal. 3d 557, 564, 86 Cal. Rptr. 65, 468 P.2d 193* ; *Putnam v. Clague (1992) 3 Cal. App. 4th 542, 557, 5 Cal. Rptr. 2d 25*).

[*Optional*] **D. Plaintiff's Excuse That Is Credible and Not Clearly Unreasonable Under the Circumstances Constitutes Good Cause.** In determining whether the plaintiff's excuse constitutes good cause to overcome discretionary dismissal pursuant to *Code of Civil Procedure Sections 583.410* and *583.420(a)(1)* for failure to effect service, the trial court should examine whether the excuse is credible and not clearly unreasonable under the factual and procedural circumstances of the case (*see Putnam v. Clague (1992) 3 Cal. App. 4th 542, 557, 5 Cal. Rptr. 2d 25* ; *Yao v. Anaheim Eye Medical Group, Inc. (1992) 10 Cal. App. 4th 1024, 1029-1030, 12 Cal. Rptr. 2d 856*).

[*Optional*] **E. Factors Set Out in Court Rule Reveal Good Cause for Delay.** In exercising its discretion to dismiss an action pursuant to *Code of Civil Procedure Sections 583.410* and *583.420(a)(1)* for failure to effect service, the trial court must consider the factors set forth in *California Rules of Court, Rule 3.1342(e)*, and should not dismiss if application of those factors reveals good reason for delay in service of summons (*see Tannatt v. Joblin (1982) 130 Cal. App. 3d 1063, 1066-1070, 182 Cal. Rptr. 112*).

[*Optional*] **F. No Injustice Has Resulted From the Delay.** Once a plaintiff has demonstrated good cause for the delay, the burden of proof shifts to the defendant who must establish actual prejudice from the delay (*see Putnam v. Clague (1992) 3 Cal. App. 4th 542, 549, 564-566, 5 Cal. Rptr. 2d 25* ; *Yao v. Anaheim Eye Medical Group, Inc. (1992) 10 Cal. App. 4th 1024, 1032, 12 Cal. Rptr. 2d 856*).

[*Optional*] **G. Conditional Denial of Discretionary Dismissal.** In exercising its discretion to dismiss an action pursuant to *Sections 583.410* and *583.420(a)(1) of the Code of Civil Procedure* for failure to effect service, the court may require as a condition of granting or denying dismissal that the parties comply with terms that appear proper to effectuate substantial justice (*Code Civ. Proc. § 583.430(a)*; *see Cal. Rules of Ct., Rule 3.1342(e)*; *see Hansen v. Snap-Tite, Inc. (1972) 23 Cal. App. 3d 208, 213, 100 Cal. Rptr. 51* (action dismissed for noncompliance with condition)).

[*Optional*] **H. Manner of Computing Time Period for Completing Service.** The time period for completing service set out under *Section 583.420(a) of the Code of Civil Procedure* must be computed in the same manner that is provided for computing the comparable time period under *Sections 583.210-583.250 of the Code of Civil Procedure* (*see Code Civ. Proc. § 583.420(b)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to defendant's motion for discretionary dismissal based on plaintiff's failure to serve and file proof of service of summons within the two-year period prescribed by *Code Civ. Proc. § 583.420(a)(1)*. The ground for opposition is that dismissal is not appropriate under all the circumstances [*see Code Civ. Proc. § 583.410(a)*; *Cal. Rules of Ct., Rule 3.1342(e)*].

Optional Paragraphs C, D, E and F may be used when the plaintiff is seeking to show good cause justifying the delay and that no injustice has resulted therefrom. Optional Paragraph G may be used to suggest that a particular condition be imposed on denial of the motion as a fair alternative to granting the motion [*Code Civ. Proc. § 583.430(a)*].

Optional Paragraph H may be used when the plaintiff is seeking to show that service was, in fact, within the period specified under *Code Civ. Proc. § 583.420(a)(1)*, after taking into account factors that effectively excuse or extend this period. The basis for this particular ground of opposition is *Code Civ. Proc. § 583.420(b)*, which provides that the period for completing service under *Code Civ. Proc. § 583.420(a)(1)* is computed in the same manner as the comparable period for completing service in order to avoid *mandatory* dismissal. If Optional Paragraph H is used, counsel should add additional points and authorities relating to the particular excuse or extension that is sought to be applied. The points and authorities *set out in §§ 90.52 -90.58* may be used for this purpose.

The principles of waiver and estoppel apply in ruling on a motion for discretionary dismissal as well as one for mandatory dismissal [*see Code Civ. Proc. § 583.140*]. Thus, the points and authorities *set out in § 90.59* may also be combined with the foregoing points and authorities in an appropriate case.

This form opposes a defendant's motion for dismissal of the complaint, and should be modified as necessary when it is used in another context, such as in opposition to a motion for dismissal of a cross complaint [*see Code Civ. Proc. § 583.110(a), (b), (d), (e)*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. For example, if it is alleged that plaintiff diligently tried to effect service of process, counsel should set forth the dates of the attempts at service and the difficulties encountered in serving defendant [*see Cal. Rules of Ct., Rule 3.1342(e)*].

These points and authorities may be submitted in opposition to a motion for discretionary dismissal supported by the general points and authorities *set out in § 90.51*. The points and authorities *set out in § 90.65* may, in turn, be used in response to, or in anticipation of, the opposition set out in the foregoing form.

[b] Excuse for Delay

There is a lack of consensus among the courts of appeal on the factors to be applied in determining whether a plaintiff has established a reasonable excuse for the delay in serving the summons and complaint. *The Fifth District in Putnam v. Clague (1992) 3 Cal. App. 4th 542, 5 Cal. Rptr. 2d 25* , set forth a test for making this determination. When the plaintiff offers some excuse reflecting a conscious decision not to serve or otherwise prosecute the action, the court should make two initial determinations. First, the court should determine whether the reasons given for the decision are clearly unreasonable; that is, whether the explanation is credible under all the circumstances. If the court finds substantial evidence that the explanation is merely a pretext designed to cover up neglect, dismissal may be warranted.

Second, the court should determine whether a reasonably competent attorney would conclude that delay was justified under the circumstances. The burden should then shift to the defendant to show that other facts, such as prejudice, support dismissal (*3 Cal. App. 4th 542, 557-558)* .

The Fourth Appellate District has applied the *Putnam* test in *Yao v. Anaheim Eye Medical Group, Inc. (1992) 10 Cal. App. 4th 1024, 1029-1031, 12 Cal. Rptr. 2d 856* . See *discussion under § 90.60[3][c]*.

The Second Appellate District, however, questioned and rejected the *Putnam* test in *Roach v. Lewis (1993) 14 Cal. App. 4th 1179, 1184, 18 Cal. Rptr. 2d 281* . It found that the first prong of the test requiring a determination of whether the explanation for the delay is credible under all the circumstances is unnecessary because attorneys are required to be truthful at all times (*14 Cal. App. 4th 1179, 1184)* . It stated that the second prong, requiring a determination of whether a reasonably competent attorney could conclude that the delay was justifiable, provides too much deference to counsel's strategy which would vitiate the trial courts' ability to run their own calendars. It further noted that Cal. Rules of Ct., Rule 373(e), sets forth the relevant matters to be considered by the court in ruling on a dismissal motion which do not include counsel's strategy calls (*14 Cal. App. 4th 1179, 1184)* .

[c] Actual Prejudice by the Delay

The courts also disagree on whether the defendant must demonstrate actualprejudice by the delay in prosecution. In one line of cases, the appellate courts concluded that the plaintiff's showing was insufficient and dismissal was justified even if the defendant did not demonstrate actual prejudice from the delay [*Ladd v. Dart Equipment Corp. (1991) 230 Cal. App. 3d 1088, 1106-1107, 281 Cal. Rptr. 813 (Second Appellate District)* ; *Trailmobile, Inc. v. Superior Court (1989) 210 Cal. App. 3d 1451-1458, 259 Cal. Rptr. 100 (Third Appellate District)* ; *Schumpert v. Tishman Co. (1988) 198 Cal. App. 3d 598, 606, 243 Cal. Rptr. 810 (Second Appellate District)]* .

In another line of cases, certain courts concluded that dismissal was proper *both* because the plaintiff did not make a sufficient showing to excuse the delay *and* the defendant showed actual prejudice [*State Compensation Ins. Fund v. Selma Trailer & Manufacturing Co. (1989) 210 Cal. App. 3d 740, 750, 258 Cal. Rptr. 545 (Fifth Appellate District)* ; *Danielson v. ITT Industrial Credit Co. (1988) 199 Cal. App. 3d 645, 659-660 (Fourth Appellate District)]* .

Some courts will infer prejudice from the delay. See discussion in *§ 90.65[3][d]*. However, the court in *Putnam v. Clague (1992) 3 Cal. App. 4th 542, 549, 5 Cal. Rptr. 2d 25* , stated that once the plaintiff has established good cause for the delay, the burden of proof then shifts to the defendant to demonstrate actual prejudice, *discussed under § 90.60[3][e]*.

[d] Effect of Authority Decided Under Former Dismissal Statutes

Before the 1984 enactment *Code Civ. Proc. § 583.420(a)(1)*, there was no express provision for discretionary dismissal of an action for failure to serve and return a summons. Decisions interpreting former Code Civ. Proc. § 583(a) have been cited in the form as persuasive rather than controlling authority to the extent that they state general principles regarding when discretionary dismissal is not appropriate.

[e] Related Pleading and Practice Forms

For forms of a notice of motion and order relating to a motion to dismiss an action pursuant to Code Civ. Proc. §§ 583.410 and 583.420(a)(1), see Ch. 212, *Dismissal* in California Forms of Pleading and Practice.

[3] Discussion of Authorities

[a] Discretion to Dismiss Not Arbitrary

Putnam v. Clague *(1992) 3 Cal. App. 4th 542, 546-547, 5 Cal. Rptr. 2d 25* , involved three medical malpractice actions against a physician arising out of a surgical procedure allegedly performed on the plaintiffs. Shortly after plaintiffs served the summons in each action, defendant filed motions to dismiss, citing *Code Civ. Proc. § 583.420(a)(1)* for failure to effectuate service within two years after the actions were commenced against the defendant. In opposing the motions, plaintiffs stated that each of their cases was one of numerous cases handled by their attorney against the defendant and that counsel elected to pursue one of the actions as the "lead" case on the issue of negligence/standard of care, with the understanding that evidence developed in that case would apply to the other cases. Following substantial discovery in that action, the "lead" case settled, prior to plaintiffs effectuating service in the instant case. The trial court ruled that the reasons given by the plaintiffs did not amount to excusable or justifiable delay and granted the motions to dismiss.

The court of appeal reversed. It noted that under *Code Civ. Proc. § 583.420,* the trial court had discretion to dismiss the action. However, that discretion is not unfettered and cannot be exercised arbitrarily; rather, it must be an impartial discretion to be exercised in conformity with the spirit of the law and in a manner to subserve the ends of substantial justice (*3 Cal. App. 4th 542, 547)* . The court analyzed what constitutes a reasonable excuse and found that under the facts of this case, plaintiffs' proffered excuse justified the delay in service and reversed the trial court's dismissal of the action (*3 Cal. App. 4th 542, 557-558)* .

[b] Plaintiff's Proof of Good Cause Is Sufficient to Preclude Discretionary Dismissal

Denham v. Superior Court *(1970) 2 Cal. 3d 557, 86 Cal. Rptr. 65, 468 P.2d 193* , involved a construction claim and enforcement of a labor and material bond. Service of process was effected within one month after commencement of the action. However, the law firm representing plaintiff subsequently dissolved and reorganized with one less attorney. Later, two of three remaining attorneys left the firm, leaving one elderly partner to handle the increased workload. Because of the change in attorneys, a trial date was not set until two months prior to expiration of the five-year period set forth in former Code Civ. Proc. § 583 [*now see Code Civ. Proc. § 583.310*], 17 months after filing of the at-issue memorandum. Defendant moved for dismissal pursuant to former Code Civ. Proc. § 583(a) [*now see Code Civ. Proc. § 583.420*]. After the trial court denied his motion, he petitioned for a writ of mandate to compel dismissal.

The Supreme Court affirmed the denial of the dismissal. The Court stated that a writ of mandate to compel dismissal of an action should issue only when there is an entire absence of any showing constituting good cause. If there is any basis on which the trial court's action can be sustained and it appears that no injustice will result from sustaining the trial court, the refusal to dismiss should be upheld (*2 Cal. 3d 557, 564)* . In this case, there was not an entire absence of any showing constituting good cause. The frequent changes in plaintiff's attorney's law firm, and the resulting pressure on the attorneys remaining in the office, together with the fact that innumerable pleadings were filed by the parties, may be considered in determining whether plaintiffs have shown that the delay was excusable (*2 Cal. 3d 557, 564-565)* . Moreover, the delay subsequent to filing of the certificate ofreadiness could be attributed to the fact that the trial court's backlog would have made it useless for plaintiff to have tried to obtain an accelerated trial date (*2 Cal. 3d 557, 564-566)* .

The facts and procedural background of ***Putnam v. Clague*** *(1992) 3 Cal. App. 4th 542, 5 Cal. Rptr. 2d 25* , are *discussed under § 90.60[3][a]*. In *Putnam,* the court analyzed the lack of consensus among the courts of appeal regarding what constitutes "some showing of excusable delay" as required by the *Denham v. Superior Court of Los Angeles County (1970) 2 Cal. 3d 557, 564, 86 Cal. Rptr. 65* . It stated that a plaintiff who has been inattentive to his case for an unreasonable period of time should not be able to nullify the dismissal statute by simply invoking the general policy favoring trial on the merits or when the plaintiff offers an excuse which is not credible or is clearly unreasonable under the factual and procedural circumstances of the case (*3 Cal. App. 4th 542, 557)* . The court articulated a test for making this determination, *discussed under § 90.60[3][c]*. Applying those factors, the court concluded that plaintiffs' excuse for the delay in service was justifiable and reversed the judgment (*3 Cal. App. 4th 542, 557-558)* .

[c] Plaintiff's Excuse That Is Credible and Not Clearly Unreasonable Under the Circumstances Constitutes Good Cause

The facts and procedural background of ***Putnam v. Clague*** *(1992) 3 Cal. App. 4th 542, 557-558, 5 Cal. Rptr. 2d 25* , are *discussed under § 90.60[3][a]*. In *Putnam*, the court articulated a test for determining whether a plaintiff has shown an excusable delay in serving the summons and complaint to overcome a motion for discretionary dismissal under *Code Civ. Proc. § 583.420*. It stated that when the plaintiff offers some excuse reflecting a conscious decision not to serve or otherwise prosecute the action, the court should first address two questions. The court should first determine whether the explanation is credible under all the circumstances. If the court finds substantial evidence that the explanation is merely a pretext designed to cover up neglect, dismissal may be warranted. If the explanation is credible, however, the court should then determine whether a reasonably competent attorney would conclude that the delay was justified under all of the circumstances. The burden then should shift to the defendant to show that other facts, such as prejudice, support dismissal (*3 Cal. App. 4th 542, 557-558)* .

Applying this test, the court examined whether the plaintiffs' explanation for the delay was credible. It found that plaintiffs provided substantial evidence that the "lead" case and the pending cases arose out of the same surgical technique employed by defendant, that extensive discovery and production of evidence regarding the issue of negligence and standard of care established in the "lead" case would be applicable to all of the other cases and service of process in the instant cases were deliberately staggered so as to avoid creating unmanageable demands on both parties and their counsel. Based upon this showing, the court found that plaintiffs' counsel's decision to move the "lead" case forward on the common issue of negligence/standard of care was a valid and legitimate reason to stagger service of process in the related actions (*3 Cal. App. 4th 542, 558)* .

The court further noted that Cal. Rules of Ct., Rule 373(e) (now see *Cal. Rules of Ct., Rule 3.1342(e)*) describes one of the factors to be considered by the court in evaluating a motion to dismiss as "the pendency of other litigation under a common set of facts or determinative of the legal or factual issues in the case. ..." The plaintiffs contended that their individual actions were parts of an overall group of cases against the same defendant arising from the same surgical procedure and sharing common questions of fact and law and that the reasonableness of the delay should be viewed within the context of the overall litigation (*3 Cal. App. 4th 542, 559)* . The trial court rejected this argument, finding that the six month delay in effectuating service in the cases at bar after the "lead" case had settled could have been avoided by serving the complaints and requesting a continuance during the pendency of the "lead" case. The court of appeal applied the second prong of the test and concluded that the trial court's suggestion was just the type of second-guessing that is inappropriate when a court is deciding whether the plaintiff has met the initial burden of proof and obscured the relevant inquiry of whether the course actually followed by the plaintiff was a reasonable one (*3 Cal. App. 4th 542, 559-560)* . The court found that reasonably competent attorneys in the position of plaintiffs' counsel could conclude that staggering service in the pending cases would accommodate the parties and their counsel for all of the cases in terms of scheduling discovery and trial.

The court then examined whether the defendant was prejudiced by the delay. It concluded that defendant failed to establish evidence of actual prejudice by the delay and reversed the judgment of dismissal (*3 Cal. App. 4th 542, 564-566)* .

The test the *Putnam* court formulated in its decision was strongly criticized in *Roach v. Lewis (1993) 14 Cal. App. 4th 1179, 1184, 18 Cal. Rptr. 2d 281* . For discussion, see *§ 90.60[2][b]*.

Yao v. Anaheim Eye Medical Group, Inc. *(1992) 10 Cal. App. 4th 1024, 12 Cal. Rptr. 2d 856* , involved a medical malpractice action. Prior to filing the complaint, plaintiff's original attorney notified defendants and certain other medical care providers of his intention to file a medical malpractice action pursuant to *Code Civ. Proc. § 364*. Shortly before the statute of limitations expired, plaintiff's attorney filed the complaint but opted not to serve it until receiving a favorable medical opinion regarding liability. Before and after this time, the attorney experienced lengthy delays in

obtaining all of the plaintiff's medical records and a medical opinion on standard of care. Approximately nine months after the complaint was filed, plaintiff consulted with new counsel who undertook a standard of care review. However, that review was delayed due to theconsultant's schedule. After the review, the new counsel was substituted as attorney of record, and two years and forty days after commencing the action, plaintiff served the summons and complaint. Defendants then moved to dismiss pursuant to *Code Civ. Proc. § 583.420(a)*, for failure to serve or bring the action to trial within two years from its commencement. The trial court granted defendant's motion and dismissed the action.

The court of appeal reversed. It found that the court in *Putnam v. Clague (1992) 3 Cal. App. 4th 542, 5 Cal. Rptr. 2d 25* , discussed *above*, articulated an appropriate approach to analyzing the issue of abuse of discretion in dismissal cases. Applying the *Putnam* test, the court examined whether the excuse was credible. It noted there was no factual dispute as to the delays in obtaining the necessary medical records and a timely standard of care review (*10 Cal. App. 4th 1024, 1029-1030)* . The court then found that a reasonably competent attorney might well have made the same decision not to serve the complaint until a favorable standard of care opinion had been obtained. The court also found the last-minute representation by new counsel should have been considered by the court in assessing diligence. It further noted that new counsel undertook an investigation and served the complaint in an expedited fashion (*10 Cal. App. 4th 1024, 1030-1031)* . Since plaintiff met his burden of showing a reasonable excuse, the burden shifted to the defendant to show actual prejudice. The court found no actual prejudice and reversed the judgment of dismissal (*10 Cal. App. 4th 1024, 1031-1032)* .

[d] Factors Set Out in Court Rule Reveal Good Cause for Delay

Cal. Rules of Ct., Rule 3.1342(e) is discussed in *§ 90.51[3][b]*.

Tannatt v. Joblin *(1982) 130 Cal. App. 3d 1063, 182 Cal. Rptr. 112* , was a complaint for wrongful appropriation of funds posted as collateral for a bail bond. The complaint named ten specific and ten fictitiously designated defendants. Plaintiff obtained summary judgment against the single defendant she believed was primarily liable, but was unable to collect on it. Nearly three years after the complaint was filed, plaintiff served the other nine named defendants with summons and complaint. After filing answers, three defendants moved to dismiss the action pursuant to former Code Civ. Proc. §§ 581a and 583(a) [*now see Code Civ. Proc. §§ 583.210, 583.420*]. The trial court granted the motion.

The court of appeal reversed the dismissal. It held that the trial court abused its discretion in dismissing the action. It found that plaintiff's delay in serving the remaining named defendants was not capricious or unreasonable. The delay was based on plaintiff's analysis of the relative liability of the defendants and the mistaken belief of plaintiff's counsel that the two-year period in former Code Civ. Proc. § 583(a) did not begin to run against a defendant until service of summons and complaint. Furthermore, former Code Civ. Proc. § 583(a) favors a trial on the merits. The 1969 amendment to that section provided that discretionary dismissal should be based on rules promulgated by the Judicial Council. Former Cal. Rules of Ct., Rule 203.5(e) [*now see Cal. Rules of Ct., Rule 3.1342(e)*] was later adopted. Subsequent case law has provided that the factors set forth in former Cal. Rules of Ct., Rule 203.5(e), must be considered by the trial court in ruling on a dismissal motion. Here, the trial court did not consider those factors but simply ruled that plaintiff did not use due diligence in prosecuting the action (*130 Cal. App. 3d 1063, 1066-1067)* . Application of the factors in former Cal. Rules of Ct., Rule 203.5(e), would have shown, at least impliedly, that plaintiff's reasons for delay were good. The trial court should have considered the law applicable to the case. Since plaintiff could have proceeded in separate suits against the primary defendant and the three defendants who sought dismissal, the fact that she delayed prosecution against them until after trying to adjudicate liability of the primary defendant should not require that she be penalized. The trial court should also have considered the its own calendar. The court of appeal noted that the chance of having a case almost three and one-half years old set for jury trial was beneficial in a court in which jury trials routinely take five years to come to trial. Finally, the trial court should have considered whether the ends of justice would be served by dismissal or trial, or by imposing conditions on dismissal or trial. The failure of the trial court to consider these factors, coupled with plaintiff's demonstrated diligence and the failure of defendants to claim or establish prejudice, resulted in an abuse of discretion preventing a meritorious cause

from being heard (*130 Cal. App. 3d 1063, 1068-1070)* .

[e] No Injustice Has Resulted From the Delay

The facts and procedural background of ***Putnam v. Clague*** *(1992) 3 Cal. App. 4th 542, 5 Cal. Rptr. 2d 25* , are *discussed under § 90.60[3][a]*. In *Putnam*, the court found that plaintiffs demonstrated good cause for the delay in service. It rejected defendant's argument that an inference of prejudice arose from the mere delay in service since plaintiffs had established good cause for the delay (*3 Cal. App. 4th 542, 564)* . The court noted that defendant had actual knowledge of the pending actions. Defendant's counsel provided a vague, conclusory declaration referring to his inability to conduct certain discovery as to plaintiffs' medical condition. The court found defendant's evidence insufficient to establish prejudice since defendant could have conducted discovery, the parties' counsel had arranged a discovery schedule of some of the related cases after the settlement of the "lead" case, and plaintiffs unsuccessfully attempted settlement of all of the actions at or around the time that the "lead" case settled (*3 Cal. App. 4th 542, 564-566)* . Since the plaintiffs demonstrated good cause for the delay and defendant failed to establish actual prejudice therefrom, the court reversed the judgment in favor of defendant.

The facts and procedural background of ***Yao v. Anaheim Eye Medical Group, Inc.*** *(1992) 10 Cal. App. 4th 1024, 12 Cal. Rptr. 2d 856* , are *discussed under§ 90.60[3][c]*. In reversing the trial court's dismissal of the action, the court first found that plaintiff established a reasonable excuse for the delay in service. It then stated that the burden of proof shifted to defendant to establish actual prejudice. Defendant made no showing of prejudice, arguing that it was not required to do so. The court rejected that argument, finding that the record reflected an absence of actual prejudice since defendant did not deny receipt of plaintiff's notice of intention to file the action and an investigation had been undertaken by its risk management personnel (*10 Cal. App. 4th 1024, 1030-1032)* .

[f] Conditional Denial of Discretionary Dismissal

In ***Hansen v. Snap-Tite, Inc.*** *(1972) 23 Cal. App. 3d 208, 100 Cal. Rptr. 51* , the case was set for trial three years and eight months after the date of filing. The case, however, was placed off calendar because of a negotiated settlement, and when some plaintiffs refused to settle, defendants moved to dismiss for failure to prosecute the action. The trial court denied the motion to dismiss on the condition that plaintiffs pay defendants $10,000 as reimbursement for attorney's fees. Plaintiffs declined to pay the money, and the trial court dismissed the action. Plaintiffs appealed.

The court of appeal affirmed, holding that the action of the trial court was justified by former Cal. Rules of Ct., Rule 203.5(f) [*now see Cal. Rules of Ct., Rule 3.1342(f)*], which permits the court, where facts warrant, to continue or defer its ruling pending performance by either party of any conditions relating to trial or dismissal of the case that may be required to effectuate substantial justice. The purpose of this rule was to give the trial court some appropriate sanction against the dilatory litigant short of the harsh remedy of dismissal. If the damage caused by the delay was compensable in money, it was a reasonable exercise of the court's power to offer the plaintiff an opportunity to make redress. Plaintiffs offered no explanation that would excuse their conduct in permitting the case to go off calendar before rejecting the settlement. The effect was to require another trial setting eleven months later, subjecting defendants to additional inconvenience, uncertainty, and expense, and to require their attorneys to rework and renew their previous trial preparation efforts (*23 Cal. App. 3d 208, 213-214)* .

California Points & Authorities

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Volume 9 Chapters 90-99 DISMISSAL---to---EMINENT DOMAIN
CHAPTER 90 DISMISSAL
PART II. FORMS
B. Involuntary Dismissal
1. Dismissal For Failure To Serve Summons and Complaint and File Proof of Service of Summons

9-90 California Points & Authorities § 90.61

§ 90.61 Reply Memorandum Supporting Motion for Mandatory Dismissal for Failure to Serve Summons and Complaint and File Proof of Service of Summons [Code Civ. Proc. §§ 583.210, 583.250]--Defendant Has Not Made General Appearance [Code Civ. Proc. § 583.220]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*] Plaintiff,	)	NO. _____
vs.	)	REPLY MEMORANDUM IN SUPPORT OF MO-
_____ [*name*],	)	TION TO DISMISS
Defendant.	)	Date: _____
	)	Time: _____
	)	Dept: _____
	)	Trial Date: _____

_____

COMPLIANCE WITH THE STATUTORY TIME REQUIREMENTS FOR SERVICE AND FILING PROOF OF SERVICE OF SUMMONS IS NOT EXCUSED UNDER SECTION 583.220 OF THE CODE OF CIVIL PROCEDURE BECAUSE _____ [*specify, e.g.,* DEFENDANT'S ACTIONS DO NOT, BY STATUTE, CONSTITUTE A GENERAL APPEARANCE]

[*EITHER*]

A. Action by Defendant Is Not General Appearance. *Code of Civil Procedure Section 583.220* excuses the time requirements for completing service and filing proof of service of summons when a defendant has made a general appearance. However, the following acts do not constitute a general appearance: (a) a stipulation extending time under *Section 583.230 of the Code of Civil Procedure, (b)* a motion to dismiss under *Sections 583.110-583.430 of the Code of Civil Procedure*, whether joined with a motion to quash service or to set aside a default judgment or otherwise, and (c) an extension of time to plead after a motion to dismiss made pursuant to *Sections 583.110-583.430 of the Code of Civil Procedure* (*Code Civ. Proc. § 583.220*).

[*AND/OR*]

B. General Appearance by Defendant After Period Expired. A defendant does not make a general appearance under *Code of Civil Procedure Section 583.220* when the appearance occurs after expiration of the statutory period. (*see Busching v. Superior Court (1974) 12 Cal. 3d 44, 52-53, 115 Cal. Rptr. 241, 524 P.2d 369* ; *Weatherby v. Van Diest (1991) 233 Cal. App. 3d 506, 511, 284 Cal. Rptr. 622*).

[*AND/OR*]

C. General Appearance by Defendant in Cross Action. A defendant does not make a general appearance in an action for the purposes of *Code of Civil Procedure Section 583.220* if the defendant's general appearance occurred only in a cross action resulting from the action (*see Glenwood Homeowners Assn., Inc. v. Prosher Development Ltd. (1980) 111 Cal. App. 3d 1002, 1004-1006, 169 Cal. Rptr. 48*).

[*AND/OR*]

D. General Appearance by Codefendant. A defendant does not make a general appearance in an action for the purposes of *Code of Civil Procedure Section 583.220* if the only general appearance is by a codefendant of the moving defendant, that defendant is not a necessary party, and the suit could have been based on joint or several liability (*see Watson v. Superior Court (1972) 24 Cal. App. 3d 53, 57, 100 Cal. Rptr. 684*).

[*AND/OR*]

E. General Appearance in Separate Action. When a defendant is served in only one of two separate actions that have been brought against him or her by different plaintiffs concerning the same incident, and that are later consolidated for trial but not merged, that defendant does not make a general appearance with regard to the action in which service has not been made by appearing and otherwise defending his or her interests in the action in which service has been made (*Sanchez v. Superior Court (1988) 203 Cal. App. 3d 1391, 1396-1399, 250 Cal. Rptr. 787*).

[*AND/OR*]

F. General Appearance in Complaint in Intervention. When a complaint in intervention has been filed and defendant has beenserved only with that complaint, the defendant does not make a general appearance with regard to the underlying action in which service has not been made by appearing and otherwise defending his or her interests in the action in which service has been made (*see Kuchins v. Hawes (1990) 226 Cal. App. 3d 535, 539, 541, 276 Cal. Rptr. 281* ; *Duckett v. Superior Court (1989) 207 Cal. App. 3d 1419, 1422-1425, 255 Cal. Rptr. 733*).

Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in a reply memorandum supporting a motion for mandatory dismissal for delay in effecting service, in response to the opposing party's position that plaintiff's delay in service is excused by the defendant's general appearance [*see Code Civ. Proc. § 583.220*; *see also § 90.52*]. The ground for the response is that the opposing party has not shown acts or conduct on the part of defendant that constitute a general appearance.

As a practical matter, these points and authorities are best used in a reply memorandum, after the opposing party has raised the issue of defendant's general appearance. Alternatively, the foregoing points and authorities may be combined with the points and authorities generally supporting a motion for mandatory dismissal that are *set out in § 90.50*, if counsel wishes to anticipate known opposition.

This form may, in addition, be adapted for use in support of a motion for discretionary dismissal [*see § 90.51*]. The principles applicable in determining whether the discretionary period has lapsed are the same as those applicable in determining whether the mandatory period has lapsed [*see Code Civ. Proc. § 583.420(b)*].

This memorandum supports a defendant's motion for dismissal of the complaint, and should be modified as necessary when it is used in another context, such as in support of a motion for dismissal of a cross complaint [*see Code Civ. Proc. § 583.110(a), (b), (d), (e)*].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. For example, if defendant filed a motion to quash or to set aside a default judgment along with a motion to dismiss, counsel should argue that these additional filings do not constitute a general appearance [*Code Civ. Proc. § 583.220(b)*].

[b] Effect of Authority Decided Under Former Dismissal Statutes

In 1984, the provision for involuntary dismissal for delay in service and return, former Code Civ. Proc. § 581a, was repealed and replaced by *Code Civ. Proc. §§ 583.210-583.250*. Decisions interpreting former Code Civ. Proc. § 581a have been cited in the form as persuasive rather than controlling authority to the extent that the revised statutes codify former case law or continue former substantive principles.

2005 amendments to *Code Civ. Proc. § 583.210* eliminated the requirement that the original summons be returned to the court; instead, the court retains the original summons, issues copies, and the plaintiff files a proof of service of summons [2005 Stats. 300].

[c] Related Pleading and Practice Forms

For forms of a notice of motion and order relating to a motion to dismiss an action pursuant to Code Civ. Proc. §§ 583.210, 583.250, see Ch. 212, *Dismissal* in California Forms of Pleading and Practice.

[d] Opposing Memoranda

The points and authorities *set out in § 90.52* may be used in an appropriate case to oppose a motion for dismissal that is supported by the foregoing points and authorities. Counsel should note that there is a split of authority regarding whether a general appearance made within three years and sixty days constitutes a general appearance within the meaning of *Code Civ. Proc. § 583.220* [*compare Wong v. Armstrong World Industries, Inc. (1991) 232 Cal. App. 3d 1032, 1034-1035, 283 Cal. Rptr. 870* (time limitation within which return of summons must be made is inapplicable when a defendant makes a general appearance within three years and sixty days of commencement of the action) discussed in *§ 90.52[3*][b] with *Weatherby v. Van Diest (1991) 233 Cal. App. 3d 506, 284 Cal. Rptr. 622* (appearance prior to the expiration of three years and sixty days from commencement of the action did not constitute a general appearance), discussed in *§ 90.61[3][a]*].

[3] Discussion of Authorities

[a] General Appearance by Defendant After Period Expired

The facts and procedural background of ***Busching v. Superior Court*** *(1974) 12 Cal. 3d 44, 115 Cal. Rptr. 241, 524 P.2d 369* , are discussed in *§ 90.50[3][b]*. In that case, the Court considered whether the letter by the corporation's officer constituted a general appearance, and found that it did not. It merely acknowledged that service might have been made, but did not purport to waive any of the requirements of former Code Civ. Proc. § 581a(a) regarding timely service. Moreover, the court found that merely seeking an extension of time to plead cannot be deemed to indicate an intention to submit to the jurisdiction of the court for a ruling going to the merits, because the purpose may be only to obtain adequate time to determine whether or not to object to the court's jurisdiction. Even if the party's action did constitute a general appearance, it took place after expiration of the three-year period, and a general appearance after the three years have run did not operate to deprive a defendant of the right to dismissal. The court approved *Watson v. Superior Court (1972) 24 Cal. App. 3d 53, 59-60, 100 Cal. Rptr. 684* , *discussed under § 90.61[3][c] below,* and disapproved *Taylor v. Hizer (1973) 30 Cal. App. 3d 846, 849-851, 106 Cal. Rptr. 603* , insofar as it reached an opposite conclusion (*12 Cal. 3d 44, 50-53)* .

Weatherby v. Van Diest *(1991) 233 Cal. App. 3d 506, 508-509, 284 Cal. Rptr. 622* , involved a personal injury action in which plaintiff identified defendant as a Doe defendant and served him with the summons and complaint two years and ten months after the complaint was filed. Defendant answered the complaint three years and forty-six days after the action commenced but plaintiff did not return the summons to the court until three years and ten months after the summons was issued. Defendant moved for dismissal pursuant to *Code Civ. Proc. § 583.250* for failure to comply with *Code Civ. Proc. § 583.210*, and the trial court granted the motion [*now see Code Civ. Proc. § 583.210* requiring only filing proof of service of summons].

The plaintiff argued on appeal that the court erred because service is not complete until the return of summons is filed with the court and defendant's general appearance in the action three years and forty-six days after the summons was issued thus relieved plaintiff of the necessity of filing the summons within three years and sixty days of its issuance. The court of appeal rejected plaintiff's argument. It noted that *Code Civ. Proc. § 583.210(a)* requires that summons and complaint be served on the defendant within three years after the action is commenced whereas *Code Civ. Proc. § 583.210(b)* provides that return of summons or other proof of service shall be made within sixty days after the time the summons and complaint must be served on a defendant. The court found it apparent from this language that the Legislature simply provided that the notice of the lawsuit could be filed sixty days after the three-year period had run within which service must be accomplished. It further noted that *Code Civ. Proc. § 583.220* provides that the time within which service must be made does not apply if there is a stipulation in writing or if some other act occurs constituting a general appearance in the action. This language recognizes that a defendant, without service on him or her of the complaint and/or the summons, may have knowledge of the lawsuit and file an answer or other pleading constituting a general appearance in the action before the three-year period has elapsed. In such a case, where a general

appearance has been made before the three-year period, service of summons and complaint is not a determinative factor of notice and defendant's participation in the lawsuit (*233 Cal. App. 3d 506, 508-509)* .

The court also stated that *Code Civ. Proc. § 583.210(b)* was added by amendment in 1984. The previous statute required both the service of summons and its return within three years. The new statute, Section 583.210, retained the requirement that the summons be served within three years of filing the complaint and added the provision that the return of the summons must be accomplished within an additional sixty days. The court concluded that these statutes require a dismissal in any action where the summons is not returned within the three year and sixty-day period within *Code Civ. Proc. § 583.210* (*233 Cal. App. 3d 506, 509-511)* .

The court rejected plaintiff's argument that defendant made a general appearance prior to the three-year and sixty-day period for return of the summons. It relied on *Busching v. Superior Court (1974) 12 Cal. 3d 44, 52, 115 Cal. Rptr. 241, 524 P.2d 369* , discussed *above,* in which the Supreme Court announced that a general appearance after the three years had run did not operate to deprive a defendant of his right to a dismissal. In this case, defendant made a general appearance after the three-year period within which service had to be made. It made no sense to say that a general appearance by defendant after the three year period for service but before the lapse of three years and sixty days lets the plaintiff off the hook in terms of complying with the requirement of returning the summons within the statutory time period (*233 Cal. App. 3d 506, 511)* . Therefore, the court affirmed the judgment.

[b] General Appearance by Defendant in Cross Action

In ***Glenwood Homeowners Assn., Inc. v. Prosher Development Ltd.*** *(1980) 111 Cal. App. 3d 1002, 169 Cal. Rptr. 48* , plaintiff sued several defendants for damages in an action involving construction of a condominium. One defendant filed numerous cross complaints for indemnity against various subcontractors, including respondent. Respondent filed an answer to defendant's cross complaint. Plaintiff then served respondent by mail with the original complaint, meeting the three-year deadline of former Code Civ. Proc. § 581a(a) [*now see Code Civ. Proc. § 583.210*]. Respondent contended that service was improper and filed a motion to quash, which the trial court granted.

The court of appeal noted that a complaint and a cross complaint in the same action are treated as if they were independent actions. It held thatan appearance by an unserved defendant by way of an answer to a cross complaint did not constitute a general appearance for purposes of jurisdiction in the original action, and that service by mail was improper. Respondent should have been served in person. Therefore, the court affirmed the granting of the motion to quash service of the summons and complaint pursuant to former Code Civ. Proc. § 581a(a), since respondent had not been properly served within the three-year period and had not made a general appearance in the original action (*111 Cal. App. 3d 1002, 1004-1008)* .

[c] General Appearance by Codefendant

In ***Watson v. Superior Court*** *(1972) 24 Cal. App. 3d 53, 100 Cal. Rptr. 684* , the court of appeal issued a writ of mandate to compel the trial court to dismiss the action for failure to serve and return summons within three years (*24 Cal. App. 3d 53, 61)* . In opposing the writ, plaintiff contended that defendant was deprived of his right to dismissal because of a general appearance by the codefendants. The court of appeal disagreed. Whatever doubts about the availability of dismissal might exist in a case in which all defendants are indispensable or necessary parties, they do not arise in this case, because defendants were sued as joint tortfeasors who were proper but not necessary parties and may have been sued jointly or severally (*24 Cal. App. 3d 53, 56-57)* .

Watson was disapproved with regard to its views on the diligence required of a plaintiff to effect service, in *Hocharian v. Superior Court (1981) 28 Cal. 3d 714, 722 n.5, 170 Cal. Rptr. 790, 621 P.2d 829* . However, former Code Civ. Proc. § 581a(f)(2) overruled *Hocharian* regarding the effect of a plaintiff's failure to discover facts or evidence, and the provisions of that statute were continued in *Code Civ. Proc. § 583.240(d)*. Therefore, it appears that the validity of

Watson is not impaired for the proposition concerning dismissal cited in the foregoing form.

[d] General Appearance in Separate Action

In ***Sanchez v. Superior Court*** *(1988) 203 Cal. App. 3d 1391, 250 Cal. Rptr. 787* , two plaintiffs brought separate actions against the same defendant with regard to the same incident. Both plaintiffs were initially represented by different law firms, but later the law firm in one action substituted into the other action as well. About the same time, the actions were consolidated for trial, but not merged. The defendant was served in one action but not in the other. On behalf of the plaintiff in the served action, the defendant was subpoenaed to attend a deposition. The defendant complied and defended his interests with regard to the served action at the deposition. Thereafter, the defendant moved for dismissal of the unserved action. The trial court denied the motion on the ground that the defendant had made a general appearance in the unserved action by attending and participating in the deposition.

The court of appeal granted the defendant's petition for writ of mandate, and directed the trial court to order the dismissal. The court explained that although the two cases had been consolidated for trial, there was no indication in the record that the two cases had become merged. The plaintiffs were not in fact joined, and the actions remained separate and distinct even after the consolidation (*203 Cal. App. 3d 1391, 1396)* . Thus, the defendant's appearance at the deposition and otherwise defending his interests with regard to the served action could not reasonably be construed to be a general appearance in the unserved action (*203 Cal. App. 3d 1391, 1399-1400)* . Further, the defendant was not estopped from seeking dismissal merely because he did not state an intention to waive his dismissal rights at the deposition; he was under no duty to engage in such affirmative conduct, and only attended the deposition because he was compelled to do so to protect his interests in the served action (*203 Cal. App. 3d 1391, 1400)* .

[e] General Appearance in Complaint in Intervention

Kuchins v. Hawes *(1990) 226 Cal. App. 3d 535, 276 Cal. Rptr. 281* , involved a personal injury action in which plaintiff filed a complaint against several defendants, including the employer of the driver of the vehicle involved in the accident. Shortly thereafter, the employer's workers' compensation insurance carrier filed a complaint in intervention naming the same defendants as in the initial action. The insurance carrier served defendant with the summons and complaint in intervention within two years. The plaintiff, however, did not serve any of the defendants until two and one-half years after filing the complaint. The individual defendant and his employer filed motions to dismiss the underlying complaint for failure to serve the summons and complaint within two years under *Code Civ. Proc. §§ 583.410* and *583.420*, which the trial court granted.

The court of appeal affirmed. It noted that the California Supreme Court has not addressed the issue of whether service of a complaint in intervention on a defendant satisfies the requirement that a plaintiff serve his or her complaint within two years. It examined the different conclusions reached by appellate courts addressing the issue in different contexts. For example, in *Duckett v. Superior Court (1989) 207 Cal. App. 3d 1419, 1422-1424, 255 Cal. Rptr. 733* , discussed *below*, the Second Appellate District held that a defendant's answer to a complaint in intervention did not constitute a general appearance in the underlying action. However, the *Fifth Appellate District, in State Compensation Ins. Fund v. Selma Trailer & Manufacturing Co. (1989) 210 Cal. App. 3d 740, 755, 258 Cal. Rptr. 545* , took the position that a complaint and a complaint in intervention were interchangeable and essentially the same lawsuit, concluding that theintervener was not permitted to file a complaint in intervention after expiration of the time period allotted plaintiff to prosecute his action (*226 Cal. App. 3d 535, 539-540)* .

The court found that to allow a plaintiff to benefit from the diligence of the workers' compensation carrier would sanction dilatory prosecution on the plaintiff's part. It concluded that plaintiff should not be allowed to ride on the coattails of the intervener and rely on the intervener's diligence (*226 Cal. App. 3d 535, 540-541)* . Therefore, service of the complaint in intervention did not operate as service of plaintiff's underlying complaint and thus, the defendants' answers were not general appearances in the underlying action.

In ***Duckett v. Superior Court*** *(1989) 207 Cal. App. 3d 1419, 255 Cal. Rptr. 733* , plaintiffs brought actions for personal injuries alleging that defendant's faulty brake repairs caused the accident. The plaintiffs' employer's workers' compensation insurance carrier filed a complaint in intervention to recover the amount of workers' compensation benefits it had paid as a result of the accident. The complaint in intervention was served and defendant filed an answer prior to the expiration of three years from the time the complaint was filed. However, the underlying complaint was not served until more than three years after the action commenced and after the complaint in intervention had been dismissed with prejudice. The trial court denied defendant's motion to quash on the ground that defendant had made a general appearance when he filed an answer to the complaint in intervention.

The court of appeal issued a writ of mandate directing the trial court to vacate the order denying defendant's motion. It noted that a complaint in intervention filed by an employer who seeks to recover benefits from a third party tortfeasor whose negligence caused an employee's injury pursuant to *Lab. Code § 3852* may be considered a separate action for some purposes and not a separate action for others (*207 Cal. App. 3d 1419, 1422)* . The California Supreme Court held in *County of San Diego v. Sanfax Corp. (1977) 19 Cal. 3d 862, 874, 140 Cal. Rptr. 638* , that the same statute of limitations applies to both actions. However, the appellate courts have recognized the separate nature of a complaint in intervention for reimbursement of workers' compensation benefits, citing *Deutschmann v. Sears, Roebuck & Co. (1982) 132 Cal. App. 3d 912, 915-916, 183 Cal. Rptr. 573* . The court found that treating defendant's answer to the complaint in intervention as a general appearance would do injury to the goals of the employee-employer statutes, which have as their objective the goal of reducing the likelihood that a third party will be forced to defend more than one action (*207 Cal. App. 3d 1419, 1424-1425)* .

[4] Additional Authorities

[a] General Appearance by Defendant After Period Expired

In *Brookview Condominium Owners' Assn. v. Heltzer Enterprises-Brookview (1990) 218 Cal. App. 3d 502, 267 Cal. Rptr. 76* , the plaintiffs' original complaint, seeking damages for construction defects, named as a defendant an entity with name similar to the developer, but did not name the developer. The developer was later added as a Doe defendant and was served more than three years after the filing of the complaint. The developer filed a joint answer with the similarly named developer, participated in discovery and filed a cross-complaint. It then filed a motion for dismissal, based on plaintiff's failure to serve the complaint within three years, which the trial court granted.

Plaintiff conceded on appeal that the complaint was not served until well after the three-year time period expired and that the time for service was not tolled or extended by *Code Civ. Proc. § 583.230* or *583.240*. It contended that defendant's extensive participation in the lawsuit after it was served constituted a general appearance barring dismissal. The court of appeal rejected this argument and affirmed the dismissal. The court found that, as the Supreme Court has continually held, a general appearance made after the three years runs does not operate to deprive a defendant of his right to a dismissal, citing *Busching v. Superior Court (1974) 12 Cal. 3d 44, 52, 115 Cal. Rptr. 241, 524 P.2d 369* , discussed in *§ 90.61[3][a]*. Participating in the lawsuit after service did not deprive the defendant of its right to dismissal (*218 Cal. App. 3d 502, 508-509)* .

In *Tires Unlimited v. Superior Court (1986) 180 Cal. App. 3d 974, 226 Cal. Rptr. 25* , the court of appeal issued a writ of mandate to compel the trial court to dismiss the action for failure to serve and return summons within three years pursuant to former Code Civ. Proc. § 581a. The court stated that a stipulation between the parties extending the time to answer the complaint did not constitute a general appearance precluding dismissal, because it occurred after expiration of the three-year period for service and return of summons, citing *Busching v. Superior Court (1974) 12 Cal. 3d 44, 115 Cal. Rptr. 241, 524 P.2d 369* , discussed in *§ 90.61[3][a]* (*180 Cal. App. 3d 974, 980-982)* .

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California Points & Authorities

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Volume 9 Chapters 90-99 DISMISSAL---to---EMINENT DOMAIN
CHAPTER 90 DISMISSAL
PART II. FORMS
B. Involuntary Dismissal
1. Dismissal For Failure To Serve Summons and Complaint and File Proof of Service of Summons

9-90 California Points & Authorities § 90.62

§ 90.62 Reply Memorandum Supporting Motion for Mandatory Dismissal for Failure to Serve Summons and Complaint and File Proof of Service of Summons [Code Civ. Proc. §§ 583.210, 583.250]--Defendant Was Amenable to Process [Code Civ. Proc. § 583.240(a)]

[1] FORM

[*Caption. See § 90.61.*]

THE TIME PLAINTIFF SEEKS TO EXCLUDE FROM THE THREE-YEAR PERIOD FOR SERVICE OF SUMMONS CANNOT BE EXCLUDED UNDER CODE OF CIVIL PROCEDURE SECTION 583.240 ON THE GROUND THAT DEFENDANT WAS NOT AMENABLE TO PROCESS BECAUSE SERVICE COULD HAVE BEEN ACCOMPLISHED _____ [*specify statutory method that was available, e.g.,* BY PUBLICATION UNDER CODE OF CIVIL PROCEDURE SECTION 415.50].

A. Defendant Amenable to Process. The provision of *Section 583.240(a) of the Code of Civil Procedure*, which excludes the time during which a defendant was not amenable to the process of the court in computing the time period for effecting service set out in Section 583.210 of the Code of Civil Procedure, does not apply if plaintiff fails to negate the possibility that service could have been accomplished under an applicable state statute, although the defendant was absent from the state (*see Adelson v. Hertz Rent-A-Car (1982) 133 Cal. App. 3d 221, 226-227, 183 Cal. Rptr. 779* (decided under former Civ. Code § 581a).

B. Plaintiff Bears the Burden of Proof Regarding Defendant's Nonamenability to the Process of the Court. Whether a defendant was "not amenable to the process of the court" is a question of fact for the trial court on which the plaintiff has the burden of proof (*see Buchanan v. Buchanan (1979) 99 Cal. App. 3d 587, 592-593, 160 Cal. Rptr. 577*).

[*Optional*] **C. Defendant Amenable to Process When Served by Publication.** A defendant is amenable to service of process by any means so long as he or she remains within the jurisdiction of the court, including the method of last resort of service by publication (*see Perez v. Smith (1993) 19 Cal. App. 4th 1595, 1598, 24 Cal. Rptr. 2d 186*). A

finding under *Code of Civil Procedure Section 415.50* that a defendant was not reasonably available for service of process other than by publication is not the equivalent of a finding that a defendant was not amenable to process within the meaning of *Code of Civil Procedure Section 583.240(a)* (*Watts v. Crawford (1995) 10 Cal. 4th 743, 761, 42 Cal. Rptr. 2d 81, 896 P.2d 807*). Thus, a finding that a defendant could not with reasonable diligence be served other than by publication does not constitute a binding adjudication that the defendant was not amenable to process for purposes of Section 583.240(a) (*Watts v. Crawford (1995) 10 Cal. 4th 743, 761-762, 42 Cal. Rptr. 2d 81, 896 P.2d 807*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in a reply memorandum supporting a motion for mandatory dismissal for delay in effecting service, in response to the opposing party's position that service was timely in view of the exclusion of time during which defendant was not amenable to service [*see Code Civ. Proc. § 583.240(a)*; *see also § 90.56*]. The ground for the response is that the opposing party has not adequately shown that defendant was not amenable to service.

Optional Paragraph C may be used when plaintiff contends that defendant was served by publication because he or she was beyond the jurisdiction of the court and thus was not amenable to the process of the court.

As a practical matter, these points and authorities are best used in a reply memorandum, after the opposing party has raised the issue of defendant's amenability to service. Alternatively, they may be combined with the points and authorities generally supporting a motion for mandatory dismissal that are *set out in § 90.50*, if counsel wishes to anticipate known opposition.

This form may, in addition, be adapted for use in support of a motion for discretionary dismissal [*see § 90.51*]. The principles applicable in determining whether the discretionary period has lapsed are the same as those applicable in determining whether the mandatory period has lapsed [*see Code Civ. Proc. § 583.420(b)*].

This memorandum supports a defendant's motion for dismissal of the complaint, and should be modified as necessary when it is used in anothercontext, such as in support of a motion for dismissal of a cross complaint [*see Code Civ. Proc. § 583.110(a), (b), (d), (e)*].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. For example, counsel may describe the facts of defendant's conduct and state the reasons why defendant was amenable to the process of the court [*see, e.g., Adelson v. Hertz Rent-A-Car (1982) 133 Cal. App. 3d 221, 226-227, 183 Cal. Rptr. 779* (defendant's change of name and move out of country did not preclude amenability to process under prior law)].

[b] Effect of Authority Decided Under Former Dismissal Statutes

In 1984, the provision for involuntary dismissal for delay in service and return, former Code Civ. Proc. § 581a, was repealed and replaced by *Code Civ. Proc. §§ 583.210-583.250*. Decisions interpreting former Code Civ. Proc. § 581a have been cited in the form as persuasive rather than controlling authority to the extent that the revised statutes codify

former case law or continue former substantive principles.

2005 amendments to *Code Civ. Proc. § 583.210* eliminated the requirement that the original summons be returned to the court; instead, the court retains the original summons, issues copies, and the plaintiff files a proof of service of summons [2005 Stats. 300].

[c] Related Pleading and Practice Forms

For forms of a notice of motion and order relating to a motion to dismiss an action pursuant to Code Civ. Proc. §§ 583.210 and 583.250, see ch. 212, *Dismissal* , in California Forms of Pleading and Practice (Matthew Bender).

[d] Opposing Memoranda

The points and authorities *set out in § 90.56* may be used in an appropriate case to oppose a motion for dismissal supported by the foregoing memorandum.

[3] Discussion of Authorities

[a] Defendant Amenable to Process

In ***Adelson v. Hertz Rent-A-Car*** *(1982) 133 Cal. App. 3d 221, 183 Cal. Rptr. 779* , defendant filed a motion to dismiss a personal injury action pursuant to former Code Civ. Proc. § 581a [*now see Code Civ. Proc. §§ 583.210, 583.250*] for failure to serve and return summons within three years. Plaintiff contended defendant was not amenable to the process of the court under former Code Civ. Proc. § 581a(d) [*now see Code Civ. Proc. § 583.240(a)*], because she changed her name and address, and therefore the action should not be dismissed. The trial court granted defendant's motion for dismissal, and plaintiff appealed.

The court of appeal affirmed. The court held that defendant's marriage and subsequent change of name and address did not make her "not amenable to process" pursuant to former Code Civ. Proc. § 581a(d), because *Code Civ. Proc. § 413.10* provided plaintiff with a means of obtaining service on a foreign individual residing out of the country (*133 Cal. App. 3d 221, 226-227)* .

[b] Plaintiff Bears the Burden of Proof Regarding Defendant's Nonamenability to the Process of the Court

In ***Buchanan v. Buchanan*** *(1979) 99 Cal. App. 3d 587, 160 Cal. Rptr. 577* , plaintiff sued her husband for damages resulting from an automobile injury, but before service could be effected, they both moved to Jamaica. Over three years later, the court granted defendant's motion to dismiss pursuant to former Code Civ. Proc. § 581a(a). Plaintiff appealed.

The court of appeal affirmed. Although former Code Civ. Proc. § 581a(d) [*now see Code Civ. Proc. § 583.240(a)*] provided that time during which a defendant is not amenable to the process of the court shall not be included in computing the time periods specified in former Code Civ. Proc. § 581a, the burden is on the plaintiff to establish that the defendant was not amenable, and a showing that the defendant was absent from the state is not sufficient (*99 Cal. App. 3d 587, 592-593)* . In the instant case, defendant might have been served by mail and have executed an acknowledgment. Additionally, he might have been served under sections of the Vehicle Code or provisions for service of persons outside the state. Plaintiff failed to negate these possibilities or to present facts in support of the claimed nonamenability (*99 Cal. App. 3d 587, 593)* .

[c] Defendant Amenable to Process When Served by Publication

In ***Watts v. Crawford*** *(1995) 10 Cal. 4th 743, 42 Cal. Rptr. 2d 81, 896 P.2d 807* , the plaintiffs filed an action against defendant on February 8, 1989, and summons issued that day. Although there was some contact with an attorney who

had represented the defendant in relation to the property underlying the lawsuit, the attorney was not authorized to receive service of summons and so informed plaintiffs. Plaintiffs attempted to serve defendant by hiring a licensed process server, who in 1989 sought to serve defendant at her last known address, and then sought an updated address through telephone directories, voter registries, the Department of MotorVehicles, and the county recorder's office. Over the three-year period, the process server made repeated attempts to locate the defendant, using various indices in several counties. In 1990, the process server learned from defendant's tenants that she had been living in a trailer on property adjacent to that which was the subject of the lawsuit. The process server could not get a new address for the defendant from the tenants. In 1991, the process server learned from the tenants that the defendant lived an intinerant lifestyle with no permanent address. On February 6, 1992, the plaintiffs filed an ex parte application for an order directing service of summons by publication, based on these facts. The court granted the motion the same day. Service by publication commenced February 27, 1992, twenty days after the three-year period for service expired, which would result in service being completed on March 25, three years and forty-seven days after the action was filed. On April 20, the defendant moved to dismiss based on plaintiffs' failure to serve the complaint within three years, as required by *Code Civ. Proc. § 583.240(a)*. The trial court granted the motion to dismiss, and the court of appeal affirmed.

The Supreme Court affirmed. The Court defined its task as being to resolve the conflict between *Quaranta v. Merlini (1987) 192 Cal. App. 3d 22, 27, 237 Cal. Rptr. 179* , relied on by the plaintiffs and *Perez v. Smith (1993) 19 Cal. App. 4th 1595, 24 Cal. Rptr. 2d 186* , relied on by the defendant (*10 Cal. 4th 743, 745, 751)* . *Quaranta* held that the trial court's finding under *Code Civ. Proc. § 415.50* that a defendant was not reasonably available for service of process other than by publication is equivalent to a finding that a defendant was not amenable to process within the meaning of *Code Civ. Proc. § 583.240(a)*, so as to extend the three-year period for service of process. *Perez* held that "not amenable to process" under Section 583.240(a) refers to a defendant being outside the jurisdiction of the court, and that a finding to allow publication under Section 415.50, that the defendant cannot, despite reasonable diligence, be served by a preferred method, actually presupposes that jurisdiction exists (*10 Cal. 4th 743, 750)* .

The Supreme Court looked to the history of the statutes, the difference in their terminology, and the common useage of "amenable to the process of the court" to conclude that the time excluded from the three-year period for service of process under Section 583.240(a) refers to time during which the defendant was not subject to the jurisdiction of the court (*10 Cal. 4th 743, 751-761)* .

The Court accordingly disapproved *Quaranta*'s holding that a finding under *Code Civ. Proc. § 415.50* that a defendant was not reasonably available for service of process other than by publication is equivalent to a finding that a defendant is not amenable to process within the meaning of *Code Civ. Proc. § 583.240(a)* (*10 Cal. 4th 743, 761)* . The Court also disapproved *Quaranta*'s holding that a court's finding that a defendant could not with reasonable diligence be served other than by publication constitutes a binding adjudication that the defendant was not amenable to process for purposes of Section 583.240(a) (*10 Cal. 4th 743, 761-762)* . Resolving the case before it, the Court held that plaintiffs had not demonstrated the existence of any circumstance indicating that the defendant was not subject to the court's jurisdiction during some part of the three-year period. Thus, the three year period was not extended by the "not amenable to process" exclusion, and since the service by publication was not completed within the three year period, the case was properly dismissed (*10 Cal. 4th 743, 762-763)* . The Court declined to address defendant's alternative assertion that part of the three-year period should be excluded based on the *Code Civ. Proc. Section 583.240(e)* tolling of time during which service is "impossible, impracticable, or futile," based on plaintiffs' waiver of that issue by failure to properly raise it in the trial court (*10 Cal. 4th 743, 763 n.17*).

In ***Perez v. Smith*** *(1993) 19 Cal. App. 4th 1595, 24 Cal. Rptr. 2d 186* , plaintiff filed her original complaint in municipal court in 1988. Approximately three years later, she filed a motion to transfer the case to the superior court. Five months after the action was transferred, she applied for and obtained an order for service of summons by publication pursuant to *Code Civ. Proc. § 415.50*. In support of her application, plaintiff's counsel declared that an attempt had been made to serve defendant by mail, but defendant's insurance carrier refused to divulge defendant's present address and attempts at locating defendant through a search of county records and potential employers in the

area were unsuccessful. In granting the application, the trial court found that plaintiff could not with reasonable diligence personally serve defendant and ordered that service be made by publication. After notice of the summons was published, defendant moved for mandatory dismissal for failure to serve summons within three years after the action had commenced under *Code Civ. Proc. §§ 583.210* and *583.250*, which the trial court granted.

The court of appeal affirmed. It noted that plaintiff's application to serve by publication was made more than three years after her complaint was filed. Therefore, the burden of establishing facts bringing the case within an exception to the general rule requiring dismissal fell on the plaintiff. Plaintiff contended that the order for service by publication established that defendant was not amenable to process until the date of the order (*19 Cal. App. 4th 1595, 1597)* .

The court examined the phrase "not amenable to the process of the court" as used in *Code Civ. Proc. § 583.240(a)(2)*. It found that the legislative history made clear that a finding that a defendant cannot, despite reasonable diligence, be served by one of the preferable means of service, that is, in person, by mail, or by substituted service, is not tantamount to a finding that defendant is outside the jurisdiction of the court. Service bypublication presupposes the defendant is subject to the court's jurisdiction and is used only after the plaintiff has exhausted all other avenues to service of process. The court noted that plaintiff's application did not demonstrate that defendant was ever outside the court's jurisdiction (*19 Cal. App. 4th 1595, 1598)* . It distinguished *Quaranta v. Merlini (1987) 192 Cal. App. 3d 22, 27, 237 Cal. Rptr. 179* , in which defendant was a resident of Italy and could not be located for service. In the case at bar, however, defendant was served by publication after the time period for service had expired and the statute does not excuse failure of service except when the defendant is not amenable to the court's process. Plaintiff's application implied that defendant was amenable to service by publication and therefore, dismissal was proper (*19 Cal. App. 4th 1595, 1599-1600)* .

[4] Additional Authorities

[a] Defendant Amenable to Process

In *Gentry v. Nielsen (1981) 123 Cal. App. 3d 27, 176 Cal. Rptr. 385* , plaintiff effected service of process on defendants approximately two and one-half years after filing a complaint against them for medical malpractice. Later, plaintiff granted defendants an indefinite extension of time to file an answer, by written stipulation. Defendants answered six months later, leaving approximately two years of the five-year period specified in former Code Civ. Proc. § 583(b) [*now see Code Civ. Proc. § 583.310*] to bring the case to trial. A trial date was set about one month after the end of the five-year statutory period. The trial court granted defendants' motion to dismiss for failure to bring the case to trial within the statutory period.

The court of appeal affirmed on the ground that, under the circumstances, the extension of time to file an answer did not extend the statutory period in which plaintiff had to bring the case to trial (*123 Cal. App. 3d 27, 33)* . The court also refused to exclude from the statutory period a period of one month during which defendant was absent from the state. The court reasoned that during this period service could have been made on persons at defendant's home, or to the office that defendant maintained during the entire time that he was absent from the state (*123 Cal. App. 3d 27, 35)* .

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CHAPTER 90 DISMISSAL
PART II. FORMS
B. Involuntary Dismissal
1. Dismissal For Failure To Serve Summons and Complaint and File Proof of Service of Summons

9-90 California Points & Authorities § 90.63

§ 90.63 Reply Memorandum Supporting Motion for Mandatory Dismissal for Failure to Serve Summons and Complaint and File Proof of Service of Summons [Code Civ. Proc. §§ 583.210, 583.250]--Plaintiff Has Not Shown That Service Was Impossible, Impracticable, or Futile Due to Causes Beyond Plaintiff's Control [Code Civ. Proc. § 583.240(d)]

[1] FORM

[*Caption. See § 90.61.*]

THE FAILURE TO SERVE SUMMONS WITHIN THE REQUIRED PERIOD WAS NOT DUE TO CAUSES BEYOND PLAINTIFF'S CONTROL AND, THEREFORE, THE TIME SOUGHT TO BE EXCLUDED FROM THE THREE-YEAR PERIOD FOR SERVICE OF SUMMONS UNDER SECTION 583.240 OF THE CODE OF CIVIL PROCEDURE, ON THE GROUND OF IMPOSSIBILITY, IMPRACTICABILITY, OR FUTILITY, DOES NOT APPLY.

A. When Exclusion for Impossibility, Impracticability, or Futility Applies. The exclusion from the computation of the three-year period of any time during which service was impossible, impracticable, or futile applies only when the period sought to be excluded was due to causes beyond plaintiff's control (*Code Civ. Proc. § 583.240(d)*; *Bishop v. Silva (1991) 234 Cal. App. 3d 1317, 1322, 285 Cal. Rptr. 910* ; *Dale v. ITT Life Ins. Corp. (1989) 207 Cal. App. 3d 495, 500-502, 255 Cal. Rptr. 8*).

B. Plaintiff Has Burden of Proof Regarding Excuses of Impossibility, Impracticability, or Futility. When service of the summons and complaint and filing of the proof of service of summons are not completed within the time periods prescribed in *Section 583.210 of the Code of Civil Procedure*, plaintiff bears the burden of proof that the excuses of impossibility, impracticability, or futility, as provided in *Section 583.240(d) of the Code of Civil Procedure*, apply to extend the periods for service and filing proof of service of summons (*see Republic Corp. v. Superior Court (1984) 160 Cal. App. 3d 1253, 1258, 207 Cal. Rptr. 241* ; *Lesko v. Superior Court, (1982) 127 Cal. App. 3d 476, 484-485, 179 Cal. Rptr. 595*).

C. Exclusion Is Strictly Construed. The excuse of impossibility, impracticability, or futility should be strictly construed in light of the need to give a defendant adequate notice of the action so thatthe defendant can take necessary steps to preserve evidence (Cal. L. Revision Comm'n Comment to *Code Civ. Proc. § 583.240*; *see Damjanovic v. Ambrose (1992) 3 Cal. App. 4th 503, 509-510, 4 Cal. Rptr. 2d 560* ; *Graf v. Gaslight (1990) 225 Cal. App. 3d 291, 296 n.4, 274 Cal. Rptr. 759*).

[*Optional*] **D. Failure to Serve Defendant After Default Was Not Due to Causes Beyond Plaintiff's Control.** When the facts of the case show that plaintiff's failure to serve defendant with summons during the three-year period was a result of plaintiff's own actions in the case and not to any causes beyond his or her control, the period between the entry of default and the date the default and default judgment were set aside is not excluded from the three-year period (*Dale v. ITT Life Ins. Corp. (1989) 207 Cal. App. 3d 495, 500-502, 255 Cal. Rptr. 8*).

[*Optional*] **E. Failure to Serve Defendants During Pendency of Federal Court Action Between Same Parties on Same Cause Was Not Due to Causes Beyond Plaintiffs' Control.** The period that a federal court action is pending between the same parties on the same cause should not be excluded from the computation of the three-year period for service of summons because the pendency of that action did not prevent plaintiffs from serving the summons in the state court action, and hence the failure to serve was not due to causes beyond plaintiffs' control (*Valerio v. Boise Cascade Corp. (1986) 177 Cal. App. 3d 1212, 1219, 223 Cal. Rptr. 592*).

[*Optional*] **F. Failure to Serve Defendants Not Subject to Stay Was Not Due to Causes Beyond Plaintiffs' Control.** In an action which has been stayed as to some, but not all, of the defendants pursuant to statute, it is within plaintiffs' control to timely serve the defendants not subject to the stay (*Damjanovic v. Ambrose (1992) 3 Cal. App. 4th 503, 510, 4 Cal. Rptr. 2d 560*).

[*Optional*] **G. Actuality of Service Is Question of Fact.** Whether defendant was actually served with process is a question of fact (*Graf v. Gaslight (1990) 225 Cal. App. 3d 291, 295, 274 Cal. Rptr. 759*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in a reply memorandum supporting a motion for mandatory dismissal for delay in effecting service, in response to the opposing party's position that service was timely in view of the exclusion of time during which service was impossible, impracticable, or futile [*see Code Civ. Proc. § 583.240(d)* and § 90.58]. The ground for the response is that the opposing party has not adequately shown service was impossible, impracticable, or futile for reasons beyond his or her control.

As a practical matter, these points and authorities are best used in a reply memorandum, after the opposing party has raised the issue of impossibility, impracticability, or futility. Alternatively, the foregoing points and authorities may be combined with the points and authorities generally supporting a motion for mandatory dismissal that are *set out in § 90.50*, when counsel wishes to anticipate known opposition.

Optional Paragraph D may be used when a default judgment is at issue. Optional Paragraph E may be used when there

are separate actions between the same parties on the same cause. Optional Paragraph F may be used when the action has been stayed as to some, but not all, of the defendants. Optional Paragraph G may be used when there is an issue as to whether defendant was actually served with process.

This form may, in addition, be adapted for use in support of a motion for discretionary dismissal [*see § 90.51*]. The principles applicable in determining whether the discretionary period has lapsed are the same as those applicable in determining whether the mandatory period has lapsed [*see Code Civ. Proc. § 583.420(b)*].

This memorandum supports a defendant's motion for dismissal of the complaint, and should be modified as necessary when it is used in another context, such as in support of a motion for dismissal of a cross complaint [*see Code Civ. Proc. § 583.110(a), (b), (d), (e)*].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth the facts showing that the failure to serve summons was due to causes within plaintiff's control.

[b] Effect of Authority Decided Under Former Dismissal Statutes

In 1984, former Code Civ. Proc. § 581a was repealed and replaced by *Code Civ. Proc. §§ 583.210-583.250*. Decisions interpreting the former statutes have been cited in the form as persuasive rather than controllingauthority to the extent that the revised statutes codify former case law or continue former substantive principles.

2005 amendments to *Code Civ. Proc. § 583.210* eliminated the requirement that the original summons be returned to the court; instead, the court retains the original summons, issues copies, and the plaintiff files a proof of service of summons [2005 Stats. 300].

[c] Related Pleading and Practice Forms

For forms of a notice of motion and order relating to a motion to dismiss an action pursuant to Code Civ. Proc. §§ 583.210 and 583.250, see Ch. 212, *Dismissal* in California Forms of Pleading and Practice.

[d] Opposing Memoranda

The points and authorities *set out in § 90.58* may be used in an appropriate case to oppose a motion for dismissal supported by the foregoing memorandum.

[3] Discussion of Authorities

[a] When Exclusion for Impossibility, Impracticability, or Futility Applies

In ***Bishop v. Silva*** *(1991) 234 Cal. App. 3d 1317, 285 Cal. Rptr. 910* , plaintiff brought a third party tort action for injuries sustained during the course and scope of his employment, and the employer's workers' compensation insurance carrier intervened. Plaintiff provided defendant with a courtesy copy of the summons and complaint shortly after filing the complaint but did not effect service. Approximately three years later, plaintiff served an individual, described on the proof of service as "staff" at defendant's office. The original summons was never returned to plaintiff's counsel although the process server claimed it was sent to the intervener's counsel. Defendant moved to quash service and for mandatory dismissal of the action under *Code Civ. Proc. § 583.250* on the grounds that plaintiff had not effected return of summons or other proof of service within three years and sixty days after the action was commenced. After the motion was filed, plaintiff filed the original proof of service, a photocopy of the summons and a declaration stating that the original summons had been lost or destroyed. The trial court granted defendant's motion and dismissed the action.

Plaintiff contended on appeal that 85 days, which represented the time when plaintiff's counsel first learned that there was a problem with the summons until counsel was able to ascertain the status of the summons, should have been excluded from the computation of the time for the return of summons due to impossibility. The court of appeal rejected plaintiff's argument. It noted the Cal. Law Revision Comm'n Comment to *Code Civ. Proc. § 583.240*, providing that the excuse of impossibility, impracticability or futility should be strictly construed in light of the need to give a defendant adequate notice of the action so that the defendant can take necessary steps to preserve evidence. This strict construction is in direct contrast to the liberal construction afforded an excuse for failure to bring an action to trial within the prescribed time period and recognizes that service is ordinarily within the plaintiff's control (*234 Cal. App. 3d 1317, 1321-1322)* .

The court then held that plaintiff's problems with service were within his control. Plaintiff employed his own agent to effect service and allowed the deadline for return of summons to pass without taking any action even though the problem with the original summons had already come to light. The court stated that counsel could have investigated the matter further and still had ample time to meet the deadline for return of summons simply by obtaining and filing an affidavit of the process server under *Code Civ. Proc. § 417.30(b)*. His failure to do so did not fall within the impossibility exception of *Code Civ. Proc. § 583.240(d)* (*234 Cal. App. 3d 1317, 1322-1323)* .

The plaintiff also argued that his failure to effect timely service was excused because defendant had notice of the lawsuit. The court disagreed, finding that notice of the lawsuit through courtesy copies of the complaint and other communications did not excuse untimely service and plaintiff could not establish a general appearance on the part of defendant during the statutory time period (*234 Cal. App. 3d 1317, 1323-1324)* .

Dale v. ITT Life Ins. Corp. *(1989) 207 Cal. App. 3d 495, 255 Cal. Rptr. 8* , was an action filed against plaintiff's former employer and one of its general agents. Plaintiff attempted to serve the summons and complaint on defendant employer by serving the agent at his business address, despite the fact that the agent was not the defendant corporation's designated agent for service of process. The agent was fired eight days after he was served and he never informed the employer of the lawsuit. Approximately seven months later, plaintiff filed a request to enter the employer's default, but sent the notice in care of the agent at the agent's previous address and did not send notice to the employer. Over two years later, plaintiff obtained a default judgment against the employer for $100,000. Defendant did not learn of the judgment for another two years when plaintiff attempted to levy execution against the employer's assets. The trial court denied the employer's motion to set aside the default judgment, which was reversed on appeal. The employer then moved to dismiss the action for plaintiff's failure to serve the summons within three years of the filing of the complaint [*Code Civ. Proc. § 583.210(a)*] or to bring the case to trial within five years [*Code Civ. Proc. § 583.310*], and the motion was granted.

The court of appeal affirmed. It held that the five-year period was tolled from the date the default was entered until the remittitur issued under *Code Civ. Proc. § 583.340(a)* (court's jurisdiction to try action suspended) and thus, the five-year rule provided no basis for dismissal of the action, but that this exclusion did not apply to the three-year period for service of summons (*207 Cal. App. 3d 495, 499)* . The court further pointed out that the exclusion for the period that the validity of service was the subject of litigation of the parties [*Code Civ. Proc. § 583.240(c)*] did not apply because the motion to set aside the default judgment for lack of service was not made until five and one-half years after the action was commenced, and that a statutory period cannot be tolled two and one-half years after it has already run (*207 Cal. App. 3d 495, 499)* . The court said that the only possible exception to the rule of mandatory dismissal was that authorized by *Code Civ. Proc. § 583.240(d)*, providing that the time service was impracticable, impossible, or futile was to be excluded from computation of the three-year period (*207 Cal. App. 3d 495, 500)* . The court pointed out that under *Code Civ. Proc. § 583.240(d)*, entry of default and default judgment against the employer would toll the dismissal period only if the claimed impracticability was due to causes beyond plaintiff's control (*207 Cal. App. 3d 495, 500-502)* .

[b] Plaintiff Has Burden of Proof Regarding Excuses of Impossibility, Impracticability, or Futility

Republic Corp. v. Superior Court *(1984) 160 Cal. App. 3d 1253, 207 Cal. Rptr. 241* , involved a petition for a writ of mandate brought by defendant for dismissal of a suit for personal injuries and property damage. Defendant was substituted for a "Doe" defendant by amendment to a complaint brought for injuries caused by a defective water heater. The complaint was not served on defendant until four years after it was filed. Defendant moved to dismiss the complaint under former Code Civ. Proc. § 581a [*now see Code Civ. Proc. §§ 583.210, 583.250*]. The trial court denied the motion and set the case for trial. Defendant then petitioned for a writ of mandate.

The court of appeal granted the writ, holding that under former Code Civ. Proc. § 581a(f), as amended in 1982 [*now see Code Civ. Proc. § 583.240(d)*], the failure of plaintiff to serve defendant within the existing three-year statutory period required mandatory dismissal. The court reasoned that unless one of the exceptions listed in former Section 581a(f) existed, dismissal was mandatory. Here, the trial record was devoid of any factual showing that defendant was estopped from seeking dismissal or that it was impossible, impracticable, or futile for plaintiffs to comply with the statutory time requirements. The court did not consider whether plaintiff exercised reasonable diligence in serving defendant, noting that former Section 581a(f) explicitly provided that failure to discover relevant facts or evidence must not excuse compliance (*160 Cal. App. 3d 1253, 1256-1258)* .

In ***Lesko v. Superior Court*** *(1982) 127 Cal. App. 3d 476, 179 Cal. Rptr. 595* , petitioner sought a writ of mandate after the trial court failed to dismiss a medical malpractice action pursuant to former Code Civ. Proc. § 581a for failure to serve and return service of summons within three years of filing the action.

The court of appeal issued a peremptory writ directing the lower court to set aside its order denying petitioner's motion to dismiss, and to issue an order granting the motion. The court explained that the concept of reasonable diligence applies when a known defendant is not served despite reasonably diligent efforts or when an unknown possible defendant is not ascertained in time to serve him or her within three years (*127 Cal. App. 3d 476, 483-485)* . The court added that a trial court must dismiss an action if the plaintiff fails to prove reasonable diligence in attempting to serve and return summons. In this case, the court concluded that petitioner was known to plaintiff at all times during the three-year period and that he was available for service of summons. Hence, plaintiff's failure to serve did not come within the reasonable diligence exception to the statute (*127 Cal. App. 3d 476, 485)* .

[c] Exclusion Is Strictly Construed

In ***Damjanovic v. Ambrose*** *(1992) 3 Cal. App. 4th 503, 4 Cal. Rptr. 2d 560* , plaintiffs filed a complaint on March 9, 1987, against certain deputy sheriffs, certain civilian defendants, and Los Angeles County for civil rights violations, assault and battery, and related tort causes of action. Prior to filing the civil action, one of the plaintiffs was charged with resisting arrest and battery on a peace officer. The first two criminal trials resulted in mistrials and after the third trial commenced, the criminal case was dismissed on the prosecution's motion on October 21, 1988. The civilian defendants were served shortly after three years from the date the action was filed. The defendants filed a motion to dismiss for failure to serve summons and complaint within three years under *Code Civ. Proc. § 583.210*. The court granted the motion as to the civilian defendants and denied the motion as to the other defendants. Plaintiffs appealed.

The court of appeal affirmed. The plaintiffs contended on appeal that the three-year period for service of process was tolled pursuant to *Gov. Code § 945.3* and *Code Civ. Proc. § 583.240* from the date the criminal complaint was filed until its dismissal 771 days later. *Gov. Code § 945.3* provides that a person charged with a criminal offense may not bring a civil action for money or damages against a peace officer or the public entity employing a peace officer based on the peace officer's conduct relating to the offense for which the accused is charged. It further provides that any applicable statute of limitations shall be tolled during the period that thecharges are pending. Plaintiffs argued that the operation of *Gov. Code § 945.3* is a statutory stay within the meaning of *Code Civ. Proc. § 583.240(b)* and makes service of summons "impracticable or futile" within the meaning of *Code Civ. Proc. § 583.240(d)* (*3 Cal. App. 4th 503, 507-509)* .

The court of appeal noted that *Gov. Code § 945.3* prohibits the commencement of a civil action against peace officers, or their employers, while a related criminal action is pending against the plaintiff but that once the action is filed, the rationale for the tolling provisions of *Gov. Code § 945.3* no longer applies. The court also rejected plaintiff's arguments that it was impracticable to prosecute the action against the civilian defendants while the action was stayed against the peace officers. It noted that the purpose of *Code Civ. Proc. § 583.210* is to give a defendant timely notice of the action so that defendant can take adequate steps to preserve evidence. The excuse of impossibility, impracticability, or futility should be strictly construed to foster this purpose (*3 Cal. App. 4th 503, 510)* . It concluded that the plaintiffs made no showing that it would have been impracticable to serve the civilian defendants within the three-year period. Moreover, the tolling requested by plaintiff would work a distinct disadvantage to the civilian defendants (*3 Cal. App. 4th 503, 509-510)* .

In ***Graf v. Gaslight*** *(1990) 225 Cal. App. 3d 291, 274 Cal. Rptr. 759* , plaintiff sued a bar, its owner, and an employee for alleged negligent and intentional tortious acts occurring on March 5, 1985. The complaint was filed on January 17, 1986. On May 27, 1988, the trial court mailed to plaintiff's attorney at the latter's address of record notice of its intention to dismiss the action on its own motion, but the attorney had moved and had failed to file a change of address with the court. The court dismissed the action on July 13, 1988, and mailed a notice of the dismissal to the attorney at the same address. The attorney learned of the dismissal in late November 1988. On January 9, 1989, plaintiff moved the court for relief under *Code Civ. Proc. § 473*, third paragraph. Sixteen days later on January 25, 1989, the court granted the motion and ordered the July 13, 1988, dismissal set aside. On March 1, 1989, defendants moved to dismiss the action under *Code Civ. Proc. § 583.210* for failure to serve the complaint within three years from filing. On March 7, 1989, plaintiff filed a proof of service indicating that the bar had been served on February 9, 1989. Also in March 1989, plaintiff filed proofs of service indicating that the bar and its owner had been served on February 28, 1989.

Finding there was no valid service within three years of the filing of the complaint, the court granted the motion and dismissed the action. The court of appeal affirmed. With respect to plaintiff's claim that during the period the action was dismissed it was impossible or futile to serve process for reasons beyond his control, the court quoted the Cal. Law Revision Commission comment set forth in Paragraph C of the foregoing form (*225 Cal. App. 3d 291, 296 n.4*). The court said that since plaintiff did not know about the dismissal until November, the failure to serve process before that time was not due to causes beyond plaintiff's control. In addition, plaintiff waited seven weeks after learning of the dismissal before seeking relief and another two weeks after the dismissal was set aside before serving process. The court held that the only period that could be excluded was the 16-day period between the date relief from the dismissal was sought and the date on which the dismissal was set aside, but after subtracting those 16 days, service was still untimely (*225 Cal. App. 3d 291, 297-298)* .

[d] Failure to Serve Defendant After Default Was Not Due to Causes Beyond Plaintiff's Control

The facts and procedural background of ***Dale v. ITT Life Ins. Corp.*** *(1989) 207 Cal. App. 3d 495, 255 Cal. Rptr. 8* , are *discussed under § 90.63[3][a]*. In affirming the judgment of dismissal on the ground summons was not served within three years from the time the action was commenced, the court of appeal said the plaintiff had to bear responsibility for his agent's failure to effect service of process, that while plaintiff's lawyer may not have filed an intentionally false return of service, he did deliberately avoid giving the employer actual notice of the lawsuit, and that once the employer's default was entered, plaintiff engaged in considerable delay before either securing a default judgment or attempting to obtain satisfaction of the judgment. The court said that had plaintiff exercised reasonable diligence in prosecuting the case, the invalidity of the service could have been discovered before the statutory period had run (which gave plaintiff the benefit of the doubt as to whether the improper service was deliberate misfeasance or merely negligence) and that, because the circumstances making service impracticable were entirely within plaintiff's control, there were no grounds for tolling the statutory period pursuant to *Code Civ. Proc. § 583.240* (*207 Cal. App. 3d 495, 502-503)* .

[e] Failure to Serve Defendants During Pendency of Federal Court Action Between Same Parties on Same Cause Was Not Due to Causes Beyond Plaintiffs' Control

Plaintiffs in ***Valerio v. Boise Cascade Corp.*** *(1986) 177 Cal. App. 3d 1212, 223 Cal. Rptr. 592* , had been class action plaintiffs in another action which was settled. After settlement of the class action, plaintiffs filed a complaint in federal court against their attorneys, alleging malpractice relating to the settlement. Defendants obtained summary judgment on the ground that plaintiffs' claims were barred by the statute of limitations. Pending their appeal from this judgment, plaintiffs filed an identical action against defendants in state court. After three years elapsed, defendants moved to dismiss the state action under former Code Civ. Proc. § 581a(a) [*now see Code Civ. Proc. § 583.210(a)*] on the ground that they had notbeen served with the complaint and summons within three years of the commencement of the action. The trial court granted the motions, and plaintiffs appealed, contending that prosecution would have been impossible, impracticable, and futile under former Section 581a(f) [*now see Code Civ. Proc. § 583.240(d)*] because pursuit of the action at any time prior to the final disposition of the federal action would have constituted a potentially wasteful use of time and resources by the parties and the court (*177 Cal. App. 3d 1212, 1215-1217)* . In affirming the trial court's ruling, the court of appeal held that plaintiffs' argument was directed to the difficulties of bringing the case to trial, and not to whether it was impracticable or futile to serve and return process. Thus, the federal action did not affect their ability to serve defendants (*177 Cal. App. 3d 1212, 1219)* . The court held that the federal action had no bearing on the state action, such as determining that an essential element to a successful trial exists (*177 Cal. App. 3d 1212, 1219)* .

[f] Failure to Serve Defendants Not Subject to Stay Was Not Due to Causes Beyond Plaintiffs' Control.

The facts and procedural background of ***Damjanovic v. Ambrose*** *(1992) 3 Cal. App. 4th 503, 510, 4 Cal. Rptr. 2d 560* are *discussed under § 90.63[3][c]*. In affirming the dismissal, the court of appeal rejected plaintiffs' contention that the *Gov. Code § 945.3* stay as to the defendants who were peace officers and their employer should apply to the civilian defendants as well. The court found that plaintiffs failed to show that it would have been impracticable to serve the civilian defendants within the three-year period. All of the plaintiffs' arguments pertained to the alleged waste of judicial resources if they were required to try the case involving the civilian defendants separately from the case involving the peace officers. The court noted that plaintiffs were nonetheless required to serve the civilian defendants and would suffer the same expense in serving them within the statutory time period as they would if they were served after the criminal proceedings concluded and therefore, the excuse of impracticability did not apply (*3 Cal. App. 4th 503, 510-511)* .

[g] Actuality of Service Is Question of Fact

The facts and procedural background of ***Graf v. Gaslight*** *(1990) 225 Cal. App. 3d 291, 274 Cal. Rptr. 759* , are *discussed under § 90.63[3][c]*. Plaintiff also had filed a proof of service regarding an alleged personal service on the bar and its owner on August 13, 1988. In affirming the judgment of dismissal, the court of appeal said that it was undisputed that service of process on defendants was effected on February 9, 1989, and on February 28, 1989, more than three years after commencement of the action. With respect to the claimed service on August 13, 1988, which was within the three-year period, the court said that whether defendants were actually served with process was a question of fact, and that appellate review was limited to a determination of whether there was substantial evidence to support the trial court's finding of no valid service within the statutory period (*225 Cal. App. 3d 291, 295)* . The court discussed the evidence and concluded that on the basis of the record before the trial court, there was substantial evidence to support the trial court's finding that no service of process was made on August 13, 1988 (*225 Cal. App. 3d 291, 295)* .

[4] Additional Authorities

[a] Plaintiff Has Burden of Proof Regarding Excuses of Impossibility, Impracticability, or Futility

In *American Western Banker v. Price Waterhouse (1993) 12 Cal. App. 4th 39, 14 Cal. Rptr. 2d 916* , plaintiffs filed but did not serve a complaint for negligence against certain accountants. Nine months later plaintiffs filed an amended

complaint that added additional plaintiffs and a new cause of action. The amended complaint was served two years and four months after the original complaint was filed. The trial court granted defendants' motions to dismiss. The appellate court reversed dismissal as to the claims of the new plaintiffs because the original complaint did not "commence" their action. However, the court affirmed dismissal as to the original plaintiffs because their excuse of financial inability to conduct discovery or otherwise prosecute a lawsuit did not constitute a reasonable excuse for the delay (*12 Cal. App. 4th 39, 57)* .

In *Nelson v. State of California (1982) 139 Cal. App. 3d 72, 188 Cal. Rptr. 479* , plaintiff appealed the order of the trial court in granting the motions of individual defendants to dismiss pursuant to former Code Civ. Proc. § 581a(a) [*now see Code Civ. Proc. §§ 583.210, 583.250*] for failure to return summons within three years from the filing of the complaint. The original complaint was filed in July, 1976, and was amended in October, 1977, to substitute the true names of certain doe defendants; however, these defendants were not served until August, 1980. The court of appeal rejected plaintiff's contention that the three-year time limit of former Section 581a did not begin to run until the filing of the amended complaint, and affirmed the order of the trial court, holding that the trial court was required to dismiss the action in light of plaintiff's failure to meet his burden of showing diligence or excuse for delay. The court concluded that plaintiff had known the true names of defendants well before the expiration of the three-year limit and had failed to serve them within the required time (*139 Cal. App. 3d 72, 76-77)* .

California Points & Authorities

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Volume 9 Chapters 90-99 DISMISSAL---to---EMINENT DOMAIN
CHAPTER 90 DISMISSAL
PART II. FORMS
B. Involuntary Dismissal
1. Dismissal For Failure To Serve Summons and Complaint and File Proof of Service of Summons

9-90 California Points & Authorities § 90.64

§ 90.64 Reply Memorandum Supporting Motion for Mandatory Dismissal for Failure to Serve Summons and Complaint and File Proof of Service of Summons [Code Civ. Proc. §§ 583.210, 583.250]--Plaintiff's Legal Incompetency Does Not Toll Periods for Service Specified in Code Civ. Proc. § 583.210

[1] FORM

[*Caption. See § 90.61.*]

THE LEGAL INCOMPETENCY OF THE PLAINTIFF DOES NOT TOLL THE PERIODS SPECIFIED IN SECTION 583.210 OF THE CODE OF CIVIL PROCEDURE, WITHIN WHICH THE SUMMONS AND COMPLAINT MUST BE SERVED AND THE PROOF OF SERVICE OF SUMMONS, ONCE THE ACTION IS FILED.

A. Dismissal of Action for Nonservice of Summons. The requirements of *Sections 583.210-583.250 of the Code of Civil Procedure* are mandatory and are not subject to extension, excuse, or exception except as expressly provided by statute. Hence, if the summons and complaint are not served and the proof of service of summons filed within the periods specified in *Section 583.210 of the Code of Civil Procedure*, excluding any times specified in *Section 583.240 of the Code of Civil Procedure*, the action must be dismissed (*Code Civ. Proc. § 583.250(a)(2), (b)*; *see Tzolov v. International Jet Leasing, Inc. (1989) 214 Cal. App. 3d 325, 327, 262 Cal. Rptr. 606*).

B. Legal Incompetency of Plaintiff Is No Exception. Once an action is commenced by the filing of the complaint, the legal incompetency of the plaintiff does not operate to toll the periods specified in *Section 583.210 of the Code of Civil Procedure* within which the summons and complaint must be served and the summons returned (*Tzolov v. International Jet Leasing, Inc. (1989) 214 Cal. App. 3d 325, 327, 262 Cal. Rptr. 606*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in a reply memorandum supporting a motion for mandatory dismissal for delay in effecting service, in response to the opposing party's position that, because he or she was legally incompetent, the provisions of *Code Civ. Proc. § 583.210* were tolled. The ground for the response is that legal incompetency is not one of the grounds specified in *Code Civ. Proc. §§ 583.210-583.250*, and that dismissal of the action is therefore mandatory under *Code Civ. Proc. § 583.250(b)*.

As a practical matter, these points and authorities are best used in a reply memorandum after the opposing party has raised the issue of tolling. Alternatively, they may be combined with the points and authorities generally supporting a motion for mandatory dismissal that are *set out in § 90.50*, if counsel wishes to anticipate known opposition.

The form may also be adapted for use in support of a motion for discretionary dismissal [*see § 90.51*]. The principles applicable in determining whether the discretionary period has lapsed are the same as those applicable in determining whether the mandatory period has lapsed [*see Code Civ. Proc. § 583.420(b)*].

This form supports a defendant's motion for dismissal of the complaint, and should be modified as necessary when it is used in another context, such as in support of a motion for dismissal of a cross complaint [*see Code Civ. Proc. § 583.110(a), (b), (d), (e)*].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms of a notice of motion and order relating to a motion to dismiss an action pursuant to Code Civ. Proc. §§ 583.210 and 583.250, see Ch. 212, *Dismissal* in California Forms of Pleading and Practice.

[3] Discussion of Authorities

[a] Dismissal of Action for Nonservice of Summons

Tzolov v. International Jet Leasing, Inc. *(1989) 214 Cal. App. 3d 325, 262 Cal. Rptr. 606* , was an action for damages for a severe head injury sustained by plaintiff when he fell from the bed of a truck owned and operated by defendant. Plaintiff had been rendered incompetent by the injury and the action was filed by and through his mother as guardian ad litem. The action lay dormant for almost four years, at which time anamended complaint alleging additional causes of action was filed, following the substitution of counsel, and defendant was served with the summons and amended complaint a month later. Defendant's motion to dismiss the action for failure to serve the summons and complaint within three years after the action was commenced was granted, and plaintiff appealed. In affirming, the court of appeal pointed out that *Code Civ. Proc. § 583.250(b)* provides that dismissal for failure to serve within the three-year period is mandatory and not subject to extension, excuse, or exception except as expressly provided by statute (*214 Cal. App. 3d 325, 327)* .

[b] Legal Incompetency of Plaintiff Is No Exception

The facts and procedural background of ***Tzolov v. International Jet Leasing, Inc.*** *(1989) 214 Cal. App. 3d 325, 262 Cal. Rptr. 606* , are *discussed under § 90.64[3][a]*. Plaintiff contended that because he was legally incompetent at the

time he filed his complaint, the provisions of *Code of Civ. Proc. § 583.210* were tolled and that the trial court should have denied the motion to dismiss. In rejecting this argument and affirming the dismissal, the court of appeal said that if it were concerned with a statute of limitations for commencing an action, plaintiff's incompetence clearly would result in a tolling of the limitations period under *Code Civ. Proc. § 352*, but that there is neither statutory nor case authority for the proposition that once the action is commenced the time within which the summons must be served and the action prosecuted is similarly tolled (*214 Cal. App. 3d 325, 327)* . The court explained that the statute of limitations is concerned only with the timeliness of instituting an action, while *Code Civ. Proc. § 583.210* is concerned with the speedy prosecution of an action after the action has been commenced (*214 Cal. App. 3d 325, 327)* . Because legal incapacity was not excluded by statute from the operation of *Code Civ. Proc. § 583.210*, the court held that plaintiff's argument was without merit (*214 Cal. App. 3d 325, 327)* . The court held that because plaintiff failed to serve defendant with process within three years after the action was commenced and there was no evidence establishing the existence of any recognized exception to the provisions of *Code Civ. Proc. § 583.210*, the trial court properly granted defendant's motion to dismiss (*214 Cal. App. 3d 325, 328)* .

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Volume 9 Chapters 90-99 DISMISSAL---to---EMINENT DOMAIN
CHAPTER 90 DISMISSAL
PART II. FORMS
B. Involuntary Dismissal
1. Dismissal For Failure To Serve Summons and Complaint and File Proof of Service of Summons

9-90 California Points & Authorities § 90.65

§ 90.65 Supplemental Memorandum [Cal. Rules of Ct., Rule 3.1342(c)] Supporting Motion for Discretionary Dismissal for Failure to Serve Summons and Complaint and File Proof of Service of Summons [Code Civ. Proc. §§ 583.410, 583.420(a)(1)]--Plaintiff Has Not Shown Good Cause for Delay in Service

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*]	)	NO. _____
Plaintiff,	)	SUPPLEMENTAL MEMORANDUM IN SUPPORT
vs.	)	OF MOTION TO DISMISS
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Dept: _____
	)	Trial Date: _____

_____

IT WOULD BE AN ABUSE OF DISCRETION TO DENY DEFENDANT'S MOTION TO DISMISS BECAUSE PLAINTIFF HAS NOT ADEQUATELY SHOWN GOOD CAUSE FOR THE DELAY IN SERVING THE SUMMONS AND COMPLAINT.

A. Legislative Intent and Purpose. *Sections 583.410* and *583.420 of the Code of Civil Procedure* are intended to compel reasonable diligence in the prosecution of an action after it has been commenced, in order to expedite the administration of justice and avoid prejudice to the defendant caused by the dissipation of evidence, thereby limiting the

defendant's ability to defend the action (*County of Los Angeles v. Superior Court (1988) 203 Cal. App. 3d 1205, 1209, 250 Cal. Rptr. 481*).

[*Optional*] **B. Investigation and Procurement of Evidence Is No Excuse for Delay in Service.** The investigation or procurement of evidence does not excuse a long, unexplained delay in serving the summons and complaint (*County of Los Angeles v. Superior Court (1988) 203 Cal. App. 3d 1205, 1209, 250 Cal. Rptr. 481*).

[*Optional*] **C. Financial Inability to Conduct Discovery or Prosecute Action Is No Excuse for Delay in Service.** The plaintiff's financial inability to conduct discovery or otherwise prosecute the action does not excuse a delay in serving thesummons and complaint (*American Western Banker v. Price Waterhouse (1993) 12 Cal. App. 4th 39, 57, 14 Cal. Rptr. 2d 916*).

D. Unreasonable Delay in Service May Give Rise to Inference of Prejudice. Some courts find an inference of prejudice to the defendant when there has been an unreasonable delay in service (*Scarzella v. DeMers (1993) 17 Cal. App. 4th 1762, 1771, 22 Cal. Rptr. 2d 329* ; *Mitchell v. Frank R. Howard Memorial Hospital (1992) 6 Cal. App. 4th 1396, 1405, 8 Cal. Rptr. 2d 521*).

[*Optional*] **E. Dismissal Statutes Apply When Defendant Is a Public Entity.** The dismissal statutes apply to all plaintiffs and to all defendants, including public entities (*County of Los Angeles v. Superior Court (1988) 203 Cal. App. 3d 1205, 1212, 250 Cal. Rptr. 481*).

F. Denial of Motion as Abuse of Discretion. To deny the motion to dismiss when plaintiff has made absolutely no showing that would legally excuse the delay, and the delay has resulted in prejudice to the defendant, would be an abuse of discretion (*see* *Scarzella v. DeMers (1993) 17 Cal. App. 4th 1762, 1768-1770, 22 Cal. Rptr. 2d 329* ; *Trailmobile, Inc. v. Superior Court (1989) 210 Cal. App. 3d 1451, 1455-1456, 259 Cal. Rptr. 100*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in a supplemental memorandum supporting a motion for discretionary dismissal for delay in effecting service, in response to the opposing party's position that dismissal is not appropriate under all the circumstances [*see Code Civ. Proc. §§ 583.410(a), 583.420(a)(1)* and § 90.60]. The ground for the response is that the opposing party has not adequately shown good cause for the delay in service, and that prejudice to the moving party may be presumed from an unreasonable delay in effecting service.

As a practical matter, these points and authorities are best used in a supplemental memorandum, after the opposing party has presented its reasons for arguing that the discretionary dismissal is inappropriate under the circumstances. A supplemental memorandum in response to written opposition to the motion is expressly authorized in motions for discretionary dismissal [*see Cal. Rules of Ct., Rule 3.1342(c)*]. Alternatively, these points and authorities may be combined with the points and authorities generally supporting a motion for discretionary dismissal that are *set out in § 90.51*, if counsel wishes to anticipate known opposition.

Optional Paragraph B may be used when plaintiff contends that the delay in service was due to the need to conduct an investigation and/or to procure evidence. Optional Paragraph C may be used when plaintiff contends that the delay was due to his or her financial inability to conduct discovery or otherwise prosecute the action. Optional Paragraph E may be used when the defendant is a public entity.

In an appropriate case, this form may be combined with one or more of the reply points and authorities supporting a motion for mandatory dismissal for delay in effecting service, which are *set out in §§ 90.61 -90.63*. These memoranda support the position that the mandatory period for effecting service has not been excused or extended but has, in fact, lapsed [*see Code Civ. Proc. §§ 583.140, 583.220-583.240* (principles applicable in calculating mandatory period)]. The principles applicable in determining whether the discretionary period has lapsed are the same as those applicable in determining whether the mandatory period has lapsed [*see Code Civ. Proc. § 583.420(b)*].

This memorandum supports a defendant's motion for dismissal of the complaint, and should be modified as necessary when it is used in another context, such as in support of a motion for dismissal of a cross complaint [*see Code Civ. Proc. § 583.110(a), (b), (d), (e)*].

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth the facts showing that the failure to serve summons within two years after the action was commenced was without any legal excuse and any facts showing the prejudice to the defendant.

[b] Inference of Prejudice

One court of appeal has stated that it could find no logical basis for requiring an inference of prejudice from the delay in serving the summons in every discretionary dismissal case, or in the one before it, that the Legislature has never provided in the discretionary dismissal statutes for such an inference, that *Cal. Rules of Ct., Rule 3.1342(e)*, does not require prejudice to be inferred from the mere passage of time, and that no decision of the California Supreme Court requires or permits a trial court to infer prejudice in all cases from a failure to diligently prosecute, and hence no such inference should be drawn in the absence of evidence to support it [*Ladd v. Dart Equipment Corp. (1991) 230 Cal. App. 3d 1088, 1106-1107, 281 Cal. Rptr. 813* (reversing judgment of dismissal and remanding case to the trial court with direction to exercise its discretion in ruling on motion to dismiss)]. See also *§§ 90.60[2][c]* and *[3][e]*.

[c] Effect of Authority Decided Under Former Dismissal Statutes

In 1984, the provision for involuntary dismissal for delay in service and return, former Code Civ. Proc. § 581a, was repealed and replaced by *Code Civ. Proc. §§ 583.210-583.250*. Decisions interpreting former Code Civ. Proc. § 583(a) have been cited in the form as persuasive rather than controlling authority.

[d] Related Pleading and Practice Forms

For forms of a notice of motion and order relating to a motion to dismiss an action pursuant to Code Civ. Proc. §§ 583.410-583.430, see Ch. 212, *Dismissal* in California Forms of Pleading and Practice.

[e] Opposing Memoranda

The memorandum *set out in § 90.60* may be used in an appropriate case to oppose a motion for dismissal supported by the foregoing memorandum.

[3] Discussion of Authorities

[a] Legislative Intent and Purpose

County of Los Angeles v. Superior Court *(1988) 203 Cal. App. 3d 1205, 250 Cal. Rptr. 481* , was an action for damages for personal injuries, resulting from an alleged assault, battery, and false arrest. On March 15, 1984, plaintiff presented a timely government tort claim against the county, which was denied. He filed his complaint against the county on January 28, 1985. The court's file lay dormant until November 6, 1987, at which time the court gave notice of its intent to dismiss the action for failure to serve the summons and complaint within two years after the action was commenced. Plaintiff filed an amended complaint and served a copy of it and the summons on the county on January 6, 1988. The court denied its own motion, whereupon defendant filed a motion to dismiss under *Code Civ. Proc. § 583.420(a)(1)*. The trial court denied the motion, and defendant petitioned the appellate court for a writ of mandate.

In granting a peremptory writ of mandate directing the trial court to vacate its denial of the motion to dismiss and to dismiss the action, the court of appeal pointed out that *Code Civ. Proc. § 583.420* provides that an action may be dismissed if service is not made within two years after the action is commenced and that *Code Civ. Proc. § 583.410* provides for dismissal for delay in prosecution if it appears to the court appropriate under the circumstances. The court stated that the intent of the statutory scheme is to compel reasonable diligence in the prosecution of an action after it has been commenced (*203 Cal. App. 3d 1205, 1208)* , and that the purpose of these statutes is to expedite the administration of justice and to avoid prejudice to the defendant caused by the dissipation of evidence, thereby limiting the defendant's ability to defend the action (*203 Cal. App. 3d 1205, 1209)* .

[b] Investigation and Procurement of Evidence Is No Excuse for Delay in Service

The facts and procedural background of ***County of Los Angeles v. Superior Court*** *(1988) 203 Cal. App. 3d 1205, 250 Cal. Rptr. 481* , are *discussed under § 90.65[3][a]*. In granting a peremptory writ of mandate directing the trial court to dismiss the action, the court of appeal said that the law is well established that the investigation or procurement of evidence does not excuse a long unexplained delay in serving the complaint, that *Code Civ. Proc. § 583.240(d)* codifies that law, and that plaintiff's sole excuse that service of the complaint was delayed because his counsel was conducting discovery does not provide a reasonable basis for denial of the motion to dismiss and does not justify the failure to serve the county within the time period set forth in *Code Civ. Proc. § 583.420(a)(1)* (*203 Cal. App. 3d 1205, 1209)* .

[c] Financial Inability to Conduct Discovery or Prosecute Lawsuit Is No Excuse for Delay in Service

In ***American Western Banker v. Price Waterhouse*** *(1993) 12 Cal. App. 4th 39, 14 Cal. Rptr. 2d 916* , plaintiffs served their amended complaint, which added plaintiffs and a new cause of action against defendant, two years and four months after the action commenced. The trial court dismissed the complaint for failure to serve the summons within two years after the action was filed, under *Code Civ. Proc. § 583.420(a)(1)*.

The court of appeal reversed dismissal as to the claims of the new plaintiffs because the original complaint did not commence their action. However, the court affirmed dismissal as to the original plaintiffs because their excuse of financial inability to conduct discovery or otherwise prosecute the lawsuit did not constitute a reasonable excuse for the delay (*12 Cal. App. 4th 39, 57)* The court found that a plaintiff opposing a motion to dismiss for delay in prosecution has the initial burden to show excusable delay. If such a showing is not made, the court may dismiss the action in its discretion even if defendant fails to establish actual prejudice, citing *Putnam v. Clague (1992) 3 Cal. App. 4th 542, 549, 5 Cal. Rptr. 2d 25* , discussed in *§ 90.60[3][c]*. The court applied the test set forth in *Putnam* and concluded that substantial evidence supported the trial court's implied finding that the excuse tendered by plaintiffs, that they were too poor to actively pursue the litigation during the 28 months between commencement of the action and service of the complaint, was not credible (*12 Cal. App. 4th 39, 54-55)* . The court also found that the trial court would have been justified in concluding that the financial impracticability excuse was unreasonable (*12 Cal. App. 4th 39, 55-56)* . It noted that the reasonableness prong of the *Putnam* criteria is limited to instanceswhen there has been a decision to delay service, and that inadvertent delay, as claimed in this case, is addressed by the factors in Cal. Rules of Ct. Rule 373(e). The court further noted that both the *Putnam* test and Cal. Rules of Ct., Rule 373(e) (now see *Cal Rules of Ct., Rule 3.1342(e)*) require a rational relationship between the asserted reason for the delay and the fact of delay of service of the

summons, aside from some generalized delay in the action as a whole (*12 Cal. App. 4th 39, 55-56, n.11*). The court then concluded that financial inability to conduct discovery or otherwise prosecute the lawsuit does not constitute a reasonable excuse for failure to simply serve the summons (*12 Cal. App. 4th 39, 57)* .

[d] Unreasonable Delay in Service May Give Rise to Inference of Prejudice

In ***Scarzella v. DeMers*** *(1993) 17 Cal. App. 4th 1762, 22 Cal. Rptr. 2d 329* , the plaintiff brought a malpractice action against his former attorney who represented him in a wrongful termination of employment action in which plaintiff prevailed. Both sides appealed that judgment and plaintiff was represented by new counsel on appeal. During the first appeal, plaintiff filed a complaint *in propria persona* against defendant, without disclosing the nature of the malpractice alleged. Two years and one month later, the court of appeal issued its opinion and affirmed the judgment, except as to the punitive damages issue. Thereafter, plaintiff, represented by counsel, filed a motion to change the venue of the malpractice action to the appropriate venue. After filing a first amended complaint, plaintiff served defendant with a summons and complaint in the malpractice action two years and four months after commencing the action.

Over three years after the complaint was filed, defendant moved for discretionary dismissal for failure to serve the summons and for failure to diligently prosecute the action by bringing it to trial within three years of filing pursuant to *Code Civ. Proc. § 583.420(a)(2)(A)*. As to the failure to timely serve the summons, plaintiff contended that he wanted to ascertain the outcome of the appeal in the wrongful termination action before serving the summons in the malpractice action. He also argued that he was advised that if the malpractice action was not filed when it was that he might waive his right to pursue any claim against his former attorney and that he did not intend to pursue it if he was entirely successful on appeal. Moreover, he declared that a representative of defendant's insurance company learned of the malpractice complaint during the appeal. The trial court granted defendant's motion to dismiss for failure to complete service within two years after commencement of the action, pursuant to *Code Civ. Proc. § 583.420(a)(1)*. It opined that plaintiff's delay in moving the litigation to the proper venue was an attempt to evade the local rules of that forum which required prompt service under the Trial Court Reduction Delay Act of 1986 (*17 Cal. App. 4th 1762, 1766-1767)* .

The court of appeal affirmed. It noted that the question of whether dismissal is appropriate under *Code Civ. Proc. § 583.420(a)(1)* is within the trial court's discretion (*17 Cal. App. 4th 1762, 1768)* . It further stated that as to service of summons, delay attributed to awaiting the outcome of related proceedings with a direct bearing on the action in which summons is not timely filed is not excusable per se. It inferred an inherent prejudice in a failure to serve summons in a timely manner and rejected plaintiff's argument that defendant learned of the pendency of the complaint prior to service. The court stated that knowledge of the complaint, obtained despite plaintiff's subterfuge in filing it in the wrong forum, was not equivalent to the notice provided by service of the summons and complaint. The defendant is not obliged to provoke or advance the litigation prior to the service of process. Moreover, the complaint on file was so nondescript that it gave no effective notice of the nature of plaintiff's claim (*17 Cal. App. 4th 1762, 1771)* .

Mitchell v. Frank R. Howard Memorial Hospital *(1992) 6 Cal. App. 4th 1396, 8 Cal. Rptr. 2d 521* , involved three separate actions against a hospital and other defendants by a physician alleging breach of his radiology contract. The first action was filed in state court on August 30, 1985. Defendants answered the complaint and discovery commenced until June 1986, when the parties took no further action in the case. Plaintiff filed a federal action against defendants on October 7, 1986, adding an antitrust and discrimination claim. In October 1989, plaintiff entered into a stipulation with defendants to a dismissal of his federal claims with prejudice and all other state claims without prejudice and the court dismissed the federal action on December 26, 1989. During the discussions leading to the dismissal of the federal action, plaintiff disclosed for the first time that two and one-half years earlier, on May 11, 1987, he had filed, but not served, a second state court action. Defendants acknowledged service of that complaint on March 6, 1990, two years and ten months after it was filed. In April, 1990, defendants moved to dismiss based on the failure to serve the complaint within two years from the filing of the complaint under *Code Civ. Proc. § 583.420*. The trial court granted the motion and plaintiff appealed.

The court of appeal affirmed. Plaintiff conceded that defendants' whereabouts were known and they could have been served within the two-year statutory period but argued that defendants had adequate notice of the claims in the second state action because of the pendency of identical claims in the federal action. He further contended that the pendency of the federal action made it impracticable or futile to serve defendants and that defendants had failed to demonstrate that they were prejudiced by the delay in service. The court of appeal, however, found that the fact that defendants were aware of the claims asserted in the federal action neither excused plaintiff's protracted delay in serving the summons in the second state action nor did it negate the prejudice inherent in such a delay (*6 Cal. App. 4th 1396, 1405)* .

[e] Dismissal Statutes Apply When Defendant Is a Public Entity

The facts and procedural background of ***County of Los Angeles v. Superior Court*** *(1988) 203 Cal. App. 3d 1205, 250 Cal. Rptr. 481* , are *discussed under § 90.65[3][a]*. In granting a peremptory writ of mandate directing the trial court to dismiss the action, the court of appeal noted that plaintiff's counsel, in his opposition to the motion to dismiss, had argued that the filing of the government tort claim was sufficient to give the county notice. The trial court, in turn, had denied the motion based on its reasoning that a government claim changes the application of the dismissal statute; the main purpose of dismissal for lack of diligence is to preclude the "ambush" of a stale claim, but once a claim is filed there is no ambush (*203 Cal. App. 3d 1205, 1208)* . The court of appeal rejected this reasoning. The court pointed out that *Code Civ. Proc. § 583.420* and Cal. Rules of Ct., Rule 373(e) (now see *Cal. Rules of Ct., Rule 3.1342(e)*) (setting forth the factors which must be considered in ruling on a discretionary dismissal) make no distinction between service on government entities or on any different category of defendants (*203 Cal. App. 3d 1205, 1209)* . The court said that the filing of a government tort claim is not equivalent to the service of summons in a lawsuit, that, until defendant was served with summons, it was under no legal duty to search the records to see if a complaint had been filed or to take any steps in the pending action, that a defendant has no legal duty to do anything more than meet the plaintiff step by step, beginning with the service of summons, and that the purposes of the dismissal statutes are defeated by carving out exceptions to the statutes based on who the defendant is (*203 Cal. App. 3d 1205, 1211-1212)* . Permitting a plaintiff who has displayed a total lack of diligence in the prosecution of the civil action and who has failed to effect service during a lengthy unexcusable delay to pursue a lawsuit merely because the defendant is a public entity clearly frustrates the policy underlying the dismissal statute. While plaintiffs must satisfy the government claims act as a prerequisite to tort suits against public entities, the Legislature has not excused those plaintiffs from the statutory mandate to prosecute their tort actions diligently. The dismissal statutes apply to all plaintiffs and to all defendants, including those defendants which are public entities (*203 Cal. App. 3d 1205, 1212)* .

[f] Denial of Motion as Abuse of Discretion

The facts and procedural background of ***Scarzella v. DeMers*** *(1993) 17 Cal. App. 4th 1762, 22 Cal. Rptr. 2d 329* , are *discussed under § 90.65[3][d]*. In affirming the dismissal of the action, the court of appeal noted that a dismissal for failure to serve summons within two years under *Code Civ. Proc. § 583.420(a)(1)* is a matter within the discretion of the trial court (*17 Cal. App. 4th 1762, 1769-1770)* . The standard of excuse for delay in service of summons is more stringent than that applicable to a delay in bringing a matter to trial. Since plaintiff did not establish that the failure to timely serve the summons was beyond his control, the court found that the trial court did not abuse its discretion in dismissing the action (*17 Cal. App. 4th 1762, 1770-1771)* .

Trailmobile, Inc. v. Superior Court *(1989) 210 Cal. App. 3d 1451, 259 Cal. Rptr. 100* , arose out of an action by a forklift operator who was injured when the forklift she was driving fell through the floor of a trailer manufactured by a defendant. The manufacturer, who was not served with process until 27 months after the complaint was filed, moved for dismissal under *Code Civ. Proc. §§ 583.410* and *583.420(a)(1)* for failure to serve process within two years. In opposing the motion, plaintiff's attorney set forth as an excuse for the delay only that he had unspecified difficulties gathering information from the Army base on which the accident had occurred, and made vague references to settlement negotiations with another defendant. The trial court denied the motion.

The court of appeal issued a writ of mandate directing the trial court to vacate its order denying the motion and to enter a new order granting the motion. The appellate court pointed out that a reviewing court generally will not substitute its judgment for that of the trial court absent a clear abuse of discretion, and that the burden was on petitioner to establish such abuse, but added that although discretion is vested in the trial judge, that discretion is not unfettered, that it cannot be exercised arbitrarily, but must be an impartial discretion to be exercised in conformity with the spirit of the law and in a manner to subserve the ends of substantial justice (*210 Cal. App. 3d 1451, 1455)* . The appellate court declared itself mindful of the general policy favoring trial on the merits over termination of a case on procedural grounds but said that policy cannot be indiscriminately applied so as to render impotent the provisions of *Code Civ. Proc. § 583.420* (*210 Cal. App. 3d 1451, 1455)* . The court said that to avoid dismissal, a plaintiff who has delayed prosecution beyond the discretionary deadlines must make some showing that the delay was excusable (*210 Cal. App. 3d 1451, 1455-1456)* , and concluded that the plaintiff had made no such showing (*210 Cal. App. 3d 1451, 1456)* .

[4] Additional Authorities

[a] Unreasonable Delay in Service May Give Rise to Inference of Prejudice

The facts and procedural background of *County of Los Angeles v. Superior Court (1988) 203 Cal. App. 3d 1205, 250 Cal. Rptr. 481* , are discussed in *§ 90.65[3][a]*. In granting a peremptory writ of mandate directing the trial court to dismiss the action, the court of appeal noted that plaintiff's counsel, in opposing to the motion to dismiss, had contended that the filing of the government tort claim was sufficient to give the county notice of the issues to be raised so that the county could not assert prejudice resulting from the delay (*203 Cal. App. 3d 1205, 1208)* . Rejecting this argument, the court said that, as a general rule, courts arereceptive to an inference of prejudice when there has been an unreasonable delay in service, and that an unjustified delay in serving the summons and complaint is accorded less appellate tolerance than one in which service was timely but the case was not diligently pursued (*203 Cal. App. 3d 1205, 1210)* . Quoting *Lopez v. Larson (1979) 91 Cal. App. 3d 383, 402-403, 153 Cal. Rptr. 912* (discussed in *§ 90.51[3][a]*), the court said that delay in effecting service constitutes a particularly pernicious form of delay in terms of potential prejudice. The defendant, during the period of that delay, may be unaware that the action has been filed and thus not alerted to the necessity for making discovery, interviewing witnesses, and preserving evidence essential to the defense, and that, even if witnesses do not become unavailable, their memories of details such as times and dates and specific words used in critical conversations will fade (*203 Cal. App. 3d 1205, 1210)* . The court pointed out that the superior court file in the action reflected a total absence of activity between the filing of the complaint and the court's notice of intent to dismiss, and that plaintiff's argument that he was conducting informal discovery during the lengthy delay merely provided support for the county's contention that it was prejudiced in that the delay denied the county the reasonable opportunity to question the witnesses and preserve their testimony before memories of details faded (*203 Cal. App. 3d 1205, 1211)* . The court said that an inference of prejudice was especially appropriate as the case was based on the allegedly wrongful conduct of individuals and the extent to which they and witnesses recalled the incident giving rise to the action. Nearly four years had passed between the incident and the service of the complaint, effectively denying the county the right to gather evidence and conduct meaningful discovery and that, to accept plaintiff's argument, would, in effect, reward unreasonable procrastination to the detriment of the defendant (*203 Cal. App. 3d 1205, 1211)* .

[b] Denial of Motion as Abuse of Discretion

Trailmobile, Inc. v. Superior Court (1989) 210 Cal. App. 3d 1451, 259 Cal. Rptr. 100 , arose out of an action by a forklift operator who was injured when the forklift she was driving fell through the floor of a trailer manufactured by a defendant. The manufacturer, who was not served with process until 27 months after the complaint was filed, moved for dismissal under *Code Civ. Proc. §§ 583.410* and *583.420(a)(1)* (failure to serve process within two years). In opposing the motion, plaintiff's attorney set forth as excuse for the delay only that he had unspecified difficulties gathering information from the Army base on which the accident had occurred, and made vague references to settlement negotiations with another defendant. The trial court denied the motion. The court of appeal issued a writ of mandate directing the trial court to vacate its order denying the motion and to enter a new order granting the motion. The

appellate court pointed out that a reviewing court generally will not substitute its judgment for that of the trial court in the absence of a clear abuse of discretion, and that the burden was on petitioner to establish such abuse, but added that although discretion is vested in the trial judge, that discretion is not unfettered, that it cannot be exercised arbitrarily, but must be an impartial discretion to be exercised in conformity with the spirit of the law and in a manner to subserve the ends of substantial justice. The appellate court declared itself mindful of the general policy favoring trial on the merits over termination of a case on procedural grounds but said that policy cannot be indiscriminately applied so as to render impotent the provisions of *Code Civ. Proc. § 583.420*. The court said that, to avoid dismissal, a plaintiff who has delayed prosecution beyond the discretionary deadlines must make some showing that the lack of activity was excusable, and concluded that the plaintiff had made no such showing (*210 Cal. App. 3d 1451, 1456)* .

The facts and procedural background of *County of Los Angeles v. Superior Court (1988) 203 Cal. App. 3d 1205, 250 Cal. Rptr. 481* , are discussed in *§ 90.65[3][a]*. In granting a peremptory writ of mandate directing the trial court to dismiss the action, the court found: (1) the government tort claim did not satisfy the purpose of the dismissal statutes as to delay after the complaint was filed; (2) plaintiff's delay in serving the complaint was unreasonable and inexcusable; (3) the county had no duty to search the records to determine whether a complaint had been filed; and (4) the unreasonable delay gave rise to an inference that the county had been prejudiced by loss of the opportunity to participate fully in discovery and to fully investigate the matter (*203 Cal. App. 3d 1205, 1212-1213)* . Weighing all the factors, the appellate court concluded that the county had satisfied its burden of showing a manifest abuse of discretion by the trial court and that it would be an injustice not to dismiss the action (*203 Cal. App. 3d 1205, 1212-1213)* .

California Points & Authorities

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[Reserved]

§§ 90.66[Reserved]

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9-90 California Points & Authorities § 90.80

§ 90.80 Supporting Motion for Mandatory Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.310, 583.320, 583.360]--General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF MOTION TO
Plaintiff,	)	DISMISS ACTION
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

THE ACTION MUST BE DISMISSED PURSUANT TO SECTION 583.360 OF THE CODE OF CIVIL PROCEDURE BECAUSE IT WAS NOT BROUGHT TO _____ [TRIAL *or* A NEW TRIAL] WITHIN THE TIME PERIOD SPECIFIED IN SECTION _____ [583.310 *or* 583.320 OF THE CODE OF CIVIL PROCEDURE].

[*EITHER, if no trial occurred*]

A. Statutory Requirements. An action must be dismissed by the court on its own or the defendant's motion, after notice to the parties, if it is not brought to trial within five years after it is commenced against the defendant (*Code Civ. Proc. §§ 583.310, 583.360(a)*).

[*OR, if new trial did not occur and no appeal was taken*]

A. Statutory Requirements. If a new trial is granted after judgment in an action and no appeal is taken, the action must be dismissed by the court on its own or the defendant's motion, after notice to the parties, if it is not brought again to trial within three years after the order granting the new trial is entered (*Code Civ. Proc. §§ 583.320(a)(2), 583.360(a)*).

[*OR, if new trial after appeal did not occur*]

A. Statutory Requirements. If on appeal in an action an order granting a new trial is affirmed or a judgment is reversed and the action is remanded for a new trial, the action must be dismissed by the court on its own or the defendant's motion, after notice to the parties, if it is not brought again to trial within three years after the remittitur is filed by the clerk of the trial court (*Code Civ. Proc. §§ 583.320(a)(3), 583.360(a)*).

[*OR, if retrial did not occur because of mistrial*]

A. Statutory Requirements. If a trial is commenced in an action but no judgment is entered because of a mistrial or because a jury is unable to reach a decision, the action must be dismissed by the court on its own or the defendant's motion, after notice to the parties, if it is not brought again to trial within three years after the order declaring the mistrial or disagreement with the jury is entered (*Code Civ. Proc. §§ 583.320(a)(1), 583.360(a)*).

[*CONTINUE*]

B. Dismissal Mandatory. Dismissal of an action pursuant to *Section 583.360 of the Code of Civil Procedure* is mandatory in the sense that if the action is not brought to _____ [trial within the period provided in *Section 583.310 of the Code of Civil Procedure or* a new trial within the period provided in *Section 583.320 of the Code of Civil Procedure*], the court is without discretion to refuse dismissal unless the plaintiff can establish an extension, excuse, or exception expressly provided by statute (*Code Civ. Proc. § 583.360(b)*; *see andersen v. Superior Court (1921) 187 Cal. 95, 97, 200 P. 963* ; *Fannin Corp. v. Superior Court (1974) 36 Cal. App. 3d 745, 749, 111 Cal. Rptr. 920*).

[*Optional*] **C. Beginning of Period for Bringing Action to Trial.** The statutory period described in *Section 583.310 of the Code of Civil Procedure* runs from the date of filing of the original complaint against the defendant [and is not affected by the filing of an amended complaint stating the same cause of action against the same defendant] (*see Davalos v. County of Los Angeles (1983) 142 Cal. App. 3d 57, 63, 190 Cal. Rptr. 711*).

[*Optional*] **D. Beginning of Period for Bringing Action to New Trial After Appeal.** The statutory period described in *Section 583.320(a)(3) of the Code of Civil Procedure*, which requires that an action that has been remanded for new trial following an appeal be retried within three years, begins to run on the filing of the remittitur in the trial court, whether the decision expressly provides for a new trial, is an unqualified reversal, or simply directs the overruling of a demurrer (*see Code Civ. Proc. § 583.320(a)(3)*; *McDonough Power Equipment Co. v. Superior Court (1972) 8 Cal. 3d 527, 532-533, 105 Cal. Rptr. 330, 503 P.2d 1338*).

[*Optional*] **E. When Action Is Deemed to Have Been Brought to Trial or New Trial.** The requirement that an action be brought to trial or new trial within a specified period of time is not satisfied unless a jury is impaneled, a witness is called who testifies, or there has otherwise been a determination of law or fact that brings the action to the stage of final disposition (*see McDonough Power Equipment Co. v. Superior Court (1972) 8 Cal. 3d 527, 531-532, 105 Cal. Rptr. 330, 503 P.2d 1338* ; *Weeks v. Roberts (1968) 68 Cal. 2d 802, 805, 69 Cal. Rptr. 305, 442 P.2d 361*).

[*Optional*] **F. No Exceptions to Mandatory Dismissal Apply.** Exceptions to mandatory dismissal include written stipulations or oral agreements made in open court extending the five-year time period; exclusion from the computation of the five years any time period during which the jurisdiction of the court was suspended or the prosecution of the action was stayed; and bringing the action to trial was impossible, impracticable, or futile (*Code Civ. Proc. §§ 583.330(a), (b),* 583.340(a)-(c); *Jordan v. Superstar Sandcars (2010) 182 Cal. App. 4th 1416, 1420, 107 Cal. Rptr. 3d 5)* .

[*Optional*] **G. Equitable Estoppel Does Not Bar Mandatory Dismissal for Failure to Bring Action to Trial Within Five Years.** Equitable estoppel does not bar mandatory dismissal for failure to bring the action to trial within five years where plaintiff is aware of the date when the five-year period ends (Jordan v. Superstar Standcars (2010) 182 Cal. App. 4th 1416, 1423, 107 Cal. Rptr. 3d 5).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be used by a defendant in support of a motion for mandatory dismissal on the ground that the action has not been brought to trial or new trial within the period required under *Code Civ. Proc. § 583.310* or *583.320* [*see Code Civ. Proc. § 583.360*]. Optional Paragraphs C and D may be used if there is a question concerning when the applicable period began. Optional Paragraph E may be used if there is a question regarding whether a trial or new trial has occurred for purposes of *Code Civ. Proc. §§ 583.310-583.360*.

Additional memoranda supporting a motion for mandatory dismissal for delay in bringing the action to trial or new trial are *set out in §§ 90.99 -90.105*. These memoranda are intended for use as supplemental points and authorities, to be submitted in response to any opposition to the motion for dismissal. Supplemental memoranda are expressly authorized in analogous motions for discretionary dismissal [*see Cal. Rules of Ct., Rule 3.1342(c)*]. Alternatively, the foregoing memorandum may be combined with these additional memoranda, when counsel wishes to anticipate any known ground for opposition.

If there is a possibility that the mandatory period may be inapplicable, counsel may wish to combine these points and authorities with others that support a motion for discretionary dismissal for failure to bring the action to trial or new trial within the periods specified under *Code Civ. Proc. § 583.420(a)(2)* or *(3)* [*see § 90.83*].

This memorandum supports a defendant's motion for dismissal of a plaintiff's complaint, and should be modified as necessary when it is used in another context, such as in support of a motion for dismissal of a cross complaint [*see Code Civ. Proc. § 583.110(a), (b), (d), (e)*].

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should indicate the date the complaint was filed against defendant who is moving for dismissal, because the five-year period for bringing an action to trial commences when the complaint is filed against that defendant [*see Code Civ. Proc. §§ 350* (action commences when complaint is filed), 583.310 (action must be brought to trial within five years "after the action is commenced against the defendant")].

[b] Effect of Authority Decided Under Former Dismissal Statutes

In 1984, the provisions for involuntary dismissal for delay in bringing an action to trial or new trial, former Code Civ. Proc. § 583(b)-(d), were repealed and replaced by *Code Civ. Proc. §§ 583.310-583.360*. Decisions interpreting the former statute have been cited in the form as persuasive rather than controlling authority to the extent that the revised statutes codify former case law or continue former substantive principles.

[c] Related Pleading and Practice Forms

For forms of a notice of motion and order relating to motions to dismiss actions pursuant to Code Civ. Proc. § 583.360, based on the time periods for bringing actions to trial [*see* Code Civ. Proc. § 583.310] or retrial [*see* Code Civ. Proc. § 583.320], see California Forms of Pleading and Practice, Ch. 212, *Dismissal* (Matthew Bender).

[d] Opposing Memoranda

The points and authorities *set out in §§ 90.86 -90.96* may be used in an appropriate case to oppose a motion for dismissal supported by this memorandum.

[3] Discussion of Authorities

[a] Dismissal Mandatory

In ***Andersen v. Superior Court*** *(1921) 187 Cal. 95, 200 P. 963* , defendants petitioned for a writ of mandate from the Supreme Court to compel the trial court to dismiss the action under former Code Civ. Proc. § 583 [*now see Code Civ. Proc. §§ 583.310, 583.360*] for failure to bring it to trial within five years.

The Court granted the writ, holding that the failure of plaintiffs to bring the action to trial within the statutory period was clear and unjustifiable (*187 Cal. 95, 103)* . The requirement of former Code Civ. Proc. § 583 for bringing an action to trial within five years is mandatory, and the trial court is without discretion to refuse an order of dismissal when it appears that the action has not been brought to trial within the prescribed period and no stipulation in writing to extend thetime has been made (*187 Cal. 95, 97)* . The mere condition that some question of fact must be determined before the court may act under this mandatory provision of law does not make the act dependent upon judicial discretion (*187 Cal. 95, 99)* .

Fannin Corp. v. Superior Court *(1974) 36 Cal. App. 3d 745, 111 Cal. Rptr. 920* , was a proceeding for a writ of prohibition to prevent the trial court from proceeding with a trial after it had denied petitioner's motion to dismiss pursuant to former Code Civ. Proc. § 583(b) [*now see Code Civ. Proc. §§ 583.310, 583.360*].

The court of appeal issued the writ, holding that after excluding the time that had elapsed during a prior appeal, the five-year statutory period had expired without the case coming to trial, and under former Code Civ. Proc. § 583(b), dismissal was mandatory if the statutory period had elapsed (*36 Cal. App. 3d 745, 749-750)* . The court conceded that there were both statutory and decisional exceptions to the mandatory dismissal requirement of the statute but found that none of them applied in this case (*36 Cal. App. 3d 745, 753-754)* .

[b] Beginning of Period for Bringing Action to Trial

Davalos v. County of Los Angeles *(1983) 142 Cal. App. 3d 57, 190 Cal. Rptr. 711* , was an action by a surviving wife for wrongful death based on medical negligence against a county hospital for the death of her husband. Plaintiff filed suit after presenting a claim to the county but before the statutory period for a reply to the claim had expired. She filed an amended complaint after the reply period had expired, alleging that the claim had been denied by operation of law. Some six months later she obtained a court order relieving her of the need to file a late claim [*see Gov. Code § 946.6*], after which defendant filed an answer. Defendant moved to dismiss the action about five years and seven months after the date of original filing pursuant to former Code Civ. Proc. § 583(b) [*now see Code Civ. Proc. § 583.310*]. The trial court granted the motion, and plaintiff appealed, claiming that the period for bringing an action to trial was tolled until she obtained the court order relieving her of the need to file a late claim.

The court of appeal affirmed the dismissal. It held that in this situation, in which a complaint was prematurely filed and compliance with a statute regulating claims against public entities was mandatory [*see Gov. Code § 945.4*], the time period utilized by plaintiff to effect compliance with the claim requirements did not toll the five-year period set forth in former Code Civ. Proc. § 583(b). Therefore, that period began to run from the date of filing of her original complaint, and not from the date of the court's order permitting plaintiff to proceed without filing a late claim. The court said that this order should be deemed equivalent to a right to amend the premature complaint, and any amendment would relate back to the date of the original filing (*142 Cal. App. 3d 57, 62-63)* .

[c] Beginning of Period for Bringing Action to New Trial After Appeal

In ***McDonough Power Equipment Co. v. Superior Court*** *(1972) 8 Cal. 3d 527, 105 Cal. Rptr. 330, 503 P.2d 1338* , the trial court dismissed the action after sustaining defendant's demurrer without leave to amend. Plaintiff appealed and the court of appeal reversed. Subsequently, defendant moved for dismissal for failure to bring an action to trial within three years after filing of the remittitur under former Code Civ. Proc. § 583(b) [*now see Code Civ. Proc. § 583.320(a)(3)*]. The trial court denied the motion, and defendant petitioned for a writ of mandate.

The Supreme Court issued a writ of mandate requiring dismissal (*8 Cal. 3d 527, 530, 534)* . The Court rejected plaintiff's contention that former Code Civ. Proc. § 583 did not apply because there had been no remand for a new trial. Although the court of appeal merely directed the trial court to overrule the demurrer, a cause is remanded for a new trial on the filing of the remittitur in the trial court whether the decision expressly provides so, is an unqualified reversal, or, as here, contains a direction regarding only the overruling of the demurrer (*8 Cal. 3d 527, 532-533)* .

[d] When Action Is Deemed to Have Been Brought to Trial or New Trial

The facts and procedural background of ***McDonough Power Equipment Co. v. Superior Court*** *(1972) 8 Cal. 3d 527, 105 Cal. Rptr. 330, 503 P.2d 1338* , are *discussed under § 90.80[3][c]*. In that case, the Court rejected plaintiff's argument that the three-year statute applied only to actions reversed after trial on the merits. A trial occurs, for purposes of former Code Civ. Proc. § 583, if there is a determination or examination of an issue of law or fact which brings the action to a stage where final disposition is to be made. A hearing on a demurrer constitutes a trial if ruling on the demurrer is a final determination of the case (*8 Cal. 3d 527, 531-532)* .

In ***Weeks v. Roberts*** *(1968) 68 Cal. 2d 802, 69 Cal. Rptr. 305, 442 P.2d 361* , plaintiff made a motion, 28 days before the five-year statute was to run, to set the case specially for trial. The court set trial for a date three days before the end of the five-year period. A week later, defendant moved to vacate the trial date. The trial court granted defendant's motion, finding that plaintiff's failure to allow sufficient time for ordinary trial setting was inexcusable. After the five-year period elapsed, defendant successfully moved to dismiss the action and plaintiff appealed.

On appeal, the Supreme Court reversed the dismissal, holding that the preferential setting was properly granted and that

the trial court did not have the discretion to vacate the trial date without setting another date within the statute(*68 Cal. 2d 802, 807-808)* . The Court noted that a trial court has the discretion to dismiss the action under former Code Civ. Proc. § 583 [*now see Code Civ. Proc. §§ 583.410-583.430*] any time after the lapse of two years but cannot dismiss the case in the guise of a refusal to set the case specially for trial (*68 Cal. 2d 802, 805, 807)* . In its discussion of the mandatory portion of the former dismissal statute [*now see Code Civ. Proc. §§ 583.310-583.360*], the Court noted that dismissal on expiration of the five-year period is mandatory unless trial has commenced or delay is excusable. A case may be brought to trial merely by empaneling a jury or calling one witness who testifies (*68 Cal. 2d 802, 805)* .

[e] No Exceptions to Mandatory Dismissal Apply

In ***Jordan v. Superstar Sandcars*** *(2010) 182 Cal. App. 4th 1416, 107 Cal. Rptr. 3d 5*, in 2003, plaintiffs filed a complaint against defendants for breach of contract, fraud, breach of warranties, and negligent repair, in connection with the sale of allegedly defective dune buggies. In 2006, plaintiffs amended their complaint to add a defendant. Defendants filed numerous demurrers and motions to strike, and plaintiffs filed three amended complaints. The third amended complaint was filed in January 2008. In January 2008, the trial court held a case management conference. The trial court noted a trial date had not been set but set a trial status conference for February 2008. The court noted that new courtrooms were available for trying civil cases. Defense counsel appeared at the TSC, but plaintiffs' attorney was unavailable. The court erroneously assumed that the only defendant remaining in the action was the defendant added in 2006. The trial court postponed setting the trial at the February hearing and continued the TSC to March 2008 and again to June 2008. In May 2008, the trial court overruled the demurrer of the defendant added in 2006 to the third amended complaint and denied his motion to strike. During the hearing, plaintiffs requested the trial court to continue the June TSC a few of months, and the trial court accordingly continued the TSC to August. In June, defendant answered the third amended complaint. In August 2008, defendants filed a motion to dismiss plaintiffs' complaint for failure to prosecute the case within five years. Plaintiffs filed opposition, arguing that it had been impractical and impossible to try the case within the five-year period due to court congestion and the two moratoriums on civil trials in 2004 and 2005. At the TSC hearing in August, defense counsel objected to setting the case for trial because defendants of the motion to dismiss. The court stated the motion was not before it and set the trial for December. In October, the trial court heard and granted the motion to dismiss, finding the five-year period to try the case was not tolled (182 Cal. App. 4th 1416, 1419-1420).

The Court of Appeal affirmed. Plaintiffs acknowledged the case was not brought to trial within five years as required under *Code Civ. Proc. § 583.310*. However, they asserted the five-year period was tolled for at least 12 weeks due to the trial court twice imposing a moratorium on civil trials, and there was an ongoing de facto moratorium on all but priority cases. The court found that the third statutory exception to mandatory dismissal, bringing the action to trial was impossible, impracticable, or futile [*Code Civ. Proc. §§ 583.330(a), (b), 583.340*(a-c)] did not apply. Time consumed by the delay caused by ordinary incidents of proceedings, like disposition of demurrer, amendment of pleadings, and the normal time of waiting for a place on the court's calendar, are not within the contemplation of the exceptions (*182 Cal. App. 4th 1416, 1420-1421)* . The determination of whether the prosecution of an action was indeed impossible, impracticable, or futile during any period of time, and hence, the determination of whether the impossibility exception to the five-year statute applies, is within the trial court's discretion. Plaintiffs acknowledged the moratorium periods in 2004 and 2005 were remote in time relative to the five-year statutory cutoff in June 2008, and did not prevent or interfere with plaintiffs prosecuting their case as plaintiffs were not ready for trial at the time of the moratoriums. With regard to the alleged de facto moratorium during the final year within which plaintiffs were required to bring their case to trial, it was well established that few civil cases were being tried due to the backlog in cases. Nevertheless, the record demonstrated that cases approaching the five-year cutoff were being tried. Thus, plaintiffs failed to establish that, had they been reasonably diligent and requested their case be tried before the five-year period ran in June 2008, their case would not have been tried (*182 Cal. App. 4th 1416, 1421)* . Furthermore, plaintiffs were not reasonably diligent in bringing the case to trial within five years. There were hearings in January, February, March, April, and May 2008, during which plaintiffs could have requested the matter be tried before June 2008, due to the impending expiration of the five-year period. Plaintiffs failed to do so, and did not file a motion for a priority trial setting. The obligation that

plaintiff monitor the case in the trial court, keep track of relevant dates, and determine whether any filing, scheduling, or calendaring errors occurred increased as the five-year deadline approached. Plaintiffs took no steps to set the case for trial before the expiration of the five-year period in June 2008. Thus, the trial court did not abuse its discretion in dismissing plaintiffs' action based on the finding that plaintiffs failed to establish that bringing the action to trial was impossible, impracticable, or futile (*Code Civ. Proc. § 583.340(c)*; *182* Cal. App. 4th 1416, 1421).

[f] Equitable Estoppel Does Not Bar Mandatory Dismissal for Failure to Bring Action to Trial Within Five Years.

The facts and proceeding in ***Jordan v. Superstar Sandcars*** *(2010) 182 Cal. App. 4th 1416, 107 Cal. Rptr. 3d 5* is discussed in [e], *above*. Plaintiffs contended defendants were estopped from relying on the five-year dismissal statute, because defense counsel submitted a declaration stating he was not available for trial until after September 2008, leading plaintiffs to believe defendants did not object to trying the case after the five-year trial deadline of June 2008. The Court of Appeal first identified the elements of equitable estoppel (*182 Cal. App. 4th 1416, 1422-1423)* :

- The party to be estopped was aware of the true facts.
- The party to be estopped either intended that its act or omission be acted upon, or so acted that the party asserting estoppel has a right to believe it was intended.
- The party asserting estoppel was unaware of the true facts.
- The party asserting estoppel relied on the other party's conduct to its detriment.

The court then found that the trial court appropriately rejected the doctrine of equitable estoppel since plaintiffs were aware the five-year trial period ran in June 2008, and it was not reasonable to assume defendants were willing to waive the deadline. Defense counsel was obligated to tell the court when he was unavailable for trial. The fact that defense counsel's notice of unavailability extended beyond the five-year cutoff date did not constitute any misrepresentation or waiver of the five-year period. Any ambiguity or confusion created by defense counsel mentioning his unavailability beyond the cutoff date could have been clarified by plaintiffs' counsel, who was responsible for insuring the case was tried before the five-year period expired. Further, plaintiffs showed no conduct on the part of defendants that would have lulled plaintiffs into a reasonable false sense of security (*182 Cal. App. 4th 1416, 1423)* .

[4] Additional Authorities

[a] When Action Is Deemed to Have Been Brought to Trial or New Trial

In *Sagi Plumbing v. Chartered Construction Corporation (2004) 123 Cal. App. 4th 443, 19 Cal. Rptr. 3d 835* , plaintiff, a plumbing contractor, sued defendant, a general contractor, for breach of contract based on defendant's failure to pay on three unrelated projects. The parties agreed to bifurcate the action and to try first the cause of action arising out of one project. After that trial was completed, plaintiff did nothing to bring the other action to trial other than to file a notice of trial and attend a status conference. Defendant brought a motion to dismiss the two remaining causes of action based upon plaintiff's failure to bring them to trial within five years. The appellate court held that the plaintiff's failure to bring the remaining two causes of action to trial within five years resulted in their involuntary dismissal. The court held that the earlier trial of issues unrelated and irrelevant to remaining two causes of action did not constitute commencement of trial on the remaining two causes of action (*123 Cal. App. 4th 443, 449)* .

In *Finnie v. District No. 1 Pacific Coast Dist. etc. Assn. (1992) 9 Cal. App. 4th 1311, 12 Cal. Rptr. 2d 348* , plaintiff was expelled from defendant unions. He filed a petition for a writ of mandate alleging defendants' failure to follow their constitutions and bylaws in the expulsion proceedings. After reversing the judgment of dismissal on defendants' motion

to dismiss for lack of subject matter jurisdiction, the court of appeal issued a remittitur. The trial court then granted defendants' motion to dismiss on the ground of plaintiff's failure to bring the action to trial within five years of the filing of the complaint, and a judgment of dismissal was entered. Plaintiff moved to vacate the order and judgment of dismissal on the grounds that *Code Civ. Proc. § 583.320(a)(3)* gave plaintiff three years after remittitur to bring the action to trial if judgment is reversed on appeal and the case is remanded for a new trial. The court granted plaintiff's motion, and defendants appealed. The court of appeal affirmed the order vacating the dismissal, following the reasoning of *McDonough Power Equipment Co. v. Superior Court of Los Angeles County (1972) 8 Cal. 3d 527* , discussed in *§ 90.80[3][d]*. The court held that the earlier dismissal for lack of subject matter jurisdiction was a "trial" for purposes of the three-year statute, and that there is no functional difference between a dismissal for lack of subject matter jurisdiction and the dismissal on statute of limitations grounds in *McDonough* (*9 Cal. App. 4th 1311, 1318)* .

In *Hendrix v. Hendrix (1985) 171 Cal. App. 3d 859, 217 Cal. Rptr. 609* , plaintiff brought an action to recover real and personal property given to defendant by her husband. The court granted a motion in limine by defendant, to exclude any evidence of the incompetence of plaintiff's husband, on the ground that the pleadings did not properly raise the issue of incompetence. Plaintiff then amended her complaint and defendant answered it. Five years and two days after the original complaint was filed plaintiff filed an at-issue memorandum and notice of motion for calendar preference. Defendant's motion to dismiss pursuant to former Code Civ. Proc. § 583(b) was granted. Plaintiff appealed. The court of appeal affirmed. The court defined "trial" for mandatory dismissal purposes as an examination before a competent tribunal, according to the law of the land, of questions of fact or of law put in issue by pleadings, for the purpose of determining the rights of the parties. The court said that the hearing on defendant's motion in limine was not a trial, because it did not involve a question of law or fact raised by the pleadings (*171 Cal. App. 3d 859, 862)* . The court's ruling on the motion in limine made no determination of plaintiff's rights under her existing cause of action (*171 Cal. App. 3d 859, 863)* .

In *Central Mutual Ins. Co. v. Executive Motor Home Sales, Inc. (1983) 143 Cal. App. 3d 791, 192 Cal. Rptr. 169* , plaintiff sought review of dismissal pursuant to former Code Civ. Proc. § 583(b) on the basis that the court clerk set the trial for two months after the expiration of the five-year period, with the acquiescence of defendant's counsel. The court of appeal held that plaintiff must show that it was impossible, impractical, or futile to bring the case to trial and said that the setting of a trial date by the court clerk was not such a showing. The plaintiff should have attempted to use the "trial-started" fiction to obtain one day or a short period of trial to avoid dismissal (*143 Cal. App. 3d 791, 794-795)* .

In *Khoury v. Comprehensive Health Agency, Inc. (1983) 140 Cal. App. 3d 714, 189 Cal. Rptr. 653* , plaintiff appealed the granting of a motion to dismiss pursuant to former Code Civ. Proc. § 583(b) [*now see Code Civ. Proc. §§ 583.310, 583.360*] for failure to bring the case to trial within five years. Plaintiff contended that an arbitration proceeding between plaintiff and defendant, consisting of 14 hearings and involving the same evidence, witnesses, and issues that would be presented at trial, was a partial trial, and that therefore a trial did commence within five years of filing the action for purposes of former Code Civ. Proc. § 583(b). The court of appeal rejected this argument, stating that an arbitration hearing conducted pursuant to the judicial arbitration rules for civil cases does notconstitute a trial within the meaning of former Code Civ. Proc. § 583(b) (*140 Cal. App. 3d 714, 719)* .

In *Brown v. Engstrom (1979) 89 Cal. App. 3d 513, 152 Cal. Rptr. 628* , the parties executed a written stipulation for arbitration approximately 10 months before expiration of the five-year period described in former Code Civ. Proc. § 583(b) [*now see Code Civ. Proc. § 583.310*]. Subsequently, while arbitration was still in progress, the period expired and the trial court granted a motion to dismiss. Plaintiff appealed, contending in part that the action was brought to trial by virtue of the holding of an arbitration hearing. The court of appeal rejected this argument. Even though a hearing was held in which one witness was called, an arbitration hearing cannot be considered a trial (*89 Cal. App. 3d 513, 518-519)* . It does not lead to a final disposition of law or fact, because under Cal. Rules of Ct., Rule 1616 (now see *Cal. Rules of Ct., Rule 3.826*), a party can reject the award and obtain a trial (*89 Cal. App. 3d 513, 520)* . However, the court did reverse on the ground that plaintiff could claim impossibility as an excuse (*89 Cal. App. 3d 513, 523-524)* .

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California Points & Authorities

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Volume 9 Chapters 90-99 DISMISSAL---to---EMINENT DOMAIN
CHAPTER 90 DISMISSAL
PART II. FORMS
B. Involuntary Dismissal
2. Dismissal For Failure To Bring Action To Trial Or New Trial

9-90 California Points & Authorities § 90.81

§ 90.81 Supporting Motion for Mandatory Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.310, 583.320, 583.360]--Judgment Not Yet Entered on Settlement Agreement

[1] FORM

[*The following should be combined with a general form of memorandum in support of a motion for dismissal pursuant to Code Civ. Proc. §§ 583.310 and 583.360 (see § 90.80).*]

THE ACTION MUST BE DISMISSED PURSUANT TO SECTION 583.360 OF THE CODE OF CIVIL PROCEDURE EVEN THOUGH THE PARTIES ENTERED INTO A SETTLEMENT AGREEMENT, BECAUSE NO PARTY HAS YET SOUGHT ENFORCEMENT OF THE SETTLEMENT AGREEMENT BY A MOTION UNDER SECTION 664.6 OF THE CODE OF CIVIL PROCEDURE, AND THE ACTION STILL HAS NOT BEEN BROUGHT TO TRIAL WITHIN THE TIME PERIOD SPECIFIED IN SECTION 583.310 OF THE CODE OF CIVIL PROCEDURE.

Action Must Be Dismissed if Not Brought to Trial and Settlement Agreement Not Yet Enforced. If the parties have entered into a settlement agreement, but none have sought to enforce the agreement by a motion under *Section 664.6 of the Code of Civil Procedure*, then there has been no final disposition of the underlying action, and the action consequently must be dismissed pursuant to *Sections 583.310* and *583.360 of the Code of Civil Procedure* if it has not been brought before the trier of fact within five years of its commencement (*see Varwig v. Leider (1985) 171 Cal. App. 3d 312, 315, 217 Cal. Rptr. 208*).

[2] Comments

[a] Use of Form

These points and authorities may be used by a defendant in support of a motion for mandatory dismissal on the ground that, although the parties may have entered into a settlement agreement, that agreement was not enforced and judgment entered thereon by a motion under *Code Civ. Proc. § 664.6*, and plaintiff did not otherwise bring the action to trial

within the period required under *Code Civ. Proc. § 583.310* [*see Code Civ. Proc. § 583.360*]. This form should be combined with the general points and authorities supporting a motion for mandatory dismissal that are *set out in § 90.80*.

This memorandum supports a defendant's motion for dismissal of a plaintiff's complaint, and should be modified as necessary when it is used in another context, such as in support of a motion for dismissal of a cross complaint [*see Code Civ. Proc. § 583.110(a), (b), (d), (e)*].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. For example, defendant should state that plaintiff made no attempt to bring a motion under *Code Civ. Proc. § 664.6* to enforce the alleged settlement agreement, and that plaintiff made no attempt to bring the action to trial within the five-year period [*see, e.g., Varwig v. Leider (1985) 171 Cal. App. 3d 312, 315-316, 217 Cal. Rptr. 208]* .

[b] Effect of Authority Decided Under Former Dismissal Statutes

In 1984, the provisions for involuntary dismissal for delay in bringing an action to trial or new trial, former Code Civ. Proc. § 583(b)-(d), were repealed and replaced by *Code Civ. Proc. §§ 583.310-583.360*. Decisions interpreting the former statute have been cited in the form as persuasive rather than controlling authority to the extent that the revised statutes codify former case law or continue former substantive principles.

[c] Related Pleading and Practice Forms

For forms of notice of motion and order relating to a motion to dismiss an action pursuant to Code Civ. Proc. §§ 583.310 and 583.360, see Ch. 212, *Dismissal* in California Forms of Pleading and Practice (Matthew Bender).

[d] Opposing Memoranda

The point supported by conflicting authority in *Gorman v. Holte (1985) 164 Cal. App. 3d 984, 211 Cal. Rptr. 34* , *set out in § 90.88*, may be used in an appropriate case to oppose a motion for dismissal supported by this point and authority.

[3] Discussion of Authorities

[a] Action Must Be Dismissed if Not Brought to Trial and Settlement Agreement Not Yet Enforced

In ***Varwig v. Leider*** *(1985) 171 Cal. App. 3d 312, 217 Cal. Rptr. 208* , plaintiff brought an action in 1976 against defendants to recover a deed on real property. The parties reached an agreement at a pretrial conference on January 30, 1980, and decided to settle their claims. The action was then taken off calendar. In 1982, the defendants moved to dismiss the action pursuant to former Code Civ. Proc. § 583(b) [*now see Code Civ. Proc. §§ 583.310, 583.360*]. Plaintiff opposed the motion, and argued that the settlement disposed of all issues to be tried and that dismissal was therefore inappropriate. The trial court granted the motion to dismiss, and plaintiff appealed.

The First District Court of Appeal, Division Two, affirmed the judgment, holding that defendants were entitled to a mandatory dismissal of the action because it was not brought to trial within the five-year period. The court explained that the action had not been finally disposed of, because no party had sought to enforce the settlement agreement and have judgment entered thereon by a motion under *Code Civ. Proc. § 664.6*. Thus, the fact that a settlement agreement had been entered into by the parties was irrelevant, and dismissal was required. However, the court noted that the settlement agreement was nevertheless still governed by the general principles of contract law (*171 Cal. App. 3d 317)* .

The court noted that its decision was in conflict with a recent decision by the *Court of Appeal of the Second District, Division Two, Gorman v. Holte (1985) 164 Cal. App. 3d 984, 211 Cal. Rptr. 34* , discussed in *§ 90.88[3][a]* (*171 Cal.*

3d 312, 315-316). Moreover, in a subsequent decision by the Court of Appeal of the Sixth District, *Schiro v. Curci (1990) 220 Cal. App. 3d 840, 269 Cal. Rptr. 639* (discussed in *§ 90.88[3][b]*), the court rejected the reasoning of *Varwig* and followed that of *Gorman.* The First District Court of Appeal, Division Five, has also rejected the reasoning of *Varwig* and followed *Schiro* and *Gorman* [*see Canal Street, Ltd. v. Sorich (2000) 77 Cal. App. 4th 602, 91 Cal. Rptr. 2d 811* , (discussed in *§ 90.88[3*][a])].

California Points & Authorities

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Volume 9 Chapters 90-99 DISMISSAL---to---EMINENT DOMAIN
CHAPTER 90 DISMISSAL
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2. Dismissal For Failure To Bring Action To Trial Or New Trial

9-90 California Points & Authorities § 90.82

§ 90.82 Supporting Motion for Mandatory Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.310, 583.320, 583.360]--Expiration of Special Extension After Statutory Tolling [Code Civ. Proc. § 530.350]

[1] FORM

[*Caption. See § 90.80.*]

THE ACTION MUST BE DISMISSED PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 583.360 BECAUSE IT WAS NOT BROUGHT TO _____ [TRIAL *or* NEW TRIAL] WITHIN THE TIME PERIOD SPECIFIED IN CODE OF CIVIL PROCEDURE SECTION _____ [583.310 *or* 583.320] OR WITHIN THE SPECIAL SIX-MONTH EXCEPTION AFTER STATUTORY TOLLING CONTAINED IN CODE OF CIVIL PROCEDURE SECTION 583.350.

Mandatory Dismissal for Failure to Bring to Trial Within Special Exception After Statutory Tolling. An action is subject to mandatory dismissal if not brought to trial within six months after the end of the period of statutory tolling of the date by which it must be brought to trial (*Greene v. Howmedica, Inc. (1993) 13 Cal. App. 4th 912, 915*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be used by a defendant in support of a motion for mandatory dismissal on the ground that the action has not been brought to trial or new trial within the special six-month exception period after statutory tolling of the date by which it must be brought to trial [*see Code Civ. Proc. § 583.350*].

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. In particular, counsel should show that six months has elapsed between the date on which the tolling period ended and the date, if any, when trial setting was requested or granted.

[3] Discussion of Authorities

[a] Mandatory Dismissal for Failure to Bring to Trial Within Special Exception After Statutory Tolling

In ***Greene v. Howmedica, Inc.*** *(1993) 13 Cal. App. 4th 912* , plaintiff in a products liability action relating to a defective hipbone prosthesis moved for preferential trial setting 48 days before the expiration of the five-year dismissal statute. The motion was denied and the action dismissed. After a successful appeal, the action was ordered set for trial. Over six months after the remittitur was filed in the trial court, plaintiff had not made any application for trial setting, and the case was not brought to trial. The case was dismissed. Plaintiff appealed, arguing that the five-year period had never run because of the tolling of the statuteand that the appellate decision imposed an affirmative duty of trial setting on the trial court (*13 Cal. App. 4th 912, 914-915)* .

The court of appeal affirmed the dismissal, holding that when the reversal occurred and trial setting was ordered, the six-month provision of *Code Civ. Proc. § 583.350* became operative, and appellant could not, at this late date, change his theory (*13 Cal. App. 4th 912, 915)* . The court also held that it was plaintiff's affirmative obligation, not the trial court's duty, to see that the action was brought to trial within the five-year period. In this regard, the court distinguished cases in which a specific statutory provision imposed a duty on the trial court sua sponte to recalendar a case after the tolling event terminated. The court also noted that even if the plaintiff believed the case would be set automatically, plaintiff would have some obligation to bring the matter to someone's attention (*13 Cal. App. 4th 912, 915)* .

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CHAPTER 90 DISMISSAL
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9-90 California Points & Authorities § 90.83

§ 90.83 Supporting Motion for Discretionary Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.410, 583.420(a)(2), (3); Cal. Rules of Ct., Rules 3.1340, 3.1342]--General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION TO DISMISS
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Dept.: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

THE ACTION SHOULD BE DISMISSED PURSUANT TO THE COURT'S DISCRETIONARY POWER UNDER CODE OF CIVIL PROCEDURE SECTION 583.410 BECAUSE THE ACTION WAS NOT BROUGHT TO _____ [TRIAL WITHIN THREE YEARS UNDER CODE OF CIVIL PROCEDURE SECTION 583.420(a)(2)(A) *or* TRIAL WITHIN TWO YEARS UNDER *CALIFORNIA RULES OF COURT, RULE 3.1340 or* A NEW TRIAL WITHIN TWO YEARS UNDER CODE OF CIVIL PROCEDURE SECTION 583.420(a)(3)] AND DISMISSAL IS OTHERWISE APPROPRIATE UNDER ALL THE CIRCUMSTANCES.

A. Discretionary Dismissal. The court may in its discretion dismiss an action for delay in prosecution pursuant to

sections 583.410-584.430 of the Code of Civil Procedure, either on its own motion or on motion of the defendant, if to do so appears to the court to be appropriate under the circumstances of the case (*Code Civ. Proc. § 583.410(a)*).

[*EITHER, if the action was not brought to trial within three years*]

B. Lapse of Minimum Period. The court may dismiss an action pursuant to *sections 583.410-584.430 of the Code of Civil Procedure* for delay in prosecution if the action is not brought to trial within three years after it is commenced against the defendant, unless otherwise prescribed by rule under *Section 583.420(a)(2)(B)of the Code of Civil Procedure* (*Code Civ. Proc. § 583.420(a)(2)(A)*).

[*OR, effective January 1, 1990, if the action was not brought to trial within two years*]

B. Lapse of Minimum Period. The court may dismiss an action pursuant to *sections 583.410-584.430 of the Code of Civil Procedure* for delay in prosecution if the action is not brought to trial or conditionally settled within two years after the action is commenced against the defendant (*Cal. Rules of Ct., Rule 3.1340(a)*; *see Code Civ. Proc. § 583.420(a)(2)(B)*).

[*OR, if no new trial within two years of mistrial or hung jury*]

B. Lapse of Minimum Period. The court may dismiss an action pursuant to *sections 583.410-584.430 of the Code of Civil Procedure* for delay in prosecution if trial is commenced but no judgment is entered because of a mistrial or because the jury was unable to reach a decision, and the action is not brought to a new trial within two years after the order is entered declaring a mistrial or disagreement of the jury (*Code Civ. Proc. § 583.420(a)(3)(A)*).

[*OR, if no new trial within two years of order after judgment*]

B. Lapse of Minimum Period. The court may dismiss an action pursuant to *sections 583.410-584.430 of the Code of Civil Procedure* for delay in prosecution if a new trial is granted after judgment and no appeal is taken, and the action is not brought to a new trial within two years after the order granting the new trial is entered (*Code Civ. Proc. § 583.420(a)(3)(B)*).

[*OR, if no new trial within two years after remittitur is filed*]

B. Lapse of Minimum Period. The court may dismiss an action pursuant to *sections 583.410-584.430 of the Code of Civil Procedure* for delay in prosecution if on appeal an order granting a new trial is affirmed or a judgment is reversed and the action is remanded for a new trial, and the action is not brought to a new trial within two years after the remittitur is filed by the clerk of the trial court (*Code Civ. Proc. § 583.420(a)(3)(C)*).

[*CONTINUE*]

[*Optional*] **C. Beginning of Period for Bringing Action to Trial.** [*See § 90.80, Paragraph C.*]

[*Optional*] **D. Beginning of Period for Bringing Action to New Trial After Appeal.** [*See § 90.80, Paragraph D.*]

[*Optional*] **E. When Action Is Deemed to Have Been Brought to Trial or New Trial.** [*See § 90.80, Paragraph E.*]

F. Other Criteria to Be Considered. Dismissal in the court's discretion shall be in accordance with the criteria prescribed by the Judicial Council (*Code Civ. Proc. § 583.410(b)*). These criteria require consideration of all matters relevant to a proper determination of the motion, including _____ [specify particular matters enumerated in *Cal. Rules of Ct., Rule 3.1342(e)* that are relevant to the determination of the present motion, e.g., the nature of any extensions of time or other delay attributable to either party] (*Cal. Rules of Ct., Rule 3.1342(e)*).

[*EITHER*]

G. Dismissal Proper Absent Good Cause for Delay. Discretionary dismissal of an action pursuant to *sections 583.410* and *583.420 of the Code of Civil Procedure* should be granted unless plaintiff makes some showing of good cause or justification that explains and justifies the total delay in bringing the action to _____ [trial *or* a new trial] (*see White v. Mortgage Finance Corp. (1983) 142 Cal. App. 3d 770, 774-775, 191 Cal. Rptr. 277* ; *Kunzler v. Karde (1980) 109 Cal. App. 3d 683, 688-689, 167 Cal. Rptr. 425*).

[*OR*]

G. Dismissal Proper Absent Good Cause for Delay. When a defendant has shown that discretionary dismissal is warranted through a showing of some prejudice or the presence of factors under *Rule 3.1342(e) of the California Rules of Court* that militate in favor of dismissal, the burden shifts to the plaintiff to show excusable delay. If none is shown by the plaintiff under these circumstances, the trial court does not abuse its discretion in dismissing the action (*see San Ramon Valley Unified School Dist. v. Wheatley-Jacobsen, Inc. (1985) 175 Cal. App. 3d 1050, 1057, 221 Cal. Rptr. 342*).

[*CONTINUE*]

[*Optional*] **H. Burden of Showing Good Cause Increases Over Time.** The showing required to justify delay in prosecuting an action increases as the time since the action was filed increases (*see andre v. General Dynamics, Inc. (1974) 43 Cal. App. 3d 839, 843, 118 Cal. Rptr. 95*).

[*Optional*] **I. Prejudice Inherent in Delay.** If delay in prosecuting the action is unjustified, prejudice to defendant is presumed to occur (*Lopez v. Larson (1979) 91 Cal. App. 3d 383, 401, 153 Cal. Rptr. 912*).

[*Optional*] **J. Prejudice to Defendant Not Necessary Factor.** Prejudice to the defendant is not a necessary factor to support a discretionary dismissal, because the policy of *Sections 583.410-583.420 of the Code of Civil Procedure* is also to expedite the administration of justice by compelling every person who files an action to prosecute it with promptness and diligence (*Blank v. Kirwan (1985) 39 Cal. 3d 311, 332, 216 Cal. Rptr. 718, 703 P.2d 58*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be used by a defendant in support of a motion for discretionary dismissal on the ground that the action has not been brought to trial or new trial within the applicable period set out under *Code Civ. Proc. § 583.420(a)(2)* or *(3)* [*see § 90.83[3*][a], and Alternative Paragraph B, *above*, and that the circumstances of the case otherwise indicate that dismissal is appropriate [*Code Civ. Proc. § 583.410*].

Paragraph F of the foregoing form sets out that rule that the court must consider all relevant matters in ruling on a motion [*Cal. Rules of Ct., Rule 3.1342(e)*], and also permits the moving party to add any particularly relevant factor that is specifically enumerated in *Cal. Rules of Ct., Rule 3.1342(e)*. For further discussion of these factors, see *§ 90.83[3][b]*.

Optional Paragraphs C and D may be used if there is a question concerning when the applicable period began. Optional Paragraph E may be used if there is a question regarding whether a trial or new trial has occurred for purposes of *Code Civ. Proc. § 583.420(a)(2)* or *(3)*. Additional optional paragraphs relate to the prejudice to the moving party [Optional Paragraphs I, J] and to the increased burden of justifying delay as more time elapses [Optional Paragraph H].

In an appropriate case, the foregoing points and authorities may be combined with others supporting a motion for mandatory dismissal for failure to bring an action to trial or retrial within the applicable period set out under *Code Civ. Proc. § 583.310* or *583.320* [*see § 90.80*]. They may also be combined in an appropriate case with points and authorities supporting a motion for mandatory [*see § 90.50*] or discretionary [*see § 90.51*] dismissal for delay in completing service.

The principles applicable in determining whether the discretionary period has lapsed are the same as those applicable in determining whether the mandatory period has lapsed [*see Code Civ. Proc. § 583.420(b)*]. Thus, §§ 90.86-90.96, which set out points and authorities opposing a motion for mandatory dismissal for failure to bring an action to trial or new trial, may also be used in an appropriate case to oppose a motion for discretionary dismissal supported by the foregoing form. Conversely, the foregoing points and authorities may be supplemented by, or combined with, the points and authorities *set out in §§ 90.99 -90.105*, which respond to various grounds for opposition *set out in §§ 90.86 -90.96*.

The foregoing memorandum supports a defendant's motion for dismissal of a plaintiff's complaint, and should be modified as necessary when it is used in another context, such as in support of a motion for dismissal of a cross complaint [*see Code Civ. Proc. § 583.110(a), (b), (d), (e)*].

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. For example, if plaintiff's delay in bringing the action to trial or a new trial is unexplained, counsel for defendant should state facts showing that plaintiff would have had sufficient time to bring the action to trial if reasonable diligence had been used [*see, e.g., White v. Mortgage Finance Corp. (1983) 142 Cal. App. 3d 770, 774-775, 191 Cal. Rptr. 277* (plaintiff's explanation, accounting for only small portion of delay of almost five years, as insufficient)].

[b] Effect of Authority Decided Under Former Dismissal Statutes

In 1984, the provisions for involuntary dismissal for delay in bringing an action to trial or new trial, former Code Civ. Proc. § 583(b)-(d), were repealed and replaced by *Code Civ. Proc. §§ 583.310-583.360*. Decisions interpreting the former statute have been cited in the form as persuasive rather than controlling authority to the extent that the revised statutes codify former case law or continue former substantive principles.

[c] Related Pleading and Practice Forms

For forms of a notice of motion and order relating to a motion to dismiss an action pursuant to Code Civ. Proc. §§ 583.410 and 583.420, see Ch. 212, *Dismissal* in California Forms of Pleading and Practice.

[d] Opposing Memoranda

The points and authorities *set out in §§ 90.98* may be used in an appropriate case to oppose a motion for dismissal supported by the foregoing memorandum.

[3] Discussion of Authorities

[a] Lapse of Minimum Period

A court may not dismiss an action under *Civ. Proc. §§ 583.410-583.430* for delay in bringing the action to *trial* unless one of the following conditions has occurred:

(1) The action is not brought to trial within three years after it is commenced against the defendant, unless otherwise prescribed by rule under *Code Civ. Proc. § 583.420(a)(2)(B)* [*Code Civ. Proc. § 583.420(a)(2)(A)*; *see* the first Alternative Paragraph B, *above*].

(2) The action is not brought to trial within two years after it is commenced against the defendant if the Judicial Council adopts a rule to that effect [*see Code Civ. Proc. § 583.420(a)(2)(B)*]. *Code Civ. Proc. § 583.420(a)(2)(B)* is implemented by *Cal. Rules of Ct., Rule 3.1340*. Under *Cal. Rules of Ct., Rule 3.1340*, the court may dismiss an action under *Code Civ. Proc. §§ 583.410-583.430* if the action has not been brought to trial or conditionally settled within two years after it was commenced against the defendant. "Conditionally settled" means (i) a settlement agreement conditions dismissal on the satisfactory completion of specified terms that are not to be fully performed within two years after the filing of the case, and (ii) notice of the settlement is filed with the court as provided under *Cal. Rules of Ct., Rule 3.1385* [*Cal. Rules of Ct., Rule 3.1340(a)*; *see* the second Alternative Paragraph B, *above*].

A court may not dismiss the action under *Code Civ. Proc. §§ 583.410-583.430* for delay in bringing the action *again to trial* unless one of the two-year time periods specified in *Code Civ. Proc. § 583.420(a)(3)* has elapsed [*see* the third, fourth, and fifth Alternative Paragraphs B, *above*].

[b] Other Criteria to Be Considered

Cal. Rules of Ct. 3.1342(e) sets out factors that must be considered by the court in ruling on a motion for discretionary dismissal brought either for failure to serve and return the summons or for failure to bring the case to trial or new trial [*Cal. Rules of Ct. 3.1342(e)*; *see Code Civ. Proc. §§ 583.410(b), 583.420(a)*]. The rule requires the court to consider all matters relevant to a proper determination of the motion, including the court's file in the case and the affidavits and declarations and supporting data submitted by the parties. When applicable, the court must also consider: (1) the availability of the moving party and other essential parties for service of process; (2) the diligence in seeking to effect service of process; (3) the extent to which the parties engaged in any settlement negotiations or discussions; (4) the diligence of the parties in pursuing discovery or other pretrial proceedings, including any extraordinary relief sought by either party; (5) the nature and complexity of the case; (6) the law applicable to the case, including the pendency of other litigation under a common set of facts or determinative of the legal or factual issues in the case; (7) the nature of any extensions of time or other delay attributable to either party; (8) the condition of the court's calendar and the availability of an earlier trial date if the matter was ready for trial; (9) whether the interests of justice are best served by dismissal or trial of the case; and (10) any other fact or circumstance relevant to a fair determination of the issue.

Cal. Rules of Ct. 3.1342(e) further provides that the court shall be guided by the policies set forth in *Code Civ. Proc.*

583.130. Under that statute, it is the policy of the state that a plaintiff shall proceed with reasonable diligence in the prosecution of an action but that all parties shall cooperate in bringing the action to trial or other disposition. Except as otherwise provided by statute or rule, the policy favoring the right of the parties to make stipulations in their own interests and the policy favoring trial or other disposition of an action on the merits are generally to be preferred over the policy that requires dismissal for failure to proceed with reasonable diligence in the prosecution of an action.

[c] Dismissal Proper Absent Good Cause for Delay

White v. Mortgage Finance Corp. *(1983) 142 Cal. App. 3d 770, 191 Cal. Rptr. 277* , was an action to quiet title. Defendants successfully demurred to the original complaint, but plaintiffs were granted leave to amend and filed an amended complaint. During the pendency of the litigation, plaintiffs' attorney died, but a second was substituted within six months. On the date set for trial and 14 days before the expiration of the five-year period for bringing the action to trial under former Code Civ. Proc. § 583(b) [*now see Code Civ. Proc. § 583.310*], the trial court granted defendants' motion to dismiss pursuant to former Code Civ. Proc. § 583(a) [*now see Code Civ. Proc. §§ 583.410, 583.420*]. Plaintiffs appealed.

The court of appeal affirmed the dismissal. The court held that delay attributable to sickness or death of counsel or of the parties is not necessarily excusable; each case must be decided on its own facts. Here, the delay caused by the death of plaintiffs' counsel was minimal in view of the overall time of inactivity involved, and defendants' dismissal motions contained detailed reasons why they were prejudiced by the delay. The record did not reveal that plaintiffs' failure to bring their case to trial was caused by their counsel's death or delay in service of one of defendants. Therefore, the trial court's dismissal was justified and not an abuse of discretion (*142 Cal. App. 3d 770, 774-775)* .

In ***Kunzler v. Karde*** *(1980) 109 Cal. App. 3d 683, 167 Cal. Rptr. 425* , the trial court dismissed an action for fraud and conversion after a dismissal hearing on the court's own motion. It found that plaintiff had failed to justify a delay of over three years in prosecuting the action and had waived the 45-day-notice requirement on a dismissal motion, as provided by former Cal. Rules of Ct., Rule 203.5(a) [*now see Cal. Rules of Ct., Rule 3.1342(a)*].

The court of appeal affirmed the dismissal, holding that there had been no abuse of the trial court's discretion (*109 Cal. App. 3d 683, 688)* . Moreover, the court rejected plaintiff's reliance on *United Farm Workers National Union v. International Brotherhood of Teamsters (1978) 87 Cal. App. 3d 225, 150 Cal. Rptr. 761* (discussed in *§ 90.98[3][b]*). Contrary to the reasoning in *United Farm Workers,* the court held that a trial court may not in its discretion deny a motion to dismiss in the absence of any evidence of good cause for protracted delays (*109 Cal. App. 3d 683, 688-689)* .

In ***San Ramon Valley Unified School Dist. v. Wheatley-Jacobsen, Inc.*** *(1985) 175 Cal. App. 3d 1050, 221 Cal. Rptr. 342* , plaintiff filed a breach ofcontract action against numerous defendants. Defendant architects sought judicial arbitration, which was granted and which stayed the proceedings between plaintiff and those defendants. The arbitration did not commence until four years later, but resulted in settlement. As to the remaining defendants, however, plaintiff took no action in prosecuting its claim other than one request to produce documents and four depositions. Four years and ten months after filing the complaint, plaintiff moved to set specially the case for trial. One defendant countered with a motion to dismiss under former Code Civ. Proc. § 583(a) [*now see Code Civ. Proc. §§ 583.410, 583.420*], which the court granted, mooting the request for special setting. Plaintiff appealed.

The court of appeal affirmed the judgment of discretionary dismissal, holding that the trial court had not abused its discretion in granting the dismissal. The court determined that the proper standard for review of the dismissal was whether the trial court had manifestly abused its discretion. In so holding, the court rejected the "plenary appellate scrutiny" standard enunciated in *Hurtado v. Statewide Home Loan Co. (1985) 167 Cal. App. 3d 1019, 213 Cal. Rptr. 712* (*175 Cal. App. 3d 1050, 1054)* . (The ruling in *Hurtado* was later disapproved on this point in *Shamblin v. Brattain (1988) 44 Cal. 3d 474, 479 fn 4, 243 Cal. Rptr. 902, 749 P.2d 339* .) In examining whether the trial court had

abused its discretion, the court of appeal held that, if defendant has shown that dismissal is warranted due to prejudice or the presence of factors under Rule 373(e) (now see Cal Rules of Ct., Rule 3.342(e) of the California Rules of Court that militated in favor of dismissal, the burden shifts to plaintiff to show excusable delay. In the case at bar, defendants made the proper showing, and plaintiff failed to show excuse for his delay. Thus, the trial court did not abuse its discretion in granting the dismissal (*175 Cal. App. 3d 1050, 1056-1058)* .

[d] Burden of Showing Good Cause Increases Over Time

In ***andre v. General Dynamics, Inc.*** *(1974) 43 Cal. App. 3d 839, 118 Cal. Rptr. 95* , plaintiff filed an at-issue memorandum eight months after filing the complaint, filed a certificate of readiness eight months later, and received a trial setting approximately four months after that. However, the case was continued once at defendant's request and twice at plaintiff's request for an additional year. It was then taken off calendar by plaintiff's counsel, who believed the matter was settled. Plaintiff refused to accept the settlement and, after her attorney withdrew from the case, took an additional five months to retain another attorney. Subsequently, a notice of motion to dismiss for want of prosecution pursuant to former Code Civ. Proc. § 583(a) [*now see Code Civ. Proc. §§ 583.410, 583.420*] was served on plaintiff by the court on its own motion. After a hearing, the court dismissed the action, approximately eight months after plaintiff had retained new counsel. Plaintiff appealed.

The court of appeal affirmed the dismissal. The court acknowledged that plaintiff may be able to demonstrate an abuse of discretion by a showing of good cause for delay in bringing the action to trial, which the trial court manifestly failed to recognize. Nevertheless, the burden was on the plaintiff to bring the case to trial, and as the time passed from two years nearer to five, the showing required to justify a failure to bring a case to trial grew greater (*43 Cal. App. 3d 839, 843)* . In this case, plaintiff made no showing that the delay in obtaining other legal representation was beyond her control; she merely listed the attorneys she had consulted and stated that for various reasons she did not retain any of them. Moreover, her new attorneys waited six weeks before the trial court filed its notice of motion to dismiss without attempting to reset the case for trial (*43 Cal. App. 3d 839, 843-844)* .

[e] Prejudice Inherent in Delay

The facts and procedural background of ***Lopez v. Larson*** *(1979) 91 Cal. App. 3d 383, 153 Cal. Rptr. 912* , are discussed in *§ 90.51[3][a]*. In *Lopez,* the court rejected plaintiff's assertion that defendant failed to show any adverse consequence or prejudice from plaintiff's delay. Prejudice is inherent in protracted delay and will be presumed when such delay is unjustified (*91 Cal. App. 3d 383, 401)* . Contrary to the decision in *United Farm Workers National Union v. International Brotherhood of Teamsters (1978) 87 Cal. App. 3d 225, 236, 150 Cal. Rptr. 761* (discussed in *§ 90.98[3][b]*), this court was persuaded that prejudice to the defendant inheres in protracted delay (*91 Cal. App. 3d 383, 402)* .

[f] Prejudice to Defendant Not Necessary Factor

In ***Blank v. Kirwan*** *(1985) 39 Cal. 3d 311, 332, 216 Cal. Rptr. 718, 703 P.2d 58* , defendant city enacted an ordinance legalizing the operation of poker clubs. The city then rezoned a parcel of property controlled by defendant landowners, permitting its use for poker clubs. Plaintiff and another defendant, a limited partnership, each subsequently applied for poker club licenses. The city approved defendant partnership's license, but delayed consideration of plaintiff's application until plaintiff could acquire property on the rezoned parcel. Plaintiff brought suit, and the city thereafter formally denied plaintiff's application. Plaintiff subsequently filed an amended complaint alleging several causes of action against all defendants. Over two years later, one of the defendants, a partner in defendant limited partnership, moved for dismissal for failure to prosecute pursuant to former Code Civ. Proc. § 583(a) [*now see Code Civ. Proc. §§ 583.410, 583.420*]. The trial court granted the motion to dismiss. Plaintiff appealed, contending that the court abused its discretion because, among other things, defendants were not prejudiced by his failure to prosecute.

The Supreme Court affirmed, holding that even if the defendants were not prejudiced, the legislative policy underlying former Code Civ. Proc. § 583(a) [*now see Code Civ. Proc. §§ 583.410, 583.420*] is not grounded solely inprejudice to a defendant caused by delay. Its purpose is also to expedite the administration of justice by compelling every person who files an action to prosecute it with promptness and diligence (*39 Cal. 3d 311, 332)* .

Counsel should note that several courts of appeal have held that a court cannot grant a discretionary dismissal without a showing of actual prejudice [*see Luti v. Graco, Inc. (1985) 170 Cal. App. 3d 228, 235-236, 215 Cal. Rptr. 902* ; *Troupe v. Courtney (1985) 169 Cal. App. 3d 930, 934-935, 215 Cal. Rptr. 703* ; *Hurtado v. Statewide Home Loan Co. (1985) 167 Cal. App. 3d 1019, 1028-1032, 213 Cal. Rptr. 712]* . However, it appears that these decisions have been impliedly disapproved by the Supreme Court's holding in *Blank* [*see Wong v. Davidian (1988) 206 Cal. App. 3d 264, 270, 253 Cal. Rptr. 675* ; *Schumpert v. Tishman Co. (1988) 198 Cal. App. 3d 598, 605, 243 Cal. Rptr. 810]* . For a discussion of how prejudice to the defendant, though not required to justify dismissal, is still a factor weighing in favor of dismissal, see *§ 90.98[2][b]*.

[4] Additional Authorities

[a] Other Criteria to Be Considered

In *Corlett v. Gordon (1980) 106 Cal. App. 3d 1005, 165 Cal. Rptr. 524* , the court of appeal affirmed dismissal of the action pursuant to former Code Civ. Proc. § 583(a) [*now see Code Civ. Proc. §§ 583.410, 583.420*], noting that factors to be considered in ruling on a motion to dismiss include the length of time since the filing of the complaint, the extent to which the parties had engaged in settlement negotiations, the parties' diligence in pursuing discovery or other pretrial proceedings, the nature and complexity of the case, the court's calendar, and whether the interests of justice would best be served by dismissal (*106 Cal. App. 3d 1005, 1013)* . Rejecting plaintiff's argument that public policy requires allowance for the problems of small firms in handling large caseloads, the court also held that small and large law firms should be judged by the same standards. However, circumstances may exist in small firms, such as illness of one of its members, which might constitute good cause for delay in bringing an action to trial, thereby precluding discretionary dismissal (*106 Cal. App. 3d 1005, 1014-1015)* .

[b] Dismissal Proper Absent Good Cause for Delay

In *Oskooi v. Fountain Valley Regional Hospital (1996) 42 Cal. App. 4th 233, 49 Cal. Rptr. 2d 769* , the court of appeal reversed the denial of a motion to dismiss under *Code Civ. Proc. §§ 583.410* and *583.420* where the plaintiff's argument for the delay in prosecution was that he had not had the money to proceed. The lead opinion (Sonenshine, J.) addressed the question of when dismissal is mandatory under the discretionary dismissal statutes, and noted that the *Denham v. Superior Court of Los Angeles County (1970) 2 Cal. 3d 557, 86 Cal. Rptr. 65* , expressly disapproved prior cases which had held that a motion to dismiss must be granted unless opposed by an adequate showing of diligence or excuse for delay. The opinion stated that several courts have misinterpreted *Denham* as permitting the trial court discretion even in the absence of any showing of excusable delay, while the correct rule is that a trial court must grant a motion to dismiss when there is no showing of excusable delay (*42 Cal. App. 4th 233, 240)* . Addressing the plaintiff's excuse of lack of money, the opinion stated that there is no authority which gives even lip service to the concept that lack of economic resources is sufficient excuse for failure to prosecute with diligence, and that moreover, plaintiff's claim of poverty was not supported by the facts (*42 Cal. App. 4th 233, 241-242)* .

In *Landry v. Berryessa Union School Dist. (1995) 39 Cal. App. 4th 691, 46 Cal. Rptr. 2d 119* , a personal injury case for assault and battery, plaintiffs appealed after the trial court granted a defense motion to dismiss for delay in prosecution pursuant to *Code Civ. Proc. §§ 583.410, 583.420*. Plaintiffs attempted to show excusable delay by arguing that ongoing settlement discussions were taking place, and also suggested that defendant should be estopped from obtaining dismissal because it had attempted to lull the plaintiffs into a false sense of security by leading them to believe settlement was possible. The court of appeal stated that the trial court did not make express findings on the

reasonableness of plaintiffs' explanations, but since express findings are not required, it presumed the court followed the law in making its determination. The court noted that notwithstanding plaintiffs' claims of diligent discovery efforts, they allowed seven and one-half months to go by without activity on the case. Similarly, the settlement discussions on which plaintiffs claimed to have relied did not commence until after an eleven month delay in activity (*38 Cal. App. 4th 689)* . The court thus affirmed the judgment of dismissal.

The facts and procedural background of *Brown v. Pacific Tel. & Tel. Co. (1980) 105 Cal. App. 3d 482, 164 Cal. Rptr. 445* , are discussed in *§ 90.51[3][a]*. In *Brown*, the court of appeal upheld dismissal of the action under former Code Civ. Proc. § 583(a) for a near three-year delay in effecting service of process on defendant. The court found plaintiff's contentions that the delay was occasioned by the need to garner medical information and by the burdensome workload on plaintiff's law firm were inadequate justification for the delay (*105 Cal. App. 3d 482, 487-488)* . It noted that a long delay in serving the complaint is particularly pernicious in that the passage of time may preclude the preparation of a defense by a defendant who is unaware of the suit (*105 Cal. App. 3d 482, 488)* .

Counsel should note that the court of appeal in *Troupe v. Courtney (1985) 169 Cal. App. 3d 930, 934, 215 Cal. Rptr. 703* , criticized the holding in *Brown* that dismissal should be imposed as a sanction when plaintiff cannot justify the delay. However, the *Troupe* court's rationale, that dismissal is inappropriate withoutsome showing of prejudice, was impliedly disapproved by the *Supreme Court in Blank v. Kirwan (1985) 39 Cal. 3d 311, 332, 216 Cal. Rptr. 718, 703 P.2d 58 , discussed under § 90.83[3][f].*

In *Moore v. El Camino Hosp. Dist. (1978) 78 Cal. App. 3d 661, 144 Cal. Rptr. 314* , the court of appeal affirmed dismissal of the action under former Code Civ. Proc. § 583(a) [*now see Code Civ. Proc. §§ 583.410, 583.420*], holding that the trial court did not abuse its discretion in dismissing, since no evidence was presented by plaintiff explaining why the action had not been brought to trial. The unsworn representation of plaintiff's counsel concerning unexplained confusion at his office was not a compelling showing of good cause. Moreover, since none of plaintiff's points on appeal had any substance, the appeal was frivolous and a penalty was imposed against counsel (*78 Cal. App. 3d 661, 664)* .

In *Farrar v. McCormick (1972) 25 Cal. App. 3d 701, 102 Cal. Rptr. 190* , the court of appeal affirmed the dismissal of plaintiff's action on the ground that the trial court had not abused its discretion in dismissing the action. A declaration filed by plaintiff's counsel opposing the motion for dismissal stated that discovery was not conducted during the first year because of settlement negotiations and that he did not appear at the settlement conference when the case was ordered off calendar because he had been disabled in an accident and later moved his offices, causing confusion for several months. However, this declaration failed to explain or justify the total delay of almost five years in bringing the case to trial and the specific inaction of 13 months between the time the case was ordered off calendar and the motion to set it specially for trial (*25 Cal. App. 3d 701, 704)* .

In *Dunsmuir Masonic Temple v. Superior Court (1970) 12 Cal. App. 3d 17, 90 Cal. Rptr. 405* , the court of appeal issued a writ of mandate compelling dismissal of the action under former Code Civ. Proc. § 583(a) [*now see Code Civ. Proc. §§ 583.410, 583.420*], holding that plaintiff had failed to make any relevant showing of good cause for delay on which the trial court could exercise its discretion (*12 Cal. App. 3d 17, 23)* . *Denham v. Superior Court (1970) 2 Cal. 3d 557, 563-564, 86 Cal. Rptr. 65, 468 P.2d 193* (discussed in *§ 90.60[3][b]*), the court held, did not remove the plaintiff's obligation to make some showing of good cause on which the trial court may exercise its discretion. Here, plaintiff was bedridden and in great pain during much of the pendency of the case, but illness that does not handicap plaintiff from communicating with counsel or create other extenuating circumstances is insufficient to prevent a two-year dismissal (*12 Cal. App. 3d 17, 21)* . Furthermore, this case had remained stagnant without explanation for more than three years and its dismissal would have resulted in its removal from an overcrowded list of pending cases (*12 Cal. App. 3d 17, 22)* .

Counsel should note that the court of appeal in *United Farm Workers National Union v. International Brotherhood of*

Teamsters (1978) 87 Cal. App. 3d 225, 234-235, 150 Cal. Rptr. 761 , criticized the *Dunsmuir* court's interpretation of *Denham* as unduly restrictive and did not agree that the court is required to dismiss the action in the absence of some showing of good cause for the delay. For a form of points and authorities that opposes discretionary dismissal based on *United Farm Workers,* see *§ 90.98*.

[c] Prejudice Inherent in Delay

In *Schumpert v. Tishman Co. (1988) 198 Cal. App. 3d 598, 243 Cal. Rptr. 810* , the court of appeal, in affirming a discretionary dismissal for delay in service, noted that in a negligence case a presumption of prejudice is particularly apt when so much of importance turns on the actions and omissions of the various parties involved, and the extent to which the parties or witnesses recall the events giving rise to plaintiff's injuries. In such a case, defendants were denied the opportunity to question witnesses and preserve their testimony before their recollections became blurred by time (*198 Cal. App. 3d 598, 606)* .

[d] Prejudice to Defendant Not Necessary Factor

In *Wong v. Davidian (1988) 206 Cal. App. 3d 264, 253 Cal. Rptr. 675* , the court of appeal, in affirming a judgment of dismissal based on *Code Civ. Proc. § 583.410(a)*(discretionary dismissal), noted that defendant's showing of prejudice was weak. The court said that the courts remain divided on the issue of whether a discretionary dismissal must be supported by an affirmative showing of prejudice and that the *Hurtado* [*Hurtado v. Statewide Home Loan Co. (1985) 167 Cal. App. 3d 1019, 1030, 213 Cal. Rptr. 712]* line of cases held that the dismissal sanction cannot be imposed without a showing of actual prejudice (*206 Cal. App. 3d 264, 269)* . However, the court added that the Supreme Court impliedly disapproved that view in *Blank v. Kirwan (1985) 39 Cal. 3d 311, 332, 216 Cal. Rptr. 718, 703 P.2d 58* (*discussed under § 90.83[3][f]*), when it affirmed a discretionary dismissal despite no showing of actual prejudice. The court said that other courts of appeal have noted that the *Hurtado* rationale is irreconcilable with *Blank* and should not be followed (*206 Cal. App. 3d 264, 270)* . The court, therefore, concluded it would follow the rule implicit in *Blank* and later cases, namely, lack of prejudice to a defendant remains a valid consideration when the plaintiff has acted diligently from the outset, but no affirmative showing of actual prejudice is necessary for defendant to be entitled to dismissal when the delay was unreasonable (*206 Cal. App. 3d 264, 270)* .

In *Freedman v. Pacific Gas & Electric Co. (1987) 196 Cal. App. 3d 696, 242 Cal. Rptr. 8* , the court of appeal affirmed a judgment of dismissal, entered on an order granting defendants' motion to dismiss made four years and seven months after the action was filed, for delay in prosecution in not bringing the action to trial within three years. On appeal, plaintiff insisted that a defendant must always show actual prejudice, and that there was no such showing in the present case. With respect to the first point, the court said that, although three court of appealdecisions had advanced the notion that actual prejudice must always be shown (citing *Luti v. Graco, Inc. (1985) 170 Cal. App. 3d 228, 235-236, 215 Cal. Rptr. 902* ; *Troupe v. Courtney (1985) 169 Cal. App. 3d 930, 934-935, 215 Cal. Rptr. 703* ; *Hurtado v. Statewide Home Loan Co. (1985) 167 Cal. App. 3d 1019, 1029-1032, 213 Cal. Rptr. 712*), these decisions had all been impliedly disapproved by the holding in *Blank v. Kirwan (1985) 39 Cal. 3d 311, 332, 216 Cal. Rptr. 718, 703 P.2d 58* (*discussed under § 90.83[3][f]*), that a showing of actual prejudice was not required (*196 Cal. App. 3d 696, 711)* . The court added, however, that prejudice remains a factor and, with respect to the plaintiff's second point, stated that the defendants clearly had shown actual prejudice (*196 Cal. App. 3d 696, 711)* .

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CHAPTER 90 DISMISSAL
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B. Involuntary Dismissal
2. Dismissal For Failure To Bring Action To Trial Or New Trial

9-90 California Points & Authorities § 90.84

§ 90.84 Supporting Motion for Discretionary Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.410, 583.420(a)(2), (3); Cal. Rules of Ct., Rule 3.1340, 3.1342]--Motion Made While Case Is Submitted to Judicial Arbitration

[1] FORM

[The following should be combined with a general form of memorandum in support of a motion for discretionary dismissal for delay in bringing the action to trial, pursuant to *Code Civ. Proc. §§ 583.410, 583.420(a)(2)* and *Cal. Rules of Ct., Rule 3.1340* (see *§ 90.83*)].

THE COURT HAS POWER TO EXERCISE ITS DISCRETION TO DISMISS A CASE FOR DELAY IN PROSECUTION UNDER CODE OF CIVIL PROCEDURE SECTION 583.410 WHILE THE CASE IS SUBMITTED TO JUDICIAL ARBITRATION UNDER CODE OF CIVIL PROCEDURE SECTION 1141.10 ET SEQ. THE COURT SHOULD EXERCISE ITS DISCRETION TO DISMISS THIS CASE BECAUSE THE PLAINTIFF HAS FAILED TO EXERCISE DUE DILIGENCE IN PROSECUTING _____ [THE ARBITRATION PROCEEDING *or* THE CASE PRIOR TO SUBMISSION TO ARBITRATION *or* THE CASE PRIOR TO AND DURING SUBMISSION TO ARBITRATION].

A. Court Retains Jurisdiction to Exercise Discretion to Dismiss Action Submitted to Judicial Arbitration. Unlike true arbitration, in which the arbitration has a life of its own outside the judicial system, in judicial arbitration the matter is only on a sabbatical from the courthouse and the court retains full jurisdiction to dismiss for lack of diligent prosecution (*Nanfito v. Superior Court (1991) 2 Cal. App. 4th 315, 318-319, 2 Cal. Rptr. 2d 876* ; *see D'Hondt v. Regents of University of California (1984) 153 Cal. App. 3d 723, 730, 200 Cal. Rptr. 628*).

[*Optional*] **B. Court May Consider Plaintiff's Lack of Diligence While Matter Is Submitted to Judicial Arbitration.** A case ordered into judicial arbitration may be dismissed while the case remains in arbitration if the statutory time period for discretionary dismissal has elapsed and plaintiff has failed to exercise due diligence in prosecuting the arbitration (*see D'Hondt v. Regents of University of California (1984) 153 Cal. App. 3d 723, 726, 727*

n.3, 730, 200 Cal. Rptr. 628).

[*Optional*] **C. Court May Consider Plaintiff's Lack of Diligence Prior to Submission of Case to Judicial Arbitration.** When the plaintiff elects arbitration near the end of the five-year mandatory period for bringing the case to trial, the court should consider the factors relevant to motions to dismiss under the discretionary dismissal provisions of *Code of Civil Procedure Section 583.420* before entering an order for arbitration. If the court fails to do, and the case is submitted to arbitration, the court nonetheless retains jurisdiction to dismiss the action based on the pre-arbitration delay (*Nanfito v. Superior Court (1991) 2 Cal. App. 4th 315, 319-320, 2 Cal. Rptr. 2d 876*).

[*Optional*] **D. Submission of Action to Judicial Arbitration Does Not Suspend Running of Time Periods Applicable to Discretionary Dismissal.** Submission of an action to arbitration pursuant to *sections 1141.10-1141.31 of the Code of Civil Procedure* shall not suspend the running of time periods specified in *sections 583.110-583.430 of the Code of Civil Procedure*, except as provided in *section 1141.17 of the Code of Civil Procedure*(*Code Civ. Proc. § 1141.17(a)*). Section 1141.17 suspends the time for bringing an action to trial only if the action is or remains submitted to arbitration more than four years and six months after plaintiff filed the action, and in that case tolls the period beginning four years and six months after plaintiff filed the action until the date a trial de novo is requested (*Code Civ. Proc. § 1141.17(b)*). Even before Section 1141.17 was amended to limit its tolling provision to the last six months of the five year mandatory dismissal period, it was held that Section 1141.17 should not be interpreted to take away all discretionary power from the trial judge to dismiss a case without regard to delay or the dilatory tactics of a litigant so long as the case is in arbitration (*D'Hondt v. Regents of University of California (1984) 153 Cal. App. 3d 723, 730, 200 Cal. Rptr. 628*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be used by a defendant in support of a motion for discretionary dismissal that is made while the case issubmitted to judicial arbitration under *Code Civ. Proc. § 1141.10 et seq.* It may be based on delay occurring during or before the case is submitted to arbitration, or both. The form should be combined with the general points and authorities supporting a motion for discretionary dismissal that are *set out in § 90.83*.

The form may be combined, if appropriate, with a memorandum in support of mandatory dismissal for failure to bring an action to trial [*see §§ 90.80* and *90.105*]. In some instances, however, the mandatory time period for bringing an action to trial is extended when an action is submitted to judicial arbitration [*see § 90.96*].

The memorandum supports a defendant's motion for dismissal of a plaintiff's complaint, and should be modified as necessary when it is used in another context, such as in support of a motion for dismissal of a cross complaint [*see Code Civ. Proc. § 583.110(a), (b), (d), (e)*].

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should state facts showing the plaintiff has failed to exercise diligence in preparing for settlement or arbitration and in setting the arbitration for hearing.

[b] Related Pleading and Practice Forms

For forms of a notice of motion and order relating to a motion for discretionary dismissal under Code Civ. Proc. §§ 583.410-583.430, see Ch. 212, *Dismissal* , in California Forms of Pleading and Practice.

[c] Related Memoranda

For forms of memoranda relating to judicial arbitration generally, see Ch. 20, *Arbitration: Compelling* .

[3] Discussion of Authorities

[a] Court Retains Jurisdiction to Exercise Discretion to Dismiss Action Submitted to Judicial Arbitration

The plaintiff in ***Nanfito v. Superior Court*** *(1991) 2 Cal. App. 4th 315, 2 Cal. Rptr. 2d 876* , unilaterally elected to submit the case to arbitration two months before the lawsuit's fifth anniversary. The defendant responded with a motion to dismiss for failure to diligently prosecute the action. Before defendant's motion was heard, the case was ordered to arbitration. When the motion to dismiss was heard, the judge decided that the order for arbitration stripped him of jurisdiction. The defendant petitioned for a writ of mandate.

The court of appeal issued a peremptory writ directing the superior court to hear the motion to dismiss. The court noted that the power of a court to terminate litigation previously ordered to arbitration depends on the nature of the arbitration. In the case of judicial arbitration, the court held that the matter is only on sabbatical from the courthouse and that the superior court retains full jurisdiction to dismiss for lack of diligent prosecution (*2 Cal. App. 4th 315, 319)* .

The facts and procedural background of ***D'Hondt v. Regents of University of California*** *(1984) 153 Cal. App. 3d 723, 730, 200 Cal. Rptr. 628* , are *discussed under § 90.84[3][d]*. Affirming dismissal of the action, the court framed the issue before it as being whether a case ordered into arbitration when it is more than two years old can be dismissed under former Code Civ. Proc. § 583(a) [*now see Code Civ. Proc. §§ 583.410, 583.420*] while the case remains in arbitration. The court concluded that there is no prohibition against such a dismissal (*153 Cal. App. 3d 723, 726)* .

[b] Court May Consider Plaintiff's Lack of Diligence While Matter Is Submitted to Judicial Arbitration

The facts and procedural background of ***D'Hondt v. Regents of University of California*** *(1984) 153 Cal. App. 3d 723, 730, 200 Cal. Rptr. 628* , are *discussed under § 90.84[3][d]*. The trial court dismissed the case based on the plaintiff's lack of diligence during the two years and eight months the case submitted to arbitration. In affirming, the court of appeal held that the trial court did not err in considering the plaintiff's diligence during the time the matter was submitted to arbitration (*153 Cal. App. 3d 723, 730)* .

[c] Court May Consider Plaintiff's Lack of Diligence Prior to Submission of Case to Judicial Arbitration

The facts and procedural background of ***Nanfito v. Superior Court*** *(1991) 2 Cal. App. 4th 315, 2 Cal. Rptr. 2d 876* , are *discussed under § 90.84[3][a]*. In issuing the peremptory writ directing the superior court to hear the motion to dismiss while the case was submitted to judicial arbitration, the court of appeal noted that since the plaintiff elected judicial arbitration so close to the five-year deadline for mandatory dismissal, the trial court should have considered the factors relevant to a motion for discretionary dismissal under *Code Civ. Proc. § 583.420* before entering the order for arbitration. Despite the failure to do so in this case, the court retained jurisdiction to consider a motion to dismiss even though the case had been submitted to arbitration (*2 Cal. App. 4th 315, 319-320)* .

[d] Submission of Action to Judicial Arbitration Does Not Suspend Running of Time Periods Applicable to Discretionary Dismissal

Except as provided in *Code Civ. Proc. § 1141.17*, submission of an action to judicial arbitration does not suspend the

running of any time period specified in *Code Civ. Proc. §§ 583.110-583.430* [*Code Civ. Proc. § 1141.17(a)*]. The only exception to this rule provided by *Code Civ. Proc. § 1141.17* concerns *Code Civ. Proc. § 583.310*, which sets out the period for bringing an action to trial afterwhich it is subject to mandatory dismissal [*see Code Civ. Proc. § 1141.17(b)*; *see also § 90.96*].

In ***D'Hondt v. Regents of University of California*** *(1984) 153 Cal. App. 3d 723, 200 Cal. Rptr. 628* , the trial court ordered a negligence action into arbitration three years and five months after the complaint was filed. During the period the case was in arbitration, plaintiff postponed the arbitration hearing three times and, after the third postponement, set no new date for the hearing. After the case had been in arbitration for two years and eight months, defendants moved for discretionary dismissal pursuant to former Code Civ. Proc. § 583(a) [*now see Code Civ. Proc. §§ 583.410, 583.420(a)(2)(B)*; *Cal. Rules of Ct., Rule 3.1340*], which authorized the court to dismiss an action that was not brought to trial within two years after filing. The trial court dismissed the action, finding that plaintiff had failed to exercise due diligence in procuring an arbitration hearing date and that defendants would be prejudiced by the delay in adjudicating a case which by then had been pending for six years and two months. Plaintiff appealed.

The court of appeal affirmed, holding that a case ordered into arbitration when it was more than two years old could be dismissed under former Code Civ. Proc. § 583(a) (discretionary dismissal for failure to bring action to trial within two years) while the case remained in arbitration (*153 Cal. App. 3d 723, 726)* . The court also held that the trial court did not err when it based its discretionary dismissal on plaintiff's lack of diligence during the two years and eight months that the case was submitted to arbitration. The relevant tolling statutes governing cases submitted to arbitration, former Code Civ. Proc. § 1141.17 and former Cal. Rule of Ct., Rule 1601(d) (now see *Cal. Rules of Ct., Rule 3.811*), could not be construed to prohibit consideration of the activities of plaintiff while a matter is submitted to arbitration (*153 Cal. App. 3d 723, 730)* .

Specifically, the court observed that former Code Civ. Proc. § 1141.17 (submission of case to arbitration within six months of expiration of time periods contained in former Code Civ. Proc. § 583 as tolling periods until filing of arbitration award) did not apply in plaintiff's case, which was not submitted to arbitration within the last six months of the two-year discretionary dismissal period (*153 Cal. App. 3d 723, 729)* . The court rejected plaintiff's argument that former Cal. Rules of Ct., Rule 1601(d) (time during which action pending on arbitration hearing list as excluded from periods specified in former Code Civ. Proc. § 583 if action was placed or remained on list for more than four years and six months after date action was filed) foreclosed dismissal while the plaintiff's action was submitted to arbitration (*153 Cal. App. 3d 723, 728-729)* . The court reasoned that the rule was intended to carry out the purpose of former Code Civ. Proc. § 1141.17, that is, to protect a litigant from the harsh rule of *mandatory* dismissal while the case was in arbitration during the last six months. Neither provision, the court concluded, took away all *discretionary* powers from the trial judge to dismiss a case, without regard to delay or the dilatory tactics of a litigant, as long as the case is in arbitration (*153 Cal. App. 3d 723, 729-730)* .

Finally, the court held that the court did not abuse its discretion in dismissing the case, although defendants made no specific allegations of prejudice suffered as a result of the delay (*153 Cal. App. 3d 723, 731)* . Under the circumstances, the court reasoned, when almost seven years had passed from the time of the alleged negligence, it was reasonable for the trial court to conclude that defendants were prejudiced by the passage of time (*153 Cal. App. 3d 723, 732)* .

Subsequent to *D'Hondt*, Section 1141.17 was amended so that by its terms it does not even arguably apply to toll the period within which a case must be brought to trial to avoid exposure to discretionary dismissal. Also, Cal. Rules of Ct., Rule 1601(d), was repealed. Therefore, counsel may wish to consider not including this paragraph in the memorandum.

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§ 90.85 Supporting Motion for Discretionary Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.410, 583.420(a)(2), (3); Cal. Rules of Ct., Rule 3.1340, 3.1342]--Dismissal After Request for Trial de Novo Following Judicial Arbitration

[1] FORM

[The following should be combined with a general form of memorandum in support of a motion for discretionary dismissal for delay in bringing the action to trial, pursuant to *Code Civ. Proc. §§ 583.410, 583.420(a)(2)* and *Cal. Rules of Ct., Rule 3.1340* (see *§ 90.83*)].

THE COURT SHOULD EXERCISE ITS DISCRETION TO DISMISS THIS ACTION UNDER CODE OF CIVIL PROCEDURESECTION 583.410 BASED ON PLAINTIFF'S FAILURE TO EXERCISE DUE DILIGENCE BEFORE AND AFTER SUBMISSION OF THE CASE TO JUDICIAL ARBITRATION.

Undergoing Judicial Arbitration Does Not Immunize Plaintiff Against Discretionary Dismissal. If a plaintiff is vulnerable to a discretionary dismissal for want of prosecution before arbitration under *Code of Civil Procedure Section 583.410*, then undergoing the arbitration process and benefitting from the recalendaring under *Code of Civil Procedure Section 1141.20* does not necessarily immunize plaintiff against discretionary dismissal (*Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 435, 442, 41 Cal. Rptr. 2d 362, 895 P.2d 469*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted by a defendant in support of a motion for discretionary dismissal on the ground that the plaintiff failed to exercise reasonable diligence in prosecuting the action when the plaintiff's failures to move the case forward occurred both before and after the case was submitted to judicial arbitration under *Code Civ. Proc. § 1141.10 et seq.* The form should be combined with the general points and authorities supporting a motion for discretionary dismissal that are *set out in § 90.83*.

The form may also be combined with a memorandum supporting mandatory dismissal for failure to bring the action to trial [*see §§ 90.80* and *90.105*].

The form supports a motion for dismissal of a complaint, and may be modified as necessary if used in a different context, such as in support of a motion for dismissal of a cross complaint [*see Code Civ. Proc. § 583.110(a), (b), (d), (e)*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should identify all the periods of inactivity in the case caused by plaintiff's failure to take any steps to move it forward [*see Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 443, 41 Cal. Rptr. 2d 362, 895 P.2d 469]* .

[b] Related Pleading and Practice Forms

For forms of notice of motion and order relating to a motion or discretionary dismissal under Code Civ. Proc. § 583.410 et seq., see ch. 212, *Dismissal* , in California Forms of Pleading and Practice.

[3] Discussion of Authorities

[a] Undergoing Judicial Arbitration Does Not Immunize Plaintiff Against Discretionary Dismissal

The facts and procedural background of ***Howard v. Thrifty Drug & Discount Stores*** *(1995) 10 Cal. 4th 424, 434-435, 41 Cal. Rptr. 2d 362, 895 P.2d 469* , are discussed in *§ 90.97[3][a]*. The trial court denied a motion to specially set, finding that the five years to bring the case to trial had already elapsed, requiring dismissal under *Code Civ. Proc. § 583.310*. Moreover, the court held that if, as plaintiff contended, 44 days remained within that period, plaintiff's lack of activity since the request for trial de novo made denial of the motion appropriate on discretionary grounds under *Code Civ. Proc. § 583.410*.

The Supreme Court affirmed the dismissal of the action based on the trial court's discretionary powers under *Code Civ. Proc. § 583.410*, after having held that the trial court had erroneously applied the mandatory dismissal statutes. In discussing *Code Civ. Proc. § 1141.20* tolling of the mandatory period for bringing the case to trial when the trial court fails, after timely request, to calendar a trial de novo so that a plaintiff obtains his or her pre-arbitration place in the calendar, the Court stated that a plaintiff who benefits from that tolling may still be subject to discretionary dismissal if the plaintiff would have been subject to discretionary dismissal before arbitration (*10 Cal. 4th 424, 435)* . Specifically addressing the discretionary dismissal, the Court held that if a plaintiff is vulnerable to a discretionary dismissal for want of prosecution before arbitration under *Code Civ. Proc. § 583.410*, then undergoing the arbitration process and benefitting from the recalendaring under *Code Civ. Proc. § 1141.20* does not necessarily immunize plaintiff against discretionary dismissal (*10 Cal. 4th 424, 442)* . The Court then held that the trial court had not abused its discretion in denying the motion to specially set the case for trial and exercising its discretion to dismiss. The facts the Court looked to were as follows (*10 Cal. 4th 424, 443)* :

1. A three-year, seven-month lapse between the filing of the complaint and the first at-issue memorandum, during which the only activity was two discovery requests.

2. The lack of evidence of active settlement negotiations or delay by the defendant.

3. Post-arbitration delay of six months after defendant's request for trial de novo to bring to the court's attention a lack of a trial date (at which time it was less than two months before expiration of the five-year mandatory dismissal deadline).

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9-90 California Points & Authorities § 90.86

§ 90.86 Opposing Motion for Mandatory Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.310, 583.320, 583.360]--Action Was Brought to Trial or New Trial Within Statutory Period

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN OPPOSITION TO MOTION
vs.	)	TO DISMISS
	)	[*Code Civ. Proc. §§ 583.310, 583.320, 583.360*]
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Trial Date: _____]

_____

DEFENDANT'S MOTION TO DISMISS THE ABOVE-ENTITLED ACTION SHOULD BE DENIED BECAUSE THE ACTION WAS BROUGHT TO _____ [TRIAL *or* A NEW TRIAL *or* A PARTIAL TRIAL] WITHIN THE STATUTORY PERIOD OF SECTION _____ [583.310 *or* 583.320] OF THE CODE OF CIVIL PROCEDURE.

A. Definition of Trial. For purposes of dismissal under *Section 583.360 of the Code of Civil Procedure*, a trial is defined as a determination of an issue of law or fact, or the examination of the facts or law put in issue in a cause (*see*

McDonough Power Equipment Co. v. Superior Court (1972) 8 Cal. 3d 527, 531, 105 Cal. Rptr. 330, 503 P.2d 1338).

[*Optional*] **B. Impaneling of Jury.** When a jury is impaneled within the period specified in section _____ [583.310 *or* 583.320] of the Code of Civil Procedure, the case has been brought to _____ [trial *or* a new trial] within the meaning of the statute and a motion to dismiss is properly denied (*see Hartman v. Santamarina (1982) 30 Cal. 3d 762, 765-767, 180 Cal. Rptr. 337, 639 P.2d 979* ; *Hilliard v. A.H. Robins Co. (1983) 148 Cal. App. 3d 374, 390, 196 Cal. Rptr. 117*).

[*Optional*] **C. Swearing and Testimony of Witness.** When the _____ [trial *or* new trial] is before the court without a jury, the action is brought to _____ [trial *or* a new trial] within the meaning of section _____ [583.310 *or* 583.320] of the Code of Civil Procedure when at least one witness is called, sworn, and gives some testimony (*see Hartman v. Santamarina (1982) 30 Cal. 3d 762, 765, 180 Cal. Rptr. 337, 639 P.2d 979* ; *see also Blue Chip Enterprises, Inc. v. Brentwood Sav. & Loan Assn. (1977) 71 Cal. App. 3d 706, 711-712, 139 Cal. Rptr. 651*).

[*Optional*] **D. Ruling on Demurrer.** The determination or hearing on a demurrer to a complaint is a trial within the meaning of section _____ [583.310 *or* 583.320] of the Code of Civil Procedure if the ruling on the demurrer is a final determination of the case (*see McDonough Power Equipment Co. v. Superior Court (1972) 8 Cal. 3d 527, 532, 105 Cal. Rptr. 330, 503 P.2d 1338*).

[*Optional*] **E. Dismissal Not Authorized if Partial Trial Occurs Within Statutory Period.** Dismissal of an action pursuant to the provisions of *section 583.360 of the Code of Civil Procedure*, which provides for dismissal if the action is not brought to _____ [trial *or* a new trial] within the period described in section _____ [583.310 *or* 583.320] of the Code of Civil Procedure, is not authorized if there has been a partial trial of the action within the statutory period (*see Rose v. Boydston (1981) 122 Cal. App. 3d 92, 98, 175 Cal. Rptr. 836*).

[*Optional*] **F. Bifurcated Marital Dissolution Proceeding.** Pursuant to *Code of Civil Procedure Section 583.161*, a petition for dissolution of marriage shall not be dismissed under *Code of Civil Procedure Section 583.360* if there has been an adjudication of the status of the marriage (*In re Marriage of Dunmore (1996) 45 Cal. App. 4th 1372, 1380, 53 Cal. Rptr. 2d 450*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be used by a plaintiff to oppose a motion for mandatory dismissal of an action for failure to bring an action to trial or retrial within the applicable period specified in *Code Civ. Proc. § 583.310* or *583.320* [*see Code Civ. Proc. § 583.360*]. The ground for opposition is that the defendant did, in fact, bring the action to a trial within the meaning of those statutes.

Optional paragraphs may be used to support the proposition that an actual trial did commence [Optional Paragraphs C and D], that a trial was had by means of a demurrer proceeding [Optional Paragraph E], or that a partial trial occurred

[Paragraph F]. Optional Paragraph F may be used when the case is a family law matter within the scope of *Code Civ. Proc. § 583.161*.

In an appropriate case, these points and authorities may be combined with additional points and authorities setting forth further grounds in opposition to a motion for mandatory dismissal for failure to bring an action to trial or new trial within the mandatory period [*see §§ 90.87 -90.96*].

The form may, in addition, be adapted for use in opposing a motion for discretionary dismissal [*see § 90.98*]. The principles applicable in determining whether the discretionary period has lapsed are the same as those applicable in determining whether the mandatory period has lapsed [*see Code Civ. Proc. § 583.420(b)*].

This memorandum opposes a defendant's motion for dismissal of the complaint, and should be modified as necessary when it is used in another context, such as in opposition to a motion for dismissal of a cross complaint [*see Code Civ. Proc. § 583.110(a), (b), (d), (e)*].

Counsel should insert argument in the form, showing a relationship between the facts of the case and the points of law stated. Thus, counsel should show either that the jury was impaneled, or, in a nonjury trial, that at least one witness had been sworn and gave some testimony unless the case is a family law matter within the scope of *Code Civ. Proc. § 583.161*, in which case it need only be shown that the case falls within that statute [*see In re Marriage of Dunmore (1996) 45 Cal. App. 4th 1372, 1380, 53 Cal. Rptr. 2d 450]* .

These points and authorities may be submitted in opposition to a motion for mandatory dismissal supported by the general points and authorities *set out in § 90.80*.

[b] Effect of Authority Decided Under Former Dismissal Statutes

In 1984, the provisions for involuntary dismissal for delay in bringing an action to trial or new trial, former Code Civ. Proc. § 583(b)-(d), were repealed and replaced by *Code Civ. Proc. §§ 583.310-583.360*. Decisions interpreting the former statute have been cited in the form as persuasive rather than controlling authority to the extent that the revised statutes codify former case law or continue former substantive principles.

[c] Related Pleading and Practice Forms

For forms of a notice of motion and order relating to a motion to dismiss an action pursuant to Code Civ. Proc. § 583.360, see Ch. 212, *Dismissal* , in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Definition of Trial

The facts and procedural background of ***McDonough Power Equipment Co. v. Superior Court*** *(1972) 8 Cal. 3d 527, 105 Cal. Rptr. 330, 503 P.2d 1338* , are discussed in *§ 90.80[3][c]*. In *McDonough*, the Supreme Court rejected plaintiff's argument that the three-year provision of former Code Civ. Proc. § 583(b), later amended to former Code Civ. Proc. § 583(c) [*now see Code Civ. Proc. § 583.320(a)(3)*], applies only when judgment is reversed after a previous trial on the merits. The Court stated that a trial occurs, for purposes of dismissal under former Code Civ. Proc. § 583, if there is a determination of an issue of law or fact, or an examination of the facts or law put to issue in a cause (*8 Cal. 3d 527, 531)* . The Court held that a hearing on a demurrer constitutes a trial if the ruling on the demurrer is a final determination of the case (*8 Cal. 3d 527, 532)* .

[b] Impaneling of Jury

The facts and procedural background of ***Hartman v. Santamarina*** *(1982) 30 Cal. 3d 762, 180 Cal. Rptr. 337, 639 P.2d 979* , are discussed in *§ 90.92[3][j]*. The Supreme Court held that the lower court erred in granting defendant's motion to dismiss for failure to bring the action to trial within five years of filing. A jury was impaneled within the five-year period, even though the jury was discharged and the case continued beyond the five-year period. The Court stated that the action was brought to trial within the meaning of former Code Civ. Proc. § 583(b) [*now see Code Civ. Proc. §§ 583.310, 583.360*] when the jury was impaneled (*30 Cal. 3d 762, 765-767)* . It explained that today's overcrowded dockets, which often cause even the most aggressive plaintiffs to have unpredictableresults in attempting to proceed to trial within five years, demand safety valves against unjust dismissals (*30 Cal. 3d 762, 766)* .

In ***Hilliard v. A.H. Robins Co.*** *(1983) 148 Cal. App. 3d 374, 196 Cal. Rptr. 117* , the court of appeal held that in a jury trial a party can avoid the bar of former Code Civ. Proc. § 583(b) by commencing jury selection, and affirmed denial of defendant's dismissal motion. In *Hilliard,* a jury panel was sworn and voir dire examination of prospective jurors began within the five-year period of former Code Civ. Proc. § 583(b), but was not concluded by the last date allowed for trial. On page 390, the court cited the Supreme Court's apparently approving reference to *Kadota v. San Francisco (1958) 166 Cal. App. 2d 194, 195, 333 P.2d 75* . There it was held that a jury case is brought to trial when the parties commence the examination of prospective jurors. The court noted that a contrary rule would invite an unscrupulous party to delay or prolong the jury selection process until the expiration of the five-year period (*148 Cal. App. 3d 374, 390)* .

[c] Swearing and Testimony of Witness

The facts and procedural background of ***Hartman v. Santamarina*** *(1982) 30 Cal. 3d 762, 180 Cal. Rptr. 337, 639 P.2d 979* , are discussed in *§§ 90.86[3][b]* and *90.92[3][j]*. The Supreme Court held that an action is brought to trial within the meaning of former Code Civ. Proc. § 583 when the jury is impaneled (*30 Cal. 3d 762, 766-767)* , relying on dictum in *Miller & Lux, Inc. v. Superior Court (1923) 192 Cal. 333, 342, 219 P. 1006* . In *Miller,* a nonjury case, the Supreme Court suggested that in order to avoid the statutory bar, counsel could simply have advised the court of the situation, requested that one witness be sworn, and then have the case continued until a convenient time for the court and parties. If the action is set for jury trial, the functional equivalent of swearing a witness is the impaneling of the jury. The Court in *Hartman* concluded that the pro forma commencement of trial plays a vital part in preserving the right to a trial on the merits (*30 Cal. 3d 762, 765-766)* .

The facts and procedural background of ***Blue Chip Enterprises, Inc. v. Brentwood Sav. & Loan Assn.*** *(1977) 71 Cal. App. 3d 706, 139 Cal. Rptr. 651* , are discussed in *§ 90.120[3][a]*. Although the court of appeal affirmed dismissal of the action, it concluded that the action had been brought to trial within the meaning of former Code Civ. Proc. § 583. In trials by the court without a jury, the law is clear that the action is brought to trial when a witness is called, sworn, and gives some testimony. Here, the record reflected that a witness was called, sworn, and some testimony was elicited (*71 Cal. App. 3d 706, 711)* . The court added that although former Code Civ. Proc. § 583 could not be used to justify dismissal of the action, the lower court has the power to dismiss an action when there has been inexcusable delay in bringing it to trial. Here, the lower court properly exercised its inherent power in dismissing the action (*71 Cal. App. 3d 706, 712-713)* .

[d] Ruling on Demurrer

The facts and procedural background of ***McDonough Power Equipment Co. v. Superior Court*** *(1972) 8 Cal. 3d 527, 105 Cal. Rptr. 330, 503 P.2d 1338* , are discussed in *§§ 90.86[3][a]* and *90.80[3][c]*. The Supreme Court held that a determination of the issues of law raised by a demurrer constitutes a trial within the meaning of former Code Civ. Proc. § 583 if the ruling on the demurrer is a final determination of the case. In rejecting plaintiff's contention that the three-year provision of former Code Civ. Proc. § 583(b) (amended to former Code Civ. Proc. § 583(c)) [*now see Code Civ. Proc. § 583.320(a)(3)*] applied only if a judgment is reversed after a previous trial on the merits, the Court noted that if a demurrer has been sustained and a judgment of dismissal entered, there has been a trial and the action is not

subject to dismissal under former Code Civ. Proc. § 583. The essential element is that the action be brought to a stage when final disposition is to be made (*8 Cal. 3d 527, 532)* .

[e] Dismissal Not Authorized if Partial Trial Occurs Within Statutory Period

Rose v. Boydston *(1981) 122 Cal. App. 3d 92, 175 Cal. Rptr. 836* , was an action for payment of a fee for services rendered, filed in 1970. Defendants cross complained for dissolution of an alleged joint venture and an accounting. The cross complaint was tried in 1973, and an interlocutory judgment was entered in favor of the cross complainants. The court ordered an accounting and retained jurisdiction over the case for purposes of rendering and settling the account. Later, the trial judge was appointed to the court of appeal, thereby becoming unavailable for further trial. A second judge continued the case for trial and ordered that the trial be de novo on all issues unless either the first judge was reassigned to superior court to try the case, or the parties stipulated that they would be bound by the prior findings, conclusions, and interlocutory judgment. Neither condition occurred. After numerous continuances, cross defendants moved to dismiss. The motion was granted in 1978 pursuant to former Code Civ. Proc. § 583(a) and (b) [*now see Code Civ. Proc. §§ 583.310-583.430*].

The court of appeal reversed, holding that because there had been a partial trial of the action before the first judge, dismissal was not authorized under former Code Civ. Proc. § 583(a) and (b) (*122 Cal. App. 3d 92, 98)* .

Although the court of appeal held only that former Code Civ. Proc. § 583(a) and (b) were inapplicable because of the partial trial of the actionwithin the statutory period, it appears that the court's reasoning would be equally applicable to oppose a motion to dismiss under *Code Civ. Proc. § 583.320* if a partial retrial of the action occurs within three years after a new trial is ordered or a mistrial is declared.

[f] Bifurcated Marital Dissolution Proceeding

In re Marriage of Dunmore *(1996) 45 Cal. App. 4th 1372, 53 Cal. Rptr. 2d 450* , was an action for dissolution of marriage. A judgment dissolving the status of the marriage was entered prior to the expiration of the five years from commencement of the action, but a bifurcated proceeding remained with regard to child support, spousal support, and property. Over five years after filing of the petition, the ex-husband moved for dismissal of the matter under *Code Civ. Proc. § 583.360*. The ex-wife opposed the motion on the ground that dismissal was barred by *Code Civ. Proc. § 583.161(c)*, which provides that a petition for dissolution of marriage shall not be dismissed if a separate trial on the issue of the status has been conducted. The ex-husband argued that the section was inapplicable because an uncontested proceeding is not a "trial." Agreeing with the ex-husband, the trial court ruled that the bifurcated status proceeding did not constitute a "trial" within the meaning of the dismissal statutes because it was uncontested, and dismissed the proceeding.

The court of appeal noted that *Code Civ. Proc. § 583.161* contains several exceptions from the dismissal statutes which are specific to proceedings involving marital status. The common thread of these exceptions is that issues of family support are intertwined with issues of marital status and property rights. The court then reasoned that the state has an interest in insuring that there are no loose ends in the adjudication of the interrelated issues of status and family support, and concluded that the dismissal of an action after the resolution of one but not the other of these interrelated issues risks defeat of the state's interest. The court thus held that the concept of a "trial" within the meaning of *Code Civ. Proc. § 583.161* encompasses the final determination of the status of a marriage, and that the statute therefore bars dismissal under the five year statute after the entry of a judgment dissolving the marriage (*45 Cal. App. 4th 1372, 1380)* . The order of dismissal was thus reversed.

[4] Additional Authorities

[a] Dismissal Not Authorized if Partial Trial Occurs Within Statutory Period

The wife in *In re Marriage of Macfarlane & Lang (1992) 8 Cal. App. 4th 247, 10 Cal. Rptr. 2d 157* , petitioned for dissolution of marriage. The husband moved for bifurcation of the proceedings and for judgment on the issue of dissolution of marital status. At an evidentiary hearing approximately 18 months after the petition was filed, the court granted the bifurcation motion, ordered termination of the marriage, and reserved jurisdiction over all other issues. At two subsequent evidentiary hearings, the court rendered judgment on two of the remaining issues (*8 Cal. App. 4th 247, 251)* . Among other procedural moves, the husband moved to dismiss the petition for failure to bring the matter to trial within five years. The court granted the motion and ordered dismissal.

The court of appeal deemed the wife's appeal to be from the order of dismissal, and reversed, finding that the evidentiary hearings on the dissolution of marriage and two of the major remaining issues constituted partial trial sufficient to take the case out of the operation of the five-year statute (*8 Cal. App. 4th 247, 255)* .

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Volume 9 Chapters 90-99 DISMISSAL---to---EMINENT DOMAIN
CHAPTER 90 DISMISSAL
PART II. FORMS
B. Involuntary Dismissal
2. Dismissal For Failure To Bring Action To Trial Or New Trial

9-90 California Points & Authorities § 90.87

§ 90.87 Opposing Motion for Mandatory Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.310, 583.320, 583.360]--Time for Bringing Action to Trial or New Trial Extended by Stipulation of Parties [Code Civ. Proc. § 583.330]

[1] FORM

[*Caption. See § 90.86.*]

DEFENDANT'S MOTION TO DISMISS THE ABOVE-ENTITLED ACTION SHOULD BE DENIED BECAUSE THE PARTIES EXTENDED THE TIME WITHIN WHICH THE ACTION HAD TO BE BROUGHT TO _____ [TRIAL *or* A NEW TRIAL] BY _____ [A WRITTEN STIPULATION _____ (FILED WITH THE COURT *or* A COPY OF WHICH IS ATTACHED TO THE NOTICE OF MOTION) *or* BY AN ORAL AGREEMENT IN OPEN COURT _____ (ENTERED IN THE COURT MINUTES *or* OF WHICH A TRANSCRIPT WAS MADE)].

[*EITHER*]

A. Written Stipulation. The parties may extend the time within which an action must be brought to _____ [trial *or* a new trial] pursuant to *Sections 583.310-583.360 of the Code of Civil Procedure* by written stipulation, brought to the attention of the court if relevant to a motion for dismissal, or filed with the court (*Code Civ. Proc. § 583.330(a)*; *see Meraia v. McCann (1978) 83 Cal. App. 3d 239, 246, 147 Cal. Rptr. 756*).

[*OR*]

A. Oral Agreement. The parties may extend the time within which an action must be brought to _____ [trial *or* a new trial] pursuant to *Sections 583.310-583.360 of the Code of Civil Procedure* by an oral agreement made in open court, if entered in the minutes of the court or if a transcript is made (*Code Civ.*

Proc. § 583.330(b)).

[*CONTINUE*]

[*Optional*] **B. Extension to Time Beyond Statutory Period or Waiver of Right to Dismissal.** A stipulation is adequate to extend time for performance of an act required to avoid dismissal if it expressly waives the right to dismissal or extends the time for performance of the act to a time beyond the statutory period (*see General Ins. Co. v. Superior Court (1975) 15 Cal. 3d 449, 455, 124 Cal. Rptr. 745, 541 P.2d 289*).

[*Optional*] **C. Trial Precluded by Indefinite Extension.** A stipulation is adequate to extend time for commencing _____ [trial *or* a new trial] under Section _____ [583.310 *or* 583.320] of the Code of Civil Procedure if it grants an indefinite extension for some activity which, by necessary implication, precludes the commencement of _____ [trial *or* a new trial] (*see Regan Distributors, Inc. v. Yurosek & Son, Inc. (1979) 88 Cal. App. 3d 924, 928-929, 152 Cal. Rptr. 127*).

[*Optional*] **D. Acceptable Writings.** The requirement that a stipulation to extend time must be in writing is satisfied by a stipulation embodied in correspondence between counsel (*see Regan Distributors, Inc. v. Yurosek & Son, Inc. (1979) 88 Cal. App. 3d 924, 928 n. 5, 152 Cal. Rptr. 127*).

[*Optional*] **E. Tolling or Extension of Time Resulting in Less Than Six Months to Bring Action.** If the time within which an action must be brought to _____ [trial *or* a new trial] pursuant to Section _____ [583.310 *or* 583.320] of the Code of Civil Procedure is tolled or otherwise extended pursuant to statute, with the result that at the end of the tolling or extension period less than six months remains within which to bring the action to _____ [trial *or* a new trial], the action must not be dismissed under *Section 583.360 of the Code of Civil Procedure* if it is brought to _____ [trial *or* a new trial] within six months after the end of the period of tolling or extension (*Code Civ. Proc. § 583.350*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be used by a plaintiff to oppose a motion for mandatory dismissal of an action for failure to bring an action to trial or retrial within the applicable period specified in *Code Civ. Proc. § 583.310* or *583.320* [*see Code Civ. Proc. § 583.360*]. The ground for opposition is that the period for bringing the action to trial or new trial was extended by written stipulation of the parties [*Code Civ. Proc. § 583.330(a)*] or by an oral agreement of the parties that was entered in the court's minutes or a transcript [*Code Civ. Proc. § 583.330(b)*], and that there has been no failure to bring the action to trial or new trial within the required time after taking this extension into account. It should be noted that a written stipulation need not be filed, but if it is not filed, it must be brought to the court's attention if relevant to a dismissal motion [*Code Civ. Proc. § 583.330(a)*].

Optional Paragraph E should be included when less than six months remained to bring the action to trial at the time the claimed extension ended, and the motion to dismiss was made prior to expiration of that six months' period.

In an appropriate case, the foregoing points and authorities may be combined with additional points and authorities setting forth further grounds in opposition to a motion for mandatory dismissal for failure to bring an action to trial or new trial within the mandatory period [*see §§ 90.86, 90.89 -90.96*].

The foregoing form may, in addition, be adapted for use in opposing a motion for discretionary dismissal [*see § 90.98*]. The principles applicable in determining whether the discretionary period has lapsed are the same as those applicable in determining whether the mandatory period has lapsed [*see Code Civ. Proc. § 583.420(b)*].

The foregoing memorandum opposes a defendant's motion for dismissal of the complaint, and should be modified as necessary when it is used in another context, such as in opposition to a motion for dismissal of a cross complaint [*see Code Civ. Proc. § 583.110(a), (b), (d), (e)*].

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. For example, if the time to bring the action to trial has been extended betweenthe parties by written stipulation, counsel should state the date and particulars of that stipulation.

These points and authorities may be submitted in opposition to a motion for mandatory dismissal supported by the general points and authorities *set out in § 90.80*.

The points and *authorities in § 90.106*, may in turn, be used to respond to those in this form.

[b] Effect of Authority Decided Under Former Dismissal Statutes

In 1984, the provisions for involuntary dismissal for delay in bringing an action to trial or new trial, former Code Civ. Proc. § 583(b)-(d), were repealed and replaced by *Code Civ. Proc. §§ 583.310-583.360*. Decisions interpreting the former statute have been cited in the form as persuasive rather than controlling authority to the extent that the revised statutes codify former case law or continue former substantive principles.

[c] Construction of Stipulation

In construing a stipulation extending the five-year period for bringing an action to trial, the ordinary rules for interpretation of contracts apply. In the interpretation of contracts, the paramount consideration is the intention of the contracting parties as it existed at the time of contracting. The court must examine the instrument in the light of the circumstances surrounding its execution so as to ascertain what the parties meant by the words they used. In determining the intention of the parties in relation to the execution of a contract, the court may look to the circumstances surrounding the making of the agreement, including the object, nature, and subject matter of the writing, and thereby place itself for this purpose in the same situation in which the parties found themselves at the time of contracting [*Miles v. Speidel (1989) 211 Cal. App. 3d 879, 883, 259 Cal. Rptr. 582]* . However, the objective intent as evidenced by the words of the contract, not the parties' subjective intent, governs the court's interpretation [*Miles v. Speidel (1989) 211 Cal. App. 3d 879, 884, 259 Cal. Rptr. 582]* .

[d] Related Pleading and Practice Forms

For forms of a notice of motion and order relating to a motion to dismiss an action pursuant to Code Civ. Proc. § 583.360, see Ch. 212, *Dismissal* in California Forms of Pleading and Practice.

[3] Discussion of Authorities

[a] Written Stipulation

In ***Meraia v. McCann*** *(1978) 83 Cal. App. 3d 239, 147 Cal. Rptr. 756* , plaintiffs gave attorneys for both defendants open-ended extensions of time in which to file responsive pleadings, subject to termination by plaintiffs' counsel, and counsel for both defendants acknowledged these extensions in writing. Approximately four years later, plaintiffs' attorney requested counsel for both defendants to file answers. Defendants moved to dismiss pursuant to former Code Civ. Proc. § 583(a) [*now see Code Civ. Proc. §§ 583.410, 583.420*] and the court granted their motion.

The court of appeal reversed, holding on the authority of *General Ins. Co. v. Superior Court (1975) 15 Cal. 3d 449, 455-456, 124 Cal. Rptr. 745, 541 P.2d 289* (discussed in *§ 90.52[3][a]*), that the written stipulation was effective to defer the proceedings and to mutually excuse the parties from diligence (*83 Cal. App. 3d 239, 243)* . Although former Code Civ. Proc. § 583(a) did not expressly provide for written stipulations, former Cal. Rules of Ct., Rule 203.5(e) [*now see Cal. Rules of Ct., Rule 3.1342(e)*], stated that the trial court shall consider in a Code Civ. Proc. § 583(a) motion the nature of any extensions of time or other delay attributable to either party (*83 Cal. App. 3d 239, 246)* .

Meraia has been limited to situations in which the defendant has requested and obtained the extension; it does not apply when the plaintiff has requested the extension for his or her own benefit [*see Blank v. Kirwan (1985) 39 Cal. 3d 311, 332* ; *see also § 90.106*].

Note that in *Martin v. K & K Properties, Inc. (1987) 188 Cal. App. 3d 1559, 234 Cal. Rptr. 161* , another court of appeal upheld a dismissal on finding that, contrary to the facts in *Meraia*, a written open stipulation to respond expressly provided that the statutory five-year period was not extended, and thus precluded any extension of that period because it put cross-complainants on notice that they were not excused from diligently prosecuting their cross complaint (*188 Cal. App. 3d 1559, 1566)* .

[b] Oral Agreement

Prior to enactment of *Code Civ. Proc. § 583.330(b)*, which sanctions oral agreements made in open court if entered in the court minutes or of which a transcript is made, the Supreme Court declined to decide whether an oral stipulation entered in the minutes constituted a written stipulation [*see Miller & Lux, Inc. v. Superior Court (1923) 192 Cal. 333, 339-340, 219 P. 1006]* . However, even without the recent statute, such stipulations may be assumed adequate on the strength of *Govea v. Superior Court (1938) 26 Cal. App. 2d 27, 31, 78 P.2d 433* , which held that even if the language of the stipulation did not comply with former Code Civ. Proc. § 583, the defendant was estopped, after the minute entry, from seeking dismissal.

[c] Extension to Time Beyond Statutory Period or Waiver of Right to Dismissal

The facts and procedural background of ***General Ins. Co. v. Superior Court*** *(1975) 15 Cal. 3d 449, 124 Cal. Rptr. 745, 541 P.2d 289* , are discussed in *§ 90.52[3][a]*. In *General Ins. Co.*, the Supreme Court reviewed the adequacy of a stipulation between the parties to extend time. The general principle, as described in *J.C. Penney Co. v. Superior Court (1959) 52 Cal. 2d 666, 669, 343 P.2d 919* , is that a stipulation is adequate if it expressly either waives the right to dismissal or extends the time for performance of the act necessary to avoid dismissal to a date beyond the statutory period. A mere extension of time within the period does not extend the deadline absent a showing that the parties intended such an extension (*15 Cal. 3d 449, 455)* . In *J.C. Penney Co.*, the Court held that an extension for a specific period of time within the statutory period for pretrial activity did not extend the period, because time necessarily consumed by ordinary proceedings is not usually excluded.

It appears that the effect of *J. C. Penney Co.* is limited by subsequent rulings that an indefinite extension of time for pretrial activities does extend the period [*see Regan Distributors, Inc. v. Yurosek & Son, Inc. (1979) 88 Cal. App. 3d 924, 928-929, 152 Cal. Rptr. 127 , discussed under § 90.87[3][d]*].

[d] Trial Precluded by Indefinite Extension

In ***Regan Distributors, Inc. v. Yurosek & Son, Inc.*** *(1979) 88 Cal. App. 3d 924, 152 Cal. Rptr. 127* , defendant had granted plaintiff two open-ended extensions of time for hearings on demurrers and these extensions had delayed proceedings by two years. The action was dismissed under former Code Civ. Proc. § 583(a) after four years had elapsed since the action was filed.

The court of appeal held, on the authority of *General Ins. Co. v. Superior Court (1975) 15 Cal. 3d 449, 455, 124 Cal. Rptr. 745, 541 P.2d 289* (*discussed under § 90.55[3][b], 90.87[3][c]*), that dismissal was improper because the extensions, while in effect, excused the plaintiff's lack of diligence (*88 Cal. App. 3d 924, 928-929)* .

[e] Acceptable Writings

The facts and procedural background of ***Regan Distributors, Inc. v. Yurosek & Son, Inc.*** *(1979) 88 Cal. App. 3d 924, 152 Cal. Rptr. 127* , are *discussed under § 90.87[3][d]*. In *Regan Distributors, Inc.*, the written stipulations on which plaintiff relied were made informally between counsel. The court explicitly noted that in prior cases, stipulations held adequate had been informal in nature and embodied in correspondence between counsel (*88 Cal. App. 3d 924, 928 n.5*).

[4] Additional Authorities

[a] Oral Agreement

Health Industries of America v. Los Angeles County Metropolitan Transportation Authority (2002) 102 Cal. App. 4th 1372, 126 Cal. Rptr. 2d 294 provides that oral stipulations to extend the five year statute are adequate and may be considered to exist where in open court the judge acts under the presumption that the parties are entering into such a stipulation and the parties do not object (*102 Cal. App. 4th 1372, 1376-1378)* .

[b] Trial Precluded by Indefinite Extension

In *Farrar, Herrick & Associates v. Safecare Co. (1981) 115 Cal. App. 3d 123, 171 Cal. Rptr. 191* , defendant wrote to plaintiff stating that it continued to rely on an expired agreement between the parties extending its time to plead unless plaintiff gave defendant notice of further action. Over three years later, plaintiff gave notice, but neither party acted for almost one and one-half years, until plaintiff took a default judgment. By then, over five years had elapsed since the complaint was filed. Before the default hearing, defendant successfully moved for dismissal under former Code Civ. Proc. § 583(b) [*now see Code Civ. Proc. §§ 583.310, 583.360*]. The court of appeal reversed, citing *General Ins. Co. v. Superior Court (1975) 15 Cal. 3d 449, 454-456, 124 Cal. Rptr. 745, 541 P.2d 289* , *discussed under §§ 90.55[3][b]* and *90.87[3][c]* (*115 Cal. App. 3d 123, 127)* . The court also relied on an estoppel theory to bar reliance on the diligence statutes. The court should give credence to the parties' intent in a reasonable manner. Finding that the parties had waived diligence by their stipulation and conduct, the court held that once such a waiver has occurred, diligence as prescribed by statute cannot be reinstated without agreement. The court also held that dismissal for lack of due diligence pursuant to the court's inherent discretionary powers without reliance on statute is a question of fact to be determined by reasonableness and good faith. The discretion must be exercised in accordance with the spirit of the law and to serve the substantial ends of justice. To allow defendant to prevail in this case would defeat the spirit of the law (*115 Cal. App. 3d 123, 131)* .

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Volume 9 Chapters 90-99 DISMISSAL---to---EMINENT DOMAIN
CHAPTER 90 DISMISSAL
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2. Dismissal For Failure To Bring Action To Trial Or New Trial

9-90 California Points & Authorities § 90.88

§ 90.88 Opposing Motion for Mandatory Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.310, 583.320, 583.360]--Action Was Settled Within Statutory Period

[1] FORM

[*Caption. See § 90.86.*]

THE COURT SHOULD DENY DEFENDANT'S MOTION TO DISMISS THE ACTION BECAUSE THE MANDATORY DISMISSAL STATUTE FOR FAILURE TO BRING AN ACTION TO TRIAL WITHIN FIVE YEARS DOES NOT APPLY TO A SETTLEMENT OF THE ACTION WITHIN THE FIVE-YEAR PERIOD, EVEN THOUGH THE SETTLEMENT IS NOT REDUCED TO A JUDGMENT WITHIN THAT PERIOD.

A. Judgment on Stipulation. If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement (*Code Civ. Proc. § 664.6*).

[*EITHER*]

B. Oral Settlement of Case in Open Court Within Five-Year Mandatory Period for Bringing Action to Trial Precludes Dismissal of Action. An action settled by oral stipulation of the parties in open court prior to expiration of the five-year period precludes dismissal of the action for failure to bring it to trial when there are no issues left to resolve and nothing remains but to formally execute a written version of the stipulation and submit it to the court for approval (*Canal Street, Ltd. v. Sorich (2000) 77 Cal. App. 4th 602, 608-609, 91 Cal. Rptr. 2d 811* ; *Malouf Bros. v. Dixon (1991) 230 Cal. App. 3d 280, 284-285, 281 Cal. Rptr. 235* ; *Gorman v. Holte (1985) 164 Cal. App. 3d 984, 987-989, 211 Cal. Rptr. 34*).

[*OR*]

B. Settlement Reached Before, But Partially Executed After, Expiration of Five-Year Period Precludes Dismissal of Action. A settlement agreement that was entered into before expiration of the five-year period for mandatory dismissal for failure to bring an action to trial but not executed by all the parties until after expiration of that period, and which provides that the superior court would retain jurisdiction over enforcement of its terms, either comes within the exception specified in *Section 583.340(c) of the Code of Civil Procedure* for the time during which it would be "futile" to bring the action to trial or constitutes an implied waiver or extension of the five-year period (*Schiro v. Curci (1990) 220 Cal. App. 3d 840, 844-845, 269 Cal. Rptr. 639*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be used by a plaintiff to oppose a motion for mandatory dismissal of an action for failure to bring it to trial within the time specified in *Code Civ. Proc. § 583.310* [*see Code Civ. Proc. § 583.360*]. The ground for opposition is that the case was settled within the five-year period by written stipulation of the parties, or by oral stipulation before the court, and that the mandatory dismissal statutes do not apply.

In an appropriate case, these points and authorities may be combined with additional points and authorities setting forth further grounds in opposition to a motion for mandatory dismissal for failure to bring an action to trial or new trial within the mandatory period [*see §§ 90.86, 90.87, 90.89 -90.96*].

This form may, in addition, be adapted for use in opposing a motion for discretionary dismissal [*see § 90.98*]. The principles applicable in determining whether the discretionary period has lapsed are the same as those applicable in determining whether the mandatory period has lapsed [*see Code Civ. Proc. § 583.420(b)*].

This memorandum opposes a defendant's motion for dismissal of the complaint, and should be modified as necessary when it is used in another context, such as in opposition to a motion for dismissal of a cross complaint [*see Code Civ. Proc. § 583.110(a), (b), (d), (e)*].

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

These points and authorities may be submitted in opposition to a motion for mandatory dismissal supported by the point and authority *set out in § 90.81*.

[3] Discussion of Authorities

[a] Oral Settlement of Case in Open Court Within Five-Year Mandatory Period for Bringing Action to Trial Precludes Dismissal of Action

Canal Street, Ltd. v. Sorich *(2000) 77 Cal. App. 4th 602, 91 Cal. Rptr. 2d 811* , involved an action by purchasers of property against defendants for damages plaintiffs incurred in cleaning up contamination. At a judicially mandated settlement conference, a settlement agreement was reached between the parties that was recited on the record.

Thereafter, however, the parties did not reach final agreement on the text of the settlement agreement. At some point, plaintiffs' counsel sent one of defendants' counsel a revised agreement by letter which noted that it reflected all the points the attorneys had discussed the day before and that plaintiffs' counsel was glad that they had reached final agreement on the text. Some time thereafter plaintiffs' counsel wrote to the other attorney requesting that defendants execute the settlement agreement. Thereafter, plaintiff's attorney, pursuant to plaintiffs' instruction, forwarded to defendants a letter from one of the plaintiffs that stated that plaintiffs' offer to settle the litigation was withdrawn and settlement discussions terminated, except on certain conditions. Defendants then moved for, and subsequently voluntarily dismissed their motions for, an order under *Code Civ. Proc. § 572* to deposit the basic amount of the settlement with the court and for judgment under *Code Civ. Proc. § 664.6* on the settlement. During the same period, plaintiffs wrote defendants several times that they were prepared to reject the settlement and proceed to trial unless the amount paid in settlement included interest and daily late penalty charges from a specified date. Ultimately, defendants moved for dismissal of the action under *Code Civ. Proc. § 583.310* based solely on plaintiffs' failure to bring the case to trial within five years from its commencement. Plaintiffs then moved under *Code Civ. Proc. § 664.6* for judgment under the settlement reached at the judicially mandated settlement conference that had been recited on the record and under *Code Civ. Proc. § 572* for an order requiring defendants to deposit the basic amount of the settlement with the court. Plaintiffs' motions were consolidated with defendants' motion to dismiss. The trial court concluded that the settlement was conditioned on plaintiffs obtaining approval of the settlement from the Underground Storage Tank Cleanup Fund and because the Fund never approved the settlement, no settlement was ever reached. The trial court dismissed plaintiffs' action for failure to bring the action to trial or have the settlement reduced to judgment within five years. Plaintiffs appealed (*77 Cal. App. 4th 602, 604-607)* .

The Court of Appeal, First District, Division Five, reversed. The court noted that defendants relied on *Varwig v. Leider (1995) 171 Cal. App. 3d 312, 217 Cal. Rptr. 208* (discussed *below*), which held that an action that is not brought to trial or reduced to judgment within five years of its commencement must be dismissed, even when settlement of the action in a pretrial conference disposed of all issues, and the action was taken off calendar. The court further noted, however, that Varwig is contrary to the other cases that have considered this issue, *Brown & Bryan, Inc. v. Hartford Accident & Indemnity Co. (1994) 24 Cal. App. 4th 247, 255* , *Malouf Bros. v. Dixon (1991) 230 Cal. App. 3d 280, 285, 281 Cal. Rptr. 235* (discussed *below*), *Schiro v. Curci (1990) 220 Cal. App. 3d 840, 844-845, 269 Cal. Rptr. 639* (*discussed under § 90.88[3][b]*), and *Gorman v. Holte (1985) 164 Cal. App. 3d 984, 988* (discussed in *§ 90.88[3][a]*). These case uniformly agree that once there has been a settlement in open court, the court can reasonably assume the matter has been finally disposed of and will not go to trial, even though details of execution remain. Consequently, there is no compelling reason why a settlement agreement must be reduced to judgment within five years. *Code Civ. Proc. § 583.310* does not require a case to reach judgment in five years, but merely that the trial commence within that period (*77 Cal. App. 4th 602, 608)* . Additionally, since Varwig the five-year statute has been amended to particularly incorporate what had been simply a judicially created exception to the mandatory five-year dismissal. The computation of the five-year period now specifically excludes (in *Code Civ. Proc. § 583.340(c)*) the time during which bring the action to trial was impossible, impracticable, or futile. Thus, the time during which a settlement agreement is in effect tolls the five-year period, for the reason that attempting to bring an action to trial when all issues have been resolved through settlement would be futile (*77 Cal. App. 4th 602, 608)* . Noting that the trial court understandably followed Varwig, an opinion from the same district, the court concluded that Brown & Bryant, Inc., Malouf Bros., Schiro, and Gorman enunciate the better rule, and that *Code Civ. Proc. § 583.310* was tolled following recitation of the settlement on the record (*77 Cal. App. 4th 602, 608-609)* . Moreover, in reversing the dismissal order, the court remanded the matter to the superior court with directions to reconsider plaintiffs' *Code Civ. Proc. § 664.6* motion and enter judgment thereon (*77 Cal. App. 4th 602, 609)* .

Malouf Bros. v. Dixon *(1991) 230 Cal. App. 3d 280, 281 Cal. Rptr. 235* , was an action filed on July 19, 1983, by grading and excavating contractors to recover a sum remaining due on a contract between the parties for construction of a road on defendant's property, and in which the defendant filed a cross complaint. The case was settled at the mandatory settlement conference, and the terms of the settlement were stated in open court. Under the terms of the settlement, defendant was to convey a specified parcel of land to the plaintiffs who would pay defendant $10,000 within

90 days, and plaintiffs, at their expense, would repair portions of the road that had washed out. The road was to be tested for compaction by aqualified soil engineer, and one of the plaintiffs would pay defendant $500 to be paid over to the soil engineer. Thereafter, defendant, claiming the road repair work was unsatisfactory, refused to convey the parcel. After unsuccessful negotiations between the parties, plaintiffs, on January 27, 1989, filed a motion under *Code Civ. Proc. § 664.6* (*see* Paragraph A of foregoing form) to enforce settlement of the agreement. On July 28, 1989, judgment was entered requiring defendant to convey the parcel on payment of the $10,000. Defendant appealed, contending, among other things, that the trial court was required to dismiss the action because plaintiffs had failed to enforce the settlement before expiration of five years from the date the original complaint was filed, citing as authority *Varwig v. Leider (1985) 171 Cal. App. 3d 312, 315-316, 217 Cal. Rptr. 208* (discussed *below*).

Division Five of the Court of Appeal of the Second District, rejected the contention. Rejecting the holding in *Varwig* and following *Gorman v. Holte (1985) 164 Cal. App. 3d 984, 987-988, 211 Cal. Rptr. 34* (discussed *below*) and *Schiro v. Curci (1990) 220 Cal. App. 3d 840, 844, 269 Cal. Rptr. 639* (*discussed under § 90.88[3][b]*), the court held that *Code Civ. Proc. § 583.310* applies only to disputes that can and will be settled by trial and does not apply to a judgment entered pursuant to a motion to enforce a settlement agreement entered into within the five-year period. The court said the purpose of *Code Civ. Proc. § 583.310* is to prevent avoidable delay in bringing an action to trial; that once the parties have stated a complete settlement in open court, the court may assume that the matter has been finally disposed of; that, although details of execution may remain, it is reasonable to assume the matter will not go to trial; and that if a dispute about the settlement develops, it can be resolved through the streamlined procedure set forth in *Code Civ. Proc. § 664.6* (*230 Cal. App. 3d 280, 284-285)* . The court explained that the *Varwig* view might prevent settlements on the eve of trial shortly before the five-year deadline or settlements which enable the defendant to avoid a court judgment, and that the law should encourage the avoidance of needless trials (*230 Cal. App. 3d 280, 285)* .

Gorman v. Holte *(1985) 164 Cal. App. 3d 984, 211 Cal. Rptr. 34* , was a May, 1978, action for breach of a construction contract and fraud in which defendant also filed a cross complaint. At a mandatory settlement conference in December, 1982, the parties entered into an extensive oral stipulation in open court in which they agreed to settle the action in favor of plaintiff. The stipulation was recorded by a court reporter and plaintiff's counsel was directed to prepare a written order for the court's signature and approval by defendant's counsel. Defendant's counsel rejected the version submitted to him by plaintiff's counsel and prepared his own version, which plaintiff's counsel rejected. In May, 1983, plaintiff's counsel sent his proposed judgment to the court requesting that it be signed notwithstanding defendant's lack of approval, but the court apparently did not respond. In June 1983, defendant moved to dismiss the action pursuant to former Code Civ. Proc. § 583(b) [*now see Code Civ. Proc. §§ 583.310, 583.360*] for failure to bring it to trial within five years. Plaintiff filed a response and moved for summary judgment. The trial court granted the motion to dismiss, and dismissed the summary judgment motion as moot. Plaintiff appealed.

The Court of Appeal of the Second District, Division Two, reversed the dismissal. The court held that former Code Civ. Proc. § 583(b) does not apply if, as here, no issues remain to be tried after the parties arrive at a complete settlement of their dispute. The purpose of former Code Civ. Proc. § 583(b) is to prevent avoidable delay in bringing an action to trial and thus obtaining a resolution of the dispute. An action settled by agreement will not proceed to trial and such a settlement renders the five-year limit legally irrelevant. Although the settlement did not adjudicate facts or law, a final disposition of the dispute had been made since there were no issues left to resolve and nothing remained but to formally execute the agreement. Former Code Civ. Proc. § 583(b) does not require that every action be brought to trial or suffer dismissal. It applies exclusively to disputes that can and will be resolved only by trial. Moreover, nothing in former Code Civ. Proc. § 583 requires that a judgment be obtained within five years after filing the complaint; that section requires only that trial commence within that period. Furthermore, a settlement agreement has the attributes of a judgment in that it is decisive of the rights of the parties and serves to bar reopening of the issues involved, and oral agreements to compromise and settle lawsuits at judicially supervised settlement conferences are enforceable. While certain time constraints govern the mechanics of enforcing settlement agreements, they are not found in former Code Civ. Proc. § 583(b) (*164 Cal. App. 3d.984, 987-989)* .

The Court of Appeal of the First District, Division Two, in ***Varwig v. Leider*** *(1985) 171 Cal. App. 3d 312, 217 Cal. Rptr. 208* (discussed in *§ 90.81[3][a]*, noted that its decision was in conflict with *Gorman.* In *Varwig*, plaintiff brought an action in 1976, and the parties reached a settlement agreement at a pretrial conference on January 30, 1980, after which time the action was taken off calendar. Afterwards, however, no one moved to enforce the settlement agreement under *Code Civ. Proc. § 664.6* (Paragraph A of foregoing form) before the lapse of the five-year period. In 1982, defendants successfully obtained dismissal under former Code Civ. Proc. § 583(b) [*now see Code Civ. Proc. §§ 583.310, 583.360*], despite plaintiff's contention that the settlement disposed of all issues to be tried and that dismissal was therefore inappropriate. The First District Court of Appeal affirmed, holding that because no party had sought to enforce the settlement, the action had not been finally disposed of, and was thus subject to mandatory dismissal. However, the court noted that the settlement agreement nevertheless could be enforced under the general principles of contract law (*171 Cal. App. 3d.312, 315-316)* .

[b] Settlement Agreement Reached Before, But Partially Executed After, Expiration of Five-Year Period Precludes Dismissal

Schiro v. Curci *(1990) 220 Cal. App. 3d 840, 269 Cal. Rptr. 639* , was an action to quiet title to a strip of property over which adjoining property owners claimed an easement. After pursuing litigation for several years, but before expiration of the five-year period for mandatory dismissal, the parties settled their case on the day it was set for trial. However, the settlement agreement was not executed by all the parties until after expiration of the five-year period. In addition to settling the case, the agreement also provided that the superior court would retain jurisdiction over enforcement of the terms of the agreement. The plaintiff did not perform despite defendants' repeated requests that he do so, and defendants eventually filed a noticed motion to enforce the agreement and to enter judgment pursuant to *Code Civ. Proc. § 664.6* (*see* Paragraph A of foregoing form). Plaintiff countered with the argument that the court, on its own motion, had to dismiss the case for failure to bring it to trial within five years. The trial court granted the defendants' motion, judgment was entered, and plaintiff appealed.

The Court of Appeal of the Sixth District said the case involved the interaction between *Code Civ. Proc. § 583.310* and *Code Civ. Proc. § 664.6* (Paragraph A of foregoing form), and the question of whether the latter section applied. The court held that it did apply, and affirmed the judgment (*220 Cal. App. 3d 840, 843, 845)* . The court discussed the facts and holdings in *Gorman v. Holte (1985) 164 Cal. App. 3d 984, 211 Cal. Rptr. 34* , and *Varwig v. Leider (1985) 171 Cal. App. 3d 312, 217 Cal. Rptr. 208* (both *discussed under § 90.88[3][a]*), concluded that *Gorman* presented the better rule, and rejected the reasoning of *Varwig* (*220 Cal. App. 3d 840, 843-844)* . The court believed the case came within the "futile" exception enunciated in *Code Civ. Proc. § 583.340(c)* in that, during the time between the agreement to settle and the final execution of the settlement by all the interested parties, it would have been "futile" to bring the action to trial because all the issues had been resolved through settlement (*220 Cal. App. 3d 840, 844-845)* . The court added that if it viewed the issue presented as one of fact, it would be whether the settlement agreement constituted an implied waiver or extension of the five-year statute. The court said that in that event the standard of review would be whether the trial court's interpretation was supported by substantial evidence, and in view of the fact that the settlement agreement vested continued jurisdiction in the court to supervise compliance with its terms, it concurred in the trial court's implied finding that the parties impliedly waived their rights under the dismissal statute (*220 Cal. App. 3d 840, 845)* .

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§ 90.89 Opposing Motion for Mandatory Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.310, 583.320, 583.360]--Time for Bringing Action to Trial or New Trial Tolled by Statutory Exclusion--Court's Jurisdiction to Try Action Was Suspended [Code Civ. Proc. § 583.340(a)]

[1] FORM

[*Caption. See § 90.86.*]

DEFENDANT'S MOTION TO DISMISS SHOULD BE DENIED BECAUSE THE TIME DURING WHICH THE COURT'S JURISDICTION TO TRY THE ACTION WAS SUSPENDED MUST BE EXCLUDED FROM THE PERIOD WITHIN WHICH THE ACTION HAD TO BE BROUGHT TO _____ [TRIAL *or* A NEW TRIAL].

A. Jurisdiction Suspended. In computing the time within which an action must be brought to _____ [trial *or* a new trial] pursuant to *Code of Civil Procedure Section 583.310 et seq.*, the time during which the court's jurisdiction to try the action was suspended must be excluded (*Code Civ. Proc. § 583.340(a)*; *see Ocean Services Corp. v. Ventura Port Dist. (1993) 15 Cal. App. 4th 1762, 1774, 19 Cal. Rptr. 2d 750* ; *Schwenke v. J & P Scott, Inc. (1988) 205 Cal. App. 3d 71, 77-78, 252 Cal. Rptr. 91*).

B. Period of Excuse Excluded Regardless of Time Remaining. [*See § 90.92, Paragraph M.*]

[*Optional*] **C. Reasonable Diligence Is Not Required Under *Code of Civil Procedure Section 583.340(a)*.** Lack of jurisdiction is an express statutory exception to the five-year bar, separate and distinct from exceptions based on impossibility or impracticability. When lack of jurisdiction is asserted, plaintiff's diligence, or lack thereof, has no place in the analysis (*see Ocean Services Corp. v. Ventura Port Dist. (1993) 15 Cal. App. 4th 1762, 1774, 19 Cal. Rptr. 2d 750* ; *Schwenke v. J & P Scott, Inc. (1988) 205 Cal. App. 3d 71, 77-78, 252 Cal. Rptr. 91* (citing *Code Civ. Proc. § 583.340(a)* and former Code Civ. Proc. § 583(f)).

[*Optional*] **D. Tolling or Extension of Time Resulting in Less Than Six Months to Bring Action.** [*See § 90.87,*

Paragraph E.]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be used by a plaintiff to oppose a motion for mandatory dismissal of an action for failure to bring it to trial or retrial within the applicable period specified in *Code Civ. Proc. § 583.310* or *583.320* [*see Code Civ. Proc. § 583.360*]. The ground for opposition is that the time during which the court's jurisdiction to try the action is suspended must be excluded when calculating the applicable time period [*see Code Civ. Proc. § 583.340(a)*].

Optional Paragraph C is for use if the defendant contends that plaintiff failed to exercise diligence during that time period in which the court's jurisdiction was suspended.

Optional Paragraph D is for use when less than six months remained to bring the action to trial at the time the claimed suspension ended.

In an appropriate case, these points and authorities may be combined with additional points and authorities setting forth further grounds in opposition to a motion for mandatory dismissal for failure to bring an action to trial or new trial within the mandatory period [*see §§ 90.86, 90.87, 90.90 -90.96*].

These points and authorities may be submitted in opposition to a motion for mandatory dismissal supported by the general points and authorities *set out in § 90.80*. They may also be adapted for use in opposing a motion for discretionary dismissal [*see § 90.98*]. The principles applicable in determining whether the discretionary period has lapsed are the same as those applicable in determining whether the mandatory period has lapsed [*see Code Civ. Proc. § 583.420(b)*].

This memorandum opposes a defendant's motion for dismissal of the complaint, and should be modified as necessary when it is used in another context, such as in opposition to a motion for dismissal of a cross complaint [*see Code Civ. Proc. § 583.110(a), (b), (d), (e)*].

Counsel should insert argument in the form, showing a relationship between the facts of the case and the points of law stated. For example, plaintiff should state what caused the court's jurisdiction to be suspended, and the duration of the suspension in relation to the time periods for bringing the action to an original or new trial.

[b] Effect of Authority Decided Under Former Dismissal Statutes

In 1984, the provisions for involuntary dismissal for delay in bringing an action to trial or new trial, former Code Civ. Proc. § 583(b)-(d), were repealed and replaced by *Code Civ. Proc. §§ 583.310-583.360*. Decisions interpreting the former statute have been cited in the form as persuasive rather than controlling authority to the extent that the revised statutes codify former case law or continue former substantive principles.

[c] Related Pleading and Practice Forms

For forms of a notice of motion and order relating to a motion to dismiss an action pursuant to Code Civ. Proc. §§ 583.360 and 583.410, see Ch. 212, *Dismissal* in California Forms of Pleading and Practice.

[3] Discussion of Authorities

[a] Jurisdiction Suspended

While ***Ocean Services Corp. v. Ventura Port Dist.*** *(1993) 15 Cal. App. 4th 1762, 19 Cal. Rptr. 2d 750* , was pending, defendant filed a related action to disqualify plaintiff's trial counsel and obtained a preliminary injunction enjoining counsel from representing plaintiff. Counsel appealed the order and obtained a writ of supersedeas staying the instant action. Counsel prevailed in the related action and judgment was entered in his favor. The stay in the instant action was later vacated. One year later, defendant moved to dismiss the action on the ground that the case had not been brought to trial within the mandatory five-year time period under *Code Civ. Proc. § 583.310*. The trial court denied the motion because the statute was tolled during the stay order. Judgment was entered in plaintiff's favor after trial, and defendant appealed.

The court of appeal affirmed, finding, among other things, that the court lacked jurisdiction to try the action during the period of time in which the case was stayed (*15 Cal. App. 4th 1762, 1774)* . Following *Schwenke v. J & P Scott, Inc. (1988) 205 Cal. App. 3d 71, 77-78, 252 Cal. Rptr. 91* , the court found that *Code Civ. Proc. § 583.340(a)* provides an express exception to the five-year dismissal period and thus, plaintiff's diligence, or lack thereof is irrelevant when computing the tolling period (*15 Cal. App. 4th 1762, 1774)* . Therefore, the trial court did not abuse its discretion in denying the motion to dismiss.

In ***Schwenke v. J & P Scott, Inc.*** *(1988) 205 Cal. App. 3d 71, 252 Cal. Rptr. 91* , the plaintiff filed a verified complaint in municipal court and six months later, the defendants filed an unverified cross-complaint seeking damages in excess of the municipal court's jurisdiction. Approximately six months later, the defendants filed a motion to transfer the action tosuperior court on the ground that the amount in controversy exceeded the municipal court's jurisdictional limits. The matter was transferred to the superior court approximately two months later. Following an arbitration award, plaintiff filed a trial de novo request and later requested that the case be ordered off the court's active calendar. For two and one-half years, there was no activity on the case until plaintiff moved to restore it to the trial calendar. Three months later, the court granted defendant's motion to dismiss under *Code Civ. Proc. § 583.310*, and five years and six months after the complaint was filed, the judgment of dismissal was entered. Plaintiff appealed.

The court of appeal affirmed. On appeal, plaintiff argued that the jurisdiction was suspended under *Code Civ. Proc. § 396* from the date the unverified cross-complaint was filed until the time when the action was transferred and refiled in superior court. Thus, eight and one-half months would have been excluded from the calculation of the five-year period under the tolling provision of *Code Civ. Proc. § 583.340(a)*, and the motion to dismiss filed five years and six months from the time the complaint was filed was premature (*205 Cal. App. 3d 71, 75)* . The court noted that plaintiff's diligence "has no place in the analysis" when computing the tolling period, finding that *Code Civ. Proc. § 583.340(a)* provides an express exception to the five-year dismissal rule (*205 Cal. App. 3d 71, 77-78)* . However, the court pointed out that jurisdiction is suspended under *Code Civ. Proc. § 396* only when it appears that determination of the action will necessarily involve questions not within the court's jurisdiction. The court then held that jurisdiction was not suspended from the date the cross complaint was filed, but only from the date of the hearing on the motion to transfer, because the unverified cross-complaint was insufficient alone to make it appear that the action would necessarily involve questions not within the court's jurisdiction (*205 Cal. App. 3d 71, 78)* . Thus, the court affirmed the judgment of dismissal, because calculating the period jurisdiction was stayed on that basis, the motion to dismiss was not premature.

[b] Reasonable Diligence Is Not Required Under Code of Civil Procedure Section 583.340(a)

Ocean Services Corp. v. Ventura Port Dist. *(1993) 15 Cal. App. 4th 1762, 19 Cal. Rptr. 2d 750* , is *discussed under §*

90.89[3][a].

Schwenke v. J & P Scott, Inc. *(1988) 205 Cal. App. 3d 71, 252 Cal. Rptr. 91* , is *discussed under § 90.89[3][a]*.

[4] Additional Authorities

[a] Jurisdiction Suspended

In *Bergin v. Portman (1983) 141 Cal. App. 3d 23, 190 Cal. Rptr. 81* , defendant successfully appealed summary judgment entered in plaintiff's favor. Following the remittitur, the case was set for trial and the defendant moved to vacate the trial date and dismiss the action, contending that plaintiffs had failed to bring it to trial as required, either under former Code Civ. Proc. § 583(b) [*now see Code Civ. Proc. §§ 583.310, 583.360*] (within five years after the complaint was filed), or under former Code Civ. Proc. § 583(c) [*now see Code Civ. Proc. §§ 583.320(a)(3), 583.360*] (within three years after the remittitur was filed in the trial court following reversal of the summary judgment). The trial court granted the motion under former Code Civ. Proc. § 583(c) and plaintiff appealed.

The court of appeal reversed the dismissal, holding that the statutory period for bringing the action to trial did not include the time of defendant's appeal from the summary judgment since the trial court's jurisdiction was suspended. Therefore, the period in excess of one year when the cause was before the court of appeal could not be counted against the overall five-year period of former Code Civ. Proc. § 583(b).

The facts and procedural background of *Christin v. Superior Court (1937) 9 Cal. 2d 526, 71 P.2d 205* , are discussed in *§ 90.91[3][a]*. In *Christin,* the Supreme Court specifically stated that impossibility applies as an exception to the dismissal requirement when the trial court loses jurisdiction in the sense that it is divested of its power to act, as by an appeal or dismissal (*9 Cal. 2d 526, 530-531)* .

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2. Dismissal For Failure To Bring Action To Trial Or New Trial

9-90 California Points & Authorities § 90.90

§ 90.90 Opposing Motion for Mandatory Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.310, 583.320, 583.360]--Time for Bringing Action to Trial or New Trial Tolled by Statutory Exclusion--Prosecution or Trial of Action Was Stayed or Enjoined [Code Civ. Proc. § 583.340(b)]

[1] FORM

[*Caption. See § 90.86.*]

DEFENDANT'S MOTION TO DISMISS SHOULD BE DENIED BECAUSE THE TIME DURING WHICH PROSECUTION OR TRIAL OF THE ACTION WAS STAYED OR ENJOINED MUST BE EXCLUDED FROM THE PERIOD WITHIN WHICH THE ACTION HAD TO BE BROUGHT TO _____ [TRIAL *or* A NEW TRIAL].

A. Prosecution or Trial Stayed or Enjoined. In computing the time within which an action must be brought to _____ [trial *or* a new trial] pursuant to *Code of Civil Procedure Section 583.310 et seq.*, the time during which prosecution or trial of the action wasstayed or enjoined must be excluded (*Code Civ. Proc. § 583.340(b)*; *see Bruns v. E-Commerce Exchange, Inc. (2009) 172 Cal. App. 4th 488, 498-502, 90 Cal. Rptr. 3d 889* ; *Ocean Services Corp. v. Ventura Port Dist. (1993) 15 Cal. App. 4th 1762, 1774, 19 Cal. Rptr. 2d 750* ; *Brock v. Kaiser Foundation Hospitals (1992) 10 Cal. App. 4th 1790, 1797-1801, 13 Cal. Rptr. 2d 678*).

[*Optional*] **B. Reasonable Diligence Is Not Required Under *Code of Civil Procedure Section 583.340(b)*.** *Code of Civil Procedure Section 583.340(b)* is unconditional and is intended to have uniform application. "This is consistent with the treatment given other statutory excuses; it increases certainty and minimizes the need for a judicial hearing to ascertain whether or not the statutory period has run" (*Ocean Services Corp. v. Ventura Port Dist. (1993) 15 Cal. App. 4th 1762, 1774, 19 Cal. Rptr. 2d 750* , *quoting* 17 Cal. Law Revision Com. Rep. (Jan. 1984) p. 919). Tolling is automatic and not subject to a reasonable diligence restriction (*Ocean Services Corp. v. Ventura Port Dist. (1993) 15 Cal. App. 4th 1762, 1774, 19 Cal. Rptr. 2d 750* ; *Brock v. Kaiser Foundation Hospitals (1992) 10 Cal. App. 4th 1790, 1798-1799, 13 Cal. Rptr. 2d 678*).

[*Optional*] **C. "Continuance" Having Legal Effect of "Stay."** If the trial court granted a continuance which has the legal effect of a stay, it should be treated as a "stay" within the meaning of *Code of Civil Procedure Section 583.340(b)*. The term "stay," as used in *Code of Civil Procedure Section 583.340*, is commonly understood as meaning an indefinite postponement of an act or the operation of some consequence, pending the occurrence of a designated event; that is, a stay is a temporary suspension of a procedure in a case pending the happening of a defined contingency. Therefore, if the court's order was not merely a postponement of the trial of a pending action to a later date, then it should have the legal effect of a "stay" of the action, even though the court used the term "continuance" (*Holland v. Dave Altman's R. V. Center (1990) 222 Cal. App. 3d 477, 482, 271 Cal. Rptr. 706*).

[*Optional*] **D. Period of Excuse Excluded Regardless of Time Remaining.** [*See § 90.92, Paragraph M.*]

[*Optional*] **E. Tolling or Extension of Time Resulting in Less Than Six Months to Bring Action.** [*See § 90.87, Paragraph E.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be used by a plaintiff to oppose a motion for mandatory dismissal of an action for failure to bring an action to trial or retrial within the applicable period specified in *Code Civ. Proc. § 583.310* or *583.320* [*see Code Civ. Proc. § 583.360*]. The ground for opposition is that the time during which prosecution or trial of the action is stayed or enjoined must be excluded when calculating the applicable time period [*see Code Civ. Proc. § 583.340(b)*].

Optional Paragraph B is for use if the defendant contends that plaintiff failed to exercise diligence during the time period in which the action was stayed. Optional Paragraph C is for use when there is an issue whether a stay, as opposed to a continuance, was granted. Optional Paragraph D is for use if, without excluding the period of the stay, there was sufficient time remaining after termination of the stay in which to bring the action to trial. Optional Paragraph E is for use when less than six months remained to bring the action to trial at the time the claimed stay or injunction ended.

In an appropriate case, these points and authorities may be combined with additional points and authorities setting forth further grounds in opposition to a motion for mandatory dismissal for failure to bring an action to trial or new trial within the mandatory period [*see §§ 90.86 -90.96*].

These points and authorities may be submitted in opposition to a motion for mandatory dismissal supported by the general points and authorities *set out in § 90.80*. They may, in addition, be adapted for use in opposing a motion for discretionary dismissal [*see § 90.98*]. The principles applicable in determining whether the discretionary period has lapsed are the same as those applicable in determining whether the mandatory period has lapsed [*see Code Civ. Proc. § 583.420(b)*].

This memorandum opposes a defendant's motion for dismissal of the complaint, and should be modified as necessary when it is used in another context, such as in opposition to a motion for dismissal of a cross complaint [*see Code Civ. Proc. § 583.110(a), (b), (d), (e)*].

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, if counsel claims that the action was stayed by a court order, counsel should set out the terms of the order and the dates during which prosecution of the action was stayed and relate those dates to the statutory time periods for bringing the action to trial or new trial.

[b] Effect of Authority Decided Under Former Dismissal Statutes

In 1984, the provisions for involuntary dismissal for delay in bringing an action to trial or new trial, former Code Civ. Proc. § 583(b)-(d), were repealed and replaced by *Code Civ. Proc. §§ 583.310-583.360*. Decisions interpreting the former statute have been cited in the form as persuasive rather than controlling authority to the extent that the revised statutes codify former case law or continue former substantive principles.

[c] Stay of Action Submitted to Arbitration

[i] Contractual Arbitration

If an action is subject to a written arbitration agreement and the court has issued an order compelling arbitration, a party may obtain a stay of the action until the contractual arbitration is completed. The party seeking resolution through contractual arbitration must file a motion to stay the action at law; it will not be stayed automatically [*see Code Civ. Proc. §§ 1281.2, 1281.4*; *Brock v. Kaiser Foundation Hospitals (1992) 10 Cal. App. 4th 1790, 1796, 13 Cal. Rptr. 2d 678* ; *see also § 90.05[2][c]*]. For forms relating to dismissal for delay in prosecuting an action submitted to contractual arbitration, see Ch. 20, *Arbitration: Compelling* .

[ii] Judicial Arbitration

Submission of an action to judicial arbitration does not suspend the running of the dismissal statutes, except as provided in *Code Civ. Proc. § 1141.17*, although circumstances relating to judicial arbitration may result in post-arbitration tolling [*see Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 434-435, 437-438, 41 Cal. Rptr. 2d 362, 895 P.2d 469]* . For a form of points and authorities opposing dismissal based on those exceptions, see *§ 90.96*. For a form supporting dismissal of an action submitted to judicial arbitration for delay in the arbitration, see *§ 90.84*.

[d] Related Pleading and Practice Forms

For forms of a notice of motion and order relating to a motion to dismiss an action pursuant to Code Civ. Proc. §§ 583.360 and 583.410, see ch. 212, *Dismissal* , in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Prosecution or Trial Stayed or Enjoined

Bruns v. E-Commerce Exchange, Inc. *(2009) 172 Cal. App. 4th 488, 90 Cal. Rptr. 3d 889* was a class action against defendants for allegedly sending unsolicited advertisements to facsimile machines in violation of federal law. Plaintiff filed the original action in 2000, and there were numerous subsequent amendments, a petition for coordination and a transfer to a different county. Additionally, the trial court imposed a discovery stay shortly after plaintiff filed the action. Two years later, the entire action was stayed for over a year pending resolution of an appeal in a separate action. The courts imposed various other stays during the course of the litigation as well. Approximately six and one-half years after plaintiff filed her original complaint, one of the defendants moved to dismiss the action pursuant to *Code Civ. Proc. §§ 583.310* and *583.360(b)* on the ground that plaintiff had failed to bring the action to trial within five years. The court granted the motion, excluding from the five-year period several of the periods of time during which the action was stayed. Plaintiff appealed.

The court of appeals reversed. *Code Civ. Proc. § 583.360(b)* provides that in computing the time within which an action must be brought to trial, certain periods of time are to be excluded, including any time during which the court's jurisdiction was suspended, prosecution or trial of the action was stayed or enjoined and bringing the action to trial was impossible, impracticable or futile. The court agreed with plaintiff that a discovery stay constitutes a stay of the prosecution of the action within the meaning of the statute. Based on the numerous discovery stays in place at various times throughout the litigation, the trial court should have extended plaintiff's time for bringing the action to trial (*172 Cal. App. 4th 488, 498-502)* .

The facts and procedural background of ***Ocean Services Corp. v. Ventura Port Dist.*** *(1993) 15 Cal. App. 4th 1762, 19 Cal. Rptr. 2d 750* , are discussed in *§ 90.89[3][a]*.

In affirming judgment for plaintiff that was entered after denial of defendant's motion to dismiss for delay, the court of appeal rejected defendant's argument that the stay could have been vacated six months earlier but for plaintiff's lack of diligence. The court noted that *Code Civ. Proc. § 583.340(b)* provides that the five-year period "shall be" tolled if "[p]rosecution or trial of the action was stayed or enjoined." This language rendered the statute "unconditional," which the court found to be consistent with the treatment given other statutory excuses by increasing certainty, minimizing the need for a judicial hearing to ascertain whether or not the statutory period has run and upholding the general policy favoring trial over dismissal (*15 Cal. App. 4th 1762, 1774)* . Moreover, the court held that the trial court had no statutory duty to shorten the tolling period because counsel could have been more diligent in dismissing his appeal in the related action and vacating the stay order (*15 Cal. App. 4th 1762, 1774)* . Citing *Brock v. Kaiser Foundation Hospitals (1992) 10 Cal. App. 4th 1790, 13 Cal. Rptr. 2d 678* , *below* and *Schwenke v. J & P Scott, Inc. (1988) 205 Cal. App. 3d 71, 252 Cal. Rptr. 91* , discussed in *§ 90.89[3][a]*, the court held that tolling is automatic and reasonable diligence is not required (*15 Cal. App. 4th 1762, 1774-1775)* . Therefore, the court found no abuse of discretion in the trial court's denial of the motion to dismiss.

Brock v. Kaiser Foundation Hospitals *(1992) 10 Cal. App. 4th 1790, 13 Cal. Rptr. 2d 678* , was a medical malpractice action in which the parties entered into a stipulation for mandatory binding arbitration pursuant to contract and agreed the action at law was to be stayed pending completion of the arbitration proceedings. The court entered an order enforcing the stipulation by submitting the dispute to arbitration and by staying the action at law. Approximately five years later, the plaintiffs moved to compel certain discovery and the defendants responded with a motion to dismiss both the action at law and the arbitration proceedings on the ground that more than five years had elapsed since the complaint had been filed and the matter ordered to arbitration. The court granted the motion and entered judgment dismissing both the complaint and the arbitration proceedings.

The court of appeal reversed, relying on *Code Civ. Proc. § 583.340(b)*. It noted that the stay exception was an offshoot of the catchall impossible/impracticable/futile doctrine developed in common law before enactment of Section 583.340 in 1984 (*10 Cal. App. 4th 1790, 1797, n.4*). For example, in *Marcus v. Superior Court (1977) 75 Cal. App. 3d 204, 212-213,141 Cal. Rptr. 890* , the court held that in determining whether the five-year period has expired, the time during which it is impossible or impracticable to proceed to trial must be excluded and that while a stay order is in effect, it is impossible or impracticable to proceed to trial. This common law stay exception was then codified in *Code Civ. Proc. § 583.340(b)* separately from the catchall exception of *Code Civ. Proc. § 583.340(c)* (*10 Cal. App. 4th 1790, 1797, n.4*).

The court followed the reasoning of *Byerly v. Sale (1988) 204 Cal. App. 3d 1312, 251 Cal. Rptr. 749* , *discussed under § 90.90[4][a]*, in which the court concluded that because a stay pending arbitration had been in effect for almost the entire action at law, it was impossible for the plaintiff to proceed (*10 Cal. App. 4th 1790, 1797)* . Likewise, here, the legal action was stayed during the arbitration proceedings and thus, the time during that stay should have been excluded, pursuant to *Code Civ. Proc. § 583.340(b)*, for purposes of calculating the five-year period (*10 Cal. App. 4th 1790, 1801)* . The court reviewed cases involving dismissal of cases while submitted to contractual arbitration, and rejected those that failed to distinguish between a stayed civil action and the related arbitration or that improperly analogized contractual arbitration to judicial arbitration (*10 Cal. App. 4th 1790, 1797-1801)* . Thus, the trial court erred in

dismissing the action for delay in prosecution under the mandatory five-year dismissal statute (*10 Cal. App. 4th 1790, 1801)* .

For forms relating to dismissal for delay in prosecuting an action submitted to contractual arbitration, see Ch. 20, *Arbitration: Compelling* .

[b] Reasonable Diligence Is Not Required Under Code of Civil Procedure Section 583.340(a)

Ocean Services Corp. v. Ventura Port Dist. *(1993) 15 Cal. App. 4th 1762, 19 Cal. Rptr. 2d 750* , is *discussed under § 90.90[3][a]*.

Brock v. Kaiser Foundation Hospitals *(1992) 10 Cal. App. 4th 1790, 13 Cal. Rptr. 2d 678* , is *discussed under § 90.90[3][a]*.

[c] "Continuance" Having Legal Effect of "Stay"

Holland v. Dave Altman's R. V. Center *(1990) 222 Cal. App. 3d 477, 271 Cal. Rptr. 706* , was a personal injury action arising out of a two-vehicle accident, in which substituted service on the nonresident defendant driver was quashed, and plaintiff appealed. The court granted plaintiff's ex parte motion for a "continuance" pending the appeal; at that time there remained one year, four months, and fourteen days of the five-year period. About three weeks after the trial court granted the motion, it placed the case "off calendar pending ruling on appeal" with mandatory settlement conference and trial "to be reset ... after ruling of appellate court." Subsequently, the appellate court affirmed the order quashing service. The defendants moved to dismiss the action for failure to bring it to trial within five years after the complaint was filed, and the motion was granted. Plaintiff appealed, and the court of appeal reversed. The court found that, although the trial court utilized the term "continuance," the order had the legal effect of a stay of the action pending the appeal (*222 Cal. App. 3d 477, 482)* . It explained that the term "stay" appears to have a commonly understood meaning as an indefinite postponement of an act or the operation of some consequence, pending the occurrence of a designated event; that is, a stay is a temporary suspension of a procedure in a case until the happening of a defined contingency. By contrast, a continuance is a postponement of the trial of a pending action to a later date, at which time it automatically resumes (*222 Cal. App. 3d 477, 482)* . The court also noted that it was plain from the trial court's order that the trial court did not intend to postpone trial to any known date, but, rather, it put the trial over indefinitely, until the happening of a designated event, namely, the determination of the appeal. Therefore, the court concluded that the trial was stayed while the order to quash was on appeal, and that by excluding that time from computation of the five-year period, the action was prematurely dismissed (*222 Cal. App. 3d 477, 483)* .

[4] Additional Authorities

[a] Prosecution or Trial Stayed or Enjoined

In *Gordon's Cabinet Shop v. State Comp. Ins. Fund (1999) 74 Cal. App. 4th 33, 87 Cal. Rptr. 2d 541* , plaintiff appealed after the trial court dismissed its action for failure to bring it to trial within five years. Plaintiff contended that the five-year period was tolled while defendant's coordination petition was pending. The court of appeal affirmed (*74 Cal. App. 4th 33, 40)* . In so doing, the court noted that Cal. Rules of Ct., Rule 1510 et seq. (now see *Cal. Rules of Ct., Rule 3.510 et seq.*) deal with procedure concerning coordination proceedings. Cal. Rules of Ct., Rule 1514(f) [*see now Cal. Rules of Ct., Rule 3.515(j)*] provides that the time during which any stay of proceeding is in effect under the California Rules of Court on coordination procedure is not included in determining whether the action stayed should be dismissed for lack of prosecution under *Code Civ. Proc. § 583.110 et seq.* Thus, in the Rule concerning stay orders for coordination proceedings, express provision is made to toll the five year statute when a stay is granted. By implication, no tolling should be imputed to coordination proceedings unless a stay is granted. Accordingly, only that time when a stay has been actually granted is excluded from the time in which a case must be brought to trial. Because no stay was granted in the coordination proceeding, the coordination petition did not operate to toll the five-year dismissal statute (

74 Cal. App. 4th 33, 40-41) .

In *Rose v. Scott (1991) 233 Cal. App. 3d 537, 284 Cal. Rptr. 487* , plaintiffs alleged causes of action for fraud in the sale of real property,emotional distress and breach of an indemnity contract. Defendants moved to continue the trial setting conference because a related matter was pending before the City of Berkeley Rent Stabilization Board which would have a direct bearing on the case. The court granted the motion and continued the conference, subject to a motion for further continuance if the administrative matter had not become final. After the conference was continued a second time, a trial date was set. Additional delays were caused by motions made by both parties and the lack of an available courtroom. Ultimately, the court dismissed the action on its own motion.

Reversing, the court of appeal found, among other things, that the proceedings were properly stayed due to the administrative action and the time of the stay must be excluded in calculating the five-year limitation period, pursuant to *Code Civ. Proc. § 583.340(b)*. The court rejected as specious defendants' argument that if the plaintiffs had not opposed the initial motion for continuance of the trial setting conference, the initial trial date would have been set for an earlier date (*233 Cal. App. 3d 537, 541)* . The court also held that periods of delay caused by defendants and by courtroom unavailability, should have been excluded from the computation of the five-year period so that the dismissal was premature (*233 Cal. App. 3d 537, 541-542)* .

In *Byerly v. Sale (1988) 204 Cal App. 3d 1312, 251 Cal. Rptr. 749* , the defendant successfully moved to compel arbitration pursuant to the parties' contract and to stay the civil action for medical malpractice under *Code Civ. Proc. §§ 1281.2, 1281.4*. Defendant's motion to dismiss on the ground that arbitration was not completed within five years of the filing of the civil action was granted. The court of appeal reversed, holding that it was impossible to bring the action to trial under the court's stay pending arbitration under *Code Civ. Proc. § 583.340(b), (c)* (*204 Cal. App. 3d 1312, 1314)* . Under the court's view, dismissal of a previously stayed complaint had no effect on the pending arbitration; on this point the court disagreed with a contrary holding in *Preston v. Kaiser Foundation Hospitals (1981) 126 Cal. App. 3d 402, 406, 178 Cal. Rptr. 882* (*204 Cal. App. 3d 1312, 1316 n.3*). For forms relating to dismissal for delay in prosecuting an action submitted to contractual arbitration, see Ch. 20, *Arbitration: Compelling* .

In *Rosenthal v. Wilner (1988) 197 Cal. App. 3d 1327, 243 Cal. Rptr. 472* , plaintiffs brought a malpractice action against counsel who had defended them in a prior action. Plaintiffs meanwhile pursued an appeal in the prior action. Forty-one days before the expiration of the five-year period for bringing the action to trial, the trial court ordered the action stayed "pending resolution of the ... appeal" of the prior action. On appeal of the prior action, the court of appeal affirmed the judgment and issued a remittitur following the denial of petitions for rehearing in the court of appeal and review in the California Supreme Court. Plaintiffs, as appellants in the prior action, then filed a petition for writ of certiorari in the United States Supreme Court. While that petition was still pending in the prior action, defendants moved for dismissal of the malpractice action on the ground that the stay had ended on issuance of the remittitur, and plaintiffs had thereafter failed to bring the action to trial within six months after the end of the stay, as required under *Code Civ. Proc. § 583.350*. The trial court dismissed the action accordingly, but the court of appeal reversed and remanded on appeal by plaintiffs. The court held that, because the stay was issued "pending resolution of the ... appeal" in another action, it continued until all avenues of judicial review of that action had been exhausted, including review by the United States Supreme Court (*197 Cal. App. 3d 1327, 1333-1334)* .

In *Hughes v. Portsmouth Square, Inc. (1982) 135 Cal. App. 3d 170, 184 Cal. Rptr. 926* , the trial court dismissed plaintiff's action for breach of contract. Plaintiff appealed. The court of appeal reversed the dismissal. The court held that since defendant was involved in bankruptcy proceedings in federal court, the filing of a petition in bankruptcy under Fed. R. Bankr. P., Rule 401(a), operated as a stay on the commencement or continuation of any action against the bankrupt person. Consequently, the court held that since it was an impossibility for plaintiff to commence action against defendant during the period of time it was involved in the bankruptcy proceedings, the trial court abused its discretion in dismissing the action (*135 Cal. App. 3d 170, 172-173)* .

Note

that the Bankruptcy Act provides that the commencement or continuation of any legal proceeding *against the debtor* is automatically stayed by the filing of a petition in bankruptcy. Thus it is inapplicable to toll the time within which a debtor-plaintiff has to serve a summons and complaint under the discretionary dismissal statutes [*see Lauriton v. Carnation Co. (1989) 215 Cal. App. 3d 161, 164, 263 Cal. Rptr. 476* (discussed in *§ 90.99[3*][i]); *Danielson v. ITT Industrial Credit Co. (1988) 199 Cal. App. 3d 645, 652-653, 245 Cal. Rptr. 126* (discussed in *§ 90.98[4][a]*)].

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California Points & Authorities

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Volume 9 Chapters 90-99 DISMISSAL---to---EMINENT DOMAIN
CHAPTER 90 DISMISSAL
PART II. FORMS
B. Involuntary Dismissal
2. Dismissal For Failure To Bring Action To Trial Or New Trial

9-90 California Points & Authorities § 90.91

§ 90.91 Opposing Motion for Mandatory Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.310, 583.320, 583.360]--Time for Bringing Action to Trial or New Trial Tolled by Statutory Exclusion--Bringing Action to Trial Was Impossible [Code Civ. Proc. § 583.340(c)]

[1] FORM

[*Caption. See § 90.86.*]

THE COURT SHOULD DENY DEFENDANT'S MOTION TO DISMISS THIS ACTION BECAUSE THE TIME DURING WHICH IT WASIMPOSSIBLE FOR PLAINTIFF TO COMPLY WITH THE REQUIREMENTS OF SECTION _____ [583.310 *or* 583.320 OF THE CODE OF CIVIL PROCEDURE] SHOULD BE EXCLUDED FROM THE CALCULATION OF THE PERIOD(S) SPECIFIED IN THAT SECTION.

A. Failure to Comply Excused by Impossibility. The time during which it is impossible for a plaintiff to bring an action to _____ [trial *or* a new trial] is excluded from the calculation of any period specified in section _____ [583.310 *or 583.320 of the Code of Civil Procedure*] (*Code Civ. Proc. § 583.340(c)*; *see Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 434-435, 41 Cal. Rptr. 2d 362, 895 P.2d 469* ; *Christin v. Superior Court (1937) 9 Cal. 2d 526, 532-533, 71 P.2d 205*).

B. Impossibility Defined. It is impossible to bring an action to _____ [trial *or* a new trial] when, as a matter of law or fact, _____ [trial *or* a new trial] is either legally or factually not possible (*Christin v. Superior Court (1937) 9 Cal. 2d 526, 531-533, 71 P.2d 205*). Impossibility is determined in light of all circumstances in the case (*Monzon v. Schaefer Ambulance Service, Inc. (1990) 224 Cal. App. 3d 16, 28, 273 Cal. Rptr. 615*).

[*Optional*] **C. Extraordinary Delay.** The time during which it is not possible for plaintiff, in spite of diligence, to bring an action to _____ [trial *or* a new trial] because of extraordinary delay in a court proceeding is excluded from calculation of any period specified in section _____ [583.310 *or 583.320 of the Code of Civil Procedure*] (*see Bennett v. Bennett Cement Contractors, Inc. (1981) 125 Cal. App. 3d 673, 676-677, 178*

Cal. Rptr. 633 ; *Brown v. Engstrom (1979) 89 Cal. App. 3d 513, 524, 152 Cal. Rptr. 628* ; *Goers v. Superior Court (1976) 57 Cal. App. 3d 72, 74-75, 129 Cal. Rptr. 29*).

[*Optional*] **D. Default.** There are some circumstances in which tolling for impossibility, impracticability, or futility almost invariably applies. Such is the case when a default judgment has been entered in plaintiff's favor, effectively bringing the litigation to a standstill (*Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 437-438, 41 Cal. Rptr. 2d 362, 895 P.2d 469* ; *Maguire v. Collier (1975) 49 Cal. App. 3d 309, 313, 122 Cal. Rptr. 510*). The period is tolled until the default judgment is vacated [or if it is vacated conditionally, until the condition is fulfilled] (*Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 437-438, 41 Cal. Rptr. 2d 362, 895 P.2d 469*). A reasonable period between the default and the entry of judgment is also tolled. [One week between default and entry of judgment is an indubitably reasonable period] (*Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 438, 41 Cal. Rptr. 2d 362, 895 P.2d 469*).

[*Optional*] **E. No Courtroom Available.** The time during which both parties are ready and no courtroom is available is excluded from calculation of any period specified in Section _____ [583.310 *or* 583.320] of the Code of Civil Procedure (*see* *Chin v. Meier (1991) 235 Cal. App. 3d 1473, 1478, 1 Cal. Rptr. 2d 499*).

F. Period of Excuse Excluded Regardless of Time Remaining. [*See § 90.92, Paragraph M.*]

[*Optional*] **G. Tolling or Extension of Time Resulting in Less Than Six Months to Bring Action.** [*See § 90.87, Paragraph F.*]

[*Optional*] **H. Application of *Code Civ. Proc. § 583.340(c)* After Judicial Arbitration.** Tolling due to a post-arbitration condition of impossibility, impracticability, or futility is controlled by *Code of Civil Procedure Section 583.340(c)*, not by *Code of Civil Procedure Section 1141.17* (*Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 434-435, 41 Cal. Rptr. 2d 362, 895 P.2d 469*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be used by a plaintiff to oppose a motion for mandatory dismissal of an action for failure to bring an action to trial or retrial within the applicable period specified in *Code Civ. Proc. § 583.310* or *583.320* [*see Code Civ. Proc. § 583.360*]. The ground for opposition is that the time during which it is impossible to bring the action to trial must be excluded when calculating the applicable time period [*see Code Civ. Proc. § 583.340(c)*], and that there has been no failure to bring the action to trial or new trial within the required time after taking this exclusion into account.

Optional Paragraphs C through E set forth particular situations that courts have held to constitute a period during which bringing the action to trial was impossible. Within Optional Paragraph D two optional clausesare provided in brackets. These clauses may be used when relevant. Optional Paragraph G is for use when less than six months remained to bring the action to trial at the time the claimed period of impossibility ended.

In an appropriate case, these points and authorities may be combined with additional points and authorities setting forth further grounds in opposition to a motion for mandatory dismissal for failure to bring an action to trial or new trial within the mandatory period [*see §§ 90.86 -90.90, 90.92 -90.96*].

The form may, in addition, be adapted for use in opposing a motion for discretionary dismissal [*see § 90.98*]. The principles applicable in determining whether the discretionary period has lapsed are the same as those applicable in determining whether the mandatory period has lapsed [*see Code Civ. Proc. § 583.420(b)*].

This memorandum opposes a defendant's motion for dismissal of the complaint, and should be modified as necessary when it is used in another context, such as in opposition to a motion for dismissal of a cross complaint [*see Code Civ. Proc. § 583.110(a), (b), (d), (e)*].

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

These points and authorities may be submitted in opposition to a motion for mandatory dismissal supported by the general points and authorities *set out in § 90.80*. The points and authorities *set out in § 90.99* may, in turn, be used in response to, or in anticipation of, the opposition set out in this form.

[b] Effect of Authority Decided Under Former Dismissal Statutes

In 1984, the provisions for involuntary dismissal for delay in bringing an action to trial or new trial, former Code Civ. Proc. § 583(b)-(d), were repealed and replaced by *Code Civ. Proc. §§ 583.310-583.360*. Before the 1984 enactment of *Code Civ. Proc. § 583.340(c)*, which codified impossibility as an express exception to the dismissal statute's time requirements, a similar exception had been implied by the courts [*see Christin v. Superior Court (1937) 9 Cal. 2d 526, 530, 71 P.2d 205]* . Decisions interpreting former Code Civ. Proc. § 583 have been cited in the form as persuasive rather than controlling authority to the extent that the revised statutes codify former case law or continue former substantive principles.

[c] Related Pleading and Practice Forms

For forms of a notice of motion and order relating to a motion to dismiss an action pursuant to Code Civ. Proc. § 583.360, see Ch. 212, *Dismissal* , in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Failure to Comply Excused by Impossibility

The facts and procedural background of ***Howard v. Thrifty Drug & Discount Stores*** *(1995) 10 Cal. 4th 424, 41 Cal. Rptr. 2d 362, 895 P.2d 469* , are discussed in *§ 90.97[3][a]*. In *Howard*, the California Supreme Court stated that the determination whether it was impossible, impracticable, or futile to bring a case to trial within a given time period is usually fact specific, depending on the obstacles faced by the plaintiff in prosecuting the action and the plaintiff's exercise of reasonable diligence in overcoming those obstacles (*10 Cal. 4th 424, 434-435)* . The Court then noted that there are some circumstances in which tolling for impossibility, impracticability, or futility almost invariably applies, as *discussed under § 90.91[3][d]*.

In ***Christin v. Superior Court*** *(1937) 9 Cal. 2d 526, 71 P.2d 205* , the trial court granted defendants' second motion for change of venue but its order was reversed on appeal. Later, defendants moved to dismiss the action on the ground that it had not been brought to trial within five years. The trial court denied the motion and defendants petitioned for a writ of prohibition to prevent the court from proceeding with trial.

The Supreme Court denied the writ. In its landmark explanation of the implied impossibility exception, the Court rejected plaintiff's contention that only the written stipulations provided for in former Code Civ. Proc. § 583 could suspend running of the period for bringing an action to trial. Despite the mandatory language of the statute, implied exceptions had been recognized when it was not possible to bring an action to trial (*9 Cal. 2d 526, 530)* . The period must be extended when, for all practical purposes, going to trial would be impossible, whether this is because of total lack of jurisdiction in the strict sense, or because proceeding to trial would be both impracticable and futile (*9 Cal. 2d 526, 533)* . The court described two forms of impossibility. One form exists when the court has lost jurisdiction in the sense that it is divested, as by an appeal or dismissal, of its power to act (*9 Cal. 2d 526, 530-531)* . The second form exists when it is not possible for the plaintiff to bring the cause to trial (*9 Cal. 2d 526, 531)* . Because the appeal from an order granting change of venue did not divest the trial court of the power to proceed, but trial was impossible since the records were absent, the second form of impossibility governed the case (*9 Cal. 2d 526, 531-532)* . In addition, proceeding to the trial would have been impracticable and futile, since the results would have been nullified if the order changing venue was found to be void. Therefore, the time consumed by appeal from the order changing venue was not counted as part of the five-year period (*9 Cal. 2d 526, 532)* .

[b] Impossibility Defined

Christin v. Superior Court *(1937) 9 Cal. 2d 526, 71 P.2d 205* , is *discussed under § 90.91[3][a]*.

In ***Monzon v. Schaefer Ambulance Service, Inc.*** *(1990) 224 Cal. App. 3d 16, 273 Cal. Rptr. 615* , the court of appeal held that, under the circumstances of the case, the trial court did not abuse its discretion in denying a motion to dismiss the case for failure to bring it to trial within the five-year period when the case was set for trial within that period but was postponed to a date beyond that period because of court congestion (lack of a courtroom) (*224 Cal. App. 3d 16, 26-29)* . The court explained that (1) under *Code Civ. Proc. § 583.310* an action shall be brought to trial within five years after the action is commenced against the defendant; (2) the five-year period is tolled under *Code Civ. Proc. § 583.340(c)* when it is impossible, impracticable, or futile to comply with it; (3) a trial court's ruling on a motion to dismiss under *Code Civ. Proc. § 583.310* will be disturbed only on a showing of manifest abuse of discretion; and (4) what is impossible, impractical, or futile must be interpreted liberally, consistent with the policy favoring trial on the merits (*224 Cal. App. 3d 16, 26)* . What is impossible, impractical, or futile must be determined in light of all the circumstances in the individual case, including the conduct of the parties and the nature of the proceedings themselves. The critical factor in applying these exceptions to a given factual situation is whether the plaintiff exercised reasonable diligence in prosecuting his or her case. Thus, whether an exception is applicable is generally a question of fact to be determined by the trial court under a totality of the circumstances test (*224 Cal. App. 3d 16, 28)* .

[c] Extraordinary Delay

Bennett v. Bennett Cement Contractors, Inc. *(1981) 125 Cal. App. 3d 673, 178 Cal. Rptr. 633* , involved consolidated actions on a shareholder's derivative claim and a claim for indemnity. Because of ordinary delays the case had not been brought to trial. When approximately 18 months remained before expiration of the statutory period for bringing the case to trial, plaintiff moved to advance the trial date. The motion was granted, and a trial date was set, approximately 15 months before expiration of the statutory period. The trial date was continued five times and finally set after the statutory period had expired. Defendant's counsel had sought the first continuance because of a scheduling conflict with his own vacation plans. The other four continuances were based on the court's motion, due to lack of an available judge and courtroom. Defendant moved to dismiss for failure to bring the case to trial within the statutory period, and the motion was granted. Plaintiff appealed.

The court of appeal reversed, applying the rule of *Goers v. Superior Court (1976) 57 Cal. App. 3d 72, 74-75, 129 Cal. Rptr. 29* (discussed *below*). The court stated that while the normal time of waiting for a trial date is not excluded from computing the statutory five-year period, the period represented by additional delay because of court congestion after a trial date well within the statutory period has been set should be excluded from calculation of the period. Here, plaintiff

had exercised reasonable diligence in moving for an advanced trial date when it appeared that the end of the five-year period was approaching, and had received a trial date well within the period. Subsequent delays were due to causes beyond plaintiff's control. The court concluded that dismissal under such circumstances was an abuse of discretion (*125 Cal. App. 3d 673, 677)* .

While the *Goers* opinion specifically addressed delays caused by court congestion, the *Bennett* court's holding also appears to exclude the period of delay caused by the first continuance on defendant's motion (*125 Cal. App. 3d 673, 678)* . For this reason, *Bennett* may broaden the *Goers* rule to cover periods of delay after setting of the original trial date that are beyond plaintiff's control.

The facts and procedural background of ***Brown v. Engstrom*** *(1979) 89 Cal. App. 3d 513, 152 Cal. Rptr. 628* , are discussed in *§ 90.80[4][a]*. In *Brown*, the court of appeal reversed the dismissal of an action for failure to bring it to trial within five years on the ground that it was impossible for trial to commence within that period (*89 Cal. App. 3d 513, 524)* . The parties stipulated to arbitration almost ten months prior to expiration of the five-year period. Once a stipulation for judicial arbitration is executed and filed, a party may not withdraw from the arbitration proceedings (*89 Cal. App. 3d 513, 523)* . Delays that are incidental to judicial procedure generally should be anticipated. The arbitration administrator over whom plaintiff had no control took an extraordinary amount of time and yet plaintiff was powerless to remove her case from arbitration and to proceed to trial (*89 Cal. App. 3d 513, 524)* .

In ***Goers v. Superior Court*** *(1976) 57 Cal. App. 3d 72, 129 Cal. Rptr. 29* , petitioner sought to prevent an anticipated dismissal of his cross complaint by a writ of mandate ordering the court to commence trial within the statutory five-year period, or, alternatively, a writ of prohibition restraining the court from dismissing the action. The facts showed that on the date set for trial, no courtrooms were available and the court rescheduled the trial to a date that was one day after expiration of the five-year period. Cross defendant's counsel waived dismissal for up to five days after expiration of the period. However, the parties were unable to go to trial on the date scheduled or two days hence for lack of a judge or courtroom. They were also informed that no judge or courtroom was likely to be available on the last day for which dismissal had been waived.

The court of appeal issued the writ of mandate on the ground that the five-year statutory period had been tolled during the period that petitioner could not go to trial because of court congestion (*57 Cal. App. 3d 72, 75)* .The court reasoned that although the normal time of waiting for a place on the calendar is not excluded from computing the five-year period, when the plaintiff has waited the normal time and shows diligence in obtaining a trial date well within the five-year period, but it becomes impossible to proceed to trial because of continued court congestion, the period of court congestion should not be chargeable to the five-year period (*57 Cal. App. 3d 72, 74-75)* .

[d] Default

The facts and procedural background of ***Howard v. Thrifty Drug & Discount Stores*** *(1995) 10 Cal. 4th 424, 41 Cal. Rptr. 2d 362, 895 P.2d 469* , are discussed in *§ 90.97[3][a]*.

In *Howard*, the California Supreme Court held that once a case is no longer submitted to arbitration, *Code Civ. Proc. § 1141.17* ceases to govern tolling of the time to bring the case to trial, and that *Code Civ. Proc. § 583.340(c)*applies to post-arbitration tolling for impossibility, impracticability, or futility (*10 Cal. 4th 424, 438)* . The Court noted that there are some circumstances in which tolling for impossibility, impracticability, or futility almost invariably applies, including the time between entry of a default judgment the day the judgment is vacated. Therefore, in the case before it, in which the defendant failed to timely request trial de novo after judicial arbitration, the period to bring the case to trial was tolled between the date judgment was entered on the arbitration award and the date that judgment was vacated (*10 Cal. 4th 424, 438)* . Moreover, because the order vacating the judgment was conditional on the defendant's payment of sanctions, the period was tolled until the defendant paid the sanctions, satisfying that condition (*10 Cal. 4th 424, 439)* .

The Court also held that a reasonable period between default and the entry of judgment is also tolled. Thus, the Court held that the time to bring the case to trial was tolled for the one week between the day the defendant's right to request trial de novo expired until the entry of judgment. The Court expressly stated that one week was an indubitably reasonable period (*10 Cal. 4th 424, 438-439)* .

In ***Maguire v. Collier*** *(1975) 49 Cal. App. 3d 309, 122 Cal. Rptr. 510* , cross complainant appealed from dismissal of her cross complaint pursuant to former Code Civ. Proc. § 583(b) [*now see Code Civ. Proc. §§ 583.310, 583.360*].

The court of appeal reversed, holding that because certain periods should have been excluded from the computation, the five-year period had not expired (*49 Cal. App. 3d 309, 312-313)* . It is established law that the period during which an adversary is in default, as well as the period during which a default judgment is in effect, is to be excluded from computation of the mandatory five-year dismissal period. Although the court did not discuss the impossibility doctrine directly, it alluded to the principle by commenting that the reason for the rule excluding default time was the impracticability of taking steps to bring the case to trial (*49 Cal. App. 3d 309, 313)* .

The *Maguire* "rule" that a period of defendant's default prior to the entry of a default judgment is to be excluded from the mandatory dismissal period, and that the exclusion is not a matter in the court's discretion, was rejected in *Hughes v. Kimble (1992) 5 Cal. App. 4th 59, 6 Cal. Rptr. 2d 616* . The *Hughes* court identified the *Maguire* rule as dictum, and noted that the courts that have accepted it have done so without extensive analysis [*citing Dale v. ITT Life Ins. Corp. (1989) 207 Cal. App. 3d 495, 498-499, 255 Cal. Rptr. 8* ; *Alvarado Community Hospital v. Superior Court (1985) 173 Cal. App. 3d 476, 485, 219 Cal. Rptr. 52* ; *Ippolito v. Municipal Court (1977) 67 Cal. App. 3d 682, 686-687, 136 Cal. Rptr. 795]* . The *Hughes* court held that the normal case-by-case analysis of impossibility, impracticability, or futility should be applied to determine whether, in the court's discretion, a period after default has been taken should be excluded from the time to bring the action to trial [*Hughes v. Kimble (1992) 5 Cal. App. 4th 59, 66-71, 6 Cal. Rptr. 2d 616]* . The *Hughes* court did, however, recognize that the impossibility exception obviously and necessarily applies when the plaintiff obtains a default judgment and the judgment is later vacated. That time must be excluded from the computation of time remaining to bring the case to trial after vacation of the judgment [*Hughes v. Kimble (1992) 5 Cal. App. 4th 59, 68, 6 Cal. Rptr. 2d 616]* . In *Hughes*, after taking the defendant's default, plaintiff took no action for three years until the court moved to dismiss the action, and the appellate court upheld the dismissal. In *Howard*, the Supreme Court cited both *Maguire* and *Hughes* without criticism. Under *Howard*, it is clear that the impossibility exception will "almost invariably" apply to the period during which a default judgment is in effect, but that only a reasonable period of time between default and the entry of the default judgment will be excluded [*Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 434-435, 41 Cal. Rptr. 2d 362, 895 P.2d 469]* .

[e] No Courtroom Available

In ***Chin v. Meier*** *(1991) 235 Cal. App. 3d 1473, 1 Cal. Rptr. 2d 499* , the court granted defendant's motion to dismiss an action for injunctive relief and damages based on plaintiff's failure to bring the action to trial within five years, as required by *Code Civ. Proc. § 583.310*. Plaintiff appealed, arguing that the statute was tolled during several court-ordered continuances when both sides announced their readiness but no courtroom was available.

The court of appeal reversed, holding that tolling under *Code Civ. Proc. § 583.340(c)* includes the aggregate time a case is continued because ofcourtroom unavailability regardless of whether a reasonable time remains to bring the action to trial before the expiration of the five-year limitation period (*235 Cal. App. 3d 1473, 1477-1478)* . When the statute was enacted in 1984, the California Law Revision Commission commented that this interpretation overrules cases such as Brown v. Superior Court (1976) 62, Cal. App. 3d 197, 199, *132 Cal. Rptr. 916* , in which the court terminated plaintiff's action even though plaintiff was incarcerated after the complaint was filed but released two years prior to the deadline (*235 Cal. App. 3d 1473, 1477)* . Thus, for purposes of the five-year limitation period, a court-ordered continuance when both sides announce "ready" and no courtroom is available is to be treated as a discrete tolling event (*235 Cal. App. 3d 1473, 1478)* .

[f] Application of Code Civ. Proc. § 583.340(c) After Judicial Arbitration

Howard v. Thrifty Drug & Discount Stores *(1995) 10 Cal. 4th 424, 41 Cal. Rptr. 2d 362, 895 P.2d 469* , is *discussed under § 90.91[3][d]*. If this optional paragraph is relevant, the facts of the case may allow for an additional period of time to be tolled by *Code Civ. Proc. § 1141.17*, and possibly by *Code Civ. Proc. § 1141.20*. For forms of points and authorities arguing that the five-year period for bringing the case to trial is tolled by those statutes, see *§§ 90.96* and *90.97*, respectively.

[4] Additional Authorities

[a] Failure to Comply Excused by Impossibility

In *Rim Forest Lumber Co. v. Woodside Construction Co. (1987) 190 Cal. App. 3d 454, 235 Cal. Rptr. 443* , complaints were filed against various defendants for money due and owing, foreclosure of mechanic's liens, and to enforce a stop notice. Some of the defendants, but not all, subsequently filed petitions for bankruptcy under Title 11 of the United States Code; the actions against only them were automatically stayed under *11 U.S.C. § 362*. The trial court was aware of the pendency of the bankruptcy actions. In the meantime, plaintiff reasonably investigated whether relief from the stay could be obtained, but was advised by counsel that such relief would be unlikely. Within the five-year period, plaintiff moved to set specially for trial and to sever the nonbankruptcy defendants from the bankruptcy defendants. The trial court denied the motion, and instead on its own motion dismissed the actions pursuant to former Code Civ. Proc. § 583(a). The court of appeal reversed, holding that the trial court abused its discretion in its orders. Because the actions against the bankruptcy defendants were unquestionably stayed and it was legally impossible to proceed against them, it became legally impossible to proceed against *any* defendants when the court denied the motion to sever the nonbankruptcy defendants from the bankruptcy defendants (*190 Cal. App. 3d 454, 468)* . Further, even if the nonbankruptcy defendants had been severed, it would have been impracticable to proceed to trial during the pendency of the bankruptcies of the bankruptcy defendants, who were indispensable parties (*190 Cal. App. 3d 454, 469)* .

[b] Impossibility Defined

Rose Associates v. Coombe (1990) 225 Cal. App. 3d 9, 275 Cal. Rptr. 1 , involved a cross complaint for fraud and breach of contract arising out of the sale of a multimillion dollar hotel, in which judgment was for the plaintiff. The court of appeal, in slightly modifying the judgment and affirming it as modified, upheld the trial court's finding of impossibility or impracticability. After pointing out that a special reference does not toll the five-year statute as the trial judge had mistakenly believed, the court explained that that does not, however, mean the trial court erred in finding the excuse of impossibility or impracticability, and that it deferred to the trial court's finding absent an abuse of discretion. The trial court determines whether it is impossible, impracticable, or futile to bring a case to trial in light of all the circumstances in the individual case, including the acts and conduct of the parties and the nature of the proceedings themselves. The critical factor in applying the exceptions to a given factual situation is whether the plaintiff exercised reasonable diligence in prosecuting his or her case (*225 Cal. App. 3d 9, 17)* .

[c] Extraordinary Delay

In *Breacher v. Breacher (1983) 141 Cal. App. 3d 89, 190 Cal. Rptr. 112* , the action was originally set for trial within the five-year mandatory period, but was delayed because of court congestion and disqualification of two judges. Another delay was caused when defendant's counsel requested a continuance in order to avoid being on "beeper" call during the Christmas holiday. Shortly thereafter, defendants moved to dismiss the action for failure to prosecute within five years, and the trial court ordered the case dismissed. The court of appeal reversed the order, finding that each delay fell within well-established tolling periods or exceptions. The applicable exceptions included delay for court congestion, which the court held is not counted in calculating the mandatory five-year period (*141 Cal. App. 3d 89, 91)* . The court also found that defendants were estopped to seek dismissal by their request to delay the trial further during the holiday season (*141 Cal. App. 3d 89, 92)* .

[d] No Courtroom Available

In *Rose v. Scott (1991) 233 Cal. App. 3d 537, 284 Cal. Rptr. 487* , the trial court dismissed plaintiff's action for failure to bring it to trial withinfive years. Plaintiff argued that the five-year statute should have been tolled during two of three time periods because of continuances requested by defendants. The statute should also have been tolled on the grounds of impossibility because no courtroom was available. The appellate court agreed and reversed the judgment of dismissal. The court reiterated the rule that delay may be excused if it has been impossible or impracticable to proceed to trial, and that impossibility occurs when there is no courtroom available (*233 Cal. App. 3d 537, 542)* .

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Volume 9 Chapters 90-99 DISMISSAL---to---EMINENT DOMAIN
CHAPTER 90 DISMISSAL
PART II. FORMS
B. Involuntary Dismissal
2. Dismissal For Failure To Bring Action To Trial Or New Trial

9-90 California Points & Authorities § 90.92

§ 90.92 Opposing Motion for Mandatory Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.310, 583.320, 583.360]--Time for Bringing Action to Trial or New Trial Tolled by Statutory Exclusion--Bringing Action to Trial Was Impracticable or Futile [Code Civ. Proc. § 583.340(c)]

[1] FORM

[*Caption. See § 90.86.*]

DEFENDANT'S MOTION TO DISMISS THE ABOVE-ENTITLED ACTION SHOULD BE DENIED BECAUSE THE TIME DURING WHICH IT WAS IMPRACTICABLE OR FUTILE FOR PLAINTIFF TO COMPLY WITH THE REQUIREMENTS OF SECTION _____ [583.310 *or* 583.320 OF THE CODE OF CIVIL PROCEDURE] SHOULD BE EXCLUDED FROM THE CALCULATION OF THE PERIOD(S) SPECIFIED IN THAT SECTION.

A. Failure to Comply Excused by Impracticability or Futility. The time during which it is impracticable or futile for plaintiff to bring an action to _____ [trial *or* a new trial] is excluded from the calculation of any period specified in Section _____ [583.310 *or 583.320 of the Code of Civil Procedure*] (*Code Civ. Proc. § 583.340(c)*; *see Brunzell Constr. Co. v. Wagner (1970) 2 Cal. 3d 545, 551-552, 86 Cal. Rptr. 297, 468 P.2d 553* ; *Christin v. Superior Court (1937) 9 Cal. 2d 526, 532-533, 71 P.2d 205*).

B. Impracticability and Futility Defined. It is impracticable and futile to bring an action to _____ [trial *or* a new trial] when _____ [trial *or* a new trial] would involve excessive and unreasonable difficulty or expense (*Brunzell Constr. Co. v. Wagner (1970) 2 Cal. 3d 545, 554, 86 Cal. Rptr. 297, 468 P.2d 553*).

[*Optional*] **C. Multiple Defendants.** The time during which it is impossible or impracticable to proceed against a permissibly joined defendant is excluded from calculation of a period specified in Section _____ [583.310 *or 583.320 of the Code of Civil Procedure*] if it would involve excessive and unreasonable difficulty or expense to sever the action and proceed separately against the other defendants (*see Brunzell Constr. Co. v. Wagner*

(1970) 2 Cal. 3d 545, 553-554, 86 Cal. Rptr. 297, 468 P.2d 553).

[*Optional*] **D. When Severance Is Impracticable.** In determining whether severance is impracticable, the court may consider all the circumstances of a particular case, including the expense, complexity, and quantity of evidentiary duplication that severance would entail, the potential problems that inconsistent judicial determinations would produce, and the degree of hardship or prejudice to the defendants occasioned by the delay (*Brunzell Constr. Co. v. Wagner (1970) 2 Cal. 3d 545, 554, 86 Cal. Rptr. 297, 468 P.2d 553*).

[*Optional*] **E. Appeal of Separate Action.** The time during the pendency of an appeal of an action distinct from a plaintiff's action is excluded from calculation of a period specified in section _____ [583.310 *or 583.320 of the Code of Civil Procedure*] when the appeal would resolve issues on which the plaintiff's cause of action is based (*see* *Rose v. Knapp (1951) 38 Cal. 2d 114, 117-118, 237 P.2d 981* ; *Stella v. Great Western Sav. & Loan Assn. (1970) 13 Cal. App. 3d 732, 738-739, 91 Cal. Rptr. 771*).

[*Optional*] **F. Pending Interlocutory Appeal.** An interlocutory appeal may toll the running of the five-year statute, even if the trial court technically retains jurisdiction to try the matter, if it would be impracticable to proceed to trial pending resolution of the appeal (*Christin v. Superior Court (1937) 9 Cal. 2d 526, 532-533, 71 P.2d 205* ; *Kaye v. Mount La Jolla Homeowners Assn. (1988) 204 Cal. App. 3d 1476, 1483, 252 Cal. Rptr. 67*).

[*Optional*] **G. Pending Successful Review by Writ of Trial Court's Summary Adjudication of Issues.** It is impracticable within the meaning of *section 583.340 of the Code of Civil Procedure* to proceed to trial while a writ petition which successfully challenged the trial court's summary adjudication of issues was pending in a court of appeal, even though no stay was issued by the court of appeal (*Kaye v. Mount La Jolla Homeowners Assn. (1988) 204 Cal. App. 3d 1476, 1479, 1482-1486, 252 Cal. Rptr. 67*).

[*Optional*] **H. Unsuccessful Writ Proceeding to Overturn Denial of Summary Judgment Motion.** The five-year period in which to bring an action to trial is tolled during the pendency of a writ petitionseeking to overturn the denial of the defendant's summary judgment motion when it is impracticable within the meaning of *Section 583.340(c) of the Code of Civil Procedure* to proceed to trial while the writ petition is pending, even though the petition is subsequently denied (*New West Fed. Savings & Loan Assn. v. Superior Court (Weber) (1990) 223 Cal. App. 3d 1145, 1151-1156, 273 Cal. Rptr. 37*).

[*Optional*] **I. Time Needed for Consolidation.** The time required to consolidate two cases for trial is excluded from calculation of a period specified in section _____ [583.310 *or 583.320 of the Code of Civil Procedure*] when both actions involve identical evidence on complex factors and the plaintiff did not cause intentional delay (*see* *General Motors Corp. v. Superior Court (1966) 65 Cal. 2d 88, 96-97, 52 Cal. Rptr. 460, 416 P.2d 492*).

[*Optional*] **J. Pending Assignment of New Judge Following Successful Peremptory Challenge.** The court, in considering a motion to dismiss pursuant to *section 583.360 of the Code of Civil Procedure*, must disregard the period that the _____ [trial *or* new trial] is held in abeyance pending assignment of a new judge following a successful peremptory challenge under *section 170.6 of the Code of Civil Procedure* (*see* *Hartman v. Santamarina (1982) 30 Cal. 3d 762, 768, 180 Cal. Rptr. 337, 639 P.2d 979* ; *Nail v. Osterholm (1970) 13 Cal. App. 3d 682, 686, 91 Cal. Rptr. 908*).

[*Optional*] **K. Time Between Death of Claimant and Appointment of Personal Representative.** The time period after plaintiff dies and before the estate is opened or a personal representative is appointed to prosecute decedent's claims is considered a period of temporary impracticability and futility that is excluded from the calculation of time within which an action must be brought to trial under section _____ [583.310 *or 583.320 of the Code of Civil Procedure*] (*Pham v. Wagner Litho Machinery Co. (1985) 172 Cal. App. 3d 966, 972-973, 218 Cal. Rptr. 476*).

[*Optional*] **L. Illness of Plaintiff's Counsel.** The time during which plaintiff's counsel is gravely ill is excluded from the calculation of time within which an action must be brought to trial under section _____ [583.310 *or 583.320 of the Code of Civil Procedure*] when it renders impractical the bringing of the case to trial within the statutory period and plaintiff has otherwise exercised reasonable diligence in prosecuting his or her case (*Him v. Superior Court (1986) 184 Cal. App. 3d 35, 39, 228 Cal. Rptr. 839*).

M. Period of Excuse Excluded Regardless of Time Remaining. The time within which an action must be brought to trial is tolled for the period of the excuse, regardless whether a reasonable time remained at the end of the period of the excuse to bring the action to trial (*Kaye v. Mount La Jolla Homeowners Assn. (1988) 204 Cal. App. 3d 1476, 1486, 252 Cal. Rptr. 67*).

[*Optional*] **N. Tolling or Extension of Time Resulting in Less Than Six Months to Bring Action.** [*See § 90.87, Paragraph G.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be used by a plaintiff to oppose a motion for mandatory dismissal of an action for failure to bring an action to trial or retrial within the applicable period specified in *Code Civ. Proc. § 583.310* or *583.320* [*see Code Civ. Proc. § 583.360*]. The ground for opposition is that the time during which it is impracticable or futile to bring the action to trial must be excluded when calculating the applicable time period [*see Code Civ. Proc. § 583.340(c)*], and that there has been no failure to bring the action to trial or new trial within the required time after taking this exclusion into account.

Optional Paragraphs C through L set forth particular situations that courts have held to constitute a period during which bringing the action to trial was impracticable or futile. Optional Paragraph N is for use when less than six months remained to bring the action to trial at the time the claimed period of impossibility ended.

In an appropriate case, the foregoing points and authorities may be combined with additional points and authorities setting forth further grounds in opposition to a motion for mandatory dismissal for failure to bring an action to trial or new trial within the mandatory period [*see §§ 90.86 -90.91, 90.93 -90.96*].

The foregoing form may, in addition, be adapted for use in opposing a motion for discretionary dismissal [*see § 90.98*]. The principles applicable in determining whether the discretionary period has lapsed are the same as those applicable in determining whether the mandatory period has lapsed [*see Code Civ. Proc. § 583.420(b)*].

The foregoing memorandum opposes a defendant's motion for dismissal of the complaint, and should be modified as necessary when it is used in another context, such as in opposition to a motion for dismissal of a cross complaint [*see Code Civ. Proc. § 583.110(a), (b), (d), (e)*].

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the

points of law stated.

The foregoing points and authorities may be submitted in opposition to a motion for mandatory dismissal supported by the general points and authorities *set out in § 90.80*. The points and authorities *set out in § 90.100* may, in turn, be used in response to, or in anticipation of, the opposition set out in foregoing form.

[b] Effect of Authority Decided Under Former Dismissal Statutes

In 1984, the provisions for involuntary dismissal for delay in bringing an action to trial or new trial, former Code Civ. Proc. § 583(b)-(d), were repealed and replaced by *Code Civ. Proc. §§ 583.310-583.360*. Before the 1984 enactment of *Code Civ. Proc. § 583.340(c)*, which codified impracticability and futility as express exceptions to the dismissal statute's time requirements, a similar exception had been implied by the courts [*see Brunzell Constr. Co. v. Wagner (1970) 2 Cal. 3d 545, 551-552, 86 Cal. Rptr. 297, 468 P.2d 553]* . Decisions interpreting former Code Civ. Proc. § 583 have been cited in the form as persuasive rather than controlling authority to the extent that the revised statutes codify former case law or continue former substantive principles.

[c] Related Pleading and Practice Forms

For forms of a notice of motion and order relating to a motion to dismiss an action pursuant to Code Civ. Proc. § 583.360, see Ch. 212, *Dismissal* in California Forms of Pleading and Practice.

[3] Discussion of Authorities

[a] Failure to Comply Excused by Impracticability or Futility

Brunzell Constr. Co. v. Wagner *(1970) 2 Cal. 3d 545, 86 Cal. Rptr. 297, 468 P.2d 553* , was an action brought in California on a contract for construction of a casino in Reno, Nevada. Plaintiff joined several parties who were involved in the construction project. The defending casino, in turn, sued plaintiff and one of the other defendants in a Nevada court. One week after it was resolved that trial would proceed in California, some defendants moved to dismiss the action for failure to bring it to trial within five years. They contended, apparently, that since it was possible for plaintiff to have proceeded against them by effecting a severance, the impossibility exception did not apply. The trial court granted the motion, dismissed the case, and plaintiff appealed.

The Supreme Court reversed and remanded, holding that the impossibility exception could apply if, although technically possible, proceeding against a defendant might be impracticable and futile as a pragmatic matter (*2 Cal. 3d 545, 553-554)* . Impracticability and futility, as implied exceptions, are not equated with strict impossibility (*2 Cal. 3d 545, 551-552)* . They require a determination of excessive and unreasonable difficulty or expense in light of all the circumstances of the particular case (*2 Cal. 3d 545, 554)* . When causes may be consolidated or severed, the determination of whether or not it would be impracticable and futile to proceed on only some of the actions requires consideration of a great variety of factors. These include the expense, complexity, and quantity of evidentiary duplication, the potential problems of inconsistent judicial determinations, the degree of hardship or prejudice to the defendants occasioned by the delay, and the diligence and good-faith efforts of the plaintiff (*2 Cal. 3d 545, 554-555)* . That a plaintiff can sever the causes of action and proceed separately against one codefendant does not lead inevitably to the conclusion that such a trial is not impracticable and futile (*2 Cal. 3d 545, 553)* .

Christin v. Superior Court *(1937) 9 Cal. 2d 526, 71 P.2d 205* , is discussed in *§ 90.91[3][a]*.

[b] Impracticability and Futility Defined

Brunzell Constr. Co. v. Wagner *(1970) 2 Cal. 3d 545, 86 Cal. Rptr. 297, 468 P.2d 553* , is *discussed under § 90.92[3][a]*.

[c] Multiple Defendants

The facts and procedural background of ***Brunzell Constr. Co. v. Wagner*** *(1970) 2 Cal. 3d 545, 86 Cal. Rptr. 297, 468 P.2d 553* , are *discussed under § 90.92[3][a]*. In *Brunzell*, the Supreme Court held that to require severance of causes of action against permissibly joined defendants whenever proceeding against one of them within the statutory periods for dismissal becomes impossible or impracticable would be to require unproductive duplication of effort, compel incurrence of excessive expense, and generally undermine the policies served by modern theories of consolidation in a substantial number of cases (*2 Cal. 3d 545, 553-554)* .

[d] When Severance Is Impracticable

Brunzell Constr. Co. v. Wagner *(1970) 2 Cal. 3d 545, 86 Cal. Rptr. 297, 468 P.2d 553* , is *discussed under § 90.92[3][a]* and *[3][c]*.

[e] Appeal of Separate Action

Rose v. Knapp *(1951) 38 Cal. 2d 114, 237 P.2d 981* , was an action to quiet title. The trial court dismissed the action for failure to bring it to trial within five years.

The Supreme Court reversed the dismissal on the ground that the trial court had not excluded the period during which an appeal was pending in a related decision that invalidated the sale on which plaintiff's title was predicated (*38 Cal. 2d 114, 118)* . While that judgment was outstanding and until it was reversed or set aside, it effectively barred prosecution of plaintiff's quiet title action and it would have been impracticable and futile for plaintiff to have attempted to bring the action to trial (*38 Cal. 2d 114, 117-118)* .

Stella v. Great Western Sav. & Loan Assn. *(1970) 13 Cal. App. 3d 732, 91 Cal. Rptr. 771* , was an action for negligence in construction of plaintiffs' house. Plaintiffs were two of several homeowners who had purchased poorly designed homes. Several of the other homeowners also sued and consolidated their cases. Prior to trial of plaintiffs' case, the trial court in the consolidated cases granted defendant's motion for nonsuit. The court of appeal reversed, and subsequently the Supreme Court upheld the opinion of the court of appeal. During this period of appeals, plaintiffs' attorney did not bring the action to trial and did not file a trial setting memorandum until two days after the five-year statutory period had expired. The trial court granted defendant's motion for dismissal of plaintiffs' action.

The court of appeal reversed, holding that the statutory period was tolled until final resolution of the consolidated cases. The nonsuit and subsequent appeal in the consolidated case created a time period during which it would have been impracticable and futile for plaintiffs to proceed to trial. The court reasoned that the substantive issues were the same in both cases, the question of the liability of the defendant as a loan company was unsettled, the litigation might have been meaningless if the issue had been settled in defendant's favor, and defendant was not prejudiced by the delay because, although evidence could be lost over time, that problem was no more acute here than in the consolidated case that then had to be tried (*13 Cal. App. 3d 732, 738-739)* .

[f] Pending Interlocutory Appeal

The procedural and factual background of ***Christin v. Superior Court*** *(1937) 9 Cal. 2d 526, 71 P.2d 205* , is discussed in *§ 90.91[3][a]*. In upholding the trial court's denial of defendant's motion to dismiss, the Court held that the five-year period was tolled for the time during which the venue appeal had been pending. The Court said that the purpose of the mandatory dismissal statute is plain, namely, to prevent avoidable delay for too long a period, and that it was not designed arbitrarily to close the proceeding at all events in five years (*9 Cal. 2d 526, 532)* . The Court said that modern cases recognize as a defense not only objective impossibility in the true sense, but also impracticability due to excessive and unreasonable difficulty or expense (*9 Cal. 2d 526, 533)* .

The procedural background of ***Kaye v. Mount La Jolla Homeowners Assn.*** *(1988) 204 Cal. App. 3d 1476, 252 Cal. Rptr. 67* , is *discussed under § 90.92[3][m]*. In reversing the judgment of dismissal, the court said that in *Christin v. Superior Court (1937) 9 Cal. 2d 526, 71 P.2d 205* (discussed *above*), the California Supreme Court established the rule that an interlocutory appeal may toll the running of the five-year statute, even if the trial court technically retains jurisdiction to try the matter, if it would be impracticable to proceed to trial pending resolution of the appeal (*204 Cal. App. 3d 1476, 1483)* .

[g] Pending Successful Review by Writ of Trial Court's Summary Adjudication of Issues

The procedural background of ***Kaye v. Mount La Jolla Homeowners Assn.*** *(1988) 204 Cal. App. 3d 1476, 252 Cal. Rptr. 67* , is *discussed under § 90.92[3][m]*. In reversing the judgment of dismissal, the court said it was impracticable within the meaning of *Code Civ. Proc. § 583.340* to proceed to trial while a writ petition which successfully challenged the trial court's summary adjudication of issues was pending in a court of appeal (*204 Cal. App. 3d 1476, 1479)* . After remarking that the trial court had apparently been concerned that no stay had been issued by the court of appeal pending its resolution of the writ petition, the court said that while it could undoubtedly have been clearer in its handling of the issue in its writ opinion, the question of whether the five-year statute is tolled by some applicable exception is generally a question of law to be resolved after the fact rather than by means of a stay issued by the appellate court before anyone contends the five-year period has run. The court said that, because at the time plaintiffs filed their writ petition, the case had already been taken off calendar, there was nothing for the court of appeal to stay, and that the trial court should have drawn no inference from its failure to act on the plaintiffs' stay request (*204 Cal. App. 3d 1476, 1486)* .

The court also rejected defendants' suggestion that plaintiffs could have tried the case and pursued their writ petition simultaneously, relying on the appellate court to resolve the writ issue before the close of evidence to enable them to present any additional evidence and argue the issue to the jury. The court did not believe that *Code Civ. Proc. § 583.340* required counsel to speculate on how quickly the court of appeal will decide a writ petition and whether it will issue a stay (*204 Cal. App. 3d 1476, 1485)* . However, the court noted that an attorney who decides not to proceed to trial in such a case may act at his or her peril in that if he or she is correctand the writ petition is ultimately deemed meritorious, the attorney's decision to forego trial effectively results in the same situation as if a stay had been issued to prevent trial, but, if the writ petition is denied, it may later be determined that it was not impracticable to proceed to trial because the remedy at law was adequate (*204 Cal. App. 3d 1476, 1485-1486 n.4*).

[h] Unsuccessful Writ Proceeding to Overturn Denial of Summary Judgment Motion

New West Fed. Savings & Loan Assn. v. Superior Court *(1990) 223 Cal. App. 3d 1145, 273 Cal. Rptr. 37* , arose out of an action against a lender for damages for alleged wrongful acts in failing to comply with the terms of its agreement. The complaint was filed October 16, 1984, and plaintiffs' at-issue memorandum was filed January 27, 1989. Trial was set for July 31, 1989. Defendant's motion for summary judgment was heard June 29, 1989, and denied July 5, 1989. On July 20, 1989, defendant filed in the court of appeal a petition for writ of mandate and request for stay, seeking reversal of the denial of its summary judgment motion. The appellate court issued a stay on July 27, 1989. On August 1, 1989, the appellate court granted the writ and continued the stay in effect until the trial court entered an order complying with *Code Civ. Proc. § 437c*. On August 24, 1989, the superior court entered a new order, again denying the motion. This had the effect of dissolving the appellate court's stay order, which had been in effect for 28 days. On September 7, 1989, defendant filed another petition for writ of mandate seeking to overturn the trial court's second order, but did not seek a stay. On October 17, 1989, plaintiffs requested the appellate court to issue a stay. On October 27, 1989, the appellate court denied both the second petition and the stay request. The second petition had been pending in the appellate court for 50 days. On November 1, 1989, plaintiffs filed a motion to set specially a trial date, which was granted on November 28, 1989, and the case was set for trial on March 26, 1990. On February 27, 1990, defendant filed a motion to dismiss plaintiffs' suit for failure to bring the case to trial within the five-year period as extended pursuant to *Code Civ. Proc. § 583.350*. The motion was heard on March 15, 1990, and denied on March 21, 1990. Relying on *Kaye v.*

Mount La Jolla Homeowners Assn. (1988) 204 Cal. App. 3d 1476, 252 Cal. Rptr. 67 , discussed under § 90.92[3][f] and *[3][m],* the trial court ruled that the trial date of March 26, 1990, did not exceed the statutory limitation, on the basis of its finding that a period of 50 days should be tolled because of the impracticability of bringing the case to trial while the second writ proceeding was pending. Defendant's petition for a writ of mandate to compel dismissal of the action was denied. The appellate court pointed out that *Code Civ. Proc. § 583.340(c)* must be interpreted liberally, consistent with the policy favoring trial on the merits (*223 Cal. App. 3d 1145, 1153)* . Quoting *Moran v. Superior Court (1983) 35 Cal. 3d 229* , the court said that what is impossible, impracticable, or futile must be determined in light of all the circumstances in the individual case, including the acts and conduct of the parties and the nature of the proceedings themselves, and that the critical factor in applying these exceptions to a given factual situation is whether the plaintiff exercised reasonable diligence in prosecuting his or her case (*223 Cal. App. 3d 1145, 1150)* . The court, after discussing cases, said that there was ample precedent for the trial court to have found that the pendency of the second writ petition made it impracticable for plaintiffs to go to trial until it was resolved, and that, in addition to legal precedent, the record fully supported the trial court's ruling (*223 Cal. App. 3d 1145, 1152)* .

[i] Time Needed for Consolidation

General Motors Corp. v. Superior Court *(1966) 65 Cal. 2d 88, 52 Cal. Rptr. 460, 416 P.2d 492* , began as an action for damages for personal injuries. After it was filed one of the plaintiffs died, and a remaining plaintiff joined a wrongful death action that was eventually consolidated with the first action. Defendant moved to dismiss the first cause of action for want of prosecution within five years, but the motion was denied. Defendant then petitioned for a writ of prohibition.

The Supreme Court denied the writ on the ground that the statutory period for bringing the action to trial had been tolled because it would have been futile for plaintiffs to have attempted to prosecute their actions in separate and successive trials (*65 Cal. 2d 88, 96-97)* . Both actions required the parties to present identical evidence on complex mechanical and technical factors. To insist that the relevant evidence be duplicated at two separate trials would exacerbate the already substantial burdens of litigation, and plaintiffs had not intentionally caused the delay (*65 Cal. 2d 88, 96)* .

[j] Pending Assignment of New Judge Following Successful Peremptory Challenge

Hartman v. Santamarina *(1982) 30 Cal. 3d 762, 180 Cal. Rptr. 337, 639 P.2d 979* , was a medical malpractice action filed in 1974. After several continuances from the first assigned trial date, and vacation of one trial date because no judge was available, the case was assigned for trial in early 1978. However, defendant made a peremptory challenge of one judge under *Code Civ. Proc. § 170.6*, and plaintiff challenged the replacement. Since no other judge was available, the case was continued until January of 1979, 23 days before the fifth anniversary of the filing date. On the day set for trial, plaintiff's counsel was engaged in another trial that was taking longer than anticipated. In order to avoid the mandatory dismissal of plaintiff's action for failure to bring it to trial within five years, the parties selected a jury. The jury was sworn and the court granted plaintiff's motionfor a continuance over defendant's objection. The court then discharged the jury on its own initiative and continued the trial until August of 1979. In July of 1979, defendant filed a motion to dismiss. The court granted the motion, and plaintiff appealed.

The Supreme Court reversed. It held that the action was brought to trial within the meaning of former Code Civ. Proc. § 583(b) [*now see Code Civ. Proc. §§ 583.310, 583.360*] when the jury was impaneled (*30 Cal. 3d 762, 765-767)* . Furthermore, the Court held that dismissal was premature because the parties' challenges to the trial judges pursuant to *Code Civ. Proc. § 170.6* resulted in an 11-month delay. The Court stated that the period that the trial is held in abeyance pending the assignment of another judge is to be disregarded in considering a subsequent motion to dismiss (*30 Cal. 3d 762, 768)* . Here, the motion to dismiss was granted six months after the five-year period had run. Thus, the Court stated that by any reckoning, the dismissal was premature (*30 Cal. 3d 762, 768-769)* .

Nail v. Osterholm *(1970) 13 Cal. App. 3d 682, 91 Cal. Rptr. 908* , was a malpractice action filed in 1963. In 1967, a

pretrial conference was held and a jury trial was set to commence a few months later. The trial judge was disqualified on the date for trial by a peremptory challenge pursuant to *Code Civ. Proc. § 170.6*. Since no other judge was available, the trial judge told the parties that another judge had to be assigned by the Judicial Council. In May of 1968, plaintiff's counsel asked the court clerk why no new trial date had been assigned, and was informed that a memorandum to set was necessary. Counsel filed the memorandum two weeks later, but then moved, unsuccessfully, for a change of venue. In August of 1968, the presiding judge reset the case for trial in February of 1969. In October of 1968, plaintiff moved to advance the trial date because it had been set beyond the mandatory five-year dismissal period. Defendants moved to dismiss on the ground that the case had not been brought to trial within two years after filing. Both motions were denied. In December of 1968, defendants moved to dismiss on the ground that the action had not been brought to trial within the mandatory five-year period. The motion was granted and plaintiff appealed.

The court of appeal reversed, stating that the period during which trial is held in abeyance pending the assignment of another judge is to be disregarded in considering a subsequent motion to dismiss. There is an implied exception to the mandatory dismissal requirement of former Code Civ. Proc. § 583 [*now see Code Civ. Proc. §§ 583.310, 583.360*] if a mechanical application would result in injustice. The Court has repeatedly stated that the time elapsing during periods in which it is impossible, impracticable, or futile to go to trial is to be disregarded in considering a motion to dismiss (*13 Cal. App. 3d 682, 686)* . Furthermore, former Code Civ. Proc. § 583 is procedural, not jurisdictional, with a purpose to prevent avoidable delay, and must be reconciled with a litigant's basic right to disqualify a judge pursuant to *Code Civ. Proc. § 170.6*. The court said that if it were to hold that the five-year period of former Code Civ. Proc. § 583 is never tolled by the exercise of a challenge made pursuant to *Code Civ. Proc. § 170.6*, it would unduly favor a procedural statute over one of substance and make it possible for a defendant to use the challenge to deprive plaintiff of his or her day in court. Therefore, the dismissal of plaintiff's action resulted in a miscarriage of justice (*13 Cal. App. 3d 682, 686-687)* .

[k] Time Between Death of Claimant and Appointment of Personal Representative

In ***Pham v. Wagner Litho Machinery Co.*** *(1985) 172 Cal. App. 3d 966, 218 Cal. Rptr. 476* , plaintiff brought an action for personal injury on January 9, 1978 and defendants answered the complaint that year. In September, 1979, plaintiff was killed by her husband, who then committed suicide. An amended complaint was filed in November, 1982, naming the administrator of the deceased husband's estate as plaintiff. In February, 1983, defendants filed a motion to dismiss under former Code Civ. Proc. § 583(b) [*now see Code Civ. Proc. §§ 583.310, 583.360*] for failure to bring the action to trial within five years. The substituted administrator opposed the motion on the grounds that former Code Civ. Proc. § 583(f) tolled the five-year statute during any period in which the jurisdiction of the court was suspended, and that jurisdiction was suspended during the three-year period between plaintiff's death and the representative's substitution. The trial court granted the motion to dismiss and plaintiff appealed.

The court of appeal reversed. The court held that the period of time between plaintiff's death and the substitution of the personal representative in her place was not to be included in calculating the five-year period during which the action must be brought to trial. Since the authority of retained counsel generally does not survive the death of a client, plaintiff's death left no person or entity to prosecute her claim and any proceeding taken in the absence of a personal representative could have been set aside as void (*172 Cal. App. 3d 966, 972-973)* . The court, agreeing with plaintiff's argument that jurisdiction to try the action was suspended, noted in a footnote that the phrase "lack of jurisdiction" has been construed by the *California Supreme Court in Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 288, 109 P.2d 942* to mean that although the court may have jurisdiction over the subject matter and the parties in the fundamental sense, it has no power to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites (*172 Cal. App. 3d 966, 971 fn 6*).

[l] Illness of Plaintiff's Counsel

Him v. Superior Court *(1986) 184 Cal. App. 3d 35, 228 Cal. Rptr. 839*), was a mandate proceeding arising out of a

personal injury action whichpetitioner had failed to bring to trial within the five-year period specified in *Code Civ. Proc. § 583.310*. Real party's motion to dismiss the action was denied on the ground that the five-year period was tolled for 42 days because of the acute and serious illness of petitioner's counsel as well as for the additional period consumed by the motion to dismiss proceeding (calculated to be 61 days). Petitioner's subsequent motion to set the case specially for trial within the extended period was denied on the ground that there would be left insufficient time to give the 15-day notice of trial as required by *Code Civ. Proc. § 594*.

The court of appeal directed that a peremptory writ of mandate be issued, compelling the trial court to vacate its order denying the motion to set specially. The court held that because less than six months remained at the end of the tolling period within which the case could be brought to trial, the period was extended six months under *Code Civ. Proc. § 583.350*. In rejecting real party's argument that the five-year statute, as a matter of law, could not be tolled because of the attorney's illness, the appellate court explained that (1) the existence of impracticability is determined in light of all the circumstances of the individual case, including the acts and conduct of the parties and the nature of the proceedings themselves; (2) the critical factor in applying the exception to a given factual situation is whether the plaintiff exercised reasonable diligence in prosecuting his or her case; (3) the law, properly stated, is that delay attributable to sickness or death of counsel is not *necessarily* excusable; and (4) each case must be decided on its own peculiar features and facts (*184 Cal. App. 3d 35, 39)* . Evaluating the facts of the case by the reasonable diligence standard codified in *Code Civ. Proc. § 583.340*, the court concluded, under the facts of the case, that real party had failed to meet his burden of showing that the trial court had abused its discretion in ruling that the five-year period was tolled (*184 Cal. App. 3d 35, 39)* .

[m] Period of Excuse Excluded Regardless of Time Remaining

Kaye v. Mount La Jolla Homeowners Assn. *(1988) 204 Cal. App. 3d 1476, 252 Cal. Rptr. 67* , was an action by the owners of a condominium against the condominium association, its directors, and its members for compensatory and punitive damages for failure to maintain and repair the common areas of the condominium, as required by the condominium's covenants, conditions, and restrictions, as a result of which plaintiffs' condominium sustained substantial damage. Defendants' motion for summary adjudication of issues seeking to eliminate plaintiffs' claims for punitive damages was granted. Plaintiffs petitioned the court of appeal for writ review, and a peremptory writ of mandate, reversing the summary adjudication of issues as to the association, was issued on the last business day before the end of the five-year statutory period for bringing the action to trial [*Code Civ. Proc. § 583.310*]. The court's opinion provided that it was final immediately because the trial date had to be set by November 24, 1986, to avoid the running of the five-year statute. On November 25th, plaintiffs filed a motion in the superior court to set the case specially for trial, arguing that the five-year statute had been tolled on a variety of theories. Defendants responded that the five-year statute had run and no exceptions were applicable. The trial court agreed with defendants and dismissed the action.

The court of appeal reversed. After holding that the five-year period was tolled pending the successful writ review, the court, quoting the Law Revision Commission Comment to *Code Civ. Proc. § 583.340*, held that the time within which an action must be brought to trial is tolled for the period of the excuse, regardless of whether a reasonable time remained at the end of the period of the excuse to bring the action to trial (*204 Cal. App. 3d 1476, 1486)* .

[4] Additional Authorities

[a] Failure to Comply Excused by Impracticability or Futility

The facts and procedural background of *Holland v. Dave Altman's R.V. Center (1990) 222 Cal. App. 3d 477, 271 Cal. Rptr. 706* , are discussed in *§ 90.90[3][c]*. In reversing the order dismissing the action for failure to bring it to trial within five years from the date the complaint was filed, the court of appeal pointed out that the evident purpose of *Code Civ. Proc. § 583.340* is to exclude from the mandatory dismissal provision time periods during which the case could not be brought to trial. The court said that (1) the absence of trial court jurisdiction to try the case (the contingency covered

by *Code Civ. Proc. § 583.340(a)*) is one reason; (2) a court order barring the trial by a stay or injunction (*Code Civ. Proc. § 583.340(b)*) is another; and (3) each of these is an example of impossibility, impracticability, or futility in bringing the case to trial. The court said that the final provision (*Code Civ. Proc. § 583.340(c)*) recognizes "any other reason" that it was impossible, impracticable, or futile to bring the case to trial, that what all of these provisions have in common is the practical inability of the parties to proceed to trial. Each *prevents* a trial, and each is recognized as a basis to toll the running of the statutory period. The court noted plaintiff's two options had she continued with the case pending the appeal: (1) dismiss the nonresident defendant driver as a party from the case, which would have effected an abandonment of her appeal; or (2) sever the action of the nonresident defendant driver from the action against the resident defendant owners, who were sued both on their vicarious liability and on the theory of negligent entrustment, which ran the risk of duplicative proceedings, with all the waste of time and resources (of the parties andthe court) that would have entailed, that, if plaintiff recovered judgment against the resident defendants and the order to quash were subsequently reversed, the result would be another trial involving the same issues against the nonresident defendant. The court concluded that neither alternative was viable, and added that a further reason making it impracticable and futile to bring the case to trial within the original five-year period was that the trial court had ordered otherwise; that on two occasions, the trial court had stated its view, in unambiguous terms, that the case was not to proceed to trial until the pending appeal had been decided, and that plaintiff could not be expected to fly in the face of such orders, and that she should not be penalized for not having done so (*222 Cal. App. 3d 477, 484)* .

In *Rim Forest Lumber Co. v. Woodside Construction Co. (1987) 190 Cal. App. 3d 454, 235 Cal. Rptr. 443* , complaints were filed against various defendants for money due and owing, foreclosure of mechanic's liens, and to enforce a stop notice. Some of the defendants, but not all, subsequently filed petitions for bankruptcy under Title 11 of the United States Code; the actions against only them were automatically stayed under *11 U.S.C. § 362*. The trial court was aware of the pendency of the bankruptcy actions. In the meantime, plaintiff reasonably investigated whether relief from the stay could be obtained, but was advised by counsel that such relief would be unlikely. Within the five-year period, plaintiff moved to set specially for trial and to sever the nonbankruptcy defendants from the bankruptcy defendants. The trial court denied the motion, and instead on its own motion dismissed the actions pursuant to former Code Civ. Proc. § 583(a) [*now see Code Civ. Proc. §§ 583.410, 583.420(a)(2)*]. The court of appeal reversed, holding that the trial court abused its discretion in its orders. Because the actions against the bankruptcy defendants were unquestionably stayed and it was legally impossible to proceed against them, it became legally impossible to proceed against *any* defendants when the court denied the motion to sever the nonbankruptcy defendants from the bankruptcy defendants (*190 Cal. App. 3d 454, 468)* . Further, even if the nonbankruptcy defendants had been severed, it would have been impracticable to proceed to trial during the pendency of the bankruptcies of the bankruptcy defendants, who were indispensable parties (*190 Cal. App. 3d 454, 469)* .

[b] Appeal of Separate Action

McRoberts v. Gorham (1971) 18 Cal. App. 3d 1040, 96 Cal. Rptr. 427 , involved separate state and federal actions against different defendants arising out of one vehicle collision. Plaintiffs obtained judgment in federal court, but their recovery was reversed on appeal. While the federal action was pending, plaintiffs' state action was dismissed pursuant to former Code Civ. Proc. § 583(b) [*now see Code Civ. Proc. §§ 583.310, 583.360*] for failing to bring it to trial. The court of appeal reversed, holding that the state trial court had failed to determine whether proceeding to trial was impracticable in the light of factors described in *Brunzell Constr. Co. v. Wagner (1970) 2 Cal. 3d 545, 554, 86 Cal. Rptr. 297, 468 P.2d 553* (*discussed under § 90.91[3][a]*). The court noted that the prosecution of two separate actions was inevitable because defendant in the federal action, the federal government, could not be joined in the state action and attempts to transfer the state action to the federal forum had proven unsuccessful. Moreover, plaintiffs were diligent in their prosecution of the federal action and apparently all of the parties preferred a final adjudication of the federal action before proceeding with the state trial (*18 Cal. App. 3d 1040, 1044-1045)* .

[c] Pending Assignment of New Judge Following Successful Peremptory Challenge

The facts and procedural background of Breacher v. Breacher (l983) *141 Cal. App. 3d 89, 190 Cal. Rptr. 112* , are discussed in *§ 90.91[4][c]*. In discussing the applicable exceptions preventing dismissal for failure to prosecute, the court held that the period a trial is held in abeyance pending assignment of another judge pursuant to *Code Civ. Proc. § 170.6* is to be disregarded in considering a subsequent motion to dismiss under former Code Civ. Proc. § 583(b) [*now see Code Civ. Proc. §§ 583.310, 583.360*] (*141 Cal. App. 3d 89, 91)* .

[d] Period of Excuse Excluded Regardless of Time Remaining

The facts and procedural background of *New West Fed. Savings & Loan Assn. v. Superior Court (1990) 223 Cal. App. 3d 1145, 273 Cal. Rptr. 37* , are discussed in *§ 90.92[3][h]*. In denying the petition for writ of mandate seeking to compel dismissal of the action for failure to bring it to trial within the five-year period, as extended, the court of appeal, after discussing the Law Revision Commission's comments to *Code Civ. Proc. § 583.340*, said that it was clear that so long as the court may conclude that there was a period of impossibility, impracticability, or futility over which plaintiff had no control, the court was required to toll that period even if there was ample time after the period of impracticability within which to go to trial (*223 Cal. App. 3d 1145, 1155)* .

Holland v. Dave Altman's R. V. Center (1990) 222 Cal. App. 3d 477, 271 Cal. Rptr. 706 , is *discussed under § 90.92[4][a]*. In reversing the order dismissing the action for failure to bring it to trial within five years from the date the complaint was filed, the court of appeal pointed out that the resident defendants had argued that nearly two and one-half months remained after the appellate court filed its opinion in the appeal of the orderto quash until the fifth anniversary of the filing of the complaint and that plaintiff could have taken steps to have the case specially set during this time but that, instead, she did not file a new at-issue memorandum and notice of motion to specially set until four months after the fifth year anniversary date and six and one-half months after the appellate opinion was filed. The court said there was a time when that argument would have had merit (citing cases), but that the 1984 revision of the dismissal statutes repudiates these holdings by stating the excuse without any such qualification, and that, hence, the time during which it was impracticable is excluded in all cases (*222 Cal. App. 3d 477, 484)* . The court added that the Law Revision Commission (17 Cal. L. Revision Comm'n Rep. 919 (Jan. 1984)) explained that this is consistent with the treatment given other statutory excuses, it increases certainty and minimizes the need for a judicial hearing to ascertain whether or not the statutory period has run. The court added that it also is consistent with the general policy favoring trial over dismissal (*222 Cal. App. 3d 477, 484)* .

California Points & Authorities

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Volume 9 Chapters 90-99 DISMISSAL---to---EMINENT DOMAIN
CHAPTER 90 DISMISSAL
PART II. FORMS
B. Involuntary Dismissal
2. Dismissal For Failure To Bring Action To Trial Or New Trial

9-90 California Points & Authorities § 90.93

§ 90.93 Opposing Motion for Mandatory Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.310, 583.320, 583.360]--Defendant Is Estopped From Requesting Dismissal [Code Civ. Proc. § 583.140]

[1] FORM

[*Caption. See § 90.86.*]

DEFENDANT'S MOTION TO DISMISS THE ABOVE-ENTITLED ACTION SHOULD BE DENIED BECAUSE THE TIME DURING WHICH PLAINTIFF REASONABLY RELIED ON DEFENDANT'S CONDUCT, CAUSING PLAINTIFF TO FORGO COMPLIANCE WITH THE REQUIREMENTS OF SECTION _____ [583.310 *or* 583.320 OF THE CODE OF CIVIL PROCEDURE], SHOULD BE EXCLUDED FROM CALCULATION OF THE PERIOD(S) SPECIFIED IN THAT SECTION ON THE GROUND OF ESTOPPEL.

A. Estoppel. If a plaintiff reasonably relies on the defendant's acts or omissions to act and is thereby lulled into a false sense of security or caused to forbear doing something that otherwise would have been done to bring an action to _____ [trial *or* a new trial], the defendant is estopped from including the time of plaintiff's reliance in the calculation of the period(s) specified in section _____ [583.310 *or 583.320 of the Code of Civil Procedure*] (*see Code Civ. Proc. § 583.140*; *Tresway Aero, Inc. v. Superior Court (1971) 5 Cal. 3d 431, 437-438, 96 Cal. Rptr. 571, 487 P.2d 1211* ; *Griffis v. S.S. Kresge Co. (1984) 150 Cal. App. 3d 491, 500, 197 Cal. Rptr. 771*).

[*Optional*] **B. Dismissal for Not Commencing Trial Estopped by Request for Extension.** If a defendant requests a continuance which postpones the _____ [trial *or* new trial] to a date after _____ [a *or* the] period specified in section _____ [583.310 *or 583.320 of the Code of Civil Procedure*], and the request is shown by the trial court's minutes, the defendant is estopped from including the time of postponement in the calculation of such a period (*see Code Civ. Proc. § 583.330*; *Woley v. Turkus (1958) 51 Cal. 2d 402, 408-409, 334 P.2d 12*).

[*Optional*] **C. Dismissal for Not Commencing Trial Estopped by Defendant's Willingness to Go to Trial.** If defendant files documents indicating a willingness to go to _____ [trial *or* a new trial], defendant is estopped from including the time of reliance on this willingness in the calculation of the periods specified in section _____ [583.310 *or 583.320 of the Code of Civil Procedure*] (*see City of Los Angeles v. Gleneagle Dev. Co. (1976) 62 Cal. App. 3d 543, 564, 133 Cal. Rptr. 212* ; *Mustalo v. Mustalo (1974) 37 Cal. App. 3d 580, 584-585, 112 Cal. Rptr. 594*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be used by a plaintiff to oppose a motion for mandatory dismissal of an action for failure to bring an action to trial or retrial within the applicable period specified in *Code Civ. Proc. § 583.310* or *583.320* [*see Code Civ. Proc. § 583.360*]. The ground for opposition is that the defendant is estopped from including the time of plaintiff's reliance on defendant's acts or omissions when calculating the applicable time period [*see Code Civ. Proc. § 583.140*], and that there has been no failure to bring the action to trial or new trial within the required time after taking this exception into account.

In an appropriate case, the foregoing points and authorities may be combined with additional points and authorities setting forth further grounds in opposition to a motion for mandatory dismissal for failure to bring an action to trial or new trial within the mandatory period [*see §§ 90.86 -90.92, 90.95, 90.96*].

The foregoing form may, in addition, be adapted for use in opposing a motion for discretionary dismissal [*see § 90.98*]. The principles of waiver and estoppel apply equally to motions for discretionary dismissal [*see Code Civ. Proc. §§ 583.140, 583.420(b)*].

The foregoing memorandum opposes a defendant's motion for dismissal of the complaint, and should be modified as necessary when it is used in another context, such as in opposition to a motion for dismissal of a cross complaint [*see Code Civ. Proc. § 583.110(a), (b), (d), (e)*].

Counsel should insert argument in the foregoing form, showing a relationship between the facts of the case and the points of law stated. For example, if plaintiff has relied on defendant's actions in postponing trial, plaintiff should state the actions defendant took and how plaintiff relied on them in not proceeding to trial [*see, e.g., Woley v. Turkus (1958) 51 Cal. 2d 402, 408-409, 334 P.2d 12]* .

The foregoing points and authorities may be submitted in opposition to a motion for mandatory dismissal supported by the general points and authorities *set out in § 90.80*. The points and authorities *set out in §§ 90.102* and *90.104* may, in turn, be used in response to, or in anticipation of, the opposition set out in foregoing form.

[b] Effect of Authority Decided Under Former Dismissal Statutes

In 1984, the provisions for involuntary dismissal for delay in bringing an action to trial or new trial, former Code Civ. Proc. § 583(b)-(d), were repealed and replaced by *Code Civ. Proc. §§ 583.310-583.360*. Decisions interpreting the former statute have been cited in the form as persuasive rather than controlling authority to the extent that the revised

statutes codify former case law or continue former substantive principles.

[c] Related Pleading and Practice Forms

For forms of a notice of motion and order relating to a motion to dismiss an action pursuant to Code Civ. Proc. § 583.360, see Ch. 212, *Dismissal* in California Forms of Pleading and Practice.

[3] Discussion of Authorities

[a] Estoppel

The facts and procedural background of ***Tresway Aero, Inc. v. Superior Court*** *(1971) 5 Cal. 3d 431, 96 Cal. Rptr. 571, 487 P.2d 1211* , are discussed in *§ 90.59[3][a]*. In *Tresway Aero,* defendant corporation sought a writ of mandamus to compel dismissal of an action against it pursuant to the first paragraph of former Code Civ. Proc. § 581a [*now see Code Civ. Proc. § 583.210*] because it had not been served with a summons. The Supreme Court denied the writ insofar as it sought dismissal. The Court determined that unless the doctrine of estoppel were recognized in cases concerning former Code Civ. Proc. § 581a, the statute could not be applied to serve rather than defeat the ends of substantial justice. Although the earlier precedents were in conflict, the Court's most recent decision in *Woley v. Turkus (1958) 51 Cal. 2d 402, 408, 334 P.2d 12* (*discussed under § 90.93[3][b]*), upheld application of the doctrine of estoppel to dismissals for failure to bring an action to trial within five years pursuant to former Code Civ. Proc. § 583 (*5 Cal. 3d 431, 438)* .

Griffis v. S.S. Kresge Co. *(1984) 150 Cal. App. 3d 491, 197 Cal. Rptr. 771* , was a tort action. During a February, 1982, mandatory settlement conference the court ordered the matter submitted to arbitration. Plaintiff's attorney expressed concern over the imminent expiration of the five-year period for bringing the matter to trial, but was assured that arbitration would not place it in danger of dismissal. Defendant's attorney was present at the conference, as well as at an earlier arbitration conference at which arbitration was not ordered. Plaintiff requested a trial de novo after an arbitration award was filed, and moved to advance the case for trial. At the motion hearing, plaintiff's newly associated attorney presented her calculations of the tolling period due to arbitration and the prospective expiration period for bringing the matter to trial. These were based on the improper assumption that arbitration had been ordered at the arbitration conference in September, 1981, instead of at the mandatory settlement conference. When asked by the court, defendant's attorney stated that he would not dispute the calculations of plaintiff's attorney. A trial date and a date for a mandatory settlement conference were scheduled. At this settlement conference, defendant moved to dismiss the action pursuant to former Code Civ. Proc. § 583(b) [*now see Code Civ. Proc. §§ 583.310, 583.360*] for failure to bring the action to trial within five years, noting that the statute had not been tolled until February, 1982. The trial court dismissed the action, and plaintiff appealed on the ground that defendant was estopped from invoking the dismissal statute.

The court of appeal reversed the dismissal, holding that defendant's attorney was estopped from relying on the dismissal statute, being charged with the knowledge that the limitations period had not been tolled untilFebruary, 1982, and that plaintiff's attorney was unaware of the true facts regarding the tolling date. To invoke the doctrine of estoppel, the party estopped (1) must be apprised of the facts and must intend that his or her conduct shall be acted on, or must so act that the party asserting estoppel had a right to believe it was so intended, (2) must be ignorant of the true facts, and (3) must rely on the conduct to his or her injury. Defendant's attorney was under a duty to inform the court of all facts material to the inquiry regarding the limitations period, and since his response was under the compulsion of a legal duty to the court, plaintiff's attorney was entitled to rely on his statements. At best, the reply of defendant's attorney that he agreed with the calculations of plaintiff's attorney was negligence; at worst, an overtly false statement. To allow defendant to profit from this breach at plaintiff's expense by successfully invoking the five-year limitation imposed by former Code Civ. Proc. § 583(b) would be to subvert the concept of substantial justice. Therefore, defendant was estopped from relying on the dismissal statute and the trial court abused its discretion in dismissing the action (*150 Cal. App. 3d 491, 499-500)* .

[b] Dismissal for Not Commencing Trial Estopped by Request for Extension

In ***Woley v. Turkus*** *(1958) 51 Cal. 2d 402, 334 P.2d 12* , the parties stipulated in writing to continue the case to a specified date beyond the period in former Code Civ. Proc. § 583 [*now see Code Civ. Proc. §§ 583.310, 583.360*] for both a hearing on plaintiff's motion for summary judgment and trial. On the new date, defendant received additional time to present new defenses on the motion for summary judgment. Defendant subsequently submitted further evidence, and the motion for summary judgment was denied. The case was set once for trial, but postponed by the court. Defendant successfully moved to dismiss for lack of prosecution. Plaintiff appealed.

The Supreme Court reversed, partially on the ground that defendant was estopped from requesting a dismissal (*51 Cal. 2d 402, 409)* . Defendant's request at the hearing on the motion for summary judgment for a continuance to furnish additional evidence carried with it the implied request that the entire proceeding be postponed, and defendant's request was entered in the trial court's minute order for that hearing. In light of both parties' awareness of the problem posed by the five-year statutory period and plaintiff's readiness for trial, defendant's request for a time extension was comparable to entry of a stipulation in the court minutes, which, although not in literal compliance with former Code Civ. Proc. § 583, would estop defendant from subsequently moving to dismiss (*51 Cal. 2d 402, 408-409)* . The Court cited *Govea v. Superior Court (1938) 26 Cal. App. 2d 27, 31, 78 P.2d 433* , in which defendant requested a continuance extending the case beyond the statutory period, and the trial court noted plaintiff's stipulation to the continuance in a minute order. The court of appeal held that the stipulation between the parties as shown by the court's minute order, while it did not comply literally with the requirements of former Code Civ. Proc. § 583, would estop defendant from requesting a dismissal, since a party to an action cannot be allowed to play fast and loose with the court (*51 Cal. 2d 402, 408)* .

Woley can be used to support the broader principle that any extension of time sought by defendant and embodied in a writing can create an estoppel even though it is not as effective as a written stipulation. However, *Woley* should be contrasted with *Singelyn v. Superior Court (1976) 62 Cal. App. 3d 972, 974, 133 Cal. Rptr. 486* , discussed in *§ 90.99[4][b],* in which the court of appeal held that defendant's presence at, and participation in, a trial-setting conference that set the date for trial beyond expiration of the five-year period was not sufficient to create an estoppel.

[c] Dismissal for Not Commencing Trial Estopped by Defendant's Willingness to Go to Trial

The facts and procedural background of ***City of Los Angeles v. Gleneagle Dev. Co.*** *(1976) 62 Cal. App. 3d 543, 133 Cal. Rptr. 212* , are discussed in *§ 90.98[4][c]*. Plaintiff did not file an at-issue memorandum until 22 months remained in the five-year period of former Code Civ. Proc. § 583(b), but defendant did not then move to dismiss pursuant to former Code Civ. Proc. § 583(a) [*now see Code Civ. Proc. §§ 583.410, 583.420*]. Instead, it filed its own at-issue memorandum and waited nearly 14 months before moving to dismiss. Thus, when it was most logical to protest, defendant did not raise the question of prejudice or claim surprise, lost witnesses, or dimming memories, and did not object to moving the case forward (*62 Cal. App. 3d 543, 562)* . In particular, the affirmative action which defendant took to indicate its willingness to go to trial by filing its own at-issue memorandum estopped defendant from relying on the previous period of delay, because thereafter, plaintiff properly relied on the processes of the trial court to assign a trial date (*62 Cal. App. 3d 543, 564)* .

In ***Mustalo v. Mustalo*** *(1974) 37 Cal. App. 3d 580, 112 Cal. Rptr. 594* , plaintiff filed a divorce action, and within ten days the parties filed a stipulation citing agreement on temporary support and division of community property. Plaintiff, however, failed to proceed to a default or judgment, and approximately seven years later defendant filed a response to the complaint and a memorandum to set the case for trial. The trial court, however, dismissed the action on its own motion because plaintiff did not have judgment entered within three years. Plaintiff appealed.

The court of appeal reversed, partially on the ground that dismissal could not be upheld under former Code Civ. Proc. § 583(b) [*now see Code Civ. Proc. §§ 583.310, 583.360*]. Defendant's action in filing a response to thecomplaint and in seeking to bring the case to trial on the important property issues involved amounted to an estoppel. Neither party

consented to the dismissal and no public purpose was served by dismissal since the case could be filed again. In such a situation, the action of defendant in filing both the response and a motion to set for trial could be regarded as the equivalent of a written stipulation, which will avoid the operation of former Code Civ. Proc. § 583 (*37 Cal. App. 3d 580, 584-585)* .

In both *City of Los Angeles*, discussed *above*, and *Mustalo*, defendant filed documents and affirmatively indicated a willingness to go to trial. The situation in these cases may be distinguished from *Singelyn v. Superior Court (1976) 62 Cal. App. 3d 972, 133 Cal. Rptr. 486* , discussed in *§ 90.99[3][c]*. In *Singelyn*, the court held, in part, that defendant's presence at and participation in the trial setting conference at which the action was set for trial on a date beyond the statutory period did not by itself estop the defendant from seeking a dismissal under former Code Civ. Proc. § 583(b) (*62 Cal. App. 3d 972, 974)* .

[4] Additional Authorities

[a] Estoppel

City of Los Angeles v. Gleneagle Dev. Co. (1976) 62 Cal. App. 3d 543, 133 Cal. Rptr. 212 , is *discussed under § 90.93[3][c]*.

In *anderson v. Erwyn (1966) 247 Cal. App. 2d 503, 55 Cal. Rptr. 634* , plaintiff appealed the dismissal of his action for lack of prosecution in bringing it to trial within five years. Plaintiff partially contended that defendant waived the right to dismissal or was estopped from claiming it because he had previously requested that a scheduled pretrial conference be postponed, an event which occurred approximately three and one-half years prior to expiration of the statutory period. Although the court of appeal affirmed the decision of the trial court, it stated that estoppel would occur if there were sufficient requests for rescheduling proceedings or continuances for defendant's accommodation, or conduct by defendant which could possibly have deluded plaintiff into the belief that the matter would thereafter and forever remain unprosecuted, and that defendant would not invoke the provisions of former Code Civ. Proc. § 583. A defendant has no duty to use diligence at every stage of the proceeding to expedite the case; the defendant only has to meet the plaintiff step by step. Generally, estoppel is based on the existence of a duty to act and a failure to act in accordance with the duty (*247 Cal. App. 2d 503, 509)* .

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Volume 9 Chapters 90-99 DISMISSAL---to---EMINENT DOMAIN
CHAPTER 90 DISMISSAL
PART II. FORMS
B. Involuntary Dismissal
2. Dismissal For Failure To Bring Action To Trial Or New Trial

9-90 California Points & Authorities § 90.94

§ 90.94 Opposing Motion for Mandatory Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.310, 583.320, 583.360]--Court Is Estopped to Dismiss Action for Failure to Bring It to Trial Within Five Years [Code Civ. Proc. § 583.140]

[1] FORM

[*Caption. See § 90.86.*]

DEFENDANT'S MOTION TO DISMISS THE ABOVE-ENTITLED ACTION SHOULD BE DENIED BECAUSE A GENERAL ORDER OF THIS COURT, ADOPTED ON _____ [*date*], FOUND THAT COURT CONGESTION MADE IT IMPRACTICABLE, FUTILE, OR IMPOSSIBLE FOR THE CASE TO BE ASSIGNED TO TRIAL BEFORE EXPIRATION OF THE FIVE-YEAR PERIOD AND EXTENDED THE FIVE-YEAR PERIOD TO A SPECIFIED DATE THAT HAS NOT YET ARRIVED; TO DISMISS THE ACTION AT THIS TIME ON THE GROUND IT WAS NOT IMPRACTICABLE, FUTILE, OR IMPOSSIBLE TO BRING THE CASE TO TRIAL WITHIN THE STATUTORY PERIOD WOULD IN EFFECT VACATE THE GENERAL ORDER, ON WHICH PLAINTIFF WAS ENTITLED TO AND DID RELY, AND THIS THE COURT IS ESTOPPED TO DO.

A. Estoppel Applies to Motion to Dismiss. The equitable doctrine of estoppel applies fully to motions to dismiss on account of failure to bring an action to trial within five years of its filing (*Greene v. State Farm Fire & Casualty Co. (1990) 224 Cal. App. 3d 1583, 1590, 274 Cal. Rptr. 736*).

B. Assertion of Estoppel Against Government. Estoppel may be asserted against the government where justice and right require it, and conflicting interests may set up a situation in which equitable estoppel might be applied against the judicial branch of government (*Greene v. State Farm Fire & Casualty Co. (1990) 224 Cal. App. 3d 1583, 1590, 274 Cal. Rptr. 736*).

C. Applicable Principle. The principle that if a trial court encounters statements or conduct by a defendant that lulls the plaintiff into a false sense of security resulting in inaction, and there is reasonable reliance, estoppel must be available applies with no less force to statements and conduct by a court, on which a plaintiff surely should be able to

rely (*Greene v. State Farm Fire & Casualty Co. (1990) 224 Cal. App. 3d 1583, 1592, 274 Cal. Rptr. 736*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be used by a plaintiff to oppose a motion for mandatory dismissal of an action for failure to bring it to trial or retrial within the applicable period specified in *Code Civ. Proc. § 583.310* or *583.320* [*see Code Civ. Proc. § 583.360*]. The ground of opposition is that the court is estopped to dismiss the action because the failure to bring the action to trial within the statutory period resulted from a court order, on which plaintiff was entitled to and did rely, that found that because of court congestion, it was impossible, impracticable, or futile to assign the case to trial within the statutory period and extended that period to a future date that has not yet arrived.

In an appropriate case, the foregoing points and authorities may be combined with additional points and authorities setting forth further grounds in opposition to a motion for mandatory dismissal for failure to bring an action to trial or new trial within the statutory period [*see §§ 90.86 -90.93, 90.95, 90.96*].

The foregoing form may, in addition, be adapted for use in opposing a motion for discretionary dismissal [*see § 90.98*]. Principles of waiver and estoppel apply equally to motions for discretionary dismissal [*see Code Civ. Proc. §§ 583.140, 583.420(b)*].

Counsel should insert argument in the foregoing form, showing a relationship between the facts of the case and the points of law stated.

The foregoing points and authorities may be submitted in opposition to a motion for mandatory dismissal supported by the general points and authorities *set out in § 90.80*.

[b] Related Pleading and Practice Forms

For forms of a notice of motion and order relating to a motion to dismiss an action pursuant to Code Civ. Proc. § 583.360, see Ch. 212, *Dismissal* in California Forms of Pleading and Practice.

[3] Discussion of Authorities

[a] Estoppel Applies to Motion to Dismiss

Greene v. State Farm Fire & Casualty Co. *(1990) 224 Cal. App. 3d 1583, 274 Cal. Rptr. 736* , was an action by a homeowner against her insurer, its adjuster, a contractor, and its employee for damages caused by a leaking roof. Plaintiff had until October 30, 1987, in which to bring her case to trial. At a trial-setting conference at which plaintiff was represented by local counsel, trial was set for December 11, 1987, which was 42 days beyond the October 30 deadline. Local counsel failed to object. However, on August 27, 1987, the court, on its own motion, in the person of one judge and after two hearings, adopted a general order, which established a civil jury trial calendar disposition program to which the court assigned 500 cases, including plaintiff's case. The order stated that with regard to the 500 cases, where the five-year limitation expired before December 18, 1987, it was impracticable, futile, or impossible [*see*

Code Civ. Proc. § 583.340(c)] for these cases to be assigned to trial before that date, and that under *Code Civ. Proc. § 583.340*, the court therefore concluded that the five-year statute should effectively be extended until March 18, 1988. The case was set for trial on March 14, 1988, and was continued one day to March 15. On the latter date, defendants moved to dismiss on the ground the case had not been brought to trial within five years. The hearing was before another judge, who concluded that plaintiff's failure to bring the matter to trial within the statutory period was not the result of impossibility, impracticability, or futility and granted the motion. Plaintiff appealed.

The court of appeal reversed and remanded the case for trial setting. After pointing out that the order of dismissal in effect vacated the general order and its finding of fact and substituted the second judge's own order of dismissal and contrary finding of fact, which the second judge had no authority to do (*224 Cal. App. 3d 1583, 1588-1590)* , the court said that the equitable doctrine of estoppel applies fully to motions to dismiss on account of failure to bring an action to trial within five years of its filing (*224 Cal. App. 3d 1583, 1590)* . The court, quoting *Strong v. County of Santa Cruz (1975) 15 Cal. 3d 720, 725, 125 Cal. Rptr. 896, 543 P.2d 264* , said (1) the doctrine of equitable estoppel is founded on concepts of equity and fair dealing; (2) it provides that a person may not deny the existence of a state of facts if he or she intentionally led another to believe a particular circumstance to be true and to rely on such belief to his or her detriment; and (3) the elements of the doctrine are as follows: (a) the party to be estopped must be apprised of the facts and must intend that his or her conduct shall be acted on, or must so act that the party asserting the estoppel has a right to believe it was so intended; and (b) the other party must be ignorant of the true state of facts and must rely on the conduct to his or her injury (*224 Cal. App. 3d 1583, 1590)* .

[b] Assertion of Estoppel Against Government

The facts and procedural background of ***Greene v. State Farm Fire & Casualty Co.*** *(1990) 224 Cal. App. 3d 1583, 274 Cal. Rptr. 736* , are *discussed under § 90.94[3][a]*. In reversing the judgment of dismissal, the court of appeal said (1) estoppel may be asserted against the government where justice and right require it; (2) the executive branch of government is not the only one of the three branches that may find its interest in conflict with the interest of a litigant, such that it might be estopped from pursuing that interest to the determent of that litigant; and (3) in the present case the trial court had an interest in expeditiously clearing its calendar of old cases, plaintiff had an interest in having a full trial on the merits, and these conflicting interests set up a situation in which equitable estoppel might be applied against the judicial branch of government (*224 Cal. App. 3d 1583, 1590)* .

[c] Applicable Principle

The facts and procedural background of ***Greene v. State Farm Fire & Casualty Co.*** *(1990) 224 Cal. App. 3d 1583, 274 Cal. Rptr. 736* , are *discussed under § 90.94[3][a]*. In reversing the judgment of dismissal, the court of appeal pointed out that if a trial court encounters statements or conduct by a defendant that lulls the plaintiff into a false sense of security resulting in inaction, and there is reasonable reliance, estoppel must be available, and said that this principle applies with no less force to statements and conduct by a court on which a plaintiff surely should be able to rely. The court said that although plaintiff had no excuse for her July 31, 1987, failure to object to a trial date after October 30, 1987, her failure to take any steps to remedy the situation, after August 27, 1987, constituted an entirely reasonable reliance on the general order (*224 Cal. App. 3d 1583, 1592)* . The court held that equitable estoppel applied. It said that the trial court apprised itself of the facts it believed were germane to the adoption of the general order; plaintiff had a right to believe the court's intent was as the order implicitly indicated to achieve efficiency by processing a selected 500 cases in a certain order during a certain time period, without regard to the possible applicability of *Code Civ. Proc. §§ 583.310-583.360* to those cases; in the absence of any objection from defendants, plaintiff had a right to rely on the court's conclusion in the general order regarding impossibility, impracticability, and futility, no matter what specialized knowledge of the facts she may have had; and that to punish exercise of these rights with a dismissal pursuant to the above-cited statutes was precisely the sort of unfairness that the doctrine of equitable estoppel is designed to prevent (*224 Cal. App. 3d 1583, 1592)* .

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9-90 California Points & Authorities § 90.95

§ 90.95 Opposing Motion for Mandatory Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.310, 583.320, 583.360]--No Failure to Bring Action to New Trial After Mistrial When No Order Declaring Mistrial Was Entered [Code Civ. Proc. § 583.320(a)(1)]

[1] FORM

[*Caption. See § 90.86.*]

DEFENDANT'S MOTION TO DISMISS THE ABOVE-ENTITLED ACTION FOR FAILURE TO BRING AN ACTION TO A NEW TRIAL AFTER A MISTRIAL HAS BEEN DECLARED SHOULD BE DENIED BECAUSE THERE HAS BEEN NO ORDER ENTERED DECLARING A MISTRIAL.

A. Statutory Requirements. If a trial is commenced in an action but no judgment is entered because of a mistrial or because a jury is unable to reach a decision, the action must be dismissed by the court on its own or the defendant's motion, after notice to the parties, if it is not brought again to trial within three years after the order declaring the mistrial or disagreement with the jury is entered (*Code Civ. Proc. §§ 583.320(a)(1), 583.360(a)*).

B. Order Declaring Mistrial Required. Dismissal of an action under *section 583.360 of the Code of Civil Procedure* for failure to bring an action to a new trial within the time period provided in *section 583.320(a)(1) of the Code of Civil Procedure* after entry of an order by the court declaring a mistrial or disagreement by the jury is not proper if the court has not entered an order declaring a mistrial (*see Rose v. Boydston (1981) 122 Cal. App. 3d 92, 98-99, 175 Cal. Rptr. 836*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be used by a plaintiff to oppose a motion for mandatory dismissal of an action for failure to bringan action to retrial within the period specified in *Code Civ. Proc. § 583.320(a)(1)* [*see Code Civ. Proc. § 583.360*]. The ground for opposition is that dismissal is not authorized because the court did not enter an order declaring a mistrial [*see Code Civ. Proc. §§ 583.320(a)(1)*]..

In an appropriate case, these points and authorities may be combined with additional points and authorities setting forth further grounds in opposition to a motion for mandatory dismissal for failure to bring an action to trial or new trial within the mandatory period [*see §§ 90.86 -90.93, 90.96*].

The form may, in addition, be adapted for use in opposing a motion for discretionary dismissal [*see § 90.98*]. The requirement of a court order declaring a mistrial applies also in analogous motions for discretionary dismissal [*see Code Civ. Proc. § 583.420(a)(3)(A)*].

This memorandum opposes a defendant's motion for dismissal of the complaint, and should be modified as necessary when it is used in another context, such as in opposition to a motion for dismissal of a cross complaint [*see Code Civ. Proc. § 583.110(a), (b), (d), (e)*].

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

These points and authorities may be submitted in opposition to a motion for mandatory dismissal supported by the general points and authorities *set out in § 90.80*.

[b] Effect of Authority Decided Under Former Dismissal Statutes

In 1984, the provisions for involuntary dismissal for delay in bringing an action to trial or new trial, former Code Civ. Proc. § 583(b)-(d), were repealed and replaced by *Code Civ. Proc. §§ 583.310-583.360*. Decisions interpreting the former statute have been cited in the form as persuasive rather than controlling authority to the extent that the revised statutes codify former case law or continue former substantive principles.

[c] Related Pleading and Practice Forms

For forms of a notice of motion and order relating to a motion to dismiss an action pursuant to Code Civ. Proc. § 583.360, see ch. 212, *Dismissal* , in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Order Declaring Mistrial Required

The facts and procedural background of ***Rose v. Boydston*** *(1981) 122 Cal. App. 3d 92, 175 Cal. Rptr. 836* , are discussed in *§ 90.86[3][e]*. In *Rose*, the court of appeal held that dismissal was not proper under former Code Civ. Proc. § 583(d) [*now see Code Civ. Proc. § 583.320(a)(1)*] for failure to bring the case to trial within three years after entry of an order declaring a mistrial or disagreement by the jury. The court noted that the second trial judge indicated that he had considered declaring a mistrial but did not do so. Neither of his alternative orders, proposing further trial by the original judge or stipulation to original judge's interlocutory findings, would have been available if a mistrial had been declared. The later continuances occurred without objection or suggestion that the status of the case had changed since the hearing before the second judge. The court also noted that no one had ever moved for an order declaring a mistrial.

The court concluded that since the record did not contain a court order declaring a mistrial, as required by former Code Civ. Proc. § 583(d), dismissal of the action was improper (*122 Cal. App. 3d 92, 98-99)* .

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9-90 California Points & Authorities § 90.96

§ 90.96 Opposing Motion for Mandatory Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.310, 583.320, 583.360]--Action Submitted to Judicial Arbitration [Code Civ. Proc. § 1141.10 et seq.]--Time for Bringing Action to Trial Is Extended Under Code Civ. Proc. § 1141.17(b)

[1] FORM

[*Caption. See § 90.86.*]

THE COURT SHOULD DENY DEFENDANT'S MOTION TO DISMISS THIS ACTION BECAUSE PLAINTIFF'S ACTION WAS SUBMITTED TO JUDICIAL ARBITRATION AND, THEREFORE, THE TIME PERIOD(S) FROM _____ [THE DATE FOUR YEARS AND SIX MONTHS AFTER THE ACTION WAS FILED UNTIL THE DATE THE REQUEST FOR DE NOVO TRIAL WAS FILED *and/or* THE DATE THE ARBITRATION AWARD WAS FILED UNTIL PLAINTIFF'S NEW TRIAL DATE] MUST BE EXCLUDED IN CALCULATING THE FIVE-YEAR PERIOD UNDER SECTION 583.310 OF THE CODE OF CIVIL PROCEDURE.

A. Exclusion Under *Code Civ. Proc. § 1141.17*. If an action is or remains submitted to judicial arbitration more than four years and six months after plaintiff has filed the action, then the time beginning on the date four years and six months after the plaintiff has filed the action and ending on the date on which a request for a de novo trial is filed under *Code of Civil Procedure Section 1141.20* shall not be included in computing the five-year period under *Code of Civil Procedure Section 583.310* (*Code Civ. Proc. § 1141.17(b)*; *Gonzalez v. County of Los Angeles (2004) 122 Cal. App. 4th 1124, 1129* ; *Niesner v. Kusch (1986) 186 Cal. App. 3d 291, 295-296, 230 Cal. Rptr. 613*). The tolling commences on the four-year six-month date after the action was filed by plaintiff, not on the date the trial court orders the case to mediation (*Gonzalez v. County of Los Angeles (2004) 122 Cal. App. 4th 1124, 1129*).

[*Optional*] **B. Reasonable Diligence Is Not Required Under *Code Civ. Proc. § 1141.17*.** The exclusion of *Code of Civil Procedure Section 1141.17(b)* operates to toll the mandatory five-year period regardless of the plaintiff's exercise of reasonable diligence during this period (*Niesner v. Kusch (1986) 186 Cal. App. 3d 291, 297-298, 230 Cal. Rptr. 613*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be used by a plaintiff to oppose a motion for mandatory dismissal of an action for failure to bring an action to trial within the five-year period specified in *Code Civ. Proc. § 583.310* [*see Code Civ. Proc. § 583.360*]. The ground for opposition is that the action has been submitted to judicial arbitration and is or remains submitted to judicial arbitration more than four years and six months after plaintiff has filed the action. In that case, the time from that date until the date that a request for a de novo trial is filed under *Code Civ. Proc. § 1141.20* is excluded [*Code Civ. Proc. § 1141.17(b)*].

Although *Code Civ. Proc. § 1141.17* is the exclusive ground for tolling as a result of "submission of an action to arbitration," circumstances relating to judicial arbitration may result in post-arbitration tolling. Post-arbitration tolling may be based on *Code Civ. Proc. § 1141.20* [*see Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 434-435, 437-438, 41 Cal. Rptr. 2d 362, 895 P.2d 469]* . If the circumstances of the case indicate tolling under both *Code Civ. Proc. § 1141.17* and *Code Civ. Proc. § 1141.20*, the points and authorities *set out in § 90.97* should be combined with this form. If there are other periods before or after the submission of the case to arbitration that should be excluded from the five-year period, or other any grounds for opposing the motion to dismiss, points and authorities relating to those grounds should also be combined with this form [*see §§ 90.86 -90.95*].

This memorandum opposes a defendant's motion for dismissal of the complaint, and should be modified as necessary when it is used in another context, such as in opposition to a motion for dismissal of a cross complaint [*see Code Civ. Proc. § 583.110(a), (b), (d), (e)*].

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should set forth the date of the filing of the action and the de novo trial request date and relate those dates to the statutory time periods for bringing an action to trial.

This memorandum may be submitted in opposition to a motion for mandatory dismissal supported by the general points and authorities *set out in § 90.80*.

[b] Actions Submitted to Civil Action Mediation

This form may be modified for use when an action has been submitted to civil action mediation under Code Civ. Proc. § 1775 et seq. Civil action mediation is a pilot project in effect in Los Angeles County and in any other county that elects to participate [*see Code Civ. Proc. § 1775(e)*]. It is an alternative to judicial arbitration [*see Code Civ. Proc. § 1775.4*].

The pilot project includes a provision, *Code Civ. Proc. § 1775.7*, that is parallel to *Code Civ. Proc. § 1141.17*. The only difference is that tolling ends with the filing of a statement of nonagreement pursuant to *Code Civ. Proc. § 1775.9* rather than with the filing of a request for trial de novo pursuant to *Code Civ. Proc. § 1141.20*. Thus, this form may be used by changing references to judicial arbitration to civil action mediation, changing references to Section 1141.17 to Section 1775.7, and by changing references to a request for trial de novo to a statement of nonagreement.

In such circumstances, the time beginning on the date four years and six months after the plaintiff has filed the action

and ending on the date on which a statement of nonagreement (indicating that the mediation did not resolve the matter) is filed is not be included in computing the five year period [*Code. Civ. Proc. § 1775.7*]. The tolling commences on the four-year six-month date after the action was filed by plaintiff, not on the date the trial court orders the case to mediation [*Code. Civ. Proc. § 1775.7*; *see Gonzales v. County of Los Angeles (2004) 122 Cal. App. 4th 1124, 1129, 19 Cal. Rptr. 3d 381]* .

[c] Computation of Time Remaining to Bring Action to Trial

Code Civ. Proc. § 1141.17(a) provides that submission of an action to arbitration shall not suspend the running of the time periods specified in *Code Civ. Proc. § 583.110 et seq.* (time to bring action to trial), except as provided in "this section" (that is, except as provided under *Code Civ. Proc. § 1141.17(b)*). As pointed out in the foregoing form, *Code Civ. Proc. § 1141.17(b)* provides that, if an action is or remains submitted to arbitration more than four years and six months after the plaintiff has filed the action, the time beginning on the date four years and six months after the plaintiff has filed the action and ending on the date on which a request for a de novo trial is filed under *Code Civ. Proc. § 1141.20* is not included in computing the five-year period specified in *Code Civ. Proc. § 583.310*. A request for a trial de novo must be filed within 30 days after the date the arbitrator files the award with the court or the arbitration award is final [*Code Civ. Proc. § 1141.20(a)*].

Code Civ. Proc. § 583.350 sets out a similar rule, providing generally that if the time within which an action must be brought to trial is tolled or otherwise extended pursuant to statute with the result that at the end of the period of tolling or extension less than six months remains within which the action must be brought to trial, the action shall be dismissed if it is not brought to trial within six months after the period of tolling or extension.

Division Three of the Court of Appeal of the Second Appellate District has held that, under *Code Civ. Proc. § 1141.17(a)*, a case that is or remains submitted to judicial arbitration more than four years and six months after the action was filed is governed by *Code Civ. Proc. § 1141.17(b)*, which is the exclusive means to suspend the running of the five-year period of *Code Civ. Proc. § 583.310*, that *Code Civ. Proc. § 583.350* does not apply, and that, under *Code Civ. Proc. § 1141.17(a)*, plaintiff has six months from the date the request for a trial de novo is filed to bring the action to trial [*Drummond v. Murata (1991) 227 Cal. App. 3d 44, 48-49, 277 Cal. Rptr. 727]* . Division Three of the Court of Appeal of the Fourth Appellate District reached the same result, but cited as its authority *Code Civ. Proc. § 583.350* [*Marchuk v. Ralphs Grocery Co. (1990) 226 Cal. App. 3d 1273, 1276, 276 Cal. Rptr. 627]* . In *Marchuk*, the court said once the request for trial de novo was filed, the original filing date lost any significance in the context of a mandatory dismissal for failure to bring the case to trial within five years and that if a case remains submitted to judicial arbitration more than four years and six months after it was commenced, the extended fifth anniversary is six months from the filing of the request for trial de novo [*Marchuk v. Ralphs Grocery Co. (1990) 226 Cal. App. 3d 1273, 1276 n.1, 276 Cal. Rptr. 627]* .

[d] Reasonable Diligence

The tolling provision of *Code Civ. Proc. § 1141.17(b)* applies whether or not a plaintiff is reasonably diligent in bringing the case to trial [*Niesner v. Kusch (1986) 186 Cal. App. 3d 291, 297-298, 230 Cal. Rptr. 613]* . Optional Paragraph B may be used to support this proposition. However, counsel should note that a defendant can successfully raise the issue of reasonable diligence in a motion for *discretionary* dismissal under *Code Civ. Proc. §§ 583.410, 583.420(a)(2)*. In a motion for discretionary dismissal, the court may consider the plaintiff's conduct prior to submission of the case to arbitration and during the time the case is submitted to arbitration [*see D'Hondt v. Regents of University of California (1984) 153 Cal. App. 3d 723, 729-730, 200 Cal. Rptr. 628* , discussed in *§ 90.84[3][a]*].

[e] Effect of Authority Decided Under Former Dismissal Statutes

In 1984, the provisions for involuntary dismissal for delay in bringing an action to trial or new trial, former Code Civ.

Proc. § 583(b)-(d), were repealed and replaced by *Code Civ. Proc. §§ 583.310-583.360*. Decisions interpreting former Code Civ. Proc. § 583 have been cited in the form as persuasive rather than controlling authority to the extent that the revised statutes codify former case law or continue former substantive principles.

[f] Related Pleading and Practice Forms

For forms of a notice of motion and order relating to a motion to dismiss an action pursuant to Code Civ. Proc. § 583.360, see Ch. 212, *Dismissal* , in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Exclusion Under Code Civ. Proc. § 1141.17

In ***Gonzales v. County of Los Angeles*** *(2004) 122 Cal. App. 4th 1124, 19 Cal. Rptr. 3d 381* , plaintiff was involved in a traffic accident with Los Angeles County Deputy Sheriff in 1997. On May 14, 1998, plaintiff filed this action against the County of Los Angeles, the sheriff's department, and the Deputy Sheriff, seeking to recover for personal injuries. Under the five-year statute, plaintiff had to bring the action to trial before May 14, 2003, absent tolling. The trial court set a trial date of March 14, 2003. On February 26, 2003, at the final status conference, the trial court ordered the case to mediation, with a completion date of April 18, 2003. At the conference, plaintiff's counsel erroneously stated that the five-year statute expired on December 15, 2003. The trial court vacated the March 14, 2003 trial date and assigned a new trial date of August 4, 2003. On April 17, 2003, the parties participated in a mediation. The case did not settle. Onthe same date, the mediator filed a "Statement of Nonagreement," indicating that the mediation did not resolve the matter. On May 19, 2003, the county and Deputy Sheriff filed a "Motion to Dismiss Plaintiff's Complaint for Failure to Bring the Case to Trial Within Five Years." The notice of motion stated: "The motion shall be brought on the grounds that the plaintiff failed to bring this case to trial within five years of the date of its commencement pursuant to *Code of Civil Procedure §§ 583.310* and *583.360*." In the motion, defendants argued that plaintiff had not brought the case to trial before the five-year deadline, which, they asserted, had expired on May 14, 2003.

The court held that *Code Civ. Proc. § 1775.7* applied. The action was tolled from the date four years and six months after the filing of the action until the date on which the statement of nonagreement was filed because the case was sent to mediation during the last six months of the five-year period. The five-year statute was tolled beginning on the four-year six-month date, even though the trial court ordered the case to mediation three months later. In essence, a portion of the tolling was retroactive. Although the deadline stated by the driver's counsel at the final status conference was overly generous by two months, this misstatement did not provide a basis for reversal (*122 Cal. App. 4th 1124, 1129)* . The question of whether dismissal would have been appropriate under the three-year statute, *Code Civ. Proc. § 583.410(a)* was not one of pure law and thus could not be addressed for the first time on appeal (*122 Cal. App. 4th 1124, 1131)* .

In ***Niesner v. Kusch*** *(1986) 186 Cal. App. 3d 291, 230 Cal. Rptr. 613* , a contract action filed on January 9, 1980, was ordered into judicial arbitration on March 23, 1983. After learning that the case might be exempted from judicial arbitration, plaintiff gave the arbitrator written notice of the exemption and filed with the court a written stipulation in which the parties agreed to restore the case to the civil active list. However, on October 31, 1984, more than four years and six months after the action was filed, the court removed the case from the arbitration list because it appeared no further action had been taken. On March 14, 1985, the trial court granted plaintiff's motion to restore the matter to the civil active list but then, on its own motion, dismissed the action pursuant to former Code Civ. Proc. § 583(b) [*now see Code Civ. Proc. § 583.360*] for failure to bring the case to trial within five years. Plaintiff appealed.

The court of appeal reversed, holding that under *Code Civ. Proc. § 1141.17*, when an action remains submitted to arbitration more than four years and six months after it is filed, the time beginning on the date four year and six months after the action was filed and ending on the date on which a request for new trial was filed is not included in computing

the five-year period. The case had remained in arbitration until October 31, 1984, 114 days beyond four years and six months from the date of filing. Therefore, the court held, the five-year period was extended by 114 days to approximately May 3, 1985 (*186 Cal. App. 3d 291, 296)* . The court rejected the contention that *Code Civ. Proc. § 1141.17* did not apply when no arbitration in fact occurred, no arbitration award was ever made, and no request for a trial de novo was filed (*186 Cal. App. 3d 291, 296-297)* . Under the plain meaning of the statute, the court reasoned, the tolling begins if the action 'is or remains submitted to arbitration" (*186 Cal. App. 3d 291, 297)* . Under the statute, the tolling continues until a request for trial de novo is filed but the tolling can also end sooner, as when the arbitration process is ended on motion of parties. Therefore, the court held, the tolling provision applies whenever an action is referred to arbitration or arbitration is pending during the six-month period preceding the five-year deadline (*186 Cal. App. 3d 291, 297)* .

[b] Reasonable Diligence Is Not Required Under Code Civ. Proc. § 1141.17

The factual and procedural background of ***Niesner v. Kusch*** *(1986) 186 Cal. App. 3d 291, 230 Cal. Rptr. 613* , is *discussed under § 90.96[3][a]*. In reversing an order of mandatory dismissal for delay in prosecution, the court held that plaintiff's failure to exercise reasonable diligence in prosecuting the action did not justify the trial court in dismissing the case because *Code Civ. Proc. § 1141.17* deprives the court of the power to dismiss under the five-year mandatory dismissal statute while a case is pending in arbitration within six months of the statute's deadline, whether the plaintiff was diligent or not (*186 Cal. App. 3d 291, 297-298)* .

Counsel should note that the *Niesner* court recognized that a defendant may raise the issue of reasonable diligence in a motion for *discretionary* dismissal [*see Code Civ. Proc. §§ 583.410, 583.420(a)(2)*], under which a court may consider the plaintiff's conduct prior to submission of the case to arbitration and during the time the case is submitted to arbitration (*186 Cal. App. 3d 291, 298)* . For points and authorities supporting a motion for discretionary dismissal for failure to bring an action to trial based on unreasonable delay in the judicial arbitration proceeding, see *§ 90.84*.

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Volume 9 Chapters 90-99 DISMISSAL---to---EMINENT DOMAIN
CHAPTER 90 DISMISSAL
PART II. FORMS
B. Involuntary Dismissal
2. Dismissal For Failure To Bring Action To Trial Or New Trial

9-90 California Points & Authorities § 90.97

§ 90.97 Opposing Motion for Mandatory Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.310, 583.320, 583.360]--Action Submitted to Judicial Arbitration [Code Civ. Proc. § 1141.10 et seq.]--Post-Arbitration Tolling Under Code Civ. Proc. § 1141.20

[1] FORM

[*Caption. See § 90.86.*]

THE COURT SHOULD DENY DEFENDANT'S MOTION TO DISMISS THIS ACTION BECAUSE AFTER THE REQUEST FOR A TRIAL DE NOVO THE COURT FAILED TO RECALENDAR THE CASE FOR TRIAL WITHIN THE FIVE-YEAR PERIOD EVEN THOUGH PLAINTIFF WAS ELIGIBLE FOR A TRIAL DATE WITHIN THE FIVE-YEAR PERIOD PRIOR TO ARBITRATION AND PLAINTIFF INFORMED THE COURT OF THE FIVE-YEAR DEADLINE _____ [AT THE TIME OF *or* WITHIN _____ (*specify time period, e.g.,* ONE WEEK) OF] THE REQUEST FOR TRIAL DE NOVO.

A. Calendaring Case After Judicial Arbitration to Avoid Penalizing Plaintiff. If a party elects trial de novo after judicial arbitration, the trial is to be calendared, insofar as possible, so that the trial shall be given the same place on the active list as it had prior to arbitration, or shall receive civil priority on the next setting calendar (*Code Civ. Proc. § 1141.20(b)*). The evident purpose of *Code of Civil Procedure Section 1141.20* is to prevent plaintiffs from being penalized for having undergone the arbitration process (*Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 434, 41 Cal. Rptr. 2d 362, 895 P.2d 469*).

B. Duty of Court to Calendar Case After Arbitration. Once a plaintiff has informed the court, during or shortly after a trial de novo request, of the five-year trial date, the court then has the duty under *Code of Civil Procedure Section 1141.20* to schedule the case insofar as possible so that the trial shall be given the same place on the active list as it had prior to arbitration or to receive civil priority (*Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 435, 41 Cal. Rptr. 2d 362, 895 P.2d 469*).

C. Post-Arbitration Tolling of Five-Year Period to Bring Case to Trial. If prior to arbitration a plaintiff is eligible

to receive a trial date within the five-year statute, then the plaintiff is entitled to receive such a trial date on a timely post-arbitration request. If the trial court fails to correctly calendar or recalendar the case after having been properly notified, only then will the action be tolled pursuant to *Code Civ. Proc. Section 1141.20* from the date of the trial de novo request until the date of the new trial (*Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 435, 41 Cal. Rptr. 2d 362, 895 P.2d 469*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion for mandatory dismissal of an action for failure to bring it to trial within the five-year period specified in *Code Civ. Proc. § 583.310* [*see Code Civ. Proc. § 583.360*]. Alternatively, they may be used to support a motion to specially set the action for trial to avoid the five-year deadline. If appropriate, these points and authorities may be combined with other forms supporting tolling of additional parts of the five-year period on other grounds that may exist in the case [*see §§ 90.86 -90.96*].

In an appropriate case, these points and authorities may be submitted in opposition to the motion supported by the points and authorities *set out in § 90.80*. The points and authorities *set out in § 90.105* may, in turn be used in response to, or in anticipation of, the opposition set out in this form.

These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Related Pleading and Practice Forms

For forms of notice of motion and order relating to a motion to dismiss an action pursuant to Code Civ. Proc. § 583.360, see California Forms of Pleading and Practice, ch. 212, *Dismissal* (Matthew Bender).

[3] Discussion of Authorities

[a] Calendaring Case After Judicial Arbitration to Avoid Penalizing Plaintiff

The sequence of events in ***Howard v. Thrifty Drug & Discount Stores*** *(1995) 10 Cal. 4th 424, 41 Cal. Rptr. 2d 362, 895 P.2d 469* , was as follows:

On September 21, 1991, a judicial arbitration award became final when the defendant failed to request trial de novo.

On October 1, the court entered judgment for plaintiff pursuant to the award.

On November 7, the defendant moved to vacate the judgment and to allow a request for trial de novo, based on defendant's attorney's statement of his own neglect (renewing a defective motion first made October 11 that was denied without prejudice).

On November 27, the court granted the motion, subject to payment of sanctions to plaintiff.

On December 4, the defendant requested trial de novo.

On December 31, defendant paid the sanctions.

On July 7, 1992, the court granted plaintiff an order shortening time so that plaintiff could schedule a motion to specially set the case for trial on July 10.

The court denied the motion to specially set, finding that the five years to bring the case to trial had already elapsed, requiring dismissal under *Code Civ. Proc. § 583.310*. Moreover, the court held that if, as plaintiff contended, 44 days remained within that period, plaintiff's lack of activity since the request for trial de novo made denial of the motion appropriate on discretionary grounds under *Code Civ. Proc. § 583.410*. The court of appeal affirmed the dismissal on discretionary grounds.

The Supreme Court affirmed based on the trial court's discretionary power under *Code Civ. Proc. § 583.410*, but first held that the court erred in dismissing the case on mandatory grounds under *Code Civ. Proc. § 583.310*.

The Court first discussed *Moran v. Superior Court (1983) 35 Cal. 3d 229, 197 Cal. Rptr. 546, 673 P.2d 216* , which held that because the court, after a de novo trial request, has a duty under *Code Civ. Proc. § 1141.20* to calendar a case in the same priority it had before arbitration, the time to bring a case to trial is automatically tolled under *Code Civ. Proc. § 1141.20* until a new trial date is set. The Court confirmed the view that the courts of appeal have adopted that some initial, reasonable diligence on plaintiff's part is required to benefit from *Code Civ. Proc. § 1141.20* implied tolling and held that whatever the original viability of *Moran*'s automatic tolling holding, it is now untenable given later amendments of *Code Civ. Proc. § 1141.17*. Those amendments make *Code Civ. Proc. § 1141.17* the only basis for tolling as result of the submission of a case to arbitration. Section 1141.17 tolling ends with the request for a trial de novo, which is inconsistent with the Section 1141.20 tolling until a trial date is set (*10 Cal. 4th 424, 432-434)* .

The Court still found room for *Code Civ. Proc. § 1141.20* to toll the period for bringing the case to trial. The Court reconciled the statutes by finding that automatic tolling due to submission of a case to arbitration is strictly based on *Code Civ. Proc. § 1141.17* (i.e., during the last six months of the five-year period and only until trial de novo is requested), but that thereafter if the plaintiff informs the court, during or shortly after a trial de novo request, of the five-year trial date, post-arbitration tolling will arise if the court does not correctly calendar or recalendar the case (*10 Cal. 4th 424, 434-435)* . This tolling does not result from submission to arbitration, but from the court's failure to fulfill its post-arbitration duties under *Code Civ. Proc. § 1141.20*. This decision was based in part on the evident purpose of *Code Civ. Proc. § 1141.20* to prevent plaintiffs from being penalized for having undergone the arbitration process (*10 Cal. 4th 424, 434)* .

The Court then found, however, that because the plaintiff did not inform the court of the impending five-year deadline or make any effort to have a trial date set immediately after defendant requested trial de novo, the five-year statute continued to run during the six months between the time of the request for trial de novo and the motion to specially set the case for trial (*10 Cal. 4th 424, 435)* . Ultimately, the Court held that the five-year period was tolled under *Code Civ. Proc. § 583.340(c)* for impossibility, impracticability, or futility, so that the period had not run and the trial court erred in basing dismissal on the mandatory provisions of *Code Civ. Proc. § 583.310* (*10 Cal. 4th 424, 437-439)* . For discussion of this aspect of the case, see *§ 90.91[3][d]*.

Ultimately, however, the Court held that the trial court had not abused its discretion in denying the motion to specially set the case for trial and dismissing the action on discretionary grounds under *Code Civ. Proc. § 583.410* (*10 Cal. 4th 424, 439-444)* .

[b] Duty of Court to Calendar Case After Arbitration

The facts and procedural background of ***Howard v. Thrifty Drug & Discount Stores*** *(1995) 10 Cal. 4th 424, 434-435, 41 Cal. Rptr. 2d 362, 895 P.2d 469* , are *discussed under § 90.97[3][a]*. In analyzing implied tolling of the five-year period to bring a case to trial under *Code Civ. Proc. § 1141.20*, the Court relied on the court's duty under *Code Civ. Proc. § 1141.20* to schedule the case insofar as possible so that the trial will have the same place on the active list as it had prior to arbitration or to give the case civil priority (*10 Cal. 4th 424, 435)* .

[c] Post-Arbitration Tolling of Five-Year Period to Bring Case to Trial

The facts and procedural background of ***Howard v. Thrifty Drug & Discount Stores*** *(1995) 10 Cal. 4th 424, 434-435, 41 Cal. Rptr. 2d 362,895 P.2d 469* , are *discussed under § 90.97[3][a]*. The Court held that if the plaintiff makes a timely post-arbitration request and the trial court fails to correctly calendar or recalendar the case, the action is tolled pursuant to *Code Civ. Proc. § 1141.20* from the date of the trial de novo request until the date of the new trial (*10 Cal. 4th 424, 435)* .

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Volume 9 Chapters 90-99 DISMISSAL---to---EMINENT DOMAIN
CHAPTER 90 DISMISSAL
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B. Involuntary Dismissal
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§ 90.98 Opposing Motion for Discretionary Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.410, 583.420(a)(2), (3); Cal. Rules of Ct., Rule 3.1342]--General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN OPPOSITION TO MOTION
vs.	)	TO DISMISS ACTION
	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

THE COURT SHOULD DENY DEFENDANT'S MOTION TO DISMISS THIS ACTION BECAUSE _____ [*specify, e.g.,* THERE IS GOOD CAUSE FOR PLAINTIFF'S DELAY AND NO INJUSTICE WILL RESULT FROM DENYING DISMISSAL] AND, THEREFORE, DISMISSAL PURSUANT TO COURT'S DISCRETIONARY POWER UNDER CODE OF CIVIL PROCEDURE SECTION 583.410 IS NOT APPROPRIATE UNDER THE CIRCUMSTANCES.

A. Statutory Grounds for Discretionary Dismissal. The court may not dismiss an action under *Code of Civil Procedure Section 583.410* for failure to bring an action to _____ [trial *or* a new trial] unless the minimum period specified under _____ [*specify applicable time period, e.g.,* section 583.420(a)(2)(A)] of the Code of Civil Procedure has elapsed, and dismissal appears appropriate to the court under the circumstances (*Code Civ. Proc. §§ 583.410(a), 583.420(a)*; *see Roman v. Usary Tire & Service Center (1994) 29 Cal. App. 4th 1422, 1430-1431, 35 Cal. Rptr. 2d 329*).

B. Discretion Not Arbitrary. The discretion of the trial court to dismiss an action pursuant to *Code of Civil Procedure Section 583.410* for failure to bring the action to _____ [trial *or* a new trial] within the period specified underCode of Civil Procedure Section _____ [*specify applicable time period, e.g.,* 583.420(a)(2)(A)] is not capricious or arbitrary but one controlled by legal principles that is to be exercised in accordance with the spirit of the law and with a view to serving rather than defeating the ends of justice (*see United Farm Workers National Union v. International Brotherhood of Teamsters (1978) 87 Cal. App. 3d 225, 233-234, 150 Cal. Rptr. 761*).

[*Optional*] **C. Any Basis for Good Cause Is Sufficient.** Dismissal pursuant to *Code of Civil Procedure Section 583.410* for failure to bring the action to _____ [trial *or* a new trial] within the period specified under Code of Civil Procedure Section _____ [*specify applicable time period, e.g.,* 583.420(a)(2)(A)] is not proper if there is any basis for a showing of good cause by the plaintiff for the delay and no injustice will result from denying dismissal (*see Denham v. Superior Court (1970) 2 Cal. 3d 557, 563-564, 86 Cal. Rptr. 65, 468 P.2d 193*).

[*Optional*] **D. Plaintiff's Lack of Showing of Good Cause Not Controlling.** Even if there is an entire absence of a showing of good cause by the plaintiff, the trial court has broad discretion not to dismiss the action on the basis of any factor enumerated in *California Rules of Court, Rule 3.1342(e)* (*see United Farm Workers National Union v. International Brotherhood of Teamsters (1978) 87 Cal. App. 3d 225, 235-236, 150 Cal. Rptr. 761*).

[*Optional*] **E. Factors Relevant to Ruling on Motion.** In ruling on a motion for dismissal pursuant to *Code of Civil Procedure Section 583.410* for failure to bring an action to _____ [trial *or* a new trial] within the period specified under Code of Civil Procedure Section _____ [*specify applicable time period, e.g.,* 583.420(a)(2)(A)], the court must be guided by the policies set forth in *Code of Civil Procedure Section 583.130*. The court must also consider all matters relevant to a proper determination of the motion, including _____ [specify particular matters enumerated in *Cal. Rules of Ct., Rule 3.1342(e)* that are relevant to the determination of the present motion, e.g., the nature and complexity of the case] (*Cal. Rules of Ct., Rule 3.1342(e)*; *Tannatt v. Joblin (1982) 130 Cal. App. 3d 1063, 1068, 182 Cal. Rptr. 112*).

[*Optional*] **F. Counsel's Workload Is Sufficient Excuse.** Delay caused by pressure resulting from the workload of a plaintiff's counsel is sufficient to justify failure to bring the action to _____ [trial *or* a new trial] within the period specified under Code of Civil Procedure Section _____ [*specify applicable time period, e.g.,* 583.420(a)(2)(A)] (*see Woolfson v. Personal Travel Service, Inc. (1971) 3 Cal. 3d 909, 912 fn. 2, 912-913, 92 Cal. Rptr. 286, 479 P.2d 646* ; *Denham v. Superior Court (1970) 2 Cal. 3d 557, 564-565, 86 Cal. Rptr. 65, 468 P.2d 193*).

[*Optional*] **G. Conditional Denial of Discretionary Dismissal.** In exercising its discretion to dismiss an action pursuant to *Code of Civil Procedure Section 583.410* for delay in prosecution caused by failure to bring the action to _____ [trial *or* a new trial] within the period specified under Code of Civil Procedure Section _____ [*specify applicable time period, e.g.,* 583.420(a)(2)(A)], the court may require as a condition of granting or denying dismissal that the parties comply with terms that appear proper to effectuate substantial justice (*Code Civ. Proc. § 583.430(a)*; *see Cal. Rules of Ct., Rule 3.1342(f)*).

[*Optional*] **H. Manner of Computing Time Period for Completing Service.** The time period for bringing an action to

_____ [trial *or* a new trial] specified under Code of Civil Procedure Section
_____ [*specify applicable time period, e.g.,* 583.420(a)(2)(A)] must be computed in the same manner that is provided for computing the comparable time period under *Code of Civil Procedure Sections 583.310-583.360* (*see Code Civ. Proc. § 583.240(b)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to defendant's motion for discretionary dismissal based on plaintiff's failure to bring the action or new trial within the applicable period specified in *Code Civ. Proc. § 583.420(a)(2)* or *(3)*. The ground for opposition is that dismissal is not appropriate under all the circumstances [*see Code Civ. Proc. § 583.410(a)*; *Cal. Rules of Ct., Rule 3.1342(e)*].

Optional Paragraph C may be used when the plaintiff is seeking to show good cause justifying the delay.

Optional Paragraph D may be used when the plaintiff is seeking to emphasize that the lack of a showing of good cause is not necessarily controlling.

Optional Paragraph E may be used when the plaintiff wishes to emphasize particular factors that weigh in favor of denying the motion, particularly factors or considerations that are specifically enumerated in *Cal. Rules of Ct., Rule 3.1342(e)*.

Optional Paragraph F may be used when the plaintiff wishes to rely on his or her counsel's work load as a factor justifying the delay.

Optional Paragraph G may be used to suggest that a particular condition be imposed on denial of the motion as a fair alternative to granting the motion [*Code Civ. Proc. § 583.430(a)*].

Optional Paragraph H may be used when the plaintiff is seeking to show that service was, in fact, within the applicable period specified under *Code Civ. Proc. § 583.420(a)(2)* or *(3)*, after taking into account factors that effectively excuse or extend this period. The basis for this particular ground of opposition is *Code Civ. Proc. § 583.420(b)*, which provides that the period for completing service under *Code Civ. Proc. § 583.420(a)(1)* is computed in the same manner as the comparable period for completing service in order to avoid *mandatory* dismissal. If Optional Paragraph H is used, counsel should add additional points and authorities relating to the particular excuse or extension that is sought to be applied. The points and authorities *set out in §§ 90.86 -90.92* and *90.95* may be used for this purpose.

The principles of waiver and estoppel apply in ruling on a motion for discretionary dismissal as well as one for mandatory dismissal [*see Code Civ. Proc. § 583.140*]. Thus, the points and authorities *set out in § 90.93* may also be combined with these points and authorities in an appropriate case.

This memorandum opposes a defendant's motion for dismissal of the complaint, and should be modified as necessary when it is used in another context, such as in opposition to a motion for dismissal of a cross complaint [*see Code Civ.*

Proc. § 583.110(a), (b), (d), (e)].

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, if it is alleged that the parties engaged in settlement negotiations, counsel should set forth the dates and the contents of those negotiations [*see Cal. Rules of Ct., Rule 3.1342(e)*].

These points and authorities may be submitted in opposition to a motion for discretionary dismissal supported by the general points and authorities *set out in § 90.83*.

[b] Absence of Actual Prejudice Not Determinative

Several courts of appeal, construing former Code Civ. Proc. § 583 [*now see Code Civ. Proc. § 583.420(a)*], have ruled that discretionary dismissal is not proper absent some showing of actual prejudice to the defendant [*see Luti v. Graco, Inc. (1985) 170 Cal. App. 3d 228, 235-236, 215 Cal. Rptr. 902* ; *Troupe v. Courtney (1985) 169 Cal. App. 3d 930, 934-935, 215 Cal. Rptr. 703* ; *Hurtado v. Statewide Home Loan Co. (1985) 167 Cal. App. 3d 1019, 1028-1032, 213 Cal. Rptr. 712]* . However, it appears that these decisions have been impliedly disapproved by the *Supreme Court in Blank v. Kirwan (1985) 39 Cal. 3d 311, 332, 216 Cal. Rptr. 718, 703 P.2d 58* [discussed in *§ 90.83[3][f]*], which held that a showing of prejudice is not required [*see Freedman v. Pacific Gas & Electric Co. (1987) 196 Cal. App. 3d 696, 711, 242 Cal. Rptr. 8* ; *Longshore v. Pine (1986) 176 Cal. App. 3d 731, 736, 222 Cal. Rptr. 364]* . The rationale is that discretionary dismissal is not designed solely to remedy prejudice to the defendant, but is also designed to expedite the administration of justice by compelling every person who files an action to prosecute it with promptness and diligence [*see Freedman v. Pacific Gas & Electric Co. (1987) 196 Cal. App. 3d 696, 711, 242 Cal. Rptr. 8]* .

While a showing of prejudice is no longer required to justify discretionary dismissal, it is still a factor to be considered [*see Freedman v. Pacific Gas & Electric Co. (1987) 196 Cal. App. 3d 696, 711, 242 Cal. Rptr. 8]* . For example, it may be proper to deny discretionary dismissal when defendant has not shown any prejudice and other factors weigh against the dismissal [*see, e.g., Cubit v. Ridgecrest Community Hospital (1987) 194 Cal. App. 3d 1552, 1569-1573, 240 Cal. Rptr. 346* (reversing grant of dismissal when there was no showing of prejudice and several indications of diligence on plaintiffs' part)]. It has been said that the rule implicit in *Blank* and later cases is that lack of prejudice to a defendant remains a valid consideration when the plaintiff has acted diligently from the outset, but no affirmative showing of actual prejudice is necessary to entitle the defendant to dismissal when the delay is unreasonable [*Wong v. Davidian (1988) 206 Cal. App. 3d 264, 270, 253 Cal. Rptr. 675]* . Counsel may therefore wish to argue, in an appropriate case, that a lack of any showing of prejudice by the defendant is one factor indicating that the interests of justice are best served by denying dismissal [*see* Paragraph E].

[c] Effect of Authority Decided Under Former Dismissal Statutes

In 1984, the provision for discretionary dismissal for delay in bringing an action to trial or new trial, former Code Civ. Proc. § 583(a), was repealed and replaced by *Code Civ. Proc. §§ 583.410-583.430*. Decisions interpreting the former statute have been cited in the form as persuasive rather than controlling authority to the extent that the revised statutes codify former case law or continue former substantive principles.

[d] Related Pleading and Practice Forms

For forms of a notice of motion and order relating to a motion to dismiss an action pursuant to Code Civ. Proc. § 583.410, see California Forms of Pleading and Practice, *Dismissal* (Matthew Bender).

[3] Discussion of Authorities

[a] Statutory Grounds for Discretionary Dismissal

In ***Roman v. Usary Tire & Service Center*** *(1994) 29 Cal. App. 4th 1422, 35Cal. Rptr. 2d 329* , plaintiff's counsel failed to timely appear at the court-ordered arbitration, resulting in its cancellation. After counsel failed to timely reschedule the arbitration hearing pursuant to court order, the trial court issued an Order to Show Cause Re Dismissal/Sanctions. Although the order stated that appearance was mandatory, neither plaintiff nor his counsel appeared. The trial court dismissed the action pursuant to *Code Civ. Proc. § 583.410(a)* and filed and served its notice of ruling one year and eleven months after the complaint was filed (*29 Cal. App. 4th 1422, 1426)* . The trial court then denied plaintiff's subsequent attempts to vacate the dismissal.

The court of appeal reversed. It initially stated that the order to show cause provided sufficient due process notice to plaintiff that the action would be subject to dismissal if counsel did not appear at the hearing. It then, however, held that the trial court lacked authority to dismiss the action under *Code Civ. Proc. § 583.410(a)*. That section prohibits discretionary dismissal for delay unless one of certain conditions has occurred, which includes the failure to bring the action to trial within three years, or within two years by rule adopted by the Judicial Council pursuant to *Code Civ. Proc. § 583.410*. Former Cal. Rules of Ct. Rule 372 (now see *Cal. Rules of Ct., Rule 3.1340*) allows the court on its own motion to dismiss an action for delay in prosecution if the action has not been brought to trial within two years after commencement. Since the trial court ordered the action dismissed prior to the two-year mark, it lacked authority and thus abused its discretion (*29 Cal. App. 4th 1422, 1430-1431)* .

[b] Discretion Not Arbitrary

United Farm Workers National Union v. International Brotherhood of Teamsters *(1978) 87 Cal. App. 3d 225, 150 Cal. Rptr. 761* , was a suit between two unions. Defendants moved to dismiss the action under former Code Civ. Proc. § 583(a) [*now see Code Civ. Proc. §§ 583.410, 583.420*] for failure to bring it to trial approximately 26 months after the complaint was filed. In opposition, plaintiffs' former and current counsel filed declarations describing changes of attorney, discovery delays because of ongoing discovery activities in related lawsuits and a very heavy caseload arising out of strike activity, and extensive files which had to be reviewed. They also rebutted defendants' claims of prejudice. The trial court dismissed the action.

The court of appeal reversed. The court emphasized that the discretion to be exercised in determining whether to dismiss the action is not a capricious or arbitrary discretion but one controlled by legal principles and exercised in accordance with the spirit of the law and with a view to serving rather than defeating the ends of justice (*87 Cal. App. 3d 225, 233-234)* . Moreover, the policy underlying former Code Civ. Proc. § 583(a) must sometimes yield to the more powerful policy which seeks to dispose of litigation on the merits (*87 Cal. App. 3d 225, 232)* .

It should be noted that *United Farm Workers* was criticized for its interpretation that a trial court may, but is not required to, dismiss an action even in the absence of a showing of good cause for delay, in *Kunzler v. Karde (1980) 109 Cal. App. 3d 683, 688-689, 167 Cal. Rptr. 425* [discussed in *§ 90.83[3][c]*.

[c] Any Basis for Good Cause Is Sufficient

The facts and procedural background of ***Denham v. Superior Court*** *(1970) 2 Cal. 3d 557, 86 Cal. Rptr. 65, 468 P.2d 193* , are discussed in *§ 90.98[3][c]*. In *Denham*, the Supreme Court held that the trial court did not abuse its discretion in denying a dismissal under former Code Civ. Proc. § 583(a) [*now see Code Civ. Proc. §§ 583.410, 583.420*]. The Court stated that a writ of mandate should issue to compel dismissal of an action only if there is an entire absence of any showing constituting good cause for delay in prosecution presented to the trial court. If there is any basis on which the trial court's action can be sustained and it appears that no injustice will result from sustaining the trial court, the refusal to dismiss should be upheld (*2 Cal. 3d 557, 564)* .

Prior to *Denham*, several decisions held that the trial court lost its discretion to deny a motion to dismiss for failure to bring an action to trial within two years unless plaintiff made a specific showing of excusable delay [*see, e.g., Black*

Bros. Co. v. Superior Court (1968) 265 Cal. App. 2d 501, 507, 71 Cal. Rptr. 344 ; *Breckenridge v. Mason (1967) 256 Cal. App. 2d 121, 127, 64 Cal. Rptr. 201]* . This rule and line of cases were explicitly disapproved in *Denham,* in which the Supreme Court stated that former Code Civ. Proc. § 583 places no restrictions on the exercise of the trial court's discretion and, in particular, that there was no requirement that the motion to dismiss must be granted unless opposed by an adequate showing of diligence or excuse for delay (*265 Cal. App. 2d 501)* .

[d] Plaintiff's Lack of Showing of Good Cause Not Controlling

The facts and procedural background of ***United Farm Workers National Union v. International Brotherhood of Teamsters*** *(1978) 87 Cal. App. 3d 225, 150 Cal. Rptr. 761* , are *discussed under § 90.98[3][b]*. In *United Farm Workers,* the trial court held that plaintiffs failed to make some showing of good cause for the delay in prosecution. Therefore, dismissal was required by *Dunsmuir Masonic Temple v. Superior Court (1970) 12 Cal. App. 3d 17, 21, 90 Cal. Rptr. 405 , set out in § 90.83[4][b]*. The court of appeal reversed on the ground that the trial court failed to apply the proper legal standard (*87 Cal. App. 3d 225, 236)* . *Dunsmuir* requires the trial court to dismiss an action if plaintiff fails to make some showing of good cause for delay. However, the leading case interpreted by *Dunsmuir, Denham v. Superior Court (1970) 2 Cal. 3d 557, 563, 86 Cal. Rptr. 65, 468 P.2d 193* [*discussed under § 90.98[3][c]*], did not reach this conclusion. The court in *United Farm Workers* stated that the *Denham* Court would allow dismissal of an action in this situation (*87 Cal. App. 3d 225, 235-236)* . Moreover, former Cal.Rules of Ct., Rule 203.5 [*now see Cal. Rules of Ct., Rule 3.1342*] supports this interpretation of *Denham* because it gives the trial court broad discretion not to dismiss the action even though the plaintiff makes no affirmative showing of excuse for delay (*87 Cal. App. 3d 225, 235)* . For example, it permits the trial court to review the pleadings and conclude that a grave injustice would result to plaintiff if the case were dismissed, and this would be an adequate ground, assuming that defendant has not made a strong showing of prejudice from the delay (*87 Cal. App. 3d 225, 235-236)* . In *United Farm Workers,* it appeared the trial court concluded on the basis of *Dunsmuir* that once it had read the declarations it had no alternative but to dismiss (*87 Cal. App. 3d 225, 236)* .

Additional support for the position taken in *United Farm Workers* is found in the leading case of *Weeks v. Roberts (1968) 68 Cal. 2d 802, 69 Cal. Rptr. 305, 442 P.2d 361 , set out in § 90.80[3][d]*. In *Weeks,* the Supreme Court emphasized that although dismissal after a lapse of two years was discretionary, the dismissal power should be used in view of the facts of the entire situation, taking into account any unusual circumstances and acting to promote substantial justice (*87 Cal. App. 3d 225)* .

However, at least two court of appeal cases have disagreed with the *United Farm Workers* holding that *Denham* gives a trial court discretion to deny a motion to dismiss in the absence of any showing of justification for the delay [*see Kunzler v. Karde (1980) 109 Cal. App. 3d 683, 689, 167 Cal. Rptr. 425* (discussed in *§ 90.83[3*][c]); *Lopez v. Larson (1979) 91 Cal. App. 3d 383, 397-398, 153 Cal. Rptr. 912* (discussed in *§ 90.51[3][a]*)].

[e] Factors Relevant to Ruling on Motion

Cal. Rules of Ct., Rule 3.1342(e) is discussed in *§ 90.83[3][b]*.

The facts and procedural background of ***Tannatt v. Joblin*** *(1982) 130 Cal. App. 3d 1063, 182 Cal. Rptr. 112* , are discussed in *§ 90.83[3][c]*. In *Tannatt,* plaintiff brought an action in 1977 to recover money wrongfully obtained and received, and obtained judgment against one of the named defendants, who was the primary wrongdoer. Unable to execute on the judgment, plaintiff served the remaining nine defendants in 1980. The trial court granted defendants' motion to dismiss pursuant to former Code Civ. Proc. § 583(a) [*now see Code Civ. Proc. §§ 583.410, 583.420*]. The court of appeal reversed, holding that the trial court abused its discretion in dismissing the action, since plaintiff's forbearance from prosecuting the other defendants was neither capricious nor unreasonable. The court further held that plaintiff had proven an abuse of discretion by showing that the trial court had not carefully considered each factor of former Cal. Rules of Ct., Rule 203.5 [*now see Cal. Rules of Ct., Rule 3.1342(e)*], which would have shown that, at least

impliedly, the reason advanced by plaintiff was good (*130 Cal. App. 3d 1063, 1068)* .

[f] Counsel's Workload Is Sufficient Excuse

In ***Woolfson v. Personal Travel Service, Inc.*** *(1971) 3 Cal. 3d 909, 92 Cal. Rptr. 286, 479 P.2d 646* , plaintiff's counsel opposed defendant's motion for a dismissal pursuant to former Code Civ. Proc. § 583(a) [*now see Code Civ. Proc. §§ 583.410, 583.420*] on the grounds that he was unable to consult with his client about litigation expenses because plaintiff had become his father's executor in England, and that as a sole practitioner he had been tied up in two trials. The trial court reluctantly dismissed on the theory that it had no discretion to deny the motion unless plaintiff showed excusable delay, and plaintiff's arguments fell short.

The Supreme Court reversed on the basis of *Denham v. Superior Court (1970) 2 Cal. 3d 557, 565, 86 Cal. Rptr. 65, 468 P.2d 193 , discussed under § 90.98[3][c]*. The Court in *Denham* decided that if the record does not reveal an entire absence of any showing constituting good cause, dismissal is not mandatory and the trial court may exercise its discretion in ruling on the motion. Its discretion will not be reversed except in cases of clear abuse (*3 Cal. 3d 909, 912-913)* .

It should be noted that some courts have held dismissal proper despite the existence of factors like those in *Woolfson*. For example, in *Lopez v. Larson (1979) 91 Cal. App. 3d 383, 399-400, 153 Cal. Rptr. 912* [discussed in *§ 90.51[3][a]*], plaintiff offered workload as the sole justification of delay. The court of appeal in *Lopez* rejected this argument on the ground that in all of the cases, including *Woolfson*, the unusual press of business or a burdensome workload was only one of several factors justifying delay. The other argument offered in *Woolfson*, client unavailability to discuss litigation expenses, is somewhat analogous to plaintiff's being incapacitated and unable to communicate with counsel. Incapacitation has been held insufficient by itself to empower the trial court to exercise its discretion [*see Dunsmuir Masonic Temple v. Superior Court (1970) 12 Cal. App. 3d 17, 21-22, 90 Cal. Rptr. 405* , discussed in *§ 90.83[4][b]*].

The facts and procedural background of ***Denham v. Superior Court*** *(1970) 2 Cal. 3d 557, 86 Cal. Rptr. 65, 468 P.2d 193* , are *discussed under § 90.98[3][c]*. In *Denham*, the principal explanation for delay offered by plaintiff concerned changes in the law office of plaintiff's counsel with resulting increased workloads and the probability of error. The Supreme Court, in affirming the trial court's denial of the motion to dismiss, stated that frequent changes in plaintiffs' attorneys' law firm and the resultant pressure on the attorneys remaining in the office may be considered in determining whether plaintiffs have shown that the delay was excusable. The Court further noted that innumerable pleadings were filed by the parties. Although this fact by itself would not constitute sufficient excuse to avoid mandatory dismissal, it may be considered along with the attorneyworkload factors in a motion for discretionary dismissal pursuant to former Code Civ. Proc. § 583 (*2 Cal. 3d 557, 565)* .

[4] Additional Authorities

[a] Discretion Not Arbitrary

In *Cordova v. Vons Grocery Co. (1987) 196 Cal. App. 3d 1526, 242 Cal. Rptr. 605* , the court of appeal held that a trial court abused its discretion in dismissing an action on its own motion under *Code Civ. Proc. §§ 583.410, 583.420* for delay in prosecution when plaintiff was not ready to proceed on the date set for trial. Defendant's counsel had been substituted into the case a month before the trial date, had asked plaintiff to stipulate to a continuance, and had assured plaintiff that he would arrange for the continuance. In finding that the trial court abused its discretion by dismissing the case on its own motion, the appellate court noted that plaintiff had prepared diligently for trial and had reasonably relied on defendant's assurances that he would arrange with the court for the continuance, and that defendant would suffer no prejudice from the delay in commencement of the trial. Under these circumstances, dismissal worked a miscarriage of justice and thus constituted an abuse of discretion (*196 Cal. App. 3d 1526, 1535-1536)* .

[b] Any Basis for Good Cause Is Sufficient

In *Pomona Federal Plaza, Ltd. v. Investment Concepts, Inc. (1988) 203 Cal. App. 3d 217, 249 Cal. Rptr. 757* , plaintiff waited four years to bring an at-issue memorandum. Plaintiff had never initiated discovery, nor taken any action to bring the matter to trial before that time. However, during the first year after filing the action, plaintiff actively responded to discovery initiated by other parties. In the meantime, numerous cross complaints were filed, and extensive discovery was conducted amongst the defendants, cross complainants, and cross defendants; indeed, one cross complaint had not been answered by all cross defendants at the time the motion to dismiss for failure to prosecute was made. The real contest in the action was not in proving liability but in determining which party would pay for all the damages. The trial court ordered the action dismissed under *Code Civ. Proc. §§ 583.410(a), 583.420(a)(2)(A)*. The court of appeal reversed, holding that the dismissal was improper under the circumstances. The court of appeal explained that inherent in the dismissal statutes is the concept that parties should act reasonably in prosecuting their actions and that, when viewed in a practical sense, matters should be tried together to avoid unnecessary burden to the administration of justice. In this case, it would not have been realistic to sever the cross complaints, and defendants were not prejudiced by the delay (*203 Cal. App. 3d 217, 222-224)* .

In *Cubit v. Ridgecrest Community Hospital (1987) 194 Cal. App. 3d 1552, 240 Cal. Rptr. 346* , the court of appeal reversed the trial court's dismissal for delay in prosecution of an action for medical malpractice under former Code Civ. Proc. § 583(a) [*now see Code Civ. Proc. § 583.420(a)*] four and one-half years after the action was commenced on the ground plaintiffs had demonstrated excusable delay (plaintiffs had diligently conducted discovery and participated in and responded to extensive discovery instigated by the defendants, had learned of an additional ground of malpractice three years after the commencement of the case and immediately thereafter joined as additional defendants the parties responsible, and had vigorously responded to several demurrers and motions to strike) (*194 Cal. App. 3d 1552, 1567-1569)* , and defendants failed to demonstrate any prejudice resulting from the delay (*194 Cal. App. 3d 1552, 1569-1573)* .

[c] Counsel's Workload Is Sufficient Excuse

The facts and procedural background of *United Farm Workers National Union v. International Brotherhood of Teamsters (1978) 87 Cal. App. 3d 225, 150 Cal. Rptr. 761* , are discussed in *§ 90.98[3][b]*. In reversing the trial court's dismissal, the court of appeal noted that while the trial court may not have abused its discretion in dismissing on the basis of declarations of plaintiff's attorneys, had it also considered the other relevant factors, it could not say as a matter of law that there had been no showing of good cause (*87 Cal. App. 3d 225, 236-237)* . A change in attorneys and the press of business of plaintiffs' counsel could support the trial judge's discretion in denying a motion to dismiss, under *Denham v. Superior Court (1970) 2 Cal. 3d 557, 565, 86 Cal. Rptr. 65, 468 P.2d 193* [discussed in *§ 90.98[3][f]*). Moreover, counsel's tactical decision to defer discovery until it was completed in two cases tangentially involving the same incident could constitute adequate cause for the delay (*87 Cal. App. 3d 225, 236-237)* .

In *City of Los Angeles v. Gleneagle Dev. Co. (1976) 62 Cal. App. 3d 543, 133 Cal. Rptr. 212* , the court of appeal reversed a dismissal granted under former Code Civ. Proc. § 583(a) [*now see Code Civ. Proc. §§ 583.410, 583.420*] in regard to one of the defendants in a breach of contract action. Defendant's conduct in filing its own at-issue memorandum to correct a trial-time estimate, in response to plaintiff's memorandum, estopped defendant from relying on plaintiff's previous four-year period of delay as a basis for dismissal (*62 Cal. App. 3d 543, 564)* . Plaintiff adequately explained the delay. The only period of inactivity in prosecuting the action prior to plaintiff's filing an at-issue memorandum was explained by the fact that the law office representing plaintiff was seriously understaffed, a number of attorneys handled the case, and the office otherwise had a heavy and demanding caseload (*62 Cal. App. 3d 543, 562)* . This excuse was no better or worse than that proffered in *Denham v. Superior Court (1970) 2 Cal. 3d 557, 86 Cal. Rptr. 65, 468 P.2d 193* , and the Supreme Court's attitude indicates a trend toward more leniency than was apparent in older cases, in which neither the sickness or death of an attorney, the press of business, or a heavy trial schedule was considered an adequate excuse for delay (*62 Cal. App. 3d 543, 564-565)* .

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Volume 9 Chapters 90-99 DISMISSAL---to---EMINENT DOMAIN
CHAPTER 90 DISMISSAL
PART II. FORMS
B. Involuntary Dismissal
2. Dismissal For Failure To Bring Action To Trial Or New Trial

9-90 California Points & Authorities § 90.99

§ 90.99 Supplemental Memorandum [Cal. Rules of Ct., Rule 3.1342(c)] Supporting Motion for Mandatory Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.310, 583.320, 583.360]--Exclusion Based on Impossibility Does Not Apply [Code Civ. Proc. § 583.340(c)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	SUPPLEMENTAL MEMORANDUM IN SUPPORT
vs.	)	OF MOTION TO DISMISS
_____ [*name*],	)	[*Code Civ. Proc. §§ 583.310, 583.320, 583.360*]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Trial Date: _____]

_____

PLAINTIFF'S CLAIM THAT IT WAS IMPOSSIBLE TO BRING THE ACTION TO _____ [TRIAL *or* A NEW TRIAL] IS NOT SUPPORTED BY HIS/HER SHOWING THAT THE PERIOD OF DELAY WAS CAUSED BY _____ [*specify, e.g.,* EVENTS THAT ARE ORDINARILY INCIDENT TO COURT PROCEEDINGS].

[*EITHER*]

A. Normal Delays in Court Proceedings Are No Basis for Impossibility Exception. Periods of delay in bringing an action to _____ [trial *or* a new trial] caused by the ordinary incidents of court proceedings and the normal time of waiting for a trial date are not excluded from the calculation of the period(s) specified in Section _____ [583.310 *or* 583.320] of the Code of Civil Procedure on the ground that going to _____ [trial *or* a new trial] was impossible, because the duty rests on a plaintiff at every stage of the proceedings to use due diligence to expedite the case to a final determination (*see Crown Coach Corp. v. Superior Court (1972) 8 Cal. 3d 540, 548, 105 Cal. Rptr. 339, 503 P.2d 1347* ; *Moore v. Powell (1977) 70 Cal. App. 3d 583, 589, 138 Cal. Rptr. 914*).

[*AND/OR*]

B. Illness of Plaintiff's Counsel Is No Basis for Impossibility Exception When Failure to Bring to Trial Did Not Result From Illness. The period of illness of plaintiff's counsel is not to be excluded from computation of the five-year period for bringing an action to trial when there is no causal connection between the illness and the failure to satisfy the five-year requirement (*Sierra Nevada Memorial Miners Hospital, Inc. v. Superior Court (Hudson) (1990) 217 Cal. App. 3d 464, 473, 266 Cal. Rptr. 50*).

[*AND/OR*]

C. Plaintiff's Illness Is No Basis for Impossibility Exception. A period of delay in bringing an action to _____ [trial *or* a new trial] caused by plaintiff's illness is not excluded from the calculation of the period(s) specified in Section _____ [583.310 *or* 583.320] of the Code of Civil Procedure on the ground that going to _____ [trial *or* a new trial] was impossible (*see Singelyn v. Superior Court (1976) 62 Cal. App. 3d 972, 974-975, 133 Cal. Rptr. 486*).

[*AND/OR*]

D. Plaintiff's Bankruptcy Is No Basis for Impossibility Exception. The Bankruptcy Act provides that the commencement or continuation of any legal proceeding against a debtor is automatically stayed by the filing of a petition in bankruptcy, but this does not apply when it is the plaintiff who is a debtor and files for bankruptcy. Because prosecution of the action could have continued during the plaintiff's bankruptcy, either by the trustee in bankruptcy or, on an order of the bankruptcy court, by the plaintiff, it was not impossible to bring the action to trial within five years (*Lauriton v. Carnation Co. (1989) 215 Cal. App. 3d 161, 164-165, 263 Cal. Rptr. 476*).

[*AND/OR*]

E. Death of Coplaintiff Is No Basis for Impossibility Exception. In an action involving real property that is brought by multiple plaintiffs as joint tenants of that property, a period of delay in bringing an action to _____ [trial *or* a new trial] caused by the death of one of the plaintiffs is not excluded from the calculation of the period(s) specified in section _____ [583.310 *or* 583.320] of the Code of Civil Procedure on the ground that going to _____ [trial *or* a new trial] was impossible (*Ferk v. County of Lake (1988) 205 Cal. App. 3d 268, 273-276, 252 Cal. Rptr. 196*).

[*AND/OR*]

F. Plaintiff's Lack of Representation by Guardian Ad Litem Is No Basis for Impossibility Exception. A period of delay in bringing an action to_____ [trial *or* a new trial] caused by plaintiff's lack of representation by a guardian ad litem is not excluded from the calculation of the period(s) specified in section _____ [583.310 *or* 583.320] of the Code of Civil Procedure on the ground that the court lacked jurisdiction to try the action or that going to _____ [trial *or* a new trial] was impossible, impracticable, or futile (*see White v. Renck (1980) 108 Cal. App. 3d 835, 838-841, 166 Cal. Rptr. 701*).

[*AND/OR*]

G. Plaintiff's Inadvertence in Selecting Trial Date Is No Basis for Impossibility Exception. A period of delay caused by a plaintiff's inadvertence in selecting a date for _____ [trial *or* new trial] is not excluded from the calculation of the period(s) specified in section _____ [583.310 *or* 583.320] of the Code of Civil Procedure on the ground of impossibility, because it is the plaintiff's duty to keep track of such crucial dates (*see Cannon v. City of Novato (1985) 167 Cal. App. 3d 216, 222, 213 Cal. Rptr. 132*).

[*AND/OR*]

H. Impossibility Exception Is Inapplicable When Setting of Trial Date Beyond Five-Year Period Resulted From Plaintiff's Failure to Advise Trial Court of Chronology of Case or to Move to Set Case Specially for Trial. Plaintiff's failure to bring a civil action to trial as required by *Section 583.310 of the Code of Civil Procedure* is not excused on the ground of impossibility by the trial court clerk's having told plaintiff that no trial date was available within the statutory period when plaintiff failed to call the chronology of the case to the trial court's attention at the time the case was set for trial beyond the five-year period or to move to have trial specially set (*Wale v. Rodriguez (1988) 206 Cal. App. 3d 129, 133, 253 Cal. Rptr. 382*).

[*AND/OR*]

I. Impossibility Exception Does Not Apply Absent Showing by Plaintiff of Due Diligence. Periods of delay in bringing an action to _____ [trial *or* a new trial] that are attributable to impossibility are not excluded from the calculation of the period(s) specified in section _____ [583.310 *or* 583.320] of the Code of Civil Procedure unless the plaintiff has otherwise shown that he or she used reasonable diligence in prosecuting the case (*Lauriton v. Carnation Co. (1989) 215 Cal. App. 3d 161, 164-165, 263 Cal. Rptr. 476* ; *Hill v. Bingham (1986) 181 Cal. App. 3d 1, 10, 225 Cal. Rptr. 905*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in a supplemental memorandum supporting a motion for mandatory dismissal for delay in bringing an action to trial or new trial within the applicable period specified in *Code Civ. Proc. § 583.310* or *583.320* [*see Code Civ. Proc. § 583.360*]. Specifically, the foregoing supplemental points and authorities may be submitted in response to an opposing claim that the applicable time period has not lapsed after excluding time during which it was impossible to bring the action to trial or new trial [*see Code Civ. Proc. § 583.340(c)*; *see also § 90.91*]. The ground for the response is that the opposing party has not adequately shown acts or conduct that constitute impossibility within the meaning of *Code Civ. Proc. § 583.340(c)*.

As a practical matter, the foregoing points and authorities are best used in a supplemental memorandum, after the opposing party has raised the issue of impossibility. Although there is no express authorization for submitting supplemental memoranda in a motion for mandatory dismissal, supplemental memoranda are so authorized in analogous motions for discretionary dismissal [*see Cal. Rules of Ct., Rule 3.1342(c)*]. Alternatively, the foregoing points and authorities may be combined with the points and authorities generally supporting a motion for mandatory dismissal that are *set out in § 90.80*, when counsel wishes to anticipate known opposition.

The foregoing form may, in addition, be adapted for use in support of a motion for discretionary dismissal [*see § 90.83*]. The principles applicable in determining whether the discretionary period has lapsed are the same as those applicable in determining whether the mandatory period has lapsed [*see Code Civ. Proc. § 583.420(b)*].

The foregoing memorandum supports a defendant's motion for dismissal of the complaint, and should be modified as necessary when it is used in another context, such as in support of a motion for dismissal of a cross complaint [*see Code Civ. Proc. § 583.110(a), (b), (d), (e)*].

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated. For example, if it is claimed that the action could not be brought to trial because of the usual time in waiting for a trial date, counsel should state that this reason is an ordinary incident of court proceedings and is not an excuse recognized by case law under the doctrine of impossibility [*see, e.g., Crown Coach Corp. v. Superior Court (1972) 8 Cal. 3d 540, 548, 105 Cal. Rptr. 339, 503 P.2d 1347]* .

[b] Effect of Authority Decided Under Former Dismissal Statutes

In 1984, the provisions for involuntary dismissal for delay in bringing an action to trial or new trial, former Code Civ. Proc. § 583(b)-(d), were repealed and replaced by *Code Civ. Proc. §§ 583.310-583.360*. Before the 1984 enactment of *Code Civ. Proc. § 583.340(c)*, which codified impossibility as an express exception to the dismissal statute's time requirements, a similar exception had been implied by the courts [*see Christin v. Superior Court (1937) 9 Cal. 2d 526, 530, 71 P.2d 205]* . Decisions interpreting former Code Civ. Proc. § 583 have been cited in the form as persuasive rather than controlling authority to the extent that the revised statutes codify former case law or continue former substantive principles.

[c] Related Pleading and Practice Forms

For forms of a notice of motion and order relating to a motion to dismiss an action pursuant to Code Civ. Proc. § 583.360, see Ch. 212, *Dismissal* in California Forms of Pleading and Practice.

[d] Opposing Memoranda

The points and authorities *set out in § 90.91* may be used in an appropriate case to oppose a motion for dismissal supported by the foregoing memorandum.

[3] Discussion of Authorities

[a] Normal Delays in Court Proceedings Are No Basis for Impossibility Exception

In ***Crown Coach Corp. v. Superior Court*** *(1972) 8 Cal. 3d 540, 105 Cal. Rptr. 339, 503 P.2d 1347* , the defendant successfully sought a writ ofmandate in the Supreme Court to compel dismissal of an action that was not brought to trial within three years after the filing of the remittitur on a previous appeal. The Court rejected plaintiff's contention that it would have been impossible and futile to attempt to bring the case to trial within the statutory period (*8 Cal. 3d 540, 546)* . The implied exceptions to the running of the period do not contemplate that time consumed by the delay caused by ordinary incidents of proceedings like the disposition of a demurrer, amendment of pleadings, and the normal time of waiting for a place on the court's calendar or securing a jury trial is to be excluded from computation of the statutory period. The duty rests on a plaintiff at every stage of the proceedings to use due diligence to expedite the case to a final determination (*8 Cal. 3d 540, 548)* . Although plaintiff alleges a problem of court congestion, it is common knowledge that metropolitan courts are congested, and this delay is only part of the usual and ordinary incidents preliminary to trial, against which plaintiff could have sought protection by a motion to advance for trial (*8 Cal. 3d 540, 549)* .

In ***Moore v. Powell*** *(1977) 70 Cal. App. 3d 583, 138 Cal. Rptr. 914* , the trial court dismissed the action because plaintiff had failed to bring it to trial within five years under former Code Civ. Proc. § 583(b) [*now see Code Civ. Proc. § 583.310*]. On appeal, plaintiff contended that the five-year period was tolled by a change of venue, based on former Code Civ. Proc. § 583(f) [*now see Code Civ. Proc. § 583.340(a)*], which excluded time during which the court's jurisdiction to try the action was suspended from computation of the statutory period.

The court of appeal affirmed the judgment. The court reasoned that former Code Civ. Proc. § 583(f) merely codified the impossibility principle, and that time consumed by delay caused by ordinary incidents of proceedings is not excluded from the statutory period on the ground of impossibility. On the facts of this case, plaintiff should have foreseen the strong probability that defendants would move to change venue, and the normal time required for such a change can hardly be deemed an extraordinary or unavoidable delay (*70 Cal. App. 3d 583, 589)* .

[b] Illness of Plaintiff's Counsel Is No Basis for Impossibility Exception When Failure to Bring to Trial Did Not Result From Illness

In ***Sierra Nevada Memorial Miners Hospital, Inc. v. Superior Court (Hudson)*** *(1990) 217 Cal. App. 3d 464, 266 Cal. Rptr. 50* , plaintiffs failed to bring their action for medical malpractice to trial within five years. The failure was due to a computational error by plaintiffs' law firm in calendaring the case for timely action by mistakenly referring to the date posted on the office file label as the date the complaint was filed. In addition, the only experienced trial attorney in the office was disabled, because of three episodes of surgery and convalescence, for a total of 77 days during the five-year period. Defendant's motion to dismiss the action for failure to bring it to trial within five years was denied on the ground the 77 days of the attorney's illness were to be excluded from computation of the five-year period, and defendant petitioned the appellate court for a writ of mandate.

In issuing a peremptory writ of mandate directing the trial court to vacate its order denying the motion to dismiss, and directing it to grant the motion, the court of appeal said that failure of plaintiffs' law firm to calendar the case in a timely manner had nothing to do with counsel's physical disabilities (*217 Cal. App. 3d 464, 467)* , and that there was no basis under the governing statutes for tolling the five-year dismissal period on the ground of counsel's illness (*217 Cal. App. 3d 464, 469)* . The court said that the text of *Code Civ. Proc. § 583.340* impelled the view that there must be a causal connection between the circumstance on which plaintiff relies and the failure to satisfy the five-year requirement, that bringing the action to trial must be impossible, impracticable, or futile for the reason proffered, and that a bare showing that counsel was ill does not warrant the attribution of such causation (*217 Cal. App. 3d 464, 473)* . The court explained that plaintiff must do more than merely demonstrate that counsel was unable to attend trial or to attend to trial preparation during certain periods and thereby claim that the aggregate period was one of impossibility, impracticability, or futility warranting a tolling of the statute. In the course of five years it is reasonable to expect that counsel will suffer a number of days when illness will prevent attendance to his or her practice. Similarly, it is

reasonable to expect that counsel will have to attend to other business, personal and professional, including days off and vacations. The five-year period contains an allowance for the time so consumed in the same manner as it allows for the usual and ordinary proceedings attendant to moving the case to trial (*217 Cal. App. 3d 464, 472)* . The court said that it would render the statute utterly indeterminate, subjective, and unadministerable, and thus absurd, to read an open-ended sick leave program for counsel into the tolling provisions of *Code Civ. Proc. § 583.340(c)* (*217 Cal. App. 3d 464, 472-473)* .

[c] Plaintiff's Illness Is No Basis for Impossibility Exeption

In ***Singelyn v. Superior Court*** *(1976) 62 Cal. App. 3d 972, 133 Cal. Rptr. 486* , both parties participated in a trial-setting conference in which, without objection, the trial court inadvertently set a trial date that was one day beyond the expiration of the five-year period. On the day scheduled for trial, defendants unsuccessfully moved for dismissal under former Code Civ. Proc. § 583(b) [*now see Code Civ. Proc. §§ 583.310, 583.360*] and subsequently petitioned for a writ of mandate to vacate the trial court's order.

The court of appeal issued the writ, holding, in part, that illness of a plaintiff does not toll the statute and is not even a factor considered in that connection (*62 Cal. App. 3d 972, 974-975)* . It cited *Beswick v. Palo Verde Hosp. Ass'n (1961) 188 Cal. App. 2d 254, 260-261, 10 Cal. Rptr. 314* , for the proposition that not even the death of plaintiff's attorney can be relied on to toll the statute (*62 Cal. App. 3d 972, 975)* .

[d] Plaintiff's Bankruptcy Is No Basis for Impossibility Exception

In ***Lauriton v. Carnation Co.*** *(1989) 215 Cal. App. 3d 161, 263 Cal. Rptr. 476* , the court of appeal affirmed the trial court's order of dismissal for plaintiff's failure to bring the action to trial within five years as required by *Code Civ. Proc. § 583.310*. The complaint was filed December 8, 1983; plaintiff filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Act on October 16, 1987, and received a discharge in bankruptcy on August 18, 1988. On September 30, 1988, he filed an at-issue memorandum, and trial was scheduled for February 27, 1989. However, on February 10, 1989, the case was dismissed because of plaintiff's failure to prosecute.

The court of appeal pointed out that (1) although generally all causes of action possessed by a bankrupt vest in the trustee and the plaintiff is not authorized to prosecute the action personally without authorization from the bankruptcy court, the bankruptcy itself does not divest the superior court of jurisdiction; (2) although the Bankruptcy Act provides that the commencement or continuation of any legal proceeding against the debtor is automatically stayed by the filing of a petition in bankruptcy, a debtor's cause of action is not tolled by the filing of a bankruptcy petition; and (3) what constitutes impossibility within the meaning of *Code Civ. Proc. § 583.340(c)* must be determined in light of all the circumstances in the individual case, including the acts and conduct of the parties and the nature of the proceedings themselves (*215 Cal. App. 3d 161, 164)* . The court held that it was not impossible to bring the case to trial during plaintiff's bankruptcy, because (1) the trustee is not stayed from prosecuting actions and could have intervened in the action or moved to be substituted as party plaintiff (*215 Cal. App. 3d 161, 164)* , and (2) plaintiff could have sought relief from the bankruptcy court, such as an order permitting the trustee to maintain the action, an order compelling the trustee to maintain the action, an order authorizing plaintiff to prosecute the action on his own behalf, or a formal order of abandonment (*215 Cal. App. 3d 161, 165)* .

[e] Death of Coplaintiff Is No Basis for Impossibility Exception

Ferk v. County of Lake *(1988) 205 Cal. App. 3d 268, 252 Cal. Rptr. 196* , was an action, filed June 3, 1982, by a husband and wife, as joint tenants, for injunctive relief and damages for injury to real property. An amended complaint was filed April 13, 1983. On October 12, 1983, plaintiffs substituted themselves in pro per for their attorney. There was no further activity in the action until after the five-year period had expired, when, on June 4, 1987, plaintiff wife substituted a named attorney as her attorney. Plaintiff husband, following a lengthy illness, had died May 7, 1987.

Defendant moved to dismiss the action on the ground that it had not been brought to trial within five years after it was commenced. Prior to the hearing on the motion, plaintiff wife had undergone heart surgery and was confined to a hospital and unable to attend the hearing. However, in her declaration in opposition to the motion, she stated the following: (1) husband had been seriously ill for almost all the time since the action was filed until his death; (2) he had been hospitalized in the fall of 1981 for surgery; (3) since 1982, he had been hospitalized many times for illness; (4) when he was not hospitalized, wife had cared for him at home; (5) from August 1985 until 1987, he was confined in a convalescent hospital; (6) because of the seriousness of his illness, husband was physically incapable of proceeding with the action or handling his own affairs; (7) wife had been preoccupied with his health and welfare, and therefore did not proceed further with the action; and (8) no personal representative had been appointed for husband's estate. The motion to dismiss was granted, and plaintiff wife appealed.

The court of appeal concluded that the trial court acted within the limits of its discretion in dismissing the action and affirmed the judgment. The court rejected wife's contention that the illness and death of husband and wife's involvement in his care rendered it impossible or impracticable to bring the case to trial within five years. The court said that husband's continuing ill health did not prevent plaintiffs from commencing the lawsuit or thereafter filing an amended complaint, that it was only when plaintiffs substituted themselves in pro per for counsel that the action came to a standstill, that wife's understandable preoccupation with her husband's health during the five-year period cannot excuse her failure to obtain counsel or otherwise to act, and that her lack of attention is underscored by the fact she took no further action in the case even after 1985, when husband entered a rest home and, presumably, his physical care became less burdensome to her. The court also said that absolutely no showing had been made of diligence sufficient to require the trial court to apply the exception for impossibility, impracticability, or futility (*205 Cal. App. 3d 268, 278)* .

In addition, the court rejected plaintiff's contention that the five-year statute was tolled because the trial court's jurisdiction was suspended from the date husband died until a personal representative was appointed. The court said that on husband's death the property passed through right of survivorship to wife as the surviving joint tenant, that it was never apart of husband's estate, that the cause of action was a joint tenancy asset that also passed to wife on the death of husband, and that appointment of a personal representative to carry on the suit would have been inappropriate since the estate had no interest to pursue (*205 Cal. App. 3d 268, 275-276)* .

[f] Plaintiff's Lack of Representation by Guardian Ad Litem Is No Basis for Impossibility Exception

In ***White v. Renck*** *(1980) 108 Cal. App. 3d 835, 166 Cal. Rptr. 701* , plaintiff, a minor, filed a medical malpractice action on February 5, 1973. Her father was appointed guardian ad litem on the same day. The father died on January 18, 1976. For undisclosed reasons a second guardian ad litem for plaintiff was not appointed until approximately 200 days later, when plaintiff's mother was appointed guardian ad litem. On March 20, 1978, defendants moved to dismiss the action pursuant to former Code Civ. Proc. § 583(b) [*now see Code Civ. Proc. §§ 583.310, 583.360*]. The trial court granted the motion and dismissed the action with prejudice. Plaintiff appealed, contending that her action should not have been dismissed pursuant to former Code Civ. Proc. § 583(b) because the 200-day hiatus when she was unrepresented by a guardian ad litem should not have been included in computing the five-year period under that section. Plaintiff based her contention, in part, on former Code Civ. Proc. § 583(f) [*now see Code Civ. Proc. § 583.340(a)*], which provided that the time during which jurisdiction of the court to try the action is suspended shall not be included in computing any time period specified in former Code Civ. Proc. § 583.

The court of appeal affirmed the judgment, rejecting this contention. The court noted that failure to appoint a guardian ad litem did not result in a lack of jurisdiction in the fundamental sense of a lack of power to hear or determine the case. The failure to appoint a guardian ad litem may be waived, and a judgment rendered in the absence of a guardian ad litem is not void but is merely voidable (*108 Cal. App. 3d 835, 839-840)* . The court held that lack of jurisdiction, within the meaning of former Code Civ. Proc. § 583(f), refers to lack of jurisdiction in the fundamental sense (*108 Cal. App. 3d 835, 840)* . Since the trial court did not lack jurisdiction in the fundamental sense of power to try the case, the tolling provision of former Code Civ. Proc. § 583(f) was inapplicable to the period during which plaintiff was

unrepresented by a guardian ad litem. Therefore, dismissal of plaintiff's action was proper. The court also held that plaintiff's cause of action was not saved by implied exceptions to former Code Civ. Proc. § 583, which arise from the fact that the party is unable, from causes beyond his or her control, to bring the case to trial. Plaintiff could not rely on such implied exceptions because she had made no showing that the absence of a guardian ad litem for 200 days made it impracticable for her to bring the action to trial within the five-year period (*108 Cal. App. 3d 835, 841)* .

Note that the court of appeal in *Pham v. Wagner Litho Machinery Co. (1985) 172 Cal. App. 3d 966, 971-972, 218 Cal. Rptr. 476* , disagreed with the holding in *White v. Renck (1980) 108 Cal. App. 3d 835, 166 Cal. Rptr. 701* , on another ground.

[g] Plaintiff's Inadvertence in Selecting Trial Date Is No Basis for Impossibility Exception.

Cannon v. City of Novato *(1985) 167 Cal. App. 3d 216, 213 Cal. Rptr. 132* , was a personal injury action filed in 1976. Over a period of some three years plaintiffs sent interrogatories to defendants and responded to defendants' motions for summary judgment. However, during the succeeding 20 months plaintiffs were completely inactive. Approximately four and one-half years after the complaint was filed, plaintiffs filed an at-issue memorandum and took depositions. At a trial setting conference in February, 1981, the court ordered plaintiffs into judicial arbitration pursuant to the existing version of *Code Civ. Proc. § 1141.11*. The arbitrator denied plaintiffs' claim. Plaintiffs rejected the arbitrator's award and moved to advance the case for trial, specifying that trial must be set before October 16, 1981. However, plaintiffs' attorney miscalculated the expiration date of the mandatory five-year period for bringing the matter to trial following the extension required by former Code Civ. Proc. § 1141.17, which actually was August 23, 1981, 69 days after filing the arbitration award. The court clerk set a mandatory settlement conference for September 21, 1981, and trial for October 5, 1981. Plaintiff failed to submit a settlement conference statement within ten days of the conference and the court ordered the case off calendar. Plaintiffs again moved to advance the case for trial, and defendants moved to dismiss pursuant to former Code Civ. Proc. § 583(b) [*now see Code Civ. Proc. §§ 583.310, 583.360*]. The motion to dismiss was granted and plaintiffs appealed.

The court of appeal affirmed the dismissal. The court rejected plaintiffs' claim that it was impossible and impracticable to bring the case to trial, holding that a party's inadvertence in selecting a trial date does not constitute impossibility or impracticability under former Code Civ. Proc. § 583(b) because it is the party's duty to keep track of such crucial dates (*167 Cal. App. 3d 216, 222)* . Former Code Civ. Proc. § 583(b) will not be applied if, due to circumstances beyond a party's control, it was impossible, impracticable, or futile to bring the case to trial during the applicable five-year period. However, courts look to the circumstances beyond the plaintiff's control that prevented trial within five years and whether the plaintiff pursued the suit diligently. Although case law provides a remedy for those plaintiffs who, despite their diligence, are unable to bring their cases to trial because the courts or other officials impeded the progress of their suits, plaintiffs' failure to bring this case to trial was due to plaintiffs' own miscalculations. Plaintiffs failed to show reliance on the performance ofan official duty to obtain a timely trial date. Moreover, if a plaintiff could have acted to bring the case to trial and failed to do so, relief will not be given even if the plaintiff claims to have relied on the performance of an official duty. The court had no duty to check plaintiffs' calculations for error. In addition, the court held that plaintiffs had not pursued the action diligently, based on an examination of the circumstances existing throughout the five-year period (*167 Cal. App. 3d 216, 221-223)* .

[h] Impossibility Exception Is Inapplicable When Setting of Trial Date Beyond Five-Year Period Resulted From Plaintiff's Failure to Advise Trial Court of Chronology of Case or to Move to Set Case Specially for Trial

Wale v. Rodriguez *(1988) 206 Cal. App. 3d 129, 253 Cal. Rptr. 382* , an action for damages for false arrest, malicious prosecution, false imprisonment, and negligence, was filed on June 10, 1982. Defendants answered in July 1982. Plaintiff filed an at-issue memorandum on August 12, 1982. Discovery ensued. At the trial setting conference on July 10, 1986, trial was set for October 15, 1986, and plaintiff was prepared to go to trial on that date. On August 8, 1986, defendants moved to change venue from the court's Central District to its North Central District. The motion was

granted on August 29, and the October 15 trial date was vacated. On October 31, 1986, the court in the North Central District scheduled a trial setting conference for March 19, 1987, and a mandatory settlement conference for June 24, 1987. At the trial setting conference, which the defendants did not attend, the court set the trial for August 17, 1987. Plaintiff requested a trial date in May, but the clerk stated no earlier date was available. Plaintiff did nothing further to obtain an earlier trial date. At the June 24 mandatory settlement conference, the court suspended proceedings on the ground that the five-year statute had run on June 10, 1987, leaving the court without jurisdiction. On July 30, 1987, defendants moved to dismiss. The motion was heard and granted on September 11, and plaintiff appealed.

In affirming the judgment of dismissal, the court of appeal explained that the heart of plaintiff's case was his contention that he had pursued the matter diligently, but that bringing it to trial within five years was impossible or impracticable because his trial date was canceled and the court would not give him another within the five-year limit (*206 Cal. App. 3d 129, 133)* . The appellate court said it was true that the trial court clerk had told plaintiff that no trial date was available within the statutory period, but that plaintiff had neglected to inform the court that he had a *Code Civ. Proc. § 583.310* problem, which was crucial. The court said that the plaintiff has a duty to call the chronology of his case to the court's attention, that all plaintiffs are under a continuing duty to correctly compute the statutory five years and to advise the court of the impending deadline, and that negligently keeping the date a secret from the court cannot excuse compliance (*206 Cal. App. 3d 129, 133)* . The court concluded that plaintiff was not entitled to assume that a motion to set the case specially for trial would have been futile and that his failure to so move was fatal (*206 Cal. App. 3d 129, 133)* .

[i] Impossibility Exception Not Applicable Absent Showing by Plaintiff of Due Diligence

The facts and procedural background of ***Lauriton v. Carnation Co.*** *(1989) 215 Cal. App. 3d 161, 263 Cal. Rptr. 476* , are *discussed under § 90.99[3][d]*. In affirming the order of dismissal, the court of appeal said that the critical factor in applying the impossibility exception to a given factual situation is whether the plaintiff exercised reasonable diligence in prosecuting the case. To establish reasonable diligence, the plaintiff must be able to demonstrate diligence in pursuit of his duty to expedite the resolution of the case at all stages of the proceeding, including the specific duty to use every reasonable effort to bring the matter to trial within the five-year period (*215 Cal. App. 3d 161, 164)* . Further, plaintiff has the burden of proving it was impossible to bring the action to trial within that time (*215 Cal. App. 3d 161, 165)* . The court pointed out that plaintiff's discharge in bankruptcy occurred more than three months before expiration of the five-year period and that, although plaintiff timely filed an at-issue memorandum, he made no motion to have the case specially set for trial (*215 Cal. App. 3d 161, 165)* . The court said that when a plaintiff possesses the means to bring a matter to trial before the expiration of the five-year period by filing a motion to set the matter specially for trial, plaintiff's failure to bring such motion will preclude a later claim of impossibility or impracticability (*215 Cal. App. 3d 161, 165)* . The court said the trial court was correct in not excluding the time plaintiff was in bankruptcy from the five-year period under *Code Civ. Proc. §§ 583.310* and *583.340*, and concluded that since plaintiff did not use every reasonable effort to bring the action to trial, he did not exercise reasonable diligence in prosecuting his case (*215 Cal. App. 3d 161, 165)* .

In ***Hill v. Bingham*** *(1986) 181 Cal. App. 3d 1, 225 Cal. Rptr. 905* , plaintiff brought an action against defendant for assault and battery. After two years of discovery, an at-issue memorandum was filed, followed by a mandatory settlement conference, at which the matter was referred to judicial arbitration. An arbitration award was entered for plaintiff, and defendant requested a trial de novo. At the time of the request for trial de novo, nine months and 17 days remained before the five-year period under former Code Civ. Proc. § 583 [*now see Code Civ. Proc. § 583.310*] would run. Plaintiff filed a certificate of readiness about two weeks later, and then an at-issue memorandum about three months later. Approximately two and one-half months prior to the five-year time limit, plaintiff gave defendant notice of a second mandatory settlement conference and a new trialdate, both of which were scheduled beyond the five-year limit. After expiration of the five-year limit, defendant moved to dismiss and the court dismissed the action, but plaintiff subsequently succeeded in bringing the case to trial after moving for reconsideration of the motion to dismiss. Defendant appealed the judgment for plaintiff.

The court of appeal reversed, concluding that plaintiff did not qualify for any exception affording relief from mandatory dismissal, including the exceptions for impossibility, impracticability, or futility. The court stated that the impossibility, impracticability, or futility exceptions to the five-year period did not apply because plaintiff had not demonstrated reasonable diligence in prosecuting the case, in that plaintiff had failed to notify the court of the time limit in the certificate of readiness or the at-issue memorandum and had acquiesced in the setting of the date after the five-year limit (*181 Cal. App. 3d 1, 10)* . The delay was not, in effect, due to circumstances beyond plaintiff's control, in that plaintiff could have cured the problem by a motion to advance the trial date (*181 Cal. App. 3d 1, 1)* .

[4] Additional Authorities

[a] Normal Delays in Court Proceedings Are No Basis for Impossibility Exception

The facts and procedural background of *Sierra Nevada Memorial Miners Hospital, Inc. v. Superior Court (Hudson) (1990) 217 Cal. App. 3d 464, 266 Cal. Rptr. 50* , are *discussed under § 90.99[3][b]*. In granting a peremptory writ of mandate directing the trial court to vacate its order denying the motion to dismiss for plaintiffs' failure to bring the action to trial within five years, and to grant the motion to dismiss, the court of appeal said that ordinary and usual proceedings in the course of the prosecution of an action necessarily entail some periods during which the plaintiff cannot literally bring the matter to trial. Such periods are not within the reach of the "impossible, impracticable, or futile" standard (*217 Cal. App. 3d 464, 472)* . On the contrary, even though a part of the five-year period must necessarily be consumed in service of process, disposition of demurrers, amendment of the pleadings, if necessary, usual and reasonable time consumed in waiting for a place on the court's calendar or in securing the attendance of a jury, and similar usual and necessary proceedings, *Code Civ. Proc. § 583.340(c)* does not contemplate that time consumed in such ordinary proceedings is to be excluded from a computation of the five-year period (*217 Cal. App. 3d 464, 472)* . The court said the purpose of the statute is to prevent avoidable delay for too long a period, and that those instances that constitute the impossibility, impracticability, or futility that come within the time impliedly excepted from the statutory period must be determined in the light of the purpose of the statute. As a consequence, every period of time during which the plaintiff does not have it within his or her power to bring the case to trial is not to be excluded in making the computation (*217 Cal. App. 3d 464, 472)* .

[b] Plaintiff's Illness Is No Basis for Impossibility Exception

In *Ferk v. County of Lake (1988) 205 Cal. App. 3d 268, 274-276, 252 Cal. Rptr. 196* , the action was based on damage to property owned in cotenancy. The trial court dismissed the action for failure to prosecute within five years. One cotenant had died during the five-year period, and the surviving cotenant argued that her cotenant's illness before his death made it impossible, impracticable, or futile to bring the action to trial. The court of appeal held that the illness of a cotenant did not excuse the lack of diligence in bringing the case to trial (*205 Cal. App. 3d 268, 277-278)* .

[c] Plaintiff's Inadvertence in Selecting Trial Date Is No Basis for Impossibility Exception

In *Taylor v. Hayes (1988) 199 Cal. App. 3d 1407, 245 Cal. Rptr. 613* , plaintiff filed a personal injury suit on February 6, 1981. The case was ordered to arbitration on May 9, 1985. After the arbitrator rendered an award, plaintiff requested a trial de novo. On May 16, 1985, the county clerk notified plaintiff that her trial date was July 21, 1986. Shortly before the time set for trial, defendant moved to dismiss on the ground that more than five years had passed since the lawsuit was instituted. The trial court granted defendant's motion and dismissed the action. The court of appeal affirmed. The court stated that the critical factor in applying the exceptions based on impossibility, impracticality, or futility is whether a plaintiff exercised reasonable diligence in prosecuting his or her case. The court concluded that the inadvertent selection of a trial date beyond the five-year mark does not constitute the type of impracticability, impossibility, or futility that tolls the five-year statute. It is the plaintiff's duty to keep track of the pertinent dates that are crucial to the maintenance of the lawsuit, and to see that the action is brought to trial within five years (*199 Cal. App. 3d 1407, 1410)* . The court explained that plaintiff's affirmative duty to bring her case to trial within five years did

not cease when she filed her request for a trial de novo. She remained responsible for keeping track of the crucial date when the five years would elapse, and for alerting the court that the limit was approaching. Plaintiff acquiesced in the erroneous trial date for more than a year and did nothing to diligently prosecute her lawsuit after filing her request for a trial de novo. Thus, the court concluded that the delay in going to trial was caused by plaintiff's own miscalculation rather than by circumstances beyond her control. The court also observed that plaintiff's suit was not tolled during the time it was in arbitration because there was a period of more than six months between the filing ofthe request for a trial de novo and the expiration of the five-year period (*199 Cal. App. 3d 1407, 1411)* .

[d] Impossibility Exception Not Applicable Absent Showing by Plaintiff of Due Diligence

Wilcox v. Ford (1988) 206 Cal. App. 3d 1170, 254 Cal. Rptr. 138 , arose out of an automobile accident that occurred on May 9, 1981. The complaint was filed March 5, 1982. The matter was arbitrated, resulting in an award to plaintiff. Defendant moved for a trial de novo, and the case was set for trial on July 25, 1986. On that date, defendant's attorney appeared and, at plaintiff's behest, sought to continue the trial. The trial was continued to November 14, 1986. Defendant was to notify plaintiff of the new trial date, but neglected to do so. Neither party appeared for trial on the continued date, and the matter was dropped from the civil active list. On June 4, 1987, defendant moved for dismissal under *Code Civ. Proc. § 583.360*. Plaintiff's opposition to the dismissal motion sought relief under former Code Civ. Proc. § 473, third paragraph, [*now see Code Civ. Proc. § 473(b)*] on the grounds of surprise, inadvertence, and excusable neglect, and on the grounds of estoppel and waiver [*see Code Civ. Proc. § 583.140*]. Plaintiff also filed a separate motion for relief under former Code Civ. Proc. § 473, third paragraph [*now see Code Civ. Proc. § 473(b)*]. The trial court granted the motion to dismiss on the grounds, among others, that *Code Civ. Proc. § 473* did not apply to mandatory dismissals under the five-year statute. Plaintiff's motion for reconsideration was denied, and plaintiff appealed.

In affirming the judgment of dismissal, the appellate court said that the critical factor in applying the impossible, impractical, and futile standard to a given factual situation is whether the plaintiff exercised reasonable diligence in prosecuting his or her case, and that the reasonable diligence standard is an appropriate guideline for evaluating whether it was impossible, impracticable, or futile for the plaintiff to comply with the five-year statute due to causes beyond his or her control (*206 Cal. App. 3d 1170, 1175)* . The court said that the exercise of reasonable diligence requires a plaintiff to keep track of the pertinent dates that are crucial to maintenance of the lawsuit, and to see that the action is brought to trial within the five-year period. The failure to monitor these dates does not constitute a cause beyond the plaintiff's control so as to trigger application of the impossible, impracticable, or futile exceptions (*206 Cal. App. 3d 1170, 1175)* .

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Volume 9 Chapters 90-99 DISMISSAL---to---EMINENT DOMAIN
CHAPTER 90 DISMISSAL
PART II. FORMS
B. Involuntary Dismissal
2. Dismissal For Failure To Bring Action To Trial Or New Trial

9-90 California Points & Authorities § 90.100

§ 90.100 Supplemental Memorandum [Cal. Rules of Ct., Rule 3.1342(c)] Supporting Motion for Mandatory Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.310, 583.320, 583.360]--Exclusion Based on Impracticability or Futility Does Not Apply [Code Civ. Proc. § 583.340(c)]

[1] FORM

[*Caption. See § 90.99.*]

PLAINTIFF'S CLAIM THAT IT WAS IMPRACTICABLE OR FUTILE TO BRING THE ACTION TO _____ [TRIAL *or* A NEW TRIAL] IS NOT SUPPORTED BY HIS/HER SHOWING THAT THE PERIOD OF DELAY WAS CAUSED BY _____ [*specify, e.g.,* PLAINTIFF'S SEPARATE ACTION, WHICH PLAINTIFF FILED VOLUNTARILY].

[*EITHER*]

A. Normal Delays in Court Proceedings Are No Basis for Impracticability or Futility Exception. Periods of delay in bringing an action to _____ [trial *or* a new trial] caused by the ordinary incidents of court proceedings and the normal time of waiting for a trial date are not excluded from the calculation of the period(s) specified in Code of Civil Procedure Section _____ [583.310 *or* 583.320] on the ground that going to _____ [trial *or* a new trial] was impracticable or futile, because the duty rests on a plaintiff at every stage of the proceedings to use due diligence to expedite the case to a final determination (*see Crown Coach Corp. v. Superior Court (1972) 8 Cal. 3d 540, 548, 105 Cal. Rptr. 339, 503 P.2d 1347*).

[*AND/OR*]

B. Plaintiff's Illness Is No Basis for Impracticability or Futility Exception. A period of delay in bringing an action to _____ [trial *or* a new trial] caused by the illness of the plaintiff is not excluded from the

calculation of the period(s) specified in Code of Civil Procedure Section _____ [583.310 *or* 583.320] on the ground that going to _____ [trial *or* a new trial] was impracticable or futile (*see Singelyn v. Superior Court (1976) 62 Cal. App. 3d 972, 974-975, 133 Cal. Rptr. 486*).

[*AND/OR*]

C. Pending Appeal of Related Action Is No Basis for Impracticability or Futility Exception. A period of delay in bringing an action to _____ [trial *or* a new trial] caused by the pending appeal of an action that involved an issue affecting plaintiff's cause of action is not excluded from the calculation of the period(s) specified in Code of Civil Procedure Section _____ [583.310 *or* 583.320] on the ground that going to_____ [trial *or* a new trial] was impracticable or futile, if the facts to be tried are not complex and the legal issues may be resolved without resort to novel doctrine (*see Reserve Insurance Co. v. Universal Underwriters Ins. Co. (1975) 51 Cal. App. 3d 57, 61-64, 123 Cal. Rptr. 763*).

[*AND/OR*]

D. Separate Action by Plaintiff Is No Basis for Impracticability or Futility Exception. A period of delay in bringing an action to _____ [trial *or* a new trial] caused by the pendency of a separate action brought by the plaintiff on the same set of facts is not excluded from the calculation of the period(s) specified in Code of Civil Procedure Section _____ [583.310 *or* 583.320] on the ground of impracticability and futility when plaintiff chose to use two forums, the instant action could have been tried, and the effort involved in trial preparation would not have been wasted (*see Mitchell v. Frank R. Howard Memorial Hospital (1992) 6 Cal. App. 4th 1396, 1404, 8 Cal. Rptr. 2d 521*).

[*AND/OR*]

E. Plaintiff's Inadvertence in Selecting Trial Date Is No Basis for Impracticability Exception. Periods of delay caused by a plaintiff's inadvertence in selecting a date for _____ [trial *or* new trial] are not excluded from the calculation of the period(s) specified in Code of Civil Procedure Section _____ [583.310 *or* 583.320] on the ground of impracticability, because it is the plaintiff's duty to keep track of such crucial dates (*see Cannon v. City of Novato (1985) 167 Cal. App. 3d 216, 222, 213 Cal. Rptr. 132*).

[*AND/OR*]

F. Failure to Advise Trial Court of Chronology of Case or to Move to Set Case Specially for Trial. When the case is set for trial beyond a five-year period, plaintiff's failure to bring a civil action to trial as required by *Code of Civil Procedure Section 583.310* is not excused on the ground of impracticability by the trial court clerk's having told plaintiff that no trial date was available within the statutory period when plaintiff failed to call the chronology of the case to the trial court's attention or move to have trial specially set (*Wale v. Rodriguez (1988) 206 Cal. App. 3d 129, 133, 253 Cal. Rptr. 382*).

[*AND/OR*]

G. Plaintiff's Alleged Inability to Fulfill Requirements for Certificate of Merit Is No Basis for Impracticability Exception. A period of delay in bringing an action to _____ [trial *or* a new trial] caused by the

plaintiff's alleged inability to fulfill the requirements for the issuance of a certificate of merit pursuant to *Code of Civil Procedure Section 411.30* is not excluded from the calculation of the period(s) specified in Code of Civil Procedure Section _____ [583.310 *or* 583.320] (*see Adams v. Roses (1986) 183 Cal. App. 3d 498, 504-505, 228 Cal. Rptr. 339*).

[*AND/OR*]

H. Impracticability and Futility Exception Not Applicable Absent Showing by Plaintiff of Due Diligence. Periods of delay in bringing an action to _____ [trial *or* a new trial] that are attributable to impracticability or futility are not excluded from the calculation of the period(s) specified in Code of Civil Procedure Section _____ [583.310 *or* 583.320] unless the plaintiff has otherwise shown that he or she used reasonable diligence in prosecuting the case (*Hill v. Bingham (1986) 181 Cal. App. 3d 1, 10, 225 Cal. Rptr. 905*).

[*AND/OR*]

I. Impracticability or Futility Exception Not Available if Time Remains. Periods of delay in bringing an action to _____ [trial *or* a new trial] caused by the impracticability or futility of proceeding are not excluded from calculation of the period(s) specified in Code of Civil Procedure Section _____ [583.310 *or* 583.320] if adequate time remains after the period of inactivity ends to bring the action to _____ [trial *or* a new trial] (*see Sherberne & Associates v. Vector Mfg. Co. (1968) 263 Cal. App. 2d 68, 73, 69 Cal. Rptr. 284*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in a supplemental memorandum supporting a motion for mandatory dismissal for delay in bringing an action to trial or new trial within the applicable period specified in *Code Civ. Proc. § 583.310* or *583.320* [*see Code Civ. Proc. § 583.360*]. Specifically, the foregoing supplemental points and authorities may be submitted in response to an opposing claim that the applicable time period has not lapsed after excluding time during which it was impracticable or futile to bring the action to trial or new trial [*see Code Civ. Proc. § 583.340(c)* and § 90.92]. The ground for the response is that the opposing party has not adequately shown acts or conduct that constitute impracticability or futility within the meaning of *Code Civ. Proc. § 583.340(c)*.

As a practical matter, the foregoing points and authorities are best used in a supplemental memorandum, after the opposing party has raised the issue of impracticability or futility. Although there is not express authorization for submitting supplemental memoranda in a motion formandatory dismissal, they are so authorized in analogous motions for discretionary dismissal [*see Cal. Rules of Ct., Rule 3.1342(c)*]. Alternatively, the foregoing points and authorities may be combined with the points and authorities generally supporting a motion for mandatory dismissal that are *set out in § 90.80*, when counsel wishes to anticipate known opposition.

The foregoing form may, in addition, be adapted for use in support of a motion for discretionary dismissal [*see § 90.83*]. The principles applicable in determining whether the discretionary period has lapsed are the same as those applicable in determining whether the mandatory period has lapsed [*see Code Civ. Proc. § 583.420(b)*].

The foregoing memorandum supports a defendant's motion for dismissal of the complaint, and should be modified as necessary when it is used in another context, such as in support of a motion for dismissal of a cross complaint [*see Code Civ. Proc. § 583.110(a), (b), (d), (e)*].

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated. For example, if it is claimed that the action could not be brought to trial because of the usual time in waiting for a trial date, counsel should state that this reason is an ordinary incident of court proceedings and is not an excuse recognized by case law under the doctrine of impracticability or futility [*see, e.g., Crown Coach Corp. v. Superior Court (1972) 8 Cal. 3d 540, 548, 105 Cal. Rptr. 339, 503 P.2d 1347]* .

[b] Effect of Authority Decided Under Former Dismissal Statutes

In 1984, the provisions for involuntary dismissal for delay in bringing an action to trial or new trial, former Code Civ. Proc. § 583(b)-(d), were repealed and replaced by *Code Civ. Proc. §§ 583.310-583.360*. Before the 1984 enactment of *Code Civ. Proc. § 583.340(c)*, which codified impracticability and futility as express exceptions to the dismissal statute's time requirements, a similar exception had been implied by the courts [*see Christin v. Superior Court (1937) 9 Cal. 2d 526, 530, 71 P.2d 205]* . Decisions interpreting former Code Civ. Proc. § 583 have been cited in the form as persuasive rather than controlling authority to the extent that the revised statutes codify former case law or continue former substantive principles.

[c] Related Pleading and Practice Forms

For forms of a notice of motion and order relating to a motion to dismiss an action pursuant to Code Civ. Proc. § 583.360, see Ch. 212, *Dismissal* in California Forms of Pleading and Practice.

[d] Opposing Memoranda

The points and authorities *set out in § 90.92* may be used in an appropriate case to oppose a motion for dismissal supported by the foregoing memorandum.

[3] Discussion of Authorities

[a] Normal Delays in Court Proceedings Are No Basis for Impracticability or Futility Exception

Crown Coach Corp. v. Superior Court *(1972) 8 Cal. 3d 540, 105 Cal. Rptr. 339, 503 P.2d 1347* , is discussed in *§ 90.99[3][a]*.

[b] Plaintiff's Illness Is No Basis for Impracticability or Futility Exception

Singelyn v. Superior Court *(1976) 62 Cal. App. 3d 972, 133 Cal. Rptr. 486* , is discussed in *§ 90.99[4][b]*.

[c] Pending Appeal of Related Action Is No Basis for Impracticability or Futility Exception

In ***Reserve Insurance Co. v. Universal Underwriters Ins. Co.*** *(1975) 51 Cal. App. 3d 57, 123 Cal. Rptr. 763* , defendant filed a cross complaint against a codefendant and the trial court granted a summary judgment in the cross complainant's favor. Cross defendant appealed, and, after plaintiff did nothing to bring its action to trial before resolution of that appeal more than five years later, the trial court dismissed plaintiff's action pursuant to former Code

Civ. Proc. § 583(b) [*now see Code Civ. Proc. § 583.310*]. Plaintiff appealed, contending that it would have been impracticable and futile to bring the action to trial during the pendency of the appeal on the cross complaint because a significant legal issue in plaintiff's case was also involved in the appeal.

The court of appeal disagreed and affirmed the order to dismiss. In contrast to *Stella v. Great Western Sav. & Loan Assn. (1970) 13 Cal. App. 3d 732, 738-739, 91 Cal. Rptr. 771* (discussed in *§ 90.92[3][e]*), proceeding to trial would not have involved substantial unnecessary monetary expense, evidentiary duplication, or legal complexity (*13 Cal. App. 3d 732)* . Plaintiff's case could be tried on the documents before the court and resolved without resort to novel legal doctrine. If plaintiff's argument prevailed, the trial of almost every case could be postponed as long as some issue necessary to decide it was pending before an appellate court (*13 Cal. App. 3d 732)* .

[d] Separate Action by Plaintiff Is No Basis for Impracticability or Futility Exception

In ***Mitchell v. Frank R. Howard Memorial Hospital*** *(1992) 6 Cal. App. 4th 1396, 8 Cal. Rptr. 2d 521* , plaintiff radiologist filed three actions in state court and one action in federal court against a hospital for breach of contract and other claims related to a dispute regarding plaintiff's employment at the hospital.Plaintiff filed the first state action, prosecuted it for about one year, then filed and pursued the federal action, including denial of certiorari by the U.S. Supreme Court, for approximately three years. While the federal action was pending, plaintiff filed but did not serve a second state action. After the second action was dismissed for failure to serve within two years, the first action was dismissed for failure to bring it to trial within five years, and plaintiff filed the third action, which was dismissed as time-barred (*6 Cal. App. 4th 1396, 1399)* . Plaintiff appealed all three cases.

On the consolidated appeal, plaintiff's primary justification for delay in prosecuting the first action and in serving the second action was his diligent prosecution of the federal action and exhaustion of all federal appellate remedies. The court of appeal rejected this argument, noting when a party makes a strategic decision to file identical actions in two forums, no judicial encouragement should be given to seeking a definitive ruling in one forum while allowing the case in the second forum to gather dust. Any ruling that it is "impracticable and futile" to prepare a case for trial because pertinent legal issues are being decided in another forum would sanction the indefinite postponement of preparing the dormant case for trial (*6 Cal. App. 4th 1396, 1404)* .

[e] Plaintiff's Inadvertence in Selecting Trial Date Is Not Basis for Impracticability Exception

Cannon v. City of Novato *(1985) 167 Cal. App. 3d 216, 213 Cal. Rptr. 132* , is discussed in *§ 90.99[3][g]*.

[f] Failure to Advise Trial Court of Chronology of Case or to Move to Set Case Specially for Trial

Wale v. Rodriguez *(1988) 206 Cal. App. 3d 129, 253 Cal. Rptr. 382* , is discussed in *§ 90.99[3][h]*.

[g] Plaintiff's Alleged Inability to Fulfill Requirements for Certificate of Merit Is No Basis for Impracticability Exception

In ***Adams v. Roses*** *(1986) 183 Cal. App. 3d 498, 228 Cal. Rptr. 339* , the trial court dismissed plaintiff's malpractice complaint for failure to diligently prosecute the action within two years after filing of the initial complaint as required by former Code Civ. Proc. § 583(a) [*now see Code Civ. Proc. §§ 583.410, 583.420(a)(2)(B)*]. Plaintiff appealed, arguing that the requirement of a certificate of merit in medical malpractice actions [*see Code Civ. Proc. § 411.30* and Ch. 71, *Demurrers and Motions for Judgment on the Pleadings*] tolls the two-year period while the plaintiff obtains the certificate. Plaintiff's attorney contended that, on contacting three physicians, he was unable to find a cooperative medical expert who would provide a consultation as required for the certificate by *Code Civ. Proc. § 411.30(b)(1)*. Additionally, plaintiff's attorney noted that previous cases had tolled former Code Civ. Proc. § 583 when it had been impossible, impracticable, or futile for the plaintiff to proceed.

The court of appeal affirmed. The court noted that the purpose of *Code Civ. Proc. § 411.30* is to require a plaintiff to obtain independent support of the merits of his or her action prior to serving the defendant. Under *Code Civ. Proc. § 411.30(a)*, this is accomplished by requiring the plaintiff's attorney to consult with a medical expert. However, compliance with this requirement is postponed if the statute of limitations is near [*Code Civ. Proc. § 411.30(b)(2)*] or excused if plaintiff encounters "a conspiracy of silence" from medical experts [*Code Civ. Proc. § 411.30(b)(3)*] (*183 Cal. App. 3d 498, 504)* . The court stated that if the Legislature had intended that the time during which a plaintiff attempts to obtain a certificate of merit be excluded from any limitations or dismissal period, it would not have provided *Code Civ. Proc. § 411.30(b)(2)*, which postpones the filing of the certificate when plaintiff's action in those circumstances is threatened by dismissal (*183 Cal. App. 3d 498, 504-505)* . Moreover, although *Code Civ. Proc. § 411.30(b)(2)* excludes the limitations period embraced by former Code Civ. Proc. § 581a (the three-year period for service and return of summons), *Code Civ. Proc. § 411.30(b)(2)* does not include the two-year period of former Code Civ. Proc. § 583(a). Had the Legislature meant to include former Code Civ. Proc. § 583(a) within *Code Civ. Proc. § 411.30(b)(2)*, it would have done so. The court noted that plaintiff could have met the requirements for excuse under *Code Civ. Proc. § 411.30(b)(3)*, since plaintiff's attorney had reportedly contacted several experts who were unwilling to provide a consultation (*183 Cal. App. 3d 498, 505)* . The court concluded that *Code Civ. Proc. § 411.30* could not be construed as tolling the two-year period of former Code Civ. Proc. § 583(a) (*183 Cal. App. 3d 498, 504)* .

[h] Impracticability and Futility Exception Not Applicable Absent Showing by Plaintiff of Due Diligence

Hill v. Bingham *(1986) 181 Cal. App. 3d 1, 225 Cal. Rptr. 905* , is discussed in *§ 90.99[3][i]*.

[i] Impracticability or Futility Exception Not Available if Time Remains

In ***Sherberne & Associates v. Vector Mfg. Co.*** *(1968) 263 Cal. App. 2d 68, 69 Cal. Rptr. 284* , the trial court dismissed the action for failure to bring it to trial within five years. Plaintiff appealed, arguing that the six months while plaintiff's right of discovery was suspended should be excluded from calculation of the statutory period on the ground of impracticability and futility.

The court of appeal, however, affirmed the dismissal. After the six-month suspension period, plaintiff still had over two years to complete discovery. An exception to former Code Civ. Proc. § 583 [*now see Code Civ. Proc. §§ 583.310,583.360*] should not be made, even though the period of inactivity is excusable, if enough time is left to overcome the effect of such a period (*263 Cal. App. 2d 68, 73)* .

[4] Additional Authorities

[a] Separate Action by Plaintiff Is No Basis for Impracticability or Futility Exception

In *Manor Drug Stores v. Blue Chip Stamps (1977) 71 Cal. App. 3d 423, 139 Cal. Rptr. 483* , plaintiff's action was dismissed by the federal district court, after which plaintiff filed a class action on the same alleged facts in state court but did nothing to further the state action while appealing the federal dismissal. Four years later, the United States Supreme Court decided the federal action adversely to plaintiff, and after expiration of the five-year period of former Code Civ. Proc. § 583(b) [*now see Code Civ. Proc. §§ 583.310, 583.360*], the trial court dismissed plaintiff's state action for failure to prosecute.

The court of appeal affirmed, finding that plaintiff's contention that a trial was impossible, impracticable, and futile until a final determination of its federal action, was untenable. Plaintiff chose to use two forums for essentially the same litigation. If it had attempted to proceed with the state litigation, it is possible the state court would have refused any attempts by defendant to abate the action. Trial preparation would not have been a waste of time so far as the federal action was concerned because both actions were based on the same set of facts (*71 Cal. App. 3d 423, 426-427)* .

[b] Plaintiff's Inadvertence in Selecting Trial Date Is No Basis for Impracticability Exception

Taylor v. Hayes (1988) 199 Cal. App. 3d 1407, 245 Cal. Rptr. 613 , is discussed in *§ 90.99[4][c]*.

[c] Impracticability and Futility Exception Not Applicable Absent Showing by Plaintiff of Due Diligence

Wilcox v. Ford (1988) 206 Cal. App. 3d 1170, 254 Cal. Rptr. 138 , is discussed in *§ 90.99[3][d]*.

In *Tejada v. Blas (1987) 196 Cal. App. 3d 1335, 242 Cal. Rptr. 538* , the court of appeal affirmed the trial court's dismissal of an action for failure to bring the matter to trial within five years. The court held that it was not impossible, impracticable, or futile to bring the action to trial, since plaintiff did not exercise reasonable diligence in prosecuting the case at every stage of the proceeding, and did not use every reasonable effort to bring the matter to trial. Although defendant had failed to appear for her deposition and failed to appear for an arbitration hearing set one year prior to the expiration of the five-year period, these dilatory tactics did not preclude plaintiff from moving to set the matter specially for trial within the statutory time period (*196 Cal. App. 3d 1335, 1340-1341)* .

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Volume 9 Chapters 90-99 DISMISSAL---to---EMINENT DOMAIN
CHAPTER 90 DISMISSAL
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§ 90.101 Supplemental Memorandum [Cal. Rules of Ct., Rule 3.1342(c)] Supporting Motion for Mandatory Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.310, 583.320, 583.360]--Delay Based on Factual Error by Plaintiff's Counsel Is Not Excused

[1] FORM

[*Caption. See § 90.99.*]

A FACTUAL ERROR BY PLAINTIFF'S COUNSEL DOES NOT EXCUSE PLAINTIFF'S FAILURE TO BRING THE ACTION TO _____ [TRIAL WITHIN THE PERIOD SPECIFIED IN SECTION 583.310 *or* A NEW TRIAL WITHIN THE PERIOD SPECIFIED IN SECTION 583.320] OF THE CODE OF CIVIL PROCEDURE.

Factual Error by Counsel No Excuse. An error of fact by plaintiff's counsel that leads to expiration of the period(s) specified in section _____ [583.310 *or* 583.320] of the Code of Civil Procedure before the action is brought to _____ [trial *or* a new trial] does not excuse failure to comply with the statutory requirements (*see Martin v. Cook (1977) 68 Cal. App. 3d 799, 808, 137 Cal. Rptr. 434* ; *Singelyn v. Superior Court (1976) 62 Cal. App. 3d 972, 975, 133 Cal. Rptr. 486*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in a supplemental memorandum supporting a motion for mandatory dismissal for delay in bringing an action to trial or new trial within the applicable period specified in *Code Civ. Proc. § 583.310* or *583.320* [*see Code Civ. Proc. § 583.360*]. Specifically, the foregoing supplemental points and authorities may be submitted in response to an opposing claim that the delay in bringing the action to trial or new trial should be excused because it resulted from a factual error on the part of plaintiff's counsel. The ground for the response is that this is not an accepted basis for excusing or extending the applicable time period.

As a practical matter, the foregoing points and authorities are best used in a supplemental memorandum, after the opposing party has raised the issue of counsel's factual error. Although there is not express authorization for submitting supplemental memoranda in a motion for mandatory dismissal, they are so authorized in analogous motions for discretionary dismissal [*see Cal. Rules of Ct., Rule 3.1342(c)*]. Alternatively, the foregoing points and authorities may be combined with the points and authorities generally supporting a motion for mandatory dismissal that are *set out in § 90.80*, when counsel wishes to anticipate known opposition.

The foregoing form may, in addition, be adapted for use in support of a motion for discretionary dismissal [*see § 90.83*]. The principles applicable in determining whether the discretionary period has lapsed are the same as those applicable in determining whether the mandatory period has lapsed [*see Code Civ. Proc. § 583.420(b)*].

The foregoing memorandum supports a defendant's motion for dismissal of the complaint, and should be modified as necessary when it is used in another context, such as in support of a motion for dismissal of a cross complaint [*see Code Civ. Proc. § 583.110(a), (b), (d), (e)*].

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Effect of Authority Decided Under Former Dismissal Statutes

In 1984, the provisions for involuntary dismissal for delay in bringing an action to trial or new trial, former Code Civ. Proc. § 583(b)-(d), were repealed and replaced by *Code Civ. Proc. §§ 583.310-583.360*. Decisions interpreting the former statute have been cited in the form as persuasive rather than controlling authority to the extent that the revised statutes codify former case law or continue former substantive principles.

[c] Related Pleading and Practice Forms

For forms of a notice of motion and order relating to a motion to dismiss an action pursuant to Code Civ. Proc. § 583.360, see Ch. 212, *Dismissal* in California Forms of Pleading and Practice.

[3] Discussion of Authorities

[a] Factual Error by Counsel No Excuse

Martin v. Cook *(1977) 68 Cal. App. 3d 799, 137 Cal. Rptr. 434* , involved a medical malpractice action in which plaintiff was awarded $100,000 in damages. Defense counsel waived the dismissal provisions of former Code Civ. Proc. § 583(a), but plaintiff's counsel mistakenly believed that this waiver also covered dismissal pursuant to former Code Civ. Proc. § 583(b) [*now see Code Civ. Proc. § 583.310*]. Defendant moved to dismiss under former Code Civ. Proc. § 583(b). Plaintiff then filed a motion for relief from an order taken against the plaintiff because of mistake, inadvertence, surprise, or excusable neglect pursuant to *Code Civ. Proc. § 473*. The trial court granted the *Code Civ. Proc. § 473* motion while denying the motion to dismiss. Defendant appealed.

The court of appeal reversed, holding that the trial court had erred in denying the motion to dismiss. A plaintiff has a

duty to expedite the case for trial and any shirking of that duty is proscribed by former Code Civ. Proc. § 583 (*68 Cal. App. 3d 799, 806)* . Although there are recognized excuses for a delay in prosecution, these exceptions must be strictly construed (*68 Cal. App. 3d 799, 807)* . Plaintiff's counsel claimed belief that a waiver made in exchange for plaintiff's dropping a trial date only 19 months after commencement of the action also waived the requirement that the action must be brought to trial within five years. The court stated that this claim led to the inescapable conclusion that the conduct of plaintiff's counsel was careless, negligent, and inexcusable (*68 Cal. App. 3d 799, 808-809)* .

The facts and procedural background of ***Singelyn v. Superior Court*** *(1976) 62 Cal. App. 3d 972, 133 Cal. Rptr. 486* , are discussed in *§ 90.99[3][c]*. In *Singelyn*, the court held, in part, that inadvertence on the part of the court in selecting a trial date that was one day beyond the expiration of the five-year period did not constitute the type of impracticability, impossibility, or futility that tolls the statutory period. It is plaintiff's duty to keep track of pertinent dates and see that the action is brought to trial on time (*62 Cal. App. 3d 972, 975)* .

[4] Additional Authorities

[a] Factual Error by Counsel No Excuse

In *Cannon v. City of Novato (1985) 167 Cal. App. 3d 216, 213 Cal. Rptr. 132* , the court of appeal rejected plaintiffs' claim that it was impossible and impracticable to bring their case to trial. The court held that a party's inadvertence in selecting a trial date does not constitute impossibility or impracticability under former Code Civ. Proc. § 583(b) [*now see Code Civ. Proc. §§ 583.310, 583.360*], because it is the party's duty to keep track of such crucial dates. Here, the inadvertence was caused by the miscalculation by plaintiffs' attorney of the period within which the action could be brought to trial (*167 Cal. App. 3d 216, 222)* .

In *Griffis v. S.S. Kresge Co. (1984) 150 Cal. App. 3d 491, 197 Cal. Rptr. 771* , the court of appeal held that the neglect apparent in the failure of a plaintiff's attorney to keep an adequate record of pertinent actions by the court was not excusable and would not in itself suffice to avoid operation of the period for bringing an action to trial under former Code Civ. Proc. § 583(b) [*now see Code Civ. Proc. §§ 583.310, 583.360*]. While it might have been difficult for plaintiff'snewly associated attorney to have discovered the true date for the trial period because of tolling due to judicial arbitration, it was not impossible, since another attorney was present at hearings in which arbitration was discussed and ordered who had a continuing awareness of the pertinent dates. In order to avoid the imputation of the attorney's neglect to plaintiff, the mistake or neglect must be excusable (*150 Cal. App. 3d 491, 497)* .

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9-90 California Points & Authorities § 90.102

§ 90.102 Supplemental Memorandum [Cal. Rules of Ct., Rule 3.1342(c)] Supporting Motion for Mandatory Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.310, 583.320, 583.360]--Principles of Waiver and Estoppel Do Not Apply [Code Civ. Proc. § 583.140]--No Estoppel When Sufficient Time Remains to Bring Action to Trial

[1] FORM

[*Caption. See § 90.99.*]

PLAINTIFF CANNOT CLAIM THAT DEFENDANT IS ESTOPPED FROM MOVING FOR DISMISSAL PURSUANT TO SECTION 583.360 OF THE CODE OF CIVIL PROCEDURE IF ADEQUATE TIME REMAINS TO BRING THE ACTION TO _____ [TRIAL *or* A NEW TRIAL] AFTER THE END OF PLAINTIFF'S RELIANCE ON DEFENDANT'S CONDUCT.

Estoppel Not Available if Time for Bringing Action to Trial Remains. Periods of delay in bringing an action to _____ [trial *or* a new trial] caused by plaintiff's reliance on defendant's acts or failures to act are not excluded from calculation of the period(s) specified in section _____ [*583.310 or 583.320 of the Code of Civil Procedure*], if adequate time remains to bring the action to _____ [trial *or* a new trial] after the end of plaintiff's reliance on defendant's conduct (*see andre v. General Dynamics, Inc. (1974) 43 Cal. App. 3d 839, 842-843, 118 Cal. Rptr. 95* ; Smith v. El Centro Lodge No. 1325 *(1969) 271 Cal. App. 2d 713, 716-717, 76 Cal. Rptr. 629*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in a supplemental memorandum supporting a motion for mandatory dismissal for delay in bringing an action to trial or new trial within the applicable period specified in *Code Civ. Proc. § 583.310* or *583.320* [*see Code Civ. Proc. § 583.360*]. Specifically, the foregoing supplemental points and authorities may be submitted in response to an opposing claim that the defendant is estopped from seeking dismissal because plaintiff's delay resulted from reliance on defendant's conduct [*see* Code Civ. Proc. § 583.140 and § 90.93]. The ground for the response is that estoppel does not apply when, following the period during which plaintiff delayed in reliance on defendant's conduct, there still remained adequate time to bring the action to trial or new trial.

As a practical matter, the foregoing points and authorities are best used in a supplemental memorandum, after the opposing party has raised the issue of estoppel. Although there is not express authorization for submitting supplemental memoranda in a motion for mandatory dismissal, they are so authorized in analogous motions for discretionary dismissal [*see Cal. Rules of Ct., Rule 3.1342(c)*]. Alternatively, the foregoing points and authorities may be combined with the points and authorities generally supporting a motion for mandatory dismissal that are *set out in § 90.80*, when counsel wishes to anticipate known opposition.

The foregoing form may, in addition, be adapted for use in support of a motion for discretionary dismissal [*see § 90.83*]. The principles of waiver and estoppel apply equally in motions for discretionary dismissal [*see Code Civ. Proc. §§ 583.140, 583.420(b)*].

The foregoing memorandum supports a defendant's motion for dismissal of the complaint, and should be modified as necessary when it is used in another context, such as in support of a motion for dismissal of a cross complaint [*see Code Civ. Proc. § 583.110(a), (b), (d), (e)*].

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated. For example, if plaintiff contends that he or she relied on certain actions by defendant, counsel should state that the actions relied on ended within ample time for plaintiff to bring the action to trial [*see, e.g.,* Smith v. El Centro Lodge No. 1325 *(1969) 271 Cal. App. 2d 713, 717, 76 Cal. Rptr. 629]* .

[b] Effect of Authority Decided Under Former Dismissal Statutes

In 1984, the provisions for involuntary dismissal for delay in bringing an action to trial or new trial, former Code Civ. Proc. § 583(b)-(d), were repealed and replaced by *Code Civ. Proc. §§ 583.310-583.360*. Decisions interpreting the former statute have been cited in the form as persuasive rather than controlling authority to the extent that the revised statutes codify former case law or continue former substantive principles.

[c] Related Pleading and Practice Forms

For forms of a notice of motion and order relating to a motion to dismiss an action pursuant to Code Civ. Proc. § 583.360, see Ch. 212, *Dismissal* in California Forms of Pleading and Practice.

[d] Opposing Memoranda

The points and authorities *set out in § 90.93* may be used in an appropriate case to oppose a motion for dismissal supported by the foregoing memorandum.

[3] Discussion of Authorities

[a] Estoppel Not Available if Time for Bringing Action to Trial Remains

The facts and procedural background of ***Andre v. General Dynamics, Inc.*** *(1974) 43 Cal. App. 3d 839, 118 Cal. Rptr. 95* , are discussed in *§ 90.83[3][d]*. In *Andre,* the court of appeal noted that the trial court's willingness to grant plaintiff a continuance, even though the statutory period had already expired, did not estop the court from subsequently initiating its own motion to dismiss where several months had passed and the case still had not been brought to trial (*43 Cal. App. 3d 839, 844)* .

In **Smith v. El Centro Lodge No. 1325** *(1969) 271 Cal. App. 2d 713, 76 Cal. Rptr. 629* , an action was first set for trial approximately five months prior to expiration of the five-year period of former Code Civ. Proc. § 583 [*now see Code Civ. Proc. § 583.310*]. On the day of trial, it was placed off calendar because of illness of defendants' counsel. Ten days later, the trial was reset for a date three months beyond the statutory period. Subsequently, after expiration of the period for bringing the action to trial, the trial court granted defendants' motion to dismiss. Plaintiff appealed.

The court of appeal affirmed, holding, in part, that defendants were not estopped from asserting the dismissal provisions of former Code Civ. Proc. § 583 (*271 Cal. App. 2d 713, 716-717)* . Although the trial was first continued because of the illness of defendants' counsel, the plaintiff still had ample time to request a trial setting within the time limitation of former Code Civ. Proc. § 583. Similarly, the deterioration of settlement negotiations, another cause of delay, could not be the basis for an estoppel because it occurred three years before the period expired and plaintiff could not rely on delay caused earlier in the proceedings that hardly could have misled plaintiff to his prejudice (*271 Cal. App. 2d 713, 717)* .

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9-90 California Points & Authorities § 90.103

§ 90.103 Supplemental Memorandum [Cal. Rules of Ct., Rule 3.1342(c)] Supporting Motion for Mandatory Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.310, 583.320, 583.360]--Principles of Waiver and Estoppel Do Not Apply [Code Civ. Proc. § 583.140]--No Waiver Based on Open Extension to File Responsive Pleading When Sufficient Time Remains to Bring Action to Trial

[1] FORM

[*Caption. See § 90.99.*]

PLAINTIFF CANNOT CLAIM THAT DEFENDANT WAIVED DISMISSAL PURSUANT TO SECTION 583.360 OF THE CODE OF CIVIL PROCEDURE ON THE BASIS OF DEFENDANT'S AGREEMENT TO AN OPEN EXTENSION OF TIME TO FILE A RESPONSIVE PLEADING, BECAUSE THERE WAS ADEQUATE TIME FOR PLAINTIFF TO BRING THE CASE TO TRIAL AFTER DEFENDANT FILED THE PLEADING.

Time Limit Not Waived if Time for Bringing Action to Trial Remains After Defendant Has Filed Pleading. The statutory period provided by Section _____ 583.310 of the Code of Civil Procedure, within which plaintiff must bring the case to trial to avoid dismissal pursuant to Section _____ 583.360 of the Code of Civil Procedure, is not tolled or waived if a defendant, who had been granted an open extension of time to file a responsive pleading, files the pleading early enough in this period to allow the plaintiff adequate time to bring the case to trial before the period expires (*see Gentry v. Nielsen (1981) 123 Cal. App. 3d 27, 33*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in a supplemental memorandum supporting a motion for mandatory dismissal for delay in bringing an action to trial or new trial within the period specified in *Code Civ. Proc. § 583.310* [*see Code Civ. Proc. § 583.360*]. Specifically, the foregoing supplemental points and authorities may be submitted in response to an opposing claim that the defendant waived his or her right to seek dismissal by agreeing to an open extension of time within which to file a responsive pleading [*see Code Civ. Proc.§ 583.140*]. The ground for the response is that there is no waiver when there is sufficient time to bring the action to trial after defendant filed the responsive pleading.

As a practical matter, the foregoing points and authorities are best used in a supplemental memorandum, after the opposing party has raised the issue of waiver. Although there is not express authorization for submitting supplemental memoranda in a motion for mandatory dismissal, they are so authorized in analogous motions for discretionary dismissal [*see Cal. Rules of Ct., Rule 3.1342(c)*]. Alternatively, the foregoing points and authorities may be combined with the points and authorities generally supporting a motion for mandatory dismissal that are *set out in § 90.80*, when counsel wishes to anticipate known opposition.

The foregoing form may, in addition, be adapted for use in support of a motion for discretionary dismissal [*see § 90.83*]. The principles of waiver and estoppel apply equally in motions for discretionary dismissal [*see Code Civ. Proc. §§ 583.140, 583.420(b)*].

The foregoing memorandum supports a defendant's motion for dismissal of the complaint, and should be modified as necessary when it is used in another context, such as in support of a motion for dismissal of a cross complaint [*see Code Civ. Proc. § 583.110(a), (b), (d), (e)*].

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated. For example, if plaintiff claims that he or she failed to bring the action to trial in reliance on an open extension of time given to defendant to file a responsive pleading, defendant should state the date on which he or she served and filed the responsive pleading, and that plaintiff had adequate time thereafter to bring the action to trial before expiration of the statutory period for bringing it to trial [*see, e.g., Gentry v. Nielsen (1981) 123 Cal. App. 3d 27, 33]* .

[b] Effect of Authority Decided Under Former Dismissal Statutes

In 1984, the provisions for involuntary dismissal for delay in bringing an action to trial or new trial, former Code Civ. Proc. § 583(b)-(d), were repealed and replaced by *Code Civ. Proc. §§ 583.310-583.360*. Decisions interpreting the former statute have been cited in the form as persuasive rather than controlling authority to the extent that the revised statutes codify former case law or continue former substantive principles.

[c] Related Pleading and Practice Forms

For forms of notice of motion and order relating to a motion to dismiss an action pursuant to Code Civ. Proc. § 583.360, see Ch. 212, *Dismissal* in California Forms of Pleading and Practice.

[3] Discussion of Authorities

[a] Time Limit Not Waived if Time for Bringing Action to Trial Remains After Defendant Has Filed Pleading

The facts and procedural background of ***Gentry v. Nielsen*** *(1981) 123 Cal. App. 3d 27* , are discussed in *§ 90.62[3][a]*. In *Gentry*, the court of appeal affirmed dismissal under former Code Civ. Proc. § 583(b) [*now see Code Civ. Proc. §*

583.310] for failure to bring the case to trial within five years. The court held that the holdings in *General Ins. Co. v. Superior Court (1975) 15 Cal. 3d 449, 455, 124 Cal. Rptr. 745, 541 P.2d 289* (discussed in *§ 90.52[3][a]*), and *Regan Distributors, Inc. v. Yurosek & Son, Inc. (1979) 88 Cal. App. 3d 924, 928, 152 Cal. Rptr. 127* (discussed in *§ 90.87[3][d]*), do not extend to the facts of this case. A critical fact in *General Ins. Co.* was that the extension of time that plaintiff had granted defendant was still in effect when the statutory period expired because defendant had not answered. There, defendant's own conduct had precluded plaintiff from bringing the case to trial within the statutory period. Here, however, defendant had filed his answer, thus terminating the extension, two years before the end of the statutory period (*123 Cal. App. 3d 27, 32-33)* . Thus, the court in *Gentry* held that merely granting an open extension of time to answer, which is exercised within the statutory period, does not extend the period when the extension does not preclude plaintiff from bringing the case to trial within the prescribed time (*123 Cal. App. 3d 27, 33)* .

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9-90 California Points & Authorities § 90.104

§ 90.104 Supplemental Memorandum [Cal. Rules of Ct., Rule 3.1342(c)] Supporting Motion for Mandatory Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.310, 583.320, 583.360]--Principles of Waiver and Estoppel Do Not Apply [Code Civ. Proc. § 583.140]--No Estoppel or Waiver Based on Defendant's Failure to Attend Trial Setting Conference or to Notify Plaintiff of Continued Trial Date

[1] FORM

[*Caption. See § 90.99.*]

A DEFENDANT'S FAILURE TO ATTEND A TRIAL SETTING CONFERENCE CONSTITUTES NEITHER A WAIVER OF THE RIGHT TO HAVE THE ACTION BROUGHT TO TRIAL WITHIN FIVE YEARS FROM THE DATE IT WAS COMMENCED NOR AN ESTOPPEL TO SEEK DISMISSAL OF THE ACTION BASED ON THE MANDATORY FIVE-YEAR STATUTE.

[*EITHER*]

A. Defendant's Failure to Attend Trial Setting Conference Does Not Constitute Waiver or Estoppel. Defendant's failure to attend the trial settingconference does not constitute a waiver of the right to seek dismissal for plaintiff's failure to bring the action to trial within the period required by *section 583.310 of the Code of Civil Procedure*, nor is the defendant estopped by such conduct from seeking dismissal on that ground (*Wale v. Rodriguez (1988) 206 Cal. App. 3d 129, 132-133, 253 Cal. Rptr. 382*).

[*AND/OR*]

B. Defendant's Failure to Notify Plaintiff of Continued Trial Date or to Appear at Continued Trial Does Not Constitute Waiver or Estoppel. Neither the failure of the defendant to notify plaintiff's counsel of the continued trial date, secured by defendant at plaintiff's request, nor defendant's failure to appear for trial on the continued date,

constitutes a waiver of the mandatory provisions of *Code of Civil Procedure Section 583.310* or estops defendant to move for dismissal under *Code of Civil Procedure section 583.360* for failure to bring the case to trial within five years (*Wilcox v. Ford (1988) 206 Cal. App. 3d 1170, 1179-1180, 254 Cal. Rptr. 138*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in a supplemental memorandum supporting a motion for mandatory dismissal for delay in bringing an action to trial or new trial within the period specified in *Code Civ. Proc. § 583.310* [*see Code Civ. Proc. § 583.360*]. Specifically, the foregoing supplemental points and authorities may be submitted in response to an opposing claim that the defendant has waived the requirements of *Code Civ. Proc. § 583.310* or is estopped from seeking dismissal [*see Code Civ. Proc. § 583.140* and § 90.93]. The ground for the response is that there is no waiver or estoppel based either on a defendant's failure to attend the trial setting conference or on a defendant's failure to notify plaintiff of a continued trial date secured at plaintiff's request.

As a practical matter, the foregoing points and authorities are best used in a supplemental memorandum, after the opposing party has raised the issue of waiver or estoppel. Although there is not express authorization for submitting supplemental memoranda in a motion for mandatory dismissal, they are so authorized in analogous motions for discretionary dismissal [*see Cal. Rules of Ct., Rule 3.1342(c)*]. Alternatively, the foregoing points and authorities may be combined with the points and authorities generally supporting a motion for mandatory dismissal that are *set out in § 90.80*, when counsel wishes to anticipate known opposition.

The foregoing form may, in addition, be adapted for use in support of a motion for discretionary dismissal [*see § 90.83*]. The principles of waiver and estoppel apply equally in motions for discretionary dismissal [*see Code Civ. Proc. §§ 583.140, 583.420(b)*].

The foregoing memorandum supports a defendant's motion for dismissal of the complaint, and should be modified as necessary when it is used in another context, such as in support of a motion for dismissal of a cross complaint [*see Code Civ. Proc. § 583.110(a), (b), (d), (e)*].

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated. For example, if defendant claims that there is no estoppel or waiver based on defendant's failure to give plaintiff notice of a continued trial date, defendant should show that plaintiff failed to determine whether the requested continuance had been granted [*see Wilcox v. Ford (1988) 206 Cal. App. 3d 1170, 1180, 254 Cal. Rptr. 138]* .

[b] Effect of Authority Decided Under Former Dismissal Statutes

In 1984, the provisions for involuntary dismissal for delay in bringing an action to trial or new trial, former Code Civ.

Proc. § 583(b)-(d), were repealed and replaced by *Code Civ. Proc. §§ 583.310-583.360*. Decisions interpreting the former statute have been cited in the form as persuasive rather than controlling authority to the extent that the revised statutes codify former case law or continue former substantive principles.

[c] Related Pleading and Practice Forms

For forms of notice of motion and order relating to a motion to dismiss an action pursuant to Code Civ. Proc. § 583.360, see Ch. 212, *Dismissal* in California Forms of Pleading and Practice.

[d] Opposing Memoranda

The points and authorities *set out in § 90.93* may be used in an appropriate case to oppose a motion for dismissal supported by the foregoing memorandum.

[3] Discussion of Authorities

[a] Defendant's Failure to Attend Trial Setting Conference Does Not Constitute Waiver or Estoppel

Wale v. Rodriguez *(1988) 206 Cal. App. 3d 129, 253 Cal. Rptr. 382* , isdiscussed in *§ 90.99[3][b]*. In affirming the judgment of dismissal, the court of appeal rejected plaintiff's argument that, by their failure to attend the trial setting conference, defendants had agreed to waive the five-year statute, since this amounted to an acquiescence by defendants in whatever trial date plaintiff obtained. The court held that the question was controlled by *Code Civ. Proc. § 583.330*, setting forth the manners in which the parties may extend time [*see § 90.87*], and that missing a conference is neither a written stipulation nor an oral agreement made in open court, as required by that statute (*206 Cal. App. 3d 129, 132)* . The court similarly rejected plaintiff's estoppel arguments, holding that reliance on defendants' nonappearance at the trial setting conference was not reasonable, given the mandatory requirement of *Code Civ. Proc. § 583.330* (*206 Cal. App. 3d 129, 133)* .

[b] Defendant's Failure to Notify Plaintiff of Continued Trial Date or to Appear at Continued Trial Does Not Constitute Waiver or Estoppel

Wilcox v. Ford *(1988) 206 Cal. App. 3d 1170, 254 Cal. Rptr. 138* , is discussed in *§ 90.99[4][d]*. In affirming the judgment of dismissal, the appellate court rejected plaintiff's waiver-estoppel argument, pointing out that although *Code Civ. Proc. § 473* enables a plaintiff who has failed to oppose a motion to dismiss, through mistake, inadvertence, surprise, or excusable neglect, to file a belated opposition to the motion, it does not provide additional grounds for relief from failure to bring an action to trial within five years (*206 Cal. App. 3d 1170, 1176)* . The court said that plaintiff charges defendant with failing to notify him of the continued trial date and of failing to appear for trial, and that neither of these omissions constituted a waiver or estoppel in the case before it. The court said it could not infer from defendant's failure to notify plaintiff of the continued trial date a waiver of defendant's right to assert the five-year statute, nor could such a waiver be implied by his failure to appear for trial (*206 Cal. App. 3d 1170, 1179)* . The court explained that in this situation, a waiver would only have occurred if defendant had in some manner consented to a trial date beyond the five-year mark, which defendant, clearly, did not do (*206 Cal. App. 3d 1170, 1179-1180)* . The court further said that plaintiff could not plausibly claim to have been lulled into a false sense of security by either of defendant's omissions and that, while it was true that defendant neglected to give notice of the continued trial date, this did not obliterate the failure of plaintiff's counsel to determine whether the continuance that he requested had been granted, and that, under these circumstances, estoppel simply did not apply (*206 Cal. App. 3d 1170, 1180)* .

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9-90 California Points & Authorities § 90.105

§ 90.105 Supplemental Memorandum [Cal. Rules of Ct., Rule 3.1342(c)] Supporting Motion for Mandatory Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. §§ 583.310, 583.320, 583.360]--Action Submitted to Judicial Arbitration [Code Civ. Proc. §§ 1141.10-1141.31]--No Extension of Time Under Code Civ. Proc. § 1141.20(b) Absent Showing of Reasonable Diligence

[1] FORM

[*Caption. See § 90.99.*]

THE EXCLUSION OF TIME UNDER *MORAN* FROM THE FIVE-YEAR PERIOD IN WHICH AN ACTION MUST BE BROUGHT TO TRIAL TO AVOID MANDATORY DISMISSAL DOES NOT APPLY, BECAUSE PLAINTIFF FAILED [ACCURATELY] TO NOTIFY THE TRIAL COURT OF THE APPROACHING FIVE-YEAR DEADLINE.

Reasonable Diligence Is Required Under *Moran*. The rule of *Moran v. Superior Court (1983) 35 Cal. 3d 229, 242, 197 Cal. Rptr. 546, 673 P.2d 216* , that a certain period of time shall be excluded from the calculation of the five-year period under *Section 583.310 of the Code of Civil Procedure*, based on the court's duty under *Section 1141.20(b) of the Code of Civil Procedure* to recalendar a case after a request has been made for a trial de novo following judicial arbitration, does not apply when the plaintiff, after the request for a trial de novo, fails to exercise reasonable diligence in accurately notifying the court of the approaching five-year limit, so that the court can set the case for trial (*Messih v. Levine (1991) 228 Cal. App. 3d 454, 457-458, 278 Cal. Rptr. 825* ; *Santa Monica Hospital Medical Center v. Superior Court (1988) 203 Cal. App. 3d 1026, 1033-1034, 250 Cal. Rptr. 384* ; *Sizemore v. Tri-City Lincoln Mercury, Inc. (1987) 190 Cal. App. 3d 84, 91-92, 235 Cal. Rptr. 243*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in a supplemental memorandum supporting a motion for mandatory dismissal for delay in bringing an action to trial or new trial within the period specified in *Code Civ. Proc. § 583.310* [*see Code Civ. Proc. § 583.360*]. Specifically, the foregoing supplemental points and authorities may be submitted in response to an opposing claimthat the applicable time period has not lapsed after excluding time pursuant to the rule of *Moran v. Superior Court (1983) 35 Cal. 3d 229, 197 Cal. Rptr. 546, 673 P.2d 216* . This rule is applied when an action has been submitted to judicial arbitration under *Code Civ. Proc. §§ 1141.10-1141.31*, and a timely request for trial de novo was filed following arbitration [*see discussion under § 90.105[2*][c][i]]. The ground for the response is that the opposing party has not adequately shown reasonable diligence in prosecuting the action after the request for a trial de novo was made, and therefore the exclusion under the rule of *Moran* does not apply.

As a practical matter, the foregoing points and authorities are best used in a supplemental memorandum, after the opposing party has raised the issue of exclusion under the rule of *Moran*. Although there is no express authorization for submitting supplemental memoranda in a motion for mandatory dismissal, they are so authorized in analogous motions for discretionary dismissal [*see Cal. Rules of Ct., Rule 3.1342(c)*]. Alternatively, the foregoing points and authorities may be combined with the points and authorities generally supporting a motion for mandatory dismissal that are *set out in § 90.80*, when counsel wishes to anticipate known opposition.

The foregoing memorandum supports a defendant's motion for dismissal of the complaint, and should be modified as necessary when it is used in another context, such as in support of a motion for dismissal of a cross complaint [*see Code Civ. Proc. § 583.110(a), (b), (d), (e)*].

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated. For example, if defendant claims that the *Moran* rule does not apply, counsel should set forth facts showing that plaintiff did not exercise reasonable diligence in accurately notifying the court of the approaching five-year limit [*see Santa Monica Hospital Medical Center v. Superior Court (1988) 203 Cal. App. 3d 1026, 1033-1034, 250 Cal. Rptr. 384* (discussed in *§ 90.105[3][a]*].

[b] Effect of Authority Decided Under Former Dismissal Statutes

In 1984, the provisions for involuntary dismissal for delay in bringing an action to trial or new trial, former Code Civ. Proc. § 583(b)-(d), were repealed and replaced by *Code Civ. Proc. §§ 583.310-583.360*. Decisions interpreting the former statute have been cited in the form as persuasive rather than controlling authority to the extent that the revised statutes codify former case law or continue former substantive principles.

[c] Exclusion Under Moran

[i] Statement of Rule

In *Moran v. Superior Court (1983) 35 Cal. 3d 229, 242, 197 Cal. Rptr. 546, 673 P.2d 216* , the California Supreme Court held that, when a timely request for a trial de novo is filed after judicial arbitration, it is the court's duty to set a date for trial under *Section 1141.20(b) of the Code of Civil Procedure.* Consequently, the Court held, the time between the date the arbitration award is filed with the court and the date set for the new trial is excluded from calculation of the five-year period for mandatory dismissal under *Section 583.310 of the Code of Civil Procedure.*

[ii] Diligence Requirement

As set out in the foregoing points and authorities, a plaintiff must exercise reasonable diligence before the exclusion

under *Moran* will apply, by accurately notifying the court of the approaching five-year limit, so that the court can properly set the case for trial, and continue to exercise reasonable diligence in bringing the case to trial prior to expiration of the five-year period [*see, e.g., Messih v. Levine (1991) 228 Cal. App. 3d 454, 457, 278 Cal. Rptr. 825* ; *Santa Monica Hospital Medical Center v. Superior Court (1988) 203 Cal. App. 3d 1026, 1028, 1033-1034, 250 Cal. Rptr. 384* (both discussed in *§ 90.105[3][a]*].

[iii] Former Split Among Courts of Appeal

Formerly the courts of appeal were split on the issue of whether a plaintiff must exercise "reasonable diligence" in bringing the case to trial during the period that is tolled under the rule of *Moran v. Superior Court (1983) 35 Cal. 3d 229, 197 Cal. Rptr. 546, 673 P.2d 216* (*discussed under § 90.105[2][c][i]*. The leading decision holding that the *Moran* rule applied without regard to a plaintiff's diligence, because of the *sua sponte* duty of the court to recalendar the case in the same place in relation to the end of the five-year period as the case had before arbitration, is *Barna v. Passage 350 Canon (1986) 186 Cal. App. 3d 440, 446-448, 230 Cal. Rptr. 764* , decided by Division Seven of the Court of Appeal of the Second Appellate District.

Another line of cases, most of which were decided by the other divisions of the Court of Appeal of the Second Appellate District, held that a plaintiff must exercise "reasonable diligence" to bring the case to trial during the period that is tolled under the rule of *Moran.* Such cases include *Berry v. Weitzman (1988) 203 Cal. App. 3d 351, 357, 249 Cal. Rptr. 816* ; *Sizemore v. Tri-City Lincoln-Mercury, Inc. (1987) 190 Cal. App. 3d 84, 91-92, 235 Cal. Rptr. 243* (discussed in *§ 90.105[3][a]*); and *Hill v. Bingham (1986) 181 Cal. App. 3d 1, 11-12, 225 Cal. Rptr. 905* (discussed in *§ 90.105[4][a]*).

Attempting to reconcile the split in authority among the divisions of the Second District, Division Four of that court, in *Santa Monica Hospital Medical Center v. Superior Court (1988) 203 Cal. App. 3d 1026, 1028, 1033-1034, 250 Cal. Rptr. 384* (discussed in *§ 90.105[3][a]*), ruled that *Moran* requires a plaintiff to exercise reasonable diligence relative to the five-year period to the extent of requesting the trial court to set a trial date within that period. The court explained that theunderpinnings of *Moran's* holding are (1) trial courts have a statutory duty and the exclusive power to actually set a preferential trial date, and (2) plaintiffs are thus entitled to presumeperformance of that duty (*203 Cal. App. 3d 1026, 1033)* , but that implicitly incorporated in this formulation are the circumstances before the *Moran* court of a plaintiff diligently performing her independent duty at all times to keep track of the five-year deadline and inform the trial court of that deadline.

Subsequently, without expressly overruling its decision in *Barna* but distinguishing it on its facts, the Seventh Division of the Court of Appeal of the Second Appellate District retreated from its earlier ruling and for all practical purposes adopted the rule announced in *Santa Monica* to the effect that a plaintiff must exercise reasonable diligence at least to the extent of notifying the trial court of the approaching five-year limit and to request a trial date within that period [*see Baccus v. Superior Court (1989) 207 Cal. App. 3d 1526, 1535-1536, 255 Cal. Rptr. 781* (discussed in *§ 90.105[4*][a])]. The Court of Appeal of the Sixth Appellate District, in 1990, adopted the reasoning of *Santa Monica* and *Baccus* [*see Serrano v. FMC Corp. (1990) 221 Cal. App. 3d 1027, 1031-1032, 271 Cal. Rptr. 41* ; *Dresser v. Bindi (1990) 221 Cal. App. 3d 1493, 1494-1495, 1498, 271 Cal. Rptr. 137* (both discussed in *§ 90.105[4*][a])].

In 1991, reaffirming its position in *Baccus,* Division Seven of the Court of Appeal of the Second Appellate District said that to obtain tolling benefits a plaintiff must do more than just request a trial de novo; the plaintiff must notify the trial court of the five-year deadline and continue to exercise reasonable diligence [*Messih v. Levine (1991) 228 Cal. App. 3d 454, 457, 278 Cal. Rptr. 825* (discussed in *§ 90.105[3*][a])]. The court added that its decision in *Baccus* ended the split in authority concerning *Moran's* second alternative holding, and that all courts which have addressed the issue now agree that a plaintiff, notwithstanding his or her request for a trial de novo, has an ongoing duty of reasonable diligence [*Messih v. Levine (1991) 228 Cal. App. 3d 454, 458, 278 Cal. Rptr. 825* (discussed in *§ 90.105[3*][a]); *see also Marchuk v. Ralphs Grocery Co. (1990) 226 Cal. App. 3d 1273, 1277-1279, 276 Cal. Rptr. 627 (Fourth Appellate*

District, Division Three)] .

[d] Exclusion Under Code Civ. Proc. § 1141.17

Code Civ. Proc. § 1141.17(b) provides for an exclusion of time that is also based on submission of an action to judicial arbitration, but which is distinct from the exclusion of time under the *Moran* rule. For further discussion of the exclusion under *Code Civ. Proc. § 1141.17*, see *§ 90.96*.

[e] Related Pleading and Practice Forms

For forms of notice of motion and order relating to a motion to dismiss an action pursuant to Code Civ. Proc. § 583.360, see Ch. 212, *Dismissal* in California Forms of Pleading and Practice.

[f] Opposing Memoranda

The points and authorities *set out in § 90.96* may be used in an appropriate case to oppose a motion for dismissal supported by the foregoing memorandum.

[3] Discussion of Authorities

[a] Reasonable Diligence Is Required Under Moran

In ***Messih v. Levine*** *(1991) 228 Cal. App. 3d 454, 278 Cal. Rptr. 825* , an action by a pharmacist for wrongful termination, the complaint, almost seven years after it had been filed, was dismissed pursuant to the mandatory five-year dismissal statute (*Code Civ. Proc. § 583.310*). Plaintiff appealed, contending, inter alia, that the limitation period was automatically tolled by his postarbitration trial de novo request under the second alternative holding of *Moran v. Superior Court (1983) 35 Cal. 3d 229, 197 Cal. Rptr. 546, 673 P.2d 216* (discussed in *§ 90.105[2][c][i]*). The court of appeal affirmed. It briefly noted that as to *Moran*'s second alternative holding there had been a split in case authority and that in *Baccus v. Superior Court (1989) 207 Cal. App. 3d 1526, 1535-1536, 255 Cal. Rptr. 781* (discussed in *§ 90.105[4][a]*), it had held that to obtain the tolling benefits of *Moran* a plaintiff must do more than just request a trial de novo, he must notify the trial court of the five-year deadline and continue to exercise reasonable diligence (*228 Cal. App. 3d 454, 457)* . The court said that its decision in *Baccus* ended the split in authority and that all courts which have addressed the issue now agree that a plaintiff, notwithstanding his request for a trial de novo, has an ongoing duty of reasonable diligence, and that postarbitration tolling requires reasonable diligence on a plaintiff's part (*228 Cal. App. 3d 454, 458)* . The court said that plaintiff failed to exercise such diligence: during the six-month period following his request for a trial de novo, he did not notify the court of the five-year deadline nor take any steps to bring the action to trial, that on September 12, 988, about a month before the five-year deadline, the trial court notified plaintiff of a November 2, 1988 status conference, and that plaintiff not only failed to inform the court that this date was beyond the five-year deadline but plaintiff failed to appear at the conference. The appellate court therefore concluded that the five-year statute was not tolled by plaintiff's postarbitration trial de novo request (*228 Cal. App. 3d 454, 458)* .

In ***Santa Monica Hospital Medical Center v. Superior Court*** *(1988) 203 Cal. App. 3d 1026, 250 Cal. Rptr. 384* , an action for medical malpractice was in judicially ordered arbitration in the last six months before the five-year period expired. Plaintiff filed a timely request for trial de novo but never requested a special trial setting. More than six months after the request, and before the date set for trial, one defendant moved to dismiss the action for failure to bring the action to trial within the five-year period,as extended by the postarbitration tolling provisions of *Code Civ. Proc. § 1141.17(b)* (discussed in *§ 90.96[3][a]*). The trial court denied the motion, finding some diligence on plaintiff's part but reciting no facts showing an effort to meet the extended five-year period following the request for trial de novo. Defendant petitioned for a writ.

The court of appeal issued a writ of mandate directing the trial court to vacate its order and enter a new order granting

the defendant's motion to dismiss (*203 Cal. App. 3d 1026, 1036)* . There was no dispute that the five-year period was not tolled under the "impossible or impracticable" exception, which formed the basis for one of two independent holdings in *Moran v. Superior Court (1983) 35 Cal. 3d 229, 197 Cal. Rptr. 546, 673 P.2d 216* (discussed in *§ 90.105[2][c][i]*), because the five-year statute expired due to plaintiff's own "lack of diligence in discovery and trial setting efforts prior to arbitration" (*203 Cal. App. 3d 1026, 1031)* . The court went on to hold that, under the second independent holding in *Moran,* which was based on the trial court's *sua sponte* duty to recalendar a trial date so as to preserve plaintiff's position relative to the five-year statute, a plaintiff must exercise reasonable diligence to put trial courts on notice of the imminent five-year deadlines (*203 Cal. App. 3d 1026, 1031, 1034)* . The court reasoned that the analytical underpinnings of the second independent holding in *Moran* are (1) that the trial courts have a statutory duty and the exclusive power to set a preferential trial date and (2) that plaintiffs are thus entitled to presume the performance of that duty (*203 Cal. App. 3d 1026, 1033)* . The court found that implicitly incorporated in this formulation were the circumstances that were before the *Moran* court, that is, a plaintiff who diligently performed the independent duty to keep track of the five-year deadline at all times and inform the trial court of that deadline. Therefore, the court held, a broad, generalized rule that absolved nondiligent plaintiffs of their continuous, salutary duty to advance their cases diligently to a timely trial was not necessary to the *Moran* decision (*203 Cal. App. 3d 1026, 1033-1034)* . In addition, the court reasoned, it is unlikely that the court in *Moran* meant to abrogate totally the ongoing duty of plaintiffs to meet five-year deadlines by notifying trial courts of imminent five-year deadlines and requesting timely trial dates. Continuing that duty, in conjunction with requiring trial courts to set trials before known five-year deadlines, would better serve the fundamental public policy purpose of the mandatory dismissal statute (*203 Cal. App. 3d 1026, 1035)* . Finally, the court reasoned, if the court in *Moran* had correctly construed *Code Civ. Proc. § 1141.20* to create an unconditional and automatic tolling of the five-year period, until whatever date the trial court eventually set for trial, the Legislature's amendment of *Code Civ. Proc. § 1141.17(b),* which extended the tolling period for some plaintiffs from the date the arbitration award is filed to the date the de novo trial request is filed, would have been a useless legislative act (*203 Cal. App. 3d 1026, 1035)* .

In ***Sizemore v. Tri-City Lincoln Mercury, Inc.*** *(1987) 190 Cal. App. 3d 84, 235 Cal. Rptr. 243* , a contract action was in judicially ordered arbitration in the last six months before the five-year period expired. Plaintiffs filed a timely request for trial de novo but the trial setting conference was removed from the calendar when plaintiffs failed to give notice to defendants. Plaintiffs then successfully moved to set the case specially for trial. However, due to their own miscalculation, plaintiffs obtained a trial date beyond the five-year limit, including the extension under *Code Civ. Proc. § 1141.17* (discussed in *§ 90.96[3][a]*). Defendants filed a motion to dismiss under former Code Civ. Proc. § 583(b) [repealed, *now see Code Civ. Proc. § 583.310*]. The trial court dismissed the action and plaintiffs appealed.

The court of appeal affirmed, holding that plaintiffs failed to come under either prong of the *Moran* rule (*190 Cal. App. 3d 84, 92)* . The "impossibility" exception did not apply, the court held, because plaintiffs' failure to give notice of trial setting and subsequent miscalculation of the five-year deadline showed a lack of reasonable diligence (*190 Cal. App. 3d 84, 89)* . The court went on to hold that, under the *Code Civ. Proc. § 1141.20* prong of *Moran,* the court's *sua sponte* duty to recalendar the case never arose (*190 Cal. App. 3d 84, 92)* . The court reasoned that the plaintiff in *Moran* notified the court of the approaching five-year limit (*190 Cal. App. 3d 84, 91)* . Thus, under the *Moran* rule plaintiffs are under a duty to notify the court prior to the running of the five-year statue that the limit is rapidly approaching. The court held that it is inherent in this requirement that plaintiff will exercise diligence and assume the responsibility of correctly computing the time and advising the court of the time frame of the case. Because plaintiffs' failure to get their case to trial was caused by their own neglect and miscalculations rather than circumstances beyond their control, their case was properly dismissed (*190 Cal. App. 3d 84, 92)* .

[4] Additional Authorities

[a] Reasonable Diligence Is Required Under Moran

In *Serrano v. FMC Corp. (1990) 221 Cal. App. 3d 1027* , following judicial arbitration in which the arbitrator had ruled

in favor of the defendant, plaintiff, on December 14, 1983, made a timely request for trial de novo. However, no further action was taken by plaintiff or by the court until November 1988, at which time plaintiff's counsel contacted the superior court clerk's office and was advised to file a new at-issue memorandum, which he did on December 2, 1988, with no indication that the five-year dismissal date was approaching. The clerk contacted plaintiff's attorney on December 6, 1988, and informed him that the case was no longer on the civil active list and that a motion to restore would be necessary. Plaintiff did not file the motion at that time and the five-year period expired on December 14, 1988. On February 28, 1989, defendant filed a motion for summary judgment seeking, inter alia, dismissal for plaintiff's failure to bring the action to trial within five years (*Code Civ. Proc. § 583.310*). Plaintiff countered with a motion to restorethe case to the active list and had his motion set for hearing before defendant's motion. Neither plaintiff nor his counsel appeared at the hearing on the motion to restore, and the motion was denied. On March 28, 1989, the court dismissed the action on its own motion pursuant to *Code Civ. Proc. § 583.360*. Plaintiff appealed, contending that under *Moran v. Superior Court (1983) 35 Cal. 3d 229, 197 Cal. Rptr. 546, 673 P.2d 216* , the period of limitation was tolled by his request for a trial de novo following arbitration and that he had no duty therefore to exercise diligence in prosecuting the matter.

After discussing *Moran* and the split of authority among the courts of appeal (discussed in *§ 90.105[2][c][iii]*), the Court of Appeal of the Sixth Appellate District quoted *Santa Monica Hospital Medical Center v. Superior Court (1988) 203 Cal. App. 3d 1026, 1034, 250 Cal. Rptr. 384* (*discussed under § 90.105[3][a]*), holding that although a plaintiff is entitled to presume that a trial court will perform its duty to set a preferential trial date following a request for a trial de novo, plaintiff nonetheless must diligently perform his or her independent duty to keep track of the five-year deadline at all times and inform the trial court of that deadline (*203 Cal. App. 3d 1026, 1031)* . The court found *Santa Monica*'s reasoning persuasive and held that nowithstanding the *sua sponte* duty of the trial court to reset the matter for trial pursuant to *Code Civ. Proc. § 1141.20*, a plaintiff must continue to exercise reasonable diligence by monitoring the case calendar and alerting the court to the impending expiration of the statutory period (*203 Cal. App. 3d 1026, 1031-1032)* .

In *Dresser v. Bindi (1990) 221 Cal. App. 3d 1493, 271 Cal. Rptr. 137* , the Court of Appeal of the Sixth Appellate district took the opportunity to add its voice to that of other appellate districts that have concluded that under the Supreme Court's decision in *Moran v. Superior Court (1983) 35 Cal. 3d 229, 197 Cal. Rptr. 546, 673 P.2d 216* , a civil plaintiff is required to exercise reasonable diligence in calculating the mandatory dismissal date under *Code Civ. Proc. § 583.310*, and to request a trial date within that period. The appellate court held that when a civil plaintiff fails to calculate the deadline, or to request a trial date within the time remaining, this duty has not been met (*221 Cal. App. 3d 1493, 1494-1495)* . In this case, plaintiff's complaint was filed on June 14, 1983, and ordered to arbitration on April 30, 1987. In February 1988, plaintiff's counsel asked defendant's counsel for an extension of the five-year deadline, which the latter refused. On March 4, 1988, the arbitrator issued an award in favor of defendant. On March 18, 1988, plaintiff served a request for a trial de novo and filed the request on March 23, 1988. In May 1988, plaintiff filed a substitution of attorneys and proceeded in propria persona. On June 14, 1988, a status conference on the case was continued to September 13, 1988. On August 24, 1988, an attorney was substituted as counsel for plaintiff. Defendant's counsel phoned plaintiff's attorney and advised him that the five-year dismissal deadline was approaching and that he was not authorized to waive it. On September 18, 1988, in a letter to defendant's counsel, plaintiff's counsel stated his position that under *Code Civ. Proc. § 1141.20* and *Moran v. Superior Court (1983) 35 Cal. 3d 229* ,. *673 P.2d 216* , the five-year deadline was tolled until the date set for a trial de novo. At the status conference on September 13, 1988, despite admonitions from defendant's counsel that the five-year deadline was imminent, plaintiff's counsel again argued that under *Moran*, the five years would not expire until the new trial date. The trial court asked plaintiff if he was willing to take the chance that the statute would run before the new trial date. In response, plaintiff's counsel indicated his belief that the time between the request for a trial de novo and the date set for the trial was tolled, and then acquiesced to a trial date of January 3, 1989. On October 25, 1988, defendant filed a motion to dismiss pursuant to *Code Civ. Proc. § 583.360*. Reluctantly, the trial court granted the motion. Plaintiff appealed, arguing that under *Code Civ. Proc. § 1141.20* and *Moran*, the time between the filing of the arbitration award and the date set by the court for a de novo trial is excluded in calculating the five-year deadline imposed by *Code Civ. Proc. § 583.360*, and contended that

his duty of due diligence, under *Moran,* is discharged once he makes a request for a trial de novo, and that it is then the duty of the trial court, *sua sponte,* to set the case for trial.

The court of appeal discussed the split of authority among the courts of appeal (discussed in *§ 90.105[2][c][iii]*) (*221 Cal. App. 3d 1493, 1497-1498)* and concluded that the rule announced by *Santa Monica Hospital Medical Center v. Superior Court (1988) 203 Cal. App. 3d 1026, 1031-1033, 250 Cal. Rptr. 384* (*discussed under § 90.105[3][a],* and *[4][a]*), was the more persuasive (*221 Cal. App. 3d 1493, 1498)* . The court held that although a plaintiff is entitled to presume a trial court will perform its duty to set a preferential trial date following a request for a trial de novo, he or she must nonetheless diligently perform his or her independent duty to keep track of the five-year deadline at all times and inform the trial court of that deadline (*221 Cal. App. 3d 1493, 1498)* . After reviewing the legislative history of the 1983 amendment of *Code Civ. Proc. § 1141.17* (discussed in *§ 90.96*), the court further rejected plaintiff's contention that the Legislature's failure to amend *Code Civ. Proc. § 1141.20* following *Moran* indicated a legislative approval of the interpretation of this statute in *Moran* (*221 Cal. App. 3d 1493, 1498-1500)* . The court concluded that counsel's complete failure to calculate the deadline under *Code Civ. Proc. § 1141.17,* his failure to request a trial date within the time remaining, and his acquiescence to a trial date more than three months after the deadline expired, all despite repeated reminders from opposing counsel and warnings from the court, persuaded it that plaintiff did not meet his duty of due diligence, and it affirmed the order of dismissal (*221 Cal. App. 3d 1493, 1500-1501)* .

Baccus v. Superior Court (1989) 207 Cal. App. 3d 1526, 255 Cal. Rptr. 781 , was an action for personal injuries sustained in an automobileaccident. The action languished for nearly four years while plaintiffs went through a successive substitution of attorneys. Their third attorney had the case submitted to arbitration. After the arbitrator's award was entered, plaintiffs requested a trial de novo. The trial court set a trial date over a year later and 49 days after the expiration of the five-year limitation period. Neither at that time nor at any time prior to the trial date did plaintiffs alert the court to the fact that the trial had been set beyond the five-year period. When the matter came to trial, the trial court on its own motion moved to dismiss the action for failure to bring it to trial within the five-year period, but after a hearing denied its motion in the interest of justice.

The Court of Appeal of the Second Appellate District, Division Seven, issued a peremptory writ of mandate directing the trial court to grant its motion to dismiss. The court acknowledged the split of case authority in the courts of appeal engendered by its own prior decision in *Barna v. Passage 350 Canon (1986) 186 Cal. App. 3d 440, 230 Cal. Rptr. 764* . Although the court did not expressly overrule its decision in *Barna,* it did, however, distinguish *Barna* on its facts. The court noted that in *Barna,* the plaintiff had been diligent in attempting to bring the action to trial after arbitration. In the instant case, in which the plaintiffs had not been diligent, the court held that the analysis in *Santa Monica Hospital Medical Center v. Superior Court (1988) 203 Cal. App. 3d 1026, 250 Cal. Rptr. 384* (*discussed under § 90.105[3][a]*), controlled (*207 Cal. App. 3d 1526, 1535-1536)* . The court reasoned that it did not believe that the Supreme Court in *Moran* had intended to construe *Code Civ. Proc. 1141.20* (prior to its 1984 amendment) to effect a total abrogation of the ongoing duty of plaintiffs to meet five-year deadlines by notifying trial courts of imminent five-year deadlines and requesting timely trial dates. Continuing that duty, in conjunction with requiring trial courts to set trials before known five-year deadlines, would better serve the fundamental public purpose of the mandatory dismissal statute, which is to promote the trial of cases before evidence is lost or destroyed, or the memory of witnesses become dimmed, and to protect defendants from being subjected to the annoyance of an unmeritorious action remaining undecided for an indefinite period of time (*207 Cal. App. 3d 1526, 1536*). The court concluded accordingly that plaintiffs were not entitled to the tolling under the second *Moran* ground because they neither notified the court of the five-year deadline nor attempted to advance the trial date set beyond the deadline, and that the trial court abused its discretion in failing to dismiss the action (*207 Cal. App. 3d 1526, 1536)* .

The facts and procedural background of *Hill v. Bingham (1986) 181 Cal. App. 3d 1, 225 Cal. Rptr. 905* , are discussed in *§ 90.99[3][i]*. In *Hill,* over nine months of the five-year period remained when defendant filed a timely postarbitration request for trial de novo. Plaintiff did not indicate, either in the certificate of readiness or in the at-issue memorandum, that the five-year deadline was approaching. The trial date was set beyond the five-year limit and

plaintiff acquiesced to that trial date. After the trial setting, two and a half months remained before the five-year period ran but plaintiff did not move to have the case advanced. Defendant moved to dismiss and the trial court granted the motion. Plaintiff successfully moved for reconsideration and the trial court, following the rule in *Moran,* allowed the case to proceed to trial. Defendant appealed from the ensuing judgment for plaintiff.

The court of appeal reversed the judgment, holding that the plaintiff failed to act diligently and, therefore, neither of the *Moran* exceptions applied to take the case outside the five-year rule (*181 Cal. App. 3d 1, 10, 13)* . Under the second independent ground of the *Moran* decision, the court held, the trial court has a *sua sponte* duty to recalendar the matter in the same position it had prior to arbitration, but this duty does not excuse the plaintiff from exercising due diligence under the circumstances (*181 Cal. App. 3d 1, 11)* . The court reasoned that it is implicit that for the *sua sponte* duty to arise, not only must there be a timely request for trial de novo but the plaintiff also must bring to the trial court's attention the time frame of the case. A contrary conclusion, the court observed, could completely shift responsibility for keeping track of all applicable dates and for moving cases forward from plaintiffs to an already overburdened court system (*181 Cal. App. 3d 1, 11-12)* . The court observed that the rationale of the second independent ground of the *Moran* decision is to protect plaintiffs during the period it is *impossible* for the plaintiff to cause the matter to be set for trial because some official duty was not done. Therefore, the court held, the plaintiff still has a duty to keep track of crucial dates, to call to the court's attention the chronology of the case, and to follow up after the passage of an amount of time sufficient to indicate to a reasonably knowledgeable attorney that the official duty was not going to be performed (*181 Cal. App. 3d 1, 12)* .

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Volume 9 Chapters 90-99 DISMISSAL---to---EMINENT DOMAIN
CHAPTER 90 DISMISSAL
PART II. FORMS
B. Involuntary Dismissal
2. Dismissal For Failure To Bring Action To Trial Or New Trial

9-90 California Points & Authorities § 90.106

§ 90.106 Reply Memorandum Supporting Motion for Discretionary Dismissal for Failure to Bring Action to Trial or New Trial [Code Civ. Proc. § 583.410]--No Waiver or Estoppel Based on Open Extension to File Responsive Pleading When Extension Was for Plaintiff's Benefit

[1] FORM

[*Caption. See § 90.99.*]

DEFENDANT HAS NOT WAIVED AND IS NOT ESTOPPED TO MOVE FOR DISMISSAL FOR FAILURE TO BRING THE ACTION TO TRIAL BY VIRTUE OF THE OPEN EXTENSION OF TIME TO FILE A RESPONSIVE PLEADING BECAUSE THE EXTENSIONWAS FOR PLAINTIFF'S BENEFIT _____ [*specify benefit derived by plaintiff, e.g.,* TO PREVENT THE FILING OF A DEMURRER AND PROVIDE TIME TO PREPARE AN AMENDED COMPLAINT].

Open Extension for Plaintiff's Benefit Does Not Act as Estoppel or Waiver of Dismissal. When an open extension of the time to plead is in reality for the plaintiff's benefit, the defendant is not necessarily precluded from seeking dismissal of the action for failure to prosecute (*Marra v. Mission Foods Corp. (1993) 19 Cal. App. 4th 724, 728, 23 Cal. Rptr. 2d 741*). Although *Meraia v. McCann (1978) 83 Cal. App. 3d 239, 147 Cal. Rptr. 756* , "contains some broad language [citation] that appears to support plaintiff's position that an open-ended extension of time ... excuses a plaintiff from his obligation to prosecute during its term, *Meraia* properly read holds only that when and while a defendant obtains and enjoys an open-ended extension *for his benefit and at his request,* he may not complain that the plaintiff has not diligently prosecuted the action" (*Marra v. Mission Foods Corp. (1993) 19 Cal. App. 4th 724, 728, 23 Cal. Rptr. 2d 741* , quoting *Blank v. Kirwan (1985) 39 Cal. 3d 311, 332, 216 Cal. Rptr. 718, 703 P.2d 58* , italics added).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in a reply memorandum supporting a motion for discretionary dismissal for failure to bring an action to trial or new trial within the time periods specified in *Code Civ. Proc. § 583.420* [*see Code Civ. Proc. § 583.410*]. Specifically, these reply points and authorities may be submitted in response to an opposing claim that the defendant waived his or her right to seek dismissal by agreeing to an open extension of time within which to file a responsive pleading. The ground for response is that there is no waiver or estoppel when the extension was for the plaintiff's benefit.

This memorandum may be submitted in response to the opposing memorandum *set out in §§ 90.87* and *90.98*.

[b] Related Pleading and Practice Forms

For forms of notice of motion and order relating to a motion to dismiss an action pursuant to Code Civ. Proc. § 583.410, see Ch. 212, *Dismissal* in California Forms of Pleading and Practice.

[3] Discussion of Authorities

[a] Open Extension for Plaintiff's Benefit Does Not Act as Estoppel or Waiver of Dismissal

Plaintiff filed the action in ***Marra v. Mission Foods Corp.*** *(1993) 19 Cal. App. 4th 724, 23 Cal. Rptr. 2d 741* , in April, 1989. In July, 1989, defendant's counsel notified plaintiff's counsel of numerous deficiencies in the complaint and asked him to consider filing an amended complaint. Plaintiff's counsel then granted the defense an open extension of time to respond to the complaint, terminable on 30 days notice. Plaintiff's counsel did not pursue the case until March, 1991, at which time he indicated he was ready to amend the complaint, but suggested the defense contact him to pursue settlement discussions first. Defense counsel attempted to do so, but received no response. The next activity, in December, 1991, was the court's notice of intent to dismiss on its own motion for lack of prosecution; but it did not dismiss the action. In April, 1992, plaintiff filed an at-issue memorandum, but indicated that it was filed to pursue settlement, and pointed out that the defendant had not yet answered. The court informed the plaintiff that this was ineffective, because no answer was on file, and set a case management conference for June 19, 1992. Plaintiff filed a amended complaint on June 1, 1992, and a second amended complaint, without leave of court, on June 25. In July, defendant moved to dismiss for delay in prosecution under *Code Civ. Proc. § 583.410* based on failure to bring the action to trial within two years of filing. The court dismissed the action and plaintiff appealed.

The court of appeal affirmed. The plaintiff claimed that the trial court erred because of the open extension of time to plead, maintaining that the doctrines of waiver and estoppel prevented dismissal because the defendant had contributed to any delay (*19 Cal. App. 4th 724, 727)* . The plaintiff relied on a line of cases, including *Meraia v. McCann (1978) 83 Cal. App. 3d 239, 147 Cal. Rptr. 756* , discussed in *§ 90.87[3][a],* which have held that when a defendant has been granted an open extension of time to respond to the complaint, waiver and estoppel principles may prevent the defendant from relying on plaintiff's failure to prosecute during its term to obtains dismissal of the action. The court, however, distinguished *Meraia* as applying to situations in which the defendant obtains an extension for his or her own benefit, quoting *Blank v. Kirwan (1985) 39 Cal. 3d 311, 332, 216 Cal. Rptr. 718, 703 P.2d 58* (*19 Cal. App. 4th 724, 728)* . In this case, the plaintiff, alerted by defendant to deficiencies in the complaint, granted defendant the openextension of time to respond so that plaintiff would have additional time to file an amended complaint. Plaintiff admitted the open extension was to prevent the filing of a Section _____ to the complaint. The extension being for plaintiff's, not defendant's, benefit, it did not estop the defendant from moving to dismiss, and did

not relieve the plaintiff of the duty to move the case forward (*19 Cal. App. 4th 724, 728-729)* .

[4] Additional Authorities

[a] Open Extension for Plaintiff's Benefit Does Not Act as Estoppel or Waiver of Dismissal

In *Blank v. Kirwan (1985) 39 Cal. 3d 311, 216 Cal. Rptr. 718, 703 P.2d 58* , one issue the Supreme Court considered in affirming a judgment of dismissal was whether the trial court abused its discretion in granting a motion to dismiss under former Code Civ. Proc. § 583(a) [*now see Code Civ. Proc. § 583.420(a)*] for failure to prosecute. The Court noted that over nearly three and a half years the plaintiff did virtually nothing to prosecute the action and continually requested the defendants to agree to continue hearings on demurrers and finally obtained an agreement to take them off calendar indefinitely. The Court distinguished *Meraia v. McCann (1978) 83 Cal. App. 3d 239, 147 Cal. Rptr. 756* , limiting it to situations in which the defendant obtains and enjoys the extension, and held that the plaintiff is not relieved of the obligation to prosecute if the defendant agrees to postponement for plaintiff's benefit and at plaintiff's request (*39 Cal. 3d 311, 332)* .

In *Waxman v. Boren, Elperin, Howard & Sloan (1990) 221 Cal. App. 3d 519, 270 Cal. Rptr. 540* , cross complainants, who were embroiled in numerous civil actions, filed a cross complaint for professional malpractice against their former attorneys. The cross complainants' attorney discussed putting on "hold" any pleading or discovery to allow cross complainants to resolve some of the claims against them and better assess the extent of their potential liability. An unspoken purpose was to minimize cross complainants' litigation expenses because of the numerous claims pending against them. The court of appeal affirmed the eventual dismissal of the action for lack of prosecution under *Code Civ. Proc. § 583.420(a)(2)(A)*, finding that the open extension of time to answer was granted primarily for the cross complainant's benefit (*221 Cal. App. 3d 519, 525-526)* .

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9-90 California Points & Authorities §§ 90.107-90.119

[Reserved]

§§ 90.107[Reserved]

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9-90 California Points & Authorities § 90.120

§ 90.120 Supporting Motion for Nonstatutory Dismissal for Delay in Prosecution

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF MOTION TO
Plaintiff,	)	DISMISS ACTION
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

DISCRETIONARY DISMISSAL OF AN ACTION FOR INEXCUSABLE DELAY IN PROSECUTION IS PROPER UNDER THE INHERENT POWER OF THE COURT _____ [IN ANY SITUATION NOT GOVERNED BY A DISMISSAL STATUTE *or* IN ANY SITUATION GOVERNED BY A MANDATORY DISMISSAL STATUTE IF THE PERIOD SPECIFIED IN THE STATUTE HAS NOT YET EXPIRED AND NO OTHER STATUTE APPLIES].

A. Inherent Power to Dismiss. A trial court has the inherent power, limited only by the court's sound discretion, to

control its calendar without the aid of legislation by dismissing an action for lack of prosecution if delay in prosecution is inexcusable (*Overaa v. Keeney (1915) 169 Cal. 628, 630-631, 147 P. 466* ; *Blue Chip Enterprises, Inc. v. Brentwood Sav. & Loan Ass'n (1977) 71 Cal. App. 3d 706, 712-713*).

B. Inherent Power Not Restricted by Dismissal Statutes. The statutes governing dismissal for delay in prosecution, Chapter 1.5 of Title VIII of Part II of the Code of Civil Procedure (*Code Civ. Proc. § 583.110 et seq.*), do not limit or affect the court's authority to

dismiss an action or impose other sanctions under a rule adopted by the court pursuant to *Code of Civil Procedure Section 575.1* or by the Judicial Council pursuant to statute or otherwise under inherent authority of the court (*Code Civ. Proc. § 583.150*).

[*EITHER*]

C. Power Applicable if Statute Absent. The inherent power to dismiss applies to situations that are not governed by a dismissal statute (*Overaa v. Keeney (1915) 169 Cal. 628, 631, 147 P. 466* ; *Karras v. Western Title Ins. Co. (1969) 270 Cal. App. 2d 753, 757, 76 Cal. Rptr. 141*).

[*OR*]

C. Power Applicable if Statutory Period Unexpired. The inherent power to dismiss applies to situations governed by a mandatory dismissal statute if the period specified in the statute has not yet expired (*Witter v. Phelps (1912) 163 Cal. 655, 657, 126 P. 593* ; *Blue Chip Enterprises, Inc. v. Brentwood Sav. & Loan Assn. (1977) 71 Cal. App. 3d 706, 712-713, 139 Cal. Rptr. 651*).

[*Add points and authorities, as necessary, to set forth alternative statutory grounds for the motion or to anticipate objections of the opposing party (see, e.g., §§ 90.80, 90.86 -90.92).*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be used in support of a motion to dismiss an action on nonstatutory grounds for delay in prosecution. A nonstatutory motion is appropriate if plaintiff has not prosecuted the action with diligence by, for example, causing an unreasonable delay in prosecution after trial has commenced, but in which *Code Civ. Proc. § 583.110 et seq.* do not apply [*see, e.g.,* *Karras v. Western Title Ins. Co. (1969) 270 Cal. App. 2d 753, 757, 76 Cal. Rptr. 141* (seven-year delay following continuance to allow plaintiffs to prepare authorities in support of evidentiary objection)].

Code Civ. Proc. § 583.410 limits the court's independent power to dismiss an action for want of prosecution at any time. The court cannot exercise its discretionary powers of dismissal until the minimum periods of delay specified in the

statute have elapsed [*see Lyons v. Wickhorst (1986) 42 Cal. 3d 911, 915, 231 Cal. Rptr. 738, 727 P.2d 1019]* . Therefore, the second alternative Paragraph C should be used only the after the periods provided in *Code Civ. Proc. § 583.420* have passed and before dismissal becomes mandatory under *Code Civ. Proc. § 583.210 et seq.* or *583.310 et seq.* The *Lyons* court pointed out that although the discretionary power to dismiss with prejudice has been upheld in California, its use has been tightly circumscribed [*see Lyons v. Wickhorst (1986) 42 Cal. 3d 911, 916, 231 Cal. Rptr. 738, 727 P.2d 1019]* .

If the trial court has inherent discretionary power to dismiss in a particular case, it may employ the same discretionary considerations used to dismiss under *Code Civ. Proc. § 583.410 et seq.*, including those factors enumerated in *Cal. Rules of Ct., Rule 3.1342(e)* [*see Blue Chip Enterprises, Inc. v. Brentwood Sav. & Loan Assn. (1977) 71 Cal. App. 3d 706, 712-713, 139 Cal. Rptr. 651* for points and authorities relating to statutory discretionary dismissal, *see §§ 90.51* and *90.83*].

The foregoing form may be adapted in appropriate situations for use if a cross complainant, cross defendant, or other person commencing or defending an action, respectively, is the moving or opposing party [*see Code Civ. Proc. § 583.110(a), (d), (e)*].

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. For example, the moving party should state the nature of the delay caused by plaintiff and why that delay should result in the proceeding being dismissed, even if no statute requires dismissal [*see, e.g., Karras v. Western Title Ins. Co. (1969) 270 Cal. App. 2d 753, 757, 76 Cal. Rptr. 141]* .

[b] Related Pleading and Practice Forms

For a form of notice of motion for an order dismissing an action pursuant to the court's inherent dismissal power, see Ch. 212, *Dismissal* in California Forms of Pleading and Practice (Matthew Bender).

[c] Opposing Memoranda

The points and authorities *set out in § 90.124* may be used in an appropriate case to oppose a motion for dismissal supported by the foregoing memorandum.

[3] Discussion of Authorities

[a] Inherent Power to Dismiss

In ***Overaa v. Keeney*** *(1915) 169 Cal. 628, 147 P. 466* , plaintiff appealed from the dismissal of his action for want of prosecution. Plaintiff contended that the dismissal statute then in effect, which permitted a discretionary dismissal if the action was not brought to trial within two years after the answer was filed,deprived the court of discretion to dismiss the action if it was not brought to trial prior to the filing of the answer.

The Supreme Court affirmed the dismissal. Rejecting plaintiff's contention, the Court held that a trial court has general discretionary power, without the aid of legislation, to dismiss an action for want of prosecution. The trial court has a statutory power to dismiss an action for lack of prosecution after the answer is filed. However, if an answer has not been filed, the court's power remains, as it was before the statute, limited only by sound discretion (*169 Cal. 628, 631)* . Here, the facts of record did not show an abuse of discretion (*169 Cal. 628, 632)* .

In ***Blue Chip Enterprises, Inc. v. Brentwood Sav. & Loan Ass'n*** *(1977) 71 Cal. App. 3d 706* , the court of appeal upheld the authority of the trial court to dismiss an action not brought to trial two years and seven months after declaration of a mistrial even though the mandatory dismissal provisions of former Code Civ. Proc. § 583(d) [*now see Code Civ. Proc. § 583.320(a)(1)*] did not apply until three years after the declaration of a mistrial (*71 Cal. App. 3d*

706, 712-713). A trial court has the power to dismiss an action if there has been inexcusable delay in bringing it to trial (*71 Cal. App. 3d 706, 712)* . The considerations set forth in former Cal. Rules of Ct., Rule 203.5(e) [*now see Cal. Rules of Ct., Rule 3.1342(e)*] for deciding motions under former Code Civ. Proc. § 583(a) are those which properly may guide a trial court in the exercise of this inherent power to control its calendar (*71 Cal. App. 3d 706, 712-713)* . Here, the record showed that exercise of that power was amply warranted (*71 Cal. App. 3d 706, 713)* .

[b] Power Applicable if Statute Absent

The facts and procedural background of ***Overaa v. Keeney*** *(1915) 169 Cal. 628, 147 P. 466* , are *discussed under § 90.120[3][a]*.

In ***Karras v. Western Title Ins. Co.*** *(1969) 270 Cal. App. 2d 753, 76 Cal. Rptr. 141* , the trial court dismissed an action for lack of prosecution after the trial had already begun.

On appeal, the court of appeal affirmed. There is no statutory authority for dismissal of a case for lack of prosecution once trial has been commenced, but a court has inherent power in its discretion to do so. The court held the discretion was not abused in this case. The plaintiffs had a duty to act with reasonable diligence. The only explanation offered for delay was the illness and death of plaintiffs' counsel, but this excuse was not adequate to explain a delay of the length that occurred (*270 Cal. App. 2d 753, 757-758)* .

[c] Power Applicable if Statutory Period Unexpired

In ***Witter v. Phelps*** *(1912) 163 Cal. 655, 126 P. 593* , the trial court dismissed an action for long and unnecessary delay in the service of summons, which was issued at once but not served until two years and three months after commencement of the action.

On appeal, the Supreme Court affirmed. The former statute made dismissal mandatory if the summons was not issued within one year or served and returned within three years (*163 Cal. 655, 656-657)* . This statute, however, did not affect the court's discretionary power to dismiss for undue delay in issuing or serving summons, even though the delay had been for a shorter period than that named in the statute (*163 Cal. 655, 657)* . Here, the record did not support a finding that discretion was abused (*163 Cal. 655, 657)* . Note that *Code Civ. Proc. § 583.420(a)(1)* now provides a discretionary period of two years for service and return of summons before dismissal is authorized under *Code Civ. Proc. § 583.410* [compare *Code Civ. Proc. § 583.210* (mandatory dismissal period); for further discussion, *see § 90.120[2][a]*].

Blue Chip Enterprises, Inc. v. Brentwood Sav. & Loan Ass'n *(1977) 71 Cal. App. 3d 706* , is *discussed under § 90.120[3][a]*.

[4] Additional Authorities

[a] Power Applicable if Statute Absent

In *Pearlson v. Does 1 to 646 (1999) 76 Cal. App. 4th 1005, 90 Cal. Rptr. 2d 787* , the trial court dismissed plaintiff's action and the court of appeal affirmed based on the trial court's inherent discretionary power to do so. In affirming, the court quoted *Code Civ. Proc. § 583.150* (which in relevant part provides that *Code Civ. Proc. §§ 583.110-583.430* do not limit or effect the court's authority to dismiss an action under the court's inherent authority). The court noted that absent express statutory authority, a trial court may invoke its limited, inherent discretionary power to dismiss claims with prejudice when (1) the plaintiff has failed to prosecute diligently; or (2) the complaint has been shown to be fictitious or sham so that plaintiff has no valid cause of action. The court of appeal concluded the trial court did not err in dismissing the action on the second ground. No defendants were named in the complaint, only fictitious defendants under *Code Civ. Proc. § 474*. While such pleading is legally permissible, the fact that plaintiff could not identify even

one potential defendant in connection with allegations of nefarious conduct raised significant questions regarding the viability of the alleged claims, and plaintiff, by giving the court no specific information to demonstrate that his requested discovery to learn the identity of unnamed defendants was anything other than a fishing expedition, failed to demonstrate good cause to support the issuance of a discovery order under Code Civ. Proc. § 2025(b)(2) [*see now Code Civ. Proc. § 2025.210* operative July 1, 2005] (*76 Cal. App. 4th 1005, 1010-1012)* .

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9-90 California Points & Authorities § 90.121

§ 90.121 Supporting Motion for Dismissal for Failure to Amend Complaint After Successful Demurrer or Motion to Strike [Code Civ. Proc. § 581(f)(2), (4)]--Dismissal Required

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF MOTION TO
Plaintiff,	)	DISMISS ACTION
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: None set

_____

THE COURT SHOULD DISMISS THIS ACTION PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 581(f) FOR FAILURE TO AMEND THE COMPLAINT AFTER THE COURT _____ [SUSTAINED THE DEMURRER TO IT *or* GRANTED THE MOTION TO STRIKE IT] WITH LEAVE TO AMEND.

[*EITHER, after successful demurrer*]

A. Statutory Requirements. An action may be dismissed as to a defendant when, after a demurrer to the complaint is sustained with leave to amend, the plaintiff fails to amend it within the time allowed by the court and either party moves for dismissal (*Code Civ. Proc. § 581(f)(2)*). [The exception to this rule established by *Code of Civil Procedure Sections 581(f)(2)* and *597*, for demurrers based on another action pending, does not apply to this case].

[*OR, after successful motion to strike*]

A. Statutory Requirements. An action may be dismissed as to a defendant when, after a motion to strike the whole of the complaint or a portion thereof is granted with leave to amend, the plaintiff fails to amend it within the time allowed by the court and either party moves for dismissal (*Code Civ. Proc. § 581(f)(4)*).

B. Dismissal Required. Dismissal of an action pursuant to *Code of Civil Procedure Section 581(f)* for failure to amend a complaint within the time allowed by the court is required unless the plaintiff establishes an excuse for the failure to amend (*see Dumm v. Pacific Valves (1956) 146 Cal. App. 2d 792, 795, 304 P.2d 738* (demurrer); *Daniels v. Daniels (1955) 136 Cal. App. 2d 224, 228, 288 P.2d 910* (demurrer)).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be used in support of a motion for dismissal pursuant to *Code Civ. Proc. § 581(f)(2)* or *(4)* if plaintiff has failed to amend the complaint after a successful demurrer or motion to strike, and counsel desires to emphasize that despite the permissive language of the statute, dismissal is, in effect, mandatory. The form is not to be used when the only ground of the demurrer was that there is another action pending [*see Code Civ. Proc. §§ 430.10(c), 581(f)(2), 597*].

Although the memorandum is drafted to support a motion by defendant, it may be modified to support a motion by plaintiff, since *Code Civ. Proc. § 581(f)* permits either party to move to dismiss.

The provisions of *Code Civ. Proc. § 581* set out in the form in both alternative Paragraphs A were amended in 1984 without substantive change [*see* 17 Cal. L. Rev. Comm. Reports 905 (1984)]. In 1986, they were relettered from former Code Civ. Proc. § 581(c) to former Code Civ. Proc. § 581(f), which was, in addition, amended to provide that the court "shall" dismiss the complaint as to the defendant in the circumstances enumerated in that subdivision [*see* Stats. 1986, ch. 540]. In 1987, however, *Code Civ. Proc. § 581(f)* was amended to provide, as it did prior to the 1986 amendments, that the court "may" dismiss the complaint as to the defendant under the circumstances enumerated in that subdivision [Stats. 1987, ch. 1080]. It appears, therefore, that the decisions cited in the form under Paragraph B may still be cited as persuasive, if not controlling, authority for the circumstances under dismissal may be required following failure to amend.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. The date the demurrer or motion to strike was granted along with the time period provided for amendment should be set forth [*see Code Civ. Proc. § 581(f)*]. Facts that negate any purported excusein failing to timely amend

should also be included.

[b] Motion to Strike Untimely Amended Pleading Required

If an amended pleading is filed after the time allowed, then an order striking the amended pleading must be obtained before the action may be dismissed. The order to strike must be obtained by noticed motion under *Code Civ. Proc. § 1010* [*Cal. Rules of Ct., Rule 3.1320(i)*; *Gitmed v. General Motors (1994) 26 Cal. App. 4th 824, 828-829, 31 Cal. Rptr. 2d 625* ; *Leader v. Health Indus. of Am. (2001) 89 Cal. App. 4th 603, 620, 107 Cal. Rptr. 2d 489]* .

[c] Ex Parte Motion

A motion to dismiss the entire action and for entry of judgment after expiration of the time to amend following the sustaining of a demurrer may be made by ex parte application to the court under *Code Civ. Proc. § 581(f)(2)* [*Cal. Rules of Ct., Rule 3.1320(h)*].

[d] Related Pleading and Practice Forms

For forms of a notice of motion and order relating to a motion to dismiss an action pursuant to Code Civ. Proc. § 581(f), see Ch. 212, *Dismissal* , in California Forms of Pleading and Practice (Matthew Bender).

[e] Opposing Memoranda

The points and authorities *set out in § 90.125* may be used in an appropriate case to oppose a motion for dismissal supported by this memorandum.

[3] Discussion of Authorities

[a] Statutory Requirements

Code Civ. Proc. § 581(f)(2) by its own terms does not apply when *Code Civ. Proc. § 597* is applicable. Under Section 597 if a demurrer is sustained under *Code Civ. Proc. § 430.10(c)* only, which relates to another action pending, an appealable interlocutory judgment is to be entered in favor of the defendant so pleading to the effect that no trial of other issues shall be had until the final determination of the other action [*Code Civ. Proc. § 597*]. First alternative Paragraph A includes an optional sentence which may be used to negative the existence of this exception.

[b] Dismissal Required

In ***Dumm v. Pacific Valves*** *(1956) 146 Cal. App. 2d 792, 304 P.2d 738* , plaintiffs appealed from a judgment of dismissal granted after the court sustained a demurrer to plaintiffs' complaint. Plaintiffs contended that the court was without jurisdiction to grant the judgment.

The court of appeal rejected this argument, but reversed. The order sustaining the demurrer allowed ten days to amend, and plaintiffs failed to amend. This failure was in effect a refusal to amend, indicating that plaintiffs may have preferred to stand on the complaint as it was, or may have pleaded every fact they were prepared to prove. Their failure to amend leaves nothing to be done by the court except to make and enter the judgment (*146 Cal. App. 2d 792, 795)* . Nevertheless, the court reversed the judgment on the ground that the demurrer should not have been sustained (*146 Cal. App. 2d 792, 799)* .

In ***Daniels v. Daniels*** *(1955) 136 Cal. App. 2d 224, 288 P.2d 910* , plaintiff appealed in part from the dismissal of her second amended complaint and the denial of her *Code Civ. Proc. § 473* motion to vacate the dismissal order.

The court of appeal affirmed. Plaintiff had filed the second amended complaint after expiration of the period for amendment fixed by the court. On hearing the motion to dismiss, no showing of any kind was made about why an amended complaint was not filed in time. Under former Code Civ. Proc. § 581(3) [*now see Code Civ. Proc. § 581(f)*], if a plaintiff fails to amend a complaint within the time specified, the plaintiff's right to do so ceases (*136 Cal. App. 2d 224, 227-228)* . Plaintiff's only remedy was a *Code Civ. Proc. § 473* motion for relief from default. But the court held that the trial court did not abuse its discretion in denying her later *Code Civ. Proc. § 473* motion (*136 Cal. App. 2d 224, 228)* .

[4] Additional Authorities

[a] Dismissal Required

In *Cano v. Glover (2006) 143 Cal. App. 4th 326, 48 Cal. Rptr. 3d 871* , the trial court dismissed defendant without prejudice after plaintiff failed to name defendant in his fourth amended complaint, following a demurrer sustained with leave to amend. Defendant appealed, and the court of appeals held that while a dismissal under *Code Civ. Proc. § 581(f)(2)* is discretionary, it must be with prejudice. Dismissal without prejudice is expressly permitted by other subdivisions of *Code Civ. Proc. § 581*, but not by *Code Civ. Proc. § 581(f)(2)*, which "gives the defendant the right to obtain a court order dismissing the action with prejudice once the court sustains a demurrer with leave to amend and the plaintiff has not amended within the time given" (*143 Cal. App. 4th 326, 330* , quoting *Parsons v. Umansky (1994) 28 Cal. App. 4th 867*). A dismissal without prejudice would put defendant in "perpetual limbo," and plaintiff forfeited his right to dismiss without prejudice when he failed to name defendant in his amended complaint (*143 Cal. App. 4th 326, 330)* .

In *Harding v. Collazo (1986) 177 Cal. App. 3d 1044, 223 Cal. Rptr. 329* , plaintiff brought an action for malicious prosecution, negligence, wrongful termination, defamation, invasion of privacy and civil rights, and intentional infliction of emotional distress. Defendants filed a demurrer and motion to strikeplaintiff's first amended complaint on the grounds that plaintiff failed to state a cause of action, and that the complaint was uncertain and ambiguous. The parties stipulated to take the hearings off calendar, and plaintiff agreed to file a second amended complaint within a certain date. Plaintiff did not do so, and defendants filed a motion to dismiss based on former Code Civ. Proc. § 581(3) (*now see Code Civ. Proc. § 581(f)(2)*). The trial court granted the motion with prejudice. Plaintiff appealed, and the court of appeal affirmed, holding that the stipulation was subject to a motion to dismiss under *Code Civ. Proc. § 581(f)(2)*, just as if the parties had stipulated that the demurrer was deemed to be sustained with leave to amend within the time specified and allowed by the stipulation (*177 Cal. App. 3d 1044, 1053)* .

In *Leader v. Health Industries of America (2001) 89 Cal. App. 4th 603, 107 Cal. Rptr. 2d 489* , plaintiff doctors originally sued a hospital for breach of contract and tortious interference with prospective business relationships in 1993. The trial court sustained demurrers to the original, first amended, and second amended complaints. After sustaining a demurrer to the third amended complaint, the court imposed a deadline for amendment. After that deadline had expired more than a month earlier, plaintiffs' moved for leave to file a fourth amended complaint. The hospital opposed and moved to strike the amended complaint and dismiss the action under *Code Civ. Proc. § 581(f)(2)*. The trial court's decision was reviewed for abuse of discretion (*89 Cal. App. 4th 603, 612)* . The trial court did not abuse its discretion in granting the dismissal where the action had been pending for nearly six years, plaintiffs did not even attempt to amend until one month after trial court's deadline had passed, and information the plaintiffs were unable to locate before the deadline did not appear to be critical to the ability to file an amended complaint (*89 Cal. App. 4th 603, 614)* .

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9-90 California Points & Authorities § 90.122

§ 90.122 Supporting Motion for Dismissal for Failure to Prosecute Special Proceeding--Dismissal Statutes Apply [Code Civ. Proc. § 583.120]

[1] FORM

[*The following should be combined with a memorandum supporting specific grounds for dismissing for lack of prosecution (see, e.g., §§ 90.50 et seq. and 90.80 et seq.)*]

THE DISMISSAL STATUTES, CODE OF CIVIL PROCEDURE SECTION 583.110 ET SEQ., APPLY TO _____ [*specify special proceeding, e.g.,* PROCEEDINGS ON A PETITION FOR A WRIT OF ADMINISTRATIVE MANDATE].

A. Authority to Dismiss Special Proceeding for Delay in Prosecution. The statutes providing for dismissal of civil actions for delay in prosecution, *Code of Civil Procedure Section 583.110 et seq.*, do not apply to special proceedings except to the extent incorporated by reference in the special proceeding (*Code Civ. Proc. § 583.120(a)*).

[*EITHER, if special proceeding incorporates Code Civ. Proc. § 583.110 et seq.*]

B. Incorporation by Reference. _____ [*Set out special proceedings statute incorporating civil action procedure, e.g., Code of Civil Procedure Section 1109* provides that except as otherwise provided in Title I of Part Three of the Code of Civil Procedure (*Code Civ. Proc. § 1067 et seq.*), the provisions of Part Two of the Code of Civil Procedure (*Code Civ. Proc. § 307 et seq.*) are applicable to and constitute the rules of practice in the proceedings mentioned in Title I of Part Three of the Code of Civil Procedure, which governs proceedings for writs of review, mandate, and prohibition.] *Code of Civil Procedure Section 583.110 et seq.* is found in Part Two of the Code of Civil Procedure.

[*OR, if special proceeding does not incorporate Code Civ. Proc. § 583.110 et seq.*]

B. Court's Inherent Authority to Apply Dismissal Statutes to Special Proceedings. Notwithstanding *Code of Civil Procedure Section 583.120(a)*, the court may, by rule or otherwise under inherent authority of the court, apply this chapter to a special proceeding or part of a special proceeding except to the extent such application would be inconsistent with the character of the special proceeding or the statute governing the special proceeding (Code Civ. Proc. § 583.1230(b)).

[*CONTINUE*]

[*Optional*] **C. Administrative Mandate.** There is no bar preventing the court from applying the dismissal statutes to administrative mandate proceedings unless, as *Code of Civil Procedure Section 583.120(b)* states, such application would be inconsistent with the character of that proceeding or the statute governing it (*Binyon v. State of California (1993) 17 Cal. App. 4th 952, 955, 21 Cal. Rptr. 2d 673*). This statutory limitation is intended to prevent application of the general dismissal statutes to special proceedings where their application would permit, rather than prevent, dilatory prosecution because of the longer time periods specified in the general dismissal statutes. No specific statute permits dismissal of an administrative mandate proceeding for failure to prosecute and, therefore, it would not be inconsistent to apply the general dismissal statute to these proceedings (*Binyon v. State of California (1993) 17 Cal. App. 4th 952, 955-956, 21 Cal. Rptr. 2d 673*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a motion to dismiss a special proceeding for delay in prosecution to make the point that the general dismissal statutes apply to the special proceeding [*see Code Civ. Proc. § 583.120*]. These points and authorities should be combined with a general form of memorandum supporting a motion to dismiss for delay in prosecution [*see, e.g., §§ 90.50, 90.51, 90.80, 90.83*].

These points and authorities cannot be appropriately used to the extent a special proceeding has its own provisions regarding dismissal for delay [*see Civ. Code § 3147* (action to foreclose mechanics' lien to be brought to trial within two years); *see also Binyon v. State of California (1993) 17 Cal. App. 4th 952, 956, 21 Cal. Rptr. 2d 673]* .

[3] Discussion of Authorities

[a] Administrative Mandate

In ***Binyon v. State of California*** *(1993) 17 Cal. App. 4th 952, 21 Cal. Rptr. 2d 673* , the petitioner's employment with a state agency was terminated after a hearing before the State Personnel Board. On May 19, 1986, petitioner filed a petition for a writ of administrative mandate under *Code Civ. Proc. § 1094.5* alleging that there was insufficient evidence to support his termination. The petitioner did not serve the petition on the board, and the superior court file was consigned to the court's archives. On May 28, 1991, the petitioner noticed the matter for hearing on the petition in July, 1991. On the date noticed for hearing in July, the court dismissed the case on its own motion for failure to bring it to trial within five years of filing. Petitioner appealed.

The court of appeal affirmed, rejecting the petitioner's contention that the dismissal statutes do not apply to special proceedings for administrative mandate under *Code Civ. Proc. § 1094.5*. The court recognized that administrative mandate is a special proceeding, but did not find this dispositive. Applying *Code Civ. Proc. § 583.120(b)*, the court found that the dismissal statutes and administrative mandate proceedings are not inconsistent, and that therefore, the dismissal statutes could be applied (*17 Cal. App. 4th 952, 955-956)* . In a footnote, the court noted that its decision was also supported by *Code Civ. Proc. § 1109*, incorporating the rules for civil actions generally in the title applicable to

proceedings for administrative mandate (*17 Cal. App. 4th 952, 956 n.2*). The court also rejected petitioner's contention that the dismissal statutes did not apply because the proceedings would not require a factual hearing, but be determined on the record of the administrative hearing (*17 Cal. App. 4th 952, 956-957*). Finally, in affirming, the court found no excuse for the appalling lack of diligence present in the case (*17 Cal. App. 4th 952, 957)* .

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9-90 California Points & Authorities § 90.123

§ 90.123 Opposing Motion for Dismissal Based on Court's Inherent Powers Inherent Power to Dismiss Unavailable

[1] FORM

[*The following may be included in a memorandum or points and authorities, or in a trial or appellate brief.*]

ABSENT A STATUTORY BASIS FOR DISMISSAL, THE COURT LACKS INHERENT POWER TO DISMISS THE ACTION.

Inherent Power to Dismiss Unavailable. The concept of inherent judicial powers is confined to procedural actions essential to effective exercise of otherwise-granted jurisdiction or vindication of otherwise-established substantive rights or powers, and does not apply to the determination of a substantive principle (*Topa Ins. Co. v. Fireman's Fund Ins. Companies (1995) 39 Cal. App. 4th 1331, 1345, 46 Cal. Rptr. 2d 516*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion to dismiss pursuant to a trial court's inherent dismissal power.

These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the nature of the underlying basis for dismissal, and argue that the proposed dismissal does not arise in a situation in which the dismissal is a procedural remedy to an otherwise established legal

determination, but rather constitutes an initial determination which is not within the concept of inherent powers [*see Topa Ins. Co. v. Fireman's Fund Ins. Companies (1995) 39 Cal. App. 4th 1331, 46 Cal. Rptr. 2d 516]* .

[c] Related Pleading and Practice Forms

For a form of notice of motion to dismiss an action pursuant to the court's inherent dismissal power, see California Forms of Pleading and Practice, Ch. 212, *Dismissal* (Matthew Bender).

[3] Discussion of Authorities

[a] Inherent Power to Dismiss Unavailable

In ***Topa Ins. Co. v. Fireman's Fund Ins. Companies*** *(1995) 39 Cal. App. 4th1331, 46 Cal. Rptr. 2d 516* , an excess insurer brought an action by way of cross-complaint against a primary insurer for a declaration that the excess insurer, if found liable to the insured in the underlying action, would be entitled to contribution from the primary insurer. In its answer, the primary insurer alleged its prior settlement with the insured as an affirmative defense. The primary insurer then moved for a determination that this settlement was in good faith, and for an order dismissing the excess insurer's cross-complaint. The trial court granted the motion on the basis of its inherent equitable power.

The court of appeal reversed, finding that the trial court's order exceeded the scope of its inherent judicial powers. The court noted that although the concept of inherent powers relates primarily to procedural matters, it may also relate to situations in which the rights and powers of the parties have been established by substantive law, but workable means by which those rights may be enforced have not been granted by statute (*39 Cal. App. 4th 1331, 1344)* . However, the court reasoned that the matter before it did not come within this concept because the case involved the initial determination of the substantive effect of the good faith determination. The court granted that if the substantive effect of such a determination had been otherwise established, then the trial court could use its inherent powers to devise a procedural remedy. However, the initial determination of that substantive effect is not within the concept of inherent powers (*39 Cal. App. 4th 1331, 1345)* .

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9-90 California Points & Authorities § 90.124

§ 90.124 Opposing Motion for Nonstatutory Dismissal for Delay in Prosecution--Inherent Power to Dismiss Unavailable

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN OPPOSITION TO MOTION
vs.	)	TO DISMISS ACTION
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Trial date: _____

_____

THE COURT LACKS INHERENT POWER TO DISMISS THE ACTION FOR DELAY IN PROSECUTION BECAUSE LESS THAN TWO YEARS HAVE PASSED SINCE THE _____ [COMPLAINT WAS FILED *or* MISTRIAL WAS DECLARED *or* JURY'S DISAGREEMENT WAS ENTERED *or* ORDER GRANTING NEW TRIAL WAS ENTERED *or* REMITTITUR AFTER APPEAL WAS FILED].

Inherent Power to Dismiss Unavailable. The minimum periods before which a court may not dismiss an action for lack of prosecution under *Code of Civil Procedure Section 583.420* limit the court's independent power to dismiss an action for want of prosecution. Thus, a minimum delay of two years is required before a trial court can exercise its

discretionary dismissal powers (*Lyons v. Wickhorst (1986) 42 Cal. 3d 911, 915, 231 Cal. Rptr. 738, 727 P.2d 1019* ; *see General Motors Corp. v. Superior Court (1966) 65 Cal. 2d 88, 98, 52 Cal. Rptr. 460, 416 P.2d 492* ; *see also Code Civ. Proc. § 583.420(a)(1), (2)(B), (3)*; Cal. Rules of Ct., Rule 1.340).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be used in opposition to a motion to dismiss for lack of prosecution pursuant to a trial court's inherent dismissal power if at least two years have not passed since the complaint was filed against the defendant [*see Code Civ. Proc. § 583.420(a)(1), (2)(B)*; *Cal. Rules of Ct., Rule 3.1340*]. It may also be used if the time periods of *Code Civ. Proc. § 583.420(a)(3)* (limiting when the court may discretionarily dismiss for failure to bring case to new trial) have not passed.

If the trial court has inherent discretionary power to dismiss, it may employ the same discretionary considerations used to dismiss under *Code Civ. Proc. §§ 583.410-583.430*, including those factors enumerated in *Cal. Rules of Ct., Rule 3.1342(e)* [*see Blue Chip Enterprises, Inc. v. Brentwood Sav. & Loan Assn. (1977) 71 Cal. App. 3d 706, 712-713, 139 Cal. Rptr. 651]* .

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. The date the action was commenced against defendant should be set forth, along with any facts explaining the delay in bringing the action to trial and the lack of any prejudice to defendant during the period of delay.

In an appropriate case, this memorandum may be submitted in opposition to a motion for dismissal pursuant to the inherent power of the court supported by the points and authorities *set out in § 90.120*.

[b] Related Pleading and Practice Forms

For a form of notice of motion for a motion to dismiss an action pursuant to the court's inherent dismissal power, see Ch. 212, *Dismissal* , in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Inherent Power to Dismiss Unavailable

The plaintiff in ***Lyons v. Wickhorst*** *(1986) 42 Cal. 3d 911, 231 Cal. Rptr. 738, 727 P.2d 1019* , refused to introduce evidence in judicial arbitration proceedings. After the second attempt to arbitrate, the arbitrator entered an award in defendant's favor. Plaintiff requested trial de novo, but the court dismissed the action for failure to participate in mandatory arbitration procedures. The plaintiff appealed.

The Supreme Court reversed, finding dismissal too drastic a remedy for failure to participate in arbitration proceedings. In reviewing the law relating to the court's inherent power to dismiss actions, the court found that this power has generally been limited to two situations: (1) the failure to prosecute diligently and (2) the absence of a cause of action under a "fictitious or sham" complaint. The Court pointed out the codification of the discretion to dismiss in *Code Civ.*

Proc. § 583.410 and its two-year limitation in Section 583.420. The Court noted that this two-year statutory period limits the court's independent power to dismiss (*42 Cal. 3d 911, 915)* , and found no such delay in this case (*42 Cal. 3d 911, 916)* . The Court also noted that although the discretionary power to dismiss with prejudice has been upheld in California, its use has been tightly circumscribed (*42 Cal. 3d 911, 916)* .

The facts and procedural background of ***General Motors Corp. v. Superior Court*** *(1966) 65 Cal. 2d 88, 52 Cal. Rptr. 460, 416 P.2d 492* , are discussed in *§ 90.92[3][i]*. In *General Motors*, the Supreme Court calculated the period during which it was impracticable to bring two consolidated cases to trial. As part of this calculation, it allowed at least two years for bringing one of the actions to trial because it was not within the discretionary power of the trial court to dismiss an action until two years after it had been filed. The provision of former Code Civ. Proc. § 583 [*now see Code Civ. Proc. §§ 583.410, 583.420(a)(2)(B)*], which gave the court discretion to dismiss an action if not brought to trial within two years, appeared to represent a legislative determination that at least in the typical case, a delay of two years should be deemed unavoidable. That is, a plaintiff may not be penalized for failing to bring even the least complicated case to trial during this period (*65 Cal. 2d 88, 98)* .

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9-90 California Points & Authorities § 90.124A

§ 90.124A Opposing Motion for Nonstatutory Dismissal for Failure to Appeal Telephonically

[1] FORM Opposing Motion for Nonstatutory Dismissal for Failure to Appear Telephonically

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN OPPOSITION TO MOTION
vs.	)	TO DISMISS ACTION
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Trial date: None Set

_____

THE COURT NOT SHOULD DISMISS THIS ACTION FOR _____ [*specify party failing to appear telephonically, e.g.,* PLAINTIFF *or* DEFENDANT]'S FAILURE TO APPEAR TELEPHONICALLY AT _____ [*specify proceeding at which party failed to appear, e.g.,* CASE MANAGEMENT CONFERENCE], BECAUSE _____ [*specify party failing to appear telephonically, e.g.,* PLAINTIFF *or* DEFENDANT] WAS UNABLE TO APPEAR DUE TO _____ [*specify reason for failure to appear, e.g.,* PLAINTIFF IS A PRISONER WHO DID NOT WILFULLY FAIL TO APPEAR, BUT, RATHER, WAS NOT ALLOWED TO DO SO].

A. Plaintiff Did Not Wilfully Fail to Appear Telephonically at Proceedings in the Case. Before a trial court may

dismiss an action on the ground that an indigent prisoner has failed to appear telephonically at proceedings in the case, the trial court must find, based on facts in the record, that the prisoner has willfully failed to avail him- of herself of the right to appear telephonically (*Jameson v. Desta (2009) 179 Cal. App. 4th 672, 678-684, 101 Cal. Rptr. 3d 345*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be used in opposition to a motion to dismiss based on the opposing party's failure to appear telephonically at proceedings in the case.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Plaintiff Did Not Wilfully Fail to Appear Telephonically at Proceedings in the Case.

In ***Jameson v. Desta*** *(2009) 179 Cal. App. 4th 672, 101 Cal. Rptr. 3d 345* , a prison inmate sued a physician, alleging numerous claims stemming from defendant's allegedly negligent medical treatment of plaintiff while plaintiff was incarcerated. The trial court issued an order authorizing plaintiff to appear at court hearings by telephone. The trial court later dismissed the action without prejudice on the ground that plaintiff failed to appear telephonically at a case management conference and at a subsequent hearing on an order to show cause (*179 Cal. App. 4th 672, 677-678, 680-82)* .

The Court of Appeal reversed, concluding that before a trial court may dismiss an action on the ground that an indigent prisoner has failed to appear telephonically at proceedings in the case, the trial court must find, based on facts in the record, that the prisoner has willfully failed to avail himself of the right to appear telephonically. The court then concluded that the trial court erred in dismissing the action on the ground that plaintiff failed to appear telephonically at the case management conference and subsequent hearing on an order to show cause, because the record clearly indicated that plaintiff notified the trial court on numerous occasions that prison personnel were not allowing him to communicate telephonically with the court, yet the record did not indicate that the trial court made any inquiry into plaintiff's contentions. Further, the record did not contain any facts demonstrating that his failure to appear telephonically at the hearings was willful. On the contrary, the record established that he repeatedly made clear his desire to participate in all court proceedings and informed the court that he was not being allowed to do so (*179 Cal. App. 4th 672, 679-680, 682-684)* .

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9-90 California Points & Authorities § 90.125

§ 90.125 Opposing Motion for Dismissal for Failure to Amend Complaint After Successful Demurrer or Motion to Strike [Code Civ. Proc. § 581(f)(2), (4)]--Amendment Filed Before Motion for Dismissal

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN OPPOSITION TO MOTION
vs.	)	TO DISMISS ACTION
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Trial Date: None Set

_____

THE COURT NOT SHOULD DISMISS THIS ACTION PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 581(f) FOR FAILURE TO AMEND THE COMPLAINT AFTER THE COURT _____ [SUSTAINED THE DEMURRER TO IT *or* GRANTED THE MOTION TO STRIKE IT] WITH LEAVE TO AMEND, BECAUSE PLAINTIFF'S AMENDED COMPLAINT, ALTHOUGH LATE, WAS FILED BEFORE DEFENDANT MOVED FOR DISMISSAL, AND THE LATE FILING IS EXCUSABLE.

A. Statutory Requirements. [*See § 90.121, alternative Paragraph A.*]

B. Amendment Filed Before Defendant's Motion. Dismissal of an action pursuant to *Code of Civil Procedure Section 581(f)* for failure to amend a complaint within the time allowed by the court is not proper if the plaintiff files an amended complaint after expiration of the time allowed but before the defendant moves for dismissal, and the defendant fails to overcome plaintiff's excuses for lateness (*see Brown v. Brown (1959) 169 Cal. App. 2d 54, 57-58, 337 P.2d 140* (demurrer)).

[*Optional*] **C. Motion to Strike Is Prerequisite.** Once the plaintiff had filed an amended complaint, even though untimely, the defendant must move to strike the amended complaint before moving to dismiss it under *Code of Civil Procedure Section 581(f)(2)* (*Gitmed v. General Motors (1994) 26 Cal. App. 4th 824, 828, 31 Cal. Rptr. 2d 625* ; *Leader v. Health Indus. of Am. (2001) 89 Cal. App. 4th 603, 614, 107 Cal. Rptr. 2d 489*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be used in opposition to a motion to dismiss pursuant to *Code Civ. Proc. § 581(f)(2)* or *(4)* for failure to amend the complaint after a successful demurrer or motion to strike if plaintiff belatedly amended the complaint and defendant did not move for dismissal until after the amended complaint was filed.

This memorandum may be submitted in opposition to an ex parte motion to dismiss [*see § 90.121*], if plaintiff is given advance notice of the motion [*see Cal. Rules of Ct., Rule 3.1202-3.1207*]. If plaintiff is given sufficient notice in time to appear when the ex parte motion is presented but not enough time to draft an opposing memorandum, plaintiff should request the court to grant time to prepare the memorandum and serve and file it.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. The date by which amendment was to have occurred, as well as those dates on which the amended complaint and motion for dismissal were filed, should be set forth, together with any facts showing the reason for the delay in amendment and the lack of prejudice to defendant.

In an appropriate case, this memorandum may be submitted in opposition to a motion for dismissal pursuant to *Code Civ. Proc. § 581(c)* supported by the points and authorities *set out in § 90.121*.

[b] Related Pleading and Practice Forms

For forms of a notice of motion and order relating to a motion to dismiss an action pursuant to Code Civ. Proc. § 581(f), see Ch. 212, *Dismissal* , in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Amendment Filed Before Defendant's Motion

In ***Brown v. Brown*** *(1959) 169 Cal. App. 2d 54, 337 P.2d 140* , a demurrer to plaintiffs' first amended complaint was sustained with 10 days to amend. Plaintiffsdid not file an amended complaint for nine months. Forty-six days after that filing defendants moved to dismiss on the ground that the complaint was not timely filed, and their motion was granted.

The court of appeal reversed. Defendants did not attempt to enforce their right to dismiss until after the amended complaint was filed. By allowing this lapse of time, they lost their absolute right to obtain dismissal (*169 Cal. App. 2d 54, 57)* . Dismissal, at that point, is subject to the sound discretion of the court. If a plaintiff shows some excuse for lateness, the defendant must overcome this showing by affidavits or evidence. The absence of either is effectively the same as granting additional time for amendment. Here, defendants failed to make such a showing (*169 Cal. App. 2d 54, 58)* .

The court in *Brown* did not state explicitly whether plaintiffs had offered any excuses. Arguably, *Brown* stands for the principle that defendants' failure to move for dismissal until after plaintiff filed the amended complaint itself suffices to create an effective grant of time that the trial court must respect, unless defendant shows that dismissal is justified.

Former Code Civ. Proc. § 581(3), as interpreted by *Brown*, has since been amended to allow either party (rather than just the defendant) to move for dismissal, and to provide for dismissal when a motion to strike all or a portion of a complaint is granted with leave to amend and plaintiff fails to amend within the time allowed by the court [*see Code Civ. Proc. § 581(f)*].

[b] Motion to Strike Is Prerequisite

In ***Gitmed v. General Motors*** *(1994) 26 Cal. App. 4th 824, 31 Cal. Rptr. 2d 625* , the court sustained a demurrer to plaintiff's complaint with leave to amend. The plaintiff filed and served an amended complaint one day after the time to file expired. The defendant brought an ex parte motion to dismiss under *Code Civ. Proc. § 581(f)(2)* ten days later. The court granted the motion, and the plaintiff appealed.

The court of appeal reversed. The court held that the filing of the amended complaint, even though untimely, prevented the court from entertaining the motion to dismiss. The proper procedure would have been for the defendant to move to strike the amendment before moving to dismiss the complaint (*26 Cal. App. 4th 824, 828)* . Moreover, the court held that proceeding ex parte was improper when an amended complaint has been filed, distinguishing cases under *Code Civ. Proc. § 581(f)(2)* that did not require notice on the ground that they involved situations in which the plaintiff did not file an amended complaint at all (*26 Cal. App. 4th 824, 828-829)* .

In ***Leader v. Health Industries of America*** *(2001) 89 Cal. App. 4th 603, 107 Cal. Rptr. 2d 489* , plaintiff doctors originally sued a hospital for breach of contract and tortious interference with prospective business relationships in 1993. The trial court sustained demurrers to the original, first amended, and second amended complaints. After sustaining a demurrer to the third amended complaint, the court imposed a deadline for amendment. After that deadline had expired more than a month earlier, plaintiffs' moved for leave to file a fourth amended complaint. The hospital opposed and, recognizing that the court could allow the amended complaint to be filed, moved to strike the amended complaint and dismiss the action under *Code Civ. Proc. § 581(f)(2)*. The court of appeal pointed out that the trial court expressly granted the motion to strike and then ordered the action dismissed which satisfied the procedural concerns of *Gitmed v. General Motors*. The court of appeal pointed out that there was no reason to require that additional time and expense be incurred in filing a separate motion to dismiss after the court has ordered the amended complaint stricken (*89 Cal. App. 4th 603, 614)* .

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9-90 California Points & Authorities § 90.126

§ 90.126 Supporting Motion to Set Aside and Vacate Judgment of Dismissal--Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. § 473(b)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION TO
vs.	)	SET ASIDE AND VACATE JUDGMENT OF DIS-
_____ [*name*],	)	MISSAL
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
		Trial Date: None

_____

THE COURT SHOULD VACATE THE JUDGMENT OF DISMISSAL ON THE GROUND OF _____ [MISTAKE *and/or* INADVERTENCE *and/or* SURPRISE *and/or* EXCUSABLE NEGLECT] PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 473.

A. Statutory Requirements. The court has authority to relieve, on any terms as may be just, a party or a party's legal representative from a judgment, dismissal, order, or other proceeding taken against the party because of the party's _____ [mistake *and/or* inadvertence *and/or* surprise *and/or* excusable neglect] (*Code Civ. Proc. §*

473(b)).

B. Vacating Judgment of Dismissal Proper. It is proper to vacate a judgment of dismissal on the ground of _____ [mistake *and/or* inadvertence *and/or* surprise *and/or* excusable neglect] by a motion pursuant *Code of Civil Procedure Section 473* if the motion has the necessary factual support (*Martin v. Cook (1977) 68 Cal. App. 3d 799, 807, 137 Cal. Rptr. 434* ; *Bergloff v. Reynolds (1960) 181 Cal. App. 2d 349, 355, 5 Cal. Rptr. 461*).

[*Optional*] **C. When Motion to Set Aside and Vacate Made.** A motion to set aside a judgment of dismissal pursuant to Code of CivilProcedure Section 473 may be offered in opposition to a motion to dismiss, or made within the proper time after entry of the judgment (*Martin v. Cook (1977) 68 Cal. App. 3d 799, 804 n.3, 137 Cal. Rptr. 434* ; *Bergloff v. Reynolds (1960) 181 Cal. App. 2d 349, 355, 5 Cal. Rptr. 461*).

[*Optional*] **D. Counsel's Neglect.** Consistent and long-continued neglect by a plaintiff's counsel amounting to positive misconduct and resulting in dismissal of the plaintiff's action is the type of excusable neglect that requires setting aside the judgment of dismissal pursuant to *Code of Civil Procedure Section 473* (*Daley v. County of Butte (1964) 227 Cal. App. 2d 380, 391, 38 Cal. Rptr. 693*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in support of a motion to set aside and vacate a judgment of dismissal on the ground of mistake, inadvertence, surprise, or excusable neglect pursuant to *Code Civ. Proc. § 473(b)*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Facts specifically demonstrating how plaintiff was mistaken (factually or legally), how plaintiff's actions were inadvertent, how plaintiff was surprised, or why neglect was excusable should be included.

[b] Related Pleading and Practice Forms

For forms of a notice of motion and order relating to a motion to set aside and vacate judgment of dismissal pursuant to Code Civ. Proc. § 473, see California Forms of Pleading and Practice, Ch. 212, *Dismissal* (Matthew Bender).

For forms relating to motions for relief from judgments and orders based on Code Civ. Proc. § 473, see California Forms of Pleading and Practice, Ch. 489, *Relief From Judgments and Orders* (Matthew Bender).

[c] Related Memoranda

With appropriate modifications, the forms supporting and opposing a motion to set aside a default judgment found in Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders* , Part I, may be used to support or oppose a motion to set aside a judgment of dismissal.

[3] Discussion of Authorities

[a] Vacating Judgment of Dismissal Proper

The facts and procedural background of ***Martin v. Cook*** *(1977) 68 Cal. App. 3d 799, 137 Cal. Rptr. 434* , are discussed in *§ 90.101[3][a]*. In *Martin,* plaintiff countered defendant's motion for dismissal pursuant to former Code Civ. Proc. § 583(b) by filing a motion for relief pursuant to *Code Civ. Proc. § 473*. The trial court granted the *Code Civ. Proc. § 473* motion while denying dismissal. On appeal, the court of appeal reversed because it could find no basis for *Code Civ. Proc. § 473* relief (*68 Cal. App. 3d 799, 809-810)* . The court noted, however, that a *Code Civ. Proc. § 473* proceeding in opposition to a motion to dismiss was proper and could be entertained contemporaneously with the dismissal motion (*68 Cal. App. 3d 799, 804 n.3*).

In ***Bergloff v. Reynolds*** *(1960) 181 Cal. App. 2d 349, 5 Cal. Rptr. 461* , the trial court granted a motion to dismiss the action pursuant to former Code Civ. Proc. § 583 [*now see Code Civ. Proc. §§ 583.410, 583.420(a)(2)*] four years after the complaint was filed. Later, however, another judge granted plaintiff's motion for reconsideration and vacated the dismissal. Defendant appealed.

The court of appeal affirmed. An order dismissing a motion for lack of prosecution may be set aside pursuant to a motion under *Code Civ. Proc. § 473* if it is timely made and has the necessary factual support (*181 Cal. App. 2d 349, 355)* . The trial court's determination to grant the motion will not be disturbed on appeal unless the court is clearly shown to have abused its discretion. Here, the error of plaintiff's counsel about plaintiff's availability for trial, which resulted in his giving the court misinformation to plaintiff's detriment, was the type of mistake for which relief under *Code Civ. Proc. § 473* is appropriate (*181 Cal. App. 2d 349, 358)* . Although plaintiff's motion did not specifically refer to mistake, inadvertence, surprise, or excusable neglect as the basis of the relief sought, defendant had sufficient notice of these grounds as the basis for relief from the points and authorities and affidavits which were filed (*181 Cal. App. 2d 349, 356)* .

[b] When Motion to Set Aside and Vacate Made

Martin v. Cook *(1977) 68 Cal. App. 3d 799, 137 Cal. Rptr. 434* , and ***Bergloff v. Reynolds*** *(1960) 181 Cal. App. 2d 349, 5 Cal. Rptr. 461* , are *discussed under § 90.126[3][a]*.

[c] Counsel's Neglect

In ***Daley v. County of Butte*** *(1964) 227 Cal. App. 2d 380, 38 Cal. Rptr. 693* , the trial court granted defendant's motion to dismiss the action for failure to bring it to trial within the two-year period of former Code Civ. Proc. § 583, and subsequently denied plaintiff's *Code Civ. Proc. § 473* motion to set aside the dismissal.

The court of appeal reversed on the ground that it was an abuse of discretion to refuse to vacate the judgment (*227 Cal. App. 2d 380, 396)* . Despite the general rule that an attorney's neglect will be imputed to the client, there are exceptional cases in which a client, relatively free from personal neglect, will be relieved of a dismissal attributable to the inaction or procrastination of counsel. Here, the attorney's neglect, in the form of consistent and long-continued inaction, was so extreme that it amounted to positive misconduct, which effectively and unknowingly deprived plaintiff of representation (*227 Cal. App. 2d 380, 391)* . Unexplained examples of inaction included failure to serve process, to appear at pretrial conferences, to inform plaintiff about the motion to dismiss, or to cooperate in the substitution of attorneys (*227 Cal. App. 2d 380, 386, 391-392)* .

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B. Involuntary Dismissal
3. Dismissal On Other Grounds, General Points, and Review

9-90 California Points & Authorities § 90.127

§ 90.127 Opposing Motion to Set Aside and Vacate Judgment of Dismissal--Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. § 473(b)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN OPPOSITION TO MOTION
vs.	)	TO SET ASIDE AND VACATE JUDGMENT OF
_____ [*name*],	)	DISMISSAL
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
		Trial Date: None

_____

THE COURT SHOULD DENY PLAINTIFF'S REQUEST TO VACATE THE JUDGMENT OF DISMISSAL UNDER THE PROVISIONS OF CODE OF CIVIL PROCEDURE SECTION 473 BECAUSE SECTION 473 ONLY ALLOWS RELIEF FROM HAVING FAILED TO OPPOSE THE MOTION FOR DISMISSAL, BUT PLAINTIFF SEEKS TO REARGUE THE GROUNDS ON WHICH THE DISMISSAL WAS BASED.

A. Relief Under *Code Civ. Proc. § 473* Is Available Only From Failure to Oppose Dismissal Motion, Not to Reargue the Dismissal. The mandatory relief provisions of *Code Civ. Proc. § 473(b)* were intended to apply only to

those dismissals that occur through failure to oppose a dismissal motion (*Leader v. Health Indus. of Am. (2001) 89 Cal. App. 4th 603, 620, 107 Cal. Rptr. 2d 489* ; *Peltier v. McCloud River R.R. Co. (1995) 34 Cal. App. 4th 1809, 1815, 41 Cal. Rptr. 2d 182* ; *Graham v. Beers (1994) 30 Cal. App. 4th 1656, 1661, 36 Cal. Rptr. 2d 765* ; *see Code Civ. Proc. § 473(b)*). A motion for relief from dismissal may not be used to merely amplify or supplement the evidence and argument that were presented in opposition to a motion to dismiss (*Peltier v. McCloud River R.R. Co. (1995) 34 Cal. App. 4th 1809, 1825, 41 Cal. Rptr. 2d 182* ; *Graham v. Beers (1994) 30 Cal. App. 4th 1656, 1660, 36 Cal. Rptr. 2d 765*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be used in opposition to a motion to set aside and vacate a judgment of dismissal brought under the relief provisions of *Code Civ. Proc. § 473(b)* on the grounds of mistake, inadvertence, surprise, or excusable neglect. The basis of the opposition is that a Section 473(b) motion may only be used to obtain a hearing on the dismissal motion, not to reargue the dismissal itself.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. The grounds for relief asserted in plaintiff's opposition to motion to dismiss should be specifically referenced to demonstrate that plaintiff is seeking to reargue the dismissal rather than to reopen the hearing on the dismissal.

[b] Related Pleading and Practice Forms

For forms of a notice of motion and order relating to a motion to set aside and vacate judgment of dismissal pursuant to Code Civ. Proc. § 473, see California Forms of Pleading and Practice, Ch. 212, *Dismissal* (Matthew Bender).

For forms relating to motions for relief from judgments and orders based on Code Civ. Proc. § 473, see California Forms of Pleading and Practice, Ch. 489, *Relief From Judgments and Orders* (Matthew Bender).

[c] Related Memoranda

With appropriate modifications, the forms supporting and opposing a motion to set aside a default judgment found in Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders* , Part I, may be used to support or oppose a motion to set aside a judgment of dismissal.

[3] Discussion of Authorities

[a] Relief Under Code Civ. Proc. § 473 Available Only From Failure to Oppose Dismissal Motion

In ***Leader v. Health Industries of America*** *(2001) 89 Cal. App. 4th 603, 107 Cal. Rptr. 2d 489* , plaintiff doctors originally sued a hospital for breach of contract and tortious interference with prospective business relationships in 1993. The trial court sustained demurrers to the original, first amended, and second amended complaints. After sustaining a demurrer to the third amended complaint, the court imposed a deadline for amendment. After that deadline had expired more than a month earlier, plaintiffs' moved for leave to file a fourth amended complaint. The hospital

opposed and moved to strike the amended complaint and dismiss the action under *Code Civ. Proc. § 581(f)(2)*. The plaintiffs moved for relief under *Code Civ. Proc. § 473(b)*. Agreeing with previous decisions holding that when the Legislature incorporated dismissals into Section 473(b) it intended to reach only those dismissals which occur through failure to oppose a dismissal motion, the court of appeal held that the mandatory relief provision inapplicable to dismissal based on the failure to file an amended complaint after a demurrer has been sustained with leave to amend (*89 Cal. App. 4th 603, 620)* . The court of appeal concluded that the trial court did not abuse its discretion in granting the dismissal where the action had been pending for nearly six years, plaintiffs did not even attempt to amend until one month after trial court's deadline had passed, and information the plaintiffs were unable to locate before the deadline did not appear to be critical to the ability to file an amended complaint (*89 Cal. App. 4th 603, 614)* .

In ***Peltier v. McCloud River R.R. Co.*** *(1995) 34 Cal. App. 4th 1809, 41 Cal. Rptr. 2d 182* , plaintiff sought damages for work-related injuries against a railroad company. Nearly three years after defendant answered the complaint, plaintiff filed an at-issue memorandum and a certificate of readiness for trial, but failed to file a pretrial conference statement, and the case was dropped from the court's calendar. Defendant subsequently moved to dismiss the case for failure to bring to trial within three years. Plaintiff opposed the motion, with plaintiff's counsel asserting that he had not moved the case forward faster because plaintiff's condition had deteriorated following his deposition two years prior and remained unstable for purposes of calculating damages. Following the court's order granting defendant's motion, plaintiff filed a motion for reconsideration under *Code Civ. Proc. § 1008*, arguing that he was unable to retain an expert witness prior to filing his opposition to the motion to dismiss. The court denied the motion for reconsideration, plaintiff appealed that ruling, subsequently retained new counsel and moved to vacate the dismissal under *Code Civ. Proc. § 473*.

In his *Code Civ. Proc. § 473* motion, plaintiff argued that the dismissal of the case stemmed from the mistake or neglect of counsel because his former attorney had allegedly failed to move the case forward due to a mistaken legal strategy. Plaintiff attached a declaration from his former counsel accepting full responsibility for the pace of the case. The trial court denied plaintiff's motion and plaintiff appealed (*34 Cal. App. 4th 1809, 1813-1814)* .

The court of appeal affirmed the order denying plaintiff's motion to vacate the dismissal, finding first that the order denying plaintiff's motion was appealable (*34 Cal. App. 4th 1809, 1815)* . The court then analyzed and harmonized the provisions of *Code Civ. Proc. § 473* and *Code Civ. Proc. § 583.410 et seq.* In 1988, *Code Civ. Proc. § 473* was amended to make relief from default judgments mandatory on a sufficient showing of an attorney's mistake, inadvertence, surprise, or neglect in order to protect parties who were defaulted because of an attorney's indiscretion rather than any fault of their own (*34 Cal. App. 4th 1809, 1819)* . In 1992, the section was amended to grant plaintiffs mandatory relief if their case was dismissed as a result of their attorney's neglect, mistake, surprise or inadvertence (*34 Cal. App. 4th 1809, 1820)* . The court noted that the Legislature did not mention any possible effect of the amendment on the discretionary dismissal statutes and found it incredible that the Judiciary Committee would have considered a proposal to abrogate the discretionary dismissal statutes as "noncontroversial," as the 1992 amendment was described.

The court rejected plaintiff's interpretation of Section 473 as providing relief from the dismissal as it would render the discretionary dismissal statutes a nullity, since almost every plaintiff whose case was dismissed could merely file a Section 473 motion for relief relying on the same facts and argument that previously resulted in the dismissal (*34 Cal. App. 4th 1809, 1822)* . It relied on the courts' analyses in *Graham v. Beers (1994) 30 Cal. App. 4th 1656, 1660, 36 Cal. Rptr. 2d 765* , discussed *below*, and *Tustin Plaza Partnership v. Wehage (1994) 27 Cal. App. 4th 1557, 1563, 33 Cal. Rptr. 2d 366* , which concluded that the Legislature intended to put plaintiffs whose cases are dismissed for failing to respond to a dismissal motion on the same footing with defendants who are defaulted for failing to respond to an action (*34 Cal. App. 4th 1809, 1824)* . In affirming the dismissal, the court concluded that plaintiff's Section 473 motion merely restated the evidence and arguments offered in opposing dismissal and in seeking reconsideration of the dismissal order, and held that a motion for relief from dismissal may not be used to merely amplify or supplement the evidence and arguments presented in opposition to the original motion to dismiss (*34 Cal. App. 4th 1809, 1825)* .

In ***Graham v. Beers*** *(1994) 30 Cal. App. 4th 1656, 36 Cal. Rptr. 2d 765* , plaintiffs' personal injury action laid dormant for three and one-half years when the trial court issued and served an order to show cause regarding the dismissal on its own motion under *Code Civ. Proc. § 583.410*. Plaintiffs, meanwhile, filed an at-issue memorandum, but failed to appear at the hearing on the court's motion. The trial court subsequently filed its order and judgment of dismissal, finding a lack of justification for the delay. It denied plaintiff's motion for reconsideration, ruling that no new or different facts had been presented and that plaintiffs' counsel assumed the matter would settle and made a conscious decision to put the case on the "back burner." Plaintiffs filed a motion for relief pursuant to *Code Civ. Proc. § 473*, which the court also denied, finding that the plaintiffs were merely rearguing their prior motion.

The court of appeal affirmed the trial court's denial of relief under *Code Civ. Proc. § 473*, rejecting plaintiffs' argument that they were entitled to mandatory relief under Section 473. The court noted that plaintiffs complied with the prerequisites for mandatory relief as the application was timely, in proper form and accompanied by a sworn declaration of counsel, stating that he failed to bring the case to trial within three years because of his erroneous belief that the matter would settle. However, it found the court's "forceful dicta" in *Tustin Plaza Partnership v. Wehage (1994) 27 Cal. App. 4th 1557, 33 Cal. Rptr. 2d 366* that, although Section 473 deprives a court of discretion where a dismissal results from attorney neglect, the Legislature did not intend to undermine the court's discretion in making a determination under *Code Civ. Proc. § 583.410*, was applicable to these facts. It stated that although the seemingly contradictory language in Sections 473 and 583.410 was troubling, the Legislature could not have intended section 473 to be the "perfect escape hatch from the dismissal statutes" (*30 Cal. App. 4th 1656, 1661)* , and that a motion for relief from dismissal may not be used to merely amplify or supplement the evidence and argument that were presented in opposition to the original motion to dismiss (*30 Cal. App. 4th 1656, 1660)* .

California Points & Authorities

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CHAPTER 91 Reserved

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§ 91.syn Synopsis to Chapter 91: Reserved

Scope

California Points & Authorities

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CHAPTER 91 Reserved

9-91 California Points & Authorities

DISSOLUTION OF MARRIAGE AND RELATED PROCEEDINGS

The chapter DISSOLUTION OF MARRIAGE AND RELATED PROCEEDINGS has been discontinued in this set.

For arguments and authorities relating to family law that may be adapted for use in memoranda of points and authorities, or in trial or appellate briefs, see Denner, Rothschild & Johnson, California Family Law Trial Guide (Matthew Bender).

For a complete discussion of family law principles and procedure, see Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, 2nd ed. (Matthew Bender), and California Forms of Pleading and Practice, Ch. 220, *Dissolution of Marriage and Related Proceedings* (Matthew Bender).

California Points & Authorities

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CHAPTER 92 DURESS, MENACE, FRAUD, UNDUE INFLUENCE, AND MISTAKE

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§ 92.02 Governing Statutes

§ 92.03 Duress and Menace Distinguished

§ 92.04 Presumption of Undue Influence Arising From Advantage Gained by Persons Holding Confidential Relationship

§ 92.05 Nonapplicability of Forms to Contracts With Public Entities

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[1] Page Limits

[2] Using the Forms to Build a Draft Memorandum

§ 92.07 Related Pleading and Practice Chapters

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§§ 92.09-92.19 [Reserved]

§ 92.20 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] by Defendant in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Duress or Menace [Civ. Code §§ 1569, 1570]--Exercise of Legal Right as Not Duress or Menace

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[b] Related Memoranda

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Exercise of Valid Legal Right

[b] Refusal to Proceed With Contract

[c] Enforcement of Obligation by Suit

§ 92.21 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] by Defendant in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Duress or Menace [Civ. Code §§ 1569, 1570]--No Unlawful Act or Threat

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Memoranda

[3] Discussion of Authorities

[a] Requirement of Unlawful Act or Threat

[b] Unlawful Threat as More Than Statement Causing Fear of Prosecution

[4] Additional Authorities

[a] Requirement of Unlawful Act or Threat

[b] Unlawful Threat as More Than Statement Causing Fear of Prosecution

§ 92.22 Supporting Motion for Summary Judgment by Defendant in Action to Rescind Contract on Ground of Duress or Menace [Civ. Code §§ 1569, 1570]--Reasonable Alternative to Entering Into Contract Available

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Applicability of Authorities

[d] Related Memoranda

[3] Discussion of Authorities

[a] No Duress if Reasonable Alternative Available

§ 92.23 Supporting Contention That Contract Is Enforceable--Grief Over Death of Family Member Does Not Vitiate Cemetery Contract

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Grief Does Not Vitiate Cemetery Contract

§ 92.24 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Duress or Menace [Civ. Code §§ 1569, 1570]--Taking or Threatening to Take Legal Action With Knowledge of Falsity of Claim

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Memoranda

[3] Discussion of Authorities

[a] Rules Governing Summary Judgment Procedure

[b] Duress and Menace Defined

[c] Duress as Not Limited to Threats Against Person

[d] Knowledge of Falsity of Claim

[4] Additional Authorities

[a] Duress and Menace Defined

[b] Duress Not Limited to Threats Against Person

§ 92.25 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Duress or Menace [Civ. Code §§ 1569, 1570]--Threat of Criminal Prosecution as Duress

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Memoranda

[3] Discussion of Authorities

[a] Threat of Criminal Prosecution

[4] Additional Authorities

[a] Threat of Criminal Prosecution

§ 92.26 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Duress or Menace [Civ. Code §§ 1569, 1570]--Duress or Menace by Third Party

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Memoranda

[3] Discussion of Authorities

[a] Duress of Third Party Renders Contract Voidable

§§ 92.27-92.39 [Reserved]

§ 92.40 Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Actual Fraud [Civ. Code § 1572]--Insufficient Evidence of Materiality of Fact Allegedly Misrepresented

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Memoranda

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Elements of Actual Fraud

[b] Materiality of Fact Misrepresented

[c] Test of Materiality

[4] Additional Authorities

[a] Materiality of Misrepresented Fact

§ 92.41 Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Actual Fraud [Civ. Code § 1572]--Insufficient Evidence of Actual Reliance by Plaintiff

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[b] Related Memoranda

[3] Discussion of Authorities

[a] Reliance on Misrepresentation Required

§ 92.42 Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Actual Fraud [Civ. Code § 1572]--Evidence Insufficient to Show Plaintiff's Reliance Was Justified

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[b] Opposing Points and Authorities

[c] Related Memoranda

[3] Discussion of Authorities

[a] Reliance Must Be Justified

[b] Statement of Opinion

[c] Misrepresentations of Law

[d] Reliance Not Justified if Independent Investigation Made

[4] Additional Authorities

[a] Reliance Not Justified if Independent Investigation Made

§ 92.43 Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Actual Fraud [Civ. Code § 1572]--Insufficient Evidence of Injury to Plaintiff

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[b] Related Memoranda

[3] Discussion of Authorities

[a] Injury Required

[4] Additional Authorities

[a] Injury Required

§ 92.44 Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Constructive Fraud Based on Breach of Duty [Civ. Code § 1573(1)]--Failure to Show Existence of Confidential Relationship

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[b] Related Memoranda

[3] Discussion of Authorities

[a] Confidential Relationship Required

[b] Confidential Relationship Defined

[c] Employment Relationship Not Confidential

[d] Family Relationship Not Necessarily Confidential

[e] No Confidential Relationship Presumed Between Prospective Marriage Partners

[f] Friendship, Affection, or Intimacy as Not Necessarily Creating Confidential Relationship

[4] Additional Authorities

[a] Confidential Relationship Required

[b] Family Relationship Not Necessarily Confidential

[c] Friendship, Affection, or Intimacy as Not Necessarily Creating Confidential Relationship

§ 92.45 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Actual Fraud [Civ. Code § 1572]--False Representation Made to Prospective Purchaser of Business Concerning Income or Profits of Business as Material

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[b] Related Memoranda

[3] Discussion of Authorities

[a] Single Material Misrepresentation as Sufficient

[b] False Representation Concerning Income or Profits of Business as Material

[4] Additional Authorities

[a] Fraudulent Acts

[b] Single Material Misrepresentation as Sufficient

§ 92.46 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Actual Fraud [Civ. Code § 1572]--Expression of Opinion Not Honestly or Reasonably Entertained as Constituting Fraud

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[b] Related Memoranda

[3] Discussion of Authorities

[a] Expression of Opinion Not Honestly Entertained as Constituting Fraud

[4] Additional Authorities

[a] Expression of Opinion Not Honestly Entertained as Constituting Fraud

§ 92.47 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Actual Fraud [Civ. Code § 1572]--Expression of Opinion Asserted as Representation of Existing Fact as Actionable

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[b] Related Memoranda

[3] Discussion of Authorities

[a] Expression of Opinion Asserted as Representation of Existing Fact

§ 92.48 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Actual Fraud [Civ. Code § 1572]--Reliance on Statement of Opinion Justified if Defendant Has Expert Knowledge

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[b] Related Memoranda

[3] Discussion of Authorities

[a] Reliance on Statement of Opinion Justified if Defendant Has Expert Knowledge

§ 92.49 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Actual Fraud [Civ. Code § 1572]--Misrepresentation of Law as Actionable if Confidential Relationship Exists

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[b] Related Memoranda

[3] Discussion of Authorities

[a] Misrepresentation of Law as Fraud

[b] Nature of a Confidential Relationship

§ 92.50 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Actual Fraud [Civ. Code § 1572]--Negligent Reliance on Intentional Misrepresentation as Not Barring Relief

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[b] Related Memoranda

[3] Discussion of Authorities

[a] Negligent Reliance on Intentional Misrepresentation

§ 92.51 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Actual Fraud [Civ. Code § 1572]--No Duty to Investigate Positive Statements of Fact

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[b] Related Memoranda

[3] Discussion of Authorities

[a] Availability of Means of Discovering Truth as Not Barring Relief

[b] No Duty to Investigate Truth of Positive Statements of Fact

[c] No Duty to Investigate Representations Concerning Income or Profits

§ 92.52 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Actual Fraud [Civ. Code § 1572]--Investigation as Not Precluding Reliance on Representations Concerning Matters Beyond Scope of Investigation

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[3] Discussion of Authorities

[a] Investigation as Not Precluding Reliance on Representations Concerning Matters Beyond Scope of Investigation

§ 92.53 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Actual Fraud [Civ. Code § 1572]--Investigation as Not Precluding Reliance on Misrepresentation When Falsity Not Apparent From Investigation

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[b] Related Memoranda

[3] Discussion of Authorities

[a] Investigation as Not Precluding Reliance on Misrepresentation When Falsity Not Apparent From Investigation

§ 92.54 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Actual Fraud [Civ. Code § 1572]--Pecuniary Loss Not Required

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Memoranda

[3] Discussion of Authorities

[a] Pecuniary Loss Not Required

[b] Rescission as Proper When Consideration Received Differs Substantially From That Which Plaintiff Was Led to Expect

[c] Placing Title in Joint Tenancy

§ 92.55 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Actual Fraud [Civ. Code § 1572]--Suppression of True Facts Constituting Acts Fitted to Deceive [Civ. Code § 1572(5)]

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[3] Discussion of Authorities

[a] Suppression of True Facts as Constituting Actual Fraud Within the Meaning of Civ. Code § 1572(5)

§ 92.56 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Constructive Fraud Based on Confidential Relationship [Civ. Code § 1573(1)]--Evidence of Confidential Relationship Sufficient to Give Rise to Presumption of Constructive Fraud

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Duties in Confidential Relationship

[b] Constructive Fraud Presumed

§§ 92.57-92.69 [Reserved]

§ 92.70 Supporting Plaintiff's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Undue Influence Based on Taking Advantage of Another's Mental Weakness, Necessities, or Distress [Civ. Code § 1575(2), (3)]--Insufficiency of Evidence to Support Finding of No Undue Influence

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Use

[b] Related Memoranda

[3] Discussion of Authorities

[a] Undue Influence Defined

[b] Confidential Relationship Unnecessary Where Undue Influence Predicated on Unfair Advantage Taken of Mental Weakness

[c] Weakness of Mind Defined

[d] Elements Characteristic of Overpersuasion

[e] Old Age and Infirmity of Grantor as Raising Presumption of Undue Influence

§ 92.71 Supporting Plaintiff's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Undue Influence Based on Misuse of Confidential Relationship [Civ. Code § 1575(1)]--Evidence Insufficient to Rebut Presumption of Undue Influence Arising From Advantage Gained by Fiduciary in Transaction With Beneficiary [see Prob. Code § 16004(c); former Civ. Code § 2235]

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Use

[b] Opposing Points and Authorities

[c] Related Memoranda

[3] Discussion of Authorities

[a] Weakness of Mind Not Necessary

[b] Presumption of Undue Influence

[c] Advantage Raising Presumption of Undue Influence Defined

[d] Presumption of Undue Influence Applicable to Attorney-Client Relationship

[e] Confidential Relationship Presumed Between Husband and Wife

[4] Additional Authorities

[a] Presumption of Undue Influence

§ 92.72 Opposing Plaintiff's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Breach of Fiduciary Duty or Undue Influence Based on Misuse of Confidential Relationship [Civ. Code § 1575(1); Prob. Code § 16004(c)]--Presumption of Breach of Fiduciary Duty Not Applicable to Contract Relating to Hiring or Compensation of Fiduciary [former Civ. Code § 2235; Prob. Code § 16004(c)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Cautionary Note

[c] Related Uses

[d] Related Memoranda

[3] Discussion of Authorities

[a] Presumption of Violation of Trustee's Fiduciary Duties Is Not Applicable to Contract Relating to Hiring or Compensation of Fiduciary

[b] Presumption of Undue Influence Not Applicable to Agreement Between Attorney and Client Relating to Fees

§ 92.73 Opposing Plaintiff's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Breach of Fiduciary Duty or Undue Influence Based on Misuse of Confidential Relationship [Civ. Code § 1575(1)]--Presumption of Undue Influence [former Civ. Code § 2235] or Breach of Fiduciary

Duty [Prob. Code § 16004(c)] Not Applicable When Plaintiff Fails to Show Existence of Confidential Relationship

[1] FORM

[2] Comments

[a] Use of Form

[b] Cautionary Note

[c] Related Memoranda

[3] Discussion of Authorities

[a] Showing of Confidential Relationship and Advantage Required

[b] Existence of Confidential Relationship as Question of Fact

§§ 92.74-92.89 [Reserved]

§ 92.90 Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Mistake of Fact [Civ. Code § 1577]--Unilateral Mistake of Fact Is Not Basis for Rescission if Other Party Is Unaware of Mistake

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Opposing Points and Authorities

[d] Related Memoranda

[3] Discussion of Authorities

[a] Unilateral Mistake of Fact Is Not Basis for Rescission if Other Party Is Unaware of Mistake

[b] Assumed Risk of Unilateral Mistake Based on Insufficient Knowledge

[4] Additional Authorities

[a] Unilateral Mistake of Fact Is Not Basis for Rescission if Other Party Is Unaware of Mistake

§ 92.91 Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Mistake of Fact [Civ. Code § 1577]--No Rescission if Mistake Caused by Neglect of Legal Duty

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Memoranda

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] No Rescission if Mistake Caused by Neglect of Legal Duty

[b] Failure to Make Reasonable Inquiry Concerning Meaning of Contract Terms as Neglect of Legal Duty

§ 92.92 Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Mistake of Fact [Civ. Code § 1577]--Rescission Not Granted for Misunderstanding of Contract Provisions

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Memoranda

[3] Discussion of Authorities

[a] Rescission Not Granted for Misunderstanding of Contract Provisions

[4] Additional Authorities

[a] Rescission Not Granted for Misunderstanding of Contract Provisions

§ 92.92A Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Mistake of Fact [Civ. Code § 1577]--Rescission of Life Annuity Contract Not Allowed for Buyer's Ignorance of Condition Causing Early Death

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Memoranda

[3] Discussion of Authorities

§ 92.93 Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Mistake of Fact [Civ. Code § 1577] or Law [Civ. Code § 1578]--Mistake Not Material

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[b] Related Memoranda

[3] Discussion of Authorities

[a] Mistake Must Be Material

[b] Mistake Concerning Collateral Matter

[c] Mistake Not Material When Parties Learn True Facts Prior to Execution of Contract

[4] Additional Authorities

[a] Mistake Must Be Material

§ 92.94 Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Mistake of Fact [Civ. Code § 1577] or Law [Civ. Code § 1578]--No Rescission for Mistake Unless Material Injury or Prejudice Shown

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[b] Related Memoranda

[3] Discussion of Authorities

[a] No Rescission for Mistake Unless Material Injury Shown

§ 92.95 Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Mistake of Fact [Civ. Code § 1577] or Law [Civ. Code § 1578]--No Relief From Mistake When Parties Assumed Risk

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[b] Related Memoranda

[3] Discussion of Authorities

[a] No Mistake When Parties Assumed Risk

[4] Additional Authorities

[a] No Mistake When Parties Assumed Risk

§ 92.96 Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Mistake of Fact [Civ. Code § 1577] or Law [Civ. Code § 1578]--No Relief for Mistake Occurring After Contract Formation

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] No Relief for Mistake Occurring After Contract Formation

[4] Additional Authorities

[a] No Relief for Mistake Occurring After Contract Formation

§ 92.97 Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Mistake of Fact [Civ. Code § 1577] or Law [Civ. Code § 1578]--No Relief for Error of Judgment

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] No Relief for Error in Judgment

§ 92.98 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 657(6) in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Mistake of Fact [Civ. Code § 1577]--Rescission for Unilateral Mistake Permitted When Enforcement Would Be Unconscionable

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Memoranda

[3] Discussion of Authorities

[a] Rescission for Unilateral Mistake of Fact Permitted if Effect of Mistake is Such That Enforcement of Contract Would Be Unconscionable

§ 92.99 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Mistake of Fact [Civ. Code § 1577]--Rescission for Unilateral Mistake Permitted if Other Party Has Knowledge of Mistake

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[b] Related Memoranda

[3] Discussion of Authorities

[a] Rescission for Unilateral Mistake Permitted if Other Party Has Knowledge of Mistake

[4] Additional Authorities

[a] Rescission for Unilateral Mistake Permitted if Other Party Has Knowledge of Mistake

§ 92.100 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Mistake of Fact [Civ. Code § 1577]--Ordinary Negligence as Not Neglect of Legal Duty Barring Relief From Mistake

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[b] Related Memoranda

[3] Discussion of Authorities

[a] Carelessness Does Not Necessarily Constitute Neglect of Legal Duty

[b] Ordinary Negligence Is Not Neglect of Legal Duty; Gross Negligence Required

[c] Gross Negligence Defined

[4] Additional Authorities

[a] Carelessness Does Not Necessarily Constitute Neglect of Legal Duty

[b] Ordinary Negligence Is Not Neglect of Legal Duty; Gross Negligence Required

§ 92.101 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Mistake of Fact [Civ. Code § 1577]--Relief From Mistake Induced by Innocent Misrepresentation Is Not Precluded by Plaintiff's Negligence Unless Plaintiff's Conduct Is Preposterous or Irrational

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Memoranda

[3] Discussion of Authorities

[a] Mistake Induced by Innocent Misrepresentation as Ground for Rescission

[b] Negligent Reliance on Unintentional Misrepresentation

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9-92 California Points & Authorities § 92.01

§ 92.01 Scope of Chapter

This chapter contains memoranda dealing with the following:

- Supporting [*see §§ 92.20 -92.22*] and opposing [*see §§ 92.24 -92.26*] a defendant's motion for summary judgment in an action to rescind a contract on the ground of duress or menace.

- Supporting [*see §§ 92.40 -92.43*] and opposing [*see §§ 92.45 -92.56*] defendant's motion for a new trial in an action to rescind a contract for actual fraud.

- Supporting defendant's motion for a new trial in an action to rescind a contract on the ground of constructive fraud [*see § 92.44*].

- Supporting [*see §§ 92.70, 92.71*] and opposing [*see §§ 92.72, 92.73*] plaintiff's motion for a new trial in an action to rescind a contract on the ground of undue influence.

- Supporting [*see §§ 92.90 -92.95*] and opposing [*see §§ 92.99 -92.101*] defendant's motion for a new trial in an action to rescind a contract entered into under mistake.

Although the forms are arranged in the procedural context of a motion for new trial by a defendant against whom rescission was erroneously granted, the authority may be cited in any other appropriate procedural context, including a trial or appellate brief.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawDefensesFraud & MisrepresentationGeneral Overview

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9-92 California Points & Authorities § 92.02

§ 92.02 Governing Statutes

Consent to a contract is generally governed by *Civ. Code §§ 1565-1590*. *Civ. Code § 1565* provides that the consent of parties to a contract must be free, mutual, and communicated by each to the other. *Civ. Code § 1567* provides that an apparent consent is not real or free when obtained through duress, menace, fraud, undue influence, or mistake. Acts and omissions constituting duress, menace, fraud, undue influence, and mistake are set forth in *Civ. Code §§ 1569-1579*.

Rescission of contracts generally is governed by *Civ. Code §§ 1688-1693*. A party to a contract may rescind the contract if the consent of the party rescinding, or of any party jointly contracting with him or her, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he or she rescinds, or of any other party to the contract jointly interested with that party [*Civ. Code § 1689(b)(1)*].

Voidness and invalidity of attempted transfers to fiduciaries, including attorneys, and conservators, are governed by *Prob. Code § 21350 et seq.*

Duress and menace, as grounds for rescission of a contract, are defined in *Civ. Code §§ 1569* and *1570*, respectively.

Fraud, as a ground for rescinding a contract, may be either actual or constructive [*Civ. Code § 1571*]. Actual fraud is defined in *Civ. Code § 1572*. Constructive fraud is defined in *Civ. Code § 1573*. Actions by real estate lenders for damages for fraudulent (as defined in *Civ. Code § 1572*) inducement to make a real estate loan are governed by *Code Civ. Proc. § 726(f), (g)* (in general), *Fin. Code § 551* (banks), *Fin. Code § 7460* (savings and loans), and *Fin. Code § 15102* (credit unions). An action by a borrower for damages on account of a lender's failure to comply with the disclosure requirements for adjustable-rate residential mortgage loans is governed by *Civ. Code § 1921(b)*.

Undue influence, as a ground for rescinding a contract, is defined in *Civ. Code § 1575*.

A mistake may be either of fact or of law [*Civ. Code § 1576*]. Mistake of fact is defined in *Civ. Code §§ 1577, 1579*. Mistake of law is defined in *Civ. Code § 1578*.

Legal Topics:

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

California Points & Authorities

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9-92 California Points & Authorities § 92.03

§ 92.03 Duress and Menace Distinguished

Duress consists in the unlawful confinement of another's person, relatives, or property in order to obtain another's consent to a transaction [*see Civ. Code § 1569*]. Menace consists of a threat of duress or a threat of injury to the person, property, or character of another [*see Civ. Code § 1570*]. The courts have expanded these narrow statutory definitions, however, so that a contract, deed, or other obligation may be avoided on the ground of duress or menace if it is obtained by so oppressing a person, by threats regarding his or her safety, liberty, or property, or that of a family member, as to deprive the person of the free exercise of his or her will [*see Lewis v. Fahn (1952) 113 Cal. App. 2d 95, 99, 247 P.2d 831* (discussed in *§ 92.24*)].

Although there is a technical difference between the statutory definitions of duress and menace, the courts often use the two terms interchangeably [*see Odorizzi v. Bloomfield School Dist. (1966) 246 Cal. App. 2d 123, 128, 54 Cal. Rptr. 533]* . Thus, the holdings in cases involving contracts obtained through duress are applicable to cases involving contracts obtained through menace, and vice versa.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesGeneral OverviewContracts LawDefensesDuress & Undue InfluenceGeneral Overview

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9-92 California Points & Authorities § 92.04

§ 92.04 Presumption of Undue Influence Arising From Advantage Gained by Persons Holding Confidential Relationship

Decisional law addressing the presumption of undue influence that arises when one gains advantage from another with respect to whom he or she holds a position of trust adopted the presumption applicable to trustees [*see* former Civ. Code §§ 2219, 2235; *Prob. Code § 16004(c)*] and held it to apply to other relationships. The 1986 repeals and enactments of the Trust Law (*Prob. Code § 15000 et seq.*) were not intended to alter rules applied by courts to fiduciary and confidential relationships, except with regard to express trusts governed by the new Trust Law [*Prob. Code § 15003(b)*]. Nor were they intended to prevent application of all or part of the principles or procedures in the new Trust Law to an entity or relationship that is excluded from the definition of "trust" in *Prob. Code § 82* if those principles are applied pursuant to statutory or common law principles by court order or rule, or by contract [*Prob. Code § 15003(c)*]. Nevertheless, it remains unclear whether, and to what extent, courts will adopt the principles and presumption of *Prob. Code § 16004(c)* as applicable to relationships other than trustee-beneficiary, especially in light of the fact that former Civ. Code § 2219, which specified that one who voluntarily assumes a relation of personal confidence with another is deemed a trustee, has been repealed as of July 1, 1987, and has not been restated in a comparable statute.

Forms within this part continue to be based in part on cases decided under the repealed statutes, primarily former Civ. Code §§ 2219, 2235, and thus should be reviewed and used with caution until the effect of the presumption of *Prob. Code § 16004(c)* on relationships other than trustee-beneficiary is fully clarified.

Former Civ. Code § 2235 provided that all transactions between a trustee and his or her beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he or she obtains any advantage from his or her beneficiary, are presumed to be entered into by the latter without sufficient consideration and under undue influence when referring to such persons.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesDuress & Undue InfluenceGeneral Overview

California Points & Authorities

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9-92 California Points & Authorities § 92.05

§ 92.05 Nonapplicability of Forms to Contracts With Public Entities

Counsel should note that *Pub. Contract Code § 5100 et seq.* establish the exclusive procedure for relieving a bidder from a mistake in a bid submitted to a public entity, as defined by *Pub. Contract Code § 5100(a)* [*see A & A Elec., Inc. v. King (1976) 54 Cal. App. 3d 457, 464, 126 Cal. Rptr. 585]* . Thus, the rules governing rescission for mistake set out in the cases cited in the forms contained in this part no longer apply to bids submitted to public entities. Those rules, however, have been applied in situations not involving public entities and in cases involving disputes between general contractors and subcontractors [*see, e.g., Brunzell Constr. Co. v. G.J. Weisbrod, Inc. (1955) 134 Cal. App. 2d 278, 283-286, 285 P.2d 989* (applying law set forth in cases involving bid submitted to public entity to case involving bid between general contractor and subcontractor)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesGeneral OverviewContracts LawTypes of ContractsGeneral Overview

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9-92 California Points & Authorities § 92.06

§ 92.06 How to Use Forms in This Chapter

[1] Page Limits

Normally, no opening or responding memorandum may exceed 15 pages, except that for a summary judgment motion or summary adjudication motion, no opening or responding memorandum may exceed 20 pages. No reply or closing memorandum may exceed 10 pages. The page limit does not include exhibits, declarations, attachments, the table of contents, the table of authorities, or the proof of service [*Cal. Rules of Ct., Rule 3.1113(d)*]. A party may apply to the court for permission to file a longer memorandum [*Cal. Rules of Ct., Rule 3.1113(e)*]. These and other drafting requirements are discussed in *further detail in Ch. 1, Writing Legal Memoranda and Briefs, § 1.05*.

[2] Using the Forms to Build a Draft Memorandum

The forms in this chapter are designed to be included with other points and authorities to form a complete memorandum. For detailed discussion on how to select and use the forms in the publication to build a draft memorandum and complete the draft, with detailed discussion of all drafting requirements and strategic or stylistic considerations, see *Ch. 1, Writing Legal Memoranda and Briefs, §§ 1.03 -1.06*. For a skeletal form for memorandum for use in creating a properly formatted outline in which to compile relevant forms from this publication, see *Ch. 1, Writing Legal Memoranda and Briefs, § 1.10*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentSupporting MaterialsMemoranda of Law

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9-92 California Points & Authorities § 92.07

§ 92.07 Related Pleading and Practice Chapters

For a discussion and forms relating to the defenses of duress, menace, fraud, undue influence, and mistake, see California Forms of Pleading and Practice, Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake* (Matthew Bender).

For discussion and forms pertaining to other contractual defenses, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender). For discussion and forms relating to rescission generally, see California Forms of Pleading and Practice, Ch. 490, *Rescission and Restitution* (Matthew Bender). For discussion and forms relating to the tort of fraud and deceit, see California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender). For other discussion and forms relating to the contractual defenses of duress, menace, fraud, undue influence, and mistake, see the following chapters in that publication:

- Ch. 6, *Accord and Satisfaction*.
- Ch. 8, *Accounts Stated and Open Accounts*.
- Ch. 107, *Cancellation of Instruments*.
- Ch. 184, *Deeds*.
- Ch. 205, *Defaults and Default Judgments*.
- Ch. 226, *Dissolution of Marriage and Related Proceedings: Attorney Fees*.
- Ch. 270, *Fraudulent Conveyances*.
- Ch. 278, *Gifts*.
- Ch. 385, *Negotiable Instruments*.

- Ch. 444, *Probate: Will Contests*.
- Ch. 481, *Public Works*.
- Ch. 488, *Reformation of Instruments*.
- Ch. 489, *Relief From Judgments and Orders*.
- Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts*.
- Ch. 569, *Vendor and Purchaser*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesGeneral OverviewContracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawDefensesFraud & MisrepresentationGeneral Overview

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9-92 California Points & Authorities § 92.08

§ 92.08 Related Points And Authorities Chapters

For memoranda relating to the tort of fraud and deceit which may also be useful in actions to rescind contracts on the ground of fraud, see Ch. 105, *Fraud and Deceit* . For memoranda pertaining to other contractual defenses, see the following chapters:

- Ch. 11, *Accord and Satisfaction*.
- Ch. 50, *Contracts*.
- Ch. 118, *Insane and Incompetent Persons: Capacity to Contract*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesGeneral OverviewContracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawDefensesFraud & MisrepresentationGeneral Overview

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9-92 California Points & Authorities §§ 92.09-92.19

[Reserved]

§§ 92.09[Reserved]

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PART II. FORMS
A. Duress and Menace

9-92 California Points & Authorities § 92.20

§ 92.20 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] by Defendant in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Duress or Menace [Civ. Code §§ 1569, 1570]--Exercise of Legal Right as Not Duress or Menace

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO._____
	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*],	)	IES IN SUPPORT OF MOTION FOR SUMMARY
Plaintiff, vs.	)	JUDGMENT
_____ [*name*],	)	[*Code Civ. Proc. § 437c*]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD BE GRANTED BECAUSE THERE WAS NO DURESS OR MENACE IN THAT DEFENDANT MERELY _____ [THREATENED TO EXERCISE *or* EXERCISED] A LEGAL RIGHT.

A. Summary Judgment. Defendant may move for summary judgment in any action or proceeding if it is contended that the action has no merit. Such motion must be granted if all of the papers submitted show that there is no triable issue as to any material fact and that defendant is entitled to a judgment as a matter of law (*Code Civ. Proc. § 437c*).

B. Exercise of Valid Legal Right. The exercise of a legal right or the threat to take legal action does not constitute duress or menace [unless the party making the threat knows the falsity of his/her claim] (*Odorizzi v. Bloomfield School Dist. (1966) 246 Cal. App. 2d 123, 128, 54 Cal. Rptr. 533* ; *Goldstone-Tobias Agency, Inc. v. Barboo Enterprises Prods., Inc. (1965) 237 Cal. App. 2d 720, 724, 47 Cal. Rptr. 347*).

[*Optional*] **C. Refusal to Proceed With Contract.** It is not duress or menace to refuse, in good faith, to proceed with a contract, even though such refusal might later be found to be wrong (*London Homes, Inc. v. Korn (1965) 234 Cal. App. 2d 233, 240, 44 Cal. Rptr. 262*).

[*Optional*] **D. Enforcement of Obligation by Suit.** It is not duress or menace to threaten to or actually take advantage of the remedy of suit for enforcement of a debt or obligation (*Del Carlo v. Sonoma County (1966) 245 Cal. App. 2d 36, 40, 53 Cal. Rptr. 771*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of defendant's motion for summary judgment in an action to rescind a contract allegedly entered into under duress or menace when defendant merely exercised a legal right.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations which support the motion [*Code Civ. Proc. § 437c*].

[i] Related Uses

The points and authorities in this form may be modified to support a demurrer [*Code Civ. Proc. §§ 430.10(e), 430.30(a)*] to a complaint for rescission of a contract for duress or menace when it appears on the face of the complaint or from any matter of which the court must or may take judicial notice that defendant was merely exercising a legal right.

With appropriate modifications, this form may also be used to support plaintiff's motion for summary adjudication of the issues [*Code Civ. Proc. § 437c*] in an action for damages for breach of contract when defendant has alleged that the contract is voidable because entered into under duress or menace.

[b] Related Memoranda

For memoranda of points and authorities relating to motions for summary judgment generally, see Ch. 221, *Summary Judgments* .

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 92.24* and *92.25* may be submitted in opposition to a motion for summary judgment supported by this memorandum.

[3] Discussion of Authorities

[a] Exercise of Valid Legal Right

Plaintiff in ***Odorizzi v. Bloomfield School Dist.*** *(1966) 246 Cal. App. 2d 123, 54 Cal. Rptr. 533* , sought to rescind his resignation as a teacher from defendant school district on the ground that his consent had not been real or free but had been obtained through duress, menace, fraud, undue influence, or mistake. The trial court entered judgment of dismissal after sustaining defendant's demurrer. Plaintiff had been employed as a teacher by defendant and had been under contract to continue teaching for another year. He was arrested on criminal charges and subsequently signed and delivered to defendant his written resignation as a teacher. The criminal charges were later dismissed and plaintiff sought to resume his employment with defendant, but the latter refused to reinstate him. Plaintiff asserted that his resignation was invalid because at the time he signed it he had just completed the process of arrest, questioning by the police, booking, and release on bail and had gone for 40 hours without sleep. He further alleged that while he was in this condition and unable to think clearly, the superintendent of the district and the principal of his school came to his apartment, told him they were trying to help him and had his best interests at heart, that he should take their advice and immediately resign. They stated that there was no time to consult an attorney, and that if he did not resign immediately the district would suspend and dismiss him and publicize the proceedings, but that if he resigned at once, the incident would not be publicized and would not jeopardize his chances of securing employment as a teacher elsewhere.

The court of appeal held, in part, that the complaint failed to state a cause of action for duress or menace. The court stated that to constitute duress or menace, the action or threat must be unlawful, and a threat to take legal action is not unlawful unless the party making the threat knows the falsity of his or her claim. Since the complaint shows that the school representatives announced their intention to initiate suspension and dismissal proceedings authorized under the Education Code at a time when the filing of these proceedings was not only their legal right but their positive duty as school officials, the complaint did not state a cause of action for duress or menace (*246 Cal. App. 2d 123, 128)* .

In ***Goldstone-Tobias Agency, Inc. v. Barboo Enterprises Prods., Inc.*** *(1965) 237 Cal. App. 2d 720, 47 Cal. Rptr. 347* , plaintiff brought an action to recover the balance due under an agreement settling a municipal court action and arbitration proceeding. Judgment was for plaintiff, and the court of appeal affirmed. On appeal, one of defendant's contentions was that plaintiff knew at the time the compromise agreement was signed that one of the other parties to the note, an actor, did not want to go to court on the promissory note or to arbitration because he was emerging from a slump and could not afford the bad publicity. Consequently, defendant argued that the settlement was entered into under the pressure of economic compulsion. The court of appeal held that plaintiff's only conduct was to press an apparently valid claim using the due process of the law to recover monies which it in good faith believed were owing. Plaintiff was not required to drop the legal proceedings it had instituted because of the other party's plight (*237 Cal. App. 2d 720, 723-724)* . The exercise of a legal right does not constitute unlawful duress or compulsion and, consequently, duress did not exist under the facts of the case (*237 Cal. App. 2d 720, 724)* .

[b] Refusal to Proceed With Contract

London Homes, Inc. v. Korn *(1965) 234 Cal. App. 2d 233, 44 Cal. Rptr. 262* , was an action for damages arising out of the renegotiation of a contract for the sale of real property. Plaintiff claimed that it was forced to pay more per acre

than it had originally agreed because of business compulsion or duress on the part of defendants. The trial court found in favor of defendants, determining that there was no duress or business compulsion, and the court of appeal affirmed. Plaintiff had agreed to purchase the real property from defendants at a specified price, but defendants later refused to sell at that price since they had received a better offer. Defendants also contended that they were not bound by the original sale contract because plaintiff had not fulfilled some of the conditions thereto, although the court of appeal later found that the defendants' position was erroneous. Plaintiff needed the property because of work it had done toward building a subdivision on the land and, consequently, agreed to increase the amount it paid per acre.

According to the court of appeal, if plaintiff had sued defendants, it would almost certainly have won, but the subdivision would not have been completed on time. The court concluded, however, that there was no duress or business compulsion since plaintiff could have brought suit against defendant for damages but for what appeared to be good business reasons decided not to do so. Plaintiff was not required to enter into a second contract to pay more money for the land. It voluntarily chose to do so after considering all the elements then existing, including the pressure of time (*234 Cal. App. 2d 233, 239-240)* . The court pointed out that it is not duress to take a different view of contract rights, even though mistaken, from that of the other contracting party, and it is not duress to refuse, in good faith, to proceed with a contract, even though such refusal might later befound to be wrong (*234 Cal. App. 2d 233, 240)* . The court concluded that the trial court was correct in determining that plaintiff could not recover damages (*234 Cal. App. 2d 233, 241-242)* .

[c] Enforcement of Obligation by Suit

In ***Del Carlo v. Sonoma County*** *(1966) 245 Cal. App. 2d 36, 53 Cal. Rptr. 771* , plaintiff brought an action to quiet title to real property. Plaintiff's former wife had conveyed the property to him by a grant deed that was not recorded for some time. Thereafter, the former wife became ill and was treated at a hospital operated by defendant county. Before the deed was recorded, plaintiff's former wife executed a lien on the property as security for payment of her account with defendant. The lien was recorded without defendant having knowledge of the unrecorded deed to plaintiff. After the death of plaintiff's wife, plaintiff met with defendant's hospital committee and orally agreed to pay his wife's account. The trial court denied plaintiff relief and decreed that defendant had a valid lien on the property for hospital services rendered to plaintiff's former wife.

On appeal, plaintiff contended that his promise to pay defendant was unenforceable since it was made under duress. The court of appeal held that the contention was entirely without merit. Since the services of defendant were rendered long after plaintiff's divorce from his wife, plaintiff was not personally liable for them. However, after consulting an attorney, he voluntarily agreed to pay the debt in exchange for defendant's forbearance in enforcing its lien. The court noted that it is not legal duress to threaten to or actually take advantage of the usual remedy by suit for enforcement of a debt or obligation and affirmed the trial court's decision (*245 Cal. App. 2d 36, 40)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral Overview

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9-92 California Points & Authorities § 92.21

§ 92.21 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] by Defendant in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Duress or Menace [Civ. Code §§ 1569, 1570]--No Unlawful Act or Threat

[1] FORM

[*Caption. See § 92.20.*]

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD BE GRANTED BECAUSE THERE WAS NO UNLAWFUL ACT OR THREAT BY DEFENDANT AND THEREFORE NO DURESS.

A. Summary Judgment. [*See § 92.20, Paragraph A.*]

B. Requirement of Unlawful Act or Threat. Although a party to a contract may rescind the contract if his or her consent to the contract was obtained through the exercise of duress or menace (*Civ. Code § 1689(b)(1)*), duress and menace require an unlawful action or threat by defendant by which plaintiff's consent is obtained through fear (*Keithley v. Civil Serv. Bd. (1970) 11 Cal. App. 3d 443, 450, 89 Cal. Rptr. 809* ; *Goldstein v. Enoch (1967) 248 Cal. App. 2d 891, 894, 57 Cal. Rptr. 19*).

[*Optional*] **C. Unlawful Threat as More Than Statement Causing Fear of Prosecution.** An unlawful threat, to constitute menace, must be more than some statement or act from which plaintiff becomes apprehensive of prosecution (*Goldstein v. Enoch (1967) 248 Cal. App. 2d 891, 894, 57 Cal. Rptr. 19*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of defendant's motion for summary judgment in an action to rescind a contract allegedly entered into under duress or menace when there was no unlawful act or threat by defendant.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations supporting the motion [*see Code Civ. Proc. § 437c*].

[b] Related Uses

These points and authorities may be modified to support a demurrer [*Code Civ. Proc. §§ 430.10(e), 430.30(a)*] to a complaint for rescission of a contract on the ground of duress or menace when it appears on the face of the complaint or from any matter of which the court must or may take judicial notice that there was no unlawful act or threat by defendant.

With appropriate modifications, this form may also be used to support plaintiff's motion for summary adjudication of a cause of action or affirmative defense [*Code Civ. Proc. § 437c*] in an action for damages for breach of contract when defendant has alleged that the contract is voidable because entered into under duress or menace.

[c] Related Memoranda

For memoranda of points and authorities relating to summary judgmentgenerally, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Requirement of Unlawful Act or Threat

In ***Keithley v. Civil Serv. Bd.*** *(1970) 11 Cal. App. 3d 443, 89 Cal. Rptr. 809* , real party in interest, a police officer, resigned from his position after being charged with rape. The officer later appealed to the city civil service board, alleging that his resignation had been coerced and that, therefore, he had been unlawfully discharged. The board found that the officer had been coerced into resigning and ordered his reinstatement. The city manager then filed a petition for writ of mandate seeking to set aside the board's decision. The trial court found that there was no coercion or duress involved and that the officer had resigned voluntarily. It entered judgment granting the writ.

The court of appeal noted that when one seeks to rescind a resignation on the basis that it is coerced, he or she invokes *Civ. Code §§ 1688* and *1689*, providing for the extinguishment of a contract by rescission. He or she is in effect asserting that his or her consent had not been real or free within the meaning of *Civ. Code § 1567*, but that it had been obtained by duress, menace, fraud, undue influence, or mistake. The court then rejected the officer's contention that his resignation was obtained by duress. The court stated that duress envisions some unlawful action by a party by which one's consent is obtained through fear or threats. It concluded that there was no evidence in this case of any unlawful acts, confinement, or threats by the police department against the officer. The police proceeded along a wholly legal course of action in investigating an officer charged with rape and alleged to have conducted himself in a manner unbecoming a police officer. Accordingly, the court held, there was no evidence of duress as a ground for rescission (

11 Cal. App. 3d 443, 450) . The court held, however, that there was substantial evidence that the resignation was obtained through undue influence and reversed the judgment (*11 Cal. App. 3d 443, 451-452)* .

The plaintiff in ***Goldstein v. Enoch*** *(1967) 248 Cal. App. 2d 891, 57 Cal. Rptr. 19* , sought to recover money allegedly lost by him due in part to duress. Defendant's general demurrer to the complaint was sustained, and the court of appeal affirmed. Plaintiff owned 20 percent of a corporation's stock, and defendant owned the other 80 percent. Defendant wanted to sell all the stock using a false financial statement prepared by plaintiff, but plaintiff refused to falsify the statement. Defendant then agreed to purchase plaintiff's shares but at a smaller sum than if plaintiff had agreed to furnish the false statement. Plaintiff claimed that he was induced to part with his stock at an inequitable price as a proximate result, in part, of duress and menace exerted by defendant and was therefore entitled to recover the difference between the sales price and the then fair market value of the stock.

According to the court of appeal, duress and menace arise by virtue of unlawful action, and menace requires that an unlawful threat, which is more than some statement or act from which the guilty party becomes apprehensive of prosecution, be made by the defendant. An action for duress and menace may not be sustained when the voluntary action of the apprehensive party is induced by his or her speculation on or anticipation of a future event suggested to him or her by the defendant but not threatened to induce his or her conduct (*248 Cal. App. 2d 891, 894)* . The court noted that the issue in each case is whether the defendant intentionally exerted an unlawful pressure on the injured party to deprive him of contractual volition and to induce him or her to act to his or her own detriment (*248 Cal. App. 2d 891, 894-895)* . Since, on the facts of the case, plaintiff was not induced to participate in a fraudulent scheme by unlawful pressure executed by defendant, and he was not compelled either to prepare a false financial statement or to part with his stock to defendant, the court held he could not recover any money from defendant on the grounds of duress and menace (*248 Cal. App. 2d 891, 895)* .

[b] Unlawful Threat as More Than Statement Causing Fear of Prosecution

Goldstein v. Enoch *(1967) 248 Cal. App. 2d 891, 57 Cal. Rptr. 19* , is discussed in *§ 92.21[3][a]*.

[4] Additional Authorities

[a] Requirement of Unlawful Act or Threat

In *Tarpy v. County of San Diego (2003) 110 Cal. App. 4th 267, 1 Cal. Rptr. 3d 607* , a dog owner brought an action against the county after his dog, which had been impounded by animal control and held at an animal shelter, died from complications from a spay procedure. The trial court granted summary judgment for defendants based on a written release of liability that the dog owner had signed prior to the operation. The owner appealed, claiming that he signed the release under duress. The court of appeal affirmed. It reiterated that a written release generally extinguishes any obligation covered by its terms, provided it has not been obtained by fraud, deception, misrepresentation, duress, or undue influence. Here, the defendants relied on the release as a defense. As the owner did not contest that his claims were within the scope of the release language, the defendants had met their burden to show that a complete defense to his claims existed. The dog owner, however, contended that summary judgment was not appropriate because he presented evidence supporting a triable issue of fact as to whether he agreed to neuter the dog as a result of the defendants' mental coercion through the lack of reasonable alternatives and their unlawful detention of the dog. He argued that the county failed to offer him fee payment options available under applicable county regulations, and that this rendered their retention of the dogunlawful. The court found that the regulations did not require the department to offer him alternatives, but only provided it with discretion to allow for deferred billing. The county's retention of the dog was not unlawful. For those reasons, it concluded that the owner failed to raise a triable issue of fact as to whether retention of the dog was unlawful so as to establish statutory duress, and thus the release was valid and enforceable (*110 Cal. App. 4th 267, 276-279)* .

Robison v. City of Manteca (2000) 78 Cal. App. 4th 452, 92 Cal. Rptr. 2d 748 was an action by a refuse collector for writ of mandate directing defendant city to reinstate him to his position. Plaintiff claimed that after he tested positive for controlled stimulants in a random drug test, his employee-organization representative coerced him into executing a recovery agreement with defendant. The agreement required him to undertake a substance-abuse treatment plan and waived his right to appeal any discipline to defendant's personnel board. The city notified him by letter, in advance of its action, that it would be firing him for failure to comply with the recovery agreement. It then fired him and noted he had waived his right to appeal to the personnel board. Plaintiff sought a writ of mandate. The trial court sustained defendant's demurrer without leave to amend and entered a judgment of dismissal. The court of appeal affirmed (*78 Cal. App. 4th 452, 454-456)* .

Plaintiff claimed that the circumstances under which he executed the recovery agreement constituted both "unconscionability" and "undue influence," citing *Keithley v. Civil Service Bd (1970) 11 Cal. App. 3d 443, 89 Cal. Rptr. 809* , discussed in *§ 92.21[3][a]*. The court of appeal found a complete absence of any allegations coming within the *Keithley* criteria. Plaintiff passively alleged, in a conclusory fashion, that he "was coerced" into signing the agreement. The court found that in the absence of any additional factual allegations, this was inadequate to establish undue influence. Even accepting the truth of his declaration for purposes of assessing the denial of leave to amend, the facts would not establish circumstances approaching undue influence. On the day he was to execute the agreement, his representative "strongly advised" him to sign it or face immediate termination. The court found that rather than being any type of "coercion," this was no more than an accurate summation of plaintiff's situation (*78 Cal. App. 4th 452, 457-458)* .

[b] Unlawful Threat as More Than Statement Causing Fear of Prosecution

Brahs v. Katcher (1951) 106 Cal. App. 2d 657, 235 P.2d 619 , was an action to recover the value of cattle sold by plaintiffs to defendants. One of the defendants filed a counterclaim praying for the return of a sum of money alleged to have been paid under coercion and threats of criminal prosecution. The trial court denied recovery on defendant's counterclaim, and the court of appeal affirmed. Defendant had made several purchases of cattle from plaintiffs but the checks he gave in payment were dishonored. Plaintiff telephoned defendant from the office of a county district attorney telling him, in substance, that he could be prosecuted and put in prison for one to 14 years but that such a procedure would not collect the money plaintiff wanted since defendant could go through bankruptcy if he so desired, that plaintiff had played along with defendant for a long time but all he had received were promises, and that he had to have his money. After this conversation, the defendant paid a portion of amount thus owed plaintiff.

According to the court of appeal, to render a payment involuntary and recoverable, there must be an actual or threatened exercise of power possessed or supposed to be possessed by the party receiving payment. The threat must be clear and direct and not merely inferrable. To establish duress by threat of criminal prosecution requires a threat; a mere suggestion of payment affording a protection from criminal prosecution is not sufficient. The court held that the testimony of plaintiff showed that, at the most, a statement of power possessed, rather than a threatened exercise of that power, was made so that the trial court was justified in finding that the money was not paid under threat of criminal prosecution (*106 Cal. App. 2d 657, 659)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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9-92 California Points & Authorities § 92.22

§ 92.22 Supporting Motion for Summary Judgment by Defendant in Action to Rescind Contract on Ground of Duress or Menace [Civ. Code §§ 1569, 1570]--Reasonable Alternative to Entering Into Contract Available

[1] FORM

[*Caption. See § 92.20.*]

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD BE GRANTED BECAUSE THERE WAS NO DURESS OR MENACE IN THAT PLAINTIFF HAD A REASONABLE ALTERNATIVE TO ENTERING INTO THE CONTRACT.

A. Summary Judgment. [*See § 92.20, Paragraph A.*]

B. No Duress if Reasonable Alternative Available. Although a party to a contract may rescind the contract if his or her consent to the contract was obtained by the exercise of duress or menace (*Civ. Code § 1689(b)(1)*), duress or menace is not established if the party entering into the contract had a reasonable alternative to doing so (*see Leeper v. Beltrami (1959) 53 Cal. 2d 195, 204-205, 1 Cal. Rptr. 12, 347 P.2d 12* ; *Western Gulf Oil Co. v. Title Ins. & Trust Co. (1949) 92 Cal. App. 2d 257, 265, 206 P.2d 643*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These memorandum of points and authorities may be submitted in support of a motion for summary judgment by defendant in an action to rescind a contract allegedly entered into under duress or menace when plaintiff had a reasonable alternative to entering into the contract.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations that support the motion [*Code Civ. Proc. § 437c*].

[B] Related Uses

These points and authorities may also be modified to support a demurrer [*Code Civ. Proc. §§ 430.10(e), 430.30(a)*] to a complaint for rescission of a contract for duress or menace when it appears on the face of the complaint or from any matter of which the court must or may take judicial notice that plaintiff had a reasonable alternative to entering into the contract.

With appropriate modifications, this form may also be used to support a motion for summary adjudication of a cause of action or affirmative defense [*Code Civ. Proc. § 437c*] by plaintiff in an action for damages for breach of contract when defendant has alleged that the contract is voidable because it was entered into under duress or menace.

[c] Applicability of Authorities

Counsel should note that although both *Leeper v. Beltrami (1959) 53 Cal. 2d 195, 1 Cal. Rptr. 12, 347 P.2d 12* , and *Western Gulf Oil Co. v. Title Ins. & Trust Co. (1949) 92 Cal. App. 2d 257, 206 P.2d 643* , which are cited in Paragraph B and discussed in *§ 92.22[3][a]*, involved actions to recover payments allegedly made under duress rather than actions to rescind contracts to which the plaintiff's consent was obtained by duress, the rules stated in those cases apparently are also applicable to contracts allegedly entered into under duress. Thus, a contract may not be rescinded on the ground of duress if plaintiff had a reasonable alternative to entering into the contract.

[d] Related Memoranda

For memoranda of points and authorities relating to motions for summary judgment generally, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] No Duress if Reasonable Alternative Available

Leeper v. Beltrami *(1959) 53 Cal. 2d 195, 1 Cal. Rptr. 12, 347 P.2d 12* , was an action by plaintiffs to recover money paid and property conveyed allegedly under duress. The trial court sustained demurrers to the complaint and entered judgment for defendants. The complaint alleged that plaintiff husband borrowed money from creditor, giving a promissory note and a mortgage on two ranch properties owned by plaintiff in two counties as security. Pursuant to a separate written agreement, the debt was fully discharged by applying fees earned by plaintiff husband in acting as creditor's attorney. Later, plaintiff wife executed a bond with another person but the bond was forfeited, after which the district attorney demanded payment by the wife, threatening to force an execution sale of her home if she did not pay. Plaintiff husband deeded his ranch properties to his wife in order to facilitate payment of the bond without sacrificing the home property. In the meantime, the husband's former creditor had died and the defendant representatives of his

estate attempted to make plaintiffs husband and wife pay the debt a second time. These defendants filed an action to foreclose the mortgages on the ranch property, and notices of lis pendens were filed against the two properties. According to the complaint, these defendants knew at the time the action was filed that nothing was due on either the note or the mortgages securing it. Plaintiff wife was unable to sell one of the two ranch properties to a willing buyer to satisfy the bond debt unless she cleared the title of the false claim. As a result, she was forced to sell the other ranch to another defendant at a third of the actual value, allegedly due to the compulsion arising out of the defendant representatives, false claim, in order to pay off the bond.

In holding that the complaint stated a cause of action against the representatives of the estate of plaintiff husband's creditors, for recovery of money allegedly paid under duress, the Supreme Court noted that if the plaintiffs had a reasonable alternative to parting with the consideration to satisfy the false claim, then the payment was not made under duress (*53 Cal. 2d 195, 204)* . The Court, however, rejected defendant's contention that plaintiff wife should have permitted her house to be sold at the foreclosure sale as a reasonable alternative to making the payment to defendant. A reasonably prudent person would not take such a course and thus, the Court concluded, plaintiff had no reasonable alternative except to pay the false claim (*53 Cal. 2d 195, 204-205)* . The Court, therefore, reversed the judgment against plaintiff husband in favor of the defendant representatives of the creditor's estate, but affirmed the judgment against plaintiff wife on the ground that the statute of limitations had run against her (*53 Cal. 2d 195, 217)* .

In ***Western Gulf Oil Co. v. Title Ins. & Trust Co.*** *(1949) 92 Cal. App. 2d 257, 206 P.2d 643* , plaintiff was lessee under an oil and gas lease which provided that the lessee must pay the defendant lessor a royalty equal to one-eighth of the valueof all oil removed from the leased property. After constructing a new plant on this property, plaintiff began deducting a proportionate part of the cost of cleaning the oil from defendant's royalty payments. Thereafter, defendant notified plaintiff that plaintiff's withholding of cleaning charges from the royalty payments was a breach of the lease and ordered plaintiff to cease doing so. Plaintiff then sent defendant a check for the amounts withheld, accompanied by a letter stating that the payment was being made solely to avoid a possible forfeiture of the lease and that plaintiff was not admitting thereby that defendant's royalty payments were not properly chargeable with the cost of cleaning its proportionate part of the oil. Plaintiff later brought a declaratory relief action to determine whether defendant was obligated to pay a proportionate share of the costs of cleaning the oil and whether plaintiff was entitled to recover the payment of the costs previously made to defendant. The trial court decreed that defendant was liable for a proportionate share of the cleaning costs, but that plaintiff's payment to defendant was voluntary and not recoverable. Both parties appealed from the judgment.

The court of appeal affirmed. Addressing the issue of whether or not plaintiff could recover the payments, the court noted that payments of illegal claims enforced by duress, coercion, or compulsion are deemed to have been made involuntarily and may be recovered, but the payment must have been enforced by coercion and there must have been no other adequate means available to prevent the loss (*92 Cal. App. 2d 257, 265)* . In this case, the court observed, plaintiff could have immediately commenced an action for declaratory relief under *Code Civ. Proc. § 1060*, asking for temporary relief from forfeiture of the lease until the matter was finally determined. Instead, plaintiff chose to pay the disputed amount, thus removing the grounds for possible forfeiture of the lease, and delaying commencement of the action for 208 days. The court concluded that there was substantial evidence that the payment was voluntarily made to delay litigation and noted that payments voluntarily made, with knowledge of the facts, cannot be recovered (*92 Cal. App. 2d 257, 265-266)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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9-92 California Points & Authorities § 92.23

§ 92.23 Supporting Contention That Contract Is Enforceable--Grief Over Death of Family Member Does Not Vitiate Cemetery Contract

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE CEMETERY CONTRACT IS ENFORCEABLE EVEN THOUGH _____ [PLAINTIFF *or* DEFENDANT] WAS GRIEVING AT THE TIME THE CONTRACT WAS NEGOTIATED.

Grief Does Not Vitiate Cemetery Contract. Grief arising from the death of a close relative does not vitiate a contract between a cemetery and the decedent's family (*Sinai Memorial Chapel v. Dudler (1991) 231 Cal. App. 3d 190, 199, 282 Cal. Rptr. 263* ; *see also In re Terra (1952) 111 Cal. App. 2d 452, 462*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a cemetery contract is enforceable when the only duress alleged is the grief associated with decedent's death.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should allege facts showing that the contract terms were disucssed with the grieving relative.

[3] Discussion of Authorities

[a] Grief Does Not Vitiate Cemetery Contract

Sinai Memorial Chapel v. Dudler *(1991) 231 Cal. App. 3d 190, 282 Cal. Rptr. 263* , was an action for declaratory relief and injunction to determine whether plaintiff could enforce its rules, regulations, and the provision in a cemetery

contract that prohibited portraits or images on gravestones. Although the rule is based on Jewish law, the custom or tradition of Jews from the Soviet Union is to have an image of the deceased engraved on the monument. The contract was negotiated by the son and son-in-law of the decedent, at which time the rule prohibiting etched pictures on monuments was specifially explained and pointed out to the son and son-in-law. The portrait of the decedent was placed on the monument by decedent's spouse, a recent emigre from the Soviet Union who did not read, speak, or write English. It was not disputed that the son and son-in-law were the surviving spouse's agents in negotiating the contract. The trial court entered judgment for plaintiff based on its motion for summary judgment. Defendant appealed.

The court of appeal affirmed the judgment for plaintiff. The son was alleged to have been emotionally and physically exhausted, bewildered, and distraught at the time he met with plaintiff's representatives to execute the contract. Plaintiff contended that triable issues of fact existed regarding whether the contract resulted from duress, mutual mistake, or deceit. The basis of this claim was that the son signed the contract while he was very upset due to the recent death of the father. However, the court of appeal held that grief arising from the death of a close relative does not vitiate contracts between cemeteries and the family of the decedent (*231 Cal. App. 3d 190, 199)* . Nor did any of the documents submitted indicate that defendant acted under a mistake, and unilateral mistake is not a defense to a contract action (*231 Cal. App. 3d 190, 199)* .

In re Terra *(1952) 111 Cal. App. 2d 453, 244 P.2d 921* was a proceeding under *Health & Safety Code § 7500 et seq.* for the disinterment of three members of petitioner's family, including her deceased husband, based on breach of contract for perpetual care of the graves. The church that controlled the cemetary withheld its consent to the disinterment because petitioner wanted to comply with her deceased husband's wishes that he be creamated, and cremation was contrary to the tenets of the church. Although the graves were not originally cared for, they were being cared for when the petition was brought more than five years after the burial of petitioner's deceased spouse. The trial court approved the disinterment. The church appealed.

The court of appeal reversed based on *Health & Safety Code § 7980*, which provides that when burial is made in a religious cemetary, the rules, regulations, and discipline of the church control over the desires of the relatives (*111 Cal. App. 2d 453, 461-463)* . Petitioner told the cemetary or church representatives at the time of the burial that her husband wanted to be creamated. The court said that whatever lack of awareness of the restrictions or grief petitioner was subject to at the time the contract was negotiated, there was no undue influence on the part of the church (*111 Cal. App. 2d 452, 462)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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A. Duress and Menace

9-92 California Points & Authorities § 92.24

§ 92.24 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Duress or Menace [Civ. Code §§ 1569, 1570]--Taking or Threatening to Take Legal Action With Knowledge of Falsity of Claim

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____ _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT
vs.	)	
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON THE GROUND THAT _____ [DEFENDANT WAS MERELY EXERCISING A LEGAL RIGHT *and/or* THERE WAS NO UNLAWFUL ACT OR THREAT BY DEFENDANT] SHOULD BE DENIED BECAUSE THERE IS A TRIABLE ISSUE OF FACT AS TO WHETHER DEFENDANT OBTAINED PLAINTIFF'S CONSENT BY THREATENING TO TAKE LEGAL ACTION WITH KNOWLEDGE THAT THE ASSERTED CLAIM WAS FALSE.

A. Rules Governing Summary Judgment Procedure. Granting a motion for summary judgment is proper only if the

affidavits supporting the motion establish every element necessary to sustain a judgment in favor of the moving party, and the opposing party has not presented any facts which give rise to a triable issue. In ruling on the motion, the moving party's affidavits are strictly construed while the opposing party's are liberally construed, and doubts as to the propriety of granting the motion should be resolved in favor of the opposing party (*Corwin v. Los Angeles Newspaper Serv. Bureau, Inc. (1971) 4 Cal. 3d 842, 851 fn. 6, 852, 94 Cal. Rptr. 785, 484 P.2d 953*). The court may not properly grant summary judgment based on inferences reasonably deducible from the papers submitted, if these inferences are contradicted by other inferences which raise a triable issue offact (*Hepp v. Lockheed-California Co. (1978) 86 Cal. App. 3d 714, 717-718, 150 Cal. Rptr. 408*).

B. Contract Rescindable for Duress or Menace. A party to a contract may rescind the contract if the consent of the party rescinding, or of any party jointly contracting with him or her, was obtained through duress or menace (*Civ. Code § 1689(b)(1)*).

C. Duress and Menace Defined. Duress consists of: (1) unlawful confinement of the person of the party, or of the husband or wife of that party, or of an ancestor, descendant, or adopted child of such party, husband, or wife; (2) unlawful detention of the property of any such person; or (3) confinement of such a person, lawful in form, but fraudulently obtained, or fraudulently made unjustly harassing or oppressive (*Civ. Code § 1569*). Menace consists of a threat of: (1) such duress as is specified in Subdivisions (1) and (3) of *Civil Code Section 1569*; (2) unlawful and violent injury to the person or property of any person specified in *Civil Code Section 1569*; or *(3)* injury to the character of any such person (*Civ. Code § 1570*). The courts have expanded the narrow statutory definitions of duress and menace under *Civil Code Sections 1569* and *1570* so that, in general, a contract, deed, or other obligation, may be avoided on the ground of duress or menace if it is obtained by so oppressing a person by threats regarding his or her safety, liberty, or property, or the safety or liberty of a member of his or her family, as to deprive the person of the free exercise of his or her will (*see Lewis v. Fahn (1952) 113 Cal. App. 2d 95, 99, 247 P.2d 831*).

D. Duress Not Limited to Threats Against Person. Duress and menace are not limited to threats against the person; they may also consist of threats to business or property interests (*Leeper v. Beltrami (1959) 53 Cal. 2d 195, 203, 1 Cal. Rptr. 12, 347 P.2d 12*).

E. Knowledge of Falsity of Claim. The taking of legal action or a threat to take legal action, by a person with knowledge that the claim asserted is false, constitutes duress (*Leeper v. Beltrami (1959) 53 Cal. 2d 195, 204, 1 Cal. Rptr. 12, 347 P.2d 12*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to defendant's motion for summary judgment in an action to rescind a contract allegedly entered into under duress or menace when defendant has argued that summary judgment

is proper, either because he or she was merely exercising a legal right or because there was no unlawful act or threat by defendant. The ground of opposition presented is that there is a triable issue of fact as to whether or not defendant threatened to take legal action against plaintiff with knowledge that the asserted legal claim was false.

In an appropriate case, these points and authorities may be used in opposition to a motion for summary judgment supported by the points and authorities *set out in §§ 92.20* and *92.21*.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated, including arguments showing the insufficiency of the supporting affidavits or declarations, the existence of a triable issue of fact, or both. In addition, counsel should attach affidavits or declarations which oppose the motion [*Code Civ. Proc. § 437c*].

[b] Related Uses

The points and authorities in this form may be modified to oppose a general demurrer for failure to state a cause of action [*Code Civ. Proc. §§ 430.10(e), 430.30(a)*] to a complaint for rescission of a contract on the ground of duress or menace.

With appropriate modifications, these points and authorities may also be submitted by defendant in opposition to plaintiff's motion for summary adjudication of the cause of action or affirmative defense [*Code Civ. Proc. § 437c*] in an action for damages for breach of contract when defendant contends that the contract is voidable because entered into under duress or menace.

[c] Related Memoranda

For memoranda of points and authorities relating to summary judgments generally, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Rules Governing Summary Judgment Procedure

Plaintiffs in ***Corwin v. Los Angeles Newspaper Serv. Bureau, Inc.*** *(1971) 4 Cal. 3d 842, 94 Cal. Rptr. 785, 484 P.2d 953* , filed an action against defendants for violations of *Bus. & Prof. Code §§ 16720, 16726* (prohibited restraints on trade under Cartwright Act). The trial court granted defendants' motion for summary judgment, and plaintiffs appealed from the judgment entered in favor of defendants. The Supreme Court concluded that the trial court had erroneously granted the summary judgment, and reversed the judgment. In reviewing the trialcourt's action, the Court commented that summary judgment is a drastic procedure to be used with caution so that it does not become a substitute for the open trial method of determining facts and repeated its previous summary of the rules governing summary judgment procedure set out in Paragraph A of this form (*4 Cal. 3d 842, 851-852)* .

Hepp v. Lockheed-California Co. *(1978) 86 Cal. App. 3d 714, 150 Cal. Rptr. 408* , was an action for breach of contract and fraud. The trial court granted summary judgment for defendant, and the court of appeal reversed the judgment of dismissal. The court of appeal reviewed the rules for granting summary judgment. It relied on *Code Civ. Proc. § 437c* and *4* Witkin, California Procedure (2d ed), *Proceedings Without Trial*, in stating that summary judgment may not be granted on the basis of inferences which are contradicted by other inferences which raise a triable issue of fact (*86 Cal. App. 3d 714, 717-718)* .

[b] Duress and Menace Defined

In ***Lewis v. Fahn*** *(1952) 113 Cal. App. 2d 95, 247 P.2d 831* , plaintiffs leased real property from defendants under a lease providing for a reduction in rent payments during the period while the premises were being remodeled. Plaintiffs

alleged that notwithstanding this provision in the lease, defendants compelled plaintiffs to pay the full rental amount during this period by threatening to cancel the lease and evict plaintiffs if they did not pay the full amount. Plaintiffs brought an action to recover the amount of excess rent allegedly paid under duress. The trial court sustained a demurrer to the complaint and entered judgment for defendants, from which plaintiffs appealed. In reversing the judgment, the court of appeal noted that, by most modern authorities, a contract, deed, or any obligation may be avoided on the ground of duress if it is obtained by so oppressing a person through threats regarding his or her safety, liberty, or property, or the safety or liberty of a member of his or her family, as to deprive the person of the free exercise of his or her will and prevent the meeting of minds necessary to a valid contract. This is true, the court stated, whether the oppression causing the incompetence to act is produced by what was deemed duress at common law or by wrongful compulsion remediable by appeal to a court of equity (*113 Cal. App. 2d 95, 99)* . The court concluded that the complaint in this action stated a cause of action for the recovery of money paid under duress (*113 Cal. App. 2d 95, 100)* .

[c] Duress as Not Limited to Threats Against Person

The factual and procedural background of ***Leeper v. Beltrami*** *(1959) 53 Cal. 2d 195, 1 Cal. Rptr. 12, 347 P.2d 12* , is discussed in *§ 92.22[3][a]*. In that case, the Supreme Court held, inter alia, that plaintiffs had alleged a cause of action against the representatives of the estate of plaintiff husband's creditor for recovery of payments allegedly made under duress. The Court first noted that, under modern law, duress is not limited to threats against the person; it may also consist of threats to business or property interests. Thus, the Court stated, one who falsely clouds the title to real property and then seeks some consideration to remove the cloud is guilty of a wrongful act and may be compelled to restore the consideration recovered (*53 Cal. 2d 195, 203)* . The Court also rejected defendants' contention that no duress was involved because they were merely seeking to foreclose a mortgage, a legal remedy. The Court noted that although it is generally true that the taking of legal action or the threat to take action cannot constitute duress, the complaint in this case alleged more than a threat to take legal action. It alleged that defendants, in making these threats, knew that the claim asserted was false. The Court held that this constituted duress (*53 Cal. 2d 195, 204)* .

[d] Knowledge of Falsity of Claim

Leeper v. Beltrami *(1959) 53 Cal. 2d 195, 1 Cal. Rptr. 12, 347 P.2d 12* , is discussed in *§ 92.24[3][c]*.

[4] Additional Authorities

[a] Duress and Menace Defined

In *Alderson v. Alderson (1986) 180 Cal. App. 3d 450, 225 Cal. Rptr. 610* , the trial court invalidated several quitclaim deeds executed by plaintiff, on the grounds that they were signed under duress. The court of appeal affirmed, holding that threats of bodily harm made by the defendant, coupled with prior acts of violence by defendant against plaintiff, provided sufficient evidence to support a finding of duress (*180 Cal. App. 3d 450, 464-465)* .

[b] Duress Not Limited to Threats Against Person

In *Crosstalk Productions Inc. v. Jacobson (1998) 65 Cal. App. 4th 631, 76 Cal. Rptr. 2d 615* , plaintiffs sued defendant for economic duress and intentional and negligent infliction of emotional distress, alleging that he demanded payments in connection with plaintiffs' prospective contract to provide video promotional spots to CBS, defendant's employer. The court discussed the doctrine of economic duress, stating that when a party pleads economic duress, that party must have had no "reasonable alternative" to the action it now seeks to avoid (generally, agreeing to a contract). Whether the party had a reasonable alternative is determined by examining whether a reasonably prudent person would follow an alternative course or might submit, and is a factual inquiry not susceptible to determination on demurrer (*65 Cal. App. 4th 631, 644-645)* . The court found that the complaint alleging extortion in "securing" a contract from CBS was ambiguous as to whether plaintiffs were admitting to paying commercial bribes to obtain a contract in violation of *Penal Code § 641.3*, and thus establishing the unclean hands defense, but could be amended to cure the ambiguity to clarify

that "secure" meant simply safeguarding finalization of the contract. The court held thatbecause plaintiffs' complaint alleging economic duress was ambiguous but could be amended to cure the ambiguity, defendant was not entitled to a demurrer without leave to amend (*65 Cal. App. 4th 631, 649)* .

Although affirming the trial court's judgment that there was insufficient evidence of coercion or duress to set aside a settlement agreement and stipulated judgment, the court of appeal in *Philippine Export & Foreign Loan Guarantee Corp. v. Chuidian (1990) 218 Cal. App. 3d 1058, 267 Cal. Rptr. 457* , discussed the doctrine of economic duress, saying that the issue is purely factual (*218 Cal. App. 3d 1058, 1082-1083)* . Economic duress involves a wrongful act that is sufficiently coercive to cause a reasonably prudent person faced with no reasonable alternative to succumb to the perpetrator's pressure (*218 Cal. App. 3d 1058, 1078)* . Economic duress may consist of threats of blackmail or bad-faith use of civil process, the assertion of a claim known to be false, or a bad-faith threat to breach a contract or to withhold a payment (*218 Cal. App. 3d 1058, 1077-1078)* . Existence of duress is dependent on the particular circumstances and thus is not tested by the objective nature of threats, but by the state of mind induced in the victim. Evidentiary questions such as the victim's condition, age, sex, state of health, and mental characteristics are relevant (*218 Cal. App. 3d 1058, 1078-1079)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewContracts LawDefensesGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral Overview

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Volume 9 Chapters 90-99 DISMISSAL---to---EMINENT DOMAIN
CHAPTER 92 DURESS, MENACE, FRAUD, UNDUE INFLUENCE, AND MISTAKE
PART II. FORMS
A. Duress and Menace

9-92 California Points & Authorities § 92.25

§ 92.25 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Duress or Menace [Civ. Code §§ 1569, 1570]--Threat of Criminal Prosecution as Duress

[1] FORM

[*Caption. See § 92.24.*]

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON THE GROUND THAT _____ [DEFENDANT WAS MERELY EXERCISING A LEGAL RIGHT *or* NO UNLAWFUL ACT OR THREAT BY DEFENDANT IS SHOWN] SHOULD BE DENIED BECAUSE THERE IS A TRIABLE ISSUE OF FACT AS TO WHETHER OR NOT DEFENDANT OBTAINED PLAINTIFF'S CONSENT TO THE CONTRACT BY THREATS OF CRIMINAL PROSECUTION.

A. Rules Governing Summary Judgment Procedure. [*See § 92.24, Paragraph A.*]

B. Contract Rescindable for Duress or Menace. [*See § 92.24, Paragraph B.*]

C. Duress and Menace Defined. [*See § 92.24, Paragraph C.*]

D. Threat of Criminal Prosecution. An agreement obtained under threat of criminal prosecution may be rescinded since such a threat constitutes sufficient menace to negate the free consent required by *Section 1565 of the Civil Code* (*Helmick v. Thomas (1960) 187 Cal. App. 2d 395, 397, 9 Cal. Rptr. 512* ; *see Bridge v. Ruggles (1927) 202 Cal. 326, 331-332, 260 P. 553* ; *Slocum v. Nelson (1945) 72 Cal. App. 2d 33, 37-38, 163 P.2d 888*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to defendant's motion for summary judgment in an action to rescind a contract allegedly entered into under duress or menace when defendant alleges that summary judgment is proper either because he or she was merely exercising a legal right or because there was no unlawful act or threat by defendant. The ground of opposition presented is that there is a triable issue of fact as to whether or not plaintiff's consent to the contract was obtained by defendant's threats to criminally prosecute plaintiff if he or she did not enter into the contract.

In an appropriate case, these points and authorities may be submitted in opposition to a motion for summary judgment supported by the points and authorities *set out in §§ 92.20* and *92.21*.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated, including arguments showing the insufficiency of the supporting affidavits or declarations, the existence of a triable issue of fact, or both. In addition, counsel should attach affidavits or declarations that oppose the motion [*Code Civ. Proc. § 437c*].

[b] Related Uses

These points and authorities may be modified to oppose a general demurrer [*Code Civ. Proc. §§ 430.10(e), 430.30(a)*] for failure to state a cause of action to a complaint for rescission of a contract on the ground of duress or menace.

With appropriate modifications, these points and authorities may also be submitted by defendant in opposition to plaintiff's motion for summary adjudication of the cause of action or affirmative defense [*Code Civ. Proc. § 437c*] inan action for damages for breach of contract when defendant contends that the contract is voidable because entered into under duress or menace.

[c] Related Memoranda

For memoranda of points and authorities relating to summary judgments, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Threat of Criminal Prosecution

Helmick v. Thomas *(1960) 187 Cal. App. 2d 395, 9 Cal. Rptr. 512* , was an action to foreclose as mortgages two grant deeds given to secure a note. The jury brought in a special verdict, finding plaintiff guilty of fraud, menace, and undue influence in obtaining defendants' signatures on the note and deeds, as defendants had alleged in their answer and cross complaint. Plaintiff loaned money to defendants to use in their used car business, which plaintiff later discovered was in financial difficulty. Plaintiff suggested that defendants continue the business so all parties could get their money from it, but one of the defendants would not agree unless plaintiff left the business. Plaintiff agreed to do so if defendants gave him a note and security, including mortgages on their homes. Defendants declined to give the mortgages. Plaintiff

accused defendants of being thieves and of stealing his money and threatened that they would go to jail if they did not sign the notes and mortgages. On appeal, the court of appeal noted that an agreement obtained under threat of criminal prosecution is not enforceable in that those threats constitute sufficient menace to negate the free consent required by *Civ. Code § 1565* (*187 Cal. App. 2d 395, 397)* . The court found that there was abundant testimony that threats were made and consequently affirmed the trial court's judgment.

Bridge v. Ruggles *(1927) 202 Cal. 326, 260 P. 553* , was an action by the payee against the maker and indorser of a promissory note. The maker defaulted, and the trial court found for plaintiff. On appeal, defendant indorser claimed, in part, that the indorsement of the note was obtained by duress. Defendant indorser had advanced to defendant maker a large sum of money. Defendant maker had been indebted to plaintiff for some time, and the note involved in the action was given to cover this amount. Defendant indorser claimed that she indorsed the note because the note's maker had told her that plaintiff would put the maker in jail if the note were not indorsed and that this would prevent the maker from working on property he had purchased with the money advanced by defendant indorser, resulting in a total loss.

On appeal, the Supreme Court noted that it is well settled that a threat of arrest on a criminal charge in aid of the collection of a debt constitutes menace which warrants rescission and may be set up as a defense to an action on the debt (*202 Cal. 326, 331)* . The defense is available even though the person threatened is, in fact, subject to a criminal charge since a threat of arrest is a gross perversion and abuse of criminal process, and no court will permit it to be used to enforce a settlement of a civil claim (*202 Cal. 326, 331-332)* . The Court noted, however, that the threat of arrest in the present case was directed to defendant maker and not defendant indorser. The Court held that, notwithstanding the maker's default and the consequent waiver by him of the defense of menace, and assuming that it would be competent for the indorser to allege and prove as a complete defense as to herself that the threatened arrest of the maker had rendered the note void, proof of the indorser's state of mind at the time of the indorsement would not be competent to prove menace practiced on the maker. Since defendant indorser's appeal was based on exclusion of evidence concerning her state of mind, the Court affirmed the trial court's judgment for plaintiff, stating that appellant's state of mind was not relevant to the issue, since no threat of arrest was made against her (*202 Cal. 326, 332, 333)* .

Slocum v. Nelson *(1945) 72 Cal. App. 2d 33, 163 P.2d 888* , was an action on a promissory note. Defendant pleaded, as a defense, that he had been forced to sign the note as a compromise of a claim through coercion, intimidation, and threat of criminal prosecution. Plaintiff's motion for summary judgment was granted. The court of appeal reversed. Defendant, in his answer, alleged that plaintiff caused a criminal charge to be lodged against defendant, and that defendant had been arrested and was told by plaintiff and her representatives that if he signed the note, they would obtain a dismissal of the prosecution, but that otherwise it would continue. Defendant further alleged that the note was executed solely in order to avoid a continuance of the prosecution and that after the note was executed, the criminal charge was dismissed. On appeal, the court noted that where an instrument is executed or obtained through a clear threat of criminal prosecution, and particularly where this is carried to the extent of actually initiating a prosecution, the instrument so obtained is void and unenforceable (*72 Cal. App. 2d 33, 37-38)* . The court held that taking the allegations of defendant's affidavits as true, a clear triable issue of coercion and menace existed so that the trial court was incorrect in granting plaintiff's motion for summary judgment (*72 Cal. App. 2d 33, 38-39)* .

[4] Additional Authorities

[a] Threat of Criminal Prosecution

The court of appeal in *Bayscene Resident Negotiators v. Bayscene Mobilehome Park (1993) 15 Cal. App. 4th 119, 18 Cal. Rptr. 2d 626* , vacated an arbitration award because defendant mobilehome park owners signed the agreement to submit to arbitration under threat of criminal prosecution from the city attorney. There was a municipal ordinance, which the court found unconstitutional, thatrequired mobilehome rent rate disputes to be submitted to arbitration if they could not be resolved by negotiation. The court of appeal said that to form an enforceable contract, the parties' consent must be free [*Civ. Code § 1565*]. Apparent consent is not free when obtained, among other ways, through duress,

menace, which includes threat of criminal prosecution, or fraud (*15 Cal. App. 4th 119, 127, 129)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewContracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral Overview

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PART II. FORMS
A. Duress and Menace

9-92 California Points & Authorities § 92.26

§ 92.26 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Duress or Menace [Civ. Code §§ 1569, 1570]--Duress or Menace by Third Party

[1] FORM

[*Caption. See § 92.24.*]

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON THE GROUND THAT A THIRD PARTY, NOT DEFENDANT, WAS GUILTY OF THE ALLEGED DURESS OR MENACE SHOULD BE DENIED BECAUSE DEFENDANT HAD REASON TO KNOW OF THE ALLEGED DURESS OR MENACE BEFORE HE OR SHE GAVE OR PROMISED IN GOOD FAITH SOMETHING OF VALUE IN THE TRANSACTION OR CHANGED HIS OR HER POSITION MATERIALLY BY REASON OF THE TRANSACTION.

A. Rules Governing Summary Judgment Procedure. [*See § 92.24, Paragraph A.*]

B. Duress of Third Party Renders Contract Voidable. Duress or menace of a third party renders a transaction voidable by a party induced thereby to enter into it if the other party has reason to know of the duress or menace before he or she has given or promised in good faith something of value in the transaction or has changed his or her position materially by reason of the transaction (*see Leeper v. Beltrami (1959) 53 Cal. 2d 195, 206, 1 Cal. Rptr. 12, 347 P.2d 12* ; *Hall v. Department of Adoptions (1975) 47 Cal. App. 3d 898, 903, 121 Cal. Rptr. 223*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to defendant's motion for summary judgment in an action to rescind a contract for duress or menace when defendant asserts that the alleged duress or menace was exerted by a third party and not by defendant. The ground of opposition presented is that defendant had reason to know of the duress or menace before he or she gave or promised in good faith something of value in the transaction or changed his or her position materially because of the transaction.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated, including arguments showing the insufficiency of the supporting affidavits or declarations, the existence of a triable issue of fact, or both. In addition, counsel should attach affidavits or declarations which oppose the motion [*Code Civ. Proc. § 437c*].

[b] Related Uses

These points and authorities may also be modified to oppose a general demurrer [*Code Civ. Proc. §§ 430.10(e), 430.30(a)*] for failure to state a cause of action to a complaint for rescission of a contract on the ground of duress or menace.

With appropriate modifications, these points and authorities may be submitted by defendant in opposition to plaintiff's motion for summary adjudication of the cause of action or affirmative defense [*Code Civ. Proc. § 437c*] in an action for damages for breach of contract when defendant contends the contract is voidable because entered into under duress, menace, or fraud, but plaintiff asserts that the alleged duress, menace, or fraud was exerted by a third person and not plaintiff.

[c] Related Memoranda

For memoranda of points and authorities relating to summary judgments, generally, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Duress of Third Party Renders Contract Voidable

The factual and procedural background of ***Leeper v. Beltrami*** *(1959) 53 Cal. 2d 195, 1 Cal. Rptr. 12, 347 P.2d 12* , is discussed in *§ 92.22[3][a]*. Another issue addressed by the Supreme Court in that case was whether or not a cause of action was stated against the defendant who bought the property at one-third of its actual value. No active wrongdoing was alleged against this defendant, but he was alleged to have had knowledge of plaintiff wife's situation. The Court held that the wrongful acts of a third party constituting duress may be sufficient to allow rescission of a contract with a party, who, although not participating in those wrongful acts, had knowledge of the innocent party's position. The Court noted that Restatement of Contracts, §§ 476, 477, agreed with this statement. Consequently, the Court concluded that the allegations that defendant had knowledge of plaintiff wife's predicament were sufficient to give rise to the right of rescission,and the complaint, as far as substantive law was concerned, stated a cause of action against that defendant (*53 Cal. 2d 195, 205-206)* .

In ***Hall v. Department of Adoptions*** *(1975) 47 Cal. App. 3d 898, 121 Cal. Rptr. 223* , plaintiff sought to set aside her

relinquishment of her child to defendant county agency for the purpose of allowing the child to be placed for adoption. The trial court found for plaintiff. On appeal, defendant contended that the complaint failed to state a cause of action since it alleged that plaintiff was unaware of the consequences of her act of relinquishment because of emotional distress resulting from abuse by her husband and that plaintiff was induced to sign because of duress exerted by her husband. There were no allegations charging defendant with having engaged in any wrongful conduct towards plaintiff, with having participated in any wrongful conduct, or with having any knowledge that any wrongful conduct had been directed towards plaintiff to induce her to sign the relinquishment. In reversing, the court of appeal held that the complaint was insufficient to state a cause of action against defendant. The court noted that duress or fraud of a third party renders a transaction voidable by a party induced thereby to enter into it, if the other party has reason to know of the fraud or duress before he or she has given or promised in good faith something of value in the transaction or changed his or her position materially by reason of the transaction (*47 Cal. App. 3d 898, 903)* . The Court found, however, that since the complaint contained only a bare conclusion that defendant had committed fraud and did not allege specific facts showing knowledge of or participation in the husband's wrongful conduct, it was insufficient to state a cause of action against defendant (*47 Cal. App. 3d 898, 903-905)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentOppositionGeneral OverviewContracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral Overview

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9-92 California Points & Authorities §§ 92.27-92.39

[Reserved]

§§ 92.27[Reserved]

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PART II. FORMS
B. Fraud

9-92 California Points & Authorities § 92.40

§ 92.40 Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Actual Fraud [Civ. Code § 1572]--Insufficient Evidence of Materiality of Fact Allegedly Misrepresented

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN SUPPORT OF MOTION FOR NEW TRIAL
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

DEFENDANT'S MOTION FOR NEW TRIAL SHOULD BE GRANTED BECAUSE THE EVIDENCE IS INSUFFICIENT TO SHOW THAT THE FACT(S) ALLEGEDLY MISREPRESENTED _____ [WAS *or* WERE] MATERIAL.

A. Motion for New Trial. On the application of the party aggrieved, the _____ [verdict *or* decision] may be vacated, in whole or in part, and a new trial may be granted, on all or some of the issues, on the ground that the evidence is insufficient to justify the _____ [verdict *or* decision], if substantial rights of the aggrieved party are materially affected thereby (*Code Civ. Proc. § 657(6)*).

B. Elements of Actual Fraud. Actual fraud, as the basis for avoiding a contract, consists of (1) a false representation or concealment concerning a material fact (or in some cases, an opinion) that is susceptible of knowledge, (2) made with knowledge of its falsity or without sufficient knowledge on the subject to warrant a representation, (3) with the intent to induce the person to whom it is made to act on it, (4) actually causing that person to act in reliance on therepresentation, and (5) resulting in damage to that person (*see South Tahoe Gas Co. v. Hofmann Land Improvement Co. (1972) 25 Cal. App. 3d 750, 765, 102 Cal. Rptr. 286*).

C. Materiality of Fact Misrepresented. To rescind a contract on the ground of fraud it must be shown that the alleged misrepresentation was of a material fact (*Chalas v. Andersen (1961) 192 Cal. App. 2d 452, 456, 13 Cal. Rptr. 257*).

D. Test of Materiality. The fact misrepresented or suppressed is deemed material if it relates to a matter of substance and directly affects the purpose of the party deceived in entering into the contract (*Thomas v. Hawkins (1950) 96 Cal. App. 2d 377, 379, 215 P.2d 495*), or if it is such that the contract would not have been entered into without it (*Chalas v. Andersen (1961) 192 Cal. App. 2d 452, 456, 13 Cal. Rptr. 257*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of an unsuccessful defendant's motion for a new trial, in an action to rescind a contract allegedly induced by fraud on the part of defendant, when the evidence is insufficient to show that the fact allegedly misrepresented was material.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

These points and authorities may be modified to support a demurrer [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*] to a complaint for rescission of a contract for fraud when plaintiff fails to allege facts showing the fact misrepresented was material.

With appropriate modifications, this form may also be used to support a motion by plaintiff for a new trial [*Code Civ. Proc. § 657(6)*] in an action for damages for breach of contract when defendant alleges that the contract is voidable because it was induced by fraud on the part of plaintiff.

[c] Related Memoranda

For memoranda of points and authorities relating to motions for new trial generally, see Ch. 155, *Motions After Trial* .

[d] Opposing Points and Authorities

The points and authorities *set out in § 92.45* may be used in an appropriate case to oppose a motion for new trial supported by this form.

[3] Discussion of Authorities

[a] Elements of Actual Fraud

In ***South Tahoe Gas Co. v. Hofmann Land Improvement Co.*** *(1972) 25 Cal. App. 3d 750, 102 Cal. Rptr. 286* , defendant sought to avoid liability on a contract entered into with plaintiff utility for the extension of a gas main into a tract defendant was developing. Defendant contended, in part, that the contract was not enforceable because the utility fraudulently represented that the charges provided for in the contract did not exceed the maximum allowable rate for such extensions as established by the Public Utilities Commission. The trial court entered judgment for plaintiff.

On appeal, the court of appeal affirmed the judgment and at page 765, stated that the elements of actual fraud, whether as the basis of the remedy in contract or tort, are: (1) a false representation or concealment of a material fact (or, in some cases, an opinion) susceptible of knowledge, (2) made with knowledge of its falsity or without sufficient knowledge on the subject to warrant a representation, (3) with the intent to induce the person to whom it is made to act on it, (4) causing that person to act in reliance on the representation, (5) to his or her damage. The court held that defendant was not entitled to relief from the contract because it had suffered no damage from plaintiff's alleged fraud (*25 Cal. App. 3d 750, 765)* .

[b] Materiality of Fact Misrepresented

In ***Chalas v. Andersen*** *(1961) 192 Cal. App. 2d 452, 13 Cal. Rptr. 257* , plaintiffs entered into a contract with defendants for the sale of a retail poultry business. At the time the sale was being negotiated, defendants represented to plaintiffs that the profits of the store were actually greater than the records indicated because defendants, who also owned a wholesale poultry business, had charged a premium per pound on chicken sold to the retail business in order to absorb a portion of the store's profits into the wholesale operation. After taking over operation of the business, plaintiffs became convinced that defendants had falsely represented the profit margin of the business and that the amount of the premium was less than represented by defendants. Thereafter, plaintiffs brought an action to rescind the contract, on the grounds of misrepresentation and fraud. Defendants admitted making the representations but alleged that they believed the statements to be true. They cross complained for the balance due on the contract of sale. The trial court entered judgment denying rescission and awardingdefendants the sum asked by the cross complaint.

On appeal, the court of appeal affirmed the judgment, noting that whether or not the difference between the amount of the premium represented and the amount actually charged constituted a material misrepresentation under the facts of the case was a question of fact for the trial court. The court noted that to make out a case of fraud, it must appear that the alleged false representation was of a material fact, and to be material, the misrepresentation must be such that the contract would not have been entered into without it (*192 Cal. App. 2d 452, 456)* . The court concluded that the trial court had sufficient evidence on which to base its finding that the misrepresentation was not material and that plaintiffs would still have purchased the store even had they known the true differential (*192 Cal. App. 2d 452, 456)* .

[c] Test of Materiality

In ***Thomas v. Hawkins*** *(1950) 96 Cal. App. 2d 377, 215 P.2d 495* , plaintiff brought an action against defendant to partition certain real property, claiming that she owned an undivided one-half interest therein. Defendant filed an answer and cross complaint alleging, in part, that he had purchased the property and placed it in the joint names of the parties in reliance on plaintiff's representation that she was not married and would marry him. The cross complaint further alleged that this representation was false and was made with the intent to induce defendant to purchase the

property and place it in their names as tenants in common. Defendant prayed that he be declared sole owner of the property. The trial court found substantially in accord with these allegations and rendered judgment for defendant. In affirming the judgment and holding that the evidence supported the trial court's findings with respect to the alleged fraud, the court of appeal noted that false representations, the willful suppression of material facts, and the making of a promise without any intention of performing it, if committed by a party to a contract with intent to deceive another party thereto or to induce him or her to enter the contract, constitute fraud. The court stated that the fact represented or suppressed, as the case may be, is deemed material if it relates to a matter of substance and directly affects the purpose of the party deceived in entering into the contract (*96 Cal. App. 2d 377, 379)* .

Chalas v. Andersen *(1961) 192 Cal. App. 2d 452, 13 Cal. Rptr. 257* , is discussed in *§ 92.40[3][b]*.

[4] Additional Authorities

[a] Materiality of Misrepresented Fact

The court of appeal in *Merced County Mut. Fire Ins. Co. v. State of California (1991) 233 Cal. App. 3d 765, 284 Cal. Rptr. 680* , reversed a judgment entered by the trial court after it sustained an insured's demurrer without leave to amend. The insurer had sought to rescind an additional insured endorsement in favor of the State of California because it claimed the insured had misrepresented to it that the endorsement was necessary under the terms of its lease of property from the state. Both mistake and misrepresentation were relied on in the complaint as bases for rescission. In reversing, the court noted that the question of materiality of a mistake or representation is a question of law (*233 Cal. App. 3d 765, 772)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewContracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral Overview

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9-92 California Points & Authorities § 92.41

§ 92.41 Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Actual Fraud [Civ. Code § 1572]--Insufficient Evidence of Actual Reliance by Plaintiff

[1] FORM

[*Caption. See § 92.40.*]

DEFENDANT'S MOTION FOR NEW TRIAL SHOULD BE GRANTED BECAUSE THE EVIDENCE IS INSUFFICIENT TO SHOW THAT PLAINTIFF ACTUALLY RELIED ON THE ALLEGED MISREPRESENTATION.

A. Motion for New Trial. [*See § 92.40, Paragraph A.*]

B. Elements of Actual Fraud. [*See § 92.40, Paragraph B.*]

C. Reliance on Misrepresentation Required. To justify rescission of a contract on the ground of misrepresentation of a material fact, it must be shown that the party seeking to rescind relied on the representation and that he or she would not have entered into the contract without it (*Wood v. Kalbaugh (1974) 39 Cal. App. 3d 926, 932, 114 Cal. Rptr. 673*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of an unsuccessful defendant's motion for a new trial, in an action to rescind a contract allegedly induced by actual fraud, when the evidence is insufficient to show that plaintiff actually relied on the alleged misrepresentation.

Where appropriate, counsel should insert argument in this form showing therelationship between the facts of the case and the points of law stated.

[i] Related Uses

The points and authorities in this form may be modified to support a demurrer to a complaint for rescission of a contract for fraud when plaintiff has failed to allege facts showing that he or she actually relied on the alleged misrepresentation [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*].

With appropriate modifications, this form may also be used to support plaintiff's motion for a new trial [*Code Civ. Proc. § 657(6)*] in an action for damages for breach of contract when the defendant alleges that the contract is voidable because it was induced by fraud on the part of plaintiff.

[b] Related Memoranda

For memoranda of points and authorities relating to motions for new trial generally, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] Reliance on Misrepresentation Required

In ***Wood v. Kalbaugh*** *(1974) 39 Cal. App. 3d 926, 114 Cal. Rptr. 673* , respondents had brought an action for restitution of a down payment made pursuant to a contract for the sale of a house. Respondents asserted they were justified in unilaterally rescinding the contract because of a misrepresentation made to them by appellants' real estate agent. The agent had told respondents that everything in the house was in perfect shape. After respondents deposited the down payment into escrow, they discovered that the gas could not be turned on because of a dangerous leak in the gas line. When informed of the leak, appellants fixed the gas line, but respondents refused to make any further payments on the house and attempted to rescind the contract. The trial court entered judgment for respondents.

The court of appeal reversed, holding, inter alia, that the trial court had erroneously granted respondents restitution of their down payment without any evidence to support the implied finding that they actually relied on the representation that the house was in perfect shape when they agreed to buy it. The court noted that to justify the rescission of a contract on the ground that there was a misrepresentation of a material fact, it must be shown that the party seeking to rescind relied on the representation and that he would not have entered into the contract without it (*39 Cal. App. 3d 926, 932)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsContracts LawDefensesFraud &

MisrepresentationGeneral Overview

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9-92 California Points & Authorities § 92.42

§ 92.42 Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Actual Fraud [Civ. Code § 1572]--Evidence Insufficient to Show Plaintiff's Reliance Was Justified

[1] FORM

[*Caption. See § 92.40.*]

DEFENDANT'S MOTION FOR NEW TRIAL SHOULD BE GRANTED BECAUSE THE EVIDENCE IS INSUFFICIENT TO SHOW THAT PLAINTIFF'S RELIANCE ON THE ALLEGED MISREPRESENTATION WAS JUSTIFIED.

A. Motion for New Trial. [*See § 92.40, Paragraph A.*]

B. Elements of Actual Fraud. [*See § 92.40, Paragraph B.*]

C. Reliance Must Be Justified. To rescind a contract allegedly induced by a fraudulent misrepresentation, it must be shown not only that plaintiff acted in reliance on the misrepresentation, but that he or she was justified in his or her reliance (*Seeger v. Odell (1941) 18 Cal. 2d 409, 414, 115 P.2d 977*).

[*Optional*] **D. Statement of Opinion.** A statement of mere opinion may not be justifiably relied on as the basis for relief from a contract on the ground of fraud (*Carter v. Seaboard Fin. Co. (1949) 33 Cal. 2d 564, 569, 203 P.2d 758* ; *Seeger v. Odell (1941) 18 Cal. 2d 409, 414, 115 P.2d 977*).

[*Optional*] **E. Misrepresentations of Law.** In the absence of a relationship of trust and confidence between the parties, misrepresentations of law do not constitute fraud and do not furnish a ground for rescission of a contract (*Haviland v. Southern Cal. Edison Co. (1916) 172 Cal. 601, 608, 158 P. 328*).

[*Optional*] **F. Reliance Not Justified if Independent Investigation Made.** A party cannot justifiably rely on a misrepresentation if, prior to entering into the contract, he or she makes an independent investigation which, if performed with reasonable diligence, should disclose the true facts (*Carroll v. Dungey (1963) 223 Cal. App. 2d 247, 254, 35 Cal. Rptr. 681* ; *Teipel v. Southern Nev. Vending Co. (1954) 124 Cal. App. 2d 671, 674, 268 P.2d 1081*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of an unsuccessful defendant's motion for a new trial, in an action to rescind a contract allegedly induced by fraud on the part of defendant, when the evidence was insufficient to show that plaintiff's reliance on the alleged misrepresentation was justified.

Optional Paragraph D may be included if the alleged misrepresentation was merely a statement of opinion. Optional Paragraph E may be inserted when the alleged misrepresentation was a misrepresentation of law. Optional Paragraph F may be included when plaintiff was precluded from justifiably relying on the alleged misrepresentation because he or she made an independent investigation which should have revealed the true facts.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

These points and authorities may be modified to support a demurrer [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*] to a complaint for rescission of a contract for fraud when it appears on the face of the complaint, or from any matter of which the court must or may take judicial notice, that plaintiff's reliance on the alleged misrepresentation was not justified.

[b] Opposing Points and Authorities

The points and authorities *set out in §§ 92.46 -92.53* may be used in appropriate cases to oppose a motion for new trial supported by this memorandum.

[c] Related Memoranda

For memoranda of points and authorities relating to motions for new trial generally, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] Reliance Must Be Justified

Seeger v. Odell *(1941) 18 Cal. 2d 409, 115 P.2d 977* , was an action in part to have a mortgage foreclosure sale set aside and for rescission of an oil lease. Defendants successfully moved for judgment on the pleadings. Plaintiffs' complaint alleged that they executed a note and mortgage on a lot and that seven years later, defendants secured a final judgment of foreclosure and asked plaintiffs to meet with them concerning the disposition of the property. At that meeting, defendants' attorney told plaintiffs that their land had been sold at an execution sale to two of the defendants. The complaint further alleged that plaintiffs believed this representation and, therefore, joined in executing an oil lease of the property to a third defendant and made no attempt to pay the mortgage debt or to exercise the equity of redemption after the foreclosure sale, although during this period many persons offered to lease the land from them with advances sufficient to cover the mortgage indebtedness. The complaint further alleged that no execution actually had been levied on the land and that defendants knew that the representation that the land had been sold to two of the defendants was false, and was made for the purpose of inducing plaintiffs to enter into the lease and to not pay off the mortgage indebtedness or exercise their right to redeem.

The Supreme Court reversed, holding that plaintiffs' complaint sufficiently established the right to relief on the basis of a fraudulent misrepresentation. The Court noted the well-established rule that a person who has been induced by such a misrepresentation to enter into a contract or to make a conveyance may have the contract or conveyance set aside and secure a restitution of the benefits lost to him by the transaction. The Court stated, however, that it must appear not only that plaintiff acted in reliance on the misrepresentation, but that his or her reliance was justified, and that plaintiff may not justifiably rely on mere statements of opinion, including legal conclusions drawn from a true state of facts, unless the person expressing the opinion purports to have expert knowledge concerning the matter or occupies a position of confidence and trust. If, however, the opinion or legal conclusion misrepresents the facts on which it is based or implies the existence of acts which are nonexistent, it constitutes an actionable misrepresentation (*18 Cal. 2d 409, 414)* . The Court concluded that plaintiffs' allegations were sufficient in that they alleged a misrepresentation made by defendants through their agent with knowledge that it was false and with the intention of inducing plaintiffs to rely on it and that plaintiffs did act in reliance thereon. The Court stated that the misrepresentation was not such that its falsity must have been so obvious to the plaintiffs as to preclude any justifiable reliance thereon by them (*18 Cal. 2d 409, 415)* . The representation that a levy of execution and sale of the property had occurred was a false statement of fact which was not rendered less actionable because it also contained legal conclusions (*18 Cal. 2d 409, 416)* .

[b] Statement of Opinion

In ***Carter v. Seaboard Fin. Co.*** *(1949) 33 Cal. 2d 564, 203 P.2d 758* , plaintiff brought an action for damages based on three causes of action including, inter alia, fraud in connection with the sale of a truck. The alleged fraud was predicated, in part, on the alleged misrepresentation by defendant's agent that the truck should be in good shape because defendant had recently spent a large sum of money to have it repaired. In fact, the truck's motor was not in suitable operating condition. In affirming a judgment for the defendant as to the cause of action for fraud, the Supreme Court held that this particular representation was merely the agent'sopinion, based on the expenditure for repairs, and did not form the basis for a cause of action for fraud (*33 Cal. 2d 564, 569)* .

Seeger v. Odell (1941) 18 Cal. 2d 409, 115 P.2d 977 , is discussed in *§ 92.42[3][a]*.

[c] Misrepresentations of Law

In ***Haviland v. Southern Cal. Edison Co.*** *(1916) 172 Cal. 601, 158 P. 328* , plaintiff employee brought an action for personal injuries alleged to have been caused by defendant employer's negligence and recovered a judgment in his favor. On appeal, defendant contended, inter alia, that plaintiff had, for consideration, agreed to settle and release defendant from all claims and liabilities arising out of the injury. Plaintiff asserted that he was induced to sign the release by fraud on the part of an employee of defendant and that the release was thus without effect. Plaintiff alleged that the employee had falsely represented to plaintiff that the release was not binding on plaintiff, but was merely a

matter of form which must be signed in order to get plaintiff back on defendant's payroll, and that plaintiff relied on these statements in signing the release. In reversing the judgment for plaintiff, the Supreme Court held that the representations did not constitute fraud in the legal sense. They were not statements of fact, but at most misrepresentations of law. The Court held that such misrepresentations do not amount to fraud and do not furnish a ground for rescission of a contract, at least when no relationship of trust and confidence exists between the parties (*172 Cal. 601, 608)* .

[d] Reliance Not Justified if Independent Investigation Made

In ***Carroll v. Dungey*** *(1963) 223 Cal. App. 2d 247, 35 Cal. Rptr. 681* , plaintiffs brought an action for rescission of a contract for purchase of a water company based, in part, on alleged misrepresentations by defendants concerning the newness of the pipes in the company's water system. The trial court found that plaintiffs were precluded, in part, from relying on the representations because they had made an independent investigation of Public Utilities Commission records, and entered judgment for defendants. On appeal, the court of appeal noted that a misrepresentation does not constitute actionable fraud unless plaintiff relied on it, and plaintiff cannot claim reliance if he or she makes an independent investigation which, if performed with reasonable diligence, should disclose the true facts (*223 Cal. App. 2d 247, 254)* . The court noted, however, that in this case the only documents on file with the Public Utilities Commission which would have indicated the falsity of the representations were not in existence when the plaintiffs made their investigation. The court held that an independent investigation does not preclude reliance when the falsity of the statement is not apparent from an inspection. Thus, the court concluded, plaintiffs could not be charged with knowledge inferrable from a document which was not in existence at the time they made their investigation (*223 Cal. App. 2d 247, 255-256)* . Accordingly, the court reversed the judgment.

In ***Teipel v. Southern Nev. Vending Co.*** *(1954) 124 Cal. App. 2d 671, 268 P.2d 1081* , plaintiffs sued to rescind a contract to purchase a slot machine, pinball game, and phonograph recording route business on the ground of fraud. Prior to purchasing the business, plaintiffs requested and were permitted to inspect all the books and records of the business. When the income from the business proved to be less than was represented by defendants, plaintiffs attempted to rescind. The trial court entered judgment for defendants. On appeal, the court of appeal affirmed. The court noted that when one undertakes an investigation and proceeds with it without hindrance, it will be assumed that he or she continued until acquiring all the knowledge desired, and was satisfied with what he or she learned. The person making the investigation may not then be heard to say that he or she relied on the representations of the other party. The court held that the evidence in this case amply supported the trial court's findings that plaintiffs had investigated defendants' records to their fullest satisfaction, that no effort was made to cover up any matter, and that defendants were not guilty of fraud (*124 Cal. App. 2d 671, 674)* .

[4] Additional Authorities

[a] Reliance Not Justified if Independent Investigation Made

In *Carpenter v. Hamilton (1936) 18 Cal. App. 2d 69, 62 P.2d 1397* , plaintiffs sued to recover damages for alleged fraud by which they were induced to purchase certain real property. The trial court denied defendant's motions for a directed verdict and for judgment notwithstanding the verdict and entered judgment for plaintiffs. On appeal, defendant contended that plaintiffs did not rely on and were not induced to purchase the property by defendant's representations concerning it, that plaintiffs had ample opportunity to inspect the property and did inspect it several times, and that plaintiffs purchased the property in reliance on their own inspection. The court of appeal reversed the judgment. It first noted that plaintiffs had a right to rely on the representations made to them concerning matters of fact which were unknown to them, without making any inquiry concerning the truth thereof, and had they done so, defendant could not have evaded the consequences of any fraudulent statement he might have made by showing that the means of ascertaining the truth were easily available to plaintiffs. However, the court held, the right to rely on representations does not exist where a purchaser chooses to inspect the property before purchase, and, in making the inspection, learns

the true facts, for the obvious reason that he has not been defrauded unless he has been misled, and he has not been misled where he has acted with actual or imputed knowledge of the true facts (*18 Cal. App. 2d 69, 71)* . The court then examined the evidence and held that the evidence admitted onlythe conclusion that plaintiffs had relied not on defendant's representations but on their own inspection from which the falsity of the representations should have been apparent (*18 Cal. App. 2d 69, 73-76)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsContracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral Overview

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9-92 California Points & Authorities § 92.43

§ 92.43 Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Actual Fraud [Civ. Code § 1572]--Insufficient Evidence of Injury to Plaintiff

[1] FORM

[*Caption. See § 92.40.*]

DEFENDANT'S MOTION FOR A NEW TRIAL SHOULD BE GRANTED BECAUSE THE EVIDENCE IS INSUFFICIENT TO SHOW THAT PLAINTIFF WAS INJURED BY THE ALLEGED MISREPRESENTATION.

A. Motion for New Trial. [*See § 92.40, Paragraph A.*]

B. Elements of Actual Fraud. [*See § 92.40, Paragraph B.*]

C. Injury Required. A party may not be relieved from a contract induced by fraud unless he or she has been injured by the fraud (*Norris v. Norris (1942) 50 Cal. App. 2d 726, 734, 123 P.2d 847*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of an unsuccessful defendant's motion for a new trial, in an action to rescind a contract allegedly induced by fraud on the part of defendant, when the evidence is insufficient to show that plaintiff was injured by the alleged fraud.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

These points and authorities may be modified to support a general demurrer [*Code Civ. Proc. §§ 430.10(e), 430.30(a)*] to a complaint for rescission of a contract for fraud when plaintiff fails to allege facts showing that he or she was injured by the alleged fraud.

With appropriate modifications, these points and authorities may also be submitted in support of plaintiff's motion for a new trial [*Code Civ. Proc. § 657(6)*] in an action for damages for breach of contract when defendant asserts that the contract is voidable because it was induced by fraud on the part of plaintiff.

[b] Related Memoranda

For memoranda of points and authorities relating to motions for new trial generally, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] Injury Required

Norris v. Norris *(1942) 50 Cal. App. 2d 726, 123 P.2d 847* , was an appeal from a judgment awarding respondent a divorce from appellant on the ground of cruelty. Appellant contended, inter alia, that the trial court erred in concluding that a property settlement agreement entered into was fair and just and in assigning to respondent all of the community property not disposed of by the agreement. Appellant contended that the agreement was procured by fraud and undue influence. The court of appeal held that although it disagreed with the trial court's finding that the agreement was not obtained through undue influence and concealment, appellant was nevertheless not entitled to relief from the agreement. The court noted that one will not be relieved from a fraudulent contract unless he or she has been injured by it. The court concluded that the evidence did not show any material injury to appellant because the property received by appellant and the awards made by the decree were substantial payments and may well have exceeded whatever might have been awarded appellant had the community property been divided under the Civil Code instead of pursuant to the agreement. The court therefore affirmed the judgment (*50 Cal. App. 2d 726, 734)* .

[4] Additional Authorities

[a] Injury Required

In *South Tahoe Gas Co. v. Hofmann Land Improvement Co. (1972) 25 Cal. App. 3d 750, 102 Cal. Rptr. 286* , defendants contracted with plaintiff utility for extension of a gas main into a tract of land defendants were developing. Plaintiff brough an action to recover the balance due on the contract, and the trial court entered judgment in its favor. On appeal, defendants contended, inter alia, that plaintiff was precluded from recovering under the contract because defendants had been induced to enter into the contract by plaintiff's fraudulent representationsthat the amount charged for the gas main extension did not exceed the maximum rate permitted by the Public Utilities Commission. The

evidence showed that when defendants discovered the overcharge, after the contract had been entered into and the work completed, plaintiff acquiesced in the lower rate, but defendants refused to pay plaintiff anything. The court of appeal noted that the trial court properly found no damages resulting from the alleged fraud because the utility was not receiving more than the legal rate. The court held that fraud without damage furnishes no ground for action, nor is fraud without damage a defense (*25 Cal. App. 3d 750, 765)* . Accordingly, the court affirmed the judgment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsContracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral Overview

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9-92 California Points & Authorities § 92.44

§ 92.44 Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Constructive Fraud Based on Breach of Duty [Civ. Code § 1573(1)]--Failure to Show Existence of Confidential Relationship

[1] FORM

[*Caption. See § 92.40.*]

DEFENDANT'S MOTION FOR A NEW TRIAL SHOULD BE GRANTED BECAUSE THE EVIDENCE IS INSUFFICIENT TO SHOW THE EXISTENCE OF A CONFIDENTIAL RELATIONSHIP BETWEEN PLAINTIFF AND DEFENDANT.

A. Motion for New Trial. [*See § 92.40, Paragraph A.*]

B. Confidential Relationship Required. Under *Section 1573(1) of the Civil Code*, plaintiff must show that there is a confidential relationship between the parties in order to rescind a contract for constructive fraud (*Crocker-Anglo Nat'l Bank v. Kuchman (1964) 224 Cal. App. 2d 490, 494, 36 Cal. Rptr. 806*).

C. Confidential Relationship Defined. A confidential relationship exists whenever trust and confidence is reposed by one person in the integrity and fidelity of another (*Estate of Cover (1922) 188 Cal. 133, 143, 204 P. 583* ; *O'Neil v. Spillane (1975) 45 Cal. App. 3d 147, 153, 119 Cal. Rptr. 245*).

[*Optional*] **D. Employment Relationship Not Confidential.** No presumption of a confidential relationship arises from the fact that parties to a contract are employer and employee (*Odorizzi v. Bloomfield School Dist. (1966) 246 Cal. App. 2d 123, 129, 54 Cal. Rptr. 533*).

[*Optional*] **E. Family Relationship Not Necessarily Confidential.** The solitary fact of family relationship does not of itself establish the existence of a fiduciary or confidential relationship (*Peters v. Papoulacos (1963) 218 Cal. App. 2d*

791, 794, 32 Cal. Rptr. 689).

[*Optional*] **F. No Confidential Relationship Presumed Between Prospective Marriage Partners.** No confidential relationship is presumed between prospective parties to a marriage (*Fernandez v. Fernandez (1961) 194 Cal. App. 2d 782, 790, 15 Cal. Rptr. 374*).

[*Optional*] **G. Friendship, Affection, or Intimacy as Not Necessarily Creating Confidential Relationship.** Friendship, affection, or intimacy existing between two parties does not necessarily create a confidential relationship (*Wilson v. Sampson (1949) 91 Cal. App. 2d 453, 459, 205 P.2d 753*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of an unsuccessful defendant's motion for a new trial in an action to rescind a contract on the ground of constructive fraud predicated on breach of a duty owed to plaintiff when the evidence is insufficient to show a confidential relationship between the parties.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

These points and authorities may be modified to support a general demurrer [*Code Civ. Proc. §§ 430.10(e), 430.30(a)*] to a complaint for rescission of a contract for constructive fraud when plaintiff has failed to allege facts showing the existence of a confidential relationship between the parties.

With appropriate modifications, these points and authorities may also be used to support plaintiff's motion for a new trial [*Code Civ. Proc. § 657(6)*] in an action for damages for breach of contract when defendant contends that the contract is voidable because plaintiff was guilty of constructive fraud in obtaining defendant's consent to the contract.

[b] Related Memoranda

For memoranda of points and authorities relating to motions for new trial generally, see Ch. 155, *Motions After Trial* in this set.

[3] Discussion of Authorities

[a] Confidential Relationship Required

The factual and procedural background of ***Crocker-Anglo Nat'l Bank v. Kuchman*** *(1964) 224 Cal. App. 2d 490, 36 Cal. Rptr. 806* , is discussed in *§ 92.101[3][a]*. In that case, the court of appeal rejected plaintiffs' contention that innocent misrepresentation is a form of constructive fraud and that plaintiffs were therefore entitled to prove innocent misrepresentation under the count of their complaint which alleged constructive fraud. The court noted that by the clear language of *Civ. Code § 1573(1)*, there must be a breach of duty to give rise to constructive fraud and that the duty must be one created by a confidential relationship (*224 Cal. App. 2d 490, 494)* . Thus, the court held that innocent misrepresentation itself is not constructive fraud (*224 Cal. App. 2d 490, 495)* . The court held, however, that innocent misrepresentation was a type of mistake and thus supported rescission on that ground (*224 Cal. App. 2d 490, 495-497)* .

[b] Confidential Relationship Defined

Estate of Cover *(1922) 188 Cal. 133, 204 P. 583* , is discussed in *§ 92.71[3][e]*.

O'Neil v. Spillane (1975) 45 Cal. App. 3d 147, 119 Cal. Rptr. 245 , is discussed in *§ 92.71[4][a]*.

[c] Employment Relationship Not Confidential

The factual and procedural background of ***Odorizzi v. Bloomfield School Dist.*** *(1966) 246 Cal. App. 2d 123, 54 Cal. Rptr. 533* , is discussed in *§ 92.20[3][a]*. Plaintiff attempted to allege constructive fraud by asserting the existence of a confidential relationship between plaintiff teacher and the school superintendent and principal as agents of defendant, plaintiff's employer. The court of appeal stated that such a confidential relationship may exist whenever a person with justification places trust and confidence in the integrity and fidelity of another. However, plaintiff set forth no facts to support his conclusion of a confidential relationship other than the fact that the parties bore the relationship of employer and employee. The court held that no presumption of a confidential relationship arises from the bare fact that parties to a contract are employer and employee; additional ties must be brought out in order to create such a presumption. The court observed that the absence of a confidential relationship between employer and employee is especially apparent where, as in the factual situation involved in this case, the parties were negotiating to bring about a termination of their relationship, since each party is expected to look after his own interests, and a lack of confidentiality is implicit in the subject matter of their dealings. The court concluded that the complaint did not allege a cause of action for constructive fraud (*246 Cal. App. 2d 123, 129)* .

[d] Family Relationship Not Necessarily Confidential

In ***Peters v. Papoulacos*** *(1963) 218 Cal. App. 2d 791, 32 Cal. Rptr. 689* , plaintiff brought an action to recover a sum of money from defendant. Defendant, the son of plaintiff's cousin, was a Greek citizen residing in the U.S. under a student visa. He had married a U.S. citizen and desired to go to Canada and reenter the U.S. on a basis of an entry other than that of a student. Plaintiff, who had sponsored defendant's previous immigration, sent defendant a sum of money. In his complaint, plaintiff alleged that the sum of money which he sought to recover was advanced to defendant as a loan so that defendant could demonstrate to immigration authorities that he had financial responsibility sufficient to permit reentry to the U.S. Defendant contended that the money was a wedding gift. The trial court entered judgment for defendant, finding that the transfer of the money was a gift.

On appeal, plaintiff contended, inter alia, that the evidence at trial showed a confidential relationship between the parties and, therefore, raised a presumption of undue influence by defendant which was not rebutted by him. In rejecting this contention and affirming the judgment, the court of appeal noted that the solitary fact of family relationship will not of itself establish the existence of a fiduciary or confidential relation raising a presumption of undue influence. Whether or not such a relation exists between members of the same family depends on all the facts and circumstances of the case, and unless one party actually dominates the other, so that the other depends on him for advice and guidance, a confidential relation does not exist, even though the parties are closely related by family (*218 Cal. App. 2d 791, 794)* .

The court concluded that the evidence in this case fell far short of constituting a substantial showing that any confidential relationship existed between the parties, on which could be rested a presumption that the transmission of the money was the result of undue influence exercised by defendant (*218 Cal. App. 2d 791, 794-795)* .

[e] No Confidential Relationship Presumed Between Prospective Marriage Partners

In ***Fernandez v. Fernandez*** *(1961) 194 Cal. App. 2d 782, 15 Cal. Rptr. 374* , the trial court entered judgment granting plaintiff a divorce, but held, pursuant to an antenuptial agreement, that there was no community property. The parties had been married in Mexico, but had subsequently moved to California. At the time the parties were married, Mexican law required that prospective parties to a marriage enter into an agreement with respect to their property rights, declaring either that all their property be separate or that it be jointly owned by the spouses. The agreement entered into between plaintiff and defendant provided that the parties' marriage was to be contracted under the rule of absolute separate property. At the time the parties were married, plaintiff was 19 years old and defendant was 45 years old.

Plaintiff appealed from the portion of the judgment decreeing that there was no community property, contending, inter alia, that a confidential relationship existed between the parties at the time the premarital agreement was entered into and that defendant had breached his fiduciary duty to plaintiff. In affirming the judgment, the court of appeal rejected this contention. The court held that her position was without merit because the parties were not yet married at the time the agreement was entered into, and neither the law of Mexico nor the law of California presumes the existence of a confidential relationship between prospective parties to a marriage (*194 Cal. App. 2d 782, 790)* .

[f] Friendship, Affection, or Intimacy as Not Necessarily Creating Confidential Relationship

In ***Wilson v. Sampson*** *(1949) 91 Cal. App. 2d 453, 205 P.2d 753* , plaintiff's guardian brought an action to quiet title to certain real and personal property. The complaint alleged, in part, that at the time plaintiff had transferred the property in question to defendant, she was of unsound mind and laboring under the false belief that she was being persecuted by gangsters and others, and that defendant induced plaintiff to transfer the property to him without consideration by representing that if she did so, he would keep such persons from persecuting her. The complaint also alleged that plaintiff reposed trust and confidence in defendant. The trial court entered judgment for defendant, finding, inter alia, that defendant had paid for the property transferred and that there was no confidential relationship between plaintiff and defendant.

On appeal, plaintiff attacked the trial court's findings as not supported by the evidence. The court of appeal affirmed, holding that the findings were supported by substantial evidence. Addressing itself to the question of whether a confidential relationship existed, the court noted that even the evidence set forth in plaintiff's brief did not establish a confidential relationship. That evidence showed only that defendant roomed at plaintiff's rooming house and that they frequently sat together and "talked very friendly." Plaintiff also testified that defendant made love to her. The court held, however, that friendship, affection, and even intimacy existing between two parties does not constitute a confidential relationship (*91 Cal. App. 2d 453, 459)* .

[4] Additional Authorities

[a] Confidential Relationship Required

The factual background of *Guthrie v. Times-Mirror Co. (1975) 51 Cal. App. 3d 879, 124 Cal. Rptr. 577* , is discussed in *§ 92.94[3][a]*. Plaintiffs contended, inter alia, that the complaint stated a cause of action for constructive fraud. The court of appeal held that the complaint failed to allege the statutory elements of constructive fraud. The breach of duty referred to in *Civ. Code § 1573* (defining constructive fraud) must be one created by a confidential relationship (*51 Cal. App. 3d 879, 889)* . The court found that the facts alleged by plaintiffs did not show the existence of a confidential relationship between plaintiffs and defendant.

[b] Family Relationship Not Necessarily Confidential

The factual and procedural background of *Kudokas v. Balkus (1972) 26 Cal. App. 3d 744, 103 Cal. Rptr. 318* , is discussed in *§ 92.73[3][b]*. In holding that the trial court's finding of no confidential relationship was supported by the evidence, the court of appeal noted that a confidential relationship exists when one party gains the confidence of the other and purports to act or advise with the other's interests in mind, and that such a relationship is particularly likely to exist when there is a family relationship or one of friendship. The court observed, however, that although kinship or friendship are elements, they do not necessarily create a confidential relationship (*26 Cal. App. 3d 744, 750)* . The court then reviewed the evidence and concluded that although there was an association of kinship and friendship extending back to the parties' common origin in Lithuania, the trial court was nevertheless justified in viewing the sale as an arm's length transaction between the seller and self-reliant buyers (*26 Cal. App. 3d 744, 750-751)* .

In *Townsend v. Wingler (1952) 114 Cal. App. 2d 64, 249 P.2d 613* , plaintiff brought an action against his daughter and her husband, alleging that he had conveyed two parcels of real property to her as collateral security for a loan which had subsequently been repaid. Plaintiff sought reconveyance of the property and an accounting. Defendants denied that the property was conveyed as collateral security for any loan, alleging that the property was conveyed to them for consideration pursuant to a written agreement between the parties whereby defendants agreed to provide funds to plaintiff to carry on certain litigation he was then engaged in and to pay plaintiff a certain sum for the rest of his life. Defendants further contended that they had complied with their obligations under the agreement and that plaintiff had received and accepted, and continued to accept, benefits under the agreement. The trial court rendered judgment for defendants.

On appeal, plaintiff sought for the first time to attack the transaction on the grounds of undue influence, fraud, and coercion. Plaintiff contended that there was a presumption that the deeds and the contract between him and his daughter were vitiated on these grounds and that the burden was on defendants to establish that they were free from such taint. The court of appeal affirmed the judgment and rejected this contention. The court held that the relationship of parent and child, per se, does not create any inference of imposition, undue influence, or fraud (*114 Cal. App. 2d 64, 67)* . The burden was thus on plaintiff to show, as a fact, that the deeds he prepared and signed, were induced through fraud, undue influence, or coercion on the part of defendants. The court observed that plaintiff did not prove such facts, nor did he raise any such issue by his pleadings or during the trial. The court concluded that to permit plaintiff to change his theory of recovery on appealwould be manifestly unfair to defendants (*114 Cal. App. 2d 64, 68)* .

[c] Friendship, Affection, or Intimacy as Not Necessarily Creating Confidential Relationship

Kudokas v. Balkus (1972) 26 Cal. App. 3d 744, 103 Cal. Rptr. 318 , is discussed in *§ 92.44[4][b]*.

In *Mead v. Smith (1951) 106 Cal. App. 2d 1, 234 P.2d 705* , plaintiff, as executor, sought to set aside a deed to real property executed by the decedent to defendants. Plaintiff alleged that a friendly, confidential, and/or fiduciary relationship existed between defendants and decedent; that decedent, who was 81 years old at the time, was mentally and physically feeble; and that defendants took advantage of their confidential relationship to gain unlawful benefits at the expense of decedent. The trial court found that defendants had been tenants of decedent, occupying an apartment on the rear of the property for several years prior to decedent's death; decedent had occupied an apartment on the front of the property. The trial court also found that decedent was not mentally incompetent, and that the deed was executed voluntarily and with a clear understanding of the material facts, and that while the property conveyed was reasonably worth more than the price paid by defendants, the consideration for decedent's executing the deed was not only the money, but also the affection that decedent had towards defendants for their kindness and helpfulness to him. The trial court entered judgment for defendants.

On appeal, plaintiff argued, inter alia, that friendly relations constitute confidential relations in equity and that, in such cases, there exists a presumption of undue influence which shifted to respondents the burden of proving that the

transaction was fair, free from fraud or undue influence, and made by a person in full possession of his faculties. In affirming the judgment, the court of appeal rejected this argument. The court held that the mere fact that friendly relations exist between the parties to a transaction did not necessarily carry with it the chain of results contended by plaintiff. The court noted that in this case the trial court had found, on substantial evidence, that defendants did not stand in the relationship of attorney in fact, agent, or employee with respect to decedent. The court concluded that although relations between the parties were friendly, such relations furnished a reasonable motive for decedent's actions rather than a ground for condemning the transaction as fraudulent (*106 Cal. App. 2d 1, 4)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsContracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral Overview

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Volume 9 Chapters 90-99 DISMISSAL---to---EMINENT DOMAIN
CHAPTER 92 DURESS, MENACE, FRAUD, UNDUE INFLUENCE, AND MISTAKE
PART II. FORMS
B. Fraud

9-92 California Points & Authorities § 92.45

§ 92.45 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Actual Fraud [Civ. Code § 1572]--False Representation Made to Prospective Purchaser of Business Concerning Income or Profits of Business as Material

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN OPPOSITION TO MOTION FOR NEW TRI-
vs.	)	AL
_____ [*name*],	)	[*Code Civ. Proc. § 657(6)*]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

DEFENDANT'S MOTION FOR A NEW TRIAL ON THE GROUND THAT THE FACT MISREPRESENTED WAS NOT MATERIAL SHOULD NOT BE GRANTED BECAUSE THE EVIDENCE WAS SUFFICIENT TO SHOW THAT THE ALLEGED MISREPRESENTATION CONCERNED THE INCOME OR PROFITS OF THE BUSINESS TO BE PURCHASED BY PLAINTIFF AND WAS THEREFORE A MISREPRESENTATION OF A MATERIAL

FACT.

A. New Trial Precluded Unless Court Convinced That Court or Jury Clearly Should Have Reached Different Result. A new trial must not be granted on the ground of insufficiency of the evidence to justify the _____ [verdict *or* decision] unless, after weighing the evidence, the court is convinced from the entire record, including reasonable inferences therefrom, that the _____ [jury *or* court] clearly should have reached a different _____ [verdict *or* decision] (*Code Civ. Proc. § 657*).

B. Rescission for Fraud. A party to a contract may rescind the contract if the consent of the party rescinding, or of any party jointly contracting with him or her, was obtained through fraud (*Civ. Code § 1689(b)(1)*).

C. Fraudulent Acts. Actual fraud, for purposes of the provisions governing rescission of a contract for fraud, may consist of any of the following acts committed by or with the connivance of a party to the contract, with intent to deceive another party to the contract or to induce him or her to enter into the contract: (1) the suggestion, as a fact, of that which is not true by one who does not believe it to be true; (2) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, although he or she believes it to be true; (3) the suppression of that which is true, by one having knowledge or belief of the fact; (4) a promise made without any intention of performing it; or (5) any other act fitted to deceive (*Civ. Code § 1572*).

D. Single Material Misrepresentation as Sufficient. One material false statement justifiably relied on by plaintiff is sufficient ground for rescission of a contract (*Hefferan v. Freebairn (1950) 34 Cal. 2d 715, 721, 214 P.2d 386* ; *Wilke v. Coinway, Inc. (1967) 257 Cal. App. 2d 126, 138, 64 Cal. Rptr. 845*).

E. False Representation Concerning Income or Profits of Business as Material. A false representation to the prospective purchaser of a business concerning the income or profits from the business is a misrepresentation of a material fact which may be the basis for rescission of the contract (*Rogers v. Bill & Vince's, Inc. (1962) 203 Cal. App. 2d 292, 295-296, 21 Cal. Rptr. 269*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to an unsuccessful defendant's motion for a new trial, in an action to rescind a contract allegedly induced by fraud on the part of defendant, when defendant has asserted in the motion that the fact allegedly misrepresented (or concealed) was not material. The ground of opposition presented is that the misrepresentation concerned the income or profits of the business plaintiff was to purchase under the contract and therefore concerned a material fact.

In an appropriate case, this memorandum may be submitted in opposition to a motion for new trial supported by the

points and authorities *set out in § 92.40*.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

These points and authorities may be modified to oppose a general demurrer [*Code Civ. Proc. §§ 430.10(e), 430.30(a)*] for failure to state a cause of action to a complaint for rescission of a contract allegedly induced by fraud.

With appropriate modifications, these points and authorities may also be used by defendant to oppose plaintiff's motion for new trial [*Code Civ. Proc. § 657(6)*], in an action for damages for breach of contract, when defendant contends that the contract is voidable because induced by fraud on the part of plaintiff.

[b] Related Memoranda

For memoranda of points and authorities relating to motions for new trial generally, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] Single Material Misrepresentation as Sufficient

In ***Hefferan v. Freebairn*** *(1950) 34 Cal. 2d 715, 214 P.2d 386* , plaintiff buyer brought an action to rescind a contract for the sale of a restaurant business, cancel a note and chattel mortgage, and obtain restitution of a cash payment on the ground that defendant induced plaintiff to enter into the contract by making numerous fraudulent misrepresentations concerning the profits of the business and other matters. The trial court entered judgment for plaintiff. On appeal, the Supreme Court affirmed. After holding that there was sufficient evidence to support the trial court's findings that one of the representations was fraudulent and justifiably relied on by plaintiff, the Court noted that since there was one material misrepresentation, there was no necessity for a discussion of the other misrepresentations made by defendant (*34 Cal. 2d 715, 721)* .

In ***Wilke v. Coinway, Inc.*** *(1967) 257 Cal. App. 2d 126, 64 Cal. Rptr. 845* , plaintiffs, an elderly couple wishing to supplement their retirement income, entered into a contract with defendant for the purchase of coin-operated testing devices to be installed in various locations selected by defendant, relying on representations by defendant's agents that the machines would be a suitable source of supplemental income. After entering into the contract, plaintiffs discovered that they could not profitably operate the machines and thereafter sought to rescind the contract. The trial court entered judgment for defendant, from which plaintiffs appealed. In reversing the judgment for insufficiency of the evidence, the court of appeal noted that one material false statement is sufficient ground for rescission of a contract (*257 Cal. App. 2d 126, 138)* .

[b] False Representation Concerning Income or Profits of Business as Material

In ***Rogers v. Bill & Vince's, Inc.*** *(1962) 203 Cal. App. 2d 292, 21 Cal. Rptr. 269* , plaintiff brought an action for damages for breach of a contract for the purchase of a liquor license and for nonpayment under a lease of a restaurant. In its answer, defendant pleaded that the transaction had been induced by plaintiff's fraudulent misrepresentations concerning the daily gross income of the restaurant. The trial court found that plaintiff had, in fact, misrepresented the amount of income from the restaurant, but that defendant was put on inquiry as to the truth of the representations and that it was therefore not entitled to rely on them. Accordingly, it entered judgment for plaintiff.

On appeal, the court of appeal reversed the portion of the judgment awarding plaintiff damages for breach of contract and nonpayment of rent. Addressing itself to the question of the materiality of the misrepresentations, the court noted

that a false representation as to income or profits from a property or business is a material misrepresentation and a basis for rescission (*203 Cal. App. 2d 292, 295-296)* . The court stated that in the sale of a business such as a restaurant, sale negotiations frequently turn on the volume of business or daily receipts handled. Thus, the court held, a misrepresentation as to the gross volume of business handled is a material one (*203 Cal. App. 2d 292, 296)* . The court then held that defendant was entitled to rely on plaintiff's representations and was not bound to make an independent investigation of the facts (*203 Cal. App. 2d 292, 296-299)* .

[4] Additional Authorities

[a] Fraudulent Acts

In *Campbell v. McClure (1986) 182 Cal. App. 3d 806, 227 Cal. Rptr. 450* , the court of appeal affirmed the judgment rescinding the sale of defendant's business to plaintiff. The court stated that the trial court's findings of intentional fraud and justifiable reliance were supported by evidence of defendant's signed escrow instructions guaranteeing the accuracy of his sales brochure, the admission by defendant that the brochure represented profits to be more than they actually were, expert testimony that defendant's records were misleading, plaintiff's assertion of reliance, and plaintiff's lack of experience in similar business (*182 Cal. App. 3d 806, 811)* .

[b] Single Material Misrepresentation as Sufficient

Friedberg v. Weissbuch (1955) 135 Cal. App. 2d 750, 287 P.2d 785 , was an action for damages for the alleged breach of a written lease and purchase agreement involving real property, together with furniture, fixtures, medical equipment, the goodwill of a medical practice, and the use of a trade name. The trial court rendered a judgment for defendants lessees and purchasers on the ground that the agreement was void because of fraud and misrepresentations on the part of plaintiffs concerning the value of the property, and the income produced therefrom, which induced defendants to enter into the agreement. In affirming the judgment, the court of appeal noted that a single material misrepresentation justifiably relied on is sufficient ground for rescission of a contract (*135 Cal. App. 2d 750, 754)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsContracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral Overview

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Volume 9 Chapters 90-99 DISMISSAL---to---EMINENT DOMAIN
CHAPTER 92 DURESS, MENACE, FRAUD, UNDUE INFLUENCE, AND MISTAKE
PART II. FORMS
B. Fraud

9-92 California Points & Authorities § 92.46

§ 92.46 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Actual Fraud [Civ. Code § 1572]--Expression of Opinion Not Honestly or Reasonably Entertained as Constituting Fraud

[1] FORM

[*Caption. See § 92.45.*]

DEFENDANT'S MOTION FOR A NEW TRIAL ON THE GROUND THAT THE ALLEGED MISREPRESENTATION WAS MERELY A STATEMENT OF OPINION SHOULD NOT BE GRANTED BECAUSE THE EVIDENCE WAS SUFFICIENT TO SHOW THAT DEFENDANT DID NOT _____ [HONESTLY *or* REASONABLY] BELIEVE THE OPINION.

A. New Trial Precluded Unless Court Convinced That Court or Jury Clearly Should Have Reached Different Result. [*See § 92.45, Paragraph A.*]

B. Rescission for Fraud. [*See § 92.45, Paragraph B.*]

C. Fraudulent Acts. [*See § 92.45, Paragraph C.*]

D. Single Material Misrepresentation as Sufficient. [*See § 92.45, Paragraph D.*]

E. Expression of Opinion Not Honestly Entertained as Constituting Fraud. An expression of an opinion which is not honestly believed or which cannot reasonably be believed constitutes fraud if the other elements of fraud are present (*Cooper v. Jevne (1976) 56 Cal. App. 3d 860, 866, 128 Cal. Rptr. 724* ; *Gillespie v. Ormsby (1954) 126 Cal. App. 2d 513, 527, 272 P.2d 949*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to an unsuccessful defendant's motion for a new trial, in an action to rescind a contract allegedly induced by fraud, when defendant has contended in the motion that there was no fraud because the alleged misrepresentation was merely a statement of opinion on which plaintiff was not justified in relying. The ground of opposition set forth is that the evidence is sufficient to show that the opinion was not honestly entertained by defendant or could not honestly have been believed by him or her.

In an appropriate case, this memorandum may be submitted in opposition to a motion for new trial supported by the points and authorities *set out in § 92.42*.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

These points and authorities may be modified to oppose a general demurrer [*Code Civ. Proc. §§ 430.10(e), 430.30(a)*] for failure to state a cause of action to a complaint for rescission of a contract allegedly induced by fraud.

With appropriate modifications, these points and authorities may also be used to oppose plaintiff's motion for new trial [*Code Civ. Proc. § 657(6)*] in an action for damages for breach of contract when defendant contends that the contract is voidable because induced by fraud on the part of plaintiff.

[b] Related Memoranda

For memoranda of points and authorities relating to motions for new trial generally, see Ch. 155, *Motions After Trial* in this set.

[3] Discussion of Authorities

[a] Expression of Opinion Not Honestly Entertained as Constituting Fraud

In ***Cooper v. Jevne*** *(1976) 56 Cal. App. 3d 860, 128 Cal. Rptr. 724* , plaintiffs, purchasers of condominiums in a residential project, brought an action to rescind or affirm with damages their contracts for purchase of the units on the ground that defendants engaged in a fraudulent conspiracy among themselves to conceal from purchasers within the project the fact that the project was dangerously, defectively, and illegally constructed. The trial court sustained demurrers, without leave to amend, to the complaint as against defendant sales agents, architects, and county building inspectors. On appeal, the court of appeal reversed as to the sales agents.

In their complaint, plaintiffs had alleged that the sales agents had fraudulently misrepresented that condominiums were

luxurious and had outstanding investment potential, whereas in fact the sales agents knew (but plaintiffs did not know) that the project was constructed in a substandard manner, and was hazardous to personal safety because of the possibility of structural failure of portions of the building and because of inadequate safeguards from fire. The court noted that the statements of the sales agents were clearly statements of opinion, which ordinarily cannot constitute actionable fraud or deceit (*56 Cal. App. 3d 860, 865)* . However, the court stated, if a person advances an opinion in which he does not honestly or cannot reasonably believe, then an action for affirmative fraud will lie if the remaining elements of the tort are present. In this case, if the sales agents knew of the alleged substantial structural defects in the condominiums, they could not honestly have held the opinion that these homes were luxurious or outstanding investments. Even if the agents stated their opinions sincerely, it was reckless and unreasonable to do so in light of their alleged knowledge. The court concluded that the complaint was sufficient to state a cause of action for misrepresentation by false opinion (*56 Cal. App. 3d 860, 866)* .

In ***Gillespie v. Ormsby*** *(1954) 126 Cal. App. 2d 513, 272 P.2d 949* , plaintiff brought an action for damages for breach of a contract relating to the drilling of an oil well, alleging that defendant had failed to contribute his agreed share of the drilling costs. Defendant cross complained for damages for fraud and deceit or, in the alternative, rescission of the contract and return of the sums paid thereunder to plaintiff. The trial court found that plaintiff had fraudulently misrepresented to defendant, at the time the contract was entered into, that the well could be commercially productive at its present depth and that even more oil could be produced if the well was drilled deeper. In fact, plaintiff knew that the well had already been drilled beyond the represented depths and that it was not productive and could not be productive at that depth or at any other depth. The trial court entered judgment for defendant granting rescission of the contract.

On appeal, the court of appeal affirmed. It rejected plaintiff's contention that the alleged misrepresentations constituted a statement of opinion on which fraud cannot be predicated. The court noted that while it is generally true that a statement of opinion cannot constitute fraud, this rule is subject to the exception that the opinion must in fact be honestly entertained. The court reviewed the evidence and concluded that the trial court was justified in finding that plaintiff had no honest belief in his representation and that it was fraudulent (*126 Cal. App. 2d 513, 527)* .

[4] Additional Authorities

[a] Expression of Opinion Not Honestly Entertained as Constituting Fraud

In *Ogier v. Pacific Oil & Gas Dev. Corp. (1955) 132 Cal. App. 2d 496* P.2d574, plaintiff, an elderly single woman, brought an action against defendants seeking to recover the purchase price paid for certain interests in real property on several grounds, including fraud. The trial court sustained demurrers to the complaint without leave to amend and dismissed the action. On appeal, the court of appeal reversed. In her fraud counts, plaintiff alleged that the individual defendant had represented to plaintiff that the lands were potential oil lands, that defendant corporation was going to drill for oil on them or engage some other company to do so, and that the lands were potentially valuable. Plaintiff further alleged that because of her faith and confidence in the individual defendant, she relied on these statements, all of which were untrue and known by him to be untrue or not warranted by the information he possessed. The court rejected defendants' argument that the alleged misrepresentations were expressions of opinion and therefore not actionable. The court noted that there are two exceptions to the rule that expressions of opinion are not actionable. The first is that an expression of opinion is actionable if the party expressing it does not honestly entertain that opinion (*132 Cal. App. 2d 496, 506)* . The second arises when the party expressing the opinion has superior knowledge or special information (*132 Cal. App. 2d 496, 506-507)* . The court held that plaintiff had pleaded facts sufficient to place plaintiff within both exceptions.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsContracts LawDefensesFraud &

MisrepresentationGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral Overview

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9-92 California Points & Authorities § 92.47

§ 92.47 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Actual Fraud [Civ. Code § 1572]--Expression of Opinion Asserted as Representation of Existing Fact as Actionable

[1] FORM

[*Caption. See § 92.45.*]

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON THE GROUND THAT THE MISREPRESENTATION WAS MERELY A STATEMENT OF OPINION SHOULD BE DENIED BECAUSE THE EVIDENCE WAS SUFFICIENT TO SHOW THAT THE OPINION WAS ASSERTED AS A REPRESENTATION OF AN EXISTING FACT.

A. New Trial Precluded Unless Court Convinced That Court or Jury Clearly Should Have Reached Different Result. [*See § 92.45, Paragraph A.*]

B. Rescission for Fraud. [*See § 92.45, Paragraph B.*]

C. Fraudulent Acts. [*See § 92.45, Paragraph C.*]

D. Single Material Misrepresentation as Sufficient. [*See § 92.45, Paragraph D.*]

E. Expression of Opinion Asserted as Representation of Existing Fact. A misrepresentation, concerning the subject matter of a transaction, that might ordinarily be only the expression of an opinion may constitute fraud if it is expressed in the form of a representation of existing fact that is material to the transaction and that has a tendency to induce one of the parties to consider and rely on the representation as a fact (*Gagne v. Bertran (1954) 43 Cal. 2d 481, 489, 275 P.2d 15* ; *Wilke v. Coinway, Inc. (1967) 257 Cal. App. 2d 126, 137, 64 Cal. Rptr. 845*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to an unsuccessful defendant's motion for a new trial, in an action to rescind a contract allegedly induced by fraud on the part of defendant, when defendant has asserted in the motion that the alleged misrepresentation was merely a statement of opinion. The ground of opposition presented is that the statement is actionable because it was expressed not in the form of an opinion but as a representation of existing fact.

In an appropriate case, this memorandum may be submitted in opposition to a motion for new trial supported by the points and authorities *set out in § 92.42*.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

These points and authorities may be modified to oppose a general demurrer [*Code Civ. Proc. §§ 430.10(e), 430.30(a)*] for failure to state a cause of action to a complaint for rescission of a contract allegedly induced by fraud.

With appropriate modifications, these points and authorities may also be used to oppose plaintiff's motion for new trial [*Code Civ. Proc. § 657(6)*], in an action for damages for breach of contract, when defendant contends that the contract is voidable because it was induced by fraud on the part of plaintiff.

[b] Related Memoranda

For memoranda of points and authorities relating to motions for new trial generally, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] Expression of Opinion Asserted as Representation of Existing Fact

In ***Gagne v. Bertran*** *(1954) 43 Cal. 2d 481, 275 P.2d 15* , plaintiff hired defendant to test the soil of a lot he was considering purchasing, in order to determine the amount of fill below the surface. In reliance on defendant's representation that there were only 12 to 16 inches of fill below the surface and that plaintiff need not worry about building on the lot, plaintiff purchased the lot. Later, when plaintiff began digging foundations for an apartment building to be constructed on the lot, he discovered that the lot contained three to six feet of fill in many places. This necessitated a deeper (and more expensive) foundation than defendant's report had led plaintiff to believe. Plaintiff brought an action against defendant for damages based, in part, on deceit. The trial court entered judgment for plaintiff.

On appeal, defendant contended, inter alia, that no cause of action for deceit had been established because his statement was not a misrepresentation of fact but only a statement of opinion. The Supreme Court rejected this contention, holding that defendant had not given his statement in the form of an opinion but as a representation of fact. His assertion, stated the Court, was not a casual expression of belief, but was a deliberate affirmation of the matters stated and was thus within *Civ. Code § 1710(2)* [*see* also *Civ. Code § 1572(1), (2)*], which requires only that he assert as a fact that which is not true (*43 Cal. 2d 481, 489)* . The Court held, however, that the trial court had used the incorrect measure of damages and, therefore, reversed the judgment.

Counsel should note that although *Gagne* involved a tort action for deceit under *Civ. Code §§ 1709, 1710*, the statutory definition of deceit contained in *Civ. Code § 1710*, which was construed by the Court in *Gagne*, is very similar to the definition of actual fraud contained in *Civ. Code § 1572*. Thus, the holding in that case appears equally applicable to an action to rescind a contract for fraud.

The factual and procedural background of ***Wilke v. Coinway, Inc.*** *(1967) 257 Cal. App. 2d 126, 64 Cal. Rptr. 845* , is *set forth in § 92.45[3][a]*. The court of appeal, in reversing a judgment for defendant, rejected defendant's contention that its representations were merely predictions of future income and, therefore, could not be the basis for a rescission of the contract for fraud. The court noted that when a representation concerning the subject matter of a transaction which might ordinarily be only the expression of an opinion is asserted as an existing fact which is material to the transaction and which has a reasonable tendency to induce one of the parties to consider and rely on the representation as a fact, the statement becomes an assertion of an existing fact within the meaning of the general rule regarding fraudulent misrepresentations (*257 Cal. App. 2d 126, 137)* . The court held that the representation that the coin-operated machines were a profitable part-time source of income was a positive misstatement of fact by defendant's agents, who admittedly had no experience or basis for such a representation, and that the misrepresentation was unquestionably material in view of the uncontroverted evidence that plaintiffs were interested in a source of supplemental income during their retirement and were induced to sign the contract on that basis (*257 Cal. App. 2d 126, 137-138)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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9-92 California Points & Authorities § 92.48

§ 92.48 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Actual Fraud [Civ. Code § 1572]--Reliance on Statement of Opinion Justified if Defendant Has Expert Knowledge

[1] FORM

[*Caption. See § 92.45.*]

DEFENDANT'S MOTION FOR NEW TRIAL ON THE GROUND THAT THE MISREPRESENTATION WAS MERELY A STATEMENT OF OPINION SHOULD BE DENIED BECAUSE THE EVIDENCE IS SUFFICIENT TO SHOW THAT PLAINTIFF WAS ENTITLED TO RELY ON THE REPRESENTATION IN THAT DEFENDANT PURPORTED TO HAVE EXPERT KNOWLEDGE CONCERNING THE MATTER.

A. New Trial Precluded Unless Court Convinced That Court or Jury Clearly Should Have Reached Different Result. [*See § 92.45, Paragraph A.*]

B. Rescission for Fraud. [*See § 92.45, Paragraph B.*]

C. Fraudulent Acts. [*See § 92.45, Paragraph C.*]

D. Single Material Misrepresentation as Sufficient. [*See § 92.45, Paragraph D.*]

E. Reliance on Statement of Opinion Justified if Defendant Has Expert Knowledge. A person may justifiably rely on a statement of opinion if the person expressing the opinion purports to have expert knowledge concerning the matter (*Gagne v. Bertran (1954) 43 Cal. 2d 481, 489, 275 P.2d 15* ; *Seeger v. Odell (1941) 18 Cal. 2d 409, 414, 115 P.2d 977* ; *Ogier v. Pacific Oil & Gas Dev. Corp. (1955) 132 Cal. App. 2d 496, 506-507, 282 P.2d 574*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to an unsuccessful defendant's motion for new trial, in an action to rescind a contract allegedly induced by fraud on the part of defendant, when defendant has asserted that the alleged misrepresentation was merely a statement of opinion. The ground of opposition set forth is that the evidence is sufficient to show that plaintiff was justified in relying on the statement because defendant purported to have expert knowledge concerning the matter.

In an appropriate case, this memorandum may be submitted in opposition to a motion for new trial supported by the points and authorities *set out in § 92.42*.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

These points and authorities may also be modified to oppose a general demurrer [*Code Civ. Proc. §§ 430.10(e), 430.30(a)*] for failure to state a cause of action to a complaint for recission of a contract allegedly induced by fraud.

With appropriate modifications, these points and authorities may also be used to oppose plaintiff's motion for new trial [*Code Civ. Proc. § 657(6)*] in an action for damages for breach of contract when defendant contends that the contract is voidable because it was induced by fraud on the part of plaintiff.

[b] Related Memoranda

For memoranda of points and authorities relating to motions for new trial generally, see Ch. 155, *Motions After Trial* in this set.

[3] Discussion of Authorities

[a] Reliance on Statement of Opinion Justified if Defendant Has Expert Knowledge

The facts and procedural background of ***Gagne v. Bertran*** *(1954) 43 Cal. 2d 481, 275 P.2d 15* , is *set forth in § 92.47[3][a]*. The Supreme Court held that even if defendant's statement was an opinion, plaintiffs justifiably relied thereon because defendant had held himself out as an expert, plaintiffs hired him to supply information concerning matters of which they were ignorant, and his unequivocal statement necessarily implied that he knew facts that justified his statement (*43 Cal. 2d 481, 489)* .

Seeger v. Odell *(1941) 18 Cal. 2d 409, 115 P.2d 977* , is discussed in *§ 92.42[3][a]*. In that case, the Supreme Court noted that a plaintiff may not rely on mere statements of opinion, unless the person expressing the opinion purports to

have expert knowledge concerning the matter or occupies a position of trust and confidence (*43 Cal. 2d 481)* .

Ogier v. Pacific Oil & Gas Dev. Corp. *(1955) 132 Cal. App. 2d 496, 282 P.2d 574* , is discussed in *§ 92.46[4][a]*. The court of appeal noted that an exception to the rule that expressions of opinion are not actionable as fraud arises when the party expressing the opinion has superior knowledge or special information (*43 Cal. 2d 481)* . The court held that plaintiff had pleaded facts sufficient to place her within the exception. It therefore reversed the judgment sustaining demurrers to the complaint.

Legal Topics:

For related research and practice materials, see the following legal topics:
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9-92 California Points & Authorities § 92.49

§ 92.49 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Actual Fraud [Civ. Code § 1572]--Misrepresentation of Law as Actionable if Confidential Relationship Exists

[1] FORM

[*Caption. See § 92.45.*]

DEFENDANT'S MOTION FOR A NEW TRIAL ON THE GROUND THAT THE MISREPRESENTATION WAS MERELY A CONCLUSION OF LAW SHOULD NOT BE GRANTED BECAUSE THE EVIDENCE IS SUFFICIENT TO SHOW THAT A CONFIDENTIAL RELATIONSHIP EXISTED BETWEEN THE PARTIES, SO THAT PLAINTIFF WAS ENTITLED TO RELY ON DEFENDANT'S REPRESENTATION OF LAW.

A. New Trial Precluded Unless Court Convinced That Court or Jury Clearly Should Have Reached Different Result. [*See § 92.45, Paragraph A.*]

B. Rescission for Fraud. [*See § 92.45, Paragraph B.*]

C. Fraudulent Acts. [*See § 92.45, Paragraph C.*]

D. Single Material Misrepresentation as Sufficient. [*See § 92.45, Paragraph D.*]

E. Misrepresentation of Law as Fraud. A misrepresentation of law may constitute fraud justifying rescission of a contract when the parties to the contract have a confidential or fiduciary relationship, particularly when one of the parties who has a superior means of information possesses a knowledge of the law and thereby gains an unconscionable advantage over another who is ignorant and uninformed (*Ramos v. Pacheco (1944) 64 Cal. App. 2d 304, 308, 148 P.2d 704* ; *Bank of America v. Sanchez (1934) 3 Cal. App. 2d 238, 242, 38 P.2d 787* .

[*Optional*] **F. Nature of a Confidential Relationship.** For a party's misrepresentation of law to constitute fraud, it is unnecessary that there exist a confidential or fiduciary relationship in the strict legal sense of those terms; the relationship may be moral, social, domestic, or personal (*Bank of America v. Sanchez (1934) 3 Cal. App. 2d 238, 243, 38 P.2d 787*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to an unsuccessful defendant's motion for a new trial, in an action to rescind a contract allegedly induced by fraud on the part of defendant, when defendant has asserted in the motion that the alleged misrepresentation was merely a legal conclusion on which plaintiff was not entitled to rely. The ground of opposition set out is that the evidence is sufficient to show that plaintiff was entitled to rely on the representation because a confidential relationship existed between the parties.

In an appropriate case, this memorandum may be submitted in opposition to a motion for new trial supported by the points and authorities *set out in § 92.42*.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

These points and authorities may be modified to oppose a general demurrer [*Code Civ. Proc. §§ 430.10(e), 430.30(a)*] for failure to state a cause of action to a complaint for rescission of a contract allegedly induced by fraud.

With appropriate modifications, these points and authorities may also be used to oppose plaintiff's motion for new trial [*Code Civ. Proc. § 657(6)*], in an action for damages for breach of contract, when defendant contends that the contract is voidable because it was induced by fraud on the part of plaintiff.

[b] Related Memoranda

For memoranda of points and authorities relating to motions for new trial generally, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] Misrepresentation of Law as Fraud

In ***Ramos v. Pacheco*** *(1944) 64 Cal. App. 2d 304, 148 P.2d 704* , plaintiff and defendant, an unmarried couple, lived together and operated a grocery store as partners pursuant to an agreement whereby all profits from the operation of the

store, in excess of living expenses, were to be invested in real property in joint tenancy. During this period, plaintiff's child was born. From the profits earned by the partnership, plaintiff and defendant purchased four parcels of improved realty. Because of defendant's violent treatment of plaintiff, plaintiff was forced to leave him. Thereafter, defendant undertook to induce plaintiff to enter into a contract, and to execute deeds conveying her one-half interest in the real properties to defendant, by representing to her that she was a common law wife who had no legal standing, that she had no right to anything, including the property, that by signing the contract he presented she would legitimize her child, that she could not claim the real properties because she held title to them under an assumed name, and that it was a crime to do so. Because of her eagerness to legitimize her child and her fear of defendant, plaintiff executed the contract and deeds. When plaintiff later learned that defendant's representations were false, she brought an action to rescind the contract, cancel the deeds, and recover her half interest in the profits of the grocery business. The trial court entered judgment for plaintiff.

On appeal, the court of appeal affirmed the judgment and rejected defendant's contention, inter alia, that the alleged misrepresentations concerned matters of law and were therefore not actionable. The court noted that where a confidential relationship exists between two parties, misrepresentations of law may constitute such a fraud as to enable parties to avoid contracts made between them, particularly when the oppressor has had superior means of information and thereby gains an unconscionable advantage over his victim who has not been in a situation to become informed. The court stated that this is especially so when the defrauded party is weakened by sickness and grief at the time advantage of her is taken (*64 Cal. App. 2d 304, 308)* .

In ***Bank of America v. Sanchez*** *(1934) 3 Cal. App. 2d 238, 38 P.2d 787* , plaintiff bank sued defendants, who were formerly husband and wife, to recover the deficiency on a note after sale under a deed of trust securing the note. The note was given to the bank on defendant husband's application for a loan. At the time the note was signed, defendants were living separately and apart and were shortly thereafter divorced. The trial court found that defendant wife had been induced to sign the note by false and fraudulent representations by plaintiff's officers that the wife's signature was necessary to make the loan valid because she was still legally married to defendant husband and that the wife would not be personally liable forthe indebtedness if she signed the note and trust deed. Accordingly, the court entered judgment reforming the note by striking defendant wife's name from it.

On appeal, plaintiff contended, inter alia, that the statements were misrepresentations of law and could not be the basis for fraud. The court of appeal affirmed the judgment and rejected this contention. The court noted that the general rule is that deception as to matters of law does not amount to fraud and will not furnish a ground for rescission of a contract. However, the court observed that exceptions to the general rule arise when the parties to the contract occupy confidential or fiduciary relations or when one who has a superior means of information possesses a knowledge of the law and thereby gains an unconscionable advantage over another who is ignorant and has not been in a situation to become informed (*3 Cal. App. 2d 238, 242)* . The exceptions are not limited to cases in which there exist confidential or fiduciary relations in the strict legal sense of those terms, but have been extended to every possible case in which a fiduciary relationship exists as a fact.

The court noted that the relationship need not be legal; it may be moral, social, domestic, or merely personal. To entitle one to relief on the ground of fraud, it is sufficient to show the existence of such friendly relations during a period of several years between the parties as would entitle the injured person to place confidence in the integrity and honesty of the other party to the contract and in the truth of whatever representations the latter made with regard to the transaction between them (*3 Cal. App. 2d 238, 243)* . The court then examined the evidence and concluded that although it did not establish a technical fiduciary relationship, it nevertheless did show a sufficiently confidential relationship to bring defendant wife within the above-noted exceptions and that she had therefore established actual fraud, as defined in *Civ. Code § 1572*, as a defense to the action on the note (*3 Cal. App. 2d 238, 243-244)* .

[b] Nature of a Confidential Relationship

Bank of America v. Sanchez *(1934) 3 Cal. App. 2d 238, 38 P.2d 787* , is discussed in *§ 92.49[3][a]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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9-92 California Points & Authorities § 92.50

§ 92.50 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Actual Fraud [Civ. Code § 1572]--Negligent Reliance on Intentional Misrepresentation as Not Barring Relief

[1] FORM

[*Caption. See § 92.45.*]

DEFENDANT'S MOTION FOR A NEW TRIAL ON THE GROUND THAT PLAINTIFF'S RELIANCE ON THE MISREPRESENTATION WAS NEGLIGENT AND THEREFORE NOT JUSTIFIABLE SHOULD NOT BE GRANTED BECAUSE THE EVIDENCE IS SUFFICIENT TO SHOW THAT THE MISREPRESENTATION WAS INTENTIONAL.

A. New Trial Precluded Unless Court Convinced That Court or Jury Clearly Should Have Reached Different Result. [*See § 92.45, Paragraph A.*]

B. Rescission for Fraud. [*See § 92.45, Paragraph B.*]

C. Fraudulent Acts. [*See § 92.45, Paragraph C.*]

D. Single Material Misrepresentation as Sufficient. [*See § 92.45, Paragraph D.*]

E. Negligent Reliance on Intentional Misrepresentation. Negligence on the part of plaintiff in failing to discover the falsity of a statement is no defense to an action to rescind a contract for fraud when the misrepresentation was intentional rather than negligent [*Seeger v. Odell (1941) 18 Cal. 2d 409, 414-415, 115 P.2d 977* ; *Rogers v. Bill & Vince's, Inc. (1962) 203 Cal. App. 2d 292, 296, 21 Cal. Rptr. 269*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to an unsuccessful defendant's motion for new trial in an action to rescind a contract allegedly induced by fraud on the part of defendant when defendant has asserted in the motion that plaintiff's reliance on the alleged misrepresentation was negligent and thus not justifiable. The ground of opposition presented is that plaintiff's negligence in failing to discover the falsity of the representation is no defense when the misrepresentation is intentional.

In an appropriate case, this memorandum may be submitted in opposition to a motion for a new trial supported by the points and authorities *set out in § 92.42*.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

These points and authorities may also be modified to oppose a general demurrer[*Code Civ. Proc. §§ 430.10(e), 430.30(a)*] for failure to state a cause of action to a complaint for rescission of a contract allegedly induced by fraud.

With appropriate modifications, these points and authorities may also be used by defendant to oppose plaintiff's motion for new trial [*Code Civ. Proc. § 657(6)*] in an action for damages for breach of contract when defendant contends that the contract is voidable because it was induced by fraud on the part of plaintiff.

[b] Related Memoranda

For memoranda of points and authorities relating to motions for new trial generally, see Ch. 155, *Motions After Trial* in this set.

[3] Discussion of Authorities

[a] Negligent Reliance on Intentional Misrepresentation

The factual and procedural background of ***Seeger v. Odell*** *(1941) 18 Cal. 2d 409, 115 P.2d 977* , is *set out in § 92.42[3][a]*. In that case, the Supreme Court noted that negligence on the part of the plaintiff in failing to discover the falsity of a statement is no defense when the misrepresentation is intentional rather than negligent, since, as a general rule, negligence of plaintiff is no defense to an intentional tort (*18 Cal. 2d 409, 414)* . The Court also held that the fact that an investigation would have revealed the falsity of the misrepresentation does not alone bar plaintiff's recovery and that he or she is not held to constructive notice of a public record which would reveal the true facts (*18 Cal. 2d 409, 414-415)* . A plaintiff is not held to the standard of precaution or minimum knowledge of a hypothetical reasonable person; exceptionally gullible or ignorant people have been permitted to recover from defendants who took advantage

of them in circumstances where persons of normal intelligence would not have been misled. The Court concluded that the allegations of the plaintiffs' complaint, if true, were sufficient to establish the right to relief on the basis of a fraudulent misrepresentation, since the complaint alleged that the misrepresentation was made by defendants through their agent with the knowledge that it was false and with the intention of inducing plaintiffs to act in reliance on it, and that plaintiffs did act in reliance on it. The fact that an examination of the record would have revealed to plaintiffs the falsity of the representation or that they may have been negligent in failing to make further investigations did not bar their right to relief (*18 Cal. 2d 409, 415)* .

The factual and procedural background of ***Rogers v. Bill & Vince's, Inc.*** *(1962) 203 Cal. App. 2d 292, 21 Cal. Rptr. 269* , is *set forth in § 92.45[3][b]*. In addressing the question of whether defendant was entitled to rely on plaintiff seller's representations as to the daily receipts of the restaurant business which was the subject of the contract, the court of appeal noted that the trial court had found that plaintiff's representations were false, and known by plaintiff to be false. The court held that in such a situation where the seller knowingly and intentionally makes false representations, he cannot contend that the buyer was negligent and therefore not in a position to rely on the representation (*18 Cal. 2d 409)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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9-92 California Points & Authorities § 92.51

§ 92.51 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Actual Fraud [Civ. Code § 1572]--No Duty to Investigate Positive Statements of Fact

[1] FORM

[*Caption. See § 92.45.*]

DEFENDANT'S MOTION FOR A NEW TRIAL ON THE GROUND THAT PLAINTIFF NEGLIGENTLY FAILED TO INVESTIGATE THE TRUTH OF THE REPRESENTATIONS AND THEREFORE COULD NOT JUSTIFIABLY RELY THEREON SHOULD NOT BE GRANTED BECAUSE THE EVIDENCE WAS SUFFICIENT TO ESTABLISH THAT THE REPRESENTATIONS WERE POSITIVE STATEMENTS OF FACT SO THAT PLAINTIFF, WHO WAS NOT AWARE OF ANY FACTS WHICH WOULD BRING THE STATEMENTS UNDER SUSPICION, HAD NO DUTY TO INVESTIGATE THE TRUTH OF SUCH STATEMENTS.

A. New Trial Precluded Unless Court Convinced That Court or Jury Clearly Should Have Reached Different Result. [*See § 92.45, Paragraph A.*]

B. Rescission for Fraud. [*See § 92.45, Paragraph B.*]

C. Fraudulent Acts. [*See § 92.45, Paragraph C.*]

D. Single Material Misrepresentation as Sufficient. [*See § 92.45, Paragraph D.*]

E. Availability of Means of Discovering Truth as Not Barring Relief. If no duty is imposed by law on a person to make inquiry concerning the truth of representations and if under the circumstances a prudent person would not be put on inquiry, the mere fact that means of knowledge are open to the party deceived does not preclude him or her from relief on the ground of fraud when he or she thereafter discovers the truth (*Lobdell v. Miller (1952) 114 Cal. App. 2d*

328, 338, 250 P.2d 357).

F. No Duty to Investigate Truth of Positive Statements of Fact. One who is induced to enter into a contract by positive representations of fact is under no duty to inquire as to the truth of the representations, unless he or she is made aware of facts which bring the representations under suspicion and which would induce a prudent person to make inquiry (*Chamberlain v. Wakefield (1949) 95 Cal. App. 2d 280, 288, 213 P.2d 62*).

[*Optional*] **G. No Duty to Investigate Representations Concerning Income or Profits.** When the representation concerns the volume of business, income, or profits of a business and the facts are peculiarly within the knowledge of the seller, the buyer is entitled to rely on such statements and is not bound to make an independent investigation (*Rogers v. Bill & Vince's, Inc. (1962) 203 Cal. App. 2d 292, 298, 21 Cal. Rptr. 269*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to defendant's motion for a new trial in an action to rescind a contract when defendant has asserted in the motion that plaintiff negligently failed to investigate the truth of the alleged misrepresentation and is therefore precluded from justifiably relying thereon. The ground of opposition presented is that plaintiff is under no duty to investigate the truth of positive statements of fact unless he or she is aware of facts which should bring the statements under suspicion.

In an appropriate case, this memorandum may be submitted in opposition to a motion for new trial supported by the points and authorities *set out in § 92.42*.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

These points and authorities may be modified to oppose a general demurrer [*Code Civ. Proc. §§ 430.10(e), 430.30(a)*] for failure to state a cause of action to a complaint for rescission of a contract allegedly induced by fraud.

With appropriate modifications, these points and authorities may also be used by a defendant to oppose plaintiff's motion for a new trial [*Code Civ. Proc. § 657(6)*] in an action for damages for breach of contract when defendant contends that the contract is voidable because it was induced by fraud on the part of plaintiff.

[b] Related Memoranda

For memoranda of points and authorities relating to motions for new trial generally, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] Availability of Means of Discovering Truth as Not Barring Relief

In ***Lobdell v. Miller*** *(1952) 114 Cal. App. 2d 328, 250 P.2d 357* , plaintiffs brought an action to rescind a contract for purchase of a hotel on the ground that they were induced to enter into the contract by fraudulent misrepresentations made by defendants. The trial court found, inter alia, that defendants had falsely and fraudulently represented that there existed a water spring, well, and pumping plant on the premises with adequate and sufficient water for all the needs of the hotel business. There was some evidence that plaintiffs had made some partial independent investigation of this and other alleged misrepresentations before purchasing the property. The trial court entered judgment for plaintiffs.

On appeal, the court of appeal affirmed. The court held, inter alia, that plaintiffs' numerous visits to the property prior to the purchase did not absolutely preclude reliance on false representations made by the seller. In so holding, the court noted that when no duty is imposed by law on a person to make inquiry, and when under the circumstances a prudent man would not be put on inquiry, the mere fact that means of knowledge are open to plaintiff and he has not availed himself of them does not debar him from relief when thereafter he makes actual discovery of the truth (*114 Cal. App. 2d 328, 338)* .

[b] No Duty to Investigate Truth of Positive Statements of Fact

In ***Chamberlain v. Wakefield*** *(1949) 95 Cal. App. 2d 280, 213 P.2d 62* , plaintiffs were lessees of a hotel and owners of the furniture therein. Plaintiffs entered into contract by which they assigned their interest in the lease and sold the furniture to defendants in exchange for which defendants made a cash down payment, transferred certain real property to plaintiffs, and executed a promissory note for the balance of the purchase price. Thereafter, when defendants refused to make any payments on the promissory note, plaintiffs brought an action to recover the amounts due. Defendants filed a cross complaint for rescission of the contract, or, in the alternative, for damages, on the ground that they were induced to enter into the contract by plaintiffs' false and fraudulent representations. The trial court found that plaintiffs had fraudulently misrepresented the amount of income derived from the hotel during the year preceding the sale, and entered judgment for defendants.

On appeal, plaintiffs asserted, inter alia, that defendants could not have relied on the alleged misrepresentations because one of defendants was a real estate broker familiar with buying, selling, and leasing property, and she had examined the premises and was in a position to know or ascertain the facts. The court of appeal rejected this contention and affirmed the judgment. The court noted that thetrial court had found that defendants had, in fact, relied on the misrepresentations and that this finding was supported by the evidence. The court observed that the evidence showed that plaintiffs made positive statements regarding the income and expenses of the hotel business. The court held that one who is induced to enter into a contract by positive representations of fact is under no duty to inquire as to the truth of the representations, unless he is made aware of facts which bring the representations under suspicion and which would induce a prudent man to make inquiry [quoting *Mirich v. Underwriters at Lloyd's of London (1944) 64 Cal. App. 2d 522, 531, 149 P.2d 19]* ; a person can act on the presumption that there exists no intention to defraud him (*95 Cal. App. 2d 280, 288)* . The court concluded that the circumstances here were not such that defendants were required to inquire as to the truth of plaintiffs' representations.

[c] No Duty to Investigate Representations Concerning Income or Profits

The factual and procedural background of ***Rogers v. Bill & Vince's, Inc.*** *(1962) 203 Cal. App. 2d 292, 21 Cal. Rptr. 269* , is discussed in *§ 92.45[3][b]*. In that case, the court of appeal concluded that defendant buyer was not put on inquiry and was not bound to make an independent investigation as to the gross volume of business being done at the restaurant which was the subject of the transaction. The court held that when the representation has to do with the volume of business, income, or profits, and the facts are peculiarly within the knowledge of the seller, the buyer is

entitled to rely on such statements and is not bound to make an independent investigation (*203 Cal. App. 2d 292, 298)* . The court noted that although there may be cases where the buyer has no right to rely on the seller's representations, such as when the statements are in the form of an opinion or estimate as to income or profits, or when an experienced buyer makes his own investigation and relies thereon, such was not the case here because plaintiff's statements were direct representations as to material facts and the buyer did not make an independent investigation on which it relied (*203 Cal. App. 2d 292, 298-299)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsContracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral Overview

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9-92 California Points & Authorities § 92.52

§ 92.52 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Actual Fraud [Civ. Code § 1572]--Investigation as Not Precluding Reliance on Representations Concerning Matters Beyond Scope of Investigation

[1] FORM

[*Caption. See § 92.45.*]

DEFENDANT'S MOTION FOR A NEW TRIAL ON THE GROUND THAT PLAINTIFF MADE AN INDEPENDENT INVESTIGATION OF THE FACTS AND THEREFORE COULD NOT JUSTIFIABLY RELY ON DEFENDANT'S REPRESENTATIONS SHOULD NOT BE GRANTED BECAUSE THE EVIDENCE IS SUFFICIENT TO SHOW THAT THE REPRESENTATIONS CONCERNED MATTERS TO WHICH PLAINTIFF'S INVESTIGATION DID NOT EXTEND.

A. New Trial Precluded Unless Court Convinced That Court or Jury Clearly Should Have Reached Different Result. [*See § 92.45, Paragraph A.*]

B. Rescission for Fraud. [*See § 92.45, Paragraph B.*]

C. Fraudulent Acts. [*See § 92.45, Paragraph C.*]

D. Investigation as Not Precluding Reliance on Representations Concerning Matters Beyond Scope of Investigation. A party who makes an investigation of the facts prior to entering into a transaction is not absolutely precluded from relying on false representations made by the other party. He or she may still be entitled to rely on representations concerning matters to which the investigation does not extend (*Lobdell v. Miller (1952) 114 Cal. App. 2d 328, 338, 250 P.2d 357*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to defendant's motion for a new trial in an action to rescind a contract when defendant has asserted in the motion that plaintiff made an independent investigation of the facts and is therefore precluded from justifiably relying on defendant's alleged misrepresentation. The ground of opposition presented is that plaintiff was not precluded from relying on the representations because they concerned matters to which plaintiff's investigation did not extend.

In an appropriate case, this memorandum may be submitted in opposition to a motion for new trial supported by the points and authorities *set out in § 92.42*.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

These points and authorities may also be modified to oppose a general demurrer[*Code Civ. Proc. §§ 430.10(e), 430.30(a)*] for failure to state a cause of action to a complaint for rescission of a contract allegedly induced by fraud.

With appropriate modifications, these points and authorities may also be used by a defendant to oppose plaintiff's motion for new trial [*Code Civ. Proc. § 657(6)*] in an action for damages for breach of contract when defendant contends that the contract is voidable because it was induced by fraud on the part of plaintiff.

[3] Discussion of Authorities

[a] Investigation as Not Precluding Reliance on Representations Concerning Matters Beyond Scope of Investigation

The factual and procedural background of ***Lobdell v. Miller*** *(1952) 114 Cal. App. 2d 328, 250 P.2d 357* , is *set forth in § 92.51[3][a]*. In that case, the court of appeal affirmed a judgment for plaintiffs in an action to rescind a contract on the ground of fraud. The court concluded that plaintiffs' numerous visits to the property and partial investigation of defendants' representations did not bar plaintiffs from relief. The court noted that when one conducts an investigation, he or she may still be entitled to rely on certain representations concerning conditions as to which the investigation does not extend (*114 Cal. App. 2d 328, 338)* . The court held that evidence in this case did not conclusively show that plaintiffs completely relied on their own investigation (*114 Cal. App. 2d 328, 339)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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9-92 California Points & Authorities § 92.53

§ 92.53 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Actual Fraud [Civ. Code § 1572]--Investigation as Not Precluding Reliance on Misrepresentation When Falsity Not Apparent From Investigation

[1] FORM

[*Caption. See § 92.45.*]

DEFENDANT'S MOTION FOR A NEW TRIAL ON THE GROUND THAT PLAINTIFF MADE AN INDEPENDENT INVESTIGATION OF THE FACTS AND THEREFORE COULD NOT JUSTIFIABLY RELY ON DEFENDANT'S REPRESENTATIONS SHOULD NOT BE GRANTED BECAUSE THE FALSITY OF THE REPRESENTATIONS WAS NOT APPARENT FROM PLAINTIFF'S INVESTIGATION.

A. New Trial Precluded Unless Court Convinced That Court or Jury Clearly Should Have Reached Different Result. [*See § 92.45, Paragraph A.*]

B. Rescission for Fraud. [*See § 92.45, Paragraph B.*]

C. Fraudulent Acts. [*See § 92.45, Paragraph C.*]

D. Investigation as Not Precluding Reliance on Misrepresentation When Falsity Not Apparent From Investigation. An independent investigation does not preclude reliance on a misrepresentation when the falsity of the statement is not apparent from the investigation (*Carroll v. Dungey (1963) 223 Cal. App. 2d 247, 255-256, 35 Cal. Rptr. 681*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to an unsuccessful defendant's motion for a new trial in an action to rescind a contract when defendant has asserted in the motion that plaintiff made an independent investigation of the facts and is therefore precluded from justifiably relying on defendant's alleged misrepresentation. The ground of opposition presented is that plaintiff was not precluded from relying on the representation because its falsity was not apparent from plaintiff's investigation.

In an appropriate case, this memorandum may be submitted in opposition to a motion for new trial supported by the points and authorities *set out in § 92.42*.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

These points and authorities may be modified to oppose a general demurrer [*Code Civ. Proc. §§ 430.10(e), 430.30(a)*] for failure to state a cause of action to a complaint for rescission of a contract for fraud.

With appropriate modifications, these points and authorities may also be used by a defendant to oppose plaintiff's motion for new trial [*Code Civ. Proc. § 657(6)*], in an action for damages for breach of contract, when defendant contends that the contract is voidable because it was induced by fraud on the part of plaintiff.

[b] Related Memoranda

For memoranda of points and authorities relating to motions for new trialgenerally, see Ch. 155, *Motions After Trial* in this set.

[3] Discussion of Authorities

[a] Investigation as Not Precluding Reliance on Misrepresentation When Falsity Not Apparent From Investigation

Carroll v. Dungey *(1963) 223 Cal. App. 2d 247, 35 Cal. Rptr. 681* , is discussed in *§ 92.42[3][d]*. In that case, the court of appeal held that an independent investigation does not preclude reliance when the falsity of the statement is not apparent from an inspection (*223 Cal. App. 2d 247, 255-256)* . The court concluded that plaintiffs were not precluded by their investigation from relying on defendants' representations because the document which would have indicated the falsity of the representations was not in existence at the time plaintiffs made their investigation.

Legal Topics:

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

Civil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsContracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral Overview

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9-92 California Points & Authorities § 92.54

§ 92.54 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Actual Fraud [Civ. Code § 1572]--Pecuniary Loss Not Required

[1] FORM

[*Caption. See § 92.45.*]

DEFENDANT'S MOTION FOR NEW TRIAL ON THE GROUND THAT PLAINTIFF HAS NOT BEEN DAMAGED BY THE ALLEGED FRAUD SHOULD NOT BE GRANTED BECAUSE PLAINTIFF IS NOT REQUIRED TO SHOW PECUNIARY LOSS AS LONG AS THE RECORD INDICATES SOME TYPE OF INJURY OR PREJUDICE RESULTING FROM THE FRAUD. THE RECORD SHOWS THAT PLAINTIFF HAS BEEN INJURED IN THAT _____ [*specify nature of resulting injury, e.g.*, PLAINTIFF HAS RECEIVED SOMETHING SUBSTANTIALLY DIFFERENT FROM THAT WHICH HE WAS LED TO EXPECT].

A. New Trial Precluded Unless Court Convinced That Court or Jury Clearly Should Have Reached Different Result. [*See § 92.45, Paragraph A.*]

B. Rescission for Fraud. [*See § 92.45, Paragraph B.*]

C. Fraudulent Acts. [*See § 92.45, Paragraph C.*]

D. Pecuniary Loss Not Required. In an action for rescission of a contract for fraud, plaintiff is not required to plead or prove specific pecuniary loss so long as the record indicates injury or prejudice resulting from the fraud (*Earl v. Saks & Co. (1951) 36 Cal. 2d 602, 611, 226 P.2d 340* ; *Santoro v. Carbone (1972) 22 Cal. App. 3d 721, 728-729, 99 Cal. Rptr. 488 , disapproved on another ground in Tenzer v. Superscope, Inc. (1985) 39 Cal. 3d 18, 30, 216 Cal. Rptr. 130, 702 P.2d 212*).

[*Optional*] **E. Rescission as Proper When Consideration Received Differs Substantially From That Which**

Plaintiff Was Led to Expect. A person fraudulently induced to enter into a contract may rescind the contract when he or she obtains something substantially different from that which he or she was led to expect, even though that which was obtained may be more valuable than that which he or she expected to get (*see Earl v. Saks & Co. (1951) 36 Cal. 2d 602, 611, 612, 226 P.2d 340*).

[*Optional*] **F. Placing Title in Joint Tenancy.** A party who is fraudulently induced to place title to property in joint tenancy is sufficiently damaged thereby so as to permit rescission of the transaction on the ground of fraud (*Santoro v. Carbone (1972) 22 Cal. App. 3d 721, 729, 99 Cal. Rptr. 488 , disapproved on another ground in Tenzer v. Superscope, Inc. (1985) 39 Cal. 3d 18, 30, 216 Cal. Rptr. 130, 702 P.2d 212*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to an unsuccessful defendant's motion for new trial in an action to rescind a contract allegedly induced by fraud on the part of defendant when defendant has asserted in the motion that plaintiff was not damaged thereby. The ground of opposition presented is that plaintiff need not show pecuniary loss as long as some type of injury or prejudice results from the fraud.

In an appropriate case, these points and authorities may be submitted in opposition to a motion for new trial supported by the points and authorities *set out in § 92.43*.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

These points and authorities may be modified to oppose a general demurrer[*Code Civ. Proc. §§ 430.10(e), 430.30(a)*] for failure to state a cause of action to a complaint for rescission of a contract allegedly induced by fraud.

With appropriate modifications, these points and authorities may also be used by a defendant to oppose plaintiff's motion for a new trial [*Code Civ. Proc. § 657(6)*] in an action for damages for breach of contract when defendant contends that the contract is voidable because it was induced by fraud on the part of plaintiff.

[c] Related Memoranda

For memoranda of points and authorities relating to motions for new trial generally, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] Pecuniary Loss Not Required

In ***Earl v. Saks & Co.*** *(1951) 36 Cal. 2d 602, 226 P.2d 340* , Barbee and Earl went to a fur salon operated by Saks. A representative of Saks showed them a mink coat and told them that its price was $5,000. Barbee told the Saks representative that he would like to buy the coat as a gift for Earl but that he would pay no more than $4,000 for it. Saks rejected repeated offers by Barbee to purchase the coat for $4,000. Unknown to Barbee, Earl then asked Saks to pretend to sell the coat to Barbee for $4,000 and stated that she would pay the difference between $4,000 and the price of the coat. Saks agreed to this. It told Barbee that it would sell the coat to him for $3,981.25 and made out a sales slip for this amount, which Barbee signed in the belief that it was the full price of the coat. Saks then delivered the coat to Barbee, who in turn gave it to Earl. The next day Earl returned the coat to the store to be monogrammed and paid the balance of the purchase price. Later that day, Barbee told Saks that he had revoked the gift to Earl and that he would pay Saks the agreed price of $3,981.25 only if it would deliver the coat to him and not to Earl. Thereafter, Earl demanded that Saks deliver the coat to her, but Saks refused and attempted to return her money to her but she refused to accept it. Earl then sued Saks for conversion of the coat. Saks answered and cross complained against both Earl and Barbee, alleging that it was willing to deliver the coat to either of them providing that it received the full price of $5,000 from either or both of them. Saks also brought a separate complaint against Barbee for goods sold and delivered. Barbee answered the complaint, alleging that he was induced to make both the purchase and the gift by fraudulent misrepresentations by both Saks and Earl that the full price of the coat was $3,981.25. Barbee attempted to rescind both transactions. The trial court entered judgment against Earl on her complaint for conversio and in favor of Saks on its complaint against Barbee for goods sold and delivered. On Saks' cross complaint, the trial court decreed that Earl was the owner of and entitled to possession of the coat. Barbee appealed from the judgment.

The Supreme Court reversed. In holding that Barbee had been fraudulently induced to enter into the contract for the purchase of the coat, the Court rejected Saks' contention that Barbee could not rescind the contract because he had not been injured thereby. The Court noted that the "no injury, no rescission" formula is not very helpful because, in a sense, anyone who is fraudulently induced to enter into a contract is injured in that his or her interest in making a free choice and in exercising his or her own best judgment in making decisions with respect to economic transactions is interfered with. The Court also rejected the implication of some California cases [*see, e.g., Spreckels v. Gorrill (1907) 152 Cal. 383, 388, 92 P. 1011]* that in every case in which rescission is sought for fraud there must be pecuniary loss (*36 Cal. 2d 602, 611)* .

The Court observed that a representee can rescind a contract when he or she obtains something substantially different from that which he or she was led to expect. Thus, for example, if one is induced to buy a certain lot of land by misrepresentation that it contains a vineyard, he or she need not keep it when he or she learns that it contains an apple orchard instead; even though the lot of land is the identical lot of land, and although the orchard may be more valuable than the vineyard which he expected to get, it is obviously unfair to require a person to keep what he or she did not bargain for and did not want. The Court concluded that the undisputed evidence describing the sale in this case put it within this class of cases. The coat bargained for between Barbee and Saks, in Barbee's belief, as known by Saks, was a coat fully paid for by Barbee which Saks knew was intended to be used as a gift. Saks, however, intended to and did deliver something substantially different, that is, a coat on which Barbee was credited with only a down payment and for which his intended donee had secretly agreed to pay in a substantial sum (*36 Cal. 2d 602, 612)* . The Court concluded that the contracts of purchase and gift were voidable and were properly rescinded (*36 Cal. 2d 602, 613)* .

In ***Santoro v. Carbone*** *(1972) 22 Cal. App. 3d 721, 99 Cal. Rptr. 488* , plaintiff sought to quiet title to real property conveyed by grant deed to plaintiff and defendant as joint tenants. Plaintiff alleged in the complaint that plaintiff had bought the property and caused title to be placed in the parties' names as joint tenants, in reliance on defendant's false representation that, if plaintiff did so, defendant would remarry him. One of defendant's purported affirmative defenses was that the complaint did not state facts sufficient to constitute a cause of action. After a trial without a jury, the court entered judgment decreeing that plaintiff was the owner of the property, quieting title in him, and enjoining defendant from asserting any claim to the property.

On appeal, defendant contended, inter alia, that there was no evidence to support the finding that plaintiff was damaged as a result of the fraud. The court of appeal noted that in an action to recover damages for fraud, plaintiff must allegeand prove the precise amount of his or her damages (*22 Cal. App. 3d 721, 728)* . However, the present action was not one to recover damages but was an equitable suit to quiet title, which is akin to an action for rescission on the ground of fraud. The court noted that in such an action, plaintiff need not plead or prove pecuniary loss so long as the record indicates injury or prejudice resulting from the fraud (*22 Cal. App. 3d 721, 729)* . The trial court found that plaintiff was damaged because he had been induced by defendant's fraud to place title to the property in joint tenancy, and the court of appeal concluded that there was substantial evidence to support the finding that plaintiff was damaged by defendant's fraud (*22 Cal. App. 3d 721, 729)* . The court reversed the trial court's decision on other grounds. Counsel should note that *Santoro v. Carbone (1972) 22 Cal. App. 3d 721, 99 Cal. Rptr. 488* , was disapproved on another ground in *Tenzer v. Superscope, Inc. (1985) 39 Cal. 3d 18, 30, 216 Cal. Rptr. 130, 702 P.2d 212* .

[b] Rescission as Proper When Consideration Received Differs Substantially From That Which Plaintiff Was Led to Expect

Earl v. Saks & Co. *(1951) 36 Cal. 2d 602, 226 P.2d 340* , is discussed in *§ 92.54[3][a]*.

[c] Placing Title in Joint Tenancy

The factual and procedural background of ***Santoro v. Carbone*** *(1972) 22 Cal. App. 3d 721, 99 Cal. Rptr. 488* , is discussed in *§ 92.54[3][a]*. In that case, the court of appeal held that plaintiff was sufficiently damaged by the alleged fraud to obtain rescission of the transaction because he had been induced to place title to property in joint tenancy with defendant. The court noted that placing property in joint tenancy was prejudicial to plaintiff because if he predeceased defendant, who was not his wife, she would acquire title to the property to the exclusion of plaintiff's heirs or devisees, regardless of their relationship to plaintiff. Plaintiff was also damaged because although he alone maintained the property and made all of the required payments, he could sell or encumber only a portion of it and hence, for all practical purposes, could not sell or encumber it at all. The court concluded that there was substantial evidence to support the trial court's finding that plaintiff was damaged by defendant's fraud (*22 Cal. App. 3d 721, 729)* .

Counsel should note that *Santoro v. Carbone (1972) 22 Cal. App. 3d 721, 99 Cal. Rptr. 488* , has been disapproved on another ground in *Tenzer v. Superscope, Inc. (1985) 39 Cal. 3d 18, 30, 216 Cal. Rptr. 130, 702 P.2d 212* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsContracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral Overview

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9-92 California Points & Authorities § 92.55

§ 92.55 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Actual Fraud [Civ. Code § 1572]--Suppression of True Facts Constituting Acts Fitted to Deceive [Civ. Code § 1572(5)]

[1] FORM

[*Caption. See § 92.45.*]

DEFENDANT'S MOTION FOR NEW TRIAL ON THE GROUND THAT HIS/HER/ITS ACTIONS DID NOT AMOUNT TO ACTUAL FRAUD SHOULD NOT BE GRANTED BECAUSE DEFENDANT'S KNOWLEDGE OF PLAINTIFF'S MISTAKE OF FACT AND SUPPRESSION OF THE TRUE FACTS CONSTITUTED ACTS FITTED TO DECEIVE WITHIN THE MEANING OF SUBDIVISION 5 OF SECTION 1572 OF THE CIVIL CODE.

A. New Trial Precluded unless Court Convinced That Court or Jury Clearly Should Have Reached Different Result. [*See § 92.45, Paragraph A.*]

B. Rescission for Fraud. [*See § 92.45, Paragraph B.*]

C. Fraudulent Acts. [*See § 92.45, Paragraph C.*]

D. Suppression of True Facts as Constituting Actual Fraud Within the Meaning of Subdivision 5 of *Section 1572 of the Civil Code*. When a party, having solicited the other party's bid and knowing that the other party is a "babe in the woods" regarding the subject matter of the potential contract, that a third party has represented to the other party that the potential contract is profitable, and that the bid price submitted by the other party will result in a substantial loss, fails to disclose the true facts to the other party, that party's activities are fitted to deceive within the meaning of Subdivision 5 of *Section 1572 of the Civil Code* (*Architects & Contractors Estimating Service, Inc. v. Smith (1985) 164 Cal. App. 3d 1001, 1008-1009, 211 Cal. Rptr. 45*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to an unsuccessfuldefendant's motion for new trial in an action to rescind a contract, when defendant asserted in the motion that his or her actions did not amount to fraud. The ground of opposition is that defendant's actions did constitute actual fraud in the form of acts fitted to deceive within the meaning of *Civ. Code § 1572(5).*

In an appropriate case, this memorandum may be submitted in opposition to a motion for new trial supported by the points and authorities *set out in §§ 92.99 -92.101*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated.

[i] Related Uses

These points and authorities may be modified to oppose a general demurrer [*Code Civ. Proc. §§ 430.10(e), 430.30(a)*] for failure to state a cause of action to a complaint for rescission of a contract allegedly induced by fraud.

With appropriate modifications, these points and authorities may be used by a defendant to oppose plaintiff's motion for new trial in an action for damages for breach of contract, when defendant contends that the contract is voidable because it was induced by fraud on the part of plaintiff.

With appropriate modifications, these points and authorities may also be used in an appellate brief to support the contention that the contract at issue is voidable on account of the other party's fraud in the inducement.

[3] Discussion of Authorities

[a] Suppression of True Facts as Constituting Actual Fraud Within the Meaning of Civ. Code § 1572(5)

Architects & Contractors Estimating Service, Inc. v. Smith *(1985) 164 Cal. App. 3d 1001, 211 Cal. Rptr. 45* , was an action by a contractor plaintiff against a subcontractor defendant for the difference between the $110,000 plaintiff had paid a third party to install a heating, ventilating, and air conditioning system (hereinafter HVAC) and the amount for which defendant had contracted to install the system ($86,500). Prior to defendant's learning of the job, plaintiff had discussed two bids for the HVAC submitted by other subcontractors: one for $86,500 and one for $94,000, both exclusive of a $16,000 chilled water system included in the plans. Berry, a third party who had worked up plaintiff's bid to the Navy on the primary contract and for whom two of defendant's sons worked, suggested to plaintiff that defendant might install the HVAC and told defendant that his $86,500 bid had a 20 percent profit margin. This contract represented defendants's first heavy commercial air conditioning work and his first contract in excess of $10,000. When

plaintiff and defendant met to sign the contract, defendant related to plaintiff that Berry had assured him there was a profit in his bid and told plaintiff he had not done much examination of the plans or specifications. After defendant had examined the job site and the plans, he told plaintiff that $86,500 would not cover the HVAC with the chilled water system. Plaintiff responded that he would get another contractor and sue defendant for the difference, which he did. The trial court awarded judgment for defendant based on his material mistake of fact. Plaintiff appealed.

In affirming, the court of appeal reiterated the rule that unilateral mistake of fact is a ground for relief only when the mistake is due to the fault of the other party or the other party knows or had reason to know of the mistake. The court found that substantial evidence supported the conclusion that defendant did not know the contract included the chilled water system but that plaintiff knew it did and knew that defendant didn't know. The court characterized defendant's mistake of fact as caused only by his ordinary negligence, which did not amount to a neglect of legal duty (*164 Cal. App. 3d 1001, 1007-1008)* . The court of appeal then considered the fraud ground not relied on by the trial court. After reviewing the facts, including the fact that plaintiff had used $90,000 for the HVAC, exclusive of the chilled water system, in framing its own bid to the Navy, and the fact that plaintiff knew or should have known defendant was "a babe in the woods of commercial air conditioning," the court concluded that plaintiff had set defendant up and that plaintiff's activities constituted actual fraud because they were "fitted to deceive" within the meaning of *Civ. Code § 1572(5)* (*164 Cal. App. 3d 1001, 1008-1009)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsContracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral Overview

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PART II. FORMS
B. Fraud

9-92 California Points & Authorities § 92.56

§ 92.56 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Constructive Fraud Based on Confidential Relationship [Civ. Code § 1573(1)]--Evidence of Confidential Relationship Sufficient to Give Rise to Presumption of Constructive Fraud

[1] FORM

[*Caption. See § 92.45.*]

DEFENDANT'S MOTION FOR NEW TRIAL ON THE BASIS OF THE INSUFFICIENCY OF THE EVIDENCE TO ESTABLISH CONSTRUCTIVE FRAUD SHOULD NOT BE GRANTED BECAUSE THE EVIDENCE OF THE PARTIES' RELATIONSHIP TO THE TRANSACTIONS INVOLVED AND THE CIRCUMSTANCES IN WHICH THEY TOOK PLACE GIVE RISE TO THE PRESUMPTION, WHICH DEFENDANT DID NOT REBUT, THAT CONSTRUCTIVE FRAUD OCCURRED.

A. New Trial Precluded Unless Court Convinced That Court or Jury Clearly Should Have Reached Different Result. [*See § 92.45, Paragraph A.*]

B. Rescission for Fraud. [*See § 92.45, Paragraph B.*]

C. Constructive Fraud Defined. Constructive fraud consists (1) of any breachof duty which, without actual fraudulent intent, gains an advantage to the person at fault, or anyone claiming under him or her, by misleading another to his or her prejudice, or the prejudice of anyone claiming under him or her, or (2) of any act or omission which the law specially declares to be fraudulent, without respect to actual fraud (*Civ. Code § 1573*).

D. Confidential Relationship Required. [*See § 92.44, Paragraph B.*]

E. Confidential Relationship Defined. [*See § 92.44, Paragraph C.*]

F. Duties in Confidential Relationship. When there exists a relationship of trust and confidence, it is the duty of the one in whom the confidence is placed to make full and complete disclosure of all material facts within his or her knowledge relating to the transaction in question, and any concealment of material facts or material misrepresentation will amount to fraud sufficient to entitle the injured party to relief (*Ford v. Shearson Lehman American Express, Inc. (1986) 180 Cal. App. 3d 1011, 1020, 225 Cal. Rptr. 895*).

G. Constructive Fraud Presumed. Constructive fraud is presumed from the relation of the parties to a transaction, or the circumstances under which it takes place. Constructive fraud often exists when parties to a contract have a special confidential or fiduciary relationship that affords the power and means to one party to take undue advantage of, or exercise undue influence over, another party (*Ford v. Shearson Lehman American Express, Inc. (1986) 180 Cal. App. 3d 1011, 1020, 225 Cal. Rptr. 895*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to defendant's motion for a new trial based on the alleged insufficiency of the evidence to support the finding of constructive fraud. The motion is based on the ground that the evidence is sufficient to give rise to a presumption of constructive fraud.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should specify the transactions sought to be rescinded and the relationship and circumstances of the parties at the time the transactions were entered into. Counsel may wish to contrast the relationship and facts at issue with those described in § 92.44.

Counsel may wish to include points and authorities from § 92.71 if undue influence is also involved.

[3] Discussion of Authorities

[a] Duties in Confidential Relationship

Plaintiff in ***Ford v. Shearson Lehman American Express, Inc.*** *(1986) 180 Cal. App. 3d 1011, 225 Cal. Rptr. 895* , was an heir to the Ford Motor Company fortune and sought counseling from one defendant while he was attending college. That defendant soon gave up his practice as a psychotherapist to become plaintiff's business advisor. Using the psychotherapist-patient relationship, defendant was able to secure plaintiff's complete trust and confidence for 14 years, during which time he supervised and controlled plaintiff's wealth and business affairs. That defendant enlisted the aid of another of his patients, an executive of defendant Shearson Lehman American Express, Inc., and others. They eventually gained control of nearly all of plaintiff's $25 million in assets and misappropriated, dissipated, or converted the bulk of those assets. Plaintiff filed suit against his former psychotherapist-business manager and the securities broker from Shearson Lehman for breach of fiduciary duty, conversion, and civil conspiracy to commit fraud, among

other things. The broker moved to compel arbitration, based on arbitration agreements plaintiff had signed with the broker's predecessors in interest. The trial court denied the motion to compel arbitration, and the broker appealed.

The court of appeal affirmed on theories of fraud and undue influence. The court first stated that the Federal Arbitration Act (*9 U.S.C. § 2*) applied to the case because the agreements involved securities transactions in interstate commerce (*180 Cal. App. 3d 1011, 1017-1018)* . The court stated that under federal law, an arbitration clause can be unenforceable if grounds for revocation exist at law or in equity for the revocation of any contract (*180 Cal. App. 3d 1011, 1024)* . The court reviewed the law of constructive fraud and undue influence as it relates to confidential relationships. The court described the duty of disclosue involved in a confidential relationship as requiring the one in whom the confidence is placed to make full and complete disclosure of all material facts within his or her knowledge relating to the transaction in question, and said that any concealment of material facts or material misrepresentation will amount to fraud sufficient to entitle the injured party to relief (*180 Cal. App. 3d 1011, 1020)* .

[b] Constructive Fraud Presumed

The facts and procedural background of ***Ford v. Shearson Lehman American Express, Inc.*** *(1986) 180 Cal. App. 3d 1011, 225 Cal. Rptr. 895* , are discussed in*§ 92.56[3][a]*. The court, after discussing the duties of disclosure in confidential relationships, went on to state that constructive fraud is presumed from the relation of the parties to a transaction, or the circumstances under which it takes place. Constructive fraud often exists when parties to a contract have a special confidential or fiduciary relationship that affords the power and means to one party to take undue advantage of, or exercise undue influence over, another party (*180 Cal. App. 3d 1011, 1020)* . The court then held that fraud permeated the agreements to the extent that the fraud vitiated the arbitration agreement, as well as the rest of the contract, under tort principles. Pursuant to contract principles, the agreement was void under *Civ. Code § 1550* because it was not voluntarily entered into, but was signed only because plaintiff was told to do so by those who controlled his business affairs and were the other defendants in the fraud action (*180 Cal. App. 3d 1011, 1027-1028)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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9-92 California Points & Authorities §§ 92.57-92.69

[Reserved]

§§ 92.57[Reserved]

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CHAPTER 92 DURESS, MENACE, FRAUD, UNDUE INFLUENCE, AND MISTAKE
PART II. FORMS
C. Undue Influence

9-92 California Points & Authorities § 92.70

§ 92.70 Supporting Plaintiff's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Undue Influence Based on Taking Advantage of Another's Mental Weakness, Necessities, or Distress [Civ. Code § 1575(2), (3)]--Insufficiency of Evidence to Support Finding of No Undue Influence

[1] FORM

[*Caption. See § 92.40.*]

PLAINTIFF'S MOTION FOR A NEW TRIAL SHOULD BE GRANTED BECAUSE THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE _____ [VERDICT *or* FINDING] OF NO UNDUE INFLUENCE [*if optional Paragraph G is included, add*: IN THAT THE EVIDENCE IS INSUFFICIENT TO REBUT THE PRESUMPTION OF UNDUE INFLUENCE ARISING FROM THE EXTREME AGE, INFIRMITY, AND SUSCEPTIBILITY TO IMPOSITION OF PLAINTIFF AND THE SLIGHT EVIDENCE OF CIRCUMSTANCES FROM WHICH COERCION BY DEFENDANT MAY BE INFERRED].

A. Motion for New Trial. [*See § 92.40, Paragraph A.*]

B. Rescission for Undue Influence. A party to a contract may rescind the contract if the consent of the party rescinding, or of any party jointly contracting with him, was obtained through undue influence exercised by or with the connivance of the party as to whom he rescinds, or of any party to the contract jointly interested with such party (*Civ. Code § 1689(b)(1)*)].

C. Undue Influence Defined. Undue influence consists: (1) in the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him; (2) in taking an unfair advantage of another's weakness of mind; or (3) in taking a grossly oppressive and unfair advantage of another's necessities or distress (*Civ. Code § 1575*). In essence, undue influence consists of the use of excessive pressure by a dominant person over a servient person resulting in the apparent will of

the servient person being in fact the will of the dominant person (*Keithley v. Civil Serv. Bd. (1970) 11 Cal. App. 3d 443, 451, 89 Cal. Rptr. 809* ; *Odorizzi v. Bloomfield School Dist. (1966) 246 Cal. App. 2d 123, 131, 54 Cal. Rptr. 533*).

D. Confidential Relationship Unnecessary Where Undue Influence Predicated on Unfair Advantage Taken of Mental Weakness. In an action to rescind a transaction for undue influence predicated on the defendant's taking unfairadvantage of plaintiff's weakness of mind, it is not necessary to show that a confidential relationship existed between the parties (*Odorizzi v. Bloomfield School Dist. (1966) 246 Cal. App. 2d 123, 130, 54 Cal. Rptr. 533* ; *Wells Fargo Bank v. Brady (1953) 116 Cal. App. 2d 381, 398, 254 P.2d 71*).

E. Weakness of Mind Defined. The weakness of mind which provides sufficient grounds to rescind a contract for undue influence need not be long lasting nor wholly incapacitating, but may be merely a lack of full vigor due to age, physical condition, emotional anguish, or a combination of such factors (*Odorizzi v. Bloomfield School Dist. (1966) 246 Cal. App. 2d 123, 131, 54 Cal. Rptr. 533*).

F. Elements Characteristic of Overpersuasion. The overpersuasion which provides grounds for rescission of a contract for undue influence is generally accompanied by the following characteristic elements which, when simultaneously present in a significant number, characterize the persuasion as excessive: (1) discussion of the transaction at an unusual or inappropriate time, (2) consummation of the transaction in an unusual place, (3) insistent demand that the business be finished at once, (4) extreme emphasis on untoward consequences of delay, (5) the use of multiple persuaders by the dominant side against a single servient party, (6) absence of third-party advisers to the servient party, (7) statements that there is no time to consult financial advisers or attorneys (*Keithley v. Civil Serv. Bd. (1970) 11 Cal. App. 3d 443, 452, 89 Cal. Rptr. 809* ; *Odorizzi v. Bloomfield School Dist. (1966) 246 Cal. App. 2d 123, 133, 54 Cal. Rptr. 533*).

[*Optional*] **G. Old Age and Infirmity of Grantor as Raising Presumption of Undue Influence.** The susceptibility to imposition, extreme age, and infirmity of a contracting party, together with slight evidence of circumstances from which it may be inferred that the transaction was the product of coercion, will suffice to shift the burden of proof and require the other party to show affirmatively that the transaction was fair and free from undue influence (*see* *O'Neil v. Spillane (1975) 45 Cal. App. 3d 147, 155, 119 Cal. Rptr. 245*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of an unsuccessful plaintiff's motion for a new trial in an action to rescind a contract when plaintiff's consent thereto was obtained through defendant's exercise of undue influence. The ground of the motion is the insufficiency of the evidence to support the verdict or decision. Optional Paragraph G may be included when the evidence is insufficient to overcome the presumption of undue influence arising

from the susceptibility to imposition, extreme age, and infirmity of plaintiff and slight evidence that the transaction was the result of coercion by defendant.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[i] Related Use

With appropriate modifications, these points and authorities may be used to support defendant's motion for a new trial [*see Code Civ. Proc. § 657(6)*] in an action for damages for breach of contract when defendant asserts that the contract is voidable because defendant's consent thereto was obtained through the exercise of undue influence by plaintiff.

[b] Related Memoranda

For memoranda of points and authorities relating to motions for new trial generally, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] Undue Influence Defined

The factual and procedural background of ***Keithley v. Civil Serv. Bd.*** *(1970) 11 Cal. App. 3d 443, 89 Cal. Rptr. 809* , is discussed in *§ 92.21[3][a]*. In that case, real party in interest, a police officer, resigned from his position after being charged with rape and thereafter brought an action to compel his reinstatement, alleging that his resignation had been coerced. The evidence at the hearing before the civil service board showed that prior to resigning, the officer had been called to police headquarters on three successive days, had been kept waiting for long periods of time, had been interrogated by a member of the homicide squad, and, on the third day, had been ordered to appear before the deputy chief of police, who, although already advised that the criminal charges against the officer had been dropped, proceeded to read statements to him regarding the charges and asked the officer what he was going to do, emphasizing simultaneously that the charges should not be made public, and suggesting that the officer was guilty of unofficer-like conduct. The officer was not given any time to consider what to do and was repeatedly asked what he intended to do about the situation. There was also evidence that at the time he signed his resignation, the officer was emotionally upset and that he was physically fatigued because he had not slept for 24 hours.

In reversing the trial court's judgment, which granted the city's petition for a writ of mandate to set aside the civil service board's decision reinstating the officer, the court of appeal held that there was substantial evidence in the record that the officer's resignation was the result of undue influence. The court noted that, in essence, undue influence consists of the use of excessive pressure by a dominent person over a servient person resulting in the apparent will of the servient person being in fact the will of the dominant person. Undue susceptiblity to such overpersuasive influence may be the product of physical or emotional exhaustion or anguish which results in one's inability to act with unencumbered volition (*11 Cal. App. 3d 443, 451)* . The court observed that overpersuasion is generally accompanied by certain characteristic elements which, when simultaneously present in a significant number, characterize the persuasion as excessive. The court then listed the seven elements set forth in Paragraph F. The court reviewed the evidence and held that the facts reasonably lent themselves to the inference that excessive pressure was used to persuade the officer, who was vulnerable to such pressure, by the deputy chief, a dominant person, so as to overcome the officer's will without convincing his judgment. The court concluded that there was substantial evidence of undue influence and accordingly the civil service board was entitled to conclude therefrom that the officer's resignation was coerced (*11 Cal. App. 3d 443, 452)* .

The factual and procedural background of ***Odorizzi v. Bloomfield School Dist.*** *(1966) 246 Cal. App. 2d 123, 54 Cal. Rptr. 533* , is discussed in *§ 92.20[3][a]*. In that case, the court of appeal held that the complaint did set out a claim that plaintiff's consent to the transaction had been obtained through the use of undue influence. The court noted that the type

of undue influence involved here is a shorthand legal phrase used to describe persuasion which tends to be coercive in nature and which overcomes the will without convincing the judgment. The hallmark of such persuasion is high pressure which works on mental, moral, or emotional weakness to such an extent that it approaches the boundaries of coercion. The court observed that while most reported cases of undue influence involve persons who bear a confidential relationship to one another, a confidential or authoritative relationship between the parties need not be present when the undue influence involves unfair advantage taken of another's weakness or distress (*246 Cal. App. 2d 123, 130)* . In essence, the court stated, undue influence involves the use of excessive pressure to persuade one vulnerable to such pressure, that is, the application of pressure by a dominant subject to a servient object. In combination, the elements of undue susceptibility in the servient person and excessive pressure by the dominating person make the latter's influence undue, because it results in the apparent will of the servient person being in fact the will of the dominant person (*246 Cal. App. 2d 123, 131)* .

The court held that undue susceptibility may consist of total weakness of mind which leaves a person entirely without understanding, or a lesser weakness which destroys the capacity of a person to make a contract even though he or she is not totally incapacitated, or a still lesser weakness which provides grounds to rescind a contract for undue influence. This lesser weakness of mind need not be long lasting nor wholly incapacitating, but may be merely a lack of full vigor due to age, physical condition, emotional anguish, or a combination of such factors. The court held that plaintiff had pleaded such weakness of mind, since it is possible for exhaustion and emotional turmoil to wholly incapacitate a person from exercising his judgment (*246 Cal. App. 2d 123, 131)* .

The court then noted that the second aspect of undue influence involves an application of excessive strength by a dominant subject against a servient object (*246 Cal. App. 2d 123, 132)* . Such overpersuasion, the court stated, is generally accompanied by certain characteristics which tend to create a pattern. The court then listed the seven elements set forth in Paragraph F. The court stated that if a number of these elements are simultaneously present, the persuasion may be characterized as excessive (*246 Cal. App. 2d 123, 133)* . The court observed that under the allegations of plaintiff's complaint, the school board representatives had undertaken to achieve their objective by overpersuasion and imposition to secure plaintiff's signature, but not his consent, to the resignation through a high pressure carrot-and-stick technique. The court concluded that the complaint stated a cause of action for rescission of a transaction to which plaintiff's consent had been obtained through undue influence. Accordingly, it reversed the judgment of dismissal (*246 Cal. App. 2d 123, 135)* .

[b] Confidential Relationship Unnecessary Where Undue Influence Predicated on Unfair Advantage Taken of Mental Weakness

Odorizzi v. Bloomfield School Dist. *(1966) 246 Cal. App. 2d 123, 54 Cal. Rptr. 533* , is discussed in *§ 92.70[3][a]*.

In ***Wells Fargo Bank v. Brady*** *(1953) 116 Cal. App. 2d 381, 254 P.2d 71* , decedent, an elderly widow who was in poor health, had had a substantial amount of money on deposit with four banks. Shortly before her death, decedent, accompanied by defendants, who were decedent's niece and the niece's daughter, went to all four banks and transferred the amounts deposited therein from decedent's individual name into the names of herself and defendants as joint tenants. When decedent died, plaintiff was appointed administrator of her estate and brought an action to recover the amounts transferred, alleging, in part, that undue influence was exerted on decedent by defendants. The trial court entered judgment against defendants.

On appeal, defendant argued, inter alia, that the evidence was insufficient to support the trial court's finding of undue influence because plaintiff had neither pleaded nor proved that a confidential relationship existed between decedent and herself. In affirming the judgment, the court of appeal held that the existence ofa confidential relationship was not a necessary element in this case because there was ample evidence in the record to support the finding of undue influence based alone on decedent's weakness of mind on the day the funds were transferred (*116 Cal. App. 2d 381, 398-399)* .

[c] Weakness of Mind Defined

Odorizzi v. Bloomfield School Dist. *(1966) 246 Cal. App. 2d 123, 54 Cal. Rptr. 533* , is discussed in *§ 92.70[3][a]*.

[d] Elements Characteristic of Overpersuasion

Keithley v. Civil Serv. Bd. *(1970) 11 Cal. App. 3d 443, 89 Cal. Rptr. 809* , and ***Odorizzi v. Bloomfield School Dist.*** *(1966) 246 Cal. App. 2d 123, 54 Cal. Rptr. 533* , are discussed in *§ 92.70[3][a]*.

[e] Old Age and Infirmity of Grantor as Raising Presumption of Undue Influence

The factual and procedural background of ***O'Neil v. Spillane*** *(1975) 45 Cal. App. 3d 147, 119 Cal. Rptr. 245* , is discussed in *§ 92.71[4][a]*. In that case, the court of appeal held that the trial court's finding of undue influence was sustainable not only on the ground that defendants had breached a confidential relationship existing between them and plaintiff, but also on the ground that defendants had taken an unfair advantage of respondent's weakness of mind, within the meaning of *Civ. Code § 1575(2)* (*45 Cal. App. 3d 147, 153, 154)* .

The court rejected defendants' contention that in order to prove undue influence, plaintiff had the burden of showing that her mind was overpowered and her volition was borne down by defendants at the time the deed was made, noting that the rule proposed by defendants was applicable only to will contest cases where the testamentary capacity and free will of a testator are questioned. The court stated that the law makes a clear distinction between the proof of the existence of undue influence necessary to set aside a will and that which is required to cancel a deed of gift or conveyance inter vivos. The court held that although no presumption of undue influence is indulged in a will contest unless confidential relations are first established, with respect to inter vivos gifts or conveyances, the susceptibility to imposition, extreme age, and infirmity of the grantor, together with slight evidence of circumstances from which it may be inferred that the instrument was the product of coercion, will suffice to shift the burden of proof and require the beneficiary to show affirmatively that the transaction was fair and free from influence (*45 Cal. App. 3d 147, 155)* .

The court then observed that in the present case, it was established that plaintiff was susceptible to imposition because of her age and mental infirmity and the evidence in the record gave rise to an inference that the transaction complained of was not the product of plaintiff's free volition. Thus, under these circumstances, the burden of proof shifted to defendants, and it was incumbent on them to overcome the presumption of undue influence. The court stated that although defendants had produced evidence to show that the deed in question had been signed by plaintiff on her own volition after defendant's attorney had explained to her the difference between a will and a deed, this evidence was contradicted by plaintiff's evidence, and the resolution of the resulting conflict of evidence was the exclusive province of the trier of fact (*45 Cal. App. 3d 147, 155-156)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsContracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral Overview

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9-92 California Points & Authorities § 92.71

§ 92.71 Supporting Plaintiff's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Undue Influence Based on Misuse of Confidential Relationship [Civ. Code § 1575(1)]--Evidence Insufficient to Rebut Presumption of Undue Influence Arising From Advantage Gained by Fiduciary in Transaction With Beneficiary [*see* Prob. Code § 16004(c); former Civ. Code § 2235]

[1] FORM

[*Caption. See § 92.40.*]

PLAINTIFF'S MOTION FOR A NEW TRIAL SHOULD BE GRANTED BECAUSE THE EVIDENCE IS INSUFFICIENT TO REBUT THE PRESUMPTION OF UNDUE INFLUENCE ARISING FROM DEFENDANT'S OBTAINING AN ADVANTAGE IN THE TRANSACTION WITH PLAINTIFF, WITH WHOM DEFENDANT HAD A CONFIDENTIAL RELATIONSHIP.

A. Motion for New Trial. [*See § 92.40, Paragraph A.*]

B. Rescission for Undue Influence. [*See § 92.70, Paragraph B.*]

C. Definition of Undue Influence Based on Misuse of Confidential Relationship. Undue influence consists of the use by one in whom a confidence is reposed by another, or by one who holds a real or apparent authority over another, of such confidence or authority for the purpose of obtaining an unfair advantage over the other (*Civ. Code § 1575(1)*).

D. Confidential Relationship Defined. [*See § 92.44, Paragraph C.*]

E. Weakness of Mind Not Necessary. Weakness of mind of the person imposed on is not a necessary element of undue influence in a case which arises out of a breach of a confidential relationship (*Krug v. Meeham (1952) 109 Cal. App. 2d 274, 279, 240 P.2d 732*).

F. Presumption of Undue Influence. A transaction between the trustee and a beneficiary that occurs during the existence of the trust or while the trustee's influence with the beneficiary remains, and by which the trustee obtains anadvantage from the beneficiary, is presumed to be a violation of the trustee's fiduciary duties. This presumption is a presumption affecting the burden of proof (*Prob. Code § 16004(c)*); *see Rebmann v. Major (1970) 5 Cal. App. 3d 684, 688, 85 Cal. Rptr. 399* (attorney-client); *Krug v. Meeham (1952) 109 Cal. App. 2d 274, 279, 240 P.2d 732* (unmarried cohabitants)).

G. Advantage Raising Presumption of Undue Influence Defined. A fiduciary obtains an advantage which raises the presumption of undue influence provided by former Section 2235 of the Civil Code (*see Prob. Code § 16004(c)* when he or she enters into a transaction with a beneficiary whereby the fiduciary's position is improved, or he or she obtains a favorable opportunity, or where he or she otherwise gains, benefits, or profits; it need not be shown that the advantage obtained was unfair, unjust, or inequitable (*Bradner v. Vasquez (1954) 43 Cal. 2d 147, 152, 272 P.2d 11*).

[*Optional*] **H. Presumption of Undue Influence Applicable to Attorney-Client Relationship.** Because of the strict fiduciary and confidential nature of the attorney-client relationship, the presumption of former Section 2235 of the Civil Code that any transaction between a trustee and his or her beneficiary by which the trustee obtains any advantage is entered into under undue influence applies to the relationship of attorney and client (*Bradner v. Vasquez (1954) 43 Cal. 2d 147, 151, 272 P.2d 11* ; *Hicks v. Clayton (1977) 67 Cal. App. 3d 251, 262, 136 Cal. Rptr. 512*).

[*Optional*] **I. Confidential Relationship Presumed Between Husband and Wife.** Each spouse is required to act with respect to the other spouse in the management and control of the community property in accordance with the general rules governing fiduciary relationships that control the actions of persons having relationships of personal confidence as specified in Section 721 (of the Family Code), until their community property has been divided by the parties or by a court. This duty includes the obligation to make full disclosure to the other spouse of all material facts and information regarding the existence, characterization, and valuation of all assets in which the community has or may have an interest and debts for which the community is or may be liable, and to provide equal access to all information, records, and books that pertain to the value and character of those assets and debts on request (*Fam. Code § 1100(e)*; *see, e.g., Estate of Cover (1922) 188 Cal. 133, 143, 204 P. 583*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of an unsuccessful plaintiff's motion for a new trial in an action to rescind a contract when plaintiff's consent thereto was obtained through defendant's exercise of undue influence. The ground of the motion is the insufficiency of the evidence to overcome the presumption of undue influence arising from (1) the existence of a confidential relationship between plaintiff and defendant and (2) the advantage obtained by defendant from the transaction with plaintiff.

When appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

Most of the decisional authority used in this form was decided under former Civ. Code § 2235, which was repealed as of July 1, 1987, and replaced by *Prob. Code § 16004(c)* (Paragraph F). This change is discussed in *§ 92.04*. As cases apply *Prob. Code § 16004(c)* to particular relationships, they will be added to the appropriate form, until then, the cases decided under the former Civ. Code § 2235 are retained but should be reviewed and used with caution until the effect of the presumption of *Prob. Code § 16004(c)* on relationships other than trustee-beneficiary is fully clarified. 1992 and 1993 legislation, effective January 1, 1994, specifies the extent to which the spousal relationship is invested with the same rights, duties, and standards of care as the trustee-beneficiary relationship [*see* Paragraph I].

[i] Related Use

With appropriate modifications, these points and authorities may be used to support defendant's motion for a new trial [*Code Civ. Proc. § 657(6)*] in an action for damages for breach of contract when defendant asserts that the contract is voidable because defendant's consent thereto was obtained through the exercise of undue influence by plaintiff.

[b] Opposing Points and Authorities

The points and authorities *set out in §§ 92.72* and *92.73* may be used in an appropriate case to oppose a motion for new trial supported by this memorandum.

[c] Related Memoranda

For memoranda of points and authorities relating to motions for new trial generally, see Ch. 155, *Motions After Trial* in this set.

[3] Discussion of Authorities

[a] Weakness of Mind Not Necessary

Krug v. Meeham *(1952) 109 Cal. App. 2d 274, 240 P.2d 732* , was an action by plaintiff decedent's administrator, to set aside conveyances of realty. In his complaint, plaintiff alleged that decedent had purchased certain parcels of real property with his own money and placed title to them in the names of decedent and defendant in joint tenancy; that at the time of the purchases decedent and defendant, although not married, lived and resided together as husband and wife; that decedent reposed great trust and confidence in defendant and in her judgment and advice; that decedent consulted with defendant concerning his business affairs and followed her advice and instructions in managing them; and that by reason of the relationship between decedent and defendant and by taking advantage of the trust and confidence reposed in her by him, and by the exercise of undue influence over decedent, defendant acquired an influence over decedent's mind whereby his free will was overborne and her own substituted for it, and thus she was enabled to and did induce decedent to make the purchases and to name herself as joint tenant in the deeds. The trial court sustained defendant's demurrer to the complaint and dismissed the action.

On appeal, defendant argued in support of the judgment, inter alia, that the complaint was insufficient because it failed to allege that decedent was weak of mind. In reversing the judgment, the court of appeal rejected this argument, holding that weakness of mind of the person imposed on is not a necessary element of undue influence in a case which arises out of a breach of a confidential relationship (*109 Cal. App. 2d 274, 279)* .

[b] Presumption of Undue Influence

Prob. Code § 16004(c) became operative July 1, 1991. As yet, few cases have emerged to specify whether, as

specified by former Civ. Code § 2219, every person who voluntarily assumes a relationship of personal confidence with another is deemed a trustee, and thus bound by the same rights, duties, and standards of care that apply to trustee-beneficiary relationships [*compare Prob. Code § 16004(c) and* former Civ. Code § 2235, set forth *below*]. The cases used in Paragraph F were decided under the former Civil Code provisions and are illustrative of the types of relationships to which the former presumption was applied [*see Prob. Code § 15003(b), (c)* (intent of 1986 repeals and enactments as not to alter rules applied by courts to fiduciary and confidential relationships)].

Former Civil Code § 2235 provided that all transactions between a trustee and his or her beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he or she obtains any advantage from his or her beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence.

In ***Rebmann v. Major*** *(1970) 5 Cal. App. 3d 684, 85 Cal. Rptr. 399* , plaintiff held title to certain real property with his wife in joint tenancy. Defendant was an attorney who was next-door neighbor to plaintiff and his wife. Plaintiff's wife was godmother to both defendant's children. Defendant's husband was a surgeon. Shortly after defendant's husband discovered that plaintiff's wife had cancer and performed surgery on her, plaintiff's wife told defendant that she wanted her interest in the real property to go to defendant's children. Defendant testified that she told plaintiff's wife that the joint tenancy could be severed by executing deeds to the children and suggested that another attorney should handle the transfer. Plaintiff's wife requested, however, that defendant prepare the deeds. Defendant did so, and plaintiff's wife executed them in defendant's presence and gave them to defendant for safekeeping. Defendant did not record the deeds until the day before plaintiff's wife's death, four years later. During that period, defendant kept the existence of the deeds a secret from her children, her husband, and plaintiff. Thereafter, plaintiff brought an action to quiet title to the property. The trial court found that the deeds were induced by the undue influence of defendant and entered judgment for plaintiff.

The factual and procedural background of ***Krug v. Meeham*** *(1952) 109 Cal. App. 2d 274, 240 P.2d 732* , is discussed in *§ 92.71[3][a]*. In that case, the court of appeal reversed a judgment of dismissal entered after the trial court had sustained a demurrer to the complaint. The court held that the allegations of the complaint sufficiently alleged the ultimate fact that the conveyances were procured by the undue influence of defendant. The court noted that where a confidential relation exists between the parties, and the one in whom confidence is reposed actively participates in a transaction whereby he or she obtains a gift from, or advantage over, the other, a presumption of undue influence arises and casts on the party who has gained the gift or advantage the burden of rebutting it and showing fairness and good faith (*109 Cal. App. 2d 274, 278-279)* . The court then observed that the facts alleged in this case showed (1) that a relation of trust and confidence existed between decedent and defendant, and (2) that defendant actively participated in securing the conveyances whereby, without consideration, she received a joint tenancy interest in the properties (*109 Cal. App. 2d 274, 279)* .

On appeal, defendant attacked the trial court's finding of undue influence as not supported by the evidence. In particular, defendant contended that the trial court's determination that the statutory presumption of undue influence [*see* former Civ. Code § 2235] was not dispelled was erroneous. Defendant's contention was based on the premise that this presumption is only one which affects the burden of producing evidence, so that once defendant testified to the relevant circumstances, the presumption was dispelled and the trial judge was in error in finding on the basis of that presumption. In affirming the judgment, the court of appeal rejected this contention. The court held that the presumption of undue influence set forth in former Civ. Code § 2235 is designed to implement the public policy in favorof the security of those who entrust themselves or their property to the administration of others and thus is a presumption affecting the burden of proof under *Evid. Code § 605* (defining presumptions affecting burden of proof). The court noted that the effect of the presumption was to impose on defendant the burden of proof as to the nonexistence of the presumed undue influence and that it was for the trial judge to determine whether the evidence offered by appellants showed, by a preponderance of the evidence, that there was no undue influence (*109 Cal. App. 2d 274)* .

[c] Advantage Raising Presumption of Undue Influence Defined

Civ. Code §§ 2219 and *2235* were repealed as of July 1, 1987. There is no counterpart for former Civ. Code § 2219. The presumption of *Civ. Code § 2235* is now set forth in *Prob. Code § 16004(c)* [*see* Paragraph F].

In ***Bradner v. Vasquez*** *(1954) 43 Cal. 2d 147, 272 P.2d 11* , plaintiff entered into a contract with defendants by which plaintiff agreed to handle all business affairs for defendants in connection with the lease of certain real property owned by defendants for the drilling of oil wells. The contract also provided for plaintiff to prepare income tax returns and provide investment advice. In return for these services, defendants agreed to pay plaintiff a percentage of the income received by them from the oil company which was leasing the land. At the time the contract was executed, plaintiff was defendants' attorney. The contract provided that it would terminate on plaintiff's death. Several years after the contract was executed, defendants discharged plaintiff from his employment and notified him that they would make no further payments to him under the contract. Plaintiff then brought an action against defendants for money allegedly due under the contract. The trial court found that the contract was procured by undue influence and entered judgment for defendants.

On appeal, the Supreme Court affirmed. The Court first noted that under former Civ. Code § 2235, all transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration and under undue influence, and that under former Civ. Code § 2219, everyone who voluntarily assumes a relation of personal confidence with another is deemed a trustee. The Court observed that former Civ. Code § 2235 applies to contractual dealings between attorney and client because it is recognized that this relationship is one of a strict fiduciary and confidential nature. To bring the presumptions of insufficient consideration and undue influence into operation, the Court stated, it is necessary to show that a confidential relationship existed and that this relationship was used by the fiduciary to gain an advantage (*43 Cal. 2d 147, 151)* .

The Court then rejected plaintiff's contention that the advantage gained by the fiduciary must be unfair before the presumptions of former Civ. Code § 2235 may be properly applied to the case. The Court noted that while certain cases apparently did require an unfair advantage [*see, e.g.,* *Patterson v. Davis (1953) 121 Cal. App. 2d 152, 159, 262 P.2d 601* ; *Donovan v. Security-First Nat'l Bank (1945) 67 Cal. App. 2d 845, 853-854, 155 P.2d 856]* , numerous other cases discussing virtually all types of fiduciary and confidential relationships properly required only an advantage [*see, e.g.,* *Weil v. Weil (1951) 37 Cal. 2d 770, 788, 236 P.2d 159* ; *Johnson v. Clark (1936) 7 Cal. 2d 529, 534, 61 P.2d 767* ; *Plxweve Aircraft Co. v. Greenwood (1943) 61 Cal. App. 2d 21, 24, 141 P.2d 933]* , and these latter cases were in accord with the language of former Civ. Code § 2235 (*43 Cal. 2d 147, 151-152)* . The Court held that when a fiduciary enters into a transaction with a beneficiary whereby the fiduciary's position is improved, or he obtains a favorable opportunity, or where he otherwise gains, benefits, or profits, it may fairly be said that an advantage has been obtained. To declare that the advantage obtained must be unfair, unjust, or inequitable before the presumptions arise would result in the imposition of a condition which is not required by former Civ. Code § 2235 (*43 Cal. 2d 147, 152)* .

The Court held that there was evidence in the record from which the trial court could reasonably have concluded that plaintiff had obtained an advantage from defendants by the contract at the time it was made, and that the presumptions of undue influence and insufficient consideration specified in *Civ. Code § 2235* were thus present in the case (*43 Cal. 2d 147, 152-153)* . The presumption of undue influence was evidence and sufficient to sustain the judgment even though there was direct evidence contrary to the presumption. The Court noted that although plaintiff presented some evidence tending to show that there was no undue influence, this evidence did not overcome the presumption of undue influence as a matter of law. Since the trial court resolved the conflicting evidence by finding that there was undue influence, and since the finding was supported by the evidence, the Court would not disturb the finding on appeal (*43 Cal. 2d 147, 153-154)* .

[d] Presumption of Undue Influence Applicable to Attorney-Client Relationship

Civ. Code § 2235 was repealed as of July 1, 1987. The presumption of *Civ. Code § 2235* is now set forth in ***Prob. Code § 16004(c)*** [*see* Paragraph F].

Bradner v. Vasquez *(1954) 43 Cal. 2d 147, 272 P.2d 11* , is discussed in *§ 92.71[3][c]*.

In ***Hicks v. Clayton*** *(1977) 67 Cal. App. 3d 251, 136 Cal. Rptr. 512* , plaintiffs brought an action to rescind a contract by which they agreed to sell certain real property to defendant and his wife. At the time the contract was entered into and for several years before then, defendant had been plaintiffs' attorney. Plaintiffs hadborrowed money from several different parties to finance the purchase of the land and the construction of a house thereon. These debts were secured by deeds of trust on the property. The holder of one of these trust deeds brought an action for foreclosure. Defendant represented plaintiffs in negotiations to settle this lawsuit. When these negotiations failed, defendant became interested in buying the property himself. The parties entered into a contract by which plaintiffs agreed to convey the property to defendant and his wife. Plaintiffs were to remain responsible for the debts secured by trust deeds other than the one which was the subject of the foreclosure suit. Defendant agreed to give his own personal note, secured by a deed of trust, to the holder of the latter trust deed and to obtain plaintiffs' release from their obligations thereunder. Defendant also agreed to reimburse plaintiffs for their payments on the debts secured by the other trust deeds and to give plaintiffs his personal unsecured promissory note for the total amount of these debts. Finally, he agreed to transfer to plaintiffs stock in a corporation, which he also represented and of which he was a substantial shareholder. Defendant failed to inform plaintiffs of financial and legal difficulties facing the corporation, although he had access to such information. Defendant did not suggest to plaintiffs that they obtain independent legal advice concerning the transaction, nor did plaintiffs obtain such advice. After taking possession of the property, defendant failed to perform virtually all of the terms of the contract. The corporation went into bankruptcy shortly afte the contract was entered into, and the stock became worthless. The trial court denied plaintiffs equitable relief from the contract (that is, restitution and rescission) and awarded them only a money judgment for damages for breach of contract, concluding that defendant had breached no duty to plaintiffs arising out of the attorney-client relationship.

On appeal, plaintiff contended that the finding of no breach of duty was not supported by the evidence, and also that the trial court had erred in not making any findings concerning the adequacy of the legal remedy. Addressing itself to the issue of breach of duty, the court of appeal first observed that the undisputed evidence showed that defendant was acting as plaintiffs' attorney at the time the contract was entered into. The court noted that former Civ. Code § 2235 provides that all transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence, and that this code section applies to the relationship of attorney and client. Thus, the court held, where the attorney-client relationship exists, the rebuttable presumption of fraud or undue influence arises where the attorney profits from his dealing with the client, and this presumption can only be overcome by clear and satisfactory evidence that the transaction between the attorney and the client was fair and equitable and that the client was fully informed as to all matters relative to the transaction (*67 Cal. App. 3d 251, 262)* . The court then examined the uncontroverted facts of the case and concluded that the contract in question was patently and grossly unfair to the client and that the presumptions of former Civ. Code § 2235 stood unrebutted (*67 Cal. App. 3d 251, 262-263)* . The court also held that the remedy of damages awarded to plaintiffs was not adequate under the circumstances of this case and remanded the case to the trial court for further proceedings to fashion a proper equitable remedy (*67 Cal. App. 3d 251, 264-266)* .

[e] Confidential Relationship Presumed Between Husband and Wife

Generally, in transactions between themselves, a husband and his wife are subject to the general rules governing fiduciary relationships which control the actions of persons occupying confidential relations with each other. This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither may take any unfair advantage of the other. This confidential relationship is a fiduciary relationship subject to the same rights and

duties of nonmarital business partners, as provided in *Corp. Code §§ 16403, 16404,* and *16503,* including, but not limited to, the following [*Fam. Code § 721(b)*]:

- Providing each spouse access at all times to any books kept regarding a transaction for the purposes of inspection and copying [*see Corp. Code § 16403(b)*];

- Rendering upon request, true and full information of all things affecting any transaction which concerns the community property (except that nothing in *Fam. Code § 721* is intended to impose a duty for either spouse to keep detailed books and records of community property transactions); and

- Accounting to the spouse, and holding as a trustee, any benefit or profit derived from any transaction by one spouse without the consent of the other spouse which concerns the community property [*see Corp. Code § 16404(b)(1)*].

This fiduciary relationship rule is expressly subject to exceptions in the following provisions of the Probate Code [*Fam. Code § 721(b)*]:

- *Prob. Code §§ 143, 144,* and *146,* concerning waivers of rights of inheritance.

- *Prob. Code § 16040,* concerning the trustee's standard of care in administering a trust.

- *Prob. Code § 16047,* concerning a trustee's duties under the Uniform Prudent Investor Act.

It is the intent of the legislature that *Fam. Code § 721* provides that thefiduciary relationship between spouses includes all of the same rights and duties in the management of community property as the rights and duties of unmarried business partners managing partnership property, as provided in *Corp. Code §§ 16403, 16404,* and *16503,* and to abrogate the ruling in *In re Marriage of Duffy (2001) 91 Cal. App. 4th 923, 111 Cal. Rptr. 2d 160* , to the extent that it is in conflict with that intent [Stats. 2002, ch. 310, § 2].

In ***Estate of Cover*** *(1922) 188 Cal. 133, 204 P. 583* , decedent's widow applied for and was granted letters of administration to administer the estate of her deceased husband. Thereafter, decedent's son filed a petition to revoke the widow's letters of administration and to substitute himself as administrator of the estate, alleging that under the terms of a marriage settlement agreement entered into between the deceased and his widow, the latter ceased to be an heir of the deceased and expressly waived all interest whatsoever in his estate. Under the terms of the agreement, the widow received about $14,000 from the property of the deceased. The estate was worth about $200,000. In her answer, the widow admitted signing the agreement and alleged, inter alia, that the agreement was the result of undue influence exerted on her by the deceased and others. The trial court, sitting in probate, entered judgment denying the petition.

On appeal, the Supreme Court affirmed. The Court held that the evidence supported the finding of undue influence. The Court first noted that confidential and fiduciary relations are synonymous, and may be said to exist whenever trust and confidence is reposed by one person in the integrity and fidelity of another. Confidential relations are presumed to exist between husband and wife. Thus, the Court stated, the husband, if he obtains an advantage over his wife in his dealings with her, must stand unimpeached of any abuse of the confidence presumptively reposed in him by the wife and resulting from the marital relation, and, failing in this, he must bear the burden of showing that the transaction was fair and just and fully understood by the party from whom the advantage was obtained (*188 Cal. 133, 143)* .

The Court observed that it is the rule in California that transactions between husband and wife are subject to the general rule which controls the actions of persons occupying confidential relations with each other, as provided in former Civ. Code § 2235, which means, when applied to the relation of husband and wife, that in every transaction between them by which the superior party obtains a possible benefit, equity raises a presumption against its validity and casts on that

party the burden of proving affirmatively its compliance with equitable requisites and of thereby overcoming the presumption (*188 Cal. 133, 143-144)* . The Court held that the finding that the agreement was conceived and consummated in presumptive undue influence was sufficiently sustained by uncontradicted evidence in the record which showed that the widow executed the agreement in ignorance of her rights and without independent advice as to its meaning and effect, that she thereby released her expectancy to a substantial portion of a $200,000 estate in return for a consideration obviously inadequate, and that the agreement was drafted at the direction of the deceased and executed by the widow at his instigation, without any disclosure by him to her of the value and character of his estate or of the rights which she was called on to surrender by the agreement (*188 Cal. 133, 145)* .

[4] Additional Authorities

[a] Presumption of Undue Influence

In *Ford v. Shearson Lehman American Express, Inc. (1986) 180 Cal. App. 3d 1011, 225 Cal. Rptr. 895* , the court of appeal discussed the presumption as applicable both to constructive fraud and to undue influence. The court stated that constructive fraud is presumed from the relation of the parties to a transaction, or the circumstances under which it takes place. Constructive fraud often exists when parties to a contract have a special confidential or fiduciary relationship that affords the power and means to one party to take undue advantage of, or exercise undue influence over, the other party, and under such circumstances undue influence will also be inferred or presumed (*180 Cal. App. 3d 1011, 1020)* (quoting *Main v. Merrill Lynch, Pierce, Fenner & Sminth, Inc. (1977) 67 Cal. App. 3d 19, 31-33, 136 Cal. Rptr. 378*).

In *O'Neil v. Spillane (1975) 45 Cal. App. 3d 147, 119 Cal. Rptr. 245* , plaintiff sought to rescind a deed conveying real property owned by her to defendants, who were husband and wife, and herself in joint tenancy. Plaintiff, an elderly and lonely woman, and defendants had been close friends for many years. When plaintiff's sister, her only living relative, died, plaintiff went through considerable emotional strain. Thereafter, she became increasingly dependent on defendants and placed trust and confidence in them in conducting her affairs. Defendants suggested to plaintiff that she should find an attorney to draft her will so that she might, on her passing, reward some of those who had helped her during her lifetime. One of defendants enlisted the services of a friend, who was an attorney, to prepare a will leaving the property in question to defendants. The attorney, accompanied by her husband and one of defendants, went to plaintiff's home and after an interview, convinced plaintiff to sign not only the will but a deed giving defendants a two-thirds interest in the property in joint tenancy. Plaintiff signed the deed apparently believing that she had given nothing away and that the purpose was merely to avoid probate. Some time later, plaintiff discovered that defendants were actual owners of two-thirds of the property and requested an immediate reconveyance of the property. When defendants refused to comply, she brought an action to rescind the deed. The trial court found that defendants had procured the deed by means of undue influence and entered judgment for plaintiff.

On appeal, defendants sought reversal primarily on the ground that the evidencewas insufficient to support the trial court's finding of undue influence. In affirming the judgment insofar as it ordered reconveyance of the property, the court of appeal rejected this contention, holding that the record sustained the finding of undue influence both on the basis that defendants breached the confidential relationship existing between the parties and that they took an unfair advantage of plaintiff's weakness of mind. In addressing the issue of breach of confidential relationship, the court noted that while the mere fact that a relationship is friendly and intimate does not necessarily amount to a confidential relationship, nevertheless, such a relationship may be said to exist whenever trust and confidence is reposed by one person in the integrity and fidelity of another (*45 Cal. App. 3d 147, 153)* . The court held that the evidence in this case and reasonable inferences drawn therefrom amply supported the existence of a confidential relationship between defendants and plaintiff (*45 Cal. App. 3d 147, 153)* . The court also noted that it was clear that due to defendants' activity the deed in dispute was prepared, executed, and recorded, and that the transaction resulted in a detriment to plaintiff who was thereby deprived of her primary asset providing her security and livelihood and yielded a substantial benefit to defendants. In this type of situation, the court stated, a presumption arises that the advantage obtained by the grantee was by reason of undue influence exerted on the grantor. This presumption was, by itself, sufficient to support

the finding of undue influence (*45 Cal. App. 3d 147, 153-154)* .

In *Ortiz v. Avila (1963) 222 Cal. App. 2d 786, 35 Cal. Rptr. 522* , plaintiff brought an action to recover money paid by him to defendants. Plaintiff, a person of subnormal intelligence, had gone to live with defendants, who had known plaintiff for many years, and who had promised to take care of plaintiff for the rest of his life and to give him a decent funeral when he died. Plaintiff alleged that he had reposed great trust and confidence in defendants, that he had delivered his paychecks to them, and that defendants had agreed to act as his agents, representing that they would open and maintain a bank account in his name into which these paychecks would be deposited in his name. Plaintiff further alleged that the representations were false and fraudulent and that defendants had appropriated the money delivered to them to their own use. Defendants' answer denied the confidential relationship, the agreement, the representations, and any misappropriation of money, alleging that all earnings of either plaintiff or defendants were to be placed in a common fund for the common support and welfare of plaintiff and defendants and that the funds were so used. The trial court entered judgment for defendants.

On appeal, plaintiff contended, inter alia, that the trial court had erroneously refused to make findings on the issue of whether a confidential relationship existed and that such refusal was prejudicial to plaintiff. The court of appeal agreed and reversed the judgment. The court noted the statutory presumption of *Civ. Code § 2235*, which provides that any transaction entered into between a trustee and his beneficiary by which the trustee obtains any advantage is entered into without sufficient consideration and under undue influence, and observed that when a fiduciary enters into a transaction with a beneficiary by which the fiduciary's position is improved, or he obtains a favorable opportunity, or where he otherwise gains, benefits, or profits, it may fairly be said that an advantage has been obtained. To declare that the advantage obtained must be shown to be unfair, unjust, or inequitable before the presumptions arise would result in the imposition of a condition which is not required by *Civ. Code § 2235* [quoting *Bradner v. Vasquez (1954) 43 Cal. 2d 147, 152, 272 P.2d 11* , discussed in *§ 92.71[3][c]*] (*222 Cal. App. 2d 786, 791)* . The court held that under the evidence of this case, there was no doubt that plaintiff was a person of subnormal intelligence and that a fiduciary relationship existed between plaintiff and defendants. It was also clear that the arrangement by which plaintiff delivered almost his entire paycheck to defendants placed them in a position to gain an advantage (*222 Cal. App. 2d 786, 791-792)* . Thus, the court stated, the burden was on defendants to prove that no unfair advantage had been taken of plaintiff; however, because the trial court failed to make special findings on the issue of confidential relationship, it was impossible to tell whether the trial court, in weighing the evidence, had considered the presumption of *Civ. Code § 2235* and determined that it had been overcome, or had just disregarded it (*222 Cal. App. 2d 786, 792)* .

In *Bank of America v. Cox (1957) 153 Cal. App. 2d 651, 314 P.2d 993* , plaintiff, as guardian of the estate of an incompetent person, brought an action to recover on promissory notes executed by defendant to the ward, defendant's mother. In his answer, defendant alleged that his mother had executed a release from these notes shortly before she was adjudged incompetent. The record showed that the mother was 82 years old, that her vision was impaired to the point where she was unable to read, that she lacked mental vigor, that defendant, her son, had handled all her business affairs for 10 years, and that she had the fullest confidence in him. The trial court entered judgment for plaintiff.

On appeal, the parties argued the case on the theory that the trial court found the release to have been procured by undue influence. The court of appeal affirmed, holding that although the record did not show that the trial court had in fact decided the case on a theory of undue influence, the evidence did in fact support such a theory. The court noted that the evidence here was ample to sustain a finding of confidential relationship between defendant and his mother. The court then stated that where, as here, the party in whom the trust is reposed obtained an advantage, it is presumed that the transaction was the result of undue influence (*153 Cal. App. 2d 651, 652)* . Defendant's evidence created at most a conflict and there was ample support in the record for the view that defendant had failed to sustain his burden of showing that his mother freely and voluntarily executed the release (*153 Cal. App. 2d 651, 652-653)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsContracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral Overview

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Volume 9 Chapters 90-99 DISMISSAL---to---EMINENT DOMAIN
CHAPTER 92 DURESS, MENACE, FRAUD, UNDUE INFLUENCE, AND MISTAKE
PART II. FORMS
C. Undue Influence

9-92 California Points & Authorities § 92.72

§ 92.72 Opposing Plaintiff's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Breach of Fiduciary Duty or Undue Influence Based on Misuse of Confidential Relationship [Civ. Code § 1575(1); Prob. Code § 16004(c)]--Presumption of Breach of Fiduciary Duty Not Applicable to Contract Relating to Hiring or Compensation of Fiduciary [former Civ. Code § 2235; Prob. Code § 16004(c)]

[1] FORM

[*Caption. See § 92.45.*]

PLAINTIFF'S MOTION FOR NEW TRIAL SHOULD NOT BE GRANTED BECAUSE THE CONTRACT IN QUESTION RELATED TO THE _____ [HIRING *or* COMPENSATION] OF DEFENDANT. THE PRESUMPTION OF _____ [*if parties are the trustee and beneficiary of an express trust:* VIOLATION OF FIDUCIARY DUTIES ESTABLISHED BY PROBATE CODE SECTION 16004(c) *or, if parties are fiduciaries other than the trustee and beneficiary of an express trust:* UNDUE INFLUENCE AND/OR INSUFFICIENT CONSIDERATION] THEREFORE IS NOT APPLICABLE, AND THE EVIDENCE WAS OTHERWISE SUFFICIENT TO SUSTAIN THE _____ [VERDICT *or* DECISION].

A. New Trial Precluded Unless Court Convinced That Court or Jury Clearly Should Have Reached Different Result. [*See § 92.45, Paragraph A.*]

[*If parties to case are the trustee and beneficiary of an express trust, use the following:*]

B. Presumption of Violation of Trustee's Fiduciary Duties Is Not Applicable to Contract Relating to Hiring or Compensation of Fiduciary. The presumption that a transaction between the trustee and a beneficiary that occurs during the existence of the trust or while the trustee's influence with the beneficiary remains, and by which the trustee obtains an advantage from the beneficiary, is presumed to be a violation of the trustee's fiduciary duties, does not apply to the provisions of an agreement between a trustee and a beneficiary relating to the hiring or compensation of the

trustee (*Prob. Code § 16004(c)*).

[*Or, if parties to case are fiduciaries other than the trustee and beneficiary of an express trust, use the following after reading the Cautionary Note in the Comment:*]

B. Presumption of Undue Influence and/or Insufficient Consideration Is Not Applicable to Contract Relating to Hiring or Compensation of Fiduciary. Neither the presumptions of insufficient consideration and undue influence established under former Civil Code Section 2235 and case law, which remains applicable to the facts of this case (*Probate Code Section 15003(b)*), nor the presumption of violation of fiduciary duties under current *Probate Code Section 16004(c)*, apply to the provisions of any agreement between a trustee and beneficiary relating to the hiring or compensation of the trustee (*Walton v. Broglio (1975) 52 Cal. App. 3d 400, 403-404, 125 Cal. Rptr. 123* ; *see* former Civ. Code § 2235; *Prob. Code § 16004(c)*; *see also Prob. Code § 15003(c)*).

[*CONTINUE:*]

[*Optional*] **C. Presumption of Undue Influence Not Applicable to Agreement Between Attorney and Client Relating to Fees.** The presumption that any transaction between an attorney and his client by which the attorney gains any advantage from his or her client is obtained by undue influence does not apply to any agreement relating to fees, even when there is a pre-existing attorney-client relationship (*Walton v. Broglio (1975) 52 Cal. App. 3d 400, 403-404, 125 Cal. Rptr. 123* ; *see* former Civ. Code 2235; *Prob. Code § 16004(c)*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a plaintiff's motion for a new trial in an action to rescind a contract entered into between a "trustee" and a "beneficiary" during the existence of the trust and by which the trustee obtains an advantage from the beneficiary. Ordinarily, such a transaction is presumed to be a violation of the trustee's fiduciary duties [*Prob. Code § 16004(c)*; *see* former Civ. Code § 2235]. However, this presumption does not apply to the provisions of an agreement between trustee and beneficiary relating to the hiring or compensation of the trustee [*Prob. Code § 16004(c)*; former Civ. Code § 2235]. Use of these points and authorities is appropriate when the underlying contract falls within the latter exception.

In an appropriate case, these points and authorities may be submitted in opposition to a motion for a new trial supported by the points and authorities *set out in § 92.71*.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Cautionary Note

The language of current *Prob. Code § 16004(c)* was derived from former Civ. Code § 2235 (repealed by stats. 1986, ch. 820, operative July 1, 1987). Although the statutory language of former Civ. Code § 2235 referred to the "trustee" and "beneficiary," case law repeatedly referred to and often applied that statute in fiduciary situations other than those involving trustees and beneficiaries as those terms are ordinarily used. For example, former Civ. Code § 2235 was repeatedly applied to the attorney-client relationship [*see Bradner v. Vasquez (1954) 43 Cal. 2d 147, 151, 272 P.2d 11]* . The repeal of former Civ. Code § 2235 raised questions regarding whether and to what extent case law decided under that section applies to the successor section, *Prob. Code § 16004(c)*, or remains valid independently of the successor section. The answer to that question is not entirely clear.

The Trust Law itself states that its enactment was not intended to alter the rules applied by courts to fiduciary and confidential relationships, other than with respect to express trusts specifically governed by the Trust Law [*Prob. Code § 15003(b)*]. Moreover, nothing in the Trust Law or in *Prob. Code § 82* (which defines "trustee" for purposes of the Probate Code) is intended to prevent courts from applying the principles in the Trust Law to other types of entities or relationships when those principles or procedures are applied pursuant to statutory or common law principles [*Prob. Code § 15003(c)*]. However, the language of former Civ. Code § 2235 created a presumption of insufficient consideration and undue influence on the part of the trustee, whereas the current Probate Code provision instead creates a presumption of breach of fiduciary duty. In practice, the distinction between the language of the former and current statutes may be more a matter of semantics than of substance. Nevertheless, the change in the nature of the statutory presumption and the fact that the section has been moved from the Civil Code to the Probate Code suggest that practitioners should be cautious in relying on cases under former Civ. Code § 2235 in situations now expressly governed by the Trust Law.

Conversely, as to fiduciary relationships *not* expressly governed by the Trust Law, it is unclear whether the relevant fiduciary principles are governed by the case law that existed under former Civ. Code § 2235, the presumption as currently stated in *Prob. Code § 16004(c)*, a combination of both, or neither. The safest course of action is probably to cite all the potentially applicable authorities. Thus, the second alternative Paragraph B of this form cites both case law that developed under former Civ. Code § 2235, relying on *Prob. Code § 15003(b)* for its continuing applicability, and the current law under *Prob. Code § 16004(c)*, both of which support the position taken in this memo.

[c] Related Uses

With appropriate modifications, these points and authorities may be submitted by a plaintiff in opposition to a motion for a new trial [*Code Civ. Proc. § 657(6)*] by an unsuccessful defendant in an action for damages for breach of contract when defendant has alleged that the contract is voidable because his or her consent was obtained through undue influence on the part of plaintiff.

[d] Related Memoranda

For memoranda of points and authorities relating to motions for new trial generally, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] Presumption of Violation of Trustee's Fiduciary Duties Is Not Applicable to Contract Relating to Hiring or Compensation of Fiduciary

In ***Walton v. Broglio*** *(1975) 52 Cal. App. 3d 400, 125 Cal. Rptr. 123* , plaintiff attorney contracted to represent defendant, who was facing a criminal charge of extortion, for $15,000. As part of the fee agreement, plaintiff insisted that defendant sign a promissory note for $7,500. Plaintiff represented defendant in the criminal charge. When defendant defaulted on the note, plaintiff brought an action seeking recovery on the note. The trial court entered

judgment for defendant, finding that at the time the note was executed, there was a preexisting attorney-client relationship between plaintiff and defendant which gave rise to a presumption of invalidity under former Civ. Code § 2235, and that plaintiff had failed to successfully rebut the presumption.

On appeal, plaintiff contended that the presumptions of insufficient consideration and undue influence codified by former Civ. Code § 2235 did not apply to the case. The court of appeal agreed with this contention and reversed the judgment. The court noted that the last sentence of former Civ. Code § 2235, which states that the presumptions established by that section do not apply to the provisions of an agreement between a trustee and his beneficiary relating to the hiring or compensation of the trustee, was added in 1963 and appears broadly to exclude all agreements relating to hiring or compensation, including those made after the fiduciary relationship is established (*52 Cal. App. 3d 400, 403-404)* . The court observed that prior law had created an exception to the presumptions only when there was no preexisting fiduciary relationship [*see, e.g.*, *Setzer v. Robinson (1962) 57 Cal. 2d 213, 216, 18 Cal. Rptr. 524, 368 P.2d 124]* and that no case since the amendment of former Civ. Code § 2235 had directly construed it. The court held that the amendment, properly construed, prevents the application of the presumption to any agreement relating to fees, even where there is a preexisting attorney-client relationship, and that the trial court thus erred in not trying the issues in the case without application of the presumption (*52 Cal. App. 3d 400, 404)* .

Although this case was decided under former Civ. Code § 2235, the presumption that formed the basis for the decision was continued under current *Prob. Code § 16004(c)*. Since *Prob. Code § 15003(b)* provides that enactment of the Trust law was not intended to alter principles applicable to other types of fiduciary arrangements, and since *Prob. Code § 15003(c)* permits application of Trust Law principles to other types of entities and relationships, it is presumed that the rule stated in *Walton v. Broglio* remains applicable in situations other than those specifically subject to the Trust Law. For additional discussion, see Cautionary Note in the comment to this form.

[b] Presumption of Undue Influence Not Applicable to Agreement Between Attorney and Client Relating to Fees

The facts and holding in ***Walton v. Broglio*** *(1975) 52 Cal. App. 3d 400, 125 Cal. Rptr. 123* , are discussed in *§ 92.72[3][a]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsContracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral Overview

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Volume 9 Chapters 90-99 DISMISSAL---to---EMINENT DOMAIN
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PART II. FORMS
C. Undue Influence

9-92 California Points & Authorities § 92.73

§ 92.73 Opposing Plaintiff's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Breach of Fiduciary Duty or Undue Influence Based on Misuse of Confidential Relationship [Civ. Code § 1575(1)]--Presumption of Undue Influence [former Civ. Code § 2235] or Breach of Fiduciary Duty [Prob. Code § 16004(c)] Not Applicable When Plaintiff Fails to Show Existence of Confidential Relationship

[1] FORM

[*Caption. See § 92.45.*]

PLAINTIFF'S MOTION FOR NEW TRIAL SHOULD NOT BE GRANTED BECAUSE PLAINTIFF'S EVIDENCE FAILED TO ESTABLISH THE EXISTENCE OF A CONFIDENTIAL RELATIONSHIP BETWEEN PLAINTIFF AND DEFENDANT, SO THAT THE PRESUMPTION OF BREACH OF FIDUCIARY DUTIES UNDER PROBATE CODE SECTION 16004(c) [*if appropriate (see comment), add:*, AND THE PRESUMPTIONS OF INSUFFICIENT CONSIDERATION AND UNDUE INFLUENCE UNDER CASE LAW DECIDED UNDER FORMER CIVIL CODE SECTION 2235], _____ [WAS *or* WERE] NOT APPLICABLE, AND THE EVIDENCE WAS OTHERWISE SUFFICIENT TO SUSTAIN THE _____ [VERDICT *or* DECISION].

A. New Trial Precluded Unless Court Convinced That Court or Jury Clearly Should Have Reached Different Result. [*See § 92.45, Paragraph A.*]

B. Showing of Confidential Relationship and Advantage Required. In order to bring into operation the presumption of breach of fiduciary duties under *Probate Code Section 16004(c)*, or the presumptions of insufficient consideration and undue influence under case law decided under former Civil Code Section 2235, it is necessary to show that a confidential relationship existed and that this relationship was used by the fiduciary to gain an advantage (*Bradner v. Vasquez (1954) 43 Cal. 2d 147, 151, 272 P.2d 11* (decided under former Civ. Code § 2235); *see Prob. Code §§ 15003(b)* (Trust Law did not alter law governing other types of fiduciary and confidential relationships), (c) (Trust Law principles may be applied to other types of fiduciary relationships pursuant to statutory or common law principles),

16004(c)).

C. Existence of Confidential Relationship as Question of Fact. The existence of a confidential or fiduciary relationship depends on the circumstances of each case and is a question of fact for the trier of fact (*Kudokas v. Balkus (1972) 26 Cal. App. 3d 744, 750, 103 Cal. Rptr. 318*).

D. Confidential Relationship Defined. [*See § 92.44, Paragraph C.*]

[*Optional*] **E. Employment Relationship Not Confidential.** [*See § 92.44, Paragraph D.*]

[*Optional*] **F. Family Relationship Not Necessarily Confidential.** [*See § 92.44, Paragraph E.*]

[*Optional*] **G. No Confidential Relationship Presumed Between Prospective Marriage Partners.** [*See § 92.44, Paragraph F.*]

[*Optional*] **H. Friendship, Affection, or Intimacy as Not Necessarily Creating Confidential Relationship.** [*See § 92.44, Paragraph G.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to an unsuccessful plaintiff's motion for a new trial in an action to rescind a contract allegedly entered into as a result of undue influence on the part of defendant when plaintiff has contended in the motion that the evidence is insufficient to rebut the presumptions of insufficient consideration and undue influence under case law decided under former Civil Code Section 2235, and/or the presumption of breach of fiduciary duties under *Probate Code Section 16004(c)*. The ground of opposition presentedis that these presumptions are not applicable because plaintiff failed to establish the existence of a confidential relationship between the parties.

In an appropriate case, these points and authorities may be submitted in opposition to a motion for new trial supported by the points and authorities *set out in § 92.71*.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Cautionary Note

The language of current *Prob. Code § 16004(c)* was derived from former Civ. Code § 2235 (repealed by stats. 1986 ch. 820, operative July 1, 1987). Although the statutory language of former Civ. Code § 2235 referred to the "trustee" and

"beneficiary," case law repeatedly referred to and often applied that statute in fiduciary situations other than those involving trustees and beneficiaries as those terms are ordinarily used. For example, former Civ. Code § 2235 was repeatedly applied to the attorney-client relationship [*see Bradner v. Vasquez (1954) 43 Cal.2d 147, 151, 272 P.2d 11]* .

The language of former Civ. Code § 2235 created a presumption of insufficient consideration and undue influence on the part of the trustee, whereas the current Probate Code provision instead creates a presumption of breach of fiduciary duty. In practice, the distinction between the language of the former and current statutes may be more a matter of semantics than of substance. Nevertheless, the repeal of former Civ. Code § 2235 raised questions regarding whether and to what extent case law decided under that section applies to the successor section, *Prob. Code § 16004(c)*, or remains valid independently of the successor section.

The Trust Law itself states that its enactment was not intended to alter the rules applied by courts to fiduciary and confidential relationships, other than with respect to express trusts specifically governed by the Trust Law [*Prob. Code § 15003(b)*]. Moreover, nothing in the Trust Law or in *Prob. Code § 82* (which defines "trustee" for purposes of the Probate Code) is intended to prevent courts from applying the principles in the Trust Law to other types of entities or relationships when those principles or procedures are applied pursuant to statutory or common law principles [*Prob. Code § 15003(c)*]. Nevertheless, the change in the nature of the statutory presumption and the fact that the section has been moved from the Civil Code to the Probate Code suggest that practitioners should be cautious in relying on cases under former Civ. Code § 2235 in situations now expressly governed by the Trust Law.

Conversely, as to fiduciary relationships *not* expressly governed by the Trust Law, it is unclear whether the relevant fiduciary principles are governed by the case law that existed under former Civ. Code § 2235, the presumption as currently stated in *Prob. Code § 16004(c)*, a combination of both, or neither. The safest course of action is probably to cite all the potentially applicable authorities.

[c] Related Memoranda

For memoranda of points and authorities relating to motions for new trial generally, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] Showing of Confidential Relationship and Advantage Required

The factual and procedural background of ***Bradner v. Vasquez*** *(1954) 43 Cal. 2d 147, 272 P.2d 11* , is discussed in *§ 92.71[3][c]*. In holding that the presumptions of undue influence and insufficient consideration established by former Civ. Code § 2235 were applicable to the contract in that case, the Supreme Court noted that to bring those presumptions into operation, it is necessary to show that a confidential relationship existed and that this relationship was used by the fiduciary to gain an advantage (*43 Cal. 2d 147, 151)* .

[b] Existence of Confidential Relationship as Question of Fact

In ***Kudokas v. Balkus*** *(1972) 26 Cal. App. 3d 744, 103 Cal. Rptr. 318* , defendants contracted to buy a motel from plaintiff. After several years, defendants defaulted in their payments under the contract but refused to surrender possession of the motel. Plaintiff then filed an action to recover possession of and quiet title to the motel and its furnishings and equipment. Defendants cross complained on the ground of actual and constructive fraud. The trial court held that there was no fraud, and sustained plaintiff's claim of title.

On appeal, defendants contended that the trial court's finding of no confidential relationship between the parties was not supported by the evidence. In affirming the judgment insofar as it rejected defendants' allegations of fraud, the court of appeal rejected this contention. The court noted that existence of a confidential or fiduciary relationship depends on the

circumstances of each case and is a question of fact for the fact trier (*26 Cal. App. 3d 744, 750)* . The court held that the trial court's finding of no confidential relationship was reasonably and fairly supported by the evidence (*26 Cal. App. 3d 744, 750-751)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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9-92 California Points & Authorities §§ 92.74-92.89

[Reserved]

§§ 92.74[Reserved]

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D. Mistake

9-92 California Points & Authorities § 92.90

§ 92.90 Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Mistake of Fact [Civ. Code § 1577]--Unilateral Mistake of Fact Is Not Basis for Rescission if Other Party Is Unaware of Mistake

[1] FORM

[*Caption. See § 92.40.*]

DEFENDANT'S MOTION FOR A NEW TRIAL SHOULD BE GRANTED BECAUSE THE ALLEGED MISTAKE WAS UNILATERAL ON THE PART OF PLAINTIFF[, AND THE EVIDENCE IS INSUFFICIENT TO SHOW THAT DEFENDANT WAS AWARE OF PLAINTIFF'S MISTAKE AT THE TIME THE CONTRACT WAS ENTERED INTO].

A. Motion for New Trial. [*See § 92.40, Paragraph A.*]

B. Unilateral Mistake of Fact Is Not Basis for Rescission if Other Party Is Unaware of Mistake. A unilateral mistake may not invalidate a contract [without a showing that the other party to the contract was aware of the mistaken belief and unfairly utilized that mistaken belief in a manner enabling him to take advantage of the mistaken party] (*In re Marriage of Hahn (1990) 224 Cal. App. 3d 1236, 1241, 273 Cal. Rptr. 516* ; *Meyer v. Benko (1976) 55 Cal. App. 3d 937, 944, 127 Cal. Rptr. 846*).

[*Optional*] **C. Assumed Risk of Unilateral Mistake Based on Insufficient Knowledge.** A party bears the risk of mistake when he or she is aware, at the time the contract is made, that he or she has only limited knowledge with respect to the fact to which the mistake relates but treats that knowledge as sufficient (*In re Marriage of Hahn (1990) 224 Cal. App. 3d 1236, 1241, 273 Cal. Rptr. 516* ; *see* Restatement (Second) of Contracts § 154(b)).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of an unsuccessful defendant's motion for new trial in an action to rescind a contract allegedly entered into under a mistake of fact when plaintiff made a unilateral mistake of which defendant was not aware at the time the contract was entered into. Paragraph B supports the general proposition that there is no relief for unilateral mistake. Optional Paragraph C addresses one particular type of unilateral mistake--going ahead with insufficient knowledge.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

These points and authorities may be modified to support a general demurrer [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*] to a complaint for rescission of a contract entered into by mistake when it appears on the face of the complaint or from any matter of which the court must or may take judicial notice that the alleged mistake was unilateral on the part of plaintiff.

With appropriate modifications, these points and authorities may also be used to support plaintiff's motion for a new trial [*Code Civ. Proc. § 657(6)*] in an action for damages for breach of contract when defendant contends that the contract is voidable because defendant entered into it under a mistake of fact.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 92.99* may be used to oppose a motion for new trial supported by these points and authorities.

[d] Related Memoranda

For memoranda of points and authorities relating to motions for new trial generally, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] Unilateral Mistake of Fact Is Not Basis for Rescission if Other Party Is Unaware of Mistake

In re Marriage of Hahn *(1990) 224 Cal. App. 3d 1236, 273 Cal. Rptr. 516* , is discussed in *§ 92.90[3][b]*.

In ***Meyer v. Benko*** *(1976) 55 Cal. App. 3d 937, 127 Cal. Rptr. 846* , plaintiffs brought an action for specific performance of a contract for the sale of real property. The document executed by the parties provided that plaintiff buyers were to obtain an FHA-guaranteed loan to finance the purchase and that defendant sellers were to perform any necessary work at their expense. Following execution of the contract, plaintiffs procured such a loan. However, as a condition to guaranteeing the loan, the FHA required that a new roof be installed on theresidence. Both parties refused

to pay for the cost of a new roof, and, as a result, the loan commitment lapsed. Defendants never conveyed possession of or title to the residence to plaintiffs. The trial court concluded that no contract existed between the parties and entered judgment for defendants.

The court of appeal reversed, holding that there was an enforceable contract between the parties (*55 Cal. App. 3d 937, 942-944)* . On appeal, defendants also contended that a material mistake of fact (defendants' belief that they would not be obligated to install a new roof on the residence) prevented contract formation. The court held that a unilateral mistake may not invalidate a contract without a showing that the other party to the contract was aware of the mistaken belief and unfairly utilized that mistaken belief in a manner enabling him or her to take advantage of the other party (*55 Cal. App. 3d 937, 944)* . The court noted that defendants failed to present any evidence in support of either requirement.

[b] Assumed Risk of Unilateral Mistake Based on Insufficient Knowledge

The parties in ***In re Marriage of Hahn*** *(1990) 224 Cal. App. 3d 1236, 273 Cal. Rptr. 516* , entered into an oral stipulation in open court on July 13, 1988, that the marital home was worth $179,000, based on an appraisal supplied by appellant. The appraiser used comparable sales occurring within seven months before the July 1988 trial. Later, appellant tried to reopen to present evidence that the home was worth $225,000. The new evidence would have been based on comparable sales that occurred on July 3, August 9, August 18, and in October. The trial court refused to allow the later evidence, and the court of appeal affirmed.

The court of appeal said that the court could not be faulted for a party's failure to properly investigate or estimate the value of an asset. Appellant supplied the appraisal that was the basis of the stipulated value and assumed any risk that that appraisal might be faulty. It is hornbook law that one party's mistaken belief is insufficient to justify relieving that party from his or her obligations (*224 Cal. App. 3d 1236, 1241)* . The court cited Restatement (Second) of Contracts § 154(b) for the proposition that a party bears the risk of mistake when he or she is aware, at the time the contract is made, that he or she has only limited knowledge with respect to the fact to which the mistake relates but treats that knowledge as sufficient. Thus, the trial court was well within its prerogative to deny appellant's motion to be relieved of the stipulation (*224 Cal. App. 3d 1236, 1241)* .

[4] Additional Authorities

[a] Unilateral Mistake of Fact Is Not Basis for Rescission if Other Party Is Unaware of Mistake

The court of appeal in *Sinai Memorial Chapel v. Dudler (1991) 231 Cal. App. 3d 190, 282 Cal. Rptr. 263* , affirmed a judgment enforcing a cemetery contract. None of the documents submitted indicated that defendant acted under a mistake, and unilateral mistake is not a defense to a contract action (*231 Cal. App. 3d 190, 199)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsContracts LawDefensesAmbiguity & MistakeUnilateral MistakeContracts LawRemediesRescission & RedhibitionGeneral Overview

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9-92 California Points & Authorities § 92.91

§ 92.91 Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Mistake of Fact [Civ. Code § 1577]--No Rescission if Mistake Caused by Neglect of Legal Duty

[1] FORM

[*Caption. See § 92.40.*]

DEFENDANT'S MOTION FOR A NEW TRIAL SHOULD BE GRANTED BECAUSE PLAINTIFF'S ALLEGED MISTAKE WAS CAUSED BY HIS/HER NEGLECT OF A LEGAL DUTY.

A. Motion for New Trial. [*See § 92.40, Paragraph A.*]

B. No Rescission if Mistake Caused by Neglect of Legal Duty. The mistakes for which relief from a contract may be granted are limited to those that are not caused by the neglect of a legal duty (*Civ. Code § 1577*; *Lawrence v. Shutt (1969) 269 Cal. App. 2d 749, 765, 75 Cal. Rptr. 533*).

[*Optional*] **C. Failure to Make Reasonable Inquiry Concerning Meaning of Contract Terms as Neglect of Legal Duty.** When a party who has notice of sufficient facts to put him or her on inquiry as to the meaning of the terms of a contract fails to make reasonable inquiry concerning those terms, he or she is guilty of neglect of legal duty, which precludes rescission of the contract for mistake of fact (*see Lawrence v. Shutt (1969) 269 Cal. App. 2d 749, 765-766, 75 Cal. Rptr. 533*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of defendant's motion for a new trial in an action to rescind a contract allegedly entered into under a mistake of fact when plaintiff's mistake was the result of his or her neglect of a legal duty.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

These points and authorities may be modified to support a general demurrer [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*] to a complaint for rescission of a contract entered into by mistake when it appears on the face of the complaint or from any matter of which the court must or may take judicial notice that plaintiff's mistake resulted from his or her neglect of a legal duty.

With appropriate modifications, these points and authorities may also be used to support plaintiff's motion for a new trial [*see Code Civ. Proc. § 657(6)*] in an action for damages for breach of contract when defendant contends that the contract is voidable because defendant entered into it under a mistake of fact.

[c] Related Memoranda

For memoranda of points and authorities relating to motions for new trial generally, see Ch. 155, *Motions After Trial* .

[d] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 92.100* may be used to oppose a motion for new trial supported by the memorandum.

[3] Discussion of Authorities

[a] No Rescission if Mistake Caused by Neglect of Legal Duty

In ***Lawrence v. Shutt*** *(1969) 269 Cal. App. 2d 749, 75 Cal. Rptr. 533* , defendants entered into a contract with plaintiffs' assignor for the sale of a large parcel of land. Under the terms of the contract, the unpaid balance of the purchase price was secured by a trust deed on the land. The trust deed contained a release clause which provided for the manner in which portions of the real property would be released from the lien of the trust deed as the payments were made on the principal. After the buyer assigned his interest in the contract to plaintiffs, but before escrow closed, a dispute concerning the release clause arose when defendants refused to release a certain parcel of property at plaintiffs' request. Thereafter, escrow closed and plaintiffs brought an action for specific performance of the trust deed release clause. Defendants then gave notice of rescission of the contract on several grounds, including mistake. The trial court entered judgment for defendants rescinding the agreement and ordering the grant deeds and trust deeds cancelled. Plaintiffs appealed.

In support of the judgment, defendants contended, inter alia, that the unilateral misunderstanding of defendants as to the meaning of the release clause justified rescission of the entire transaction based on unilateral mistake. In reversing the judgment, the court of appeal noted that under *Civ. Code § 1577*, a mistake of fact is defined as "a mistake, not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in: [P] 1. An unconscious ignorance or forgetfulness of a fact, past or present, material to the contract; or, [P] 2. Belief in the present existence of a thing material to the contract, which does not exist, or in the past existence of such a thing, which has not existed." Thus, the court stated, the mistakes for which relief may be granted are limited to those that are not caused by the neglect of a legal duty (*269 Cal. App. 2d 749, 765)* . The court then noted that in the case at bench, the record reflected that three or four months prior to the scheduled close of escrow, defendants had expressed dissatisfaction with the release clause and had changed counsel, and that just prior to the close of escrow, defendants had again indicated their dissatisfaction with the terms of the release clause but had raised no objection to the close of escrow. The court concluded that defendants clearly had notice of sufficient facts to put them on inquiry as to the meaning of the release clause, but nevertheless had failed to make reasonable inquiry, or any inquiry at all. The court held that defendants were therefore guilty of neglect of a legal duty and that the mistake which defendants had entertained was not a mistake of fact within the meaning of the law (*269 Cal. App. 2d 749, 765-766)* .

[b] Failure to Make Reasonable Inquiry Concerning Meaning of Contract Terms as Neglect of Legal Duty

Lawrence v. Shutt *(1969) 269 Cal. App. 2d 749, 75 Cal. Rptr. 533* , is discussed in *§ 92.91[3][a]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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9-92 California Points & Authorities § 92.92

§ 92.92 Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Mistake of Fact [Civ. Code § 1577]--Rescission Not Granted for Misunderstanding of Contract Provisions

[1] FORM

[*Caption. See § 92.40.*]

DEFENDANT'S MOTION FOR A NEW TRIAL SHOULD BE GRANTED BECAUSE THE ALLEGED MISTAKE CONSISTED SOLELY OF PLAINTIFF'S UNILATERAL _____ [IGNORANCE *or* MISUNDERSTANDING] OF THE CONTRACT PROVISIONS.

A. Motion for New Trial. [*See § 92.40, Paragraph A.*]

B. Rescission Not Granted for Misunderstanding of Contract Provisions. A court will not set aside contractual obligations on the ground of mistake, particularly where they are embodied in written contracts, merely because one of the parties claims to have been ignorant of or misunderstood the provisions of thecontract (*Lawrence v. Shutt (1969) 269 Cal. App. 2d 749, 765, 75 Cal. Rptr. 533*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of defendant's motion for a new trial in an action to rescind a contract allegedly entered into under a mistake of fact when the alleged mistake consists solely of plaintiff's ignorance or misunderstanding of the terms of the contract.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

This form may be modified to support a general demurrer [*Code Civ. Proc. §§ 430.10(e), 430.30(a)*] to a complaint for rescission of a contract entered into by mistake when it appears from the face of the complaint or from any matter of which the court must or may take judicial notice that the alleged mistake consisted solely of plaintiff's ignorance or misunderstanding of the terms of the contract.

With appropriate modifications, this form also may be used to support plaintiff's motion for a new trial [*Code Civ. Proc. § 657(6)*] in an action for damages for breach of contract when defendant contends that the contract is voidable because it was entered into under a mistake of fact.

[c] Related Memoranda

For memoranda relating to motions for new trial generally, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] Rescission Not Granted for Misunderstanding of Contract Provisions

Lawrence v. Shutt *(1969) 269 Cal. App. 2d 749, 75 Cal. Rptr. 533* , is discussed in *§ 92.91[3][a]*. In that case, the court of appeal reversed a judgment in favor of defendants rescinding a contract for the sale of land and rejected defendants' contention that their unilateral misunderstanding of the meaning of the release clause in the trust deed justified rescission of the entire transaction on the ground of mistake. The court noted that a court, under its equitable power, does have the right to rescind a contract for purely unilateral mistake of one contracting party. Nevertheless, the court stated that in the interest of preserving some reasonable stability in commercial transactions, courts will not set aside contractual obligations, particularly where they are embodied in written contracts, merely because one of the parties claims to have been ignorant of or misunderstood the provisions of the contract (*269 Cal. App. 2d 749, 764-765)* .

[4] Additional Authorities

[a] Rescission Not Granted for Misunderstanding of Contract Provisions

In *Merced County Sheriff's Employee's Assn. v. County of Merced (1987) 188 Cal. App. 3d 662, 233 Cal. Rptr. 519* , county firefighters' and sheriffs' associations sought enforcement of contracts between each association and the county in accordance with the associations' interpretations. The court of appeal reversed the trial court, upheld the sheriffs' contract as interpreted by the sheriffs' association, and held that no contract was formed between the county and the firefighters' association (*188 Cal. App. 3d 662, 676-677)* . In the case of the sheriffs' association contract, the court

stated the principle that when contract language is ambiguous and susceptible to two different meanings, one understood by each party, the contract is properly upheld in accordance with the meaning attached by the party who manifested the meaning it attached if that party had no reason to know of a different meaning attached by the other party and the other party had reason to know of the meaning attached by the first party. Since the sheriffs' association's negotiating representative had made its interpretation clear and the county had not, the county was bound by the sheriffs' association's interpretation (*188 Cal. App. 3d 662, 672-674)* . In the case of the firefighters' agreement, the court applied the principle that mutual assent is lacking if the parties attach materially different meanings to the contract language and (1) neither party knows or has reason to know the meaning attached by the other party, or (2) each party knows or has reason to know the meaning attached by the other. Here, no contract was formed because both parties were at fault, one by misstating the reason for its proffered language, which produced irreconcilable ambiguity, and the other for failing to appreciate the import of that language (*188 Cal. App. 3d 662, 675-676)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsContracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral Overview

California Points & Authorities

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Volume 9 Chapters 90-99 DISMISSAL---to---EMINENT DOMAIN
CHAPTER 92 DURESS, MENACE, FRAUD, UNDUE INFLUENCE, AND MISTAKE
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9-92 California Points & Authorities § 92.92A

§ 92.92A Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Mistake of Fact [Civ. Code § 1577]--Rescission of Life Annuity Contract Not Allowed for Buyer's Ignorance of Condition Causing Early Death

[1] FORM

[*Caption. See § 92.40.*]

DEFENDANT'S MOTION FOR A NEW TRIAL SHOULD BE GRANTED BECAUSE RESCISSION OF A LIFE-ANNUITY CONTRACT MAY NOT BE BASED ON THE BUYER'S IGNORANCE OF A PRE-EXISTING MEDICAL CONDITION THAT CAUSES UNEXPECTEDLY EARLY DEATH.

A. Motion for New Trial. [*See § 92.40, Paragraph A.*]

B. Rescission of Life Annuity Contract May Not Be Based on Buyer's Ignorance of Pre-Existing Fatal Condition. A life annuity contract may not be rescinded for the buyer's benefit on the ground of mistake of fact when the alleged mistake is that, at the time of making the contract, the buyer was ignorant of a pre-existing condition leading inexorably to an unexpectedly early death (*Grenall v. United of Omaha Life Ins. Co. (2008) 165 Cal. App. 4th 188, 193-196, 80 Cal. Rptr. 3d 609*).

Dated: _____.

Respectfully submitted,

_____[*firm name, if any*]

By:_____ [*signature*]

_____[*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of defendant's motion for a new trial in an action to rescind a life annuity contract allegedly entered into under a mistake of fact when the alleged mistake consists of the buyer's ignorance of a pre-existing condition that causes an unexpectedly early death.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

This form may be modified to support a general demurrer [*Code Civ. Proc. §§ 430.10(e), 430.30(a)*] to a complaint for rescission of a life annuity contract entered into by mistake when it appears from the face of the complaint or from any matter of which the court must or may take judicial notice that the alleged mistake consists of the buyer's ignorance of a pre-existing condition that causes an unexpectedly early death.

With appropriate modification, this memorandum may also be used to support defendant's motion for summary judgment [*Code Civ. Proc. § 437c*] when the ground for relief does not appear on the face of the complaint or from any matter of which the court must or may take judicial notice.

[c] Related Memoranda

For memoranda relating to motions for new trial generally, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

In ***Grenall v. United of Omaha Life Ins. Co.*** *(2008) 165 Cal. App. 4th 188, 80 Cal. Rptr. 3d 609* , a woman bought a single-premium life annuity contract from an insurance company, not knowing at the time that she had untreatable ovarian cancer, from which she died several weeks later. The personal representative of her estate sought a decree of rescission of the contract on the ground of mistake of fact. The trial court granted the insurance company's motion for summary judgment, and the personal representative appealed.

The court of appeal affirmed. Noting that no California case had dealt with the issue (although California cases on closely similar issues did exist), the court followed cases from other states in holding, as a matter of law, that a life annuity contract cannot be rescinded for the buyer's benefit on the ground of mistake of fact when the alleged mistake is that, at the time of making the contract, the buyer was ignorant of a pre-existing condition leading inexorably to an unexpectedly early death. The court concluded, "In light of these authorities, we hold that [the annuitant] bore the risk of the alleged mistake regarding her health and life expectancy at the time of the annuity contract." Because the plaintiff could not establish an essential element of its rescission claim--namely, that the party asserting mistake of fact did not bear the risk of the mistake--summary judgment was held to be proper (*165 Cal. App. 4th 188, 193)* .

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9-92 California Points & Authorities § 92.93

§ 92.93 Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Mistake of Fact [Civ. Code § 1577] or Law [Civ. Code § 1578]--Mistake Not Material

[1] FORM

[*Caption. See § 92.40.*]

DEFENDANT'S MOTION FOR A NEW TRIAL SHOULD BE GRANTED BECAUSE THE EVIDENCE IS INSUFFICIENT TO ESTABLISH THAT THE ALLEGED MISTAKE WAS MATERIAL TO THE CONTRACT.

A. Motion for New Trial. [*See § 92.40, Paragraph A.*]

B. Mistake Must Be Material. A mistake may be urged as a ground for relief from a contract only if the mistake is material to the contract (*Edwards v. Lang (1961) 198 Cal. App. 2d 5, 12, 18 Cal. Rptr. 60*). The mistake, whether of fact or law, must affect the execution and essential elements of the contract and not merely some collateral matter (*Bellwood Discount Corp. v. Empire Steel Bldgs. Co. (1959) 175 Cal. App. 2d 432, 435, 346 P.2d 467*). The mistake must be such that it animated and controlled the conduct of the party; it must go to the essence of the object of the contract and not be merely incidental. It must be shown that but for the mistake the party would not have assumed the obligation from which he or she seeks to be relieved (*Roller v. California Pac. Title Ins. Co. (1949) 92 Cal. App. 2d 149, 157, 206 P.2d 694*).

[*Optional*] **C. Mistake Concerning Collateral Matter.** If a mistake pertains to a collateral matter, such as a quality or characteristic of the thing sold, rescission may not be granted unless the difference between the real and the supposed quality or nature of the thing is so extreme as to make it virtually a different thing (*see* *Vickerson v. Frey (1950) 100 Cal. App. 2d 621, 628, 224 P.2d 126*).

[*Optional*] **D. Mistake as Not Material When Parties Learn True Facts Prior to Execution of Contract.** Any

representations and mistakes of fact made by the parties during the negotiations become immaterial when, prior to the execution of the contract, the parties learn the true facts (*Coleman v. Edgar (1927) 83 Cal. App 720, 724, 257 P. 452*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of defendant's motion for new trial in an action to rescind a contract entered into under a mistake of fact or law when the alleged mistake was not material to the contract.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

These points and authorities may also be modified to support a general demurrer [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*] to a complaint for rescission of a contract entered into by mistake when it appears from the face of the complaint or from any matter of which the court must or may take judicial notice that the alleged mistake was not material to the contract.

With appropriate modifications, these points and authorities may be used to support plaintiff's motion for a new trial [*Code Civ. Proc. § 657(6)*] in an action for damages for breach of contract when defendant contends that the contract is voidable because it was entered into under a mistake of fact or law.

[b] Related Memoranda

For memoranda of points and authorities relating to motions for new trial generally, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] Mistake Must Be Material

In ***Edwards v. Lang*** *(1961) 198 Cal. App. 2d 5, 18 Cal. Rptr. 60* , plaintiff entered into a contract with defendants for the sale of a business. The business consisted of the manufacture of push button spice racks. In the course of negotiations for the sale of the business, plaintiff represented to defendants that he had a patent which "covered" the spice racks. Defendants entered into the contract believing that this patent covered the working mechanism of the spice rack, that is, the push button, and that the patent would protect them in the exclusive manufacture of the spice racks. In fact, the patent was merely a design patent which did not cover the functional aspects of the spice racks. After going into possession of the business, defendants found they were unable to produce the spice racks as cheaply as plaintiff had

and were thus unable to deliver them at the price that their distributor was willing to pay for them. Thereafter, they ceased production and failed to meet their obligations on the promissory note which theyhad given to plaintiff to finance the purchase. Plaintiff brought an action to foreclose the chattel mortgage which secured the note and for a deficiency judgment in the event that the obligation on the note was not satisfied through foreclosure. Defendants cross complained for rescission of the contract on the ground of fraud. The trial court entered judgment for plaintiff.

On appeal, defendants changed their defensive theory, contending that the findings made by the trial court required a conclusion that they executed the note and chattel mortgage under a mistake of fact. In affirming, the court of appeal noted that a mistake of fact may be urged as a defense to an action on a contract only if the mistake is material to the contract (*198 Cal. App. 2d 5, 12)* . The court observed that in this case, even though the trial court found that plaintiff had innocently misrepresented that the patent owned by him covered the spice racks he manufactured, which might be the basis for a mistaken belief by defendants as to the fact represented, there was neither pleading, proof, nor finding that this mistake was material to the contract.

In ***Bellwood Discount Corp. v. Empire Steel Bldgs. Co.*** *(1959) 175 Cal. App. 2d 432, 346 P.2d 467* , plaintiff brought an action to rescind a contract that it had entered into with defendant and to recover its initial payment under the contract. The contract provided for defendant to furnish all labor and materials necessary to construct a tapered girder steel panel building on a parcel of land owned by plaintiff and to furnish necessary engineering of structural steel and concrete block walls and foundation drawings only. The contract explicitly excluded electrical work, plumbing, concrete work, reinforcing steel, painting, or interior partitions, and any other work not specifically mentioned. After the contract was signed, defendant prepared a set of plans for submission to the city building department covering the structural details of the contemplated building and the concrete walls and foundations. The building department returned the plans to plaintiff with a correction sheet specifying certain additional information which had to be furnished before a building permit could be issued. Included were certain items required by the fire prevention provisions of the building code relating to plaintiff's contemplated use of the structure as an automotive repair shop, which required either installation of automatic sprinklers or the division of the building into two parts by a proper fire resistant wall. A sprinkling system had not been discussed by the parties prior to making the contract and interior walls had been expressly excluded from the contract. After learning of the need for one or the other of these items, plaintiff attempted to rescind the contract on the ground of mistake. The trial court entered judgment for defendant.

The court of appeal affirmed. The court noted that mistake, either of law or fact, as grounds for rescission of a contract, must affect the execution and material elements of the contract and not merely some collateral matter (*175 Cal. App. 2d 432, 435)* . The court then reviewed the trial court's findings and observed that no provision for either a sprinkling system or a fire resistant interior wall was included in the contract and that defendant owed plaintiff no duty with respect thereto. The court concluded that these items were collateral to the agreement of the parties and that the trial court therefore correctly held that plaintiff had no right to rescind on the ground of mistake (*175 Cal. App. 2d 432, 436)* .

In ***Roller v. California Pac. Title Ins. Co.*** *(1949) 92 Cal. App. 2d 149, 206 P.2d 694* , plaintiff brought an action for money had and received to recover the amount of a down payment paid into escrow pursuant to a contract for the purchase of real property. Plaintiff claimed the right to rescind the contract on the ground that it had been entered into by mistake. The property had formerly been owned by a third party who held a trust deed to the property, which had been given by defendant. The sale contract provided that plaintiff was to assume the mortgage and make payments thereunder to the third party. Defendant was to lease the property from plaintiff. The contract further provided that any failure to pay rent when due could, at plaintiff's option, be credited against plaintiff's obligation to pay the balance of the purchase price. However, as the court noted, because the outstanding encumbrance on the property was payable to the third party, who held the trust deed, and not to defendant, there was no balance against which plaintiff could offset any unpaid rent. Plaintiff contended that he had entered into the contract under the mistaken belief that defendant's obligation to pay rent would be secured by his right to offset unpaid rent against the unpaid balance of the purchase price. The trial court entered judgment for defendant, holding that the contract was valid and enforceable and that

plaintiff had breached it.

The court of appeal affirmed the judgment. In addressing the question of the materiality of the provision for the security of the lease, the court stated that it was plaintiff's burden to prove that the mistake was material. The court noted that to warrant relief in equity, a mistake concerning a matter of fact, must be material, and the fact must be such that it animated and controlled the conduct of the party. It must go to the essence of the object in view, and not be merely incidental. The court must be satisfied that, but for the mistake, the complainant would not have assumed the obligation from which he seeks to be relieved (*92 Cal. App. 2d 149, 157)* . The court concluded that plaintiff did not sustain his burden in this respect.

[b] Mistake Concerning Collateral Matter

In ***Vickerson v. Frey*** *(1950) 100 Cal. App. 2d 621, 224 P.2d 126* , plaintiff appealed from an adverse judgment in an action in which she sought to rescind a contract purchase of real property from defendants on several grounds, including mistake of law and fact. The property was a building which contained two apartments and an unfinished basement. Plaintiff and defendants entered into the contract believing that the basement could be converted into an apartment which could be rented for living quarters. None of the parties was aware at the time that the basement could not readily be converted because building regulations requiredan eight-foot clearance between the floor and ceiling and the unfinished basement had a clearance of only seven and one-half feet.

The court of appeal affirmed the judgment, holding that the mistake of the parties was not a mistake material to the contract as required for rescission of the contract under *Civ. Code §§ 1577* and *1578* (*100 Cal. App. 2d 621, 627)* . The court noted that the mistake bore on the use of only a portion of the property under purchase and that this contemplated use, despite the mistake, was not impossible but only more costly and difficult (*100 Cal. App. 2d 621, 627-628)* . The mistake did not relate to the intrinsic nature of the bargain and did not vitally affect a fact on the basis of which the parties contracted. The court stated that the mistake pertained to a collateral matter, that is, a quality or characteristic of the thing sold. In such a case, the court held, the difference between the real and the supposed quality or nature of the thing must be so great as to make it virtually a different thing (*100 Cal. App. 2d 621, 628)* .

[c] Mistake Not Material When Parties Learn True Facts Prior to Execution of Contract

In ***Coleman v. Edgar*** *(1927) 83 Cal. App 720, 257 P. 452* , plaintiff brought an action to recover the amount due on a contract for the sale of real property. The property in question lay along the banks of a river. Defendants alleged in their answer that plaintiff had represented that all of her land lay south of the south bank of the river and that both parties so believed and were mutually mistaken in that regard. They claimed that they were entitled to a reduction in the purchase price of the land because of the worthless character of the land which lay in the river and north thereof. The trial court found, however, that prior to the execution of the contract, the parties discovered that there was an overlapping boundary on the north end of plaintiff's land. From an examination of the overlapping deed, it was obvious that plaintiff's land could not have laid entirely to the south of the south river bank.

The court of appeal affirmed. It held that any representations made in the beginning of the negotiations and any mistake of fact then made by the parties became immaterial when, prior to the execution of the contract, they learned the true facts (*83 Cal. App. 720, 724)* .

[4] Additional Authorities

[a] Mistake Must Be Material

In *Harris v. Rudin, Richman & Appel (2002) 95 Cal. App. 4th 1332, 116 Cal. Rptr. 2d 552* , a client of defendant law firm brought a malpractice action against the firm and several individuals, alleging that they had prepared an irrevocable inter vivos trust in such a way that the trustees were exposed to personal liability for gift and estate taxes on

distributions under the trust. The parties entered into settlement negotiations and told the court that with the exception of some additional drafting work, the matter had been resolved. However, defendants then sent the plaintiff a letter stating that they had just discovered an amendment to the Probate Code that would take effect shortly and that would eliminate the tax problem which had led to the malpractice suit. In light of the amendment, plaintiff would suffer no damage as a result of the way defendants prepared his trust, and therefore defendants were taking the settlement arrangement "off the table." Plaintiff amended his complaint to allege breach of an oral and written contract, and both sides moved for summary judgment. The trial court granted plaintiff's motion for summary judgment. Defendants moved for reconsideration, for vacation of the judgment and for new trial. The trial court denied all three motions, and defendants appealed.

The court of appeal reversed the judgment for plaintiff, holding that defendants raised triable issues of fact as to their defense of rescission based on mutual mistake of law or fact. The mutual mistake was the parties' belief that the tax consequences of distributions from the trust would be governed by the applicable Probate Code section as it existed when the malpractice action was filed, rather than the amended version. The court found that this mutual mistake went to the very heart of the settlement agreement. If the amendment had the effect defendants claimed, then the trustees would suffer no adverse consequences and the settlement value of plaintiff's suit would be diminished. Defendants' evidence tended to show that they would not have entered into the settlement agreement had they known about the Probate Code amendment. Whether or not their interpretation of the amendment proved correct, they had enough confidence in their interpretation to rescind the agreement and risk a finding of liability at trial. Furthermore, any mistake on defendants' part resulting from their negligence would not preclude rescission. Freedom from negligence is not a requirement for rescission based on mistake of law, and ordinary negligence does not constitute neglect of a legal duty barring rescission for mistake of fact (*95 Cal. App. 4th 1332, 1338-1341)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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9-92 California Points & Authorities § 92.94

§ 92.94 Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Mistake of Fact [Civ. Code § 1577] or Law [Civ. Code § 1578]--No Rescission for Mistake Unless Material Injury or Prejudice Shown

[1] FORM

[*Caption. See § 92.40.*]

DEFENDANT'S MOTION FOR A NEW TRIAL SHOULD BE GRANTED BECAUSE THE EVIDENCE IS INSUFFICIENT TO SHOW THAT PLAINTIFFHAS SUFFERED ANY MATERIAL INJURY OR PREJUDICE BECAUSE OF THE MISTAKE.

A. Motion for New Trial. [*See § 92.40, Paragraph A.*]

B. No Rescission for Mistake Unless Material Injury Shown. A contract is voidable for mistake only if enforcement would be materially harmful or more onerous to the party seeking avoidance than it would have been had the law or facts been as believed. The party seeking to rescind the contract must show that he or she has suffered material injury or prejudice although he or she need not show pecuniary loss (*Guthrie v. Times-Mirror Co. (1975) 51 Cal. App. 3d 879, 886, 124 Cal. Rptr. 577*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of an unsuccessful defendant's motion for new trial in an action to rescind a contract allegedly entered into under a mistake of fact or law when plaintiff has not suffered any material injury or prejudice from the mistake.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

These points and authorities may be modified to support a general demurrer [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*] to a complaint for rescission of a contract entered into by mistake when plaintiff fails to allege facts showing that he or she has suffered material injury or prejudice because of the mistake.

With appropriate modifications, these points and authorities may be used to support plaintiff's motion for a new trial [*Code Civ. Proc. § 657(6)*] in an action for damages for breach of contract when defendant contends that the contract is voidable because it was entered into under a mistake of fact or law.

[b] Related Memoranda

For memoranda of points and authorities relating to motions for new trial generally, see Ch. 155, *Motions After Trial* in this set.

[3] Discussion of Authorities

[a] No Rescission for Mistake Unless Material Injury Shown

Guthrie v. Times-Mirror Co. *(1975) 51 Cal. App. 3d 879, 124 Cal. Rptr. 577* , arose out of the sale of a newspaper publishing company to defendant. Plaintiffs, former shareholders of the company, sought to rescind the transaction and recover profits allegedly realized by defendant on its subsequent resale of the company. The trial court sustained a demurrer to plaintiffs' complaint without leave to amend. Plaintiffs appealed from the ensuing judgment of dismissal. The complaint alleged that plaintiffs and other shareholders had sold all of the stock of the company to defendant for $15,000,000 cash. Shortly after the sale, however, a U.S. District Court entered judgment decreeing that defendant's control of the company violated federal antitrust laws and this judgment was affirmed by the United States Supreme Court. Pursuant to the judgment, defendant sold the company to another publishing company. Plaintiffs further alleged that the parties had entered into the contract under a mutual mistaken belief that the contract for sale of the newspaper to defendant did not violate the antitrust laws.

On appeal, plaintiffs contended, inter alia, that they had alleged facts entitling them to relief on the ground of mutual mistake of law. The court of appeal affirmed the judgment and rejected this contention. The court held that the complaint was fatally defective because it failed to set forth facts showing that plaintiffs were harmed or injured as a result of the claimed mistake. The court noted that a contract is voidable for mistake only if enforcement would be materially harmful or more onerous to the party seeking avoidance than it would have been had the law or the facts been as believed. This, stated the court, is a necessary corollary of the principle that the mistake, whether of law or fact, must materially affect an essential element of the contract. Thus, a party seeking to rescind a contract must show that he has suffered material injury or prejudice, although he need not show pecuniary loss (*51 Cal. App. 3d 879, 886)* . The court

then observed that had the law been as the parties supposed, plaintiffs would have been no better off. The alleged mistake did not affect the consideration for which plaintiffs contracted; they received the $15,000,000 cash for which they had agreed to sell the newspaper. Nor did the federal antitrust suit render performance more onerous to plaintiffs or otherwise materially injure them. The court concluded that the alleged mistake concerning the legal consequences flowing from defendant's control of the company had no effect on the intrinsic merits of the contract insofar as plaintiffs were concerned; plaintiffs' interests therein were not injuriously affected by the alleged mistake of law (*51 Cal. App. 3d 879, 886-887)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsContracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral Overview

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9-92 California Points & Authorities § 92.95

§ 92.95 Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Mistake of Fact [Civ. Code § 1577] or Law [Civ. Code § 1578]--No Relief From Mistake When Parties Assumed Risk

[1] FORM

[*Caption. See § 92.40.*]

DEFENDANT'S MOTION FOR A NEW TRIAL SHOULD BE GRANTED BECAUSE THE ALLEGED MISTAKE CONCERNED MATTERS WHICH THE PARTIES HAD IN MIND AS POSSIBILITIES AT THE TIME THE CONTRACT WAS ENTERED INTO AND AS TO THE EXISTENCE OF WHICH THE PARTIES ASSUMED THE RISK.

A. Motion for New Trial. [*See § 92.40, Paragraph A.*]

B. No Mistake When Parties Assumed Risk. Where parties are aware at the time the contract is entered into that a doubt exists in regard to a certain matter and contract on that assumption, the risk of the existence of the doubtful matter is assumed as an element of the bargain; therefore, the kind of mistake which renders a contract voidable does not include mistakes as to matters which the contracting parties had in mind as possibilities and as to the existence of which they took the risk (*Guthrie v. Times-Mirror Co. (1975) 51 Cal. App. 3d 879, 885, 124 Cal. Rptr. 577*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of an unsuccessful defendant's motion for a new trial in an action to rescind a contract allegedly entered into under a mistake of fact or law when the alleged mistake concerned matters which the parties considered at the time the contract was entered into and as to the existence of which they assumed the risk.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

These points and authorities may be modified to support a general demurrer [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*] to a complaint for rescission of a contract entered into by mistake when it appears on the face of the complaint or from any matter of which the court must or may take judicial notice that the mistake concerned matters as to which the parties assumed the risk.

With appropriate modifications, these points and authorities may be used to support plaintiff's motion for a new trial [*Code Civ. Proc. § 657(6)*] in an action for damages for breach of contract when defendant contends that the contract is voidable because it was entered into under a mistake of fact or law.

[b] Related Memoranda

For memoranda of points and authorities relating to motions for new trial generally, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] No Mistake When Parties Assumed Risk

The factual and procedural background of ***Guthrie v. Times-Mirror Co.*** *(1975) 51 Cal. App. 3d 879, 124 Cal. Rptr. 577* , is discussed in *§ 92.94[3][a]*. In that case, the court of appeal affirmed the trial court's judgment dismissing an action to rescind a contract on the ground of mutual mistake of law after sustaining a demurrer to the complaint without leave to amend. In support of the judgment, defendant contended, inter alia, that the complaint revealed that at the time they contracted, the parties were aware that defendant's acquisition and control of the newspaper company presented a possible or potential federal antitrust problem and that they therefore assumed the risk that their counsel's prophecy as to what the court in the antitrust suit would do might be wrong. The court of appeal noted that where parties are aware at the time the contract is entered into that doubt exists in regard to a certain matter and contract on that assumption, the risk of the existence of the doubtful matter is assumed as an element of the bargain. Thus, the court stated, the kind of mistake which renders a contract voidable does not include mistakes as to matters which the contracting parties had in mind as possibilities and as to the existence of which they took the risk (*51 Cal. App. 3d 879, 885)* .

The court, however, concluded that it would be inappropriate at the demurrer stage to determine the validity of defendant's contention because the court could not infer solely from the facts alleged that the parties doubted the validity of the transaction and therefore assumed the risk that the contract might be found to be violative of the federal antitrust laws. The parties' doubts may have been laid to rest after their consultation with legal counsel. Thus, it was

necessary to haveevidence concerning the nature of the legal advice on which the parties relied and their state of mind at the time they contracted in order to determine whether defendant's contention that the parties assumed the risk was correct (*51 Cal. App. 3d 879, 885-886)* . The court held, however, that the complaint failed to state a cause of action for relief on the ground of mistake because it failed to allege facts showing that plaintiffs were harmed or injured as a result of the mistake (*51 Cal. App. 3d 879, 886-889)* .

[4] Additional Authorities

[a] No Mistake When Parties Assumed Risk

Spurgeon v. Drumheller (1985) 174 Cal. App. 3d 659, 220 Cal. Rptr. 195 , involved a situation in which one party was aware that there was some doubt and the other party apparently had not made his mistaken belief known. Although reversing on other grounds, the court of appeal agreed that there were no grounds for rescission based on mutual mistake. Defendant had agreed to purchase property subject to an existing deed of trust. He understood that to mean he could continue the existing financing without any involvement of the lenders. When one lender demanded financial information from the buyer, he refused to provide it or to consummate the transaction. The seller had been involved in many real estate transactions and had no basis for believing that credit information would or would not be requested. The court of appeal concluded that the evidence supported the trial court's finding that there was no showing that both parties contemplated at the time of the contract that no financial suitability information would be requested by any existing mortgagee (*174 Cal. App. 3d 659, 663-664)* .

In *Glendale Fed. Sav. & Loan Ass'n v. Marina View Heights Dev. Co. (1977) 66 Cal. App. 3d 101, 135 Cal. Rptr. 802* , plaintiff entered into a contract with defendants whereby plaintiff agreed to lend defendants a sum of money to finance the purchase of land from plaintiff and to finance the development of this land and adjacent land owned by defendants. Under the agreement, defendants agreed to construct certain offsite improvements on the property within 18 months. Defendants subsequently defaulted on the loan payments and failed to construct the improvements. Plaintiff brought an action against defendants for damages for breach of the agreement and for fraud. The trial court entered judgment for plaintiff.

On appeal, defendants contended, inter alia, that they were excused from performance of the contract because of mistake. Defendants argued that the evidence showed that installation of the offsite improvements would be uneconomical without freeway access to the property and that the parties had contracted under the mistaken assumption that such access would soon be available. In affirming the judgment, the court of appeal rejected this contention, noting that the trial court's findings sufficiently determined all issues of fact necessary to support the judgment and to overcome all pertinent theories of the defense. Defendants also contended that the trial court's finding that defendants intended to complete the offsite improvements but believed that completion within 18 months would be impracticable should have led to a finding of mistake. The court held that this argument was specious because that finding negated the defense of mistake. The court noted that the kind of mistake which renders a contract voidable does not include a mistake as to a matter which one of the contracting parties had in mind as a possibility and as to the existence of which he took the risk (*66 Cal. App. 3d 101, 153)* .

In *Raddue v. LeSage (1956) 138 Cal. App. 2d 852, 292 P.2d 522* , plaintiff and defendants entered into a contract by which plaintiff agreed to purchase from defendants all merchantable timber on a certain tract of land and to pay defendants a total sum of $35,000 therefor. The contract provided that plaintiff was to pay defendants $10,000 on execution of the agreement and $16 per thousand board feet as the timber was harvested until $25,000 more had been paid. The contract also provided that if the harvesting operations failed to yield $35,000 in timber at $16 per thousand board feet, the total price was to be reduced pro rata. Thereafter, plaintiff brought an action to reform the contract, alleging that the total price specified in the contract was arrived at as a result of a mutually mistaken belief by the parties that the amount of timber on the property was 3.5 million board feet; the amount of timber actually on the land was less than one-third of the amount that the parties had believed there was; the parties had intended that plaintiff

should pay at a rate of $10 per thousand board feet for the timber actually on the property; because of the mutual mistake, the contract did not express the intentions of the parties; and plaintiff had been damaged thereby in that he had paid more for the timber than the parties intended he should. The trial court entered judgment reforming the contract.

On appeal, the court of appeal reversed. The court reviewed the evidence and observed that the alleged basic assumption as to the quantity of timber on the property was necessarily an approximation and that the parties themselves had recognized this in their pleadings; exact certainty could not be determined by any means other than actually harvesting the timber. The court noted that where the parties to a contract know that there is doubt in regard to a certain matter and contract on that assumption, the contract is not rendered voidable because one is disappointed in the hope that the facts accord with his wishes. The risk of the existence of the doubtful fact is then assumed as one of the elements of the bargain [quoting Rest Contracts, § 502, comment f] (*138 Cal. App. 2d 852, 855-856)* . The court held that the case before it was brought within these rules by the presence in the contract of a provision which demonstrated that the parties considered that their assumption as to the quantity of merchantable timber on the land might be erroneous and provided for what their contractual relations should be in that event (*138 Cal. App. 2d 852, 856)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsContracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral Overview

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Volume 9 Chapters 90-99 DISMISSAL---to---EMINENT DOMAIN
CHAPTER 92 DURESS, MENACE, FRAUD, UNDUE INFLUENCE, AND MISTAKE
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9-92 California Points & Authorities § 92.96

§ 92.96 Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Mistake of Fact [Civ. Code § 1577] or Law [Civ. Code § 1578]--No Relief for Mistake Occurring After Contract Formation

[1] FORM

[*Caption. See § 92.40.*]

RESCISSION CANNOT BE GRANTED FOR A MISTAKE REGARDING A FACT THAT CAME INTO EXISTENCE AFTER THE CONTRACT WAS FORMED.

A. Motion for New Trial. [*See § 92.40, Paragraph A.*]

B. No Relief for Mistake Occurring After Contract Formation. In order to support rescission or provide a defense against an action for breach of contract, a mistake of fact must concern a present or past fact, not one that came into existence after the contract was formed (*See Civ. Code § 1577*; *Mosher v. Mayacamas Corp. (1989) 215 Cal. App. 3d 1, 4-5, 263 Cal. Rptr. 373*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be used in support of a defendant's unsuccessful motion for a new trial in an action to rescind a contract. The ground for the motion is that rescission based on mistake of fact [*see Civ. Code § 1577*] is not available when the particular fact regarding which the other party was mistaken came into existence after formation of the contract. This form may be combined, in an appropriate case, with the points and authorities *set out in § 92.97*.

Although this form is arranged in the procedural context of a motion for new trial by a defendant against whom rescission was erroneously granted, it may be modified for use in another procedural context, including a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law stated.

[3] Discussion of Authorities

[a] No Relief for Mistake Occurring After Contract Formation

Civ. Code § 1577 is *set out in § 92.99*, Paragraph D.

Plaintiff in ***Mosher v. Mayacamas Corp.*** *(1989) 215 Cal. App. 3d 1, 263 Cal. Rptr. 373* , once owned several Tahoe vacation properties with his brother, who formed defendant corporation to manage them and to hold the brother's interests. In 1982, the brother proposed that the corporation buy out plaintiff's interest in the properties. Plaintiff agreed, and the brother, in his capacity as chief executive officer of defendant, drafted the contract. It provided for a downpayment with the remainder to be paid with interest over five years. Beginning in 1985, property values at Lake Tahoe declined drastically. It was assumed for purposes of the case that the principal cause of the decline was the impending tax legislation, later enacted as the Tax Reform Act of 1986, which substantially eliminated tax benefits for secondary residences. Defendant stopped making payments under the contract, and plaintiff sued for breach of contract seeking the balance owing. Defendant cross complained for rescission claiming mistake of fact regarding the valuation of the properties and failure of consideration. Plaintiff moved for summary judgment. It was granted, the trial court finding, as a matter of law, that plaintiff was entitled to full performance of the contract. Judgment was entered for plaintiff. Defendant appealed.

The court of appeal affirmed. Defendant contended that summary judgment was improper because there were three material issues of fact: (1) whether there was a mistake of fact regarding the valuation of the properties; (2) whether there was a basic assumption by the parties at the time they entered into the contract that the tax benefits generated by the properties would continue indefinitely; and (3) whether the parties intended to share the risk of any subsequent decline in value. Regarding Defendant's first contention, the court of appeal set forth *Civ. Code § 1577*, emphasizing the words "fact past or present," "present existence," "does not exist," "past existence," and "has not existed" (*215 Cal. App. 3d 1, 4-5)* . There was no evidence that the value of the properties was overstated in 1982 when the contract was formed. The entire thrust of defendant's argument was that subsequent events rendered the valuation mistaken. The court said that the emphasized words in *Civ. Code § 1577* make clear that there is no legal authority for defendant's position. Without evidence that the future contingency was an assumption of the contract, the defense of mutual mistake of fact must be premised on past or present facts about which the parties are ignorant or mistaken (*215 Cal. App. 3d 1, 5)* .

The court of appeal distinguished *Smith v. Zimbalist (1934) 2 Cal. App. 2d 324, 38 P.2d. 170* , which involved a

contract by a famous violinist to purchase twoviolins. Both the seller and the purchaser believed the violins were a "Guarnerius" and a "Stradivarius," and the contract price was reflected in that belief. The purchaser ceased making payment after discovering that the violins were not a "Guarnerius" and a "Stradivarius." In *Smith*, there was a mutual mistake regarding the identity of the violins, which were never what both parties believed them to be and never had the value attributed to them by the parties. Here, the properties did have the value the parties attributed to them at the time of contracting (*215 Cal. App. 3d 1, 5)* .

The court concluded its consideration of this first contention by saying that adoption of defendant's argument would expose virtually any unprofitable contract to legal attack on the later occurrence of unforeseen adverse events (*215 Cal. App. 3d 1, 5)* .

[4] Additional Authorities

[a] No Relief for Mistake Occurring After Contract Formation

In *Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga (2009) 175 Cal. App. 4th 1306, 96 Cal. Rptr. 3d 813* , the parties had made a contract, and achieving the contract's purpose depended on one party's obtaining a city's approval of that party's status as a qualified conservation entity, which that party failed to do. The other party claimed the right to rescind the contract on several grounds including mistake of fact, contending that the parties had made the contract on the assumption that the unapproved party was eligible for the city's approval as having the necessary status when in fact that was not true. The trial court concluded that both parties had been mistaken in that assumption and that rescission was justified on the ground of mistake of fact. The court of appeal concurred. The unapproved party, relying on *Mosher v. Mayacamas Corp.*, contended on appeal that the only mistake involved the parties' assumption as to the occurrence of a future event, which was that the necessary approval would be obtained. The court of appeal was able to distinguish that case, however. " *Unlike the Mosher v. Mayacamas Corp. (1989) 215 Cal. App.3d 1* [*263 Cal. Rptr. 373*], case cited by Habitat/Sage, where the facts showed not that both parties were mistaken at the time of contracting, but that one party simply failed to consider the possibility of a future event (*id. at p. 5*), the parties here were mistaken, at the time they entered the Agreement, as to the present fact that Habitat would qualify as a QCE. This fact was an assumption of the Agreement, a circumstance that the Mosher court recognized would have altered its analysis of the risks in favor of finding mistake" (*175 Cal. App. 4th 1306, 1343)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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9-92 California Points & Authorities § 92.97

§ 92.97 Supporting Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Mistake of Fact [Civ. Code § 1577] or Law [Civ. Code § 1578]--No Relief for Error of Judgment

[1] FORM

[*Caption. See § 92.40.*]

RESCISSION CANNOT BE GRANTED FOR AN ERROR IN JUDGMENT.

A. Motion for New Trial. [*See § 92.40, Paragraph A.*]

B. No Relief for Error in Judgment. When a contract becomes unprofitable for one party, who knew its value could be significantly affected by a particular future event and yet made no provision in the contract with respect to that matter, there is no mistake of fact or failure of consideration, but only an error in judgment. The risk in such circumstances is borne only by that one party, who is not entitled to avoid, rescind, or reform the contract (*Mosher v. Mayacamas Corp. (1989) 215 Cal. App. 3d 1, 5-6, 263 Cal. Rptr. 373*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be used in support of an unsuccessful defendant's motion for a new trial in an action to rescind a contract. The ground for the motion is that rescission based on mistake of fact [*see Civ. Code § 1577*] is not available when the purported mistake is merely an error in judgment regarding a risk that was assumed by the party seeking rescission. This form may be combined, in an appropriate case, with the points and authorities *set out in § 92.95, § 92.96*, or both.

Although this form is arranged in the procedural context of a motion for new trial by a defendant against whom rescission was erroneously granted, it may be modified for use in another procedural context, including a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law stated.

[3] Discussion of Authorities

[a] No Relief for Error in Judgment

The facts and procedural background of ***Mosher v. Mayacamas Corp.*** *(1989) 215 Cal. App. 3d 1, 263 Cal. Rptr. 373* , are discussed in *§ 92.96[3][a]*. After disposing of defendant's contention that there was a triable issue of fact as to whether there was a mistake of fact regarding the valuation of the properties, the court of appeal considered defendant's argument that it had raised triable issues of fact regarding whether the parties assumed a continuation of favorable tax treatment of the properties and resultant high valuation in entering into the contract and whether the parties intended to share the risk of any postsale economic adversity (*215 Cal. App. 3d 1, 5)* . The court noted that there was no evidence of any such assumption or agreement. There was no language to that effect in the written agreement prepared by defendant, nor was there any evidence of an oral agreement or understanding (*215 Cal. App. 3d 1, 6)* . As a matter of law, defendant's predicament resulted from an error in judgment rather than a mistake of fact or failure of consideration. Defendant chose to enter into the contract knowing the tax benefits were a major aspect of the value of the properties and presumably knowing that the availability of those benefits could be affected by future legislation, yet it made no provision with respect to tax matters in the contract. Thus, defendant alone had to bear this risk and was not entitled to avoid, rescind, or reform the contract (*215 Cal. App. 3d 1, 6)* .

Legal Topics:

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9-92 California Points & Authorities § 92.98

§ 92.98 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 657(6) in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Mistake of Fact [Civ. Code § 1577]--Rescission for Unilateral Mistake Permitted When Enforcement Would Be Unconscionable

[1] FORM

[*Caption. See § 92.45.*]

DEFENDANT'S MOTION FOR A NEW TRIAL ON THE GROUND THAT PLAINTIFF'S MISTAKE WAS UNILATERAL SHOULD NOT BE GRANTED BECAUSE THE EVIDENCE IS SUFFICIENT TO SHOW THAT THE EFFECT OF THE MISTAKE IS SUCH THAT ENFORCEMENT OF THE CONTRACT WOULD BE UNCONSCIONABLE.

A. New Trial Precluded Unless Court Convinced That Court or Jury Clearly Should Have Reached Different Result. [*See § 92.45, Paragraph A.*]

B. Rescission for Mistake. A party to a contract may rescind the contract if the consent of the party rescinding, or of any party jointly contracting with him or her, was given by mistake (*Civ. Code § 1689(b)(1)*).

C. Kinds of Mistake. Mistake may be either of fact or law (*Civ. Code § 1576*).

D. Mistake of Fact Defined. A mistake of fact is a mistake, not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in: (1) an unconscious ignorance or forgetfulness of a past or present fact which is material to the contract; or (2) belief in the present existence of a thing which is material to the contract and which does not exist, or in the past existence of such a thing which has not existed (*Civ. Code § 1577*).

E. Rescission for Unilateral Mistake Permitted If Effect of Mistake Would Make Enforcement of Contract Unconscionable. Rescission is permitted when the effect of an unilateral mistake of fact is such that enforcement of the

contract would be unconscionable (*Donovan v. RRL Corp. (2001) 26 Cal. 4th 261, 280-282, 109 Cal. Rptr. 2d 807, 27 P.3d 702*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to an unsuccessful defendant's motion for new trial in an action to rescind a contract allegedly entered into under a mistake of fact when defendant has asserted in the motion that the claimed mistake was unilateral on the part of plaintiff. The ground of opposition presented is that the effect of the unilateral mistake of fact is such that enforcement of the contract would be unconscionable.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

These points and authorities may be modified to oppose a general demurrer for failure to state a cause of action [*see* Civ. Code §§ 430.10(c), 430.30(a)] to a complaint for rescission of a contract entered into by mistake.

[c] Related Memoranda

For memoranda of points and authorities relating to motions for new trial generally, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] Rescission for Unilateral Mistake of Fact Permitted if Effect of Mistake is Such That Enforcement of Contract Would Be Unconscionable

In ***Donovan v. RRL Corp.*** *(2001) 26 Cal. 4th 261, 109 Cal. Rptr. 2d 807, 27 P.3d 702* , plaintiff noticed a newspaper advertisement placed by defendant car dealer which described a specific car for sale at a specific price. The name of the dealer was prominently displayed. When plaintiff attempted to purchase the car at the advertised price, the dealer's salesperson stated that the advertised price was a mistake and refused to sell the car to plaintiff at that price. Apparently the advertised price was a result of typographical and proofreading errors made by the newspaper staff. Defendant had not reviewed proof sheets of the ad before it was published, and was unaware of the mistake until plaintiff attempted to purchase the car. Plaintiff filed suit for breach of contract, fraud and negligence. The municipal court entered judgment for defendant, finding that there was no valid offer because defendant's unilateral mistake of fact vitiated or negated contractual intent. The court made factual findings that defendant's mistake regarding the advertisement was made in good faith, was not intended to deceive the public, and that plaintiff was unaware of the mistake before defendant's representatives disclosed it to him. Plaintiff appealed to the appellate department of the superiorcourt, which reversed

the judgment for defendant. It concluded that the ad constituted an offer capable of acceptance by tender of the advertised price, and that defendant bore the risk of its mistake because plaintiff was unaware of the mistake. The court of appeal reversed the judgment of the municipal court and held that the ad constituted a contractual offer that invited acceptance, which plaintiff performed. It also found that defendant's failure to review the proof sheet for the newspaper ad constituted negligence that contributed to the placement of the erroneous advertisement.

The California Supreme Court reversed. It first found that the advertisement constituted an offer (*26 Cal. 4th 261, 271-273)* . It next held that defendant's printed name in the ad evidenced an intention to authenticate the advertisement as an offer and therefore constituted a signature, satisfying the statute of frauds (*26 Cal. 4th 261, 276-278)* . Finally, the court held that defendant could avoid enforcement of the contract on the ground of mistake. It initially found that defendant's lack of knowledge regarding the typographical error in the advertised price of the vehicle constituted a mistake of fact. The court noted that under the first Restatement of Contracts, unilateral mistake did not render a contract voidable unless the other party knew of or caused the mistake. The court noted that California case law does not adhere to the original Restatement's requirements for rescission based on unilateral mistake. The Restatement Second of Contracts, § 153(a), however, authorizes rescission for a unilateral mistake of fact where the effect of the mistake is such that enforcement of the contract would be unconscionable. The court adopted that rule as California law (*26 Cal. 4th 261, 278-282)* . Having concluded that a contract properly may be rescinded on the ground of unilateral mistake of fact as set forth in section 153(a), the court next considered whether the requirements of that provision, construed in light of its previous decisions, were satisfied in the present case. The court stated that when the plaintiff has no reason to know of and does not cause the defendant's unilateral mistake of fact, the defendant must establish the following facts to obtain rescission of the contract: (1) the defendant made a mistake regarding a basic assumption upon which the defendant made the contract; (2) the mistake has a material effect upon the agreed exchange of performances that is adverse to the defendant; (3) the defendant does not bear the risk of the mistake; and (4) the effect of the mistake is such that enforcement of the contract would be unconscionable (*26 Cal. 4th 261, 282)* . In this case, a significant error in the price term of the contract established the first factor. Because the error amounted to 32 percent of the price defendant intended, such a mistake was material. As for bearing the risk of mistake, the court reiterated that ordinary negligence does not constitute neglect of a legal duty under *Civ. Code § 1577*. Absent any evidence of bad faith, even the violation of any duty imposed by *Veh. Code § 11713.1(e)* (which states it is a violation of Vehicle Code for dealer to fail to sell vehicle at advertised price) would not constitute the neglect of a legal duty that precludes rescission for unilateral mistake of fact. In this instance, defendant's fault constituted of failure to review a newspaper proof sheet. Although it might constitute negligence, it was not a breach of defendant's good faith and fair dealing. Thus, defendant's conduct did not preclude rescission. Finally, the court held that enforcement of the contract would be unconscionable. Defendant would lose more than $9,000 of its original investment in the vehicle, while plaintiff would obtain a $12,000 windfall merely by paying the erroneous advertised price. Having determined that defendant satisfied the requirement for rescission of the contract on the ground of unilateral mistake of fact, the court concluded that the municipal court correctly entered judgment in defendant's favor (*26 Cal. 4th 261, 294)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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9-92 California Points & Authorities § 92.99

§ 92.99 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Mistake of Fact [Civ. Code § 1577]--Rescission for Unilateral Mistake Permitted if Other Party Has Knowledge of Mistake

[1] FORM

[*Caption. See § 92.45.*]

DEFENDANT'S MOTION FOR A NEW TRIAL ON THE GROUND THAT PLAINTIFF'S MISTAKE WAS UNILATERAL SHOULD NOT BE GRANTED BECAUSE THE EVIDENCE IS SUFFICIENT TO SHOW THAT DEFENDANT KNEW OR HAD REASON TO KNOW THAT PLAINTIFF WAS ACTING UNDER A MISTAKE AT THE TIME THE CONTRACT WAS ENTERED INTO.

A. New Trial Precluded Unless Court Convinced That Court or Jury Clearly Should Have Reached Different Result. [*See § 92.45, Paragraph A.*]

B. Rescission for Mistake. A party to a contract may rescind the contract if the consent of the party rescinding, or of any party jointly contracting with him or her, was given by mistake (*Civ. Code § 1689(b)(1)*).

C. Kinds of Mistake. Mistake may be either of fact or law (*Civ. Code § 1576*).

D. Mistake of Fact Defined. A mistake of fact is a mistake, not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in: (1) an unconscious ignorance or forgetfulness of a past or present fact which is material to the contract; or (2) belief in the present existence of a thing which is material to the contract and which does not exist, or in the past existence of such a thing which has not existed (*Civ. Code § 1577*).

E. Rescission for Unilateral Mistake Permitted if Other Party Has Knowledge of Mistake. When one party to a contract knows or has reason to know thatthe other party is acting under a mistake, the contract may be rescinded by the

mistaken party (*M.F. Kemper Constr. Co. v. Los Angeles (1951) 37 Cal. 2d 696, 701, 235 P.2d 7*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to an unsuccessful defendant's motion for new trial in an action to rescind a contract allegedly entered into under a mistake of fact when defendant has asserted in the motion that the claimed mistake was unilateral on the part of plaintiff. The ground of opposition presented is that defendant knew or had reason to know of plaintiff's unilateral mistake.

In an appropriate case, this memorandum may be submitted in opposition to a motion for new trial which is supported by the points and authorities *set out in § 92.90*.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

These points and authorities may be modified to oppose a general demurrer for failure to state a cause of action [*see* Civ. Code §§ 430.10(c), 430.30(a)] to a complaint for rescission of a contract entered into by mistake.

With appropriate modifications, these points and authorities may also be used by a defendant to oppose plaintiff's motion for new trial [*see Civ. Code § 657(6)*] in an action for damages for breach of contract when defendant contends that the contract is voidable because it was entered into under a mistake of fact.

[b] Related Memoranda

For memoranda of points and authorities relating to motions for new trial generally, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] Rescission for Unilateral Mistake Permitted if Other Party Has Knowledge of Mistake

In ***M.F. Kemper Constr. Co. v. Los Angeles*** *(1951) 37 Cal. 2d 696, 235 P.2d 7* , defendant city published a notice inviting bids for the construction of a sewer project. The notice provided that each bid must be accompanied by a certified check or surety bond for an amount not less than 10 percent of the bid which was to be forfeited to the city if the city accepted the bid and the bidder failed or refused to execute a contract with the city. Plaintiff learned of the invitation for bids and proceeded to prepare a bid for submission to defendant. In the course of preparing the bid, an item estimated on a work sheet in the amount of $301,769 was inadvertently omitted from the final accumulation sheet

and was overlooked in computing the total amount of the bid. The error was caused by the fact that the men preparing the bid were exhausted after working long hours under pressure. When the bids were opened, it was found that plaintiff's bid was $780,305 and the bids of the other three contractors were $1,049,592, $1,183,000, and $1,278,895. Plaintiff discovered its error several hours after the bids were opened and promptly notified defendant of its error. Defendant, however, passed a resolution accepting defendant's erroneous bid. Plaintiff refused to enter into a contract at that figure, and defendant demanded forfeiture of plaintiff's surety bond. Plaintiff then brought an action to rescind its bid and to obtain discharge of the bond. The trial court entered judgment for plaintiff.

On appeal, defendant contended that a party is entitled to relief on the ground of mistake only where the mistake is mutual and that plaintiff's mistake in this case was wholly unilateral. In affirming the judgment, the Supreme Court rejected this contention. The Court noted that defendant had actual notice of the error in the estimates before it attempted to accept the bid, and knowledge by one party that the other is acting under mistake is treated as equivalent to mutual mistake for purposes of rescission. The Court observed that relief from mistaken bids is consistently allowed where one party knows or has reason to know of the other's error and the other requirements for rescission are fulfilled (*37 Cal. 2d 696, 701)* . The Court stated that rescission may be had for mistake of fact if the mistake is material to the contract and was not the result of neglect of a legal duty if enforcement of the contract would be unconscionable, and if the other party can be placed in status quo. In addition, the Court stated, the party seeking relief must give prompt notice of his election to rescind and must restore or offer to restore to the other party everything of value which he has received under the contract (*37 Cal. 2d 696, 701)* . The Court then held that plaintiff had met all the requirements for rescission (*37 Cal. 2d 696, 702-703)* .

[4] Additional Authorities

[a] Rescission for Unilateral Mistake Permitted if Other Party Has Knowledge of Mistake

In *Brunzell Constr. Co. v. G.J. Weisbrod, Inc. (1955) 134 Cal. App. 2d 278, 285 P.2d 989* , plaintiff, who was bidding for the general contract on a public school construction project, solicited bids from subcontractors for various phases of the work. One of the items for which bids were sought was the steel work on the project, which included the construction of some steel decking. Defendant submitted a bid for the steel work to plaintiff by telephone, quoting a price which expressly omitted the steel decking. After plaintiff successfully bid for the general contract, defendant sent plaintiff a letter confirming the bid on the subcontract. This letter erroneously failed to omit steel decking from the work covered by the bid. Plaintiff then prepared a written subcontract agreement which provided that defendant would perform the work previously quoted in its bid confirmation letter. Both parties signed this agreement. Several days later, defendant discovered that neither the bid confirmation nor the contract excluded steel decking. Defendant requested that plaintiff amend the written contract so as to exclude the decking, in accordance with defendant's verbal bid. Plaintiff declined to do so, and defendant then refused to perform under the contract as executed. Plaintiff awarded the subcontract to another bidder and brought an action against defendant for damages for breach of contract. The trial court entered judgment for defendant.

The court of appeal affirmed the judgment. The court first reviewed the evidence and concluded that the trial court was justified in finding that defendant had made a mistake in its letter of confirmation, that plaintiff knew that such a mistake had been made, that it took unfair advantage of this mistake to incorporate decking into the contract though the bid price was made exclusive of decking, and that defendant assented to the contract under an honest misapprehension which plaintiff was trying to exploit. The court noted that on discovering the true facts a few days after the contract was signed and while it was still executory, defendant gave prompt notice of rescission and no offer of restoration was necessary because it had received nothing of value which it could restore. Thus, the court concluded, the trial court was justified in concluding that plaintiff could not enforce the contract as made. The court held that when a contract is still executory, and the parties can be put in status quo, one party to the contract will not be permitted to obtain an unconscionable advantage through enforcement of the contract where he or she knows of the other's mistake, where the mistake is material and not the result of neglect of a legal duty or an error in judgment, and the requirements for

rescission are fulfilled (*134 Cal. App. 2d 278, 286)* .

The Ninth Circuit Court of Appeals in Bldg. Serv. Emp. Pension Tr. v. Amer. Bldg. Maint. (9th Cir. 1987) 828 F.2d 576, 578 , reversed a judgment entered against plaintiff based on accord and satisfaction. Although the pension issues were governed by federal law, the issue of the effect of plaintiff's attorney's miscalculation of interest in the demand letter was determined under California law. After defendant paid the amount demanded, plaintiff's attorney discovered the mistake. The court said that even if a unilateral mistake is not discovered until after the nonmistaken party has fully performed the accord, rescission would be required if the nonmistaken party should have known that the mistake was made. Thus summary judgment based on accord and satisfaction was error. A triable question of fact existed about whether defendant's attorney should have known from the demand letter that opposing counsel miscalculated the amount of interest claimed. If defense counsel should have spotted the mistake, the accord could be rescinded (*828 F.2d 576, 578)* .

Architects & Contractors Estimating Service, Inc. v. Smith (1985) 164 Cal. App. 3d 1001, 211 Cal. Rptr. 45 , involved a judgment for a nonperforming party who had asserted mistake as a defense. The decision was based in part on the ground that rescission for unilateral mistake is permitted only if the other party knew or had reason to know of the mistake (*164 Cal. App. 3d 1001, 1007-1008)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsContracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral Overview

California Points & Authorities

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Volume 9 Chapters 90-99 DISMISSAL---to---EMINENT DOMAIN
CHAPTER 92 DURESS, MENACE, FRAUD, UNDUE INFLUENCE, AND MISTAKE
PART II. FORMS
D. Mistake

9-92 California Points & Authorities § 92.100

§ 92.100 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Mistake of Fact [Civ. Code § 1577]--Ordinary Negligence as Not Neglect of Legal Duty Barring Relief From Mistake

[1] FORM

[*Caption. See § 92.45.*]

DEFENDANT'S MOTION FOR A NEW TRIAL ON THE GROUND THAT THE MISTAKE WAS THE RESULT OF PLAINTIFF'S NEGLECT OF A LEGAL DUTY SHOULD NOT BE GRANTED BECAUSE THE EVIDENCE SHOWS THAT, AT MOST, PLAINTIFF WAS GUILTY OF ONLY ORDINARY NEGLIGENCE WHICH DOES NOT CONSTITUTE A NEGLECT OF LEGAL DUTY PRECLUDING RELIEF FROM A CONTRACT ON THE GROUND OF MISTAKE.

A. New Trial Precluded Unless Court Convinced That Court or Jury Clearly Should Have Reached Different Result. [*See § 92.45, Paragraph A.*]

B. Rescission for Mistake. [*See § 92.99, Paragraph B.*]

C. Kinds of Mistake. [*See § 92.99, Paragraph C.*]

D. Mistake of Fact Defined. [*See § 92.99, Paragraph D.*]

E. Carelessness Does Not Necessarily Constitute Neglect of Legal Duty. The mere fact that a mistake is due to some carelessness on the part of the mistakenparty does not necessarily indicate a neglect of legal duty which will prevent rescission of the contract for mistake (*M.F. Kemper Constr. Co. v. Los Angeles (1951) 37 Cal. 2d 696, 702, 235 P.2d 7*).

F. Ordinary Negligence Is Not Neglect of Legal Duty; Gross Negligence Required. A plaintiff may not be denied rescission or reformation because of lack of care unless his or her conduct amounts to gross negligence or the neglect of a legal duty. Ordinary negligence does not constitute a neglect of a legal duty which will bar relief on the ground of mistake under *Civil Code Section 1577* (*Van Meter v. Bent Constr. Co. (1956) 46 Cal. 2d 588, 594, 595, 297 P.2d 644*).

G. Gross Negligence Defined. Gross negligence is the want of even scant care or an extreme departure from the ordinary standard of conduct (*Van Meter v. Bent Constr. Co. (1956) 46 Cal. 2d 588, 594, 297 P.2d 644*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to an unsuccessful defendant's motion for new trial in an action to rescind a contract allegedly entered into under a mistake of fact when defendant has asserted in the motion that the mistake was the result of plaintiff's neglect of a legal duty. The ground of opposition presented is that plaintiff was guilty of, at most, ordinary negligence, which does not constitute neglect of a legal duty barring relief from the mistake.

In an appropriate case, this memorandum may be submitted in opposition to a motion for new trial supported by the points and authorities *set out in § 92.91*.

When appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

These points and authorities may be modified to oppose a general demurrer for failure to state a cause of action to a complaint for rescission of a contract allegedly entered into by mistake.

With appropriate modifications, these points and authorities may also be used to oppose a plaintiff's motion for new trial in an action for damages for breach of contract when defendant contends that the contract is voidable because it was entered into under a mistake of fact.

[b] Related Memoranda

For memoranda of points and authorities relating to motions for new trial generally, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] Carelessness Does Not Necessarily Constitute Neglect of Legal Duty

The factual and procedural background of ***M.F. Kemper Constr. Co. v. Los Angeles*** *(1951) 37 Cal. 2d 696, 235 P.2d 7* , is discussed in *§ 92.99[3][a]*. In that case, defendant city claimed that plaintiff was barred from relief from its mistaken bid because it was negligent in preparing the cost estimates. In affirming the judgment, the Supreme Court rejected this contention. The Court noted that even if it was assumed that the error was due to some carelessness, it did not follow that plaintiff was without remedy. The Court observed that *Civ. Code § 1577*, which defines mistake of fact for which relief may be allowed, describes it as a mistake not caused by the neglect of a legal duty on the part of the person making the mistake and that not all carelessness constitutes a neglect of legal duty within the meaning of the section. The Court then held that the type of error involved in this case was one which sometimes occurs in the conduct of reasonable and cautious businesspersons, and, under the circumstances, it did not constitute a neglect of legal duty which would bar the right to equitable relief, as a matter of law (*37 Cal. 2d 696, 702)* .

[b] Ordinary Negligence Is Not Neglect of Legal Duty; Gross Negligence Required

In ***Van Meter v. Bent Constr. Co.*** *(1956) 46 Cal. 2d 588, 297 P.2d 644* , defendants contracted with a city to construct a dam and remove brush and trees from the reservoir basin. Thereafter, defendants entered into a subcontract with plaintiff for clearance of the basin, representing to him that the area to be cleared had been marked with flags. Plaintiff later discovered that the flagged area covered only a part of the reservoir basin, and he notified defendants that unless some adjustment was made, he would not proceed with the work. The parties agreed that plaintiff should clear the entire basin without prejudice to his rights under the subcontract. On completion of the work, plaintiff brought an action seeking, in separate counts, a declaration of rights, reformation of the subcontract, recovery of the reasonable value of services performed, and damages for false representations. The trial court found that the misrepresentations made to plaintiff were not willful and since plaintiff did not use reasonable care in ascertaining the extent ofthe work to be performed under the subcontract, he was entitled to no relief. The trial court also concluded that these findings were determinative of all the issues involved in the action and that it was therefore unnecessary to make further findings of fact.

On appeal, defendants contended that their conduct, although characterized by *Civ. Code § 1572(2)* as fraudulent, was merely negligent and that, by analogy to the rule in tort cases, plaintiff's contributory negligence was a complete defense as a matter of law. The Supreme Court rejected this contention, noting that there is an element of carelessness in nearly every case of mistake, and that an unqualified application of the principle urged by defendants would result in the virtual destruction of the equitable remedies for relief from mistake. The Court observed that it is settled that, even in the absence of any misrepresentation, the negligent failure of a party to know or discover facts as to which both parties are under a mistake does not preclude rescission or reformation because of the mistake and that a plaintiff will not be denied rescission or reformation because of lack of care unless his conduct amounts to gross negligence or the neglect of a legal duty. The Court stated that although the theory of degrees of negligence has been criticized by legal writers, a distinction has been made in California between ordinary and gross negligence. Gross negligence means the want of even scant care or an extreme departure from the ordinary standard of conduct (*46 Cal. 2d 588, 594)* . The Court held that although a breach of legal duty may consist of either ordinary or gross negligence, ordinary negligence does not constitute the neglect of legal duty as that term is used in *Civ. Code § 1577* (governing relief from a contact for mistake of fact) (*46 Cal. 2d 588, 595)* . The Court observed that the trial court had not determined that plaintiff's conduct was preposterous or irrational or that it amounted to gross negligence or the neglect of a legal duty and stated that any such determination could not have been supported in view of the findings that were made. The Court concluded that the trial court's determination that plaintiff wasprecluded from obtaining any relief by his own negligence was erroneous. The Court reversed the judgment and remanded the case to the trial court for further findings of fact (*46 Cal. 2d 588, 595-596)* .

[c] Gross Negligence Defined

Van Meter v. Bent Constr. Co. *(1956) 46 Cal. 2d 588, 297 P.2d 644* , is discussed in *§ 92.100[3][b]*.

[4] Additional Authorities

[a] Carelessness Does Not Necessarily Constitute Neglect of Legal Duty

Van Meter v. Bent Constr. Co. (1956) 46 Cal. 2d 588, 297 P.2d 644 , is discussed in *§ 92.100[3][b]*.

In *Williams v. Puccinelli (1965) 236 Cal. App. 2d 512, 46 Cal. Rptr. 285* , plaintiff and defendant entered into a contract for the lease of a portion of a two-story building owned by defendant. The parties mutually comtemplated that plaintiff would install and operate a restaurant and bar on the second floor of the building. Unknown to both parties, substantial alterations in the building, including portions not leased by plaintiff, were required by law in order to allow the second floor to be used for a restaurant and bar. The structural weaknesses in the building were not discovered by plaintiff until after the lease had been signed and plans and specifications were being prepared for the construction and installation of the restaurant and bar. Defendant refused to make any structural corrections to the part of the building not leased by plaintiff. After giving notice of rescission to defendant, plaintiff brought an action for rescission of the lease and restitution of the money which plaintiff had paid under the lease. The trial court entered judgment for plaintiff, finding that there was a material, mutual mistake of fact which had induced plaintiff to enter into the lease.

On appeal, defendant contended, inter alia, that plaintiff was precluded from relying on mistake as a ground for rescission because of the provision in *Civ. Code § 1577* that such a mistake must be one not caused by the neglect of a legal duty on the part of the person making the mistake. Defendant argued that plaintiff was negligent in not ascertaining the structural defects in the building before entering into the lease. In affirming the judgment, the court of appeal rejected this contention. The court observed that in this case, plaintiff's son, who had acted for plaintiff in the entire transaction, had no training or previous experience which would or should have raised any question in his mind as to the structural capacity of the building, and that the engineer who was hired by plaintiff's architect to help prepare the plans and specifications for the restaurant and bar testified that a nonexpert could not tell from physical observation of the building that substantial structural work would have to be done to it before a restaurant and bar could lawfully be installed and operated on the second floor (*236 Cal. App. 2d 512, 518-519)* . The court noted that the Supreme Court had held that not all carelessness constitutes a neglect of legal duty within the meaning of *Civ. Code § 1577* [*see M.F. Kemper Constr. Co. v. Los Angeles (1951) 37 Cal. 2d 696, 702, 235 P.2d 7]* . The court concluded that the circumstances of this case did not require a holding that plaintiff's failure to discover the defects until after the lease was signed constituted such a neglect of legal duty as would bar recovery as a matter of law (*236 Cal. App. 2d 512, 519)* .

[b] Ordinary Negligence Is Not Neglect of Legal Duty; Gross Negligence Required

In *Sun'n Sand, Inc. v. United Cal. Bank (1978) 21 Cal. 3d 671, 148 Cal. Rptr. 329, 582 P.2d 920* , plaintiff brought an action to recover amounts paid to defendant bank. In its complaint, plaintiff alleged that an employee of plaintiffhad, in the course of her employment, obtained the signature of an officer of plaintiff to several corporate checks made payable to defendant bank. The officer had signed the checks believing that they represented small amounts which his company owed defendant. In fact, no such debts were owed. After obtaining the officer's signature to the checks, the employee altered them, increasing the amount in each case to several thousand dollars, and presented them to defendant. Defendant caused or permitted the proceeds of the checks to be deposited in a personal account maintained by the employee at defendant bank. Plaintiff's complaint was based on six alternative theories, one of which was mistake of fact. The trial court sustained a demurrer to the complaint without leave to amend and dismissed the action.

On appeal, defendant argued, in support of the judgment, that plaintiff was barred from relief on the ground of mistake of fact because plaintiff's mistake was caused by neglect of its legal duty under former Com. Code § 4406(1) (*now see Com. Code § 4406(c)*) to examine its bank statements and returned checks for alterations and forgeries. The Supreme Court observed, however, that it does not follow that breach of this duty by failure to exercise reasonable care in

discharging it constitutes the neglect of a legal duty such that a cause of action for mistake must be barred (*21 Cal. 3d 671, 700)* . The Court noted that ordinary negligence does not constitute the neglect of a legal duty as that term is used in *Civ. Code § 1577* (defining mistake of fact) and that this rule reflected a determination that the neglect of a legal duty qualification derives content from equitable considerations and principles, and that it would be inequitable to bar relief for mistake because of the breach of a duty of care when the party from whom recovery is sought suffers no loss. The Court concluded that the fact that plaintiff may have failed to exercise care in examining its bank statements was not a sufficient basis for denying it equitable relief for mistake (*21 Cal. 3d 671, 701)* . The Court held, however, that the cause of action for mistake was barred by the statute of limitations and therefore affirmed the judgment insofar as it dismissed the cause of action based on mistake (*21 Cal. 3d 671, 701-702)* .

The factual and procedural background of *Harris v. Rudin, Richman & Appel (2002) 95 Cal. App. 4th 1332, 116 Cal. Rptr. 2d 552* , is discussed in *§ 92.93[4][a]*. In that case, the parties had failed to discover a proposed amendment to a section of the Probate Code until after they had agreed to settle a malpractice case involving that section. The amendment arguably would have eliminated the tax problem which had led to the malpractice suit. The court noted that with respect to a mistake of fact, ordinary negligence does not constitute neglect of a legal duty as that term is used in *Civ. Code § 1577*. To bar rescission, the party seeking to rescind must be guilty of gross negligence (*citing Van Meter v. Bent Construction Co. (1956) 46 Cal. 2d 588, 594, 297 P.2d 644* , discussed *above*). The court found that plaintiff had cited no authority for the proposition that a party to a lawsuit (even if a lawyer) has a duty to monitor all the bills introduced in the Legislature during the pendency of the suit, lest one of them affect the merits of the claim or defense. Even assuming such a radical duty could be established, its breach would be no more than ordinary negligence. The negligent failure of a party to know or discover facts as to which both parties are under a mistake does not preclude rescission or reformation because of the mistake (*95 Cal. App. 4th 1332, 1341-1342)* .

Architects & Contractors Estimating Service, Inc. v. Smith (1985) 164 Cal. App. 3d 1001, 211 Cal. Rptr. 45 , involved a judgment for a nonperforming party who had asserted his unilateral mistake as a defense. The decision was based in part on the ground that defendant's mistake had been caused only by his ordinary negligence, which was not neglect of a legal duty (*164 Cal. App. 3d 1001, 1007-1008)* .

See *Balistreri v. Nevada Livestock Producers Credit Assn. (1989) 214 Cal. App. 3d 635, 262 Cal. Rptr. 862* , discussed in *§ 92.101[3][b]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsContracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral Overview

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9-92 California Points & Authorities § 92.101

§ 92.101 Opposing Defendant's Motion for New Trial [Code Civ. Proc. § 657(6)] in Action to Rescind Contract [Civ. Code §§ 1689, 1692] on Ground of Mistake of Fact [Civ. Code § 1577]--Relief From Mistake Induced by Innocent Misrepresentation Is Not Precluded by Plaintiff's Negligence Unless Plaintiff's Conduct Is Preposterous or Irrational

[1] FORM

[*Caption. See § 92.45.*]

DEFENDANT'S MOTION FOR NEW TRIAL ON THE GROUND THAT THE MISTAKE WAS CAUSED BY PLAINTIFF'S NEGLECT OF A LEGAL DUTY SHOULD NOT BE GRANTED BECAUSE THE MISTAKE WAS INDUCED BY PLAINTIFF'S RELIANCE ON DEFENDANT'S MISREPRESENTATIONS OF A MATERIAL FACT AND PLAINTIFF'S CONDUCT IN SO RELYING WAS NOT PREPOSTEROUS OR IRRATIONAL.

A. New Trial Precluded Unless Court Convinced That Court or Jury Clearly Should Have Reached Different Result. [*See § 92.45, Paragraph A.*]

B. Rescission for Mistake. [*See § 92.99, Paragraph B.*]

C. Kinds of Mistake. [*See § 92.99, Paragraph C.*]

D. Mistake of Fact Defined. [*See § 92.99, Paragraph D.*]

E. Mistake Induced by Innocent Misrepresentation as Ground for Rescission. A contract entered into as a result of an innocent misrepresentation of a material fact may be rescinded on the ground of mutual mistake (Crocker-Anglo *Nat'l Bank v. Kuchman (1964) 224 Cal. App. 2d 490, 495-497, 36 Cal. Rptr. 806*).

F. Negligent Reliance on Unintentional Misrepresentation. When a mistake is due in part to plaintiff's good faith

reliance on false statements of fact by defendant, defendant may not assert that the reliance was negligent in an equitable action to rescind the contract, unless plaintiff's conduct, in light of his intelligence and information, is preposterous or irrational, even though the statements were not made with an intent to deceive (*see Van Meter v. Bent Constr. Co. (1956) 46 Cal. 2d 588, 595, 297 P.2d 644*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to an unsuccessful defendant's motion for new trial in an action to rescind a contract allegedly entered into under a mistake of fact when defendant has asserted in the motion that plaintiff is precluded from relief because the mistake was caused by plaintiff's neglect of a legal duty. The ground of opposition presented is that the mistake was caused by plaintiff's reliance on defendant's misrepresentation of a material fact and that defendant may not assert that such reliance was negligent unless plaintiff's conduct was preposterous or irrational.

In an appropriate case, this form may be submitted in opposition to a motion for new trial supported by the points and authorities *set out in § 92.91*.

If appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

These points and authorities may be modified to oppose a general demurrer for failure to state a cause of action to a complaint for rescission of a contract allegedly entered into by mistake.

With appropriate modifications, these points and authorities may also be used to oppose plaintiff's motion for new trial in an action for damages for breach of contract when defendant contends that the contract is voidable because it was entered into under a mistake of fact.

[b] Related Memoranda

For memoranda of points and authorities relating to motions for new trial generally, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] Mistake Induced by Innocent Misrepresentation as Ground for Rescission

In ***Crocker-Anglo Nat'l Bank v. Kuchman*** *(1964) 224 Cal. App. 2d 490, 36 Cal. Rptr. 806* , plaintiffs brought an action to rescind a contract for the purchase of corporate stock, alleging that they had been induced to purchase the stock by misrepresentations on the part of defendants concerning the value of the stock as reflected by the corporation's

assets, business, prospects, and goodwill. The complaint contained one count based on actual fraud, one count based on constructive fraud, and one common count for money had and received. After making his opening statement to the jury, plaintiffs' counsel requested permission from the trial court to amend the second count of the complaint to allege innocent misrepresentation and mutual mistake of fact. The trial court denied this request in language which made it clear that any attempt by plaintiffs to introduce evidence of innocent misrepresentation or mistake under the common count would be futile (*224 Cal. App. 3d 478)* . Plaintiffs refused to proceed with the case, and the trial court granted defendants' motion for nonsuit.

On appeal, the court of appeal reversed. The court held that the trial court had committed reversible error in not allowing plaintiffs to introduce evidence on innocent misrepresentation because innocent misrepresentation is a ground for permitting rescission of contracts. The court held that although innocent misrepresentation is not specifically enumerated in *Civ. Code § 1689* as a ground for rescission, it is a type of mistake, which is enumerated in *Civ. Code § 1689*, and hence supports rescission (*224 Cal. App. 3d 478)* . The court concluded that such a mistake was alleged in the complaint in this case. According to their pleading, plaintiffs believed the stock to be worth $30,000 when, according to the complaint, it was without substantial value. Because of defendants' representations, plaintiffs were mistaken as to the stock's value. Thus, the court concluded, plaintiffs' consent to the contract of purchase was given by mistake and they had a cause of action for rescission of the contract under *Civ. Code § 1689(b)(1)* (*224 Cal. App. 2d 490, 496)* . The court stated that the rule is founded in justice because it would be unjust to allow one who has made false representations, even innocently, to retain the fruits of a bargain induced by such representations. The court then held that plaintiffs were entitled to change their theory of recovery under the common count from fraud to innocent misrepresentation since the latter theory was fully supported by the specific facts pleaded in the other two counts (*224 Cal. App. 2d 490, 497)* .

[b] Negligent Reliance on Unintentional Misrepresentation

The factual and procedural background of ***Van Meter v. Bent Constr. Co.*** *(1956) 46 Cal. 2d 588, 297 P.2d 644* , is discussed in *§ 92.100[3][b]*. In holding that plaintiff was not barred from relief on the ground of mistake because of his negligence in failing to ascertain the extent of the work required by the subcontract, the Supreme Court stated that there is even more reason for not barring a plaintiff from equitable relief when his negligence is due in part to his reliance in good faith on the false representations of a defendant, although the statements were not made with intent to deceive. The Court held that a defendant who misrepresents facts and induces plaintiff to rely on his statements may not be heard in an equitable action to assert that the reliance was negligent unless plaintiff's conduct, in light of his intelligence and information, is preposterous or irrational (*46 Cal. 2d 588, 595)* . The Court then observed that in this case, the trial court did not determine that plaintiff's conduct was preposterous or irrational or that it amounted to gross negligence or the neglect of a legal duty and that any such determination could not have been supported in view of the findings made.

The court of appeal in ***Balistreri v. Nevada Livestock Producers Credit Assn.*** *(1989) 214 Cal. App. 3d 635, 262 Cal. Rptr. 862* , reversed a judgment for defendant in an action in which plaintiff trustors sought to cancel a deed of trust on their residence in Petaluma. Plaintiffs intended to execute a deed of trust on their son's residence in Sebastopol, which they owned jointly with their son, in order to provide security for a loan defendant made to the son. The deed of trust they signed, however, described the Petaluma property. Plaintiffs did not read the deed of trust before they signed it but relied on the cover letter from defendant's loan agent that asked plaintiffs to execute a deed of trust on "your Sebastopol residence for your son." In reversing, two of the three judges agreed there was mutual mistake in that defendant intended the Petaluma property would be encumbered and plaintiffs intended the Sebastopol property would be encumbered (*214 Cal. App. 3d 635, 640-642)* . In addition, the court considered defendant's contention that relief was barred by plaintiffs' failure to read the deed of trust before signing it. Although generally a party is bound by a contract, the general principle did not apply in this case because plaintiffs reasonably relied on mistaken representations by defendant concerning the subject matter of the contract (*214 Cal. App. 3d 635, 642)* . The court implied that failure to read a contract before signing it is only ordinary negligence, not neglect of a legal duty sufficient to bar relief, and unanimously agreed that in view of the unilateral mistake induced by action of the other party, relief should not be

barred (*214 Cal. App. 3d 635, 643-644)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsContracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral Overview

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CHAPTER 95 EMINENT DOMAIN

9-95 California Points & Authorities 95.syn

AUTHOR: Jeffrey S. Rosen

§ 95.syn Synopsis to Chapter 95: EMINENT DOMAIN

§ 95.01 Scope of Chapter

§ 95.02 Governing Statutes

§ 95.03 Objection to Right to Take

§ 95.04 Inverse Condemnation

[1] In General

[2] Exemption From Claims Requirements

§ 95.05 Related Pleading and Practice Chapters

§ 95.06 Related Points and Authorities Chapters

§ 95.07 Related Jury Instructions

§§ 95.08-95.19 [Reserved]

§ 95.20 Supporting General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] in Eminent Domain Action [Code Civ. Proc. § 1250.350]--Plaintiff Not Authorized by Statute to Exercise Power of Eminent Domain for Purpose Stated [Code Civ. Proc. § 1250.360(a)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Lack of Authority as Ground for Objection

§ 95.21 Supporting General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] in Inverse Condemnation Action [Code Civ. Proc. § 1250.350]--Insubstantial Impairment of Access

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memorandum

[3] Discussion of Authorities

[a] Eminent Domain Principles Applicable to Inverse Condemnation

[b] Insubstantial Impairment of Access Is Not Compensable

[4] Additional Authorities

[a] Insubstantial Impairment of Access Is Not Compensable

§ 95.22 Supporting General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] in Inverse Condemnation Action [Code Civ. Proc. § 1250.350]--Taking or Damaging Occurred in Proper Exercise of Police Power

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Taking in Exercise of Police Power Is Not Compensable

[b] Traffic Regulation as Exercise of Police Power

[c] Damage to Property by Law Enforcement Officers

[d] Damage to Property Resulting from Flood Control Activities

[4] Additional Authorities

[a] Taking in Exercise of Police Power Is Not Compensable

[b] Traffic Regulation as Exercise of Police Power

§ 95.23 Supporting General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] in Inverse Condemnation Action [Code Civ. Proc. § 1250.350]--Lapse of Statute of Limitations on Action Challenging Adoption or Application of Subdivision Ordinance [Gov. Code § 66499.37]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Eminent Domain Principles Applicable to Inverse Condemnation

[b] Inverse Condemnation Actions Challenging Adoption or Application of Ordinance Enacted Pursuant to Subdivision Map Act Must Be Filed and Served Within 90 Days of Challenged Decision

§§ 95.24-95.39 [Reserved]

§ 95.40 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] in Inverse Condemnation Action [Code Civ. Proc. § 1250.350]--Taking or Damaging Did Not Occur During Emergency Exercise of Police Power

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Emergency Exercise of Police Power Must Be in Response to Immediate Peril

[b] Allegation of Nonemergency

[4] Additional Authorities

[a] Emergency Exercise of Police Power Must Be in Response to Immediate Peril

§ 95.41 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] in Inverse Condemnation Action [Code Civ. Proc. § 1250.350]--Substantial Impairment of Access

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] The Concept of "Taking" Does Not Require a Physical Seizure

[b] Substantial Impairment of Right of Access

[c] Allegation of Substantial Impairment

[4] Additional Authorities

[a] Compensation for Taking

[b] Allegation of Substantial Impairment

§ 95.42 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] in Inverse Condemnation Action [Code Civ. Proc. § 1250.350]--Intangible Intrusion Resulted in Damage That Is Direct, Substantial, and Peculiar to Property

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] The Concept of "Taking" Does Not Require Physical Damage to Property

[b] Intangible Intrusion That Burdens Property in Direct, Substantial, and Peculiar Manner

[c] Allegation of Direct, Substantial, and Peculiar Impairment

[4] Additional Authorities

[a] Intangible Intrusion That Burdens Property in Direct, Substantial, and Peculiar Manner

§ 95.43 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] in Inverse Condemnation Action [Code Civ. Proc. § 1250.350]--Public Entity Does Not Need Statutory Power to Condemn by Eminent Domain

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] No Need to Show Eminent Domain Power of Defendant

§ 95.44 Supporting Application for Temporary Restraining Order and Preliminary Injunction [Code Civ. Proc. § 527]--Use of Power of Eminent Domain Without Compensation

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

[3] Discussion of Authorities

[a] Injunction Against Eminent Domain Without Compensation

[b] Preliminary Injunction to Prevent Taking of Property

[c] Great or Irreparable Injury or Waste

[4] Additional Authorities

[a] Injunction Against Eminent Domain Without Compensation

[b] Great or Irreparable Injury or Waste

§§ 95.45-95.59 [Reserved]

§ 95.60 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Eminent Domain Action [Code Civ. Proc. § 1230.040]--By Defendant--Stated Purpose Is Not Public Use [Code Civ. Proc. § 1250.360(b)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] General Practice Rules Applicable in Eminent Domain Proceeding

[b] Nonpublic Use as Ground for Objection

[c] Public Use

[4] Additional Authorities

[a] Nonpublic Use as Ground for Objection

[b] Public Use

§ 95.61 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Eminent Domain Action [Code Civ. Proc. § 1230.040]--By Defendant--Property Not Subject to Acquisition by Eminent Domain for Stated Purpose [Code Civ. Proc. § 1250.360(e)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Property Exempt From Condemnation for Certain Purposes

§ 95.62 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Eminent Domain Action [Code Civ. Proc. § 1230.040]--By Defendant--Failure to Meet Requirements for Excess Condemnation [Code Civ. Proc. § 1240.410], Condemnation for Compatible Use [Code Civ. Proc. § 1240.510], or Condemnation for More Necessary Public Use [Code Civ. Proc. § 1240.610] [Code Civ. Proc. § 1250.360(f)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Requirements for Excess Condemnation

[b] Requirements for Condemnation for Compatible Use

[c] Requirements for Condemnation for More Necessary Public Use

[d] Nonauthorized Taking of Remnant

§ 95.63 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Eminent Domain Action [Code Civ. Proc. § 1230.040]--By Defendant--Resolution of Necessity Fails to Satisfy Requirements [Code Civ. Proc. § 1250.370(a)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Failure to Adopt Resolution of Necessity as Prescribed as Ground for Objection

[b] Contents of Resolution Insufficient

[c] Failure to Provide Notice and Opportunity to Be Heard

[d] Lack of Two-Thirds Vote of All Members of Governing Body

[e] Resolution Procured by Bribery

§ 95.64 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Eminent Domain Action [Code Civ. Proc. § 1230.040]--By Defendant--Lack of Public Necessity [Code Civ. Proc. § 1250.370(b)-(d)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Project Not Required by Public Interest and Necessity as Ground for Objection

[b] Project Not Planned or Located to Be Most Compatible With Greatest Public Good and Least Private Injury as Ground for Objection

[c] Property Not Necessary to Project as Ground for Objection

§ 95.65 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Eminent Domain Action [Code Civ. Proc. § 1230.040]--By Defendant--Plaintiff's Failure to Satisfy Requirements for Resolution of Consent [Code Civ. Proc. § 1250.370(e)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Failure to Meet Requirements for Resolution of Consent as Ground for Objection

[b] No Resolution of Consent

[c] Contents of Resolution Insufficient

[d] Failure to Hold Hearing and Inadequate Notice of Hearing

[e] Lack of Two-Thirds Vote of All Members of Legislative Body

§ 95.66 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Inverse Condemnation Action

[Code Civ. Proc. § 1250.350]--By Defendant--Legally Erroneous Decision Resulting in Delay in Development Approval Does Not Constitute Compensable Taking

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Error During Development Approval Process Does Not Amount to Temporary Taking

[4] Additional Authorities

[a] Error During Development Approval Process Does Not Amount to Temporary Taking

§§ 95.67-95.79 [Reserved]

§ 95.80 Supporting Motion for New Trial [Code Civ. Proc. § 659] in Eminent Domain Action [Code Civ. Proc. § 1230.040]--By Plaintiff--Excessive Damages [Code Civ. Proc. § 657(5)] and Insufficiency of Evidence to Justify Decision [Code Civ. Proc. § 657(6)]--Severance Damages Awarded When Property Taken Was Not Part of Larger Parcel [Code Civ. Proc. § 1263.410(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memorandum

[c] Related Jury Instructions

[3] Discussion of Authorities

[a] Consideration of Sufficiency of Evidence

[b] Court Not Bound by Prior Rulings

[c] Duty to Grant New Trial When Jury Verdict Clearly Wrong

[d] Severance Damages

[e] Requisites for Unity of Property

[f] Lack of Unity of Title

[g] Prospective Use as Insufficient to Overcome Lack of Contiguity

[h] Separation With No Access Rights as Defeating Contiguity

[i] Lack of Unity of Use

[j] Prospective Use as Insufficient

§ 95.81 Supporting Motion for New Trial in Eminent Domain Action--By Plaintiff--Benefits Not Deducted From Damages [Code Civ. Proc. § 1263.410(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memorandum

[c] Related Jury Instructions

[3] Discussion of Authorities

[a] Compensation After Offsetting Benefit

[b] Offset of All Reasonably Certain, Immediate, and Nonspeculative Benefits

[4] Additional Authorities

[a] Severance Damages

§§ 95.82-95.99 [Reserved]

§ 95.100 Opposing Plaintiff's Motion for New Trial [Code Civ. Proc. § 659] in Eminent Domain Action [Code Civ. Proc. § 1230.040]--Excessive Damages [Code Civ. Proc. § 657(5)] and Insufficiency of Evidence to Justify Decision [Code Civ. Proc. § 657(6)]--Property Taken Was Part of Larger Parcel [Code Civ. Proc. § 1263.410(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memorandum

[c] Related Jury Instructions

[3] Discussion of Authorities

[a] Constructive Contiguity as Sufficient

[b] Factors in Determining Constructive Contiguity

[c] Separation by Easement With Free Access as Not Defeating Contiguity

[d] Failure to Use as Not Defeating Unity of Use

[e] Subdivision Plan as Not Defeating Unity of Property

[f] Unity of Property Exists When All Contiguous Lots Will Be Available for Development or Use as Integrated Economic Unit

[4] Additional Authorities

[a] Separation by Easement With Free Access as Not Defeating Contiguity

§ 95.101 Opposing Plaintiff's Motion for New Trial in Eminent Domain Action--Benefits to Remainder Were Not Reasonably Certain, Immediate, and Nonspeculative

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memorandum

[3] Discussion of Authorities

[a] Deductible Benefits Must Be Reasonably Certain, Immediate, and Nonspeculative

§ 95.102 Opposing Plaintiff's Motion for New Trial in Eminent Domain Action--Capitalization of Excess Income Is Proper Measure of Damages for Loss of Goodwill [Code Civ. Proc. § 1263.510]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Capitalization of Excess Income Based on Lost Profits Is Proper Measure of Damages

[b] Fair Market Value Capitalization of Excess Income Proper Measure of Damages

§§ 95.103-95.119 [Reserved]

§ 95.120 Supporting Motion to Strike Irrelevant Matter in Answer [Code Civ. Proc. § 436] in Eminent Domain Action [Code Civ. Proc. § 1230.040]--Allegations Attacking Resolution of Necessity [Code Civ. Proc. § 1245.250(a)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Resolution of Necessity as Conclusive

§ 95.121 Supporting Motion for Increase of Deposit of Probable Amount of Compensation [Code Civ. Proc. § 1255.030]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Determination Before Possession Is Taken

[b] Determination After Possession Is Taken

[c] Trial Court Has Jurisdiction to Order Increase in Deposit After Filing of Notice of Appeal

[4] Additional Authorities

[a] Motion for Determination of Probable Amount of Compensation

§ 95.122 Supporting Motion for Order for Possession [Code Civ. Proc. § 1255.410]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Motion for Order Authorizing Possession

[b] The Plaintiff Is Authorized to Take the Property by Eminent Domain

[c] The Plaintiff Has Deposited an Amount That Satisfies the Requirements of Code Civ. Proc. § 1255.010 et seq.

[4] Additional Authorities

[a] Motion for Order Authorizing Possession

§ 95.123 Supporting Motion to Set Aside Abandonment of Eminent Domain Proceeding [Code Civ. Proc. § 1268.510(b)]--By Defendant

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Motion to Set Aside Abandonment

[4] Additional Authorities

[a] Motion to Set Aside Abandonment

§ 95.124 Supporting Motion for Dismissal of Abandoned Eminent Domain Proceeding [Code Civ. Proc. § 1268.510(c)] and Award of Litigation Expenses [Code Civ. Proc. § 1268.610]--By Defendant

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[3] Discussion of Authorities

[a] Motion to Dismiss

[b] Award of Litigation Expenses

[c] Litigation Expenses Defined

[4] Additional Authorities

[a] Award of Litigation Expenses

Jeffrey S. Rosen n*

FOOTNOTES:
(n8)Footnote *. Jeffrey S. Rosen is an attorney with offices in San Francisco and Berkeley. His civil litigation practice emphasizes real estate and commercial litigation matters.

California Points & Authorities

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Volume 9 Chapters 90-99 DISMISSAL---to---EMINENT DOMAIN
CHAPTER 95 EMINENT DOMAIN
PART I. INTRODUCTION

9-95 California Points & Authorities § 95.01

AUTHOR: Jeffrey S. Rosen

§ 95.01 Scope of Chapter

This chapter contains memoranda for use in eminent domain and inverse condemnation actions. Included are memoranda (1) supporting [*see §§ 95.20 -95.23*] and opposing [*see §§ 95.40 -95.43*] demurrers to complaints; (2) supporting motions for summary judgment based on *Code Civ. Proc. §§ 1250.360* and *1250.370* [*see §§ 95.60 -95.65*]; (3) supporting [*see §§ 95.80, 95.81*] and opposing [*see §§ 95.100 -95.102*] motions for new trials based on allegedly excessive severance damages; (4) supporting motions to strike irrelevant matter in an answer attacking a resolution of necessity [*see § 95.120*]; (5) supporting motions to increase the deposit of the probable amount of compensation [*see § 95.121*]; (6) supporting motions for orders for possession [*see § 95.122*]; (7) supporting motions to set aside abandonment of a proceeding [*see § 95.123*]; and (8) supporting motions to dismiss an abandoned proceeding [*see § 95.124*].

For comprehensive coverage of eminent domain and inverse condemnation, see California Real Estate Law & Practice, Chs. 500-513 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEminent Domain ProceedingsGeneral OverviewReal Property LawEminent Domain ProceedingsGeneral Overview

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9-95 California Points & Authorities § 95.02

AUTHOR: Jeffrey S. Rosen

§ 95.02 Governing Statutes

Eminent domain proceedings are governed by the Eminent Domain Law [*Code Civ. Proc. §§ 1230.010-1273.050*]. Except as specifically provided in the Law, the rules of practice that govern civil actions generally are the rules of practice for eminent domain proceedings [*Code Civ. Proc. § 1230.040*]. These general rules of practice mainly are found in *Code Civ. Proc. §§ 307-1062.10*.

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9-95 California Points & Authorities § 95.03

AUTHOR: Jeffrey S. Rosen

§ 95.03 Objection to Right to Take

A defendant may object to the plaintiff's right to take by demurrer or answer as provided in *Code Civ. Proc. § 430.30*, on any ground authorized by *Code Civ. Proc. § 1250.360* or § 1250.370. The demurrer or answer must state the specific ground on which the objection is taken and, if the objection is taken by answer, the specific facts on which the objection is based. An objection may be taken on more than one ground and the grounds may be inconsistent [*Code Civ. Proc. § 1250.350*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAnswersCivil ProcedureEminent Domain ProceedingsGeneral OverviewCivil ProcedureEminent Domain ProceedingsPleadingsAnswersReal Property LawEminent Domain ProceedingsGeneral OverviewReal Property LawEminent Domain ProceedingsDefenses

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9-95 California Points & Authorities § 95.04

AUTHOR: Jeffrey S. Rosen

§ 95.04 Inverse Condemnation

[1] In General

An inverse condemnation action is an eminent domain proceeding initiated by the property owner rather than by the condemnor. The principles that affect the parties' rights in an inverse condemnation suit are the same as those in an eminent domain action [*Breidert v. Southern Pac. Co. (1964) 61 Cal. 2d 659, 663 n.1, 39 Cal. Rptr. 903, 394 P.2d 719]* .

[2] Exemption From Claims Requirements

No claim need be filed pursuant to *Gov. Code §§ 900-915.4* to maintain an action against a public entity for the taking of, or damage to, private property pursuant to *Cal. Const., art. I, § 19* (governing the power of eminent domain and the right to compensation) [*Gov. Code § 905.1*; *see also Code Civ. Proc. § 1245.260(b)* (presentation of claim unnecessary to maintain inverse condemnation action against public entity under *Code Civ. Proc. § 1245.260(a)*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEminent Domain ProceedingsGeneral OverviewReal Property LawEminent Domain ProceedingsGeneral OverviewReal Property LawInverse CondemnationGeneral Overview

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9-95 California Points & Authorities § 95.05

AUTHOR: Jeffrey S. Rosen

§ 95.05 Related Pleading and Practice Chapters

For discussions and forms of complaints, summons, notices of motion, declarations, applications, and orders involving eminent domain and inverse condemnation, see Ch. 247, *Eminent Domain and Inverse Condemnation* , in California Forms of Pleading and Practice (Matthew Bender).

For discussions and forms for use in particular cases involving eminent domain and inverse condemnation, see in that set the following chapters:

Ch. 11, *Adjoining Landowners;*

Ch. 108, *Captions and Introductions;*

Ch. 277, *Gas and Electricity;*

Ch. 418, *Pollution and Environmental Matters;* and

Ch. 511, *Sanitation and Sewerage Districts.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEminent Domain ProceedingsGeneral OverviewReal Property LawEminent Domain ProceedingsGeneral OverviewReal Property LawInverse CondemnationGeneral Overview

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9-95 California Points & Authorities § 95.06

AUTHOR: Jeffrey S. Rosen

§ 95.06 Related Points and Authorities Chapters

Related memoranda that may be useful in particular cases when eminent domain or inverse condemnation is involved may be found in the following chapters in this set:

Ch. 61, *Cross Complaints;* and

Ch. 225, *Trespass.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEminent Domain ProceedingsGeneral OverviewReal Property LawEminent Domain ProceedingsGeneral OverviewReal Property LawInverse CondemnationGeneral Overview

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9-95 California Points & Authorities § 95.07

AUTHOR: Jeffrey S. Rosen

§ 95.07 Related Jury Instructions

For jury instructions on eminent domain, including special verdict forms, see *Judicial Council of California Civil Jury Instructions (CACI), 3500* Series (LexisNexis Matthew Bender, Official Publisher), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions.

For a set of jury instructions on inverse condemnation, see California Forms of Jury Instruction, Ch. 35A, *Matthew Bender Inverse Condemnation Instructions* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureEminent Domain ProceedingsGeneral OverviewReal Property LawEminent Domain ProceedingsGeneral OverviewReal Property LawInverse CondemnationGeneral Overview

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9-95 California Points & Authorities §§ 95.08-95.19

AUTHOR: Jeffrey S. Rosen

[Reserved]

§§ 95.08[Reserved]

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A. Supporting Demurrer to Complaint

9-95 California Points & Authorities § 95.20

AUTHOR: Jeffrey S. Rosen

§ 95.20 Supporting General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] in Eminent Domain Action [Code Civ. Proc. § 1250.350]--Plaintiff Not Authorized by Statute to Exercise Power of Eminent Domain for Purpose Stated [Code Civ. Proc. § 1250.360(a)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM IN SUPPORT OF DEMURRER
_____ [*name*],	)	TO COMPLAINT
	)	Date: _____
Defendant.	)	Time: _____
	)	Dept: _____
	)	Trial Date: None Set

_____

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION BECAUSE IT FAILS TO ALLEGE THAT PLAINTIFF IS AUTHORIZED BY STATUTE TO EXERCISE THE POWER OF EMINENT DOMAIN FOR THE PURPOSE STATED IN THE COMPLAINT.

A. Objection to Right to Take. A defendant may object to the plaintiff's right to take under eminent domain by demurrer or answer as provided in *Code of Civil Procedure Section 430.30* (*Code Civ. Proc. § 1250.350*).

B. Objection by Demurrer. A defendant in an eminent domain action may demur to the plaintiff's complaint, as

provided in *Code of Civil Procedure Section 430.30*, on the ground that the complaint does not state facts sufficient to constitute a cause of action (*Code Civ. Proc. § 430.10(e)*). When any ground for objection to the complaint appears on the face thereof, the objection on that ground may be taken by a demurrer to the complaint (*Code Civ. Proc. § 430.30(a)*).

C. Lack of Authority as Ground for Objection. A defendant may object tothe plaintiff's right to take on the ground that the plaintiff is not authorized by statute to exercise the power of eminent domain for the purpose stated in the complaint (*Code Civ. Proc. § 1250.360(a)*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a general demurrer (that is, a demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action) to a complaint in eminent domain when the plaintiff has failed to plead that it is authorized by statute to exercise the power of eminent domain for the purpose stated in the complaint. This objection may be raised regardless of whether the plaintiff has adopted a resolution of necessity that satisfies the requirements of *Code Civ. Proc. §§ 1245.210-1245.270*.

When appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

As a practical matter, if the plaintiff is a public entity and the only defect in its complaint is the failure to plead that it is authorized by statute to exercise the power of eminent domain, a demurrer may be sustained with leave to amend. Defendant's counsel may thus choose to avoid the time and expense associated with preparing and filing a demurrer and request in writing that plaintiff file and serve an amended complaint prior to the date a responsive pleading is due.

[3] Discussion of Authorities

[a] Lack of Authority as Ground for Objection

Code Civ. Proc. § 1250.360(a) is based on *Code Civ. Proc. § 1240.020*, which provides that the power of eminent domain may be exercised to acquire property for a particular use only by a person authorized by statute to exercise the power to acquire the property for that use. This codification continues the prior law that there is no inherent power of eminent domain and that a public entity can exercise the power of eminent domain only when expressly so authorized by law [*see, e.g., City & County of San Francisco v. Ross (1955) 44 Cal. 2d 52, 55, 279 P.2d 529* ; *People v. Superior Court (1937) 10 Cal. 2d 288, 295-296, 73 P.2d 1221* ; *see also Gov. Code § 37350.5* (expressly conferring power of eminent domain on cities); *Unocal California Pipeline Co. v. Conway (1994) 23 Cal. App. 4th 331, 28 Cal. Rptr. 2d 429* (holding that pipeline corporation that had as its only customer its parent company was public utility and thus had power of eminent domain; determinative issue is not number or type of customers, but whether property has been

dedicated to public use)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEminent Domain ProceedingsGeneral OverviewCivil ProcedureEminent Domain ProceedingsPleadingsGeneral OverviewReal Property LawEminent Domain ProceedingsGeneral OverviewReal Property LawEminent Domain ProceedingsProcedure

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A. Supporting Demurrer to Complaint

9-95 California Points & Authorities § 95.21

AUTHOR: Jeffrey S. Rosen

§ 95.21 Supporting General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] in Inverse Condemnation Action [Code Civ. Proc. § 1250.350]--Insubstantial Impairment of Access

[1] FORM

[*Caption. See § 95.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION BECAUSE IT APPEARS ON THE FACE THEREOF THAT THE IMPAIRMENT OF ACCESS IS INSUBSTANTIAL.

A. Eminent Domain Principles Applicable to Inverse Condemnation. The principles that affect the parties' rights in an inverse condemnation suit are the same as those in an eminent domain action (*Breidert v. Southern Pac. Co. (1964) 61 Cal. 2d 659, 663 n.1, 39 Cal. Rptr. 903, 394 P.2d 719*).

B. Objection by Demurrer. A defendant in an inverse condemnation action may demur to the plaintiff's complaint, as provided in *Code of Civil Procedure Section 430.30*, on the ground that the complaint does not state facts sufficient to constitute a cause of action (*Code Civ. Proc. § 430.10(e)*). When any ground for objection to the complaint appears on the face thereof, the objection on that ground may be taken by a demurrer to the complaint (*Code Civ. Proc. § 430.30(a)*).

C. Insubstantial Impairment of Access is Not Compensable. Damages claimed for impairment of access in an inverse condemnation proceeding are not compensable unless the impairment is substantial and will cause substantial loss (*Brumer v. Metropolitan Transp. Authority (1995) 36 Cal. App. 4th 1738, 1746-1748, 43 Cal. Rptr. 2d 314* ; *Rosenthal v. City of Los Angeles (1961) 193 Cal. App. 2d 29, 33-34, 13 Cal. Rptr. 824*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a general demurrer to a complaint in inverse condemnation when the demurrer asserts that the complaint fails to state a cause of action in that it appears on the face of the complaint that the impairment of access is insubstantial.

When appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Opposing Memorandum

In an appropriate case, contentions *set out in § 95.41* may be used to oppose the motion supported by this points and authorities.

[3] Discussion of Authorities

[a] Eminent Domain Principles Applicable to Inverse Condemnation

The facts and procedural background of ***Breidert v. Southern Pac. Co.*** *(1964) 61 Cal. 2d 659, 39 Cal. Rptr. 903, 394 P.2d 719* , are discussed in *§ 95.41[3][b]* and *[c]*. In holding that a showing of a substantial impairment of the property owner's right of access to the system of public streets established a compensable right, the Supreme Court compared inverse condemnation with eminent domain. It found that the difference rested in the initiation of the action by the property owner rather than the condemnor, and that the principles affecting the parties' rights in each proceeding were the same (*61 Cal. 2d 659, 663 n.1*).

[b] Insubstantial Impairment of Access Is Not Compensable

In ***Brumer v. Metropolitan Transp. Authority*** *(1995) 36 Cal. App. 4th 1738, 43 Cal. Rptr. 2d 314* , owners of commercial property brought an action for inverse condemnation against the public transportation agency that installed rail lines directly in front of their property. Plaintiffs' complaint alleged that their easement to the street had been substantially impaired by construction of the transit line. Among other things, the construction work (1) separated their property from vehicular traffic by a metal guard rail, two sets of rail lines, and a raised concrete divider, (2) made curbside traffic and parking no longer available, (3) converted the two-way street in front of their property into a one-way street, and (4) made the future construction of a driveway onto the plaintiffs' property impossible. Plaintiffs asserted that they previously had access to the street from their property, but had been denied all vehicular access to and from their property by the foregoing improvements. The trial found no substantial impairment of access, and denied plaintiffs relief.

The court of appeal affirmed. It stated that an inverse condemnation claim must rest on a property owner's showing of substantial impairment of his or her right of access to the general system of public streets. An abutting owner does not

have the right to insist that a street be left in its original condition. Thus, substantial impairment will be found when construction built directly on a portion of a road cuts off a direct access from an abutting property; or when a major change in the grade of the road, such as construction of highway underpasses, overpasses, and freeway offramps, prevent direct access to a property abutting the new construction. The court held that the redesignation of an entire street as one-way and the deprivation of parking rights are noncompensable police regulations, and that the plaintiffs did not demonstrate a substantial impairment of vehicular access from the other facts of their case, including the installation of pedestrian guard rails and raised concrete traffic separators that made future construction of a driveway onto the plaintiffs' property impossible (*36 Cal. App. 4th 1738, 1747-1749)* . For discussion of a case with a similar factual situation, see *§ 95.21[4][a]*.

In ***Rosenthal v. City of Los Angeles*** *(1961) 193 Cal. App. 2d 29, 13 Cal. Rptr. 824* , plaintiffs brought an inverse condemnation action alleging damages to their industrially zoned property. Their action followed construction of a through street that bypassed their property and caused traffic approaching from the east to follow a slightly different route to get to their property. The construction did not affect two north-south streets that provided access to plaintiff's property. The plaintiffs contended that the construction constituted an actionable interference with their easement of access. The trial court sustained a demurrer without leave to amend.

The court of appeal affirmed. The fact that traffic was permitted to travel around the plaintiffs' property to the south did not make their asserted damages compensable. The case merely presented a situation in which their property could formerly be reached by traveling on any one of three streets, and after the construction could be reached only by the two north-south streets. Those who would formerly have sought access to the property from the east could still reach the property by taking the next east-west street to the north and then traveling south on either of the two streets that continued to provide access to the property. This was a minor inconvenience and did not constitute a "substantial impairment" of the right of access (*193 Cal. App. 2d 29, 34)* .

[4] Additional Authorities

[a] Insubstantial Impairment of Access Is Not Compensable

In *San Diego Metro. Transit v. Price Co. (1995) 37 Cal. App. 4th 1541, 44 Cal. Rptr. 2d 705* , a transit line was constructed in the center of the street on which plaintiff's property was located, and concrete berms were placed adjacent andparallel to the rail line. As a result, plaintiff's property no longer had direct access from and to the southbound lanes of the street, but did have indirect access from and to these lanes. The trial court considered evidence that the access impairment only increased the distance of travel from and to one side of one adjacent street, and that the property could be used for the same purposes before and after the impairment. It held that no compensable severance damages resulted from the impairment of access. The court of appeal affirmed, noting that compensable access impairment exists if there is a substantial impairment of access to the abutting street and from there to the general system of public streets. To determine that issue, the trial court must compare the access available to the particular property before and after the impairment and then decide if the impairment is substantial. Because of the factual nature of the inquiry, which is unique to each property, the trial court's determination of substantial impairment is a determination to be sustained if supported by substantial evidence. The court of appeal found that the evidence was substantial and supported the determination of the trial court that there was no compensable impairment of access (*37 Cal. App. 4th 1541, 1547-1549)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEminent Domain ProceedingsGeneral OverviewCivil ProcedureEminent Domain ProceedingsPleadingsGeneral OverviewReal Property LawEminent Domain ProceedingsGeneral OverviewReal Property LawEminent Domain ProceedingsProcedure

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California Points & Authorities

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Volume 9 Chapters 90-99 DISMISSAL---to---EMINENT DOMAIN
CHAPTER 95 EMINENT DOMAIN
PART II. FORMS
A. Supporting Demurrer to Complaint

9-95 California Points & Authorities § 95.22

AUTHOR: Jeffrey S. Rosen

§ 95.22 Supporting General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] in Inverse Condemnation Action [Code Civ. Proc. § 1250.350]--Taking or Damaging Occurred in Proper Exercise of Police Power

[1] FORM

[*Caption. See § 95.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION BECAUSE IT APPEARS ON THE FACE THEREOF THAT THE _____ [*either* TAKING *or* DAMAGES] OCCURRED IN THE PROPER EXERCISE OF THE POLICE POWER.

A. Eminent Domain Principles Applicable to Inverse Condemnation. [*See § 95.21, Paragraph A.*]

B. Objection by Demurrer. [*See § 95.21, Paragraph B.*]

C. Taking in Exercise of Police Power Is Not Compensable. Under the police power, the state or its subdivision may take or damage private property without compensating the property owner if the action is essential to public health, safety, or morals (*Customer Co. v. City of Sacramento (1995) 10 Cal. 4th 368, 384-385, 41 Cal. Rptr. 2d 658, 895 P.2d 900* ; *Archer v. City of Los Angeles (1941) 19 Cal. 2d 19, 23, 119 P.2d 1*).

[*Optional*] **D. Traffic Regulation as Exercise of Police Power.** The modification of streets and highways is an exercise of the police power to regulate and control traffic, and a property owner's access rights may be taken or damaged by this activity without any compensation due to the property owner (*People v. Ayon (1960) 54 Cal. 2d 217, 224, 5 Cal. Rptr. 151, 352 P.2d 519* ; *Friends of H Street v. City of Sacramento (1993) 20 Cal. App. 4th 152, 167, 24 Cal. Rptr. 2d 607*).

[*Optional*] **E. Damage to Property by Law Enforcement Officers.** Recovery under a theory of inverse condemnation is not available for damage to private property resulting from efforts of law enforcement officers in response to emergency situations that endanger public safety (*Customer Co. v. City of Sacramento (1995) 10 Cal. 4th 368, 384-385, 41 Cal. Rptr. 2d 658, 895 P.2d 900*).

[*Optional*] **F. Damage to Property Resulting from Flood Control Activities.** Recovery under a theory of inverse condemnation is not available for damage to private property resulting from the cutting of a breach in a levee in response to emergency flooding that endangers public safety (Thousand Trails, Inc. v. California Reclamation Dist. Number 17 *(2004) 124 Cal. App. 4th 450, 465, 21 Cal. Rptr. 3d 196*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a general demurrer to a complaint in inverse condemnation when the demurrer asserts that the complaint fails to state a cause of action because it appears on the face of the complaint that the taking or damage occurred in the proper exercise of the police power.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Opposing Memoranda

In an appropriate case, contentions *set out in § 95.40* may be used to oppose the motion supported by these points and authorities.

[3] Discussion of Authorities

[a] Taking in Exercise of Police Power Is Not Compensable

Customer Co. v. City of Sacramento *(1995) 10 Cal. 4th 368* , is *discussed in § 95.22[3][c]*.

Archer v. City of Los Angeles *(1941) 19 Cal. 2d 19, 119 P.2d 1* , was an action for damages resulting from flooding of plaintiffs' lands caused by defendants' construction of a drainage system with an inadequate outlet. Defendants improved the drainage in an area that was becoming urbanized, resulting in a greater flow of water into the lagoon on which plaintiffs' property was situated. The outlet from the lagoon into the ocean, however, was not improved to accommodate the increased flow of water. A heavy rainstorm caused the lagoon to overflow onto plaintiff's property to a depth of six to eight feet for about four days. At the conclusion of plaintiffs' evidence, the trial court entered judgments of nonsuit in favor of defendants, and plaintiffs appealed.

The Supreme Court affirmed, holding that the state or its subdivisions may take or damage private property without compensation if such action is essential to safeguard public health, safety, or morals (*19 Cal. 2d 19, 23*). The Court noted that in certain circumstances the taking or damaging of private property under the police power is not prompted by so great a necessity as to be justified without proper compensation to the property owner. The question is whether the taking or damaging is so essential to the general welfare as to be sanctioned under the police power (*19 Cal. 2d 19, 24*).

[b] Traffic Regulation as Exercise of Police Power

In ***People v. Ayon*** *(1960) 54 Cal. 2d 217, 5 Cal. Rptr. 151, 352 P.2d 519* , defendants received an award of $5,800 (the amount to which the parties had stipulated was the market value of the property actually taken in eminent domain plus the damage to the remainder as a result of the severance). In the stipulation, defendants reserved the right to introduce evidence of additional damage resulting from loss of business, customers, and goodwill. The trial court held that they had suffered no compensable damage not included in the stipulation and rejected an offer of proof relating to the claimed impairment of their right of access to the street on which their property abutted.

On appeal, the Supreme Court affirmed. The Court stated that in the proper exercise of its police power in the regulation of traffic, a state or county may do many things that are not compensable to an abutting property owner, such as constructing a traffic island, placing permanent dividing strips that deprive an abutter of direct access to the opposite side of the highway, painting double white lines on the highway, or designating the entire street as a one-way street (*54 Cal. 2d 217, 224)* .

Ayon was cited with approval in ***Friends of H Street v. City of Sacramento*** *(1993) 20 Cal. App. 4th 152, 167, 24 Cal. Rptr. 2d 607* , a case in which an unincorporated association comprised principally of residents living near H Street in Sacramento filed a complaint for nuisance and sought injunctions to force the City to reduce the traffic speed and volume on H Street. The trial court sustained the City's demurrer without leave to amend, stating that the routing of traffic is a legislative function and that no cause of action for nuisance could be asserted. The Court of Appeal affirmed the ruling on the nuisance cause of action and held that the trial court had not erred in denying plaintiffs an opportunity to amend their complaint and plead an inverse condemnation cause of action. The court cited *Ayon* for the proposition that the right of ingress and egress is not absolute and that there is no constitutional right to compensation simply because abutting streets are improved so as to affect traffic flow. The court concluded that plaintiffs' allegations involved ordinary changes in traffic flow and were insufficient to state a cause of action for inverse condemnation. Plaintiffs' claim that a cause of action for inverse condemnation based on damage from noise and fumes was also rejected because plaintiffs did not allege unique, special, or peculiar damages not common to all property in the neighborhood (*20 Cal. App. 4th 152, 167)* [*see Harding v. State of California ex rel. Dep't of Transp. (1984) 159 Cal. App. 3d 359]* .

[c] Damage to Property by Law Enforcement Officers

In ***Customer Co. v. City of Sacramento*** *(1995) 10 Cal. 4th 368, 41 Cal. Rptr. 658, 895 P.2d 900* , the police caused extensive damage to plaintiffs' store when they fired tear gas canisters into the store in an attempt to apprehend a suspected felon. Plaintiff sued the city and county, alleging inverse condemnation and negligence causes of action, among others. The trial court granted judgment on the pleadings for defendants, ruling that defendants were immune from liability for negligence under the Government Tort Claims Act [*Gov. Code § 810 et seq.*], and that the actions of the law enforcement officers was a proper exercise of the police power to protect the public health, safety, and welfare. Plaintiff appealed, and the court of appeal affirmed.

Plaintiff sought review of the inverse condemnation issue. The Supreme Court affirmed, holding that recovery under a theory of inverse condemnation is generally not available for damage to property resulting from efforts of law enforcement officers to enforce the criminal laws (*10 Cal. 4th 368, 384-385*). The Court reasoned that law

enforcement officers must be permitted to respond to emergency situations that endanger public safety without the specter of constitutionally mandated liability for resulting damage to private property (*10 Cal. 4th 368, 384-385*). The Court also stated that an inverse condemnation claim would not lie because the efforts of the law enforcement officers to apprehend the suspect could not be likened to an exercise of a power of eminent domain. However, the Court stated that unusual situations, such as when law enforcement officers commandeer a citizen's automobile to chase a fleeing suspect or appropriate ammunition from a gun shop, might constitute an exercise of eminent domain, because private property would be taken for public use (*10 Cal. 4th 368, 388-389)* .

[d] Damage to Property Resulting from Flood Control Activities

In ***Thousand Trails, Inc. v. California Reclamation Dist. Number 17*** *(2004) 124 Cal. App. 4th 450, 21 Cal. Rptr. 3d 196* , the court of appeal affirmed a summary judgment for defendant reclamation district, holding that the district's action in cutting a levee to prevent potentially massive flooding was a legitimate exercise of police power (*124 Cal. App. 4th 450, 464)* . The reclamation district cut the breaches in a levee in an effort to prevent the failure of the levee system during torrential rains, resulting in the flooding of the plaintiffs' property. The police power exception applied because the district had no prior knowledge that the levee system might fail, and there was no evidence that actions taken by the district before the flooding caused the failure (*124 Cal. App. 4th 450, 463-464)* . Furthermore, all the evidence pointed to an extraordinary event: massive flooding up and down the Central Valley caused by torrential rains (*124 Cal. App. 4th 450, 463)* . The facts in *Thousand Trails* are distinguishable from *Odello Brothers v. County of Monterey (1998) 63 Cal. App. 4th 778, 791, 73 Cal. Rptr. 2d 903* , which held that the police power exception was inapplicable when the county breached a levee during flooding, because the county in *Odello* had prior knowledge of the flood threat and failed to take action (*124 Cal. App. 4th 450, 463-464)* .

[4] Additional Authorities

[a] Taking in Exercise of Police Power Is Not Compensable

While *Archer* may still be good law for its general statements regarding taking or damaging of property as a result of the exercise of the police power, its so-called "natural watercourse rule" is no longer valid. *Locklin v. City of Lafayette (1994) 7 Cal. 4th 327, 27 Cal. Rptr. 2d 613, 867 P.2d 724* , was an action for damages resulting from extensive landslide damage to plaintiffs' property caused by defendants' storm drainage system. Plaintiffs sought to recover damages on several theories, including inverse condemnation. The trial court granted defendants' motion for judgment on plaintiffs' inverse condemnation cause of action. The trial court ruled, *inter alia,* that the natural watercourse rule set forth in *Archer* shielded defendants from liability for damages caused by their collection of natural surface water drainage and discharge of that water into a natural channel even if the volume and velocity of the water caused the damage. While plaintiffs' appeal was directed principally to the disposition of their inverse condemnation claim, they argued that the trial court had erred in applying the *Archer* natural watercourse rule and that defendants should not be absolutely immune from liability on the inverse condemnation (and tort) claims. The court of appeal affirmed the trial court in all respects (*7 Cal. 4th 327, 361)* .

The Supreme Court concluded that the court of appeal erred in holding that the natural watercourse rule insulated defendants from inverse condemnation and tort liability, but nonetheless affirmed its judgment. In addressing whether a public entity could be liable in tort or inverse condemnation for damage to downstream riparian property caused by the discharge of surface waters into a natural watercourse abutting its property, the Supreme Court held, *inter alia,* that a governmental entity will be liable under the principles of inverse condemnation for downstream damage caused by an increased volume or velocity of surface waters discharged into a natural watercourse from improvements on publicly owned land if it fails to use reasonably available, less injurious alternatives, or if it has incorporated the watercourse into a public drainage system or otherwise converted the watercourse into a public work (*7 Cal. 4th 327, 362-367)* .

[b] Traffic Regulation as Exercise of Police Power

The facts and procedural background of *Brumer v. Metropolitan Transp. Authority (1995) 36 Cal. App. 4th 1738, 43 Cal. Rptr. 2d 314* , are discussed in *§ 95.21[3][b]*. Citing *People v. Ayon (1960) 54 Cal. 2d 217, 5 Cal. Rptr. 151* (*discussed in § 95.22[3][b]* and [4][b]), the court of appeal in *Brumer* held that the redesignation of an entire street as one-way is a noncompensable police regulation (*36 Cal. App. 4th 1738, 1748)* . Similarly, even if the loss of a single parking space constitutes an impairment of vehicular access, the deprivation of parking rights on abutting streets constitutes a noncompensable exercise of the municipality's police power (*36 Cal. App. 4th 1738, 1748)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEminent Domain ProceedingsGeneral OverviewCivil ProcedureEminent Domain ProceedingsPleadingsGeneral OverviewReal Property LawEminent Domain ProceedingsGeneral OverviewReal Property LawInverse CondemnationGeneral OverviewReal Property LawInverse CondemnationProcedure

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Volume 9 Chapters 90-99 DISMISSAL---to---EMINENT DOMAIN
CHAPTER 95 EMINENT DOMAIN
PART II. FORMS
A. Supporting Demurrer to Complaint

9-95 California Points & Authorities § 95.23

AUTHOR: Jeffrey S. Rosen

§ 95.23 Supporting General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] in Inverse Condemnation Action [Code Civ. Proc. § 1250.350]--Lapse of Statute of Limitations on Action Challenging Adoption or Application of Subdivision Ordinance [Gov. Code § 66499.37]

[1] FORM

[*Caption. See § 95.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN INVERSE CONDEMNATION BECAUSE IT WAS NOT FILED AND SERVED WITHIN THE 90-DAY PERIOD PRESCRIBED BY GOVERNMENT CODE SECTION 66499.37.

A. Eminent Domain Principles Applicable to Inverse Condemnation. The principles that affect the parties' rights in an inverse condemnation suit are the same as those in an eminent domain action (*Breidert v. Southern Pac. Co. (1964) 61 Cal. 2d 659, 663 n.1, 39 Cal. Rptr. 903, 394 P.2d 719*).

B. Objection By Demurrer. A defendant in an inverse condemnation actionmay demur to the plaintiff's complaint, as provided in *Code of Civil Procedure Section 430.30*, on the ground that the complaint does not state facts sufficient to constitute a cause of action (*Code Civ. Proc. § 430.10(e)*). When any ground for objection to the complaint appears on the face thereof, the objection on that ground may be taken by a demurrer to the complaint (*Code Civ. Proc. § 430.30(a)*).

C. Ninety-Day Statute of Limitations. Any action or proceeding to attack, review, set aside, void, or annul the decision of an advisory agency, appeal board, or legislative body concerning a subdivision, or of any of the proceedings, acts, or determinations taken, done, or made prior to such a decision, or to determine the reasonableness, legality, or validity of any condition attached thereto, shall not be maintained by any person unless the action or proceeding is

commenced and service of summons effected within 90 days after the date of the decision. Thereafter all persons are barred from any such action or proceeding or any defense of invalidity or unreasonableness of the decision or of the proceedings, acts, or determinations (*Gov. Code § 66499.37*).

D. Applicability of Limitations Period to Inverse Condemnation Action Challenging Subdivision Ordinance. An action in inverse condemnation challenging a local ordinance adopted pursuant to the Subdivision Map Act (*Gov. Code § 66410 et seq.*) or the application of such an ordinance to the plaintiff's property must be filed and served within the 90-day limitation period prescribed by *Government Code Section 66499.37* unless it alleges the existence of a final judgment establishing that there has been a compensable taking of the plaintiff's land (*Hensler v. City of Glendale (1994) 8 Cal. 4th 1, 7* ; *Maginn v. City of Glendale (1999) 72 Cal. App. 4th 1102, 1108, 85 Cal. Rptr. 2d 639*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a general demurrer to a complaint in inverse condemnation when the demurrer asserts that the complaint fails to state a cause of action in that it appears on the face of the complaint that the plaintiff's inverse condemnation action challenging a local ordinance filed pursuant to the Subdivision Map Act, or challenging the application of such an ordinance to the plaintiff's property, was not filed within 90 days of the local government decision from which the action allegedly arose.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. For example, counsel should refer to the lack of allegations in the complaint establishing that the plaintiff brought the action within the 90-day limitations period. Counsel can then argue that the complaint is subject to demurrer based on the authorities set forth above and discussed below.

[3] Discussion of Authorities

[a] Eminent Domain Principles Applicable to Inverse Condemnation

For discussion of ***Breidert v. Southern Pac. Co.*** *(1964) 61 Cal. 2d 659, 39 Cal. Rptr. 903, 394 P.2d 719* , see *§ 95.21[3][a]*.

[b] Inverse Condemnation Actions Challenging Adoption or Application of Ordinance Enacted Pursuant to Subdivision Map Act Must Be Filed and Served Within 90 Days of Challenged Decision

In ***Hensler v. City of Glendale*** *(1994) 8 Cal. 4th 1, 32 Cal. Rptr. 2d 247, 876 P.2d 1046* , the complaint alleged that plaintiff purchased a 300-acre tract of land zoned for single-family residential use in 1978. In 1981, defendant City of

Glendale adopted an ordinance that prohibited construction on major ridge lines within the city. The ordinance was enacted pursuant to authority granted by the Subdivision Map Act. Plaintiff was advised by city representatives that development would not be permitted on ridge lines on his property. A plan for the construction of 588 residential units on the property was approved on April 1, 1986, but that approval rejected all proposed use of, and any encroachment within, on, or over, the major ridge lines within the tract. Claiming that the ordinance on which this action was based precluded development of 40 percent of the tract, plaintiff initiated an action in inverse condemnation in September 1989. Glendale demurred, asserting the 90-day limitations period of *Gov. Code § 66499.37*. It also argued that plaintiff's failure to challenge the conditions placed on development of his land barred the inverse condemnation action. The trial court sustained the demurrer and entered judgment dismissing the action.

The court of appeal affirmed the judgment of dismissal. The court held that the longer limitations period of *Code Civ. Proc. § 338(j)*, and *Code Civ. Proc. §§ 318* and *319*, which govern actions for damage to and taking of property, were notapplicable to actions based on a decision made pursuant to an ordinance enacted under the authority of the Subdivision Map Act.

The Supreme Court affirmed the Court of Appeal, concluding that an action in inverse condemnation challenging such an ordinance or its application to the plaintiff's property, is governed by *Gov. Code § 66499.37* unless it alleges the existence of a final judgment establishing that there has been a compensable taking of plaintiff's land. The Court noted that Section 66499.37 was enacted to ensure that any challenge to local legislative or administrative acts or decisions taken pursuant to ordinances enacted under the authority of the Subdivision Map Act will be brought promptly. The Court held that a complaint in inverse condemnation, even one that does not expressly attack the validity of the ordinance or its application, and seeks only compensation for an alleged taking, must be deemed a challenge to the local action because the constitutional validity of the governmental action if uncompensated must be determined in the course of ruling on the claim that compensation is owed. Moreover, the validity of the action must be determined to afford the local entity the opportunity to rescind its action rather than pay compensation for a taking. A landowner may not, by seeking only compensation, force a governmental agency to condemn the property. Therefore, the Court held, unless the complaint alleges that the existence of a taking has already been judicially established, the complaint necessarily states a cause of action that requires judicial review of a decision of the local legislative body concerning a subdivision or of the reasonableness, legality, or validity of any condition attached to a permit decision within the meaning of *Gov. Code § 66499.37*. An action that requires that review is governed by Section 66499.37 regardless of the plaintiff's characterization of the cause of action (*8 Cal. 4th 1, 7)* .

In ***Maginn v. City of Glendale*** *(1999) 72 Cal. App. 4th 1702, 85 Cal. Rptr. 2d 639* , plaintiffs sued the City of Glendale for, among other things, inverse condemnation after the city council denied plaintiffs' application for a tentative parcel map to subdivide real property for the purpose of building a home on the proposed second lot. Plaintiffs' complaint was filed on the 90th day following the city's decision, but the summons was not served until three days later. The trial court dismissed the case after sustaining a demurrer on statute of limitations grounds.

The court of appeal affirmed, holding that *Gov. Code § 66499.37*, which imposes a 90-day limitation period on actions challenging local government decisions that apply the requirements of the Subdivision Map Act, expressly requires not only that the action be commenced within 90 days, but also that service of summons be effected within the same 90 days (*72 Cal. App. 4th 1102, 1108)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEminent Domain ProceedingsGeneral OverviewReal Property LawEminent Domain ProceedingsGeneral OverviewReal Property LawInverse CondemnationGeneral OverviewReal Property LawInverse CondemnationProcedure

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Volume 9 Chapters 90-99 DISMISSAL---to---EMINENT DOMAIN
CHAPTER 95 EMINENT DOMAIN
PART II. FORMS
A. Supporting Demurrer to Complaint

9-95 California Points & Authorities §§ 95.24-95.39

AUTHOR: Jeffrey S. Rosen

[Reserved]

§§ 95.24[Reserved]

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Volume 9 Chapters 90-99 DISMISSAL---to---EMINENT DOMAIN
CHAPTER 95 EMINENT DOMAIN
PART II. FORMS
B. Opposing Demurrer to Complaint

9-95 California Points & Authorities § 95.40

AUTHOR: Jeffrey S. Rosen

§ 95.40 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] in Inverse Condemnation Action [Code Civ. Proc. § 1250.350]--Taking or Damaging Did Not Occur During Emergency Exercise of Police Power

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN OPPOSITION TO DEMUR-
Plaintiff,	)	RER TO COMPLAINT
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

PLAINTIFF'S COMPLAINT ALLEGING _____ [A TAKING OF *or* SERIOUS DAMAGE TO] HIS/HER PROPERTY STATES A CAUSE OF ACTION FOR INVERSE CONDEMNATION BECAUSE IT APPEARS ON THE FACE OF THE COMPLAINT THAT THE _____ [TAKING *or* DAMAGE] DID NOT OCCUR IN RESPONSE TO AN IMMEDIATE PERIL PRESENTING AN IMMINENT AND SUBSTANTIAL THREAT TO THE PUBLIC HEALTH, SAFETY, OR WELFARE.

A. Eminent Domain Principles Applicable to Inverse Condemnation. [*See § 95.21, Paragraph A.*]

B. Emergency Exercise of Police Power Must Be in Response to Immediate Peril. The state or its subdivision may take or damage private property under an emergency exercise of the police power without compensating the property owner only if the action is in response to a situation of grave character and serious moment evidenced by an imminent and substantial threat to public health, safety, or welfare (*Holtz v. Superior Court (1970) 3 Cal. 3d 296, 305, 90 Cal. Rptr. 345, 475 P.2d 441* ; *Los Osos Valley Associates v. City of San Luis Obispo (1994) 30Cal. App. 4th 1670, 1681* , *36 Cal. Rptr. 2d 758*).

C. Allegation of Nonemergency. An allegation that defendant's action was not in response to an imminent and serious threat to public health, safety, or welfare, with allegations of the substantial impact of defendant's actions on plaintiff's property, pleads a cause of action sufficient to withstand a general demurrer (*House v. Los Angeles County Flood Control District (1944) 25 Cal. 2d 384, 388-389, 153 P.2d 950*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a general demurrer to a complaint in inverse condemnation when the demurrer asserts that the complaint fails to state a cause of action because it appears on the face of the complaint that the taking or damage occurred in the proper exercise of the police power.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, this form may be submitted in opposition to the motion supported by the points and authorities *set out in § 95.22*.

[3] Discussion of Authorities

[a] Emergency Exercise of Police Power Must Be in Response to Immediate Peril

In ***Holtz v. Superior Court*** *(1970) 3 Cal. 3d 296, 305, 90 Cal. Rptr. 345, 475 P.2d 441* , plaintiffs brought an inverse condemnation action against the San Francisco Bay Area Rapid Transit District (BART) and the City and County of San Francisco for physical damage to plaintiffs' land and buildings caused by excavations undertaken by BART. The trial court struck from the complaint certain allegations relating to plaintiffs' contention that defendants were strictly liable on a theory of inverse condemnation. The court apparently concluded that defendants could not be held liable without a showing of negligence. Plaintiffs sought a writ of mandate to compel the trial court to reinstate the stricken allegations.

The California Supreme Court granted a peremptory writ of mandate to compel reinstatement of the stricken

allegations. The Court found that defendants could be liable on an inverse condemnation theory for the damage allegedly caused by the excavation without a showing of negligence. In making this determination, the Court found that the case clearly did not fall within the "police power" exception to inverse condemnation liability. The Court stated that this doctrine of noncompensable loss comes into play in connection with the taking or damaging of property only under "emergency" conditions, i.e., when damage to private property is inflicted by government "under the pressure of public necessity and to avert impending peril" (*3 Cal. 3d 296, 305)* . Because a broad interpretation of this doctrine would completely vitiate the constitutional requirement of just compensation, the courts have narrowly circumscribed the types of emergency that will exempt the public entity from liability. The Court noted that "[i]nstances of this character are the demolition of all or parts of buildings to prevent the spread of conflagration, or the destruction of diseased animals, or rotten fruit, or infected trees where life or health is jeopardized" (*3 Cal. 3d 296, 305* , citing *House v. Los Angeles Flood Control Dist. (1944) 25 Cal. 2d 384, 391, 153 P.2d 950*).

In ***Los Osos Valley Associates v. City of San Luis Obispo*** *(1994) 30 Cal. App. 4th 1670, 36 Cal. Rptr. 2d 758* , plaintiff brought an action for inverse condemnation against the city, alleging that the city's groundwater extraction program had caused subsidence, resulting in damage to plaintiff's property. The trial court rejected the city's affirmative defense that it was immune from liability for inverse condemnation under its police powers due to an emergency created by a drought. The trial court granted judgment for plaintiff, and the city appealed.

The court of appeal affirmed. The court held that the city's removal of subjacent support worked a physical taking for which compensation was required (*30 Cal. App. 4th 1670, 1680)* . In so holding, the court found that the exception to compensation for damages inflicted pursuant to the proper exercise of the emergency police power was inapplicable (*30 Cal. App. 4th 1670, 1681)* . The court explained that "emergency" means an unforeseen situation calling for immediate action. Urgency must be present, and the magnitude of the exigency must be a factor. "Emergency" is not synonymous with expediency, convenience, or best interests, and it imports more than merely a general public need. Rather, "emergency" comprehends a situation of grave character and serious moment, and is evidenced by an imminent and substantial threat to public health or safety (*30 Cal. App. 4th 1670, 1681* , citing *Sonoma County Organization etc. Employees v. County of Sonoma (1991) 1 Cal. App. 4th 267, 276-277, 1 Cal. Rptr. 2d 850*). The court found that the city had chosen to use a combination of mild conservation measures and the damaging groundwater pumping over a period of years. Further, the city never declared an emergency under the Emergency Services Act, nor did it require more stringent conservation measures of its citizens. The court thereforeconcluded that the city's choice of action did not constitute an emergency (*30 Cal. App. 4th 1670, 1681-1682)* .

[b] Allegation of Nonemergency

In ***House v. Los Angeles County Flood Control District*** *(1944) 25 Cal. 2d 384, 153 P.2d 950* , the plaintiff alleged that defendant's negligent planning, construction, and maintenance of a flood control channel caused her property to flood and resulted in a physical taking. The trial court sustained defendant's demurrer without leave to amend. Plaintiff appealed.

The California Supreme Court reversed. It held that the trial court erred in concluding that defendant could not be held liable for a taking based on negligent construction and maintenance of the flood control project (*25 Cal. 2d 384, 390)* . The Court further held that the emergency exception to takings liability was inapplicable under the facts alleged (*25 Cal. 2d 384, 391-392)* . The Court noted that under the pressure of public necessity and to avert impending peril, a legitimate exercise of the police power often works not only avoidable damage but destruction of property without calling for compensation (*25 Cal. 2d 384, 391)* . However, it concluded that the situation at issue was not one of such emergency character as would preclude the defendant from being held liable for unnecessary damage resulting from its allegedly inadequate and negligent planning, construction, and maintenance of the flood channel project. According to the plaintiff's pleading, the defendant had had the time to exercise a deliberate choice of action in the manner of its installation of the river improvements (*25 Cal. 2d 384, 391-392*). The Court stated that in view of the organic rights to acquire, possess, and protect property and to due process and equal protection of the laws, the principles of nonliability

and *damnum absque injuria* are not applicable when, in the exercise of the police power, private, personal, and property rights are interfered with, injured, or impaired in a manner that is not reasonably necessary to serve a public purpose for the general welfare (*25 Cal. 2d 384, 392*).

[4] Additional Authorities

[a] Emergency Exercise of Police Power Must Be in Response to Immediate Peril

In *Smith v. County of Los Angeles (1989) 214 Cal. App. 3d 266, 262 Cal. Rptr. 754* , several hillside homes were destroyed due to a landslide caused by the county's removal of debris alongside roads it had built, and by a waterworks district's discharge of water into the hillside. These activities removed lateral and subjacent support from the homes, resulting in their destruction. Plaintiff landowners obtained a judgment against the county on causes of action for inverse condemnation, dangerous condition of public property, and nuisance. Defendant appealed.

The court of appeal affirmed. With respect to the inverse condemnation cause of action, the court held that the county's decision to remove debris from roads rather than to close them constituted a choice, rather than an exercise of the police power under emergency conditions. The court stated that removing slide debris in order to keep a road open to traffic, when alternate routes are available, is not among the narrowly circumscribed types of emergency that can justify the taking of private property without compensation (*214 Cal. App. 3d 266, 287)* .

In *Rose v. City of Coalinga (1987) 190 Cal. App. 3d 1627, 236 Cal.Rptr. 124* , plaintiffs brought an inverse condemnation action based on the city's demolition of plaintiff's building following the Coalinga earthquake of 1983. The trial court granted the city summary judgment on the ground plaintiff's building had been demolished in an emergency exercise of the police power. Plaintiffs appealed.

The court of appeal reversed. It held that a triable question of fact existed as to whether there was "a true emergency" caused by the plaintiff's damaged building, in light of evidence that the building was not a hazard, the property was enclosed by a fence, and the city had waited 57 days before destroying the building (*190 Cal. App. 3d 1627, 1635)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEminent Domain ProceedingsGeneral OverviewReal Property LawEminent Domain ProceedingsGeneral OverviewReal Property LawInverse CondemnationGeneral OverviewReal Property LawInverse CondemnationProcedure

California Points & Authorities

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Volume 9 Chapters 90-99 DISMISSAL---to---EMINENT DOMAIN
CHAPTER 95 EMINENT DOMAIN
PART II. FORMS
B. Opposing Demurrer to Complaint

9-95 California Points & Authorities § 95.41

AUTHOR: Jeffrey S. Rosen

§ 95.41 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] in Inverse Condemnation Action [Code Civ. Proc. § 1250.350]--Substantial Impairment of Access

[1] FORM

[*Caption. See § 95.40.*]

PLAINTIFF'S COMPLAINT ALLEGING SERIOUS DAMAGE TO HIS/HER PROPERTY RESULTING FROM SUBSTANTIAL IMPAIRMENT OF THE RIGHT OF ACCESS TO PUBLIC STREETS STATES A CAUSE OF ACTION FOR INVERSE CONDEMNATION.

A. Compensation for Taking. Private property may be taken or damaged for public use only when just compensation has first been paid to, or into court for, the owner (*Cal. Const. art. I, § 19*).

B. The Concept of "Taking" Does Not Require a Physical Seizure. Under the *California Constitution, article I, section 19*, the concept of "taking" does not require a physical seizure of land, and extends to a diminution of the owner's rights and attributes of ownership (*Tilem v. City of Los Angeles (1983) 142 Cal. App. 3d 694, 702, 191 Cal. Rptr. 229*).

C. Substantial Impairment of Right of Access. Substantial impairment of a property owner's right of access to the system of public streets establishes a compensable right (*Breidert v. Southern Pac. Co. (1964) 61 Cal. 2d 659, 661, 39 Cal. Rptr. 903, 394 P.2d 719*).

D. Allegation of Substantial Impairment. An allegation that defendant's action has substantially lessened and seriously impaired the free and full use by plaintiff of his or her property with allegations of the serious impact of this loss of access on the plaintiff's property pleads a cause of action sufficient to withstand a general demurrer (*Breidert*

v. Southern Pac. Co. (1964) 61 Cal. 2d 659, 667, 39 Cal. Rptr. 903, 394 P.2d 719).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a general demurrer to an inverse condemnation complaint when the demurrer asserts that the complaint fails to state a cause of action in that it appears on the face of the complaint that the impairment of access is insubstantial.

When appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, this form may be submitted in opposition to the motion supported by the points and authorities *set out in § 95.21*.

[3] Discussion of Authorities

[a] The Concept of "Taking" Does Not Require a Physical Seizure

In ***Tilem v. City of Los Angeles*** *(1983) 142 Cal. App. 3d 694, 191 Cal. Rptr. 229* , the city filed an action in eminent domain as to a portion of two contiguous parcels owned by the plaintiff. One parcel contained two apartment buildings and the other was undeveloped. The plaintiff filed an action for inverse condemnation, and the two actions were consolidated. A month before trial, the city abandoned its action and the matter was tried on the plaintiff's complaint. The trial court awarded the plaintiff damages for loss of the use of the undeveloped parcel but denied any recovery for the other parcel. Both sides appealed.

The court of appeal affirmed the award of damages for the undeveloped parcel but reversed the denial of damages for the developed parcel. The court noted that the concept of "taking" has changed from the notion of a physical seizure to that of a diminution of the owner's rights and attributes of ownership. Thus, the rule has developed that a cause of action for inverse condemnation arises from a governmental invasion or appropriation of a valuable property right that directly and specifically affects the landowner to his or her injury. Damages may be recovered for a public agency's unreasonable conduct during precondemnation and postcondemnation activities if it can be established that the governmental entity acted improperly, either by unreasonably delaying the institution of an eminent domain action following an announcement of intent to condemn or by other unreasonable precondemnation conduct, and that as a result of this action the property suffered a diminution in market value (*142 Cal. App. 3d 694, 702)* .

The court of appeal then found that the trial court properly determined that the city was liable to the owner for damages resulting from the city's precondemnation conduct. Among other things, the city prevented the plaintiff from developing the vacant property for almost three years, the proposed taking (in conjunction with a setback requirement) rendered the

real estate virtually useless, the city's offer of compensation was inadequate and directly affected the plaintiff's ability to obtain the fair market value of his property, the city refused to consider severance damages, and the city violated the six-month time limit imposed by *Code Civ. Proc. § 1245.260(a)* by waiting 10 months after the passage of the resolution of necessity before filing and serving the condemnation action (*142 Cal. App. 3d 694, 703-705)* . Finally, the court found that the trial court erred when it concluded that a lease-option contract for the developed parcel did not constitute a "sale" of the parcel for purposes of determining damages.

[b] Substantial Impairment of Right of Access

Breidert v. Southern Pac. Co. *(1964) 61 Cal. 2d 659, 39 Cal. Rptr. 903, 394 P.2d 719* , was an inverse condemnation action for damages to private property resulting from impairment of the easement of access to the system of public streets. The plaintiffs' property fronted on Vaughn Street, which crossed a railroad right-of-way and intersected with San Fernando Road. The plaintiffs used the Vaughn Street crossing as a means of access to and from San Fernando Road. The defendants barricaded Vaughn Street and closed the crossing. This deprived the plaintiffs of access to the next intersecting street in one direction. Plaintiffs initiated an inverse condemnation action for damages. The trial court sustained the defendants' general demurrer to the plaintiffs' amended complaint and entered judgments of dismissal as to the defendants. The plaintiffs appealed.

The Supreme Court reversed. The Court held that the easement of access is a property right of the urban landowner, and that this easement consists of the right to get into the street on which the landowner's property abuts and from there, in a reasonable manner, to the general system of public streets. A substantial impairment of the right of access to the general system of public streets entitles the property owner to compensation.

[c] Allegation of Substantial Impairment

The fact situation in ***Breidert v. Southern Pac. Co.*** *(1964) 61 Cal. 2d 659, 39 Cal. Rptr. 903, 394 P.2d 719* , is discussed in *§ 95.41[3][b]*. The Court noted that *Bacich v. Board of Control (1943) 23 Cal. 2d 343, 349, 144 P.2d 818* held that the easement of access includes a right to pass to the next intersecting streets. The recognition that the easement includes the right to reach the general system of public streets over either of the next intersecting streets in two directions, however, does not mean that in every case an allegation of impaired access to the next intersecting street in one direction will establish a compensable right. Loss of access to the next intersecting street in one direction is a significant factor in finding an impairment of the right of access, and obstruction of access to the next intersecting street serves as one element of the impairment. Not every cul-de-sac case is compensable, however. The complaint must allege that the loss of access has substantially lessened and seriously impaired the free and full use by plaintiffs of their property and that this loss of access has had a serious impact on the plaintiffs' real property. The claimed damage to property owners from loss of access to the next intersecting street and to the general system of streets must be more than formal in order to be compensable. It must be a true, substantial loss.

[4] Additional Authorities

[a] Compensation for Taking

It is well established that *section 19 of article I of the California Constitution*, which states in pertinent part that "[p]rivate property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner," provides the authority for prosecution of an inverse condemnation proceeding [*Holtz v. San Francisco Bay Area Rapid Transit Dist. (1976) 17 Cal. 3d 648, 652, 131 Cal. Rptr. 646, 552 P.2d 430]* .

[b] Allegation of Substantial Impairment

Valenta v. County of Los Angeles (1964) 61 Cal. 2d 669, 39 Cal. Rptr. 909, 394 P.2d 725 , involved an inverse

condemnation action in which the plaintiffs claimed damages because of the closing by the defendants of a railroad crossing for a county road running through their property. This resulted in the destruction of all access from their property over the road and the placing of their property in a cul-de-sac. A grade crossing had been provided at another road at some distance from the previous crossing. The trial court sustained the defendants' general demurrer and entered judgments of dismissal. The Supreme Court stated that the complaint did not sufficiently allege the necessary showing under the substantial impairment test, but reversed the judgments to grant plaintiffs a further opportunity to amend their complaint. The Court noted that a showing of substantial impairment of access is necessary; the bare allegation of a cul-de-sac is not sufficient. The plaintiffs should specify the use to which plaintiffs have put their property, the added distance, if any, that they must travel in order to reach the general system of public streets or public highways, the lack of availability of reasonable alternative routes to the general system, and any other factors showing that the closing has substantially impaired plaintiffs' right of access.

Jones v. People ex rel. Dep't of Transp. (1978) 22 Cal. 3d 144, 148 Cal. Rptr. 640, 583 P.2d 165 , was a proceeding in inverse condemnation by plaintiffs who had purchased nine and one-half acres of city land in 1963 for the purpose of subdividing it. Thereafter, the State Department of Public Works (now Department of Transportation) announced plans to construct a freeway that would cross the northern portion of the property, requiring acquisition of approximately two and one-half acres of land. The proposed freeway would have cut off access to a city street and, without this access, plaintiffs would have been unable to subdivide the property. Plaintiffs were unsuccessful in their attempts to sell the land and in 1973 filed their suit in inverse condemnation. After trial by jury, plaintiffs were awarded $75,000 for diminution in the fair market value of their land and $25,000 attorney's fees and costs. Several months after judgment was rendered, the Legislature deleted the proposed freeway from the highway system. The Supreme Court held that a landowner is entitled to compensation for a substantial impairment of a temporary right of access, but reversed the judgment for further proceedings on the ground that the damages assessed were based on the assumption that plaintiffs' land had diminished in value because it was permanently deprived of access to the city street, but that since access was restored by deletion of the freeway project, the amount awarded had to be adjusted accordingly (*22 Cal. 3d 144, 154)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEminent Domain ProceedingsGeneral OverviewReal Property LawEminent Domain ProceedingsGeneral OverviewReal Property LawInverse CondemnationGeneral OverviewReal Property LawInverse CondemnationProcedure

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Volume 9 Chapters 90-99 DISMISSAL---to---EMINENT DOMAIN
CHAPTER 95 EMINENT DOMAIN
PART II. FORMS
B. Opposing Demurrer to Complaint

9-95 California Points & Authorities § 95.42

AUTHOR: Jeffrey S. Rosen

§ 95.42 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] in Inverse Condemnation Action [Code Civ. Proc. § 1250.350]--Intangible Intrusion Resulted in Damage That Is Direct, Substantial, and Peculiar to Property

[1] FORM

[*Caption. See § 95.40.*]

PLAINTIFF'S COMPLAINT ALLEGING AN INTANGIBLE INTRUSION ON HIS/HER PROPERTY BY DEFENDANT'S ACTIVITIES STATES A CAUSE OF ACTION FOR INVERSE CONDEMNATION BECAUSE IT APPEARS ON THE FACE OF THE COMPLAINT THAT THE INTANGIBLE INTRUSION RESULTED IN A BURDEN ON THE PROPERTY THAT IS DIRECT, SUBSTANTIAL, AND PECULIAR TO THE PROPERTY ITSELF.

A. Compensation for Taking. (*See § 95.41, Paragraph A.*)

B. The Concept of "Taking" Does Not Require Physical Damage to Property. Physical damage to property is not invariably a prerequisite to a right to compensation in an inverse condemnation action (*Varjabedian v. City of Madera (1977) 20 Cal. 3d 285, 296, 142 Cal. Rptr. 429, 572 P.2d 43*).

C. Intangible Intrusion That Burdens Property in Direct, Substantial, and Peculiar Manner. A public entity's intangible intrusion onto private property that does not physically damage the property nonetheless can serve as a basis for inverse liability if the intrusion amounts to a permanent and substantial impairment in the use of the property (*Varjabedian v. City of Madera (1977) 20 Cal. 3d 285, 297-298, 142 Cal. Rptr. 429, 572 P.2d 43*).

D. Allegation of Direct, Substantial, and Peculiar Impairment. An allegation that plaintiff's property has suffered a

direct, substantial, and peculiar burden as a result of a public entity's intangible intrusion onto the property pleads a cause of action in inverse condemnation sufficient to withstand a general demurrer (*Varjabedian v. City of Madera (1977) 20 Cal. 3d 285, 298-299, 142 Cal. Rptr. 429, 572 P.2d 43*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a general demurrer to an inverse condemnation complaint when the demurrer asserts that the complaint fails to state a cause of action in that it appears on the face of the complaint that the intangible intrusion on plaintiff's property caused by defendant's activities did not result in a burden on the property that is direct, substantial, and peculiar to the property.

Counsel should add argument linking the points in this form with the facts of his or her case.

[3] Discussion of Authorities

[a] The Concept of "Taking" Does Not Require Physical Damage to Property

The plaintiffs in ***Varjabedian v. City of Madera*** *(1977) 20 Cal. 3d 285, 142 Cal. Rptr. 429, 572 P.2d 43* brought an action against the City of Madera. It included a cause of action in inverse condemnation, which alleged that their farm was directly in the path of odors blown by the prevailing winds from defendant's waste treatment facility located on land 600 feet from plaintiffs' residence. At trial the court granted defendant's motion for judgment on the pleadings on the inverse condemnation cause of action and dismissed that count, stating that recovery on an inverse condemnation theory required "physical damage to the property."

The California Supreme Court reversed and remanded, ordering that the judgment be amended to reinstate the inverse condemnation cause of action. The Court noted that physical damage to property is not invariably a prerequisite to compensation. Rather, the determination of the scope of the *just compensation clause* rests on its construction as a matter of interpretation. Contending policies guide this construction. On one hand, the policy underlying the eminent domain provision in the Constitution is to distribute throughout the community the loss inflicted on the individual by the making of public improvements. On the other hand, there is a fear that compensation allowed too liberally will seriously impede, if not stop, beneficial public improvements because of the greatly increased cost (*20 Cal. 3d 285, 290)* .

The Court found that the presence of several factors militated in favor of a distribution throughout the community of the type of loss at issue. In particular, it noted the plaintiffs' claim stemmed from the recurring violation of their property by a gaseous effluent. This injury was not far removed from the core cases of direct physical invasion (such as invasions of water or other liquid effluents) that indisputably require compensation (*20 Cal. 3d 285, 296-297)* .

[b] Intangible Intrusion That Burdens Property in Direct, Substantial, and Peculiar Manner

The facts in ***Varjabedian v. City of Madera*** *(1977) 20 Cal. 3d 285, 142 Cal. Rptr. 429, 572 P.2d 43* are discussed in *§ 95.42[3][a]*. That discussion also notes that the *Varjabedian* Court found several factors present that militated in favor of a distribution throughout the community of the type of loss at issue. One of these was the claim that plaintiffs' land was made "untenantable for residential purposes." The Court ruled that this claim was clearly sufficient to depict a permanent and substantial impairment in plaintiffs' use of the land (*20 Cal. 3d 285, 297)* . At the same time, the Court acknowledged that fears that compensation would seriously impede or stop the beneficial construction of sewage treatment plants might be realized if courts were to award compensation for every objectionable odor produced by such facilities. The Court found, however, that the problem of reconciling this consideration with the competing policy of loss-distribution was not presented in its most difficult form in this case because it appeared from the allegations that plaintiffs' property may have been peculiarly burdened by the odors. This brought the case within the doctrine of Richards v. *Washington Terminal Co. (1914) 233 U.S. 546, 34 S. Ct. 654, 58 L. Ed. 1088* , which held that federal statutes immunizing a railroad from nuisance liability in light of the *Fifth Amendment* do not authorize the imposition of so direct, peculiar, and substantial a burden on the plaintiff's property without compensation. The Court noted that *Richards* could be factually distinguished from this case, but that the factual differences did not render the underlying principle of *Richards* inapplicable to the issue at hand. Thus, the Court ruled that if a plaintiff can establish that his or her property has suffered a direct, peculiar, and substantial burden as a result of recurring odors produced by a sewage facility--that the plaintiff has been in effect "singled out" to suffer the detrimental environmental effects of the enterprise--then the policy favoring distribution of the resulting loss of market is strong and the likelihood that compensation will impede necessary public construction is relatively slight (*20 Cal. 3d 285, 297-299)* .

[c] Allegation of Direct, Substantial, and Peculiar Impairment

The facts in ***Varjabedian v. City of Madera*** *(1977) 20 Cal. 3d 285, 142 Cal. Rptr. 429, 572 P.2d 43* are discussed in *§ 95.42[3][a]*. After determining that compensation will be allowed in a particular case if plaintiff can show that defendant's activities burdened plaintiff's property in a direct and substantial manner that is peculiar to plaintiff's property, the Court applied this standard to plaintiffs' complaint, which alleged that their farm was directly in the path of the odors from defendant's waste treatment plant as they were blown by the prevailing winds. The Court held that plaintiffs' should have been given the opportunity, through amendment of their pleadings if necessary, to demonstrate that the burden on their farm was sufficiently direct, substantial, and peculiar to justify compensation. On that showing, the Court held that the plaintiffs could base a claim for inverse condemnation (*20 Cal. 3d 285, 299)* .

[4] Additional Authorities

[a] Intangible Intrusion That Burdens Property in Direct, Substantial, and Peculiar Manner

San Diego Gas & Electric Co. v. Superior Court (1996) 13 Cal. 4th 893, 55 Cal. Rptr. 2d 724, 920 P.2d 669 , involved, among other things, an inverse condemnation claim against an electric utility arising from electric and magnetic fields emitted from electric power lines located on a easement adjacent to the plaintiffs' property. Citing *Varjabedian v. City of Madera (1977) 20 Cal. 3d 285, 142 Cal. Rptr. 429, 572 P.2d 43* , the California Supreme Court held that when the conduct of a public entity results in an intangible intrusion onto the plaintiff's property but does not cause physical damage, the plaintiff will be entitled to compensation only on a showing that the burden imposed on the property is direct, substantial, and peculiar to the property itself (*13 Cal. 4th 893, 940-941)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEminent Domain ProceedingsGeneral OverviewReal Property LawEminent Domain ProceedingsGeneral OverviewReal Property LawInverse CondemnationGeneral OverviewReal Property LawInverse CondemnationProcedure

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PART II. FORMS
B. Opposing Demurrer to Complaint

9-95 California Points & Authorities § 95.43

AUTHOR: Jeffrey S. Rosen

§ 95.43 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] in Inverse Condemnation Action [Code Civ. Proc. § 1250.350]--Public Entity Does Not Need Statutory Power to Condemn by Eminent Domain

[1] FORM

[*Caption. See § 95.41.*]

PLAINTIFF'S COMPLAINT NEED NOT ALLEGE THAT DEFENDANT PUBLIC ENTITY HAS THE STATUTORY AUTHORITY TO EXERCISE AFFIRMATIVE EMINENT DOMAIN POWER TO ACCOMPLISH THE SAME RESULT.

A. Compensation for Taking. [*See § 95.41, Paragraph A.*]

B. The Concept of "Taking" Does Not Require a Physical Seizure. [*See § 95.41, Paragraph B.*]

C. No Need to Show Eminent Domain Power of Defendant. Liability in inverse condemnation does not depend on a showing that there is statutory authority in the defendant entity to exercise affirmative eminent domain powers to accomplish the same result. Any governmental entity may be liable for inverse condemnation, even agencies that lack eminent domain authority. Inverse condemnation is an action grounded not on statutory condemnation power, but on the constitutional proscription against the taking (pursuant to California *Constitution, amendment V*), or the taking or damaging (pursuant to *California Constitution, article I, section 19*), of property for public use without just compensation (*Baker v. Burbank-Glendale-Pasadena Airport Authority (1985) 39 Cal. 3d 862, 866-867, 218 Cal. Rptr. 293, 705 P.2d 866 , cert. denied, (1986) 475 U.S. 1017, 106 S. Ct. 1200, 89 L. Ed. 2d 314*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a general demurrer to a complaint in inverse condemnation when the demurrer asserts that the complaint fails to state a cause of action in that the defendant public entity lacks statutory authority to exercise affirmative eminent domain powers to accomplish the same result [*see Baker v. Burbank-Glendale-Pasadena Airport Authority (1985) 39 Cal. 3d 862, 867, 218 Cal. Rptr. 293, 705 P.2d 866 , cert. denied, 475 U.S. 1017 (1986)*].

Counsel should insert argument in this form showing the relationship between the facts present in the case and the points of law stated.

[3] Discussion of Authorities

[a] No Need to Show Eminent Domain Power of Defendant

Baker v. Burbank-Glendale-Pasadena Airport Authority *(1985) 39 Cal. 3d 862, 218 Cal. Rptr. 293, 705 P.2d 866 , cert. denied, 475 U.S. 1017 (1986)* , was an action in inverse condemnation and nuisance brought by homeowners against an airport adjacent to their properties. The trial court sustained demurrers to both causes of action, dismissing the inverse condemnation action because defendant was prohibited by statute from exercising the power of eminent domain, and dismissing the nuisance action pursuant to the statute of limitations covering permanent nuisances. Plaintiffs appealed.

The Supreme Court reversed, holding that liability in inverse condemnation does not depend on a showing that there is statutory authority in the defendant entity to exercise affirmative eminent domain powers to accomplish the same result (*39 Cal. 3d 862, 867)* . The Court rejected defendant's argument that inverse condemnation is another description of a landowner's remedy for a taking of his or her property when condemnation proceedings have not been instituted, and that an entity that lacks the power to condemn by eminent domain is therefore not liable in inverse condemnation. Although there is some authority for defendant's contention, inverse condemnation is based not on statutory condemnation power, but on the constitutional proscription against the taking (Cal. *Const., amend. V*), or the taking or damaging (*Cal. Const., art. I, § 19*), of property for public use without just compensation (*39 Cal. 3d 862, 866)* . A landowner whose property has been invaded by a public entity that lacks eminent domain power suffers no less a taking merely because the defendant was not authorized to take. Plaintiff need only show that the damage resulted from an exercise of governmental power, and that this occurred while the defendant was "seeking to promote the general interest in its relation to any legitimate object of government" (*39 Cal. 3d 862, 867)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEminent Domain ProceedingsGeneral OverviewReal Property LawEminent Domain ProceedingsGeneral OverviewReal Property LawInverse CondemnationGeneral OverviewReal Property LawInverse CondemnationProcedure

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PART II. FORMS
B. Opposing Demurrer to Complaint

9-95 California Points & Authorities § 95.44

AUTHOR: Jeffrey S. Rosen

§ 95.44 Supporting Application for Temporary Restraining Order and Preliminary Injunction [Code Civ. Proc. § 527]--Use of Power of Eminent Domain Without Compensation

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF APPLICA-
vs.	)	TION FOR [TEMPORARY RESTRAINING OR-
_____ [*name*],	)	DER AND] PRELIMINARY INJUNCTION
Defendant.	)	Date: _____
	)	Time: _____
	)	Dept.: _____
		Trial Date: _____

_____

THE COURT SHOULD ISSUE A [TEMPORARY RESTRAINING ORDER AND] PRELIMINARY INJUNCTION TO ENJOIN DEFENDANTS' ATTEMPTED USE OF THE POWER OF EMINENT DOMAIN TO TAKE PLAINTIFF'S PROPERTY BECAUSE PLAINTIFF HAS RECEIVED NO COMPENSATION FOR THE TAKING.

A. Injunction Against Eminent Domain Without Compensation. The ascertainment and payment of damages is a condition precedent to the right of a public entity to do public work that will destroy or damage private property. When a taking is attempted under the power of eminent domain without any provision being made for compensation, an injunction will lie (*Beals v. Los Angeles (1943) 23 Cal. 2d 381, 387-388, 144 P.2d 839* ; *Wilcox v. Engebretsen*

(1911) 160 Cal. 288, 299, 116 P. 750).

B. Preliminary Injunction to Prevent Taking of Property. In an action to enjoin the taking of private property without compensation or in a condemnation proceeding, a superior court has the power to issue a preliminary injunction to prevent the taking of the property before compensating the plaintiff or before the final judgment in the proceeding (*Geurkink v. Petaluma (1896) 112 Cal. 306, 308-310, 44 P. 570* ; *Felton Water Co. v. Superior Court (1927) 82 Cal. App. 382, 388, 256 P. 255*).

C. Great or Irreparable Injury or Waste. An injunction may be grantedwhen it appears by the complaint or affidavits (or declarations) that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury, to a party to the action (*Code Civ. Proc. § 526(a)(2), 2015.5*; *Volpicelli v. Jared Sydney Torrance Memorial Hosp. (1980) 109 Cal. App. 3d 242, 167 Cal. Rptr. 610* ; *Smith v. Smith (1942) 49 Cal. App. 2d 716, 718-719, 122 P.2d 346*). The term "irreparable injury" means that species of damages, whether great or small, that ought not to be submitted to on the one hand or inflicted on the other (*Wind v. Herbert (1960) 186 Cal. App. 2d 276, 285, 8 Cal. Rptr. 817*). This definition warrants the use of the injunctive power of the court against a wrong that a trial judge deems insufferable because it constitutes an overbearing assumption by one person of superiority and domination over the rights and property of others (*Fretz v. Burke (1967) 247 Cal. App. 2d 741, 746, 55 Cal. Rptr. 879*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of an application for a temporary restraining order and preliminary injunction or for a preliminary injunction by itself when the defendant is taking private property without any compensation or is threatening to do so. With modification of the caption, it may be used in support of a motion for a preliminary injunction to the same effect.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For a general form of complaint for provisional and permanent injunctive relief as well as other forms for use in obtaining provisional injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender). For practice forms for use in connection with eminent domain proceedings, see Ch. 247, *Eminent Domain and Inverse Condemnation* in that set.

[c] Related Memoranda

For memoranda supporting applications for preliminary injunctions and temporary restraining orders generally, see Ch.

116, *Injunctions* in this set.

[3] Discussion of Authorities

[a] Injunction Against Eminent Domain Without Compensation

In ***Beals v. Los Angeles*** *(1943) 23 Cal. 2d 381, 144 P.2d 389* , plaintiff brought an action for an injunction to restrain defendants from closing a public alley pursuant to ordinances enacted by the City of Los Angeles and to have the ordinances declared void. The superior court sustained defendants' demurrer and entered a judgment dismissing the action. Plaintiff appealed, and the court of appeal reversed.

The court of appeal agreed with plaintiff's contention that the complaint stated a cause of action. It noted that the closing of an alley results in the taking or damaging of private property for a public use. It further found that it is settled that the ascertainment and payment of damages is a condition precedent to the right of a city to do public work that will destroy or damage private property (*23 Cal. 2d 381, 387)* . Accordingly, the court held that when a taking is attempted under the power of eminent domain without any provision being made for compensation, an injunction will lie. Even though the city council concluded that there would be no damages arising out of the work when it ordered the closing of the alley, the court of appeal stated that a property owner cannot be deprived of the constitutional guarantee of compensation and prepayment by the decision of a city council that the owner is not damaged (*23 Cal. 2d 381, 388)* .

Wilcox v. Engebretsen *(1911) 160 Cal. 288, 116 P. 750* , involved an action by an abutting property owner to enjoin the city council of San Diego and defendant Engebretsen, as contractor under a street grading contract, from proceeding to reduce the street surface in front of the plaintiff's property to the established grade. Defendants' demurrer was sustained by the superior court, and they obtained a judgment. Plaintiff appealed, and the Supreme Court reversed.

The Supreme Court stated that under former Cal. Const., art. I, § 14 [*now see Cal. Const., art. I, § 19*], the ascertainment and payment of damages in a condemnation proceeding is a condition precedent to the right of a city to do any public work that will cause damage. Thus, a property owner has the right to enjoin such work until his or her damages have been lawfully ascertained and paid in the manner prescribed by the Constitution (*160 Cal. 288, 298-299)* .

[b] Preliminary Injunction to Prevent Taking of Property

In ***Geurkink v. Petaluma*** *(1896) 112 Cal. 306, 44 P. 570* , plaintiffs owned two lots that abutted certain streets in the City of Petaluma. They brought an action to enjoin defendant city from changing a natural course of a creek and thusdamaging their property by preventing free access to the street unless the city compensated them for the damage. The superior court issued a temporary restraining order, but after trial it gave judgment for defendant and denied plaintiffs' motion for a new trial. Plaintiffs appealed, and the Supreme Court reversed.

The Supreme Court stated that a threatened permanent injury to a party's real property may be enjoined (*112 Cal. 306, 309)* . Until compensation was made, the city had no right to damage the plaintiffs' property. Payment of the damages was a condition precedent to the creation of the right, and, until payment, the city was a trespasser. In such a case an injunction is the plain, ordinary, and best remedy (*112 Cal. 306, 310)* .

In ***Felton Water Co. v. Superior Court*** *(1927) 82 Cal. App. 382, 256 P. 255* , plaintiff was a corporation that had organized for the purpose of supplying the inhabitants of the town of Felton and its vicinity with water. It filed an action to condemn an easement consisting of the right to take, divert, and carry away 150,000 gallons of water per day from a particular stream. Defendants' answer denied the allegations of the complaint; defendants also cross complained for damages and for a preliminary injunction restraining plaintiff from taking any part of defendants' property pending the trial of the action. The superior court issued an order requiring plaintiff to show cause why it should not be restrained

pending the trial of the action from further obstructing the flow and diverting the waters of the stream. Plaintiff brought a prohibition proceeding in the court of appeal to prevent the superior court from conducting any further proceedings on the order to show cause. It contended that the superior court did not have jurisdiction to grant affirmative relief to a defendant in a condemnation proceeding or to entertain an application therefor. The court of appeal rejected this contention and denied the writ.

The court of appeal noted that the taking of private property before the amount of the compensation is ascertained will be enjoined unless the owner with knowledge has permitted without protest the property to be devoted to a public use by one engaged in administering the use. In such a case, the owner's conduct is regarded as a dedication of the property to the use, and the owner's only remedy will be an action for compensation (*82 Cal. App. 382, 387-388)* .

In a condemnation proceeding when the court has jurisdiction both of the parties and of the subject of the litigation, the court, in the exercise of its power to hear and determine the issues necessarily involved, has the incidental power to prevent the plaintiff from taking possession prior to the entry of judgment. Because it has this power in a proper case, its conclusion as to whether the facts alleged or the pleadings are sufficient to warrant the relief sought is an exercise of jurisdiction even though it might be erroneous (*82 Cal. App. 382, 388*). Further, a writ of prohibition will not lie to prevent a subordinate court from deciding erroneously or to prescribe what a court shall or shall not consider in a matter before it and within its jurisdiction. For the foregoing reasons, the writ was denied (*82 Cal. App. 382, 389*).

[c] Great or Irreparable Injury or Waste

In ***Volpicelli v. Jared Sydney Torrance Memorial Hosp.*** *(1980) 109 Cal. App. 3d 242, 167 Cal. Rptr. 610* , a trial court granted a preliminary injunction in a case involving the termination of plaintiff physician from the medical staff due to a dispute over staff dues. Plaintiff alleged that he was entitled to be temporarily reinstated to the staff pending adequate notice and hearing on the matter. Defendants argued, however, that injunctive relief was not proper because plaintiff failed to show irreparable injury. Defendants contended that plaintiff's fundamental right to practice his profession was not impaired because plaintiff still retained staff membership at two other hospitals.

The court of appeal upheld the injunction, reasoning that plaintiff had the right to fully and capably practice his profession, and an exclusion from one hospital out of three could substantially bear on plaintiff's right to fully practice. Furthermore, defendant hospital had a unique burn center. Because it was clear that plaintiff may have been deprived of a valuable right without due process of law, the court concluded that there was a sufficient showing of irreparable injury, thereby upholding the issuance of the preliminary injunction (*109 Cal. App. 3d 242, 248)* .

In ***Smith v. Smith*** *(1942) 49 Cal. App. 2d 716, 122 P.2d 346* , appellant contended that the trial court did not have jurisdiction to order him to remove himself from the family home pending the trial of the divorce action. The complaint had alleged that appellant had committed acts of violence about the residence, had threatened the life of respondent and the children, and had destroyed property. There was also testimony that appellant had on one occasion discharged firearms in the home, destroyed property, and threatened the lives of his family to the extent that it was necessary to summon the police to disarm him.

In affirming the order, the court of appeal stated that the trial court acted within its jurisdiction in entering an order in the nature of a preliminary injunction excluding appellant from the residence during the pendency of the action because such an order is specifically granted to the courts by statute (citing former Code Civ. Proc. § 526 first subd (2); now *Code Civ. Proc. § 526(a)(2)*) (*49 Cal. App. 2d 716, 718-719)* .

In ***Wind v. Herbert*** *(1960) 186 Cal. App. 2d 276, 8 Cal. Rptr. 817* , the superior court had granted a preliminary injunction ancillary to an accounting, declaratory relief, and dissolution of a limited partnership. The defendants argued in appealing the order granting the injunction that plaintiffs had failed to show that a preliminary injunction was necessary to prevent irreparable injury to the partnership assets. They contended that any conceivable future injury

would be readily ascertainable and could be compensated by money damages and that there was no claim that defendants could not respond in damages.

In affirming the preliminary injunction, the court of appeal stated that this argument was without merit. It explained that the concept of irreparable injury does not concern itself entirely with injury beyond the possibility of repair or beyond possible compensation in damages. Rather, as defined by *Civ. Code § 3422*, an injunction properly issues in any case in which it would be extremely difficult to ascertain the amount of compensation that would afford adequate relief. Quoting from *Anderson v. Souza (1952) 38 Cal. 2d 825, 834, 243 P.2d 497* , it defined the term "irreparable injury" as meaning that species of damages, whether great or small, that ought not to be submitted to on the one hand or inflicted on the other.

It further stated that the argument that there is no "irreparable damage" would not be so often used by wrongdoers if they would take the trouble to observe that the word "irreparable" is a very unhappily chosen one used in expressing the rule that an injunction may issue to prevent wrongs of a repeated and continuing character or that occasion damages estimable only by conjecture and not by any accurate standard. Thus, because in the instant case the wrongs complained of were obviously of a repeated and continuing character, the preliminary injunction was properly issued by the trial court (*186 Cal. App. 2d 276, 285)* .

In ***Fretz v. Burke*** *(1967) 247 Cal. App. 2d 741, 55 Cal. Rptr. 879* , plaintiffs obtained a preliminary injunction requiring defendants to pay their respective shares of profits of a corporation. They appealed from this part of the order, and one of the points that defendant argued was that plaintiffs did not show any irreparable injury.

The court of appeal rejected this argument and affirmed the order granting the preliminary injunction. It quoted the definition of "irreparable injury" set forth in *Anderson v. Souza (1952) 38 Cal. 2d 825, 834, 243 P.2d 497* , as that species of damages, whether great or small, that ought not to be submitted to on the one hand or inflicted on the other. The court rejected the assertion by defendants that under this definition all injuries approach the status of "irreparability." The court stated that this definition should be deemed as warranting the use of the injunctive power of the court against a wrong that a trial judge deems insufferable because it constitutes an overbearing assumption by one person of superiority and domination over the rights and property of others (*247 Cal. App. 2d 741, 746)* .

[4] Additional Authorities

[a] Injunction Against Eminent Domain Without Compensation

O'Connor v. Southern P. R. Co. (1898) 122 Cal. 681, 55 P. 688 , involved an action by an owner of real property that abutted on a street to restrain defendant from constructing a railroad on the street. The superior court entered judgment for plaintiff, and defendant appealed. The Supreme Court affirmed the judgment. It noted that the superior court's findings of fact declared that the street was 72 feet wide, but that the railroad would have left plaintiff with the use of only 31 feet between the tracks and his lot. The Court found, as a matter of law, that it could not say that 31 feet would have answered all the legitimate uses to which the street might have been put by the plaintiff. Thus, the Court held that it was clear that the facts gave plaintiff the right of invoking the remedy of injunction (*122 Cal. 681, 683-684)* .

In *Schaufele v. Doyle (1890) 86 Cal. 107, 24 P. 834* , plaintiff owned and operated a hotel that abutted onto a street. Defendants were engaged in regrading the street when plaintiff brought an action for an injunction to stop their work. Defendants' answer alleged that they were working under the authority of the City of Monterey in regrading the street. After plaintiff rested her case at trial, defendants moved for a nonsuit; they based their motion on the ground that it appeared from the evidence that any damage plaintiff might sustain by the performance of the proposed work could be fully compensated for in money and that it did not appear that defendants were insolvent and unable to make such compensation. The superior court granted the motion, and it also denied a motion for a new trial. Plaintiff appealed, and the Supreme Court reversed the judgment and order. The Court stated that every person whose property abuts on a street

has the right of access to and egress from the land abutting on the street. This right of access and egress is property that a person cannot be deprived of without compensation being made first (*86 Cal. 107, 109)* .

[b] Great or Irreparable Injury or Waste

In *Rudel v. Los Angeles County (1897) 118 Cal. 281, 50 P. 400* , plaintiff brought an action to restrain the supervisors of Los Angeles County from diverting the waters of the Rubio Canyon and causing them to flow into and through the Eaton Canyon. The Supreme Court affirmed a judgment so restraining the defendants. It stated that the facts entitled plaintiff to an injunction under the provisions of *Code Civ. Proc. § 526* first subd (2) (now *Code Civ. Proc. § 526(a)(2)*), and brought the case within the scope of the general rules under which courts of equity restrain the doing of wrongful acts that necessarily result in irreparable injury to others (*118 Cal. 281, 289)* .

In *Brookshire Oil Co. v. Casmalia Ranch Oil & Dev. Co. (1907) 151 Cal. 577, 91 P. 383* , defendant had torn up an oil pipeline on the assertion that he held paramount title to the property through which the line passed. Plaintiff alleged that he was entitled to an easement for his pipeline and that, therefore, defendant should be enjoined from interfering with the pipeline. The superior court granted a preliminary injunction to restrain the defendant from interfering with therelaying and reestablishment of the pipeline. The defendant appealed to the Supreme Court after the trial court denied its motion to dissolve the preliminary injunction. The Supreme Court affirmed the order denying the motion. It stated that the continuance of the use of the pipeline would not materially interfere with defendant's use of the land, even if it ultimately prevailed, but that if the preliminary injunction was dissolved and the plaintiff eventually prevailed, plaintiff would have suffered great and irreparable damages (*151 Cal. 577, 580)* .

Ketchens v. Reiner (1987) 194 Cal. App. 3d 470, 239 Cal. Rptr. 549, involved a plaintiff charged with violation of certain Education Code provisions pertaining to verbal and related abuse of teachers. Plaintiff claimed that the statutes under which she was cited were unconstitutionally vague and overbroad. Although a TRO was initially granted, after an order to show cause hearing, a preliminary injunction was denied, and the TRO was dissolved. The court of appeal reversed. It said that trial courts should evaluate two interrelated factors in deciding whether to issue a preliminary injunction: (1) the likelihood that the plaintiff will prevail on the merits at trial, and (2) the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm that the defendant is likely to suffer if the preliminary injunction were issued (*194 Cal. App. 3d 470, 474*). The court held that it was likely that plaintiff would prevail at trial, and that the loss of *First Amendment* freedoms (freedom of speech) for even minimal periods of time unquestionably constitutes irreparable injury (*194 Cal. App. 3d 470, 480)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining OrdersCivil ProcedureEminent Domain ProceedingsGeneral OverviewReal Property LawEminent Domain ProceedingsGeneral Overview

California Points & Authorities

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Volume 9 Chapters 90-99 DISMISSAL---to---EMINENT DOMAIN
CHAPTER 95 EMINENT DOMAIN
PART II. FORMS
B. Opposing Demurrer to Complaint

9-95 California Points & Authorities §§ 95.45-95.59

AUTHOR: Jeffrey S. Rosen

[Reserved]

§§ 95.45[Reserved]

California Points & Authorities

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Volume 9 Chapters 90-99 DISMISSAL---to---EMINENT DOMAIN
CHAPTER 95 EMINENT DOMAIN
PART II. FORMS
C. Supporting Motion for Summary Judgment

9-95 California Points & Authorities § 95.60

AUTHOR: Jeffrey S. Rosen

§ 95.60 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Eminent Domain Action [Code Civ. Proc. § 1230.040]--By Defendant--Stated Purpose Is Not Public Use [Code Civ. Proc. § 1250.360(b)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION FOR
vs.	)	SUMMARY JUDGMENT
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Dept.: _____
	)	Trial Date: _____

_____

THE COURT SHOULD GRANT DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE STATED PURPOSE FOR THE TAKING IS NOT A PUBLIC USE.

A. General Practice Rules Applicable in Eminent Domain Proceeding. The rules of practice that govern civil actions generally are the rules of practice for eminent domain proceedings (*Code Civ. Proc. § 1230.040*).

B. Summary Judgment. A defendant may move for summary judgment in any action or proceeding if it is contended that the action has no merit. The motion must be granted if all of the papers submitted show that there is no triable issue as to any material fact and that defendant is entitled to a judgment as a matter of law (*Code Civ. Proc. § 437c(a), (c)*).

C. Nonpublic Use as Ground for Objection. A defendant may object to the plaintiff's right to take on the ground that the stated purpose is not a public use (*Code Civ. Proc. § 1250.360(b)*).

D. Public Use. A public use is one that concerns the whole community or promotes the general interest in its relation to any legitimate object of government. To make a use public in character, a duty must fall on the person or corporation holding the property appropriated by eminent domain to furnish thepublic with the use intended, and the public must be entitled to use or enjoy the property taken (*Bauer v. County of Ventura (1955) 45 Cal. 2d 276, 284, 289 P.2d 1*).

[*Optional*] **E. Property Taken by Eminent Domain and Leased to Private Party Must Be Restricted to Public Use.** When property taken by eminent domain is to be leased to a private party, the public entity must exercise strict control to guarantee that the private lessee is not using the property for purely private gain (*City and County of San Francisco v. Ross (1955) 44 Cal. 2d 52, 57, 279 P.2d 529*).

[*Optional*] **F. Government Agencies Are Prohibited From Condemning Owner-Occupied Home to Transfer it to Another Private Owner or Developer.** *Cal. Const., art. I, § 19* expressly prohibits government agencies from using eminent domain to take an owner-occupied home to transfer it to another private owner or developer.

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for summary judgment in an eminent domain action when (1) the defendant has raised the affirmative defense that the stated purpose is not a public use, and (2) the motion asserts that the defendant is entitled to entry of judgment as a matter of law. This objection may be raised regardless of whether the plaintiff has adopted a resolution of necessity that satisfies the requirements of *Code Civ. Proc. §§ 1245.210-1245.270*.

Optional Paragraph E should be used if the public entity appropriating property for a public use plans to lease the property to a private party and does not plan to exercise adequate control over the property to ensure that the property will be operated for a public use.

Optional Paragraph F should be used if the public entity appropriating an owner-occupied home for public use plans to transfer the property to a private party.

When appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Additionally, counsel should submit affidavits or declarations that support the motion [*Code Civ. Proc. § 437c(c), (d)*].

[3] Discussion of Authorities

[a] General Practice Rules Applicable in Eminent Domain Proceeding

Code Civ. Proc. § 1230.040 codifies the general principle that eminent domain proceedings are governed by the same rules of practice applicable to civil actions [*see Felton Water Co. v. Superior Court (1927) 82 Cal. App. 382, 388, 256 P. 255]* .

The rules of practice that govern civil actions generally may be found in *Code Civ. Proc. §§ 307-1062.10*. However, *Code Civ. Proc. § 1230.040* does not limit its incorporation of general rules to these statutes. Other statutes and many non-statutory rules of procedure may also be applicable to eminent domain proceedings. The intent of *Code Civ. Proc. § 1230.040* is to include as many rules of practice as are consistent with the efficient administration of the Eminent Domain Law, whether the rule refers to an action rather than a proceeding and despite the fact that a provision has not been applied to other special proceedings [*Recommendation-- The Eminent Domain Law*, 12 Cal. L. Rev. Comm'n Reports 1681 (1974)].

[b] Nonpublic Use as Ground for Objection

Code Civ. Proc. § 1250.360(b) specifies that a defendant may object to the right to take when the stated purpose is not a public use. This is based on the limitation of *Code Civ. Proc. § 1240.010* that the power of eminent domain may be exercised to acquire property only for a public use. This provision is itself a reiteration of the basic constitutional limitation [*see Cal. Const., art. I, § 19*].

Code Civ. Proc. § 1240.010 also provides that when the Legislature provides by statute that a use or purpose is one for which the power of eminent domain may be exercised, this action is deemed to be a declaration by the Legislature that the use, purpose, object, or function is a public use. While this does not preclude judicial review to determine whether a proposed use is actually a public use [*see, e.g., City & County of San Francisco v. Ross (1955) 44 Cal. 2d 52, 55, 279 P.2d 529]* , the Legislature's determination will be accepted as controlling unless it is shown to be clearly erroneous and without reasonable foundation [*The Housing Authority v. Dockweiler (1939) 14 Cal. 2d 437, 449-450, 94 P.2d 794* ; *see County of Los Angeles v. Anthony (1964) 224 Cal. App. 2d 103, 106, 36 Cal. Rptr. 308]* .

[c] Public Use

The United States Supreme Court has held that economic development constitutes a "public use" within the meaning of the *Takings Clause of the Fifth Amendment* [*Kelo v. City of New London (2005) 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439*]. However, states may impose "public use" requirements that are stricter than the federal baseline. In 2008, *Cal. Const., art. I, § 19*, which gives state and local government the power of eminent domain, was amended through the initiative process [Proposition 99 (effective June 4, 2008)] to expressly prohibit government agencies from using eminent domain to take an owner-occupied home to transfer it to another private owner or developer [Proposition 99, § 1 (effective June 4, 2008)]. Proposition 99 was enacted in response to *Kelo v. City of New London* [*see* Proposition 99, §§ 1(b), 2 (effective June 4, 2008)]. Furthermore, under California's redevelopment law, a governmental entity may only take land for economic development purposes in blighted areas [*Health & Safety Code § 33030 et seq.*; *see Redevelopment Agency of Chula Vista v. Rados Bros. (2002) 95 Cal. App. 4th 309, 314, 115 Cal. Rptr. 2d 234*].

In ***Bauer v. County of Ventura*** *(1955) 45 Cal. 2d 276, 289 P.2d 1* , the plaintiffsowned real property located near a storm drain that was constructed by a county and a storm drain maintenance district. When the waters contained in the ditch overflowed upon and damaged the plaintiffs' property, they commenced an action to recover the resulting damages. The trial court's judgment of dismissal was based on its orders sustaining the demurrers of each defendant to the amended complaint.

The Supreme Court reversed the judgment in favor of the county with directions to overrule its demurrers, and affirmed as to the other defendants. Noting that former Cal. Const., art. I, § 14 [*now see Cal. Const., art. I, § 19*] requires the payment of compensation when private property is taken for a public use, the Court defined "public use" as a use that concerns the whole community or promotes the general interest in its relation to any legitimate object of government. According to the Court, to make a use public in character, a duty must fall on the person or entity holding the property appropriated by eminent domain to furnish the public with the use intended, and the public must be entitled to use or enjoy the property taken (*45 Cal. 2d 276, 284)* .

In ***City and County of San Francisco v. Ross*** *(1955) 44 Cal. 2d 52, 279 P.2d 529* , the plaintiff, the City and County of San Francisco, sought a writ of mandamus to compel defendant, the Controller of the City and County of San Francisco, to release funds allowing the city to acquire property under eminent domain for use as a public parking lot. The city planned to lease the property to private parties who would then build a parking garage to the city's specifications and operate parking and other facilities on the property. The city did not intend to directly regulate the rates of the parking facility or otherwise regulate the operation of the facility. The Controller's refusal to release the funds was based on his contention that the city could not condemn private property to be immediately leased to private parties for use as a private venture.

The Supreme Court denied the writ of mandamus. The Court considered Rhode Island and United States Supreme Court cases that had allowed the leasing of property taken by eminent domain to private parties. The Court distinguished these cases by pointing out that the public entities involved in them planned to maintain stringent control over the properties to ensure that the use of the property taken by eminent domain remained public. In the case at hand this control was lacking. The Court concluded that the leasing of the property to a private party without controls amounted to an exercise of the power of eminent domain for the purpose of "private gain and not public need."

[4] Additional Authorities

[a] Nonpublic Use as Ground for Objection

In *Yeshiva Torath Emeth Academy v. University of So. Calif. (1962) 208 Cal. App. 2d 618, 25 Cal. Rptr. 422* , the plaintiff appealed entry of judgment in favor of the defendant after a demurrer was sustained without leave to amend. The ground of the demurrer was that the complaint failed to state a cause of action in that the proposed condemnation was not for a public use as authorized by the Legislature. Plaintiff was a private educational institution for elementary grade students that sought to condemn property it was leasing from defendant so that it could continue to use the property. The court of appeal held that former Code Civ. Proc. § 1238(3), which authorized school districts to exercise the right of eminent domain over public buildings and grounds, did not apply to a private elementary school because the use was not a public one. Thus, the demurrer was properly sustained (*208 Cal. App. 2d 618, 620)* .

The issue of whether a taking is for a public use must be distinguished from the issue of necessity. Only the former is justiciable; the latter is conclusively established by the adoption of a resolution of necessity [*People ex rel. Dept. Pub. Wks. v. Superior Court (1968) 68 Cal. 2d 206, 215, 65 Cal. Rptr. 342, 436 P.2d 342]* .

[b] Public Use

Public use was an issue in *City of Needles v. Griswold (1992) 6 Cal. App. 4th 1881, 8 Cal. Rptr. 2d 753* , a case in which a city obtained a preliminary injunction against two licensees and operators of a golf course owned by the city. The city exercised its option to terminate the operating license and, in response to the city's request for immediate relief, the trial court enjoined the licensees from preventing the city from taking possession of and using the licensees' private personal property (such as golf carts, trucks, office machines, etc.) purportedly necessary for the proper operation of the golf course.

The court of appeal held that the city had taken the licensees' personal property for a public purpose without the constitutionally required compensation. The court noted that the United States Constitution does not make a distinction between personal property and real property and modified the injunction accordingly (*6 Cal. App. 4th 1881, 1891)* .

The issue of public use also arose in *City of Oakland v. Oakland Raiders (1982) 32 Cal. 3d 60, 183 Cal. Rptr. 673, 646 P.2d 835* , when the California Supreme Court ruled that the city could attempt to prove that its proposed acquisition of a professional football team, even if a subsequent sale to private parties was contemplated, was an appropriate exercise of its eminent domain power. Ultimately, it was held that the proposed taking unreasonably burdened interstate commerce, and the city was unsuccessful in its attempt to acquire the Raiders [*see City of Oakland v. Oakland Raiders (1985) 174 Cal. App. 3d 414, 422, 220 Cal. Rptr. 153]* .

Damages for the loss of personal property resulting from inverse condemnation were upheld in *McMahan's of Santa Monica v. City of Santa Monica (1983) 146 Cal. App. 3d 683, 194 Cal. Rptr. 582* , and *Aetna Life & Casualty Co. v. City of Los Angeles (1985) 170 Cal. App. 3d 865, 216 Cal. Rptr. 831* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureEminent Domain ProceedingsGeneral OverviewReal Property LawEminent Domain ProceedingsGeneral Overview

California Points & Authorities

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Volume 9 Chapters 90-99 DISMISSAL---to---EMINENT DOMAIN
CHAPTER 95 EMINENT DOMAIN
PART II. FORMS
C. Supporting Motion for Summary Judgment

9-95 California Points & Authorities § 95.61

AUTHOR: Jeffrey S. Rosen

§ 95.61 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Eminent Domain Action [Code Civ. Proc. § 1230.040]--By Defendant--Property Not Subject to Acquisition by Eminent Domain for Stated Purpose [Code Civ. Proc. § 1250.360(e)]

[1] FORM

[*Caption. See § 95.60.*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE PROPERTY DESCRIBED IN THE COMPLAINT IS NOT SUBJECT TO ACQUISITION BY THE POWER OF EMINENT DOMAIN FOR THE STATED PURPOSE.

A. General Practice Rules Applicable in Eminent Domain Proceeding. [*See § 95.60, Paragraph A.*]

B. Summary Judgment. [*See § 95.60, Paragraph B.*]

C. Property Exempt From Condemnation for Certain Purposes. A defendant may object to the plaintiff's right to take when the described property is not subject to acquisition by the power of eminent domain for the stated purpose (*Code Civ. Proc. § 1250.360(e)*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for summary judgment in an eminent domain action when (1) the defendant has raised the affirmative defense that the described property is not subject to acquisition by the power of eminent domain for the stated purpose, and (2) the motion asserts that the defendant is entitled to entry of judgment as a matter of law. This objection may be raised regardless of whether the plaintiff has adopted a resolution of necessity that satisfies the requirement of *Code Civ. Proc. §§ 1245.210-1245.270*.

When appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Additionally, counsel should submit affidavits or declarations that support the motion [*Code Civ. Proc. § 437c(c), (d)*].

[3] Discussion of Authorities

[a] Property Exempt From Condemnation for Certain Purposes

Code Civ. Proc. § 1250.360(e) provides that a defendant may object if the property sought to be taken is not subject to acquisition by the power of eminent domain for the purpose specified in the complaint. For example, condemnation may not be utilized by a city to acquire an existing golf course for golf course purposes [*Gov. Code § 37353(c)*]. Similarly, cemetery land may not be taken for rights-of-way [*Health & Safety Code §§ 8134, 8560, 8560.5*].

The purpose for which the power of eminent domain may be exercised may be implied, however. *Golden Gate Bridge Etc. Dist. v. Muzzi (1978) 83 Cal. App. 3d 707, 148 Cal. Rptr. 197* involved former Sts. & Hy. Code § 27166, which provided that the district "may have and exercise ... the right of eminent domain for the condemnation of any property, whether such property is already devoted to the same use or another public use, or otherwise, necessary to the exercise of the powers granted in this part, or in any provision of law, to the district" (emphasis omitted). These powers included the powers to "study, construct, acquire, improve, maintain, and operate any and all modes of transportation within or partly within the district, including, but not limited to water transportation" (*83 Cal. App. 3d 707, 711-712)* . In connection with the construction of a ferry terminal within a city, the district condemned between 589 and 600 acres of which 369-380 were tidelands (submerged) and the remaining 199-220 acres lay behind dikes. Of the area behind the dikes, about 60 acres were filled; the rest was low and marshy. The property was a short distance from the ferry terminal site. The resolution of public interest and necessity stated that the property was "suitable, adaptable, necessary, and required for public use" by the district "for the placement of dredged spoils incident to the construction of the district's Larkspur Ferry Terminal, for the implementation of recommended environmental mitigation measures, and for various transit purposes." The landowner argued that "environmental mitigation" was neither an expressed nor an implied public purpose justifying the condemnation.

In affirming the judgment of condemnation, the court of appeal held that the view that the power to condemn property for a water transportation system implicitly includes the power to condemn for necessary mitigation of the resulting environmental effects was consistent with the legislative intent and policy expressed in the California Environmental Quality Act [*Pub. Res. Code § 21000 et seq.*] (*83 Cal. App. 3d 707, 713)* . The court also noted the following limitation on this power to condemn, however: "In concluding that [district's] power to condemn for the construction, acquisition and operation of a water transportation system implicitly includes the power to condemn for environmental mitigation, we recognize this latter power only as to environmental mitigation necessitated by an authorized activity. The power to condemn for specified purposes does not implicitly include the power to condemn for general

environmental purposes unrelated to the agency's powers" (*83 Cal. App. 3d 707, 713)* .

When property is already appropriated to a public use it may not be taken except for a more necessary or a compatible use [*Code Civ. Proc. §§ 1240.510, 1240.610*]. See *§ 95.62*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureEminent Domain ProceedingsGeneral OverviewReal Property LawEminent Domain ProceedingsGeneral Overview

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California Points & Authorities

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Volume 9 Chapters 90-99 DISMISSAL---to---EMINENT DOMAIN
CHAPTER 95 EMINENT DOMAIN
PART II. FORMS
C. Supporting Motion for Summary Judgment

9-95 California Points & Authorities § 95.62

AUTHOR: Jeffrey S. Rosen

§ 95.62 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Eminent Domain Action [Code Civ. Proc. § 1230.040]--By Defendant--Failure to Meet Requirements for Excess Condemnation [Code Civ. Proc. § 1240.410], Condemnation for Compatible Use [Code Civ. Proc. § 1240.510], or Condemnation for More Necessary Public Use [Code Civ. Proc. § 1240.610] [Code Civ. Proc. § 1250.360(f)]

[1] FORM

[*Caption. See § 95.60.*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE PLAINTIFF SEEKS TO ACQUIRE THE DESCRIBED PROPERTY PURSUANT TO _____ [*either* SECTION 1240.410 OF THE CODE OF CIVIL PROCEDURE (EXCESS CONDEMNATION) *OR* SECTION 1240.510 OF THE CODE OF CIVIL PROCEDURE (CONDEMNATION FOR COMPATIBLE USE) *or* SECTION 1240.610 OF THE CODE OF CIVIL PROCEDURE (CONDEMNATION FOR MORE NECESSARY PUBLIC USE)] BUT THE ACQUISITION FAILS TO SATISFY THE REQUIREMENTS OF THAT PROVISION.

A. General Practice Rules Applicable in Eminent Domain Proceeding. [*See § 95.60, Paragraph A.*]

B. Summary Judgment. [*See § 95.60, Paragraph B.*]

C. Failure to Satisfy Statutory Requirements as Ground for Objection. A defendant may object to the plaintiff's right to take when the property described in the complaint is sought to be acquired pursuant to _____ [*either Code of Civil Procedure Section 1240.410 or Code of Civil Procedure Section 1240.510 or Code of Civil Procedure Section 1240.610*] but the acquisition does not satisfy the requirements of that provision (*Code Civ. Proc. § 1250.360(f)*).

[*EITHER*]

D. Requirements for Excess Condemnation. Pursuant to *Code of Civil Procedure Section 1240.410*, a public entity may exercise the power of eminent domain to acquire a remnant left after the acquisition of part of a larger parcel of property only when the remnant will be left in such a size, shape, or condition that it will be of little market value (*Code Civ. Proc. § 1240.410*).

[*OR*]

D. Requirements for Condemnation for Compatible Use. Pursuant to *Code of Civil Procedure Section 1240.510*, a person authorized to acquire property for a particular use by eminent domain may exercise that power to acquire property appropriated to public use if the proposed use will not unreasonably interfere with or impair the continuance of the public use as it then exists or may reasonably be expected to exist in the future. When property is sought to be acquired in this manner, the complaint, and the resolution of necessity if one is required, must refer specifically to *Code of Civil Procedure Section 1240.510* (*Code Civ. Proc. § 1240.510*).

[*OR*]

D. Requirements for Condemnation for More Necessary Public Use. Pursuant to *Code of Civil Procedure 1240.610*, a person authorized to acquire property for a particular use by eminent domain may exercise that power to acquire property appropriated to public use if the use for which the property is sought to be taken is a more necessary public use than the use to which the property is appropriated. When property is sought to be acquired in this manner, the complaint, and the resolution of necessity if one is required, must refer specifically to *Code of Civil Procedure Section 1240.610* (*Code Civ. Proc. § 1240.610*; *see Pacific Gas & Electric Co. v. Superior Court (1986) 180 Cal. App. 3d 770, 773-774, 225 Cal. Rptr. 768*).

[*Optional*] **E. Nonauthorized Taking of Remnant.** Excess property may not be taken _____ [*either* to avoid the cost and inconvenience of litigating the issue of damages *or* to preclude the payment of damages, even when the damages may be substantial *or* to coerce the condemnee to accept the price offered by the condemnor for the property actually needed for the public project or to coerce the condemnee into waiving severance or consequential damages to avoid an excess taking *or* to recoup damages by speculating as to the futuremarket value of the property] (see *People ex rel. Dept. Pub. Wks. v. Superior Court (1968) 68 Cal. 2d 206, 213-214, 65 Cal. Rptr. 342, 436 P.2d 342*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for summary judgment in an eminent domain action when (1) the defendant has raised the affirmative defense that the plaintiff is seeking to acquire property pursuant to *Code Civ. Proc. § 1240.410* (excess condemnation), *Code Civ. Proc. § 1240.510* (condemnation for compatible use), or *Code Civ. Proc. § 1240.610* (condemnation for more necessary public use) without satisfying the requirements imposed by the appropriate section, and (2) the motion asserts that the defendant is entitled to judgment as a matter of law. This objection may be raised regardless of whether the plaintiff has adopted a resolution of necessity that satisfies the requirements of *Code Civ. Proc. §§ 1245.210 through 1245.260*.

When appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Additionally, counsel should submit affidavits or declarations that support the motion [*Code Civ. Proc. § 437c(c), (d)*].

[3] Discussion of Authorities

[a] Requirements for Excess Condemnation

Code Civ. Proc. § 1240.410 sets forth the test to be applied by a court in determining whether a remainder or portion thereof is a remnant that may be acquired by eminent domain. The remnant must be such that its size, shape, or condition render it of little market value. This test is substantially the same one applied in *People ex rel. Dept. Pub. Wks. v. Superior Court (1968) 68 Cal. 2d 206, 212-213, 65 Cal. Rptr. 342, 436 P.2d 342* .

The concept of "little market value" has various applications and a determination must depend on the facts of a particular case. Property may have little market value after the rest of the parcel is taken when, for example, it would be totally landlocked and no physical solution would be practical. This may also be the result when the size of the remaining property is reduced below the minimum required by zoning enactments for building purposes and it is not reasonably probable that there will be a zoning change. If the remnant would be of significant value to only one or a few persons, such as adjoining landowners, or it would be landlocked and have primarily a speculative value dependent on access being provided when adjacent land is developed at an unspecified time in the future, then it has little market value [*Recommendations-- The Eminent Domain Law*, 12 Cal. L. Rev. Comm'n Reports 1722 (1974)].

[b] Requirements for Condemnation for Compatible Use

Code Civ. Proc. § 1240.510 governs condemnation for compatible use. When property is already appropriated to a public use it may be taken by eminent domain only if the proposed use is compatible with the existing use [*Code Civ. Proc. § 1240.510*] or is more necessary than the existing use [*Code Civ. Proc. § 1240.610*; *see § 95.62[3][c]*].

The requirement that the proposed use be compatible with the existing use continues the substance of prior law, which allowed condemnation for consistent uses [*see* former Code Civ. Proc. § 1240(3), (4), (6)]. *Code Civ. Proc. § 1240.510* does not contemplate displacement of the existing use by the proposed use, but it allows common utilization of the property when the proposed use will not unreasonably interfere with or impair the continuance of the existing use.

The facts and procedural background of ***Pacific Gas & Electric Co. v. Superior Court*** *(1986) 180 Cal. App. 3d 770, 225 Cal. Rptr. 768* are discussed in *§ 95.62[3][c]*. That case involved an eminent domain action brought under *Code Civ. Proc. § 1240.610* (condemnation for more necessary public use). The court of appeal found that the complaint was fatally flawed and that the property owner's demurrer should have been sustained because the complaint (and the resolution of public need and necessity it incorporated by reference) did not contain the required reference to *Code Civ. Proc. § 1240.610* (*180 Cal. App. 3d 770, 772-774)* . *Code Civ. Proc. § 1240.510* contains a comparable reference requirement, and counsel should expect a similar result to occur if the requirement is violated. In that case, however, the

public entity will be permitted to correct the deficiency and to apply to the trial court for permission to file an amended complaint (*180 Cal. App. 3d 770, 774)* .

[c] Requirements for Condemnation for More Necessary Public Use

Code Civ. Proc. § 1240.610 allows condemnation of property appropriated to a public use if the proposed use is a more necessary public use. The authority to condemn for a more necessary public use is independent of the authority to take for a compatible use, and vice versa. When property is taken under more necessary use authority, however, the defendant may be entitled to continue joint use of the property [*see Code Civ. Proc. § 1240.630*].

In ***Pacific Gas & Electric Co. v. Superior Court*** *(1986) 180 Cal. App. 3d 770, 225 Cal. Rptr. 768* , a public utility district commenced an eminent domain action to acquire power transmission facilities that were owned by a utility company and devoted to a public use (i.e., the distribution of electric power). The complaint incorporated by reference the resolution of public need and necessity adopted by the district's board of directors. The utility company demurred on the ground, among others, that the district failed to comply with *Code Civ. Proc. § 1240.610* by neglecting to refer to that statute in the complaint and the incorporated resolution of necessity. The trial court overruled the demurrer and the utility company sought writ review (*180 Cal. App. 3d 770, 772-773)* .

The court of appeal issued a writ of mandate directing the trial court (1) to vacate its order overruling the demurrer, and (2) to enter an order sustaining the demurrer with leave to amend. The court found that the complaint was fatally flawed because neither it nor the incorporated resolution of necessity complied with *Code Civ. Proc. § 1240.610*. The court also ruled, however, that the district's board of directors could still take steps to correct that deficiency [*see Code Civ. Proc. § 1245.255(c)*], and that if they did so, the district could apply to the trial court for permission to file an amended complaint [*see Code Civ. Proc. § 1250.340*] (*180 Cal. App. 3d 770, 772, 774)* .

[d] Nonauthorized Taking of Remnant

In ***People ex rel. Dept. Pub. Wks. v. Superior Court*** *(1968) 68 Cal. 2d 206, 65 Cal. Rptr. 342, 436 P.2d 342* , the construction of a freeway resulted in a parcel of land becoming landlocked. The Department of Public Works sought to condemn that parcel (along with the land the freeway occupied) to avoid excessive severance damages that might have been awarded. The real parties in interest challenged the excess condemnation on the ground that taking property for such a purely economic purpose violated the constitutional requirement that a taking be for a public use. The trial court decided in favor of the real parties in interest, and ordered the complaint dismissed insofar as it sought to condem that landlocked parcel. The department then petitioned for a writ of mandate to compel the trial court to proceed with the condemnation of the landlocked parcel and the land occupied by the freeway. The writ was granted.

The Supreme Court held that the trial court was required to proceed with the action to condemn the landlocked parcel, but that it should refuse to condemn the property if it found that the taking was not justified and was only to avoid excessive severance or consequential damages. The court stated that the economic benefit to the state must be clear in cases of excess condemnation. This condemnation is not authorized (1) any time the condemnee claims severance or consequential damages or (2) to coerce condemnees into either accepting whatever value the state offered for the property actually taken or waiving severance or consequential damages to avoid an excess taking. Nor is excess condemnation authorized for recoupment purposes.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureEminent Domain ProceedingsGeneral OverviewReal Property LawEminent Domain ProceedingsGeneral Overview

California Points & Authorities

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Volume 9 Chapters 90-99 DISMISSAL---to---EMINENT DOMAIN
CHAPTER 95 EMINENT DOMAIN
PART II. FORMS
C. Supporting Motion for Summary Judgment

9-95 California Points & Authorities § 95.63

AUTHOR: Jeffrey S. Rosen

§ 95.63 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Eminent Domain Action [Code Civ. Proc. § 1230.040]--By Defendant--Resolution of Necessity Fails to Satisfy Requirements [Code Civ. Proc. § 1250.370(a)]

[1] FORM

[*Caption. See § 95.60.*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE PLAINTIFF IS A PUBLIC ENTITY AND HAS NOT ADOPTED A RESOLUTION OF NECESSITY THAT SATISFIES THE REQUIREMENTS OF CODE OF CIVIL PROCEDURE SECTIONS 1245.210 THROUGH 1245.270.

A. General Practice Rules Applicable in Eminent Domain Proceeding. [*See § 95.60, Paragraph A.*]

B. Summary Judgment. [*See § 95.60, Paragraph B.*]

C. Failure to Adopt Resolution of Necessity as Prescribed as Ground for Objection. When the plaintiff is a public entity, the failure to adopt a resolution of necessity that satisfies the requirements of *Code of Civil Procedure Sections 1245.210 through 1245.270* is a ground for objection to the right to take (*Code Civ. Proc. § 1250.370(a)*).

[*EITHER*]

D. Contents of Resolution Insufficient. A resolution of necessity does not satisfy the requirements of *Code of Civil Procedure Sections 1245.210 through 1245.270* when it fails to contain _____ [*either* a general

statement of the public use for which the property is to be taken and a reference to the statute that authorizes the public entity to acquire the property by eminent domain *or* a description of the general location and extent of the property to be taken, with sufficient detail for reasonable identification *or* a declaration that the governing body of the public entity has found and determined that the public interest and necessity require the proposed project, that the proposed project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury, that the property described in the resolution is necessary for the proposed project, and that either the offer required by *Government Code Section 7267.2* has been made to the owner or owners of record, or the offer has not been made because the owner cannot be located with reasonable diligence] (*Code Civ. Proc. § 1245.230*).

[*OR*]

D. Failure to Provide Notice and Opportunity to Be Heard. A resolution ofnecessity does not satisfy the requirements of *Code of Civil Procedure Sections 1245.210 through 1245.270* if the governing body of the public entity has failed to provide each person whose property is to be acquired by eminent domain and whose name and address appears on the last equalized county assessment roll with notice and a reasonable opportunity to appear and be heard on the matters referred to in *Code of Civil Procedure Section 1240.030* (*Code Civ. Proc. § 1245.235(a)*; *Redevelopment Agency v. Norm's Slauson (1985) 173 Cal. App. 3d 1121, 1125, 219 Cal. Rptr. 365* ; *City of Lincoln v. Barringer (2002) 102 Cal. App. 4th 1211, 1223-1224, 126 Cal. Rptr. 2d 178*).

[*OR*]

D. Lack of Two-Thirds Vote of All Members of Governing Body. A resolution of necessity does not satisfy the requirements of *Code of Civil Procedure Sections 1245.210 through 1245.270* when the resolution is not adopted by a vote of two thirds of all the members of the governing body of the public entity (*Code Civ. Proc. § 1245.240*).

[*OR*]

D. Resolution Procured by Bribery. A resolution of necessity does not satisfy the requirements of *Code of Civil Procedure Sections 1245.210 through 1245.270* if a member of the governing body who voted in favor of the resolution received or agreed to receive a bribe involving adoption of the resolution and but for that conduct the resolution would not otherwise have been adopted (*Code Civ. Proc. § 1245.270(a)*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for summary judgment in an eminent domain action when the motion asserts that the defendant is entitled to judgment as a matter of law because the plaintiff is a public entity and has not adopted a resolution of necessity that satisfies the requirements of *Code Civ. Proc. §§ 1245.210-1245.270*. This objection may be raised because an invalid resolution of necessity is not conclusive as to the matters referred to in *Code Civ. Proc. § 1240.030*.

When appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Additionally, counsel should submit affidavits or declarations that support the motion [*Code Civ. Proc. § 437c(c), (d)*].

[3] Discussion of Authorities

[a] Failure to Adopt Resolution of Necessity as Prescribed as Ground for Objection

The ground for objection set forth in *Code Civ. Proc. § 1250.370(a)* applies only to public entities. It is based on *Code Civ. Proc. § 1240.040*, which provides that a public entity may exercise the power of eminent domain only if it has adopted a resolution of necessity that meets the requirements of *Code Civ. Proc. §§ 1245.210-1245.270* [*see also Code Civ. Proc. § 1245.220*].

[b] Contents of Resolution Insufficient

Code Civ. Proc. § 1245.230 lists the required contents of a resolution of necessity by a public entity. It supersedes various provisions that required a resolution of necessity by particular public entities.

The requirement of a general statement of the public use is satisfied by a statement that the public use is "right-of-way for a freeway" or "open space to be maintained in its natural condition" [*Recommendation-- The Eminent Domain Law*, 12 Cal. L. Rev. Comm'n Reports 1746 (1974)]. A statement that property is being acquired for the elimination of blight and for redevelopment purposes is also sufficient [*Anaheim Redevelopment Agency v. Dusek (1987) 193 Cal. App. 3d 249, 263, 239 Cal. Rptr. 319]* .

The description of the property to be taken that is required by *Code Civ. Proc. § 1245.230* must be sufficiently precise so as to enable the owner to determine the physical extent of the taking and the interest sought [*Recommendation-- The Eminent Domain Law*, 12 Cal. L. Rev. Comm'n Reports 1746 (1974)].

The resolution is also required to contain a declaration that the governing body of the public entity has found and determined the existence of each of the four elements of public necessity required by *Code Civ. Proc. § 1240.030(c)*. See *§ 95.64*.

[c] Failure to Provide Notice and Opportunity to Be Heard

Code Civ. Proc. § 1245.235(a) establishes the requirement that public entities must give notice to persons whose property is sought to be acquired by eminent domain and afford them a reasonable opportunity to appear and be heard before a resolution of necessity may validly be adopted.

This code provision sets forth a procedure that satisfies the requirement fornotice and hearing [*Code Civ. Proc. § 1245.235(b), (c)*], but the governing body may satisfy the requirements through any other procedure that gives reasonable written personal notice and a reasonable opportunity to appear and be heard [*Code Civ. Proc. § 1245.235(d)*]. Thus, they may be combined with other administrative procedures such as those relating to environmental impact reports.

In ***Redevelopment Agency v. Norm's Slauson*** *(1985) 173 Cal. App. 3d 1121, 219 Cal. Rptr. 365* , the redevelopment

agency instituted an action in eminent domain to take four lots that constituted a major portion of a restaurant's parking area. Its attempt to take the lots was preceded by an agreement between the agency and a developer by which the agency agreed to acquire the property for transfer to the developer so that the developer could build a condominium project thereon. Thereafter, the agency issued and sold tax exempt bonds to pay for the acquisition before conducting the hearing that led to the adoption of the resolution of necessity. The trial court found that the resolution was affected by a gross abuse of discretion and ruled that the agency had no right to take the property.

The court of appeal affirmed. It held that the requirement for a hearing prior to the adoption of a resolution of necessity implicitly includes the concept that the government agency must engage in good faith and judicious consideration of the pros and cons of the proposed taking, and that the decision to adopt a resolution of necessity must be buttressed by substantial evidence of the existence of the three basic requirements of *Code Civ. Proc. § 1240.030*. In concluding that the hearing that led to the adoption of the resolution of necessity was a sham and that a predetermined result had merely been "rubber stamped," the court noted that by the time the hearing to determine the necessity for the proposed taking was held, the redevelopment agency had, by virtue of its contract with a developer and the issuance of revenue bonds, irrevocably committed itself to take the subject property, regardless of any evidence that might be presented at a hearing. The court opined that the redevelopment agency's hearing was affected not by just a gross abuse of discretion but by the prior elimination of any discretion whatsoever (*173 Cal. App. 3d 1121, 1127)* .

The facts of this case are an extreme example of abuse of discretion. Counsel seeking to challenge a resolution of necessity must be sure to search, through both formal and informal discovery, for more subtle evidence supporting a claim that a predetermined result was "rubber stamped" following a public hearing.

In ***City of Lincoln v. Barringer*** *(2002) 102 Cal. App. 4th 1211, 126 Cal. Rptr. 2d 178* , the city filed a complaint in eminent domain alleging that 6,000 acres in the southeastern part of the city were the subject of a "Revised Twelve Bridges Specific Plan," and that development within the plan area required construction of extensive off-site improvements and the acquisition of easements, rights-of-way, and fee simple interests for such improvements. At the city's request and over defense objections, the trial court granted an Order for Immediate Possession pursuant to which the city took possession of the property interests described in the initial complaint and completed construction of the off-site improvement project. Defendants opposed the taking, claiming the resolution was invalid in part due to defective notice.

Defendants argued that *Code Civ. Proc. § 1245.235(b)(3)*, which provides that the "failure to file a written request to appear and be heard within 15 days after the notice was mailed will result in waiver of the right to appear and be heard," mandates that property owners are entitled to a minimum of 15 days before adoption of a resolution of necessity affecting their property. The court of appeal found that this argument was refuted by *Code Civ. Proc. § 1245.235(d)*, which provides "[n]otwithstanding subdivision (b), the governing body may satisfy the requirements of this section through any other procedure that has given each person described in subdivision (a) reasonable written personal notice and a reasonable opportunity to appear and be heard on the matters referred to in Section 1240.030" (*102 Cal. App. 4th 1211, 1225)* . The court concluded that the procedure followed by the city, under which the defendants had actual notice 14 days before the hearing and written notice 11 days before the hearing, gave the defendants reasonable written personal notice and a reasonable opportunity to appear and be heard (*102 Cal. App. 4th 1211, 1225)* .

The defendants asserted that they had not attended the public hearing due to their belief that it would be futile to do so because the decision to condemn was already a "done deal," and that this meant that they had not been given a "reasonable and meaningful" opportunity to be heard as required by *Code Civ. Proc. § 1245.235(d)*. The court stated that "reasonable opportunity" refers to the procedure of notice and hearing. The defendants' futility argument did not go to the notice and hearing procedure, and thus the defendants' asserted belief that it would be futile to attend the hearing did not establish a violation of § 1245.235(d) (*102 Cal. App. 4th 1211, 1227)* .

[d] Lack of Two-Thirds Vote of All Members of Governing Body

Code Civ. Proc. § 1245.240 sets forth the general rule that a resolution of necessity must be adopted by a two-thirds vote of all of the members of the governing body of the public entity, not just two thirds of those present at the time of adoption, in order to be valid. Under prior law, it was unclear as to whether the requirement pertained to all members or just those present.

Code Civ. Proc. § 1245.240 continues the provision of former Code Civ. Proc. § 1241(2) that made the resolutions of many local public entities conclusive on necessity if the resolution was adopted by a two-thirds vote. It superseded the requirement for takings by the state that required only a majority vote [*see, e.g.,* former Gov. Code § 15855]. More stringent voting requirements may be imposed by special statute, charter, or ordinance [*see, e.g., Sts. & Hy. Code § 760* (four-fifths vote required for taking by county for state highway purposes)].

[e] Resolution Procured by Bribery

Code Civ. Proc. § 1245.270 precludes condemnation when the resolution of necessity is procured by a bribe. A resolution might also be subject to attack under *Gov. Code § 91003(b)* when it was influenced by a conflict of interest, or under *Code Civ. Proc. § 1245.255* when its content or adoption were influenced or affected by gross abuse of discretion by the governing body.

The degree of proof required to demonstrate bribery is not as stringent as that required in a criminal prosecution. However, if there has been a criminal prosecution based on the conduct, proof of conviction is conclusive evidence that such conduct occurred. Likewise, an acquittal or other dismissal of a criminal prosecution is conclusive evidence that the conduct did not occur. When a criminal action is pending, the court may exercise its discretion to take such actions as staying the eminent domain proceeding until the criminal case is resolved, permitting the proceeding to continue but reserving the issue of necessity, or permitting the case to proceed [*see Code Civ. Proc. § 1245.270(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureEminent Domain ProceedingsGeneral OverviewReal Property LawEminent Domain ProceedingsGeneral Overview

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Volume 9 Chapters 90-99 DISMISSAL---to---EMINENT DOMAIN
CHAPTER 95 EMINENT DOMAIN
PART II. FORMS
C. Supporting Motion for Summary Judgment

9-95 California Points & Authorities § 95.64

AUTHOR: Jeffrey S. Rosen

§ 95.64 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Eminent Domain Action [Code Civ. Proc. § 1230.040]--By Defendant--Lack of Public Necessity [Code Civ. Proc. § 1250.370(b)-(d)]

[1] FORM

[*Caption. See § 95.60.*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE _____ [*either* THE PUBLIC INTEREST AND NECESSITY DO NOT REQUIRE THE PROPOSED PROJECT *or* THE PROPOSED PROJECT IS NOT PLANNED OR LOCATED IN THE MANNER THAT WILL BE MOST COMPATIBLE WITH THE GREATEST PUBLIC GOOD AND THE LEAST PRIVATE INJURY *or* THE PROPERTY DESCRIBED IN THE COMPLAINT IS NOT NECESSARY FOR THE PROPOSED PROJECT].

A. General Practice Rules Applicable in Eminent Domain Proceeding. [*See § 95.60, Paragraph A.*]

B. Summary Judgment. [*See § 95.60, Paragraph B.*]

[*EITHER*]

C. Project Not Required by Public Interest and Necessity as Ground for Objection. A defendant may object to the plaintiff's right to take when the public interest and necessity do not require the proposed project (*Code Civ. Proc. § 1250.370(b)*).

[*OR*]

C. Project Not Planned or Located to Be Most Compatible With Greatest Public Good and Least Private Injury as Ground for Objection. A defendant may object to the plaintiff's right to take when the proposed project is not planned or located in the manner that will be most compatible with the greatest public good and the least private injury (*Code Civ. Proc. § 1250.370(c)*).

[*OR*]

C. Property Not Necessary to Project as Ground for Objection. A defendant may object to the plaintiff's right to take when the property described in the complaint is not necessary for the proposed project (*Code Civ. Proc. § 1250.370(d)*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for summary judgment in an eminent domain action when the motion asserts that defendant is entitled to judgment as a matter of law one of the following grounds: the public interest and necessity do not require the proposed project; the proposed project is not planned or located in the manner that will be most compatible with the greatest public good and the least private injury; or the property described in the complaint is not necessary for the proposed project. These objections may be raised only when the plaintiff has not adopted a resolution of necessity because then these matters would not be conclusively established [*see Code Civ. Proc. § 1245.250(b)*].

When appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Additionally, counsel should submit affidavits or declarations that support the motion [*Code Civ. Proc. § 437c(c), (d)*].

[3] Discussion of Authorities

[a] Project Not Required by Public Interest and Necessity as Ground for Objection

Code Civ. Proc. § 1240.030 generally requires that the necessity for a taking be established before property may be taken for a project by eminent domain. The word "project" applies to any type of public use regardless of whether the use is active (requiring construction of an improvement) or passive (requiring appropriation of property in unimproved condition) [*Recommendation-- Eminent Domain Law*, 12 Cal. L. Rev. Comm'n Reports 1699 (1974)].

The ground for objection set forth in *Code Civ. Proc. § 1250.370(b)* is based on *Code Civ. Proc. § 1240.030(a)*, which restricts the exercise of the power of eminent domain to situations where the public interest and necessity require the

project. Public interest and necessity include all aspects of the public good including social, economic, environmental, and aesthetic considerations [*Recommendation--The Eminent Domain Law*, Cal. L. Rev. Comm'n Reports 1700 (1974)]. Under prior law, the necessity of a proposed improvement was not subject to judicial review; the decision of the condemnor on this factor was conclusive [*see, e.g., City of Pasadena v. Stimson (1891) 91 Cal. 238, 253, 27 P. 604]* . This is still true when a public entity has adopted a resolution of necessity [*Code Civ. Proc. § 1245.250*]. However, in the absence of such a resolution, lack of public interest and necessity is a ground for objection [*Code Civ. Proc. § 1250.370(b)*].

[b] Project Not Planned or Located to Be Most Compatible With Greatest Public Good and Least Private Injury as Ground for Objection

The ground for objection found in *Code Civ. Proc. § 1250.370(c)* is based on *Code Civ. Proc. § 1240.030*, which prevents the taking of property by eminent domain unless the project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury. This provision generalizes the plan or location requirement found in former Code Civ. Proc. §§ 1240(6) and 1242(a). The limitation has been described as "the necessity for adopting a particular plan" for a given project [*People v. Chevalier (1959) 52 Cal. 2d 299, 307, 340 P.2d 598]* .

Both the public good and private injury must be considered under this requirement. The condemnor's choice is correct unless another site would involve an equal or greater public good and a lesser private injury. When a different site would result in a lesser public good it cannot be counterbalanced by a lesser private injury [*see Montebello etc. School Dist. v. Keay (1942) 55 Cal. App. 2d 839, 844, 131 P.2d 384]* . A choice is not improper even though another location may involve an equal public good and an equal private injury [*California Cent. R'y Co. v. Hooper (1888) 76 Cal. 404, 412-413, 18 P. 599]* .

As a practical matter, determination of whether a project is planned or located in the manner most compatible with the greatest public good and the least private injury will almost always involve questions of fact. Prevailing on a motion for summary judgment on this ground absent very compelling facts may be nearly impossible. From a strategic point of view, a well drafted motion for summary judgment may compel the party opposing the motion to set forth all supporting evidence, thus aiding trial preparation even if the motion is denied. However, counsel must remain mindful of the potential ramifications of filing a frivolous motion.

[c] Property Not Necessary to Project as Ground for Objection

The ground for objection found in *Code Civ. Proc. § 1250.370(d)* is based on *Code Civ. Proc. § 1240.030(c)*, which requires that the property or interest sought to be acquired be necessary for the proposed project.

The requirement of necessity does not mean that the proposed project would be impossible without taking the particular land, but merely that the land must be reasonably suitable and useful for the improvement [*City of Hawthorne v. Peebles (1959) 166 Cal. App. 2d 758, 763, 333 P.2d 442]* . Determination of whether property is necessary for a project will almost always involve questions of fact. It may be extremely difficult to prevail on a motion for summary judgment on this ground absent very compelling facts. Nevertheless, from a strategic point of view, a well drafted motion for summary judgment may compel the party opposing the motion to set forth all supporting evidence, thus aiding trial preparation even if the motion is denied. Counsel must remain mindful of the potential ramifications of filing a frivolous motion, however.

Legal Topics:

For related research and practice materials, see the following legal topics:
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Volume 9 Chapters 90-99 DISMISSAL---to---EMINENT DOMAIN
CHAPTER 95 EMINENT DOMAIN
PART II. FORMS
C. Supporting Motion for Summary Judgment

9-95 California Points & Authorities § 95.65

AUTHOR: Jeffrey S. Rosen

§ 95.65 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Eminent Domain Action [Code Civ. Proc. § 1230.040]--By Defendant--Plaintiff's Failure to Satisfy Requirements for Resolution of Consent [Code Civ. Proc. § 1250.370(e)]

[1] FORM

[*Caption. See § 95.60.*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE PLAINTIFF IS A QUASI-PUBLIC ENTITY WITHIN THE MEANING OF CODE OF CIVIL PROCEDURE SECTION 1245.320 AND THE LEGISLATIVE BODY OF THE _____ [*either* CITY *or* COUNTY] WHERE THE PROPERTY SOUGHT TO BE TAKEN IS LOCATED HAS NOT SATISFIED THE REQUIREMENTS OF CODE OF CIVIL PROCEDURE SECTIONS 1245.310 THROUGH 1245.390 GOVERNING THE ADOPTION OF A RESOLUTION CONSENTING TO THE ACQUISITION BY EMINENT DOMAIN.

A. General Practice Rules Applicable in Eminent Domain Proceeding. [*See § 95.60, Paragraph A.*]

B. Summary Judgment. [*See § 95.60, Paragraph B.*]

C. Failure to Meet Requirements for Resolution of Consent as Ground for Objection. The failure of a plaintiff to satisfy the requirements of *Code of Civil Procedure Sections 1245.310 through 1245.390* is a ground for objection when the plaintiff is a quasi-public entity within the meaning of *Code of Civil Procedure Section 1245.320* (*Code Civ. Proc. § 1250.370(e)*).

[*EITHER*]

D. No Resolution of Consent. A quasi-public entity may not commence an eminent domain proceeding to acquire property until the legislative body of the city or county where the land is located has adopted a resolution consenting to that acquisition (*Code Civ. Proc. § 1245.330*).

[*OR*]

D. Contents of Resolution Insufficient. A resolution of consent does not satisfy the requirements of *Code of Civil Procedure Sections 1245.310 through 1245.390* if it fails to contain _____ [*either* a general statement of the public use for which the property is to be taken and a reference to the statute that authorizes the quasi-public entity to acquire the property by eminent domain *or* a description of the general location and extent of the property to be taken, with sufficient detail for reasonable identification *or* a declaration that the legislative body has found and determined that the public interest and necessity require the proposed project, the proposed project is planned or located in the manner that will be most compatible with the greatest good and least private injury, the property described in the resolution is necessary for the proposed project, and the hardship to the quasi-public entity if the acquisition of the property by eminent domain is not permitted outweighs any hardship to the owners of the property] (*Code Civ. Proc. § 1245.340*).

[*OR*]

D. Failure to Hold Hearing. A resolution of consent does not satisfy the requirements of *Code of Civil Procedure Sections 1245.310 through 1245.390* if the legislative body adopted it without first holding a hearing at which persons whose property is to be acquired by eminent domain had a reasonable opportunity to appear and be heard (*Code Civ. Proc. § 1245.350(a)*).

[*OR*]

D. Inadequate Notice of Hearing. A resolution of consent does not satisfy the requirements of *Code of Civil Procedure Sections 1245.310 through 1245.390* if the legislative body failed to give adequate notice of the hearing concerning the resolution in that _____ [*either* notice was not sent to each person whose property is to be acquired and whose name and address appear on the last equalized county assessment roll *or* the notice did not state the time, place, and subject of the hearing *or* the notice was not mailed at least 15 days before the date of the hearing] (*Code Civ. Proc. § 1245.350(b)*).

[*OR*]

D. Lack of Two-Thirds Vote of All Members of Legislative Body. A resolution of consent does not satisfy the requirements of *Code of Civil Procedure Sections 1245.310 through 1245.390* if the resolution is not adopted by a vote of two thirds of all the members of the legislative body (*Code Civ. Proc. § 1245.360*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for summary judgment in an eminent domain action when the motion asserts that defendant is entitled to judgment as a matter of law because the plaintiff is a quasi-public entity and either (1) the legislative body of the city or county where the land sought to be acquired is located has not adopted a resolution consenting to the taking, or (2) the resolution that was adopted failed to meet the requirements of *Code Civ. Proc. §§ 1245.310 through 1245.390*.

When appropriate, counsel should insert argument in this form showing the relationship between the facts present in the case and the points of law stated. Additionally, counsel should submit affidavits or declarations that support the motion [*Code Civ. Proc. § 437c(c), (d)*].

[3] Discussion of Authorities

[a] Failure to Meet Requirements for Resolution of Consent as Ground for Objection

The ground of objection set forth in *Code Civ. Proc. § 1250.370(e)* applies onlyto quasi-public entities within the meaning of *Code Civ. Proc. § 1245.320*. It is based on *Code Civ. Proc. § 1245.330*, which provides that a quasi-public entity may not commence an eminent domain proceeding to acquire any property until the legislative body of the city or county has adopted a resolution consenting to the acquisition of the property by eminent domain.

[b] No Resolution of Consent

Code Civ. Proc. § 1245.330 is part of a series of provisions dealing with the resolution of consent [*see Code Civ. Proc. §§ 1245.310-1245.390*]. The consent of the appropriate local public entity is required before a quasi-public entity may condemn property. "Quasi-public entity" is defined in *Code Civ. Proc. § 1245.320* and does not include privately-owned public utilities [*see Pub. Util. Code §§ 610-624*] or other private persons. Consent must be obtained from the legislative body of each city in which the entity seeks to condemn property. When property is not located within city limits, the consent of the legislative body of the appropriate county must be secured [*Code Civ. Proc. § 1245.310*]. The requirement of a resolution of consent is in addition to any other requirements imposed by law, such as those imposed by *Code Civ. Proc. § 1240.030* (requirement of necessity). The legislative body of the local public entity may decline to adopt a resolution of consent without a hearing [*Code Civ. Proc. § 1245.350*], and such a decision is not subject to appeal [*Recommendation -- The Eminent Domain Law,* 13 Cal. L. Rev. Comm'n Reports 1001, Comment to *Code Civ. Proc. § 1245.330* (1975)].

[c] Contents of Resolution Insufficient

The resolution of consent must contain the information and determinations required of resolutions of necessity [*Code Civ. Proc. § 1245.230*; *see § 95.63[3][b]*], and a finding of hardship to the condemnor that outweighs the hardship to the property owner [*Code Civ. Proc. § 1245.340(c)(4)*].

[d] Failure to Hold Hearing and Inadequate Notice of Hearing

Unlike the hearing and notice requirements for a resolution of necessity, which may be satisfied by the statutory

procedure or by any procedure that gives reasonable notice and an opportunity to appear and be heard [*Code Civ. Proc. § 1245.235*], these requirements for a resolution of consent appear to be mandatory. In any case, there is no specific statutory authorization for utilization of any other procedure.

[e] Lack of Two-Thirds Vote of All Members of Legislative Body

Code Civ. Proc. § 1245.360, requiring a two-thirds vote of all members of the legislative body to adopt a resolution of consent, differs from the two-thirds vote requirement for a resolution of necessity in that it does not provide for more stringent voting requirements [*see Code Civ. Proc. § 1245.240*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureEminent Domain ProceedingsGeneral OverviewReal Property LawEminent Domain ProceedingsGeneral Overview

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Volume 9 Chapters 90-99 DISMISSAL---to---EMINENT DOMAIN
CHAPTER 95 EMINENT DOMAIN
PART II. FORMS
C. Supporting Motion for Summary Judgment

9-95 California Points & Authorities § 95.66

AUTHOR: Jeffrey S. Rosen

§ 95.66 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Inverse Condemnation Action [Code Civ. Proc. § 1250.350]--By Defendant--Legally Erroneous Decision Resulting in Delay in Development Approval Does Not Constitute Compensable Taking

[1] FORM

[*Caption. See § 95.60*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE A LEGALLY ERRONEOUS DECISION BY DEFENDANT, WHICH RESULTED IN A DELAY IN THE APPROVAL PROCESS FOR PLAINTIFF'S DEVELOPMENT, WAS PART OF A REASONABLE REGULATORY PROCESS DESIGNED TO ADVANCE LEGITIMATE GOVERNMENTAL INTERESTS AND THEREFORE DID NOT CONSTITUTE A COMPENSABLE TEMPORARY TAKING OF PROPERTY.

A. Summary Judgment. [*See § 95.60 Paragraph B.*]

B. Error During Development Approval Process Does Not Amount to Temporary Taking. An error by a governmental agency during the development approval process resulting in delay does not necessarily amount to a temporary taking compensable under the *Fifth Amendment*, even if the error in some way diminishes the value of the subject property, when the agency's action was part of a reasonable regulatory process designed to advance legitimate government interests (*Landgate, Inc. v. California Coastal Com. (1998) 17 Cal. 4th 1006, 1020-1021, 73 Cal. Rptr. 2d 841, 953 P.2d 1188*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted by the defendant in support of a motion for summary judgment in an inverse condemnation action when the motion asserts that the defendant is entitled to judgment as a matter of lawbecause any delay in the development approval process that was caused by a legally erroneous decision by the defendant was part of a reasonable regulatory process designed to advance legitimate government interests and therefore did not rise to the level of a compensable taking.

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should demonstrate that the delay was caused by a legally erroneous decision, which was part of a reasonable regulatory process designed to advance legitimate government interests.

[3] Discussion of Authorities

[a] Error During Development Approval Process Does Not Amount to Temporary Taking

In ***Landgate, Inc. v. California Coastal Com.*** *(1998) 17 Cal. 4th 1006, 73 Cal. Rptr. 2d 841, 953 P.2d 1188* , in exchange for a dedication of portions of two long, narrow, side-by-side lots for a roadway easement, the county reconfigured the lots into a lot above the road and another lot below the road. Plaintiff bought the lot above the road. The Coastal Commission denied plaintiff a development permit on the bases of visual impacts, the amount of grading required, and the fact that the Commission had not approved the county's lot line adjustment on the parcel. Commission staff concluded that the lot line adjustment had been illegal, citing (1) *Pub. Res. Code § 30106* ("development" requiring coastal development permit includes change in density or intensity of use of land, including lot splits), and (2) a state Attorney General memorandum concluding that a lot line adjustment is a form of a lot split. The staff concluded that the lot line adjustment here altered the intensity of development. Plaintiff filed a petition for writ of mandate asserting that the Commission had no jurisdiction over the lot line adjustment, and a complaint seeking damages for a taking. The trial court granted plaintiff's petition for writ of mandate, holding that the definition of development in *Pub. Res. Code § 30106* did not include the lot line adjustment here. The court of appeal affirmed in an unpublished decision. The trial court subsequently denied the Commission's motion for summary judgment and granted plaintiff's motion for summary adjudication on the takings claim, holding that the Commission's erroneous assertion of permit jurisdiction over the lot line adjustment prevented plaintiff from making any economically viable use of the property before the Commission's approval of the project. It awarded plaintiff $155,657 in damages. The court of appeal affirmed the grant of summary adjudication. The Supreme Court granted review.

In reversing the court of appeal's decision, the Supreme Court held that a legally erroneous decision of a government agency during the development approval process resulting in delay does not necessarily amount to a taking even if the error in some way diminishes the property's value. If the error is of a particular constitutional type--the passage and enforcement of a law or regulation that deprives property of all value--the error is a compensable taking. However, government land use regulations and decisions that, despite their ultimately determined statutory defects, are part of a reasonable regulatory process designed to advance legitimate governmental interests, are not takings of property. In this case, the plaintiff failed to show that delay in approving its development application was due to anything other than a

bona fide dispute over the legality of a lot line adjustment and the Coastal Commission's jurisdictional authority over the lot line adjustment. The delay was an incident of property ownership and not a taking of property (*17 Cal. 4th 1006, 1020)* .

[4] Additional Authorities

[a] Error During Development Approval Process Does Not Amount to Temporary Taking

Landgate, Inc. v. California Coastal Com. (1998) 17 Cal. 4th 1006, 73 Cal. Rptr. 2d 841, 953 P.2d 1188 (discussed in *§ 95.66[3][a]*) was distinguished by the court of appeal in *Ali v. City of Los Angeles (1999) 77 Cal. App. 4th 246, 91 Cal. Rptr. 2d 458* , which held that a delay in issuing a demolition permit for a fire-damaged hotel that was caused by the city's enforcement of restrictions in its residential hotel ordinance despite the prohibitions of the Ellis Act [*Gov. Code § 7060 et seq.* (allowing landlords to go out of business by withdrawing their rental units from the market, provided the landlords comply with the Act's requirements)] constituted a temporary regulatory taking (*77 Cal. App. 4th 246, 254-255)* . The *Ali* court noted that *Landgate* cautioned that even if the agency action depriving the owner of all viable use occurs during the development process, and ostensibly serves a proper governmental purpose, it is not a "normal" delay in the process if it is so unreasonable from a legal standpoint as to be arbitrary (*77 Cal. App. 4th 246, 254* , citing *Landgate, Inc. v. California Coastal Com. (1998) 17 Cal. 4th 1006, 1024, 1029, 73 Cal. Rptr. 2d 841, 953 P.2d 1188*). The *Ali* court stated that the defendant's attempt to enforce its residential hotel ordinance in violation of the Ellis Act was so unreasonable from a legal standpoint as to be arbitrary, not in furtherance of any legitimate governmental objective, and for no other purpose than to delay any development other than for a single-room-occupancy hotel. The court held, therefore, that the delay in demolition of the hotel was a temporary regulatory taking requiring compensation (*77 Cal. App. 4th 246, 254-255*).

In *Calprop Corp. v. City of San Diego (2000) 77 Cal. App. 4th 582, 91 Cal. Rptr. 2d 792* , the court of appeal held that a city's extended delay in making planning decisions with respect to a former military base on which the plaintiffs owned property did not constitute a taking (*77 Cal. App. 4th 582, 600-601)* . The court found that the record showed that the delay in adopting an updated plan for the area occurred while the city staff negotiated with the property owner's association over the impact and applicability of resource conservation measures for the area and while it considered the area for development as a landfill. The court concluded that the city was advancing important interests and that while the time the city took in negotiating over the conservation measures and considering the landfill development was lengthy, it was necessary under the circumstances. The court held that because the delay in developing a plan was therefore part of the normal regulatory process, it did not give rise to any takings claim (*77 Cal. App. 4th 582, 600-601)* .

Loewenstein v. City of Lafayette (2002) 103 Cal. App. 4th 718, 127 Cal. Rptr. 2d 79 followed *Landgate, Inc. v. California Coastal Com. (1998) 17 Cal. 4th 1006, 73 Cal. Rptr. 2d 841, 953 P.2d 1188* (discussed in *§ 95.66[3][a]*) in holding that a two-year delay in development precipitated by the city's erroneous action in denying an application for a lot line adjustment was not an unlawful temporary taking of private property for a public use (*103 Cal. App. 4th 718, 733)* . The city's reasons for rejecting the lot line revision application were based on concerns that the reduced area of the new parcels would not conform to the minimum lot size requirements for hillside lots, and that the application created a fifth lot in a duly restricted subdivision with improvements and utilities designed for four lots. The court concluded that even if the city incorrectly maintained that lot size and subdivision restrictions applied, the monitoring of density and hillside slope requirements were legitimate governmental interests (*103 Cal. App. 4th 718, 732)* . It held that the delay in the plaintiffs' development plans caused by the need for resolution of these threshold issues, and the trial court's subsequent determination that the city was mistaken, did not convert the pursuit of a reasonable policy into an unconstitutional taking (*103 Cal. App. 4th 718, 733)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewReal Property LawInverse CondemnationGeneral OverviewReal Property LawInverse CondemnationProcedure

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9-95 California Points & Authorities §§ 95.67-95.79

AUTHOR: Jeffrey S. Rosen

[Reserved]

§§ 95.67[Reserved]

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PART II. FORMS
D. Supporting Motion for New Trial

9-95 California Points & Authorities § 95.80

AUTHOR: Jeffrey S. Rosen

§ 95.80 Supporting Motion for New Trial [Code Civ. Proc. § 659] in Eminent Domain Action [Code Civ. Proc. § 1230.040]--By Plaintiff--Excessive Damages [Code Civ. Proc. § 657(5)] and Insufficiency of Evidence to Justify Decision [Code Civ. Proc. § 657(6)]--Severance Damages Awarded When Property Taken Was Not Part of Larger Parcel [Code Civ. Proc. § 1263.410(a)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	NO. _____
Plaintiff,	MEMORANDUM IN SUPPORT OF MOTION FOR NEW TRIAL
vs.	Date: _____
_____ [*name*],	Time: _____
Defendant.	Location: _____
	[Judge: _____]
	Date Action Filed: _____
	[Trial Date: _____]

_____

THE COURT SHOULD GRANT PLAINTIFF'S MOTION FOR A NEW TRIAL FOLLOWING A DETERMINATION THAT EXCESSIVE DAMAGES WERE AWARDED OR THAT THERE WAS INSUFFICIENT EVIDENCE TO JUSTIFY THE DECISION, AND THAT SUBSTANTIAL RIGHTS OF DEFENDANT WERE MATERIALLY AFFECTED THEREBY, WHEN AFTER WEIGHING THE EVIDENCE THE COURT IS CONVINCED FROM THE ENTIRE RECORD, INCLUDING REASONABLE INFERENCES THEREFROM, THAT

THE _____ [*either* COURT *or* JURY] SHOULD HAVE REACHED A DIFFERENT DECISION BECAUSE SEVERANCE DAMAGES WERE AWARDED WHEN THE PROPERTY TAKEN WAS NOT PART OF A LARGER PARCEL.

A. General Practice Rules Applicable in Eminent Domain Proceeding. [*See § 95.60, Paragraph A.*]

B. New Trial for Excessive Damages. A new trial may be granted on theground of excessive damages if substantial rights of the aggrieved party are materially affected thereby and if, after weighing the evidence, the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury should have reached a different decision (*Code Civ. Proc. § 657(5)*).

C. New Trial for Insufficient Evidence. A new trial may be granted on the ground of insufficiency of the evidence to justify the decision if substantial rights of the aggrieved party are materially affected thereby and if, after weighing the evidence, the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury should have reached a different decision (*Code Civ. Proc. § 657(6)*).

D. Consideration of Sufficiency of Evidence. In considering the sufficiency of the evidence on the hearing of a motion for a new trial, it is the exclusive province of the trial court to judge the credibility of the witnesses, to determine the probative force of testimony, and to weigh the evidence, and the court may draw reasonable inferences from the foregoing that are opposed to those drawn by the trier of fact at the trial (*Yarrow v. State of California (1960) 53 Cal. 2d 427, 434, 2 Cal. Rptr. 137, 348 P.2d 687*).

E. Court Not Bound by Prior Rulings. In granting a new trial, the court is not bound by its prior rulings on questions of law or by its prior view of the evidence (*Yarrow v. California (1960) 53 Cal. 2d 427, 437, 2 Cal. Rptr. 137, 348 P.2d 687*).

[*Optional*] **F. Duty to Grant New Trial When Jury Verdict Clearly Wrong.** It is the duty of the court to grant a new trial when, after weighing the evidence, the court is convinced from the entire record, including reasonable inferences therefrom, that the jury clearly should have reached a contrary verdict (*Weinman v. Gray (1962) 206 Cal. App. 2d 817, 819-821, 24 Cal. Rptr. 189*).

G. Severance Damages. When the property acquired is part of a larger parcel, compensation must be awarded for the injury, if any, to the remainder (*Code Civ. Proc. § 1263.410(a)*).

H. Requisites for Unity of Property. Three elements must ordinarily be present to constitute unity of property: (1) unity of title; (2) contiguity; and (3) unity of use (*People ex rel. Dept. Public Works v. Dickinson (1964) 230 Cal. App. 2d 932, 934, 41 Cal. Rptr. 427*).

[*Optional*] **I. Lack of Unity of Title.** The property acquired is not part of a larger parcel when the property is owned by different individuals (*People ex rel. Dept. Public Works v. Dickinson (1964) 230 Cal. App. 2d 932, 934, 41 Cal. Rptr. 427*).

[*Optional*] **J. Prospective Use as Insufficient to Overcome Lack of Contiguity.** Severance damages are not allowed when the property is not contiguous and there is merely a possible or prospective, and not a presently existing, unity of use (*People v. Ocean Shore Railroad (1948) 32 Cal. 2d 406, 424, 196 P.2d 570*).

[*Optional*] **K. Separation With No Access Rights as Defeating Contiguity.** When parcels are separated by land held in fee title by another person and there are no direct access rights between the parcels, the properties are non-contiguous and an award for severance damages is improper (*People ex rel. Dept. Public Works v. Fair (1964) 229 Cal. App. 2d 801, 808, 40 Cal. Rptr. 644*).

[*Optional*] **L. Lack of Unity of Use.** When a parcel is set apart from the remainder of the property and is devoted to a different use, it is not part of a larger parcel and severance damages are improper (*City of Stockton v. Marengo (1934) 137 Cal. App. 760, 767, 31 P.2d 467*).

[*Optional*] **M. Prospective Use as Insufficient.** When land is devoted to separate uses at the time an eminent domain action is brought, a reasonable probability of combined use in the future is insufficient to meet the requirement of unity of use and severance damages are improper (*City of Menlo Park v. Artino (1957) 151 Cal. App. 2d 261, 269-270, 311 P.2d 135*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for a new trial alleging an award of excessive damages and/or insufficiency of the evidence to justify an award of severance damages when the property taken was not part of a larger parcel.

When appropriate, counsel should insert argument in this form showing the relationship between the facts present in the case and the points of law stated. Additionally, counsel should submit affidavits or declarations that support the motion [*Code Civ. Proc. § 437c(c), (d)*].

[b] Opposing Memorandum

In an appropriate case, contentions *set out in § 95.100* may be used to oppose the motion supported by this points and authorities.

[c] Related Jury Instructions

For jury instructions on severance damages, see *Judicial Council of California Civil Jury Instructions, CACI Nos. 3511, 3512* (LexisNexis Matthew Bender, Official Publisher), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions.

[3] Discussion of Authorities

[a] Consideration of Sufficiency of Evidence

Yarrow v. State of California *(1960) 53 Cal. 2d 427, 2 Cal. Rptr. 137, 348 P.2d 687* , was an action for damages for personal injuries sustained by the plaintiffs when their car went out of control while attempting to avoid a collision with a state-owned bulldozer engaged in construction work on the highway. There was a conflict in the evidence as to the

negligence of the state employees and there was some evidence of contributory negligence on the part of the plaintiffs. After the jury rendered a verdict for plaintiffs, defendant's motion for a new trial on the ground of insufficiency of the evidence was granted. Plaintiffs appealed the order.

The Supreme Court affirmed. The Court held that only when there is no substantial evidence to support a contrary judgment will an appellate court reverse an order granting a new trial on the ground of insufficiency of the evidence. It is within the exclusive province of the trial court to judge the credibility of the witness, to determine the probative force of testimony, and to weigh the evidence, and it may draw reasonable inferences from the foregoing that are opposed to those drawn by the trier of fact at the trial (*53 Cal. 2d 427, 434)* .

[b] Court Not Bound by Prior Rulings

The factual background of ***Yarrow v. State of California*** *(1960) 53 Cal. 2d 427, 2 Cal. Rptr. 137, 348 P.2d 687* , is discussed in *§ 95.80[3][a]*. The Supreme Court held that in granting a new trial the court was not bound by its prior rulings on questions of law or its prior view of the evidence (*53 Cal. 2d 427, 437)* .

[c] Duty to Grant New Trial When Jury Verdict Clearly Wrong

Weinman v. Gray *(1962) 206 Cal. App. 2d 817, 24 Cal. Rptr. 189* , involved an action and cross action to recover for damage to property arising out of a collision of automobiles. The jury found against each of the parties and the court granted plaintiff's motion for a new trial on the basis that the evidence did not justify the verdict. The court of appeal affirmed, noting that it was not only the right but the duty of the trial judge to grant a new trial when he believed that the evidence did not justify the verdict (*206 Cal. App. 2d 817, 819)* .

[d] Severance Damages

Code Civ. Proc. § 1263.410(a) indirectly limits the award of severance damages to instances when the property acquired is part of a larger parcel.

[e] Requisites for Unity of Property

People ex rel. Dept. Public Works v. Dickinson *(1964) 230 Cal. App. 2d 932, 41 Cal. Rptr. 427* , involved a proceeding to condemn, for highway purposes, part of a parcel owned by one defendant and all of another parcel owned by the second defendant. The two tracts were separated by a distance of about 500 feet but were connected by a nonpublic road over which one of the defendants owned an easement of way. Both parcels were leased and utilized for an automobile salvage and wrecking business by a partnership comprised of the two defendants. The court entered judgment denying the defendants severance damages.

The court of appeal affirmed the denial of severance damages. While finding that there was unity of use, the court also ruled that there was no unity of title since the partners retained the parcels in individual ownership, effecting by the lease the right of the use for the partnership (*230 Cal. App. 2d 932, 934)* . Also lacking was the element of contiguity. The general rule is that when parcels are noncontiguous and are separated by property to which parties other than the condemnee hold the fee, they are not a single parcel merely because of unity of use. The defendants could not unite by an easement two parcels 500 feet apart with the intervening land owned in fee by other persons. The court suggested that the type of easement might affect a determination of contiguity (*230 Cal. App. 2d 932, 934-936)* .

An exception to the general rule requiring unity of property for an award of severance damages was stated by the California Supreme Court in *City of Los Angeles v. Wolfe (1971) 6 Cal. 3d 326, 336, 99 Cal. Rptr. 21, 491 P.2d 813* . The defendants in that case sought severance damages following the condemnation of their parking facility, which was near, but not physically contiguous with, their commercial building. The Court held that the facts made a showing of constructive, or legal, contiguity. For a complete discussion of *Wolfe*, see *§ 95.100[3][a]* and *[b]*.

[f] Lack of Unity of Title

The factual background of ***People ex rel. Dept. Public Works v. Dickinson*** *(1964) 230 Cal. App. 2d 932, 41 Cal. Rptr. 427* , is discussed in *§ 95.80[3][e]*. The court of appeal noted that under certain circumstances land held in the names of individual partners could be found to be partnership property, but that land is not necessarily partnership property merely because it is used for partnership purposes. In this case, the existence of the lease showed that the partners retained the parcels in individual ownership and thus there was no unity of title (*230 Cal. App. 2d 932, 934)* .

[g] Prospective Use as Insufficient to Overcome Lack of Contiguity

In ***People v. Ocean Shore Railroad*** *(1948) 32 Cal. 2d 406, 196 P.2d 570* , the state brought an action in eminent domain to condemn property for highway purposes. The defendant appealed in part from a judgment denying severance damages for a portion of the property. The property taken was located north of Sharp Park and the property for which the defendant sought severance damages was south of the park and was not contiguous. The defendant had formerly possessed an easement across Sharp Park, but there was evidence that it was lost by abandonment (or nonuse) when the company removed its tracks and represented that it was no longer a public utility.

The Supreme Court affirmed the judgment. The Court stated that it was for the trier of fact to determine whether the right-of-way was abandoned and the easement terminated (*32 Cal. 2d 406, 418)* . The trial court found that abandonment and termination had occurred; thus, the parcels were not contiguous. The defendant urged that the parcels north and south of Sharp Park were inseparable in use and should be considered in the nature of a single parcel for purposes of severance damages. The Court stated that the mere fact that there was a possible or prospective use of separate properties as a unit, or that they were susceptible to a common use, did not justify the allowance of severance damages (*32 Cal. 2d 406, 423)* .

[h] Separation With No Access Rights as Defeating Contiguity

People ex rel. Dept. Public Works v. Fair *(1964) 229 Cal. App. 2d 801, 40 Cal. Rptr. 644* , was an eminent domain action to condemn property for freeway purposes. The plaintiff appealed the portion of the judgment holding that the special benefits to property on the east side of the highway should not be offset against the severance damages accruing to the property on the west side. The plaintiff argued that all of the property taken was part of the same larger parcel. Prior to this action, the defendants' property had been divided by a highway owned in fee by the state. Defendants' lands did not have access rights directly to the highway but did have access rights to a road that intersected the highway at a grade and thus served to provide access between the land on either side of the highway. The special benefits found were predicated on the access that defendants' property on the east side would acquire to the new frontage road; the severance damages were based on the loss of direct access to the road by defendants' remaining property on the west side of the highway.

The court of appeal affirmed, holding that the two parcels were not part of a larger parcel (*229 Cal. App. 2d 801, 808)* . The parcels were separated by the intervening fee title of the state and there was no unlimited direct access between the parcels. The court distinguished cases where the intervening land was only an easement and where there was a taking of direct access rights.

[i] Lack of Unity of Use

City of Stockton v. Marengo *(1934) 137 Cal. App. 760, 31 P.2d 467* , involved an action in eminent domain to condemn a strip of land for extension of a street. The tract through which the street was to be extended consisted of several acres of land. All of this land was used by the defendants for the purpose of farming except for one corner of the tract. That corner, consisting of two lots, was separated from the balance of the tract by a fence and was occupied by a gas station, which was leased to a third party. The condemned strip of land cut across that corner, forming a shortcut

between two streets that bypassed the gas station. The effect of the construction of the street extension would have been to divert a large proportion of the traffic and thus depreciate the value of the gas station property. Both parties appealed from the judgment for damages entered pursuant to a jury verdict. The plaintiff argued that the court erred in holding that the entire tract of defendants' land constituted but one parcel.

The court of appeal reversed the judgment on the ground that the trial court erred in considering the lots operated as a gas station as part of the balance of defendants' property. The larger portion of the tract was used solely for farming purposes. The gas station property was separated from the balance of the tract by a fence and was set apart from the tract to be used exclusively for the operation of another business. It had been actually used for several years for operating a gas station. The gas station property was not part of the larger parcel of which the condemned property was a part, and the decrease in its rental value could not be included in the assessment of severance damages (*137 Cal. App. 760, 766-767)* .

[j] Prospective Use as Insufficient

In ***City of Menlo Park v. Artino*** *(1957) 151 Cal. App. 2d 261, 311 P.2d 135* , the plaintiff sought to condemn land for the construction of parking areas. Defendants appealed from the judgment for damages. The appeal was based in part on the trial court's directing the jury to disregard all evidence of severance damages as to a certain parcel. This parcel was contiguous to two other parcels also owned by the defendants that were taken in the eminent domain proceeding. The defendants argued that severance damages should have been allowed based on the reasonable probability of the combined use of all three lots in the near future for commercial purposes. The defendants' expert witness testified that these three lots were the only piece of land of that size left on that street under one ownership that were not commercially improved. At the time of the action, each of the three lots had a separate dwelling on it. There was no evidence introduced that showed any intention to use the three lots in any manner other than as individual rental properties as they were being used.

The court of appeal affirmed the judgment. The court stated that since the lots were used separately there was no unity of use. Unity of use cannot be onlyprospective; to recover severance damages the loss in market value claimed must directly and proximately flow from the taking. Damage that is speculative, remote, imaginary, contingent, or merely possible cannot serve as a legal basis for recovery (*151 Cal. App. 2d 261, 270)* .

Counsel should be aware of the contradictory holding in *City of San Diego v. Neumann (1993) 6 Cal. 4th 738, 25 Cal. Rptr. 2d 480, 863 P.2d 725* . The facts and procedural background of that case are discussed in *§ 95.100[3][f]*. *Neumann* held that separate but contiguous legal parcels in common ownership currently devoted to diverse uses may be aggregated and considered as a "larger parcel" for purposes of proving entitlement to severance damages when the owner establishes a reasonable probability that all of the contiguous commonly owned lots will be available for development or use as an integrated economic unit in the reasonably foreseeable future (*6 Cal. 4th 738, 756)* . The dissent strongly criticizes the majority opinion with the somewhat valid accusation that the majority arrived at a "doubtful conclusion that the rule they adopt is not precluded by precedent." The dissent further argues that the new rule stated by the majority will require California taxpayers to compensate owners of condemned parcels for speculative claims based on possible development. Not only may this encourage claims and litigation, but the successful owner will receive the benefits of a project without any of the attendant risks. The dissent concludes by stating that this decision mandates that California taxpayers are being ordered to pay for a dream.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureEminent Domain ProceedingsGeneral OverviewReal Property LawEminent Domain ProceedingsGeneral Overview

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Volume 9 Chapters 90-99 DISMISSAL---to---EMINENT DOMAIN
CHAPTER 95 EMINENT DOMAIN
PART II. FORMS
D. Supporting Motion for New Trial

9-95 California Points & Authorities § 95.81

AUTHOR: Jeffrey S. Rosen

§ 95.81 Supporting Motion for New Trial in Eminent Domain Action--By Plaintiff--Benefits Not Deducted From Damages [Code Civ. Proc. § 1263.410(b)]

[1] FORM

[*Caption. See § 95.80.*]

THE COURT SHOULD GRANT PLAINTIFF'S MOTION FOR A NEW TRIAL BECAUSE THE BENEFITS ACCRUING TO THE REMAINDER WERE REASONABLY CERTAIN, IMMEDIATE, AND NONSPECULATIVE, AND THUS SHOULD HAVE BEEN DEDUCTED FROM THE DAMAGES IN DETERMINING THE AMOUNT OF SEVERANCE DAMAGES.

A. General Practice Rules Applicable in Eminent Domain Proceeding. [*See § 95.60, Paragraph A.*]

B. New Trial for Excessive Damages. [*See § 95.80, Paragraph B.*]

C. New Trial for Insufficient Evidence. [*See § 95.80, Paragraph C.*]

D. Consideration of Sufficiency of Evidence. [*See § 95.80, Paragraph D.*]

E. Court Not Bound by Prior Rulings. [*See § 95.80, Paragraph E.*]

[*Optional*] **F. Duty to Grant New Trial When Jury Verdict Clearly Wrong.** [*See § 95.80, Paragraph F.*]

G. Severance Damages. [*See § 95.80, Paragraph G.*]

H. Compensation After Offsetting Benefit. Compensation for injury to the remainder is the amount of the damage to the remainder reduced by the amount of the benefit to the remainder (*Code Civ. Proc. § 1263.410(b)*).

I. Offset of All Reasonably Certain, Immediate, and Nonspeculative Benefits. All benefits to the remainder that are reasonably certain, immediate, and nonspeculative must be offset against an award for severance damages (*Los Angeles Co. Metropolitan Transp. Auth. v. Continental Development Corp. (1997) 16 Cal. 4th 694, 716-718, 66 Cal. Rptr. 2d 630, 941 P.2d 809*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion for a new trial alleging an award of excessive damages and/or insufficiency of the evidence to justify an award of severance damages when the benefits to the remainder were not deducted from the damages in determining the amount of severance damages.

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may refer to the allegations in the complaint that establish that there were benefits to the remainder that were reasonably certain, immediate, and nonspeculative.

[b] Opposing Memorandum

In an appropriate case, contentions *set out in § 95.101* may be used to oppose the motion supported by this form.

[c] Related Jury Instructions

For a jury instruction on severance damages and an offset for benefits, see *Judicial Council of California Civil Jury Instructions, CACI No. 3512* (LexisNexis Matthew Bender, Official Publisher), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions.

[3] Discussion of Authorities

[a] Compensation After Offsetting Benefit

Code Civ. Proc. § 1263.410 requires that the amount of the benefit to the remainder be subtracted from the amount of damage to the remainder to determine the amount of compensation. If the amount of the benefit equals or exceeds the amount of the damage, no compensation can be awarded. If the amount of the benefit exceeds the amount of damage, the excess must be deducted from the compensation awarded for loss of goodwill [*see Code Civ. Proc. § 1263.510*] but not from any other award [*Code Civ. Proc. § 1263.410(b)*].

Damage to the remainder is defined in *Code Civ. Proc. § 1263.420*; benefit to the remainder is defined in *Code Civ. Proc. § 1263.430*.

[b] Offset of All Reasonably Certain, Immediate, and Nonspeculative Benefits

In ***Los Angeles Co. Metropolitan Transp. Auth. v. Continental Development Corp.*** *(1997) 16 Cal. 4th 694, 66 Cal. Rptr. 2d 630, 941 P.2d 809* , the plaintiff brought an eminent domain proceeding to acquire three interests in a small part of the defendant's property. The interests consisted of an air rights easement for the area in which an elevated rail line was to be constructed, a construction easement located under the air rights easement, and a small area taken in fee. When the suit was filed, the property was unimproved, but by the time of trial, the defendant had constructed a four-story office building on the site. Before trial, the court conducted a hearing to determine whether the plaintiff would be permitted to present evidence on the issue of severance damages. This evidence indicated that proximity to a transit station, which was to be constructed as part of the rail line project, was a special benefit that enhanced the value of the defendant's remaining property. After hearing expert testimony to the effect that the value of buildings within walking distance of transit stations in other cities was enhanced due to the proximity to the stations, the court ruled that such a benefit is merely the benefit of access. As such, the court concluded, it confers no peculiar or unique benefit on the defendant's property. Accordingly, the court declined to permit introduction of evidence or cross-examination on the subject of any enhancement in value to the defendant's property resulting from its proximity to the new station. The jury returned a general verdict that included a substantial severance damage award. The plaintiff moved for a new trial contending, among other things, that the trial court erred in refusing to admit evidence of enhanced value to the defendant's property resulting from proximity to a transit station, and in failing to instruct the jury to state separately in its verdict the amount of any benefits resulting from proximity to the station. The plaintiff's motion was denied.

The Court of Appeal affirmed the judgment, but the Supreme Court granted review and reversed. The Court overruled the long-standing distinction between general and special benefits announced in *Beveridge v. Lewis (1902) 137 Cal. 619, 623-624, 70 P. 1083 (16 Cal. 4th 694, 718)* , pursuant to which only special benefits could be offset against severance damages. Under the *Beveridge* analysis, general benefits consist of an increase in value that is common to the community generally from advantages that will accrue to the community from the improvement. They are conjectural, incapable of estimation. Special benefits are those that result from the mere construction of the improvement. They are peculiar to the condemned property and can be evaluated with reasonable certainty. Thus, general and special benefits have been distinguished along two distinct dimensions: generality versus peculiarity, and conjecture versus certainty. In *Los Angeles Co. Metropolitan Transp. Auth. v. Continental Development Corp.*, the Court revisited this distinction and noted that it does not resolve whether a reasonably certain, nonspeculative, nonconjectural enhancement that is not peculiar to the property in question, but is shared by a number of properties in the neighborhood, can nevertheless constitute a special benefit and therefore constitute an offset against severance damages (*16 Cal. 4th 694, 707*). The Court overruled the decision in *Beveridge* to the extent that it holds that only special benefits may be offset against severance damages. Instead, the Court adopted a rule permitting the offset of all reasonably certain, immediate, and nonspeculative benefits. Thus, in determining a defendant's entitlement to severance damages, the Court held that the jury must consider competent evidence that is relevant to any conditions caused by the project that affect the remainder property's fair market value, provided that evidence is neither conjectural nor speculative (*16 Cal. 4th 694, 716-718*).

[4] Additional Authorities

[a] Severance Damages

In *San Diego Gas & Electric Co. v. Daley (1988) 205 Cal. App. 3d 1334, 253 Cal. Rptr. 144* , the court of appeal found that the following are all compensable as direct damages pursuant to *Code Civ. Proc. § 1263.410(a)*: impairment of view, restriction of access, increased noise, invasion of privacy, unsightliness of the project, lack of maintenance of an easement, and nuisances in general, such as trespassers and safety risks (*205 Cal. App. 3d 1334, 1345)* .

Commerce City v. National Starch & Chemical Corp. (1981) 118 Cal. App. 3d 1, 173 Cal. Rptr. 176 , was a condemnation action in which a city took defendants' right-of-way and slope easement that bisected industrial property owned by defendants for street purposes. The court of appeal found that the trial court properly considered evidence of accelerated depreciation of fixtures and equipment used in defendants' plant for manufacturing adhesives for the purpose of determining severance damages to the remainder parcel because (1) the originalparcel was a special use property, and (2) defendants, by virtue of the taking, lost the opportunity to sell their property as an adhesives manufacturing plant. Further, there was ample evidence to support the trial court's findings that the remaining life of the machinery and fixtures was reduced to six years and to support the court's use of the calculations of severance damages based on this determination (*118 Cal. App. 3d 1, 18-19)* .

Placer County Water Agency v. Hofman (1985) 165 Cal. App. 3d 890, 211 Cal. Rptr. 894 , was an action in which the court held that legal and engineering expenses incurred by owners attempting to compel a county water agency to comply with an environmental impact report were incurred to alter the taking of the owners' land rather than to mitigate damages caused by the taking. Therefore, the expenses could not be recovered as condemnation damages pursuant to *Code Civ. Proc. § 1263.420* (*165 Cal. App. 3d 890, 903)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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Volume 9 Chapters 90-99 DISMISSAL---to---EMINENT DOMAIN
CHAPTER 95 EMINENT DOMAIN
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D. Supporting Motion for New Trial

9-95 California Points & Authorities §§ 95.82-95.99

AUTHOR: Jeffrey S. Rosen

[Reserved]

§§ 95.82[Reserved]

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Volume 9 Chapters 90-99 DISMISSAL---to---EMINENT DOMAIN
CHAPTER 95 EMINENT DOMAIN
PART II. FORMS
E. Opposing Motion for New Trial

9-95 California Points & Authorities § 95.100

AUTHOR: Jeffrey S. Rosen

§ 95.100 Opposing Plaintiff's Motion for New Trial [Code Civ. Proc. § 659] in Eminent Domain Action [Code Civ. Proc. § 1230.040]--Excessive Damages [Code Civ. Proc. § 657(5)] and Insufficiency of Evidence to Justify Decision [Code Civ. Proc. § 657(6)]--Property Taken Was Part of Larger Parcel [Code Civ. Proc. § 1263.410(a)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN OPPOSITION TO MOTION
vs.	)	FOR NEW TRIAL
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Dept: _____
	)	Trial Date: _____

_____

PLAINTIFF'S MOTION FOR A NEW TRIAL SHOULD BE DENIED BECAUSE THE EVIDENCE IS SUFFICIENT TO PROVE THAT THE PROPERTY TAKEN WAS PART OF A LARGER PARCEL AND THE AWARD OF SEVERANCE DAMAGES IS PROPER.

[*Optional*] **A. Constructive Contiguity as Sufficient.** Actual physical contiguity is not required if there is constructive or legal contiguity and a strong showing of interdependent present use (*City of Los Angeles v. Wolfe (1971) 6 Cal. 3d 326, 336, 99 Cal. Rptr. 21, 491 P.2d 813*).

[*Optional*] **B. Factors in Determining Constructive Contiguity.** In determining whether lands that are physically separated should be treated as constructively contiguous, all relevant facts must be analyzed and considered, including the degree of access before and after the taking, ownership of the underlying fee of the separating property, and the unified use or lack of diversity of use of the separated parcels (*City of Los Angeles v. Wolfe (1971) 6 Cal. 3d 326, 335, 99 Cal. Rptr. 21, 491 P.2d 813*).

[*Optional*] **C. Separation by Easement With Free Access as Not DefeatingContiguity.** If land is crossed by an easement for a street or highway that is in actual use but that permits unlimited access at all points, the sections are contiguous and severance damages may be awarded (*People v. Thompson (1954) 43 Cal. 2d 13, 23-25, 271 P.2d 507*).

[*Optional*] **D. Failure to Use as Not Defeating Unity of Use.** A failure to use some of the property, as opposed to diversity or division of use, does not defeat a finding of unity of use (*People v. Thompson (1954) 43 Cal. 2d 13, 26, 271 P.2d 507*).

[*Optional*] **E. Subdivision Plan as Not Defeating Unity of Property.** If several contiguous lots or tracts are used for one general purpose by a common owner, they constitute one parcel, even when the land is platted and a subdivision map is filed (*City of Stockton v. Marengo (1934) 137 Cal. App. 760, 765-766, 31 P.2d 467*).

[*Optional*] **F. Unity of Property Exists When All Contiguous Lots Will Be Available for Development or Use as Integrated Economic Unit.** Separate lots may be considered as a single larger parcel when the landowner establishes a reasonable probability that all of the contiguous commonly owned lots are or will be available for development or use as an integrated economic unit in the reasonably foreseeable future (*City of San Diego v. Neumann (1993) 6 Cal. 4th 738, 756, 25 Cal. Rptr. 2d 480, 863 P.2d 725*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion for new trial on the basis of excessive damages and/or insufficiency of the evidence to justify the decision when the defendant argues that the property taken was part of a larger parcel.

When appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Opposing Memorandum

In an appropriate case, this form may be submitted in opposition to the motion supported by the points and authorities

set out in § 95.80.

[c] Related Jury Instructions

For jury instructions on severance damages, see *Judicial Council of California Civil Jury Instructions, CACI Nos. 3511, 3512* (LexisNexis Matthew Bender, Official Publisher), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions.

[3] Discussion of Authorities

[a] Constructive Contiguity as Sufficient

In ***City of Los Angeles v. Wolfe*** *(1971) 6 Cal. 3d 326, 99 Cal. Rptr. 21, 491 P.2d 813* , the defendants erected a commercial building on a parcel they owned. Thereafter, the city enacted a zoning ordinance requiring that parking be provided within 750 feet of a commercial building. Under the ordinance, if parking space for a preexisting building was insufficient, it could continue to operate as a nonconforming building, but could not be altered or enlarged. Defendants' building was such a nonconforming building. To remedy this situation, defendants purchased a second parcel that was not physically contiguous to the first parcel but that was well within 750 feet of it. Defendants had access over the public roads between their parcels. The city then brought an action to condemn several parcels of property for public off-street parking, including the defendants' second parcel. Because the loss of this parcel would subject the defendants to more restrictive zoning, the defendants claimed a right to severance damages. The court of appeal held that there was a single taking, denied the claim, and entered judgment for the fair market value of the second parcel only.

The Supreme Court reversed and remanded the case for further proceedings on the issue of severance damages. The Court held that the special circumstances of the case brought it within the exception to the usual requirement of physical contiguity. When the facts demonstrate constructive or legal contiguity, a strong showing of interdependent present use, and unity of ownership, the case falls within an exception to the requirement of physical contiguity (*6 Cal. 3d 326, 336)* .

For coverage of the general requirement of physical contiguity, see *§ 95.80[3][e]* and *[g]*.

[b] Factors in Determining Constructive Contiguity

The factual background of ***City of Los Angeles v. Wolfe*** *(1971) 6 Cal. 3d 326, 99 Cal. Rptr. 21, 491 P.2d 813* , is discussed in *§ 95.100[3][a]*. The Supreme Court stated that the degree of access before and after the taking, who owns the underlying fee of the separating property, and the unified use or lack of diversity of use of the separated parcels are all relevant facts to be considered indetermining whether unity exists for purposes of a claim for severance damages (*6 Cal. 3d 326, 335)* .

[c] Separation by Easement With Free Access as Not Defeating Contiguity

In ***People v. Thompson*** *(1954) 43 Cal. 2d 13, 271 P.2d 507* , an eminent domain proceeding was brought to condemn part of defendants' land for enlargement of a highway and to obtain a fee interest in a presently existing easement. The judgment granted severance damages to the defendants and the plaintiff appealed. The defendants owned a parcel of land through which ran a highway easement. As the roadway existed at the time the action commenced, the defendants had unlimited access back and forth across it from any part of their parcel to any other part. Construction of the proposed improvement (i.e., widening the highway and erecting a fence) would sever the defendants' remaining property into separate parcels, and the right of access would be substantially impaired. The defendants' expert witnesses testified that cutting off the free passage across the old highway would lessen the value of the property for development as a unit for residential and business purposes. The Supreme Court held that the existence of the highway easement with free access across it did not constitute a true or complete separation and that the land taken was part of a larger parcel,

thus entitling the defendant to severance damages (*43 Cal. 2d 13, 23-25)* .

[d] Failure to Use as Not Defeating Unity of Use

The factual background of ***People v. Thompson*** *(1954) 43 Cal. 2d 13, 271 P.2d 507* , is discussed in *§ 95.100[3][c]*. Some of the property involved was undeveloped and part was used for agricultural purposes. The Supreme Court noted that this situation, involving a failure to use some of the property, differed from cases where there was actual diversity or division of use. Simple nonuse does not negate the existence of unity of use (*43 Cal. 2d 13, 26)* .

[e] Subdivision Plan as Not Defeating Unity of Property

City of Stockton v. Marengo *(1934) 137 Cal. App. 760, 31 P.2d 467* , involved an action in eminent domain to condemn a strip of land for extension of a street. Both parties appealed from the judgment for damages entered pursuant to a jury verdict. The land taken divided the remaining land into two sections. With the exception of a portion used for a gas station [*see § 95.80[3][i]*], the tract as a whole was used for farming. The tract had been platted and a map of the subdivision project was filed, but the land was continuously farmed as one parcel without regard to the subdivision plan. The court of appeal upheld the part of the judgment that awarded severance damages for the loss in value to this farmland, stating that the mere fact that the tract was mapped and platted for future prospective sales did not necessarily determine its identity as separate parcels. If the lots are used as one tract by a common owner, the owner may recover severance damages (*137 Cal. App. 760, 765-766)* .

[f] Unity of Property Exists When All Contiguous Lots Will Be Available for Development or Use as Integrated Economic Unit

In ***City of San Diego v. Neumann*** *(1993) 6 Cal. 4th 738, 25 Cal. Rptr. 2d 480, 863 P.2d 725* , Neumann owned a trailer park and two parcels that jutted out from the trailer park and abutted San Ysidro Boulevard. The two parcels were not used for access to the park and were leased for separate businesses. The city brought an action to condemn the two parcels to widen the street. At trial, Neumann claimed that all the parcels together were suitable for commercial development as a shopping center and that the condemnation of the adjacent parcels damaged the trailer park's value because of the loss of access to San Ysidro Boulevard. Neumann had no plans to undertake this project, but hoped instead to sell the entire property to a developer. The trial court held that Neumann was not entitled to severance damages for the trailer park because there was no present unity of use between the separate parcels. The court of appeal reversed.

The Supreme Court affirmed the court of appeal. The Court found that the measure of compensation for property taken for public use is the fair market value, which is the highest price on the date of valuation that would be agreed to by a buyer and seller, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available (*6 Cal. 4th 738, 744)* . When the property taken is part of a larger parcel, the property owner must also be compensated for the injury to the part that remains. Traditionally, three requirements must be met to establish that the land remaining is part of a larger parcel: unity of title, contiguity of the parcels, and unity of use (*6 Cal. 4th 738, 745)* . The Court found that only unity of use was at issue. However, the Court also determined that the courts have not always insisted on strict application of the three unities to find that a "larger parcel" exists, and that the courts have been flexible in applying the title and contiguity requirements (*6 Cal. 4th 738, 746)* . The Court then examined the existing California authorities on severance damages and concluded that they did not preclude it from considering whether severance damages may be awarded based on a prospective integrated use of several parcels. The Court noted that *City of Stockton v. Marengo (1934) 137 Cal. App. 760, 31 P.2d 467* [*see § 95.100[3][e]*], is the case often cited as the original source for the rule that there must be actual unity of use. However, the Court also found that the owner in that case did not contend that future uses were relevant (*6 Cal. 4th 738, 749)* . In *City of Los Angeles v. Wolfe (1971) 6 Cal. 3d 326, 99 Cal. Rptr. 21, 491 P.2d 813* [*see § 95.100[3][a]*], the Court allowed an award for severance damages when the parcels were not contiguous because of the parcels' interdependence in use for parking.

In addition, the Court found that certain broad statements in *People v. Ocean Shore Railroad (1948) 32 Cal. 2d 406, 196 P.2d 570* [*see § 95.80[3][j]*], which indicated that the possibility of joinder ofparcels had no bearing on the allowance of severance damages, were based on no cited authority and have not been followed. The Court also noted that other jurisdictions and authorities, including *Nichols on Eminent Domain* [*see* 4A *Nichols on Eminent Domain*, § 14B.03 (Matthew Bender)], have recognized that reasonably prospective future use may be used to satisfy the unity of use requirement (*6 Cal. 4th 738, 749-755)* .

The Court further stated that it has long recognized that future use may affect the present value of real property. The statutory definition of fair market value acknowledges that it includes uses to which the property is adaptable and available. The Court's recognition that the present value of property may reflect its development potential was nothing more than an acknowledgment of the realities of the marketplace. These realities suggest that the Court acknowledge an economic fact, i.e., that contiguous property held in common ownership but devoted to separate uses may nonetheless be valued by the market for an integrated use. When the government impairs that integrated use by taking some of the property, the remaining property declines in value. The Court held that if the landowner establishes that there is a reasonable probability that his or her contiguous commonly owned lots are or will be available for development or use as an integrated economic unit in the reasonably foreseeable future, all of the separate lots may be considered as a larger parcel for purposes of awarding severance damages (*6 Cal. 4th 738, 756)* . The Court found that the facts relevant to this proof will typically include evidence of the existing uses of the property, the time and expense necessary for their termination, the physical adaptability of the property for use as an integrated whole, the existing and proposed zoning, local market conditions, the local regulatory climate, and the property owner's plans for development (*6 Cal. 4th 738, 757)* .

Counsel arguing that the reasonable probability for future development mandates entitlement to severance damages should carefully consider the factors listed at the end of the majority opinion and note that the Supreme Court stated that trial courts may consider the distinct factual issues present in each case.

For coverage of the strongly-worded dissent in *Neumann*, see *§ 95.80[3][j]*.

[4] Additional Authorities

[a] Separation by Easement With Free Access as Not Defeating Contiguity

In *People v. Chastain (1960) 180 Cal. App. 2d 805, 4 Cal. Rptr. 785* , an eminent domain proceeding was instituted to condemn for freeway purposes certain farming lands owned by the defendant and located on both sides of a highway. Defendant's motion for a new trial was denied and he appealed. The proposed improvements to the existing highway would result in depriving the defendant of free passage over the road, i.e, defendant's degree of access would be reduced after the state made the highway into a limited access freeway. The trial court refused to allow the defendant's expert witness to testify as to the increased cost to defendant resulting from the reduced degree of access. This ruling formed the basis for the appeal.

The court of appeal held that this exclusion of evidence was error and reversed. The court noted that here, as in the *Thompson* case [*see § 95.100[3][c]*], free passage across the highway between the two parcels of land would be cut off and the prior unity of use of the land would be permanently damaged (*180 Cal. App. 2d 805, 807)* . Defendant's parcels were held to constitute one parcel for severance purposes. In this case, however, the court did not comment on whether the state owned the existing highway in fee or merely had an easement.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureEminent Domain

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E. Opposing Motion for New Trial

9-95 California Points & Authorities § 95.101

AUTHOR: Jeffrey S. Rosen

§ 95.101 Opposing Plaintiff's Motion for New Trial in Eminent Domain Action--Benefits to Remainder Were Not Reasonably Certain, Immediate, and Nonspeculative

[1] FORM

[*Caption. See § 95.100.*]

PLAINTIFF'S MOTION FOR A NEW TRIAL SHOULD BE DENIED BECAUSE THE EVIDENCE IS SUFFICIENT TO PROVE THAT THE BENEFITS ACCRUING TO THE REMAINDER WERE NOT REASONABLY CERTAIN, IMMEDIATE, AND NONSPECULATIVE; THUS, THEY WERE NOT SUBJECT TO DEDUCTION FROM THE AMOUNT OF SEVERANCE DAMAGES AND THE AMOUNT OF SEVERANCE DAMAGES AWARDED IS PROPER.

Only Reasonably Certain, Immediate, and Nonspeculative Benefits Are Subject to Deduction. Only benefits to the remainder that are reasonably certain, immediate, and nonspeculative must be offset against an award for severance damages (*Los Angeles Co. Metropolitan Transp. Auth. v. Continental Development Corp. (1997) 16 Cal. 4th 694, 716-718, 66 Cal. Rptr. 2d 630, 941 P.2d 809*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motionfor a new trial on the basis of excessive damages and/or insufficiency of the evidence to justify the decision if the defendant argues that the benefits to the remainder were not reasonably certain, immediate, and nonspeculative and thus that it was proper not to deduct them from the damages.

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may refer to (1) the lack of allegations in the complaint establishing that there were reasonably certain, immediate, and nonspeculative benefits to the remainder, or (2) any facts controverting the material allegations in the complaint relating to such benefits.

[b] Opposing Memorandum

In an appropriate case, this form may be submitted in opposition to the motion supported by the points and authorities *set out in § 95.81*.

[3] Discussion of Authorities

[a] Deductible Benefits Must Be Reasonably Certain, Immediate, and Nonspeculative

Los Angeles Co. Metropolitan Transp. Auth. v. Continental Development Corp. *(1997) 16 Cal. 4th 694, 66 Cal. Rptr. 2d 630, 941 P.2d 809* is discussed in *§ 95.81[3][b]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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9-95 California Points & Authorities § 95.102

AUTHOR: Jeffrey S. Rosen

§ 95.102 Opposing Plaintiff's Motion for New Trial in Eminent Domain Action--Capitalization of Excess Income Is Proper Measure of Damages for Loss of Goodwill [Code Civ. Proc. § 1263.510]

[1] FORM

[*Caption. See § 95.100.*]

PLAINTIFF'S MOTION FOR A NEW TRIAL SHOULD BE DENIED BECAUSE DAMAGES FOR LOSS OF GOODWILL DUE TO THE FORCED RELOCATION OF A BUSINESS MAY BE MEASURED BY CAPITALIZATION OF EXCESS INCOME.

[*EITHER*]

Capitalization of Excess Income Based on Lost Profits or Income Is Proper Measure of Damages. If a taking causes a defendant to relocate his or her business to a location with a higher rent, a proper measure of damages for loss of goodwill is capitalization of excess income based on the present value of profits lost as a result of the higher rent (*People ex rel. Dep't of Transportation v. Muller (1984) 36 Cal. 3d 263, 269-271*).

[*OR*]

Fair Market Value Capitalization of Excess Income Is Proper Measure of Damages. If a taking causes loss of income from a business located in a blighted area, a proper measure of damages for loss of goodwill is capitalization of the excess income of the business, using a capitalization rate derived from a fair market value analysis (*Community Development Com. v. Asaro (1989) 212 Cal. App. 3d 1297, 1301-1305, 261 Cal. Rptr. 231*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion for a new trial alleging that excessive damages were awarded for loss of goodwill. Although goodwill may properly be measured using the "excess earnings" method of valuation, there is no single acceptable method of valuing goodwill. Valuation methods vary based on the nature of the business and the purpose for which the evaluation is conducted. Both alternative paragraphs above are for use when lost goodwill is valued based on the excess earnings method. The first alternative is appropriate when the value is derived from the present value of profits lost as a result of the taking. The second alternative is for use when the capitalization rate is based on a fair market value analysis.

When appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should describe the nature of the loss of income and the basis for the capitalization rates.

[3] Discussion of Authorities

[a] Capitalization of Excess Income Based on Lost Profits Is Proper Measure of Damages

In ***People ex rel. Dept. of Transportation v. Muller*** *(1984) 36 Cal. 3d 263, 203 Cal. Rptr. 772, 681 P.2d 1340* , defendant's veterinary building was taken to build a freeway. Defendant was forced to relocate and pay a significantly higher rent although he did not lose any patronage. At trial, defendant's experts testified that defendant lost all his goodwill in paying the higher rent. They based their testimony on capitalization of defendant's profits at the lower rent, using the excess earnings method of valuation. The capitalization rates were based on current interest rates. Plaintiff's expert testified that defendant did not have any goodwill to lose. The jury awarded $96,000 for loss of goodwill, an amount that was less than defendant's experts' testimony.

The Supreme Court affirmed. It held that the loss of lower rent resulting from a forced relocation to a premises with higher rent was compensable as a loss of goodwill. It also held that loss of patronage was not required and that the statute provided for consideration for loss of location. The Court stated that itsinterpretation of the statute providing for compensation for loss of goodwill was required by the remedial nature of the statute, which was enacted in response to widespread criticism of the injustice wrought by the inability to recover for loss of goodwill. The Court held that goodwill may be measured by the capitalized value of net income or profits using a capitalization rate based on current interest rates (*36 Cal. 3d 263, 266 n.2, 271)* .

[b] Fair Market Value Capitalization of Excess Income Proper Measure of Damages

Community Development Com. v. Asaro *(1989) 212 Cal. App. 3d 1297, 261 Cal. Rptr. 231* , involved the taking of a building leased as a restaurant in a blighted part of National City. The only issue at trial was the value of the goodwill lost by the lessee of the premises. Three experts testified. Defendant/lessee's experts applied capitalization rates of 14 and 9 percent to the lessee's income stream from the business to reach values of $775,000 and $963,000, respectively. Plaintiff's expert used a capitalization rate of 50 percent, which represented the percent per year return that a buyer on the open market purchasing goodwill would expect to receive on his or her investment given the risks and the location. The value of the goodwill pursuant to this fair market analysis was $160,000. The trial court adopted the rationale of plaintiff's expert, but used a capitalization rate of 25 percent to reach a value of $328,000.

The court of appeal affirmed. It held that *People ex rel. Dept. of Transportation v. Muller (1984) 36 Cal. 3d 263, 269-271, 203 Cal. Rptr. 772, 681 P.2d 1340* (*discussed in § 95.102[3][a]*), affirmed use of capitalization of excess earnings based on prevailing interest rates, but expressly stated that there were other reasonable methods of measuring loss of goodwill. The court held that *Code Civ. Proc. § 1263.310* expressly bases compensation on fair market value

and concluded that a market analysis is an acceptable method of valuing goodwill (*212 Cal. App. 3d 1297, 1303-1305)* . The court then found that there was sufficient evidence to support the trial court's determination of the value of the lost goodwill, which was confirmed by comparison with four somewhat comparable sales in the open market. It was within the trial court's discretion to apply its own capitalization rate somewhere between the rates applied by the parties' experts. The appellate court noted that the lessee's approach treated the profits as an annuity subject to no risk when there were obvious risks in the restaurant business in a blighted area (*212 Cal. App. 3d 1297, 1305-1306)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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9-95 California Points & Authorities §§ 95.103-95.119

AUTHOR: Jeffrey S. Rosen

[Reserved]

§§ 95.103[Reserved]

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9-95 California Points & Authorities § 95.120

AUTHOR: Jeffrey S. Rosen

§ 95.120 Supporting Motion to Strike Irrelevant Matter in Answer [Code Civ. Proc. § 436] in Eminent Domain Action [Code Civ. Proc. § 1230.040]--Allegations Attacking Resolution of Necessity [Code Civ. Proc. § 1245.250(a)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION TO
vs.	)	STRIKE IRRELEVANT MATTER IN ANSWER
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Dept: _____
	)	Trial Date: _____

_____

ALLEGATIONS IN THE ANSWER ATTACKING MATTERS COVERED BY THE RESOLUTION OF NECESSITY SHOULD BE STRICKEN AS IRRELEVANT.

A. General Practice Rules Applicable in Eminent Domain Proceeding. [*See § 95.60, Paragraph A.*]

B. Striking Irrelevant Matter. Irrelevant, false, or improper matter asserted in an answer may be stricken (*Code Civ. Proc. § 436*).

C. Resolution of Necessity as Conclusive. A resolution of necessity adopted by the governing body of a public entity that satisfies the statutory requirements conclusively establishes that the public interest and necessity require the project, that the project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury, and that the property sought to be acquired is necessary for the project (*Code Civ. Proc. § 1245.250(a)*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion to strike irrelevant matter in an answer in an eminent domain action when the answer contains allegations attacking matters that are conclusively determined by a resolution of necessity.

When appropriate, counsel should insert argument in this form showing the relationship between the facts present in the case and the points of law stated.

[3] Discussion of Authorities

[a] Resolution of Necessity as Conclusive

A valid resolution of necessity precludes judicial review only of the matters specified in *Code Civ. Proc. § 1240.030*. A condemnee may still base a challenge to a resolution of necessity on the grounds listed in *Code Civ. Proc. § 1250.360* or on other specific statutory grounds provided in the Eminent Domain Law [*see, e.g., Code Civ. Proc. § 1240.230* (taking for future use)]. The validity of the resolution itself may also be attacked [*Code Civ. Proc. § 1250.370(a)*; *see § 95.63*].

As recognized in *Code Civ. Proc. § 1245.250(a)*, there may be exceptions to the general rule of conclusiveness. One exception is found in *Code Civ. Proc. § 1245.250(b)* for takings by a local public entity when the property described in the resolution is not entirely within the boundaries of that entity. In such a case, the presumption created is not conclusive but merely affects the burden of producing evidence. Another exception is when the resolution is the result of a gross abuse of discretion [*Code Civ. Proc. § 1245.255(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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9-95 California Points & Authorities § 95.121

AUTHOR: Jeffrey S. Rosen

§ 95.121 Supporting Motion for Increase of Deposit of Probable Amount of Compensation [Code Civ. Proc. § 1255.030]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION FOR
vs.	)	INCREASE OF DEPOSIT OF PROBABLE
_____ [*name*],	)	AMOUNT OF COMPENSATION
Defendant.	)	Date: _____
	)	Time: _____
	)	Dept: _____
		Trial Date: _____

_____

THE COURT _____ [*either* MAY *or* MUST], ON MOTION, ORDER AN INCREASE IN THE DEPOSIT OF THE PROBABLE AMOUNT OF COMPENSATION IF THE COURT DETERMINES THAT THE PROBABLE AMOUNT OF COMPENSATION EXCEEDS THE AMOUNT DEPOSITED.

A. Motion for Determination of Probable Amount of Compensation. At any time after a deposit of an amount alleged to be the probable amount of compensation, the court must, on motion of the plaintiff or of any party having an interest in the property for which the deposit was made, determine or redetermine whether the amount deposited is the probable amount of compensation that will be awarded in the proceeding; provided the motion is supported with detail

sufficient to indicate clearly the basis for the motion, including information specifically required by *Code of Civil Procedure Section 1255.030(a)(1) through (3)* to the extent such information is relevant to the motion (*Code Civ. Proc. § 1255.030(a)*).

[*EITHER*]

B. Determination Before Possession Is Taken. If the plaintiff has not taken possession of the property and the court determines that the probable amount of compensation exceeds the amount deposited, the court may order the plaintiff to increase the deposit (*Code Civ. Proc. § 1255.030(b)*).

[*OR*]

B. Determination After Possession Is Taken. If the plaintiff has takenpossession of the property and the court determines that the probable amount of compensation exceeds the amount deposited, the court must order the amount deposited to be increased to the amount determined to be the probable amount of compensation (*Code Civ. Proc. § 1255.030(c)*).

[*CONTINUE*]

[*Optional*] **C. Trial Court Has Jurisdiction to Order Increase in Deposit After Filing of Notice of Appeal.** The trial court has jurisdiction under *Code of Civil Procedure Section 1255.030* to order a plaintiff in possession of the property to increase the deposit of probable compensation when a judgment exceeding the amount on deposit has been entered and the plaintiff seeks to retain possession pending appeal (*Whittier Redevelopment Agency v. Oceanic Arts (1995) 33 Cal. App. 4th 1052, 1060, 39 Cal. Rptr. 2d 396*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for an increase of the deposit of the probable amount of compensation when the probable amount of compensation exceeds the amount deposited.

Special rules of evidence are applicable to determinations of the value of property in eminent domain and inverse condemnation proceedings [*see Evid. Code §§ 810-824*]. Counsel should insert authority on the matter of evidence, using the applicable Evidence Code provisions, as additional paragraphs to this form. For comprehensive coverage of the statutory rules, see California Real Estate Law & Practice, Ch. 508 (Matthew Bender).

Counsel should insert argument in this form showing the relationship between the facts present in the case and the points of law stated.

[3] Discussion of Authorities

[a] Determination Before Possession Is Taken

If the court determines that the probable amount of compensation exceeds the amount deposited and the plaintiff has not taken possession of the property, *Code Civ. Proc. § 1255.030(b)* permits the court to order the plaintiff to increase the deposit. As an alternative, the court may deny the plaintiff possession of the property until the amount deposited has been increased to the amount specified in the order.

[b] Determination After Possession Is Taken

If the court determines that the probable amount of compensation exceeds the amount deposited and the plaintiff has taken possession of the property, *Code Civ. Proc. § 1255.030(c)* compels the court to order the amount deposited to be increased to the amount determined to be the probable amount of compensation. If the amount on deposit is not increased accordingly within 30 days from the date of the court's order, or any longer time allowed by the court at the time of making the order, the defendant may serve on the plaintiff a notice of election to treat the failure as an abandonment of the proceeding. If the plaintiff does not cure its failure within 10 days after receipt of this notice, the court must, on motion of the defendant, enter judgment dismissing the proceeding and awarding the defendant his or her litigation expenses and damages as provided in *Code Civ. Proc. §§ 1268.610* and *1268.620*.

[c] Trial Court Has Jurisdiction to Order Increase in Deposit After Filing of Notice of Appeal

In ***Whittier Redevelopment Agency v. Oceanic Arts*** *(1995) 33 Cal. App. 4th 1052, 39 Cal. Rptr. 2d 396* , the court of appeal held that a trial court has jurisdiction under *Code Civ. Proc. § 1255.030* to order an increase in deposit after the filing of a notice of appeal. It concluded that the phrase "at any time" as used in the statute is not limited to "any time before judgment" (*33 Cal. App. 4th 1052, 1058-1059)* . The court also held that the trial court must require an increase in deposit when a plaintiff who has obtained prejudgment possession appeals a judgment in excess of its deposit of probable compensation (*33 Cal. App. 4th 1052, 1059)* . However, the trial court must provide the plaintiff with an opportunity to request a period longer than 30 days to increase the deposit (*33 Cal. App. 4th 1052, 1060)* .

The *Whittier* court agreed with the result but not the reasoning of *People ex rel. Dept. of Transportation v. Zivelonghi (1986) 181 Cal. App. 3d 1035, 1045-1046* , which held that *Code Civ. Proc. § 1255.030* only applies to deposits for purposes of acquiring and retaining possession before judgment is entered, but that the trial court may require an increase in deposit on appeal pursuant to its inherent powers (*33 Cal. App. 4th 1052, 1058)* .

[4] Additional Authorities

[a] Motion for Determination of Probable Amount of Compensation

The amount deposited or withdrawn may not be given in evidence or referredto in the trial on the issue of compensation [*Code Civ. Proc. § 1255.060(a)*]. At trial, an appraisal report, written statement and summary of an appraisal, or other statement made in connection with a deposit or withdrawal may not be considered to be an admission of any party [*Code Civ. Proc. § 1255.060(b)*]. The person who made the report, written statement and summary, or other statement may not be called by any other party to give an opinion as to compensation at the trial on that issue over the objection of the party at whose request the report or statement was made. If the person who prepared the report or statement is called as a witness to give an opinion as to compensation, the report, statement and summary, or other statement may be used for impeachment purposes [*Code Civ. Proc. § 1255.060(c)*].

Notwithstanding these provisions, counsel should endeavor to analyze the relevant issues fully and obtain complete appraisals and expert reports as soon as possible. Even if a motion for increase or decrease of the deposit is not made, this preparation will not only provide clients and counsel with clear expectations of their case and the ensuing litigation, but will also assist in settlement negotiations.

Legal Topics:

For related research and practice materials, see the following legal topics:
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9-95 California Points & Authorities § 95.122

AUTHOR: Jeffrey S. Rosen

§ 95.122 Supporting Motion for Order for Possession [Code Civ. Proc. § 1255.410]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*]	)	MEMORANDUM IN SUPPORT OF MOTION FOR
Plaintiff,	)	ORDER FOR POSSESSION
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THE COURT SHOULD GRANT PLAINTIFF'S MOTION FOR AN ORDER AUTHORIZING PLAINTIFF TO TAKE POSSESSION OF THE PROPERTY BECAUSE PLAINTIFF IS ENTITLED TO TAKE THE PROPERTY BY EMINENT DOMAIN AND HAS DEPOSITED AN AMOUNT THAT SATISFIES THE REQUIREMENTS OF CODE OF CIVIL PROCEDURE SECTIONS 1255.010 THROUGH 1255.080.

A. Motion for Order Authorizing Possession. At the time of filing the complaint or at any time thereafter before entry of judgment, the plaintiff may move the court for an order for possession, demonstrating that the plaintiff (1) is

entitled to take the property by eminent domain, and (2) has deposited an amount that satisfies the requirements of *Code of Civil Procedure Sections 1255.010 through 1255.080* (*Code Civ. Proc. § 1255.410(a)*).

B. The Plaintiff Is Authorized to Take the Property by Eminent Domain. The power of eminent domain may be exercised to acquire property for a proposed project if all of the following are established: (1) the public interest and necessity require the project; (2) the project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury; and (3) the property sought to be acquired is necessary for the project (*Code Civ. Proc. § 1240.030*).

C. The Plaintiff Has Deposited an Amount That Satisfies the Requirements of *Code of Civil Procedure Sections 1255.010 through 1255.080*. Before making a deposit, the plaintiff shall have an expert qualified to express an opinion as to the value of the property (1) make an appraisal of the property, and (2) prepare a written statement of, or summary of the basis for, the appraisal. The written statement must be in sufficient detail to indicate clearly the basis for the appraisal, including all information specifically required by *Code of Civil Procedure Section 1255.010(b)(2)(A) through (C)* (*Code Civ. Proc. § 1255.010(b)*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for an order authorizing the plaintiff to take possession of the property prior to judgment if the plaintiff is entitled to take the property by eminent domain and has deposited an amount that satisfies the requirements of *Code Civ. Proc. §§ 1255.010 through 1255.080*.

Special rules of evidence are applicable to determinations of the value of property in eminent domain and inverse condemnation proceedings [*see Evid. Code §§ 810-824*]. Counsel should insert authority on the matter of evidence, using the applicable Evidence Code provisions, as additional paragraphs to this form. For comprehensive coverage of the statutory rules, see California Real Estate Law & Practice, Ch. 508 *Evidence: General* (Matthew Bender).

When appropriate, counsel should insert argument in this form showing the relationship between the facts present in the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms and discussion relating to motions for an order for possession prior to judgment, see Ch. 247, *Eminent Domain and Inverse Condemnation* , in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Motion for Order Authorizing Possession

A motion for possession may be opposed by any defendant or occupant of the property provided written opposition is filed with the court within 30 days after service of the motion. If the written opposition asserts a hardship, is must be supported by a declaration signed under penalty of perjury stating facts supporting the hardship. The plaintiff must serve and file any reply to the opposition not less than 15 days before the hearing [*Code Civ. Proc. § 1255.410(c)*].

If the motion is not opposed, the court will make an order for possession if it finds that the plaintiff is entitled to the property by eminent domain, and has deposited an amount that satisfies the statutory requirements [*Code Civ. Proc. § 1255.410(d)(1)*]. If the motion is opposed, the court will hold a hearing and issue an order for possession if it finds that [*Code Civ. Proc. § 1255.410(d)(2)*]:

- The plaintiff is entitled to take the property by eminent domain;
- The plaintiff has deposited an amount with the court that meets the statutory just compensation requirements;
- There is an overriding need for the plaintiff to possess the property before final judgment is issued, and the plaintiff will suffer a substantial hardship if the motion is denied; and
- The hardship to the plaintiff if possession is denied outweighs the hardship to the defendant or occupant if possession is granted.

The plaintiff is entitled to take possession either 30 days (if the property is lawfully occupied by a person dwelling on it or by a farm or business operation) or 10 days (in all other cases) after service of the order [*Code Civ. Proc. § 1255.450(b)*].

[b] The Plaintiff Is Authorized to Take the Property by Eminent Domain

The matters referred to in *Code Civ. Proc. § 1240.030* are conclusively established if a resolution of necessity is adopted by the governing body of the public entity [*Code Civ. Proc. § 1245.250(a)*].

A motion for an order of possession may be a defendant's first and/or best opportunity to attempt to establish that the resolution of necessity should not have presumptive effect because its adoption or contents were influenced or affected by gross abuse of discretion by the governing body [*Code Civ. Proc. § 1245.255(b)*]. Prudent counsel will have conducted an informal investigation and/or formal discovery prior to the hearing on the motion to determine whether there is any evidence of abuse of discretion. If no such case can be made, a defendant may choose to not oppose the motion for possession and direct all resources toward the issue of just compensation.

[c] The Plaintiff Has Deposited an Amount That Satisfies the Requirements of Code Civ. Proc. § 1255.010 et seq.

Code Civ. Proc. § 1255.010 does not require the plaintiff to provide the defendant with a copy of the appraisal. Such an exchange does not take place until after the trial date is selected [*see Code Civ. Proc. §§ 1258.210-1258.300*].

[4] Additional Authorities

[a] Motion for Order Authorizing Possession

The court's order of possession must do all of the following [*Code Civ. Proc. § 1255.460*]:

- Recite that it has been made under *Code Civ. Proc. § 1255.460*;

- Describe the property to be acquired, which may be by reference to the description in the complaint; and

- State the date after which the plaintiff is authorized to take possession.

If an order for possession before judgment has been made under *Code Civ. Proc. § 1255.410* and the court subsequently determines that the statutory conditions for issuing the order have not been satisfied, the order must be vacated [*Code Civ. Proc. § 1255.440*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersGeneral OverviewCivil ProcedureEminent Domain ProceedingsGeneral OverviewReal Property LawEminent Domain ProceedingsGeneral Overview

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Volume 9 Chapters 90-99 DISMISSAL---to---EMINENT DOMAIN
CHAPTER 95 EMINENT DOMAIN
PART II. FORMS
F. Miscellaneous Supporting Motions

9-95 California Points & Authorities § 95.123

AUTHOR: Jeffrey S. Rosen

§ 95.123 Supporting Motion to Set Aside Abandonment of Eminent Domain Proceeding [Code Civ. Proc. § 1268.510(b)]--By Defendant

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION TO
vs.	)	SET ASIDE ABANDONMENT
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Dept: _____
	)	Trial Date: _____

_____

THE COURT SHOULD GRANT DEFENDANT'S MOTION TO SET ASIDE THE ABANDONMENT OF THE EMINENT DOMAIN PROCEEDING BECAUSE THE DEFENDANT HAS SUBSTANTIALLY CHANGED HIS/HER POSITION TO HIS/HER DETRIMENT IN JUSTIFIABLE RELIANCE ON THE PROCEEDINGS AND THE DEFENDANT'S PRIOR POSITION CANNOT BE RESTORED.

Motion to Set Aside Abandonment. The abandonment of an eminent domain proceeding may be set aside on motion made within 30 days after the filing of notice of abandonment if the position of the moving party has been substantially changed to his or her detriment in justifiable reliance on the proceeding and the party cannot be restored to substantially the same position as if the proceeding had not been commenced (*Code Civ. Proc. § 1268.510(b)*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion to set aside theabandonment of an eminent domain action when the defendant has relied on the proceeding in substantially changing his or her position to his or her detriment and cannot be restored to the prior position.

When appropriate, counsel should insert argument in this form showing the relationship between the factors present in the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms and discussion relating to proceedings to set aside an abandonment of an eminent domain proceeding, see Ch. 247, *Eminent Domain and Inverse Condemnation* , in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Motion to Set Aside Abandonment

Code Civ. Proc. § 1268.510(b), allowing the abandonment of an eminent domain proceeding to be set aside, continues prior law [*see* former Code Civ. Proc. § 1255a(b)]. This provision allows a court to relieve a property owner from hardship when the owner has relied on a condemnation proceeding in good faith and cannot be restored to his or her original position. For example, this provision applies when an owner has constructed a new building to replace an old one that was supposed to be condemned or when an owner has relocated and incurred moving expenses [*see Times-Mirror Co. v. Superior Court (1935) 3 Cal. 2d 309, 333-334, 44 P.2d 547]* .

[4] Additional Authorities

[a] Motion to Set Aside Abandonment

Redevelopment Agency v. Heller (1988) 200 Cal. App. 3d 517, 519, 246 Cal. Rptr. 160 , held that inverse condemnation damages could not be recovered in an eminent domain proceeding that had been abandoned because no timely motion to set aside the abandonment (pursuant to *Code Civ. Proc. § 1268.510(b)*) had been filed. The owner's action to recover monetary damages for precondemnation delay under *Klopping v. City of Whittier (1972) 8 Cal. 3d 39, 43, 104 Cal. Rptr. 1, 500 P.2d 1345* , had to be asserted in a separate action alleging inverse condemnation damages.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersGeneral OverviewCivil ProcedureEminent Domain ProceedingsGeneral OverviewReal Property LawEminent Domain ProceedingsGeneral Overview

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CHAPTER 95 EMINENT DOMAIN
PART II. FORMS
F. Miscellaneous Supporting Motions

9-95 California Points & Authorities § 95.124

AUTHOR: Jeffrey S. Rosen

§ 95.124 Supporting Motion for Dismissal of Abandoned Eminent Domain Proceeding [Code Civ. Proc. § 1268.510(c)] and Award of Litigation Expenses [Code Civ. Proc. § 1268.610]--By Defendant

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION FOR
vs.	)	DISMISSAL AND AWARD OF LITIGATION EX-
_____ [*name*],	)	PENSES
Defendant.	)	Date: _____
	)	Time: _____
	)	Dept: _____
		Trial Date: _____

_____

THE COURT SHOULD GRANT THE DEFENDANT'S MOTION FOR DISMISSAL AND FOR AN AWARD OF LITIGATION EXPENSES BECAUSE THE PLAINTIFF HAS SERVED AND FILED A WRITTEN NOTICE OF ABANDONMENT AND A MOTION TO SET ASIDE THE ABANDONMENT _____ [HAS BEEN DENIED *or* WAS NOT FILED].

A. Motion to Dismiss. On denial of a motion to set aside an abandonment or, if no such motion is filed, on the expiration of the time for filing such a motion, the court must, on motion of any party, enter judgment wholly or partially dismissing the proceeding (*Code Civ. Proc. § 1268.510(c)*).

B. Award of Litigation Expenses. The court must award the defendant his or her litigation expenses whenever the proceeding is wholly or partly dismissed for any reason (*Code Civ. Proc. § 1268.610(a)(1)*).

C. Litigation Expenses Defined. Litigation expenses include the following: (1) all expenses reasonably and necessarily incurred in the proceeding in preparing for trial, during trial, and in any subsequent judicial proceedings; and (2) reasonable attorney's fees, appraisal fees, and fees for the services of other experts when these fees were reasonably and necessarily incurred to protect the defendant's interests in the proceeding in preparing for trial, during trial, and in any subsequent judicial proceedings, whether the fees were incurred for services rendered before or after the filing of the complaint (*Code Civ. Proc. § 1235.140*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a defendant's motion for dismissal and an award of litigation expenses when the plaintiff has wholly or partially abandoned an eminent domain proceeding by serving on the defendant and filing in court a written notice of the abandonment at any time after the filing of the complaint and before the expiration of 30 days after final judgment.

When the defendant claims litigation expenses on dismissal, these expenses must be claimed in and by a cost bill that is prepared, served, filed, and taxed as in a civil action [*Code Civ. Proc. § 1268.610(d)*]. The cost bill should be filed along with this memorandum.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should show the facts establishing the plaintiff's filing of the notice of abandonment, the denial or failure to file a motion to set aside the abandonment, and the defendant's entitlement to litigation expenses.

[c] Related Pleading and Practice Chapters

For forms and discussion relating to the dismissal of an eminent domain proceeding following abandonment, see Ch. 247, *Eminent Domain and Inverse Condemnation* , in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Motion to Dismiss

Code Civ. Proc. § 1268.510(c) provides a method for effecting an abandonment of an eminent domain proceeding,

either in whole or in part. It also provides for dismissal of the proceeding following abandonment, on motion of any party, in the event a motion to set aside the abandonment is denied or is not filed prior to the expiration of the time for filing the motion [*see Code Civ. Proc. § 1268.510(b)*].

[b] Award of Litigation Expenses

Code Civ. Proc. § 1268.610(a)(1) applies whenever the proceeding is wholly or partially dismissed for any reason, including abandonment under *Code Civ. Proc. § 1268.510*, implied abandonment (such as that resulting from failure to pay the judgment) [*see Code Civ. Proc. § 1268.020*], or partial abandonment by amendment of the complaint to add additional property [*see Code Civ. Proc. § 1250.340(c)*].

[c] Litigation Expenses Defined

Code Civ. Proc. § 1235.140 defines the term "litigation expenses" as including all expenses reasonably and necessarily incurred in the proceeding in preparing for trial, during trial, and in any subsequent judicial proceedings. Reasonable attorney's fees, appraisal fees, and fees for the services of other experts, if reasonably and necessarily incurred to protect the defendant's interests, are recoverable.

A property owner may not recover fees for the owner's time spent preparing and presenting testimony, even if the owner is qualified to testify as an expert [*County of Madera v. Forrester (1981) 115 Cal. App. 3d 57, 61-62, 170 Cal. Rptr. 896]* .

[4] Additional Authorities

[a] Award of Litigation Expenses

Code Civ. Proc. § 1250.410 provides that at least 20 days before trial of the issues relating to compensation, the plaintiff must file and serve its final offer of compensation and the defendant must file and serve its final demand for compensation. The offer and demand must include all required compensation, including any compensation for loss of goodwill, and must state whether interest and costs are included. The offer and demand must be the only ones considered by the court in determining the entitlement, if any, to litigation expenses [*Code Civ. Proc. § 1250.410(a)*]. "Litigation expenses" means the party's reasonable attorney's fees and costs, including reasonable expert witness and appraiser fees [*Code Civ. Proc. § 1250.410(e)*].

If a settlement demand is accepted, a defendant is entitled to recover ordinary costs and prejudgment interest [*Coachella Valley County Water Dist. v. Dreyfuss (1979) 91 Cal. App. 3d 949, 953, 154 Cal. Rptr. 467]* .

If the court, on motion of the defendant made within 20 days after entry of judgment, finds that the offer of the plaintiff was unreasonable and that the demand of the defendant was reasonable viewed in light of the evidence admitted and the compensation awarded in the proceeding, the costs allowed pursuant to *Code Civ. Proc. § 1268.710* must include the defendant's litigation expenses [*Code Civ. Proc. § 1250.410(b)*].

In *City of Los Angeles v. Cannon (1976) 57 Cal. App. 3d 559, 562, 127 Cal.Rptr. 709* , the court of appeal considered the reasonableness of the city's offer, which was $10,000 lower than the owner's demand. While acknowledging that $10,000 is "a significant amount of money," the court found that such a differencebetween a demand and offer may or may not be unreasonable depending on a variety of factors. Reasonableness depends not only on monetary amounts or the percentage of difference between the offer and the demand, but also on the good faith, care, and accuracy in how the offer and demand were determined. Those were factual determinations best made by the trial court. The offer was not unreasonable as a matter of law, and the trial court did not abuse its discretion in denying the owner's request for attorney's fees and appraiser's expenses.

A contrary result was reached in *City of Commerce v. National Starch & Chemical Corp. (1981) 118 Cal. App. 3d 1, 19, 173 Cal. Rptr. 176* , a case in which the court determined that the city had made no effort to show good faith because it had not obtained an appraisal that took into consideration the reduced value of fixtures in calculating severance damages. The city's offer was $78,950; the owner's demand was $145,000, an amount approximately $96,000 less than the eventual judgment. The owner's application for litigation expenses was successful.

In *People ex rel. Dept. of Transportation v. Yuki (1995) 31 Cal. App. 4th 1754, 37 Cal. Rptr. 2d 616* , the court of appeal concluded from a survey of results in other cases that final offers that are 60 percent or less of the jury's verdict are generally found to be unreasonable, while offers that are above 85 percent are generally considered to be reasonable per se. Final offers that come within the middle range can fall within either group depending on other factors, particularly whether the government agency was unyielding and the extent of the "good faith, care and accuracy in the method of determination of offer and demand" (*31 Cal. App. 4th 1754, 1764)* . In the *Yuki* case, the final offer was 77 percent of the jury's verdict. The court held that the trial court was well within its discretion in finding the final offer unreasonable, because the offer (1) was based on an unwavering reliance on an appraisal that was over $2 million low in its valuation of the acquired land, and (2) was incorrect in its evaluation of both severance damages and special benefits (*31 Cal. App. 4th 1754, 1767)* .

In *San Diego County v. Woodward (1986) 186 Cal. App. 3d 82, 91, 230 Cal. Rptr. 406* , the county's offer was held to be reasonable even though it was substantially less than the jury verdict, when the owner did not have an appraisal and failed to furnish the county with any appraisal information before the deadline for filing the statutory settlement offer. The court stated that *Code Civ. Proc. § 1250.410* imposes on both parties "the duty to act reasonably in an effort to settle disputes" (*186 Cal. App. 3d 82, 91)* .

In *County of Contra Costa v. Pinole Point Properties, Inc. (1994) 27 Cal. App. 4th 1105, 1115, 33 Cal. Rptr. 2d 38* , an award of litigation expenses was reversed on the ground the owner's demand of an amount that was $800,000 more, and five times greater, than the amount awarded at trial was unreasonable.

In addressing the issue of attorney's fees, the court in *City of Oakland v. Oakland Raiders (1988) 203 Cal. App. 3d 78, 83, 249 Cal. Rptr. 606* , stated that trial courts must consider factors such as the amount of time spent on a case, the reasonable hourly rate of attorneys, the difficulty of the issues involved, the skill employed in presenting the case, and the extent to which the case precluded the attorneys from working on other matters. The trial court set attorney's fees by multiplying the number of hours spent by an hourly rate similar to one charged by law firms in the area. The court then raised the fee because of the complexity of the issues, the nature of the litigation, and the results obtained. The court of appeal affirmed.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersGeneral OverviewCivil ProcedureEminent Domain ProceedingsGeneral OverviewReal Property LawEminent Domain ProceedingsGeneral Overview

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 100 EMPLOYER AND EMPLOYEE: WRONGFUL TERMINATION AND DISCIPLINE

10-100 California Points & Authorities 100.syn

AUTHOR: Carolyn Rashby

§ 100.syn Synopsis to Chapter 100: EMPLOYER AND EMPLOYEE: WRONGFUL TERMINATION AND DISCIPLINE

§ 100.01 Scope of Chapter

§ 100.02 Page Limits on Memoranda

§ 100.03 Related Pleading and Practice Chapters

§ 100.04 Related Points and Authorities Chapters

§ 100.05 Related California Torts Chapters

§ 100.06 Related California Employment Law Chapters

§§ 100.07-100.19 [Reserved]

§ 100.20 Supporting Contention That Wrongful Discharge Cause of Action Exists--Employment Was Not "At Will"--Right to Terminate Limited by Express Agreement Between Parties

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[d] Related Pleading and Practice Forms

[e] Related California Employment Law References

[3] Discussion of Authorities

[a] Express "Good Cause" Agreement Rebuts "At Will" Presumption

§ 100.21 Supporting Contention That Wrongful Discharge Cause of Action Exists--Employment Is Not "At Will"--Right to Terminate Limited by Implied Agreement Between the Parties

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[d] Related Pleading and Practice Forms

[e] Related California Employment Law References

[3] Discussion of Authorities

[a] Implied Good Cause Agreement Rebuts "At Will" Presumption

[b] Totality of Circumstances May Establish "Good Cause" Agreement

[c] Parol Evidence Is Admissible to Show "Good-Cause" Agreement

[d] Employer's Breach of Written Personnel Policy May Support Cause of Action

[e] Independent Consideration Not Required

[4] Additional Authorities

[a] Implied Good Cause Agreement Rebuts "At Will" Presumption

[b] Totality of Circumstances May Establish "Good Cause" Agreement

[c] Parol Evidence Is Admissible to Show "Good-Cause" Agreement if Written Agreement Is Not Integrated

[d] Employer's Breach of Written Personnel Policy May Support Cause of Action

§ 100.22 Opposing Contention That Wrongful Discharge Cause of Action Exists--Employment Was "At Will"--No Express or Implied Agreement Limited Defendant's Right to Discharge Plaintiff "At Will" [Lab. Code § 2922]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related California Employment Law References

[3] Discussion of Authorities

[a] Employment for Unspecified Term Terminable At Will Absent Other Agreement

[b] Personnel "Guidelines" Do Not Indicate That Employment Was Not "At Will"

[c] Existence of Progressive Discipline Policy Does Not Negate "At Will" Presumption

[d] Positive Performance Reviews, Commendations, Salary Increases, and Vague Assurances of Advancement in Company Do Not Negate "At Will" Presumption

[e] Employer's Unilaterally Adopted "No-Layoff" Policy May be Unilaterally Discontinued

[f] Contractual Provision for Performance Review After 12 Months Does Not Negate "At Will" Presumption

[4] Additional Authorities

[a] Employment for Unspecified Term Terminable At Will Absent Other Agreement

§ 100.23 Opposing Contention That Wrongful Discharge Cause of Action Exists--Employment Was "At Will"--Parties' Agreement Retaining Right to Discharge "At Will" Is Integrated, Precluding Oral or Implied Modification

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related California Employment Law References

[3] Discussion of Authorities

[a] Agreement Expressly Retains Right to Terminate "At Will"

[b] Implied Contract Contradicted by Express Agreement

[c] Integrated "At Will" Employment Application Precludes Parol Evidence

[d] Personnel Policy May Not Contradict Express "At Will" Agreement

[e] Contractual Right to Review of Termination Decision Does Not Change Nature of "At Will" Employment

[4] Additional Authorities

[a] Implied Contract Contradicted by Express Agreement

§ 100.24 Opposing Contention That Wrongful Discharge Cause of Action Exists--No Discharge in Failure to Renew Fixed-Term Contract

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] No Discharge Where Fixed-Term Employment Contract Fully Executed

§ 100.25 Opposing Contention That Wrongful Discharge Cause of Action Exists--Good-Faith Determination of Conduct Justifying Discharge Notwithstanding Implied Agreement Between Parties

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] No Wrongful Discharge When Employer's Termination of Implied Agreement Was Based on Good-Faith Conclusion That Good Cause Existed to Discharge Employee

§ 100.26 Opposing Contention That Wrongful Discharge Cause of Action Exists--Implied Agreement to Terminate Only for Good Cause Did Not Limit Employer's Right to Eliminate Plaintiff's Job as Part of Reduction in Workforce

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] Implied Agreement to Terminate Only for Good Cause Does Not Ordinarily Include Restriction on Employer's Right to Reduce Workforce

§ 100.27 Supporting Contention That Wrongful Discharge Cause of Action Exists--Discharge Breached Contract Because No Good Cause to Terminate Existed

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[d] Related Pleading and Practice Forms

[e] Related California Employment Law References

[3] Discussion of Authorities

[a] Good Cause Defined

[b] Trivial, Capricious, or Pretextual Reason for Discharge Precludes Finding of Good Cause

[4] Additional Authorities

[a] Trivial, Capricious, or Pretextual Reason for Discharge Precludes Finding of Good Cause

§ 100.28 Supporting Contention That Wrongful Discharge Cause of Action Exists--Discharge Breached Covenant of Good Faith and Fair Dealing

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[d] Related Pleading and Practice Forms

[e] Related California Employment Law References

[3] Discussion of Authorities

[a] Covenant of Good Faith and Fair Dealing in Employment Contract

[b] Employer's Bad Faith Conduct Extraneous to Contract and Intent to Frustrate Employee's Contract Rights Breach Covenant of Good Faith and Fair Dealing

[c] Termination of Long-Term Employment Without Cause Breaches Covenant of Good Faith and Fair Dealing

§ 100.29 Opposing Contention That Wrongful Discharge Cause of Action Exists--Discharge Did Not Breach Contract Because Good Cause to Terminate Existed

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related California Employment Law References

[3] Discussion of Authorities

[a] "Good Cause" Defined

[b] Serious Misconduct Violating Company Policy Provides Good Cause for Discharge

[c] Legitimate Business Reasons Provide Good Cause for Discharge

[4] Additional Authorities

[a] "Good Cause" Defined

§ 100.30 Opposing Contention That Wrongful Discharge Cause of Action Exists--Discharge Did Not Breach Implied Covenant of Good Faith and Fair Dealing--Implied Covenant of Good Faith and Fair Dealing Not Breached

Absent Breach of Underlying Employment Contract

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related California Employment Law References

[3] Discussion of Authorities

[a] Implied Covenant of Good Faith and Fair Dealing Breached Only Where Defendant in Bad Faith Deprived Plaintiff of Benefit of Employment Agreement

[b] No Breach of Implied Covenant of Good Faith and Fair Dealing if Underlying Employment Agreement Not Breached

[c] No Breach of Implied Covenant of Good Faith and Fair Dealing Where Employer Makes Mistaken but Good-Faith Determination That Misconduct Occurred

[d] Claim for Breach of Covenant of Good Faith and Fair Dealing Cannot Be Maintained Where Employment Was At-Will

§ 100.31 Supporting Contention That Wrongful Discharge Cause of Action Exists Absent Unequivocal Termination of Plaintiff's Employment--Plaintiff Was Constructively Discharged

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[d] Related Pleading and Practice Forms

[e] Related California Employment Law References

[3] Discussion of Authorities

[a] Constructive Discharge Legally Regarded as Firing

[b] Constructive Discharge as Breach of Good Cause Agreement

[c] Constructive Discharge as Violation of Public Policy

[d] Employer Created Intolerable or Aggravated Working Conditions

[e] Series of Separate Incidents May Constitute Constructive Discharge

[f] Knowledge or Intent of Employer

[g] Statute of Limitations Period Commences on Date of Actual Termination

[h] Leaving Job Because of Intolerable Conditions Constitutes Resignation

[4] Additional Authorities

[a] Employer Created Intolerable or Aggravated Working Conditions

§ 100.32 Supporting Contention That Plaintiff Was Constructively Discharged--Employer Created Intolerable Working Conditions--Hostile Work Environment Caused by Widespread Sexual Favoritism

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[d] Opposing Memoranda

[e] Related California Employment Law References

[3] Discussion of Authorities

[a] Widespread Sexual Favoritism Can Create Hostile Work Environment for All Employees

§ 100.33 Supporting Contention That Cause of Action Exists Absent Unequivocal Termination of Plaintiff's Employment--Discipline of Employee Violated Public Policy

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[d] Related Pleading and Practice Forms

[e] Related California Employment Law References

[3] Discussion of Authorities

[a] Cause of Action Exists for Wrongful Discipline in Violation of Public Policy

§ 100.34 Supporting Contention That Cause of Action Exists Absent Unequivocal Termination of Plaintiff's Employment--Right to Demote Limited by Express or Implied Agreement Between Parties

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[d] Related Pleading and Practice Forms

[e] Related California Employment Law References

[3] Discussion of Authorities

[a] Express or Implied Good Cause Agreement Rebuts Presumption That Employee May Be Demoted At Will

[b] Implied Contract Terms Not to Demote May Arise From Employer's Policies and Practices

§ 100.35 Opposing Contention That Wrongful Discharge Cause of Action Exists Absent Unequivocal Termination of Plaintiff's Employment--Constructive Discharge of Plaintiff Was Neither Breach of Contract, Nor Tort, Nor Violation of Fundamental Public Policy or Statutory or Constitutional Right

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[d] Opposing Memoranda

[e] Related California Employment Law References

[3] Discussion of Authorities

[a] Discharge of Employee, Even Constructive Discharge, Does Not Give Rise to Cause of Action Unless It Violates Employee's Contractual Rights or Constitutes Actionable Tort or Violates a Fundamental Public Policy or Statutory or Constitutional Right

§ 100.36 Opposing Contention That Wrongful Discharge Cause of Action Exists Absent Unequivocal Termination of Plaintiff's Employment--Plaintiff Was Not Constructively Discharged--Conditions of Employment Were Not Sufficiently Intolerable That Reasonable Employee Would Have Felt Compelled to Resign

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related California Employment Law References

[3] Discussion of Authorities

[a] Constructive Discharge Determined by Objective Standard

[b] Single, Trivial, or Isolated Acts of Misconduct Insufficient

[c] Poor Performance Rating or Demotion Insufficient

[4] Additional Authorities

[a] Constructive Discharge Determined by Objective Standard

[b] Poor Performance Rating or Demotion Insufficient

§ 100.37 Opposing Contention That Wrongful Discharge Cause of Action Exists Absent Unequivocal Termination of Plaintiff's Employment--Plaintiff Was Not Constructively Discharged--Employer Did Not Have Actual Knowledge of Allegedly Intolerable Conditions That Caused Plaintiff to Resign

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related California Employment Law References

[3] Discussion of Authorities

[a] Employer Must Have Actual Knowledge of Intolerable Working Conditions

[b] Employer Took Steps to Correct the Allegedly Intolerable Working Conditions

§ 100.38 Opposing Contention That Wrongful Discharge Cause of Action Exists Absent Unequivocal Termination of Plaintiff's Employment--Plaintiff Was Not Constructively Discharged--Passage of Time Before Resignation Indicates That Conditions Not Sufficiently Intolerable to Cause Reasonable Person to Resign

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related California Employment Law References

[3] Discussion of Authorities

[a] Passage of Time Before Resignation Factor in Determining Whether Conditions Were Intolerable

§ 100.39 Opposing Contention That Cause of Action Exists Absent Unequivocal Termination of Plaintiff's Employment--No Express or Implied Agreement Limited Defendant's Right to Demote Plaintiff "At Will"

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related California Employment Law References

[3] Discussion of Authorities

[a] Presumption That Employee May Be Demoted At Will

§ 100.40 Opposing Contention That Cause of Action Exists--Change in Terms of Employment Does Not Constitute Breach of Employment At Will Contract, But Rather Termination and Offer of New Agreement

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related California Employment Law References

[e] Related Memoranda

[3] Discussion of Authorities

[a] Employment At Will Includes the Right to Impose Prospective Changes in Terms as a Condition of Continued Employment

§ 100.41 Supporting Contention That Tort Action Exists Due to Public Policy Violation--Discharge Violated Public Policy Established by Constitutional Provision, Statute, or Statutorily Authorized Administrative Regulations

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[d] Opposing Memoranda

[e] Related Pleading and Practice Forms

[f] Related California Employment Law References

[3] Discussion of Authorities

[a] Employer's Right to Terminate Employment Cannot Be Exercised in Violation of Public Policy

[b] Test for Public Policy Creating Protection Against Termination

[4] Additional Authorities

[a] Employer's Right to Terminate Employment Cannot Be Exercised in Violation of Public Policy

§ 100.42 Supporting Contention That Tort Action Exists Due to Public Policy Violation--Discharge Violated Statute That Limits Right to Discharge Plaintiff

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[d] Opposing Memoranda

[e] Related Pleading and Practice Forms

[f] Related California Employment Law References

[3] Discussion of Authorities

[a] Statutory Provision Precluding Discharge for Conduct Within Statute Can Be Basis of Common Law Wrongful-Discharge Action

[b] Prohibition Against Sexual Orientation Discrimination

[c] Prohibition Against Age Discrimination

[d] Prohibition Against Retaliation for Taking Family Care and Medical Leave

[e] Right to Report and Refuse to Participate in Illegal Activity

[f] Prohibition Against Retaliation for Opposing Practices Forbidden by Fair Employment and Housing Act

[g] Prohibition of Retaliation Against Physician for Advocating for Appropriate Health Care

[h] Prohibition Against Retaliation Based on Race

[i] Prohibition Against Retaliation for Filing Complaint Under Age Discrimination in Employment Act

[j] Prohibition Against Retaliation for Opposing Practice That Violates Title VII of Civil Rights Act

[4] Additional Authorities

[a] Statutory Provision Precluding Discharge for Conduct Within Statute Can Be Basis of Common Law Wrongful-Discharge Action

§ 100.43 Supporting Contention That Tort Action Exists Due to Public Policy Violation--Discharge Violated Constitutionally-Based Public Policy Regarding Discrimination

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[d] Opposing Memoranda

[e] Cause of Action Inapplicable to Independent Contractor

[f] Related Pleading and Practice Forms

[g] Related California Employment Law References

[3] Discussion of Authorities

[a] Employment Discrimination Prohibited by California Constitution

[b] Exhaustion of Administrative Remedies Not Required

[4] Additional Authorities

[a] Exhaustion of Administrative Remedies Not Required

§ 100.44 Supporting Contention That Tort Action Exists Due to Public Policy Violation--Discharge Based on Violation of Constitutional Rights Other Than Right to Nondiscriminatory Treatment

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[d] Opposing Memoranda

[e] Related Pleading and Practice Forms

[f] Related California Employment Law References

[3] Discussion of Authorities

[a] Discharge for Exercising (or Refusing to Waive) a Fundamental Constitutional Right Actionable as Against Public Policy

§ 100.45 Supporting Contention That Tort Action Exists Due to Public Policy Violation--Discharge Based on Employee's Protest of Unsafe Working Conditions

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[d] Opposing Memoranda

[e] Related Pleading and Practice Forms

[f] Related California Employment Law References

[3] Discussion of Authorities

[a] Discharge for Protest of Unsafe or Unhealthy Working Conditions Actionable as Against Public Policy

[b] Common-Law Action for Wrongful Discharge Not Precluded by California Occupational Safety and Health Act

[c] Actual Violation of OSHA Not Necessary

[d] Action Against Subsequent Employer

[4] Additional Authorities

[a] Discharge for Protest of Unsafe or Unhealthy Working Conditions Actionable as Against Public Policy

§ 100.46 Supporting Contention That Tort Action Exists Due to Public Policy Violation--Discharge Based on Employee's Refusal to Commit Unlawful Act

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[d] Opposing Memoranda

[e] Related Pleading and Practice Forms

[f] Related California Employment Law References

[3] Discussion of Authorities

[a] Termination for Refusal to Commit Unlawful Act Violates Public Policy

[4] Additional Authorities

[a] Termination for Refusal to Commit Unlawful Act Violates Public Policy

§ 100.47 Supporting Contention That Tort Action Exists Due to Violation of Public Policy--Discharge in Retaliation for Employee's Attempt to Rectify Employer's Public Policy Violation

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[d] Opposing Memoranda

[e] Related Pleading and Practice Forms

[f] Related California Employment Law References

[3] Discussion of Authorities

[a] Discharge for Seeking to Rectify Public Policy Violation

[b] Termination in Retaliation for Voicing Concerns About Legality or Morality of Conduct of Enterprise

[c] Termination for Reporting Coworkers' Illegal Activity

[d] Termination in Retaliation for Voicing Concerns About Legality or Morality of Conduct of Enterprise

[e] Termination for Reporting Employer's Hiring of Undocumented Aliens

§ 100.48 Supporting Contention That Tort Action Exists Due to Violation of Public Policy--Discharge in Retaliation for Employee's "Whistleblowing"

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[f] Related California Employment Law References

[3] Discussion of Authorities

[a] Discharge for Disclosure of Improper Governmental Activities

§ 100.49 Supporting Contention That Tort Action Exists Due to Violation of Public Policy--Discharge in Retaliation for In-House Counsel's Compliance With Mandatory Ethical Requirements--Cause of Action Can Be Maintained Without Violating Attorney-Client Confidences

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[d] Opposing Memoranda

[e] Related Pleading and Practice Forms

[f] Related California Employment Law References

[3] Discussion of Authorities

[a] Discharge of In-House Counsel for Following Mandatory Ethical Obligation

[b] Discharged In-House Counsel May Bring Wrongful Discharge Action if Attorney-Client Confidences Will Not Be Publicly Revealed

§ 100.50 Supporting Contention That Tort Action Exists Due to Violation of Public Policy--Discharge of Employee for Refusing to Sign Employment Agreement Containing Illegal Covenant Not to Compete

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[f] Related California Employment Law References

[3] Discussion of Authorities

[a] Discharge for Refusal to Sign Illegal Covenant Not to Compete

§ 100.51 Supporting Contention That Tort Action Exists Due to Violation of Public Policy--Discharge of Employee for Designating Attorney to Conduct Negotiations With Employer

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[f] Related California Employment Law References

[3] Discussion of Authorities

[a] Discharge for Designating Attorney to Negotiate With Employer

§ 100.51A Supporting Contention That Tort Action Exists Due to Violation of Public Policy--Employer May Not Retaliate Against Employee Who Makes Good-Faith but Mistaken Complaint or Claim

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Discharge of Employee for Making Good-Faith but Mistaken Complaint or Claim of Right Violates Public Policy

§ 100.52 Opposing Contention That Tort Action Exists Due to Public Policy Violation--Asserted Public Policy Not Delineated in Constitutional Provision, Statute, or Statutorily Authorized Administrative Regulations

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related California Employment Law References

[3] Discussion of Authorities

[a] Public Policy Must Be Delineated in Constitutional or Statutory Provision or in Statutorily Authorized Administrative Regulations

§ 100.53 Opposing Contention That Tort Action Exists Due to Public Policy Violation--Asserted Public Policy Does Not Inure to Benefit of Public at Large

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related California Employment Law References

[3] Discussion of Authorities

[a] Duty Underlying Public Policy Must Inure to Benefit of Public at Large

[b] Termination of Employee for Refusing Drug Test Is Not Violation of Public Policy

[c] Denial of Employee's Request to Work Part-Time Does Not Violate Public Policy

§ 100.54 Opposing Contention That Tort Action Exists Due to Public Policy Violation--Asserted Public Policy Is Inapplicable to Defendant

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related California Employment Law References

[3] Discussion of Authorities

[a] Inapplicable Constitutional or Statutory Policy Cannot Be "Fundamental"

§ 100.54A Opposing Contention That Tort Action Exists Due to Public Policy Violation--Alleged Discharge Because of Pregnancy--Defendant Was Unaware That Plaintiff Was Pregnant

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related California Employment Law References

[3] Discussion of Authorities

[a] Plaintiff Must Establish That Defendant Knew Plaintiff Was Member of Protected Class

§ 100.55 Opposing Contention That Tort Action Exists Due to Public Policy Violation--In-House Counsel's Wrongful Discharge Cause of Action Not Based on Explicit and Unequivocal Mandatory Ethical Requirement

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related California Employment Law References

[3] Discussion of Authorities

[a] Action Must Be Based on Explicit and Unequivocal Mandatory Ethical Obligations

[b] Action Must Be Based on Mandatory Ethical Requirement Intended to Benefit Public

§ 100.56 Opposing Contention That Tort Action Exists Due to Public Policy Violation--In-House Counsel's Wrongful Discharge Cause of Action Cannot Be Maintained Without Violating Attorney-Client Privilege

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related California Employment Law References

[3] Discussion of Authorities

[a] Wrongful Discharge Claim May Not Breach Attorney-Client Privilege

§ 100.57 Opposing Contention That Tort Action Exists Due to Public Policy Violation--Policy Relied on by Plaintiff Is Counterbalanced by Another Policy

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related California Employment Law References

[3] Discussion of Authorities

[a] Public Policy Will Not Support Wrongful Discharge Action If Counterbalanced by Other Public Policy

§ 100.58 Opposing Contention That Tort Action Exists Due to Public Policy Violation--No Fundamental Public Policy Against Discharge for Exercise of Constitutional or Statutory Right

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related California Employment Law References

[3] Discussion of Authorities

[a] Discharge of Employee for Exercising Constitutional or Statutory Right Is Not Actionable Unless Discharge Violates Clear Public Policy

§ 100.59 Opposing Contention That Tort Action Exists Due to Public Policy Violation--Failure to Exhaust Internal Grievance Procedure

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related California Employment Law References

[3] Discussion of Authorities

[a] Exhaustion of Internal Grievance Procedure Is Prerequisite to Tort Action

[4] Additional Authorities

[a] Exhaustion of Internal Grievance Procedure Is Prerequisite to Tort Action

§ 100.59A Opposing Contention That Tort Action Exists Due to Public Policy Violation--Employer Is Public Entity

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Action for Wrongful Discharge in Violation of Public Policy Is Unavailable Against Public Entity

§ 100.60 Opposing Contention That Plaintiff Was Discharged in Retaliation for "Whistleblowing"--Discharge Occurred for Legitimate, Independent Reasons

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

§ 100.61 Opposing Contention That Plaintiff Was Discharged in Retaliation for "Whistleblowing"--Failure to Exhaust Internal Grievance Procedure

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related California Employment Law References

[3] Discussion of Authorities

[a] Exhaustion of Internal Grievance Procedure Is Prerequisite to Retaliatory Discharge Action

§ 100.61A Opposing Contention That Plaintiff Was Discharged for "Whistleblowing"--Plaintiff's Conduct Did Not Amount to Protected "Whistleblowing"

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related California Employment Law References

[3] Discussion of Authorities

[a] Plaintiff Must Have Engaged in Protected Activity

§ 100.61B Opposing Contention That Tort Action Exists Due to Public Policy Violation--Physician Not Terminated for Advocating for Medically Appropriate Health Care

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memorandum

[3] Discussion of Authorities

[a] Physician May Be Terminated for Failure to Comply With Employer's Directives That Are Medically Appropriate

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[d] Related Memoranda

[e] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Fraud Cause of Action Not Precluded in Wrongful Discharge Action If Misrepresentation Was for Purpose Separate From Effecting Termination of Employment

[b] Action for Promissory Fraud

[c] Action for Fraud in Inducing Employment Not Barred by Workers' Compensation Exclusivity Rule

[4] Additional Authorities

[a] Fraud Cause of Action Not Precluded in Wrongful Discharge Action if Misreprentation Was for Purpose Separate From Effecting Termination of Employment

§ 100.63 Opposing Contention That Tort Cause of Action for Fraud Exists--Fraud Not Independent of Termination

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Misrepresentation in Course of Termination of Employment Does Not Support Cause of Action in Tort

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Exclusive Jurisdiction of National Labor Relations Board

[4] Additional Authorities

[a] Exclusive Jurisdiction of National Labor Relations Board

§ 100.65 Supporting Contention That Wrongful Discharge Cause of Action Is Preempted--Federal Labor Laws Preempt Action--Section 301 of Labor Management Relations Act Preempts State-Law Cause of Action [29 U.S.C. § 185(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Federal Preemption of State-Law Claim

[4] Additional Authorities

[a] Federal Preemption of State-Law Claim

§ 100.66 Supporting Contention That Wrongful Discharge Cause of Action Is Preempted--Federal Labor Laws Preempt Action--Labor-Management Reporting and Disclosure Act Preempts State-Law Claim Against Labor Organization

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Preemption by Labor-Management Reporting and Disclosure Act

§ 100.67 Supporting Contention That Wrongful Discharge Cause of Action Is Preempted--ERISA Preempts State-Law Claim--Claim Relates to Benefit Plan Regulated by ERISA [29 U.S.C. § 1001 et seq.]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] ERISA Preempts State Laws That Relate to Benefit Plans

[b] "Relates to" Defined

[4] Additional Authorities

[a] "Relates to" Defined

§ 100.68 Supporting Contention That Wrongful Discharge Cause of Action Is Preempted--ERISA Preempts State-Law Claim--ERISA Action Covers Same Misconduct Alleged in State-Law Action [29 U.S.C. § 1001 et seq.]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Preemption Based on ERISA Claims

[4] Additional Authorities

[a] Preemption Based on ERISA Claims

§ 100.69 Supporting Contention That Wrongful Discharge Cause of Action Is Preempted--Federal Preemption of State-Law Claim by National Bank Act [12 U.S.C. § 24]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Federal Preemption by National Bank Act

[4] Additional Authorities

[a] Federal Preemption by National Bank Act

§ 100.70 Supporting Contention That Wrongful Discharge Cause of Action Is Preempted--Action Preempted by Statute Providing Exclusive Remedy--Workers' Compensation Act Provides Exclusive Remedy for Injury Caused by Termination [Lab. Code §§ 3600, 3602]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Exclusive Remedy for Personal Injury Caused by Discharge

[4] Additional Authorities

[a] Exclusive Remedy for Injury Caused by Discharge

§ 100.71 Opposing Contention That Wrongful Discharge Cause of Action Is Preempted--Federal Labor Laws Do Not Preempt Action--Labor Management Relations Act Does Not Preempt Action--Action Based on Right Independent of Collective Bargaining Agreement [29 U.S.C. § 185(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] No Federal Preemption of Independent State--Law Claim

[4] Additional Authorities

[a] No Federal Preemption of Independent State-Law Claim

§ 100.72 Opposing Contention That Wrongful Discharge Cause of Action Is Preempted--Federal Labor Laws Do Not Preempt Action--National Labor Relations Act Does Not Preempt Action--Unrelated Causes of Action Not Preempted by National Labor Relations Act [29 U.S.C. § 151 et seq.]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Claims Unrelated to Unfair Labor Practices Not Preempted

§ 100.73 Opposing Contention That Wrongful Discharge Cause of Action Preempted--Federal Labor Laws Do Not Preempt Cause of Action--Action Based on Conduct Not Exclusively Regulated by National Labor Relations Act [29

U.S.C. § 151 et seq.]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] NLRA Does Not Exclusively Regulate All Areas Concerned With Labor Standards

§ 100.74 Opposing Contention That Wrongful Discharge Cause of Action Is Preempted--Federal Labor Laws Do Not Preempt Action--Labor Management Relations Act Does Not Preempt Action--Plaintiff Not Covered by Collective Bargaining Agreement Action [29 U.S.C. § 185(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Employee Not Covered by Labor Agreement

§ 100.75 Opposing Contention That Wrongful Discharge Cause of Action Preempted--ERISA Does Not Preempt Action--State-Law Claim Not Preempted by ERISA if Claim Only Tenuously Related to Administration of Benefit Plan

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] ERISA Preempts Only State Law That Covers the Same Subject or That Prevents an Interstate Benefit Plan From

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[b] ERISA Does Not Preempt State-Law Claim for Recovery of Lost Wages and Benefits as Consequence of Wrongful Discharge

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Allegations Independent of Benefit Plan Are Not Preempted

§ 100.77 Opposing Contention That Wrongful Discharge Cause of Action Is Preempted--Action Not Preempted by Statute Providing Exclusive Remedy--Workers' Compensation Act Does Not Provide Exclusive Remedy for Discharge in Violation of Public Policy

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Exception to Exclusive Remedy Provisions

[b] Workers' Compensation Remedy for Retaliatory Discharge Is Not Exclusive

[4] Additional Authorities

[a] Exception to Exclusive Remedy Provisions

§ 100.78 Opposing Contention That Wrongful Discharge Cause of Action Is Preempted--National Bank Act [12 U.S.C. § 24] Does Not Preempt FEHA Claims Not in Conflict With Federal Antidiscrimination Laws

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Preemption by National Bank Act Is Limited

§ 100.79 Opposing Contention That Wrongful Discharge Cause of Action Is Preempted--Labor-Management Reporting and Disclosure Act Does Not Preempt Wrongful Discharge Claims Based on Public Policy Against Discrimination

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[3] Discussion of Authorities

[a] Labor-Management Reporting and Disclosure Act Does Not Preempt Wrongful Discharge Claims Based on Public Policy Against Discrimination

§ 100.80 Supporting Contention That Wrongful Termination Cause of Action Is Barred by After-Acquired Evidence Justifying Termination

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[d] Related Pleading and Practice Forms

[e] Related California Employment Law References

[3] Discussion of Authorities

[a] After-Acquired Evidence Doctrine

[b] Misconduct Relating to Heart of Employment Relationship Bars Wrongful Termination Action

[c] After-Acquired Evidence Admissible to Support Employer's Originally Proffered Reason for Termination

§ 100.81 Opposing Contention That Wrongful Termination Cause of Action Is Barred by After-Acquired Evidence Justifying Termination

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related California Employment Law References

[3] Discussion of Authorities

[a] After-Acquired Evidence Does Not Defeat Wrongful Termination Action

[b] After-Acquired Evidence Does Not Bar or Limit Employee's Action Unless It Would Actually Have Resulted in Termination

[c] After-Acquired Evidence Pertaining to Plaintiff's Immigration Status Does Not Bar Wrongful Termination Action

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[3] Discussion of Authorities

[a] Employer Not Liable for Avoidable Consequences of Alleged Sexual Harassment

§ 100.83 Opposing Contention That Plaintiff Was Subjected to Hostile Environmental Sexual Harassment--Alleged Conduct Not Hostile or Abusive to Employees Because of Their Sex

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related California Employment Law References

[3] Discussion of Authorities

[a] Plaintiff Must Establish Sex-Based Harassment That Alters Conditions of Employment

Carolyn Rashby n*

FOOTNOTES:
(n10)Footnote *. Carolyn Rashby is an attorney and free-lance writer, specializing in labor and employment law.

California Points & Authorities

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 100 EMPLOYER AND EMPLOYEE: WRONGFUL TERMINATION AND DISCIPLINE
PART I. INTRODUCTION

10-100 California Points & Authorities § 100.01

AUTHOR: Carolyn Rashby

§ 100.01 Scope of Chapter

This chapter contains memoranda that may be submitted in actions asserting wrongful termination from employment. It also contains points and authorities pertaining to wrongful demotion and other discipline short of termination. It includes memoranda for use in supporting [*see §§ 100.20, 100.21*] and opposing [*see §§ 100.22, 100.23*] contentions regarding the applicability of the presumption of "at-will" employment; opposing a contention that failure to renew a fixed-term employment contract can be a wrongful discharge [*see § 100.24*]; supporting [*see §§ 100.27, 100.28*] and opposing [*see §§ 100.25, 100.26, 100.29, 100.30*] contentions that a cause of action can be stated because good cause to terminate the employment did not exist; supporting [*see §§ 100.31 -100.33*] and opposing [*see §§ 100.35 -100.38*] the contention that plaintiff was constructively discharged; supporting [*see § 100.34*] and opposing [*see § 100.39*] the contention that plaintiff was demoted in violation of an express or implied agreement to demote for cause only; opposing breach of at will contract because of change in terms and conditions [*see § 100.40*]; and supporting [see *§§ 100.41* -100.51A] and opposing [*see §§ 100.52 -100.61B*] the contention that the termination of plaintiff's employment violated public policy and therefore could be the basis of a tort cause of action. It also includes memoranda supporting [*see § 100.62*] and opposing [*see § 100.63*] the contention that a fraud cause of action exists against the employer, and memoranda supporting [*see §§ 100.64 -100.70*] and opposing [*see §§ 100.71 -100.79*] the contention that any wrongful termination cause of action is preempted by other law. This chapter also contains Memoranda supporting [*see § 100.80*] and opposing [*see § 100.81*] the contention that a wrongful termination action is barred by after-acquired evidence justifying the termination. Finally, this chapter includes a form for use in supporting a contention that the defendant is not liable for the avoidable consequences of workplace sexual harassment alleged by the plaintiff [*see § 100.82*], and a form for use in opposing a contention that the plaintiff was subjected to hostile environmental sexual harassment [*see § 100.83*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPleading & PracticeMotion PracticeSupporting MemorandaLabor & Employment LawDiscriminationHarassmentSexual HarassmentHostile Work

EnvironmentLabor & Employment LawWrongful TerminationGeneral OverviewLabor & Employment LawWrongful TerminationBreach of ContractGeneral Overview

California Points & Authorities

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 100 EMPLOYER AND EMPLOYEE: WRONGFUL TERMINATION AND DISCIPLINE
PART I. INTRODUCTION

10-100 California Points & Authorities § 100.02

AUTHOR: Carolyn Rashby

§ 100.02 Page Limits on Memoranda

Generally, a memorandum must not exceed 15 pages, or in the case of a motion for summary judgment or summary adjudication, 20 pages. A reply or closing memorandum may not exceed 10 pages [*Cal. Rules of Ct., Rule 3.1113(d)*]. Any party desiring to file a longer memorandum must obtain leave of court [*Cal. Rules of Ct., Rule 3.1113(e)*]. For further discussion of the page limitations under *Cal. Rules of Ct., Rule 3.1113,* and of other basic format requirements of memoranda,see Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureSummary JudgmentOppositionMemoranda in OppositionCivil ProcedureSummary JudgmentSupporting MaterialsMemoranda of LawGovernmentsCourtsRule Application & Interpretation

California Points & Authorities

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 100 EMPLOYER AND EMPLOYEE: WRONGFUL TERMINATION AND DISCIPLINE
PART I. INTRODUCTION

10-100 California Points & Authorities § 100.03

AUTHOR: Carolyn Rashby

§ 100.03 Related Pleading and Practice Chapters

For discussion and forms relating to wrongful termination of employment, see Ch. 249, *Employment Law: Termination and Discipline* , in California Forms of Pleading and Practice (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewLabor & Employment LawEmployment RelationshipsGeneral OverviewLabor & Employment LawWrongful TerminationGeneral Overview

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10-100 California Points & Authorities § 100.04

AUTHOR: Carolyn Rashby

§ 100.04 Related Points and Authorities Chapters

For discussion and forms relating to employer's liability for employee's torts, see Ch. 100A, *Employer and Employee: Respondeat Superior* .

For discussion and forms relating to workers' compensation, see Ch. 239, *Workers' Compensation Exclusive Remedies Doctrine* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsDuties & LiabilitiesNegligent Acts of AgentsLiability of PrincipalsTortsVicarious LiabilityEmployersGeneral OverviewWorkers' Compensation & SSDIRemedies Under Other LawsExclusivityGeneral Overview

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10-100 California Points & Authorities § 100.05

AUTHOR: Carolyn Rashby

§ 100.05 Related California Torts Chapters

For discussion relating to wrongful termination actions, see Levy, Golden & Sacks, California Torts, Ch. 40, Pt. E (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawWrongful TerminationGeneral OverviewLabor & Employment LawWrongful TerminationPublic PolicyTortsBusiness TortsBad Faith Breach of ContractGeneral Overview

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10-100 California Points & Authorities § 100.06

AUTHOR: Carolyn Rashby

§ 100.06 Related California Employment Law Chapters

For a discussion of California law regarding wrongful termination, see Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, Ch. 61, *Bringing and Defending Wrongful Termination Claims*, Ch. 62, *Avoiding Wrongful Termination and Discipline Claims*, and Ch. 63, *Cause of Action Related to Wrongful Termination* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployment RelationshipsGeneral OverviewLabor & Employment LawWrongful TerminationGeneral Overview

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10-100 California Points & Authorities §§ 100.07-100.19

AUTHOR: Carolyn Rashby

[Reserved]

§§ 100.07[Reserved]

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PART II. FORMS

10-100 California Points & Authorities § 100.20

AUTHOR: Carolyn Rashby

§ 100.20 Supporting Contention That Wrongful Discharge Cause of Action Exists--Employment Was Not "At Will"--Right to Terminate Limited by Express Agreement Between Parties

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

DEFENDANT DID NOT HAVE THE RIGHT TO TERMINATE PLAINTIFF'S EMPLOYMENT AT WILL, BECAUSE DEFENDANT'S RIGHT TO TERMINATE PLAINTIFF IS LIMITED BY AN EXPRESS AGREEMENT TO TERMINATE ONLY FOR "GOOD CAUSE."

Express "Good Cause" Agreement Rebuts "At-Will" Presumption. The *Labor Code Section 2922* presumption of "at-will" employment is rebuttable by evidence of an express agreement to terminate only for good cause (*Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 677, 254 Cal. Rptr. 211, 765 P.2d 373* ; *Drzewiecki v. H & R Block, Inc. (1972) 24 Cal. App. 3d 695, 704, 101 Cal. Rptr. 169*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a plaintiff's contention that the employment was not "at-will" because there was an express agreement limiting defendant's right to discharge plaintiff except for good cause.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the statutory at-will presumption does not apply because there is an agreement limiting discharge except for good cause, for example in a motion for summary judgment. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence (such as a written employment agreement or evidence of an employer's policies and practices) of an express agreement not to terminate except for good cause, and should argue that the agreement overcomes the presumption established by *Lab. Code § 2922* [*see Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 677, 254 Cal. Rptr. 211, 765 P.2d 373* ; *Drzewiecki v. H & R Block, Inc. (1972) 24 Cal. App. 3d 695, 704, 101 Cal. Rptr. 169]* . If the evidence of an express agreement is equivocal, or if it appears that defendant may be able to argue that there is a defense to the enforcement of any express agreement, counsel should also use the appropriate contentions from § 100.21 to argue that the at-will presumption is overcome by an implied agreement.

[c] Opposing Memoranda

In an appropriate case, the points and authorities *set out in § 100.22* may be used to oppose the contention supported by these points and authorities.

[d] Related Pleading and Practice Forms

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender). For discussion and forms relating to wrongful discharge, see Ch. 249, *Employment Law: Termination and Discipline* , in that publication.

[e] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 60, § 60.05* (Matthew Bender).

[3] Discussion of Authorities

[a] Express "Good Cause" Agreement Rebuts "At Will" Presumption

In ***Foley v. Interactive Data Corp.*** *(1988) 47 Cal. 3d 654, 254 Cal. Rptr. 211, 765 P.2d 373* , a discharged employee brought a wrongful discharge action against his former employer, alleging causes of action for tortious breach of public policy, tortious breach of the implied covenant of good faith and fair dealing, and breach of implied-in-fact contract. At the time of employment, plaintiff was required to sign a "Confidential and Proprietary Information Agreement" in which he promised not to engage in certain competition with defendant for one year after the termination of his employment for any reason. He also signed agreements to disclose to defendant all information and developments relating to computers for oneyear following termination, and to assign to defendant all rights to computer inventions for one year. There was no agreement stating any limitation on the grounds for which plaintiff's employment could be terminated. Plaintiff was given good evaluations and promoted regularly, and alleged that the officers of defendant corporation made repeated oral assurances of job security so long as his performance remained adequate. Plaintiff also alleged that during his employment, defendant maintained written "Termination Guidelines" that set forth express grounds for discharge and a mandatory seven-step pretermination procedure, which he alleged applied to him. He alleged that he reasonably believed, on the basis of representations contained in those guidelines, that he would not be discharged except for good cause, and that he therefore refrained from accepting or pursuing other job opportunities.

Almost seven years after being employed, plaintiff's supervisor was replaced by a man whom plaintiff discovered was under federal investigation for embezzlement from the supervisor's former employer, a financial institution. Plaintiff disclosed that information to an officer of the corporation, in a private conversation, because he was worried about working for that supervisor in light of his suspected criminal conduct. He asserted that he made the disclosure in the interest and for the benefit of his employer, allegedly because he believed that because defendant and its parent company did business with the financial community on a confidential basis, the company would have a legitimate interest in knowing about a high executive's alleged prior criminal conduct. The officer told plaintiff to "forget" what he

had heard about the supervisor's past. A few months later, the supervisor told plaintiff that defendant had decided to replace him for "performance reasons," first telling him that he could transfer to a position in another state, then making the transfer contingent on satisfactory performance under a "performance plan." Ultimately, the supervisor gave plaintiff the choice of resigning or being fired. The trial court sustained defendant's demurrer to all three causes of action without leave to amend, and dismissed the action. The court of appeal affirmed the dismissal of all three counts.

The Supreme Court affirmed with respect to the causes of action for tortious breach of public policy and tortious breach of the implied covenant of good faith and fair dealing, but reversed with respect to the cause of action for breach of an implied-in-fact contract, holding that the claim is not barred by the statute of frauds (*47 Cal. 3d 654, 700)* . In its most significant aspect, the decision clarified the law with regard to damages in wrongful discharge actions, holding that a plaintiff can recover available contract remedies for breach of the covenant of good faith and fair dealing, but may not recover tort damages (*47 Cal. 3d 654, 682-699)* .

Although the Court reaffirmed that a wrongful discharge cause of action may also be based on an implied-in-fact contract not to discharge except for "good cause," [citing *Pugh v. See's Candies, Inc. (1981) 116 Cal. App. 3d 311, 329, 171 Cal. Rptr. 917* , discussed in *§ 100.21[3][a]*], it recognized that an "at will" agreement is presumed if there is no express oral or written agreement specifying the length of employment or the ground for termination [*Lab. Code § 2922*] (*47 Cal. 3d 654, 675-677)* .

In ***Drzewiecki v. H & R. Block, Inc.*** *(1972) 24 Cal. App. 3d 695, 101 Cal. Rptr. 169* , the plaintiff was hired in 1959 by defendant as an income tax preparer. In April 1959, defendant and plaintiff executed an agreement entitled "Articles of Employment" that gave plaintiff the opportunity to manage a new company office that was yet to be opened in another city. The "Articles of Employment" stated that the agreement was for a period of two years and thereafter would automatically renew from year to year unless either party gave written notice of termination 90 days prior to the renewal date. The Articles also stated that the defendant could give notice of termination only if the plaintiff improperly conducted the business. The plaintiff moved his family and opened up the office. Several years later, the defendant terminated the agreement after the plaintiff had refused to sign a new agreement limiting his share of net profits. The trial court found that the agreement employed plaintiff for so long as he properly conducted business and that the agreement could not be terminated by the defendant except for good cause. Further, the trial court held that the defendant did not have good cause to terminate the agreement, and entered judgment for the plaintiff. The defendant appealed.

The court of appeal affirmed, holding that the general rule is that a contract for employment, whether or not it is based on some consideration other than the employee's services, cannot be terminated at the will of the employer if it contains an express or implied condition to the contrary. Finding that the agreement explicitly stated, inter alia, that the employer could give notice only if the plaintiff improperly conducted the business, the court concluded that if the contract had been terminable at the defendant's will, "these provisions, which were inserted in a contract prepared by [defendant's] own lawyer, were redundant and useless" (*24 Cal. App. 3d 695, 703-705)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureSummary JudgmentSupporting MaterialsMemoranda of LawLabor & Employment LawEmployment RelationshipsAt-Will EmploymentDuration of EmploymentLabor & Employment LawEmployment RelationshipsAt-Will EmploymentExceptionsExpress ContractsLabor & Employment LawWrongful TerminationBreach of ContractExpress Contracts

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10-100 California Points & Authorities § 100.21

AUTHOR: Carolyn Rashby

§ 100.21 Supporting Contention That Wrongful Discharge Cause of Action Exists--Employment Is Not "At Will"--Right to Terminate Limited by Implied Agreement Between the Parties

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

DEFENDANT DID NOT HAVE THE RIGHT TO TERMINATE PLAINTIFF'S EMPLOYMENT AT WILL, BECAUSE DEFENDANT'S RIGHT TO TERMINATE PLAINTIFF WAS LIMITED BY AN IMPLIED AGREEMENT TO TERMINATE ONLY FOR "GOOD CAUSE."

A. Implied Good Cause Agreement Rebuts "At-Will" Presumption. The presumption of "at-will" employment is rebuttable by evidence of an implied agreement to terminate only for good cause (*Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 677, 254 Cal. Rptr. 211, 765 P.2d 373* ; *Pugh v. See's Candies, Inc. (1981) 116 Cal. App. 3d 311, 324-325, 171 Cal. Rptr. 917* ; *see Lab. Code § 2922*).

[*Optional*] **B. Totality of Circumstances May Establish "Good Cause" Agreement.** The court may consider the totality of the parties' relationship to determine the existence of a "good cause" agreement. Thus, the acts and conduct of the parties, interpreted in light of the subject matter and of the surrounding circumstances, may show such an agreement (*Pugh v. See's Candies, Inc. (1981) 116 Cal. App. 3d 311, 329, 171 Cal. Rptr. 917* ; *see Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 681-682, 254 Cal. Rptr. 211, 765 P.2d 373*).

[*Optional*] **C. Parol Evidence Is Admissible to Show "Good Cause" Agreement if Written Agreement Is Not Integrated.** Parol evidence is admissible to show that a written agreement, which is not a complete and final expression of the parties' agreement because it lacks an integration clause and specific terms of employment, is reasonably susceptible to the interpretation that the parties agreed to a requirement that termination be based only on "good cause" (*McLain v. Great American Ins. Companies (1989) 208 Cal. App. 3d 1476, 1483-1486, 256 Cal. Rptr. 863*).

[*Optional*] **D. Employer's Breach of Written Personnel Policy May Support Cause of Action.** An allegation of breach of written guidelines, such as a personnel manual or policy, that imply self-imposed limitations on the power to discharge at will, may be sufficient to state a cause of action for breach of a "good cause" agreement (*Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 681-682, 254 Cal. Rptr. 211, 765 P.2d 373*).

[*Optional*] **E. Independent Consideration Not Required.** Separate consideration is not necessary to support a "good cause" agreement; an employee's promise to render services, or the actual rendition of services over time, can be sufficient consideration for an agreement to terminate for cause only (*Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 679-680, 254 Cal. Rptr. 211, 765 P.2d 373* ; *Pugh v. See's Candies, Inc. (1981) 116 Cal. App. 3d 311, 325-326, 171 Cal. Rptr. 917*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a plaintiff's contention that an implied agreement between the parties limited the defendant's right to terminate the plaintiff's employment at will, permitting discharge only for good cause [*see Pugh v. See's Candies, Inc. (1981) 116 Cal. App. 3d 311, 327, 171 Cal. Rptr. 917]* . Optional Paragraph B is for use if plaintiff wishes to contend that the existence of an implied "good-cause" contract, which is supported by the totality of the relationship. Optional Paragraph C may be used when a "good-cause" agreement was orally created and is not contradicted by a written agreement that is integrated and therefore precludes modification by parol evidence. Optional Paragraph D is for use if the employer has a written personnel policy, such as a manual, which limits its power to terminate "at will." The plaintiff may use Optional Paragraph E to counter an assertion that there was no independent consideration for any "good-cause" agreement.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that plaintiff's employment is not at will because there is an implied agreement not to terminate except for good cause, for example in a summary judgment motion. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel could discuss evidence which indicates that, although the employment relationship initially may have been at will, the parties impliedly altered it by a promise by defendant not to discharge plaintiff without good cause. Thus, counsel should specify the conduct of the parties that evidences the implied agreement, such as the personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged [*see Pugh v. See's Candies, Inc. (1981) 116 Cal. App. 3d 311, 327, 171 Cal. Rptr. 917]* .

[c] Opposing Memoranda

In an appropriate case, the points and authorities *set out in § 100.23* may be used to oppose the contention supported by these points and authorities.

[d] Related Pleading and Practice Forms

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender). For discussion and forms relating to wrongful discharge, see Ch. 249, *Employment Law: Termination and Discipline* , in that publication.

[e] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 60, §§ 60.05, 60.09[5]* (Matthew Bender).

[3] Discussion of Authorities

[a] Implied Good Cause Agreement Rebuts "At Will" Presumption

The facts and procedural background of ***Foley v. Interactive Data Corp.*** *(1988) 47 Cal. 3d 654, 254 Cal. Rptr. 211, 765 P.2d 373* , are discussed in *§ 100.20[3][a]*. In *Foley*, the California Supreme Court cited with approval *Pugh v. See's Candies, Inc. (1981) 116 Cal. App. 3d 311, 329, 171 Cal. Rptr. 917* , discussed *below*, which held that a jury could determine the existence of an implied promise that an employer would not arbitrarily terminate employment. The court noted that *Lab. Code § 2922* establishes a presumption of at will employment if the parties have made no express oral or written agreement specifying the length of employment or the grounds for termination. However, this presumption may be overcome by evidence that, even though the agreement does not specify the term of employment, the parties agreed that the employer's power to terminate would be limited in some way, for example, by a requirement that termination be based only on "good cause." Moreover, the absence of an express written or oral contract term concerning termination of employment does not necessarily indicate that the employment is actually intended by the parties to be "at will," because the presumption of at will employment may be overcome by evidence of contrary intent. Generally, to enforce the actual understanding of the parties to a contract, courts may inquire into the parties' conduct to determine if it demonstrates an implied contract. Thus, it is a question of fact whether the parties acted in such a manner as to provide the necessary foundation for an implied contract, and evidence may be introduced to rebut the inferences and show that there is another explanation for the conduct (*47 Cal. 3d 654, 677)* .

In ***Pugh v. See's Candies, Inc.*** *(1981) 116 Cal. App. 3d 311, 171 Cal. Rptr. 917* , an employee sued his former employer for wrongful discharge on grounds of breach of contract and the employer's violation of public policy. The plaintiff, who worked his way up the corporate ladder from dishwasher to vice-president, worked for the defendant for 32 years. When the plaintiff first went to work for the defendant in 1941, the defendant's president told him that if he was loyal to the company, his future was secure. In addition, the defendant had a practice of not terminating administrative personnel except for good cause. Nevertheless, in 1973, the defendant fired the plaintiff without giving him a reason and without notice or warning. The defendant never formally criticized the plaintiff's work and never complained about him at annual meetings. In fact, the defendant regularly promoted the plaintiff and congratulated him on his accomplishments and loyal service. Plaintiff alleged that the defendant fired him because he objected to a questionable agreement between the defendant and the union representing the defendant's employees. On conclusion of the plaintiff's case-in-chief, the trial court granted the defendants' motions for nonsuit. The plaintiff appealed.

The court of appeal reversed, holding that an employer may not dismiss an employee "at will" if the discharge is contrary to the terms of an express or implied agreement between the parties (*116 Cal. App. 3d 311, 322)* . The court noted that the law of employment relationships has undergone continuing evolution (*116 Cal. App. 3d 311, 319)* , and the employer's right to terminate employees is no longer absolute (*116 Cal. App. 3d 311, 321)* . An employer's right to terminate employment is limited in two situations: (1) when an employee's discharge violates fundamental principles of public policy; and (2) when the discharge is contrary to the terms of an express or implied agreement (*116 Cal. App. 3d 311, 322)* . With respect to the latter issue, the court stated that the presumption that an employment contract is intended to be terminable at will is subject, like any presumption, to contrary evidence, which may take the form of an express or implied agreement that the relationship will continue indefinitely, pending the occurrence of some event such as the employer's dissatisfaction with the employee's services or the existence of some "cause" for termination (*116 Cal. App. 3d 311, 324-325)* . The court held that such an agreement is no less enforceable because it places no equivalent limits on the power of the employee to quit the employment (*116 Cal. App. 3d 311, 325)* .

[b] Totality of Circumstances May Establish "Good Cause" Agreement

The facts and procedural background of ***Pugh v. See's Candies, Inc.*** *(1981) 116 Cal. App. 3d 311, 171 Cal. Rptr. 917* , are *discussed under§ 100.21[3][a]*. *Pugh* held that an employer may not fire an employee "at will" if there is an express or implied agreement that the employee may be fired only "for cause" (*116 Cal. App. 3d 311, 324-325)* . The court also held that in determining whether an implied-in-fact promise for some form of continued employment exists, courts have considered a variety of factors, including personnel policies or practices, longevity of service, actions or communications reflecting assurances of continued employment, and industry practices (*116 Cal. App. 3d 311, 327)* . In the instant case, there were facts in evidence from which the jury could determine the existence of such an implied promise: the duration of plaintiff's employment, the commendations and promotions he received, the apparent lack of any direct criticism of his work, the assurances he was given, and the employer's acknowledged policies (*116 Cal. App. 3d 311, 329)* . Although oblique language will not, standing alone, be sufficient to establish an agreement, it is appropriate to consider the totality of the parties' relationship. Agreement may be shown by the acts and conduct of the parties, interpreted in the light of the subject matter and of the surrounding circumstances (*116 Cal. App. 3d 311, 329)* .

[c] Parol Evidence Is Admissible to Show "Good-Cause" Agreement

In ***McLain v. Great American Ins. Companies*** *(1989) 208 Cal. App. 3d 1476, 256 Cal. Rptr. 863* , an employee signed a job application that stated that he could be terminated with or without cause, but that also stated that the terms of employment could be changed. After being discharged, the employee sued for wrongful termination and recovered a judgment in his favor. The employer appealed on the basis that the written application provided an at will employment.

The court of appeal affirmed the judgment for the employee. The court first determined that the employment application was not an integrated contract meant to embody the final agreement of the parties (*208 Cal. App. 3d 1476, 1484-1485)* . A standardized employment application, stating that employment could be "terminated with or without cause, and with or without notice, at any time," but which contained no integration clause, did not cover the employee's salary or position, and provided that the terms and conditions of employment could be changed at any time without cause or notice, was not an integrated document (i.e., a final and complete expression of the parties' agreement that precludes evidence of collateral agreements) (*208 Cal. App. 3d 1476, 1486)* . The court went on to state that even if the writing had been an integrated contract, parol evidence would have been admissible to prove a meaning to which the language of the instrument was reasonably susceptible. The court stated that the evidence introduced by the employee, which included language from the employer's personnel manual requiring cause for termination, supported the verdict for the employee (*208 Cal. App. 3d 1476, 1486-1487)* .

[d] Employer's Breach of Written Personnel Policy May Support Cause of Action

The facts and procedural background of ***Foley v. Interactive Data Corp.*** *(1988) 47 Cal. 3d 654, 254 Cal. Rptr. 211, 765 P.2d 373* , are discussed in *§ 100.20[3][a]*. In *Foley,* the Court relied on *Pugh v. See's Candies, Inc. (1981) 116 Cal. App. 3d 311, 171 Cal. Rptr. 917* , *discussed under § 100.21[3][b],* to hold that an allegation of breach of written "Termination Guidelines" implying self-imposed limitations on the employer's power to discharge "at will" may be sufficient to state a cause of action for breach of an employment contract.

[e] Independent Consideration Not Required

The facts and procedural background of ***Foley v. Interactive Data Corp.*** *(1988) 47 Cal. 3d 654, 254 Cal. Rptr. 211, 765 P.2d 373* , are discussed in *§ 100.20[3][a]*. In *Foley,* the Court agreed with *Pugh v. See's Candies, Inc. (1981) 116 Cal. App. 3d 311, 171 Cal. Rptr. 917* , discussed *below,* and under § 100.21[3][b], that a requirement of separate consideration as a substantive limitation on "good cause" employment agreements is contrary to the general contract principle that courts should not inquire into the adequacy of consideration (*47 Cal. 3d 654, 679)* . Thus, the California

Supreme Court rejected the defendant's contention that such an agreement should not be enforced without separate consideration (*47 Cal. 3d 654, 678)* . The Court noted that the defendant relied on limitations developed during a period when courts were reluctant to look beyond the parties' explicit promises, whereas courts now consider factors apart from consideration and express terms to ascertain the existence and content of employment agreements (*47 Cal. 3d 654, 680)* .

The facts and procedural background of ***Pugh v. See's Candies, Inc.*** *(1981) 116 Cal. App. 3d 311, 171 Cal. Rptr. 917* , are *discussed under § 100.21[3][b]. Pugh,* which held that an employer may not dismiss an employee "at will" if the discharge is contrary to the terms of an express or implied agreement between the parties (*116 Cal. App. 3d 311, 322)* , also rejected the notion that "independent consideration," i.e., consideration other than the services rendered, must support a "for cause" agreement. The court held that such a rule is contrary to general contract principles, and that there was "no analytical reason why an employee's promise to render services, or his [or her] actual rendition of services over time, may not support an employer's promise to refrain from arbitrary dismissal" (*116 Cal. App. 3d 311, 325-326)* . Rather, the "independent consideration" requirement serves an evidentiary function, in that it is more probable that the parties intended a continuing relationship, with limitations on the employer's dismissal authority, when the employee has provided some benefit to the employer, or suffers some detriment, beyond the usual rendition of service (*116 Cal. App. 3d 311, 326)* .

[4] Additional Authorities

[a] Implied Good Cause Agreement Rebuts "At Will" Presumption

In *Wilkerson v. Wells Fargo Bank (1989) 212 Cal. App. 3d 1217, 261 Cal. Rptr. 185* (disapproved on other grounds in *Cotran v. Rollins Hudig Hall International, Inc. (1998) 17 Cal. 4th 93, 96, 69 Cal. Rptr. 2d 900, 948 P.2d 412*), a bank officer was discharged for misconduct in authorizing an overdraft that personally benefited him. Plaintiff alleged that there was an implied-in-fact contract not to discharge except for good cause. The trial court granted summary judgment for the bank based on the bank's argument that an employee handbook and operations manual contained at-will employment provisions. The appellate court reversed that portion of the judgment, holding that the handbook provisions did not constitute an integrated contract and that therefore were not controlling. Instead, the provisions were only factors to be considered by a jury, along with the defendant's personnel policies and practices, in determining the existence and content of any employment agreement (*212 Cal. App. 3d 1217, 1226-1228)* .

[b] Totality of Circumstances May Establish "Good Cause" Agreement

In *Thomka v. Financial Corp. (1993) 15 Cal. App. 4th 877, 19 Cal. Rptr. 2d 382* , a former account executive brought an action against a savings and loan association alleging wrongful termination based on breach of an implied-in-fact contract not to terminate except for good cause. After a jury trial, the plaintiff accepted a remittur and judgment, and defendants appealed. The court of appeal affirmed, holding, inter alia, that the existence of the contract was supported by the circumstances of plaintiff's employment, including evidence at trial of express or implied promises of continued employment (*15 Cal. App. 4th 877, 881-885)* .

In *Walker v. Blue Cross of California (1992) 4 Cal. App. 4th 985, 6 Cal. Rptr. 2d 184* , plaintiff sued her former employer for wrongful termination based on breach of an implied-in-fact contract not to terminate her employment except for good cause. The trial court granted summary judgment in favor of the employer. The court of appeal reversed, holding that in view of the totality of circumstances surrounding plaintiff's employment, including her 19 1/2 years of service, her receipt of consistent promotions, salary and merit increases, and satisfactory evaluations, and the employer's personnel policies, there was a triable issue of material fact with respect to whether there was an implied agreement not to terminate except for good cause (*4 Cal. App. 4th 985, 993)* .

[c] Parol Evidence Is Admissible to Show "Good-Cause" Agreement if Written Agreement Is Not Integrated

In *Esbensen v. Userware Internat., Inc. (1992) 11 Cal. App. 4th 631, 14 Cal. Rptr. 2d 93* , plaintiff sued his former employer for wrongful termination. He had worked under a series of one-year employment contracts, and was terminated before the last one expired, allegedly for failing to timely return from a vacation. The contract provided that either party could terminate the agreement on two-weeks notice. The trial court found that the contract was an integrated one-year agreement, and prevented plaintiff from offering evidence of an unwritten but consistent oral agreement to terminate only for cause; the parties entered into a stipulated judgment based on that ruling. On appeal by plaintiff, the court of appeal reversed, holding that the contract was only partially integrated, in that it was silent with respect to acceptable grounds for termination; therefore, plaintiff could properly introduce parol evidence of related oral understandings to prove additional terms of the contract not inconsistent with the express language of the writing (*11 Cal. App. 4th 631, 636-640)* .

In *Aragon-Haas v. Family Security Ins. Services, Inc. (1991) 231 Cal. App. 3d 232, 282 Cal. Rptr. 233* , an employment contract provided that it would expire in one year and would automatically extend for six consecutive one-year terms. Under the contract, the defendant could terminate the plaintiff with or without cause during the first year, but it was unclear whether the defendant could do so after the first year. The defendant did not terminate the plaintiff during the first year, and in fact promoted her, praised her in reviews, gave her raises and bonuses, and never significantly criticized her performance. After the first year, the defendant sold the plaintiff three percent of its shares pursuant to a stock purchase and sale agreement. Shortly thereafter, without warning, or any stated justification or cause, the defendant terminated plaintiff's employment by letter. The plaintiff sued defendant for wrongful termination, alleging breach of contract, breach of the implied covenant of good faith and fair dealing, estoppel to terminate except for good cause, and fraud. The defendant demurred and the trial court sustained the demurrer. The plaintiff appealed, and the court of appeal reversed as to the breach of contract and implied covenant causes of action.

The court declared that even if the parties to a contract agree that it is an integrated agreement, extrinsic evidence is admissible to explain what the parties meant by the language they used (*231 Cal. App. 3d 232, 240)* . The court also held that the plaintiff was entitled to plead her own construction of the ambiguous employment contract, and a demurrer was improper to resolve the meaning of the contract against the plaintiff, so long as her construction was not clearly erroneous. The court explained that the contract was unclear whether the right to terminate "with or without cause" existed only during the first year or whether the right continued throughout the specified term of employment (i.e., throughout the subsequent six years). The court concluded that the contract was ambiguous and was reasonably susceptible to the plaintiff's interpretation that after successful completion of the first year, the defendant could not fire her without cause (*231 Cal. App. 3d 232, 239-240)* .

In *Harden v. Maybelline Sales Corp. (1991) 230 Cal. App. 3d 1550, 282 Cal. Rptr. 96* , a court of appeal declared that the parol evidence rule does not apply to a standardized preprinted employment application, because such an application is not a contract, but instead is a solicitation of an offer of employment. It is evidence concerning the ultimate agreement entered into by the parties, but is not an integrated agreement that cannot be modified by contemporaneous oral agreements (*230 Cal. App. 3d 1550, 1555)* . Therefore, if a plaintiff introduces evidence of a contemporaneous oral agreement that the employment could be terminated only for good cause, there is a triable issue of fact concerning the terms of his or her employment (*230 Cal. App. 3d 1550, 1556)* .

[d] Employer's Breach of Written Personnel Policy May Support Cause of Action

In *Prevost v. First Western Bank (1987) 193 Cal. App. 3d 1492, 239 Cal. Rptr. 161* , an employee under an oral employment contract brought a wrongful discharge action against his former employer, alleging that the stated grounds for his dismissal were pretextual, and that the true reason for discharge was his refusal to support the ultimately successful executive in a corporate power struggle. The trial court granted defendant's motion for summary judgment, based at least in part on defendant's argument that the statute of frauds applied. The court of appeal reversed, stating that the contract appeared to require cause to terminate, and holding that there was a triable issue of material fact regarding whether just cause was the basis for termination, or whether the termination was for a reason that defendants did not

believe constituted good cause under the contract (*193 Cal. App. 3d 1492, 1500-1501)* . The court based its discussion of the limits on defendant's right to terminate plaintiff on the policies and procedures regarding termination that were set forth in the employer's personnel policy manual (*193 Cal. App. 3d 1492, 1501)* .

In *Rulon-Miller v. International Business Machines Corp. (1984) 162 Cal. App. 3d 241, 208 Cal. Rptr. 524* , an employee sued her former employer based on allegations that she was discharged for engaging in a romantic relationship with an employee of defendant's competition, in contravention of defendant's written policy of respecting the private lives of its employees, although defendant stated the reason for discharge to be "conflict of interest." The court of appeal affirmed the trial court judgment for plaintiff for compensatory and punitive damages, holding, among other things, that the jury properly considered the question of whether defendant's overall policy, based partly on personnel guidelines, precluded the discharge absent good cause (*162 Cal. App. 3d 241, 247-251)* . Counsel should note that Rulon-Miller was disapproved by the *California Supreme Court in Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 700 n.42, 254 Cal. Rptr. 211, 765 P.2d 373* , to the extent that it permitted tort remedies for a breach of the implied covenant of good faith and fair dealing. However, the discussion of the permissible sources of an agreement to terminate only for cause should not be affected by the disapproval.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureSummary JudgmentSupporting MaterialsMemoranda of LawLabor & Employment LawEmployment RelationshipsAt-Will EmploymentEmployersLabor & Employment LawEmployment RelationshipsAt-Will EmploymentExceptionsImplied ContractsLabor & Employment LawWrongful TerminationBreach of ContractImplied Contracts

California Points & Authorities

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 100 EMPLOYER AND EMPLOYEE: WRONGFUL TERMINATION AND DISCIPLINE
PART II. FORMS

10-100 California Points & Authorities § 100.22

AUTHOR: Carolyn Rashby

§ 100.22 Opposing Contention That Wrongful Discharge Cause of Action Exists--Employment Was "At Will"--No Express or Implied Agreement Limited Defendant's Right to Discharge Plaintiff "At Will" [Lab. Code § 2922]

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF'S EMPLOYMENT FOR AN UNSPECIFIED TERM WAS AT WILL BECAUSE NO EXPRESS OR IMPLIED AGREEMENT LIMITED THE DEFENDANT'S RIGHT TO DISCHARGE PLAINTIFF AT WILL.

A. Employment for Unspecified Term Terminable At Will Absent Other Agreement. An employment, having no specified term, may be terminated at the will of either party on notice to the other, in the absence of some other agreement, either express or implied, between the parties. [Employment for a specified term means an employment for a period greater than one month] (*Lab. Code § 2922*; *Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 671-675, 254 Cal. Rptr. 211, 765 P.2d 373*).

[*Optional*] **B. Personnel "Guidelines" Do Not Indicate That Employment Was Not "At Will."** A personnel policy that is not mandatory, but merely sets forth guidelines for employee terminations, does not overcome the statutory presumption of at will employment (*Knights v. Hewlett Packard (1991) 230 Cal. App. 3d 775, 780, 281 Cal. Rptr. 295*).

[*Optional*] **C. Existence of Progressive Discipline Policy Does Not Negate "At Will" Presumption.** The mere existence of a progressive discipline policy neither proves nor disproves that the employment relationship was at will. (*Davis v. Consolidated Freightways (1994) 29 Cal. App. 4th 354, 367, 34 Cal. Rptr. 2d 438*).

[*Optional*] **D. Positive Performance Reviews, Commendations, SalaryIncreases, and Vague Assurances of Advancement in Company Do Not Negate "At Will" Presumption.** Such matters, by themselves, are insufficient to

support an inference that there was an implicit agreement to terminate the employee only for cause (*Guz v. Bechtel Nat., Inc. (2000) 24 Cal. 4th 317, 341-343* ; *Kovatch v. California Casualty Management Co. (1998) 65 Cal. App. 4th 1256, 1275-1276, 77 Cal. Rptr. 2d 217*).

[*Optional*] **E. Employer's Unilaterally Adopted "No-Layoff" Policy May be Unilaterally Discontinued.** A no-layoff policy, unilaterally adopted by the employer, may be unilaterally discontinued, so long as the employer does so after a reasonable time, on reasonable notice, and without interfering with employees' vested benefits. Once the policy is discontinued, the statutory at-will presumption is applicable (*Asmus v. Pacific Bell (2000) 23 Cal. 4th 1, 9-18, 96 Cal. Rptr. 2d 179, 999 P.2d 71*).

[*Optional*] **F. Contractual Provision for Performance Review After 12 Months Does Not Negate "At Will" Presumption.** A contractual provision that a performance review will be completed after 12 months' employment is not by itself sufficient to overcome the statutory presumption that the employment is at will (*Lenk v. Total-Western, Inc. (2001) 89 Cal. App. 4th 959, 969-970, 108 Cal. Rptr. 2d 34*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a plaintiff-employee's contention that employment cannot be terminated at will, if there is no allegation that there is an agreement, either express or implied, that limits the defendant-employer's right to terminate the plaintiff's employment at will. If the plaintiff contends that the defendant's personnel policies created an implied agreement limiting the defendant's right to discharge plaintiff, the defendant may use Optional Paragraph B if it can show that its personnel policy, although it sets forth guidelines for terminating employees, including termination for unacceptable performance, is not mandatory, and therefore does not establish a for cause agreement. Similarly, if the plaintiff relies on circumstances such as the defendant's progressive discipline policy, performance reviews, or discontinued no-layoff policy to rebut the statutory presumption that the employment was at will, Optional Paragraphs C--E may be used as appropriate. Because the at will presumption may be easily overcome by a plaintiff, in an appropriate case these points and authorities should be combined with points and authorities such as those *set out in § 100.29* contending that, even if the employment was not at will, defendant had good cause to terminate the plaintiff.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 100.21*.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that plaintiff's employment was at will, for example in a demurrer or motion for summary judgment. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show that the employment was an at will relationship based on an oral contract of employment, and that there was no agreement written or otherwise altering the employer's right to discharge at will. If the plaintiff relies on personnel policies to argue an implied agreement to terminate only for cause, counsel should argue that the personnel policies did not create an agreement because they were merely guidelines for termination. If the plaintiff relies on the defendant's discontinued no-layoff policy to rebut the at-will presumption, the argument should show that the employer discontinued the policy a reasonable time after adopting it, on reasonable notice, and without interfering with employees' vested benefits.

[c] Related Pleading and Practice Forms

For a general form of demurrer to a complaint based on the failure to state facts sufficient to constitute a cause of action, see *California Formsof Pleading and Practice, Ch. 206, Demurrers and Motions for Judgment on the Pleadings, § 206.122* (Matthew Bender). For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender). For discussion and forms relating to wrongful discharge, see California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline* (Matthew Bender).

[d] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 60, § 60.05* (Matthew Bender).

[3] Discussion of Authorities

[a] Employment for Unspecified Term Terminable At Will Absent Other Agreement

The facts and procedural background of ***Foley v. Interactive Data Corp.*** *(1988) 47 Cal. 3d 654, 254 Cal. Rptr. 211, 765 P.2d 373* , are discussed in *§ 100.20[3][a]*. Generally, *Foley* held (1) that in an action for wrongful discharge in violation of public policy, the policy must affect a duty to the public at large and not merely to a particular employee or employer, and, most significantly, (2) that an action for breach of the implied covenant of good faith and fair dealing does not afford tort remedies, but rather gives rise only to ordinary contract damages (*47 Cal. 3d 654, 682-699)* . Although the Court reaffirmed that a wrongful discharge cause of action may also be based on an implied-in-fact contract not to discharge except for "good cause" [*citing Pugh v. See's Candies, Inc. (1981) 116 Cal. App. 3d 311, 329, 171 Cal. Rptr. 917* , discussed in *§ 100.21[3][a]*] (*47 Cal. 3d 654, 675-676)* , it recognized that an "at will" agreement is presumed if there is no express oral or written agreement specifying the length of employment or the ground for termination [*Lab. Code § 2922*] (*47 Cal. 3d 654, 677)* .

[b] Personnel "Guidelines" Do Not Indicate That Employment Was Not "At Will"

In ***Knights v. Hewlett Packard*** *(1991) 230 Cal. App. 3d 775, 281 Cal. Rptr. 295* , an employee was injured on the job and went on medical leave. While he was on leave, the employee won a vacation and informed his defendant-employer that he could not return to work until after the vacation. When he did not return to work when he was supposed to, the defendant demanded that he return or be fired. When the employee then requested a personal leave because he was unhappy, the defendant offered him a further six weeks of leave with assurances that his job was safe if he returned on time. When his time was up, the employee requested an extension. The defendant told him that an extension was possible, but that he had to finalize his plans by a specified date. When the employee did not respond by that date, the defendant demanded that he contact the defendant within four days or be fired. The employee did not respond until seven days later, at which time the defendant told him he was fired. The employee sued for wrongful termination, alleging an implied contract requiring good cause for termination. The trial court granted the defendant's motion for summary judgment, finding that employment was "at will" and that good cause existed for the employee's discharge. The employee appealed.

The court of appeal affirmed, holding that the employee did not raise a triable issue as to whether the defendant promised only to terminate for good cause. The court disagreed with the employee that the defendant's personnel policies were a part of his employment contract, and that the defendant failed to comply with its own policies. The court noted that the policy stated that it was a "guide for supervisors involved with employment termination[,]" and therefore it was only a guideline (*230 Cal. App. 3d 775, 780)* . The court also held that sufficient cause existed if the policies were binding (*230 Cal. App. 3d 775, 780-781)* .

[c] Existence of Progressive Discipline Policy Does Not Negate "At Will" Presumption

In ***Davis v. Consolidated Freightways*** *(1994) 29 Cal. App. 4th 354, 34 Cal. Rptr. 2d 438* , an employee was terminated for theft after an investigation by management. The employee had worked for the defendant for ten years and had received regular merit increases and promotions. The employee sued for wrongful termination, alleging, among other things, breach of an implied contract not to terminate except for good cause. The defendant moved for summary judgment, which was granted.

The court of appeal affirmed, finding that the plaintiff could not raise a triable issue of fact as to whether he could overcome the presumption of at will employment. The court found that the existence of the defendant's progressive discipline policy proved "nothing regarding the existence or nonexistence of [the defendant's] at will employment policy" (*29 Cal. App. 4th 354, 367)* .

[d] Positive Performance Reviews, Commendations, Salary Increases, and Vague Assurances of Advancement in Company Do Not Negate "At Will" Presumption

In ***Guz v. Bechtel Nat., Inc.*** *(2000) 24 Cal. 4th 317* , a longtime employee was released at age 49 when his work unit was eliminated and its tasks transferred to another office of theemployer. The employee sued the employer, alleging among other things, an implied contract to be terminated only for good cause, based on his long and successful service with the employer. The employee argued that by retaining him for 20 years and by providing steady raises, promotions, commendations, and good performance reviews, the employer had engaged in actions reflecting assurances of continued employment. The California Supreme Court rejected this contention, holding that an employee's mere passage of time in the employer's service, even when marked with tangible indicia that the employer approves of the employee's work, cannot alone form an implied-in-fact contract to be terminated only for good cause. Absent other evidence of the employer's intent, the employee's longevity, raises, and promotions are their own rewards for continuing valued service; they do not, in and of themselves, additionally constitute a contractual guarantee of future employment security (*24 Cal. 4th 317, 341-343)* .

Kovatch v. California Casualty Management Co. *(1998) 65 Cal. App. 4th 1256, 77 Cal. Rptr. 2d 217* , concerned a plaintiff who was claiming wrongful termination. Among other things, he alleged that his termination constituted a breach of an implied contract of continued employment. As part of his employment application, the plaintiff had signed a section providing as follows: "In consideration of my employment, I agree to conform to the rules and regulations of CASUALTY MANAGEMENT CO., and my employment and compensation can be terminated, with or without cause, at any time, at the option of either the Company or myself. I understand that no representative of CASUALTY MANAGEMENT CO. other than the President of the Company, has any authority to enter into any agreement for employment for any specified period of time, or to make any agreement contrary to the foregoing." Later, the plaintiff signed a document entitled "Employment Agreement," which stated "CCMC has offered to employ [the plaintiff] subject to ... the terms and conditions ... set forth in the CCMC employee handbook and personnel manual. [The plaintiff] desires to accept such employment on the basis offered." The plaintiff also signed an acknowledgment of receipt of an employee handbook, which provided "[a]ny individual may voluntarily leave employment with California Casualty Management Co. upon proper notice, and may be terminated by California Casualty Management Co. at any time and for any reason." The employer moved for summary judgment, contending that these documents, plus the statutory presumption of at-will employment (*Lab. Code § 2922*), established that the plaintiff's employment could be terminated at will. In opposition to the motion, the plaintiff offered evidence that throughout his five years of employment with the employer, he had received positive performance reviews, commendations from his superiors, and salary increases. He also offered evidence of various statements made to him over the years by various supervisory employees in which they allegedly assured him he had a future with the company and undoubtedly would be promoted (*65 Cal. App. 4th 1256, 1262-1265)* .

The trial court granted the employer summary judgment on the plaintiff's breach-of-contract claim. The court of appeal affirmed, holding that the plaintiff's evidence of positive performance reviews, commendations, salary increases, and

vague assurances that he would be promoted was not sufficient to create a triable issue of fact as to whether the parties had implicitly agreed to limit the employer's right to terminate the plaintiff. The court noted that most of those factors are natural occurrences for an employee who remains with an employer for a substantial length of time (*65 Cal. App. 4th 1275-1276), 65 Cal. App. 4th 1256, 1276* .

[e] Employer's Unilaterally Adopted "No-Layoff" Policy May be Unilaterally Discontinued

In ***Asmus v. Pacific Bell*** *(2000) 23 Cal. 4th 1, 96 Cal. Rptr. 2d 179, 999 P.2d 71* , the employer issued a Management Employment Security Policy ("MESP") in 1986 that stated it was the employer's policy to "offer all management employees who continue to meet our changing business expectations employment security through reassignment to and retraining for other management positions, even if their present jobs are eliminated." The policy was to be maintained so long as no changes occurred that would materially affect the employer's business plan achievement. In 1990, the employer notified its managers that it might have to discontinue the MESP for business reasons. Almost two years later, the employer did terminate its MESP. In its place, the employer adopted a new layoff policy designed to decrease management through job reassignments and voluntary terminations and providing a generous severance package. Those employees who opted to retire under this policy would be given enhanced benefits. Those employees who opted to remain were given increased pension benefits, which were less than those given employees who opted to leave.

A group of employees who remained and were affected by the MESP cancellation, but who were given increased pension benefits, sued the employer in federal district court. The plaintiffs sought, among other things, damages for breach of contract. The district court granted the plaintiffs' summary judgment on the breach of contract claim, holding that the employer could not terminate the MESP without demonstrating that the condition specified in the MESP for allowing its termination occurred. Pursuant to the parties' agreement, on interlocutory appeal the Ninth Circuit certified the following question for the California Supreme Court to answer: "Once an employer's unilaterally adopted policy--which requires employees to be retained so long as a specified condition does not occur--has become a part of the employment contract, may the employer thereafter unilaterally terminate the policy, even though the specified condition has not occurred?" The California Supreme Court granted the certification request and answered the question in the affirmative.

The Supreme Court noted that an implied contract not to terminate or demote except for good cause rebuts the statutory presumption that employment is at will (*see Lab. Code § 2922*). Similarly, an employer may adopt a no-layoff policy that may become a part of a unilateral contract. The Court defined a unilateral contract as having only one promisor, who gives the promise in consideration of the promisee's act or forbearance, including the employee's continuing to work in response to the unilateral promise. The Court explained that in a unilateral contract of employment, the employer promises additional advantages to employees, and the offer is accepted if the employee continues in employment (*23 Cal. 4th 1, 9-10)* .

The Court next addressed how such a unilateral contract may be terminated. The Court looked to the rules of termination of unilateral contracts in other jurisdictions because California had no case on point. The Court stated that the majority of jurisdictions that have addressed the issue of whether and how an employer may terminate or modify a unilateral employment contract with no fixed duration period have held that the employer may terminate or modify such a contact after a reasonable time period if it provides employees with reasonable notice, and the modification does not interfere with vested employee benefits. The Court noted that only a minority of jurisdictions hold that employers cannot terminate or modify a unilateral employment contract without the employees' express knowledge and consent, and that continued employment is inadequate consideration for the change. The Court disagreed with this notion, finding that employers may be forced by economic reasons to shut down or curtail their operations, and when an employer chooses in good faith to modify or eliminate a policy as a business alternative to totally shutting down, the employer has shown forbearance that constitutes a benefit to the employees in the form of continuing employment under modified terms (*23 Cal. 4th 1, 11-14)* .

The court reiterated that the general rule governing the termination of unilateral contracts is that additional consideration is not necessary, so long as the employer provides reasonable notice of the change. The Court explained that the principle of mutuality of obligation does not apply to unilateral contracts. The continued employment by the employees constitutes the acceptance of the modification to a unilateral contract. The Court held that, here, when the employees' signed the acknowledgment of notice of the policy termination and continued to work, it constituted their acceptance of the change (*23 Cal. 4th 1, 14-15)* .

The Court next addressed the plaintiffs' argument that if the employer could unilaterally modify the MESP, it was an illusory contract. The Court made the distinction that if the words in the contract expressly give one party the sole and unfettered right to make changes, the promise is illusory, but if one party reserves the implied power to terminate or modify the contract, it is not illusory if the exercise of that right is subject to limitations, such as fairness and reasonable notice. The Court pointed out that as long as the MESP remained in effect, the employer was required to follow it, and it was fully enforceable until terminated or modified (*23 Cal. 4th 1, 15-16)* .

The Court also addressed the plaintiffs' argument that a contract specifying termination on the occurrence or nonoccurrence of a future happening, instead of on a specific date, is one of definite duration and cannot be terminated until that event occurs. The event at issue pertained to the language in the MESP stating that it would maintain the MESP so long as its business conditions did not substantially change. The Court pointed out that this condition did not refer to a specific, ascertainable event, but rather a series of changes that would lead to the need to terminate or modify the policy. The court therefore determined that the condition in the MESP did not restrict the employer's ability to terminate or modify it so long as it did so after a reasonable time, on reasonable notice, and in a manner that did not interfere with employees' vested benefits. Applying that standard, the Court found that those conditions were met. The policy remained in effect for six years, until the company determined that there was a business need to make the change. It then implemented a new program providing ample advance notice of the termination and corresponding benefits for a two-year period, and it did not interfere with the employees' vested benefits. In addition, the employees accepted the policy by continuing to work for the employer (*23 Cal. 4th 1, 16-18)* .

[f] Contractual Provision for Performance Review After 12 Months Does Not Negate "At Will" Presumption

In ***Lenk v. Total-Western, Inc.*** *(2001) 89 Cal. App. 4th 959, 108 Cal. Rptr. 2d 34* , the plaintiff was discharged after six months of employment. The plaintiff sued for breach of his employment contract, contending that the contract contemplated a minimum one-year term of employment. The plaintiff's written employment contract did not state that the employment was for any specific term. However, the plaintiff argued that a minimum one-year term was necessarily implied because the contract included a provision that a performance review would be conducted "after twelve (12) months employment." The court of appeal vacated a judgment in favor of the plaintiff on his breach-of-contract claim. The court held as a matter of law that the contractual provision for a performance review after 12 months' employment was not sufficient to overcome the statutory presumption of at-will employment (*see Lab. Code § 2922*), especially since the plaintiff had signed an employment application confirming that the employment would be at will and had acknowledged receipt of an employee manual with an express at-will provision (*89 Cal. App. 4th 959, 969-970)* .

[4] Additional Authorities

[a] Employment for Unspecified Term Terminable At Will Absent Other Agreement

In *Miller v. Pepsi-Cola Bottling Co. (1989) 210 Cal. App. 3d 1554, 259 Cal. Rptr. 56* , the court held as a matter of law that there was no enforceable contract to terminate the plaintiff, a salesman, for good cause only. It was uncontroverted that the employer had no established policies governing termination of sales personnel, and plaintiff received no oral assurances of job security (*210 Cal. App. 3d 1554, 1558-1559)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedureSummary JudgmentOppositionMemoranda in OppositionLabor & Employment LawEmployment RelationshipsAt-Will EmploymentDuration of EmploymentLabor & Employment LawWrongful TerminationBreach of ContractExpress ContractsLabor & Employment LawWrongful TerminationBreach of ContractImplied Contracts

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 100 EMPLOYER AND EMPLOYEE: WRONGFUL TERMINATION AND DISCIPLINE
PART II. FORMS

10-100 California Points & Authorities § 100.23

AUTHOR: Carolyn Rashby

§ 100.23 Opposing Contention That Wrongful Discharge Cause of Action Exists--Employment Was "At Will"--Parties' Agreement Retaining Right to Discharge "At Will" Is Integrated, Precluding Oral or Implied Modification

[1] FORM

[*The following may be included in a memorandum supporting or opposing a motion, or in a trial or appellate brief.*]

PLAINTIFF'S EMPLOYMENT WAS TERMINABLE "AT WILL" BECAUSE THE PARTIES' AGREEMENT EXPRESSLY RETAINED DEFENDANT'S RIGHT TO TERMINATE THE EMPLOYMENT AT WILL [AND BECAUSE THE "AT WILL" AGREEMENT WAS EXPRESS AND INTEGRATED, IT CANNOT BE MODIFIED OR LIMITED BY EVIDENCE OF AN ORAL OR IMPLIED-IN-FACT AGREEMENT THAT THE PLAINTIFF'S EMPLOYMENT COULD BE TERMINATED ONLY FOR GOOD CAUSE].

A. Agreement Expressly Retains Right to Terminate "At Will." If the employment contract expressly states that the employment is "at will" and terminable "at any time," it unambiguously creates an at-will employment relationship, even if it does not also state that termination can be without cause (*Dore v. Arnold Worldwide, Inc. (2006) 39 Cal. 4th 384, 389-393, 46 Cal. Rptr. 3d 668*). Similarly, if the employment contract expressly reserves the employer's right to discharge the employee at any time for any reason, with or without cause, the employment is "at will" (*Shapiro v. Wells Fargo Realty Advisors (1984) 152 Cal. App. 3d 467, 474-475, 199 Cal. Rptr. 613*).

[*Optional*] **B. Implied Contract Contradicted by Express Agreement.** An employee cannot reasonably rely on any implied promise of continued employment that contradicts express provisions of an agreement signed by the employee (*Dore v. Arnold Worldwide, Inc. (2006) 39 Cal. 4th 384, 393-394* ; *Agosta v. Astor (2004) 120 Cal. App. 4th 596, 603-605, 15 Cal. Rptr. 3d 565* ; *Starzynski v. Capital Pub. Radio, Inc. (2001) 88 Cal. App. 4th 33, 37-39, 105 Cal. Rptr. 2d 525* ; *Shapiro v. Wells Fargo Realty Advisors (1984) 152 Cal. App. 3d 467, 482, 199 Cal. Rptr. 613* ; *Tollefson v. Roman Catholic Bishop (1990) 219 Cal. App. 3d 843, 855, 268 Cal. Rptr. 550*).

[*Optional*] **C. Integrated "At Will" Employment Application Precludes Parol Evidence.** An application [and employment agreement] providing that employment is "at will" and constituting an integration, i.e., the final expression of the parties' agreement with respect to grounds for termination, may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement (*Haggard v. Kimberly Quality Care Inc. (1995) 39 Cal. App. 4th 508, 521, 46 Cal. Rptr. 2d 16* ; *Slivinsky v. Watkins-Johnson Co. (1990) 221 Cal. App. 3d 799, 804-805, 270 Cal. Rptr. 585* ; *see Code Civ. Proc. § 1856(a)*).

[*Optional*] **D. Personnel Policy May Not Contradict Express "At Will" Agreement.** An employee may not use a personnel policy to establish an implied-in-fact "good cause" contract if the original employment agreement clearly defines the relationship as employment "at will" (*DeHorney v. Bank of America Nat. Trust and Sav. (9th Cir. 1989) 879 F.2d 459, 466)* .

[*Optional*] **E. Contractual Right to Review of Termination Decision Does Not Change Nature of "At Will" Employment.** A contractual provision that gives an employee the right to request management review of the employee's termination does not change an at-will employment relationship into one that can be terminated only for cause (*Bernard v. State Farm Mut. Auto. Ins. Co. (2007) 158 Cal. App. 4th 304, 310-311, 69 Cal. Rptr. 3d 700*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a plaintiff-employee's contention that his or her employment could not be terminated at will pursuant to an agreement limiting the employer's right to terminate, based on the argument that the parties had an agreement that expressly retained the employer's right to terminate the employment at will [*Shapiro v. Wells Fargo Realty Advisors (1984) 152 Cal. App. 3d 467, 482, 199 Cal. Rptr. 613]* . Optional Paragraph B may be used to oppose the contention that employment cannot be terminated at will because there is an implied agreement that limits the defendant-employer's right to terminate the plaintiff's employment at will, where the defendant can show that an implied promise not to discharge except for good cause is contradicted by a valid express "at will" agreement. Optional Paragraph C may be used to preclude evidence of an oral agreement if the plaintiff signed an integrated employment application that states the employment relationship was "at will," based on the argument that the application is part of the employment contract, and an express "at will" agreement in that contract controls. The defendant may use Optional Paragraph D to oppose plaintiff's contention that the employer has a written personnel policy, such as a manual, that limits its power to terminate "at will," based on the argument that the express at will agreement controls. If plaintiff contends that the employment agreement contained a "good-cause" limit on defendant's right to terminate plaintiff, this form may be combined with a memorandum, such as that in § 100.29, asserting that the termination did not breach the employment agreement because good cause for discharge existed.

This form may be combined with a memorandum pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that an implied promise not to discharge except for good cause is effectively contradicted by a valid express "at will" agreement, for example in a motion for summary judgment. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the evidence of an express agreement that the employment is "at will," in addition to evidence of the integrated nature of the agreement. The argument should refer specifically to the contract language showing an intent that the contract be the entire agreement between the parties.

[c] Related Pleading and Practice Forms

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender). For discussion and forms relating to wrongful discharge, see Ch. 249, *Employment Law: Termination and Discipline* , in that publication.

[d] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 60, §§ 60.05, 60.09[3]* (Matthew Bender).

[3] Discussion of Authorities

[a] Agreement Expressly Retains Right to Terminate "At Will"

In ***Dore v. Arnold Worldwide, Inc.*** *(2006) 39 Cal. 4th 384, 46 Cal. Rptr. 3d 668* , the plaintiff's employment agreement provided "[y]ou will have a 90 day assessment with your supervisor at which time you will receive initial performance feedback. This assessment will also be the time that you will work with your supervisor to set objectives against which you will be evaluated at the time of your annual review." The agreement further stated that "your employment with [the employer] is at will. This simply means that [the employer] has the right to terminate your employment at any time just as you have the right to terminate your employment ... at any time" (*39 Cal. 4th 384, 388)* . After the employer terminated the plaintiff, he sued, asserting breach of contract, fraud, and other claims. The defendant contended that the employment agreement was terminable at will. The plaintiff contended that, even though the agreement stated that the employment was at will, it did not unequivocally create an at-will relationship because it did not expressly state that the employment could be terminated without cause. As a result, the plaintiff argued, the provisions for performance reviews and aspects of the employer's conduct and oral representations created an implied contract not to terminate the employment except for cause. The trial court granted summary judgment for the employer, and the California Supreme Court agreed. The Court held that an employment contract stating that the employment is "at will" and terminable "at any time" unambiguously creates an at-will employment relationship, even if it does not also state that termination can be without cause. Because there is no ambiguity about the at-will nature of the employment, additional provisions in that contract regarding a probationary period and annual reviews ordinarily will not expressly or impliedly create a right to be terminated only for cause (*39 Cal. 4th 384, 389-393)* .

The facts and procedural background of ***Shapiro v. Wells Fargo Realty Advisors*** *(1984) 152 Cal. App. 3d 467, 199 Cal. Rptr. 613* , are *discussed under § 100.23[3][b]*. *Shapiro* held that the implied contract alleged by plaintiff was contradicted by a valid express contract. The contract, which expressly reserved defendant's right to "discharge [plaintiff] at any time for any reason whatsoever, with or without good cause," defined plaintiff's position as an "at will" employee (*152 Cal. App. 3d 467, 474-475, 482)* .

[b] Implied Contract Contradicted by Express Agreement

The background of ***Dore v. Arnold Worldwide, Inc.*** *(2006) 39 Cal. 4th 384, 46 Cal. Rptr. 3d 668* , are *discussed under § 100.23[3][a]*. In that case, the California Supreme Court found that the parties' contract unambiguously created an at-will employment relationship. Based on that finding, the Court went on to hold that the plaintiff could not maintain an action for fraudulent inducement of an employment contract on the basis of an alleged false representation regarding the duration of employment. The Court explained that when there is an unambiguous at-will employment relationship, the employee will be unable to show justifiable reliance on an alleged false representation about the duration of employment (*39 Cal. 4th 384, 393-394)* .

In ***Agosta v. Astor*** *(2004) 120 Cal. App. 4th 596, 15 Cal. Rptr. 3d 565* , the plaintiff signed a document entitled "Compensation Plan." The document outlined the plaintiff's compensation for proposed employment and included the following language: "Company is an 'at will' employer, and either party may terminate employment upon notice to the other party or at a mutually agreed upon departure date."

After the employer terminated the plaintiff's employment, the plaintiff sued the employer for intentional misrepresentation, negligent misrepresentation, fraudulent inducement of employment contract, breach of the implied covenant of good faith and fair dealing, and defamation. The trial court denied summary adjudication as to the defamation cause of action, but granted it as to the other causes of action on the ground the Compensation Plan unambiguously provided that the plaintiff's employment was terminable at will, and thus he could not have justifiably relied on the defendants' representations of long-term employment. The plaintiff then voluntarily dismissed the defamation claim and appealed the ensuing judgment on the other causes of action.

The court of appeal reversed the trial court's judgment on the misrepresentation and fraudulent inducement claims. However, the court affirmed the summary disposition of the cause of action for breach of the implied covenant of good faith and fair dealing, relying on the established principle that a breach of the implied covenant cannot logically be based on a claim that the discharge of an at-will employee was made without good cause (*120 Cal. App. 4th 596, 607-608)* . In holding that the plaintiff was indeed an at-will employee, the court of appeal held that an at-will provision in an express written agreement, signed by an employee, cannot be overcome by proof of an implied contrary understanding. The court explained that there cannot be a validexpress contract and an implied contract, each embracing the same subject, but requiring different results. Thus, the express term is controlling even if it is not contained in an integrated employment contract (*120 Cal. App. 4th 596, 604)* .

The court of appeal rejected a contention that the "at-will" provision in this case was ineffective because it did not include a warning that the employer could fire the plaintiff without good cause. The court pointed out that, by definition, an express at-will contract allows an employer to sever the employment relationship with or without cause (*120 Cal. App. 4th 596, 604)* .

The court of appeal also rejected a contention that the "at-will" provision in this case was inapplicable because the Compensation Plan failed to indicate that it was a "contract" or that it did anything other than set forth compensation guidelines. The court explained that to be enforceable, a written agreement need not be entitled "contract" (*120 Cal. App. 4th 596, 604-605)* .

Further, the court of appeal rejected an assertion the Compensation Plan was ambiguous because it did not indicate whether the plaintiff would be considered an "at-will" employee. The court found that the statement "Company is an 'at will' employer" meant that the company's employees were necessarily employed at-will. Moreover, the contract stated that "either party may terminate employment upon notice to the other party" (*120 Cal. App. 4th 596, 605)* .

In ***Starzynski v. Capital Pub. Radio, Inc.*** *(2001) 88 Cal. App. 4th 33, 105 Cal. Rptr. 2d 525* , the plaintiff signed an employment agreement that expressly stated, "I understand and agree that my employment is AT-WILL and that either [the employer] or I may terminate the employment relationship at any time, with or without cause or advance notice. I understand further that only the Board of Directors, by affirmative action, has the authority to change or make any agreement contrary to this at-will employment relationship." Three days later, the plaintiff's supervisor orally advised the plaintiff that, notwithstanding the written agreement, the plaintiff's employment would not be terminated as long as his performance was satisfactory. Six years later, the plaintiff resigned and sued the employer for wrongful discharge. The plaintiff claimed that he had been constructively discharged in violation of an implied contract not to terminate him so long as his performance was satisfactory. The trial court granted summary judgment in favor of the employer.

The court of appeal affirmed. The court stated that, although the statutory presumption of at-will employment [*Lab. Code § 2922*] may be overcome by an implied agreement, the parties cannot have a valid express contract and a valid implied contract that contradict each other. The express term is controlling even if it is not contained in an integrated contract. In this case, the written agreement clearly and unambiguously stated that the employment was at will and that only the employer's board of directors, by "affirmative action," could change the at-will nature of the employment. Therefore, the plaintiff's supervisor's assurances could not create an implied agreement in the face of the written

provision directly addressing that issue. This result was not changed by the fact that the supervisor's oral assurance was made subsequent to the signing of the written agreement. The supervisor's assurance could not serve as a modification of the contract, because the written agreement expressly limited the manner in which modifications could be made, and there was no evidence that the supervisor's oral statement constituted the "affirmative action" of the employer's board of directors (*88 Cal. App. 4th 33, 37-39)* .

In ***Shapiro v. Wells Fargo Realty Advisors*** *(1984) 152 Cal. App. 3d 467, 199 Cal. Rptr. 613* , a discharged employee filed an action for wrongful discharge, alleging, among other things, that he was advised orally by his supervisors, and in writing through benefit brochures, that he would have an opportunity to achieve the maximum level of base pay, and that he would not be terminated without good cause. Defendant filed a demurrer, motion to strike, and request for judicial notice of a stock-option agreement that defendant and plaintiff signed. The agreement stated that nothing in it conferred on plaintiff any right to continue in defendant's employ or interfere with the rights expressly reserved by defendant to discharge plaintiff for any reason, with or without cause. The trial court sustained the demurrer without leave to amend, and dismissed the action. Plaintiff appealed.

The court of appeal affirmed the dismissal of all counts, holding that the alleged implied contract was contradicted by a valid express contract, which rendered the relationship "at will" (*152 Cal. App. 3d 467, 482)* . Although mindful that *Pugh v. See's Candies, Inc. (1981) 116 Cal. App. 3d 311, 329, 171 Cal. Rptr. 917* (discussed in *§ 100.21[3][a]*), held that "[a] contract for permanent employment, whether or not it is based on some consideration other than the employee's services, cannot be terminated at the will of the employer if it contains an express or implied condition to the contrary," the court rejected plaintiff's contention that in order to determine if there was an implied promise to discharge only "for cause," the factors presented in *Pugh* must be considered only by the trier of fact in all cases, with the court not allowed to determine the issue as a matter of law (*152 Cal. App. 3d 467, 480)* . The court distinguished *Pugh*, because in that case, there was no contract that expressly defined the employment relationship. In the instant case, the stock option agreement, signed by plaintiff, stated that it did not confer a right to continued employment on plaintiff, and did not limit the employer's right to discharge him at any time for any reason, with or without good cause. Therefore, the agreement defined the relationship as "at will." Since there cannot be a valid express contract and an implied contract, each embracing the same subject, but requiring different results, plaintiff was unable as a matter of law to rebut the presumption of his at will status (*152 Cal. App. 3d 467, 482)* .

In ***Tollefson v. Roman Catholic Bishop*** *(1990) 219 Cal. App. 3d 843, 853-857, 268 Cal. Rptr. 550* , Maria Tollefson was employed for five years as an assistant principal in a Catholic school run by the Diocese. She was employed under a series of one-year contracts which specifically stated no requirement for renewal. In 1985, she did not receive a new contract and sued, stating that there was an implied in fact or implied promise to renew her contract in the absence of good cause and that the Diocese had a duty to apply an "objective standard" to determine whether her contract would be renewed (*219 Cal. App. 3d 843, 854)* .

On review of a motion for summary judgment brought and won by the defendants, the court reviewed the sufficiency of the evidence presented by Ms. Tollefson and determined that proof of the professional nature of her position, her length of service(she had worked for the Diocese as a teacher for over 7 years prior to becoming an administrator), her prior contract renewals, the Diocese's failure to evaluate her performance as an administrator, the lack of negative evaluations, and the custom and practice of retaining administrators in their positions so long as they perform satisfactorily did not constitute proof establishing an implied contract to employ Ms. Tollefson indefinitely, in light of the existence of the express one year contract (*219 Cal. App. 3d 843, 855)* . Citing well established precedent that there cannot be both a valid express contract and an implied one "each embracing the identical subject but requiring different results and treatment" (*219 Cal. App. 3d 843, 855)* the court found that her evidence could not change her express one year contract into one that was indefinite.

The court further stated that "lengthy service combined with promotions and salary increases are natural occurrences for an employee who remains with an employer for a substantial length of time and do not evince or create" an implied

contract for permanent employment, terminable only for cause (*219 Cal. App. 3d 843, 856)* .

[c] Integrated "At Will" Employment Application Precludes Parol Evidence

In ***Haggard v. Kimberly Quality Care Inc.*** *(1995) 39 Cal. App. 4th 508, 46 Cal. Rptr. 2d 16* , the court held that an at will clause in a confidentiality agreement constituted a fully integrated agreement with respect to the subject of termination so that parol evidence was precluded (*39 Cal. App. 4th 508, 521)* . Cynthia Haggard was hired as a field staff supervisor by Quality Care, in 1986; a year later she was promoted to the position of branch manager. In 1988, Quality Care merged with Kimberly to form Kimberly Quality Care (KQC). KQC provided Haggard with an "Employment and Confidentiality Agreement" in 1989, which she signed. This agreement contained an at will provision and an integration clause. Plaintiff testified that she read the agreement before signing it and was reluctant to sign it, but understood that her future employment with KQC depended on her signing it (*39 Cal. App. 4th 508, 514)* . In 1991, Haggard was given an employee handbook and signed an acknowledgment of receipt which reiterated that her employment was at will (*39 Cal. App. 4th 508, 515)* . When Haggard was fired six weeks after signing the acknowledgment she filed suit alleging wrongful termination and disability discrimination (she had been diagnosed with multiple sclerosis in 1990), among other things. Her claims for breach of implied contract terminable only for cause and disability discrimination survived pretrial motions and were tried to a jury (*39 Cal. App. 4th 508, 515)* , which ruled in her favor and awarded her $250,000 (*39 Cal. App. 4th 508, 516)* .

During deliberation, the jury had asked several questions regarding the interaction of implied and express contracts and the meaning of "integration." KQC appealed the verdict on the ground that the trial court should have ruled, as a matter of law, that an integrated express contract barred Haggard's breach of implied contract claim (*39 Cal. App. 4th 508, 516)* . The court of appeal reversed the judgment on the implied in fact contract on the ground that, since the 1989 agreement was an express integrated agreement with respect to the term of her contract, evidence of prior and contemporaneous oral agreements should not have been allowed. The court further found that language in the 1990 employee handbook regarding progressive discipline, KQC's reservation of the right to change the policies at any time, the fact that the 1989 agreement was not an employment agreement, and the suggestion that employees give two weeks written notice did not modify the earlier agreement (*39 Cal. App. 4th 508, 522-524)* . Accordingly, the appellate court found that there was insufficient evidence to find in favor of the plaintiff and reversed the judgment with respect to the breach of implied contract claim (*39 Cal. App. 4th 508, 524)* .

Slivinsky v. Watkins-Johnson Co. *(1990) 221 Cal. App. 3d 799, 270 Cal. Rptr. 585* , involved a plaintiff employee who was terminated as a result of a reduction in force. When plaintiff initially applied for her position, the employment application provided that employment was conditioned on the execution of an employment agreement, and stated that there was "no agreement, express or implied ... for any specific period of employment, nor for continuing or long term employment." When the plaintiff accepted the defendant's offer of employment and reported for work, she signed an employment agreement setting forth the same language and stating that the "[e]mployee and the [defendant] each have a right to terminate employment, with or without cause." After she was fired, the plaintiff sued, alleging, among other things, breach of contract and breach of the implied covenant of good faith and fair dealing. The plaintiff contended that the defendant breached the implied covenant because it fired her in violation of an express and implied-in-fact agreement that she would be employed for as long as she satisfactorily performed her duties. She claimed that the defendant made these assurances during her preemployment interviews. However, the trial court granted defendant's motion for summary judgment. The plaintiff appealed and the court of appeal affirmed.

The court concluded, as a matter of law, that the parties" written employment agreement defined plaintiff's employment as "at will" (*221 Cal. App. 3d 799, 802)* . It relied on the parol evidence rule, which precludes the introduction of evidence that varies or contradicts the terms of an integrated written instrument (i.e., an instrument representing the final agreement of the parties) [*Code Civ. Proc. § 1856(a)*] (*221 Cal. App. 3d 799* , 804). Noting that the question whether an agreement is an integration is one of law [*see Code Civ. Proc. § 1856(d)*], the court concluded that the agreement in the instant case was integrated with respect to the grounds for termination. Both the application (which

conditioned employment on execution of an employment agreement) and the employment agreement expressly provided that there was no express or implied agreement for continuing or long-term employment. Moreover, the agreement expressly stated that both parties could terminate employment "with or without cause." The court read these documents together and concluded that the parties intended that there would be no other agreement regarding termination, and that the plaintiff's employment was terminable at will (*221 Cal. App. 3d 799, 805-806)* .

[d] Personnel Policy May Not Contradict Express "At Will" Agreement

In ***DeHorney v. Bank of America Nat. Trust and Sav.*** *(9th Cir. 1989) 879 F.2d 459* , the plaintiff, a bank teller for the defendant, alleged that she had inadvertently processed a $20 check twice, thereby causing a shortage in her end-of-the-day tally.After an investigation and interview, during which a bank auditor made racially suggestive statements and accused plaintiff of stealing the $20, the defendant fired the plaintiff. The plaintiff then sued the defendant for, among other things, wrongful discharge. The defendant had the case removed to federal court (based on federal question jurisdiction because the plaintiff also alleged a violation of *42 U.S.C. § 1981*), and filed a motion for summary judgment. The district court granted the defendant's motion, finding, among other things, that the defendant had "good cause" to fire the plaintiff because its policies permitted termination even for errors occurring through inadvertence. The plaintiff appealed, and the Ninth Circuit Court of Appeals affirmed.

The court held that the plaintiff did not raise a triable issue of material fact as to the existence of an implied-in-fact contract modifying her original "at will" employment agreement. The plaintiff had argued that the original contract was modified by the defendant's "Code of Corporate Conduct," which promised "all employees fair treatment, good career opportunities, and attractive working conditions" and provided that employees would be discharged "whenever such action is justified." The court, however, held that the plaintiff could not have reasonably believed that the defendant's personnel policies modified the clear terms of her "at will" employment agreement (*879 F.2d 459, 466)* .

[e] Contractual Right to Review of Termination Decision Does Not Change Nature of "At Will" Employment

Bernard v. State Farm Mut. Auto. Ins. Co. *(2007) 158 Cal. App. 4th 304, 69 Cal. Rptr. 3d 700* , involved an agreement between an insurance company and an agent. The agreement included a provision that either the company or the agent had "the right to terminate this Agreement by written notice delivered to the other or mailed to the other's last known address." Citing the Supreme Court's decision in *Dore v. Arnold Worldwide, Inc. (2006) 39 Cal. 4th 384, 46 Cal. Rptr. 3d 668, 139 P.3d 56* (discussed in [a], *above*), the court of appeal held that this provision was not reasonably susceptible to an interpretation requiring good cause for termination (*158 Cal. App. 4th 304, 310)* .

The agreement also provided that "[i]n the event we terminate this Agreement, you are entitled upon request to a review in accordance with the termination review procedures approved by the Board of Directors of the Compan[y], as amended from time to time." The court of appeal held that this provision did not change the at-will nature of the parties' employment relationship. The court of appeal noted that, in discussing a similar agency agreement that had been involved in an earlier appellate case (*see* *Wallis v. Farmers Group, Inc. (1990) 220 Cal. App. 3d 718, 269 Cal. Rptr. 299*), the *Dore* court focused simply on the termination-notice provision and did not mention the termination-review provision as providing something "more" that would change the at-will employment nature of the relationship in that appellate case (*158 Cal. App. 4th 304, 311)* .

The court of appeal construed the termination-review provision in this case as merely providing an internal forum, primarily for the company's benefit, for reconsidering a decision to end the agency agreement (for example, when a good agent is terminated merely because of a personality conflict with an immediate supervisor). The termination-review procedure did not, however, substantively transform termination on notice into something other than at-will termination (*158 Cal. App. 4th 304, 311)* .

[4] Additional Authorities

[a] Implied Contract Contradicted by Express Agreement

In *Comeaux v. Brown & Williamson Tobacco Co. (9th Cir. 1990) 915 F.2d 1264* , the Ninth Circuit Court of Appeals held that an employee's assertions that a prospective employer's personnel verbally assured him that he would only be terminated for cause was parol evidence inadmissible to contradict the express, unambiguous terms of the employee's employment application, which stated that it constituted the terms of the employment contract and that the relationship was "at will" (*915 F.2d 1264, 1271)* .

In *Anderson v. Savin Corp. (1988) 206 Cal. App. 3d 356, 254 Cal. Rptr. 627* , the court of appeal held that an employment letter giving the employer the right to terminate the employee at any time superseded any contrary implied agreements between the parties (*206 Cal. App. 3d 356, 364)* . The court stated that there was no conflict between California and New York law on this issue, so New York law was applied because the employment letter stated that the arrangement should be governed by New York law (*206 Cal. App. 3d 356, 362-364)* .

In *Gerdlund v. Electronic Dispensers International (1987) 190 Cal. App. 3d 263, 235 Cal. Rptr. 279* , the court of appeal reversed a judgment for independent sales representatives whose contract with the manufacturer had been terminated by the manufacturer without cause pursuant to notice provisions in the agreement. The contract provided that notice of termination could be given at any time and for any reason. The court first determined that no extrinsic evidence should have been admitted to vary the terms of the written agreement between the parties (*190 Cal. App. 3d 263, 272-276)* . The court stated that although the covenant of good faith and fair dealing has been held to supply a requirement of good cause for termination when the contract between the parties is silent or ambiguous on that subject, the covenant of good faith and fair dealing cannot be used to imply a requirement for good cause to terminate when a written contract expressly provides that it may be terminated at will or for any reason on notice (*190 Cal. App. 3d 263, 277-278)* .

In *Malmstrom v. Kaiser Aluminum & Chemical Corp. (1986) 187 Cal. App. 3d 299, 231 Cal. Rptr. 820* , an employee who accepted a transfer from California to Florida and was terminated within months after relocating, brought an action against the employer for breach of written policies, breach of an implied contract to retain him until retirement, and breach of the duty of good faith and fair dealing. The court of appeal affirmed the order of the trial court granting summary judgment in favor of the employer, holding, in part, that the written employment contract under which the employee could be terminated at will precluded, as a matter of law, the contradictory implied promise to retain him until retirement (*187 Cal. App. 3d 299, 317-318)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedureSummary JudgmentOppositionMemoranda in OppositionContracts LawContract InterpretationParol EvidenceGeneral OverviewLabor & Employment LawEmployment RelationshipsAt-Will EmploymentDuration of EmploymentLabor & Employment LawWrongful TerminationBreach of ContractGeneral Overview

California Points & Authorities

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 100 EMPLOYER AND EMPLOYEE: WRONGFUL TERMINATION AND DISCIPLINE
PART II. FORMS

10-100 California Points & Authorities § 100.24

AUTHOR: Carolyn Rashby

§ 100.24 Opposing Contention That Wrongful Discharge Cause of Action Exists--No Discharge in Failure to Renew Fixed-Term Contract

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF CANNOT PROVE A WRONGFUL DISCHARGE BECAUSE HIS/HER CONTRACT EXPIRED BY ITS OWN TERMS.

A. No Discharge When Fixed-Term Employment Contract Fully Executed. A claim for wrongful termination requires that the employee be discharged. Where a contract is for a fixed term, even if it is renewable and has been renewed, failure to renew is not a termination (*Motevalli v. Los Angeles Unified Sch. Dist. (2004) 122 Cal. App. 4th 97, 112-113, 18 Cal. Rptr. 3d 562* ; *Daly v. Exxon Corp. (1997) 55 Cal. App. 4th 39, 45, 63 Cal. Rptr. 2d 727*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that plaintiff could not have been wrongfully terminated because his or her employment contract expired by its own terms. It should be combined with any of the other forms in this chapter that are applicable to the particular case.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Counsel should, for example, cite evidence or plaintiff's allegations showing that the contract was for a fixed term and was honored until it expires.

[c] Related Pleading and Practice Chapters

For related legal background, research guides, and forms for alleging affirmative defenses in wrongful discharge cases, see California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline* (Matthew Bender). There is no pleading form for alleging that the contract expired, because this is not an affirmative defense; all that is necessary is to deny that there was a discharge and then demur to the complaint or move for summary judgment.

[d] Related Memoranda

Any of the other points and authorities for opposing a wrongful discharge claim that are set out in this chapter may be combined with this form.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] No Discharge Where Fixed-Term Employment Contract Fully Executed

In ***Motevalli v. Los Angeles Unified Sch. Dist.*** *(2004) 122 Cal. App. 4th 97, 18 Cal. Rptr. 3d 562* , the plaintiff was a schoolteacher who was employed under an emergency teaching credential; as such, she was a probationary employee [*see Educ. Code § 44915*], and her contract specified a termination date at the end of the school year. The school district failed to offer the plaintiff a new employment contract for the following school year. The plaintiff then sued the district for wrongful termination in violation of public policy, claiming, among other things, that she had been terminated because she had engaged in constitutionally protected activity. The superior court granted summary adjudication in favor of the school district on this claim.

The court of appeal affirmed. The court found it significant that the school district had not *terminated* the plaintiff. Rather, the plaintiff had been a probationary teacher (working under an emergency credential), whose contract was not renewed. Absent a termination, there is no cause of action for wrongful termination in violation of public policy. Further, the court held that the plaintiff would have been incapable of amending her complaint to allege a new cause of action for tortious nonrenewal of her employment contract in violation of public policy, because no such cause of action is recognized (*122 Cal. App. 4th 97, 112-113)* .

In ***Daly v. Exxon Corp.*** *(1997) 55 Cal. App. 4th 39, 63 Cal. Rptr. 2d 727* , plaintiff was hired for a one-year term, renewable at defendant's option, and the contract had been twice renewed. Her contract was not renewed after she complained of Cal-OSHA violations, was told to stop complaining, and learned that the subcontractor whose practices she complained of had requested her termination (*55 Cal. App. 4th 39, 42)* .

The trial court sustained a demurrer without leave to amend on the ground that there was no cause of action for wrongful discharge where the contract had been allowed to expire on its terms (*55 Cal. App. 4th 39, 43)* .

The court of appeal affirmed this portion of the trial court's ruling, citing *Tollefson v. Roman Catholic Bishop (1990), 219 Cal. App. 3d 843, 854, 268 Cal. Rptr. 550* , and *Schimmel v. NORCAL Mutual Ins. Co. (1995) 39 Cal. App. 4th 1282, 1286, 46 Cal. Rptr. 2d 401* , for the proposition that an employee may not sue for tort damages where the employment contract is for a fixed term and expires, expressly declining to create a new cause of action for tortious nonrenewal of an employment contract in violation of public policy (*55 Cal. App. 4th 39, 45-46)* .

However, the court reversed, with directions to the trial court to sustain the demurrer with leave to amend, since there

was another theory available to plaintiff. It cited *Labor Code § 6310(b)*, providing a statutory cause of action (for reinstatement and recovery of lost wages and benefits) for one discharged, threatened, or in any manner discriminated against because of a bona fide complaint of unsafe working conditions. The court found that failure to renew a contract because of a protected complaint could be a form of the discrimination the statute intended to prohibit (*55 Cal. App. 4th 39, 43-44)* .

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 100 EMPLOYER AND EMPLOYEE: WRONGFUL TERMINATION AND DISCIPLINE
PART II. FORMS

10-100 California Points & Authorities § 100.25

AUTHOR: Carolyn Rashby

§ 100.25 Opposing Contention That Wrongful Discharge Cause of Action Exists--Good-Faith Determination of Conduct Justifying Discharge Notwithstanding Implied Agreement Between Parties

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF HAS NO CAUSE OF ACTION FOR WRONGFUL DISCHARGE BECAUSE DEFENDANT'S DECISION TO TERMINATE PLAINTIFF'S EMPLOYMENT, NOTWITHSTANDING AN IMPLIED AGREEMENT BETWEEN THE PARTIES TO TERMINATE FOR GOOD CAUSE ONLY, WAS BASED ON A GOOD FAITH CONCLUSION THAT PLAINTIFF HAD ENGAGED IN MISCONDUCT CONSTITUTING GOOD CAUSE FOR TERMINATION.

No Wrongful Discharge When Employer's Termination of Implied Agreement Was Based on Good-Faith Conclusion That Good Cause Existed to Discharge Employee. In a claim for wrongful termination under an implied agreement to terminate for good cause only, when the plaintiff denies the misconduct that was the basis for defendant's decision to terminate for good cause, the applicable standard is not whether the misconduct actually happened, but rather whether the defendant had reasonable grounds for believing that it happened, thoroughly investigated, and otherwise acted fairly (*Cotran v. Rollins Huding Hall Internat., Inc. (1998) 17 Cal. 4th 93, 107-108, 69 Cal. Rptr. 2d 900, 948 P.2d 412*); *Silva v. Lucky Stores, Inc. (1998) 65 Cal. App. 4th 256, 264-277, 76 Cal. Rptr. 2d 382*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that plaintiff could not have been wrongfully terminated because his or her implied agreement for termination on good cause only was not breached: the defendant employer, after investigation of alleged misconduct by plaintiff, concluded in good-faith that plaintiff had in fact engaged in misconduct that constituted good cause for termination.

This forms may be combined with any of the other forms in this chapter that are applicable to the particular case.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Counsel should, for example, show allegations or evidence, depending on the proceeding in which the issue is raised, showing that defendant conducted an investigation of alleged misconduct by plaintiff that resulted in a good-faith conclusion by defendant that the plaintiff had engaged in misconduct that constituted good cause for termination.

[c] Related Pleading and Practice Chapters

For related legal background, research guides, and forms for alleging affirmative defenses in wrongful discharge cases, see California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline* (Matthew Bender).

[d] Related Memoranda

Any of the other points and authorities for opposing a wrongful discharge claim that are set out in this chapter may be combined with this form.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] No Wrongful Discharge When Employer's Termination of Implied Agreement Was Based on Good-Faith Conclusion That Good Cause Existed to Discharge Employee

In ***Cotran v. Rollins Hudig Hall International, Inc.*** *(1998) 17 Cal. 4th 93, 69 Cal. Rptr. 2d 900, 948 P.2d 412* , plaintiff was a senior vice-president and western regional international manager of Rollins Hudig Hall International, Inc. ("Rollins") from 1988 until he was fired on April 23, 1993. In March 1993, an employee reported to Redmond, human resources director for Rollins, that Cotran was sexually harassing two female employees, Dolce and Pickett. When interviewed by Redmond, Dolce and Pickett both stated that Cotran had exposed himself and masturbated in their presence more than once and that they had received obscene phone calls from him. Rollins's president, Feldman, then arranged a meeting with Cotran that included Hurvitz, the head of EEO, and Held, the manager for EEO compliance. At the meeting, Feldman reviewed the accusations against Cotran and explained that an investigation of the complaints would be made, and the outcome would depend on credibility. Cotran did not say anything about having had consensual relations with either Dolce or Pickett nor offer any explanation for their complaints (*17 Cal. 4th 93, 97)* .

Later, Morris, an account executive, told Held that Cotran had made obscene phone calls to her soon after they had ended a sexual relationship. In addition, during the investigation, one employee whom Cotran had asked to be interviewed, and who at first called Cotran a "perfect gentleman," later complained of a strange early morning phone call from Cotran. As a result of the investigation, Held concluded it was more likely than not the harassment had occurred and fired Cotran (*17 Cal. 4th 93, 97-98)* .

Cotran brought suit for wrongful termination. At trial, Cotran presented evidence that he had a sexual relationship with Dolce, whom he hired as a secretary in his department, from May 1991 to February 1993 and that he had a sexual relationship with Pickett from January to April 1992. He testified that he did not mention the relationships to Feldman because he was upset and frightened and felt "ambushed." Both Dolce and Pickett denied having sex with Cotran but

testified that he had masturbated in front of them and had made obscene phone calls to them (*17 Cal. 4th 93, 98-99)* .

Rollins defended its decision to fire Cotran on the ground that its decisions had been reached honestly and in good faith. The trial court rejected that defense, stating that it was not available in a contract action. Accordingly, the court instructed the jury that Rollins's good faith belief was not at issue, but rather, what was at issue was whether the claimed acts of harassment actually took place. The jury returned a verdict of $1.78 million for Cotran. In the special verdict, it found that Cotran had not engaged in any of the behavior on which Rollins based its decision to terminate him (*17 Cal. 4th 93, 99)* .

The court of appeal overturned the verdict and ordered a new trial. The Supreme Court granted review to determine the standard to be applied when an employee denies committing the misconduct that provoked his or her termination. The Court affirmed the decision of the court of appeal (*17 Cal. 4th 93, 99, 109)* .

The Court began its analysis by surveying the legal policies in the employment relationship to assist it in determining the appropriate standard to apply in this case. The Court noted in interpreting the terms "just cause" or "good cause," several appellate courts have emphasized that it is important not to interfere with the employer's exercise of managerial discretion, but to give the employer substantial scope to exercise its subjective judgment, and that a balance must be made between the employer's interest in operating its business efficiently and profitably and the employee's interest in continued employment [*see Walker v. Blue Cross of California (1992) 4 Cal. App. 4th 985, 994* ; *Pugh v. See's Candies, Inc. (1988) 203 Cal. App. 3d 743, 769* (*Pugh II*); *Pugh v. See's Candies, Inc. (1981) 116 Cal. App. 3d 311, 330* (*Pugh I*)] (*17 Cal. 4th 93, 100)* .

With this background, the Court went on to address the issue of what exactly the trier of fact must decide in evaluating a defense based on employee misconduct. An employee hired under an implied agreement not to dismiss except for good cause brought a wrongful termination action challenging his termination for misconduct, the jury must determine not whether the misconduct actually happened, but rather whether the employer had reasonable grounds for believing that it happened, thoroughly investigated, and otherwise acted fairly (*17 Cal. 4th 93, 107)* .

The Court noted that prior to the court of appeal decision in the case before it, the law on this issue was sparse, consisting only of the decision in *Wilkerson v. Wells Fargo Bank (1989) 212 Cal. App. 3d 1217* . *Wilkerson*, relying exclusively on *Pugh II*, held that the employer had the burden of proving that the misconduct leading to the dismissal actually occurred. The Court in *Cotran* asserted that such reliance was erroneous. The Court cited to the court of appeal opinion in *Cotran*, which made the point that the portion of *Pugh II* that the *Wilkerson* court relied on is actually a quotation from a Michigan case, *Toussaint v. Blue Cross (Mich. 1980) 292 N.W.2d 880* . Thus, *Wilkerson's* reasoning was actually based on a Michigan case, not *Pugh II*, according to the Court (*17 Cal. 4th 93, 102)* .

The Court disagreed with *Toussaint's* view that the promise to terminate for cause only would be illusory if the employer is the sole judge of the propriety of the discharge and that, therefore, the jury should be allowedto review the employer's decision. The *Cotran* Court asserted that the standard it now established provided a middle ground, adopted by a number of other jurisdictions, that combined the employee's interest in continued employment with the employer's interest in efficient personnel decisions. That standard establishes the jury's role as assessing the objective reasonableness of the employer's factual determination as of the time the decision was made. The Court described this standard as adopting the contract model of just cause analysis and conjoining it with a requirement that the employer adhere to an objective good faith standard that the jury applies. Thus, according to the Court, the jury checks the subjective good faith of the employer with an objective reasonable belief standard (*17 Cal. 4th 93, 104-105)* .

In summarizing, the Court held that the *Wilkerson-Toussaint* standard was too intrusive, unreasonably tipping the balance between the employee's and employer's interest. Additionally, the Court pointed out that the jury is too remote from the every day realities of the workplace. The Court added that requiring the employer to have the factual exactness of a signed confession or eyewitness account of wrongdoing would thwart effective workplace desisionmaking. The

Court acknowledged that these factors do not justify a rule permitting employees to be arbitrarily dismissed, but the Court asserted that a rule allowing the jury to make the factual determination of whether there was sufficient cause for dismissal would be at odds with the underlying policy of finding a balance between the interests of employer and employee. The Court reiterated that its implementation of an objective good faith standard that strikes a fair balance between the interests of the parties would in fact ensure that good cause dismissals would promote limitations on the at-will doctrine and the continuing scrutiny of good cause dismissals (*17 Cal. 4th 93, 106-107)* .

The Court further elucidated its good cause standard derived from *Pugh and Scott v. Pacific Gas & Electric Co. (1995) 11 Cal. 4th 454, 467, 46 Cal. Rptr. 2d 427, 904 P.2d 834* , as requiring "fair and honest reasons, regulated by good faith on the part of the employer, that are not trivial, arbitrary or capricious, unrelated to business needs or goals, or pretextual." The court also noted that it requires an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond. Beyond that, the Court found it to be more prudent not to specify in detail what would constitute an adequate investigation, but rather to allow the determination to be made on a case-by-case basis (*17 Cal. 4th 93, 108)* .

Based on the above standard established by the Court, the Court determined that a retrial was necessary in which the jury would be instructed to determine whether at the time the decision to terminate Cotran's employment, Rollins acted in good faith, and, following an investigation that was appropriate under the circumstances, Rollins had reasonable ground for believing Cotran had committed the misconduct (*17 Cal. 4th 93, 109)* .

Justice Mosk, joined by Justice Werdegar, wrote separately to concur with the standard established by the majority, but to make three additional points. First, Justice Mosh emphasized that "substantial evidence" does not mean simply "any" evidence, but requires the ultimate determination of whether a reasonable employer could have found that the employee committed the misconduct. Similarly, the fair procedures the employer must adopt require a truly meaningful opportunity on the part of the employee to tell his or her story and influence the employer's decision. Second, the good cause standard established by the Court is a "default" standard when there is not a specific agreement between the parties that more explicitly defines "good cause," but the parties may make their own agreement that overrides this more general standard. Third, the good cause standard established in the majority opinion applies only to implied contracts between employers and individual employees and does not apply to the term as construed by arbitrators pursuant to collective bargaining agreements between unions and employers (*17 Cal. 4th 93, 109-110* , concurring opinion of Mosk, J.).

Justice Kennard also wrote a separate concurring and dissenting opinion. In her view, the issue of the "good cause" condition of the parties' implied employment agreement is one of contract interpretation that should be resolved by determining the parties's intent when they entered into the contract. Kennard opined that only if the parties's intent cannot be discerned should the court supply the meaning that comports with community standards of fairness and public policy. Kennard added that employers should be held to a standard whereby they may discharge employees only for acts of misconduct that were actually committed. Acknowledging the difficulty this places on employers, Kennard would limit employers's liability to back pay if they reinstated a falsely accused and wrongfully discharged employee (*17 Cal. 4th 93, 110-118* , concurring and dissenting opinion of Kennard, J.).

In ***Silva v. Lucky Stores, Inc.*** *(1998) 65 Cal. App. 4th 256, 76 Cal. Rptr. 2d 382* , the court of appeal affirmed a summary judgment in favor of the employer in a wrongful termination suit brought by an employee who had been fired for sexual harassment. Applying the criteria set forth by the Supreme Court in *Cotran v. Rollins Huding Hall International, Inc. (1998) 17 Cal. 4th 93* , the court found that the employer (1) had acted in good faith in deciding to terminate the plaintiff, (2) had made an appropriate investigation under the circumstances, and (3) had reasonable grounds for believing the employee had engaged in misconduct. In this case, the employee had allegedly been involved in two incidents of harassment. The employer had a clear policy against sexual harassment, stating how such allegations were to be investigated. The employer assigned a human resources officer with expertise in the subject to investigate immediately. The investigation included interviews with 15 witnesses, including eyewitnesses to the alleged

incidents.Several key employees were reinterviewed and were given an opportunity to respond to information provided by other employees. The court found that although the investigation was not perfect, it was appropriate, given that it was conducted under the exigencies of the workaday world. The investigator's report included some hearsay, gossip, and rumor, but the court found that that was not the basis for the employer's conclusion that the employee had indeed engaged in harassment. Rather, the employer's conclusion was based on the witnesses' statements and the plaintiff's admission that physical contact had occurred in both incidents. Under the circumstances, the court found no triable issue of fact, especially since the plaintiff had conceded that the employer had acted in good faith in investigating the matter (*65 Cal. App. 4th 256, 264-277)* .

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CHAPTER 100 EMPLOYER AND EMPLOYEE: WRONGFUL TERMINATION AND DISCIPLINE
PART II. FORMS

10-100 California Points & Authorities § 100.26

AUTHOR: Carolyn Rashby

§ 100.26 Opposing Contention That Wrongful Discharge Cause of Action Exists--Implied Agreement to Terminate Only for Good Cause Did Not Limit Employer's Right to Eliminate Plaintiff's Job as Part of Reduction in Workforce

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF HAS NO CAUSE OF ACTION FOR WRONGFUL DISCHARGE, NOTWITHSTANDING AN IMPLIED AGREEMENT BETWEEN THE PARTIES TO TERMINATE ONLY FOR GOOD CAUSE, BECAUSE THE IMPLIED AGREEMENT DID NOT RESTRICT THE DEFENDANT'S RIGHT TO REORGANIZE, REDUCE, AND CONSOLIDATE ITS WORKFORCE, AND THE PLAINTIFF'S DISCHARGE OCCURRED AS PART OF SUCH A REORGANIZATION.

Implied Agreement to Terminate Only for Good Cause Does Not Ordinarily Include Restriction an Employer's Right to Reduce Workforce. An implied agreement not to terminate an employee except for good cause does not prohibit the employer from legitimately terminating an employee on the basis of the need to eliminate the employee's work unit, in the absence of evidence of an agreement restricting that right (*Guz v. Bechtel Nat., Inc. (2000) 24 Cal. 4th 317, 338*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a contention that an implied agreement to terminate an employee only for good cause limits the employer's right to legitimately terminate the employee as part of a reorganization, workforce reduction, or consolidation of the employer's operations. In an appropriate case, this form may be submitted in opposition to the contention supported by the points and authorities *set forth in § 100.21*.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. The argument should, therefore, establish that there is no documentary or other evidence of any agreement between the parties restricting the employer's right to eliminate jobs as part of a reorganization, workforce reduction, or consolidation of the employer's operations.

[c] Related Memoranda

Any of the other points and authorities for opposing a wrongful discharge claim that are set out in this chapter may be combined with this form.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Implied Agreement to Terminate Only for Good Cause Does Not Ordinarily Include Restriction on Employer's Right to Reduce Workforce

In ***Guz v. Bechtel Nat., Inc.*** *(2000) 24 Cal. 4th 317* , a longtime employee was released at age 49 when his work unit was eliminated and its tasks transferred to another office of the employer. The employee sued the employer, alleging age discrimination, breach of an implied contract to be terminated only for good cause, and breach of the implied covenant of good faith and fair dealing. The California Supreme Court held that, even though there was evidence in certain written personnel documents of an implied agreement not to terminate except for good cause under certain circumstances, this implied agreement did not prohibit the employer from legitimately terminating the employeeon the basis of the need to eliminate his work unit. There was no evidence of an agreed restriction on the employer's right to reorganize, reduce, or consolidate its work force for whatever reasons it wished. This was so, the Court said, even if the employer's decision was influenced by dissatisfaction with the eliminated unit's performance and even if individual employees were entitled to progressive discipline procedures before being fired for poor performance. However, the Court left to the court of appeal on remand the issue of whether the employer had failed to follow its fair layoff policies when it made individual decisions leading to the employee's termination (*24 Cal. 4th 317, 338-348)* .

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10-100 California Points & Authorities § 100.27

AUTHOR: Carolyn Rashby

§ 100.27 Supporting Contention That Wrongful Discharge Cause of Action Exists--Discharge Breached Contract Because No Good Cause to Terminate Existed

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

DEFENDANT BREACHED THE EMPLOYMENT CONTRACT BY TERMINATING PLAINTIFF BECAUSE DEFENDANT DID NOT HAVE GOOD CAUSE TO DISCHARGE PLAINTIFF.

A. "Good Cause" Defined. The term "good cause" connotes "a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power" (*Pugh v. See's Candies, Inc. (1981) 116 Cal. App. 3d 311, 330, 171 Cal. Rptr. 917*).

B. Trivial, Capricious, or Pretextual Reason for Discharge Precludes Finding of Good Cause. An employer does not have the right to make an arbitrary or unreasonable decision about terminating an employee when there is a contract to terminate only for good cause. If the reasons advanced by the employer for the termination are either trivial, capricious, unrelated to business needs or goals, or pretextual, the trier of fact may find that the termination was not for good cause (*Pugh v. See's Candies, Inc. (1988) 203 Cal. App. 3d 743, 769-770, 250 Cal. Rptr. 195*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of the contention that a wrongful discharge cause of action exists, based on the argument that the defendant breached the employment agreement by terminating plaintiff's employment without good cause. This form should be combined with the points and authorities in *§ 100.20, 100.21* which support the contention that an express or implied employment agreements limits the employer's right to discharge plaintiff in the absence of good cause.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the employer lacked good cause for discharge, for example in a motion for summary judgment. The above points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that the employer did not have good cause for discharge and evidence tending to show that the reason advanced by the employer for discharge is either trivial, capricious, pretextual, or unrelated to business needs or goals. Counsel should also discuss any evidence that can arguably support an inference that the employer did not reasonably believe that good cause to discharge existed given the facts known to the employer at the time. This argument could be supported by evidence that the employer either did not investigate, or conducted a cursory investigation of the employee, or by evidence that the employer terminated the employee despite evidence exonerating the employee from the alleged wrongdoing.

[c] Opposing Memoranda

In an appropriate case, the points and authorities *set out in § 100.29* may be used to oppose the contention supported by these points and authorities.

[d] Related Pleading and Practice Forms

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender). For discussion and forms relating to wrongful discharge, see California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts* , Ch. 249, *Employment Law: Termination and Discipline* , and Ch. 250, *Employment Law: Wage and Hour Disputes* .

[e] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 60, Liability for Wrongful Termination and Discipline, §§ 60.05, 60.09[5]* (Matthew Bender).

[3] Discussion of Authorities

[a] Good Cause Defined

The facts and procedural background of ***Pugh v. See's Candies, Inc.*** *(1981) 116 Cal. App. 3d 311, 330, 171 Cal. Rptr. 917* , are discussed in *§ 100.21[3][a]*. *Pugh* held that an employer may not fire an employee "at will" if there is an express or implied agreement that the employee may be fired only "for cause" (*116 Cal. App. 3d 311, 324-325)* . According to the court, the terms "just cause" and "good cause," although difficult to define, connote a "fair and honest cause or reason, regulated by good faith on the part of the party exercising the power." The court added that care must be taken not to interfere with the legitimate exercise of managerial discretion, particularly when the employee occupies a sensitive managerial or confidential position (*116 Cal. App. 3d 311, 330)* .

[b] Trivial, Capricious, or Pretextual Reason for Discharge Precludes Finding of Good Cause

In ***Pugh v. See's Candies, Inc.*** *(1988) 203 Cal. App. 3d 743, 250 Cal. Rptr. 195* (*Pugh II*), the court of appeal affirmed the judgment of the trial court denying the plaintiff's motion for a new trial after, on remand from the court's earlier decision in *Pugh v. See's Candies, Inc. (1981) 116 Cal. App. 3d 311, 330, 171 Cal. Rptr. 917* (*Pugh I*) discussed under,

(*§ 100.27[3][a]*) the jury returned a verdict in favor of the defendants. The court examined and rejected plaintiff's contention that the trial court should have instructed the jury that even if the defendant was, in good faith, dissatisfied with plaintiff's performance, that would not be sufficient to constitute good cause. The court stated that the trial court properly instructed the jury on good cause consistent with the definition of good cause set out in *Pugh I,* and properly instructed the jury to balance the employer's interest in operating its business with the employee's interest in maintaining his employment, giving substantial weight to managerial discretion. Under the *Pugh I* instruction, the employer's good faith dissatisfaction alone is not sufficient to constitute good cause to discharge the employee in breach of the contract; therefore, the plaintiff's proffered jury instruction was unnecessary (*203 Cal. App. 3d 743, 768-769)* . The court then further expanded on the standard the trier of fact should apply in determining whether there was good cause for discharge, finding that the employer does not have an unfettered right to exercise discretion under the guise of business judgment; the trier of fact will scrutinize the employer's business judgment and determine whether the discharge was justified under the circumstances. If the reasons advanced by the employer are either trivial, capricious, unrelated to business needs or goals, or pretextual, that will allow the trier of fact to find that the discharge was not for good cause (*203 Cal. App. 3d 743, 769-770)* .

[4] Additional Authorities

[a] Trivial, Capricious, or Pretextual Reason for Discharge Precludes Finding of Good Cause

In *Sheppard v. Morgan Keegan & Co. (1990) 218 Cal. App. 3d 61, 266 Cal. Rptr. 784* , the defendant, an investment banking and stock brokerage firm located in Memphis, Tennessee, offered plaintiff, who worked in California, a position as a stock analyst. Plaintiff accepted the offer and quit his job in California. Several weeks later, he flew to Memphis to lease and apartment and set up his office. While in Memphis, he visited the office several times dressed in casual attire. The managing director told him that such attire was inappropriate for the office. Two days before plaintiff was to begin working for defendant, the managing director told him that they had decided to "separate" from plaintiff before plaintiff started working, but that he did not know the reason for the separation. Plaintiff filed suit for breach of contract, fraud, and wrongful termination. The lower court granted defendant's motion for summary judgment, and plaintiff appealed, in part on the basis that there was a triable issue of fact regarding whether good cause existed for terminating his employment.

The court of appeal held that there was a triable issue of fact as to whether good cause existed. Defendant had relied on two alleged instances of good cause contained in the managing director's declaration supporting the summary judgment motion. First, the declaration contained the conclusory statement that plaintiff had made disparaging and demeaning remarks regarding defendant and the Memphis area. The court found that this conclusory statement could not support good cause. Second, the declaration stated that plaintiff had appeared at the office inappropriately attired. However, these visits had been prior to his start date and while he was house hunting. Also, the declaration did not state that this was the reason for the termination; indeed, the managing director admitted in his deposition that he did not know why plaintiff was terminated (*218 Cal. App. 3d 61, 67-68)* .

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10-100 California Points & Authorities § 100.28

AUTHOR: Carolyn Rashby

§ 100.28 Supporting Contention That Wrongful Discharge Cause of Action Exists--Discharge Breached Covenant of Good Faith and Fair Dealing

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF'S TERMINATION BREACHED THE COVENANT OF GOOD FAITH AND FAIR DEALING IN THE EMPLOYMENT CONTRACT BECAUSE DEFENDANT TERMINATED PLAINTIFF WITHOUT CAUSE AND IN BAD FAITH.

A. Covenant of Good Faith and Fair Dealing in Employment Contract. Every employment contract imposes on each party to the contract a duty of good faith and fair dealing in the performance and enforcement of the contract (*Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 683, 254 Cal. Rptr. 211, 765 P.2d 373*).

B. Employer's Bad Faith Conduct Extraneous to Contract and Intent to Frustrate Employee's Contract Rights Breach Covenant of Good Faith and Fair Dealing. A breach of the covenant of good faith and fair dealing in employment contracts is established where the employer engages in bad faith conduct that is extraneous to the employment contract and intends to frustrate the employee's enjoyment of his or her contract rights (*Khanna v. Microdata Corp. (1985) 170 Cal. App. 3d 250, 262-263, 215 Cal. Rptr. 860*).

[*Optional*] **C. Termination of Long-Term Employment Without Cause Breaches Covenant of Good Faith and Fair Dealing.** Termination of employment without legal cause after an employee has satisfactorily performed for a lengthy period of time deprives the employee of the benefits of an employment agreement not to discharge without good cause and, thus, breaches the covenant of good faith and fair dealing contained in the employment contract (*Cleary v. American Airlines, Inc. (1980) 111 Cal. App. 3d 443, 455, 168 Cal. Rptr. 722*).

[2] Comments

[a] Use of Form

The above points and authorities may be submitted in support of a plaintiff's contention that a wrongful discharge cause of action exists, based on the argument that the discharge breached the implied covenant of good faith and fair dealing in the employment agreement. Optional Paragraph C is for use where the plaintiff is discharged without cause after satisfactorily working for defendant for a substantial period of time.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that plaintiff's discharge breached the covenant of good faith and fair dealing, for example in a motion for summary judgment. The above points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence of the terms of the employment contract and evidence that the employer, in discharging plaintiff, acted in bad faith and deprived plaintiff of the benefits of the employment contract. In making this argument, counsel should emphasize the evidence that the employee was a good worker, apparently valued by the employer. If there is evidence of a specific motive for the termination, which can be characterized as one exercised in bad faith, that should be discussed as well.

[c] Opposing Memoranda

In an appropriate case, the points and authorities *set out in § 100.30* may be used to oppose the contention supported by the above points and authorities.

[d] Related Pleading and Practice Forms

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender). For discussion and forms relating to wrongful discharge, see California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts* , Ch. 249, *Employment Law: Termination and Discipline* , and Ch. 250, *Employment Law: Wage and Hour Disputes* .

[e] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 60, Liability for Wrongful Termination and Discipline, § 60.06* (Matthew Bender).

[3] Discussion of Authorities

[a] Covenant of Good Faith and Fair Dealing in Employment Contract

The factual and procedural background of ***Foley v. Interactive Data Corp.*** *(1988) 47 Cal. 3d 654, 254 Cal. Rptr. 211, 765 P.2d 373* , are *set forth in § 100.20[3][a]*. In *Foley,* the Supreme Court held that an action for breach of the implied covenant of good faith and fair dealing in an employment contract does not afford tort remedies, but rather gives rise only to ordinary contract damages (*47 Cal. 3d 654, 682-699)* . In discussing the cause of action for breach of the implied covenant, the Court noted that every contract imposes on each party to the contract a duty of good faith and fair dealing in its performance and its enforcement (*47 Cal. 3d 654, 683)* . The Court, however, did not set forth the elements of a prima facie case for breach of the implied covenant.

[b] Employer's Bad Faith Conduct Extraneous to Contract and Intent to Frustrate Employee's Contract

Rights Breach Covenant of Good Faith and Fair Dealing

In ***Khanna v. Microdata Corp.*** *(1985) 170 Cal. App. 3d 250, 215 Cal. Rptr. 860* , the plaintiff, Nand Khanna, was recruited to work as a salesperson for defendant Microdata Corp., a computer manufacturer, by Richard Manuel, a branch manager for Microdata. Khanna initially rejected the job offer to join Microdata in San Francisco, but changed his mind on the basis of Manuel's representations that he would be assigned the profitable Van Waters and Rogers (VWR) account. In a letter of July 12, 1978, to Khanna, Manuel specified that Khanna would be paid a 4% commission for hardware sold to VWR through a dealer ESCOM, and that Khanna would be paid a full commission, ranging from 8% to 12%, where the hardware was sold directly to VWR without ESCOM's participation. From this letter, Khanna understood that he would receive a commission on any Microdata computer sold to VWR, which was a national company, regardless of who sold the computer or where the computer was installed. Khanna began work for Microdata in mid-July of 1978. During his first few months with Microdata, Khanna expended time and effort to land the VWR account. Eventually, however, Manuel directed him to stop working on the account because ESCOM was going to be providing computers to VWR as a retail dealer. Thus, even though Microdata would still make a profit on the sales, there no longer was a need to directly pitch the Microdata product to VWR. Khanna stopped working on the account, but then asked Manuel how he was to be compensated under the terms of the July 12 letter. Manuel told him that he should just forget about the July 12 letter. A November 7, 1978, memo stated that Khanna would receive 60% of the normal commission for direct sales of computers for units sold to VWR and actually installed within the San Francisco Branch territory. Khanna believed that this was inconsistent with the terms of the July 12 letter which stated that he would receive a commission regardless of where the computers were installed In November 1979, Khanna complained that he had not received any commissions from sales to VWR and ased to be compensated under the terms of the July 12 letter. Microdata responded that it would only compensate him under the terms of the November 1978 memo. Khanna filed suit against Microdata seeking to recover his commissions. While the suit was pending, he continued to perform well and use his best efforts to sell Microdata's products. On the day after Khanna was denied a jury trial in the lawsuit and fired his lawyer, he received a letter from Microdata informing him that he was being terminated for inability to maintain a normal employee relationship in that his lawsuit was based on unfounded representations and was construed by Microdata as being disloyal. At the time he was fired, he had commissions pending on nearly $250,000 in sales, which Microdata refused to pay under the terms of a Microdata compensation plan, which Khanna had signed, specifying that when employment was terminated, regardless of the reason, there was no right to collect a commission on sales that were not booked, installed, and paid for before termination. Khanna then filed suit for fraud, wrongful discharge, breach of the covenant of good faith and fair dealing, and breach of contract. The jury returned a general verdict for Khanna.

The court of appeal affirmed the verdict. With respect to Khanna's claim for breach of the covenant of good faith and fair dealing, the court traced the decisional history of the claim in employment cases. The court acknowledged that the cause of action emanated from a footnote in *Tameny v. Atlantic Richfield Co. (1980) 27 Cal. 3d 167, 179 n.12, 164 Cal. Rptr. 839, 610 P.2d 1330* (discussed in *§ 100.42[3][a]*) recognizing that a cause of action could be established on the ground that an employer's discharge of an at-will employee violated the employer's good faith and fair dealing obligations. The court then stated that several subsequent cases (beginning with *Cleary v. American Airlines, Inc. (1980) 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 , discussed under § 100.28[3][c]*) acknowledged that the covenant is implied by law in employment contracts. The court rejected Microdata's contention that the cause of action for breach of the covenant could be made out only if, as in *Cleary*, the employee establishes lengthy satisfactory service and establishes that the employer acted contrary to it own procedures or acted arbitrarily in terminating the employee. The court found instead that to establish a breach of the covenant, the employee must show that the defendant engaged in bad faith extraneous to the contract, combined with the defendant's intent to frustrate the employee's enjoyment of contract rights. The court stated that the facts in Clearyindicate only one manner among many in which an employer might violate the covenant (*170 Cal. App. 3d 250, 262-263)* .

Applying this standard to the facts of the instant case, the court found that there was substantial evidence to support the claim that Microdata fired Khanna in bad faith retaliation for bringing his lawsuit and that Microdata intended to

deprive Khanna of the benefits of his employment contract. Specifically, given the discrepancy between the July 12 letter and the November 7 memo, the jury could have concluded that the lawsuit was not unfounded, and that this characterization of the lawsuit was advanced merely as a pretext to fire Khanna. Moreover, Khanna's outstanding performance, even after filing his lawsuit, belied the claim that he was disloyal. Further, the fact that he was fired the day after he was denied a jury trial and fired his lawyer supported an inference that the termination was retaliatory. Finally, there was substantial evidence to conclude that the termination was intended to deprive Khanna of commissions on nearly $250,000 worth of computers (*170 Cal. App. 3d 250, 264)* .

Note that *Khanna* was disapproved by *Foley* to the extent that *Khanna* held that tort damages were recoverable for a breach of the implied covenant of good faith and fair dealing.

[c] Termination of Long-Term Employment Without Cause Breaches Covenant of Good Faith and Fair Dealing

In ***Cleary v. American Airlines, Inc.*** *(1980) 111 Cal. App. 3d 443, 168 Cal. Rptr. 722* , plaintiff worked for American Airlines from 1958 through 1976, first as a payroll clerk, then as a ramp agent, and then as an airport operations agent, until his termination on December 30, 1976. Plaintiff alleged that, in violation of its own regulations regarding employee grievances and discharge, the company falsely and without just cause accused him of theft, leaving his work area without authorization, and threatening a fellow employee with bodily harm. Plaintiff contended that the real reason for his termination was his union-organizing activities and that the company denied to review his suspension and discharge, although such review was required by company regulations. At the time of the termination, plaintiff had acquired certain retirement and pension benefits. Plaintiff filed suit for breach of contract and breach of the implied covenant of good faith and fair dealing, as well as a cause of action for wrongful interference with business relationship and wrongful inducement to breach the employment contract. The trial court sustained the demurrer without leave to amend and dismissed the suit. Plaintiff appealed.

The court of appeal reversed, finding that plaintiff had stated a viable cause of action. With respect to the claim for breach of the implied covenant of good faith and fair dealing, the court found two factors to be of paramount significance. First, that the plaintiff had worked for defendant for 18 years with satisfactory performance. The court stated that termination of employment without legal cause after such a period of time offends the covenant. Second, the policies of defendant set forth specific procedures for adjudicating employee disputes such as the plaintiff's. The court stated that the existence of these policies compels the conclusion that defendant had recognized its responsibility to engage in good faith and fair dealing, rather than in arbitrary conduct, with respect to its employees. The court concluded that the longevity of service coupled with the defendant's policies operated as a form of estoppel to preclude discharge without good cause (*111 Cal. App. 3d 443, 455-456)* .

Note that *Cleary* was disapproved by *Foley* to the extent that *Cleary* allowed tort damages for a breach of the covenant.

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 100 EMPLOYER AND EMPLOYEE: WRONGFUL TERMINATION AND DISCIPLINE
PART II. FORMS

10-100 California Points & Authorities § 100.29

AUTHOR: Carolyn Rashby

§ 100.29 Opposing Contention That Wrongful Discharge Cause of Action Exists--Discharge Did Not Breach Contract Because Good Cause to Terminate Existed

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF'S DISCHARGE DID NOT BREACH THE EMPLOYMENT CONTRACT BECAUSE DEFENDANT HAD GOOD CAUSE TO DISCHARGE PLAINTIFF, IN THAT_____ [*specify grounds for termination, such as serious misconduct violating company policy or legitimate business reasons*].

A. "Good Cause" Defined. The term "good cause" connotes "a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power" (*Moore v. May Dept. Stores (1990) 222 Cal. App. 3d 836, 839-840, 271 Cal. Rptr. 841* ; *Pugh v. See's Candies, Inc. (1981) 116 Cal. App. 3d 311, 330, 171 Cal. Rptr. 917*).

[*Optional*] **B. Serious Misconduct Violating Company Policy Provides Good Cause for Discharge.** There is good cause for discharge as a matter of law when misconduct is serious and violates the employer's security procedures (*Moore v. May Dept. Stores Co. (1990) 222 Cal. App. 3d 836, 839-840, 271 Cal. Rptr. 841*).

[*Optional*] **C. Legitimate Business Reasons Provide Good Cause for Discharge.** There is good cause for discharge when the employer has a legitimate business reason for terminating theemployment (*Clutterham v. Coachmen Industries, Inc. (1985) 169 Cal. App. 3d 1223, 1226-1227, 215 Cal. Rptr. 795*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a plaintiff's contention that the discharge breached the employment contract because no good cause to terminate existed. Specifically, the form may be used when defendant is

able to show that although its employment relationship with plaintiff was one in which the plaintiff could be discharged only for cause, the defendant had good cause to discharge the plaintiff. Optional Paragraph B may be used if an employee's serious misconduct violated company policy. Optional Paragraph C can be used where the employer had legitimate business reasons for terminating the employment. In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 100.27*.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that good cause for discharge existed, for example in a motion for summary judgment. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that the employer had good cause for discharge. Counsel should explain the specific grounds for the dismissal, such as dissatisfaction with the employee's performance, serious misconduct on the part of the employee that violated company policy [*Moore v. May Dept. Stores Co. (1990) 222 Cal. App. 3d 836, 839-840, 271 Cal. Rptr. 841]* , or the employer's legitimate business reasons (for example, a company reorganization [*Clutterham v. Coachmen Industries, Inc. (1985) 169 Cal. App. 3d 1223, 1226-1227, 215 Cal. Rptr. 795*)]. Unless there is an express employment agreement containing a good cause provision, counsel should also consider using the appropriate contentions from § 100.22 to argue that the employment was at will and could be terminated for any reason.

[c] Related Pleading and Practice Forms

For a form of notice for summary judgment and related discussion, see California Forms of Pleasing and Practice, Ch. 537, *Summary Judgment* (Matthew Bender). For discussion and forms relating to wrongful discharge, see California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts* , Ch. 249, *Employment Law: Termination and Discipline* , and Ch. 250, *Employment Law: Wage and Hour Disputes* .

[d] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 60, Liability for Wrongful Termination and Discipline, §§ 60.05, 60.09[5]* (Matthew Bender).

[3] Discussion of Authorities

[a] "Good Cause" Defined

In ***Moore v. May Dept. Stores Co.*** *(1990) 222 Cal. App. 3d 836, 271 Cal. Rptr. 841* , the plaintiff, a managerial employee for the defendant jewelry store, left two boxes of jewelry unattended while she helped a customer. The jewelry was stolen and never recovered. Consequently, the defendant fired the plaintiff, as she had violated defendant's security procedures which required that all merchandise valued at $60 or more be locked up. The defendant's personnel policy provided that a "[f]ailure to follow [the] operating selling procedure" could result in termination. The plaintiff sued the defendant for breach of contract and breach of the implied covenant of good faith and fair dealing. The defendant moved for summary judgment on the ground that it had good cause for firing the plaintiff. The trial court agreed and granted the defendant's motion. The plaintiff appealed and the court of appeal affirmed.

The court held that the trial court correctly concluded there was "good cause," as a matter of law, to terminate the plaintiff because her violation of security procedures (of which she was aware) resulted in the loss of over $50,000 in merchandise (*222 Cal. App. 3d 836, 840)* . In reaching its holding, the court relied on the definition of "just cause" or "good cause" set forth in *Pugh v. See's Candies, Inc. (1981) 116 Cal. App. 3d 311, 330, 171 Cal. Rptr. 917* , discussed *below* (*222 Cal. App. 3d 836, 839-840)* .

The facts and procedural background of ***Pugh v. See's Candies, Inc.*** *(1981) 116 Cal. App. 3d 311, 330, 171 Cal. Rptr. 917* , are discussed in *§ 100.21[3][a]*. *Pugh* held that an employer may not fire an employee "at will" if there is an express or implied agreement that the employee may be fired only "for cause" (*116 Cal. App. 3d 311, 324-325)* . According to the court, the terms "just cause" and "good cause," although difficult to define, connote a "fair and honest cause or reason, regulated by good faith on the part of the party exercising the power." The court added that care must be taken not to interfere with the legitimate exercise of managerial discretion, particularly when the employee occupies a sensitive managerial or confidential position (*116 Cal. App. 3d 311, 330)* .

[b] Serious Misconduct Violating Company Policy Provides Good Cause for Discharge

The facts and procedural background of ***Moore v. May Dept. Stores*** *(1990) 222 Cal. App. 3d 836, 271 Cal. Rptr. 841* , are *discussed under § 100.29[3][a]*. Moore held that, as a matter of law, the defendant had good cause to terminate the plaintiff for leaving valuable jewelry unattended, resulting in its subsequent theft. The plaintiff argued that the issue of "good cause" is a question of fact, and thus the trial court should not have granted summary judgment for the defendant (*222 Cal. App. 3d 836, 838-839)* . The court of appeal disagreed, explaining that there was no question as to the plaintiff's fault for the lost jewelry, nor could there be any argument as to the seriousness of her conduct. Furthermore, the plaintiff clearly violated the defendant's security procedures and the defendant's personnel policy stated that failure to follow procedures could result in termination, depending on the seriousness of the violation (*222 Cal. App. 3d 836, 839)* .

[c] Legitimate Business Reasons Provide Good Cause for Discharge

In ***Clutterham v. Coachmen Industries, Inc.*** *(1985) 169 Cal. App. 3d 1223, 215 Cal. Rptr. 795* , plaintiff was a sales representative working under a written "independent sales representative agreement" that contained a clause providing for termination by either party on 30 days" written notice. Plaintiff was given notice that for a number of reasons, including depressed market conditions and corporate reorganization involving transfer of manufacturing and marketing divisions to another state, plaintiff's employment would be terminated. The court of appeal affirmed the trial court's grant of summary judgment in favor the defendant, holding that even assuming the issue of contractual interpretation would be resolved in appellant's favor, good cause for appellant's termination existed in view of market conditions and company reorganization (*169 Cal. App. 3d 1223, 1226)* . Observing that the courts must take care not to interfere with the legitimate exercise of managerial discretion, the court held that in the absence of a showing by the appellant that the employer's professed reasons for termination were pretextual or that the employer acted in bad faith toward him, the motion for summary judgment was properly granted (*169 Cal. App. 3d 1223, 1227)* .

[4] Additional Authorities

[a] "Good Cause" Defined

Knights v. Hewlett Packard (1991) 230 Cal. App. 3d 775, 281 Cal. Rptr. 295 , involved an employee who was fired when he failed to return to work after he was injured on the job, failed to comply with several deadlines to return to work, and failed to request leave extensions. The court of appeal affirmed summary judgment for the employer, noting that the employer's personnel policies permitted termination for unacceptable performance and holding that by any standard or definition the employee's conduct constituted unacceptable performance. The court stated that whether an employee's performance was unacceptable and whether good cause for discharge existed are issues that may be determined on a summary judgment motion (*230 Cal. App. 3d 775, 780)* . The facts and procedural background of *Knights* are discussed in *§ 100.22[3][b]*.

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CHAPTER 100 EMPLOYER AND EMPLOYEE: WRONGFUL TERMINATION AND DISCIPLINE
PART II. FORMS

10-100 California Points & Authorities § 100.30

AUTHOR: Carolyn Rashby

§ 100.30 Opposing Contention That Wrongful Discharge Cause of Action Exists--Discharge Did Not Breach Implied Covenant of Good Faith and Fair Dealing--Implied Covenant of Good Faith and Fair Dealing Not Breached Absent Breach of Underlying Employment Contract

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF'S TERMINATION DID NOT VIOLATE THE COVENANT OF GOOD FAITH AND FAIR DEALING BECAUSE DEFENDANT DID NOT ACT IN BAD FAITH IN TERMINATING THE EMPLOYMENT RELATIONSHIP [AND PLAINTIFF HAS FAILED TO PROVE A BREACH OF THE UNDERLYING EMPLOYMENT AGREEMENT].

A. Implied Covenant of Good Faith and Fair Dealing Breached Only Where Defendant in Bad Faith Deprived Plaintiff of Benefit of Employment Agreement. The implied covenant of good faith and fair dealing requires only that the employer act fairly and in good faith. Thus, to prevail on a claim of breach of the implied covenant of good faith and fair dealing, plaintiff must prove that the employer acted in bad faith and without probable cause in terminating the employment agreement (*Burton v. Security Pacific Nat. Bank (1988) 197 Cal. App. 3d 972, 979, 243 Cal. Rptr. 277*).

[*Optional*] **B. No Breach of Implied Covenant of Good Faith and Fair Dealing if Underlying Employment Agreement Not Breached.** To establish a claim for breach of the implied covenant of good faith and fair dealing, plaintiff must establish that a termof the employment agreement was violated by the termination (*Guz v. Bechtel Nat., Inc. (2000) 24 Cal. 4th 317, 349-353* ; *Flait v. North American Watch Corp. (1992) 3 Cal. App. 4th 467, 481, 4 Cal. Rptr. 2d 522* ; *see Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 698 n.39, 254 Cal. Rptr. 211, 765 P.2d 373*).

[*Optional*] **C. No Breach of Implied Covenant of Good Faith and Fair Dealing Where Employer Makes Mistaken but Good-Faith Determination That Misconduct Occurred.** The implied covenant of good faith and fair dealing

requires only that the employer act fairly and in good faith. If the employer terminates the plaintiff based upon a mistaken although good faith belief that the employee has committed misconduct, there is no breach of the implied covenant of good faith and fair dealing, even if the plaintiff could prove that the factual finding of misconduct was a mistake (*Burton v. Security Pacific Nat. Bank (1988) 197 Cal. App. 3d 972, 978-979, 243 Cal. Rptr. 277*).

[*Optional*] **D. Claim for Breach of Covenant of Good Faith and Fair Dealing Cannot Be Maintained Where Employment Was At-Will.** An at-will employee cannot maintain a claim for breach of the covenant of good faith and fair dealing based on the argument that the discharge was made without cause (*Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 698 n.39, 254 Cal. Rptr. 211, 765 P.2d 373* ; *Alexander v. Nextel Communications, Inc. (1997) 52 Cal. App. 4th 1376, 1381* & n.5, *61 Cal. Rptr. 2d 293*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a contention that defendant breached the implied covenant of good faith and fair dealing in terminating plaintiff's employment, on the ground that plaintiff has not alleged facts sufficient to show that the termination was made in bad faith. Paragraph B is for use where there is no breach of the underlying employment agreement. Optional Paragraph C is for use to counter an assertion that defendant's determination that plaintiff committed misconduct warranting discharge was mistaken, based on the argument that the determination was made in good faith. Optional Paragraph D should be used to counter an at-will plaintiff's contention that termination without cause breached the covenant. In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 100.28.*

These points and authorities may, in an appropriate case, be combined with the points and *authorities in § 100.22* arguing that plaintiff's employment was at will. Also, these points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the breach of the implied covenant and good faith was not violated, for example, in a motion for summary judgment. The above points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the specific reasons for the termination, showing that the employer acted consistent with the terms of the employment agreement and personnel policies (for example, that the employer gave the plaintiff the required written warnings of performance deficiency) and that the employer at all times acted fairly and in good faith. If plaintiff contends that the employer's factual findings regarding plaintiff's misconduct or poor performance, for example, were erroneous, counsel should also discuss evidence that such findings were merely mistaken but made in good faith [*Burton v. Security Pacific Nat. Bank (1988) 197 Cal. App. 3d 972, 978-979, 243 Cal. Rptr. 277]* . If there is no evidence of either an express or implied employment agreement, counsel should use appropriate contentions from § 100.22 to argue that the employment was at will and therefore, there was no covenant of good faith and fair dealing [*Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 698 n.39, 254 Cal. Rptr. 211, 765 P.2d 373]* .

[c] Related Pleading and Practice Forms

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender). For discussion and forms relating to wrongful discharge, see Ch. 249, *Employment Law: Termination and Discipline* , in that publication.

[d] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 60, § 60.06* (Matthew Bender).

[3] Discussion of Authorities

[a] Implied Covenant of Good Faith and Fair Dealing Breached Only Where Defendant in Bad Faith Deprived Plaintiff of Benefit of Employment Agreement

In ***Burton v. Security Pacific Nat. Bank*** *(1988) 197 Cal. App. 3d 972, 243 Cal. Rptr. 277* , plaintiff was hired for an indefinite period of time under an oral agreement. Almost two years after he was hired, he was given a written warning for excessive absenteeism, but never received prior oral warnings as required by the employer's policy. Two days after the warning, plaintiff's supervisor observed plaintiff reading a confidential personnel book that contained sensitive salary and disciplinary information about other employees. The book was kept in a file cabinet in a restricted area. The next day, plaintiff was discharged for unauthorized entry into a restricted area and for reading confidential materials. Plaintiff argued that he was reading nonconfidential materials in a nonconfidential area. He appealed his discharge to the vice-president of corporate employee relations, who after listening to plaintiff's story and discussing the matter with other personnel, denied the appeal. Plaintiff sued for breach of oral contract, breach of the implied covenant of good faith and fair dealing, fraud, and negligent misrepresentation. The trial court sustained defendant's motion for summary judgment and plaintiff appealed.

The court of appeal affirmed. With respect to the cause of action for breach of the implied covenant of good faith and fair dealing, the court held that plaintiff's contention that he was in a nonconfidential area reading nonconfidential materials did not raise an issue of bad faith on the part of the employer. The implied covenant of good faith and fair dealing requires only that the employer act fairly and good faith, and to prevail on a claim of breach of the covenant, the plaintiff must show that the employer acted in bad faith and without probable cause. The court stated that the employer had investigated the incident and that there was no contrary evidence that the employer lacked probable cause to believe that plaintiff was in a confidential area reading confidential documents or that the employer lacked a good-faith belief that the charge was true. The fact that the employer chose to believe witnesses other than plaintiff does not raise an inference of bad faith. If an employer makes a determination in good faith that misconduct occurred, there is no breach of the covenant, even if the employee subsequently could prove that the finding of misconduct was mistaken. The court concluded that if an employee were entitled to a jury trial for breach of the covenant merely by asserting that the charged misconduct was not true, the decision to terminate would be at the discretion of the jury rather than the employer (*197 Cal. App. 3d 972, 978-979)* .

[b] No Breach of Implied Covenant of Good Faith and Fair Dealing if Underlying Employment Agreement Not Breached

In ***Guz v. Bechtel Nat'l, Inc.*** *(2000) 24 Cal. 4th 317* , a longtime employee was released at age 49 when his work unit was eliminated and its tasks transferred to another office of the employer. The employee sued the employer, alleging age discrimination, breach of an implied contract to be terminated only for good cause, and breach of the implied covenant of good faith and fair dealing. The California Supreme Court held that the cause of action for violation of the covenant of good faith and fair dealing was inapplicable or superfluous. The employee had argued that even if he was an at-will employee, the employer had violated its own established personnel policies and therefore had violated the covenant of good faith and fair dealing. The Court responded that the covenant cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement. Thus, unless a contract term provides otherwise, the employer may terminate the employee for any reason or no reason and in any manner; unless the employer's action breaches a specific contract provision providing otherwise, the unfairness of the manner of termination does not set forth a cause of action for breach of the covenant (*24 Cal. 4th 317, 349-353)* .

In ***Flait v. North American Watch Corp.*** *(1992) 3 Cal. App. 4th 467, 4 Cal. Rptr. 2d 522* , Flait began working for the defendant in 1984 as a sales representative under a contract of employment that stated that it was not for a definite term.

Although Flait increased defendant's sales volume, defendant nevertheless became dissatisfied with his performance because he exhibited greater allegiance to customers than to the company, did not require customers to carry all segments of defendant's line of products, and did not adequately service some stores. In 1986 and 1987, the vice president of human resources and Flait's supervisor, Pistner, spoke to Flait about an "attitude problem," and he agreed to improve. A female employee whom Flait supervised complained to him on several occasions that Pistner had made several inappropriate sexual comments to her. In several conversations, Flait told Pistner that his conduct was inappropriate, but during each such conversation, Pistner ignored Flait's concerns. In January 1988, Pistner made the decision to terminate Flait because he was not a "company man" and because Pistner had been dissatisfied with Flait's performance. Flait filed a complaint with the Department of Fair Employment and Housing and received a right-to-sue letter. He then filed this lawsuit alleging that he had been dismissed in retaliation for his efforts to prevent the female employee from being sexually harassed. The trial court granted the defendant's motion for summary adjudication, finding, among other things, that Flait was terminated for good cause and not for engaging instatutorily-protected behavior, and that his breach of the covenant of good faith and fair dealing claim was either statutorily preempted or barred because he was an at-will employee. Flait appealed.

On the claim of breach of the implied covenant of good faith and fair dealing, the court of appeal stated that a contract cause of action may be stated for breach of the implied covenant if the plaintiff was denied the benefits of the parties' agreement. The court found that the contract between Flait and the defendant stated that it was not for a definite term, and therefore was terminable at the will of either party. Moreover, Flait did not present any evidence of any other contract term or established company policy which assured him continued employment, or which was violated by his termination. The court concluded that because Flait could not show a violation of a contractual covenant or promise, summary judgment for the defendant was proper on the claim for breach of the implied covenant of good faith and fair dealing (*3 Cal. App. 4th 467, 480-481)* .

[c] No Breach of Implied Covenant of Good Faith and Fair Dealing Where Employer Makes Mistaken but Good-Faith Determination That Misconduct Occurred

The facts and procedural background of ***Burton v. Security Pacific Nat. Bank*** *(1988) 197 Cal. App. 3d 972* , are discussed under *§ 100.30[3][a]*. The court held that if an employer makes a determination in good faith that misconduct occurred, there is no breach of the covenant, even if the employee subsequently could prove that the finding of misconduct was mistaken. In reaching this decision, the court noted that if an employee were entitled to a jury trial for breach of the covenant merely by asserting that the charged misconduct was not true, the decision to terminate would be at the discretion of the jury rather than the employer (*197 Cal. App. 3d 972, 978-979)* .

[d] Claim for Breach of Covenant of Good Faith and Fair Dealing Cannot Be Maintained Where Employment Was At-Will

The factual and procedural background of ***Foley v. Interactive Data Corp.*** *(1988) 47 Cal. 3d 654, 254 Cal. Rptr. 211, 765 P.2d 373* , are *set forth in § 100.20[3][a]*. In discussing whether tort damages were available for breach of the implied covenant of good faith and fair dealing this holding, the Court noted that with regard to an at-will employment relationship, breach of the covenant cannot be based on a claim that the discharge was made without good cause. The court stated that if such an interpretation was applied, all at-will contracts would be transformed into contracts requiring good cause for termination and *Labor Code § 2922* would be eviscerated (*47 Cal. 3d 654, 698 n. 39*).

In ***Alexander v. Nextel Communications, Inc.*** *(1997) 52 Cal. App. 4th 1376, 61 Cal. Rptr. 2d 293* , plaintiff alleged that he accepted a position in a new division of his employer, was not given the responsibilities and resultant compensation he had been promised in accepting the new position, and that he was subsequently terminated. He won a judgment based on breach of an express contract to give him the new position and breach of the implied covenant of good faith and fair dealing. The appellate opinion does not make clear how the case was framed as a wrongful-termination one but treats it as such: the court reversed on the basis that the jury was never instructed on the

statutory presumption that the employment agreement was at will and the plaintiff's burden to overcome that presumption.

In the course of its opinion, the court stated that on neither cause of action (breach of express contract, breach of implied covenant) was the jury permitted to find for plaintiff before determining that there was an agreement that his employment was terminable only for cause (*52 Cal. App. 4th 1376, 1381* & n. 5).

In holding this, the opinion can be cited for a broader proposition than the one stated in the form: that no at-will employee can maintain a claim for breach of the covenant of good faith and fair dealing. However, this part of the opinion can be criticized for the breadth of its language. The case it cites in support of its position on the implied covenant (*see 52 Cal. App. 4th 1376, 1381 n. 5*), *Camp v. Jeffer, Mangels, Butler & Marmaro (1995) 35 Cal. App. 4th 620, 631* , makes clear that there is a need for rebuttal of the at-will presumption in an breach-of-implied-covenant case only where the sole allegation of a benefit of the contract taken from plaintiff by the breach is the right to continued employment. In this *Camp* is consistent with *Foley*, discussed immediately above. Similarly, it seems illogical to tie a finding of a breach of an express promise to employ plaintiff in a specified position to the issue of whether the contract would be at will or not.

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CHAPTER 100 EMPLOYER AND EMPLOYEE: WRONGFUL TERMINATION AND DISCIPLINE
PART II. FORMS

10-100 California Points & Authorities § 100.31

AUTHOR: Carolyn Rashby

§ 100.31 Supporting Contention That Wrongful Discharge Cause of Action Exists Absent Unequivocal Termination of Plaintiff's Employment--Plaintiff Was Constructively Discharged

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF HAS ALLEGED SUFFICIENT FACTS TO SHOW THAT HE/SHE WAS CONSTRUCTIVELY DISCHARGED IN BREACH OFTHE EMPLOYMENT AGREEMENT [or IN VIOLATION OF PUBLIC POLICY] IN THAT THE EMPLOYER CREATED CONDITIONS OF EMPLOYMENT THAT WERE SO INTOLERABLE THAT A REASONABLE PERSON WOULD RESIGN.

A. Constructive Discharge Legally Regarded as Firing. Constructive discharge occurs when the employer's conduct forces the employee to resign. Although the employee resigns, the employment relationship actually is severed involuntarily by the employer's acts, and against the employee's will. Thus, constructive discharge is legally considered a firing rather than a resignation (*Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238, 1244-1245, 32 Cal. Rptr. 2d 223, 876 P.2d 1022*).

[*Optional*] **B. Constructive Discharge as Breach of Good Cause Agreement.** When the employment is governed by an express or implied agreement not to terminate except for good cause, the employer has no right to constructively discharge the employee in contravention of that agreement (*Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238, 1252, 32 Cal. Rptr. 2d 223, 876 P.2d 1022*).

[*Optional*] **C. Constructive Discharge as Breach of Public Policy.** The employer has no right to terminate employment for a reason that contravenes public policy. An actual or constructive discharge in violation of fundamental public policy gives rise to a tort action in favor of the terminated employee (*Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238, 1252, 32 Cal. Rptr. 2d 223, 876 P.2d 1022*).

D. Employer Created Intolerable or Aggravated Working Conditions. Constructive discharge is established when the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign (*Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238, 1251, 32 Cal. Rptr. 2d 223, 876 P.2d 1022* ; *see Pennsylvania State Police v. Suders (2004) 542 U.S. 129, 124 S. Ct. 2342, 2351-2355, 159 L. Ed. 2d 204, 216-220)* .

[*Optional*] **E. Series of Separate Incidents May Constitute Constructive Discharge.** Although single, trivial, or isolated incidents ordinarily are insufficient to constitute a constructive discharge, a series of separate incidents may establish a constructive discharge through a continuous pattern of harassment of the employee, even if each incident considered separately might be viewed as trivial (*Thompson v. Tracor Flight Sys., Inc. (2001) 86 Cal. App. 4th 1156, 1171-1172, 104 Cal. Rptr. 2d 95*).

F. Knowledge or Intent of Employer. For purposes of establishing a claim of constructive discharge, the requisite knowledge or intent may exist either on the part of the employer, or on the part of persons who effectively represent the employer, including its officers, directors, managing agents, or supervisory employees (*Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238, 1251, 32 Cal. Rptr. 2d 223, 876 P.2d 1022*).

[*Optional*] **G. Statute of Limitations Period Commences on Date of Actual Termination.** In a constructive discharge action, the statute of limitations does not begin to run until the date of the actual termination, rather than from the date the employee is subjected to allegedly intolerable working conditions (*Mullins v. Rockwell International Corp. (1997) 15 Cal. 4th 731, 737-741*).

[*Optional*] **H. Leaving Job Because of Intolerable Conditions Constitutes Resignation.** To have a valid claim of constructive eviction, an employee need not have completely resigned from the job. It is sufficient if the employee establishes that, because of intolerable conditions, he or she needed to remove himself or herself from the job (for example, by electing to go on disability retirement) and thus was *effectively* constructively discharged (*Colores v. Board of Trustees (2003) 105 Cal. App. 4th 1293, 1316-1318*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of the contention that plaintiff was constructively discharged. Optional Paragraph B is for use where the constructive discharge violates an express or implied agreement that the employment will be terminated only for cause. If Optional Paragraph B is used, these points and authorities should be combined with the points and *authorities in § 100.20, 100.21* regarding the existence of an express or implied contract not to terminate except for good cause. Optional Paragraph C is for use where the constructive discharge violates public policy. If Optional Paragraph C is used, these points and authorities should be combined with the points and *authorities in § 100.42* regarding the nature of the public policy violation. Optional Paragraph E may be used if the adverse working conditions establishing the constructive discharge resulted from a series of separate incidents that,considered individually, might be viewed as trivial. Optional Paragraph G is for use if the employer contends that the constructive discharge claim is time-barred because the suit was not filed within the appropriate limitations period following the date the employee was subjected to the intolerable working conditions. Optional Paragraph H is for use if the employer contends that the employee has not been constructively discharged because he or she took disability retirement rather than simply quitting the job.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that plaintiff was constructively discharged, for example in opposition to a demurrer or in a motion for summary judgment. The above points and authorities may also be adapted for use in a trial

or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that plaintiff was a diligent, hard working employee, but was forced to resign because of intolerable working conditions. Counsel should specifically identify such conditions and show that they either were aggravated or continuous. Generally, single, trivial, or isolated incidents are not sufficient to support a claim for constructive discharge (*Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238, 1247, 32 Cal. Rptr. 2d 223, 876 P.2d 1022*). However, counsel may establish that a series of separate incidents constituted a continuous pattern of intolerable conditions by showing that the incidents amounted to a campaign of harassment against the employee (*Thompson v. Tracor Flight Sys., Inc. (2001) 86 Cal. App. 4th 1156, 1171-1172, 104 Cal. Rptr. 2d 95*). Further, counsel must show that the employer, or persons representing the employer (including officers, directors, managing agents, or supervisors) either intentionally created the conditions or knowingly permitted them to continue, such as evidence that plaintiff complained about the conditions but the employer failed to take remedial action.

[c] Opposing Memoranda

In an appropriate case, the points and authorities *set out in §§ 100.35 -100.38* may be used to oppose the contention supported by the above points and authorities.

[d] Related Pleading and Practice Forms

For a general form of demurrer to a complaint based on the failure to state facts sufficient to constitute a cause of action, see *California Forms of Pleading and Practice, Ch. 206, Demurrers and Motions for Judgment on the Pleadings, § 206.122* (Matthew Bender). For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* . For discussion and forms relating to wrongful discharge, see California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts* , Ch. 249, *Employment Law: Termination and Discipline* , and Ch. 250, *Employment Law: Wage and Hour Disputes* .

[e] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 60, Liability for Wrongful Termination and Discipline, § 60.07* (Matthew Bender).

[3] Discussion of Authorities

[a] Constructive Discharge Legally Regarded as Firing

In ***Turner v. Anheuser-Busch, Inc.*** *(1994) 7 Cal. 4th 1238, 32 Cal. Rptr. 2d 223, 876 P.2d 1022* , James Turner (Turner) resigned from his employment with Anheuser-Busch, Inc. (ABI) after he received a negative personnel evaluation, and filed suit alleging, inter alia, that he was wrongfully discharged in violation of public policy. The public policy discharge cause of action was based on allegations that he had been harassed for reporting (several years before the evaluation) ABI's violations of federal and state laws, internal company policies, and provisions of ABI's collective bargaining agreement. The trial court granted ABI's motion for summary judgment, but the court of appeal reversed, holding that the "cumulative effect" of the "long list of alleged actions [by ABI] and [workplace] conditions" established a triable case of constructive wrongful discharge in violation of public policy. The California Supreme Court granted review, and reversed the court of appeal's judgment.

The Court discussed the nature of a constructive discharge, stating that although the employee resigns, the employment relationship actually is severed involuntarily by the employer's acts, and against the employee's will. Thus, constructive

discharge is legally considered a firing rather than a resignation (*7 Cal. 4th 1238, 1245)* . To support a claim of constructive discharge, the conditions giving rise to the resignation must be sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to earn a livelihood and serve his or her employer. The proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee (*7 Cal. 4th 1238, 1246)* . The adverse working conditions must be unusually aggravated or amount to a continuous pattern before the situation will be deemed intolerable (*7 Cal. 4th 1238, 1247)* . In some circumstances, asingle intolerable incident, such as a crime of violence against an employee by an employer, or an employer's ultimatum that an employee commit a crime, may constitute a constructive discharge (*7 Cal. 4th 1238, 1247 n.3*). Generally, though, single, trivial, or isolated acts of misconduct are insufficient to support a constructive discharge claim. Citing *Soules v. Cadam, Inc. (1991) 2 Cal. App. 4th 390, 401, 3 Cal. Rptr. 2d 6* , the Court also stated that a poor performance rating or a demotion, even if accompanied by a reduction in pay, does not by itself trigger a constructive discharge (*7 Cal. 4th 1238, 1247)* . The Court also held that the authorities are in agreement that a constructive discharge can only exist if, under an objective standard, a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative but to quit, citing *Rochlis v. Walt Disney Co. (1993) 19 Cal. App. 4th 201, 212, 23 Cal. Rptr. 2d 793* (*7 Cal. 4th 1238, 1248)* . The Court examined Turne's allegations of illegality at ABI in the light of this standard, and relied on the absence of any evidence that Turner was required, or even requested, to join in the illegal conduct, as well as the nature of the alleged violations (involving violations of state law regulating the economic and contractual relationships between beverage manufacturers and their customers and competition), to conclude that the conditions were not so obnoxious as to cause a reasonable employee to feel compelled to resign (*7 Cal. 4th 1238, 1254-1255)* .

[b] Constructive Discharge as Breach of Good Cause Agreement

The factual and procedural background of ***Turner v. Anheuser-Busch, Inc.*** *(1994) 7 Cal. 4th 1238, 32 Cal. Rptr. 2d 223, 876 P.2d 1022* , are set forth under § 100.31[3][a]. The Court stated that after proving the existence of a constructive discharge, the employee must independently prove a breach of contract or violation of public policy in connection with the termination. The Court's rationale was that constructive discharge in and of itself is neither a tort nor a breach of contract, but is merely a doctrine that transforms an ostensible resignation into a dismissal (*7 Cal. 4th 1238, 1251)* .

[c] Constructive Discharge as Violation of Public Policy

The factual and procedural background of ***Turner v. Anheuser-Busch, Inc.*** *(1994) 7 Cal. 4th 1238, 32 Cal. Rptr. 2d 223, 876 P.2d 1022* , are set forth under § 100.31[3][a]. The Court stated that after proving the existence of a constructive discharge, the employee must independently prove a breach of contract or violation of public policy in connection with the termination. The Court's rationale was that constructive discharge in and of itself is neither a tort nor a breach of contract, but is merely a doctrine that transforms an ostensible resignation into a dismissal (*7 Cal. 4th 1238, 1251)* .

[d] Employer Created Intolerable or Aggravated Working Conditions

The factual and procedural background of ***Turner v. Anheuser-Busch, Inc.*** *(1994) 7 Cal. 4th 1238, 32 Cal. Rptr. 2d 223, 876 P.2d 1022* , are set forth under § 100.31[3][a]. The Court found that in order to support a claim of constructive discharge, the conditions giving rise to the resignation must be sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to earn a livelihood and serve his or her employer. The proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee (*7 Cal. 4th 1238, 1246)* . The adverse working conditions must be unusually aggravated or amount to a continuous pattern before the situation will be deemed intolerable (*7 Cal. 4th 1238, 1247)* . In some circumstances, a single intolerable incident, such as a crime of violence against an employee by an employer, or an employer's ultimatum that an employee commit a crime, may constitute a constructive discharge (*7 Cal. 4th 1238, 1247 n.3*). Generally,

though, single, trivial, or isolated acts of misconduct are insufficient to support a constructive discharge claim. Citing *Soules v. Cadam, Inc. (1991) 2 Cal. App. 4th 390, 401, 3 Cal. Rptr. 2d 6* , the Court also stated that a poor performance rating or a demotion, even if accompanied by a reduction in pay, does not by itself trigger a constructive discharge (*7 Cal. 4th 1238, 1247)* . The Court also held that the authorities are in agreement that a constructive discharge can only exist if, under an objective standard, a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative but to quit, citing *Rochlis v. Walt Disney Co. (1993) 19 Cal. App. 4th 201, 212, 23 Cal. Rptr. 2d 793* (*7 Cal. 4th 1238, 1248)* .

In ***Pennsylvania State Police v. Suders*** *(2004) 542 U.S. 129, 124 S. Ct. 2342, 159 L. Ed. 2d 204* , the plaintiff sued her former employer in federal district court, alleging that sexually harassing conduct by her supervisors violated Title VII of the Civil Rights Act of 1964 (*42 U.S.C. § 2000e et seq.*). She further alleged that the hostile work environment created by the supervisors' conduct was so severe that she was forced to resign; in other words, she claimed that she had been constructively discharged. The district court granted the employer's motion for summary judgment, holding that the employer was not vicariously liable for the supervisors' harassment because the harassment did not culminate in a tangible employment action. The Third Circuit reversed and remanded for further proceedings, holding that the plaintiff's claim of constructive discharge, if proved, would constitute a sufficient tangible employmentaction to render the employer vicariously liable under Title VII for the supervisors' harassing conduct.

The United States Supreme Court reversed. The Court held that a constructive discharge does not by itself constitute a tangible employment action for this purpose. Thus, if a Title VII plaintiff alleges that he or she was constructively discharged, the employer may assert an affirmative defense based on the employee's failure to use the employer's internal procedure for reporting harassment [*see* *Burlington Industries v. Ellerth (1998) 524 U.S. 742, 765, 118 S. Ct. 2257, 141 L. Ed. 2d 633* ; *Faragher v. City of Boca Raton (1998) 524 U.S. 775, 807-808, 118 S. Ct. 2275, 141 L. Ed. 2d 662]* unless the employee quit in reasonable response to an employer-sanctioned adverse action that would qualify as a tangible employment action (for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which the employee would face unbearable working conditions) (*159 L. Ed. 2d 204, 216-223)* .

In the course of its analysis, the Supreme Court examined the origins and scope of the constructive discharge doctrine. Under that doctrine, an employee's reasonable decision to resign because of unendurable working conditions is assimilated to a formal discharge for remedial purposes. The test is objective: an employee's resignation will be deemed a constructive discharge only if working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign. The constructive discharge concept originated in the 1930's, when the National Labor Relations Board developed the doctrine to address situations in which employers coerced employees to resign, often by creating intolerable working conditions, in retaliation for the employees' engaging in collective activities. Since then, the doctrine has become firmly established in the courts and has been applied in a variety of situations, including Title VII cases (*159 L. Ed. 2d 204, 216-217)* .

The Court went on to hold that a plaintiff who advances a hostile environment constructive-discharge claim must show that (1) the offending behavior was sufficiently severe or pervasive to alter the conditions of the plaintiff's employment and create an abusive working environment, and (2) the resulting working environment was so intolerable that a reasonable person would have felt compelled to resign. Harassment so intolerable as to cause resignation may be effected through co-worker conduct, unofficial supervisory conduct, or official company acts (*159 L. Ed. 2d 204, 217-220)* .

[e] Series of Separate Incidents May Constitute Constructive Discharge

In ***Thompson v. Tracor Flight Sys., Inc.*** *(2001) 86 Cal. App. 4th 1156, 104 Cal. Rptr. 2d 95* , the plaintiff resigned from her job as human resources director and then sued her former employer for wrongful termination, alleging that she had been constructively discharged in violation of the Fair Employment and Housing Act (*see Gov. Code § 12940*). The plaintiff alleged that a series of incidents in which the employer's general manager mistreated the plaintiff had resulted

in intolerable working conditions that amounted to constructive discharge. The incidents involved various forms of intimidation and harassment by the general manager, such as shouting at the plaintiff, glaring at her, and suggesting in the presence of other managers that the plaintiff was not a "team player." The plaintiff's supervisor testified that it seemed that the general manager was "picking on" the plaintiff and "going out of his way to make her life difficult." The jury found that the plaintiff had indeed been constructively discharged, and the trial court entered a judgment awarding the plaintiff compensatory and punitive damages.

The court of appeal affirmed. The court acknowledged that each incident alleged by the employee did not by itself justify the employee's decision to resign. However, an overall campaign of harassment can justify a decision to resign. In this case the evidence supported the jury's finding that the separate incidents, considered together, constituted a continuous pattern of intolerable working conditions (*86 Cal. App. 4th 1156, 1171-1172)* .

[f] Knowledge or Intent of Employer

The factual and procedural background of ***Turner v. Anheuser-Busch, Inc.*** *(1994) 7 Cal. 4th 1238, 32 Cal. Rptr. 2d 223, 876 P.2d 1022* , is set forth under § 100.31[3][a]. The Court stated that because a constructive discharge is equivalent to a termination, the resignation must be coerced by the employer and not simply caused by the voluntary action of the employee or by conditions that are not within the employer's control. The Court therefore disapproved of the constructive knowledge standard established by *Brady v. Elixir Industries (1987) 196 Cal. App. 3d 1299, 1306, 242 Cal. Rptr. 324* , because that standard would not ensure that the employer had the opportunity to take corrective measures (*7 Cal. 4th 1238, 1248)* . The Court stated that an employer's actual knowledge of the intolerable conditions and subsequent failure to remedy the situation may be circumstantial evidence that the employer coerced the resignation (*7 Cal. 4th 1238, 1249)* . The Court reasoned that this actual knowledge standard will require the employee to notify someone in a position of authority, thus giving employers who were previously unaware of the conditions a chance to remedy them, but preventing employers from shielding themselves from liability by ignoring the conditions (*7 Cal. 4th 1238, 1250)* .

[g] Statute of Limitations Period Commences on Date of Actual Termination

In ***Mullins v. Rockwell International Corp.*** *(1997) 15 Cal. 4th 731, 63 Cal. Rptr. 2d 636, 936 P.2d 1246* , Cornelius Mullins (Mullins), a 22-yearemployee of Rockwell International Corp. (Rockwell), was demoted in early 1988 from his executive-level position to a non-executive position, without a change in pay. Thereafter, Mullins's job responsibilities and working environment continued to diminish, and in mid-1988 he was told that he would be assigned to a new grade level to reflect the responsibilities of his new position. Mullins expected that this would lead to lower pay and loss of benefits. Due to stress and humiliation, he took several medical leaves of absence and eventually resigned on September 20, 1989. On September 19, 1991, Mullins filed suit against Rockwell alleging constructive discharge. The trial court granted Rockwell's motion for summary judgment on the ground, inter alia, that Mullins's contract claims were barred by the two-year statute of limitations set out in *Code Civ. Proc. § 339*. The court ruled that the limitations period began to run once Mullins suffered appreciable harm, which, according to the court, was when Mullins first learned that his status was being downgraded. The court of appeal affirmed. The California Supreme Court granted review and reversed the court of appeal's judgment.

The Court, referring to its decision in *Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238, 32 Cal. Rptr. 2d 223, 876 P.2d 1022* (*discussed under § 100.31[3][a]*), stated that a constructive discharge occurs only when an employer terminates employment by forcing the employee to resign. To ensure that the resignation is actually coerced, courts require proof that the employer intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time the employee resigned that a reasonable employer would realize that a reasonable person in the employee's situation would be compelled to resign (*15 Cal. 4th 731, 737-738)* . The Court then reviewed its decision in *Romano v. Rockwell International, Inc. (1996) 14 Cal. 4th 479, 59 Cal. Rptr. 2d 20, 926 P.2d 1114* , in which it held that the statute of limitations in an action based on breach of an implied contract not to terminate

employment without good cause begins running at the time of the actual termination of employment. According to the court, the same result applies in a constructive discharge action. Any early breach of contract committed through Rockwell's creation of intolerable working conditions did not rescind the contract because Mullins continued to perform. Mullins had an election of remedies, and the statute of limitations did not begin to run until he made an election by resigning (*15 Cal. 4th 731, 738-739)* . Rockwell argued that this result would allow employees to control the limitations period, such that an employee could delay filing suit until memories have faded and the claim is stale. The Court, however, said that an employer that creates intolerable conditions should be prepared for a possible lawsuit when the coerced resignation finally occurs; because intolerable conditions normally continue up to the date of the resignation, litigation will often involve recent circumstances. The longer an employee delays resigning, however, the more difficult it may be for him or her to prove that the working conditions actually were intolerable. The Court also noted that the parties' efforts to resolve differences informally would be stifled if the statute of limitations began to run on the first date that an employee suffered appreciable harm, rather than on the date of actual termination (*15 Cal. 4th 731, 739-741)* .

[h] Leaving Job Because of Intolerable Conditions Constitutes Resignation

In ***Colores v. Board of Trustees*** *(2003) 105 Cal. App. 4th 1293* , the plaintiff was a state-university employee who sued the university for constructive wrongful discharge in violation of public policy. The trial court granted summary judgment in favor of the defendant university, holding that the facts of the case could not support the plaintiff's allegation of constructive discharge. The plaintiff appealed, and the university filed a cross-appeal challenging the trial court's order denying the university's first motion for summary adjudication of issues. The court of appeal reversed the summary judgment and denied the university's cross-appeal (*105 Cal. App. 4th 1293, 1321)* .

On the university's cross-appeal, one issue was whether an employee who takes a disability retirement from employment is precluded from recovering on a wrongful constructive discharge cause of action. The university contended that, under the laws governing the Public Employees Retirement System, a disability retirement does not sever the employment relationship. For example, a disability retiree who sufficiently recovers his or her health may request reinstatement (*see Gov. Code § 21193*). Therefore, the university contended, a disability retirement will not support a claim of constructive discharge, because it is inconsistent with the notion of a coerced termination of the employer-employee relationship that is the basis of the doctrine of constructive discharge (*105 Cal. App. 4th 1293, 1317-1318)* .

The court of appeal rejected the university's position on this issue, preferring instead to focus on "the *true* logic of plaintiff's case--that the university, through its agents, allegedly made plaintiff's working conditions so intolerable that her preexisting medical condition worsened to the point where she was no longer able to function in her duties and *needed to remove herself from her job,* and thus was *effectively* constructively discharged." The court explained that an abusive employer does not have the right to orchestrate how its employee exits his or her employment by demanding that the employee quit or take a service retirement before acquiring a cause of action for wrongful constructive discharge (*105 Cal. App. 4th 1293, 1318-1319)* .

[4] Additional Authorities

[a] Employer Created Intolerable or Aggravated Working Conditions

In *Zilmer v. Carnation Co. (1989) 215 Cal. App. 3d 29, 263 Cal. Rptr. 422* , the plaintiff had worked for defendant Carnation for 31 years. At the time of his resignation, he was a controller for Carnation. Approximately one year prior to his resignation, his supervisors informed him that all accounting directors and controllers had to obtain a CMA certificate as a condition of further employment. He told the supervisors that because of his immense job responsibilities, in part due to the recent acquisition of Carnation by the Nestle Co., he did not believe that he could obtain the certificate. They told him that there would be no exceptions to the requirement. However, following his

resignation, they hired noncertified accounting directors and controllers and relieved them, and other similarly-situated employees, of the certificate requirement. Plaintiff sued, alleging that the certificate requirement was false and intended to create intolerable working conditions for him and to force his resignation, all as part of a plan to replace high-level managerial personnel with associates and friends of one of the supervisors. The trial court sustained the defendants" demurrer and plaintiff appealed. The court of appeal reversed, finding that plaintiff had properly plead an implied-in-fact contract not to terminate except for cause, and that plaintiff had stated a cause of action for constructive discharge. In particular, the certification requirement imposed by defendants was unreasonable under the circumstances and created an intolerable work situation that could result only in his termination or resignation (*215 Cal. App. 3d 29, 38-39)* . Note that *Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238, 1251, 32 Cal. Rptr. 2d 223, 876 P.2d 1022* , disapproved *Zilmer* to the extent that *Zilmer* is inconsistent with the standard of actual employer knowledge required for a showing of constructive discharge.

California Points & Authorities

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 100 EMPLOYER AND EMPLOYEE: WRONGFUL TERMINATION AND DISCIPLINE
PART II. FORMS

10-100 California Points & Authorities § 100.32

AUTHOR: Carolyn Rashby

§ 100.32 Supporting Contention That Plaintiff Was Constructively Discharged--Employer Created Intolerable Working Conditions--Hostile Work Environment Caused by Widespread Sexual Favoritism

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF HAS ALLEGED SUFFICIENT FACTS TO SHOW THAT THE DEFENDANT CREATED INTOLERABLE WORKING CONDITIONS BY ALLOWING WIDESPREAD SEXUAL FAVORITISM THAT PRODUCED A HOSTILE WORK ENVIRONMENT.

Widespread Sexual Favoritism Can Create Hostile Work Environment for All Employees. When favoritism in a workplace based on a supervisor's consensual sexual affairs with female employees is sufficiently widespread, it may create a hostile work environment in which the demeaning message is conveyed to female employees that they are viewed by management as "sexual playthings" or that the way for women to get ahead in the workplace is by engaging in sexual conduct with their supervisors or managers. Such conduct is actionable by any employee, male or female, who finds it offensive and can establish that it is sufficiently severe or pervasive to alter his or her working conditions and create a hostile working environment (*Miller v. Department of Corr. (2005) 36 Cal. 4th 446, 464-467, 30 Cal. Rptr. 3d 797, 115 P.3d 77*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a contention that the plaintiff was constructively discharged because of a hostile work environment created by widespread sexual favoritism in the workplace.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Counsel should, for example, cite evidence or allegations showing that at the relevant times the plaintiff and other employees were aware that certain employees who had engaged in consensual sexual affairs with supervisors recieved preferential treatment, such as promotions or sought-after assignments.

[c] Related Memoranda

This form may be combined with the points and *authorities in § 100.31* to support a claim that the plaintiff was wrongfully, constructively discharged by the employer's creation of intolerable working conditions that prompted the plaintiff to resign.

[d] Opposing Memoranda

The points and authorities *set out in §§ 100.35 -100.38, 100.82* may be used in appropriate cases to oppose the points and authorities set out in this form.

[e] Related California Employment Law References

For further discussion of hostile work environment, see Wilcox, *California Employment Law, Ch. 41, § 41.81[1][b]* (Matthew Bender).

[3] Discussion of Authorities

[a] Widespread Sexual Favoritism Can Create Hostile Work Environment for All Employees

The plaintiffs in ***Miller v. Department of Corr.*** *(2005) 36 Cal. 4th 446, 30 Cal. Rptr. 3d 797, 115 P.3d 77* , sued their former employer, claiming that they had been victims of sexual harassment under the Fair Employment and Housing Act (*Gov. Code § 12900 et seq.*). Specifically, the plaintiffs claimed that an actionable hostile work environment existed as a result of their supervisor's having accorded unwarranted favorable treatment to numerous female employees with whom the supervisor was having sexual affairs. The trial court granted summary judgment in favor of the employer, concluding that the conduct in question did not support a claim of sexual harassment, and the court of appeal affirmed.

The California Supreme Court reversed, holding that although an isolated instance of favoritism on the part of a supervisor toward a female employee with whom the supervisor is conducting a consensual sexual affair ordinarily would not constitute sexual harassment, when such sexual favoritism in a workplace is sufficiently widespread it may create an actionable hostile work environment (*36 Cal. 4th 446, 451-452)* .

In general, an employee claiming harassment based on a hostile work environment must demonstrate that the conduct complained of was severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees because of their sex, as judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances. In holding that the plaintiffs in this case had at least raised a question of fact concerning the existence of a hostile work environment, the Supreme Court placed great reliance on a 1990 policy statement of the federal Equal Employment Opportunity Commission (EEOC) regarding hostile environment claims under Title VII of the Civil Rights Act of 1964 (*42 U.S.C. § 2000e et seq.*). The Court cited with approval the policy statement's explanation that widespread sexual favoritism of the kind alleged in the present case may create a hostile work environment by sending employees the demeaning message that female employees are viewed by management as "sexual playthings" or that the way for women to get ahead in the workplace is to engage in sexual conduct with their supervisors (*36 Cal. 4th 446, 462-463)* .

Again citing the EEOC policy statement, the Court also held that if favoritism based on the granting of sexual favors is widespread in a workplace, both male and female colleagues who do not welcome this conduct can establish a hostile

work environment, regardless of whether any objectionable conduct is directed at them and regardless of whether those who were granted favorable treatment willingly bestowed the sexual favor. Thus, sexual favoritism of the kind alleged in the present case is actionable by any employee who can establish that the conduct is sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. The employee need not demonstrate the existence of coercive sexual conduct directed at him or her, or even conduct of a sexual nature (*36 Cal. 4th 446, 464)* .

California Points & Authorities

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CHAPTER 100 EMPLOYER AND EMPLOYEE: WRONGFUL TERMINATION AND DISCIPLINE
PART II. FORMS

10-100 California Points & Authorities § 100.33

AUTHOR: Carolyn Rashby

§ 100.33 Supporting Contention That Cause of Action Exists Absent Unequivocal Termination of Plaintiff's Employment--Discipline of Employee Violated Public Policy

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

A CAUSE OF ACTION AGAINST DEFENDANT EXISTS ABSENT TERMINATION OF EMPLOYMENT WHERE DEFENDANT'S DISCIPLINE OF PLAINTIFF WAS IMPOSED IN VIOLATION OF PUBLIC POLICY.

Cause of Action Exists for Wrongful Discipline in Violation of Public Policy. The doctrine of wrongful termination in violation of public policy embraces wrongful discipline. Thus, an employee can maintain a tort claim against his or her employer where disciplinary action has been taken against the employee in violation of a public policy, even though the ultimate sanction of discharge has not been imposed (*Garcia v. Rockwell Internat. Corp. (1986) 187 Cal. App. 3d 1556, 1562, 232 Cal. Rptr. 490*).

[2] Comments

[a] Use of Form

The above points and authorities may be submitted in support of the contention that, absent termination, a tort cause of action can exist for discipline imposed in violation of public policy. These points and authorities should be combined with points and authorities which describe the nature of the public policy that has been violated, for example, the points and authorities *set out in §§ 100.41 -100.47*.

The above points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a cause of action exists absent termination where the plaintiff has been disciplined in violation of public policy, for example in opposition to a demurrer or in a motion for summary judgment. These points and authorities may also be adapted for use in a trial or appellate brief or in jury

instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the conduct of plaintiff that is alleged to have lead to the discipline (for example, whistleblowing or refusing to violate the law), the nature of the discipline imposed (such as demotion or suspension), and the public policy at issue. Further, counsel should discuss evidence that tends to link the discipline to plaintiff's conduct. This could include evidence of threats, statements made by the employer as to the reason for the disciplinary action, or other evidence indicating a relationship between the discipline and the conduct, such as the fact that plaintiff was performing his or her job satisfactorily.

[c] Opposing Memoranda

In an appropriate case, the points and authorities *set out in §§ 100.52 -100.54* may be used to oppose the contention supported by these points and authorities.

[d] Related Pleading and Practice Forms

For a general form of demurrer to a complaint based on the failure to state facts sufficient to constitute a cause of action, see *California Forms of Pleading and Practice, Ch. 206, Demurrers and Motions for Judgment on the Pleadings, § 206.122* (Matthew Bender). For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* . For discussion and forms relating to wrongful discharge, see California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts* , Ch. 249, *Employment Law: Termination and Discipline* , and Ch. 250, *Employment Law: Wage and Hour Disputes* .

[e] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 60, Liability for Wrongful Termination and Discipline, § 60.07[2]* (Matthew Bender).

[3] Discussion of Authorities

[a] Cause of Action Exists for Wrongful Discipline in Violation of Public Policy

In ***Garcia v. Rockwell Internat. Corp.*** *(1986) 187 Cal. App. 3d 1556, 232 Cal. Rptr. 490* , plaintiff Joe Garcia began work for defendant Rockwell in 1960. From October 1977 to April 21, 1980, he was a supervisor in manufacturing operations and was responsible for keeping time records for employees in his department and charging an employee's time to a "charge number" that represented the project on which they were working. Garcia mischarged the time of his employees to projects they were not working on. In July 1979, Garcia told a NASA representative that he had been ordered to mischarge the time by his supervisor, Ray Ciotta. Ciotta denied this allegation. In November 1979, Garcia told Rockwell officials that he had reported to NASA overcharging on the Shuttle program by another supervisor. He did not tell the Rockwell officials that he had reported his own mischarging. In March 1980, Garcia met again with Rockwell officials and signed a statement admitting the mischarging. Four days later, he was placed on leave without pay and subsequently was suspended without pay. Six months later, Rockwell reinstated him to a nonsupervisory position with no reduction in pay. Garcia sued, claiming that he had been wrongfully suspended and demoted in retaliation for revealing the mischarging to NASA. The lower court granted summary judgment in favor of the employer who claimed that, as a matter of law, an employee who is wrongfully disciplined in retaliation for whistle blowing may not maintain an action unless the discipline imposed is termination. Garcia appealed.

The court of appeal reversed, rejecting defendant's argument that a tort claim under *Tameny v. Atlantic Richfield Co.*

(1980) 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330 (discussed in *§ 100.42[3][a]*), cannot as a matter of law be based on alleged retaliatory discipline. The court stated that it saw no reason why the rationale of *Tameny* could not be applied where an employee is wrongfully disciplined and suffers damage as a result of a breach of a duty growing out of the contract, as opposed to breach of a contract term. The court then found that public policy, specifically *Labor Code § 1102.5*, forbids retaliation against an employee who discloses information regarding the employer's violation of the law to a government agency. The same wrongful conduct is involved whether the retaliation that is inflicted is discharge or a suspension, the only difference being in the extent of the damages suffered. The court concluded that an employee can maintain a tort claim against his or her employer where disciplinary action has been taken against the employee in retaliation for "whistle blowing," even though the employee was not terminated (*187 Cal. App. 3d 1556, 1561-1562)* .

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California Points & Authorities

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 100 EMPLOYER AND EMPLOYEE: WRONGFUL TERMINATION AND DISCIPLINE
PART II. FORMS

10-100 California Points & Authorities § 100.34

AUTHOR: Carolyn Rashby

§ 100.34 Supporting Contention That Cause of Action Exists Absent Unequivocal Termination of Plaintiff's Employment--Right to Demote Limited by Express or Implied Agreement Between Parties

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

DEFENDANT DID NOT HAVE THE RIGHT TO DEMOTE PLAINTIFF AT WILL, BECAUSE DEFENDANT'S RIGHT TO DEMOTE PLAINTIFF WAS LIMITED BY AN_____ [EXPRESS *and/or* IMPLIED] AGREEMENT TO DEMOTE OR DISCIPLINE PLAINTIFF ONLY FOR "GOOD CAUSE."

A. Express or Implied Good Cause Agreement Rebuts Presumption That Employee May Be Demoted at Will. The presumption that an employee may be demoted at will is rebuttable by evidence of an express or implied agreement to demote only for good cause (*Scott v. Pacific Gas & Electric Co. (1995) 11 Cal. 4th 454, 464-465, 46 Cal. Rptr. 2d 427, 904 P.2d 834*).

[*Optional*] **B. Implied Contract Terms Not to Demote May Arise From Employer's Policies and Practices.** Courts will look to the employer's policies, both official and unofficial, practices, and communications in order to discover the contents of an implied employment agreement not to demote without good cause. In particular, an employer's discipline policy may be evidence of an implied contract not to demote without cause (*Scott v. Pacific Gas & Electric Co. (1995) 11 Cal. 4th 454, 463-464, 46 Cal. Rptr. 2d 427, 904 P.2d 834*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a plaintiff's contention that either an express or an implied agreement between the parties limited the defendant's right to demote plaintiff at will, permitting demotion only for good cause [*see Scott v. Pacific Gas & Electric Co. (1995) 11 Cal. 4th 454, 464-465, 46 Cal. Rptr. 2d 427, 904 P.2d 834]* .

Optional Paragraph B is for use if plaintiff bases the contention on the existence of an implied agreement not to demote without good cause. Counsel may combine these points and authorities with the points and *authorities in § 100.27,* which support the contention that the defendant lacked good cause to discharge plaintiff; however, counsel will need to modify those points and authorities to reflect lack of good cause for *demotion* rather than termination.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that an express or implied agreement limited defendant's right to demote plaintiff at will, for example in opposition to a demurrer or in a motion for summary judgment. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Counsel should discuss evidence indicating that the defendant promised not to demote plaintiff without good cause. If the contention is based on the existence of an express agreement, counsel should specify the defendant's express promise. If the contention is based on an implied agreement, counsel should specify the conduct of the parties that evidences an implied agreement not to demote without good cause. For example, counsel could discuss evidence of defendant's personnel policies or practices, such as, if appropriate, a progressive discipline policy. Counsel also should discuss evidence that in demoting plaintiff, defendant breached the express or implied promise not to demote without good cause.

[c] Opposing Memoranda

In an appropriate case, the points and authorities *set out in § 100.39* may be used to oppose the contention supported by these points and authorities.

[d] Related Pleading and Practice Forms

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender). For discussion and forms relating to wrongful demotion, see Ch. 249, *Employment Law: Termination and Discipline* , in that publication.

[e] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 60, § 60.07[2]* (Matthew Bender).

[3] Discussion of Authorities

[a] Express or Implied Good Cause Agreement Rebuts Presumption That Employee May Be Demoted At Will

In ***Scott v. Pacific Gas & Electric Co.*** *(1995) 11 Cal. 4th 454, 46 Cal. Rptr. 2d 427, 904 P.2d 834* , the plaintiffs, Scott and Johnson, were engineers with Pacific Gas & Electric Co. ("PG&E") for 24 and 20 years, respectively. Scott was a director of technical services with responsibility for 250 employees, and Johnson was a supervisory engineer with responsibility for 56 employees. In 1979, plaintiffs began their own consulting business, S&J Engineering ("S&J"). All S&J work was done in the evenings, on vacation days, or on weekends. PG&E managers were aware of the existence of S&J and the plaintiff's involvement in it, and PG&E employment policies permitted such outside work so long as it was not a conflict of interest with PG&E. On occasion, several PG&E technicians were employed on S&J projects, but they performed this work only during their off hours. In late 1988, PG&E's internal auditing department began investigating plaintiffs supervisorial practices and outside business interests. Plaintiffs were eventually charged with being negligent supervisors, and with having conflicts of interests with PG&E arising out of their work in S&J. In August 1989,

plaintiffs were suspended with only a brief explanation of the charges against them. In September, they were finally allowed to read, but were not given copies of, the investigation report. Plaintiffs responded to the charges in writing, but nonetheless were demoted in October to nonsupervisory positions, and their salaries and benefits were accordingly reduced by approximately 25 percent. At trial, personnel supervisors testified that the demotion decision actually had been made in July.

Plaintiffs brought suit for breach of an implied employment contract, based on evidence that PG&E did not comply with the terms of its positive discipline policy. The policy contained a progressive system of discipline, beginning with counseling, followed by an oral reminder, a written reminder, and then a paid one-day leave for the employee to consider whether he or she could comply with PG&E's standards of conduct. The policy provided for termination when the positive discipline steps were ineffective, or in extreme circumstances when the employee forfeited the right to positive discipline, such as for theft. Demotion was discussed as an intermediate disciplinary step short of discharge. There was evidence that the policy was intended to be uniformly applied to all nonprobationary employees, and that PG&E considered the policy to express what the company expected from employees and what employees could expect from the company. The jury found that PG&E had breached an implied agreement not to discipline or demote plaintiffs without good cause. PG&E then appealed following the trial court's denial of PG&E's motion for judgment notwithstanding the verdict. The court of appeal reversed the judgment for the plaintiffs on the grounds that no cause of action existed for breach of an implied-in-fact contract not to demote except for good cause because such a contract would be too vague and uncertain to enforce.

The Supreme Court reversed. The Court reviewed the principles applicable to a cause of action for breach of an implied in fact contract not to terminate without good cause, and concluded that, consistent with the reasoning in *Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 254 Cal. Rptr. 211, 765 P.2d 373* (discussed in *§ 100.20[3][a]*), there was no rational reason why an employer's policy that it will not demote employees except for good cause cannot become an implied contract term of an employment contract (*11 Cal. 4th 454, 464)* . The Court explained that there is a common-law presumption that an employee may be demoted at will (derived from the employment at will presumption of *Lab. Code § 2922*), but that the employer's right to demote, just like the right to discharge, is not absolute. The presumption that an employee may be demoted at will may be rebutted by evidence of a contractual agreement, express or implied, to limit the employer's power to demote (*11 Cal. 4th 454, 465)* .

The Court then found that there was sufficient evidence to conclude that PG&E had entered into an implied contractual agreement not to demote without good cause. PG&E's detailed positive discipline policy was intended to apply to all employees, and there was ample evidence that employees had a reasonable expectation that the company would follow its own discipline policy, which had as its basic premise the disciplining of employees only based on good cause (*11 Cal. 4th 454, 465)* . The Court also found that PG&E had breached the implied contract. The evidence indicated that plaintiffs did not commit significant conflict of interest or supervisory violations, and, pursuant to the positive discipline policy, PG&E should have given plaintiffs an opportunity to cure any minor offenses (*11 Cal. 4th 454, 465)* .

[b] Implied Contract Terms Not to Demote May Arise From Employer's Policies and Practices

The facts and procedural background of ***Scott v. Pacific Gas & Electric Co.*** *(1995) 11 Cal. 4th 454, 46 Cal. Rptr. 2d 427, 904 P.2d 834* , are *discussed under § 100.34[3][a]*. The Court explained that in examining whether an implied in fact contract exists in the employment context, courts will look not only to express agreements, but also to the employer's policies, practices, and communications to discover the contents of an employment contract (*11 Cal. 4th 454, 463)* . The Court concluded that in the case before it, the employer's progressive discipline policy created an implied in fact contract that it would not demote employees without good cause (*11 Cal. 4th 454, 465)* .

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CHAPTER 100 EMPLOYER AND EMPLOYEE: WRONGFUL TERMINATION AND DISCIPLINE
PART II. FORMS

10-100 California Points & Authorities § 100.35

AUTHOR: Carolyn Rashby

§ 100.35 Opposing Contention That Wrongful Discharge Cause of Action Exists Absent Unequivocal Termination of Plaintiff's Employment--Constructive Discharge of Plaintiff Was Neither Breach of Contract, Nor Tort, Nor Violation of Fundamental Public Policy or Statutory or Constitutional Right

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF HAS NOT ESTABLISHED THAT HIS/HER ALLEGED CONSTRUCTIVE DISCHARGE WAS A BREACH OF CONTRACT OR A TORT.

Discharge of Employee, Even Constructive Discharge, Does Not Give Rise to Cause of Action Unless It Violates Employee's Contractual Rights or Constitutes Actionable Tort. A constructive discharge, by itself, is not necessarily a wrongful discharge. Even after establishing a constructive discharge, an employee must independently prove a breach of contract or a tort, or a violation of fundamental public policy or statutory or constitutional right in connection with the termination in order to recover damages for wrongful discharge. Thus, an at-will employee who is constructively discharged has no viable contractual claim for wrongful discharge because at-will employment may be terminated for any reason (*Starzynski v. Capital Pub. Radio, Inc. (2001) 88 Cal. App. 4th 33, 40-41, 105 Cal. Rptr. 2d 525*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a contention that plaintiff has a cause of action based solely on an alleged constructive discharge, when the plaintiff has not alleged or established that the discharge was a violation of contractual rights or a tort.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Counsel should, for example, cite evidence or allegations showing that the plaintiff's employment was at will, and that the termination of the plaintiff's employment did not violate public policy.

[c] Related Memoranda

Any of the other points and authorities for opposing a wrongful discharge claim that are set out in this chapter may be combined with this form. For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Memoranda

The points and authorities *set out in §§ 100.20, 100.21, 100.31, 100.42* et seq. may be used in an appropriate case to oppose the points and authorities set out in this form.

[e] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 60, § 60.07* (Matthew Bender).

[3] Discussion of Authorities

[a] Discharge of Employee, Even Constructive Discharge, Does Not Give Rise to Cause of Action Unless It Violates Employee's Contractual Rights or Constitutes Actionable Tort or Violates a Fundamental Public Policy or Statutory or Constitutional Right

In ***Starzynski v. Capital Pub. Radio, Inc.*** *(2001) 88 Cal. App. 4th 33, 105 Cal. Rptr. 2d 525* , the plaintiff was an at-will employee. After he resigned from his job, he sued his employer, alleging that his resignation was a constructive discharge prompted by intolerable working conditions and that the termination of his employment violated an implied contract not to terminate him so long as his performance was satisfactory. The trial court granted summary judgment in favor of the employer.

The court of appeal affirmed. The court first determined that there was no implied contract modifying the plaintiff's status as an at-will employee. Thus, the plaintiff could be terminated "for any or no reason" (*88 Cal. App. 4th 33, 37-39)* .

The court of appeal next considered the plaintiff's contention that the trial court had erred in finding that the plaintiff had not been constructively discharged. The court of appeal held that it was unnecessary to decide whether the plaintiff had been constructively discharged. Even assuming the truth of the plaintiff's allegations that intolerable conditions had forced him to resign (that is, assuming he had been constructively discharged),the plaintiff still had no cause of action. The court explained that constructive discharge by itself is neither a tort nor a breach of contract, but a doctrine that transforms a resignation into a firing. Even after establishing a constructive discharge, the employee must independently prove a breach of contract or a tort or a violation of fundamental public policy or statutory or constitutional right in connection with the termination of employment in order to obtain damages for wrongful discharge. In this case, because the plaintiff was an at-will employee and because he had not asserted that the termination of employment violated any public policy, the plaintiff could not prove a breach of contract or a tort in connection with the termination. Therefore, he had no cause of action for wrongful discharge (*88 Cal. App. 4th 33, 40-41)* .

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PART II. FORMS

10-100 California Points & Authorities § 100.36

AUTHOR: Carolyn Rashby

§ 100.36 Opposing Contention That Wrongful Discharge Cause of Action Exists Absent Unequivocal Termination of Plaintiff's Employment--Plaintiff Was Not Constructively Discharged--Conditions of Employment Were Not Sufficiently Intolerable That Reasonable Employee Would Have Felt Compelled to Resign

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF HAS NOT ESTABLISHED THAT HE/SHE WAS CONSTRUCTIVELY DISCHARGED BECAUSE THE RESIGNATION WAS NOT CAUSED BY WORKING CONDITIONS SO INTOLERABLE THAT A REASONABLE EMPLOYEE WOULD HAVE FELT COMPELLED TO RESIGN.

A. Constructive Discharge Determined by Objective Standard. Whether plaintiff was constructively discharged is determined by an objective standard: plaintiff must prove that a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative except to quit (*Pennsylvania State Police v. Suders (2004) 542 U.S. 129, 124 S. Ct. 2342, 159 L. Ed. 2d 204, 216-220* ; *Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238, 1251, 32 Cal. Rptr. 2d 223, 876 P.2d 1022*).

[*Optional*] **B. Single, Trivial, or Isolated Acts of Misconduct Insufficient.** To amount to a constructive discharge, adverse working conditions must be unusually aggravated or amount to a continuous pattern before the situation will be deemed intolerable; in general, single, trivial, or isolated acts of misconduct are insufficient to support a constructive discharge claim (*Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238, 1247, 32 Cal. Rptr. 2d 223, 876 P.2d 1022*).

[*Optional*] **C. Poor Performance Rating or Demotion Insufficient.** A poor performance rating or a demotion, even when accompanied by a reduction in pay, does not by itself trigger a constructive discharge (*Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238, 1251, 32 Cal. Rptr. 2d 223, 876 P.2d 1022* ; *Soules v. Cadam, Inc.*

(1991) 2 Cal. App. 4th 390, 401, 3 Cal. Rptr. 2d 6).

[2] Comments

[a] Use of Form

This form can be used in support of the contention that the plaintiff in a wrongful discharge action has not established that his or her resignation from employment was in fact a constructive discharge that can be the basis for a wrongful discharge action. The ground asserted for the contention is that the conditions that allegedly forced the plaintiff to resign were not so intolerable that a reasonable person in that position would be compelled to resign. Optional Paragraphs B and C set forth factual scenarios that have been found insufficient to meet the objective standard.

The points and authorities in this form may be combined with those in §§ 100.37, 100.38 in an appropriate case. In addition, even if a resignation is found to constitute a constructive discharge, that finding alone does not establish liability; a constructive discharge is neither a breach of contract nor a tort, and a plaintiff must independently prove a breach of contract or a tort in order to obtain damages for a *wrongful* discharge. Thus, substantive contentions such as those *set forth in §§ 100.22, 100.23, 100.29, 100.30, 100.49, 100.52 -100.54* may also be combined with the constructive discharge contentions in this form and in §§ 100.37, 100.38.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a reasonable person, faced with the conditions of employment that allegedly caused plaintiff to resign, would not have found the conditions so intolerable that resignation was the only reasonable course of action. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counselshould discuss evidence that the conditions that allegedly caused plaintiff to resign were not sufficiently intolerable to cause a reasonable person to resign, such as evidence that any misconduct was merely trivial or isolated, or occurred on only one instance. Counsel also should discuss evidence, if appropriate, that the employer (and the employer's representatives) at all times dealt fairly and in good faith with plaintiff. If plaintiff resigned due to a poor performance rating, other criticism of work performance, or demotion, counsel should argue that such conduct does not create the type of intolerable conditions necessary to support a claim of constructive discharge [*Soules v. Cadam, Inc. (1991) 2 Cal. App. 4th 390, 401, 3 Cal. Rptr. 2d 6]* .

[c] Related Pleading and Practice Forms

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender). For discussion and forms relating to wrongful demotion, see Ch. 249, *Employment Law: Termination and Discipline* , in that publication.

[d] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 60, § 60.07[1]* (Matthew Bender).

[3] Discussion of Authorities

[a] Constructive Discharge Determined by Objective Standard

The factual and procedural background of ***Pennsylvania State Police v. Suders*** *(2004) 542 U.S. 129, 124 S. Ct. 2342,*

159 L. Ed. 2d 204 , is *set forth in § 100.31[3][d]*. The Court emphasized that the test for determining whether a constructive discharge has occurred is objective: an employee's resignation will be deemed a constructive discharge only if working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign (*159 L. Ed. 2d 204, 216-217)* .

The factual and procedural background of ***Turner v. Anheuser-Busch, Inc.*** *(1994) 7 Cal. 4th 1238, 32 Cal. Rptr. 2d 223, 876 P.2d 1022* , is *set forth in § 100.31[3][a]*. The Court stated that, in order to support a claim of constructive discharge, the conditions giving rise to the resignation must be sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to earn a livelihood and serve his or her employer. The proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee (*7 Cal. 4th 1238, 1246)* . The adverse working conditions must be unusually aggravated or amount to a continuous pattern before the situation will be deemed intolerable (*7 Cal. 4th 1238, 1247)* . In some circumstances, a single intolerable incident, such as a crime of violence against an employee by an employer, or an employer's ultimatum that an employee commit a crime, may constitute a constructive discharge (*7 Cal. 4th 1238, 1247 n.3*). Generally, though, single, trivial, or isolated acts of misconduct are insufficient to support a constructive discharge claim. Citing *Soules v. Cadam, Inc. (1991) 2 Cal. App. 4th 390, 401, 3 Cal. Rptr. 2d 6* , the Court also stated that a poor performance rating or a demotion, even if accompanied by a reduction in pay, does not by itself trigger a constructive discharge (*7 Cal. 4th 1238, 1247)* . The Court also held that the authorities are in agreement that a constructive discharge can only exist if, under an objective standard, a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative but to quit, citing *Rochlis v. Walt Disney Co. (1993) 19 Cal. App. 4th 201, 212, 23 Cal. Rptr. 2d 793* (*7 Cal. 4th 1238, 1248)* . The Court examined Turner's allegations of illegality at ABI in the light of this standard, and relied on the absence of any evidence that Turner was required, or even requested, to join in the illegal conduct, as well as the nature of the alleged violations (involving violations of state law regulating the economic and contractual relationships between beverage manufacturers and their customers and competition), to conclude that the conditions were not so obnoxious as to cause a reasonable employee to feel compelled to resign (*7 Cal. 4th 1238, 1254-1255)* .

[b] Single, Trivial, or Isolated Acts of Misconduct Insufficient

The facts and procedural background of ***Turner v. Anheuser-Busch, Inc.*** *(1994) 7 Cal. 4th 1238, 32 Cal. Rptr. 2d 223, 876 P.2d 1022* , are *set forth in § 100.31[3][a]*. In discussing the requirement that the resignation must have been coerced, rather than merely one rational option for the employee, the Court quoted with approval a federal case that noted that employees are not guaranteed a workplace free from stress, and from a variety of sources that used varying language such as "intolerable" or "aggravated" to describe the character of the working conditions required to establish constructive discharge (*7 Cal. 4th 1238, 1247)* . The Court did note that in some circumstances, such as a crime of violence by an employee against an employer, or an employer's ultimatum that an employee commit a crime, may constitute a constructive discharge (*7 Cal. 4th 1238, 1247 n.3*). However, the Court set forth a general rule that single, trivial, or isolated acts of misconduct are insufficient to support a constructive discharge claim (*7 Cal. 4th 1238, 1247)* .

[c] Poor Performance Rating or Demotion Insufficient

The facts and procedural background of ***Turner v. Anheuser-Busch, Inc.*** *(1994) 7 Cal. 4th 1238, 32 Cal. Rptr. 2d 223, 876 P.2d 1022* , are *set forth in § 100.31[3][a]*. The Court's discussion of the requirement that a resignation be coerced by intolerable working conditions cited with approval the holding of *Soules v. Cadam, Inc. (1991) 2 Cal. App. 4th 390, 401, 3 Cal. Rptr. 2d 6* , that a poor performance rating or a demotion, even when accompanied by a reduction in pay, does not by itself trigger a constructive discharge (*7 Cal. 4th 1238, 1247)* . In holding that ABI was entitled to summary judgment, the Court relied on this principle to reject Turner's claim that the negative evaluation, allegedly part of a campaign of harassment, could establish a constructive discharge (*7 Cal. 4th 1238, 1255)* .

In ***Soules v. Cadam, Inc.*** *(1991) 2 Cal. App. 4th 390, 3 Cal. Rptr. 2d 6* , plaintiff brought an action against her former employer (various related corporations, referred to here as "defendant"), stating causes of action for age discrimination, sex discrimination, wrongful constructive termination in breach of employment contract, and related claims, based on her resignation because of a series of occurrences that culminated in a job reassignment. Plaintiff had been hired as an electronic data processing typist. At that time, she signed a document in which she acknowledged that no representations of employment conditions other than those set forth specifically, are valid; at no time did she enter into a written contract of employment. Ten years later, she was hired to work for a subsidiary company of that employer; she again signed a document acknowledging no additional representations of employment conditions. A year later, she was promoted to a managerial position. Two years later, plaintiff received another promotion, which entailed a change in her supervisor. Shortly afterward, plaintiff received a critical performance evaluation, although her overall performance was rated as good, and ultimately was informed of a demotion to a nonmanagerial position without a reduction in pay. Plaintiff became upset, took sick leave, and then resigned. Defendant invited plaintiff to return to her job; she rejected the offer and filed suit. The trial court granted defendant's motion for summary judgment, and plaintiff appealed.

The court of appeal affirmed (*2 Cal. App. 4th 390, 404)* . The court noted that an employee who is forced to resign due to actions and conditions so intolerable or aggravated at the time of his or her resignation that a reasonable person in the employee's position would have resigned, and whose employer had actual or constructive knowledge of the intolerable actions and conditions and of their impact on the employee and could have remedied the situation, but did not, is constructively discharged (*2 Cal. App. 4th 390, 399)* . Whether conditions were so intolerable as to justify a reasonable employee's decision to resign is normally a question of fact. However, the court stated, situations may exist in which the employee's decision to resign is unreasonable as a matter of law (*2 Cal. App. 4th 390, 400)* .

The court observed that the allegedly intolerable working conditions that forced plaintiff to resign consisted of an evaluation of plaintiff's performance to which she objected and her demotion to a nonmanagerial position (*2 Cal. App. 4th 390, 400-401)* . The court held that the fact that an employee received a poor performance rating will not support a finding of constructive discharge. It cited the absence of authority holding that the features of plaintiff's performance evaluation constituted working conditions so intolerable as to cause a reasonable employee to resign. Further, the court stated, demotion of job level, even when accompanied by a reduction in pay, does not in itself constitute constructive discharge. In another context, the court noted, the California Supreme Court has held that when the misconduct attributed to an employer is based on actions that are a normal part of the employment relationship, such as demotions, promotions, and criticism of work practices, an employee suffering emotional distress may not avoid the exclusive remedy provisions of the Labor Code by characterizing the employer's decisions as manifestly unfair or intended to cause emotional disturbance resulting in disability (*citing Cole v. Fair Oaks Fire Protection Dist. (1987) 43 Cal. 3d 148, 160, 233 Cal. Rptr. 308, 729 P.2d 743*). Since demotion of an employee or criticism of his or her job performance--even if alleged to be unfair or outrageous--does not permit the employee to bypass the remedy afforded by the workers' compensation law and sue the employer for emotional distress and resultant physical disability, the same conduct does not create the intolerable working conditions necessary to support a claim of constructive discharge (*2 Cal. App. 4th 390, 401)* .

[4] Additional Authorities

[a] Constructive Discharge Determined by Objective Standard

In *Schnidrig v. Columbia Machine, Inc. (9th Cir. 1996) 80 F.3d 1406* , the Ninth Circuit Court of Appeals reviewed the termination of an older employee on a motion for summary judgment brought and won by the employer. Schnidrig, a longtime employee of Columbia Machine, was made general manager/vice-president when its president resigned. When a younger candidate was hired as President, he claimed he was constructively discharged (*80 F.3d 1406, 1409)* . The employer moved for summary judgment, which Schnidrig unsuccessfully opposed with evidence that his employer replaced him with an employee 15 years his junior, moved him to a smaller office, gave another vice-president a pay raise so that he was earning more than plaintiff, did not give him a new position, excluded himfrom a lunch meeting

with bank officers, and told other executives that they were not to speak with him regarding financial affairs of the company (*80 F.3d 1406, 1411)* . The Ninth Circuit agreed with the lower court that these action, as a matter of law, were not so intolerable that Schrindrig was forced to resign (*80 F.3d 1406, 1412)* . Note that this case was decided under Oregon law.

King v. AC & R Advertising (9th Cir. 1995) 65 F.3d 764, 767 , involved constructive termination claims based on the facts that the employee's status was changed to that of an at will employee, that the employee's supervisory and client contact duties were reduced and that his salary was reduced to $175,000 (*65 F.3d 764, 768)* . The Ninth Circuit Court of Appeals, following *Turner,* discussed *above,* found that as a matter of law these actions did not create working conditions egregious or intolerable enough to constitute constructive termination (*65 F.3d 764, 769)* .

[b] Poor Performance Rating or Demotion Insufficient

In *Addy v. Bliss & Glennon (1996) 44 Cal. App. 4th 205* , the court of appeal upheld summary judgment for the employer on a constructive termination claim (*44 Cal. App. 4th 205, 218-219)* . The plaintiff, Addy, predicated her constructive termination claim on denial of training and demotion. However, her employer produced evidence that she received the same training as one of her peers, with the exception of a session she missed due to illness, and that her demotion was due to her failure to do her job successfully (*44 Cal. App. 4th 205, 219)* . Further, the court stated, relying on *Turner,* discussed *above,* that "[d]emotions, even with reductions in pay, are not by themselves, enough to constitute constructive discharge" (*44 Cal. App. 4th 205, 219)* .

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PART II. FORMS

10-100 California Points & Authorities § 100.37

AUTHOR: Carolyn Rashby

§ 100.37 Opposing Contention That Wrongful Discharge Cause of Action Exists Absent Unequivocal Termination of Plaintiff's Employment--Plaintiff Was Not Constructively Discharged--Employer Did Not Have Actual Knowledge of Allegedly Intolerable Conditions That Caused Plaintiff to Resign

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF HAS NOT ESTABLISHED THAT HE/SHE WAS CONSTRUCTIVELY DISCHARGED BECAUSE HE/SHE HAS NOT PROVEN THAT THE EMPLOYER HAD ACTUAL KNOWLEDGE OF THE ALLEGEDLY INTOLERABLE WORKING CONDITIONS THAT CAUSED PLAINTIFF TO RESIGN.

A. Employer Must Have Actual Knowledge of Intolerable Working Conditions. To establish constructive discharge, plaintiff must prove that the resignation was coerced by the employer and, therefore, that the employer created or knowingly permitted the allegedly intolerable working conditions to continue (*Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238, 1251, 32 Cal. Rptr. 2d 223, 876 P.2d 1022*).

[*Optional*] **B. Employer Took Steps to Correct the Allegedly Intolerable Working Conditions.** Where the employer takes steps to remedy the allegedly intolerable working conditions that caused plaintiff to resign, the employer is shielded from liability for constructive discharge (*Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238, 1250, 32 Cal. Rptr. 2d 223, 876 P.2d 1022*).

[2] Comments

[a] Use of Form

This memorandum may be submitted to oppose a plaintiff's constructive discharge claim. The opposition is based on the fact that the employer did not have actual knowledge of the allegedly intolerable working conditions. Optional Paragraph B is for use where the employer did have knowledge of the conditions, but took steps to correct the

conditions.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the plaintiff has not established a claim of constructive discharge because he/she has not proven (or alleged) that the employer had actual knowledge of the allegedly intolerable working conditions, for example in a motion for summary judgment or in a demurrer. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that the employer and the employer's representatives (including officers, directors, managing agents, or supervisors) did not have actual knowledge of the allegedly intolerable conditions. The argument should refer to the fact that the employer neither created the conditions (for example, the misconduct was on the part of a coworker only) andthe fact that the employer did not knowingly permit the conditions to continue. With respect to the latter, counsel should show that the employer was not aware of the conditions and had no reason to be aware of them (because, for example, plaintiff did not complain), or that, once the employer became aware of the conditions, it took immediate remedial steps.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 100.31*.

[c] Related Pleading and Practice Forms

For a general form of demurrer to a complaint based on the failure to state facts sufficient to constitute a cause of action, see *California Forms of Pleading and Practice, Ch. 206, Demurrers and Motions for Judgment on the Pleadings, § 206.122* (Matthew Bender). For a form of notice for summary judgment and related discussion, see Ch. 537, *Summary Judgment* , in that publication. For discussion and forms relating to wrongful discharge, see Ch. 249, *Employment Law: Termination and Discipline* , in that publication.

[d] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 60, § 60.07[1]* (Matthew Bender).

[3] Discussion of Authorities

[a] Employer Must Have Actual Knowledge of Intolerable Working Conditions

The facts and procedural background of ***Turner v. Anheuser-Busch, Inc.*** *(1994) 7 Cal. 4th 1238, 32 Cal. Rptr. 2d 223, 876 P.2d 1022* , are *set forth in § 100.31[3][a]*. The Court held that since a constructive discharge is equivalent to a dismissal, the employee's resignation must be coerced by the employer, not simply caused by the voluntary action of the employee or by conditions not within the employer's control. Therefore, the Court disapproved the standard in *Brady v. Elixir Industries (1987) 196 Cal. App. 3d 1299, 242 Cal. Rptr. 324* , which held that constructive knowledge by the employer was sufficient. According to the Court, an employer's actual knowledge of the intolerable working conditions and subsequent failure to remedy them may constitute circumstantial evidence that the employer deliberately forced the employee's resignation. The Court explained that it did not require express intent by the employer to force the resignation, because that would require a showing by direct evidence which rarely is available. Rather, under the actual knowledge standard, it would be sufficient to establish that the employer's actions were deliberate or that the employer was aware of the situation but permitted it to continue (*7 Cal. 4th 1238, 1248-1250)* .

In *Gibson v. Aro Corp. (1995) 32 Cal. App. 4th 1628, 38 Cal. Rptr. 2d 882* , the court reviewed testimony of the

employee regarding what, if anything, he told his employer about the effect of his demotion and decrease in pay on his working conditions and determined that since the employee had not communicated to his employer his displeasure with the change, he could not, as a matter of law establish constructive termination (*32 Cal. App. 4th 1628, 1639)* . The court found that while, of course, the employer was aware of the change in conditions, it could not be presumed to be aware that the impact of those conditions was to create an intolerable workplace (*32 Cal. App. 4th 1628, 1640)* .

[b] Employer Took Steps to Correct the Allegedly Intolerable Working Conditions

The facts and procedural background of ***Turner v. Anheuser-Busch, Inc.*** *(1994) 7 Cal. 4th 1238, 32 Cal. Rptr. 2d 223, 876 P.2d 1022* , are *set forth in § 100.31[3][a]*. The Court held that the employer must have actual knowledge of the intolerable working conditions. Since this actual knowledge standard requires the employee to notify someone in a position of authority with the employer of the conditions, employers who were previously unaware of the situation would have an opportunity to correct it, while employers will be prevented from shielding themselves from liability by deliberately ignoring such a situation (*7 Cal. 4th 1238, 1249-1250)* .

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10-100 California Points & Authorities § 100.38

AUTHOR: Carolyn Rashby

§ 100.38 Opposing Contention That Wrongful Discharge Cause of Action Exists Absent Unequivocal Termination of Plaintiff's Employment--Plaintiff Was Not Constructively Discharged--Passage of Time Before Resignation Indicates That Conditions Not Sufficiently Intolerable to Cause Reasonable Person to Resign

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF HAS NOT ESTABLISHED THAT HE/SHE WAS CONSTRUCTIVELY DISCHARGED BECAUSE THE PASSAGE OF TIME BEFORE HIS/HER RESIGNATION INDICATES THAT THE CONDITIONS WERE NOT SO INTOLERABLE THAT A REASONABLE PERSON WOULD HAVE RESIGNED.

Passage of Time Before Resignation Factor in Determining Whether Conditions Were Intolerable. Although the passage of time after the onset of allegedly intolerable working conditions is not dispositive of whether or not a constructive discharge existed, it may be a relevant consideration regarding the intolerability of the situation (*Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238, 1254, 32 Cal. Rptr. 2d 223, 876 P.2d 1022* ; *Mullins v. Rockwell International Corp. (1997) 15 Cal. 4th 731, 740, 60 Cal. Rptr. 2d 636, 939 P.2d 1246* ; *Mullins v. Rockwell International Corp. (1997) 15 Cal. 4th 731, 740, 60 Cal. Rptr. 2d 636, 939 P.2d 1246*).

[2] Comments

[a] Use of Form

This memorandum may be submitted to oppose a plaintiff's constructive discharge claim if plaintiff's resignation was well after the time the allegedly intolerable conditions began. The opposition is based on the fact that the length of time between the resignation and the onset of the allegedly intolerable working conditions indicates that the conditions were not so intolerable that a reasonable person would have resigned because of them.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel

wishes to raise the substantive issue that the plaintiff has not established a claim of constructive discharge because the passage of time between the onset of the conditions and the resignation indicate that the conditions were not so intolerable, for example in a motion for summary judgment. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that plaintiff remained on the job for a significant period of time after the onset of the allegedly intolerable conditions. If appropriate, other evidence that continuing to work during the interim was not problematic for plaintiff could also be discussed, such as evidence that plaintiff's job performance did not decline between the onset of the conditions and the resignation. Counsel should argue that the conditions could not, therefore, have been so intolerable as to force a reasonable person to resign.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 100.31*.

[c] Related Pleading and Practice Forms

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender). For discussion and forms relating to wrongful demotion, see Ch. 249, *Employment Law: Termination and Discipline* , in that publication.

[d] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 60, § 60.07[1]* (Matthew Bender).

[3] Discussion of Authorities

[a] Passage of Time Before Resignation Factor in Determining Whether Conditions Were Intolerable

The facts and procedural background of ***Turner v. Anheuser-Busch, Inc.*** *(1994) 7 Cal. 4th 1238, 32 Cal. Rptr. 2d 223, 876 P.2d 1022* , are *set forth in § 100.31[3][a]*. The Court rejected the rule used by the court of appeal in *Panopulos v. Westinghouse Electric Corp. (1989) 216 Cal. App. 3d 660, 669-670, 264 Cal. Rptr. 810* , under which a delay longer than the applicable statute of limitations barred the action, finding the rule unduly arbitrary. Instead, the Court held that the length of time may be one relevant factor in determining the intolerability of employment conditions from the standpoint of a reasonable person, but that the length of the delay alone is not dispositive (*7 Cal. 4th 1238, 1254)* . In examining the facts of the case before it, though, the Court noted that the passage of time (at least four years) between the allegedly illegal acts and plaintiff's resignation "strongly suggests" that the working conditions were not intolerable (*7 Cal. 4th 1238, 1255)* .

The facts and procedural background of *Mullins v. Rockwell International Corp. (1997) 15 Cal. 4th 731, 60 Cal. Rptr. 2d 636, 939 P.2d 1246* , are *set forth in § 100.31[3][g]*. Upon holding that in a constructive discharge action the statute of limitations does not begin to run until the date of the actual termination, rather than the date the employee is subjected to the allegedly intolerable conditions, the Court dismissed the employer's argument that such a rule would allow employees to delay bringing a lawsuit indefinitely. However, the Court stated that the longer the employee delays resigning, the more difficult it may be for the employee to prove that the allegedly intolerable working conditions actually were intolerable on an objective basis (*15 Cal. 4th 731, 740)* .

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10-100 California Points & Authorities § 100.39

AUTHOR: Carolyn Rashby

§ 100.39 Opposing Contention That Cause of Action Exists Absent Unequivocal Termination of Plaintiff's Employment--No Express or Implied Agreement Limited Defendant's Right to Demote Plaintiff "At Will"

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

DEFENDANT HAD THE RIGHT TO DEMOTE PLAINTIFF AT WILL BECAUSE NO EXPRESS OR IMPLIED AGREEMENT TO DEMOTE ONLY FOR "GOOD CAUSE" EXISTED.

Presumption That Employee May Be Demoted At Will. There exists a strong common law presumption that an employee may be demoted at will, in the absence of some other agreement, either express or implied, between the parties (*Scott v. Pacific Gas & Electric Co. (1995) 11 Cal. 4th 454, 464-465, 46 Cal. Rptr. 2d 427, 904 P.2d 834*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a plaintiff-employee's contention that he or she could not be demoted at will, if there is no allegation or proof that there is an agreement, either express or implied, that limits the defendant's right to demote plaintiff at will [*see Scott v. Pacific Gas & Electric Co. (1995) 11 Cal. 4th 454, 464-465, 46 Cal. Rptr. 2d 427, 904 P.2d 834]* . In an appropriate case, counsel may also combine these points and authorities with points and authorities from §§ 100.22, 100.23 contending that no implied contract exists. Moreover, because the at-will presumption may be easily overcome by a plaintiff, in an appropriate case these points and authorities should be combined with points and authorities from § 100.29 to contend that there was good cause for the adverse action. Counsel, however, will need to modify the points and authorities from §§ 100.22, 100.23, 100.29 to reflect that the subject of the alleged agreement is *demotion* rather than termination.

In an appropriate case, these points and authorities may be submitted in opposition to the points and authorities *set out*

in § 100.34.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that an express or implied agreement limited defendant's right to demote plaintiff at will, for example in a demurrer or motion for summary judgment. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Counsel should show that defendant had the right to demote plaintiff at will, and that there was no agreement, written or otherwise, altering this right.

[c] Related Pleading and Practice Forms

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender). For discussion and forms relating to wrongful demotion, see Ch. 249, *Employment Law: Termination and Discipline* , in that publication.

[d] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 60, § 60.07[2]* (Matthew Bender).

[3] Discussion of Authorities

[a] Presumption That Employee May Be Demoted At Will

The facts and procedural background of ***Scott v. Pacific Gas & Electric Co.*** *(1995) 11 Cal. 4th 454, 46 Cal. Rptr. 2d 427, 904 P.2d 834* , are discussed in *§ 100.34[3][a]*. The Supreme Court explained that there is a strong common law presumption that an employee may be demoted at will. However, under the principles enunciated in *Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 254 Cal. Rptr. 211, 765 P.2d 373* (discussed in *§ 100.20[3][a]*), the presumption that an employee may be demoted at will may be rebutted by evidence of a contractual agreement, express or implied, to limit the employer's power to demote (*11 Cal. 4th 454, 464-465)* .

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10-100 California Points & Authorities § 100.40

AUTHOR: Carolyn Rashby

§ 100.40 Opposing Contention That Cause of Action Exists--Change in Terms of Employment Does Not Constitute Breach of Employment At Will Contract, But Rather Termination and Offer of New Agreement

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

DEFENDANT'S REDUCTION OF PLAINTIFF'S COMPENSATION TERMINATED THE PARTIES' FIRST AT-WILL EMPLOYMENT AGREEMENT AND CONSTITUTED AN OFFER OF NEW EMPLOYMENT AT A NEW RATE.

Employment At Will Includes the Right to Impose Prospective Changes in Terms as a Condition of Continued Employment. As a matter of law, an at-will employee who continues to work after the employer has given notice of changed terms or conditions of employment has accepted the changed terms and conditions. Under these conditions, the employer's modification has expressly and impliedly terminated the old contract and stated an offer of a new contract. The employee's continuing to work under the modified terms and conditions, even if grudging and protest-filled, constitutes the employee's acceptance of the new offer (*DiGiacinto v. Ameriko-Omserv Corp. (1997) 59 Cal. App. 4th 629, 637-638, 69 Cal. Rptr. 2d 300*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a plaintiff-employee's contention that the employer has breached an at-will employment agreement by unilaterally modifying the terms and conditions of employment. In an appropriate case, counsel may combine this form with § 100.39, contending that under an at-will employment agreement, an employee may also be demoted at will.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Counsel should establish that the original employment agreement was at-will, permitting either party to terminate the employment at any time, with or without cause. The argument should also establish that the employer gave the employee notice of the modification of the terms and conditions of employment and that the employee continued to work for the employer under the terms of the modification.

[c] Related Pleading and Practice Chapters

For related legal background, research guides, and forms for alleging affirmative defenses in wrongful discharge cases, see California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline* (Matthew Bender). For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[d] Related California Employment Law References

For further discussion of this issue, see Wilcox, California Employment Law, Ch. 60 (Matthew Bender).

[e] Related Memoranda

For discussion of the requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Employment At Will Includes the Right to Impose Prospective Changes in Terms as a Condition of Continued Employment

In ***DiGiacinto v. Ameriko-Omserv Corp.*** *(1997) 59 Cal. App. 4th 629, 69 Cal. Rptr. 2d 300* , plaintiff began his employment with Ameriko Inc. in 1990. In 1993, Ameriko and Omserv Corporation formed a joint venture. Later that year, defendant transferred plaintiff to a new project; and in August 1994, plaintiff signed a letter agreement setting forth the terms and conditions of his employment. The agreement stated, among other things, that plaintiff would receive wages at the rate of $23.97 per hour for the position of structural/mechanical supervisor and that the employment "may be voluntarily terminated at any time by either party, with or without cause, with or without notice ..." (*59 Cal. App. 4th 629, 632)* .

In December 1994, defendant instituted a reorganization and on January 30, 1995, notified plaintiff orally and in writing that plaintiff would have new and reduced responsibilities and a new rate of compensation, $18.00 per hour. Although plaintiff asked that his wages not be reduced and refused to sign the January 30th letter, he continued in defendant's employ at the new rate of pay. In January 1996, plaintiff filed an action for breachof contract in municipal court, seeking as damages the $5.97 per hour pay differential; plaintiff contended that by continuing to work, he was mitigating his damages (*59 Cal. App. 4th 629, 632-633)* .

The trial court held for plaintiff on the ground that although defendant could have terminated plaintiff because of his at-will status, it could not unilaterally reduce his compensation. The appellate department of the superior court reversed the trial court, and finding the case to be one of first impression, held that the power to terminate at will includes the lesser power to prospectively modify the terms of the employment relationship. Adopting the majority view, the superior court stated that a prospective change in the rate of compensation "effectively constitutes a negation of the old contract and becomes an offer of new employment at the new rate" (*59 Cal. App. 4th 629, 633)* .

The court of appeal affirmed. It found at-will employment having no specified term to be terminable at will, regardless of the duration (*59 Cal. App. 4th 629, 634)* . It noted, also, that the California Supreme Court has held that the presumption of at-will employment similarly applies to "lesser quantums [*sic*] of discipline" [*see Scott v. Pacific Gas & Electric Co. (1995) 11 Cal. 4th 454, 464-465]* . The court added that in cases involving employee benefits, a rule has developed that an offer of such benefits constitutes an offer of a unilateral contract which is accepted if the employee continues in employment after the offer (*59 Cal. App. 4th 629, 634-635)* .

Surveying cases from other jurisdictions, the court adopted the majority view that as a matter of law, an at-will employee who continues in the employment after receiving notice of prospectively changed terms or conditions has accepted the changed terms and conditions. The court explained its rationale: the old contract has been expressly or impliedly terminated by the employer's modification, and the modification constitutes both the termination of the old contract and the offer of a new contract (*59 Cal. App. 4th 629, 637)* .

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10-100 California Points & Authorities § 100.41

AUTHOR: Carolyn Rashby

§ 100.41 Supporting Contention That Tort Action Exists Due to Public Policy Violation--Discharge Violated Public Policy Established by Constitutional Provision, Statute, or Statutorily Authorized Administrative Regulations

[1] FORM

[*The following may be included in a memorandum supporting or opposing a motion, or in a trial or appellate brief.*]

PLAINTIFF HAS ALLEGED SUFFICIENT FACTS TO ESTABLISH THAT DEFENDANT TERMINATED PLAINTIFF'S EMPLOYMENT IN VIOLATION OF PUBLIC POLICY, IN THAT THE TERMINATION VIOLATED THE PUBLIC POLICY ESTABLISHED BY_____ [*specify constitutional provision, statute, or statutorily authorized administrative regulation*].

A. Employer's Right to Terminate Employment Cannot Be Exercised in Violation of Public Policy. Although an at-will employee may be terminated for no reason, or for an arbitrary or irrational reason, there can be no right to terminate for an unlawful reason, or for a reason that contravenes fundamental public policy as expressed in a statutory or constitutional provision (*Gantt v. Sentry Insurance (1992) 1 Cal. 4th 1083, 1094-1095, 4 Cal. Rptr. 2d 874, 824 P.2d 680* ; *see* *Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238, 1252, 32 Cal. Rptr. 2d 223, 876 P.2d 1022* ; *Casella v. Southwest Dealer Servs., Inc. (2007) 157 Cal. App. 4th 1127, 1138-1143, 69 Cal. Rptr. 3d 445*), or in administrative regulations authorized by statute (*Green v. Ralee Engineering Co. (1998) 19 Cal. 4th 66, 71-72, 80-90, 78 Cal. Rptr. 2d 16, 960 P.2d 1046*).

B. Test for Public Policy Creating Protection Against Termination. To support a tortious discharge claim, a public policy must (1) be supported by either constitutional or statutory provisions, (2) inure to the benefit of the public rather than serving merely the interests of the individual, (3) have been articulated at the time of the discharge, and (4) be fundamental and substantial. In addition, the public policy must be one framed to include, rather than exempt, the employer against whom it is sought to be applied (*Stevenson v. Superior Court (1997) 16 Cal. 4th 880, 889-890, 890-894, 66 Cal. Rptr. 2d 888, 941 P.2d 1157* ; *see* *Silo v. CHW Med. Found. (2002) 27 Cal. 4th 1097, 1108-1110,*

119 Cal. Rptr. 2d 698, 45 P.3d 1162 ; *Phillips v. St. Mary Reg'l Med. Ctr. (2002) 96 Cal. App. 4th 218, 230-238, 116 Cal. Rptr. 2d 770*). For this purpose, a public policy embodied in statutorily authorized administrative regulations is considered to be supported by the statutory provisions (*Green v. Ralee Engineering Co. (1998) 19 Cal. 4th 66, 71-72, 80-90, 78 Cal. Rptr. 2d 16, 960 P.2d 1046*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a contention that sufficient facts are alleged to show that, in terminating plaintiff's employment, the employer violated public policy because the termination violated the public policy established by a statutory, administrative, or constitutional provision. Use this form when none of the more specific grounds *set forth in § 100.42* et seq. exists, as each of those is tailored to a situation where direct authority exists for the defendant's particular action being a public-policy tort or where other more specific arguments may apply (*see § 100.41[2][c]*). This form is is suitable when it is necessary to argue that the fact situation meets the *general* test for an actionable public-policy violation.

This form may be combined with memoranda pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that plaintiff's discharge violated a statute or constitutional provision, and therefore can be the basis of a tort action for wrongful discharge in violation of public policy. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the public policy alleged to have been violated, specifying the constitutional, statutory, or administrative provision on which it is based, and, unless there is already authority that a violation of the particular policy supports a wrongful discharge claim, the reasons thepolicy inures to the public and is substantial and fundamental. In addition counsel should specify evidence of the plaintiff's conduct which lead to the discharge, and evidence of the employer's misconduct, explaining how that misconduct contravenes the public policy. Facts tending to show that the discharge was due to plaintiff's protected conduct, rather than for a legitimate reason (such as poor performance or misconduct), should also be discussed, such as evidence of threats or statements made by the employer, or that plaintiff was a long-term employee, had received favorable performance evaluations, and had not previously been disciplined. For an example of arguments regarding the lack of good cause for discharge, see *§ 100.27*.

[c] Related Memoranda

Section 100.42 et seq. are tailored to specific situations for which it has been established that discharge may be a common law public-policy tort or where more particular arguments for such a holding may apply. See *§ 100.42* (where the discharge was in violation of a statute protecting plaintiff against discharge), § 100.43 (where the discharge discriminated against plaintiff as a member of a class protected against discrimination *by a constitutional provision*), § 100.44 (where the discharge punished plaintiff for exercising or refusing to waive a constitutional right), § 100.45 (where the discharge was based on the employee's protest of unsafe working conditions), § 100.46 (where the discharge was based on the employee's refusal to commit an unlawful act), § 100.47 (where the discharge was in retaliation for the employee's attempt to rectify the employer's public policy violation), § 100.49 (where the discharge was in retaliation for the employee's disclosure of wrongdoing to upper management or governmental authorities), and § 100.50 (where the plaintiff was defendant's in-house counsel).

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Memoranda

The memoranda *set out in § 100.52* et seq. may be used in an appropriate case to oppose the contentions made in this form. In an appropriate case, this form may be adapted for use in opposing the contentions made in the memorandum *set out in § 100.22*.

[e] Related Pleading and Practice Forms

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender). For discussion and forms relating to wrongful termination and demotion, see Ch. 249, *Employment Law: Termination and Discipline* , in that publication.

[f] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 60, § 60.04* (Matthew Bender).

[3] Discussion of Authorities

[a] Employer's Right to Terminate Employment Cannot Be Exercised in Violation of Public Policy

In ***Gantt v. Sentry Insurance*** *(1992) 1 Cal. 4th 1083, 4 Cal. Rptr. 2d 874, 824 P.2d 680* , plaintiff brought an action against his former employer and various individuals, stating causes of action that included tortious discharge in violation of public policy. A coworker of plaintiff had complained to plaintiff, who was one of her supervising managers, and others, about sexual harassment by another manager. Plaintiff supported her claim, but the harassment continued, and the complaining employee was eventually fired. In response to an ensuing investigation by the Department of Fair Employment and Housing (DFEH), plaintiff spoke to a DFEH investigator, and expressed his fears that, based on his employer's conduct thus far, he would be retaliated against if he cooperated with the investigation. The day before plaintiff's formal DFEH interview, the employer's house counsel reminded him that he was the only management employee supporting his coworker's claims of harassment. In plaintiff's view, the attorney was displeased with his testimony and intended to induce him to change it. The attorney also told him about another employee against whom claims of sexual harassment were confirmed, but whom the company retained because he was a loyal employee. At this meeting, plaintiff also discovered a disfavorable alteration in a previous performance evaluation. These events confirmed his fears that the employer was threatening to retaliate against him unless he withheld truthful testimony from the DFEH. He proceeded to take part in the formal interview, and subsequently experienced negative treatment from his employer, including a demotion and deprivation of information required to perform his job. He ultimately resigned "as a result of the pressure" from defendants. After trial, the jury returned a special verdict in plaintiff's favor, finding, inter alia, that he had been constructively discharged, and that he was discharged in retaliation for refusing to testify untruthfully or to withhold his testimony to the DFEH; judgment was entered for plaintiff accordingly. The court of appeal reversed with respect to the individual defendants, but affirmed in all other respects. Defendant petitioned the Supreme Court for review.

The Supreme Court affirmed, holding, inter alia, that plaintiff stated a cause of action for tortious wrongful discharge based on defendant's violation of public policy (*1 Cal. 4th 1083, 1097)* . The Court discussed the background of the public policy exception to the at-will employment rule, noting the establishment of that principle in *Tameny v. Atlantic Richfield Co. (1980) 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330* . An at-will employee possesses a tort action when he or she is discharged for performing an act that public policy would encourage, or discharged for refusing to do something that public policy would condemn. *Pursuant to Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 669-670, 254 Cal. Rptr. 211, 765 P.2d 373* (discussed in *§ 100.20[3][a]*), the policy in question must involve a matter that affects society at large, rather than a purely personal or proprietary interest of the plaintiff or employer; in addition, the policy must be fundamental, substantial, and well-established at the time of discharge (*1 Cal. 4th 1083, 1090*). In dictum, the Court clarified that the public policy in support of this cause of action must derive from either

constitutional orstatutory provisions (*1 Cal. 4th 1083, 1095)* .

In applying those principles to this case, the Court noted that the Fair Employment and Housing Act (FEHA) prohibits a person from willfully impeding or interfering with FEHA employees in the performance of their duties and subjects a violator of this provision to criminal penalties [*see Gov. Code § 12975*]. Thus, the Court concluded, any attempt to induce or coerce an employee to lie to a DFEH investigator plainly contravenes the public policy of California. Accordingly, the Court held that plaintiff established a *Tameny* claim based on the theory of retaliation for refusal to withhold information or to provide false information to the DFEH (*1 Cal. 4th 1083, 1097)* .

The facts and procedural background of ***Turner v. Anheuser-Busch, Inc.*** *(1994) 7 Cal. 4th 1238, 32 Cal. Rptr. 2d 223, 876 P.2d 1022* , are discussed in *§ 100.31[3][a]*. In affirming summary judgment in favor of the defendant employer, the Court held that plaintiff's failure to identify a statutory or constitutional policy that would be thwarted by his alleged discharge doomed his cause of action. The Court relied on *Gantt* for the requirement that the policy be established by statute or constitutional provision, without mentioning that the requirement was not essential to the holding of that case (*7 Cal. 4th 1238, 1256)* .

In ***Casella v. Southwest Dealer Servs., Inc.*** *(2007) 157 Cal. App. 4th 1127, 69 Cal. Rptr. 3d 445* , the plaintiff claimed that his employment was wrongfully terminated in violation of public policy because he had reported his employer's participation in some of its car dealership clients' fraudulent business practices. The fraudulent conduct involved was "payment packing," in which car dealership sales personnel quoted inflated monthly payment amounts for cars to customers in order to hide the true cost of aftermarket products, thereby facilitating the sale of such products.

The defendants contended that the plaintiff's claim was not based on a fundamental public policy as expressed in a constitutional or statutory provision. Specifically, the defendants pointed out that it was not until after the trial in this case that the Car Buyer's *Bill of Rights* was enacted to address the specific payment packing activity involved in this case and impose new disclosure requirements on car dealers (*see* Stats. 2005, ch. 128). The court of appeal rejected this argument. Payment packing practices were indeed specifically addressed in legislation enacted after the trial in this case. However, aside from this legislation, payment packing violated long-established policies prohibiting theft by misrepresentation to customers as proscribed by *Penal Code § 487*. Thus, the viability of the plaintiff's claim did not depend on the existence of another statute specifically proscribing car dealers from secretly inflating monthly payment quotes to customers (*157 Cal. App. 4th 1127, 1138-1143)* .

In ***Green v. Ralee Engineering Co.*** *(1998) 19 Cal. 4th 66, 78 Cal. Rptr. 2d 16, 960 P.2d 1046* , the Supreme Court squarely held that public policy supporting a wrongful discharge claim must be "tethered to fundamental policies that are delineated in constitutional or statutory provisions." The court further held that public policy supporting a wrongful discharge claim may be embodied in statutorily authorized administrative regulations (*19 Cal. 4th 66, 71-72)* . In this case, the plaintiff brought a wrongful termination action against his former employer, alleging that he had been discharged from his job as an inspector of airplane components in retaliation for complaining to the employer that its inspection practices violated regulations issued by the Federal Aviation Administration (FAA). The trial court, finding no fundamental public policy in the regulations, granted the employer's motion for summary judgment. The court of appeal reversed, and the Supreme Court affirmed the judgment of the court of appeal. The Supreme Court noted that in the Federal Aviation Act (*49 U.S.C. § 40101 et seq.*), Congress declared the public interest in commercial air safety and then delegated regulatory power to the FAA, which established an intricate regulatory scheme to ensure that aircraft design meets safety standards and that aircraft manufacture conforms to the design. Thus, the regulations were clearly "tethered" to their statutory basis and promoted a most important and fundamental public policy goal: air safety. Since the plaintiff's job was to perform inspections of aircraft components to further that fundamental public policy, that policy could serve as the basis for the plaintiff's wrongful discharge claim (*19 Cal. 4th 66, 80-90)* . In so holding, the Supreme Court expressly declined to address whether any other potential sources of public policy may serve as the basis of such an action (*19 Cal. 4th 66, 80 n.6*).

[b] Test for Public Policy Creating Protection Against Termination

The facts and procedural background of ***Stevenson v. Superior Court*** *(1997) 16 Cal. 4th 880, 66 Cal. Rptr. 2d 888, 941 P.2d 1157* , are discussed in *§ 100.42[3][c]*. The Court again reviewed its previous holdings regarding the tort of wrongful termination in violation of public policy and concluded that those holdings established a four-fold test for a policy that would protect a worker from that at-will employment rule: the policy must (1) be supported by either constitutional or statutory provisions, (2) inure to the benefit of the public rather than serving merely the interests of the individual, (3) have been articulated at the time of the discharge, and (4) be fundamental and substantial (*16 Cal. 4th 880, 889-890)* . The Court noted that its precedents had not recognized a distinction between *substantial* and *fundamental* in this context, so that it was treating them as one requirement (*16 Cal. 4th 880, 890 n.4*).

The Court also discussed its determination in *Jennings v. Marralle (1994) 8 Cal. 4th 121, 32 Cal. Rptr. 2d 275, 876 P.2d 1074* , that the statutory exemption of employers with fewer than five employees from the FEHA's age-discrimination ban meant that there was no fundamental public policy against age discrimination in that circumstance (*16 Cal. 4th 880, 890-894)* . Presumably, therefore, in addition to the four factors listed by the Court when it articulated its test, the public policy must be one framed to include, rather than exempt, the employer against whom it is sought to be applied.

The facts and procedural background of ***Silo v. CHW Med. Found.*** *(2002) 27 Cal. 4th 1097, 119 Cal. Rptr. 2d 698, 45 P.3d 1162* are *set forth in § 100.57[3][a]*. The Supreme Court held that a wrongful discharge claim cannot be based on a fundamental public policy created by a statute that was enacted after the plaintiff's discharge. In such a case, the public policy obviously would not have been manifest at the time of the alleged violation; thus, one of the requirements for maintaining a tort claim for violation of public policy would fail (*27 Cal. 4th 1097, 1110)* .

In ***Phillips v. St. Mary Reg'l Med. Ctr.*** *(2002) 96 Cal. App. 4th 218, 116 Cal. Rptr. 2d 770* , the plaintiff filed a wrongful discharge action against his former employer, a nonprofit religious corporation. The complaint alleged that the plaintiff had been discharged for filing race- and sex-discrimination charges with state and federal agencies. The plaintiff claimed that the discharge violated public policy set forth in the Fair Employment and Housing Act (FEHA), the California Constitution (*see Cal. Const., art. I, § 8*), and Title VII of the federal Civil Rights Act of 1964 (*see 42 U.S.C. § 2000e et seq.*). The trial court sustained the defendant's demurrer without leave to amend, holding that the FEHA's exemption for religious employers (as in effect at the relevant time) shielded the defendant from liability (*96 Cal. App. 4th 218, 223-225)* .

The court of appeal reversed, holding that if a statutory exemption or limitation prevents a particular statute from serving as the basis for a claim of wrongful discharge in violation of public policy, the plaintiff may rely on alternative sources of fundamental public policy in support of the claim. At the time of the relevant events in this case, for example, an express exemption for religious employers prevented the FEHA from serving as a public-policy basis for the plaintiff's wrongful discharge claim (*see Gov. Code § 12926(d)* [FEHA's formerly unqualified general exemption for religious employers]; *now see Gov. Code § 12926.2(c)* [effective January, 2000, FEHA exemption for religious employers generally does not apply to persons employed to perform nonreligious duties at health-care facilities that are not restricted to adherents of religion that established employer]). The court of appeal held, however, that the plaintiff could pursue a wrongful discharge claim on the basis of a violation of public policy derived from the California Constitution and from Title VII of Civil Rights Act of 1964 (*96 Cal. App. 4th 218, 230-238)* .

In ***Green v. Ralee Engineering Co.*** *(1998) 19 Cal. 4th 66, 78 Cal. Rptr. 2d 16, 960 P.2d 1046 , discussed under § 100.41[3][a]*, the Supreme Court held that public policy supporting a wrongful discharge claim may be embodied in statutorily authorized administrative regulations (*19 Cal. 4th 66, 71-72)* .

[4] Additional Authorities

[a] Employer's Right to Terminate Employment Cannot Be Exercised in Violation of Public Policy

In *Gould v. Maryland Sound Industries, Inc. (1995) 31 Cal. App. 4th 1137, 37 Cal. Rptr. 2d 718* , plaintiff alleged, among other things, that his employer terminated him to avoid paying him accrued commissions and vacation pay, and that the discharge contravened the fundamental public policy regarding the prompt payment of wages due employee. The trial court sustained the defendant employer's demurrer, but the court of appeal reversed. The court of appeal found that a number of statutory provisions supported plaintiff's contention that the prompt payment of wages due an employee is a fundamental public policy in California, including *Lab. Code §§ 201, 202*, and *216*. The court concluded that if plaintiff was discharged in order to avoid payment of commissions and vacation pay, such discharge violated a fundamental public policy (*31 Cal. App. 4th 1137, 1147-1148)* .

California Points & Authorities

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 100 EMPLOYER AND EMPLOYEE: WRONGFUL TERMINATION AND DISCIPLINE
PART II. FORMS

10-100 California Points & Authorities § 100.42

AUTHOR: Carolyn Rashby

§ 100.42 Supporting Contention That Tort Action Exists Due to Public Policy Violation--Discharge Violated Statute That Limits Right to Discharge Plaintiff

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF HAS ALLEGED SUFFICIENT FACTS TO ESTABLISH THAT DEFENDANT TERMINATED PLAINTIFF'S EMPLOYMENT IN VIOLATION OF PUBLIC POLICY, IN THAT THE TERMINATION VIOLATED _____ [*specify statutory provision, e.g.,* LABOR CODE SECTION 232], WHICH PRECLUDES TERMINATION OF EMPLOYMENT IN RETALIATION FOR CONDUCT PROTECTED UNDER THE STATUTE.

A. Employer's Right to Terminate Employment Cannot Be Exercised in Violation of Public Policy. [*See § 100.41, Paragraph A.*]

[*Optional*] **B. Test for Public Policy Creating Protection Against Termination.** [*See § 100.41, Paragraph B.*]

C. Statutory Provision Precluding Discharge for Conduct Within Statute Can Be Basis of Common Law Wrongful-Discharge Action. As long as statutory remedial provisions are not exclusive, a statute that prohibits termination of employment based on specified conduct by the employee can articulate a public policy which serves as the basis for the common law tort of wrongful discharge in violation of public policy (*Stevenson v. Superior Court (1997) 16 Cal. 4th 880, 889-890, 66 Cal. Rptr. 2d 888, 941 P.2d 1157* ; *Leibert v. Transworld Systems, Inc. (1995) 32 Cal. App. 4th 1693, 1702-1706, 39 Cal. Rptr. 2d 65*).

[*Optional*] **D. Garnishment of Wages.** No employer may discharge any employee by reason of the fact that garnishment of his or her wages has been threatened or that his or her wages have been subjected to garnishment for the payment of one judgment. A provision of a contract of employment that provides an employee with less protection than

is provided by these provisions is against public policy and void (*Lab. Code § 2929*).

[*Optional*] **E. Right to Time Off for Jury Duty.** No employer may discharge or in any manner discriminate against an employee for taking time off to serve as required by law on an inquest jury or trial jury, if such employee, prior to taking such time off, gives reasonable notice to the employer that he or she is required to serve (*Lab. Code § 230(a)*).

[*Optional*] **F. Right to Time Off to Appear as Witness in Compliance With Subpoena or Other Court Order.** No employer may discharge or in any manner discriminate or retaliate against an employee for taking time off to appear in court to comply with a subpoena or other court order as a witness in any judicial proceeding (*Lab. Code § 230(b)*).

[*Optional*] **G. Right to Time Off to Deal With Effects of Domestic Violence.** No employer may discharge, discriminate against, or retaliate against an employee who is a victim of domestic violence or of sexual assault for taking time off from work to obtain or attempt to obtain judicial relief (such as a temporary restraining order, restraining order, or other injunctive relief) to help ensure the health, safety, or welfare of the victim or his or her child (*Lab. Code § 230(c)*). [*If appropriate add:* Further, no employer with 25 or more employees may discharge, discriminate against, or retaliate against an employee who is a victim of domestic violence or of sexual assault for taking time off from work to seek medical attention for injuries caused by domestic violence or sexual assault; to obtain services from a domestic violence shelter, program, or rape crisis center as a result of domestic violence or sexual assault; to obtain psychological counseling related to an experience of domestic violence or sexual assault; or to participate in safety planning and take other actions to increase safety from future domestic violence or sexual assault, including temporary or permanent relocation (*Lab. Code § 230.1(a)*)]. The right to time off for these purposes may be exercised if the employee gives the employer reasonable advance notice of the intention to take time off, unless advance notice is not feasible, in which case the employee must, within a reasonable time after the absence, provide the employer with a certification (such as a police report or court or medical records) documenting that the employee was a victim of domestic violence or sexual assault or has appeared in court (*Lab. Code §§ 230(d), 230.1(b)*).

[*Optional*] **H. Right to Time Off to Attend Criminal Proceedings.** An employer may not discharge an employee for taking time off from work to attend judicial proceedings related to a crime perpetrated against the employee, a member of employee's immediate family, the employee's domestic partner (*see Fam. Code § 297 et seq.*), or the domestic partner's child, if the crime is a serious or violent felony(*see Penal Code §§ 667.5(c),* 1193.7(c)) or a violation of a felony provision of law proscribing theft or embezzlement (*Lab. Code § 230.2(a), (b), (f), (g)*). The right to time off for this purpose may be exercised if the employee gives the employer a copy of the notice of the scheduled proceeding that is provided to the crime victim by the agency responsible for providing notice, unless advance notice is not feasible or an unscheduled absence occurs, in which case the employee must, within a reasonable time after the absence, provide the employer with documentation evidencing the judicial proceeding from (1) the court or government agency setting the hearing, (2) the district attorney or prosecuting attorney's office, (3) or the victim/witness office that is advocating on behalf of the victim (*Lab. Code § 230.2(c)*).

[*Optional*] **I. Right to Disclose Amount of Wages.** No employer may discharge, formally discipline, or otherwise discriminate against an employee who discloses the amount of his or her wages (*Lab. Code § 232*).

[*Optional*] **J. Prohibition Against Sexual Orientation Discrimination.** An employer may not discharge or discriminate against an employee based on the employee's actual or perceived sexual orientation (*Gov. Code § 12940(a), (d), (j)(1)*; *see Gov. Code § 12926(m)*; *see also Lab. Code §§ 1101, 1102*). Termination of employment in violation of this prohibition violates a fundamental public policy and creates a common law tort claim for wrongful discharge in violation of public policy (*Leibert v. Transworld Systems, Inc. (1995) 32 Cal. App. 4th 1693, 1702-1704, 39 Cal. Rptr. 2d 65*).

[*Optional*] **K. Prohibition Against Age Discrimination.** With exceptions not applicable here, an employer may not discharge an individual over the age of 40 on the ground of age (*Gov. Code §§ 12926(b), 12940(a)*). Termination of

employment in violation of this prohibition violates a fundamental public policy and creates a common law tort claim for wrongful discharge in violation of public policy (*Stevenson v. Superior Court (1997) 16 Cal. 4th 880, 897, 66 Cal. Rptr. 2d 888, 941 P.2d 1157*).

[*Optional*] **L. Prohibition Against Retaliation for Taking Family Care and Medical Leave.** An employer may not discharge or otherwise discriminate against an employee because of the employee's exercise of the right to family care and medical leave under the *Dudley v. Department of Transportation (2001) 90 Cal. App. 4th 255, 262* ; *see Gov. Code § 12945.2*(*l*)(1)).

[*Optional*] **M. Right to Disclose Working Conditions.** No employer may discharge, formally discipline, or otherwise discriminate against an employee who discloses information about the employer's working conditions (*Lab. Code § 232.5(c)*).

[*Optional*] **N. Right to Report and Refuse to Participate in Illegal Activity.** An employer may not retaliate against an employee for refusing to participate in any activity that would result in a violation of state or federal law, or for providing information to a government or law enforcement agency (including the employer) if the employee reasonably believes the information discloses a violation of state or federal law (*Lab. Code § 1102.5(b), (c), (e)*; *Patten v. Grant Joint Union High Sch. Dist. (2005) 134 Cal. App. 4th 1378, 1385-1390, 37 Cal. Rptr. 3d 113*). This provision prohibits retaliation not only for conduct of the employee in current employment, but also for conduct in former employment (*Lab. Code § 1102.5(d)*).

[*Optional*] **O. Prohibition Against Retaliation for Opposing Practices Forbidden by Fair Employment and Housing Act.** An employer may not discharge or otherwise discriminate against an employee because of the employee's opposition to any practice forbidden by the Fair Employment and Housing Act (FEHA), or because the employee has filed a complaint, testified, or assisted in any proceeding under FEHA (*Gov. Code § 12940(h)*; *Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal. 4th 1028, 1035, 32 Cal. Rptr. 3d 436, 116 P.3d 1123*).

[*Optional*] **P. Prohibition of Retaliation Against Physician for Advocating for Appropriate Health Care.** An employer of a physician or surgeon may not terminate, retaliate against, or otherwise penalize the physician or surgeon for advocating for medically appropriate health care consistent with the degree of learning and skill ordinarily possessed by reputable physicians practicing according to the applicable legal standard of care (*Bus. & Prof. Code § 2056(c)*; *Khajavi v. Feather River Anesthesia Med. Group (2000) 84 Cal. App. 4th 32, 45-51, 100 Cal. Rptr. 2d 627*).

[*Optional*] **Q. Prohibition Against Retaliation Based on Race.** *42 U.S.C. § 1981* prohibits retaliation on the basis of race, including retaliation against a person for complaining about a violation of another person's rights under the statute (*CBOCS W., Inc. v. Humphries (2008) 553 U.S. 442, 128 S. Ct. 1951, 1954-1955, 1961, 170 L. Ed. 2d 864, 869, 877)* .

[*Optional*] **R. Prohibition Against Retaliation for Filing Complaint Under Age Discrimination in Employment Act.** The federal-sector provision of the Age Discrimination in Employment Act, *29 U.S.C. § 633a(a)*, which prohibits "discrimination based on age" in federal employment, includes a prohibition of retaliation based on the filing of an age discrimination complaint (*Gomez-Perez v. Potter (2008) 553 U.S. 474, 128 S. Ct. 1931, 170 L. Ed. 2d 887, 894-896, 902)* .

[*Optional*] **S. Prohibition Against Retaliation for Opposing Practice That Violates Title VII of Civil Rights Act.** Title VII of the Civil Rights Act of 1964, which generally prohibits employment discrimination based on race, color, religion, sex, or national origin (*42 U.S.C. § 2000e-2(a)*), also prohibits retaliation against an employee or applicant because he or she has opposed any violation of Title VII, or because he or she has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under Title VII (*42 U.S.C. § 2000e-3(a)*). This protection extends to an employee who opposes unlawful discrimination by speaking out about it in answering

questions during the employer's internal investigation, even if that employee did not report the discrimination on his or her own initiative (*Crawford v. Metro. Gov't of Nashville & Davidson County (2009) ___ U.S. ___, 129 S. Ct. 846, 172 L. Ed. 2d 650, 656-658)* .

[2] Comments

[a] Use of Form

This form may be submitted in support of a contention that sufficient facts are alleged or proved to show that, in terminating plaintiff's employment, the employer violated public policy because the termination violated a statute that precluded discharge based on conduct specified in the statute. Use Optional Paragraph B if none of the options (Paragraphs G et seq.) with direct authority applicable to plaintiff's factual situation applies. Optional Paragraphs D et seq. set forth contentions concerning specific statutes that preclude discharge of employees. For further discussion of these and additional statutes that expressly prohibit discharge and the effects of those statutes, see Wilcox, *California Employment Law, §§ 60.03, 60.04* (Matthew Bender).

This form may be combined with forms pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that plaintiff's discharge violated a statute that expressly prohibited discharge, and therefore can be the basis of a tort action for wrongful discharge in violation of public policy.This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should review the statute that the discharge is alleged to have violated, and should argue that the statutory remedial provisions are not plaintiff's exclusive remedy. Further, counsel should specify plaintiff's conduct that led to the dismissal, explaining how such conduct is protected by the statute. Evidence indicating that discharge was the proximate result of the protected conduct, and not for a legitimate reason (such as poor performance or misconduct), should also be discussed, such as evidence of statements or threats made by the employer, or evidence that plaintiff was a long-term employee, had received favorable performance evaluations, and had not previously been disciplined. For an example of arguments regarding lack of good cause for discharge, see *§ 100.27*.

[c] Related Memoranda

Section 100.41 is a general memorandum for a situation in which there is no statute that limits the employer's right to discharge the plaintiff, and in which none of the other specific situations covered by § 100.42 et seq. applies. See *§ 100.43* (when the discharge discriminated against plaintiff as a member of a class protected against discrimination *by a constitutional provision*), § 100.44 (when the discharge punished plaintiff for exercising or refusing to waive a constitutional right), § 100.45 (when the discharge was based on the employee's protest of unsafe working conditions), § 100.46 (when the discharge was based on the employee's refusal to commit an unlawful act, § 100.47 (when the discharge was in retaliation for the employee's attempt to rectify the employer's public policy violation), § 100.49 (when the discharge was in retaliation for the employee's disclosure of wrongdoing to upper management or governmental authorities), and § 100.50 (when the plaintiff was defendant's in-house counsel).

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Memoranda

The memoranda *set out in § 100.52* et seq. may be used in an appropriate case to oppose the points and authorities set

out in this form. In an appropriate case, this form may be adapted and submitted in opposition to the memorandum *set out in § 100.22*.

[e] Related Pleading and Practice Forms

For a form for notice of summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender). For discussion and forms relating to wrongful demotion, see Ch. 249, *Employment Law: Termination and Discipline* , in that publication.

[f] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 60, § 60.04[2][c]* (Matthew Bender).

[3] Discussion of Authorities

[a] Statutory Provision Precluding Discharge for Conduct Within Statute Can Be Basis of Common Law Wrongful-Discharge Action

The facts and procedural background of ***Stevenson v. Superior Court*** *(1997) 16 Cal. 4th 880, 66 Cal. Rptr. 2d 888, 941 P.2d 1157* , are *discussed under § 100.42[3][c]*. In *Stevenson*, the Court ruled that the Fair Employment and Housing Act, in banning discharge from employment because of age discrimination, articulates a public policy sufficient to permit the bringing of an age-discrimination claim as a common law tort of wrongful discharge in violation of public policy, irrespective of the remedies and procedures created by the FEHA itself (*16 Cal. 4th 880, 897)* . The core of the Court's analysis was its review of whether the Legislature intended the statutory remedies to be exclusive (*16 Cal. 4th 880, 898-905)* .

The facts and procedural background of ***Leibert v. Transworld Systems, Inc.*** *(1995) 32 Cal. App. 4th 1693, 39 Cal. Rptr. 2d 65* , are *discussed under § 100.42[3][b]*. In *Leibert*, the court held that *Lab. Code §§ 1101* and *1102* and former Lab. Code § 1102.1 [*now see Gov. Code § 12940(a), (d), (j)(1)*] state a fundamental public policy against employment discrimination based on sexual orientation, sufficient to support a cause of action for wrongful termination in violation of public policy (*32 Cal. App. 4th 1693, 1703-1704)* .

[b] Prohibition Against Sexual Orientation Discrimination

In ***Leibert v. Transworld Systems, Inc.*** *(1995) 32 Cal. App. 4th 1693, 39 Cal. Rptr. 2d 65* , following plaintiff's employer's discovery that plaintiff was a homosexual, coworkers and managers harassed plaintiff, including calling him a "fag" and portraying him in an effeminate manner. The employer's vice president instructed another employee to keep a close watch on plaintiff, and said that any mistake by plaintiff would get plaintiff fired because they did not need a homosexual working in the office. Plaintiff subsequently was terminated. He brought an action against the employer alleging that he had been harassed and discharged him on the basis of his sexual orientation in violation of *Lab. Code §§ 1101* and *1102* and former Lab. Code § 1102.1 [*now see Gov. Code § 12940(a), (d), (j)(1)*]. Plaintiff also alleged that he had been wrongfully discharged in violation of the public policy against sexual orientation discrimination as embodied in those statutes. The trial court sustained a demurrer to the statutory violations on the ground that plaintiff failed to exhaust the administrative remedies provided for violations of those statutes [*see Lab. Code § 98.7*]. The trial court then granted judgment on the pleadings in favor of the employer on the public policy claim on the ground that the direct statutory causes of action underlying the public policy claim had been removed from the case by demurrer.

The court of appeal reversed with respect to the public policy claim. The court stated that *Lab. Code §§ 1101* and *1102* and former Lab. Code § 1102.1 [*now see Gov. Code § 12940(a), (d), (j)(1)*] state a fundamental public policy against employment discrimination and harassment based on sexual orientation sufficient to support a cause of action for wrongful termination in violation of public policy (*32 Cal. App. 4th 1693, 1702-1706)* . The court found that this cause

of action remained viable notwithstanding the dismissal of plaintiff's Labor Code causes of action due to failure to exhaust administrative remedies. The administrative remedies provided for a violation of those statutes, as contained in *Lab. Code § 98.7*, are not exclusive, and exhaustion of them is generally not required before instituting a civil suit alleging certain nonstatutory claims. The court explained that the rationale of a public-policy wrongful discharge claim would be undermined if a public-policy violation had to remain unaddressed simply because a plaintiff failed to exhaust nonexclusive administrative remedies (*32 Cal. App. 4th 1693, 1704-1706)* .

[c] Prohibition Against Age Discrimination

In ***Stevenson v. Superior Court*** *(1997) 16 Cal. 4th 880, 66 Cal. Rptr. 2d 888, 941 P.2d 1157* , plaintiff alleged she was terminated from her job at age 60 because of her age. She sued her former employer, alleging, among other causes of action, a tort claim for wrongful discharge in violation of a public policy against age discrimination. The trial court sustained a demurrer without leave to amend because plaintiff had not exhausted her statutory remedies under the Fair Employment and Housing Act (FEHA). The court of appeal affirmed.

The Supreme Court reversed, holding that there is a common law cause of action to enforce the right against age discrimination created by FEHA and that under such a cause of action the statutory exhaustion-of-remedies requirement is inapplicable.

The Court first reviewed the development in California of the cause of action for tortious discharge in violation of public policy, observing that its prior decisions had created four requirements which a policy must satisfy to support such a cause of action: (1) it must be supported by either constitutional or statutory provisions; (2) it must inure to the benefit of the public rather than serving merely the interests of the individual; (3) it must have been articulated at the time of the discharge; and (4) it must be fundamental and substantial (*16 Cal. 4th 880, 887-890)* . The Court discussed its holdings in *Rojo v. Kliger (1990) 52 Cal. 3d 65, 276 Cal. Rptr. 130, 801 P.2d 373* , that FEHA's remedies are not exclusive, that its administrative remedies need not be exhausted before the assertion of a common law claim, and that sexual harassment in the workplace violates fundamental public policy, founded in the state constitutional ban on sex discrimination. It also discussed its determination in *Jennings v. Marralle (1994) 8 Cal. 4th 121, 32 Cal. Rptr. 2d 275, 876 P.2d 1074* , that the statutory exemption of employers with fewer than five employees from FEHA's age-discrimination ban meant that there was no fundamental public policy against age discrimination in that circumstance (*16 Cal. 4th 880, 890-894)* . Note, therefore, that in addition to the four factors listed by the Court when it articulated its test, the public policy must be one framed to include, rather than exempt, the employer against whom it is sought to be applied.

The Court then turned to the question of whether a wrongful discharge claim for age discrimination could be brought against a larger employer, one subject to FEHA. The Court found the first three requirements of the four it had articulated clearly met (*16 Cal. 4th 880, 895)* and then considered whether the public policy against age discrimination was substantial and fundamental (It had previously noted that there was no distinction between *substantial* and *fundamental* in this context (*16 Cal. 4th 880, 890 n. 4*)). Noting that age discrimination is ethically comparable to race and sex discrimination and that it is prohibited in the same statute with them, that prohibitions on age discrimination have been California law for more than 35 years and take multiple forms, and that Congress and 45 other states have enacted similar bans, the Court concluded that FEHA's policy against age discrimination in employment is sufficiently substantial and fundamental to support a tort claim for wrongful discharge (*16 Cal. 4th 880, 895-897)* .

The Court went on to reject the contention that its *Rojo* holding on FEHA's non-exclusivity was distinguishable because the sex discrimination claim considered in *Rojo* was founded in policy set forth in the Constitution (*16 Cal. 4th 880, 898-903)* . It similarly found unpersuasive defendant's attempt to distinguish the *Rojo* holding on the inapplicability of FEHA's exhaustion-of-remedies requirements to public-policy based antidiscrimination claims (*16 Cal. 4th 880, 903-905)* . The Court concluded its analysis by considering a suggestion, argued in a dissenting opinion, that the tort of wrongful discharge in violation of public policy be recognized only in situations where there is no statutory remedy.

The Court found this position to fly in the face of legislative intent to preserve common law remedies, as already explicated in *Rojo* (*16 Cal. 4th 880, 905-909)* .

There appears to be a certain circularity in the Court's reasoning. The core of its argument is that the Legislature intended FEHA to expand, not supplant, existing antidiscrimination remedies (*16 Cal. 4th 880, 891, 900-901)* , but wrongful discharge via age discrimination was not a cause of action that existed before FEHA grounded it in statutorily-expressed public policy. Under the Court's method of analysis, any future legislation, therefore, protecting another class against discharge and creating statutory remedies for its violation will implicitly create common law remedies as well, as long as (a) it meets the fourfold test for the type of public policy that will be so enforced, and (b) the legislation declares itself nonexclusive. Where the legislation is silent on the question of preemption, there will still be room for argument either way.

[d] Prohibition Against Retaliation for Taking Family Care and Medical Leave

In ***Dudley v. Department of Transp.*** *(2001) 90 Cal. App. 4th 255, 108 Cal. Rptr. 2d 739* , the plaintiff sought to assert a cause of action for discrimination under the Moore-Brown-Roberti Family Rights Act (*Gov. Code §§ 12945.1, 12945.2*). The plaintiff alleged that she had suffered discrimination for, among other things, exercising her right to take medical leave under the Act. The trial court dismissed the plaintiff's complaint without leave to amend. The court of appeal reversed, holding that the Act does indeed provide a cause of action for an employee who suffers discrimination or other adverse employment action in retaliation for exercising his or her right to take leave under the Act (*see Gov. Code § 12945.2*(*l*)(1)). The elements of the cause of action are satisfied if (1) the defendant was an employer covered by the Act, (2) the plaintiff was an employee eligible to take leave under the Act, (3) the plaintiff exercised his or her right to take leave, and (4) the plaintiff suffered an adverse employment action as a result (*90 Cal. App. 4th 255, 259-261)* .

[e] Right to Report and Refuse to Participate in Illegal Activity

The plaintiff in ***Patten v. Grant Joint Union High Sch. Dist.*** *(2005) 134 Cal. App. 4th 1378, 37 Cal. Rptr. 3d 113* , was a school principal who sued her employer, a public school district, under the whistleblower-retaliation statute. That statute prohibits an employer from retaliating against an employee for disclosing information to a government or law-enforcement agency when the employee had reasonable cause to believe that the information disclosed a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation (*Lab. Code § 1102.5(b)*). Specifically, the plaintiff alleged that she had been transferred to a less desirable position in retaliation for disclosures that she had made to her employer, which qualified as a government agency for this purpose (see *Lab. Code § 1102.5(e)*), and to legislative personnel. The relevant disclosures arose from the district's discovery, in its year-end financial audit, of a surplus of approximately $127,000 in the budget for the Immediate Intervention/Underperforming Schools Program (II/USP) for the plaintiff's school. The district wanted to reassign expenditures already incurred for at least one other educational program, and perhaps others, to nearly $104,000 of this surplus. The reassignment would allow the district to retain that amount of unspent II/USP funds (rather than return the amount to the state) and, the plaintiff maintained, would provide the district with funds to clean up its budget. To effectuate the reassignment of expenditures, the district requested that the plaintiff sign blank "transfer of funds" forms. The plaintiff refused, explaining to the district that she was "fearful of the legality of this action." The district later carried out the reassignment, and the plaintiff eventually met with a state assembly member and a representative of a state senator regarding the matter. She also attended a school-board meeting and provided information about the II/USP funding issue (*134 Cal. App. 4th 1378, 1381-1382)* .

The trial court granted the district's motion for summary judgment, holding that as to the disclosure regarding II/USP funding, the district had not retaliated against the plaintiff by subjecting her to an adverse employment action, because the complained-of transfer was between essentially equivalent positions (*134 Cal. App. 4th 1378, 1383)* .

The court of appeal began its analysis by stating that, to establish a prima facie case of retaliation under the

whistleblower statute (*Lab. Code § 1102.5(b)*), the plaintiff had to show (1) she engaged in a protected activity, (2) her employer subjected her to an adverse employment action, and (3) there was a causal link between the two (*134 Cal. App. 4th 1378, 1384)* . On the first element--whether the plaintiff had engaged in protected activity--the court of appeal found that the disclosure regarding II/USP funding presented a triable question of whistleblowing activity. The court of appeal explained that the plaintiff's disclosures to the district and to legislative personnel regarding the reassignment of other program expenditures to the II/USP surplus presented a whistleblowing archetype: disclosing the allegedly unauthorized use of public assets. Also, the plaintiff presented a triable issue that she reasonably believed she was disclosing a violation of law: she informed a state Assembly member, his assistant, and a representative of a state Senator; she had refused to sign the blank "transfer of funds" forms that the district requested because "there was no way to ensure the [reassigned] expenditures were legitimate based on II/USP guidelines"; and she "was fearful of the legality of this action" (*134 Cal. App. 4th 1378, 1385-1386)* .

The court of appeal went on to find that there was a triable issue of fact on the second element of the plaintiff's prima facie case, whether she had suffered an adverse employment action when the district transferred her to another school. Generally, an adverse employment action is one that materially affects the terms and conditions of employment. The California Supreme Court has applied the"materiality" test in the context of a retaliation action under the Fair Employment and Housing Act (*Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal. 4th 1028, 1050-1061, 32 Cal. Rptr. 3d 436, 116 P.3d 1123* , discussed in [f], *below*; *see Gov. Code § 12940(h)*), and in this case the court of appeal held that the same test applies in a retaliation action under the whistleblower statute (*134 Cal. App. 4th 1378, 1386-1388* ; *see Lab. Code § 1102.5(b)*). Applying that test in this case, the court of appeal found that, even though the wages, benefits, and duties of the two positions (as set forth in the job descriptions) were the same, the transfer could reasonably be viewed as an adverse employment action. The plaintiff's new school was a smaller, higher-achieving school, and it did not present the same challenges for a principal as did the plaintiff's former school. The court of appeal remarked that the new school did "not present the kinds of administrative challenges an up-and-coming principal wanting to make her mark would relish." Also, the year-round schedule of the new school conflicted with the plaintiff's family schedule and her own educational plans. Considering the plaintiff's allegations collectively, the court of appeals concluded that the plaintiff had presented a triable issue on the question of adverse employment action (*134 Cal. App. 4th 1378, 1388-1390)* .

Finally, the court of appeal found that the chronology of events raised a triable issue concerning the existence of a causal link between the plaintiff's II/USP disclosures and her transfer to the new school. Accordingly, the court of appeal reversed the grant of summary judgment and remanded the case for further proceedings on the plaintiff's retaliation claim (*134 Cal. App. 4th 1378, 1390-1391)* .

[f] Prohibition Against Retaliation for Opposing Practices Forbidden by Fair Employment and Housing Act

The plaintiff in ***Yanowitz v. L'Oreal USA, Inc.*** *(2005) 36 Cal. 4th 1028, 32 Cal. Rptr. 3d 436, 116 P.3d 1123* , was a regional sales manager for the defendant, a cosmetics and fragrance company. The plaintiff claimed that she had been subjected to adverse employment action in retaliation for her refusal to carry out her supervisor's instruction to terminate a dark-skinned female sales associate whom the supervisor found to be insufficiently attractive. The complaint included a claim of retaliation under the Fair Employment and Housing Act (FEHA), which prohibits discrimination against an employee in retaliation for the employee's engaging in activity protected under FEHA (*Gov. Code § 12940(h)*). On the retaliation claim, the trial court granted summary judgment in favor of the defendant, finding that the plaintiff had not engaged in any protected activity. The court of appeal reversed, holding, among other things, that the plaintiff's refusal to obey the supervisor's sexually discriminatory order to fire the sales associate was a protected activity under FEHA.

The California Supreme Court affirmed the court of appeal's judgment. The Supreme Court began its analysis by restating the elements of a plaintiff's prima facie case of retaliation under FEHA: the plaintiff must show (1) he or she engaged in a protected activity, (2) the employer subjected the employee to an adverse employment action, and (3) a

causal link existed between the protected activity and the employer's action. The Court found that the first element--that the plaintiff engaged in protected activity--was satisfied by the plaintiff's refusal to follow the supervisor's order to terminate the sales associate. FEHA's anti-retaliation provision indicates that protected conduct includes opposing any practices forbidden by FEHA (*Gov. Code § 12940(h)*). The Court noted that an employee's conduct in opposing an employer's practice may constitute protected activity so long as the employee reasonably and in good faith believed the practice to be discriminatory, whether or not the conduct is ultimately found to be in violation of the law (*36 Cal. 4th 1028, 1043)* . In this particular instance, the Court found that there was sufficient evidence to support a finding that the plaintiff had a reasonable belief that the supervisor's order to terminate a sales associate who was "not good looking enough" represented an instance of impermissible discrimination on the basis of sex (*36 Cal. 4th 1028, 1044-1045* ; *see Gov. Code § 12940(a)*).

The Supreme Court rejected the defendant's contention that the plaintiff's conduct could not be protected activity because the plaintiff had never *explicitly* informed the defendant that she believed the supervisor's order was discriminatory. The Court explained that FEHA's anti-retaliation provision applies so long as the circumstances are sufficient to establish that the employer had knowledge that the employee's refusal to engage in the particular practice was based on the employee's reasonable belief that the practice was discriminatory (*36 Cal. 4th 1028, 1046)* . In this case, the Supreme Court found that, although the plaintiff had not explicitly informed the defendant that she believed her supervisor's order to be discriminatory, the circumstances--including the plaintiff's requests that the supervisor provide "adequate justification" for the order--provided a sufficient basis for a trier of fact to find that the defendant knew that the plaintiff's refusal to obey the order to terminate the sales associate was based on the plaintiff's belief that the order was discriminatory (*36 Cal. 4th 1028, 1046-1048)* .

In this case the Supreme Court also held that to qualify as an "adverse employment action" under FEHA, an employer's act must have a material effect on the terms, conditions, or privileges of employment; it is not sufficient that the act deter the plaintiff or other employees from engaging in protected activities (*36 Cal. 4th 1028, 1050-1055)* . Also, a series of separate retaliatory acts collectively may constitute an "adverse employment action," even if some or all of the component acts might not be individually actionable (*36 Cal. 4th 1028, 1055-1056)* . The Supreme Court concluded that the alleged circumstances of this case, including unwarranted negative performance evaluations, unwarranted criticism, solicitation of negative feedback from the plaintiff's staff, and a refusalto allow the plaintiff to respond to criticisms, were sufficient to support a finding by a trier of fact that the plaintiff had suffered an adverse employment action (*36 Cal. 4th 1028, 1059-1061)* .

[g] Prohibition of Retaliation Against Physician for Advocating for Appropriate Health Care

In ***Khajavi v. Feather River Anesthesia Med. Group*** *(2000) 84 Cal. App. 4th 32, 100 Cal. Rptr. 2d 627* , the plaintiff was an anesthesiologist whose employment was terminated after he had a disagreement with a surgeon about the medical wisdom of subjecting a particular patient to cataract surgery. The anesthesiologist sued the surgeon and the employer medical group; one of his claims was that he had been wrongfully discharged in violation of public policy. In support of this claim, the plaintiff cited *Business and Professions Code Section 2056*, which declares it a violation of public policy for "any person ... to terminate an employment or other contractual relationship with or otherwise penalize ... a physician ... principally for advocating for medically appropriate health care" (*Bus. & Prof. Code § 2056(c)*).

At the close of the plaintiff's case-in-chief, the trial court granted the defendants' motion for nonsuit on the wrongful-discharge claim. The trial court relied on Section 2056's declaration of legislative intent, which states that "[t]he purpose of this section is to provide protection against retaliation for physicians who advocate for medically appropriate health care for their patients pursuant to *Wickline v. State of California [(1986)] 192 Cal. App. 3d 1630 [239 Cal. Rptr. 810]* " (*Bus. & Prof. Code § 2056(a)*). Because the *Wickline* case involved a dispute between a physician and a health-care payor, the trial court construed Section 2056 as proscribing only retaliation by a third-party payor against a physician (*84 Cal. App. 4th 32, 45)* .

The court of appeal reversed, finding that the plain language of Section 2056, as well as the legislative history, made it clear that the statute was intended to provide an express public policy in favor of physicians' advocacy for appropriate health care of their patients and against employment termination or penalization of physicians for such advocacy, and to state that a physician who has an employment or other contractual relationship with a person should not be terminated or otherwise penalized principally for advocating for appropriate health care for his or her patient. Thus, Section 2056 was intended to apply not just to disputes between physicians and third-party payors, but also to disputes between physicians and their employers (*84 Cal. App. 4th 32, 45-51)* . In this case, the evidence proffered by the plaintiff would have been sufficient to support a jury finding that the plaintiff's employment had been terminated because of his disagreement with the surgeon, and that the disagreement constituted the plaintiff's advocacy of medically appropriate health care. Therefore, the court of appeal reversed the judgment of nonsuit and remanded for further proceedings (*84 Cal. App. 4th 32, 52, 63)* .

[h] Prohibition Against Retaliation Based on Race

The plaintiff in ***CBOCS W., Inc. v. Humphries*** *(2008) 553 U.S. 442, 128 S. Ct. 1951, 170 L. Ed. 2d 864* , sued his former employer, claiming that he had been discharged in retaliation for complaining that the defendant had discharged another employee for race-based reasons. The plaintiff charged that the alleged retaliatory conduct violated federal civil-rights laws, including *42 U.S.C. § 1981(a)*. Specifically, *42 U.S.C. § 1981(a)* provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts ... as is enjoyed by white citizens." The basic question for the United States Supreme Court in this case was whether *42 U.S.C. § 1981(a)* encompasses a complaint of retaliation against a person who has complained about a race-based violation of another person's contract-related "right." The Court concluded that *42 U.S.C. § 1981(a)* does prohibits retaliation based on race (*170 L. Ed. 2d 864, 869, 877)* .

The United States Supreme Court acknowledged that *42 U.S.C. § 1981(a)* does not expressly refer to the claim of an individual (black or white) who suffers retaliation because he has tried to help a different individual secure his or her rights under *42 U.S.C. § 1981*. Nevertheless, the Court concluded that the statute encompasses retaliation claims, basing its reasoning on its previous decisions construing other, similarly worded provisions. For example, the Court has long construed *42 U.S.C. § 1982*, which provides that all citizens will have the same right as white persons to own and dispose of real and personal property, as covering retaliation against those who advocate the rights of persons expressly protected by that provision [*see Jackson v. Birmingham Bd. of Educ. (2005) 544 U.S. 167, 176, 125 S. Ct. 1497, 161 L. Ed. 2d 361* ; *Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 237, 90 S. Ct. 400, 24 L. Ed. 2d 386*]. Moreover, the Court has long construed *42 U.S.C. §§ 1981* and *1982* similarly, because of their common language, origin, and purposes; both statutes were originally enacted just after the Civil War to protect the rights of black citizens [*see Runyon v. McCrary (1976) 427 U.S. 160, 173, 96 S. Ct. 2586, 49 L. Ed. 2d 415*]. Therefore, despite the fact that *42 U.S.C. § 1981* does not use the word "retaliation," the Court concluded that principles of stare decisis strongly support adhering to the line of cases interpreting *42 U.S.C. §§ 1981* and *1982* similarly. Accordingly, and the Court held that *42 U.S.C. § 1981(a)* encompasses claims of retaliation (*170 L. Ed. 2d 864, 869-873, 877)* .

[i] Prohibition Against Retaliation for Filing Complaint Under Age Discrimination in Employment Act

The question before the United States Supreme Court in ***Gomez-Perez v. Potter*** *(2008) 553 U.S. 474, 128 S. Ct. 1931, 170 L. Ed. 2d 887* , was whether a federal employee who is a victim of retaliation due to the filing of a complaint of age discrimination may assert a claim under the federal-sector provision of the Age Discrimination in Employment Act of 1967 (ADEA) [*see 29 U.S.C. § 633a(a)*]. That statute provides that "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age ... shall be made free from any discrimination based on age." Although the statute does not expressly refer to "retaliation," the Supreme Court held that the statutory phrase "discrimination based on age" includes retaliation based on the filing of an age discrimination complaint (*170 L. Ed. 2d 887, 894, 902)* .

In reaching its conclusion, the Court was guided by its prior decisions interpreting similar language in other antidiscrimination statutes [*see, e.g.,* *Jackson v. Birmingham Bd. of Educ. (2005) 544 U.S. 167, 173-174, 125 S. Ct. 1497, 161 L. Ed. 2d 361* (retaliation claims are encompassed by *20 U.S.C. § 1681(a)*, which provides that no person shall, "on the basis of sex, ... be subjected to discrimination" under federally funded education programs; *Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 237, 90 S. Ct. 400, 24 L. Ed. 2d 386* (*42 U.S.C. § 1982*, which that all citizens will have the same right as white persons to own and dispose of real and personal property, prohibits retaliation based on race)]. Applying the reasoning of those decisions, the Court concluded that the federal-sector provision of the ADEA prohibits retaliation against individuals who complain about age discrimination in federal employment (*170 L. Ed. 2d 887, 894-896)* .

[j] Prohibition Against Retaliation for Opposing Practice That Violates Title VII of Civil Rights Act

The plaintiff in ***Crawford v. Metro. Gov't of Nashville & Davidson County*** *(2009) ___ U.S. ___, 129 S. Ct. 846, 172 L. Ed. 2d 650* , was a public employee who had been questioned by her employer as part of the employer's investigation of rumors that another one of its employees was committing sexual harassment. In response to the employer's questioning, the plaintiff described several instances of sexually harassing behavior. The employer ultimately took no action against the employee who allegedly committed harassment, but shortly after completing the harassment investigation, the employer dismissed the plaintiff, saying that the dismissal was for embezzlement. The plaintiff brought a Title VII claim against the employer, charging that the dismissal was actually done in retaliation for her report of the other employee's harassing behavior. The Title VII antiretaliation provision makes it an unlawful employment practice for an employer to discriminate against an employee (1) because the employee "has opposed any practice made an unlawful employment practice" by Title VII (the "opposition" clause); or (2) because the employee has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under Title VII (the "participation clause") (*42 U.S.C. § 2000e-3(a)*). The lower courts granted and affirmed summary judgment for the employer, holding that the plaintiff was not protected by the opposition clause, because she had not initiated the employer's internal investigation, and that she was not protected by the participation clause, because that clause applies only to participation in a investigation conducted pursuant to a pending charge filed with the Equal Employment Opportunity Commission.

The United States Supreme Court granted certiorari, primarily to review the applicability of the opposition clause. Construing the statutory word "opposed," the Court stated that "'[o]ppose' goes beyond 'active, consistent' behavior in ordinary discourse, where we would naturally use the word to speak of someone who has taken no action at all to advance a position beyond disclosing it. ... There is, then, no reason to doubt that a person can 'oppose' by responding to someone else's question just as surely as by provoking the discussion, and nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question" (*172 L. Ed. 2d 650, 657)* . Therefore, the Court concluded that the plaintiff's conduct had constituted opposition to the alleged harassment and was within the scope of the opposition clause of Title VII's antiretaliation provision (*172 L. Ed. 2d 650, 657-659)* .

Accordingly, the Court reversed the appellate court's judgment and remanded the case for further proceedings (*172 L. Ed. 2d 650, 659)* . Because the plaintiff's conduct was covered by the opposition clause, the Court found it unnecessary to reach the question whether the participation clause also covered the plaintiff's conduct (*172 L. Ed. 2d 650, 659)* .

[4] Additional Authorities

[a] Statutory Provision Precluding Discharge for Conduct Within Statute Can Be Basis of Common Law Wrongful-Discharge Action

Hentzel v. Singer Co. (1982) 138 Cal. App. 3d 290, 188 Cal. Rptr. 159 , arose out of an action against defendant by its former employee for wrongful discharge. Plaintiff claimed that his former employer wrongfully terminated him in

retaliation for his actions in attempting to obtain a reasonably smoke-free environment. Plaintiff's complaint contained five causes of action, including tortious wrongful discharge. The trial court sustained defendant's demurrer to the complaint without leave to amend and dismissed the action. Plaintiff appealed, contending, among other things, that he had a common-law right to bring his action in tort irrespective of the provisions of *Lab. Code §§ 6310* and *6312*, prohibiting retaliatory dismissal for actions relating to safe and healthy working conditions and providing for maintenance by an administrative agency of a lawsuit on behalf of a complaining employee. In response, defendant argued that plaintiff's rights were limited to the filing of a complaint with the Labor Commissioner under *Lab. Code § 6312*.

The court of appeal reversed the order of the trial court that sustained defendant's demurrer and dismissed the complaint. The court held that plaintiff's complaint was sufficient to state a cause of action for the tort of wrongful discharge based on a retaliatory dismissal arising out of plaintiff's activities in attempting to obtain a reasonably smoke-free environment (*138 Cal. App. 3d 290, 295-304)* . The court ruled that this common-law right of action was available to the plaintiff irrespective of *Lab. Code §§ 6310* and *6312* of the California Occupational and Safety Health Act (Cal OSHA), which provides protection for employees who complain about unsafe or unhealthy working conditions and for maintenance of a suit by the Labor Commissioner on behalf of wrongfully discharged employees (*138 Cal. App. 3d 290, 295-302)* .

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 100 EMPLOYER AND EMPLOYEE: WRONGFUL TERMINATION AND DISCIPLINE
PART II. FORMS

10-100 California Points & Authorities § 100.43

AUTHOR: Carolyn Rashby

§ 100.43 Supporting Contention That Tort Action Exists Due to Public Policy Violation--Discharge Violated Constitutionally-Based Public Policy Regarding Discrimination

[1] FORM

[*The following may be included in a memorandum supporting or opposing a motion, or in a trial or appellate brief.*]

PLAINTIFF HAS ALLEGED SUFFICIENT FACTS TO ESTABLISH THAT DEFENDANT TERMINATED PLAINTIFF'S EMPLOYMENT IN VIOLATION OF PUBLIC POLICY, IN THAT THE TERMINATION WAS IN VIOLATION OF THE FUNDAMENTAL PUBLIC POLICY PROHIBITING DISCRIMINATION IN EMPLOYMENT.

A. Employer's Right to Terminate Employment Cannot Be Exercised in Violation of Public Policy. [*See § 100.41, Paragraph A.*]

B. Employment Discrimination Prohibited by California Constitution. *Article I, Section 8, of the California Constitution*, which declares that a person may not be disqualified from entering or pursuing, among other things, employment because of sex, race, creed, color, or national or ethnic origin, sets forth a fundamental public policy against discrimination in employment on any of those bases. An employee who has been terminated on any of those bases may therefore bring a tort action for wrongful discharge in violation of public policy (*Rojo v. Kliger (1990) 52 Cal. 3d 65, 90, 276 Cal. Rptr. 130, 801 P.2d 373* (involving sex discrimination)).

[*Optional*] **C. Exhaustion of Administrative Remedies Not Required.** A plaintiff who brings a civil tort action for wrongful discharge in violation of public policy based on discrimination in employment is not required to first exhaust his or her administrative remedy under the Fair Employment and Housing Act (*Stevenson v. Superior Court (1997) 16 Cal. 4th 880, 903-905, 66 Cal. Rptr. 2d 888, 941 P.2d 1157* ; *Rojo v. Kliger (1990) 52 Cal. 3d 65, 88, 276 Cal. Rptr. 130, 801 P.2d 373*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a contention that plaintiff has alleged sufficient facts to show that, in terminating plaintiff's employment, the employer violated public policy, based on constitutional provisions prohibiting discrimination, sufficient to support an action for wrongful discharge. Optional Paragraph D is for use where defendant contends that plaintiff's action for wrongful discharge in violation of public policy is preempted because plaintiff failed to exhaust his or her administrative remedy under the Fair Employment and Housing Act (FEHA) (*Gov. Code § 12900 et seq.*).

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that plaintiff's termination violated a fundamental public policy against discrimination, for example, in opposition to a demurrer or summary judgment motion. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence which indicates that plaintiff was discharged in violation of the fundamental public policy against employment discrimination contained in *Cal. Const., art. I, § 8*. Counsel should, therefore, set forth facts tending to show that the discharge was premised on one or more of the bases enumerated in the constitutional provision, including sex, race, creed, color, or national origin. Such evidence could include, for example, statements made by the employer or evidence that other similarly situated employees were treated differently. Further, if appropriate, counsel should argue that plaintiff was not required to exhaust FEHA administrative remedies prior to filing a wrongful termination lawsuit [*Rojo v. Kliger (1990) 52 Cal. 3d 65, 88, 276 Cal. Rptr. 130, 801 P.2d 373]* .

[c] Related Memoranda

Section 100.41 is general points and authorities for a situation where there is no constitutional antidiscrimination provision that limits the employer's right to discharge the plaintiff, and where none of the other specific situations covered by § 100.42 et seq. applies. See *§ 100.42* (where the discharge was in violation of a statute protecting plaintiff against discharge), § 100.44 (where the discharge punished plaintiff for exercising or refusing to waive a constitutional right), § 100.45 (where the discharge was based on the employee's protest of unsafe working conditions), § 100.46 (where the discharge was based on the employee's refusal to commit an unlawful act, § 100.47 (where the discharge was in retaliation for the employee's attempt to rectify the employer's public policy violation), § 100.49 (where the discharge was in retaliation for the employee's disclosure of wrongdoing to upper management or governmental authorities), and § 100.50 (where the plaintiff was defendant's in-house counsel).

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Memoranda

The points and authorities *set out in § 100.52* et seq. may be used in an appropriate case to oppose the points and authorities set out in this form. In an appropriate case, these points and authorities may be submitted in opposition to the points and authorities *set out in § 100.22*.

[e] Cause of Action Inapplicable to Independent Contractor

The theory set forth in this memorandum only applies to employer/employee relations, and cannot support a recovery of damages in tort for termination of a contract with an independent contractor pursuant to a contract provision allowing

either party the right to terminate the contract unilaterally [*Abrahamson v. NME Hospitals, Inc. (1987) 195 Cal. App. 3d 1325, 1329-1330, 241 Cal. Rptr. 396* (independent-contractor physician charged termination was due to his refusal to condone poor practices in healing arts; court held that no cause of action was stated)].

[f] Related Pleading and Practice Forms

For a general form of demurrer to a complaint based on the failure to state facts sufficient to constitute a cause of action, see *California Forms of Pleading and Practice, Ch. 206, Demurrers and Motions for Judgment on the Pleadings, § 206.122* (Matthew Bender). For a form of notice for summary judgment and related discussion, see Ch. 537, *Summary Judgment* , in that publication. For discussion and forms relating to wrongful discharge, see Ch. 249, *Employment Law: Termination and Discipline* , in that publication.

For a discussion and forms relating to the California Fair Employment and Housing Act [Gov. Code § 12900 et seq.], see California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination* (Matthew Bender).

[g] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 60, § 60.04[2][c], [e]* (Matthew Bender).

[3] Discussion of Authorities

[a] Employment Discrimination Prohibited by California Constitution

Rojo v. Kliger *(1990) 52 Cal. 3d 65, 276 Cal. Rptr. 130, 801 P.2d 373* , involved female employees who were allegedly sexually harassed by their employer, a doctor and medical corporation. The employer's offensive conduct eventually forced the plaintiffs to quit, after which they filed a complaint for violations of FEHA, for intentional infliction of emotional distress, and for tortious discharge in contravention of public policy. The trial court granted the employer's motion for summary judgment on the grounds that FEHA constituted the plaintiffs' exclusive remedy and that they had failed to exhaust FEHA's administrative channels. The court of appeal reversed, holding that FEHA does not preempt other state law claims, that administrative remedies must be exhausted only with respect to FEHA claims, and that the allegations of sexual harassment would support a claim of tortious discharge in violation of public policy. The employer sought review by the California Supreme Court.

The Court affirmed, holding that sex discrimination in employment offends fundamental public policy, and may provide the basis for a suit for wrongful discharge in violation of public policy (*52 Cal. 3d 65, 90)* . Relying on *Tameny v. Atlantic Richfield Co. (1980) 27 Cal. 3d 167, 176-177, 164 Cal. Rptr. 839, 610 P.2d 1330* , which was reaffirmed in *Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 665-669, 254 Cal. Rptr. 211, 765 P.2d 373* , the Court agreed with the plaintiffs that *Cal. Const., art. I, § 8,* which prohibits, among other things, employment discrimination based on sex, is declaratory of fundamental public policy (*181 Cal. App. 4th 218, 231)* . The Court acknowledged that FEHA, which declares that discrimination on specified grounds, including sex, violates public policy [*see Gov. Code § 12920*], establishes administrative procedures to redress discrimination, and that the DFEH, FEHA's enforcement agency, must issue a "right to sue" letter before a complainant may sue under FEHA [*see Gov. Code §§ 12930, 12965*] (*181 Cal. App. 4th 218, 233-234)* . It pointed out, however, that FEHA also clearly disclaims an intent to repeal any other California discrimination law [*see Gov. Code § 12993(a)*], and added that it is settled that California law includes common law as well as the Constitution and the codes [*see, e.g., Code Civ. Proc. §§ 1895, 1899*; *Victory Oil Co. v. Hancock Oil Co. (1954) 125 Cal. App. 2d 222, 229, 270 P.2d 604]* (*52 Cal. 3d 65, 73-74)* . The Court repeated its declaration, originally made in *State Personnel Board v. Fair Employment & Housing Com. (1985) 39 Cal. 3d 422, 431, 217 Cal. Rptr. 16, 703 P.2d 354* that "[t]he FEHA was meant to supplement, not supplant or be supplanted by, existing antidiscrimination remedies, in order to give employees the maximum opportunity to vindicate their civil rights against discrimination ... ." (*52 Cal. 3d 65, 74-75)* . The Court interpreted FEHA as thus amplifying rather than

abrogating common-law remedies for employment discrimination (*178 Cal. App. 4th 536, 550-551)* .

The Court acknowledged that FEHA states that it is the Legislature's intent to "occupy the field" of employment discrimination "exclusive of all other laws banning discrimination ... by any city, city and county, county, or other political subdivision ..." [*see Gov. Code § 12993(c)*]. Accordingly, the Court construed FEHA's legislative history, pointing out that FEHA is an amalgamation of the former Fair Employment Practices Act ("FEPA") (former Lab. Code § 1410 et seq.), FEHA's predecessor, and the former Rumford Fair Housing Act ("Rumford Act") (former Health & Safety Code § 35700 et seq.). It concluded that when those statutes were combined to form FEHA, the present *Gov. Code § 12993(c)* was created by merging two separate sections, neither of which was intended to preempt any but local law (*178 Cal. App. 4th 536, 553)* .

The Court found the "new right-exclusive remedy" rule to be inapplicable to FEHA. That rule states that if a statute creates a right that did not exist at common law and provides a comprehensive and detailed remedial scheme for its enforcement, the statutory remedy is exclusive [*see Flores v. Los Angeles Turf Club (1961) 55 Cal. 2d 736, 746-747, 13 Cal. Rptr. 201, 361 P.2d 921* ; *Hentzel v. Singer Co. (1982) 138 Cal. App. 3d 290, 301, 188 Cal. Rptr. 159]* . The Court explained that (1) the unequivocal language of FEHA disclaims an intent to repeal existing law [*see Gov. Code § 12993(a)*], (2) common-law remedies for employment discrimination existed prior to the enactment of FEHA and its predecessor, and (3) FEHA is not such a "general and comprehensive" legislative scheme as to imply an intent to displace existing law. The Court cited various circumstances under which FEHA does not apply [*see Gov. Code §§ 12926(c)* (*now see Gov. Code § 12926(d)*) (employers with less than five employees), 12926(c) (*now see Gov. Code § 12926(d)*) (religious organizations); *Gay Law Students Assn. v. Pacific Tel. & Tel. Co. (1979) 24 Cal. 3d 458, 489, 156 Cal. Rptr. 14, 595 P.2d 592* (sexual orientation)], and observed that it has a limited administrative remedial scheme [*see Peralta Community College Dist. v. Fair Employment & Housing Com. (1990) 52 Cal. 3d 40, 55-57, 60, 276 Cal. Rptr. 114, 801 P.2d 357* (FEHC may not award compensatorydamages); *Dyna-Med, Inc. v. Fair Employment & Housing Com. (1987) 43 Cal. 3d 1379, 1404, 241 Cal. Rptr. 67, 743 P.2d 1323 (FEHC may not award punitive damages)]* (*52 Cal. 3d 65, 79-81)* .

Acknowledging that a complainant must exhaust FEHA's administrative process before filing a lawsuit alleging FEHA causes of action [*see People v. Craycroft (1852) 2 Cal. 243, 244* (when right is given and remedy provided by statute, remedy so provided must ordinarily be pursued); *see also Gov. Code § 12965(b)* ("right to sue" letter must be obtained before bringing civil action under FEHA); *State Personnel Board v. Fair Employment & Housing Com. (1985) 39 Cal. 3d 422, 433 n.11, 217 Cal. Rptr. 16, 703 P.2d 354* ("right to sue" letter is prerequisite to judicial action); *Commodore Home Systems, Inc. v. Superior Court (1982) 32 Cal. 3d 211, 218, 185 Cal. Rptr. 270, 649 P.2d 912* (same)], the Court held, however, that a complainant need not exhaust FEHA administrative process before filing a civil suit alleging nonstatutory causes of action. The Court explained that the exhaustion doctrine applies only to rights created by the statute providing the administrative system. It declared that the policy considerations served by the doctrine, namely the promotion of administrative autonomy, utilization of agency expertise, mitigation of damages, and conservation of judicial resources, although particularly apt in the context of a self-contained entity (e.g., a hospital, a private or professional association, or a public agency), which has a pervasive and self-contained internal mechanism for addressing disputes that are singularly within the technical competence of that mechanism, are not applicable to FEHA, since it does not regulate or monitor employment relationships (*Rojo v. Kliger (1990) 52 Cal. 3d 65, 83-88, 276 Cal. Rptr. 130, 801 P.2d 373*).

Thus, the Court concluded that an employee may elect to waive his or her FEHA claims and proceed directly to court on common-law claims; alternatively, the employee may pursue both the administrative and judicial remedies either sequentially or simultaneously (in the latter case by amending his or her complaint to join FEHA cause of action once the DFEH issues a "right to sue" letter) (*Rojo v. Kliger (1990) 52 Cal. 3d 65, 88, 276 Cal. Rptr. 130, 801 P.2d 373*).

Based on *Rojo*, it appears that a cause of action for wrongful termination in violation of public policy based on employment discrimination may be based on any of the categories protected by *Cal. Const., art. I, § 8*, namely sex, race,

creed, color, or national or ethnic origin. However, FEHA also proscribes employment discrimination based on a number of other classifications that are not mentioned in *Cal. Const., art. I, § 8,* including physical and mental disability, medical condition, marital status, and age [*Gov. Code § 12940*]. The California Supreme Court has held that the broad statements of policy in *Gov. Code §§ 12920* and *12921* cannot be the basis of a cause of action for wrongful termination in violation of the public policy against age discrimination in employment against an employer exempt from the substantive provisions of FEHA; because there is no other statutory or constitutional basis for the public policy against age discrimination, FEHA does not create new common-law rights beyond the rights created by the statute itself [*Jennings v. Marralle (1994) 8 Cal. 4th 121, 134-136, 32 Cal. Rptr. 2d 275, 876 P.2d 1074* (employer exempt from age discrimination prohibition of former Gov. Code § 12941 [*now see Gov. Code § 12940(a)*]due to employment of fewer than five employees cannot be liable for wrongful termination in violation of public policy); *cf.* *Stevenson v. Superior Court (1997) 16 Cal. 4th 880, 897, 66 Cal. Rptr. 2d 888, 941 P.2d 1157* (larger employer, covered by FEHA age-discrimination prohibition, subject to age-discrimination claim for wrongful termination in violation of public policy)]. Thus, it appears that a cause of action for discrimination on bases not listed in *Cal. Const., art I, § 8,* must be based on a violation of FEHA or some other comparable statutory provision, and that the defendant must be subject to the statutory provision. At least in the case of FEHA, a wrongful-discharge action would be functionally identical to the action under the statute. Because the benefits of suing under a wrongful discharge cause of action based on alleged violations of constitutional rights--administrative procedures need not be exhausted before filing suit, and the broader applicability of the constitutional provisions--do not apply to actions based solely on FEHA, there is no reason to assert both causes of action.

[b] Exhaustion of Administrative Remedies Not Required

Rojo v. Kliger *(1990) 52 Cal. 3d 65, 276 Cal. Rptr. 130, 801 P.2d 373* , is *discussed under § 100.43[3][a]*. Acknowledging that a complainant must exhaust FEHA's administrative process before filing a lawsuit alleging FEHA causes of action, the Court held that a complainant need not exhaust FEHA administrative process before filing a civil suit alleging nonstatutory causes of action (*Rojo v. Kliger (1990) 52 Cal. 3d 65, 88, 276 Cal. Rptr. 130, 801 P.2d 373*).

The facts and procedural background of ***Stevenson v. Superior Court*** *(1997) 16 Cal. 4th 880, 66 Cal. Rptr. 2d 888, 941 P.2d 1157* , are discussed in *§ 100.42[3][c]*. The *Stevenson* court vigorously reaffirmed the *Rojo* analysis regarding exhaustion of remedies under FEHA. It also rejected an attempt by the *Stevenson* age-discrimination defendant to distinguish *Rojo*, a sex-discrimination case, on the basis that only in *Rojo* was the discrimination proscribed by the state constitution as well as by the statute (*16 Cal. 4th 880, 903-907)* .

[4] Additional Authorities

[a] Exhaustion of Administrative Remedies Not Required

In *Schifando v. City of Los Angeles (2003) 31 Cal. 4th 1074, 6 Cal. Rptr. 3d 457, 79 P.3d 569* , the California Supreme Court considered whetherexhaustion of an employer's internal grievance procedures is a prerequisite for a civil action asserting a claim under the Fair Employment and Housing Act (FEHA). The plaintiff in this case was a city employee who alleged employment discrimination based on physical disability under FEHA (*see Gov. Code §§ 12926(k), 12940(a)*). Before filing suit, the plaintiff complied with the administrative procedures prescribed by FEHA, by filing a complaint with the Department of Fair Employment and Housing (DFEH) (*see Gov. Code § 12960*). After investigating the complaint, the DFEH issued the plaintiff a right-to-sue letter (*see Gov. Code § 12965(b)*), and the plaintiff filed suit. On appeal, the city argued that the plaintiff's suit should be dismissed because he had failed to pursue administrative remedies provided under the city charter. Those remedies included the filing of a demand for reinstatement, which would have given the local board of civil service commissioners the opportunity to consider the propriety of the plaintiff's discharge.

The Supreme Court acknowledged that its precedents establish that employers' internal grievance procedures are subject to an exhaustion requirement (*see, e.g., Westlake Cmty. Hosp. v. Superior Court (1976) 17 Cal. 3d 465, 476, 131 Cal. Rptr. 90, 551 P.2d 410*). However, those precedents did not involve statutory claims for which the Legislature had specifically mandated its own administrative review process, as in FEHA, and the Court found this distinction to be "compelling." Accordingly, the Supreme Court held that exhaustion of an employer's internal procedures is not a prerequisite for a civil action asserting a claim under FEHA or another statutory scheme that contains its own exhaustion prerequisite. Thus, an employee who has exhausted FEHA administrative process and obtained a right-to-sue letter from the DFEH need not also exhaust internal administrative procedures provided by the employer prior to filing lawsuit alleging an FEHA claim (*31 Cal. 4th 1074, 1084-1086)* .

The Supreme Court recognized that procedural issues might arise if an employee chooses to pursue both statutory and internal administrative remedies, but the Court left the resolution of those issues for the future (*31 Cal. 4th 1074, 1087-1089)* . Also, the Court expressly left open the question whether an employee would be required to satisfy internal administrative remedies before suing on a claim based on a statute that does not provide its own administrative procedures (*31 Cal. 4th 1074, 1089 n.5*).

In *Badih v. Myers (1995) 36 Cal. App. 4th 1289, 43 Cal. Rptr. 2d 229* , plaintiff was employed by Myers, an employer of less than five people. When Myers terminated plaintiff after learning of her pregnancy, plaintiff attempted to file a complaint with the Department of Fair Employment of Housing but her complaint was not accepted because Myers was not covered by FEHA, *Gov. Code § 12940 et seq.* Plaintiff then filed suit alleging, among other things, wrongful termination in violation of a policy against pregnancy discrimination based on the proscription against sex discrimination embodied in the California Constitution even though her employer was not subject to FEHA. After the jury ruled in plaintiff's favor on this claim, Myers appealed, claiming that FEHA was the exclusive basis of recovery for pregnancy discrimination (*Badih v. Myers (1995) 36 Cal. App. 4th 1289, 1293, 43 Cal. Rptr. 2d 229*). The court of appeal rejected Myers's position and upheld the verdict. After a lengthy review of earlier authorities defining pregnancy as a sex characteristic, the court held that pregnancy discrimination falls within the proscription of sex discrimination stated in *Cal. Const., art. I, § 8.*

California Points & Authorities

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 100 EMPLOYER AND EMPLOYEE: WRONGFUL TERMINATION AND DISCIPLINE
PART II. FORMS

10-100 California Points & Authorities § 100.44

AUTHOR: Carolyn Rashby

§ 100.44 Supporting Contention That Tort Action Exists Due to Public Policy Violation--Discharge Based on Violation of Constitutional Rights Other Than Right to Nondiscriminatory Treatment

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF HAS ALLEGED SUFFICIENT FACTS TO ESTABLISH THAT DEFENDANT TERMINATED PLAINTIFF'S EMPLOYMENT IN VIOLATION OF PUBLIC POLICY, IN THAT THE TERMINATION WAS IN VIOLATION OF PLAINTIFF'S CONSTITUTIONAL RIGHTS.

A. Employer's Right to Terminate Employment Cannot Be Exercised in Violation of Public Policy. [*See § 100.41]1], Paragraph A.*]

[*Optional*] **B. Test for Public Policy Creating Protection Against Termination.** [*See § 100.41]1], Paragraph B.*]

C. Discharge for Exercising (or Refusing to Waive) a Fundamental Constitutional Right Actionable as Against Public Policy. An employer who discharges an employee to punish or retaliate for the employee's choice to exercise (or refuse to waive) a fundamental state constitutional right violates public policy, and the discharged employee may bring an action in tort for wrongful discharge on that ground (*Pettus v. Cole (1996) 49 Cal. App. 4th 402, 452-457, 57 Cal. Rptr. 2d 46*).

[2] Comments

[a] Use of Form

This memorandum may be used in support of the contention that a cause of action for wrongful discharge inviolation of public policy can be based on an employer's termination of employment to punish or retaliate for the employee's exercise of (or refuse to waive) a fundamental state constitutional right. If it is arguable that the authority cited in

Paragraph C is distinguishable, use the optional paragraph as a basis for arguing in more detail how the plaintiff's conduct is entitled to public-policy protection.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that the termination was punishment or retaliation for exercising or refusing to waive a fundamental state constitutional right. Counsel should discuss facts showing that plaintiff exercised or refused to waive a specific constitutional right, for instance refusal to waive the constitutional right to privacy set forth in *Cal. Const., art. I, § 1* [*Pettus v. Cole (1996) 49 Cal. App. 4th 402, 456-457, 57 Cal. Rptr. 2d 46]* .

[c] Related Memoranda

The *form in § 100.41* is a general form for a situation in which there is no constitutional provision protecting the plaintiff, and when none of the other specific situations covered by § 100.42 et seq. applies. See the forms in *§ 100.42* (when the discharge was in violation of a statute protecting plaintiff against discharge), § 100.43 (when the discharge discriminated against plaintiff as a member of a class protected against discrimination *by a constitutional provision*), § 100.45 (when the discharge was based on the employee's protest of unsafe working conditions), § 100.46 (when the discharge was based on the employee's refusal to commit an unlawful act), § 100.47 (when the discharge was in retaliation for the employee's attempt to rectify the employer's public policy violation), § 100.49 (when the discharge was in retaliation for the employee's disclosure of wrongdoing to upper management or governmental authorities), and § 100.50 (when the plaintiff was defendant's in-house counsel).

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Memoranda

The points and authorities *set out in § 100.52* et seq. may be used in an appropriate case to oppose the points and authorities set out in this form. In an appropriate case these points and authorities may be submitted in opposition to the points and authorities *set out in § 100.22*.

[e] Related Pleading and Practice Forms

For a general form of demurrer to a complaint based on failure to state facts sufficient to constitute a cause of action, see *California Forms of Pleading and Practice, Ch. 206, Demurrers and Motions for Judgment on the Pleadings, § 206.122* (Matthew Bender). For a form for notice for summary judgment and related discussion, see Ch. 537, *Summary Judgment* , in that publication. For discussion and forms relating to wrongful discharge, see Ch. 249, *Employment Law: Termination and Discipline* , in that publication.

[f] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 60, § 60.04[2][e]* (Matthew Bender).

[3] Discussion of Authorities

[a] Discharge for Exercising (or Refusing to Waive) a Fundamental Constitutional Right Actionable as Against Public Policy

One of the claims addressed in ***Pettus v. Cole*** *(1996) 49 Cal. App. 4th 402, 57 Cal. Rptr. 2d 46* , was a claim for

discharge because the employee refused to enroll in an inpatient alcohol treatment program chosen by his employer and mandated as a condition of continued employment (*49 Cal. App. 4th 402, 452)* . The trial court had ruled that the termination was justified and that the requirement imposed by the employer was neither an invasion of privacy nor wrongful termination in violation of the public policy embodied in the privacy clause of the *California Constitution, art. I, § 1*, and granted judgment to the defendant-employer, Du Pont, on motion made after the plaintiff's case.

The court of appeal reversed the judgment and remanded the case for further proceedings. The court first reviewed the role of the California constitutional right to privacy in the private workplace and the tort of wrongful termination in violation of public policy in general (*49 Cal. App. 4th 402, 452-453)* . In particular, the court focused on two cases which involved workplace drug-testing, *Semore v. Pool (1990) 217 Cal. App. 3d 1087, 266 Cal. Rptr. 280* , and *Luck v. Southern Pacific Transportation Co. (1990) 218 Cal. App. 3d 1, 267 Cal. Rptr. 618 , cert. denied, 498 U.S. 939* (*49 Cal. App. 4th 402, 454-456)* . These cases are discussed in more detail in *§ 100.53[3][b]*. The court discussed the majority opinions in those cases as well as the dissents, and concluded that the reason the results in those two cases were inconsistent was because the courts had tried to "shoehorn the privacy claims at issue in those cases into the *Foley* model of a tort cause of action for wrongful termination in violation of public policy" (*49Cal. App. 4th 402, 457)* . Instead it viewed Mr. Pettus's termination by Du Pont as economic coercion to affect Mr. Pettus's decision whether to exercise or waive the constitutional right of privacy (*49 Cal. App. 4th 402, 457)* .

The court stated that, while the drug-testing case of *Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 26 Cal. Rptr. 2d 834, 865 P.2d 633* , did not involve employment, it was clear from that case that an employee's claim for invasion of privacy was subject to the test set forth in *Hill.* Accordingly, it first determined that there was a legally protected privacy interest: Mr. Pettus had an autonomy privacy interest in determining his own medical treatment (*49 Cal. App. 4th 402, 457)* . It then turned to whether Mr. Pettus had a reasonable expectation of privacy, and stated that by becoming an employee one does not give up their right to control their medical destiny (*49 Cal. App. 4th 402, 458-459)* . Thirdly, it determined that the invasion was serious and finally, it examined the countervailing interests of the employer and whether there were less intrusive alternatives. In doing so, the court found that Du Pont had put forth no justification for the invasion it proposed and that there were equally effective, less intrusive means to address the interests of the employer (*49 Cal. App. 4th 402, 460-463)* .

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CHAPTER 100 EMPLOYER AND EMPLOYEE: WRONGFUL TERMINATION AND DISCIPLINE
PART II. FORMS

10-100 California Points & Authorities § 100.45

AUTHOR: Carolyn Rashby

§ 100.45 Supporting Contention That Tort Action Exists Due to Public Policy Violation--Discharge Based on Employee's Protest of Unsafe Working Conditions

[1] FORM

[*The following may be included in a memorandum or in a trial or appellate brief.*]

PLAINTIFF HAS ALLEGED SUFFICIENT FACTS TO ESTABLISH THAT DEFENDANT TERMINATED PLAINTIFF'S EMPLOYMENT IN VIOLATION OF PUBLIC POLICY, IN THAT THE TERMINATION WAS BASED ON PLAINTIFF'S PROTEST OF UNSAFE OR UNHEALTHY WORKING CONDITIONS.

A. Employer's Right to Terminate Employment Cannot Be Exercised in Violation of Public Policy. [*See § 100.41[1], Paragraph A.*]

[*Optional*] **B. Test for Public Policy Creating Protection Against Termination.** [*See § 100.41[1], Paragraph B.*]

C. Discharge for Protest of Unsafe or Unhealthy Working Conditions Actionable as Against Public Policy. An employer that discharges an employee for protesting unhealthy or unsafe working conditions impermissibly violates public policy, and the discharged employee may bring an action in tort for wrongful discharge on that ground (*Boston v. Penny Lane Ctrs., Inc. (2009) 170 Cal. App. 4th 936, 944-947, 88 Cal. Rptr. 3d 707* ; *Franklin v. Monadnock Co. (2007) 151 Cal. App. 4th 252, 259, 59 Cal. Rptr. 3d 692* ; *Jenkins v. Family Health Program (1989) 214 Cal. App. 3d 440, 447-449, 262 Cal. Rptr. 798* ; *Hentzel v. Singer Co. (1982) 138 Cal. App. 3d 290, 295-304, 188 Cal. Rptr. 159*).

[*Optional*] **D. Common-Law Action for Wrongful Discharge Not Precluded by California Occupational Safety and Health Act.** Provisions of the California Occupational Safety and Health Act prohibiting discharge or discrimination because of an employee's activity in relation to health and safety matters under *Labor Code Section 6310(a)*, providing victims of discharge or discrimination with the right to reinstatement and reimbursement for lost wages and work benefits under *Labor Code Section 6310(b)*, and providing for the maintenance of suit under certain

circumstances by the Labor Commissioner on behalf of employees discharged or discriminated against under *Labor Code Section 6312* are not exclusive and do not preclude an employee from bringing a common-law cause of action for tortious wrongful discharge (*Jenkins v. Family Health Program (1989) 214 Cal. App. 3d 440, 447-449, 262 Cal. Rptr. 798* ; *Hentzel v. Singer Co. (1982) 138 Cal. App. 3d 290, 298-304, 188 Cal. Rptr. 159*).

[*Optional*] **E. Actual Violation of OSHA Not Necessary.** An employee is protected against discharge or discrimination for complaining in good faith about working conditions or practices he or she reasonably believes to be unsafe, whether or not an OSHA violation actually exists at the time of the complaint (*Cabesuela v. Browning-Ferris Industries of Cal., Inc. (1998) 68 Cal. App. 4th 101, 109, 80 Cal. Rptr. 2d 60*).

[*Optional*] **F. Action Against Subsequent Employer.** An employee may bring an action for retaliatory discharge in violation of public policy against a subsequent employer who discharges the employee for having made claims of health and safety violations against a former employer (*Skillsky v. Lucky Stores, Inc. (9th Cir. 1990) 893 F.2d 1088, 1092-1094)* .

[2] Comments

[a] Use of Form

This memorandum may be used in support of the contention that a cause of action for wrongful discharge in violation of public policy can be based on an employer's termination of employment in retaliation for protesting unsafe or unhealthy working conditions. If it is arguable that the authority cited in Paragraph C is distinguishable, use the optional paragraph as a basis for arguing in more detail how the plaintiff's conduct is entitled to public-policy protection.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a discharge based on an employee's protest of unsafe or unhealthy working conditions can be the basis for a tort cause of action for wrongful discharge in violation of public policy, for example, in opposition to a demurrer or in a motion for summary judgment. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that the dismissal was the proximate result of plaintiff's protest of unhealthy or unsafe working conditions. For example, counsel could discuss facts showing how plaintiff attempted to obtain safe or healthy working conditions, that the employer ignored these attempts or made threats or statements undermining the attempts, that plaintiffsoon thereafter was terminated, and that there was not another, legitimate reason for the discharge (such as poor performance or misconduct); for an example of this type of argument, see *§ 100.27*. Counsel should argue that the remedial provisions of the California Occupational Safety and Health Act are not exclusive and should cite legal authority supporting the contention that the employer is legally bound to provide plaintiff with safe and healthful working conditions [*see Lab. Code § 6400 et seq.*].

[c] Related Memoranda

The *form in § 100.41* is a general form for a situation in which the plaintiff's termination was not connected to health or safety issues, and when none of the other specific situations covered by § 100.42 et seq. applies. See the forms in *§ 100.42* (when the discharge was in violation of a statute protecting plaintiff against discharge), § 100.43 (when the discharge discriminated against plaintiff as a member of a class protected against discrimination *by a constitutional provision*), § 100.44 (when the discharge punished plaintiff for exercising or refusing to waive a constitutional right), § 100.46 (when the discharge was based on the employee's refusal to commit an unlawful act), § 100.47 (when the discharge was in retaliation for the employee's attempt to rectify the employer's public policy violation), § 100.49 (when

the discharge was in retaliation for the employee's disclosure of wrongdoing to upper management or governmental authorities), and § 100.50 (when the plaintiff was defendant's in-house counsel).

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Memoranda

This form *set out in § 100.52* et seq. may be used in an appropriate case to oppose the points and authorities set out in this form. In an appropriate case, this form may be used to oppose the contention supported by the form *set out in § 100.22*.

[e] Related Pleading and Practice Forms

For a general form of demurrer to a complaint based on the failure to state facts sufficient to constitute a cause of action, see *California Forms of Pleading and Practice, Ch. 206, Demurrers and Motions for Judgment on the Pleadings, § 206.122* (Matthew Bender). For a form for notice for summary judgment and related discussion, see Ch. 537, *Summary Judgment* , in that publication. For discussion and forms relating to wrongful discharge, see Ch. 249, *Employment Law: Termination and Discipline* , in that publication.

[f] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 60, §§ 60.03[2][r], 60.04[2][c]* (Matthew Bender).

[3] Discussion of Authorities

[a] Discharge for Protest of Unsafe or Unhealthy Working Conditions Actionable as Against Public Policy

The plaintiff in ***Boston v. Penny Lane Ctrs., Inc.*** *(2009) 170 Cal. App. 4th 936, 88 Cal. Rptr. 3d 707* , was employed by the defendant, a social services agency, to provide therapy for clients in a day treatment program operated by the defendant. After the plaintiff complained several times about an unsafe work environment that was largely the result of inadequate staffing, the defendant terminated the plaintiff's employment. The plaintiff sued for wrongful termination in violation of public policy. After a jury verdict and judgment in favor of the plaintiff, the defendant appealed.

The defendant contended that the judgment should be reversed because the plaintiff's exclusive remedy was under the whistleblower protections of the California Child Day Care Act, which governs the licensing and staffing of various facilities (*see Health & Safety Code § 1596.70 et seq.*). Specifically, the Act provides that no employer may discriminate against an employee who makes a good-faith complaint to a regulatory agency or the employer regarding the employer's violations of the Act, including the Act's staffing requirements (*Health & Safety Code 1596.881*). The Act also provides that an employee who is discriminated against in violation of the Act must, in most cases, pursue a grievance through the Division of Labor Standards Enforcement (*Health & Safety Code § 1596.882*).

The court of appeal rejected this argument. The court noted that the Act's exclusive-remedy provision specifies that it applies only to claims brought "under this article" (*Health & Safety Code § 1596.882(f)*). The court found it significant that although the Act expressly preempts other claims brought under the article in which it appears, the statutory language is silent as to nonstatutory claims. Although the plaintiff's complaints to the employer included complaints about inadequate staffing, she presented a broader range of workplace safety concerns. Thus, the gravamen of her lawsuit was not that she was retaliated against for objecting to the employer's noncompliance with statutory staffing requirements; it was that she was retaliated against for objecting to unsafe working conditions. Accordingly, her lawsuit

asserted a wrongful-termination claim under common law, not a statutory claim under the Act. The court concluded, therefore, that the Act's provision of an exclusive remedy for claims brought under the Act did not bar the plaintiff's lawsuit asserting a common-law claim. The court viewed this as an application of the settled principle that when a statutory remedy is provided for the enforcement of a preexisting common-law right, the newer statutory remedy will be considered only cumulative unless the statute expressly extinguishes the common-law right (*170 Cal. App. 4th 936, 944-947)* .

The plaintiff in ***Franklin v. Monadnock Co.*** *(2007) 151 Cal. App. 4th 252, 59 Cal. Rptr. 3d 692* , sued his employer for wrongful termination in violation of public policy. The plaintiff claimed that he had been discharged as a result of his complaints to the employer and police about a coworker who had threatened to kill the plaintiff and had physically attacked him. The trial court sustained the defendant's demurrer to the complaint and dismissed the case.

The court of appeal reversed the dismissal order, holding that the plaintiff's allegations were sufficient to state a claim for wrongful termination based on the public policy requiring employers to provide safe and secure places to work and encouraging employees to report credible threats of violence in the workplace (*151 Cal. App. 4th 252, 255)* .

The court of appeal specifically rejected a contention that the plaintiff's complaint about threats by his coworker did not involve a fundamental public policy. The court noted that the California Occupational Safety and Health Act (*Lab. Code § 6400 et seq.*) requires every employer to provide a safe and healthful workplace (see *Lab. Code § 6400(a)*). Also, *Code Civ. Proc. § 527.8* requires every employer to take reasonable steps to address credible threats of violence in the workplace. These statutes, taken together, establish an explicit public policy requiring employers to provide safe and secure workplaces (*151 Cal. App. 4th 252, 258-260)* .

The court of appeal observed that it is self-evident that the policy of ensuring a safe and secure workplace, and not terminating an employee for raising concerns about safety, is fundamental and substantial, since threats of violence can be crimes (*151 Cal. App. 4th 252, 260* (citing *Penal Code § 422*). In addition, the policy inures to the benefit of the public, because it allows employers to prevent crimes and foreseeable violence from occurring in the workplace (*151 Cal. App. 4th 252, 263-266)* .

Jenkins v. Family Health Program *(1989) 214 Cal. App. 3d 440, 262 Cal. Rptr. 798* , involved a wrongful discharge action by a nurse practitioner against her former employer. Plaintiff alleged in part that she was discharged for complaining to defendant that conditions were in many cases substandard and required modification to make the conditions fair and safe for both employees and patients. Plaintiff cited violations of Labor Code provisions protecting women, which were repealed subsequent to plaintiff's discharge. The court sustained the demurrer to this cause of action without leave to amend.

The court of appeal reversed the order of dismissal, stating that the trial court should have allowed plaintiff leave to amend. The court stated thatthere were other grounds besides the repealed statutes to support a public policy argument based on protest of unsafe working conditions. The court cited *Hentzel v. Singer Co. (1982) 138 Cal. App. 3d 290, 297-298, 302-303, 188 Cal. Rptr. 159* , discussed *below*, to show that a public policy wrongful termination may be brought against an employer for retaliatory discharge for protesting unsafe working conditions under *Lab. Code §§ 6310* and *6312*, which prohibit discharge or discrimination because of such a protest by an employee (*214 Cal. App. 3d 440, 448-449)* .

The facts and procedural background of *178 Cal. App. 4th 536, 554-555)* , are discussed in *§ 100.42[4][a]*. Plaintiff claimed that his former employer wrongfully terminated him in retaliation for his actions in attempting to obtain a reasonably smoke-free environment. Plaintiff's complaint contained five causes of action, including tortious wrongful discharge. The court of appeal held that plaintiff's complaint was sufficient to state a cause of action for the tort of wrongful discharge based on a retaliatory dismissal arising out of plaintiff's activities in attempting to obtain a reasonably smoke-free environment (*138 Cal. App. 3d 290, 295-304)* . The court ruled that this common-law right of

action was available to the plaintiff irrespective of *Lab. Code §§ 6310* and *6312* of the California Occupational and Safety Health Act (Cal OSHA), which provides protection for employees who complain about unsafe or unhealthy working conditions and for maintenance of a suit by the Labor Commissioner on behalf of wrongfully discharged employees (*138 Cal. App. 3d 290, 295-302)* . For further discussion of the effect of Cal OSHA on the action, see *§ 100.45[3][b]*.

[b] Common-Law Action for Wrongful Discharge Not Precluded by California Occupational Safety and Health Act

The factual and procedural background of ***Jenkins v. Family Health Program*** *(1989) 214 Cal. App. 3d 440, 262 Cal. Rptr. 798* , is *discussed under § 100.45[3][a]*. The court in *Jenkins* cited *Hentzel v. Singer Co. (1982) 138 Cal. App. 3d 290, 297-298, 302-303, 188 Cal. Rptr. 159* , discussed *below,* which held that the remedy under *Lab. Code §§ 6310* and *6312*, which protect certain activities of employees relating to reporting safety and health matters, is neither exclusive nor requisite to the maintenance of a private cause of action, thus allowing their incorporation in a public policy wrongful discharge action (*214 Cal. App. 3d 440, 448-449)* .

The factual and procedural background of ***Hentzel v. Singer Co.*** *(1982) 138 Cal. App. 3d 290, 188 Cal. Rptr. 159* , is discussed in *§ 100.42[4][a]*. In *Hentzel,* the court of appeal observed that provisions of Cal OSHA expressly protect certain activities by employees relating to safety and health matters, by prohibiting discharge or discrimination because of that activity [*Lab. Code § 6310(a)*], by declaring victims of discharge or discrimination to be entitled to reinstatement and reimbursement for lost wages and work benefits [*Lab. Code § 6310(b)*], and by providing for the maintenance of suit by the Labor Commissioner on behalf of victims under certain circumstances [*Lab. Code § 6312*] (*138 Cal. App. 3d 290, 298)* . The court held that these provisions are not exclusive and do not destroy an employee's common-law cause of action for tortious wrongful discharge. The court stated that under *Lab. Code § 6310(b)*, an employee is protected against discharge or discrimination for complaining about working conditions or practices that he or she reasonably believes to be unsafe, whether or not any violation of any Cal OSHA standard or order exists (*138 Cal. App. 3d 290, 301-302)* . Moreover, *Lab. Code § 6312* is not the sole remedy available to an employee wrongfully discharged for protesting unsafe or unhealthy working conditions, since plaintiff's complaint depended on a common-law right of action that existed prior to that section. Thus, the statutory remedy is only cumulative (*138 Cal. App. 3d 290, 302-304)* .

[c] Actual Violation of OSHA Not Necessary

In ***Cabesuela v. Browning-Ferris Industries of Cal., Inc.*** *(1998) 68 Cal. App. 4th 101, 80 Cal. Rptr. 2d 60* , the plaintiff alleged that he was discharged because he had complained to his employer about extended working hours, which the plaintiff believed posed a health and safety hazard. The court of appeal reversed the trial court's order sustaining the defendant's demurrer. The court of appeal held that an employee is protected against discharge or discrimination for complaining in good faith about working conditions or practices he or she reasonably believes to be unsafe, whether or not an OSHA violation actually exists at the time of the complaint (*68 Cal. App. 4th 101, 109)* . Therefore, for the employee to maintain a cause of action for wrongful discharge in this context, it is not necessary to allege or prove that the workplace actually was unsafe.

[d] Action Against Subsequent Employer

Skillsky v. Lucky Stores, Inc. *(9th Cir. 1990) 893 F.2d 1088* , involved a wrongful discharge action by an employee against his employer, charging that the employer had discharged the employee in violation of public policy because of health and safety complaints the employee had made against his former employer. The district court granted summary judgment for the employer. The Ninth Circuit reversed the judgment in part, holding that although the California courts had not determined the issue, the federal court predicted that the California Supreme Court would allow a cause of action for retaliatory discharge against subsequent employers because the public policy prohibiting retaliatory discharge

for reporting safety and health considerations in California is a strong one. Additionally, there would be a significant threat to employees, the public, and the Cal OSHAstatute if subsequent employers, hearing of health and safety complaints against previous employers, could discharge such employees. Employers could then threaten retaliation in future employment, and employees might hesitate to file such complaints (*893 F.2d 1088, 1092-1094)* .

[4] Additional Authorities

[a] Discharge for Protest of Unsafe or Unhealthy Working Conditions Actionable as Against Public Policy

In *Dabbs v. Cardiopulmonary Management Services (1987) 188 Cal. App. 3d 1437, 234 Cal. Rptr. 129* , plaintiff was a certified respiratory therapist who refused to work the night shift at San Clemente General Hospital. Her refusal was in protest of the working conditions, in that she was required to work the shift with only one other therapist, who was not qualified to handle the assigned work, and the shift customarily required three qualified therapists. After she was discharged for refusal to work, she filed an action against her employer for intentional infliction of emotional distress and for wrongful termination, alleging that she was fired for protesting conditions that "violate fundamental public policy of the State of California." The trial court granted defendant's motion for partial summary adjudication of the issues, ruling that a cause of action for wrongful termination cannot be based on violation of an alleged public policy that is not embodied in a statute or regulation. The parties stipulated that the trial court's order could be treated as a judgment on the pleadings, and plaintiff appealed.

The court of appeal reversed the judgment. The court stated that plaintiff was not required to rely on a specific statutory violation by her employer to state a cause of action for wrongful discharge in violation of fundamental public policy considerations. The court cited various sections of the Business and Professions Code dealing with safeguards for the health of patients, to support a state public policy favoring qualified care for its ill and infirm. In addition, the court noted that general societal concerns for qualified patient care militate against an employer's discharging an employee for voicing dissatisfaction with procedures he or she reasonably believes might endanger the health, safety, and well-being of the patients (*188 Cal. App. 3d 1437, 1444)* .

California Points & Authorities

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 100 EMPLOYER AND EMPLOYEE: WRONGFUL TERMINATION AND DISCIPLINE
PART II. FORMS

10-100 California Points & Authorities § 100.46

AUTHOR: Carolyn Rashby

§ 100.46 Supporting Contention That Tort Action Exists Due to Public Policy Violation--Discharge Based on Employee's Refusal to Commit Unlawful Act

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF HAS ALLEGED SUFFICIENT FACTS TO ESTABLISH THAT DEFENDANT TERMINATED PLAINTIFF'S EMPLOYMENT IN VIOLATION OF PUBLIC POLICY, IN THAT THE TERMINATION WAS BASED ON PLAINTIFF'S REFUSAL TO PERFORM AN UNLAWFUL ACT.

A. Employer's Right to Terminate Employment Cannot Be Exercised in Violation of Public Policy. [*See § 100.41]1], Paragraph A.*]

[*Optional*] **B. Test for Public Policy Creating Protection Against Termination.** [*See § 100.41]1], Paragraph B.*]

C. Termination for Refusal to Commit Unlawful Act Violates Public Policy. An employee's continued employment may not be made contingent on his or her commission of an unlawful act at the instance of his or her employer; a discharge based on the employee's refusal to commit an unlawful act gives rise to a tort cause of action for wrongful discharge in violation of public policy (*Tameny v. Atlantic Richfield Co. (1980) 27 Cal. 3d 167, 176, 164 Cal. Rptr. 839, 610 P.2d 1330* ; *see Lab. Code § 1102.5(c)*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a contention that, in terminating plaintiff's employment, the employer violated public policy because the termination was based on the employee's refusal to commit an unlawful act. If it is arguable that the authority cited in Paragraph C is distinguishable, use the optional paragraph as a basis for

arguing in more detail how the plaintiff's conduct is entitled to public-policy protection.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that plaintiff's discharge was due to plaintiff's refusal to commit an unlawful act, and therefore can be the basis of a tort action for wrongful discharge in violation of public policy, for example, in opposition to a demurrer or in a summary judgment motion. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that plaintiff was discharged as a proximate resultof his/her refusal to commit an unlawful act. Counsel should also cite legal authority for the unlawfulness of the act. For example, counsel could discuss facts that the employer pressured plaintiff to commit an illegal act, that plaintiff refused to yield to the pressure, and that soon thereafter plaintiff was fired. Evidence that there was not another, legitimate reason (such as poor performance or misconduct) for the discharge also should be discussed, such as evidence that plaintiff had a long-term employment relationship with the employer and had received favorable performance evaluations. For an example of arguments regarding lack of good cause for discharge, see *§ 100.27*.

[c] Related Memoranda

Section 100.41 is general points and authorities for a situation where the termination was not based on the employee's refusal to commit an unlawful act, and where none of the other specific situations covered by § 100.42 et seq. applies. See *§ 100.42* (where the discharge was in violation of a statute protecting plaintiff against discharge), § 100.43 (where the discharge discriminated against plaintiff as a member of a class protected against discrimination *by a constitutional provision*), § 100.44 (where the discharge punished plaintiff for exercising or refusing to waive a constitutional right), § 100.45 (where the discharge was based on the employee's protest of unsafe working conditions), § 100.47 (where the discharge was in retaliation for the employee's attempt to rectify the employer's public policy violation), § 100.49 (where the discharge was in retaliation for the employee's disclosure of wrongdoing to upper management or governmental authorities), and § 100.50 (where the plaintiff was defendant's in-house counsel).

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Memoranda

The points and authorities *set out in § 100.52* et seq. may be used in an appropriate case to oppose the points and authorities set out in this form. In an appropriate case, these points and authorities may be submitted in opposition to a demurrer supported by the points and authorities *set out in § 100.22*.

[e] Related Pleading and Practice Forms

For a general form of demurrer to a complaint based on the failure to state facts sufficient to constitute a cause of action, see *California Forms of Pleading and Practice, Ch. 206, Demurrers and Motions for Judgment on the Pleadings, § 206.122* (Matthew Bender). For a form of notice for summary judgment and related discussion, see Ch. 537, *Summary Judgment* , in that publication. For discussion and forms relating to wrongful discharge, see Ch. 249, *Employment Law: Termination and Discipline* , in that publication.

[f] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 60, § 60.04[2][d]* (Matthew Bender).

[3] Discussion of Authorities

[a] Termination for Refusal to Commit Unlawful Act Violates Public Policy

In ***Tameny v. Atlantic Richfield Co.*** *(1980) 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330* , plaintiff's complaint alleged that he had worked for defendants for 15 years, receiving regular advances, merit increases, and commendatory evaluations throughout the early years. Beginning sometime after his tenth year, however, defendants allegedly began to pressure plaintiff to coerce independent service stations to cut their prices. Plaintiff further alleged that when he refused to yield to this pressure, his supervisor threatened termination, and that soon thereafter plaintiff was fired. The ostensible reason for the termination was incompetence, but in fact, plaintiff contended that the sole reason for his discharge was his refusal to commit the unlawful acts that were the subject of defendants' attempted coercion. Plaintiff sought relief on a number of grounds, including the ground that defendants had committed the tort of wrongful discharge. Defendants demurred to the complaint on the ground that a terminated employee's remedy sounds only in contract and not in tort, and that trial court sustained the demurrer. Plaintiff appealed.

The Supreme Court overturned the judgment, holding that well-reasoned California and out-of-state authority supports the position that when a discharge would contravene a fundamental public policy, the employee injured by the discharge may sue the employer in tort (*27 Cal. 3d 167, 176-178)* . In discussing the parameters of the tort cause of action for wrongful discharge in violation of public policy, the Court noted with approval past cases such as *Kouff v. Bethlehem-Alameda Shipyard (1949) 90 Cal. App. 2d 322, 325, 202 P.2d 1059* , in which a tort cause of action was stated by allegations that plaintiff had been terminated from his job for acting as an election poll official, in violation of statute (*27 Cal. 3d 167, 176)* .

The Court held further that an employer's authority over its employee does not extend to the right to coerce the employee to perform an unlawful act in furtherance of the employer's interests, and that an employee whohas been discharged for refusal to yield to the coercion, thereby incurring damages, may sue the employer in tort (*27 Cal. 3d 167, 178)* .

[4] Additional Authorities

[a] Termination for Refusal to Commit Unlawful Act Violates Public Policy

In *Jacobs v. Universal Development Corp. (1997) 53 Cal. App. 4th 120* , the court of appeal was confronted with an employer's contention that, since the discharged employee had for a time participated in the illegal conduct, the *in pari delicto* doctrine barred recovery. The employer had won summary judgment based on the *in pari delicto* theory.

Plaintiff worked for a two-year period as sales and marketing director for a residential developer. On a number of occasions, from nearly the beginning of his employment, he protested that he thought certain rebates to purchasers were illegal. There were also periods in which he acquiesced in the program, fearing that he would be fired if he did not. He received commissions on the sales which were made with illegal terms. After finally taking a stand that he would not acquiesce further, he was discharged (*53 Cal. App. 4th 692, 696, 700-701)* .

The court noted that the purpose of the *in pari delicto* doctrine was to prevent the courts from being used to enforce an illegal bargain or permit the plaintiff to recover benefits based on illegal conduct. The situation presented by the current case was not of that nature, but rather of the kind which the tort of wrongful discharge in violation of public policy was meant to address. I.e., there was a clear need to vindicate a public policy against employers forcing their employees into illegality (*53 Cal. App. 4th 692, 699-700, 702-703)* . To hold otherwise when an employee initially acquiesces in an employer's criminality would simply discourage employees in that situation from ceasing their participation in the illegal conduct (*53 Cal. App. 4th 692, 703)* . The court remanded the case for trial.

California Points & Authorities

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 100 EMPLOYER AND EMPLOYEE: WRONGFUL TERMINATION AND DISCIPLINE
PART II. FORMS

10-100 California Points & Authorities § 100.47

AUTHOR: Carolyn Rashby

§ 100.47 Supporting Contention That Tort Action Exists Due to Violation of Public Policy--Discharge in Retaliation for Employee's Attempt to Rectify Employer's Public Policy Violation

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF HAS ALLEGED SUFFICIENT FACTS TO SHOW THAT DEFENDANT TERMINATED PLAINTIFF'S EMPLOYMENT IN VIOLATION OF PUBLIC POLICY, IN THAT THE TERMINATION WAS RETALIATION FOR PLAINTIFF'S ATTEMPT TO RECTIFY HIS/HER EMPLOYER'S PUBLIC POLICY VIOLATION.

A. Employer's Right to Terminate Employment Cannot Be Exercised in Violation of Public Policy. [*See § 100.41]1], Paragraph A.*]

B. Test for Public Policy Creating Protection Against Termination. [*See § 100.41]1], Paragraph B.*]

C. Discharge for Seeking to Rectify Public Policy Violation. A former employee discharged in retaliation for seeking to rectify the employer's public policy violation has a common-law cause of action in tort against the employer (*Blom v. N.G.K. Spark Plugs (U.S.A.), Inc. (1992) 3 Cal. App. 4th 382, 388, 4 Cal. Rptr. 2d 139*).

[*Optional*] **D. Termination in Retaliation for Voicing Concerns About Legality or Morality of Conduct of Enterprise.** Public policy favors protection of employees from dismissal for voicing concerns, within an enterprise, concerning the legality or morality of the enterprise's conduct. A terminated employee states a cause of action for wrongful discharge based on violation of public policy by pleading (1) the employer's policy to contravene a statutory proscription affecting matters relating to the employer's business; (2) the employee's protest to company management regarding the unlawful policy; and (3) retaliatory termination of employment resulting from the protest (*Hejmadi v. AMFAC, Inc. (1988) 202 Cal. App. 3d 525, 538-540, 249 Cal. Rptr. 5*).

[*Optional*] **E. Termination for Reporting Coworkers' Illegal Activity.** An employee who is terminated in retaliation for reporting to his or her employer reasonably suspected illegal conduct by other employees that harms the public as well as the employer, has a cause of action for wrongful discharge in violation of public policy (*Collier v. Superior Court (1991) 228 Cal. App. 3d 1117, 1119-1120, 279 Cal. Rptr. 453*).

[*Optional*] **F. Termination for Reporting Employer's Hiring of Undocumented Aliens.** By prohibiting the employment of undocumented aliens, the Immigration Reform and Control Act of 1986 (*8 U.S.C. § 1324a*) establishes a public policy that protects an employee who complains to the authorities that the employer has hired undocumented aliens (*Jie v. Liang Tai Knitwear Co., Ltd. (2001) 89 Cal. App. 4th 654, 661-662, 107 Cal. Rptr. 2d 682*).

[2] Comments

[a] Use of Form

These points and authorities may be used in support of the contention that plaintiff's allegations of discharge in retaliation for his or her attempt to rectify a public policy violation committed by defendant do in fact state a cause of action.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a tort cause of action for wrongful discharge in violation of public policy can be based on a discharge in retaliation for an employee's attempt to rectify his or her employer's violation of public policy, for example, in opposition to a demurrer or in a summary judgment motion. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that the employer committed a public policy violation (for example, racially discriminatory practices), that plaintiff sought to rectify the violation, and that soon thereafter plaintiff was discharged. Counsel should also discuss any other evidence of retaliation for plaintiff's protests, such as facts that plaintiff's working conditions deteriorated or that plaintiff received a wage cut or poor performance ratings. Facts tending to show that there was not another, legitimate reason for the dismissal (such as poor performance or misconduct) also could be discussed, such as proof that plaintiff had a long-term employment relationship with the employer and previously had received favorable performance evaluations. For an example of arguments regarding lack of good cause for discharge, see *§ 100.27*.

[c] Related Memoranda

Section 100.41 is general points and authorities for a situation where the discharge was not in retaliation for the employee's attempt to rectify the employer's public policy violation, and where none of the other specific situations covered by § 100.42 et seq. applies. See *§ 100.42* (where the discharge was in violation of a statute protecting plaintiff against discharge), § 100.43 (where the discharge discriminated against plaintiff as a member of a class protected against discrimination *by a constitutional provision*), § 100.44 (where the discharge punished plaintiff for exercising or refusing to waive a constitutional right), § 100.45 (where the discharge was based on the employee's protest of unsafe working conditions), § 100.46 (where the discharge was based on the employee's refusal to commit an unlawful act), § 100.49 (where the discharge was in retaliation for the employee's disclosure of wrongdoing to upper management or governmental authorities), and § 100.50 (where the plaintiff was defendant's in-house counsel).

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Memoranda

The points and authorities *set out in § 100.52* et seq. may be used in an appropriate case to oppose the points and authorities set out in this form. In an appropriate case, these points and authorities may be used to oppose the contention supported by the points and authorities *set out in § 100.22*.

[e] Related Pleading and Practice Forms

For a general form of demurrer to a complaint based on the failure to state facts sufficient to constitute a cause of action, see *California Forms of Pleading and Practice, Ch. 206, Demurrers and Motions for Judgment on the Pleadings, § 206.122* (Matthew Bender). For a form of notice for summary judgment and related discussion, see Ch. 537, *Summary Judgment* , in that publication. For discussion and forms relating to wrongful discharge, see Ch. 249, *Employment Law: Termination and Discipline* , in that publication.

[f] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 60, § 60.04* (Matthew Bender).

[3] Discussion of Authorities

[a] Discharge for Seeking to Rectify Public Policy Violation

In ***Blom v. N.G.K. Spark Plugs (U.S.A.), Inc.*** *(1992) 3 Cal. App. 4th 382, 4 Cal. Rptr. 2d 139* , a former personnel manager of a company brought an action against the employer (a subsidiary and its parent corporation) for wrongful discharge, following his termination because of his efforts to end discriminatory practices in the company against the minority of employees who were not Japanese. When plaintiff was hired, he was told to "Americanize" the staff. However, his efforts to diversify personnel andeliminate discrimination against non-Japanese and women employees regarding wages and other benefits were resisted. The efforts included attempts to secure compliance with the Fair Employment and Housing Act (FEHA) [*Gov. Code § 12900 et seq.*] and with Title VII of the federal Civil Rights Act of 1964 [*42 U.S.C. § 2000e et seq.*]. The employer not only rejected plaintiff's efforts, but also retaliated against him with respect to his salary, working conditions, and performance evaluations. Ultimately, he was terminated because of his antidiscrimination efforts and defendants' resistance to them (whether plaintiff resigned or was constructively discharged was found by the appellate court to be a triable issue). The complaint alleged causes of action that included wrongful termination and breach of employment contract. Defendants moved for summary adjudication that the wrongful discharge causes of action were groundless, contending, inter alia, that California common law provided no cause of action for wrongful discharge in retaliation for seeking to correct an employers' sex or national origin discrimination. With respect to that issue, the trial court ruled that although plaintiff stated public policies sufficient to state a *Tameny* cause of action, it was preempted by FEHA [*Tameny v. Atlantic Richfield Co. (1980) 27 Cal. 3d 167, 173-178* , 164 Cal. Rpr. 839, *610 P.2d 1330* , discussed in *§ 100.46[3][a]*]. Defendants successfully moved for summary judgment on all causes of action. Plaintiff appealed.

The court of appeal reversed, holding that FEHA does not preempt a common-law cause of action for wrongful termination based on violation of public policy, and that plaintiff stated a cause of action for discharge in retaliation for seeking to rectify defendants' violations (*3 Cal. App. 4th 382, 386-390)* . With respect to the existence of a cause of action based on defendants' conduct, the court noted that the cause of action for tortious wrongful discharge derives from *Tameny*, and that the strength and sufficiency of the public policies cited by plaintiff in the instant case were irrefutable (*3 Cal. App. 4th 382, 387)* . The court rejected defendants' claim that no common-law right of action exists for discharge in retaliation for seeking to correct or remedy an employer's sex or national origin discrimination (*3 Cal. App. 4th 382, 386-388)* . The court noted that the Supreme Court decided *Rojo v. Kliger (1990) 52 Cal. 3d 65, 276 Cal. Rptr. 130, 801 P.2d 373* (discussed in *§ 100.43[3][a]*) after the trial court's decision in the instant case. The court held that *Rojo* supports the existence of a California public policy against discrimination based on sex as well as

national origin. Moreover, the court stated, "retaliation" has long provided a basis for wrongful discharge cases, including *Tameny* itself. In the present case, the alleged basis of plaintiff's discharge was "retaliation" for his efforts to require defendants to conform to employment discrimination laws and policies (*3 Cal. App. 4th 382, 388-389)* . The court stated that this retaliation frustrates and contravenes the underlying public policy so as to give rise to a *Tameny* cause of action. The court concluded that *Tameny* and its progeny confirm that discharge of an employee in retaliation for resisting employer violations of laws that secure important public policies contravenes those policies, and gives rise to a common-law action in tort. Accordingly, the court reversed (*3 Cal. App. 4th 382, 387-390)* .

[b] Termination in Retaliation for Voicing Concerns About Legality or Morality of Conduct of Enterprise

In ***Hejmadi v. AMFAC, Inc.*** *(1988) 202 Cal. App. 3d 525, 249 Cal. Rptr. 5* , after shopping in a department store owned by the corporation in which he was employed as vice-president and treasurer, plaintiff and his girlfriend were forcibly detained, and the girlfriend was accused of theft and subjected to a strip search by store personnel. As a corporate officer and senior executive, plaintiff voiced his concerns and later tried to change the corporate policy regarding store security, which he claimed was illegal and violative of personal rights. Plaintiff was discharged five months after the incident and subsequently brought suit on several causes of action against defendant, including a wrongful discharge action based on public policy violation. The trial court dismissed the action after sustaining without leave to amend defendant's demurrer to that action. Plaintiff appealed.

The court of appeal reversed on that action, finding that plaintiff had stated a cause of action. The court explained that when the discharge of an employee violates fundamental principles of public policy, it is seen as wrongful because it arises out of a duty implied in law on the part of the employer to conduct its affairs in compliance with public policy (*202 Cal. App. 3d 525, 538)* . Plaintiff argued that public policy favors protection of employees against dismissal for voicing concerns, within an enterprise, concerning the legality or morality of the enterprise's conduct, and that a cause of action for wrongful discharge will be stated when it is alleged the employee was terminated in retaliation for complaining to management that the employer's acts violated public policy. The court agreed, finding that even in the absence of "whistleblowing," an activity specifically protected by *Lab. Code § 1102.5*, plaintiff may still state a cause of action for wrongful discharge in violation of public policy (*202 Cal. App. 3d 525, 539)* . The court said that *Penal Code § 490.5*, as it was written at the time of the incident, did not authorize defendant to subject plaintiff's girlfriend to a strip search, and therefore plaintiff's concerns were well grounded. The court concluded that a tort cause of action for wrongful discharge in violation of public policy will be stated when the former employee-plaintiff pleads (1) the employer's policy to contravene a statutory proscription affecting matters relating to the employer's business; (2) the employee's protest to company management regarding the unlawful policy; and (3) retaliatory termination of employment resulting from the protest (*202 Cal. App. 3d 525, 540)* .

[c] Termination for Reporting Coworkers' Illegal Activity

The plaintiff in ***Collier v. Superior Court*** *(1991) 228 Cal. App. 3d 1117, 279 Cal. Rptr. 453* , was a regional manager at his employer's distribution center, which shipped phonograph records and other recorded products ("cleans"), at no cost to the recipients, for promotional purposes. "Cleans" could, however, have monetary value to a recipient who chose to ignore their promotional purpose and sell them at retail or to return them for credit. In 1984, the plaintiff became suspicious of criminal conduct by certain "cleans" recipients and required shipping personnel to give him copies of all documents for "cleans" ordered by certain company vice presidents. He also reported his suspicions to higher management. Subsequently, the plaintiff was fired, purportedly for failing to perform his job adequately. He then sued, claiming that he was actually fired in retaliation for checking on, trying to prevent, and reporting possible illegal conduct. He asserted three causes of action: (1) wrongful termination in violation of public policy; (2) breach of the covenant of good faith and fair dealing; and (3) breach of implied contract. The employer demurred to the first cause of action, arguing that under *Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 254 Cal. Rptr. 211, 765 P.2d 373* , an employee cannot state a cause of action for wrongful termination based on reporting a fellow employee's illegal conduct to the employer [*see* discussion in *§ 100.20[3][a]*]. The trial court sustained the demurrer without leave to

amend. The plaintiff sought a writ of mandate to overturn the ruling, and the court of appeal issued it.

The court of appeal held that an employee who is terminated for reporting to his employer suspected illegal conduct by other employees has a cause of action for tortious wrongful discharge (*228 Cal. App. 3d 1117, 1119-1120)* . The court distinguished *Foley* from the case before it as not having the same public policy implications. In particular, the plaintiff reported suspected conduct that may have violated antitrust laws and laws against bribery and kickbacks, embezzlement, tax evasion, and possibly even drug trafficking and money laundering (*228 Cal. App. 3d 1117, 1122)* . In addition, under *Foley*'s hypothetical test [*see Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 670 n.12, 254 Cal. Rptr. 211, 765 P.2d 373]* , an agreement prohibiting an employee from reporting to an employer suspicions of ongoing criminal conduct by coworkers would be a disservice to both the employer's and the public's interests (*228 Cal. App. 3d 1117, 1124-1125)* . The plaintiff's report served not only the interests of his employer, but also the public interest in deterring crime and the interests of persons who stood to suffer specific harm, namely artists and tax authorities (*228 Cal. App. 3d 1117, 1123)* . The court also felt that it was important that the alleged misconduct involved, as it did in *Tameny v. Atlantic Richfield Co. (1980) 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330* , violations of the antitrust laws, which provide for both criminal prosecution and civil liability [*see, e.g., 15 U.S.C. §§ 1, 4, 13a*], and offer a broad scope of citizen enforcement [*see Blue Shield of Virginia v. McCready (1982) 457 U.S. 465, 472, 102 S. Ct. 2540, 73 L. Ed. 2d 149]* (*228 Cal. App. 3d 1117, 1124)* .

The court also relied on *Lab. Code § 1102.5(b)*, which prohibits employers from retaliating against employees who report a reasonably suspected violation of the law to a government or law enforcement agency. Although *Lab. Code § 1102.5* did not directly protect the plaintiff, it evinces a strong public interest in encouraging employee reports of illegal activity in the workplace (*228 Cal. App. 3d 1117, 1123-1124)* .

Finally, the court distinguished *American Computer Corp. v. Superior Court (1989) 213 Cal. App. 3d 664, 261 Cal. Rptr. 796* [discussed in *§ 100.53[3][a]*], which held that an employee fired for telling his employer that he believed certain individuals were receiving consulting fees without rendering any services did not allege a public-policy cause of action. The only victim of wrongdoing in *American Computer*, explained the court of appeal, was the employer itself (*228 Cal. App. 3d 1117, 1125-1126)* . Furthermore, *American Computer* focused on the absence of any attempt to coerce criminal conduct and the absence of a direct violation of a statute protecting the employee's rights, a position expressly rejected by *Rojo v. Kliger (1990) 52 Cal. 3d 65, 91, 276 Cal. Rptr. 130, 801 P.2d 373* . *Rojo* held that discharge because of resistance and objection to sexual harassment contravened a fundamental and substantial public policy, and recognized a "fundamental public interest in a workplace free from ... sexism" [*Rojo v. Kliger (1990) 52 Cal. 3d 65, 90, 276 Cal. Rptr. 130, 801 P.2d 373* ; *see* discussion in *§ 100.43[3][a]*]. The court of appeal felt that there is an equally compelling fundamental public interest in a workplace free from crime (*228 Cal. App. 3d 1117, 1127)* .

[d] Termination in Retaliation for Voicing Concerns About Legality or Morality of Conduct of Enterprise

In ***Gould v. Maryland Sound Industries, Inc.*** *(1995) 31 Cal. App. 4th 1137, 37 Cal. Rptr. 2d 718* , plaintiff alleged, among other things, that his employer had terminated him in retaliation for reporting to management that certain employees were working overtime but not being paid overtime wages, and that the discharge was in contravention of fundamental public policy involving the payment of overtime wages. The trial court sustained the defendant-employer's demurrer to this cause of action, but the court of appeal reversed.

The appellate court found that the duty to pay overtime wages is indeed a fundamental public policy. The court then rejected the employer's contention that the discharge did not contravene the public policy because the plaintiff himself was not entitled to overtime wages. The court explainedthat plaintiff need not be a direct beneficiary of the fundamental public policy violated by his or her discharge. Finally, the court rejected the contention that the discharge did not contravene a fundamental public policy because plaintiff's report of overtime violations to management served only the employer's private interests. The court stated that plaintiff informed management about ongoing conduct which was illegal and inimical to the public health and general welfare, and that prior cases have recognized the tort of wrongful

discharge for terminating an employee for reporting to the employer about existing unhealthful or unlawful conduct (*31 Cal. App. 4th 1137, 1150)* .

[e] Termination for Reporting Employer's Hiring of Undocumented Aliens

In ***Jie v. Liang Tai Knitwear Co., Ltd.*** *(2001) 89 Cal. App. 4th 654, 107 Cal. Rptr. 2d 682* , the plaintiffs sued their former employer for wrongful termination in violation of public policy. The plaintiffs alleged that they had been discharged in retaliation for complaining to the employer, and then reporting to the Immigration and Naturalization Service, that the employer had been employing undocumented workers. The court of appeal affirmed a judgment in favor of the plaintiffs. The court held that the Immigration Reform and Control Act of 1986 (*8 U.S.C. § 1324a*), which provides criminal and civil sanctions for knowingly hiring illegal aliens, embodies a fundamental, substantial, and well-established public policy of protecting documented workers from employment discrimination and from competition by undocumented workers. When the employer hired undocumented workers, it violated that policy, and when the employer terminated the plaintiffs in retaliation for reporting the violation, that was also a violation of the policy (*89 Cal. App. 4th 654, 661-662)* .

California Points & Authorities

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CHAPTER 100 EMPLOYER AND EMPLOYEE: WRONGFUL TERMINATION AND DISCIPLINE
PART II. FORMS

10-100 California Points & Authorities § 100.48

AUTHOR: Carolyn Rashby

§ 100.48 Supporting Contention That Tort Action Exists Due to Violation of Public Policy--Discharge in Retaliation for Employee's "Whistleblowing"

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF HAS ALLEGED SUFFICIENT FACTS TO SHOW THAT DEFENDANT TERMINATED PLAINTIFF'S EMPLOYMENT IN VIOLATION OF PUBLIC POLICY, IN THAT THE TERMINATION WAS IN RETALIATION FOR PLAINTIFF'S ATTEMPT TO DISCLOSE DEFENDANT'S WRONGFUL CONDUCT.

A. Employer's Right to Terminate Employment Cannot Be Exercised in Violation of Public Policy. [*See § 100.41[1], Paragraph A*].

B. Test for Public Policy Creating Protection Against Termination. [*See § 100.41[1], Paragraph B*].

C. Discharge for Disclosure of Improper Governmental Activities. Discharge in violation of the public policy that government employees should be able to disclose wrongful conduct without suffering work-related reprisal is the common law tort of wrongful termination in violation of public policy (*Bayley v. Regents of Univ. of Cal. (1997) 57 Cal. App. 4th 1314, 1330-1331* & n.15, *67 Cal. Rptr. 2d 707*). The policy protects an employee who makes a disclosure to the employing agency; it is not necessary that the employee have disclosed the wrongful conduct to an outside agency (*Lab. Code § 1102.5(e)*; *Gardenhire v. Housing Auth. (2000) 85 Cal. App. 4th 236, 241-243, 101 Cal. Rptr. 2d 893*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that plaintiff was wrongfully terminated for disclosing

improper activities by the employer or one of its agents. The language in Paragraph C relating to improper governmental activities and disclosures by governmental employees should be added if applicable.

Caution:

Before using the form on behalf of a nongovernmental employee or when the disclosure was not to a governmental agent, counsel should read the Discussion of *Authorities in § 100.48[3]*.

The form should be combined with any of the other forms in this chapter that are applicable to the particular case.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Counsel should, for example, cite evidence or allegations showing that the plaintiff sought to rectify particular wrongful conduct by contacting the appropriate higher-level person or outside authority.

[c] Related Pleading and Practice Chapters

For related legal background, research guides, and forms for alleging wrongful discharge in violation of public policy, see California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline* (Matthew Bender).

[d] Related Memoranda

Any of the other points and authorities for supporting a wrongful discharge claim that are set out in this chapter may be combined with this form. If the case involves a nongovernmental employee, counsel should consider whether some of the optional paragraphs of § 100.47 are more appropriate. See the concluding paragraph of the discussion of the *Bayley* case in § 100.48[3][a].

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The points and authorities *set out in § 100.52* et seq. may be used in an appropriate case to oppose the points and authorities set out in this form.

[f] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 60, § 60.04* (Matthew Bender).

[3] Discussion of Authorities

[a] Discharge for Disclosure of Improper Governmental Activities

In ***Bayley v. Regents of Univ. of Cal.*** *(1997) 57 Cal. App. 4th 1314, 67 Cal. Rptr. 2d 707* , plaintiff alleged that he was assigned by his superior at the Associated Students of UCLA, apparently a University of California entity, to examine the feasibility of a major construction project. When he reported that ASUCLA was in financial difficulty and that the project would make matters worse, he was reassigned to a project for which he was not qualified. After further issues with his supervisor, whom he believed was misleading the ASUCLA board regarding a fiscal crisis that could bankrupt the Association, he spoke to two Board members about the problem. His supervisor terminated him. Plaintiff sued for

wrongful termination in violation of public policy and negligence, along with other causes of action. The trial court sustained demurrers to all causes of action without leave to amend (*57 Cal. App. 4th 1314, 1320-1323)* .

The court of appeal first considered a contention that plaintiff's action was defective for failure to allege exhaustion of internal remedies of the employer. Because plaintiff had alleged and offered amended allegations showing that the supervisor had misled him as to what his grievance rights were, the court concluded that the employer's alleged conduct either estopped it from requiring that the internal procedures be followed or amounted to a waiver of its rights to have those procedures be used (*57 Cal. App. 4th 1314, 1325-1326)* .

The court then noted that there was a three-part test for determining whether there is a tort action for wrongful discharge in violation of public policy in a particular area: whether the policy is delineated in a statutory or constitutional provision; whether it involves a matter affecting society at large rather than the purely personal interests of the plaintiff or the employer; and whether the policy is fundamental, substantial, and well-established at the time of termination (*57 Cal. App. 4th 1314, 1326-1327)* . (For a more authoritative statement of the test, *see* the discussion of *Stevenson v. Superior Court (1997) 16 Cal. 4th 880, 66 Cal. Rptr. 2d 888, 941 P.2d 1157* in § 100.42[3][c].)

In this case the court concluded that all three tests were met. The primary statutory delineation of the policy was The Reporting of Improper Governmental Activities Act (now called California Whistleblower Protection Act) (*Gov. Code § 8547 et seq.*), which protects those who report improper governmental activities to the State Auditor, but the court also cited *Lab. Code § 1102.5(b)* (protecting non-governmental employees who report employer misconduct to public authorities) and *Gov. Code § 53296 et seq.* (protecting local agency employees) (*57 Cal. App. 4th 1314, 1327-1331* & n.15). It considered the plaintiff's having made the report to persons other than the Auditor immaterial: the point was not whether the statute applied to plaintiff, but whether it delineates a public policy, the protection of which he could claim (*57 Cal. App. 4th 1314, 1330)* .

The court rejected a defense contention that plaintiff's failure to pursue a statutory internal remedy barred the suit, concluding that pursuing the remedy is a prerequisite for a statutorily-based legal action but not for a common law one (*57 Cal. App. 4th 1314, 1328)* .

The court also found that plaintiff could successfully plead a negligence claim, since it alleged breach of defendant's duties to apprise plaintiff of his rights as an employee and to follow its own grievance procedures (*57 Cal. App. 4th 1314, 1331-1332)* .

The case is only direct authority in support of a claim by a former governmental employee for making a disclosure to a governmental authority. A non-public-sector employee could note the court's citation of *Lab. Code § 1102.5(b)* as additional support for its conclusion that there is a "public policy that employees should be able to disclose wrongful conduct without suffering work-related reprisal" (*57 Cal. App. 4th 1314, 1330-1331 n.15*).

Similarly, if the disclosure is not to a governmental authority, a plaintiff might argue that *Bayley* on its facts was about a disclosure to those with authority over the offending supervisor, not to a governmental agent charged with investigating wrongdoing. However, a defendant would have a strong basis for distinguishing the case, and plaintiff's counsel would do well to consider whether some of the optional paragraphs of § 100.47 would be more appropriate.

In ***Gardenhire v. Housing Auth.*** *(2000) 85 Cal. App. 4th 236, 101 Cal. Rptr. 2d 893* , the plaintiff was an employee of the Housing Authority of the City of Los Angeles. In her first six years of employment, the plaintiff had good and outstanding performance reviews; she received promotions and pay increases and was named employee of the year in 1996. Later that year, the plaintiff reported to her supervisor that an individual who had several consulting contracts with the Housing Authority had asked the plaintiff to allow certain illegal acts regarding his contracted work. Soon thereafter, a substantial portion of the plaintiff's responsibilities were transferred to another employee, and the plaintiff eventually received a very unfavorable performance evaluation.

The plaintiff filed suit against the Housing Authority and her supervisor, alleging causes of action for discrimination, retaliation, and harassment under the Fair Employment and Housing Act (*Gov. Code § 12940 et seq.*). At the end of trial, the trial court granted the plaintiff's motion to amend the complaint to add a cause of action against the Housing Authority under *Labor Code Section 1102.5*, the "whistle-blower" statute. That statute prohibits employment discrimination against an employee who discloses to a government agency or law-enforcement agency information about violations of federal or state law (*Lab. Code § 1102.5(b)*). This provision is applicable to employees of public agencies such as the defendant Housing Authority (*Lab. Code § 1106*). After the trial court dismissed all but the "whistle-blower" cause of action and a cause of action for the intentional infliction of emotional distress, the jury returned a verdict in favor of the plaintiff.

The Housing Authority appealed, contending that the plaintiff had not established a cause of action under the whistle-blower statute because she had reported her suspected violation of the law to her employer, rather than to a separate government agency or a law-enforcement agency. The court of appeal rejected this contention. Relying on the clear language of the statute, the court held that in this case the plaintiff's report to her employer was sufficient to bring her within the coverage of the statute. The statute clearly covers employees who report their concerns to public agencies, and the plaintiff reported directly to a public agency, which happened also to be her employer (*85 Cal. App. 4th 236, 241-243)* . The "whistle-blower" statute was later amended to provide expressly that it applies to a report made by an employee of a government agency to his or her employer [*Lab. Code § 1102.5(e)*].

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PART II. FORMS

10-100 California Points & Authorities § 100.49

AUTHOR: Carolyn Rashby

§ 100.49 Supporting Contention That Tort Action Exists Due to Violation of Public Policy--Discharge in Retaliation for In-House Counsel's Compliance With Mandatory Ethical Requirements--Cause of Action Can Be Maintained Without Violating Attorney-Client Confidences

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF HAS ALLEGED SUFFICIENT FACTS TO ESTABLISH THAT DEFENDANT TERMINATED PLAINTIFF'S EMPLOYMENT IN VIOLATION OF PUBLIC POLICY, IN THAT THE TERMINATION OF PLAINTIFF'S EMPLOYMENT AS IN-HOUSE COUNSEL WAS IN RETALIATION FOR PLAINTIFF'S COMPLIANCE WITH MANDATORY ETHICAL OBLIGATIONS. [THE CAUSE OF ACTION FOR WRONGFUL DISCHARGE IS NOT PRECLUDED BECAUSE THE PROOFS NECESSARY TO ESTABLISH THE CAUSE OF ACTION WILL NOT VIOLATE PRINCIPLES OF PROFESSIONAL CONFIDENTIALITY].

A. Employer's Right to Terminate Employment Cannot Be Exercised in Violation of Public Policy. [*See § 100.41]1], Paragraph A.*]

[*Optional*] **B. Test for Public Policy Creating Protection Against Termination.** [*See § 100.41]1], Paragraph B.*]

C. Discharge of In-House Counsel for Following Mandatory Ethical Obligation. An in-house attorney who is discharged from employment for following a mandatory ethical obligation prescribed by professional rule or statute can maintain a wrongful discharge action against the employer (*General Dynamics Corp. v. Superior Court (1994) 7 Cal. 4th 1164, 1188-1189, 32 Cal. Rptr. 2d 1, 876 P.2d 487*).

[*Optional*] **D. Discharged In-House Counsel May Bring Wrongful Discharge Action if Attorney-Client Confidences Will Not Be Publicly Revealed.** A claim for wrongful discharge in violation of public policy that could be maintained by a non-attorney employee may be maintained by a discharged in-house counsel, if the elements of the

action can be established without the public disclosure of confidential information protected by the attorney-client privilege (*General Dynamics Corp. v. Superior Court (1994) 7 Cal. 4th 1164, 1190, 32 Cal. Rptr. 2d 1, 876 P.2d 487* ; *Fox Searchlight Pictures, Inc. v. Paladino (2001) 89 Cal. App. 4th 294, 308-315, 106 Cal. Rptr. 2d 906*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a contention that sufficient facts are alleged to show that in terminating plaintiff's employment, the employer acted in retaliation for plaintiff's following a mandatory ethical obligation. If it is arguable that the authority cited in Paragraph C is distinguishable, use Optional Paragraph B as a basis for arguing in more detail how the plaintiff's conduct is entitled to public-policy protection. Optional Paragraph D may be used if defendant contends that the wrongful discharge cause of action cannot be maintained without violating attorney-client confidences, on the ground that the essential elements of the cause of action would not require disclosure of material protected by the attorney-client privilege.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that plaintiff's discharge can be the basis of a tort action for wrongful discharge in violation of public policy because the discharge was in retaliation for plaintiff following a mandatory ethical obligation. Also, these points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that plaintiff can establish the elements of his or her cause of action for wrongful discharge without violating the attorney-client privilege (in *General Dynamics Corp. v. Superior Court (1994) 7 Cal. 4th 1164, 1190, 32 Cal. Rptr. 2d 1, 876 P.2d 487* , the Court pointed out that these issues will ordinarily not be resolvable at the demurrer stage, but would instead be litigated and determined in the context of motions for protective orders or to compel further discovery responses, as well as at the time of motions for summary judgment). These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should cite the professional rule or statute in which the ethical requirement at issue is delineated, establish the unequivocal requirements of the ethical norm, and argue that the ethical norm is intended for the protection of the public at large. Counsel further should discuss facts indicating that but for plaintiff's exercise of the ethical requirement, plaintiff would not have been discharged. If appropriate, facts should be set forth showing that proof of the wrongful discharge cause of action can be established without the need to disclose matters protected by the attorney-client privilege. For example, counsel could argue that the trial court could impose certain measures to maintain confidentiality, such as protective orders, in camera proceedings, limited admissibility, and other restrictions on evidence. In making this showing, counsel should ensure that the confidentiality of matters covered by the privilege is maintained.

[c] Related Memoranda

Section 100.41 is general points and authorities for a situation where the plaintiff was not defendant's in-house counsel, and where none of the other specific situations covered by § 100.42 et seq. applies. See *§ 100.42* (where the discharge was in violation of a statute protecting plaintiff against discharge), § 100.43 (where the discharge discriminated against plaintiff as a member of a class protected against discrimination *by a constitutional provision*), § 100.44 (where the discharge punished plaintiff for exercising or refusing to waive a constitutional right), § 100.45 (where the discharge was based on the employee's protest of unsafe working conditions), § 100.46 (where the discharge was based on the employee's refusal to commit an unlawful act, § 100.47 (where the discharge was in retaliation for the employee's attempt to rectify the employer's public policy violation), and § 100.50 (where the plaintiff was defendant's in-house counsel).

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Memoranda

In an appropriate case, these points and authorities may be adapted and submitted in opposition to the points and authorities *set out in §§ 100.55, 100.56*.

[e] Related Pleading and Practice Forms

For a general form of demurrer to a complaint based on the failure to state facts sufficient to constitute a cause of action, see *California Forms of Pleading and Practice, Ch. 206, Demurrers and Motions for Judgment on the Pleadings, § 206.122* (Matthew Bender). For a form of notice for summary judgment and related discussion, see Ch. 537, *Summary Judgment* , in that publication. For discussion and forms relating to wrongful discharge, see Ch. 249, *Employment Law: Termination and Discipline* , in that publication.

[f] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 60, § 60.04* (Matthew Bender).

[3] Discussion of Authorities

[a] Discharge of In-House Counsel for Following Mandatory Ethical Obligation

In ***General Dynamics Corp. v. Superior Court*** *(1994) 7 Cal. 4th 1164, 32 Cal. Rptr. 2d 1, 876 P.2d 487* , Andrew Rose (Rose) was an attorney employed by General Dynamics, Inc. General Dynamics terminated Rose's employment, and Rose sued, alleging that his termination violated an implied agreement that he would be terminated only for good cause and violated public policy on the ground that the real reason for the discharge was to cover up illegal conduct at General Dynamics. General Dynamics demurred to the complaint, arguing that Rose's employment as an attorney could be terminated at any time, for any reason or for no reason. The trial court overruled the demurrer, and the court of appeal denied General Dynamics' petition for a writ of mandate, holding that the complaint was sufficient to survive a general demurrer. The California Supreme Court granted review, and affirmed the judgment of the court of appeal.

The Court noted the increasing number and professional stature of so-called in-house or corporate counsel, and the difficulties inherent in attempting to apply standards applicable to outside law firms to attorneys whose economic fate is tied to a single employer. The Court described their status as often similar to other corporate executives, with the addition (by virtue of the attorney's professional license) of ethical imperatives that exceed those of non-attorneys. The issue was therefore phrased by the Court as a consideration of the effects of in-house counsel's professional role and ethical duties on access to judicial remedies for alleged wrongful termination that are available to the nonattorney colleague (*7 Cal. 4th 1164, 1173)* .

The Court held that the fiduciary values of mutual trust and confidence can be protected from the threat of damages by limiting judicial access to those claims grounded in explicit and unequivocal ethical norms embodied in the Rules of Professional Conduct and statutes, and claims that are maintainable by the non-attorney employee under *Gantt v. Sentry Insurance (1992) 1 Cal. 4th 1083, 1094-1097, 4 Cal. Rptr. 2d 874, 824 P.2d 680* , under circumstances in which the Legislature has manifested a judgment that the principle of professional confidentiality does not apply (*7 Cal. 4th 1164, 1188)* .

If the elements of a wrongful-discharge-in-violation-of-public-policy claim cannot, for reasons peculiar to the particular

case, be fully established without breaching the attorney-client privilege, the suit must be dismissed in the interest of preserving the privilege (*7 Cal. 4th 1164, 1190)* . Whether the attorney-client privilege precludes a plaintiff's recovery will ordinarily not be resolvable at the demurrer stage. Rather, in the usual case, whether the privilege serves as a bar to the plaintiff's recovery will be litigated and determined in the context of motions for protective orders or to compel further discovery responses, as well as at the time of summary judgment (*7 Cal. 4th 1164, 1190)* . In making this determination, the trial court can and should apply an array of ad hoc measures within its equitable powers in order to permit the attorney plaintiff to attempt to make the necessary proof while protecting from disclosure client confidences subject to the privilege (*7 Cal. 4th 1164, 1191)* . The Court rejected any suggestion that the scope of the attorney-client privilege should be diluted in the context of in-house counsel and their corporate clients (*7 Cal. 4th 1164, 1190)* .

The Court also set forth subsidiary rules that will deter the incidence of strike suits or claims filed in bad faith. The contested ethical requirement must be clearly established by the ethics code or statutory provision; disagreements over policy are not actionable. Further, the plaintiff bears the burden of establishing the unequivocal requirements of the ethical norm at issue, and of establishing that the employer's conduct was motivated by impermissible considerations under a "but for" standard of causation. The ethical norm at issue must be one that is intended for the protection of the public at large; measures designed solely for the benefit of the attorney or the client will not suffice to support a wrongful discharge claim (*7 Cal. 4th 1164, 1191)* .

[b] Discharged In-House Counsel May Bring Wrongful Discharge Action if Attorney-Client Confidences Will Not Be Publicly Revealed

The facts and procedural background of ***General Dynamics Corp. v. Superior Court*** *(1994) 7 Cal. 4th 1164, 32 Cal. Rptr. 2d 1, 876 P.2d 487* , are *discussed under § 100.49[3][a]*. The Court held that judicial access for claims of wrongful discharge in violation of public policy extends to those limited circumstances in which in-house counsel's nonattorney colleagues would be permitted to pursue a cause of action, and governing professional rules or statutes expressly remove the requirement of attorney confidentiality (*7 Cal. 4th 1164, 1188)* .

In ***Fox Searchlight Pictures, Inc. v. Paladino*** *(2001) 89 Cal. App. 4th 294, 106 Cal. Rptr. 2d 906* , a former in-house counsel sued her former employer for wrongful discharge. The employer filed its own suit against the employee, alleging that the disclosure of the employer's confidential information to the employee's attorneys constituted a violation of the employee's ethical duties (*see Bus. & Prof. Code § 6068(e)*). The employer alsomoved to disqualify the employee's attorneys on the ground that they had been exposed to confidential information concerning the defendant. The trial court denied the employer's motion to disqualify the employee's attorneys; the trial court also denied the employee's motion to dismiss the employer's suit.

The court of appeal affirmed the denial of the employer's motion to disqualify the employee's attorneys and reversed the denial of the employee's motion to dismiss the employer's suit. The court of appeal acknowledged that the Supreme Court had held in General Dynamics Corp. v. Superior Court that a former in-house counsel's wrongful termination suit must be dismissed if it cannot be fully established without breaching the attorney-client privilege (*see General Dynamics Corp. v. Superior Court (1994) 7 Cal. 4th 1164, 1190, 32 Cal. Rptr. 2d 1, 876 P.2d 487 , above*). However, the court of appeal noted that the Supreme Court's primary concern was over the *public* disclosure of confidential information. Thus, the court of appeal reasoned, disclosure of confidential information to a plaintiff's own attorneys for purposes of the wrongful-termination action would not violate the rule of *General Dynamics* because (1) the Supreme Court's opinion in *General Dynamics* contemplated such nonpublic disclosure to the plaintiff's own attorneys, (2) such a disclosure would not violate the plaintiff's duty of confidentiality to the employer (*see Bus. & Prof. Code § 6068(e)*) so long as the disclosure was limited to the information necessary to prepare and prosecute the wrongful-termination action, and (3) fundamental fairness requires that the plaintiff be allowed to make such a disclosure to the extent necessary to prepare the claim for wrongful termination (*89 Cal. App. 4th 294, 310-314)* . Once such a disclosure has been made to the plaintiff's attorneys, it is up to the attorneys to determine if, when, and how such information can be utilized in the wrongful-termination action in conformity with the guidelines laid down by the Supreme Court in

General Dynamics (*89 Cal. App. 4th 294, 315)* .

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 100 EMPLOYER AND EMPLOYEE: WRONGFUL TERMINATION AND DISCIPLINE
PART II. FORMS

10-100 California Points & Authorities § 100.50

AUTHOR: Carolyn Rashby

§ 100.50 Supporting Contention That Tort Action Exists Due to Violation of Public Policy--Discharge of Employee for Refusing to Sign Employment Agreement Containing Illegal Covenant Not to Compete

[1] FORM

[*The following may be included in a memorandum supporting or opposing a motion, or in a trial or appellate brief.*]

PLAINTIFF HAS ALLEGED SUFFICIENT FACTS TO SHOW THAT DEFENDANT TERMINATED PLAINTIFF'S EMPLOYMENT IN VIOLATION OF PUBLIC POLICY, IN THAT THE TERMINATION WAS BASED ON PLAINTIFF'S REFUSAL TO SIGN AN EMPLOYMENT AGREEMENT THAT CONTAINED AN ILLEGAL COVENANT NOT TO COMPETE.

A. Employer's Right to Terminate Employment Cannot Be Exercised in Violation of Public Policy. [*See § 100.41[1], Paragraph A.*]

B. Test for Public Policy Creating Protection Against Termination. [*See § 100.41[1], Paragraph B.*]

C. Discharge for Refusal to Sign Illegal Covenant Not to Compete. Discharge of an employee for refusing to sign a noncompetition covenant that violates *Business and Professions Code Section 16600* gives rise to a tort cause of action for wrongful discharge in violation of public policy (*D'Sa v. Playhut, Inc. (2000) 85 Cal. App. 4th 927, 929, 931-935, 102 Cal. Rptr. 2d 495*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that plaintiff was wrongfully terminated for refusing to sign an employment agreement that contained an illegal covenant not to compete. A covenant not to compete is ordinarily void to the extent that it restrains a person from engaging in a lawful profession, trade, or business of any kind (*Bus. & Prof.*

Code § 16600; *Edwards v. Arthur Andersen LLP (2008) 44 Cal. 4th 937, 945-950, 955, 81 Cal. Rptr. 3d 282, 288-292, 296, 189 P.3d 285* (noncompetition agreement is invalid under *Bus. & Prof. Code § 16600*, even if narrowly drawn, unless it falls within one of statutory exceptions provided by *Bus. & Prof. Code §§ 16601, 16602, 16602.5*, which authorize noncompetition agreements in connection with sale of goodwill of business or dissolution of partnership or limited liability company)).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Counsel should, for example, cite evidence or allegations showing that the defendant sought to condition employment, or continued employment, on the plaintiff's signing an employment agreement that contained an illegal covenant not to compete.

[c] Related Pleading and Practice Chapters

For related legal background, research guides, and forms for alleging wrongful discharge in violation of public policy, see California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline* (Matthew Bender).

[d] Related Memoranda

Any of the other memoranda for supporting a wrongful discharge claim that are set out in this chapter may be combined with thisform. For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The points and authorities *set out in § 100.52* et seq. may be used in an appropriate case to oppose the points and authorities set out in this form.

[f] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, § 60.04* (Matthew Bender).

[3] Discussion of Authorities

[a] Discharge for Refusal to Sign Illegal Covenant Not to Compete

In ***D'Sa v. Playhut, Inc.*** *(2000) 85 Cal. App. 4th 927, 102 Cal. Rptr. 2d 495* , the defendants had hired the plaintiff pursuant to an oral contract of employment for an indefinite term. Thereafter, the defendants presented the plaintiff with an employee confidentiality agreement, and when he refused to sign it, the defendants terminated the plaintiff's employment.

The confidentiality agreement contained provisions addressing employees' responsibilities concerning the nondisclosure of the defendants' trade secrets and the transfer to the defendants of inventions or patents arising from the employees' work. The agreement also contained a provision restricting an employee's competition with the defendants by, among other things, prohibiting the employee from rendering services to a competing entity for a year after the termination of employment with the defendants. The agreement also contained a severability provision, which stated that a judicial declaration that any part of the agreement was void or invalid would not invalidate the remainder of the agreement.

The plaintiff sued the defendants, claiming that his dismissal was in violation of public policy embodied in *Business*

and Professions Code Section 16600, which provides that (with exceptions not relevant in this case) "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." The trial court granted the defendants' motion for summary judgment, but the court of appeal reversed and remanded for further proceedings.

The court of appeal began its discussion by observing that the very broad noncompetition covenant contained in the confidentiality agreement was at least partially within the prohibition of Section 16600 and therefore to that extent void and unenforceable (*85 Cal. App. 4th 927, 931)* . The court then held that, because the noncompetition covenant was illegal, the plaintiff's discharge for refusing to sign it was a violation of public policy. The court characterized Section 16600 as a clear legislative declaration of the public policy against covenants not to compete (*85 Cal. App. 4th 927, 932-933)* .

The inclusion in the confidentiality agreement of a severability provision that would have preserved the enforceability of the remainder of the agreement contained did not change the result. The defendants argued that the severability provision would prevent the confidentiality agreement from being construed in a manner that would violate the public policy of Section 16600, and that therefore the agreement did not violate public policy. The court of appeal rejected this argument, noting that it was not likely that the defendants' employees would know that they could sign the confidentiality agreement without fear that they would be bound by the noncompetition covenant. Therefore, the court concluded, the illegality of the noncompetition covenant made the plaintiff's discharge a violation of public policy despite the presence of the severability provision (*85 Cal. App. 4th 927, 933-934)* .

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PART II. FORMS

10-100 California Points & Authorities § 100.51

AUTHOR: Carolyn Rashby

§ 100.51 Supporting Contention That Tort Action Exists Due to Violation of Public Policy--Discharge of Employee for Designating Attorney to Conduct Negotiations With Employer

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF HAS ALLEGED SUFFICIENT FACTS TO SHOW THAT DEFENDANT TERMINATED PLAINTIFF'S EMPLOYMENT IN VIOLATION OF PUBLIC POLICY, IN THAT THE TERMINATION WAS BASED ON PLAINTIFF'S DESIGNATING AN ATTORNEY TO CONDUCT NEGOTIATIONS WITH DEFENDANT.

A. Employer's Right to Terminate Employment Cannot Be Exercised in Violation of Public Policy. [*See § 100.41]1], Paragraph A.*]

B. Test for Public Policy Creating Protection Against Termination. [*See § 100.41]1], Paragraph B.*]

C. Discharge for Designating Attorney to Negotiate With Employer. Discharge of an employee for designating an attorney torepresent the employee in negotiations with the employer gives rise to a tort cause of action for wrongful discharge in violation of the public policy embodied in *Labor Code Section 923*, which protects workers' right to organize (*Gelini v. Tishgart (1999) 77 Cal. App. 4th 219, 223-228, 91 Cal. Rptr. 2d 447*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that plaintiff was wrongfully terminated for designating an attorney to negotiate with the employer.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Counsel should, for example, cite evidence or allegations showing that the employer discharged the employee in retaliation for the employee's hiring of an attorney to negotiate with the employer.

[c] Related Pleading and Practice Chapters

For related legal background, research guides, and forms for alleging wrongful discharge in violation of public policy, see California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline* (Matthew Bender).

[d] Related Memoranda

Any of the other points and authorities for supporting a wrongful discharge claim that are set out in this chapter may be combined with this form. For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

The points and authorities *set out in § 100.52* et seq. may be used in an appropriate case to oppose the points and authorities set out in this form.

[f] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, § 60.04* (Matthew Bender).

[3] Discussion of Authorities

[a] Discharge for Designating Attorney to Negotiate With Employer

In ***Gelini v. Tishgart*** *(1999) 77 Cal. App. 4th 219, 91 Cal. Rptr. 2d 447* , the plaintiff was an employee of the defendant attorney. When the plaintiff became pregnant, the defendant reduced the plaintiff's hours and pay by half. The plaintiff then retained counsel, who wrote a letter to the defendant advising him that he was discriminating against the plaintiff in violation of the Fair Employment and Housing Act [*Gov. Code § 12900 et seq.*]. Counsel's letter suggested the problem be resolved by having the plaintiff continue working full-time for four and a half months, at which time the plaintiff would take parental leave and eventually return to work for the defendant only if they both agreed. The defendant fired the plaintiff within a week.

The plaintiff sued alleging, among other things, wrongful termination in violation of *Labor Code Section 923*, which states in part that it is the public policy of the state "that it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." At trial, the jury found that the defendant had fired the plaintiff in retaliation for the letter. The court of appeal affirmed the judgment for the plaintiff.

On appeal, the defendant did not challenge the jury's factual finding, instead contending that Section 923 applies only to collective bargaining or nonunion self-organizing among employees and does not protect individual employees like the plaintiff. The court of appeal rejected this contention, holding that it was settled law that Section 923 declares a public policy of protecting individual employees who retain counsel to represent them in negotiating terms and conditions of

employment (*77 Cal. App. 4th 219, 222-226)* .

The court of appeal stated that if the issue presented were one of first impression, it would have decided that Section 923 protects only the rights of employees to bargain collectively or pursue other mutual remedies, and not the right of an individual employee to choose an attorney to represent him or her in negotiations over a personal dispute with an employer. However, the court felt bound by precedent to hold that the employer in this case had violated the public policy declared in Section 923 (*see Montalvo v. Zamora (1970) 7 Cal. App. 3d 69, 75, 86 Cal. Rptr. 401* ; *accord, Hentzel v. Singer Co. (1982) 138 Cal. App. 3d 290, 296, 188 Cal. Rptr. 159* ;*see also Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 666 n.5, 254 Cal. Rptr. 211, 765 P.2d 373* (citing *Montalvo* with approval); *Tameny v. Atlantic Richfield Co. (1980) 27 Cal. 3d 167, 176, 164 Cal. Rptr. 839, 610 P.2d 1330* (citing *Montalvo* with approval)) (*77 Cal. App. 4th 219, 222-226)* .

The court of appeal went on to hold that the public policy set forth in Section 923 met the requirements for a cause of action for wrongful termination in violation of public policy. That is, (1) the policy is delineated in a statute; (2) the policy is "public" in the sense that it inures to the benefit of the public rather than serving merely individual interests, as shown by the Section 923's express statement that it expresses public policy; (3) the policy was well established at the time of the discharge; and (4) the policy is substantial and fundamental, as demonstrated by the vast array of statutes concerning employment, including Section 923 (*77 Cal. App. 4th 219, 226-228)* .

The court also stated that, although it is not obvious from Section 923's terms that it applies to individual employees, the statute does use the term "the individual workman," but it also recognizes that the individual unorganized worker is helpless to protect his or her rights, and thus is given the right to band together with others for mutual aid and protection. The court stated that it seemed anomalous for the Legislature to emphasize individual freedom on the one hand, while on the other hand limiting the protection of individual employees while extending protection to several employees together. Thus, although the court found the fairest reading to be that the statute is meant to protect individual employees only to the extent that they band together to negotiate with their employer, it found that the previous precedential construction of Section 923 by the courts does find support in the statute and provides notice to employers that the statute protects individual employees. Because the precedential interpretation is the settled law to this point, the court said that only the Supreme Court could alter that construction (*77 Cal. App. 4th 219, 228)* .

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10-100 California Points & Authorities § 100.51A

AUTHOR: Carolyn Rashby

§ 100.51A Supporting Contention That Tort Action Exists Due to Violation of Public Policy--Employer May Not Retaliate Against Employee Who Makes Good-Faith but Mistaken Complaint or Claim

[1] FORM

[*The following may be included in a memorandum or in a trial or appellate brief.*]

PLAINTIFF HAS ALLEGED SUFFICIENT FACTS TO ESTABLISH THAT DEFENDANT TERMINATED PLAINTIFF'S EMPLOYMENT IN VIOLATION OF PUBLIC POLICY, IN THAT THE TERMINATION WAS BASED ON THE PLAINTIFF'S REASONABLE, GOOD-FAITH BELIEF THAT _____[*e.g.*, DEFENDANT HAD UNLAWFULLY FAILED TO PAY PLAINTIFF OVERTIME COMPENSATION].

Discharge of Employee for Making Good-Faith but Mistaken Complaint or Claim of Right Violates Public Policy. An employee's good-faith but mistaken belief that the employer is acting unlawfully is protected from employer retaliation (*Green v. Ralee Engineering Co. (1998) 19 Cal. 4th 66, 87, 78 Cal. Rptr. 2d 16, 960 P.2d 1046* ; *Barbosa v. Impco Techs., Inc. (2009) 179 Cal. App. 4th 1116, 1121-1123, 101 Cal. Rptr. 3d 923*).

[2] Comments

[a] Use of Form

This form may be used to support a contention that public policy is violated by the termination of an employee for making a good-faith complaint or claim against the employer, even though the complaint or claim turns out to be wrong. This form may be combined with other forms that may establish the fundamental public policy underlying the employee's complaint or claim (*see, e.g., §§ 100.41 -100.51*).

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law

stated. For example, counsel should show that, although the employer was not actually violating the law, the employee's belief that there was a violation was reasonably based on the information available to the employee at the relevant time.

[3] Discussion of Authorities

[a] Discharge of Employee for Making Good-Faith but Mistaken Complaint or Claim of Right Violates Public Policy

In ***Green v. Ralee Engineering Co.*** *(1998) 19 Cal. 4th 66, 78 Cal. Rptr. 2d 16, 960 P.2d 1046* , discussed in *§ 100.41[3]*, the California Supreme Court held that a plaintiff's failure to prove an actual violation of law by his employer did not defeat the wrongful termination cause of action. The Court explained that "an employee need not prove an actual violation of law; it suffices if the employer fired him for reporting his 'reasonably based suspicions' of illegal activity" (*19 Cal. 4th 66, 87)* .

In ***Barbosa v. Impco Techs., Inc.*** *(2009) 179 Cal. App. 4th 1116, 101 Cal. Rptr. 3d 923* , the court of appeal held that public policy protected the plaintiff from being terminated for making a good-faith claim to overtime pay, even though it was subsequently discovered that the defendant employer had not wrongfully denied the plaintiff any overtime pay (*179 Cal. App. 4th 1116, 1121, 1123)* . The court noted that the duty to pay overtime wages is a well-established fundamental public policy affecting the broad public interest; that public policy therefore protected the plaintiff against retaliation for making a good-faith claim to overtime pay (*179 Cal. App. 4th 1116, 1122)* . The court of appeal cited *Green v. Ralee Engineering Co. (1998) 19 Cal. 4th 66, 78 Cal. Rptr. 2d 16, 960 P.2d 1046* (discussed above), and *Freund v. Nycomed Amersham (9th Cir. 2003) 347 F.3d 752, 759* , which held that as long as an employee makes a health or safety complaint in good faith, it does not matter for purposes of a wrongful-termination action whether the complaint identifies an actual violation of workplace-safety statutes or regulations. The court of appeal concluded that the same result should obtain when an employee exercises his or her statutory right to overtime wages out of a reasonable, good-faith belief that he or she is entitled to it, notwithstanding the later discovery that he or she is wrong (*179 Cal. App. 4th 1116, 1123)* .

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10-100 California Points & Authorities § 100.52

AUTHOR: Carolyn Rashby

§ 100.52 Opposing Contention That Tort Action Exists Due to Public Policy Violation--Asserted Public Policy Not Delineated in Constitutional Provision, Statute, or Statutorily Authorized Administrative Regulations

[1] FORM

[*The following may be included in a memorandum supporting or opposing a motion, or in a trial or appellate brief.*]

PLAINTIFF HAS NOT STATED A CAUSE OF ACTION FOR WRONGFUL TERMINATION BASED ON VIOLATION OF PUBLIC POLICY BECAUSE THE ASSERTED PUBLIC POLICY IS NOT DELINEATED IN ANY CONSTITUTIONAL PROVISION, STATUTE, OR STATUTORILY AUTHORIZED ADMINISTRATIVE REGULATIONS.

Public Policy Must Be Delineated in Constitutional or Statutory Provision or in Statutorily Authorized Administrative Regulations. In a wrongful discharge action based on the employer's alleged violation of public policy, the underlying public policy must be delineated in constitutional or statutory provisions (*Gantt v. Sentry Insurance (1992) 1 Cal. 4th 1083, 1095, 4 Cal. Rptr. 2d 874, 824 P.2d 680* ; *Sequoia Ins. Co. v. Superior Court (1993) 13 Cal. App. 4th 1472, 1480, 16 Cal. Rptr. 2d 888*), or in administrative regulations authorized by statute (*Green v. Ralee Engineering Co. (1998) 19 Cal. 4th 66, 71-72, 80-90*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a plaintiff's contention that the termination was in violation of public policy, based on the argument that the asserted public policy is not delineated in any constitutional or statutory provision [*see* *Gantt v. Sentry Insurance (1992) 1 Cal. 4th 1083, 1095, 4 Cal. Rptr. 2d 874, 824 P.2d 680]* . In an appropriate case, this form may be submitted in opposition to the contention supported by the form *set out in § 100.42*.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel

wishes to raise the substantive issue that the termination did not violate public policy because the asserted public policy is not delineated in a statutory or constitutional provision, for example, in a demurrer or motion for summary judgment. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, if appropriate, counsel should argue that plaintiff has not asserted a statutory or constitutional provision that contains the public policy at issue. If plaintiff has asserted a statutory or constitutional basis for the public policy, counsel should discuss evidence that the gravamen of defendant's alleged conduct is not delineated in the provisions relied on by plaintiff.For example, counsel could argue that although the provisions concern the subject matter generally, they do not state a public policy specifically prohibiting that conduct.

[c] Related Pleading and Practice Forms

For a general form of demurrer to a complaint based on the failure to state facts sufficient to constitute a cause of action, see *California Forms of Pleading and Practice, Ch. 206, Demurrers and Motions for Judgment on the Pleadings, § 206.122* (Matthew Bender). For a form of notice for summary judgment and related discussion, see Ch. 537, *Summary Judgment* , in that publication. For discussion and forms relating to wrongful discharge, see Ch. 249, *Employment Law: Termination and Discipline* , in that publication.

[d] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 60, § 60.04[2][a]* (Matthew Bender).

[3] Discussion of Authorities

[a] Public Policy Must Be Delineated in Constitutional or Statutory Provision or in Statutorily Authorized Administrative Regulations

The factual and procedural background of ***Gantt v. Sentry Insurance Co.*** *(1992) 1 Cal. 4th 1083, 4 Cal. Rptr. 2d 874, 824 P.2d 680* , is discussed in *§ 100.41[3][a]*. The California Supreme Court held that in wrongful termination actions based on violation of public policy, the public policy must derive from constitutional or statutory authority; i.e., reliance on judicial or other nonlegislative source is insufficient to support this cause of action (*1 Cal. 4th 1083, 1095)* . The Court also held that courts in wrongful discharge actions may not declare public policy without a basis in either constitutional or statutory provisions, and that a public-policy exception carefully tethered to fundamental policies that are delineated in constitutional or statutory provisions strikes the proper balance among the interests of employers, employees, and the public (*1 Cal. 4th 1083, 1095)* . Although technically dictum, inasmuch as the issue was not raised in the case and plaintiff never asserted a basis for the action that was not founded on statutory authority, the Court treated the statement as settled law in *Stevenson v. Superior Court (1997) 16 Cal. 4th 880, 889-890, 66 Cal. Rptr. 2d 888, 941 P.2d 1157* . *Stevenson* is discussed in full under in § 100.42[3][c].

In ***Sequoia Ins. Co. v. Superior Court*** *(1993) 13 Cal. App. 4th 1472, 16 Cal. Rptr. 2d 888* , a former employee brought a wrongful termination action against the insurance company employer after his termination allegedly for disagreeing with the perceived overall company practice by the claims department of inflating case reserves. He asserted that Proposition 103, which was adopted by voters in the 1988 general election for the express purpose of reducing and controlling insurance rates, created a public policy prohibiting that case reserve practice. Defendants unsuccessfully moved for summary judgment or summary adjudication, on the ground that plaintiff failed to state a factual or legal foundation for a wrongful termination claim based on public policy, then sought a writ of mandate in the court of appeal.

The court of appeal let the writ issue, directing the trial court to vacate its order denying the motion for summary adjudication of the public policy cause of action and to enter a new order granting the motion (*13 Cal. App. 4th 1472, 1482)* . The court rejected plaintiff's contention that *Gantt* permitted a public policy to be merely "derived from" or "based on" a statute, holding rather that under *Gantt*, the fundamental policies underlying the public policy exception must be *delineated in a constitutional or statutory provision.* The court in the instant case stated that a requirement that a policy be "delineated" entails more specificity than merely being "derived from" or "based on" its source, i.e., "delineate" means "to describe in detail." The court stated that although one should not assume that the employer's *precise act* must be specifically prohibited for the public policy exception to apply, a constitutional or statutory provision must sufficiently describe the type of prohibited conduct to enable an employer to know the fundamental public policies that are expressed in that law. In this case, the court noted, the employer was accused of violating public policy by attempting to persuade plaintiff to "inflate" case reserves. That court noted that plaintiff could not point to a specific statement in Proposition 103 or another statute that restricts the amount of reserves an insurer may set aside for the anticipated cost of a pending claim, and therefore no public policy could be inferred (*13 Cal. App. 4th 1472, 1480)* .

The factual and procedural background of ***Green v. Ralee Engineering Company*** *(1998) 19 Cal. 4th 66* , is discussed in *§ 100.41[3][a]*. In *Green*, the Supreme Court squarely held that public policy supporting a wrongful discharge claim may be embodied in statutorily authorized administrative regulations (*19 Cal. 4th 66, 71-72)* .

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10-100 California Points & Authorities § 100.53

AUTHOR: Carolyn Rashby

§ 100.53 Opposing Contention That Tort Action Exists Due to Public Policy Violation--Asserted Public Policy Does Not Inure to Benefit of Public at Large

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF'S COMPLAINT FOR DAMAGES FOR WRONGFUL DISCHARGE FAILS TO STATE A CAUSE OF ACTION BASED ON VIOLATION OF PUBLIC POLICY BECAUSE DEFENDANT DID NOT VIOLATE ANY POLICY THAT INURED TO THE BENEFIT OF THE PUBLIC AT LARGE.

A. Duty Underlying Public Policy Must Inure to Benefit of Public at Large. When a wrongful-discharge action alleges a violation of public policy, the discharge must affect a duty that inures to the benefit of the public at large, rather than to a particular employer or employee (*Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 669, 254 Cal. Rptr. 211, 765 P.2d 373* ; *American Computer Corp. v. Superior Court (1989) 213 Cal. App. 3d 664, 667-669, 261 Cal. Rptr. 796*).

[*Optional*] **B. Termination of Employee for Refusing Drug Test Is Not Violation of Public Policy.** Although drug testing may violate an employee's constitutional right to privacy, such a violation is a private, not public, one, and as such does not give rise to a cause of action for wrongful termination in violation of public policy (*Luck v. Southern Pacific Transportation Co. (1990) 218 Cal. App. 3d 1, 28-29, 267 Cal. Rptr. 618 , cert. denied, 498 U.S. 939*).

[*Optional*] **C. Denial of Employee's Request to Work Part-Time Does Not Violate Public Policy.** An employer's denial of an employee's request for a reduced workload may not serve as the basis of an action for wrongful constructive discharge in violation of public policy. Even a statute authorizing the employer to establish programs allowing senior employees to work part-time does not create a sufficiently fundamental and substantial public policy to support a cause of action for wrongful constructive discharge in violation of public policy (*Sinatra v. Chico Unified Sch. Dist. (2004) 119 Cal. App. 4th 701, 706-708, 14 Cal. Rptr. 3d 661*).

[2] Comments

[a] Use of Form

This form may be used to oppose a wrongful discharge complaint based on a cause of action alleging the employer's violation of public policy, based on the argument that the public policy alleged does not affect a duty owed to the public at large, but rather affects only the particular employer or employee [*see Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 669, 254 Cal. Rptr. 211, 765 P.2d 373]* . In an appropriate case, these points and authorities may be submitted in opposition to the contentions supported by the points and authorities *set out in §§ 100.41 -100.45* regarding an employee's cause of action for wrongful discharge based on the employer's violation of public policy.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the public policy on which plaintiff bases the claim of wrongful discharge does not affect a duty to the public at large, for example, in a demurrer or motion for summary judgment. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the statutory or constitutional provision relied on by plaintiff, showing how such provision does not affect a duty to the public at large, but rather benefits only one particular party. For example, if plaintiff contends that he or she was discharged for reporting to the employer a coworker's violation of company rules, counsel could argue that such disclosure was only of a private nature because it was of interest only to the employer [*see Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 669-671, 254 Cal. Rptr. 211, 765 P.2d 373* ; *American Computer Corp. v. Superior Court (1989) 213 Cal. App. 3d 664, 667-669, 261 Cal. Rptr. 796]* .

[c] Related Pleading and Practice Forms

For a general form of demurrer to a complaint based on the failure to state facts sufficient to constitute a cause of action, see *California Forms of Pleading and Practice, Ch. 206, Demurrers and Motions for Judgment on the Pleadings, § 206.122* (Matthew Bender). For a form of notice for summary judgment and related discussion, see Ch. 537, *Summary Judgment* , in that publication. For discussion and forms relating to wrongful discharge, see Ch. 249, *Employment Law: Termination and Discipline* , in that publication.

[d] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 60, § 60.04[2][b]* (Matthew Bender).

[3] Discussion of Authorities

[a] Duty Underlying Public Policy Must Inure to Benefit of Public at Large

The factual and procedural background of ***Foley v. Interactive Data Corp.*** *(1988) 47 Cal. 3d 654, 254 Cal. Rptr. 211, 765 P.2d 373* , is discussed in *§ 100.20[3][a]*. With respect to the plaintiff's cause of action regarding violation of public policy, the Court noted that under *Lab. Code § 2922*, an "employment, having no specified term, may be terminated at the will of either party on notice to the other." This presumption may be superseded by a contract, express or implied, limiting the employer's right to discharge the employee. Absent any contract, however, the employment is "at will," and the employee can be fired with or without good cause. The employer's right to discharge an "at will" employee is still subject to limits imposed by public policy, because otherwise the threat of discharge could be used to coerce employees into committing crimes, concealing wrongdoing, or taking other action harmful to the public interest (*47 Cal. 3d 654, 665)* .

The Court traced the decisional history of wrongful-discharge actions based on public-policy violations. In *Petermann v. International Brotherhood of Teamsters (1959) 174 Cal. App. 2d 184, 188-189, 344 P.2d 25* , the court of appeal had held that it is contrary to public policy and sound morality to allow an employer to discharge any employee, whether the employment be for a designated or unspecified duration, on the ground that the employee declined to commit perjury, an act specifically enjoined by statute (*47 Cal. 3d 654, 665-666)* . Similarly, in *Tameny v. Atlantic Richfield Co. (1980) 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330* , an action based on violation of federal anti-trust laws, the Court held that a tort action for wrongful discharge may lie if the employer conditions employment on required participation in unlawful conduct by the employee (*47 Cal. 3d 654, 666)* (for discussion of *Tameny,* see *§ 100.46[3][a]*). The theoretical reason for labeling the discharge wrongful in those cases is not based on the terms and conditions of the contract, but rather arises out of a duty implied in law on the part of the employer to conduct its affairs in compliance with public policy. The Court reiterated an appellate-court decision holding that there is no logical basis to distinguish, in cases of wrongful termination for reasons violative of fundamental principles of public policy, between situations in which the employee is an at-will employee and those in which the employee has a contract for a specified term, because the tort is independent of the term of employment (*47 Cal. 3d 654, 667)* .

In *Tameny,* the Court deemed the cause of action based on public policy as "ex delicto," or arising "from a breach of duty growing out of the contract," rather than "from a breach of a promise set forth in the contract" or "ex contractu" (*47 Cal. 3d 654, 667-667)* . The Court held in *Tameny* that an employer's obligation to refrain from discharging an employee who refuses to commit a criminal act does not depend on any express or implied promises set forth in the employment contract, but rather reflects a duty imposed by law on all employers in order to implement the fundamental public policies embodied in the state's penal statutes. As such, a wrongful discharge suit exhibits the classic elements of a tort cause of action. In *Tameny,* because there was no statute specifically barring an employer from terminating an employee who refused to act illegally, the Court was required to consider whether, without the authority of an express prohibition on the reasons for discharge, the plaintiff's action could proceed. It concluded that even in the absence of explicit statutory provisions prohibiting the discharge of a worker on those grounds, fundamental principles of public policy and adherence to the objectives underlying the state's penal statutes require the recognition of a rule barring an employer from discharging an employee who has simply complied with a legal duty and has refused to commit an illegal act. The Court noted that the public policy examined in *Tameny* was one about which reasonable persons can have little disagreement, and that was "firmly established" at the time of discharge (*47 Cal. 3d 654, 668)* .

The Court in *Foley* observed that the law is unsettled with regard to whether tortious violation of public policy as a ground for wrongful discharge requires the violation of a specific statute or constitutional provision, but did not decide that issue (*47 Cal. 3d 654, 668-669)* . (*Subsequently, in Gantt v. Sentry Insurance (1992) 1 Cal. 4th 1083, 4 Cal. Rptr. 2d 874, 824 P.2d 680* , the Court stated, in dictum, that the public policy supporting a wrongful termination action must be based on statutory or constitutional authority [*see* discussion of *Gantt* in § 100.41[3][a]].) However, the Court held that even when a statutory touchstone has been asserted (as in the instant case), it must still inquire whether the discharge is against public policy and affects a duty that inures to the benefit of the public at large rather than to a particular employer or employee. The Court held that, whether or not the existence of a statutory or constitutional link is required under *Tameny,* disparagement of a basic *public* policy must be alleged (*47 Cal. 3d 654, 669)* . Plaintiff alleged that defendant discharged him in derogation of a substantial public policy that imposes a legal duty on employees to report relevant business information to management, asserting that an employee is an agent, and as such is required to disclose to the principal all information relevant to the subject matter of the agency. Plaintiff contended that if he discovered information that might lead his employer to conclude that an employee was an embezzler, and should not be retained, plaintiff had a duty to communicate that information to hisprincipal (*47 Cal. 3d 654, 669)* . The Court concluded that the alleged duty was not founded in statute, noting that no enactment expressly requires an employee to report relevant information concerning other employees to the employer, and none prohibits discharge of the employee for so doing. The Court stated that it is unclear whether the duty to communicate relevant information is subsumed under the statutory duty of ordinary care regarding master-servant relations under *Lab. Code § 2854,* or is a separate duty not codified in that provision. Whether or not there is a statutory reporting duty, the Court did not find a substantial

public policy prohibiting an employer from discharging an employee for performing that duty (*47 Cal. 3d 654, 670)* . When the duty of an employee to disclose information to the employer serves only the private interest of the employer, the rationale underlying the *Tameny* cause of action is not implicated (*47 Cal. 3d 654, 670-671)* . Therefore, with respect to that cause of action, the Court held that the court of appeal properly upheld the trial court's ruling sustaining the demurrer without leave to amend (*47 Cal. 3d 654, 670)* .

In ***American Computer Corp. v. Superior Court*** *(1989) 213 Cal. App. 3d 664, 261 Cal. Rptr. 796* , plaintiff, the director of marketing and sales at a computer firm, brought a wrongful termination action against his former employer alleging, among other things, that he was discharged in violation of public policy. Plaintiff alleged that he discovered that funds were being embezzled by several employees and former employees, but that when he reported his findings to his superiors, he was first told not to concern himself with this, and later discharged. The trial court overruled defendant's demurrer to this cause of action. Subsequently, the Supreme Court filed its opinion in *Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 669-671, 254 Cal. Rptr. 211, 765 P.2d 373* , discussed *above.* Relying on *Foley,* defendant filed a motion for judgment on the pleadings, or in the alternative, for summary judgment. The court denied the motion, and defendant filed a petition for a writ of mandate.

The court of appeal granted the petition based on the decision in *Foley.* The court reiterated the holding in *Foley* that the policy violated must be a *public* one, and not a policy that serves only the private interest of the employer. The court stated that under the facts of the case, the only interest served was that of the employer because plaintiff was not punished for reporting criminal activity to a law enforcement agency, but for reporting the activity to his superiors. The court concluded that although plaintiff's actions might have conferred a public benefit in possibly preventing the commission of a crime, the potential for such a public interest was not a public policy weighty enough to give rise to a claim for wrongful discharge (*213 Cal. App. 3d 664, 668-669)* .

[b] Termination of Employee for Refusing Drug Test Is Not Violation of Public Policy

In ***Luck v. Southern Pacific Transportation Co.*** *(1990) 218 Cal. App. 3d 1, 267 Cal. Rptr. 618* , *cert. denied, 498 U.S. 939* , a computer programmer for a railroad was discharged for failure to take a required drug test. The employee filed suit for wrongful termination and other causes of action, and the jury returned a verdict in her favor. The employee applied for an award of attorney's fees without success, and appealed.

The court of appeal affirmed the trial court's order denying attorney's fees, and affirmed the judgment, although it found that several theories of liability were without legal support. The court held that a private employer may be liable for violating an employee's right to privacy, and that discharging an employee for exercising his or her right to privacy by refusing to take a drug test could constitute bad faith (*218 Cal. App. 3d 1, 19, 26)* . However, the court held that, measured against the standard in *Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 668-669, 254 Cal. Rptr. 211, 765 P.2d 373* , requiring that the public policy affect a duty that inures to the public benefit, violation of the right to privacy, by its very name, cannot be a public right. In addition, the court stated that two other requirements set forth in *Foley* for a public policy case were missing. First, the public policy must be one about which reasonable persons can have little disagreement, and drug testing is a hotly contested issue about which there is no consensus concerning whether it is consistent with privacy rights. Second, the public policy must be one that was firmly established at the time of the termination, and at that time no cases had held that drug testing intruded on privacy rights (*218 Cal. App. 3d 1, 28-29)* .

Note that there is an apparent conflict among the courts of appeal on this point. The court of appeal in *Semore v. Pool (1990) 217 Cal. App. 3d 1087, 1096-1098, 266 Cal. Rptr. 280* , held that termination for refusing to take a drug test violates an employee's constitutional right to privacy, which is an assertion of a fundamental principle of public policy.

[c] Denial of Employee's Request to Work Part-Time Does Not Violate Public Policy

The plaintiff in ***Sinatra v. Chico Unified Sch. Dist.*** *(2004) 119 Cal. App. 4th 701, 14 Cal. Rptr. 3d 661* , was a former school-district employee who claimed that he had been constructively discharged in violation of public policy when the district denied his request for a reduced workload. Specifically, the plaintiff claimed that the statute authorizing school districts to establish programs allowing educators who might otherwise retire to work part-time [*see Educ. Code § 44922*] embodies a fundamental and substantial California public policy. The superior court granted the school district's motion for judgment on the pleadings, and the plaintiff appealed.

The court of appeal affirmed, holding that the school district's denial of the plaintiff's request for a reduced workload could not serve as the basis of an action for wrongful constructive discharge in violation of public policy. The court explained that not all statutes encompass a sufficient policy to support a claim of wrongful discharge in violation of public policy. Although the Legislature presumably believes that each statute enacted serves the public interest, the courts have clearly and consistently demanded that public policy supporting a wrongful discharge must be fundamental and substantial and must inure to the benefit of the public at large. Turning to the statute involved in this case, the court acknowledged that the statute grants school districts the discretion to implement part-time programs for senior employees [*see Educ. Code § 44922*]. While it enables school districts, therefore, to bestow a valuable right on a select segment of their employees, the court concluded that the statute does not embody the kind of universal and important right recognized as fundamental to the public good. School districts are not obligated to provide part-time programs, and the statute provides no direct benefit to the public at large. While individual teachers and administrators are able to reap the benefits of the part-time option, the benefit to the public is indirect and tangential. Accordingly, court of appeal concluded that the statute does not create a sufficiently fundamental and substantial public policy to support a cause of action for wrongful discharge in violation of public policy (*119 Cal. App. 4th 701, 706-708)* .

California Points & Authorities

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 100 EMPLOYER AND EMPLOYEE: WRONGFUL TERMINATION AND DISCIPLINE
PART II. FORMS

10-100 California Points & Authorities § 100.54

AUTHOR: Carolyn Rashby

§ 100.54 Opposing Contention That Tort Action Exists Due to Public Policy Violation--Asserted Public Policy Is Inapplicable to Defendant

[1] FORM

[*The following may be included in a memorandum supporting or opposing a motion, or in a trial or appellate brief.*]

PLAINTIFF HAS NOT STATED A CAUSE OF ACTION FOR WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY BECAUSE THE CONSTITUTIONAL/STATUTORY PROVISION(S) STATED AS THE BASIS FOR THE ALLEGATION THAT THE DISCHARGE VIOLATED PUBLIC POLICY DOES/DO NOT APPLY TO DEFENDANT OR TO DEFENDANT'S CONDUCT, AND THEREFORE IS/ARE NOT "FUNDAMENTAL" PUBLIC POLICY.

Inapplicable Constitutional or Statutory Policy Cannot Be "Fundamental." A constitutional or statutory provision that is inapplicable to defendant or to defendant's conduct cannot be the basis of a "fundamental" public policy for the purposes of a cause of action for wrongful discharge in violation of public policy (*Jennings v. Marralle (1994) 8 Cal. 4th 121, 125, 32 Cal. Rptr. 2d 275, 876 P.2d 1074* ; *see, e.g.,* *Ross v. RagingWire Telecommunications, Inc. (2008) 42 Cal. 4th 920, 925931, 70 Cal. Rptr. 3d 382, 174 P.3d 200* ; *Estes v. Monroe (2004) 120 Cal. App. 4th 1347, 1355-1360, 16 Cal. Rptr. 3d 616* ; *Grinzi v. San Diego Hospice Corp. (2004) 120 Cal. App. 4th 72, 80-84, 14 Cal. Rptr. 3d 893*).

[2] Comments

[a] Use of Form

This form may be used to oppose a contention that plaintiff's termination was in violation of public policy, based on the argument that the statutory basis for the alleged public policy does not apply to the defendant. This form is not for use when there is a separate statutory or constitutional basis for the public policy allegedly violated that applies to the defendant [*see* *Phillips v. St. Mary Reg'l Med. Ctr. (2002) 96 Cal. App. 4th 218, 230-238, 116 Cal. Rptr. 2d 770* ;

Badih v. Myers (1995) 36 Cal. App. 4th 1289, 1292-1295, 43 Cal. Rptr. 2d 229] . In an appropriate case, this form may be used in opposition to the forms *set forth in §§ 100.41, 100.42*.

This form may be combined with memoranda pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the public policy is not "fundamental" due to defendant's exemption from the statutory provision(s), for example, in a demurrer or summary judgment motion. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should identify the statute underlying plaintiff's claim for wrongful discharge and describe the specific provision of the statute which exempts the employer from the statute's coverage. Counsel also should set forth facts indicating that the employer falls within the statutory exemption. Further, the absence of any other statutory or constitutional basis for the public policy allegedly violated by plaintiff's dismissal also should be discussed.

[c] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 60, § 60.04* (Matthew Bender).

[3] Discussion of Authorities

[a] Inapplicable Constitutional or Statutory Policy Cannot Be "Fundamental"

In ***Jennings v. Marralle*** *(1994) 8 Cal. 4th 121, 32 Cal. Rptr. 2d 275, 876 P.2d 1074* , plaintiff brought a wrongful discharge action alleging that defendant terminated her employment in violation of the statutory prohibition of age discrimination in the Fair Employment and Housing Act (FEHA) (former Gov. Code § 12941; *now see Gov. Code § 12940(a)*; *see also Gov. Code § 12900 et seq.*). After the defendant's summary judgment motion was granted on the ground that he was exempt from the provisions of FEHA because he employed fewer than five persons (*see Gov. Code § 12926(d)*), plaintiff sought leave to amend her complaint to allege a cause of action for wrongful discharge in violation of public policy. The proposed amendment asserted the public policy against age discrimination, set forth in *Gov. Code §§ 12920* and *12921*. The trial court denied leave to amend, plaintiff appealed, and the court of appeal reversed, holding that the general statements of policy were sufficient to formthe basis for a wrongful discharge action. The California Supreme Court granted review, and reversed the judgment of the court of appeal.

The Court contrasted the broad statement of policy set forth in *Gov. Code §§ 12920* and *12921* with the express exemption of small employers from the age discrimination prohibition, set forth in *Gov. Code § 12926(d)*, and concluded that the Legislature did not intend to make the right to be free of age discrimination by a small employer a "fundamental" public policy and to thereby subject employers who are not within FEHA's statutory prohibitions and remedies to common law civil liability for age discrimination (*8 Cal. 4th 121, 135)* . Although the public policy declared by the Legislature in § 12920 applies to all employers, it does not follow that in declaring the policy the Legislature intended to create the basis for a common law tort action and to thereby subject employers whom it expressly exempted from FEHA coverage to liability for age discrimination (*8 Cal. 4th 121, 134-135)* . The Court therefore concluded that the inclusion of age in the policy statement of FEHA alone is not sufficient to establish a "fundamental" public policy for the violation of which an employer may be held liable in a common law tort action (*8 Cal. 4th 121, 135-136)* .

Counsel should note that this argument should not be used in the event that there is a separate statutory or constitutional basis for the public policy allegedly violated that applies to the defendant. In *Badih v. Myers (1995) 36 Cal. App. 4th 1289* , a court of appeal rejected an employer's argument that his exemption from FEHA because he employed fewer than five employees compelled reversal of a jury verdict that he had wrongfully discharged a former employee on the

basis of pregnancy in violation of public policy. The court explained that, unlike age discrimination, there is a proscription against pregnancy discrimination that is independent of FEHA. Specifically, *Cal. Const., art. I, § 8*, expresses a public policy against sex discrimination, which, the court found, includes pregnancy discrimination (*36 Cal. App. 4th 1289, 1292-1295)* .

NOTE:

Subsequently, in *Phillips v. St. Mary Reg'l Med. Ctr. (2002) 96 Cal. App. 4th 218, 116 Cal. Rptr. 2d 770* , the court of appeal cited *Jennings v. Marralle* and *Badih v. Myers* in holding that if a statutory exemption or limitation prevents a particular statute from serving as the basis for a claim of wrongful discharge in violation of public policy, the plaintiff may rely on alternative sources of fundamental public policy in support of the claim. For example, if the express exemption for religious employers prevents FEHA from serving as a public-policy basis for a plaintiff's wrongful discharge claim against a religious employer (*see Gov. Code §§ 12926(d), 12926.2(c)*), the plaintiff may pursue a wrongful discharge claim on the basis of a violation of public policy derived from the California Constitution (*Cal. Const., art. I, § 8*) and from Title VII of Civil Rights Act of 1964 (*42 U.S.C. § 2000e et seq.*) (*Phillips v. St. Mary Reg'l Med. Ctr. (2002) 96 Cal. App. 4th 218, 230-238, 116 Cal. Rptr. 2d 770*).

In ***Ross v. RagingWire Telecommunications, Inc.*** *(2008) 42 Cal. 4th 920, 70 Cal. Rptr. 3d 382, 174 P.3d 200* , the California Supreme Court held that the Compassionate Use Act of 1996 (Proposition 215; *Health & Safety Code § 11362.5*) does not establish a public policy against terminating employees who use marijuana for medical purposes. The Act does exempt certain medical users of marijuana from criminal liability under two specific California statutes (*see Health & Safety Code § 11362.5(d)* (providing defense against prosecution under *Health & Safety Code §§ 11357* and *11358* for person who possesses or cultivates marijuana for medical purposes on recommendation or approval of physician)). However, marijuana possession remains illegal under federal law, even for medical use (*21 U.S.C. §§ 812, 844(a)*; *Gonzales v. Raich (2005) 545 U.S. 1, 26-29, 125 S. Ct. 2195, 162 L. Ed. 2d 1*). Moreover, the Compassionate Use Act is limited in scope: it merely exempts medical users and their primary caregivers from criminal liability under two specified state statutes, and it does not address the rights and obligations of employers and employees. Therefore, the Compassionate Use Act cannot be read as requiring employers to accommodate medical marijuana use (*42 Cal. 4th 920, 925-931)* .

In ***Estes v. Monroe*** *(2004) 120 Cal. App. 4th 1347, 16 Cal. Rptr. 3d 616* , the California National Guard terminated a state active duty guardsman after he was paralyzed in an automobile accident. The guardsman then brought a wrongful termination claim against the California Military Department, alleging that his discharge violated the California public policy of providing reasonable accommodation to disabled workers.

The court of appeal affirmed the trial court's dismissal of the claim. The court acknowledged that the Fair Employment and Housing Act (FEHA) embodies a general public policy of accommodating disabled workers [*see Gov. Code § 12900 et seq.*]. However, applying a deferential analysis of the pertinent provisions of FEHA, the court concluded that the policy at issue was not applicable to members of the military (*120 Cal. App. 4th 1347, 1350)* .

In *Feres v. United States (1950) 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 152* , the United States Supreme Court held that members of the armed forces may not bring tort lawsuits under the Federal Tort Claims Act (FTCA) [*see 28 U.S.C. § 2671 et seq.*] for physical injuries that arise out of or occur in the course of activity incident to service. Specifically, the Court construed the FTCA provision that the federal government is liable under local law "in the same manner and to the same extent as a private individual under like circumstances ..." [*28 U.S.C. § 2674*]. The Court rejected the notion that Congress intended to extend the remedies of the FTCA to members of the military for injuries that arise out of or are in the course of activity incident to service. The Court stated that "[w]ithout exception, the relationship of military personnel to the Government has been governed exclusively by federal law. We do not think that Congress, in drafting this Act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence. We cannot impute to Congress such a radical departure from established law in the absence of express congressional

command" [*Feres v. United States (1950) 340 U.S. 135, 146, 71 S. Ct. 153, 95 L. Ed. 152]* . Although frequently criticized, the rationale of *Feres* has been used to construe a wide variety of statutory and constitutional claims, and it has come to be known as the *Feres* doctrine.

In this case, the court of appeal applied the *Feres* doctrine to the plaintiff's claim of wrongful discharge in violation of the public policy embodied in FEHA. Although it is established that FEHA's provisions prohibiting discrimination may provide the policy basis for such a claim, the tort claim based on a violation of FEHA is limited by the terms of the statute. That is, the viability of plaintiff's tort claim is tethered to the meaning of the pertinent provisions of FEHA (*120 Cal. App. 4th 1347, 1355)* .

To ascertain the meaning of the pertinent FEHA provisions in light of the *Feres* doctrine, the court of appeal looked to federal decisions interpreting federal antidiscrimination statutes. Because the antidiscrimination objectives and relevant wording of Title VII of the Civil Rights Act of 1964 [*42 U.S.C. § 2000e et seq.*], the Age Discrimination in Employment Act (ADEA) [*29 U.S.C. § 621 et seq.*], and the Americans with Disabilities Act (ADA) [*42 U.S.C. § 12111 et seq.*] are similar to those of FEHA, California courts often look to federal decisions interpreting these statutes for assistance in interpreting FEHA (*120 Cal. App. 4th 1347, 1355-1357)* . Federal courts have construed these federal statutes as being inapplicable to members of the national armed forces or a state militia [*see, e.g., Frey v. California (9th Cir. 1993) 982 F.2d 399, 402-404* ; *Helm v. California (9th Cir. 1983) 722 F.2d 507, 509* ; *Gonzalez v. Department of Army (9th Cir. 1983) 718 F.2d 926, 928]* .

The court of appeal found that the public policy incorporated into FEHA is as broadly stated as the policies set forth in the federal cases construing the federal antidiscrimination statutes [*see Gov. Code § 12920*]. Like the federal statutes, FEHA generally prohibits an employer from discriminating in the "terms, conditions, or privileges of employment" [*see Gov. Code § 12940*], and the definition of "employer" in FEHA is as broad as in federal provisions [*see Gov. Code § 12926(d)*]. The court of appeal held, therefore, that the Legislature did not express the requisite intent to extend FEHA to cover claims by those on active duty when the challenged personnel actions are incident to service. Because the California National Guard terminated the plaintiff in this case based on his physical disability and did not provide a reasonable accommodation, the decision was clearly "incident to service" and directly affected the peculiar and special relationship between soldiers and their superiors. The court observed that the Legislature certainly has the prerogative to subject the California National Guard to the same obligation to provide reasonable accommodation for disabled guardsmen as other California employers, but under the *Feres* doctrine, the court concluded that the Legislature would have to explicitly extend a FEHA remedy to military personnel to overcome the judicial predisposition to defer to military wisdom. Hence, in the absence of express statutory language extending FEHA to military personnel, the court held that the public policy embodied in FEHA is not applicable to the California National Guard and therefore does not support the plaintiff's claim of wrongful discharge in violation of public policy (*120 Cal. App. 4th 1347, 1358-1360)* .

In ***Grinzi v. San Diego Hospice Corp.*** *(2004) 120 Cal. App. 4th 72, 14 Cal. Rptr. 3d 893* , the plaintiff claimed that she was wrongfully terminated from private employment in violation of established public policy supported by the free-speech provision of the *First Amendment of the United States Constitution*. The court of appeal affirmed a dismissal of the plaintiff's complaint. The court reasoned that the *First Amendment* free-speech provision fails to establish a public policy against terminations by private employers for speech-related activities because it applies only to government actions and expresses no public policy regarding terminations by private employers (*120 Cal. App. 4th 72, 80-84)* .

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 100 EMPLOYER AND EMPLOYEE: WRONGFUL TERMINATION AND DISCIPLINE
PART II. FORMS

10-100 California Points & Authorities § 100.54A

AUTHOR: Carolyn Rashby

§ 100.54A Opposing Contention That Tort Action Exists Due to Public Policy Violation--Alleged Discharge Because of Pregnancy--Defendant Was Unaware That Plaintiff Was Pregnant

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION FOR WRONGFUL DISCHARGE IN VIOLATION OF THE PUBLIC POLICY AGAINST DISCRIMINATION ON THE BASIS OF PREGNANCY, BECAUSE THE PLAINTIFF'S PREGNANCY WAS NOT APPARENT AT THE TIME OF HER DISCHARGE, AND THE COMPLAINT FAILS TO ALLEGE FACTS SHOWING THAT THEDEFENDANT KNEW OF THE PREGNANCY AT THE TIME OF THE DISCHARGE.

Plaintiff Must Establish That Defendant Knew Plaintiff Was Member of Protected Class. To establish that the defendant discharged the plaintiff with an unlawful discriminatory intent, the plaintiff must show that the defendant was aware of the plaintiff's membership in the protected class. For example, in a case of alleged discharge on the basis of pregnancy (*see Gov. Code §§ 12926(p), 12940(a)*), if the pregnancy was not apparent at the time of discharge and the employee had not disclosed it to her employer, she must allege that the plaintiff had knowledge of the pregnancy and must present, as part of her prima facie case, evidence from which a rational trier of fact could infer that the employer knew she was pregnant (*Trop v. Sony Pictures Entm't Inc. (2005) 129 Cal. App. 4th 1133, 1145-1146, 29 Cal. Rptr. 3d 144*).

[2] Comments

[a] Use of Form

These points and authorities may be used to oppose a contention that the plaintiff's termination was in violation of the public policy against employment discrimination on the basis of pregnancy [*see Gov. Code §§ 12926(p), 12940(a)*], on the ground that the termination could not have been based on pregnancy because the defendant was not aware of the

pregnancy at the relevant time [*see* *Trop v. Sony Pictures Entm't Inc. (2005) 129 Cal. App. 4th 1133, 1145-1146, 29 Cal. Rptr. 3d 144]* . In an appropriate case, this form may be adapted for use in other cases of claimed unlawful discrimination, if the defendant was unaware at the time of termination that the plaintiff was a member of the relevant protected class.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should explain that the plaintiff has not made any allegation or produced any credible evidence to support a finding that the defendant knew the plaintiff was pregnant at the time of the termination.

[c] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 43, § 43.01[2][b], [10][h]*.

[3] Discussion of Authorities

[a] Plaintiff Must Establish That Defendant Knew Plaintiff Was Member of Protected Class

The plaintiff in ***Trop v. Sony Pictures Entm't Inc.*** *(2005) 129 Cal. App. 4th 1133, 29 Cal. Rptr. 3d 144* , worked as an assistant to one of the defendants. The plaintiff alleged that her employment had been terminated on the basis of her pregnancy, in violation of public policy established by the Fair Employment and Housing Act (FEHA). FEHA prohibits an employer from terminating an employee because of her sex, which includes "pregnancy, childbirth, or medical conditions related to pregnancy or childbirth" (*Gov. Code §§ 12926(p), 12940(a)*). In this case, the court of appeal noted that a three-stage burden-shifting test generally applies in trying employment discrimination claims that are based on a disparate-treatment theory: (1) the plaintiff must establish a prima facie case of discrimination; (2) if the plaintiff is successful, the employer must offer a legitimate nondiscriminatory reason for its actions; and (3) if the employer produces evidence on that point, the plaintiff must show that employer's reason was a pretext for discrimination. This test is inapplicable, however, if the plaintiff presents direct evidence of discrimination (*129 Cal. App. 4th 1133, 1144)* .

The court of appeal in this case affirmed the trial court's grant of summary judgment in favor of the defendants. The court of appeal explained that the plaintiff could not establish a prima facie case of discrimination on the basis of pregnancy, because she had failed to raise a triable issue of fact that the defendants knew the plaintiff was pregnant before she was fired. In response to the defendant's motion for summary judgment, the plaintiff presented no evidence that she was visibly pregnant at the time of her firing, and she had not told the defendants she was pregnant. In the absence of credible evidence that the defendants knew the plaintiff was pregnant, the plaintiff was unable to establish a prima facie case of discrimination (*129 Cal. App. 4th 1133, 1145-1146)* .

Similarly, the court of appeal found that the plaintiff had not presented any direct evidence of discrimination. The defendant for whom the plaintiff worked had made remarks to the effect that a pregnant woman could not work as her assistant. However, those remarks did not rise to the level of *direct* evidence of discrimination, because those remarks were made either (1) after the plaintiff was fired, or (2) before the plaintiff was fired but without knowledge that she was pregnant (*129 Cal. App. 4th 1133, 1146-1149)* .

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10-100 California Points & Authorities § 100.55

AUTHOR: Carolyn Rashby

§ 100.55 Opposing Contention That Tort Action Exists Due to Public Policy Violation--In-House Counsel's Wrongful Discharge Cause of Action Not Based on Explicit and Unequivocal Mandatory Ethical Requirement

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE COMPLAINT FOR WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY ESTABLISHED BY ETHICAL STANDARDS DOES NOT STATE A CAUSE OF ACTION BECAUSE THE DISCHARGE OF PLAINTIFF AS IN-HOUSE COUNSEL WAS NOT BASED ON PLAINTIFF'S FOLLOWING OF EXPLICIT AND UNEQUIVOCAL MANDATORY ETHICAL OBLIGATION.

A. Action Must Be Based on Explicit and Unequivocal Mandatory Ethical Obligations. A cause of action brought by in-house counsel for wrongful discharge in violation of public policy established by ethical obligations must be based on explicit and unequivocal ethical norms established in the Rules of Professional Responsibility and statutes (*General Dynamics Corp. v. Superior Court (1994) 7 Cal. 4th 1164, 1189, 32 Cal. Rptr. 2d 1, 876 P.2d 487*).

[*Optional*] **B. Action Must Be Based on Mandatory Ethical Requirement Intended to Benefit Public.** An ethical norm that is merely permissive rather than mandatory, or that is designed solely for the benefit of the attorney or the client rather than for the protection of the public at large, cannot be the basis for a wrongful discharge cause of action (*General Dynamics Corp. v. Superior Court (1994) 7 Cal. 4th 1164, 1191, 32 Cal. Rptr. 2d 1, 876 P.2d 487*).

[2] Comments

[a] Use of Form

These points and authorities may be used to oppose the contention that a discharged in-house counsel has stated a cause of action for wrongful termination in violation of the public policy underlying an attorney's ethical obligations, based on the argument that the policy allegedly violated by the discharge was insufficient to support the action. Optional

Paragraph B may be used if the ethical requirement involved is permissive rather than mandatory, or if it can be argued that the provision involved is not for the protection of the general public. In an appropriate case, this form may be used in opposition to the points and authorities *set forth in § 100.49*.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the discharged in-house attorney's action does not meet the requirements set forth in *General Dynamics Corp. v. Superior Court (1994) 7 Cal. 4th 1164, 32 Cal. Rptr. 2d 1, 876 P.2d 487* , for example, in a demurrer or summary judgment motion. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Counsel should argue that plaintiff has failed to identify a professional rule or statute as the basis for the wrongful discharge claim. If plaintiff has identified a professional rule or statute, counsel should argue that the ethical norm is merely permissive, rather than mandatory, or that it is designed solely for the benefit of the attorney rather than the public at large. If appropriate, counsel also could set forth facts indicating that plaintiff would have been discharged regardless of plaintiff's exercise of the ethical requirement. For an example of arguments regarding good cause for discharge, see *§ 100.29*.

[c] Related Pleading and Practice Forms

For a general form of demurrer to a complaint based on the failure to state facts sufficient to constitute a cause of action, see *California Forms of Pleading and Practice, Ch. 206, Demurrers and Motions for Judgment on the Pleadings, § 206.122* (Matthew Bender). For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* . For discussion and forms relating to wrongful discharge, see California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts* , Ch. 249, *Employment Law: Termination and Discipline* , and Ch. 250, *Employment Law: Wage and Hour Disputes* .

[d] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 60, Liability for Wrongful Termination and Discipline, § 60.04* (Matthew Bender).

[3] Discussion of Authorities

[a] Action Must Be Based on Explicit and Unequivocal Mandatory Ethical Obligations

The facts and procedural background of ***General Dynamics Corp. v. Superior Court*** *(1994) 7 Cal. 4th 1164, 32 Cal. Rptr. 2d 1, 876 P.2d 487* , are discussed in *§ 100.49[3][a]*. Regarding the required elements of a cause of action for wrongful discharge in violation of public policy as expressed in attorneys' ethical responsibilities, the Court discussed the conflicting values presented: on the one hand, the case for shielding the in-house attorney from retaliation by the employer for either insisting on adhering to mandatory ethical norms of the profession or for refusing to violate them; on the other hand, protecting the confidential role of the attorney from the damage that could be caused by suits against the client, especially given an attorney's ethical obligation to withdraw from representation when an ethical conflict arises (*7 Cal. 4th 1164, 1181-1182)* . The Court rejected the approach taken by courts in other states (citing *Balla v. Gambro, Inc. (Ill. 1991) 584 N.E.2d 104*), under which actions by in-house counsel are precluded on the ground that the ethical obligation to withdraw insufficient (*7 Cal. 4th 1164, 1188)* . Instead, the Court held that it is *because* of the nature of the attorney's rule that a remedy should be available when mandatory ethical norms embodied in the Rules of Professional Conduct collide with illegitimate demands of the employer, and the attorney insists on adhering to his or her clear professional duty (*7 Cal. 4th 1164, 1188)* . The "remedy" of withdrawal was seen as illusory, in that it

appeared more likely that, in the absence of any available remedy, counsel would tend to remain silent in the face of unethical demands (*7 Cal. 4th 1164, 1188)* .

Instead, the Court fashioned a rule designed to support in-house counsel in remaining faithful to the fundamental public policies reflected in the governing ethical code when carrying out professional assignments (*7 Cal. 4th 1164, 1188-1189)* . The Court held that the fiduciary values of mutual trust and confidence can be protected from the threat of damages by limiting judicial access to those claims grounded in explicit and unequivocal ethical norms embodied in the Rules of Professional Conduct and statutes (*7 Cal. 4th 1164, 1189)* . The claim must be based on a mandatory ethical obligation; if the conduct in which the attorney has engaged is merely permissible, but not required by statute or ethical code, the court must treat the claim under the rules applicable to nonattorneys under *Gantt v. Sentry Insurance (1992) 1 Cal. 4th 1083, 1094-1097, 4 Cal. Rptr. 2d 874, 824 P.2d 680* , and determine whether some statute or ethical rule permits the attorney to depart from the usual requirement of confidentiality (*7 Cal. 4th 1164, 1189* ; *see § 100.56*).

[b] Action Must Be Based on Mandatory Ethical Requirement Intended to Benefit Public

The facts and procedural background of ***General Dynamics Corp. v. Superior Court*** *(1994) 7 Cal. 4th 1164, 32 Cal. Rptr. 2d 1, 876 P.2d 487* , are discussed in *§ 100.49[3][a]*. The Court set out subsidiary rules that it claimed would deter the incidence of strike suits or claims filed in bad faith. The contested rules must be clearly established by the ethics code or statutory provision; disagreements over policy are not actionable (*7 Cal. 4th 1164, 1191)* . The plaintiff bears the burden of establishing the unequivocal requirements of the ethical norm at issue and that the employer's conduct was motivated by impermissible considerations under a "but for" standard of causation (*7 Cal. 4th 1164, 1191)* . The ethical norm at issue must be one that is intended for the protection of the public at large; measures designed solely for the benefit of the attorney or the client will not suffice to support a retaliatory discharge claim (*7 Cal. 4th 1164, 1191)* .

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10-100 California Points & Authorities § 100.56

AUTHOR: Carolyn Rashby

§ 100.56 Opposing Contention That Tort Action Exists Due to Public Policy Violation--In-House Counsel's Wrongful Discharge Cause of Action Cannot Be Maintained Without Violating Attorney-Client Privilege

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF'S CAUSE OF ACTION FOR WRONGFUL DISCHARGE FROM HIS/HER POSITION AS IN-HOUSE COUNSEL CANNOT BE MAINTAINED BECAUSE IT CANNOT BE ESTABLISHED WITHOUT THE PUBLIC DISCLOSURE OF CONFIDENTIAL INFORMATION PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE.

Wrongful Discharge Claim May Not Breach Attorney-Client Privilege. A wrongful discharge cause of action brought by in-house counsel must be dismissed if the elements of the action cannot, for reasons peculiar to the particular case, be established without the public disclosure of confidential information protected by the attorney-client privilege (*General Dynamics Corp. v. Superior Court (1994) 7 Cal. 4th 1164, 1190, 32 Cal. Rptr. 2d 1, 876 P.2d 487* ; *Fox Searchlight Pictures, Inc. v. Paladino (2001) 89 Cal. App. 4th 294, 308-315, 106 Cal. Rptr. 2d 906*).

[2] Comments

[a] Use of Form

This form may be used to oppose a contention that a wrongful discharge action may be maintained by former in-house counsel, on the ground that the action must be dismissed because the elements of the claim cannot be fully established without breaching the attorney-client privilege. Note that in *General Dynamics Corp. v. Superior Court (1994) 7 Cal. 4th 1164, 32 Cal. Rptr. 2d 1, 876 P.2d 487* , the California Supreme Court referred specifically to actions to recover tort damages based on a wrongful discharge in violation of public policy, and stated that actions for breach of a contract provision to terminate the employment only for cause are unlikely to implicate values central to the attorney-client relationship. However, even in breach-of-contract actions there may be contested issues that involve the attorney-client privilege, such as issues regarding whether or not cause to terminate existed in a particular case. Therefore, the points

and authorities set forth in this form may be appropriate in either type of action, depending on the particular factual circumstances present. In an appropriate case, this form may be used in opposition to the points and authorities *set forth in § 100.49*.

Counsel may use these points and authorities in conjunction with those in § 100.55 if the discharged in-house attorney's complaint also alleges a cause of action for wrongful discharge based on a violation of public policy as expressed in the ethical standards applicable to attorneys.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that plaintiff cannot establish the elements of his or her cause of action for wrongful discharge without violating the attorney-client privilege. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts indicating that plaintiff's claim for wrongful discharge cannot be prosecuted without violating the attorney-client privilege because matters covered by the privilege will be an essential part of plaintiff's case. In making this showing, counsel should ensure that the confidentiality of matters covered by the privilege is maintained. Counsel also should show that there are no equitable measures that the trial court could impose with respect to plaintiff's proof that would effectively protect the privilege.

[c] Related Pleading and Practice Forms

For a general form of demurrer to a complaint based on the failure to state facts sufficient to constitute a cause of action, see *California Forms of Pleading and Practice, Ch. 206, Demurrers and Motions for Judgment on the Pleadings, § 206.122* (Matthew Bender). For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* . For discussion and forms relating to wrongful discharge, see California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts* , Ch. 249, *Employment Law: Termination and Discipline* , and Ch. 250, *Employment Law: Wage and Hour Disputes* .

[d] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 60, Liability for Wrongful Termination and Discipline, § 60.04* (Matthew Bender).

[3] Discussion of Authorities

[a] Wrongful Discharge Claim May Not Breach Attorney-Client Privilege

The facts and procedural background of ***General Dynamics Corp. v. Superior Court*** *(1994) 7 Cal. 4th 1164, 32 Cal. Rptr. 2d 1, 876 P.2d 487* , are *set forth in § 100.49[3][a]*. The Court held that if the elements of a wrongful discharge in violation of public policy claim cannot, for reasons peculiar to the particular case, be fully established without breaching the attorney-client privilege, the suit must be dismissed in the interest of preserving the privilege (*7 Cal. 4th 1164, 1190)* . Whether the attorney-client privilege precludes a plaintiff's recovery will ordinarily not be resolvable at the demurrer stage. Rather, in the usual case, whether the privilege serves as a bar to the plaintiff's recovery will be litigated and determined in the context of motions for protective orders or to compel further discovery responses, as well as at the time of summary judgment (*7 Cal. 4th 1164, 1190)* . In making this determination, the trial court can and should apply an array of ad hoc measures within its equitable powers in order to permit the attorney plaintiff to attempt to make the necessary proof while protecting from disclosure client confidences subject to the privilege (*7 Cal. 4th 1164, 1191)* . The Court rejected any suggestion that the scope of the attorney-client privilege should be diluted in the

context of in-house counsel and their corporate clients (*7 Cal. 4th 1164, 1191)* .

In ***Fox Searchlight Pictures, Inc. v. Paladino*** *(2001) 89 Cal. App. 4th 294, 106 Cal. Rptr. 2d 906* , a court of appeal held that the rule of *General Dynamics Corp. v. Superior Court (1994) 7 Cal. 4th 1164, 1190, 32 Cal. Rptr. 2d 1, 876 P.2d 487* (discussed *above*) is limited to circumstances in which the maintenance of a wrongful discharge claim would result in *public* disclosure of the employer's confidential information. In the case before the court of appeal, a former in-house counsel sued her former employer for wrongful discharge. The employer filed its own suit against the employee, alleging that the disclosure of the employer's confidential information to the employee's attorneys constituted a violation of the employee's ethical duties (*see Bus. & Prof. Code § 6068(e)*). The employer also moved to disqualify the employee's attorneys on the ground that they had been exposed to confidential information concerning the defendant. The trial court denied the employer's motion to disqualify the employee's attorneys; the trial court also denied the employee's motion to dismiss the employer's suit.

The court of appeal affirmed the denial of the employer's motion to disqualify the employee's attorneys and reversed the denial of the employee's motion to dismiss the employer's suit. The court of appeal acknowledged that the Supreme Court had held in General Dynamics Corp. v. Superior Court that a former in-house counsel's wrongful termination suit must be dismissed if it cannot be fully established without breaching the attorney-client privilege (*see General Dynamics Corp. v. Superior Court (1994) 7 Cal. 4th 1164, 1190, 32 Cal. Rptr. 2d 1, 876 P.2d 487* , discussed *above*). However, the court of appeal noted that the Supreme Court's primary concern was over the *public* disclosure of confidential information. Thus, the court of appeal reasoned, disclosure of confidential information to a plaintiff's own attorneys for purposes of the wrongful-termination action would not violate the rule of *General Dynamics* because (1) the Supreme Court's opinion in *General Dynamics* contemplated such nonpublic disclosure to the plaintiff's own attorneys, (2) such a disclosure would not violate the plaintiff's duty of confidentiality to the employer (*see Bus. & Prof. Code § 6068(e)*) so long as the disclosure was limited to the information necessary to prepare and prosecute the wrongful-termination action, and (3) fundamental fairness requires that the plaintiff be allowed to make such a disclosure to the extent necessary to prepare the claim for wrongful termination (*89 Cal. App. 4th 294, 310-314)* . Once such a disclosure has been made to the plaintiff's attorneys, it is up to the attorneys to determine if, when, and how such information can be utilized in the wrongful-termination action in conformity with the guidelines laid down by the Supreme Court in *General Dynamics* (*89 Cal. App. 4th 294, 310-314)* .

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10-100 California Points & Authorities § 100.57

AUTHOR: Carolyn Rashby

§ 100.57 Opposing Contention That Tort Action Exists Due to Public Policy Violation--Policy Relied on by Plaintiff Is Counterbalanced by Another Policy

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF'S CAUSE OF ACTION FOR WRONGFUL DISCHARGE CANNOT BE MAINTAINED BECAUSE THE DEFENDANT'S CONDUCT DID NOT VIOLATE A FUNDAMENTAL AND SUBSTANTIAL PUBLIC POLICY.

Public Policy Will Not Support Wrongful Discharge Action If Counterbalanced by Other Public Policy. For purposes of an action for wrongful discharge in violation of public policy, a public policy is not sufficiently fundamental and substantial if it is counterbalanced by another established public policy (*Silo v. CHW Med. Found. (2002) 27 Cal. 4th 1097, 1108-1109*).

[2] Comments

[a] Use of Form

This form may be used to oppose a contention that a plaintiff's termination was in violation of fundamental public policy, based on the existence of a competing public policy. To support a tortious discharge claim, the public policy relied on by the plaintiff must be fundamental and substantial [*Stevenson v. Superior Court (1997) 16 Cal. 4th 880, 66 Cal. Rptr. 2d 888, 889-890, 941 P.2d 1157* ; *see § 100.41*]. In an appropriate case, this form may be used in opposition to the points and authorities *set forth in § 100.41*.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the public policy is not fundamental and substantial, for example, in a demurrer or summary judgment motion. The points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should identify the specific public policy relied on by the plaintiff, as wellas the counterbalancing public policy. Counsel should cite the constitutional or statutory basis for each policy and demonstrate how the facts of the case bring the defendant's conduct within the scope of the counterbalancing policy.

[c] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 60, Liability for Wrongful Termination and Discipline, § 60.04* (Matthew Bender).

[3] Discussion of Authorities

[a] Public Policy Will Not Support Wrongful Discharge Action If Counterbalanced by Other Public Policy

In ***Silo v. CHW Med. Found.*** *(2002) 27 Cal. 4th 1097* , the plaintiff had been employed by a religious hospital. After being discharged for discussing his contrary religious beliefs on the job, the plaintiff sued the hospital. The complaint alleged, among other things, a cause of action for wrongful discharge in violation of public policy. The court of appeal affirmed a judgment in favor of the plaintiff on this cause of action, finding that *Article I, § 8, of the California Constitution* established a fundamental public policy against religious discrimination in employment (*27 Cal. 4th 1097, 1100-1103)* .

The Supreme Court reversed, holding that the public policy against religious discrimination in employment must be qualified by another public policy--that of permitting religious employers considerable discretion to choose employees who will not interfere with their religious mission or message (*see U.S. Const., Amend. I*; *Cal. Const., art. I, § 4*). Construing the two policies together, along with FEHA's formerly unqualified general exemption for religious employers (*see Gov. Code § 12926(d)*; *now see Gov. Code § 12926.2(c)* [effective January 2000, FEHA exemption for religious employers generally does not apply to persons employed to perform nonreligious duties at health-care facilities that are not restricted to adherents of religion that established employer]), the Court stated that it could not find a fundamental and substantial public policy prohibiting a religious employer from terminating an employee because of the employee's objectionable religious speech in the workplace (*27 Cal. 4th 1097, 1108-1109)* .

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10-100 California Points & Authorities § 100.58

AUTHOR: Carolyn Rashby

§ 100.58 Opposing Contention That Tort Action Exists Due to Public Policy Violation--No Fundamental Public Policy Against Discharge for Exercise of Constitutional or Statutory Right

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF'S CAUSE OF ACTION FOR WRONGFUL DISCHARGE CANNOT BE MAINTAINED BECAUSE THE DEFENDANT'S CONDUCT DID NOT VIOLATE A FUNDAMENTAL AND SUBSTANTIAL PUBLIC POLICY.

Discharge of Employee for Exercising Constitutional or Statutory Right Is Not Actionable Unless Discharge Violates Clear Public Policy. The termination of an employee for exercising a constitutional or statutory right does not violate public policy unless the termination undermines a clearly mandated policy embodied in the provision from which that right emanates. For example, an employer may terminate an at-will employee for refusing to drop a lawsuit against the employer's customer, even though access to courts is guaranteed by the federal and state Constitutions, because there is no clearly mandated policy against such a termination (*Jersey v. John Muir Med. Ctr. (2002) 97 Cal. App. 4th 814, 820-829, 118 Cal. Rptr. 2d 807*).

[2] Comments

[a] Use of Form

This form may be used to oppose a contention that a plaintiff's termination was in violation of fundamental public policy. To support a tortious discharge claim, the public policy relied on by the plaintiff must be fundamental and substantial [*Stevenson v. Superior Court (1997) 16 Cal. 4th 880, 66 Cal. Rptr. 2d 888, 889-890, 941 P.2d 1157* ; *see § 100.41*]. In an appropriate case, this form may be used in opposition to the points and authorities *set forth in §§ 100.41, 100.44.*

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the public policy is not fundamental and substantial, for example, in a demurrer or summary judgment motion. The points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should describe the plaintiff's conduct that allegedly resulted in the discharge, identify the constitutional or statutory source of the right the plaintiff allegedly exercised, and demonstrate that the source of the right does not embody a clearly mandated public policy protecting the plaintiff against discharge.

[c] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 60, Liability for Wrongful Termination and Discipline, § 60.04* (Matthew Bender).

[3] Discussion of Authorities

[a] Discharge of Employee for Exercising Constitutional or Statutory Right Is Not Actionable Unless Discharge Violates Clear Public Policy

In ***Jersey v. John Muir Med. Ctr.*** *(2002) 97 Cal. App. 4th 814, 118 Cal. Rptr. 2d 807* , the plaintiff, while employed by the defendant hospital, was attacked by a patient of the hospital. The plaintiff sued the patient, alleging assault, battery, and sexual battery. Citing the patient's condition as a head-trauma victim who might not have been responsible for his conduct at the relevant time, and the hospital's mission to serve its clients with compassion, the hospital demanded that the plaintiff dismiss her suit against the patient. When the plaintiff refused, she was discharged. The plaintiff then sued the hospital for, among other things, wrongful termination in violation of public policy. The plaintiff contended that her discharge violated her constitutional right of access to the courts. The trial court disagreed, holding that although access to courts is a right owed to the public by the government, there is no general public policy that bars private employers from reacting adversely to lawsuits filed by their employees (*97 Cal. App. 4th 814, 818-819)* .

The court of appeal agreed. The court noted that while discharging an employee for exercising a right or privilege may in some instances contravene a fundamental public policy, not every such discharge necessarily satisfies the criteria for a wrongful termination action. The court acknowledged that access to the courts is indeed a right guaranteed to all persons by the federal and state Constitutions; it is regarded as arising from the *First Amendment* right to petition the government for redress of grievances. Nonetheless, in determining whether discharging an employee for exercising a right violates a fundamental public policy, the focus is not simply on the importance of the right that was exercised. The issue is whether permitting an employer to discharge an employee for exercising that right would undermine a "clearly mandated public policy" embodied in the provision from which that right emanates. Thus, it must be clear from the provision itself or from some other legislative or regulatory enactment that employers are not free to disregard or limit that right. After reviewing several statutory provisions that clearly limited an employer's right to discharge an employee for exercising particular rights (*see, e.g., Lab. Code § 98.6* [no employer may discharge employee for filing claim with Labor Commissioner]), the court found no such provision relating to the exercise of the right of access to courts. The court also noted that an agreement between plaintiff and defendant in which the plaintiff agreed that she would not sue patients for their behavior while in the hospital would not be unenforceable as against public policy. The court reasoned that because the plaintiff could expressly waive the right to bring such an action, it followed that there is no strong public policy preventing her employer from discharging her for commencing litigation, despite the absence of an express agreement not to do so (*97 Cal. App. 4th 814, 820-829)* .

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10-100 California Points & Authorities § 100.59

AUTHOR: Carolyn Rashby

§ 100.59 Opposing Contention That Tort Action Exists Due to Public Policy Violation--Failure to Exhaust Internal Grievance Procedure

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF'S CAUSE OF ACTION FOR WRONGFUL DISCHARGE CANNOT BE MAINTAINED BECAUSE THE PLAINTIFF HAS FAILED TO EXHAUST THE REMEDIES AVAILABLE THROUGH THE DEFENDANT'S INTERNAL GRIEVANCE PROCEDURE.

Exhaustion of Internal Grievance Procedure Is Prerequisite to Tort Action. If an employer provides an internal grievance procedure, an employee must exhaust that remedy before pursuing a tort action for wrongful discharge in violation of public policy (*Palmer v. Regents of Univ. of Cal. (2003) 107 Cal. App. 4th 899, 903-906, 132 Cal. Rptr. 2d 567*).

[2] Comments

[a] Use of Form

This form may be used to oppose a contention that the plaintiff has a cause of action for wrongful termination in violationof public policy, based on the plaintiff's failure to exhaust internal grievance procedures established by the defendant. In an appropriate case, this form may be used in opposition to the points and authorities *set forth in § 100.43*.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should establish that the defendant has an established internal grievance procedure that would encompass the claim asserted by the plaintiff.

[c] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 60, Liability for Wrongful Termination and Discipline, § 60.04,* and *Ch. 62, Avoiding Wrongful Termination and Discipline Claims, § 62.03* (Matthew Bender).

[3] Discussion of Authorities

[a] Exhaustion of Internal Grievance Procedure Is Prerequisite to Tort Action

In ***Palmer v. Regents of Univ. of Cal.*** *(2003) 107 Cal. App. 4th 899, 132 Cal. Rptr. 2d 567* , the plaintiff was a University of California employee who sued the regents of the university for wrongful termination in violation of public policy, claiming that she had been the victim of retaliation for reporting improper activities. The trial court granted the defendants' motion for summary judgment based on the plaintiff's failure to exhaust the University of California's internal grievance procedures expressly created to protect employees like the plaintiff who claim to be victims of retaliation.

The court of appeal affirmed. The court acknowledged that when a statute (such as the Fair Employment and Housing Act, *Gov. Code § 12900 et seq.*) provides an administrative process for the resolution of grievances, exhaustion of those administrative remedies is a precondition to bringing a civil suit on a statutory cause of action, but not for seeking judicial relief on a common-law tort claim for wrongful termination in violation of public policy. However, if an employer establishes an internal grievance mechanism, a failure to exhaust those internal remedies precludes a subsequent private civil action (*107 Cal. App. 4th 899, 903-906)* .

The court of appeal explained that exhaustion of internal grievance procedures is required not because of contractual obligation but because of compelling policy considerations. If an employer is given the opportunity quickly to determine through the operation of its internal procedures that it has committed error, it may be able to minimize, and sometimes eliminate, any monetary injury to the employee by immediately reversing its initial decision; an employee should not be permitted to increase damages by forgoing available internal remedies. Moreover, an exhaustion requirement reflects the courts' recognition of the "expertise" of the employer's quasi-judicial tribunal, permitting it to adjudicate the merits of the plaintiff's claim in the first instance (*107 Cal. App. 4th 899, 905)* .

[4] Additional Authorities

[a] Exhaustion of Internal Grievance Procedure Is Prerequisite to Tort Action

In *McDonald v. Antelope Valley Cmty. Coll. Dist. (2008) 45 Cal. 4th 88, 84 Cal. Rptr. 3d 734, 194 P.3d 1026* , the California Supreme Court held that the one-year statute of limitations for actions brought under the Fair Employment and Housing Act (FEHA) (*Gov. Code § 12960(d)*) is subject to equitable tolling while the employee voluntarily pursues the employer's internal administrative remedy, even though the internal remedy is optional and need not be exhausted before filing a FEHA action, and even if the employee voluntarily terminates the internal proceeding before an administrative decision is rendered (*45 Cal. 4th 88, 105-114)* . However, the Court cautioned that if the employee elects to pursue the employer's internal administrative process to a decision that is of a sufficiently judicial character to support collateral estoppel, the employee must pursue that process to completion, including exhausting any available judicial avenues for reversal of adverse findings. A failure to do so will result in any quasi-judicial administrative findings having binding, preclusive effect in later judicial proceedings (*45 Cal. 4th 88, 113)* .

In *Schifando v. City of Los Angeles (2003) 31 Cal. 4th 1074, 6 Cal. Rptr. 3d 457, 79 P.3d 569* , the California Supreme Court considered whether exhaustion of an employer's internal grievance procedures is a prerequisite for a civil action asserting a claim under the Fair Employment and Housing Act (FEHA). The plaintiff in this case was a city employee who alleged employment discrimination based on physical disability under FEHA (*see Gov. Code §§*

12926(k), 12940(a)). Before filing suit, the plaintiff had complied with the administrative procedures prescribed by FEHA, by filing a complaint with the Department of Fair Employment and Housing (DFEH) (*see Gov. Code § 12960*). After investigating the complaint, the DFEH issued the plaintiff a right-to-sue letter (*see Gov. Code § 12965(b)*), and the plaintiff filed suit. On appeal, the city argued that the plaintiff's suit should be dismissed because he had failed to pursue administrative remedies provided under the city charter. Those remedies included the filing of a demand for reinstatement, which would have given the local board of civil service commissioners the opportunity to consider the propriety of the plaintiff's discharge.

The Supreme Court acknowledged that its precedents establish that employers' internal grievance procedures are subject to an exhaustion requirement (*see, e.g., Westlake Cmty. Hosp. v. Superior Court (1976) 17 Cal. 3d 465, 476, 131 Cal. Rptr. 90, 551 P.2d 410*). However, because those precedents did not involve statutory claims for which the Legislature had specifically mandated its own administrative review process, as in FEHA, the Court found this distinction to be "compelling." Accordingly, the Supreme Court held that exhaustion of an employer's internal procedures is not a prerequisite for a civil action asserting a claim under FEHA or another statutory scheme that contains its own exhaustion prerequisite. Thus, an employee who has exhausted FEHA administrative process and obtained a right-to-sue letter from the DFEH need not also exhaust the employer's internal administrative procedures prior to filing lawsuit alleging an FEHA claim (*31 Cal. 4th 1074, 1084-1086)* .

The Supreme Court recognized that procedural issues might arise if an employee chooses to pursue both statutory and internal administrativeremedies, but the Court left the resolution of those issues for the future (*31 Cal. 4th 1074, 1087-1089)* . Also, the Court expressly left open the question whether an employee would be required to satisfy internal administrative remedies before suing on a claim based on a statute that does not provide its own administrative procedures (*31 Cal. 4th 1074, 1089)* .

In *Williams v. Housing Auth. (2004) 121 Cal. App. 4th 708, 17 Cal. Rptr. 3d 374* , the court of appeal addressed a question that was not answered by *Schifando v. City of Los Angeles (2003) 31 Cal. 4th 1074, 6 Cal. Rptr. 3d 457, 79 P.3d 569* [discussed *above*]: whether a public employee who claims employment-related discrimination, and asserts both Fair Employment and Housing Act (FEHA) claims and nonstatutory claims for wrongful termination in violation of public policy must exhaust the internal administrative remedy provided by the employer with respect to those nonstatutory claims before filing a civil action. The court of appeal held that *Schifando*'s exemption from the need to exhaust administrative remedies also applies to FEHA-related nonstatutory claims when the resolution of those claims would have a preclusive impact on FEHA claim (*121 Cal. App. 4th 708, 727-731)* . The court of appeal reasoned that as in *Schifando*, the policy reasons for enforcing an exhaustion requirement, including judicial economy, agency expertise, and potential for swift resolution of grievances, are not served by requiring a public employee to pursue FEHA-related nonstatutory claims in a separate forum that might result in inconsistent rulings, or worse, preclude the employee from pursuing a FEHA claim in the forum of his or her choice (*121 Cal. App. 4th 708, 728-729)* . The court emphasized that in determining whether a nonstatutory claim falls within the exemption from the internal-exhaustion requirement, the primary focus is not on whether the claim is based on the same set of facts as FEHA claim, although that circumstance might well bear on the issue, but on whether the resolution of the nonstatutory claim will have a preclusive impact on FEHA claim (*121 Cal. App. 4th 708, 729-730)* .

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 100 EMPLOYER AND EMPLOYEE: WRONGFUL TERMINATION AND DISCIPLINE
PART II. FORMS

10-100 California Points & Authorities § 100.59A

AUTHOR: Carolyn Rashby

§ 100.59A Opposing Contention That Tort Action Exists Due to Public Policy Violation--Employer Is Public Entity

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF'S CAUSE OF ACTION FOR WRONGFUL DISCHARGE CANNOT BE MAINTAINED BECAUSE THE DEFENDANT EMPLOYER IS A PUBLIC ENTITY, AND THE OTHER DEFENDANTS DID NOT HAVE AN EMPLOYMENT RELATIONSHIP WITH THE PLAINTIFF.

Action for Wrongful Discharge in Violation of Public Policy Is Unavailable Against Public Entity. Public entities are subject to liability only as provided by statute (*Gov. Code § 815(a)*). Therefore, the common law cause of action for wrongful discharge in violation of public policy is not available against a public entity (*Miklosy v. Regents of Univ. of Cal. (2008) 44 Cal. 4th 876, 899-900, 80 Cal. Rptr. 3d 690, 188 P.3d 629*). Further, because the tort of wrongful discharge in violation of public policy can be committed only by an employer, any defendant who was not the plaintiff's employer is not liable for that tort. Moreover, a public entity is liable for the conduct of its employee within the scope of employment only if that conduct would otherwise subject the employee to liability (*Gov. Code § 815.2(a)*). Therefore, the conduct of the entity's employees--who were not themselves employers of the plaintiff--cannot serve as a basis for imposing liability on the entity for wrongful discharge in violation of public policy (*Miklosy v. Regents of Univ. of Cal. (2008) 44 Cal. 4th 876, 901, 80 Cal. Rptr. 3d 690, 188 P.3d 629* ; *Lloyd v. County of Los Angeles (2009) 172 Cal. App. 4th 320, 328-330, 90 Cal. Rptr. 3d 872*).

[2] Comments

[a] Use of Form

This form may be used to oppose a contention that the plaintiff has a cause of action for wrongful discharge in violation of public policy, based on the following: (1) the defendant employer is a public entity and therefore is not liable for torts

except as provided by statute; (2) the entity's liability for conduct of its agents extends only to conduct that would subject the agents themselves to liability; and (3) the entity's agents cannot be subjected to tort liability for wrongful discharge in violation of public policy, because they did not themselves have an employer-employee relationship with the plaintiff [*see Miklosy v. Regents of Univ. of Cal. (2008)44 Cal. 4th 876, 899-901, 80 Cal. Rptr. 3d 690, 188 P.3d 629*].

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show that the defendant employer is a public entity within the scope of the Government Claims Act [*Gov. Code § 810 et seq.*], and that other defendants did not have an employment relationship with the plaintiff.

[3] Discussion of Authorities

[a] Action for Wrongful Discharge in Violation of Public Policy Is Unavailable Against Public Entity

In ***Miklosy v. Regents of Univ. of Cal.*** *(2008) 44 Cal. 4th 876, 80 Cal. Rptr. 3d 690, 188 P.3d 629* , the plaintiffs were former employees of the University of California who sued the university and their former supervisors. The plaintiffs asserted, among other claims, that their employment had been wrongfully terminated in violation of public policy. The plaintiffs based their claims on the public policy reflected in the Whistleblower Act, which provides that state employees should be free to report waste, fraud, abuse of authority, violation of law, or threat to public health without fear of retribution [*Gov. Code § 8547.1*]. The plaintiffs also relied on *Lab. Code § 6310*, which prohibits the firing of an employee who complains to a governmental agency having responsibility for regulating safety in the relevant industry.

The California Supreme Court affirmed the dismissal of the plaintiffs' claim, on the grounds that a common law claim of wrongful discharge in violation of public policy is not available against a public entity.

The Court started its analysis of this issue with the Government Claims Act [*Gov. Code § 810 et seq.*], which provides that except as otherwise provided by statute, a public entity is not liable for any injury, whether the injury arises out of an act or omission of the public entity or a public employee or any other person [*Gov. Code § 815(a)*]. Thus, the Act clearly protects public entities from common law tort liability, including claims of wrongful discharge in violation of public policy (*44 Cal. 4th 876, 899)* .

The plaintiffs argued, however, that despite the general abolition of common law liability for public entities, the individual defendants were subject to common law liability, and that their liability should be imputed to the university. This argument was based on Government Claims Act's respondeat superior provision, which states that a public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would otherwise give rise to a cause of action against that employee [*Gov. Code § 815.2(a)*].

The Supreme Court rejected the plaintiffs' respondeat superior argument. The Court emphasized that a common-law action for wrongful discharge can be asserted only against an *employer.* An individual who is not an employer (for example, a supervisorial employee) cannot commit the tort of wrongful discharge in violation of public policy; rather, he or she can only be the agent by which an *employer* commits that tort. Therefore, since the individual defendants in this case could not be personally liable for wrongful discharge in violation of public policy, the Government Claims Act's respondeat superior provision did not impose liability on the university (*44 Cal. 4th 876, 900-901)* .

In ***Lloyd v. County of Los Angeles*** *(2009) 172 Cal. App. 4th 320, 90 Cal. Rptr. 3d 872* , the plaintiff asserted common-law tort claims against his former employer, which was a public entity. The plaintiff's complaint included

claims of retaliation in violation of public policies set forth in the California Constitution (*see Cal. Const., art. I, § 1*) and in statutory provisions prohibiting retaliation for whistleblower activity (*see Lab. Code §§ 98.6, 1102.5, 6399.7*; *Gov. Code § 8547*). The court of appeal affirmed a summary judgment in favor of the employer, holding that under *Government Code Section 815*, the defendant had statutory immunity against such common-law tort claims (*172 Cal. App. 4th 320, 328-329)* . The court of appeal went on to explain that although a public entity that is immune from direct liability could theoretically be held liable under the doctrine of respondeat superior for the conduct of its employees, such liability could not be imposed in this case. Citing *Miklosy v. Regents of Univ. of Cal. (2008) 44 Cal. 4th 876, 80 Cal. Rptr. 3d 690, 188 P.3d 629* , discussed above, the court of appeal explained that a common-law action for wrongful discharge can be asserted only against an employer, not against the supervisor through whom the employer commits the tort. Therefore, the doctrine of respondeat superior had no application to the plaintiff's common-law claims of wrongful retaliation in this case (*172 Cal. App. 4th 320, 330)* .

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10-100 California Points & Authorities § 100.60

AUTHOR: Carolyn Rashby

§ 100.60 Opposing Contention That Plaintiff Was Discharged in Retaliation for "Whistleblowing"--Discharge Occurred for Legitimate, Independent Reasons

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

EVEN IF PLAINTIFF'S _____ [*specify plaintiff's activity protected under Lab. Code § 1102.5, e.g.,* REFUSAL TO PARTICIPATE IN ILLEGAL ACTIVITY] WAS A CONTRIBUTING FACTOR IN THE DISCHARGE OF PLAINTIFF, DEFENDANT IS NOT LIABLE IF CLEAR AND CONVINCING EVIDENCE SHOWS THAT THE DISCHARGE WOULD HAVE OCCURRED FOR LEGITIMATE, INDEPENDENT REASONS.

Employer Not Liable for Retaliatory Discharge if Employee Would Have Been Terminated for Legitimate, Independent Reasons. In an action for wrongful discharge based on alleged retaliation for an employee's "whistleblowing" activity (*see Lab. Code § 1102.5* ["whistleblower" statute, prohibiting retaliation against employees who report or refuse to participate in illegal activity]), the employer may defend by claiming that the employee would have been discharged anyway. If it has been demonstrated by a preponderance of the evidence that a protected activity was a contributing factor in the alleged retaliatory discharge, the employer has the burden of proof to demonstrate by clear and convincing evidence that the alleged discharge would have occurred for legitimate, independent reasons even if the employee had not engaged in protected activities (*see Lab. Code § 1102.6*).

[2] Comments

[a] Use of Form

This form may be used to oppose a contention that the employee was discharged because he or she had refused to participate in illegal activity, or had reported illegal activity to a government or law-enforcement agency ("whistleblowing"). In an appropriate case, this form may be used in opposition to the points and authorities *set forth in*

§§ 100.42, 100.46 -100.48.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should establish that the plaintiff would have been discharged for legitimate, independent reasons even if the plaintiff had not engaged in activities protected by the whistleblower statute (*see Lab. Code § 1102.5*). If the plaintiff shows by a preponderance of the evidence that a protected activity was a contributing factor in the alleged retaliatory discharge, the defendant will have the burden of proving by clear and convincing evidence that the alleged discharge would have occurred for legitimate, independent reasons even if the employee had not engaged in protected activities (*Lab. Code § 1102.6*).

[c] Related Pleading and Practice Chapters

For related legal background, research guides, and forms for defending against claims of wrongful termination in violation of public policy, see California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline* (Matthew Bender).

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10-100 California Points & Authorities § 100.61

AUTHOR: Carolyn Rashby

§ 100.61 Opposing Contention That Plaintiff Was Discharged in Retaliation for "Whistleblowing"--Failure to Exhaust Internal Grievance Procedure

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF'S CAUSE OF ACTION FOR RETALIATORY DISCHARGE CANNOT BE MAINTAINED BECAUSE THE PLAINTIFF HAS FAILED TO EXHAUST THE REMEDIES AVAILABLE THROUGH THE DEFENDANT'S INTERNAL GRIEVANCE PROCEDURE.

Exhaustion of Internal Grievance Procedure Is Prerequisite to Retaliatory Discharge Action. If an employer provides an internal grievance procedure, an employee must exhaust that remedy before pursuing a statutory action for retaliatory discharge (*Campbell v. Regents of Univ. of Cal. (2005) 35 Cal. 4th 311, 329-331, 25 Cal. Rptr. 3d 320, 106 P.3d 976*).

[2] Comments

[a] Use of Form

This form may be used to oppose a contention that the employee was discharged because he or she had refused to participate in illegal activity, or had reported illegal activity to a government or law-enforcement agency ("whistleblowing") [*see Lab. Code § 1102.5*; *Gov. Code § 12653(c)*]. In an appropriate case, this form may be used in opposition to the points and authorities *set forth in §§ 100.42, 100.46 -100.48*.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should establish that the defendant has an established internal grievance procedure that would

encompass the claim asserted by the plaintiff.

[c] Related California Employment Law References

For further discussion of retaliatory discharge actions and exhaustion of internal grievance procedures, see Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline* (Matthew Bender).

[3] Discussion of Authorities

[a] Exhaustion of Internal Grievance Procedure Is Prerequisite to Retaliatory Discharge Action

In ***Campbell v. Regents of Univ. of Cal.*** *(2005) 35 Cal. 4th 311, 25 Cal. Rptr. 3d 320, 106 P.3d 976* , a University of California employee filed suit for retaliatory termination under two whistleblower provisions, *Gov. Code § 12653* and *Lab. Code § 1102.5*. Section 12653, which is part of the False Claims Act, provides that no employer may discharge an employee because that employee has acted lawfully in disclosing false claims to law enforcement agencies [*Gov. Code § 12653(b)*]. Section 1102.5 stipulates that an employer may not retaliate against an employee for refusing to participate in any activity that would result in a violation of state or federal law, or for providing information to a government or law enforcement agency (including the employer) if the employee reasonably believes the information discloses a violation of state or federal law [*Lab. Code § 1102.5(b)-(e)*].

Construing both statutory provisions as requiring the exhaustion of administrative remedies before a lawsuit is filed, the Supreme Court held that the plaintiff was required to exhaust the University's internal grievance procedure before filing suit. The Court emphasized that the exhaustion of administrative remedies generally is a jurisdictional prerequisite to resort to the courts. The exhaustion requirement has important benefits: (1) it serves the salutary function of mitigating damages; (2) it recognizes the quasi-judicial tribunal's expertise; and (3) it promotes judicial economy by unearthing the relevant evidence and by providing a record should there be a review of the case (*35 Cal. 4th 311, 327-328)* . The Court rejected an argument that the whistleblower statutes' silence regarding administrative remedies should be construed as an indication of legislative intent to abrogate the exhaustion requirement for retaliatory-termination suits. Rather, the Court found that the Legislature's silence makes the common-law exhaustion rule applicable and requires employees to exhaust their internal administrative remedies prior to filing a lawsuit (*35 Cal. 4th 311)* .

The Supreme Court also rejected an argument that exhaustion should not be required in this case because the internal grievance procedure provided by the University could not provide the full range of remedies available in a lawsuit. The Court explained that even if an eventual lawsuit is inevitable because the employee seeks a remedy that is not available inthe administrative (e.g., damages) the "policy considerations which support the imposition of a general exhaustion requirement remain compelling," since the administrative proceeding will still promote judicial efficiency by unearthing the relevant evidence and by providing a record that the court may review (*35 Cal. 4th 311, 328-329)* .

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10-100 California Points & Authorities § 100.61A

AUTHOR: Carolyn Rashby

§ 100.61A Opposing Contention That Plaintiff Was Discharged for "Whistleblowing"--Plaintiff's Conduct Did Not Amount to Protected "Whistleblowing"

[1] FORM

[*The following may be included in a memorandum supporting or opposing a motion, or in a trial or appellate brief.*]

PLAINTIFF'S CAUSE OF ACTION FOR RETALIATORY DISCHARGE CANNOT BE MAINTAINED BECAUSE THE ALLEGED CONDUCT OF PLAINTIFF'S DID NOT AMOUNT TO PROTECTED "WHISTLEBLOWING" ACTIVITY.

Plaintiff Must Have Engaged in Protected Activity. To establish a prima facie case of retaliation, a plaintiff must show (1) the plaintiff engaged in a protected activity, (2) the defendant employer subjected the plaintiff to an adverse employment action, and (3) there is a causal link between the two (*Patten v. Grant Joint Union High Sch. Dist. (2005) 134 Cal. App. 4th 1378, 1384, 37 Cal. Rptr. 3d 113*). Protected activities include "whistleblowing," that is, disclosing to a government or law-enforcement agency (including the employer if it is a governmental agency) information that the employee reasonably believes discloses a violation of law (*see Lab. Code § 1102.5(b)*). However, an employee's disclosure to the employer of an internal personnel matter, such as forwarding a complaint about another employee's behavior that does not involve a legal violation, does not qualify as protected "whistleblowing" (*Carter v. Escondido Union High Sch. Dist. (2007) 148 Cal. App. 4th 922, 933-936, 56 Cal. Rptr. 3d 262* ; *Patten v. Grant Joint Union High Sch. Dist. (2005) 134 Cal. App. 4th 1378, 1384-1386, 37 Cal. Rptr. 3d 113*).

[2] Comments

[a] Use of Form

This form may be used to oppose a contention that the plaintiff suffered a retaliatory discharge, on the ground that the plaintiff's alleged "whistleblowing" does not qualify as a protected activity [*see Lab. Code § 1102.5*; *Patten v. Grant Joint Union High Sch. Dist. (2005) 134 Cal. App. 4th 1378, 1384-1386, 37 Cal. Rptr. 3d 113]* . This form may be

adapted for use in cases of other adverse employment actions alleged to have been taken in retaliation for whistleblowing.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. For example, counsel should explain that the plaintiff's alleged reporting of information involved internal personnel matters rather than legal violations.

[c] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 60, §§ 60.03[2][aa], 60.04[2][e].*

[3] Discussion of Authorities

[a] Plaintiff Must Have Engaged in Protected Activity

The plaintiff in ***Carter v. Escondido Union High Sch. Dist.*** *(2007) 148 Cal. App. 4th 922, 56 Cal. Rptr. 3d 262* , was a schoolteacher who claimed that his employment was wrongfully terminated in violation of public policy because, while employed by another school district, he reported that the football coach had recommended a nutritional supplement to a student. The coach had suggested to the student, who aspired to play football in college, that consuming protein drinks containing creatine would help him gain weight. After the student became ill, the plaintiff informed the athletic director at the school that the student had taken the supplement at the suggestion of the football coach. When the athletic director took no action against the coach, the plaintiff sought other employment. After accepting a position at a school in the defendant school district, the plaintiff learned that his principal there was the wife of the football coach who had been the subject of the plaintiff's report at his previous school. Two years later, when his employment was terminated, the plaintiff filed suit, claiming that his termination was motivated by his reporting of the coach during his previous employment. The plaintiff contended that the termination violated a public policy against teachers recommending weight-gaining substances to students.

After a jury trial resulted in a judgment for the plaintiff, the school district appealed. The court of appeal reversed, holding that because the football coach's conduct violated no law--protein drinks containing creatine were not unlawful under state or federal law--the public policy asserted by the plaintiff did not support his cause of action.

The court of appeal explained that a discharge is actionable as against public policy only if it violates a policy that is (1) delineated in either constitutional or statutory provisions; (2) "public" in the sense that it inures to the benefit of the public, rather than serving merely the interests of the individual; (3) well established at the time of the discharge; and (4) substantial and fundamental. In this case, the court found that the public policy claimed by the plaintiff was not sufficiently fundamental, because it was not "tethered" to a specific constitutionalor statutory provision (*148 Cal. App. 4th 922, 929)* .

The plaintiff argued that *Education Code Section 49423* and its implementing regulations establish a policy against teachers recommending weight-gaining substances to students. The court pointed out, however, that Section 49423 simply authorizes school personnel, under certain conditions, to assist in taking a prescribed medication (*Educ. Code § 49423(a), (b)*). The court opined that since Section 49423 does not prohibit any conduct, it does not establish a fundamental public policy that could support a wrongful-termination claim. Although the regulations implementing Section 49423 define "medication" as including over-the-counter nutritional supplements (*see 5 Cal. Code Reg. § 601(b)*), they too contain no prohibition of any conduct and address solely the administration by school personnel of required medical care. In sum, the court of appeal found that Section 49423 and its implementing regulations did not establish any fundamental and well-established public policy against teachers recommending weight-gaining substances to students (*148 Cal. App. 4th 922, 930-932)* .

The court of appeal also rejected the plaintiff's argument that his termination violated the general whistleblower statute, *Labor Code Section 1102.5*. That statute prohibits termination of an employee "for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation" (*Lab. Code § 1102.5(b)*; *see also Lab. Code § 1102.5(d), (e)*). The court of appeal concluded that the plaintiff's conduct in reporting the football coach was not protected by Section 1102.5. First, as noted above, the information disclosed by the plaintiff did not disclose a violation of a state or federal statute, or a violation or noncompliance with a state or federal rule or regulation. Second, the plaintiff's report was not motivated by his belief that a law had been broken: he had taken no action upon learning that the coach had recommended the protein shakes; rather, the plaintiff testified he made his report only after the student became ill. Third, even if the plaintiff subjectively believed that the coach had violated a statute or regulation, that belief was not reasonable, since protein shakes containing creatine were not unlawful under either state or federal law. Since the plaintiff's report was not protected by the whistleblower statute, the court of appeal concluded that the defendant school district was not prohibited from discharging the plaintiff based on that report (*148 Cal. App. 4th 922, 933-935)* .

The plaintiff in ***Patten v. Grant Joint Union High Sch. Dist.*** *(2005) 134 Cal. App. 4th 1378, 37 Cal. Rptr. 3d 113* , was a school principal who sued her employer, a public school district, under the whistleblower-retaliation statute. That statute prohibits an employer from retaliating against an employee for disclosing information to a government or law-enforcement agency when the employee had reasonable cause to believe that the information disclosed a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation (*Lab. Code § 1102.5(b)*). Specifically, the plaintiff alleged that she had been transferred to a less desirable position in retaliation for four disclosures that she made to her employer, which qualified as a government agency for this purpose (*see Lab. Code § 1102.5(e)*). The first disclosure arose from the district's discovery, in its year-end financial audit, of a surplus of approximately $127,000 in the budget for the Immediate Intervention/Underperforming Schools Program (II/USP) for the plaintiff's school. The district wanted to reassign expenditures already incurred for at least one other educational program, and perhaps others, to nearly $104,000 of this surplus. The reassignment would allow the district to retain that amount of unspent II/USP funds (rather than return the amount to the state) and, the plaintiff maintained, would provide the district with funds to clean up its budget. To effectuate the reassignment of expenditures, the district requested that the plaintiff sign blank "transfer of funds" forms. The plaintiff refused, explaining to the district that she was "fearful of the legality of this action." The district later carried out the reassignment, and the plaintiff eventually met with a state assembly member and a representative of a state senator regarding the matter. She also attended a school-board meeting and provided information about the II/USP funding issue (*134 Cal. App. 4th 1378, 1381-1382)* .

The second disclosure occurred when the plaintiff received complaints from female students that a male physical-education teacher was peering into the girls' locker room. The plaintiff disclosed this information to her district superiors for personnel action (*134 Cal. App. 4th 1378, 1382)* .

The third disclosure involved an off-color remark that a male science teacher had made to a female student. Again, the plaintiff disclosed this information to her superiors for personnel action (*134 Cal. App. 4th 1378, 1382)* .

The fourth and final disclosure occurred after a student was assaulted on the school campus. The plaintiff requested additional staff to keep the campus safe (*134 Cal. App. 4th 1378, 1382)* .

The trial court granted the district's motion for summary judgment, holding that only the disclosure regarding II/USP funding constituted protected whistleblowing. As to that disclosure, however, the court determined that the district had not retaliated against the plaintiff by subjecting her to an adverse employment action, because the complained-of transfer was between essentially equivalent positions (*134 Cal. App. 4th 1378, 1383)* .

The court of appeal began its analysis by stating that, to establish a prima facie case of retaliation under the

whistleblower statute (*Lab. Code § 1102.5(b)*), the plaintiff had to show (1) she engaged in a protected activity, (2) her employer subjected her to an adverse employment action, and (3) there was a causal linkbetween the two (*134 Cal. App. 4th 1378, 1384)* . On the first element--whether the plaintiff had engaged in protected activity--the court of appeal held as a matter of law that the second and third disclosures (relaying complaints about two teachers) did not amount to whistleblowing. Although the disclosures were made to a government agency (the district), the court found that the disclosures indisputably encompassed only the context of internal personnel matters involving a supervisor and her employees, rather than the disclosure of a legal violation. The court found it significant that the plaintiff had admitted she merely forwarded complaints by students of inappropriate conduct of the teachers for personnel action (*134 Cal. App. 4th 1378, 1384-1385)* . The court remarked that "[t]o exalt these exclusively internal personnel disclosures with whistleblower status would create all sorts of mischief. Most damagingly, it would thrust the judiciary into micromanaging employment practices and create a legion of undeserving protected 'whistleblowers' arising from the routine workings and communications of the job site" (*134 Cal. App. 4th 1378, 1385)* .

The court of appeal also found as a matter of law that the fourth disclosure (regarding the need for more staff for safety purposes) did not amount to whistleblowing. Again, the disclosure was made in an exclusively internal administrative context and did not show any belief on the plaintiff's part that she was disclosing a violation of state or federal law in any sort of whistleblowing context (*134 Cal. App. 4th 1378, 1385)* .

The court of appeal thus agreed with the trial court that only the first disclosure (regarding II/USP funding) presented a triable question of whistleblowing activity. The court of appeal explained that the plaintiff's disclosures to the district and to legislative personnel regarding the reassignment of other program expenditures to the II/USP surplus presented a whistleblowing archetype: disclosing the allegedly unauthorized use of public assets. Also, the plaintiff presented a triable issue that she reasonably believed she was disclosing a violation of law: she informed a state Assembly member, his assistant, and a representative of a state Senator; she had refused to sign the blank "transfer of funds" forms that the district requested because "there was no way to ensure the [reassigned] expenditures were legitimate based on II/USP guidelines"; and she "was fearful of the legality of this action" (*134 Cal. App. 4th 1378, 1385-1386)* .

The court of appeal went on to find held that there was a triable issue of fact on the second element of the plaintiff's prima facie case, whether she had suffered an adverse employment action when the district transferred her to another school. Generally, an adverse employment action is one that materially affects the terms and conditions of employment. The California Supreme Court has applied the "materiality" test in the context of a retaliation action under the Fair Employment and Housing Act (*Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal. 4th 1028, 1050-1061, 32 Cal. Rptr. 3d 436, 116 P.3d 1123* , discussed in *§ 100.42[3][f]*; *see Gov. Code § 12940(h)*), and in this case the court of appeal held that the same test applies in a retaliation action under the whistleblower statute (*134 Cal. App. 4th 1378, 1386-1388* ; *see Lab. Code § 1102.5(b)*). Applying that test in this case, the court of appeal found that, even though the wages, benefits, and duties of the two positions (as set forth in the job descriptions) were the same, the transfer could reasonably be viewed as an adverse employment action. The plaintiff's new school was a smaller, higher-achieving school, and it did not present the same challenges for a principal as did the plaintiff's former school. The court of appeal remarked that the new school did "not present the kinds of administrative challenges an up-and-coming principal wanting to make her mark would relish." Also, the year-round schedule of the new school conflicted with the plaintiff's family schedule and her own educational plans. Considering the plaintiff's allegations collectively, the court of appeals concluded that the plaintiff had presented a triable issue on the question of adverse employment action (*134 Cal. App. 4th 1378, 1388-1390)* .

Finally, the court of appeal found that the chronology of events raised a triable issue concerning the existence of a causal link between the plaintiff's II/USP disclosures and her transfer to the new school. Accordingly, the court of appeal reversed the grant of summary judgment and remanded the case for further proceedings on the plaintiff's retaliation claim (*134 Cal. App. 4th 1378, 1390-1391)* .

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10-100 California Points & Authorities § 100.61B

AUTHOR: Carolyn Rashby

§ 100.61B Opposing Contention That Tort Action Exists Due to Public Policy Violation--Physician Not Terminated for Advocating for Medically Appropriate Health Care

[1] FORM

[*The following may be included in a memorandum supporting or opposing a motion, or in a trial or appellate brief.*]

PLAINTIFF'S CAUSE OF ACTION FOR WRONGFUL DISCHARGE CANNOT BE MAINTAINED BECAUSE THE PLAINTIFF WAS NOT TERMINATED PRINCIPALLY FOR ADVOCATING FOR MEDICALLY APPROPRIATE HEALTH CARE.

Physician May Be Terminated for Failure to Comply With Employer's Directives That Are Medically Appropriate. Although public policy prohibits the termination of a physician for advocating for medically appropriate health care (*see Bus. & Prof. Code § 2056(c)*), an employer may terminate a physician for refusing to comply with the employer's directives that are medically appropriate (*Sarka v. Regents of Univ. of Cal. (2006) 146 Cal. App. 4th 261, 271-275, 52 Cal. Rptr. 3d 810*).

[2] Comments

[a] Use of Form

This form may be used to oppose a contention that a physician's employment was terminated because of the physician's advocacy of medically appropriate health care [*see Bus. & Prof. Code § 2056(c)*]. Specifically, this form supports a contention that the termination was based on the physician's refusal to comply with the employer's medically appropriate directives.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should (1) cite instances of the physician's refusal or failure to comply with the employer's directives, and (2) explain how those directives comported with medically appropriate health care.

[b] Opposing Memorandum

In an appropriate case, the memorandum *set out in § 100.42* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Physician May Be Terminated for Failure to Comply With Employer's Directives That Are Medically Appropriate

Sarka v. Regents of Univ. of Cal. *(2006) 146 Cal. App. 4th 261, 52 Cal. Rptr. 3d 810* , involved a physician who had been employed as a primary-care physician in the student health service at the University of California at Los Angeles. After the university terminated his employment, the physician filed an administrative grievance, contending that he had been terminated in violation of *Business and Professions Code Section 2056(c)*, which declares it a violation of public policy for employers to penalize physicians "principally for advocating for medically appropriate health care." The termination was upheld by an administrative hearing officer. The physician then sought a writ of administrative mandate to overturn the termination decision. The trial court denied the petition, and the physician appealed.

The court of appeal affirmed the trial court's denial of the writ. The court noted that Section 2056 was intended to provide an express statutory public policy in favor of physicians' advocacy for appropriate health care of their patients and against employment termination or penalization of physicians for such advocacy, and to state that a physician who has an employment or other contractual relationship with a person should not be terminated or otherwise penalized principally for advocating for appropriate health care for his or her patient (*see Khajavi v. Feather River Anesthesia Med. Group (2000) 84 Cal. App. 4th 32, 45-51, 100 Cal. Rptr. 2d 627* , discussed in *§ 100.42[3][f]*). In this case, however, the court of appeal found that there was substantial evidence supporting the trial court's conclusion that the physician had not been terminated principally for advocating for medically appropriate health care (*146 Cal. App. 4th 261, 271-272)* .

Specifically, the university had introduced evidence that the physician had been terminated for refusing to modify his practice in response to his supervisor's requests to be less wasteful of health-service resources by relying more on his clinical judgment and utilizing testing and follow-up procedures more judiciously. The university substantiated its position with medical literature and references to generally accepted standards of practice in the community of primary health care physicians at the student health service, at student health centers at the other University of California campuses, and at "benchmark universities." Thus, the university's evidence established that its policies were medically appropriate for student health care at large university campuses (*146 Cal. App. 4th 261, 272-274)* .

The court of appeal found it significant that the physician did not counter the university's showing with any evidence that the university's requirements were not medically appropriate. Therefore, even if the physician's practice was medically appropriate, his failure to comply with the university's medically appropriate constituted insubordination. Accordingly, the physician's termination was not *principally* based on his advocating for medically appropriate health care, and the termination did not violate the public policy embodied in *Business and Professions Code Section 2056* (*146 Cal. App. 4th 261, 274-275)* .

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10-100 California Points & Authorities § 100.62

AUTHOR: Carolyn Rashby

§ 100.62 Supporting Contention That Tort Cause of Action for Fraud Exists--Fraud Independent of Termination

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF HAS ALLEGED SUFFICIENT FACTS TO ESTABLISH A TORT CAUSE OF ACTION FOR FRAUD AND DECEIT ON THE GROUND THAT THE MISREPRESENTATION(S) MADE BY DEFENDANT WAS/WERE AIMED NOT AT EFFECTING THE TERMINATION OF PLAINTIFF'S EMPLOYMENT, BUT AT INDUCING PLAINTIFF TO ALTER DETRIMENTALLY HIS/HER POSITION IN RESPECT TO_____ [*specify*].

A. Fraud Cause of Action Not Precluded in Wrongful Discharge Action If Misrepresentation Was for Purpose Separate From Effecting Termination of Employment. A cause of action for fraud as a basis for recovery of tort damages, is not precluded in a wrongful discharge action if the employer's misrepresentation is not aimed at effecting a termination of plaintiff's employment, but rather at causing plaintiff to alter his or her position in some other respect, thereby causing plaintiff to suffer detriment separate from the harm caused by loss of plaintiff's employment (*Lazar v. Superior Court (1996) 12 Cal. 4th 631, 646-649, 49 Cal. Rptr. 2d 377, 909 P.2d 981*).

[*Optional*] **B. Action for Promissory Fraud.** A tort cause of action for promissory fraud is available to a plaintiff, in addition to a cause of action for wrongful discharge, if the employer made misrepresentations which induced plaintiff to enter into the employment contract, and plaintiff justifiably relied on the misrepresentations to change his or her position with resulting detriment (*Lazar v. Superior Court (1996) 12 Cal. 4th 631, 646-649, 49 Cal. Rptr. 2d 377, 909 P.2d 981*).

[*Optional*] **C. Action for Fraud in Inducing Employment Not Barred by Workers' Compensation Exclusivity Rule.** An action for fraud in inducing the plaintiff to accept employment is not barred by the workers' compensation exclusivity rule, if the defendant employer's misrepresentations were not a normal part of the employment relationship

or a risk reasonably encompassed within the compensation bargain (*Lenk v. Total-Western, Inc. (2001) 89 Cal. App. 4th 959, 970-973, 108 Cal. Rptr. 2d 34* ; *see Lab. Code § 3602*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a defendant's contention that plaintiff cannot seek tort remedies for fraud in connection with defendant's allegedly wrongful discharge of plaintiff, based on the argument that the fraud was aimed at some purpose other than the termination of the employment and therefore can be a proper basis for a fraud claim [*Lazar v. Superior Court (1996) 12 Cal. 4th 631, 646-649, 49 Cal. Rptr. 2d 377, 909 P.2d 981]* .

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that plaintiff has established a fraud cause of action, based on the argument that the fraud was independent of the termination, for example in opposition to a demurrer or in a motion for summary judgment. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts indicating that each element of the fraud cause of action has been established [*see* *Kerr v. Rose (1990) 216 Cal. App. 3d 1551, 1564-565, 265 Cal. Rptr. 597]* . Counsel also should set forth facts showing that the misrepresentation at issue was not aimed at effecting the termination of plaintiff's employment, but rather at some purpose separate from the termination. For example, counsel could show, if appropriate, that the employer committed fraud in inducing plaintiff to settle an agency charge [*Miller v. Fairchild Industries, Inc. (9th Cir. 1989) 885 F.2d 498, 509-510]* .

[c] Opposing Memoranda

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 100.63*.

[d] Related Memoranda

For detailed points and authorities relating to a tort cause of action for fraud and deceit, including points and authorities relating to the elements of, and defenses to, the cause of action, see Ch. 105, *Fraud and Deceit* .

[e] Related Pleading and Practice Forms

For a general form of demurrer to a complaint based on the failure to state facts sufficient to constitute a cause of action, see *California Forms of Pleading and Practice, Ch. 206, Demurrers and Motions for Judgment on the Pleadings, § 206.122* (Matthew Bender). For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* . For discussion and forms relating to wrongful discharge, see California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts* , Ch. 249, *Employment Law: Termination and Discipline* , and Ch. 250, *Employment Law: Wage and Hour Disputes* .

[3] Discussion of Authorities

[a] Fraud Cause of Action Not Precluded in Wrongful Discharge Action If Misrepresentation Was for Purpose Separate From Effecting Termination of Employment

In ***Lazar v. Superior Court*** *(1996) 12 Cal. 4th 631, 49 Cal. Rptr. 2d 377, 909 P.2d 981* , plaintiff alleged that real party in interest, Rykoff-Sexton, Inc., had recruited him away from his secure and successful position as president of his New York family-owned company, where he earned $120,000 a year. Lazar further alleged that Rykoff, through its vice president and president, induced him to accept its employment based on representations that led him to believe that he would continue to be employed by Rykoff so long as he performed well, that he would be eligible for continued advancement, that he would be part of the Rykoff "family," that the company was strong financially and anticipated solid growth and a stable, profitable future, and that the department in which Lazar worked was a growth division within the company. In accepting the offer, Lazar asked for a written employment contract but alleged that Rykoff refused on the ground that "our word is our bond." Lazar further alleged that Rykoff's offer caused him to uproot his family and move to Los Angeles at significant financial and emotional expense and to forfeit the security and success of his prior employment.

Rykoff performed his job in an exemplary manner. He increased sales in his region, and under his direction, his region achieved its sales budget for the first time. Two years after Lazar quit his old job and relocated with his family to California, Rykoff reorganized, with the resulting elimination of Lazar's job. Rykoff advised Lazar that he would be better off tendering his resignation, but keeping his position for three months longer while he sought other work. However, Rykoff gave Lazar a desk in its warehouse where the noise made it impossible to use a telephone. Lazar had lost touch with the restaurant business in New York and was burdened with house payments he could not afford. Lazar and his family suffered emotional distress due to the situation.

Lazar brought an action against Rykoff, alleging a number of causes of action, including (1) violation of *Lab. Code § 970* (false representations to induce relocation); (2) wrongful termination in violation of public policy; (3) fraud; (4) negligent misrepresentation; (5) breach of contract; (6) promissory estoppel; and (7) intentional and negligent infliction of emotional distress. The trial court sustained Rykoff's demurrer to all causes of action except the Labor Code and breach of contract claims. The court of appeal granted Lazar's petition for writ of mandate and directed the trial court to vacate its order sustaining demurrers to the causes of action for public policy wrongful termination, fraud, negligent misrepresentation, and intentional infliction of emotional distress. The Supreme Court granted review on the issue of whether and under what circumstances a plaintiff may state a cause of action for fraudulent inducement of employment contract. The Supreme Court affirmed the ruling of the court of appeal.

Calling promissory fraud a "subspecies of the action for fraud and deceit," the Court set forth the element of the prima facie case: (1) misrepresentation; (2) knowledge of falsity; (3) intent to defraud; and (4) resulting damage. The Court noted that an action for promissory fraud may lie when a defendant fraudulently induces the plaintiff to enter into a contract. The Court observed that if true, Lazar's allegations established all of the elements of promissory fraud since (1) Rykoff represented that he would be employed by the company so long as he performed his job, that he would receive significant salary increases, and that the company was strong financially; (2) the representations were false, and Rykoff knew that they were false at the time they were made since Rykoff was planning an operational merger likely to eliminate Lazar's job and company policy limited annual increases to less than what was promised him; (3) Lazar justifiably relied on them; and (4) he left the New York employment market, uprooted his family, and purchased a California home to his detriment (*12 Cal. 4th 631, 646-649)* .

[b] Action for Promissory Fraud

Lazar v. Superior Court *(1996) 12 Cal. 4th 631, 49 Cal. Rptr. 2d 377, 909 P.2d 981* , is *discussed under § 100.62[3][a]*.

[c] Action for Fraud in Inducing Employment Not Barred by Workers' Compensation Exclusivity Rule

In ***Lenk v. Total-Western, Inc.*** *(2001) 89 Cal. App. 4th 959, 108 Cal. Rptr. 2d 34* , the plaintiff was discharged after six months of employment. The plaintiff sued the employer for fraud in inducing the plaintiff to leave his former

employer; the relief sought by the plaintiff included damages for emotional distress. After the plaintiff obtained a judgment, the employer appealed, contending that the plaintiff's emotional-distress damages were barred by the workers' compensation exclusivity rule (*see Lab. Code § 3602*). The court of appeal rejected the employer's contention, holding that the exclusivity-of-remedy rule of the workers' compensation applies only if the conditions for workers' compensation exist. Those conditions include a requirement that the injury arise from, or be a normal risk of, the employment relationship (*see Lab. Code § 3600(a)*). In this particular case, the court of appeal found that the conditions of compensation did not exist because the injury was not part of the normal risk of employment. Specifically, the employer's false statements about the company's financial stability, future plans, and the plaintiff's prospects for promotion--all designed to induce the plaintiff to accept employment--were not a normal part of the employment relationship or a risk reasonably encompassed within the compensation bargain. Therefore, the plaintiff's fraud cause of action seeking emotional distress damages for such false statements was not barred by the workers' compensation exclusivity rule (*89 Cal. App. 4th 959, 970-973)* .

[4] Additional Authorities

[a] Fraud Cause of Action Not Precluded in Wrongful Discharge Action if Misreprentation Was for Purpose Separate From Effecting Termination of Employment

Miller v. Fairchild Industries, Inc. (9th Cir. 1989) 885 F.2d 498 , was an action in which plaintiffs alleged that defendant discharged them in retaliation for filing discrimination charges before the Equal Employment Opportunity Commission (EEOC) in violation of statute, and also alleged various state-law causes of action. One cause of action alleged that defendant committed fraud by inducing plaintiffs to settle their complaint with the EEOC and waive their rights to sue for discrimination in exchange for improved training opportunities and other changes in terms of employment, without informing plaintiffs that they were likely to be laid off, as they were shortly after they executed the settlement agreements. The trial court directed a verdict in favor of the defendant on the fraud claim, and plaintiffs appealed. The court of appeals reversed the directed verdict on the fraud claim, holding that the evidence that some representatives of defendant knew that layoffs were likely to occur soon after the agreements were executed and that plaintiffs were likely candidates to be laid off, but that those representatives did not inform plaintiffs of that fact, could support a jury conclusion that the information was intentionally concealed from plaintiffs (*885 F.2d 498, 509)* . Because a reasonable jury could have found for plaintiffs on the fraud claim, directed verdict was improper (*885 F.2d 498, 510)* .

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10-100 California Points & Authorities § 100.63

AUTHOR: Carolyn Rashby

§ 100.63 Opposing Contention That Tort Cause of Action for Fraud Exists--Fraud Not Independent of Termination

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO STATE A TORT CAUSE OF ACTION BASED ON FRAUD AND DECEIT, BECAUSE TORT DAMAGES CANNOT BE RECOVERED BASED ON MISREPRESENTATIONS MADE IN THE COURSE OF THE TERMINATION OF PLAINTIFF'S EMPLOYMENT.

A. Misrepresentation in Course of Termination of Employment Does Not Support Cause of Action in Tort. A cause of action for fraud or deceit, sounding in tort, cannot be based on an employer's misrepresentation made in the course of terminating an employment relationship (*Hunter v. Up-Right, Inc. (1993) 6 Cal. 4th 1174, 1178, 26 Cal. Rptr. 2d 8, 864 P.2d 88* ; *Kerr v. Rose (1990) 216 Cal. App. 3d 1551, 1564-1565, 265 Cal. Rptr. 597*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a contention that plaintiff has established a tort cause of action for fraud and deceit based on allegations that the former employer's misrepresentation during the course of the termination of employment constituted fraud or deceit, on the ground that such a misrepresentation cannot be the basis of recovery in tort. Optional Paragraph B is for use where the plaintiff has failed to establish one or more of the elements of the cause of action for fraud or deceit. In an appropriate case, these points and authorities may be submitted in opposition to the points and authorities *set out in § 100.62*.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that plaintiff cannot maintain a tort cause of action for fraud and deceit because the

fraud was not independent of the termination, for example in a demurrer or in a motion for summary judgment. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts tending to show that the misrepresentation alleged by plaintiff was aimed solely at terminating plaintiff's employment, and did not induce plaintiff to alter his/her position detrimentally in any other respect. Counsel also should argue that plaintiff's damages result only from the termination itself. If appropriate, facts indicating that all elements of the fraud cause of action have not been met should be discussed.

[c] Related Memoranda

For detailed points and authorities relating to a tort cause of action for fraud and deceit, including points and authorities relating to the elements of, and defenses to, the cause of action, see Ch. 105, *Fraud and Deceit* .

[d] Related Pleading and Practice Forms

For a general form of demurrer to a complaint based on the failure to state facts sufficient to constitute a cause of action, see *California Forms of Pleading and Practice, Ch. 206, Demurrers and Motions for Judgment on the Pleadings, § 206.122* (Matthew Bender). For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* . For discussion and forms relating to wrongful discharge, see California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts* , Ch. 249, *Employment Law: Termination and Discipline* , and Ch. 250, *Employment Law: Wage and Hour Disputes* . For discussion and forms relating to actions for fraud and deceit, see California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* .

[3] Discussion of Authorities

[a] Misrepresentation in Course of Termination of Employment Does Not Support Cause of Action in Tort

The facts and procedural background of ***Hunter v. Up-Right, Inc.*** *(1993), 6 Cal. 4th 1174, 26 Cal. Rptr. 2d 8, 864 P.2d 88* , are discussed in *§ 100.62[3][a]*. The Court held that, although a misrepresentation made by an employer to effect a termination probably could not constitute a separately actionable tort, a misrepresentation designed to induce the employee to alter detrimentally his or her position in some other respect might form a basis for a valid fraud claim even in the context of a wrongful termination. In the Court's summary of its holding, it phrased the rule as permitting tort recovery "only if the plaintiff can establish all of the elements of fraud with respect to a misrepresentation that is separate from the termination of the employment contract, i.e., when the plaintiff's fraud damages cannot be said to result from termination itself " (*6 Cal. 4th 1174, 1178)* .

In ***Kerr v. Rose*** *(1990) 216 Cal. App. 3d 1551, 1564, 265 Cal. Rptr. 597* , plaintiff sued his former employer and supervisors alleging that they failed to recall him to work as required by company policy, after his layoff from employment. Among other claims, plaintiff alleged fraud regarding entitlement to recall and rehire. Plaintiff appealed the trial court's grant of defendants' motions for summary judgment.

The court of appeal affirmed, concluding that the facts as disclosed by the evidence supporting and opposing the summary judgment motions showed, at most, one representation made to plaintiff during the layoff recall period, but that this was not a false representation and thus did not satisfy one of the elements of a cause of action for fraud (*216 Cal. App. 3d 1551, 1564-1565)* .

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10-100 California Points & Authorities § 100.64

AUTHOR: Carolyn Rashby

§ 100.64 Supporting Contention That Wrongful Discharge Cause of Action Is Preempted--Federal Labor Laws Preempt Action--National Labor Relations Board Has Exclusive Jurisdiction

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE TRIAL COURT HAS NO JURISDICTION OVER PLAINTIFF'S CAUSE OF ACTION FOR WRONGFUL DISCHARGE BECAUSE PLAINTIFF HAS ALLEGED A VIOLATION OF FEDERAL LABOR LAW. PLAINTIFF'S STATE-LAW WRONGFUL DISCHARGE CLAIM THEREFORE IS PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT, WHICH GIVES THE NATIONAL LABOR RELATIONS BOARD EXCLUSIVE JURISDICTION OVER THE ACTION.

Exclusive Jurisdiction of National Labor Relations Board. The National Labor Relations Board has exclusive jurisdiction over awrongful discharge claim, filed in state court, that alleges both state and federal labor law violations (*Rodriguez v. Yellow Cab Cooperative, Inc. (1988) 206 Cal. App. 3d 668, 674-679, 253 Cal. Rptr. 779* ; *Bassett v. Attebery (1986) 180 Cal. App. 3d 288, 290, 294, 225 Cal. Rptr. 399* ; *Henry v. Intercontinental Radio, Inc. (1984) 155 Cal. App. 3d 707, 713-715, 202 Cal. Rptr. 328*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of the contention by a defendant-employer that a wrongful discharge action is preempted by the National Labor Relations Act, where the employee has alleged violations of both state and federal labor laws.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a wrongful discharge cause of action is preempted by the National Labor

Relations Act, for example in a demurrer or in a motion for summary judgment. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the employer's misconduct alleged by plaintiff and show how that conduct, if proven, would be a violation of the National Labor Relations Act (NLRA), specifying the applicable provision of the NLRA. For example, counsel could set forth facts indicating that plaintiff has alleged that he or she engaged in activity protected by section 7 of the NLRA and was discharged in retaliation for such conduct. If the alleged conduct does not clearly fall within the NLRA's coverage, counsel should argue that it is the type of activity that the NLRA is intended to cover, and not merely of peripheral concern to federal labor policy, and that there is no state or local compelling interest which would justify interference with federal labor law [*San Diego Bldg. Trades Council v. Garmon (1959) 359 U.S. 236, 244-245, 79 S. Ct. 773, 3 L. Ed. 2d 775]* .

[c] Opposing Memoranda

In an appropriate case, the points and authorities *set out in §§ 100.71 -100.73* may be used to oppose the contention supported by the above points and authorities.

[d] Related Pleading and Practice Forms

For a general form of demurrer to a complaint based on the failure to state facts sufficient to constitute a cause of action, see *California Forms of Pleading and Practice, Ch. 206, Demurrers and Motions for Judgment on the Pleadings, § 206.122* (Matthew Bender). For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* . For discussion and forms relating to wrongful discharge, see California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts* , Ch. 249, *Employment Law: Termination and Discipline* , and Ch. 250, *Employment Law: Wage and Hour Disputes* .

[3] Discussion of Authorities

[a] Exclusive Jurisdiction of National Labor Relations Board

In ***Rodriguez v. Yellow Cab Cooperative, Inc.*** *(1988) 206 Cal. App. 3d 668, 253 Cal. Rptr. 779* , a taxicab driver brought an action for wrongful termination against his employer on the basis of public policy violations and interference with his political activities. While employed, the plaintiff had received many warnings concerning violation of company rules and refusals to convey passengers. He had also founded a labor organization and organized fellow employees. After his termination, plaintiff filed an unfair labor practice charge with the National Labor Relations Board (NLRB), claiming he was discharged in retaliation for his union activities. The NLRB refused to issue a complaint, on the ground that other employees had been discharged for similar misconduct. In bringing the civil action, the plaintiff argued that the action was based not on the allegation that he was fired for his union activities, but rather that he was fired in retaliation for testimony he had given the PUC in opposition to defendant's application for an airport van permit, which he opposed as against the interest of cab drivers. The employer moved for summary judgment based on preemption of the action by the National Labor Relations Act (NLRA). The trial court granted the motion, and the plaintiff appealed.

The court of appeal affirmed the judgment. The court stated that plaintiff's testimony was protected by NLRA § 7 (*29 U.S.C. § 157*), which guarantees employees the right, among other things, to engage in concerted activities for the purpose of mutual aid and protection. The court further held that plaintiff's conduct did not fall within any of the exceptions to the broad preemption rule established in *San Diego Bldg. Trades Council v. Garmon (1959) 359 U.S. 236, 244-245, 79 S. Ct. 773, 3 L. Ed. 2d 775* . The court also analyzed the test in *Farmer v. Carpenters (1977) 430 U.S. 290, 297, 302-303, 97 S. Ct. 1056, 51 L. Ed. 2d 338* , for application of the preemption rule. That case posited two

questions: (1) did the natureof the conduct complained of create a risk that the lawsuit would result in regulation of conduct protected by the NLRA? and (2) did the state have a substantial interest in protecting the plaintiff from the harm he alleged? (*206 Cal. App. 3d 668, 677)* . The court in *Rodriguez* stated that although the second question could be answered affirmatively, the first could also be answered affirmatively (*206 Cal. App. 3d 668, 678)* . The court stated that because the state court would look at the same aspects of plaintiff's conduct as would the NLRB, to prove his case in state court the plaintiff would have to disprove the factual finding of the NLRB. The court did not find merit in plaintiff's attempt to characterize his activity as "political," rather than "union" activity, and stated that there was no doubt the activity was protected by the NLRA and that the state civil action was therefore preempted (*206 Cal. App. 3d 668, 679)* .

In ***Bassett v. Attebery*** *(1986) 180 Cal. App. 3d 288, 225 Cal. Rptr. 399* , plaintiff was terminated from his position as executive producer and supervisor of a television news program. Plaintiff brought an action in superior court against his employer and supervisor. The complaint alleged several causes of action, including one for wrongful discharge that alleged serious violations of state and federal labor laws in connection with a recent union election. Defendants moved for summary judgment, which was granted. With regard to the wrongful discharge cause of action, the superior court granted summary judgment on the ground that the National Labor Relations Board (NLRB) had exclusive jurisdiction over the claim. Plaintiff appealed.

The court of appeal affirmed, holding that the NLRB has exclusive jurisdiction over a wrongful discharge claim filed in state court alleging federal labor law violations (*180 Cal. App. 3d 288, 290)* . The court rejected plaintiff's claim that he was entitled to maintain a cause of action under *Tameny v. Atlantic Richfield Co. (1980) 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330* , which held that an employee who is discharged for refusing to comply with the employer's demand to commit a criminal act may maintain a tort action against the employer. The court explained that since *Tameny* did not address the preemption issue, it did not support plaintiff's argument (*180 Cal. App. 3d 288, 293-294)* . The court also rejected plaintiff's argument that, as a supervisor, he was exempt from the jurisdiction of the National Labor Relations Act, because his allegations fell within one of the three basic exceptions to the exemption rule (*180 Cal. App. 3d 288, 294-295)* .

In ***Henry v. Intercontinental Radio, Inc.*** *(1984) 155 Cal. App. 3d 707, 202 Cal. Rptr. 328* , a radio station manager brought a wrongful termination action against the station that discharged him, claiming that his work to bring a union to the station and to improve the working conditions of other employees was a significant factor in the decision to terminate him. The trial court sustained the defendant employer's demurrer, on the ground that the causes of action were preempted by the National Labor Relations Act (NLRA).

The court of appeal affirmed on the basis of the guidelines set forth by the *United States Supreme Court in San Diego Bldg. Trades Council v. Garmon (1959) 359 U.S. 236, 244-245, 79 S. Ct. 773, 3 L. Ed. 2d 775* , concerning preemption of activities involving labor-management relations. The court reiterated the *Garmon* rule that any activity arguably subject to the NLRA is within the exclusive jurisdiction of the National Labor Relations Board (NLRB), unless the activity is only peripherally involved with the federal law or involves state interests deeply rooted in local feeling and responsibility (*155 Cal. App. 3d 707, 712-713)* . The court stated that the critical inquiry is whether the activity that is arguably subject to preemption could have been presented to the NLRB even though it was not so presented (*155 Cal. App. 3d 707, 714)* . The court concluded that the question of whether certain labor-related activities of the plaintiff were significant contributing factors in his discharge was a subject for decision by the NLRB in the first instance. The court added that the action was not merely of peripheral concern to federal labor policy and that there was no compelling interest so deeply rooted in local law as to justify local interference with federal labor law (*155 Cal. App. 3d 707, 715)* . The court also discounted the plaintiff's theory that his supervisorial status immunized him from the NLRA, on the basis of a line of federal cases holding otherwise (*155 Cal. App. 3d 707, 713)* .

[4] Additional Authorities

[a] Exclusive Jurisdiction of National Labor Relations Board

In *Kelecheva v. Multivision Cable T.V. Corp. (1993) 18 Cal. App. 4th 521, 22 Cal. Rptr. 2d 453* , the plaintiff alleged that his discharge from employment violated the fundamental public policy embodied in state and federal labor law statutes, in that the discharge was based on plaintiff's refusal to illegally prevent coworkers' unionization attempts. Plaintiff also alleged that his discharge breached an implied covenant to discharge only for good cause and the implied covenant of good faith and fair dealing. The trial court granted defendant's motion for summary judgment, ruling that all three causes of action were preempted by federal labor law. The court of appeal affirmed the dismissal of the cause of action based on public policy, holding that the cause of action was preempted under the analysis of the *United States Supreme Court in San Diego Bldg. Trades Council v. Garmon (1959) 359 U.S. 236, 245, 79 S. Ct. 773, 3 L. Ed. 2d 775* , and *Sears, Roebuck & Co. v. Carpenters (1978) 436 U.S. 180, 197, 98 S. Ct. 1745, 56 L. Ed. 2d 209* . Under that analysis, the critical inquiry is whether the controversy presented to the state court is identical to or different fromthat which could have been, but was not, presented to the NLRB (*18 Cal. App. 4th 521, 527-528)* . Because the employer's conduct that was alleged to violate the federal labor laws would, if proven, be a violation of the NLRA, the cause of action was held preempted (*18 Cal. App. 4th 521, 528)* . However, the court held that the contract causes of action were not preempted, on the ground that the issues involved in those causes of action would not be identical to issues involved in an unfair labor practice claim, and that the state's interests in providing contract remedies for employees such as plaintiff (supervisors who are neither covered by collective bargaining agreements nor directly protected by the NLRA) outweigh any marginal effect the adjudication of those claims might have on the administration of national labor policies (*18 Cal. App. 4th 521, 529-532)* .

California Points & Authorities

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 100 EMPLOYER AND EMPLOYEE: WRONGFUL TERMINATION AND DISCIPLINE
PART II. FORMS

10-100 California Points & Authorities § 100.65

AUTHOR: Carolyn Rashby

§ 100.65 Supporting Contention That Wrongful Discharge Cause of Action Is Preempted--Federal Labor Laws Preempt Action--Section 301 of Labor Management Relations Act Preempts State-Law Cause of Action [29 U.S.C. § 185(a)]

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF'S CLAIM FOR WRONGFUL DISCHARGE IS PREEMPTED BY SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT IN THAT RESOLUTION OF PLAINTIFF'S STATE-LAW CLAIM FOR WRONGFUL TERMINATION IS SUBSTANTIALLY DEPENDENT ON ANALYSIS OF THE TERMS AND CONDITIONS OF THE COLLECTIVE BARGAINING AGREEMENT THAT GOVERNS PLAINTIFF'S EMPLOYMENT.

Federal Preemption of State-Law Claim. A state-law claim for wrongful termination by an employee is preempted by *Section 301 of the Labor* Management Relations Act (*29 U.S.C. § 185(a)*) if the application of state law requires interpretation of a collective bargaining agreement or is substantially dependent on the analysis of such an agreement (*Lingle v. Norge Division, Magic Chef (1988) 486 U.S. 399, 413, 108 S. Ct. 1877, 100 L. Ed. 2d 410, 423* ; *Allis-Chalmers Corp. v. Lueck (1985) 471 U.S. 202, 220, 105 S. Ct. 1904, 85 L. Ed. 2d 206* ; *Newberry v. Pacific Racing Ass'n (9th Cir. 1988) 854 F.2d 1142, 1147* ; *DFEH v. Verizon Cal., Inc. (2003) 108 Cal. App. 4th 160, 164-171, 133 Cal. Rptr. 2d 258* ; *Friday v. Hughes Aircraft Co. (1986) 188 Cal. App. 3d 117, 123, 236 Cal. Rptr. 291*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a defendant employer's contention that a plaintiff's state-law claim for wrongful discharge is preempted by *Section 301 of the Labor* Management Relations Act, based on the argument

that determination of the claim under state law would require interpretation of a collective bargaining agreement or is substantially dependent on the analysis of such agreement.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a state-law wrongful discharge claim is preempted by the Labor Management Relations Act, for example in a demurrer or in a motion for summary judgment. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should demonstrate that plaintiff is covered by a collective bargaining agreement, discuss the specific provisions of the collective bargaining agreement that are implicated by plaintiff's state-law claim, and show how such provisions would necessarily have to be interpreted or analyzed to determine the claim. For example, counsel could set forth facts indicating that plaintiff's claim for breach of contract or breach of the covenant of good faith and fair dealing are preempted because the collective bargaining agreement, rather than a separate employment agreement, governs the plaintiff's employment relationship (e.g., the contract contains a job security clause [*Cook v. Lindsay Olive Growers (9th Cir. 1990) 911 F.2d 233, 239]*).

[c] Opposing Memoranda

In an appropriate case, the points and authorities *set out in § 100.71* may be used to oppose the contention supported by the above points and authorities.

[d] Related Pleading and Practice Forms

For a general form of demurrer to a complaint based on the failure to state facts sufficient to constitute a cause of action, see *California Forms of Pleading and Practice, Ch. 206, Demurrers and Motions for Judgment on the Pleadings, § 206.122* (Matthew Bender). For a form of notice forsummary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* . For discussion and forms relating to wrongful discharge, see California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts* , Ch. 249, *Employment Law: Termination and Discipline* , and Ch. 250, *Employment Law: Wage and Hour Disputes* .

[3] Discussion of Authorities

[a] Federal Preemption of State-Law Claim

In ***Lingle v. Norge Division, Magic Chef*** *(1988) 486 U.S. 399, 108 S. Ct. 1877, 100 L. Ed. 2d 410* , an employee who was covered under a collective bargaining agreement was discharged for allegedly filing a false workers' compensation claim and sued her employer in state court for retaliatory discharge for filing a workers' compensation claim. The employer removed the case to the federal district court on grounds of diversity of citizenship and moved that the district court either dismiss on the ground of preemption or stay the proceedings until completion of arbitration. The district court dismissed on the basis that the claim for retaliatory discharge was inextricably intertwined with a collective bargaining provision that generally prohibited wrongful discharge and that allowing the state-law action to proceed would undermine the arbitration procedures called for in the parties' contract. The circuit court of appeals upheld the dismissal.

The U.S. Supreme Court first stated its agreement with *Allis-Chalmers Corp. v. Lueck (1985) 471 U.S. 202, 105 S. Ct. 1904, 85 L. Ed. 2d 206* , discussed *below*, which held that a state-law claim is preempted by *Section 301 of the Labor* Management Relations Act (*29 U.S.C. § 185(a)*) if its resolution depends on the meaning of a collective bargaining agreement, because state-law interpretations of collective bargaining agreements could be inconsistent with each other (

486 U.S. 399, 405-406) . The Court went on to state that if the state-law claim can, however, be resolved without interpreting the collective bargaining agreement, the claim is independent and will not be preempted (*486 U.S. 399, 407-410)* . The Court emphasized that collective bargaining agreements should be interpreted by arbitrators as generally provided by the agreements, but that judges can determine state-law questions involving labor-management relations if they do not require construing the labor contracts (*486 U.S. 399, 411)* . The Court held that an application of state law is preempted under Section 301 only if the application requires the interpretation of a collective bargaining agreement (*486 U.S. 399, 413)* . The Court stated, however, that in the case before it, the claim of retaliatory discharge simply required the employer's factual showing of a nonretaliatory reason for the discharge and did not require an inquiry into the meaning of any provision of the collective bargaining agreement (*486 U.S. 399, 407)* .

In ***Allis-Chalmers Corp. v. Lueck*** *(1985) 471 U.S. 202, 105 S. Ct. 1904, 85 L. Ed. 2d 206* , an employee sued his employer for the bad-faith handling of a disability claim included in an insurance plan contained in a collective bargaining agreement. On the employer's and disability insurer's motion for summary judgment, the trial court ruled that the action either arose under *Section 301 of the Labor* Management Relations Act or that the state-law claim was preempted by Section 301. The state court of appeal affirmed, and the state Supreme Court reversed on the ground that a Section 301 suit arises out of a labor contract and the employee's claim was a tort claim of bad faith that was distinguishable from a contract claim.

The United States Supreme Court stated that for purposes of uniformity in the application of federal law, questions relating to what the parties to a labor agreement agreed to and the legal consequences of a breach of such an agreement must be resolved by reference to uniform federal law under Section 301, whether such questions arise in the context of a suit for breach of contract or for a suit alleging tort liability (*471 U.S. 202, 211)* . However, the Court pointed out that Section 301 was not meant to preempt state rules proscribing conduct or establishing rights independent of labor contracts (*471 U.S. 202, 212-213)* . The Court formulated its test to require the determination of whether the tort claim was independent of any right established by contract or whether the tort claim was "inextricably intertwined with consideration of the terms of the labor contract" (*471 U.S. 202, 213)* . The Court found that because the right asserted under the tort claim not only derived from the contract but was defined by the contractual obligation of good faith, any attempt to assess liability would inevitably involve contract interpretation (*471 U.S. 202, 218)* . The Court also stated that the full scope of the preemptive effect of federal labor-contract law must be determined on a case-by-case basis (*471 U.S. 202, 220)* .

In ***Newberry v. Pacific Racing Ass'n*** *(9th Cir. 1988) 854 F.2d 1142* , a racetrack employee discharged for misappropriation of funds sued her former employer for wrongful discharge and related actions, claiming that the charges against her were a pretext for her firing. Defendants removed the case to federal court on the basis of that court's jurisdiction over federal questions. The district court granted defendants' motion for summary judgment on all claims.

The Ninth Circuit Court of Appeals held that the employee's claims were preempted by *Section 301 of the Labor* Management Relations Act (*854 F.2d 1142, 1146-1147)* . The court applied what it termed the "twin tests" of the U.S. Supreme Court derived from *Lingle v. Norge Division, Magic Chef (1988) 486 U.S. 399, 108 S. Ct. 1877, 100 L. Ed. 2d 410* , and *Allis-Chalmers Corp. v. Lueck (1985) 471 U.S. 202, 105 S. Ct. 1904, 85 L. Ed. 2d 206* , both discussed above. The court presented the tests as follows: Does the application of state law (1) require the interpretation of a collective bargaining agreement (*Lingle* test), or (2) substantially depend on analysisof the terms of an agreement made between the parties in a labor contract (*Lueck* test)? (*854 F.2d 1142, 1147)* . In applying this test to the employee's claim that the employer breached the implied covenant of good faith and fair dealing, the court stated that the claim was preempted because the basis of the complaint was the plaintiff's employment contract, which in this case was the collective bargaining agreement (*854 F.2d 1142, 1147-1148)* .

In ***DFEH v. Verizon Cal., Inc.*** *(2003) 108 Cal. App. 4th 160, 133 Cal. Rptr. 2d 258* , the plaintiff was an employee who took time off under the Moore-Brown-Roberti California Family Rights Act (CFRA) (*see Gov. Code § 12945.2*).

CFRA allows an employee in a firm over a certain size to have up to 12 weeks off each year because of a need to care for seriously ill family members or because of the employee's own serious health condition (*Gov. Code § 12945.2(a), (b)*). CFRA does not require that an employee be paid for leave time unless the employee would otherwise have had the right to be paid for the time, such as an employee's having accrued vacation leave or sick leave (*Gov. Code § 12945.2(e)*).

In this case, the plaintiff was an hourly worker covered by a collective bargaining agreement (CBA). She had accrued 300 hours of sick leave under the relevant terms of the CBA when she began taking time off for chiropractic treatment of back problems. The employer used the accrued sick leave to pay her for the time off, pursuant to CFRA, for the first four weeks. After that, the employer demanded that the employee provide a medical report from a specialist in orthopedics or neurology showing total incapacitation. She never provided such a report. She continued to have chiropractic treatment, for which she was not penalized by the employer, but she did not continue to receive *paid* time off. The California Department of Fair Employment and Housing (DFEH) filed a complaint alleging that the employer's failure to pay the employee for all absences after the first four weeks was a violation of CFRA. The employer defended on the basis that the state-law CFRA claim was preempted by Section 301 of the federal Labor Management Relations Act of 1947 (LMRA) (*29 U.S.C. § 185(a)*). The trial court rejected the preemption argument and entered judgment in favor of the employee, and the employer appealed.

The court of appeal reversed. The court noted that in general, Section 301 preempts a state-law claim that is "substantially dependent" on an analysis of a CBA. However, factual and legal issues independent of a CBA are not preempted, and a state-law claim is not preempted if it implicates rights and obligations that exist independent of the CBA (*108 Cal. App. 4th 160, 164-168)* . Applying those principles, the court of appeal found that the resolution of the dispute clearly depended on an analysis of the CBA. The CBA contained several complex provisions governing sickness and accident benefits. A crucial portion of the CBA reserved to management the right to investigate disabilities due to injury or other causes, and it granted management "sole discretion" to require an opinion from a nontreating physician, with "the payment of benefits [to] be governed by such investigation and opinion." The court pointed out that the relevant provisions of the CBA were subject to different interpretations: one possible interpretation could be that the employer had the right to cut off benefits if the employee failed to provide the requested specialist's opinion, but another possible interpretation could be that a simple note from a chiropractor would have sufficed. The court found that under the circumstances, determining whether the employee was entitled to paid leave after the first four weeks could not be resolved without interpreting the relevant provisions of the CBA. Moreover, this case did not involve a state-law right independent of the CBA. CFRA only mandated unpaid leave; whether the employee was entitled to be paid for the time off depended on what had been negotiated in the CBA regarding paid sick leave (*see Gov. Code § 12945.2(e)*) (*108 Cal. App. 4th 160, 169-171)* .

Because resolution of the employee's claim required interpretation of the CBA, the court of appeal concluded that the employee's claim was preempted by Section 301 of the LMRA. Applying federal law, the court found that the six-month limitations period applicable to Section 301 claims had expired when the action was filed. Accordingly, the court reversed the trial court's judgment and remanded with directions to dismiss the action as time-barred (*108 Cal. App. 4th 160, 172)* .

In ***Friday v. Hughes Aircraft Co.*** *(1986) 188 Cal. App. 3d 117, 236 Cal. Rptr. 291* , an employee of an aircraft manufacturing company, though not a union member, was a member of the bargaining unit and thus bound by the terms and conditions of the collective bargaining agreement. This employee brought an action against his employer for wrongful termination of employment and intentional infliction of emotional distress. The trial court granted summary judgment in favor or the employer on the grounds of federal preemption and collateral estoppel.

Without ruling on the collateral estoppel issue, the court of appeal affirmed, holding, in part, that both causes of action were preempted by *Section 301 of the Labor* Management Relations Act (*188 Cal. App. 3d 117, 123, 125)* . Federal law preempts state wrongful discharge law because the right not to be dismissed without just cause is essentially

equivalent to a right created by the collective bargaining agreement (*188 Cal. App. 3d 117, 123)* . The one exception to the rule of preemption for wrongful discharge claims stemming from violations of public policy or statute was not applicable because plaintiff did not report a clear violation of a specific statute for the protection of the public, but merely complained about the safety of his workplace, a subject covered by the collective bargaining agreement (*188 Cal. App. 3d 117, 124)* .

[4] Additional Authorities

[a] Federal Preemption of State-Law Claim

In *Schlacter-Jones v. General Telephone (9th Cir. 1991) 936 F.2d 435* , a former employee brought an action against the employer for wrongful termination, violation of state constitutional rights, and related claims, based on termination following mandatory drug-testing that revealed the presence of cocaine. The federal court of appeals upheld summary judgment for the defendant, holding that the action was preempted by *Section 301 of the Labor* Management Relations Act because determination of the employer's liability necessarily involved contract interpretation, even though the collective bargaining agreement contained no provision regarding the drug-testing program, which was implemented by the employer after the plaintiff had been hired, and was not the subject of bilateral negotiation (*936 F.2d 435, 439-443)* .

In *Cook v. Lindsay Olive Growers (9th Cir. 1990) 911 F.2d 233* , an employee was fired because he took personal leave and then did not report to work or call in for five consecutive days after the employer transferred him to a position that paid him less money, but which accommodated his religious requirement that he observe the Sabbath. The employee, who was covered by a collective bargaining agreement, sued the employer for, among other things, wrongful termination in violation of public policy, breach of the implied covenant of good faith and fair dealing, and intentional and negligent infliction of emotional distress. The Ninth Circuit Court of Appeals affirmed summary judgment for the employer, in part because *Section 301 of the Labor* Management Relations Act preempted the implied covenant (*911 F.2d 233, 241)* . The court found that Section 301 preempted the implied covenant claim because the collective bargaining agreement contained terms governing job security. Since the claim asserted rights which were based directly on those terms, it required analysis of the collective bargaining agreement (*911 F.2d 233, 239)* . Section 301 preempted the emotional distress claims because the determination of whether the employer acted outrageously in firing the employee depended on the court's interpretation of the collective bargaining agreement provisions governing discharge, seniority, and work transfers (*911 F.2d 233, 239-240)* . Section 301 did not preempt the public policy claim because the public policy at issue was religious discrimination in violation of the Fair Employment and Housing Act (FEHA) and it was not necessary to interpret the collective bargaining agreement to enforce that statute (*911 F.2d 233, 238, 240)* . However, FEHA preempted the public policy claim because that statute provides the exclusive remedy for religious discrimination claims (*911 F.2d 233, 238)* (*but cf. Rojo v. Kliger (1990) 52 Cal. 3d 65, 90-91, 276 Cal. Rptr. 130, 801 P.2d 373* (involving sex discrimination, but holding that *Cal. Const., art. I, § 8*, which prohibits discrimination based on sex, race, creed, color, or national origin, is declaratory of fundamental policy, and may provide basis for claim for wrongful discharge in violation of public policy, independent of FEHA), discussed in *§ 100.43[3][a]*).

In *Harris v. Alumax Mill Products, Inc. (9th Cir. 1990) 897 F.2d 400* , an employee brought a state wrongful termination action against his employer based on his termination resulting from application of the employer's rule deeming any three-day unauthorized absence to be a voluntary termination. The district court granted summary judgment for the employer, holding that the action was preempted by *Section 301 of the Labor* Management Relations Act and was time-barred under the six-month statute of limitations for Section 301 actions of that kind. The Ninth Circuit affirmed, holding that the employee's wrongful termination claim that his employer had violated the covenant of good faith and fair dealing was clearly dependent on analysis of the terms of the collective bargaining agreement and was thus preempted. The agreement expressly provided for grievance procedures for an employee to follow regarding any discharge or application of work rules. Because the complaint involved both wrongful discharge and application of

a work rule, both of which were covered under the agreement, the court held that the action was preempted (*897 F.2d 400, 402-403)* .

In *Jackson v. Southern California Gas Co. (9th Cir. 1990) 881 F.2d 638* , a former employee brought an action alleging race discrimination and constructive wrongful discharge based on several theories, including breach of contract and breach of the implied covenant of good faith and fair dealing. The employer removed the state action to federal court on the basis of preemption under *Section 301 of the Labor* Management Relations Act, and the district court dismissed the contract and covenant of good-faith actions for failure to exhaust the grievance procedures contained in the collective bargaining agreement between the parties. The Ninth Circuit affirmed these actions of the district court, stating that the collective bargaining agreement covered in detail the conduct that would give rise to dismissal for cause. The appellate court agreed with the district court's determination that the employee's action for breach of the covenant of good faith and fair dealing was preempted by Section 301 and that he had not exhausted his remedies under the agreement (*881 F.2d 638, 644-645, 646)* .

In *Moreau v. San Diego Transit Corp. (1989) 210 Cal. App. 3d 614, 258 Cal. Rptr. 647* , an employee brought suit for wrongful termination and related causes of action when he was forced to resign after being entrapped into selling drugs in the work place. The defendant employer claimed that the action was preempted by the collective bargaining agreement, and the trial court granted summary judgment for the defendant. The court of appeal affirmed, stating that the state-law action was preempted because the agreement stated that employees could not be discharged without justcause, and in order to determine whether the employer could terminate the employee on the basis of the entrapment procedure, the court would have to interpret the agreement to determine whether the just-cause requirement was intended to encompass entrapment to control drug use in the work place (*210 Cal. App. 3d 614, 624-625)* . In addition, the court held that even if the state remedy was a nonnegotiable one, preemption would occur because the parties would have to interpret the terms of the agreement (*210 Cal. App. 3d 614, 627)* .

In *Abreu v. Svenhard's Swedish Bakery (1989) 208 Cal. App. 3d 1446, 257 Cal. Rptr. 26* , the court of appeal affirmed the trial court's granting of a judgment notwithstanding the verdict in favor of the defendants in a wrongful termination action on the basis that five of the plaintiff's causes of action were preempted by *Section 301 of the Labor* Management Relations Act because of the existence of a collective bargaining agreement. The court stated that because the plaintiff was terminated for fighting on the job, his complaint regarding termination could only be handled through the grievance procedure set out in the collective bargaining agreement, and it was therefore proper for the trial court to find certain causes of action were preempted by federal law (*208 Cal. App. 3d 1446, 1452-1454)* .

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 100 EMPLOYER AND EMPLOYEE: WRONGFUL TERMINATION AND DISCIPLINE
PART II. FORMS

10-100 California Points & Authorities § 100.66

AUTHOR: Carolyn Rashby

§ 100.66 Supporting Contention That Wrongful Discharge Cause of Action Is Preempted--Federal Labor Laws Preempt Action--Labor-Management Reporting and Disclosure Act Preempts State-Law Claim Against Labor Organization

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF'S CLAIM FOR WRONGFUL DISCHARGE IS PREEMPTED BY THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT, IN THAT PLAINTIFF WAS A _____ [*insert either* POLICYMAKING *or* CONFIDENTIAL] EMPLOYEE OF DEFENDANT LABOR UNION.

Preemption by Labor-Management Reporting and Disclosure Act. The federal Labor-Management Reporting and Disclosure Act (*29 U.S.C. § 401 et seq.*) preempts wrongful discharge claims brought against labor unions or their officials by former policymaking or confidential employees (*Screen Extras Guild, Inc. v. Superior Court (1990) 51 Cal. 3d 1017, 1021, 1024, 1032, 275 Cal. Rptr. 395, 800 P.2d 873* ; *Thunderburk v. United Food & Commercial Workers' Union, Local 324 (2001) 92 Cal. App. 4th 1332, 1341-1343, 112 Cal. Rptr. 2d 609* ;

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of the contention that a wrongful discharge claim against a labor organization by a former policymaking or confidential employee is preempted by the Labor-Management Reporting and Disclosure Act.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a wrongful discharge action against a labor organization by a policymaking or confidential employee is preempted by the Labor-Management Reporting and Disclosure Act, for example in a

demurrer or in a motion for summary judgment. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence of plaintiff's job duties, and show how those duties put plaintiff in a policymaking or confidential position with defendant union. For example, counsel could set forth facts indicating that plaintiff was not a rank and file union employee, but had significant discretion and decisionmaking authority, such as with respect to handling union members' grievances, implementing union policies, or granting waivers under the terms of the collective bargaining agreement [*see Screen Extras Guild, Inc. v. Superior Court (1990) 51 Cal. 3d 1017, 1031-1032, 275 Cal. Rptr. 395, 800 P.2d 873]* .

[c] Related Pleading and Practice Forms

For a general form of demurrer to a complaint based on the failure to state facts sufficient to constitute a cause of action, see *California Forms of Pleading and Practice, Ch. 206, Demurrers and Motions for Judgment on the Pleadings, § 206.122* (Matthew Bender). For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* . For discussion and forms relating to wrongful discharge, see California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts* , Ch. 249,*Employment Law: Termination and Discipline*, and Ch. 250, *Employment Law: Wage and Hour Disputes*.

[3] Discussion of Authorities

[a] Preemption by Labor-Management Reporting and Disclosure Act

In ***Screen Extras Guild, Inc. v. Superior Court*** *(1990) 51 Cal. 3d 1017, 275 Cal. Rptr. 395, 800 P.2d 873* , the plaintiff was a business agent for the defendant union and was considered a union management employee. The plaintiff filed and handled members' claims, settled wage claims and grievances, and granted waivers of certain collective bargaining agreement terms. After the union discharged the plaintiff, allegedly for dishonesty and insubordination, she sued the union and its executive secretary, alleging breach of the implied covenant of good faith and fair dealing, intentional and negligent infliction of emotional distress, and defamation. The defendant moved for summary judgment on the ground that the plaintiff's action was preempted by the Labor-Management Reporting and Disclosure Act (LMRDA) [*29 U.S.C. § 401 et seq.*]. The trial court denied the motion, and the court of appeal summarily denied defendant's petition for writ of mandate to compel the trial court to reverse its decision. The defendant sought review by the California Supreme Court.

The Court granted review and reversed, holding that the LMRDA, which mandates that unions be democratically governed and that elected union officials be responsive to the will of their union membership-electorate [*see Finnegan v. Leu (1982) 456 U.S. 431, 435-436, 102 S. Ct. 1867, 72 L. Ed. 2d 239]* , preempts wrongful discharge claims brought against labor unions or their officials by former policymaking or confidential employees (*51 Cal. 3d 1017, 1021, 1024, 1032)* . It explained that a state-law action is preempted by federal law whenever the action stands as an obstacle to the accomplishment and execution of Congress' full purposes (*51 Cal. 3d 1017, 1022)* . According to the Court, the LMRDA was the product of congressional concern over abuses of power by union leadership, but its primary purpose is to ensure that unions are democratically governed and responsive to the will of their memberships (*51 Cal. 3d 1017, 1024)* . The Court observed that elected union officials must necessarily rely on their appointed representatives to carry out the officials' programs and policies, and consequently the officials' ability to select their own administrators is an integral part of ensuring that the administrators are responsive to the will of union members (*51 Cal. 3d 1017, 1024-1025)* . The Court thus concluded that to allow such administrators to sue for wrongful discharge would interfere with the elected officials' ability to implement the union members' will, therefore frustrating the goal of union democracy embodied by the LMRDA, and would violate the Supremacy Clause [*see* U.S. *Const., art. VI, § 2*] (*51 Cal.*

3d 1017, 1030) .

In **Thunderburk v. United Food & Commercial Workers' Union, Local 324** *(2001) 92 Cal. App. 4th 1332, 112 Cal. Rptr. 2d 609* , the plaintiff had been employed by the defendant labor union as a secretary. After her discharge, she sued the union for wrongful termination. The trial court granted the defendant's motion for summary judgment on the ground that the wrongful-termination claims were preempted by the Labor-Management Reporting and Disclosure Act (LMRDA) (*29 U.S.C. § 401 et seq.*). The court of appeal affirmed, holding that although the plaintiff was not a management or policymaking employee, she was a confidential employee. In this context, "confidential" employees include secretaries who do not have policymaking responsibilities but who have access to confidential union information that, if disclosed, could thwart union policies and objectives. In this case, the plaintiff's job responsibilities had given her access to confidential information such as the union's communications with its attorneys, union representatives' mail, members' disciplinary notices, grievance files, membership files, and information regarding the union's political propaganda. Accordingly, she was a confidential employee and her cause of action was preempted by the LMRDA (*92 Cal. App. 4th 1332, 1341-1343)* .

In ***Hanson v. Int'l Ass'n of Machinists & Aerospace Workers*** *(2001) 90 Cal. App. 4th 977 , cert. denied, 535 U.S. 1078 (2002)* , the plaintiff was a labor union's business representative who had been discharged for making disparaging remarks about the union's leadership. The plaintiff sued the union for wrongful termination in violation of public policy. After the entry of a judgment for the plaintiff, the union appealed, contending that the plaintiff's cause of action was preempted by the Labor-Management Reporting and Disclosure Act (LMRDA) (*29 U.S.C. § 401 et seq.*). In response, the plaintiff asserted that his action should not be barred, because the LMRDA does not preempt wrongful-termination suits by elected union officials (*see Sheet Metal Workers' Int'l Ass'n v. Lynn (1989) 488 U.S. 347, 355, 109 S. Ct. 639, 644-645, 102 L. Ed. 2d 700*). The plaintiff argued that because he initially attained his position as a union business agent through an election, his cause of action was not preempted by the LMRDA. The court of appeal rejected this contention, however, because after the plaintiff's election the union had been reorganized, and at the time of his termination he held the business-agent job as an appointee of the union's district president. Therefore, at the relevant time the plaintiff was not an elected official, and his cause of action was preempted by the LMRDA. Accordingly, the court of appeal reversed the trial court's judgment, with instructions to dismiss the complaint (*90 Cal. App. 4th 977, 982-983, 986)* .

California Points & Authorities

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 100 EMPLOYER AND EMPLOYEE: WRONGFUL TERMINATION AND DISCIPLINE
PART II. FORMS

10-100 California Points & Authorities § 100.67

AUTHOR: Carolyn Rashby

§ 100.67 Supporting Contention That Wrongful Discharge Cause of Action Is Preempted--ERISA Preempts State-Law Claim--Claim Relates to Benefit Plan Regulated by ERISA [29 U.S.C. § 1001 et seq.]

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF'S CLAIM FOR WRONGFUL DISCHARGE IS PREEMPTED BY ERISA IN THAT THE CLAIM RELATES TO AN EMPLOYEE BENEFIT PLAN UNDER ERISA.

A. ERISA Preempts State Claims That Relate to Benefit Plans. The Employee Retirement Income Security Act of 1974 (ERISA) supersedes any and all state laws, including state wrongful termination actions, insofar as they relate to any employee benefit plan covered by ERISA (*29 U.S.C. § 1144(a)*; *Ingersoll-Rand v. McClendon (1990) 498 U.S. 133, 138-139, 111 S. Ct. 478, 112 L. Ed. 2d 474* ; *Sorosky v. Burroughs Corp. (9th Cir. 1987) 826 F.2d 794, 799-800)* .

B. "Relates to" Defined. A cause of action "relates to" a benefit plan if it has a connection with or refers to such a plan (*Ingersoll-Rand v. McClendon (1990) 498 U.S. 133, 139-140, 111 S. Ct. 478, 112 L. Ed. 2d 474* ; *Sorosky v. Burroughs Corp. (9th Cir. 1987) 826 F.2d 794, 799-800)* , especially if the cause of action is premised on the existence of a plan (*see* *Ingersoll-Rand v. McClendon (1990) 498 U.S. 133, 140, 111 S. Ct. 478, 112 L. Ed. 2d 474, 484-485)* .

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a defendant employer's contention that a plaintiff's wrongful discharge cause of action is preempted when the claim relates to an employee benefit plan under ERISA.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that ERISA preempts a wrongful discharge cause of action, for example in a

demurrer or motion for summary judgment. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence indicating the existence of an ERISA-covered plan, showing how the cause of action either refers to or is premised on such plan. For example, counsel could set forth facts establishing the existence of a pension plan under which plaintiff was covered and facts indicating that plaintiff has alleged that he/she was dismissed because the employer wished to avoid contributing to the pension fund [*Ingersoll-Rand v. McClendon (1990) 498 U.S. 133, 139-140, 111 S. Ct. 478, 112 L. Ed. 2d 474]* .

[c] Opposing Memoranda

In an appropriate case, the points and authorities *set out in §§ 100.75, 100.76* may be used to oppose the contention supported by the above points and authorities.

[d] Related Pleading and Practice Forms

For a general form of demurrer to a complaint based on the failure to state facts sufficient to constitute a cause of action, see *California Forms of Pleading and Practice, Ch. 206, Demurrers and Motions for Judgment on the Pleadings, § 206.122* (Matthew Bender). For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* . For discussion and forms relating to wrongful discharge, see California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts* , Ch. 249, *Employment Law: Termination and Discipline* , and Ch. 250, *Employment Law: Wage and Hour Disputes* .

[3] Discussion of Authorities

[a] ERISA Preempts State Laws That Relate to Benefit Plans

29 U.S.C. § 1144(a) provides that, except to the extent that they are expressly exempted by *29 U.S.C. § 1144(b)* (savings clause for insurance laws), ERISA supersedes any and all state laws insofar as they may now or hereafter relate to any ERISA-covered employee benefit plan [*see 29 U.S.C. § 1003* (benefit plans covered and exempted by ERISA)].

Ingersoll-Rand v. McClendon *(1990) 498 U.S. 133, 111 S. Ct. 478, 112 L. Ed. 2d 474* , and ***Sorosky v. Burroughs Corp.*** *(9th Cir. 1987) 826 F.2d 794* , are *discussed under § 100.67[3][b]*.

[b] "Relates to" Defined

Ingersoll-Rand v. McClendon *(1990) 498 U.S. 133, 111 S. Ct. 478, 112 L. Ed. 2d 474* , involved an employee who was fired after almost ten years of service, ostensibly because of a workforce reduction. The plaintiff employee sued his former employer, alleging that he was fired because his employer wished to avoid contributing to his pension fund. The employee did not sue under ERISA, but instead sought damages under various tort and contract theories. The trial court granted summary judgment for the employer and the intermediate appellate court affirmed, holding that the plaintiff's employment was at will. The Texas Supreme Court reversed, holding that public policy limits the at-will doctrine and reasoning that the employee's case was not preempted by ERISA because he was seeking tort and contract damages rather than lost pension benefits.

The United States Supreme Court reversed, holding that such a cause of action is preempted by ERISA because it specifically refers to, and is premised on, the existence of a pension plan; thus, the cause of action "relates to" a pension plan. Relying on the "deliberately expansive language" of the ERISA preemption provision [*see 29 U.S.C. § 1144(a)*],

the Court explained that Congress used the words "relate to" in the broad sense, and did not limit their application only to state laws that relate to the specific subjects covered by ERISA. It added that Congress also used broad language to define "state law" as "all laws, decisions, rules, regulations, or other [s]tate action having the effect of law" [*29 U.S.C. § 1144(c)(1)*]. The Court explained that a law "relates to" a benefit plan if it has a connection with or reference to such a plan [*see Sorosky v. Burroughs Corp. (9th Cir. 1987) 826 F.2d 794, 799-800]* , and concluded that a state law may "relate to" a plan, and thereby be preempted, even if the law is not specifically designed to affect the plan or the effect is only indirect (*498 U.S. 133, 139-140)* . The Court rejected the employee's argument that ERISA did not preempt his cause of action because it did not focus on benefit terms and conditions, but rather on the employer's termination decision. The Court explained that the ERISA definition of the term "state" is expansive, rather than restrictive, because it includes state agencies and instrumentalities whose actions might not otherwise be considered state law [*see 29 U.S.C. § 1144(c)(2)* ("state" as including any political subdivision, or any agency or instrumentality, which purports to regulate, directly or indirectly, the terms and conditions of benefit plans)]. Thus, Congress did not intend to restrict the ERISA preemption provision to state laws purporting to regulate plan terms and conditions (*498 U.S. 133, 141-142)* .

In ***Sorosky v. Burroughs Corp.*** *(9th Cir. 1987) 826 F.2d 794* , a former employee brought a wrongful discharge action against his former employer, alleging in part that the discharge was intended to prevent the employee from acquiring certain retirement benefits that he was promised. The action was originally brought in state court, and the employer successfully moved for removal to federal court. The district court granted summary judgment in favor of the employer.

The Ninth Circuit Court of Appeals affirmed the summary judgment with regard to the issue of preemption under ERISA. The court held that the employee's claims concerning the retirement plan were completely preempted because they "related to" the employer's employee benefit plan (*826 F.2d 794, 799)* . The court stated that Congress intended for the words "relate to" to be interpreted broadly (*826 F.2d 794, 799)* . The court explained that state-law causes of action relate to an employee benefit plan if they have a connection with or reference to such a plan, and certain allegations in the employee's complaint related to the retirement plan, which established such a connection (*826 F.2d 794, 799-800)* .

[4] Additional Authorities

[a] "Relates to" Defined

In *Nishimoto v. Federman-Bachrach & Associates (9th Cir. 1990) 903 F.2d 709* , a plaintiff argued that her wrongful termination claim, which in substance alleged that her employer fired her to prevent her from receiving pension and insurance benefits, was improperly removed to federal court because she did not state an ERISA claim. In concluding that the district court would have had jurisdiction over the plaintiff's claim had it originally been filed there, the Ninth Circuit Court of Appeals discussed the "complete preemption" of any claims that "relate to" employee benefit plans [*see 29 U.S.C. § 1144(a)*], and held that ERISA preempted the plaintiff's claim because it referred to, and was connected with, an ERISA-covered plan (*903 F.2d 709, 713)* .

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CHAPTER 100 EMPLOYER AND EMPLOYEE: WRONGFUL TERMINATION AND DISCIPLINE
PART II. FORMS

10-100 California Points & Authorities § 100.68

AUTHOR: Carolyn Rashby

§ 100.68 Supporting Contention That Wrongful Discharge Cause of Action Is Preempted--ERISA Preempts State-Law Claim--ERISA Action Covers Same Misconduct Alleged in State-Law Action [29 U.S.C. § 1001 et seq.]

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF'S WRONGFUL DISCHARGE CLAIM IS PREEMPTED BY HIS/HER ERISA CAUSE OF ACTION FOR_____ [DISCHARGE FOR EXERCISING HIS/HER RIGHTS UNDER ABENEFIT PLAN *or* INTERFERENCE WITH THE ATTAINMENT OF BENEFIT RIGHTS].

Preemption Based on ERISA Claims. ERISA preempts a wrongful termination claim that conflicts directly with a Title *29, United States Code, Section 1140,* cause of action that alleges either discharge of a plan participant for exercising his or her rights under the plan or interference with the attainment of benefit rights (*Aetna Health Inc. v. Davila (2004) 542 U.S. 200, 124 S. Ct. 2488, 159 L. Ed. 2d 312, 326* ; *Ingersoll-Rand v. McClendon (1990) 498 U.S. 133, 145, 111 S. Ct. 478, 112 L. Ed. 2d 474*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a defendant employer's contention that a wrongful discharge state-law claim is preempted because the facts alleged in support of the claim would also support ERISA claims covering the same employer misconduct.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a wrongful discharge state-law claim is preempted by ERISA because the facts alleged in support of such claim also support ERISA claims covering the same employer misconduct, for example, in a

demurrer or in a motion for summary judgment. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence indicating the existence of an ERISA-covered plan, and should demonstrate that plaintiff has alleged that he/she was discharged for exercising his/her rights under the plan or that the employer interfered with his/her attainment of benefits under the plan. For example, counsel could set forth facts establishing that plaintiff has alleged that the employer dismissed him/her to prevent the attainment of pension benefits [*Ingersoll-Rand v. McClendon (1990) 498 U.S. 133, 139-140, 142-145, 111 S. Ct. 478, 112 L. Ed. 2d 474]* .

[c] Opposing Memoranda

In an appropriate case, the points and authorities *set out in § 100.76* may be used to oppose the contention supported by the above points and authorities.

[d] Related Pleading and Practice Forms

For a general form of demurrer to a complaint based on the failure to state facts sufficient to constitute a cause of action, see *California Forms of Pleading and Practice, Ch. 206, Demurrers and Motions for Judgment on the Pleadings, § 206.122* (Matthew Bender). For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* . For discussion and forms relating to wrongful discharge, see California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts* , Ch. 249, *Employment Law: Termination and Discipline* , and Ch. 250, *Employment Law: Wage and Hour Disputes* .

[3] Discussion of Authorities

[a] Preemption Based on ERISA Claims

In ***Aetna Health Inc. v. Davila*** *(2004) 542 U.S. 200, 124 S. Ct. 2488, 159 L. Ed. 2d 312* , a participant and a beneficiary in employee benefit plans regulated under the Employee Retirement Income Security Act of 1974 (ERISA) (*see 29 U.S.C. § 1132 et seq.*) sued their respective health-maintenance organizations in state court. In separate complaints, the plaintiffs alleged that the defendants had failed to exercise ordinary care in the handling of coverage decisions, in violation of a duty imposed by a state health-care liability statute. The plaintiffs both suffered injuries allegedly arising from the defendants' decisions not to provide coverage for certain treatment and services recommended by plaintiffs' treating physicians. Invoking state law, the plaintiffs argued that defendants' refusal to cover the requested services violated their state-law "duty to exercise ordinary care when making health care treatment decisions," and that these refusals proximately caused their injuries. The defendants removed the cases to federal district courts, arguing that the plaintiffs' causes of action fit within the scope of, and were therefore completely preempted by, *ERISA Section 502(a)* [*29 U.S.C. § 1132(a)*]. The district courts declined to remand the cases to state court. Then, because the plaintiffs refused to amend their complaints to bring explicit ERISA claims, the district courts dismissed the complaints with prejudice. On appeal, the Fifth Circuit consolidated the cases and reversed the district courts' judgments, holding that the plaintiffs' claims did not duplicate or fall within the scope of an *ERISA Section 502(a)* remedy.

The United States Supreme Court reversed the judgment of the Fifth Circuit and held that the plaintiffs' state-law claims were completely preempted by ERISA and thus were removable to federal court. The Supreme Court explained that if a federal statute wholly displaces a state-law cause of action through complete preemption, the state claim can be removed. This is so because if the federal statute completely preempts thestate-law cause of action, a claim that comes within the scope of that cause of action--even if pleaded in terms of state law--is, in reality, based on federal law.

ERISA is one of these statutes (*159 L. Ed. 2d 312, 326)* .

The purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans. To this end, ERISA includes expansive preemption provisions (*see 29 U.S.C. § 1144*), which are intended to ensure that employee-benefit-plan regulation would be exclusively a federal concern. ERISA's comprehensive legislative scheme includes an integrated system of procedures for enforcement that is essential to accomplish Congress's purpose of creating a comprehensive statute for the regulation of employee benefit plans. The Supreme Court has held that the policy choices reflected in the inclusion of certain remedies, and the exclusion of others, would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress had rejected in ERISA. Accordingly, any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy is deemed to conflict with the clear congressional intent to make the ERISA remedy exclusive. Any such cause of action is therefore preempted (*159 L. Ed. 2d 312, 326)* .

ERISA Section 502(a)(1)(B) provides that a civil action may be brought by a plan participant or beneficiary to recover benefits due to him or her under the terms of the plan, to enforce his or her rights under the terms of the plan, or to clarify his or her rights to future benefits under the terms of the plan (*29 U.S.C. § 1132(a)(1)(B)*). Section 502(a)(1)(B) is relatively straightforward. If an individual brings suit complaining of a denial of coverage for medical care, when the individual is entitled to such coverage only because of the terms of an ERISA-regulated employee benefit plan, and when no legal duty independent of ERISA or the plan terms is violated, then the suit falls within the scope of *ERISA Section 502(a)(1)(B)* (*159 L. Ed. 2d 312, 328)* .

In this case, the only actions complained of were the defendants' refusals to pay or cover medical care for the plaintiffs, and the only connection the defendants had with the plaintiffs was the defendants' administration of the employee benefit plans. It was clear, then, that the plaintiffs complained only about denials of coverage promised under the terms of ERISA-regulated employee benefit plans. Upon the denial of benefits, plaintiffs could have sought injunctive relief under Section 502(a)(1)(B), or they could have paid for the treatment themselves and then sought reimbursement through a Section 502(a)(1)(B) action (*159 L. Ed. 2d 312, 329)* .

The Court emphasized that interpretation of the terms of the plaintiffs' benefit plans formed an essential part of their state-law claims, and any liability under that state law would exist only because of the defendants' administration of ERISA-regulated benefit plans. In essence, the plaintiffs sued only to rectify a wrongful denial of benefits promised under ERISA-regulated plans, and they did not attempt to remedy any violation of a legal duty independent of ERISA. The Supreme Court therefore concluded that the plaintiffs' state-law claims fell within the scope of *ERISA Section 502(a)(1)(B),* were therefore completely preempted by Section 502, and were removable to federal district court (*159 L. Ed. 2d 312, 329-330)* .

The facts and procedural background of ***Ingersoll-Rand v. McClendon*** *(1990) 498 U.S. 133, 111 S. Ct. 478, 112 L. Ed. 2d 474* , are discussed in *§ 100.67[3][b]*. In *Ingersoll-Rand,* the United States Supreme Court held that ERISA preempted a claim alleging that an employee was wrongfully discharged to prevent him from attaining pension benefits, even though the employee was seeking various tort and contract remedies rather than pension benefits. The Court noted, however, that even if there was no express preemption provision [*see 29 U.S.C. § 1144(a)*], ERISA would preempt the employee's cause of action because the latter conflicted directly with an ERISA cause of action for discharging or otherwise discriminating against a plan participant for exercising his or her rights under the plan or for interfering with the attainment of benefit rights [*see 29 U.S.C. § 1140*]. Although the existence of such an enforcement scheme does not itself imply preemption, the ERISA provision contains "special features" warranting preemption, in that it authorizes equitable relief and gives federal courts exclusive jurisdiction in ERISA actions [*see 29 U.S.C. § 1132(a)*] (*498 U.S. 133, 142-145)* .

[4] Additional Authorities

[a] Preemption Based on ERISA Claims

In *Dytrt v. Mountain State Tel. & Tel. Co. (9th Cir. 1990) 921 F.2d 889* , the Ninth Circuit Court of Appeals affirmed the dismissal of an employee's claim for breach of the implied covenant of good faith and fair dealing, holding that the claim was preempted by ERISA because the conduct alleged in the claim was identical to the misconduct she alleged in two ERISA claims for breach of fiduciary duty and interference with protected rights [*see 29 U.S.C. §§ 1104(a)(1), 1140*] (*921 F.2d 889, 897)* .

In *Nishimoto v. Federman-Bachrach & Associates (9th Cir. 1990) 903 F.2d 709* , the court of appeals held that a district court had jurisdiction over a plaintiff's wrongful termination claim that alleged that she was fired to deprive her of employee benefits because federal courts have exclusive jurisdiction over ERISA actions alleging interference with benefits [*see 29 U.S.C. §§ 1132(e), 1140*], and pendent jurisdiction over state claims arising from a nucleus of operative facts common to both state law and ERISA claims (*903 F.2d 709, 713-714)* .

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PART II. FORMS

10-100 California Points & Authorities § 100.69

AUTHOR: Carolyn Rashby

§ 100.69 Supporting Contention That Wrongful Discharge Cause of Action Is Preempted--Federal Preemption of State-Law Claim by National Bank Act [12 U.S.C. § 24]

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF'S CLAIM FOR WRONGFUL DISCHARGE IS PREEMPTED BY THE NATIONAL BANK ACT, WHICH PROVIDES THAT BANK OFFICERS MAY BE TERMINATED "AT PLEASURE."

Federal Preemption by National Bank Act. Section 24 of the National Bank Act (*12 U.S.C. § 24*, para. 5), which provides that national banks have the power to dismiss bank officers "at pleasure," preempts state-law wrongful termination claims by such officers, except Fair Employment and Housing Act (FEHA) claims that do not conflict with federal antidiscrimination laws (*Peatros v. Bank of America (2000) 22 Cal. 4th 147, 167-176, 91 Cal. Rptr. 2d 659, 990 P.2d 539* ; *Aalgaard v. Merchants National Bank, Inc. (1990) 224 Cal. App. 3d 674, 692, 274 Cal. Rptr. 81* ; *see 29 U.S.C. § 621 et seq.*; *42 U.S.C. § 2000e et seq.*; *Gov. Code § 12900 et seq.*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a contention that a state-law wrongful discharge claim is preempted by the National Bank Act because plaintiff was a bank officer. In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set forth in § 100.78*.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a state-law wrongful discharge claim is preempted by the National Bank Act, for example, in a demurrer or motion for summary judgment. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should demonstrate that plaintiff was a bank officer, including a president, vice president, cashier, or other officer. In particular, counsel should discuss facts indicating that plaintiff was appointed by the board of directors and held an office created by the board of directors and listed in the bylaws, that plaintiff had express legal authority to bind the bank in its transactions by executing contracts or other legal instruments on the bank's behalf, and that plaintiff's decisionmaking authority related to fundamental banking operations in such a manner as to potentially affect public trust in the bank [*Wells Fargo Bank v. Superior Court (1991) 53 Cal. 3d 1082, 1091, 282 Cal. Rptr. 841, 811 P.2d 1025]* .

If the plaintiff's claim is based on alleged discriminatory discharge in violation of the California Fair Employment and Housing Act (FEHA) [*Gov. Code § 12900 et seq.*], counsel should show that the alleged basis for the discrimination is not prohibited by Title VII of the Civil Rights Act of 1964 [*42 U.S.C. § 2000e et seq.*] or the Age Discrimination in Employment Act of 1967 (ADEA) [*29 U.S.C. § 621 et seq.*]. For example, physical disability, mental disability, medical condition, sexual orientation, and marital status are grounds of discrimination prohibited by FEHA but not by Title VII or the ADEA [*see Gov. Code § 12940(a)*]. This showing is necessary because the National Bank Act does not preempt claims based on discrimination that violates Title VII or the ADEA [*Peatros v. Bank of America (2000) 22 Cal. 4th 147, 167-176, 91 Cal. Rptr. 2d 659, 990 P.2d 539]* .

[c] Related Pleading and Practice Forms

For a general form of demurrer to a complaint based on the failure to state facts sufficient to constitute a cause of action, see *California Forms of Pleading and Practice, Ch. 206, Demurrers and Motions for Judgment on the Pleadings, § 206.122* (Matthew Bender). For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* . For discussion and forms relating to wrongful discharge, see California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts* , Ch. 249, *Employment Law: Termination and Discipline* , and Ch. 250, *Employment Law: Wage and Hour Disputes* .

[3] Discussion of Authorities

[a] Federal Preemption by National Bank Act

In ***Peatros v. Bank of America*** *(2000) 22 Cal. 4th 147, 91 Cal. Rptr. 2d 659, 990 P.2d 539* , the plaintiff had been employed as an officer of a national bank. After she was demoted and then discharged by the bank's board of directors, the plaintiff sued the bank, alleging that the grounds for her termination were her race (African-American) and her age (45 years at the time of the demotion and 47 years at the time of discharge). The complaint asserted five causes of action: (1) breach of implied contract ofemployment, (2) violation of the California Fair Employment and Housing Act (FEHA, *Gov. Code § 12900 et seq.*), (3) wrongful discharge in violation of public policy as declared in FEHA, (4) breach of a covenant of good faith and fair dealing that was part of the implicit contract of employment, and (5) misrepresentation and deceit. The bank filed a motion for summary judgment, contending that it was entitled to judgment as a matter of law because Section 8 of the National Bank Act of 1864 (now codified as *12 U.S.C. § 24*, para. 5) preempts all state-law causes of action arising from the dismissal of a bank officer. The superior court granted the bank's motion, and the court of appeal affirmed. The California Supreme Court granted review on the sole issue of whether *12 U.S.C. § 24*, para. 5 preempts FEHA (*22 Cal. 4th 147, 154-156)* .

The Supreme Court reversed the judgment of the court of appeal, finding that the plaintiff's FEHA claims of racial and age discrimination were not preempted by the federal statute (*22 Cal. 4th 147, 179)* . The Court held that *12 U.S.C. § 24*, para. 5 does indeed preempt FEHA to the extent the two laws are in conflict. However, the Court also held that the actual scope of the National Bank Act provision has been limited since its original enactment in 1864. Reading federal

law as a whole, the Court found that the National Bank Act has been impliedly amended by subsequently enacted federal civil-rights laws, specifically Title VII of the Civil Rights Act of 1964 (*42 U.S.C. § 2000e et seq.*) and the Age Discrimination in Employment Act of 1967 (ADEA, *29 U.S.C. § 621 et seq.*). Thus, as impliedly amended by Title VII and the ADEA, the National Bank Act provision actually grants a national bank only a *limited* power to dismiss its officers; the power does not extend to dismissal on the grounds of race, color, religion, sex, national origin, or age. As so amended, the National Bank Act provision preempts FEHA, but only to the extent that FEHA confers on officers of a national bank a right against dismissal on grounds not mentioned in Title VII or the ADEA (for example, physical disability, mental disability, medical condition, marital status, or sexual orientation; *see Gov. Code § 12940(a)*) (*22 Cal. 4th 147, 167-176)* . Presumably, the Court's reasoning would also apply to prevent preemption of a claim of wrongful discharge in violation of public policy, if the public policy is embodied in a provision of FEHA that is not preempted by the National Bank Act.

In ***Aalgaard v. Merchants Nat. Bank, Inc.*** *(1990) 224 Cal. App. 3d 674, 274 Cal. Rptr. 81* , the plaintiff, a bank executive, had most of his duties and responsibilities taken away and given to younger employees. Then, allegedly because the plaintiff's performance had been inadequate for three years, the defendant demanded that the plaintiff draft a letter requesting his early retirement. The plaintiff quit without doing so, but produced a letter two weeks later. He then sued the defendant for, among other things, breach of implied contract not to terminate him except for good cause, and breach of the implied covenant of good faith and fair dealing. The defendant moved for summary judgment, asserting, among other things, that the plaintiff's claims were preempted by Section 24 of the National Bank Act [*12 U.S.C. § 24*, para. 5]. The trial court granted defendant's motion and the plaintiff appealed. The court of appeal affirmed.

The court of appeal, after reviewing the long history and the purpose of the National Bank Act, held that allowing state employment termination claims, whether framed in tort or in contract, would frustrate the effectiveness of federal law by limiting the power of bank officials to dismiss "at pleasure" [*see 12 U.S.C. § 24*, para. 5] (*224 Cal. App. 3d 674, 686-692)* . The court explained that the purpose of the National Bank Act preemption provision is to confer on a bank's board of directors sweeping powers of dismissal in order to insure the fiscal integrity of and public confidence in national banking institutions (*224 Cal. App. 3d 674, 689)* . The court also noted that California has long recognized that the National Bank Act preempts suits based on breach of express contractual employment rights [*see, e.g., Kozlowsky v. Westminster Nat. Bank (1970) 6 Cal. App. 3d 593, 596-597, 86 Cal. Rptr. 52* ; *Cox v. First Nat. Bank (1935) 10 Cal. App. 2d 302, 52 P.2d 524]* , and that cases in other states hold that the National Bank Act bars suits based on implied contracts [*see, e.g., Kemper v. First Nat. Bank of Newton (1981) 94 Ill. App. 3d 169, 418 N.E. 2d 819]* (*224 Cal. App. 3d 674, 690-691)* . Furthermore, a number of federal decisions construing the power to dismiss "at pleasure" in other, analogous federal banking statutes and regulations have concluded that state claims based on express or implied covenants are preempted [*see, e.g., Bollow v. Federal Reserve Bank of San Francisco (9th Cir. 1981) 650 F.2d 1093, 1098]* (*224 Cal. App. 3d 674, 691-692)* .

[4] Additional Authorities

[a] Federal Preemption by National Bank Act

In *Wells Fargo Bank v. Superior Court (1991) 53 Cal. 3d 1082, 282 Cal. Rptr. 841, 811 P.2d 1025* , the California Supreme Court held that under the National Bank Act, which gives banks the power to appoint and dismiss at pleasure a "president, vice president, cashier, and *other officers*" [*12 U.S.C. § 24*, para. 5 (emphasis added)], a national bank's assistant vice president and branch manager had no state law cause of action for breach of the employment contract (*53 Cal. 3d 1082, 1094)* . The Court declared that within the meaning of the National Bank Act, a bank "officer" has the following attributes: (1) he or she holds an office created by the board of directors and listed in the bank's bylaws; (2) he or she is appointed by the board of directors, either directly or pursuant to a delegation of board authority set forth in the bylaws; (3) he or she has the express legal authority to bind the bank in its transactions with borrowers, depositors, customers, or other third parties by executing contracts, or other legalinstruments on the bank's behalf; and (4) his or her decisionmaking authority, however it might be limited by bank rule or policy, relates to fundamental banking operations

in such a manner as to affect potentially the public's trust in the banking institution (*53 Cal. 3d 1082, 1091)* .

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PART II. FORMS

10-100 California Points & Authorities § 100.70

AUTHOR: Carolyn Rashby

§ 100.70 Supporting Contention That Wrongful Discharge Cause of Action Is Preempted--Action Preempted by Statute Providing Exclusive Remedy--Workers' Compensation Act Provides Exclusive Remedy for Injury Caused by Termination [Lab. Code §§ 3600, 3602]

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF'S CLAIM FOR PERSONAL INJURY CAUSED BY TERMINATION IS PREEMPTED BY THE WORKERS' COMPENSATION ACT WHICH PROVIDES THE EXCLUSIVE REMEDY FOR INJURY CAUSED BY TERMINATION UNLESS THE INJURY IS THE RESULT OF CONDUCT THAT DOES NOT COME WITHIN THE COMPENSATION BARGAIN.

Exclusive Remedy for Personal Injury Caused by Discharge. The Workers' Compensation Act provides the exclusive remedy for personal injury caused by termination, unless the injury is the result of conduct that does not reasonably come within the compensation bargain (*Miklosy v. Regents of Univ. of Cal. (2008) 44 Cal. 4th 876, 902, 80 Cal. Rptr. 3d 690, 188 P.3d 629* ; *Shoemaker v. Myers (1990) 52 Cal. 3d 1, 17-20, 276 Cal. Rptr. 303, 801 P.2d 1054* ; *see Lab. Code §§ 3600, 3602*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a defendant employer's contention that plaintiff's claim for personal injury resulting from wrongful discharge is preempted, based on the argument that the Workers' Compensation Act (*Labor Code §§ 3600, 3602*) provides the exclusive remedy for such claims.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that plaintiff's claim for personal injuries arising out of his or her discharge is

preempted by the Workers' Compensation Act, for example, in a demurrer or motion for summary judgment. This form also be adapted for use in a trial or appellate brief or in jury instructions.

For additional form pertaining to the exclusive remedy doctrine generally, see Ch. 239, *Workers' Compensation Exclusive Remedy Doctrine* .

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that plaintiff is claiming damages for personal injury, such as physical disability or emotional distress, and that such damages arose out of the discharge. Counsel also should set forth facts indicating that the employer's conduct in discharging plaintiff comes within the compensation bargain in that it neither contravened a fundamental public policy (such as the public policy against certain types of discrimination) nor exceeded the risks inherent in the employment relationship. This argument may be combined with arguments from Ch. 239, *Workers' Compensation Exclusive Remedy Doctrine*, §§ 239.20, 239.21, 239.23, as applicable.

[c] Opposing Memoranda

In an appropriate case, the *form in § 100.77* may be used to oppose the contention supported by this form.

[d] Related Pleading and Practice Forms

For a general form for a demurrer to a complaint based on the failure to state facts sufficient to constitute a cause of action, see *California Forms of Pleading and Practice, Ch. 206, Demurrers and Motions for Judgment on the Pleadings, § 206.122* (Matthew Bender). For a form for notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* . For discussion and forms relating to wrongful discharge, see California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts* , Ch. 249, *Employment Law: Termination and Discipline* , and Ch. 250, *Employment Law: Wage and Hour Disputes* .

[3] Discussion of Authorities

[a] Exclusive Remedy for Personal Injury Caused by Discharge

In ***Miklosy v. Regents of Univ. of Cal.*** *(2008)44 Cal. 4th 876, 80 Cal. Rptr. 3d 690, 188 P.3d 629* , the plaintiffs were former employees of the University of California who sued the university and their former supervisors. The plaintiffs alleged that the defendants had retaliated against the plaintiffs in violation of theWhistleblower Act, which provides that state employees should be free to report waste, fraud, abuse of authority, violation of law, or threat to public health without fear of retribution [*Gov. Code § 8547.1*].

Among the claims asserted by theplaintiffs was a claim that the defendants had committed thecommon law tort of intentional infliction of emotional distress. The California Supreme Court affirmed the dismissal of the claim, concluding that the exclusive-remedy provision of the Workers' Compensation Act [*Lab. Code § 3602*] barred the plaintiffs' claim (*44 Cal. 4th 876, 902-903)* .

The Court reaffirmed its decision and reasoning in *Shoemaker v. Myers (1990) 52 Cal. 3d 1, 276 Cal. Rptr. 303, 801 P.2d 1054* , discussed below, another case that involved the termination of a whistleblower employee. The Court repeated that the kinds of conduct at issue in these cases (e.g., discipline or criticism) are a normal part of the employment relationship, and even if such conduct may be characterized as intentional, unfair or outrageous, it is nevertheless covered by the workers' compensation exclusivity provisions. Specifically, the Court reaffirmed that whistleblower retaliation is a risk inherent in the employment relationship. Accordingly, the Court concluded that the plaintiffs' exclusive remedy for their claims of intentional infliction of emotional distress were under the Workers'

Compensation Act (*44 Cal. 4th 876, 902-903)* .

In ***Shoemaker v. Myers*** *(1990) 52 Cal. 3d 1, 276 Cal. Rptr. 303, 801 P.2d 1054* , plaintiff had been an investigator for the Department of HealthServices (DHS) for 22 years. The DHS fired the plaintiff after he filed a report concluding that high DHS officials knowingly sanctioned illegal activity. The DHS purportedly fired plaintiff for insubordination, after he asserted his right to representation under the Public Safety Officers Procedural *Bill of Rights* [*Gov. Code § 3300 et seq.*] when the DHS subjected him to interrogations and written questions. After appealing to the State Personnel Board, the plaintiff was reinstated. Thereafter, he filed a civil action against the DHS and his supervisors alleging that he was terminated in retaliation for his report, and that the pretextual reason for his firing (i.e., insubordination) was improper. The plaintiff's complaint included causes of action for wrongful termination and unlawful retaliatory termination in violation of former Gov. Code § 19683, a "whistleblower" statute that provided that a state employee could not use or threaten to use his or her authority to discourage the reporting of violations of the law, and alleged physical injury resulting from the DHS's actions. The trial court sustained DHS's demurrer on the ground that the plaintiff's physical injury allegations were barred by the exclusive remedy provisions of the Workers' Compensation Act (WCA) [*Lab. Code § 3200 et seq.*]. The court of appeal affirmed, holding that notwithstanding former Gov. Code § 19683, the WCA provided the plaintiff with his exclusive remedy (citing *Cole v. Fair Oaks Fire Protection Dist. (1987) 43 Cal. 3d 148, 233 Cal. Rptr. 308, 729 P.2d 743*). The plaintiff sought and received review by the California Supreme Court.

The Supreme Court affirmed with respect to the wrongful termination causes of action, holding that physical or mental disabling injuries arising from termination of employment are generally within the WCA's coverage and are subject to its exclusive remedy provisions, unless the discharge comes within an express or implied statutory exception or it results from risks reasonably deemed not to be within the "compensation bargain" (*52 Cal. 3d 1, 7)* . Analyzing the case under the WCA as it existed before it was amended in 1982, the Court explained that employer liability for WCA compensation, "in lieu of any other liability ..., []" exists for any employee injury "arising out of and in the course of ... employment" [*see* former Lab. Code § 3600]. The Court added that according to the former provisions, WCA compensation is the exclusive remedy for such injuries [*see* former Lab. Code § 3601] (*52 Cal. 3d 1, 13-14)* . The Court reviewed the principles it had developed in *Cole v. Fair Oaks Fire Protection Dist. (1987) 43 Cal. 3d 148, 159-160, 233 Cal. Rptr. 308, 729 P.2d 743* , in which it held that a claim for intentional infliction of emotional distress based on disabilities compensable under the WCA was preempted by the WCA's exclusive remedy provisions. According to the Court, the exclusive remedy provisions apply if an employee sustains an injury that arises out of and in the the course of employment, notwithstanding that it resulted from intentional, even egregious, employer conduct. The Court explained that these provisions give efficacy to the WCA's "compensation bargain," whereby employers assume liability for industrial injuries or death without regard to fault in exchange for limitations on the amount of that liability (*52 Cal. 3d 1, 15-16)* .

Applying these principles, the Court determined that a nonconsensual termination is a normal part of the employment relationship, indistinguishable from other employment actions such as demotions, transfers, and discipline, all of which are included in the WCA's ambit because they involve risks that are encompassed within the compensation bargain [*see Cole v. Fair Oaks Fire Protection Dist. (1987) 43 Cal. 3d 148, 160, 233 Cal. Rptr. 308, 729 P.2d 743* ; *see also Traub v. Board of Retirement (1983) 34 Cal. 3d 793, 801* (construing similar language in *Gov. Code § 31720*, which governs disability retirement, as covering injuries arising from erroneous discharge)] (*52 Cal. 3d 1, 18)* . The Court added that furthermore, since courts have interpreted *Lab. Code § 3202*, which provides that the WCA must be liberally construed, to extend the WCA's protections to posttermination injuries [*see, e.g., Mitchell v. Hizer (1977) 73 Cal. App. 3d 499, 140 Cal. Rptr. 790* ; *Argonaut Ins. Co. v. Industrial Acci. Com. (1963) 221 Cal. App. 2d 140]* , both the act of termination and the acts leading up to it necessarily arise out of and occur during the course of employment (*52 Cal. 3d 1, 19)* .

[4] Additional Authorities

[a] Exclusive Remedy for Injury Caused by Discharge

In *Livitsanos v. Superior Court (1992) 2 Cal. 4th 744, 7 Cal. Rptr. 2d 808, 828 P.2d 1195* , plaintiff sued the defendants for breach of contract, defamation, and intentional and negligent infliction of emotional distress. The plaintiff alleged that the defendants had engaged in a campaign of harassment resulting in the wrongful termination of his employment, including falsely claiming that he had embezzled money from the company and tried to sabotage the company's product, compelling him to sell his independent distribution company which had distributed the company's product, demanding possession of his company's books and records, and forcing him to sign a promissory note for a debt owed to his company under threat of retaliation if he refused. The trial court sustained the employer's demurrers to the causes of action for defamation and negligent and intentional infliction of emotional distress, without leave to amend, based on the exclusive remedy provisions of the workers' compensation act. Subsequently, the court of appeal, citing *Cole*, discussed *above*, summarily denied plaintiff's petition for a writ of mandate.

In considering plaintiff's contention on appeal that his claims of intentional and negligent infliction of emotional distress, without accompanying physical injury, were not barred by the exclusive remedy rule based on the decision of *Renteria v. County of Orange (1978) 82 Cal. App. 3d 833, 147 Cal. Rptr. 447* , the California Supreme Court held that the Renteria court "plainly erred in suggesting that emotional injury which results in an industrial disability is not compensable under the Workers' Compensation Act" (*2 Cal. 4th 744, 754)* . The Court concluded that so long as the basic conditions of compensation are otherwise satisfied, and the employer's conduct neither contravenes a fundamental public policy nor exceeds the risks inherent in the employment relationship, an employee's emotional distress injuries, whether or not accompanied by physical disability, are within the exclusive remedy provisions of workers' compensation (*2 Cal. 4th 744, 754)* . The Court noted that for such an injury to be compensable under the workers' compensation system, however, it must result in an industrial disability or need for medical treatment (*2 Cal. 4th 744, 754)* . Thus, the Court observed that it is theoretically possible for an employee to incur a work-related emotional injury that results in no compensable industrial disability, but that the existence of such a noncompensable injury does not abrogate the exclusive remedy provisions of the workers' compensation act (*2 Cal. 4th 744, 754-755)* . The Supreme Court remanded the case to the court of appeal for a determination of whether the defendants' conduct exceeded the normal risks of the employment relationship.

Cole v. Fair Oaks Fire Protection Dist. (1987) 43 Cal. 3d 148, 233 Cal. Rptr. 308, 729 P.2d 743 , was an action by a firefighter against his employer, a fire protection district, and a fellow employee, the district's assistant fire chief, for damages for intentional infliction of emotional distress and by the firefighter's wife for intentional infliction of emotional distress and for loss of consortium. The complaint alleged the firefighter's employment history with the district and that the assistant fire chief had subjected him to a deliberate campaign of harassment, which included the unjustified institution of disciplinary proceedings, procuring his temporary demotion, and attempting to force his retirement, as a result of which he suffered a severe and totally disabling stroke. The trial court sustained the defendants' demurrer without leave to amend on the ground plaintiffs' claims were within the exclusive jurisdiction of the Workers' Compensation Appeals Board. The court of appeal affirmed as to eight of the ten causes of action alleged but reversed with directions to permit amendment of the complaint as to causes of action for defamation and for false light invasion of privacy. The Supreme Court granted review. There was no challenge to the court of appeal's holding that the causes of action for defamation and privacy were not barred by the exclusive remedy provisions of the Labor Code.

In affirming the judgment of the court of appeal, the Supreme Court held the action for intentional infliction of emotional distress was barred by the exclusivity provisions of the workers' compensation law (*Lab. Code §§ 3600, 3601, 4553*) as they read prior to their 1982 amendment, because the claim was based on conduct normally occurring in the workplace, and that, because the employee's action was barred, his spouse's actions for damages for intentional infliction of emotional distress and loss of consortium were likewise barred (*43 Cal. 3d 148, 151, 162)* . The Court said that in order properly to manage its business, every employer must on occasion review, criticize, demote, transfer, and discipline employees, that employers are necessarily aware that their employees will feel distressed by adverse personnel decisions, that employees may consider any such adverse action to be improper and outrageous, and that it would, indeed, be unusual for an employee not to suffer emotional distress as a result of an unfavorable decision by the

employer (*43 Cal. 3d 148, 160)* . The Court concluded that when the misconduct attributed to the employer is actions that are a normal part of the employment relationship, such as demotions, promotions, criticism of work practices, and frictions in negotiations as to grievances, an employee suffering emotional distress causing disability may not avoid the exclusive remedy provisions of the workers' compensation law by characterizing the employer's decisions as manifestly unfair, outrageous, harassment, or intended to cause emotional disturbance resulting in disability (*43 Cal. 3d 148, 160)* .

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10-100 California Points & Authorities § 100.71

AUTHOR: Carolyn Rashby

§ 100.71 Opposing Contention That Wrongful Discharge Cause of Action Is Preempted--Federal Labor Laws Do Not Preempt Action--Labor Management Relations Act Does Not Preempt Action--Action Based on Right Independent of Collective Bargaining Agreement [29 U.S.C. § 185(a)]

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF'S STATE-LAW CLAIM CAN BE RESOLVED WITHOUT INTERPRETING THE COLLECTIVE BARGAINING AGREEMENT AND, THEREFORE, IS NOT PREEMPTED BY SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT.

No Federal Preemption of Independent State-Law Claim. *Section 301 of the Labor* Management Relations Act (*29 U.S.C. § 185(a)*) does not preempt application of state law to a wrongful discharge claim brought by an employee whose terms and conditions of employment are covered by a collective bargaining agreement unless such application requires the interpretation of a collective bargaining agreement (*Lingle v. Norge Division, Magic Chef (1988) 486 U.S. 399, 413, 108 S. Ct. 1877, 100 L. Ed. 2d 410*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a contention that plaintiff's wrongful discharge cause of action is preempted by the Labor Management Relations Act, because the claim is based on state-law grounds independent of an applicable collective bargaining agreement. In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 100.65*.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a wrongful discharge cause of action is not preempted by the Labor

Management Relations Act, for example, in opposition to a demurrer or motion for summary judgment. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should demonstrate that the resolution of plaintiff's state-law claim does not depend on an interpretation of the collective bargaining agreement applicable to plaintiff's employment. For example, counsel could discuss facts indicating that plaintiff's state-law claim is for discriminatory discharge [*see Cook v. Lindsay Olive Growers (9th Cir. 1990) 911 F.2d 233, 237-238* (discussed in *§ 100.65*)] or retaliatory discharge for plaintiff's complaints about health and safety violations (*see Paige v. Henry J. Kaiser Co. (9th Cir. 1987) 826 F.2d 857, 863* (discussed in *§ 100.73*)], neither of which require interpretation of the collective bargaining agreement.

[c] Related Pleading and Practice Forms

For a general form of demurrer to a complaint based on the failure to state facts sufficient to constitute a cause of action, see *California Forms of Pleading and Practice, Ch. 206, Demurrers and Motions for Judgment on the Pleadings, § 206.122* (Matthew Bender). For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* . For discussion and forms relating to wrongful discharge, see California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts* , Ch. 249, *Employment Law: Termination and Discipline* , and Ch. 250, *Employment Law: Wage and Hour Disputes* .

[3] Discussion of Authorities

[a] No Federal Preemption of Independent State--Law Claim

The factual and procedural background of ***Lingle v. Norge Division, Magic Chef*** *(1988) 486 U.S. 399, 108 S. Ct. 1877, 100 L. Ed. 2d 410* , are discussed in *§ 100.65[3][a]*. The U.S. Supreme Court declared its agreement with *Allis-Chalmers Corp. v. Lueck (1985) 471 U.S. 202, 105 S. Ct. 1904, 85 L. Ed. 2d 206* , which held that a state-law claim is preempted by *Section 301 of the Labor* Management Relations Act (*29 U.S.C. § 185(a)*) if its resolution depends on the meaning of a collective bargaining agreement, because state-law interpretations of collective bargaining agreements could be inconsistent with each other (*486 U.S. 399, 405-406)* . The Court stated, however, that if the state-law claim can be resolved without interpreting the collective bargaining agreement, the claim is independent and will not be preempted (*486 U.S. 399, 407-410)* . The Court emphasized that collective bargaining agreements should be interpreted by arbitrators as generally provided by the agreements, but that judges can determine state-law questions involving labor-management relations if they do not require construing the labor contracts (*486 U.S. 399, 411)* . The Court held that an application of state law is preempted under Section 301 only if the application requires the interpretation of a collective bargaining agreement (*486 U.S. 399, 413)* . The Court stated, however, that in the case before it, the claim of retaliatory discharge simply required the employer's factual showing of a nonretaliatory reason for the discharge and did not require an inquiry into the meaning of any provision of the collective bargaining agreement (*486 U.S. 399, 407)* .

[4] Additional Authorities

[a] No Federal Preemption of Independent State-Law Claim

In *Garibaldi v. Lucky Stores, Inc. (9th Cir. 1984) 726 F.2d 1367* , a truck driver who was covered by a collective bargaining agreement brought a grievance against his employer, who allegedly harassed and eventually fired the driver for reporting to the health authorities that the employer had directed him to deliver spoiled milk. After an arbitrator found he was discharged for cause, plaintiff filed an action for wrongful discharge in violation of state public policy, as well as for intentional infliction of emotional distress, in state court. Defendant removed the case to federal court, and

plaintiff moved to remand. The district court held that it had removal jurisdiction over the wrongful discharge claim under *Section 301 of the Labor* Management Relations Act (*29 U.S.C. § 185(a)*) and subsequently granted defendant's motion for summary judgment, holding thatplaintiff's action was an untimely appeal from the labor arbitrator's award. Plaintiff appealed.

The court of appeal reversed the summary judgment on the ground that the action was improperly removed and instructed the district court to remand the case to the state court (*726 F.2d 1367, 1376)* . The court reasoned that the sale or delivery of adulterated milk was prohibited by California law and that plaintiff's "whistleblowing" was exactly the type of conduct that the California Supreme Court protected in *Tameny v. Atlantic Richfield Co. (1980) 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330* (discussed in *§ 100.42[3][a]*), which recognized an action for wrongful termination based on violation of public policy. The court held that a claim grounded in state law for wrongful termination for public policy reasons is not preempted by *Section 301 of the Labor* Management Relations Act (*726 F.2d 1367, 1374-1376)* .

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10-100 California Points & Authorities § 100.72

AUTHOR: Carolyn Rashby

§ 100.72 Opposing Contention That Wrongful Discharge Cause of Action Is Preempted--Federal Labor Laws Do Not Preempt Action--National Labor Relations Act Does Not Preempt Action--Unrelated Causes of Action Not Preempted by National Labor Relations Act [29 U.S.C. § 151 et seq.]

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE NATIONAL LABOR RELATIONS ACT (NLRA) DOES NOT PREEMPT PLAINTIFF'S WRONGFUL DISCHARGE ACTION BECAUSE AN UNFAIR LABOR PRACTICE SUBJECT TO PREEMPTION BY THE NLRA WAS NOT THE ONLY MOTIVATION ALLEGED FOR THE DISCHARGE, AND THE OTHER ALLEGATIONS OF WRONGFUL DISCHARGE ARE NOT RELATED TO UNFAIR LABOR PRACTICES.

Claims Unrelated to Unfair Labor Practices Not Preempted. When plaintiff alleges that an employer's wrongful discharge was motivated by impermissible considerations other than solely a desire or plan to commit an unfair labor practice, the action is not preempted by the National Labor Relations Act (*29 U.S.C. § 151 et seq.*) (*Balog v. LRJV, Inc. (1988) 204 Cal. App. 3d 1295, 1304*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a contention that plaintiff's wrongful discharge action is preempted by the National Labor Relations Act, based on the argument that the complaint alleges that plaintiff was terminated for reasons not solely related to federal labor law. In an appropriate case, This memorandum may be submitted in opposition to the contention *set out in § 100.64*.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the National Labor Relations Act does not preempt plaintiff's wrongful

discharge action, for example in opposition to a demurrer or motion for summary judgment. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should demonstrate that the circumstances of plaintiff's dismissal show that the employer was motivated by reasons other than an intent to commit an unfair labor practice, such as in retaliation for plaintiff's exercise conduct protected by a state public policy [*see Balog v. LRJV, Inc. (1988) 204 Cal. App. 3d 1295]* . Counsel should argue that causes of action based on these other motivations are not preempted by the National Labor Relations Act. For examples of arguments regarding wrongful discharge in violation of public policy, see *§§ 100.41 -100.47*.

[c] Related Pleading and Practice Forms

For a general form of demurrer to a complaint based on the failure to state facts sufficient to constitute a cause of action, see *California Forms of Pleading and Practice, Ch. 206, Demurrers and Motions for Judgment on the Pleadings, § 206.122* (Matthew Bender). For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* . For discussion and forms relating to wrongful discharge, see California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts* , Ch. 249, *Employment Law: Termination and Discipline* , and Ch. 250, *Employment Law: Wage and Hour Disputes* .

[3] Discussion of Authorities

[a] Claims Unrelated to Unfair Labor Practices Not Preempted

In ***Balog v. LRJV, Inc.*** *(1988) 204 Cal. App. 3d 1295* , a former supervisor brought a wrongful termination action against his employer, a facility that cleaned and repaired railroad cars used for transporting hazardous materials. The complaint alleged plaintiff was discharged for complaining about the employer's failure to comply with minimum safety standards, refusing to assign workers to jobs that exposed them to hazardous conditions in violation of state health and safety regulations, refusing to falsify accident investigation reports, and also refusing to violate state public policy and the workers' collective bargaining agreement by discharging probationary employees for pretextual reasons to prevent them from joining a union. Defendant moved for summary judgment on the ground that plaintiff had estimated in deposition testimony that "60 percent of [the employer's] decision to discharge him was because of his refusal to perform hazardous work and 40 percent was because of his refusal to terminate a [probationary employee]" and, therefore, the action was preempted by the National Labor Relations Act (NLRA) (*29 U.S.C. §§ 151-169*). The trial court denied the summary judgment motion on the ground that plaintiff's estimate was still a disputed fact. The employer then moved for judgment on the pleadings on the ground that the wrongs alleged arguably constituted unfair labor practices and that, therefore, the action was preempted by the NLRA as a matter of law. The trial court granted the motion and entered judgment for defendant. Plaintiff appealed.

The court of appeal reversed, holding that judgment on the pleadings is improper when the complaint states a cause of action that is not preempted by the NLRA (*204 Cal. App. 3d 1295, 1310)* . The court recognized that state court actions premised on activities that "arguably" constitute unfair labor practices are preempted under the NLRA. The rationale for preemption is to have a uniform national policy related to collective bargaining and negotiation and to avoid diverse and conflicting state adjudications (*204 Cal. App. 3d 1295, 1303)* . Plaintiff, the court observed, alleged he was fired for five distinct reasons, four of which were not even "arguably" unfair labor practices because they in no way implicated collective bargaining or unionization. The preemption rationale, the court concluded, does not require that a plaintiff's state-law cause of action be dismissed merely because one of the employer's motives for termination may have been, or was, his refusal to commit an unfair labor practice. So long as defendant's intentional wrongful conduct was motivated by impermissible considerations other than solely a desire or plan to interfere with collective bargaining or unionization, the employer may be held liable under state law (*204 Cal. App. 3d 1295, 1304)* . The court

distinguished *Bassett v. Attebery (1986) 180 Cal. App. 3d 288, 225 Cal. Rptr. 399* (discussed in *§ 100.64[3][a]*), on the ground that, although the plaintiff in Bassett alleged violations of state and federal labor laws, there were no allegations that plaintiff was terminated for nonunion-related but illegal reasons. In addition, the court stated that if the trier of fact were to determine that the unfair labor practices-related reason was the only cause for plaintiff's discharge, the action would be preempted and the court could not proceed any further (*204 Cal. App. 3d 1295, 1307, 1309)* .

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 100 EMPLOYER AND EMPLOYEE: WRONGFUL TERMINATION AND DISCIPLINE
PART II. FORMS

10-100 California Points & Authorities § 100.73

AUTHOR: Carolyn Rashby

§ 100.73 Opposing Contention That Wrongful Discharge Cause of Action Preempted--Federal Labor Laws Do Not Preempt Cause of Action--Action Based on Conduct Not Exclusively Regulated by National Labor Relations Act [29 U.S.C. § 151 et seq.]

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF'S CLAIM IS NOT PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT BECAUSE THE CLAIM AFFECTS AN AREA THAT IS NOT EXCLUSIVELY REGULATED BY THE NATIONAL LABOR RELATIONS ACT AND IS WITHIN THE STATE'S POLICE POWERS TO REGULATE.

NLRA Does Not Exclusively Regulate All Areas Concerned With Labor Standards. The National Labor Relations Act (*29 U.S.C. § 151 et seq.*) regulates areas concerned with self-organization and bargaining, but it does not preempt state regulation in areas involving minimum labor standards pertaining to interests that are deeply rooted in local feeling and responsibility, such as the health and safety of workers (*Paige v. Henry J. Kaiser (9th Cir. 1987) 826 F.2d 857, 863-865* ; *Inter-Modal Rail Employees Ass'n v. Burlington N. & Santa Fe Ry. Co. (1999) 73 Cal. App. 4th 918, 924-928, 87 Cal. Rptr. 2d 60*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to the contention that plaintiff's wrongful discharge cause of action is preempted by the National Labor Relations Act, based on the argument that the action is one that is not preempted by the National Labor Relations Act and iswithin the state's power to regulate. In an appropriate case, This memorandum may be submitted in opposition to the contention supported by the points and authorities *set out in § 100.64*.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel

wishes to raise the substantive issue that a wrongful discharge cause of action is not preempted by the National Labor Relations Act, for example in opposition to a demurrer or motion for summary judgment. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts indicating that the conduct addressed by plaintiff's state-law claim is not preempted by the National Labor Relations Act, such as conduct violating state legislation regarding health and safety [*Paige v. Henry J. Kaiser (9th Cir. 1987) 826 F.2d 857, 865]* . Counsel also should argue that the state law does not interfere with the collective bargaining process.

[c] Related Pleading and Practice Forms

For a general form of demurrer to a complaint based on the failure to state facts sufficient to constitute a cause of action, see *California Forms of Pleading and Practice, Ch. 206, Demurrers and Motions for Judgment on the Pleadings, § 206.122* (Matthew Bender). For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* . For discussion and forms relating to wrongful discharge, see California Forms of Pleading and Practice, Ch. 360, Ch. 248, *Employer's Liability for Employee's Torts*, Ch. 249, *Employment Law: Termination and Discipline*, and Ch. 250, *Employment Law: Wage and Hour Disputes*.

[3] Discussion of Authorities

[a] NLRA Does Not Exclusively Regulate All Areas Concerned With Labor Standards

In ***Paige v. Henry J. Kaiser*** *(9th Cir. 1987) 826 F.2d 857* , former employees brought an action in state court for wrongful discharge, claiming that they were fired because they refused to undertake job duties that were unsafe and illegally hazardous. Two claims for wrongful discharge were removed to federal court on the basis that they were preempted by federal law and were dismissed as being barred by the statute of limitations.

On appeal, the Ninth Circuit addressed the issue of whether preemption was proper. The court discussed the propriety of preemption under the NLRA and under another federal law (*Section 301 of the Labor* Management Relations Act). In discussing preemption under the NLRA, the court stated that there are state laws which concern conduct that Congress intended to be unregulated by the NLRA (*826 F.2d 857, 862)* . The court stated that Congress's main goal in enacting the NLRA was to establish an equitable uniform bargaining process and that state laws that set minimum work safety standards do not interfere with the bargaining process (*826 F.2d 857, 863-864)* . The court held that since it is uniquely within the state's police powers to legislate for the health and safety of their citizens, and such regulation does not interfere with the NLRA's goals, the NLRA does not preempt a wrongful discharge action based on violation of work safety laws (*826 F.2d 857, 865)* .

In ***Inter-Modal Rail Emples. Assn. v. Burlington Northern & Santa Fe Ry.*** *(1999) 73 Cal. App. 4th 918, 87 Cal. Rptr. 2d 60* , a group of about 200 employees formed an association to complain to government agencies about hazardous conditions at their place of employment. When their employer discharged them en masse, their association sued the employer, alleging, among other things, retaliatory discharge in violation of the California Occupational Safety and Health Act (*Lab. Code § 6300 et seq.*). The employer moved for judgment on the pleadings, characterizing the gravamen of the association's retaliatory discharge claim as a complaint about being fired for banding together to complain about safety concerns. Therefore, argued the employer, the association's claim was essentially that the employer had committed an unfair labor practice by discharging the employees engaging in "protected concerted activity" under the National Labor Relations Act (*29 U.S.C. § 151 et seq.*). Since the National Labor Relations Board (NLRB) has exclusive jurisdiction over the adjudication of unfair labor practices, the employer contended that the trial court had no jurisdiction over the association's claim. The trial court agreed and dismissed the complaint.

The court of appeal reversed, holding that there is an exception to the NLRB's exclusive jurisdiction for certain matters of local concern. This exception applies to matters that touch interests that are so deeply rooted in local feeling and responsibility, that the courts will not find that the NLRB has exclusive jurisdiction in the absence of a plain expression of congressional intent to preempt state regulation. One such area is the regulation of occupational health and safety (*73 Cal. App. 4th 918, 924-928)* . Therefore, the association's wrongful discharge claims were not preempted (*73 Cal. App. 4th 918, 925-929)* .

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PART II. FORMS

10-100 California Points & Authorities § 100.74

AUTHOR: Carolyn Rashby

§ 100.74 Opposing Contention That Wrongful Discharge Cause of Action Is Preempted--Federal Labor Laws Do Not Preempt Action--Labor Management Relations Act Does Not Preempt Action--Plaintiff Not Covered by Collective Bargaining Agreement Action [29 U.S.C. § 185(a)]

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT DOES NOT PREEMPT PLAINTIFF'S WRONGFUL DISCHARGE ACTION BECAUSE PLAINTIFF WAS NOT COVERED BY THE COLLECTIVE BARGAINING AGREEMENT IN THAT_____ [*specify, e.g.,* PLAINTIFF RESIGNED HIS/HER UNION MEMBERSHIP WHEN HE/SHE ACCEPTED PROMOTION TO THE MANAGEMENT POSITION FROM WHICH HE/SHE WAS FIRED].

Employee Not Covered by Labor Agreement. *Section 301 of the Labor* Management Relations Act (*29 U.S.C. § 185(a)*) does not preempt a wrongful discharge action by an employee who is not covered by a collective bargaining agreement (*Wanland v. Los Gatos Lodge, Inc. (1991) 230 Cal. App. 3d 1507, 1514-1515, 281 Cal. Rptr. 890*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a contention that plaintiff's wrongful discharge cause of action is preempted by the Labor Management Relations Act, based on the argument that plaintiff is not covered by a collective bargaining agreement. In an appropriate case, This memorandum may be submitted in opposition to the contention supported by the points and authorities *set out in § 100.65*.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a wrongful discharge cause of action is not preempted by the Labor

Management Relations Act, for example, in opposition to a demurrer or motion for summary judgment. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should demonstrate that plaintiff was not covered by the collective bargaining agreement at the time of the dismissal. For example, counsel could set forth facts indicating that plaintiff had resigned from the union, that plaintiff was not employed in a union position (for example, that plaintiff was a supervisory employee and such employees were not union members), and that the union refused to assist plaintiff with a grievance relating to the discharge [*see Wanland v. Los Gatos Lodge, Inc. (1991) 230 Cal. App. 3d 1507, 281 Cal. Rptr. 890]* . Counsel should also argue that *section 301 of the Labor* Management Relations Act does not preempt plaintiff's claim merely because resolution of plaintiff's status as a union member entails scrutiny of the agreement [*Wanland v. Los Gatos Lodge, Inc. (1991) 230 Cal. App. 3d 1507, 281 Cal. Rptr. 890]* .

[c] Related Pleading and Practice Forms

For a general form of demurrer to a complaint based on the failure to state facts sufficient to constitute a cause of action, see *California Forms of Pleading and Practice, Ch. 206, Demurrers and Motions for Judgment on the Pleadings, § 206.122* (Matthew Bender). For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* . For discussion and forms relating to wrongful discharge, see California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts* , Ch. 249, *Employment Law: Termination and Discipline* , and Ch. 250, *Employment Law: Wage and Hour Disputes* .

[3] Discussion of Authorities

[a] Employee Not Covered by Labor Agreement

Wanland v. Los Gatos Lodge, Inc. *(1991) 230 Cal. App. 3d 1507, 281 Cal. Rptr. 890* , involved a plaintiff employee who, when she was promoted to a management position, refused to quit her union. The employer removed her from the position and attempted to reassign her with no loss of salary or benefits. The plaintiff refused the reassignment and quit. She sued the employer for intentional interference with contractual relations and wrongful constructive discharge. The trial court refused to dismiss the action as preempted by the Labor Management Relations Act, Section 301 [*29 U.S.C. § 185(a)*], and the court of appeal affirmed.

The court concluded that the collective bargaining agreement did not cover the plaintiff, noting that the agreement gave the employer the right to require that its supervisory employees not be union members, andexplaining that this was inconsistent with an intent that such employees be covered under the agreement. The court also observed that the use of the term "managers" in a wage scale provision did not mean that the agreement applied to plaintiff, since she was salaried and the wage scale did not apply to her (*230 Cal. App. 3d 1507, 1515)* . Finally, the court declared that § 301 did not preempt the plaintiff's claim merely because the resolution of the issue of whether she was covered by the collective bargaining agreement entailed judicial scrutiny of the agreement's provision (*230 Cal. App. 3d 1507, 1517)* .

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10-100 California Points & Authorities § 100.75

AUTHOR: Carolyn Rashby

§ 100.75 Opposing Contention That Wrongful Discharge Cause of Action Preempted--ERISA Does Not Preempt Action--State-Law Claim Not Preempted by ERISA if Claim Only Tenuously Related to Administration of Benefit Plan

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE COMPLAINT'S ALLEGING_____ [*specify allegations claimed by defendant to bring action within ERISA, e.g., that a result of the discharge was a loss of retirement benefits*] DOES NOT BRING IT WITHIN THE SPHERE CONGRESS INTENDED TO REGULATE IN ERISA.

A. ERISA Preempts Only State Law That Covers the Same Subject or That Prevents an Interstate Benefit Plan From Having Uniformity in Its Benefits Structure and Administration. The United States Supreme Court has emphasized that, despite broad language in its earlier decisions: (1) it will presume that Congress did not intend ERISA to supersede historic police powers of the states, absent evidence of a contrary intention in a particular sphere of regulation; (2) important factors to consider are the actual concerns of ERISA (reporting, disclosure, fiduciary responsibility and the like) and the purpose of its preemption clause (allowing a benefit plan to operate interstate with uniformity in benefit structures and administrative practices); and (3) state law's merely having an effect on the economic environment in which a plan operates is too tenuous a relation to make it "related to" a plan under *ERISA (Cal. Div. of Lab. Stds. v. Dillingham (1997) 519 U.S. 316, 117 S. Ct. 832, 136 L. Ed. 2d 791, 802-805* (no preemption of scheme penalizing ERISA-covered apprenticeship program for not meeting state standards)).

[*Optional*] **B. ERISA Does Not Preempt State-Law Claim for Recovery of Lost Benefits as Consequence of Wrongful Discharge.** ERISA preemption is inapplicable in a state-law action alleging that the plaintiff has lost benefits as a consequence of his or her wrongful discharge but not that denial of benefits was a motivating factor of the discharge (*Campbell v. Aerospace Corp. (9th Cir. 1997) 123 F.3d 1308, 1311-1314* ; *Ethridge v. Harbor House Restaurant (9th Cir. 1988) 861 F.2d 1389, 1404-1405)* .

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to the contention that a wrongful discharge claim is preempted by ERISA because the action relates to loss of benefits or otherwise invokes state law that has some connection with an ERISA-covered benefit plan, on the ground that the connection is too tenuous to fall within the sphere occupied by ERISA. Use the optional paragraph if the preemption argument is based on plaintiff's allegation that damages include loss of employee benefits. In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 100.67*.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a wrongful discharge action is not preempted by ERISA because the claim does not relate to a benefit plan, for example in opposition to a demurrer or motion for summary judgment. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Counsel should show how the California rule of law sought to be applied only tangentially affects employee benefit plans and does so in an area beyond the scope of Congress' concerns in enacting ERISA. If the particular issue is that the plaintiff has alleged loss of benefits, counsel should demonstrate that plaintiff has not alleged that the employer's motivation for the termination was to deprive plaintiff of employee benefits, but has alleged merely that loss of benefits was part of the injury suffered by plaintiff as a consequenceof termination or make up a portion of the damages that plaintiff seeks to recover.

[c] Related Pleading and Practice Forms

For a general form of demurrer to a complaint based on the failure to state facts sufficient to constitute a cause of action, see *California Forms of Pleading and Practice, Ch. 206, Demurrers and Motions for Judgment on the Pleadings, § 206.122* (Matthew Bender). For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* . For discussion and forms relating to wrongful discharge, see California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline* .

[3] Discussion of Authorities

[a] ERISA Preempts Only State Law That Covers the Same Subject or That Prevents an Interstate Benefit Plan From Having Uniformity in Its Benefits Structure and Administration

In ***Cal. Div. of Lab. Stds. v. Dillingham*** *(1997) 519 U.S. 316, 117 S. Ct. 832, 136 L. Ed. 2d 791* , a unanimous Supreme Court implicitly refined its analysis of when state law is "related to" an employee benefit plan and thus preempted by ERISA (per *29 U.S.C. § 1002(1)*). The state had blocked certain payments to a contractor for using apprentices at other than the local prevailing journeyman wage. The prevailing wage must be paid on public construction projects unless the contractor employs apprentices who are participating in a state-approved program. The particular form of the apprenticeship program was one in which expenses were defrayed by monies placed by employers and unions into a separate fund, making it an "employee welfare benefit plan" for purposes of ERISA (*136 L. Ed. 2d 791, 796-798, 800)* . The employer filed a federal suit to prevent the state from interfering with its payments and lost in the district court, but the Ninth Circuit reversed on the ground that the state law related to an ERISA-covered benefit plan and was preempted (*136 L. Ed. 2d 791, 798)* .

The Supreme Court noted its own considerable history of settling disputes over the "unhelpful text" of ERISA's

preemption provision and repeated that a law "relates to" a covered plan if it (1) has a connection with or (2) has reference to such a plan. Where a state's law acts immediately and exclusively upon such plans, or where their existence is essential to the law's operation, there is a "reference" triggering preemption (*136 L. Ed. 2d 791, 799)* . The Court noted that it had recently recognized that "uncritical literalism" in applying the other standard ("connection with") was not useful in determining how far Congress intended preemption to go (*136 L. Ed. 2d 791, 799-800* , citing New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co. (1995) *514 U.S. 645, 656, 115 S. Ct. 1671, 131 L. Ed. 2d 695*). Rather, the Court looks both to the objectives of ERISA as a guide to the scope of the state law that Congress understood would survive, as well as to the nature of the effect of the challenged state law on ERISA plans (*136 L. Ed. 2d 791, 800)* . The Court acknowledged both that ERISA's preemption provision is "clearly expansive" (*136 L. Ed. 2d 791, 799)* , and, on the other hand, that it had traditionally assumed that "the historic police powers of the States were not to be superseded by ... [federal law] unless that was the clear and manifest purpose of Congress" (*136 L. Ed. 2d 791, 800)* .

The Court disposed of a contention that the California framework makes "reference to" ERISA plans by noting that the state-regulated apprenticeship programs may or may not be funded in a way that brings them under ERISA. Since it functions irrespective of the existence of an ERISA plan, it cannot be said to make reference to such plans (*136 L. Ed. 2d 791, 800-801)* .

The Court then reviewed some of its cases under the "connected-with" prong of the "related-to" test. Examples of when a preemption-triggering connection were found had to do with statutes that mandated something about the benefits structure or administration of benefit plans. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co. (1995) 514 U.S. 645, 115 S. Ct. 1671, 131 L. Ed. 2d 695* was cited as a counter-example. In *Travelers*, the *Dillingham* Court explained, New York law provided economic incentives for purchasers of health insurance, including ERISA plans (which predominated among such purchasers) to purchase Blue Cross/Blue Shield plans rather than commercial ones. The Court had upheld the challenged statute because (1) it did not bind plan administrators to a particular choice nor preclude uniform interstate benefits packages or administrative practices, and (2) if any state action that could increase costs of providing health benefits were preempted, ERISA's reach would be virtually unlimited (*136 L. Ed. 2d 791, 802)* .

The Court found California's apprenticeship program to be indistinguishable from the New York health-insurance program, in all relevant respects. The area was one long subject to state regulation; it was very remote from the express concerns of ERISA ("reporting, disclosure, fiduciary responsibility, and the like") and from the Act's substantive coverage; neither the Act nor its legislative history provided--in the areas of state apprenticeship training standards or prevailing wage laws that incorporate them--any basis for countering the assumption that historic state police powers were not intended to be preempted; and the California scheme altered the economic incentives facing plan administrators who have certain decisions to make without dictating their choices, like "myriad state laws in areas traditionally subject to local regulation, which Congresscould not possibly have intended to eliminate" (*136 L. Ed. 2d 791, 803-805)* .

The factual context of *Dillingham* could not be farther from the typical wrongful-discharge case. The reason it may be useful for a plaintiff is that defendants may persuasively cite earlier preemption cases for their broad language about the sweep of ERISA's preemption in order to defeat actions that "relate to" ERISA-covered plans in the most peripheral of ways. A powerful argument can be made that *Dillingham* demonstrates what only Justices Scalia and Ginsburg were willing to say explicitly: "the criteria set forth in some of ...[the earlier cases] have in effect been abandoned" and that the Court is now applying traditional preemption analysis (*136 L. Ed. 2d 791, 806* (concurring opinion)).

[b] ERISA Does Not Preempt State-Law Claim for Recovery of Lost Wages and Benefits as Consequence of Wrongful Discharge

In ***Campbell v. The Aerospace Corporation*** *(9th Cir. 1997) 123 F.3d 1308, 1311* , plaintiff alleged he was terminated

for blowing the whistle on his employer's illegal conduct. In an allegation supporting a punitive-damages prayer, he stated that the employer knew that a consequence of his termination would be to deprive him of retirement benefits and make it difficult for him to acquire them elsewhere. The case was removed to federal district court because of that allegation, on an ERISA preemption theory. Plaintiff lost a tortious discharge claim at the summary-judgment stage and claims for breaches of implied contract and the implied covenant of good faith and fair dealing before a jury. He appealed, challenging the district court's subject-matter jurisdiction on the basis that ERISA did not preempt the claim (*123 F.3d 1308, 1311)* .

The court of appeal reviewed the "broad but not limitless scope of ERISA preemption" in general, then its own and other precedents concerning the issue in a wrongful-termination context, including *Ethridge v. Harbor House Restaurant (9th Cir. 1988) 861 F.2d 1389* , discussed immediately *below* (*123 F.3d 1308, 1311-1314)* . The court reaffirmed its *Ethridge* holding that the issue is whether a plaintiff alleges that denial of benefits was a motivator or a consequence of the termination, and that ERISA preempts only in the former circumstance. Analyzing whether the allegation of knowledge of the benefits loss made *Ethridge* distinguishable, the court concluded that the allegation still did not make it a case where the employer's motivation was the denial of benefits (*123 F.3d 1308, 1313)* . The court also noted that its holding was consistent with congressional intent: preempting state law that made no attempt to regulate pension plans, such as wrongful-termination law not involving benefits-motivated discharges, would not promote uniformity of the legal environment in which benefit plans operate (*123 F.3d 1308, 1314)* .

The court also rejected an attempt to find federal-question jurisdiction in the federal False Claims Act, one of the statutes cited by plaintiff as a basis for a claim of tortious discharge in violation of public policy. The court held that, since the procedural requirements for a claim under that act were not met, the federal interest is in *not* providing a federal forum for a "backdoor FCA state claim" (*123 F.3d 1308, 1314-1315)* . Reversing, the court remanded with instructions to remand to California Superior Court.

In ***Ethridge v. Harbor House Restaurant*** *(9th Cir. 1988) 861 F.2d 1389* , a former employee brought an action for wrongful discharge against his former employer. Although his first complaint was removed to federal court and dismissed, the employee brought a second complaint, which also was removed and dismissed. One basis for removal alleged by the employer was ERISA preemption based on a paragraph in the complaint stating that the discharge had caused damage and injury to the employee, including loss of employment and benefits. The district court denied preemption and removal on this ground and removed the case on other grounds. The Ninth Circuit Court of Appeals determined that the district court did not have jurisdiction of the case on the other ground and examined the issue of ERISA preemption, among other issues, to determine whether the federal court had jurisdiction on any other basis.

The Ninth Circuit determined that ERISA preemption did not provide a basis for jurisdiction of the cause of action. The court stated that if a cause of action relates to an employee benefit plan, ERISA preemption applies (*861 F.2d 1389, 1404)* . However, the court stated that some laws affect employee benefit plans too tenuously to be characterized fairly as relating to the benefit plan, and consequently, ERISA preempts only state-law claims that arise out of the administration of a covered plan (*861 F.2d 1389, 1404)* . The court stated that it agreed with other courts that have held that no ERISA action lies when the loss of pension benefits is a mere consequence of, but not a motivating factor behind, the termination of benefits (*861 F.2d 1389, 1405)* . The court, giving the phrase "relates to" its common-sense construction, held that the claim for wrongful discharge was not preempted by ERISA simply because the employee sought to recover lost salary and benefits (*861 F.2d 1389, 1405)* .

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10-100 California Points & Authorities § 100.76

AUTHOR: Carolyn Rashby

§ 100.76 Opposing Contention That Wrongful Discharge Cause of Action Preempted--ERISA Does Not Preempt Action--ERISA Does Not Preempt State Claims That Are Independent of ERISA-Related Claims

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF'S WRONGFUL-DISCHARGE ACTION IS NOT COMPLETELY PREEMPTED BY ERISA WHEN THERE ARE SOME CLAIMS INDEPENDENT OF ERISA CLAIMS INCLUDED WITH ERISA CLAIMS.

Allegations Independent of Benefit Plan Are Not Preempted. When a cause of action mixes allegations including those that relate to the administration of a benefit plan and those that do not, the allegations that do not relate to such a plan are not preempted by ERISA *Sorosky v. Burroughs Corp. (9th Cir. 1987) 826 F.2d 794, 799* ; *Barnick v. Longs Drug Stores, Inc. (1988) 203 Cal. App. 3d 377, 383-384, 250 Cal. Rptr. 10*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to the contention that a wrongful discharge action is preempted by ERISA, on the ground that ERISA does not preempt claims that are independent of ERISA-related claims. In an appropriate case, This memorandum may be submitted in opposition to the contention supported by the points and authorities *set out in § 100.67*.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that ERISA does not preempt a state-law claim that is independent of ERISA-related claims, for example, in opposition to a demurrer or motion for summary judgment. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should demonstrate that the complaint contains allegations that are unrelated to the administration of a benefit plan. For example, counsel could discuss facts indicating that plaintiff also has alleged that the discharge breached the employment contract [*see Sorosky v. Burroughs Corp. (9th Cir. 1987) 826 F.2d 794, 800]* , or that the discharge violated public policy [*see Barnick v. Longs Drug Stores, Inc. (1988) 203 Cal. App. 3d 377, 383, 250 Cal. Rptr. 10]* . For examples of arguments relating to breach of the employment contract, see *§§ 100.20, 100.21, 100.27*. For examples of arguments relating to wrongful termination in violation of public policy, see *§§ 100.41 -100.47*.

[c] Related Pleading and Practice Forms

For a general form of demurrer to a complaint based on the failure to state facts sufficient to constitute a cause of action, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* . For discussion and forms relating to wrongful discharge, see California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts* , Ch. 249, *Employment Law: Termination and Discipline* , and Ch. 250, *Employment Law: Wage and Hour Disputes* .

[3] Discussion of Authorities

[a] Allegations Independent of Benefit Plan Are Not Preempted

The facts and procedural background of ***Sorosky v. Burroughs Corp.*** *(9th Cir. 1987) 826 F.2d 794* , are discussed in *§ 100.67[3][b]*. Although part of the employee's case was preempted by ERISA, the court held that the lawsuit was not completely preempted. To the extent that the complaint contained allegations of breach of contract or wrongful termination unrelated to the benefit plan, certain claims were not preempted (*826 F.2d 794, 800)* .

In ***Barnick v. Longs Drug Stores, Inc.*** *(1988) 203 Cal. App. 3d 377, 250 Cal. Rptr. 10* , a former employee brought an action for wrongful termination, breach of contract, and other causes of action. During discovery, the employee contended that the employer had fired him to prevent his pension profit-sharing plan benefits from fully vesting. The employer moved for summary judgment based on ERISA preemption. The trial court granted summary judgment.

The court of appeal reversed, because the first two causes of action for breach of employment contract and wrongful termination included more than one theory of liability and damages, some of which were unrelated to the pension profit-sharing plan (*203 Cal. App. 3d 377, 383)* . For example, under one theory, the employee alleged that he was fired because he refused to violate certain state statutes, and under another theory he alleged that the employer violated its employment policies and procedures in the way in which it fired him (*203 Cal. App. 3d 377, 383)* . The court stated that it was guided by the language in *Sorosky v. Burroughs Corp. (9th Cir. 1987) 826 F.2d 794, 800* , discussed *above*, which allowed partial preemption of other parts of a cause of action that were unrelated to a pension plan (*203 Cal. App. 3d 377, 383-384)* .

California Points & Authorities

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 100 EMPLOYER AND EMPLOYEE: WRONGFUL TERMINATION AND DISCIPLINE
PART II. FORMS

10-100 California Points & Authorities § 100.77

AUTHOR: Carolyn Rashby

§ 100.77 Opposing Contention That Wrongful Discharge Cause of Action Is Preempted--Action Not Preempted by Statute Providing Exclusive Remedy--Workers' Compensation Act Does Not Provide Exclusive Remedy for Discharge in Violation of Public Policy

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE EXCLUSIVE REMEDY PROVISIONS OF THE WORKERS' COMPENSATION ACT DO NOT APPLY TO PLAINTIFF'S CLAIM FOR WRONGFUL DISCHARGE BECAUSE PLAINTIFF HAS ALLEGED THAT DEFENDANT DISCHARGED PLAINTIFF FOR_____ [*specify public policy that was violated*], WHICH IS A VIOLATION OF THE PUBLIC POLICY OF THIS STATE AS SET FORTH IN_____ [*specify statute or constitutional provision violated*].

A. Exception to Exclusive Remedy Provisions. The exclusive remedy provisions of the Workers' Compensation Act (*see Lab. Code § 3600*) do not apply if the employer discharges the employee in violation of a fundamental public policy (*Gantt v. Sentry Insurance (1992) 1 Cal. 4th 1083, 1101, 4 Cal. Rptr. 2d 874, 824 P.2d 680*).

[*Optional*] **B. Workers' Compensation Remedy for Retaliatory Discharge Is Not Exclusive.** The remedy provided by the Workers' Compensation Act against an employer that retaliates against an employee who obtains or seeks workers' compensation (*see Lab. Code § 132a*) is not exclusive. The employee is not precluded from pursuing a remedy for wrongful discharge under the Fair Employment and Housing Act (FEHA) (*Gov. Code § 12900 et seq.*) or under common law (*City of Moorpark v. Superior Court (1998) 18 Cal. 4th 1143, 1148, 77 Cal. Rptr. 2d 445, 959 P.2d 752*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a defendant's contention that the Workers' Compensation Act preempts plaintiff's wrongful discharge claim, on the ground that the Act does not preempt claims for wrongful discharge in violation of public policy. In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 100.70*.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue the a claim for wrongful discharge in violation of public policy is not preempted by the Workers' Compensation Act, for example in opposition to a demurrer or in a motion for summary judgment. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

For additional points and authorities pertaining to the exclusive remedy doctrine generally, see Ch. 239, *Workers' Compensation Exclusive Remedy Doctrine* .

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that the employer violated a public policy, specifying the statutory or constitutional provision in which the policy is delineated. For example, counsel could set forth facts indicating that plaintiff was discharged in retaliation for supporting a coworker's sexual harassment claim [*Gantt v. Sentry Insurance (1992) 1 Cal. 4th 1083, 1101, 4 Cal. Rptr. 2d 874, 824 P.2d 680]* or for protesting hazardous working conditions [*cf. Jenkins v. Family Health Program (1989) 214 Cal. App. 3d 440, 262 Cal. Rptr. 798* , discussed in *§ 100.45*]. For examples of other arguments relating to wrongful termination in violation of public policy, see *§§ 100.41 -100.47*.

[c] Related Pleading and Practice Forms

For a general form of demurrer to a complaint based on the failure to state facts sufficient to constitute a cause of action, see *California Forms of Pleading and Practice, Ch. 206, Demurrers and Motions for Judgment on the Pleadings, § 206.122* (Matthew Bender). For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* . For discussion and forms relating to wrongful discharge, see California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts* , Ch. 249, *Employment Law: Termination and Discipline* , and Ch. 250, *Employment Law: Wage and Hour Disputes* .

[3] Discussion of Authorities

[a] Exception to Exclusive Remedy Provisions

In ***Gantt v. Sentry Insurance*** *(1992) 1 Cal. 4th 1083, 4 Cal. Rptr. 2d 874, 824 P.2d 680* , the California Supreme Court held that an employeemay state a cause of action for tortious discharge in violation of public policy against his or her employer, and that the exclusive remedy provisions of the Workers' Compensation Act do not preempt such an action (*1 Cal. 4th 1083, 1101)* . In *Gantt*, the employee was allegedly discharged for testifying truthfully before the Department of Fair Employment and Housing in support of a coworker's claim of sexual harassment. The public policy allegedly violated by the employer was the prohibition set forth in *Gov. Code § 12975* against any interference in an official investigation of a sexual harassment claim (*1 Cal. 4th 1083, 1096-1097)* . The Court noted that when an employer's decision to discharge an employee results from an animus that violates the fundamental public policy of this state proscribing any interference in the official investigation of sexual harassment, this misconduct cannot, under any reasonable viewpoint, be considered a normal part of the employment relationship or a risk reasonably encompassed within the compensation bargain (*1 Cal. 4th 1083, 1100)* . The factual and procedural background of *Gantt* is discussed in *§ 100.41[3][a]*.

[b] Workers' Compensation Remedy for Retaliatory Discharge Is Not Exclusive

In ***City of Moorpark v. Superior Court*** *(1998) 18 Cal. 4th 1143, 77 Cal. Rptr. 2d 445, 959 P.2d 752* , the Supreme Court disapproved a line of cases that had held that *Labor Code Section 132a* provides an exclusive remedy for an employee who suffers any employment discrimination as a result of an industrial injury. That statute provides civil remedies and criminal penalties against an employer that retaliates against an employee who seeks workers' compensation benefits, and a line of cases had construed the statute as providing the exclusive remedy for all forms of employment discrimination based on job-related disability. In *Moorpark*, the Supreme Court pointed out that the terms of the statute do not purport to make its remedy exclusive; moreover, the plain language of the workers' compensation exclusive-remedy provision, *Labor Code Section 3600*, indicates that it does not apply to Section 132a. The Court found that, like sexual and racial discrimination, a Section 132a violation violates substantial and fundamental public policy, and therefore it may be the basis for a wrongful-discharge action under the Fair Employment and Housing Act (FEHA) (*Gov. Code § 12900 et seq.*) or under common law (*18 Cal. 4th 1143, 1148, 1154-1158)* . However, the Court noted that not every instance of disability discrimination in violation of Section 132a gives rise to a valid FEHA claim (*18 Cal. 4th 1143, 1158)* .

[4] Additional Authorities

[a] Exception to Exclusive Remedy Provisions

In *Lenk v. Total-Western, Inc. (2001) 89 Cal. App. 4th 959, 108 Cal. Rptr. 2d 34* , the plaintiff was discharged after six months of employment. The plaintiff sued the employer for fraud in inducing the plaintiff to leave his former employer; the relief sought by the plaintiff included damages for emotional distress. After the plaintiff obtained a judgment, the employer appealed, contending that the plaintiff's emotional-distress damages were barred by the workers' compensation exclusivity rule (*see Lab. Code § 3602*). The court of appeal rejected the employer's contention, holding that the exclusivity-of-remedy rule of the workers' compensation applies only if the conditions for workers' compensation exist. Those conditions include a requirement that the injury arise from, or be a normal risk of, the employment relationship (*see Lab. Code § 3600(a)*). In this particular case, the court of appeal found that the conditions of workers' compensation did not exist, because the injury was not part of the normal risk of employment. Specifically, the employer's false statements about the company's financial stability, future plans, and the plaintiff's prospects for promotion--all designed to induce the plaintiff to accept employment--were not a normal part of the employment relationship or a risk reasonably encompassed within the compensation bargain. Therefore, the plaintiff's fraud cause of action seeking emotional distress damages for such false statements was not barred by the workers' compensation exclusivity rule (*89 Cal. App. 4th 959, 970-973)* .

In *Murray v. Oceanside Unified Sch. Dist. (2000) 79 Cal. App. 4th 1338, 95 Cal. Rptr. 2d 28* , the plaintiff brought suit against her employer for workplace harassment and retaliation against her based on her sexual orientation. The plaintiff's complaint included a cause of action for intentional infliction of emotional distress based on abuse of authority and outrageous conduct. The court of appeal held that when a plaintiff can allege emotional distress resulting from a pattern of continuing violations of harassment based on sexual orientation, a cause of action for infliction of emotional distress will not be barred by the exclusivity provisions of workers' compensation law. Such a pattern of continuing violations of the public policy against workplace harassment on the basis of sexual orientation is outside the normal part of the employment environment. Therefore, a cause of action for emotional distress caused by such violations is not barred by the workers' compensation law (*79 Cal. App. 4th 1338, 1362-1363)* .

In *Kovatch v. California Casualty Management Co. (1998) 65 Cal. App. 4th 1256, 77 Cal. Rptr. 2d 217* , the plaintiff asserted a cause of action for intentional infliction of emotional distress in connection with his claim of wrongful constructive discharge. The complaint alleged that the plaintiff's emotional injuries, as well as the conditions leading to his constructive discharge, resulted from harassment on the basis of perceived sexual orientation, in violation of an express statutory prohibition against such discriminatory conduct (*see former* Lab. Code § 1102.1; *now see Gov. Code § 12940(a)-(d), (j)(1)*). The court held that the workers' compensation lawdid not bar the plaintiff's claim of intentional infliction of emotional distress, since it arose out of conduct that was also the basis for a claim of wrongful termination

in violation of public policy (*65 Cal. App. 4th 1256, 1277)* .

In *Phillips v. Gemini Moving Specialists (1998) 63 Cal. App. 4th 563, 74 Cal. Rptr. 2d 29* , the plaintiff brought an action for wrongful termination in violation of public policy and intentional and negligent infliction of emotional distress, asserting that his discharge was in retaliation for his attempt to protect his statutory rights to employment compensation. He alleged that the setoff of debts from his paycheck was illegal under applicable statutes. The trial court granted the defendant's demurrer and dismissed the claim, ruling among other things that the plaintiff's claim for emotional distress was barred by the exclusivity of workers' compensation. The court of appeal reversed. The court acknowledged that emotional distress from employment is ordinarily a normal part of employment and is covered by workers' compensation. However, an employee can recover damages for emotional distress in the context of a tort action for wrongful termination in violation of public policy, which is not barred by the workers' compensation exclusive-remedy rule, because the emotional-distress damages are simply a component of the plaintiff's compensatory tort damages (*63 Cal. App. 4th 563, 577)* .

In *Accardi v. Superior Court (1993) 17 Cal. App. 4th 341, 21 Cal. Rptr. 2d 292* , a former police officer brought an action against a city and several individuals alleging causes of action for sexual harassment in violation of FEHA (*Gov. Code § 12940 et seq.*), constructive discharge, intentional interference with business relationship, and intentional infliction of emotional distress. The trial court sustained defendants' demurrers without leave to amend as to the causes of sexual harassment and emotional distress, ruling among other things that the cause of action for intentional infliction of emotional distress was barred by the exclusive remedy rule (*17 Cal. App. 4th 341, 345-346)* . The court of appeal issued a writ of mandate directing the trial court to set aside its order sustaining the demurrers and enter a new order overruling the demurrers. Citing *Gantt v. Sentry Insurance (1992) 1 Cal. 4th 1083* , and distinguishing *Davaris v. Cubaleski (1993) 12 Cal. App. 4th 1583, 16 Cal. Rptr. 2d 330* , the court held that the exclusive remedy rule does not bar the plaintiff's action under FEHA against the employer for emotional distress arising out of sexual harassment at work because sexual harassment violates public policy and is not a normal part of employment (*17 Cal. App. 4th 341, 352-353)* .

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PART II. FORMS

10-100 California Points & Authorities § 100.78

AUTHOR: Carolyn Rashby

§ 100.78 Opposing Contention That Wrongful Discharge Cause of Action Is Preempted--National Bank Act [12 U.S.C. § 24] Does Not Preempt FEHA Claims Not in Conflict With Federal Antidiscrimination Laws

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF'S CLAIM FOR WRONGFUL DISCHARGE IN VIOLATION OF THE FAIR EMPLOYMENT AND HOUSING ACT (FEHA) IS NOT PREEMPTED BY THE NATIONAL BANK ACT, BECAUSE THE CLAIM DOES NOT CONFLICT WITH FEDERAL ANTIDISCRIMINATION LAWS.

Preemption by National Bank Act Is Limited. Section 24 of the National Bank Act (*12 U.S.C. § 24*, P 5, providing that national banks have the power to dismiss bank officers "at pleasure") preempts most state-law causes of action. However, it does not preempt a claim brought under the California Fair Employment and Housing Act (FEHA, *Gov. Code § 12900 et seq.*), if the basis of the claim is discrimination on the grounds of race, color, religion, sex, national origin, or age, since those grounds of discrimination are prohibited by federal law (*Peatros v. Bank of America (2000) 22 Cal. 4th 147, 167-176, 91 Cal. Rptr. 2d 659, 990 P.2d 539* ; *see 29 U.S.C. § 621 et seq.* [Age Discrimination in Employment Act of 1967]; *42 U.S.C. § 2000e et seq.* [Title VII of Civil Rights Act of 1964]; *see also Kroske v. US Bank Corp. (9th Cir. 2005) 432 F.3d 976, 981-989)* .

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a contention that a terminated bank officer's wrongful discharge claim is preempted by the National Bank Act, if the claim is based on alleged discrimination that violated federal law as well as the California FEHA. In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set forth in § 100.69*.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the plaintiff's claim is not preempted, for example in a motion for summary judgment. These points andauthorities may be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. The argument should, therefore, establish that the plaintiff's FEHA claim is based on discrimination that is also prohibited by Title VII or the ADEA, such as a discharge on the grounds of race, color, religion, sex, national origin, or age [*Peatros v. Bank of America (2000) 22 Cal. 4th 147, 167-176, 91 Cal. Rptr. 2d 659, 990 P.2d 539]* .

[c] Related Pleading and Practice Forms

For a general form of demurrer to a complaint based on the failure to state facts sufficient to constitute a cause of action, see *California Forms of Pleading and Practice, Ch. 206, Demurrers and Motions for Judgment on the Pleadings, § 206.122* (Matthew Bender). For a form of notice for summary judgment and related discussion, see Ch. 537, *Summary Judgment* , in that publication. For discussion and forms relating to wrongful discharge, see Ch. 249, *Employment Law: Termination and Discipline* , in that publication.

[3] Discussion of Authorities

[a] Preemption by National Bank Act Is Limited

In ***Peatros v. Bank of America*** *(2000) 22 Cal. 4th 147, 91 Cal. Rptr. 2d 659, 990 P.2d 539* , the plaintiff had been employed as an officer of a national bank. After she was demoted and then discharged by the bank's board of directors, the plaintiff sued the bank, alleging that the grounds for her termination were her race (African-American) and her age (45 years at the time of the demotion and 47 years at the time of discharge). The complaint asserted five causes of action: (1) breach of implied contract of employment, (2) violation of the California Fair Employment and Housing Act (FEHA, *Gov. Code § 12900 et seq.*), (3) wrongful discharge in violation of public policy as declared in FEHA, (4) breach of a covenant of good faith and fair dealing that was part of the implicit contract of employment, and (5) misrepresentation and deceit. The bank filed a motion for summary judgment, contending that it was entitled to judgment as a matter of law because Section 8 of the National Bank Act of 1864 (now codified as *12 U.S.C. § 24*, P 5) preempts all state-law causes of action arising from the dismissal of a bank officer. The superior court granted the bank's motion, and the court of appeal affirmed. The California Supreme Court granted review on the sole issue of whether *12 U.S.C. § 24*, P 5 preempts FEHA (*22 Cal. 4th 147, 154-156)* .

The Supreme Court reversed the judgment of the court of appeal, finding that the plaintiff's FEHA claims of racial and age discrimination were not preempted by the federal statute (*22 Cal. 4th 147, 179)* . The Court held that *12 U.S.C. § 24*, P 5 does indeed preempt FEHA to the extent the two laws are in conflict. However, the Court also held that the actual scope of the National Bank Act provision has been limited since its original enactment in 1864. Reading federal law as a whole, the Court found that the National Bank Act has been impliedly amended by subsequently enacted federal civil-rights laws, specifically Title VII of the Civil Rights Act of 1964 (*42 U.S.C. § 2000e et seq.*) and the Age Discrimination in Employment Act of 1967 (ADEA, *29 U.S.C. § 621 et seq.*). Thus, as impliedly amended by Title VII and the ADEA, the National Bank Act provision actually grants a national bank only a *limited* power to dismiss its officers; he power does not extend to dismissal on the grounds of race, color, religion, sex, national origin, or age. As so amended, the National Bank Act provision preempts FEHA, but only to the extent that FEHA confers on officers of a national bank a right against dismissal on grounds not mentioned in Title VII or the ADEA (for example, physical disability, mental disability, medical condition, marital status, or sexual orientation; *see Gov. Code § 12940(a)*) (*22 Cal. 4th 147, 167-176)* . Presumably, the Court's reasoning would also apply to prevent preemption of a claim of wrongful discharge in violation of public policy, if the public policy is embodied in a provision of FEHA that is not preempted by the National Bank Act.

Kroske v. US Bank Corp. *(9th Cir. 2005) 432 F.3d 976* was an age-discrimination suit brought by a former employee of a national bank in the State of Washington. The plaintiff claimed that her employment as a bank officer had been terminated on the basis of age in violation of Washington's law against age discrimination; she did not assert any claims under federal law. The trial court granted the defendant bank's motion for summary judgment, holding that the National Bank Act preempted the plaintiff's state-law claim of age discrimination. Specifically, the court held that the Act's provision empowering national banks to dismiss their officers "at pleasure" (*12 U.S.C. § 24*, P 5) preempted any state law regulating the defendant bank's employment practices (*432 F.3d 976, 979)* .

The Ninth Circuit reversed, holding that under the circumstances of this case, the state's age-discrimination law was not preempted. The court of appeals explained that federal law may preempt state law in three ways. First, Congress may state its intent through an express preemption statutory provision. Second, in the absence of such an express statutory preemption provision, state law may be preempted in a field that Congress intended federal law to occupy exclusively. Finally, state law that actually conflicts with federal law is preempted. Further, in a field of traditional state regulation, courts will assume that the historic police powers of the states were not to be superseded by a federal act unless that was the clear and manifest purpose of Congress. This presumption of non-preemption does not apply, however, in an area where there has been a history of significant federal presence (*432 F.3d 976, 981)* .

In this case, the trial court's decision was based on the second method of preemption: that the dismiss-at-pleasure provision of the National Bank Act preempted the entire field of employment law. In reviewing that decision, the Ninth Circuit recognized that there is a significant federal presence in the regulation of national banks, but the court of appeals also emphasized that the state's age-discrimination law was enacted pursuant to the state's historic police powers to prohibit discrimination on specified grounds. Thus, the court started with the presumption that Congress did not intend the National Bank Act to preempt the state's age-discrimination law (*432 F.3d 976, 981)* .

Turning to the dismiss-at-pleasure provision of the National Bank Act, the Ninth Circuit found that in light of the historic dual regulation of banks by state and federal law, the trial court had erred in determining that the provision preempts the entire field of law governing national banks' employment practices. Rather, that one undefined clause does not reflect that Congress's clear and manifest purpose was preemption of the entire field of state law (*432 F.3d 976, 982-983)* . Therefore, it was necessary for the court of appeals to consider, in light of the intended purpose and scope of the dismiss-at-pleasure provision, whether the state law conflicted with that provision.

The Ninth Circuit noted that the original congressional intent behind the dismiss-at-pleasure provision was to ensure the financial stability of the banks by affording a bank the means to discharge employees who were felt to compromise an institution's integrity. Thus, the provision has been interpreted as creating an at-will employment relationship, and the Ninth Circuit has applied the provision to bar contract claims challenging a bank officer's dismissal and to bar state common-law wrongful-discharge claims (*432 F.3d 976, 983-985)* . In contrast, however, state anti-discrimination statutes enacted under a state's police powers are not preempted by the banking laws simply because they are part of a general category of state-created employment rights. Unlike cases involving state common-law claims, the present case involved a state statute prohibiting discrimination, which was modeled after and incorporated into the federal anti-discrimination laws (*432 F.3d 976, 984-986)* . The federal Age Discrimination in Employment Act (ADEA) disclaims any preemptive effect on state laws and incorporates consistent state anti-discrimination laws (*29 U.S.C. §§ 626(d)(2), 633(a),* (b)). Moreover, national banks are not exempt from federal anti-discrimination laws (*432 F.3d 976, 986)* .

The Ninth Circuit went on to observe that the anti-discrimination provisions of the ADEA conflict with banks' authority to dismiss officers "at pleasure." As a result, the court found it necessary to give effect to the congressional intent expressed in the ADEA by limiting the power granted to banks through the dismiss-at-pleasure provision. Because the two acts are in irreconcilable conflict, the court found that the ADEA (which was enacted after the National Bank Act) effected an implied repeal of the National Bank Act to the extent necessary to give effect to the ADEA. Accordingly,

the authority to dismiss officers "at pleasure" does not encompass the right to terminate an officer in a manner that violates the prohibitions against discrimination enumerated in the ADEA (*432 F.3d 976, 986-987)* .

The Ninth Circuit then concluded that, given the ADEA's implied partial repeal of the dismiss-at-pleasure provision of the National Bank Act, there was no conflict between that provision and a state-law prohibition of age discrimination that substantively mirrors the ADEA. Therefore, the plaintiff's state-law claim of age discrimination in this case was not preempted (*432 F.3d 976, 987-989)* .

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10-100 California Points & Authorities § 100.79

AUTHOR: Carolyn Rashby

§ 100.79 Opposing Contention That Wrongful Discharge Cause of Action Is Preempted--Labor-Management Reporting and Disclosure Act Does Not Preempt Wrongful Discharge Claims Based on Public Policy Against Discrimination

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF'S CLAIM FOR WRONGFUL DISCHARGE IS NOT PREEMPTED BY THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT, BECAUSE THE CLAIM IS BASED ON A VIOLATION OF PUBLIC POLICY AGAINST_____ [*specify, e.g.,* AGE *or* DISABILITY] DISCRIMINATION.

Labor-Management Reporting and Disclosure Act Does Not Preempt Wrongful Discharge Claims Based on Public Policy Against Discrimination. The federal Labor-Management Reporting and Disclosure Act (*29 U.S.C. § 401 et seq.*) does not preemptclaims of wrongful discharge in violation of public policy against discrimination based on characteristics such as sex, race, age, disability, and religion (*Smith v. International Brotherhood of Electrical Workers (2003) 109 Cal. App. 4th 1637, 1648-1654*).

[2] Comments

[a] Use of Form

This form may be used to oppose a contention that a wrongful discharge claim against a labor organization by a former policy-making or confidential employee is preempted by the Labor-Management Reporting and Disclosure Act. In an appropriate case, this form may be used in opposition to the points and *authorities in § 100.66*.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law

stated. Thus, counsel should establish that the plaintiff's claim meets the elements of a claim of wrongful discharge in violation of public policy (*see Stevenson v. Superior Court (1997) 16 Cal. 4th 880, 889-894, 66 Cal. Rptr. 2d 888, 941 P.2d 1157* ; *see also § 100.41* et seq.).

[c] Related Pleading and Practice Chapters

For related legal background and forms for asserting claims of wrongful termination in violation of public policy, see California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline* (Matthew Bender).

[3] Discussion of Authorities

[a] Labor-Management Reporting and Disclosure Act Does Not Preempt Wrongful Discharge Claims Based on Public Policy Against Discrimination

In ***Smith v. International Brotherhood of Electrical Workers*** *(2003) 109 Cal. App. 4th 1637* , the plaintiff was a union organizer who brought suit against the union after he was discharged. The complaint included claims of wrongful termination in violation of the public policies against age discrimination and disability discrimination. The trial court dismissed those claims, holding that they were preempted by the federal Labor-Management Reporting and Disclosure Act (LMRDA) (*29 U.S.C. § 401 et seq.*), because the plaintiff was a policy-making employee of the union.

The court of appeal reversed. To protect the prerogative of elected union officials to choose staff members with views comparable to their own and in whom they have confidence, the LMRDA generally preempts tort claims based on "patronage" discharges of policy-making or confidential union employees. However, the court of appeal rejected a contention that LMRDA preemption extends to claims of employment discrimination based on characteristics such as sex, race, age, disability, and religion. If the LMRDA were allowed to preempt a union employee's cause of action for wrongful discharge in violation of public policy, the deterrent effect of such a suit would be lost, and abuses of power by union leadership would receive protection. The court explained that the plaintiff's causes of action for wrongful discharge in violation of public policy in this case fell outside the class of actions preempted by the LMRDA. Generally speaking, California law imposes a responsibility on employers, including unions, to refrain from discharging an employee on the basis of physical disability or age over 40, and to provide reasonable accommodation for a disabled employee [*Gov. Code § 12940(a), (m)*]. Because the LMRDA does not explicitly provide to the contrary, those responsibilities (and the state's means of enforcing them) are not reduced or limited by the LMRDA. Therefore, the court concluded that the LMRDA does not preempt an action against a union by a union employee arising out of job discrimination based on age or disability (*109 Cal. App. 4th 1637, 1648-1654)* .

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PART II. FORMS

10-100 California Points & Authorities § 100.80

AUTHOR: Carolyn Rashby

§ 100.80 Supporting Contention That Wrongful Termination Cause of Action Is Barred by After-Acquired Evidence Justifying Termination

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF CANNOT MAINTAIN A CAUSE OF ACTION FOR WRONGFUL TERMINATION BECAUSE DEFENDANT HAS ACQUIRED EVIDENCE THAT PLAINTIFF_____ [*specify misconduct, e.g., falsified resume or job application or committed post-hire misconduct*], WHICH, IF DISCOVERED DURING THE COURSE OF PLAINTIFF'S EMPLOYMENT, WOULD HAVE JUSTIFIED TERMINATION.

A. After-Acquired Evidence Doctrine. The after-acquired evidence doctrine bars an action for wrongful termination, or limits the relief available to a discharged employee, when, after the termination, the employer learns for the first time about employee misconduct that would have led to discharge, or the employee not beinghired, had the misconduct been discovered during the employment (*see Camp v. Jeffer, Mangels, Butler & Marmaro (1995) 35 Cal. App. 4th 620, 632, 41 Cal. Rptr. 2d 329*).

B. Misconduct Relating to Heart of Employment Relationship Bars Wrongful Termination Action. Misconduct by an employee that renders the employee legally unqualified for the job and that has a potential detrimental impact on the employer goes to the heart of the employment relationship. Under these circumstances, the employee is not entitled to recourse for alleged wrongful termination of his or her employment (*Camp v. Jeffer, Mangels, Butler & Marmaro (1995) 35 Cal. App. 4th 620, 636-639, 41 Cal. Rptr. 2d 329*).

[*Optional*] **C. After-Acquired Evidence Admissible to Support Employer's Originally Proffered Reason for Termination.** Although under some circumstances an employer may not rely on previously unknown wrongdoing of the employee to justify an allegedly wrongful termination, after-acquired evidence is clearly admissible if offered to support the employer's originally proffered reason for termination (*Finegan v. County of Los Angeles (2001) 91 Cal.*

App. 4th 1, 10-13, 109 Cal. Rptr. 2d 762).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a defendant-employer's contention that plaintiff's wrongful termination action is barred based on after-acquired evidence of misconduct justifying termination [*see Camp v. Jeffer, Mangels, Butler & Marmaro (1995) 35 Cal. App. 4th 620, 41 Cal. Rptr. 2d 329]* .

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that after-acquired evidence of misconduct bars plaintiff's cause of action for wrongful termination, for example, in a motion for summary judgment. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in the above form showing the relationship between the facts of the case and the points of law stated. Counsel should discuss evidence of the misconduct, such as facts indicating that plaintiff falsified his or her resume or job application, or that plaintiff committed post-hire misconduct. Counsel should also show that plaintiff would have been fired for such misconduct, or not hired in the first place, had the misconduct been discovered earlier. In addition, counsel should argue that the misconduct renders plaintiff legally unqualified for the position and that it was potentially harmful to defendant. For example, in an appropriate case, counsel could set forth facts indicating that there was a legal requirement regarding qualifications for the position, plaintiff misrepresented those qualifications, and that such misrepresentations could have subjected defendant to potential civil or criminal prosecution.

[c] Opposing Memoranda

In an appropriate case, the points and authorities *set out in § 100.81* may be used to oppose the contention supported by these points and authorities.

[d] Related Pleading and Practice Forms

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender). For discussion and forms relating to wrongful demotion, see Ch. 249, *Employment Law: Termination and Discipline* , in that publication.

[e] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 60, § 60.09[9]* (Matthew Bender).

[3] Discussion of Authorities

[a] After-Acquired Evidence Doctrine

In ***Camp v. Jeffer, Mangels, Butler & Marmaro*** *(1995) 35 Cal. App. 4th 620, 41 Cal. Rptr. 2d 329* , the plaintiffs, Mr. and Mrs. Camp, were convicted of a felony and served time in prison. In 1989, the defendant law firm hired Mr. Camp as a legal secretary, and in 1990 it hired Mrs. Camp. The Camps, however, lied on their job applications when asked whether they had ever been convicted of a felony, and omitted reference to the convictions on their resumes. In 1990, defendant became a contractor for the federal Resolution Trust Corporation, and was required by law to certify that none of its employees had ever been convicted of a felony. To comply, defendant had new employees, including Mrs.

Camp, complete a form stating that they had not been convicted of a felony. Then, in 1991, Mrs. Camp was fired, allegedly because of typing errors. Mr. Camp was also fired, allegedly for attending to personal matters on company time. The Camps, however, claimed that they were terminated because Mrs. Camp had recently reported to defendant's director of human resources that a partner in the law firm was involved in insider trading. The Camps sueddefendant alleging breach of an implied-in-fact contract, breach of the covenant of good faith and fair dealing, wrongful termination in violation of public policy, and misrepresentation. During discovery, defendant learned for the first time that the Camps had been convicted of a felony. The trial court granted defendant's motion for summary judgment, finding that the Camps' at will status barred their contract and misrepresentation claims and that the after-acquired evidence doctrine barred their public policy claims. The Camps appealed.

The court of appeal affirmed. With respect to the after-acquired evidence issue, the court explained that the after-acquired evidence doctrine shields an employer from liability, or limits the relief available to a plaintiff, where, after a termination, the employer discovers for the first time employee misconduct that would have lead to discharge in any event. According to the court, such misconduct usually involves misrepresentations on a resume or job application or posthire, on-the-job misconduct (*35 Cal. App. 4th 620, 632)* . The court distinguished *Cooper v. Rykoff-Sexton, Inc. (1994) 24 Cal. App. 4th 614, 29 Cal. Rptr. 2d 642* (discussed in *§ 100.81[3][a]*), and *McKennon v. Nashville Banner Publ. Co. (1995) 513 U.S. 352, 115 S. Ct. 879, 130 L. Ed. 2d 852* , both of which found that after-acquired evidence of misconduct did not bar the employees' actions [*see* *Cooper v. Rykoff-Sexton, Inc. (1994) 24 Cal. App. 4th 614, 29 Cal. Rptr. 2d 642* (holding that resume fraud did not bar age discrimination and breach of contract claims); *McKennon v. Nashville Banner Publ. Co. (1995) 513 U.S. 352, 115 S. Ct. 879, 130 L. Ed. 2d 852* (holding that after-acquired evidence did not bar age discrimination claim)] on the grounds that the misconduct in those cases involved violating the employers' internal, voluntarily-adopted policies, whereas the Camps misrepresented a job qualification imposed by the government such that they were not lawfully qualified for the job (*35 Cal. App. 4th 620, 636)* . The *Camp* court also noted that *Cooper* left open the possibility that after-acquired evidence might bar or limit recovery in some cases, but declined to adopt a blanket rule that material falsification of an employment application is a complete defense to wrongful termination claim (*35 Cal. App. 4th 620, 633* ; citing Cooper v. Rykoff-Sexton, Inc. (1994) *24 Cal. App. 4th 614, 617, 29 Cal. Rptr. 2d 642*).

The court also explained that the doctrine of unclean hands compelled the result that the Camps not have legal recourse for their termination. According to the court, the doctrine bars relief where the misconduct relates directly to the transaction concerning which the complaint is made. The court concluded that the Camps' misrepresentations related directly to their wrongful termination claims, and since they were not lawfully qualified for their jobs, they cannot be heard to complain that they improperly lost them (*35 Cal. App. 4th 620, 637-639)* .

[b] Misconduct Relating to Heart of Employment Relationship Bars Wrongful Termination Action

Camp v. Jeffer, Mangels, Butler & Marmaro *(1995) 35 Cal. App. 4th 620, 41 Cal. Rptr. 2d 329* , is *discussed under § 100.80[3][a].*

[c] After-Acquired Evidence Admissible to Support Employer's Originally Proffered Reason for Termination

In ***Finegan v. County of Los Angeles*** *(2001) 91 Cal. App. 4th 1, 109 Cal. Rptr. 2d 762* , the plaintiff asserted a claim under the Fair Employment and Housing Act (*Gov. Code § 12940 et seq.*), alleging that he had been discriminated against on the basis of a physical disability. The employer contended that the plaintiff was removed from his position not because of a disability, but rather because he was not qualified for the job. This contention, if established, would negate one of the elements of the plaintiff's cause of action. In support of its contention, the employer offered at trial the expert testimony of a physician who had examined the plaintiff after his termination. The plaintiff objected to this testimony on the ground that it was "after-acquired evidence." The trial court overruled the objection and admitted the expert testimony. After a judgment in favor of the employer, the plaintiff appealed. The court of appeal affirmed,

holding that the after-acquired evidence doctrine is inapplicable to exclude evidence offered in support of the employer's originally proffered reason for the adverse employment action. Generally, the after-acquired evidence doctrine limits an employer's ability to rely on previously unknown wrongdoing of an employee to justify the employer's unlawful discrimination against the employee. The rationale for the doctrine does not apply, however, when the employer disputes one of the elements of the employee's claim and offers later-acquired medical evidence to show that the element is missing (*91 Cal. App. 4th 1, 9-13)* .

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 100 EMPLOYER AND EMPLOYEE: WRONGFUL TERMINATION AND DISCIPLINE
PART II. FORMS

10-100 California Points & Authorities § 100.81

AUTHOR: Carolyn Rashby

§ 100.81 Opposing Contention That Wrongful Termination Cause of Action Is Barred by After-Acquired Evidence Justifying Termination

[1] FORM

[*The following may be included in a memorandum supporting or opposing a motion, or in a trial or appellate brief.*]

PLAINTIFF'S CAUSE OF ACTION FOR WRONGFUL TERMINATION IS NOT BARRED BY AFTER-ACQUIRED EVIDENCE OF MISCONDUCT THAT PLAINTIFF_____ [*specify misconduct, e.g., falsified resume or job application*], BECAUSE DEFENDANT TERMINATED PLAINTIFF IN VIOLATION OF PLAINTIFF'S LEGAL RIGHTS UNDER _____ [*specify source of legal rights, e.g., employment contract or statute*] [*if appropriate, add:*, AND BECAUSE THE EVIDENCE DOES NOT ESTABLISH THAT DEFENDANT ACTUALLY WOULD HAVE TERMINATED PLAINTIFF BASED ON THE MISCONDUCT].

A. After-Acquired Evidence Does Not Defeat Wrongful Termination Action. There is no blanket rule that material falsification of an employment application or other misconduct is a complete defense to a claim that the employer, while still unaware of the falsification, terminated the employment in violation of the employee's legal rights. Neither public policy nor contract principles dictate that an employee who was fired without cause in violation of the employment contract or a statute should forfeit all legal remedies merely because of earlier misrepresentations on an employment application that did not concern a legal disqualification from holding the employment (*Cooper v. Rykoff-Sexton, Inc. (1994) 24 Cal. App. 4th 614, 617-619, 29 Cal. Rptr. 2d 642* ; *Murillo v. Rite Stuff Foods, Inc. (1998) 65 Cal. App. 4th 833, 842-845, 77 Cal. Rptr. 2d 12*).

[*Optional*] **B. After-Acquired Evidence Does Not Bar or Limit Employee's Action Unless It Would Actually Have Resulted in Termination.** Even if an employer presents after-acquired evidence that would have justified termination of the employee, it remains a question of fact whether the employer would have actually terminated the employee on the basis of the after-acquired evidence. Thus, depending on the circumstances of the particular case, the trier of fact might

reasonably find that the employee would have been subjected to less-harsh disciplinary action, or to no adverse action at all. In such a case the court would be justified in refusing to bar or reduce the employee's recovery of damages for wrongful termination (*Thompson v. Tracor Flight Sys., Inc. (2001) 86 Cal. App. 4th 1156, 1172-1174, 104 Cal. Rptr. 2d 95*).

[*Optional*] **C. After-Acquired Evidence Pertaining to Plaintiff's Immigration Status Does Not Bar Wrongful Termination Action.** The Legislature has declared that all protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals who are or who have been employed in California, regardless of immigration status (*Civ. Code § 3339(a)*; *Gov. Code § 7285(a)*; *Lab. Code § 1171.5(a)*). Accordingly, for purposes of enforcing California labor, employment, and civil-rights laws, the plaintiff's immigration status is irrelevant to the issue of liability (*Civ. Code § 3339(b)*; *Gov. Code § 7285(b)*; *Lab. Code § 1171.5(b)*; *see Incalza v. Fendi N. Am., Inc. (9th Cir. 2007) 479 F.3d 1005, 1010-1013)* .

[2] Comments

[a] Use of Form

This form may be submitted by a plaintiff in opposition to a defendant-employer's contention that plaintiff's wrongful termination action is barred based on after-acquired evidence of misconduct justifying termination (*see Cooper v. Rykoff-Sexton, Inc. (1994) 24 Cal. App. 4th 614, 617-619, 29 Cal. Rptr. 2d 642*).

In an appropriate case, this form may be submitted in opposition to the contention supported by the form presented in § 100.80.

This form may be combined with memoranda pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that after-acquired evidence of misconduct does not bar an action for wrongful termination, for example, in opposition to a defendant's motion for summary judgment or in support of a motion in limine to exclude such evidence from consideration by the jury. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in the above form showing the relationship between the facts of the case and the points of law stated. Counsel should discuss evidence that defendant terminated plaintiff in violation of his or her legal rights under either an employment contract or statute. Counsel also should set forth facts indicating that the alleged misconduct was perpetrated long before plaintiff's termination, and that defendant was unaware of the alleged misconduct at the time of the discharge. If appropriate, counsel should also point out that, even though the alleged misconduct might have justified termination, there is insufficient evidence that the defendant would *actually* have terminated the plaintiff had the misconduct been known. Also, if appropriate, counsel should stress that the after-acquired evidence pertains to the plaintiff's immigration status.

[c] Related Pleading and Practice Forms

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender). For discussion and forms relating to wrongful demotion, see Ch. 249, *Employment Law: Termination and Discipline* , in that publication.

[d] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 60, § 60.09[9]* (Matthew Bender).

[3] Discussion of Authorities

[a] After-Acquired Evidence Does Not Defeat Wrongful Termination Action

In ***Cooper v. Rykoff-Sexton, Inc.*** *(1994) 24 Cal. App. 4th 614, 29 Cal. Rptr. 2d 642* , the plaintiff was fired, after 10 years of satisfactory job performance, for violating the defendant-employer's unwritten policy requiring advance authorization for overtime and rules requiring accurate recordkeeping. Plaintiff sued for wrongful termination in violation of his employment contract and for age discrimination. During discovery, defendant's counsel found that plaintiff had made two falsifications on his original application for employment with defendant by not disclosing that he had been fired from two prior jobs. Defendant moved for summary judgment on the ground that plaintiff could not complain that his firingwas unlawful because plaintiff had made material omissions from his employment application 10 years earlier. The motion was supported by a declaration from one of defendant's managers claiming that if he had known about the omissions, he would not have hired plaintiff, and that if the omissions had become known to him while plaintiff was employed, plaintiff would have been discharged for falsifying his employment application. The trial court granted the motion, and plaintiff appealed.

The court of appeal reversed. The court reviewed two conflicting lines of authority in federal court decisions applying the after-acquired evidence doctrine. The court rejected the line of cases that followed the reasoning of *Summers v. State Farm Mutual Auto Insurance Co. (10th Cir. 1988) 864 F.2d 700* , in which the Tenth Circuit held that after-acquired evidence of employment application or resume falsification completely bars plaintiff from obtaining recovery for wrongful termination (*24 Cal. App. 4th 614, 616-617)* . The court of appeal then noted that the Eleventh and Seventh Circuits have rejected the resume-falsification defense as a complete bar to relief, although recognizing that the measure of damages can be affected if the employer can prove it would eventually have discovered the falsification even in the absence of the litigation (*24 Cal. App. 4th 614, 617* ; *see also* McKennon v. Nashville Banner Publishing Co. (1995) *513 U.S. 352, 356-363, 115 S. Ct. 879, 130 L. Ed. 2d 852* (rejecting *Summers* line of authority and holding that after-acquired evidence does not completely bar relief in action under Age Discrimination in Employment Act, *29 U.S.C. 621 et seq.*; such evidence is relevant to scope of relief, such that it will generally preclude reinstatement or front pay, as well as limit plaintiff's back pay). The court in *Cooper* concluded that it would not adopt a blanket rule that material falsification of an employment application is a complete defense to a claim that the employer, while still unaware of the misrepresentation, discharged the employee in violation of the employee's legal rights (*24 Cal. App. 4th 614, 617-618)* . While there were no prior California decisions on point, neither public policy nor contract law dictate that an employee who is fired without cause in violation of his employment contract or because of his age should forfeit all resulting remedies against the employer because of the earlier falsifications. The court recognized that resume fraud is a serious social problem, but noted that wrongful termination also is a problem, so automatic forfeiture of all employment rights, regardless of the circumstances, can be too harsh a penalty in many cases. According to the court, when a termination violates the statutory ban on discrimination in the workplace, the purpose of the antidiscrimination statutes would be undermined by a principle allowing a fact that played no part in the discharge to bar recovery. Thus, the court declined to allow plaintiff's earlier falsifications to defeat his claims that he was fired in breach of contract and because of his age (*24 Cal. App. 4th 614, 618-619)* .

Murillo v. Rite Stuff Foods, Inc. *(1998) 65 Cal. App. 4th 833, 77 Cal. Rptr. 2d 12* , held that if after-acquired evidence establishes that the employee had made a misrepresentation that went to the heart of the employment relationship and related directly to the employee's wrongful discharge claim, the unclean-hands doctrine will bar that claim. Thus, if an employee who is disqualified from employment by government-imposed requirements nevertheless obtains a job by misrepresenting the pertinent qualifications, the employee will have no recourse for an alleged wrongful termination of employment. For example, because federal law prohibits employers from knowingly hiring or continuing to employ unauthorized aliens (*see 8 U.S.C. § 1324a(a), (b), (e), (f)*--Immigration Reform and Control Act of 1986), an employee's misrepresentation of his or her entitlement to work in the United States goes to the heart of the employment relationship and deprives the employee of any right to complain about termination (*65 Cal. App. 4th 833, 845)* . Even in such a case, however, neither the after-acquired evidence doctrine nor the unclean-hands doctrine will

completely bar the employee's discrimination or harassment claims for acts occurring during employment. Although the employee cannot complain of having lost a job that he or she was never entitled to in the first place, the employee nonetheless was employed by the employer. The employee's misrepresentation did not void the employment contract; it merely rendered it voidable should the employer seek to rescind it. While employed, the employee was entitled to all the protections available under employment law. Barring the employee's claim for sexual harassment occurring during the employment relationship would not serve the primary purpose of the Fair Employment and Housing Act (FEHA) (*Gov. Code § 12900 et seq.*) and Title VII of the Federal Civil Rights Act (*see 42 U.S.C. § 2000e et seq.*), which is to end employment discrimination. In such a case, the equities between employer and employee can be balanced by barring all portions of the employment discrimination claim that are tied to the employee's discharge. Thus, the employer will not be permitted to escape the consequences of discriminatory conduct that was not caused or justified by the employee's misrepresentation (*65 Cal. App. 4th 833, 842)* .

The *Murillo* court cited with approval the *Cooper* holding that after-acquired evidence of employee misconduct does not necessarily bar all relief. Therefore, *Murillo* can be read as holding that after-acquired evidence will bar a wrongful termination action only if it discloses that the employee procured the job through misrepresentation or misconduct that went to the heart of the employment relationship, such as the employee's concealment of the fact that he or she is legally disqualified from employment (*65 Cal. App. 4th 833, 845)* . This interpretation is in conformity with the *Murillo* court's earlier opinion in *Camp v. Jeffer, Mangels, Butler & Marmaro (1995) 35 Cal. App. 4th 620, 636-638, 41 Cal. Rptr. 2d 329* , which made a distinction between misrepresentations that violate an employer's internal policies and misrepresentations that conceal the fact that an employee is not lawfully qualified for employment. The *Camp* case is discussed in detail in *§ 100.80[3][a]*.

NOTE:

Subsequent to the *Murillo* decision, the Legislature enacted statutory provisions declaring that all protections, rights, and remedies available under California law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who are or have been employed in California [*Civ. Code § 3339(a)*; *Gov. Code § 7285(a)*; *Lab. Code § 1171.5(a)*]. Thus, for purposes of enforcing California labor, employment, and civil-rights laws, a person's immigration status is irrelevant to the issue of liability, although as noted in *Murillo*, the remedy of reinstatement will not be available to an unauthorized alien [*Civ. Code § 3339(b)*; *Gov. Code § 7285(b)*; *Lab. Code § 1171.5(b)*]. Further, in proceedings or discovery undertaken to enforce California labor, employment, and civil-rights laws no inquiry may be made into a person's immigration status unless the person seeking to make the inquiry has shown by clear and convincing evidence that the inquiry is necessary in order to comply with federal immigration law [*Civ. Code § 3339(b)*; *Gov. Code § 7285(b)*; *Lab. Code § 1171.5(b)*]. Accordingly, after-acquired evidence of the employee's immigration status will be of limited value in an action to enforce employment rights.

[b] After-Acquired Evidence Does Not Bar or Limit Employee's Action Unless It Would Actually Have Resulted in Termination

In ***Thompson v. Tracor Flight Sys., Inc.*** *(2001) 86 Cal. App. 4th 1156, 104 Cal. Rptr. 2d 95* , the plaintiff resigned from her job as human resources director and then sued her former employer for wrongful termination, alleging that she had been constructively discharged in violation of the Fair Employment and Housing Act (*see Gov. Code § 12940*). The jury found that the plaintiff had been constructively discharged and that she had not engaged in "wrongdoing prior to or at the time of her resignation which would have given defendant grounds to terminate her had it known of her misconduct at the time of her resignation." Based on this finding, the trial court held that the after-acquired evidence did not entitle the employer to an equitable reduction of the damages awarded by the jury.

The court of appeal affirmed, noting that there was conflicting evidence concerning the employee's actions, her motivations, and the possible consequences of her actions within the employer's disciplinary system. After reviewing

the record, the court of appeal found that there was sufficient evidence to support the jury's conclusion that the employee's wrongdoing, if any, and even if known to the employer, would not have resulted in the employee's termination. In general, though an employer may present after-acquired evidence that would have justified termination of the employee, it remains a question of fact whether the employer would have *actually* terminated the employee on the basis of the after-acquired evidence. Thus, depending on the circumstances of the particular case, a jury might reasonably find that the employee would have been subjected to less harsh disciplinary action, or to no adverse action at all. In such a case the trial court would be justified in refusing to bar or reduce the plaintiff's recovery of damages for the wrongful termination (*86 Cal. App. 4th 1156, 1172-1174)* .

[c] After-Acquired Evidence Pertaining to Plaintiff's Immigration Status Does Not Bar Wrongful Termination Action

The plaintiff in ***Incalza v. Fendi N. Am., Inc.*** *(9th Cir. 2007) 479 F.3d 1005* , was a native and citizen of Italy who sued his former employer in a California superior court. The plaintiff claimed that he had been wrongfully terminated (1) in violation of an implied contract that he would not be fired without good cause; and (2) because of his Italian heritage, in violation of the California Fair Employment and Housing Act (*see Gov. Code § 12900 et seq.*). The plaintiff had been working in the United States under a visa obtained by the defendant corporation. However, when the ownership of the defendant changed hands, the visa became invalid. The defendant then terminated the plaintiff, falsely saying that nothing could be done to remedy the visa problem (the defendant did obtain a new visa for another employee). The defendant also refused to allow the plaintiff to take an unpaid leave of absence until the visa problem could be resolved (the plaintiff was one month away from marrying his fiancee, an American citizen, which would have made him eligible for a green card).

The defendant removed the action to federal district court on the basis of diversity of citizenship. In district court, the defendant moved for summary judgment, contending that it had been compelled by the federal Immigration Reform and Control Act of 1986 (IRCA) to terminate the plaintiff, since his visa had expired. The district court denied the motion, and at trial the jury found for the plaintiff in the amount of more than $1 million. The defendant appealed.

The Ninth Circuit affirmed. The court of appeals first considered the defendant's argument that the IRCA preempted California law. The Court observed that California provides remedies for workers who are discharged in violation of an express or implied contract that they will not be discharged without good cause. Moreover, those remedies are available to illegal immigrants as well as other employees. The California Legislature has declared that all protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment, or who are or who have been employed, in California (*Civ. Code § 3339(a)*; *Gov. Code § 7285(a)*; *Lab. Code § 1171.5(a)*). Accordingly, for purposes of enforcing state labor, employment, and civil rights laws, a person's immigration status is irrelevant to the issue of liability; in proceedings or discovery undertaken to enforce those state laws, no inquiry may be made into a person's immigration status unless the person seeking to make the inquiry has shown by clear and convincing evidence that the inquiry is necessary in order to comply with federal immigration law (*Civ. Code § 3339(b)*; *Gov. Code§ 7285(b)*; *Lab. Code § 1171.5(b)*) (*479 F.3d 1005, 1009)* .

The Ninth Circuit concluded that in this case, these provisions of California law were not preempted by the IRCA provision forbidding employers from knowingly employing unauthorized aliens (*see 8 U.S.C. § 1324a(a)(2)*). The defendant in this case could lawfully have taken action other than discharging the plaintiff: it could have granted the plaintiff's request for unpaid leave so that he could resolve his work authorization problems. The IRCA and its implementing regulations do not bar an employer from suspending an employee or placing him or her on unpaid leave for a reasonable time to remedy the deficiency in his or her immigration status. Thus, because the defendant was not required by the IRCA to terminate the plaintiff, there was no conflict between the IRCA and California law, which provided the plaintiff a remedy for wrongful termination (*479 F.3d 1005, 1010-1013)* .

The Ninth Circuit also pointed out that there is clearly no conflict between California law and the IRC--and therefore no preemption--when an employer is required to terminate an employee by IRCA and does so in order to comply with that statute. Under those circumstances, the employer can obey both laws because compliance with IRCA provides good cause, as defined by California law, for terminating unauthorized aliens (*479 F.3d 1005, 1010)* . It remains an open question, however, whether California law and the IRCA conflict when an employer that is required by federal law to terminate an unlawful alien does so, but for reasons that are unlawful under California law (*479 F.3d 1005, 1010)* .

California Points & Authorities

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CHAPTER 100 EMPLOYER AND EMPLOYEE: WRONGFUL TERMINATION AND DISCIPLINE
PART II. FORMS

10-100 California Points & Authorities § 100.82

AUTHOR: Carolyn Rashby

§ 100.82 Supporting Contention That Plaintiff's Alleged Damages Were Avoidable--Affirmative Defense to Hostile Environment Sexual Harassment Claim

[1] FORM

[*The following may be included in a memorandum supporting or opposing a motion, or in a trial or appellate brief.*]

EVEN IF PLAINTIFF WAS SUBJECTED TO SEXUAL HARASSMENT IN THE WORKPLACE, RESULTING IN A HOSTILE OR ABUSIVE WORK ENVIRONMENT, PLAINTIFF IS NOT ENTITLED TO RECOVER DAMAGES FOR HARM THAT COULD HAVE BEEN AVOIDED WITH REASONABLE EFFORTS.

Employer Not Liable for Avoidable Consequences of Alleged Sexual Harassment. Under the "avoidable consequences" defense to a claim of workplace sexual harassment, an employer is not liable for harm that the employee could have avoided with reasonable effort. The employer may establish this defense by showing (1) that the employer took reasonable steps to prevent and correct workplace sexual harassment, (2) that the employee unreasonably failed to use the preventive and corrective measures that the employer provided, and (3) that reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered (*State Dep't of Health Servs. v. Superior Court (2003) 31 Cal. 4th 1026, 1042-1048, 6 Cal. Rptr. 3d 441, 79 P.3d 556*).

[2] Comments

[a] Use of Form

This form may be used to support a contention that an employee alleging workplace sexual harassment may not recover damages for harm that he or she could have avoided with reasonable effort. In an appropriate case, this form may be used in opposition to the points and authorities *set forth in §§ 100.31, 100.41 -100.43*.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should establish that the defendant had adopted appropriate antiharassment policies and had communicated essential information about the policies and the implementing procedures to its employees, that the plaintiff failed to use those procedures, and that using those procedures would have prevented at least some of the harm claimed by the plaintiff (*see State Dep't of Health Servs. v. Superior Court (2003) 31 Cal. 4th 1026, 1042-1048, 6 Cal. Rptr. 3d 441, 79 P.3d 556*).

[c] Related Pleading and Practice Chapters

For related legal background, research guides, and forms for defending against claims of workplace sexual harassment, see California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination* (Matthew Bender).

[3] Discussion of Authorities

[a] Employer Not Liable for Avoidable Consequences of Alleged Sexual Harassment

State Dep't of Health Servs. v. Superior Court *(2003) 31 Cal. 4th 1026, 6 Cal. Rptr. 3d 441, 79 P.3d 556* , was a workplace sexual-harassment and sex discrimination action brought under the Fair Employment and Housing Act (FEHA) (*Gov. Code § 12940 et seq.*). FEHA prohibits sexual harassment in the workplace and provides the basis for a cause of action for hostile-environment sexual harassment (*Gov. Code § 12940(j)(1)*). Under FEHA, the employer is liable for harassment by a nonsupervisory employee only if the employer was negligent, that is, if the employer knew or should have known of the harassing conduct and failed to take immediate and appropriate corrective action (*Gov.Code § 12940(j)(1)*). In this case, the California Supreme Court held that if the harassment is committed by a supervisory employee, the employer is liable without negligence (*31 Cal. 4th 1026, 1040-1042)* .

The Court went on to hold that this "strict" liability does not preclude the defense of "avoidable consequences." To establish this defense, the employer must prove (1) that the employer took reasonable steps to prevent and correct workplace sexual harassment, (2) that the employee unreasonably failed to use the preventive and corrective measures that the employer provided, and (3) that reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered (*31 Cal. 4th 1026, 1042-1048)* .

The Court explained that the avoidable consequences defense affects damages, not liability. Thus, an employer that has exercised reasonable care nevertheless remains liable for sexual harassment damages caused by a supervisory employee that the harassed employee could not have avoided through the exercise of reasonable care (*31 Cal. 4th 1026, 1045)* .

The Court stated that to take advantage of the avoidable consequences defense, the employer ordinarily should be prepared to show that it has adopted appropriate antiharassment policies and has communicated essential information about the policies and the implementing procedures to its employees. In a particular case, the trier of fact may appropriately consider whether the employer prohibited retaliation for reporting violations, whether the employer's reporting and enforcement procedures protect employee confidentiality to the extent practical, and whether the employer consistently and firmly enforced the policy. Evidence potentially relevant to the avoidable consequences defense includes anything tending to show that the employer took effective steps to encourage victims to come forward with complaints of unwelcome sexual conduct and to respond effectively to their complaints (*31 Cal. 4th 1026, 1045-1046)* .

The Court also pointed out that in the context of the avoidable consequences defense, the employee's conduct is judged against a standard of reasonableness. Thus, an employee's failure to report harassing conduct immediately to the employer might not reduce the employee's recoverable damages if the employer lacked an adequate antiharassment policy or adequate procedures to enforce it, if the employer did not communicate the policy or procedures to the victimized employee, or if the employee reasonably feared reprisal by the harassing supervisor or other employees.

Moreover, in some cases an employee's natural feelings of embarrassment, humiliation, and shame may provide a sufficient excuse for delay in reporting acts of sexual harassment by a supervisor (*31 Cal. 4th 1026, 1045)* .

Although the Supreme Court did not directly address the question, it appears that the "avoidable consequences" defense, which is sometimes called the "mitigation of damages" defense, is also applicable to hostile environment sexual harassment claims based on harassment by non-supervisory employees. Moreover, the Court pointed out that the avoidable consequences defense has wide application in civil cases generally and has been applied to workplace torts (*31 Cal. 4th 1026, 1042-1043)* . For example, the United States Supreme Court has recognized the defense in actions seeking damages for workplace sexual harassment under Title VII of the Civil Rights Act of 1964 (*Burlington Industries v. Ellerth (1998) 524 U.S. 742, 765, 118 S. Ct. 2257, 141 L. Ed. 2d 633* ; *Faragher v. City of Boca Raton (1998) 524 U.S. 775, 807, 118 S. Ct. 2275, 141 L. Ed. 2d 662* ; *see 42 U.S.C. § 2000e et seq.*).

California Points & Authorities

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 100 EMPLOYER AND EMPLOYEE: WRONGFUL TERMINATION AND DISCIPLINE
PART II. FORMS

10-100 California Points & Authorities § 100.83

AUTHOR: Carolyn Rashby

§ 100.83 Opposing Contention That Plaintiff Was Subjected to Hostile Environmental Sexual Harassment--Alleged Conduct Not Hostile or Abusive to Employees Because of Their Sex

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF'S CAUSE OF ACTION FOR SEXUAL HARASSMENT CANNOT BE MAINTAINED BECAUSE PLAINTIFF'S ALLEGATIONS DO NOT ESTABLISH SEX-BASED HARASSMENT THAT WAS SEVERE ENOUGH OR SUFFICIENTLY PERVASIVE TO ALTER THE CONDITIONS OF THE PLAINTIFF'S EMPLOYMENT.

A. Plaintiff Must Establish Sex-Based Harassment That Alters Conditions of Employment. A hostile work environment sexual harassment claim requires the plaintiff to show that he or she was subjected to unwelcome sexual advances, conduct, or comments that constitute discrimination because of sex. Such a claim is not established, for example, where a supervisor or coworker simply uses crude or inappropriate language in front of employees, makes lewd gestures, or draws a vulgar picture, without directing sexual innuendos or gender-related language toward the plaintiff or toward one sex in general (*Lyle v. Warner Bros. Television Prods. (2006) 38 Cal. 4th 264, 279-282, 286-288, 42 Cal. Rptr. 3d 2, 132 P.3d 211*). Even as to conduct directed at specific persons, whether the alleged harassment is sufficiently severe and pervasive to alter the conditions of employment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances. For example, occasional graphic sexual comments made by coworkers about employees other than the plaintiff, in the context of a creative workplace focused on generating scripts for an adult-oriented television comedy show featuring sexual themes, would not support a finding that those comments permeated the plaintiff's direct work environment or were pervasive and destructive of that environment so as to constitute an actionable hostile work environment (*Lyle v. Warner Bros. Television Prods. (2006) 38 Cal. 4th 264, 283-285, 289-292, 42 Cal. Rptr. 3d 2, 132 P.3d 211*).

[2] Comments

[a] Use of Form

These points and authorities may be used to oppose a contention that the plaintiff was subjected to a hostile work environment caused by sexual harassment, for example, in an action brought under the Fair Employment and Housing Act [*see, e.g., Gov. Code § 12940(j)*] or Title VII [*see 42 U.S.C. § 2000e-2(a)(1)*]. In an appropriate case, these points and authorities may be used to oppose the contentions supported by the points and *authorities in § 100.32*.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. For example, counsel should explain the social context in which the allegedly harassing conduct occurred and, if possible, demonstrate that the conduct the plaintiff complains of was not directed toward the plaintiff or any coworkers.

[c] Related California Employment Law References

For further discussion of this issue, see *Wilcox, California Employment Law, Ch. 41, § 41.81*.

[3] Discussion of Authorities

[a] Plaintiff Must Establish Sex-Based Harassment That Alters Conditions of Employment

In ***Lyle v. Warner Bros. Television Prods.*** *(2006) 38 Cal. 4th 264, 42 Cal. Rptr. 3d 2, 132 P.3d 211* , the plaintiff had been employed as a writers' assistant on the production of an adult-oriented television comedy show featuring sexual themes. Before she was hired, the plaintiff was forewarned that the show dealt with sexual matters and that, as an assistant to the comedy writers, she would be listening to their sexual jokes and discussions about sex and transcribing the jokes and dialogue most likely to be used for scripts. After four months of employment, she was fired because of problems with her typing and transcription. She then filed this action against three of the male comedy writers and others, asserting that the defendants' use of sexually coarse and vulgar language and conduct, including the recounting of their own sexual experiences, constituted harassment based on sex, within the meaning of the Fair Employment and Housing Act (FEHA), *Gov. Code, § 12900 et seq.*

The trial court order granted the defendants' motion for summary judgment on the sexual harassment claim; the court of appeal reversed. The California Supreme Court reversed the judgment of the court of appeal, finding that no reasonable trier of fact could conclude that the language and conduct alleged by the plaintiff constituted harassment directed at the plaintiff because of her sex. The Court also found that to the extent that some of the alleged comments had been made about women other than the plaintiff, no reasonable trier of fact could conclude that those particular comments were severe enough or sufficiently pervasive to create a work environment that was hostile or abusive to the plaintiff in violation of the FEHA (*38 Cal. 4th 264, 271-272)* .

The Supreme Court, taking guidance from the United States Supreme Court's decisions construing Title VII, observed that an employee claiming harassment based on a hostile work environment must demonstrate that the conduct complained of was severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees because of their sex. Under both Title VII and the FEHA, a hostile work environment sexual harassment claim requires a plaintiff employee to show she was subjected to sexual advances, conduct, or comments that were (1) unwelcome; (2) because of sex; and (3) sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work environment. In addition, she must establish (4) that the offending conduct was imputable to her employer (*38 Cal. 4th 264, 278-279)* . In this case, the first and fourth elements were not in dispute, and the Court focused its analysis on the second and third elements.

Regarding the second element--whether the allegedly harassment was because of sex--the Supreme Court emphasized that it is the disparate treatment of an employee on the basis of sex, not the mere discussion of sex or use of vulgar

language, that is the essence of a sexual harassment claim. While the use of vulgar or sexually disparaging language may be relevant to show such discrimination, it is not necessarily sufficient, by itself, to establish actionable conduct. Thus, a hostile work environment sexual harassment claim is not established simply because a supervisor or coworker uses crude or inappropriate language in front of employees or draws a vulgar picture, without directing sexual innuendos or gender-related language toward a plaintiff or toward women in general (*38 Cal. 4th 264, 279-282)* .

As to sexual language or conduct directed at specific persons in the workplace, the Supreme Court pointed out that such conduct does not result in an actionable hostile work environment unless it is sufficiently severe or pervasive to alter the conditions of the plaintiff's employment and create a hostile or abusive work environment. In determining the severity of harassment, the evidence should be judged objectively, from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances. That inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. The Court noted that "[t]he real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensibility to social context, will enable courts and juries to distinguish between simple teasing or roughhousing ... and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive" (*38 Cal. 4th 264, 283* , quoting *Oncale v. Sundowner Offshore Servs., Inc. (1998) 523 U.S. 75, 81-82, 118 S. Ct. 998, 140 L. Ed. 2d 201*). When the harassing conduct is not severe in the extreme, more than a few isolated incidents must have occurred to prove a claim based on working conditions. Moreover, when the plaintiff cannot point to a loss of tangible job benefits, and is not herself the target of the alleged behavior, the plaintiff must make a commensurately higher showing that the conduct alleged was pervasive and destructive of the working environment. To be actionable, a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the plaintiff in fact did perceive to be so. To meet this burden, the plaintiff generally must show that the harassment directed at others was in her immediate work environment, and that she personally witnessed it (*38 Cal. 4th 264, 283-285)* .

The Court remarked that the circumstance that this case involved--a creative workplace focused on generating scripts for an adult-oriented comedy show featuring sexual themes--was significant in assessing the existence of triable issues of facts regarding whether the writers' sexual antics and coarse sexual talk were aimed at the plaintiff or at women in general, whether the plaintiff and other women were singled out to see and hear what happened, and whether the conduct was otherwise motivated by the plaintiff's gender (*38 Cal. 4th 264, 286-287)* .

Turning to the specific conduct involved in this case, the Supreme Court found that most of the conduct alleged by the plaintiff did not present a triable issue whether the writers had engaged in harassment *because of sex*. Most of the conduct alleged by the plaintiff (including the writers' graphic discussions of their sexual experiences, pantomiming of sexual activity, and drawings) was "nondirected," that is, not aimed at the plaintiff or any other female employee. There was no evidence that this nondirected conduct affected the plaintiff and her male counterparts in a disparate manner, or that it exposed employees of one sex to disadvantageous terms or conditions of employment to which members of the other sex were not exposed. Thus, there was no evidence that the writers' nondirected talk and sexual antics contributed to an environment in which men and women were treated disparately, and there was nothing to suggest that the writers engaged in the nondirected conduct to make the plaintiff uncomfortable or to intimidate her (*38 Cal. 4th 264, 286-288)* .

Aside from the writers' nondirected conduct, the plaintiff alleged some instances of sexual comments and jokes about (but not in the presence of) certain cast members on the show. Although this "directed" conduct was "because of sex," thus satisfying the second element of a hostile work environment claim, the Court found that the conduct was not frequent or severe enough to meet the third element. The plaintiff had conceded in her evidentiary submissions that some of the more graphic comments were made only once or twice. The Court concluded that without more, a reasonable trier of fact could not conclude that these reported comments concerning the cast members permeated the plaintiff's direct work environment, or that they were pervasive and destructive of that environment so as to allow

recovery despite the fact that the plaintiff was not personally subjected to offensive remarks or touchings and did not suffer a tangible job detriment (*38 Cal. 4th 264, 289-292)* .

Accordingly, the Court concluded that the trial court had properly granted the defendants' summary-judgment motion (*38 Cal. 4th 264, 293-295)* .

California Points & Authorities

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 100A EMPLOYER AND EMPLOYEE: RESPONDEAT SUPERIOR

10-100A California Points & Authorities 100A.syn

AUTHOR: Carolyn Rashby

§ 100A.syn Synopsis to Chapter 100A: EMPLOYER AND EMPLOYEE: RESPONDEAT SUPERIOR

§ 100A.01 Scope of Chapter

§ 100A.02 Related Pleading and Practice Chapters

§ 100A.03 Related California Torts Chapters

§§ 100A.04-100A.19 [Reserved]

§ 100A.20 Supporting Contention That Employer Is Directly Liable in Tort to Third Party Based on Employer's Own Conduct--Employee Acted Under Employer's Express Direction

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities Chapters

[e] Related California Employment Law References

[3] Discussion of Authorities

[a] Employee Acting Under Direction of Employer

[4] Additional Authorities

[a] Employee Acting Under Direction of Employer

§ 100A.21 Supporting Contention That Employer Is Directly Liable in Tort to Third Party Based on Employer's Own Conduct--Employer Ratified Employee's Conduct

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related California Employment Law References

[3] Discussion of Authorities

[a] Ratification of Employee's Conduct

[b] Employer's Conduct or Knowledge as Evidence of Ratification

§ 100A.22 Supporting Contention That Employer Is Directly Liable in Tort to Third Party Based on Employer's Own Conduct--Employer Negligently Hired or Retained Employee

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[c] Argument

[d] Related Pleading and Practice Forms

[e] Related California Employment Law References

[3] Discussion of Authorities

[a] Liability for Negligent Hiring or Retention

[4] Additional Authorities

[a] Liability for Negligent Hiring or Retention

§ 100A.23 Opposing Contention That Employer Is Directly Liable in Tort to Third Party Based on Employer's Own Conduct--Employer Did Not Negligently Hire or Retain Employee

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related California Employment Law References

[3] Discussion of Authorities

[a] Employer Must Have Knowledge of Employee's Unsuitable Characteristics

[b] Employer Must Have Knowledge That Hiring Employee Created Particular Risk

[c] Employer Must Have Knowledge That Employee Is Unfit for Specific Tasks

[d] Employer Must Owe Legal Duty to Seek Knowledge

[e] Employer Not Liable for Injury Caused by Former Employee

§ 100A.24 Opposing Contention That Employer Is Directly Liable In Tort to Third Party Based on Employer's Own Conduct--Hiring and Retention of Employee Did Not Proximately Cause Tort

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related California Employment Law References

[3] Discussion of Authorities

[a] Unforeseeable Private Act of Employee Breaks Chain of Proximate Cause Connecting Employer to Tort

§ 100A.25 Supporting Contention That Employer Is Vicariously Liable for Employee's Wrongful Conduct Based on Doctrine of Respondeat Superior--Tortfeasor Was Employee

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[d] Related Pleading and Practice Forms

[e] Related Memoranda

[f] Related California Employment Law References

[3] Discussion of Authorities

[a] Doctrine of Respondeat Superior

[b] Employer/Employee Relationship

[c] Monetary Compensation Not Required

[d] Right of Control

[e] Characterization of Relationship Not Determinative

[f] Balance of Factors Supports Finding of Employment Relationship

§ 100A.26 Supporting Contention That Employer Is Vicariously Liable for Employee's Wrongful Conduct Based on Doctrine of Respondeat Superior--Employee Acted Within Scope of Employment

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[d] Related Pleading and Practice Forms

[e] Related Memoranda

[f] Related California Employment Law References

[3] Discussion of Authorities

[a] Scope of Employment

[b] Tests to Determine Whether Conduct Is Within Scope of Employment

[c] Conduct Was Foreseeable

[d] Sufficient Nexus Between Conduct and Duties of Employment

[e] Duties and Purpose of Employment Broadly Construed

[4] Additional Authorities

[a] Scope of Employment

[b] Sufficient Nexus Between Conduct and Duties of Employment

§ 100A.27 Supporting Contention That Employer Is Vicariously Liable for Employee's Wrongful Conduct Based on Doctrine of Respondeat Superior--Employee Acted Within Scope of Employment--Conduct Violative of Employer Rules or Instructions Still Within Scope of Employment

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[e] Related California Employment Law References

[3] Discussion of Authorities

[a] Effect of Employee Violation of Employer's Rules or Instructions

§ 100A.28 Supporting Contention That Employer Is Vicariously Liable for Employee's Wrongful Conduct Based on Doctrine of Respondeat Superior--Employee Acted Within Scope of Employment--Going and Coming Rule Does Not Apply--Special Errand Exception to Going and Coming Rule Applies

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[d] Related Pleading and Practice Forms

[e] Related Memoranda

[f] Related California Employment Law References

[3] Discussion of Authorities

[a] Special Errand Exception

[b] Effect of Partial Abandonment of Employer's Business

[c] Out-of-Town Business Travel May Constitute Special Errand

[4] Additional Authorities

[a] Special Errand Exception

§ 100A.29 Supporting Contention That Employer Is Vicariously Liable for Employee's Wrongful Conduct Based on Doctrine of Respondeat Superior--Employee Acted Within Scope of Employment--Going and Coming Rule Does Not Apply--Special Risk Exception Applies

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Special Risk Exception

§ 100A.30 Supporting Contention That Employer Is Vicariously Liable for Employee's Wrongful Conduct Based on Doctrine of Respondeat Superior--Employee Acted Within Scope of Employment--Going and Coming Rule Does Not Apply--Travel Inherent in Employee's Job Duties

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[d] Related Pleading and Practice Forms

[e] Related Memoranda

[f] Related California Employment Law References

[3] Discussion of Authorities

[a] Travel Inherent in Employee's Job Duties

§ 100A.31 Supporting Contention That Employer Is Vicariously Liable for Employee's Wrongful Conduct Based on Doctrine of Respondeat Superior--Going and Coming Rule Does Not Apply--Employer Paid for Employee's Commute Time

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[d] Related Pleading and Practice Forms

[e] Related Memoranda

[f] Related California Employment Law References

[3] Discussion of Authorities

[a] Effect of Employer Paying for Employee's Commute Period

§ 100A.32 Supporting Contention That Employer Is Vicariously Liable for Employee's Wrongful Conduct Based on Doctrine of Respondeat Superior--Employee Acted Within Scope of Employment--Going and Coming Rule Does Not Apply--Employer Required Use of Employee Vehicle

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[d] Related Pleading and Practice Forms

[e] Related Memoranda

[f] Related California Employment Law References

[3] Discussion of Authorities

[a] Effect of Employer Requiring Employee to Use Employee's Vehicle

[b] Frequency of Use of Vehicle for Employer Business Does Not Defeat Application of Required-Vehicle Exception

[4] Additional Authorities

[a] Effect of Employer Requiring Employee to Use Employee's Vehicle

§ 100A.33 Supporting Contention That Employer Is Vicariously Liable for Employee's Wrongful Conduct Based on Doctrine of Respondeat Superior--Liability Based on Employee's Intentional Tort

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[d] Related Pleading and Practice Forms

[e] Related Memoranda

[f] Related California Employment Law References

[3] Discussion of Authorities

[a] Employer Liability for Employee's Intentional Torts

[b] Job Duties Involve Use of Force

[c] Conduct Arose Out of Work-Related Dispute

[d] Employer Liability for Employee's Fraud and Misrepresentation

[4] Additional Authorities

[a] Employer Liability For Employee's Fraud and Misrepresentation

§ 100A.34 Opposing Contention That Employer Is Vicariously Liable for Employee's Wrongful Conduct Based on

Doctrine of Respondeat Superior--Tortfeasor Not an Employee

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[e] Related California Employment Law References

[3] Discussion of Authorities

[a] Doctrine of Respondeat Superior

[b] Employer/Employee Relationship

[c] Effect of Lack of Control

[d] Workers' Compensation Precedent Not Controlling

[e] Balance of Factors Supports Finding of Independent Contractor Rather Than Employee Relationship

[f] Student Trainee Not Employee

§ 100A.35 Opposing Contention That Employer Is Vicariously Liable for Employee's Wrongful Conduct Based on Doctrine of Respondeat Superior--Employee's Conduct Was Outside Scope of Employment--Conduct Was Outside Duties of Employment

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[e] Related California Employment Law References

[3] Discussion of Authorities

[a] Scope of Employment

[b] Test for Determining Whether Act Within Scope of Employment

[c] Employee's Actions Were Neither Required Nor Incident to Duties

[4] Additional Authorities

[a] Scope of Employment

[b] Test for Determining Whether Act Within Scope of Employment

[c] Employee's Actions Were Neither Required Nor Incident to Duties

§ 100A.36 Opposing Contention That Employer Is Vicariously Liable for Employee's Wrongful Conduct Based on Doctrine of Respondeat Superior--Employee's Conduct Outside Scope of Employment--Going and Coming Rule Applies

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[e] Related California Employment Law References

[3] Discussion of Authorities

[a] Going and Coming Rule

[b] Effect of Abandonment of Employer's Business

[c] Attendance at Social Event Not Within Scope of Employment

[d] Payment of Travel Expenses Does Not Defeat Going and Coming Rule

[e] "Commercial Traveler Rule" Inapplicable to Respondeat Superior Cases

[f] "Premises Line" Rule Inapplicable to Respondeat Superior Cases

[4] Additional Authorities

[a] Going and Coming Rule

§ 100A.37 Opposing Contention That Employer Is Vicariously Liable for Employee's Wrongful Conduct Based on Doctrine of Respondeat Superior--Employee's Tortious Conduct Outside Scope of Employment--Employee Pursuing Purely Personal Objective Although On-Duty

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[d] Related California Employment Law References

[3] Discussion of Authorities

[a] Pursuit of Purely Personal Objectives While on Duty Takes Conduct Outside Scope of Employment

[4] Additional Authorities

[a] Pursuit of Purely Personal Objectives While on Duty Takes Conduct Outside Scope of Employment

§ 100A.38 Opposing Contention That Employer Is Vicariously Liable to Third Party Based on Intentional Torts of Employee--Conduct of Employee Motivated by Personal Malice

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[e] Related California Employment Law References

[3] Discussion of Authorities

[a] No Liability Where Conduct Based on Personal Malice

[4] Additional Authorities

[a] No Liability Where Conduct Based on Personal Malice

§ 100A.39 Opposing Contention That Employer Is Vicariously Liable for Harassment of One Employee by

Another--Alleged Harasser Was Not Supervisory Employee, and Employer Complied With Requirements of California Fair Employment and Housing Act (FEHA) [Gov. Code § 12940(j)(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] California Fair Employment and Housing Act (FEHA) Does Not Subject Employer to Liability for Harassment Committed by Nonsupervisory Employee Unless Employer Knew or Should Have Known of Harassment and Failed to Take Immediate and Appropriate Corrective Action

§ 100A.40 Opposing Contention That Employer May Be Vicariously Liable for Wrongful Conduct of Employee--Statute of Limitations Bars Action Against Employer

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Statute of Limitations Applies Separately to Employer

[b] Claim May Not Be Pursued Against Bankrupt Employee

§ 100A.41 Supporting Contention That Hirer Is Vicariously Liable to Third Party Based on Torts of Independent Contractor--Work Involved Peculiar Risk

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[d] Related Pleading and Practice Forms

[e] Related California Employment Law References

[3] Discussion of Authorities

[a] Peculiar Risk Doctrine

[b] Definition of Peculiar Risk

[c] Factors in Determining Whether Danger Is a Peculiar Risk

[d] Employer's Lack of Knowledge Regarding Special Precautions

[4] Additional Authorities

[a] Peculiar Risk Doctrine

§ 100A.42 Supporting Contention That Hirer Is Vicariously Liable to Third Party Based on Torts of Independent Contractor--Work Involved Nondelegable Duty

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[d] Related Pleading and Practice Forms

[e] Related California Employment Law References

[3] Discussion of Authorities

[a] Nondelegable Duty Doctrine

[b] Sources of Nondelegable Duty

[4] Additional Authorities

[a] Sources of Nondelegable Duties

§ 100A.43 Opposing Contention That Employer Is Vicariously Liable to Third Party Based on Torts of Independent Contractor--Independent Contractor's Conduct Involved Collateral Negligence

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related California Employment Law References

[3] Discussion of Authorities

[a] Collateral Negligence Doctrine

§ 100A.44 Opposing Contention That Employer Is Vicariously Liable to Third Party Based on Torts of Independent Contractor--Peculiar Risk Doctrine Not Applicable

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related California Employment Law References

[3] Discussion of Authorities

[a] General Rule of Nonliability

[b] Peculiar Risk Doctrine

[c] Work Did Not Involve Peculiar Risk

[d] Routine Negligence Does Not Provide Basis for Liability Under Peculiar Risk Doctrine

§ 100A.45 Opposing Contention That Employer Is Vicariously Liable to Third Party Based on Torts of Independent Contractor--Employees of Independent Contractor Cannot Recover Under Peculiar Risk Doctrine

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related California Employment Law References

[3] Discussion of Authorities

[a] Peculiar Risk Doctrine Not Applicable to Injured Employee of Independent Contractor

[b] Privette Applicable Despite Express Indemnity Agreement

[c] Privette Is Retroactive

[d] "Hirer" May Be Owner, Lessee or General Contractor

[e] Privette Bars Recovery by Employee Whether Hirer Provided for Special Precautions or Not

[f] Hirer Not Liable for Injury to Contractor's Employee for Failing to Exercise General Supervisory Power Over Safety

[g] Privette Bars Recovery by Injured Employee for Negligent Hiring of Contractor

[h] Contractor's Employee Cannot Sue Hirer Even If Contractor Fails to Provide Workers' Compensation Coverage

[i] Hirer's Violation of Nondelegable Duty Must Affirmatively Contribute to Employee's Injury

[j] Agent of Hirer Protected to Same Extent as Hirer

[4] Additional Authorities

[a] Peculiar Risk Doctrine Not Applicable to Injured Employee of Independent Contractor

[b] Hirer Not Liable for Injury to Contractor's Employee for Failing to Exercise General Supervisory Power Over Safety

[c] Contractor's Employee Cannot Sue Hirer Even if Contractor Fails to Provide Workers' Compensation Coverage

§ 100A.45A Opposing Contention That Employer Is Vicariously Liable to Third Party Based on Torts of Independent Contractor--Independent Contractor Hired by Independent Contractor Cannot Recover Under Peculiar Risk Doctrine

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Privette Doctrine Applicable to Injured Party Who Is Independent Contractor Rather Than Employee

§ 100A.46 Supporting Contention That Hirer of Independent Contractor Is Directly Liable to Employee of

Independent Contractor for Hirer's Own Independent Fault

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[3] Discussion of Authorities

[a] Hirer Exercising Retained Control Liable for Affirmatively Contributing to Employee's Injury

[b] Hirer Who Provides Unsafe Equipment May Be Liable

[c] Hirer May Be Liable For Failure to Warn of Hazardous Condition

[d] Breach of Regulatory Duty May Support Liability

[e] Public Entity Hirer of Independent Contractor May Be Liable for Exercise of Retained Control

[4] Additional Authorities

[a] Hirer Exercising Retained Control Liable for Affirmatively Contributing to Employee's Injury

[b] Breach of Regulatory Duty May Support Liability

§ 100A.47 Supporting Contention That Punitive Damages Can Be Recovered From Employer--Employer Employed Tortfeasor With Conscious Disregard of Others' Safety [Civ. Code § 3294(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[d] Related Pleading and Practice Forms

[e] Related Memoranda

[f] Related California Employment Law References

[3] Discussion of Authorities

[a] Liability of Employer for Punitive Damages for Employing Tortfeasor With Conscious Disregard for Rights or Safety of Others

§ 100A.48 Supporting Contention That Punitive Damages Can Be Recovered From Employer--Employer Authorized or Ratified Tortfeasor's Conduct [Civ. Code § 3294(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[d] Related Pleading and Practice Forms

[e] Related Memoranda

[f] Related California Employment Law References

[3] Discussion of Authorities

[a] Form of Authorization

[b] Form of Ratification

§ 100A.49 Supporting Contention That Punitive Damages Can Be Recovered From Employer--Employer's Own Conduct Constituted Oppression, Fraud, or Malice

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[d] Related Pleading and Practice Forms

[e] Related Memoranda

[f] Related California Employment Law References

[3] Discussion of Authorities

[a] Liability of Employer for Punitive Damages Based on Employer's Own Oppression, Fraud or Malice

§ 100A.50 Supporting Contention That Punitive Damages Can Be Recovered From Corporate Employer--Wrongful Conduct Was Performed, Authorized, or Ratified by Officer, Director, or Managing Agent of Corporation [Civ. Code § 3294(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[d] Related Pleading and Practice Forms

[e] Related Memoranda

[f] Related California Employment Law References

[3] Discussion of Authorities

[a] Liability of Corporate Employer for Punitive Damages

[b] Employee Who Exercises Policy-making Authority Is Managing Agent of Corporate Employer

§ 100A.51 Opposing Contention That Punitive Damages Can Be Recovered From Corporate Employer Based on Acts of Employee--Wrongful Conduct Was Not Performed, Authorized, or Ratified by Officer, Director, or Managing Agent of Corporation [Civ. Code § 3294(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[e] Related California Employment Law References

[3] Discussion of Authorities

[a] No Involvement by Any Corporate Officer, Director, or Managing Agent

[4] Additional Authorities

[a] No Involvement by Officer, Director, or Managing Agent

§ 100A.52 Opposing Contention That Punitive Damages Can Be Recovered From Employer--No Employer Authorization, Ratification, Advance Knowledge of Employee Unfitness, or Personal Oppression, Fraud or Malice [Civ. Code § 3294(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[e] Related California Employment Law References

[3] Discussion of Authorities

[a] No Evidence of Employer Ratification of Employee Misconduct

[4] Additional Authorities

[a] No Evidence of Employer Ratification of Employee Misconduct

§ 100A.53 Opposing Contention That Punitive Damages Can Be Recovered From Employer--Employee Misconduct Was Personal and Not Within Scope of Employment [Civ. Code § 3294(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[e] Related California Employment Law References

[3] Discussion of Authorities

[a] Acts Must Be Within Scope of Employment

Carolyn Rashby n*

FOOTNOTES:
(n12)Footnote *. Carolyn Rashby is an attorney and freelance writer, specializing in labor and employment law.

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 100A EMPLOYER AND EMPLOYEE: RESPONDEAT SUPERIOR
PART I. INTRODUCTION

10-100A California Points & Authorities § 100A.01

AUTHOR: Carolyn Rashby

§ 100A.01 Scope of Chapter

This chapter contains memoranda that may be submitted in actions asserting that an employer is liable based on the wrongful conduct of an employee. It includes memoranda for use in supporting [*see §§ 100A.20 -100A.22*] and opposing [*see §§ 100A.23 -100A.24*] contentions regarding the employer's liability based on its own wrongdoing; supporting [*see §§ 100A.25 -100A.33*] and opposing [*see §§ 100A.34 -100A.39*] contentions that the employer is vicariously liable for the employee's wrongful conduct. It also includes memoranda supporting [*see §§ 100A.41* and *100A.42*] and opposing [*see §§ 100A.43 -100A.45*] the contention that an employer is liable for the wrongful conduct of an independent contractor; and memoranda supporting [*see §§ 100A.46 -100A.50*] and opposing [*see §§ 100A.51 -100A.53*] contentions that an employer is liable for punitive damages.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsDuties & LiabilitiesAuthorized Acts of AgentsLiability of PrincipalCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaTortsBusiness TortsNegligent Hiring & SupervisionGeneral OverviewTortsVicarious LiabilityEmployersGeneral Overview

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10-100A California Points & Authorities § 100A.02

AUTHOR: Carolyn Rashby

§ 100A.02 Related Pleading and Practice Chapters

For discussion and forms relating to respondeat superior liability of employers, see California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsDuties & LiabilitiesAuthorized Acts of AgentsLiability of PrincipalCivil ProcedurePleading & PracticeGeneral OverviewTortsVicarious LiabilityEmployersGeneral Overview

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10-100A California Points & Authorities § 100A.03

AUTHOR: Carolyn Rashby

§ 100A.03 Related California Torts Chapters

For discussion relating to respondeat superior liability generally, see Levy, Golden, & Sacks, California Torts, Chs. 8 and 74 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsDuties & LiabilitiesAuthorized Acts of AgentsLiability of PrincipalTortsVicarious LiabilityEmployersGeneral Overview

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10-100A California Points & Authorities §§ 100A.04-100A.19

AUTHOR: Carolyn Rashby

[Reserved]

§§ 100A.04[Reserved]

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PART II. FORMS

10-100A California Points & Authorities § 100A.20

AUTHOR: Carolyn Rashby

§ 100A.20 Supporting Contention That Employer Is Directly Liable in Tort to Third Party Based on Employer's Own Conduct--Employee Acted Under Employer's Express Direction

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF CAN RECOVER DAMAGES FROM DEFENDANT BASED ON DEFENDANT'S OWN CONDUCT, RATHER THAN BASED ON THE CONDUCT OF DEFENDANT'S EMPLOYEE, BECAUSE THE EMPLOYEE ACTED AT THE EXPRESS DIRECTION OF DEFENDANT.

Employee Acting Under Direction of Employer. If an employee acts under the direction of his or her employer, the employer participates in the act, and the employer's liability is based on the employer's own fault, rather than on respondeat superior or vicarious liability (*Jensen v. Southern Pac. Co. (1954) 129 Cal. App. 2d 67, 70, 276 P.2d 703*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that the defendant is liable in tort to the plaintiff based on the defendant's own conduct, rather than on the conduct of the defendant's employee, because the employee acted under the defendant's direction.

This form may be combined with points pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the defendant is liable based on the defendant's own conduct and not on the conduct of the defendant's employee, because the employee acted under the defendant's direction--for example, in a motion for summary judgment. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that the defendant's employee tortiously injured the plaintiff, and that the employee's misconduct was at the direction of the defendant. For example, counsel could set forth facts indicating that the defendant directed the employee to drive at an excessive speed or otherwise controlled the speed of the employee's vehicle [*see Jensen v. Southern Pac. Co. (1954) 129 Cal. App. 2d 67, 70-71, 276 P.2d 703]* , or facts showing that the defendant authorized a coemployee's acts of discrimination against the plaintiff [*see Roberts v. Ford Aerospace & Commc'ns Corp. (1990) 224 Cal. App. 3d 793, 800-802, 274 Cal. Rptr. 139]* .

[c] Related Pleading and Practice Forms

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[d] Related Points and Authorities Chapters

For discussion and forms relating to wrongful termination, see Ch. 100, *Employer and Employee: Wrongful Termination and Discipline* .

For discussion and forms relating to workers' compensation, see Ch. 239, *Workers' Compensation Exclusive Remedies Doctrine* .

[e] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 30, § 30.02[1][a]* (Matthew Bender).

[3] Discussion of Authorities

[a] Employee Acting Under Direction of Employer

Jensen v. Southern Pac. Co. *(1954) 129 Cal. App. 2d 67, 276 P.2d 703* , involved a negligence action by a widow and her children against the defendant for the death of her husband. Her husband was hit by one of the defendant's trains while he was driving a truck across railroad tracks. On appeal by the defendant following a judgment for the plaintiff, the defendant argued that verdicts in favor of the train engineer, conductor, and foreman, all of whom were employees of the defendant, exonerated the defendant from liability based on negligent operation of the train.

The court of appeal rejected this contention. The court stated that if the defendant's liability rested solely on respondeat superior, then exoneration of the employees would have exonerated the plaintiff. However, the plaintiff pleaded concurrent liability on the part of the defendant and its employees, thus presenting the possibility of a finding of independent negligence by the defendant. The court discussed *Benson v. Southern Pac. Co. (1918) 177 Cal. 777, 778-779* , in which the complaint alleged negligence based on respondeat superior, but also alleged that the defendants were negligent in operating a train at an excessive speed in a crowded thoroughfare. The *Benson* court found that the defendant could be liable only under respondeat superior if the employee had done this without the express direction of the employer; but if the negligent speed was maintained by the express direction of the employer, the employer would be independently negligent.

In the case at hand, the court cited evidence that the defendant, and not the employees, directed and controlled the speed of trains at crossings. Thus, there was a basis for a finding of negligence on the part of the defendant based on the defendant's own conduct and not on respondeat superior (*129 Cal. App. 2d 67, 70-71)* .

[4] Additional Authorities

[a] Employee Acting Under Direction of Employer

Roberts v. Ford Aerospace & Commc'ns Corp. (1990) 224 Ca. App. 3d 793, 274 Cal. Rptr. 139 , was a suit by a discharged employee against his employer and certain supervisory coemployees for wrongful termination in violation of the public policy against racial discrimination. The court of appeal found that the jury could properly assess greater damages against employer than against the supervisory employees because the evidence supported a finding that the employer participated in the discriminatory conduct through its ratification of its employees' conduct (*224 Ca. App. 3d 793, 800-802)* . The court cited *Jensen v. Southern Pac. Co. (1954) 129 Cal. App. 2d 67, 70, 276 P.2d 703* [*see § 100A.20[3][a]*], for the principle that if an employee acts under the direction of his or her employer, the employer participates in the act, and the employer's liability is based on the employer's own fault.

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10-100A California Points & Authorities § 100A.21

AUTHOR: Carolyn Rashby

§ 100A.21 Supporting Contention That Employer Is Directly Liable in Tort to Third Party Based on Employer's Own Conduct--Employer Ratified Employee's Conduct

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF CAN RECOVER DAMAGES FROM DEFENDANT BASED ON DEFENDANT'S OWN CONDUCT, RATHER THAN ON THE CONDUCT OF DEFENDANT'S EMPLOYEE, BECAUSE DEFENDANT RATIFIED THE EMPLOYEE'S MISCONDUCT THAT INJURED PLAINTIFF.

A. Ratification of Employee's Conduct. Where an employer ratifies his or her employee's negligent or intentional tort, the employer is subject to direct liability. By ratifying the employee's tortious conduct, the employer makes the conduct his or her own (*Jameson v. Gavett (1937) 22 Cal. App. 2d 646, 651-652, 71 P.2d 937*).

B. Employer's Conduct or Knowledge as Evidence of Ratification. An employer's conduct with respect to his or her employee's tortious act, or the employer's knowledge of the tortious act, can support a finding that the employer ratified the tortious conduct (*Jameson v. Gavett (1937) 22 Cal. App. 2d 646, 651-652, 71 P.2d 937* ; Coats v. Construction & Gen. Laborers Local No. 185 *(1971) 15 Cal. App. 3d 908, 913-915, 93 Cal. Rptr. 639*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that the defendant is directly liable for his or her employee's tortious conduct based on the defendant's ratification of the tortious conduct.

This form may be combined with points pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the defendant is directly liable for the tortious act of the defendant's employee because the

defendant ratified such conduct, for example in a motion for summary judgment. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that the defendant's employee tortiously injured the plaintiff, and that the defendant ratified the employee's misconduct by indicating an intent to adopt or approve such conduct. For example, counsel could set forth facts indicating that the defendant knew of the employee's misconduct but failed to express disapproval, or that the defendant continued to employ the employee with full knowledge of the misconduct [*see Jameson v. Gavett (1937) 22 Cal. App. 2d 646, 651-652, 71 P.2d 937* ; Coats v. Construction & Gen. Laborers Local No. 185 *(1971) 15 Cal. App. 3d 908, 913-914, 93 Cal. Rptr. 639]* .

[c] Related Pleading and Practice Forms

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[d] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 30, § 30.02[1][b]* (Matthew Bender).

[3] Discussion of Authorities

[a] Ratification of Employee's Conduct

In ***Jameson v. Gavett*** *(1937) 22 Cal. App. 2d 646, 71 P.2d 937* , the plaintiff sued an employee and his employer to recover damages for personal injuries sustained in an assault and battery committed by the employee. The trial court entered judgment for the plaintiff, and the employer appealed on the grounds that the tortfeasor was not an employee and on the grounds that, assuming the tortfeasor was an employee, the evidence was insufficient to support a finding that the tort was committed in the course of the tortfeasor's employment.

The court of appeal first found that there was sufficient evidence to support the trial court's finding that the tortfeasor was an employee of the employer (*22 Cal. App. 2d 646, 648)* . The court also found that the employer had by its conduct and knowledge ratified the act that produced the plaintiff's injuries. Specifically, on the day following the assault, the employer discussed the matter with the employee but did not express any disapproval of the act. Also, the employer continued to employ the employee following the assault. The court stated that it is settled law that approval and ratification by the employer with full knowledge of the surrounding circumstances may fix liability on the employer for an act of the servant that was outside the scope of employment (*22 Cal. App. 2d 646, 651-652)* .

[b] Employer's Conduct or Knowledge as Evidence of Ratification

Jameson v. Gavett *(1937) 22 Cal. App. 2d 646, 71 P.2d 937* , is discussed in *§ 100A.21[3][a]*.

In **Coats v. Construction & Gen. Laborers Local No. 185** *(1971) 15 Cal. App. 3d 908, 93 Cal. Rptr. 639* , the plaintiff, a union member, sued hisunion and two union employees who had attacked him during arguments concerning union policies. The day after the employees attacked the plaintiff, the plaintiff advised the union president, business manager, and secretary of the attack. The union investigated and while a union officer concluded that it was just a personal matter between the plaintiff and the employees, the union president wanted to fire the employees. However, the union continued to employ the employees. The plaintiff subsequently began experiencing difficulties with the union in his treatment at meetings and at work. For the first time in his 12 years of union membership, he failed to receive

enough hours of work to qualify for health and welfare benefits. After the plaintiff filed his lawsuit, one of his witnesses was attacked by someone who worked for the union and was subsequently expelled from the union. Further, the plaintiff had difficulty obtaining job referrals through the union hiring hall. The union appealed from jury verdicts in favor of the plaintiff.

The court of appeal held that by retaining the tortfeasors in service with full knowledge of the employees' wrongful conduct, the union ratified their torts. Further, the union's inactive pursuit of the plaintiff's grievance, reduced job referrals to the plaintiff, and the assault and expulsion of the plaintiff's witness, were further evidence of ratification. The court stated that an employer is responsible for the torts of an employee that the employer has ratified. Failure to discharge an employee who has committed a tort toward a patron of the employer is evidence of ratification (*15 Cal. App. 3d 908, 913-914)* .

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10-100A California Points & Authorities § 100A.22

AUTHOR: Carolyn Rashby

§ 100A.22 Supporting Contention That Employer Is Directly Liable in Tort to Third Party Based on Employer's Own Conduct--Employer Negligently Hired or Retained Employee

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

DEFENDANT IS LIABLE TO PLAINTIFF, A THIRD PARTY INJURED BY DEFENDANT'S EMPLOYEE, FOR NEGLIGENTLY _____ [*insert either* HIRING *or* RETAINING] THE EMPLOYEE BECAUSE DEFENDANT HAD REASON TO BELIEVE PRIOR TO THE _____ [HIRING *or* RETENTION] THAT AN UNDUE RISK OF HARM TO OTHERS WOULD EXIST BECAUSE OF THE EMPLOYMENT.

Liability for Negligent Hiring or Retention. An employer can be directly liable in tort to a third party if the employer was negligent in hiring or in retaining an employee who is incompetent or unfit and who injures the third party, if the employer prior to the hiring (or retention) had reason to believe that an undue risk of harm to others would exist because of the employment (*Underwriters Ins. Co. v. Purdie (1983) 145 Cal. App. 3d 57, 69, 193 Cal. Rptr. 248*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that the defendant is liable to the plaintiff for injuries caused by the defendant's employee, on the grounds that the defendant negligently hired or retained the employee.

This form may be combined with points pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the defendant is liable in tort to the plaintiff for injuries caused by the defendant's employee because the defendant negligently hired or retained the employee, for example in a motion for summary judgment. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Opposing Memoranda

In an appropriate case, the points *in § 100A.23* may be used to oppose the contention supported by this form.

[c] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that the defendant's employee tortiously injured the plaintiff, and that the injury was the proximate result of the employee's unfitness for the employment. Counsel also should demonstrate that prior to hiring or retaining the employee, the defendant had reason to believe that there was a risk that the employee would harm third parties. For example, counsel could set forth facts indicating that the defendant learned prior to hiring the employee that the employee had violent propensities or that the employee had tortiously injured a third party while working at a prior job.

[d] Related Pleading and Practice Forms

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[e] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 30, § 30.02[2]* (Matthew Bender).

[3] Discussion of Authorities

[a] Liability for Negligent Hiring or Retention

In ***Underwriters Ins. Co. v. Purdie*** *(1983) 145 Cal. App. 3d 57, 193 Cal. Rptr. 248* , following a verbal argument, a liquor store clerk shot a third party who was making a delivery to the liquor store. The third party sued the defendant, the clerk's employer, on a negligent hiring/negligent supervision theory, alleging, among other things, that the defendant knew before hiring the employee that the employee was hostile, violent, vicious in character, and unfit for employment in a position requiring constant contact with the public. The defendant's insurer sought declaratory relief that it had no duty to defend or indemnify the defendant or the employee in the third-party suit. The trial court declared that there was no coverage on the ground that the insurance policy contained a firearm exclusion.

The court of appeal reversed, finding that the firearm exclusion did not preclude coverage because the defendant's liability arose from two independent negligent acts, one that was gun-related and the other that was caused by negligent hiring of a person known to be violent, which concurred to produce one injury. When two independent, negligent acts concur to produce one injury, each act should be viewed separately to determine policy coverage (*145 Cal. App. 3d 57, 68)* . The court then considered whether negligent hiring was an independent cause of the injury. Citing Restatement (Second) of Agency § 213, the court explained that the rule in California is that an employer may be liable to a third person for the employer's negligence in hiring or retaining an employee who is incompetent or unfit. Comment d to § 213 further provides that an agent may be incompetent because the agent has a reckless or vicious disposition, and if a principal, without exercising due care in hiring, employs the agent to do an act that necessarily brings the agent into contact with others, the principal is liable for harm caused by the vicious propensity. The liability results not because of the employer/employee relationship, but because the employer antecedently had reason to believe that an undue risk of harm would exist because of the employment. The court of appeal concluded that the third party had stated a negligent hiring cause of action against the defendant that was covered by the insurance policy (*145 Cal. App. 3d 57, 69)* .

[4] Additional Authorities

[a] Liability for Negligent Hiring or Retention

In *Hawkins v. Wilton (2006) 144 Cal. App. 4th 936, 51 Cal. Rptr. 3d 1* , plaintiff, the tenant at an apartment complex, was shot by the apartment manager, who also served as a nighttime security guard at the complex. Plaintiff sued the owners of the complex, alleging that they were negligent in allowing the manager to carry firearms even though they knew that he was a convicted violent felon, that he abused methamphetamine, and that he had previously threatened other tenants. The trial court granted summary judgment for the defendants, but the court of appeal reversed. The court of appeal noted that the defendants' summary judgment motion, which focused on the plaintiff's voluntary association with the shooter, did not address plaintiff's claim that defendants were negligent in hiring or retaining the shooter. The court recognized that the employer of a security guard may be liable for the guard's assaults, if the employer negligently hired the guard or negligently placed the guard in a position to commit foreseeable harmful acts. The court concluded that plaintiff's allegations, if proven, could support the imposition of liability on the owners. Because the summary judgment motion failed to show that plaintiff could not prove that theory at trial, summary judgment should not have been granted (*144 Cal. App. 4th 936, 943-944)* .

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10-100A California Points & Authorities § 100A.23

AUTHOR: Carolyn Rashby

§ 100A.23 Opposing Contention That Employer Is Directly Liable in Tort to Third Party Based on Employer's Own Conduct--Employer Did Not Negligently Hire or Retain Employee

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF CANNOT RECOVER DAMAGES FROM DEFENDANT FOR NEGLIGENTLY _____ [*insert either* HIRING *or* RETAINING] DEFENDANT'S EMPLOYEE BECAUSE THERE IS NO EVIDENCE THAT DEFENDANT KNEW OR SHOULD HAVE KNOWN OF THE EMPLOYEE'S UNSUITABLE CHARACTERISTICS BEFORE THE EMPLOYEE INJURED PLAINTIFF.

A. Employer Must Have Knowledge of Employee's Unsuitable Characteristics. While an employer can be liable to a third party for the employer's negligence in hiring or retaining an employee who is incompetent or unfit if the employee tortiously injures the third party, to prevail on a such a claim the third party must establish that the employer knew or should have known of the employee's unsuitable characteristics before the employee injured the third party (*Roman Catholic Bishop v. Superior Court (1996) 42 Cal. App. 4th 1556, 1565, 50 Cal. Rptr. 2d 399* ; *Golden W. Broadcasters, Inc. v. Superior Court (1981) 114 Cal. App. 3d 947, 954, 171 Cal. Rptr. 95*).

B. Employer Must Have Knowledge That Hiring Employee Created Particular Risk. In order to prevail on a claim for negligent hiring, a plaintiffmust allege facts showing that the employer knew or should have known that an employee would act in a certain way and that the employee did act in that way (*Doe v. Capital Cities (1996) 50 Cal. App. 4th 1038, 1055, 58 Cal. Rptr. 2d 122*).

C. Employer Must Have Knowledge That Employee Is Unfit for Specific Tasks. Liability for negligent hiring can be imposed only when an employer knows or should know that the employee, because of past behavior or other factors, is unfit for the specific tasks to be performed [*Federico v. Superior Court (1997) 59 Cal. App. 4th 1207, 1215, 69 Cal. Rptr. 2d 370]* .

D. Employer Must Owe Legal Duty to Seek Knowledge. An employer who lacks actual knowledge of an employee's unfitness cannot be held liable for negligent hiring or retention of that employee unless the employer was under a legal duty to undertake a search that would have uncovered facts demonstrating that the employee was unfit for the employment (*Flores v. AutoZone West, Inc. (2008) 161 Cal. App. 4th 373, 384, 74 Cal. Rptr. 3d 178*).

[*Optional*] **E. Employer Not Liable for Injury Caused by Former Employee.** Because the employer-employee relationship ends on the termination of employment, an employer cannot be held liable for the negligent hiring and retention of an unfit employee for harm inflicted by the employee after his or her employment has been terminated, even if the former employee initially met the plaintiff while working for the employer (*Phillips v. TLC Plumbing, Inc. (2009) 172 Cal. App. 4th 1133, 1144-1145, 91 Cal. Rptr. 3d 864*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that the defendant is liable to the plaintiff for injuries caused by the defendant's employee because the defendant negligently hired or retained the employee, based on the argument that the plaintiff has failed to show that the defendant knew or should have known of the employee's unsuitable characteristics before the injury occurred. In an appropriate case, these points (combined with those in § 100A.24, if appropriate) may be submitted in opposition to the contention supported by the points *in § 100A.22*.

This form may be combined with points pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the plaintiff has failed to establish a cause of action for negligent hiring, for example in a motion for summary judgment. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that prior to the incident in which the plaintiff was tortiously injured by the defendant's employee, the defendant had no reason to know whether there was a risk that the employee would harm third parties. For example, if applicable, counsel could demonstrate that evidence of the employee's unsuitable characteristics for the job did not surface during the reference and background checks made by the defendant prior to hiring the employee, and that while employed by the defendant, the employee did not demonstrate any violent propensities prior to the incident at issue [*see Golden W. Broadcasters, Inc. v. Superior Court (1981) 114 Cal. App. 3d 947, 954, 171 Cal. Rptr. 95]* .

[c] Related Pleading and Practice Forms

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[d] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 30, § 30.02[2]* (Matthew Bender).

[3] Discussion of Authorities

[a] Employer Must Have Knowledge of Employee's Unsuitable Characteristics

In ***Roman Catholic Bishop v. Superior Court*** *(1996) 42 Cal. App. 4th 1556, 50 Cal. Rptr. 2d 399* , a minor plaintiff

claimed she was sexually abused by her parish priest, and brought an action against the church for negligent hiring. The church claimed that it had no prior knowledge or reason to know that the priest was a risk to engage in a sexual relationship with a minor. However, the trial court denied the church's motion for summary judgment, concluding that a triable issue existed whether the church breached its duty of care to discover the priest's unfitness as an employee. The court of appeal disagreed, citing the rule of direct employer liability under Restatement (Second) of Agency § 213. The court emphasized comment d, which states in part that employer liability results because the employer antecedently had reason to believe that an undue risk of harm would exist because of the employment. In this case, no facts in the record indicated that the priest had a criminal history or had been previously implicated in sexual abuse of a minor. Furthermore, the plaintiff did not dispute that the church had no actual knowledge of the priest's sexual activity with her or with anyone else until her mother reported suspicions (*42 Cal. App. 4th 1556, 1565)* .

The plaintiff also contended that the church was negligent in failing to ask the priest if he had problems with his vows of celibacy. However, the court held that the duty the plaintiff sought to impose on the church as an employer would violate the employee's privacy rights explicitly guaranteed under the California constitution. Stating that the right to privacy encompasses privacy in one's sexual matters and is not limited to the marital relationship, the court also held that there was no compelling state interest to require the employer to investigate the sexual practices of its employee (*42 Cal. App. 4th 1556, 1567)* . Concluding that the church was entitled to summary judgment, the court issued a writ of mandate directing the trial court to enter a new order granting the motion.

In ***Golden W. Broadcasters, Inc. v. Superior Court*** *(1981) 114 Cal. App. 3d 947, 171 Cal. Rptr. 95* , the plaintiff sued the defendant for negligent employment and under the doctrine of respondeat superior for injuries caused when the defendant's employee assaulted the plaintiff in a fight outside a bar. The employee had gone to the bar after finishing work while on location for the day in Palm Springs to set up the staging for a telecast of a professional baseball game. The plaintiff alleged that the employee had violent propensities, of which the defendant was aware. The defendant filed a motionfor summary judgment and, in support of the motion, submitted declarations from the employee's supervisor stating that the employee was efficient and hardworking and had never demonstrated a propensity toward fighting or excessive drinking. The plaintiff's opposition did not refute this evidence. The defendant petitioned for a writ of mandate after the trial court denied the motion.

The appeals court let the writ issue. Although the plaintiff abandoned the negligent hiring theory on appeal, the court indicated that allegations based on the plaintiff's own experience with the tortfeasor will not establish the employer's knowledge, which is a prerequisite to liability based on negligent hiring. The declaration of the defendant's supervisor that he had no knowledge of the employee's alleged propensities for drinking and violence was sufficient to establish that no one connected with the defendant had such knowledge (*114 Cal. App. 3d 947, 954)* .

[b] Employer Must Have Knowledge That Hiring Employee Created Particular Risk

In ***Doe v. Capital Cities*** *(1996) 50 Cal. App. 4th 1038, 58 Cal. Rptr. 2d 122* , the plaintiff was an aspiring actor who was drugged and gang-raped by a casting director and four other men at the casting director's home. The actor sued the casting director's employer, a broadcasting company, for negligent hiring, training and/or supervision. The trial court ruled against the plaintiff, sustaining the defendant's demurrer without leave to amend. The plaintiff appealed.

The court of appeal affirmed. The court began its analysis by stating the prerequisites to liability in negligent hiring cases, as in *Evan F. v. Hughson United Methodist Church (1992) 8 Cal. App. 4th 828, 10 Cal. Rptr. 2d 748* . Liability is based on the facts that the employer knew or should have known that hiring the employee created a particular risk or hazard and that particular harm materialized. In this case, the plaintiff alleged that the defendant knew or should have known that the casting director engaged in the purchase and use of serious, mind-altering drugs, that he used his position to gain sexual favors, and that use of a "casting couch" was common within the entertainment industry. The court ruled that given the severity of the harm the plaintiff suffered, the allegations were insufficient to allege a cause of action against the defendant (*50 Cal. App. 4th 1038, 1055)* . Specifically, the court found that the defendant's

knowledge that the casting director personally used "serious, mind-altering drugs" did not equate with knowledge that he would surreptitiously use drugs to place a prospective employee into a situation of helplessness before violently assaulting him. According to the court, the "casting couch" allegation suffered from the same infirmity; that is, knowledge that the director used his position of authority to extract or coerce sexual favors is not knowledge that he would first drug and then attack a potential employee (*50 Cal. App. 4th 1038, 1054-1055)* .

[c] Employer Must Have Knowledge That Employee Is Unfit for Specific Tasks

In ***Federico v. Superior Court*** *(1997) 59 Cal. App. 4th 1207, 69 Cal. Rptr. 2d 370* , a plaintiff who was sexually molested by the defendant's employee sued the defendant on the theory of negligent hiring. The plaintiff alleged that the defendant knew, or should have known that his employee had suffered prior convictions for sexually molesting juvenile males and was negligent in hiring him to manage and supervise the training of students at his hairstyling college. The defendant sought a writ of mandate directing the trial court to grant its motion for summary judgment. The court of appeal concluded that the defendant was entitled to prevail and issued a peremptory writ of mandate.

According to the court, even if the defendant was aware of the employee's prior convictions for sexually molesting juvenile males, and could have foreseen that the employee's duties at the hair-styling school would entail some degree of contact with young males, the employer's actions in hiring the employee to manage and supervise the training of hair-styling students was not unreasonable. It reasoned that the employee's position required him only to supervise adult students and perform administrative tasks for the hair-styling college; his prior convictions did not involve students or customers of the hairdressing establishments in which he was employed at the time the offenses were committed; there was no connection between the employee's abnormal sexual interest in children and his profession, and nothing in the employee's history would have indicated to the employer that the employee posed a threat of harm to minors he might encounter in the course of his work (*59 Cal. App. 4th 1207, 1215)* .

[d] Employer Must Owe Legal Duty to Seek Knowledge

In ***Flores v. AutoZone West, Inc.*** *(2008) 161 Cal. App. 4th 373, 74 Cal. Rptr. 3d 178* , plaintiff was hit in the head with a metal pipe wielded by the employee of an auto parts store. Plaintiff had gone into the store for a case of motor oil and had apparently whistled to get the employee's attention, an act which annoyed the employee. Plaintiff then asked for the price of a case of oil, and the employee, still annoyed, pointed to the posted price and asked if plaintiff was "too stupid" to read the prices on the shelves. Plaintiff responded that if the employee did not want to work, he should not have come into work, and the employee responded by striking plaintiff in the head with a piece of metal pipe that he had been holding. Plaintiff sued the employee and the employer, but the trial court granted summary judgment in favor of the employer on the grounds that the employee's conduct was not foreseeable enough to place it within the course of employment and the employer did not breach any independent duty owed to plaintiff. Plaintiff appealed.

The court of appeal affirmed in part and reversed in part. The court first held that the trial court erred in granting summary judgment on the basis that the assault did not take place within the course of the employee's employment with defendant. The court concluded that the evidence was sufficient to support a jury finding that the assault arose when the employee was assisting plaintiff in buying motor oil and was within the course of employment. Thus, summary judgment on plaintiff's theory of respondeat superior was improperly granted (*161 Cal. App. 4th 373, 379-384)* . However, the court also held that the employer could not be directly liable for negligent hiring or retention of the employee who committed the assault. Plaintiff had argued that the employer could have discovered the employee's prior juvenile delinquency record, or otherwise determined that the employee had "dangerous propensities," if the employerhad made a better effort to investigate the employee's past or subject him to personality screening. The court rejected this argument, noting that liability could not be imposed on the employer merely because the employer *could have* discovered such information, if the employer did not have a legal duty to do so. The court held that plaintiff had not identified any legal duty on the part of the employer to conduct a background check so thorough that it would have identified the employee's past juvenile records, which, as the court noted, are made confidential by statute. The court

also concluded that one prior incidence of discipline imposed on the employee three years earlier for having a "loud and inappropriate" conversation with another customer was insufficient to support a finding that the employer had been negligent in retaining the employee. Because the employer was not otherwise on notice of the employee's propensity for violence, the claim for negligent hiring or retention failed (*161 Cal. App. 4th 373, 384-385)* .

[e] Employer Not Liable for Injury Caused by Former Employee

In ***Phillips v. TLC Plumbing, Inc.*** *(2009) 172 Cal. App. 4th 1133, 91 Cal. Rptr. 3d 864* , plaintiff was the daughter of a woman who was shot and killed by the defendant's former employee. The shooter was a former parolee who had been hired by defendant as a plumbing service repairman. While so employed, he was twice sent on service calls to the house of plaintiff's mother. The following month, defendant terminated the employment of this repairman for misuse of a company vehicle, drug and alcohol use, and threatening a coworker. Based on the repairman's service call meetings with plaintiff's mother, however, the two had begun a long-term personal relationship, which ended two years later when the former repairman shot and killed plaintiff's mother. Plaintiff sued defendant on the theory that it had negligently hired and retained the repairman. The trial court granted summary judgment for defendant. Plaintiff appealed.

The court of appeal affirmed. As an issue of first impression in California, the court held that because the employer-employee relationship ends on the termination of employment, an employer cannot be held liable for the negligent hiring and retention of an unfit employee for harm inflicted by the employee after his or her employment has been terminated. The court noted that in the instant case, even though the former employee initially met the plaintiff's mother while working for the defendant, the injury was inflicted two years after the employment relationship had been terminated by defendant. Under those circumstances, defendant owed plaintiff no duty of care and could not be liable under a theory of negligent hiring and retention (*172 Cal. App. 4th 1133, 1144-1145)* .

California Points & Authorities

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CHAPTER 100A EMPLOYER AND EMPLOYEE: RESPONDEAT SUPERIOR
PART II. FORMS

10-100A California Points & Authorities § 100A.24

AUTHOR: Carolyn Rashby

§ 100A.24 Opposing Contention That Employer Is Directly Liable In Tort to Third Party Based on Employer's Own Conduct--Hiring and Retention of Employee Did Not Proximately Cause Tort

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF CANNOT RECOVER DAMAGES FROM DEFENDANT FOR NEGLIGENTLY _____ [HIRING *or* RETAINING] DEFENDANT'S EMPLOYEE, BECAUSE _____ [HIRING *or* RETAINING] THE EMPLOYEE WAS NOT A PROXIMATE CAUSE OF THE TORT. THE EMPLOYEE'S TORTIOUS ACT WAS UNRELATED TO _____ [HIS *or* HER] JOB DUTIES, AND THERE IS NOEVIDENCE THAT _____ [NOT HIRING *or* FIRING] THE EMPLOYEE WOULD HAVE LESSENED THE RISK THAT THE TORT WOULD HAVE OCCURRED.

Unforeseeable Private Act of Employee Breaks Chain of Proximate Cause Connecting Employer to Tort. When an employee commits a tort that was not reasonably foreseeable by the employer and that was not related to the employee's job, the employer cannot be held liable for the tort, because any negligence of the employer in hiring or retaining the employee was not a proximate cause of the tort [*Mendoza v. City of Los Angeles (1998) 66 Cal. App. 4th 1333, 1342, 78 Cal. Rptr. 2d 525]* .

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a contention that the defendant is liable to the plaintiff for injuries caused by the defendant's employee because the defendant negligently hired or retained the employee, based on the argument that any negligence in hiring or retaining the employee was not a proximate cause of the plaintiff's injuries. This form (combined with those in § 100A.23, if appropriate) may be submitted in opposition to the contention supported by the points *in § 100A.22*.

This form may be combined with points pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the plaintiff has failed to establish proximate cause, for example in a motion for summary judgment. This form may be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. The argument should, therefore, establish that the employee's tortious conduct was unforeseeable by the employer, that it was not related to the employee's job duties, and that the fact of employment did not make the tort more likely to occur (*see Mendoza v. City of Los Angeles (1998) 66 Cal. App. 4th 1333, 1342, 78 Cal. Rptr. 2d 525*).

[c] Related Pleading and Practice Forms

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[d] Related California Employment Law References

For a further discussion, see Wilcox, *California Employment Law, Ch. 30, § 30.02[2]* (Matthew Bender).

[3] Discussion of Authorities

[a] Unforeseeable Private Act of Employee Breaks Chain of Proximate Cause Connecting Employer to Tort

In ***Mendoza v. City of Los Angeles*** *(1998) 66 Cal. App. 4th 1333, 1342, 78 Cal. Rptr. 2d 525* , an off-duty police officer who had been drinking shot and killed his fiancee with his own gun during a domestic argument. The ensuing wrongful-death action included a claim against the city that employed the officer, on the theory that the city had negligently hired and supervised the officer and negligently entrusted him to carry a concealed firearm while off duty. After a jury trial, the trial court entered judgment against the city.

The court of appeal reversed, holding that the trial court had erred in allowing the case to go to the jury. The court found that there was insufficient evidence to establish that the city owed a duty of care to the victim and the plaintiffs in connection with its hiring and supervision of the officer: the shooting did not occur in the workplace, and the contact between the officer and the victim had not been generated by the officer's employment relationship with the city. The city did not require the officer to carry a firearm while off duty; moreover, the weapon used in the shooting was not his service revolver, but rather his own gun, which he could have obtained regardless of his employment. Additionally, there was no evidence of past violence by the officer that would have made his criminal attack in this case foreseeable. Since the city had no duty to the plaintiffs in connection with its hiring of the officer, it could not be found negligent (*66 Cal. App. 4th 1333, 1339-1341)* .

Further, the court held that, even if the city had been negligent in hiring and supervising the officer, there was insufficient evidence to establish that the negligence was a proximate cause of the victim's death. Neither rejecting the officer nor firing him would have eliminated his access to a gun. The shooting occurred while the officer was off duty, during a domestic dispute, and it had no connection to his official duties. Finally, the officer's lack of a prior history of violence or excessive use of force made his act of domestic violence unforeseeable (*66 Cal. App. 4th 1333, 1342)* .

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CHAPTER 100A EMPLOYER AND EMPLOYEE: RESPONDEAT SUPERIOR
PART II. FORMS

10-100A California Points & Authorities § 100A.25

AUTHOR: Carolyn Rashby

§ 100A.25 Supporting Contention That Employer Is Vicariously Liable for Employee's Wrongful Conduct Based on Doctrine of Respondeat Superior--Tortfeasor Was Employee

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF CAN RECOVER DAMAGES FROM DEFENDANT UNDER THE DOCTRINE OF RESPONDEAT SUPERIOR BECAUSE THE TORTFEASOR WAS DEFENDANT'S EMPLOYEE.

A. Doctrine of Respondeat Superior. The doctrine of respondeat superior provides that an employer or principal is vicariously liable for the wrongful conduct of his or her employees or agents committed within the scope of the employment or agency (*Perez v. Van Groningen & Sons, Inc. (1986) 41 Cal. 3d 962, 967, 227 Cal. Rptr. 106, 719 P.2d 676*).

B. Employer/Employee Relationship. An employee is one who is subject to his or her employer's right of control with respect to any act, labor, or work to be done in the course and scope of the employment. If a person is performing work and labor for another, a prima facie showing of an employer/employee relationship is established, and the person is presumed to be an employee in the absence of contrary evidence (*Gipson v. Davis Realty Co. (1963) 215 Cal. App. 2d 190, 205, 30 Cal. Rptr. 253* ; *Pierson v. Holly Sugar Corp. (1951) 107 Cal. App. 2d 298, 301, 237 P.2d 28*).

[*Optional*] **C. Monetary Compensation Not Required.** Monetary compensation is not a necessary element of an employer/employee relationship (*Eye v. Kafer (1962) 202 Cal. App. 2d 449, 453, 20 Cal. Rptr. 841*).

D. Right of Control. The key factor in determining whether an employer/employee relationship exists rather than an independent contractor relationship is whether the employer has the right to exercise control over the employee with respect to the means and manner of the performance of the work, regardless of whether or not that potential control is actually exercised with respect to all of the employee's duties. The fact that there is a certain amount of freedom

inherent in the nature of the employee's work does not mean that an employment relationship does not exist (*City of Los Angeles v. Vaughn (1961) 55 Cal. 2d 198, 201, 10 Cal. Rptr. 457, 358 P.2d 913* ; Societa per *Azioni de Navigazione Italia v. City of Los Angeles (1982) 31 Cal. 3d 446, 458, 183 Cal. Rptr. 51, 645 P.2d 102* ; *Briggs v. Lawrence (1991) 230 Cal. App. 3d 605, 615, 281 Cal. Rptr. 578*).

[*Optional*] **E. Characterization of Relationship Not Determinative.** The fact that the defendant and tortfeasor characterized their relationship as that of independent contractor is not controlling. That characterization will be ignored if they, by their conduct, act like employee and employer (*Toyota Motor Sales U.S.A., Inc. v. Superior Court (1990) 220 Cal. App. 3d 864, 877, 269 Cal. Rptr. 647*).

F. Balance of Factors Supports Finding of Employment Relationship. In addition to the right of control, there are a number of other factors to be taken into consideration in determining whether one is an employee or an independent contractor. Where the preponderance of the factors suggests an employment relationship, the tortfeasor will be considered an employee (*Briggs v. Lawrence (1991) 230 Cal. App. 3d 605, 614-615, 617, 281 Cal. Rptr. 578* ; *Toyota Motor Sales U.S.A., Inc. v. Superior Court (1990) 220 Cal. App. 3d 864, 874, 269 Cal. Rptr. 647*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that the defendant is liable under the doctrine of respondeat superior because the tortfeasor was the defendant's employee. Optional Paragraph C is for use if there is evidence that the employee was not paid wages for his or her work. Optional Paragraph E is for use if there is evidence that the employer and employee characterized the relationship as that of independent contractor. In an appropriate case, these points should be combined with the points *in § 100A.26*.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should demonstrate that an employment relationship existed between the defendant and the tortfeasor, including evidence that the defendant had the right to control both the means and manner of the tortfeasor's work. Counsel also should discuss evidence of other factors tending to indicate the existence of an employment relationship, such as facts showing thatthe tortfeasor's work was of the type normally performed under the direction of an employer; the work did not require special skills; the defendant supplied the tools and place of work; the tortfeasor worked for the defendant for an extended period of time; the tortfeasor was paid a salary or by the hour; the work was part of the defendant's regular business; the tortfeasor and the defendant believed that they had an employment relationship; and the defendant had the right to discharge the tortfeasor at will [*see* *Briggs v. Lawrence (1991) 230 Cal. App. 3d 605, 615-618, 281 Cal. Rptr. 578* ; *Toyota Motor Sales U.S.A., Inc. v. Superior Court (1990) 220 Cal. App. 3d 864, 874, 269 Cal. Rptr. 647]* . If the issue of whether the tortfeasor acted within the scope of the employment is also contested, counsel should combine these points with arguments from §§ 100A.26-100A.32, as appropriate, establishing that the tortfeasor acted within the scope of his or her employment.

[c] Opposing Memoranda

In an appropriate case, the points *in § 100A.34* may be used to oppose the contention supported by this form.

This form may be combined with points pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the defendant is liable under the doctrine of respondeat superior because the tortfeasor was the defendant's employee, for example in opposition to a demurrer or in a motion for summary judgment. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[d] Related Pleading and Practice Forms

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[e] Related Memoranda

For forms relating to the vicarious liability of a principal for the acts of its agent, see Ch. 182, *Principal and Agent* .

[f] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 30, § 30.04* (Matthew Bender).

[3] Discussion of Authorities

[a] Doctrine of Respondeat Superior

In ***Perez v. Van Groningen & Sons, Inc.*** *(1986) 41 Cal. 3d 962, 227 Cal. Rptr. 106, 719 P.2d 676* , the defendant's employee told the plaintiff to ride with him and he would teach the plaintiff how to drive while he (the employee) performed his job for the defendant of driving a tractor. The plaintiff had to ride on the top of a toolbox because the tractor had only one seat. Company rules stated that only the driver could ride on the tractor because of the potential danger. After the plaintiff lost part of one leg and the use of one arm when he was knocked off the tractor by a low-hanging branch, he sued the defendant under the doctrine of respondeat superior. The trial court refused to give an instruction requested by the plaintiff that the employee was acting within the scope of his employment at the time of the accident as a matter of law, and instead submitted the issue to the jury as a factual question. The jury returned a verdict for the defendant, and the plaintiff appealed.

The issue on appeal was whether acceptance of an unauthorized passenger took the employee's acts out of the scope of his employment because such an act is not a risk arising out of the employment. The court of appeal stated that under the doctrine of respondeat superior, an employer is vicariously liable for torts committed by his or her employees in the scope of their employment. The rationale underlying respondeat superior is an allocation of risk; that is, losses caused by the torts of employees are certain to occur in the conduct of an employer's business, and such losses are best placed on the business itself, as a cost of doing business. A risk arises out of employment when an employee's conduct is not so unusual that it would seem unfair to include the loss resulting from the risk among the other costs of the employer's business. Thus, an employer's liability extends beyond the employer's actual or possible control of the employee to include risks inherent in or created by the enterprise (*41 Cal. 3d 962, 967-968)* .

To recover under respondeat superior, a plaintiff must demonstrate that the employee's tort was committed in the scope of employment. When the facts are undisputed, the issue becomes a question of law. In this case, the plaintiff requested an instruction that as a matter of law the employee was acting within the scope of his employment. The defendant objected to the instruction on the ground that the employee violated company rules by having an unauthorized passenger and that his conduct benefited only him and not the defendant. However, because the facts were uncontroverted that the employee was performing an assigned task during working hours at the time of the accident, the court found that the trial court erred in refusing the plaintiff's instruction. The fact that the employee had an unauthorized passenger was immaterial so long as he was performing hiswork. Further, there is no requirement that an employee's act benefit the employer for respondeat superior to apply. In fact, an employer can be liable for an employee's intentional torts committed within the scope of employment, even though such torts do not benefit the employer. The court also found that the fact that the employee may have been combining his personal business with his work was not relevant, because the employee clearly was still performing an assigned task. The court stated that the defendant anticipated the risk of injury inherent in carrying a passenger on a tractor and sought to minimize the risk with its no passenger rule. However, an employer cannot escape liability just by ordering employees to act carefully; if

they could, few employers would ever be held liable. The court concluded that, as a matter of law, the employee was acting within the scope of his employment (*41 Cal. 3d 962, 969-970)* .

[b] Employer/Employee Relationship

In ***Pierson v. Holly Sugar Corp.*** *(1951) 107 Cal. App. 2d 298, 237 P.2d 28* , the plaintiff, a salesman who was making a delivery to the defendant, was injured when the "manlift" he was riding in on the defendant's premises plummeted to the ground. Even though the manlift had a sign stating that it was for "Employees Only," an employee of the defendant told the plaintiff that the plaintiff could use the manlift. The plaintiff testified that on two occasions prior to the accident he had ridden the manlift, and that a man on the defendant's premises showed him how to operate it. After a jury verdict in the plaintiff's favor, the defendant appealed, asserting as grounds for reversal that the trial court erred in permitting the introduction of certain testimony and in the giving of instructions.

The court of appeal considered the defendant's contention that the trial court erred in admitting the plaintiff's testimony about the man who showed him how to operate the manlift because the plaintiff failed to establish that the man was the defendant's employee and acting within the scope of his employment. The court stated that, under the circumstances, the jury was entitled to infer that the man was an employee. Where one is performing work and labor for another, prima facie evidence of employment is shown and that person is presumed to be an employee in the absence of evidence to the contrary (*107 Cal. App. 2d 298, 301)* .

In ***Gipson v. Davis Realty Co.*** *(1963) 215 Cal. App. 2d 190, 30 Cal. Rptr. 253* , an ambulance carrying a pregnant woman on her way to deliver at the hospital, collided with a car. The child was born 40 minutes later and immediately showed signs of brain damage. The driver of the car, a real estate salesman, and the defendant had entered into a contract that stated that the driver would pay the defendant certain profits from his real estate activities in exchange for office space. The agreement also provided that he was not an employee of the defendant, and that the defendant did not control or have any right of control over his activities. Further, the agreement stated that salesmen could be terminated on 30-days' notice. In an attachment to the agreement, there was a reference that all "employees" had to show proof of automobile insurance. All real estate transactions entered into by the driver were made in the defendant's name because the driver was not licensed as a broker. The child's parents sued the defendant as the alleged employer of the driver. The trial court instructed the jury as to the meanings of "independent contractor" and "agent." The court also told the jury that the contract between the driver and the defendant was prima facie evidence of their relationship and was the controlling factor, in the absence of other evidence, in determining whether the driver was an independent contractor. However, the court said that the jury "may" take into account other evidence in determining who had the right to control the driver's work. The jury returned a verdict for the defendant, and the plaintiffs appealed, in part on the grounds that the trial court's instruction regarding the weight of the agreement between the defendant and the driver was prejudicial error.

The court of appeal found that it was error to have given any instruction on the effect of the contract because the driver was an agent of the defendant as a matter of law. Under real estate law, a real estate salesman is strictly the agent of the broker and referred to the relationship between a broker and a salesman as that of employer/employee [Grand v. Griesinger (1958) *160 Cal. App. 2d, 397, 405-406* , *325 P.2d 475]* . The court stated that an "employee" is one who is subject to the absolute control and direction of his or her employer in regard to any act, labor, or work to be done in the course and scope of the employment. And while an individual can be both an employee and an agent, the two terms are not synonymous. The distinguishing factor of an employment relationship is that the employee is entirely under the control and direction of the employer, which presupposes the right to direct the method and mode of the work. The distinguishing features of an agency relationship, on the other hand, is its representative character and its derivative authority. The court stated that it may be a question of fact as to whether in each case a salesman is an employee, but a salesman is an agent as a matter of law. Further, it is contrary to the provisions of real estate law to change the relationship between a salesman and a broker from that of an agent to independent contractor. Thus, the trial court's instruction that the agreement was prima facie evidence of the relationship between the defendant and the driver was

prejudicial error (*215 Cal. App. 2d 190, 205-208)* .

[c] Monetary Compensation Not Required

In ***Eye v. Kafer*** *(1962) 202 Cal. App. 2d 449, 20 Cal. Rptr. 841* , the plaintiff was beaten up in the restroom of a bar. The tortfeasor had been serving drinks and collecting money at the bar on the night of the incident,but the defendant, the bar owner, testified that he had not left the tortfeasor in charge of the bar. The tortfeasor had been an employee at some time during the month the incident occurred, and the defendant told a police officer that the tortfeasor was employed by the bar at the time of the incident to work off a tab owed for food and drink. The jury returned a verdict for the plaintiff, and the defendant appealed on the grounds that the tortfeasor was not an employee.

The court stated that although there was evidence to suggest that the tortfeasor was not an employee, the jury obviously did not believe the defendant's witnesses, and it is not the responsibility of the court to determine the credibility of the witnesses. An inference that the tortfeasor was an employee could be drawn from the defendant's statement to the police officer. The court stated that one of the tests for determining whether an employment relationship exists is the right of control. The court further stated that the test is whether an employee is subject to control and not whether control is being exercised at any particular moment. Furthermore, the control must be complete, extending not only to the employment, but to all of its details or the means by which the work is to be accomplished. The existence of the right of control can be tested by determining whether instructions would have to be obeyed. The court stated, however, that it was not necessary for the plaintiff to establish that the tortfeasor received payment in dollars for his services. The evidence indicated that he served drinks and collected money, and whether it was for a stated sum is not crucial to a determination of whether he was an employee of the defendant [*Bonetti v. Double Play Tavern (1954) 126 Cal. App. 2d Supp. 848* , *274 P.2d 751* ; *Lab. Code § 350*] (*202 Cal. App. 2d 449, 453)* .

[d] Right of Control

In ***Briggs v. Lawrence*** *(1991) 230 Cal. App. 3d 605, 281 Cal. Rptr. 578* , the plaintiff sued the public defender and deputy public defender of Monterey County for malpractice. The defendants' demurrers and motions for judgment on the pleadings were granted without leave to amend. On appeal, the issue was whether the plaintiff was required to have filed a claim against the county under the California Tort Claims Act; if the defendants were public employees acting in the scope of their employment, he was so required; if the defendants were independent contractors, he was not required to file such a claim. The court of appeal concluded that salaried full-time public defenders representing assigned clients are public employees acting in the scope of their employment, and thus, the trial court's order had to be affirmed. The court stated that the plaintiff's assertion that the employment relationship requires complete or absolute control was far too rigid; just because there is a certain amount of freedom inherent in the nature of the work, does not necessarily mean that one becomes an independent contractor. The court explained that the while the right to control the means by which the work is accomplished is the most significant test of whether an employment relationship exists, other factors should also be considered [*Tieberg v. Unemployment Ins. Appeals Bd. (1970) 2 Cal. 3d 943, 950, 88 Cal. Rptr. 175]* . The Restatement (Second) of Agency, § 220, defines a "servant" (a term that is synonymous with "employee") as a person who is "employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right of control." The Restatement further provides that the following factors must be considered in determining whether one is an employee or independent contractor: (1) the extent of control that the master may exercise over the details of the work; (2) whether or not the one employed is engaged in a distinct occupation or business; (3) whether the kind of occupation is normally performed under the direction of an employer or by a specialist without supervision; (4) the skill required in the occupation; (5) whether the worker or the master supplies the tools and place of work; (6) the length of time for which the person is employed; (7) the method of payment, whether by time or by the job; (8) whether the work is part of the regular business of the master; (9) whether the parties believe they are creating an employment relationship; and (10) whether the principal is or is not in business. Applying these factors to the case at hand, the court concluded that the preponderance of the factors suggested an employment relationship (*230 Cal. App. 3d 605, 615-618)* .

In **Societa per** ***Azioni de Navigazione Italia v. City of Los Angeles*** *(1982) 31 Cal. 3d 446, 183 Cal. Rptr. 51, 645 P.2d 102* , the plaintiff was the owner of a merchant vessel and customarily used local pilots to guide its ships within the Los Angeles Harbor. The defendant maintained a staff of local pilots, who were civil service employees, and on request would furnish one of the pilots to a ship for a fee. While one of these pilots was navigating the plaintiff's ship, the ship struck and damaged a wharf owned by the defendant and dock facilities owned by an oil company. A dispute arose over who was to bear financial responsibility for the damages. The trial court found that both the pilot and the ship's crew were negligent. One of the issues on appeal was whether the defendant or the plaintiff was vicariously liable for the pilot's negligence.

The court stated that in determining whether an employment relationship exists, the most important factor is the right to control the manner and means by which the work is to be performed. But if control may be exercised only as to the result of the work and not as to the means by which it is accomplished, an independent contractor relationship is established. The broad authority that a pilot has over navigation, however, would ordinarily weigh against finding the pilot to be an employee. Nonetheless, federal courts have concluded that sufficient indicia of a master-servant relationship are present to hold the shipowner the pilot's employer: theoccupation is one that is ordinarily considered an incident of the shipowner's business, and that the shipowner, through ship's master, has the capacity to exercise some limited control over the pilot. Moreover, the ship's master has some control over the pilot's actual performance of the pilot's task, may advise the pilot, can interfere in cases of danger, and can remove the pilot just as the ship's master can remove any other member of the crew. The court concluded that the facts of the case established that the plaintiff, through its shipmaster, had a sufficient degree of control to render an employment relationship with the pilot (*31 Cal. 3d 446, 457-459)* .

The court also stated, however, that the conclusion that an employment relationship existed between the plaintiff and the pilot did not necessarily mean that the respondeat superior nexus between the defendant and the pilot ceased to exist, based on the possibility of dual employment. The court then found that the pilot simultaneously served two employers, the defendant and the plaintiff, and that both the defendant and the plaintiff were therefore jointly and severally liable under the doctrine of respondeat superior for the damages caused by the pilot's negligence (*31 Cal. 3d 446, 460-461)* .

[e] Characterization of Relationship Not Determinative

In ***Toyota Motor Sales U.S.A., Inc. v. Superior Court*** *(1990) 220 Cal. App. 3d 864, 269 Cal. Rptr. 647* , the plaintiff's vehicle collided with a pizza delivery vehicle. The plaintiff sued the driver, the owner of the pizza franchise, and Toyota. She alleged that the franchise owner was liable under respondeat superior as the employer of the driver. She further alleged that Toyota had defectively designed the seatbelt in her car, thus contributing to her injuries. The plaintiff made a demand of $500,000 from the defendants to settle the entire case. Subsequently, she settled with the driver for $100,000, and Toyota did not object to the court's good faith determination as to this settlement. However, she also entered into a separate settlement with the franchise owner for $15,000, and, over Toyota's objection, the trial court found this settlement to be in good faith and dismissed Toyota's cross-complaint against the franchise owner for comparative equitable indemnity. Toyota filed a petition for a writ of mandate.

The appeals court let the writ issue. The court stated that the trial court's good faith determination of the settlement was based on a determination that the driver was not an employee of the franchise owner, but an independent contractor. Under that assumption, the franchise owner would not have any liability to the plaintiff because the plaintiff only asserted respondeat superior liability as to the franchise owner and there was no claim that the owner was independently negligent. On the other hand, if the driver was an employee, then the franchise owner might be exposed to unlimited liability, and the trial court's good faith determination would be questionable. The most significant factor in determining whether an employment relationship exists is the right to control the manner and means of accomplishing the result of the work. A number of other factors also are to be considered [Restatement (Second) of Agency, § 220], but such factors are secondary to the right of control. In addition, courts also have looked at the unlimited right to discharge at

will and without cause as a strong factor indicating employment [*Riskin v. Industrial Accident Comm'n (1943) 23 Cal. 2d 248, 255, 144 P.2d 16* ; *Empire Star Mines Co., Ltd. v. California Employment Comm'n (1946) 28 Cal. 2d 33, 43, 168 P.2d 686* ; *Malloy v. Fong (1951) 37 Cal. 2d 356, 370* ; *City of Los Angeles v. Vaughn (1961) 55 Cal. 2d 198, 201, 10 Cal. Rptr. 457, 358 P.2d 913]* .

In this case, the court found that the owner controlled and directed the number, nature and type of pizzas to be delivered, the time of such deliveries, the location of the deliveries, and price to be collected for each delivery. The only portion of the driver's work that arguably was left to the driver's control was the route or how fast he would drive. And the only evidence offered in support of the fact that he was an independent contractor, that he provided his own car, expenses and insurance, were circumstances constituting merely secondary factors and worthy of little weight. Further, the driver could not be characterized as an independent route driver or salesman because the owner had total control as to all aspects of the job, including when he reported to work, how long he worked, and when and to whom he made deliveries. The driver was at no risk with respect to the business (except his commission was subject to a charge for any shortages). Also, the owner had the right to terminate the relationship at will.

The court stated that some of the facts asserted by the franchise owner in support of the conclusion that the driver was an independent contractor were irrelevant. In particular, the fact that there was an agreement characterizing the relationship as one of "client-independent contractor" will be ignored when the parties, by their conduct, act like employer and employee. Attempts to conceal employment by formal documents purporting to create other relationships are disregarded when the conduct and declarations of the parties are inconsistent with the documents (*220 Cal. App. 3d 864, 878)* . In addition, the fact that the driver had to pay his own payroll and income taxes and provide his own workers' compensation insurance were viewed by the court merely as legal consequences of an independent contractor relationship, and not as a means of proving such a relationship. An employer cannot change the status of an employee to one of independent contractor by illegally requiring the employee to assume burdens that the law imposes directly on the employer. Based on a review of the factors, the court found that there was no substantial evidence to support the trial court's determination that the driver was an independent contractor. And,therefore, the trial court's good faith determination as to the plaintiff's settlement with the franchise owner was an abuse of discretion (*220 Cal. App. 3d 864, 878)* .

[f] Balance of Factors Supports Finding of Employment Relationship

Toyota Motor Sales U.S.A., Inc. v. Superior Court *(1990) 220 Cal. App. 3d 864, 269 Cal. Rptr. 647* , is discussed in *§ 100A.25[3][e]*.

Briggs v. Lawrence *(1991) 230 Cal. App. 3d 605, 281 Cal. Rptr. 578* , is discussed in *§ 100A.25[3][d]*.

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 100A EMPLOYER AND EMPLOYEE: RESPONDEAT SUPERIOR
PART II. FORMS

10-100A California Points & Authorities § 100A.26

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§ 100A.26 Supporting Contention That Employer Is Vicariously Liable for Employee's Wrongful Conduct Based on Doctrine of Respondeat Superior--Employee Acted Within Scope of Employment

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF MAY RECOVER DAMAGES FROM DEFENDANT EMPLOYER FOR THE WRONGFUL ACTS OF DEFENDANT'S EMPLOYEE BECAUSE THE ACTS WERE COMMITTED WITHIN THE SCOPE OF THE EMPLOYMENT.

A. Scope of Employment. Under the doctrine of respondeat superior, an employer is vicariously liable for the torts committed by his or her employees, provided that the torts are committed within the scope of the employment (*Munyon v. Ole's, Inc. (1982) 136 Cal. App. 3d 697, 701, 186 Cal. Rptr. 424*).

B. Tests to Determine Whether Conduct Is Within Scope of Employment. Specific conduct by an employee is considered to be within the scope of his or her employment if either: (1) the employee's act or conduct was "foreseeable;" or (2) the employee's act or conduct was required by or incident to his or her duties, regardless of whether it could be foreseen by the employer (*Jeffrey E. v. Central Baptist Church (1988) 197 Cal. App. 3d 718, 722, 243 Cal. Rptr. 128* ; *Alma W. v. Oakland Unified Sch. Dist. (1981) 123 Cal. App. 3d 133, 141-142, 176 Cal. Rptr. 287* ; *Golden W. Broadcasters, Inc. v. Superior Court (1981) 114 Cal. App. 3d 947, 956-957, 171 Cal. Rptr. 95*).

C. Conduct Was Foreseeable. An employee's conduct is foreseeable if the conduct is not so unusual or startling that it would seem unfair to include the loss resulting from such conduct among the other costs of the employer's business (*Mary M. v. City of Los Angeles (1991) 54 Cal. 3d 202, 209, 285 Cal. Rptr. 99, 814 P.2d 1341* ; *Perez v. Van Groningen & Sons, Inc. (1986) 41 Cal. 3d 962, 968, 227 Cal. Rptr. 106, 719 P.2d 676* ; *Alma W. v. Oakland Unified Sch. Dist. (1981) 123 Cal. App. 3d 133, 141-142, 176 Cal. Rptr. 287* ; *Golden W. Broadcasters, Inc. v. Superior Court (1981) 114 Cal. App. 3d 947, 956-957, 171 Cal. Rptr. 95*).

D. Sufficient Nexus Between Conduct and Duties of Employment. Regardless of whether the employee's conduct was foreseeable, the conduct will be found to be within the scope of employment if there is a sufficient nexus between the conduct and the duties of his or her employment (*Jeffrey E. v. Central Baptist Church (1988) 197 Cal. App. 3d 718, 722, 243 Cal. Rptr. 128* ; *Munyon v. Ole's, Inc. (1982) 136 Cal. App. 3d 697, 701, 186 Cal. Rptr. 424* ; *Golden W. Broadcasters, Inc. v. Superior Court (1981) 114 Cal. App. 3d 947, 956, 171 Cal. Rptr. 95* ; *Alma W. v. Oakland Unified Sch. Dist. (1981) 123 Cal. App. 3d 133, 139-141, 176 Cal. Rptr. 287*).

E. Duties and Purpose of Employment Broadly Construed. In determining whether an employee's tort was incidental to his or her job duties, an employee's duties and the purpose of his or her employment are broadly construed (*Alma W. v. Oakland Unified Sch. Dist. (1981) 123 Cal. App. 3d 133, 139, 176 Cal. Rptr. 287*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that the defendant is liable under the doctrine of respondeat superior because the defendant's employee committed a tort in the scope of his or her employment that injured the plaintiff.

This form may be combined with points pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the defendant is liable under the doctrine of respondeat superior because the defendant's employee committed a tort within the scope of employment, for example in a motion for summary judgment.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that the risk of the employee's conduct was typical of or incidental to the defendant's business, and that the conduct was foreseeable in light of the duties the employee was hired to perform. Counsel should argue that the precise circumstances giving rise to the injury need not be anticipated so long as the risk is reasonably foreseeable. If appropriate, counsel also should set forth facts indicating that the conduct was required by or incidental to the employee's job duties. Further, counsel should argue that occupational duties are defined broadly, and, if applicable, that the fact that the employee was not engaged in the ultimate object of the employment at the time of the wrongful conduct does not preclude respondeat superior liability [*Alma W. v. Oakland Unified Sch. Dist. (1981) 123 Cal. App. 3d 133, 138-139, 176 Cal. Rptr. 287]* .

[c] Opposing Memoranda

In an appropriate case, the points *in §§ 100A.35 -100A.37* may be used to oppose the contention supported by these points.

[d] Related Pleading and Practice Forms

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[e] Related Memoranda

For points relating to the vicarious liability of a principal for the acts of its agent, see Ch. 182, *Principal and Agent* .

[f] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 30, § 30.05* (Matthew Bender).

[3] Discussion of Authorities

[a] Scope of Employment

In ***Munyon v. Ole's, Inc.*** *(1982) 136 Cal. App. 3d 697, 186 Cal. Rptr. 424* , the plaintiff was struck by a vehicle driven by the defendant's employee. The employee's duties at the defendant's hardware store were limited to operating a cash register and marking and pricing inventory. She never made any deliveries, nor used her car in connection with her work. On the day of the accident, a Friday, she had driven to the defendant's store to pick up her paycheck, but she was not scheduled to work that day. Payday was always the Friday following the work week that ended the previous Sunday. After picking up her paycheck, she walked to a nearby bank, but the bank was busy. She got back in her car, drove one block, and then hit the plaintiff. The plaintiff sued the defendant alleging that the employee was acting within the scope of her employment. The trial court granted the defendant's motion for summary judgment, and the plaintiff appealed.

The appeals court stated that under the doctrine of respondeat superior, an employer is liable for the torts of his or her employees committed within the scope of employment, but the burden of proof is on the plaintiff to establish that the act was within the scope of employment. The court rejected the plaintiff's reliance on workers compensation cases to establish that activities incident to collecting wages arise out of in the course of employment. According to the court, workers compensation cases, while helpful, are not instructive in determining respondeat superior liability, mainly because the two areas of law serve different purposes: while workers' compensation is a shield for the injured worker, the imposition of vicarious liability is a sword. This difference is underscored by the fact that an injured worker need not prove fault as a condition precedent to workers' compensation recovery, but the plaintiff in a respondeat superior case has to prove fault by a preponderance of the evidence. The court concluded that an employee can suffer an injury that is compensable under the workers' compensation laws and at the same time not be within the scope of employment under the doctrine of respondeat superior (*136 Cal. App. 3d 697, 702-703)* .

The court also rejected the plaintiff's assertion that the defendant was liable under the special errand exception to the going and coming rule, which provides that if the employee is engaged in a special errand, either as part of the employee's regular duties or at the specific order or request of the employer, the employee is considered to be within the scope of employment from the time the employee commences the errand until the employee returns, or until the employee deviates from his or her special errand for personal reasons. The court found that the availability of the plaintiff's paycheck on the day of the accident did not convert that circumstance into an invitation to engage in a special errand for the benefit of the employer. At most, it was an option available at the election of the employee, and solely for the benefit of the employee (*136 Cal. App. 3d 697, 704)* .

Finally, the court rejected the plaintiff's assertion that the going and coming rule did not apply because going to pick up her paycheck was a risk that was created by the defendant's enterprise and was foreseeable. The court cited *Rodgers v. Kemper Constr. Co. (1975) 50 Cal. App. 3d 608, 618-619, 124 Cal. Rptr. 143* [*see § 100A.33[3][c]*], for the proposition that the employer's liability should extend beyond actual or possible control over employees to include risks inherent in or created by the enterprise because the employer is better able than the injured party to spread the risk through prices, rates, or liability insurance. One way to determine whether a risk should be borne by the enterprise is to ask whether the actual occurrence was a foreseeable consequence of the activity. Foreseeability as a test for respondeat superior means that in the context of the enterprise, an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business. The court stated that, in the case before it, there was no inherent risk to the employment that would have made the accident foreseeable. The employee was a cashier who was not required to use her car for work and there was no evidence that the defendant had any knowledge that the employee would use her car to go to the store on her day off to get her paycheck. Further, there was nothing

unusual in having a fixed pay day and having a short time lag between the pay day and the last day worked, and thus, the plaintiff's argument that the defendant created the risk by holding on the money was too attenuated. The court stated that if the employee had been working on the day of the accident and had picked up her paycheck during the day, there is no question that the going and coming rule would bar any claim against the defendant for torts committed by the employee while driving her car from home to work. The fact that she voluntarily chose to come into work on her day off should not produce a different result (*136 Cal. App. 3d 697, 705-706)* .

[b] Tests to Determine Whether Conduct Is Within Scope of Employment

In ***Jeffrey E. v. Central Baptist Church*** *(1988) 197 Cal. App. 3d 718, 243 Cal. Rptr. 128* , Ernest Schwobeda was a member of the Central Baptist Church and a Sunday school teacher. He also participated in the Church's organized evening program of visitation to homes that was designed to enlarge the Church's membership. He was not compensated for any of these activities. The plaintiff was in Schwobeda's second grade Sunday school class, and, shortly thereafter, Schwobeda began picking up the plaintiff at his home on Thursday evenings to bring him along on the visitations. He also had the plaintiff help him with yardwork or other errands on Saturdays. The Saturday outings were unrelated to Church activities. This relationship lasted two years. Schwobeda was charged with child molestation involving the plaintiff and others. The plaintiff sued the Church, and the Church moved for summary judgment claiming that Schwobeda's actions were not foreseeable, that Schwobeda had no authority or agency to commit the acts, and that the acts were unrelated to Schwobeda's duties as a Church member or Sunday school teacher. The trial court granted the motion.

The appeals court explained that an employer is liable for the torts of his or her employees committed within the scope of employment. The determination of whether the tort was within the scope of employment turns on whether either the act performed was required or incident to the employee's duties, or on whether the misconduct could be reasonably foreseen by the employer in any event. Examining the evidence, the court found that the acts of molestation were not within the scope of employment. Schwobeda was not employed to molest young boys, and there was no evidence that the acts occurred during Sunday school or during a visitation period. Further, the acts were not actuated by a purpose to serve the Church, but rather were self-serving acts unrelated to Church activities. Thus, the acts were neither required, incidental to his duties, nor foreseeable (*197 Cal. App. 3d 718, 722)* .

In ***Alma W. v. Oakland Unified Sch. Dist.*** *(1981) 123 Cal. App. 3d 133, 176 Cal. Rptr. 287* , the plaintiff, an 11-year-old, was sexually molested by a school custodian. The molestation occurred on school premises on a Friday afternoon in the custodian's office. The plaintiff, through her mother as guardian ad litem, filed an amended complaint alleging liability of the school district on the basis of respondeat superior. The trial court dismissed the complaint on the basis of failure to state a cause of action.

On appeal the issue was whether a school district may be liable for a sexual assault committed by an employee. The court noted that the case was governed by *Gov. Code § 815.2*, which provides that a government employer is vicariously liable for the tort of an employee if the employee acted in the scope of his or her employment. However, the general rule for respondeat superior for nongovernmental employers is the same. Thus, in determining whether the custodian acted within the scope of his employment, the court looked to common law under the doctrine of respondeat superior.

A two-part test for determining whether an employee's wrongful act fell within the scope of employment was articulated in *Clark Equip. Co. v. Wheat (1979) 92 Cal. App. 3d 503, 520, 154 Cal. Rptr. 874* : (1) whether the act performed was either required or incident to the employee's duties; and (2) whether, in any event, the employee's misconduct could be reasonably foreseen by the employer. If an employee's activities falls within the range of actions covered by either part of the test, the employer will be liable for the wrong, even if the employee acted maliciously and intentionally. Further, in assessing whether an employee's wrongful act was required by or incidental to the employee's duties, the law defines occupational duties broadly, and the fact that an employee was not engaged in the ultimate object of his or her

employment at the time of his or her wrongful act does not preclude liability on the part of the employer (*123 Cal. App. 3d 133, 138-139)* .

In the case before it, the court concluded that the connection between the employee's duties and the wrongful acts became so attenuated that the law could not hold the employer vicariously liable. Specifically, sexual molestation is in no way related to mopping floors, or any of the other duties of a custodian. Thus, the custodian's acts were not required by or incidental to his work duties. The fact that the custodian used school facilities to commit the offense did not change the result. If an employee pursues the employee's own ends, the use of property or facilities entrusted to the employee by the employer is an inadequate basis for imputing liability to the employer. Nor did the fact that the offense occurred during working hours make the actions incidental to the employment. If a tort is personal in nature to the employee, mere presence at the site of employment and attendance to occupational duties prior to or subsequent to the offense does not give rise to a cause of action against the employer under respondeat superior (*123 Cal. App. 3d 133, 139-140)* .

With respect to whether the conduct was foreseeable in any event, the court stated that the question should be whether the risk was one that may fairly be regarded as typical of or broadly incidental to the enterprise undertaken by the employer. The court concluded that it defies notions of fairness to say that rape is characteristic of a school district's activities. The court rejected the plaintiff's assertion that the fact that the legislature anticipated molestation by enacting *Education Code §§ 44425* and *45123*, which attempt to safeguard the school against those with sexual offense histories, made the conduct foreseeable. Efforts by the legislature to guard against such conduct do not prove that the legislature believed molestation to be characteristic of public school employees. The test is not whether it is foreseeable that one or more employees might at some time act in such a way as to give rise to civil liability, but whether the employee's act is foreseeable in light of the duties the employee was hired to perform. There is no aspect of a janitor's duties that would make sexual assault anything other than highly unusual and very startling. In conclusion, the court stated that the facts, construed most favorably for the plaintiff, admitted no inference other than that in his rape of the plaintiff, the custodian stepped outside of the scope of his employment (*123 Cal. App. 3d 133, 141-144)* .

The factual and procedural background of ***Golden W. Broadcasters, Inc. v. Superior Court*** *(1981) 114 Cal. App. 3d 947, 171 Cal. Rptr. 95* , is discussed in *§ 100A.23[3][a]*. The court stated that liability under respondeat superior attaches only to torts committed by an employee within the scope of his or her employment. One test for determining whether conduct was within the scope of employment is to ask whether it was foreseeable. Foreseeability in this context means that the conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business. The court held that if a tort is committed for the employee's own purposes, or as the result of a personal quarrel, the employer need not be liable even though the employee is engaged in the employer's service at the time. The court found that, as matter of law, the beating was not inflicted within the scope of employment. In the view of the court, it is specious to argue that the employment of a television technician whose duties are to set up telecasts of events creates an inherent risk of the type involved in the case at hand. The employment at no time contemplated contacts with the public, and there is no inherent risk incidental to this type of employment importing foreseeability (*114 Cal. App. 3d 947, 957-958)* .

[c] Conduct Was Foreseeable

Mary M. v. City of Los Angeles *(1991) 54 Cal. 3d 202, 285 Cal. Rptr. 99, 814 P.2d 1341* , involved an action against a city brought by a woman who was raped by one of the city's on-duty police officers after he stopped her for erratic driving. The plaintiff pleaded with the officer not to take her to jail because she had been drinking. He drove her to her home and told her that he expected payment for taking her home instead of to jail. He raped her, and then left her house and radioed to the police station that he was returning from a lunch break. The trial court entered judgment for the plaintiff after a jury verdict in her favor and a special jury finding that the officer acted within the scope of his employment. The court of appeal reversed.

The Supreme Court reversed and remanded to the court of appeal. The Court first discussed the principles underlying respondeat superior. For the doctrine to apply, the plaintiff must prove that the employee's tortious conduct was committed within the scope of employment. An act will be found to be within the scope of employment when the conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business. In other words, the act will be within the scope of employment if it was foreseeable. Tortious conduct that violates an employee's official duties or disregards an employer's express orders may nonetheless be within the scope of employment, as may acts that do not benefit the employer or that are willful or malicious in nature. Further, respondeat superior applies to both public and private employers (*54 Cal. 3d 202, 208-209)* .

In its determination of whether the conduct was foreseeable, the Court reviewed the three policy objectives underlying respondeat superior. The first policy objective is imposing liability on the employer may prevent recurrence of the tortious conduct because it creates a strong incentive for the employer to guard against such conduct. In this case, there was little risk that preventive measures would significantly interfere with the ability of police departments to enforce the law and protect society from criminal acts. Thus, the first policy basis for respondeat superior supported the jury's verdict against the city. The second policy objective is togive greater assurance of compensation to the victim. Prior decisions recognized that vicarious liability is an appropriate method to ensure that victims of police misconduct are compensated [*City of Los Angeles v. Superior Court (1973) 33 Cal. App. 3d 778, 782, 109 Cal. Rptr. 365* ; *Larson v. City of Oakland (1971) 17 Cal. App. 3d 91, 98, 94 Cal. Rptr. 466* ; *Scruggs v. Haynes (1967) 252 Cal. App. 2d 256, 268, 60 Cal. Rptr. 355* ; *Griffith v. City of Monrovia (1982) 134 Cal. App. 3d Supp. 6]*]. The third policy consideration, the appropriateness of spreading the risk of loss among the beneficiaries of the enterprise, also supported the jury verdict against the city. Society has granted police officers extraordinary power and authority over citizens, and inherent in this power is the potential for abuse. The cost resulting from such abuse should be borne by the community because of the substantial benefits that the community derives from the lawful exercise of police power (*54 Cal. 3d 202, 213-217)* .

The Court rejected the city's argument that the rape was so unusual or startling that it could not fairly be regarded as typical of or broadly incidental to the task of law enforcement. In view of the considerable power and authority that police officers possess, it is neither startling or unexpected that on occasion an officer will misuse that authority by engaging in assaultive conduct. The precise circumstances of the assault need not be anticipated, so long as the risk is one that is reasonably foreseeable. The Court also rejected the city's assertion that the officer was primarily pursuing his own interests, explaining that the case did not fall within one of the few exceptions to liability for instances in which the employee substantially deviated from the employee's duties for personal purposes. The officer was acting in the scope of his employment when he stopped the plaintiff for erratic driving and ordered her to get out of her car to perform a field sobriety test and when he ordered her to get in his car. He was misusing his authority when he drove her home and raped her. Cases relied on by the city involving private security guards were distinguishable because such persons do not act as official representatives of the state and any authority they have is different from and less that that conferred on a law officer. The Court held that if a police officer on duty misuses his official authority by raping a woman whom he has detained, the public entity that employs him can be held vicariously liable, although it is a question of fact for the jury (*54 Cal. 3d 202, 217-221)* .

Golden W. Broadcasters, Inc. v. Superior Court *(1981) 114 Cal. App. 3d 947, 171 Cal. Rptr. 95* , is discussed in *§ 100A.26[3][b]*.

Alma W. v. Oakland Unified Sch. Dist. *(1981) 123 Cal. App. 3d 133, 176 Cal. Rptr. 287* , is discussed in *§ 100A.26[3][b]*.

Perez v. Van Groningen & Sons, Inc. *(1986) 41 Cal. 3d 962, 227 Cal. Rptr. 106, 719 P.2d 676* , is discussed in *§ 100A.25[3][a]*. The court stated that under the doctrine of respondeat superior, an employer is vicariously liable for torts committed by his or her employees in the scope of their employment. The rationale underlying respondeat superior is an allocation of risk; that is, losses caused by the torts of employees are certain to occur in the conduct of an

employer's business, and such losses are best placed on the business itself, as a cost of doing business. A risk arises out of employment when an employee's conduct is not so unusual that it would seem unfair to include the loss resulting from the risk among the other costs of the employer's business. Thus, an employer's liability extends beyond the employer's actual or possible control of the employee to include risks inherent in or created by the enterprise (*41 Cal. 3d 962, 967-968)* .

[d] Sufficient Nexus Between Conduct and Duties of Employment

Jeffrey E. v. Central Baptist Church *(1988) 197 Cal. App. 3d 718, 243 Cal. Rptr. 128* , is discussed in *§ 100A.26[3][b]*.

Munyon v. Ole's, Inc. *(1982) 136 Cal. App. 3d 697, 186 Cal. Rptr. 424* , is discussed in *§ 100A.26[3][a]*.

Golden W. Broadcasters, Inc. v. Superior Court *(1981) 114 Cal. App. 3d 947, 171 Cal. Rptr. 95* , is discussed in *§ 100A.26[3][b]*.

Alma W. v. Oakland Unified Sch. Dist. *(1981) 123 Cal. App. 3d 133, 176 Cal. Rptr. 287* , is discussed in *§ 100A.26[3][b]*.

[e] Duties and Purpose of Employment Broadly Construed

Alma W. v. Oakland Unified Sch. Dist. *(1981) 123 Cal. App. 3d 133, 176 Cal. Rptr. 287* , is discussed in *§ 100A.26[3][b]*.

[4] Additional Authorities

[a] Scope of Employment

In *PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP (2007) 150 Cal. App. 4th 384, 58 Cal. Rptr. 3d 516* , plaintiff corporations, through their receiver, sued a law partner and his firm. Plaintiffs alleged that the attorney, while providing criminal defense services for a client accused of fraudulently soliciting investment loans, sent persons to the client's residence to retrieve several duffel bags filled with money that was obtained by the client illegally, and that the money properly belonged to the receivership. Plaintiffs alleged causes of action for conversion, breach of fiduciary duty, money had and received, and related claims, brought against both the individual attorney and the firm. The trial court granted summary judgment for the firm, concluding that the firm could not be held vicariously liable for the law partner's conduct, but the court of appeal held that triable issues existed and reversed. The court of appeal held that a reasonable jury could conclude that the partner acted within the scope of his authority with the law partnership when he had the money removed from theclient's residence. The partner's conduct was taken in an effort to secure funds to post the client's bail and ensure that the firm's fees were paid. The court concluded that both of these activities were "typical of or broadly incidental" to the practice of law by a white-collar criminal defense attorney and therefore sufficient to hold the firm liable under the doctrine of respondeat superior (*150 Cal. App. 4th 384, 390-394)* .

[b] Sufficient Nexus Between Conduct and Duties of Employment

In *Fowler v. Howell (1996) 42 Cal. App. 4th 1746, 50 Cal. Rptr. 2d 484* , a public employee who had been accused of sexual harassment by a coworker brought an action against his accuser for malicious prosecution after most of her accusations were found to be not proven. The trial court granted the defendant's motion for judgment on the pleadings in the malicious prosecution action based on the plaintiff's failure to file a claim under the California Tort Claims Act. The plaintiff appealed, contending that the defendant was not acting within the scope of her employment as a public official when she made her accusations of sexual harassment. The plaintiff relied on *Davaris v. Cubaleski (1993) 12 Cal. App. 4th 1583, 16 Cal. Rptr. 2d 330* [*see Ch. 239, Workers' Compensation Exclusive Remedy Doctrine, § 239.38[3][a]*],

which held that defamatory statements are notpart of the employment relationship or a risk of employment. The court of appeal affirmed the trial court, noting that the fact that an employee is not engaged in the ultimate object of employment at the time of a wrongful act does not necessarily mean that the employee acted outside the scope of employment. The court held as a matter of law that an employee who has been encouraged to complain and provided a procedure to complain of sexual harassment by a coworker acts within the scope of employment by making such a complaint (*42 Cal. App. 4th 1746, 1751)* .

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 100A EMPLOYER AND EMPLOYEE: RESPONDEAT SUPERIOR
PART II. FORMS

10-100A California Points & Authorities § 100A.27

AUTHOR: Carolyn Rashby

§ 100A.27 Supporting Contention That Employer Is Vicariously Liable for Employee's Wrongful Conduct Based on Doctrine of Respondeat Superior--Employee Acted Within Scope of Employment--Conduct Violative of Employer Rules or Instructions Still Within Scope of Employment

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF MAY RECOVER DAMAGES FROM DEFENDANT EMPLOYER UNDER THE DOCTRINE OF RESPONDEAT SUPERIOR FOR THE WRONGFUL ACTS OF THE DEFENDANT'S EMPLOYEE BECAUSE THE ACTS, EVEN THOUGH VIOLATIVE OF THE DEFENDANT'S _____ [*insert either* RULES *or* INSTRUCTIONS] WERE COMMITTED WITHIN THE SCOPE OF THE EMPLOYMENT.

Effect of Employee Violation of Employer's Rules or Instructions. Liability under the doctrine of respondeat superior does not depend on the employee having specific authority from the employer to perform the act that results in injury to a third party; even in the absence of such authority, the employer is liable to the third party if the act was within the scope of the employment. And even if the employee's conduct is contrary to his or her employer's instructions, this alone will not take the conduct outside the scope of employment (*Mary M. v. City of Los Angeles (1991) 54 Cal. 3d 202, 209, 285 Cal. Rptr. 99, 814 P.2d 1341* ; *Perez v. Van Groningen & Sons, Inc. (1986) 41 Cal. 3d 962, 968-971, 227 Cal. Rptr. 106, 719 P.2d 676*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that the defendant is vicariously liable for the wrongful acts of the defendant's employee committed within the scope of employment even though such acts were contrary to the rules or instructions of the defendant.

This form may be combined with points pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the defendant is vicariously liable for the wrongful acts of his or her employee committed within the scope of employment even though such acts were contrary to the defendant's rules or instructions--for example, in a motion for summary judgment. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts indicating that the employee's acts were committed within the scope of the employment [*see § 100A.26* for an example of this argument]. Counsel should argue that so long as the conduct was within the scope of employment, the fact that the employee may have acted contrary to the defendant's instructions or that the defendant did not authorize the conduct does not defeat respondeat superior liability [*Mary M. v. City of Los Angeles (1991) 54 Cal. 3d 202, 209, 285 Cal. Rptr. 99, 814 P.2d 1341* ; *Perez v. Van Groningen & Sons, Inc. (1986) 41 Cal. 3d 962, 968-969, 227 Cal. Rptr. 106, 719 P.2d 676]* .

[c] Related Pleading and Practice Forms

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[d] Related Memoranda

For forms relating to the vicarious liability of a principal for the acts of its agent, see Ch. 182, *Principal and Agent* .

[e] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 30, § 30.05[6]* (Matthew Bender).

[3] Discussion of Authorities

[a] Effect of Employee Violation of Employer's Rules or Instructions

The factual and procedural background of ***Mary M. v. City of Los Angeles*** *(1991) 54 Cal. 3d 202, 285 Cal. Rptr. 99, 814 P.2d 1341* , is discussed in *§ 100A.26[3][c]*. In discussing the principles of respondeat superior, the Court explained that tortious conduct that violates an employee's official duties or disregards the employer's express orders may nonetheless be within the scope of employment (*54 Cal. 3d 202, 209)* . The Court concluded that when an on-duty police officer misuses his official authority to rape a woman whom he detained, the public entity that employs him can be held vicariously liable (*54 Cal. 3d 202, 221)* .

The factual and procedural background of ***Perez v. Van Groningen & Sons, Inc.*** *(1986) 41 Cal. 3d 962* , is discussed in *§ 100A.25[3][a]*. The defendant had argued that because the employee had violated a company rule against taking passengers, that the employee's conduct benefited only him and not the defendant, and, therefore, that his conduct was outside the scope of employment. The Court rejected this contention, stating that as long as it is clear that at the time of injury the employee was engaged in his work, the fact that he was not authorized to take a passenger is immaterial. Proof of an employer's authorization of the act is not necessary to show that the act is within the scope of employment (*41 Cal. 3d 962, 968-969)* .

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CHAPTER 100A EMPLOYER AND EMPLOYEE: RESPONDEAT SUPERIOR
PART II. FORMS

10-100A California Points & Authorities § 100A.28

AUTHOR: Carolyn Rashby

§ 100A.28 Supporting Contention That Employer Is Vicariously Liable for Employee's Wrongful Conduct Based on Doctrine of Respondeat Superior--Employee Acted Within Scope of Employment--Going and Coming Rule Does Not Apply--Special Errand Exception to Going and Coming Rule Applies

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF MAY RECOVER DAMAGES FROM DEFENDANT EMPLOYER UNDER THE DOCTRINE OF RESPONDEAT SUPERIOR FOR THE WRONGFUL ACTS OF DEFENDANT'S EMPLOYEE BECAUSE THE ACTS, EVEN THOUGH COMMITTED DURING _____ [*insert, e.g.,* THE EMPLOYEE'S COMMUTE *or* THE EMPLOYEE'S MEAL PERIOD], WERE WITHIN THE SCOPE OF THE EMPLOYMENT BECAUSE THE SPECIAL ERRAND EXCEPTION TO THE GOING AND COMING RULE APPLIES.

A. Special Errand Exception. When an employee pursues his or her employer's business during the commute time or a meal period, the going and coming rule does not apply and the employee will be within the scope of employment for the entire period. The "special errand rule" applies both to employees who regularly or only occasionally perform work for their employer during commute or meal periods (*Gipson v. Davis Realty Co. (1963) 215 Cal. App. 2d 190, 209-210, 30 Cal. Rptr. 253* ; *Boynton v. McKales (1956) 139 Cal. App. 2d 777, 789, 294 P.2d 733*).

[*Optional*] **B. Effect of Partial Abandonment of Employer's Business.** Although an employee may be found to be outside the scope of employment if, while on a special errand, the employee completely abandons the employer's business for personal reasons, the employee will still be found to be acting in the scope of employment if such deviation is not substantial and complete. A mere deviation for personal reasons is insufficient, and an employee who is pursuing a business errand and a personal objective simultaneously is still acting within the scope of employment (*Felix v. Asai (1987) 192 Cal. App. 3d 926, 932, 237 Cal. Rptr. 718* ; *O'Connor v. McDonald's Rests. (1990) 220 Cal. App. 3d 25, 30, 269 Cal. Rptr. 101* ; *Lazar v. Thermal Equip. Corp. (1983) 148 Cal. App. 3d 458, 462-467, 195 Cal. Rptr. 890*).

[*Optional*] **C. Out-of-Town Business Travel May Constitute Special Errand.** An employee's attendance at an out-of-town business conference authorized and paid for by the employer can be a special errand for the benefit of the employer under the special errand rule, and in such cases, the employee is in the course and scope of employment until the trip is completed (*Jeewarat v. Warner Bros. Entertainment Inc. (2009) 177 Cal. App. 4th 427, 436, 98 Cal. Rptr. 3d 837*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that the defendant is vicariously liable for the wrongful acts of his or her employee on the grounds that the special errand exception to the going and coming rule applies. Optional Paragraph B is for use if the defendant contends that the employee abandoned the employer's business while on the special errand. Optional Paragraph C is for use if the special errand takes the form of an out-of-town business trip.

This form may be combined with points pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the special errand exception to the going and coming rule applies such that the employee's acts were within the scope of employment, for example in a motion for summary judgment. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that although the employee was commuting or was on a meal period when the plaintiff was injured, the employee was attending to the defendant's business at the time. For example, counsel could set forth facts indicating that the plaintiff was injured while the employee was on his or her way home after having performed an errand at the request of the defendant [*see Gipson v. Davis Realty (1963) 215 Cal. App. 2d 190, 209-210, 30 Cal. Rptr. 253]* . If the defendant contends that the employee abandoned the errand in pursuit of personal objectives, counsel should discuss facts showing that the deviation was slight and immaterial, such as facts that the employee had made only a brief stop for personal reasons while on the errand but the main purpose of his or her activity remained attending to the defendant's business [*see Lazar v. Thermal Equip. Corp. (1983) 148 Cal. App. 3d 458, 462-465, 195 Cal. Rptr. 890]* . For an example of an argument that the employee's conduct was within the scope of the employment generally, see *§ 100A.26*.

[c] Opposing Memoranda

In an appropriate case, the points *in § 100A.36* may be used to oppose the contention supported by these points.

[d] Related Pleading and Practice Forms

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[e] Related Memoranda

For forms relating to the vicarious liability of a principal for the acts of its agent, see Ch. 182, *Principal and Agent* .

[f] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 30, § 30.05[4][a][ii]* (Matthew Bender).

[3] Discussion of Authorities

[a] Special Errand Exception

The factual and procedural background of ***Gipson v. Davis Realty*** *(1963) 215 Cal. App. 2d 190, 30 Cal. Rptr. 253* , is discussed in *§ 100A.25[3][b]*. The facts were undisputed that on the morning of the auto accident that injured the plaintiff, the employee left work to obtain a real-estate listing on behalf of the employer. While driving to the property, he decided to go home for lunch. On his way home, his car collided with the ambulance that was carrying the plaintiff. The court explained that an employer is not liable for the acts of his or her employee while the employee is pursuing the employee's own ends. Thus, the general rule is that an employee on his or her way to lunch, even if the employee is driving the employer's vehicle, is not engaged in furthering any end of the employer, and therefore, is not within the scope of employment. However, if an employee is combining his or her own business with that of the employer, or attending to both at substantially the same time, no inquiry will be made as to which business the employee was actually engaged in when the third party was injured, and the employer will be held responsible. The inquiry is not which purpose was dominant. The court stated further that the applicable rule is that one does not cease to be within the scope of employment just because one's pursuit of one's employer's business is subject to necessary, usual, or incidental personal acts, or even because of slight and immaterial delays or deflections from the most direct route for a personal or private purposes, so long as the employer's continues to be the controlling purpose. Such acts are to be reasonably expected, and the employer's assent may be fairly assumed. In this case, there was no evidence to show that the employee was engaged in an act done for his own personal convenience and related to his own personal ends. Instead, initially his sole intent was to attend to the employer's business, but en route he decided to combine his own business with that of his employer (*215 Cal. App. 2d 190, 208-213)* .

In ***Boynton v. McKales*** *(1956) 139 Cal. App. 2d 777, 294 P.2d 733* , the plaintiff was struck by a car driven by the defendant's employee, who was on his way home from a banquet given by the defendant. The trial court denied the defendant's motion for judgment notwithstanding the verdict, and the defendant appealed on the grounds that it could not be liable under respondeat superior because the employee was not acting within the scope of his employment because he was returning home from the banquet, which was a social affair.

The appeals court discussed the special errand exception to the going and coming rules. If an employee is not simply on his or her way from home to the employee's place of work or vice versa, but is coming home or returning to it on a special errand either as part of the employee's duties or at a specific order or request of the employer, the employee is within the scope of employment from the time the employee starts on the errand until the employee has returned or deviates from it for personal reasons. The court explained that attendance at a social function may come under the special errand exception if the function or attendance was connected with the employment and, for a material part, intended to benefit theemployer who requested or expected the employee to attend (*139 Cal. App. 2d 777, 789)* . In the case before the court, the evidence established that the banquet was offered to employees who had worked for at least five years for the defendant. Also in attendance were representatives of firms whose products the defendant sold. Employees' families were not invited, and the dinner was paid for by the defendant. At the end of the dinner, pins were presented to the employees. Although there was testimony that the banquet was purely social, this evidence was open to the inference that it was an official company function closely related to the company's sales program and intended to benefit the company by increase in the continuity of employment, and attendance was expected from the employees. Thus, the court concluded that the issue of whether the driver's attendance was within the scope of his employment was correctly left to the jury, and the motion for judgment notwithstanding the verdict was correctly denied (*139 Cal. App. 2d 777, 790-791)* .

[b] Effect of Partial Abandonment of Employer's Business

In ***Felix v. Asai*** *(1987) 192 Cal. App. 3d 926, 237 Cal. Rptr. 718* , the plaintiff was hit by a car driven by the defendant's employee. On the day of the accident, the defendant directed the employee to deliver some mail to the post

office on his way home. He drove to the post office, delivered the mail, and then drove back past his employer's business on his way to his parents house when he struck the plaintiff. He testified that he had intended to go to his parents' house for dinner after work, and had he not been directed to go to the post office, he would driven straight to his parents' house, although he would have taken a different route. The trial court granted the defendant's motion for summary judgment on the grounds that the employee was not acting in the scope of his employment once he left the post office and had gone beyond the employer's place of business.

The appeals court affirmed. The court explained that even if the special errand exception to the going and coming rule is applicable, an employee may still have been outside the scope of employment if at the time of the accident the employee had completely abandoned his or her employer's business for personal reasons. To constitute an abandonment, the deviation must be substantial and complete, and if the employee is pursuing a business errand and a personal objective simultaneously, the employee will still be found within the scope of employment. In determining whether abandonment has occurred, a variety of factors should be considered, including the intent of the employee, the nature, time and place of the employee's conduct, the work the employee was hired to do, the incidental acts the employer should reasonably have expected the employee to do, the amount of freedom allowed the employee in performing his or her duties, and the amount of time consumed in the personal activity (*192 Cal. App. 3d 926, 931-933)* .

In this case, it was conceded that the employee had been sent on a special errand and would have been acting in the scope of his employment during the portion of his journey between the place of employment and the post office, as well as the portion of his journey between the post office and his home, had he gone directly home. But his clear intent to go directly to his parents' home constituted a complete abandonment of his employer's business. Once he delivered the mail and left the post office intending to drive directly to his parents' home, he completed his parents' business and was pursuing a personal objective, regardless of the fact that he would have taken a different route to his parents' house had he gone their directly from work. Thus, the court found that the employee was not acting within the scope of his employment at the time of the accident (*192 Cal. App. 3d 926, 933-934)* .

In ***O'Connor v. McDonald's Rests.*** *(1990) 220 Cal. App. 3d 25, 269 Cal. Rptr. 101* , several of the defendant's employees had taken part in cleaning up one of the defendant's restaurants to prepare the restaurant for inspection as part of a competition. The employees worked without pay. After the cleanup, they went to the house of one of the employees where they talked shop and socialized for a few hours. As one of the employees left the house to drive home, he was in an auto accident with the plaintiff. The plaintiff sued the defendant for negligence based on respondeat superior and the trial court granted summary judgment for the defendant. The plaintiff appealed.

The court explained that the special errand exception to the going and coming rule does not apply when the employee completely departs from a special errand for his or her employer. The court listed the various factors that should be considered in determining whether an employee has completely abandoned a business errand for pursuit of a personal objective, including the intent of the employee, the nature, time and place of the employee's conduct, the work the employee was hired to do, the incidental acts the employer should reasonably have expected the employee to do, the amount of freedom allowed the employee in performing his or her duties, and the amount of time consumed in the personal activity (*220 Cal. App. 3d 25, 30)* . Applying these factors to the case at hand, the court concluded that the employee did not completely abandon his special errand when he stopped at the other employee's house following the cleanup at the restaurant (*220 Cal. App. 3d 25, 30-33)* .

In ***Lazar v. Thermal Equip. Corp.*** *(1983) 148 Cal. App. 3d 458, 195 Cal. Rptr. 890* , the defendant's employee finished work and left the premises in one of the defendant's trucks. He planned to stop at a store and then go home. Before reaching the store, he struck the plaintiff's car. The employee took the company truck home on a daily basis so that he could carrytools that he sometimes needed after hours because he was constantly on-call as a troubleshooter for the defendant. After the jury returned a verdict in favor of the plaintiff, the trial court reduced the verdict on the defendant's motion. The trial court then granted the plaintiff's motion for a judgment notwithstanding the verdict and for

a new trial on the grounds that the jury should have been instructed that the employee was acting in the scope of his employment as a matter of law.

The appeals court affirmed. An exception to the going and coming rule exists if the employee's trip to or from work involves an incidental benefit to the employer, not common to commute trips made by ordinary members of the workforce. Thus, the going and coming rule does not apply if the employer compensates an employee for his or her travel time, or if an employee is required to drive to and from work in order to have his or her vehicles available for company business. In this case, the employer derived a special benefit from the employee's commute, because the commute was made in the company's vehicle so that the employee could use it for after hours repair calls. Thus, the employee was acting in the scope of his employment and the going and coming rule was inapplicable (*148 Cal. App. 3d 458, 462-463)* .

An additional issue, however, was whether the employee's decision to stop at a store before going home, especially considering that the store was located in an opposite direction from his home, changed the result. The court stated that the issue turned on foreseeability of the accident. Minor deviations from the employer's business are deemed foreseeable and remain within the scope of employment, and substantial departures from the employer's business are deemed unforeseeable and take the employee outside the scope of employment. Acts necessary to the comfort, convenience, health and welfare of the employee, though strictly personal to the employee and not acts of service, do not take the employee outside the scope of his or her employment if the main purpose of the employee's activity is still the employer's business (*148 Cal. App. 3d 458, 462-465)* . The court found that the employee's deviation was minor, because he only intended a brief stop, and it would be unreasonable to conclude that he should have had to drive home, get his own car, and then go back out to the store. The deviation also was foreseeable, because an employee's stopping to purchase a few items on the way home is predictable conduct. The court stated that if the trip home is made for the benefit of the employer, in the employer's vehicle, accidents occurring during such minor and foreseeable deviations become part of the inevitable toll of a lawful enterprise. Finally, the court stated that the fact that the store was located in a direction opposite from the employee's home was irrelevant because an employer's liability should not turn on the point of a compass (*148 Cal. App. 3d 458, 465-466)* .

[c] Out-of-Town Business Travel May Constitute Special Errand

In ***Jeewarat v. Warner Bros. Entertainment Inc.*** *(2009) 177 Cal. App. 4th 427, 98 Cal. Rptr. 3d 837* , plaintiffs were pedestrians who were injured when two vehicles travelling on the road near them collided and one or both of the vehicles struck plaintiffs. Plaintiffs sued both of the drivers and added as a defendant the employer of one of the drivers. At the time of the accident, that driver was returning home from an out of-town business conference authorized and paid for by the employer and was en route from the airport to his residence. Plaintiffs argued that the business trip was a special errand for the employer, and as such, that driver was in the course of his employment until he arrived at his home and the employer was vicariously liable for the driver's negligence under the doctrine of respondeat superior. The trial court granted summary judgment for the employer, however, and plaintiffs appealed.

The court of appeal reversed. The court agreed with plaintiffs that an employee's attendance at an out-of-town business conference authorized and paid for by the employer can be a special errand for the benefit of the employer under the special errand exception to the going-and-coming rule. As such, because the driver intended to return home after leaving the airport, in the absence of any intervening personal deviations, the driver was in the course and scope of employment until the business trip was completed upon his arrival at home (*177 Cal. App. 4th 427, 436-437)* . The fact that the employee may have coincidentally passed his place of employment, without stopping, on the way home from the airport, and continued on from there by way of his normal commute path, did not change the result that the employee was considered in the course of employment until arriving at his residence (*177 Cal. App. 4th 427, 438)* .

[4] Additional Authorities

[a] Special Errand Exception

In *Anderson v. Pacific Gas & Elec. Co. (1993) 14 Cal. App. 4th 254, 17 Cal. Rptr. 2d 534* , the defendant's employee was driving himself and a coworker home from work when his car collided with the plaintiff's car. The employee was receiving per diem travel expenses from the defendant pursuant to a union contract. The court held that the payment of a travel allowance pursuant to a union contract does not alter the general rule that an employee is not acting within the scope of employment during his or her commute to and from work because the employer did not enjoy a substantial benefit from providing the allowance. Further, the employee's informal arrangement to drive his coworker home did not constitute a special errand for the defendant (*14 Cal. App. 4th 254, 258-262)* .

In *Blackman v. Great Am. First Sav. Bank (1991) 233 Cal. App. 3d 598, 284 Cal. Rptr. 491* , after the plaintiff was injured in an automobile collision with the defendant's employee, he sued the defendant under the theory of respondeat superior. At the time of the accident, the employee was leaving work to go to a university class that she was taking under the defendant's educational assistance program. The court of appeals affirmed the trial court's grant of summary judgment in favor of the defendant. The court found that the going and coming rule precluded liability because there was no significant benefit to the defendant from the employee's attendance at the class. Further, the special errand exception to the going and coming rule was inapplicable because the commute was not at the defendant's order or request (*233 Cal. App. 3d 598, 603-605)* .

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CHAPTER 100A EMPLOYER AND EMPLOYEE: RESPONDEAT SUPERIOR
PART II. FORMS

10-100A California Points & Authorities § 100A.29

AUTHOR: Carolyn Rashby

§ 100A.29 Supporting Contention That Employer Is Vicariously Liable for Employee's Wrongful Conduct Based on Doctrine of Respondeat Superior--Employee Acted Within Scope of Employment--Going and Coming Rule Does Not Apply--Special Risk Exception Applies

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF MAY RECOVER DAMAGES FROM DEFENDANT FOR THE WRONGFUL ACTS OF THE DEFENDANT'S EMPLOYEE UNDER THE DOCTRINE OF RESPONDEAT SUPERIOR BECAUSE THE ACTS, EVEN THOUGH COMMITTED DURING THE EMPLOYEE'S COMMUTE, WERE WITHIN THE SCOPE OF EMPLOYMENTAS ACTS ARISING FROM A SPECIAL RISK CREATED BY THE EMPLOYMENT.

Special Risk Exception. An employer may be liable for an employee's torts that occur while the employee is commuting from work if the employee has endangered others with a risk arising from or related to the employment and if the risk created by the employee was a generally foreseeable consequence of the employee's work activity (*Bussard v. Minimed, Inc. (2003) 105 Cal. App. 4th 798, 804, 129 Cal. Rptr. 2d 675*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that the defendant is vicariously liable for an employee's wrongful acts, even though those acts occurred during the employee's commute, on the grounds that the employment created a special risk of danger that led to the injury sustained.

This form may be combined with points pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the going-and-coming rule does not apply. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include facts showing the special risk created by the employee's work and argue that it was foreseeable that this risk could lead to the type of injury sustained by the plaintiff.

[c] Opposing Memoranda

In an appropriate case, the points *in § 100A.36* may be used to oppose the contention supported by these points.

[3] Discussion of Authorities

[a] Special Risk Exception

In ***Bussard v. Minimed, Inc.*** *(2003) 105 Cal. App. 4th 798, 129 Cal. Rptr. 2d 675* , the plaintiff was involved in a car accident caused by an employee of the defendant while the employee was driving home from work. The employee had left work complaining of illness after exposure to pesticide fumes for several hours in the workplace. The employee reported to the police officer on the scene that she was feeling dizzy and lightheaded at the time of the accident because of the pesticide exposure. The plaintiff argued that the defendant was liable for the injuries under the doctrine of respondeat superior, but the trial court granted summary judgment to the defendant under the going-and-coming rule.

The court of appeal reversed. The court of appeal recognized that an exception to the going-and-coming rule applies if an employee endangers others due to a risk arising from or related to work, so long as the danger was foreseeable (*105 Cal. App. 4th 798, 804-805)* . The court concluded that the work site pesticide exposure caused a special risk of danger, it was foreseeable that an employee might not be fit to drive after such exposure, and the occurrence of a car accident under those circumstances was not so startling or unusual as to be unforeseeable. The fact that the defendant had inquired about whether the employee was able to drive safely was not relevant to the imposition of liability under a theory of respondeat superior, because foreseeability of risk arising from or connected to work requires no more than a causal connection between a work-related event and the employee's subsequent injury-causing act (*105 Cal. App. 4th 798, 806)* .

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 100A EMPLOYER AND EMPLOYEE: RESPONDEAT SUPERIOR
PART II. FORMS

10-100A California Points & Authorities § 100A.30

AUTHOR: Carolyn Rashby

§ 100A.30 Supporting Contention That Employer Is Vicariously Liable for Employee's Wrongful Conduct Based on Doctrine of Respondeat Superior--Employee Acted Within Scope of Employment--Going and Coming Rule Does Not Apply--Travel Inherent in Employee's Job Duties

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF MAY RECOVER DAMAGES FROM DEFENDANT EMPLOYER FOR THE WRONGFUL ACTS OF THE DEFENDANT'S EMPLOYEE UNDER THE DOCTRINE OF RESPONDEAT SUPERIOR BECAUSE THE ACTS, EVEN THOUGH COMMITTED DURING THE EMPLOYEE'S COMMUTE, WERE WITHIN THE SCOPE OF THE EMPLOYMENT BECAUSE TRAVEL WAS INHERENT IN THE EMPLOYEE'S JOB DUTIES.

Travel Inherent in Job Duties. Because the going and coming rule is primarily intended to apply to employees with a single, fixed work location, whose job duties do not include driving, an employeewhose regular job duties require frequent travel is not subject to automatic application of the going and coming rule (*Lazar v. Thermal Equip. Corp. (1983) 148 Cal. App. 3d 458, 460-461, 195 Cal. Rptr. 890*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that the defendant is vicariously liable for his or her employee's wrongful acts, even though such acts occurred during the employee's commute time, on the grounds that travel was inherent in the employee's job duties.

This form may be combined with points pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the going and coming rule does not apply because travel was inherent in the employee's job duties--for example, in a motion for summary judgment. This form may also be adapted for use in a trial or appellate

brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that travel was included in the employee's job duties, such as facts that the employee frequently had to do field work or travel between various business locations of the defendant. Counsel should argue that although the plaintiff was injured while the employee was on his or her way to or from work, the defendant derived a special benefit from the commute, and the going and coming rule does not apply if the commute involves an incidental benefit to the employer. For an example of an argument that the employee's conduct was within the scope of the employment generally, see *§ 100A.26*.

[c] Opposing Memoranda

In an appropriate case, the points and *authorities in § 100A.39* may be used to oppose the contention supported by This form.

[d] Related Pleading and Practice Forms

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[e] Related Memoranda

For points relating to the vicarious liability of a principal for the acts of its agent, see Ch. 182, *Principal and Agent* .

[f] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 30, § 30.05[4][a][iii]* (Matthew Bender).

[3] Discussion of Authorities

[a] Travel Inherent in Employee's Job Duties

The factual and procedural background of ***Lazar v. Thermal Equip. Corp.*** *(1983) 148 Cal. App. 3d 458, 195 Cal. Rptr. 890* , is discussed in *§ 100A.28[3][b]*. The court stated that an exception to the going and coming rule exists if the employee's trip to or from work involves an incidental benefit to the employer, not common to commute trips made by ordinary members of the workforce. Thus, the going and coming rule does not apply if the employer compensates an employee for the employee's travel time, or if an employee is required to drive to and from work in order to have the employee's vehicle available for company business. In this case, the employer derived a special benefit from the employee's commute, because the commute was made in the company's vehicle so that the employee could use it for after hours repair calls. Thus, the employee was acting in the scope of his employment and the going and coming rule was inapplicable (*148 Cal. App. 3d 458, 462-463)* .

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CHAPTER 100A EMPLOYER AND EMPLOYEE: RESPONDEAT SUPERIOR
PART II. FORMS

10-100A California Points & Authorities § 100A.31

AUTHOR: Carolyn Rashby

§ 100A.31 Supporting Contention That Employer Is Vicariously Liable for Employee's Wrongful Conduct Based on Doctrine of Respondeat Superior--Going and Coming Rule Does Not Apply--Employer Paid for Employee's Commute Time

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF MAY RECOVER DAMAGES FROM DEFENDANT EMPLOYER FOR THE WRONGFUL ACTS OF THE DEFENDANT'S EMPLOYEE UNDER THE DOCTRINE OF RESPONDEAT SUPERIOR BECAUSE THE ACTS, EVEN THOUGH COMMITTED DURING THE EMPLOYEE'S COMMUTE, WERE WITHIN THE SCOPEOF THE EMPLOYMENT BECAUSE DEFENDANT PAID FOR THE EMPLOYEE'S COMMUTE TIME.

Effect of Employer Paying for Employee's Commute Time. When an employer makes his or her employee's commute period part of the employee's paid work time, the employee remains within the scope of employment during such periods, and the employer is therefore liable for its employee's torts so long as the employee is using the commute period for its designated purpose (*Hinman v. Westinghouse Elec. Co. (1970) 2 Cal. 3d 956, 962, 88 Cal. Rptr. 188, 471 P.2d 988*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that the defendant is vicariously liable for his or her employee's wrongful acts committed during the employee's commute time, on the grounds that the defendant paid for the employee's commute period.

This form may be combined with points pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the going and coming rule does not apply because the defendant paid for the employee's

commute period, for example in a motion for summary judgment. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts indicating that the plaintiff was injured during the employee's commute, and that the defendant had agreed to pay the employee for his or her commute period. For example, counsel could discuss evidence of a union contract or other employment contract containing such a payment provision [*see Hinman v. Westinghouse Elec. Co. (1970) 2 Cal. 3d 956, 961-962, 88 Cal. Rptr. 188, 471 P.2d 988]* . For an example of an argument that the employee's conduct was within the scope of the employment generally, see *§ 100A.26*.

[c] Opposing Memoranda

In an appropriate case, the points and *authorities in § 100A.36* may be used to oppose the contention supported by these points.

[d] Related Pleading and Practice Forms

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[e] Related Memoranda

For points relating to the vicarious liability of a principal for the acts of its agent, see Ch. 182, *Principal and Agent* .

[f] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 30, § 30.05[4][a][iv]* (Matthew Bender).

[3] Discussion of Authorities

[a] Effect of Employer Paying for Employee's Commute Period

In ***Hinman v. Westinghouse Elec. Co.*** *(1970) 2 Cal. 3d 956, 88 Cal. Rptr. 188, 471 P.2d 988* , the defendant's employee was driving home from work from a job site when he struck the plaintiff. The union contracts under which the employee worked provided for the payment of carfare and travel time, but the defendant had no control over the method or route of transportation used by the employee. The plaintiff appealed from a judgment for the defendant entered after a jury verdict and from an order denying the plaintiff's motion for judgment notwithstanding the verdict.

The court of appeal reversed. Under the going and coming rule, an employee going to and from work is ordinarily considered outside the scope of employment so that the employer is not liable for the employee's torts. The idea behind the rule is that the employment relationship is suspended from the time the employee leaves until the employee returns, or that in commuting the employee is not rendering services to the employer. However, exceptions will be made to the rule if the commute trip involves an incidental benefit to the employer, not common to commute trips made by ordinary members of work force. But there is a substantial benefit to an employer in one area to be permitted to reach out to a broader labor market by providing travel expenses and payment for travel time. This reaching out also increases the risk of injury in transportation, and the employer should be required to pay for this risk. The court concluded that if the employer and employee make travel time part of the work day by their contract, the employer should be treated as the employer during the travel time. And, so long as the employee is using the travel time for the designated purpose of

commuting, the doctrine of respondeat superior is applicable (*2 Cal. 3d 956, 961-962)* .

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10-100A California Points & Authorities § 100A.32

AUTHOR: Carolyn Rashby

§ 100A.32 Supporting Contention That Employer Is Vicariously Liable for Employee's Wrongful Conduct Based on Doctrine of Respondeat Superior--Employee Acted Within Scope of Employment--Going and Coming Rule Does Not Apply--Employer Required Use of Employee Vehicle

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF MAY RECOVER DAMAGES FROM DEFENDANT EMPLOYER FOR THE WRONGFUL ACTS OF THE DEFENDANT'S EMPLOYEE UNDER THE DOCTRINE OF RESPONDEAT SUPERIOR BECAUSE THE ACTS, EVEN THOUGH COMMITTED DURING THE EMPLOYEE'S COMMUTE, WERE WITHIN THE SCOPE OF THE EMPLOYMENT BECAUSE DEFENDANT REQUIRED EMPLOYEE TO DRIVE HIS/HER VEHICLE TO WORK SO THAT THE VEHICLE WOULD BE AVAILABLE FOR THE EMPLOYER'S BUSINESS DURING THE WORKDAY.

A. Effect of Employer Requiring Employee to Use Employee's Vehicle. When an employer requires an employee to drive his or her own vehicle to work so that the vehicle will be available for the employer's business use during the workday, motor vehicle accidents that occur on the employee's way to or from work are within the scope of employment (*Huntsinger v. Glass Containers Corp. (1972) 22 Cal. App. 3d 803, 810, 99 Cal. Rptr. 666*).

[*Optional*] **B. Frequency of Use of Vehicle for Employer Business Does Not Defeat Application of Required-Vehicle Exception.** If an employer requires or reasonably relies upon the employee to make his or her personal vehicle available for use for the employer's benefit, the fact that the employer only rarely makes use of the employee's personal vehicle should not, in and of itself, defeat application of the required-vehicle exception (*Lobo v. Tamco (2010) 182 Cal. App. 4th 297, 303, 105 Cal. Rptr. 3d 718*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that the defendant is vicariously liable for injuries to the plaintiff sustained in an automobile accident caused by the defendant's employee during the employee's commute time, on the grounds that the defendant required the employee to drive the vehicle to work.

This form may be combined with points pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the going and coming rule does not apply because the defendant required the employee to drive his or her vehicle to work so that the vehicle would be available for the employer's business use during the workday--for example, in a motion for summary judgment. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that the employee injured the plaintiff while the employee was commuting to or from work, and that the employee was required to use the employee's own vehicle as an integral part of the job. For example, counsel could set forth facts indicating that the employee was required to use the vehicle during the work day to run errands for the defendant [*see Huntsinger v. Glass Containers Corp. (1972) 22 Cal. App. 3d 803, 810, 99 Cal. Rptr. 666]* . Counsel should argue that the going and coming rule is inapplicable to take the employee's conduct outside the scope of employment because the employee's trip to or from the office, as applicable, involved a benefit to the defendant not common to commute trips made by employees who are not required to use their vehicles on the job. For an example of an argument that the employee's conduct was within the scope of the employment generally, see *§ 100A.26*.

[c] Opposing Memoranda

In an appropriate case, the points and *authorities in § 100A.36* may be used to oppose the contention supported by these points.

[d] Related Pleading and Practice Forms

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[e] Related Memoranda

For points relating to the vicarious liability of a principal for the acts of its agent, see Ch. 182, *Principal and Agent* .

[f] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 30, § 30.05[4][a][v]* (Matthew Bender).

[3] Discussion of Authorities

[a] Effect of Employer Requiring Employee to Use Employee's Vehicle

In ***Huntsinger v. Glass Containers Corp.*** *(1972) 22 Cal. App. 3d 803, 99 Cal. Rptr. 666* , the defendant's employee was required to drive extensively in carrying out his employment duties, which included many field trips. He drove his own truck, and the defendant reimbursed for mileage except when driving to and from work. On his way home from the office, he struck and killed a motorcycle driver. Earlier that day, the employee had used his truck to drive from the

company office to a plant, but had returned to the office before going home. The survivors and administratix of the estate of the motorcycle driver sued the defendant for wrongful death on the theory of respondeat superior. The trial court granted the defendant's motion for nonsuit, and the plaintiffs appealed.

The appeals court reversed. The court discussed *Smith v. Workmen's Comp. Appeals Bd. (1968) 69 Cal. 2d 814, 816-820, 73 Cal. Rptr. 253, 447 P.2d 365* , in which it was held that in the workers' compensation field, when the employer requires an employee to furnish a vehicle on the job, the going and coming rule is inapplicable, at least if there is no evidence that at the time of the accident the employee was not driving directly to or from work. The court found that Smith was applicable despite the fact that it was a workers' compensation case because the philosophies underlying the application of the going and coming rule and its exceptions in tort law are substantially similar to those underlying workers' compensation law. In any event, the court also found *Richards v. Metropolitan Life Ins. Co. (1941) 19 Cal. 2d 236, 241-244, 120 P.2d 650* , a tort case, to be instructive. In *Richards,* the employee was an insurance salesman whose duties included both office and field work and who was not required to report to the office before commencing work if he had field work in the morning. He was not compensated for using his car. On the morning of the accident, he was on his way directly to work from home, and the court found that the trier of fact could find that he was within the scope of his employment. The circumstances of *Richards* have come to constitute a recognized exception to the going and coming rule. Further, the court in *Harris v. Oro-Dam Constructors (1969) 269 Cal. App. 2d 911, 916-917, 75 Cal. Rptr. 544* , observed that the going and coming rule has particular application to vehicle accidents of employees whose jobs do not require driving. The court of appeal observed that the facts in the case before it were substantially similar to the facts of *Richards,* and that under *Richards,* it was immaterial that on the specific occasion of the accident the employee in this case was going directly home from the office and not making a customer call (*22 Cal. App. 3d 803, 807-810)* .

The court also found that, pursuant to *Hinman v. Westinghouse Elec. Co. (1970) 2 Cal. 3d 956, 962, 88 Cal. Rptr. 188, 471 P.2d 988* [*see § 100A.31[3][a]*], the employee's trip from the office to his home during which the accident occurred did involve an incidental benefit to the defendant not common to commute trips made by ordinary members of the work force. When an employer requires an employee to drive to and from work in order to have the employee's vehicle available for company business during the day, accidents on the way to or from the office are statistically certain to occur, and the business enterprise should bear the risk (*22 Cal. App. 3d 803, 810)* .

[b] Frequency of Use of Vehicle for Employer Business Does Not Defeat Application of Required-Vehicle Exception

In ***Lobo v. Tamco*** *(2010) 182 Cal. App. 4th 297, 105 Cal. Rptr. 3d 718* , plaintiffs were the surviving family member of a police officer who was killed when the employee of defendant, a steel beam manufacturer, drove his vehicle out of defendant's parking lot into traffic and struck decedent's motorcycle. In trying to establish the defendant's vicarious liability, plaintiffs argued that while the employee was driving his own vehicle and was on his way home at the time of the accident, the employee was nonetheless in the course and scope of his employment at the time. The trial court disagreed and granted summary judgment in favor of defendant. Plaintiff appealed.

The court of appeal reversed, holding that a jury could find under the facts that defendant's employee was acting in the course and scope of employment at the time of the accident pursuant to the required-vehicle exception to the coming-and-going rule. The court noted evidence establishing that the employee, a quality control manager who was required at times to visit customer construction sites to deal with customer complaints, sometimes used his personal vehicle to make such trips, although he usually rode with another employee. Nonetheless, the employee estimated that he had used his personal vehicle for such travel up to ten times during his 16-year employment, his employer required him to have his personal vehicle available if the need to visit a costumer site arose, and he was reimbursed for his mileage when his personal vehicle was used. The court concluded that if an employer requires or reasonably relies upon an employee to make his or her personal vehicle available for use for the employer's benefit, the fact that the employer only rarely makes use of the employee's personal vehicle should not, in and of itself, defeat application of the

required-vehicle exception (*182 Cal. App. 4th 297, 303)* . The court also noted that the fact that the personal vehicle was needed only rarely when the employee performed his work duties was one of the reasons that the employer required the employee to use his own car and a company car was not provided (*182 Cal. App. 4th 297, 303)* . In holding that the infrequent use of the vehicle did not defeat application of the required-vehicle exception, the court rejected a contrary suggestion made in dicta in *Tryer v. Ojai Valley Sch. (1992) 9 Cal. App. 4th 1476, 1481-1482, 12 Cal. Rptr. 2d 114* , which had suggested that the required-vehicle exception to the coming-and-going rule applies only if the employer requires the use of a vehicle as an integral part of performing the job at disparate locations throughout the course of work hours (*182 Cal. App. 4th 297, 303)* .

[4] Additional Authorities

[a] Effect of Employer Requiring Employee to Use Employee's Vehicle

In *Singh v. Board of Ret. (1996) 41 Cal. App. 4th 1180, 49 Cal. Rptr. 2d 220* , the issue of the application of the "going-and-coming" rule arose in the context of an employee's application for a work-connected disability. The plaintiff was employed by the county as a health department inspector. His job required him to perform inspections at a variety of locations, and he used his private truck in the conduct of this business. The truck was equipped with a county radio and a county-supplied toolbox. As a regular part of the plaintiff's duties, he was required to proceed directly from his home to a work site. The plaintiff was injured in a morning traffic accident, while on his way to his office. The local Board of Retirement denied the plaintiff's application for disability on the basis that the accident was not in the course of employment. The plaintiff sought review in superior court, which overturned the denial of disability retirement benefits. The court of appeal reviewed the case law on the going and coming rule, stating that generally an employee does not pursue the course of his or her employment when the employee is on the way to or from work, but that an exception arises if the use of the car gives some incidental benefit to the employer (*41 Cal. App. 4th 1180, 1186-1187)* . The court emphasized that the key inquiry in the exception to the coming and going rule is whether there is an incidental benefit derived by the employer. The court concluded that the trial court correctly applied the law in finding that the plaintiff's injury arose out of the course of his employment (*41 Cal. App. 4th 1180, 1188)* . The court thus affirmed the judgment granting benefits to the plaintiff.

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10-100A California Points & Authorities § 100A.33

AUTHOR: Carolyn Rashby

§ 100A.33 Supporting Contention That Employer Is Vicariously Liable for Employee's Wrongful Conduct Based on Doctrine of Respondeat Superior--Liability Based on Employee's Intentional Tort

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF MAY RECOVER DAMAGES FROM DEFENDANT EMPLOYER FOR THE WRONGFUL INTENTIONAL TORT OF THE DEFENDANT'S EMPLOYEE UNDER THE DOCTRINE OF RESPONDEAT SUPERIOR BECAUSE THE EMPLOYEE'S CONDUCT AROSE OUT OF _____ [*insert either* DUTIES OF THE EMPLOYEE WHICH INCLUDED THE USE OF FORCE *or* A WORK-RELATED DISPUTE *or* THE MISUSE OF AUTHORITY INHERENT IN THE EMPLOYEE'S POSITION].

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

A. Employer Liability for Employee's Intentional Torts. Generally, an employer will be held vicariously liable under the doctrine of respondeat superior for the intentional torts of his or her employee committed within the scope of employment (*Carr v. Wm. C. Crowell Co. (1946) 28 Cal. 2d 652, 654, 171 P.2d 5*).

[*Optional*] **B. Job Duties Involve Use of Force.** If the employee's job duties involve the possibility of force being used against others, the employer may be held vicariously liable for the employee's wrongful or excessive use of force in carrying out his or her duties (*Monty v. Orlandi (1959) 169 Cal. App. 2d 620, 624, 337 P.2d 861* ; *Haworth v. Elliott (1944) 67 Cal. App. 2d 77, 81, 153 P.2d 804*).

[*Optional*] **C. Conduct Arose Out of Work-Related Dispute.** An employer may be held vicariously liable for his or her employee's intentional tort if the tort arose out of a dispute that was work-related (*Carr v. Wm. C. Crowell Co. (1946) 28 Cal. 2d 652, 657, 171 P.2d 5* ; *Rodgers v. Kemper Constr. Co. (1975) 50 Cal. App. 3d 608, 621-624, 124 Cal. Rptr. 143*).

[*Optional*] **D. Employer Liability for Employee's Fraud and Misrepresentation.** Vicarious liability based on the doctrine of respondeat superior extends to the torts of fraud and misrepresentation committed by employees within the scope of their employment, even if the employee acts in excess of authority or contrary to the employer's instructions (*Garton v. Title Ins. & Trust Co. (1980) 106 Cal. App. 3d 365, 375-376, 165 Cal. Rptr. 449*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that the defendant is vicariously liable for the intentional torts of the defendant's employee, on the grounds that those torts arose out of duties of the employee that included the use of force, a work-related dispute, or the misuse of authority inherent in the employee's position. Depending on the facts of the particular case, counsel should insert either Optional Paragraph B, C, or D.

This form may be combined with points pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the defendant is vicariously liable for the intentional torts of the defendant's employee--for example, in a motion for summary judgment. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should specify the employee's misconduct that injured the plaintiff and should discuss evidence either that the conduct arose out of job duties that included the use of force (for example, that the assault was connected with the employee's duties as a bartender/bouncer [*see Haworth v. Elliott (1944) 67 Cal. App. 2d 77, 81-83, 153 P.2d 804]*), out of a work-related dispute [*Rodgers v. Kemper Constr. Co. (1975) 50 Cal. App. 3d 608, 619-624, 124 Cal. Rptr. 143]* , or from the employee's misuse of authority inherent in the employee's job position [*Garton v. Title Ins. & Trust Co. (1980) 106 Cal. App. 3d 365, 375-376, 165 Cal. Rptr. 449]* . If the plaintiff contends that the injury was inflicted out of personal malice, counsel should set forth facts indicating that the employee's conduct was engendered by and connected to the employment and did not arise out of a personal matter [*Carr v. Wm. C. Crowell Co. (1946) 28 Cal. 2d 652, 657, 171 P.2d 5* ; *Monty v. Orlandi (1959) 169 Cal. App. 2d 620, 623-624, 337 P.2d 861]* . For an example of an argument that the employee's conduct was within the scope of the employment generally, see *§ 100A.26*.

[c] Opposing Memoranda

In an appropriate case, the points and *authorities in § 100A.38* may be used to oppose the contention supported by these points.

[d] Related Pleading and Practice Forms

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[e] Related Memoranda

For points relating to the vicarious liability of a principal for the acts of its agent, see Ch. 182, *Principal and Agent* .

[f] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 30, § 30.06* (Matthew Bender).

[3] Discussion of Authorities

[a] Employer Liability for Employee's Intentional Torts

In ***Carr v. Wm. C. Crowell Co.*** *(1946) 28 Cal. 2d 652, 171 P.2d 5* , one of the defendant's employees got into an argument with the plaintiff, a subcontractor's employee, over how to perform a certain construction task. He threw a hammer at the plaintiff, seriously injuring him. The plaintiff appealed from a directed verdict in favor of the defendant.

The court of appeal stated that an employer is liable for willful and malicious torts of his or her employee committed in the scope of employment. Further, if the injury resulted from a dispute arising out of the employment, it is not necessary that the assault further the interests of the employer. In this case, the defendant's enterprise required that its employee associate with third parties, which carried the risk that a third party might be injured. The fact that the employee did no further work immediately after the incident was irrelevant because he threw the hammer while still engaged in his work and as an immediate outgrowth of the work. The court also stated that if an employee inflicts an injury out of personal malice, not engendered by employment, the employer is not liable, but such facts were not present in the case before it (*28 Cal. 2d 652, 654-657)* .

[b] Job Duties Involve Use of Force

In ***Monty v. Orlandi*** *(1959) 169 Cal. App. 2d 620, 337 P.2d 861* , the plaintiff sued for injuries he sustained when the defendant's bartender hit him in the jaw. The incident occurred as the bartender grabbed a woman, his common-law wife, and began to eject her from the bar. The plaintiff commented that it was an awful way to treat a woman, and the bartender swung around and hit the plaintiff, stating that he was running the bar and would do it to suit himself. The bartender's wife testified that prior the incident, her husband had told her that she should go home because she had enough to drink, and that the matter was personal between herself and her husband. The jury returned a verdict in the defendant's favor, and the plaintiff appealed.

The appeals court affirmed. An employer is liable for the intentional torts of his or her employee committed in the scope of employment, but if an employee inflicts an injury out of personal malice not engendered by the employment, the employer will not be vicariously liable. In this case, an inference could be drawn that the bartender's ejection of his wife was a personal matter and not connected with the maintenance of order in the bar, and the attack on the plaintiff arose out of this incident. Thus, the question was properly left to the jury since the assault may not have been within the scope of employment (*169 Cal. App. 2d 620, 623-624)* .

Further, the court rejected the plaintiff's argument that the trial court erred in instructing the jury. The jury was told clearly that if the assault by the bartender was done as part of a transaction of the defendant's business, then the verdict should be in favor of the plaintiff. The jury also was told that if the defendant through negligence employed someone whom the defendant should have known was likely to commit an assault on persons entering the bar, they should render a verdict in favor of the plaintiff. Thus, the jury must have concluded that the assault was a personal altercation between the plaintiff and the bartender not in the course of the bartender's employment, and that the defendant did not negligently employ the bartender (*169 Cal. App. 2d 620, 627-628)* .

In ***Haworth v. Elliott*** *(1944) 67 Cal. App. 2d 77, 153 P.2d 804* , the plaintiff was in a bar operated by the defendant when he became involved in an argument with another bar patron. Two bartenders employed by the defendant injured the plaintiff while ejecting him from the bar. The defendant appealed from a judgment in favor of the plaintiff.

The appeals court affirmed. The court stated that the assault was committed within the scope of the bartender's employment. The defendanthad testified that the bartenders were in charge of the bar at the time of the incident, and that they were authorized to maintain order, quell disturbances, and protect the property; if necessary, they had the authority to eject anyone creating a disturbance. The court noted that it was immaterial whether the assault occurred in the bar or

on the sidewalk, because they were acting within the course of their duty to eject someone whom they believed was creating a disturbance. In order to establish the liability of the employer, it is sufficient to prove that excessive force was applied and that the employee was acting in the scope of employment. The court explained that liability of the employer in this case was established by the fact that the assault grew immediately out of the performance of duties owed to the defendant. Further, excessive force was used by the bartenders because they could have removed the plaintiff from the bar without injuring him (*67 Cal. App. 2d 77, 81-83)* .

[c] Conduct Arose Out of Work-Related Dispute

Carr v. Wm. C. Crowell Co. *(1946) 28 Cal. 2d 652, 171 P.2d 5* , is discussed in *§ 100A.33[3][a]*.

In ***Rodgers v. Kemper Constr. Co.*** *(1975) 50 Cal. App. 3d 608, 124 Cal. Rptr. 143* , at the site of a construction project, two employees of a subcontractor got into a fight with and assaulted two employees of a general contractor when one of the general contractor's employees refused to give the subcontractor's employee a lift on a vehicle he was driving. The subcontractor's employees were off duty at the time of the assault and had just had three or four beers in a trailer provided by the subcontractor so that employees could shower and change clothes. The jury returned a general verdict finding the subcontractor and its employees liable.

The appeals court affirmed. Under the doctrine of respondeat superior, an employer is liable for the torts of his or her employees committed within the scope of their employment. The rationale is that the employer's liability should extend beyond the employer's actual or possible control to include risks inherent in the enterprise because the employer is best able to spread the risk. The court explained that one way to determine whether a risk is inherent in or created by an enterprise is to ask whether the actual occurrence was a foreseeable consequence of the activity. Foreseeability means that in the context of the particular enterprise, an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business. In other words, the inquiry should be whether the risk was one that could fairly be regarded as typical of or broadly incidental to the enterprise undertaken by the employer (*50 Cal. App. 3d 608, 617-619)* .

The court rejected the subcontractor's contention that respondeat superior liability was not established because the assault occurred after its employees had finished work and the assault was the result of personal malice unrelated to work. First, the court found that the subcontractor customarily allowed employees to remain on the premises long after their work shift had ended, and that when the subcontractor needed additional employees for later shifts, it frequently contacted employees who had stuck around. Under workers' compensation law, employees can be held to be acting within the scope of employment even though they are off duty. For example, in *McCarty v. Workmen's Comp. Appeals Bd. (1974) 12 Cal. 3d 677, 681-683, 117 Cal. Rptr. 65, 527 P.2d 617* , the Supreme Court held that if social or recreational pursuits on the employer's premises after hours are endorsed by the permission of the employer and are of some conceivable benefit to the employer or, even in the absence of a benefit, the activities have become a customary incident of the employment relationship, an employee engaged in such activities after hours will be considered to be acting within the scope of employment. In this case, it was not unusual for the subcontractor's employees to be on the job site after hours, their presence was conceivably of some benefit to the subcontractor, and the subcontractor had given express or implied permission for them to remain. The court also concluded that the evidence did not establish, as a matter of law, that the assault was the result of personal malice unconnected with the employment relationship. Respondeat superior liability includes liability for intentional torts, and if the tort is motivated by personal malice not engendered by the employment, the employer is not vicariously liable. The court found substantial evidence that the assault was work related, because the jury could permissibly infer that the employee of the subcontractor only asked for a ride because he believed his status as the subcontractor's employee carried with it the fringe benefit of free rides on the general contractor's equipment. Finally, the incident was one that might normally be expected to occur during the course of a major construction job (*50 Cal. App. 3d 608, 619-624)* .

[d] Employer Liability for Employee's Fraud and Misrepresentation

In ***Garton v. Title Ins. & Trust Co.*** *(1980) 106 Cal. App. 3d 365, 165 Cal. Rptr. 449* , the plaintiffs were purchasers of real property who sued a title insurer under respondeat superior for misrepresentations of their real estate salesperson, an agent of the title insurer. The plaintiffs appealed from an order sustaining a demurrer to the plaintiffs' complaint without leave to amend.

The court of appeal reversed. The court stated that the doctrine of respondeat superior imposes liability on an innocent principal or employer for the torts of his or her agent or employee committed within the scope of employment, regardless of whether the agent or employee acted in excess of his or her authority or contrary to his or her instructions. Further, a principal can be liable for the fraud and misrepresentation of an agent oremployee. The court rejected the title insurer's argument that the causes of action for respondeat superior were insufficient because no agency relationship existed between it and the salesperson. The court held that the respondeat superior causes of action were not precluded merely because the salesperson was employed by a real estate firm. The fact that the salesperson was employed by a real estate firm and her status as the plaintiffs' salesperson did not preclude the possibility that, for the particular transaction at issue, the salesperson also acted as an agent or employee of the title insurer (*106 Cal. App. 3d 365, 375-376)* .

[4] Additional Authorities

[a] Employer Liability For Employee's Fraud and Misrepresentation

In *Inter Mountain Mortgage, Inc. v. Sulimen (2000) 78 Cal. App. 4th 1434* , the plaintiff was a mortgage loan brokerage company that processed a fraudulent loan submitted by a licensed real estate agent employed by the defendant. The alleged fraud arose by virtue of the fact that the loan application stated a property purchase price of $800,000, although the true value of the property was $480,000. After settling a claim brought against it by the company that funded the loan, the plaintiff brought suit against the defendant for fraud, negligence, and equitable indemnity. The trial court granted summary judgment for the defendant on the fraud cause of action, concluding that the fraudulent party was not acting as an agent for the defendant at the time of the transaction. The court of appeal reversed. The court stated the applicable rule that an employer is vicariously liable for the torts of its employees committed within the scope of employment, even if the torts are intentional, are not authorized by the employer, and provide no benefit to the employer (*78 Cal. App. 4th 1434, 1440)* . Therefore, the defendant could be vicariously liable for the real estate agent's fraud if the fraud was perpetrated within the scope of his employment with the defendant. The court then held that there was an abundance of evidence creating at least a triable issue of fact as to whether the real estate agent was acting within the scope of employment when submitting the fraudulent loan transaction to the mortgage loan broker. The real estate agent's licensing information showed that he was employed by the defendant on the dates of the alleged fraudulent transaction, that he represented to the plaintiff's representative that he was a representative and real estate agent of the defendant, and that he submitted a property appraisal originally made for the defendant (*78 Cal. App. 4th 1434, 1441-1442)* .

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 100A EMPLOYER AND EMPLOYEE: RESPONDEAT SUPERIOR
PART II. FORMS

10-100A California Points & Authorities § 100A.34

AUTHOR: Carolyn Rashby

§ 100A.34 Opposing Contention That Employer Is Vicariously Liable for Employee's Wrongful Conduct Based on Doctrine of Respondeat Superior--Tortfeasor Not an Employee

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF CANNOT RECOVER DAMAGES FROM DEFENDANT UNDER THE DOCTRINE OF RESPONDEAT SUPERIOR BECAUSE AN EMPLOYER/EMPLOYEE RELATIONSHIP DID NOT EXIST BETWEEN THE DEFENDANT AND THE TORTFEASOR.

A. Doctrine of Respondeat Superior. The doctrine of respondeat superior provides that an employer or principal is vicariously liable for the wrongful conduct of his or her employees or agents committed within the scope of the employment or agency (*Perez v. Van Groningen & Sons, Inc. (1986) 41 Cal. 3d 962, 967, 227 Cal. Rptr. 106, 719 P.2d 676*).

B. Employer/Employee Relationship. An employee is one who is subject to his or her employer's right of control with respect to any act, labor, or work to be done in the course and scope of the employment (*Gipson v. Davis Realty Co. (1963) 215 Cal. App. 2d 190, 205 30 Cal. Rptr. 253*).

C. Effect of Lack of Control. The control must encompass both the means and manner of performance of the work. If control pertains only to the result of the work and not to the means by which it is accomplished, the relationship is one of independent contractor rather than employee and vicarious liability under the doctrine of respondeat superior will not attach (*Millsap v. Federal Express Corp. (1991) 227 Cal. App. 3d 425, 431, 277 Cal. Rptr. 807*).

[*Optional*] **D. Workers' Compensation Precedent Not Controlling.** Standards under workers' compensation cases for determining employment status are not controlling in determining the tortfeasor's employment status in a third-party claim lodged against the tortfeasor's alleged employer (*Fleming v. Foothill-Montrose Ledger (1977) 71 Cal. App. 3d*

681, 688-689, 139 Cal. Rptr. 579).

E. Balance of Factors Supports Finding of Independent Contractor Rather Than Employee Relationship. There are a number of factors other than the right of control that can be taken intoaccount in determining whether the tortfeasor is an employee or an independent contractor. When the balance of the factors support that the relationship is one of independent contractor, liability will not attach under the doctrine of respondeat superior (*Millsap v. Federal Express Corp. (1991) 227 Cal. App. 3d 425, 431, 277 Cal. Rptr. 807*).

[*Optional*] **F. Student Trainee Not Employee.** A student trainee, on a scholarship from a Saudi Arabian airlines training program to study aircraft maintenance and English in the United States, was not an employee of the airline at the time he caused a motor vehicle accident; therefore, the airline was not vicariously liable under the theory of respondeat superior (*Randolph v. Budget Rent-A-Car (9th Cir. 1996) 97 F.3d 319, 326)* .

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that the defendant is vicariously liable under the doctrine of respondeat superior, based on the argument that the tortfeasor was not an employee of the defendant. Optional Paragraph D should be used if the plaintiff asserts that workers' compensation case precedent supports a finding of an employment relationship. In an appropriate case, This form may be submitted in opposition to the contention supported by the points and *authorities in § 100A.25*.

This form may be combined with points pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the defendant is not vicariously liable under the doctrine of respondeat superior because the tortfeasor was not an employee of the defendant--for example, in a demurrer or motion for summary judgment. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that an employment relationship did not exist between the defendant and the tortfeasor. In particular, counsel should set forth facts indicating that the defendant lacked the right to control and direct the work activities of the tortfeasor--for example, that the defendant did not instruct the tortfeasor how to do the job but only dictated the required result of the work. Counsel also should discuss other evidence that the tortfeasor was not an employee, such as facts showing that the tortfeasor's work was not of the type normally performed under the direction of an employer; the work required special skills; the tortfeasor supplied his or her own tools and place of work; the tortfeasor worked for the defendant only briefly or intermittently; the tortfeasor was paid by the job and not hourly; the work was not part of the defendant's regular business; the tortfeasor and the defendant operated on the understanding that the tortfeasor was an independent contractor; and the defendant did not have the right to discharge the tortfeasor at will [*see* *Millsap v. Federal Express Corp. (1991) 227 Cal. App. 3d 425, 431-433, 277 Cal. Rptr. 807* ; *Briggs v. Lawrence (1991) 230 Cal. App. 3d 605, 615-618, 281 Cal. Rptr. 578* (discussed in *§ 100A.25*)].

[c] Related Pleading and Practice Forms

For a general form of demurrer to a complaint based on the failure to state facts sufficient to constitute a cause of action, see *California Forms of Pleading and Practice, Ch. 206, Demurrers and Motions for Judgment on the Pleadings, § 206.122* (Matthew Bender). For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[d] Related Memoranda

For points relating to the vicarious liability of a principal for the acts of its agent, see Ch. 182, *Principal and Agent* .

[e] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 30, § 30.04* (Matthew Bender).

[3] Discussion of Authorities

[a] Doctrine of Respondeat Superior

Perez v. Van Groningen & Sons, Inc. *(1986) 41 Cal. 3d 962, 227 Cal. Rptr. 106, 719 P.2d 676* , is discussed in *§ 100A.25[3][a]*. The court of appeal stated that under the doctrine of respondeat superior, an employer is vicariously liable for torts committed by his or her employees in the scope of their employment. The rationale underlying respondeat superior is an allocation of risk; that is, losses caused by the torts of employees are certain to occur in the conduct of an employer's business, and such losses are best placed on the business itself, as a cost of doing business. A risk arises out of employment when an employee's conduct is not so unusual that it would seem unfair to include the loss resulting from the risk among the other costs of the employer's business. Thus, an employer's liabilityextends beyond the employer's actual or possible control of the employee to include risks inherent in or created by the enterprise (*41 Cal. 3d 962, 967-968)* .

[b] Employer/Employee Relationship

The factual and procedural background of ***Gipson v. Davis Realty Co.*** *(1963) 215 Cal. App. 2d 190, 30 Cal. Rptr. 253* , is discussed in *§ 100A.25[3][b]*. The court stated that an "employee" is one who is subject to the absolute control and direction of his or her employer in regard to any act, labor, or work to be done in the course and scope of the employment. And while an individual can be both an employee and an agent, the two terms are not synonymous. The distinguishing factor of an employment relationship is that the employee is entirely under the control and direction of the employer, which presupposes the right to direct the method and mode of the work. The distinguishing features of an agency relationship, on the other hand, is its representative character and its derivative authority (*215 Cal. App. 2d 190, 205)* .

[c] Effect of Lack of Control

In ***Millsap v. Federal Express Corp.*** *(1991) 227 Cal. App. 3d 425, 277 Cal. Rptr. 807* , the plaintiff, who was injured in an automobile collision, sued the other driver, the express company for whom the driver was delivering parcels, and the larger express corporation that had contracted with the company for work done by the driver. The trial court granted summary judgment for both the corporation and the company.

With respect to whether the company was liable under respondeat superior, the court of appeal affirmed, stating the general rule that the hirer of an independent contractor is not liable to third parties for the contractor's negligence. Whether a person is an employee or an independent contractor is a question of fact, except that when only one inference may be drawn from all the facts, it becomes a matter of law. The most significant factor in determining the existence of an employer/independent contract relationship is the right control the manner and means by which the work is to be done. If control can only be exercised as to the result of the work, rather than as to the means by which the work is accomplished, an independent contractor relationship, and not an employee relationship, is established (*227 Cal. App. 3d 425, 430-431)* .

In the case before it, the court reviewed the facts to determine whether the driver was an employee or an independent contractor. The company paid the driver to deliver packages to customers, and they operated on the understanding that the driver was an independent contractor. Further, the driver used his own car for deliveries, furnished his own gas, oil,

insurance, and car repairs. He was paid a lump sum based on the distance traveled to deliver packages, rather than on an hourly basis, he would be called if there were packages to deliver, or he would stop by to see if anything was available, and he did not receive any employee benefits or tax withholdings. He submitted invoices at his convenience and was compensated on the invoices he submitted at any given time. The company did not instruct him how to make deliveries or how to drive his car, other than to tell him to be careful, to give him directions to a particular location, or to tell him to deliver packages in the order received. He was required to return a signed confirmation of delivery to the company, and the company gave him a guide and list of prices so that he could answer customer questions (*227 Cal. App. 3d 425, 431)* .

The court of appeal found that the facts that the company instructed him to be careful or required him to return signed confirmation of delivery forms did not indicate that the company exercised the type of control over the driver so as to make him an employee. Further, none of the other facts raised a triable issue as to whether the driver was anything but an independent contractor compensated on a piecemeal basis. In a footnote, the court discussed that the power to terminate employment at any time is a strong indication of an employer/employee relationship. In this case, however, the significance of this factor was minimal because although the driver had an ongoing relationship with the company, each time he picked up packages operated as a new contract; the company could choose not to continue the relationship, but that choice would be more of a determination not to hire than a determination to fire. The court also found that the fact that the company exercised some control over the driver did not subject the company to respondeat superior liability, because even one who is interested primarily in the result of the work is still permitted to retain some interest in how the work is done without subjecting himself or herself to the liabilities imposed by law on an employer (*227 Cal. App. 3d 425, 431-433)* .

[d] Workers' Compensation Precedent Not Controlling

Fleming v. Foothill-Montrose Ledger *(1977) 71 Cal. App. 3d 681, 139 Cal. Rptr. 579* , the plaintiff sued a newspaper company when she was struck by the automobile driven by the father of a newspaper boy. At the time of the accident, the father was driving his son for purposes of making newspaper deliveries. The trial court granted the newspaper's motion for summary judgment on the ground that the boy was an independent contractor as a matter of law.

The appeals court affirmed. In discussing the plaintiff's argument that the boy was an employee under the definition of employee in *Lab. Code § 3352(b)*, the court said that such definition was intended for purposes of workers' compensation law. According to the court, the broad application of workers' compensation laws cannot be used to define and expandthe scope of liability to a third person for the acts of another, because even though the two fields of law overlap, in each context the determination of whether there is an employment relationship has to depend on the purpose for which the determination is being made. Further, for purposes of unemployment insurance the definition of employee would exclude the possibility that the boy was an employee. The court stated that the plaintiff would not likely contend that the workers' compensation definition should apply but the unemployment insurance definition should not. The court concluded that neither definition should apply because they were not designed for the situation in this case (*71 Cal. App. 3d 681, 688-689)* .

[e] Balance of Factors Supports Finding of Independent Contractor Rather Than Employee Relationship

Millsap v. Federal Express Corp. *(1991) 227 Cal. App. 3d 425, 277 Cal. Rptr. 807* , is discussed in *§ 100A.34[3][c]*.

[f] Student Trainee Not Employee

In ***Randolph v. Budget Rent-A-Car*** *(9th Cir. 1996) 97 F.3d 319* , the plaintiffs sued a foreign student trainee and the airline that provided the student's training. The trainee held a scholarship from a Saudi Arabian airlines training program to study English and aircraft maintenance in the United States. The plaintiff sustained damages when the trainee negligently crashed his rental car into the plaintiff's motorcycle. The airlines, a corporation owned by the Saudi Arabian

government, removed the action to federal district court and asserted the Foreign Sovereign Immunities Act as a defense. The district court granted the plaintiff's motion for summary judgment, ruling as a matter of law that the trainee was an airline employee acting within the scope of his employment at the time of the accident. After a bench trial on damages, the district court entered judgment against the airlines and the airlines appealed.

The Ninth Circuit Court of Appeals reversed, holding that under California law, the trainee was not an airline employee at the time of the accident. In so holding the court found the following facts compelling: at the time of the accident the trainee had lived in the United States for over two and one-half years taking classes to develop the general skills needed to work in aircraft maintenance; the airlines paid his tuition, provided a living allowance as well as money for books, clothing, tools, medical and dental insurance; the trainee received bonuses and penalties based on his academic performance; before he could even be considered for future employment with the airlines, the trainee had to return to Saudi Arabia and successfully complete additional training; the initiation of the trainee's relationship with the airlines did not displace work from existing airline employees, nor did his activities in the United States aid the airlines in its daily operations or confer an immediate benefit on the airlines; and there was no evidence that the airlines had guaranteed to hire him after his training or that the trainee was obligated to accept such a job offer if tendered. The court first considered each of these facts and determined that the trainee was not engaged "to do something for the benefit of" the airlines, within the meaning of *Lab. Code § 2750*, but rather was learning for his own benefit. The court then acknowledged decisions holding that student trainees were not employees under the Fair Labor Standards Act. Finally, the court acknowledged the control exercised by the scholarship sponsor over the trainee (termination of the scholarship if the student's grades fell below a designated level) and concluded that the imposition of scholarship conditions was far from the direction and supervision necessary to hold scholarship sponsors vicariously liable for the torts of their beneficiaries (*97 F.3d 319, 326)* .

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 100A EMPLOYER AND EMPLOYEE: RESPONDEAT SUPERIOR
PART II. FORMS

10-100A California Points & Authorities § 100A.35

AUTHOR: Carolyn Rashby

§ 100A.35 Opposing Contention That Employer Is Vicariously Liable for Employee's Wrongful Conduct Based on Doctrine of Respondeat Superior--Employee's Conduct Was Outside Scope of Employment--Conduct Was Outside Duties of Employment

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF CANNOT RECOVER DAMAGES FROM DEFENDANT UNDER THE DOCTRINE OF RESPONDEAT SUPERIOR BECAUSE THE TORTIOUS ACT BY DEFENDANT'S EMPLOYEE WAS COMMITTED OUTSIDE THE SCOPE OF EMPLOYMENT IN THAT THE ACT WAS NEITHER REQUIRED BY NOR INCIDENTAL TO THE EMPLOYEE'S DUTIES, NOR WAS THE RISK INVOLVED ONE THAT MAY FAIRLY BE REGARDED AS TYPICAL OF OR BROADLY INCIDENTAL TO THE EMPLOYER'S ENTERPRISE.

A. Scope of Employment. An employer is not liable under respondeat superior for the torts of an employee unless the employee was acting within the scope of employment. At a minimum, this means that liability may not be imposed unless there is a nexus between the employment and the tortious act (*Alma W. v. Oakland Unified Sch. Dist. (1981) 123 Cal. App. 3d 133, 141, 176 Cal. Rptr. 287*).

B. Test for Determining Whether Act Within Scope of Employment. An act is not within the scope of employment unless eitherthe act was either required or incidental to an employee's duties, regardless of whether the conduct could be reasonably foreseen by the employer, or the risk involved was one that may fairly be regarded as typical of or broadly incidental to the enterprise undertaken by the employer (*Lisa M. v. Henry Mayo Newhall Mem'l Hosp. (1995) 12 Cal. 4th 291, 298, 48 Cal. Rptr. 2d 510* ; *Maria D. v. Westec Residential Sec., Inc. (2000) 85 Cal. App. 4th 125, 146-149, 102 Cal. Rptr. 2d 326* ; *Jeffrey E. v. Central Baptist Church (1988) 197 Cal. App. 3d 718, 721-722, 243 Cal. Rptr. 128* ; *Golden W. Broadcasters, Inc. v. Superior Court (1981) 114 Cal. App. 3d 947, 957, 171 Cal. Rptr. 95* ; *Alma W. v. Oakland Unified Sch. Dist. (1981) 123 Cal. App. 3d 133, 139, 176 Cal. Rptr. 287*).

[*Optional*] **C. Employee's Actions Were Neither Required Nor Incident to Duties.** Respondeat superior liability demands a nexus between the employee's tort and the employment to ensure that liability is properly placed on the employer (*Bailey v. Filco, Inc. (1996) 48 Cal. App. 4th 1552, 1560, 56 Cal. Rptr. 2d 333*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that the defendant is liable for the torts of its employee under the doctrine of respondeat superior, on the grounds that the tortious act was not committed in the scope of employment. In an appropriate case, these points may be submitted in opposition to the contention supported by the points *in § 100A.26*.

This form may be combined with points pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the defendant is not liable under the doctrine of respondeat superior because the tortious act was not committed within the scope of employment--for example, in a motion for summary judgment. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that there was no connection between the employment and the tortious act, including evidence that the act was not required by or incidental to the employee's job duties or evidence that the employee's act did not involve a risk that was typical of or incidental to the defendant's business. For example, in a case involving sexual molestation, counsel could argue, if appropriate, that such misconduct was personal to the employee, that the employee was not motivated by a purpose to serve the defendant, and that the act was not foreseeable in light of the employee's job duties [*Jeffrey E. v. Central Baptist Church (1988) 197 Cal. App. 3d 718, 722, 243 Cal. Rptr. 128]* . If the plaintiff contends that the act was within the scope of employment because it occurred on the defendant's premises or during working hours, counsel should argue that if an act is personal to the employee, mere presence at the employment site and performance of job duties before or after the act does not give rise to respondeat superior liability [*Alma W. v. Oakland Unified Sch. Dist. (1981) 123 Cal. App. 3d 133, 139-140, 176 Cal. Rptr. 287]* .

[c] Related Pleading and Practice Forms

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[d] Related Memoranda

For points relating to the vicarious liability of a principal for the acts of its agent, see Ch. 182, *Principal and Agent* .

[e] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 30, § 30.05* (Matthew Bender).

[3] Discussion of Authorities

[a] Scope of Employment

The factual and procedural background of ***Alma W. v. Oakland Unified Sch. Dist.*** *(1981) 123 Cal. App. 3d 133, 176 Cal. Rptr. 287* , is discussed in *§ 100A.26[3][b]*. On appeal the issue was whether a school district may be liable for a

sexual assault committed by an employee. The two-part test for determining whether an employee's wrongful act fell within the scope of employment is: (1) whether the act performed was either required or incident to the employee's duties; and (2) whether, in any event, the employee's misconduct could be reasonably foreseen by the employer. If an employee's activities falls within the range of actions covered by either part of the test, the employer will be liable for the wrong, even if the employee acted maliciously and intentionally. Further, in assessing whether an employee's wrongful act was required by or incidental to the employee's duties, the law defines occupational duties broadly, and the fact that an employee was not engaged in the ultimate object of his or heremployment at the time of the employee's wrongful act does not preclude liability on the part of the employer (*123 Cal. App. 3d 133, 138-139)* .

In the case before it, the court concluded that the connection between the employee's duties and the wrongful acts became so attenuated that the law could not hold the employer vicariously liable. Specifically, sexual molestation is in no way related to mopping floors, or any of the other duties of a custodian. Thus, the custodian's acts were not required by or incidental to his work duties. The fact that the custodian used school facilities to commit the offense did not change the result. Where an employee pursues the employee's own ends, the use of property or facilities entrusted to the employee by the employer is an inadequate basis for imputing liability to the employer. Nor did the fact that the offense occurred during working hours make the actions incidental to the employment. If a tort is personal in nature to the employee, mere presence at the site of employment and attendance to occupational duties prior to or subsequent to the offense does not give rise to a cause of action against the employer under respondeat superior (*123 Cal. App. 3d 133, 139-140)* .

With respect to whether the conduct was foreseeable in any event, the court stated that the question should be whether the risk was one that may fairly be regarded as typical of or broadly incidental to the enterprise undertaken by the employer. The court concluded that it defies notions of fairness to say that rape is characteristic of a school district's activities. The court rejected the plaintiff's assertion that the fact that the legislature anticipated molestation by enacting *Education Code §§ 44425* and *45123*, which attempt to safeguard the school against those with sexual offense histories, made the conduct foreseeable. Efforts by the legislature to guard against such conduct do not prove that the Legislature believed molestation to be characteristic of public school employees. The test is not whether it is foreseeable that one or more employees might at some time act in such a way as to give rise to civil liability, but whether the employee's act is foreseeable in light of the duties the employee was hired to perform. There is no aspect of a janitor's duties that would make sexual assault anything other than highly unusual and very startling. In conclusion, the court stated that the facts, construed most favorably for the plaintiff, admitted no inference other than that in his rape of the plaintiff, the custodian stepped outside of the scope of his employment (*123 Cal. App. 3d 133, 141-144)* .

[b] Test for Determining Whether Act Within Scope of Employment

In ***Lisa M. v. Henry Mayo Newhall Mem'l Hosp.*** *(1995) 12 Cal. 4th 291, 48 Cal. Rptr. 2d 510* , the plaintiff sued a hospital under the doctrine of respondeat superior after she was sexually assaulted by a technician under the pretense of conducting an ultrasound imaging examination on her. The trial court granted a motion by the hospital for summary judgment. The court of appeal reversed on the respondeat superior issue, and the Supreme Court granted review.

The court stated the established rule that an employee's willful, malicious and even criminal torts may fall within the scope of his or her employment for purposes of respondeat superior, even though the employer has not authorized the employee to commit crimes or intentional torts. The requirement for respondeat superior liability in this situation is for the tort to be engendered by or arise from the work. This is more than a form of "but for" causation, meaning that the incident leading to the injury must be an outgrowth or the employment or be inherent in the working environment (*12 Cal. 4th 291, 298)* . The court thus stated that a sexual tort will not be considered engendered by the employment unless its motivating emotions were fairly attributable to work-related events or conditions, and concluded that the technician's decision to exploit the plaintiff did not arise out of the performance of the examination (*12 Cal. 4th 291, 301)* . The plaintiff argued that the technician's misconduct was generally foreseeable given the physically intimate nature of the work he was employed to perform. However, the court held that a job involving physical contact is not, by itself, a

sufficient basis on which to impose vicarious liability for a sexual assault (*12 Cal. 4th 291, 302)* . The court thus reversed the court of appeal judgment on the issue of respondeat superior, and remanded the matter to the court of appeal to consider whether the summary judgment was supportable on other grounds.

In ***Maria D. v. Westec Residential Sec., Inc.*** *(2000) 85 Cal. App. 4th 125, 102 Cal. Rptr. 2d 326* , the plaintiff sued a private security service. The complaint sought, among other things, to impose vicarious liability on the defendant based on the plaintiff's rape by an on-duty security guard employed by the defendant. According to the plaintiff, the security guard had detained the plaintiff on a public highway (not on any property of a client of the defendant) by shining a light from his patrol car into her vehicle; he then took her to another location, where he raped her. At the time, the guard was on duty, was wearing a uniform, was driving the defendant's patrol car equipped with a spotlight, and had a gun and handcuffs on his belt. The plaintiff testified that she thought the guard was a police officer. Evidence in the case included the defendant's patrol manual, which severely limits its guards' authority to stop or detain persons in public areas and specifically stated that guards were not authorized to make traffic stops. The manual also required guards to do nothing to imply that they are police officers. The evidence in the case also established that it was against the defendant's policy for a security guard to follow a vehicle for any reason or to use a spotlight on a moving vehicle.

The trial court granted summary judgment in favor of the defendant on the causes of action alleging vicarious liability, holding as a matter of law that the security guard's actions had been outside the scope of his employment when he detained and raped the plaintiff. The court of appealaffirmed, holding that the security guard had completely violated the defendant's policies and substantially deviated from his employment duties in coming into contact with the plaintiff and in performing the alleged misconduct. The court therefore found that the misconduct was not foreseeable from the nature of his duties for purposes of respondeat superior liability (*85 Cal. App. 4th 125, 146-147)* . In this connection, the court found it significant that (1) the security guard was not acting as an official representative of a public entity, and (2) the guard's actual power and authority were significantly less in degree and kind than those of a police officer. Because the guard in this case was not actually authorized to stop or detain the plaintiff, the court reasoned that the guard's misconduct was not fairly attributable to any aspect of the defendant's operations. The court thus distinguished this case from a situation in which vicarious liability may be imposed on a public entity that employs a police officer who misuses official authority by raping a detainee [*see* *Mary M. v. City of Los Angeles (1991) 54 Cal. 3d 202, 208-211, 285 Cal. Rptr. 99, 814 P.2d 1341* (discussed in *§ 100A.26[3*][c])] (*85 Cal. App. 4th 125, 146-149)* . Finally, the court of appeal noted that it was not dealing with a situation in which a securities service provider had no policies, or had policies that did not address the manner in which an employee would come into contact with a sexual assault victim; in such a case, different respondeat superior considerations might be presented (*85 Cal. App. 4th 125, 150)* .

The factual and procedural background of ***Jeffrey E. v. Central Baptist Church*** *(1988) 197 Cal. App. 3d 718, 243 Cal. Rptr. 128* , is discussed in *§ 100A.26[3][b]*. The court explained that the determination of whether a tort was committed within the scope of employment turns on whether either the act performed was required or incident to the employee's duties, or on whether the misconduct could be reasonably foreseen by the employer in any event. Examining the evidence in the case before it, the court found that the acts of molestation were not within the scope of employment. The employee was not employed to molest young boys, and there was no evidence that the acts occurred during Sunday school or during a visitation period. Further, the acts were not actuated by a purpose to serve the church, but rather were self-serving acts unrelated to church activities. Thus, the acts were neither required, incidental to his duties, nor foreseeable (*197 Cal. App. 3d 718, 722)* .

The factual and procedural background of ***Golden W. Broadcasters, Inc. v. Superior Court*** *(1981) 114 Cal. App. 3d 947, 171 Cal. Rptr. 95* , is discussed in *§ 100A.23[3][a]*. The court stated that liability under respondeat superior attaches only to torts committed by an employee within the scope of his or her employment. One test for determining whether conduct was within the scope of employment is to ask whether it was foreseeable. Foreseeability in this context means that the conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business. The court held that if a tort is committed for the employee's own purposes, or as the result of a personal quarrel, the employer need not be liable even though the employee is engaged in his or her

employer's service at the time. The court found that, as matter of law, the beating was not inflicted within the scope of employment. In the view of the court, it is specious to argue that the employment of a television technician whose duties are to set up telecasts of events creates an inherent risk of the type involved in the case at hand. The employment at no time contemplated contacts with the public, and there is no inherent risk incidental to this type of employment importing foreseeability (*114 Cal. App. 3d 947, 957-958)* .

Alma W. v. Oakland Unified Sch. Dist. *(1981) 123 Cal. App. 3d 133, 176 Cal. Rptr. 287* , is discussed in *§ 100A.35[3][a]*.

[c] Employee's Actions Were Neither Required Nor Incident to Duties

In ***Bailey v. Filco, Inc.*** *(1996) 48 Cal. App. 4th 1552, 56 Cal. Rptr. 2d 333* , the plaintiff brought an action under the theory of respondeat superior after he was injured in an automobile accident caused by the defendant's employee. At the time of the accident, the employee was on a paid break and was driving to obtain some cookies to eat back at work. A jury found that the employee was not engaged within the scope of her employment at the time of the accident, and the court entered judgment in favor of the defendant.

The court of appeal reviewed the law regarding respondeat superior, and noted that in *Perez v. Van Groningen & Sons, Inc. (1986) 41 Cal. 3d 962, 227 Cal. Rptr. 106* , the California Supreme Court adopted a foreseeability-based explanation of respondeat superior, holding that the test for vicarious liability is whether the risk is one that was typical of or broadly incidental to the enterprise undertaken by the employer. Building from this foreseeability premise, some courts have employed a two-prong test, asking if the employee's action is (1) either required or incident to the employee's duties, or (2) could be reasonably foreseen by the employer in any event. The plaintiff contended that the first prong of this test does not require a nexus between the employee's tort and the employee's duties, so long as the employee engages in an act of comfort and convenience while on a paid break. However, this argument would make respondeat superior liability synonymous with strict liability (*48 Cal. App. 4th 1552, 1561)* . Noting that the defendant did not instruct the employee to use her car to run errands for the defendant or to buy cookies, and that the employee did not receive money from the defendant for the cookies she bought, the court concluded that the employee was not in an act of comfort and convenience that had a nexus to her employment (*48 Cal. App. 4th 1552, 1565)* .Since the employee was outside of her employment at the time of the accident, the court affirmed the judgment for the defendant.

[4] Additional Authorities

[a] Scope of Employment

In *Miller v. American Greetings Corp. (2008) 161 Cal. App. 4th 1055, 74 Cal. Rptr. 3d 776* , plaintiff was standing next to her car on the side of the road when she was struck by a vehicle owned and driven by defendant's employee. Plaintiff alleged that the driver, who regularly used his own vehicle and cell phone to conduct business for his employer, was within the course and scope of employment at the time of the accident because cell phone records showed that the employee on that day had made a one-minute work-related call at 9:26 a.m. However, 9-1-1 records and the police report indicated that the accident occurred at 9:35 a.m. Moreover, the driver's uncontradicted testimony was that he was on his way to see an attorney for personal reasons at the time of the accident and was distracted when he looked down to find the attorney's address. Recognizing that under the appropriate circumstances an employee may be in the course and scope of employment while making a business call on his or her cell phone while driving his or her personal vehicle, the court of appeal held as a matter of law that this employee was not in the course and scope of employment at the time of the accident. According to the court, the mere fact that the employee had made a brief work-related phone call from the vehicle approximately eight minutes earlier while driving on what was otherwise a personal trip was an insufficient basis upon which to impose respondeat superior liability on the employer (*161 Cal. App. 4th 1055, 1062-1063)* .

[b] Test for Determining Whether Act Within Scope of Employment

In *Hoblitzell v. City of Ione (2003) 110 Cal. App. 4th 675, 2 Cal. Rptr. 3d 8* , the plaintiff was a construction contractor who brought suit against a city, based on the conduct of two city employees that took place at a construction site outside the city's jurisdictional limits. The plaintiff alleged that one of the city's building inspectors, as well as an off-duty city police officer posing as a building inspector, came to the plaintiff's construction site with a disgruntled former employee of the plaintiff and harassed the plaintiff, telling him that the construction site should be shut down because it did not have the necessary permits and generally disparaging the quality of the construction. As a result, work at the site was halted for three days before county inspectors came to assure the property owner that no permits were required. The trial court granted the city's motion for summary judgment, and the court of appeal affirmed. The court held that the city was not liable on a theory of respondeat superior because the building inspector and the off-duty police officer were not acting within the scope of employment at the time of the incident. The court noted that an employer is not liable for an employee's malicious or tortious conduct if the employee substantially deviates from his or her employment duties for personal reasons. The two city employees had gone to the site in an unmarked car, wearing civilian clothing, and the plaintiff knew that the site was outside the city's jurisdiction. Although the two employees identified themselves as building inspectors, they never said that they were there on official city business. Moreover, their motivation was personal and unrelated to their employment with the city. Under those facts, the court held that the conduct of the two city employees could not be regarded as typical of or broadly incidental to the city's business, and as such, the city was not liable under a theory of respondeat superior (*110 Cal. App. 4th 675, 680-684)* .

In Doe 1 v. *City of Murrieta (2002) 102 Cal. App. 4th 899, 126 Cal. Rptr. 2d 213* , the plaintiffs were two minor females who were participants in a program sponsored by a city police department and designed to encourage teenagers to consider careers in law enforcement. While on patrol with a police officer as part of this program, the plaintiffs engaged in consensual sexual activities with the officer. The plaintiffs then brought suit based on sexual abuse against the city and the police department, alleging causes of action based on vicarious liability, breach of contract, and negligent supervision. After the trial court granted demurrers and summary judgment in favor of the defendants on all causes of action, the court of appeal affirmed in part and reversed in part. As to the cause of action alleging that the city and the police department were vicariously liable for the officer's conduct, however, the court of appeal agreed with the trial court that there was no vicarious liability under the facts. The court concluded that because the officer was engaged in supervising and training the plaintiffs when the sexual conduct occurred, making the relationship akin to that of supervisor and employee, because the officer did not exert police authority over the plaintiffs to coerce them to take part in the sexual conduct, and because the infatuated plaintiffs actually pursued the officer, the conduct could not be deemed to be within the course of the officer's employment, and the defendants were not vicariously liable (*102 Cal. App. 4th 899, 906-910)* .

In *John Y. v. Chaparral Treatment Ctr., Inc. (2002) 101 Cal. App. 4th 565, 124 Cal. Rptr. 2d 330* , the plaintiff was an 11-year-old boy who was sexually molested by a counselor while a resident at a group residential facility for seriously emotionally disturbed children. The counselor who assaulted the plaintiff was employed to aid in teaching academic and behavioral skills, although he had no training in psychology or prior experience working with disturbed children. His basic duties included ensuring that residents such as the plaintiff got dressed, maintained proper hygiene, did their homework, ate properly, took their medications, followed the rules, and acted properly, as well as working as a teacher's aide at the affiliated school. At trial, during which the facility was found liable for its own negligence and for violations of certain regulatory duties, the court refused to instruct the jury on the issue of the employer's vicarious liability for the counselor's acts. The court of appeal affirmed this ruling. The court of appeal noted that an employer is not liable for an assault or other intentional tort that does not have a causal nexus to the employee's work. Liability requires that the incident leading to the injury must be an outgrowth of the employment--that is, the risk of injury must be inherent in the working environment or typical of or broadly incidental to the employer's enterprise. Although sexual assaults are not per se beyond the scope of employment, such conduct is not considered to be engendered by the employment unless its motivating emotions were fairly attributable to work-related events or conditions (*101 Cal. App. 4th 565, 575)* . The court concluded that theauthority conferred on the residential counselor, and the abuse of that authority to indulge in personal sexual wrongdoing, was too attenuated to permit a trier of fact to view the sexual assaults as being within the

risks properly allocated to the employer (*101 Cal. App. 4th 565, 576)* .

In *Saks v. Charity Mission Baptist Church (2001) 90 Cal. App. 4th 1116, 110 Cal. Rptr. 2d 45* , the plaintiff was a doctor who had engaged in a series of business transactions with a developer and a church pastor. In the course of those transactions, the plaintiff had loaned $810,000 to purchase property in the church's name, with the understanding that the pastor or the church would repay the amount. Use of the church's name to purchase the property was necessary to obtain a public loan or grant, the proceeds from which would be used to repay the plaintiff. The plaintiff knew when he made the payments that use of the church's name was only necessary to obtain the public funds, and that after the funds were obtained, title to the property would be transferred to a partnership owned by the plaintiff, the developer, and possibly the pastor. Eventually, the public funding did not materialize, the transactions fell apart, and the plaintiff did not recover the money he had paid. The plaintiff sued, seeking in part to hold the church liable for the notes signed by the pastor on theories of breach of contract and fraud. After a jury verdict for the plaintiff, the court of appeal reversed. On the fraud cause of action, the court noted that to apply the respondeat superior doctrine to hold an employer liable for an employee's torts, the tort must foreseeably arise from the employee's duties for the employer. The plaintiff knew that the pastor was using the church's name only to secure public funding for the project, after which title for the purchased property would be transferred to the private partnership. With this knowledge, and in the absence of evidence that the church regularly engaged in real estate development transactions, the plaintiff had to know that the pastor's actions did not arise from the pastor's normal duties on behalf of the church and could not be deemed to be foreseeable by the church (*90 Cal. App. 4th 1116, 1139)* .

In *Maria D. v. Westec Residential Sec., Inc. (2000) 85 Cal. App. 4th 125, 102 Cal. Rptr. 2d 326* , the plaintiff was allegedly raped by a privately employed, on-duty, uniformed, and armed security guard after the guard pulled the plaintiff over while she was driving down the highway. The plaintiff sued the security guard's employer on the theory that the employer was vicariously liable for the guard's sexual assault. The trial court granted summary judgment for the employer on the vicarious liability claims, and the court of appeal affirmed. The court of appeal concluded that, although the assault may not have occurred but for the employment, the guard's decision to assault the victim was strictly personal and did not arise out of the guard's duties with the employer (*85 Cal. App. 4th 125, 146-147)* . The court of appeal also concluded that for purposes of potential respondeat superior liability, the guard's misconduct was not foreseeable from the nature of the guard's duties. Unlike a public law enforcement officer, the privately employed security guard was not vested with considerable authority and control over citizens, nor was he authorized to pull over the plaintiff, conduct field sobriety tests as he did on the plaintiff, or order her into his vehicle as he did. Therefore, the sexual assault could not fairly be attributed to any peculiar aspect of the employer's business operations (*85 Cal. App. 4th 125, 147)* .

[c] Employee's Actions Were Neither Required Nor Incident to Duties

In *M.P. v. City of Sacramento (2009) 177 Cal. App. 4th 121, 98 Cal. Rptr. 3d 812* , a photographer was sexually assaulted by two firefighters employed by the city of Sacramento while the parties were attending a costume ball. The firefighters, one of whom was on duty at the time, had invited plaintiff to photograph them on their fire truck, and the assault occurred when she was inside the truck taking pictures with them. Plaintiff sued the city for the sexual assault committed by the firefighters. The trial court entered judgment for the city on summary adjudication, finding in part that the sexual assault was not within the scope of the firefighters' employment. The court of appeal affirmed. The court reviewed the relevant case law on holding public entity employers liable for sexual assaults committed by employees, including the California Supreme Court's holding in *Mary M. v. City of Los Angeles (1991) 54 Cal. 3d 202, 285 Cal. Rptr. 99, 814 P.2d 1341* , that a public entity could be liable for a sexual assault committed by an on-duty police officer against a woman that he had detained while on duty. Questioning whether the *Mary M.* holding would still receive the support of a majority of the Supreme Court, the court of appeal rejected an attempt to extend that holding to a sexual assault committed by firefighters, even if the firefighters were on duty at the time of the assault. The court noted that the firefighters had no coercive authority over the victim and did not purport to detain the victim in the course of any investigation or even while performing any official duties, the assault was motivated for strictly personal reasons, and

the harm was not a risk that may fairly be regarded as typical of or broadly incidental to the operations of a firefighter (*177 Cal. App. 4th 121, 130-133)* .

In *Baptist v. Robinson (2006) 143 Cal. App. 4th 151, 49 Cal. Rptr. 3d 153* , plaintiffs brought suit against a winery and its employee for injuries one plaintiff sustained when his motorcycle collided with a bin the winery used to haul crushed grapes. The bin fell out of the back of the winery employee's pickup truck onto the highway while the employee was traveling to pick up grapes from a vineyard in another town. Significantly, the employee intended to use the grapes to make wine for his own personal use. The employee was not on duty when the accident occurred, and no one at the winery had authorized or permitted the employee to use the bin for his own personal winemaking. When previously informed that the employee was using winery facilities to produce and store small amounts of his own wine, the employer's principals told the employee's supervisor to tell the employee not to do so, although the supervisor had failed to convey this instruction to the employee. Concluding that the employee's conduct did not fall within the course of his employment, the court of appeal upheld summary judgment for the winery. The court stressed that no one at the winery had prior knowledge that the employee was planning to or had taken a bin to transport grapes for his own personal use. In addition, the employee had chosen the wrong type of bin to transport the grapes, as the bin he took was designed only to transport crushed grapes on winery premises (*143 Cal. App. 4th 151, 164)* . The court also rejected the argument that the employee's conduct provided a benefit to his employer because the employee's personal winemaking enhanced his winemaking skills and made him a better employee. The court concluded that this type of incidental benefit to an employer was not the type of tangible benefit that could support the imposition of vicarious liability (*143 Cal. App. 4th 151, 164-166)* .

In *K. G. v. County of Riverside (2003) 106 Cal. App. 4th 1374, 131 Cal. Rptr. 2d 762* , the plaintiff, a minor, brought an action against a county for sexual assaults she suffered over the span of several years at the hands of her stepfather, who was employed as a deputy sheriff for the county at the time of the assaults. The plaintiff alleged that the county was vicariously liable for the assaults because her stepfather controlled and intimidated her in part by threatening to use his authority as an officer against her if she reported the assaults. The court of appeal held that this was an insufficient nexus between the assaults and the stepfather's employment to hold the county vicariously liable. Instead, the assaults took place within the course of the stepfather's personal, family life and were not, as a matter of law, related in any way to law enforcement, despite the fact that some of the assaults may have occurred while the stepfather was on duty or in his patrol car (*106 Cal. App. 4th 1374, 1382-1383)* .

In *Tognazzini v. San Luis Coastal Unified Sch. Dist. (2001) 86 Cal. App. 4th 1053, 103 Cal. Rptr. 2d 790* , the plaintiff was injured in a motorcycle accident and brought suit against the school district that employed the driver of the car that hit him. The plaintiff argued that the school district was vicariously liable because the employee was returning from being fingerprinted, a requirement of employment, when the accident occurred. At trial, the jury by special verdict decided that the employee was not acting in the scope of employment at the time of the accident, and the court of appeal held that sufficient evidence supported the jury verdict. The fingerprinting wasrequired by the state, not the school district, although the district had informed the employee that she needed to comply with the state mandate. However, the employee had the discretion to decide when, where, and how to fulfill the requirement, and the employee performed the task on her day off at a location chosen by the employee. The employee was not required to drive as part of her duties with the school, and no other job-related activities were involved. Therefore, the relationship between employment by the district and the accident was too attenuated to require the employer to bear responsibility for the injury (*86 Cal. App. 4th 1053, 1059-1060)* .

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 100A EMPLOYER AND EMPLOYEE: RESPONDEAT SUPERIOR
PART II. FORMS

10-100A California Points & Authorities § 100A.36

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§ 100A.36 Opposing Contention That Employer Is Vicariously Liable for Employee's Wrongful Conduct Based on Doctrine of Respondeat Superior--Employee's Conduct Outside Scope of Employment--Going and Coming Rule Applies

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF CANNOT RECOVER DAMAGES FROM DEFENDANT UNDER THE DOCTRINE OF RESPONDEAT SUPERIOR FOR INJURIES CAUSED BY A TORT COMMITTED BY DEFENDANT'S EMPLOYEE BECAUSE THE GOING AND COMING RULE APPLIES TO TAKE THE EMPLOYEE'S CONDUCT OUTSIDE THE SCOPE OF HIS OR HER EMPLOYMENT.

A. Going and Coming Rule. The going and coming rule is applied to determine whether torts committed while an employee is commuting or traveling constitute conduct within the scope of employment. Under the rule, an employee is outside the scope of employment while commuting to and from work or while traveling to or from a meal period. Thus, an employer will generally not be liable under the doctrine of respondeat superior for torts committed while an employee is doing such commuting or traveling (*Munyon v. Ole's, Inc. (1982) 136 Cal. App. 3d 697, 703, 186 Cal. Rptr. 424* ; *Ducey v. Argo Sales Co. (1979) 25 Cal. 3d 707, 722-723, 159 Cal. Rptr. 835, 602 P.2d 755* ; *Tryer v. Ojai Valley Sch. (1992) 9 Cal. App. 4th 1476, 1482, 12 Cal. Rptr. 2d 114*).

[*Optional*] **B. Effect of Abandonment of Employer's Business.** Even if the special errand exception to the going and coming rule is found to be applicable, the employee will still be found to be acting outside the scope of employment if the employee completely abandoned the employer's business for personal reasons (*Felix v. Asai (1987) 192 Cal. App. 3d 926, 932, 237 Cal. Rptr. 718*).

[*Optional*] **C. Attendance at Social Event Not Within Scope of Employment.** When an employee is involved in tortious activity while going to, attending, or commuting home from a social event, the activity will not be within the

scope of employment if the social event is not related to the employment or did not provide an intended direct or indirect benefit to the employer (*Robbins v. Hewlett-Packard Co. (1972) 26 Cal. App. 3d 489, 494, 103 Cal. Rptr. 184*).

[*Optional*] **D. Payment of Travel Expenses Does Not Defeat Going and Coming Rule.** An employer's payment of an employee's commute travel expenses is insufficient to impose vicarious liability under respondeat superior law (*Anderson v. Pacific Gas & Elec. Co. (1993) 14 Cal. App. 4th 254, 259, 17 Cal. Rptr. 2d 534*).

[*Optional*] **E. "Commercial Traveler Rule" Inapplicable to Respondeat Superior Cases.** The "commercial traveler rule," under which a workers' compensation claimant can be acting in the course and scope of employment during the entire period of travel on an employer's business, does not apply in a respondeat superior case (*Sunderland v. Lockheed Martin Aeronautical Sys. Support Co. (2005) 130 Cal. App. 4th 1, 10-12, 29 Cal. Rptr. 3d 665*).

[*Optional*] **F. "Premises Line" Rule Inapplicable to Respondeat Superior Cases.** The "premises line rule," under which a workers' compensation claimant may be acting in the course and scope of employment when entering the employer's premises even if the claimant has not yet begun work, does not apply in a respondeat superior case (*Hartline v. Kaiser Found. Hosps. (2005) 132 Cal. App. 4th 458, 469-470, 33 Cal. Rptr. 3d 713*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that the defendant is liable under the doctrine of respondeat superior, on the grounds that the going and coming rule applies to take the employee's conduct outside the scope of employment. Optional Paragraph B is for use if the plaintiff contends the special errand exception to the going and coming rule applies. Optional Paragraph C should be used if the tortious act occurred while the employee was attending a social event. Optional Paragraph D should be used if the plaintiff contends that the going and coming rule does not apply because the employer paid the employee's travel expenses. Optional Paragraph E should be used if the plaintiff contends that the coming and going rule does not apply because the employee was away from home on a business trip at the time of the tort. Optional Paragraph F should be used if the plaintiff contends that the coming and going rule does not apply because the employee had entered or was about to enter onto the employer's premises at the time of the tort.

In an appropriate case, these points may be submitted in opposition to the contention supported by the points and *authorities in §§ 100A.26, 100A.28*.

This form may be combined with points pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the defendant is not liable under the doctrine of respondeat superior for the tortious act of his or her employee because the going and coming rule applies to take the act outside the scope of employment--for example, in a motion for summary judgment. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that at the time the plaintiff was injured by the defendant's employee, the employee was commuting to or from work or was on a meal period. Counsel also should demonstrate that the employee was not on a business errand for the defendant at the time of the accident or, if appropriate, counsel should set forth facts indicating that the employee had abandoned the errand for personal reasons by the time of the accident [*see Felix v. Asai (1987) 192 Cal. App. 3d 926, 933-934, 237 Cal. Rptr. 718]* . If the accident occurred while the employee was going to or returning from a business social function, counsel should discuss evidence that the function was not

connected with the employment or that the employee's attendance was not intended to directly or indirectly benefit the defendant, such as facts indicating that the social function was for the enjoyment of employees and that attendance was entirely voluntary [*see Robbins v. Hewlett-Packard Corp. (1972) 26 Cal. App. 3d 489, 493-496, 103 Cal. Rptr. 184]* .

[c] Related Pleading and Practice Forms

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[d] Related Memoranda

For points relating to the vicarious liability of a principal for the acts of its agent, see Ch. 182, *Principal and Agent* .

[e] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 30, §§ 30.05[4][a], 30.05[4][b]* (Matthew Bender).

[3] Discussion of Authorities

[a] Going and Coming Rule

Munyon v. Ole's, Inc. *(1982) 136 Cal. App. 3d 697, 186 Cal. Rptr. 424* , is discussed in *§ 100A.26[3][a]*. The appeals court stated that under the doctrine of respondeat superior, an employer is liable for the torts of his or her employees committed within the scope of employment, but the burden of proof is on the plaintiff to establish that the act was within the scope of employment. The court rejected the plaintiff's assertion that the going and coming rule did not apply because going to pick up her paycheck was a risk that was created by the defendant's enterprise and was foreseeable. The court cited *Rodgers v. Kemper Constr. Co. (1975) 50 Cal. App. 3d 608, 618-619, 124 Cal. Rptr. 143* [*see § 100A.33[3][c]*], for the proposition that the employer's liability should extend beyond actual or possible control over employees to include risks inherent in or created by the enterprise because the employer is better able than the injured party to spread the risk through prices, rates, or liability insurance. One way to determine whether a risk should be borne by the enterprise is to ask whether the actual occurrence was a foreseeable consequence of the activity. Foreseeability as a test for respondeat superior means that in the context of the enterprise, an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business. The court stated that, in the case before it, there was no inherent risk to the employment that would have made the accident foreseeable. The employee was a cashier who was not required to use her car for work and there was no evidence that the defendant had any knowledge that the employee would use her car to go to the store on her day off to get her paycheck. Further, there was nothing unusual in having a fixed pay day and having a short time lag between the pay day and the last day worked, and thus, the plaintiff's argument that the defendant created the risk by holding on the money was too attenuated. The court stated that if the employee had been working on the day of the accident and had picked up her paycheck during the day, there is no question that the going and coming rule would bar any claim against the defendant for torts committed by the employee while driving her car from home to work. The fact that she voluntarily chose to come into work on her day off should not produce different result (*136 Cal. App. 3d 697, 705-706)* .

Ducey v. Argo Sales Co. *(1979) 25 Cal. 3d 707, 159 Cal. Rptr. 835, 602 P.2d 755* , involved an action for personal injuries sustained by the plaintiffs when their car collided with a vehicle driven by the defendant's employee. The employee was employed to clean the defendant's model homes at various locations, and she regularly drove up to 45 miles from her home to the model homes several days a week. The accident occurred when she was returning home after performing her job. The jury returned a verdict absolving the defendant of liability, and the plaintiffs appealed.

The court of appeal affirmed. Under the going and coming rule, an employee is not considered to be acting within the scope of employment while going to or coming from the employee's place of work. Courts have recognized several exceptions to the rule, including if the employer compensates the employee for travel time or if the employee was engaged in a special errand for the employer. But neither of these circumstances were present in this case. In addition, the going and coming rule is inapplicable if the employer requires an employee to furnish his or her own vehicle on the job. Again, however, this exception was inapplicable in this case. The job was not one that embraced driving and the employee was not required to use her vehicle for work. Although she occasionally did errands for the employer, these errands were not shown to be a condition of her employment, and she was not engaged in such an errand at the time of the accident. Further, while she transported cleaning materials in her car, the evidence did not establish that she was required to do so, especially in light of the fact that the defendant provided ample storage space at each model home tract where such equipment could have been stored. Thus, the jury could have found that taking equipment home was for the employee's own personal benefit and merely incidental to her employment (*25 Cal. 3d 707, 721-723)* .

In ***Tryer v. Ojai Valley Sch.*** *(1992) 9 Cal. App. 4th 1476, 12 Cal. Rptr. 2d 114* , survivors of a man killed in an automobile accident sued the driver of the truck that struck his automobile and the driver's employer, a school. The driver had been employed to feed the school's horses at two different locations each day. When the accident occurred she had been on her way to her afternoon shift after eating lunch at home. The trial court granted the school's motion for summary judgment on the grounds that the driver was not within the course and scope of her employment at the time of the accident.

The court of appeal found that the case turned on application of the lunch break rule, which states that an employee, while taking time away from work for meals, is not in the service of his or her employer and that the employer therefore is not responsible for the negligence of the employee during such periods of absence from work. The court rejected the plaintiffs' contention that the driver was not on a lunch break when the accident occurred. The driver left her first shift for the school at nine in the morning on the day of the accident, and went to ride her own horse and eat lunch off campus at a ranch. The accident occurred when she was returning to the school for her afternoon shift (*9 Cal. App. 4th 1476, 1482-1483)* .

[b] Effect of Abandonment of Employer's Business

The factual and procedural background of ***Felix v. Asai*** *(1987) 192 Cal. App. 3d 926, 237 Cal. Rptr. 718* , is discussed in *§ 100A.28[3][b]*. The court explained that even if the special errand exception to the going and coming rule is applicable, the employee may still be found to have been outside the scope of employment if at the time of the accident the employee had completely abandoned his or her employer's business for personal reasons. To constitute an abandonment, the deviation must be substantial and complete, and if the employee is pursuing a business errand and a personal objective simultaneously, the employee will still be found within the scope of employment. In determining whether abandonment has occurred, a variety of factors should be considered, including the intent of the employee, the nature, time and place of the employee's conduct, the work the employee was hired to do, the incidental acts the employer should reasonably have expected the employee to do, the amount of freedom allowed the employee in performing his or her duties, and the amount of time consumed in the personal activity (*192 Cal. App. 3d 926, 931-933)* .

In this case, it was conceded that the employee had been sent on a special errand and would have been acting in the scope of his employment during the portion of his journey between the place of employment and the post office, as well as the portion of his journey between the post office and his home, had he gone directly home. But his clear intent to go directly to his parents' home constituted a complete abandonment of his employer's business. Once he delivered the mail and left the post office intending to drive directly to his parents' home, he completed his parents' business and was pursuing a personal objective, regardless of the fact that he would have taken a different route to his parents' house had he gone their directly from work. Thus, the court found that the employee was not acting within the scope of his employment at the time of the accident (*192 Cal. App. 3d 926, 933-934)* .

[c] Attendance at Social Event Not Within Scope of Employment

In ***Robbins v. Hewlett-Packard Corp.*** *(1972) 26 Ca. App. 3d 489, 103 Cal. Rptr. 184* , involved an automobile accident that occurred when an employee was on his way home from a company picnic. The company sponsored a yearly summer picnic for employees and their families. All levels of employees were invited, but they were not required to check in or out of the picnic grounds. No seminars were conducted at the picnic, and no speeches or honorary awards were bestowed. Employees were asked to volunteer to work at the picnic, but received no compensation for the work. No one was compelled to attend the picnic, and attendance or volunteering to help at the picnic was not considered in an employee's evaluation. The picnic was held on a Saturday, which was not a regular work day, and employees provided and paid for their own transportation to and from the picnic. The plaintiffs contended that the employee was acting within the scope of his employment at the time of the accident. The trial court entered judgment for the defendant, and the plaintiffs appealed.

The court of appeal affirmed. Generally, an employee is not acting within the scope of his or her employment when traveling between home and work. However, if an employee is traveling from his or her home or returning to it as part of the employee's usual duties or at the specific request or order of his or her employer, the employee is considered to be on a special errand for the employer and acting within the scope of employment. Attendance at a social function will not come under the special errand rule unless the function or attendance at it was connected with the employment and for a material part intended to benefit the employer who requested or expected the employee to attend [*Boynton v. McKales (1956) 139 Cal. App. 2d 777, 789, 294 P.2d 733* (discussed in *§ 100A.28[3*][a])]. In this case, the court found that the employee was not on a special errand at the time of the accident. The picnic was primarily for the enjoyment of employees and only incidentally benefited the employer by contributing to morale. Although the employee had volunteered to work at the picnic for one hour, he still was not obligated to attend the picnic. Further, the employee attended the picnic to have a good time, there were no speeches, awards, or seminars, whether or not an employee attended or volunteered was not considered in evaluations, a volunteer could withdraw at any time, the company did not provide transportation or travel expenses, nor did it prescribe which route to take to get to the picnic, and the company did not have control over when an employee arrived at or left the picnic (*26 Cal. App. 3d 489, 493-496)* .

[d] Payment of Travel Expenses Does Not Defeat Going and Coming Rule

In ***Anderson v. Pacific Gas & Elec. Co.*** *(1993) 14 Cal. App. 4th 254, 17 Cal. Rptr. 2d 534* , the plaintiff was injured in an automobile accident. The driver of the other car was going home from work at the time of the accident and was receiving per diem travel expenses from his employer pursuant to a union contract. The plaintiff sued the employer under the doctrine of respondeat superior, and the trial court granted the employer's motion for summary judgment.

The court of appeal affirmed. The court rejected the plaintiff's contention that the employee was acting within the scope of his employment at the time of the accident because he was receiving travel expenses. The going and coming rules has several exceptions, and generally an exception will be found when the employer derives some incidental benefit from the employee's trip, such as when the employer pays for the employee's travel time. While acknowledging that workers' compensation decisions had recognized an exception to the going and coming rule if an employer defrayed its employee's commute expenses [*see* *Zenith Nat'l Ins. Co. v. Workmen's Comp. Appeals Bd. (1967) 66 Cal. 2d 944, 948-949, 59 Cal. Rptr. 622, 428 P.2d 606]* , the court stated that under respondeat superior law, this exception has been rejected [*Caldwell v. A.R.B., Inc. (1986) 176 Cal. App. 3d 1028, 222 Cal. Rptr. 494* ; *Harris v. Oro-Dam Constructors (1969) 269 Cal. App. 2d 911, 75 Cal. Rptr. 544]* . Workers' compensation decisions can be helpful in determining whether an employer should be vicariously liable, but they are not controlling precedent (*14 Cal. App. 4th 254, 258-259)* . The court also rejected the plaintiff's assertion that the employee was engaged in a special errand for the employer because he was driving a coworker home at the time of the accident. Although the employer allegedly encouraged carpooling, the court stated that there is a considerable difference between encouraging socially beneficial conduct and requiring certain activities as part of one's job (*14 Cal. App. 4th 254, 262)* . Finally, the court rejected the plaintiff's argument that the travel expense was also intended to compensate the employee for his commute time. The

employee was paid an hourly wage for an eight-hour shift, and there was no evidence that he was paid for travel time (*14 Cal. App. 4th 254, 262-263)* .

[e] "Commercial Traveler Rule" Inapplicable to Respondeat Superior Cases

In ***Sunderland v. Lockheed Martin Aeronautical Sys. Support Co.*** *(2005) 130 Cal. App. 4th 1, 29 Cal. Rptr. 3d 665* , the plaintiff's car was struck while she was waiting in the drive-through line at a fast food restaurant. The plaintiff sued the driver of the other car, as well as his employer, arguing that the other driver was acting within the scope of his employment at the time of the accident. The other driver was a field service representative for an airplane manufacturer and was only in that particular city because he had been assigned there temporarily by his employer. However, he had stopped working for the day about eight hours earlier. The trial court granted summary judgment for the employer on the grounds that the accident did not occur within the scope of employment. The plaintiff appealed.

The court of appeal affirmed. The court rejected the plaintiff's argument that the "commercial traveler rule," under which a workers' compensation claimant can be acting in the course and scope of employment during the entire period of travel on an employer's business, should be applied to this respondeat superior case. The court reiterated the established rule that in the respondeat superior context, the determining factor in ascertaining whether an employee's act is within the scope of employment is whether the risk of the activity is typical of or broadly incidental to the employer's enterprise. However, the test for determining whether an employee was acting in the course and scope of employment for workers' compensation purposes is different and is broadly construed to effectuate the statutory goal of providing workers' compensation to injured employees (*130 Cal. App. 4th 1, 9-10)* . Because the commercial traveler rule results from the liberal construction given to the workers' compensation laws, the court ofappeal refused to apply it in the context of a respondeat superior action to impose vicarious liability on an employer. Applying the normal rule applicable in respondeat superior cases, the court concluded that the activity of getting dinner at a restaurant was purely personal in nature and did not create a risk typical of or broadly incidental to the employee's employment. The fact that the employee was paid per diem while in the city, and that he was technically on call 24 hours a day, did not change the result (*130 Cal. App. 4th 1, 11-12)* .

[f] "Premises Line" Rule Inapplicable to Respondeat Superior Cases

In ***Hartline v. Kaiser Found. Hosps.*** *(2005) 132 Cal. App. 4th 458, 33 Cal. Rptr. 3d 713* , the plaintiff and his dog were struck by an automobile driven by a physical therapist employed by a hospital. The accident occurred while the driver was turning off the street and into her employer's parking lot on her way to work. In addition to suing the driver for negligence, the plaintiff sued the employer for premises liability and for negligence on a vicarious liability theory. Although the plaintiff argued that there was a triable issue of fact concerning whether the driver was acting in the scope of her employment at the time of the accident, the trial court granted summary adjudication in favor of the employer on the vicarious liability claim. The remaining claim against the employer was eventually dismissed, and the plaintiff appealed the trial court's adjudication of the vicarious liability claim.

The court of appeal affirmed, rejecting the plaintiff's contention that the "premises line" rule as developed in workers' compensation cases could be applied in the respondeat superior context. The court noted that under the premises line rule as applied in workers' compensation cases, the employment relationship begins when the employee enters the employer's premises, and injuries sustained in close proximity to the employer's premises may arise out of the employment if sustained in a parking lot used by employees or on public property immediately adjacent to the workplace (*132 Cal. App. 4th 458, 467)* . In rejecting application of the rule to respondeat superior cases, the court concluded that absent application of existing exceptions to the "coming and going rule," it would be an arbitrary expansion of employer liability to impose vicarious liability for events that happen to occur in public areas on or near an employer's premises if those events were neither typical of nor broadly incidental to the employer's particular enterprise. The court concluded that the risks associated with an employee's commute to and from work are not generally inherent in, typical of, or created by the employee's work, and certainly not typical of this employee's work as a physical

therapist. Therefore, it would be inappropriate to hold the employer liable just because the employee was in a car accident as she was turning into the employer's parking lot (*132 Cal. App. 4th 458, 469-470)* .

[4] Additional Authorities

[a] Going and Coming Rule

In *Depew v. Crocodile Enters., Inc. (1998) 63 Cal. App. 4th 480, 73 Cal. Rptr. 2d 673* , the plaintiffs were the heirs of a driver who was killed when the defendant's employee fell asleep at the wheel while driving home from work. They brought an action against the employer based on respondeat superior. At the time of the accident, the employee had one hour earlier completed a six-hour evening shift, although on the prior day the employee had worked a double shift. The employee had sixteen hours off work in between the double shift and the six-hour shift. The court of appeal affirmed the trial court's grant of summary judgment for the employer based on the going-and-coming rule. The plaintiffs argued that the "special risk" exception to the going-and-coming rule justified holding the employer liable. That exception, which originated as an exception to the going-and-coming rule in the workers' compensation context, would hold an employer liable for injuries caused from a special risk related to the employment, if the employee would not have been at the scene of the injury but for the employment and the risk is distinctive in nature or quantitatively greater than risks common to the general public. The court noted that the exception had never specifically been held to apply to the doctrine of respondeat superior, but that even assuming it could apply, there was an insufficient nexus between the injury and the employment under the facts of the case. The court concluded that the employee's work schedule, with the sixteen hours off in between the double shift and the six-hour shift, was not the type of excessive work load that would justify holding the employer liable (*63 Cal. App. 4th 480, 487-490)* .

The factual and procedural background of *Anderson v. Pacific Gas & Elec. Co. (1993) 14 Cal. App. 4th 254, 259, 17 Cal. Rptr. 2d 534* , is discussed in *§ 100A.36[3][d]*. The court found that the fact that the driver of the car that injured the plaintiff was driving a coworker home did not invoke the special errand exception to the going and coming rule. Even though the employer encouraged carpooling, the court held that there is a considerable difference between encouraging socially beneficial conduct and requiring certain activities as part of one's job.

In *Blackman v. Great Am. First Sav. Bank (1991) 233 Cal. App. 3d 598, 284 Cal. Rptr. 491* , after the plaintiff was injured in an automobile collision with the defendant's employee, he sued the defendant under the theory of respondeat superior. At the time of the accident, the employee was leaving work to go to a university class that she was taking under the defendant's educational assistance program. The court of appeals affirmed the trial court's grant of summary judgment in favor of the defendant. The court found that the going and coming rule precluded liability because there was no significant benefit to the defendant from the employee'sattendance at the class. Further, the special errand exception to the going and coming rule was inapplicable because the commute was not at the defendant's order or request (*233 Cal. App. 3d 598, 603-605)* .

California Points & Authorities

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 100A EMPLOYER AND EMPLOYEE: RESPONDEAT SUPERIOR
PART II. FORMS

10-100A California Points & Authorities § 100A.37

AUTHOR: Carolyn Rashby

§ 100A.37 Opposing Contention That Employer Is Vicariously Liable for Employee's Wrongful Conduct Based on Doctrine of Respondeat Superior--Employee's Tortious Conduct Outside Scope of Employment--Employee Pursuing Purely Personal Objective Although On-Duty

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF CANNOT RECOVER DAMAGES FROM DEFENDANT FOR INJURIES CAUSED BY THE TORTIOUS ACT OF DEFENDANT'S EMPLOYEE BECAUSE EVEN THOUGH THE EMPLOYEE WAS ON DUTY AT THE TIME OF THE ACT, THE EMPLOYEE IN COMMITTING THE ACT WAS PURSUING PURELY PERSONAL OBJECTIVES.

Pursuit of Purely Personal Objectives While on Duty Takes Conduct Outside Scope of Employment. An on-duty employee who is pursuing purely personal objectives in the commission of a tort that did not have a causal nexus to the employee's work will generally be found to have departed from the scope of employment (*Lisa M. v. Henry Mayo Newhall Mem'l Hosp. (1995) 12 Cal. 4th 291, 297-298, 48 Cal. Rptr. 2d 510, 907 P.2d 358* ; *Jeffrey E. v. Central Baptist Church (1988) 197 Cal. App. 3d 718, 721, 243 Cal. Rptr. 128* ; *Alma W. v. Oakland Unified Sch. Dist. (1981) 123 Cal. App. 3d 133, 140, 176 Cal. Rptr. 287* ; *see Farmers Ins. Group v. County of Santa Clara (1995) 11 Cal. 4th 992, 1006, 47 Cal. Rptr. 2d 478, 906 P.2d 440*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that the defendant is vicariously liable for the tortious acts of his or her employee under the doctrine of respondeat superior, based on the argument that even though the employee was on duty, the employee was pursuing purely personal objectives in the commission of the tort. In an appropriate case, these points may be submitted in opposition to the contention supported by the points and *authorities in § 100A.26*

.

This form may be combined with points pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the defendant is not vicariously liable for the torts of his or her employee because the employee was pursuing purely personal objectives at the time of the tortious act even though on duty, for example in a motion for summary judgment. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that at the time of the tortious conduct that injured the plaintiff, the employee was pursuing purely personal objectives and was not engaged in activities of service to the defendant. For example, in a case involving molestation, counsel could argue that the employee's acts were self-serving and were not required by, or incidental to, his or her job duties [*Lisa M. v. Henry Mayo Newhall Mem'l Hosp. (1995) 12 Cal. 4th 291, 299-301, 48 Cal. Rptr. 2d 510, 907 P.2d 358* ; *Jeffrey E. v. Central Baptist Church (1988) 197 Cal. App. 3d 718, 722, 243 Cal. Rptr. 128* ; *Alma W. v. Oakland Unified Sch. Dist. (1981) 123 Cal. App. 3d 133, 139-140, 176 Cal. Rptr. 287]* . For an example of an argument that the tortious acts were outside the scope of employment generally, see *§ 100A.35*.

[c] Related Memoranda

For points relating to the vicarious liability of a principal for the acts of its agent, see Ch. 182, *Principal and Agent* .

[d] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 30, § 30.05[5]* (Matthew Bender).

[3] Discussion of Authorities

[a] Pursuit of Purely Personal Objectives While on Duty Takes Conduct Outside Scope of Employment

In ***Lisa M. v. Henry Mayo Newhall Mem'l Hosp.*** *(1995) 12 Cal. 4th 291, 48 Cal. Rptr. 2d 510, 907 P.2d 358* , the plaintiff, a 19-year-old pregnantwoman, was injured in a fall and sought treatment at a hospital. An ultrasound technician conducted an examination as directed by the examining physicians, and then sexually molested the plaintiff under the guise of performing further, medically necessary procedures. The plaintiff sued to recover damages for professional negligence, battery, and intentional infliction of emotional distress, and named as the defendants the technician, the hospital, and others. The trial court granted the hospital's summary judgment motion, on the ground that the technician's conduct was not within the scope of his employment, precluding a finding that Hospital could be held vicariously liable for the technician's conduct. The plaintiff appealed, and the court of appeal reversed; the California Supreme Court granted review, and reversed the judgment of the court of appeal.

The Court set out the basic rules regarding vicarious liability: that an employer is vicariously liable for the torts of its employees committed within the scope of the employment, and that even an employee's willful, malicious, criminal torts may fall within the scope of his or her employment for purposes of respondeat superior liability, even though the employer has not authorized the employee to commit crimes or intentional torts (*12 Cal. 4th 291, 296-297)* . The Court noted that California does not follow the traditional rule under which conduct was in the scope of employment only if motivated (in whole or in part) by a desire to serve the employer's interests, but stated that, under the developed case law, the employer will not be held liable for an assault or other intentional tort that did not have a causal nexus to the employee's work (*12 Cal. 4th 291, 297)* . "But for" causation is insufficient; that the employment brought tortfeasor and victim together is not enough. Instead, courts have used varied language to describe the requisite link: the incident leading to injury must be an "outgrowth" of the employment, the risk of injury must be "inherent in the working

environment," or "typical of or broadly incidental to the enterprise [the employer] has undertaken" (*12 Cal. 4th 291, 298)* .

In applying these rules to the case before it, the Court found that the requisite link between the employment and the tortious conduct did not exist. The Court noted that vicarious liability has been considered inappropriate when the conduct was motivated by a personal dispute or a personal compulsion, and that the technician here acted out of motivations that were not caused by his employment, but were caused instead only by "propinquity and lust" (*12 Cal. 4th 291, 301-303)* .

Jeffrey E. v. Central Baptist Church *(1988) 197 Cal. App. 3d 718, 243 Cal. Rptr. 128* , is discussed in *§ 100A.26[3][b]*. The court found that the employee's acts of molestation were not intended to serve the employer, a church, but rather were self-serving acts unrelated to church activities. Based on this and other evidence, the court held that the acts were not required, incidental to his duties, or foreseeable (*197 Cal. App. 3d 718, 722)* .

The factual and procedural background of ***Alma W. v. Oakland Unified Sch. Dist.*** *(1981) 123 Cal. App. 3d 133, 176 Cal. Rptr. 287* , is discussed in *§ 100A.26[3][b]*. In determining whether the school district was liable for a sexual assault committed by an employee-custodian, the court found that the connection between the employee's duties and the wrongful acts became so attenuated that the law could not hold the employer vicariously liable. Specifically, sexual molestation is in no way related to mopping floors, or any of the other duties of a custodian. Thus, the custodian's acts were not required by or incidental to his work duties. The fact that the custodian used school facilities to commit the offense did not change the result. Where an employee pursues his or her own ends, the use of property or facilities entrusted to the employee by the employer is an inadequate basis for imputing liability to the employer. Nor did the fact that the offense occur during working hours make the actions incidental to the employment. If a tort is personal in nature to the employee, mere presence at the site of employment and attendance to occupational duties prior to or subsequent to the offense does not give rise to a cause of action against the employer under respondeat superior (*123 Cal. App. 3d 133, 139-140)* .

Farmers Ins. Group v. County of Santa Clara *(1995) 11 Cal. 4th 992, 47 Cal. Rptr. 2d 478, 906 P.2d 440* , raised the issue of employer liability for sexual harassment by an employee. The California Supreme Court once again found that sexual harassment was a purely personal objective that could not be imputed to the employer for the purposes of respondeat superior (*11 Cal. App. 4th 976)* .

In this case, a county had promulgated in 1980 a policy prohibiting sexual harassment in the workplace, which policy was in effect while one deputy sheriff admittedly harassed other deputies. The deputies who had been harassed sued the harasser and the county in federal court, alleging violations of federal and state law covering sexual harassment in the workplace [*see 42 U.S.C.S. § 2000e-2*; *see also Gov. Code § 12940(j)*]. The county refused to defend and indemnify the accused deputy under *Gov. Code §§ 825* and *995*, on the ground that the harassing conduct was outside the scope of employment. The accused deputy's defense was assumed by his homeowner's insurance carrier, and on the date set for trial, the deputy settled and was dismissed from the action. The trial court found that the settlement was in good faith [*see Code Civ. Proc. § 877.6*], and the carrier paid the settlement. The carrier sued the county after its claims were rejected, seeking indemnity for the settlement amount and the costs of defense of the federal action. The parties filed cross motions for summary judgment, directed primarily to the issue of whether the harassment was undertaken in the scope of the deputy's employment. The trial court granted the county's motion, finding that the conduct was outside the scope of the accused deputy's employment, and entered judgment for the county. The court of appeal reversed, on the ground that the conductwas in fact committed in the scope of employment, and was not so unusual or startling that it would be unfair to include as a cost of the employer's business. The Supreme Court granted review, and reversed the judgment of the court of appeal.

The Court noted that under *Gov. Code § 825(a)*, the scope of employment issue is decided under the general principles used by California courts in the respondeat superior context (*11 Cal. 4th 992, 1003)* . These general principles,

although interpreted broadly, do not make an employer strictly liable for all actions of its employees during working hours; specifically, employers are not held vicariously liable for an employee's malicious or tortious conduct if the employee substantially deviates from the employment duties for personal purposes (*11 Cal. 4th 992, 1004)* . The Court distinguished cases in which the employee's conduct had in some way been related to the employee's duties, and vicarious liability had been found, with cases denying vicarious liability on the ground that the conduct arose from events unrelated to the employment, such as personal disputes or compulsions of the employee (*11 Cal. 4th 992, 1006)* .

The Court was persuaded by opinions that had held that except in the cases involving sexual misconduct of on-duty police officers against members of the public, employers are not liable for their employees' sexual misconduct because it could not be demonstrated that the misconduct arose from the employers' enterprises (*11 Cal. 4th 992, 1006-1007)* . If the conduct is motivated by strictly personal reasons of the employee, unrelated to the performance of the employee's job duties, vicarious liability cannot be imposed (*11 Cal. 4th 992, 1007)* . The Court distinguished *Mary M. v. City of Los Angeles (1991) 54 Cal. 3d 202, 285 Cal. Rptr. 99, 814 P.2d 1341* [*see § 100A.26[3][c]*], on the ground that the official authority of a police officer over members of the public is different in kind from that of an employee (even a supervisor) over another employee. The Court declined to read *Mary M.* to permit vicarious liability based solely on the abuse of job-created authority over others for purely personal reasons (*11 Cal. 4th 992, 1012-1013)* .

The plaintiffs, female deputy sheriffs, settled with the harassing male coemployee and his homeowner's insurance carrier, and also recovered a judgment against the county under the FEHA. The issue decided was whether the county was also obligated to indemnify the harasser under *Gov. Code § 825.2*, which requires indemnity for liability incurred for acts within the scope of employment.

The California Supreme Court affirmed that the test under the statute was the same as the common law test for scope of employment generally (*11 Cal. App. 4th 976)* . In holding that the conduct was outside of the scope of employment, the Court appears effectively to have insulated employers from vicarious liability for sexual harassment under the common-law respondeat superior doctrine; employers can apparently only be held "directly" liable for harassment to the extent provided by the FEHA. For example, there is no FEHA employer liability for a nonsupervisory employee's sexual harassment of a fellow employee if the employer had no knowledge or reason to know of the harassment [*Gov. Code § 12940(j)*; *Carrisales v. Department of Corr. (1999) 21 Cal. 4th 1132, 1136-1137, 1140, 90 Cal. Rptr. 2d 804, 988 P.2d 1083* (sexual harassment by nonsupervisory fellow employee does not constitute unlawful employment practice under FEHA unless employer knows or should know of it and fails to take immediate and appropriate corrective action)]. And although *Civ. Code § 51.9* imposes liability for sexual harassment in a business, service, or professional relationship, it would appear that under the rationale of this case, liability would be confined to the individual harasser unless the individual's employer somehow participated in the harassment (*see also Gov. Code § 12940(j)(1), (3)*), no vicarious liability would be imposed on the employer under the respondeat superior doctrine.

NOTE:

Three justices of the Court would have overruled *Mary M.* and held that sexual misconduct even by on-duty police officers is outside the scope of employment [*see Farmers Ins. Group v. County of Santa Clara (1995) 11 Cal. 4th 992, 1020-1023, 47 Cal. Rptr. 2d 478, 906 P.2d 440* (concurring opinion of George, J.)].

NOTE:

The Fair Employment and Housing Act (FEHA) provides for direct employer liability for harassment of one employee by another, other than an agent or supervisor, if the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action [*Gov. Code § 12940(j)*]. This language has been construed as providing for strict employer liability for the conduct of an agent or supervisor [*Kelly-Zurian v. Wohl Shoe Co. (1994) 22 Cal. App. 4th 397, 414-417, 27 Cal. Rptr. 2d 457]* .

[4] Additional Authorities

[a] Pursuit of Purely Personal Objectives While on Duty Takes Conduct Outside Scope of Employment

In *Van Ort v. Estate of Stanewich (9th Cir. 1996) 92 F.3d 831* , the plaintiffs, who were the victims of an assault and attempted robbery by an undercover narcotics officer, sued the county and the Sheriff's Department who employed the officer, for negligence. The district court ruledagainst them as a matter of law, and the plaintiffs appealed. The Ninth Circuit Court of Appeal ruled that the county was not vicariously liable under *Gov. Code § 815.2(a)* because the officer was not acting within the scope of employment. In its ruling, the court relied on the holding of *Farmers Ins. Group v. County of Santa Clara (1995) 11 Cal. 4th 992, 47 Cal. Rptr. 2d 478* [*see § 100A.37[3][a]*], which provided that an employer will not be held vicariously liable for an employee's malicious or tortious conduct if the employee substantially deviates from the employment duties for personal purposes. The court found that the free-lance criminal exploits of a law enforcement officer fell within the California Supreme Court's language in *Farmers* (*92 F.3d 831, 840)* .

John Y. v. Chaparral Treatment Ctr., Inc. (2002) 101 Cal. App. 4th 565, 124 Cal. Rptr. 2d 330 , is discussed in *§ 100A.35[4][a]*.

In *Maria D. v. Westec Residential Sec., Inc. (2000) 85 Cal. App. 4th 125, 102 Cal. Rptr. 2d 326* , the plaintiff was allegedly raped by a privately employed, on-duty, uniformed, and armed security guard after the guard pulled the plaintiff over while she was driving down the highway. The plaintiff sued the security guard's employer on the theory that the employer was vicariously liable for the guard's sexual assault. The trial court granted summary judgment for the employer on the vicarious liability claims, and the court of appeal affirmed. The court of appeal concluded that, although the assault may not have occurred but for the employment, the guard's decision to assault the victim was strictly personal and did not arise out of the guard's duties with the employer (*85 Cal. App. 4th 125, 146-147)* . The court ruled that the Supreme Court's decision in *Mary M. v. City of Los Angeles (1991) 54 Cal. 3d 202, 285 Cal. Rptr. 99, 814 P.2d 1341* [*see § 100A.26[3][c]*], did not support a finding of vicarious liability, because the assault on the plaintiff by the private security guard did not arise from the misuse of authority uniquely conferred on a public law enforcement officer, and because the security guard was not acting as an official representative of the state at the time of the assault (*85 Cal. App. 4th 125, 146)* .

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CHAPTER 100A EMPLOYER AND EMPLOYEE: RESPONDEAT SUPERIOR
PART II. FORMS

10-100A California Points & Authorities § 100A.38

AUTHOR: Carolyn Rashby

§ 100A.38 Opposing Contention That Employer Is Vicariously Liable to Third Party Based on Intentional Torts of Employee--Conduct of Employee Motivated by Personal Malice

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF CANNOT RECOVER DAMAGES FROM DEFENDANT FOR INJURIES CAUSED BY A TORT COMMITTED BY DEFENDANT'S EMPLOYEE BECAUSE THE EMPLOYEE'S CONDUCT WAS MOTIVATED BY PERSONAL MALICE NOT ENGENDERED BY HIS/HER EMPLOYMENT.

No Liability Where Conduct Based on Personal Malice. An employer will not be held vicariously liable for a tort committed by his or her employee if the employee in committing the tort was motivated by personal malice not engendered by his or her employment (*Carr v. Wm. C. Crowell Co. (1946) 28 Cal. 2d 652, 656, 171 P.2d 5* ; *Martinez v. Hagopian (1986) 182 Cal. App. 3d 1223, 1227-1229, 227 Cal. Rptr. 763* ; *Monty v. Orlandi (1959) 169 Cal. App. 2d 620, 624, 337 P.2d 861*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that the defendant is vicariously liable for the intentional torts of his or her employee, based on the argument that the employee's conduct in committing the tort was based on his or her personal malice. In an appropriate case, This form may be submitted in opposition to the contention supported by the points and *authorities in § 100A.33*.

This form may be combined with points pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the defendant is not vicariously liable for the torts of his or her employee because such torts were based on the employee's personal malice--for example, in a motion for summary judgment. This form may also be

adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that the employee inflicted injury on the plaintiff out of personal malice that was not engendered by the employment. For example, counsel could set forth facts indicating that the employee and the plaintiff became embroiled in a dispute that lead to the injury, and such dispute was not an outgrowth of the employment and had no connection to the employee's job duties [*see Martinez v. Hagopian (1986) 182 Cal. App. 3d 1223, 1227-1230, 227 Cal. Rptr. 763]* . For an example of an argument that the tortious acts were outside the scope of employment generally, see *§ 100A.35*.

[c] Related Pleading and Practice Forms

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[d] Related Memoranda

For points relating to the vicarious liability of a principal for the acts of its agent, see Ch. 182, *Principal and Agent* .

[e] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 30, § 30.06[2][a]* (Matthew Bender).

[3] Discussion of Authorities

[a] No Liability Where Conduct Based on Personal Malice

The factual and procedural background of ***Carr v. Wm. C. Crowell Co.*** *(1946) 28 Cal. 2d 652, 171 P.2d 5* , is discussed in *§ 100A.33[3][a]*. The court stated that if an employee inflicts an injury out of personal malice, not engendered by employment, the employer is not liable, but such facts were not present in the case before it (*28 Cal. 2d 652, 654-657)* .

The factual and procedural background of ***Monty v. Orlandi*** *(1959) 169 Cal. App. 2d 620, 337 P.2d 861* , is discussed in *§ 100A.33[3][b]*. The court stated that an employer is liable for the intentional torts of his or her employee committed in the scope of employment, but if an employee inflicts an injury out of personal malice not engendered by the employment, the employer will not be vicariously liable. In this case, an inference could be drawn that the bartender's ejection of his wife was a personal matter and not connected with the maintenance of order in the bar, and the attack on the plaintiff arose out of this incident. Thus, the question was properly left to the jury since the assault may not have been within the scope of employment (*169 Cal. App. 2d 620, 623-624)* .

In ***Martinez v. Hagopian*** *(1986) 182 Cal. App. 3d 1223, 227 Cal. Rptr. 763* , the plaintiffs sued the defendant, a grape grower, under respondeat superior after their husband and father was fatally knifed by the defendant's employee, a farm worker. The incident occurred after hours at a social gathering of relatives at a labor camp maintained by the defendant. The trial court granted the defendant's motion for summary judgment, and the plaintiffs appealed.

The appeals court affirmed. The court stated that under respondeat superior, an employer will be liable for the torts, including intentional torts, of an employee committed within the scope of her employment. However, if the employee inflicts an injury out of personal malice, not engendered by the employment, the employer is not liable. The determination as to whether a tort was committed within the scope of employment turns on whether the act was either

required or incident to the employee's duties or whether the misconduct could be reasonably foreseen by the employer in any event. The court discussed the test set forth in *Rodgers v. Kemper Constr. Co. (1975) 50 Cal. App. 3d 608, 618-619, 124 Cal. Rptr. 143* [*see § 100A.33[3][c]*], for determining foreseeability. In *Rodgers,* the court held that foreseeability means that in the context of the employer's particular enterprise, an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business, or whether the risk was one that may fairly be regarded as typical of or broadly incidental to the enterprise undertaken by the employer.

In this case, the court rejected the plaintiffs' argument that the incident was foreseeable. The dispute leading to the assault was not an outgrowth of the employment relationship. The court stated that liability will attach only if there is a nexus between the employment and the activity that results in an injury that is foreseeable. The test is not whether it is foreseeable that employees might act in such a way as to give rise to civil liability, but whether the employee's act is foreseeable in light of the duties the employee was hired to perform. The court stated that the assault arose out of an argument between visitors to the labor camp and workers concerning one worker's treatment of a visitor's wife. Thus, the dispute did not have any connection to harvesting grapes. The fact that both the victim and the assailant had been drinking, even though such drinking is common among farm workers during their after hours socials and drinking often leads to quarrels and violence, did not provide a sufficient link to the employment to impose vicarious liability on the defendant. The court concluded that the assault could not fairly be regarded as typical of or broadly incidental to the farming activities involved (*182 Cal. App. 3d 1223, 1227-1230)* .

[4] Additional Authorities

[a] No Liability Where Conduct Based on Personal Malice

In *Kephart v. Genuity, Inc. (2006) 136 Cal. App. 4th 280, 38 Cal. Rptr. 3d 845* , the defendant's employee was involved in an accident with the plaintiffs, all members of the same family. Witnesses testified that the employee, driving his own car, intentionally pursued the plaintiffs' vehicle in an act of "road rage" and forced their vehicle off the highway, causing the vehicle to overturn. The plaintiffs settled with the employee and sued the defendant, arguing that the employee was acting within the scope of employment at the time of the accident because he had left his house and was making preparations to begin a business trip later that evening. However, the jury found that the employee was not acting in the scope of employment, and the court of appeal affirmed. Although the employee had left home and would eventually travel to the airport to catch a flight for a business trip, he was not due at the airport for at least five hours and would be taking care of personal business in the interim. In addition, the employee's injury-causing conduct was intentional and egregious and was motivated solely by personal malice and in no way designed or intended to further the defendant's interests. Under those circumstances, the court concluded that sufficient evidence supported the jury's finding that the employee was not acting in the scope of employment at the time of the accident (*136 Cal. App. 4th 280, 294-295)* .

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10-100A California Points & Authorities § 100A.39

AUTHOR: Carolyn Rashby

§ 100A.39 Opposing Contention That Employer Is Vicariously Liable for Harassment of One Employee by Another--Alleged Harasser Was Not Supervisory Employee, and Employer Complied With Requirements of California Fair Employment and Housing Act (FEHA) [Gov. Code § 12940(j)(1)]

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF CANNOT RECOVER DAMAGES FROM DEFENDANT FOR HARASSMENT COMMITTED BY PLAINTIFF'S FELLOW EMPLOYEE, BECAUSE THE HARASSMENT WAS NOT COMMITTED BY A SUPERVISORY EMPLOYEE, AND DEFENDANT _____ [HAD NO KNOWLEDGE OR REASON TO KNOW OF THE HARASSMENT *or* TOOK IMMEDIATE AND APPROPRIATE CORRECTIVE ACTION ON LEARNING OF THE HARASSMENT].

California Fair Employment and Housing Act (FEHA) Does Not Subject Employer to Liability for Harassment Committed by Nonsupervisory Employee Unless Employer Knew or Should Have Known of Harassment and Failed to Take Immediate and Appropriate Corrective Action. The FEHA imposes liability on employers only for unlawful employment practices (*see Gov. Code § 12940*). Harassment of one employee by another employee who is not an agent or supervisor of the employer does not constitute an unlawful employment practice unless the employer knows or should know of it and fails to take immediate and appropriate corrective action (*Gov. Code § 12940(j)(1)*). Thus, if the employer has no reason to know of the harassment, or if the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of the harassment (for example, when the victim or someone else informs the employer) there simply is no "unlawful employment practice" or employer liability under the FEHA (*Carrisales v. Department of Corr. (1999) 21 Cal. 4th 1132, 1136-1137, 1140, 90 Cal. Rptr. 2d 804, 988 P.2d 1083*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a contention that the defendant is liable under the California Fair Employment and Housing Act (FEHA) (*Gov. Code § 12900 et seq.*) for harassment committed by an employee against another employee, a job applicant, or a person providing services under contract to the employer [*see Gov. Code § 12940(j)(1)*].

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. The argument should, therefore, establish that the employee who allegedly committed harassment was not an agent of the employer or a supervisor of the plaintiff (*see Gov. Code § 12926(r)*), and either (1) the employer had no knowledge or reason to know of the harassment, or (2) the employer took immediate and appropriate corrective action on learning of the harassment.

[3] Discussion of Authorities

[a] California Fair Employment and Housing Act (FEHA) Does Not Subject Employer to Liability for Harassment Committed by Nonsupervisory Employee Unless Employer Knew or Should Have Known of Harassment and Failed to Take Immediate and Appropriate Corrective Action

In ***Carrisales v. Department of Corr.*** *(1999) 21 Cal. 4th 1132, 90 Cal. Rptr. 2d 804, 988 P.2d 1083* , an employee of the Department of Corrections sued the Department, two of her supervisors, and a coworker for sexual harassment in violation of the California Fair Employment and Housing Act (FEHA) (*Gov. Code § 12900 et seq.*). She alleged that her coworker had repeatedly sexually harassed her, and that the defendant supervisors knew of the sexual harassment but failed to take immediate and appropriate corrective action.

The trial court granted summary judgment in favor of each defendant. The court of appeal reversed the grant of summary judgment as to the Department, finding a triable issue of fact regarding whether the Department and the defendant supervisors took immediate and appropriate corrective action. The court of appeal affirmed the grant of summary judgment as to the supervisors and as to the coworker. The Supreme Court granted the plaintiff's petition for review, which raised only the issue of the liability of the coworker for harassment under the FEHA. On that issue, the Supreme Court held that under the pertinent FEHA provision as it existed at the relevant time [*see* former Gov. Code § 12940(h)(1); *now see Gov. Code § 12940(j)(1)*], the co-worker was not personally liable for harassment of the plaintiff, although the coworker could be liable under other statutes or tort theories (*21 Cal. 4th 1132, 1136)* .

In the course of its discussion, the Supreme Court clarified the circumstances under which an employer can be held liable for harassment under the FEHA. The FEHA makes an employer strictly liable for harassment by an agent or supervisor. However, an employer cannot be liable for harassing conduct by a nonsupervisory employee unless the employer (or its agent or a supervisor) knows or should know of the conduct and fails to take immediate and appropriate corrective action [*see Gov. Code § 12940(j)(1)*]. So long as the employer has no reason to know of the harassment, or takes immediate and appropriate corrective action when the harassment is or should be known, there is simply no "unlawful employment practice" that would subject the employer to liability under the FEHA (*21 Cal. 4th 1132, 1136-1137, 1140)* .

NOTE:

After the Supreme Court's decision, the FEHA was amended to provide specifically that any employee of an employer subject to the FEHA is personally liable for any harassment that the employee perpetrates [*see Gov. Code § 12940(j)(3)*, effective January 1, 2001].

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10-100A California Points & Authorities § 100A.40

AUTHOR: Carolyn Rashby

§ 100A.40 Opposing Contention That Employer May Be Vicariously Liable for Wrongful Conduct of Employee--Statute of Limitations Bars Action Against Employer

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE PLAINTIFF CANNOT RECOVER AGAINST THE DEFENDANT EMPLOYER UNDER A THEORY OF RESPONDEAT SUPERIOR FOR THE WRONGFUL CONDUCT OF AN EMPLOYEE BECAUSE THE PLAINTIFF FAILED TO NAME THAT EMPLOYER AS A DEFENDANT PRIOR TO EXPIRATION OF THE STATUTE OF LIMITATIONS.

A. Statute of Limitations. An action for an injury to an individual caused by the wrongful act or neglect of another must be commenced within two years of accrual of the cause of action (*Code Civ. Proc. § 335.1*).

B. Statute of Limitations Applies Separately to Employer. A plaintiff seeking to hold an employer liable for the torts of an employee must name the employer as a defendant prior to the running of the applicable statute of limitations, even if the claim against the employee is not barred by limitations (*Boyer v. Jensen (2005) 129 Cal. App. 4th 62, 70-71, 28 Cal. Rptr. 3d 124*).

[*Optional*] **C. Claim May Not Be Pursued Against Bankrupt Employee.** If the employee's debts have been discharged by bankruptcy, shielding the employee from suit, and the plaintiff failed to name the employer as a defendant prior to expiration of the statute of limitations, the plaintiff may not pursue the action against the employee to obtain a judgment that might be enforced against the employer (*Boyer v. Jensen (2005) 129 Cal. App. 4th 62, 77-78, 28 Cal. Rptr. 3d 124*).

[2] Comments

[a] Use of Form

This form may be submitted in defense to a plaintiff's action against an employer for the wrongful acts of an employee under the doctrine of respondeat superior. The grounds for the defense are that the plaintiff failed to name the employer as a defendant prior to expiration of the statute of limitations.

This form may be combined with points pertaining to the specific procedural context in which these points are raised, such as in a motion for summary judgment. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form showing the relationship between the facts of the case and the point of law stated. Thus, for example, counsel should include facts showing when the cause of action accrued and when the employer was named as a defendant.

[3] Discussion of Authorities

[a] Statute of Limitations Applies Separately to Employer

In ***Boyer v. Jensen*** *(2005) 129 Cal. App. 4th 62, 28 Cal. Rptr. 3d 124* , one of the drivers involved in a car accident that occurred in October 2000 filed a negligence lawsuit in September 2001 against the driver of the other car. In February 2002, the other driver countered with a cross-complaint for negligence against the plaintiff. During discovery, the cross-complainant learned that the plaintiff might have been engaged in job-related travel at the time of the accident. Subsequently, in August 2002, the cross-complainant amended her cross-complaint to add the plaintiff's employer as a defendant. Because the cross-complaint was responding to a timely lawsuit filed by the plaintiff, the cross-complaint against the plaintiff was not barred by the one-year statute of limitations then applicable to personal injury actions [*now see Code Civ. Proc. § 335.1* (two-year statute of limitations)]. However, the amendment adding the plaintiff's employer was not filed within the limitations period. The employer answered the cross-complaint and raised the statute of limitations as an affirmative defense. Judgment on the pleadings was eventually granted in favor of the employer, and the cross-complainant appealed.

The court of appeal affirmed. The court held that the cross-complainant was required to add the employer as a named cross-defendant before expiration of the statute of limitations in October 2001. The court rejectedthe argument of the cross-complainant that because the employer was potentially liable under principles of respondeat superior for the wrongful conduct of its employee, then the employer's statute of limitations defense should be tied to the employee's statute of limitations defense. According to the cross-complainant, because the plaintiff had waived the statute of limitations defense by filing suit first against the cross-complainant, the employer that is potentially vicariously liable should not be able to assert a statute of limitations defense. The court disagreed, finding no authority to support that argument. The court also rejected the equitable argument that the employer was not prejudiced because it should have foreseen a potential respondeat superior claim, noting that application of a statute of limitations requires no showing of prejudice. Because the employer was not sued within the applicable limitations period, and no relevant exceptions had been identified, the action against the employer was time-barred (*129 Cal. App. 4th 62, 69-71)* .

[b] Claim May Not Be Pursued Against Bankrupt Employee

The factual and procedural background of ***Boyer v. Jensen*** *(2005) 129 Cal. App. 4th 62, 28 Cal. Rptr. 3d 124* , is discussed in *§ 100A.40[3][a]*. While trial on the complaint and cross-complaint was pending, the plaintiff filed for bankruptcy protection and received an automatic stay. In late 2003, the plaintiff's debts were discharged by the bankruptcy court, and the plaintiff filed a motion to dismiss the tort litigation. The cross-complainant opposed this motion to dismiss, arguing that she was seeking a judgment against the plaintiff to proceed against the plaintiff's employer, the employer's insurer, or both. The trial court granted the plaintiff's motion to dismiss the action, and the cross-complainant appealed this judgment of dismissal.

The court of appeal affirmed. The court noted the court-fashioned rule under bankruptcy law that although a plaintiff or other creditor may not seek to hold a debtor personally liable after discharge in bankruptcy, the plaintiff or creditor may proceed against the debtor to attain a judgment enforceable against a codebtor or a surety that guaranteed payment of that debt. However, the court also recognized that this rule was fashioned in the context of trying to recover from an insurer of the debtor, and insurance law requires two separate suits under those circumstances--one suit against the insured and then a second against the insurer (*129 Cal. App. 4th 62, 72)* . Moreover, the court was persuaded by case law that a suit should not be allowed against a discharged debtor unless the debtor's presence in the action was truly essential (*129 Cal. App. 4th 62, 75-77)* . Because holding an employer liable under a theory of respondeat superior does not require a prior judgment against the employee, and in fact the employee need not be sued at all, the employee is not a necessary party, and there is no reason to allow suit to proceed against a bankrupt employee to try to attain a judgment enforceable against the employer. The fact that the cross-complainant was barred by the statute of limitations from suing the employer directly in this particular case did not alter this outcome (*129 Cal. App. 4th 62, 77-78)* . Finally, the court recognized that even if the cross-complainant were allowed to proceed to judgment against the employee, that judgment could not be transformed into a judgment against the employer or its insurer, who would not be parties to the action (*129 Cal. App. 4th 62, 78-79)* .

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10-100A California Points & Authorities § 100A.41

AUTHOR: Carolyn Rashby

§ 100A.41 Supporting Contention That Hirer Is Vicariously Liable to Third Party Based on Torts of Independent Contractor--Work Involved Peculiar Risk

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF CAN RECOVER DAMAGES FROM DEFENDANT FOR INJURIES CAUSED BY A TORT COMMITTED BY AN INDEPENDENT CONTRACTOR HIRED BY DEFENDANT BECAUSE THE WORK FOR WHICH THE INDEPENDENT CONTRACTOR WAS HIRED INVOLVED A PECULIAR RISK OF PHYSICAL HARM TO OTHERS UNLESS SPECIAL PRECAUTIONS WERE TAKEN, AND THE CONTRACTOR FAILED TO EXERCISE SUCH PRECAUTIONS.

A. Peculiar Risk Doctrine. One who employs an independent contractor to do work that the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused by the failure of the independent contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise (Restatement (Second) of Torts § 416; *Johnson v. Tosco Corp. (1991) 1 Cal. App. 4th 123, 132, 1 Cal. Rptr. 2d 747*).

B. Definition of Peculiar Risk. A peculiar risk is a risk that is peculiar to the work to be done that arises from the character of the work or from the place where the work is to be done, against which a reasonable person would recognize the necessity of taking special precautions. A peculiar risk does not mean that the riskmust be one that is abnormal to the type of work done, or that it is an abnormally great risk, but rather refers to a special recognizable danger arising out of the work itself (*Johnson v. Tosco Corp. (1991) 1 Cal. App. 4th 123, 132, 1 Cal. Rptr. 2d 747* ; *Henderson Bros. Stores, Inc. v. Smiley (1981) 120 Cal. App. 3d 903, 915-916, 174 Cal. Rptr. 875*).

C. Factors in Determining Whether Danger Is a Peculiar Risk. Facts that are important in determining whether a particular danger is a "special danger" include: (1) the foreseeability of the specific risk or set of risks arising in

connection with the work as planned; (2) whether the risk is intimately connected with the work; (3) the degree of risk; and (4) the possibility of anticipating and prescribing definite precautions to avert the anticipated risk or risks (*Henderson Bros. Stores, Inc. v. Smiley (1981) 120 Cal. App. 3d 903, 916-917, 174 Cal. Rptr. 875*).

[*Optional*] **D. Employer's Lack of Knowledge Regarding Special Precautions.** The fact that the employer does not know, or that a reasonable person would not know, that the independent contractor has not taken special precautions or is not planning to take them does not preclude liability under the peculiar risk doctrine (*McDonald v. City of Oakland (1967) 255 Cal. App. 2d 816, 823, 63 Cal. Rptr. 593*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that the defendant is liable for the torts of his or her independent contractor because the work the independent contractor was hired to do involved a peculiar risk and the contractor failed to take special precautions to prevent harm to others. Optional Paragraph D is for use if the defendant asserts that he or she did not know that the contractor did not take or did not plan to take special precautions.

This form may be combined with points pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the defendant is liable for the torts of his or her independent contractor because a peculiar risk existed for which the contractor failed to take special precautions, for example in a motion for summary judgment. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that the work that the defendant hired the tortfeasor-contractor to perform involved a peculiar risk and that the contractor failed to take special precautions to prevent the risk from harming others. In establishing that the work involved a peculiar risk, counsel should set forth facts indicating that the risk was foreseeable and intimately connected with the work, the degree of risk was high, and that it was possible to anticipate and guard against the risk [*Henderson Bros. Stores, Inc. v. Smiley (1981) 120 Cal. App. 3d 903, 916-917, 174 Cal. Rptr. 875]* . If the defendant contends that he or she did not know that the contractor did not plan to or failed to take special precautions, counsel should argue that such lack of knowledge does not preclude respondeat superior liability [*McDonald v. City of Oakland (1967) 255 Cal. App. 2d 816, 823, 63 Cal. Rptr. 593]* .

[c] Opposing Memoranda

In an appropriate case, the points and *authorities in § 100A.45* may be used to oppose the contention supported by these points.

[d] Related Pleading and Practice Forms

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[e] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 30, § 30.10[2][b]* (Matthew Bender).

[3] Discussion of Authorities

[a] Peculiar Risk Doctrine

In ***Johnson v. Tosco Corp.*** *(1991) 1 Cal. App. 4th 123, 1 Cal. Rptr. 2d 747* , the plaintiff was an insulator who fell from scaffolding at an oil refinery. He was employed by an insulation company that was assisting in the refitting of a steamline at the refinery. Another contractor was responsible for erecting the scaffoldings that were required for the refitting project. The plaintiff sued the oil refinery for, among other things, the employment of a contractor for work involving a peculiar risk of bodily harm. The trial court entered judgment for the plaintiff, and the defendant appealed.

The appeals court reversed. The court stated the general rule that an employer of an independent contractor is not liable for the negligence of the contractor or its employees. However, exceptions to the rule have become so numerous that the rule is applied only if there is no good reason to depart from it. One such exception is the peculiar risk doctrine. California courts have adopted the peculiar risk doctrine as stated in § 416 of the Restatement (Second) of Torts that "one who employs an independent contractor to do work that the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise." Comment b to § 413 states that the doctrine applies to "special risks, peculiar to the work to be done, and arising out of its character, or out of the place where it is to be done, against which a reasonable [person] would recognize the necessity of taking special precautions. The situation is one in which a risk is created that is a normal, routine matter of customary human activity, such as driving an automobile, but is rather a special danger to those in the vicinity, arising out of the particular situation created, and calling for special precautions. 'Peculiar' ... has reference only to a special recognizable danger arising out of the work itself." Comment b further provides that "[i]t is obvious that an employer of an independent contractor may always anticipate that if the contractor is in any way negligent toward third persons, some harm to such persons may result ... . [The doctrine] has no reference to such a general anticipation of the possibility that the contractor may in some way be negligent. It is not concerned with the taking of routine precautions, of a kind that any careful contractor could reasonably be expected to take, against all of the ordinary and customary dangers that may arise in the course of the contemplated work." The court stated that a contractor's use of defective equipment, which the employer had no part in selecting, does not bring the contractor's conduct within the peculiar risk doctrine, nor does the contractor's misuse of equipment, whether or not defective, give rise to the doctrine (*1 Cal. App. 4th 123, 131-133)* .

In this case, the court found that the use of the particular type of scaffolding did not present a peculiar risk; it was of a standard type commonly used in the construction industry, the required fittings alleged by the plaintiff to be missing were ordinary elements of the scaffold rather than special precautions directed against unusual hazards, and the installation of the scaffolding by specially trained personnel was a routine precaution found in most phases of construction work. Further, the plaintiff's injury resulted from the provision of a defective piece of scaffolding and the negligent use of the equipment. Both of these elements of negligence, according to the court, lay outside the peculiar risk doctrine (*1 Cal. App. 4th 123, 133-134)* .

[b] Definition of Peculiar Risk

Johnson v. Tosco Corp. *(1991) 1 Cal. App. 4th 123, 1 Cal. Rptr. 2d 747* , is discussed in *§ 100A.41[3][a]*.

In ***Henderson Bros. Stores, Inc. v. Smiley*** *(1981) 120 Cal. App. 3d 903, 174 Cal. Rptr. 875* , the plaintiff, a property owner, sued an adjacent property owner who had hired an independent roofing contractor whose tar kettle had erupted into flames setting fire to the plaintiff's building. At the conclusion of the plaintiff's case at trial, the trial court granted a nonsuit in favor of the defendant.

The court of appeal reversed the nonsuit, stating that while it is the general rule that there is no vicarious liability on an employer for the torts of an independent contractor, a well-recognized exception to this rule applies if the contractor is engaged in the performance of inherently dangerous work. This exception, which is known as the peculiar risk doctrine,

is contained in §§ 413 and 416 of the Restatement (Second) of Torts. It is not necessary that the work be of a kind that cannot be done without a risk of harm to others; rather, application of the rule is predicated on the negligent failure to either the employer or the contractor to take appropriate special precautions (*120 Cal. App. 3d 903, 910-913)* .

The court determined that the normal operation of tar kettles in roofing work presented a significant, recognizable danger of fire. Specifically, there was abundant testimony that explosions or "flashes" were common and unavoidable in the operation of tar kettles, and the defendant admitted that he knew before the fire that the use of hot tar and a tar kettle presented a fire hazard. Further, the negligence of the roofing contractor in maintaining the tar kettle, amounted to the kind of failure to take special precautions against a risk for which an employer is held responsible (*120 Cal. App. 3d 903, 914-915)* .

Comment b to § 413 of the Restatement (Second) of Torts states that doctrine is concerned with risks that are "peculiar to the work to be done, and arising out of its character, or out of the place where it is to be done, against which a reasonable [person] would recognize the necessity of taking special precautions. The situation is one in which a risk is created [that] is not a normal, routine matter of customary human activity, such as driving an automobile, but is rather a special danger to those in the vicinity, arising out of the particular situation created, and calling for special precautions. 'Peculiar' does not mean that the risk must be one [that] is abnormal to the type of work to be done, or that it must be an abnormally great risk. It has reference only to a special, recognizable danger arising out of the work itself." The court stated that there are four factors that are recognized as important determinants of the dangers' character: (1) the foreseeability of the specific risk or set of risks arising in connection with the work as planned; (2) whether the risk is intimately connected with thework or accidental; (3) the degree of risk; and (4) the possibility of anticipating and prescribing definite precautions to avert the anticipated risk or risks (*120 Cal. App. 3d 903, 915-917)* .

In this case, there was substantial evidence that the risk of fire presented by an inadequately tended tar kettle was anticipated by both the contractor and employer, that the use of the tar kettle was indispensable to the roofing job, that the risk was very great, and that it was commonly known by roofers that the hazard could be avoided by taking certain precautions (*120 Cal. App. 3d 903, 917)* .

[c] Factors in Determining Whether Danger Is a Peculiar Risk

Henderson Bros. Stores, Inc. v. Smiley *(1981) 120 Cal. App. 3d 903, 174 Cal. Rptr. 875* , is discussed in *§ 100A.41[3][b].*

[d] Employer's Lack of Knowledge Regarding Special Precautions

In ***McDonald v. City of Oakland*** *(1967) 255 Cal. App. 2d 816, 63 Cal. Rptr. 593* , an industrial painter was killed in an explosion that occurred inside a water tank he was painting pursuant to a written contract between his employer and the city. The paint manufacturer's instructions stated that when the paint was used in a confined area, it was necessary to use an exhaust fan of sufficient capacity to keep vapors below an explosive limit. The instructions further warned that the solvents in the product were volatile and flammable, that containers should be kept away from heat, open flames or sparks, and that certain precautions should be taken when using the product in tanks or other confined areas. The contractor testified that he was familiar with the use of the product and special precautions that needed to be taken. However, the explosion was caused because an inadequate ventilation system was in use. The plaintiffs appealed from a judgment in favor of the city.

The appeals court reversed. The issue on appeal was whether, for liability to attach under § 416 of the Restatement (Second) of Torts, the employer not only must recognize that the work being performed by the contractor necessarily involves peculiar risks of harm unless special precautions are taken, but must also know, or as a reasonable man should know, that the contractor has not taken or planned to take such precautions. The court concluded that such knowledge is not required. Under § 416, liability attaches when the employer knows or should know that the risks described in the

section are involved in a contemplated project and neither the contractor nor employer exercised reasonable care to see that the requisite precautions are taken. The rationale behind imposition of liability on the employer is that the nature of the risk makes it imperative that the most responsible party involved in the transaction, the party for whose benefit the work is being done, should be charged with the ultimate protection of those who are performing the work or who are likely to be injured during its progress. A requirement that the employer must know, or as a reasonable man should know, that the contractor is not taking the requisite precautions would contravene this rationale (*255 Cal. App. 2d 816, 822-823)* .

[4] Additional Authorities

[a] Peculiar Risk Doctrine

In *Torres v. Reardon (1992) 3 Cal. App. 4th 831, 5 Cal. Rptr. 2d 52* , clients of a self-employed gardener hired the gardener to trim a tree. A neighbor who was concerned that a branch would fall on his house pulled on a rope attached to the branch that the gardener was cutting. The gardener fell from the tree and sustained serious injuries. The gardener sued the clients. The court of appeal held that the gardener was an independent contractor, but that the peculiar risk doctrine did not apply to impose vicarious liability on a hirer for injuries sustained by an independent contractor as a result of the contractor's own negligence. In discussing the peculiar risk doctrine, the court of appeal stated that the doctrine is an exception to the general rule that one who employs an independent contractor is not liable for injuries resulting from the contractor's negligence. The doctrine imposes liability on a principal or hirer only for harm to "others," and not for harm to the contractor himself or herself (*3 Cal. App. 4th 831, 839-841)* .

The factual and procedural background of *Privette v. Superior Court (1993) 5 Cal. 4th 689, 21 Cal. Rptr. 2d 72, 854 P.2d 721* , is discussed in *§ 100A.45[3][a]*. The Supreme Court found that liability under the peculiar risk doctrine does not extend to the contractor's employees. The Court reasoned that when an employee of an independent contractor that is hired to do dangerous work suffers a work-related injury, the employee can recover under the workers' compensation system. That system provides compensation regardless of fault and advances the same policies that underlie the peculiar risk doctrine. Thus, when the contractor fails to provide safe working conditions, and such failure results in injuries to the contractor's employee, additional recovery from the hirer of the contractor, who was not negligent, does not advance any societal interest not already served by workers' compensation (*5 Cal. 4th 689, 693-702)* .

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CHAPTER 100A EMPLOYER AND EMPLOYEE: RESPONDEAT SUPERIOR
PART II. FORMS

10-100A California Points & Authorities § 100A.42

AUTHOR: Carolyn Rashby

§ 100A.42 Supporting Contention That Hirer Is Vicariously Liable to Third Party Based on Torts of Independent Contractor--Work Involved Nondelegable Duty

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF CAN RECOVER DAMAGES FROM DEFENDANT FOR INJURIES CAUSED BY THE MISCONDUCT OF DEFENDANT'S INDEPENDENT CONTRACTOR IN REGARD TO _____ [*specify duty*] BECAUSE THE DUTY WAS NONDELEGABLE.

A. Nondelegable Duty Doctrine. A person who hires an independent contractor is liable for the misconduct of the contractor in regard to a duty of the hirer that is deemed nondelegable. Thus, if the law imposes a definite affirmative duty on one by reason of his her relationship with others, whether as an owner or proprietor of land or chattels or in some other capacity, the person cannot escape liability for a failure to perform the duty by entrusting it to an independent contractor (*Van Arsdale v. Hollinger (1968) 68 Cal. 2d 245, 251, 66 Cal. Rptr. 20, 437 P.2d 508*).

B. Sources of Nondelegable Duty. A nondelegable duty may be imposed by statute, charter, common law, or contract (*Van Arsdale v. Hollinger (1968) 68 Cal. 2d 245, 251, 66 Cal. Rptr. 20, 437 P.2d 508* ; *Millsap v. Federal Express Corp. (1991) 227 Cal. App. 3d 425, 433, 277 Cal. Rptr. 807*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that the defendant is liable for the misconduct of his or her independent contractor in regard to a duty because the duty was deemed nondelegable.

This form may be combined with points pertaining to the specific procedural context in which counsel wishes to raise

the substantive issue that the defendant is liable for the misconduct of his or her independent contractor in regard to a duty of the defendant because the duty was nondelegable--for example, in a motion for summary judgment. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that the defendant had a legal duty, including the source of the duty, and that the injury to the plaintiff arose out of the failure of the defendant and the defendant's contractor to perform such duty. For example, counsel could set forth facts indicating that the plaintiff's injury arose out of an automobile accident due to faulty brakes on the defendant's vehicle, and that despite the defendant's argument that a mechanic failed to properly fix the brakes, the vehicle code imposes a nondelegable obligation on the owner of a vehicle to keep that vehicle in safe working condition [*see Maloney v. Rath (1968) 69 Cal. 2d 442, 446-448, 71 Cal. Rptr. 897, 445 P.2d 513]* .

[c] Opposing Memoranda

In an appropriate case, the points and *authorities in § 100A.45* may be used to oppose the contention supported by these points.

[d] Related Pleading and Practice Forms

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[e] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 30, § 30.10[2][d]* (Matthew Bender).

[3] Discussion of Authorities

[a] Nondelegable Duty Doctrine

In ***Van Arsdale v. Hollinger*** *(1968) 68 Cal. 2d 245, 66 Cal. Rptr. 20, 437 P.2d 508* , the plaintiff was struck by an automobile as he was performing road work under a contract between his employer and the city. There was evidence that at the time of the accident, there was no flagman to warn motorists of the road work, the plaintiff was not wearing the required red or orange clothing, and that the plaintiff was working beyond the traffic barricades. The jury found that the city was not negligent, that the plaintiff was not contributorily negligent, and that the plaintiff's employer was negligent. The plaintiff appealed from the judgment in favor of the city.

The court of appeal reversed. The court noted that *Gov. Code § 815.4* provides that a "public entity is liable for injury proximately caused by a tortious act or omission of an independent contractor of the public entityto the same extent that the public entity would be subject to such liability if it were a private person." Thus, the court had to determine whether a private person engaged in the undertaking that the city was engaged in would have been liable for the tortious acts and omissions of an independent contractor (*68 Cal. 2d 245, 249)* . In *Snyder v. Southern Cal. Edison (1955) 44 Cal. 2d 793, 799-801, 285 P.2d 912* , the Court recognized an exception to the general rule that a hirer of an independent contractor is not liable for the torts of the contractor, in the case of a nondelegable duty: "Where the law imposes a definite, affirmative duty [on] one by reason of [his or her] relationship with others, whether as an owner or proprietor of land or chattels or in some other capacity, such persons cannot escape liability for a failure to perform the duty thus imposed by entrusting it to an independent contractor ... . It is immaterial whether the duty thus regarded as 'nondelegable' be imposed by statute, charter or by common law." A further exception to the general rule of nonliability

exists for the misconduct of the independent contractor in the performance of intrinsically dangerous work. With respect to both of these types of exceptions, however, there is the limitation that the employer's liability for the contractor's acts extends only to negligence in failing to take necessary precautions, failing to adopt a reasonably safe method, or in failing to produce a result that it is the duty of the employer to have attained. Such liability, however, does not extend to "collateral" or "casual" negligence on the part of the contractor or the contractor's employees in the performance of the operative detail of the work. Rather, the negligence for which the employer is liable must be intimately connected with the work authorized and such as is reasonably likely from its nature.

The Court stated that this case fell within an exception to the general rule of nonliability for torts of independent contractors as stated in § 416 of the Restatement (Second) of Torts: "One who employs an independent contractor to do work [that] the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise." The Court then proceeded to find that § 416 imposed a nondelegable duty and, in this case, the conditions precedent to that duty appeared as a matter of law. Specifically, absent special precautions to keep traffic from going into the lanes on which the plaintiff was working, the work was highly dangerous. The necessity for such precautions was inherent in the work and was obvious before the work commenced. While the contract of the city provided for such special precautions, this did not satisfy its duty under the language of § 416. Thus, the city had a nondelegable duty to exercise due care and that the city could not avoid that duty by hiring an independent contractor (*68 Cal. 2d 245, 253-255)* .

NOTE:

The Court's holding that an employee of the independent contractor could recover for a breach of a nondelegable duty was overturned in *Privette v. Superior Court (1993) 5 Cal. 4th 689, 21 Cal. Rptr. 2d 72, 854 P.2d 721* [*see § 100A.45* [3][a]].

[b] Sources of Nondelegable Duty

Van Arsdale v. Hollinger *(1968) 68 Cal. 2d 245, 66 Cal. Rptr. 20, 437 P.2d 508* , is discussed in *§ 100A.42[3][a]*.

The factual and procedural background of ***Millsap v. Federal Express Corp.*** *(1991) 227 Cal. App. 3d 425, 277 Cal. Rptr. 807* , is discussed in *§ 100A.34[3][c]*. The court discussed the liability of an express delivery company for personal injuries to the plaintiff caused in an automobile accident with a delivery person who, according to the court, was an independent contractor. The court stated that the general rule of nonliability of an employer for an independent contractor's negligence is subject to exceptions of such magnitude that they leave only a small area in which the general rule operates. In *Capitol Chevrolet Co. v. Lawrence Warehouse Co. (9th Cir. 1955) 227 F.2d 169* , it was held that the rule of nonliability does not apply if a person assumes the contractual duty to perform a service for another. This rule is based on contractual relationships; that is, one who contracts to perform an undertaking is liable to his or her promisee for the negligence of an independent contractor to whom he or she delegates actual performance. Application of this rule in this case, however, would cause the express company to be liable for its independent contractor's torts to the corporation with whom it had contracted to deliver packages, but would not cause the company to be liable for such torts to third parties like the plaintiff. The plaintiff also argued that the liability resulting from the independent contractor's delivery of packages was nondelegable because the operation was regulated by a public agency. The court stated that this rule applies if a public service corporation attempts to delegate its duty to an independent contractor, or if an employer is subject to regulations enacted for the protection of the public. In this case, however, the court found that the express company was not subject to obligations or liabilities imposed by the public authority. Thus, the court concluded that the company was not precluded from delegating t the driver the responsibility of delivering packages without incurring any liability resulting therefrom (*227 Cal. App. 3d 425, 433-435)* .

[4] Additional Authorities

[a] Sources of Nondelegable Duties

In *Maloney v. Rath (1968) 69 Cal. 2d 442, 71 Cal. Rptr. 897, 445 P.2d 513* , the plaintiff sued for personal injuries sustained in an automobile accident caused by faulty brakes on the defendant's vehicle. The defendant had had the brakes completely overhauled by a mechanic about three months prior to the accident and had no reason to know they were defective until they failed. The court found that certain statutory safety provisions, such as those found in the Vehicle Code, create duties that may not be delegated. Thus, the owner of a vehicle is liable for harm caused by the negligence of his or her mechanic in servicing a vehicle even though the mechanic is an independent contractor (*69 Cal. 2d 442, 446-448)* .

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CHAPTER 100A EMPLOYER AND EMPLOYEE: RESPONDEAT SUPERIOR
PART II. FORMS

10-100A California Points & Authorities § 100A.43

AUTHOR: Carolyn Rashby

§ 100A.43 Opposing Contention That Employer Is Vicariously Liable to Third Party Based on Torts of Independent Contractor--Independent Contractor's Conduct Involved Collateral Negligence

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF CANNOT RECOVER DAMAGES FROM DEFENDANT FOR THE MISCONDUCT OF DEFENDANT'S INDEPENDENT CONTRACTOR BECAUSE SUCH MISCONDUCT WAS COLLATERAL NEGLIGENCE IN THAT THE CONTRACTOR'S NEGLIGENCE CONSISTS SOLELY OF THE IMPROPER MANNER IN WHICH HE/SHE PERFORMED THE WORK, THE NEGLIGENCE CREATED A RISK OF HARM NOT INHERENT IN OR NORMAL TO THE WORK, AND THERE IS NO EVIDENCE THAT DEFENDANT HAD ANY REASON TO CONTEMPLATE THE CONTRACTOR'S NEGLIGENCE WHEN THE CONTRACT WAS MADE OR THAT DEFENDANT WAS OTHERWISE NEGLIGENT.

Collateral Negligence Doctrine. Under the doctrine of collateral negligence, an employer is not liable for the acts of his or her independent contractor or the independent contractor's employees if those acts are deemed collateral. Thus, an employer is not liable for harm caused by the contractor if (1) the contractor's negligence consists solely of the improper manner in which he or she does the work, (2) the negligence creates a risk of harm that is not inherent in or normal to the work, and (3) the employer had no reason to contemplate the contractor's negligence when the contract was made and the employer was not otherwise negligent (*Van Arsdale v. Hollinger (1968) 68 Cal. 2d 245, 252, 66 Cal. Rptr. 20, 437 P.2d 508* ; *LaCount v. Hensel Phelps Constr. Co. (1978) 79 Cal. App. 3d 754, 764-765, 145 Cal. Rptr. 244* ; *Smith v. Lucky Stores (1976) 61 Cal. App. 3d 826, 829-831, 132 Cal. Rptr. 628*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that the defendant is liable for the torts of his or her

independent contractor, based on the argument that the independent contractor's conduct involved collateral negligence.

This form may be combined with points pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the defendant is not liable for the torts of his or her independent contractor because the contractor's conduct involved collateral negligence--for example, in a motion for summary judgment. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that the injury to the plaintiff arose out of the contractor's negligence. Counsel also should set forth facts tending to show that the negligence consisted solely of the improper manner in which the contractor did the work, that the risk created by the negligence was not inherent in or normal to the work the contractor was hired to perform, that the defendant had no reason to contemplate the negligence, and that the defendant was not otherwise negligent [*see LaCount v. Hensel Phelps Constr. Co. (1978) 79 Cal. App. 3d 754, 764-765, 145 Cal. Rptr. 244* ; *Smith v. Lucky Stores (1976) 61 Cal. App. 3d 826, 829-831, 132 Cal. Rptr. 628]* .

[c] Related Pleading and Practice Forms

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[d] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 30, § 30.10[4]* (Matthew Bender).

[3] Discussion of Authorities

[a] Collateral Negligence Doctrine

Van Arsdale v. Hollinger *(1968) 68 Cal. 2d 245, 66 Cal. Rptr. 20, 437 P.2d 508* , is discussed in *§ 100A.42[3][a]*.

In ***LaCount v. Hensel Phelps Constr. Co.*** *(1978) 79 Cal. App. 3d 754, 145 Cal. Rptr. 244* , an independent contractor's employee brought a personal injury action against the general contractor in charge of a rapid transit district construction project. The independent contractor was to fabricate several concrete girders on the general contractor's premises. Each girder weighed about 100 tons, and the independent contractor then had to transfer them to the construction site by river barges, which had to be trimmed by the use of ballast loaded into them from the trolley slung under a crane. The load capacity of the trolley was not correctly marked, and the employee was injured when a 16-ton load of ballast, which the foreman thought was only 10 tons, tore the trolley from the crane and knocked the employee into the water. The general contractor appealed after the jury returned a verdict in favor of the plaintiff.

The appeals court affirmed. The court discussed the defendant's contention that the peculiar risk doctrine had no application to this case because the plaintiff's injuries resulted from the collateral negligence of the independent contractor. The peculiar risk doctrine, as contained in §§ 413 and 416 of the Restatement (Second) of Torts, presents an exception to the general rule that an employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or the contractor's employees. § 427 of the Restatement provides a further exception in the case of inherently dangerous work. Despite these exceptions, the employer of an independent contractor is not liable for the "collateral" or "casual" negligence by an employee the independent contractor. § 426 of the Restatement (Second) of Torts states the collateral negligence rule as follows: "[A]n employer of an independent contractor, unless [the employer] is [himself or herself] negligent, is not liable for physical harm caused by any negligence of the contractor if (a) the contractor's negligence consists solely in the improper manner in which [the

contractor] does the work, and (b) it creates a risk of such harm [that] is not inherent in or normal to the work, and (c) the employer had no reason to contemplate the contractor's negligence when the contract was made." The comment to this section states that the distinction between negligence of the independent contractor and collateral negligence is "one of negligence [that] is unusual or abnormal, or foreign to the normal or contemplated risks of doing the work, as distinguished from negligence [that] creates only the normal or contemplated risk." In this case, the court found that the independent contractor's conduct did not involve collateral negligence. The contractor was hired to move girders from the construction yard where they were fabricated to the barges on which they were to be transported to the place of installation. The defendant knew that the loading operations would involve the lifting of aerial girders and the ballast girders. A major inherent risk in any crane operation is the overloading of the crane. Since it was necessary to use the ballast to balance the barges, the use of the ballast was an integral part of the loading procedure. Thus, there was a direct causal relationship between the peculiar risk inherent in the work of loading for proper transportation 100-ton girders and the material necessary to balance the load, and the plaintiff's injuries, which were sustained when a crane that was being used to load the ballasts was overloaded (*79 Cal. App. 3d 754, 764-766)* .

NOTE:

Privette v. Superior Court (1993) 5 Cal. 4th 689, 21 Cal. Rptr. 2d 72, 854 P.2d 721 [*see § 100A.45[3][a*]], overrules this case to the extent it holds that employees of an independent contractor can sue the contractor's employer under the peculiar risk doctrine.

In ***Smith v. Lucky Stores*** *(1976) 61 Cal. App. 3d 826, 132 Cal. Rptr. 628* , the plaintiff sued a supermarket corporation for personal injuries sustained when a large letter from a sign that had just been removed from the defendant's building fell on her. The defendant had hired an independent contractor to remove the sign from the building. After the contractor had lowered the sign to the sidewalk and leaned it against its truck, the worker holding it negligently let go and a gust of wind blew it over onto the plaintiff. The trial court entered judgment for the defendant, and the plaintiff appealed.

The court of appeal affirmed, stating that the defendant would have been liable for the negligence of its contractor had the plaintiff been injured while the sign was being lowered to the ground; but once the letter had reached the pavement, the defendant's responsibility for the contractor's negligence ceased. The trouble with the plaintiff's case, according to the court, it that it was a textbook example of "collateral" or "casual" negligence by an employee ofan independent contractor for which the employer of the contractor is held not to be responsible. The premise of the doctrine is that if harm results from a risk other than the one that makes the employer liable for the negligence of the independent contractor, the reason for imposing such liability no longer applies. There must be a relationshipbetween the particular act of negligence of the contractor and the peculiar risk involved in the work in order to justify a departure from the general rule of nonliability. In this case, the manner in which the independent contractor's worker held onto the letter after it reached the ground was totally unrelated to any aspect of the contractor's work that would have justified a departure from the general rule of nonliability (*61 Cal. App. 3d 826, 829-831)* .

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CHAPTER 100A EMPLOYER AND EMPLOYEE: RESPONDEAT SUPERIOR
PART II. FORMS

10-100A California Points & Authorities § 100A.44

AUTHOR: Carolyn Rashby

§ 100A.44 Opposing Contention That Employer Is Vicariously Liable to Third Party Based on Torts of Independent Contractor--Peculiar Risk Doctrine Not Applicable

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF CANNOT RECOVER DAMAGES FROM DEFENDANT FOR THE TORTS OF DEFENDANT'S INDEPENDENT CONTRACTOR BECAUSE THE GENERAL RULE IS THAT AN EMPLOYER IS NOT LIABLE FOR THE TORTS OF HIS OR HER INDEPENDENT CONTRACTOR AND THE WORK DID NOT INVOLVE A PECULIAR RISK.

A. General Rule of Nonliability. The general rule is that an employer of an independent contractor is not liable for the torts of the contractor or the contractor's employees (*Johnson v. Tosco Corp. (1991) 1 Cal. App. 4th 123, 131, 1 Cal. Rptr. 2d 747*).

B. Peculiar Risk Doctrine. Under the peculiar risk doctrine, one who employs an independent contractor to do work that the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractors to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise (Restatement (Second) of Torts § 416; *Johnson v. Tosco Corp. (1991) 1 Cal. App. 4th 123, 132, 1 Cal. Rptr. 2d 747*).

C. Work Did Not Involve Peculiar Risk. A peculiar risk is something other than the ordinary and customary dangers that may arise in the course of the work or of normal human activity. A risk is not a peculiar risk unless it is peculiar to the work to be done that arises from the character of the work or from the place where the work is to be done, against which a reasonable person would recognize the necessity of taking special precautions (*Johnson v. Tosco Corp. (1991) 1 Cal. App. 4th 123, 132, 1 Cal. Rptr. 2d 747*).

D. Routine Negligence Does Not Provide Basis for Liability Under Peculiar Risk Doctrine. Routine negligence does not provide a basis for liability under the peculiar risk doctrine. Thus, a contractor's use of defective equipment or misuse of equipment is not within the doctrine (*Johnson v. Tosco Corp. (1991) 1 Cal. App. 4th 123, 133, 1 Cal. Rptr. 2d 747* ; *Stark v. Weeks Real Estate (1979) 94 Cal. App. 3d 965, 972, 156 Cal. Rptr. 701*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that the defendant is vicariously liable for the torts of his or her independent contractor, on the grounds that the peculiar risk doctrine does not apply. In an appropriate case, This form may be submitted in opposition to the contention supported by the points and *authorities in § 100A.41*.

This form may be combined with points pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the peculiar risk doctrine is not applicable--for example, in a motion for summary judgment. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that the work the contractor was hired to perform did not involve a peculiar risk, including facts indicating that the risk was not foreseeable nor intimately connected with the work, there was not a high degree of risk, and that a reasonable person would not have recognized that it was necessary to take precautions to guard against the risk [*Johnson v. Tosco Corp. (1991) 1 Cal. App. 4th 123, 132, 1 Cal. Rptr. 2d 747* ; *Henderson Bros. Stores, Inc. v. Smiley (1981) 120 Cal. App. 3d 903, 916-917, 174 Cal. Rptr. 875* , discussed in *§ 100A.41*]. If the work did involve a peculiar risk, counsel should demonstrate that the injury to the plaintiff arose out of a risk unconnected to the work itself, such as the contractor's misuse of equipment or use of defective equipment, and should argue that such routine negligence does not provide the basis forliability under the peculiar risk doctrine [*Johnson v. Tosco Corp. (1991) 1 Cal. App. 4th 123, 131-133, 1 Cal. Rptr. 2d 747]* .

[c] Related Pleading and Practice Forms

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[d] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 30, §§ 30.10[1], 30.10[2][b]* (Matthew Bender).

[3] Discussion of Authorities

[a] General Rule of Nonliability

The factual and procedural background of ***Johnson v. Tosco Corp.*** *(1991) 1 Cal. App. 4th 123, 1 Cal. Rptr. 2d 747* , is discussed in *§ 100A.41[3][a]*. The court stated the general rule that an employer of an independent contractor is not liable for the negligence of the contractor or its employees. However, exceptions to the rule have become so numerous that the rule is applied only if there is no good reason to depart from it. One such exception is the peculiar risk doctrine. California courts have adopted the peculiar risk doctrine as stated in § 416 of the Restatement (Second) of Torts that "one who employs an independent contractor to do work that the employer should recognize as likely to create during

its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise." Comment b to § 413 states that the doctrine applies to "special risks, peculiar to the work to be done, and arising out of its character, or out of the place where it is to be done, against which a reasonable [person] would recognize the necessity of taking special precautions. The situation is one in which a risk is created that is not a normal, routine matter of customary human activity, such as driving an automobile, but is rather a special danger to those in the vicinity, arising out of the particular situation created, and calling for special precautions. 'Peculiar' ... has reference only to a special recognizable danger arising out of the work itself." Comment b further provides that "[i]t is obvious that an employer of an independent contractor may always anticipate that if the contractor is in any way negligent toward third persons, some harm to such persons may result ... . [The doctrine] has no reference to such a general anticipation of the possibility that the contractor may in some way be negligent. It is not concerned with the taking of routine precautions, of a kind [that] any careful contractor could reasonably be expected to take, against all of the ordinary and customary dangers which may arise in the course of the contemplated work." The court stated that a contractor's use of defective equipment, which the employer had no part in selecting, does not bring the contractor's conduct within the peculiar risk doctrine, nor does the contractor's misuse of equipment, whether or not defective, give rise to the doctrine (*1 Cal. App. 4th 123, 131-133)* .

In this case, the court found that the use of the particular type of scaffolding did not present a peculiar risk; it was of a standard type commonly used in the construction industry, the required fittings alleged by the plaintiff to be missing were ordinary elements of the scaffold rather than special precautions directed against unusual hazards, and the installation of the scaffolding by specially trained personnel was a routine precaution found in most phases of construction work. Further, the plaintiff's injury resulted from the provision of a defective piece of scaffolding and the negligent use of the equipment. Both of these elements of negligence, according to the court, lay outside the peculiar risk doctrine (*1 Cal. App. 4th 123, 133-134)* .

[b] Peculiar Risk Doctrine

Johnson v. Tosco Corp. *(1991) 1 Cal. App. 4th 123, 1 Cal. Rptr. 2d 747* , is discussed in *§ 100A.44[3][a]*.

[c] Work Did Not Involve Peculiar Risk

Johnson v. Tosco Corp. *(1991) 1 Cal. App. 4th 123, 1 Cal. Rptr. 2d 747* , is discussed in *§ 100A.44[3][a]*.

[d] Routine Negligence Does Not Provide Basis for Liability Under Peculiar Risk Doctrine

Johnson v. Tosco Corp. *(1991) 1 Cal. App. 4th 123, 1 Cal. Rptr. 2d 747* , is discussed in *§ 100A.44[3][a]*.

In ***Stark v. Weeks Real Estate*** *(1979) 94 Cal. App. 3d 965, 156 Cal. Rptr. 701* , a carpenter who was employed by an independent contractor building homes on property owned by the defendant, who hired the contractor, sustained injuries while using a power saw. The trial court entered judgment for the defendant, and the plaintiff appealed.

The court of appeal affirmed, stating that the issue for appeal was whether an employee of an independent contractor could maintain a suit against the hirer under the peculiar risk exception to the general rule that one who employs an independent contractor is not liable for injuries caused by the negligence of the contractor. After discussing the circumstances under which the peculiar risk doctrine is applicable, the courtnoted that comments to §§ 413 and 416 of the Restatement (Second) of Torts refines the application of the doctrine by removing from its ambit certain routine types of negligent conduct. Comment b to § 413 provides that an employer of an independent contractor may always anticipate that if the contractor is in any way negligent, harm to third persons may result. Thus, one who hires a trucker to transport his or her goods must realize that if the truck is driven too fast or with defective breaks, some harm to others on the highway is likely to occur. The peculiar risk rule has no reference to such a general anticipation of the possibility

that the contractor may be negligent. The doctrine is not concerned with the taking of routine precautions that any careful contractor could reasonably be expected to take against all of the ordinary and customary dangers that may arise in the course of the contemplated work. Comment d to § 416 provides that a peculiar risk must involve a special hazard resulting from the nature of the work, which calls for special precautions. Thus, if a contractor is hired to transport the employer's goods by truck, the employer is not liable for the contractor's failure to inspect the brakes on the contractor's truck or for driving too fast, because the risk is not peculiar, and only an ordinary precaution is called for. But if the contractor is hired to transport giant logs weighing several tons over the highway, the employer will be subject to liability for the contractor's failure to take special precautions to anchor them on the contractor's truck (*94 Cal. App. 3d 965, 971-972)* .

The court stated that it had found no case in which the peculiar risk doctrine had been extended to injuries caused by the negligent use or misuse of hand tools by the independent contractor or its employees, and that it did not believe that the risk involved from that type of activity is the type of risk the doctrine is intended to cover. It is obvious that every owner who employs an independent contractor can anticipate that employees of the contractor may misuse hand tools, thus endangering themselves and third parties. This risk is always present, and there is nothing peculiar about it; it is a usual, common and anticipatable danger in the routine performance of the work, against which the owner is not required to take special precautions. The court concluded that if this type of risk were to be considered within the peculiar risk doctrine, it would be hard to imagine any type of negligence of the contractor or the contractor's employees for which the hirer could not be held liable (*94 Cal. App. 3d 965, 972)* .

California Points & Authorities

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 100A EMPLOYER AND EMPLOYEE: RESPONDEAT SUPERIOR
PART II. FORMS

10-100A California Points & Authorities § 100A.45

AUTHOR: Carolyn Rashby

§ 100A.45 Opposing Contention That Employer Is Vicariously Liable to Third Party Based on Torts of Independent Contractor--Employees of Independent Contractor Cannot Recover Under Peculiar Risk Doctrine

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF CANNOT RECOVER DAMAGES FROM DEFENDANT FOR THE MISCONDUCT OF DEFENDANT'S INDEPENDENT CONTRACTOR BECAUSE PLAINTIFF WAS AN EMPLOYEE OF THE INDEPENDENT CONTRACTOR AT THE TIME OF THE INCIDENT AND WORKERS' COMPENSATION IS HIS/HER SOLE REMEDY.

A. Peculiar Risk Doctrine Not Applicable to Injured Employee of Independent Contractor. Employees of an independent contractor who are injured by the fault of the contractor cannot sue the hirer of the contractor based on the peculiar risk doctrine. Workers' compensation is the sole remedy for such employees (*Privette v. Superior Court (1993) 5 Cal. 4th 689, 696-702, 21 Cal. Rptr. 2d 72, 854 P.2d 721*).

B. *Privette* Applicable Despite Express Indemnity Agreement. The *Privette* holding, that a person who hires an independent contractor may not be held vicariously liable under the doctrine of peculiar risk for an on-the-job injury to an employee of that contractor, applies even if there is an express indemnity agreement between the independent contractor and the person who hired the contractor [*Redfeather v. Chevron USA, Inc. (1997) 57 Cal. App. 4th 702, 705, 67 Cal. Rptr. 2d 159]* .

C. *Privette* Is Retroactive. The *Privette* holding, that a person who hires an independent contractor may not be held vicariously liable under the doctrine of peculiar risk for an on-the-job injury to an employee of that contractor, is retroactive [*Redfeather v. Chevron USA, Inc. (1997) 57 Cal. App. 4th 702, 707, 67 Cal. Rptr. 2d 159]* .

D. "Hirer" May Be Owner, Lessee or General Contractor. The doctrine of peculiar risk shields the person who

hired an independent contractor from peculiar risk liability and "the person who hired the contractor" can be an owner, a lessee or a generalcontractor (*Lopez v. University Partners (1997) 54 Cal. App. 4th 1117, 1123, 63 Cal. Rptr. 2d 359*).

E. *Privette* Bars Recovery by Employee Whether Hirer Provided for Special Precautions or Not. The *Privette* holding, that a person who hires an independent contractor may not be held liable under the doctrine of peculiar risk for an on-the-job injury to an employee of that contractor, bars employees of a hired contractor who are injured by the contractor's negligence from seeking recovery against the hiring person, irrespective of whether recovery is sought under the theory of peculiar risk set forth in Restatement (Second) of Torts Section 413 or 416 (*Toland v. Sunland Hous. Group, Inc. (1998) 18 Cal. 4th 253, 267* ; Restatement (Second) of Torts §§ 413, 416).

F. Hirer Not Liable for Injury to Contractor's Employee for Failing to Exercise General Supervisory Power Over Safety. The hirer of an independent contractor is not liable for an injury to an employee of that independent contractor merely because the hirer retained control over safety conditions at a work site, if the hirer's exercise of retained control over safety did not affirmatively contribute to the employee's injury (*Hooker v. Department of Transp. (2002) 27 Cal. 4th 198, 202, 115 Cal. Rptr. 2d 853, 38 P.3d 1081* ; *Kinney v. CSB Constr., Inc. (2001) 87 Cal. App. 4th 28, 36, 103 Cal. Rptr. 2d 594*).

G. *Privette* Bars Recovery by Injured Employee for Negligent Hiring of Contractor. An employee of an independent contractor who is injured on the job cannot sue the hirer of the contractor for negligence in hiring the contractor (*Camargo v. Tjaarda Dairy (2001) 25 Cal. 4th 1235, 1244-1245, 108 Cal. Rptr. 2d 617, 25 P.3d 1096*).

H. Contractor's Employee Cannot Sue Hirer Even If Contractor Fails to Provide Workers' Compensation Coverage. An injured employee of an independent contractor cannot sue the hirer of the contractor even if the contractor fails to provide workers' compensation coverage (*Lopez v. C.G.M. Dev., Inc. (2002) 101 Cal. App. 4th 430, 444-445, 124 Cal. Rptr. 2d 227*).

[*Optional*] **I. Hirer's Violation of Nondelegable Duty Must Affirmatively Contribute to Employee's Injury.** Under the rule of *Privette v. Superior Court* and its progeny, even if a nondelegable duty exists, a hirer is not liable to an injured employee of an independent contractor unless the hirer's conduct affirmatively contributed to the employee's injury (*Park v. Burlington N. Santa Fe Ry. Co. (2003) 108 Cal. App. 4th 595, 610-611, 133 Cal. Rptr. 2d 757*).

[*Optional*] **J. Agent of Hirer Protected to Same Extent as Hirer.** The principles governing the liability of a hirer apply equally to a claim against an agent of the hirer who has been delegated the responsibility to oversee safety for the hirer (*Ruiz v. Herman Weissker, Inc. (2005) 130 Cal. App. 4th 52, 61-62, 29 Cal. Rptr. 3d 641*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a contention that the defendant is vicariously liable under the peculiar risk doctrine for harm caused to his or her independent contractor's employees, on the grounds that the peculiar risk doctrine is not applicable to such employees. In an appropriate case, these points may be submitted in opposition to the contention supported by the points and *authorities in § 100A.41*.

This form may be combined with points pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the peculiar risk doctrine is not applicable to injured employees of an independent contractor--for example, in a demurrer or motion for summary judgment. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that the plaintiff was an employee of the independent contractor hired by the defendant, and that the injury to the plaintiff arose out of the negligence of the independent contractor. Counsel should argue that even if the work that the contractor was hired to perform did involve a peculiar risk, such doctrine is inapplicable to impose liability on a hirer for injuries to a contractor's employees, and workers' compensation is the plaintiff's sole remedy [*Privette v. Superior Court (1993) 5 Cal. 4th 689, 695-696, 700-702, 21 Cal. Rptr. 2d 72, 854 P.2d 721]* .

[c] Related Pleading and Practice Forms

For a general form of demurrer to a complaint based on the failure to state facts sufficient to constitute a cause of action, see *California Formsof Pleading and Practice, Ch. 206, Demurrers and Motions for Judgment on the Pleadings, § 206.122* (Matthew Bender). For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[d] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 30, § 30.10[2][b]* (Matthew Bender).

[3] Discussion of Authorities

[a] Peculiar Risk Doctrine Not Applicable to Injured Employee of Independent Contractor

In ***Privette v. Superior Court*** *(1993) 5 Cal. 4th 689, 21 Cal. Rptr. 2d 72, 854 P.2d 721* , an employee of a roofing company that had been hired to install a new roof on a duplex was injured while attempting to carry a bucket of hot tar up a ladder to the roof. He sued the duplex owner under the peculiar risk doctrine, and the trial court denied the duplex owner's motion for summary judgment. After the court of appeal summarily denied the duplex owner's petition for a writ of mandate, the Supreme Court reversed, with directions to grant the petition for a writ of mandate ordering the trial court to enter judgment for the duplex owner.

The issue before the Supreme Court was whether employees of an independent contractor who is hired to perform inherently dangerous work can sue the contractor's hirer under the peculiar risk doctrine when the contractor's negligent performance of the work injures them. The Court noted that at common law, a person who hired an independent contractor generally was not liable to third parties for injuries caused by the contractor's negligence. The reasoning behind this rule was that the work performed was the enterprise of the contractor who would be better able than the hirer to absorb accident losses incurred in the course of the work, such as by including the cost of safety precautions and insurance coverage in the contract price. Over time, however, courts created numerous exceptions to the rule of nonliability, one such exception being the doctrine of peculiar risk. The doctrine was adopted originally to ensure that innocent third parties injured by the negligence of an independent contractor hired by a landowner to do inherently dangerous work on the land would not have to depend on the contractor's solvency in order to receive compensation for their injuries. Gradually, the doctrine was expanded to allow the hired contractor's employees to seek recovery from the nonnegligent properly owner for injuries caused by the negligent contractor. California is among a minority of jurisdictions that adopted this view. In *Woolen v. Aerojet Gen. Corp. (1962) 57 Cal. 2d 407, 20 Cal. Rptr. 12, 369 P.2d 708* , the Supreme Court first adhered to the view that an employee an independent contractor could seek tort damages from the hirer of the contractor under the peculiar risk doctrine. Since that decision, the Court did not have occasion to reconcile it with the workers' compensation scheme (*5 Cal. 4th 689, 693-694, 696)* .

According to the Court, a person held liable under the peculiar risk doctrine is entitled to equitable indemnity from the independent contractor at fault. The Court also discussed the nature of peculiar risk, stating that it is a special,

recognizable danger arising out of the work itself, and does not mean a risk that is abnormal to the type of work done, nor a risk that is abnormally great. But even if the work involves a peculiar risk, the hirer will not be liable if the injury results from the contractor's casual or collateral negligence (*5 Cal. 4th 689, 695-696)* .

The Court also discussed the purpose of the workers' compensation scheme in California. Under the workers' compensation act, when the conditions of compensation exist, workers' compensation is the exclusive remedy against an employer for the injury or death of the employee, regardless of fault. In *S.G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal. 3d 341, 354, 256 Cal. Rptr. 543, 769 P.2d 399* , the Court articulated four objectives of the workers' compensation act: "(1) to ensure that the cost of industrial injuries will be part of the cost of goods rather than a burden on society, (2) to guarantee prompt, limited compensation for an employee's work injures, regardless of fault, as an inevitable costs of production, (3) to spur increased industrial safety, and (4) in return, to insulate the employer from tort liability for [his or her] employee's injuries."

When an independent contractor causes injury to the contractor's own employee, the workers' compensation exclusive remedy provisions shield the contractor from further liability for the injury. Yet under the peculiar risk doctrine, the person who hired the independent contractor can be held liable in tort for the same injury-causing conduct of the contractor. The Court noted that this anomalous result has been widely criticized. Moreover, a majority of courts that have considered the issue have refused to extend the peculiar risk doctrine to allow such an employee to recover tort damages from the hirer of the contractor, reasoning that a principal who hires a contractor should be subject to no greater liability than the contractor whose exposure is limited to providing workers' compensation insurance, or that the workers' compensation exclusivity rule should equally protect the hirer because the hirer is indirectly paying for the cost of workers' compensation insurance coverage (*5 Cal. 4th 689, 697-699)* .

Further, courts and legal commentators have expressed concern that to allow a contractor's employees who incur work-related injuries compensable under the workers' compensation system to also seek damages fromthe person who hired the contractor would give the employees an unwarranted windfall. Permitting such recovery would allow these employees something that is denied to other workers: the right to recover tort damages for injuries caused by their employer's failure to maintain a safe work environment. In addition, to impose vicarious liability for tort damages on a person who hires an independent contractor for specialized work would penalize such persons who hire experts to perform dangerous work, rather than assigning such activity to their own inexperienced employees (*5 Cal. 4th 689, 699-700)* .

The Court discussed the fact that equitable indemnity against the independent contractor is available to the contractor's hirer who is held liable under the peculiar risk doctrine for injuries to a third party. But such indemnity is not available against a contractor who is shielded from liability under the workers' compensation system. The availability of equitable indemnity is one of the policy reasons underlying the peculiar risk doctrine. Additionally, the doctrine seeks to ensure that injuries caused by contracted work will not go uncompensated, that the risk of loss is spread to the person who contracted for and primarily benefited from the work, that adequate safety measures are taken to prevent injuries resulting from the work. But in the case of an injury to an employee of the independent contractor, the workers' compensation system regardless of fault achieves the identical purposes. Thus, considered in light of the goals of the workers' compensation scheme, the Court concluded that its decision in *Woolen* that peculiar risk liability should extend to employees the independent contractor did not withstand scrutiny (*5 Cal. 4th 689, 700-702)* .

[b] Privette Applicable Despite Express Indemnity Agreement

In ***Redfeather v. Chevron USA, Inc.*** *(1997) 57 Cal. App. 4th 702, 67 Cal. Rptr. 2d 159* , the defendant contracted with a company to close down an oil well. The contract contained an express indemnity agreement requiring the independent contractor to indemnify the defendant against all liability for injury to an employee of the contractor. The plaintiff, an employee of the independent contractor, was injured when well pipe and down hole equipment fell on him after coming loose from a hoisting mechanism.

The plaintiff sued the defendant. A jury trial took place that resulted in a special verdict in favor of the defendant. The plaintiff requested that the judgment be set aside, arguing that under the peculiar risk doctrine, the defendant was vicariously liable for the independent contractor's failure to take reasonable precautions. The judge heard the plaintiff's request, determined that the defendant should be liable and ordered a new trial. Before the new trial was held, the Supreme Court handed down its decision in *Privette v. Superior Court (1993) 5 Cal. 4th 689, 692, 21 Cal. Rptr. 2d 72, 854 P.2d 721* , holding that the application of liability under the peculiar risk doctrine to a person who hires an independent contractor for the injuries of that contractor's employees conflicts with the exclusive remedy provisions of the workers' compensation laws. The plaintiff moved for an order declaring that the rule in *Privette* not be held retroactive. The trial court determined that *Privette* was to be applied retroactively, judgment was entered in favor of the defendant, and the plaintiff appealed.

On appeal, the plaintiff contended that the rule in *Privette* should not apply if the party who hires an independent contractor has an express indemnity agreement with that contractor, even though the sole basis of liability against the hiring party is the peculiar risk doctrine. The court of appeal disagreed, stating that just because the hiring party may obtain indemnity from the independent contractor is no reason to carve out an exception to *Privette*. According to the court, the unfairness of imposing peculiar risk liability if indemnity was not available was only one reason behind the *Privette* decision. The overarching principle in *Privette* was whether liability advanced any societal interest that was not already served by the workers' compensation system. On that score, the presence of an express indemnity agreement made no difference (*57 Cal. App. 4th 702, 705)* . The court reasoned that holding otherwise would: (1) make both the hirer and the independent contractor pay for the same risk twice in the form of workers' compensation and liability insurance; (2) denude subcontractors of the protection of the exclusive remedy provisions of the workers' compensation laws; (3) result in an unwarranted windfall to employees who work for independent contractors and also are entitled to a workers' compensation recovery; and (4) penalize persons who hire experts to perform dangerous work rather than assigning this activity to their own inexperienced employees (*57 Cal. App. 4th 702, 707)* .

[c] Privette Is Retroactive

The facts and procedural background of ***Redfeather v. Chevron USA, Inc.*** *(1997) 57 Cal. App. 4th 702, 67 Cal. Rptr. 2d 159* , are discussed in *§ 100A.45[3][b]*. The plaintiff argued on appeal that *Privette*, even if otherwise applicable, should not be held retroactive. The court of appeal disagreed and held that *Privette* was retroactive, that it merely conformed the law to the standard assumption that on-the-job injuries are a matter for the workers' compensation system (*57 Cal. App. 4th 702, 708)* .

[d] "Hirer" May Be Owner, Lessee or General Contractor

In ***Lopez v. University Partners*** *(1997) 54 Cal. App. 4th 1117, 63 Cal. Rptr. 2d 359* , a property owner leased a property, and the lessee contracted with an excavating company to excavate and remove underground storage tanks on the leased premises. The plaintiff was working for his employer in an excavation pit when the walls of the pit collapsed. The plaintiff suedthe property owner as well as the lessee for personal injuries he sustained as a result of the collapse. The trial court concluded that both defendants were not liable to the plaintiff because under *Privette v. Superior Court (1993) 5 Cal. 4th 689, 21 Cal. Rptr. 2d 72, 854 P.2d 721* , an owner who hires an independent contractor cannot be held vicariously liable under the peculiar risk doctrine for injuries suffered on the job by the contractor's employees. The issue on appeal was whether *Privette* applied in an action against a lessee rather than an owner of the construction site where the lessee was acting as a general contractor at the site.

The court of appeal affirmed, holding that because the plaintiff was unable to show the existence of a triable issue of fact as to the applicability of *Privette*, the plaintiff could not recover under the peculiar risk doctrine as a matter of law (*54 Cal. App. 4th 1117, 1125)* . The plaintiff argued that *Privette* did not bar his action against lessee because it did not hire the excavation company as an "owner" of the construction site, but rather as a general contractor. The court ruled

that the holding in *Privette* was not limited to owners. Rather, the holding excludes from peculiar risk liability "the person who hired the contractor but did not cause the injuries." "The person who hired the contractor" could be an owner, a lessee or a general contractor. The court then stated that it need not decide whether *Privette* shields general contractors from liability for injuries to employees of subcontractors any less than owners, because in this case there was no admissible evidence in the record that lessee was acting as a general contractor when it hired the excavation company (*54 Cal. App. 4th 1117, 1123)* .

[e] Privette Bars Recovery by Employee Whether Hirer Provided for Special Precautions or Not

In ***Toland v. Sunland Hous. Group, Inc.*** *(1998) 18 Cal. 4th 253* , the plaintiff was working for a framing subcontractor at a housing development under construction. He was injured when a large and heavy framed wall, which he and other employees were raising, fell on him. The plaintiff sought recovery from his employer under the Workers' Compensation Act. He also sued the defendant, the project's owner and general contractor, alleging that raising the wall created a peculiar risk of injury for which the defendant should have required the subcontractor to take special precautions. The defendant moved for summary judgment, asserting that the plaintiff's action was barred under the Supreme Court's decision in *Privette v. Superior Court (1993) 5 Cal. 4th 689, 21 Cal. Rptr. 2d 72, 854 P.2d 721* , holding that a person who hires an independent contractor may not be held liable under the doctrine of peculiar risk for an on-the-job injury to an employee of that contractor. For discussion of *Privette*, see *§ 100A.45[3][a]*. The trial court entered summary judgment for the defendant. The court of appeal affirmed.

The plaintiff argued that *Privette* had eliminated peculiar risk liability for employees of independent contractors only in actions based on Restatement (Second) of Torts § 416, but that *Privette* had no effect on an action such as his, which was brought under Restatement (Second) of Torts § 413. The plaintiff's argument rested on the distinction some courts and commentators have drawn between these two Restatement sections, characterizing the liability under Restatement (Second) of Torts § 413 as "direct" liability, while describing the liability under Restatement (Second) of Torts § 416 as "vicarious" liability. The Supreme Court found that this distinction was misleading, for liability under these sections was neither purely direct nor purely vicarious (*18 Cal. 4th 253, 264)* . Under Restatement (Second) of Torts § 416, a person who hires a contractor to do inherently dangerous work is subject to liability for harm caused by a contractor's failure to take special precautions, even though the hirer has provided for such precautions in the contract or otherwise. Because the hirer's liability under this section flows from the independent contractor's negligent failure to take special precautions in performing the inherently dangerous work, the hirer's liability is sometimes referred to as "vicarious liability." Under Restatement (Second) of Torts § 413, a person who hires a contractor to do work that imposes a peculiar unreasonable risk of harm to others unless special precautions are taken, is subject to liability for harm caused by the absence of such precautions. Because this section rests the liability of the hirer on his or her omission to provide for special precautions in the contract or in some other manner, it is sometimes described as a rule of "direct" liability.

Ultimately, the Supreme Court held that contrary to the plaintiff's assertion, its decision in *Privette* barred employees of a hired contractor who are injured by the contractor's negligence from seeking recovery against the hiring person, irrespective of whether recovery was sought under the theory of peculiar risk set forth in Restatement (Second) of Torts § 416 or 413 (*18 Cal. 4th 253, 267)* . In so holding, the Court disapproved an earlier court of appeals case, *Owens v. Giannetta-Heinrich Constr. Co. (1994) 23 Cal. App. 4th 1662* , which had incorrectly interpreted its decision in *Privette*, as applying only to the theory of peculiar risk described in Restatement (Second) of Torts § 416 (*18 Cal. 4th 253, 270 fn. 5*).

The Court's decision was premised on the policy considerations stated in *Privette*; that it was illogical and unfair that a landowner or other person who hired an independent contractor should have greater liability for the independent contractor's negligence towards the contractor's employees than the independent contractor whose liability was limited to providing workers' compensation coverage. Imposing on the hirer a liability greater than that incurred by the independent contractor (the party with the greatest and most direct fault) was, in the opinion of the Court, equallyunfair and illogical whether the hirer's liability was premised on the theory of Restatement (Second) of Torts § 416 or 413 (*18*

Cal. 4th 253, 270) .

[f] Hirer Not Liable for Injury to Contractor's Employee for Failing to Exercise General Supervisory Power Over Safety

In ***Hooker v. Department of Transp.*** *(2002) 27 Cal. 4th 198, 115 Cal. Rptr. 2d 853, 38 P.3d 1081* , the plaintiff was the widow of the decedent, who was working as the employee of an independent contractor hired by the California Department of Transportation (Caltrans) to construct an overpass. The decedent was killed when he attempted to swing the boom on the crane he was operating without having the outriggers extended. He had retracted the outriggers to allow other vehicles to pass, and the weight of the boom caused the crane to topple when the decedent tried to swing it without re-extending the outriggers. The plaintiff sued Caltrans on the theory that it had negligently exercised the authority to control safety at the construction site that it had retained when it hired the contractor. Caltrans successfully moved for summary judgment on the grounds that a suit against the hirer of an independent contractor by an employee of the contractor for negligent exercise of retained control was barred by the California Supreme Court's decisions in *Privette v. Superior Court (1993) 5 Cal. 4th 689, 21 Cal. Rptr. 2d 72, 854 P.2d 721* [*see § 100A.45[3][a]*], and *Toland v. Sunland Hous. Group, Inc. (1998) 18 Cal. 4th 253* [*see § 100A.45[3][g]*]. The plaintiff appealed, the court of appeal reversed, and the defendant appealed.

The California Supreme Court reversed the court of appeal, holding that the hirer of an independent contractor is not liable to the employee of a contractor merely because the hirer retained control over safety conditions at a work site. Instead, liability may only be imposed if a hirer's exercise of retained control affirmatively contributes to the employee's injuries (*27 Cal. 4th 198, 202)* . The Court first reviewed its prior decisions in *Privette, Toland, and Camargo v. Tjaarda Dairy (2001) 25 Cal. 4th 1235, 108 Cal. Rptr. 2d 617, 25 P.3d 1096* [*see § 100A.45[3][g]*]. The Court then reviewed the approaches taken by courts in other jurisdictions to the question of whether § 414 of the Restatement (Second) of Torts, which formed the basis for the plaintiff's theory of liability based on failure to use reasonable care in exercising control over work site safety, applies if the injured party is an employee of an independent contractor. Although the Court noted that the California court of appeal had taken different approaches in separate decisions, it agreed with the approach taken in *Kinney v. CSB Constr., Inc. (2001) 87 Cal. App. 4th 28, 103 Cal. Rptr. 2d 594* . The Court concluded that imposing tort liability on the hirer of an independent contractor only if the hirer's conduct has affirmatively contributed to the injuries of the contractor's employee is consistent with the rationale of its earlier decisions, because the liability of the hirer in such a case is not vicarious or derivative in the sense that it derives from the act or omission of the hired contractor. Instead, the liability of the hirer is direct in a much stronger sense of that term (*27 Cal. 4th 198, 211-212)* . Applying this rule to the facts before it, the Court concluded that summary judgment for the defendant was proper. Although Caltrans may have permitted traffic to use the overpass while the crane was being operated, Caltrans did not direct the crane operator to retract his outriggers to permit traffic to pass. Therefore, even if Caltrans may have been aware of the decedent's unsafe practice, this did not constitute the type of affirmative contribution that could support liability (*27 Cal. 4th 198, 214-215)* .

In ***Kinney v. CSB Constr., Inc.*** *(2001) 87 Cal. App. 4th 28, 103 Cal. Rptr. 2d 594* , the plaintiff was a construction worker who fell from scaffolding at a construction site. He received workers' compensation benefits from his employer, and then brought suit against the general contractor of the project, alleging that the general contractor negligently failed to require the plaintiff's employer, a subcontractor on the project, to provide adequate protection against falls. The contract between the general contractor and the property owner had imposed on the general contractor the sole and complete responsibility for working conditions and safety on the project. However, the subcontract between the general contractor and the plaintiff's employer required the subcontractor to perform all obligations owed by the general contractor to the owner to the extent that such obligations applied to the subcontractor's work, and that contract also required the subcontractor to furnish workers' compensation coverage. The parties agreed for purposes of the defendant's summary judgment motion that the general contractor had the right to order any safety means or measures it considered appropriate at the site, although the site superintendent did not recall ever actually directing the plaintiff's employer or any other subcontractors on that particular building site to alleviate an unsafe condition. The trial court

granted summary judgment for the general contractor, and the plaintiff appealed.

The court of appeal affirmed. The court recognized that under Restatement (Second) of Torts § 414, a hirer of an independent contractor may be liable for injury to another if the hirer retains control over any part of the work and fails to exercise that control with reasonable care. The court also recognized that there would be at least a triable issue of fact as to whether the defendant's conduct triggered application of that rule if the injured party had been a stranger to the construction work, rather than an employee of a subcontractor (*87 Cal. App. 4th 28, 33)* . However, after reviewing the holdings and rationales of the California Supreme Court in *Privette* and *Toland*, the court of appeal concluded that the plaintiff, the employee of a subcontractor who provided workers' compensation benefits, could not sue the hirer (in this case, the general contractor) under the facts of this case. The court held that a general contractor is not liable for aninjury to the employee of a hired subcontractor if the sole factual basis for the claim is that the general contractor failed to exercise a general supervisory power to require the subcontractor to correct an unsafe procedure or condition of the subcontractor's own making, at least in the absence of evidence that the contractor's own conduct contributed in any way to the subcontractor's negligent performance, such as through direction, induced reliance, or other affirmative conduct. The court noted that the fairness rationale at the core of those Supreme Court decisions applied equally to preclude the imposition of liability on a hirer for the mere failure to exercise a general supervisory power to prevent the creation or continuation of a hazardous practice, if that liability would exceed the liability imposed on the party who created the hazard, the injured plaintiff's immediate employer (*87 Cal. App. 4th 28, 36)* .

[g] Privette Bars Recovery by Injured Employee for Negligent Hiring of Contractor

In ***Camargo v. Tjaarda Dairy*** *(2001) 25 Cal. 4th 1235, 108 Cal. Rptr. 2d 617, 25 P.3d 1096* , the plaintiffs were the surviving wife and children of the decedent, who was an employee of an independent contractor. The decedent was killed on the job when his tractor rolled over as he was driving over a large mound of manure in a corral owned by the defendants, who had hired the contractor to haul away the manure. The plaintiffs sued the defendants, alleging in part that they were negligent in hiring the contractor without determining whether the decedent was qualified to operate the tractor safely. The trial court granted the defendants' motion for summary judgment. The plaintiffs appealed, limiting their appeal to the issue of negligent hiring. The court of appeal reversed the trial court, and the defendants appealed.

The Supreme Court reversed the court of appeal and held that an employee of an independent contractor who is injured on the job cannot sue the hirer of the contractor for negligence in hiring the contractor. After reviewing the Court's earlier rulings in *Privette v. Superior Court (1993) 5 Cal. 4th 689, 21 Cal. Rptr. 2d 72, 854 P.2d 721* , and *Toland v. Sunland Hous. Group, Inc. (1998) 18 Cal. 4th 253* , the Court reviewed the language of § 411 of Restatement (Second) of Torts, which articulates the general rule imposing liability on an employer for physical harm to third persons caused by the negligent hiring of a contractor who is not competent or careful. The Court concluded that the reference in § 411 to third persons did not include employees of the independent contractor. None of the illustrations supporting the section involve injuries to an employee of the contractor, and a tentative draft of the Restatement specifically stated that reference to "third persons" did not include employees of the contractor (*25 Cal. 4th 1235, 1241)* . The Court then concluded that, although in some sense the employer is being sued for the employer's own negligence, imposing liability under those circumstances would really be a form of vicarious liability, because the injury to the employee is actually caused by the negligent act or omission of the contractor primarily responsible for the details of the employee's work. Because the contractor would be shielded from tort liability by the exclusivity of workers' compensation, the hirer of the contractor should not be exposed to any greater liability (*25 Cal. 4th 1235, 1244)* . Moreover, allowing the injured employee to recover tort damages for what is essentially the failure to provide a safe workplace would provide a windfall to the employees of an independent contractor that is unavailable to the injured employees of other types of employers (*25 Cal. 4th 1235, 1245)* .

[h] Contractor's Employee Cannot Sue Hirer Even If Contractor Fails to Provide Workers' Compensation Coverage

In ***Lopez v. C.G.M. Dev., Inc.*** *(2002) 101 Cal. App. 4th 430, 124 Cal. Rptr. 2d 227* , the plaintiff was injured while working on a commercial construction project as an employee of an independent contractor hired by the general contractor to frame a roof. Despite a legal obligation to do so, the independent contractor failed to provide workers' compensation insurance for its employees, including the plaintiff. The plaintiff sued the property owner for negligence, alleging that the owner maintained dangerous working conditions at the site and failed to provide safety equipment. The owner successfully moved for summary judgment and the plaintiff appealed.

The court of appeal affirmed. After reviewing the relevant California Supreme Court rulings governing the application of the peculiar risk doctrine if the injured party is an employee of an independent contractor, the court rejected the plaintiff's argument that he could sue the owner because his employer failed to provide workers' compensation coverage. The court noted that although the employee could file suit against his employer, because the employer did not provide coverage, the principles of equity and public policy that underlie the peculiar risk doctrine would not be served by allowing the plaintiff to sue the property owner, because this would penalize the owner for the subcontractor's wrongdoing (*101 Cal. App. 4th 430, 444-445)* . The court also noted that the property owner was under no obligation to ascertain whether or not the subcontractor provided workers' compensation coverage (*101 Cal. App. 4th 430, 445)* . Finally, the court held that the plaintiff was in error in arguing that he was not covered by workers' compensation, because the Uninsured Employers Fund provides coverage to employees if the employer fails to do so (*101 Cal. App. 4th 430, 445)* .

[i] Hirer's Violation of Nondelegable Duty Must Affirmatively Contribute to Employee's Injury

In ***Park v. Burlington N. Santa Fe Ry. Co.*** *(2003) 108 Cal. App. 4th 595, 133 Cal. Rptr. 2d 757* , the plaintiff was the employee of a hazardous waste disposal company who was injured when a sealed drum of batteries exploded. The batteries had been picked up by the disposal company several days earlier from a railroad company, which had an ongoing contract with the disposal company to dispose of the batteries. Although the railroad company left the batteries for pickup packed in plastic totes, the disposal company employee in charge of the pickup repacked the batteries into 55-gallon drums. Although the battery leads would normally have been removed prior to packing the batteries into sealed drums, the leads were not removed because the employee in charge of pickup was in a hurry on that particular day. This employee then signed a hazardous waste manifest on behalf of the railroad company, as he was authorized to do, certifying that the batteries were safe for transport. Several days later, because the leads were not removed before the batteries were packed into sealed drums, one of the drums exploded, injuring the plaintiff. The plaintiff collected workers' compensation benefits from his employer, but brought suit against the railroad company. At trial, the jury apportioned 33 percent of the fault to the railroad company and 67 percent to the plaintiff's employer, and it awarded the plaintiff $1.7 million in damages. Because the plaintiff's employer was not liable for damages due to the exclusive remedy doctrine of the workers' compensation law, the railroad company was liable for the entire damages award. The railroad company appealed, arguing that under the doctrine of *Privette v. Superior Court* and its progeny, it was not liable to the injured employee of an independent contractor that it had hired.

The court of appeal agreed and reversed the judgment. The court first held that under the relevant federal statutes and rules governing hazardous waste disposal, the railroad had a nondelegable duty to see that the hazardous waste that it generated was disposed of properly (*108 Cal. App. 4th 595*). According to the court, however, that conclusion did not end the inquiry. Under the holding of *Hooker v. Department of Transportation* [*see § 100A.45[3][f]*], the plaintiff was still required to prove that the railroad company's conduct affirmatively contributed to the plaintiff's injuries. The court held that the plaintiff had failed to do so. The undisputed evidence showed that the railroad company had packed the batteries into plastic totes, which posed no danger of explosion even with the battery leads attached, and that an employee of the disposal company created the danger by packing the batteries into sealed drums without removing the leads. It was this conduct by the plaintiff's own employer that violated federal regulations and was the clear cause of the plaintiff's injuries. Therefore, the court held that the jury's finding that the railroad was a legal cause of the plaintiff's injuries was not supported by the evidence (*108 Cal. App. 4th 595, 610-611)* . The court also rejected the plaintiff's argument that liability could be imposed on the railroad company under an agency theory. The plaintiff argued that

because the railroad company had authorized the disposal company employee to sign the manifest certifying the batteries safe for transport, the disposal company was acting as an agent of the railroad company when it picked up the batteries. The court concluded that any agency, if it existed under the facts, extended only to the signing of the manifesto, not to the negligent packing of the drums. Because the negligent packing was the cause of the injuries, the plaintiff still failed to satisfy the *Hooker* requirement that the hirer's conduct affirmatively contribute to the plaintiff's injuries (*108 Cal. App. 4th 595, 611-614)* .

[j] Agent of Hirer Protected to Same Extent as Hirer

In ***Ruiz v. Herman Weissker, Inc.*** *(2005) 130 Cal. App. 4th 52, 29 Cal. Rptr. 3d 641* , the plaintiffs were the survivors of a man who was electrocuted while working for an independent contractor to replace insulators on a utility company's power line, apparently because he removed his grounding cable before completing his work. Although the contract between the utility company and the decedent's employer placed on the decedent's employer the responsibility for work details and the safety of the workers, the utility company also had hired a contract administrator with responsibility for overseeing safety and contract compliance. The plaintiffs sued the utility company and the contract administrator. The trial court granted summary judgment for the contract administrator, finding no evidence that this defendant had done anything to affirmatively contribute to the decedent's death. The plaintiffs appealed.

The court of appeal affirmed. The court agreed that although the plaintiffs were trying to hold an agent of the hirer liable, and the Supreme Court's earlier cases dealt with the liability of the hirer itself, this distinction was insignificant and the logic of those earlier cases still applied. Therefore, to hold the contract administrator liable, the plaintiffs would have to show that the contract administrator took actions that affirmatively contributed to the decedent's death. Mere retention of control over safety is insufficient, unless the defendant promised to take specific safety measures and failed to do so (*130 Cal. App. 4th 52, 61-62)* . The plaintiffs also argued that the agent could be held liable because the hirer had a nondelegable duty to provide a safe workplace, but the court rejected this argument, given the absence of authority for imposing liability on an agent if the nondelegable duty is imposed on the principal (*130 Cal. App. 4th 52, 64)* . Finally, the court held that the evidence could not support a finding that the agent was directly liable either because it exercised its retained control over safety or because it failed to undertake adequate rescue operations (*130 Cal. App. 4th 52, 66-67)* .

[4] Additional Authorities

[a] Peculiar Risk Doctrine Not Applicable to Injured Employee of Independent Contractor

In *Zamudio v. City & County of San Francisco (1999) 70 Cal. App. 4th 445, 82 Cal. Rptr. 2d 664* , the plaintiff was the employee of a concrete subcontractor injured while working at a construction site when he fell while walking on a plywood plank resting between two concrete pouring forms. The plaintiff received workers' compensation benefits from his employer for the injury. He subsequently brought suit against the owner of the project site, the construction manager, and his employer. Summary judgment was granted for all defendants. The court of appeal affirmed. As to the claims against the owner of the site and the construction manager, the court held that, after the Supreme Court's decisions in *Privette* and *Toland,* the plaintiff had no basis for holding the owner and construction manager vicariously liable for the negligence of the plaintiff's employer (*70 Cal. App. 4th 445, 450)* . The court also rejected arguments that those the defendants could be held directly liable for their own negligence under the facts of the case. Assuming without directly deciding that direct liability could be imposed on the hirer of an independent contractor for an injury to an employee of the independent contractor based on the breach of a duty of care owed by the hirer by virtue of the hirer having retained control over operative details of the work being done, the court found that such control was missing in this case. Neither the fact that employees of those defendants may have participated in general workplace safety discussions, nor the fact that the site owner retained the right to inspect the work to ensure quality control, constituted sufficient control to support direct liability (*70 Cal. App. 4th 445, 452-453)* .

In *Yanez v. United States (9th Cir. 1995) 63 F.3d 870* , the Ninth Circuit Court of Appeals (construing California law) found that allegations that the contractor negligently supervised its employees (thereby causing injury to one of them) was within the exception to the peculiar risk doctrine recognized in *Privette*. The hirer of the contractor could not be held liable for injuries to the contractor's employee, whether the allegations were characterized as a theory of direct liability or of vicarious liability (*63 F.3d 870, 872-873)* . However, the court did allow the case to proceed under the exception to the peculiar risk doctrine for retention of sufficient control over the contractor [*see* Restatement (Second) of Torts § 414] (*63 F.3d 870, 874-875)* .

In *Sheeler v. Greystone Homes, Inc. (2003) 113 Cal. App. 4th 908, 6 Cal. Rptr. 3d 683* , the plaintiffs, a masonry tile worker and his wife, brought suit against the general contractor on a home building project for an injury sustained by the worker when he slipped and fell while carrying a tile saw up a flight of stairs at a construction site. Although he could not see his feet while carrying the saw, the worker believed that he slipped on a piece of wood left on a stair by a sweeper that he saw on the site immediately before the accident. The sweeper was not identified, and there was no evidence of who employed the sweeper. The worker received workers' compensation benefits for the injury. The project superintendent overseeing the construction submitted deposition testimony that one of his general duties was to oversee safety at the construction sites. Although the superintendent testified that no one was responsible to ensure on a daily basis that the sites were safe for the next subcontractor, he abated hazards of which he was aware. He also testified that although the building was swept twice in the days before the accident, the purpose for sweeping was to facilitate painting, and not necessarily to ensure safety. The trial court granted summary judgment for the general contractor, and the court of appeal affirmed. The court first rejected the plaintiffs' argument that *Privette* and its progeny did not apply because the plaintiff's immediate employer was not negligent. The court noted that the plaintiff's supervisor was at the scene of the accident and allowed the plaintiff to carry the saw up the stairs unassisted, even though the saw obstructed the plaintiff's view of his feet. Moreover, the court noted that actual negligence by the plaintiff's own employer is not necessary to apply the *Privette* line of cases (*113 Cal. App. 4th 908, 918-919)* . The court then concluded that the general contractor could not be liable for the negligent exercise of retained control over safety. The on-site cleaning was done primarily to facilitate painting, not to ensure safety, and the general contractor never promised to clean up to protect safety or established a practice of doing so. In the absence of any evidence that the general contractor contributed affirmatively to the injury, that the general contractor had any knowledge of the debris that allegedly caused the injury, or that the sweeper was even employed by the general contractor, the general contractor could not be liable for the injury (*113 Cal. App. 4th 908, 919-921)* .

[b] Hirer Not Liable for Injury to Contractor's Employee for Failing to Exercise General Supervisory Power Over Safety

In *Padilla v. Pomona College (2008) 166 Cal. App. 4th 661, 82 Cal. Rptr. 3d 869* , plaintiff was injured while employed by a subcontractor hired on a college dormitory remodeling project to demolish old cast-iron water pipes. Plaintiff had been standing on a ladder in order to demolish one old, non-pressurized pipe when a portion of the pipe came loose and fell, breaking a pressurized PVC pipe that spewed a gusher of water that knocked plaintiff off of his ladder, causing his injuries. He sued the general contractor and the premises owner, alleging negligence and premises liability based on a failure to ensure that there was no water pressure in the pipes in the area in which plaintiff was working. The trial court granted summary judgment for defendants and the court of appeal affirmed. The court noted that prior to beginning work on the project, the general contractor explained to plaintiff's employer the scope of the demolition and which pipes would remain pressurized throughout in order to supply water for work purposes. The court also noted that at the time of the accident, plaintiff was using his employer's equipment and being directed in his work by his own supervisor, who apparently had earlier indicated to plaintiff that the PVC pipe that broke was one of the pipes that had been left pressurized. Moreover, the evidence indicated that plaintiff was not using the proper, standard procedures when demolishing the old pipe. The court concluded that plaintiff could not show that defendants' general retention of control over the work area, including the pressurized PVC pipe, affirmatively contributed to his injuries. Thus, under the Supreme Court's analysis in *Hooker v. Department of Transportation,* discussed in [3][f], *above,* defendants could not be held liable (*166 Cal. App. 4th 661, 670-671)* . The court also rejected plaintiff's argument that

liability could be premised on a violation of a nondelegable duty created by *8 Cal. Code Regs. § 1735(a)*, which provides that utility companies must be notified and utility services controlled before starting demolition, unless it is necessary to use such services, in which case services are to be relocated or rearranged as necessary. The court held that the regulation, by its very language, did not impose a duty on any particular party, and thus could not be considered to be nondelegable. In addition, even if the regulation created a nondelegable duty, plaintiff still failed to provide evidence showing that anything defendants did that might arguably have been in violation of the regulation affirmatively contributed to plaintiff's injury (*166 Cal. App. 4th 661, 673-674)* .

In *Madden v. Summit View, Inc. (2008) 165 Cal. App. 4th 1267, 81 Cal. Rptr. 3d 601* , the employee of an electrical subcontractor on a residential construction project was injured when he fell off of an elevated patio that had no railing. The employee sued the general contractor for premises liability for failing to place a railing on the patio during construction. The trial court granted summary judgment for the general contractor and the court of appeal affirmed. The court held that under the Supreme Court's analysis in *Hooker v. Department of Transportation*, discussed in [3][f], *above*, plaintiff was required not merely to prove that the general contractor retained control over safety at the site, but that the general contractor affirmatively contributed to the plaintiff's injury. The court noted that the general contractor had no control over the methods by which the electrical subcontractor performed its work and supplied none of the materials. Even if a jury could find that the general contractor retained control over safety conditions, the court concluded that there was no triable issue of fact as to whether the general contractor affirmatively contributed to plaintiff's injury. There was no evidence that the general contractor or its agents directed that no guardrail be placed along the open side of the patio or that it acted to prevent such a railing. Moreover, the absence of a guardrail was open and obvious to all of the subcontractors and it was established that all of the workers had been using the patio as a walkway and platform, including plaintiff. Finally, it was undisputed that plaintiff made his own decisions as to how to perform his work and no one else was present at the time of plaintiff's accident (*165 Cal. App. 4th 1267, 1276-1278)* . Although plaintiff also argued that the general contractor could be liable for failing to provide a railing under *8 Cal. Code Regs. § 1621*, the court noted that the regulation only requires railings on surfaces that are at least 7 and one-half feet or more above the ground. While the patio ranged from 2 to 8 feet in height above the ground, plaintiff admitted that he did not know the height of the patio at the point he fell. Thus, the court concluded that plaintiff could not prove that any violation of that regulation caused his injury (*165 Cal. App. 4th 1267, 1280-1281)* .

In *Millard v. Biosources, Inc. (2007) 156 Cal. App. 4th 1338, 68 Cal. Rptr. 3d 177* , plaintiff was injured when he fell through the ceiling while working in an attic for a heating and air conditioning subcontractor. Alleging that he fell after losing his balance when the lights in the attic went out, plaintiff sued the general contractor because the contractor retained control of the work project and failed to exercise control over safety at the site. The court of appeal affirmed a summary judgment granted in favor of the general contractor. The court held that plaintiff failed to create a triable issue of fact as to whether the general contractor affirmatively contributed to plaintiff's injuries. The evidence established that the general contractor did not control the means and methods of plaintiff's work and no personnel of the general contractor were present at the work site when the accident occurred. While an agent of the general contractor had tripped a circuit breaker earlier in the day that had caused the attic lights to go out briefly, there was no evidence tying the earlier incident to the plaintiff's accident (*156 Cal. App. 4th 1338, 1348-1349)* . The court also rejected plaintiff's argument that liability could be imposed on the general contractor for violating OSHA regulations. The court concluded that under *Lab. Code § 6304.5*, safety regulations may be admissible in actions brought by employees of subcontractors against general contractors that retain control of safety conditions only if the general contractor affirmatively contributed to the employee's injuries. Because the court had already concluded that there was no evidence that the general contractor affirmatively contributed to the injuries, there was no basis for imposing liability. The court also noted in any event that plaintiff had failed to plead negligence per se, thus precluding him from relying on the violation of OSHA regulations to establish that the generalcontractor had breached a duty of care owed to plaintiff (*156 Cal. App. 4th 1338, 1352-1353)* .

In *Tilley v. CZ Master Ass'n (2005) 131 Cal. App. 4th 464* , the plaintiff was employed as a security guard by a security firm that was hired by a homeowners' association to provide security for a gated residential community. After the

plaintiff was attacked by two youths who were attending a residential party, the plaintiff sued the association for failing to take steps to prevent the assault by controlling youth parties within the community. The trial court granted summary judgment for the association, and the court of appeal affirmed. The court concluded that the undisputed evidence demonstrated that the security firm was hired largely to control access to the community and to observe and reportproblems. The association neither required nor expected its unarmed security personnel to confront potentially violent persons, and thus it could not be liable for injuries sustained when the plaintiff decided to go beyond the scope of his duties. Although the homeowners' association retained control over certain aspects of the work site--specifically, the association's residential property--the security firm controlled the details of the plaintiff's work, and the plaintiff answered to and took orders from his employer, not from the association. Moreover, even assuming that the association retained control over certain aspects of the plaintiff's work site, nothing that the homeowners' association did affirmatively contributed to the plaintiff's injuries. The association did not have advance notice of when parties would be held, and the mere failure to limit residential parties was an insufficient basis to hold the association liable (*131 Cal. App. 4th 464, 484-486)* .

[c] Contractor's Employee Cannot Sue Hirer Even if Contractor Fails to Provide Workers' Compensation Coverage

In *Bell v. Greg Agee Constr., Inc. (2004) 125 Cal. App. 4th 453, 23 Cal. Rptr. 3d 33* , a gust of wind caused a framed wall to fall on the plaintiff, a construction worker. The plaintiff's employer, a roofing subcontractor, admitted that the wall was not properly braced. In addition to suing his employer, who did not provide workers' compensation coverage on the date of the injury, the plaintiff also sued the general contractor for the project, seeking to impose liability on the basis of the peculiar risk doctrine. The trial court granted summary judgment for the general contractor and the court of appeal affirmed. The sole issue on appeal was whether, under *Privette* and its progeny, the general contractor could be liable under the peculiar risk doctrine because the injured worker's employer did not provide workers' compensation coverage, even if the general contractor did not affirmatively contribute to causing the injury. The court of appeal, agreeing with the reasoning of *Lopez v. C.G.M. Dev., Inc. (2002) 101 Cal. App. 4th 430, 124 Cal. Rptr. 2d 227* [*see § 100A.45[3][h]*], held that the general contractor could not be liable. The court noted that the plaintiff was not prevented from seeking compensation from the Uninsured Employers Fund, and that the plaintiff had in fact filed a claim with the Fund. Because this compensation was available for the injury, the court saw no social utility in imposing liability on the non-negligent general contractor (*125 Cal. App. 4th 453, 466)* . The court also pointed to support in language from *Privette* and subsequent Supreme Court opinions suggesting that the ability to recover from the Fund if an employer is uninsured or insolvent was sufficient to preclude application of the peculiar risk doctrine (*125 Cal. App. 4th 453, 466-467)* . The court also rejected various policy arguments advanced by the plaintiff, including the argument that the peculiar risk doctrine should be applied to the general contractor because the general contractor had the right to seek indemnity from the plaintiff's employer. The court noted that the plaintiff also had the right to seek recovery directly from his uninsured employer (*125 Cal. App. 4th 453, 467)* .

California Points & Authorities

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 100A EMPLOYER AND EMPLOYEE: RESPONDEAT SUPERIOR
PART II. FORMS

10-100A California Points & Authorities § 100A.45A

AUTHOR: Carolyn Rashby

§ 100A.45A Opposing Contention That Employer Is Vicariously Liable to Third Party Based on Torts of Independent Contractor--Independent Contractor Hired by Independent Contractor Cannot Recover Under Peculiar Risk Doctrine

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE PLAINTIFF CANNOT RECOVER DAMAGES FROM DEFENDANT, WHO HIRED THE INDEPENDENT CONTRACTOR WHO HIRED THE PLAINTIFF, FOR THE BREACH OF A DUTY OF CARE OWED BY THE PLAINTIFF'S HIRER, EVEN THOUGH THE PLAINTIFF WAS HIRED AS AN INDEPENDENT CONTRACTOR RATHER THAN AS AN EMPLOYEE.

***Privette* Doctrine Applicable to Injured Party Who Is Independent Contractor Rather Than Employee.** The *Privette* doctrine, which precludes application of the peculiar risk doctrine to an injury sustained by the employee of an independent contractor, applies even if the injured party is an independent contractor, rather than actually an employee, of another contractor (*Michael v. Denbeste Transp., Inc. (2006) 137 Cal. App. 4th 1082, 1093, 40 Cal. Rptr. 3d 777*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that the defendant is vicariously liable under the peculiar risk doctrine for an injury sustained by an independent contractor who was hired by an independent contractor that was hired by the defendant. The basis for the opposition is that the *Privette* doctrine, discussed in *§ 100A.45*, applies equally if the injured worker is hired as an independent contractor, rather than as an actual employee.

This form may be combined with points pertaining to the specific procedural context in which counsel wishes to raise this substantive issue. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law stated. Thus, counsel should include facts showing that the injured party was injured as a result of the negligence of his or her hirer, and not as a result of the affirmative negligence of the defendant.

[3] Discussion of Authorities

[a] *Privette* Doctrine Applicable to Injured Party Who Is Independent Contractor Rather Than Employee

In ***Michael v. Denbeste Transp., Inc.*** *(2006) 137 Cal. App. 4th 1082, 40 Cal. Rptr. 3d 777* , the plaintiff, a self-employed truck driver, was hired as an independent contractor by a hazardous waste hauler subcontractor who had been hired to help remove hazardous waste from a work site. The plaintiff fell 10 feet from a trailer while trying to install a tarp over the load that he was towing. This trailer was owned by the hazardous waste hauler subcontractor who hired the plaintiff, and although the subcontractor provided brief instructions to the plaintiff on using the trailer, the subcontractor did not discuss the intricacies of unrolling the tarp over the trailer load. The plaintiff sued the subcontractor, as well as the decontamination general contractor and the transportation contractor that hired the hazardous waste hauler subcontractor who had hired the plaintiff. The trial court granted summary judgment in favor of the general contractor and the transportation contractor on the grounds that, regardless of whether the plaintiff was an employee of the hazardous waste hauler subcontractor or an independent contractor, the *Privette* doctrine applied to preclude liability under the peculiar risk doctrine. The plaintiff appealed.

The court of appeal affirmed the summary judgment as to those defendants. Under the *Privette* doctrine [*see § 100A.45*], the hirer of an independent contractor is not generally liable for an injury to an employee of the independent contractor unless the hirer's own conduct affirmatively contributes to the injury. The court of appeal agreed that the *Privette* doctrine applies even if the injured party is an independent contractor, rather than actually an employee, of another contractor (*137 Cal. App. 4th 1082, 1093)* . The court, concluding that this result was consistent with the policy concerns underlying the *Privette* doctrine, noted that the lack of workers' compensation coverage for independent contractors was not dispositive and recognized that it was reasonable for hirers to anticipate that an independent contractor would insure against the risk of injury associated with the work and factor the cost of this insurance into the price of the hiring contract. In fact, the contract under which the plaintiff was hired specifically provided that the plaintiff was required to carry personal injury liability insurance and workers' compensation insurance (*137 Cal. App. 4th 1082, 1094-1095)* . The court noted that the decontamination general contractor and the transportation contractor had delegated responsibility to the hazardous waste hauler subcontractor for the safety of that subcontractor's personnel. The court concluded that the liability of a hirer of an independent contractor for an injury sustained by a person hired by the independent contractor should not depend on whether the injured person was hired as an actual employee or hired as an independent contractor (*137 Cal. App. 4th 1082, 1095-1096)* . Then, applying the *Privette* doctrine to the facts of the case, the court held that neither the decontamination general contractor nor the transportation contractor took any action that affirmatively contributed to the plaintiff's injury. Any mere failure to intervene in the procedures or practices of the hazardous waste hauler subcontractor was an insufficient basis for imposing liability. Therefore, these two defendants could not be held liable (*137 Cal. App. 4th 1082, 1096-1097)* .

California Points & Authorities

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 100A EMPLOYER AND EMPLOYEE: RESPONDEAT SUPERIOR
PART II. FORMS

10-100A California Points & Authorities § 100A.46

AUTHOR: Carolyn Rashby

§ 100A.46 Supporting Contention That Hirer of Independent Contractor Is Directly Liable to Employee of Independent Contractor for Hirer's Own Independent Fault

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF IS ENTITLED TO RECOVER DAMAGES FROM DEFENDANT BECAUSE PLAINTIFF'S INJURIES WERE THE RESULT OF DEFENDANT'S OWN NEGLIGENT CONDUCT.

A. Hirer Exercising Retained Control Liable for Affirmatively Contributing to Employee's Injury. Liability may be imposed on the hirer of an independent contractor who retains control over safety at a work site if the hirer's exercise of retained control affirmatively contributes to the injuries of an employee of the independent contractor (*Hooker v. Department of Transp. (2002) 27 Cal. 4th 198, 202, 115 Cal. Rptr. 2d 853, 38 P.3d 1081*).

B. Hirer Who Provides Unsafe Equipment May Be Liable. The hirer of an independent contractor may be liable for an injury to an employee of the contractor if the hirer's negligent provision of unsafe equipment to the contractor affirmatively contributes to the injury (*McKown v. Wal-Mart Stores, Inc. (2002) 27 Cal. 4th 219, 222, 115 Cal. Rptr. 2d 868, 38 P.3d 1094*).

C. Hirer May Be Liable For Failure to Warn of Hazardous Condition. A landowner or occupier of land who hires an independent contractor may be liable for an injury suffered by the contractor's employee if: (1) the hirer knew, or should have known, of a latent or concealed preexisting hazardous condition on the property; (2) the contractor did not know of, and could not reasonably have discovered, the hazardous condition; and (3) the hirer failed to warn the contractor of the hazardous condition [*Kinsman v. Unocal Corp. (2005) 37 Cal. 4th 659, 673-674, 36 Cal. Rptr. 3d 495, 123 P.3d 931]* .

[*Optional*] **D. Breach of Regulatory Duty May Support Liability.** A hirer may be held liable to an employee of an

independent contractor if the hirer breaches a duty imposed on the hirer by regulation and the breach affirmatively contributes to the employee's injury (*Barclay v. Jesse M. Lange Distrib., Inc. (2005) 129 Cal. App. 4th 281, 298-301, 28 Cal. Rptr. 3d 242*).

[*Optional*] **E. Public Entity Hirer of Independent Contractor May Be Liable for Exercise of Retained Control.** Under *Government Code Section 815.4*, a public entity hirer of an independent contractor can be held liable for an injury to an employee of that independent contractor if the employee's injury was proximately caused by a tortious act or omission of the independent contractor and the public entity's negligent exercise of retained control over safety affirmatively contributed to the injury (*McCarty v. Department of Transportation (2008) 164 Cal. App. 4th 955, 977-979, 79 Cal. Rptr. 3d 777*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that the hirer of an independent contractor may be liable for injuries to an employee of the independent contractor for the hirer's own negligence. Depending on the nature of the hirer's negligence, the applicable paragraph should be used to support the contention that the hirer is liable.

This form may be combined with points pertaining to the specific procedural context in which counsel wishes to raise this issue. This form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law stated. Thus, counsel should discuss evidence that the plaintiff was an employee of the independent contractor hired by the defendant and that the injury to the plaintiff arose out of the defendant's negligence.

[c] Related Pleading and Practice Forms

For discussion of the topic covered by these points, see California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts* (Matthew Bender).

[d] Related Memoranda

For memoranda opposing the contention that the hirer of an independent contractor is vicariously liable to an employee of the contractor based on the negligence of the contractor, see *§ 100A.45*.

[3] Discussion of Authorities

[a] Hirer Exercising Retained Control Liable for Affirmatively Contributing to Employee's Injury

Hooker v. Department of Transp. *(2002) 27 Cal. 4th 198, 115 Cal. Rptr. 2d 853, 38 P.3d 1081* , is discussed in *§ 100A.45[3][f]*.

[b] Hirer Who Provides Unsafe Equipment May Be Liable

In ***McKown v. Wal-Mart Stores, Inc.*** *(2002) 27 Cal. 4th 219, 115 Cal. Rptr. 2d 868, 38 P.3d 1094* , the plaintiff was an employee of an independent contractor hired to install sound systems in the stores of a large national chain. The plaintiff was working on a platform being lifted by a forklift when the platform hit a ceiling pipe, causing the platform to disengage from the forklift and fall to the floor. The forklift, which was provided by the defendant, which asked that

the contractor use the defendant's forklifts whenever possible, was supposed to have been equipped with a chain to secure the platform to the forklift, but it was not. The plaintiff's action against the defendant went to a jury, who allocated 55 percent of the fault to the contractor, 23 percent to the defendant, 15 percent to the manufacturer of the equipment, and 7 percent to the plaintiff. The court of appeal affirmed the judgment, and the defendant appealed.

The California Supreme Court affirmed, holding that the hirer of an independent contractor may be liable for an injury to an employee of the contractor, if the hirer's negligent provision of unsafe equipment to the contractor affirmatively contributes to the injury (*27 Cal. 4th 219, 222)* . The Court briefly reviewed its prior decisions in *Privette v. Superior Court (1993) 5 Cal. 4th 689, 21 Cal. Rptr. 2d 72, 854 P.2d 721* [*see § 100A.45[3][a]*], *Toland v. Sunland Hous. Group, Inc. (1998) 18 Cal. 4th 253* [*see § 100A.45[3][e]*], and *Camargo v. Tjaarda Dairy (2001) 25 Cal. 4th 1235, 108 Cal. Rptr. 2d 617, 25 P.3d 1096* [*see § 100A.45[3][g]*]. The Court then briefly summarized its opinion in the companion case of *Hooker v. Department of Transp. (2002) 27 Cal. 4th 198, 115 Cal. Rptr. 2d 853, 38 P.3d 1081* [*see § 100A.45[3][f]*]. Noting its conclusion in *Hooker* that a hirer who retains control over safety at a work site may be liable if the hirer's exercise of retained control affirmatively contributes to the employee's injuries, the Court held that the same principle applied to the case before it. If the hirer of an independent contractor negligently furnishes unsafe equipment to the contractor, which then affirmatively contributes to an injury to an employee of that contractor, the hirer may be liable for the consequences of the hirer's own negligence (*27 Cal. App. 4th 218, 225)* . The Court then affirmed the judgment in the case, concluding that the jury was entitled to apportion a share of liability to the defendant under the facts. The defendant did not actually require that the contractor use the defendant's forklifts, but given the economic importance to the contractor of the defendant's business and the practical difficulty of getting a replacement forklift during the night when the injury occurred, the contractor had little real choice but to use the defendant's forklift (*27 Cal. 4th 219, 225-226)* .

[c] Hirer May Be Liable For Failure to Warn of Hazardous Condition

The plaintiff in ***Kinsman v. Unocal Corp.*** *(2005) 37 Cal. 4th 659, 36 Cal. Rptr. 3d 495, 123 P.3d 931* , was exposed to airborne asbestos in the 1950s while working at an oil refinery owned by the defendant. The plaintiff was working there as an employee of an independent contractor hired by the defendant to build and dismantle scaffolding used by other trades. Years later, the plaintiff developed mesothelioma, an asbestos-induced malignant cancer of the lungs. The plaintiff sued the defendant as well as an array of manufacturers and distributors of asbestos-containing products. Ultimately, however, the case went to trial against the defendant alone, and the jury found the defendant liable on a premises liability theory, concluding that the defendant had been negligent in managing the areas where the plaintiff had worked. The court of appeal reversed the judgment on the verdict, holding that the defendant could not be liable for an injury suffered by an independent contractor's employee unless it had affirmatively contributed to the injury. The California Supreme Court granted review.

The Supreme Court began its analysis with a review of the evolution of the *Privette* doctrine, which deals with the liability of a hirer of an independent contractor for injuries suffered by the contractor's employees [*see Privette v. Superior Court (1993) 5 Cal. 4th 689, 21 Cal. Rptr. 2d 72, 854 P.2d 721* (discussed in *§ 100A.45[3*][a]); *see also McKown v. Wal-Mart Stores, Inc. (2002) 27 Cal. 4th 219, 115 Cal. Rptr. 2d 868, 38 P.3d 1094* (discussed in *§ 100A.46[3][b]*); *Hooker v. Department of Transp. (2002) 27 Cal. 4th 198, 115 Cal. Rptr. 2d 853, 38 P.3d 1081* (discussed in *§ 100A.45[3][f]*); *Camargo v. Tjaarda Dairy (2001) 25 Cal. 4th 1235, 108 Cal. Rptr. 2d 617, 25 P.3d 1096* (discussed in *§ 100A.45[3][g]*); *Toland v. Sunland Hous. Group, Inc. (1998) 18 Cal. 4th 253* (discussed in *§ 100A.45[3][e]*)]. The Court suggested that a useful way to view these cases is in terms of delegation. At common law, if a hirer delegated a task to an independent contractor, the hirer effectively delegated responsibility for performing that task safely, and liability for a breach of that responsibility was therefore assigned to the contractor. For various policy reasons, courts have severely limited the hirer's ability to delegate responsibility and escape liability. However, in *Privette* and its progeny, the Supreme Court held that, principally because of the availability of workers' compensation, the policy reasons for limiting delegation do not apply to the hirer's ability to delegate to an independent contractor the duty to provide the contractor's employees with a safe working environment. Nonetheless, if the hirer does not fully

delegate the task of providing a safe working environment, but in some manner actively participates in how the job is done, and if that participation affirmatively contributes to the employee's injury, the hirer may be liable in tort to the employee (*37 Cal. 4th. 659, 667-672)* .

Under general principles of premises liability, if the occupier of land is aware of a concealed condition that, in the absence of precautions, involves an unreasonable risk of harm to those coming in contact with it, and is aware that a person on the premises is about to come in contact with it, a trier of fact can reasonably conclude that a failure to warn or to repair the condition constitutes negligence [*see Rowland v. Christian (1968) 69 Cal. 2d 108, 119, 70 Cal. Rptr. 97, 443 P.2d 561]* . In this case, the Supreme Court used its "delegation" analysis to explain how these general principles apply if a landowner hires an independent contractor whose employee is injured by a hazardous condition on the premises.

Generally, the hirer delegates to the contractor responsibility for supervising the job, including responsibility for looking after employee safety. If there is a known safety hazard on a hirer's premises that can be addressed through reasonable safety precautions by the independent contractor, the hirer generally delegates the responsibility to take those precautions to the contractor and is not liable to the contractor's employee if the contractor fails to do so. However, if the hazard is concealed from the contractor, but known to the hirer, a different rule must apply. A hirer cannot effectively delegate to the contractor responsibility for the safety of the contractor's employees if the hirer fails to disclose critical information needed to fulfill that responsibility. In such a case, the hirer would be liable to the contractor's employee if the employee's injury is attributable to an undisclosed hazard. The hirer's liability in these circumstances would be derived from the hirer's own negligence. In other words, because the landowner/hirer delegates the responsibility of employee safety to the contractor, the teaching of *Privette* and its progeny is that a hirer has no duty to act to protect the employee. If the contractor fails in that responsibility, the landowner/hirer is not liable, because this liability would essentially be derivative or vicarious. However, if the landowner/hirer knows or should know of a concealed hazard on its premises, then under ordinary premises liability principles, the landowner/hirer may be liable for a resultant injury to those employees (*37 Cal. 4th, 659, 673-674)* .

The Court concluded, therefore, that a hirer of an independent contractor may be liable under a premises liability theory for an injury suffered by the contractor's employee if: (1) the hirer knew, or should have known, of a latent or concealed preexisting hazardous condition on the hirer's property; (2) the contractor did not know of, and could not reasonably have discovered, the condition; and (3) the hirer failed to warn the contractor of the condition (*37 Cal. 4th 659, 675)* .

The Court noted that its holding does not apply to a hazard created by the independent contractor, which that contractor necessarily is or should be aware of. Also, the Court expressly left open the question of landowner liability if the employee is on the premises but not working--for example, if the employee is on a part of the premises other than the job site (*37 Cal. 4th 659, 674-675 ns. 2, 3*).

The jury in this case had not been properly instructed that the hirer would not be liable if the hazardous condition was reasonably discoverable by the independent contractor. Accordingly, the Supreme Court remanded the case for a new trial on the question of whether the plaintiff's employer knew or should have known of the hazard posed by the airborne asbestos (*37 Cal. 4th 659, 683)* .

[d] Breach of Regulatory Duty May Support Liability

In ***Barclay v. Jesse M. Lange Distrib., Inc.*** *(2005) 129 Cal. App. 4th 281, 28 Cal. Rptr. 3d 242* , the plaintiff suffered serious burns in a fuel tank explosion while working for his employer, which had been hired to clean and remove fuel tanks at a gasoline bulk plant facility. The trial court granted summary judgment for the facility on the grounds that it could not be liable for injuries to an employee of an independent contractor hired to perform hazardous work on the property. The plaintiff appealed.

The court of appeal reversed the summary judgment. The court noted that the Supreme Court's analysis in *Hooker v. Department of Transp. (2002) 27 Cal. 4th 198, 115 Cal. Rptr. 2d 853, 38 P.3d 1081* [*see § 100A.45[3][f]*], did not preclude imposing direct liability on a hirer on a theory other than the retained control theory discussed in that case (*129 Cal. App. 4th 281, 294)* . The court then noted that § 424 of the Restatement (Second) of Torts provided that if specific precautions are required by statute or regulation for the safety of others, the party on whom that duty is imposed may be liable for injuries to those other persons if the party breaches that duty (*129 Cal. App. 4th 281, 295)* . Consistent with the conclusion in *Hooker* that a hirer may be directly liable if that hirer affirmatively contributes to the injuries to an employee of an independent contractor, the court held that a hirer may be liable if the hirer breaches a duty imposed on the hirer by regulation and if that breach affirmatively contributes to the employee's injury. The court agreed with the plaintiff that a state regulation, 24 Cal. Code Regs. § 7904.4.9.2, specifically imposed a duty on petroleum bulk plant facilities to provide fire extinguishers within 75 feet of likely fire areas. The plaintiff had presented evidence at the summary judgment stage that no fire extinguishers were seen in the area of the fire that injured the plaintiff, requiring a coworker to go 50 yards to get the nearest extinguisher. A doctor provided a declaration that the injuries to the plaintiff would have been less severe if the fire engulfing him had been put out sooner. Because the plant facility challenged the conclusion that the plaintiff's evidence conclusively established that there were no fire extinguishers within 75 feet, and also challenged whether that was an area where a fire was likely to occur, the court concluded that there were triable issues of fact on the plaintiff's claim that the facility breached the duty imposed by the regulation, making summary judgment inappropriate (*129 Cal. App. 4th 281, 298-301)* .

[e] Public Entity Hirer of Independent Contractor May Be Liable for Exercise of Retained Control

In ***McCarty v. Department of Transportation*** *(2008) 164 Cal. App. 4th 955, 79 Cal. Rptr. 3d 777* , plaintiff was severely injured while employed as a heavy equipment operator for a general contractor hired by Caltrans to build a freeway extension. At the time of injury, plaintiff was using an excavator to remove a utility pole from the freeway right-of-way when the pole fell on the roof of his excavator. The freeway right-of-way belonged to Caltrans, although the pole belonged to a utility company, which was responsible for removing the poles. While the general contractor was in control of the workplace, Caltrans had the authority to order the contractor to stop if Caltrans knew it was doing something unsafe. However, Caltrans did not order the general contractor to stop in its attempt to remove the pole that injured plaintiff, even though Caltrans knew that the utility company had its own contractor with special equipment for removing the utility poles that the general contractor did not have. After settling with other defendants, plaintiff went to trial against Caltrans. The trial judge granted a nonsuit in favor of defendant on plaintiff's cause of action for respondeat superior liability, and the jury found in favor of defendant on plaintiff's theory that defendant was liable for maintaining a dangerous condition of public property. However, the jury found in favor of plaintiff on his theory that defendant was liable for its exercise of retained control over safety at the workplace. The trial court denied defendant's motion for JNOV, although it granted a partial new trial on the basis that the jury had not been properly instructed on the retained control theory. Both parties appealed.

The court of appeal affirmed. Defendant's appeal was based on the argument that as a public entity, it could not be held liable for negligently exercising retained control over safety at the work site absent a statutory basis for imposing liability. While agreeing that a public entity cannot be held liable under general negligence principles without a statutory basis, the court of appeal held that *Gov. Code § 815.4* provided that a statutory basis for imposing liability on the public entity hirer of an independent contractor. Under *Gov. Code § 815.4*, a public entity is liable for an injury proximately caused by the tortious act or omission of an independent contractor to the same extent that the public entity would be subject to such liability if it were a private person. Thus, according to the court, if the employee's injury was proximately caused by a tortious act or omission of the independent contractor, and, as with a private person hirer, the public entity's negligent exercise of retained control over safety affirmatively contributed to the injury, defendant could be held liable under that statute. The court found that that statutory prerequisite of tortious conduct by the contractor was present, as the jury had allocated 42 percent of the fault to the general contractor. Thus, the court concluded that the jury could have imposed liability under *Gov. Code § 815.4*, even if no particular public employee was liable (*164 Cal. App. 4th 955, 977-979)* . However, the court affirmed the partial new trial on the retained control theory, agreeing that

the trial court provided erroneous instructions to the jury. As given, the instructions allowed the jury to impose liability under a theory of retained control if Caltrans, through its actions or failure to take required actions, "contributed" to plaintiff's injury. The instructions failed to specify that liability could only be imposed on this theory if Caltrans *negligently* exercised its retained control so as to affirmatively contribute to plaintiff's injury (*164 Cal. App. 4th 955, 984-986)* .

[4] Additional Authorities

[a] Hirer Exercising Retained Control Liable for Affirmatively Contributing to Employee's Injury

In *Browne v. Turner Constr. Co. (2005) 127 Cal. App. 4th 1334, 26 Cal. Rptr. 3d 433* , the plaintiff was an employee of a subcontractor on a building construction project. The subcontractor had been hired to install a fire sprinkler system, and the plaintiff fell nine feet from a ladder while he was attempting to install overhead sprinkler pipe. The plaintiff sued the building owner and the general contractor, alleging that they had provided hydraulic lifts and other safety equipment for use by the workers on the site, but had removed the safety equipment prior to the plaintiff's fall, causing him to resort to unsafe methods to finish his job. The trial court granted summary judgment for the defendants after concluding that the defendants did not affirmatively contribute to the plaintiff's injury. The court of appeal reversed. The court reasoned that a fact-finder could conclude that the defendants' act of providing safety equipment constituted a voluntary undertaking, the abrupt removal of that equipment before completion of the project constituted negligence in the performance of that undertaking, and this negligence affirmatively contributed to the plaintiff's injury. Under the Supreme Court's analysis in *Hooker v. Department of Transp. (2002) 27 Cal. 4th 198, 115 Cal. Rptr. 2d 853, 38 P.3d 1081* [*see § 100A.45[3][f]*], this affirmative conduct could have been sufficient to impose liability on the hirer and general contractor (*127 Cal. App. 4th 1334, 1345-1347)* . Moreover, the court noted that the concern in *Hooker* and related cases was to ensure that a nonnegligent hirer was not held liable for the negligence of an independent contractor when an employee of the independent contractor was injured. In this case, there was no evidence yet on the record that any negligence on the part of the plaintiff's own employer had contributed to the injury, and there was no reason not to hold hirers liable under those circumstances for the results of their own negligence (*127 Cal. App. 4th 1334, 1345-1346)* .

In *Ray v. Silverado Constructors (2002) 98 Cal. App. 4th 1120, 120 Cal. Rptr. 2d 251* , the employee of an independent contractor on a highway construction project was killed when he was struck in the head with construction materials that blew off a bridge during high winds. At the time he was struck, the decedent had stopped his vehicle to assist other employees of the independent contractor in securing other materials that had blown off the bridge. The decedent's widow filed suit against the owners of the project and the general contractor, asserting that they failed to carry out their duties of care for the work site. The trial court granted summary judgment for the defendants, but the court of appeal reversed. After reviewing the relevant case law, including the Supreme Court's decision in *Hooker v. Department of Transp. (2002) 27 Cal. 4th 198, 115Cal. Rptr. 2d 853, 38 P.3d 1081* [*see § 100A.45[3][f]*], the court of appeal concluded that a triable issue existed as to whether the failure of the owners and the general contractor to prevent traffic from using the road under the bridge was sufficient to impose liability. The plaintiff had alleged that the defendants had been actively negligent in failing to blockade the road during the high wind conditions to prevent injuries to members of the public using it. She provided evidence that contractual provisions made the defendants responsible for traffic control, and in fact prevented the independent contractor from closing roadways without the prior written approval of the general contractor, and she also pointed to statutes that arguably supported imposing a duty of care over traffic control as well (*98 Cal. App. 4th 1120, 1131-1136)* . Noting triable issues with respect to breach of duty and causation, the court concluded that summary judgment was inappropriate (*98 Cal. App. 4th 1120, 1136-1139)* .

[b] Breach of Regulatory Duty May Support Liability

In *Evard v. Southern California Edison (2007) 153 Cal. App. 4th 137, 62 Cal. Rptr. 3d 479* , plaintiff was the

employee of a tree service company that was hired by the owner of a billboard to work on the billboard. While plaintiff understood that company policy required him to hook his harness at all times while he was on the billboard, he failed to do so. Plaintiff was injured when a metal pole he was using made contact with an electrical line, causing plaintiff to fall and hit the ground. Plaintiff received workers' compensation benefits, but sued the billboard owner, the power company, and other parties for his injuries. The trial court granted summary judgment in favor of the billboard owner, but the court of appeal reversed. The court held that the billboard owner owed a regulatory duty imposed by *8 Cal. Code Reg. § 3416(a)*, which generally required billboard owners to provide either guardrails or a safety line on platforms over 7 and a half feet above the ground, and that this duty was nondelegable (*153 Cal. App. 4th 137, 147)* . The court then concluded that there was a triable issue of fact as to whether the billboard owner breached this nondelegable regulatory duty, and if so, whether such breach affirmatively contributed to the injury to plaintiff (*153 Cal. App. 4th 137, 147-148)* .

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 100A EMPLOYER AND EMPLOYEE: RESPONDEAT SUPERIOR
PART II. FORMS

10-100A California Points & Authorities § 100A.47

AUTHOR: Carolyn Rashby

§ 100A.47 Supporting Contention That Punitive Damages Can Be Recovered From Employer--Employer Employed Tortfeasor With Conscious Disregard of Others' Safety [Civ. Code § 3294(b)]

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF CAN RECOVER PUNITIVE DAMAGES FROM DEFENDANT PURSUANT TO *CIVIL CODE SECTION 3294(b)* BASED ON THE WRONGFUL CONDUCT OF DEFENDANT'S EMPLOYEE BECAUSE DEFENDANT HAD ADVANCE KNOWLEDGE OF THE UNFITNESS OF THE EMPLOYEE AND EMPLOYED HIM/HER WITH A CONSCIOUS DISREGARD FOR THE RIGHTS OR SAFETY OF OTHERS.

A. Punitive Damages Standard. Punitive damages may be recovered for the sake of example and by way of punishing a defendant if the defendant has been guilty of oppression, fraud, or malice (*Civ. Code § 3294(a)*).

B. Liability of Employer for Punitive Damages for Employing Tortfeasor With Conscious Disregard for Rights and Safety of Others. An employer is liable for punitive damages pursuant to *Civil Code Section 3294(a)* based on the acts of his or her employee if the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others (*Civ. Code § 3294(b)*; *Weeks v. Baker & McKenzie (1998) 63 Cal. App. 4th 1128, 1159-1160, 74 Cal. Rptr. 2d 510* ; Coats v. Construction & Gen. Laborers Local No. 185 *(1971) 15 Cal. App. 3d 908, 915-916, 93 Cal. Rptr. 639*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that the defendant is liable for punitive damages based on the conduct of the defendant's employee, on the grounds that the defendant had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard for the rights or safety of others.

This form may be combined with points pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the defendant is liable for punitive damages based on the conduct of his or her employee because the defendant had knowledge of the employee's unfitness and employed him or her with a conscious disregard for the rights or safety of others--for example, in a motion for summary judgment. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that the employee's conduct was oppressive, fraudulent, or malicious [*Civ. Code § 3294(a)*; oppression, fraud, or malice must be shown by clear and convincing evidence], and that the employee was acting in a corporate or employment capacity in connection with the misconduct [*College Hosp., Inc. v. Superior Court (1994) 8 Cal. 4th 704, 723-724, 34 Cal. Rptr. 2d 898, 882 P.2d 894* , discussed in *§ 100A.53*]. Counsel also should demonstrate that the defendant knew of the employee's unfitness for the work but nonetheless employed or continued to employ him or her. For example, counsel could set forth facts indicating that the defendant hired the employee into a job position in which the employee necessarily would come into contact with third parties, even though the defendant knew that the employee previously had assaulted third parties [*see* Coats v. Construction & Gen. Laborers Local No. 185 *(1971) 15 Cal. App. 3d 908, 915-916, 93 Cal. Rptr. 639]* . If the defendant is a corporate employer, the advance knowledge and conscious disregard must be on the part of an officer, director, or managing agent of the corporation [*Civ. Code§ 3294(b)*]. For an example of an argument that punitive damages may be imposed on a corporate employer, see *§ 100A.50*.

[c] Opposing Memoranda

In an appropriate case, the points and *authorities in § 100A.52* may be used to oppose the contention supported by these points.

[d] Related Pleading and Practice Forms

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[e] Related Memoranda

For points relating to the recovery of punitive damages from a principal based on the acts of its agent, see Ch. 182, *Principal and Agent* .

[f] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 30, § 30.07[1]* (Matthew Bender).

[3] Discussion of Authorities

[a] Liability of Employer for Punitive Damages for Employing Tortfeasor With Conscious Disregard for Rights or Safety of Others

In ***Weeks v. Baker & McKenzie*** *(1998) 63 Cal. App. 4th 1128, 74 Cal. Rptr. 2d 510* , the plaintiff was a legal secretary who brought a sexual harassment action under *Gov. Code § 12940* of the Fair Employment and Housing Act against a partner in her former law firm and against the firm itself. At trial, the jury found that the partner had sexually harassed the plaintiff and awarded compensatory damages from both the partner and the firm, as well as punitive damages of

$225,000 from the partner and $6.9 million from the firm, which was reduced by the trial court to $3.5 million. In addition to other issues raised on appeal by the partner and the law firm, the firm appealed the award of punitive damages assessed against it.

The court of appeal affirmed the punitive damages award against the law firm. After reviewing the provisions and legislative history of *Civ. Code § 3294(b)*, the court held that a finding that the employer was guilty of malice, oppression, or fraud is not required in order to justify an award of punitive damages when either the employer had advance knowledge of the unfitness of the employee but employed him or her with a conscious disregard of the rights or safety of others, or the employer authorized or ratified the employee's wrongful conduct (*63 Cal. App. 4th 1128, 1153-1154)* . The court further rejected the firm's argument that its liability for punitive damages was only vicarious, and as such the punitive damages assessed against the firm could be no greater than the punitive damages assessed against the liable employee. Since an employer's liability under *Civ. Code § 3294(b)* is for the employer's own wrongful conduct, the punitive damage award assessed against the employer may be greater than the award assessed against the liable employee (*63 Cal. App. 4th 1128, 1154-1156)* . Additionally, the court rejected the firm's argument that, since the statutory liability of an employer for punitive damages based on the knowing employment of an unfit employee with a conscious disregard of the rights or safety of others imposes a duty on the employer to fire an unfit employee to avoid liability for punitive damages, the offending employee's conduct must rise to a level sufficient to justify termination of the employee before the employer may be liable for punitive damages under *Civ. Code § 3294(b)*. The court explained that an employer is not necessarily required to terminate the offending employee in order to escape liability for punitive damages, and in the context of the case at issue, the employer's duty was to take reasonable measures to prevent a known harasser from committing future acts of harassment (*63 Cal. App. 4th 1128, 1157)* . Finally, the court held that there was substantial evidence to support the jury finding that the firm or a managing agent of the firm had advance knowledge that the partner was likely to sexually harass employees such as the plaintiff, and that the firm exhibited conscious disregard for the rights and safety of others by failing to take reasonable steps to prevent the partner's misconduct. The court noted that the evidence suggested that, several years before the plaintiff was assigned to work with the offending partner, it was common knowledge among members of the firm that the offending partner regularly harassed female employees, and that although the partner was occasionally warned about the misconduct, the firm allowed the misconduct to continue (*63 Cal. App. 4th 1128, 1159-1160)* .

The factual and procedural background of **Coats v. Construction & Gen. Laborers Local No. 185** *(1971) 15 Cal. App. 3d 908, 93 Cal. Rptr. 639* , is discussed in *§ 100A.21[3][b]*. In discussing whether the defendant, a union, was liable for punitive damages based on the conduct of its employees, the court stated that while maintaining a wrongdoer in the service of the employer does not, standing alone, make the employer liable, it indicates the employer's approval of the employee's course and with other acts will make the employer liable for punitive damages. The court held that the knowledge that the defendant had of the tendencies of the employees and the fact that they had on a prior occasion beaten up another union member, the fact that even with such knowledge the defendant continued to employ them, and the oppression of the defendant with respect to the plaintiff and another union member by not dispatching them for jobs,allowed the trier of fact to assess punitive damages against the defendant (*15 Cal. App. 3d 908, 915-916)* .

California Points & Authorities

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 100A EMPLOYER AND EMPLOYEE: RESPONDEAT SUPERIOR
PART II. FORMS

10-100A California Points & Authorities § 100A.48

AUTHOR: Carolyn Rashby

§ 100A.48 Supporting Contention That Punitive Damages Can Be Recovered From Employer--Employer Authorized or Ratified Tortfeasor's Conduct [Civ. Code § 3294(b)]

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF CAN RECOVER PUNITIVE DAMAGES FROM DEFENDANT PURSUANT TO *CIVIL CODE SECTION 3294(b)* BASED ON THE WRONGFUL CONDUCT OF DEFENDANT'S EMPLOYEE BECAUSE DEFENDANT [AUTHORIZED *or* RATIFIED] THE EMPLOYEE'S WRONGFUL CONDUCT.

A. Punitive Damages Standard. Punitive damages may be recovered for the sake of example and by way of punishing a defendant if the defendant has been guilty of oppression, fraud, or malice (*Civ. Code § 3294(a)*).

B. Liability of Employer for Punitive Damages for Authorizing Employee's Conduct. An employer is liable for punitive damages pursuant to *Civil Code Section 3294(a)* based on the acts of his or her employee if the employer authorized or ratified the wrongful conduct for which the punitive damages are awarded (*Civ. Code § 3294(b)*).

[*Optional*] **C. Form of Authorization.** Authorization of an employee's tortious conduct can be shown by proof that the employee was acting within the course and scope of his or her employment and with the permission and consent of the employer (*Kiseskey v. Carpenters' Trust for S. Cal. (1983) 144 Cal. App. 3d 222, 234-235, 192 Cal. Rptr. 492* ; *Hale v. Farmers Ins. Exch. (1974) 42 Cal. App. 3d 681, 690, 117 Cal. Rptr. 146*).

[*Optional*] **D. Form of Ratification.** Ratification can be established by showing that the employer knew of the employee's tortious conduct, and implicitly or expressly approved of the conduct with such knowledge (*Alhino v. Starr (1980) 112 Cal. App. 3d 158, 173-174, 169 Cal. Rptr. 136* ; *Hale v. Farmers Ins. Exch. (1974) 42 Cal. App. 3d 681, 691-692, 117 Cal. Rptr. 146* ; *Roberts v. Ford Aerospace & Commc'ns Corp. (1990) 224 Cal. App. 3d 793, 800-802, 274 Cal. Rptr. 139*).

[*Optional*] **E. Retention of Tortfeasor May Establish Ratification.** An employer's retention of the tortfeasor in employment, after the employer is advised of the employee's wrongful conduct, can establish ratification of such wrongful conduct (Coats v. Construction & Gen. Laborers Local No. 185 *(1971) 15 Cal. App. 3d 908, 914, 93 Cal. Rptr. 639*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that the defendant is liable for punitive damages based on the conduct of the defendant's employee, on the grounds that the defendant authorized or ratified the conduct.

This form may be combined with points pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the defendant is liable for punitive damages based on the conduct of his or her employee because the defendant authorized or ratified the conduct--for example, in a motion for summary judgment. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that the employee's conduct was oppressive, fraudulent, or malicious [*Civ. Code § 3294(a)*; oppression, fraud, or malice must be shown by clear and convincing evidence], and that the employee was acting in a corporate or employment capacity in connection with the misconduct [*College Hosp., Inc. v. Superior Court (1994) 8 Cal. 4th 704, 723-724, 34 Cal. Rptr. 2d 898, 882 P.2d 894* , discussed in *§ 100A.53*]. Counsel also should demonstrate that the defendant authorized or ratified such conduct. For example counsel could set forth facts indicating that the defendant either orally or in writing encouraged or consented to the conduct, or that the defendant knew about the wrongful conduct and expressed implicit or express approval of it after the fact, such as by failing to fully investigate the incident and failing to punish the employee [*see Roberts v. Ford Aerospace & Commc'ns Corp. (1990) 224 Cal. App. 3d 793, 801-802, 274 Cal. Rptr. 139]* . If the defendant is a corporate employer, the authorization or ratification must be on the part of an officer, director, or managing agent of the corporation [*Civ. Code § 3294(b)*]. For an exampleof an argument that punitive damages may be imposed on a corporate employer, see *§ 100A.50*.

[c] Opposing Memoranda

In an appropriate case, the points and *authorities in § 100A.52* may be used to oppose the contention supported by these points.

[d] Related Pleading and Practice Forms

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[e] Related Memoranda

For points relating to the recovery of punitive damages from a principal based on the acts of its agent, see Ch. 182, *Principal and Agent* .

[f] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 30, §§ 30.07[1], 30.07[3]* (Matthew

Bender).

[3] Discussion of Authorities

[a] Form of Authorization

In ***Kiseskey v. Carpenters' Trust for S. Cal.*** *(1983) 144 Cal. App. 3d 222, 192 Cal. Rptr. 492* , a husband and wife brought suit against a union and certain of its agents and employees for compensatory and punitive damages for intentional infliction of emotional distress after the husband suffered a heart attack following a series of telephone calls from union agents and employees threatening the husband and his family with bodily harm if he did not sign another agreement with the union. The trial court dismissed the action after sustaining the defendants' general demurrer without leave to amend on the basis of the statute of limitations. The plaintiffs appealed.

The court of appeal reversed. The court reviewed the sufficiency of the allegations by which the plaintiff sought to recover punitive damages against the union for the conduct of its agents and employees. The complaint alleged that the persons making the threatening phone calls were the agents and/or employees of the union and were acting in the course and scope of their agency and with the permission and consent of the union. The court examined whether the words "permission" and "consent" constituted a sufficient allegation that the union had authorized or approved the acts. Webster's dictionary defines "permission" as "the act of permitting," "formal consent," and "authorization." It defines "consent" as "compliance or approval esp. of what is done or proposed by another," "acquiescence," "permission," "capable, deliberate, and voluntary agreement to or concurrence in some act or purpose implying physical and mental power and free action." Further, it defines the word "authorize" as "to endorse, empower, justify, or permit by or as if some recognized or proper authority: sanction." The court concluded that the words "permission and consent," coupled with the factual allegations in the complaint, constituted a sufficient allegation, if proven, on which punitive damages could be assessed against the union (*144 Cal. App. 3d 222, 234-235)* .

In ***Hale v. Farmers Ins. Exch.*** *(1974) 42 Cal. App. 3d 681, 117 Cal. Rptr. 146* , the plaintiff sued an insurer and its employees Pensasa and Lawrence for bad faith refusal to pay medical benefits under his automobile insurance policy. The plaintiff alleged that after paying initial medical bills submitted from a doctor, the defendants refused to pay additional bills when the plaintiff sought treatment from a specialist. The defendants claimed that they had not received bills from the plaintiff and had no medical report in their files relating to the accident. Less than one year after the accident, the defendants closed the plaintiff's file and opened a regional file, which was the usual practice when no bills were unpaid at the end of a year following the filing of a claim; but no evidence was introduced to show why the plaintiff's claim was closed and transferred less than one year after it was opened and while it contained unpaid medical bills. Although the cooperation clause in the plaintiff's policy merely specified that he was to file his claim and authorize inspection of all medical expenses and reports, Pensasa stated that the policy authorized him to request the plaintiff to furnish the medical reports. Further, although there was no evidence in the file to indicate that the plaintiff's injury for which he sought treatment was not related to the automobile accident, the defendants took no action to obtain a medical report until over one year after the plaintiff first filed his claim. The jury returned verdicts against the defendants, including punitive damages assessments against the insurer and separately against the employees. The trial court granted a motion for judgment notwithstanding the verdict and a motion for a new trial as to the punitive damage award against the insurer, but denied the motions as to the punitive damage awards against the employees.

The appeals court considered the plaintiff's contention that the trial court erred in granting the insurer a judgment notwithstanding the verdict assessing punitive damages against it. The court first stated that denying the motion as to the punitive damage awards against the employees reflected the trial court's concurrence in the jury verdict finding that the employs were guilty of oppression or malice. Thus, whether granting the motion as to their employer, the insurer, was appropriate had to beresolved by determining whether there was substantial evidence to sustain a finding of knowledge, authorization, or ratification on the part of the insurer for the acts of the employees. The court explained that while an employer may be liable for an employee's tort under respondeat superior, the employer is not responsible

for punitive damages if the employer did not direct or ratify the act (*42 Cal. App. 3d 681, 689-690)* .

In this case, the testimony was that Pensasa was the claims supervisor in charge of the office where the plaintiff filed his claim, and was responsible for assigning the handling of claims in the geographical area of the office. He was the person who approved paying the plaintiff's initial medical bills, he supervised all medical claims in the office, and had full authority to determine whether payment should be authorized or withheld. Both Pensasa and Lawrence testified that they were merely following the insurer's usual policy in processing the plaintiff's claim. The court stated that such usual and authorized procedure could have been viewed by the jury as including the practice of making unauthorized and oppressive demands on the insured to himself furnish medical reports when the policy required only that he execute the necessary consents so that the company could procure the reports it desired. Thus, the jury could have determined that by following the insurer's usual procedures in processing claims, all of the acts and conduct of the individual defendants were known and directed by the insurer, since such usual procedures had to be known and authorized by those who dictated company policy (*42 Cal. App. 3d 681, 691)* .

The court further explained that ratification is a question of fact and the burden of proving it is on the party asserting its existence. Ratification may be proved by circumstantial as well as direct evidence, and anything that convincingly shows the intention of the principal to adopt or approve the act in question is sufficient. Pensasa had testified that claims files were sent to the regional office at the end of one year following the filing of a claim if no bills remained unpaid, and at that time, it could be reviewed by other personnel of the insurer. The plaintiff's file was forwarded in the usual manner. Even though Pensasa did not know whether the plaintiff's file was every reviewed, the jury could have inferred that it was, and that all of the conduct of the individual defendants became known to the corporation through such examination. Therefore, nonpayment of the plaintiff's claim could be found to mean that the insurer had adopted and approved of Pensasa's decision not to pay the plaintiff's claim, and that the insurer thus ratified his conduct. The court thus reversed the judgment notwithstanding the verdict (*42 Cal. App. 3d 681, 691-692)* .

[b] Form of Ratification

In ***Alhino v. Starr*** *(1980) 112 Cal. App. 3d 158, 169 Cal. Rptr. 136* , the plaintiff sued a real estate brokerage company and its employee, a real estate agent, for fraudulent misrepresentation as to the security and assets of the buyer of real estate her husband had sold. The jury returned a verdict against the defendants for general and punitive damages. The trial court conditionally granted the defendants a new trial on damages if the plaintiff did not agree to a reduction of the punitives to $25,000, among other things. The defendants appealed, and the plaintiff cross-appealed on the conditional order granting new trial.

The defendants argued on appeal, among other things, that there was insufficient evidence of fraud, both with respect to the real estate agent's acts and the company's ratification of such acts, to support the punitive damages award. The court reviewed the facts of the case, stating that the issue turned on whether the agent was the plaintiff's husband's agent or the buyer's agent in the real estate transaction. The agent had encouraged the plaintiff's husband to accept an unsecured note from the buyer, despite his knowledge that some of the representations in the buyer's financial statement were false, and knew that the buyer wanted omissions in the note so that he could default with impunity. In addition, the agent failed to disclose to the plaintiff's husband that the buyer was borrowing 100 percent of the downpayment, despite the fact that a real estate agent is obligated to disclose this fact to the agent's principal. Based on such evidence, the court found that there was ample evidence that the agent violated his fiduciary duties toward the plaintiff's husband. Further, there was substantial evidence that the company ratified the agent's conduct, based on the facts that the agent informed his supervisor of the details of the real estate transaction, including the unsecured note and the downpayment loan, and that prior to trial, the agent was reemployed by the company and defended at trial by its attorney. The court stated that the assertion of defense alone demonstrates ratification of the employee's conduct. The court concluded that all of the agent's acts were either approved or subsequently ratified by the company, and that such ratification supported the award of punitive damages (*112 Cal. App. 3d 158, 173-174)* .

Hale v. Farmers Ins. Exch. *(1974) 42 Cal. App. 3d 681, 117 Cal. Rptr. 146* , is discussed in *§ 100A.48[3][a]*.

In ***Roberts v. Ford Aerospace & Commc'ns Corp.*** *(1990) 224 Cal. App. 3d 793, 274 Cal. Rptr. 139* , a discharged employee sued his employer and individual supervisory employees for breach of the covenant of good faith and fair dealing, breach of contract, and retaliatory discharge. The plaintiff complained to his supervisors about being racially harassed by other employees and about not receiving pay raises and chances for promotion. The incidents of harassment escalated after his complaints, and after he began to complain, his performance reviews deteriorated and he was eventually fired. The jury found that the termination was racially motivated in violation of public policy, and awarded punitive damages against the employer only. After the trial court denied the employer's motion for judgment notwithstanding the verdict and for a new trial, the employerappealed, in part on the grounds that punitive damages against it could be no greater than those assessed against the individual employees.

The court rejected the employer's argument that its liability was merely derivative and therefore it could not be liable for greater damages than its individual employees. The court stated that that rule is inapplicable if the company was aware of the employee's complaints and sanctioned the conduct of its employees and managing agent. The court reviewed the punitive damages standard under *Civ. Code § 3294* and found that the evidence supported a finding that the employer participated in the discriminatory conduct, based on a manager's testimony that in order to fire someone, he had to have support from the company's industrial relations department. Responding to the employer's argument that evidence of ratification was merely circumstantial, the court stated that ratification may be established by circumstantial or direct evidence that demonstrates adoption or approval of the employee's actions by a corporate agent. Ratification also may be inferred from the fact that an employer, after being informed of the employee's actions, does not fully investigate and fails to repudiate the employee's conduct by redressing the harm done and punishing or discharging the employee (*224 Cal. App. 3d 793, 800-801)* . Finally, the court rejected the employer's argument that the jury could not assess punitive damages against it without similarly assessing such damages against the individual employees. Punitive damages may be apportioned among joint tortfeasors in various amounts according to their individual culpability. The jury found that all of the defendants acted with malice. Also, the jury could have found that the corporate consciousness of the employer fostered tolerance of discrimination and that the employer's ratification of the supervisors', managing agents', and employees' actions merited the imposition of punitive damages (*224 Cal. App. 3d 793, 801-802)* .

The factual and procedural background of **Coats v. Construction & Gen. Laborers Local No. 185**, *(1971) 15 Cal. App. 3d 908, 93 Cal. Rptr. 639* , is discussed in *§ 100A.21[3][b]*. In finding that the defendant ratified the conduct of its agents and employees, the court placed particular reliance on the defendant's failure to discharge the agents and employees who assaulted the plaintiff after the defendant received knowledge of the assault (*15 Cal. App. 3d 908, 913-914)* .

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CHAPTER 100A EMPLOYER AND EMPLOYEE: RESPONDEAT SUPERIOR
PART II. FORMS

10-100A California Points & Authorities § 100A.49

AUTHOR: Carolyn Rashby

§ 100A.49 Supporting Contention That Punitive Damages Can Be Recovered From Employer--Employer's Own Conduct Constituted Oppression, Fraud, or Malice

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF CAN RECOVER PUNITIVE DAMAGES FROM DEFENDANT PURSUANT TO *CIVIL CODE SECTION 3294(b)* BASED UPON THE ACTS OF DEFENDANT'S EMPLOYEE BECAUSE DEFENDANT WAS PERSONALLY GUILTY OF OPPRESSION, FRAUD OR MALICE.

A. Punitive Damages Standard. Punitive damages may be recovered for the sake of example and by way of punishing a defendant if the defendant has been guilty of oppression, fraud, or malice (*Civ. Code § 3294(a)*).

B. Liability of Employer for Punitive Damages for Employer's Own Oppression Fraud or Malice. An employer will be held liable for punitive damages pursuant to *Civil Code Section 3294(a)* based on the acts of his or her employee if the employer was personally guilty of oppression, fraud, or malice (*Civ. Code § 3294(b)*; *Roberts v. Ford Aerospace & Commc'ns Corp. (1990) 224 Cal. App. 3d 793, 801-802, 274 Cal. Rptr. 139*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that the defendant is liable for punitive damages because he or she was personally guilty of oppression, fraud or malice.

This form may be combined with points pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the defendant is liable for punitive damages because he or she personally was guilty of oppression, fraud, or malice--for example, in a motion for summary judgment. This form may also be adapted for use in

a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counselshould discuss evidence that the defendant's own conduct in connection with the plaintiff's injury was oppressive, fraudulent, or malicious [*Civ. Code § 3294(a)*; oppression, fraud, or malice must be shown by clear and convincing evidence], such as facts indicating that the defendant knowingly participated in its employee's harassing and discriminatory acts toward the plaintiff [*see Roberts v. Ford Aerospace & Commc'ns Corp. (1990) 224 Cal. App. 3d 793, 801-802, 274 Cal. Rptr. 139]* . If the defendant is a corporate employer, the oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation [*Civ. Code § 3294(b)*]. For an example of an argument that punitive damages may be imposed on a corporate employer, see *§ 100A.50*.

[c] Opposing Memoranda

In an appropriate case, the points and *authorities in § 100A.52* may be used to oppose the contention supported by these points.

[d] Related Pleading and Practice Forms

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[e] Related Memoranda

For points relating to the recovery of punitive damages from a principal based on the acts of its agent, see Ch. 182, *Principal and Agent* .

[f] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 30, § 30.07[1]* (Matthew Bender).

[3] Discussion of Authorities

[a] Liability of Employer for Punitive Damages Based on Employer's Own Oppression, Fraud or Malice

The factual and procedural background of ***Roberts v. Ford Aerospace & Commc'ns Corp.*** *(1990) 224 Cal. App. 3d 793, 274 Cal. Rptr. 139* , is discussed in *§ 100A.48[3][b]*. The court rejected the employer's argument that its liability was merely derivative and therefore it could not be liable for greater damages than its individual employees. The court stated that that rule is inapplicable if the company was aware of the employee's complaints and sanctioned the conduct of its employees and managing agent. The court reviewed the punitive damages standard under *Civ. Code § 3294* and found that the evidence supported a finding that the employer participated in the discriminatory conduct, based on a manager's testimony that in order to fire someone, he had to have support from the company's industrial relations department. Responding to the employer's argument that evidence of ratification was merely circumstantial, the court stated that ratification may be established by circumstantial or direct evidence that demonstrates adoption or approval of the employee's actions by a corporate agent. Ratification also may be inferred from the fact that an employer, after being informed of the employee's actions, does not fully investigate and fails to repudiate the employee's conduct by redressing the harm done and punishing or discharging the employee (*224 Cal. App. 3d 793, 800-801)* . Finally, the court rejected the employer's argument that the jury could not assess punitive damages against it without similarly assessing such damages against the individual employees. Punitive damages may be apportioned among joint tortfeasors in various amounts according to their individual culpability. The jury found that all of the defendants acted

with malice. Also, the jury could have found that the corporate consciousness of the employer fostered tolerance of discrimination and that the employer's ratification of the supervisors', managing agents', and employees' actions merited the imposition of punitive damages (*224 Cal. App. 3d 793, 801-802)* .

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CHAPTER 100A EMPLOYER AND EMPLOYEE: RESPONDEAT SUPERIOR
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10-100A California Points & Authorities § 100A.50

AUTHOR: Carolyn Rashby

§ 100A.50 Supporting Contention That Punitive Damages Can Be Recovered From Corporate Employer--Wrongful Conduct Was Performed, Authorized, or Ratified by Officer, Director, or Managing Agent of Corporation [Civ. Code § 3294(b)]

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF CAN RECOVER PUNITIVE DAMAGES FROM DEFENDANT, A CORPORATE EMPLOYER, PURSUANT TO *CIVIL CODE SECTION 3294(b)* BASED ON THE ACTS OF DEFENDANT'S EMPLOYEE BECAUSE THE WRONGFUL CONDUCT WAS _____ [PERFORMED *or* AUTHORIZED *or* RATIFIED] BY _____ [AN OFFICER *or* A DIRECTOR *or* A MANAGING AGENT] OF DEFENDANT.

A. Punitive Damages Standard. Punitive damages may be recovered for the sake of example and by way of punishing a defendant if the defendant has been guilty of oppression, fraud, or malice (*Civ. Code § 3294(a)*).

B. Liability of Corporate Employer for Punitive Damages. A corporate employer can be held liable for punitive damages pursuant to *Civil Code Section 3294(a)* based on the acts of its employee if the employee was an officer, director, or managing agent of the corporation, or if the corporation authorized or ratified the employee's wrongful conduct and such authorization or ratification was on the part of an officer, director, or managing agent of the corporation (*Civ. Code § 3294(b)*; Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 822-823, 157 Cal. Rptr. 482, 598 P.2d 452).

C. Employee Who Exercises Policy-making Authority Is Managing Agent of Corporate Employer. For purposes of imposing liability for punitive damages under *Civ. Code § 3294(b)*, a "managing agent" is a corporate employee who exercises substantial independent authority and judgment in making decisions that ultimately determine corporate policy (*White v. Ultramar, Inc. (1999) 21 Cal. 4th 563, 573-577, 88 Cal. Rptr. 2d 19, 981 P.2d 944*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that the defendant, a corporate employer, is liable for punitive damages because an officer, director, or managing agent of the defendant committed, authorized, or ratified the wrongful conduct on which the punitive damages are based.

This form may be combined with points pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the defendant is liable for punitive damages because an officer, director, or managing agent of the defendant committed the wrongful conduct or authorized or ratified another employee's wrongful conduct--for example, in a motion for summary judgment. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that the defendant is a corporate employer, that the tortious conduct of the defendant's employee was oppressive, fraudulent, or malicious [*Civ. Code § 3294(a)* (oppression, fraud, or malice must be shown by clear and convincing evidence)], that the employee was acting in a corporate or employment capacity in connection with the misconduct [*College Hosp., Inc. v. Superior Court (1994) 8 Cal. 4th 704, 723-724, 34 Cal. Rptr. 2d 898, 882 P.2d 894* (discussed in *§ 100A.53*)], and that the employee was an officer, director, or managing agent of the corporation, or that an officer, director, or managing agent authorized or ratified such conduct. In an appropriate case, counsel should discuss evidence that the managing agent who authorized or ratified the tortious conduct exercised substantial independent authority and judgment in his or her corporate decisionmaking such that the decisions ultimately determined corporate policy [*White v. Ultramar, Inc. (1999) 21 Cal. 4th 563, 566-567, 573-577, 88 Cal. Rptr. 2d 19, 981 P.2d 944* ; *see* Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 822-823, 157 Cal. Rptr. 482, 598 P.2d 452] . For an example of an argument that the defendant authorized or ratified the employee's conduct, see *§ 100A.48*.

[c] Opposing Memoranda

In an appropriate case, the points and *authorities in § 100A.52* may be used to oppose the contention supported by these points.

[d] Related Pleading and Practice Forms

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[e] Related Memoranda

For points relating to the recovery of punitive damages from a principal based on the acts of its agent, see Ch. 182, *Principal and Agent* .

[f] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 30, §§ 30.07[1], 30.07[2]* (Matthew Bender).

[3] Discussion of Authorities

[a] Liability of Corporate Employer for Punitive Damages

Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 157 Cal. Rptr. 482, 598 P.2d 452 , was an action against a corporate defendant and its agents who handled the plaintiff's claim, seeking compensatory and punitive damages for the bad faith breach of a health and disability insurance policy. The trial court directed a verdict for the plaintiff on the ground that the failure to have the plaintiff examined by a doctor of the defendant's choice or to consult with the plaintiff's treating physicians before denyingthe plaintiff's claims for benefits under the policy constituted a breach of the duty of good faith and fair dealing. The jury awarded the plaintiff compensatory and punitive damages, and the defendant appealed.

The Supreme Court affirmed the award of punitive damages against the defendant as a principal, holding that California follows the rule of Restatement (Second) of Torts § 909 regarding an assessment of punitive damages against a principal. The Court noted that § 909 permits an award of punitive damages if (but only if): (1) the principal authorized the doing and the manner of the act; (2) the agent was unfit, and the principal was reckless in employing him or her; (3) the agent was employed in a managerial capacity and was acting in the scope of employment; and (4) the principal or a managerial agent of the principal ratified or approved the act (*24 Cal. 3d 809, 822)* . In response to the defendant's argument that neither of the employee defendants were managerial employees because neither was involved in high-level policymaking, the court stated that the determination of whether an employee acts in a managerial capacity does not necessarily hinge on his or her level of corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employee possesses in making decisions that will ultimately determine corporate policy. The court concluded that when an employee disposes of insureds' claims with little if any supervision, they possess sufficient discretion for the law to impute their actions concerning those claims to the corporation (*24 Cal. 3d 809, 822-823)* . The Court also noted that managerial capacity is not determined by title, and that an employer cannot insulate itself from punitive damage liability by giving an employee a nonmanagerial title while permitting that employee to make crucial policy decisions (*24 Cal. 3d 809, 823)* .

[b] Employee Who Exercises Policy-making Authority Is Managing Agent of Corporate Employer

White v. Ultramar, Inc. *(1999) 21 Cal. 4th 563, 88 Cal. Rptr. 2d 19, 981 P.2d 944* , the plaintiff sought punitive damages against his former employer based on the conduct of his supervisor in firing him. The trial court entered a judgment on a jury verdict that awarded punitive damages. The court of appeal affirmed, holding that the supervisor's power to fire the plaintiff was sufficient to make her a "managing agent" of the corporation for purposes of holding the corporation liable for punitive damages under *Civ. Code § 3294(b).*

The Supreme Court rejected the reasoning of the court of appeal and held that in enacting *Civ. Code § 3294(b)* to provide for corporate punitive-damages liability based on the conduct of managing agents, the legislature intended to refer to those employees who exercise substantial independent authority and judgment over decisions that ultimately determine corporate policy (*21 Cal. 4th 563, 573)* . The Court expressly rejected a rule defining the term "managing agent" as any supervisor with authority to hire and fire employees; such a rule would effectively allow punitive damage liability in most employment cases (*21 Cal. 4th 563, 575)* . In so holding, the Court reaffirmed the reasoning of Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809 [*see § 100A.50[3][a]*], which prior to the enactment of *Civ. Code § 3294(b)* had held that a corporate employer's liability for punitive damages based on an employee's conduct does not depend on the employee's official title, but rather on whether the employee exercises discretionary authority to decide corporate policy (*21 Cal. 4th 563, 570-571, 576-577)* . Accordingly, the determination of managing-agent status is a factual determination that must be made on a case-by-case basis (*21 Cal. 4th 563, 567)* . To demonstrate that an employee is a managing agent under *Civ. Code § 3294(b)*, a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of the corporation's business. The mere ability to hire and fire employees would not be a sufficient showing of such authority (*21 Cal. 4th 563, 577)* .

In this case, the Supreme Court held that--contrary to the ruling of the court of appeal--the employee's supervision of the

plaintiff and her authority to fire him were not sufficient to make the employee a managing agent for the corporate employer. However, the Supreme Court affirmed the judgment awarding punitive damages, because other circumstances in the case established that the employee was indeed a managing agent with substantial discretionary authority over vital aspects of the defendant's business and company policy. For example, the employee was a zone manager for the defendant, with primary responsibility for managing eight stores and at least 65 employees. Under the circumstances of the case, the fact that the employee had consulted with the corporate human resources department before firing the plaintiff did not detract from her ability to act independently in making the firing decision (*21 Cal. 4th 563, 577)* .

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 100A EMPLOYER AND EMPLOYEE: RESPONDEAT SUPERIOR
PART II. FORMS

10-100A California Points & Authorities § 100A.51

AUTHOR: Carolyn Rashby

§ 100A.51 Opposing Contention That Punitive Damages Can Be Recovered From Corporate Employer Based on Acts of Employee--Wrongful Conduct Was Not Performed, Authorized, or Ratified by Officer, Director, or Managing Agent of Corporation [Civ. Code § 3294(b)]

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF CANNOT RECOVER PUNITIVE DAMAGES FROM DEFENDANT, A CORPORATE EMPLOYER, PURSUANT TO CIVILCODE SECTION 3294(b) BECAUSE, DESPITE EVIDENCE OF WRONGFUL CONDUCT BY AN EMPLOYEE OF DEFENDANT, THE WRONGFUL CONDUCT WAS NOT PERFORMED, AUTHORIZED, OR RATIFIED BY AN OFFICER, DIRECTOR, OR MANAGING AGENT OF DEFENDANT.

No Involvement by Any Corporate Officer, Director, or Managing Agent. A corporate employer will not be held liable for punitive damages based on the act of its employee unless the act was performed, authorized, or ratified by a director, officer, or managing agent of the corporation (*Civ. Code § 3294(a), (b)*; *White v. Ultramar, Inc. (1999) 21 Cal. 4th 563, 573-577, 88 Cal. Rptr. 2d 19, 981 P.2d 944* ; *see* Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 822-823).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that the defendant is liable for punitive damages because of the wrongful conduct of its employee, based on the argument that the wrongful conduct was not performed, authorized, or ratified by a director, officer, or managing agent of the corporation. In an appropriate case, This form can be submitted in opposition to the contention supported by the points and *authorities in § 100A.50*.

This form may be combined with points pertaining to the specific procedural context in which counsel wishes to raise

the substantive issue that a corporate defendant is not liable for punitive damages because its employee's wrongful conduct was not performed, authorized, or ratified by an officer, director, or managing agent of the corporation--for example, in a demurrer or motion for summary judgment. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that the individual alleged to have committed the tortious act, or to have authorized or ratified it, was not an officer, director, or managing agent. If the plaintiff contends that such individual was a managing agent, counsel should set forth facts indicating that such individual did not exercise substantial independent authority and judgment in his or her corporate decisionmaking such that the decisions ultimately determined corporate policy [*White v. Ultramar, Inc. (1999) 21 Cal. 4th 563, 566-567, 573-577, 88 Cal. Rptr. 2d 19, 981 P.2d 944* ; *see Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 822-823* .

[c] Related Pleading and Practice Forms

For a general form of demurrer to a complaint based on the failure to state facts sufficient to constitute a cause of action, see *California Forms of Pleading and Practice, Ch. 206, Demurrers and Motions for Judgment on the Pleadings, § 206.122* (Matthew Bender). For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[d] Related Memoranda

For points relating to the recovery of punitive damages from a principal based on the acts of its agent, see Ch. 182, *Principal and Agent* .

[e] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 30, §§ 30.07[1], 30.07[2]* (Matthew Bender).

[3] Discussion of Authorities

[a] No Involvement by Any Corporate Officer, Director, or Managing Agent

The facts and procedural background of ***White v. Ultramar, Inc.*** *(1999) 21 Cal. 4th 563, 88 Cal. Rptr. 2d 19, 981 P.2d 944* , are discussed in *§ 100A.50[3][a]*. The Supreme Court held that "managing agents" under *Civ. Code § 3294(b)* are those employees who exercise substantial independent authority and judgment over decisions that ultimately determine corporate policy (*21 Cal. 4th 563, 573)* . The Court expressly rejected a rule defining the term "managing agent" as any supervisor with authority to hire and fire employees; such a rule would effectively allow punitive damages liability in most employment cases (*21 Cal. 4th 563, 575)* . In so holding, the Court reaffirmed the reasoning of Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809 , which prior to the enactment of *Civ. Code § 3294(b)* had held that a corporate employer's liability for punitive damages based on an employee's conduct does not depend on the employee's official title, but rather on whether the employee exercises discretionary authority to decide corporate policy (*21 Cal. 4th 563, 570-571, 576-577)* . The Court also cited with approval *Kelly-Zurian v. Wohl Shoe Co. (1994) 22 Cal. App. 4th 397, 27 Cal. Rptr. 2d 457* [*see § 100A.51[4][a]*], which held that an employee is not a managing agent unless he or she is engaged in policy making (*21 Cal. 4th 563, 573-574)* .

The Court noted that the determination of managing-agent status is a factual determination that must be made on a case-by-case basis (*21 Cal. 4th 563, 567)* . To demonstrate that an employee is a managing agent under *Civ. Code §*

3294(b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of the corporation's business. The mere ability to hire and fire employees would not be a sufficient showing of such authority (*21 Cal. 4th 563, 577)* .

The factual and procedural background of **Egan v. Mutual of Omaha Ins. Co.** (1979) 24 Cal. 3d 809, 822-823, 598 P.2d 452 , is discussed in *§ 100A.50[3][a]*. In response to the defendant's argument that neither of the employee defendants were managerial employees because neither was involved in high-level policymaking, the Court stated that the determination of whether an employee acts in a managerial capacity does not necessarily hinge on his or her level of corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employee possesses in making decisions that will ultimately determine corporate policy. The court concluded that when an employees dispose of insureds' claims with little if any supervision, they possess sufficient discretion for the law to impute their actions concerning those claims to the corporation (*24 Cal. 3d 809, 822-823)* . The Court also noted that managerial capacity is not determined by title, and that an employer cannot insulate itself from punitive damage liability by giving an employee a nonmanagerial title while permitting that employee to make crucial policy decisions (*24 Cal. 3d 809, 823)* .

Egan was decided before the enactment of *Civ. Code § 3294(b)* and did not construe the language of that statutory provision. The Supreme Court provided the exact standard for defining a "managing agent" under *Civ. Code § 3294(b)* in *White v. Ultramar, Inc. (1999) 21 Cal. 4th 563, 566-567, 88 Cal. Rptr. 2d 19, 981 P.2d 944* [*see § 100A.50[3][b]*]. However, the Supreme Court's opinion in *White* cited the discussion in *Egan* favorably [*see White v. Ultramar, Inc. (1999) 21 Cal. 4th 563, 571-576, 88 Cal. Rptr. 2d 19, 981 P.2d 944]* , and the discussion in *Egan* concerning those actions that may make a corporation liable for punitive damages for the actions of a "managerial agent" should remain instructive.

[4] Additional Authorities

[a] No Involvement by Officer, Director, or Managing Agent

In *Cruz v. HomeBase (2000) 83 Cal. App. 4th 160, 99 Cal. Rptr. 2d 435* , the plaintiff sued a chain store company, a security guard at one of its stores, and the guard's supervisor, based on an incident at the store during which the plaintiff was accused of stealing, handcuffed, physically and verbally attacked, and sent to jail. The plaintiff sought compensatory and punitive damages for battery, false imprisonment, and malicious prosecution. After prevailing on the battery cause of action in the first trial, the trial court declared a mistrial as to the other actions, which were subsequently retried. At retrial, the plaintiff prevailed and was awarded both compensatory and punitive damages. The court of appeal affirmed the compensatory damages award but reversed the award of punitive damages that had been rendered against the chain store company. The court of appeal concluded, first, that the security guard's supervisor was not a managing agent, because he was supervisor of only one aspect of the operations of a single store in a chain of stores (*83 Cal. App. 4th 160, 168)* . The court also rejected the argument that by not firing employees after receiving reports casting doubt on their fitness, the corporation effectively ratified their misconduct. The court noted that a punitive damages award based on ratification by a corporate employer requires that the corporate employer have actual knowledge of the misconduct. Because the internal corporate reports of the incident submitted by the guard and his supervisor did not mention the misconduct alleged by the plaintiff, there was no evidence that an officer, director, or managing agent of the corporation during the relevant time period had actual knowledge of the misconduct alleged by the plaintiff (*83 Cal. App. 4th 160, 168)* .

In *Kelly-Zurian v. Wohl Shoe Co. (1994) 22 Cal. App. 4th 397, 27 Cal. Rptr. 2d 457* , an employee brought a sexual harassment action against her supervisor and employer. On the plaintiff's appeal following the trial court's refusal to proceed with the punitive damage phase of trial against the employer, the appeals court stated that *Cal. Civil Code § 3294(b)* provides the standard for assessing punitive damages against an employer, and that Restatement (Second) of Torts § 909, which California has adopted, provides the standard for assessing punitive damages against a principal for an act by an agent. The court found that the plaintiff had failed to establish that her supervisor, the tortfeasor, was a

managing agent because there was no evidence that he was in a policymaking position. Instead, the evidence established that he did not have authority to change or establish business policy, and could not even set the plaintiff's salary or give her a raise without corporate authorization (*22 Cal. App. 4th 397, 419-420)* .

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CHAPTER 100A EMPLOYER AND EMPLOYEE: RESPONDEAT SUPERIOR
PART II. FORMS

10-100A California Points & Authorities § 100A.52

AUTHOR: Carolyn Rashby

§ 100A.52 Opposing Contention That Punitive Damages Can Be Recovered From Employer--No Employer Authorization, Ratification, Advance Knowledge of Employee Unfitness, or Personal Oppression, Fraud or Malice [Civ. Code § 3294(b)]

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF CANNOT RECOVER PUNITIVE DAMAGES FROM DEFENDANT PURSUANT TO *CIVIL CODE SECTION 3294(b)* BECAUSE PLAINTIFF HAS FAILED TO PROVE THAT DEFENDANT EITHER HAD ADVANCE KNOWLEDGE OF THE UNFITNESS OF THE EMPLOYEE EMPLOYING HIM OR HER WITH A CONSCIOUS DISREGARD FOR THE RIGHTS OR SAFETY OF OTHERS, THAT DEFENDANT AUTHORIZED OR RATIFIED THE WRONGFUL CONDUCT, OR THAT DEFENDANT IS PERSONALLY GUILTY OF OPPRESSION, FRAUD OR MALICE.

A. No Employer Liability for Punitive Damages. An employer shall not be liable for punitive damages pursuant to *Civil Code Section 3294(a)* for the wrongful acts of its employee unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others, or authorized or ratified the wrongful conduct for which punitive damages are awarded, or was personally guilty of oppression, fraud, or malice (*Civ. Code § 3294(b)*).

[*Optional*] **B. No Evidence of Employer Ratification of Employee's Misconduct.** Punitive damages will be assessed against an employer based on the ratification of his or her employee's misconduct only if there is evidence that, under the particular circumstances, the employer demonstrated an intent to adopt or approve oppressive, fraudulent, or malicious behavior by the employee in the performance of the employee's job duties (*College Hosp., Inc. v. Superior Court (1994) 8 Cal. 4th 704, 726, 34 Cal. Rptr. 2d 898, 882 P.2d 894*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that the defendant is liable for punitive damages because the plaintiff has failed to prove such liability under *Civ. Code § 3294(b)*. Optional Paragraph B is for use if the plaintiff contends that the defendant ratified the misconduct of the employee. In an appropriate case, This form can be submitted in opposition to the contention supported by the points and *authorities in §§ 100A.47 -100A.50*.

This form may be combined with points pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the defendant is not liable for punitive damages--for example, in a motion for summary judgment. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence tending to show that the defendant did not authorize or ratify the employee's misconduct, that the defendant was not personally guilty of oppression, fraud or malice, and that the defendant had no advance knowledge of the employee's unfitness and did not employ him or her with a conscious disregard for the rights and safety of others. For example, counsel could set forth facts showing that the defendant had no knowledge of any prior misconduct by the employee, that the defendant did not participate in the alleged tortious conduct, and that the defendant conducted an immediate and thorough investigation of the alleged incident and imposed appropriate punishment on the employee.

[c] Related Pleading and Practice Forms

For a form of notice for summary judgment and related discussion, see Ch. 537, *Summary Judgment* , in California Forms of Pleading and Practice (Matthew Bender).

[d] Related Memoranda

For points relating to the recovery of punitive damages from a principal based on the acts of its agent, see Ch. 182, *Principal and Agent* .

[e] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 30, § 30.07[1]* (Matthew Bender).

[3] Discussion of Authorities

[a] No Evidence of Employer Ratification of Employee Misconduct

College Hosp., Inc. v. Superior Court *(1994) 8 Cal. 4th 704, 34 Cal. Rptr. 2d 898, 882 P.2d 894* , is discussed in *§ 100A.53[3][a]*. The Court stated that for purposes of determining an employer's liability under *Civ. Code § 3294(b)*, ratification occurs when the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his or her job duties. The issue of ratification often arises, according to the Court, if the employer or its managing agent failed to intercede in a known pattern of workplace abuse, or failed to investigate or discipline the employee once such conduct became known. In this case, the Court found that by cautioning its employee against personal involvement with patients, the employer attempted to repudiate, and not ratify, such conduct on the hospital's behalf. Further, there was no evidence that the hospital knew of the sexual or harmful relationship between the employee and patient. The employee had denied contact with the patient, and there is no indication that the hospital's chief administrator had any personal knowledge to the contrary (*8 Cal. 4th 704, 726-727)* .

[4] Additional Authorities

[a] No Evidence of Employer Ratification of Employee Misconduct

In *Plancarte v. Guardsmark (2004) 118 Cal. App. 4th 640, 13 Cal. Rptr. 3d 315* , the plaintiff, a janitor, brought suit against a security service company for an alleged sexual assault committed by a security guard while the plaintiff was cleaning a men's room in the building. The trial court granted summary judgment for the security service company and denied the plaintiff's motion for a new trial. In seeking a new trial, the plaintiff argued that subsequent to the granting of summary judgment, the plaintiff learned that the security service company was paying the attorney's fees for the security guard and that this constituted newly-discovered evidence of employer ratification of the employee's wrongful conduct. The court of appeal affirmed the denial of the motion for a new trial. The court held that the mere act of providing a defense for the employee at trial, through the payment of the employee's attorney's fees, was not a ratification of the employee's allegedly tortious conduct. An employer has an interest in protecting itself from vicarious liability by providing its employee with the best possible defense against claims that he or she committed tortious acts (*118 Cal. App. 4th 640, 647)* . The court also noted that *Lab. Code § 2802* obligates an employer to pay any judgment against an employee for conduct arising out of the employment and to provide a defense against charges brought by a third party against an employee for that conduct (*118 Cal. App. 4th 640, 647-648)* . In addition, the fact that the security guard had denied any wrongful acts to his employer, that the security guard had pleaded nolo contendere to criminal charges, and that the employer suspended the security guard immediately after the incident and terminated his employment after his criminal conviction, militated against a finding that the security service company had ratified the security guard's conduct (*118 Cal. App. 4th 640, 650)* .

Cruz v. HomeBase (2000) 83 Cal. App. 4th 160, 99 Cal. Rptr. 2d 435 , is discussed in *§ 100A.51[4][a]*.

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CHAPTER 100A EMPLOYER AND EMPLOYEE: RESPONDEAT SUPERIOR
PART II. FORMS

10-100A California Points & Authorities § 100A.53

AUTHOR: Carolyn Rashby

§ 100A.53 Opposing Contention That Punitive Damages Can Be Recovered From Employer--Employee Misconduct Was Personal and Not Within Scope of Employment [Civ. Code § 3294(b)]

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF CANNOT RECOVER PUNITIVE DAMAGES FROM DEFENDANT PURSUANT TO *CIVIL CODE SECTION 3294(b)* BECAUSE THE EMPLOYEE'S ACTS ON WHICH PUNITIVE DAMAGES WOULD BE BASED WERE PERSONAL AND FOR THE EMPLOYEE'S OWN PRIVATE BENEFIT, AND THEREFORE, NOT WITHIN THE SCOPE OF HIS/HER EMPLOYMENT.

A. No Employer Liability for Punitive Damages. An employer shall not be liable for punitive damages pursuant to *Civil Code Section 3294(a)* for the wrongful acts of its employee unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others, or authorized or ratified the wrongful conduct for which punitive damages are awarded, or was personally guilty of oppression, fraud, or malice (*Civ. Code § 3294(b)*).

B. Acts Must Be Within Scope of Employment. An employer will not be held liable for punitive damages based on the misconduct of its employee if the employee was not acting in either a corporate or employment capacity when performing, ratifying, or approving the misconduct (*College Hosp., Inc. v. Superior Court (1994) 8 Cal. 4th 704, 723, 34 Cal. Rptr. 2d 898, 882 P.2d 894*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that the defendant is liable for punitive damages because the plaintiff has failed to prove such liability under *Civ. Code § 3294(b)*. In an appropriate case, This form can be combined

with the points and *authorities in §§ 100A.51, 100A.52*. This form can be submitted in opposition to the contentions supported by the points and *authorities in §§ 100A.47 -100A.50*.

This form may be combined with points pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the defendant is not liable for punitive damages--for example, in a motion for summary judgment. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that the employee's tortious conduct was unrelated to the defendant's business and the employee's duties, and that the conduct was performed for the employee's own personal benefit.

[c] Related Pleading and Practice Forms

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[d] Related Memoranda

For points relating to the recovery of punitive damages from a principal based on the acts of its agent, see Ch. 182, *Principal and Agent* .

[e] Related California Employment Law References

For further discussion of this issue, see Wilcox, *California Employment Law, Ch. 30, § 30.07* (Matthew Bender).

[3] Discussion of Authorities

[a] Acts Must Be Within Scope of Employment

In ***College Hosp., Inc. v. Superior Court*** *(1994) 8 Cal. 4th 704, 34 Cal. Rptr. 2d 898, 882 P.2d 894* , the plaintiff was an outpatient obtaining psychological therapy at a hospital. She became involved in an extramarital affair with Berry, the head of the hospital's cardiopulmonary unit. The plaintiff later claimed that Berry exploited her and manipulated her into giving him sex, money, and gifts, and that when he ended their relationship after six months, she suffered a breakdown. The plaintiff also alleged that the hospital knew that Berry had had a prior sexual relationship with another patient, that it knew of his relationship with the plaintiff, and that it should have known that she would suffer mental injury because of it. The plaintiff and her husband sued the hospital and Berry alleging professional negligence and infliction of emotional distress. The defendants moved to strike the punitive damages allegations on the grounds that the plaintiffs had not complied with *Code Civ. Proc. § 425.13(a)*, which bars inclusion of a punitive damages claim in certain actions against health care providers unless the plaintiff first can demonstrate a substantial probability that he or she will prevail on the claim. The trial court allowed the plaintiffs to amend the complaint, and the court of appeal summarily denied the hospital's petition for relief. The Supreme Court granted the hospital's petition for review and transferred the matter to the court of appeal with directions to issue an alternative writ. The court of appeal then concluded that a complaint governed by § 425.13 cannot be amended to seek punitive damages unless there is a competent prima facie showing of a viable punitive damages claim. The court then found that the plaintiffs had satisfied that requirement and denied the defendant's petition for relief. The Supreme Court granted review and reversed.

After tracing the history of the punitive damages scheme and the requirements of § 425.13, the Court analyzed whether the plaintiffs had met the requirements of *Civ. Code § 3294* in order to determine whether the plaintiff had stated a triable claim for punitive damages. When a plaintiff attempts to hold an employer liable for punitive damages based on

the acts of its employee, there must be evidence that the employer (1) had advance knowledge of the employee's unfitness and employed him or her with a conscious disregard of the rights or safety of others, (2) authorized or ratified the wrongful conduct, or (3) was personally guilty of oppression, fraud, or malice. When the employer is a corporation, the conduct must have been on the part of an officer, director or managing agent of the corporation. The Court stated that the issue of whether Berry was a "managing agent" was irrelevant because in any event the plaintiffs had failed to state a claim for punitive damages. According to the Court, an employer will not be held liable for punitive damages based on its employee's conduct if such conduct is wholly unrelated to its business or the employee's duties. The Court found that the scope of employment issue was missing from plaintiffs' case because Berry's acts were not performed in the course of his employment, but rather, were personal acts of exploitation for his own private benefit (*8 Cal. 4th 704, 723-724)* . The Court also found that the actions of Westbrook, the hospital's chief administrator,could not be the basis for punitive damages liability, because his conduct in failing to follow up on Berry's misconduct could not be characterized as malice (*8 Cal. 4th 704, 724-725)* .

Further, the Court found that Westbrook had not ratified Berry's conduct within the meaning of *Civ. Code § 3294(b)*. The Court stated that for purposes of determining an employer's liability under *Civil Code § 3294(b)*, ratification occurs when the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his or her job duties. The issue of ratification often arises, according to the Court, if the employer or its managing agent fail to intercede in a known pattern of workplace abuse, or fail to investigate or discipline the employee once such conduct became known. In this case, the Court found that by cautioning Berry against personal involvement with patients, Westbrook attempted to repudiate, and not ratify, such conduct on the hospital's behalf. Further, there was no evidence that the hospital knew of the sexual or harmful relationship between Berry and the plaintiff. Berry had denied contact with the plaintiff, and there was no indication that Westbrook had any personal knowledge to the contrary (*8 Cal. 4th 704, 726-727)* .

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CHAPTER 101 ESCROWS

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§§ 101.06-101.09 [Reserved]

§ 101.10 Supporting Demurrer to Complaint--Action Barred by Statute of Limitations for Oral Escrow Contract [Code Civ. Proc. §§ 339(1), 430.10(e)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Objection by Demurrer

[b] Failure to State Cause of Action

[c] Period of Limitation

[4] Additional Authorities

[a] Failure to State Cause of Action

§ 101.11 Supporting Demurrer to Complaint--Action Barred by Statute of Limitations for Oral Escrow Contract [Code Civ. Proc. §§ 339(1), 430.10(e)]--Agreement Between Buyer and Seller Not Sufficient to Invoke Four-Year Statute of Limitations for Written Contract [Code Civ. Proc. § 337(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Agreement Between Buyer and Seller Not Sufficient Writing to Invoke Four-Year Statute of Limitations

§§ 101.12-101.14 [Reserved]

§ 101.15 Opposing Demurrer to Complaint--Four-Year Statute of Limitations [Code Civ. Proc. § 337(1)] for Actions on Written Contract Applicable--Written Escrow Instructions Need Not Be Signed by Escrow Holder

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Written Contract Statute of Limitations Applicable

[b] Writing Need Not Be Signed by Party to Be Charged

[c] Period of Limitation

[4] Additional Authorities

[a] Written Contract Statute of Limitations Applicable

§ 101.16 Opposing Demurrer to Complaint--Action Barred by Statute of Limitations--Statute of Limitations Does Not Begin to Run Until Breach Is Discovered

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Statute Begins to Run When Breach Discovered

§§ 101.17-101.19 [Reserved]

§ 101.20 Supporting Contention That Escrow Holder Has No Liability for Failure to Do Something Not Included in Instructions

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Duty of Escrow Holder

[b] No Liability for Failure to Do Something Not Included in Instructions

[4] Additional Authorities

[a] No Liability for Failure to Do Something Not Included in Instructions

§ 101.21 Supporting Contention That Escrow Holder Has No Duty to Disclose

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] No Duty to Disclose

§ 101.22 Supporting Contention That Exculpatory Clause in Escrow Contract Invalid as Against Public Policy

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Exculpatory Clause Invalid

§ 101.23 Supporting Contention That Escrow Holder Is Liable for Negligently Carrying Out Its Instructions

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Duty of Escrow Holder

[4] Additional Authorities

[a] Duty of Escrow Holder

§§ 101.24-101.29 [Reserved]

§ 101.30 Opposing Contention That Escrow Holder Has No Liability for Failure to Do Something Not Included in Instructions--Escrow Holder Liable for Closing Escrow After Notice of Possible Material Error in Instructions

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Liability for Closing After Notice of Mistake

§ 101.31 Opposing Contention That Escrow Holder Has No Duty to Disclose--Escrow Holder Liable for Negligent Failure to Disclose

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Liability for Negligent Failure to Disclose

[4] Additional Authorities

[a] Liability for Negligent Failure to Disclose

§§ 101.32-101.39 [Reserved]

§ 101.40 Supporting Contention That Escrow Holder Is Liable for Breach of Contract--Failure to Comply With Instructions

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Liability for Breach of Instructions

[4] Additional Authorities

[a] Liability for Breach of Instructions

§ 101.41 Supporting Contention That Escrow Holder Is Liable for Breach of Contract--Release of Buyer's Funds Before Conditions Being Met

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Escrow Agent Liable for Releasing Funds Prematurely

§§ 101.42-101.44 [Reserved]

§ 101.45 Opposing Contention That Escrow Holder Is Liable for Breach of Contract--Failure to Comply With Escrow Instructions--Breach Was Not Proximate Cause of Plaintiff's Loss

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] No Liability If Breach Is Not Proximate Cause of Loss

§ 101.46 Opposing Contention That Escrow Holder Is Liable for Breach of Contract--Delivery of Invalid Deed--Appropriate Action by Seller Is Quiet Title or Rescission Action

[1] Form

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Quiet Title or Rescission Appropriate Remedy

§ 101.47 Supporting Contention That Escrow Holder Is Liable for Breach of Fiduciary Duty--Failure to Obtain Reliable Evidence That Broker Is Licensed

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Jury Instructions

[3] Discussion of Authorities

[a] Liability for Breach of Fiduciary Duty for Failure to Obtain Reliable Evidence That Broker Is Licensed

§§ 101.48-101.49 [Reserved]

§ 101.50 Supporting Contention in Action for Rescission or to Quiet Title--Delivery of Deed Invalid if Buyer Did Not Satisfy All Conditions of Escrow

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Quiet Title or Rescission Should Be Granted When Delivery of Deed Invalid

§ 101.51 Supporting Contention in Action for Rescission or to Quiet Title--Delivery of Deed Was Valid--Plaintiff Waived Conditions to Closing of Escrow

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Waiver of Condition

§§ 101.52-101.54 [Reserved]

§ 101.55 Opposing Contention That Buyer Forfeited Deposit--Seller Waived "Time Is of the Essence" Clause

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Waiver of "Time Is of the Essence" Clause

§ 101.56 Opposing Contention That Buyer May Recover Deposit From Seller--Proper Action Is Against Escrow Holder

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Plaintiff May Not Recover Deposit From Defendant

§§ 101.57-101.59 [Reserved]

§ 101.60 Supporting Contention That Escrow Holder Is Liable for Breach of Contract With Third Party

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Escrow Holder's Liability to Third Party

§§ 101.61-101.64 [Reserved]

§ 101.65 Opposing Contention That Escrow Holder Is Liable for Interference With Brokerage Contract--No Liability When There Is No Knowledge of Contract or Assignment of Sale Proceeds

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] No Liability for Interference With Brokerage Contract

§ 101.66 Opposing Contention That Escrow Holder Is Liable for Payment to Assignor Rather than Assignee of Beneficial Interest in Deed of Trust--Escrow Holder Owes No Duty to Stranger to Escrow

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[3] Discussion of Authorities

[a] No Duty Owed to Nonparties to the Escrow

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10-101 California Points & Authorities § 101.01

§ 101.01 Scope of Chapter

This chapter contains the following points and authorities relating to escrows:

- Points and authorities for use in supporting (*see §§ 101.10 -101.11*) and opposing (*see §§ 101.15 -101.16*) a demurrer to a complaint in actions based on an escrow contract.

- Points and authorities in support of (*see §§ 101.20 -101.23*) and in opposition to (*see §§ 101.30*-101.31) contentions based on the negligence of an escrow holder.

- Points and authorities in support of (*see §§ 101.40 -101.41*) and in opposition to (*see §§ 101.45 -101.47*) contentions based on a breach of contract by the escrow holder.

- Points and authorities in support of (*see §§ 101.50 -101.51*) and in opposition to (*see §§ 101.55 -101.56*) contentions involving actions between buyers and sellers pertaining to escrows.

- Points and authorities in support of (*see § 101.60*) and in opposition to (*see § 101.65*) contentions based on an escrow holder's liability to third parties.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAgents DistinguishedSpecial AgentsContracts LawBreachCauses of ActionGeneral OverviewReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleEscrowTortsNegligenceDutyAffirmative Duty to ActVoluntary Assumption of Duty

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10-101 California Points & Authorities § 101.02

§ 101.02 Governing Law

Escrow matters are governed by *Civ. Code § 1057 et seq.* The regulation of escrow agents is governed by *Civ. Code § 1057.5* and *Fin. Code § 17000 et seq.* Other statutes that pertain to specific types of escrows or regulations include:

- Alcoholic Beverage Escrows [*Bus. & Prof. Code § 24074 et seq.*];
- Escrows Involving Real Estate Developers [*Civ. Code § 2995*];
- Title Insurance Matters [*Ins. Code § 12340 et seq.*];
- Closing Statements [*Bus. & Prof. Code § 10141*]; and
- Deposit of Funds [*Bus. & Prof. Code § 10145*].

In addition, the Commissioner of Real Estate must notify the Insurance Commissioner and the Commissioner of Corporations concerning any final enforcement or disciplinary action against a licensed escrow holder that is related to escrow services provided pursuant to *Fin. Code § 17006(a)(4)*, and the other Commissioners are required to provide information to the Department of Real Estate and the other departments concerning persons who have been subject to enforcement or disciplinary action for malfeasance or misconduct related to theescrow industry [*Bus. & Prof. Code § 10176.1(a)(1)*; *see Fin. Code § 17423.1*; *Ins. Code § 12414.31*]. In addition to the notification, the Commissioner must also provide the other Commissioners with a copy of the written accusation, a statement of issues, or the order issued or filed in the matter, as well as additional requested materials concerning the relevant facts of the enforcement or disciplinary action [*Bus. & Prof. Code § 10176.1(a)(2), (b)*; *see Bus. & Prof. Code § 10176.1(c)* (no liability for release of false information unless done with knowledge and malice)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAgents DistinguishedSpecial AgentsGovernmentsState & Territorial

GovernmentsLicensesReal Property LawPurchase & SaleEscrow

California Points & Authorities

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§ 101.02A Internet and Electronic Escrow Transactions

All records required under the escrow laws may be retained by an Internet escrow agent and provided to the Commissioner in electronic format [*Fin. Code § 17403.5(a)*]. All transfers by an Internet escrow agent between trust accounts and interest-bearing accounts, and between escrow accounts, may be made electronically [*Fin. Code § 17403.5(b)*]. In addition, a statement of account may be delivered by an Internet escrow agent to a customer by electronic mail or via the Internet, unless otherwise requested by the customer [*Fin. Code § 17403.5(c)*]. With regard to Internet escrow companies, transfers to trust accounts by commercial banks, and transfers from operating accounts to cover losses, may be made through wire transfers. Receipts for these transactions may be maintained in electronic form [Fin. Code § 17409.01(b)]. Internet escrow agents, as well as all other escrow agents, must comply with, at a minimum, the specified procedures for wire transfers, which are also known as "electronic fund transfers" [*see 10 Cal. Code Reg. § 1738(b)*].

Internet escrow agents may accept escrow instructions that are created, generated, sent, communicated, received, or stored by electronic means provided that the principals to the transaction agree to conduct the transaction electronically [*10 Cal. Code Reg. § 1738.6(a)*]. The Internet escrow agent must require that the principals to the transaction acknowledge that they are able to electronically receive the escrow instructions, download the escrow instructions, and print the escrow instructions [*10 Cal. Code Reg. § 1738.6(b)*]. If a principal to the transaction is not able to receive the escrow instructions electronically, download the escrow instructions, and print the escrow instructions, the Internet escrow agent must mail a true and correct copy of the instructions to the person within 24 hours of executing the document. The Internet escrow agent must maintain a record of the principal's acknowledgment, and a record of each mailing [*10 Cal. Code Reg. § 1738.6(b)*]. The principals to the transaction may execute the escrow instructions and other escrow documents with an electronic signature that complies with the federal Electronic Signatures in Global and National Commerce Act (The E-Sign Act) [*10 Cal. Code Reg. § 1738.6(c)*; *see 15 U.S.C. § 7001 et seq.*].

An Internet escrow agent must issue consecutively numbered receipts for all escrow money or checks deposited with or mailed to the Internet escrow agent [*10 Cal. Code Reg. § 1741.1(b)*]. An Internet escrow agent may deliver the receipts electronically over the Internet to the person depositing the funds into escrow. If a person is not able to electronically receive the receipt, the Internet escrow agent must mail a true and correct copy of the receipt within 24 hours of execution, and may retain the receipt electronically [*10 Cal. Code Reg. § 1741.1(b)*; *see 10 Cal. Code Reg. § 1737.3*

(electronic receipts)].

Additional provisions apply to Internet escrow agent special accounts [*see 10 Cal. Code Reg. § 1737.1*]. Special provisions also apply to Internet escrow agents and customer contact centers [*see 10 Cal. Code Reg. § 1709.1*]. For additional discussion, see California Real Estate Law and Practice, Ch. 91, *Escrows* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesElectronic BankingFund TransfersBusiness & Corporate LawAgency RelationshipsAgents DistinguishedSpecial AgentsComputer & Internet LawInternet BusinessContractsDigital SignaturesReal Property LawPurchase & SaleEscrow

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§ 101.03 Terminology

Both the case opinions and the discussions included in this chapter refer to the terms "escrow contract" and "escrow instructions." These are interchangeable for purposes of this chapter. Likewise, the terms, "escrow holder," "escrow officer," and "escrow agent" are all synonymous terms for purposes of this chapter.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAgents DistinguishedSpecial AgentsReal Property LawPurchase & SaleEscrow

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§ 101.04 How to Use the Forms in This Chapter

[1] Page Limits on Memoranda

One of the more significant drafting requirements to keep in mind are page limits: supporting and opposing memoranda must not exceed 15 pages, or 20 pages in summary judgment or summary adjudication proceedings. A reply or closing memorandum may not exceed 10 pages. Exhibits, declarations, attachments, a table of contents, a table of authorities, and the proof of service are excluded from these page limits [*Cal. Rules of Ct., Rule 3.1113(d)*]. A party must apply to the court for permission to file a longer memorandum [*see Cal. Rules of Ct., Rule 3.1113(e)*]. These and other drafting requirements are discussed in further detail in Ch. 1, *Writing Legal Memoranda and Briefs* .

[2] Using the Forms to Build a Draft Memorandum

The forms included in this chapter are designed to be combined with other points and authorities to form a complete memorandum. For a detailed discussion on how to select and use the forms in the publication to build a draft memorandum and complete the draft, with detailed discussion of all drafting requirements and strategic or stylistic considerations, see Ch. 1, *Writing Legal Memoranda and Briefs* . For a skeletal form of memorandum for use in creating a properly formatted outline in which to compile relevant forms from this publication, seealso Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPleading & PracticeMotion PracticeSupporting MemorandaCivil ProceduresSummary JudgmentOppositionMemoranda in OppositionCivil ProceduresSummary JudgmentSupporting MaterialsMemoranda of LawGovernmentsCourtsRule Application & Interpretation

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§ 101.05 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

For discussion and forms for use in actions involving escrows, see California Forms of Pleading and Practice, Ch. 253, *Escrows* (Matthew Bender).

For discussion and forms relating to escrows, see the following chapters in California Forms of Pleading and Practice (Matthew Bender):

- Ch. 7, *Accounting, Action for.*
- Ch. 18, *Alcoholic Beverage Licenses.*
- Ch. 26, *Answers.*
- Ch. 103, *Brokers.*
- Ch. 140, *Contracts.*
- Ch. 184, *Deeds.*
- Ch. 206, *Demurrers and Motions for Judgment on the Pleadings.*
- Ch. 314, *Interpleader.*
- Ch. 345, *Limitation of Actions.*
- Ch. 348, *Lis Pendens.*

- Ch. 361, *Mechanics' Liens.*
- Ch. 375, *Motions to Strike.*.
- Ch. 389, *Nonsuit and Motions for Judgment.*
- Ch. 427, *Principal and Agent.*
- Ch. 482, *Quieting Title.*
- Ch. 490, *Rescission and Restitution.*
- Ch. 537, *Summary Judgment.*
- Ch. 569, *Vendor and Purchaser.*

[2] Related Points and Authorities

For points and authorities that are generally most closely related to those set out in this chapter, see the following chapters:

- Ch. 50, *Contracts.*
- Ch. 71, *Demurrers and Motions for Judgment on the Pleadings.*
- Ch. 123, *Interpleader.*
- Ch. 143, *Limitation of Actions.*
- Ch. 165, *Negligence.*
- Ch. 182, *Principal and Agent.*
- Ch. 198, *Quieting Title.*
- Ch. 221, *Summary Judgments.*

[3] Other Related Matthew Bender Publications

- For a general discussion of the law pertaining to escrows, see Ch. 91, *Escrow* , in California Real Estate Law and Practice(Matthew Bender).
- For coverage of escrows with a transactional focus (for example, drafting, interpreting, and executing escrow instructions), see Ch. 26, *Real Property Escrows* , in California Legal Forms(Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAgents DistinguishedSpecial AgentsCivil ProcedurePleading &

PracticeGeneral OverviewReal Property LawPurchase & SaleEscrow

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[Reserved]

§§ 101.06[Reserved]

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II. FORMS
A. Statute of Limitations

10-101 California Points & Authorities § 101.10

§ 101.10 Supporting Demurrer to Complaint--Action Barred by Statute of Limitations for Oral Escrow Contract [Code Civ. Proc. §§ 339(1), 430.10(e)]

[1] FORM Supporting Demurrer to Complaint--Action Barred by Statute of Limitations for Oral Escrow Contract [Code Civ. Proc. §§ 339(1), 430.10(e)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____ MEMORANDUM OF
_____ [*name*], Defendant.	)	POINTS AND AUTHORITIES IN SUPPORT OF
	)	DEMURRER TO COMPLAINT
	)	

THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION AGAINST THE ESCROW HOLDER IN THAT IT REVEALS ON ITS FACE THAT IT IS BARRED BY THE STATUTE OF LIMITATIONS BECAUSE IT IS BASED ON AN ORAL ESCROW CONTRACT AND THE COMPLAINT WAS FILED MORE THAN TWO YEARS FROM THE ALLEGED BREACH.

A. Objection by Demurrer. The party against whom a complaint has been filed may object to the complaint by demurrer on the ground that it does not state facts sufficient to constitute a cause of action (*Code Civ. Proc. § 430.10(e)*). When any ground for objection to a complaint appears on the face of the complaint (or from any matter of which the court is required to or may take judicial notice), the objection on that ground may be taken by a demurrer to the complaint (*Code Civ. Proc. § 430.30(a)*).

B. Failure to State Cause of Action. The objection that an action is barred by a statute of limitations may be made by

demurrer (*Basin Construction Corp. v. Department of Water & Power (1988) 199 Cal. App. 3d 819, 823, 245 Cal. Rptr. 178*) notwithstanding the fact that *Code Civ. Proc. § 430.10* does not specifically list the statute of limitations as an objection permitted to be raised by demurrer. An objection based on the statute of limitations is deemed to be included in the ground of demurrer that the complaint does not state facts sufficient to constitute a cause of action under *Code Civ. Proc. § 430.10(e)* (*Bank of America Etc. Assn. v. Ames (1936) 18 Cal. App. 2d 311, 313-314)* .

C. Period of Limitation. An action based on a contract not in writing must be commenced within two years of the alleged breach or negligent act or omission (*Code Civ. Proc. § 339(1)*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of an escrow holder's general demurrer to a complaint filed by a party to an escrow when the complaint reveals that the escrow contract was not written and two years expired before the complaint was filed.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should refer to the allegations in the complaint that establish that the escrow contract in question was not in writing, and that the alleged breach of the escrow contract occurred more than two years before the complaint's filing. Counsel can then argue the complaint is subject to demurrer based on the authorities set forth above.

[c] Related Pleading and Practice Chapters

For a form of demurrer for use in asserting the bar of the statute of limitations, see Ch. 345, *Limitation of Actions* , in California Forms of Pleading and Practice (Matthew Bender).

[d] Related Points and Authorities

For points and authorities for use in supporting demurrers based on the statute of limitations, see Ch. 143, *Limitation of Actions* . For points and authorities supporting demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . In particular, for points and authorities supporting a demurrer based on the contention that it cannot be ascertained from the complaint whether the escrow contract is written, oral, or implied [*see Code Civ. Proc. § 430.10(g)*], see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* , § 71.72.

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 101.15* (when the complaint shows that the written escrow instructions were in fact "accepted" by the escrow holder, even though not signed by the escrow holder) or § 101.16

(when the complaint shows that the discovery of the alleged breach occurred after the breach thereby tolling the statute of limitations until the subsequent discovery) may be used to oppose a demurrer supported by this form.

[3] Discussion of Authorities

[a] Objection by Demurrer

The party against whom a complaint or cross-complaint has been filed may object, by demurrer, to the pleading on the ground that the pleading does not state facts sufficient to constitute a cause of action [***Code Civ. Proc. § 430.10(g)***]. When any ground for objection to a complaint, cross-complaint, or answer appears on the face of the complaint, cross-complaint, or answer, or from any matter of which the court is required to or may take judicial notice, the objection on that ground may be taken by a demurrer to the complaint [***Code Civ. Proc. § 430.30(a)***].

[b] Failure to State Cause of Action

In ***Basin Construction Corp. v. Department of Water & Power*** *(1988) 199 Cal. App. 3d 819, 245 Cal. Rptr. 178* , the owners of a property filed a complaint in intervention in another property owner's action against the City of Los Angeles for damages to property arising out of a fire caused by malfunctioning city electrical equipment. The trial court sustained the defendant's demurrer without leave to amend based on the applicable five year statute of limitations. The court of appeal affirmed, stating, "a complaint showing on its face the cause of action is barred by the statute of limitations is subject to general demurrer" (*199 Cal. App. 3d 819, 823)* .

An explanation for the ruling in the above case was found in ***Bank of American Etc. Assn. v. Ames*** *(1936) 18 Cal. App. 2d 311* . In this action for money due under a contract, the trial court overruled the defendant's demurrer, which was based on the bar of the statute of limitations. Judgment was entered for the plaintiff and the defendant appealed, in part on the theory that the action was barred by the statute of limitations. The court of appeal affirmed the judgment, holding that the demurrer had been properly overruled because, under any theory, a part of the claim was good (*18 Cal. App. 2d 311, 315)* . The court did acknowledge that Code Civ. Proc. § 430 does not expressly authorize the common practice of raising the statute of limitations bar by way of demurrer. However, citing *California Safe etc. Co. v. Sierra etc. Co. (1910) 158 Cal. 690, 112 P. 274* , the court concluded that the only ground under which the statute of limitations could be brought is the ground of failure to state facts sufficient to constitute a cause of action (*18 Cal. App. 2d 311, 314)* .

[c] Period of Limitation

An action on a contract, obligation, or liability not founded on a written instrument must be commenced within two years [***Code Civ. Proc. § 339(1)***].

[4] Additional Authorities

[a] Failure to State Cause of Action

Bell v. Bank of California (1908) 153 Cal. 234, 94 P 889 involved an action for the recovery of shares of stock. The defendant asserted in a general demurrer that the action was barred by a statute of limitations, and the trial court sustained the demurrer and dismissed the action. The plaintiff appealed. The method of asserting the defense of the bar of a statute of limitations apparently was not an issue either in the trial court or on appeal. However, the California Supreme Court held in dictum that while the bar of the statute of limitations is not specified as a ground of demurrer in the code, this objection to a complaint must be deemed to be included within the ground of want of facts sufficient to constitute a cause of action (*153 Cal. 234, 245)* .

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II. FORMS
A. Statute of Limitations

10-101 California Points & Authorities § 101.11

§ 101.11 Supporting Demurrer to Complaint--Action Barred by Statute of Limitations for Oral Escrow Contract [Code Civ. Proc. §§ 339(1), 430.10(e)]--Agreement Between Buyer and Seller Not Sufficient to Invoke Four-Year Statute of Limitations for Written Contract [Code Civ. Proc. § 337(1)]

[1] FORM Supporting Demurrer to Complaint--Action Barred by Statute of Limitations for Oral Escrow Contract [Code Civ. Proc. §§ 339(1), 430.10(e)]--Agreement Between Buyer and Seller Not Sufficient to Invoke Four-Year Statute of Limitations for Written Contract [Code Civ. Proc. § 337(1)]

[*Caption. See § 101.10[1].*]

THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION AGAINST THE ESCROW HOLDER IN THAT IT REVEALS ON ITS FACE THAT IT IS BARRED BY THE STATUTE OF LIMITATIONS BECAUSE IT IS BASED ON AN ORAL ESCROW CONTRACT AND THE COMPLAINT WAS FILED MORE THAN TWO YEARS FROM THE ALLEGED BREACH.

A. Objection by Demurrer. [*See § 101.10[1], Paragraph A.*]

B. Failure to State a Cause of Action. [*See § 101.10[1], Paragraph B.*]

C. Period of Limitation. [*See § 101.10[1], Paragraph C.*]

D. Agreement Between Buyer and Seller Not Sufficient Writing to Invoke Four-Year Statute of Limitations. When the agreement with the escrow holder is oral, the fact that there is a separate written agreement of sale between buyer and seller is not a sufficient basis to invoke the four-year statute of limitations in *Code Civ. Proc. § 337(1)* in an action against the escrow holder because the escrow holder is not a party to the written sales contract. Therefore, the two-year statute of limitations for oral contracts set forth in *Code Civ. Proc. § 339(1)* is applicable in this action (*Roberts v. Carter & Portruch (1956) 140 Cal. App. 2d 370, 372-373, 295 P.2d 515*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of an escrow holder's general demurrer to a complaint filed by a party to an escrow when the complaint reveals that the escrow contract was not in writing (notwithstanding the fact that there is a written sales agreement between buyer and seller) and the complaint was filed more than two years after the alleged breach.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should point out any allegations in the complaint that refers to the agreement between the buyer and seller and argue that the agreement does not invoke the four-year statute of limitations in an action against the escrow holder based on the above authorities. Counsel should also point out that no where in the complaint is there an allegation that the escrow instructions are in writing. If there is a specific allegation affirmatively establishing the fact that the escrow contract was based on an oral agreement, counsel should point that out. Once counsel has established that the escrow contract was oral, he or she can then refer to the date of the breach, as alleged in the complaint, and the date the complaint was filed and argue that the complaint's filing occurred more than two years after the alleged breach.

[c] Related Pleading and Practice Chapters

For a form of demurrer for use in asserting the bar of the statute of limitations, see Ch. 345, *Limitation of Actions* , in California Forms of Pleading and Practice (Matthew Bender).

[d] Related Points and Authorities

For points and authorities for use in supporting demurrers based on the statute of limitations, see Ch. 143, *Limitation of Actions* . For points and authorities supporting demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For points and authorities supporting a demurrer based on the contention that it cannot be ascertained from the complaint whether the escrow contract is written, oral, or implied [*see Code Civ. Proc. § 430.10(g)*], see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* , § 71.72.

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 101.15* (when complaint shows that written escrow contract was in fact "accepted" by escrow holder, even if it was not signed by escrow holder) and § 101.16 (when complaint shows that discovery of alleged breach occurred after breach thereby tolling statute of limitations until subsequent discovery) may be used to oppose a demurrer supported by this form.

[3] Discussion of Authorities

[a] Agreement Between Buyer and Seller Not Sufficient Writing to Invoke Four-Year Statute of Limitations

In ***Roberts v. Carter & Portruch*** *(1956) 140 Cal. App. 2d 370, 295 P.2d 515* , the plaintiff entered into a written contract to sell its wrecking yard with some of the payments deferred. The defendant attorneys orally agreed to be the escrow holder and transferred the title and a note to the respective parties. The complaint alleged that the defendants then received some of the deferred payments and failed to pay them to the plaintiff. However, the complaint was filed more than two years after the alleged failure to pay. A demurrer was sustained by the trial court, and the plaintiff appealed.

The court of appeal affirmed. It held that the two-year statute of limitations in *Code Civ. Proc. § 339(1)* for actions on oral contracts was applicable. The fact that there was a written contract of sale was not sufficient to invoke the four-year statute of limitations for written contracts (*Code Civ. Proc. § 337(1)*) in an action against the escrow holder because the escrow holder was not a party to the contract of sale and was a stranger to the sales transaction (*140 Cal. App. 2d 370, 372-373)* .

California Points & Authorities

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CHAPTER 101 ESCROWS
II. FORMS
A. Statute of Limitations

10-101 California Points & Authorities §§ 101.12-101.14

[Reserved]

§§ 101.12[Reserved]

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A. Statute of Limitations

10-101 California Points & Authorities § 101.15

§ 101.15 Opposing Demurrer to Complaint--Four-Year Statute of Limitations [Code Civ. Proc. § 337(1)] for Actions on Written Contract Applicable--Written Escrow Instructions Need Not Be Signed by Escrow Holder

[1] FORM Opposing Demurrer to Complaint--Four-Year Statute of Limitations [Code Civ. Proc. § 337(1)] for Actions on Written Contract Applicable--Written Escrow Instructions Need Not Be Signed by Escrow Holder

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____ MEMORANDUM OF
_____ [*name*], Defendant.	)	POINTS AND AUTHORITIES IN OPPOSITION TO
	)	DEMURRER TO COMPLAINT
	)	

THE DEMURRER SHOULD BE OVERRULED BECAUSE THE FOUR-YEAR STATUTE OF LIMITATIONS FOR ACTIONS ON WRITTEN CONTRACTS IS APPLICABLE, NOTWITHSTANDING THE FACT THAT THE WRITTEN ESCROW INSTRUCTIONS WERE NOT SIGNED BY THE ESCROW HOLDER, AND THE COMPLAINT WAS FILED WITHIN FOURS YEARS OF THE ALLEGED BREACH.

A. Written Contract Statute of Limitations Applicable. If the escrow instructions are in writing and the escrow holder accepts them or if the escrow holder prepares the instructions, offers to perform them, and the buyer and seller accept the escrow holder's offer, an action for failure to comply with the instructions is based on a written contract for statute of limitations purposes (*Amen v. Merced County Title Co. (1962) 58 Cal. 2d 528, 532, 25 Cal. Rptr. 65, 375 P.2d 33*).

B. Writing Need Not Be Signed by Party to Be Charged. The four-year statute of limitations, unlike the statute of

frauds, does not require that the writing be signed by the party to be charged. The contract is deemed to be "in writing" even though it was accepted orally or by an act other than signing (*Amen v. Merced County Title Co. (1962) 58 Cal. 2d 528, 532-533, 25 Cal. Rptr. 65, 375 P.2d 33*).

C. Period of Limitation. An action based on a written contract must be commenced within four years of the alleged breach or negligent act or omission (*Code Civ. Proc. § 337(1)*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to a demurrer to a complaint against an escrow holder that asserts that the action is barred by the two-year statute of limitations for oral contracts when the plaintiff has alleged sufficient facts to show that the escrow instructions were in writing and accepted by the escrow holder, notwithstanding the fact that the escrow holder did not actually sign the instructions.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should refer to the allegations in the complaint that establish that some form of writing establishing the duties of the escrow holder exists and that the escrow holder did in fact agree to undertake the escrow agency. Counsel can then refer to the dates of the alleged breach and the filing of the complaint to argue that the complaint was filed timely within the applicable four-year statute of limitations for written contracts.

[c] Related Pleading and Practice Chapters

For forms and discussion relating to demurrers, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , in California Forms of Pleading and Practice (Matthew Bender). For forms and discussion relating to the statute of limitations, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* .

[d] Related Points and Authorities

For points and authorities for use in opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For points and authorities relating to the defense of the statute of limitations, see Ch. 143, *Limitation of Actions* .

[e] Opposing Points and Authorities

In an appropriate case, this form of points and authorities may be submitted in opposition to a demurrer supported by the points and authorities *set out in § 101.10* or *§ 101.11*.

[3] Discussion of Authorities

[a] Written Contract Statute of Limitations Applicable

In ***Amen v. Merced County Title Co.*** *(1962) 58 Cal. 2d 528, 25 Cal. Rptr. 65, 375 P.2d 33* , the complaint alleged that the defendant escrow holder failed to comply with the escrow instruction to pay any debts over $10,000 out of the sale proceeds or inform the plaintiff buyer of potential liability for sales taxes in the purchase of a tavern after the escrow holder received notice from the state of the potential liability. The plaintiff alleged further that because of this failure, the plaintiff was liable for the seller's unpaid sales taxes. The complaint was filed more than two years after the alleged failure. The trial court sustained a demurrer to the complaint, apparently on the ground that the two-year statute of limitations set out in *Code Civ. Proc. § 339(1)* for actions on an oral contract was applicable and barred the action.

The plaintiff appealed and the California Supreme Court reversed. It held that the contract between the buyer and the seller in the form of escrow instructions to the defendant escrow holder, which instructions the defendant drafted and agreed to perform, was a sufficient writing to make applicable the four-year statute of limitations for actions on a written contract of *Code Civ. Proc. § 337(1)*. The Court noted that the instructions included a statement that they were accepted by the escrow holder subject to the terms and conditions in the instructions. If the escrow instructions are in writing and the escrow holder accepts them, or if the escrow holder prepares the instructions, offers to perform them, and the buyer and seller accept the offer, the contract is in writing even though the escrow holder accepts orally or by an act other than writing (*58 Cal. 2d 528, 532)* .

Note that the *Amen* case can be distinguished from the ruling in *Roberts v. Carter & Portruch (1956) 140 Cal. App. 2d 370, 295 P.2d 515* , discussed in *§ 101.11[3][a]*, which held that a written contract between the buyer and seller was not sufficient to invoke the four-year statute of limitations for written contracts. In *Amen*, the sales contract and escrow instructions were drafted by the escrow holder as one document and contained a clear statement that the escrow holder accepted the instructions whereas there was no evidence of any knowledge of the contract or acceptance by the escrow holder in *Roberts*.

[b] Writing Need Not Be Signed by Party to Be Charged

Amen v. Merced County Title Co. *(1962) 58 Cal. 2d 528, 25 Cal. Rptr. 65, 375 P.2d 33* is discussed in *§ 101.15[3][a]*.

[c] Period of Limitation

An action on a contract, obligation, or liability founded on a written instrument must be commenced within four years [*Code Civ. Proc. § 337(1)*].

[4] Additional Authorities

[a] Written Contract Statute of Limitations Applicable

In *Bruckman v. Parliament Escrow Corp. (1987) 190 Cal. App. 3d 1051, 235 Cal. Rptr. 813* , the complaint was based on the negligent failure to follow written escrow instructions. The court held that the four-year statute of limitations was applicable because the action was based on breach of a written contract (*190 Cal. App. 3d 1051, 1058-1059)* .

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A. Statute of Limitations

10-101 California Points & Authorities § 101.16

§ 101.16 Opposing Demurrer to Complaint--Action Barred by Statute of Limitations--Statute of Limitations Does Not Begin to Run Until Breach Is Discovered

[1] FORM Opposing Demurrer to Complaint--Action Barred by Statute of Limitations--Statute of Limitations Does Not Begin to Run Until Breach Is Discovered

[*Caption. See § 101.15[1].*]

THE DEMURRER SHOULD BE OVERRULED BECAUSE THE ALLEGATIONS OF THE COMPLAINT SHOW THAT THE COMPLAINT WAS TIMELY FILED IN THAT THE STATUTE OF LIMITATIONS DID NOT BEGIN TO RUN UNTIL PLAINTIFF DISCOVERED THE BREACH BY THE ESCROW HOLDER.

Statute Begins to Run When Breach Discovered. The statute of limitations on a cause of action for breach of contract by an escrow holder does not begin to run until plaintiff knew, or should have known, the facts that constituted the breach of contract (*Amen v. Merced County Title Co. (1962) 58 Cal. 2d 528, 534, 25 Cal. Rptr. 65, 375 P.2d 33* ; *Lee v. Escrow Consultants, Inc. (1989) 210 Cal. App. 3d 915, 259 Cal. Rptr. 117*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to a demurrer based on the statute of limitations when the action was timely filed, taking into consideration the applicable statute of limitations calculated from the date the plaintiff discovered the breach. The delayed discovery rule can apply to a case involving fraud by the escrow holder, or, as explained below, to a case involving a breach of contract by the escrow holder, since this breach also constitutes a breach of fiduciary duty [*see § 101.16[3][a]*]. This form can be used when opposing a demurrer based on either a two-year statute of limitations for oral contracts or a four-year statute of limitations for written contracts.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should refer to the allegations in the complaint that establish the date plaintiff discovered the breach and argue facts that support the reasonableness of the delay in discovery. Counsel can then refer to the date of the complaint's filing to establish that it was filed within the applicable two-year or four-year time periods from the date of discovery.

[c] Related Pleading and Practice Chapters

For forms and discussion relating to demurrers, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , in California Forms of Pleading and Practice (Matthew Bender). For forms and discussion relating to the statute of limitations, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* .

[d] Related Points and Authorities

For points and authorities for use in opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For points and authorities relating to the defense of the statute of limitations, see Ch. 143, *Limitation of Actions* .

[e] Opposing Points and Authorities

In an appropriate case, this form of points and authorities may be submitted in opposition to a demurrer supported by the points and authorities *set out in § 101.10* or *§ 101.11*.

[3] Discussion of Authorities

[a] Statute Begins to Run When Breach Discovered

The facts of ***Amen v. Merced County Title Co.*** *(1962) 58 Cal. 2d 528, 25 Cal. Rptr. 65, 375 P.2d 33* , are discussed in *§ 101.15[3][a]*. The court held that even if the escrow instructions had not been in writing, the action was still filed in time because it was brought within two years of the date that the plaintiff discovered the breach, which was the date the plaintiff was notified by the state of her obligation for the unpaid sales taxes. The court found that the plaintiff's ignorance of the defendant's breach before this notification was justifiable (*58 Cal. 2d 528, 534)* .

In ***Lee v. Escrow Consultants, Inc.*** *(1989) 210 Cal. App. 3d 915, 259 Cal. Rptr. 117* , the plaintiff buyer filed an action against the escrow holder for fraud, breach of contract, negligence, conversion, and civil conspiracy for releasing funds to the sellers during the escrow. The escrow holder did so based on instructions containing the forged signature of the buyer. The plaintiff's complaint was filed more than five years after the last distribution of funds to the sellers. The defendant escrow holder demurred to the complaint based on the statute of limitations. The trial court sustained the demurrer and the plaintiff appealed.

The court of appeal reversed. The court held that in a case involving fraud, the cause of action does not accrue until discovery of facts constituting fraud (citing former Code Civ. Proc. § 338(4); *now see Code Civ. Proc. § 338(d)*) (*210*

Cal. App. 3d 915, 920) . Once the plaintiff becomes aware of facts that would make a reasonably prudent person suspicious, the duty to investigate arises, and he or she may then be charged with knowledge that would be discovered by such investigation (*210 Cal. App. 3d 915, 921)* . In this case, the plaintiff alleged that the fraud was not discovered until a few months before the action was filed. The court found that the delayed discovery by the plaintiff was reasonable in that the plaintiff was regularly informed, and might reasonably believe, that the delay in closing escrow was due to the complex nature of this transaction involving a subdivision.

Regarding the breach of contract cause of action, the court held that since the alleged breach also constituted a breach of fiduciary duty and the existence of the fiduciary relationship tolls the statute of limitations until actual discovery of the breach, the delayed discovery rule would apply to this cause of action as well (*210 Cal. App. 3d 915, 922-923)* .

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[Reserved]

§§ 101.17[Reserved]

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B Negligence of Escrow Holder

10-101 California Points & Authorities § 101.20

§ 101.20 Supporting Contention That Escrow Holder Has No Liability for Failure to Do Something Not Included in Instructions

[1] FORM Supporting Contention That Escrow Holder Has No Liability for Failure to Do Something Not Included in Instructions

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS NOT LIABLE FOR THE FAILURE COMPLAINED OF BY PLAINTIFF BECAUSE THE FAILURE WAS BASED ON SOMETHING THAT WAS NOT A PART OF THE ESCROW INSTRUCTIONS.

A. Duty of Escrow Holder. The agency created by escrow instructions is limited, rather than general, and the escrow holder's obligations are to strictly comply with its instructions (*Hannon v. Western Title Ins. Co. (1989) 211 Cal. App. 3d 1122, 1128, 260 Cal. Rptr. 21* ; *Schaefer v. Manufacturers Bank (1980) 104 Cal. App. 3d 70, 77, 163 Cal. Rptr. 402*).

B. No Liability for Failure to Do Something Not Included in Instructions. An escrow holder will not be liable for failing to do something that is not required by the terms of the escrow instructions (*Hannon v. Western Title Ins. Co. (1989) 211 Cal. App. 3d 1122, 1127-1128, 260 Cal. Rptr. 21* ; *Schaefer v. Manufacturers Bank (1980) 104 Cal. App. 3d 70, 77-78, 163 Cal. Rptr. 402*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of defendant escrow holder's contention that it is not liable for the failure to do that complained of in the complaint, because the action was not required by the terms of the escrow instructions.

This form of points and authorities may be combined with points and authorities pertaining to the specific procedural

context in which counsel wishes to raise the substantive issue that the escrow holder is not liable for failing to do something not required by the terms of the escrow instructions, for example in a motion for summary judgment. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should attach affidavits or declarations that establish the terms of the escrow instructions and argue that the instructions do not require the escrow holder to do the act that is the basis of the plaintiff's complaint.

[c] Related Pleading and Practice Chapters

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* , (Matthew Bender). For forms and discussion relating to escrows generally, see California Forms of Pleading and Practice, Ch. 253, *Escrows* , (Matthew Bender).

[d] Related Points and Authorities

For memoranda of points and authorities for use in supporting motions for summary judgments, see Ch. 221, *Summary Judgments* .

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 101.30* or *§ 101.31* may be used to oppose a contention supported by this form.

[3] Discussion of Authorities

[a] Duty of Escrow Holder

In ***Hannon v. Western Title Ins. Co.*** *(1989) 211 Cal. App. 3d 1122, 260 Cal. Rptr. 21* , the plaintiff filed a complaint against the escrow holder based on the latter's failure to deposit funds into an interest bearing account during the escrow. The trial court sustained a demurrer without leave to amend and the plaintiff appealed. The court of appeal affirmed. The court acknowledged that an escrow agent has an obligation to strictly comply with its instructions and will be liable for any negligence in so doing, and further, that it has a fiduciary relationship with the parties to the escrow. However, the escrow holder does not have a general duty to police the affairs of its depositors and will not be liable for failing to do something that is not required by the instructions (*211 Cal. App. 3d 1122, 1127-1128)* . In this case, the escrow holder was not liable for not depositing the funds into an interest bearing account because the escrow instructions did not require it.

In ***Schaefer v. Manufacturers Bank*** *(1980) 104 Cal. App. 3d 70, 163 Cal. Rptr. 402* , an escrow holder was sued in an action involving a real estate transaction, only a part of which was handled through the defendant. The plaintiffs sold their property for some worthless deeds of trust. However, the transfer of these deeds of trust were not part of the escrow processed by the defendant escrow holder. The defendant escrow company moved for summary judgment. Its declarations established that it had strictly followed its escrow instructions and were essentially uncontradicted by the plaintiffs' attorney's declaration. The summary judgment was granted and the plaintiffs appealed.

The court of appeal affirmed. It stated that escrow holders were the agents of both parties but that the agency was limited to following the instructions of the parties. It then held that the uncontradicted showing was that the escrow had nothing to do with the part of the transaction causing the plaintiffs' loss, and that the escrow holder had carried out its instructions, complying strictly with the instructions as was its duty and thus was not liable for the plaintiffs' loss (*104*

Cal. App. 3d 70, 77-78) .

[b] No Liability for Failure to Do Something Not Included in Instructions

Hannon v. Western Title Ins. Co. *(1989) 211 Cal. App. 3d 1122, 260 Cal. Rptr. 21* , and ***Schaefer v. Manufacturers Bank*** *(1980) 104 Cal. App. 3d 70, 163 Cal. Rptr. 402* , are discussed in *§ 101.20[3][a]*.

[4] Additional Authorities

[a] No Liability for Failure to Do Something Not Included in Instructions

In *Axley v. Transamerica Title Ins. Co. (1978) 88 Cal. App. 3d 1, 151 Cal. Rptr. 570* , the defendant escrow company was sued on the basis of a real estate transaction in which the plaintiff sold property and received, among other considerations, a fourth deed of trust that turned out to be worthless. The original contract called for the plaintiff 's security to be a second deed of trust but this was later amended by the parties to provide for a fourth deed of trust. The defendant escrow company moved for and was granted a summary judgment. The plaintiff appealed, arguing that the escrow holder was negligent in failing to call to the plaintiff's attention the apparent diminution of security in substituting a fourth deed of trust for a second deed of trust.

The court of appeal affirmed. It held that the agency created by an escrow is limited, rather than general, and that the duty of the escrow holder is to obey its instructions (*88 Cal. App. 3d 1, 8)* . The court further held that no liability attaches to the escrow holder for failure to do something not required by the terms of the escrow instructions (*88 Cal. App. 3d 1, 9)* . The court rejected the plaintiff's argument of negligence, distinguishing cases cited by the plaintiff in which negligence was found in searching a title record [*see Contini v. Western Title Ins. Co. (1974) 40 Cal. App. 3d 536, 115 Cal. Rptr. 257* ; *see also § 101.23[4*][a] for a detailed discussion of *Contini*] and in recording second deeds of trust instead of a first deed of trust [*Ruth v. Lytton Sav. & Loan Assn. (1968) 266 Cal. App. 2d 831, 72 Cal. Rptr. 521]* . The court distinguished the instant case by pointing out the absence of an essential element, namely failure to follow the escrow instructions or negligence in carrying out the escrow instructions. The court noted that the instructions signed by the plaintiff indicated that part of the security would be a fourth deed of trust. Therefore, the defendant escrow holder was not liable because it had done no more than carry out its instructions (*88 Cal. App. 3d 1, 8-10)* .

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B Negligence of Escrow Holder

10-101 California Points & Authorities § 101.21

§ 101.21 Supporting Contention That Escrow Holder Has No Duty to Disclose

[1] FORM Supporting Contention That Escrow Holder Has No Duty to Disclose

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT HAS NO DUTY TO DISCLOSE TO PLAINTIFF INFORMATION OUTSIDE THE SCOPE OF THE ESCROW INSTRUCTIONS.

A. Duty of Escrow Holder. [*See § 101.20[1], Paragraph A.*]

B. No Duty to Disclose. An escrow holder is a limited agent only and does not have a duty to disclose to its principals matters that are not required to be disclosed by its escrow instructions (*Lee v. Title Ins. & Trust Co. (1968) 264 Cal. App. 2d 160, 162-164, 70 Cal. Rptr. 378* ; *Blackburn v. McCoy (1934) 1 Cal. App. 2d 648, 37 P.2d 153*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted by a defendant escrow holder in support of its contention that it is not liable for failing to disclose matters that were outside the scope of the escrow instructions.

This form of points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the escrow holder had no duty to disclose matters outside the scope of the escrow instructions, for example in a motion for summary judgment. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel

should attach affidavits or declarations that establish that the escrow instructions did not include any duty or obligation to disclose information that is the basis of the plaintiff's complaint. Counsel can then argue that, absent specific requirements, the escrow holder had no duty to disclose the information.

[c] Related Pleading and Practice Chapters

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* , (Matthew Bender). For forms and discussion relating to escrows generally, see California Forms of Pleading and Practice, Ch. 253, *Escrows* , (Matthew Bender).

[d] Related Points and Authorities

For memoranda of points and authorities for use in supporting motions for summary judgments, see Ch. 221, *Summary Judgments* ,.

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 101.31* may be used to oppose a contention supported by this form.

[3] Discussion of Authorities

[a] No Duty to Disclose

In ***Lee v. Title Ins. & Trust Co.*** *(1968) 264 Cal. App. 2d 160, 70 Cal. Rptr. 378* , the cause of action against the escrow holder was based on allegations that it had failed to disclose to the plaintiff that it knew that the other party to the transaction was defrauding the plaintiff. A demurrer was sustained to the cause of action and the plaintiff appealed.

The court of appeal affirmed. The court defined the issue as whether an escrow agent is under a fiduciary duty to go beyond the escrow instructions and notify each party of any suspicious fact or circumstance that has come to his or her attention even though the fact or circumstance is not related to his or her specific instructions. The court responded in the negative. It held that an escrow agent was only a limited agent; its obligations were defined by the escrow instructions, and its duty was to obey the instructions (*264 Cal. App. 2d 160, 162-163)* . The court pointed out that a rule requiring disclosure of these matters beyond the scope of its instructions would force the escrow holder to make an independent judgment as to the accuracy of the information and to risk liability for either the failure to disclose or for making the disclosure, should the escrow holder's judgment be incorrect. Such a rule would discourage a reasonable and prudent person from acting as an escrow holder (*264 Cal. App. 2d 160, 163)* .

Blackburn v. McCoy *(1934) 1 Cal. App. 2d 648, 37 P.2d 153* , involved a double escrow in which the holder of an option bought real property at one price and immediately sold an interest in it to the plaintiff at a higher price. The cause of action against the escrow holder was based on the latter's failure to disclose to the plaintiff the lower purchase price. A judgment was entered in the escrow holder's favor and the plaintiff appealed. The court of appeal affirmed. It held that the escrow transaction created an agency that was limited to following escrow instructions (*1 Cal. App. 2d 648, 654-655)* . It then held that the escrow holder had followed the instructions, and, since there was no instruction by the plaintiff to tell her the original purchase price, it had no duty to make such a disclosure (*1 Cal. App. 2d 648, 655)* .

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10-101 California Points & Authorities § 101.22

§ 101.22 Supporting Contention That Exculpatory Clause in Escrow Contract Invalid as Against Public Policy

[1] FORM Supporting Contention That Exculpatory Clause in Escrow Contract Invalid as Against Public Policy

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

JUDGMENT SHOULD BE ENTERED FOR PLAINTIFF BECAUSE THE EXCULPATORY CLAUSE IN THE ESCROW INSTRUCTIONS ATTEMPTING TO LIMIT THE LIABILITY OF THE ESCROW HOLDER IS INVALID AS AGAINST PUBLIC POLICY.

Exculpatory Clause Invalid. A clause in a contract by which an escrow holder intends to exculpate itself from liability for its own mistakes and ordinary negligence is unenforceable as against public policy when the clause is in a standardized contract written by the escrow company with a decisive advantage in bargaining strength (*Akin v. Business Title Corp. (1968) 264 Cal. App. 2d 153, 156-159, 70 Cal. Rptr. 287*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that an exculpatory clause is contained in an adhesion contract and thus is invalid because it is against public policy.

This form of points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the exculpatory clause in the escrow contract is invalid as against public policy, for example in a motion for summary judgment. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel

should set forth the exculpatory language of the escrow contract, attaching affidavits or declarations, as appropriate. Counsel should argue that the escrow contract is a standardized form that is presented to the parties with the understanding that there is very little, if any, room for negotiating the language of the contract. Counsel can then argue that the escrow holder's uncontested negligence did not absolve the escrow holder of liability by means of the exculpatory clause.

[c] Related Pleading and Practice Chapters

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* , (Matthew Bender). For forms and discussion relating to escrows generally, see California Forms of Pleading and Practice, Ch. 253, *Escrows* , (Matthew Bender).

[d] Related Points and Authorities

For memoranda of points and authorities for use in supporting motions for summary judgments, see Ch. 221, *Summary Judgments* . For points and authorities relating to negligence generally, see Ch. 165, *Negligence* .

[3] Discussion of Authorities

[a] Exculpatory Clause Invalid

Akin v. Business Title Corp. *(1968) 264 Cal. App. 2d 153, 70 Cal. Rptr. 287* , involved the sale of a bar and restaurant business in Orange County. The escrow holder recorded a chattel mortgage with the seller as beneficiary in Los Angeles County instead of Orange County. The buyer went bankrupt. The seller's mortgage was unenforceable because it had been recorded in the wrong county. The escrow agreement contained an exculpatory clause that provided that the escrow holder would not be liable for its ordinary negligence or mistakes. After a verdict for the plaintiff seller, the defendant escrow holder appealed.

The court of appeal affirmed. It held that the clause was unenforceable as against public policy, relying on *Tunkl v. Regents of University of California (1963) 60 Cal. 2d 92, 98-101, 32 Cal. Rptr. 33, 383 P.2d 441* , in which the California Supreme Court held that an exculpatory clause in a hospital form was unenforceable. The court of appeal held that the six factors relied on in *Tunkl* were present in the instant case, making the clause invalid as affecting the public interest. These six factors were as follows (*264 Cal. App. 2d 153, 155-158)* :

- The escrow business is publicly regulated;
- The escrow company performed an important public service;
- The escrow company held itself out as ready to perform its services for any member of the public;
- The escrow company has a decisive advantage in bargaining strength;
- The escrow business presents the public with a standardized adhesion contract of exculpation without a provision allowing the other party to pay for more protection; and
- The parties to the contract were placed under the escrow company's control and were subject to the risk of its carelessness.

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10-101 California Points & Authorities § 101.23

§ 101.23 Supporting Contention That Escrow Holder Is Liable for Negligently Carrying Out Its Instructions

[1] FORM Supporting Contention That Escrow Holder Is Liable for Negligently Carrying Out Its Instructions

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS LIABLE TO PLAINTIFF FOR FAILING TO EXERCISE ORDINARY SKILL AND DILIGENCE IN CARRYING OUT ITS ESCROW INSTRUCTIONS.

Duty of Escrow Holder. It is the escrow holder's duty to exercise ordinary skill and diligence in his or her employment and if an escrow holder acts negligently, he or she is liable for any loss proximately occasioned by the negligence (*Common Wealth Insurance Systems, Inc. v. Kersten (1974) 40 Cal. App. 3d 1014, 1030, 115 Cal. Rptr. 653*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the escrow holder is liable for its negligent acts or omissions in carrying out the escrow instructions.

This form of points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the escrow holder is liable for its negligence, for example in a motion for summary judgment. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should discuss the specific instructions involved, with an accompanying affidavit or declaration incorporating the exact language of the instructions. Counsel can then summarize the acts or omissions of the escrow holder and argue that

these actions or omissions demonstrated a failure to exercise ordinary skill and diligence in carrying out the instructions.

[c] Related Pleading and Practice Chapters

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* , (Matthew Bender). For forms and discussion relating to escrows generally, see California Forms of Pleading and Practice, Ch. 253, *Escrows* , (Matthew Bender).

[d] Related Points and Authorities

For memoranda of points and authorities for use in supporting motions for summary judgments, see Ch. 221, *Summary Judgments* . For points and authorities relating to negligence generally, see Ch. 165, *Negligence* .

[3] Discussion of Authorities

[a] Duty of Escrow Holder

Common Wealth Insurance Systems, Inc. v. Kersten *(1974) 40 Cal. App. 3d 1014, 115 Cal. Rptr. 653* , was a consolidated action, a part of which involved a declaratory relief action for indemnity against the escrow holder by signers of a certain note. The escrow instructions called for the deposit of the affidavit of a third party company showing that 2/3 of its stock was owned by co-signers of the note. The document that was submitted as the "affidavit," apart from being a forgery, was not a true affidavit, in that it was simply an unsworn statement, not a written declaration signed under oath. The trial court found that the escrow holder was negligent, but that the negligence was not the proximate cause of the plaintiffs' loss. Judgment was entered in the escrow company's favor, and the plaintiffs appealed.

The court of appeal reversed the judgment. It concurred with the trial court's finding of negligence by the escrow holder (*40 Cal. App. 3d 1014, 1031)* , and further held that the fact that the loss was uncertain at this time (until a possible future foreclosure sale) did not deprive the plaintiffs of a favorable decree of a declaratory judgment (*40 Cal. App. 3d 1014, 1032)* .

[4] Additional Authorities

[a] Duty of Escrow Holder

Wasmann v. Seidenberg (1988) 202 Cal. App. 3d 752, 248 Cal. Rptr. 744 involved a marital dissolution. After the parties reached agreement on the property settlement portion of the dissolution, the plaintiff's attorney forwarded to the then ex-wife's attorney the final draft of the settlement agreement along with a grant deed conveying certain property to the ex-wife and with a letter authorizing the ex-wife's attorney to record the deed only on obtaining $70,000 in cash or a promissory note from the ex-wife. In some manner not explicitly stated in the opinion, the ex-wife obtained the grant deed and recorded it without providing the required funds or note. The ex-wife's attorney did not respond to repeated inquiries from the plaintiff's attorney regarding the status of the settlement agreement and payment. The husband sued the ex-wife's attorney and the trial court sustained a general demurrer in the attorney's favor. The plaintiff appealed.

The court of appeal reversed. It held that although the ex-wife's attorney owned plaintiff no professional duty, his acceptance of the deed imposed on him fiduciary duties as an escrow holder (*202 Cal. App. 3d 752, 755)* . The court then held that plaintiff had pled sufficient facts to state a cause of action for negligence by the attorney as escrow holder by alleging that the attorney allowed the deed to be recorded without payment and that the attorney failed to disclose the fact that the deed was recorded (*202 Cal. App. 3d 752, 755-758)* .

In *Contini v. Western Title Insurance Co. (1974) 40 Cal. App. 3d 536, 115 Cal. Rptr. 257* , one title company provided title insurance and another title company acted as escrow holder. The escrow holder failed to discover and communicate

to the purchaser a notice of lis pendens and unrecorded judgment on the property. The effect of the judgment was to reduce the acreage and market value of the property. The jury returned a verdict for the plaintiff but the trial court granted a motion for judgment notwithstanding the escrow holder's favor.

The court affirmed the judgment as to the title company providing the insurance, but reversed the judgment as to the title company acting as escrow holder. It held that the escrow holder, who was to perform an abstract search, was negligent in searching the public records and in reporting the state of title in the abstract of title (*40 Cal. App. 3d 536, 545)* . It also held that "an escrow holder is a fiduciary and like any other fiduciary is under a duty to communicate to his principal knowledge acquired in the course of his agency with respect to material facts which might affect the principal's decision as to a pending transaction, particularly where, as here, he knows the principal is looking to him for protection as to those very facts of which he has knowledge (citations omitted)" (*40 Cal. App. 3d 536, 547)* .

For further cases and discussion on an escrow holder's duty to disclose information to his or her principal, see *§ 101.31[3], [4]*.

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[Reserved]

§§ 101.24[Reserved]

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10-101 California Points & Authorities § 101.30

§ 101.30 Opposing Contention That Escrow Holder Has No Liability for Failure to Do Something Not Included in Instructions--Escrow Holder Liable for Closing Escrow After Notice of Possible Material Error in Instructions

[1] FORM Opposing Contention That Escrow Holder Has No Liability for Failure to Do Something Not Included in Instructions--Escrow Holder Liable for Closing Escrow After Notice of Possible Material Error in Instructions

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS LIABLE FOR CLOSING ESCROW BECAUSE IT RECEIVED NOTICE OF POSSIBLE MATERIAL ERROR IN INSTRUCTIONS AND PROCEEDED TO CLOSE ESCROW WITHOUT FURTHER INQUIRY.

Liability for Closing After Notice of Mistake. When a party to an escrow has notified the escrow holder that there was a material mistake in the instructions, the escrow holder is liable if it closes the escrow without further inquiry as to the correctness of the instructions (*Diaz v. United Cal. Bank (1977) 71 Cal. App. 3d 161, 170-172, 139 Cal. Rptr. 314*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted to oppose a contention by the escrow holder that it has no liability because it simply followed the escrow instructions and had no duty to do something that is not required by the escrow instructions [*see § 101.20*]. This form illustrates an exception to this general rule, that is, if the escrow holder receives notice from one or more parties to the escrow that there is a material error in the instructions, the escrow holder must inquire further to resolve the matter before closing escrow.

This form of points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the escrow holder is liable for closing escrow after receiving notice of a material error in the instructions, for example in opposing a motion for summary judgment. This

form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should attach affidavits or declarations that establish the date and substance of the notice provided to the escrow holder regarding the error in the instructions. Counsel should argue that the escrow holder proceeded to close escrow without further inquiry and/or resolving the issue and is therefore liable.

[c] Related Pleading and Practice Chapters

For a form opposing a motion for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* , (Matthew Bender). For forms and discussion relating to escrows generally, see California Forms of Pleading and Practice, Ch. 253, *Escrows* , (Matthew Bender).

[d] Related Points and Authorities

For memoranda of points and authorities for use in opposing motions for summary judgments, see Ch. 221, *Summary Judgments* .

[e] Opposing Points and Authorities

In an appropriate case, this form of points and authorities may be used to oppose a contention supported by the points and authorities *set out in § 101.20*.

[3] Discussion of Authorities

[a] Liability for Closing After Notice of Mistake

Diaz v. United Cal. Bank *(1977) 71 Cal. App. 3d 161, 139 Cal. Rptr. 314* , involved the sale of a restaurant. The parties executed escrow instructions providing for a note in the seller's favor for $7,000. After execution of the instructions, the attorney for the seller sent a notice to the escrow holder that the instructions were in error and the note should be for $19,000. Attached was a copy of the agreement for sale that showed that the price was $19,000. Disregarding the notice, the escrow holder closed the escrow with a $7,000 note. The seller filed an action against the escrow holder, and a general demurrer was sustained without leave to amend.

The court of appeal reversed. Quoting extensively from *Spaziani v. Millar (1963) 215 Cal. App. 2d 667, 30 Cal. Rptr. 658* [*see § 101.31[4*][a] for a complete discussion of this case], the court held that the escrow holder's failure to heed the notice of a possible error was a breach of its duty of skill and ordinary diligence in the conduct of the escrow (*71 Cal. App. 3d 161, 167-171)* . It noted that the escrow holder was not required to accept unilateral changes in the instructions but held that the escrow holder had the right under the instructions to hold up the closing when there were conflicting demands. Therefore, it should have held up the closing while it made an effort to discover whether its instructions were correct (*71 Cal. App. 3d 161, 170-171)* . It also held that a provision giving the escrow holder an election not to close the escrow in a case of conflicting demands conversely did not give the escrow holder the right to proceed to close in the face of these demands (*71 Cal. App. 3d 161, 171)* . The court held that such an interpretation would be in the nature of an exculpatory clause, and would be unenforceable as against public policy under the doctrine set forth in *Akin v. Business Title Corp. (1968) 264 Cal. App. 2d 153, 70 Cal. Rptr. 287* (*71 Cal. App. 3d 161, 171)* [*see § 101.22[3*][a] for a discussion of the *Akin* case].

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§ 101.31 Opposing Contention That Escrow Holder Has No Duty to Disclose--Escrow Holder Liable for Negligent Failure to Disclose

[1] FORM Opposing Contention That Escrow Holder Has No Duty to Disclose--Escrow Holder Liable for Negligent Failure to Disclose

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS LIABLE FOR ITS NEGLIGENT FAILURE TO DISCLOSE TO PLAINTIFF MATERIAL FACTS ABOUT THE TRANSACTION.

Liability for Negligent Failure to Disclose. An escrow holder is liable if it negligently fails to exercise reasonable skill and ordinary diligence by failing to disclose material facts to the plaintiff concerning aspects of its escrow instructions (*Kirby v. Palos Verdes Escrow Co. (1986) 183 Cal. App. 3d 57, 65, 227 Cal. Rptr. 785* ; *Wade v. Lake County Title Co. (1970) 6 Cal. App. 3d 824, 828-829, 86 Cal. Rptr. 182*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted to oppose a contention that the escrow holder has no duty to disclose information to the parties or to support a contention that the escrow holder is liable for its negligent failure to disclose material information to the parties of an escrow.

This form of points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that an escrow holder is liable for the negligent failure to disclose material facts, for example in a motion for summary judgment. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should discuss facts that establish that the escrow holder withheld certain material information from the plaintiff, including dates and the substance of the information. Counsel should argue the materiality of the information and the fact that the information was specifically related to the escrow instructions. Counsel can then conclude that the escrow holder is liable to the plaintiff.

[c] Related Pleading and Practice Chapters

For a form opposing a motion for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* , in (Matthew Bender). For forms and discussion relating to escrows generally, see California Forms of Pleading and Practice, Ch. 253, *Escrows* , (Matthew Bender).

[d] Related Points and Authorities

For memoranda of points and authorities for use in opposing motions for summary judgments, see Ch. 221, *Summary Judgments* .

[e] Opposing Points and Authorities

In an appropriate case, this form of points and authorities may be used to oppose a contention supported by the points and authorities *set out in § 101.21*.

[3] Discussion of Authorities

[a] Liability for Negligent Failure to Disclose

In ***Kirby v. Palos Verdes Escrow Co.*** *(1986) 183 Cal. App. 3d 57, 227 Cal. Rptr. 785* , the plaintiff was the assignee of the beneficial interest under a note and second deed of trust. The defendant escrow company made payment to the assignor of the note even though the final title policy referred to the recordation of the assignment of the note and deed of trust. At trial, the escrow holder claimed that the policy was only cursorily reviewed before it was forwarded to the buyers and that it was unrealistic and unfair to charge it with knowledge of its contents. The trial court entered a judgment for the plaintiff and the defendant appealed.

The court of appeal affirmed the judgment. The court held that it was incumbent on an escrow holder to review any documents related to the escrow to discover any potential risks to its principals (*183 Cal. App. 3d 57, 65)* . The escrow holder had the duty to inform the principals of any facts that materially affected their interest in the property or the escrow funds (*183 Cal. App. 3d 57, 65)* . The court found that the escrow holder's receipt of notice of the assignment in the final title policy was equivalent to receiving new instructions regarding the party to be paid. These "new" instructions conflicted with the buyer's verbal instructions to pay the assignor of the note. The escrow holder then had the duty to delay payment until the proper payee was identified (*183 Cal. App. 3d 57, 65-66)* .

It should be noted that in ***Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co.*** *(2002) 27 Cal. 4th 705, 117 Cal. Rptr. 2d 541, 41 P.3d 548* , the California Supreme Court disapproved of *Kirby v. Palos Verdes Escrow Co. (1986) 183 Cal. App. 3d 57, 227 Cal. Rptr. 785* to the extent *Kirby* held that an escrow holder can be liable to strangers to the escrow for injuries allegedly caused by the escrow holder following its principals' instructions. *Kirby* relied on *Builders' Control Service of No. Cal., Inc. v. North American Title Guar. Co. (1962) 205 Cal. App. 2d 68, 22 Cal. Rptr. 712* to hold that an escrow holder owes the same obligations to nonparties as it does to parties to the escrow. The Supreme Court found that the result in *Kirby* rested on *Kirby*'s erroneous reading of *Builders' Control Service* as holding that (1) knowledge of an escrow holder that a nonparty distributee of funds from the escrow has made an assignment of the right to receive those funds is deemed an amendment to the escrow instructions by the parties to the escrow, and (2)

an escrow holder who follows the parties' instructions rather than the "deemed amended" instructions is exposed to liability even though its principals suffer no injury from the fact the escrow holder followed its principals' instructions. The Court stated that *Kirby* improperly transformed *Builders' Control Service*'s holding that an agent has an obligation to honor an assignment by its principal into a duty owed to honor contracts made by creditors of the principal even though the escrow holder had no agency relationship with the creditor (*27 Cal. 4th 705, 712-714)* . For further discussion of *Summit Financial Holdings*, see *§ 101.66*.

In ***Wade v. Lake County Title Co.*** *(1970) 6 Cal. App. 3d 824, 86 Cal. Rptr. 182* , the complaint against the escrow holder was based on (1) its failure to disclose to the plaintiff-seller the fact that the deposit check from the buyer had not been cashed as per its private instructions to the escrow holder and (2) its holding on to the check for months without checking to see whether there were sufficient funds to cover it. After four to five months in escrow, the real estate transaction fell through and the plaintiff was unable to obtain specific performance against the buyer because of its bankruptcy. The complaint alleged that the failure to inform the plaintiff that the check had not been cashed and the failure to cash the check caused the plaintiff to lose a source of recovery for its damages for the buyer's breach of contract. After judgment for the defendant escrow holder, the plaintiff appealed.

The court of appeal reversed. It held that an escrow holder has the duty to exercise reasonable skill and ordinary diligence in its employment and that if the escrow holder acts negligently, it is ordinarily liable for any loss occasioned by its breach of duty (*6 Cal. App. 3d 824, 828)* . It held that there was ample evidence to support the trial court's finding that the escrow company was negligent in not cashing the deposit check or informing the plaintiff that the check had not been cashed, stating that an escrow agent in the exercise of ordinary diligence would not have taken this course of action (*6 Cal. App. 3d 824, 828-829)* . The case was remanded with directions to determine the amount of the plaintiff's damages. The court stated that the escrow holder would be liable for the plaintiff's damages up to the amount of the check (*6 Cal. App. 3d 824, 830-831)* .

[4] Additional Authorities

[a] Liability for Negligent Failure to Disclose

In *Spaziani v. Millar (1963) 215 Cal. App. 2d 667, 30 Cal. Rptr. 658* , the escrow instructions provided that the property the plaintiff was selling was to be encumbered first by an unspecified construction loan and then by a second deed of trust securing the buyer's obligation to the plaintiff. Without seeking clarification on the terms of the construction loan and without disclosing to the plaintiff the fact that the first deed of trust was not a construction loan, the escrow holder closed the transaction, encumbering the property with a first deed of trust that it knew was not a construction loan and the second deed of trust securing the note held by the plaintiff. After default in the payment of the note secured by the second deed of trust, the plaintiff sued the buyers, the lending institution, and the escrow holder. The trial court granted the escrow holder's motion for nonsuit and the plaintiff appealed.

The court of appeal reversed the judgment in the escrow holder's favor. It held that the escrow company would be liable if it failed to exercise ordinary skill and diligence with regard to the escrow. The court found that an escrow holder has the duty to exercise ordinary care to communicate to its principal knowledge acquired in the ordinary course of employment with regard to matters pertaining thereto, and this duty must be viewed in the light of the fiduciary relationship between the escrow holder and the parties to the escrow (*215 Cal. App. 2d 667, 684)* . The court found that there was evidence from which the trial court could have found that the escrow holder was negligent in closing the escrow without seeking further instructions from the plaintiff as to the terms of the first deed of trust. It also found that there was evidence from which the trial court could have found that the escrow company was negligent in not informing the plaintiff that the first deed of trust was not a construction loan and did not conform to the provisions of the deposit receipt. The court concluded that the issue of negligence is a question of fact and should not have been determined as a matter of law on a motion for nonsuit (*215 Cal. App. 2d 667, 684)* .

In *Zang v. Northwestern Title Co. (1982) 135 Cal. App. 3d 159, 185 Cal. Rptr. 176* , the plaintiff was to pay off a deed of trust for a property owner plus provide funds for additional liens and in turn receive a deed of trust on the property. Plaintiff paid off the deed of trust outside of escrow but with the escrow holder's knowledge, and the beneficiary of the deed of trust forwarded a reconveyance deed directly to the escrow holder. The escrow holder recorded the reconveyance deed without recording the deed of trust in favor of plaintiff and without notice to plaintiff or his attorney that this was being done. Also, the escrow holder had knowledge that the owner intended to defraud the plaintiff by obtaining a loan from another lender and recording a deed of trust in favor of that lender, thereby depriving plaintiff of his security interest. The trial court entered judgment for the plaintiff and the escrow holder appealed. The court of appeal affirmed. It found that the escrow holder was negligent in its affirmative act of recording the reconveyance deed without notifying the plaintiff or his attorney and in allowing fraud to be perpetrated by the owner (*135 Cal. App. 3d 159, 168)* .

The holding in *Zang* should be evaluated carefully in light of the ruling in *Lee v. Title Ins. & Trust Co. (1968) 264 Cal. App. 2d 160, 70 Cal. Rptr. 378* , discussed in *§ 101.21[3][a]*, with regard to the issue of escrow holder liability for failure to disclose knowledge of an underlying fraud. In *Lee*, the court reached the opposite conclusion of the *Zang* court and held that the escrow holder was not liable for failing to disclose an underlying fraud. However, *Zang* can be distinguished because the underlying fraud prevented the escrow holder from complying with the plaintiff's instructions whereas this was not the case in *Lee*.

It is also important to distinguish the cases discussed above with the case law supporting the contention that the escrow holder has no duty to disclose [*see § 101.21[3][a]*]. It is clear from the above cases than an escrow holder is required to disclose material information to the parties relating to the matters involved in the escrow, for example, title issues, deposits made by the parties, and payments made to the beneficiaries under encumbrances recorded against the property. However, an escrow holder is not required to disclose information not directly pertaining to matters involving the escrow, for example, issues relating to underlying fraud in the purchase transaction (not affecting the matters involved in the escrow) or information concerning the price the seller paid for the property [*see § 101.21[3][a]*].

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[Reserved]

§§ 101.32[Reserved]

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C. Breach of Contract by Escrow Holder

10-101 California Points & Authorities § 101.40

§ 101.40 Supporting Contention That Escrow Holder Is Liable for Breach of Contract--Failure to Comply With Instructions

[1] FORM Supporting Contention That Escrow Holder Is Liable for Breach of Contract--Failure to Comply With Instructions

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT FAILED TO COMPLY WITH ITS INSTRUCTIONS AND IS THEREFORE LIABLE FOR BREACH OF CONTRACT.

Liability for Breach of Instructions. When an escrow holder breaches an instruction that it has contracted to perform, or an implied promise arising out of the agreement with buyer or seller, the injured party acquires a cause of action for breach of contract (*Amen v. Merced County Title Co. (1962) 58 Cal. 2d 528, 532, 25 Cal. Rptr. 65, 375 P.2d 33* ; *Gordon v. D & G Escrow Corp. (1975) 48 Cal. App. 3d 616, 621-623, 122 Cal. Rptr. 150*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted by a plaintiff in opposition to a motion for summary judgment based on the contention that the escrow holder carried out its instructions if there is a triable issue of fact as to whether or not the escrow holder breached its instructions.

This form of points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the escrow holder is liable for breach of contract, for example in a motion for summary judgment. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should attach affidavits or declarations that oppose a motion for summary judgment [*Code Civ. Proc. § 437c*], which sets forth facts showing a breach of the instructions by the escrow holder.

[c] Related Pleading and Practice Chapters

For a form opposing a motion for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender). For forms and discussion relating to escrows generally, see California Forms of Pleading and Practice, Ch. 253, *Escrows* (Matthew Bender). For forms and discussion relating to contract actions generally, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Points and Authorities

For memoranda of points and authorities for use in opposing motions for summary judgments, see Ch. 221, *Summary Judgments* . For points and authorities relating to contract actions generally, see Ch. 50, *Contracts* .

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 101.45* or *§ 101.46* may be used to oppose a contention supported by this form.

[3] Discussion of Authorities

[a] Liability for Breach of Instructions

The facts and procedural background of ***Amen v. Merced County Title Co.*** *(1962) 58 Cal. 2d 528, 25 Cal. Rptr. 65, 375 P.2d 33* , are discussed in *§ 101.15[3][a]*. The California Supreme Court held that when an escrow holder breaches an instruction that it has contracted to perform or an implied promise arising out of the agreement with buyer or seller, the injured party acquires a cause of action for breach of contract (*58 Cal. 2d 528, 532)* .

In ***Gordon v. D & G Escrow Corp.*** *(1975) 48 Cal. App. 3d 616, 122 Cal. Rptr. 150* , the plaintiff and his estranged wife opened an escrow to sell their house. Although the record title to the property was in the wife's name only, both spouses signed the instructions and the parties viewed the plaintiff as the seller. The title company closed the escrow and disbursed all the proceeds to the wife. The plaintiff sued the escrow company and after the trial court entered a verdict for the defendant, plaintiff appealed.

The court of appeal reversed. It held that the escrow company had a duty to obey its instructions and was liable for the breach of that duty (*48 Cal. App. 3d 616, 621)* . It then held that the instructions, impliedly, if not expressly, called for the proceeds to be paid to both sellers, not just to one seller (*48 Cal. App. 3d 616, 622-623)* . The court found that the trial court had erred in not admitting certain evidence as to whether the plaintiff had any interest in the property, which error required reversal of the trial court's finding that the plaintiff had no interest in the property and therefore was not damaged by the payment to the wife (*48 Cal. App. 3d 616, 623-626)* .

[4] Additional Authorities

[a] Liability for Breach of Instructions

In *Garton v. Title Insurance & Trust Co. (1980) 106 Cal. App. 3d 365, 165 Cal. Rptr. 449* , a purchaser filed a complaint against a title company, as escrow holder, and others, in part for breach of contract and negligent performance of duties as escrow holder. The preliminary title report provided to the purchaser did not mention the

reservation of oil, gas, and mineral rights, nor did the deed of trust executed by the plaintiff refer to this reservation. On discovering the error, the escrow holder altered the deed of trust to reflect the reservation and accepted a false acknowledgment of the plaintiff's signature on the document, without plaintiff's knowledge or consent. The trial court sustained the defendant's demurrer and the plaintiff appealed.

The court of appeal reversed and remanded. It held that the facts alleged in the complaint did state a cause of action for breach of contract and it was error to sustain the demurrer (*106 Cal. App. 3d 365, 381)* . The court further held that the facts also stated a cause of action for negligence against the escrow holder (*106 Cal. App. 3d 365, 381-382)* [*see § 101.23[3], [4]* for additional cases involving negligence by an escrow holder.

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10-101 California Points & Authorities § 101.41

§ 101.41 Supporting Contention That Escrow Holder Is Liable for Breach of Contract--Release of Buyer's Funds Before Conditions Being Met

[1] FORM Supporting Contention That Escrow Holder Is Liable for Breach of Contract--Release of Buyer's Funds Before Conditions Being Met

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS LIABLE FOR BREACH OF CONTRACT IN RELEASING THE BUYER'S FUNDS BEFORE REQUIRED CONDITIONS WERE MET.

A. Liability for Breach of Instructions. [*See § 101.40[1], Paragraph A.*]

B. Escrow Agent Liable for Releasing Funds Prematurely. When a party deposits funds into escrow, and those funds are disposed of without complying with the escrow instructions, the party is entitled to recover damages from the escrow holder (*Kelly v. Steinberg (1957) 148 Cal. App. 2d 211, 217, 306 P.2d 955*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the escrow holder is liable for the depositor's funds because the escrow holder released the funds before the required conditions of escrow were met.

This form of points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the escrow holder is liable for releasing a depositor's funds, for example in a motion for summary judgment. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should refer to the specific escrow instructions that require the escrow holder to hold the funds in question until the specified conditions are met. An accompanying affidavit or declaration setting forth the exact language of the instructions in question should be attached. Counsel can then recite the facts relating to the escrow holder's release of the funds and the facts supporting the contention that the conditions of escrow had not been met at the time of the release. Counsel can then argue that the release of funds was a breach of the instructions and the escrow holder is liable.

[c] Related Pleading and Practice Chapters

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender). For forms and discussion relating to escrows generally, see California Forms of Pleading and Practice, Ch. 253, *Escrows* (Matthew Bender).

[d] Related Points and Authorities

For memoranda of points and authorities for use in supporting motions for summary judgments, see Ch. 221, *Summary Judgments* . For points and authorities relating to contract actions generally, see Ch. 50, *Contracts* .

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 101.45* may be used to oppose a contention supported by this form.

[3] Discussion of Authorities

[a] Escrow Agent Liable for Releasing Funds Prematurely

In ***Kelly v. Steinberg*** *(1957) 148 Cal. App. 2d 211, 306 P.2d 955* , a purchaser deposited funds with an attorney who was to act as an escrow agent for the sales transaction. Unknown to the plaintiff, the attorney cashed the check and converted it to his personal use. The sales transaction was later mutually rescinded by the seller and buyer. Judgment was entered for the plaintiff against the attorney escrow agent. The court of appeal affirmed. It held that title to funds deposited into escrow remains in the depositor until the conditions have been met and it is returnable to the buyer if the seller doesn't comply with the conditions (*148 Cal. App. 2d 211, 217-218)* . The court also held that if the escrow agent violates the instructions or acts negligently in retaining a check in its files, it would ordinarily be liable for any loss occasioned by the breach (*148 Cal. App. 2d 211, 217)* . In this case there was a clear breach by the attorney escrow agent when he converted the buyer's deposit funds to his own use.

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10-101 California Points & Authorities §§ 101.42-101.44

[Reserved]

§§ 101.42[Reserved]

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10-101 California Points & Authorities § 101.45

§ 101.45 Opposing Contention That Escrow Holder Is Liable for Breach of Contract--Failure to Comply With Escrow Instructions--Breach Was Not Proximate Cause of Plaintiff's Loss

[1] FORM Opposing Contention That Escrow Holder Is Liable for Breach of Contract--Failure to Comply With Escrow Instructions--Breach Was Not Proximate Cause of Plaintiff's Loss

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS NOT LIABLE FOR FAILURE TO COMPLY WITH THE ESCROW INSTRUCTIONS BECAUSE THE ALLEGED BREACH WAS NOT THE PROXIMATE CAUSE OF PLAINTIFF'S LOSS.

No Liability If Breach Is Not Proximate Cause of Loss. When the escrow holder breaches the escrow instructions, but the breach is not the proximate cause of plaintiff's loss, plaintiff is entitled to nominal damages only (*Capell Associates, Inc. v. Central Valley Security Co. (1968) 260 Cal. App. 2d 773, 779-785, 67 Cal. Rptr. 463* ; *see Civ. Code § 3360*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted to oppose a contention that the escrow holder is liable for damages to plaintiff when plaintiff's losses were not caused by the escrow holder's breach of the instructions.

This form of points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the escrow holder's breach was not the proximate cause of plaintiff's loss, for example in a motion for summary judgment. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should refer to the alleged breach by the escrow holder and discuss the facts that led to the plaintiff's loss. Counsel can then argue that the escrow holder's breach was not the proximate cause of the plaintiff's loss and therefore the escrow holder is not liable to the plaintiff.

[c] Related Pleading and Practice Chapters

For a form opposing a motion for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender). For forms and discussion relating to escrows generally, see California Forms of Pleading and Practice, Ch. 253, *Escrows* (Matthew Bender).

[d] Related Points and Authorities

For memoranda of points and authorities for use in opposing motions for summary judgments, see Ch. 221, *Summary Judgments* . For points and authorities relating to contract actions generally, see Ch. 50, *Contracts* .

[e] Opposing Points and Authorities

In an appropriate case, this form of points and authorities may be used to oppose a contention supported by the points and authorities *set out in § 101.40* or *§ 101.41*.

[3] Discussion of Authorities

[a] No Liability If Breach Is Not Proximate Cause of Loss

Civ. Code § 3360 provides that when a breach of duty has caused no appreciable detriment to the party affected, that party may recover nominal damages.

In ***Capell Associates, Inc. v. Central Valley Security Co.*** *(1968) 260 Cal. App. 2d 773, 67 Cal. Rptr. 463* , the escrow holder recorded a purchase money trust deed inadvertently containing a provision violating the seller's instructions. This resulted in an automatic subordination of the seller's trust deed to subsequently recorded blanket construction loans, as to one half of the property in question. The seller's instructions provided that its lien be subordinate only to separate loans for each lot in the subdivision. The developer was unable to sell the improved lots and defaulted on the blanket construction loans, resulting in a loss to the seller on the trust deed. Judgment was entered for the seller and the escrow holder appealed.

The court of appeal reversed. The escrow holder admitted a negligent breach of the escrow instructions, but argued that the breach was not the proximate cause of the seller's loss. Had separate loans for each lot been recorded, instead of a blanket loan, the result would have been the same, that is, the lots would have been foreclosed on and the seller would still suffer a loss (*260 Cal. App. 2d 773, 779-780)* . The court concluded that the depressed real estate market was the sole proximate cause of the seller's loss (*260 Cal. App. 2d 773, 782)* . Since there was a breach but no actual damages, the seller was entitled to nominal damages only (*260 Cal. App. 2d 773, 785)* .

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10-101 California Points & Authorities § 101.46

§ 101.46 Opposing Contention That Escrow Holder Is Liable for Breach of Contract--Delivery of Invalid Deed--Appropriate Action by Seller Is Quiet Title or Rescission Action

[1] Form Opposing Contention That Escrow Holder Is Liable for Breach of Contract--Delivery of Invalid Deed--Appropriate Action by Seller Is Quiet Title or Rescission Action

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS NOT LIABLE FOR DAMAGES FOR DELIVERY OF AN INVALID DEED; THE APPROPRIATE ACTION FOR PLAINTIFF IS ONE TO QUIET TITLE OR AN ACTION FOR RESCISSION.

Quiet Title or Rescission Appropriate Remedy. When an invalid deed is delivered to the buyer by the escrow holder in violation of the escrow instructions, the appropriate action by the seller is one to quiet title or an action for rescission (*Montgomery v. Bank of America (1948) 85 Cal. App. 2d 559, 564-565, 193 P.2d 475*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted to oppose a contention that the escrow holder is liable for damages for delivering an invalid deed to the buyer in violation of seller's instructions.

This form of points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the escrow holder is not liable for damages for delivery of an invalid deed, for example in a motion for summary judgment. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel

should refer to the alleged breach by the escrow holder in delivering an invalid deed to the buyer and argue that since the deed did not convey title, seller has suffered no damages, and seller's sole remedy is to quiet his or her title or seek rescission of the sale.

[c] Related Pleading and Practice Chapters

For a form opposing a motion for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender). For forms and discussion relating to escrows generally, see California Forms of Pleading and Practice, Ch. 253, *Escrows* (Matthew Bender). For forms and discussion relating to quieting title, see California Forms of Pleading and Practice, Ch. 482, *Quieting Title* , (Matthew Bender). For forms and discussion relating to rescission actions, see California Forms of Pleading and Practice, Ch. 490, *Rescission and Restitution* (Matthew Bender).

[d] Related Points and Authorities

For memoranda of points and authorities for use in opposing motions for summary judgments, see Ch. 221, *Summary Judgments* .

[e] Opposing Points and Authorities

In an appropriate case, this form of points and authorities may be used to oppose a contention supported by the points and authorities *set out in § 101.40*.

[3] Discussion of Authorities

[a] Quiet Title or Rescission Appropriate Remedy

In ***Montgomery v. Bank of America*** *(1948) 85 Cal. App. 2d 559, 193 P.2d 475* , the escrow agent altered the legal description of the grant deed after it was signed and delivered into escrow by the seller. The result was to include more land than what was intended. The vendor sued the escrow agent for damages and judgment was entered for the defendant escrow holder.

The court of appeal affirmed the judgment. It held that the delivery of such a deed, contrary to the vendor's instructions, conveys no title and the deed was void (*85 Cal. App. 2d 559, 563-564)* . It also held that the proper action for the vendor is one to quiet title or an action for rescission (*85 Cal. App. 2d 559, 564-565)* . An escrow agent will be liable only for the costs and expenses incurred in recovering title (*85 Cal. App. 2d 559, 565)* .

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10-101 California Points & Authorities § 101.47

§ 101.47 Supporting Contention That Escrow Holder Is Liable for Breach of Fiduciary Duty--Failure to Obtain Reliable Evidence That Broker Is Licensed

[1] FORM Supporting Contention That Escrow Holder Is Liable for Breach of Fiduciary Duty--Failure to Obtain Reliable Evidence That Broker Is Licensed

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT FAILED TO OBTAIN RELIABLE EVIDENCE THAT THE BROKER TO WHOM IT PAID A COMMISSION WAS LICENSED AND THEREFORE IS LIABLE FOR BREACH OF FIDUCIARY DUTY.

Liability for Breach of Fiduciary Duty for Failure to Obtain Reliable Evidence That Broker Is Licensed. Escrow holders have a fiduciary duty to the parties in escrow to obtain reliable evidence that a real estate broker is regularly licensed before paying the broker a commission, and to communicate facts concerning the broker's license to the parties in escrow (*Kangarlou v. Progressive Title Co. (2005) 128 Cal. App. 4th 1174, 1179, 27 Cal. Rptr. 3d 754*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted by a plaintiff to oppose a contention that the escrow holder has no duty to disclose information to the parties regarding the licensing of brokers or to support a contention that the escrow holder is liable for breach of fiduciary duty.

This form of points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the escrow holder is liable for breach of contract, for example, in a motion for summary judgment. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should discuss facts that establish that the escrow holder failed to obtain evidence that a broker to whom it paid a commission was licensed and withheld information concerning the broker's lack of a license from the plaintiff. Counsel should argue the materiality of the information and the fact that the information was specifically related to the escrow contract. Counsel can then conclude that the escrow holder is liable to the plaintiff.

[c] Related Pleading and Practice Chapters

For forms and discussion relating to escrows generally, see California Forms of Pleading and Practice, Ch. 253, *Escrows* (Matthew Bender).

[d] Related Jury Instructions

For a jury instruction on breach of fiduciary duty by an escrow holder, see *Judicial Council of California Civil Jury Instructions, CACI No. 4104, Duties of Escrow Holder* (LexisNexis Matthew Bender, Official Publisher), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions.

[3] Discussion of Authorities

[a] Liability for Breach of Fiduciary Duty for Failure to Obtain Reliable Evidence That Broker Is Licensed

In ***Kangarlou v. Progressive Title Co.*** *(2005) 128 Cal. App. 4th 1174, 27 Cal. Rptr. 3d 754* , the purchaser prevailed against the escrow agent and holder on a cause of action for breach of fiduciary duty based on allegations that the purchaser's real estate agent, real estate broker, and loan broker were not properly licensed and the defendants violated *Bus. & Prof. Code § 10137* by transacting business through unlicensed persons or entities and by paying them commissions. In holding that the purchaser could recover attorneys' fees under the escrow contract pursuant to *Civ. Code § 1717*, the court of appeal concluded that the defendants' fiduciary duties arose out of and were not outside the contract (*128 Cal. App. 4th 1174, 1179)* [*see also* *Fairchild v. Park (2001) 90 Cal. App. 4th 919, 925-926, 109 Cal. Rptr. 2d 442* (breach of fiduciary duty may be both a breach of contract and a tort)]. The duty of an escrow holder to obtain evidence that a real estate broker is regularly licensed before delivering compensation arises from *Bus. & Prof. Code § 10138*, and the defendants assumed that duty only by entering the contract to execute the escrow for plaintiff purchaser and the seller. Furthermore, the defendants' duty to communicate facts learned about the broker's licenses arose only because of the duty to obtain such evidence. Since the duty to obtain such evidence was not outside the contract, the duty to communicate those findings also was not outside the contract. Finally, the defendants' obligation to exercise reasonable skill and diligence in carrying out the escrow instructions, and to comply strictly with the depositor's written instructions, were within the duties undertaken in the contract (*128 Cal. App. 4th 1174, 1179)* .

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10-101 California Points & Authorities §§ 101.48-101.49

[Reserved]

§§ 101.48[Reserved]

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10-101 California Points & Authorities § 101.50

§ 101.50 Supporting Contention in Action for Rescission or to Quiet Title--Delivery of Deed Invalid if Buyer Did Not Satisfy All Conditions of Escrow

[1] FORM Supporting Contention in Action for Rescission or to Quiet Title--Delivery of Deed Invalid if Buyer Did Not Satisfy All Conditions of Escrow

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

JUDGMENT SHOULD BE ENTERED FOR THE PLAINTIFF IN _____ [A QUIET TITLE ACTION *or* AN ACTION FOR RESCISSION] BECAUSE DELIVERY OF THE DEED WAS INVALID IN THAT DEFENDANT DID NOT SATISFY ALL CONDITIONS TO CLOSING OF ESCROW.

Quiet Title or Rescission Should Be Granted When Delivery of Deed Invalid. When a deed is placed in escrow with instructions that it should only be delivered to the buyer when the buyer has complied with certain conditions, delivery of the deed before all the conditions have been met is invalid and does not pass title to the buyer (*Promis v. Duke (1929) 208 Cal. 420, 425, 281 P 613* ; *Todd v. Vestermark (1956) 145 Cal. App. 2d 374, 377, 302 P.2d 347*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted by a plaintiff in support of a contention that a judgment to quiet title or for rescission of a contract should be entered because delivery of the deed to the defendant buyer was invalid in that the defendant failed to comply with all of the conditions of the escrow.

This form of points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the deed delivered to the buyer was invalid, for example in a motion for summary judgment. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should attach affidavits or declarations that set forth the conditions of the escrow that the defendant buyer failed to meet. Counsel should set out the dates and facts substantiating the defendant's failure to satisfy specific conditions and argue that the judgment sought is appropriate.

[c] Related Pleading and Practice Chapters

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender). For forms and discussion relating to quieting title, see California Forms of Pleading and Practice, Ch. 482, *Quieting Title* (Matthew Bender). For forms and discussion relating to rescission actions, see California Forms of Pleading and Practice, Ch. 490, *Rescission and Restitution* (Matthew Bender). For forms and discussion relating to the transfer of deeds see California Forms of Pleading and Practice, Ch. 184, *Deeds* (Matthew Bender).

[d] Related Points and Authorities

For memoranda of points and authorities for use in supporting motions for summary judgments, see Ch. 221, *Summary Judgments* . For points and authorities for use in quiet title actions, see Ch. 198, *Quieting Title* .

[3] Discussion of Authorities

[a] Quiet Title or Rescission Should Be Granted When Delivery of Deed Invalid

Promis v. Duke *(1929) 208 Cal. 420, 281 P. 613* , involved a real estate transaction in which the plaintiff agreed to sell certain property to the defendant. The consideration was to be cash and a note secured by a first deed of trust on certain other property. The defendant had agreed to pay off a note secured by a lien on the other property to give the plaintiff's note priority. The plaintiff placed a deed to the property in escrow and the terms of the sale were set out in the escrow instructions. Without performing the conditions of escrow, the defendant obtained the deed (in a manner not discussed in the court's opinion) and recorded it. The plaintiff sued to rescind and to obtain a reconveyance. The trial court entered a judgment for the plaintiff and the defendant appealed.

The California Supreme Court affirmed. It held that when a deed is placed in the hands of an escrow holder, with an agreement between the grantor and grantee that the deed must not be delivered to the grantee until certain conditions are met, the grantee does not acquire any title to the land, nor is he or she entitled to a delivery of the deed unless the conditions are complied with. Since the defendant had not complied with the conditions when he received the deed, title to the property did not pass and vest in the defendant by virtue of the improper delivery (*208 Cal. 420, 425)* .

In ***Todd v. Vestermark*** *(1956) 145 Cal. App. 2d 374, 302 P.2d 347* , an escrow holder embezzled certain funds which it held. The seller brought an action to quiet title to the property that had been transferred by the escrow holder and obtained a judgment quieting his title. The buyer appealed and the court of appeal affirmed. It stated that the case revolved around whose money had been embezzled. It held that when all the conditions of the escrow have been met, title passes to the buyer but that delivery of the deed before all the conditions are met is a nullity and does not pass title (*145 Cal. App. 2d 374, 377)* . In this case, all of the conditions had not been met at the time the deed was delivered; specifically, the condition of obtaining title insurance had not been met. Therefore, title to the property did not pass to the buyer with delivery of the deed and the buyer still had title to the money in escrow at the time of the embezzlement. The court held that it was proper to quiet title in the seller who had not been paid (*145 Cal. App. 2d 374, 378-380)* .

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10-101 California Points & Authorities § 101.51

§ 101.51 Supporting Contention in Action for Rescission or to Quiet Title--Delivery of Deed Was Valid--Plaintiff Waived Conditions to Closing of Escrow

[1] FORM Supporting Contention in Action for Rescission or to Quiet Title--Delivery of Deed Was Valid--Plaintiff Waived Conditions to Closing of Escrow

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

JUDGMENT _____ [TO QUIET TITLE *or* FOR RESCISSION] IS PROPER WHEN PLAINTIFF WAIVED CONDITIONS TO CLOSING OF ESCROW AND, THEREFORE, DELIVERY OF THE DEED WAS VALID.

Waiver of Condition. When a condition to the closing of escrow was inserted for one party's benefit, that party's waiver of the condition precludes the other party from contending that the delivery of the deed was invalid because the condition was not fulfilled (*Kish v. Bay Counties Title Guar. Co. (1967) 254 Cal. App. 2d 725, 728-729, 62 Cal. Rptr. 494*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted to support a contention that title should be quieted because delivery of the deed was valid notwithstanding the fact that conditions to escrow were not met. This form may be used in a factual situation in which the party seeking to quiet title is the party who waived the conditions that were inserted into the escrow instructions for his or her own benefit.

This form of points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the party seeking to quiet title waived the conditions inserted for his or her benefit, for example in a motion for summary judgment. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should set forth the language of the condition or conditions that were not met, attaching affidavits and declarations when appropriate. Counsel should point out that the condition or conditions in question were for the benefit of the party seeking to quiet title and that party waived those conditions. Counsel can then conclude that delivery of the deed was in fact valid.

[c] Related Pleading and Practice Chapters

For a form of notice of a motion for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender). For forms and discussion relating to quieting title, see California Forms of Pleading and Practice, Ch. 482, *Quieting Title* (Matthew Bender). For forms and discussion relating to rescission actions, see California Forms of Pleading and Practice, Ch. 490, *Rescission and Restitution* (Matthew Bender). For forms and discussion relating to the transfer of deeds see California Forms of Pleading and Practice, Ch. 184, *Deeds* (Matthew Bender).

[d] Related Points and Authorities

For memoranda of points and authorities for use in supporting motions for summary judgments, see Ch. 221, *Summary Judgments* . For points and authorities for use in quiet title actions, see Ch. 198, *Quieting Title* .

[3] Discussion of Authorities

[a] Waiver of Condition

Kish v. Bay Counties Title Guar. Co. *(1967) 254 Cal. App. 2d 725, 62 Cal. Rptr. 494* , arose out of a complicated real estate transaction, in which a broker loaned his commission to a buyer as a part of the down payment for the purchase of a motel and also purchased the buyer's house. The escrow holder was instructed to prepare a note and security interest to evidence and secure the commission's loan. This was not done. After a trial between all parties to the transaction, the broker's title to the house was quieted. The seller of the house appealed, contending that title to the house did not pass to the broker because a condition to the escrow did not happen in that the security instrument was not prepared or executed. The court of appeal affirmed the judgment quieting the broker's title. It noted that no title passes when the escrow holder delivers and records a deed before full performance of the escrow's terms (*254 Cal. App. 2d 725, 728)* . However, it pointed out that the seller was complaining that the security instrument condition was not performed, but that condition was for the benefit of the broker, not the seller. The court then held that the broker must have waived the performance of the condition of the security instrument's execution (*254 Cal. App. 2d 725, 728-729)* .

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10-101 California Points & Authorities §§ 101.52-101.54

[Reserved]

§§ 101.52[Reserved]

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10-101 California Points & Authorities § 101.55

§ 101.55 Opposing Contention That Buyer Forfeited Deposit--Seller Waived "Time Is of the Essence" Clause

[1] FORM Opposing Contention That Buyer Forfeited Deposit--Seller Waived "Time Is of the Essence" Clause

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS NOT ENTITLED TO PLAINTIFF'S DEPOSIT WHEN DEFENDANT WAIVED A CONDITION OF ESCROW THAT PAYMENTS BY PLAINTIFF BE MADE WITHIN TIME LIMITS SET FORTH IN THE ESCROW INSTRUCTIONS.

Waiver of "Time Is of the Essence" Clause. When the escrow instructions contain a time limit for performance and a "time is of the essence" clause, a plaintiff waives the right to claim that the defendant's performance was not timely if plaintiff indicated that it would accept performance after the time limit and did not thereafter give notice that performance would be required by a certain date (*Chan v. Title Ins. & Trust Co. (1952) 39 Cal. 2d 253, 258-259, 246 P.2d 632* ; *Galdjie v. Darwish (2003) 113 Cal. App. 4th 1331, 1342-1343, 7 Cal. Rptr. 3d 178* ; *Ninety Nine Investments, Ltd. v. Overseas Courier Service (2003) 113 Cal. App. 4th 1118, 1134, 6 Cal. Rptr. 3d 891*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted to oppose a contention that the buyer is not entitled to the return of his or her deposit for failing to make deposits by the dates specified in the escrow instructions, and the escrow instructions contained a "time is of the essence" clause. This form may be used in those factual situations when the buyer can show that the seller waived the timely performance of the buyer.

This form of points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the seller waived any rights it had to demand timely deposits by the buyer, for example, in a motion for summary judgment. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should set forth the relevant language from the escrow instructions relating to the deposits or other performance by the buyer, attaching affidavits or declarations when appropriate. Counsel should summarize the facts relating to the buyer's performance and the actions by the seller that indicate a waiver, for example, the seller's continued interest in proceeding with the transaction long after the buyer failed to meet a deadline. Counsel can then conclude that the buyer did not forfeit his or her deposit.

[c] Related Pleading and Practice Chapters

For a form opposing a motion for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender). For forms and discussion relating to escrows generally, see California Forms of Pleading and Practice, Ch. 253, *Escrows* (Matthew Bender).

[d] Related Points and Authorities

For memoranda of points and authorities for use in opposing motions for summary judgments, see Ch. 221, *Summary Judgments* .

[e] Opposing Points and Authorities

In an appropriate case, this form of points and authorities may be used to oppose a contention supported by the points and authorities *set out in § 101.50*.

[3] Discussion of Authorities

[a] Waiver of "Time Is of the Essence" Clause

In ***Chan v. Title Ins. & Trust Co.*** *(1952) 39 Cal. 2d 253, 246 P.2d 632* , the plaintiffs brought an action seeking a judgment that the defendants, who had contracted to buy property from the plaintiffs, had forfeited money deposited in escrow for failure to make certain deposits in escrow on time. The defendants cross complained for return of the deposit in escrow. After a judgment for the defendants and cross complainants, the plaintiffs and cross defendants appealed.

The California Supreme Court affirmed. It held that it was clear that the plaintiffs had waived the "time is of the essence" clause with regard to the defendants' deposits in escrow because, with the plaintiffs' approval, the transaction was still pending after the dates for making the deposit. Thus, if the plaintiffs wanted to reinstate any right of forfeiture that they may have had, they had to give notice to the defendants that performance had to be made by a certain date. Since the evidence was conflicting as to whether such a notice had been given, the finding of the trial court in favor of the defendants had to be upheld (*39 Cal. 2d 253, 258-259)* .

In ***Galdjie v. Darwish*** *(2003) 113 Cal. App. 4th 1331, 7 Cal. Rptr. 3d 178* , an agreement for the purchase and sale of property was not automatically discharged when neither party performed concurrent obligations by the date specified in the escrow instructions, even though the sales agreement provided that time was of the essence. The seller waived the time provisions by continuing to deal with the buyer after the date specified in the contract, and the buyer was prevented from tendering the loan funds by the seller's failure to provide a termite report as required by the agreement (*113 Cal. App. 4th 1331, 1342-1343)* .

In ***Ninety Nine Investments, Ltd. v. Overseas Courier Service*** *(2003) 113 Cal. App. 4th 1118, 1134, 6 Cal. Rptr. 3d 891* , a buyer was entitled to specific performance of two purchase and sales contracts when it was ready, willing, and able to perform the transactions and the seller prevented the buyer from performing by failing to comply with its escrow

obligations, even though the escrow instructions contained "time is of the essence" clauses (*113 Cal. App. 4th 1118, 1134)* .

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10-101 California Points & Authorities § 101.56

§ 101.56 Opposing Contention That Buyer May Recover Deposit From Seller--Proper Action Is Against Escrow Holder

[1] FORM Opposing Contention That Buyer May Recover Deposit From Seller--Proper Action Is Against Escrow Holder

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF IS NOT ENTITLED TO RECOVER A DEPOSIT FROM DEFENDANT BECAUSE TITLE TO FUNDS IS STILL IN PLAINTIFF AND THEREFORE THE PROPER ACTION IS ONE AGAINST THE ESCROW HOLDER, NOT THE SELLER.

Plaintiff May Not Recover Deposit From Defendant. When an escrow does not close because there had not been full performance of the escrow terms, title to the deposit funds remains in the buyer; therefore the buyer may not recover the deposit from the seller but must file an action against the escrow holder (*Love v. White (1961) 56 Cal. 2d 192, 194*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted to oppose a contention that the buyer is entitled to recover the amount of his or her deposit from the seller in an escrow that failed to close.

This form of points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the buyer is not entitled to recover the amount of his or her deposit from the seller, for example in a motion for summary judgment. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should set forth the facts relating to the terms of the escrow and how and why it did not close. Counsel should argue that title to the deposit funds remained with the buyer at the time the escrow was terminated. Counsel should also argue that the buyer is not entitled to recover the deposit from the seller, but must instead file an action against the escrow holder for the return of his or her deposit.

[c] Related Pleading and Practice Chapters

For a form opposing a motion for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender). For forms and discussion relating to escrows generally, see California Forms of Pleading and Practice, Ch. 253, *Escrows* (Matthew Bender).

[d] Related Points and Authorities

For memoranda of points and authorities for use in opposing motions for summary judgments, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Plaintiff May Not Recover Deposit From Defendant

In ***Love v. White*** *(1961) 56 Cal. 2d 192, 14 Cal. Rptr. 442, 363 P.2d 482* , the defendant buyer placed money in escrow to pay part of the purchase price for a cafe business and took possession under a lease. Before the escrow closed, a dispute arose over certain repairs. The plaintiff seller filed an action and recovered possession. The defendant counterclaimed against the plaintiff for the amount of the deposit and received a judgment for that amount and for conversion of bar fixtures that remained in the bar when the plaintiff recovered possession.

The plaintiff appealed and the California Supreme Court reversed. It held that title to the money in escrow remained in the defendant because there had not been full performance of the escrow and the defendant could recover the money from the escrow holder. Therefore, the defendant was not entitled to a judgment against the plaintiff for the deposit funds (*56 Cal. 2d 192, 194)* . The court also reversed the judgment with regard to conversion of the fixtures because the defendant never had title to the fixtures since all the conditions of the escrow had not been performed (*56 Cal. 2d 192, 195)* .

The ruling of this case should be viewed carefully in light of *Civ. Code § 1057.3*, enacted in 1990. This statute provides that it should be the obligation of a buyer and seller to ensure that all funds deposited into escrow are returned to the person who is entitled to the funds if the purchase is not completed [*Civ. Code § 1057.3(a)*]. Any party who fails to execute any document required by the escrow holder to release funds on deposit within 30 days of demand will be liable to the party making the deposit [*Civ. Code § 1057.3(b)*], unless the funds are withheld to resolve a good faith dispute between the buyer and seller [*Civ. Code § 1057.3(c)*]. This statute presumably would restrict the ruling of *Love v. White* to situations in which no demand is made of a seller to release the buyer's deposit, or in which the seller has executed a release but for some reason the escrow holder fails to release the funds to the buyer.

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[Reserved]

§§ 101.57[Reserved]

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10-101 California Points & Authorities § 101.60

§ 101.60 Supporting Contention That Escrow Holder Is Liable for Breach of Contract With Third Party

[1] FORM Supporting Contention That Escrow Holder Is Liable for Breach of Contract With Third Party

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS LIABLE TO PLAINTIFF FOR FAILING TO COMPLY WITH AN AGREEMENT VOLUNTARILY UNDERTAKEN BY DEFENDANT.

Escrow Holder's Liability to Third Party. When an escrow agent intentionally makes himself or herself a party to a contract with a third party to the original escrow, recovery can be had against the escrow agent for failing to comply with the terms of the contract (*Warrington Lumber Co. v. Fullerton Mortg. & Escrow Co. (1963) 222 Cal. App. 2d 706, 710, 35 Cal. Rptr. 423*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the escrow holder is liable for breach of contract with a third party when the escrow holder voluntarily entered into an agreement with the third party and then failed to comply with the agreement's terms.

This form of points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the escrow holder is liable for breach of contract with a third party, for example in a motion for summary judgment. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel

should set forth the facts relating to the formation of the contract between the escrow holder and the third party and attach an affidavit or declaration that sets forth the contract's exact language. Counsel should also discuss the facts that constitute the breach of the contract and argue that the escrow holder is liable for damages resulting from that breach.

[c] Related Pleading and Practice Chapters

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender). For forms and discussion relating to escrows generally, see California Forms of Pleading and Practice, Ch. 253, *Escrows* (Matthew Bender). For forms and discussion relating to contract actions generally, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Points and Authorities

For memoranda of points and authorities for use in supporting motions for summary judgments, see Ch. 221, *Summary Judgments* . For points and authorities related to contract actions generally, see Ch. 50, *Contracts* . For points and authorities related to agency, see Ch. 182, *Principal and Agent* .

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 101.45* may be used to oppose a contention supported by this form.

[3] Discussion of Authorities

[a] Escrow Holder's Liability to Third Party

In ***Warington Lumber Co. v. Fullerton Mortgage & Escrow Co.*** *(1963) 222 Cal. App. 2d 706, 35 Cal. Rptr. 423* , the escrow holder was a disbursing agent on a construction loan. In a letter to a building materials dealer, the defendant escrow holder agreed to withhold sums distributed to the developer and make payments totaling approximately $120,000 directly to the plaintiff. These payments were authorized by the developer. Three payments were made by the escrow holder. The developer then advised the escrow holder that the plaintiff had been paid in full. Without seeking verification from the plaintiff, the escrow holder distributed the balance of the funds to the developer. The plaintiff sued and judgment was entered against the escrow holder. The escrow holder appealed.

The court of appeal affirmed the judgment. The court held that the letter from the escrow holder to the plaintiff constituted a valid contract, and that this resulted in the escrow holder no longer being just a disbursing agent for the loan, but now was also a principal under an agreement with the plaintiff (*222 Cal. App. 2d 706, 710)* . The court held that when an agent intentionally makes himself or herself a party to a contract, recovery can be had against the agent for breach of contract (*222 Cal. App. 2d 706, 710)* . The court explained that the escrow holder should not have accepted the unilateral statement from the developer that the plaintiff was paid in full; neither the escrow holder nor the developer could unilaterally terminate the agreement between the escrow holder and the plaintiff (*222 Cal. App. 2d 706, 711)* .

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[Reserved]

§§ 101.61[Reserved]

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10-101 California Points & Authorities § 101.65

§ 101.65 Opposing Contention That Escrow Holder Is Liable for Interference With Brokerage Contract--No Liability When There Is No Knowledge of Contract or Assignment of Sale Proceeds

[1] FORM Opposing Contention That Escrow Holder Is Liable for Interference With Brokerage Contract--No Liability When There Is No Knowledge of Contract or Assignment of Sale Proceeds

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS NOT LIABLE FOR INTERFERENCE WITH A BROKERAGE CONTRACT BECAUSE DEFENDANT HAD NO KNOWLEDGE OF THE AGREEMENT PROVIDING FOR A BROKERAGE FEE, NOR WAS THERE AN ASSIGNMENT OF SALE PROCEEDS TO THE BROKER.

A. Duty of Escrow Holder. [*See § 101.20[1], Paragraph A.*]

B. No Liability for Interference With Brokerage Contract. An escrow holder will not be liable for a broker's commission when there was no assignment of sale proceeds or knowledge by the escrow holder of an agreement providing for a brokerage commission (*Contemporary Investments, Inc. v. Safeco Title Ins. Co. (1983) 145 Cal. App. 3d 999, 1003-1005, 193 Cal. Rptr. 822*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted by a defendant in opposition to a contention that the escrow holder is liable for interference with a brokerage contract when the facts show that the escrow holder had no knowledge of the brokerage contract, nor was there an assignment of sale proceeds to the broker.

This form of points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the escrow holder is not liable for interference with a brokerage contract, for example in a motion for summary judgment. This form may also be adapted for use in a trial or

appellate brief or in jury instructions.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should set forth the facts, and attach affidavits or declarations when appropriate, to establish that the escrow instructions did not provide for a payment to the broker (or if they did, the instructions were revoked), that the escrow holder had no knowledge of an agreement to pay a brokerage fee, and that there was not an assignment of sale proceeds for the broker's benefit. Counsel can then argue that the escrow holder has no liability to the broker.

[c] Related Pleading and Practice Chapters

For a form opposing a motion for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender). For forms and discussion relating to escrows generally, see California Forms of Pleading and Practice, Ch. 253, *Escrows* (Matthew Bender). For forms and discussion relating to brokers, see California Forms of Pleading and Practice, Ch. 103, *Brokers* (Matthew Bender).

[d] Related Points and Authorities

For memoranda of points and authorities for use in opposing motions for summary judgments, see Ch. 221, *Summary Judgments* .

[e] Opposing Points and Authorities

In an appropriate case, this form of points and authorities may be used to oppose a contention supported by the points and authorities *set out in § 101.60*.

[3] Discussion of Authorities

[a] No Liability for Interference With Brokerage Contract

In ***Contemporary Investments, Inc. v. Safeco Title Ins. Co.*** *(1983) 145 Cal. App. 3d 999, 193 Cal. Rptr. 822* , a broker filed an action against the seller, buyer, and escrow holder for recovery of its commission. The broker's action against the escrow holder was based on the latter's alleged interference with the sales contract providing for a payment to the broker. The seller and buyer instructed the escrow holder to make the payment to the broker and later revoked the instruction. The trial court entered a judgment against the defendant escrow holder, and the defendant appealed.

The court of appeal reversed. The court recited the required elements to establish a case based on interference with a contract, including the requirement that the defendant had knowledge of a contract and intended to induce a breach (*145 Cal. App. 3d 999, 1002)* . It then held that there was no evidence that the escrow holder had received a copy of the sales contract or had knowledge of the provision providing for a payment to the broker (*145 Cal. App. 3d 999, 1003)* . Additionally, the broker neither argued nor proved that there was an assignment of sale proceeds to the broker for the commission (*145 Cal. App. 3d 999, 1004-1005)* . Furthermore, there was no argument or proof that there was any direct contract between the broker and the escrow holder (*145 Cal. App. 3d 999, 1004)* .

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10-101 California Points & Authorities § 101.66

§ 101.66 Opposing Contention That Escrow Holder Is Liable for Payment to Assignor Rather than Assignee of Beneficial Interest in Deed of Trust--Escrow Holder Owes No Duty to Stranger to Escrow

[1] FORM Opposing Contention That Escrow Holder Is Liable for Payment to Assignor Rather than Assignee of Beneficial Interest in Deed of Trust--Escrow Holder Owes No Duty to Stranger to Escrow

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT CANNOT BE HELD LIABLE TO A NONPARTY TO THE ESCROW BASED ON AN ASSIGNMENT TO THAT NONPARTY BY ANOTHER NONPARTY TO THE ESCROW.

No Duty Owed to Nonparties to the Escrow. An escrow holder owes neither a fiduciary duty nor a general tort duty to a nonparty to the escrow. Therefore, an escrow holder cannot be held liable to a nonparty assignee of the beneficial interest in a deed of trust for payment on the note to the nonparty assignor of that interest. *Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co. (2002) 27 Cal. 4th 705, 711-716, 117 Cal. Rptr. 2d 541, 41 P.3d 548* .

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted to oppose a contention that the escrow holder has a duty to third parties who are strangers to the escrow and therefore may be held liable for payment to the nonparty assignor of the beneficial interest in a deed of trust rather than to the nonparty assignee of that interest.

This form of points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that an escrow holder may not be held liable to a stranger to the escrow, for example, in a motion for summary judgment. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should discuss facts that establish that the assignor and assignee were nonparties to the escrow. Counsel can then conclude that the escrow holder cannot be held liable to the plaintiff.

[c] Related Pleading and Practice Chapters

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender). For forms and discussion relating to escrows generally, see California Forms of Pleading and Practice, Ch. 253, *Escrows* (Matthew Bender).

[3] Discussion of Authorities

[a] No Duty Owed to Nonparties to the Escrow

In ***Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co.*** *(2002) 27 Cal. 4th 705, 117 Cal. Rptr. 2d 541, 41 P.3d 548* , a purchaser of real property borrowed $425,000 from Talbert. The note, made payable to Talbert, was secured by the deed of trust on the property. At the same time the deed of trust was recorded, a document entitled "Assignment of Deed of Trust" was recorded that assigned the beneficial interest under the note and deed of trust from Talbert to Summit. However, neither Talbert nor Summit gave the borrower notice of the assignment. The borrower subsequently obtained a new loan from Dundrel that was used in part to pay the first note. The refinancing transaction was handled by BHE and CLTC acted as an escrow holder in connection with issuing the title insurance for the new deed of trust securing the new note. CLTC prepared a preliminary title report noting that the property was encumbered by a deed of trust securing the Talbert note, and that an assignment of the note and deed of trust from Talbert to Summit had been recorded. BHE thereafter obtained a note payoff demand from Talbert specifying the outstanding balance to be paid to Talbert. BHE forwarded Talbert's payoff demand to CLTC. On close of the refinancing transaction, CLTC paid Talbert in accordance with the payoff demand and BHE's instructions. Summit did not receive the funds from Talbert.

The borrower filed for protection under Chapter 11 of the United States Bankruptcy Code. The bankruptcy court entered an order for sale of the property free and clear of all liens. The order directed that the proceeds of the sale be used to pay the amounts owed Dundrel as the holder of the first trust deed and amounts owed to another secured creditor, and that any purported liens on the property held by other parties, including Summit, would attach to the remaining proceeds of the sale. The borrower moved in the bankruptcy court for an order disallowing Summit's lien claim on the ground the amount paid to Talbert in the refinance transaction fully extinguished the borrower's obligations under the note. The bankruptcy court concluded that the borrower was not given the required notice of the assignment and the payment to Talbert extinguished the note under *Civ. Code § 2937(f)* (debtor's payment to the prior note holder before receiving notice of the assignment pro tanto extinguishes the underlying obligation). It therefore disallowed Summit's lien claim.

Summit then brought an action seeking recovery from CLTC of the note payment CLTC made to Talbert. In affirming the court of appeal's judgment for CLTC, the California Supreme Court held that an escrow holder owes a duty only to parties and participants in the escrow, and may not be held liable to a stranger to the escrow such as Summit (*27 Cal. 4th 705, 708)* . Thus, CLTC, who paid the note as instructed by issuing a check to the assignor of the note rather than the assignee, neither of whom were parties to the escrow, could not be held liable for breach of fiduciary duty (*27 Cal. 4th 705, 714)* . In addition, CLTC could not be held liable to the assignee on a general negligence theory (*27 Cal. 4th 705, 715)* [*see also* *Biakanja v. Irving (1958) 49 Cal. 2d 647, 650, 320 P.2d 16* (factors to apply in determining whether duty of care exists to a third party not in privity)]. In *Summit* (1) the transaction undertaken by the escrow holder was not intended to affect or benefit the assignee; (2) the harm was not foreseeable because the escrow holder could not have foreseen that the assignor would default on its obligation to disburse the funds to the assignee; and (3) there was no moral blame connected with the act of paying the assignor rather than the assignee because that act fulfilled the escrow holder's duty to perform the instructions given to it by the parties to the escrow and was authorized

by statute (*27 Cal. 4th 705, 715-716)* [*see also Civ. Code § 2937(d), (f)*]. In addition, there was not a sufficiently close connection between the payment to the assignor and the injury suffered by the assignee to warrant imposition of a duty of care on the escrow holder. Although the payment extinguished the borrower's obligation under the note, the assignee's injury was caused by its own noncompliance with its statutory obligation to give notice of the assignment [*Civ. Code § 2937(d)*] and because the assignor breached its contractual obligation to the assignee (*27 Cal. 4th 705, 716)* .

It should be noted that the Supreme Court disapproved of *Kirby v. Palos Verdes Escrow Co. (1986) 183 Cal. App. 3d 57, 227 Cal. Rptr. 785* to the extent *Kirby* held that an escrow holder can be liable to strangers to the escrow for injuries allegedly caused by the escrow holder following its principals' instructions. *Kirby* relied on *Builders' Control Service of No. Cal., Inc. v. North American Title Guar. Co. (1962) 205 Cal. App. 2d 68, 22 Cal. Rptr. 712* to hold that an escrow holder owes the same obligations to nonparties as it does to parties to the escrow. The Supreme Court found that the result in *Kirby* rested on *Kirby*'s erroneous reading of *Builders' Control Service* as holding that (1) knowledge of an escrow holder that a nonparty distributee of funds from the escrow has made an assignment of the right to receive those funds is deemed an amendment to the escrow instructions by the parties to the escrow, and (2) an escrow holder who follows the parties' instructions rather than the "deemed amended" instructions is exposed to liability even though its principals suffer no injury from the fact the escrow holder followed its principals' instructions. The Court stated that *Kirby* improperly transformed *Builders' Control Service*'s holding that an agent has an obligation to honor an assignment by its principal into a duty owed to honor contracts made by creditors of the principal even though the escrow holder had no agency relationship with the creditor (*27 Cal. 4th 705, 712-714)* . For discussion of *Kirby*, see *§ 101.31*.

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§ 103.syn Synopsis to Chapter 103: FALSE IMPRISONMENT

§ 103.01 Scope of Chapter

§ 103.02 Governing Statutes

§ 103.03 Page Limits on Points and Authorities

§ 103.04 Related Pleading and Practice Chapters

§ 103.05 Related Points and Authorities Chapters

§§ 103.06-103.19 [Reserved]

§ 103.20 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for False Imprisonment--Bar of Statute of Limitations [Code Civ. Proc. § 340(c)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Accrual of Cause of Action

[b] Plaintiff's Ignorance of Illegality of Imprisonment

[c] Fraud as Not Presumed

[d] Running of Statute Not Barred by Pendency of Criminal Proceeding in Action Against Private Defendant

[e] Plaintiff's Release on Bail

[4] Additional Authorities

[a] Accrual of Cause of Action

§ 103.21 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant Public Entity or Employee--In Action for False Imprisonment--Failure to File Claim With Public Entity Within Statutory Time Limit After Accrual of Cause of Action [Gov. Code § 911.2] or to Seek Leave to File Late Claim [Gov. Code §§ 911.4, 946.6]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Failure to Comply With Claim Procedure Bars Action

§§ 103.22-103.39 [Reserved]

§ 103.40 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--In Action for False Imprisonment Based on Detention Without Arrest Property Owner Justified in Detaining Suspected Thief or Vandal for Reasonable Investigation

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Property Owner's Right to Detain for Investigation

[b] Probable Cause as Question of Law

[c] Outcome of Criminal Charges Immaterial

[4] Additional Authorities

[a] Probable Cause as Question of Law

§ 103.41 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant Merchant, Library Employee, or Theater Owner--In Action for False Imprisonment Based on Detention Without Arrest--Defendant Justified in Detaining Suspected Thief for Reasonable Investigation [Penal Code § 490.5(f)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Merchant's Right to Detain for Investigation

[b] Library Employee's Right to Detain for Investigation

[c] Theater Owner's Right to Detain for Investigation

§ 103.42 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--In Action for False Imprisonment Based on Detention Without Arrest--Reasonableness of Manner or Length of Time of Investigative Detention as Question of Fact

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Reasonableness of Length and Manner of Detention as Question of Fact

§ 103.43 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--In Action for False Imprisonment Based on Detention Without Arrest--Probable Cause as Not Justifying Detention for Purpose Other Than Investigation

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Probable Cause No Defense

[b] Detention to Secure Confession

[4] Additional Authorities

[a] Probable Cause No Defense

§ 103.44 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--In Action for False Imprisonment Based on Detention Without Arrest--Awareness of Confinement Not an Essential Element

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Awareness of Confinement Not Required for Recovery

§§ 103.45-103.59 [Reserved]

§ 103.60 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--In Action for False Imprisonment Based on Warrantless Arrest--Private Citizen Not Liable for Report to Authorities Resulting in Warrantless Arrest

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Statements Made to Police Reporting Potential Criminal Conduct Absolutely Privileged

§ 103.61 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--In Action for False Imprisonment Based on Warrantless Arrest--Private Citizen Not Liable Where Acting Pursuant to Request and Instructions of Peace Officer in Making Arrest

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Use of Form

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Arrest Pursuant to Police Instructions

§ 103.62 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--In Action for False Imprisonment Based on Warrantless Arrest--Private Citizen Justified in Arresting Plaintiff for Public Offense Committed or Attempted in His/Her Presence [Penal Code § 837(1)]

[1] FORM

[2] Comments

[a] Use of Form

§ 103.63 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--In Action for False Imprisonment Based on Warrantless Arrest--Felony Had Been Committed and Defendant Citizen Had Reasonable Cause to Believe Plaintiff Committed It [Penal Code § 837(3)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Reasonable Cause as Question of Law

[b] Determination of Reasonable Cause

§ 103.64 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--In Action for False Imprisonment Based on Warrantless Arrest--Arrest Justified Because Plaintiff Had Committed a Felony [Penal Code §§ 836(a)(2), 837(2)]

[1] FORM

[2] Comments

[a] Use of Form

§ 103.65 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--In Action for False Imprisonment Based on Warrantless Arrest--Peace Officer Had Probable Cause to Believe Person Arrested Had Committed Public Offense in His/Her Presence [Penal Code § 836(a)(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Points and Authorities

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Probable Cause as Question of Law

[b] Determination of Probable Cause

[c] Effect of Subsequent Decision Not to Prosecute

§ 103.66 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--In Action for False Imprisonment Based on Warrantless Arrest--Defendant Peace Officer Had Probable Cause to Believe Plaintiff Had Committed Felony [Penal Code § 836(a)(3)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Probable Cause as Question of Law

[b] Determination of Probable Cause

[c] Information From Victim of Felony

[d] Information Transmitted Through Official Channels

[4] Additional Authorities

[a] Determination of Probable Cause

[b] Information From Victim of Felony

§ 103.67 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for False Imprisonment--Action Based on Warrantless Arrest--Peace Officer Not Liable for Receiving Custody of Person Arrested in Citizen's Arrest [Penal Code §§ 142, 847]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Immunity of Peace Officer

§ 103.68 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for False Imprisonment--Action Based on Warrantless Arrest by Peace Officer--Supervisor Not Liable for False Imprisonment by Subordinates [Gov. Code § 820.8]

[1] FORM

[2] Comments

[a] Use of form

[3] Discussion of Authorities

[a] Supervisor Not Liable for Acts of Subordinates

§ 103.69 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for False Imprisonment--Action Based on Warrantless Arrest--Magistrate Immune From Liability Based on Oral Order to Arrest [Penal Code § 838]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Immunity of Magistrate

§ 103.70 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for False Imprisonment--Action Based on Warrantless Arrest--Public Authorities Not Liable for Taking Child Into Custody and Filing Petition for Dependency of Child [Gov. Code §§ 815.2(b), 821.6; Welf. & Inst. Code §§ 300, 305]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] No False Imprisonment for Taking Dependent Child Into Custody Under Legal Authority

§ 103.71 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--In Action for False Imprisonment Based on Warrantless Arrest--Private Citizen Liable for Procuring Unlawful Arrest

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Procurement of Unlawful Arrest

[b] Absolute Privilege of Civil Code Section 47(b) Inapplicable to Act of Making Citizen's Arrest

[4] Additional Authorities

[a] Procurement of Unlawful Arrest

[b] Absolute Privilege of Civil Code Section 47(b) Inapplicable to Act of Making Citizen's Arrest

§ 103.72 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--In Action for False Imprisonment Based on Citizen's Arrest--Triable Issue of Fact Existing as to Whether Offense Committed in Presence of Private Citizen Accomplishing Citizen's Arrest

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Triable Issue of Fact as to Legality of Arrest

§ 103.73 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--In Action for False Imprisonment Based on Warrantless Arrest--Warrantless Felony Arrest Not Justified Where Offense Committed as Result of Entrapment

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Entrapment as Vitiating Justification

[4] Additional Authorities

[a] Test of Entrapment

§ 103.74 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--In Action for False Imprisonment Based on Warrantless Arrest--Information From Untested Informer as Not Providing Reasonable Cause for Warrantless

Arrest Absent Showing Justifying Reliance

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Information From Untested Informer

§ 103.75 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--In Action for False Imprisonment Based on Warrantless Arrest--Finding at Preliminary Hearing in Criminal Proceeding as Not Estopping Plaintiff From Litigating Issue of Probable Cause for Arrest

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Plaintiff Not Estopped From Litigating Probable Cause for Underlying Criminal Arrest

§ 103.76 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for False Imprisonment--Action Based on Warrantless Arrest--Complaint Does Not Allege Facts Showing Probable Cause for Warrantless Arrest as Matter of Law [Penal Code §§ 836(a)(1), (3), 837(3)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Sustaining Demurrer as Improper

[b] Statements Regarding Plaintiff's Criminal Conduct as Not Establishing Reasonable Cause

[c] Fact of Plaintiff's Guilt as Not Establishing Reasonable Cause

[4] Additional Authorities

[a] Sustaining Demurrer as Improper

§ 103.77 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for False Imprisonment--Action Based on Warrantless Arrest--Allegation of Unlawfulness of Arrest Not Required Where Arrest Made Without Warrant

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Allegation of Unlawfulness Unnecessary

[b] Defendant Has Burden of Proving Justification for Arrest

§§ 103.78-103.89 [Reserved]

§ 103.90 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for False Imprisonment--Action Based on Arrest Pursuant to Warrant--Judge Immune From Liability for Defective Issuance of Arrest Warrant

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Judicial Immunity

[b] Error in Determination of Jurisdiction

[c] Issuance of Warrant of Insufficient Complaint

[d] Lack of Statutory Compliance

[e] Inferior Court Judges Immune

[4] Additional Authorities

[a] Judicial Immunity

§ 103.91 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for False Imprisonment--Action Based on Detention of Juvenile--Juvenile Court Judge Immune From Liability for Detention of Minor

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Immunity of Juvenile Court Judges

[b] Effect of Procedural Irregularities

[c] Effect of Habeas Corpus Release

§ 103.92 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for False Imprisonment--Action Based on Arrest Pursuant to Warrant--Private Citizen Not Liable for Providing Information in Good Faith Leading to Issuance of Arrest Warrant

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Immunity of Private Citizen

[4] Additional Authorities

[a] Immunity of Private Citizen

§ 103.93 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for False Imprisonment--Action Based on Arrest Pursuant to Warrant--Failure to Allege Facts Showing Warrant Invalid on Its Face

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Necessary Allegations Where Arrest Pursuant to Warrant

[b] Insufficient Allegations

[4] Additional Authorities

[a] Necessary Allegations Where Arrest Pursuant to Warrant

§ 103.94 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for False Imprisonment--Action Based on Arrest Pursuant to Warrant--Peace Officer and Public Entity Employing Him/Her Immune From Liability for Execution of Facially Valid Arrest Warrant or Other Process [Civ. Code § 43.55; Code Civ. Proc. § 262.1]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Immunity of Peace Officer

[b] Facial Regularity of Process

[c] Determination of Facial Regularity

[d] Defects in Issuance Proceeding

[e] Knowledge of Officer

[f] Determination of Invalidity on Habeas Corpus

[g] Malice of Officer

[h] Jurisdiction of Person

[i] Immunity of Public Entity

[4] Additional Authorities

[a] Immunity of Peace Officer

§ 103.95 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for False Imprisonment--Action Based on Arrest Pursuant to Warrant--Judicial Immunity Does Not Protect Judge Acting in Complete Absence of Jurisdiction to Issue Arrest Warrant

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Inapplicability of Judicial Immunity

[4] Additional Authorities

[a] Inapplicability of Judicial Immunity

§ 103.96 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e) for False Imprisonment--Action Based on Arrest Pursuant to Bench Warrant--Bench Warrant for Civil Contempt Not Regular on Its Face [Civ. Code § 43.55; Code Civ. Proc. § 1213]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Civil Contempt Bench Warrant Not Regular on Its Face

§ 103.97 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for False Imprisonment--Action Based on Arrest Pursuant to Bench Warrant--Bench Warrant to Compel Attendance of Witness Not Regular on Its Face [Civ. Code § 43.55; Code Civ. Proc. § 1994]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Bench Warrant to Compel Attendance of Witness Not Regular on Its Face

§ 103.98 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for False Imprisonment--Action Based on Arrest Pursuant to Warrant--Arrest Unlawful Where Peace Officer Failed to Use Reasonable Prudence to Determine That Person Arrested Was Person Named in Warrant or Acted With Malice [Civ. Code § 43.55]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Liability for Arrest of Wrong Person

[b] Liability for Arrest Made With Malice

[c] Prima Facie Showing of Unlawfulness

[4] Additional Authorities

[a] Liability for Arrest of Wrong Person

[b] Liability for Arrest Made With Malice

§§ 103.99-103.109 [Reserved]

§ 103.110 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for False Imprisonment--Action Based on Detention After Arrest--Failure to Allege Facts Showing Delay Unnecessary or Unreasonable [Penal Code §§ 825, 847, 849(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Failure to Allege Unnecessary Delay

§ 103.111 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant Peace Officer--In Action for False Imprisonment Based on Detention After Arrest--Delay in Taking Arrestee Before Magistrate Not Unreasonable Where Arrestee Assented to Delay [Penal Code §§ 825, 849(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Delay Not Unreasonable Where Arrestee Assents

§ 103.112 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for False Imprisonment--Action Based on Detention After Arrest--Delay in Taking Arrested Person Before Magistrate [Penal Code §§ 825, 849]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Cause of Action for Unreasonable Delay

[b] Lawful Arrest as Not Excusing Subsequent Unreasonable Detention

[c] Delay of Less Than Two Days Not Reasonable as Matter of Law

§ 103.113 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for False Imprisonment--Action Based on Detention After Arrest--Cause of Action Stated Based on Failure of Public Entity to Perform Mandatory Duty [Gov. Code § 815.6]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Failure to Release After Dismissal of Criminal Charges

[b] Failure to Make Record Entries of Dismissal of Criminal Charges

[c] Failure to Release on Posting of Bail

[d] Liability Not Barred by Section 844.6(a)(2) of Government Code

[e] Liability Not Barred by Section 821.6 of Government Code

§ 103.114 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--In Action for False Imprisonment Based on Detention After Arrest--Unreasonableness of Delay in Taking Defendant Before Magistrate Is Question of Fact

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Unreasonableness of Delay as Question of Fact

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CHAPTER 103 FALSE IMPRISONMENT
PART I. INTRODUCTION

10-103 California Points & Authorities § 103.01

§ 103.01 Scope of Chapter

This chapter contains memoranda of points and authorities for use in supporting and opposing demurrers and motions for summary judgment in actions for damages for false imprisonment. Part II.A contains memoranda supporting a demurrer and a motion for summary judgment based on expiration of limitations periods [*see §§ 103.20, 103.21*]. Part II.B contains memoranda supporting [*see §§ 103.40, 103.41*] and opposing [*see §§ 103.42, 103.43*] motions for summary judgments in actions for false imprisonment based on detention of the plaintiff without actual arrest. Part II.C contains memoranda supporting [*see §§ 103.60 -103.70*] and opposing [*see §§ 103.71 -103.77*] motions for summary judgment and demurrers in actions for false imprisonment based on the warrantless arrest of the plaintiff, by either a private person or a peace officer. Part II.D contains memoranda supporting [*see §§ 103.90 -103.94*] and opposing [*see §§ 103.95 -103.98*] demurrers to complaints in actions for false imprisonment based on an arrest of the plaintiff pursuant to warrant. Part II.E contains memoranda supporting [*see §§ 103.110, 103.111*] and opposing [*see §§ 103.112 -103.114*] demurrers and motions for summary judgment in actions for false imprisonment based on the wrongful detention of the plaintiff after a lawful arrest.

For a discussion and sample forms showing how to use the forms in this chapter to draft a complete memorandum of points and authorities or brief, and for further discussion of law and motion procedure and strategy, see Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresSummary JudgmentOppositionMemoranda in OppositionCivil ProceduresSummary JudgmentSupporting MaterialsMemoranda of LawTortsIntentional TortsFalse ImprisonmentGeneral OverviewTortsIntentional TortsFalse ImprisonmentDefensesGeneral Overview

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10-103 California Points & Authorities § 103.02

§ 103.02 Governing Statutes

Several different codes contain statutes relevant to civil actions for false imprisonment. Relevant provisions of the Civil Code include: *Civ. Code §§ 43* (right of protection from bodily restraint or harm) and 43.55 (limits on liability of peace officer executing arrest warrant regular on its face). Pertinent provisions of the Code of Civil Procedure include: *Code Civ. Proc. §§ 262.1* (sheriffs and others justified in executing all regular process, regardless of defects in issuance) and 340(c) (one-year statute of limitations for false imprisonment actions). Related sections of the Penal Code include: *Penal Code §§ 9* (civil damages for criminal acts); 142 (penalties for peace officer's failure to take custody of person arrested in citizen's arrest); 145 (penalties for failure to take arrested person before magistrate); 146 (penalties for arrest without legal authority); 182 (penalties for conspiring to wrongfully procure the arrest of another); 210.5 (increased penalties for false imprisonment committed for purposes of protection from arrest or to use person as shield); 236 (false imprisonment defined); 237 (penalties for crime of false imprisonment); 490.5(f) (merchant's privilege to detain suspected thief for investigation); 825(a) (duty to take arrested person before magistrate within specified time limit); 836 (warrantless arrests by peace officers); 837 (warrantless arrests by private persons); 838 (warrantless arrests ordered by magistrates); 847 (duty of person making citizen's arrest to turn arrested person over to peace officer or magistrate; immunity of peace officer in various arrest situations); 849 (duty to take person arrested without warrant before magistrate).

Provisions relating to release on bail are found in *Penal Code §§ 1268-1298* and *1384*. Provisions of the Government Code relevant to the liability of public employees and public entities for false imprisonment include *Gov. Code §§ 815.2*, *815.6*, *820*, *820.4*, *820.8*, and *821.6*. Claims against public entities are generally governed by *Gov. Code §§ 900-935.6*, with *Gov. Code §§ 911.2* and *945.3* governing specific situations applicable to false imprisonment actions. Other codes, such as the Business and Professions Code, the Food and Agriculture Code, and the Health and Safety Code contain provisions relating to arrests by persons under their governance.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsFalse ImprisonmentGeneral OverviewTortsIntentional TortsFalse ImprisonmentDefensesGeneral OverviewTortsIntentional TortsFalse ImprisonmentDefensesStatutes of LimitationsTortsIntentional TortsFalse

ImprisonmentRemediesTortsIntentional TortsFalse ImprisonmentWarrants

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10-103 California Points & Authorities § 103.03

§ 103.03 Page Limits on Points and Authorities

Generally, a supporting or opposing memorandum of points and authorities must not exceed 15 pages, or in the case of a motion for summary judgment or summary adjudication, 20 pages. A reply or closing memorandum may not exceed 10 pages [*see Cal. Rules of Ct., Rule 3.1113(d)*]. Any party desiring to file a longer memorandum must obtain leave of court [*see Cal. Rules of Ct., Rule 3.1113(e)*]. For further discussion of the page limitations under *Cal. Rules of Ct., Rule 3.1113*, and of other basic format requirements of memoranda of points and authorities, see *Ch. 1, Writing Legal Memoranda and Briefs, § 1.05*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureSummary JudgmentOppositionMemoranda in OppositionCivil ProcedureSummary JudgmentSupporting MaterialsMemoranda of LawGovernmentsCourtsRule Application & Interpretation

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10-103 California Points & Authorities § 103.04

§ 103.04 Related Pleading and Practice Chapters

For a discussion and forms of complaints, allegations, and affirmative defenses in actions for damages for false imprisonment, see California Forms of Pleading and Practice, Ch. 257, *False Imprisonment* (Matthew Bender).

For a discussion and forms for use in filing claims and bringing tort actions against public entities and their employees, see California Forms of Pleading and Practice, Ch. 480, *Public Entities and Officers* .

For discussion and forms for use in tort actions to protect interests similar to the interest in freedom from unlawful violation of personal liberty protected by false imprisonment actions, see the following chapters in California Forms of Pleading and Practice (Matthew Bender):

- Ch. 58, *Assault and Battery*.
- Ch. 112, *Civil Rights*.
- Ch. 357, *Malicious Prosecution and Abuse of Process*.
- Ch. 362, *Mental Suffering and Emotional Distress*.
- Ch. 429, *Privacy*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewTortsIntentional TortsGeneral OverviewTortsIntentional TortsFalse ImprisonmentGeneral OverviewTortsPublic Entity LiabilityLiabilityGeneral Overview

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10-103 California Points & Authorities § 103.05

§ 103.05 Related Points and Authorities Chapters

Related memoranda of points and authorities that may be useful in particular false imprisonment cases may be found in the following chapters:

- Ch. 64, *Damages: Tort.*
- Ch. 71, *Demurrers and Motions for Judgment on the Pleadings*.
- Ch. 90, *Dismissal*.
- Ch. 104, *Fictitiously Named Defendants (DOES)*.
- Ch. 117, *Insane and Incompetent Persons: Actions Involving Mental Patients*.
- Ch. 160, *Motions to Strike*.
- Ch. 182, *Principal and Agent*.
- Ch. 221, *Summary Judgments*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsGeneral OverviewCivil ProceduresPleading & PracticeGeneral OverviewCivil ProcedureDismissalsGeneral OverviewCivil ProcedureSummary JudgmentGeneral OverviewTortsDamagesGeneral OverviewTortsIntentional TortsFalse ImprisonmentGeneral Overview

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10-103 California Points & Authorities §§ 103.06-103.19

[Reserved]

§§ 103.06[Reserved]

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PART II. FORMS
A. Limitation of Actions

10-103 California Points & Authorities § 103.20

§ 103.20 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for False Imprisonment--Bar of Statute of Limitations [Code Civ. Proc. § 340(c)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN SUPPORT OF DEMURRER TO COM-
vs.	)	PLAINT
_____ [*name*],	)	[*Code Civ. Proc. § 430.10(e)*]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT APPEARS ON THE FACE OF THE COMPLAINT THAT IT IS BARRED BY THE STATUTE OF LIMITATIONS.

A. Objection by Demurrer. The party against whom a complaint has been filed may object to the complaint by demurrer on the ground that it does not state facts sufficient to constitute a cause of action where such ground appears on the face of the complaint [or from any matter of which the court is required to or may take judicial notice] (*Code Civ. Proc. §§ 430.10(e), 430.30(a)*).

B. One-Year Limitations Period. The statute of limitations for a false imprisonment action is one year (*Code Civ. Proc. § 340(c)*).

C. Accrual of Cause of Action. A cause of action for false imprisonment accrues upon termination of the wrongful imprisonment (*Collins v. Los Angeles County (1966) 241 Cal. App. 2d 451, 454-455, 50 Cal. Rptr. 586*).

[*Optional*] **D. Plaintiff's Ignorance of Illegality of Imprisonment.** The fact that plaintiff did not know that his/her imprisonment was illegal does not bar the running of the statute, unless his/her ignorance was induced by defendant's fraud (*Collins v. Los Angeles County (1966) 241 Cal. App. 2d 451, 455, 458, 50 Cal. Rptr. 586*).

[*Optional*] **E. Fraud as Not Presumed.** Fraud will not be presumed, and the facts constituting fraud must be specifically pleaded (*Cooper v. Leslie Salt Co. (1969) 70 Cal. 2d 627, 636, 75 Cal. Rptr. 766, 451 P.2d 406*).

[*Optional*] **F. Running of Statute Not Barred by Pendency of Criminal Proceeding in Action Against Private Defendant.** The running of the statute of limitations is not barred in an action against a private defendant by the pendency against plaintiff of a criminal proceeding related to the false imprisonment (*Collins v. Los Angeles County (1966) 241 Cal. App. 2d 451, 455, 458, 50 Cal. Rptr. 586*).

[*Optional*] **G. Plaintiff's Release on Bail.** False imprisonment does not continue while plaintiff is released on bail (*Collins v. Los Angeles County (1966) 241 Cal. App. 2d 451, 455, 458, 50 Cal. Rptr. 586*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a general demurrer to a complaint for damages for false imprisonment where the demurrer asserts that the complaint fails to state a cause of action in that the bar of the statute of limitations appears on the face of the complaint.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

The authority in optional *Paragraph F, Collins v. Los Angeles County (1966) 241 Cal. App. 2d 451, 50 Cal. Rptr. 586* , is no longer valid law in false arrest suits against public entities or peace officers. Under *Gov. Code § 945.3*, a person charged with a criminal offense is prohibited from bringing a false arrest action against a public entity or peace officer based on the acts of the officer in arresting or detaining that person as long as the criminal action is pending. The statute of limitations is tolled during the period that the criminal action is pending.

[b] Related Points and Authorities

For a memorandum of points and authorities supporting a demurrer to a complaint against a public entity or public employee for false imprisonment on the ground that failure to file a claim appears on the face of the complaint, see *§ 103.21*.

[3] Discussion of Authorities

[a] Accrual of Cause of Action

In ***Collins v. Los Angeles County*** *(1966) 241 Cal. App. 2d 451, 50 Cal. Rptr. 586* , plaintiffs sued the County of Los Angeles for damages for false arrest and imprisonment by two deputy sheriffs. The trial court sustained defendant county's demurrer to the second amended complaint without leave to amend and entered a judgment of dismissal as to the county. The court of appeal affirmed. The complaint alleged plaintiffs' warrantless arrest and imprisonment on June 3, 1963, and the filing of a claim for damages with the County of Los Angeles on December 27, 1963. The complaint further alleged that the discovery of the illegality of plaintiffs' arrest did not occur until plaintiffs' trial in October of 1963, and that the claim with Los Angeles County had been filed within 100 days from the discovery of the unlawfulness of the arrest. Plaintiffs were released on bail on June 3, 1963, and the complaint did not allege further imprisonment after that date. The court of appeal held that a cause of action for false imprisonment accrues on the date of termination of the imprisonment, not on the date when the illegality of the imprisonment is discovered. The fact that plaintiff does not know his or her imprisonment was illegal does not bar the running of the statute, unless plaintiff's ignorance of his or her cause of action is induced by defendant's fraud. The court of appeal rejected plaintiffs' contention that for purposes of determining the date of accrual of their cause of action for false imprisonment, they should have been considered to have been "imprisoned" or "detained" during the period when they were released on bail and until the criminal proceedings against them were dismissed. The court held that for purposes of accrual of a cause of action for false imprisonment, the imprisonment terminates when plaintiff is released on bail, provided that during the period of release on bail plaintiff is not personally restrained of his or her liberty, or confined, or compelled to stay or to go somewhere against his or her will. If the imprisonment has been terminated, the running of the statute of limitations is not barred by the continued pendency of the criminal proceedings in connection with which plaintiff was imprisoned.

Because plaintiffs' cause of action against the county accrued on June 3, 1963, their failure to file a claim pursuant to former Gov. Code § 715 [*now see Gov. Code § 911.2*], within 100 days after the accrual of their cause of action, barred their action against the county.

[b] Plaintiff's Ignorance of Illegality of Imprisonment

Collins v. Los Angeles County *(1966) 241 Cal. App. 2d 451, 50 Cal. Rptr. 586* , is discussed in *§ 103.20[3][a]*.

[c] Fraud as Not Presumed

Cooper v. Leslie Salt Co. *(1969) 70 Cal. 2d 627, 75 Cal. Rptr. 766, 451 P.2d 406* , was a taxpayer action attacking the manner in which the defendants caused municipal improvements and services to be financed by a municipal improvement district. The trial court entered a judgment of dismissal following the sustaining of general demurrers without leave to amend. The Supreme Court affirmed. Among other holdings, the court stated that it was possible that the plaintiff-appellant intended to allege fraudulent misappropriations of district funds, but failed to do so adequately. With respect to allegations of fraud, the court explained that fraud is never presumed, and the facts constituting fraud must be specifically pleaded in order to withstand a general demurrer.

[d] Running of Statute Not Barred by Pendency of Criminal Proceeding in Action Against Private Defendant

Collins v. Los Angeles County *(1966) 241 Cal. App. 2d 451, 50 Cal. Rptr. 586* , is discussed in *§ 103.20[3][a]*.

[e] Plaintiff's Release on Bail

Collins v. Los Angeles County *(1966) 241 Cal. App. 2d 451, 50 Cal. Rptr. 586* is discussed in *§ 103.20[3][a]*.

[4] Additional Authorities

[a] Accrual of Cause of Action

In *Scannell v. County of Riverside (1984) 152 Cal. App. 3d 596, 199 Cal. Rptr. 644* , plaintiff sued a county, certain of its employees, and a private defendant attempting to state causes of action for false imprisonment. The trial court sustained a general demurrer to these causes of action without leave to amend, and plaintiff appealed the ensuing judgment of dismissal. The court of appeal affirmed regarding these causes of action, and as one ground for such affirmance held that they were barred regarding the public defendants by *Gov. Code § 911.2* and regarding the private defendant by former Code Civ. Proc. § 340(3) [*now see Code Civ. Proc. § 340(c)*]. In so holding the court stated that a cause of action for false imprisonment accrues, and triggers the statute of limitations, when the imprisonment terminates and the plaintiff is released from confinement (*152 Cal. App. 3d 596, 606, 615)* .

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 103 FALSE IMPRISONMENT
PART II. FORMS
A. Limitation of Actions

10-103 California Points & Authorities § 103.21

§ 103.21 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant Public Entity or Employee--In Action for False Imprisonment--Failure to File Claim With Public Entity Within Statutory Time Limit After Accrual of Cause of Action [Gov. Code § 911.2] or to Seek Leave to File Late Claim [Gov. Code §§ 911.4, 946.6]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____ _____

	)	
	)	NO. _____
	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*],	)	IES IN SUPPORT OF MOTION FOR SUMMARY
Plaintiff,	)	JUDGMENT
vs.	)	[*Code Civ. Proc. § 437c*]
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]
		[Attached Documents: _____]

_____

SUMMARY JUDGMENT FOR DEFENDANT IS PROPER BECAUSE PLAINTIFF FAILED TO FILE A CLAIM WITH _____ [*specify appropriate public entity*] WITHIN THE STATUTORY TIME LIMIT AFTER

THE ACCRUAL OF HIS/HER CAUSE OF ACTION AND FAILED TO SEEK LEAVE TO FILE A LATE CLAIM.

A. Summary Judgment. A defendant may move for summary judgment in any action or proceeding if it is contended that the action has no merit. Such motion must be granted if all of the papers submitted show that there is no triable issue as to any material fact and that defendant is entitled to a judgment as a matter of law (*Code Civ. Proc. § 437c*).

B. Failure to Comply With Claim Procedure Bars Action. A plaintiff seeking damages from a _____ [public entity *or* public employee] for false imprisonment must file a claim with the entity not later than six months after the accrual of the cause of action, and failure to file a claim within the six-month claim period or to follow statutory procedures for relief to persons who have failed to file claims within the six-month period as provided in *Sections 911.4* and *946.6 of the Government Code* bars the action (*Gov. Code §§ 911.2, 945.3, 945.4, 950.2, 950.6*; *see Ridley v. City & County of San Francisco (1969) 272 Cal. App. 2d 290, 292, 77 Cal. Rptr. 199*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for summary judgment by the defendant in an action for false imprisonment against a public entity or employee when the motion asserts that the cause of action is barred because the plaintiff failed to file a claim with the public entity within six months of the accrual of the cause of action and failed to follow statutory procedures for leave to file a late claim. For actions based on acts or omissions occurring before January 1, 1988, the time period for presenting claims was 100 days.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations which support the motion, as well as a separate statement of material facts that the moving party contends are undisputed [*Code Civ. Proc. § 437c(b)*].

With appropriate modifications, these points and authorities may be used to support a general demurrer to the complaint, where plaintiff's failure to file a claim in a timely fashion appears on the face of the complaint [*see Scannell v. County of Riverside (1984) 152 Cal. App. 3d 596, 199 Cal. Rptr. 644* ; *Collins v. Los Angeles County (1966) 241 Cal. App. 2d 451, 50 Cal. Rptr. 586* ; *see also § 103.20[4][a]*].

[b] Related Pleading and Practice Forms

For forms of claims against public entities and forms of allegations regarding the filing and rejection of claims, see California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

[3] Discussion of Authorities

[a] Failure to Comply With Claim Procedure Bars Action

In *Ridley v. City & County of San Francisco (1969) 272 Cal. App. 2d 290, 77 Cal. Rptr. 199* (decided under *Gov. Code § 911.2* before January 1, 1988 amendment, when claim presentation period was 100 days), minor plaintiffs sued the City and County of San Francisco claiming assault, battery, and false imprisonment by city police officers. The defendant moved for summary judgment on the ground that no claim had been filed with the city within the time limits set forth in *Gov. Code §§ 911.2* and *911.4*. The court granted summary judgment in favor of defendant. The court of appeal affirmed. The complaint alleged timely filing of a claim with the City and County of San Francisco. However, it developed on motion for summary judgment that plaintiffs' allegations regarding compliance with the claims statutes were false. The court of appeal held that compliance with the applicable claims statutes is a jurisdictional prerequisite to the filing of a suit against a public entity. If a claim is not filed within 100 days of the accrual of a cause of action for false arrest and false imprisonment, relief must be sought by application to the public entity for leave to file a late claim [*see Gov. Code § 911.4*]. If no claim is filed and no application for leave to file a late claim is made, the suit is barred. This rule applies to minor, as well as to adult, plaintiffs.

The plaintiffs argued that making an application to file a late claim would have been an "idle act" because relief would certainly have been granted. Plaintiffs further contended that their "substantial rights" were being denied for failure to perform an idle act. The court of appeal rejected this argument. It stated that the right to sue a public entity for the torts of its employees is a creature of statute, and that the power of the plaintiff to enforce that right is measured by his or her substantial compliance with the governing statutes.

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10-103 California Points & Authorities §§ 103.22-103.39

[Reserved]

§§ 103.22[Reserved]

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CHAPTER 103 FALSE IMPRISONMENT
PART II. FORMS
B. Detention Without Arrest

10-103 California Points & Authorities § 103.40

§ 103.40 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--In Action for False Imprisonment Based on Detention Without Arrest Property Owner Justified in Detaining Suspected Thief or Vandal for Reasonable Investigation

[1] FORM

[*Caption. See § 103.21.*]

SUMMARY JUDGMENT FOR DEFENDANT IS PROPER BECAUSE DEFENDANT WAS JUSTIFIED IN DETAINING PLAINTIFF FOR INVESTIGATION BASED ON PROBABLE CAUSE TO BELIEVE THAT PLAINTIFF WAS _____ [STEALING *or* DAMAGING] DEFENDANT'S PROPERTY.

A. Summary Judgment. [*See § 103.21, Paragraph A.*]

B. Property Owner's Right to Detain for Investigation. Where a person has probable cause to believe that another is _____ [stealing *or* damaging] his/her property, he/she is justified in detaining the suspect for a reasonable period of time for the purpose of investigation in a reasonable manner (*Collyer v. S.H. Kress & Co. (1936) 5 Cal. 2d 175, 180, 54 P.2d 20*).

C. Probable Cause as Question of Law. Whether or not probable cause existed to detain a suspected _____ [thief *or* vandal] for investigation is a question of law for the court (*Collyer v. S.H. Kress & Co. (1936) 5 Cal. 2d 175, 181, 54 P.2d 20*).

[*Optional*] **D. Outcome of Criminal Charges Immaterial.** The determination of whether or not probable cause existed for the detention for investigation of one suspected of _____ [stealing *or* vandalism] is to be determined without regard to the ultimate outcome of criminal charges made against the person in question (*Collyer v. S.H. Kress & Co. (1936) 5 Cal. 2d 175, 181, 54 P.2d 20*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for summary judgment by defendant in an action for false imprisonment based on detention without arrest where the motion asserts that the action is without merit because the defendant was justified in detaining the plaintiff for investigation based on probable cause to believe that the plaintiff was stealing or damaging the defendant's property. Such a motion would probably be granted only where the complaint failed to allege that the detention was for an unreasonable time or in an unreasonable manner, or where the plaintiff's declaration in opposition to the motion failed to raise a triable issue of fact with regard to the reasonableness of the detention. This is because the question of the reasonableness of the length of time and the manner of the detention (as opposed to probable cause for the detention) is a question of fact [*see Alterauge v. Los Angeles Turf Club (1950) 97 Cal. App. 2d 735, 738, 218 P.2d 802* ; *see also § 103.42*].

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations which support the motion [*Code Civ. Proc. § 437c*].

[3] Discussion of Authorities

[a] Property Owner's Right to Detain for Investigation

In ***Collyer v. S.H. Kress & Co.*** *(1936) 5 Cal. 2d 175, 54 P.2d 20* , the plaintiff sued a store and others for damages for false imprisonment arising from his detention as a suspected shoplifter. The jury in the trial court awarded the plaintiff damages for false imprisonment in the amount of $3,500. The Supreme Court reversed the judgment. The plaintiff had been observed putting merchandise into his pockets without paying for it. He was intercepted at the main exit of the store, just as he was leaving, by the store detective and her assistants, who escorted him back into the store to a room on the second floor for the purpose of investigating the matter. The testimony conflicted as to what happened in the room. The detention lasted approximately 20 minutes, during which time the store employees accused the plaintiff of pilfering and requested that he sign a statement that he had taken the articles without paying for them. Plaintiff denied any wrongdoing. Some force was involved when the store detective attempted to remove the articles from the plaintiff's pockets and the plaintiff tried to prevent her from doing so. Plaintiff was then turned over to the police. He was tried for petty theft and acquitted.

The Supreme Court held that when a person has reasonable ground to believe that another is stealing his or her property, he or she is justified in detaining the suspect for a reasonable length of time for the purpose of investigation in a reasonable manner. Further, determination of probable cause for detention is a question of law for the court, to be decided in accordance with the circumstances as they appeared at the time of the detention. The outcome of any charges against the defendant is irrelevant to the question of the lawfulness of the detention. Finally, a property owner is entitled to use reasonable force to detain a suspected thief or vandal for the purpose of investigation. In this case, the evidence

showed that the amount of force involved was not unreasonable.

[b] Probable Cause as Question of Law

Collyer v. S.H. Kress & Co. *(1936) 5 Cal. 2d 175, 54 P.2d 20* , is discussed in *§ 103.40[3][a]*.

[c] Outcome of Criminal Charges Immaterial

Collyer v. S.H. Kress & Co. *(1936) 5 Cal. 2d 175, 54 P.2d 20* , is discussed in *§ 103.40[3][a]*.

[4] Additional Authorities

[a] Probable Cause as Question of Law

Roberson v. J.C. Penney Co. (1955) 136 Cal. App. 2d 1, 288 P.2d 275 , was an action for false imprisonment brought against a store and its employee by a 12-year-old girl who had been detained without arrest for suspected shoplifting. The jury rendered its verdict for the defendants, and the trial court granted the plaintiff's motion for a new trial. The court of appeal affirmed. First, the court of appeal held that the trial court had correctly concluded that its instructions to the jury regarding probable cause to detain the child were erroneous. The court had instructed the jury that probable cause was a question of fact. The correct instruction should have followed the rule that probable cause is a matter of law for determination by the trial court. Where there is a conflict in the evidence relating to probable cause, the jury must be told that if they find certain facts to be true, then such facts do or do not amount to probable cause [*see* BAJI 6.86]. The appellant store argued that it was error to grant the plaintiff's motion for a new trial, because the evidence showed as a matter of law that there was probable cause to detain for investigation. Reviewing the evidence presented at the trial, namely that the child had been standing at the scarf counter, went to a mirror, and came back wearing a new scarf, which resembled the store's scarves only in size and shape, the court of appeal concluded that probable cause for the detention of the child was not established as a matter of law.

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CHAPTER 103 FALSE IMPRISONMENT
PART II. FORMS
B. Detention Without Arrest

10-103 California Points & Authorities § 103.41

§ 103.41 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant Merchant, Library Employee, or Theater Owner--In Action for False Imprisonment Based on Detention Without Arrest--Defendant Justified in Detaining Suspected Thief for Reasonable Investigation [Penal Code § 490.5(f)]

[1] FORM

[*Caption. See § 103.21.*]

SUMMARY JUDGMENT FOR DEFENDANT IS PROPER BECAUSE DEFENDANT, AS A _____ [MERCHANT *or* PERSON EMPLOYED BY A LIBRARY FACILITY *or* THEATER OWNER], WAS JUSTIFIED IN DETAINING PLAINTIFF FOR INVESTIGATION BASED ON PROBABLE CAUSE TO BELIEVE THAT PLAINTIFF _____ [WAS ATTEMPTING TO UNLAWFULLY TAKE, OR HAD UNLAWFULLY TAKEN, ANY ITEM FROM THE PREMISES *or* WAS ATTEMPTING TO OPERATE A VIDEO RECORDING DEVICE WITHIN THE PREMISES OF A MOTION PICTURE THEATER WITHOUT THE AUTHORITY OF THE OWNER OF THE THEATER].

A. Summary Judgment. [*See § 103.21, Paragraph A.*]

[*EITHER, if defendant is a merchant*]

B. Merchant's Right to Detain for Investigation. A merchant may detain a person for a reasonable time for the purpose of conducting an investigation in a reasonable manner whenever the merchant has probable cause to believe the person to be detained _____ [is attempting unlawfully to take *or* has unlawfully taken] merchandise from the merchant's premises (*Penal Code § 490.5(f)(1)*).

C. Probable Cause Is Defense. In any civil action brought by any person resulting from a detention or arrest by a merchant, it is a defense to that action that the merchant detaining or arresting the person had probable cause to believe

that the person had stolen or attempted to steal merchandise and that the merchant acted reasonably under all the circumstances (*Penal Code § 490.5(f)(7)*).

[*OR, if defendant is a library employee*]

B. Library Employee's Right to Detain for Investigation. A person employed by a library facility may detain a person for a reasonable time for the purpose of conducting an investigation in a reasonable manner whenever the person employed by a library facility has probable cause to believe the person to be detained _____ [is attempting unlawfully to remove *or* has unlawfully removed] books or library materials from the premises of the library facility (*Penal Code § 490.5(f)(1)*).

C. Probable Cause Is Defense. In any civil action brought by any person resulting from a detention or arrest by a person employed by a library facility, it is a defense to that action that the person employed by a library facility detaining or arresting the person had probable cause to believe that the person had stolen or attempted to steal books or library materials and that the person employed by a library facility acted reasonably under all the circumstances (*Penal Code § 490.5(f)(7)*).

[*OR, if defendant is a theater owner*]

B. Theater Owner's Right to Detain for Investigation. A theater owner may detain a person for a reasonable time for the purpose of conducting an investigation in a reasonable manner whenever the theater owner has probable cause to believe the person to be detained is attempting to operate a video recording device within the premises of a motion picture theater without the authority of the owner of the theater (*Penal Code § 490.5(f)(1)*).

C. Probable Cause Is Defense. In any civil action brought by any person resulting from a detention or arrest by a theater owner, it is a defense to that action that the theater owner detaining or arresting the person had probable cause to believe that the person was attempting to operate a video recording device within the premises of a motion picture theater without the authority of the owner of the theater and that the theater owner acted reasonably under all the circumstances (*Penal Code § 490.5(f)(7)*).

[*CONTINUE*]

D. Probable Cause Is Question of Law. [*See § 103.40, Paragraph C.*]

[*Optional*] **E. Outcome of Criminal Charge Immaterial.** [*See § 103.40, Paragraph D.*]

[*Optional*] **F. Use of Reasonable Force.** In making the detention a _____ [merchant *or* person employed by a library facility *or* theater owner] may use a reasonable amount of nondeadly force necessary to protect himself or herself and to prevent escape of the person detained or the loss of the tangible or intangible property (*Penal Code § 490.5(f)(2)*).

[*Optional*] **G. Examination of Items in Plain View.** During the period of detention any item that a _____[merchant *or* person employed by a library facility *or* theater owner] has probable cause to believe is _____ [unlawfully taken from the premises of the _____ (merchant *or* library) facility *or* recorded on theater premises] and that is in plain view may be examined by the _____ [merchant *or* person employed by a library facility *or* theater owner] for the purposes of ascertaining the ownership of the item (*Penal Code § 490.5(f)(3)*).

[*Optional*] **H. Reasonable Search of Limited Items.** During the period of detention, the _____ [merchant *or* person employed by a library facility *or* theater owner], or his or her agent, may conduct a limited and reasonable search of packages, shopping bags, handbags, or other property in the immediate possession of the person detained, after the person detained has refused a request to surrender the recording or item voluntarily (*Penal Code § 490.5(f)(4)*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for summary judgment by a defendant merchant, library employee, or theater owner in an action for false imprisonment based on detention without arrest. The defendant asserts that he or she was justified in detaining the plaintiff for investigation based on probable cause to believe that the plaintiff was attempting unlawfully to take, or had unlawfully taken, merchandise or books or other library materials from the premises of the merchant or library facility, or had attempted to operate a video recording device within the premises of a motion picture theater without the authority of the owner of the theater [*Penal Code § 490.5(f)*].

The motion would probably be granted only when the complaint failed to allege that the detention was for an unreasonable time, or in an unreasonable manner, or when the plaintiff's declaration in opposition to the motion failed to raise a triable issue of fact with regard to the reasonableness of the detention. This is because the question of the reasonableness of the length of time and manner of the detention, as opposed to probable cause for the detention, is a question of fact [*see Alterauge v. Los Angeles Turf Club (1950) 97 Cal. App. 2d 735, 738, 218 P.2d 802* ; *see also § 103.42*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations that support the motion [*Code Civ. Proc. § 437c*].

[b] Related Pleading and Practice Forms

For a form of complaint in an action for false imprisonment by a store customer accused of shoplifting against the store, store owner or manager, and others, see California Forms of Pleading and Practice, Ch. 257, *False Imprisonment* (Matthew Bender).

[3] Discussion of Authorities

[a] Merchant's Right to Detain for Investigation

Penal Code § 490.5(f) provides a merchant with a defense to an action for false imprisonment, if he or she had probable

cause to believe a person was unlawfully taking, or had unlawfully taken, merchandise from the premises of the merchant, and detained the suspect for a reasonable period of time for the purpose of investigation in a reasonable manner.

It is clear, however, that probable cause and reasonable behavior as a defense to an action for false imprisonment based on a detention of a suspected thief for investigation is not limited solely to the case of merchants whose merchandise is being stolen. The case of *Collyer v. S.H. Kress & Co. (1936) 5 Cal. 2d 175, 180, 54 P.2d 20* , although involving the detention of a suspected thief by a merchant, makes it clear that such a defense is available to any property owner who has probable cause to believe that the person detained is stealing or damaging his or her property, and who detains the suspect for a reasonable period of time for investigation in a reasonable manner [*see § 103.40*].

[b] Library Employee's Right to Detain for Investigation

Penal Code § 490.5(f) provides an employee of a library facility with a defense to a false imprisonment action, if he or she had probable cause to believe that a person had stolen or attempted to steal books or library materials, detained the suspect for a reasonable time, and the person employed by the library facility acted reasonably under all the circumstances.

[c] Theater Owner's Right to Detain for Investigation

Penal Code § 490.5(f) provides a theater owner with a defense to a false imprisonment action, if he or she had probable cause to believe that a person had attempted to operate a video recording device within the premises of a motion picture theater without the authority of the owner of the theater, and detained the suspect for a reasonable time.

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PART II. FORMS
B. Detention Without Arrest

10-103 California Points & Authorities § 103.42

§ 103.42 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--In Action for False Imprisonment Based on Detention Without Arrest--Reasonableness of Manner or Length of Time of Investigative Detention as Question of Fact

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____ _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*],	)	IES IN OPPOSITION TO MOTION FOR SUM-
Defendant.	)	MARY JUDGMENT
	)	[*Code Civ. Proc. § 437c*]
	)	

_____

WHETHER OR NOT THE MANNER AND LENGTH OF TIME OF AN INVESTIGATIVE DETENTION WITHOUT ARREST BY A _____ [MERCHANT *or* PROPERTY OWNER] WERE REASONABLE IS A QUESTION OF FACT FOR THE TRIER OF FACT.

Reasonableness of Length and Manner of Detention as Question of Fact. When a property owner detains a person suspected of interfering with or injuring his/her property for the purpose of investigation, whether or not length of time of the detention and the manner of detention were reasonable is a question of fact for the trier of fact (*Alterauge v. Los Angeles Turf Club (1950) 97 Cal. App. 2d 735, 738, 218 P.2d 802*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for summary judgment in an action for false imprisonment based on defendant's detention of plaintiff without arrest for investigation of plaintiff's suspected interference with, or injury to, defendant's property where the motion asserts that defendant had probable cause as a matter of law to detain plaintiff, but the pleadings and the declarations in opposition to the motion raise a triable issue of fact as to the reasonableness of the length of time and manner of the detention. Probable cause for a property owner to detain a person suspected of stealing or otherwise interfering with his or her property may be found by the court as a matter of law where the surrounding facts are without significant conflict [*Collyer v. S.H. Kress & Co. (1936) 5 Cal. 2d 175, 181, 54 P.2d 20* ; *see § 103.40*]. However, it would ordinarily appear to be improper for the court to determine as a matter of law that the length of time and manner of the detention were reasonable [*see Alterauge v. Los Angeles Turf Club (1950) 97 Cal. App. 2d 735, 738, 218 P.2d 802]* . Thus, where the pleadings and the declarations in opposition to the motion for summary judgment raise the issue of the reasonableness of the detention itself, as opposed to probable cause to initiate the detention, it would appear improper for the court to grant a summary judgment for the defendant.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations which support the memorandum [*Code Civ. Proc. § 437c*].

[b] Related Pleading and Practice Forms

For a form of complaint in an action for false imprisonment by a store customer accused of shoplifting, against the store, store owner or manager, and others, see California Forms of Pleading and Practice, Ch. 257, *False Imprisonment* (Matthew Bender).

[3] Discussion of Authorities

[a] Reasonableness of Length and Manner of Detention as Question of Fact

In ***Alterauge v. Los Angeles Turf Club*** *(1950) 97 Cal. App. 2d 735, 218 P.2d 802* , the plaintiff brought an action for false imprisonment against a corporation operating a racetrack and a security company and its employees who were hired to police the racetrack grounds. The jury awarded the plaintiff $300 compensatory damages against all defendants, $2,000 exemplary damages against the corporation, and $750 exemplary damages against the security company and its employees. The defendants appealed. The court of appeal modified the judgment as to the amount of exemplary damages and otherwise affirmed. The plaintiff, known to be a person with a criminal record, was sitting in an automobile in the racetrack parking lot. Two security guards demanded to know the name of the owner of the automobile, and when plaintiff refused to tell them, pulled him from the car and forced him to accompany them to the

clubhouse office where he was searched for evidence of bookmaking, questioned by employees of the security service, detained for 15 minutes, and then released with instructions never to return to the track. In this case, by implication, both the question of probable cause to detain the plaintiff and the reasonableness of the manner of his detention were resolved against the defendants. The court of appeal held that based on the evidence presented at the trial, the jury was justified in deciding that the manner of the detention and investigation were unreasonable. The court of appeal reversed the award of $2,000 punitive damages against the corporation because there was no proof that it authorized or ratified the wrongful detention accomplished by its agents.

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10-103 California Points & Authorities § 103.43

§ 103.43 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--In Action for False Imprisonment Based on Detention Without Arrest--Probable Cause as Not Justifying Detention for Purpose Other Than Investigation

[1] FORM

[*Caption. See § 103.42.*]

PROBABLE CAUSE IS NOT A DEFENSE TO AN ACTION FOR FALSE IMPRISONMENT BASED ON THE DETENTION OF THE PLAINTIFF WITHOUT ARREST WHERE THE DETENTION IS IN CONNECTION WITH AN OFFENSE WHICH HAS PREVIOUSLY BEEN COMPLETED AND IS FOR A PURPOSE OTHER THAN INVESTIGATION.

A. Probable Cause No Defense. Probable cause is not a defense to an action for false imprisonment based on the detention of plaintiff without arrest where the detention is in connection with an offense which has previously been completed and is for a purpose other than investigation (*Moffatt v. Buffums' Inc. (1937) 21 Cal. App. 2d 371, 375, 69 P.2d 424*).

[*Optional*] **B. Detention to Secure Confession.** There is no right for a private citizen to detain another without arrest for the purpose of securing a confession of a crime allegedly committed previously (*Moffatt v. Buffums' Inc. (1937) 21 Cal. App. 2d 371, 375, 69 P.2d 424*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for summary judgment in an action for false imprisonment based on the detention of the plaintiff without arrest where the motion asserts that the action is without merit because, as a matter of law, the defendant property owner had probable cause to detain the plaintiff whom he or she suspected of stealing, or otherwise injuring, his or her property. The memorandum may be used where the detention was not for the purposes of investigating a contemporaneous offense, which would be privileged if reasonable, but was in connection with an offense allegedly previously completed.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations which support the memorandum [*Code Civ. Proc. § 437c*].

[b] Related Pleading and Practice Forms

For a form of complaint for false imprisonment based on the detention of an employee for questioning by his or her employer, see California Forms of Pleading and Practice, Ch. 257, *False Imprisonment* (Matthew Bender).

[3] Discussion of Authorities

[a] Probable Cause No Defense

In ***Moffatt v. Buffums' Inc.*** *(1937) 21 Cal. App. 2d 371, 69 P.2d 424* , the plaintiff sued the corporation by which she was employed, and certain of its agents, for false imprisonment. The defendants moved for a nonsuit which was granted. Plaintiff appealed from the judgment of dismissal, and the court of appeal reversed. The plaintiff had been summoned to the office of Galbreth, the treasurer and secretary of the corporation, and there Watson, an employee of the defendant corporation, detained her against her will for five hours, attempting to get her to sign a confession of having stolen money belonging to the corporation. He threatened to make her stay until she signed the confession, which she ultimately did.

The court of appeal held that her complaint and the evidence presented in support of it made out a prima facie case of false imprisonment, noting that any unlawful exercise of force, or express or implied threat of force, by which any person is deprived of his or her liberty and compelled to remain where he or she does not wish to remain is a false imprisonment. The defendants contended on appeal that they were justified in detaining the plaintiff because they had probable cause to believe that she had stolen the money. The court of appeal held that probable cause for detention is a defense to an action for false imprisonment only where the defendant has reasonable grounds to believe that another is stealing his or her property, as distinguished from where the offense has been completed previously. In this case, the plaintiff was not detained for the purpose of investigating a crime which she was in the act of committing, but for the purpose of obtaining a confession to a crime she had allegedly committed some time previously. Furthermore, the manner of detention was unreasonable. In response to the defendants' contention that neither the corporation nor Galbreth were responsible for the false imprisonment, the court of appeal held that the facts and circumstances in evidence were such that the inference might reasonably be drawn that the false imprisonment was under the active supervision and direction of Galbreth and the corporation.

[b] Detention to Secure Confession

Moffatt v. Buffums' Inc. *(1937) 21 Cal. App. 2d 371, 69 P.2d 424* , is discussed in *§ 103.43[3][a]*.

[4] Additional Authorities

[a] Probable Cause No Defense

In *Parrott v. Bank of Am. (1950) 97 Cal. App. 2d 14, 217 P.2d 89* , the plaintiff sued the Bank of America and certain of its agents for false arrest, imprisonment, malicious and oppressive conduct, wrongful discharge, and slander. The jury found for the plaintiff in the sum of $30,000. Defendants' motions for judgment notwithstanding the verdict and for new trial were denied, and defendants appealed from the judgment in favor of plaintiff. The court of appeal affirmed. The plaintiff was a teller for the bank. A long-standing customer of the bank reported that she had made a deposit which was not credited to her account. The plaintiff was the teller to whom the customer allegedly gave the deposit. Based on this information and a brief investigation of plaintiff's employment history with the bank, bank officials detained the plaintiff for questioning for two hours and threatened her with prosecution unless she signed a confession and returned the amount of the deposit. The customer later discovered that she had not made a deposit and had erred in her accusations regarding the plaintiff. On appeal the defendants attempted to avoid liability on the ground that they had probable cause to believe the plaintiff had appropriated the deposit, and that they conducted their investigation in a reasonable manner. The court of appeal rejected this contention, stating that the evidence in the case clearly disclosed that the plaintiff was not detained for the purpose of investigating a crime in progress, but was detained for the purposes of securing a confession to the theft of money at a prior time and obtaining restitution of the money from the plaintiff. In such a case, impliedly, probable cause was not a justification for the detention.

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10-103 California Points & Authorities § 103.44

§ 103.44 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--In Action for False Imprisonment Based on Detention Without Arrest--Awareness of Confinement Not an Essential Element

[1] FORM

[*The following may be included in a memorandum or points and authorities, or in a trial or appellate brief.*]

CONTEMPORANEOUS AWARENESS OF UNLAWFUL RESTRAINT OR CONFINEMENT BY PLAINTIFF IS NOT AN ESSENTIAL ELEMENT OF AN ACTION FOR FALSE IMPRISONMENT.

Awareness of Confinement Not Required for Recovery. Contemporaneous awareness of false imprisonment is not an essential element of a cause of action for false imprisonment because harm may result even if the victim does not learn until afterward of the confinement or its wrongfulness (*Scofield v. Critical Air Med., Inc. (1996) 45 Cal. App. 4th 990, 1005, 52 Cal. Rptr. 2d 915*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for summary judgment in an action for false imprisonment based on the detention of the plaintiff without arrest where the motion assets that the action is without merit because the plaintiff was not aware of the confinement.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that awareness of confinement is not an essential element of the tort of false imprisonment. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence of the false imprisonment or detention, and should argue that the fact that plaintiff was not aware of the false imprisonment or detention at the time is not essential to establishment of the tort, and that harm resulted when the plaintiff later learned of the false imprisonment or detention.

[3] Discussion of Authorities

[a] Awareness of Confinement Not Required for Recovery

In ***Scofield v. Critical Air Med., Inc.*** *(1996) 45 Cal. App. 4th 990, 52 Cal. Rptr. 2d 915* , two minor children brought an action for false imprisonment against an air transport company which flew them from Mexico to the United States without authorization. The children had been injured in a vehicle accident in Mexico in which their mother had been killed. The children's father, who was in the United States, made arrangements to have the children flown to the United States by an air transport company. However, another air transport company learned of the situation and managed to get its plane to the Mexican site before the authorized company. The children knew their father had sent a plane for them, but did not know that the one they boarded was not the one authorized by their father, and would not have boarded it if they had known it was not the one their father had sent. The children were awarded damages by a jury verdict. Defendant moved for judgment notwithstanding the verdict, and appealed the denial of its motion, contending that the trial court erred in giving a jury instruction which made no reference to force or the threat of force in relation to false imprisonment.

The court of appeal affirmed the judgment for the children, ultimately concluding that a contemporaneous awareness is not an essential element of false imprisonment. The court began by deciding that because the crime of false imprisonment and the tort are defined identically, the Penal Code may be used to determine the means by which the tort may be brought about. Through that analysis, it is clear that force or the threat of force is not the only means by which the tort of false imprisonment can be achieved, since there are alternative methods such as fraud or deceit or any unreasonable duress (*45 Cal. App. 4th 990, 1001-1002)* . The court then considered the state of mind of the victim of the tort, noting that a victim may be entirely unaware of confinement and still suffer harm as a result of the false imprisonment. The court concluded that contemporaneous awareness is not an essential element of false imprisonment, but that the relevant factor is whether the unlawful restraint or confinement results in harm (*45 Cal. App. 4th 990, 1006-1007)* . Since the evidence established that the children suffered actual harm as a result of the false imprisonment, the court affirmed the judgment in their favor.

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[Reserved]

§§ 103.45[Reserved]

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10-103 California Points & Authorities § 103.60

§ 103.60 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--In Action for False Imprisonment Based on Warrantless Arrest--Private Citizen Not Liable for Report to Authorities Resulting in Warrantless Arrest

[1] FORM

[*Caption. See § 103.21.*]

SUMMARY JUDGMENT FOR DEFENDANT IS PROPER BECAUSE DEFENDANT ONLY GAVE INFORMATION TO THE POLICE.

A. Summary Judgment. [*See § 103.21, Paragraph A.*]

B. Statements Made to Police Reporting Potential Criminal Conduct Absolutely Privileged. Unless the elements of malicious prosecution can be proven, statements made to the police regarding potential criminal activity are protected from civil liability by an absolute privilege under *Civ. Code § 47(b)*, and this absolute privilege extends to a cause of action for false imprisonment (*Hagberg v. California Fed. Bank (2004) 32 Cal. 4th 350, 355, 7 Cal. Rptr. 3d 803, 81 P.3d 244* ; *see also* *Mulder v. Pilot Air Freight (2004) 32 Cal. 4th 384, 387, 7 Cal. Rptr. 3d 828, 81 P.3d 264*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for summary judgment in an action for false imprisonment based on a warrantless arrest where the motion asserts that the defendant private citizen is not liable for false imprisonment as a matter of law because his or her sole connection with the arrest of the plaintiff was the giving of information to the police.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations which support the motion [*Code Civ. Proc. § 437c*].

[b] Related Pleading and Practice Forms

For a form of affirmative defense that the defendant, a private citizen, made an honest mistake in identifying the plaintiff to police, and for a form of affirmative defense that the defendant, a private citizen, gave information to the police, see California Forms of Pleading and Practice, Ch. 257, *False Imprisonment* (Matthew Bender).

[3] Discussion of Authorities

[a] Statements Made to Police Reporting Potential Criminal Conduct Absolutely Privileged

In ***Hagberg v. California Fed. Bank*** *(2004) 32 Cal. 4th 350, 7 Cal. Rptr. 3d 803, 81 P.3d 244* , the plaintiff was a woman of Hispanic descent who attempted to cash a check at a bank. Prompted by seeming irregularities with the printed check, the bank teller consulted with her supervisor about the possibility that the check might be counterfeit. The supervisor called the alleged issuer of the check, who told her that the check was not a valid check. The supervisor then called the police to report that she had a customer attempting to cash an apparent counterfeit check. While the supervisor was speaking with the police dispatcher, the bank's regional security manager again phoned the alleged issuer of the check, who this time informed the bank that the check was in fact valid. This information was relayed to the supervisor, but by then the police had arrived on the scene. The supervisor tried to stop the police before they approached the plaintiff, but she was unsuccessful. The police proceeded to detain the plaintiff. They questioned her, searched her, handcuffed her, and, after about twenty minutes, released her. The plaintiff sued the bank for various causes of action, including slander, false arrest and imprisonment, and civil rights violations. The trial court granted summary judgment for the defendant on the grounds that the statements to the police were absolutely privileged pursuant to *Civ. Code § 47(b)*, and the plaintiff appealed. The court of appeal affirmed, and the plaintiff again appealed.

The California Supreme Court affirmed. The Court agreed with the majority of court of appeal cases that had addressed the issue that statements to the police reporting suspected criminal conduct were absolutely privileged under *Civ. Code § 47(b)* (*32 Cal. 4th 350, 355)* . The Court noted the established rule that statements made in preparation for an official proceeding, or intended to prompt an official investigation, were covered by the absolute privilege, and need not have been made during an actual proceeding (*32 Cal. 4th 350, 361-364)* . According to the Court, applying the absolute privilege to statements to police, which are generally made in preparation for or intended to prompt investigation that could result in an official proceeding, serves the important public interest of securing open channels of communication between citizens and law enforcement personnel (*32 Cal. 4th 350, 368-372)* . The Court, recognizing an established exception to the absolute privilege for a cause of action for malicious prosecution (*32 Cal. 4th 350, 361)* , refused to create another exception for the tort of false imprisonment, and expressly disapproved of language in earlier cases that had suggested that statements to the police were only protected from potential liability for false imprisonment if made in bad faith (*32 Cal. 4th 350, 373-375* & n.8).

Mulder v. Pilot Air Freight *(2004) 32 Cal. 4th 384, 7 Cal. Rptr. 3d 828, 81 P.3d 264* , was a companion case to *Hagberg*. In *Mulder,* the plaintiff was a commercial dealer in salvage material who was arrested after an employee of a company contacted the police department to report that the plaintiff was in possession of a flight recorder that had been stolen from the company. The plaintiff alleged that this employee knew, or should have known, that the plaintiff had acquired the recorder legitimately from another employee of the company, but that the employee failed to report this information to the police, who arrested the plaintiff for having possession of the recorder. The plaintiff sued the company and the employee who made the report to the police for false imprisonment and intentional infliction of emotional distress, alleging that the report had been motivated by malice on the part of the employee. The trial court granted judgment on the pleadings in favor of the defendants, the court of appeal affirmed, and the California Supreme Court affirmed. For the reasons given in *Hagberg,* the Court held that the report to the police was absolutely privileged pursuant to *Civ. Code § 47(b),* and that there was no compelling reason to create an exception for a cause of action for false imprisonment (*32 Cal. 4th 384, 387)* .

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10-103 California Points & Authorities § 103.61

§ 103.61 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--In Action for False Imprisonment Based on Warrantless Arrest--Private Citizen Not Liable Where Acting Pursuant to Request and Instructions of Peace Officer in Making Arrest

[1] FORM

[*Caption. See § 103.21.*]

SUMMARY JUDGMENT FOR DEFENDANT IS PROPER BECAUSE DEFENDANT ACTED PURSUANT TO REQUEST AND INSTRUCTIONS OF A PEACE OFFICER IN MAKING THE ARREST.

A. Summary Judgment. [*See § 103.21, Paragraph A.*]

B. Arrest Pursuant to Police Instructions. A private citizen who assists in the making of an arrest pursuant to the request or instructions of a peace officer is not liable for false imprisonment (*Peterson v. Robison (1954) 43 Cal. 2d 690, 697, 277 P.2d 19*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for summary judgment in an action for false imprisonment against a private citizen where the motion asserts that the defendant is not liable for false imprisonment as a matter of law because he or she assisted in the making of an arrest pursuant to the request or instructions of a peace officer.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations which support the motion [*Code Civ. Proc. § 437c*].

[b] Related Use of Form

With appropriate modifications, these points and authorities may be used to support a demurrer to a complaint for damages for false imprisonment where the fact that the private citizen assisted in the making of the arrest pursuant to the request or instructions of a police officer appears on the face of the complaint.

[c] Related Pleading and Practice Forms

For a form of affirmative defense that the defendant private citizen acted pursuant to the request and instructions of a peace officer in making the arrest, see California Forms of Pleading and Practice, Ch. 257, *False Imprisonment* (Matthew Bender).

[3] Discussion of Authorities

[a] Arrest Pursuant to Police Instructions

In ***Peterson v. Robison*** *(1954) 43 Cal. 2d 690, 277 P.2d 19* , plaintiff sued a private citizen for false arrest and imprisonment. The case was tried by the court without a jury and judgment was entered for the plaintiff. The Supreme Court reversed the judgment. The defendant had seen the plaintiff drive his car into defendant's car with such force that it broke a parking meter. The defendant called the Burlingame police and identified the plaintiff, who was subsequently arrested in South San Francisco pursuant to the "all points bulletin" issued by the Burlingame police. Although the plaintiff had been driving erratically and appeared intoxicated when arrested, the South San Francisco police did not file any charges but delivered him to Burlingame. There, a police officer induced the defendant to make a citizen's arrest of the plaintiff. The officer assured defendant that the police would handle everything thereafter. Plaintiff was ultimately released from jail, and the defendant refused to file a complaint against him. The Supreme Court found that no liability could be predicated on the defendant's report to the police of the facts concerning the damages to his car and the parking meter. A private person does not become liable for false imprisonment for giving information in good faith to the police, even if it is mistaken information, and even though such information may be the principal cause of the plaintiff's imprisonment. However, in this case, defendant had gone further and had made a citizen's arrest of the plaintiff. The court held that citizen's arrest could not be justified on the ground that there was uncontradicted evidence that the plaintiff was committing a public offense in the defendant's presence at the time the citizen's arrest was accomplished. However, the defendant was not liable for the arrest under the rule that a private citizen who assists in the making of an arrest pursuant to the request or persuasion of a police officer is not liable for false imprisonment. The court pointed out that the uncontradicted evidence showed that all the defendant's actions in connection with the citizen's arrest were done, not of defendant's own initiative, but at the request and pursuant to the direction of the police officer. This being the case, he could not be held liable for false imprisonment.

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10-103 California Points & Authorities § 103.62

§ 103.62 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--In Action for False Imprisonment Based on Warrantless Arrest--Private Citizen Justified in Arresting Plaintiff for Public Offense Committed or Attempted in His/Her Presence [Penal Code § 837(1)]

[1] FORM

[*Caption. See § 103.21.*]

SUMMARY JUDGMENT IS PROPER BECAUSE DEFENDANT, A PRIVATE CITIZEN, WAS JUSTIFIED IN ARRESTING PLAINTIFF WHO WAS _____ [COMMITTING *OR* ATTEMPTING TO COMMIT] A PUBLIC OFFENSE IN DEFENDANT'S PRESENCE.

A. Summary Judgment.[*See § 103.21, Paragraph A.*]

B. Warrantless Arrest by Private Person. A private person may arrest another for a public offense _____ [committed *or* attempted] in his/her presence (*Penal Code § 837(1)*).

C. Public Offense Defined. A public offense is an act committed or omitted in violation of a law forbidding or commending it, and to which is annexed, upon conviction, either of the following punishments: death; imprisonment; fine; removal from office; or disqualification to hold and enjoy any office of honor, trust, or profit in this state. Public offenses include felonies, misdemeanors, and infractions (*Penal Code §§ 15, 16*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for summary judgment in an action for damages for false imprisonment where the motion asserts that the warrantless arrest of plaintiff by defendant private citizen was lawful because the plaintiff committed or attempted to commit a public offense in the presence of the defendant.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations which support the memorandum [*Code Civ. Proc. § 437c*].

With appropriate modifications, these points and authorities may be used to support a defendant's demurrer to the complaint.

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10-103 California Points & Authorities § 103.63

§ 103.63 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--In Action for False Imprisonment Based on Warrantless Arrest--Felony Had Been Committed and Defendant Citizen Had Reasonable Cause to Believe Plaintiff Committed It [Penal Code § 837(3)]

[1] FORM

[*Caption. See § 103.21.*]

SUMMARY JUDGMENT FOR DEFENDANT IS PROPER BECAUSE A FELONY HAD BEEN COMMITTED, DEFENDANT HAD REASONABLE CAUSE FOR BELIEVING PLAINTIFF TO HAVE COMMITTED IT, AND THEREFORE DEFENDANT'S ARREST OF PLAINTIFF WAS JUSTIFIED.

A. Summary Judgment. [*See § 103.21, Paragraph A.*]

B. Warrantless Arrest by Private Person. A private person may arrest another when a felony has been in fact committed and he/she has reasonable cause for believing the person arrested to have committed it (*Penal Code § 837(3)*).

C. Reasonable Cause as Question of Law. The question of whether or not reasonable cause existed for believing that the arrested person had committed a felony is a question of law for the court if the underlying facts are without substantial conflict (*Wilson v. Los Angeles County (1971) 21 Cal. App. 3d 308, 316, 98 Cal. Rptr. 525*).

D. Determination of Reasonable Cause. Reasonable or probable cause for making a warrantless arrest for a felony exists when the facts and circumstances within the knowledge of the person making the arrest at the moment of the arrest are sufficient to warrant a prudent person in believing that the arrested person had committed a felony (*Wilson v. Los Angeles County (1971) 21 Cal. App. 3d 308, 314, 98 Cal. Rptr. 525*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a motion for summary judgment by the defendant private citizen in an action for false imprisonment based on a warrantless citizen's arrest where the motion asserts that the defendant is not liable because a felony had in fact been committed, and the defendant had reasonable cause to believe that the plaintiff committed it.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations in support of this form [*Code Civ. Proc. § 437c*].

[3] Discussion of Authorities

[a] Reasonable Cause as Question of Law

Wilson v. Los Angeles County *(1971) 21 Cal. App. 3d 308, 98 Cal. Rptr. 525 , disapproved on other grounds, Cervantez v. J. C. Penney Co., Inc. (1979) 24 Cal. 3d 579, 592, 156 Cal. Rptr. 198, 595 P.2d 975* , is discussed in *§ 103.77[3][b]*.

[b] Determination of Reasonable Cause

Wilson v. Los Angeles County *(1971) 21 Cal. App. 3d 308, 98 Cal. Rptr. 525 , disapproved on other grounds, Cervantez v. J. C. Penney Co., Inc. (1979) 24 Cal. 3d 579, 592, 156 Cal. Rptr. 198, 595 P.2d 975* , is discussed in *§ 103.77[3][b]*.

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10-103 California Points & Authorities § 103.64

§ 103.64 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--In Action for False Imprisonment Based on Warrantless Arrest--Arrest Justified Because Plaintiff Had Committed a Felony [Penal Code §§ 836(a)(2), 837(2)]

[1] FORM

[*Caption. See § 103.21.*]

SUMMARY JUDGMENT FOR DEFENDANT IS PROPER BECAUSE DEFENDANT WAS JUSTIFIED IN ARRESTING PLAINTIFF AS A PERSON WHO HAD COMMITTED A FELONY, ALTHOUGH NOT IN HIS/HER PRESENCE.

A. Summary Judgment. [*See § 103.21, Paragraph A.*]

[*EITHER*]

B. Arrest by Private Person. A private person may arrest another when the person arrested has committed a felony, although not in his/her presence (*Penal Code § 837(2)*).

[*OR*]

B. Arrest by Peace Officer. A warrantless arrest by a peace officer is justified and lawful if the person arrested has committed a felony, although not in the officer's presence (*Penal Code § 836(a)(2)*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a motion for summary judgment by the defendant in an action against either a private citizen of a peace officer for damages for false imprisonment based on a warrantless arrest where the motion asserts that the defendant was justified in arresting the plaintiff as a person who had committed a felony, although not in his or her presence.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations in support of the memorandum [*Code Civ. Proc. § 437c*].

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10-103 California Points & Authorities § 103.65

§ 103.65 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--In Action for False Imprisonment Based on Warrantless Arrest--Peace Officer Had Probable Cause to Believe Person Arrested Had Committed Public Offense in His/Her Presence [Penal Code § 836(a)(1)]

[1] FORM

[*Caption. See § 103.21.*]

SUMMARY JUDGMENT FOR DEFENDANT IS PROPER BECAUSE DEFENDANT HAD PROBABLE CAUSE TO BELIEVE THAT PLAINTIFF HAD COMMITTED A PUBLIC OFFENSE IN HIS/HER PRESENCE, AND THEREFORE DEFENDANT'S ARREST OF PLAINTIFF WAS JUSTIFIED.

A. Summary Judgment. [*See § 103.21, Paragraph A.*]

B. Immunity of Peace Officer. There is no civil liability on the part of, and no cause of action shall arise against, any police officer, acting within the scope of his/her authority, for false arrest or false imprisonment arising out of any arrest when the arrest was lawful, or when the peace officer, at the time of the arrest, had reasonable cause to believe the arrest was lawful (*Penal Code § 847(b)(1)*).

C. Lawfulness of Arrest. A warrantless arrest by a peace officer is justified and lawful if the officer had probable cause to believe that the person to be arrested had committed a public offense in his/her presence (*Penal Code § 836(a)(1)*).

D. Probable Cause as Question of Law. In an action for false imprisonment based on a warrantless arrest, for an offense committed in the presence of the arresting officer, when the facts are admitted or are beyond controversy, the question of whether the arresting officer had probable cause to make the arrest is a question of law for the court (*Whaley v. Jansen (1962) 208 Cal. App. 2d 222, 227, 25 Cal. Rptr. 184*).

E. Determination of Probable Cause. A peace officer has probable cause to make an arrest for acts done within his/her presence if the acts done would cause a reasonable person to conclude that a public offense is being committed by the person who is arrested (*Coverstone v. Davies (1952) 38 Cal. 2d 315, 321, 239 P.2d 876*).

[*Optional*] **F. Apparent Commission of Misdemeanor.** The justification of probable cause for making a warrantless arrest applies as much in the case of the apparent commission of a misdemeanor as in the case of the apparent commission of a felony (*Coverstone v. Davies (1952) 38 Cal. 2d 315, 320-321, 239 P.2d 876*).

[*Optional*] **G. Effect of Subsequent Acquittal of Plaintiff.** The subsequent acquittal of the plaintiff on the criminal charge for which he/she was arrested does not destroy the justification of probable cause for the original arrest, and does not render the arresting officer liable for damages for false imprisonment (*Coverstone v. Davies (1952) 38 Cal. 2d 315, 319, 239 P.2d 876*).

[*Optional*] **H. Effect of Subsequent Decision Not to Prosecute.** A subsequent decision not to prosecute made by prosecutors does not vitiate probable cause to arrest [*Johnson v. Lewis (2004) 120 Cal. App. 4th 443, 456, 15 Cal. Rptr. 3d 507]* .

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a motion for summary judgment by the defendant in an action against a peace officer for damages for false imprisonment based on a warrantless arrest where the motion asserts that the peace officer had probable cause to believe that a public offense was being committed in his or her presence, and that the arrest was therefore justified under *Penal Code § 836(a)(1).*

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, these points and authorities may be used to support a demurrer to the complaint where it is clear from the facts alleged in the complaint that there was probable cause for the arresting officer to believe that a public offense was being committed in his or her presence [*see Whaley v. Jansen (1962) 208 Cal. App. 2d 222, 227-228, 25 Cal. Rptr. 184* [*see § 103.65[3][a]*].

[c] Related Points and Authorities

For a form of points and authorities supporting a demurrer to a complaint for false imprisonment where the complaint shows the existence of probable cause to detain a person as mentally disordered, see Ch. 117, *Insane and Incompetent*

Persons: Actions Involving Mental Patients .

[d] Related Pleading and Practice Forms

For a form of affirmative defense that the defendant has reasonable cause to believe that the plaintiff had committed a misdemeanor in his or her presence, see California Forms of Pleading and Practice, Ch. 257, *False Imprisonment* (Matthew Bender).

[3] Discussion of Authorities

[a] Probable Cause as Question of Law

In ***Whaley v. Jansen*** *(1962) 208 Cal. App. 2d 222, 25 Cal. Rptr. 184* , plaintiff brought an action for false imprisonment against certain police officers and others based on his arrest and detention pursuant to former Welf. & Inst. Code § 5050.3, which provided that when any person becomes so mentally ill as to be likely to cause injury to himself or others and requires immediate care, treatment, or restraint, a peace officer who has reasonable cause to believe that such is the case may take the person into custody [*see Welf. & Inst. Code § 5150*]. Plaintiff's complaint alleged the facts of his detention, including the fact that he carried a letter from house to house which alleged wrongdoing in government and listed his grievances against various officials. The complaint also alleged that the defendant police officers arrested the plaintiff for vagrancy and took him to the county psychiatric unit, and that plaintiff was released from custody without being charged with a crime or with mental illness. Although plaintiff alleged that there was no probable cause for the detention, defendants demurred to the complaint on the ground that its allegations showed probable cause for the arrest and detention of the plaintiff. The trial court sustained the demurrer without leave to amend and rendered a judgment of dismissal. The court of appeal affirmed. The court of appeal held that the question of probable cause for a warrantless arrest for a misdemeanor is a question of law where the facts are admitted or beyond controversy (*208 Cal. App. 2d 222, 227)* . Where the issue is raised on a demurrer, the whole complaint is subject to review on the question. The court of appeal then applied these rules to a warrantless arrest for psychiatric detention. Basing its determination on the facts alleged in the complaint, the court of appeal held that the defendant police officers had probable cause as a matter of law to arrest and detain plaintiff pursuant to former Welf. & Inst. Code § 5050.3. The court also noted that the plaintiff's account of his detention clearly indicated hat the officers had reasonable cause to believe that a misdemeanor was being committed. Therefore, the complaint failed to state a cause of action for false imprisonment.

[b] Determination of Probable Cause

Coverstone v. Davies *(1952) 38 Cal. 2d 315, 239 P.2d 876* , was an action for damages alleging, among other torts, false imprisonment. At the close of the plaintiffs' case, the defendants moved for, and were granted, nonsuits. The Supreme Court affirmed the judgment. The action arose out of the warrantless arrests of the plaintiffs for commission of the misdemeanor of unlawful assembly. At subsequent trial on the misdemeanor charge, the plaintiffs were acquitted. The facts showed that the arresting officers had come upon a group of students assembled to watch an illegal "hot-rod" race. They arrested the plaintiffs as among those apparently taking part in the illegal act. The Supreme Court held that the evidence established as a matter of law that the arresting officers had probable cause to believe that an illegal act was taking place, and were entitled, in making their arrests, to act on reasonable appearances in determining who were parties to the offense. The arrests were made for acts done in the officers' presence, which acts would cause a reasonable person to conclude that a public offense was being committed by the persons who were arrested. Therefore, the arrests were lawful. The justification of probable cause for making a warrantless arrest applies as much in the case of the apparent commission of a misdemeanor, as well as the apparent commission of a felony. The fact of the subsequent acquittal of plaintiffs on the criminal charge did not destroy the justification of probable cause for the original arrest and did not render the arresting officers liable for damages for false imprisonment (*38 Cal. 2d 315, 319-321)* .

[c] Effect of Subsequent Decision Not to Prosecute

In ***Johnson v. Lewis*** *(2004) 120 Cal. App. 4th 443, 15 Cal. Rptr. 3d 507* , an off-duty arson investigator arrested the plaintiff for reckless driving, temporarily handcuffed the plaintiff, issued her a citation, and released her. The investigator, who had statutory police officer authority, observed the plaintiff driving her vehicle at a high rate of speed on a public highway, cutting across multiple lanes of traffic without signaling, and causing other drivers to brake to avoid collisions. When the investigator approached the plaintiff's vehicle from the rear and turned on his red light and siren, the plaintiff led the investigator on a high speed chase for five or ten minutes before deciding to pull over. Because the county fire district had a policy against its arson investigators making off-duty misdemeanor traffic arrests, even though the investigators had the statutory authority to do so, the county fire marshal convinced the prosecutor to dismiss the traffic citation. The plaintiff then sued the investigator and the county for false imprisonment and other related causes of action. The trial court granted summary judgment for all defendants. The plaintiff appealed, then stipulated to dismiss the appeal and pay specified costs to the defendants. The court of appeal agreed to dismiss the appeal on the condition that the plaintiff's counsel appear at oral argument and show cause why sanctions for a frivolous appeal should not also be paid to the appellate court. The plaintiff's counsel agreed to appear at oral argument.

The court of appeal held that the investigator had probable cause to make the arrest and imposed sanctions on the plaintiff's attorney for filing a frivolous appeal. Given that the plaintiff admitted that she was speeding and had led the investigator on a high-speed case, the court concluded that the investigator had a reasonable suspicion that the plaintiff was engaging in reckless driving that posed a danger to persons and property and had probable cause to make the arrest. The investigator had the statutory authority to make the arrest, and the fact that the arrest was not supported by local policy did not abrogate that authority. Moreover, the plaintiff's attempts to explain her conduct were irrelevant, because the issue was the investigator's probable cause to arrest, which was determined by reference to the facts known by the investigator at the time of making the arrest (*120 Cal. App. 4th 443, 453-456)* . The court also rejected the plaintiff's claim that the decision of the prosecutor not to prosecute collaterally estopped defendants from arguing that probable cause to arrest existed. The court noted again that probable cause is determined with reference to the facts known to the officer at the time of the arrest, and is unhampered by the outcome of the charges, including a subsequent decision not to prosecute made by prosecutors (*120 Cal. App. 4th 443, 456)* .

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10-103 California Points & Authorities § 103.66

§ 103.66 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--In Action for False Imprisonment Based on Warrantless Arrest--Defendant Peace Officer Had Probable Cause to Believe Plaintiff Had Committed Felony [Penal Code § 836(a)(3)]

[1] FORM

[*Caption. See § 103.21.*]

SUMMARY JUDGMENT FOR DEFENDANT PEACE OFFICER IS PROPER BECAUSE DEFENDANT HAD PROBABLE CAUSE TO BELIEVE THAT PLAINTIFF HAD COMMITTED A FELONY AND THEREFORE DEFENDANT'S ARREST OF PLAINTIFF WAS JUSTIFIED.

A. Summary Judgment. [*See § 103.21, Paragraph A.*]

B. Immunity of Peace Officer. [*See § 103.65, Paragraph B.*]

C. Lawfulness of Arrest. A warrantless arrest by a peace officer is justified and lawful if the arresting officer has probable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed (*Penal Code § 836(a)(3)*).

D. Probable Cause as Question of Law. The question of whether or not a police officer was justified in making a warrantless arrest based on probable cause for believing that the arrested person had committed a felony is a question of law for the court if the underlying facts are without substantial conflict (*Wilson v. Los Angeles County (1971) 21 Cal. App. 3d 308, 316, 98 Cal. Rptr. 525 , disapproved on other grounds, Cervantez v. J. C. Penney Co., Inc. (1979) 24 Cal. 3d 579, 592, 156 Cal. Rptr. 198, 595 P.2d 975*).

E. Determination of Probable Cause. Probable cause for making a warrantless arrest for a felony exists when the facts and circumstances within the knowledge of the arresting officer at the moment of the arrest are sufficient to

warrant a prudent person in believing that the arrested person had committed a felony (*Wilson v. Los Angeles County (1971) 21 Cal. App. 3d 308, 314, 98 Cal. Rptr. 525 , disapproved on other grounds, Cervantez v. J. C. Penney Co., Inc. (1979) 24 Cal. 3d 579, 592, 156 Cal. Rptr. 198, 595 P.2d 975*).

[*Optional*] **F. Information From Victim of Felony.** Information given to a peace officer by a citizen who purports to be the victim of a felony is sufficient to justify a warrantless arrest by a peace officer, even though the reliability of the victim has not been previously tested (*Wilson v. Los Angeles County (1971) 21 Cal. App. 3d 308, 314, 98 Cal. Rptr. 525 , disapproved on other grounds, Cervantez v. J. C. Penney Co., Inc. (1979) 24 Cal. 3d 579, 592, 156 Cal. Rptr. 198, 595 P.2d 975*).

[*Optional*] **G. Information Transmitted Through Official Channels.** Reliable information furnishing reasonable cause for a warrantless felony arrest does not lose its reliability when it is transmitted through official channels to arresting officers, and the latter may rely on it when making an arrest (*Wilson v. Los Angeles County (1971) 21 Cal. App. 3d 308, 315, 98 Cal. Rptr. 525 , disapproved on other grounds, Cervantez v. J. C. Penney Co., Inc. (1979) 24 Cal. 3d 579, 592, 156 Cal. Rptr. 198, 595 P.2d 975*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a motion for summary judgment by the defendant in an action for false imprisonment against a peace officer based on a warrantless arrest where the demurrer asserts that the arrest was justified because the peace officer had probable cause to believe that the plaintiff had committed a felony.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations in support of this form [*Code Civ. Proc. § 437c*].

[b] Related Pleading and Practice Forms

For a form of affirmative defense that the defendant had reasonable cause to believe that the plaintiff had committed a felony, see California Forms of Pleading and Practice, Ch. 257, *False Imprisonment* (Matthew Bender).

[3] Discussion of Authorities

[a] Probable Cause as Question of Law

The factual background of ***Wilson v. Los Angeles County*** *(1971) 21 Cal. App. 3d 308, 98 Cal. Rptr. 525 , disapproved on other grounds, Cervantez v. J. C. Penney Co., Inc. (1979) 24 Cal. 3d 579, 592, 156 Cal. Rptr. 198, 595 P.2d 975* , is discussed in *§ 103.77[3][b]*. With regard to sheriffs' deputies who made the warrantless arrest, the court of appeal held that determination of probable cause to make a warrantless arrest is a question of law where the facts are without

substantial conflict. The identification made and the circumstances of the case were sufficient to cause the officers to entertain a strong suspicion that the plaintiffs were the guilty parties. This being the case, the trial court did not err in determining as a matter of law that the arresting officers had probable cause for a warrantless arrest (*21 Cal. App. 3d 308, 316)* .

[b] Determination of Probable Cause

The factual background of ***Wilson v. Los Angeles County*** *(1971) 21 Cal. App. 3d 308, 98 Cal. Rptr. 525 , disapproved on other grounds, Cervantez v. J. C. Penney Co., Inc. (1979) 24 Cal. 3d 579, 592, 156 Cal. Rptr. 198, 595 P.2d 975* , is discussed in *§ 103.77[3][b]*. The court of appeal held that reasonable cause for making a warrantless felony arrest exists when the facts and circumstances within the knowledge of the arresting officer at the moment of the arrest are sufficient to warrant a prudent person in believing that the arrested person had committed a felony. In *Wilson*, the arresting officers had an identification of the arrestees by the victim of the crime, and information from other informants, tending to create a strong suspicion that the plaintiffs were guilty of tool embezzlement (*21 Cal. App. 3d 308, 314)* .

[c] Information From Victim of Felony

The factual background of ***Wilson v. Los Angeles County*** *(1971) 21 Cal. App. 3d 308, 98 Cal. Rptr. 525 , disapproved on other grounds, Cervantez v. J. C. Penney Co., Inc. (1979) 24 Cal. 3d 579, 592, 156 Cal. Rptr. 198, 595 P.2d 975* , is discussed in *§ 103.77[3][b]*. The court of appeal held that information given to a peace officer by a citizen who purports to be the victim of a felony is sufficient to justify a warrantless arrest by a peace officer, even though the reliability of the victim has not been previously tested (*21 Cal. App. 3d 308, 314)* .

[d] Information Transmitted Through Official Channels

The factual background of ***Wilson v. Los Angeles County*** *(1971) 21 Cal. App. 3d 308, 98 Cal. Rptr. 525 , disapproved on other grounds, Cervantez v. J. C. Penney Co., Inc. (1979) 24 Cal. 3d 579, 592, 156 Cal. Rptr. 198, 595 P.2d 975* , is discussed in *§ 103.77[3][b]*. The court of appeal held that reliable information furnishing probable cause for a warrantless felony arrest does not lose its reliability when it is transmitted through official channels to arresting officers, and the latter may rely on it when making an arrest (*21 Cal. App. 3d 308, 316)* .

[4] Additional Authorities

[a] Determination of Probable Cause

In *Levin v. United Air Lines, Inc. (2008) 158 Cal. App. 4th 1002, 70 Cal. Rptr. 3d 535* , plaintiff was arrested at Los Angeles International Airport when, in frustration after missing her flight and the perceived lack of assistance given her earlier by airport and airline personnel, she sarcastically stated that she had a bomb in her luggage. Plaintiff was taken to jail and released later that night. She sued the airline, the city, and several individuals for false arrest. At trial, a jury concluded that defendants were not liable. Plaintiff appealed, arguing that the trial court erred in instructing the jury that they must find probable cause to arrest if they found that plaintiff falsely stated to police officers or to airport of airline employees that a bomb was placed in a public or private place, without regard to whether plaintiff made such statements sarcastically and the persons hearing the statements believed that she was being sarcastic. The court of appeal affirmed the judgment for defendants. The court noted that the criminal statute plaintiff was arrested for violating, *Pen. Code § 148.1*, had two basic elements: that the arrestee "report" to any peace officer or airline or airport employee that a bomb has been or will be placed in a public or private place, and that the arrestee know that the report was false. Therefore, the court concluded that the trial court, when instructing the jury, did not err in omitting any reference to plaintiff's alleged sarcasm or the officers' perception or knowledge of such sarcasm, as the statute did not require any showing as to plaintiff's intent when making the statements or the effect of such statements on the persons who heard them. Under the statute, it was sufficient that plaintiff made the statements knowing they were false (*158 Cal. App. 4th 1002,*

1020-1025) .

[b] Information From Victim of Felony

The factual background of *Gorlack v. Ferrari (1960) 184 Cal. App. 2d 702, 7 Cal. Rptr. 699* , is discussed in *§ 103.111[3][a]*. The court of appeal held that in determining whether or not a police officer making an arrest without a warrant had reasonable cause to believe the person arrested had committed a felony, the courts will look to the facts and circumstances known to the officer when the arrest was made. There is no exact formula for determining the reasonableness of an arrest, and each case must be decided on its own facts and circumstances. However, where the victim of a felony relates the circumstances of the offense and identifies the perpetrator, his or her arrest by officers acting on this information is lawful. In this case, the victim of the theft reported to the police that her ring, valued at $1,000, had been stolen by the plaintiff, and acting on this information and circumstances found by them at the plaintiff's home, the officers arrested the plaintiff. The trial court's finding that the plaintiff's arrest by the officers was based on reasonable or probable cause was therefore supported by substantial evidence.

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10-103 California Points & Authorities § 103.67

§ 103.67 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for False Imprisonment--Action Based on Warrantless Arrest--Peace Officer Not Liable for Receiving Custody of Person Arrested in Citizen's Arrest [Penal Code §§ 142, 847]

[1] FORM

[*Caption. See § 103.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT SHOWS ON ITS FACE THAT DEFENDANT PEACE OFFICER RECEIVED CUSTODY OF PLAINTIFF AFTER A CITIZEN'S ARREST.

A. Objection by Demurrer. [*See § 103.20, Paragraph A.*].

B. Immunity of Peace Officer. A peace officer is not liable for false arrest or false imprisonment when he/she takes custody of a person arrested by a private citizen in a citizen's arrest (*Penal Code §§ 142, 847*; *Kinney v. County of Contra Costa (1970) 8 Cal. App. 3d 761, 767, 87 Cal. Rptr. 638*).

[*Optional*] **C. No Duty to Determine Probable Cause.** A peace officer does not have the duty to determine reasonable or probable cause before accepting custody of a citizen arrested by another and is not required at his/her peril to correctly adjudge whether the citizen had probable cause to make a citizen's arrest (*Kinney v. County of Contra Costa (1970) 8 Cal. App. 3d 761, 768, 87 Cal. Rptr. 638*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a general demurrer to the complaint in an action for false imprisonment against a peace officer to whom custody of a person arrested in a citizen's arrest is delivered, where the demurrer asserts that the peace officer is immune from liability for false imprisonment under such circumstances.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Immunity of Peace Officer

In ***Kinney v. County of Contra Costa*** *(1970) 8 Cal. App. 3d 761, 87 Cal. Rptr. 638* , Mr. and Mrs. Kinney sued a private citizen, a sheriff's deputy, and Contra Costa County for damages for false imprisonment. At the close of the plaintiffs' case, the trial court granted the motions of the county and the deputy for nonsuit. The jury subsequently returned its verdict awarding the plaintiffs damages against the private citizen. The court of appeal affirmed the judgment of nonsuit in favor of the county and deputy. Mrs. Kinney had engaged in an argument with the private citizen (Vallentyne) who owned a vacuum cleaner repair shop. After some heated words were exchanged in the shop, Vallentyne locked Mrs. Kinney in the store and called the police. The sheriff's deputy (Wallis) arrived on the scene, and Vallentyne told him that he had made a citizen's arrest of Mrs. Kinney. Wallis asked Vallentyne if that was what he really wanted to do, and Vallentyne said yes. Wallis had Vallentyne make a citizen's arrest in front of him and then took Mrs. Kinney to the county jail. She was released between four and five hours later. The court of appeal pointed out that under *Penal Code § 142*, every peace officer who willfully refuses to receive a person charged with a criminal offense, including a person arrested under a citizen's arrest, is himself or herself subject to criminal penalties. Further, when a peace officer receives a person arrested under a citizen's arrest under his or her statutory duty to accept custody of one arrested by a citizen, *Penal Code § 847(c)* expressly exempts the officer from liability for false arrest and false imprisonment based on the receipt of custody. The court rejected Mrs. Kinney's contention that the *Fourth Amendment of the United States Constitution*requires a peace officer to determine reasonable or probable cause before accepting custody of a citizen arrested by another. The court noted that, were this required, the means of information would ordinarily be scant, and any error on the officer's part would be costly; should he or she incorrectly find no probable cause and refuse custody he or she would face criminal sanctions (*Penal Code § 142*), while a faulty contrary decision would subject him or her to civil liability to the person arrested (*8 Cal. App. 3d 761, 768)* .

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10-103 California Points & Authorities § 103.68

§ 103.68 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for False Imprisonment--Action Based on Warrantless Arrest by Peace Officer--Supervisor Not Liable for False Imprisonment by Subordinates [Gov. Code § 820.8]

[1] FORM

[*Caption. See § 103.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION AGAINST DEFENDANT _____ [*specify, e.g.*, CHIEF OF POLICE] BECAUSE A PUBLIC EMPLOYEE IN A SUPERVISORIAL POSITION IS NOT LIABLE IN DAMAGES FOR THE UNLAWFUL ACTS OR OMISSIONS OF HIS/HER SUBORDINATES UNLESS HE/SHE HAS DIRECTED SUCH ACTS OR PERSONALLY COOPERATED IN THEM.

A. Obligation by Demurrer. [*See § 103.20, Paragraph A.*]

B. No Liability for Act of Another. Except as provided by statute, a public employee is not liable for an injury caused by the act or omission of another person (*Gov. Code § 820.8*).

C. Supervisor Not Liable for Acts of Subordinates. A public employee in a supervisorial position is not liable in damages for false imprisonment committed by his/her subordinates, unless he/she directed their acts or personally participated in them (*Oppenheimer v. Los Angeles (1951) 104 Cal. App. 2d 545, 549, 232 P.2d 26*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of form

This form of points and authorities may be submitted in support of a general demurrer to the complaint in an action for false imprisonment against a public employee in a supervisorial position based on acts allegedly committed by his or her subordinates, where the demurrer asserts that the complaint does not state facts sufficient to constitute a cause of action against the supervisor in that it does not allege that he or she directed the acts or personally participated in them.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Supervisor Not Liable for Acts of Subordinates

In ***Oppenheimer v. Los Angeles*** *(1951) 104 Cal. App. 2d 545, 232 P.2d 26* , the plaintiff sued certain police officers, their police chief, and the City of Los Angeles for damages for false imprisonment for a warrantless arrest, allegedly unlawful because made for a misdemeanor not committed in the arresting officers' presence. At that time, *Penal Code § 836* prohibited such a warrantless arrest. Present *Penal Code § 836(a)(1)* allows a warrantless arrest for a misdemeanor by a police officer if the officer has probable cause to believe the arrestee is committing a misdemeanor in his or her presence. The trial court sustained all the defendants' demurrers and entered a judgment of dismissal. The court of appeal sustained the judgment as to the city and as to the police chief, but held that the complaint stated a cause of action against the police officers for false imprisonment. The grounds on which the city's demurrer was sustained are no longer valid since the enactment of the California Tort Claims Act, which makes municipalities liable for the torts of their employees committed within the scope of their employment [*see Gov. Code § 815.2*]. However, the grounds on which the demurrer of the chief of police was sustained remain valid. The court of appeal held that a chief of police is not liable in damages for the unlawful acts and omissions of his or her subordinates unless he or she has directed such acts or personally cooperated in them. Because the complaint merely alleged that the chief of police "in effect ratified, condoned and abetted the cruel and lawless actions" of the defendant police officers "and has never repudiated them," the complaint failed to state a cause of action against the police chief. This rule of immunity of a public employee for acts of his or her subordinates, unless he or her personally participates in, or directs, the wrongful acts is now embodied in *Gov. Code § 820.8*, set forth in Paragraph B of this form.

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10-103 California Points & Authorities § 103.69

§ 103.69 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for False Imprisonment--Action Based on Warrantless Arrest--Magistrate Immune From Liability Based on Oral Order to Arrest [Penal Code § 838]

[1] FORM

[*Caption. See § 103.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION BECAUSE A MAGISTRATE IS IMMUNE FROM LIABILITY FOR DAMAGES FOR FALSE IMPRISONMENT BASED ON AN ORAL ORDER TO A PEACE OFFICER OR PRIVATE PERSON TO ARREST ONE COMMITTING OR ATTEMPTING TO COMMIT A PUBLIC OFFENSE IN THE PRESENCE OF SUCH MAGISTRATE.

A. Objection by Demurrer. [*See § 103.20, Paragraph A.*]

B. Authority to Order Arrest. A magistrate may orally order a peace officer or private person to arrest anyone committing or attempting to commit a public offense in the presence of such magistrate (*Penal Code § 838*).

C. Immunity of Magistrate. A magistrate ordering an arrest pursuant to *Section 838 of the Penal Code* is exercising a judicial power vested in him/her and is therefore protected by judicial immunity from civil liability for damages for false imprisonment based on the arrest, even if it is alleged that he/she acted on insufficient evidence and with a malicious desire to injure the person arrested (*Frazier v. Moffatt (1951) 108 Cal. App. 2d 379, 387, 239 P.2d 123*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a demurrer to a complaint for damages for false arrest and imprisonment where the demurrer asserts that the complaint fails to state facts sufficient to constitute a cause of action in that the defendant is a magistrate who is protected from liability for false imprisonment, based on an arrest pursuant to *Penal Code § 838*, by the doctrine of judicial immunity.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Immunity of Magistrate

In ***Frazier v. Moffatt*** *(1951) 108 Cal. App. 2d 379, 239 P.2d 123* , the plaintiff brought an action against a justice of the peace for false arrest and false imprisonment. The case was tried before a court and judgment was entered for the plaintiff. Defendant appealed and the court of appeal reversed the judgment on the ground of judicial immunity. The plaintiff and defendant had been eating in the same restaurant. The plaintiff's loud laughter annoyed the justice of the peace who called the police and ordered them to arrest the plaintiff on a charge of violating *Penal Code § 415* (disturbing the peace). The plaintiff was subsequently tried and acquitted.

Penal Code § 838 authorizes a magistrate to order a peace officer or private person to arrest anyone committing or attempting to commit a public offense in the present of the magistrate. The defendant justice of the peace was a magistrate under the provision of *Penal Code § 808*. The question presented on appeal was whether a magistrate could be held liable for civil damages for ordering an arrest pursuant to *Penal Code § 838* when he acted on insufficient evidence and with an alleged malicious desire to injure the person arrested. The court of appeal held that the doctrine of judicial immunity protects a magistrate from civil liability for false imprisonment if he or she orders an arrest pursuant to *Penal Code § 838*. The court pointed out, first, that judicial officers are not liable for the erroneous exercise of judicial powers vested in them. The court then concluded that an arrest ordered by a magistrate under *Penal Code § 838* is a judicial or quasi-judicial act. Because the defendant magistrate was acting within the general scope of his judicial powers when he ordered the arrest, he was protected from civil liability and not amenable to any civil action for damages.

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10-103 California Points & Authorities § 103.70

§ 103.70 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for False Imprisonment--Action Based on Warrantless Arrest--Public Authorities Not Liable for Taking Child Into Custody and Filing Petition for Dependency of Child [Gov. Code §§ 815.2(b), 821.6; Welf. & Inst. Code §§ 300, 305]

[1] FORM

[*Caption. See § 103.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION BECAUSE UNDER WELFARE AND INSTITUTIONS CODE SECTIONS 300, 305 PUBLIC AUTHORITIES MAY TAKE A CHILD INTO CUSTODY WITHOUT A WARRANT WHEN THEY HAVE REASONABLE CAUSE TO BELIEVE THAT THE CHILD IS A DEPENDENT CHILD, SO LONG AS THEY FILE THE PROPER PETITION FOR DEPENDENCY PROCEEDINGS THEREAFTER, AND PUBLIC EMPLOYEES AND ENTITIES ARE IMMUNE FROM PROSECUTION FOR THE INSTITUTION OF ACTIONS WITHIN THE SCOPE OF EMPLOYMENT AND UNDER LEGAL AUTHORITY.

A. Objection by Demurrer. [*See § 103.20, Paragraph A.*]

B. No False Imprisonment for Taking Dependent Child Into Custody Under Legal Authority. Public authorities are not liable for false imprisonment for taking a child into custody under legal authority of the child dependency statutes (*Welf. & Inst. Code §§ 300, 305*; *Jenkins v. County of Orange (1989) 212 Cal. App. 3d 278, 285, 260 Cal. Rptr. 645*).

C. Immunity for Institution or Prosecution of Action. Public employees and entities are immune from prosecution for instituting or prosecuting any judicial or administrative proceeding within the scope of the employee's employment, even if the employee acts maliciously and without probable cause (*Gov. Code §§ 815.2(b), 821.6*; *Jenkins v. County of Orange (1989) 212 Cal. App. 3d 278, 283-285, 260 Cal. Rptr. 645*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a demurrer to a complaint for damages for false imprisonment when the demurrer asserts that the complaint fails to state facts sufficient to constitute a cause of action because the defendant public authorities took a child into custody under legal authority based on the child's appearance of being a dependent child and when the authorities complied with the statutory dependency requirements [*Welf. & Inst. Code §§ 300, 305*; *Jenkins v. County of Orange (1989) 212 Cal. App. 3d 278, 285, 260 Cal. Rptr. 645]* .

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] No False Imprisonment for Taking Dependent Child Into Custody Under Legal Authority

In ***Jenkins v. County of Orange*** *(1989) 212 Cal. App. 3d 278, 260 Cal. Rptr. 645* , a mother sued a social worker and county for false imprisonment for, among other things, taking her son away from her and keeping him in custody for six weeks on the basis of a report made by her ex-husband that the child was being abused by his maternal grandfather, who did not live with the mother and son. The social worker and public authorities complied with all statutory requirements of the dependency statutes (see *Welf. & Inst. Code §§ 300, 305*). An application for petition to declare the child a dependent child was initiated. At the hearing at which the child was taken into custody, the court found that there was substantial danger to his health, that there was no reasonable means by which his health could be protected other than by removing him from his parent's physical custody, and that he would remain in custody until the next hearing date, some six weeks later. The mother claimed that defendants failed to use due care by failing to investigate the claims thoroughly, which she stated were false. The court entered a judgment of dismissal after granting a demurrer without leave to amend. The mother and the grandparents appealed from the judgment.

The court of appeal affirmed, stating that an employee has immunity for instituting an action within the scope of employment even if it was done negligently or maliciously. Additionally, a public entity is immune for an employee's acts if the employee is immune (*212 Cal. App. 3d 278, 283-284)* . The court also stated that there could be no false imprisonment, because the child was detained under color of legal authority through defendants' compliance with the dependency statutes (*212 Cal. App. 3d 278, 285)* .

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10-103 California Points & Authorities § 103.71

§ 103.71 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--In Action for False Imprisonment Based on Warrantless Arrest--Private Citizen Liable for Procuring Unlawful Arrest

[1] FORM

[*Caption. See § 103.42.*]

A PRIVATE CITIZEN WHO CAUSES, PROCURES, INSTIGATES, OR ACTIVELY PARTICIPATES IN AN UNLAWFUL ARREST OR IMPRISONMENT IS LIABLE FOR FALSE IMPRISONMENT.

A. Procurement of Unlawful Arrest. A private citizen who authorizes, encourages, directs, or assists a peace officer to do an unlawful act, or procures an unlawful arrest without process, or actively participates in an unlawful arrest or imprisonment is liable for false imprisonment (*Kaufman v. Brown (1949) 93 Cal. App. 2d 508, 515, 209 P.2d 156* , *disapproved on other grounds,* *Dragna v. White (1955) 45 Cal. 2d 469, 289 P.2d 428*).

[*Optional*] **B. Absolute Privilege of *Civil Code Section 47(b)* Inapplicable to Act of Making Citizen's Arrest.** A defendant sued for false imprisonment based on the act of making a citizen's arrest cannot defend the action on the grounds that the conduct was absolutely privileged under *Civ. Code § 47(b)* (*Kesmodel v. Rand (2004) 119 Cal. App. 4th 1128, 1136-1137, 15 Cal. Rptr. 3d 118*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion for summary judgment in an action for false imprisonment against a private citizen who procured, instigated, or actively participated in plaintiff's false arrest, where the motion asserts that the defendant is not liable because he or she merely gave information to the police in good faith, but where a triable issue of fact exists as to whether the defendant actually actively participated in the wrongful arrest.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and points of law stated. In addition, counsel should attach affidavits or declarations which support the memorandum [*Code Civ. Proc. § 437c*].

[3] Discussion of Authorities

[a] Procurement of Unlawful Arrest

In ***Kaufman v. Brown*** *(1949) 93 Cal. App. 2d 508, 209 P.2d 156* , the plaintiff sued a labor union, certain of its officers and agents, and two police officers for false imprisonment based on a warrantless arrest. Both general and special demurrers to plaintiff's original complaint, the amended and the second amended complaints were sustained with leave to amend. Plaintiff declined to plead further. Judgment for the defendants was rendered and the plaintiff appealed. The court of appeal reversed, holding that plaintiff's second amended complaint stated facts sufficient to constitute a cause of action against the defendants. Plaintiff alleged that the police officers and the officers and agents of the union, acting in its behalf and with its knowledge, consent, and advice, maliciously, wrongfully, and unlawfully, and without an order, warrant, or process of any court authorizing them to do so, forcibly arrested and imprisoned the plaintiff for 24 hours in the city jail without taking the plaintiff before a magistrate or advising him of the charges against him. In addition to holding that the complaint stated a prima facie cause of action for false imprisonment (namely, arrest without warrant, imprisonment, and damages), the court of appeal also stated that a party who authorizes, encourages, directs, or assists an officer to do an unlawful act, or procures an unlawful arrest without process, or participates in the unlawful arrest or imprisonment is liable for false imprisonment.

NOTE:

Language in *Kaufman v. Brown* to the effect that, when there is an unreasonable delay in taking a person before a magistrate after a lawful arrest, the false imprisonment dates from the time of the arrest was disapproved in *Dragna v. White (1955) 45 Cal. 2d 469, 473, 289 P.2d 428* . In *Dragna*, the Supreme Court stated that, where the arrest is lawful, a subsequent, unreasonable delay in taking a person before a magistrate will not affect the legality of the arrest, although it will subject the offending person to liability for so much of the imprisonment as occurs after the period of necessary or reasonable delay.

The California Supreme Court has subsequently held that unless the elements of malicious prosecution can be proven, statements made to the police regarding potential criminal activity are protected from civil liability by an absolute privilege under *Civ. Code § 47(b)*. Therefore, even if the information is false or given in bad faith, a person is immune from liability for merely giving information to the police leading to a false arrest or imprisonment [*Hagberg v. California Fed. Bank (2004) 32 Cal. 4th 350, 355, 7 Cal. Rptr. 3d 803, 81 P.3d 244* ; *Mulder v. Pilot Air Freight (2004) 32 Cal. 4th 384, 387, 7 Cal. Rptr. 3d 828, 81 P.3d 264* ; *see Civ. Code § 47(b)*]. However, the privilege only applies to communications to the police or other officials and does not apply to noncommunicative conduct [*see Mulder v. Pilot Air Freight (2004) 32 Cal. 4th 384, 387, 7 Cal. Rptr. 3d 828, 81 P.3d 264]* . For points and authorities relating to this privilege as it applies to statements to the police, see *§ 103.60*.

[b] Absolute Privilege of Civil Code Section 47(b) Inapplicable to Act of Making Citizen's Arrest

In ***Kesmodel v. Rand*** *(2004) 119 Cal. App. 4th 1128, 15 Cal. Rptr. 3d 118* , another tenant in the plaintiff's apartment building placed the plaintiff under citizen's arrest, in the presence of police officers, based on allegations by the other tenant and his mother that the plaintiff had been "peeping" into the mother's apartment window while she was undressed. By law, the police were required to take the plaintiff into custody, where he was kept for 12 hours before being released. Because the incident was the latest in a series of confrontations between the parties, the plaintiff and his wife had been videotaping the incident, and the tape clearly showed that the plaintiff had not been "peeping" into the neighbor's window, but had merely been watering some plants and cleaning off the sidewalk. The district attorney declined to prosecute the plaintiff, and the plaintiff filed a civil action for false imprisonment against the other tenant and his mother. The jury found for the plaintiff, awarded damages against the other tenant for false imprisonment, and awarded damages against the mother for conspiracy for her role in prompting her son to make the false arrest. The compensatory damages awarded consisted of $3,500 in economic damages and $27,000 in noneconomic damages, for which the defendants were held jointly and severally liable. The defendants appealed.

The court of appeal affirmed, rejecting the defendants' contention that their conduct in making a citizen's arrest was absolutely privileged under *Civ. Code § 47(b)*. The court recognized that in *Hagberg v. California Fed. Bank FSB (2004) 32 Cal. 4th 350, 7 Cal. Rptr. 3d 803, 81 P.3d 244* , the California Supreme Court had held that a citizen was absolutely privileged under that statute for making reports of possible criminal activity to the police. The court of appeal noted, however, that the Supreme Court specifically distinguished the situation in which a citizen merely gives information to the police from the situation in which the citizen intentionally and actively assists in making a false arrest (*119 Cal. App. 4th 1128, 1136)* . In this particular case, the defendants had done more than merely provide information to the police. When the police indicated that they would not make an arrest, the defendants took the affirmative conduct of effecting a citizen's arrest. This affirmative conduct was not privileged under *Civ. Code § 47(b)*, which only protects communications or broadcasts (*119 Cal. App. 4th 1128, 1137-1138)* .

[4] Additional Authorities

[a] Procurement of Unlawful Arrest

In *Collins v. Owens (1947) 77 Cal. App. 2d 713, 176 P.2d 372* , plaintiff sued a private citizen who allegedly instigated his warrantless arrest by a police officer for intoxication. The court of appeal sustained a general demurrer with leave to amend. The plaintiff failed to amend, and a judgment of dismissal was entered against him. The court of appeal reversed the judgment, holding that plaintiff's complaint stated a cause of action for false imprisonment. The complaint alleged the fact of plaintiff's warrantless arrest, his incarceration, and damages, sufficient allegations to state a cause of action as against a general demurrer. The court of appeal also held that the fact that the complaint alleged that the defendant did not directly make the arrest, but that the arrest was made by an officer at the instance and instigation or direction of the defendant, did not relieve the defendant from legal responsibility if the arrest was in fact unlawful.

[b] Absolute Privilege of Civil Code Section 47(b) Inapplicable to Act of Making Citizen's Arrest

In *Buchanan v. Maxfield Enters., Inc. (2005) 130 Cal. App. 4th 418, 29 Cal. Rptr. 3d 909* , the plaintiff sued a clothing store following a citizen's arrest made by the head of the store's security team. The arrest was made after the plaintiff refused a request to leave the store, a request that was made because two celebrities were shopping in the store at the time and (although the evidence was not yet developed on this issue) the plaintiff may have been targeted as a potential stalker. Police, who were already on the scene at the time, took immediate custody of the plaintiff, placed him in handcuffs, and "paraded" him through the store parking lot, which was filled with media reporters and film crews because of the presence of the celebrities. A manager from the store then informed the police that the store did not want the plaintiff arrested after all, and he was released. In his complaint, the plaintiff alleged causes of action for false imprisonment and invasion of privacy. The trial court sustained the defendant's demurrer on the grounds that the

defendant's conduct was privileged under *Civ. Code § 47(b)*, but the court of appeal reversed. The court of appeal noted that the conduct forming the basis of the operative complaint was that store personnel effected a citizen's arrest and, accompanied by police, paraded plaintiff in handcuffs around the parking lot in full view of the assembled media hordes. Although store personnel may have communicated to police that they wanted the plaintiff out of the store, the police did not arrest the plaintiff themselves because of any communication made to them by store personnel. Instead, the police only took the plaintiff into custody because they were required to do so after the citizen's arrest was made. Therefore, the court concluded that the essential conduct underlying the complaint, the arrest and subsequent detaining, was not communicative in nature and was not protected by the privilege of *Civ. Code § 47(b)* (*130 Cal. App. 4th 418, 424-426)* .

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10-103 California Points & Authorities § 103.72

§ 103.72 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--In Action for False Imprisonment Based on Citizen's Arrest--Triable Issue of Fact Existing as to Whether Offense Committed in Presence of Private Citizen Accomplishing Citizen's Arrest

[1] FORM

[*Caption. See § 103.42.*]

A SUMMARY JUDGMENT IS IMPROPER WHERE THE COMPLAINT AND SUPPORTING AFFIDAVITS PRESENT A TRIABLE ISSUE OF FACT WHETHER OR NOT AN OFFENSE WAS ATTEMPTED OR COMMITTED IN THE PRESENCE OF A PRIVATE CITIZEN MAKING A CITIZEN'S ARREST FOR A MISDEMEANOR.

A. Citizen's Arrest for Misdemeanor. A private citizen may arrest another person for a misdemeanor only if the offense was committed or attempted in his/her presence (*Penal Code §§ 16, 837(1)*).

B. Triable Issue of Fact as to Legality of Arrest. It is improper to grant a summary judgment in an action for false arrest and imprisonment based on a citizen's arrest of plaintiff for a misdemeanor where the pleadings and _____ [affidavits *or* declarations] raise a triable issue of fact as to whether or not the offense was committed or attempted in the arresting party's presence and thus as to whether or not the citizen's arrest was legal (*Hamburg v. Wal-Mart Stores, Inc. (2004) 116 Cal. App. 4th 497, 512, 10 Cal. Rptr. 3d 568* ; *Leggett v. De Giorgio Corp. (1969) 276 Cal. App. 2d 306, 312, 80 Cal. Rptr. 697*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion for summary judgment in an action for false imprisonment against a private citizen who arrested the plaintiff for a misdemeanor in a citizen's arrest, where the motion asserts that there is no triable issue of fact as to the lawfulness of the arrest, but where a triable issue of fact exists as to whether or not the plaintiff committed or attempted an offense in the presence of the defendant.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations which support the memorandum [*Code Civ. Proc. § 437c*].

[3] Discussion of Authorities

[a] Triable Issue of Fact as to Legality of Arrest

In ***Hamburg v. Wal-Mart Stores, Inc.*** *(2004) 116 Cal. App. 4th 497, 10 Cal. Rptr. 3d 568* , the plaintiffs were in front of a store, attempting to collect signatures for a voter initiative to legalize marijuana use and simultaneously protesting the store's decision to have a man arrested days earlier for similarly collecting signatures on store property. The store had a policy establishing restrictions on the use of store property for public demonstrations, with which the plaintiffs were admittedly not in compliance. After receiving several complaints from customers, who apparently found the activities distasteful, the police were called to the scene. The police consulted with the store manager about his options, but after observing the plaintiffs, the police decided not to make any arrests. The police informed the manager, however, about the provisions of *Pen. Code § 602.1(a)*, under which it is a misdemeanor trespass to intentionally interfere with a store's business by obstructing or intimidating customers. After asking the protestors to leave or face arrest, the manager made a citizen's arrest of those who chose to stay. The police took the plaintiffs into custody and removed them to the police department, where they were booked and released without charges being filed. The plaintiffs sued the store and the manager for false arrest and civil rights violations. The defendants moved for summary judgment. The trial court granted the motion on the grounds that the store had in place reasonable and constitutional "time, place, and manner" restrictions for governing expressive activity such as the plaintiffs', and that the plaintiffs' failure to comply with these restrictions was a complete defense to their claims. The plaintiffs appealed.

The court of appeal reversed. The court held that the plaintiffs' failure to abide by the store's "time, place, and manner" restrictions did not establish that they had violated *Pen. Code § 602.1(a)*, which formed the basis for the manager's citizen's arrest (*116 Cal. App. 4th 497, 509)* . For summary judgment to be proper, the defendants were required to provide evidence proving that the protestors were in fact in violation of *Pen. Code § 602.1(a)*, and that the violation took place in the presence of the store manager, as required to justify his citizen's arrest under *Pen. Code § 837(1)*. The defendants' evidence did not establish these facts as a matter of law. Three written statements by store customers showed only that these customers were offended by the plaintiffs' conduct, not that the plaintiffs were in fact intimidating or obstructing customers. Moreover, there was no evidence in the record that the store manager ever actually observed any such conduct before making the citizen's arrest. Conversely, the plaintiffs submitted declarations refuting the claim that their protest was anything but peaceful and denying that they obstructed, intimidated, or otherwise interfered with the store's customers. Under that state of the evidence, summary judgment for the defendants was improper (*116 Cal. App. 4th 497, 510-512)* .

In ***Leggett v. De Giorgio Corp.*** *(1969) 276 Cal. App. 2d 306, 80 Cal. Rptr. 697* , plaintiff sued a corporation and its attorney for false arrest and imprisonment based on a citizen's arrest by the attorney at a picketing site. The trial court granted a summary judgment for the defendants, finding that the defendants' declaration showed that the action had no merit and that the plaintiff's declaration in opposition raised no triable issue of fact. The court of appeal reversed the summary judgment. Plaintiff was arrested for engaging in picketing in deliberate violation of a temporary restraining order, a misdemeanor under *Penal Code § 166*. Defendants conceded that when the corporate attorney arrested plaintiff, he was acting pursuant to *Penal Code § 837(1)* which authorizes a private citizen to arrest for a public offense committed or attempted in his or her presence. In his declaration, plaintiff denied that he continued picketing after he had been read portions of the restraining order. He further stated that between the time he was approached by the corporate agent and the time of his arrest, he did nothing but argue the legality of the restraining order, ask to read the order in its entirety, and announce his intention to continue picketing. The court of appeal held that the plaintiff's right to recover depended solely on a showing that his arrest and imprisonment were unlawful, and that the provocation, motive, and good faith of the defendants were immaterial, except on the issue of punitive damages. Noting that the alleged offense was a misdemeanor and that an arrest for the offense by a private citizen would have been lawful only if the offense were attempted or committed in the presence of the arresting citizen, the court held that a triable issue of fact was raised as to whether the offense for which plaintiff was arrested was in fact committed or attempted in the presence of the arresting attorney.

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10-103 California Points & Authorities § 103.73

§ 103.73 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--In Action for False Imprisonment Based on Warrantless Arrest--Warrantless Felony Arrest Not Justified Where Offense Committed as Result of Entrapment

[1] FORM

[*Caption. See § 103.42.*]

A WARRANTLESS ARREST BY PEACE OFFICERS IS NOT JUSTIFIED WHERE THE OFFENSE FOR WHICH THE ARREST WAS MADE WAS THE RESULT OF AN ENTRAPMENT.

Entrapment as Vitiating Justification. Although a peace officer may be justified in making a warrantless arrest without probable cause where the person arrested has in fact committed a felony (*Penal Code § 836(a)(2)*), if the felony was committed as the result of an entrapment, the warrantless arrest is not justified, and the arresting officer is liable for false imprisonment (*Beauregard v. Wingard (1965) 237 Cal. App. 2d 760, 765, 47 Cal. Rptr. 279*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to a motion for summary judgment in an action for false imprisonment where the motion asserts that the arrest was justified in that the person arrested had in fact committed a felony, although not in the presence of the arresting officer [*Penal Code § 836(a)(2)*], but where the pleadings and declarations aver facts which show that the offense for which the plaintiff was arrested was committed because of entrapment by the arresting, or other, peace officer.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations in support of the form [*Code Civ. Proc. § 437c*].

[3] Discussion of Authorities

[a] Entrapment as Vitiating Justification

In ***Beauregard v. Wingard*** *(1965) 237 Cal. App. 2d 760, 47 Cal. Rptr. 279* , the plaintiff sued a chief of police and certain of his deputies for false arrest. The defendants moved for nonsuit, and judgment was entered in their favor. The plaintiff appealed and the court of appeal reversed. The plaintiff, a businessman in the City of Oceanside, was about to go to the racetrack, when a plainclothes policeman entered his shop, representing himself as a friend and employee of an acquaintance of the plaintiff. He asked the plaintiff to place a $10 bet for him at the racetrack, after declining plaintiff's invitation to accompany him to the track. Plaintiff agreed. As plaintiff was leaving his shop, another police officer, stationed behind his shop and not present during the transaction inside the shop, arrested the plaintiff for bookmaking. At the time of the arrest, he remarked to the plaintiff that the police chief had told him to arrest the plaintiff. It appeared that the police chief had planned the arrest to discredit the plaintiff who was an opponent of the chief's in city politics. Prior to the arrest, none of the officers or the chief had any information to connect the plaintiff with any criminal activity. The court of appeal found that the warrantless arrest could not be justified under either former Penal Code § 836(1) [*now see Penal Code § 836(a)(1)* (arrest for public offense committed in officer's presence)] or under former Penal Code § 836(3) [*now see Penal Code § 836(a)(3)* (arrest based on reasonable cause to believe arrestee has committed felony)], because the arresting officer had not been present during the betting transaction and had no communication with the plainclothes officer prior to the arrest. The only possible justification was former Penal Code § 836(2) [*now see Penal Code § 836(a)(2)*], which justifies a warrantless arrest by a peace officer when the arrestee has in fact committed a felony, although not in the arresting officer' s presence The court of appeal expressly declined to decide whether reasonable or probable cause is required to justify an arrest under former Penal Code § 836(2) [*now see Penal Code § 836(a)(2)*]. Instead, the court held that an act committed as the result of an entrapment cannot serve to justify and make lawful a warrantless arrest under former Penal Code § 836(2) [*now see Penal Code § 836(a)(2)*] (*237 Cal. App. 2d 760, 765)* .

[4] Additional Authorities

[a] Test of Entrapment

In *People v. Barraza (1979) 23 Cal. 3d 675, 153 Cal. Rptr. 459, 591 P.2d 947* , the Supreme Court held that the proper test of entrapment in California is whether the conduct of a law enforcement agent was likely to induce a normally law-abiding person in the plaintiff's position to commit the offense for which the plaintiff was arrested. Official conduct amounting to no more than offering an opportunity to commit a crime is permissible, but overbearing conduct such as badgering, cajoling, or importuning the plaintiff to commit a crime is not permissible.

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10-103 California Points & Authorities § 103.74

§ 103.74 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--In Action for False Imprisonment Based on Warrantless Arrest--Information From Untested Informer as Not Providing Reasonable Cause for Warrantless Arrest Absent Showing Justifying Reliance

[1] FORM

[*Caption. See § 103.42.*]

INFORMATION PROVIDED BY AN _____ [UNTESTED *or* ANONYMOUS] INFORMER IS NOT, WITHOUT SOME SHOWING JUSTIFYING RELIANCE, SUFFICIENT TO PROVIDE REASONABLE CAUSE FOR A WARRANTLESS ARREST.

Information From Untested or Anonymous Informer. Information from an _____ [untested *or* anonymous] informer is not, without some showing justifying reliance, sufficient to establish reasonable cause for a warrantless arrest (*Wilson v. Los Angeles County (1971) 21 Cal. App. 3d 308, 314, 98 Cal. Rptr. 525 , disapproved on other grounds, Cervantez v. J. C. Penney Co., Inc. (1979) 24 Cal. 3d 579, 592, 156 Cal. Rptr. 198, 595 P.2d 975*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to a motion for summary judgment in an action for false imprisonment based on the warrantless arrest of the plaintiff by a peace officer where the motion asserts that the action is without merit because the defendant had reasonable or probable cause to arrest plaintiff, but where the basis of the reasonable cause was information from an anonymous or untested informer.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations in support of the memorandum [*Code Civ. Proc. § 437c*].

[b] Related Pleading and Practice Forms

For a form of complaint for false imprisonment based on an arrest by a peace officer without a warrant, see California Forms of Pleading and Practice, Ch. 257, *False Imprisonment* (Matthew Bender).

[3] Discussion of Authorities

[a] Information From Untested Informer

Wilson v. Los Angeles County *(1971) 21 Cal. App. 3d 308, 98 Cal. Rptr. 525 , disapproved on other grounds, Cervantez v. J. C. Penney Co., Inc. (1979) 24 Cal. 3d 579, 592, 156 Cal. Rptr. 198, 595 P.2d 975* , is discussed in *§ 103.77[3][b]*. The court in *Wilson* found that the police officers making a warrantless arrest had reasonable cause as a matter of law, based on information given them by the victim of a felony. However, the court stated that where information relied on by the police is from an untested or anonymous informer, this is not enough to establish reasonable cause for a warrantless arrest, without some showing justifying reliance on the informer's information (*21 Cal. App. 3d 308, 314)* .

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 103 FALSE IMPRISONMENT
PART II. FORMS
C. Warrantless Arrest

10-103 California Points & Authorities § 103.75

§ 103.75 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--In Action for False Imprisonment Based on Warrantless Arrest--Finding at Preliminary Hearing in Criminal Proceeding as Not Estopping Plaintiff From Litigating Issue of Probable Cause for Arrest

[1] FORM

[*Caption. See § 103.42.*]

A FINDING AT AN EARLIER PRELIMINARY HEARING IN A CRIMINAL PROCEEDING THAT THE EVIDENCE WAS SUFFICIENT TO REQUIRE THE PLAINTIFF TO STAND TRIAL DOES NOT PRECLUDE THE PLAINTIFF FROM LITIGATING IN A SUBSEQUENT CIVIL TRIAL THE ISSUE OF WHETHER PROBABLE CAUSE FOR THE ARREST EXISTED, IF THE EVIDENCE PRESENTED AT THE PRELIMINARY HEARING INCLUDED EVIDENCE NOT AVAILABLE TO THE ARRESTING OFFICER AT THE TIME OF ARREST.

Plaintiff Not Estopped From Litigating Probable Cause for Underlying Criminal Arrest. A finding at an earlier preliminary hearing in a criminal proceeding that the evidence was sufficient to require the plaintiff to stand trial does not preclude the plaintiff from litigating in a subsequent civil action the issue of whether probable cause for the arrest existed, if the evidence presented at the preliminary hearing included evidence not available to the arresting officer at the time of arrest (*McCutchen v. City of Montclair (1999) 73 Cal. App. 4th 1138, 1147-1148, 87 Cal. Rptr. 2d 95*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for summary judgment in an action for false imprisonment or false arrest based on the warrantless arrest of the plaintiff by a police officer, if the motion asserts that a finding at the preliminary hearing in the criminal proceeding that the evidence was sufficient to require the plaintiff to stand trial estops the plaintiff from relitigating the issue of the existence of probable cause for the plaintiff's arrest. The basis for the opposition is that the evidence at the preliminary hearing included evidence that was not available to the arresting officer at the time of arrest.

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law stated. Thus, counsel should show that the evidence at the preliminary hearing supporting the decision to require the plaintiff to stand trial included evidence that was not available to the arresting officer at the time of arrest.

This form can be modified to conform to the specific procedural context in which the issue of collateral estoppel is raised.

[b] Related Pleading and Practice Forms

For a form of complaint for false imprisonment based on an arrest by a peace officer without a warrant, see California Forms of Pleading and Practice , Ch. 257, *False Imprisonment* (Matthew Bender).

[3] Discussion of Authorities

[a] Plaintiff Not Estopped From Litigating Probable Cause for Underlying Criminal Arrest

In ***McCutchen v. City of Montclair*** *(1999) 73 Cal. App. 4th 1138, 87 Cal. Rptr. 2d 95* , the plaintiff was arrested and spent four months in jail on a charge of rape, although the charges were eventually dismissed by the prosecution before the case went to trial. Prior to dismissal of the criminal charges, the court had ruled in a preliminary hearing that there was probable cause to bring the plaintiff to trial on the rape charge. Included in evidence at the preliminary hearing were identifications by the complaining witness made at live lineups after the plaintiff had been arrested. The plaintiff brought a civil suit asserting various causes of action, including a false arrest claim, against the arresting officer, the complaining witness, the city, and the county. The defendants filed a motion for judgment on the pleadings, contending that a finding of probable cause to try the plaintiff on the rape charge collaterally estopped the plaintiff's civil suit. The trial court denied this motion, although the court did grant a motion for summary judgment in favor of the defendants on other grounds. The plaintiff appealed the summary judgment disposition, and the defendants appealed the denial of the motion for judgment on the pleadings.

The court of appeal affirmed. Addressing the trial court's denial of the motion for judgment on the pleadings, the court of appeal held that in conformity with the rule applied by the Ninth Circuit, a prior judicial determination at a criminal preliminary hearing that there was sufficient evidence to hold the plaintiff over for trial may, under some circumstances, preclude that plaintiff from relitigating the issue of probable cause to arrest in a subsequent civil suit. The court concluded that, absent a showing that evidence not available to the arresting officer at the time of arrest was presented at the preliminary hearing, a finding at the preliminary hearing that there was sufficient evidence to require a criminal defendant to stand trial is a finding of probable cause to arrest that may be given collateral estoppel effect (*73 Cal. App. 4th 1138, 1145-1148)* . However, the court held that in this case, the finding at the preliminary hearing was not entitled to collateral estoppel effect, because the evidence presented at the preliminary hearing was not limited to the evidence available to the officer at the time of the plaintiff's arrest. Therefore, the finding at the preliminary hearing did

not address the issue that the plaintiff sought to litigate, whether there was probable cause *at the time of arrest*, but instead was a finding that there was sufficient evidence *at the time of the hearing* to hold the plaintiff over for trial (*73 Cal. App. 4th 1138, 1147-1148)* .

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10-103 California Points & Authorities § 103.76

§ 103.76 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for False Imprisonment--Action Based on Warrantless Arrest--Complaint Does Not Allege Facts Showing Probable Cause for Warrantless Arrest as Matter of Law [Penal Code §§ 836(a)(1), (3), 837(3)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*],	)	IES IN OPPOSITION TO DEMURRER TO COM-
Defendant.	)	PLAINT
	)	[*Code Civ. Proc. § 430.10(e)*]
	)	

_____

SUSTAINING DEFENDANTS DEMURRER WOULD BE IMPROPER BECAUSE THE ALLEGATIONS IN PLAINTIFF'S COMPLAINT DO NOT ESTABLISH AS A MATTER OF LAW THAT DEFENDANT HAD PROBABLE CAUSE FOR THE WARRANTLESS ARREST.

A. Sustaining Demurrer as Improper. It is improper to sustain a demurrer to a complaint for false imprisonment based on a warrantless arrest where the complaint states a prima facie cause of action and the allegations of the complaint do not establish as a matter of law that defendant had reasonable cause for the arrest (*Dragna v. White (1955) 45 Cal. 2d 469, 471-472, 289 P.2d 428*).

[*Optional*] **B. Statements Regarding Plaintiff's Criminal Conduct as Not Establishing Reasonable Cause.** Allegations in the complaint regarding defendant's statements about plaintiff's alleged criminal conduct at the time of

the warrantless arrest do not establish as a matter of law that defendant had probable cause to arrest plaintiff. The complaint does not allege that the statements made by defendant were true, or that defendant believed them to be true or had reasonable cause for such belief (*Dragna v. White (1955) 45 Cal. 2d 469, 472, 289 P.2d 428*).

[*Optional*] **C. Fact of Plaintiff's Guilt as Not Establishing Probable Cause.** An allegation in the complaint that plaintiff pleaded guilty to, or was found guilty of, the charge for which he/she was arrested does not establish as a matter of law that defendant had probable cause for a warrantless arrest, nor does it establish a defense or justification as a matter of law to a cause of action for false imprisonment (*Collins v. Owens (1947) 77 Cal. App. 2d 713, 717, 176 P.2d 372*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to a general demurrer to a complaint in an action for false imprisonment where the demurrer asserts that the complaint fails to state a cause of action because it appears on the face of the complaint that the defendant had reasonable or probable cause for the warrantless arrest of plaintiff.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For a form of complaint for false imprisonment based on a citizen's arrest, and a form of complaint for false imprisonment based on an arrest by a peace officer without a warrant, see California Forms of Pleading and Practice, Ch. 257, *False Imprisonment* (Matthew Bender).

[3] Discussion of Authorities

[a] Sustaining Demurrer as Improper

In ***Dragna v. White*** *(1955) 45 Cal. 2d 469, 289 P.2d 428* , the Supreme Court reversed a judgment on the pleadings in favor of three police officer defendants who were sued for false arrest and false imprisonment. The Supreme Court held that granting judgment on the pleadings was improper because the complaint stated a cause of action for false imprisonment based on either of two separate theories. First, it alleged an arrest without process, followed by imprisonment and damages, sufficient for a prima facie case of false imprisonment, shifting the burden to the defendants to plead and prove justification for the arrest. Secondly, it alleged an unnecessary delay in taking the arrested plaintiff before a magistrate. With regard to the first theory, the Court held that the fact that the complaint alleged certain statements made by the defendants to the press regarding the cause for the arrest did not establish reasonable cause as a matter of law. The complaint did not allege that the statements were true, that the defendants believed them

to be true, or that the defendants had reasonable cause for such belief (*45 Cal. 2d 469, 471-472)* .

[b] Statements Regarding Plaintiff's Criminal Conduct as Not Establishing Reasonable Cause

Dragna v. White *(1955) 45 Cal. 2d 469, 289 P.2d 428* , is discussed in *§ 103.76[3][a]*.

[c] Fact of Plaintiff's Guilt as Not Establishing Reasonable Cause

In ***Collins v. Owens*** *(1947) 77 Cal. App. 2d 713, 176 P.2d 372* , plaintiff sued a private citizen who allegedly instigated a warrantless arrest by a police officer for intoxication. The trial court sustained a general demurrer with leave to amend. The plaintiff failed to amend, and a judgment of dismissal was entered against him. The court of appeal reversed the judgment, holding that plaintiff's complaint stated a cause for false imprisonment. The complaint alleged the fact of plaintiff's warrantless arrest, his incarceration, and release on bail. It also alleged that a misdemeanor charge was laid against the plaintiff, and that he did not appear on the charge and his bail money was forfeited. The court of appeal held that although the complaint did not state a cause of action for malicious prosecution, because it did not allege want of probable cause, or the favorable termination of the proceedings against the plaintiff, it did state a cause of action for false imprisonment sufficient against a general demurrer. When an arrest is made without a warrant, the complaint states a cause of action for false imprisonment by alleging the arrest without process, the imprisonment, and the damages. Allegations that the arrest was unlawful or without probable cause are unnecessary, because in the warrantless arrest situation, the burden is on the defendant to prove justification. Further, the court of appeal held that although the facts alleged in the complaint regarding the forfeiture of bail might be construed as an allegation that the plaintiff had pleaded guilty to an intoxication charge, this did not constitute a defense or justification, as a matter of law, to his cause of action for false arrest. The court stated that a person may be guilty of an offense and may plead guilty thereto, but the arrest without a warrant may still be illegal. The court of appeal also held that the fact that the complaint alleged that the defendant did not directly make the arrest, but that the arrest was made by an officer at the instance and instigation, or direction, of the defendant did not relieve the defendant from legal responsibility if the arrest was in fact unlawful (*77 Cal. App. 2d 713, 717)* .

[4] Additional Authorities

[a] Sustaining Demurrer as Improper

In *White v. County of Orange (1985) 166 Cal. App. 3d 566, 212 Cal. Rptr. 493* , the court of appeal held that a county was subject to liability for false imprisonment, assault, and intentional infliction of emotional distress arising out of its employee's wrongful detention of a motorist. Because no supporting affidavits were filed, contrary to *Code Civ. Proc. § 437c(b)*, the court treated the county's motion, filed as a motion for summary judgment, as one for judgment on the pleadings, which performs the same function as a general demurrer (*166 Cal. App. 3d 566, 569-570)* . The plaintiff alleged that she was improperly stopped by the defendant's employee, a sheriff's deputy, detained by him for several hours in his patrol vehicle, and threatened with murder and rape until she promised to go out with him, as well as being later stopped by him for a "goodnight kiss." There existed only a question of law--namely, whether the county was liable under *Gov. Code § 815.2(a)* for an action by its employee within the scope of his employment. *Under Alma W. v. Oakland Unified Sch. Dist. (1981) 123 Cal. App. 3d 133, 139-140, 176 Cal. Rptr. 287* , whether a tort is committed within the scope of employment depends on whether the act performed was required or incident to the employee's duties or whether the employer could have reasonably foreseen the employee's conduct in any event. In this case, the deputy's wrongful acts flowed from the entrustment to him of authority to ensure immediate compliance with his directions by members of the public and were an incidental and integral part of his duties. Therefore, the plaintiff stated a valid cause of action for vicarious liability against the county, requiring adjudication on the merits (*166 Cal. App. 3d 566, 570-572)* .

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10-103 California Points & Authorities § 103.77

§ 103.77 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for False Imprisonment--Action Based on Warrantless Arrest--Allegation of Unlawfulness of Arrest Not Required Where Arrest Made Without Warrant

[1] FORM

[*Caption. See § 103.74.*]

UNLAWFULNESS OF THE ARREST IS NOT AN ESSENTIAL ALLEGATION WHERE THE ARREST WAS MADE WITHOUT A WARRANT.

A. Allegation of Unlawfulness Unnecessary. Where an action for false imprisonment is based on an arrest without a warrant, all that need be alleged is the arrest without process, the imprisonment, and the damages, and it is not necessary to allege that the arrest was unlawful (*Muller v. Reagh (1963) 215 Cal. App. 2d 831, 836, 30 Cal. Rptr. 633*).

[*Optional*] **B. Defendant Has Burden of Proving Justification for Arrest.** On proof of the facts that there was an arrest without process, followed by imprisonment and damages, the burden is on defendant to prove justification for the arrest (*Cervantez v. J. C. Penney Co., Inc. (1979) 24 Cal. 3d 579, 592, 156 Cal. Rptr. 198, 595 P.2d 975*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to a general demurrer to a complaint for false imprisonment based on a warrantless arrest where the demurrer asserts that the complaint fails to state a cause of action because it fails to allege facts showing that the arrest of the plaintiff was unlawful, but where an allegation of unlawfulness of the arrest is unnecessary because the arrest was made without a warrant.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For a form of complaint for damages for false imprisonment based on an arrest by a peace officer without a warrant, see California Forms of Pleading and Practice, Ch. 257, *False Imprisonment* (Matthew Bender).

[3] Discussion of Authorities

[a] Allegation of Unlawfulness Unnecessary

In ***Muller v. Reagh*** *(1963) 215 Cal. App. 2d 831, 30 Cal. Rptr. 633* , the plaintiff sued 63 defendants, including the City and County of San Francisco, the sheriff, various jail personnel, and his former wife's attorney (Reagh) for false imprisonment, based on his arrest on an allegedly invalid warrant of attachment issued after plaintiff failed to appear at a show cause hearing. The trial court sustained Reagh's demurrer to plaintiff's amended complaint without leave to amend. The court of appeal affirmed. The gist of plaintiff's allegations concerned the invalidity of the warrant under which he was arrested. The court of appeal found that plaintiff did not sufficiently allege facts to show that the arrest was unlawful, a necessary allegation where the arrest is pursuant to warrant. In so holding, the court of appeal contrasted the pleading requirements for a cause of action for false imprisonment where the arrest was pursuant to warrant and one where the arrest is without a warrant. In the latter case, the court stated, it is not necessary to allege facts showing the unlawfulness of the arrest.

NOTE:

The overwhelming weight of authority is to the effect that where arrest is without a warrant or other court process, such as an order of commitment, plaintiff need only plead and prove that the arrest was without process. The burden is then on defendant to prove the existence of reasonable cause to arrest [*see Dragna v. White (1955) 45 Cal. 2d 469, 471, 289 P.2d 428* ; *Collins v. Los Angeles County (1966) 241 Cal. App. 2d 451, 456, 50 Cal. Rptr. 586* ; *Muller v. Reagh (1963) 215 Cal. App. 2d 831, 836, 30 Cal. Rptr. 633]* . Although one case does state that the burden is on the plaintiff to show lack of reasonable cause, this statement may be regarded as dictum, because in that case reasonable cause to make the warrantless arrest appeared as a matter of law [*see Wilson v. Los Angeles County (1971) 21 Cal. App. 3d 308, 315, 98 Cal. Rptr. 525]* .

[b] Defendant Has Burden of Proving Justification for Arrest

In ***Cervantez v. J. C. Penney Co., Inc.*** *(1979) 24 Cal. 3d 579, 156 Cal. Rptr. 198, 595 P.2d 975* , plaintiff sued defendant department store in part for false arrest and imprisonment. The jury returned a verdict for defendants. On appeal, the Supreme Court reversed the jury verdict. The Court noted that a cause of action for false imprisonment is stated where it is alleged that there was an arrest without process, followed by imprisonment and damages. On proof of

those facts, according to the Court, the burden is on defendant to prove justification for the arrest. The Court stated that considerations of both a practical and policy nature underlie this rule. The existence of justification is a matter which ordinarily lies peculiarly within defendant's knowledge and plaintiff would encounter almost insurmountable practical problems in attempting to prove the negative proposition of the nonexistence of any justification. The Court further noted that the rule serves to assure that official intermeddling is justified, as it is a serious matter to accuse someone of committing a crime and to arrest him or her without the protection of the warrant process (*24 Cal. 3d 579, 592)* .

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10-103 California Points & Authorities §§ 103.78-103.89

[Reserved]

§§ 103.78[Reserved]

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D. Arrest Pursuant to Warrant

10-103 California Points & Authorities § 103.90

§ 103.90 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for False Imprisonment--Action Based on Arrest Pursuant to Warrant--Judge Immune From Liability for Defective Issuance of Arrest Warrant

[1] FORM

[*Caption. See § 103.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION BECAUSE DEFENDANT JUDGE IS IMMUNE FROM LIABILITY FOR FALSE IMPRISONMENT IN CONNECTION WITH THE ISSUANCE OF AN ARREST WARRANT, EVEN IF DEFENDANT ACTED IN EXCESS OF HIS/HER JURISDICTION [AND IS ALLEGED TO HAVE ACTED MALICIOUSLY AND CORRUPTLY].

A. Objection by Demurrer. [*See § 103.20, Paragraph A.*]

B. Judicial Immunity. A judge is immune from liability for damages for false arrest and imprisonment for the issuance of an arrest warrant, even if he/she acted in excess of jurisdiction [and even if he/she is accused of acting maliciously or corruptly]. Judicial immunity for the acts of a judge in his/her official capacity applies unless the judge in question acts in the clear absence of all jurisdiction over the subject matter (*Paddleford v. Biscay (1971) 22 Cal. App. 3d 139, 143, 99 Cal. Rptr. 220*).

[*Optional*] **C. Error in Determination of Jurisdiction.** A judge is immune from liability for false imprisonment for the issuance of an arrest warrant, notwithstanding an error in the judge's determination of his/her jurisdiction to issue the warrant. Determination of jurisdiction is a judicial duty, and error in such determination is itself within the rule of judicial immunity. If a reasonable, although erroneous, ground for the assumption of jurisdiction appears, the immunity applies (*Taliaferro v. Contra Costa County (1960) 182 Cal. App. 2d 587, 593, 6 Cal. Rptr. 231*).

[*Optional*] **D. Issuance of Warrant on Insufficient Complaint.** A judge is not liable for damages for false imprisonment for issuing an arrest warrant based on a complaint wholly insufficient to charge the crime intended to be

charged, where his/her action was based on an erroneous determination as to the sufficiency of the complaint (*Platz v. Marion (1917) 35 Cal. App 241, 243, 169 P. 697*).

[*Optional*] **E. Lack of Statutory Compliance.** A judge is not liable for false imprisonment for issuance of an arrest warrant in a manner not complying with the statutes governing its issuance, provided the judge has subject matter jurisdiction to issue the warrant [even if he/she acts maliciously or corruptly] (*Paddleford v. Biscay (1971) 22 Cal. App. 3d 139, 143-144, 99 Cal. Rptr. 220*).

[*Optional*] **F. Inferior Court Judges Immune.** The rule of judicial immunity is the same whether the acts of a judge of an inferior court or one of general jurisdiction are involved (*Taliaferro v. Contra Costa County (1960) 182 Cal. App. 2d 587, 592, 6 Cal. Rptr. 231*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a demurrer to a complaint for damages for false imprisonment where the demurrer asserts that the complaint fails to state facts sufficient to constitute a cause of action in that the defendant is a judge who is protected from liability for acts in his or her official capacity by the doctrine of judicial immunity.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

With appropriate modifications, these points and authorities may be used to support a motion for summary judgment [*Code Civ. Proc. § 437c*; *see Paddleford v. Biscay (1971) 22 Cal. App. 3d 139, 99 Cal. Rptr. 220]* .

[3] Discussion of Authorities

[a] Judicial Immunity

In ***Paddleford v. Biscay*** *(1971) 22 Cal. App. 3d 139, 99 Cal. Rptr. 220* , the plaintiff brought an action for false imprisonment, assault and battery, and denial of bail against a municipal court judge who issued an invalid misdemeanor arrest warrant which improperly allowed night service in violation of the provisions of *Penal Code § 840* then in effect. The trial court entered a summary judgment dismissing the complaint, concluding that, as a matter of law, the defendant judge was not liable in his judicial capacity for the acts described. After the state court judgment became final, a judgment of nonsuit was entered against the plaintiff in federal district court on a substantially similar cause of action under the federal Civil Rights Act. The court of appeal affirmed the state court summary judgment. The court held, first, that the federal judgment of nonsuit formed the basis of a collateral estoppel against the plaintiff, even though it was not final until after an appeal was taken from the state trial court judgment. Second, the court held that the

arrest warrant was not in compliance with statutory requirements then in effect, in that it allowed night service of a misdemeanor arrest warrant without being personally indorsed by the judge [*see Penal Code § 840*]. However, the judge was not acting in the complete absence of jurisdiction, but only in excess of his jurisdiction, and was therefore protected from civil liability for false imprisonment by the doctrine of judicial immunity.

NOTE:
Penal Code § 840 now requires a showing of good cause before a judge may authorize night service of a misdemeanor arrest warrant.

[b] Error in Determination of Jurisdiction

In ***Taliaferro v. Contra Costa County*** *(1960) 182 Cal. App. 2d 587, 6 Cal. Rptr. 231* , the plaintiff brought an action for damages for false imprisonment against Contra Costa County and against a judicial district court judge of that county. The action was based on the judge's issuance of an arrest warrant allegedly without jurisdiction and for motives of personal animosity and revenge. The trial court entered judgment for the judge after sustaining his demurrer to the complaint without leave to amend. The plaintiff appealed from the judgment and the court of appeal affirmed. The plaintiff, a resident of Contra Costa County, had been arrested on a warrant issued by the judge on a criminal complaint charging him with a misdemeanor under *Lab. Code § 93* for willfully ignoring a subpoena duces tecum requiring his appearance at a Labor Commissioner's hearing in Alameda County. He was convicted in a criminal proceeding in Contra Costa County, but the judgment of conviction was ultimately reversed by the superior court appellate department.

The court of appeal suggested that under the circumstances the defendant judge may not have had jurisdiction to issue the warrant. However, the court noted that although "failure to appear" at a hearing can only occur where the hearing is scheduled, "wilfully ignoring" a subpoena might have been interpreted as a personal act not confined to the forum of appearance. The allegation of the defendant's residence in Contra Costa County, and its geographical proximity to Oakland, furnished reasonable grounds for the defendant judge to believe that the criminal act denounced in the complaint had occurred in Contra Costa County and that the filing of the complaint demanded the exercise of the magisterial power. Given the fact that the judge had reasonable grounds for belief that jurisdiction to issue the warrant existed, he was immune from liability in connection with its issuance. Plaintiff's allegations of malice and corrupt motives were therefore treated as surplusage. The court held that a judge is immune from civil liability for every act performed within the general scope of his official duties, even though it is charged that the act was a malicious personal tort. An error of judgment as to jurisdiction does not expose the judge to civil liability as long as there were reasonable grounds to believe that jurisdiction existed (*182 Cal. App. 2d 587, 593)* .

NOTE:
Lab. Code § 93, the subpoena enforcement statute discussed in *Taliaferro v. Contra Costa County (1960) 182 Cal. App. 2d 587, 6 Cal. Rptr. 231* , was subsequently held to be unenforceable as a violation of *U.S. Const. amend. IV* and *Cal. Const. art. I, § 13*, because it provides no judicial procedure to test the validity of the subpoena except by the subpoenaed party's refusing to comply and thereby committing a misdemeanor [*California Restaurant Assn. v. Henning (1985) 173 Cal. App. 3d 1069, 1074-1077, 219 Cal. Rptr. 630]* .

[c] Issuance of Warrant of Insufficient Complaint

In ***Platz v. Marion*** *(1917) 35 Cal. App 241, 169 P. 697* , the plaintiff, an attorney, sued a justice of the peace for damages for false imprisonment in connection with the issuance of an arrest warrant. Defendant's demurrer to the amended complaint was sustained, and a judgment was entered against the plaintiff. The arrest warrant was issued on a criminal complaint which attempted to charge the crime of common barratry (the persistent incitement of lawsuits). However, it appeared from the face of the complaint that it was wholly insufficient to charge the crime alleged and in fact accused the attorney of activities merely amounting to the exhaustion of available legal remedies in relieving his

client of the effects of a judgment. The court of appeal nevertheless upheld the judgment in favor of the defendant. The court stated that the action of the defendant in issuing the arrest warrant based on an erroneous determination as to the sufficiency of the criminal complaint, in the absence of any claim that the justice of the peace was actuated by malice or corrupt motives, was protected from being the basis of civil liability by the doctrine of judicial immunity (*35 Cal. App 241, 243)* .

[d] Lack of Statutory Compliance

Paddleford v. Biscay *(1971) 22 Cal. App. 3d 139, 99 Cal. Rptr. 220* , is discussed in *§ 103.90[3][a]*.

[e] Inferior Court Judges Immune

Taliaferro v. Contra Costa County *(1960) 182 Cal. App. 2d 587, 6 Cal. Rptr. 231* , is discussed in *§ 103.90[3][b]*.

[4] Additional Authorities

[a] Judicial Immunity

In *Perry v. Meikle (1951) 102 Cal. App. 2d 602, 228 P.2d 17* , plaintiff sued several defendants for false imprisonment and conspiracy, including a superior court judge who had ordered her imprisoned for contempt. The trial court sustained demurrers of certain defendants without leave to amend and entered judgment for those defendants. The court of appeal affirmed. It stated that a judge is immune from liability for judicial acts, even when such acts are in excess of the judge's jurisdiction and are alleged to have been done maliciously and corruptly. It concluded that no liability could be imposed on the judge, or on the other defendants, in connection with an order made by a judge in a matter over which he had jurisdiction, and where the proceeding was regular in all respects.

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10-103 California Points & Authorities § 103.91

§ 103.91 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for False Imprisonment--Action Based on Detention of Juvenile--Juvenile Court Judge Immune From Liability for Detention of Minor

[1] FORM

[*Caption. See § 103.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION BECAUSE DEFENDANT JUVENILE COURT JUDGE IS IMMUNE FROM LIABILITY FOR FALSE IMPRISONMENT FOR THE DETENTION OF A MINOR.

A. Objection by Demurrer. [*See § 103.20, Paragraph A.*]

B. Immunity of Juvenile Court Judges. A judge of the juvenile court is protected by the doctrine of judicial immunity from liability for false imprisonment in connection with the detention of a minor, so long as he/she acts within the general scope of his/her powers and in an honest belief that his/her actions are legally warranted, even if he/she commits an error of judgment in acting as he/she does (*Singer v. Bogen (1957) 147 Cal. App. 2d 515, 524-525, 305 P.2d 893*).

[*Optional*] **C. Effect of Procedural Irregularities.** If a juvenile court judge acts within the scope of the general subject matter over which he/she has been given power, procedural irregularities in connection with the detention of a minor are not acts "without jurisdiction" so as to remove the protection of judicial immunity and subject the judge to liability for false imprisonment (*Singer v. Bogen (1957) 147 Cal. App. 2d 515, 525, 305 P.2d 893*).

[*Optional*] **D. Effect of Habeas Corpus Release.** A decision in a habeas corpus proceeding that a minor should be released from the custody of the juvenile court does not amount to a finding that the judge who ordered the minor's detention was acting without jurisdiction in the sense that it would take him/her out of the protection of the immunity rules and subject him/her to civil liability for false imprisonment (*Singer v. Bogen (1957) 147 Cal. App. 2d 515, 525, 305 P.2d 893*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a demurrer to a complaint for damages for false imprisonment where the demurrer asserts that the complaint fails to state facts sufficient to constitute a cause of action in that the defendant is a juvenile court judge who is immune from liability for false imprisonment in connection with the detention of a minor.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

With appropriate modifications, these points and authorities may be used to support a motion for summary judgment [*Code Civ. Proc. § 437c*] in an action for damages for false imprisonment against a juvenile court judge in connection with the detention of a minor.

[3] Discussion of Authorities

[a] Immunity of Juvenile Court Judges

In ***Singer v. Bogen*** *(1957) 147 Cal. App. 2d 515, 305 P.2d 893* , an eight-year-old child and her parents brought an action for false imprisonment against two juvenile court judges. The trial court ordered a dismissal of the action after sustaining the defendant's demurrer to the amended complaint. The plaintiffs appealed and the court of appeal affirmed the judgment. The amended complaint alleged that one judge ordered the child detained in juvenile hall without a prior hearing, and that a subsequent predetention hearing was held without proper citation on the child's parents. As to the other judge, it was alleged that he had ordered the child detained in juvenile hall pursuant to a written request of the district attorney at a time before any petition was filed to have the child declared a ward of the juvenile court. The district attorney requested that the child be detained as a material witness in a trial against her grandfather. It was feared that her parents, who did not wish the grandfather to be prosecuted, might try to influence or intimidate the child. The child was subsequently ordered released from custody of the juvenile court in a habeas corpus proceeding.

The court of appeal held that the juvenile court judges were protected from civil liability for their actions by the doctrine of judicial immunity. It stated that the test of immunity from civil suit for damages on the part of a judicial officer is not whether he or she committed an error of judgment in acting as he or she did, but whether the act in question was within the general scope of the officer's judicial powers and whether he or she acted in an honest belief that he or she was legally warranted in doing it. In this case, the judges were acting within the scope of the general subject matter over which they were given power. The plaintiff's allegations regarding procedural irregularities, namely the lack of timely filing of a petition and citation and the irregularity of the grounds on which the district attorney sought the detention, were not sufficient to characterize the action of the judges as being "without jurisdiction" so as to remove the protection

of the immunity rules. Further, the child's release on habeas corpus did not constitute a prior finding that the judges had acted without jurisdiction so as to deprive them of judicial immunity in a civil suit.

[b] Effect of Procedural Irregularities

Singer v. Bogen *(1957) 147 Cal. App. 2d 515, 305 P.2d 893* , is discussed in *§ 103.91[3][a]*.

[c] Effect of Habeas Corpus Release

Singer v. Bogen *(1957) 147 Cal. App. 2d 515, 305 P.2d 893* , is discussed in *§ 103.91[3][a]*.

California Points & Authorities

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
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PART II. FORMS
D. Arrest Pursuant to Warrant

10-103 California Points & Authorities § 103.92

§ 103.92 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for False Imprisonment--Action Based on Arrest Pursuant to Warrant--Private Citizen Not Liable for Providing Information in Good Faith Leading to Issuance of Arrest Warrant

[1] FORM

[*Caption. See § 103.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE CAUSE OF ACTION IN THAT A PRIVATE CITIZEN IS NOT LIABLE FOR PROVIDING INFORMATION IN GOOD FAITH LEADING TO THE ISSUANCE OF AN ARREST WARRANT.

A. Objection by Demurrer. [*See § 103.20, Paragraph A.*]

B. Immunity of Private Citizen. Where a private citizen reports the facts of an alleged offense to a magistrate, takes no active part in the arrest, but leaves the matter to the public officials, and no bad faith appears, he/she is not liable for false imprisonment merely because the facts he/she has stated to the magistrate do not constitute a public offense (*Gogue v. MacDonald (1950) 35 Cal. 2d 482, 487, 218 P.2d 542*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a general demurrer to the complaint in an action for false imprisonment against a private citizen who gave facts to a magistrate resulting in the issuance of a warrant for the plaintiff's arrest where the demurrer asserts that the defendant is immune from liability for good faith presentation of facts to the magistrate, notwithstanding the fact that the information presented does not constitute a public offense.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For a form of affirmative defense that the defendant private citizen gave information to the police in good faith, see California Forms of Pleading and Practice, Ch. 257, *False Imprisonment* (Matthew Bender).

[3] Discussion of Authorities

[a] Immunity of Private Citizen

In ***Gogue v. MacDonald*** *(1950) 35 Cal. 2d 482, 218 P.2d 542* , the plaintiff brought an action for false imprisonment against his former landlord who had supplied information to a magistrate which resulted in the issuance of a warrant for his arrest and in his temporary detention. The trial court found that the complaint failed to state a cause of action, and entered judgment for the defendant. The complaint alleged that the defendant went before a justice of the peace and complained that the plaintiff had removed himself and his belongings from the defendant's cottage without paying rent due. The justice of the peace prepared a criminal complaint and issued an arrest warrant. The complaint and warrant were based on an alleged violation of *Penal Code § 537* which at that time made it a crime to remove belongings without payment was of rent due for certain furnished accommodations, The plaintiff arrested, detained, and the charge was subsequently dismissed. Plaintiff further alleged that the facts alleged by the defendant and made the basis of the criminal complaint and the arrest warrant did not constitute the designated, or any, penal offense.

The Supreme Court sustained the judgment of the trial court. It held that a private citizen is protected from liability for false imprisonment where he or she does nothing more than state facts in good faith to the magistrate who then issues a warrant for arrest, even though the facts are insufficient to show that a crime has been committed. The Court reasoned that to hold the complainant liable on the basis of the magistrate's mistake in determining that a crime has been committed would be unjust (*35 Cal. 2d 482, 487)* .

[4] Additional Authorities

[a] Immunity of Private Citizen

Cummings v. Farmers Ins. Exch. (1988) 202 Cal. App. 3d 1407, 249 Cal. Rptr. 568 , involved an action against an insurance company for false imprisonment. The defendant had supplied police with information concerning a false claim filed by the plaintiff. The police arrested the plaintiff for filing the false claim, but the case was eventually dismissed. The court of appeal affirmed the trial court's grant of summary judgment in the defendant's favor, stating that a private person does not become liable for false imprisonment when that person gives information, even mistaken information, in good faith to the proper authorities, even if the information is the principal cause of the plaintiff's

imprisonment (*202 Cal. App. 3d 1407, 1422)* .

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10-103 California Points & Authorities § 103.93

§ 103.93 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for False Imprisonment--Action Based on Arrest Pursuant to Warrant--Failure to Allege Facts Showing Warrant Invalid on Its Face

[1] FORM

[*Caption. See § 103.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT FAILS TO ALLEGE FACTS SHOWING WARRANT INVALID ON ITS FACE.

A. Objection by Demurrer. [*See § 103.20, Paragraph A.*]

B. Necessary Allegations Where Arrest Pursuant to Warrant. To state a cause of action for false imprisonment based on an arrest pursuant to warrant, the plaintiff must allege the unlawfulness of the arrest by pleading facts to show that the warrant was invalid on its face (*Muller v. Reagh (1963) 215 Cal. App. 2d 831, 837, 30 Cal. Rptr. 633*).

[*Optional*] **C. Insufficient Allegations.** Allegations such as that the warrant was "void," "illegal," "unauthorized," or "void on its face," are conclusions of law and do not fulfill plaintiff's burden of pleading facts to show the facial invalidity of the legal process (*Muller v. Reagh (1963) 215 Cal. App. 2d 831, 837, 30 Cal. Rptr. 633*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a general demurrer to a complaint in an action for false imprisonment where the demurrer asserts that the complaint fails to state a cause of action in that the arrest was pursuant to warrant and the complaint fails to show the unlawfulness of the arrest by alleging facts demonstrating that the warrant was void on its face.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Points and Authorities

For a memorandum of points and authorities which may be submitted in support of a demurrer to a complaint on the ground that a police officer is immune from liability for false imprisonment based on the execution of a facially valid warrant of arrest, see *§ 103.94*.

[3] Discussion of Authorities

[a] Necessary Allegations Where Arrest Pursuant to Warrant

Muller v. Reagh *(1963) 215 Cal. App. 2d 831, 30 Cal. Rptr. 633* , is discussed in *§ 103.94[3][b]*.

[b] Insufficient Allegations

Muller v. Reagh *(1963) 215 Cal. App. 2d 831, 30 Cal. Rptr. 633* , is discussed in *§ 103.94[3][b]*.

[4] Additional Authorities

[a] Necessary Allegations Where Arrest Pursuant to Warrant

Scannell v. County of Riverside (1984) 152 Cal. App. 3d 596, 199 Cal. Rptr. 644 , is discussed in *§ 103.20[4][a]*. As an additional ground for upholding the trial court's sustaining of general demurrers to the plaintiff's causes of action for false imprisonment, the court held that the plaintiff had not alleged any facts showing the invalidity of his arrest pursuant to complaint and warrant. Therefore, there was no allegation that the plaintiff's imprisonment was without color of legal authority, an essential element necessary to state a cause of action for false imprisonment (*152 Cal. App. 3d 596, 607-608, 615)* .

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10-103 California Points & Authorities § 103.94

§ 103.94 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for False Imprisonment--Action Based on Arrest Pursuant to Warrant--Peace Officer and Public Entity Employing Him/Her Immune From Liability for Execution of Facially Valid Arrest Warrant or Other Process [Civ. Code § 43.55; Code Civ. Proc. § 262.1]

[1] FORM

[*Caption. See § 103.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION BECAUSE A PEACE OFFICER [AND THE PUBLIC] ENTITY EMPLOYING HIM/HER] IS/ARE IMMUNE FROM LIABILITY FOR FALSE IMPRISONMENT IF THE OFFICER, WITHOUT MALICE, MAKES AN ARREST PURSUANT TO _____ [A FACIALLY VALID WARRANT OF ARREST *or* FACIALLY VALID PROCESS].

A. Objection by Demurrer. [*See § 103.20, Paragraph A.*]

B. Immunity of Peace Officer. A peace officer is immune from liability for false arrest and imprisonment if, without malice, he/she makes an arrest pursuant to process that is regular on its face (*Civ. Code § 43.55(a)*; *Vallindras v. Massachusetts Bonding & Ins. Co. (1954) 42 Cal. 2d 149, 153-154, 265 P.2d 907* ; *Collins v. City & County of San Francisco (1975) 50 Cal. App. 3d 671, 676-678, 123 Cal. Rptr. 525*).

C. Facial Regularity of Process. Process is regular on its face when it proceeds from a court, officer, or body having authority of law to issue process of that nature, and when it is legal in form and contains nothing to notify or fairly apprise anyone that it was issued without authority (*Vallindras v. Massachusetts Bonding & Ins. Co. (1954) 42 Cal. 2d 149, 153-154, 265 P.2d 907* ; *Muller v. Reagh (1963) 215 Cal. App. 2d 831, 837-838, 30 Cal. Rptr. 633*).

D. Determination of Facial Regularity. Facial regularity of process is not to be determined on the basis of scrutiny by a trained legal mind nor to be judged in the light of facts outside its provisions that the officer may know. Unless there is a clear absence of jurisdiction on the part of the court or magistrate issuing the process, it is sufficient if on its face it

appears to be valid in the judgment of an ordinarily intelligent and informed lay person (*Vallindras v. Massachusetts Bonding & Ins. Co. (1954) 42 Cal. 2d 149, 154, 265 P.2d 907* ; *Lopez v. City of Oxnard (1989) 207 Cal. App. 3d 1, 10, 254 Cal. Rptr. 556*).

[*Optional*] **E. Defects in Issuance Proceeding.** A peace officer is not liable for the execution of process which is valid on its face, irrespective of any defects in the proceedings leading up to its issuance (*Code Civ. Proc. § 262.1*; *Barrier v. Alexander (1950) 100 Cal. App. 2d 497, 501, 224 P.2d 436*).

[*Optional*] **F. Knowledge of Officer.** Knowledge, imputed or actual, on the part of the arresting officer, of facts outside the warrant is not sufficient ground for basing a cause of action for false imprisonment if the warrant is regular on its face (*Lopez v. City of Oxnard (1989) 207 Cal. App. 3d 1, 10, 254 Cal. Rptr. 556* ; *Herndon v. Marin County (1972) 25 Cal. App. 3d 933, 936, 102 Cal. Rptr. 221 , disapproved on other grounds, Sullivan v. County of Los Angeles (1974) 12 Cal. 3d 710, 722, 117 Cal. Rptr. 241, 527 P.2d 865*).

[*Optional*] **G. Determination of Invalidity on Habeas Corpus.** A warrant may be facially valid for purposes of providing the arresting officer with immunity for its execution in a civil suit, notwithstanding the warrant was found invalid in a criminal habeas corpus proceeding in a higher court, if the warrant would have appeared valid to an ordinarily intelligent and informed lay person (*Vallindras v. Massachusetts Bonding & Ins. Co. (1954) 42 Cal. 2d 149, 151, 154, 265 P.2d 907*).

[*Optional*] **H. Malice of Officer.** An allegation that a peace officer executing an arrest warrant regular on its face knew that the warrant was improperly issued, but failed to contact the judge who issued the warrant[, although requested to do so by the person arrested], is not a sufficient allegation of malice to remove the immunity provided by *Section 43.55 of the Civil Code*, which exempts arresting officers from liability if the arrest warrant is regular on its face and he/she acts without malice (*Herndon v. Marin County (1972) 25 Cal. App. 3d 933, 936-937, 102 Cal. Rptr. 221 , disapproved on other grounds, Sullivan v. County of Los Angeles (1974) 12 Cal. 3d 710, 722, 117 Cal. Rptr. 241, 527 P.2d 865*).

[*Optional*] **I. Jurisdiction of Person.** It is not necessary that the process under which a sheriff acts should show jurisdiction of the person to afford him/her protection and justification for his/her acts in executing it (*Vallindras v. Massachusetts Bonding & Ins. Co. (1954) 42 Cal. 2d 149, 154, 265 P.2d 907*).

[*Optional*] **J. Immunity of Public Entity.** If a peace officer is immune from liability for false imprisonment based on an arrest pursuant to a facially valid warrant, the public entity employing him/her is likewise immune from liability (*Gov. Code § 815.2(b)*; *Collins v. City & County of San Francisco (1975) 50 Cal. App. 3d 671, 673-674, 123 Cal. Rptr. 525*).

[*Optional*] **K. Judicial Order Entered Into Automated Warrant System May Be "Regular On Its Face."** A "warrant deemed regular on its face" encompasses not only a paper arrest warrant issued pursuant to a judicial order, but also a judicial order entered into an automated warrant system by law enforcement or court personnel authorized to make such entries at or near the time the judicial order is made (*Civ. Code § 43.55(b)*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a general demurrer to the complaint in an action against a peace officer and/or the public entity employing him or her for damages for false imprisonment where the demurrer asserts that the complaint fails to state a cause of action because the peace officer is immune as a matter of law from liability for execution, without malice, of an arrest warrant or other process regular on its face.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

With appropriate modifications, these points and authorities may be used to support a motion for summary judgment in an action for damages for false imprisonment against a peace officer who arrested the plaintiff pursuant to a facially regular warrant or other process.

[3] Discussion of Authorities

[a] Immunity of Peace Officer

Vallindras v. Massachusetts Bonding & Ins. Co. *(1954) 42 Cal. 2d 149, 265 P.2d 907* , was an action for false imprisonment against a sheriff and his sureties based on the execution of an order of commitment for contempt for failure to pay child support. The trial court entered a judgment for the defendants after general demurrers to plaintiff's complaint were sustained without leave to amend. The Supreme Court affirmed. The complaint alleged that the contempt order was void on its face and that, therefore, in executing it, the sheriff acted unlawfully. In support of his theory that the contempt order was facially void, the plaintiff pointed out that in an independent habeas corpus proceeding he had been ordered released from custody because the contempt order did not meet the law's requirements in that it did not specify the amount of money which the plaintiff was required to pay to purge himself from contempt and secure his release. The Supreme Court held that the standards which were applied in determining the validity of the contempt order for the purpose of habeas corpus were not to be applied in determining whether the order was regular on its face, so as to shield the sheriff from civil liability in executing it. The Court held that process is fair on its face if it proceeds from a court having jurisdiction of the subject matter and contains nothing which ought reasonably to apprise the officer that it was issued without authority. It is not necessary that the process under which a sheriff acts should show jurisdiction of the person to afford him or her protection and justification for his or her acts in executing it. When a sheriff receives an order directing him or her to imprison a person for contempt, while obliged to use reasonable diligence to perform the duties of his or her office in a lawful manner, the sheriff is not bound at his or her peril to anticipate that a court higher than the one which made the order will not uphold its validity. The court further noted that it is the duty of a sheriff to execute the orders of the court unless they are patently irregular and void.

In ***Collins v. City & County of San Francisco*** *(1975) 50 Cal. App. 3d 671, 123 Cal. Rptr. 525* , the plaintiff sued the City and County of San Francisco for damages for false arrest and imprisonment. The trial court granted a summary judgment in favor of the city and the court of appeal affirmed. The complaint alleged that the plaintiff had been arrested on three misdemeanor charges and that the municipal court dismissed two of the charges. Pursuant to *Penal Code § 1387*, the dismissal of the two charges barred further prosecution on them. Nevertheless, the arresting office refiled one of the dismissed charges, and a warrant was sworn out for the plaintiff's arrest. Later the plaintiff was arrested on the warrant by another officer, kept in custody overnight, and released. Subsequently, the charges were dismissed. The plaintiff sued the City and County of San Francisco, alleging that the city was liable to him in damages for false arrest and imprisonment based on the culpable conduct of the first arresting officer who refiled the barred charge and whose conduct thus resulted in plaintiff's subsequent arrest. The court of appeal held that the city's motion for summary

judgment was properly granted. Under *Gov. Code § 815.2*, the city was liable only if its employee, the first arresting officer, was liable to the plaintiff. As a matter of law, the complaint showed that the arrest at issue was under due forms of law and under color of legal authority. Thus it could not form the basis of a cause of action for false arrest. The facts alleged in the complaint, namely the refiling of a complaint on a barred misdemeanor charge, which resulted in the issuance of a warrant and the subsequent arrest of the plaintiff, might have formed the basis of the cause of action for malicious prosecution. However, under *Gov. Code § 821.6*, public employees, including police officers, are immune from liability for malicious prosecution. The police officer being immune, the city, his public employer, was also immune, and thus the city's motion for summary judgment was properly granted.

NOTE:

Collins v. City & County of San Francisco must be distinguished from *Sullivan v. County of Los Angeles (1974) 12 Cal. 3d 715, 722, 117 Cal. Rptr. 241, 527 P.2d 865* [*see § 103.113*], in which the Supreme Court held that if county clerks fail to keep proper records indicating that a person has already served a sentence or to inform the judge of that fact, they may be liable for false imprisonment if the judge then issues a warrant based on the misinformation.

[b] Facial Regularity of Process

Vallindras v. Massachusetts Bonding & Ins. Co. *(1954) 42 Cal. 2d 149, 265 P.2d 907* , is discussed in *§ 103.94[3][a]*.

In ***Muller v. Reagh*** *(1963) 215 Cal. App. 2d 831, 30 Cal. Rptr. 633* , the plaintiff sued 63 defendants, including the City and County of San Francisco, the sheriff, various jail personnel, and his former wife's attorney (Reagh) for false imprisonment, based on his arrest on an allegedly invalid warrant of attachment issued after plaintiff failed to appear at a show cause hearing. The trial court sustained Regah's demurrer to plaintiff's amended complaint without leave to amend and entered judgment. The gist of plaintiff's allegations concerned the invalidity of the warrant under which he was arrested. He alleged, essentially, that the warrant was in mimeographed form, with the endorsement filled in by defendant Reach, and signed by the judge. In ordering the issuance of the bench warrant, the judge had made a minute order referring to the payment of bail in cash, surety bonds, or personal bonds. The endorsement on the warrant omitted reference to surety bonds. The court of appeal affirmed the judgment of the trial court, basing its decision on the rule that where a cause of action for false imprisonment is based on an arrest pursuant to warrant, the complaint must allege facts which show that the warrant was invalid on its face. The court of appeal found that plaintiff's allegations of the invalidity of the warrant were insufficient to state a cause of action for false imprisonment. The court pointed out that allegations that the warrant was "void," "unlawful," "illegal," or "unauthorized," are mere conclusions of law and not allegations of act. The court went on to state that process is regular on its face when it proceeds from a court, officer, or body having authority of law to issue process of that nature, and when it is legal in form, and contains nothing to notify or fairly apprise anyone that it is issued without authority. A warrant prepared by the attorney and signed by the court is as much the order of the ourt as though the judge of the court had written it in its final form. The endorsement on the warrant regarding bail was in conformity with the statute governing bail in such cases [*Code Civ. Proc. § 1215*], which statute contained no reference to surety bonds. It was therefore immaterial that the surety bond provision contained in the minute order did not appear in the endorsement on the warrant.

[c] Determination of Facial Regularity

In ***Lopez v. City of Oxnard*** *(1989) 207 Cal. App. 3d 1, 254 Cal. Rptr. 556* , the plaintiff was arrested three times on the same warrant that listed plaintiff's name, birth date, address, and physical description. However, plaintiff was not the person wanted on the warrant. After the first arrest and release, the court gave the plaintiff a "disposition sheet" for him to carry and show stating that plaintiff was not the person named in the warrant. On the second arrest, plaintiff showed the disposition sheet but was held for three days before being released. Plaintiff was released several hours after the third arrest. Plaintiff sued various public entities and their employees for false imprisonment and other torts based on

the arrests and the refusal of the arresting officers and jail personnel to verify the validity of the court order plaintiff showed them. The trial court sustained demurrers to the complaint and dismissed the action. The court of appeal affirmed.

The court stated that the defendants did not breach any duty in refusing to consider the disposition sheet shown to them (*207 Cal. App. 3d 1, 5)* . The court further stated that it is not the function of an arresting officer to investigate the procedure by which the warrant was issued, nor is it the officer's duty to consider the propriety of the issuance if the warrant is regular on its face (*207 Cal. App. 3d 1, 8)* . Because the warrant accurately described the plaintiff and included his name and address and other identifying information, the arresting officers, sheriff, and jail personnel did not act without reasonable precaution and were entitled to rely on the orders, which were apparently valid (*207 Cal. App. 3d 1, 8-10)* .

The factual background of ***Vallindras v. Massachusetts Bonding & Ins. Co.*** *(1954) 42 Cal. 2d 149, 265 P.2d 907* , is discussed in *§ 103.94[3][a]*. In that case, the Supreme Court held that the facial regularity of process is not to be determined on the basis of scrutiny by a trained legal mind, nor to be judged in the light of facts outside its provisions which the officer may know, and that unless there is a clear absence of jurisdiction on the part of the court or magistrate issuing the process, it is sufficient if upon its face it appears to be valid in the judgment of an ordinarily intelligent and informed lay person.

[d] Defects in Issuance Proceeding

In ***Barrier v. Alexander*** *(1950) 100 Cal. App. 2d 497, 224 P.2d 436* , the plaintiff sued a highway patrol officer for false imprisonment and malicious prosecution based on the plaintiff's arrest pursuant to warrant for the offense of reckless driving [former Veh. Code § 505 (*now see Veh. Code §§ 23103, 23104*)]. The trial court sustained defendant's demurrer to plaintiff's second amended complaint without leave to amend and entered judgment in favor of the defendant. Plaintiff alleged that his arrest and imprisonment were unlawful and void based on alleged defects in the proceedings in which the arrest warrant was issued. It appeared that the plaintiff was not originally arrested, but had been notified to appear in court, did appear, and was subsequently released on his own recognizance because the complaint was defective. An amended complaint was thereafter filed, a warrant of arrest was issued, and the plaintiff was arrested.

Plaintiff alleged that his release on his own recognizance when the original complaint was dismissed deprived the court of jurisdiction to issue a warrant of arrest on the filing of the amended complaint. The court of appeal held that whatever may have been the defects in the proceedings leading up to the issuance of the warrant, these could not subject the defendant highway patrol officer to liability for false imprisonment for execution of the warrant, under the general rule that a peace officer is not liable for the service of a warrant which is valid on its face, irrespective of any defects in the proceedings leading up to its issuance. The court further held that the plaintiff's amended complaint did not contain facts sufficient to state a cause of action against the defendant for malicious prosecution, because it did not state that the proceedings upon which it was based had finally terminated in favor of the plaintiff, one of the essential elements of a complaint for malicious prosecution.

NOTE:

Although the offense for which the plaintiff in *Barrier v. Alexander* was arrested was a misdemeanor, under the provisions of former Penal Code § 1387, effective in 1950, dismissal of a misdemeanor charge for the purpose of amending a defective complaint did not bar further prosecution for the charge. Under present *Penal Code § 1387*, dismissal of a misdemeanor charge bars further prosecution for the charge.

[e] Knowledge of Officer

The factual background of ***Lopez v. City of Oxnard*** *(1989) 207 Cal. App. 3d 1, 254 Cal. Rptr. 556* is discussed in *§*

103.94[3][c]. The court held that although a sheriff may be liable for false imprisonment if he or she knows the imprisonment is unlawful or if he or she is put on official notice sufficient to require investigation of its validity, such liability generally applies only in a situation in which the sheriff is not acting pursuant to a warrant valid on its face. The court held that the sheriff in the case before it was not liable for simply refusing to look behind a paper handed to him by an arrestee. The sheriff had violated no statute, and the arrestee would not have languished in jail, but would have had to appear before a magistrate within two days of the arrest (*207 Cal. App. 3d 1, 10-11)* .

Herndon v. Marin County *(1972) 25 Cal. App. 3d 933, 102 Cal. Rptr. 221* , was an action for false imprisonment against the County of Marin, the county sheriff, and a deputy sheriff following the plaintiff's arrest on a warrant. There was no allegation in the complaint that the warrant was irregular on its face. The trial court entered a judgment of dismissal following an order sustaining the defendant's demurrer to the complaint without leave to amend. The plaintiff had been cited for two traffic violations. On a nonjury trial, he was found not guilty of one and guilty of the other. He paid his fine. Subsequently, a new complaint was negligently filed, and a warrant was issued for the plaintiff's arrest on the same charges. Plaintiff was arrested by the deputy sheriff who had been a witness at the previous trial on the same charges. In his complaint, plaintiff alleged that the deputy sheriff was liable for false imprisonment, notwithstanding the fact that the warrant was regular on its face, because he knew that a final judicial determination of all aspects of the charge had been made and knew or should have known that the warrant was improperly issued.

The court of appeal sustained the judgment in favor of defendants. *Civ. Code § 43.55* grants a peace officer immunity from liability for false imprisonment in connection with the execution of an arrest warrant regular on its face, provided he or she acts without malice and in the reasonable belief that the person arrested is the person named in the warrant. The court held that no cause of action for false imprisonment was stated based on the deputy's alleged knowledge of facts outside the record showing that the warrant was improperly issued. The court stated that it is not the duty of an arresting officer to investigate the procedure which led to the issuance of a facially regular warrant, nor is there any obligation on his or her part to pass judgment on the judicial act of issuing the warrant.

Plaintiff also alleged that the county was liable for false imprisonment based on its employee's negligence in giving faulty information to the judge who issued the arrest warrant. Although the court of appeal found that the county was immune from liability on this ground under the provisions of *Gov. Code § 821.6* (public employee immunity for initiation of judicial proceeding) the Supreme Court subsequently disapproved this and similar holdings in the case of *Sullivan v. County of Los Angeles (1974) 12 Cal. 3d 710, 117 Cal. Rptr. 241, 527 P.2d 865* .

[f] Determination of Invalidity on Habeas Corpus

Vallindras v. Massachusetts Bonding & Ins. Co. *(1954) 42 Cal. 2d 149, 265 P.2d 907* , is discussed in *§ 103.67[3][a]*.

[g] Malice of Officer

The factual background of ***Herndon v. Marin County*** *(1972) 25 Cal. App. 3d 933* , *102 Cal. Rptr. 221* , is discussed in *§ 103.94[3][e]*. The court of appeal held that an allegation that the peace officer executing an arrest warrant regular on its face knew that the warrant was improperly issued, but failed to contact the judge who issued the warrant although requested to do so by the person arrested, is not a sufficient allegation of malice to remove the immunity provided by *Civ. Code § 43.55*, which provides that an arresting officer is exempt from liability if the arrest warrant is regular on its face and he or she acts without malice. The court conceded, however, that there may be some acts, malicious and closely connected with an arrest itself, which would remove *Civ. Code § 43.55* immunity, even if a warrant were valid on its face.

[h] Jurisdiction of Person

Vallindras v. Massachusetts Bonding & Ins. Co. *(1954) 42 Cal. 2d 149, 265 P.2d 907* , is discussed in *§ 103.94[3][a]*. The Supreme Court held that an order may be void as to the parties, and yet valid to protect ministerial officers who execute it, when the court issuing it had jurisdiction of the subject matter, and nothing appears on the face of the process to apprise the officer that the court did not also have jurisdiction of the person.

[i] Immunity of Public Entity

Collins v. City & County of San Francisco *(1975) 50 Cal. App. 3d 671, 123 Cal. Rptr. 525* , is discussed in *§ 103.94[3][a]*.

[4] Additional Authorities

[a] Immunity of Peace Officer

The factual and procedural background of *Scannell v. County of Riverside (1984) 152 Cal. App. 3d 596, 199 Cal. Rptr. 644* , is discussed in *§ 103.20[4][a]*. The court of appeal held that a county detective and the county was not liable for a claim of false imprisonment when the confinement was facially lawful, although such confinement violated prior immunity from prosecution given to the plaintiff.

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10-103 California Points & Authorities § 103.95

§ 103.95 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for False Imprisonment--Action Based on Arrest Pursuant to Warrant--Judicial Immunity Does Not Protect Judge Acting in Complete Absence of Jurisdiction to Issue Arrest Warrant

[1] FORM

[*Caption. See § 103.76.*]

JUDICIAL IMMUNITY DOES NOT PROTECT A JUDGE FROM LIABILITY FOR DAMAGES FOR FALSE IMPRISONMENT WHERE HE/SHE ISSUES AN ARREST WARRANT IN THE COMPLETE ABSENCE OF JURISDICTION TO DO SO.

A. Inapplicability of Judicial Immunity. A judge is not protected from liability for false arrest and imprisonment where he/she issues an arrest warrant in the complete absence of jurisdiction to issue the warrant. Issuance of an arrest warrant in the complete absence of subject matter jurisdiction to do so, as opposed to issuance of a warrant in excess of jurisdiction, subjects the judge to liability for damages for false imprisonment (*De Courcey v. Cox (1892) 94 Cal. 665, 668-669, 30 P. 95*).

[*Optional*] **B. Arrest for Noncriminal Act.** A judge acts in the complete absence of jurisdiction when he/she issues a warrant of arrest for an act which is not a crime (*De Courcey v. Cox (1892) 94 Cal. 665, 668-669, 30 P. 95*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a general demurrer to a complaint seeking damages for false imprisonment from a judge issuing an arrest warrant without jurisdiction where the demurrer asserts that the judge is protected from liability by the doctrine of judicial immunity.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Inapplicability of Judicial Immunity

In ***De Courcey v. Cox*** *(1892) 94 Cal. 665, 30 P. 95* , the plaintiff brought an action for damages for false imprisonment against a justice of the peace who had issued a warrant for his arrest which had resulted in his incarceration in the county jail for three days. The trial court overruled the defendant's general demurrer, and then granted defendant's subsequent motion for judgment on the pleadings. The Supreme Court reversed. The justice of the peace had issued the arrest warrant after a complaint was made to him charging the plaintiff with refusing to return the sum of $20, allegedly overpaid to the plaintiff by mistake. The justice of the peace issued an arrest warrant, the plaintiff was arrested, brought before the defendant, and required to plead to the charge. The justice rendered a judgment that the plaintiff restore the $20 or be committed to the county jail for 20 days. Pursuant to the judgment, the defendant issued a commitment and placed it in the hands of an officer who executed it by imprisoning plaintiff in the county jail for a period of three days.

The Supreme Court held that the complaint stated a cause of action against the defendant for damages for false imprisonment. Not only did the justice exceed his jurisdiction in issuing the warrant of arrest, but he was completely without jurisdiction to do so. The complaint filed with the justice of the peace charged the plaintiff with an act which clearly did not constitute a crime. Therefore, the defendant justice never acquired any jurisdiction to proceed in the matter, and the judgment and commitment were facially void. The facts appearing in the complaint, coupled with the arrest and imprisonment of the plaintiff for an act clearly not a crime, constituted a cause of action, and the lower court erred in granting the defendant's motion for judgment on the pleadings. Because the justice of the peace was completely without jurisdiction to act, the doctrine of judicial immunity did not apply (*94 Cal. 665, 668-669)* .

[4] Additional Authorities

[a] Inapplicability of Judicial Immunity

In *Paddleford v. Biscay (1971) 22 Cal. App. 3d 139, 99 Cal. Rptr. 220* , the plaintiff brought an action for false imprisonment, assault and battery, and denial of bail against a municipal court judge who issued an invalid misdemeanor arrest warrant which improperly allowed night service in violation of the provisions of *Penal Code § 840* then in effect. The trial court entered a summary judgment dismissing the complaint, concluding that, as a matter of law, the defendant judge was not liable in his judicial capacity for the acts described. The court of appeal affirmed the summary judgment. The court acknowledged that the arrest warrant was not in compliance with statutory requirements then in effect, in that it allowed night service of a misdemeanor arrest warrant without being personally endorsed by the judge [*see Penal Code § 840*]. However, the judge was not acting in the complete absence of jurisdiction, but only in

excess of his jurisdiction, and was therefore protected from civil liability for false imprisonment by the doctrine of judicial immunity. The court pointed out, however, that a distinction must be observed between actions merely in excess of jurisdiction and those which indicate a clear absence of all jurisdiction over the subject matter. In those cases, impliedly, the doctrine of judicial immunity does not apply to shield the judge in question from liability.

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10-103 California Points & Authorities § 103.96

§ 103.96 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e) for False Imprisonment--Action Based on Arrest Pursuant to Bench Warrant--Bench Warrant for Civil Contempt Not Regular on Its Face [Civ. Code § 43.55; Code Civ. Proc. § 1213]

[1] FORM

[*Caption. See § 103.76.*]

A BENCH WARRANT DIRECTING A BODY ATTACHMENT TO ANSWER A CHARGE OF CIVIL CONTEMPT IS NOT REGULAR ON ITS FACE WITHIN THE MEANING OF SECTION 43.55 OF THE CIVIL CODE IF IT FAILS TO SPECIFY THE NATURE OF THE CONTEMPT AND THE AMOUNT OF BAIL.

Civil Contempt Bench Warrant Not Regular on Its Face. A bench warrant directing a body attachment to answer a charge of civil contempt is not regular on its face if it fails to specify the nature of the contempt and the amount of bail. A complaint alleging the arrest of plaintiff pursuant to such a facially irregular bench warrant states a cause of action for false imprisonment (*Civ. Code § 43.55*; *Code Civ. Proc. § 1213*; *Allison v. Ventura County (1977) 68 Cal. App. 3d 689, 702-704, 137 Cal. Rptr. 542*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to a general demurrer to a complaint for false imprisonment based on the arrest of the plaintiff pursuant to a bench warrant for civil contempt, where the demurrer asserts that the peace officer executing the warrant, or the public entity employing him or her, is immune from liability because the warrant was regular on its face, but where the warrant is in fact irregular because it fails to specify the nature of the contempt and the amount of bail.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Civil Contempt Bench Warrant Not Regular on Its Face

In ***Allison v. Ventura County*** *(1977) 68 Cal. App. 3d 689, 137 Cal. Rptr. 542* , the plaintiff sued the County of Ventura for damages for false imprisonment based on her arrest pursuant to a bench warrant which had issued during the course of civil litigation between the plaintiff and her husband. The trial court sustained a demurrer to plaintiff's complaint without leave to amend, and plaintiff appealed from the subsequently entered judgment of dismissal. The court of appeal reversed, holding that the complaint stated a cause of action for false imprisonment. The bench warrant on which the plaintiff had been arrested was three years and three months old at the time of the arrest. Furthermore, although the bench warrant was issued in a civil action, it complied with the provisions of neither of the two statutory sources dealing with issuance of a civil arrest warrant that is, those dealing with the issuance of a warrant to compel the presence of one charged with civil contempt [*Code Civ. Proc. §§ 1209-1222*] and those dealing with the issuance of a warrant for arrest of a nonappearing witness [*Code Civ. Proc. §§ 1993, 1994*]. The court held that if it was intended to be a civil contempt bench warrant, it was facially irregular for failure to specify the nature of the contempt or the amount of the bail [*Code Civ. Proc. § 1213*]. If it was intended as a warrant to compel the attendance of the plaintiff as a witness, it was facially irregular because it failed to specify the cause of the commitment or to state the question, if any, which the plaintiff refused to answer [*Code Civ. Proc. § 1994*]. Therefore, because the bench warrant was facially irregular, the peace officer arresting the plaintiff was not immune from liability under the provisions of *Civ. Code § 43.55*, and the plaintiff's complaint stated a cause of action for false imprisonment (*68 Cal. App. 3d 689, 702-704)* .

Although a substantial period of time had elapsed between the time of issuance of the warrant and the arrest, the court of appeal declined to hold that, as a matter of law, all bench warrants dated over three years prior to their execution are irregular on their faces. The court did hold, however, the lack of timeliness of service or execution of a warrant of arrest may appropriately be considered where the malicious service or execution of a facially valid warrant is alleged [*see Civ. Code § 43.55*].

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§ 103.97 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for False Imprisonment--Action Based on Arrest Pursuant to Bench Warrant--Bench Warrant to Compel Attendance of Witness Not Regular on Its Face [Civ. Code § 43.55; Code Civ. Proc. § 1994]

[1] FORM

[*Caption. See § 103.76.*]

A BENCH WARRANT ISSUED TO COMPEL THE ATTENDANCE OF A WITNESS IN A CIVIL CASE IS NOT REGULAR ON ITS FACE WITHIN THE MEANING OF SECTION 43.55 OF THE CIVIL CODE IF IT FAILS TO SPECIFY THE CAUSE OF THE COMMITMENT, AND IF IT IS FOR REFUSING TO ANSWER A QUESTION, FAILS TO SET FORTH THE QUESTION.

Bench Warrant to Compel Attendance of Witness Not Regular on Its Face. A bench warrant issued to compel the attendance of a witness in a civil case is not regular on its face if it fails to specify the cause of the arrest, and, if it is for the refusal to answer a question, fails to set forth the question. A complaint alleging the arrest of plaintiff pursuant to such a facially irregular bench warrant states a cause of action for false imprisonment (*Civ. Code § 43.55*; *Code Civ. Proc. § 1994*; *Allison v. Ventura County (1977) 68 Cal. App. 3d 689, 702-704, 137 Cal. Rptr. 542*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to a general demurrer to a complaint for false imprisonment based on the arrest of the plaintiff pursuant to a bench warrant to compel the plaintiff's attendance as a witness in a civil case, where the demurrer asserts that the peace officer executing the warrant, and/or the public entity employing him or her, is immune from liability because the warrant was regular on its face, but where the warrant is in fact irregular because it fails to specify the reason for the commitment and, if it is for refusing to answer a question, fails to set forth the question.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Bench Warrant to Compel Attendance of Witness Not Regular on Its Face

Allison v. Ventura County *(1977) 68 Cal. App. 3d 689, 137 Cal. Rptr. 542* is discussed in *§ 103.96[3][a]*.

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10-103 California Points & Authorities § 103.98

§ 103.98 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for False Imprisonment--Action Based on Arrest Pursuant to Warrant--Arrest Unlawful Where Peace Officer Failed to Use Reasonable Prudence to Determine That Person Arrested Was Person Named in Warrant or Acted With Malice [Civ. Code § 43.55]

[1] FORM

[*Caption. See § 103.76.*]

AN ARREST PURSUANT TO WARRANT IS UNLAWFUL IF THE ARRESTING OFFICER _____ [FAILED TO USE REASONABLE PRUDENCE AND DILIGENCE TO DETERMINE WHETHER THE PERSON ARRESTED WAS ACTUALLY THE PERSON NAMED IN THE WARRANT *and/or* ACTED WITH MALICE].

[*EITHER*]

A. Liability for Arrest of Wrong Person. An arrest pursuant to a warrant regular on its face is unlawful, and the arresting officer is liable for false arrest, if the officer arrests the wrong person, having failed to use reasonable prudence and diligence to determine whether the person arrested was actually the one named in the warrant (*Civ. Code § 43.55(a)*; *Robinson v. City & County of San Francisco (1974) 41 Cal. App. 3d 334, 336-338, 116 Cal. Rptr. 125* ; *Smith v. Madruga (1961) 193 Cal. App. 2d 543, 546, 14 Cal. Rptr. 389*).

[*AND/OR*]

B. Liability for Arrest Made With Malice. An arrest pursuant to a warrant is unlawful, and the arresting officer is liable for false arrest, if the arrest is made maliciously and without reasonable cause to believe that the one arrested was the one who committed the crime (*Civ. Code § 43.55(a)*; *Laible v. Superior Court (1984) 157 Cal. App. 3d 44, 47, 203*

Cal. Rptr. 513).

C. Prima Facie Showing of Unlawfulness. A complaint makes a prima facie showing of the unlawfulness of an arrest pursuant to warrant where it alleges facts showing that the arresting officer did not use reasonable prudence and diligence to determine if the party arrested was the party named in the warrant or showing that the arresting officer maliciously and knowingly arrested the wrong person (*Smith v. Madruga (1961) 193 Cal. App. 2d 543, 546-548, 14 Cal. Rptr. 389*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to a general demurrer to a complaint seeking damages for false imprisonment from an arresting officer and/or his or her public employer when the demurrer asserts that there is no liability on the part of the officer (or derivative liability on the part of his or her public employer) because the warrant was regular on its face and the complaint did not sufficiently allege facts showing that the arrest pursuant to warrant was unlawful. The ground for opposition is that the officer acted without a reasonable belief that the one arrested was the person named in the warrant and/or acted maliciously [*see Civ. Code § 43.55*].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For a form of allegation that defendant arrested plaintiff pursuant to warrant with no reasonable belief that plaintiff was the person named in the warrant, see California Forms of Pleading and Practice, Ch. 257, *False Imprisonment* (Matthew Bender).

[3] Discussion of Authorities

[a] Liability for Arrest of Wrong Person

In ***Robinson v. City & County of San Francisco*** *(1974) 41 Cal. App. 3d 334, 116 Cal. Rptr. 125* , the plaintiff brought an action for false arrest against two police officers. The trial court granted summary judgment in favor of the two police officers. The charge on which the plaintiff was arrested was that of failing to pay the legal fare for hire of a public passenger vehicle. It appeared from the record that one Harold Cunningham, using the plaintiff's stage name of "Smokey Robinson," had hired a limousine and failed to pay for it. Plaintiff's real name was William Robinson, and evidence was presented at the trial on the criminal charge that the Harold Cunningham who had rented the car was a different person from the plaintiff. Plaintiff was acquitted of the criminal charge.

The court of appeal reversed the summary judgment and remanded the case for trial. The court pointed out that a police officer is immune from liability for false arrest if, while acting pursuant to a warrant, he or she effects the arrest without malice and in the reasonable belief that the person arrested was the one named in the warrant. Arresting a person without reasonable belief that he or she is the person named in the warrant, even if malice is not alleged, can subject the officer to liability for false arrest. In granting the motion for summary judgment, the trial court impliedly held that the police officers had reasonable cause as a matter of law to believe that plaintiff was the person named in the warrant, and that no triable issue of fact existed. In reversing the judgment of the trial court, the appeals court pointed out that plaintiff's declaration in opposition to summary judgment showed that the sole basis for the officers' belief was that plaintiff's stage name was the same as the alias of Harold Cunningham, the person named in the warrant. The declaration further showed that plaintiff offered to prove his identity to the officers when he was presented with the warrant, and that the police officers did not consider any of his proffered identification when making the arrest. The court held that, unlike the question of probable cause for a warrantless arrest or detention of an individual, both of which are questions of law, the question of reasonable belief that the person being arrested is the same person as the person named in the arrest warrant is a question of fact. The court further held that a jury might reasonably have concluded either that the officers belief was reasonable or that it was unreasonable. Thus, a triable issue of fact existed, and the granting of the motion for summary judgment was error (*41 Cal. App. 3d 334, 336-338)* .

[b] Liability for Arrest Made With Malice

In ***Laible v. Superior Court*** *(1984) 157 Cal. App. 3d 44, 203 Cal. Rptr. 513* , the court of appeal issued a writ of mandate directing the trial court to deny a motion for summary judgment in an action for false arrest and imprisonment. The trial court had acted under the belief that defendant had met the requisites of the immunity of *Civ. Code § 43.55*, which provides immunity for arrests made with a facially valid warrant and without malice (*157 Cal. App. 3d 44, 48)* . In reaching its decision, the appellate court found that a factual question concerning the officer's malice in making the arrest pursuant to a warrant had been raised by plaintiff, in that plaintiff had presented evidence that the officer possessed significant exculpatory evidence that he failed to investigate further and failed to present to the magistrate when seeking the arrest warrant (*157 Cal. App. 3d 44, 53)* .

[c] Prima Facie Showing of Unlawfulness

In ***Smith v. Madruga*** *(1961) 193 Cal. App. 2d 543, 14 Cal. Rptr. 389* , plaintiff brought an action against a deputy sheriff, and others, for false arrest and imprisonment based on an arrest pursuant to warrant, and subsequent incarceration. The trial court sustained defendants' demurrer and entered judgment for defendants. The plaintiff appealed from the judgment insofar as it dismissed his action against the deputy sheriff. The court of appeal reversed. The complaint alleged that the warrant under which plaintiff was arrested named Bennie Leon Smith, while plaintiff's name was Bennie Lee Smith. It further alleged that the person named in the warrant was already incarcerated in the state prison at the time of the arrest, and that this fact appeared in the records of the sheriff's department and was known to the deputy sheriff. The plaintiff also alleged that he continually protested that he was the wrong person during the arrest, booking, fingerprinting, and detention process, and that, although the defendants knew from fingerprint charts and records that the correct person was incarcerated in state prison, and that they had the wrong person, they refused to release the plaintiff. The court of appeal held that plaintiff's complaint stated a cause of action against the deputy sheriff. The court stated that an officer making an arrest pursuant to warrant is liable for damages for false imprisonment if he fails to use prudence and diligence to find out if the party arrested is the party described in the warrant. The complaint alleged sufficient facts which, if true, showed a failure to use reasonable prudence and diligence to ascertain that the right person was being arrested. The court rejected the defendant's argument that he had no discretion with regard to plaintiff's arrest and incarceration and that, therefore, he was relieved of liability for false imprisonment (*193 Cal. App. 2d 543, 546-548)* .

[4] Additional Authorities

[a] Liability for Arrest of Wrong Person

In *Bell v. State of California (1998) 63 Cal. App. 4th 919, 74 Cal. Rptr. 2d 541* , plaintiff, a well-dressed 43-year-old African-American who worked for the Los Angeles District Attorney's office, was mistakenly arrested in a public building by a team of state investigators and local police pursuant to a valid warrant. Despite immediate protestations by the plaintiff that he was not the person named in the warrant and an offer to show his driver's license, the arresting officers, using considerable force to restrain plaintiff in an uncomfortable and demeaning position, led plaintiff out of the building and to his car, from where the police obtained satisfactory identification of plaintiff, released him, and apologized for the mistake. At the time of the arrest, the officers had in their possession a picture of the person named in the warrant, which did not match plaintiff, and plaintiff was 12 years older than the person actually sought. In a suit brought against the investigators and officers, the city, and the State of California, for false imprisonment and other causes of action, the trial court refused a motion for directed verdict brought by the defendants, the jury returned a verdict for defendants, and a new trial was granted on the grounds of juror misconduct. The court of appeal affirmed the order for a new trial, and also held that the trial court did not err in refusing defendants' motion for directed verdict on the false imprisonment claim. In concluding that ample evidence showed that the state officers lacked a reasonable basis to conclude that plaintiff was the man sought, the court reviewed the careless manner in which the plaintiff was identified and arrested, including the failure to match the picture with the plaintiff. The court also considered and rejected the state investigator's argument that she had acted reasonably because the plaintiff had been the only African-American in the room, he was well-dressed, and he carried himself with dignity, characteristics that matched the profile of the man sought (*63 Cal. App. 4th 919, 928)* .

[b] Liability for Arrest Made With Malice

In *Harden v. San Francisco Bay Area Rapid Transit Dist. (1989) 215 Cal. App. 3d 7, 263 Cal. Rptr. 549* , the defendant, a rapid transit district officer, reported falsely to local police that plaintiff, another rapid transit district officer who had a side business in typewriters, knowingly had possession of stolen typewriters. Defendant authorized another transit district officer to serve an arrest warrant on plaintiff after it was procured by local police. Eventually, the charges against plaintiff were dropped for lack of evidence. Plaintiff subsequently brought suit against defendant and others for false imprisonment. Defendant argued that he was immune from liability under *Civ. Code § 43.55*. The court of appeal upheld the judgment against the defendant, stating that *Civ. Code § 43.55* does not provide immunity to an officer for service of a valid warrant if the arrest is made with malice. As the jury found that defendant acted with malice by knowingly or recklessly procuring plaintiff's arrest, no immunity could attach (*215 Cal. App. 3d 7, 14-15)* .

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[Reserved]

§§ 103.99[Reserved]

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E. Detention After Arrest

10-103 California Points & Authorities § 103.110

§ 103.110 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for False Imprisonment--Action Based on Detention After Arrest--Failure to Allege Facts Showing Delay Unnecessary or Unreasonable [Penal Code §§ 825, 847, 849(a)]

[1] FORM

[*Caption. See § 103.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT FAILS TO ALLEGE FACTS SHOWING THAT THE PERIOD OF TIME BETWEEN PLAINTIFF'S ARREST AND PLAINTIFF'S BEING TAKEN BEFORE A MAGISTRATE WAS UNNECESSARY OR UNREASONABLE.

A. Objection by Demurrer. [*See § 103.20, Paragraph A.*]

B. Failure to Allege Unnecessary Delay. A complaint for false imprisonment based on postarrest detention fails to state a cause of action where it fails to allege that defendant peace officer detained plaintiff other than for the length of time necessarily incident to the action of the peace officer in carrying out his/her statutory duty to _____ [receive *or* arrest] a person charged with a criminal offense and to hold such person for an appearance before a magistrate (*Penal Code §§ 142, 825(a), 847, 849(a)*; *Shakespeare v. City of Pasadena (1964) 230 Cal. App. 2d 387, 389, 40 Cal. Rptr. 871*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a general demurrer to the complaint in an action for false imprisonment based on postarrest detention where the demurrer asserts that the complaint fails to state a cause of action in that it fails to allege facts showing that the period of time that the plaintiff was detained after arrest and before being taken to a magistrate was unnecessary or unreasonable.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For a form of complaint for false imprisonment based on arrest followed by unreasonable delay in taking the plaintiff before a magistrate, see California Forms of Pleading and Practice, Ch. 257, *False Imprisonment* (Matthew Bender).

[3] Discussion of Authorities

[a] Failure to Allege Unnecessary Delay

In ***Shakespeare v. City of Pasadena*** *(1964) 230 Cal. App. 2d 387, 40 Cal. Rptr. 871* , the plaintiff sued the City of Pasadena and others for damages for false arrest, false imprisonment, and malicious prosecution. The complaint was based on an incident in which the plaintiff was arrested by a private citizen and her custody turned over to the police officers of the City of Pasadena. The trial court sustained the city's demurrer to the plaintiff's complaint without leave to amend and entered a judgment of dismissal. The court of appeal affirmed the judgment of the trial court. Among other holdings, the court held that the complaint completely failed to state a cause of action based upon postarrest detention because it alleged no detention in connection with plaintiff's arrest other than that necessarily incident to the action of the arresting police officers in carrying out their statutory duty [*Penal Code §§ 142, 847*] to accept custody of one arrested by a citizen and hold that person for an appearance before a magistrate (*230 Cal. App. 2d 387, 389)* .

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10-103 California Points & Authorities § 103.111

§ 103.111 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant Peace Officer--In Action for False Imprisonment Based on Detention After Arrest--Delay in Taking Arrestee Before Magistrate Not Unreasonable Where Arrestee Assented to Delay [Penal Code §§ 825, 849(a)]

[1] FORM

[*Caption. See § 103.21.*]

SUMMARY JUDGMENT FOR DEFENDANT IS PROPER IN THAT THE DELAY IN TAKING PLAINTIFF BEFORE A MAGISTRATE AFTER ARREST WAS NOT UNREASONABLE BECAUSE PLAINTIFF ASSENTED TO THE DELAY.

A. Summary Judgment. [*See § 103.21, Paragraph A.*]

B. Delay Not Unreasonable Where Arrestee Assents. If the arrested person agrees to a delay in taking him/her before a magistrate following arrest, he/she cannot make such delay the basis of a cause of action for false imprisonment on the ground that the delay was unreasonable (*Penal Code §§ 825, 849(a)*; *Gorlack v. Ferrari (1960) 184 Cal. App. 2d 702, 710-711, 7 Cal. Rptr. 699*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for summary judgment where the motion asserts that the plaintiff's cause of action for false imprisonment based on delay in taking him or her before a magistrate after arrest has no merit because the plaintiff assented to the delay.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations which support the motion [*Code Civ. Proc. § 437c*].

[b] Related Pleading and Practice Forms

For a form of affirmative defense that the delay in taking the plaintiff before a magistrate was caused by the illness of the plaintiff, see California Forms of Pleading and Practice, Ch. 257, *False Imprisonment* (Matthew Bender).

[3] Discussion of Authorities

[a] Delay Not Unreasonable Where Arrestee Assents

In ***Gorlack v. Ferrari*** *(1960) 184 Cal. App. 2d 702, 7 Cal. Rptr. 699* , the plaintiff brought an action for false arrest and false imprisonment against Mr. and Mrs. Ferrari and three police officers. After a nonjury trial, judgment was entered for the defendants and the plaintiff appealed. On information supplied to the police by Mrs. Ferrari regarding the alleged theft of Mrs. Ferrari's diamond ring by the plaintiff, the plaintiff was arrested, booked on a felony grand theft charge, detained in jail for two or three days, and then released without a complaint being filed. One of the plaintiff's theories of liability of the city policemen for false imprisonment was unreasonable delay in taking her before a magistrate after her warrantless arrest [*see Penal Code § 849*]. The court of appeal affirmed the judgment in favor of the defendant policeman. There was substantial evidence presented at trial to support the finding of the trial court that the delay was not unreasonable. It appeared from the evidence that after the investigating officer's initial interview with the plaintiff, he had informed her that she could call an attorney and be released on bail, but that after some discussion he offered to complete the investigation of her case as speedily as possible and effect her release without filing a formal charge if he then determined that a charge should not be filed. The point of the offer was to save the plaintiff the cost of a bail bond and an attorney's fee. The plaintiff assented to this procedure, and could not, in a false imprisonment suit, take advantage of a delay in which she acquiesced and which was due to her own conduct.

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10-103 California Points & Authorities § 103.112

§ 103.112 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for False Imprisonment--Action Based on Detention After Arrest--Delay in Taking Arrested Person Before Magistrate [Penal Code §§ 825, 849]

[1] FORM

[*Caption. See § 103.76.*]

A COMPLAINT STATES A CAUSE OF ACTION FOR FALSE IMPRISONMENT WHERE IT ALLEGES FACTS SHOWING THAT DEFENDANT DELAYED AN UNREASONABLE TIME IN TAKING PLAINTIFF BEFORE A MAGISTRATE AFTER ARREST.

A. Cause of Action for Unreasonable Delay. A complaint for false imprisonment states a cause of action where it alleges that, following arrest, defendant unlawfully detained plaintiff for an unreasonable period of time and unnecessarily delayed taking him/her before a magistrate (*Penal Code §§ 825, 849*; *Dragna v. White (1955) 45 Cal. 2d 469, 472, 289 P.2d 428*).

[*Optional*] **B. Lawful Arrest as Not Excusing Subsequent Unreasonable Detention.** That fact that an arrest may have been lawful does not relieve defendant of liability for false imprisonment based on subsequent unreasonable delay in taking the arrested person before a magistrate (*Dragna v. White (1955) 45 Cal. 2d 469, 472, 289 P.2d 428*).

[*Optional*] **C. Delay of Less Than Two Days Not Reasonable as Matter of Law.** A delay of less than two days in taking an arrested person before a magistrate may be unreasonable. *Section 825 of the Penal Code,* which provides that an arrested person must be taken before a magistrate within two days, merely establishes the outer permissible time limits and does not mean that any delay of less than two days is reasonable as a matter of law [particularly if the arrest is without a warrant] (*Dragna v. White (1955) 45 Cal. 2d 469, 473, 289 P.2d 428*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a general demurrer to a complaint in an action for false imprisonment where the demurrer asserts that the complaint fails to state a cause of action for false imprisonment because it fails to allege facts showing that the delay between arresting plaintiff and taking plaintiff before a magistrate was unnecessary or unreasonable.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For a form of complaint for false imprisonment based on an unreasonable delay in taking the plaintiff before a magistrate, see California Forms of Pleading and Practice, Ch. 257, *False Imprisonment* (Matthew Bender).

[3] Discussion of Authorities

[a] Cause of Action for Unreasonable Delay

In ***Dragna v. White*** *(1955) 45 Cal. 2d 469, 289 P.2d 428* , the Supreme Court reversed a judgment on the pleadings in favor of three police officer defendants who were sued for false arrest and false imprisonment. The Supreme Court held that granting judgment on the pleadings was improper because the complaint stated a cause of action for false imprisonment based on either of two separate theories. First, it alleged an arrest without process, followed by imprisonment and damages, sufficient for a prima facie case of false imprisonment and to shift the burden onto the defendants to plead and prove justification for the arrest. Secondly, it alleged an unnecessary delay in taking the arrested plaintiff before a magistrate. With regard to the second theory, the Court pointed out that *Penal Code § 849(a)* requires that when a defendant is arrested without a warrant he or she must be taken before a magistrate without any unnecessary delay. Furthermore, *Penal Code § 825* requires that any arrested person be taken before a magistrate not later than two days after his or her arrest. Therefore, a complaint for false imprisonment states a cause of action where it alleges facts showing that, following arrest, the defendant unlawfully detained the plaintiff for an unreasonable period of time before taking him or her before a magistrate.

Although the delay in bringing the plaintiff before a magistrate may have been less than two days, as pointed out by defendants, it was not reasonable as a matter of law, inasmuch as *Penal Code § 825* merely establishes two days as the outer permissible time limit. A delay in bringing an arrestee before a magistrate may be unreasonable, even if less than two days, particularly if the arrest was without a warrant.

[b] Lawful Arrest as Not Excusing Subsequent Unreasonable Detention

The factual background of ***Dragna v. White*** *(1955) 45 Cal. 2d 469, 289 P.2d 428* , is discussed in *§ 103.112[3][a]*. The Supreme Court held that where an arrest is lawful, subsequent unreasonable delay in taking the person arrested before a magistrate will not affect the legality of the arrest, but it will subject the offending person to liability for so

much of the imprisonment as occurs after the period of necessary or reasonable delay.

[c] Delay of Less Than Two Days Not Reasonable as Matter of Law

The factual background of ***Dragna v. White*** *(1955) 45 Cal. 2d 469, 289 P.2d 428* , is discussed in *§ 103.112[3][a]*.

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10-103 California Points & Authorities § 103.113

§ 103.113 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for False Imprisonment--Action Based on Detention After Arrest--Cause of Action Stated Based on Failure of Public Entity to Perform Mandatory Duty [Gov. Code § 815.6]

[1] FORM

[*Caption. See § 103.76.*]

A COMPLAINT FOR FALSE IMPRISONMENT STATES A CAUSE OF ACTION WHERE IT ALLEGES FACTS SHOWING THAT A PUBLIC ENTITY FAILED TO PERFORM A MANDATORY DUTY RESULTING IN PLAINTIFF'S UNLAWFUL IMPRISONMENT.

A. Direct Liability of Public Entity. Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty, unless the public entity establishes that it exercised reasonable diligence to discharge the duty (*Gov. Code § 815.6*).

[*EITHER*]

B. Failure to Release After Dismissal of Criminal Charges. The failure of a public entity to release a prisoner after dismissal of all charges against him/her renders it directly liable for false imprisonment under *Section 815.6 of the Government Code* which imposes liability on a public entity for failure to perform a duty made mandatory by statute. In this case, the mandatory statutory duty is imposed by *Section 1384 of the Penal Code* which provides that a defendant must be released from custody if the court directs dismissal of the charges against him/her (*Sullivan v. County of Los Angeles (1974) 12 Cal. 3d 710, 715, 117 Cal. Rptr. 241, 527 P.2d 865*).

[*OR*]

B. Failure to Make Record Entries of Dismissal of Criminal Charges. Failure to discharge the mandatory duty imposed by *Sections 11116.6* and *11117 of the Penal Code*, by failing to make appropriate record entries of dismissal of criminal charges pursuant to *Section 1203.4 of the Penal Code*, renders the state directly liable to a person injured by such failure (*Bradford v. California (1973) 36 Cal. App. 3d 16, 19-21, 111 Cal. Rptr. 852*).

[*OR*]

B. Failure to Release on Posting of Bail. The failure of a public entity to discharge a prisoner on bail after the statutory conditions for bail have been met is a violation of the statutory duty imposed by *Section 1295 of the Penal Code* and renders the public entity directly liable for subsequent unlawful detention (*Shakespeare v. City of Pasadena (1964) 230 Cal. App. 2d 375, 377, 40 Cal. Rptr. 863*).

[*Optional*] **C. Liability Not Barred by *Section 844.6(a)(2) of Government Code*.** *Section 844.6(a)(2) of the Government Code*, which provides that a public entity is not liable for an injury to any prisoner, does not relieve a public entity from liability for failure to perform a mandatory duty, as provided in *Section 815.6 of the Government Code*, where the failure results in the wrongful incarceration or detention of a person (*Sullivan v. County of Los Angeles (1974) 12 Cal. 3d 710, 716-717, 117 Cal. Rptr. 241, 527 P.2d 865*).

[*Optional*] **D. Liability Not Barred by *Section 821.6 of Government Code*.** *Section 821.6 of the Government Code*, which provides that a public employee is not liable for injury caused by his/her instituting or prosecuting any judicial or administrative proceeding within the scope of his/her employment, does not immunize either the employee or the public entity employing him/her from liability for false imprisonment where the employee fails properly to record _____ [the dismissal of criminal charges against defendant *or* the fact that defendant had completed serving a sentence] which failure results in defendant's _____ [wrongful detention *or* subsequent arrest on the same charges] (*Sullivan v. County of Los Angeles (1974) 12 Cal. 3d 710, 720-723, 117 Cal. Rptr. 241, 527 P.2d 865*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a general demurrer to a complaint for false imprisonment against a public entity where the demurrer asserts that the complaint fails to state a cause of action because the public entity is immune from liability [*see* Ch. 196, *Public Entities*], but where the complaint states a cause of action based on the failure of the public entity to perform a mandatory duty [*Gov. Code § 815.6*] resulting in the wrongful incarceration or detention of the plaintiff.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For a form of complaint for false imprisonment based on the failure to release the plaintiff on bail, see California Forms of Pleading and Practice, Ch. 257, *False Imprisonment* (Matthew Bender).

[3] Discussion of Authorities

[a] Failure to Release After Dismissal of Criminal Charges

In ***Sullivan v. County of Los Angeles*** *(1974) 12 Cal. 3d 710, 117 Cal. Rptr. 241, 527 P.2d 865* , the plaintiff sued the County of Los Angeles for false imprisonment as a result of his alleged confinement in the county jail several days beyond the termination of his sentence. The trial court granted the defendant's motion for judgment on the pleadings on the ground that the governmental immunity provisions of the Tort Claims Act barred the suit. The Supreme Court reversed the judgment. Plaintiff had been charged with several Penal Code violations. He pleaded guilty to a misdemeanor and began serving a sentence of 50 days in jail. Meanwhile, the other charges against him were consolidated and transferred to superior court. The superior court dismissed the two felony charges against the plaintiff but failed to issue a release order. A remaining misdemeanor charge against the plaintiff was returned to municipal court where it was dismissed and a release order issued. The plaintiff's 50-day jail term expired, but he was not released because of the failure of the superior court to issue the release order. After obtaining his release, the plaintiff brought an action against the county, based on the sheriff's failure to release him, when, in the exercise of reasonable care, the sheriff should have known that no charges were pending against the plaintiff. The Supreme Court held that the county's failure to release the plaintiff after dismissal of all charges against him, as mandated by *Penal Code § 1384*, rendered it directly liable under *Gov. Code § 815.6* which provides that a public entity is liable for harm caused by its failure to perform a duty made mandatory by statute. Further, if the sheriff knew or should have known that all charges against the plaintiff had been dismissed, the county was derivatively liable under *Gov. Code § 815.2* for the sheriff's wrongful failure to release him. Finally, the Supreme Court concluded that neither the sheriff, nor, derivatively, the county was immune from liability for false imprisonment under the provisions of *Gov. Code § 821.6* which immunizes a public employee from liability for instituting or prosecuting a judicial proceeding. The Court found that the purpose of *Gov. Code § 821.6* is to provide public immunity from malicious prosecution suits, but not from suits for false imprisonment (*12 Cal. 3d 710, 715)* .

[b] Failure to Make Record Entries of Dismissal of Criminal Charges

In ***Bradford v. California*** *(1973) 36 Cal. App. 3d 16, 111 Cal. Rptr. 852* , the plaintiff sued the State of California for damages from his arrest allegedly resulting from the negligent failure of state employees to make appropriate record entries of the dismissal of charges against him pursuant to *Penal Code § 1203.4*. The trial court sustained the defendant state's general demurrer. The plaintiff appealed, and the court of appeal reversed. Plaintiff had been convicted of violating former Penal Code § 647a (*now see Penal Code § 647.6*) and was sentenced to two years on probation. He served his sentence and the court in which he had been convicted dismissed the proceeding pursuant to *Penal Code § 1203.4*. The plaintiff's original conviction obligated him to register as a sex offender pursuant to *Penal Code § 290*. However, this duty ceased when the proceeding was dismissed under *Penal Code § 1203.4*. The complaint alleged that the State of California failed to perform the mandatory duty of making record entries of the 1203.4 dismissal, as required by *Penal Code §§ 11116.6* and *11117*. As a result, the plaintiff was subsequently arrested for failing to register as a sex offender. The court went on to say that regardless of whether or not the negligent employee who failed to make the mandatory record entries was liable, the state was directly liable to the plaintiff under *Gov. Code § 815.6*, which imposes liability on a public entity for harm resulting from failure to perform a statutorily mandated duty (*36 Cal. App. 3d 16, 19-21)* .

[c] Failure to Release on Posting of Bail

In ***Shakespeare v. City of Pasadena*** *(1964) 230 Cal. App. 2d 375, 40 Cal. Rptr. 863* , the plaintiff brought an action against defendant city for false arrest and imprisonment, and malicious prosecution. The trial court sustained the city's demurrer to plaintiff's second amended complaint and entered a judgment of dismissal. The court of appeal reversed the judgment in part and remanded with instructions to allow the plaintiff to amend his complaint to allege compliance with the then applicable claims provisions of the Pasadena City Charter and to allege an action for false imprisonment. Although finding the allegations of the second amended complaint inadequate as they stood, the court concluded that the plaintiff had alleged sufficient facts to indicate that he might have had a cause of action against the city for false imprisonment, based on the city's alleged failure to release him promptly after bail had been posted. The court stated that, if plaintiff was able to allege that bail had been duly fixed for his release, deposited as required by law, the proper certificate delivered to the jailer, and the jailer, knowing of these facts, intentionally failed to advise the plaintiff that he was entitled to release, a cause of action for false imprisonment would have been stated. The duty to release, if the statutory conditions for bail have been met, is mandatory [*Penal Code § 1295*], and detention thereafter is unlawful. The court went on to state that no provision of the Tort Claims Act [*Gov. Code §§ 810-996.6*] exempts public employees from liability for false imprisonment, and that, in addition, a city is directly liable under *Section 815.6 of the Government Code* for failure to perform the mandatory duty of releasing a prisoner on bail when the statutory conditions have been met.

[d] Liability Not Barred by Section 844.6(a)(2) of Government Code

The factual background of ***Sullivan v. County of Los Angeles*** *(1974) 12 Cal. 3d 710, 117 Cal. Rptr. 241, 527 P.2d 865* , is discussed in *§ 103.113[3][a]*. The county argued that it was immune from liability for false imprisonment for failure to release the plaintiff after his term of imprisonment expired under *Gov. Code § 844.6(a)(2)* which provides immunity to a public entity from liability for injury to any prisoner. The Supreme Court held that continued confinement after a jail term has expired does not make the wronged person a "prisoner" and that in the eyes of the law he is no longer a prisoner. Therefore, *Gov. Code § 844.6(a)(2)* which refers to "injury to any prisoner" does not apply to immunize a public entity from liability for false imprisonment.

[e] Liability Not Barred by Section 821.6 of Government Code

The factual background of ***Sullivan v. Los Angeles County*** *(1974) 12 Cal. 3d 710, 117 Cal. Rptr. 241, 527 P.2d 865* is discussed in *§ 103.113[3][a]*. The Supreme Court disapproved the holding of *Watson v. Los Angeles County (1967) 254 Cal. App. 2d 361, 62 Cal. Rptr. 191* . In the *Watson* case, the plaintiff completed his jail sentence, but the county clerk failed to record that fact, and the plaintiff was rearrested and imprisoned again. The *Watson* court reasoned that the clerk's failure to record completion of sentence was the first step toward the plaintiff's subsequent arrest and incarceration, and therefore, could not be the basis of liability for false imprisonment because of *Gov. Code § 821.6*, which exempts a public employee from liability in connection with the institution or prosecution of judicial proceedings. In disapproving the *Watson* holding, the Supreme Court held in effect that failure to record the completion of sentence, or other negligent administrative record-keeping failure, which results in the unlawful incarceration of the plaintiff, cannot be compared to the act of filing charges or swearing out affidavits of criminal activity. Therefore, a record-keeping failure resulting in the unlawful detention of a person is not exempt from liability for false imprisonment under the provisions of *Gov. Code § 821.6*.

NOTE:

The holding in *Sullivan v. Los Angeles County* can be distinguished from the holding in *Collins v. City & County of San Francisco (1975) 50 Cal. App. 3d 671, 123 Cal. Rptr. 525* , in which the court of appeal held that the action of a police officer in wrongfully swearing out a new warrant for misdemeanor charges that had already been dismissed against the arrestee could not be the basis of a cause of action for false imprisonment, but might, were it not for the immunity provisions of *Gov. Code § 821.6*, be the

basis of a cause of action for malicious prosecution.

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10-103 California Points & Authorities § 103.114

§ 103.114 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--In Action for False Imprisonment Based on Detention After Arrest--Unreasonableness of Delay in Taking Defendant Before Magistrate Is Question of Fact

[1] FORM

[*Caption. See § 103.42.*]

THE QUESTION OF WHETHER OR NOT DEFENDANT DELAYED AN UNREASONABLE TIME IN TAKING PLAINTIFF BEFORE A MAGISTRATE AFTER ARREST IS A QUESTION OF FACT FOR THE TRIER OF FACT.

Unreasonableness of Delay as Question of Fact. The issue of whether or not an unreasonable time elapsed between the arrest of plaintiff and the time when he/she was taken before a magistrate is a question of fact. It would be improper for the trial court to determine that the delay was reasonable as a matter of law (*Kaufman v. Brown (1949) 93 Cal. App. 2d 508, 513, 515, 209 P.2d 156 , disapproved on other grounds, Dragna v. White (1955) 45 Cal. 2d 469, 289 P.2d 428*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for summary judgment in an action for damages for false imprisonment based on the failure of the defendant promptly to take the plaintiff before a magistrate after arrest, where the motion asserts that there is no triable issue of fact because the delay involved was reasonable as a matter of law.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations which support the memorandum [*Code Civ. Proc. § 437c*].

[b] Related Pleading and Practice Forms

For a form of complaint for false imprisonment based on an unreasonable delay in taking the plaintiff before a magistrate, see California Forms of Pleading and Practice, Ch. 257, *False Imprisonment* (Matthew Bender).

[3] Discussion of Authorities

[a] Unreasonableness of Delay as Question of Fact

In ***Kaufman v. Brown*** *(1949) 93 Cal. App. 2d 508, 209 P.2d 156* , the plaintiff sued a labor union, certain of its officers and agents, and two police officers for false imprisonment based on a warrantless arrest. Both general and special demurrers to plaintiff's original complaint, the amended, and the second amended complaints were sustained with leave to amend. Plaintiff declined to plead further. Judgment for the defendants was rendered and plaintiff appealed. The court of appeal reversed, holding that the plaintiff's second amended complaint stated facts sufficient to constitute a cause of action against the defendants. Among other holdings, the court of appeal held that the complaint stated a cause of action based on the defendants' alleged failure to take the plaintiff before a magistrate during the nearly 24 hours that he was allegedly incarcerated. It was improper for the trial court to determine as a matter of law that the delay in taking the plaintiff before a magistrate was reasonable. The question of whether or not an unreasonable time elapsed after an arrest before taking the plaintiff to a magistrate is a factual question for the trier of fact.

NOTE:

The California Supreme Court has disapproved language in *Kaufman v. Brown* to the effect that, when there is an unreasonable delay in taking a person before a magistrate after a lawful arrest, the false imprisonment dates from the time of the arrest. The Supreme Court stated that the better rule is that where the arrest is lawful, subsequent unreasonable delay in taking a person before a magistrate will not affect the legality of the arrest, although it will subject the offending person to liability for so much of the imprisonment as occurs after the period of necessary or reasonable delay [*Dragna v. White (1955) 45 Cal. 2d 469, 473, 289 P.2d 428]* .

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10-104 California Points & Authorities 104.syn

§ 104.syn Synopsis to Chapter 104: FICTITIOUSLY NAMED DEFENDANTS (DOES)

§ 104.01 Scope of Chapter

§ 104.02 Governing Statutes

§ 104.03 Allegations in Pleading

§ 104.04 Page Limits on Points and Authorities

§ 104.05 Related Pleading and Practice Chapters

§ 104.06 Related Points and Authorities Chapters

§§ 104.07-104.19 [Reserved]

§ 104.20 Supporting Demurrer to Amended Complaint [Code Civ. Proc. § 430.10(e)]--Action Against Fictitious Defendant Is Barred by Statute of Limitations--Amended Complaint Does Not Relate Back When Not Based on Same General Set of Facts as Original Complaint

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Failure to State Cause of Action

[b] Amended Complaint Does Not Relate Back If Based on Different Set of Facts

[c] No Relation Back If Accident and Instrumentality Are Different in Amended Complaint

§ 104.21 Supporting Demurrer to Amended Complaint [Code Civ. Proc. § 430.10(e)]--Action Against Fictitious Defendant Is Barred by Statute of Limitations--Plaintiff Had Actual Knowledge of Defendant's Identity and Defendant's Relationship to Plaintiff's Injuries

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Plaintiff Cannot Amend Pursuant to Code Civ. Proc. § 474 If Plaintiff Had Actual Knowledge of Defendant's Identity

[b] Code Civ. Proc. § 474 Is Not Available to Plaintiff Who Knew But Forgot Defendant's Identity When Identity Ascertainable From Readily Available Information

[4] Additional Authorities

[a] Plaintiff Cannot Amend Pursuant to Code Civ. Proc. § 474 If Plaintiff Had Actual Knowledge of Defendant's Identity

§ 104.22 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)]--Summons or Notice Does Not Comply With Fictitious Name Statute [Code Civ. Proc. § 474]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Necessity for Compliance With Statutes

[b] Service of Summons Pursuant to Code Civ. Proc. § 474 Without Endorsement Is Insufficient to Give Court Jurisdiction

[c] Complaint Must Have Contained Fictitious Name Allegations Regarding Defendant

§ 104.23 Opposing Demurrer to Amended Complaint [Code Civ. Proc. § 430.10(e)]--Action Against Fictitious Defendant Not Barred by Statute of Limitations--Amended Complaint Relates Back When Based on Same Set of Facts as Original Complaint

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Amendment of Complaint Relates Back to Time of Filing

[b] Amended Complaint May Rest on Different Legal Theory or State Different Cause of Action

[c] Code Civ. Proc. § 474 Should Be Liberally Construed to Allow Cases to Be Decided on Their Merits

§ 104.24 Opposing Demurrer to Amended Complaint [Code Civ. Proc. § 430.10(e)]--Action Against Fictitious Defendant Not Barred by Statute of Limitations--Plaintiff Did Not Have Actual Knowledge of Identity of Defendant and/or Facts Giving Rise to Cause of Action Against Defendant

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Amendment Relates Back in MICRA Case

[b] Standard for Applying Code Civ. Proc. § 474 Test of Ignorance of True Identity of Defendant Is Whether Plaintiff Had Actual Knowledge

[c] Ignorance of Party's Capacity

[d] Reasonably Diligent Effort to Discover Defendant's Name Not Required

[e] Change in Decisional Law May Be Basis for Relation Back to Original Complaint

[f] Amendment to Name Previously-Dismissed Party in New Capacity

[g] Forgetfulness of Defendant's Identity Does Not Precluded Plaintiff From Adding Defendant Under Code Civ. Proc. § 474

[4] Additional Authorities

[a] Standard for Applying Code Civ. Proc. § 474 Test of Ignorance of True Identity of Defendant Is Whether Plaintiff Had Actual Knowledge

[b] Reasonably Diligent Effort to Discover Defendant's Name Not Required

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CHAPTER 104 FICTITIOUSLY NAMED DEFENDANTS (DOES)
PART I. INTRODUCTION

10-104 California Points & Authorities § 104.01

§ 104.01 Scope of Chapter

This chapter contains points and authorities relating to fictitiously named defendants. It includes points and authorities for use in supporting [*see §§ 104.20, 104.21*] and opposing [*see §§ 104.23, 104.24*] demurrers to complaints based on the bar of the statute of limitations in suits in which the plaintiff has sought to substitute a named defendant for a fictitious defendant, and supporting a motion to quash service of summons because the summons did not comply with the endorsement requirement of *Code Civ. Proc. § 474* [*see § 104.22*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProceduresPleading & PracticeService of ProcessSummonsContent & FormCivil ProceduresPartiesFictitious Names

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10-104 California Points & Authorities § 104.02

§ 104.02 Governing Statutes

The right to name fictitious defendants in a pleading and to amend a pleading substituting named defendants for fictitious defendants charged in the original complaint is governed by *Code Civ. Proc. § 474. Code Civ. Proc. § 474* provides in part that when a plaintiff is ignorant of the name of a defendant, that fact must be stated in the complaint, and the defendant may be designated by a fictitious name; when the defendant's true name is discovered, the pleading must be amended accordingly.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePartiesFictitious NamesCivil ProcedurePartiesSubstitutionsGeneral Overview

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10-104 California Points & Authorities § 104.03

§ 104.03 Allegations in Pleading

Under prior case law, the plaintiff was required not only to be ignorant of the true name of the defendant at the time the fictitious defendant was designated, but also to make a clear statement of that fact in the pleading [*see Nissan v. Barton (1970) 4 Cal. App. 3d 76, 79, 84 Cal. Rptr. 36* ; *Stephens v. Berry (1967) 249 Cal. App. 2d 474, 477, 57 Cal. Rptr. 505* (both cases requiring specific allegation)]. Although it is still required that plaintiff actually be ignorant of defendant's true name at the time of the pleading, the case law seems to have relaxed the requirement of an express allegation of that fact in the complaint. An allegation that the plaintiff sued the Doe defendants pursuant to the provisions of *Code Civ. Proc. § 474* would now seem to suffice and prevents the exaltation of form over substance [*Motor City Sales v. Superior Court (1973) 31 Cal. App. 3d 342, 346-347, 107 Cal. Rptr. 280* (specific allegation of ignorance not required)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProceduresPartiesFictitious Names

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10-104 California Points & Authorities § 104.04

§ 104.04 Page Limits on Points and Authorities

Generally, a supporting or opposing memorandum of points and authorities may not exceed 15 pages, or 20 pages in the case of a memorandum supporting or opposing a motion for summary judgment or summary adjudication. A reply or closing memorandum may not exceed 10 pages [*Cal. Rules of Ct., Rule 3.1113(d)*]. A party desiring to file a longer memorandum must obtain leave of court [*Cal. Rules of Ct., Rule 3.1113(d)*]. For further discussion of these page limitations, and of other basic format requirements governing memoranda of points and authorities, see *Ch. 1, Writing Legal Memoranda and Briefs, § 1.05*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureSummary JudgmentOppositionMemoranda in OppositionCivil ProcedureSummary JudgmentSupporting MaterialsMemoranda of LawGovernmentsCourtsRule Application & Interpretation

California Points & Authorities

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PART I. INTRODUCTION

10-104 California Points & Authorities § 104.05

§ 104.05 Related Pleading and Practice Chapters

For a discussion and forms to amend pleadings to substitute named defendants for fictitious defendants, see Ch. 21, *Amended and Supplemental Pleadings* , in California Forms of Pleading and Practice (Matthew Bender). For discussion and forms of allegations for use in a complaint in which the plaintiff is ignorant of a defendant's name and wishes to designate a fictitious defendant, see Ch. 20, *Allegations Commonly Used* , of California Forms of Pleading and Practice (Matthew Bender). For a form of introduction to an answer to a complaint when the defendant was sued under a fictitious name, and for forms of captions to complaints when fictitious names are used, see Ch. 26, *Answers* and Ch. 108, *Captions and Introductions* , respectively, of California Forms of Pleading and Practice (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProceduresPleading & PracticePleadingsAnswersCivil ProceduresPleading & PracticePleadingsComplaintsRequirementsCivil ProceduresPleading & PracticePleadingsSupplemental PleadingsCivil ProceduresPartiesSubstitutionsGeneral Overview

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10-104 California Points & Authorities § 104.06

§ 104.06 Related Points and Authorities Chapters

For forms of memoranda of points and authorities supporting and opposing demurrers on the ground of the bar of a statute of limitations, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* and Ch. 143, *Limitation of Actions* . For other points and authorities relating to the addition of new parties or causes of action after the statute of limitations has run, see Ch. 16, *Amended and Supplemental Pleadings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticePleadingsAmended PleadingsRelation BackCivil ProceduresPleading & PracticePleadingsSupplemental PleadingsCivil ProceduresPretrial JudgmentsJudgment on the PleadingsGovernmentsLegislationStatutes of LimitationsPleading & Proof

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10-104 California Points & Authorities §§ 104.07-104.19

[Reserved]

§§ 104.07[Reserved]

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10-104 California Points & Authorities § 104.20

§ 104.20 Supporting Demurrer to Amended Complaint [Code Civ. Proc. § 430.10(e)]--Action Against Fictitious Defendant Is Barred by Statute of Limitations--Amended Complaint Does Not Relate Back When Not Based on Same General Set of Facts as Original Complaint

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM OF
_____ [*name*],	)	POINTS AND AUTHORITIES
Plaintiff,	)	IN SUPPORT OF DEMURRER
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

THE DEMMURRER SHOULD BE SUSTAINED ON THE GROUND THAT PLAINTIFF'S AMENDED COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT THE AMENDMENT SUBSTITUTING DEFENDANT _____ [*name of defendant*] FOR A FICTITIOUSLY NAMED DEFENDANT DOES NOT RELATE BACK TO THE ORIGINAL COMPLAINT BECAUSE THE AMENDED COMPLAINT IS NOT BASED ON THE SAME GENERAL FACTS AS THE ORIGINAL COMPLAINT, AND THE COMPLAINT IS THEREFORE BARRED BY THE STATUTE OF LIMITATIONS.

A. Objection by Demurrer. The party against whom a complaint has been filed may object to the complaint by demurrer on the ground that it does not state facts sufficient to constitute a cause of action when such ground appears on the face of the complaint or from any matter of which the court is required to or may take judicial notice (*Code Civ. Proc. §§ 430.10(e), 430.30(a)*).

B. Failure to State Cause of Action. The objection that an action is barred by a statute of limitations may be set up by demurrer (*Baillargeon v. Department of Water & Power (1977) 69 Cal. App. 3d 670, 675, 138 Cal. Rptr. 338*) and must be deemed to be included in the ground of demurrer that the complaint does not state facts sufficient to constitute a cause of action (*Bell v. Bank of Cal. (1908) 153 Cal. 234, 245, 94 P. 889*).

C. Amended Complaint Does Not Relate Back If Based on Different Set of Facts. An amended complaint that substitutes a named defendant for a fictitious defendant does not relate back to the original complaint, thus avoiding the bar of the statute of limitations, if it is based on a different set of facts than those alleged in the original complaint (*Coronet Manufacturing Co. v. Superior Court (1979) 90 Cal. App. 3d 342, 345, 153 Cal. Rptr. 366*).

[*Optional*] **D. No Relation Back If Accident and Instrumentality Are Different in Amended Complaint.** When the accident and the offending instrumentality set forth in the amended complaint are different than those in the original complaint, the amendment is not based on the same set of facts and thus does not relate back to the original complaint (*Coronet Manufacturing Co. v. Superior Court (1979) 90 Cal. App. 3d 342, 345-347, 153 Cal. Rptr. 366*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of a demurrer to a complaint when the plaintiff has attempted to amend the original complaint to include a newly named plaintiff after the statute of limitations has run. The ground of the demurrer supported by this form is that the action fails to state a cause of action in that, as appears from the face of the complaint or other matters of which the court is required to or may take judicial notice, it is barred by the statute of limitations because the amendment cannot relate back to the original complaint if it is not based on the same set of facts that were set forth in the original complaint.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 104.23* may beused to oppose the demurrer supported by the foregoing points and authorities.

[c] Related Pleading and Practice Forms

For forms of fictitious name allegations to be used in complaints, see Ch. 20, *Allegations Commonly Used* , in California Forms of Pleading and Practice (Matthew Bender).

[d] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing demurrers on the ground of the bar of a statute of limitations, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* , and Ch. 143, *Limitation of Actions* .

[3] Discussion of Authorities

[a] Failure to State Cause of Action

Baillargeon v. Department of Water & Power *(1977) 69 Cal. App. 3d 670, 138 Cal. Rptr. 338* was an action for breach of contract, infliction of mental distress, and declaratory relief. Defendant's answer included the affirmative defense of the statute of limitations. After discovery, the trial court granted defendant's motion for judgment on the pleadings, apparently on the basis that the action was barred by the statute of limitations. Although the court of appeal reversed the decision as to the cause of action for breach of contract, the court observed that the defense of the statute of limitations may be raised by demurrer and noted that since judgment on the pleadings is similar to a judgment following the sustaining of a demurrer, the standard of appellate review is the same (*69 Cal. App. 3d 670, 675)* .

Bell v. Bank of California *(1908) 153 Cal. 234, 94 P. 889* was an action for the recovery of shares of stock. The defendant asserted in a general demurrer that the action was barred by a statute of limitations, and the trial court sustained the demurrer and dismissed the action. The method of asserting the defense or bar of a statute of limitations was apparently not at issue in the trial court or on appeal. The Supreme Court, however, noted that the bar of the statute of limitations is not specified in the Code of Civil Procedure as a ground of demurrer. That particular objection to a complaint, while required to be stated in the demurrer, must be deemed to be included within the ground of lack of facts sufficient to constitute a cause of action (*153 Cal. 234, 245)* .

[b] Amended Complaint Does Not Relate Back If Based on Different Set of Facts

Coronet Manufacturing Co. v. Superior Court *(1979) 90 Cal. App. 3d 342, 153 Cal. Rptr. 366* was an action by the parents of a girl who was electrocuted while using a hair dryer. The original complaint was timely filed against Sunbeam Corporation and fictitious defendants, alleging that the girl was electrocuted because of a defective Sunbeam hair dryer. The complaint contained allegations that each of the defendants was legally responsible in some manner for the girl's injuries and that each had supplied component parts for the hair dryer. More than two years after the accident, plaintiffs amended the complaint and served Coronet Manufacturing Company, identifying Coronet as one of the original fictitious defendants. The amended complaint alleged that Coronet had manufactured and supplied component parts of the hair dryer and a table lamp with a socket and switch that was used with the hair dryer. Coronet demurred to the complaint. The trial court overruled the demurrer, and Coronet petitioned for a writ of mandate. The court of appeal initially denied the petition, but the Supreme Court directed it to grant a hearing and issue an alternative writ. The court of appeal issued the alternative writ and held that a peremptory writ should issue but that plaintiffs should be given an opportunity to amend their complaint. The court stated that the action should be barred by the statute of limitations unless the amendment could be shown to relate back to the original complaint. The court stated that the theory of the original complaint was different from the theory in the amended complaint. While the original complaint alleged that the hair dryer was the cause of the injuries, the amended complaint alleged that the table lamp with the socket and switch was the cause. The court further stated that the rule of relation back in California is liberal, and allows an amended complaint to relate back if the amended complaint rests on the same general set of facts as the original complaint and refers to the same action and the same injuries referred to in the original complaint (*90 Cal. App. 3d 342, 345)* . The court stated that the focus should be on whether the same accident and the same offending

instrumentality is involved in both cases. The court compared the facts before it with the facts of the line of cases allowing relation back. The court concluded that in the case before it the offending instrumentality in the original complaint was the hair dryer and the accident was the use of the hair dryer, while in the amended complaint the instrumentality was the table lamp and the accident was the use of the lamp; thus, the same general set of facts did not exist in both cases (*90 Cal. App. 3d 342, 345-347)* . The court stated that if the plaintiffs could amend the complaint to show that the table was in the chain of causation of the originally pleaded complaint, it would be based on the same general set of facts and would relate back (*90 Cal. App. 3d 342, 348)* .

[c] No Relation Back If Accident and Instrumentality Are Different in Amended Complaint

The factual and procedural background of ***Coronet Manufacturing Co. v. Superior Court*** *(1979) 90 Cal. App. 3d 342, 153 Cal. Rptr. 366* is discussed in *§ 104.20[3][b]*. The court issued a peremptory writ of mandate ordering the trialcourt to vacate its order overruling the demurrer to the amended complaint, and ordering the trial court to sustain the demurrer with leave to amend. The court based its ruling on the fact that the amended complaint alleged a different accident and a different instrumentality than those alleged in the original complaint and thus could not relate back to the original complaint (*90 Cal. App. 3d 342, 345-347)* . The court stated that the difference between being electrocuted by a hair dryer and being electrocuted by a table lamp is as great as being electrocuted by the hair dryer and being poisoned by some improperly processed food found on the kitchen shelf. Although they relate to a single death at a single location they are different accidents and involve different instrumentalities (*90 Cal. App. 3d 342, 347)* .

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10-104 California Points & Authorities § 104.21

§ 104.21 Supporting Demurrer to Amended Complaint [Code Civ. Proc. § 430.10(e)]--Action Against Fictitious Defendant Is Barred by Statute of Limitations--Plaintiff Had Actual Knowledge of Defendant's Identity and Defendant's Relationship to Plaintiff's Injuries

[1] FORM

[*Caption. See § 104.20[1].*]

THE DEMURRER SHOULD BE SUSTAINED ON THE GROUND THAT PLAINTIFF'S AMENDED COMPLAINT FAILS TO STATE A CAUSE OF ACTION AGAINST DEFENDANT _____ [*name of defendant*] IN THAT PLAINTIFF'S SUBSTITUTION OF DEFENDANT FOR A FICTITIOUSLY NAMED DEFENDANT IS IMPROPER BECAUSE PLAINTIFF KNEW OF THE IDENTITY OF DEFENDANT AND DEFENDANT'S RELATIONSHIP TO THE INJURIES TO PLAINTIFF AT THE TIME THE COMPLAINT WAS FILED; BECAUSE PLAINTIFF'S SUBSTITUTION OF DEFENDANT WAS IMPROPER, THE AMENDMENT DOES NOT RELATE BACK TO THE DATE OF FILING OF THE ORIGINAL COMPLAINT, AND THE COMPLAINT IS THEREFORE BARRED BY THE STATUTE OF LIMITATIONS.

A. Objection by Demurrer. [*See § 104.20[1], Paragraph A.*]

B. Failure to State Cause of Action. [*See § 104.20[1], Paragraph B.*]

C. Plaintiff Cannot Amend Pursuant to *Code Civ. Proc. § 474* If Plaintiff Had Actual Knowledge of Defendant's Identity. A plaintiff may not amend a complaint for the purpose of substituting a named defendant for a fictitious defendant pursuant to *Section 474 of the Code of Civil Procedure* if at the time the original complaint was filed the plaintiff knew the identity of the defendant and the defendant's relationship to the injuries on which the action was based (*Dover v. Sadowinski (1983) 147 Cal. App. 3d 113, 116, 194 Cal. Rptr. 866* ; *Miller v. Thomas (1981) 121 Cal. App. 3d 440, 445, 175 Cal. Rptr. 327*).

[*Optional*] **D. *Code Civ. Proc. § 474* Is Not Available to Plaintiff Who Knew But Forgot Defendant's Identity**

When Identity Ascertainable From Readily Available Information. If a plaintiff knows the defendant's identity and then forgets it at the time the complaint is filed, in order to use the *Code of Civil Procedure § 474* relation back doctrine to avoid the bar of the statute of limitations the plaintiff must have at least reviewed readily available information likely to refresh his or her memory. If the defendant can be identified from the readily available information then section 474 is not available (*Woo v. Superior Court (1999) 75 Cal. App. 4th 169, 179-180, 89 Cal. Rptr. 2d 20 (Fourth Dist., Div. One))* . The *Woo* court refused to follow *Balon v. Drost (1993) 20 Cal. App. 4th 483, 25 Cal. Rptr. 2d 12 (First Dist., Div. Two)* , in which the majority opinion considered forgetfulness with no effort to refresh memory to be negligent ignorance, and held that negligent ignorance of a defendant's identity does not preclude adding a defendant under *Code of Civil Procedure section 474* after the statute of limitations expired. The *Balon* rule permits plaintiffs to assert they forgot the defendant's identity even though it is uncontested they knew the identity at an earlier time, and relieves them of any obligation to refresh their memory with readily available information. The result is to excise from section 474 the importance of actual ignorance of the defendant's name because by the assertion of memory loss a plaintiff would always be considered ignorant of the name of the defendant. The better rule is that announced above in *Woo* which retains meaning to the actual ignorance requirement of section 474 (*Woo v. Superior Court (1999) 75 Cal. App. 4th 169, 179-180, 89 Cal. Rptr. 2d 20*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a demurrer to a complaint when the plaintiff has attempted to amend the original complaint to substitute a named defendant for a fictitious defendant after the statute of limitations has run. The ground of the demurrer supported by this form is that the action fails to state a cause of action in that, as appears from the face of the complaint or other matters of which the court is required to or may take judicial notice, it is barred by the statute of limitations because the plaintiff did not namethe defendant in the original complaint even though at the time the original complaint was filed plaintiff knew of defendant's identity and defendant's relationship to the injuries involved.

This form can also be adapted for use in supporting a motion for summary judgment if the above ground does not appear on the face of the challenged pleading.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 104.24* may be used to oppose the demurrer supported by these points and authorities.

[c] Related Pleading and Practice Forms

For forms of fictitious name allegations to be used in complaints, see Ch. 20, *Allegations Commonly Used* , in California Forms of Pleading and Practice (Matthew Bender).

[d] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing demurrers on the ground of the bar of a statute of limitations, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* , and Ch. 143, *Limitation of Actions* .

[3] Discussion of Authorities

[a] Plaintiff Cannot Amend Pursuant to Code Civ. Proc. § 474 If Plaintiff Had Actual Knowledge of Defendant's Identity

Dover v. Sadowinski *(1983) 147 Cal. App. 3d 113, 194 Cal. Rptr. 866* was an action against several named defendants and Doe defendants, alleging that the defendants' negligence caused the death of plaintiff's wife. The complaint did not name decedent's doctor, Sadowinski, as a defendant. After the statute of limitations had run, plaintiff served Sadowinski as Doe III and amended the complaint. Plaintiff's attorney declared that he had been ignorant of the true name of defendant Sadowinski at the time the original complaint was filed. The trial court granted summary judgment for defendant on the ground that plaintiff had not been truly ignorant of the identity of Dr. Sadowinski at the time of filing the complaint and that plaintiff therefore was unable to come within the provisions of *Code Civ. Proc. § 474* for the purpose of tardily bringing Sadowinski into the action as a named defendant.

The court of appeal affirmed. The court stated that for purposes of applying the requirement of *Code Civ. Proc. § 474* that the plaintiff be ignorant of the name of a defendant in order to name a fictitious defendant, the applicable standard is that plaintiff must have had no actual knowledge of the defendant's identity, and that that lack of knowledge must have been real and not feigned (*147 Cal. App. 3d 113, 116)* . The court stated that in applying the standard, as delineated in *Munoz v. Purdy (1979) 91 Cal. App. 3d 942, 947-948, 154 Cal. Rptr. 472* , the evidence clearly indicated that plaintiff was neither ignorant of the facts giving plaintiff a cause of action, nor of Dr. Sadowinski's name (*147 Cal. App. 3d 113, 116)* . The court pointed out that plaintiff's wife had been in the hospital for three weeks prior to her death, Dr. Sadowinski had been her attending physician throughout that period, plaintiff had spoken to Dr. Sadowinski on several occasions and at least once in person, and had been informed by Sadowinski that he was in charge of plaintiff's wife's care. Furthermore, the court stated that plaintiff's attorney's admission at the summary judgment hearing that he knew of Sadowinski's involvement but not the extent of the involvement was a crucial factor. The court stated that a plaintiff does not need to know every detail concerning a defendant's involvement, and that the evidence before the court clearly showed that plaintiff's lack of knowledge was feigned and not real (*147 Cal. App. 3d 113, 117-118)* .

Miller v. Thomas *(1981) 121 Cal. App. 3d 440, 175 Cal. Rptr. 327* was an action for injuries incurred in an automobile accident. Plaintiff's automobile had been hit by Thomas, who identified himself to plaintiff as an undercover narcotics officer for the Los Angeles Police Department and stated that the vehicle he was driving was an unmarked police vehicle. Plaintiff sued the City of Los Angeles, the only named defendant, and Doe defendants for damages. The city's answer denied the agency allegations contained in the complaint and stated further that in setting forth its defenses the city neither admitted nor denied that Thomas was acting within the scope of his employment at the time of the accident. Thereafter, plaintiff substituted attorneys twice. Plaintiff's third attorney amended the complaint to substitute Thomas as Doe I more than three years after the accident, after finding out through the use of interrogatories that the city contended that Thomas had been outside the course and scope of his employment at the time of the accident. Thomas then moved for a summary judgment on the ground that the action against him was barred by the one-year statute of limitations. The trial court granted summary judgment, and the court of appeal affirmed. The court stated that *Code Civ. Proc. § 474*, authorizing the use of fictitious names when the plaintiff is ignorant of the defendant's name, has

been liberally construed by the courts to explain the failure to name a person as a defendant until some time later. The court stated that even when a person's identity has been known to plaintiff when the action was filed, the use of *Code Civ. Proc. § 474* has been upheld if the plaintiff was initially unaware of that person's true relationship to the injuries on which the action was based, or if a change in the law has indicated that persons not originally joined might be held liable (*121 Cal. App. 3d 440, 444-445)* . The court said thatin those cases there has always been some showing that at the time th original complaint was filed the plaintiff was ignorant of something having a bearing on the liability of the newly summoned party. However, the court said that in the case before it, the plaintiff conceded to knowing the identity of the driver of the vehicle that collided with hers within minutes of the accident. The court said that plaintiff's first attorney, who drafted and signed the complaint, knew Thomas's identity and knew he was legally responsible but made a tactical choice to proceed against the city only. The court further stated that the fact that the attorney stated in his declaration that he was not aware that the city would deny that the accident was within the course and scope of Thomas's employment was no excuse because the attorney should have been put on notice of that issue when the city answered the complaint, which occurred before the statute of limitations had run. The court said since none of plaintiff's attorneys learned anything about Thomas that was not known when the original complaint was drafted, *Code Civ. Proc. § 474* could not be used; the statute of limitations had thus run long before Thomas was made a party to the action (*121 Cal. App. 3d 440, 445-446)* .

[b] Code Civ. Proc. § 474 Is Not Available to Plaintiff Who Knew But Forgot Defendant's Identity When Identity Ascertainable From Readily Available Information

In ***Woo v. Superior Court*** *(1999) 75 Cal. App. 4th 169, 89 Cal. Rptr. 2d 20 (Fourth Dist., Div. One)* , a medical malpractice case, plaintiff filed a complaint on April 25, 1997, naming several defendants other than Woo, alleging, among other things, that one defendant doctor misinterpreted a mammogram in February, 1996, and inserted incorrectly a breast hookwire, the purpose of which was to identify for the surgeon, another named defendant, the portion of the breast from which to obtain a biopsy specimen. Plaintiff sought damages resulting from unnecessary multiple operations to obtain biopsy specimens. The defendant doctor who allegedly misinterpreted the mammogram served plaintiff with a request for production of documents. The responses included a reports showing that defendant not to have been involved in the February, 1996, procedure, and included reports from Woo relating to that procedure. Plaintiff filed a dismissal without prejudice of the action as to only that doctor. On February 3, 1998, plaintiff filed an amended complaint that named the same defendants except that Woo was added as a defendant in place of the dismissed defendant. In plaintiff's deposition, taken in July and August, 1998, plaintiff testified that in May, 1996, the surgeon told her and her husband that Woo misinterpreted plaintiff's February 1996 mammogram and incorrectly placed the hookwire. Woo moved for summary judgment asserting that plaintiff's action against Woo was barred by the one-year limitation period of *Code Civ. Proc. § 340.5*. Plaintiff opposed the motion arguing that although the statute of limitations began to run in May, 1996, plaintiff's original complaint was filed on April 25, 1997, within the one-year limitation period and the amended complaint naming Woo related back to the time of filing the original complaint. The trial court treated the amended complaint as the functional equivalent of the substitution of a party for a fictitious Doe defendant, held that the time of filing the amended complaint related back to the date of filing the original complaint and denied Woo's motion for summary judgment. Woo filed a petition for writ of mandate challenging the trial court's denial of the motion (*75 Cal. App. 4th 169, 172-175)* .

The court of appeal granted the writ directing the trial court to vacate its order denying the motion for summary judgment and to enter a new order granting the motion (*75 Cal. App. 4th 169, 180-181)* . Initially the court noted that an amended complaint that adds a new defendant does not relate back to the date of filing the original complaint and the statute of limitations is applied as of the date the amended complaint is filed, not the date the original complaint is filed. A recognized exception to the general rule is the substitution under *Code Civ. Proc. § 474* of a new defendant for a fictitious Doe defendant named in the original complaint as to whom a cause of action was stated in the original complaint. If the requirements of section 474 are satisfied, the amended complaint substituting a new defendant for a fictitious Doe defendant filed after the statute of limitations has expired is deemed filed as of the date the original complaint was filed. Among the requirements for application of the section 474 relation back doctrine is that the new

defendant in an amended complaint be substituted for an existing fictitious Doe defendant named in the complaint (*75 Cal. App. 4th 169, 176)* . After discussing plaintiff's failure to satisfy this procedural requirement, by not identifying Woo in the amended complaint as a substitute for a previously named fictitious defendant and not identifying Woo as such in the summons served, the court nevertheless concluded that these defects would not foreclose consideration of plaintiff's section 474 relation back contention. The court also noted, however, that in other cases the court may require strict compliance and advising counsel to follow the correct procedure for substituting a named defendant for a fictitious Doe defendant (*75 Cal. App. 4th 169, 176-177)* .

The court next noted that a further and nonprocedural requirement for application of the *Code Civ. Proc. § 474* relation back doctrine is that the plaintiff must have been genuinely ignorant of Woo's identity at the time plaintiff filed plaintiff's original complaint. The omission of the defendant's identity in the original complaint must be real and not merely a subterfuge for avoiding the requirements of section 474. Furthermore, if the identity ignorance requirement of section 474 is not met, a new defendant may not be added after the statute of limitations has expired even if the new defendant cannot establish prejudice resulting from the delay. If, however, the plaintiff is actually ignorant of the defendant's identity, the section 474 relation back doctrine applies even if that ignorance is the result of the plaintiff's negligence (*75 Cal. App. 4th 169, 177)* . The court pointed out that plaintiff's deposition testimony established that in May,1996, plaintiff knew Woo's identity, but at the time of filing the complaint plaintiff averred that plaintiff was ignorant of Woo's identity. Plaintiff sought to avoid the import of her deposition testimony by asserting, among other things, that at the time plaintiff filed the complaint she forgot that the surgeon had discussed Woo's participation with plaintiff and her husband and that plaintiff remembered Woo's identity only when conferring with her attorney in November 1997 after reviewing medical records showing that Woo, and not the previously named defendant, was responsible for her injuries (*75 Cal. App. 4th 169, 177-178)* . With regard to the issue of known but forgotten defendant identity under section 474, the court first discussed *Balon v. Drost (1993) 20 Cal. App. 4th 483, 25 Cal. Rptr. 2d 12 (First Dist., Div. Two)* , in which the court equated forgetting a defendants's known identity with actual, good faith and nonfeigned ignorance of the defendant's identity, and denied the existence of an obligation to make any effort to obtain easily accessible information to refresh one' memory. The *Balon* court considered forgetfulness with no effort to refresh memory to be negligent ignorance, and held that negligent ignorance of a defendant's identity does not preclude adding a defendant under section 474 after the statute of limitations expired (*75 Cal. App. 4th 169, 178)* . The court rejected the reasoning and holding in *Balon* agreeing with its dissenting opinion in which it was noted that a requirement of reviewing readily available information is not a significant burden, is not inconsistent with cases that impose no duty of inquiry on plaintiff's who never knew the defendant's identity, and assures the good faith of plaintiff's who seek to use the section 474 relation back doctrine. The court then noted that the *Balon* rule permits plaintiffs to assert they forgot the defendant's identity even though it is uncontested they knew the identity at an earlier time, and relieves them of any obligation to refresh their memory with readily available information. The result is to excise from *Code Civ. Proc. § 474* the importance of actual ignorance of the defendant's name because by the assertion of memory loss a plaintiff would always be considered ignorant of the name of the defendant. The better rule is that if a plaintiff knows the defendant's identity and then forgets it at the time the complaint is filed, in order to use the section 474 relation back doctrine to avoid the bar of the statute of limitations the plaintiff must have at least reviewed readily available information likely to refresh his or her memory. If the defendant cannot be identified from readily available information then section 474 is available. If the defendant can be identified from the readily available information then section 474 is unavailable. Because plaintiff did not avail herself of readily available information to refresh her recollection of Woo's identity, plaintiff was not entitled to use section 474 to amend her complaint after the statute of limitations had run. Under these circumstances there was no good faith, bona fide ignorance as required by *Code Civ. Proc. § 474* (*75 Cal. App. 4th 169, 179-180)* .

For discussion of *Balon v. Drost (1993) 20 Cal. App. 4th 483, 25 Cal. Rptr. 2d 12 (First Dist., Div. Two)* , *see § 104.24[3][b]*.

[4] Additional Authorities

[a] Plaintiff Cannot Amend Pursuant to Code Civ. Proc. § 474 If Plaintiff Had Actual Knowledge of Defendant's Identity

In *Snoke v. Bolen (1991) 235 Cal. App. 3d 1427* , plaintiff filed a complaint for dental negligence against an oral surgeon and 20 Doe defendants alleging injury to bone and a tooth. At the time, plaintiff was also under the care of her dentist, respondent/defendant Bolen. After plaintiff learned it could not be determined whether the oral surgeon or Bolen caused the injury, plaintiff amended her complaint to substitute Bolen as Doe I. The trial court granted Bolen's motion for summary judgment on the ground the action against Bolen was barred by the statute of limitations (*235 Cal. App. 3d 1427, 1430)* . The court of appeal affirmed, stating that plaintiff knew at the time the complaint was filed that both Bolen and the oral surgeon had performed dental work in and around the injured tooth, thus failing to demonstrate that she was ignorant at the time of filing the complaint of facts having a bearing on Bolen's liability (*235 Cal. App. 3d 1427, 1432)* .

Hazel v. Hewlett (1988) 201 Cal. App. 3d 1458, 247 Cal. Rptr. 723 was a medical malpractice action against two dentists arising from an alleged failure to prescribe antibiotics before, during, and after the extraction of 13 teeth over three visits. The first dentist extracted seven teeth and informed the plaintiff that the rest of the extractions would be performed by the other dentist, who was identified by name and described as an associate of the first dentist. Plaintiff's initial complaint alleged professional negligence against the first dentist and numerous Doe defendants. After the statute of limitations had run, plaintiff amended the complaint to substitute the name of the second dentist for a Doe. The trial court held that the action was barred against the second dentist by the statute of limitations, and the appellate court affirmed. The court held that while "ignorance" within the meaning of *Code Civ. Proc. § 474* was not to be interpreted literally and extended to ignorance of germane facts other than the defendant's name, the ignorance must be real and not feigned. Under the facts of the case, the plaintiff, as of the date on which the statute ran, knew all of the basic facts that constituted a cause of action for professional negligence against the second dentist (*201 Cal. App. 3d 1458, 1464-1465)* .

In *Pabitzky v. Frager (1985) 164 Cal. App. 3d 401, 210 Cal. Rptr. 426* , plaintiffs sued an insurance agent who sold them an automobile insurance policy, and the insurer of that policy. The trial court sustained a demurrer to their amended complaint without leave to amend, and the court of appeal affirmed. The court held, inter alia, that the cause of action against the insurer was barred by the statute of limitations. Plaintiffs initially named only the agent and fictitious defendants and later, after the statute of limitations had run, added their insurer byamendment, although they had from the beginning known what company had issued their policy. The court, in so holding, relied on the rule that a plaintiff cannot avoid the statute of limitations by naming a fictitious defendant in a timely complaint, and then, after the statute has run, adding by amendment a defendant whose identity and capacity were known from the outset (*164 Cal. App. 3d 401, 403-404)* .

Ingram v. Superior Court (1979) 98 Cal. App. 3d 483, 159 Cal. Rptr. 557 was an action for personal injuries incurred in an automobile accident in which plaintiff was a passenger in a pick-up truck that collided with another vehicle. The truck driver died as a result of the accident. In plaintiff's original complaint, he named the owner of the pick-up truck, the driver of the other vehicle, and fictitious defendants, but did not sue the estate of the driver of the vehicle in which he was a passenger. The complaint did allege that the truck driver was negligent. When the trial commenced, plaintiff learned that his recovery would be less if he did not sue the truck driver because the truck owner's insurance was limited in cases of derivative liability for injuries caused by a permissive user. Plaintiff then attempted to amend the complaint to name and bring in the truck driver's estate. The trial court granted a motion to strike the amended complaint. The court of appeal denied plaintiff's petition for a writ of mandate, stating that the use of Doe defendants and substitution of them by amendment is allowed only if the plaintiff was ignorant of the identity of the defendant. The court said that the only factor that was unknown to plaintiff was the limitation on the insurance policy for liability arising out of permissive use. The court further stated that the effect of the proposed amendment would be to name a new party without justifiable cause after the statute had run (*98 Cal. App. 3d 483, 491-492)* . The court stated the rule that amendment after the statue of limitations has run will not be permitted when the result adds a party who was neither a

named nor a fictitiously designated party to the proceeding before the time of the proposed amendment (*98 Cal. App. 3d 483, 492)* .

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 104 FICTITIOUSLY NAMED DEFENDANTS (DOES)
PART II. FORMS

10-104 California Points & Authorities § 104.22

§ 104.22 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)]--Summons or Notice Does Not Comply With Fictitious Name Statute [Code Civ. Proc. § 474]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____ _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO QUASH SERVICE OF SUMMONS ON PERSON SERVED UNDER FICTITIOUS NAME STATUTE
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	[*Code Civ. Proc. §§ 418.10(a)(1), 474*]
	)	Date: _____
		Time: _____
		Location: _____

_____

DEFENDANT'S MOTION TO QUASH SERVICE OF SUMMONS SHOULD BE GRANTED BECAUSE THE _____ [SUMMONS *or* COMPLAINT] WAS FATALLY DEFECTIVE IN THAT IT DID NOT COMPLY WITH THE _____ [ENDORSEMENT *or* ALLEGATION] REQUIREMENT OF SECTION 474 OF THE CODE OF CIVIL PROCEDURE.

A. Motion to Quash. On or before the last day of defendant's time to plead, or within such additional time as the court may for good cause allow, defendant may serve and file a notice of motion to quash service of summons on the ground that the court lacks jurisdiction over him or her (*Code Civ. Proc. § 418.10(a)(1)*).

B. Necessity for Compliance With Statutes. A court does not obtain jurisdiction of a defendant when service of the summons is not made in compliance with statutory requirements (*House v. State of California (1981) 119 Cal. App. 3d 861, 873, 174 Cal. Rptr. 279* ; *Eagle Electric Mfg. Co. v. Keener (1966) 247 Cal. App. 2d 246, 250, 55 Cal. Rptr. 444*).

[*Optional*] **C. *Code Civ. Proc. § 474* Requires Endorsement on Summons.** *Section 474 of the Code of Civil Procedure* provides in part that no default or default judgment shall be entered against a defendant designated as a fictitious defendant unless it appears that the copy of the summons or other process, or if there is no summons or process, the copy of the first pleading or notice served onthe defendant bore on the face of it a notice stating in substance: "To the person served: You are hereby served in the within action (or proceedings) as (or on behalf of) the person sued under the fictitious name of (designating it)." (*see Code Civ. Proc. § 474*).

[*Optional*] **D. Service of Summons Pursuant to *Code Civ. Proc. § 474* Without Endorsement Is Insufficient to Give Court Jurisdiction.** The provision of *Section 474 of the Code of Civil Procedure* that requires an endorsement on the summons or notice stating that the defendant is being served as the designated fictitious defendant is mandatory, and failure to provide that endorsement deprives the court of the right to proceed against a defendant served with such a defective summons (*Carol Gilbert, Inc. v. Haller (2009) 179 Cal. App. 4th 852, 101 Cal. Rptr. 3d 843* ; *Fuss v. City of Los Angeles (1958) 162 Cal. App. 2d 643, 646, 328 P.2d 831* ; *Armstrong v. Superior Court (1956) 144 Cal. App. 2d 420, 424, 301 P.2d 51*).

[*Optional*] **E. Complaint Must Have Contained Fictitious Name Allegations Regarding Defendant.** Unless the requirement of *Code of Civil Procedure Section 474* that plaintiff plead his or her ignorance of the true name of the defendant sued under the fictitious name is met, service of that defendant will be quashed (Kerr-McGee Chemical Corp. v. Superior Court (l984) *160 Cal. App. 3d 594, 597-601, 206 Cal. Rptr. 654*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of defendant's motion to quash service of summons when the summons did not contain an endorsement stating that defendant is served under a designated fictitious name, or when the complaint failed to allege that plaintiff was ignorant of the true name of the fictitiously named defendant. The ground of the motion is that, as indisputably appears from the papers submitted on the motion, the service of summons is defective and the court lacks jurisdiction over the defendant because the endorsement required by *Code Civ. Proc. § 474* is mandatory.

This form can also be adapted for use in supporting a motion to set aside a default judgment obtained in contravention of *Code Civ. Proc. § 474* because the summons lacked the proper endorsement.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms of a notice of motion to quash service of summons, a declaration in support of the motion, and an order quashing service, and for a form of petition for writ of mandate to compel a lower court to quash service of summons, see Ch. 518, *Service of Summons and Papers* , in California Forms of Pleading and Practice.

[c] Related Points and Authorities

For forms of memoranda of points and authorities supporting motions to quash service of summons, see Ch. 132, *Jurisdiction: Personal Jurisdiction and Inconvenient Forum* .

[3] Discussion of Authorities

[a] Necessity for Compliance With Statutes

House v. State of California *(1981) 119 Cal. App. 3d 861, 174 Cal. Rptr. 279* was an action for false imprisonment against various police officers and their employing governmental agencies. In attempting to serve the State of California, plaintiff's attorney had served an employee of the State Board of Control. Plaintiffs contended that the employee had stated that she was authorized to accept service of process on behalf of the State, while the employee contended that she had told the attorney she could not accept service. One of the issues on appeal was the propriety of the trial court's quashing of service of the summons and complaint and dismissing plaintiffs' action against the State. The court of appeal affirmed the trial court's actions, stating that substantial evidence supported the implied determinations that the board was not the State's ostensible agent for service and that equitable estoppel did not preclude assertion of the bar of former Code Civ. Proc. § 581a(a) (*now see Code Civ. Proc. §§ 583.210-583.250*). The court stated that plaintiffs were required by *Gov. Code § 955.4* to serve the summons on the Attorney General. The court stated that statutory service requirements are jurisdictional in nature and that noncompliance deprives the trial court of jurisdiction (*119 Cal. App. 3d 861, 873)* .

Eagle Electric Mfg. Co. v. Keener *(1966) 247 Cal. App. 2d 246, 55 Cal. Rptr. 444* involved substituted service on the Secretary of State pursuant to a court order (void) based on a declaration which, on its face, was insufficient to give the court jurisdiction. In affirming a summary judgment in favor of plaintiff, by which a default and default judgment against plaintiff were vacated, the court of appeal stated that when jurisdiction is obtained by a prescribed form of constructive notice, the statutory conditions on which service depends must be strictlyconstrued; that there must be strict conformity with the mode prescribed in the statute; and that conformity with the statute is deemed jurisdictional so that the absence of conformity deprives the court in the particular action of the power to render a judgment (*247 Cal. App. 2d 246, 250-251)* .

[b] Service of Summons Pursuant to Code Civ. Proc. § 474 Without Endorsement Is Insufficient to Give Court Jurisdiction

In ***Carol Gilbert, Inc. v. Haller*** *(2009) 179 Cal. App. 4th 852, 101 Cal. Rptr. 3d 843* , a realtor filed a complaint naming a restaurant, an individual, and Does 1 through 25 as defendants. She alleged a single cause of action for breach of a contract signed by the individual defendant, engaging plaintiff as exclusive agent to locate a suitable property for a restaurant. Plaintiff alleged that she found numerous properties, which she repeatedly brought to his attention. The individual defendant later gave notice that he was terminating the contract. Although it was terminable only for cause, plaintiff agreed to its termination, reminding him of the properties she had already identified. In the complaint, she alleged that shortly after termination, defendants negotiated a lease for a property she had found for them. The

complaint's only allegations concerning fictitiously named defendants were, "Plaintiff is ignorant of the true names and capacities, whether individual, corporate, associate, or otherwise, of Defendants sued herein as DOES 1 through 25, inclusive ('Does'), and therefore sues these Defendants by such fictitious names and will ask leave of the court to amend this Complaint to show their true names and capacities when the same are ascertained. Plaintiff is informed and believes, and on that basis alleges, that each of the Defendants designated by such fictitious name could or may assert interest [sic] in the subject matter of this litigation." It was alleged that each of the defendants was acting at all times as the agent and employee of each other defendant. Summons was served on the individual defendant, personally and on behalf of the restaurant. In the answer, defendant stated that in operating the restaurant, which had closed after five months, he had acted at all times as the agent of the restaurant's owners. He acknowledged that he was a partner in the restaurant or in one or both of two entities that owned it, but asserted that under the partnership agreement he was not liable for "guaranteed [liabilities] of the partnership," and therefore "should be exempt from this matter." He identified another person as one of seven "legal entities and individuals" that held an interest in the restaurant." He further asserted that in his first meeting with plaintiff, he informed her that another realtor had already shown him the property, among others, and he made numerous further assertions in derogation of plaintiff's claims. Plaintiff's attorney later declared that based on this pleading and ensuing conversations with defendant, he concluded that the other person was a principal of the restaurant, and likely the real party in interest in the case" On plaintiff's behalf, he filed an "Amendment Substituting True Name for Fictitious Name (*C.C.P. § 474*)," reciting that plaintiff had learned the true name of the defendant designated in the Complaint as Doe I, and substituted his true name for the fictitious name whenever it appeared in the complaint. A process server handed the person, at his home, copies of a summons, the complaint, and the Doe amendment, and plaintiff filed a declaration of service stating the name of the party as shown on documents served sued as DOE 1. However, the copy of the summons actually received and eventually filed with the court was left blank in the space designated to notify him that he was sued as a fictitiously named defendant. Consistent with this appearance, the second page of the declaration of service also stated that "The 'Notice to the Person Served' (on the summons) was completed" to show service "as an individual defendant" and did not claim to have shown service "as the person sued under the fictitious name of (specify)." At plaintiff's request, the clerk entered his default and subsequently entered the restaurant's default. The clerk refused to enter judgment, however, on the ground that, the individually-named defendant answered the complaint, so that any default judgment had to be entered by the court. Plaintiff thereafter caused the individually-named defendant to be dismissed from the action without prejudice. The clerk again refused to enter judgment on the ground that accrued interest could not be calculated from the face of the complaint. Plaintiff then submitted declarations in support of an application for a default judgment, in substance repeating the allegations of the complaint. She did not address the assertions in the individually-named defendant's answer that the property had been brought to his attention by another agent and expressly excluded from the contract. Her attorney filed a declaration to the effect that she had incurred attorney's fees. The court entered a judgment by default against the person served as the fictitiously named defendant and the restaurant. Plaintiff then served notice of entry of judgment. Nearly one year later, plaintiff's counsel caused an earnings withholding order to be served on the fictitiously-named person's employer. Some time thereafter, the person was served with a notice of creditor's examination. He filed a motion to vacate the judgment under *Code Civ. Proc. § 473(d)* and to set aside the default on the grounds that they were void by deficient service of process. He contended that he was not properly named as a defendant in substitution for Doe 1, nor was he properly served under *Code Civ. Proc. § 474*. In the supporting memorandum, he asserted that the judgment was deficient in numerous respects, including that the summons served on him did not comply with *Code Civ. Proc. § 474*, which requires that such a summons notify the recipient that he is sued as a fictitiously named defendant. The court denied the motion to vacate, finding that he had actual notice of the suit and that plaintiff had substantially complied with *Code Civ. Proc. § 474* by filing an Amendment Substituting True Name for Fictitious Name (*179 Cal. App. 4th 852, 855-858)* .

The Court of Appeal reversed. The court found that the form of summons used in California is intended to facilitate compliance with the requirement in *Code Civ. Proc. § 474* that the summons notify the recipient that he or she is sued as a fictitiously named defendant by providing a checkbox whereby the serving party can indicate that the recipient is being served as a person sued under a fictitious name, with the name to be written on the form at that point. The summons served here was not so marked. It was only marked to show service on defendant "as an individual

defendant." There was nothing affirmatively misleading about checking that box; he was served as an individual defendant, rather than on behalf of a corporation or other entity. The problem lay in the failure to check the box and fill in the blank so as to state in substance that he was sued as the person named in the accompanying pleadings as Doe 1, and the complete absence of the required notice from the summons was a clear violation of *Code Civ. Proc. § 474*. The amendment identifying him as Doe 1 did not constitute "other process as used in § 474. The function of the phrase "or other process" in § 474 is to address situations where the defendant is served with an instrument, other than a summons, by which the court commands some action. Section § 474 embraces a third situation, where the paper served is neither a writ nor a summons, but the operation of that phrase is limited to situations in which "no summons or process" is served (*Code Civ. Proc. § 474*.) When a writ or summons is served, as it was here, the notice must appear in that document, and its appearance in some other document will not comply with the statute (*179 Cal. App. 4th 852, 858-862)* . Further, the papers served on the fictitiously named defendant were not sufficient to substantially comply with statutory requirements, because the complete failure to include the required notice precluded reliance on the doctrine of substantial compliance. Nothing in the summons hinted to the fictitiously named defendant, let alone "made clear" to him, that the summons was served on him as Doe 1. The summons made no reference to the statute governing such service. Nor does anything in his conduct show that he knew the summons did, or was intended to, hale him personally into court. His inaction suggested the opposite, i.e., that he did not understand the summons required him to answer on pain of an adverse judgment. At best the question of his understanding and belief was open to doubt and dispute. The court questioned in dicta whether service that does not comply with statutory requirements should ever be allowed to stand, over a defendant's challenge, as the basis for a default judgment, and opined that a distinction should be drawn between the sufficiency of service to support a default judgment, and the sufficiency of service for other purposes, including to avoid dismissal for want of prosecution. However, the court concluded that it did not need to decide whether a rule of substantial compliance should be flatly excluded in the default setting, because that rule, properly understood, did not permit the court to overlook the defects here. The court did find that a finding of substantial compliance requires three preconditions:

- There must have been some degree of compliance with the offended statutory requirements.

- The objective nature and circumstances of the attempted service must have made it highly probable that it would impart the same notice as full compliance.

- It must in fact have imparted such notice, or at least sufficient notice to put the defendant on the defense. It is not enough that the process inform the defendant of the fact of a lawsuit, or even of a lawsuit in which the defendant's name appeared. Due process required notice of "the duty to defend."

In this case, there was no compliance at all. Thus, the trial court erred by holding that the service on defendant was sufficient to confer jurisdiction for purposes of a default judgment (*179 Cal. App. 4th 852, 862-866)* .

Fuss v. City of Los Angeles *(1958) 162 Cal. App. 2d 643, 328 P.2d 831* was a personal injury action that alleged that plaintiff's injuries were incurred because of the negligence of "J.A. Thompson, J.H. Thompson and their agents and employees, Doe V and Doe VI." The complaint did not allege negligence against J.A. Thompson and Son, a corporation. Thereafter, service was made on the corporation, but the summons did not contain the endorsement required by *Code Civ. Proc. § 474*, stating that the corporation was served as a defendant sued under a designated fictitious name. The corporation appeared specially and moved to quash service. The trial court granted the corporation's motion, and the court of appeal affirmed. The court held that the failure of the summons to bear the endorsement required by *Code Civ. Proc. § 474* was a sufficient ground to uphold the trial court's action. The court also held that one who is not named either by his or her true name or by a fictitious name is not a proper party to an action and that service of summons on such a person should be quashed (*162 Cal. App. 2d 643, 646)* .

Armstrong v. Superior Court *(1956) 144 Cal. App. 2d 420, 301 P.2d 51* was a mandate proceeding to compel the superior court to issue an order quashing the service of summons in a personal injury suit. In the underlying action,

plaintiff brought suit for damages for injuries incurred in an automobile accident against certain named defendants and Doe defendants. Armstrong was not a named defendant. Armstrong was served by plaintiff, but the summons did not contain the endorsement required by *Code Civ. Proc. § 474*. Armstrong made a special appearance and moved to quash service of summons. The trial court denied the motion. In seeking the writ of mandate, Armstrong contended that the complaint was insufficient to make him a party to the action and that therefore the service of summons on him did not subject him to the personal jurisdiction of the court. The court of appeal held that the plaintiff had a right to allege that there were defendants, other than those named, whose true names were unknown to plaintiff and to thereafter amend the complaint to name those tortfeasors and serve them. However, the appellate court issued the writ, stating that a summons served pursuant to *Code Civ. Proc. § 474* that does not contain the endorsement stating that the defendant was sued under a designated fictitious name is fatally defective. The court stated that the provision in *Code Civ. Proc. § 474* requiring the endorsement is mandatory and not directory, and its effect is to deprive the court of the right to proceed against a defendant served with such a defective summons. The court stated that such defective service deprived the court of jurisdiction over the person of the defendant (*144 Cal. App. 2d 420, 424)* .

[c] Complaint Must Have Contained Fictitious Name Allegations Regarding Defendant

In ***Kerr-McGee Chemical Corp. v. Superior Court*** *(1984) 160 Cal. App. 3d 594, 206 Cal. Rptr. 654* , plaintiff had named Does and made fictitious name allegations with respect to them, but not with respect to defendant Trona Medical Clinic (TMC). Plaintiff served Kerr-McGee Chemical Corp "as the person sued under the fictitious name of Trona Medical Clinic." At the motion to quash summons, plaintiff submitted an amendment seeking to insert Kerr-McGee Chemical Corporation doing business as Trona Medical Clinic in place of TMC (Kerr-McGee could not then be served as a Doe, the three-year period of former Code Civ. Proc. 581a having expired). The trial court denied the motion to quash.

The court of appeal reversed, issuing a writ of mandate to quash service of the summons and complaint. In addition to citing *Nissan v. Barton (1970) 4 Cal. App. 3d 76, 79, 84 Cal. Rptr. 36* , for the proposition that the failure to allege plaintiff's ignorance of defendant's true name is fatal, the court rejected the trial court's characterization of the situation as an attempt to correct plaintiff's mistake in the name of a party, and stated that this was actually an attempt to bring a new party into the litigation (*160 Cal. App. 3d 594, 598-601)* .

A vigorous dissent discussed the spectrum of cases involving similar situations, including *Austin v. Massachusetts Bonding & Insurance Co. (1961) 56 Cal. 2d 596, 15 Cal. Rptr. 817* (allowing amendment relating back despite lack of allegation that fictitious defendant was liable as surety), *Garrett v. Crown Coach Corp. (1968) 259 Cal. App. 2d 647, 66 Cal. Rptr. 590* (allowing amendment relating back despite lack of allegation that fictitious defendant was liable for negligent design), *Mayberry v. Coca Cola Bottling Co. (1966) 244 Cal. App. 2d 350, 53 Cal. Rptr. 317* (allowing substitution of partnership for similarly named corporation), and *Henderson v. Superior Court (1915) 26 Cal. App. 437, 147 P. 216* (allowing plaintiff suing only in fictitious business name to amend on day of trial to state true name and capacity). The dissent also pointed out that Kerr-McGee had notice that it was the entity intended to be named as defendant, and opined that the majority opinion was a triumph of insubstantial technicalities over substantial legal rights (*56 Cal. 2d 596, 601-603)* .

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 104 FICTITIOUSLY NAMED DEFENDANTS (DOES)
PART II. FORMS

10-104 California Points & Authorities § 104.23

§ 104.23 Opposing Demurrer to Amended Complaint [Code Civ. Proc. § 430.10(e)]--Action Against Fictitious Defendant Not Barred by Statute of Limitations--Amended Complaint Relates Back When Based on Same Set of Facts as Original Complaint

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____ _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF
vs.	)	POINTS AND AUTHORITIES
_____ [*name*],	)	IN OPPOSITION TO
Defendant.	)	DEMURRER
	)	[*Code Civ. Proc. § 430.10(e)*]
	)	

_____

DEFENDANT'S DEMURRER SHOULD BE OVERRULED BECAUSE A COMPLAINT MAY BE AMENDED TO CHANGE THE NAME OF A FICTITIOUS DEFENDANT TO A NAMED DEFENDANT WHEN THE TRUE NAME BECOMES KNOWN, AND THE AMENDMENT RELATES BACK TO THE DATE THE COMPLAINT WAS FILED, AVOIDING THE BAR OF THE STATUTE OF LIMITATIONS.

A. Amendment of Fictitious Name. When a plaintiff is ignorant of the name of a defendant, that fact must be stated in the complaint and that defendant may be designated in a pleading by a fictitious name that must be amended when the true name of the defendant is known (*see Code Civ. Proc. § 474*).

B. Amendment of Complaint Relates Back to Time of Filing. An amended complaint relates back to the filing of the original complaint and thus avoids the bar of the statute of limitations as long as recovery is sought in both pleadings on the same general set of facts (*Marasco v. Wadsworth (1978) 21 Cal. 3d 82, 85, 145 Cal. Rptr. 843, 578 P.2d 90* ; *Smeltzley v. Nicholson Mfg. Co. (1977) 18 Cal. 3d 932, 934, 136 Cal. Rptr. 269, 559 P.2d 624* ; *Austin v. Massachusetts Bonding & Insurance Co. (1961) 56 Cal. 2d 596, 600, 15 Cal. Rptr. 817, 364 P.2d 681* ; *Winding Creek v. McGlashan (1996) 44 Cal. App. 4th 933, 52 Cal. Rptr. 2d 236*).

C. Amended Complaint May Rest on Different Legal Theory or State Different Cause of Action. An amendment substituting a named individual previously sued by a fictitious name relates back to the filing of the original complaint even if it sets out a different legal theory or states a different cause of action, if both pleadings rest on the same general set of facts (*Marasco v. Wadsworth (1978) 21 Cal. 3d 82, 85-86, 145 Cal. Rptr. 843, 578 P.2d 90* ; *Smeltzley v. Nicholson Mfg. Co. (1977) 18 Cal. 3d 932, 936, 136 Cal. Rptr. 269, 559 P.2d 624* ; *Austin v. Massachusetts Bonding & Insurance Co. (1961) 56 Cal. 2d 596, 600, 15 Cal. Rptr. 817, 364 P.2d 681* ; *Olson v. Volkswagen of America (1988) 201 Cal. App. 3d 1437, 1442-1443, 247 Cal. Rptr. 719*).

D. *Code Civ. Proc. § 474* Should Be Liberally Construed to Allow Cases to Be Decided on Their Merits. The purpose of *Section 474 of the Code of Civil Procedure* is to enable a plaintiff to bring suit before it is barred by the statute of limitations and thus allow the case to be decided on its merits. *Section 474 of the Code of Civil Procedure* should be liberally construed to fulfill that purpose; fulfillment of that purpose has long been recognized as not subjecting the defendant to undue hardship (*Austin v. Massachusetts Bonding & Insurance Co. (1961) 56 Cal. 2d 596, 602, 15 Cal. Rptr. 817, 364 P.2d 681* ; *Wallis v. Southern Pac. Transportation Co. (1976) 61 Cal. App. 3d 782, 786, 132 Cal. Rptr. 631* ; see *Smeltzley v. Nicholson Mfg. Co. (1977) 18 Cal. 3d 932, 939 fn. 1, 136 Cal. Rptr. 269, 559 P.2d 624*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a demurrer by the defendant based on the defense that the plaintiff's amendment of the complaint by replacing a fictitious defendant with the named defendant is barred by the statute of limitations.

The ground for opposition is that when a complaint is amended to replace a fictitious defendant with a named defendant, the amendment relates back to the time of filing of the original complaint if the amended complaint is based on the same set of facts as the original complaint. This avoids the bar of the statute of limitations if the original complaint was filed within the statutory period.

In an appropriate case, these points and authorities may be submitted in opposition to the demurrer supported by the points and authorities *set out in § 104.20*.

This form can be adapted for use in opposing a motion for summary judgmentbased on the bar of the statute of limitations when a summary judgment motion brought because a demurrer is inappropriate in that the defect in the pleading did not appear on the face of the amended complaint.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Amendment of Complaint Relates Back to Time of Filing

Marasco v. Wadsworth *(1978) 21 Cal. 3d 82, 145 Cal. Rptr. 843, 578 P.2d 90* was an action by plaintiff for wrongful death caused by an automobile accident. The decedent had been a passenger in Wadsworth's car. Plaintiff sued the driver of the other car and Doe defendants. More than one year after the accident, the Supreme Court held the guest statute (*Veh. Code § 17158*) unconstitutional, and plaintiff amended her complaint and served Wadsworth as a codefendant in place of Doe XI. Wadsworth demurred on the ground that any cause of action against her was barred by the statute of limitations. The trial court sustained the demurrer without leave to amend and entered judgment for defendant. The Supreme Court reversed with directions to overrule the demurrer and allow time for defendant to answer. The Court held that the amendment substituting Wadsworth as a named defendant related back to the filing date of the original complaint, thereby defeating the bar of the statute of limitations. The Court stated that an amendment substituting a named individual sued by a fictitious name relates back to the original complaint when the recovery is for the same accident and injury, regardless of whether it sets out a different legal theory or states a different cause of action (*21 Cal. 3d 82, 85-86)* . The Court said that the case before it involved the same accident and the same injuries as were presented in the original complaint. The Court at page 86 cited *Smeltzley v. Nicholson Mfg. Co. (1977) 18 Cal. 3d 932, 136 Cal. Rptr. 269, 559 P.2d 624* (discussed below), as being dispositive of the issue. *Smeltzley* had held that an amended complaint will be deemed filed as of the date of the original complaint provided recovery is sought in both pleadings on the same general set of facts.

Smeltzley v. Nicholson Mfg. Co. *(1977) 18 Cal. 3d 932, 136 Cal. Rptr. 269, 559 P.2d 624* was an action for injuries incurred by plaintiff at his place of employment. Plaintiff's original complaint alleged injuries caused by his employer's failure to provide a safe place to work. His amended complaint added a cause of action alleging that his injuries resulted from a defective machine manufactured by defendant Nicholson Manufacturing Company and substituted Nicholson for one of the Doe defendants. The amended complaint was filed after the statute of limitations had run. The trial court sustained Nicholson's demurrer and entered judgment for Nicholson. The Supreme Court reversed. The Court stated that the California courts have established the rule that an amended complaint relates back to the filing of the original complaint, avoiding the bar of the statute of limitations, so long as recovery is sought in both pleadings on the same general set of facts (*18 Cal. 3d 932, 935-936)* . The Court that is the modern rule, as enunciated in *Austin v. Massachusetts Bonding & Insurance Co. (1961) 56 Cal. 2d 596, 15 Cal. Rptr. 817, 364 P.2d 681* (*18 Cal. 3d 932, 935-936)* (discussed below).

Austin v. Massachusetts Bonding & Insurance Co. *(1961) 56 Cal. 2d 596, 15 Cal. Rptr. 817, 364 P.2d 681* was an action to recover securities and moneys. The original complaint against a securities corporation and some of its officers and fictitious defendants alleged that defendants acted as brokers and agents of plaintiffs and refused to deliver securities and money they had received on behalf of plaintiffs. The complaint also alleged that a surety bond had been filed by defendants. The amended complaint substituted Massachusetts Bonding and Insurance Company (Massachusetts) for one of the fictitious defendants, alleging that Massachusetts executed the surety bond, and added allegations of fraud and negligence against some of the securities corporation officers. Massachusetts argued that the action against it was barred because the amended complaint, naming Massachusetts for the first time, was filed more than two years after plaintiffs' rights accrued. The trial court sustained Massachusetts' demurrer without leave to amend.

The Supreme Court reversed. The court held that when a complaint sets forth a cause of action against a defendant designated by fictitious name and the defendant's true name is thereafter discovered and substituted by amendment, that defendant is considered a party to the action from its commencement, so that the statute of limitations stops running as of the date of the earlier pleading (*56 Cal. 2d 596, 599)* . The Court stated that the modern rule is that when an amendment is sought after the statute of limitations has run, the amended complaint will be deemed filed as of the date of the original complaint if recovery is sought in both pleadings on the same general set of facts (*56 Cal. 2d 596, 600)* .

Winding Creek v. McGlashan *(1996) 44 Cal. App. 4th 933, 52 Cal. Rptr. 2d 236* involved an action by limited partnerships against various attorney defendants, alleging attorney malpractice. The complaint included a standard fictitious defendant allegation. During a deposition in a related action, plaintiffs allegedly learned for the first time that a new group of attorneys had provided advice relating to the subject matter of the complaint. Over two years after the deposition, plaintiffs filed an amendment to their complaint, substituting the new attorney defendants for some of the fictitiously named defendants. The new attorney defendants demurred on the grounds that the claims against them were barred by the one-year statute of limitations for legal malpractice, and the trial court sustained the demurrer.

The court of appeal, however, held that the amended complaint related back to the filing date of the original complaint, thus defeating the statute of limitations (*44 Cal. App. 4th 933, 940)* . The court stated that the complaint's allegationsagainst fictitious defendants was sufficient to set forth a cause of action against the fictitiously named defendants. The court also noted that the trial court's ruling suggested that its decision was based in part on plaintiff's two-year delay between learning of the new defendant's alleged involvement and naming them as defendants. However, to preclude the doctrine of relation back on the basis of unreasonable delay, the opposing party must show prejudice. Here, the new defendants made no showing of prejudice, and in fact agreed that delay and prejudice were irrelevant to the action (*44 Cal. App. 4th 933, 942)* . Concluding that the amended complaint was not barred by the statute of limitations, the court reversed the trial court judgment and remanded with instructions to overrule the demurrer to the amended complaint.

[b] Amended Complaint May Rest on Different Legal Theory or State Different Cause of Action

The factual background of ***Marasco v. Wadsworth*** *(1978) 21 Cal. 3d 82, 145 Cal. Rptr. 843, 578 P.2d 90* is discussed in *§ 104.23[3][a]*. The Supreme Court held that the amended complaint substituting the named defendant for a fictitious defendant related back to the original complaint, avoiding the bar of the statute of limitations. The Court stated that the amended complaint relates back to the original complaint when both are based on the same general set of facts (*21 Cal. 3d 82, 86)* . The Court further stated that the change in the legal theory in the amended complaint is permissible (*21 Cal. 3d 82, 87)* . The original complaint did not single out and specifically charge the driver of the vehicle in which the decedent was riding with negligence, while the amended complaint did so allege. The Court pointed out that changes in theory have been upheld in earlier cases in which the amended complaint was based on the same set of facts, and the Court upheld the amended pleading because both pleadings involved the identical collision and the identical injury (the death of decedent) (*21 Cal. 3d 82, 86-87)* .

The factual background of ***Smeltzley v. Nicholson Mfg. Co.*** *(1977) 18 Cal. 3d 932, 136 Cal. Rptr. 269, 559 P.2d 624* is discussed in *§ 104.23[3][a]*. The Supreme Court held that the plaintiff's amended complaint, substituting a named defendant for the fictitious defendant, related back to the time of filing of the original complaint (*18 Cal. 3d 932, 934)* . The Court held that so long as recovery was based on the same general set of facts (i.e., the same accident and injuries), it relates back despite the fact that the theory of recovery is different in the amended complaint. On pages 936-938, the Court discussed another case that presented a striking parallel to *Smeltzley.* In *Garrett v. Crown Coach Corp. (1968) 259 Cal. App. 2d 647, 66 Cal. Rptr. 590* , to a factual situation indistinguishable to that in *Smeltzley.* In *Garrett,* the plaintiff's original complaint asserted that the named defendants and Doe defendants had negligently maintained and operated a school bus, causing the bus to strike plaintiff's vehicle and injure plaintiff. In the amended complaint, filed after the statute of limitations had run, plaintiff substituted Crown Coach for a fictitious defendant and alleged that Crown Coach had negligently designed and manufactured the bus. The trial court had sustained Crown

Coach's demurrer without leave to amend, and the court of appeal reversed. The court in *Garrett* held that the amendment changing the obligation of the fictitious defendant from that of an operator to that of a manufacturer was no more drastic than the change of theory allowed in *Austin.*

In *Smeltzley* the Supreme Court said that in both *Smeltzley* and *Garrett* the plaintiffs had not originally based their allegations of defendants' liability on their duty as manufacturers, but in both cases the plaintiffs had sought to change defendant's obligation from operator to manufacturer in the amended complaints. The Court said that the important point was that in both cases the original complaints and the amended complaints referred to the same accident and the same injuries. Thus, the Court said that under the reasoning in *Garrett*, the amended complaint in *Smeltzley* related back to the original complaint because it was predicated on the same general set of facts as those in the original complaint (*18 Cal. 3d 932, 937-938)* .

The factual background of ***Austin v. Massachusetts Bonding & Insurance Co.*** *(1961) 56 Cal. 2d 596, 15 Cal. Rptr. 817, 364 P.2d 681* is discussed in *§ 104.23[3][a]*. The Court traced the changes in case law regarding relation back of an amended pleading to the original complaint. The Court stated that the early cases held that an amendment stating any new cause of action could not relate back to the original complaint and that a plaintiff could not amend the original complaint in a way that would change the legal theory of the action. Later cases held that a mere change in legal theory would not prevent an amendment from relating back but that an amendment that set forth a different cause of action or legal liability would not relate back. The Court stated that the modern rule is that an amendment relates back if it is based on the same general set of facts. The Court stated that if Massachusetts Bonding had been sued by its true name in the original complaint, the amendment changing the character of the obligation would have related back for purposes of the statute of limitations and that the fact that it was originally designated as a fictitious defendant should not warrant a different result (*56 Cal. 2d 596, 602)* .

Olson v. Volkswagen of America *(1988) 201 Cal. App. 3d 1437, 247 Cal. Rptr. 719* was a personal injury action for damages arising from an automobile accident in which the plaintiff was injured on impact by contact with the steering wheel of her own vehicle. Plaintiff originally sued the driver of the other car and various entities involved in the chain of manufacture, sale, and delivery of the steering wheel, alleging malfunction of the steering wheel and defects in its manufacture and design. The complaint included the standard Doe allegations. After discovery, plaintiff filed amended complaints against entities involved in the chain of manufacture, sale, and delivery of plaintiff's vehicle itself, identifying theseentities as defendants sued as Does in the original complaint. The final amended complaint also added express allegations of negligence in the design and manufacture of the vehicle itself, in addition to the prior allegations concerning the steering wheel. The trial court granted demurrers as to the defendants originally sued as Does based on the running of the statute of limitations before the filing of the amended complaint.

The appellate court reversed. The court noted the general rule that an amendment sought after the statute of limitations has run is deemed filed as of the date of filing the original complaint if recovery is sought in both pleadings on the same general facts. An amendment that substitutes the true name of a defendant sued originally as a Doe relates back if the original complaint is against a driver of a vehicle and the amended complaint seeks to bring in the new defendant on warranty and product liability theories. The amendment is not barred by the statute of limitations because it involves the same accident and injury. Further, an amended complaint relates back if it seeks to bring in a defendant that is in the chain of causation of the originally pleaded cause of action. The court held that under the facts of the case, those involved in the design and manufacture of the vehicle were in the chain of causation of the originally pleaded cause of action regarding the steering wheel (*201 Cal. App. 3d 1437, 1442-1443)* .

[c] Code Civ. Proc. § 474 Should Be Liberally Construed to Allow Cases to Be Decided on Their Merits

The factual background of ***Austin v. Massachusetts Bonding & Insurance Co.*** *(1961) 56 Cal. 2d 596, 15 Cal. Rptr. 817, 364 P.2d 681* , is discussed in *§ 104.23[3][a]*. In holding that the statute of limitations did not bar the amended complaint against the named defendant that was substituted for a fictitious defendant, the Court stated that the purpose

of *Code Civ. Proc. § 474* is to enable a plaintiff who is ignorant of the true name of defendant to bring suit before it is barred by the statute of limitations. The Court said that it has long been recognized that this procedure does not subject the defendant to undue hardship. The Court further stated that a party sued by a fictitious name and later brought into the case by an amendment substituting defendant's true name is considered a party to the action from its commencement for purposes of the statute of limitations; a defendant is in no worse position if, in addition to substituting defendant's true name, the amendment makes other changes in the allegations on the basis of the same general set of facts (*56 Cal. 2d 596, 602)* .

Wallis v. Southern Pac. Transportation Co. *(1976) 61 Cal. App. 3d 782, 132 Cal. Rptr. 631* was an action for personal injuries that named as defendants Does One through Twenty. After the statute of limitations had run, plaintiff served Southern Pacific Transportation Company as Doe One. Southern Pacific moved to strike the complaint, contending that it could not be served as a Doe under *Code Civ. Proc. § 474* because plaintiff knew of defendant's existence at the time the complaint was filed, and that the cause of action was barred by the statute of limitations. The trial court granted the motion to strike and dismissed the complaint. The court of appeal reversed. The court stated that the purpose of *Code Civ. Proc. § 474* is to enable a plaintiff to commence an action before it has become barred by the statute of limitations due to plaintiff's ignorance of the identity of the defendant, and that the statute should be liberally construed to accomplish that purpose (*61 Cal. App. 3d 782, 786)* . The court explained that the phrase "ignorant of the name" of the defendant should not be interpreted literally, and that a plaintiff who knows the identity of a person but is ignorant of the facts giving rise to a cause of action against that person could be considered ignorant of the name of the defendant for purposes of *Code Civ. Proc. § 474*. The court stated that the ignorance must be real and not feigned, and that the question of whether plaintiff acted in good faith in using *Code Civ. Proc. § 474* rests with the trial court. However, the court held that defendant's affidavit in support of the motion to strike contained no facts on which the trial court could have reasonably found that plaintiff actually knew or should have known whom his cause of action was against (*61 Cal. App. 3d 782, 786)* . The court further held that the complaint was filed and served within the statutory period (*61 Cal. App. 3d 782, 787)* .

The factual background of ***Smeltzley v. Nicholson Mfg. Co.*** *(1977) 18 Cal. 3d 932, 136 Cal. Rptr. 269, 559 P.2d 624* is discussed in *§ 104.23[3][a]*. In holding that plaintiff could amend the complaint to substitute a named defendant for a fictitious defendant, the court cited *Austin v. Massachusetts Bonding & Insurance Co. (1961) 56 Cal. 2d 596, 602, 15 Cal. Rptr. 817, 364 P.2d 681* , stating that it has long been the purpose of *Code Civ. Proc. § 474* to enable a plaintiff to bring suit before it is barred by the statute of limitations and that the procedure does not subject the defendant to undue hardship (*18 Cal. 3d 932, 939 n.1*).

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 104 FICTITIOUSLY NAMED DEFENDANTS (DOES)
PART II. FORMS

10-104 California Points & Authorities § 104.24

§ 104.24 Opposing Demurrer to Amended Complaint [Code Civ. Proc. § 430.10(e)]--Action Against Fictitious Defendant Not Barred by Statute of Limitations--Plaintiff Did Not Have Actual Knowledge of Identity of Defendant and/or Facts Giving Rise to Cause of Action Against Defendant

[1] FORM

[*Caption. See § 104.20[1].*]

DEFENDANT'S DEMURRER SHOULD BE OVERRULED IN THAT IT WAS PROPER FOR PLAINTIFF TO NAME A FICTITIOUS DEFENDANT IN THE ORIGINAL COMPLAINT BECAUSE AT THAT TIME PLAINTIFF DID NOT HAVE ACTUAL KNOWLEDGE OF _____ [DEFENDANT'S IDENTITY *and/or* FACTS GIVING RISE TO A CAUSE OF ACTION AGAINST DEFENDANT], AND PLAINTIFF'S AMENDMENT SUBSTITUTING THE FICTITIOUS DEFENDANT WITH DEFENDANT'S TRUE NAMERELATES BACK TO THE TIME THE ORIGINAL COMPLAINT WAS FILED, THEREBY AVOIDING THE BAR OF THE STATUTE OF LIMITATIONS.

A. Amendment of Fictitious Name. [*See § 104.23[1], Paragraph A.*]

B. Amendment of Complaint Relates Back to Time of Filing. [*See § 104.23[1], Paragraph B.*]

[*Optional*] **C. Amendment Relates Back in MICRA Case.** In an action under the Medical Injury Compensation Reform Act of 1975 (MICRA), when the required *Code of Civil Procedure Section 364(d)* and *(e)* 90-days notice of intent to commence a medical malpractice action was given to only known potential defendants, and thereafter the action is commenced, the action may name "Does" as defendants and any amendment to the action thereafter to name any "Doe" defendant when the name becomes known relates back to the original complaint as in any other action (*see Camarillo v. Vaage (2003) 105 Cal. App. 4th 552, 562-570, 130 Cal. Rptr. 2d 26*).

D. Standard for Applying *Code Civ. Proc. § 474* Test of Ignorance of True Identity of Defendant Is Whether Plaintiff Had Actual Knowledge. The standard to be applied to determine whether plaintiff has met the requirement of

Section 474 of the Code of Civil Procedure that a fictitious defendant be used only if plaintiff is ignorant of the name of the defendant is whether or not the plaintiff had actual knowledge of the true identity of the defendant at the time the complaint was filed. Although lack of knowledge of the true name of the defendant or the applicable facts giving plaintiff a cause of action must be real and not feigned, the plaintiff does not relinquish his or her rights under *Code Civil Procedure Section 474* because he or she has a suspicion of wrongdoing arising from one or more facts he or she does know (*General Motors Corp. v. Superior Court (1996) 48 Cal. App. 4th 580, 593-595, 55 Cal. Rptr. 2d 871* ; *Balon v. Drost (1993) 20 Cal. App. 4th 483, 488-490, 25 Cal. Rptr. 2d 12* ; *Munoz v. Purdy (1979) 91 Cal. App. 3d 942, 947, 154 Cal. Rptr. 472*).

[*Optional*] **E. Ignorance of Party's Capacity.** Although the statute refers literally only to ignorance of the name of a defendant, it is well established that amendment is permitted, even though the plaintiff knew a defendant's name, if the plaintiff was ignorant of the facts giving rise to a cause of action against that defendant (*General Motors Corp. v. Superior Court (1996) 48 Cal. App. 4th 580, 593-594, 55 Cal. Rptr. 2d 871* ; *Parker v. Robert E. McKee, Inc. (1992) 3 Cal. App. 4th 512, 516, 4 Cal. Rptr. 2d 347*).

[*Optional*] **F. Reasonably Diligent Effort to Discover Defendant's Name Not Required.** In determining whether the plaintiff was ignorant of the identity of the defendant at the time the fictitious name was used, the fact that plaintiff's ignorance may have been due to misinformation or negligence is irrelevant, and plaintiff need not show reasonable diligence in attempting to learn defendant's name (*General Motors Corp. v. Superior Court (1996) 48 Cal. App. 4th 580, 592, 596, 55 Cal. Rptr. 2d 871* ; *Munoz v. Purdy (1979) 91 Cal. App. 3d 942, 947, 154 Cal. Rptr. 472*).

[*Optional*] **G. Change in Decisional Law May Be Basis for Relation Back to Original Complaint.** When a legal theory becomes available to plaintiff by virtue of a change in decisional law, a fictitious name in a complaint may be amended to include a defendant whose identity and name were always known to plaintiff (*Marasco v. Wadsworth (1978) 21 Cal. 3d 82, 88, 145 Cal. Rptr. 843, 578 P.2d 90* ; *Barnes v. Wilson (1974) 40 Cal. App. 3d 199, 205, 114 Cal. Rptr. 839*).

[*Optional*] **H. Amendment to Name Previously-Dismissed Party in New Capacity.** The fact that plaintiff, in ignorance of the true facts, actually named and then dismissed a party as a defendant should not make a difference, and the plaintiff may amend the complaint to substitute a party for a fictitious defendant even though the party has been previously dismissed from the action when named in a different capacity (*Parker v. Robert E. McKee, Inc. (1992) 3 Cal. App. 4th 512, 518, 4 Cal. Rptr. 2d 347*).

[*Optional*] **I. Forgetfulness of Defendant's Identity Does Not Precluded Plaintiff From Adding Defendant Under *Code Civ. Proc. § 474.*** *Code of Civil Procedure Section 474* is restricted to the plaintiff's knowledge at the time the complaint is filed. The lack of knowledge of defendant's true name must be real and not feigned. Ignorance of the facts is the critical issue and it is irrelevant whether the ignorance is due to misinformation or negligence. Accordingly, under Section 474, a plaintiff has no duty before filing the complaint to exercise reasonable diligence to discover the defendant's identity. Because a defendant has no such duty and is under no obligation to discover readily ascertainable information, a defendant may act unreasonably in ascertaining a defendant's name and still claim the benefit of Section 474 (*Balon v. Drost (1993) 20 Cal. App. 4th 483, 487-490, 25 Cal. Rptr. 2d 12 (First Dist., Div. Two))* . Although *Balon* was not followed in *Woo v. Superior Court (1999) 75 Cal. App. 4th 169, 89 Cal. Rptr. 2d 20 (Fourth Dist., Div. One)* , the law as specified in *Balon* is applicable and should be applied.

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a demurrer by defendant based on the ground that plaintiff's amendment of the complaint by replacing a fictitious defendant with the named defendant is barred by the statute of limitations because plaintiff was not ignorant of the identity of the defendant or facts giving rise to a cause of action against defendant at the time the fictitious defendant was designated in the original complaint.

The ground for opposition is that plaintiff did not have actual knowledge of the true identity of the defendant at the time he or she designated a fictitious defendant in the original complaint. When a plaintiff designates a fictitious defendant pursuant to *Code Civ. Proc. § 474* because he or she is ignorant of the true identity of the defendant, and the plaintiff later amends the complaint to substitute the true name of defendant, the amendment relates back to the time of filing of the original complaint, thus avoiding the bar of the statute of limitations.

This form can be adapted for use in opposing a motion for summary judgment based on the bar of the statute of limitations when a summary judgment motion is brought because a demurrer was inappropriate in that the defect in the pleading did not appear on the face of the amended complaint.

In an appropriate case, these points and authorities may be submitted in opposition to the motion for demurrer supported by the points and authorities *set out in § 104.21*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Amendment Relates Back in MICRA Case

In ***Camarillo v. Vaage*** *(2003) 105 Cal. App. 4th 552, 130 Cal. Rptr. 2d 26* , the plaintiff brought a legal malpractice suit against attorneys for failing to file a timely medical malpractice action against an unknown doctor. Summary judgment was granted because the attorneys had given notice of intent to file a malpractice action to the health center and hospital, pursuant to a provision under Medical Injury Compensation Reform Act of 1975 (MICRA), that of *Code Civ. Proc. § 364(d)* and *(e)*. The court of appeal upheld the summary judgment, holding that the giving of the 90 days notice of intent to commence the medical malpractice action to only known potential defendants nevertheless served to extend the statute of limitations for commencing an action against both the known defendants and unknown defendants designated in the action as "Does." In this regard, the court of appeal found that this aspect of the earlier case of *Grimm v. Thayer (1987) 188 Cal. App. 3d 866, 233 Cal. Rptr. 687* has survived *Woods v. Young (1991) 53 Cal. 3d 315, 320, 279 Cal. Rptr. 613, 807 P.2d 455* , even though *Woods* disapproved *Grimm* in other respects (*105 Cal. App. 4th 552, 562-570)* .

[b] Standard for Applying Code Civ. Proc. § 474 Test of Ignorance of True Identity of Defendant Is Whether Plaintiff Had Actual Knowledge

In ***General Motors Corp. v. Superior Court*** *(1996) 48 Cal. App. 4th 580, 55 Cal. Rptr. 2d 871* , within one year after

an automobile accident, the plaintiff sued the driver of the other car, as well as 20 Doe defendants. Approximately two and one half years after the accident, after plaintiff's counsel associated with more experienced counsel, plaintiff substituted the manufacturer of her car for a Doe defendant, and thereafter filed a first amended complaint against the manufacturer, adding a products liability claim alleging that the seat belts were defective. The manufacturer moved to quash service of the first amended complaint on the ground that the plaintiff must have known she had a potential claim against the manufacturer when the original complaint was filed because "a seat belt either restrains a person or it does not and this fact is known immediately after" an automobile accident. In opposition to the manufacturer's motion, the plaintiff argued, among other things, that she first learned that her injury was most likely suffered as a result in the design of the seat belt when her new attorney explained it to her and identified the so-called comfort feature in the seat belt (*48 Cal. App. 4th 580, 585)* . The trial court denied the manufacturer's motion, and the manufacturer filed for a writ of mandate (*48 Cal. App. 4th 580, 587)* .

The court of appeal denied the petition. The court held that even though a plaintiff might know of the existence and actual identity of a defendant sued by a fictitious name, the plaintiff is "ignorant" within the meaning of the statute if the plaintiff lacks knowledge of that defendant's connection with the case or with the plaintiff's injuries (*48 Cal. App. 4th 580, 593-594)* . Ignorance of the facts giving rise to a cause of action is the "ignorance" required under *Code Civ. Proc. § 474*, and the pivotal question is whether the plaintiff knew facts, and not whether the plaintiff knew or believed that he or she had a cause of action based on those facts (*48 Cal. App. 4th 580, 595)* . To defeat a claim of ignorance, it must be shown that the plaintiff had actual knowledge of the basic facts (*48 Cal. App. 4th 580, 594)* . Moreover, *Code Civ. Proc. § 474* does not impose on the plaintiff a duty to search for facts the plaintiff does not actually have at the time the original complaint is filed (*48 Cal. App. 4th 580, 596)* . All the statute requires is ignorance notwithstanding that it may be from misfortune or negligence (*48 Cal. App. 4th 580, 592)* .

In ***Balon v. Drost*** *(1993) 20 Cal. App. 4th 483, 25 Cal. Rptr. 2d 12 (First Dist., Div. Two)* , plaintiff filed a complaint for injuries she received in a traffic collision naming the vehicle owner and unknown "Does" as defendants. The plaintiff retained an attorney shortly before the statute of limitations expired but could notrecall the identity of the driver although the driver had given her a piece of paper with her name and other information on it at the time of the accident. Approximately two weeks after the statute of limitations had expired, plaintiff's attorney obtained the accident report and discovered the name of the driver of the vehicle. The attorney then filed an amendment to the complaint under *Code Civ. Proc. § 474*, naming the driver as a Doe defendant. The trial court granted the driver's motion to quash service of the summons and complaint and denied plaintiff's motion for reconsideration of its order.

The appellate court reversed and remanded for the driver's reinstatement as a party defendant. It stated that Section 474 is restricted to the plaintiff's knowledge at the time of the filing of the complaint. It noted that the plaintiff's ignorance of the facts is the critical issue and that the plaintiff bears no duty to exercise reasonable diligence prior to filing the complaint to discover the defendant's identity (*20 Cal. App. 4th 483, 488)* .

The defendant relied on *Schroeter v. Lowers (1968) 260 Cal. App. 2d 695, 67 Cal. Rptr. 270* , for the proposition that a plaintiff's ignorance of a defendant's true name must not be willful ignorance. The court of appeal rejected this authority as an incorrect statement of the law in light of the Supreme Court's pronouncement in *Irving v. Carpentier (1886) 70 Cal. 23, 26, 11 P. 391* , that Section 474 imposes no duty of inquiry. It found that the trial court erroneously concluded that Section 474 did not apply because the plaintiff had acted negligently in failing to obtain the defendant's name. It further stated that the record did not support a finding that plaintiff acted willfully or intentionally in her use of Section 474, but rather, that she acted negligently in forgetting or failing to inquire as to the defendant's name. Furthermore, the fact that plaintiff amended the original complaint two weeks after filing it demonstrated that she had no design to use Section 474 beyond its intended purpose. Therefore, the court concluded that the plaintiff was ignorant of the defendant's name at the time of filing the complaint and the trial court erred in granting defendant's motion to quash service of the summons and complaint (*20 Cal. App. 4th 483, 488-490)* .

With regard to the duty of a plaintiff to determine the identity of a defendant once known but forgotten by the plaintiff,

the reasoning of *Balon* has been criticized in *Woo v. Superior Court (1999) 75 Cal. App. 4th 169, 89 Cal. Rptr. 2d 20 (Fourth Dist., Div. One)* . For discussion of *Woo*, see *§ 104.21[3][b]*.

Munoz v. Purdy *(1979) 91 Cal. App. 3d 942, 154 Cal. Rptr. 472* was a medical malpractice action. Following foot surgery by Dr. Purdy, plaintiff was taken to the radiology department and asked to stand for an x-ray. Plaintiff fainted and then began suffering severe headaches. She consulted counsel shortly thereafter, at which time she believed she had been a victim of medical malpractice. When plaintiff filed her malpractice action, she did not specifically name Dr. Purdy as a defendant, but she substituted him for a fictitious defendant after the statute of limitations had run. Purdy moved for summary judgment on the ground that the statute of limitations barred plaintiff's suit. The trial court granted summary judgment, holding that plaintiff was charged not only with her actual knowledge at the time she filed suit, but with information that she could have obtained on exercising reasonable diligence, which would have enabled her to file suit against Dr. Purdy in a timely fashion.

The court of appeal reversed. The court held that the trial court had used an erroneous standard in applying *Code Civ. Proc. § 474*. The court stated that *Code Civ. Proc. § 474* is to be applied when the plaintiff is ignorant of the name of the defendant and that plaintiff's lack of knowledge must be measured from the time plaintiff filed the complaint. The court said that the lack of knowledge must be real and not feigned, but if the ignorance really exists it is irrelevant whether it is due to misinformation or negligence. The court stated that no showing of reasonable diligence in attempting to discover the defendant's true name need be made so long as plaintiff's lack of knowledge is shown to have been real at the time the complaint was filed (*91 Cal. App. 3d 942, 946)* . The court further stated that a requirement that the plaintiff be charged not only with his or her actual knowledge, but with information that could have been obtained on exercising reasonable diligence, would be contrary to the statutory scheme (*91 Cal. App. 3d 942, 946-947)* .

[c] Ignorance of Party's Capacity

General Motors Corp. v. Superior Court *(1996) 48 Cal. App. 4th 580, 55 Cal. Rptr. 2d 871* is discussed in *§ 104.24[3][b]*.

In ***Parker v. Robert E. McKee, Inc.*** *(1992) 3 Cal. App. 4th 512, 4 Cal. Rptr. 2d 347* , plaintiff dismissed a named defendant, mistakenly believing defendant was merely a subcontractor on the construction project on which plaintiff was injured. Plaintiff later learned of the dismissed defendant's capacity as general contractor and moved to substitute the defendant for a Doe defendant. The trial court sustained defendant's demurrer without leave to amend on statute of limitations grounds on the basis of defendant's prior dismissal from the action. Plaintiff appealed.

The court of appeal reversed. The court noted the well-established rule that although *Code Civ. Proc. § 474* refers only to ignorance of a defendant's name, amendment is permitted, even though the plaintiff knew a defendant's name, if the plaintiff was ignorant of the facts giving rise to a cause of action against that defendant (*3 Cal. App. 4th 512, 516)* . Plaintiff fell within this rule because, although he knew the defendant's name, he did not know of defendant's capacity as the general contractor (*3 Cal. App. 4th 512, 517)* . In light of this rule, the court rejected the defendant's argument that it was legally impossible for it to be a named defendant and a Doe in the original complaint, finding that fact thatplaintiff, in ignorance of the true facts, actually named and then dismissed a party as a defendant should not make a difference (*3 Cal. App. 4th 512, 518)* . Thus, the court reversed.

[d] Reasonably Diligent Effort to Discover Defendant's Name Not Required

General Motors Corp. v. Superior Court *(1996) 48 Cal. App. 4th 580, 592, 596, 55 Cal. Rptr. 2d 871* and ***Munoz v. Purdy*** *(1979) 91 Cal. App. 3d 942, 154 Cal. Rptr. 472* are discussed in *§ 104.24[3][b]*.

[e] Change in Decisional Law May Be Basis for Relation Back to Original Complaint

The factual background of ***Marasco v. Wadsworth*** *(1978) 21 Cal. 3d 82, 145 Cal. Rptr. 843, 578 P.2d 90* is discussed in *§ 104.23[3][a]*. The Supreme Court reversed a judgment entered after the trial court sustained defendant's demurrer to the amended complaint on the ground that the statute of limitations barred the action. The Court held that the amendment substituting the named defendant related back to the filing date of the original complaint, thereby defeating the bar of the statute of limitations (*21 Cal. 3d 82, 85)* . The Court held that the substitution and change of theory was permissible, based on the fact that the cause of action in the amended complaint did not exist at the time of the original complaint. The Court said that its previous decision invalidating the guest statute [*see* *Brown v. Merlo (1973) 8 Cal. 3d 855, 859, 106 Cal. Rptr. 388, 506 P.2d 212]* gave plaintiff a new cause of action based on a different legal theory but on the same set of facts--the accident and injuries (*21 Cal. 3d 82, 86)* . The Court cited with approval *Barnes v. Wilson (1974) 40 Cal. App. 3d 199, 114 Cal. Rptr. 839* (discussed infra), in which amendment of a complaint was held to relate back to the original complaint when the plaintiff amended the complaint based on the availability of a new cause of action against tavern owners due to a change in the law based on a Supreme Court decision (*21 Cal. 3d 82, 86)* .

Barnes v. Wilson *(1974) 40 Cal. App. 3d 199, 114 Cal. Rptr. 839* , was a wrongful death action by the heirs of a victim of a stabbing against the owners of the tavern in which the stabbing occurred (Golden Gloves Tavern). That complaint stated that the owners of the Golden Gloves Tavern, their employee, and Doe defendants had negligently failed to warn patrons of the unreasonable risk created by the presence of the assailant and had negligently failed to provide protection for their patrons. Almost one year after the statute of limitations had run, plaintiffs amended their complaint to substitute the owners of another tavern, the Copper Door Tavern, for fictitious defendants, alleging that the death occurred as a proximate result of the Copper Door's owners' negligence in continuing to furnish intoxicating beverages to the assailant who was already drunk and brandishing a knife. Six months prior to plaintiffs' amendment, the California Supreme Court had rendered a decision holding that a vendor of alcoholic beverages could be held liable for furnishing such beverages to a customer, who, as a result of being intoxicated, injured a third person [*see* *Vesely v. Sager (1971) 5 Cal. 3d 153, 157, 95 Cal. Rptr. 623, 486 P.2d 151]* , thereby giving plaintiffs a cause of action against the tavern owners. The defendants demurred to the complaint. The trial court sustained the demurrer without leave to amend and dismissed the complaint.

The court of appeal reversed. The issue on appeal was whether the amendment related back to the date of filing of the original complaint, thus avoiding the bar of the statute of limitations. The court held that the amendment did relate back because it was based on the same set of facts as the original complaint (*40 Cal. App. 3d 199, 203)* . The court stated that whether or not an amendment is based on the same general set of facts as the original complaint is often a close question, but that recent decisions had liberally construed plaintiffs' right to amend pleadings without incurring the bar of the statute of limitations so that cases could be decided on their merits (*40 Cal. App. 3d 199, 204)* . The court further stated that the requirement in *Code Civ. Proc. § 474*, that the plaintiff use fictitious names in the complaint only when the plaintiff is ignorant of the name of the defendant, should not be interpreted literally. Rather, the court said, the plaintiff is deemed ignorant of the name if the plaintiff knew the identity of the facts giving rise to a cause of action against the person, or knew the name and all the facts but was unaware that the law gave him or her a cause of action against the fictitiously named defendant, and discovered that right by reason of decisions rendered after commencement of the action (*40 Cal. App. 3d 199, 205)* . The court said that because plaintiffs had amended their complaint to substitute defendants six months after the decision giving them a right to sue defendants, they had not slept on their rights and were therefore able to assert their claim (*40 Cal. App. 3d 199, 206)* .

[f] Amendment to Name Previously-Dismissed Party in New Capacity

Parker v. Robert E. McKee, Inc. *(1992) 3 Cal. App. 4th 512, 4 Cal. Rptr. 2d 347* is discussed in *§ 104.24[3][c]*.

[g] Forgetfulness of Defendant's Identity Does Not Precluded Plaintiff From Adding Defendant Under Code Civ. Proc. § 474

The factual background of ***Balon v. Drost*** *(1993) 20 Cal. App. 4th 483, 25 Cal. Rptr. 2d 12 (First Dist., Div. Two)* is discussed in *§ 104.24[3][b]*. In reversing the trial court's judgment for defendant based on an order sustaining defendant's motion to quash service of the summons and complaint for failure to comply with *Code Civ. Proc. § 474*, the court of appeal noted that the trial court erred when it concluded that plaintiff had a duty of inquiry and that plaintiff ignored the fact there was another party that plaintiff could have easily identified. The trial courtwas under an erroneous impression that plaintiff could not employ section 474 if plaintiff acted negligently (*20 Cal. App. 4th 483, 488)* . Rather, section 474 is restricted to the plaintiff's knowledge at the time the complaint is filed. The lack of knowledge of defendant's true name must be real and not feigned. Ignorance of the facts is the critical issue and it is irrelevant whether the ignorance is due to misinformation or negligence. Accordingly, under section 474, a plaintiff has no duty before filing the complaint to exercise reasonable diligence to discover the defendant's identity. Because a defendant has no such duty a defendant may act unreasonably in ascertaining a defendant's name and still claim the benefit of section 474 (*20 Cal. App. 4th 483, 487-489)* . Thus, the court could not agree with the dissenting justice's view that section 474 imposes on plaintiffs the obligation to discover readily accessible information (*20 Cal. App. 4th 483, 489)* . Moreover, the court, after reviewing plaintiff's conduct, further noted that under the facts, plaintiff's conduct demonstrated carelessness, not willful misuse of section 474 (*20 Cal. App. 4th 483, 489-490)* .

The reasoning of *Balon* was criticized and rejected in *Woo v. Superior Court (1999) 75 Cal. App. 4th 169, 89 Cal. Rptr. 2d 20 (Fourth Dist., Div. One)* . For discussion of *Woo, see § 104.21[3][b]*.

[4] Additional Authorities

[a] Standard for Applying Code Civ. Proc. § 474 Test of Ignorance of True Identity of Defendant Is Whether Plaintiff Had Actual Knowledge

In *Streicher v. Tommy's Electric Co. (1985) 164 Cal. App. 3d 876, 211 Cal. Rptr. 22* , the court of appeal held that a trial court abused its discretion in sustaining defendants' demurrer to a complaint for personal injuries, which plaintiff had amended after the statute of limitations had run to substitute defendants' names for fictitiously named defendants. In rejecting defendants' claim that plaintiff did not act in good faith in using the procedures provided in *Code Civ. Proc. § 474*, the court said that a plaintiff's ignorance of the true identity of a defendant must be tested at the time the complaint is filed. It was undisputed in this case that at the time of the filing of the original complaint plaintiff was ignorant of defendants' true identities or of their status as manufacturers and distributors of the allegedly defective product (*164 Cal. App. 3d 876, 882-883)* .

Barrows v. American Motors Corp. (1983) 144 Cal. App. 3d 1, 192 Cal. Rptr. 380 was a wrongful death action by the heirs of a man who was killed while riding as a passenger in a jeep that overturned. The original complaint was against the driver of the vehicle and Doe defendants. The plaintiffs settled with the named defendant, and later filed an amended complaint against the vehicle's manufacturers and distributor, as well as against various Doe defendants, alleging negligence, breach of warranty, and strict product liability. The defendants demurred to the complaint on the ground that the claim was barred by the statute of limitations because the complaint did not state that the defendants were the fictitious defendants in the original complaint.

The plaintiffs filed a motion for leave to amend the complaint to include an allegation that the defendants were the parties previously sued as Does in the original complaint, stating that the allegation had been omitted due to an oversight. Prior to the hearing on the demurrer and motion for leave to amend, the defendants submitted a declaration that the plaintiffs knew of the identity of the defendants and of the existence of facts supporting a suit against them well before the amended complaint was filed, and that the delay in filing the amended complaint was unreasonable. The basis of that contention was a questionnaire completed by one of the plaintiffs for the National Highway Traffic Safety Administration, in which that plaintiff expressed his opinion that the jeep was defectively designed and manufactured.

The trial court denied the plaintiffs' motion for leave to amend, sustained the defendants' demurrer, and rendered judgment for the defendants. The court of appeal reversed. The court stated that *Code Civ. Proc. § 474* permits a plaintiff who is ignorant of the identity of a defendant to use fictitious defendants in order to file the complaint before it is barred by the statute of limitations. The court stated that case law is clear that when fictitious defendant allegations are contained in the original complaint it is proper to amend to include other causes of action, and that the amendment will relate back to satisfy the statute of limitations (*144 Cal. App. 3d 1, 7)* . The court stated that the issue before it should be characterized not as a statute of limitations problem, since the amended complaint was filed within the statutory period, but as a question of laches or unreasonable delay in filing the amendment (*144 Cal. App. 3d 1, 8)* . The court found that the defendants had made no showing that they had suffered any specific prejudice from the delay, and that the delay was therefore not unreasonable (*144 Cal. App. 3d 1, 9)* . The court further stated that the questionnaire did not establish that the plaintiff had actual knowledge of the identity of all of the defendants or the facts showing their involvement in the injuries to the decedent. The court pointed out that in determining the propriety of a plaintiff's Doe allegations in the original complaint, the courts look only to the plaintiff's actual knowledge at that time. The plaintiff is not charged with knowledge of the defendant's true identity which could have been acquired by reasonable diligence (*144 Cal. App. 3d 1, 10 n.4*).

[b] Reasonably Diligent Effort to Discover Defendant's Name Not Required

In *Streicher v. Tommy's Electric Co. (1985) 164 Cal. App. 3d 876, 211 Cal. Rptr. 22* (discussed in *§ 104.24[4][a]*), the court of appeal held that Code Civ.Proc. § 474 does not require a plaintiff to exercise reasonable diligence in discovering either the true identity of fictitious defendants or the facts giving rise to a cause of action against those persons after the complaint is filed and up to the expiration of the applicable limitations period. Plaintiff did not know the true identity of fictitiously designated defendants at the time he filed the complaint, and his use of *Code Civ. Proc. § 474* was proper (*164 Cal. App. 3d 876, 883)* .

Barrows v. American Motors Corp. (1983) 144 Cal. App. 3d 1, 192 Cal. Rptr. 380 is discussed in *§ 104.24[4][a]*.

California Points & Authorities

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§ 105.10 Pleading Lacks Specificity Required for Fraud Action--Pleading Is Subject to Objection by Demurrer

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Objection by Demurrer

[b] Statement of Facts

[c] Specific and Factual Allegations in Pleading Fraud

[4] Additional Authorities

[a] Specific and Factual Allegations in Pleading Fraud

§ 105.11 Pleading Lacks Specificity Required for Fraud Action--Pleading Alleges Mere Conclusions of Law

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Pleading Conclusions of Law Insufficient

[4] Additional Authorities

[a] Pleading Conclusions of Law Insufficient

§ 105.12 Pleading Lacks Specificity Required for Fraud Action--Pleading Fails to Specifically Allege Corporate Fraud

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Pleading Fraud Against Corporations

§§ 105.13-105.19 [Reserved]

§ 105.20 Pleading Does Not Lack Specificity Required for Fraud Action--Elements Are Inferable

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Necessarily Inferred Facts

[b] Incorporated Allegations Satisfy Specificity Requirement

§§ 105.21-105.29 [Reserved]

§ 105.30 Misrepresentation or Omission Is Not Sufficiently Pleaded or Proven--No Sufficient Pleading or Proof of Intentional Misrepresentation

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Deceit Defined

[b] Deceit Must Be Pleaded

[c] Misrepresentation of Material Fact Required

[d] Test of Materiality

[4] Additional Authorities

[a] Deceit Must Be Pleaded

[b] Misrepresentation of Material Fact Required

[c] Test of Materiality

§ 105.31 Misrepresentation of Omission Is Not Sufficiently Pleaded or Proven--No Pleading or Proof That Representation Was False When Made

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Representation Was Not False When Made

[4] Additional Authorities

[a] Representation Was Not False When Made

§ 105.32 Misrepresentation of Omission Is Not Sufficiently Pleaded or Proven--No Pleading or Proof That Defendant Lacked Knowledge or Belief of Falsity

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Deceit Defined

[b] Defendant Lacked Knowledge or Belief of Falsity

[4] Additional Authorities

[a] Defendant Lacked Knowledge or Belief of Falsity

§ 105.33 Misrepresentation of Omission Is Not Sufficiently Pleaded or Proven--Pleading or Proof Merely Shows Statement of Opinion, Not Fraud

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Statement of Opinion Is Not Fraud

[4] Additional Authorities

[a] Statement of Opinion Is Not Fraud

§ 105.34 Misrepresentation of Omission Is Not Sufficiently Pleaded or Proven--Pleading or Proof Merely Shows Seller's Statement of Opinion With Disclosure

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Seller's Statement of Opinion With Disclosure Is Not Fraud

§ 105.35 Misrepresentation of Omission Is Not Sufficiently Pleaded or Proven--Pleading or Proof Merely Show Legal Opinion of Person Who Is Not Attorney

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Legal Opinion of Person Who Is Not Attorney

[b] Statement of Law Absent Confidential Relationship

[4] Additional Authorities

[a] Legal Opinion of Person Who Is Not Attorney

[b] Statement of Law Absent Confidential Relationship

§ 105.36 Misrepresentation of Omission Is Not Sufficiently Pleaded or Proven--Pleading or Proof Merely Shows Speculation About Future Events

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Speculation Concerning Future Events

[4] Additional Authorities

[a] Speculation Concerning Future Events

§§ 105.37-105.49 [Reserved]

§ 105.50 Misrepresentation or Omission Is Sufficiently Pleaded or Proven--Pleading or Proof Shows False Opinion Made to One Entitled to Rely

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] False Belief in Opinion

[b] False Assertion of Opinion as Fact

[4] Additional Authorities

[a] False Belief in Opinion

[b] False Assertion of Opinion as Fact

§ 105.51 Misrepresentation or Omission Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Statement of Opinion Coupled With False Representation

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Opinion Coupled With False Representation

§ 105.52 Misrepresentation or Omission Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Opinion Coupled With Special Relationship or Knowledge

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Opinion of Person With Superior Knowledge or Occupying Position of Trust

[4] Additional Authorities

[a] Opinion of Person With Superior Knowledge or Occupying Position of Trust

§ 105.53 Misrepresentation or Omission Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Legal Opinion of Person Who Is Not Attorney Coupled With Special Relationship or Knowledge

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Legal Opinion by Person Who Is Not Attorney But Is in Position of Trust or Purports to Have Expert Knowledge

[4] Additional Authorities

[a] Legal Opinion by Person Who Is Not Attorney But Is in Position of Trust or Purports to Have Expert Knowledge

§ 105.54 Misrepresentation or Omission Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Predictions Intended as Representations of Fact

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Prediction Intended as Representation of Fact

[4] Additional Authorities

[a] Prediction Intended as Representation of Fact

§ 105.55 Misrepresentation or Omission Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Misrepresentation Implied by Conduct

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Misrepresentation May Be Implied by Conduct

§§ 105.56-105.69 [Reserved]

§ 105.70 Concealment Is Not Sufficiently Pleaded or Proven--No Sufficient Pleading or Proof of Suppression of Fact

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] No Allegation of Defendant's Duty to Disclose

[b] Silence in Absence of Duty to Speak Is Not Fraud

[c] No Allegation of Misleading Statement

[4] Additional Authorities

[a] No Allegation of Defendant's Duty to Disclose

[b] Silence in Absence of Duty to Speak Is Not Fraud

§ 105.71 Concealment Is Not Sufficiently Pleaded or Proven--Facts Allegedly Suppressed Are Not Material

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Misrepresentation Not of Material Fact

[4] Additional Authorities

[a] Misrepresentation Not of Material Fact

§§ 105.72-105.79 [Reserved]

§ 105.80 Concealment Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Silence in Confidential Relationship

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Breach of Duty Arising From Confidential Relationship

§ 105.81 Concealment Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Silence By Agent

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Breach of Duty Arising From Agency Relationship

§ 105.82 Concealment Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Silence By Fiduciary

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Breach of Duty Arising From Fiduciary Relationship

[b] Oral Joint Venture Constitutes Fiduciary Relationship

[4] Additional Authorities

[a] Breach of Duty Arising From Fiduciary Relationship

§ 105.83 Concealment Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Silence With Knowledge That Affected Value of Transaction

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Breach of Duty Arising From Knowledge of Material Facts

[4] Additional Authorities

[a] Breach of Duty Arising From Knowledge of Material Facts

§ 105.84 Concealment Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Silence By Person With Statutory Duty

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Breach of Duty Arising From Statutory Obligation

[4] Additional Authorities

[a] Breach of Duty Arising From Statutory Obligation

§ 105.85 Concealment Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Concealment in Letter of Recommendation of Facts That Would Present Substantial Foreseeable Risk of Physical Injury to Third Persons

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Duty of Writer of Letter of Recommendation to Disclose Facts That Would Present Substantial Foreseeable Risk of Physical Injury to Third Persons

§§ 105.86-105.99 [Reserved]

§ 105.100 Promise Without Intent to Perform Is Not Sufficiently Pleaded or Proven--No Sufficient Pleading or Proof of Promise Without Intent to Perform

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Absence of Intent to Perform When Promise Made

[b] Facts Required

[4] Additional Authorities

[a] Absence of Intent to Perform When Promise Made

§ 105.101 Promise Without Intent to Perform Is Not Sufficiently Pleaded or Proven--No Sufficient Pleading or Proof of Promise Concerning Material Fact

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Promise Concerning Material Fact

[4] Additional Authorities

[a] Promise Concerning Material Fact

§ 105.102 Promise Without Intent to Perform Is Not Sufficiently Pleaded or Proven--Pleading or Proof of Plaintiff's Expectation Is Insufficient to Establish Misrepresentation

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Plaintiff's Expectation Insufficient to Establish Misrepresentation

§ 105.103 Promise Without Intent to Perform Is Not Sufficiently Pleaded or Proven--No Pleading or Proof of Failure to Perform

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Promisor's Failure to Perform

[4] Additional Authorities

[a] Promisor's Failure to Perform

§§ 105.104-105.109 [Reserved]

§ 105.110 Promise Without Intent to Perform is Sufficiently Pleaded or Proven--Pleading or Proof Shows Intent Not to Perform by Inference

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Necessary Inference of Lack of Intent to Perform Promise

[b] Intent May Be Established by Circumstantial Evidence

[4] Additional Authorities

[a] Necessary Inference of Lack of Intent to Perform Promise

[b] Intent May Be Established by Circumstantial Evidence

§§ 105.111-105.119 [Reserved]

§ 105.120 Misrepresentation by Agent Is Not Sufficiently Pleaded or Proven--Pleading or Proof of Facts Fails to Show Defendant Participated in or Knowingly Accepted Proceeds of Fraudulent Acts

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Liability Based on Participation or Knowing Acceptance of Proceeds

[4] Additional Authorities

[a] Liability Based on Participation or Knowing Acceptance of Proceeds

§ 105.121 Misrepresentation by Agent Is Not Sufficiently Pleaded or Proven--Pleading or Proof Shows Mere Innocent Principal Who Is Not Bound by Agent's Representations Beyond Terms of Contract

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Agent's Representations Exceeding Contract Terms

[4] Additional Authorities

[a] Agent's Representations Exceeding Contract Terms

§ 105.122 Misrepresentation by Agent Is Not Sufficiently Pleaded or Proven--Pleading or Proof Shows No Liability for Conspiracy to Commit Constructive Fraud Because of Absence of Fiduciary Relationship

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] No Liability Based on Conspiracy for Constructive Fraud

§§ 105.123-105.129 [Reserved]

§ 105.130 Misrepresentation by Agent Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Principal's Liability for Agent's Fraud

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Principal Liable for Fraud of Agent in Agency Business

[4] Additional Authorities

[a] Principal Liable for Fraud of Agent in Agency Business

§ 105.131 Misrepresentation by Agent Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Innocent Principal Accepted Benefits

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Innocent Principal Who Accepts Benefits

[4] Additional Authorities

[a] Innocent Principal Who Accepts Benefits

§ 105.132 Misrepresentation by Agent Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Innocent Joint Venturers Retained Benefits

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Innocent Joint Venturer

§ 105.133 Misrepresentation by Agent Is Sufficiently Pleaded or Proven--Pleading or Proof Need Not Show Benefit to Person Charged With Fraud

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Liability Not Predicated on Profit

§ 105.134 Misrepresentation by Agent Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Agent Concealed Known Facts

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Imputation of Agent's Knowledge

§ 105.135 Misrepresentation by Agent Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Agent's Fraud Resulted in Plaintiff's Failure to Read Contract Containing Exculpatory Clause

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Failure to Read Exculpatory Clause

§ 105.136 Misrepresentation by Agent Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Plaintiff Is Entitled to Rescission for Fraudulent Act of Agent

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Retaining Benefits of Fraud

[4] Additional Authorities

[a] Retaining Benefits of Fraud

§ 105.137 Misrepresentation by Agent Is Sufficiently Pleaded or Proven-- Pleading or Proof Shows Plaintiff Is Entitled to Rescission for Fraud on Agent Despite Exculpatory Clause in Contract

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Representations as Grounds for Rescission

§§ 105.138-105.149 [Reserved]

§ 105.150 Misrepresentation by Employer in Employment Termination Is Not Sufficiently Pleaded or Proven--Employer's Misrepresentation Aimed at Employment Termination Is Not Actionable in Tort

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] No Fraud Claim From Misrepresentation Aimed at Employment Termination

§§ 105.151-105.159 [Reserved]

§ 105.160 Misrepresentation Regarding Sexual Relations Is Not Sufficiently Pleaded or Proven--Privacy and Public Policy Concerns Bar Action Based on Representations Regarding Sexual Relations

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Representations Regarding Sexual Relations

[b] No Fraud in False Representations of Love or Sexual Desire

§§ 105.161-105.169 [Reserved]

§ 105.170 Misrepresentation Regarding Sexual Relations Is Sufficiently Pleaded or Proven--Pleading or Proof of Facts Consistent With Policy Favoring Prevention of Disease and Injury

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Contagious Disease or Serious Physical Harm

§§ 105.171-105.179 [Reserved]

§ 105.180 Intent to Induce Reliance Is Not Sufficiently Pleaded or Proven--No Sufficient Pleading or Proof of Intent to Induce Action in Reliance

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Intent to Induce Action in Reliance

[4] Additional Authorities

[a] Intent to Induce Action in Reliance

§ 105.181 Intent to Induce Reliance Is Not Sufficiently Pleaded or Proven--Pleading or Proof Show No Intent to Induce Because Representation Made to Stranger

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Representation to Stranger

[4] Additional Authorities

[a] Representation to Stranger

§ 105.182 Intent to Induce Reliance Is Not Sufficiently Pleaded or Proven--Pleading or Proof Shows No Intent to Induce Reliance of All Members of Public or Class Under Civil Code Section 1711

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Representations to Public or Class

§§ 105.183-105.189 [Reserved]

§ 105.190 Intent to Induce Reliance Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Intent By Inference

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Intent to Induce Action in Reliance Inferable

§ 105.191 Intent to Induce Reliance Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Intent to Induce Reliance Because Representation Was Made to Public or Class

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Representations to Public or Class

§ 105.192 Intent to Induce Reliance Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Defendant Had Reason to Expect Plaintiff's Reliance on Statement Not Made Directly to Plaintiff

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Reason to Expect Reliance by Plaintiff Sufficient

[4] Additional Authorities

[a] Reason to Expect Reliance by Plaintiff Sufficient

§§ 105.193-105.199 [Reserved]

§ 105.200 Actual and Justifiable Reliance on Misrepresentation Is Not Sufficiently Pleaded or Proven--No Sufficient Pleading or Proof of Actual and Justifiable Reliance

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Actual Reliance

[b] Justifiable Reliance

[c] Actual Reliance Requires Belief in Truth of Statements

[4] Additional Authorities

[a] Actual Reliance

[b] Justifiable Reliance

§ 105.201 Actual and Justifiable Reliance on Misrepresentation Is Not Sufficiently Pleaded or Proven--Pleading or Proof Shows Plaintiff Relied on Own Judgment

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Plaintiff Relied on Own Judgment

[4] Additional Authorities

[a] Plaintiff Relied on Own Judgment

§ 105.202 Actual and Justifiable Reliance on Misrepresentation Is Not Sufficiently Pleaded or Proven--Pleading or Proof Shows Plaintiff Relied on Independent Investigation

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Plaintiff Relied on Independent Investigation

[4] Additional Authorities

[a] Plaintiff Relied on Independent Investigation

§ 105.203 Actual and Justifiable Reliance on Misrepresentation Is Not Sufficiently Pleaded or Proven--Pleading or Proof Shows Plaintiff Relied on Third Party's Advice

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Plaintiff Relied on Third Party's Advice

[4] Additional Authorities

[a] Plaintiff Relied on Third Party's Advice

§ 105.204 Actual and Justifiable Reliance on Misrepresentation Is Not Sufficiently Pleaded or Proven--Pleading or Proof Shows Pleading or Proof Shows Plaintiff Relied on Statement of Opinion

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Plaintiff Relied on Statement of Opinion

§ 105.205 Actual and Justifiable Reliance on Misrepresentation Is Not Sufficiently Pleaded or Proven--Pleading or Proof Shows Plaintiff Relied on Preposterous Representations

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Plaintiff Relied on Preposterous Representations

§ 105.206 Actual and Justifiable Reliance on Misrepresentation Is Not Sufficiently Pleaded or Proven--Pleading or Proof Shows Plaintiff's Reliance Is Precluded by Contract

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Justifiable Reliance Precluded by Contract

[4] Additional Authorities

[a] Justifiable Reliance Precluded by Contract

§ 105.207 Actual and Justifiable Reliance on Misrepresentation Is Not Sufficiently Pleaded or Proven--Pleading or Proof Shows Plaintiff's Reliance on Legal Duty to Act

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Plaintiff's Actions Mandated by Law

§ 105.208 Actual and Justifiable Reliance on Misrepresentation Is Not Sufficiently Pleaded or Proven--"Fraud-on-Market" Is Inapplicable to Common Law Fraud

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] "Fraud-on-Market" Doctrine Does Not Apply to Common Law Fraud

§ 105.209 Actual and Justifiable Reliance on Misrepresentation Is Not Sufficiently Pleaded or Proven--Pleading or Proof Shows Plaintiff Failed to Read Insurance Policy

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Failure to Read Policy Precludes Reliance on Coverage Misrepresentation

§ 105.210 Actual and Justifiable Reliance on Misrepresentation Is Not Sufficiently Pleaded or Proven--Reliance on Corporate Misrepresentations Inducing Decision to Retain Stock in Corporation Must Be Pleaded With Specificity

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Reliance on Corporate Misrepresentations Inducing Decision Not to Sell Stock in Corporation Must Be Pleaded With Specificity

§§ 105.211-105.219 [Reserved]

§ 105.220 Actual and Justifiable Reliance Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Mere Failure to Investigate That Will Not Bar Recovery

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Mere Failure to Investigate Does Not Bar Recovery

[b] Defendant's Misrepresentation Was Intentional

[c] Right of Action Not Destroyed if Plaintiff Justifiably Relied

[4] Additional Authorities

[a] Mere Failure to Investigate Does Not Bar Recovery

[b] Defendant's Misrepresentation Was Intentional

[c] Right of Action Not Destroyed if Plaintiff Justifiably Relied

§ 105.221 Actual and Justifiable Reliance Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Plausible Explanation Eliminated Duty to Investigate

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Plausible Explanation Precludes Investigation

§ 105.222 Actual and Justifiable Reliance Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Plaintiff Had Limited Capacity to Investigate

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Reliance Not Precluded by Failure to Investigate

[4] Additional Authorities

[a] Reliance Not Precluded by Failure to Investigate

§ 105.223 Actual and Justifiable Reliance Is Sufficiently Pleaded or Proven--Pleading or Proof Merely Shows Existence of Public Record of Which Plaintiff Had No Constructive Notice

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Constructive Notice of Public Record

§ 105.224 Actual and Justifiable Reliance Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Reliance Because Misrepresentation Was Substantial Factor in Inducement

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Representations as Substantial Factor in Inducement

[4] Additional Authorities

[a] Representations as Substantial Factor in Inducement

§ 105.225 Actual and Justifiable Reliance Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Reliance Exists Because Plaintiff Was "Brainwashed"

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Plaintiff "Brainwashed" and Unable to Act on Truth

[b] Freedom of Religion Does Not Exempt Religious Organization

§ 105.226 Actual and Justifiable Reliance Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Reliance on Facts Discovered After Agreement Signed But Before Escrow Closed

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Discovery After Purchase Agreement Signed But Before Escrow Closed

§ 105.227 Actual and Justifiable Reliance Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Mere Contract Clause That May Not Preclude Proof of Reliance

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Contract Clause Does Not Preclude Proof of Reliance

[4] Additional Authorities

[a] Contract Clause Does Not Preclude Proof of Reliance

§ 105.228 Actual and Justifiable Reliance Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Indirect Reliance

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Reliance May Be Indirect

[b] Computer Network Equivalent to Plaintiff's Agent

§ 105.229 Pleading or Proof Shows Reliance Unnecessary When There Is Reasonable Reliance Shown by Third-Party Recipient of Defendant's Misrepresentations and Resulting Physical Injury to Plaintiff

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] No Reliance Is Necessary When There Was Reasonable Reliance by a Third-Party Recipient of Defendant's Misrepresentation and Resulting Physical Injury to Plaintiff

§§ 105.230-105.239 [Reserved]

§ 105.240 Causation Is Not Sufficiently Pleaded or Proven--Pleading or Proof Fails to Show Misrepresentation Caused Resulting Harm

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Plaintiff Must Allege and Show Causal Connection

§§ 105.241-105.249 [Reserved]

§ 105.250 Damages Are Not Sufficiently Pleaded or Proven--Pleading or Proof Fails to Show Damages

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Damages Resulting From Fraud Must Be Alleged

[4] Additional Authorities

[a] Damages Resulting From Fraud Must Be Alleged

§ 105.251 Damages Are Not Sufficiently Pleaded or Proven--Pleading or Proof Merely Shows Damages From Fraudulent Affirmative Defenses That Are Not Compensable

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Damages From Fraudulent Defenses Are Not Compensable

§ 105.252 Damages Are Not Sufficiently Pleaded or Proven--Pleading or Proof Damages for Fraud in Property Sale That Exceed Damages Permitted by Statute

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Statutory Measure of Damages Exclusive

[b] Out-of-Pocket Measure Appropriate Even in Action Involving Fraud by Fiduciary

[4] Additional Authorities

[a] Statutory Measure of Damages Exclusive

§ 105.253 Damages Are Not Sufficiently Pleaded or Proven--No "Cost of Repair" Recovery for Sale of Right of Way

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] No "Cost of Repair" Recovery for Sale of Right of Way

§§ 105.254-105.259 [Reserved]

§ 105.260 Damages Are Sufficiently Pleaded or Proven--Pleading or Proof Shows Damages

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Cases Not Involving Vendor and Vendee

[b] Fraud of Fiduciary

[4] Additional Authorities

[a] Damages for Inducing Reliance Through Deceit

[b] Fraud in Sale of Goods

[c] Fraud of Fiduciary

§ 105.261 Damages Are Sufficiently Pleaded or Proven--Economic Loss Rule Inapplicable if Defendant's Intentional Fraud Exposed Plaintiff to Liability

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Economic Loss Rule Inapplicable

§§ 105.262-105.269 [Reserved]

§ 105.270 Negligent Misrepresentation Is Not Sufficiently Pleaded or Proven--Pleading or Proof Fails to Show Lack of Reasonable Ground to Believe Truth of Representation

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Failure to Show No Reasonable Ground for Belief

[4] Additional Authorities

[a] Failure to Show No Reasonable Ground for Belief

§ 105.271 Negligent Misrepresentation Is Not Sufficiently Pleaded or Proven--Pleading or Proof Fails to Show Positive Assertion

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Positive Assertion Required for Negligent Misrepresentation

[4] Additional Authorities

[a] Positive Assertion Required for Negligent Misrepresentation

§ 105.272 Negligent Misrepresentation Is Not Sufficiently Pleaded or Proven--Pleading or Proof Shows Mere Gratuitous Promise

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Gratuitous Promise Is Not Grounds for Negligent Misrepresentation

§ 105.273 Negligent Misrepresentation Is Not Sufficiently Pleaded or Proven--Pleading or Proof Shows Mere Opinion as to Future Fact

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Opinion as to Future Fact Is Not Actionable as Negligent Misrepresentation

§§ 105.274-105.279 [Reserved]

§ 105.280 Negligent Misrepresentation Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Third Party Auditor's Misrepresentation in Audit Report

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Class of Persons Entitled to Recover

[b] Liability If Auditor Prepares Financial Records

[4] Additional Authorities

[a] Class of Persons Entitled to Recover

§§ 105.281-105.289 [Reserved]

§ 105.290 Bar by Statute of Limitations Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Three-Year Statute of Limitations for Fraud Applies

[1] Pleading or Proof Shows Three-Year Statute of Limitations for Fraud Applies

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Application of Statute of Limitations

[4] Additional Authorities

[a] Application of Statute of Limitations

§ 105.291 Bar by Statute of Limitations Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Two-Year Statute of Limitations for Breach of Real Estate Broker's Duty Applies

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Two-Year Period for Breach of Real Estate Broker's Duty

§ 105.292 Bar by Statute of Limitations Is Sufficiently Pleaded or Proven--Complaint Fails to Allege Facts Excusing Failure to Detect Fraud

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Pleading Facts Excusing Failure to Detect Fraud

§ 105.293 Bar by Statute of Limitations Is Sufficiently Pleaded or Proven--General Demurrer by Law Includes Bar of Statute of Limitations

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Bar of Statute Deemed Included in General Demurrer

§§ 105.294-105.299 [Reserved]

§ 105.300 Bar by Statute of Limitations Is Not Sufficiently Pleaded or Proven--Pleading or Proof Shows Late Discovery Excused By Absence of Reasonable Notice

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Mere Fact of Available Means of Knowledge Is Insufficient

[4] Additional Authorities

[a] Mere Fact of Available Means of Knowledge is Insufficient

§ 105.301 Bar by Statute of Limitations Is Not Sufficiently Pleaded or Proven--Pleading or Proof Shows That Defendant's Statements Lulled Plaintiff Into Inaction

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Defendant's Statements Lulled Plaintiff Into Inaction

[4] Additional Authorities

[a] Defendant's Statements Lulled Plaintiff Into Inaction

§ 105.302 Bar by Statute of Limitations Is Not Sufficiently Pleaded or Proven--Pleading or Proof Shows That Defendant Was Fiduciary or Confidential Relationship

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Fiduciary or Confidential Relationship Existed

[4] Additional Authorities

[a] Fiduciary or Confidential Relationship Existed

§ 105.303 Bar by Statute of Limitations Is Not Sufficiently Pleaded or Proven--Pleading or Proof Shows That Defendant's Statements Lulled Plaintiff Into Inaction

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Delay of Discovery Explained by Plaintiff's Absence

§ 105.304 Bar by Statute of Limitations Is Not Sufficiently Pleaded or Proven--Pleading or Proof Shows Defendant Fraudulently Concealed Facts

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Defendant Fraudulently Concealed Facts

§ 105.305 Bar by Statute of Limitations Is Not Sufficiently Pleaded or Proven--Pleading or Proof Shows Defendant's Continued Fraud Tolled Statute

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Defendant's Continued Fraud Tolled Statute

§§ 105.306-105.319 [Reserved]

§ 105.320 Bar by Ratification or Waiver Is Sufficiently Pleaded or Proven--Pleading or Proof Shows That Plaintiff Ratified Fraud

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Plaintiff Ratified Fraud

§ 105.321 Bar by Ratification or Waiver Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Plaintiff Waived Fraud Claim

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Waiver of Claim for Fraud

[4] Additional Authorities

[a] Waiver of Claim for Fraud

§§ 105.322-105.329 [Reserved]

§ 105.330 Bar by Ratification or Waiver Is Not Sufficiently Pleaded or Proven--Contract Cannot Waive Fraud Claim

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

§ 105.331 Bar by Ratification or Waiver Is Not Sufficiently Pleaded or Proven--Contract Cannot Waive Claim of Negligent Misrepresentation

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] "Fraud" Includes Negligent Misrepresentation

§ 105.332 Bar by Ratification or Waiver Is Not Sufficiently Pleaded or Proven--Pleading or Proof Merely Shows Continued Performance That Is Not Waiver

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Waiver of Fraud Requires Relinquishment of Right

[b] Continued Performance Is Not Waiver

[4] Additional Authorities

[a] Waiver of Fraud

[b] Continued Performance Is Not Waiver

§ 105.333 Bar by Ratification or Waiver Is Not Sufficiently Pleaded or Proven--Pleading or Proof Merely Shows Request for Favor in Continuing Performance That Is Not Waiver

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Mere Request for Favor in Continuing Performance Is Not Waiver

§ 105.334 Bar by Ratification or Waiver Is Not Sufficiently Pleaded or Proven--Pleading or Proof Merely Shows Modification of Contract That Is Not Necessarily Waiver of Fraud

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Modification of Contract Is Not Necessarily Waiver of Fraud

[4] Additional Authorities

[a] Modification of Contract Is Not Necessarily Waiver of Fraud

§ 105.335 Bar by Ratification or Waiver Is Not Sufficiently Pleaded or Proven--Pleading or Proof Merely Shows New Agreement That Is Not Waiver Because Original Agreement Not Superseded

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] New Agreement Must Be With Defendant and Supersede Original Contract

California Points & Authorities

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 105 FRAUD AND DECEIT
PART I. INTRODUCTION

10-105 California Points & Authorities § 105.01

§ 105.01 Scope of Chapter

[1] Tort Actions for Fraud and Deceit

This chapter contains forms of points and authorities relating to both actions for the intentional tort of deceit, commonly referred to as an action for fraud and deceit, and actions for negligent misrepresentation.

The forms in Part II of this chapter are set out as contentions, supporting or opposing specific issues relating to actions for fraud and deceit and negligent misrepresentation. They are designed to be combined with other points and authorities that relate to the specific motion or proceeding in which these issues are to be raised, for example, in a demurrer or a motion for summary judgment [*see § 105.04[2*] for references to related points and authorities, including the commonly relevant procedural contexts or other related substantive points and authorities].

The forms in Part II are organized as follows:

- Forms relating to the requirement that actions for fraud and deceit must be alleged specifically [*see § 105.10* et seq.]. As these forms involve a pleading requirement, they are designed primarily to be combined with other points and authorities supporting a demurrer.

- Forms relating to the sufficiency in pleading or proving the initial element in an action for fraud and deceit: the misrepresentation, omission or concealment of material fact, or other deceitful act [*see § 105.30* et seq.]. These may be combined with points and authorities supporting or opposing a demurrer or motion challenging the pleading, or supporting or opposing a motion challenging the evidence, such as a motion for summary judgment. These include forms relating to special, specific types of misrepresentations, including those in an employment context, those in the context of a consensual sexual relationship, and those made by a third party agent.

- Forms relating to the sufficiency in pleading or proving the other elements in an action for fraud and deceit: intent to induce reliance [*see § 105.180* et seq.], actual and justifiable reliance [*see § 105.200* et seq.], harm caused as a result [*see § 105.240* et seq.], and measurable damages for the resulting harm [*see*

§ 105.250 et seq.].

- Forms relating to the sufficiency of pleading or proof of an action for negligent misrepresentation [*see § 105.270* et seq.].

- Forms relating to affirmative defenses to an action for fraud and deceit [*see § 105.290* et seq.].

[2] Fraud as Defense to Breach of Contract Distinguished

Civ. Code §§ 1709 and *1710*, in codifying a common law tort action, use the term "deceit" to indicate conduct giving rise to a tort action for damages, which is grouped generally with other tortious conduct that, without any contractual obligation, results in injury to the person or property of another or actionable infringement on another's rights [*see Civ. Code §§ 1708-1710*].

On the other hand, *Civ. Code §§ 1572, 1573* and other code provision use the term "fraud" to refer to conduct that in nullifies otherwise valid consent to a contract, and is thus a defense to an action for breach of contract.

Courts, however, commonly use the term "fraud" or "fraud and deceit" in referring to the tort cause of action [*see, e.g., City Bank of San Diego v. Ramage (1968) 266 Cal. App. 2d 570, 588, 72 Cal. Rptr. 273]* . Careful distinction is necessary, therefore, not so much between usage of the terms "fraud" and "deceit," but between the application and case law interpretation of the contract defense codified in *Civ. Code § 1572* as distinguished from the application and case law interpretation of the tort action codified in *Civ. Code § 1710* [*see Bezaire v. Fidelity & Deposit Co. (1970) 12 Cal. App. 3d 888, 892, 91 Cal. Rptr. 142]* .

This distinction can be all the more confusing because the element in establishing both the contract defense and the tort action are very similar [*South Tahoe Gas Co. v. Hofmann Land Improvement Co. (1972) 25 Cal. App. 3d 750, 765, 102 Cal. Rptr. 286]* .

For forms of points and authorities relating to the contractual defense of fraud under *Civ. Code §§ 1572, 1573* and related provisions, see Ch. 92, *Duress, Menace, Fraud, Undue Influence and Mistake* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsContracts LawDefensesFraud & MisrepresentationGeneral OverviewTortsBusiness TortsFraud & MisrepresentationActual FraudDefensesTortsBusiness TortsFraud & MisrepresentationActual FraudElementsTortsBusiness TortsFraud & MisrepresentationNegligent MisrepresentationDefensesTortsBusiness TortsFraud & MisrepresentationNegligent MisrepresentationElements

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10-105 California Points & Authorities § 105.02

§ 105.02 Governing Law

The tort action of fraud and deceit is governed generally by *Civ. Code §§ 1709, 1710* (liability for damages based on deceit and actionable deceit or fraud defined) and interpretive case law.

Other related statutory provisions (and their interpretive decisional law) include:

- *Code Civ. Proc. § 338(d)* (three-year limitation period on action for relief for fraud, beginning on the date the aggrieved party discovers the facts constituting the fraud).

- *Civ. Code §§ 3294, 3333* (punitive and compensatory tort damages generally).

- *Civ. Code § 3343* (measure of compensatory damages for fraud in the purchase, sale, or exchange of real property).

- *Civ. Code § 1710.1* (liability for fraudulent transfer of specified personal property from which serial numbers or similar identification has been removed).

- *Civ. Code § 1710.2* (duty of disclosure, in transfer of real property, of fact that previous occupant had or died as a result of HIV/AIDS).

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsTortsBusiness TortsFraud & MisrepresentationActual FraudGeneral OverviewTortsBusiness TortsFraud & MisrepresentationActual FraudDefensesTortsBusiness TortsFraud & MisrepresentationActual FraudRemediesTortsProcedureStatutes of LimitationsAccrual of ActionsDiscovery Rule

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10-105 California Points & Authorities § 105.03

§ 105.03 How to Use Forms in This Chapter

[1] Page Limits on Points and Authorities

One of the more significant drafting requirements to keep in mind are page limits: supporting memoranda of points and authorities must not exceed 15 pages (or 20 pages in a summary adjudication proceeding). Exhibits, declarations, attachments, a table of contents, a table of authorities, or the proof of service, are not included in the page limitation. A reply or closing memorandum may not exceed 10 pages in length. Any party desiring to file a longer memorandum must obtain leave of court [*see Cal. Rules of Ct., Rule 3.1113(d), (e)*]. These and other drafting requirements are discussed in *further detail in Ch. 1, Writing Legal Memoranda and Briefs, § 1.04*.

[2] Using Forms to Build Draft Memorandum

The forms included in this chapter are designed to be combined with other points and authorities to form a complete memorandum. For a detailed discussion on how to select and use the forms in the publication to build a draft memorandum and complete the draft, with detailed discussion of all drafting requirements and strategic or stylistic considerations, see *Ch. 1, Writing Legal Memoranda and Briefs, §§ 1.03 -1.05*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureSummary JudgmentOppositionMemoranda in OppositionCivil ProcedureSummary JudgmentSupporting MaterialsMemoranda of LawGovernmentsCourtsRule Application & Interpretation

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10-105 California Points & Authorities § 105.04

§ 105.04 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

See the following chapters in California Forms of Pleading and Practice (Matthew Bender), for detailed treatise discussion, pleading and practice forms, procedural checklists, and research guides relating to the forms in this chapter:

- Actions for fraud and deceit and negligent representation:
  - Ch. 269, *Fraud and Deceit*.
- Pretrial proceeding in which the points and authorities in this chapter are most likely to be raised:
  - Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*.
  - Ch. 375, *Motions to Strike*.
  - Ch. 389, *Nonsuit and Motions for Judgment*.
  - Ch. 489, *Relief From Judgments and Orders*.
  - Ch. 537, *Summary Judgment*.
- Other procedural contexts in which the points and authorities in this chapter may be raised:
  - Ch. 107, *Cancellation of Instruments*.
  - Ch. 205, *Defaults and Default Judgments*.
  - Ch. 318, *Judgments*.

- Ch. 444, *Probate: Will Contests*,
- Ch. 482, *Quieting Title*.
- Ch. 488, *Reformation of Instruments*.
- Ch. 490, *Rescission and Restitution*.

- Other related substantive and procedural subject areas:
  - Ch. 7, *Accounting, Action for*.
  - Ch. 8, *Accounts Stated and Open Accounts*.
  - Ch. 12, *Adoptions: Nature and Effect*.
  - Ch. 12A, *Adoptions: Termination of Parental Rights*.
  - Ch. 12B, *Adoptions: Unmarried Minors*.
  - Ch. 12C, *Adoptions: Adults and Married Minors*.
  - Ch. 12E, *Adoptions: Attack on Decree*.
  - Ch. 14, *Advertising*.
  - Ch. 23, *Animals: Civil Liability*.
  - Ch. 25, *Annulment (Nullity) of Marriage and Related Spousal Rights*.
  - Ch. 57, *Art*.
  - Ch. 77, *Auctions and Auctioneers*.
  - Ch. 95, *Banks, Deposits, and Checks*.
  - Ch. 103, *Brokers*.
  - Ch. 104, *Building Contracts*.
  - Ch. 121, *Common Counts*.
  - Ch. 122, *Community Property*.
  - Ch. 127, *Consumer Contracts and Loans*.
  - Ch. 140, *Contracts*.
  - Ch. 150, *Conversion*.

- Ch. 177, *Damages*.
- Ch. 184, *Deeds*.
- Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake*.
- Ch. 307, *Insolvency*.
- Ch. 308, *Insurance*.
- Ch. 393, *Oil and Gas*.
- Ch. 401, *Partnerships: Actions Between General Partners and Partnership*.
- Ch. 402, *Partnerships: Actions Between General Partners or Partnership and Third Parties*.
- Ch. 405, *Partnerships: Actions Between Limited Partners or Partnerships and Third Parties*.
- Ch. 460, *Products Liability*.
- Ch. 500, *Sales: Sales Under the Commercial Code*.
- Ch. 501, *Sales: Retail Installment Sales*.
- Ch. 502, *Sales: Warranties*.
- Ch. 503, *Sales: Secured Transactions*.
- Ch. 504, *Sales: Consumers Legal Remedies Act*.
- Ch. 505, *Sales: Independent Wholesale Sales Representatives Contractual Relations Act*.
- Ch. 538, *Suretyship, Bonds, and Undertakings*.
- Ch. 560, *Trusts: Constructive Trusts,*
- Ch. 569, *Vendor and Purchaser*.

[2] Related Points and Authorities

- For forms of points and authorities relating to procedural contexts in which the forms in this chapter are most likely to be used, see:

  - Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders*.
  - Ch. 71, *Demurrers and Motions for Judgment on the Pleadings*.

- Ch. 160, *Motions to Strike*.
- Ch. 221, *Summary Judgments*.

- For other procedural contexts, see also:
  - Ch. 16, *Amended and Supplemental Pleadings*.
  - Ch. 20, *Arbitration: Compelling*.
  - Ch. 20A, *Arbitration: Resisting*.
  - Ch. 61, *Cross Complaints*.
  - Ch. 112, *Homesteads*.
  - Ch. 121, *Interest*.
  - Ch. 131, *Judgments*.
  - Ch. 132, *Jurisdiction: Personal Jurisdiction and Inconvenient Forum*.
  - Ch. 133, *Jurisdiction: Subject Matter Jurisdiction*.
  - Ch. 143, *Limitation of Actions*.
  - Ch. 155, *Motions After Trial*.
  - Ch. 168, *Parties*.
  - Ch. 198, *Quieting Title*.

- For points of authorities in related substantive contexts, with which the forms in this chapter may be combined, see:
  - Ch. 12, *Accounting*.
  - Ch. 14, *Advertising*.
  - Ch. 30, *Bankruptcy*.
  - Ch. 31, *Brokers and Salespersons*.
  - Ch. 34, *Checks and Banks*.
  - Ch. 43, *Common Counts and Bills of Particulars*.
  - Ch. 50, *Contracts*.

- Ch. 51, *Conversion*.
- Ch. 64, *Damages: Tort*.
- Ch. 65, *Damages: Contract*.
- Ch. 92, *Duress, Menace, Fraud, Undue Influence, and Mistake*.
- Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*.
- Ch. 100A, *Employer and Employee: Respondeat Superior*.
- Ch. 114, *Husband and Wife*.
- Ch. 120, *Insurance*.
- Ch. 141, *Landlord and Tenant*.
- Ch. 142, *Libel and Slander (Defamation)*.
- Ch. 170, *Partnerships and Joint Ventures*.
- Ch. 182, *Principal and Agent*.
- Ch. 186, *Probate of Wills*.
- Ch. 190, *Products Liability*.
- Ch. 196, *Public Entities*.
- Ch. 206, *Sales*.
- Ch. 214, *Specific Performance*.
- Ch. 222, *Suretyship*.
- Ch. 225, *Trespass*.
- Ch. 239, *Workers' Compensation Exclusive Remedy Doctrine*.

Legal Topics:

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

§§ 105.05[Reserved]

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PART II. FORMS
A. Specific Pleading Requirement

10-105 California Points & Authorities § 105.10

§ 105.10 Pleading Lacks Specificity Required for Fraud Action--Pleading Is Subject to Objection by Demurrer

[1] FORM

[*The following may be included in a memorandum of points and authorities, or adapted for use in a trial or appellate brief.*]

THE COMPLAINT IS SUBJECT TO DEMURRER ON THE GROUND THAT IT FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION BECAUSE IT FAILS TO ALLEGE ALL ELEMENTS OF THE FRAUD COMPLAINED OF IN SPECIFIC TERMS.

A. Objection by Demurrer. The party against whom a complaint has been filed may object to the complaint by demurrer on the ground that it does not state facts sufficient to constitute a cause of action where such ground appears on the face of the complaint or from any matter of which the court is required to or may take judicial notice (*Code Civ. Proc. § 430.10(e)*).

B. Statement of Facts. A complaint must contain a statement of the facts constituting the cause of action in ordinary and concise language (*Code Civ. Proc. § 425.10(a)*).

C. Specific and Factual Allegations in Pleading Fraud. It is fundamental that fraud is not presumed. Whenever it constitutes an element of a cause of action or is invoked as conferring a right, it must be alleged (*Cooper v. Leslie Salt Co. (1969) 70 Cal. 2d 627, 636, 75 Cal. Rptr. 766, 451 P.2d 406* ; *Goldrich v. Natural Y Surgical Specialties, Inc. (1994) 25 Cal. App. 4th 772, 782-783, 31 Cal. Rptr. 2d 162*). In pleading fraud, it is essential that the facts and circumstances constituting the fraud should be set out clearly, concisely, and with sufficient particularity to apprise the opposite party of what he or she is called on to answer and to enable the court to determine if, on the facts pleaded, there is any foundation, prima facie at least, for the charge of fraud (*Hannon v. Madden (1931) 214 Cal. 251, 267-268, 5 P.2d 4* ; *Scafidi v. Western Loan & Bldg. Co. (1946) 72 Cal. App. 2d 550, 553, 165 P.2d 260*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a general demurrer to a complaint based on fraud and deceit when the pleading fails to allege all of the elements of the particular type of deceit involved specifically and factually. It should be combined, when appropriate, with the points and *authorities in § 105.11* et seq., which challenge the sufficiency of specific pleading with regard to particular elements of the cause of action for fraud and deceit.

This form may be modified depending on the procedural context in which the issue is raised and any other substantive issues that need to be addressed. For example, it may be submitted with other points and authorities supporting a motion for summary challenging the sufficiency of the proof.

This form should be combined, when appropriate, with the points and authorities in *§ 105.30* et seq., which challenge the sufficiency of pleading or proof with regard to other aspects or elements in a cause of action for fraud and deceit.

This form may also be adapted for a trial or appellate brief, or to support of a motion for judgment on the pleadings, a motion for nonsuit, or any other request for relief based on plaintiff's failure to show or establish the essential elements of the action for fraud or deceit.

For legal background with detailed coverage of the elements of a tort action for fraud and deceit, see California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. In this instance, involving a pleading requirement, counsel should argue that the facts alleged by the opposing party are not specific enough to constitute an actionable tort of fraud and deceit. In a demurrer, counsel may also request judicial notice, if appropriate, to show the insufficient specificity of the alleged facts [*see Evid. Code § 450 et seq.*].

For further legal background, research guides, and forms relating to judicial notice, see California Forms of Pleading and Practice, Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For related legal background, research and procedural guides, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , Ch. 269, *Fraud and Deceit* , Ch. 375, *Motions to Strike* , and Ch. 389, *Nonsuit and Motions for Judgment* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§ 105.11* et seq., relating to inadequate specificity generally, and § 105.30 et seq., which pertains to the sufficiency of either pleading or proof of specific elements.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For additional points and authorities relating to demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[e] Opposing Points and Authorities

The points and authorities in *§ 105.20* may be used in an appropriate case to oppose the points and authorities in this form. In addition, when appropriate, points and authorities which oppose contentions based on the sufficiency of pleading or proof of specific elements may be used to oppose the points and authorities in this form [*see, e.g., § 105.50* et seq.].

[3] Discussion of Authorities

[a] Objection by Demurrer

Code Civ. Proc. § 430.10(e) sets out the provision applicable to a general demurrer, that is, a demurrer based on the ground that a complaint fails to state facts sufficient to constitute a cause of action. Under ***Code Civ. Proc. § 430.30(a)*** , the provision applies to cross complaints as well as complaints.

[b] Statement of Facts

Code Civ. Proc. § 425.10(a) sets out the general requirement that a cause of action be pleaded by stating facts in ordinary and concise language that constitute that cause of action.

[c] Specific and Factual Allegations in Pleading Fraud

In ***Cooper v. Leslie Salt Co.*** *(1969) 70 Cal. 2d 627* , the Supreme Court affirmed judgments of dismissal after general demurrers to a complaint were sustained without leave to amend in a case involving actions by taxpayers attacking the manner in which a municipal improvement district financed certain municipal improvements and services. The Court considered the possibility that the appellant-taxpayers intended to allege fraudulent misappropriations of district funds. The Court stated, however, that fraud is never presumed--facts constituting fraud must be specifically pleaded. The court must be able to determine from the complaint that a prima facie case is alleged. In this case, the complaint neglected to set forth any specific facts that would establish fraudulent acts. For example, the taxpayer did not allege that the work performed for the district was done poorly or not done at all, nor did he allege facts to show that the price paid was more than the contract called for or that the endorsements of the checks given in payment for the work were fraudulent (*70 Cal. 2d 627, 636*).

In ***Goldrich v. Natural Y Surgical Specialties, Inc.*** *(1994) 25 Cal. App. 4th 772, 31 Cal. Rptr. 2d 162* , plaintiff suffered injuries as a result of defective silicone breast implants. She brought an action for, among other things, fraud against the surgeon who had inserted the implants and several breast implant manufacturers. She alleged in general terms that the defendants "had falsely and fraudulently represented" to her, her physicians, "and other members of the general public" that their product was "safe for use in breast surgery, that it posed no dangerous risks of injury, ... and that it would not require frequent removal from her body." The complaint provided no details regarding how and when the alleged misrepresentations were made or the exact nature of the misrepresentations. The court of appeal held that the trial court had correctly disposed of the fraud cause of action by demurrer and judgment on the pleadings. The court noted that fraud must be pleaded with specificity, to provide the defendants with the fullest possible details of the charge so that they can prepare a defense to this serious attack. To withstand a demurrer, the facts constituting every element of the fraud must be alleged with particularity, and the claim cannot be salvaged by references to the general policy favoring liberal construction of pleadings. The court stated that even in a case involving numerous oft-repeated misrepresentations, the plaintiff must, at a minimum, set out a representative sample of the alleged misrepresentations sufficient to permit the trial court to ascertain whether the statements were material and otherwise actionable. The court concluded that the pleading in this case did not come close to the required specificity (*25 Cal. App. 4th 772, 782-783)* .

In ***Hannon v. Madden (1931) 214 Cal. 251, 5 P.2d 4*** , certain taxpayers had contested the validity of a street improvement assessment, alleging fraud among other matters. In reversing the trial court's judgment for the plaintiffs, the Supreme Court examined the complaint as amended, and concluded that its pleading of fraud was deficient. It is a cardinal rule of pleading, the Court noted, that fraud must be pleaded in specific language descriptive of the acts relied

on to constitute fraud. It is not sufficient to allege it in general terms or in terms that are mere conclusions. Fraud, being a term that imputes venality and corruption to the person charged, should be proved clearly and established satisfactorily (*214 Cal. 251, 267-268)* .

In ***Scafidi v. Western Loan & Bldg. Co.*** *(1946) 72 Cal. App. 2d 550* , the court of appeal affirmed a judgment for the defendants in an action for money had and received which the plaintiffs characterized as essentially an action for fraud and deceit. If the action was for money had and received, the statute of limitations barred it, if it were characterized as one for fraud, the issue was whether or not the complaint stated a cause of action therefor. The court noted that in pleading a cause of action based on fraud or in pleading fraud in avoidance of the bar of the statute of limitations, it is essential that the facts and circumstances that constitute the fraud be set out clearly, concisely, and with sufficient particularity to apprise the opposite party of what he is called on to answer and to enable the court to determine if on the facts pleaded, there is any foundation, prima facie at least, for the charge of fraud. On analysis of the complaint, the court found it deficient for failure to allege (1) any false or fraudulent representations, which must be pleaded clearly and unequivocally; (2) defendants' ever having made any representation; or (3) defendants' having made a representation that (a) was false, (b) defendants knew to be false, (c) plaintiffs believed and relied on, or (d) defendants made with intent to deceive and defraud the plaintiffs. If the plaintiffs intended to allege defendants' fraud in making a promise without any intention to perform it, they failed to allege that defendants so promised or so promised with the intent to deceive or defraud the plaintiffs. Moreover, the facts that plaintiffs pleaded in alleging fraudulent concealment of their cause of action for money had and received were wholly insufficient to establish such a concealment (*72 Cal. App. 2d 550, 553*).

[4] Additional Authorities

[a] Specific and Factual Allegations in Pleading Fraud

In *Stansfield v. Starkey(1990) 220 Cal. App. 3d 59, 269 Cal. Rptr. 337* , several present and former members of a church brought an action against the church, alleging fraud and other causes of action, based on allegations, inter alia, that they were fraudulently induced to become members. The court of appeal affirmed the sustaining of a demurrer to the cause of action in fraud without leave to amend, holding that every element must be alleged in the proper manner, and the facts constituting the fraud must be alleged with sufficient specificity to allow defendant to understand fully the nature of the charge made. In the instant case, the court held that the alleged representations made by defendant, for example, that its founder was underpaid and a wounded war hero, allegedly made to induce plaintiffs to join the church, were inadequate to support a cause of action in fraud (*220 Cal. App. 3d 59, 73-75)* .

In *Cooper v. Equity Gen. Ins. (1990) 219 Cal. App. 3d 1252* , the defendant insurer filed a cross complaint in an insurance bad-faith action brought by its insured. In the cross complaint, defendant alleged that the plaintiff and his attorneys committed conspiracy to commit fraud in connection with an underlying third-party claim; the pleadings claimed that the cross defendants' misrepresentations caused it to consult insurance coverage counsel, and to start an investigation, but failed to allege specifically how the misrepresentations or any other acts of the cross defendants caused it to be damaged. The court of appeal affirmed the trial court's sustaining of the cross defendants' demurrer to the cross complaint without leave to amend, noting that defendant did not subsequently assert any supportive facts, and holding that every element of a cause of action for fraud must be alleged both factually and specifically, and the policy of liberal construction of pleadings will not be invoked to sustain a defective pleading (*219 Cal. App. 3d 1252, 1262-1264*).

In *California Trust Co. v. Gustason (1940) 15 Cal. 2d 268* , the Supreme Court affirmed the trial court's judgment for the plaintiff which it entered after sustaining the plaintiff's general and special demurrers to the defendant's second amended answer and cross complaint without leave to amend. The defendant's theory was that the plaintiff had committed fraud in inducing contracts for the sale of certain property. However, the Court noted, whatever is essential to a cause of action must be distinctly averred. The necessary elements of fraud were not pleaded. The defendant

charged in legal conclusions that fraud and misrepresentation had been perpetrated on him but set forth not a single false representation. Moreover, there was no allegation of either the plaintiff's knowledge of falsity or reliance on defendant's representations. The agreements involved were not pleaded and no statement was made about their terms or conditions. Thus, it could not be determined what right or title the agreements or their alleged fraudulent procurement conferred on the defendant, and it could not be determined how any right or title was conferred. Although an exhibit attached to the answer recited the false representations on which the defendant alleged his reliance, such inferential pleading is wholly insufficient. Matters of substance must be alleged in direct terms and not by recital or reference, much less by exhibits merely attached to the pleadings (*15 Cal. 2d 268, 272-273*).

In *Davis v. Rite-Lite Sales Co. (1937) 8 Cal. 2d 675* , the Supreme Court affirmed a judgment for the defendant entered by the trial court after it had sustained the defendant's general and special demurrers to the second amended complaint without leave to amend. The complaint purported to state a cause of action for rescission of a contract for fraud in that the defendant had represented to plaintiff that it owned an interest in a patent, that the plaintiff had purchased stock in the defendant as a result, but that because a federal court order had been entered restraining the defendant from manufacturing the patented item, the stock was worthless. There was no allegation that defendant's representations were false when made or that the defendant knew the representations were false when made. In holding that the grounds for the demurrers were well taken, the Court stated that in an action for fraud and deceit, the allegations of fraud must be clear and unequivocal (*8 Cal. 2d 675, 680-681)* .

In *La Vista Cemetery Assn. v. American Sav. & Loan Ass'n 1970) 12 Cal. App. 3d 365* , the court of appeal affirmed the trial court's judgment sustaining, without leave to amend, the defendant's demurrer for failure to state a cause of action and for uncertainty in an action for recovery of money on deposit and for damages for fraud. The plaintiff based a constructive fraud charge on an allegation that the defendant had breached a supposed fiduciary relationship. The complaint contained general allegations of "connivance," "complicity," and "intent to aid and abet." The court stated that it is essential that the facts and circumstances constituting actual fraud be set forth with particularity to enable the court to determine if on the facts pleaded, the charge has any foundation. The general allegations did not meet that burden of particularity (*12 Cal. App. 3d 365, 368-369*).

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PART II. FORMS
A. Specific Pleading Requirement

10-105 California Points & Authorities § 105.11

§ 105.11 Pleading Lacks Specificity Required for Fraud Action--Pleading Alleges Mere Conclusions of Law

[1] FORM

[*The following may be included in a memorandum of points and authorities, or adapted for use in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE PLAINTIFF ATTEMPTS TO ALLEGE FRAUD _____ [GENERAL TERMS *or* TERMS THAT ARE MERE CONCLUSIONS].

A. Pleading Conclusions of Law Insufficient. It is not sufficient to allege fraud in general terms or in terms that are mere conclusions. Every element of a cause of action for fraud must be alleged factually and specifically (*Lesperance v. North Am. Aviation, Inc. (1963) 217 Cal. App. 2d 336, 344, 31 Cal. Rptr. 873*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the plaintiff or cross complainant has failed to allege sufficient facts to constitute a cause of action for fraud because the pleadings attempt to allege fraud in general terms or in terms that are mere conclusions.

This form may be modified for use with other points and authorities depending on the procedural context in which the issue is raised and other substantive issues that may be involved [*see § 105.10[2]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.10[2][b]*].

[c] Related Pleading and Practice Chapters

For related legal background, research and procedural guides, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , Ch. 269, *Fraud and Deceit* , Ch. 375, *Motions to Strike* , and Ch. 389, *Nonsuit and Motions for Judgment* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see [*see § 105.10*, relating to inadequate specificity generally, and § 105.30 et seq., which pertains to the sufficiency of either pleading or proof of specific elements.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For additional points and authorities relating to demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[e] Opposing Points and Authorities

The points and authorities in *§ 105.20* may be used in an appropriate case to oppose the points and authorities in this form. In addition, when appropriate, points and authorities which oppose contentions based on the sufficiency of pleading or proof of specific elements may be used to oppose the points and authorities in this form [*see, e.g., § 105.50* et seq.].

[3] Discussion of Authorities

[a] Pleading Conclusions of Law Insufficient

In ***Lesperance v. North Am. Aviation, Inc.*** *(1963) 217 Cal. App. 2d 336, 31 Cal. Rptr. 873* , the background of which is discussed in *§ 105.10[4]*, the court of appeal noted that fraud actions are subject to strict requirements of particularity in pleading. The effect of the rule that fraud must be specifically pleaded is that general pleading of the legal conclusion of "fraud" is insufficient. In addition, the court noted, every element of the cause of action must be alleged factually and specifically. The policy of liberal construction of the pleadings will not ordinarily be invoked to sustain a pleading that is defective in any material respect (*217 Cal. App. 2d 336, 344)* .

[4] Additional Authorities

[a] Pleading Conclusions of Law Insufficient

In *Hannon v. Madden (1931) 214 Cal. 251, 5 P.2d 4* , discussed in *§ 105.10[3][d]*, the plaintiffs sought to invalidate a street improvement assessment on the ground alleged in the complaint that the board of trustees of the taxing entity had fraudulently, unlawfully, and arbitrarily overruled plaintiffs' protests concerning the quality of the street improvement work, knowing that the work was not performed according to the plans and specifications. In reversing the trial court's judgment for the plaintiffs, the Court pointed out that it is a cardinal rule of pleading that fraud must be pleaded in specific language descriptive of the acts relied on to constitute fraud. It is not sufficient, said the Court, to allege fraud in general terms or in terms that are mere conclusions (*214 Cal. 251, 267)* .

In *Zumbrun v. University of S. Cal. (1972) 25 Cal. App. 3d 1, 101 Cal. Rptr. 499* , a complaint for fraud was found deficient in that it did not allege a casual connection between defendants' averred wrongs and the damages claimed. The court of appeal stated that allegations of damages without allegations of fact to support them are but conclusions of law,

which are not admitted by demurrer (*25 Cal. App. 3d 1, 12)* .

In *Starbird v. Lane (1962) 203 Cal. App. 2d 247, 21 Cal. Rptr. 280* , the court of appeal affirmed the trial court's judgment for some defendants after it sustained a general demurrer to a fifth amended complaint without leave to amend and an order dismissing the action as to the remaining defendants. The complaint sought the removal of a corporate director alleging fraud among other matters. The court observed that all the essential charges of fraud were stated in the form of "the most general conclusions" and concluded that the insufficiency of such allegations has long been recognized (*203 Cal. App. 2d 247, 257)* .

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 105 FRAUD AND DECEIT
PART II. FORMS
A. Specific Pleading Requirement

10-105 California Points & Authorities § 105.12

§ 105.12 Pleading Lacks Specificity Required for Fraud Action--Pleading Fails to Specifically Allege Corporate Fraud

[1] FORM

[*The following may be included in a memorandum of points and authorities, or adapted for use in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE THE COMPLAINT, WHICH ASSERTS FRAUD AGAINST A CORPORATION, FAILS TO ALLEGE _____ [THE NAME OF THE PERSON WHO SPOKE *and/or* THE AUTHORITY OF THE PERSON WHO SPOKE *and/or* THE PERSON TO WHOM THE SPEECH WAS ADDRESSED *and/or* WHAT WAS SAID *and/or* WHEN THE STATEMENT WAS MADE].

Pleading Fraud Against Corporations. If the plaintiff seeks to charge a defendant corporation with making fraudulent misrepresentations, it is necessary for him or her to allege the name of the person who spoke, his of her authority to speak, the person to whom the speech was addressed, what was said, and when it was said. A complaint lacking in such allegations does not state facts sufficient to charge a corporate defendant with fraud (*Mason v. Drug, Inc. (1939) 31 Cal. App. 2d 697, 703, 88 P.2d 929*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the plaintiff has failed to allege sufficient facts to constitute a cause of action for fraud against a corporation because the pleadings fail to allege such specific information as the person making the representation and to whom the representation was directed.

This form may be modified for use with other points and authorities depending on the procedural context in which the issue is raised and other substantive issues that may be involved [*see § 105.10*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.10[2][b]*].

[c] Related Pleading and Practice Chapters

For related legal background, research and procedural guides, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , Ch. 269, *Fraud and Deceit* , Ch. 375, *Motions to Strike* , and Ch. 389, *Nonsuit and Motions for Judgment* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§ 105.10*, relating to inadequate specificity generally, and § 105.30 et seq., which pertains to the sufficiency of either pleading or proof of specific elements.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For additional points and authorities relating to demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[e] Opposing Points and Authorities

The points and authorities in *§ 105.20* may be used in an appropriate case to oppose the points and authorities in this form. In addition, when appropriate, points and authorities which oppose contentions based on the sufficiency of pleading or proof of specific elements may be used to oppose the points and authorities in this form [*see, e.g., § 105.50* et seq.].

[3] Discussion of Authorities

[a] Pleading Fraud Against Corporations

In ***Mason v. Drug, Inc.*** *(1939) 31 Cal. App. 2d 697, 88 P.2d 929* , the court of appeal affirmed the trial court's judgment for the plaintiff which was entered after the trial court sustained general and special demurrers to the plaintiff's complaint filed by two of the defendants. The complaint alleged that the defendants had fraudulently conspired to cause certain shareholders of one of the corporate defendants to enter into certain stock transactions. With respect to the cause of action for fraudulent misrepresentation by one of the corporate defendants, the court stated that since corporations can speak and act only through their agents and officers, it is material to state such persons' names, what they said and did which was material to the cause of action, when the event happened, and such facts and circumstances as the pleader relies on as proof of the fraud and deceit constituting his cause of action. Each party must allege every fact which he is required to prove and will be precluded from proving any fact not alleged. Fraud is never presumed. Thus, in this case, the court observed, if the plaintiff would charge the defendant corporation with making fraudulent misrepresentations plaintiff must allege the name of the person who spoke, his authority to speak, to whom he spoke, what he said or wrote, and when he said or wrote it. Since the amended complaint was wholly wanting in such allegations, it did not state facts sufficient to charge the corporate defendant (*31 Cal. App. 2d 697, 703)* .

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10-105 California Points & Authorities §§ 105.13-105.19

[Reserved]

§§ 105.13[Reserved]

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PART II. FORMS
A. Specific Pleading Requirement

10-105 California Points & Authorities § 105.20

§ 105.20 Pleading Does Not Lack Specificity Required for Fraud Action--Elements Are Inferable

[1] FORM

[*The following may be included in a memorandum of points and authorities, or adapted for use in a trial or appellate brief.*]

PLAINTIFF _____ [SHOULD PREVAIL ON THE *or* HAS STATED FACTS SUFFICIENT TO CONSTITUTE A] CAUSE OF ACTION FOR FRAUD AND DECEIT DESPITE AN ALLEGED FAILURE TO PLEAD THAT _____ [*identify element that defendant contends has not been alleged by separate allegation, e.g,* PLAINTIFF ACTUALLY AND JUSTIFIABLY RELIED ON DEFENDANT'S MISREPRESENTATION] BECAUSE THAT ELEMENT IS NECESSARILY INFERRED FROM OTHER PLEADED FACTS.

A. Necessarily Inferred Facts. A general demurrer admits not only the facts expressly alleged but also facts essential to a cause of action which the facts alleged supply by implication or inference (*McKay v. New York Life Ins. Co. (1899) 124 Cal. 270, 272-273, 56 P. 1112* ; *Remus Films, Ltd. v. William Morris Agency, Inc. (1966) 244 Cal. App. 2d 763, 768, 53 Cal. Rptr. 526*).

[*Optional*] **B. Incorporated Allegations Satisfy Specificity Requirement.** The requirement that the elements of fraud be pled with specificity may be met by incorporated allegations showing a false misrepresentation and knowledge of falsity (*Wilson v. Houston Funeral Home (1996) 42 Cal. App. 4th 1124, 1139, 50 Cal. Rptr. 2d 169*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff has failed to establish a cause of action for fraud or deceit. The basis of this form is that the pleading states the facts sufficiently to infer all necessary elements of the cause of action without further specificity.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue, for example, by response to a demurrer or by opposition to summary judgment motion. These points and authorities may also be adapted for use in a trial or appellate brief.

In submitting these points and authorities, counsel should note that it is directly opposed to and appears irreconcilable with the general rule that fraud must be specifically and factually pleaded [*see § 105.10* et seq.]. However, that rule is most strictly applied to allegations concerning the acts or statements of the defendant or cross defendant [*see, e.g., § 105.30* et seq.]. If such facts are sufficiently pleaded, it is arguable that others may be inferred, particularly the defendant's or cross defendant's state of mind (intent, knowledge, belief, etc.). However, while such inference may save the pleading from a general demurrer, it may still be subject to a special demurrer for lack of certainty, if the pleading of any necessary element lacks sufficient detail [*see Remus Films, Ltd. v. William Morris Agency, Inc. (1966) 244 Cal. App. 2d 763, 768, 53 Cal. Rptr. 526]* .

For legal background with detailed coverage of the elements of a tort action for fraud and deceit, see California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* .

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. In this instance, involving a pleading requirement, counsel should argue that the facts alleged by his or her client are specific enough to constitute an actionable tort of fraud and deceit, in that all the necessary elements may be inferred to the extent that they are not specifically pleaded. In opposing a demurrer, counsel may also request judicial notice, if appropriate, to show the sufficiency of the alleged facts [*see Evid. Code § 450 et seq.*].

For further legal background, research guides, and forms relating to judicial notice, see California Forms of Pleading and Practice, Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For related legal background, research and procedural guides, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , Ch. 269, *Fraud and Deceit* , Ch. 375, *Motions to Strike* , and Ch. 389, *Nonsuit and Motions for Judgment* (Matthew Bender).

[d] Related Points and Authorities

For points and authorities opposing a contention that the complaint insufficiently pleads that a promisor made a promise without intent to perform, because the allegation of intent is inferable, see *§ 105.110*.

For additional points and authorities to combine with this form, see points and authorities which oppose contentions based on the sufficiency of pleading or proof of specific elements [*see, e.g., § 105.50* et seq.].

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For additional points and authorities relating to demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Necessarily Inferred Facts

In ***McKay v. New York Life Ins. Co. (1899)*** *124 Cal. 270, 56 P. 1112* , the Supreme Court reversed a trial court's judgment after sustaining a general demurrer to a complaint for fraud, holding that the complaint alleged facts from which other essential facts were inferred. The complaint alleged that (1) the defendant life insurance company's agent had represented to the plaintiff that the company would issue a policy entitling him to $5,000 if he survived for 10 years; (2) the plaintiff believed the representations and in reliance thereon and also on the agent's assurances that the application was properly drawn and "all right," signed the application without reading it; (3) the agent then knew his representations to be false and fraudulent; and (4) when plaintiff received the policy found that the benefit was only $2,500. The Court conceded that against a special demurrer the complaint could not stand. But the Court noted that the demurrer was general and could not prevail when the essential facts substantially appeared, even though some of them were stated defectively. Thus, the Court found that the averment that the agent knew his promises to be false and fraudulent necessarily implied that they were in fact false and fraudulent and that he had no intention that they should be performed. The matters thus inferred are in the face of a general demurrer imputed to the complaint in the same manner as if they had been directly charged, the Court ruled (*124 Cal. 270, 272-273)* .

In ***Remus Films, Ltd. v. William Morris Agency, Inc.*** *(1966) 244 Cal. App. 2d 763* , the court of appeal reversed the trial court's dismissing a complaint after sustaining the defendant's demurrer without leave to amend because the allegation in the complaint that the defendant knew of certain falsity necessarily implied falsity. The complaint alleged that the defendant (1) had represented that Stewart Granger and Jean Simmons were willing and anxious to act in a certain movie and would be available on a stated date; (2) made these representations with intent to deceive; and (3) knew at the time that Simmons would not be so available. The allegations of the complaint sufficed to plead an action for damages for deceit, at least against a general demurrer, said the court. Strictly speaking, the complaint omitted direct allegations of facts from which the falsity of the representations could be concluded. But the court ruled that the averments that the defendant knew of the falsity and intended to deceive carried the necessary implication of falsity, which suffice against a general demurrer (*244 Cal. App. 2d 763, 768*).

[b] Incorporated Allegations Satisfy Specificity Requirement

In ***Wilson v. Houston Funeral Home*** *(1996) 42 Cal. App. 4th 1124, 50 Cal. Rptr. 2d 169* , a decedent's family sued the funeral home which handled the services, bringing causes of action for breach of contract, breach of the covenant of good faith and fair dealing, and fraud. The wording of the fraud allegation was that defendant falsely represented that it was capable of handling plaintiffs' insurance policy and would provide for a dignified and respectful service. Noting that the elements of a fraud cause of action must be pled with specificity, defendant contended that the complaint failed to allege any facts showing that it was not capable of "handling" plaintiffs' insurance policy, and that the representation that the service would be "dignified and respectful" was too general to serve as a basis for a fraud cause of action. The trial court agreed, and sustained defendant's demurrer to the complaint.

The court of appeal stated that if the only allegations of misrepresentation were those specifically identified in the fraud portion of the complaint, then it would tend to agree that the fraud count had no merit. However, the court noted that the fraud cause of action incorporated by reference earlier allegations in the complaint regarding defendant's representations about payment. Those allegations included allegations about representations by defendant about payment, as well as subsequent conduct by defendant which demonstrated that those representations were false. The court concluded that these representations were sufficiently specific to satisfy the pleading requirements of a false representation and knowledge of falsity (*42 Cal. App. 4th 1124, 1139)* . The court thus reversed the trial court's judgment of dismissal, and remanded the case with directions to overrule the demurrer.

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[Reserved]

§§ 105.21[Reserved]

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PART II. FORMS
B. Deceit: Misrepresentation, Omission, Concealment, or False Promise
1. Misrepresentation or Omission of Material Fact Generally

10-105 California Points & Authorities § 105.30

§ 105.30 Misrepresentation or Omission Is Not Sufficiently Pleaded or Proven--No Sufficient Pleading or Proof of Intentional Misrepresentation

[1] FORM

[*The following may be included in a memorandum of points and authorities, or adapted for use in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO _____ [STATE FACTS SUFFICIENT TO CONSTITUTE *or* ESTABLISH] A CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE THE _____ [COMPLAINT FAILS TO ALLEGE *or* EVIDENCE FAILS TO SHOW] THE CLAIMED FRAUDULENT REPRESENTATION OF A MATERIAL FACT.

A. Deceit Defined. A deceit is the suggestion as a fact of something that is not true by one who does not believe it to be true or the assertion as a fact of something that is not true by one who has no reasonable ground for believing it to be true (*Civ. Code § 1710(1), (2)*).

B. Deceit Must Be Pleaded. A claimed fraudulent representation must be pleaded to be relied on in a pleading based on fraud (*Mayer v. Mayer (1929) 207 Cal. 685, 694, 279 P. 783*).

C. Misrepresentation of Material Fact Required. A complaint setting forth fraud must show that the defendant made a false representation of a material fact (*Hill v. Wrather (1958) 158 Cal. App. 2d 818, 823-824, 323 P.2d 567*).

D. Test of Materiality. A misrepresentation is not material unless either the plaintiff would not have acted as he or she did without it or it relates to a matter of substance and directly affects the purpose for which the plaintiff acted (*Adkins v. Wyckoff (1957) 152 Cal. App. 2d 684, 689, 313 P.2d 592* ; *Handley v. Handley (1960) 179 Cal. App. 2d 742, 746, 3 Cal. Rptr. 910*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that the plaintiff or cross complainant either has failed either to allege sufficient facts to constitute a cause of action for fraud or has failed to present evidence to establish a fraud claim. The basis of these points and authorities is that the pleadings fail to allege, or evidence fails to establish, the claimed fraudulent representation of a material fact.

This form should be included with other points and authorities depending on the procedural context in which the issue is raised and any other substantive issues that need to be addressed. For example, it may be submitted with other points and authorities supporting a demurrer or a motion for summary challenging, respectively, the sufficiency of the pleading or the proof.

These points and authorities may also be adapted for a trial or appellate brief or to support a motion for judgment on the pleadings, a motion for nonsuit, or any other request for relief based on the plaintiff's failure to show or establish the essential elements of the action for fraud or deceit.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, in a case of objection by demurrer involving a pleading requirement, counsel should argue that the opposing party's conduct does not constitute an actionable deceit or misrepresentation because it is not a misrepresentation of material fact.

Any statement of fact should be supported by adequate reference to the pleading (or matters subject to judicial notice), if the form is used in a memorandum supporting a demurrer or other challenge to the sufficiency of the pleading. Similarly, any statement of fact should be supported by adequate reference to evidence admitted or otherwise cognizable by the court, if the form is used in support of a motion challenging the adequacy of proof.

For example, a memorandum supporting a motion for summary judgment may refer to affidavits or declarations based on personal knowledge or matters subject to judicial notice [*see Code Civ. Proc. §§ 2009, 2015.5* (affidavits and declarations); *Evid. Code § 450 et seq.* (judicial notice)]. For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For related legal background, research and procedural guides, and forms relating to the most common proceedings for challenging the sufficiency of pleading or proof (demurrer or motion for summary judgment), see respectively California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , Ch 269, *Fraud and Deceit* , and Ch. 537, *Summary Judgment* (Matthew Bender). For legal background with detailed coverage of the elements of a tort action for fraud and deceit, see California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form see *§ 105.30* et seq., which challenge the sufficiency of pleading or proof with regard to other aspects or elements in a cause of action for fraud and deceit. If this form is being used to support a demurrer, it may also be combined, if appropriate, with the *forms in § 105.10* et seq.], which focus on the requirement that elements of an action for fraud and deceit, particularly the deceitful act or omission, be alleged in specific rather than general terms. For references to chapters relating to other potential procedural contexts, see *§ 105.04[1]*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For additional points and authorities relating to demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[e] Opposing Points and Authorities

The points and *authorities in § 105.50* et seq. may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Deceit Defined

Civ. Code § 1710(1), (2) defines deceit as the suggestion as a fact of something that is not true by one who does not believe it to be true or the assertion as a fact of something that is not true by one who has no reasonable ground for believing it to be true.

[b] Deceit Must Be Pleaded

In ***Mayer v. Mayer*** *(1929) 207 Cal. 685* , the Supreme Court reversed a decree annulling a marriage in a case in which the wife contended that she had been induced to marry by representations her spouse allegedly made before the marriage concerning his age and former military service. However, the Court observed that the complaint made no reference to fraudulent representations of age and military service as grounds for the annulment. On this issue, the Court concluded that it is the general rule that fraudulent representations must be pled to be relied on. Because the evidence, as a matter of law, impelled a finding that the defendant did not go through with the ceremony with the fraudulent intention of not consummating the marriage, the trial court's decree was reversed (*207 Cal. 685, 694*).

[c] Misrepresentation of Material Fact Required

In ***Hill v. Wrather*** *(1958) 158 Cal. App. 2d 818, 323 P.2d 567* , the court of appeal affirmed a trial court judgment for the plaintiff after sustaining the plaintiffs' demurrer in a case in which the defendants' cross complaint was found to have failed to state facts sufficient to constitute a cause of action. The cross complaint pleaded fraud in that the defendants were induced to enter into two related transactions in reliance on the plaintiffs' alleged representations that they were not married to each other and that. by virtue of those representations and the concealment of plaintiffs' intimate relationship, the defendants thought they were dealing with two independent individuals whose relationship was purely a business one. The defendants alleged that if they had known the plaintiffs' true relationship, they would not have entered into the transactions involved. In ruling that the cross complaint did not state a cause of action because its allegations failed to establish detriment by the defendants, the court noted that a pleading alleging fraud must show, among others matter, a false representation of fact made by the representor. The plaintiffs' allegedly concealed and misrepresented relationship had to be regarded as wholly collateral and immaterial because it had no bearing on the value of what the defendants bargained for. A false representation that cannot possibly affect the intrinsic merits of a business transaction must necessarily be immaterial because reliance on it cannot produce injury in a legal sense (*158 Cal. App. 2d 818, 823-824)* .

[d] Test of Materiality

In ***Adkins v. Wyckoff*** *(1957) 152 Cal. App. 2d 684* , the court of appeal affirmed the trial court's judgment denying the

plaintiff's claim for damages for fraud because the representations the plaintiff relied on did not concern a material fact. The plaintiff and the defendant had entered into a partnership for the purpose of carrying on an advertising business. The plaintiff asserted that prior to the formation of the partnership, the defendant had represented that his business was operating at a profit, but that, in fact, the net working assets of the business were actually worth substantially less than the amount represented by the defendant. However, it appeared that the plaintiff remained with the firm for eight or nine months following his investigation of the facts, accepted his salary, and made no complaint of fraud. It also appeared that the real basis for the plaintiff's dissatisfaction with the business was personality differences between the two partners. Even assuming that the defendant misrepresented the profits of the business, which the court found questionable, the plaintiff's conduct and testimony demonstrated that the representation was not a material inducement to his entering into the contract. To make out a cause of actionable fraud, it must appear that the alleged false representation was of a material fact, and to be material the representation must be such that the contract would not have been entered into without it (*152 Cal. App. 2d 684, 689*).

In ***Handley v. Handley*** *(1960) 179 Cal. App. 2d 742, 3 Cal. Rptr. 910* , the court of appeal affirmed the trial court's judgment granting the plaintiff an annulment of his marriage. The complaint alleged that the marriage was induced by the fraud of the defendant in that she secretly had no intention of adopting the plaintiff's name, residing with him, making known to friends or others the fact of the marriage, or providing the plaintiff with the usual companionship inherent in the marital state. On the issue of fraud as a ground for annulment, the court stated that the fraud must relate to a matter that the state deems vital to the marriage relationship. The fact represented or suppressed, the court ruled, is material if it relates to a matter of substance and directly affects the purpose of the party who was deceived in entering into the contract. The deceived party may be relieved from the contract on proof that the deceived party would not have entered into it if that party had known the facts and if performance of the contract would give that party substantially less than he or she bargained for (*179 Cal. App. 2d 742, 746)* .

[4] Additional Authorities

[a] Deceit Must Be Pleaded

In *Scafidi v. Western Loan & Bldg. Co. (1946) 72 Cal. App. 2d 550, 165 P.2d 260* , discussed in *§ 105.10[4]*, the court of appeal affirmed a judgment for the defendants in an action that was characterized as one based on fraud, finding that the complaint was deficient for failing to allege among other matters, that the defendants ever made any representation. It is a general rule, noted the court, that fraudulent representations must be pleaded to be relied on (*72 Cal. App. 2d 550, 558)* .

In *Mason v. Drug, Inc. (1939) 31 Cal. App. 2d 697, 88 P.2d 929* , discussed in *§ 105.10[3][a]*, the court of appeal ruled that a complaint that failed to set forth, among other matters, the representations that the plaintiff claimed constituted fraudulent misrepresentations by agents of a corporate defendant failed to state facts sufficient to charge the corporate defendant (*31 Cal. App. 2d 697, 703)* .

[b] Misrepresentation of Material Fact Required

In *Adkins v. Wyckoff (1957) 152 Cal. App. 2d 684, 313 P.2d 592* , discussed in *§ 105.30[3][d]*, the court of appeal noted that to make out a case of actionable fraud, it must appear that the alleged false representation was of a material fact (*152 Cal. App. 2d 684, 689)* .

[c] Test of Materiality

In *Wennerholm v. Stanford Univ. Sch. of Med. (1942) 20 Cal. 2d 713, 128 P.2d 522* , the Supreme Court ruled that it is unnecessary for the representations relied on in an action for fraud to be the sole cause of the damage. If they are a substantial factor in inducing the plaintiff to act, even though the plaintiff also relies in part of the advice of others, reliance is sufficiently shown (*20 Cal. 2d 713, 717)* .

In *Hill v. Wrather (1958) 158 Cal. App. 2d 818, 323 P.2d 567* , discussed in *§ 105.30[3][c]*, the court of appeal ruled that the allegedly concealed and misrepresented relationship between the plaintiffs (cross defendants) was wholly collateral and immaterial because it had no bearing on the value of what the defendant (cross complainant) had bargained for. A false representation that cannot possibly affect the intrinsic merits of a business transaction must necessarily be immaterial because reliance on it cannot produce injury in a legal sense (*158 Cal. App. 2d 818, 824)* .

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1. Misrepresentation or Omission of Material Fact Generally

10-105 California Points & Authorities § 105.31

§ 105.31 Misrepresentation of Omission Is Not Sufficiently Pleaded or Proven--No Pleading or Proof That Representation Was False When Made

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO _____ [STATE FACTS SUFFICIENT TO CONSTITUTE *or* ESTABLISH] A CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE THE _____ [COMPLAINT FAILS TO ALLEGE *or* EVIDENCE FAILS TO SHOW] THAT DEFENDANT MADE A REPRESENTATION THAT WAS FALSE AT THE TIME IT WAS MADE.

Representation Was Not False When Made. To establish an action for fraud and deceit, the plaintiff/cross complainant must allege or establish facts sufficient to show a representation that was false at the time it was made (*Davis v. Rite-Lite Sales Co. (1937) 8 Cal. 2d 675, 680-681, 67 P.2d 1039* ; *Kerr v. Rose (1990) 216 Cal. App. 3d 1551, 265 Cal. Rptr. 597*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that the plaintiff or cross complainant either has failed to allege sufficient facts to constitute a cause of action for fraud or has failed to present evidence to establish a fraud claim. The basis of this form is that the pleadings fail to allege or the evidence fails to establish that the representation was false when it was made.

This form should be included with other points and authorities depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.30[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.30[2][b]*].

[c] Opposing Points and Authorities

The points and *authorities in § 105.50* et seq. may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Representation Was Not False When Made

In ***Davis v. Rite-Lite Sales Co.*** *(1937) 8 Cal. 2d 675, 67 P.2d 1039* , discussed in *§ 105.10[4][b]*, the Supreme Court held that a complaint was defective and vulnerable to general and special demurrers because, among other matters, there was no allegation that the representations complained of were false when made. The complaint alleged that the plaintiff was induced to buy stock in the defendant's firm in August 1927, when the defendant represented to the plaintiff that his firm had been organized to handle the exclusive sale of a spotlight under an arrangement with a manufacturing firm that allegedly owned the patent to the spotlight. It was also alleged that in February 1929, a federal court order restrained the defendant from manufacturing or selling the spotlight. However, the Court found that from all that appeared in the complaint, the patent rights may have been the property of the manufacturing firm by arrangement with the firm that actually owned the patent and that the injunction might have been granted for reasons occurring after the sale of stock to the plaintiff (*8 Cal. 2d 675, 679-681)* .

In ***Kerr v. Rose*** *(1990) 216 Cal. App. 3d 1551* , an employee had agreed to accept a layoff, subject to possible rehiring within two years, but the employee was not rehired within that period. The employee sued his former employer, alleging several causes of action, including fraud. The court of appeal affirmed summary judgment against the plaintiff with respect to the cause of action in fraud because it was based on representations made to plaintiff before the layoff, stating that there were no comparable positions available prior to his layoff and that he was eligible for full reinstatement within two years, both of which representations were true at that time (*216 Cal. App. 3d 1551, 1564-1565)* .

[4] Additional Authorities

[a] Representation Was Not False When Made

In *Magpali v. Farmers Group, Inc. (1996) 48 Cal. App. 4th 471, 55 Cal. Rptr. 2d 225* , plaintiff brought an action for fraud arising out of his tenure as an insurance agent for defendant. The complaint included several different allegations of fraud, including that defendant falsely represented that plaintiff would be permitted to run his office as he saw fit. The trial court ruled that the evidence did not establish that fraud had been perpetrated, and entered a defense motion for nonsuit. The court of appeal affirmed, stating that a promise of future conduct is actionable as fraud only if made without a present intent to perform. Evidence other than subsequent nonperformance is required to prove the defendant's intent not to perform the promise. If plaintiff provides no further evidence of fraudulent intent than proof of nonperformance, he will never reach a jury. Noting that the evidence was uncontroverted that for years after plaintiff became an agent defendant did not interfere with his operations in any way, the court concluded that there was no evidence to support the claim that the alleged promise was false when made (*48 Cal. App. 4th 471, 481)* .

Scafidi v. Western Loan & Bldg. Co. (1946) 72 Cal. App. 2d 550, 165 P.2d 260 , is discussed in *§ 105.10[4][b]*.

In McDougall v. Roberts (1919) 43 Cal. App. 553 , the court of appeal affirmed the trial court's judgment for the defendants after it denied permission to the plaintiff to file a third amended complaint for fraud on the ground that the

complaint failed to state a cause of action. In the first count, the alleged misrepresentation was that if the plaintiff did not sell certain stock to the defendants, he would be subjected to criminal prosecution, but the complaint did not allege that this statement was untrue. In the second count, the alleged misrepresentation was that the defendants stated that it was in the plaintiff's best interest that he dispose of all his real property, but there was no allegation that this statement was untrue. The third count alleged a representation that the plaintiff was about to be indicted, but, again, it was not alleged that the statement was untrue. Assuming that the representations were actionable misrepresentations, rather than mere expressions of opinion, the court ruled that it is essential to a plea of false representation that it be alleged to be untrue. Accordingly, it was concluded that the three counts failed to state a cause of action (43 Cal. App. 553, 556-557).

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B. Deceit: Misrepresentation, Omission, Concealment, or False Promise
1. Misrepresentation or Omission of Material Fact Generally

10-105 California Points & Authorities § 105.32

§ 105.32 Misrepresentation of Omission Is Not Sufficiently Pleaded or Proven--No Pleading or Proof That Defendant Lacked Knowledge or Belief of Falsity

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO _____ [STATE FACTS SUFFICIENT TO CONSTITUTE *or* ESTABLISH] A CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE THE _____ [COMPLAINT FAILS TO ALLEGE *or* EVIDENCE FAILS TO SHOW] KNOWLEDGE OR BELIEF ON THE PART OF THE DEFENDANT AS TO THE FALSITY OF THE DEFENDANT'S REPRESENTATION.

A. Intentional Deceit Defined. [*See § 105.30* et seq., Paragraph A].

B. Defendant Lacked Knowledge or Belief of Falsity. A pleading alleging fraud that fails to state knowledge or belief on the part of the representer that the representation is false does not state sufficient facts to constitute a cause of action (*California Trust Co. v. Gustason (1940) 15 Cal. 2d 268, 272, 101 P.2d 74* ; *Hill v. Wrather (1958) 158 Cal. App. 2d 818, 823, 323 P.2d 567*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the plaintiff or cross complainant either has failed to allege sufficient facts to constitute a cause of action for fraud or has failed to present evidence to establish a fraud claim. The basis of this form is that the pleadings fail to allege, or the evidence fails to establish, knowledge or belief on the part of the defendant as to the falsity of the defendant's representation.

This form should be included with other points and authorities depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.30[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.30[2][b]*].

[c] Opposing Points and Authorities

The points and *authorities in § 105.50* et seq. may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Deceit Defined

Civ. Code § 1710(1), (2) defines deceit as the suggestion as a fact of something that is not true by one who does not believe it to be true or the assertion as a fact of something that is not true by one who has no reasonable ground for believing it to be true.

[b] Defendant Lacked Knowledge or Belief of Falsity

California Trust Co. v. Gustason *(1940) 15 Cal. 2d 268, 101 P.2d 74* , is discussed in *§ 105.10[3][c]*.

In ***Hill v. Wrather*** *(1958) 158 Cal. App. 2d 818, 323 P.2d 567* , discussed in *§ 105.30[3][c]*, the defendants' cross complaint failed to state a cause of action because the allegations of the cross complaint failed to establish that the defendants had suffered any detriment as a result of the claimed fraud. The court stated that a pleading alleging fraud, must show a false representation of fact made by the representer, knowledge or belief on the part of the representer that the representation is false, an intention to induce the representee to act or refrain from acting in reliance on the misrepresentation, reasonable reliance on the misrepresentation by the representee in taking action or refraining from it, and damage to the representee resulting from that reliance (*158 Cal. App. 2d 818, 823)* .

[4] Additional Authorities

[a] Defendant Lacked Knowledge or Belief of Falsity

In *Padgett v. Phariss (1997) 54 Cal. App. 4th 1270, 63 Cal. Rptr. 2d 373* , the court of appeal affirmed a summary judgment in favor of real estate agents who had failed to inform plaintiffs, the purchaser of residence in a planned unit development, of construction defects in the common area. Plaintiff's contended that the agents had a duty to ask the homeowner's association about such defects, and that the failure to disclose information about a pending construction defect lawsuit constituted misrepresentation. The agents made showings that they had no knowledge of the defects or of the pending litigation. The court agreed with the trial court conclusion that the agents had no duty to investigate beyond a diligent visual inspection. Since plaintiff failed to show that the agents had any further information, other than by speculating that they must have known more than they said, the trial court did not err in granting summary judgment (*54 Cal. App. 4th 1270, 1284)* .

In *Morrell v. Clark (1951) 106 Cal. App. 2d 198, 234 P.2d 774* , the court of appeal held that the plaintiff's pleading of fraud was insufficient, although it upheld the trial court's judgment for the plaintiff on other grounds. The plaintiff had entered into an automobile dealership agreement with the defendant, who had secured the exclusive right to sell the automobiles involved within California. The complaint alleged that the defendant had represented to the plaintiff that the plaintiff could expect a demonstrator automobile within a stated time, that the plaintiff could expect more within a

few months after that, and that the automobiles were sufficiently designed and tested to go into production. It was alleged that the representations were false, but it was not alleged that the defendant knew that they were false or that the defendant did not have reason to believe that they were true. Accordingly, the court ruled that the pleading of fraud was not sufficient (*106 Cal. App. 2d 198, 201-202)* .

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10-105 California Points & Authorities § 105.33

§ 105.33 Misrepresentation of Omission Is Not Sufficiently Pleaded or Proven--Pleading or Proof Merely Shows Statement of Opinion, Not Fraud

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO _____ [STATE FACTS SUFFICIENT TO CONSTITUTE *or* ESTABLISH] A CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE THE DEFENDANT'S STATEMENT WAS ONE OF MERE OPINION, NOT FACT.

Statement of Opinion Is Not Fraud. The statement of a mere opinion may not justifiably be relied on as the basis for a cause of action for fraud and deceit (*Carter v. Seaboard Fin. Co. (1949) 33 Cal. 2d 564, 569, 203 P.2d 758* ; *Seeger v. Odell (1941) 18 Cal. 2d 409, 414, 115 P.2d 977*).

[*These points and authorities may be combined, if appropriate, with other points and authorities that contend that a statement of opinion is not fraud in specific instances. See § 105.34 et seq.*]

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that the plaintiff or cross complainant either has failed to allege sufficient facts to constitute a cause of action for fraud or has failed to present evidence to establish a fraud claim. The basis of this form is that the pleadings allege, or the evidence establishes, that the defendant's statement was one of mere opinion, not fact.

This form should be included with other points and authorities depending on the procedural context in which the issue is

raised and on other substantive issues that may be involved [*see § 105.30[2][a]*].

They may also be combined with points and authorities contending that a statement of opinion is not fraud in specific instances [*see § 105.34* et seq.].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.30[2][b]*].

[c] Opposing Points and Authorities

The points and *authorities in § 105.50* et seq. may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Statement of Opinion Is Not Fraud

In ***Carter v. Seaboard Fin. Co.*** *(1949) 33 Cal. 2d 564, 203 P.2d 758* , the first cause of action charged that the defendant's agent fraudulently misrepresented that the truck the plaintiff had purchased was in good mechanical condition, whereas shortly after the plaintiff took possession of the truck, he learned that the motor was not suitable for the truck's operation. The alleged fraud was predicated on the contention, among others, that the agent made express representations about the truck's condition. In affirming the trial court's judgment, the Supreme Court observed that ample evidence was offered at the trial to support the judgment for the defendant on that cause of action. The only statement of the defendant's agent about the truck's condition was that "it should be in good condition" and apparently was made because the defendant had recently spent nearly $3,000 having it repaired. The Court stated that this statement was the agent's mere opinion, based on expenditures for repairs, and did not form a basis for a cause of action (*33 Cal. 2d 564, 569)* .

Seeger v. Odell *(1941) 18 Cal. 2d 409, 414, 115 P.2d 977* , is discussed in *§ 105.200[3][a]*.

[4] Additional Authorities

[a] Statement of Opinion Is Not Fraud

In *Rendell v. Scott (1886) 70 Cal. 514, 11 P. 779* , the Supreme Court sustained a general demurrer to a cross complaint seeking to set aside a contract for the sale of certain farm land on the ground of fraud. The Court found that it the statement by the plaintiff and cross defendant--that the land involved was the best ranch in the valley, very rich and productive, capable of producing 50 bushels of wheat per acre, and enhanced by portions of both good alfalfa land and rich mineral deposits--was an opinion. Accordingly, the Court concluded that the cross complainant should have exercised his own judgment and was not entitled to relief (*70 Cal. 514, 514-515)* .

In *Lease & Rental Mgmt. Corp. v. Arrowhead Cent. Credit Union (2005) 126 Cal. App. 4th 1052, 24 Cal. Rptr. 3d 483* , a lender sought credit references from a credit union before lending money to a business that was a member of the credit union. On three occasions, the lender sent a general, one-page questionnaire to the credit union seeking any information that the credit union could provide about the member's credit history. On these three occasions, different employees responded to the questionnaires and suggested that the member's credit history was "satisfactory." The lender loaned money to the business, which subsequently encountered financial trouble and filed for bankruptcy. The lender suffered $900,000 in losses and sued the credit union for fraud and negligence for suggesting that the business's credit history was satisfactory, even though the business had an extensive history of checking overdrafts. The court of appeal held that under the circumstances, the credit union was not liable for providing their opinion that the business's credit

history was satisfactory. The court noted that the questionnaires provided by the lender were very general, couched in the form of a checklist, which credit union employees answered, and that the lender did not seek more specific information. Although the business did maintain almost constant overdrafts, these checks amounted to less than one percent of the checks processed on the account by the credit union, the business always covered those overdrafts, and the credit union was used to dealing with these overdrafts and considered the business's credit to be satisfactory when they responded to the lender's inquiries. Under these facts, given that the lender did not seek more specific information, the actions of the credit union did not constitute fraud or negligence (*126 Cal. App. 4th 1052, 1061)* .

In *Pacesetter Homes, Inc. v. Brodkin (1970) 5 Cal. App. 3d 206, 85 Cal. Rptr. 39* , the court of appeal affirmed a judgment against a cross complainant on his claim for damages for alleged fraud in inducing his purchase of a duplex apartment house because the representations involved were neither representations of existing facts nor the type of opinion on which actionable fraud can be founded. The record disclosed that although the plaintiff's agents had told the cross complainant that the units would rent for specified amounts, they also stated that the building would be an excellent investment "if" he received the rents "as we contemplate." The court of appeal was justified in construing the fair meaning of the statements as those of opinion and not an unqualified representation of what those rentals would be. That construction, said the court of appeal, precluded the treatment of those statements as positive assertions within the meaning of *Civ. Code § 1572(2)* or as an assertion of fact within the meaning of *Civ. Code § 1710*, in the absence of exceptional circumstances that would result in the expression of opinion being treated as a misrepresentation. These exceptional circumstances include the following situations: (1) the one expressing the opinion does not in fact entertain it; (2) the opinion amplifies false representations of facts; (3) the opinion is expressed in a manner implying a factual basis that does not exist; (4) the opinion is expressed as a fact; or (5) one with superior knowledge expresses the opinion (*5 Cal. App. 3d 206, 210-211)* .

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10-105 California Points & Authorities § 105.34

§ 105.34 Misrepresentation of Omission Is Not Sufficiently Pleaded or Proven--Pleading or Proof Merely Shows Seller's Statement of Opinion With Disclosure

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO _____ [STATE FACTS SUFFICIENT TO CONSTITUTE *or* ESTABLISH] A CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE DEFENDANT SELLER'S STATEMENTS WERE MERE OPINION, WERE MADE TO PLAINTIFF BUYER WHILE THE PARTIES WERE DEALING AT ARM'S LENGTH, AND WITH THE STATEMENTS OF OPINION DEFENDANT DISCLOSED THE INFORMATION ON WHICH THE STATEMENTS WERE BASED.

Seller's Statement of Opinion With Disclosure Is Not Fraud. A seller's statements of mere opinion to a buyer dealing at arm's length do not constitute fraud and deceit if the seller discloses the information on which those statements are based to the buyer along with the statements of opinion (*Gleason v. McPherson (1917) 175 Cal. 594, 598, 166 P. 332*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the plaintiff or cross complainant either has failed to allege sufficient facts to constitute a cause of action for fraud or has failed to present evidence to establish a fraud claim. The basis of this form is that the pleadings allege, or the evidence establishes, that the defendant seller's statements of opinion were made with a proper disclosure and therefore were not fraud.

This form of points and authorities should be included with other points and authorities depending on the procedural

context in which the issue is raised and on other substantive issues that may be involved [*see § 105.30[2][a]*].

These points and authorities may also be combined with points and authorities generally contending that a statement of opinion is not fraud [*see § 105.33*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.30[2][b]*].

[c] Opposing Points and Authorities

The points and *authorities in § 105.50* et seq. may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Seller's Statement of Opinion With Disclosure Is Not Fraud

In ***Gleason v. McPherson*** *(1917) 175 Cal. 594* , the Supreme Court affirmed a judgment granting the defendants' motion for nonsuit in an action for damages allegedly caused by the defendants' false representations regarding the purchase of certain bonds. The defendants' statements--that money invested in the bonds would be safe, that the bonds were "gilt-edged security," that they would command ready sale, that they were a good investment, and that the interest and principal would be duly paid--were all statements of the defendants' respective opinions. One of the defendants expressly stated to the plaintiff that he had investigated all the available sources of information about the bonds and that two letters, which were shown to the plaintiff, were the result of that investigation. This defendant did not profess to have other means of knowledge. The Court stated that expressions of mere opinions of this character by a seller to a buyer dealing at arm's length did not constitute fraud if the information on which the opinions are based is disclosed to the buyer along with the statement of the opinions (*175 Cal. 594, 598*).

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10-105 California Points & Authorities § 105.35

§ 105.35 Misrepresentation of Omission Is Not Sufficiently Pleaded or Proven--Pleading or Proof Merely Show Legal Opinion of Person Who Is Not Attorney

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO _____ [STATE FACTS SUFFICIENT TO CONSTITUTE *or* ESTABLISH] A CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE DEFENDANT'S REPRESENTATION WAS MERELY THE STATEMENT OF A LEGAL OPINION BY A PERSON WHO IS NOT AN ATTORNEY.

A. Legal Opinion of Person Who Is Not Attorney. A statement of legal opinion by a person who is not an attorney cannot constitute actionable fraud, and a pleading seeking relief on the ground of fraud as the result of such an opinion does not state a cause of action (*Orange County Rock Prod. Co. v. Cook Bros. Equip. Co. (1966) 246 Cal. App. 2d 698, 700-701, 55 Cal. Rptr. 265*).

[*Optional*] **B. Statement of Law Absent Confidential Relationship.** A plaintiff may not recover in an action for fraud and deceit if the alleged misrepresentations by one who has no confidential relationship with the plaintiff are but expressions of opinion or statements of law based on facts known to both alike (*Smith v. Brown (1943) 59 Cal. App. 2d 836, 838, 140 P.2d 86*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the plaintiff or cross complainant either has failed to allege sufficient facts to constitute a cause of action for fraud or has failed to present evidence to establish a

fraud claim. The basis of this form is that the pleadings allege, or the evidence establishes, that the defendant's representation was merely the statement of a legal opinion by a person who is not an attorney.

Optional Paragraph B may be added to contend that the opinion was expressed in the absence of any confidential relationship or position of trust.

This form of points and authorities should be included with other points and authorities depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.30[2][a]*].

These points and authorities may also be combined with points and authorities generally contending that a statement of opinion is not fraud [*see § 105.33*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.30[2][b]*].

[c] Opposing Points and Authorities

The points and *authorities in § 105.50* et seq., generally, may be used in an appropriate case to oppose the points and authorities in this form. In particular, § 105.53 contends that a person who is not an attorney, but who gives a legal opinion, may be liable for fraud if he or she is in a position of trust or purports to have knowledge.

[3] Discussion of Authorities

[a] Legal Opinion of Person Who Is Not Attorney

In ***Orange County Rock Prod. Co. v. Cook Bros. Equip Co.*** *(1966) 246 Cal. App. 2d 698* , the court of appeal affirmed the trial court's judgment for the dependants in an action for damages based on an alleged fraudulent representation that charges plaintiffs paid under certain rental agreements would be deductible for state and federal income tax purposes. The court stated that standing alone, this representation would not be a basis for a fraud action because a legal opinion by a lay person cannot constitute the basis of recovery for fraud. Although the plaintiffs also claimed the existence of other facts that would justify their reliance on the defendants' statements and constitute a cause of action for fraud, any such action was barred by the statute of limitations (*246 Cal. App. 2d 698, 700-701*).

[b] Statement of Law Absent Confidential Relationship

In ***Smith v. Brown*** *(1943) 59 Cal. App. 2d 836, 140 P.2d 86* , the court of appeal reversed judgment for the plaintiffs in an action for damages for fraudulent misrepresentations because the judgment had no evidentiary support. The complaint alleged, among other matters, that the defendant had represented, with respect to certain property being traded to the plaintiffs that it was free and clear of encumbrances and that there was no cloud on the title except for back taxes. The court of appeal noted that the property was encumbered, but that the defendant had exhibited both the note and the mortgage to the plaintiffs and informed them that she had legal advice that the lien of the mortgage had been lost because the statute of limitations had run on the note. The court also noted that the plaintiffs had then consulted the same attorney that the defendant had consulted. To recover for fraud, the representee must have relied on the representation. Recovery is not permitted if the representee makes his or her own investigation, discovers the true facts, and acts without reliance on the representations. Nor may the representee recover if the alleged misrepresentations by one occupying no confidential relationship toward the representee are but expressions of opinion or statements of law based on facts known to both alike (*59 Cal. App. 2d 836, 838*).

[4] Additional Authorities

[a] Legal Opinion of Person Who Is Not Attorney

In *Haviland v. Southern Cal. Edison Co. (1916) 172 Cal. 601* , the Supreme Court reversed a trial court's judgment for the plaintiff in a personal injury action because the plaintiff had executed a full release and because the statements made to induce him to do so were a nonactionable statements of law by someone who was not an attorney. The plaintiff had executed the release of his claim for damages for severe injuries in return for the payment of $42 following statements by the defendant's employee that the plaintiff had to sign the paper to stay on the payroll, but that the signature was not binding and merely a matter of form. The Supreme Court concluded that the statements were not statements of fact but were, at most, misrepresentations of law. It is well settled, the Court stated, that such misrepresentations, at least where there is no relationship of trust or confidence between the parties, do not amount to fraud. The Court observed that whether or not the rule's true basis is that everyone is presumed, or, rather, bound, to know the law or is that a representation regarding the law constitutes an expression of opinion on which the party to whom it is addressed has no right to rely, the rule itself is well settled (*172 Cal. 601, 607-609)* .

In *Agnew v. Foell (1952) 113 Cal. App. 2d 575* , the court of appeal affirmed a judgment for the defendants in an action for damages for misrepresentation. The plaintiff had sold certain property, but before escrow closed in that transaction she learned that the buyer had resold the property for a higher price. She sought the advice of her banker, one of the defendants, as to whether she could be released from the transaction. Her banker advised her that she would have to complete the sale and that if she tried to withdraw, she would be sued. The banker denied having advised her that she was legally bound to proceed with the sale. The court noted, however, that if such advice had been given, it would have been in accord with the law. Furthermore, the court ruled, a lay person's legal opinion cannot constitute the basis of recovery for fraud (*113 Cal. App. 2d 575, 577*).

[b] Statement of Law Absent Confidential Relationship

In *Rheingans v. Smith (1911) 161 Cal. 362, 119 P. 494* , the Supreme Court reversed both the trial court's judgment for the plaintiff and its denial of the defendant's motion for a new trial in an action for rescission of a contract for fraud. It appeared from the evidence and the pleadings that the plaintiff had relied on the defendant's statement that a certain option agreement executed by the plaintiff had expired and that he was free to contract for the sale of his property with the defendant. The Court found that this statement was a mere opinion on a question of law based on facts known to both parties. Such an opinion by one occupying no confidential relationship toward the person to whom it is addressed does not justify the person's reliance on it and does not suffice to support a charge of fraudulent misrepresentation (*161 Cal. 362, 365)* .

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10-105 California Points & Authorities § 105.36

§ 105.36 Misrepresentation of Omission Is Not Sufficiently Pleaded or Proven--Pleading or Proof Merely Shows Speculation About Future Events

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO _____ [STATE FACTS SUFFICIENT TO CONSTITUTE *or* ESTABLISH] A CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE DEFENDANT'S REPRESENTATION CONSISTED OF MERE SPECULATION OR PREDICTION REGARDING FUTURE EVENTS.

Speculation Concerning Future Events. A representation as to a future event is classified as a speculative observation and a statement of mere opinion, and, as such, does not constitute a basis for a complaint of fraud (*Everts v. Matteson (1942) 21 Cal. 2d 437, 451, 132 P.2d 476*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the plaintiff or cross complainant either has failed to allege sufficient facts to constitute a cause of action for fraud or has failed to present evidence to establish a fraud claim. The basis of this form is that the pleadings allege, or the evidence establishes, that the defendant's representation consisted of mere speculation or prediction regarding future events.

This form of points and authorities should be included with other points and authorities depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.30[2][a]*].

These points and authorities may also be combined with points and authorities generally contending that a statement of opinion is not fraud [*see § 105.33*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.30[2][b]*].

[c] Opposing Points and Authorities

The points and *authorities in § 105.50* et seq., generally, may be used in an appropriate case to oppose the points and authorities in this form. In particular, § 105.54 contends that the prediction regarding a future event was intended and accepted as a representation of fact and involves matters peculiarly within the speaker's knowledge.

[3] Discussion of Authorities

[a] Speculation Concerning Future Events

In ***Everts v. Matteson*** *(1942) 21 Cal. 2d 437* , the Supreme Court reversed judgment for the plaintiff in an action to recover a deficiency resulting from a sale under a trust deed from the party obligated to pay the underlying debt, but it ruled that a misrepresentation alleged as a defense was a mere speculative observation that could not form a basis for a complaint of fraud or estoppel. The defendants had sold certain property to the other defendants, the appellants in this case. They deposited in escrow their deed reciting that the property was sold, and the note was assigned to the plaintiff, who sued the defendants and their purchaser, the appellants. As one of their defenses, the appellants claimed that the plaintiff, an officer of the lender, had induced them to execute the note and trust deed by telling them that they would never be liable to pay a deficiency judgment because the property would have to be bid at its appraised value, which would not be less than the balance due on the note. As to that representation, however, the Supreme Court ruled that a representation of what property will be worth at a date about two and one-half years in the future must be classified as a speculative observation and a statement of mere opinion, and, as such, does not constitute a basis for a complaint of fraud or estoppel (*21 Cal. 2d 437, 451*).

[4] Additional Authorities

[a] Speculation Concerning Future Events

In *Ayers v. Southern P. R. Co. (1916) 173 Cal. 74, 159 P. 144* , the Supreme Court reversed a trial court's judgment against the defendant on a complaint stating causes of action for damages arising from the defendant's failure to prevent the sale of liquor in a town that the defendant developed. As part of the development publicity, the defendant had held out to the public that liquor would never be sold in the town. The Court noted that there was no allegation in the complaint that the statement was made as a promise or agreement. Literally, the allegation meant only that the defendant had made the statement as merely an opinion or prophecy. In neither case, said the Court, would such a statement constitute either a binding contract or warranty that future events would occur according to the prophecy or a basis for an action (*173 Cal. 74, 79)* .

In *Lloyd v. Kehl (1901) 132 Cal. 107* , the Supreme Court affirmed a trial court's judgment for the defendant in an action based on fraudulent misrepresentation on the ground that the misrepresentations relied on were of matters of mere opinion or speculations as to what might be developed in the future. The defendant sought to sell water rights to the plaintiff and had represented that by building a new flume and ditch and using a new wheel and certain other new appliances, a certain amount of horsepower could be developed from the stream's water. This, said the Supreme Court, was a mere speculative opinion that was not actionable under the most extreme authorities (*132 Cal. 107, 111-112)* .

In *Finch v. McKee (1936) 18 Cal. App. 2d 90, 62 P.2d 1380* , the court of appeal ruled that a real estate seller's

representation that the building involved in the sale would withstand earthquake shock was a expression of mere opinion that did not furnish grounds for damages in a suit for fraud and deceit. The mere statement that the building in question was constructed to be earthquake proof, said the court, is a matter of pure speculation or prophecy on which no purchaser had a right to rely (*18 Cal. App. 2d 90, 93-94)* .

In *Zeh v. Alameda Cmty. Hotel Corp. (1932) 122 Cal. App. 366, 10 P.2d 190* , the court of appeal affirmed the trial court's judgment for the defendant after sustaining a demurrer to the second amended complaint based on alleged fraudulent misrepresentations made in connection with a stock purchase subscription. The complaint alleged that the defendant represented that certain preferred stock provided for the payment of interest at a stated percentage and that if the plaintiff would invest a certain sum for this stock, the issuer would pay interest on that investment at a stated rate. The court of appeal noted that as a general rule, statements made to persons to induce them to subscribe for stock that relate to the stock's future earnings, expected profits, dividends, or the successful conduct of its business are matters of mere opinion, on which the subscribers have no right to rely. Moreover, even if they prove to have been false when made or made with no expectation of their ever being realized, they furnish no ground for rescission of the subscription contract, This rule, the court said, is based on the fundamental principle that predictions as to future events are ordinarily regarded as nonactionable expressions of opinion. The law does not prohibit prophesying the expression of sanguine business hopes and beliefs in events to come (*122 Cal. App. 366, 368)* .

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PART II. FORMS
B. Deceit: Misrepresentation, Omission, Concealment, or False Promise
1. Misrepresentation or Omission of Material Fact Generally

10-105 California Points & Authorities §§ 105.37-105.49

[Reserved]

§§ 105.37[Reserved]

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10-105 California Points & Authorities § 105.50

§ 105.50 Misrepresentation or Omission Is Sufficiently Pleaded or Proven--Pleading or Proof Shows False Opinion Made to One Entitled to Rely

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF _____ [SHOULD PREVAIL ON THE *or* HAS STATED FACTS SUFFICIENT TO CONSTITUTE A] CAUSE OF ACTION FOR FRAUD AND DECEIT, DESPITE RELIANCE ON AN ALLEGED STATEMENT OF OPINION, BECAUSE DEFENDANT MADE A FALSE STATEMENT TO ONE ENTITLED TO RELY ON IT.

A. False Belief in Opinion. Because an expression of an opinion, if honestly made, is an expression of what the speaker believes to be a fact, the speaker practices deceit by expressing a dishonest opinion to one entitled to rely on it, and an action lies for resulting injury and damages (*Hobart v. Hobart Estate Co. (1945) 26 Cal. 2d 412, 430, 159 P.2d 958* ; *Edward Barron Estate Co. v. Woodruff Co. (1912) 163 Cal. 561, 573, 126 P. 351*).

B. False Assertion of Opinion as Fact. A statement of opinion is actionable if it is (1) made as a positive affirmation of fact, (2) intended as such by the party making it, (3) false and known to be false by the person making it, and (4) relied on by the person to whom it is made (*Willson v. Municipal Bond Co. (1936) 7 Cal. 2d 144, 151, 59 P.2d 974*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff or cross complainant has failed to establish a cause of action for fraud or deceit. The basis of this form is that the defendant is liable for fraud despite the assertion that the representation was a statement of opinion, because the statement was not mere opinion, but

was a false opinion. In other words, the defendant's statement was both false in fact and false in the sense that the defendant had no sincere or reasonable belief that it was true, and the plaintiff was entitled to rely on the statement.

An example of the fraud contended in this form would be a case in which (1) the plaintiff lacked an opportunity to inspect property, (2) the defendant made statements concerning the value of the property that were made as actual facts rather than matters of mere opinion, and (3) the plaintiff justifiable relied on those statements.

This form may be used to oppose the points and *authorities in § 105.30* et seq.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue--for example, by response to a demurrer or by opposition to summary judgment motion. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Any statement of fact should be supported by adequate reference to the pleading (or to matters subject to judicial notice), if the form is used in a memorandum opposing a demurrer or another challenge to the sufficiency of the pleading. Similarly, any statement of fact should be supported by adequate reference to evidence admitted or otherwise cognizable by the court, if the form is used to oppose a motion challenging the adequacy of proof.

For example, a memorandum opposing a motion for summary judgment may refer to affidavits or declarations based on personal knowledge or matters subject to judicial notice [*see Code Civ. Proc. §§ 2009, 2015.5* (affidavits and declarations); *Evid. Code § 450 et seq.* (judicial notice)]. For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For related legal background with detailed coverage of the elements of a tort action for fraud and deceit, see California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender).

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For additional points and authorities relating to demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] False Belief in Opinion

In ***Hobart v. Hobart Estate Co.*** *(1945) 26 Cal. 2d 412, 159 P.2d 958* , the Supreme Court ruled that representations concerning the value of certain stock constituted actionable fraud despite the defendants' contention that the representations expressed opinion rather than fact. The Court reiterated that bearing in mind that an expression of an opinion, if honestly made, is an expression of what the speaker believes to be a fact, one practices deceit by expressing a dishonest opinion to one entitled to rely on it, injury may result, and an action will lie. To avoid an action for deceit, an expression of an opinion must be the expression of an opinion honestly entertained by the person making it. Citing

Restatement Torts § 525, Comment b, the Court noted that a representation of the state of mind of the maker or of a third person is a misrepresentation if the state of mind in question is other than as represented. Thus, a statement that a particular person, whether the maker of the statement or a third person, is of a particular opinion is a misrepresentation if the person in question does not hold the opinion asserted (*26 Cal. 2d 412, 430)* .

In ***Edward Barron Estate Co. v. Woodruff Co.*** *(1912) 163 Cal. 561, 126 P. 351* , the Supreme Court reversed judgment for the defendant in an action for damages for fraud and deceit, following the sustaining of a general demurrer. The Court held that the complaint's allegation of fraud consisting of a false statement of opinion set forth facts sufficient to constitute a cause of action. The complaint alleged that the defendant had represented himself as a skilled architect and designer and had represented that the maximum cost of the building the plaintiff desired to build would not exceed a stated figure. The Court noted that the plaintiff employed the defendant because of the false representations of the defendant's skill and knowledge and was justified in relying on those representations. As to the statement regarding the maximum cost of the building, the Court noted that it is generally true that an action for deceit cannot be founded on the expression of mere opinion. However, the qualifications and modifications of this general rule are as important as the rule itself. Bearing in mind that an expression of an opinion, if honestly made, is an expression of what the speaker believes to be a fact, the expression of a dishonest opinion to one entitled to rely on it is deceit, injury may result, and an action will lie. Whenever a party states a matter that might otherwise be only an opinion and does not state it as the expression of his or her mere opinion, but affirms it as an existing fact material to the transaction so that the other party may reasonably treat it as a fact and rely and act on it as such, then the statement clearly becomes an affirmation of fact within the meaning of the general rule and may be a fraudulent misrepresentation. Therefore, the Court concluded, it is legally a matter of indifference whether the matters alleged are considered the expression of an opinion or the representation of a fact. If it were the expression of an opinion, the complaint showed that it was not the expression of an honest opinion but was dishonestly made with the defendant's knowledge of its falsity, and its influence in inducing the plaintiff to employ the defendant could not be denied (*163 Cal. 561, 573)* .

[b] False Assertion of Opinion as Fact

In ***Willson v. Municipal Bond Co.*** *(1936) 7 Cal. 2d 144* , the Supreme Court affirmed a judgment for the plaintiff in an action for fraud in connection with statements as to the value of certain bonds given in payment to the plaintiff for certain real property. The bonds had no market value and could not have been sold at any price, although they were represented as worth 100 cents on the dollar and having value sufficient to pay for the plaintiff's property. The defendants contended that the statements, even if false, were expressions of mere opinion and, as such, not actionable. The Court stated that the determination as to whether a particular statement is an expression of opinion or an affirmation of a fact is often difficult and frequently is dependent on the facts and circumstances existing when the statement is made. If a statement about value is made as a positive affirmation of a fact and is intended as such by the party making it, if that statement is false and is known to be false by the person making it, and if that statement is relied on by the person to whom it is made, then that false statement is actionable. The Court noted that although there might be doubt as to whether or not the representation that the bonds were worth 100 cents on the dollar, standing alone, constituted an affirmation of fact, all such doubt disappeared when this representation was considered in connection with a statement that a bank would lend over 30 percent of the face value of the bonds (a fraudulent statement) (*7 Cal. 2d 144, 151*).

[4] Additional Authorities

[a] False Belief in Opinion

In *Ogier v. Pacific Oil & Gas Dev. Corp. (1955) 132 Cal. App. 2d 496* , the court of appeal reversed the trial court's judgment of dismissal on sustaining the defendant's general demurrers to a complaint, holding that the allegations of fraud consisting of false representations of opinion were actionable. The complaint alleged statements by the defendant that lands involved in the transaction were potential oil lands, a good buy, and worth the price asked. These statements were within an exception to the rule that expressions of opinion are not actionable. Under this exception, an expression

of opinion is actionable if the party expressing it does not honestly entertain that opinion. In this case, the plaintiff alleged that the defendant did not believe his representation to be true, thus making his opinion a dishonest one (*132 Cal. App. 2d 496, 506*).

[b] False Assertion of Opinion as Fact

In *Gagne v. Bertran (1954) 43 Cal. 2d 481, 275 P.2d 15* , the plaintiff alleged that the defendant had misrepresented the depth of fill on certain real property after having drilled test holes and examined the soil. The defendant contended that even if his statement was erroneous, it was not a misrepresentation of fact, but only a statement of opinion that could not form the basis of an action for deceit. The Supreme Court pointed out that the defendant had not given the statement as an opinion but as a representation of fact. His assertion was not a casual expression of belief, but was a deliberate affirmation of the matters stated and was thus within *Civ. Code § 1710(2)* as an assertion "as a fact" of that which was not true (*43 Cal. 2d 481, 487-489)* .

In *Neff v. Engler (1928) 205 Cal. 484* , the Supreme Court affirmed a trial court's judgment for the plaintiff in a case based on fraudulent representation concerning the value of certain stock. The alleged misrepresentation was that the stock was worth a specified amount and that the defendants were receiving and had been paid specified dividends, whereas it appeared that the stock was practically worthless. The Court stated that matters that might otherwise be only expressions of opinion, if stated as accomplished facts by one of the parties to a contract and accepted and relied on by the other as such, may, and often do, become the basis of actions for fraudulent misrepresentation (*205 Cal. 484, 489-490*).

In *Harris v. Miller (1925) 196 Cal. 8, 235 P. 981* , the Supreme Court affirmed a judgment for the plaintiff in a case involving allegations of fraud in the sale of an orange grove. The real estate agent's statement about the value of the crop of oranges still on the trees was a statement of fact in light of evidence that the plaintiff had no knowledge or experience in raising oranges. The Court noted that it is the general and well-settled rule that if a representation concerning the subject matter of a transaction that ordinarily might be only the expression of an opinion is asserted as an existing fact, material to the transaction, and has a reasonable tendency to induce one of the parties to the transaction to consider and rely on the representation as a fact, the statement then becomes an assertion of an existing fact (*196 Cal. 8, 13)* .

In *Edward Barron Estate Co. v. Woodruff Co. (1912) 163 Cal. 561, 126 P. 351* , discussed in *§ 105.50[3][1]*, the Supreme Court ruled that a complaint that alleged fraud consisting of a false statement of an opinion set forth facts sufficient to constitute a cause of action. The Court added that whenever a party states a matter that might otherwise be only an opinion but affirms it as an existing fact material to the transaction so that the other party may reasonably treat it as a fact and rely and act on it as such, the statement clearly becomes an affirmation of fact and may be a fraudulent misrepresentation (*163 Cal. 561, 573)* .

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10-105 California Points & Authorities § 105.51

§ 105.51 Misrepresentation or Omission Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Statement of Opinion Coupled With False Representation

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF _____ [SHOULD PREVAIL ON THE *or* HAS STATED FACTS SUFFICIENT TO CONSTITUTE A] CAUSE OF ACTION FOR FRAUD AND DECEIT, DESPITE RELIANCE ON AN ALLEGED STATEMENT OF OPINION, BECAUSE DEFENDANT'S STATEMENT WAS COUPLED WITH A FALSE REPRESENTATION OF FACT.

Opinion Coupled With False Representation. If a statement, which by itself may be considered mere opinion that may not become the basis of a suit for fraud, is coupled with false representations of fact that give material support to this opinion, there is actionable fraud (*Friedberg v. Weissbuch (1955) 135 Cal. App. 2d 750, 755, 287 P.2d 785*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff or cross complainant has failed to establish a cause of action for fraud or deceit. The basis of this form is that the defendant's statement was coupled with a false representation of fact.

This form may be used to oppose the points and *authorities in § 105.30* et seq.

This form should be included with other points and authorities depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.50[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.50[2][b]*].

[c] Related Points and Authorities

This form sets forth one of the exceptions to the general rule that a statement of opinion is not actionable in fraud and deceit. For forms dealing with other exceptions, see *§§ 105.50* and *105.52*.

[3] Discussion of Authorities

[a] Opinion Coupled With False Representation

In ***Friedberg v. Weissbuch*** *(1955) 135 Cal. App. 2d 750, 287 P.2d 785* , the court of appeal affirmed the trial court's judgment for the defendant on the ground that the agreements that the plaintiff sued on were void for fraud and misrepresentations by the plaintiff. The plaintiff made false material representations to the defendant about the value of the real property being sold, the value of the equipment and goodwill of the business sold to the defendant, the gross return of the business, the activities of an associate, and the state of health of another associate. The court noted that the statement of the owner of property respecting its value is usually considered the expression of a mere opinion that may not become the basis of a suit for damages for fraud on that account, but if the owner of property makes a positive statement of its value, coupled with other asserted facts or circumstances such as a false representation of past income from the property, the statement may constitute competent evidence of the alleged fraudulent representations that may support a judgment for damages. The court also noted authority to the effect that if opinions are given concomitantly with statements of fact that give material support to those opinions and are expressed to people who are ignorant of the true facts, there is actionable fraud (*135 Cal. App. 2d 750, 755)* .

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10-105 California Points & Authorities § 105.52

§ 105.52 Misrepresentation or Omission Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Opinion Coupled With Special Relationship or Knowledge

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF _____ [SHOULD PREVAIL ON THE *or* HAS STATED FACTS SUFFICIENT TO CONSTITUTE A] CAUSE OF ACTION FOR FRAUD AND DECEIT, DESPITE RELIANCE ON AN ALLEGED STATEMENT OF OPINION BY DEFENDANT, BECAUSE _____ [DEFENDANT'S STATEMENT WAS ONE MADE WITH SPECIAL KNOWLEDGE *or* DEFENDANT OCCUPIED A POSITION OF TRUST].

Opinion of Person With Superior Knowledge or Occupying Position of Trust. One who has been induced to enter into a transaction by fraudulent misrepresentations may have relief if he or she acted in reliance on the misrepresentations and was justified therein. One may justifiably rely on statements of mere opinion if the person stating the opinion purports to have expert knowledge concerning the matter or occupies a position of confidence and trust (*Seeger v. Odell (1941) 18 Cal. 2d 409, 414, 115 P.2d 977*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff or cross complainant has failed to establish a cause of action for fraud or deceit. The basis of this form is that the defendant's alleged statement of opinion was made with special knowledge or the defendant occupied a position of trust and therefore the statement provides a basis for a cause of action for fraud and deceit.

This form may be used to oppose the points and *authorities in § 105.30* et seq.

This form should be included with other points and authorities depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.50[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.50[2][b]*].

[c] Related Points and Authorities

This form sets forth one of the exceptions to the general rule that a statement of opinion is not actionable in fraud and deceit. For forms dealing with other exceptions, see *§§ 105.50, 105.51,* and *105.53* et seq.

[3] Discussion of Authorities

[a] Opinion of Person With Superior Knowledge or Occupying Position of Trust

In ***Seeger v. Odell*** *(1941) 18 Cal. 2d 409* , the Supreme Court reversed a judgment on the pleadings in favor of the defendants in an action to have a mortgage foreclosure sale set aside and to obtain other relief, because the allegations of the complaint were sufficient to establish the right to relief on the basis of a fraudulent misrepresentation. The complaint alleged that the plaintiffs were induced through representations made by the defendants' attorney to execute an oil lease to one defendant and to make no attempt to pay a mortgage debt on the property in question or to exercise the equity of redemption after a subsequent foreclosure sale. The complaint further alleged that the attorney had told the plaintiffs that as an attorney he had superior knowledge of many facts concerning the land and that they could rely on all he had to say. The Court noted that one has been induced by fraudulent misrepresentations to enter into a contract or make a conveyance may have the contract or conveyance set aside and secure restitution of the benefits lost by the transaction, if one acted in reliance on the misrepresentation was justified in that reliance. One may not justifiably rely on mere statements of opinion, including legal conclusions drawn from a true state of facts, unless the person stating the opinion purports to have expert knowledge concerning the matter or occupies a position of confidence and trust (*18 Cal. 2d 409, 414*).

[4] Additional Authorities

[a] Opinion of Person With Superior Knowledge or Occupying Position of Trust

In *Cohen v. S & S Constr. Co. (1983) 151 Cal. App. 3d 941, 201 Cal. Rptr. 173* , the appellate court reversed the trial court's dismissal of homeowners' action for fraud and negligent misrepresentation against the land developer and its sales agent. The plaintiffs were charged premiums for view lots that the sales agent said were protected from interferences by a Declaration of Covenants of the homeowners' association. The defendants argued that the agent's representation could not support a cause of action because it was an opinion, which is not actionable as fraud. Although acknowledging this rule, the court noted that plaintiffs' allegations were sufficient to meet the requisites of the exceptions to the rule. Situations in which an opinion may be actionable as fraud include: a party holding himself or herself out to be specially qualified to another who is so situated that he or she reasonably may rely on that superior knowledge; an opinion by a fiduciary or other trusted person; and a party's stating the opinion as an existing fact or implying facts that justify a belief in the truth of the opinion (*151 Cal. App. 3d 941, 946)* .

In *Union Flower Mkt., Ltd. v. Southern Cal. Flower Mkt., Inc. (1938) 10 Cal. 2d 671* , the Supreme Court reversed the trial court's judgment on the pleadings for the individual defendants in an action based on a promise made without any intention of performing it, holding that the defendants' representations, including a statement of opinion, were actionable. The parties included two flower market concerns and their respective officers. The officers of the corporate defendant officers promised the officers of the corporate plaintiff that they would exert their efforts to secure the

consent of their members to a consolidation of the two concerns and their memberships, representing that there could be no doubt but that the corporate defendant would receive the members of the corporate plaintiff. The corporate plaintiff, acting in reliance, surrendered its leases and ceased to function as the corporate defendant's competitor. The complaint alleged that thereafter the individual defendants refused to carry out their promise and refused to permit the corporate plaintiff's members to become members of the corporate defendant, urging the corporate defendant's members not to consent to consolidation and to refuse membership to the corporate plaintiff's members. The Court ruled that the allegations as to the promises coupled with the representation that there could be no doubt that the corporate defendant would receive the corporate plaintiff's members constituted an averment of actionable fraud. This latter representation was in a sense a statement of opinion, but a false statement of opinion fraudulently made may form the basis of an action if the party making it possesses superior knowledge or special information regarding the representation's subject matter. The Court further noted that in this case, the individual defendants, as directors, officers, and holders of a large financial interest in the corporate defendant, had superior means of ascertaining and influencing the views of the corporation's members concerning the consolidation (*10 Cal. 2d 671, 675-676*).

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10-105 California Points & Authorities § 105.53

§ 105.53 Misrepresentation or Omission Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Legal Opinion of Person Who Is Not Attorney Coupled With Special Relationship or Knowledge

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF _____ [SHOULD PREVAIL ON THE *or* HAS STATED FACTS SUFFICIENT TO CONSTITUTE A] CAUSE OF ACTION FOR FRAUD AND DECEIT, DESPITE RELIANCE ON AN ALLEGED STATEMENT OF A LEGAL OPINION BY A PERSON WHO IS NOT AN ATTORNEY, BECAUSE THE STATEMENT WAS MADE BY A PERSON _____ [PURPORTING TO HAVE EXPERT KNOWLEDGE CONCERNING THE MATTER *or* WHO OCCUPIES A POSITION OF CONFIDENCE AND TRUST].

Legal Opinion by Person Who Is Not Attorney But Is in Position of Trust or Purports to Have Expert Knowledge. One may justifiably rely on statements of opinion, including legal conclusions drawn from a true state of facts, if the person expressing the opinion purports to have expert knowledge concerning the matter or occupies a position of confidence and trust (*Harazim v. Lynam (1968) 267 Cal. App. 2d 127, 133, 72 Cal. Rptr. 670*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff or cross complainant has failed to establish a cause of action for fraud or deceit. The basis of this form is that the plaintiff justifiably relied on legal conclusions drawn from a true state of facts, because the defendant either purported to have expert knowledge concerning the matter or occupied a position of confidence and trust.

This form may be used to oppose the points and *authorities in § 105.30* et seq. In particular, this form may be used counter the contention in § 105.35, which asserts that the legal opinion of a person who is not an attorney is not fraud.

This form should be included with other points and authorities depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.50[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.50[2][b]*].

[c] Related Points and Authorities

This form sets forth one of the exceptions to the general rule that a statement of opinion is not actionable in fraud and deceit. For forms dealing with other exceptions, see *§§ 105.50 -105.52* and *105.54*.

[3] Discussion of Authorities

[a] Legal Opinion by Person Who Is Not Attorney But Is in Position of Trust or Purports to Have Expert Knowledge

In ***Harazim v. Lynam*** *(1968) 267 Cal. App. 2d 127* , the court of appeal reversed a judgment of dismissal entered after the trial court sustained general and special demurrers to the plaintiff's fourth amended complaint, holding that it was possible that the plaintiff could amend his complaint to allege facts showing that his reliance on the defendant's legal opinion was justifiable. The complaint alleged various misrepresentations consisting of legal opinions or legal conclusions by persons who were not lawyers. Standing alone, the court noted, those allegations would not suffice as actionable misrepresentations because the representations relied on must ordinarily be affirmations of fact and misrepresentations of law or legal opinions by persons who were not lawyers were insufficient. However, misrepresentations of opinion are actionable if the person making them holds himself or herself out to be specially qualified. It must appear, the court said, not only that the plaintiff acted in reliance on the misrepresentations, but that the plaintiff's reliance was justified. A plaintiff may not justifiably rely on statements of mere opinion, including legal conclusions drawn from a true state of facts, unless the person expressing the opinion purports to have expert knowledge concerning the matter or occupies a position of confidence and trust. The court concluded that if the plaintiff in this case could amend his pleadings to alleged that the defendants held themselves out as experts or persons with superior knowledge whose statements were made as material facts, the misrepresentations alleged in the complaint would constitute a sound basis for a cause of action in fraud (*267 Cal. App. 2d 127, 133*).

[4] Additional Authorities

[a] Legal Opinion by Person Who Is Not Attorney But Is in Position of Trust or Purports to Have Expert Knowledge

In *Lynch v. Cruttenden & Co. (1993) 18 Cal. App. 4th 802,* the plaintiffs alleged fraud in connection with various securities transactions. The defendants moved to compel arbitration based on arbitration provisions contained in various documents signed by the plaintiffs in connection with the transactions. The plaintiffs opposed the motion to compel arbitration on the ground that they were induced to sign the documents on the basis of fraudulent misrepresentations by one of the defendants, who was a close friend of the plaintiffs and in whom the plaintiffs had placed trust and confidence, that the documents did not affect the plaintiffs' legal rights and that there was no need for them to read the documents. The court of appeal affirmed the trial court's denial of defendant's motion to compel arbitration. The court noted that a person may be found to have reasonably relied on the opinion of another person who is not a lawyer if the recipient of the opinion is in a relationship of trust and confidence with the other person or if the recipient of the opinion reasonably believes that the person giving the opinion has special knowledge or skill pertaining to the subject matter, as

compared to the recipient. The court found that the plaintiffs had alleged sufficient facts to bring them within either of those circumstances (*18 Cal. App. 4th 802, 808)* . The court also held that the plaintiffs' failure to discover the arbitration clause by reading the documents was excused by their reliance on the trust and confidence they placed in the defendant (*18 Cal. App. 4th 802, 809)* .

In *Regus v. Schartkoff (1957) 156 Cal. App. 2d 382* , the court of appeal stated the general rule that one cannot justify relying on a representation of law that is made by a person who is not a lawyer and who does not occupy a confidential relationship toward the one to whom it is addressed, if the representation is based on facts equally known or accessible to both persons. One exception, said the court, applies if the party expressing the opinion purports to have expert knowledge concerning the matter. Another exception applies if the party expressing the opinion, having had superior means of information, possesses a knowledge of the law and thereby gains an unconscionable advantage over one who is ignorant and has not been in a situation to become informed. In either of these cases, said the court, the injured party is entitled to relief predicated on the same ground as if the misrepresentation of law were a matter of fact (*156 Cal. App. 2d 382, 388-389*).

In *Bank of Am. v. Sanchez (1934) 3 Cal. App. 2d 238, 38 P.2d 787* , the court of appeal affirmed the trial court's judgment for the defendant, ruling that she was not liable on a note and was entitled to have the note reformed by striking her name from it because of the plaintiff's fraud in inducing her signature on the note. The trial court found that by means of misrepresentations of law by an officer of the plaintiff, the defendant was led into a misapprehension of the law and as a result was induced to sign her name to the note. The plaintiff contended that deception as to matters of law does not amount to fraud. However, the court observed that this rule has its exceptions. One most commonly known and recognized exception applies if the parties to a contract are in a confidential or fiduciary relationship. Another applies if one who has had superior means of information possesses a knowledge of the law and thereby gains an unconscionable advantage over another, who is ignorant and has not been in a situation to become informed. In either of these cases, the injured party is entitled to relief, and in the latter case, the right to relief is predicated on the same ground as if the misrepresentations of law were matters of fact (*3 Cal. App. 2d 238, 242)* .

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 105 FRAUD AND DECEIT
PART II. FORMS
B. Deceit: Misrepresentation, Omission, Concealment, or False Promise
1. Misrepresentation or Omission of Material Fact Generally

10-105 California Points & Authorities § 105.54

§ 105.54 Misrepresentation or Omission Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Predictions Intended as Representations of Fact

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF _____ [SHOULD PREVAIL ON THE *or* HAS STATED FACTS SUFFICIENT TO CONSTITUTE A] CAUSE OF ACTION FOR FRAUD AND DECEIT, DESPITE RELIANCE ON AN ALLEGED STATEMENT OF OPINION REGARDING A FUTURE EVENT, BECAUSE DEFENDANT'S STATEMENT WAS INTENDED AND ACCEPTED AS A REPRESENTATION OF FACT AND INVOLVED MATTERS PECULIARLY WITHIN DEFENDANT'S KNOWLEDGE.

Prediction Intended as Representation of Fact. The fact that predictions as to future events are ordinarily regarded as nonactionable expressions of opinion will not preclude relief on the ground of fraud if they were intended and accepted as representations of fact and involved matters peculiarly within the speaker's knowledge (*Eade v. Reich (1932) 120 Cal. App. 32, 35, 7 P.2d 1043*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff or cross complainant has failed to establish a cause of action for fraud or deceit. The basis of this form is that despite the fact that predictions as to future events are ordinarily regarded as nonactionable expressions of opinion, a defendant may be liable for fraud if the predictions were intended and accepted as representations of fact and involved matters peculiarly within the defendant's knowledge.

This form may be used to oppose the points and *authorities in § 105.200* et seq.

This form should be included with other points and authorities depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.50[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, in the case of opposition to a motion for summary of judgment or summary adjudication, counsel would refer to facts in declarations or deposition transcripts establishing that there is no triable issue of material fact regarding whether all of the elements of that cause of action are satisfied or whether plaintiff is in the class of persons entitled to recover.

See also *§ 105.50[2][b]*.

[c] Related Points and Authorities

This form sets forth one of the exceptions to the general rule that a statement of opinion is not actionable in fraud and deceit. For forms dealing with other exceptions, see *§§ 105.50 -105.53*.

[3] Discussion of Authorities

[a] Prediction Intended as Representation of Fact

In ***Eade v. Reich*** *(1932) 120 Cal. App. 32, 7 P.2d 1043* , the court of appeal affirmed a judgment in favor of the defendants on their cross complaint alleging the plaintiff's fraud in connection with the sale of real property to the defendants. The cross complaint alleged that the plaintiff's agent induced the purchase by falsely representing himself to be employed by a major corporation and stating that if the defendants/cross complainants purchased the land, the corporation would lease a portion of it. In ruling for the defendants/cross complainants, the court noted that predictions as to future events are ordinarily regarded as nonactionable expressions of opinion. However, such statements will not preclude relief on the ground of fraud if they were intended and accepted as representations of fact and involved matters peculiarly within the speaker's knowledge. Thus, if one party possesses or assumes to possess superior knowledge regarding the subject matter of the representation, which knowledge is not equally open to the other party, what might otherwise be regarded as an expression of opinion may amount to an affirmation of fact (*120 Cal. App. 32, 35)* .

[4] Additional Authorities

[a] Prediction Intended as Representation of Fact

In *Daniels v. Oldenburg (1950) 100 Cal. App. 2d 724* , the court of appeal affirmed judgment for the plaintiffs in an action to rescind a lease for fraud. The plaintiffs contended that the defendants had induced them to lease a motel by falsely representing to them that all the units were rented and that the plaintiffs would be able to keep them rented all the time. The representation that the plaintiffs could keep the motel rented all the time pertained to the future and could appear to be a expression of mere opinion. However, when coupled with the additional representation that all the units were rented, the statements could indicate that the defendants were renting all the units nightly to full capacity at the prices indicated and that the plaintiffs could do the same. Moreover, the court stated, the trial court could well have believed from the evidence produced that the defendants had not been and were not renting the units to capacity. This fact was known only to the defendants. Thus, the trial court had properly concluded that the representations were made not as a matter of opinion, but as fact (*100 Cal. App. 2d 724, 728-729*).

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1. Misrepresentation or Omission of Material Fact Generally

10-105 California Points & Authorities § 105.55

§ 105.55 Misrepresentation or Omission Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Misrepresentation Implied by Conduct

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF _____ [SHOULD PREVAIL ON THE *or* HAS STATED FACTS SUFFICIENT TO CONSTITUTE A] CAUSE OF ACTION FOR FRAUD AND DECEIT, DESPITE THE ABSENCE OF A STATEMENT IN THE USUAL SENSE, BECAUSE THE ELEMENTS OF MISREPRESENTATION AND RELIANCE CAN BE ESTABLISHED THROUGH CONDUCT.

Misrepresentation May Be Implied by Conduct. A misrepresentation need not be oral, but may be implied by conduct (*Thrifty-Tel, Inc. v. Bezenek (1996) 46 Cal. App. 4th 1559, 1567, 54 Cal. Rptr. 2d 468*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff or cross complainant has failed to establish a cause of action for fraud or deceit. The basis of this form is that there may be recovery for fraud and deceit if a misrepresentation is implied by defendant's conduct.

This form may be used to oppose the points and *authorities in § 105.30* et seq.

This form should be included with other points and authorities depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.50[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.50[2][b]*].

[c] Related Points and Authorities

For points and authorities asserting that plaintiff may justifiably rely on a misrepresentation achieved through indirect means, such as through an agent or computer network, see *§ 105.228*.

[3] Discussion of Authorities

[a] Misrepresentation May Be Implied by Conduct

In ***Thrifty-Tel, Inc. v. Bezenek*** *(1996) 46 Cal. App. 4th 1559, 54 Cal. Rptr. 2d 468* , a long distance telephone carrier sued for fraud based on the use by the defendants' teenage sons of computer technology to "crack" the plaintiff's access and authorization codes and make long distance phone calls without paying for them. After a judgment was entered for the plaintiff, the defendants appealed on various grounds, including the contention that the computer machinations did not constitute a misrepresentation. Although it reversed the award of damages on the basis of a failure to mitigate, the court of appeal affirmed the judgment. The court found that the boys' use of the confidential access codes was the legal equivalent of a misrepresentation that they were authorized users of the plaintiff's services. A misrepresentation need not be oral, but may be implied by conduct. Thus, the use of the access codes was an implied misrepresentation of authorization to use those codes (*46 Cal. App. 4th 1559, 1567)* .

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[Reserved]

§§ 105.56[Reserved]

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2. Concealment of Material Fact

10-105 California Points & Authorities § 105.70

§ 105.70 Concealment Is Not Sufficiently Pleaded or Proven--No Sufficient Pleading or Proof of Suppression of Fact

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE THE COMPLAINT MERELY ALLEGES THAT DEFENDANT FAILED TO DISCLOSE _____ [*specify facts allegedly not disclosed*], BUT DOES NOT ALLEGE FACTS ESTABLISHING A DUTY ON DEFENDANT'S PART TO DISCLOSE _____ [*specify facts allegedly not disclosed*] AND DOES NOT ALLEGE THAT DEFENDANT GAVE PLAINTIFF OTHER INFORMATION THAT WAS LIKELY TO MISLEAD PLAINTIFF BECAUSE OF THE FAILURE TO DISCLOSE _____ [*specify facts allegedly not disclosed*].

[*EITHER*]

A. No Allegation of Defendant's Duty to Disclose. A complaint for fraud and deceit based on suppression of fact is not sufficient to constitute a cause of action if it fails to allege that a fact was suppressed by one who is bound to disclose it (*Lingsch v. Savage (1963) 213 Cal. App. 2d 729, 738-739, 29 Cal. Rptr. 201* (demurrer); *see Chicago Title Ins. Co. v. Superior Court (1985) 174 Cal. App. 3d 1142, 1156, 220 Cal. Rptr. 507* (summary adjudication)).

[*Optional*] **B. Silence in Absence of Duty to Speak Is Not Fraud.** In the absence of any showing that the defendant had a duty to speak, such as the existence of a confidential or fiduciary relationship between the parties, the defendant is not bound to volunteer information concerning the subject matter in dispute (*Carter v. Seaboard Fin. Co. (1949) 33 Cal. 2d 564, 569, 203 P.2d 758* ; *LiMandri v. Judkins (1997) 52 Cal. App. 4th 326, 336-337, 60 Cal. Rptr. 2d 539*).

[*OR*]

A. No Allegation of Misleading Statement. A complaint for fraud and deceit based on suppression of fact is not sufficient to constitute a cause of action if it does not allege that the other party gave information of other facts that were likely to mislead for want of the communication of the suppressed fact (*see Rogers v. Warden (1942) 20 Cal. 2d 286, 289-290, 125 P.2d 7*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the plaintiff or cross complainant has failed to allege sufficient facts to constitute a cause of action for fraud because the pleading is based on fraud consisting of an alleged suppression of fact and fails to allege facts showing a duty on the part of the defendant to make the disclosure. This duty is present if: (1) one is bound to make the disclosure by reason of a fiduciary, agency, or similar relationship; or (2) one gives information of other facts that are likely to mislead for want of the communication of the suppressed fact. Accordingly, this form includes alternative points for either situation [*see* Alternative Paragraphs A].

This form should be included with other points and authorities depending on the procedural context in which the issue is raised or on any other substantive issues that need to be addressed. For example, it may be submitted with other points and authorities supporting a demurrer or motion for summary challenging, respectively, the sufficiency of the pleading or the sufficiency of the proof.

This form should be combined, when appropriate, with the points and authorities in *§ 105.30* et seq., which challenge the sufficiency of pleading or proof with regard to other aspects or elements in a cause of action for fraud and deceit. If this form is being used to support a demurrer, it may also be combined, when appropriate, with the *forms in § 105.10* et seq., which focus on the requirement that elements of an action for fraud and deceit, particularly the deceitful act or omission, be alleged in specific rather than general terms.

This form may also be adapted for a trial or appellate brief, or to support of a motion for judgment on the pleadings, a motion for nonsuit, or any other request for relief based on plaintiff's failure to show or establish the essential elements of the action for fraud or deceit.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Any statement of fact should be supported by adequate reference to the pleading (or matters subject to judicial notice), if the form is used in a memorandum supporting a demurrer or other challenge to the sufficiency of the pleading. Similarly, any statement of fact should be supported by adequate reference to evidence admitted or otherwise cognizable by the court, if the form is used in support of a motion challenging the adequacy of proof.

For example, a memorandum supporting a motion for summary judgment may refer to affidavits or declarations based on personal knowledge or matters subject to judicial notice [*see Code Civ. Proc. §§ 2009, 2015.5* (affidavits and declarations); *Evid. Code § 450 et seq.* (judicial notice)]. For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For legal background with detailed coverage of the elements of a tort action for fraud and deceit, see California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender).

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For additional points and authorities relating to demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[e] Opposing Points and Authorities

The points and *authorities in § 105.80* et seq. may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] No Allegation of Defendant's Duty to Disclose

In ***Lingsch v. Savage*** *(1963) 213 Cal. App. 2d 729, 29 Cal. Rptr. 201* , the court of appeal reversed the trial court's judgment for the defendant after sustaining a demurrer without leave to amend. The case involved a suit for damages for fraud by the buyer of real property against the sellers and their real estate broker. The complaint alleged that the property was in a state of disrepair, included illegal units, and was in a state of condemnation. It also alleged that the defendants knew these facts and fraudulently failed to reveal them. The court held that if a seller knows facts materially affecting the value or desirability of the property that are known or accessible only to the seller and also knows that those facts are not known to, or within the reach of, the diligent attention and observation of the buyer, the seller is under a duty of disclose them to the buyer. If the real estate broker representing the seller possesses the requisite knowledge, he or she is also is under the same duty of disclosure. The elements of the cause of action include the defendant's nondisclosure of facts materially affecting the value or desirability of the property and the defendant's knowledge of those facts coupled with the fact that they are unknown to, or beyond the reach of, the plaintiff. All of the allegations in this case concerning the nondisclosure were deficient either in form or substance, and the allegations concerning the defendants' knowledge were deficient because the complaint did not allege that the defendants knew that the facts were unknown to the plaintiff (*213 Cal. App. 2d 729, 738-739)* .

In ***Chicago Title Ins. Co. v. Superior Court*** *(1985) 174 Cal. App. 3d 1142, 220 Cal. Rptr. 507* , plaintiff, a title insurance company, filed a complaint against defendant, a bank, alleging causes of action for fraud, conspiracy to defraud, breach of duty of good faith, wrongful dishonor of checks, and for money had and received. Regarding the fraud causes of action, the complaint alleged that plaintiff acted as an escrow agent in the transfer of funds from a corporate third party to an individual third party in transactions under which the corporate third party delivered to plaintiff checks drawn on the corporate party's trust and escrow accounts at defendant. Both third parties represented to plaintiff that the checks were for the financing and refinancing of loans by the corporate party to the individual party and that the loans were to be secured by trust deeds against properties owned by the individual party. The corporate party represented that it was delivering good and sufficient funds to plaintiff, and, in reliance on these representations, plaintiff issued to the individual party checks payable to that party equal to the amount of the corporate party's checks, less escrow charges.

The complaint alleged that these purported loan transactions were fraudulent shams designed to induce plaintiff to pay money to the individual party in exchange for the corporate party's checks drawn on nonexistent funds at defendant. During the five-month period in which the fraud operated, approximately $300 million in checks passed through the

corporate party's accounts at defendant, and, in the process, both third parties siphoned off nearly $17 million for their private use. The complaint then alleged that defendant knew of unusual activity in the corporate party's accounts, that the accounts regularly appeared on defendant's "kite suspect" and overdraft lists, and that, after investigating the activity in the accounts, defendant's auditors concluded that a check kiting scheme was occurring with the accounts and recommended that the accounts be closed. Despite recognition of the improper use of the account, defendant did not close the accounts, but instead conspired with both third parties in perpetrating the fraud on plaintiff by improperly providing special treatment of the corporate party's checks drawn on nonexistent funds and by informing the corporate party on a daily basis of the amount needed to cover the checks. As a result of this assistance, defendant received in excess of $150,000 from the corporate party in overdraft charges. Finally, the complaint alleged that defendant at no point informed plaintiff of the kiting activity in the accounts. Moreover, during the operation of the scheme, plaintiff was unaware of the fraud and unaware that the representations on which plaintiff relied were false.

Defendant moved for summary judgment, summary adjudication of each cause of action, or judgment on the pleadings. The trial court denied the motion for summary judgment, judgment on the pleadings, and summary adjudication on the conspiracy and wrongful dishonor of checks causes of action, but granted the motion for summary adjudication on the causes of action for fraud, breach of the duty of good faith, and money had and received. Plaintiff then petitioned the court of appeal for a writ of mandate, seeking vacation of the order granting summary adjudication of the specified causes of action.

The court of appeal consolidated the petition on the summary adjudication issue with an additional petition for a writ of mandate to review the trial court's order compelling discovery of plaintiff's in-house counsel. The court then discharged the summary adjudication alternative writ and denied the petition for a peremptory writ on that issue (*174 Cal. App. 3d 1142, 1160)* . The court held that the trial court was correct in its determination that defendant had made no representation to plaintiff relative to the sufficiency of funds in the corporate party's accounts and that, for purposes of *Civ. Code § 1710(3)*, defendant owed neither a common law nor a statutory duty of disclosure to plaintiff (*174 Cal. App. 3d 1142, 1159)* . In so holding, the court first rejected plaintiff's argument that when defendant repeatedly honored the corporate party's checks, it was impliedly representing that that party had sufficient funds to cover the checks. Noting an apparent conflict between California and federal law over whether a check constitutes a representation, the court commented that the potential conflict was of no concern in this case because the corporate third party, rather than defendant, was responsible for whatever representations to plaintiff were presented through uttering checks (*174 Cal. App. 3d 1142, 1156)* .

The court then rejected plaintiff's arguments that former Com. Code § 1203 (now see *Com. Code § 1304*, providing that every contract or duty within the commercial code imposes an obligation of good faith in its performance or enforcement) and *Com. Code § 4103* (providing that the effect of the commercial code provisions governing bank deposits and collections may be varied by agreement, except that no agreement can disclaim a bank's responsibility for its own lack of good faith or failure to exercise ordinary care or can limit the measure of damages for that lack or failure) imposed a duty of good faith and an obligation on the bank to stop the perpetration of a fraud. *Com. Code §§ 1203* and *4103* both contemplate some type of contractor agreement between the parties, but no relationship of that type existed between plaintiff and defendant (*174 Cal. App. 3d 1142, 1156-1157)* .

Relying on case law from other jurisdictions and citing *Burrows v. Superior Court (1974) 13 Cal. 3d 238, 243, 118 Cal. Rptr. 166, 529 P.2d 590* , the court noted that a bank customer's reasonable expectation is that, absent compulsion by legal process, the matters he or she reveals to the bank will be used by the bank only for internal banking purposes. Thus, a depositor may reasonably expect that a bank will maintain the confidentiality of both those papers that originate with the depositor in check form and the bank statements into which a record of those checks are transformed pursuant to internal bank practice. Therefore, if, as plaintiff suggested, banks had a duty to reveal suspicions about their customers, they would violate their customers' rights to privacy and be forced to act as guarantors of checks written by depositors. The court refused to recognize a duty by banks to inform on suspicious customers, thereby avoiding the loss of privacy, expense, and commercial havoc that would result from the imposition of that duty (*174 Cal. App. 3d 1142,*

1159) .

[b] Silence in Absence of Duty to Speak Is Not Fraud

In ***Carter v. Seaboard Fin. Co.*** *(1949) 33 Cal. 2d 564, 203 P.2d 758* , the facts and background of which are discussed in *§ 105.202[3]*, the failure of the defendant's agent to inform the plaintiff that the truck the plaintiff was purchasing had been in a wreck was not fraud because in the absence of a fiduciary relationship, the defendant was not bound to volunteer that information. The Court cited Rest, Contracts, § 472 (*33 Cal. 2d 564, 569)* .

In ***LiMandri v. Judkins*** *(1997) 52 Cal. App. 4th 326, 60 Cal. Rptr. 2d 539* , plaintiff was an attorney representing a party in litigation arising out of environmental contamination of real property owned by the party. Plaintiff had entered into a written fee agreement with the party providing that plaintiff would be paid an hourly rate for his services in addition to 20 percent of any recovery the party might obtain. While the action was pending, plaintiff was contacted by counsel for a trust company that had extended a loan to the party. In that conversation counsel for the trust company asked plaintiff about the status and settlement value of the pending action and specifically asked about his fee arrangement with the party. However, counsel did not tell plaintiff that the party, in connection with the loan transaction, had granted the trust company a lien against their share of any judgment or settlement proceeds obtained in the action. Plaintiff filed an action against the counsel for the trust company alleging fraud and deceit based on an intentional and negligent failure to disclose facts. The trial court sustained defendant's general demurrer without leave to amend.

The court of appeal affirmed, holding that the trial court properly dismissed plaintiff's nondisclosure causes of action on the ground that defendant owed plaintiff no duty to disclose his intention to assert the superiority of trust company's lien (*52 Cal. App. 4th 326, 338)* . The court began its analysis by listing the four circumstances in which nondisclosure would constitute actionable fraud: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant has exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material facts. It then concluded that none of these circumstances applied in this case. The court found that there was no fiduciary relationship between plaintiff and defendant and there was no other relationship between plaintiff and defendant in which a duty to disclose arose. Plaintiff's complaint, according to the court, failed to allege any sort of transaction between the parties, or any existing or anticipated contractual relationship that would give rise to a duty to disclose. Moreover, the court found that the duty of disclosure plaintiff sought to impose on defendant was negated by defendant's attorney-client relationship with the trust company (*52 Cal. App. 4th 326, 338)* .

[c] No Allegation of Misleading Statement

In ***Rogers v. Warden*** *(1942) 20 Cal. 2d 286, 125 P.2d 7* , the background of which is discussed in *§ 105.71*, the Supreme Court reversed the lower court's judgment sustaining a general demurrer. The Court noted that the complaint alleged fraud in the form of the suppression of material facts, even though the record did not show any confidential or fiduciary relationship between the plaintiff and the defendants. The rule is that although one may be under no duty to speak as to a matter, if one undertakes to do so, as alleged and shown in this case, one is bound not only to state truly what one tells, but also not to suppress or conceal any facts within one's knowledge that materially qualify those stated. If one speaks at all, one must make a full and fair disclosure. Thus, when the defendants undertook to tell the plaintiff why they wanted a deed from her, a matter alleged in the complaint, they were under a duty, even in the absence of a confidential relationship, to disclose the facts within their knowledge relating to her rights in the property involved and the true reason why they were seeking the deed. Because the allegations of the complaint contained all the elements of actionable fraud, the trial court erred in sustaining a general demurrer (*20 Cal. 2d 286, 289-290)* .

[4] Additional Authorities

[a] No Allegation of Defendant's Duty to Disclose

In *Kovich v. Paseo Del Mar Homeowners' Assn. (1996) 41 Cal. App. 4th 863, 48 Cal. Rptr. 2d 758* , plaintiff, the purchaser of a townhouse, brought an action against both the seller and the homeowners association for fraudulent concealment based on the failure to inform him about construction defects and the existence of a civil action against the developer to repair the defects. The homeowners association demurred on the ground that it had no duty of care to plaintiff prior to the sale. The trial court agreed, sustaining the demurrer without leave to amend. The court of appeal began its analysis by stating the general rule that even if material facts are known to one party and not the other, failure to disclose those facts is not actionable fraud unless there is some fiduciary or confidential relationship giving rise to a duty to disclose. There are also some exceptions that make nondisclosure actionable without such a relationship--for example, if material facts are not otherwise accessible to a buyer of real property. With regard to the relationship between the parties, the court found that there were no facts alleged indicating that the homeowners association was a party to the sales contract or that it assumed a special relationship with plaintiff (*41 Cal. App. 4th 863, 866)* . With regard to the argument that everyone must abstain from conduct that unreasonably causes injury to another, the court noted that it was the duty of the seller to disclose information to plaintiff and that the homeowners association had no duty to monitor the seller's disclosures (*41 Cal. App. 4th 863, 868-869)* . Concluding that plaintiff failed to state a cause of action against the homeowners association, the court affirmed the judgment entered on the demurrer.

[b] Silence in Absence of Duty to Speak Is Not Fraud

In *Jappe v. Mandt (1955) 130 Cal. App. 2d 426, 278 P.2d 940* , the court of appeal affirmed judgment for the defendant in an action for damages for fraud in which the plaintiff alleged that he had been induced as a result of suppression of fact on the part of the defendant to enter into a contract for the purchase of a rubbish route. The plaintiff's complaint alleged that the defendant knew that the city in which the route was located was contemplating the letting of a contract for the disposal of rubbish, but failed to disclose that fact to him. The evidence showed that prior to executing the contract, the plaintiff examined the defendant's books and had full opportunity to make whatever investigation he thought was necessary. However, the court of appeal noted that the parties were dealing at arm's length, that there was no fiduciary or other relationship of trust or confidence between them, and that the plaintiff had had full opportunity to investigate. Under these circumstances, the defendant was not legally bound to tell the plaintiff of any rumors or reports of possible actions by the city (*130 Cal. App. 2d 426, 429)* .

In *Scafidi v. Western Loan & Bldg. Co. (1946) 72 Cal. App. 2d 550, 165 P.2d 260* , the facts and background of which are discussed in *§ 105.10[3][d],* the court of appeal stated that if mere silence and inaction on the part of the alleged concealer are relied on to establish the fraudulent concealment of a cause of action, it is almost universally held in all jurisdictions, including California, that mere silence or inaction or both are insufficient to establish fraudulent concealment, in the absence of a confidential relationship between the parties or a showing of some specially appearing circumstances that of themselves equitably estop a person from relying on this silence or inaction or suffice to create on the part of the nonrevealer a positive duty to speak or act (*72 Cal. App. 2d 550, 562)* .

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10-105 California Points & Authorities § 105.71

§ 105.71 Concealment Is Not Sufficiently Pleaded or Proven--Facts Allegedly Suppressed Are Not Material

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO _____ [STATE FACTS SUFFICIENT TO CONSTITUTE *or* ESTABLISH] A CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE THE _____ [COMPLAINT FAILS TO ALLEGE *or* EVIDENCE FAILS TO SHOW] THAT THE ALLEGED MISREPRESENTATION CONCERNED A MATERIAL FACT.

Misrepresentation Not of Material Fact. A pleading based on suppression of fact that does not allege that the party charged suppressed a material fact fails to state facts sufficient to constitute a cause of action (*see Rogers v. Warden (1942) 20 Cal. 2d 286, 290, 125 P.2d 7*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the plaintiff or cross complainant either has failed to allege sufficient facts to constitute a cause of action for fraud or has failed to present evidence to establish a fraud claim. The basis of this form is that the pleadings fail to allege, or the evidence fails to establish, that the alleged misrepresentation regarded a material fact.

This form should be included with other points and authorities depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.70[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.70[2][b]*].

[c] Related Points and Authorities

For points and authorities supporting the contention that plaintiff has insufficiently pleaded or proved fraud and deceit generally, and the test for materiality in particular, see *§ 105.30[3][d]*.

[d] Opposing Points and Authorities

The points and *authorities in § 105.80* et seq. may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Misrepresentation Not of Material Fact

In ***Rogers v. Warden*** *(1942) 20 Cal. 2d 286, 125 P.2d 7* , the Supreme Court reversed the judgment of the trial court with directions to the lower court to overrule a general demurrer to the plaintiff's complaint because the allegations of the complaint contained all the elements of actionable fraud. The complaint alleged that although she did not know it, the plaintiff owned certain mineral rights and that the defendants conspired to cheat and defraud her and secure her interest by representing that (1) the land was owned by another party, of little value, and clouded by outstanding taxes; (2) the plaintiff had no right in the property; and (3) their purpose in wanting her to sign a quitclaim deed to the property was to make the property marketable by removing a technicality in the claimed owner's title. The complaint further alleged that each of these representations was false, known by the defendants to be false when made, and made to induce the plaintiff to execute a conveyance of the mineral rights, thereby defrauding her of those rights. Thus, the Court stated, the complaint alleged fraud in the form of suppression of material facts (*20 Cal. 2d 286, 290)* .

[4] Additional Authorities

[a] Misrepresentation Not of Material Fact

In *La Jolla Village Homeowners' Assn. v. Superior Court (1989) 212 Cal. App. 3d 1131* , a homeowners association sued subcontractors of the condominium complex alleging nondisclosure. The court of appeal denied the plaintiff's petition for a writ of mandate to overturn the trial court's striking of the cause of action. The court stated that the complaint failed to specifically allege that the defendants had made representations to the plaintiffs and did not disclose facts that either materially qualified those facts disclosed or rendered that disclosure likely to mislead the plaintiff to rely on it to the plaintiff's detriment. In addition, the complaint failed to show that the facts were known or accessible only to the defendants and that the defendants owed a duty to the plaintiff (*212 Cal. App. 3d 1131, 1152*).

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10-105 California Points & Authorities §§ 105.72-105.79

[Reserved]

§§ 105.72[Reserved]

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10-105 California Points & Authorities § 105.80

§ 105.80 Concealment Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Silence in Confidential Relationship

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF _____ [SHOULD PREVAIL ON THE *or* HAS STATED FACTS SUFFICIENT TO CONSTITUTE A] CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE PLAINTIFF HAS SUFFICIENTLY _____ [ALLEGED *or* ESTABLISHED] THAT DEFENDANT BREACHED, BY HIS/HER/ITS SILENCE, A DUTY OF DISCLOSURE ARISING FROM DEFENDANT'S CONFIDENTIAL RELATIONSHIP WITH PLAINTIFF.

Breach of Duty Arising From Confidential Relationship. If any relationship of confidence and trust exists between the parties that demands that the information communicated respecting the subject of their dealings be full and complete, any concealment or misrepresentation is fraud sufficient to entitle the party injured by it to an action (*Kruse v. Miller (1956) 143 Cal. App. 2d 656, 659-660, 300 P.2d 855*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff has failed to establish a cause of action for fraud or deceit. The basis of this form is that the defendant breached a duty to disclose that arises from the defendant's confidential relationship with the plaintiff.

This form may be used to oppose the points and *authorities in § 105.70* et seq.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue--for example, by response to a demurrer or by opposition to a motion for summary judgment. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Any statement of fact should be supported by adequate reference to the pleading (or to matters subject to judicial notice), if the form is used in a memorandum opposing a demurrer or other challenge to the sufficiency of the pleading. Similarly, any statement of fact should be supported by adequate reference to evidence admitted or otherwise cognizable by the court, if the form is used to oppose a motion challenging the adequacy of proof.

For example, a memorandum opposing a motion for summary judgment may refer to affidavits or declarations based on personal knowledge or matters subject to judicial notice [*see Code Civ. Proc. §§ 2009, 2015.5* (affidavits and declarations); *Evid. Code § 450 et seq.* (judicial notice)]. For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For legal background with detailed coverage of the elements of a tort action for fraud and deceit, see California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender).

For related legal background, research and procedural guides, and forms relating to the most common proceedings for challenging the sufficiency of pleading or proof--demurrer or motion for summary judgment--see respectively California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , and Ch. 537, *Summary Judgment* (Matthew Bender). For references to chapters relating to other potential procedural contexts, see § 105.04[1].

[d] Related Points and Authorities

For points and authorities setting forth other bases for alleging or establishing a duty of disclosure, see *§ 105.81* et seq. This form may also be combined in an appropriate case with relevant points and *authorities in § 105.20*, focusing on the pleading requirement that elements for an action for fraud and deceit be pleaded in specific rather than general terms.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For additional points and authorities relating to demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Breach of Duty Arising From Confidential Relationship

In ***Kruse v. Miller*** *(1956) 143 Cal. App. 2d 656, 300 P.2d 855* , the court of appeal affirmed a judgment for damages for the plaintiffs against the real estate broker who had represented them in the sale of property. The judgment was based on the agent's fraudulent concealment, which resulted in the sale's rescission. The plaintiffs had listed the undeveloped property with a real estate broker. The defendant, a second broker acting with the first broker's permission, showed the property to the buyers, who asked if the lot was filled. The defendant answered in the negative, and the sale

was made. Subsequently, on discovering the lot's filled condition, the buyers successfully rescinded the sale. The defendant contended that the plaintiffs had not pleaded or proven a cause of action for fraud. However, there was evidence of the concealment, and the court of appeal concluded that the defendant had violated his duty to the plaintiffs, his principals, by not informing them of the representations he had made to the buyers that the lot was not filled, thereby perpetrating a fraud on the confidence the plaintiffs bestowed on him. The court stated that if any relationship of confidence and trust exists between the parties that demands that the information communicated respecting the subject of their dealings be full and complete, any concealment or misrepresentation will amount to fraud sufficient to entitle the injured party to an action. The court added that the contract between the parties in this action created the relationship of principal and agent. The agent therefore had the duty of informing his principals fully and correctly regarding all matters concerning the business transacted under his contract of agency (*143 Cal. App. 2d 656, 659-660)* .

In ***Roddenberry v. Roddenberry*** *(1996) 44 Cal. App. 4th 634, 51 Cal. Rptr. 2d 907* , plaintiff, the first wife of the creator of the Star Trek television series, sued the loan-out corporation of her deceased ex-husband for fraud in connection with the company's handling of profit participation payments to her. At the time of her divorce, plaintiff agreed to a settlement allocating her a one-half interest, without deduction or offset, in all future profit participation income from Star Trek to which either or both were entitled. When the corporation began receiving profit participation payments for Star Trek syndications, it initially forwarded a full half to plaintiff. Sometime thereafter and unbeknownst to plaintiff, the amount was reduced to one-third. The trial court entered judgment on a jury verdict against defendant for fraud. The court of appeal affirmed, holding that the facts supported a finding of liability for fraudulent concealment (*44 Cal. App. 4th 634, 665)* . The court found initially that defendant was under a duty to disclose because it was handling money belonging to plaintiff. In addition, the evidence amply supported the finding that defendant concealed the true facts in the hope that plaintiff would accept defendant's payments and never discover that she was receiving only a third (*44 Cal. App. 4th 634, 666)* . On appeal, defendant argued that evidence of reliance and damage was lacking. The court rejected this argument, holding that substantial evidence supported the conclusion that plaintiff was misled or at least confused and consequently delayed pressing for full payment. The court held that delay in receiving full payment can constitute actual damage (*44 Cal. App. 4th 634, 666)* .

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10-105 California Points & Authorities § 105.81

§ 105.81 Concealment Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Silence By Agent

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF _____ [SHOULD PREVAIL ON THE *or* HAS STATED FACTS SUFFICIENT TO CONSTITUTE A] CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE HE/SHE HAS SUFFICIENTLY _____ [ALLEGED *or* ESTABLISHED] THAT DEFENDANT BREACHED, BY HIS/HER/ITS SILENCE, A DUTY OF DISCLOSURE ARISING FROM DEFENDANT'S AGENCY RELATIONSHIP WITH PLAINTIFF.

Breach of Duty Arising From Agency Relationship. An agent has the duty of informing the agent's principal fully and correctly regarding all matters involved in the business being transacted under the agency contract (*Kruse v. Miller (1956) 143 Cal. App. 2d 656, 660, 300 P.2d 855*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff or cross complainant has failed to establish a cause of action for fraud or deceit. The basis of this form is that the defendant breached the duty to disclose that arises from the defendant's confidential agency relationship with the plaintiff.

This form may be used to oppose the points and *authorities in § 105.70* et seq.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.80[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.80[2][b]*].

[c] Related Points and Authorities

For points and authorities setting forth other bases for alleging or establishing a duty of disclosure, see *§§ 105.80* and *105.82* et seq.

[3] Discussion of Authorities

[a] Breach of Duty Arising From Agency Relationship

Kruse v. Miller *(1956) 143 Cal. App. 2d 656, 300 P.2d 855* , is discussed in *§ 105.80[3][c]*.

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10-105 California Points & Authorities § 105.82

§ 105.82 Concealment Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Silence By Fiduciary

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF _____ [SHOULD PREVAIL ON THE *or* HAS STATED FACTS SUFFICIENT TO CONSTITUTE A] CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE PLAINTIFF HAS SUFFICIENTLY _____ [ALLEGED *or* ESTABLISHED] THAT DEFENDANT BREACHED, BY HIS/HER/ITS SILENCE, A DUTY OF DISCLOSURE ARISING FROM DEFENDANT'S FIDUCIARY RELATIONSHIP WITH PLAINTIFF.

A. Breach of Duty Arising From Fiduciary Relationship. The intentional failure to disclose a material fact is actionable fraud if there is a fiduciary relationship giving rise to a duty to disclose it (*Moe v. Transamerica Title Ins. Co. (1971) 21 Cal. App. 3d 289, 306, 98 Cal. Rptr. 547*).

[*Optional*] **B. Oral Joint Venture Constitutes Fiduciary Relationship.** Joint venturers are fiduciaries with a duty of disclosure, and the existence of an oral joint venture agreement may be established by a preponderance of the evidence (*Weiner v. Fleischman (1991) 54 Cal. 3d 476, 482-486, 286 Cal. Rptr. 40, 816 P.2d 892*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff or cross complainant has failed to establish a cause of action for fraud or deceit. The basis of this form is that the defendant breached the duty to disclose that arises from the defendant's fiduciary relationship with the plaintiff. Optional Paragraph B may be used if the defendant is in a joint venture with the plaintiff.

This form may be used to oppose the points and *authorities in § 105.70* et seq.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.80[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.80[2][b]*].

[c] Related Points and Authorities

For points and authorities setting forth other bases for alleging or establishing a duty of disclosure, see *§§ 105.80-105.81* or *§ 105.83* et seq.

[3] Discussion of Authorities

[a] Breach of Duty Arising From Fiduciary Relationship

In ***Moe v. Transamerica Title Ins. Co.*** *(1971) 21 Cal. App. 3d 289, 98 Cal. Rptr. 547* , the court of appeal affirmed a judgment for the plaintiffs for fraudulent concealment against the defendant, a title company that had omitted to mention a pending bankruptcy action connected with its assignment of a title insurance policy. An examination of the policy originally issued and subsequently assigned to the plaintiffs in a transaction involving an escrow showed that it omitted any reference to the pending bankruptcy proceeding. The evidence established that this omission was knowing and deliberate. A title insurance company is a trustee to all principals to an escrow, and it was obvious that the defendant had fulfilled none of these duties. The court held the defendant liable for actionable fraud because deceit may consist of a fact's suppression by one bound to disclose it [*Civ. Code § 1710(3)*], and the intentional failure to disclose a material fact is actionable fraud if there is a fiduciary relationship giving rise to a duty to disclose it (*21 Cal. App. 3d 289, 306)* .

[b] Oral Joint Venture Constitutes Fiduciary Relationship

In ***Weiner v. Fleischman*** *(1991) 54 Cal. 3d 476, 286 Cal. Rptr. 40, 816 P.2d 892* , two persons entered into an oral agreement to arrange the sale and purchase of stock held by several stockholders. After the sale, one of the parties to the agreement brought an action against the other party, alleging that the other party had fraudulently concealed his participation in the stock sale as a buyer, in violation of the terms of an alleged oral joint venture agreement between them. The plaintiff, an attorney, represented a group of shareholders who wished to sell their stock in a certain corporation. She entered into the oral agreement with the defendant, another attorney, under which they would find a third-party buyer of the stock and equally share the finder's fee. The plaintiff alleged (and the defendant denied) that the parties also agreed to purchase the stock together if they were unable to find a third-party buyer. The defendant informed the plaintiff of a potential buyer for the stock, and the plaintiff's clients accepted the offer. The defendant proceeded to form a corporation for the prospective purchaser. Subsequently, a dissenting shareholder unsuccessfully attempted to prevent the sale, which caused the prospective purchaser to withdraw from the purchase to avoid litigation. Conflicting evidence was presented regarding when defendant informed the shareholders of the withdrawal and what the defendant revealed about the identity of the purchaser when the stock was finally sold. Shortly before the closing of the stock sale, the defendant introduced a third party, but a question remains whether he identified the person as an employee of the first prospective buyer or as his own business partner. Soon after the sale, the shares were reissued in the names of the defendant and the third party whom he had introduced shortly before the sale. Pursuant to their oral agreement, the plaintiff and the defendant each received their share of the finder's fee.

Some two years later, the plaintiff read a newspaper article that named the defendant as one of the owners of the

corporation. She filed an action alleging that the defendant fraudulently concealed his participation in the stock sale as a buyer and hence violated their alleged oral agreement. The trial court ordered bifurcation of the alleged fraud from other issues. On conclusion of the trial testimony, the court instructed the jury to return a special verdict. The first question of the special verdict involved whether the plaintiff and the defendant had a relationship, contractual, fiduciary, or other, to acquire the shares if unable to find a buyer. The jury was given, at the defendant's request and over the plaintiff's objection, a modified *BAJI No. 12.35* (regarding fraud and deceit based on concealment), presenting the five elements necessary for a fraudulent concealment cause of action, and another instruction that stated, "[a]s a threshold matter, you must find by clear and convincing evidence, first, that the plaintiff and the defendant did enter into an oral joint venture and, second, the essential terms of that joint venture." The instruction also repeated the second element of *BAJI No. 12.35*, that the defendant must have been under a duty to disclose the allegedly concealed fact to the plaintiff, with the following addition: "[a]s noted previously, the existence of the oral joint venture and its scope must be proved by clear and convincing evidence." On a vote of nine to three, the jury returned a special verdict finding no oral joint venture or other relationship between the plaintiff and the defendant. A motion for new trial was denied, and the plaintiff appealed. The court of appeal reversed and remanded for a new trial, holding that the trial court erred in instructing the jury that the existence of the oral joint venture agreement had to be proved by clear and convincing evidence. The California Supreme Court granted the defendant's petition for review to determine the correct standard of proof for establishing an oral joint venture or partnership.

The Supreme Court affirmed the judgment of the court of appeal. The Court noted that a joint venture is an undertaking by two or more persons jointly to carry out a single business enterprise for profit. Like partners, joint venturers are fiduciaries with a duty of disclosure and liability to account for profits. The Court stated that the distinction between joint ventures and partnerships is not sharply drawn. A joint venture usually involves a single business transaction, whereas a partnership may involve a continuing business for an indefinite or fixed period of time. Yet a joint venture may be of longer duration and greater complexity than a partnership. From a legal standpoint, the Court stated, both relationships are virtually the same. Accordingly, the courts freely apply partnership law to joint ventures when appropriate. A joint venture or partnership may be formed orally or assumed to have been organized from a reasonable deduction from the acts and declarations of the parties. Before the issue of fraud by concealment can be raised, the plaintiff has to establish the existence of some type of legal relationship giving rise to a duty to disclose. Although material facts may be known to one party and not the other, failure to disclose them is ordinarily not actionable fraud unless there is some fiduciary relationship giving rise to that duty. Because the trial court did not determine the existence or nature of any relationship between the plaintiff and the defendant, but rather determined that the plaintiff had proceeded to trial solely on an oral agreement or oral joint venture theory, it left to the jury, by way of a response for a special verdict, the determination whether the oral joint venture agreement existed. The court instructed the jury to determine whether the plaintiff had proven by "clear and convincing" evidence that the relationship existed between the plaintiff and the defendant.

The Court discussed whether existing law requires a burden of proof higher than preponderance of the evidence to establish an oral joint venture or partnership. Under the general rule, issues of fact in civil cases are determined by a preponderance of testimony. Pursuant to *Evid. Code § 115*, three possible burdens of proof exist: preponderance of the evidence, clear and convincing evidence, or proof beyond a reasonable doubt. Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence. The Court therefore analyzed constitutional, statutory, and decisional law on this point, finding first that neither constitutional nor statutory law provided an answer. The Court conceded that certain appellate decisions have stated that proof of an oral joint venture or partnership agreement must be by clear and convincing evidence, but on a close examination of those cases, the Court concluded that their reasoning was unpersuasive and their reliance on prior cases unfounded. The Court concluded that decisional law does not justify or require a departure from the ordinary civil standard of preponderance of the evidence when a party seeks to establish the existence and scope of an oral joint venture or partnership agreement. The Court rejected the defendant's contention that the clear and convincing evidence standard is compelled based on the gravity of the consequences of establishing the existence of a joint venture or partnership agreement. The Court noted that proof by that standard is required if particularly important individual interests or rights are at stake, but concluded that areas of

law to which courts have applied that standard involve historically disfavored subjects, such as an oral agreement to make a will (*54 Cal. 3d 476, 487-489)* . The Court found no reason why proof of a joint venture or partnership agreement should be subject to any higher standard of proof than any other ordinary oral contract in a civil dispute. Because of the closeness of the jury's vote on the special verdict, indications that the jury requested rereading of evidence related to the erroneous instruction, and other factors, the Court held that reversal was proper (*54 Cal. 3d 476, 482-486, 491)* .

[4] Additional Authorities

[a] Breach of Duty Arising From Fiduciary Relationship

In *Day v. Rosenthal (1985) 170 Cal. App. 3d 1125* , the court of appeal affirmed a judgment for the plaintiff for damages for fraud. At trial, the court, sitting as the trier of fact, found that the defendant, while acting as the plaintiff's attorney and business manager, had defrauded the plaintiff in several business transactions. On appeal, the defendant argued that the plaintiff had not proven any actual concealment or misrepresentation. The court rejected this argument, holding that an intentional failure to disclose is an actionable fraud in the presence of a fiduciary duty to disclose and that the attorney-client relationship imposed such a fiduciary relationship (*170 Cal. App. 3d 1125, 1159-1160*).

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10-105 California Points & Authorities § 105.83

§ 105.83 Concealment Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Silence With Knowledge That Affected Value of Transaction

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF _____ [SHOULD PREVAIL ON THE *or* HAS STATED FACTS SUFFICIENT TO CONSTITUTE A] CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE PLAINTIFF HAS SUFFICIENTLY _____ [ALLEGED *or* ESTABLISHED] THAT DEFENDANT BREACHED, BY DEFENDANT'S SILENCE, A DUTY OF DISCLOSURE ARISING FROM DEFENDANT'S KNOWLEDGE OF FACTS MATERIALLY AFFECTING THE VALUE OR DESIRABILITY OF THE SUBJECT MATTER OF THE TRANSACTION.

Breach of Duty Arising From Knowledge of Material Facts. If one party knows of facts materially affecting the value or desirability of the subject matter of the transaction, only that party knows or has access to those facts, and he or she also knows that the facts are not known to, or within the reach of, the other party's diligent attention and observation, he or she is under a duty to disclose them and the failure to fulfill that a duty constitutes fraud (*Lingsch v. Savage (1963) 213 Cal. App. 2d 729, 735-736, 29 Cal. Rptr. 201* ; *see also Vega v. Jones, Day, Reavis & Pogue (2004) 121 Cal. App. 4th 282, 292-294, 17 Cal. Rptr. 3d 26*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff or cross complainant has failed to establish a cause of action for fraud or deceit. The basis of this form is that the defendant breached the duty to disclose that arises from the defendant's knowledge of facts materially affecting the value or desirability of the subject

matter of the transaction.

This form may be used to oppose the points and *authorities in § 105.70* et seq.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.80[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.80[2][b]*].

[c] Related Points and Authorities

For points and authorities setting forth other bases for alleging or establishing a duty of disclosure, see *§§ 105.80 -105.82* or *§ 105.84*.

[3] Discussion of Authorities

[a] Breach of Duty Arising From Knowledge of Material Facts

In ***Vega v. Jones, Day, Reavis & Pogue*** *(2004) 121 Cal. App. 4th 282, 17 Cal. Rptr. 3d 26* , the plaintiff, a shareholder in a company acquired in a merger transaction, sued the attorneys for the acquiring company for fraud. As part of the merger, the plaintiff received stock in the acquiring company in exchange for his shares in the former company, which were valued at $3.45 million at the time of the merger. The plaintiff alleged that prior to the closing of the merger, the acquiring company secured $10 million in investment financing from a third party, and that as part of that transaction, the investors would receive stock issues that would seriously dilute the value of the stock held by other stockholders, including the plaintiff and the other shareholders in the company being acquired. However, although the attorneys for the acquiring company revealed that they were engaging in a third-party financing transaction, they concealed the facts about the stock issues from the plaintiff and the other shareholders involved in the proposed merger, knowing that full disclosure about the stock issues would kill the merger and result in the acquiring company going out of business. The attorneys went so far as to issue a separate disclosure statement on the investment transaction, prepared solely for the shareholders of the plaintiff's company, that omitted the stock issues completely. The trial court sustained a demurrer for the defendants, based in part on the defendants' claim that they could not be liable for failure to disclose if they owed no duty to disclose in the first instance. The plaintiff appealed.

The court of appeal reversed. The court held that even if no duty to disclose otherwise exists, a party who volunteers or undertakes to provide information may be liable for fraud if that party intentionally conceals material facts (*121 Cal. App. 4th 282, 292)* . Although the defendants were counsel for the adverse party in a merger, once the attorneys revealed the third-party financing agreement, they were under a duty not to mislead the shareholders of the other company by leaving out information about the terms of the transactions that the attorneys knew would have a substantial effect on those shareholders and their decision to approve the merger or not. The defendants knew that the investment transaction was relevant to the parties to the proposed merger, including the plaintiff, that the plaintiff had no independent knowledge of the terms of the investment transaction, and that the plaintiff relied on the defendants and their client company to provide the material terms of the investment transaction once the transaction was disclosed. The defendants intentionally failed to do so. Therefore, the plaintiff properly pleaded a cause of action for fraud based on a failure to disclose, and the trial court erred in sustaining the defendants' demurrer on that cause of action (*121 Cal. App. 4th 282, 292-295)* .

Lingsch v. Savage *(1963) 213 Cal. App. 2d 729, 735-736, 29 Cal. Rptr. 201* , is discussed in *§ 105.70[3][a]*.

[4] Additional Authorities

[a] Breach of Duty Arising From Knowledge of Material Facts

In *OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp. (2007) 157 Cal. App. 4th 835, 68 Cal. Rptr. 3d 82* , an investment bank was sued by purchasers of securities after the bank drafted an offering memorandum for the securities that made numerous representations about the established success of the relevant company's business strategy and its strong prospects going forward. However, the offering memorandum failed to contain any information on the company's recent poor quarter and "channel stuffing" with product that enabled the company to inflate its financial estimates for the upcoming year, but deflated the company's prospects for survival, although the bank had knowledge of these poor financial conditions. The court of appeal concluded that the half-truths and material omissions in the offering memorandum were sufficient to support an action for negligent misrepresentation (*157 Cal. App. 4th 835, 855)* . In addition, on the plaintiffs' claim for intentional nondisclosure, the court held that the investment bank had a duty to disclose full and accurate financial information about the company whose securities the bank was selling. Although the bank sold only unregistered notes to qualified buyers in private transactions, the bank knew that these unregistered notes would soon be replaced with registered securities saleable through a public market, and in fact the bank actively advised potential purchasers of the publicly-traded securities. Because of this, the bank's duty to disclose ran to subsequent purchasers of those registered securities, even though the bank was not the seller of those securities (*157 Cal. App. 4th 835, 859-860)* .

In *Persson v. Smart Inventions, Inc. (2005) 125 Cal. App. 4th 1141, 23 Cal. Rptr. 3d 335* , the plaintiff sued a corporation and its president/shareholder for fraud and breach of fiduciary duty arising from the defendants' buyout of the plaintiff's 50 percent share of corporate stock. The corporation's president had undertaken to provide the plaintiff with all necessary financial information about their struggling company prior to reaching agreement on the terms of the buyout, but he did not tell the plaintiff about a new product that the company was about to release. This new product, which was unveiled immediately after the plaintiff signed the buyout agreement, made millions of dollars for the company. The plaintiff argued that the president had a duty to disclose the new product when he undertook to provide all relevant financial information about the company prior to the buyout. After a jury trial, judgment was entered for the plaintiff on the fraudulent concealment claim, and the court of appeal affirmed on this cause of action. The court held that even though the president had no duty to provide information to the plaintiff prior to the buyout, once he undertook to "paint ... the truest picture possible of where the company is right now," he had a duty to disclose all information that was material to the transaction. The court then held that there was sufficient evidence to support the jury's finding that the president intentionally concealed facts about the new product and that these facts were material to the transaction (*125 Cal. App. 4th 1141, 1164-1165)* .

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10-105 California Points & Authorities § 105.84

§ 105.84 Concealment Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Silence By Person With Statutory Duty

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF _____ [SHOULD PREVAIL ON THE *or* HAS STATED FACTS SUFFICIENT TO CONSTITUTE A] CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE PLAINTIFF HAS SUFFICIENTLY _____ [ALLEGED *or* ESTABLISHED] THAT DEFENDANT BREACHED, BY DEFENDANT'S SILENCE, A DUTY OF DISCLOSURE ARISING FROM DEFENDANT'S STATUTORY OBLIGATION.

Breach of Duty Arising From Statutory Obligation. If a statute imposes an obligation on a party to make a disclosure, the failure of that party to make the disclosure constitutes an actionable fraudulent concealment (*Pastoria v. Nationwide Ins. (2003) 112 Cal. App. 4th 1490, 1499, 6 Cal. Rptr. 3d 148* ; *Kimball v. Pacific Gas & Elec. Co. (1934) 220 Cal. 203, 217-218, 30 P.2d 39*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff or cross complainant has failed to establish a cause of action for fraud or deceit. The basis of this form is that the defendant breached the duty to disclose imposed by statute.

This form may be used to oppose the points and *authorities in § 105.70* et seq.

This form should be included with other points and authorities, depending on the procedural context in which the issue

is raised and on other substantive issues that may be involved [*see § 105.80[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.80[2][b]*].

[c] Related Points and Authorities

For points and authorities setting forth other bases for alleging or establishing a duty of disclosure, see *§§ 105.80 -105.83*.

[3] Discussion of Authorities

[a] Breach of Duty Arising From Statutory Obligation

In ***Pastoria v. Nationwide Ins.*** *(2003) 112 Cal. App. 4th 1490, 6 Cal. Rptr. 3d 148* , the plaintiffs brought an action against their health insurance company for unfair competition, fraud, and negligent failure to disclose. The plaintiffs claimed that the company failed to disclose to them before they purchased their policy that the company was about to make substantial changes to the policy line, including new deductibles, new and increased co-payments, reduced drug benefits, and increased premiums. The defendant demurred, arguing that compliance with *Ins. Code § 10199.1*, which requires insurers to give only 30 days notice before changing insurance benefits and premiums, precluded the action. The trial court sustained the demurrer with leave to amend. The plaintiffs failed to amend the complaint, judgment was entered, and the plaintiffs appealed.

The court of appeal reversed. The court noted that the plaintiffs had alleged that the defendant had a duty to disclose the impending changes under *Ins. Code §§ 330, 331, 332, 334,* and *361,* and the court concluded that the plaintiff's argument was not without merit under the literal language of those statutes. Therefore, based on the procedural posture of the case, it was error for the trial court to sustain the defendant's demurrer on the unfair competition claims (*112 Cal. App. 4th 1490, 1496-1499)* . In addition, because the plaintiffs had pleaded that the defendant had a duty to disclose under those statutes, the court held that it was also error to sustain the demurrer on the fraud cause of action, as well as on the cause of action for negligent failure to disclose (*112 Cal. App. 4th 1490, 1499)* .

In ***Kimball v. Pacific Gas & Elec. Co.*** *(1934) 220 Cal. 203, 30 P.2d 39* , the Supreme Court affirmed a judgment for the plaintiff in an action for the defendant's fraudulent concealment of facts that would toll the statute of limitations in a personal injury action. The plaintiff sought damages for personal injuries he suffered, while working for Pacific Gas & Electric Company (PG&E), as a result of the negligence of an employee of General Electric Company (GE). The complaint alleged that PG&E advised him that it was responsible for the accident although it knew that GE was responsible, that the two companies concealed an agreement to share the related costs, and that as a result of the fraudulent concealment he had no knowledge of his cause of action until discovery of the facts. The Supreme Court noted that under the Workers' Compensation Act, PG&E was entitled to recover from GE, but had brought no action, which would have disclosed to the plaintiff GE's connection with the instant action. The act also provides that no release or settlement is valid without written consent of both the employer and the employee. The Court held that when the two companies started negotiations for settlement of the claim, a positive duty existed on the part of PG&E to inform the plaintiff. The Court concluded that keeping the facts concealed from the plaintiff constituted fraud (*220 Cal. 203, 217-220)* .

[4] Additional Authorities

[a] Breach of Duty Arising From Statutory Obligation

In *Lovejoy v. AT & T Corp. (2004) 119 Cal. App. 4th 151, 14 Cal. Rptr. 3d 117* , the plaintiff filed suit for fraudulent

concealment against a phone company for obtaining the plaintiff's 800 number service from a different provider without the plaintiff's knowledge or consent. At the time of the switch, the defendant had also been providing the plaintiff with long distance phone service. After a disagreement over long-distance charges, the defendant canceled the plaintiff's long distance service and his 800 number. Because the plaintiff believed his 800 number was still being provided by another company, the plaintiff did not realize that his 800 number had been reassigned to another consumer, resulting in a serious loss of business to plaintiff. The trial court granted summary judgment for the defendant on the grounds that the plaintiff could not prove a cause of action for fraudulent concealment because the plaintiff's phone bill reflected that the defendant had taken over plaintiff's 800 number service. The court of appeal reversed. The court noted that *Pub. Util. Code § 2889.5* imposes several steps of disclosure that a phone company must take, and the pre-approval that it must obtain, before it can change a consumer's telephone service provider, and that the defendant failed to comply with these requirements. The court held that this failure to comply with the statute can constitute fraudulent concealment and that triable issues existed as to whether the subsequent revelation of the change in the plaintiff's monthly phone bill satisfied the defendant's duty of disclosure and whether it was unreasonable for the plaintiff to fail to read the multi-page phone bill and discover the change (*119 Cal. App. 4th 151, 158-162)* .

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10-105 California Points & Authorities § 105.85

§ 105.85 Concealment Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Concealment in Letter of Recommendation of Facts That Would Present Substantial Foreseeable Risk of Physical Injury to Third Persons

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF HAS SUFFICIENTLY _____ [ALLEGED *or* ESTABLISHED] THAT DEFENDANT, IN WRITING A LETTER OF RECOMMENDATION, BREACHED A DUTY TO DISCLOSE KNOWN INFORMATION ABOUT THE PERSON BEING RECOMMENDED THAT WOULD PRESENT A SUBSTANTIAL AND FORESEEABLE RISK OF PHYSICAL INJURY TO THIRD PERSONS.

Duty of Writer of Letter of Recommendation to Disclose Facts That Would Present Substantial Foreseeable Risk of Physical Injury to Third Persons. The writer of a letter of recommendation owes to third persons a duty not to misrepresent the facts in describing the qualifications and character of a former employee, if making the representations would present a substantial, foreseeable risk of physical injury to the third persons (*Randi W. v. Muroc Joint Unified Sch. Dist. (1997) 14 Cal. 4th 1066, 1081, 60 Cal. Rptr. 2d 263*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff or cross complainant has failed to establish a cause of action for fraud or deceit. The basis of this form is that the defendant breached the duty to disclose that arises from the defendant's having undertaken to write a letter of recommendation about a person, omitting known facts that would present a substantial and foreseeable risk of harm not only to the recipient of the letter but to other third persons.

This form may be used to oppose the points and *authorities in § 105.70* et seq.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.80[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.80[2][b]*].

[c] Related Points and Authorities

For points and authorities setting forth other bases for alleging or establishing a duty of disclosure, see *§§ 105.80 -105.84*. For a form and discussion of the decision in *Randi W. v. Muroc Joint Unified Sch. Dist. (1997) 14 Cal. 4th 1066, 60 Cal. Rptr. 2d 263* as it relates to the issue of a third party's actual reliance, see *§ 105.229*.

[3] Discussion of Authorities

[a] Duty of Writer of Letter of Recommendation to Disclose Facts That Would Present Substantial Foreseeable Risk of Physical Injury to Third Persons

Randi W. v. Muroc Joint Unified Sch. Dist. *(1997) 14 Cal. 4th 1066, 60 Cal. Rptr. 2d 263* , raised the issue of whether a person who intentionally or negligently provides false information to another owes a duty of care to a third person who neither received the information nor had any special relationship with the provider. Plaintiff, a 13-year old middle school student who had been sexually molested by a school vice principal, sought damages against the principal's former employers for failing to use reasonable care in recommending their former employee for employment without disclosing material information bearing on his fitness. Specifically, plaintiff claimed that (1) defendant school district officers unreservedly recommended the vice principal for employment without disclosing to prospective employers facts defendants knew regarding prior charges or complaints of sexual misconduct and impropriety leveled against the principal, and (2) that defendants' letters induced another school district to hire the principal, who later sexually assaulted plaintiff. Defendants demurred, arguing that the facts alleged failed to establish that defendants owed any duty to plaintiff. The trial court sustained the demurrers and entered judgment of dismissal with prejudice in favor of defendants. Plaintiff appealed. The court of appeal reversed the trial court's ruling as to the negligent misrepresentation and fraud counts.

The Supreme Court held that defendants' letters of recommendation, containing unreserved and unconditional praise for their former employee despite defendants' alleged knowledge of complaints or charges of his sexual misconduct with students, constituted misleading statements that could form the basis for tort liability for fraud or negligent misrepresentation. The Court held that the writer of a letter of recommendation owes to third persons a duty not to misrepresent the facts in describing the qualifications and character of a former employee, if making these misrepresentations would present a substantial, foreseeable risk of physical injury to the third persons (*14 Cal. 4th 1066, 1081)* . However, this duty of care is limited to situations involving resulting physical injury or some special relationship between the parties. In determining the duty issue, the Court applied the factors enumerated in *Rowland v. Christian (1968) 69 Cal. 2d 108, 70 Cal. Rptr. 97* and made the following findings: (1) while the chain of causation leading from defendants' statements and omissions to the vice principal's alleged assault on plaintiff was attenuated, the assault was reasonably foreseeable, (2) defendants' unreserved recommendations of the vice principal, together with their failure to disclose facts reasonably necessary to avoid or minimize the risk of further child molestations or abuse, were arguably morally blameworthy, and (3) defendants had alternative courses of conduct available to them to avoid tort liability, namely, writing a "full disclosure" letter revealing all relevant facts regarding the principal's background, or writing a "no comment" letter omitting any affirmative representations regarding his qualifications, and merely verifying basic employment dates and details (*14 Cal. 4th 1066, 1078)* .

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[Reserved]

§§ 105.86[Reserved]

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10-105 California Points & Authorities § 105.100

§ 105.100 Promise Without Intent to Perform Is Not Sufficiently Pleaded or Proven--No Sufficient Pleading or Proof of Promise Without Intent to Perform

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO _____ [STATE FACTS SUFFICIENT TO CONSTITUTE *or* ESTABLISH] A CAUSE OF ACTION FOR FRAUD AND DECEIT BASED ON A PROMISE MADE WITHOUT THE INTENTION OF PERFORMING IT, BECAUSE THE _____ [COMPLAINT FAILS TO ALLEGE *or* EVIDENCE FAILS TO SHOW] THAT THE PROMISOR HAD NO INTENT TO PERFORM WHEN THE PROMISE WAS MADE.

A. Absence of Intent to Perform When Promise Made. The allegation of facts showing the promisor's lack of intent at the time the promise was made to perform that promise is essential to the statement of a cause of action in fraud or deceit based on a promise made without any intention of performing it (*Bondi v. Jewels by Edwar, Ltd. (1968) 267 Cal. App. 2d 672, 677, 73 Cal. Rptr. 494*).

[*Optional*] **B. Facts Required.** In pleading the lack of intent to perform a promise, the complaint must set forth specific facts to show how, when, where, to whom, and by what means the representations were tendered or from what data the falsity of the defendant's intentions can be inferred (*Hills Transp. Co. v. Southwest Forest Indus., Inc. (1968) 266 Cal. App. 2d 702, 707, 72 Cal. Rptr. 441*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the plaintiff or cross complainant either

has failed to allege sufficient facts to constitute a cause of action for fraud or has failed to present evidence to establish a fraud claim. The basis of this form is that the plaintiff is not entitled to recover because the plaintiff has failed to establish that when the defendant made the promise claimed as the basis of the fraud, the defendant did not intend to perform the promise.

This form may also be used to support a contention that the complaint lacks sufficient specificity to set forth a cause of action for fraud [*see § 105.10* et seq.].

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised any other substantive issues that need to be addressed. For example, it may be submitted with other points and authorities supporting a demurrer or motion for summary challenging, respectively, the sufficiency of the pleading or proof.

This form should be combined, when appropriate, with the points and authorities in *§ 105.30* et seq., which challenge the sufficiency of pleading or proof with regard to other aspects or elements in a cause of action for fraud and deceit. If this form is being used to support a demurrer, it may also be combined, when appropriate, with the *forms in § 105.10* et seq., which focus on the requirement that elements of an action for fraud and deceit, particularly the deceitful act or omission, be alleged in specific rather than general terms.

This form may also be adapted for a trial or appellate brief, or to support of a motion for judgment on the pleadings, a motion for nonsuit, or any other request for relief based on the plaintiff's failure to show or establish the essential elements of the action for fraud or deceit.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Any statement of fact should be supported by adequate reference to the pleading (or matters subject to judicial notice), if the form is used in a memorandum supporting a demurrer or other challenge to the sufficiency of the pleading. Similarly, any statement of fact should be supported by adequate reference to evidence admitted or otherwise cognizable by the court, if the form is used in support of a motion challenging the adequacy of proof.

For example, a memorandum supporting a motion for summary judgment may refer to affidavits or declarations based on personal knowledge or matters subject to judicial notice [*see Code Civ. Proc. §§ 2009, 2015.5* (affidavits and declarations); *Evid. Code § 450 et seq.* (judicial notice)]. For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For legal background with detailed coverage of the elements of a tort action for fraud and deceit, see California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender).

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For additional points and authorities relating to demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[e] Opposing Points and Authorities

The points and *authorities in § 105.110* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Absence of Intent to Perform When Promise Made

Bondi v. Jewels by Edwar, Ltd. *(1968) 267 Cal. App. 2d 672, 73 Cal. Rptr. 494* , is discussed in *§ 105.101[3]*.

[b] Facts Required

In ***Hills Transp. Co. v. Southwest Forest Indus., Inc.*** *(1968) 266 Cal. App. 2d 702* , the court of appeal affirmed a judgment of dismissal of an action for damages for breach of contract and fraud. The trial court sustained general and special demurrers to the second amended complaint without leave to amend because the fraud count failed to allege with specific facts that the defendant had made a promise without any intent to perform it. The pleading charged that the defendant had made a false promise to enter into a five-year contract without intent to perform. The court of appeal noted that no specific facts were pleaded to show how, when, where, to whom, and by what means the representations were tendered or from what data the falsity of the defendant's intentions could be inferred. It is well established, the court held, that the pleading of fraud and deceit must be specific. It is essential that the facts and circumstances that constitute the fraud be set out clearly, concisely, and with sufficient particularity to apprise the opposite party of what that party is called on to answer and to enable the court to determine if on the facts pleaded there is any foundation, prima facie at least, for the charge of fraud. A cause of action for a false promise, the court ruled, should plead facts to show the promisor's specific intentions. It is indispensable to set forth the falsity of the promisor's intent when the promise was tendered. The allegations necessary to show contemporaneous intention not to perform should be clear, specific, and unequivocal (*266 Cal. App. 2d 702, 707*).

[4] Additional Authorities

[a] Absence of Intent to Perform When Promise Made

In *Maynes v. Angeles Mesa Land Co. (1938) 10 Cal. 2d 587* , the Supreme Court affirmed the trial court's judgment for the defendant in an action for declaratory relief and damages. The trial court considered only one theory of recovery--fraud that the defendant allegedly committed by purporting to lease certain real estate to the plaintiffs and failing to execute the lease. As the Court noted, the plaintiffs had attempted to plead a cause of action for fraud consisting of the making of a promise without any intention of performing it. The complaint alleged the defendant's representations that it would lease the premises to the plaintiffs. However, it did not allege that the promise was made with the intention of deceiving the plaintiffs or that the promise was made without the intention of performing it. The mere failure to carry out a promise is not a tort, and it is therefore essential in pleading fraud consisting of a false promise to allege the elements of fraud. Because it was perfectly consistent with the complaint's allegations to infer that the defendant made the alleged promise, the complaint was wholly insufficient with respect to the allegations required for pleading fraud. Moreover, said the Court, the plaintiffs failed to plead properly any damage resulting from the alleged fraud. Thus, even if fraud had been well pleaded in other respects, the complaint would still be fatally defective in its attempted pleading of damage, an essential element of the cause of action (*10 Cal. 2d 587, 589-590*).

In *O'Mary v. Mitsubishi Elecs. Am., Inc. (1997) 59 Cal. App. 4th 563, 69 Cal. Rptr. 2d 389* , a laid off employee sued his previous employer for fraud alleging that the employer breached its promise of lifetime employment. The trial court dismissed the action and the court of appeal affirmed. It stated that in order to support a claim for fraud based on the alleged failure to perform a promise, it must be shown that the promisor did not intend to perform at the time the promise was made. In this case, while plaintiff may have been promised lifetime employment in the tradition of

Japanese companies at the time, at trial he offered no evidence to show that defendant had no intent to perform that promise at the time it was made (*59 Cal. App. 4th 563, 579)* .

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10-105 California Points & Authorities § 105.101

§ 105.101 Promise Without Intent to Perform Is Not Sufficiently Pleaded or Proven--No Sufficient Pleading or Proof of Promise Concerning Material Fact

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE THE COMPLAINT FAILS TO ALLEGE THAT THE PROMISE CONCERNED A MATERIAL FACT.

A. Promise Concerning Material Fact. It is essential to the statement of a cause of action in fraud and deceit based on a promise made without any intention of performing it to allege facts showing that the promise made concerned a material fact (*see Bondi v. Jewels by Edwar, Ltd. (1968) 267 Cal. App. 2d 672, 677, 73 Cal. Rptr. 494* ; *Regus v. Schartkoff (1957) 156 Cal. App. 2d 382, 388, 319 P.2d 721*).

B. Determining Whether Pleaded Facts Are Material [*see § 105.30[1]*, Paragraph D].

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the plaintiff or cross complainant either has failed to allege sufficient facts to constitute a cause of action for fraud or has failed to present evidence to establish a fraud claim. The basis of this form is that the pleadings fail to allege the promise made without intention of performing it did not concern a material fact.

This form may also be used to support a contention that the complaint lacks sufficient specificity to set forth a cause of

action for fraud [*see § 105.10* et seq.].

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.100[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [§ 105.100[2][b]].

[c] Opposing Points and Authorities

The points and *authorities in § 105.110* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Promise Concerning Material Fact

In ***Bondi v. Jewels by Edwar, Ltd.*** *(1968) 267 Cal. App. 2d 672, 73 Cal. Rptr. 494* , the court of appeal reversed the trial court's judgment of dismissal, which it had entered after it sustained a general demurrer to a complaint that included a cause of action in deceit based on allegations that the defendant had made a promise without any intention of performing it. The complaint alleged, in substance, that the plaintiff had owned his own jewelry business, that the defendants induced him to close it pursuant to a promise that they would employ him as a manager, that when they made this promise, the defendants did not intend to perform it, and that instead they intended to remove the plaintiff as a competitor. The complaint further alleged that the defendants actually employed the plaintiff for about one month. The trial court sustained the general demurrer to the cause of action on the erroneous assumption that the employment contract was terminable at the will of the defendants. However, the court of appeal pointed out that the cause of action was predicated on a promise made without any intention of performing it. A complaint seeking to allege this cause of action must contain facts showing the following essential elements: a promise made regarding a material fact, the promisor's lack of intent when making the promise to perform it, the promisor's intent to induce the promisee to act, the promisee's justifiable reliance on the promise, the promisor's nonperformance of the promise, and injury and damage proximately resulting to the promisee. Gauging the complaint by these standards, the court concluded that the complaint stated a cause of action sounding in fraud (*267 Cal. App. 2d 672, 677*).

In ***Regus v. Schartkoff*** *(1957) 156 Cal. App. 2d 382, 319 P.2d 721* , the court of appeal reversed the trial court's judgment sustaining a general demurrer and dismissing a cause of action based on fraud consisting of a promise allegedly made without any intention of performing it. Count three of the complaint was based on allegations that an insurer had promised to pay certain damages claimed by the plaintiff, but that it had no intention of performing that promise. The court noted that the facts essential to the statement of a cause of action in fraud or deceit based on a promise made without any intention of performing it are: a promise made regarding a material fact without any intention of performing it, the existence of the intent of nonperformance at the time of making the promise, the making of the promise with intent to deceive or with intent to induce the party to whom it was made to enter into the transaction, reliance by the promisee, nonperformance by the promisor, and injury to the promisee. The complaint alleged all of those facts and, accordingly, the court held that it stated a cause of action against the insurer (*156 Cal. App. 2d at 388*).

[4] Additional Authorities

[a] Promise Concerning Material Fact

In *Cicone v. URS Corp. (1986) 183 Cal. App. 3d 194, 227 Cal. Rptr. 887* , an attorney was sued for legal malpractice

by his former clients because of alleged negligence in conducting negotiations for the sale of their business. The plaintiffs had settled with the buyers of the business after being sued for understatement of liabilities contained in the balance sheet provided at the time of the sale. The attorney filed a cross complaint for fraud, negligent misrepresentation, and equitable indemnity against the buyers' attorney, alleging that the buyers' attorney had promised, without intent to perform, that the buyers would accept the balance sheet as correct to the best of the sellers' knowledge, rather than relying on the strict warranty regarding the accuracy of the balance sheet contained in the proposed final agreement. The cross complaint further alleged that the promise was made for the purpose of inducing the attorney to rely on it and thereby to advise his clients to proceed with the sale and sign the final agreement. The trial court sustained a demurrer to the cross complaint and, on appeal, the court of appeal reversed. The court rejected the cross defendants' assertion that the alleged misrepresentation was one of law and therefore not actionable, because a statement of what the defendant intends to do relates to an existing state of mind and is a representation of fact (*183 Cal. App. 3d 194, 203)* .

In *Berkey v. Halm (1950) 101 Cal. App. 2d 62* , the court of appeal reversed a judgment for the defendants pursuant to the trial court's order sustaining a demurrer to the third amended complaint. As to the cause of action for fraud based on a promise made with intention not to perform it, the court noted that the facts essential to the statement of this cause of action are: a promise made regarding a material fact without any intention of performing it, the existence of the intent of nonperformance at the time of making the promise, the intent to deceive the promisee or the intent to induce the promisee to enter into the transaction, the promisee's reliance, the promisor's nonperformance, and the promisee's injury. The defendants' contention that the complaint did not state a cause of action in fraud was without merit because it alleged all of these facts (*101 Cal. App. 2d 62, 69*).

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10-105 California Points & Authorities § 105.102

§ 105.102 Promise Without Intent to Perform Is Not Sufficiently Pleaded or Proven--Pleading or Proof of Plaintiff's Expectation Is Insufficient to Establish Misrepresentation

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO _____ [STATE FACTS SUFFICIENT TO CONSTITUTE *or* ESTABLISH] A CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE THE _____ [COMPLAINT DISCLOSES *or* EVIDENCE SHOWS] THAT PLAINTIFF UNJUSTIFIABLY RELIED ON PLAINTIFF'S UNDERSTANDING OR EXPECTATION THAT DEFENDANT WOULD PERFORM, AND THAT UNDERSTANDING OR EXPECTATION IS INSUFFICIENT TO ESTABLISH DEFENDANT'S REPRESENTATION THAT DEFENDANT WOULD PERFORM.

Plaintiff's Expectation Insufficient to Establish Misrepresentation. A plaintiff's understanding or expectation that a defendant would perform is insufficient to establish the defendant's representation that defendant would perform (*Conrad v. Bank of Am. (1996) 45 Cal. App. 4th 133, 156, 53 Cal. Rptr. 2d 336*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the plaintiff or cross complainant either has failed to allege sufficient facts to constitute a cause of action for fraud or has failed to present evidence to establish a fraud claim. The basis of this form is that a plaintiff's understanding or expectation that a defendant would perform is insufficient to establish the defendant's representation that defendant would perform.

This form should be included with other points and authorities, depending on the procedural context in which the issue

is raised and on other substantive issues that may be involved [*see § 105.100[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.100[2][b]*].

[c] Opposing Points and Authorities

The points and *authorities in § 105.110*. may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Plaintiff's Expectation Insufficient to Establish Misrepresentation

In ***Conrad v. Bank of Am.*** *(1996) 45 Cal. App. 4th 133, 53 Cal. Rptr. 2d 336* , the plaintiffs sued a bank, claiming that it falsely promised to make a loan to them. The plaintiffs had told the bank that they needed a loan. A bank officer agreed to process the loan application and said he would comply, which the plaintiffs understood to mean he would make the loan. The matter went to trial, and the jury returned a verdict in favor of the plaintiffs. The trial court granted judgment notwithstanding the verdict, and the plaintiffs appealed.

The court of appeal affirmed, finding that there was insufficient evidence to support the misrepresentation element of the fraud action. The court found that the alleged promise was oral and that there were no witnesses and no documentary evidence to establish such a promise. The court concluded that the plaintiffs' evidence established nothing more than a willingness to consider future loan applications and did not establish a fraudulent promise to make the loan. The court ruled that the plaintiffs' understanding or expectation that the bank would extend a loan was not sufficient to establish an agreement to make a loan (*45 Cal. App. 4th 133, 156*).

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10-105 California Points & Authorities § 105.103

§ 105.103 Promise Without Intent to Perform Is Not Sufficiently Pleaded or Proven--No Pleading or Proof of Failure to Perform

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO _____ [STATE FACTS SUFFICIENT TO CONSTITUTE *or* ESTABLISH] A CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE THE _____ [COMPLAINT FAILS TO ALLEGE *or* EVIDENCE FAILS TO SHOW] THAT THE PROMISOR FAILED TO PERFORM HIS/HER/ITS PROMISE.

Promisor's Failure to Perform. It is essential to the statement of a cause of action for deceit based on a promise made without any intention of performing it to allege facts showing that the promisor failed to perform his/her/its promise (*Bondi v. Jewels by Edwar, Ltd. (1968) 267 Cal. App. 2d 672, 677, 73 Cal. Rptr. 494*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the plaintiff or cross complainant either has failed to allege sufficient facts to constitute a cause of action for fraud or has failed to present evidence to establish a fraud claim. The basis of this form is that the plaintiff is not entitled to a recovery because regardless of the defendant's intent to perform the promise at the time the defendant made the promise, the defendant did in fact perform it.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.100[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.100[2][b]*].

[c] Opposing Points and Authorities

The points and *authorities in § 105.110* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Promisor's Failure to Perform

Bondi v. Jewels by Edwar, Ltd. *(1968) 267 Cal. App. 2d 672, 73 Cal. Rptr. 494* , is discussed in *§ 105.101[3]*.

[4] Additional Authorities

[a] Promisor's Failure to Perform

Regus v. Schartkoff (1957) 156 Cal. App. 2d 382, 319 P.2d 721 , is discussed in *§ 105.101[3]*.

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[Reserved]

§§ 105.104[Reserved]

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10-105 California Points & Authorities § 105.110

§ 105.110 Promise Without Intent to Perform is Sufficiently Pleaded or Proven--Pleading or Proof Shows Intent Not to Perform by Inference

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF HAS STATED FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION FOR FRAUD AND DECEIT, DESPITE A LACK OF SPECIFIC ALLEGATIONS THAT DEFENDANT DID NOT INTEND TO PERFORM THE PROMISE, BECAUSE THE PROMISE TO PERFORM IS ALLEGED WITH SUFFICIENT SPECIFICITY WITH OTHER FACTS THAT DEFENDANT'S INTENT NOT TO PERFORM IS NECESSARILY INFERRED FROM THOSE FACTS.

A. Promise Without Intent to Perform. A deceit is a promise made without any intention of performing it (*Civ. Code § 1710(4)*).

B. Necessary Inference of Lack of Intent to Perform Promise. It is not essential that a complaint should charge in so many words that there was no intent to fulfill the promise alleged when it was made. It suffices that this was the effect of the complaint's averments on the subject (*Langley v. Rodriguez (1898) 122 Cal. 580, 582, 55 P. 406*).

C. Intent May Be Established by Circumstantial Evidence. Fraudulent intent may be inferred from such circumstances as defendant's failure to attempt performance (*Locke v. Warner Bros., Inc. (1997) 57 Cal. App. 4th 354, 368, 66 Cal. Rptr. 2d 921*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff or cross complainant has failed to establish a cause of action for fraud or deceit. The basis of this form is that the complaint need not specifically allege a promise without the intention of performing it if the intent not to perform is inferable from the facts alleged regarding the promise.

This form may be used to oppose the points and *authorities in § 105.100* et seq.

This form may also be used to oppose a contention that the complaint lacks sufficient specificity to set forth a cause of action for fraud [*see § 105.10* et seq.].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue--for example, by response to a demurrer or by opposition to summary judgment motion. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. In this instance, involving a pleading requirement, counsel would argue that the facts alleged in the pleading are sufficient to infer, necessarily, that the defendant intended not to perform an alleged promise regarding a material fact.

Any statement of fact should be supported by adequate reference to the pleading (or matters subject to judicial notice), if the form is used in a memorandum opposing a demurrer or another challenge to the sufficiency of the pleading. Similarly, any statement of fact should be supported by adequate reference to evidence admitted or otherwise cognizable by the court, if the form is used to oppose a motion challenging the adequacy of proof.

For example, a memorandum opposing a motion for summary judgment may refer to affidavits or declarations based on personal knowledge or matters subject to judicial notice [*see Code Civ. Proc. §§ 2009, 2015.5* (affidavits and declarations); *Evid. Code § 450 et seq.* (judicial notice)]. For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For legal background with detailed coverage of the elements of a tort action for fraud and deceit, see California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender).

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For additional points and authorities relating to demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Necessary Inference of Lack of Intent to Perform Promise

In ***Langley v. Rodriguez*** *(1898) 122 Cal. 580, 55 P. 406* , the Supreme Court reversed the trial court's judgment against the defendant, who had pleaded fraud in his answer as a defense to an action on a delivery contract for his raisin

grapes. The defendant's answer alleged that to induce his signing of the contract, the agent of the plaintiff's assignor had made certain oral promises, including a promise to advance a portion of the price to enable him to pick and cure the grapes, that he would not have signed without this promise, and that when the agent made that promise, he did not know and was without reasonable ground to believe that the principal would make the promised advance. The Supreme Court observed that if, as alleged and as the evidence the defendant offered tended somewhat to show, the agent had no reasonable ground to believe that the principal would make the advance payment when the agent promised the advance payment, it was impossible to see how the promise could have been made in good faith--that is, with intent that it should be kept. Therefore, it was equivalent to a promise made without such intention and was fraudulent. The Court held that it was not essential that the answer should charge in so many words that there was no intention to fulfill the promise at the time it was made. It was sufficient that this was the effect of the averments on the subject (*122 Cal. 580, 582)* .

[b] Intent May Be Established by Circumstantial Evidence

In ***Locke v. Warner Bros., Inc.*** *(1997) 57 Cal. App. 4th 354, 66 Cal. Rptr. 2d 921* , plaintiff filed an action against a film studio, alleging fraud in entering into a development contract with her. Plaintiff filed a declaration and deposition testimony of witnesses who had heard statements made two years after the contract, indicating that the studio did not intend to work with plaintiff. The trial court was not convinced by this evidence, stating that they were not sufficient to permit a jury to infer that the studio had intended to breach its obligations at the time of entering the contract. The trial court thus granted a summary judgment to the studio.

The court of appeal reversed, stating that fraudulent intent must often be established by circumstantial evidence, and may be inferred from such circum stances as defendant's failure to even attempt performance. The court concluded that plaintiff's evidence was sufficient to allow a trier of fact to infer that defendant never intended to give plaintiff's proposals a good faith evaluation (*57 Cal. App. 4th 354, 368)* .

[4] Additional Authorities

[a] Necessary Inference of Lack of Intent to Perform Promise

In *Wilson v. Rigali & Veselich (1934) 138 Cal. App. 760* , the court of appeal affirmed a judgment for the plaintiffs in an action for rescission for fraud. The complaint involved the allegation of promises the defendants made without any intention of performing. However, the complaint did not expressly allege that the defendants had no intention of fulfilling the promises. The court of appeal ruled that the complaint was not deficient for this failure because the effect of the averments made on the subject was that there was no intention on the part of the defendants to fulfill the promises alleged (*138 Cal. App. 760, 767*).

[b] Intent May Be Established by Circumstantial Evidence

In *Warren v. Merrill (2006) 143 Cal. App. 4th 96, 49 Cal. Rptr. 3d 122* , plaintiff brought an action to quiet title to a condominium and for damages for fraud and breach of fiduciary duty against the real estate broker who worked with plaintiff to purchase the property. After a bench trial, the court awarded plaintiff compensatory and punitive damages, and imposed a constructive trust on the property in plaintiff's name. The court of appeal affirmed. The appellate court held that substantial evidence supported the trial court's finding that the broker breached her fiduciary duties and procured the property through fraud. The evidence showed that the broker promised plaintiff that if he agreed to name the broker's daughter as a co-borrower on the mortgage loan application, her daughter would execute a quit claim deed after escrow closed, thus placing the property in plaintiff's name alone. The broker then submitted a loan application in the daughter's name alone, which falsely stated the daughter's business and financial assets as well as her current residence. The broker then convinced plaintiff to make several large payments that did not go directly into escrow, including payments to the broker's boyfriend and daughter, as down payment for the property. She also convinced plaintiff to sign a document renouncing any interest in the escrow property, ostensibly as a short-term measure to allow

escrow to close. When escrow closed, however, the broker never transferred title in the property from her daughter to plaintiff. When plaintiff could not make the payments, she evicted him from the property, which she then rented out to a series of tenants. The court agreed that the evidence showed that the broker had fraudulently used the plaintiff to provide a down payment for the condominium, but never had any intention of transferring title in the property back to plaintiff as she had promised (*143 Cal. App. 4th 96, 110-111)* .

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[Reserved]

§§ 105.111[Reserved]

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10-105 California Points & Authorities § 105.120

§ 105.120 Misrepresentation by Agent Is Not Sufficiently Pleaded or Proven--Pleading or Proof of Facts Fails to Show Defendant Participated in or Knowingly Accepted Proceeds of Fraudulent Acts

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO _____ [STATE FACTS SUFFICIENT TO CONSTITUTE *or* ESTABLISH] A CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE THE _____ [COMPLAINT FAILS TO ALLEGE *or* EVIDENCE FAILS TO SHOW] THAT DEFENDANT _____ [IN SOME WAY PARTICIPATED IN THE FRAUDULENT ACTS OR CONDUCT OF WHICH PLAINTIFF COMPLAINS *or* KNOWINGLY ACCEPTED THE PROCEEDS OF THE FRAUDULENT ACTS OR CONDUCT OF WHICH PLAINTIFF COMPLAINS].

Liability Based on Participation or Knowing Acceptance of Proceeds. Only those persons who in some way participate in the fraud complained of or who knowingly accept the fruits thereof can be held liable in damages therefor (*Central Mut. Ins. Co. v. Schmidt (1957) 152 Cal. App. 2d 671, 673-674, 313 P.2d 132*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the plaintiff or cross complainant either has failed to allege sufficient facts to constitute a cause of action for fraud or has failed to present evidence to establish a fraud claim. The basis of this form is that the defendant is not liable for the harm claimed by the plaintiff because the defendant is innocent of any participation in the alleged fraud and deceit and is innocent of any knowing acceptance of any of the proceeds from the alleged fraud.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised any other substantive issues that need to be addressed. For example, it may be submitted with other points and authorities supporting a demurrer or motion for summary challenging, respectively, the sufficiency of the pleading or proof.

This form should be combined, when appropriate, with the points and authorities in *§ 105.30* et seq., which challenge the sufficiency of pleading or proof with regard to other aspects or elements in a cause of action for fraud and deceit. If this form is being used to support a demurrer, it may also be combined, if appropriate, with the *forms in § 105.10* et seq., which focus on the requirement that elements of an action for fraud and deceit, particularly the deceitful act or omission, be alleged in specific rather than general terms.

This form may also be adapted for a trial or appellate brief or to support of a motion for judgment on the pleadings, a motion for nonsuit, or any other request for relief based on the plaintiff's failure to show or establish the essential elements of the action for fraud or deceit.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Any statement of fact should be supported by adequate reference to the pleading (or matters subject to judicial notice), if the form is used in a memorandum supporting a demurrer or another challenge to the sufficiency of the pleading. Similarly, any statement of fact should be supported by adequate reference to evidence admitted or otherwise cognizable by the court, if the form is used in support of a motion challenging the adequacy of proof.

For example, a memorandum supporting a motion for summary judgment may refer to affidavits or declarations based on personal knowledge or matters subject to judicial notice [*see Code Civ. Proc. §§ 2009, 2015.5* (affidavits and declarations); *Evid. Code § 450 et seq.* (judicial notice)]. For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For legal background with detailed coverage of the elements of a tort action for fraud and deceit, see California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender).

[d] Related Points and Authorities

If it appears that an agent's misrepresentations are in conflict with the limitations imposed on the agent by the terms of the written agreement between the principal and the complaining party, counsel should refer to § 105.121.

[e] Opposing Points and Authorities

In an appropriate case, this memorandum of points and authorities may be opposed by the points and *authorities in §§ 105.130*-105.135, which indicate that an innocent principal is liable for fraud because either:

- The agent is acting within the agent's actual or apparent authority [§§ 105.130-105.133],
- The agent's knowledge of concealed facts may be imputed to the principal [§ 105.134],
- The other party has failed to read contract provisions limiting the agent's authority as a result of the agent's fraud [§ 105.135], or

- The principal has ratified the fraud of the agent [§ 105.131].

In addition, this form may be opposed by the points and *authorities in §§ 105.133, 105.136,* and *105.137* based on the principles that:

- A participant who receives no benefit from a fraudulent transaction may yet be liable therefor [§§ 105.133, 105.136, and 105.137],

- An innocent recipient cannot retain property acquired through a third party's fraud [§ 105.136], or

- Acts not within the agent's authority may be grounds for rescission [§ 105.137].

[3] Discussion of Authorities

[a] Liability Based on Participation or Knowing Acceptance of Proceeds

In ***Central Mut. Ins. Co. v. Schmidt*** *(1957) 152 Cal. App. 2d 671, 313 P.2d 132* , the court of appeal reversed a judgment for the plaintiff in an action for damages for fraud in connection with the sale of real property. The individual defendant had contracted to sell land to a corporation. which had sold a portion of that land to the plaintiff. The individual defendant had retained title to the land so that existing loan arrangements would not be disturbed. The individual defendant had promised to convey individual lots as they were sold, which he had done in this case. The contract between the defendant and the corporation provided that all sales would be deemed to be made by and on behalf of the corporation and that it was entitled to all proceeds of those sales. The plaintiff charged that the lot consisted of fill, which caused subsidence of the soil and damage to the house he built on the lot, and that neither the individual defendant nor the corporation's real estate agent had informed him of the soil's nature. The defendant contended that the corporation, not he, was the vendor and that the mere fact that he executed the conveyance did not make him the vendor. The court ruled that only those persons who in some way participate in a fraud or who knowingly accept the fruits of that fraud can be held liable in damages for the fraud. The individual defendant had not personally profited from the transaction, and the cause was remanded for determination of the question as to whether or not the individual defendant participated in the fraud.

[4] Additional Authorities

[a] Liability Based on Participation or Knowing Acceptance of Proceeds

In *Thomsen v. Culver City Motor Co., Inc. (1935) 4 Cal. App. 2d 639, 41 P.2d 597* , the court of appeal reversed a judgment for the plaintiff in a case in which two officers and directors of a corporation had been held liable for damages for fraud involved in the corporation's sale of certain automobiles. The court noted that it is true that directors and officers of a corporation are liable for the corporation's torts in which they participate, but that it is equally true that they are not liable, if they do not participate in those torts and if they are guilty of no culpable negligence in allowing the commission of the wrongful acts. On a review of the evidence, the court concluded that it fell far short of showing a liability on the part of the directors, even if it were assumed that the corporation made the sales involved and received the proceeds. The case was distinguished from cases in which corporate directors were held liable on the principle that directors are presumed to know of corporate transactions. In those cases, they in fact had actual knowledge of the facts. In this case, the defendants did not have knowledge of and did not participate in any wrongful act, nor was either of them at fault in the performance of his duties as director or officer (*4 Cal. App. 2d 639, 644-645)* .

In *Montgomery v. Meyerstein (1921) 186 Cal. 459, 199 P. 800* , the Supreme Court ruled that the trial court had properly refused to enter judgment against certain innocent defendants merely because they were parties to a real estate purchase agreement. The facts clearly showed that the defendants involved had no interest in the purchase other than that they held the encumbrance on the property by virtue of a deed of trust and the obligation of the seller. The plaintiff

had requested them to sign the agreement to protect herself against the contingency that the encumbrances might not be paid out of payments made to the seller. Neither defendant had any knowledge whatever of the fraud perpetrated by the seller in procuring the agreement. They were innocent participants in the agreement and were entitled to the money due under the seller's preexisting obligation to them. Although the agreement on its face appeared to be the agreement of the seller and the other two defendants as parties of the first part, it was obvious from the facts that the other two parties had no interest in the transaction except so far as they had a lien on the property to be satisfied out of the purchase money. Thus, the Court concluded that there was no personal obligation on their part for the return of the money paid on the price or expended on the property by the plaintiff as a result of the seller's fraud. The plaintiff's only recourse, the Court observed, was against the seller alone (*186 Cal. 459, 463)* .

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10-105 California Points & Authorities § 105.121

§ 105.121 Misrepresentation by Agent Is Not Sufficiently Pleaded or Proven--Pleading or Proof Shows Mere Innocent Principal Who Is Not Bound by Agent's Representations Beyond Terms of Contract

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO _____ [STATE FACTS SUFFICIENT TO CONSTITUTE *or* ESTABLISH] A CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE THE _____ [COMPLAINT *or* ACTION] SEEKS TO IMPOSE LIABILITY ON THE PRINCIPAL FOR REPRESENTATIONS MADE BY AN AGENT BEYOND THE LIMITED AUTHORITY SET FORTH IN THE WRITTEN CONTRACT.

Agent's Representations Exceeding Contract Terms. In an action for damages for deceit, a principal is bound only by the representations embodied in a written contract if the contract notifies the other contracting party that the agent's authority goes no further (*Speck v. Wylie (1934) 1 Cal. 2d 625, 627, 36 P.2d 618* ; *Gridley v. Tilson (1927) 202 Cal. 748, 751, 262 P. 322*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the plaintiff or cross complainant either has failed to allege sufficient facts to constitute a cause of action for fraud or has failed to present evidence to establish a fraud claim. The basis of this form is that an innocent principal is not liable in damages for an agent's fraud if the agent's representations exceeded the terms of the contract with the principal and if this contract provided that the agent's authority went no further than what was expressed in the contract.

This form should be included with other points and authorities, depending on the procedural context in which the issue

is raised and on other substantive issues that may be involved [*see § 105.120[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.120[2][b]*].

[c] Opposing Points and Authorities

The points and *authorities in § 105.130* et seq. may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Agent's Representations Exceeding Contract Terms

In ***Speck v. Wylie*** *(1934) 1 Cal. 2d 625* , the Supreme Court affirmed the trial court's judgment for the plaintiffs in a suit for rescission by the purchasers of real property under an installment contract. The purchase was induced by material misrepresentations fraudulently made by the sellers' agent. The contract between the seller and the buyer contained an exculpatory clause to the effect that the contract contained all matters agreed on by the parties, that no agent had authority to alter its terms, that the parties were not bound by representations not in conformity with the contract, that the property was purchased based on the buyer's inspection of the property and not as a result of representations by the sellers' agent, and that the buyer waived all claims for damages or for cancellation of the contract by reason of any selling agent's representation other than as contained in the contract. The Court reiterated the rule that a principal is bound only by the representations embodied in the written contract if a provision in the contract notified the prospective purchaser that the agent's authority went no further. However, although an action for deceit would not be allowed, the principal, although innocent, should not be allowed to retain a consideration with which the purchaser has parted by reason of fraud, if the defrauded party rescinds promptly and the parties can be restored without substantial injury to their former status (*1 Cal. 2d 625, 627*).

In ***Gridley v. Tilson*** *(1927) 202 Cal. 748, 262 P. 322* , an action, on behalf of the issuer of shares pursuant to a subscription agreement, on a promissory note given by the defendant for the purchase of the shares involved, the Supreme Court ruled that the trial court should not have received evidence concerning certain false statements and representations made to the defendant by the plaintiff's agents because the subscription contract limited the authority of the agents to make such representations. The defendant's answer alleged that the notes were given in reliance on certain false and fraudulent statements and representations made by the plaintiff's agents in connection with the subscription. The subscription contract included a copy of the securities sales permit issued by the Commissioner of Corporations. That document included authority to sell the shares for $1, but the agent had represented that the stock would subsequently be sold for $1.50 per share. The Court noted that although the statute [*Civ. Code § 1625*] provides that a written contract supersedes all negotiations and stipulations concerning the matter between the parties, fraud in the inducement of a contract may be shown. However, a well-settled exception is the case in which the party seeking to rely on fraudulent representations of an agent had notice of the limitation on the agent's authority to make representations. Therefore, concluded the Court, a principal is bound only by the representations embodied in the written contract if a provision in the contract notified the prospective purchaser that the agent's authority went no further (*202 Cal. 748, 751)* .

[4] Additional Authorities

[a] Agent's Representations Exceeding Contract Terms

In *Weiner v. Roof (1937) 10 Cal. 2d 450* , the Supreme Court reversed a judgment for damages, but affirmed a judgment for rescission against the defendant, a bank, in a case in which a developer had acted as the sales agent for

land whose title the defendant held as trustee. The plaintiff and the developer had entered into a contract with the trustee under which a lot was sold to the plaintiff. On discovering the falsity of certain representations the developer made prior to and at the time of the contract's execution, the plaintiff rescinded. The trial court entered judgment decreeing rescission and awarding damages from both the developer and the defendant. However, the Supreme Court stated that an innocent principal is bound only by the representations embodied in a written contract, if that contract provides that the agent's authority goes no further. Innocent principals that contract in this way thus may relieve themselves of liability in deceit for the fraud of their agents. The Court added, however, that innocent principals are nevertheless subject to rescission on the part of the defrauded party on the theory that innocent principals so contracting may not be permitted to enrich themselves by reason of their agents' fraud and that any property received by those principals is held by them as constructive trustees for the person defrauded (*10 Cal. 2d 450, 452-453*).

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10-105 California Points & Authorities § 105.122

§ 105.122 Misrepresentation by Agent Is Not Sufficiently Pleaded or Proven--Pleading or Proof Shows No Liability for Conspiracy to Commit Constructive Fraud Because of Absence of Fiduciary Relationship

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO _____ [STATE FACTS SUFFICIENT TO CONSTITUTE *or* ESTABLISH] A CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE A PARTY WHO IS NOT IN A FIDUCIARY RELATIONSHIP WITH THE PLAINTIFF CANNOT BE HELD LIABLE FOR CONSPIRACY TO COMMIT CONSTRUCTIVE FRAUD.

No Liability Based on Conspiracy for Constructive Fraud. A party who is not in a fiduciary relationship with the plaintiff cannot be held liable for conspiracy to commit constructive, as opposed to actual, fraud (*Kidron v. Movie Acquisition Corp. (1995) 40 Cal. App. 4th 1571, 1598, 47 Cal. Rptr. 2d 752*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the plaintiff or cross complainant either has failed to allege sufficient facts to constitute a cause of action for fraud or has failed to present evidence to establish a fraud claim. The basis of this form is that a party who is not in a fiduciary relationship with the plaintiff cannot be held liable for conspiracy to commit constructive fraud.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.120[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.120[2][b]*].

[c] Opposing Points and Authorities

The points and *authorities in § 105.130* et seq. may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] No Liability Based on Conspiracy for Constructive Fraud

Kidron v. Movie Acquisition Corp. *(1995) 40 Cal. App. 4th 1571, 1598, 47 Cal. Rptr. 2d 752* stemmed from a dispute between partners in a joint venture to produce a failed television series. The plaintiff, the originator of the concept, sued his producers and a distributor for conspiracy to commit fraud in removing the plaintiff from the venture. The plaintiff contended that the distributor had either breached a direct fiduciary duty or had conspired with the producers to breach a duty owed to the plaintiff by the producers. At the conclusion of the plaintiff's case, the trial court granted a motion by the distributor for nonsuit, dismissing the distributor.

The court of appeal affirmed, noting initially that the plaintiff had been unable to produce evidence of a direct breach of fiduciary duty by the distributor. There was no evidence that the distributor had intended to agree to defraud or had intended to defraud the plaintiff. As for the claim of conspiracy to breach a duty owed to the plaintiff by the producers, the court ruled that a person who is not a fiduciary cannot conspire to breach a duty owed only by a fiduciary. The court stated that both a fiduciary and a person who is not a fiduciary owe a duty not to engage in actual fraud, but only a fiduciary owes a duty not to engage in constructive fraud (*40 Cal. App. 4th 1571, 1597)* . Because the plaintiff did not suggest that the distributor owed him a fiduciary duty, the distributor could not be subject to liability for conspiracy to commit constructive fraud (*40 Cal. App. 4th 1571, 1598)* .

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[Reserved]

§§ 105.123[Reserved]

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10-105 California Points & Authorities § 105.130

§ 105.130 Misrepresentation by Agent Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Principal's Liability for Agent's Fraud

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF _____ [SHOULD PREVAIL ON THE *or* HAS STATED FACTS SUFFICIENT TO CONSTITUTE A] CAUSE OF ACTION FOR FRAUD AND DECEIT, EVEN IF DEFENDANT, AS PRINCIPAL, IS INNOCENT OF PERSONAL PARTICIPATION IN THE FRAUD, BECAUSE DEFENDANT IS JOINTLY LIABLE WITH DEFENDANT'S AGENT FOR DAMAGES INCURRED BY THE AGENT'S PROCUREMENT OF THE TRANSACTION BY MEANS OF FRAUD WHILE THE AGENT WAS ACTING WITHIN THE AGENT'S ACTUAL OR APPARENT AUTHORITY.

Principal Liable for Fraud of Agent in Agency Business. A principal is responsible to third persons for the negligence of the principal's agent in the transaction of the business of the agency, including wrongful acts committed by the agent in and as a part of the transaction of that business, and for the agent's willful omission to fulfill the obligations of the principal, unless the principal is required or authorized by law to employ that agent (*Civ. Code § 2338*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff or cross complainant has failed to establish a cause of action for fraud or deceit. The basis of this form is that the defendant or cross defendant, albeit an innocent principal [*see § 105.120 et seq.*] was jointly liable with the defendant's or cross defendant's agent, who was acting within the scope of his or her actual or apparent authority or in the course of the business of the agency

when the agent procured a transaction by means of fraud.

This form may be used to oppose the points and authorities in *§ 105.120 et seq*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue--for example, by response to a demurrer or by opposition to a summary judgment motion. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Any statement of fact should be supported by adequate reference to the pleading (or matters subject to judicial notice), if the form is used in a memorandum opposing a demurrer or other challenge to the sufficiency of the pleading. Similarly, any statement of fact should be supported by adequate reference to evidence admitted or otherwise cognizable by the court, if the form is used to oppose a motion challenging the adequacy of proof.

For example, a memorandum opposing a motion for summary judgment may refer to affidavits or declarations based on personal knowledge or matters subject to judicial notice [*see Code Civ. Proc. §§ 2009, 2015.5* (affidavits and declarations); *Evid. Code § 450 et seq.* (judicial notice)]. For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For legal background with detailed coverage of the elements of a tort action for fraud and deceit, see California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender).

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For additional points and authorities relating to demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Principal Liable for Fraud of Agent in Agency Business

Civ. Code § 2338 provides that unless a principal is required by law to employ a particular agent, a principal is responsible to third persons for the negligence of the principal's agent in the transaction of agency business, including wrongful acts committed by the agent in and as a part of the transaction of agency business, and for the agent's willful omission to fulfill the principal's obligation.

[4] Additional Authorities

[a] Principal Liable for Fraud of Agent in Agency Business

In *Seymour v. Summa Vista Cinema, Inc. (9th Cir. 1987) 809 F.2d 1385* , the Ninth Circuit Court of Appeals affirmed an award of compensatory and punitive damages against a stock brokerage firm whose employee had defrauded clients.

The court (citing *Alhino v. Starr (1980) 112 Cal. App. 3d 158, 174, 169 Cal. Rptr. 136*) said that the brokerage firm was liable for the employee's fraud in inducing securities purchases under federal law, for failure to provide reasonable supervision and training, and under California law, for acts of its agent performed within the scope of the agent's authority (*809 F.2d 1385, 1388)* .

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10-105 California Points & Authorities § 105.131

§ 105.131 Misrepresentation by Agent Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Innocent Principal Accepted Benefits

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief*].

PLAINTIFF _____ [SHOULD PREVAIL ON THE *or* HAS STATED FACTS SUFFICIENT TO CONSTITUTE A] CAUSE OF ACTION FOR FRAUD AND DECEIT, EVEN IF DEFENDANT, AS PRINCIPAL, IS INNOCENT OF PERSONAL PARTICIPATION IN THE FRAUD, BECAUSE DEFENDANT ACCEPTED AND RETAINED THE BENEFITS THAT ACCRUED FROM THE TRANSACTION, WHICH WAS PROCURED BY MEANS OF THE FRAUD OF DEFENDANT'S AGENT.

Innocent Principal Who Accepts Benefits. If an agent acting within the agent's actual or apparent authority procures a transaction by means of fraud, the principal is jointly liable with the agent for damages incurred thereby, even though the principal is innocent of personally participating in the fraud, if the principal accepts and retains the benefits that accrue from the transaction (*Crawford v. Nastos (1960) 182 Cal. App. 2d 659, 667, 6 Cal. Rptr. 425*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff or cross complainant has failed to establish a cause of action for fraud or deceit. The basis of this form is that the defendant accepted and retained the benefits that accrued from the transaction, which was procured by means of the fraud of the defendant's agent.

This form may be used to oppose the points and authorities in *§ 105.120* et seq.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.130[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, in the case of opposition to a motion for summary judgment or summary adjudication, counsel would refer to facts in declarations or deposition transcripts establishing that there is no triable issue of material fact regarding whether all of the elements of that cause of action are satisfied or whether the plaintiff is in the class of persons entitled to recover [*see § 105.130[2][b]*].

[3] Discussion of Authorities

[a] Innocent Principal Who Accepts Benefits

In ***Crawford v. Nastos*** *(1960) 182 Cal. App. 2d 659* , the court of appeal reversed a judgment in favor of an innocent principal in an action for fraud arising out of the sale of real property through an agent. The agent, a real estate broker, told the plaintiff, the purchaser of the property, that the property contained an adequate water supply, which was a misrepresentation. The plaintiff sued the seller, her two sons, and the broker. As to the two sons, the court of appeal agreed with the trial court that there could be no liability because neither participated in the fraud and neither profited from the transaction. However, the seller had authorized and directed the agent to sell the property, ratified the sale, executed the deed, accepted the purchase price, and retained the fruits of the sale. Accordingly, the court held that the trial court had ignored the legal basis of the seller's liability, namely, that if an agent acting within the agent's actual or apparent authority procures a sale of property by means of fraud and if the principal accepts and retains the benefits that accrue from the sale, the principal is jointly liable with the agent for damages incurred due to the fraud, even though the principal is innocent of personally participating in the fraud (*182 Cal. App. 2d 659, 667*).

[4] Additional Authorities

[a] Innocent Principal Who Accepts Benefits

In *Ach v. Finkelstein (1968) 264 Cal. App. 2d 667, 70 Cal. Rptr. 472* , the court of appeal affirmed a trial court's judgment for the plaintiffs for fraud in an apartment house sale. Four parties owned the property, one of whom was unaware of the fraud involved and two of whom acted as the agents of the others in effecting the transaction. The fraud consisted of a failure to disclose to the buyers that rental concessions had been given to the tenants. In upholding judgment against all four defendants, the court ruled that if an agent acting within the agent's actual or apparent authority fraudulently procures a sale of property and if the principal accepts and retains the benefits that accrue from the transaction, the principal is jointly liable with the agent for damages incurred due to the fraud, even though the principal is innocent of personally participating in the fraud (*264 Cal. App. 2d 667, 677)* .

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10-105 California Points & Authorities § 105.132

§ 105.132 Misrepresentation by Agent Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Innocent Joint Venturers Retained Benefits

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF _____ [SHOULD PREVAIL ON THE *or* HAS STATED FACTS SUFFICIENT TO CONSTITUTE A] CAUSE OF ACTION FOR FRAUD AND DECEIT, EVEN IF DEFENDANT JOINT VENTURER IS INNOCENT OF PERSONAL PARTICIPATION IN THE FRAUD, BECAUSE DEFENDANT ACCEPTED AND RETAINED THE BENEFITS THAT ACCRUED FROM THE TRANSACTION PROCURED BY MEANS OF THE FRAUD OF ANOTHER JOINT VENTURER, WHO WAS ACTING WITHIN THE SCOPE OF THE JOINT VENTURE AND IN FURTHERANCE OF ITS AGREED PURPOSES.

Innocent Joint Venturer. If one joint venturer, acting within the scope of the joint venture and in furtherance of its agreed purposes, is guilty of fraud in procuring benefits that the joint venturers retain, all joint venturers are liable for the fraud (*Grant v. Weatherholt (1954) 123 Cal. App. 2d 34, 45, 266 P.2d 185*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff or cross complainant has failed to establish a cause of action for fraud or deceit. The basis of this form is that the defendant was a joint venturer who accepted and retained the benefits that accrued from a transaction procured by means of another joint venturer's fraud.

This form may be used to oppose the points and authorities in *§ 105.120 et seq*.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.130[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.130[2][b]*].

[3] Discussion of Authorities

[a] Innocent Joint Venturer

In ***Grant v. Weatherholt*** *(1954) 123 Cal. App. 2d 34, 266 P.2d 185* , the court of appeal ruled that if one joint venturer, acting within the scope of the joint venture and in furtherance of its agreed purposes, is guilty of fraud in procuring benefits that the joint venturers retain, all joint venturers are liable for the fraud. In this case, one of two joint venturers had purchased certain real property, encumbering it with a recorded trust deed. The two then formed a corporation and issued stock to themselves and their wives. The owner of the property then sought and obtained a loan from the plaintiff for the purpose of developing the property, representing that the property was free of encumbrance. The joint venturers later ran out of money, and the owner of the trust deed, the wife of the owner of the property, foreclosed. The court noted that the representations to the plaintiff that the property was unencumbered were made during the existence of the joint venture and in the interest and scope of the joint venture. The property that was exchanged for stock in the corporation was improved through the use of money the plaintiff advanced, and the joint venturers both received and retained benefits that came to them as joint venturers and stockholders through the improvement of the property at the plaintiff's expense. Under these circumstances, the fraud of one partner imposes liability on his copartners. Although the distinctions between the two types of entities (partnerships versus joint ventures) are distinctions of substance, the court held that insofar as the relations of joint venturers as between themselves and as to third parties are identical with those of partners, settled principles applicable to partnerships should control (*123 Cal. App. 2d 34, 45)* .

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10-105 California Points & Authorities § 105.133

§ 105.133 Misrepresentation by Agent Is Sufficiently Pleaded or Proven--Pleading or Proof Need Not Show Benefit to Person Charged With Fraud

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF _____ [SHOULD PREVAIL ON THE *or* HAS STATED FACTS SUFFICIENT TO CONSTITUTE A] CAUSE OF ACTION FOR FRAUD AND DECEIT, EVEN IF DEFENDANT DID NOT BENEFIT FROM THE FRAUD, BECAUSE LIABILITY FOR FRAUD IS PREDICATED ON THE FACT THAT PLAINTIFF HAS BEEN MISLED TO PLAINTIFF'S PREJUDICE, NOT THAT DEFENDANT HAS PROFITED BY DEFENDANT'S WRONG.

Liability Not Predicated on Profit. Liability for fraud is predicated on the fact that the plaintiff has been misled to plaintiff's prejudice, not that the defendant has profited by defendant's wrong. It is not essential to liability that the person charged with fraud should have received any benefit from the fraud (*Taormina v. Antelope Mining Corp. (1952) 110 Cal. App. 2d 314, 320, 242 P.2d 665* ; Swasey v. de *L'Etanche (1936) 17 Cal. App. 2d 713, 718, 62 P.2d 753*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff or cross complainant has failed to establish a cause of action for fraud or deceit. The basis of this form is that it is not essential to liability that the person charged with fraud should have received any benefit therefrom.

This form may be used to oppose the points and authorities in *§ 105.120 et seq*.

This form should be included with other points and authorities depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see 105.130[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.130[2][b]*].

[3] Discussion of Authorities

[a] Liability Not Predicated on Profit

In ***Taormina v. Antelope Mining Corp.*** *(1952) 110 Cal. App. 2d 314, 242 P.2d 665* , the court of appeal affirmed a judgment against a corporation and two of its directors in an action for damages for fraud in connection with the sale of capital stock of the corporation. The complaint alleged that the corporation had been granted a permit to issue capital stock with the proviso that the certificates be held in escrow and not issued without the consent of the Commissioner of Corporations. It further alleged that the plaintiffs and the defendants entered into an agreement for the purchase and sale of a portion of that stock, the Commissioner had not consented to the sale, and the defendants had defrauded the plaintiffs by falsely representing that they had authority to issue stock. The court noted that a person who sells a security impliedly represents that a permit for the sale has been secured, because the law requires one for such a sale. If this implied representation is false, then it is a negligent misrepresentation that is an actionable fraud. If, as in this case, the action is for damages for fraud, the plaintiff may recover against all persons participating in the fraud, whether or not they received a portion of the money (*110 Cal. App. 2d 314, 320)* .

In ***Swasey v. de L'Etanche*** *(1936) 17 Cal. App. 2d 713* , the court of appeal affirmed a judgment by the trial court for the defendants after it sustained a general and special demurrer to the complaint without leave to amend, holding that although a special demurrer to the allegation concerning the liability of the two the defendants did not lie, the special demurrer was good in one particular and, accordingly, the order sustaining it was not reversible. The complaint alleged that one defendant, acting for himself and as agent for his wife, also a defendant, made fraudulent representations as to the property sold to the plaintiffs. It also alleged that the property was the defendant's community property. The defendant demurred for uncertainty, in that it could not be ascertained if the wife was one of the owners. The court of appeal concluded that although the additional facts sought by the demurrer would more accurately have defined the wife's interest, the absence of those facts did not create any uncertainty and that a demurrer for uncertainty will not lie as to immaterial matter. To establish materiality, the defendants argued that the amount of damages that could be awarded against the wife would vary according to whether or not she was an owner of the property. However, said the court, each defendant connected with a fraud is liable for the full amount of the damages. It is not essential to liability that the person charged with fraud should have received any benefit from the fraud. It is also not essential, if the misrepresentations concern property, that the person charged with fraud be the owner of the property. Liability is predicated on the fact that the plaintiff has been misled to the plaintiff's prejudice and not that the defendant has profited by the defendant's wrong (*17 Cal. App. 2d 713, 718*).

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10-105 California Points & Authorities § 105.134

§ 105.134 Misrepresentation by Agent Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Agent Concealed Known Facts

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF _____ [SHOULD PREVAIL ON THE *or* HAS STATED FACTS SUFFICIENT TO CONSTITUTE A] CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE DEFENDANT AS A PRINCIPAL IS CHARGED WITH THE KNOWLEDGE OF FACTS KNOWN BY DEFENDANT'S AGENT WHILE THE AGENT WAS ACTING WITHIN THE SCOPE OF THE AGENT'S AUTHORITY, AND THE DEFENDANT'S FAILURE TO DISCLOSE THE FACTS CONCEALED BY THE AGENT CONSTITUTES FRAUD ON THE PART OF THE DEFENDANT.

Imputation of Agent's Knowledge of Concealed Facts. The knowledge of an agent, which the agent is under a duty to disclose to the agent's principal, is imputed to the principal so that the principal is charged with the agent's knowledge. Under these circumstances, the principal has a duty to reveal the hidden and material facts concealed by the agent and of which the principal has knowledge, and the principal's failure to disclose them constitutes fraud (*Herzog v. Capital Co. (1945) 27 Cal. 2d 349, 353, 164 P.2d 8*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff or cross complainant has failed to establish a cause of action for fraud or deceit. The basis of this form is that a principle is liable for fraud on the ground that a principal is charged with the knowledge of facts known by his or her agent, who is acting within the scope of his or her authority, and the principal fails to disclose such facts when they are concealed by the agent.

This form may be used to oppose the points and authorities in *§ 105.120 et seq*.

This form should be included with other points and authorities depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see 105.130[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.130[2][b]*].

[3] Discussion of Authorities

[a] Imputation of Agent's Knowledge

In ***Herzog v. Capital Co.*** *(1945) 27 Cal. 2d 349* , the Supreme Court affirmed judgment for the plaintiff in an action against the sellers of a house for damages for fraud perpetrated by their agent in the sale, holding that the acts of the agent were imputed to the sellers. The defendants, acting through their agent, sold the plaintiff a house, representing that it was in sound condition and perfectly intact. When the house began to leak during rainstorms, the plaintiff sued for damages, alleging in his complaint that when he inspected the house he found that it had been freshly painted, which concealed the defective condition. It was clear that the agent had prior knowledge of the defects and that he had made the representations either with actual knowledge of their falsity or in a manner not warranted by the information he possessed. The Court noted that the sales agreement provided that there were no promises or representations other than those contained in it and that this type of provision ordinarily relieves an honest seller from liability for damages arising from the fraud of the seller's agent. However, it held that this rule does not exempt the principal from liability for the principal's own conduct. In this case, although the contract notified the plaintiff that the agent had no authority to make representations, the agent knew of the defects and was acting within the scope of his authority when he caused the house to be painted, thereby concealing the defects. The knowledge of an agent, which the agent is under a duty to disclose to the agent's principal, is imputed to the principal, and, accordingly, the defendants were charged with the agent's knowledge. Under these circumstances, the Court held, the defendants, as principals, had a duty to reveal the hidden and material facts concealed by their agent and known to them, and their failure to disclose them constituted fraud. As to this positive duty of disclosure, the plaintiff could rely on the agent's actual and ostensible authority; the exculpatory provision in the contract related only to the exclusion of liability for representations and verbal understandings. A principal under a positive duty to make a disclosure cannot escape liability for failure to do so by relying on this type of contract provision (*27 Cal. 2d 349, 353*).

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10-105 California Points & Authorities § 105.135

§ 105.135 Misrepresentation by Agent Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Agent's Fraud Resulted in Plaintiff's Failure to Read Contract Containing Exculpatory Clause

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF _____ [SHOULD PREVAIL ON THE *or* HAS STATED FACTS SUFFICIENT TO CONSTITUTE A] CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE EXCULPATORY PROVISIONS LIMITING AN AGENT'S AUTHORITY AS TO REPRESENTATIONS OTHER THAN THOSE SET FORTH IN THE AGREEMENT DO NOT RELIEVE THE PRINCIPAL OF LIABILITY FOR THE AGENT'S FRAUD IF THE OTHER PARTY FAILS TO READ THE AGREEMENT AS A RESULT OF THE PRINCIPAL'S OR THE AGENT'S FRAUD OR TRICKERY.

Failure to Read Exculpatory Clause. The rule that a principal cannot be bound except by representations contained in a contract providing that the agent has no authority to make any other or different representations does not apply if the other party's failure to read the contract is the result of the fraud or trickery of the principal or the agent (*Humphrey v. Harry H. Culver & Co. (1934) 220 Cal. 765, 766, 32 P.2d 630*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff or cross complainant has failed to establish a cause of action for fraud or deceit. The basis of this form is that an innocent principal is bound only by the terms of the contract if the agent's representations exceed the contract terms [*see § 105.121*], unless the complaining party's failure to read the agreement results from the principal's or the agent's fraud or trickery.

This form may be used to oppose the points and authorities in § 105.90 et seq.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.130[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.130[2][b]*].

[3] Discussion of Authorities

[a] Failure to Read Exculpatory Clause

In ***Humphrey v. Harry H Culver & Co.*** *(1934) 220 Cal. 765* , the Supreme Court affirmed a judgment for the plaintiff in an action for fraud based on alleged fraudulent representations in connection with the sale of real property. The trial court found that the defendant's agent had made false and fraudulent representations to the plaintiff. The complaint alleged, and the trial court found, that when the plaintiff signed the sales agreement, the agent would not allow the plaintiff to read the agreement. Instead, the agent falsely and fraudulently represented to the plaintiff that each clause in the agreement was favorable to the plaintiff. The agreement provided that the principals would not be bound except by the written representations and provisions contained in the agreement and that the agent had no authority to make any other or different representations. The Court held that the rule that a principal cannot be bound except by representations contained in a contract that includes this type of exculpatory provision does not apply if the other party's failure to read the contract is the result of the fraud or trickery of the principal or the agent (*220 Cal. 765, 766*).

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10-105 California Points & Authorities § 105.136

§ 105.136 Misrepresentation by Agent Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Plaintiff Is Entitled to Rescission for Fraudulent Act of Agent

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF _____ [SHOULD PREVAIL ON THE *or* HAS STATED FACTS SUFFICIENT TO CONSTITUTE A] CAUSE OF ACTION FOR RESCISSION OF THE CONTRACT BASED ON FRAUD AND DECEIT BECAUSE A DONEE CANNOT RETAIN AN ADVANTAGE OBTAINED FROM ANOTHER AS THE RESULT OF A THIRD PARTY'S FRAUD, EVEN IF THE DONEE NEITHER KNEW NOR HAD REASON TO KNOW OF THE FRAUD.

A. Rescission of Contract. A party to a contract may rescind the contract if the consent of the party rescinding, or of any other party jointly contracting with that party, was obtained through fraud exercised by or with the connivance of the party as to whom he/she/it rescinds, or of any other party to the contract jointly interested with that party (*Civ. Code § 1689(b)(1)*).

B. Retaining Benefits of Fraud. A donee cannot conscientiously retain an advantage obtained from another because of a third person's misconduct, even if the donee neither knew nor had reason to know if the misconduct (*Nunes v. De Faria (1951) 107 Cal. App. 2d 794, 798, 238 P.2d 106*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff or cross complainant has failed to establish a cause of action for fraud or deceit. The basis of this form is that one who obtains property as a result

of a third party's fraud cannot retain it, even if he or she neither knew nor had reason to know of it.

This form may be used to oppose the points and authorities in § 105.90 et seq.

This form should be included with other points and authorities depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.130[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.130[2][b]*].

[3] Discussion of Authorities

[a] Retaining Benefits of Fraud

In ***Nunes v. De Faria*** *(1951) 107 Cal. App. 2d 794, 238 P.2d 106* , the court of appeal affirmed judgment for the plaintiff in an action to quiet title to real property and cancel a joint tenancy deed even as to the joint tenant who had not participated in the fraud. The plaintiff was persuaded to deed certain real property to the three defendants after one of the defendants falsely represented that doing so would not interfere with the plaintiff's right to sell the property. One of the other defendants contended that the misrepresentation was not binding on her. However, the court noted that as between the original parties to a transaction induced by the fraud or material representations of a third person, the injured party has power of avoidance, unless the other party is not only ignorant of the fraud or misrepresentation when entering into the transaction, but has either parted with value or has changed position materially in reliance on the transaction. A donee cannot conscientiously retain an advantage obtained from another because of a third person's conduct, even if the donee neither knew nor had reason to know of it. Accordingly, the court concluded that the misrepresentation was binding on the nonparticipating defendant (*107 Cal. App. 2d 794, 798)* .

[4] Additional Authorities

[a] Retaining Benefits of Fraud

In *Deasy v. Taylor (1918) 39 Cal. App. 235, 178 P. 538* , the court of appeal affirmed a judgment voiding certain agreements and transfers the plaintiff executed in favor of the defendants. Two of the defendants had procured the plaintiff's signature to the documents through fraud. On appeal, the other defendants contended that the defendants who had exercised the fraud had not acted as their agents, that they had not confederated or conspired with them, and therefore that the plaintiff was not entitled to rescission against them. However, under *Civ. Code § 1689*, rescission may be had if the rescinding party gave consent because of the fraud exercised by the party as to whom he or she rescinds or by any other party jointly interested in the contract (*39 Cal. App. 235, 239-240)* .

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10-105 California Points & Authorities § 105.137

§ 105.137 Misrepresentation by Agent Is Sufficiently Pleaded or Proven-- Pleading or Proof Shows Plaintiff Is Entitled to Rescission for Fraud on Agent Despite Exculpatory Clause in Contract

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF _____ [SHOULD PREVAIL ON THE *or* HAS STATED FACTS SUFFICIENT TO CONSTITUTE A] CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE A CONTRACT OBTAINED BY AN AGENT THROUGH FRAUDULENT MISREPRESENTATION OF FACTS MAY BE RESCINDED BY THE OTHER PARTY EVEN THOUGH IT PROVIDES THAT IT WILL NOT BE AFFECTED BY REPRESENTATIONS NOT CONTAINED THEREIN.

Representations as Grounds for Rescission. A contract obtained by an agent through fraudulent misrepresentation of facts may be rescinded by the other party even though it provides that it will not be affected by representations not contained in the contract, if rescission is prompt and the parties can be restored without substantial injury to their former status (*Speck v. Wylie (1937) 1 Cal. 2d 625, 628, 36 P.2d 618*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff or cross complainant has failed to establish a cause of action for fraud or deceit. The basis of this form is that even though the contract on which the suit is based contains exculpatory language to the effect that it will not be affected by representations not contained in the contract, the plaintiff or cross complainant is entitled to bring suit for rescission, if the contract was obtained by an agent through fraud, the rescission is prompt, and the parties can be restored to their pre-contract status without substantial injury.

This form may be used to oppose the points and authorities in *§ 105.120 et seq*.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.130[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.130[2][b]*].

[3] Discussion of Authorities

[a] Representations as Grounds for Rescission

Speck v. Wylie *(1934) 1 Cal. 2d 625, 36 P.2d 618* , is discussed in *§ 105.121[3][a]*.

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10-105 California Points & Authorities §§ 105.138-105.149

[Reserved]

§§ 105.138[Reserved]

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10-105 California Points & Authorities § 105.150

§ 105.150 Misrepresentation by Employer in Employment Termination Is Not Sufficiently Pleaded or Proven--Employer's Misrepresentation Aimed at Employment Termination Is Not Actionable in Tort

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE THE COMPLAINT DISCLOSES THAT THE BASIS OF THE ACTION IS AN ALLEGED MISREPRESENTATION AIMED AT TERMINATING PLAINTIFF'S EMPLOYMENT, WHICH IS NOT ACTIONABLE IN TORT.

No Fraud Claim From Misrepresentation Aimed at Employment Termination. Although termination of employment may be actionable if it breaches a contract or violates fundamental public policy, no independent tort cause of action for fraud can arise from an employer's misrepresentation aimed at terminating an employee's employment (*Hunter v. Up-Right, Inc. (1993) 6 Cal. 4th 1174, 1178, 1184-1185, 26 Cal. Rptr. 2d 8, 864 P.2d 88*); *but see Lazar v. Superior Court (1996) 12 Cal. 4th 631, 49 Cal. Rptr. 2d 377, 909 P.2d 981*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the plaintiff or cross complainant either has failed to allege sufficient facts to constitute a cause of action for fraud or has failed to present evidence to establish a fraud claim. The basis of this form is that the pleadings allege, or the evidence establishes, that the alleged misrepresentation was aimed at terminating the plaintiff's employment, which is not actionable in tort.

This form should be included with other points and authorities, depending on the procedural context in which the issue

is raised any other substantive issues that need to be addressed. For example, it may be submitted with other points and authorities supporting a demurrer or motion for summary challenging, respectively, the sufficiency of the pleading or the proof.

This form should be combined, when appropriate, with the points and authorities in *§ 105.30* et seq., which challenge the sufficiency of pleading or proof with regard to other aspects or elements in a cause of action for fraud and deceit. If this form is being used to support a demurrer, it may also be combined, if appropriate, with the forms in *§ 105.10* et seq., which focus on the requirement that elements of an action for fraud and deceit, particularly the deceitful act or omission, be alleged in specific rather than general terms.

This form may also be adapted for a trial or appellate brief, or to support of a motion for judgment on the pleadings, a motion for nonsuit, or any other request for relief based on the plaintiff's failure to show or establish the essential elements of the action for fraud or deceit.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should show how the facts alleged in the complaint indicate that any alleged misrepresentation was made as part of the process of terminating the plaintiff's employment and is therefore not separately actionable from the termination itself.

Any statement of fact should be supported by adequate reference to the pleading (or matters subject to judicial notice), if the form is used in a memorandum supporting a demurrer or another challenge to the sufficiency of the pleading. Similarly, any statement of fact should be supported by adequate reference to evidence admitted or otherwise cognizable by the court, if the form is used in support of a motion challenging the adequacy of proof.

For example, a memorandum supporting a motion for summary judgment may refer to affidavits or declarations based on personal knowledge or matters subject to judicial notice [*see Code Civ. Proc. §§ 2009, 2015.5* (affidavits and declarations); *Evid. Code § 450 et seq.* (judicial notice)]. For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For legal background with detailed coverage of the elements of a tort action for fraud and deceit, see California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender)

[d] Related Points and Authorities

For other points and authorities pertaining to actions for wrongful termination of employment, see Ch. 100, *Employer and Employee: Wrongful Termination and Dicipline* , Ch. 100, *Employer and Employee: Respondeat Superior* , and Ch. 239, *Workers' Compensation Exclusive Remedy Doctrine* , *Employer and Employee*.

[3] Discussion of Authorities

[a] No Fraud Claim From Misrepresentation Aimed at Employment Termination

The plaintiff in ***Hunter v. Up-Right, Inc.*** *(1993) 6 Cal. 4th 1174, 26 Cal. Rptr. 2d 8, 864 P.2d 88* , brought an action for wrongful termination against his employer, alleging breach of contract and various tort causes of action, including fraud. At trial, there was a conflict in the evidence regarding the circumstances surrounding the plaintiff's termination, but the plaintiff testified that his supervisor had told him in a meeting that the company had decided to eliminate his position and that he would be terminated if he did not resign. The plaintiff asked for work in a lesser position within the

company, but his supervisor refused to offer him any such position. The plaintiff therefore resigned. The supervisor's testimony related different details regarding the plaintiff's termination, but the supervisor conceded that no corporate decision had been made to eliminate the plaintiff's position. The jury returned a verdict of $120,000 for the plaintiff, of which $38,013 represented damages for breach of contract, and the remainder represented damages for fraudulent misrepresentation. The trial court entered judgment for $120,000, and the court of appeal affirmed.

On review, the Supreme Court reversed the judgment and ordered it reduced to $38.013, the amount of the contractual damages. The Court held that wrongful termination of employment ordinarily does not give rise to a cause of action for fraud or deceit, even if some misrepresentation is made in the course of the employee's dismissal (*6 Cal. 4th 1174, 1178)* . The Court relied in part on its previous decision in *Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 696, 699, 254 Cal. Rptr. 211, 765 P.2d 373* , in which the Court had held that breach of the implied covenant of good faith and fair dealing in an employment contract gives rise to contract damages only and not tort damages. The Court noted that underlying the *Foley* decision was concern about how extending tort recovery would affect economic policy and stability, the traditional separation of tort and contract law, and the existence of other protections against improper termination of employment (*6 Cal. 4th 1174, 1181-1182)* . The Court observed that the misrepresentation alleged in this case transformed what would have been a resignation into a constructive termination. The employer simply employed a falsehood to accomplish indirectly what it could have accomplished directly--termination of the plaintiff's employment (*6 Cal. 4th 1174, 1184)* . The Court concluded that such misrepresentations cannot serve as a predicate for tort damages that would otherwise be unavailable under *Foley*. The Court stated that recognition of a fraud cause of action in the context of wrongful termination of employment not only would contravene the logic of *Foley*, but would also cause adverse consequences for industry in general. The Court reasoned that fraud is easily pleaded and that, if such a cause of action were permitted, it would likely be pleaded in most wrongful termination complaints. These claims are difficult to resolve at the summary judgment or demurrer stage of litigation, and the resultant costs and inhibition of employment decision-making were precisely the sort of consequences that had supported the Court's decision in *Foley* (*6 Cal. 4th 1174, 1185)* .

The Court noted that if the termination itself is wrongful, either because it breaches the employment contract or violates a well-established public policy articulated in a statute or constitutional provision, then the employee is entitled to recover damages sounding in contract or tort, respectively. However, the Court held that no independent fraud claim arises from a misrepresentation aimed at termination of employment (*6 Cal. 4th 1174, 1185)* .

The Court noted in dicta, however, that a misrepresentation not aimed at effecting termination of employment, but instead designed to induce the employee to alter his or her position detrimentally in some other respect, might be the basis for a valid fraud claim. The Court cited as an example the case of *Miller v. Fairchild Indus., Inc. (9th Cir. 1989) 885 F.2d 498, 509-510* , in which the plaintiffs signed settlement agreements giving up their right to sue under federal employment discrimination laws in return for the employer's promise to provide training opportunities. Shortly after the settlement, the plaintiffs were laid off and did not receive the promised training. The Court suggested that this sort of conduct might constitute actionable fraud because the allegedly fraudulent settlement agreement was collateral to the defendant's termination of the employment contract itself (*6 Cal. 4th 1174, 1185-1186)* .

Lazar v. Superior Court *(1996) 12 Cal. 4th 631, 49 Cal. Rptr. 2d 377, 909 P.2d 981* , which is discussed in Ch. 100, *Employer and Employee: Wrongful Termination and Dicipline* , Ch. 100, *Employer and Employee: Respondeat Superior* , and Ch. 239, *Workers' Compensation Exclusive Remedy Doctrine* , *Employer and Employee Hunter v. Up-Right, Inc. (1993) 6 Cal. 4th 1174, 26 Cal. Rptr. 2d 8, 864 P.2d 88* . The Court held that *Hunter* does not preclude tort recovery in every case involving a termination. The rationale in *Hunter* supports tort recovery only with respect to a misrepresentation that is separate from the termination of the employment contract. This does not mean that effecting a termination in conjunction with fraudulent conduct will insulate an employer from an otherwise properly pled fraud claim. Fraud recovery is precluded only if the result of the employer's misrepresentation is indistinguishable from an ordinary constructive wrongful termination (*12 Cal. 4th 631, 643)* .

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[Reserved]

§§ 105.151[Reserved]

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10-105 California Points & Authorities § 105.160

§ 105.160 Misrepresentation Regarding Sexual Relations Is Not Sufficiently Pleaded or Proven--Privacy and Public Policy Concerns Bar Action Based on Representations Regarding Sexual Relations

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO _____ [STATE FACTS SUFFICIENT TO CONSTITUTE *or* ESTABLISH] A CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE THE _____ [COMPLAINT DISCLOSES *or* EVIDENCE SHOWS] THAT PLAINTIFF'S CLAIM IS BASED ON PROMISES OR REPRESENTATIONS MADE BY CONSENTING ADULTS REGARDING THEIR SEXUAL RELATIONSHIP AND THEREFORE IS BARRED BY PRIVACY AND PUBLIC POLICY REASONS.

A. Representations Regarding Sexual Relations. For reasons of privacy and public policy, and in recognition of the highly intimate nature of sexual relations, courts should not supervise or adjudicate the promises or representations made by consenting adults regarding their sexual relationships (*Perry v. Atkinson (1987) 195 Cal. App. 3d 14, 18-21, 240 Cal. Rptr. 402* ; *Stephen K. v. Roni L. (1980) 105 Cal. App. 3d 640, 643-645, 164 Cal. Rptr. 618*).

[*Optional*] **B. No Fraud in False Representations of Love or Sexual Desire.** The public policy behind *Civil Code Section 43.4* precludes a plaintiff from bringing an action for fraud and deceit based on inducement to marry and transfer property as a result of allegedly false or fraudulent representations of love, passion, or sexual desire (*Askew v. Askew (1994) 22 Cal. App. 4th 942, 952-957, 28 Cal. Rptr. 2d 284*).

[*Optional*] **C. False Promise to Marry or Cohabit.** A fraudulent promise to marry or to cohabit after marriage does not give rise to a cause of action for damages (*Civ. Code § 43.4*).

[*Optional*] **D. Seduction.** No cause of action arises for (a) alienation of affection, (b) criminal conversation, (c)

seduction of a person over the age of legal consent, or (d) breach of promise to marry (*Civ. Code § 43.5*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the plaintiff or cross complainant either has failed to allege sufficient facts to constitute a cause of action for fraud or has failed to present evidence to establish a fraud claim. The basis of this form is that the plaintiff may not recover for fraud and deceit if the action is based on a fraudulent breach of promise or misrepresentation regarding the sexual relationship of the parties [*see Civ. Code § 43.5*].

Paragraphs B through D should be included, if applicable, if the claim involves, respectively, fraudulent misrepresentations of sexual desire that induced the plaintiff to marry the defendant or to transfer property to the defendant after marriage, a false promise to marry or to cohabit after marriage, or false representations of love or seduction [*see Civ. Code §§ 43.4, 43.5*; *Askew v. Askew (1994) 22 Cal. App. 4th 942, 952-957, 28 Cal. Rptr. 2d 284]* .

These points and authorities should be included with other points and authorities, depending on the procedural context in which the issue is raised any other substantive issues that need to be addressed. For example, it may be submitted with other points and authorities supporting a demurrer or motion for summary challenging, respectively, the sufficiency of the pleading or the proof.

This form should be combined, if appropriate, with the points and authorities in *§ 105.30* et seq., which challenge the sufficiency of pleading or proof with regard to other aspects or elements in a cause of action for fraud and deceit. If this form is being used to support a demurrer, it may also be combined, if appropriate, with the forms in *§ 105.10 et seq.*, which focus on the requirement that elements of an action for fraud and deceit, particularly the deceitful act or omission, be alleged in specific rather than general terms.

This form may also be adapted for a trial or appellate brief, or to support of a motion for judgment on the pleadings, a motion for nonsuit, or any other request for relief based on the plaintiff's failure to show or establish the essential elements of the action for fraud or deceit.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Counsel may wish to point out that the case involves no competing or overriding public policy interests, such as those involved in *Kathleen K. v. Robert B. (1984) 150 Cal. App. 3d 992, 996, 198 Cal. Rptr. 273* and *Barbara A. v. John G. (1983) 145 Cal. App. 3d 369, 380-381, 193 Cal. Rptr. 422* , which are discussed in *§ 105.170*.

Any statement of fact should be supported by adequate reference to the pleading (or matters subject to judicial notice), if the form is used in a memorandum supporting a demurrer or another challenge to the sufficiency of the pleading. Similarly, any statement of fact should be supported by adequate reference to evidence admitted or otherwise cognizable by the court, if the form is used in support of a motion challenging the adequacy of proof.

For example, a memorandum supporting a motion for summary judgment may refer to affidavits or declarations based on personal knowledge or matters subject to judicial notice [*see Code Civ. Proc. §§ 2009, 2015.5* (affidavits and declarations); *Evid. Code § 450 et seq.* (judicial notice)]. For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For legal background with detailed coverage of the elements of a tort action for fraud and deceit, see California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender).

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For additional points and authorities relating to demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[e] Opposing Points and Authorities

The points and *authorities in § 105.170* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Representations Regarding Sexual Relations

In ***Perry v. Atkinson*** *(1987) 195 Cal. App. 3d 14, 240 Cal. Rptr. 402* , the plaintiff had been engaged in an intimate relationship with the defendant, a married man, for more than a year when the plaintiff became pregnant with the defendant's child. The defendant told the plaintiff that he would like her to have his child, but that he wanted to postpone doing so for a year. The defendant promised the plaintiff that if she would terminate the pregnancy, he would conceive a child with her in a year and that even if they were not together in a year, he would do so by artificial insemination. After the plaintiff terminated her pregnancy, she learned that the defendant never intended to keep his promise of another baby. The plaintiff became depressed, required psychiatric treatment, incurred extensive medical bills, and lost six months' earnings. The plaintiff sued the defendant for fraud and deceit and for intentional infliction of emotional distress. The trial court sustained the defendant's demurrer to the fraud and deceit cause of action in the second amended complaint. The parties settled the emotional distress cause of action for $250,000, reserving to the plaintiff her right to appeal the dismissal of the fraud and deceit cause of action.

The court of appeal affirmed the dismissal of the fraud and deceit cause of action. The court quoted at length from *Stephen K. v. Roni L. (1980) 105 Cal. App. 3d 640, 643-645, 164 Cal. Rptr. 618* , finding the reasoning in that case persuasive as applied to the facts in the case before it (*195 Cal. App. 3d 14, 18-19)* . Although the defendant in this case may have lied deliberately to induce the plaintiff to have an abortion, the procreative decisions of the parties were so intensely private that the court declined to intervene. Tort liability, the court said, cannot apply to the choice, however motivated, of whether to conceive or bear a child. The court referred to *Civ. Code § 43.4* and *Civ. Code § 43.5* as evidencing a public policy recognized by the legislature that certain sexual conduct and interpersonal decisions are outside the realm of tort liability. The court reasoned that if there is no tort cause of action for promises to fulfill the obligations of a marriage relationship, logically there can be no cause of action for a fraudulent promise by a married man to impregnate a woman who is not his wife (*195 Cal. App. 3d 14, 19)* .

Relying on *Kathleen K. v. Robert B. (1984) 150 Cal. App. 3d 992, 996, 198 Cal. Rptr. 273* , and *Barbara A. v. John G. (1983) 145 Cal. App. 3d 369, 380-381, 193 Cal. Rptr. 422* (discussed in *§ 105.170[3][a]*), the plaintiff argued that the defendant's privacy rights must give way to her right to protection from and compensation for physical harm and to the government's interest in protecting the health and welfare of its citizens. *Stephen K. v. Roni L. (1980) 105 Cal. App. 3d 640, 164 Cal. Rptr. 618* , involved a representation by a woman that she was taking birth control pills. *Barbara A. v. John G. (1983) 145 Cal. App. 3d 369, 380-381, 193 Cal. Rptr. 422* , involved a representation by a man

that he was infertile. However, the court, ruling that those cases could not readily be reconciled, chose to follow the reasoning of *Stephen K.* (*195 Cal. App. 3d 14, 20)* . The court said that *Kathleen K. v. Robert B. (1984) 150 Cal. App. 3d 992, 996* , involving tortious transmission of a contagious disease, was distinguishable in that it involved public policy considerations beyond the sexual conduct and procreative decisions of the two consenting adults (*195 Cal. App. 3d 14, 21*).

The court concluded that courts should not undertake to adjudicate promises and representations made by consenting adults regarding their sexual relationship. Once courts attempt to do so, they will be required to set standards for making and performing those promises. The court stated that *Stephen K.* and the legislature in *Civ. Code §§ 43.4* and *43.5* have wisely counseled against such folly (*195 Cal. App. 3d 14, 21)* .

Stephen K. v. Roni L. *(1980) 105 Cal. App. 3d 640, 164 Cal. Rptr. 618* , involved a father's cross complaint for fraud, negligent misrepresentation, and negligence filed in response to the mother's paternity action. The cross defendant had falsely represented to the cross plaintiff that she was taking birth control pills. The cross defendant moved for judgment on the pleadings on the grounds of public policy and the cross plaintiff's failure to establish damages. The trial court treated the motion as a general demurrer and ordered the cross action dismissed. The cross plaintiff appealed.

The court of appeal affirmed. The court first narrowed the issue, noting that the cross plaintiff's claim was personal and did not involve any issue of either parent's obligation to support the child. Thus, the state had a minimal interest, if any, in this otherwise entirely private matter. Although the cross defendant had lied and betrayed the cross plaintiff, the court concluded that the circumstances and highly intimate nature of the relationship in which the false representations occurred precluded the court's intervention (*105 Cal. App. 3d 640, 643)* . Such intervention would amount to nothing more than the court's supervising promises made between consenting adults regarding the circumstances of their private sexual conduct and would encourage unwarranted governmental intrusion into matters affecting the individual's right to privacy (*105 Cal. App. 3d 640, 644-645)* . The court noted that matters of sex and birth control have long been within the scope of an individual's right to privacy. The practice of birth control, if any, is best left to the individuals involved. Furthermore, the court noted that birth control pills are not 100 percent effective and that the cross plaintiff himself could have taken precautionary measures (*105 Cal. App. 3d 640, 645)* .

[b] No Fraud in False Representations of Love or Sexual Desire

In ***Askew v. Askew*** *(1994) 22 Cal. App. 4th 942, 28 Cal. Rptr. 2d 284* , the defendant had filed for dissolution of her 13-year marriage to the plaintiff. Five months after the dissolution proceeding was filed, the plaintiff sued the defendant for fraud, alleging that the defendant had falsely represented to the plaintiff that she loved the plaintiff and was sexually attracted to him. Allegedly in reliance on these representations, the plaintiff was induced to marry the defendant and to transfer some of his separate property into joint tenancy with the defendant. The defendant demurred to the complaint, but the demurrer was overruled. The civil action proceeded to trial before the dissolution proceeding, and the trial court entered a judgment on a jury verdict for the plaintiff. The defendant appealed, and the court of appeal reversed.

The court of appeal observed that although the plaintiff had attempted to recharacterize it, the essence of the plaintiff's case was that had the defendant not misrepresented her feelings concerning love and sexual desire, the plaintiff would never have married her and placed property into joint tenancy. The court stated that the substance of the plaintiff's case as actually pled and presented to the jury was nothing more than a latter-day incarnation of a breach-of-promise suit (*22 Cal. App. 4th 942, 953)* . The court noted that California's "antiheartbalm" statute (*Civ. Code § 43.5*), enacted in 1939, prohibits causes of action for alienation of affection, "criminal conversation," seduction of a person over the legal age of consent, and breach of promise of marriage (*22 Cal. App. 4th 942, 954)* . Although the statute clearly prohibited lawsuits for breach of contract, the California Supreme Court had held in *Langley v. Schumacker (1956) 46 Cal. 2d 601, 603, 297 P.2d 977* , that the statute did not bar tort causes of action based on fraudulent promises to marry or to consummate the marriage (*22 Cal. App. 4th 942, 954-955)* . The court noted that the legislature responded to the *Langley* decision in 1959 by enacting *Civ. Code § 43.4*, which provides that a fraudulent promise to marry or to cohabit

after marriage does not give rise to a cause of action for damages (*22 Cal. App. 4th 942, 955)* .

Citing subsequent cases construing *Civ. Code § 43.4*, the court stated that if anything is clear from the swift reaction to *Langley*, it is that the fact of false representations, even fraudulent representations, is not enough to avoid California's "antiheartbalm" statutes. The court held that in most cases, love and sexual desire are part of the "bundle of expectations" associated with marriage and that the defendant's false statements that she loved and sexually desired the plaintiff clearly come within the legal category of a fraudulent promise to "cohabit" after marriage. The court reasoned that the "antiheartbalm" statutes not only preclude "old fashioned" causes of action, but also embody a basic reluctance on the part of the legislature and the judiciary to allow recovery for promises of love (*22 Cal. App. 4th 942, 957)* . The reluctance stems in part from "the sheer unseemliness of litigating tender matters of romantic or sexual emotion in courts of law" (*22 Cal. App. 4th 942, 957-958)* . Citing concerns for privacy, the court concluded that words of love, passion, and sexual desire are unsuited to the cumbersome strictures of common law fraud and deceit and that courts should not be in the business of probing a suitor's state of mind (*22 Cal. App. 4th 942, 959)* . The court further noted that to permit such fraud actions would allow circumvention of California's statutory scheme of no-fault divorce (*22 Cal. App. 4th 942, 959-960)* .

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10-105 California Points & Authorities §§ 105.161-105.169

[Reserved]

§§ 105.161[Reserved]

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10-105 California Points & Authorities § 105.170

§ 105.170 Misrepresentation Regarding Sexual Relations Is Sufficiently Pleaded or Proven--Pleading or Proof of Facts Consistent With Policy Favoring Prevention of Disease and Injury

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF _____ [SHOULD PREVAIL ON THE *or* HAS STATED FACTS SUFFICIENT TO CONSTITUTE A] CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE THE PUBLIC INTEREST IN PREVENTING _____ [CONTAGIOUS DISEASES *and/or* SERIOUS PHYSICAL INJURY] OVERRIDES PRIVACY OR PUBLIC POLICY CONSIDERATIONS.

Contagious Disease or Serious Physical Harm. Although the right to privacy normally shields sexual relations from judicial scrutiny, it does not go so far as to insulate from liability one sexual partner who by intentionally tortious conduct causes physical injury to the other (*Kathleen K. v. Robert B. (1984) 150 Cal. App. 3d 992, 996-997, 198 Cal. Rptr. 273* ; *Barbara A. v. John G. (1983) 145 Cal. App. 3d 369, 380-381, 385, 193 Cal. Rptr. 422*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff or cross complainant has failed to establish a cause of action for fraud or deceit. The basis of this form is that the public interest in preventing contagious diseases or serious physical injury overrides privacy or public policy considerations.

This form may be used to oppose the points and *authorities in § 105.160*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context

in which counsel wishes to raise the substantive issue, for example, by response to a demurrer or by opposition to summary judgment motion. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, in the case of opposition to a motion for summary judgment or summary adjudication, counsel would refer to facts in declarations or deposition transcripts establishing that there is no triable issue of material fact regarding whether all of the elements of that cause of action are satisfied or whether the plaintiff is in the class of persons entitled to recover.

Any statement of fact should be supported by adequate reference to the pleading (or matters subject to judicial notice), if the form is used in a memorandum opposing a demurrer or another challenge to the sufficiency of the pleading. Similarly, any statement of fact should be supported by adequate reference to evidence admitted or otherwise cognizable by the court, if the form is used to oppose a motion challenging the adequacy of proof.

For example, a memorandum opposing a motion for summary judgment may refer to affidavits or declarations based on personal knowledge or matters subject to judicial notice [*see Code Civ. Proc. §§ 2009, 2015.5* (affidavits and declarations); *Evid. Code § 450 et seq.* (judicial notice)]. For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For legal background with detailed coverage of the elements of a tort action for fraud and deceit, see California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender).

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For additional points and authorities relating to demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Contagious Disease or Serious Physical Harm

The plaintiff in ***Kathleen K. v. Robert B.*** *(1984) 150 Cal. App. 3d 992, 198 Cal. Rptr. 273* , sought damages for fraud, negligence, battery, and intentional infliction of emotional distress for having contracted genital herpes through sexual intercourse with the defendant. The trial court granted judgment on the pleadings in reliance on *Stephen K. v. Roni L. (1980) 105 Cal. App. 3d 640, 164 Cal. Rptr. 618* [*see § 105.160[3][a]*], in which a man was held to have no cause of action based on a woman's allegedly false representations that she was taking birth control pills. The plaintiff appealed.

The court of appeal reversed. The court discussed both *Stephen K. and Barbara A. v. John G. (1983) 145 Cal. App. 3d 369, 193 Cal. Rptr. 422* , and noted that in this case, as in *Barbara A.,* there was no child involved (*150 Cal. App. 3d 992, 994-996)* . The court said the crux of the matter was the constitutional right of privacy, which has long been recognized in matters relating to marriage, family, and sex, and which has caused courts to frown on unwarranted governmental intrusions into private matters. The key word, the court said, is "unwarranted." The right of privacy is not absolute and sometimes must give way to other public concerns, such as health, welfare, and safety. The court quoted

Barbara A. for the proposition that the right of privacy is not absolute and does not insulate a person from all judicial inquiry into his or her sexual conduct and that exceptions to the right to privacy impose liability on one sexual partner who by intentionally tortious conduct causes physical injury to the other (*150 Cal. App. 3d 992, 996)* . The court said that this was precisely the type of conduct alleged in this case--that the plaintiff has suffered severe injury based on the defendant's misrepresentation that he was disease-free or on his negligent failure to inform the plaintiff that he had a sexually transmitted disease. The court mentioned the out-of-state cases cited in *Barbara A.* and disagreed with the defendant's argument that that line of reasoning should only apply to marital relations because of the degree of trust and confidence. A certain amount of trust and confidence exists in any intimate relationship. The basic premise underlying those cases--that consent to sexual intercourse is vitiated by one partner's fraudulent concealment of the risk of infection with a sexually transmitted disease--is equally applicable today, whether or not the partners are married to each other (*150 Cal. App. 3d 992, 996-997)* .

Barbara A. v. John G. *(1983) 145 Cal. App. 3d 369, 193 Cal. Rptr. 422* , involved a woman's cross complaint for fraud, misrepresentation, legal malpractice, battery, negligence, and intentional infliction of emotional distress, which she filed in response to an attorney's action for fees. The cross defendant had falsely represented to the cross plaintiff that he was infertile. The cross plaintiff suffered an ectopic (tubal) pregnancy and was required to undergo surgery to save her life that left her sterile. She suffered physical, emotional, and financial injuries as a result of the pregnancy. Demurrers were sustained to the emotional distress counts, the legal malpractice counts were dismissed, and demurrers were overruled as to the assault and misrepresentation counts. After the Second District filed its opinion in *Stephen K. v. Roni L. (1980) 105 Cal. App. 3d 640, 164 Cal. Rptr. 618* [*see § 105.160[3][a]*], the cross defendant moved for, and was granted, judgment on the pleadings, and the cross plaintiff appealed.

The court of appeal reversed. The court addressed *Civ. Code § 43.5(c)*, which bars a cause of action for seduction of a person over the age of legal consent and found that this section did not apply in this case because the gravamen of seduction is the loss of virtue or reputation, or humiliation, while the gravamen of this case was the ectopic pregnancy (*145 Cal. App. 3d 369, 377)* . The court held that *Stephen K.*, which arose from a woman's representation that she was taking birth control pills, was distinguishable because a child was involved in *Stephen K.* and no child was involved here. One parent's suit against the other would be strong evidence of parental rejection, which would be detrimental to the child and would be contrary to the public policy in favor of reducing acrimony between parents. Although the court agreed with the result in *Stephen K.*, it did not agree with the reasoning behind it (*145 Cal. App. 3d 369, 379)* .

The court next discussed criminal and other statutes, which show that the right of privacy is not absolute and does not insulate a person from all judicial inquiry into his or her sexual conduct. The court concluded that the right to privacy should not go so far as to insulate from liability one sexual partner who, by intentionally tortious conduct, causes physical injury to the other (*145 Cal. App. 3d 369, 380-381)* . The court found support for this view in Texas, North Carolina, and Delaware cases holding that a person is liable to a sexual partner for fraudulent concealment of disease or vermin (lice) (*145 Cal. App. 3d 369, 381-382)* . The court concluded that the cause of action for battery and deceit was not barred by *Civ. Code § 43.5*, by the holding in *Stephen K.*, or by the public policy underlying that decision. Although the right to privacy normally shields sexual relations from judicial scrutiny, it does not so do if the right of privacy is used as a shield from liability at the expense of the other party (*145 Cal. App. 3d 369, 385)* .

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[Reserved]

§§ 105.171[Reserved]

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10-105 California Points & Authorities § 105.180

§ 105.180 Intent to Induce Reliance Is Not Sufficiently Pleaded or Proven--No Sufficient Pleading or Proof of Intent to Induce Action in Reliance

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO _____ [STATE FACTS SUFFICIENT TO CONSTITUTE *or* ESTABLISH] A CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE THE _____ [COMPLAINT FAILS TO ALLEGE SPECIFIC FACTS *or* EVIDENCE FAILS TO SHOW] THAT DEFENDANT INTENDED TO INDUCE PLAINTIFF TO RELY ON THE ALLEGED MISREPRESENTATION.

Intent to Induce Action in Reliance. To be an actionable deceit, a misrepresentation must be made with intent to induce the recipient to alter the recipient's position to the recipient's injury or risk (*Civ. Code § 1709*; *Vandervort v. Farmers & Merchs. Nat'l Bank (1936) 7 Cal. 2d 28, 30-31, 59 P.2d 1028*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the plaintiff or cross complainant either has failed to allege sufficient facts to constitute a cause of action for fraud or has failed to present evidence to establish a fraud claim. The basis of this form is that the plaintiff has not alleged or established that the defendant intended to induce the plaintiff to rely on the misrepresentation.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised or on any other substantive issues that need to be addressed. For example, it may be submitted with other points and authorities supporting a demurrer or motion for summary judgment challenging, respectively, the sufficiency of the pleading or the proof.

This form should be combined, if appropriate, with the points and authorities in *§ 105.30* et seq., which challenge the sufficiency of pleading or proof with regard to other aspects or elements in a cause of action for fraud and deceit. If this form is being used to support a demurrer, it may also be combined, if appropriate, with the *forms in § 105.10* et seq., which focus on the requirement that elements of an action for fraud and deceit, particularly the deceitful act or omission, be alleged in specific rather than general terms.

This form may also be adapted for a trial or appellate brief, or to support of a motion for judgment on the pleadings, a motion for nonsuit, or any other request for relief based on the plaintiff's failure to show or establish the essential elements of the action for fraud or deceit.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Any statement of fact should be supported by adequate reference to the pleading (or matters subject to judicial notice), if the form is used in a memorandum supporting a demurrer or another challenge to the sufficiency of the pleading. Similarly, any statement of fact should be supported by adequate reference to evidence admitted or otherwise cognizable by the court, if the form is used in support of a motion challenging the adequacy of proof.

For example, a memorandum supporting a motion for summary judgment may refer to affidavits or declarations based on personal knowledge or matters subject to judicial notice [*see Code Civ. Proc. §§ 2009, 2015.5* (affidavits and declarations); *Evid. Code § 450 et seq.* (judicial notice)]. For further legal background, research guides, and forms relating to judicial notice and affidavits and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For legal background with detailed coverage of the elements of a tort action for fraud and deceit, see California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender).

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For additional points and authorities relating to demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[e] Opposing Points and Authorities

The points and *authorities in § 105.190* et seq. may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Intent to Induce Action in Reliance

In ***Vandervort v. Farmers & Merchs. Nat'l Bank*** *(1936) 7 Cal. 2d 28, 30-31* , the Supreme Court affirmed the trial court's judgment for the defendant, a bank, on the sustaining of a demurrer to the complaint without leave to amend. In a cause of action for fraud, the complaint alleged a transaction to create a trust in real property with the defendant as

trustee. There were a number of allegations of fraud by other parties to the transaction who were not parties to the suit. However, there was no sufficient allegation of fraudulent conduct by the defendant or its trust officer. Among other insufficiencies, the complaint alleged neither the defendant's intent to induce the plaintiff to act nor facts and circumstances from which that intent could necessarily be inferred. The Court ruled that there must be an allegation that the false representations were made with intent to induce the representee to enter into the transaction (*7 Cal. 2d 30-31*).

[4] Additional Authorities

[a] Intent to Induce Action in Reliance

In *Harding v. Robinson (1917) 175 Cal. 534* , the Supreme Court reversed the trial court's judgment for the plaintiff in a case in which the plaintiff had alleged fraud by the sellers of the land that he had purchased. The plaintiff alleged that he had agreed to purchase the land on the seller's representation that it contained 15 acres, but he discovered after title was passed that there were only 131/2 acres. The trial court, in effect, ordered the land purchase contract reformed for fraud. However, the Supreme Court pointed out that no fraud whatsoever was charged in the complaint. The complaint did not allege that the representation as to acreage was made in a manner not warranted by the information the sellers had at the time they made it or that the plaintiff was entitled to rely on that representation. Also, the complaint omitted the vital allegation, essential to a charge of fraud, that the sellers made their representation with the intent to induce plaintiff to enter into the contract (*175 Cal. 534, 538-539*).

Bondi v. Jewels by Edwar, Ltd. (1968) 267 Cal. App. 2d 672, 73 Cal. Rptr. 494 , is discussed in *§ 105.101[3][a]*.

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10-105 California Points & Authorities § 105.181

§ 105.181 Intent to Induce Reliance Is Not Sufficiently Pleaded or Proven--Pleading or Proof Show No Intent to Induce Because Representation Made to Stranger

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO _____ [STATE FACTS SUFFICIENT TO CONSTITUTE *or* ESTABLISH] A CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE THE _____ [COMPLAINT DISCLOSES *or* EVIDENCE SHOWS] THAT IF DEFENDANT UTTERED ANY MISREPRESEN TATION, DEFENDANT UTTERED IT TO A THIRD PARTY WHO IS A STRANGER TO PLAINTIFF AND WITHOUT INTENT TO INDUCE PLAINTIFF TO RELY ON THE STATEMENT.

Representation to Strangers. A person who utters a misrepresentation is liable only to those in whom he or she intended to induce reliance and who do rely in the manner intended, even if the misrepresentation was also made to the plaintiff but without the requisite intent (*Cohen v. Citizens Nat'l Trust & Sav. Bank (1956) 143 Cal. App. 2d 480, 484, 300 P.2d 14*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the plaintiff or cross complainant either has failed to allege sufficient facts to constitute a cause of action for fraud or has failed to present evidence to establish a fraud claim. The basis of this form is that the alleged misrepresentation was uttered to a third party and without intent to induce plaintiff to rely on the statement.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.180[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.180[2][b]*].

[c] Opposing Points and Authorities

The points and *authorities in § 105.190* et seq. may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Representation to Stranger

In ***Cohen v. Citizens Nat'l Trust & Sav. Bank*** *(1956) 143 Cal. App. 2d 480* , the court of appeal affirmed a judgment of dismissal of a complaint alleging fraudulent suppression of fact by a remote seller of real property after sustaining a demurrer to the plaintiffs' third amended complaint without leave to amend. The complaint against the remote seller alleged that the plaintiffs were the purchasers of a nonconforming apartment house for which the authorities had cited them for violations of the Health and Safety Code, that the defendant had added the nonconforming portions of the building, that he had sold the building to a third party without disclosing the improprieties, and that the third party had sold the building to the plaintiffs without such disclosure. The court noted that the elements of actionable deceit are a false representation of a material fact made either with knowledge of its falsity or recklessness or without reasonable grounds for believing its truth and with intent to induce reliance on it and on which the plaintiff justifiably relies to the plaintiff's injury. The court pointed out that although the complaint might satisfactorily allege the defendant's commission of fraud on the third party, the plaintiffs were strangers to that transaction. A person uttering misrepresentations is liable only to those in whom that person intends to induce reliance and who do rely in the manner intended. Even if a defendant makes misrepresentations directly to a plaintiff, if the facts clearly indicate that the defendant, when making such misstatements, had no intention of inducing the plaintiff's reliance, there is no actionable fraud even though the plaintiff relied to the plaintiff's detriment. However, the court added that if the circumstances do not negate a speaker's intent to induce reliance, the law will supply that intent. On the other hand, even if the misrepresentations are not made directly to and in the presence of the plaintiff, it suffices that the defendant intended those statements to reach the ears of the plaintiff and that the defendant intended the plaintiff to rely on those statements (*143 Cal. App. 2d 480, 484*).

[4] Additional Authorities

[a] Representation to Stranger

In *Hesse v. Vinatieri (1956) 145 Cal. App. 2d 448, 302 P.2d 699* , the court of appeal affirmed a trial court's judgment of dismissal on sustaining a demurrer to the plaintiff's second amended complaint because the alleged misrepresentations were not made to the plaintiff. The complaint was for personal injuries against a defendant who allegedly had made certain fraudulent statements to the police in connection with his report of an accident. The court held that the existence of a duty to tell the truth to the plaintiff is an essential basic element of any valid claim of fraud and deceit. No cause of action arises unless the defendant intended that the plaintiff rely and act on the defendant's representation or unless the plaintiff belongs to a class to whom the representation is made. Therefore, because the defendant in this case was under no duty to inform the plaintiff of the allegedly false facts he reported to the police and had not voluntarily undertaken to do so, he was not liable to the plaintiff (*145 Cal. App. 2d 448, 452-453)* .

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10-105 California Points & Authorities § 105.182

§ 105.182 Intent to Induce Reliance Is Not Sufficiently Pleaded or Proven--Pleading or Proof Shows No Intent to Induce Reliance of All Members of Public or Class Under Civil Code Section 1711

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF MAY NOT RELY ON *CIVIL CODE SECTION 1711* TO DEEM THAT DEFENDANT INTENDED TO DEFRAUD EVERY MEMBER OF A CLASS BECAUSE THAT STATUTE ONLY GRANTS RELIEF TO THOSE WHO RELY ON STATEMENTS COMMUNICATED THROUGH THE MASS MEDIA.

Representations to Public or Class. *Civil Code Section 1711*, under which a person is deemed to have intended to defraud all members of a class through the practice of a deceit with intent to defraud the public, only grants relief to those who rely on statements communicated through the mass media (*Cohen v. Citizens Nat'l Trust & Sav. Bank (1956) 143 Cal. App. 2d 480, 486, 300 P.2d 14*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the plaintiff or cross complainant either has failed to allege sufficient facts to constitute a cause of action for fraud or has failed to present evidence to establish a fraud claim. The basis of this form is that *Civ. Code § 1711*, under which a person is deemed to have intended to defraud all members of a class through the practice of a deceit with intent to defraud the public, only grants relief to those who rely on statements communicated through the mass media [*see Cohen v. Citizens Nat'l Trust & Sav. Bank (1956) 143 Cal. App. 2d 480, 486, 300 P.2d 14* , discussed in *§ 105.182[3*]].

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and other substantive issues that may be involved [*see § 105.180[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.180[2][b]*].

[c] Opposing Points and Authorities

The points and *authorities in § 105.191* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Representations to Public or Class

In ***Cohen v. Citizens Nat'l Trust & Sav. Bank*** *(1956) 143 Cal. App. 2d 480, 300 P.2d 14* , discussed in *§ 105.181[3][a]*, the plaintiffs contended that they were entitled to recover under *Civ. Code § 1711* on the ground that they belonged to a defrauded class. However, the court held that the legislature intended that statute to grant relief merely to those relying on statements in advertisements or in other mass media--in other words, statements that the speaker or writer intends to reach a considerable number of persons and to cause reliance by a class or by the public (*143 Cal. App. 2d 480, 486)* .

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[Reserved]

§§ 105.183[Reserved]

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10-105 California Points & Authorities § 105.190

§ 105.190 Intent to Induce Reliance Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Intent By Inference

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF _____ [SHOULD PREVAIL ON THE *or* HAS STATED FACTS SUFFICIENT TO CONSTITUTE A] CAUSE OF ACTION FOR FRAUD AND DECEIT DESPITE AN ALLEGED FAILURE TO INVESTIGATE, BECAUSE DEFENDANT'S INTENT TO INDUCE PLAINTIFF TO ALTER PLAINTIFF'S POSITION MAY BE INFERRED FROM THE FACT THAT DEFENDANT MADE REPRESENTATIONS WITH KNOWLEDGE THAT PLAINTIFF WOULD ACT IN RELIANCE ON THEM.

Intent to Induce Action in Reliance Inferable. The defendant's intent to induce the plaintiff to alter the plaintiff's position can be inferred from the fact that the defendant made the representation knowing that the plaintiff would act in reliance on that representation (*Gagne v. Bertran (1954) 43 Cal. 2d 481, 488, 275 P.2d 15*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff or cross complainant has failed to establish a cause of action for fraud or deceit. The basis of this form is that the defendant's intent to induce the plaintiff's reliance may be inferred from the fact that the defendant knew that the plaintiff would rely on the defendant's representation, even if the defendant's intent is not specifically shown or alleged.

This form may be used to oppose the points and *authorities in § 105.180* et seq.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context

in which counsel wishes to raise the substantive issue--for example, by response to a demurrer or by opposition to a summary judgment motion. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Any statement of fact should be supported by adequate reference to the pleading (or matters subject to judicial notice), if the form is used in a memorandum opposing a demurrer or another challenge to the sufficiency of the pleading. Similarly, any statement of fact should be supported by adequate reference to evidence admitted or otherwise cognizable by the court, if the form is used to oppose a motion challenging the adequacy of proof.

For example, a memorandum opposing a motion for summary judgment may refer to affidavits or declarations based on personal knowledge or matters subject to judicial notice [*see Code Civ. Proc. §§ 2009, 2015.5* (affidavits and declarations); *Evid. Code § 450 et seq.* (judicial notice)]. For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Forms

For legal background with detailed coverage of the elements of a tort action for fraud and deceit, see California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender).

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For additional points and authorities relating to demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Intent to Induce Action in Reliance Inferable

In ***Gagne v. Bertran*** *(1954) 43 Cal. 2d 481, 275 P.2d 15* , the facts and background of which are discussed in *§ 105.270[3]*, the Supreme Court ruled that to be an actionable deceit, a representation need only be an assertion as a fact of something that is not true by one who has no reasonable ground for believing it to be true, which is made with intent to induce the recipient to alter the recipient's position to the recipient's injury or risk (*43 Cal. 2d 481, 487)* . In this case, the defendant's intent to induce the plaintiffs to alter their position could be inferred from the fact that he made the representation knowing that the plaintiffs would act in reliance on it. Because the evidence disclosed that the defendant's statement was erroneous and that he negligently performed the test on which he based his statement, the Court concluded that he made the statement without reasonable ground for believing it to be true. The evidence further disclosed that the plaintiffs justifiably relied on the defendant's statement in buying real property and contracting for the construction of a building on that property (*43 Cal. 2d 481, 488)* . Accordingly, the Court concluded that the plaintiffs had established a cause of action for deceit.

California Points & Authorities

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C. Intent to Induce Reliance

10-105 California Points & Authorities § 105.191

§ 105.191 Intent to Induce Reliance Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Intent to Induce Reliance Because Representation Was Made to Public or Class

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF _____ [SHOULD PREVAIL ON THE *or* HAS STATED FACTS SUFFICIENT TO CONSTITUTE A] CAUSE OF ACTION FOR FRAUD AND DECEIT, BECAUSE DEFENDANT, BY MEANS OF MASS MEDIA COMMUNICATIONS, PRACTICED A DECEIT WITH INTENT TO DEFRAUD _____ [THE PUBLIC *or* A PARTICULAR CLASS OF PERSONS, THAT IS, _____ (*identify class alleged to have been defrauded*)], PLAINTIFF WAS A MEMBER OF THAT CLASS OF PERSONS, AND PLAINTIFF WAS ACTUALLY MISLED BY THE DEFENDANT'S DECEIT. HENCE, UNDER *CIVIL CODE SECTION 1711*, DEFENDANT IS BY LAW DEEMED TO HAVE INTENDED TO MISLEAD PLAINTIFF BY DEFENDANT'S DECEIT.

B. Representations to Public or Class. One who, by means of mass media communications, practices a deceit with intent to defraud the public or a particular class of persons is deemed to have intended to defraud every individual in that class who is actually misled by the deceit (*Civ. Code § 1711*; *Cohen v. Citizens Nat'l Trust & Sav. Bank (1956) 143 Cal. App. 2d 480, 486, 300 P.2d 14*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff or cross complainant has failed to establish a cause of action for fraud or deceit. The basis of this form is that one who, by means of mass media communications, practices a deceit with intent to defraud the public or a particular class of persons is deemed to have intended to defraud every individual in that class who is actually misled by the deceit.

This form may be used to oppose the points and *authorities in § 105.182*.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.190[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.190[2][b]*].

[3] Discussion of Authorities

[a] Representations to Public or Class

Cohen v. Citizens Nat'l Trust & Sav. Bank *(1956) 143 Cal. App. 2d 480, 300 P.2d 14* , is discussed in *§ 105.182[3]*.

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10-105 California Points & Authorities § 105.192

§ 105.192 Intent to Induce Reliance Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Defendant Had Reason to Expect Plaintiff's Reliance on Statement Not Made Directly to Plaintiff

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF _____ [SHOULD PREVAIL ON THE *or* HAS STATED FACTS SUFFICIENT TO CONSTITUTE A] CAUSE OF ACTION FOR FRAUD AND DECEIT, EVEN THOUGH THE DEFENDANT DID NOT MAKE THE MISREPRESENTATION DIRECTLY TO PLAINTIFF, BECAUSE DEFENDANT INTENDED OR HAD REASON TO EXPECT THAT THE PLAINTIFF OR THE CLASS OF PERSONS OF WHICH PLAINTIFF IS A MEMBER WOULD RELY ON THE MISREPRESENTATION AND BECAUSE PLAINTIFF ACTUALLY DID RELY ON THE MISREPRESENTATION.

Reason to Expect Reliance by Plaintiff Sufficient. A maker of a fraudulent misrepresentation may be subject to liability to a person who acts in reliance on it even though the statement was not made directly to the injured party, if the maker intended or had reason to expect that the injured party or the class of persons of which that party is a member would rely on the misrepresentation (*Geernaert v. Mitchell (1995) 31 Cal. App. 4th 601, 605-606, 37 Cal. Rptr. 2d 483*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff or cross complainant has failed to establish a cause of action for fraud or deceit. The basis of this form is that the defendant may be held liable for fraudulent misrepresentation, even though the defendant did not make them directly to the plaintiff, because the defendant intended or had reason to expect that the plaintiff or the class of persons of which the plaintiff is a member would rely on the misrepresentation and because the plaintiff actually did rely on the misrepresentation.

This form may be used to oppose the points and *authorities in § 105.180* et seq.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.190[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.190[2][b]*].

[3] Discussion of Authorities

[a] Reason to Expect Reliance by Plaintiff Sufficient

In ***Geernaert v. Mitchell*** *(1995) 31 Cal. App. 4th 601, 37 Cal. Rptr. 2d 483* , the plaintiffs, owners of a single-family home, sued the former owners of the home for fraudulent misrepresentation and concealment regarding structural and foundation problems with the property. The plaintiffs alleged that when the defendants sold the house to earlier purchasers, they made false representations of fact regarding the foundation of the building and they intended these misrepresentations to be repeated to subsequent purchasers of the residence. The defendants filed general demurrers to the complaint. The demurrers were sustained by the trial court on the ground that these defendants made no statements to and did not withhold information from the plaintiffs, that the plaintiffs did not rely on any of the defendants' statements or concealments, and that the plaintiffs were not a class of persons that the defendants intended to deceive. The trial court then dismissed the case.

The court of appeal reversed the judgment with directions to the trial court to overrule the demurrers. The court noted that it has traditionally been the law in California that a defendant is not liable for actionable fraud unless the defendant intends a particular person to rely on the defendant's representation. The court also noted that the trial court's ruling appeared to be based on *Cohen v. Citizens Nat'l Trust & Sav. Bank (1956) 143 Cal. App. 2d 480, 300 P.2d 14* [*see § 105.182[3]*], which held that a person who sold a building was not liable to a subsequent purchaser for a nondisclosure to the seller's immediate successor because the seller had no interest in subsequent purchasers. However, the court considered the rule stated in Restatement (Second) of Torts § 533, published 20 years after *Cohen*, that the maker of a fraudulent misrepresentation is subject to liability for loss to another who acts in reliance on it if the misrepresentation, although not made directly to the other person, is made to a third person and the maker intends or expects that it will be communicated to the other person. The court stated that *Cohen* would not have been decided the same way under § 533 (*31 Cal. App. 4th 601, 606)* . The court concluded that the plaintiffs had stated facts that would support causes of action for fraud and concealment by alleging that each defendant either misrepresented or failed to disclose known material facts regarding structural problems with the house when selling it to the earlier purchasers and that each the defendant either intended or expected that the misrepresentations would be repeated, or the nondisclosures would be transmitted, to the plaintiffs (*31 Cal. App. 4th 601, 608)* .

[4] Additional Authorities

[a] Reason to Expect Reliance by Plaintiff Sufficient

In *Murphy v. BDO Seidman (2003) 113 Cal. App. 4th 687, 6 Cal. Rptr. 3d 770* , the plaintiffs were stockholders who brought suit against two accounting firms for negligent and intentional misrepresentations in vastly inflating the value of the corporation's assets and value in financial statements prepared in anticipation of a merger with another corporation. In reliance on the misrepresentations, the plaintiffs bought or retained stock in the corporation and approved the merger, only to lose their investments after the merger when the corporation went into bankruptcy. The trial court sustained demurrers for the defendants, but the court of appeal reversed in part. The court concluded that the operative complaint stated causes of action for both negligent and intentional misrepresentations. The court held that the

defendants owed a duty that extended to the plaintiffs because the defendants knew that investors would rely on statements of value from the corporations in anticipation of the pending merger. The defendants owed a duty to the investors because the defendants could foresee with substantial certainty that their statements would be relied on by potential investors, and because the defendants could reasonably foresee that stockholders would rely on the misrepresentations in those statements (*113 Cal. App. 4th 687, 695-697)* . In addition, it was sufficient that some plaintiffs did not read the financial statements directly, but instead relied on third-party communications that conveyed the content of the statements (*113 Cal. App. 4th 687, 702-703)* .

In *Anderson v. Deloitte & Touche (1997) 56 Cal. App. 4th 1468, 66 Cal. Rptr. 2d 512* , the plaintiffs, who were purchasers of limited partnership interests who subsequently lost their investments, alleged that defendant, an accounting firm which prepared financial statements regarding the property, negligently represented the financial status of the partnership. The court of appeal reversed a summary judgment in favor of the defendant. The court stated that although the accounting reports were prepared for a research company, rather than for plaintiffs, defendant knew that its reports would be included in a confidential offering memorandum, and thus communicated to potential investors. Furthermore, the forecast and underlying assumptions in the reports were designed for the specific purpose of attracting investors (*56 Cal. App. 4th 1468, 1478)* .

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[Reserved]

§§ 105.193[Reserved]

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PART II. FORMS
D. Actual and Justifiable Reliance

10-105 California Points & Authorities § 105.200

§ 105.200 Actual and Justifiable Reliance on Misrepresentation Is Not Sufficiently Pleaded or Proven--No Sufficient Pleading or Proof of Actual and Justifiable Reliance

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO _____ [STATE FACTS SUFFICIENT TO CONSTITUTE *or* ESTABLISH] A CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE THE _____ [COMPLAINT FAILS TO ALLEGE *or* EVIDENCE FAILS TO SHOW] THAT PLAINTIFF ACTUALLY AND JUSTIFIABLY RELIED ON STATEMENTS THAT DEFENDANT MADE.

A. Actual Reliance. To state a cause of action for deceit based on a misrepresentation, a plaintiff must plead that the plaintiff actually relied on the misrepresentation (*Mirkin v. Wasserman (1993) 5 Cal. 4th 1082, 1088, 1091-1093, 23 Cal. Rptr. 2d 101, 858 P.2d 568* ; *Maxon-Nowlin Co. v. Norswing (1913) 166 Cal. 509, 511, 137 P. 240*).

B. Justifiable Reliance. To state facts sufficient to constitute a cause of action based on fraud, a complaint must set forth facts showing that the plaintiff's action in reliance on the deceit was consistent with normal prudence and reasonableness under the circumstances (*see* *Lingsch v. Savage (1963) 213 Cal. App. 2d 729, 739 n.6, 29 Cal. Rptr. 201*).

[*Optional*] C. **Actual Reliance Requires Belief in Truth of Statements.** Actual reliance is present only when the plaintiff acts based on belief in the *truth* of defendant's representations, and a plaintiff who suspects that defendant's claims are *false* and acts based on that suspicion with the intent to sue for fraud if plaintiff's suspicions turn out to be true cannot show actual reliance (*Buckland v. Threshold Enterprises, Ltd. (2007) 155 Cal. App. 4th 798, 808, 66 Cal. Rptr. 3d 543*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the plaintiff or cross complainant either has failed to allege sufficient facts to constitute a cause of action for fraud or has failed to present evidence to establish a fraud claim. The basis of these points and authorities is that the plaintiff or cross complainant party has failed to allege or establish actual and justifiable reliance.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and on any other substantive issues that need to be addressed. For example, it may be submitted with other points and authorities supporting a demurrer or motion for summary judgment challenging the sufficiency of, respectively, the pleading or the proof.

This form may be combined with points and authorities setting forth particular ways in which the plaintiff failed to actually and justifiably rely on the defendant's representations [*see § 105.201* et seq.].

This form may be combined, if appropriate, with the points and authorities in *§ 105.30* et seq., which challenge the sufficiency of pleading or proof with regard to other aspects or elements in a cause of action for fraud and deceit. If this form is being used to support a demurrer, it may also be combined, if appropriate, with the forms in *§ 105.10 et seq*, which focus on the requirement that elements of an action for fraud and deceit, particularly the deceitful act or omission, be alleged in specific rather than general terms. For points and authorities supporting a general demurrer implying expiration of statute of limitations, see *§ 105.203*.

This form may also be adapted for a trial or appellate brief, or to support of a motion for judgment on the pleadings, a motion for nonsuit, or any other request for relief based on the plaintiff's failure to show or establish the essential elements of the action for fraud or deceit.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, when counsel has demurred based on a failure to state facts sufficient to constitute a cause of action for fraud and deceit, he or she would refer to omission of allegations showing actual and justifiable reliance. If appropriate, counsel should refer to the specific page and line number of the pleading that discloses the defect.

Any statement of fact should be supported by adequate reference to the pleading (or matters subject to judicial notice), if the form is used in a memorandum supporting a demurrer or another challenge to the sufficiency of the pleading. Similarly, any statement of fact should be supported by adequate reference to evidence admitted or otherwise cognizable by the court, if the form is used in support of a motion challenging the adequacy of proof.

For example, a memorandum supporting a motion for summary judgment may refer to affidavits or declarations based on personal knowledge or matters subject to judicial notice [*see Code Civ. Proc. §§ 2009, 2015.5* (affidavits and declarations); *Evid. Code § 450 et seq.* (judicial notice)]. For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For legal background with detailed coverage of the elements of a tort action for fraud and deceit, see California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender).

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For additional points and authorities relating to demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[e] Opposing Points and Authorities

The points and *authorities in § 105.220* et seq. may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Actual Reliance

In ***Mirkin v. Wasserman*** *(1993) 5 Cal. 4th 1082, 23 Cal. Rptr. 2d 101, 858 P.2d 568* , the plaintiffs were shareholders who brought an action for deceit against a corporation and some of its officers, directors, and accountants, as well as the securities brokers who underwrote public offerings of the corporation's stock. The corporation had appeared profitable at the time of the initial stock offerings, but later suffered large losses. As a result, the corporation's stock dropped from a high of $28.50 per share to a low of $1.50 per share during a two-year period. The plaintiffs alleged that the defendants made numerous misrepresentations about the corporation's prospects and financial status in prospectuses for the initial public offerings, in documents filed with the Securities and Exchange Commission (SEC), and in other public communications. The plaintiffs further alleged that these misrepresentations inflated the price of the corporation's stock during that period. In their first amended complaint, the plaintiffs alleged that they had purchased their shares "in reliance [on those] misrepresentations." Defendants demurred to this complaint on the ground that it did not sufficiently allege actual reliance on the alleged misrepresentations. Because the plaintiffs conceded that they could not allege that they had actually read or heard the alleged misrepresentations before buying their stock, the trial court sustained the demurrer with leave to amend. In their second amended complaint, the plaintiffs alleged that they had purchased their shares "[i]n reliance [on] the integrity of the securities market and the securities offering process, and the fidelity, integrity, and superior knowledge of the defendants. ... " Once again finding the plaintiffs' pleading of actual reliance insufficient, the trial court sustained the defendants' demurrers without leave to amend and dismissed the complaint (*5 Cal. 4th 1082, 1087-1088)* . The court of appeal affirmed. The California Supreme Court granted review and affirmed the judgment.

The Court observed that it is well established that a plaintiff does not state a cause of action for deceit based on a misrepresentation unless the plaintiff pleads actual reliance on the misrepresentation (*5 Cal. 4th 1082, 1088)* . The Court rejected the plaintiffs' arguments that actual reliance is not required because the relevant statutes (*Civ. Code §§ 1709, 1710*) do not expressly mention actual reliance. The Court noted that, like much of the law in California, the law of deceit is not purely statutory, but is a mixture of statutory and common law. Under *Civ. Code § 5*, provisions of the Civil Code that are substantially the same as the common law, such as the provisions that codify common law torts, must be construed as continuations of the common law and not as new enactments (*5 Cal. 4th 1082, 1091)* . The Court stated that *Civ. Code §§ 1709* and *1710* have been recognized as continuations of the common law, and thus it is consistent with those statutes that California courts have always required the plaintiffs in actions for deceit to plead and prove actual reliance (*5 Cal. 4th 1082, 1091-1092)* . The Court also rejected the plaintiffs' argument that actual reliance was not required because *Civ. Code § 1711* provides that if a deceit is directed at the public or a particular class of persons, any person who is actually deceived may bring an action. The Court pointed out that this statute merely indicates that a person who acts with fraudulent intent need not have any particular victim in mind. Litigants who rely on this statute still must plead and prove actual reliance (*5 Cal. 4th 1082, 1092)* . The Court also rejected the plaintiffs'

reliance on *Civ. Code § 3343*, which provides additional damages (beyond the difference between the value of the property received and the price paid) to a plaintiff who enters into a transaction in reliance on the fraud and in anticipation of profits from the subsequent use or sale on the property. The Court stated that this statute could not plausibly be read as eliminating the element of reliance from the tort of deceit (*5 Cal. 4th 1082, 1092-1093)* .

The Court also rejected the plaintiffs' arguments that previous case law involving class actions had eliminated the requirement of actual reliance. The plaintiffs had relied on *Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 94 Cal. Rptr. 796, 484 P.2d 964* , and *Occidental Land, Inc. v. Superior Court (1976) 18 Cal. 3d 355, 134 Cal. Rptr. 388, 556 P.2d 750* , in which the Court had held that reliance by each member of a class could appropriately be inferred. However, the Court pointed out that in both *Vasquez* and *Occidental Land,* the same misrepresentation had been communicated to each member of the class and that it was appropriate to infer that each member had actually relied on the misrepresentation, but neither case could be read as permitting an inference of actual reliance by persons who had never read or heard the misrepresentation, as was true in this case (*5 Cal. 4th 1082, 1094-1095)* . The Court also rejected the plaintiffs' argument that the so-called "indirect communication" cases, which allowed the plaintiffs who had heard the misrepresentations indirectly through third persons to sue for fraud, had eliminated the need to plead and prove actual reliance on the misrepresentation (*5 Cal. 4th 1082, 1095-1099)* .

In ***Maxon-Nowlin Co. v. Norswing*** *(1913) 166 Cal. 509* , the Supreme Court affirmed a judgment for the defendant in an action for damages for alleged fraudulent misrepresentations in connection with an exchange of real property. The complaint alleged that the defendant had misrepresented the frontage dimensions of the real property involved. There was evidence, however, that before any agreement was made between the parties, the manager of the plaintiff, a corporation, had inspected the property and that the defendant had handed him a map showing in plain figures the actual frontages. The trial court found that the plaintiff's agent had examined the map and learned from it what the frontages in fact were. The Court ruled that the findings of the trial court were conclusive in favor of the judgment. To entitle a person to relief because of a false representation, it is not enough to show merely that the representation was material, known to be false and made with intent to deceive. One must also show that it actually did mislead and deceive--in other words, that the person relied on it (*166 Cal. 509, 511*).

[b] Justifiable Reliance

In ***Lingsch v. Savage*** *(1963) 213 Cal. App. 2d 729, 29 Cal. Rptr. 201* , the facts and background of which are discussed in *§ 105.70[3]*, the court of appeal noted that one element of a cause of action for fraud based on nondisclosure is inducement of the plaintiff to act by reason of the nondisclosure. In this case, this element of causation was pleaded in terms of reliance. The plaintiffs had alleged that they purchased the property at issue "justifiably relying" on the defendants' nondisclosure. The court stated that the word "justifiably" added nothing to the allegation in the absence of allegations of facts showing that the actual inducement of the plaintiffs to enter into the sale was justifiable or reasonable. The court added that a general allegation of inducement or reliance would seem to suffice provided that the complaint also sets forth enough facts to show that the plaintiff's conduct was consistent with normal prudence and reasonableness under the circumstances (*213 Cal. App. 2d 729, 739*). Because there was a reasonable possibility that amendment could cure the complaint's deficiencies, the defendant's demurrer should not have been sustained without leave to amend (*213 Cal. App. 2d 729, 739-740*).

[c] Actual Reliance Requires Belief in Truth of Statements

In ***Buckland v. Threshold Enterprises, Ltd.*** *(2007) 155 Cal. App. 4th 798, 66 Cal. Rptr. 3d 543* , plaintiff was the executive director of a women's law center who purchased skin creams and lotions made by defendants that contained chemicals regulated by the Food and Drug Administration. By her own admission, plaintiff purchased these products because of suspicions that the manufacturers had improperly suppressed the fact that the products contained potentially unsafe chemicals and otherwise marketed the products as safe and healthful. When satisfied that her suspicions were well-founded, she brought suit against the manufacturers for fraud and related statutory causes of action. She admitted

that she purchased the products with the intent to sue and that her only actual damages were the costs she paid for the products. The trial court sustained defendants' demurrer. Plaintiff appealed.

The court of appeal affirmed. With respect to the fraud cause of action, the court held that plaintiff could not prove that she actually relied on any representations or omissions made by a defendant. The court noted that the element of actual reliance requires that the plaintiff have relied on confidence in the *truth* of a defendant's statements, not the perceived *falsity* of those statements. In the case of fraud by omission, the court concluded that actual reliance requires a plaintiff to act on confidence in the material completeness of the defendant's representations. Because plaintiff did not purchase the products in reliance on the truth or completeness of defendant's representations, but rather purchased the products solely in anticipation of litigation, she could not prove the element of actual reliance (*155 Cal. App. 4th 798, 808-809)* .

[4] Additional Authorities

[a] Actual Reliance

In *The MEGA Life & Health Ins. Co. v. Superior Court (2009) 172 Cal. App. 4th 1522, 92 Cal. Rptr. 3d 399*, plaintiff filed a suit for fraud on behalf of his deceased wife, as well as on his own behalf, against a health insurance company for alleged misrepresentations made about the scope of coverage when selling a policy to plaintiff's spouse. The trial court denied summary adjudication to defendant on the fraud cause of action brought on behalf of plaintiff in his individual capacity. The court of appeal issued a writ of mandate ordering the trial court to grant summary adjudication in favor of defendant on that cause of action. While recognizing that plaintiff could seek to recover any damages to which his wife would be entitled, the court held that the insurance company owed no duty to plaintiff not to misrepresent the terms of the policy, even if the alleged misrepresentations were made to him and even if the policy premium was paid with community property funds. In reaching this decision, the court noted that plaintiff was a stranger to the insurance contract, and as such, there was no possibility that he detrimentally changed *his* position in reliance on defendant's representations. Absent such reliance, plaintiff in his individual capacity could not prevail on a fraud action against the insurer (172 Cal. App. 4th 1522, 1530-1532).

In *Cadlo v. Owens-Ill., Inc. (2004) 125 Cal. App. 4th 513, 23 Cal. Rptr. 3d 1* , the plaintiff had been exposed to asbestos while in the Navy in the mid-1960s and was diagnosed with mesothelioma in 2002. The plaintiff sued the company that had originally designed and manufactured the asbestos-containing insulation, Kaylo, to which the plaintiff had been exposed. However, the defendant had sold its Kaylo manufacturing enterprise in 1958 to another corporation that continued manufacturing and marketing the product, and it was undisputed that the plaintiff had not been exposed to Kaylo manufactured before the sale in 1958. Nevertheless, the plaintiff argued that the original manufacturer could be liable on the theory that it originally designed the product, hid its dangerous nature, and failed to disclose those dangers while the successor corporation continued marketing and selling the product. The trial court granted summary judgment and sustained a demurrer for the original manufacturer, and the court of appeal affirmed. The court noted that as to the fraud cause of action against the original manufacturer, the plaintiff could not plead and prove actual reliance. The defendant had sold its entire Kaylo manufacturing enterprise to a successor corporation years before the manufacture of the Kaylo to which the plaintiff had been exposed. The plaintiff had not alleged that he had been aware of or relied on any representations made by the defendant when he was exposed to a product made by a different company, nor could he amend the complaint to allege such reliance. Because the plaintiff could not allege that the defendant made representations about the product to which he was actually exposed, judgment for the defendant was proper (*125 Cal. App. 4th 513, 519-521)* .

In *Gawara v. United States Brass Corp. (1998) 63 Cal. App. 4th 1341, 74 Cal. Rptr. 2d 663* , plaintiff homeowners and developer were awarded compensatory and punitive damages at trial in an action alleging fraud and other theories of recovery against the manufacturers and sellers of defective plumbing pipes and system components. The court of appeal reversed the judgments entered on the fraud actions, agreeing with the defendants that under *Mirkin v.*

Wasserman (1993) 5 Cal. 4th 1082, 23 Cal. Rptr. 2d 101, 858 P.2d 568 [*see § 105.200[3][a]*], plaintiffs had to prove actual reliance in order to recover for fraud. The court held that misrepresentations made by the defendants when marketing the products were insufficient to prove actual reliance, since the evidence did not prove that these plaintiffs actually heard and relied on those misrepresentations, either directly or indirectly through a third party. When marketing the products, one defendant had made a sales presentation to the plumbing subcontractor used on the development project at issue, but there was no evidence that plaintiff developer heard or relied on those communications. The developer was also unable to provide evidence that he indirectly relied on any misrepresentations made by the defendants to the city prior to city approval of the plumbing components, in the absence of evidence that actual misrepresentations were made by the defendants to anyone in the city responsible for granting such approval. The fraud claims brought by the homeowners were reversed based on the lack of evidence that anyone had made any representations about the plumbing systems in the homes to the homeowners prior to their purchase, precluding any finding of actual reliance (*63 Cal. App. 4th 1341, 1348-1359)* .

In *Bay Summit Cmty. Ass'n v. Shell Oil Co. (1996) 51 Cal. App. 4th 762, 59 Cal. Rptr. 2d 322* , plaintiff was awarded damages by a jury verdict which found that defendant committed fraud and was strictly liable for damages caused by defective fittings in a plumbing system. On appeal, defendant contended that the fraud verdict was improper because plaintiff did not establish reliance. Plaintiff conceded that it could not prove reliance, and that they were required to prove reliance under *Mirkin v. Wasserman (1993) 23 Cal. Rptr. 2d 101* [*see § 105.200[3][a]*]. Based on this concession, the court of appeal reversed the judgment with regard to the fraud claim (*51 Cal. App. 4th 762, 767)* .

In *Suarez v. Life Ins. Co. of N. Am. (1988) 206 Cal. App. 3d 1396, 254 Cal. Rptr. 377* , the plaintiff sued an insurer for fraud, claiming that an advertisement for the insurance misrepresented the coverage by representing that the policy covered the loss of the use of limbs due to injuries sustained in a freeway accident, when in fact the policy covered only severance of limbs. The court of appeal upheld the trial court's granting of the insurer's motion for summary judgment, holding that the plaintiff's cause of action did not meet all of the elements of fraud, including reliance. Although the plaintiff's father had seen the advertisement before he had purchased the policy for the plaintiff, the plaintiff had not read the advertisement until after his accident and thus, as a matter of law, could not have relied on it (*206 Cal. App. 3d 1396, 1408)* .

[b] Justifiable Reliance

In *B.L.M. v. Sabo & Deitsch (1997) 55 Cal. App. 4th 823, 64 Cal. Rptr. 2d 335* , the plaintiff, a housing developer, alleged that attorneys, who where appointed a city council as special counsel to a housing project, negligently represented one of the requirements of the project. The court of appeal upheld a summary judgment in favor of the attorneys, holding that plaintiff failed to allege facts sufficient to support a claim of justifiable reliance. The court reasoned that it would be inappropriate to hold an attorney liable to a third party for a legal opinion which the third party could not have contracted to obtain. Thus, any reliance by plaintiff on the attorneys' legal opinion was not justifiable (*55 Cal. App. 4th 823, 835)* .

In *In re Daisy Systems Corp. (9th Cir. 1996) 97 F.3d 1171* , a Chapter 11 Trustee appealed the district court's grant of summary judgment in favor of an investment banker in an action for negligent misrepresentation the trustee brought on behalf of a Chapter 11 debtor that had hired the investment bank to advise it in connection with an attempted acquisition. The Ninth Circuit Court of Appeal affirmed the district court's grant of summary judgment on the negligent misrepresentation claim. The trustee based the negligent misrepresentation claim on two acts committed by the bank: the issuance of letters containing representations to debtor that the market would support the proposed acquisition, and an alleged oral commitment to provide financing for the transaction. The court interpreted the letters as expressions of confidence that financing could be obtained under certain specified conditions, but the letters did not constitute guarantees that the deal could be financed regardless of the successive permutations it might take. Therefore, any reliance on them as being indicative of a general availability of financing was unreasonable. Similarly, the court interpreted the banker's oral representations of a loan commitment as merely implying the possibility of debtor securing

long-term financing. Accordingly, the representation, as well as the terms of any implied loan agreement were so vague as to render unjustifiable any reliance on them (*97 F.3d 1171, 1181)* .

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10-105 California Points & Authorities § 105.201

§ 105.201 Actual and Justifiable Reliance on Misrepresentation Is Not Sufficiently Pleaded or Proven--Pleading or Proof Shows Plaintiff Relied on Own Judgment

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO _____ [STATE FACTS SUFFICIENT TO CONSTITUTE *or* ESTABLISH] A CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE THE _____ [COMPLAINT DISCLOSES *or* EVIDENCE SHOWS] THAT PLAINTIFF RELIED ON PLAINTIFF'S OWN JUDGMENT, RATHER THAN ON ANY REPRESENTATION OF DEFENDANT.

Plaintiff Relied on Own Judgment. If a party does not rely on the other party's statements, but instead relies on the party's own judgment, experience, and information, there is no actionable fraud (*Hallidie v. First Fed. Trust Co. (1918) 177 Cal. 600, 603-604, 171 P. 431* ; *see McLaughlin v. National Union Fire Ins. Co. (1994) 23 Cal. App. 4th 1132, 1148, 29 Cal. Rptr. 2d 559*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the plaintiff or cross complainant either has failed to allege sufficient facts to constitute a cause of action for fraud or has failed to present evidence to establish a fraud claim. The basis of this form is that the plaintiff relied on the plaintiff's own judgment, rather than on any representation of the defendant.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.200[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Therefore, for example, in the case of a motion for summary adjudication of issues, to support the argument that there is no triable issue of material fact regarding whether the plaintiff justifiably relied on the defendant's misrepresentations, counsel would refer to evidence such as deposition testimony, citing the specific page and line number of the transcript, that discloses that the plaintiff relied on the plaintiff's own judgment, rather than on any representation of the defendant [*see § 105.200[2][b]*].

[c] Opposing Points and Authorities

The points and *authorities in § 105.220* et seq. may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Plaintiff Relied on Own Judgment

In ***Hallidie v. First Fed. Trust Co.*** *(1918) 177 Cal. 600, 171 P. 431* , the Supreme Court affirmed a judgment for the defendant in an action for fraud, because the plaintiff did not rely on the defendant's alleged misrepresentations. The evidence presented showed that the plaintiff had relied on his own judgment, experience, and information. The complaint alleged that in inducing the sale to the plaintiff of 50 shares of a corporation's stock, the corporation's majority shareholder and general manager represented to the plaintiff, a minority shareholder, that the corporation was not profitable. The trial court found that the plaintiff did not rely on these statements. Such reliance is, the Court observed, a necessary element in an action based on fraud and deceit. In this case, the finding of nonreliance was amply sustained by the evidence. The plaintiff was a man of long experience in the manufacture and sale of the very class of articles that the corporation made and sold, the corporation was formed to take over the business of manufacturing and selling these items, the plaintiff became a director and president of the corporation and continued in those capacities until the sale of the shares, the plaintiff was not optimistic about the corporation's ability to realize profits and acted on the offer three or four months after it was made. Thus, the Court concluded, the trial court was warranted in concluding that the plaintiff relied on his own judgment, experience, and information in acting on the offer (*177 Cal. 600, 603-604)* .

In ***McLaughlin v. National Union Fire Ins. Co.*** *(1994) 23 Cal. App. 4th 1132, 29 Cal. Rptr. 2d 559* , the plaintiffs, as assignees, sued the defendant, an insurer, for fraud based on the defendant's alleged misrepresentations concerning coverage under an insurance policy. The court of appeal reversed judgment for the plaintiffs on the fraud cause of action. The court noted that the absence of detrimental reliance on the alleged misrepresentations is fatal to recovery for fraud and that the plaintiff must have been deceived or misled by the falsity. In this case, the plaintiffs' assignors had disputed the defendant's position on coverage and had never acted in reliance on its purported truth. Instead, they had litigated the coverage issues and had demanded that the defendant offer the full limits under the policy in settlement of their claims. The court held that, as a matter of law, these actions defeated a finding of reliance (*23 Cal. App. 4th 1132, 1148)* .

[4] Additional Authorities

[a] Plaintiff Relied on Own Judgment

In *Podlasky v. Price (1948) 87 Cal. App. 2d 151, 196 P.2d 608* , the court of appeal reversed judgment for the plaintiff with instructions to enter judgment for the defendant in an action based on fraud for rescission of a contract for the purchase of an apartment house. The trial court found that the seller had falsely represented the rental on one of the apartments and that the buyer relied on the seller's representation that no false statement had been made and entered into a compromise settlement. Conceding for the sake of argument that a deliberate fraud had been perpetrated on the

plaintiff, the court of appeal noted that the plaintiff had settled all her claims against the seller for damages or rescission. During three weeks of discussion, investigation, and consideration, she and her counsel had abundant opportunity to appraise her bargain and the building and to ascertain the facts. The court ruled that if a vendee is suspicious of the vendor's representations, proceeds to make inquiries, is unhampered in this investigation, is aided by his or her own attorney, and acts on his or her own judgment, then the purchase may not be canceled because of misstatements made by the vendor as an inducement. Also, because the plaintiff employed both a veteran broker and a seasoned lawyer who advised her throughout the negotiations for the compromise, she did not rely on anything the defendants told her and, therefore, could not enforce the rescission (*87 Cal. App. 2d 151, 162-163)* .

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10-105 California Points & Authorities § 105.202

§ 105.202 Actual and Justifiable Reliance on Misrepresentation Is Not Sufficiently Pleaded or Proven--Pleading or Proof Shows Plaintiff Relied on Independent Investigation

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO _____ [STATE FACTS SUFFICIENT TO CONSTITUTE *or* ESTABLISH] A CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE THE _____ [COMPLAINT DISCLOSES *or* EVIDENCE SHOWS] THAT PLAINTIFF RELIED ON AN INDEPENDENT EXAMINATION, RATHER THAN ON ANY REPRESENTATION OF DEFENDANT.

Plaintiff Relied on Independent Investigation. If a party does not rely on the other party's statements of fact or opinion, but instead makes an independent examination that satisfies the party, no actionable fraud is shown (*Carter v. Seaboard Fin. Co (1949) 33 Cal. 2d 564, 570, 203 P.2d 758*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the plaintiff or cross complainant either has failed to allege sufficient facts to constitute a cause of action for fraud or has failed to present evidence to establish a fraud claim. The basis of this form is that the plaintiff or cross complainant relied on an independent investigation.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.200[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Therefore, for example, in the case of a motion for summary adjudication of issues, to support the argument that there is no triable issue of material fact regarding whether the plaintiff justifiably relied on the defendant's misrepresentations, counsel would refer to evidence such as the deposition testimony of the plaintiff's expert witness that discloses that the plaintiff relied on the expert's investigation, rather than on any representation of the defendant [*see § 105.200[2][b]*].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For additional points and authorities relating to demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[d] Opposing Points and Authorities

The points and *authorities in § 105.220* et seq., generally, may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Plaintiff Relied on Independent Investigation

In ***Carter v. Seaboard Fin. Co.*** *(1949) 33 Cal. 2d 564, 203 P.2d 758* , the Supreme Court affirmed the trial court's judgment for the defendant on a cause of action for fraud because there was no evidence that the plaintiff had relied on any of the defendant's representations. The plaintiff had purchased two trucks from the defendant on an installment basis, but later notified the defendant that he could no longer make the payments. After receiving notice that the defendant would repossess and sell the trucks in the absence of immediate full payment, the plaintiff brought suit alleging that the defendant fraudulently misrepresented that one of the trucks was in good mechanical condition, but that he learned, after he took possession of the truck, that its motor was not suitable. The plaintiff contended that the defendant also fraudulently concealed from him the fact that the truck had been in an accident a short time before and that the motor's serial number had been changed to make it appear to be a later model. The defendant told the plaintiff that the defendant had recently spent nearly $3,000 to repair it. In view of this statement, the defendant's representation that the truck "should be in good condition" was merely an opinion based on the expenditures and did not form a basis for a cause of action. The defendant's failure to disclose the recent accident was likewise not a basis for a cause of action, because the defendant was not bound to volunteer this information and the repair bill should have put the plaintiff on inquiry as to the reason. No evidence was offered to show that the defendant knew of the change of the serial number or that the plaintiff relied on it in deciding to purchase. There was no evidence of reliance on any of the defendant's representations. Before buying, the plaintiff inspected the truck several times, drove it for about half an hour, and called in a mechanic who had worked on the motor and who advised him that it was all right. The Court concluded that because the plaintiff did not rely on the defendant's statements of fact or opinion, but instead made an independent examination that satisfied him, the plaintiff had not shown actionable fraud (*33 Cal. 2d 564, 570)* .

[4] Additional Authorities

[a] Plaintiff Relied on Independent Investigation

In *Blackman v. Howes (1947) 82 Cal. App. 2d 275* , the court of appeal reversed a judgment of nonsuit in an action for fraud and deceit involving the sale of a filled lot, because there was no showing that the plaintiff had investigated the facts at issue. The defendant, the lot's seller, knew it was filled and told his real estate agent so. The only way to

ascertain that it was filled was to make borings. When asked by the plaintiff's agent whether the lot was fill or solid, the defendant's agent replied that it was not filled. The court of appeal held that if a buyer has only a suspicion of fraud and the seller lulls the buyer into inaction by a false representation, the seller will not be permitted to assert that the buyer lost the right to bring an action by accepting the seller's assurance that there was no fraud. However, a plaintiff is precluding from asserting reliance on the defendant's representations if the plaintiff has the means at hand for determining its truth or falsehood, and resorts to those means without the defendant's interference, and learns after investigation that the representations were false. In this situation, the plaintiff's investigation and ascertainment of the facts exclude the idea that the plaintiff relied on the defendant's falsehood. The law presumes instead that the plaintiff relied on the plaintiff's own investigation and not on the representations of the defendant. A buyer's right to rely on a seller's representations does not exist if the buyer chooses to inspect the property and learns the true facts, for the obvious reason that the buyer has not been defrauded unless the buyer has been mislead and the buyer has not been mislead if the buyer has acted with actual or imputed knowledge of the true facts (*82 Cal. App. 2d 275, 279, 280*).

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10-105 California Points & Authorities § 105.203

§ 105.203 Actual and Justifiable Reliance on Misrepresentation Is Not Sufficiently Pleaded or Proven--Pleading or Proof Shows Plaintiff Relied on Third Party's Advice

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO _____ [STATE FACTS SUFFICIENT TO CONSTITUTE *or* ESTABLISH] A CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE THE _____ [COMPLAINT DISCLOSES *or* EVIDENCE SHOWS] THAT PLAINTIFF RELIED ON THE ADVICE OF A THIRD PARTY, RATHER THAN ON ANY REPRESENTATION OF DEFENDANT.

Plaintiff Relied on Third Party's Advice. If a party does not rely on the other party's statements, but instead relies on the advice of third parties in the matter, there is no actionable fraud (*Colton v. Stanford (1890) 82 Cal. 351, 379, 23 P. 16*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the plaintiff or cross complainant either has failed to allege sufficient facts to constitute a cause of action for fraud or has failed to present evidence to establish a fraud claim. The basis of this form is that the plaintiff relied on the advice of a third party.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.200[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Therefore, for example, in the case of a motion for summary adjudication of issues, to support the argument that there is no triable issue of material fact regarding whether the plaintiff justifiably relied on the defendant's misrepresentations, counsel would refer to evidence such as the deposition testimony of the plaintiff's expert witness that discloses that the plaintiff relied on the expert's advice, rather than on any representation of the defendant [*see § 105.200[2][b]*].

[c] Opposing Points and Authorities

The points and *authorities in § 105.220* et seq., generally, may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Plaintiff Relied on Third Party's Advice

In ***Colton v. Stanford*** *(1890) 82 Cal. 351* , the Supreme Court affirmed a judgment for the defendant in an action for fraud and deceit based on allegations of fraud, holding that the plaintiff had undertaken to investigate the matters at issue for herself and had called in and relied on the advice of experts. The plaintiff was the widow of one of the principal shareholders in the Central Pacific and the Southern Pacific railroad companies, and others became suspicious of the activities of her husband's former associates respecting negotiations leading up to the settlement of the estate's interest. On discovering errors in the calculations on which a settlement agreement had been based, she sought rescission on the ground that the agreement had been procured by fraud. The trial record showed, however, that she had relied on full and complete investigation and advice given her by expert third parties she had called in to assist her. Furthermore, the fundamental principle on which rescission is granted is the consideration that confidence has been reposed and abused. No such claim can in reason be made if the party seeking the rescission--being of competent age and understanding and acting in her own interest--has undertaken to investigate for herself, called in experts, been given free and fair means of ascertaining the truth, acted on her own judgment and the advice of others and repudiated any confidence in or reliance on the parties with whom she was dealing (*82 Cal. 351, 379*).

[4] Additional Authorities

[a] Plaintiff Relied on Third Party's Advice

In *Hackleman v. Lyman (1920) 50 Cal. App. 323, 195 P. 263* , the court of appeal reversed a judgment for the plaintiff in an action to recover damages for the defendant's allegedly fraudulent representations, because the plaintiff did not rely on those representations, but instead made an independent investigation and relied on the advice of a third party. The complaint alleged and the trial court found that for the purpose of inducing the plaintiff to purchase certain farmland, the defendant represented that the land had water on it and could be irrigated. After the representations were made, the plaintiff secured the services of an expert, and both the plaintiff and the expert went to the land and inspected it. The court observed that the plaintiff had resided in the area for more than 10 years, had engaged in farming in that area for four years, and was familiar with the conditions and requirements for irrigation. Thus, it appeared that instead of relying on the defendant's representations, the plaintiff, with the aid of the person he had employed for his experience and fitness, had made an independent examination, on which he was presumed to have acted, rather than on the defendant's representations. Thus, the court concluded, the plaintiff could not claim that the defendant's false representations deceived him (*50 Cal. App. 323, 326-328)* .

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10-105 California Points & Authorities § 105.204

§ 105.204 Actual and Justifiable Reliance on Misrepresentation Is Not Sufficiently Pleaded or Proven--Pleading or Proof Shows Pleading or Proof Shows Plaintiff Relied on Statement of Opinion

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO _____ [STATE FACTS SUFFICIENT TO CONSTITUTE *or* ESTABLISH] A CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE THE _____ [COMPLAINT DISCLOSES *or* EVIDENCE SHOWS] THAT PLAINTIFF UNJUSTIFIABLY RELIED ON STATEMENTS OF OPINION, RATHER THAN ANY REPRESENTATION OF DEFENDANT.

Plaintiff Relied on Statement of Opinion. A plaintiff may not justifiably rely on statements of opinion, including legal conclusions drawn from a true statement of facts, unless the person expressing the opinion purports to have expert knowledge concerning the matter or occupies a position of trust and confidence (*Seeger v. Odell (1941) 18 Cal. 2d 409, 414, 115 P.2d 977*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the plaintiff or cross complainant either has failed to allege sufficient facts to constitute a cause of action for fraud or has failed to present evidence to establish a fraud claim. The basis of this form is that the plaintiff unjustifiably relied on statements of opinion.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.200[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Therefore, for example, in the case of a motion for summary adjudication of issues, to support the argument that there is no triable issue of material fact regarding whether the plaintiff justifiably relied on the defendant's misrepresentations, counsel would refer to evidence such as testimony of the plaintiff at deposition that discloses that the plaintiff unjustifiably relied on a statement of opinion, rather than on any representation of the defendant [*see § 105.200[2][b]*].

[c] Opposing Points and Authorities

The points and *authorities in § 105.220* et seq., generally, may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Plaintiff Relied on Statement of Opinion

Seeger v. Odell *(1941) 18 Cal. 2d 409* , the Supreme Court reversed a judgment on the pleadings for the defendants because the complaint was sufficient to establish the right of the plaintiffs to relief on the basis of a fraudulent misrepresentation. In discussing justifiable reliance, the Supreme Court stated that a plaintiff may not justifiably rely on statements of mere opinion, including legal conclusions drawn from a true statement of facts, unless the person expressing the opinion purports to have expert knowledge concerning the matter of occupies a position of trust and confidence (*18 Cal. 2d 409, 414*).

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10-105 California Points & Authorities § 105.205

§ 105.205 Actual and Justifiable Reliance on Misrepresentation Is Not Sufficiently Pleaded or Proven--Pleading or Proof Shows Plaintiff Relied on Preposterous Representations

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO _____ [STATE FACTS SUFFICIENT TO CONSTITUTE *or* ESTABLISH] A CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE THE _____ [COMPLAINT DISCLOSES *or* EVIDENCE SHOWS] THAT PLAINTIFF PUT FAITH IN REPRESENTATIONS THAT ARE _____ [PREPOSTEROUS *or* SHOWN BY FACTS WITHIN PLAINTIFF'S OBSERVATION TO BE PATENTLY AND OBVIOUSLY FALSE].

Plaintiff Relied on Preposterous Representations. A plaintiff may not put faith in representations that are preposterous or shown by facts within the plaintiff's observation to be patently and obviously false. If the plaintiff's conduct in light of the plaintiff's own intelligence and information was manifestly unreasonable, recovery will be denied (*Seeger v. Odell (1941) 18 Cal. 2d 409, 415, 115 P.2d 977*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the plaintiff or cross complainant either has failed to allege sufficient facts to constitute a cause of action for fraud or has failed to present evidence to establish a fraud claim. The basis of this form is that the pleadings allege or evidence establishes that the plaintiff unjustifiably relied on preposterous and obviously false statements.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.200[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Therefore, for example, in the case of a motion for summary adjudication of issues, to support the argument that there is no triable issue of material fact regarding whether the plaintiff justifiably relied on the defendant's misrepresentations, counsel would refer to evidence, such as declarations and deposition transcripts, that reveals that the plaintiff unjustifiably relied on preposterous and obviously false statements [*see § 105.200[2][b]*].

[c] Opposing Points and Authorities

The points and *authorities in § 105.220* et seq., generally, may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Plaintiff Relied on Preposterous Representations

The facts and procedural background of *Seeger v. Odell (1941) 18 Cal. 2d 409, 115 P.2d 977* , are discussed in *§ 105.204[3][a]*. In holding that a plaintiff's reliance must be justifiable, the Court observed that if the plaintiff's conduct, in light of the plaintiff's own intelligence and information, was manifestly unreasonable, the plaintiff will be denied recovery. That is, the plaintiff may not put faith in representations that are preposterous or that are shown by facts within the plaintiff's observation to be so patently and obviously false that the plaintiff must have closed his or her eyes to avoid discovery of the truth (*18 Cal. 2d 409, 415)* .

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10-105 California Points & Authorities § 105.206

§ 105.206 Actual and Justifiable Reliance on Misrepresentation Is Not Sufficiently Pleaded or Proven--Pleading or Proof Shows Plaintiff's Reliance Is Precluded by Contract

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO _____ [STATE FACTS SUFFICIENT TO CONSTITUTE *or* ESTABLISH] A CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE THE _____ [COMPLAINT DISCLOSES *or* EVIDENCE SHOWS] THAT PLAINTIFF EXPRESSLY AGREED IN THE CONTRACT WITH DEFENDANT THAT PLAINTIFF WOULD INDEPENDENTLY INVESTIGATE THE FACTS AND MAKE PLAINTIFF'S DECISIONS REGARDING THE CONTRACT INDEPENDENTLY AND WITHOUT ANY RELIANCE ON DEFENDANT'S REPRESENTATIONS.

Justifiable Reliance Precluded by Contract. A contracting party may not justifiably rely on the other contracting party's representations or conduct if the first party has expressly agreed in the contract with the other party that the first party will independently investigate the facts and that the first party will make decisions regarding the contract independently and without any reliance on the other party's representations (*Bank of W. v. Valley Nat'l Bank of Ariz. (9th Cir. 1994) 41 F.3d 471, 477-478* (applying California law)).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the plaintiff or cross complainant either has failed to allege sufficient facts to constitute a cause of action for fraud or has failed to present evidence to establish a fraud claim. The basis of this form is that the plaintiff expressly agreed in the contract between the parties that the plaintiff would independently investigate the facts and make decisions regarding the contract independently and without any reliance on the defendant's representations.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.200[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Therefore, for example, in the case of a motion for summary adjudication of issues, to support the argument that there is no triable issue of material fact regarding whether the plaintiff justifiably relied on the defendant's misrepresentations, counsel would refer to the specific provisions of the contract that manifest the intent of the parties as stated in this form [*see § 105.200[2][b]*].

[c] Opposing Points and Authorities

The points and *authorities in § 105.220* et seq. generally may be used in an appropriate case to oppose the points and authorities in this form. In particular, § 105.227 contends that a contract clause does not preclude reliance on fraudulent representations made outside of the written agreement.

[3] Discussion of Authorities

[a] Justifiable Reliance Precluded by Contract

In ***Bank of W. v. Valley Nat'l Bank of Ariz.*** *(9th Cir. 1994) 41 F.3d 471* , the plaintiff was a bank that had loaned money to a corporation. As the corporation's line of credit grew, the plaintiff needed another bank to participate in the loans to avoid exceeding the plaintiff's lending limits. The plaintiff entered into a loan participation agreement with the defendant, under which the defendant agreed to provide 50 percent of the loan funds and 50 percent of any "extraordinary expenses" in connection with the loan. The plaintiff was to manage the loan and deal directly with the corporation. The agreement provided that the defendant was to make its own decisions about the corporation's creditworthiness and would not rely on the plaintiff for determining the corporation's creditworthiness.

After the banks had lent over $10 million to the corporation, the plaintiff learned that the corporation was having financial difficulties and that its creditworthiness was suspect. The plaintiff informed the defendant of this fact, and both banks stopped lending money to the corporation. The plaintiff later learned that the corporation's financial situation was even worse than it had first realized, but did not disclose this to the defendant for a period of six months. However, although it was unaware of this new information, the defendant did not advance any further money to the corporation. The defendant later agreed to advance funds to the plaintiff to bring its loan participation up to the agreed-on 50 percent level, but by this time the plaintiff had informed the defendant about what the plaintiff knew about the corporation's financial situation. Eventually, the corporation filed for bankruptcy, and its failure led to numerous lawsuits involving the banks. After settling these lawsuits and expending attorney's fees to defend them, the plaintiff was left with a net expense of about $6 million. The plaintiff sued the defendant for 50 percent of this amount under the "extraordinary expenses" provisions of the loan participation agreement. The defendant denied that the expenses were covered by the agreement and counterclaimed for fraud, based on the plaintiff's concealment of information about the corporation's financial circumstances. After trial, the jury gave a verdict for the defendant on its fraud counterclaim, but the district court granted the plaintiff a judgment notwithstanding the verdict.

The Ninth Circuit Court of Appeals affirmed the district court's judgment as to the fraud counterclaim. The court noted that to prevail on its fraud claim under California law, the defendant was required to prove five elements: (1) misrepresentation (a false representation, concealment, or nondisclosure); (2) knowledge of falsity (or "scienter"); (3) intent to defraud (intent to induce reliance); (4) justifiable reliance; and (5) resulting damage. The appellate court found that the district court had properly granted the plaintiff a judgment notwithstanding the verdict because the justifiable reliance element was entirely absent. The defendant claimed that, regardless of the contractual terms, it did in fact rely on the plaintiff for important information concerning the corporation. The court stated, however, that this reliance in

fact did not change the parties' agreement that the defendant would make its own judgment about the corporation's creditworthiness, without relying on the plaintiff. The court observed that extrinsic evidence of custom can only be used to prove an interpretation to which the contract is reasonably susceptible. In this case, the court held, the clear and explicit language of the contract prevented justifiable reliance (*41 F.3d 471, 477)* . The court stated that the most favorable characterization of the defendant's conduct allowed by the evidence was that the defendant promised not to rely on the plaintiff, but then did in fact rely on the plaintiff. The court held that this necessarily implies that, to the extent that the defendant did rely on the plaintiff, its reliance was not justifiable. In essence, the court said, the defendant had sold to the plaintiff any right it otherwise might have to rely on the plaintiff's credit evaluations and judgment, by promising away that right in the loan participation agreement (*41 F.3d 471, 478)* .

NOTE:

One California court of appeal, in a case involving somewhat different facts, reached an opposite result, concluding that a contractual provision stating that the parties did not rely on any representations not contained in the contract did not preclude the plaintiff from claiming justifiable reliance on such representations [*Ron Greenspan Volkswagen, Inc. v. Ford Motor Land Dev. Corp. (1995) 32 Cal. App. 4th 985, 996, 38 Cal. Rptr. 2d 783* ; *see also § 105.227[3][a]*].

[4] Additional Authorities

[a] Justifiable Reliance Precluded by Contract

In *Hinesley v. Oakshade Town Ctr. (2005) 135 Cal. App. 4th 289, 37 Cal. Rptr. 3d 364* , the plaintiff was a tenant of a shopping mall who sued the mall owner for fraud and rescission of the commercial lease. The plaintiff alleged that while negotiating the lease, the defendant's representative told him that certain suites around the plaintiff's suite would be occupied by certain well-known chain stores and a regional restaurant chain. However, it was several years before the restaurant opened in the mall, and the other two chains never leased space. The plaintiff argued that he relied on those representations when agreeing to the lease, and that the foot traffic around his store was not what it would have been if those tenants had moved in as represented. Summary judgment was granted for the defendant, and the court of appeal affirmed. The court held that although there was a triable issue as to what representations were actually made to the plaintiff, the plaintiff could not prove justifiable reliance on any such representations because the lease had an explicit provision specifying that the tenant was not relying on representations about other potential tenants in the shopping mall, nor was the lessor making any such representations. The plaintiff admitted that he read the entire lease before signing, had his attorney review it to look for "obvious improprieties," and in fact suggested several changes to the lease before signing. However, the plaintiff never asked about the cotenant representation clause, never mentioned any concern about it to his attorney, and never sought any clarification from the defendant or the defendant's representative before signing. In light of the lease clause, given the importance that the plaintiff allegedly was placing on oral representations about cotenants before signing, the court held that the plaintiff could not reasonably have relied on those representations without at least seeking further clarification (*135 Cal. App. 4th 289, 302-303)* .

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10-105 California Points & Authorities § 105.207

§ 105.207 Actual and Justifiable Reliance on Misrepresentation Is Not Sufficiently Pleaded or Proven--Pleading or Proof Shows Plaintiff's Reliance on Legal Duty to Act

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO _____ [STATE FACTS SUFFICIENT TO CONSTITUTE *or* ESTABLISH] A CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE THE _____ [COMPLAINT DISCLOSES *or* EVIDENCE SHOWS] THAT PLAINTIFF'S ACTIONS IN RESPONSE TO DEFENDANT'S REPRESENTATIONS WERE MANDATED BY LAW, AND AS SUCH, PLAINTIFF'S ACTIONS WERE NOT TAKEN IN RELIANCE ON DEFENDANT'S REPRESENTATIONS.

Plaintiff's Actions Mandated by Law. If misrepresentations trigger actions that are mandated by law on the part of the person to whom the representations are made, then these actions are not taken in reliance on the misrepresentations (*Leegin Creative Leather Prods., Inc. v. Diaz (2005) 131 Cal. App. 4th 1517, 1525, 33 Cal. Rptr. 3d 139*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the plaintiff has failed to allege sufficient facts to constitute a cause of action for fraud or has failed to present evidence to establish a fraud claim. The basis of this form is that the plaintiff's actions in response to the defendant's representations were actions that were mandated by law, and by acting as required by law, the plaintiff did not act in reliance on the representations themselves.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.200[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Therefore, for example, counsel should indicate the actions by the plaintiff on which the plaintiff relies to allegedly show reliance, and then indicate the legal authorities that imposed on the plaintiff the legal duty to take those actions [*see § 105.200[2][b]*].

[c] Opposing Points and Authorities

The points and *authorities in § 105.220* et seq. generally may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Plaintiff's Actions Mandated by Law

In ***Leegin Creative Leather Prods., Inc. v. Diaz*** *(2005) 131 Cal. App. 4th 1517, 33 Cal. Rptr. 3d 139* , the plaintiff was the defendant's employer. The defendant had filed a workers' compensation claim with her employer for an alleged work-related injury to her arms. The plaintiff forwarded this claim on to its workers' compensation insurance carrier. The plaintiff eventually became aware that the defendant had been tape recorded performing physical tasks inconsistent with her claimed injury. Although the workers' compensation claim was still pending, the plaintiff sued the defendant for fraudulently filing a false claim. The defendant filed a motion to strike the complaint under *Code Civ. Proc. § 425.16*, the anti-SLAPP statute. The trial court granted the motion to strike, and plaintiff appealed.

The court of appeal affirmed, concluding that the plaintiff could not establish a probability of success on the merits of the fraud claim. The plaintiff alleged that it reasonably relied on the defendant's misrepresentations by forwarding the workers' compensation claim on to the insurance carrier. However, the court held that this did not constitute detrimental reliance as a matter of law. The plaintiff was required, as an employer, by law and by its workers' compensation insurance policy to report any claims to its insurance carrier. Because of this legal requirement, the plaintiff had no choice but to report the claim to the insurance carrier and could not demonstrate reliance on the allegedly fraudulent claim filed by the defendant (*131 Cal. App. 4th 1517, 1524-1525)* .

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10-105 California Points & Authorities § 105.208

§ 105.208 Actual and Justifiable Reliance on Misrepresentation Is Not Sufficiently Pleaded or Proven--"Fraud-on-Market" Is Inapplicable to Common Law Fraud

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO _____ [STATE FACTS SUFFICIENT TO CONSTITUTE *or* ESTABLISH] A CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE THE _____ [COMPLAINT DISCLOSES *or* EVIDENCE SHOWS] THAT THE BASIS OF PLAINTIFF'S CLAIM IS THE "FRAUD-ON-THE-MARKET" DOCTRINE, WHICH DOES NOT APPLY TO ACTIONS FOR COMMON LAW FRAUD OR DECEIT UNDER CALIFORNIA LAW.

"Fraud-on-Market" Doctrine Does Not Apply to Common Law Fraud. The "fraud-on-the-market" doctrine used in actions under federal and state securities laws, which allows a purchaser of securities to sue persons who have engaged in securities fraud that affects the price of the securities without showing actual reliance on the fraud, does not apply to actions for common law deceit under California law (*Mirkin v. Wasserman (1993) 5 Cal. 4th 1082, 1089-1091, 1108, 23 Cal. Rptr. 2d 101, 858 P.2d 568*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the plaintiff or cross complainant either has failed to allege sufficient facts to constitute a cause of action for fraud or has failed to present evidence to establish a fraud claim. The basis of this form is that the ground of the plaintiff's claim is the "fraud-on-the-market" doctrine, which does not apply to actions for common law deceit under California law.

This form should be included with other points and authorities, depending on the procedural context in which the issue

is raised and on other substantive issues that may be involved [*see § 105.200[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.200[2][b]*].

[c] Opposing Points and Authorities

The points and *authorities in § 105.220* et seq., generally, may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] "Fraud-on-Market" Doctrine Does Not Apply to Common Law Fraud

The facts and procedural background of ***Mirkin v. Wasserman*** *(1993) 5 Cal. 4th 1082, 23 Cal. Rptr. 2d 101, 858 P.2d 568* , are discussed in *§ 105.200[3][a]*. In reaffirming that a plaintiff must plead actual reliance on the alleged misrepresentation to state a cause of action for deceit, the Supreme Court rejected the plaintiffs' argument that the Court should apply the "fraud-on-the-market" doctrine to common law actions for fraud. That doctrine, which applies in actions brought under *Rule 10b-5* of the Securities and Exchange Commission and in actions under *Corp. Code §§ 25400* and *25500*, allows a plaintiff who purchased or sold a security at a price that was affected by false or misleading representations to sue the person who engaged in the fraud without pleading and proving that the plaintiff actually relied on the misrepresentations. The Court rejected the plaintiffs' assertion that incorporation of the "fraud-on-the-market" doctrine in the tort of deceit was necessary to provide a remedy for victimized investors. The Court observed that defrauded investors already have remedies under the federal and state securities laws, which do not require pleading and proof of actual reliance (*5 Cal. 4th 1082, 1100-1103*). Although allowing the plaintiffs to sue under a tort cause of action for deceit would give them certain advantages that they would not have in a suit based on the securities laws, such as a longer limitations period and the possibility of recovering punitive damages, these advantages appeared to conflict with several legislative policy choices that Congress and the California legislature had made in enacting the securities laws. The Court therefore declined to upset these policy choices by incorporating the "fraud-on-the-market" doctrine into the common law tort of deceit (*5 Cal. 4th 1082, 1104-1108*).

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10-105 California Points & Authorities § 105.209

§ 105.209 Actual and Justifiable Reliance on Misrepresentation Is Not Sufficiently Pleaded or Proven--Pleading or Proof Shows Plaintiff Failed to Read Insurance Policy

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO _____ [STATE FACTS SUFFICIENT TO CONSTITUTE *or* ESTABLISH] A CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE THE _____ [COMPLAINT DISCLOSES *or* EVIDENCE SHOWS] THAT PLAINTIFF ACCEPTED THE INSURANCE POLICY AND THAT PLAINTIFF COULD HAVE ASCERTAINED THE ALLEGED MISREPRESENTATIONS REGARDING COVERAGE BY READING THE EXPRESS TERMS OF THE POLICY.

Failure to Read Policy Precludes Reliance on Coverage Misrepresentation. An insured who receives and accepts an insurance policy is bound by its terms and cannot thereafter complain that he or she did not read the policy or know its terms. Therefore, an insured cannot claim justifiable reliance on a broker's or agent's misrepresentations regarding coverage if the insured could have ascertained the truth by reading the express terms of the policy (*Hadland v. NN Investors Life Ins. Co. (1994) 24 Cal. App. 4th 1578, 1586-1589, 30 Cal. Rptr. 2d 88* ; *Hackethal v. National Cas. Co. (1987) 189 Cal. App. 3d 1102, 1111-1112, 234 Cal. Rptr. 853*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the plaintiff or cross complainant either has failed to allege sufficient facts to constitute a cause of action for fraud or has failed to present evidence to establish a fraud claim. The basis of this form is that the plaintiff accepted an insurance policy and could have ascertained the truth of any alleged misrepresentations by the defendant by reading the policy.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.200[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.200[2][b]*].

[c] Opposing Points and Authorities

The points and *authorities in § 105.220* et seq. may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Failure to Read Policy Precludes Reliance on Coverage Misrepresentation

In ***Hadland v. NN Investors Life Ins. Co.*** *(1994) 24 Cal. App. 4th 1578, 30 Cal. Rptr. 2d 88* , the plaintiffs were notified of a large premium increase for their health insurance policy and contacted the defendant, a different insurance company, to inquire about obtaining alternative coverage. The defendant's agent made a presentation to the plaintiffs at which he stated that the defendant's policy provided coverage that was "as good if not better" than the coverage under their existing policy, at half the premium cost of their existing policy. Following this presentation, the plaintiffs applied for coverage under the defendant's policy. Although the defendant's policy did cost half as much as the plaintiffs' previous coverage, the coverage was in fact much more limited. The plaintiffs subsequently received an insurance policy describing the coverage benefits, which the plaintiffs did not read. One of the plaintiffs was hospitalized for a surgical procedure, incurring substantial medical and hospital expenses. In accordance with the terms of the policy, the defendant paid less than half of these expenses. The plaintiffs sued the defendant for fraud based on the defendant's agent's misrepresentations about the level of coverage. The trial court granted the defendant a nonsuit on the fraud cause of action, but entered judgment in their favor on another cause of action. Both the defendant and the plaintiffs appealed.

On appeal, the court of appeal reversed the judgment in the plaintiffs' favor on the other cause of action and held that the trial court had correctly granted a nonsuit on the fraud cause of action. The court noted that to take their fraud cause of action to the jury, the plaintiffs had to prove not only the defendant's false representation, but their own justifiable reliance. In this case, the plaintiffs had admitted that they did not read the insurance policy. The court noted that the receipt of a policy and its acceptance by the insured without an objection binds the insured as well as the insurer and that the insured cannot thereafter complain that he or she did not read the policy or know its terms (*24 Cal. App. 4th 1578, 1586*). In this case, a comparison of the defendant's stated coverage, as in the policy, with that offered by the plaintiffs' former health insurance policy would have revealed that the defendant's policy offered less protection (*24 Cal. App. 4th 1578, 1588*). Thus, the court concluded, any representations by the defendant's agent of "full protection" under the defendant's policy or coverage that was "as good or better" than the old policy were patently at odds with the express provisions of the written contract. If the plaintiffs had read the policy, they would have discovered its coverage limitations, rejected it, and continued to pay the higher premium for the increased security of the former policy's more comprehensive coverage. An insured is bound by clear and conspicuous provisions in the policy even if the insured did not read or understand them. The court held that the plaintiffs, having failed to read the policy and having accepted it, could not complain that it was not what they expected. The court therefore concluded that the plaintiffs' reliance on representations about what they were getting for their money was unjustified as a matter of law (*24 Cal. App. 4th 1578, 1589)* .

In ***Hackethal v. National Cas. Co.*** *(1987) 189 Cal. App. 3d 1102, 234 Cal. Rptr. 853* , the defendant sold the plaintiff, a physician, an insurance policy called "Defendants Reimbursement Policy," which provided for payment to the insured of $200 per day, up to a specified maximum, for each day that the insured was required to attend the trial of a civil suit against the insured for damages alleged to have been caused by the insured's professional malpractice or by an

automobile accident. Eight years later, the Board of Medical Quality Assurance (BMQA) brought professional disciplinary proceedings against the plaintiff, seeking to revoke his license to practice medicine. These proceedings did not seek damages or compensation. The plaintiff was required to attend administrative hearings on 39 different dates. Thereafter, the plaintiff submitted a claim under the policy for the time he was required to spend away from his practice to attend the hearings. The defendant denied the claim on the ground that the policy did not cover administrative proceedings. The plaintiff then sued the insurer and the brokerage firm that sold him the policy for deceit and the insurer only for bad faith failure to pay benefits. The deceit cause of action was based on alleged misrepresentations about coverage contained in the advertising brochure for the policy, as well as alleged misstatements made by one of the brokerage firm's agents. The jury entered a verdict for the plaintiff for benefits, emotional distress damages, and punitive damages, but the trial court granted judgment notwithstanding the verdict on the emotional distress damages and a new trial on the other damages unless the plaintiff agreed to a reduction in the amount of the award. The plaintiff refused to remit any portion of the award, and both parties appealed.

The court of appeal reversed the judgment on the verdict as to both the defendants. The court first held as a matter of law that the policy clearly excluded coverage of the plaintiff's administrative hearings before the BMQA (*189 Cal. App. 3d 1102, 1108-1110)* . Turning to the fraud cause of action, the court first noted that the brochure contained no misrepresentations. Although the representations in the brochure were succinct, they were not in conflict with, nor were they misleading with regard to, the actual terms of the policy. Regarding the agent's statements, the court noted that the plaintiff had admitted that the agent never told him that the policy provided coverage for administrative hearings such as those before the BMQA, and therefore the court did not see how anything the agent had said could have led the plaintiff to believe that the policy covered such hearings. Furthermore, even if the plaintiff did rely on statements of the agent in forming such a belief and for that reason renewed the policy, his reliance was unjustifiable as a matter of law (*189 Cal. App. 3d 1102, 1111)* . The court observed that the brochure that the plaintiff had received had put him on notice that the policy controlled the extent of the coverage and advised in bold letters "PLEASE READ YOUR POLICY." The plaintiff testified that he had read the policy but had not "analyzed" it. The court stated that the plaintiff should have done so and had a duty to do so. Receipt of a policy and its acceptance by the insured without objection binds both the insured and the insurer and the insured cannot thereafter complain that he or she did not read the policy or know its terms. The court therefore concluded that the trial court erred in denying the defendants' motions for direct verdicts on the fraud causes of action (*189 Cal. App. 3d 1102, 1112)* .

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10-105 California Points & Authorities § 105.210

§ 105.210 Actual and Justifiable Reliance on Misrepresentation Is Not Sufficiently Pleaded or Proven--Reliance on Corporate Misrepresentations Inducing Decision to Retain Stock in Corporation Must Be Pleaded With Specificity

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief*].

PLAINTIFF HAS FAILED TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION FOR FRAUD BECAUSE PLAINTIFF HAS FAILED TO PLEAD WITH SPECIFICITY THE FACTS DEMONSTRATING THAT PLAINTIFF ACTUALLY RELIED ON CORPORATE MISREPRESENTATIONS WHEN DECIDING NOT TO SELL STOCK IN THE CORPORATION.

Reliance on Corporate Misrepresentations Inducing Decision Not to Sell Stock in Corporation Must Be Pleaded With Specificity. Although stock investors may bring a common law action for fraud or negligent misrepresentation if false statements or reports issued by corporate directors induce the holders of that company's stock to decide not to sell the stock, a plaintiff in such a suit must plead actual reliance with specificity to state a cause of action (*Small v. Fritz Cos., Inc. (2003) 30 Cal. 4th 167, 171, 132 Cal. Rptr. 2d 490, 65 P.3d 1255*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a plaintiff in an action against a corporation for fraud that induces the plaintiff to decide not to sell stock in the corporation that the plaintiff already owns must plead actual reliance with specificity to state a cause of action. Allegations supporting a finding of actual reliance could include allegations stating that if plaintiff had read a truthful account of the corporation's financial status, the plaintiff would have sold a specified amount of stock on a specified date [*Small v. Fritz Cos., Inc. (2003) 30 Cal. 4th 167, 184, 132 Cal. Rptr. 2d 490, 65 P.3d 1255* ; *Kouri v. Superior Court (2007) 148 Cal. App. 4th 460, 471, 55*

Cal. Rptr. 3d 777] .

Federal law preempts class action suits alleging fraud or misrepresentation in connection with the sale or purchase of securities, including actionable conduct that induces a decision to hold already-purchased securities, if those suits are brought in the name of 50 or more class members [*Merrill Lynch, Pierce, Fenner Smith, Inc. v. Dabit (2006) 547 U.S. 71, 126 S. Ct. 1503, 164 L. Ed. 2d 179, 193* (preemption based on Securities Litigation Uniform Standards Act of 1998, codified at *15 U.S.C.S. § 78bb(f)(1)(A)*)].

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.200[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel could point to the failure of the plaintiff to allege with specificity that if plaintiff had read a truthful account of the corporation's financial status, the plaintiff would have sold a specified amount of stock on a specified date [*see § 105.200[2][b]*].

[c] Opposing Points and Authorities

The points and *authorities in § 105.220* et seq. may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Reliance on Corporate Misrepresentations Inducing Decision Not to Sell Stock in Corporation Must Be Pleaded With Specificity

In ***Small v. Fritz Cos., Inc.*** *(2003) 30 Cal. 4th 167, 132 Cal. Rptr. 2d 490, 65 P.3d 1255* , the plaintiff was a stockholder who retained stock in a corporation, rather than selling it, based on a fraudulent quarterly statement issued by the corporation that grossly overreported earnings and profits. Once the fraudulent report was revealed, the price of the stock fell more than 55 percent in one day. The plaintiff then brought an action for common law fraud and negligent misrepresentation against the corporation and its officers. The trial court sustained the defendants' demurrer on the grounds that the complaint failed to allege facts constituting actual reliance with the requisite specificity. The plaintiff appealed, and the court of appeals reversed. The defendants then appealed.

The California Supreme Court reversed the court of appeals. The Court first held that because California common law recognizes the right to bring an action for fraud that induces a plaintiff to forebear from doing something, a plaintiff may bring an action if fraud or negligent misrepresentation induces the plaintiff to refrain from selling stock that the plaintiff already owns. Recognizing that California has a legitimate and compelling interest in preserving a business climate free of fraud and deceptive corporate practices, the Court rejected policy arguments made by the defendants seeking to justify a blanket rule prohibiting such an action (*30 Cal. 4th 167, 173-183)* . However, the Court also recognized that the risk of encouraging nonmeritorious suits in this context justified imposing a requirement that the plaintiff plead with specificity facts showing actual reliance on the misrepresentations. In this case, the Court concluded that the plaintiff's bare assertion that he relied on the corporation's quarterly report failed to meet this pleading requirement. The Court then remanded the case to allow the plaintiff to amend his pleadings to attempt to meet the requirement (*30 Cal. 4th 167, 183-185)* .

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[Reserved]

§§ 105.211[Reserved]

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10-105 California Points & Authorities § 105.220

§ 105.220 Actual and Justifiable Reliance Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Mere Failure to Investigate That Will Not Bar Recovery

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF _____ [SHOULD PREVAIL ON THE *or* HAS STATED FACTS SUFFICIENT TO CONSTITUTE A] CAUSE OF ACTION FOR FRAUD AND DECEIT DESPITE AN ALLEGED FAILURE TO INVESTIGATE, BECAUSE A MERE FAILURE TO INVESTIGATE DOES NOT BY ITSELF BAR RECOVERY.

A. Mere Failure to Investigate Does Not Bar Recovery. The fact that an investigation would have revealed the misrepresentation's falsity will not by itself bar the plaintiff's recovery (*Seeger v. Odell (1941) 18 Cal. 2d 409, 414-415, 115 P.2d 977*).

B. Defendant's Misrepresentation Was Intentional. The plaintiff's negligence in failing to discover a statement's falsity is no defense if the misrepresentation was intentional rather than negligent. As a general rule, the plaintiff's negligence is no defense to an intentional tort (*Seeger v. Odell (1941) 18 Cal. 2d 409, 414, 115 P.2d 977*).

C. Right of Action Not Destroyed if Plaintiff Justifiably Relied. If one is justified in relying, and in fact does rely, on false representations, one's right of action is not destroyed because the means of knowledge were open to one. In such a case, one has no duty in law to employ that means of knowledge (*Howell v. Courtesy Chevrolet, Inc. (1971) 16 Cal. App. 3d 391, 403, 94 Cal. Rptr. 33*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff or cross complainant has

failed to establish actual and justifiable reliance on the defendant's representations, because the plaintiff has failed to investigate the representations. The basis of this form is that the mere fact that the plaintiff did not investigate does not bar the plaintiff from recovery. Thus, this form may be used if the pleadings and affidavits of record clearly show that even though the plaintiff could have investigated and discovered the falsity of the defendant's representations, the plaintiff did not do so.

This form may be used to oppose the points and *authorities in § 105.200* et seq.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue--for example, by response to a demurrer or by opposition to a motion for summary judgment. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, for example, in the case of opposition to a motion for summary adjudication of issues, counsel would refer to facts in declarations or deposition transcripts establishing that there is a triable issue of material fact regarding whether the misrepresentation was intentional and that the plaintiff justifiably relied on the misrepresentation.

Any statement of fact should be supported by adequate reference to the pleading (or matters subject to judicial notice), if the form is used in a memorandum opposing a demurrer or another challenge to the sufficiency of the pleading. Similarly, any statement of fact should be supported by adequate reference to evidence admitted or otherwise cognizable by the court, if the form is used to oppose a motion challenging the adequacy of proof.

For example, a memorandum opposing a motion for summary judgment may refer to affidavits or declarations based on personal knowledge or matters subject to judicial notice [*see Code Civ. Proc. §§ 2009, 2015.5* (affidavits and declarations); *Evid. Code § 450 et seq.* (judicial notice)]. For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For legal background with detailed coverage of the elements of a tort action for fraud and deceit, see California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender).

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For additional points and authorities relating to demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Mere Failure to Investigate Does Not Bar Recovery

In ***Seeger v. Odell*** *(1941) 18 Cal. 2d 409, 115 P.2d 977* , the facts and background of which are discussed in *§ 105.204*, the plaintiffs had executed an oil lease on their property. Subsequently, they took action to prevent an impending mortgage foreclosure or to exercise their equity of redemption because of the defendant's misrepresentations.

The Supreme Court ruled that the fact that an investigation would have revealed the falsity of the misrepresentations will not by itself bar recovery. It is well established, said the Court, that the plaintiff is not held to have constructive notice of a public record that would reveal the true facts. The purpose of the recording acts is to afford protection not to those who make fraudulent misrepresentations, but to bona fide purchasers for value. A plaintiff is not held to the standard of precaution or minimum knowledge of a hypothetical reasonable person. Exceptionally gullible or ignorant people have been permitted to recover from the defendants who took advantage of them in circumstances in which persons of normal intelligence would not have been misled. A plaintiff's negligence in failing to discover the falsity of a statement is no defense if the misrepresentation was intentional rather than negligent because, as a general rule, the plaintiff's negligence is no defense to an intentional tort. However, the Court added that if the conduct of the plaintiff in the light of the plaintiff's own intelligence and information was manifestly unreasonable, the plaintiff cannot recover. The plaintiff may not put faith in representations that are preposterous, or shown by facts within the plaintiff's observation to be so patently and obviously false that the plaintiff must have closed his or her eyes to avoid discovery of the truth (*18 Cal. 2d 409, 414-415)* .

[b] Defendant's Misrepresentation Was Intentional

Seeger v. Odell *(1941) 18 Cal. 2d 409, 115 P.2d 977* , is discussed in *§ 105.220[3][a]*.

[c] Right of Action Not Destroyed if Plaintiff Justifiably Relied

In ***Howell v. Courtesy Chevrolet, Inc.*** *(1971) 16 Cal. App. 3d 391, 94 Cal. Rptr. 33* , the court of appeal affirmed a trial court's judgment in favor of the plaintiffs in an action for rescission of a contract on the grounds of fraud. The plaintiff, a financier, had relied on an invoice the defendant prepared that included the cost of three trash collection trucks with three specially fabricated bodies and had made payment for the trucks. The bodies were never installed, and the plaintiff sued for rescission. The trial court found that the plaintiff had justifiably relied on the representation made on the invoice as to the bodies and that the representation was made negligently and with intent to induce the payment. Not until the plaintiff had received notice that the user of the trucks under a lease agreement had failed to make payments and was in bankruptcy did it repossess the trucks and discover that two of the trucks had no trash bodies and one had an old damaged body. The defendant contended on appeal that the trial court should have found negligence or contributory negligence on the plaintiff's part, citing personal injury cases as authority. However, those cases were not authority for the right to assert the plaintiff's contributory negligence as a defense to an action for fraud and deceit. The court of appeal ruled that the issue in this case was whether or not the plaintiff was justified in relying on the defendant's representation. The court found that the trial court's finding that the plaintiff had justifiably relied was proper. If the plaintiff was justified in relying, and in fact did rely, on the defendant's false representations, the plaintiff's right of action was not destroyed because the means of knowledge were open to the plaintiff. In such a case, the plaintiff had no duty in law to employ such means of knowledge (*16 Cal. App. 3d 391, 403)* .

[4] Additional Authorities

[a] Mere Failure to Investigate Does Not Bar Recovery

In *Rogers v. Warden (1942) 20 Cal. 2d 286, 125 P.2d 7* , the facts and background of which are discussed in *§ 105.71[3]*, the Supreme Court noted that the alleged false representation, that the plaintiff had no right in the property in question, was actionable. The representation was alleged to have been made with knowledge of its falsity and with the intention of inducing the plaintiff to rely on it, and the plaintiff did indeed rely on it. The Court ruled that it could not be said that the plaintiff, a widow unaccustomed to handling business matters and with no knowledge that she possessed any interest at all in the property, was not justified in relying on the alleged representations without making an independent investigation. The fact that an investigation would have revealed the falsity of the misrepresentation would not by itself bar recovery (*20 Cal. 2d 286, 289)* .

In *Meyer v. Ford Motor Co. (1969) 275 Cal. App. 2d 90, 79 Cal. Rptr. 816* , the court of appeal affirmed a trial court's

judgment for the plaintiff in an action for damages for fraud and for breach of contract. The evidence, uncontested on appeal, showed that the defendant's agents made certain willfully fraudulent representations to the plaintiff at a meeting after the defendant exercised its right to terminate the plaintiff's franchise, including a promise that the plaintiff would not be hurt financially on the sale of his interest. Despite the fact that one of the subordinate agents told the plaintiff after the meeting that he would not be allowed to sell for the price necessary to avoid being hurt financially, the plaintiff relied on the promises by forgoing certain contractual rights to contest the termination. On appeal, the defendant contended that because of the subordinate agent's statement after the meeting, the plaintiff had no right to rely on the statements made at the meeting. However, the court ruled that in view of the superior positions of the other agents, it could not be said as a matter of law that it was unreasonable for the plaintiff to assume that the subordinate was merely speaking for himself and that, in keeping with their promises, the other agents would overrule that statement. The law does not require that a person to assume that everyone with whom that person has a business transaction is a rogue and act accordingly. The fact that an investigation would have revealed the falsity of the misrepresentation will not by itself bar recovery (*275 Cal. App. 2d 90, 105)* .

[b] Defendant's Misrepresentation Was Intentional

In *Manderville v. PCG&S Group, Inc. (2007) 146 Cal. App. 4th 1486, 55 Cal. Rptr. 3d 59* , plaintiffs bought a plot of land with the intent to subdivide the plot and build two houses. Prior to making an offer to buy, the brokers for the sellers represented in their listing that the county had stated that the plot could be split and allegedly told the buyers' broker that the plot had already been approved for a split. However, the sales contract gave the buyers the right to investigate the laws limiting development on the property and strongly advised the buyers to do so, and also contained an integration clause stating that all understandings between the parties were contained in the written contract. After closing, plaintiffs discovered that the property was too small to be subdivided under applicable zoning laws. The trial court granted summary judgment for the brokers on plaintiffs' intentional misrepresentation claims after concluding that the plaintiffs could not prove justifiable reliance. The court of appeal reversed. Addressing the brokers' claims that the buyers were negligent in failing to completely investigate the zoning restrictions before purchase, the court of appeal noted the established rule that, in an action for fraud or deceit, negligence on the part of the plaintiff in failing to discover the falsity of the defendant's statement is no defense if the defendant's misrepresentation was intentional (*146 Cal. App. 4th 1486, 1502)* .

Howell v. Courtesy Chevrolet, Inc. (1971) 16 Cal. App. 3d 391, 94 Cal. Rptr. 33 , is discussed in *§ 105.220[3][c]*.

[c] Right of Action Not Destroyed if Plaintiff Justifiably Relied

In *London v. Guberman (1963) 214 Cal. App. 2d 215* , the court of appeal affirmed a trial court's judgment for the plaintiff in an action for damages for fraud in the sale of an advertising business. During the purchase negotiations, the defendant's agent gave the plaintiff a written profit and loss statement indicating that the business was operating profitably. The court of appeal ruled that the trial court was justified in drawing the inference that the statement emanated from the defendant personally and that he personally had made the representations knowing that they were false. The court held that even if contracting parties are adverse to each other, either party has the right to rely on the other's express statement of an existing fact the truth of which is known to the other and unknown to the relying party. Furthermore, ruled the court, if one is justified in relying, and does in fact rely, on false representations, one's right of action is not destroyed merely because opportunities for examination or means of knowledge were open to one because, in this situation, one has no legal duty to employ such opportunities for examination or means of knowledge (*214 Cal. App. 2d 215, 219-220*).

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10-105 California Points & Authorities § 105.221

§ 105.221 Actual and Justifiable Reliance Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Plausible Explanation Eliminated Duty to Investigate

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF _____ [SHOULD PREVAIL ON THE *or* HAS STATED FACTS SUFFICIENT TO CONSTITUTE A] CAUSE OF ACTION FOR FRAUD AND DECEIT DESPITE AN ALLEGED FAILURE TO INVESTIGATE, BECAUSE DEFENDANT MADE A PLAUSIBLE EXPLANATION OF FACT.

Plausible Explanation Precludes Investigation. If the defendant makes a plausible explanation of fact, the plaintiff is not required to investigate further (*Hartong v. Partake, Inc. (1968) 266 Cal. App. 2d 942, 966, 72 Cal. Rptr. 722*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff or cross complainant has failed to establish actual and justifiable reliance on the defendant's representations, because the plaintiff has failed to investigate the representations. The basis of this form is that the mere fact that the plaintiff did not investigate does not bar the plaintiff from recovery, because the defendant made a plausible explanation of fact.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.220[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, for example, in the

case of opposition to a motion for summary adjudication of issues, counsel may refer to the defendant's deposition testimony that discloses a plausible explanation of fact on which the plaintiff reasonably relied to support the argument that there is a triable issue of material fact regarding whether the plaintiff justifiably relied on the defendant's misrepresentations [*see § 105.220[2][b]*].

[3] Discussion of Authorities

[a] Plausible Explanation Precludes Investigation

In ***Hartong v. Partake, Inc.*** *(1968) 266 Cal. App. 2d 942, 72 Cal. Rptr. 722* , the court of appeal affirmed a trial court's judgment for the plaintiff in an action for fraud in the inducement of the execution of franchise contracts. The court of appeal noted that the defendants deflected the plaintiffs' suspicions by plausible assertions of fact. As an example, the court cited the fact that when some of the plaintiffs noticed that the defendants were signing agreements, not with the nominal contracting party but with corporations having different names, the defendants' agent told them that these companies were the nominal contracting party's western branches. The court then held that if a defendant makes a plausible explanation of fact, the plaintiff is not required to investigate further (*266 Cal. App. 2d 942, 966)* .

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10-105 California Points & Authorities § 105.222

§ 105.222 Actual and Justifiable Reliance Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Plaintiff Had Limited Capacity to Investigate

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF _____ [SHOULD PREVAIL ON THE *or* HAS STATED FACTS SUFFICIENT TO CONSTITUTE A] CAUSE OF ACTION FOR FRAUD AND DECEIT DESPITE PLAINTIFF'S INDEPENDENT INVESTIGATION, BECAUSE AN INDEPENDENT INVESTIGATION DOES NOT BAR RECOVERY IF IT IS ALSO _____ [SHOWN *or* ALLEGED] THAT _____ [THE REPRESENTATION'S FALSITY WAS NOT APPARENT FROM AN INSPECTION *or* THE PERSON MAKING THE REPRESENTATIONS HAD A SUPERIOR KNOWLEDGE *or* THE PARTY RELYING ON THE REPRESENTATION WAS NOT COMPETENT TO JUDGE THE FACTS WITHOUT EXPERT ASSISTANCE].

Reliance Not Precluded by Investigation. A plaintiff's independent investigation or examination does not preclude the plaintiff's reliance on representations if the representations' falsity was not apparent from the inspection, if the person making the representations had a superior knowledge, or if the plaintiff was not competent to judge the facts without expert assistance (*Bagdasarian v. Gragnon (1948) 31 Cal. 2d 744, 748, 192 P.2d 935*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff or cross complainant has failed to establish actual and justifiable reliance on the defendant's representations, because the plaintiff conducted an independent investigation. The basis of this form is that the plaintiff's independent investigation does not bar recovery because the representation's falsity was not apparent from an inspection, the person making the representation had a superior knowledge, or the party relying on the representations was not competent to judge the facts without expert

assistance.

This form may be used to oppose the points and *authorities in § 105.200* et seq.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.220[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, for example, in the case of opposition to a motion for summary adjudication of issues, to support the argument that there is a triable issue of material fact regarding whether the plaintiff justifiably relied on the defendant's misrepresentations, counsel would refer to facts in declarations or deposition transcripts establishing that the representations' falsity were not apparent from an inspection, the person making the representations had a superior knowledge, or the party relying on the representations was not competent to judge the facts without expert assistance [*see § 105.220[2][b]*]

[3] Discussion of Authorities

[a] Reliance Not Precluded by Failure to Investigate

The facts and procedural background of ***Bagdasarian v. Gragnon*** *(1948) 31 Cal. 2d 744, 192 P.2d 935* , are discussed in *§ 105.332[3][b]*. The Supreme Court held in favor of the defendants and cross complainants on their cause of action for damages for fraud. The plaintiff had listed certain farm property for sale and furnished data concerning crop yield and value to a real estate agent. There was no question that the representations were material, false, and made to induce the purchase. However, the plaintiff contended that the buyers did not rely on the representations, because one of the buyers had visited the farm several times and inspected the crops. That party was experienced in growing other crops, but knew nothing about the crops in question, and he testified that he relied on the plaintiff's representations.

The Court noted that there was no evidence requiring a finding that the falsity of the representations as to value or yield was discoverable from the buyer's inspection, considering the time of the year when he made the inspection and his lack of experience. In addition, although the buyer was advised by a bank appraiser that "it wasn't a very good ranch" and that the grape yield would be less than half the amount represented, the Court observed that the trial court could properly find that the buyers believed the seller's estimate to be more nearly correct and that they were justified in their continued reliance on the seller's statements as to records of past production, as well as the representations concerning current crops. An independent investigation or an examination of property does not preclude reliance on representations if the representations' falsity is not apparent from an inspection, the person making the representations has a superior knowledge, or the party relying on the representations is not competent to judge the facts without expert assistance (*31 Cal. 2d 744, 748)* .

[4] Additional Authorities

[a] Reliance Not Precluded by Failure to Investigate

The facts and background of *Hobart v. Hobart Estate Co. (1945) 26 Cal. 2d 412, 159 P.2d 958* , are discussed in *§ 105.290[3][a]*. In this case, the defendants contended that the evidence showed that investigations into the value of the worth of the stock in question were made on the plaintiff's behalf and that one who has conducted an independent investigation must be deemed to have relied on the investigation rather than on any representations made to that person. However, the Court ruled that a defrauded person is not barred from maintaining an action merely because the person commenced an investigation, if that investigation was incomplete or abandoned before discovery of the falsity, particularly if the defendant has a superior knowledge of the facts, if it is difficult for the plaintiff to ascertain all the facts, or if the plaintiff is not competent to judge the facts without expert assistance. In this respect, the Court noted that

expert witnesses had testified that determining the stock's value would have required a complete examination of all of the company's assets, which were extensive. The evidence also showed that it was difficult to secure the information needed to form an accurate estimate of the value, that one of the defendants had superior knowledge concerning these facts, and that the plaintiff was not competent without expert assistance to determine the stock's worth. The evidence did not establish that those who attempted the investigation were qualified to give that assistance. Moreover, there was evidence that the plaintiff did not make a complete investigation because of his reliance on the defendant's representations (*26 Cal. 2d 412, 434-435)* .

In *Hartong v. Partake, Inc. (1968) 266 Cal. App. 2d 942, 72 Cal. Rptr. 722* , the court of appeal affirmed a trial court's judgment for the plaintiffs in an action for fraud in the inducement of the execution of franchise contracts. The defendants contended that the plaintiffs were barred from recovery because they had conducted independent investigations. However, the court of appeal ruled that if a plaintiff commences an investigation, the plaintiff's failure to discover the truth may be excused by the defendant's superior knowledge of the facts, the difficulty in ascertaining all of the facts, or the plaintiff's incompetence to judge the facts without expert assistance. Thus, the fact that some of the plaintiffs checked one of the defendants with the Better Business Bureau was no bar to recovery. The fact that this agency had no specific information about another of the defendants was consistent with the defendants' representations that this other defendant was the first defendant's new western branch (*266 Cal. App. 2d 942, 966)* .

In *Snelson v. Ondulando Highlands Corp. (1970) 5 Cal. App. 3d 243* , the court of appeal reversed the trial court's judgment for the plaintiff with directions to the trial court to take such action as was necessary to conform to the decision on appeal. The plaintiffs had negotiated for the purchase of a residence and asked the sales manager if there was fill on the lot. The defendants provided the plaintiffs with maps and reports showing the lot to be cut rather than fill. A rainstorm later caused a landslide on the lot, and experts indicated that the landslide would not have occurred if the property had been cut. The court ruled that affirmative representation that land is cut when it is on a fill constitutes actionable fraud and that the plaintiffs had relied on the representations. The court noted that surface observations would not have revealed if the land was cut or fill and held that an independent investigation or an examination of property does not preclude reliance on representations if the representations' falsity is not apparent from an inspection, if the person making the representations has a superior knowledge, or if the party relying on the representations is not competent to judge the facts without expert assistance. Accordingly, the court concluded that the evidence was adequate to support the trial court's judgment for the plaintiffs granting rescission of the purchase on the ground of fraudulent misrepresentation (*5 Cal. App. 3d 243, 251-252*).

In *Balfour, Guthrie & Co. v. Hansen (1964) 227 Cal. App. 2d 173, 38 Cal. Rptr. 525* , the court of appeal affirmed judgment for the plaintiffs in an action for damages for fraudulent misrepresentation in connection with a contract for the construction of grain silos. The defendant represented that the contract was completed according to specifications. There was reasonable reliance, the court concluded, because the owner made payment for the work believing that the work was done according to the plans and specifications and because the owner had no one competent to determine the quality of construction. The owner's agent who was on the job site daily had not been hired to make a constant investigation of whether or not the plans and specifications were being adequately followed. His main duty was to execute certificates concerning concrete incorporated into the job so that the owner could be paid by the entity financing the construction. Moreover, the court observed, it was not obvious that the concrete or reinforcing steel was being improperly placed. The agent's visits did not suffice to give him an adequate opportunity to detect failures in complying with the plans and specifications and would not have sufficed unless he had planned to spend 24 hours a day on the job. The court ruled that an independent investigation or an examination of property does not preclude reliance on representations if the representations' falsity is not apparent from an inspection, if the person making the representations has a superior knowledge, or if the party relying on the representations is not competent to judge the facts without expert assistance (*227 Cal. App. 2d 173, 193-196)* .

In *Curran v. Heslop (1953) 115 Cal. App. 2d 476* , the court of appeal affirmed the trial court's judgment for the plaintiff in an action based on fraudulent suppression of fact in negotiations for the purchase of real property. The

complaint alleged that the defendants had concealed facts concerning building code violations. The defendants argued that the plaintiff did not rely on the presence or absence of those violations in making the purchase and was not induced to purchase as a result of the alleged fraud because she made an independent examination of the property before consummating the transaction. An independent investigation or an examination of property does not preclude reliance on representations if the representations' falsity is not apparent from an inspection, if the person making the representations has a superior knowledge, or if the party relying on the representations is not competent to judge the facts without expert assistance. The evidence in this case supported the inference that the violations were not apparent, that the defendants had a superior knowledge, and that the plaintiff was not competent to judge the facts without expert assistance (*115 Cal. App. 2d 476, 481-482*).

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10-105 California Points & Authorities § 105.223

§ 105.223 Actual and Justifiable Reliance Is Sufficiently Pleaded or Proven--Pleading or Proof Merely Shows Existence of Public Record of Which Plaintiff Had No Constructive Notice

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF _____ [SHOULD PREVAIL ON THE *or* HAS STATED FACTS SUFFICIENT TO CONSTITUTE A] CAUSE OF ACTION FOR FRAUD AND DECEIT DESPITE THE EXISTENCE OF PUBLIC RECORDS THAT MIGHT HAVE ENABLED PLAINTIFF TO ASCERTAIN THE FALSITY OF DEFENDANT'S REPRESENTATIONS, BECAUSE A PLAINTIFF IS NOT HELD TO CONSTRUCTIVE NOTICE OF THOSE RECORDS.

Constructive Notice of Public Record. A plaintiff is not held to constructive notice of a public record that would reveal the true facts (*Seeger v. Odell (1941) 18 Cal. 2d 409, 415, 115 P.2d 977*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff or cross complainant has failed to establish actual and justifiable reliance on the defendant's representations, because the plaintiff examine existing public records that might have revealed the falsity of the defendant's representations. The basis of this form is that the plaintiff is not held to have constructive notice of those public records.

This form may be used to oppose the points and *authorities in § 105.200* et seq.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.220[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.220[2][b]*].

[3] Discussion of Authorities

[a] Constructive Notice of Public Record

The facts and procedural background of ***Seeger v. Odell*** *(1941) 18 Cal. 2d 409, 115 P.2d 977* , are discussed in *§ 105.204*. The Supreme Court ruled that the fact that an investigation of public records would have revealed the falsity of the misrepresentation will not by itself bar the plaintiff's recovery. It is well established that the plaintiff is not held to constructive notice of a public record that would reveal the true facts (*18 Cal. 2d 409, 414-415)* .

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10-105 California Points & Authorities § 105.224

§ 105.224 Actual and Justifiable Reliance Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Reliance Because Misrepresentation Was Substantial Factor in Inducement

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF _____ [SHOULD PREVAIL ON THE *or* HAS STATED FACTS SUFFICIENT TO CONSTITUTE A] CAUSE OF ACTION FOR FRAUD AND DECEIT, EVEN IF PLAINTIFF RELIED IN PART ON THE ADVICE OF OTHERS, BECAUSE DEFENDANT'S REPRESENTATIONS WERE A SUBSTANTIAL FACTOR IN INDUCING PLAINTIFF TO ACT.

Representations as Substantial Factor in Inducement. In actions for fraud, it is not necessary that a defendant's representations be the sole cause of the damage. If they are a substantial factor in inducing the plaintiff to act, reliance is sufficiently shown, even though the plaintiff also relied in part on the advice of others (*Wennerholm v. Stanford Univ. Sch. of Medicine (1942) 20 Cal. 2d 713, 717, 128 P.2d 522*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff or cross complainant has failed to establish actual and justifiable reliance on the defendant's representations. The basis of this form is that it is not necessary that a defendant's representations be the sole cause of the plaintiff's damage, if they are a substantial factor in inducing the plaintiff to act.

This form may be used to oppose the points and *authorities in § 105.200* et seq.

This form should be included with other points and authorities, depending on the procedural context in which the issue

is raised and on other substantive issues that may be involved [*see § 105.220[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, for example, in the case of opposition to a motion for summary adjudication of issues, to support the argument that there is a triable issue of material fact regarding whether the plaintiff justifiably relied on the defendant's misrepresentations, counsel would refer to facts in declarations or deposition transcripts establishing that the defendant's representations were a substantial factor in inducing the plaintiff to act [*see § 105.220[2][b]*].

[3] Discussion of Authorities

[a] Representations as Substantial Factor in Inducement

In ***Wennerholm v. Stanford Univ. Sch. of Medicine*** *(1942) 20 Cal. 2d 713* , the Supreme Court reversed a trial court's judgment for the defendants following the sustaining of demurrers to the plaintiff's fifth amended complaint without leave to amend. The complaint charged the defendants with fraud, alleging that the defendants had falsely represented to the public that a drug they manufactured would relieve obesity and was harmless when they knew the drug was dangerous and liable to cause blindness. The complaint further alleged that the plaintiff read, believed, and relied on the false representations and that, in reliance on them, she purchased and consumed the drug. The Court held that, even if allegations that the plaintiff took the drug on her physician's advice, which were contained in prior versions of the complaint but omitted from the complaint at issue, could be read into the complaint at issue, the complaint at issue sufficiently alleged the plaintiff's reliance on the defendants' representations. In actions for fraud, said the Court, it is not required that a defendant's representations be the sole cause of the damage. If they are a substantial factor in inducing the plaintiff to act, even though the plaintiff also relies in part on the advice of others, reliance is sufficiently shown (*20 Cal. 2d 713, 717*).

[4] Additional Authorities

[a] Representations as Substantial Factor in Inducement

The facts and background of *Sanfran Co. v. Rees Blow Pipe Mfg. Co. (1959) 168 Cal. App. 2d 191, 335 P.2d 995* , are discussed in *§ 105.71[3]*. The court of appeal held that a cause of action for fraud and deceit would be stated if the evidence showed that the fraudulent concealment involved was an inducement to the plaintiff's purchase without showing that it was the sole inducement (*168 Cal. App. 2d 191, 205)* .

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10-105 California Points & Authorities § 105.225

§ 105.225 Actual and Justifiable Reliance Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Reliance Exists Because Plaintiff Was "Brainwashed"

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF _____ [SHOULD PREVAIL ON THE *or* HAS STATED FACTS SUFFICIENT TO CONSTITUTE A] CAUSE OF ACTION FOR FRAUD AND DECEIT, EVEN IF PLAINTIFF WAS INFORMED THAT DEFENDANT'S STATEMENTS WERE MISREPRESENTATIONS, BECAUSE DEFENDANT'S DECEIT LED PLAINTIFF INTO A SETTING IN WHICH PLAINTIFF WAS RENDERED INCAPABLE OF DECIDING NOT TO ACT ON DEFENDANT'S INITIAL MISREPRESENTATIONS.

A. Plaintiff "Brainwashed" and Unable to Act on Truth. In an action for fraud, the plaintiff's reliance on the defendant's misrepresentations will not be negated by the defendant's later informing the plaintiff of the truth, if the defendant's deceit had led plaintiff into a setting in which the plaintiff could be "brainwashed" and rendered incapable of deciding not to act on the defendant's initial misrepresentations (*Molko v. Holy Spirit Assn (1988) 46 Cal. 3d 1092, 1108-1110, 252 Cal. Rptr. 122, 762 P.2d 46*).

[*Optional*] **B. Freedom of Religion Does Not Exempt Religious Organization.** A religious organization can be held liable on a traditional cause of action in fraud for inducing nonmembers, by misrepresentation and concealment of its identity, into unknowingly entering an atmosphere in which they were then subjected to coercive persuasion (*Molko v. Holy Spirit Assn (1988) 46 Cal. 3d 1092, 1110-1120, 252 Cal. Rptr. 122, 762 P.2d 46*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff or cross complainant has

failed to establish actual and justifiable reliance on the defendant's representations. The basis of this form is that the defendant's deceit had led the plaintiff into a setting in which the plaintiff could be "brainwashed" and rendered incapable of deciding not to act on the defendant's initial misrepresentations.

The optional paragraph is for use if the defendant is a religious organization that alleges liability for tort would be an interference with its right to exercise its religious beliefs.

This form may be used to oppose the points and *authorities in § 105.200* et seq.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.220[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, for example, in the case of opposition to a motion for summary adjudication of issues, to support the argument that there is a triable issue of material fact regarding whether the plaintiff justifiably relied on the defendant's misrepresentations, counsel would refer to facts in declarations or deposition transcripts establishing that the defendant's deceit had led the plaintiff into a setting in which the plaintiff could be "brainwashed" and rendered incapable of deciding not to act on the defendant's initial misrepresentations [*see § 105.220[2][b]*].

[3] Discussion of Authorities

[a] Plaintiff "Brainwashed" and Unable to Act on Truth

In ***Molko v. Holy Spirit Assn.*** *(1988) 46 Cal. 3d 1092, 252 Cal. Rptr. 122, 762 P.2d 46* , the plaintiffs, former members of the defendant's Unification Church, had initially been recruited by specific members of the defendant through invitations to socialize and then to visit a farm for relaxation. Both the plaintiffs repeatedly asked whether the group had any religious affiliation and were told that it did not. While at the farm, the plaintiffs led strictly regimented and isolated lives and were strongly discouraged from leaving. After some time, the plaintiffs were informed that the group was part of the defendant's church. The plaintiffs remained with the group and became members of the defendant's church. Later, the plaintiffs were on separate occasions forcibly abducted from a public street by third parties and deprogrammed. The plaintiffs then filed an action against the defendant, alleging they had been fraudulently induced to join the defendant's church through a variety of deceptive tactics on the part of some of its members. Each plaintiff asserted causes of action for fraud and deceit, intentional infliction of emotional distress, and false imprisonment. The defendant cross complained against the deprogrammers and one of the plaintiffs, alleging that the deprogramming violated the defendant's civil rights. The trial court granted summary judgment for the defendant on all causes of action and dismissed its cross complaint. The plaintiffs and the defendant appealed.

The court of appeal affirmed the summary judgment, but reversed the dismissal of the cross complaint. The plaintiffs and cross the defendant petitioned the Supreme Court for review.

The Supreme Court affirmed the summary judgment for false imprisonment, reversed the summary judgment for fraud and intentional infliction of emotional distress, and affirmed the reversal of the dismissal of the cross complaint. The plaintiffs contended that members of the defendant's church knowingly misrepresented its identity, with the intent to induce them to associate with and ultimately join the defendant's church, that they justifiably relied on those misrepresentations in unknowingly agreeing to participate in the defendant's activities, and that they suffered psychological and financial damages as a result of their involvement and membership. They claimed they would not have chosen to associate with the defendant had they known its true identity. The defendant contended that the facts negated justifiable reliance, a necessary element of an action for fraud. The Court noted that justifiable reliance exists if

the misrepresentation or nondisclosure was an immediate cause of the plaintiff's conduct that alters the plaintiff's legal relations and if the plaintiff would not, in all reasonable probability, have entered into the transaction without that misrepresentation or nondisclosure. The defendant contended that because the plaintiffs learned of its true identity prior to becoming formal members, the misrepresentations were "cured" and the plaintiffs could not have justifiably relied on them in deciding to join the defendant's church (*46 Cal. 3d 1092, 1108)* . The plaintiffs contended that by the time the defendant disclosed its true identity, its agents had rendered them incapable of deciding not to join the defendant's church, by subjecting them, without their knowledge or consent, to an intense program of coercive persuasion or mind control. In other words, the plaintiffs' claim was that the defendant's deceit led them into a setting in which they could be "brainwashed" and that the defendant's deception could not be cured by telling the plaintiffs the truth after their involuntary indoctrination was accomplished (*46 Cal. 3d 1092, 1108-1109)* . The Court defined "brainwashing" as a forcible indoctrination to induce someone to give up basic political, social, or religious beliefs and attitudes and to accept contrasting regimented ideas. The Court reviewed the concept, highlighting the differing opinions concerning it in the scientific community and concluded that the existence of such differing views compelled the conclusion that the plaintiffs' theory raised a factual question, which, if not prohibited by other considerations, precluded a grant of summary judgment for the defendant (*46 Cal. 3d 1092, 1109-1110)* .

[b] Freedom of Religion Does Not Exempt Religious Organization

The facts and procedural background of ***Molko v. Holy Spirit Assn.*** *(1988) 46 Cal. 3d 1092, 252 Cal. Rptr. 122, 762 P.2d 46* , are discussed in *§ 105.225[3][a]*. The Court explained that *U.S. Const. Amend. I* and *Cal. Const. Art. I, § 4* provide two types of religious freedom: the *establishment clause* guarantees that the government will not impose religion on the people, and the *free exercise clause* guarantees that the government will not prevent the people from freely pursuing any religion they choose. The Court pointed out that although religious belief is absolutely protected from governmental interference, religiously motivated conduct is not, and such conduct remains subject to regulation for the protection of society. Government action burdening religious conduct is subject to a balancing test, in which the importance of the state's interest is weighed against the severity of the burden imposed on religion. The greater the burden imposed on religion, the more compelling must be the government interest at stake (*46 Cal. 3d 1092, 1112-1113)* .

A government action that passes the balancing test must also meet the further requirements that (1) no action imposing a lesser burden on religion would satisfy the government's interest and (2) the action does not discriminate between religions or between religion and nonreligion (*46 Cal. 3d 1092, 1112-1113)* . The Court observed that although judicial sanctioning of tort recovery constitutes state action sufficient to invoke constitutional protections, religious groups are not immune from all tort liability, and courts have recognized tort liability even for acts that are religiously motivated (*46 Cal. 3d 1092, 1114)* . The defendant's alleged deceptions, although secular on the surface, are clearly rooted in religious belief. The Court held that this does not mean that those representations are immune from government regulations, but means that any such regulation must survive constitutional scrutiny (*46 Cal. 3d 1092, 1115)* .

The Court methodically subjected the imposition of tort liability to the constitutionally required balancing test. Initially, the Court analyzed whether liability implicated religious belief or religiously motivated conduct. It found that liability would not burden anyone's right to believe or to remain part of a religious community and would not subject anyone to involuntary deprogramming. Instead, it would only burden the defendant's efforts to recruit new members by deceptive means. The Court said that the challenge was not to whether anyone's faith was real, but to the defendant's practice of misrepresenting or concealing its identity to bring unsuspecting outsiders into its highly structured environment. That practice is not itself belief; it is conduct subject to regulation for the protection of society (*46 Cal. 3d 1092, 1116-1117)* .

The Court then addressed whether the state's interest in allowing tort liability is important enough to outweigh any burden that liability would impose on the defendant's religious conduct. Tort liability for fraudulent recruitment practices would discourage the defendant from putting its belief in recruiting through deception into practice by

subjecting it to possible monetary loss for doing so. Furthermore, liability presumably would impair the defendant's ability to convert nonbelievers, because some potential members who would have been recruited by deception will choose not to associate with the defendant when they are told its true identity. The Court noted that while these burdens are real, they are not substantial. Being subject to liability for fraud would not in any way or degree prevent or inhibit the defendant's members from operating their religious communities, worshiping as they see fit, freely associating with one another, selling or distributing literature, proselytizing on the street, soliciting funds, or generally spreading their message. It would not compel them to perform acts at odds with fundamental tenets of their religious beliefs (*46 Cal. 3d 1092, 1117)* .

The Court then considered whether a compelling state interest justified the marginal burden liability imposes on the defendant's free exercise rights. It found such an interest in the substantial threat to public safety, peace, and order posed by the defendant's allegedly fraudulent conduct. The Court observed that although some persons subjected to coercive persuasion without their knowledge or consent may emerge unscathed, many others develop serious and sometimes irreversible physical and psychiatric disorders, such as schizophrenia, self-mutilation, and suicide. The state clearly has a compelling interest in preventing its citizens from being deceived into submitting unknowingly to such a potentially dangerous process. The state has an equally compelling interest in protecting the family institution. Because the family almost invariably suffers great stress and sometimes incurs significant financial loss when one of its members is unknowingly subjected to coercive persuasion, the state has a compelling interest in protecting families from suffering such impairments as a result of fraud and deception. The Court concluded that although liability for deceptive recruitment practices imposes a marginal burden on the defendant's free exercise of religion, the burden is justified by the compelling state interest (*46 Cal. 3d 1092, 1117-1118)* . The Court then analyzed whether any action imposing a lesser burden on religion would satisfy that compelling state interest, and after careful consideration, the Court concluded that no less restrictive alternative was available (*46 Cal. 3d 1092, 1118)* .

Finally, the Court considered whether allowing liability would (1) have the purpose and effect of advancing the state's secular goals and (2) not discriminate between religions or between religion and nonreligion. It found that judicial sanctioning of traditional tort liability for fraudulent recruitment satisfies these standards. First, its purpose and effect is plainly to advance the legitimate secular goal of protecting persons from being harmed by fraud. Second, it is nondiscriminatory: all organizations, religious or otherwise, may be held liable for damages caused by their fraudulent acts. It concluded that neither the federal nor the state Constitution barred the plaintiffs from bringing traditional fraud actions against the defendant for allegedly inducing them, by misrepresentation and concealment of its identity, into unknowingly entering an atmosphere in which they were then subjected to coercive persuasion (*46 Cal. 3d 1092, 1119-1120)* .

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10-105 California Points & Authorities § 105.226

§ 105.226 Actual and Justifiable Reliance Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Reliance on Facts Discovered After Agreement Signed But Before Escrow Closed

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF'S DISCOVERY OF THE FALSITY OF DEFENDANT'S REPRESENTATIONS AFTER SIGNING THE PURCHASE AGREEMENT, BUT BEFORE CLOSE OF ESCROW, DOES NOT PRECLUDE A FINDING OF JUSTIFIABLE RELIANCE BY PLAINTIFF ON FALSE REPRESENTATIONS MADE BY DEFENDANT BEFORE THE AGREEMENT WAS SIGNED AND THEREFORE DOES NOT PRECLUDE A CAUSE OF ACTION FOR FRAUD AND DECEIT BASED ON THOSE REPRESENTATIONS.

Discovery After Purchase Agreement Signed But Before Escrow Closed. The plaintiff's discovery of the true facts after signing a real property purchase agreement, but before the close of escrow does not preclude a finding of reliance with respect to false representations made by the defendant before the purchase agreement was signed. The plaintiff's reliance at the inception of the agreement is sufficient to support recovery for fraud (*Jue v. Smiser (1994) 23 Cal. App. 4th 312, 313, 316-319, 28 Cal. Rptr. 2d 242*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff or cross complainant has failed to establish actual and justifiable reliance on the defendant's representations. They may also be submitted if the defendant contends that the plaintiff waived the fraud claim by not rescinding and withdrawing from the transaction after learning the true facts before the close of escrow.

The basis of this form is that the plaintiff was induced to enter into the purchase agreement by alleged false

representations made before the agreement was signed, but that the plaintiff did not learn of their falsity until after the agreement was signed and before the close of escrow.

This form may be used to oppose the points and *authorities in § 105.200* et seq.

These points and authorities may be combined with points and authorities asserting that the plaintiff's continued performance does not waive the plaintiff's claim for damages [*see § 105.220[2][a]*].

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.220[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, for example, in the case of opposition to a motion for summary adjudication of issues, to support the argument that there is a triable issue of material fact regarding whether the plaintiff justifiably relied on the defendant's misrepresentations, counsel should point to uncontradicted evidence in the record establishing that the alleged misrepresentations were made before the agreement was signed, but the plaintiff did not discovery the falsity of those representations until after the agreement was signed [*see § 105.220[2][b]*].

[3] Discussion of Authorities

[a] Discovery After Purchase Agreement Signed But Before Escrow Closed

In ***Jue v. Smiser*** *(1994) 23 Cal. App. 4th 312, 28 Cal. Rptr. 2d 242* , the plaintiffs were induced to sign an agreement to buy a house by the defendants' false representations that the house was "authenticated" as having been designed by a famous architect. After signing the agreement, but before close of escrow, the plaintiffs learned that it was impossible to confirm whether or not that architect had actually designed the house. Nevertheless, instead of canceling the agreement, the plaintiffs proceeded with the sale and then sued the defendants for fraud. The trial court granted summary judgment for the defendants, but the court of appeal reversed.

The defendants argued that the plaintiffs' discovery of the true facts before the close of escrow, when the plaintiffs could still have withdrawn from the sale, precluded a finding of justifiable reliance on the defendants' representations (*23 Cal. App. 4th 312, 316)* . The court of appeal rejected this argument. Relying on *Storage Servs. v. Oosterbaan (1989) 214 Cal. App. 3d 498, 511, 262 Cal. Rptr. 689* , the court held that the plaintiffs' reliance on the defendants' misrepresentations at the inception of the transaction was sufficient to support recovery for fraud and that the plaintiffs need not establish continuing reliance on the misrepresentation until the contract was fully executed (*23 Cal. App. 4th 312, 317)* . The court reasoned that its conclusion was supported by the public policy favoring full disclosure in real estate transactions (*23 Cal. App. 4th 312, 318)* . The court further reasoned that if it adopted the defendants' argument, a real property buyer who learns of a misrepresentation or potential misrepresentation after a purchase contract is entered into, but before escrow closes, would be forced to choose between (1) consummating the purchase and waiving any claim for damages, or (2) rescinding the deal and facing the consequences, which could include problems in securing the return of money deposited with the escrow holder, the loss of money spent to secure a loan and meet other costs of acquisition, and the risk of being sued by the seller. The court ruled that one who is or may be the victim of another's fraud should not be forced to make such a choice (*23 Cal. App. 4th 312, 319)* .

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10-105 California Points & Authorities § 105.227

§ 105.227 Actual and Justifiable Reliance Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Mere Contract Clause That May Not Preclude Proof of Reliance

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF _____ [SHOULD PREVAIL ON THE *or* HAS STATED FACTS SUFFICIENT TO CONSTITUTE A] CAUSE OF ACTION FOR FRAUD AND DECEIT DESPITE A CONTRACT CLAUSE STATING THAT THE PARTIES RELIED ONLY ON REPRESENTATIONS CONTAINED IN THE CONTRACT, BECAUSE THE CLAUSE MAY NOT, AS A MATTER OF LAW, PRECLUDE PLAINTIFF FROM PROVING FRAUD.

Contract Clause Does Not Preclude Proof of Reliance. A contract provision stating that no representations were made by the parties except as in the agreement does not preclude the plaintiffs from proving fraud (*Ron Greenspan Volkswagen, Inc. v. Ford Motor Land Dev. Corp. (1995) 32 Cal. App. 4th 985, 996, 38 Cal. Rptr. 2d 783*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff or cross complainant has failed to establish a cause of action for fraud or deceit. The basis of this form is that the existence of a contract clause stating that the parties relied only on representations contained in the contract may not preclude the plaintiff from proving fraud.

This form may be used to oppose the points and *authorities in § 105.206*.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.220[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should discuss evidence of a fraudulent misrepresentation made prior to execution of the contract that induced execution of the contract [*see Ron Greenspan Volkswagen, Inc. v. Ford Motor Land Dev. Corp. (1995) 32 Cal. App. 4th 985, 996, 38 Cal. Rptr. 2d 783* ; see *§ 105.220[2][b]*].

[3] Discussion of Authorities

[a] Contract Clause Does Not Preclude Proof of Reliance

In ***Ron Greenspan Volkswagen, Inc. v. Ford Motor Land Dev. Corp.*** *(1995) 32 Cal. App. 4th 985, 38 Cal. Rptr. 2d 783* , the plaintiff, which operated an automobile dealership, sued several related defendants for fraud with regard to a real property exchange between the plaintiff and one of the defendants. The parties eventually entered into a "Purchase and Sale and Exchange Agreement" providing for an exchange of property and appropriate payments. The agreement contained a provision stating that "this Agreement constitutes the sole agreement among the parties, and supersedes any and all prior oral or written agreements or understandings among them, pertaining to the transactions contemplated in this Agreement." The agreement was conditioned on one of the defendants obtaining financing and was subsequently terminated because that defendant did not obtain the financing. A dealership agreement between the plaintiff and one of the other defendants was then terminated, the plaintiff went out of business, and the bank foreclosed on the plaintiff's real property. In causes of action charging the defendants with fraud, the plaintiff alleged that the defendants made several false representations regarding the value of the defendant's property and the existence of potential purchasers of the property. The defendants moved for summary judgment on the fraud claims, and the trial court granted the motion on the ground that the provision in the contract providing that no representations were made except as in the agreement made any reliance by the plaintiff on alleged misrepresentation unjustifiable as a matter of law.

The court of appeal reversed the summary judgment as to the fraud claims, stating that the only authority relied on by the trial court was a prior appellate court decision (*Fisher v. Pennsylvania Life Co. (1977) 69 Cal. App. 3d 506, 138 Cal. Rptr. 181*) that was not binding on the court of appeal, which it declined to follow (*32 Cal. App. 4th 985, 996)* . The court noted initially that *Fisher* claimed that two earlier cases supported the rule that a party cannot base a fraud claim on at an oral representation if there is a contract clause providing that all representations are included in the contract. However, the court concluded that neither of the cases actually supported this proposition (*32 Cal. App. 4th 985, 991)* . The court then pointed out that *Fisher* ignored a line of California authority holding that a contract provision stating that all representations are contained in the contract does not bar an action for fraud (*32 Cal. App. 4th 985, 992*). Furthermore, the court stated that *Fisher* has been ignored by California courts and commentators that continue to embrace the rule that a contract clause like the one in this case does not bar an action for fraud (*32 Cal. App. 4th 985, 994*). Thus, refusing to follow *Fisher*, the court concluded that the contract provision did not establish as a matter of law that the plaintiff's reliance on misrepresentations not contained in the contract was unreasonable (*32 Cal. App. 4th 985, 996)* .

NOTE:

One Ninth Circuit panel, applying California law to somewhat different facts, reached an opposite conclusion concerning the effect of a contractual provision on the plaintiff's ability to claim justifiable reliance [*see Bank of W. v. Valley Nat'l Bank of Ariz. (9th Cir. 1994) 41 F.3d 471, 477-478* , discussed at *§ 105.206*].

[4] Additional Authorities

[a] Contract Clause Does Not Preclude Proof of Reliance

In *Broberg v. The Guardian Life Ins. Co. of America (2009) 171 Cal. App. 4th 912, 90 Cal. Rptr. 3d 225* , plaintiff

sued a life insurance company and a selling agent for the agent's alleged misrepresentations when selling a policy. Plaintiff alleged that the agent specifically told him through a sales demonstration that included a three-page document printed just for him that after the eleventh year, no out-of-pocket premium payments would be required because the policy would generate sufficient income to pay the premiums by itself. As it turned out, however, due to subsequent changes to the policy's dividend rate, out-of-pocket premiums were required after the eleventh year. Defendants defended on the grounds that the third page of the sales document contained a disclaimer stating that the number of years of required cash outlays depended on continuation of the company's current dividend scale. The trial court granted defendants' demurrer, concluding that the disclaimer both triggered the running of the statute of limitations and prevented plaintiff from proving justifiable reliance. The court of appeals reversed. The court held that a triable issue of fact remained on whether the disclaimer in the sales demonstration materials was sufficient to put plaintiff on notice that the agent's assertions that out-of-pocket premium payments would not be required after the eleventh year might be false. The court noted that the disclaimers were buried in 39 lines worth of same-sized, capitalized print, and that the first page of the document, on which the agent indicated that out-of-pocket premium payments would "vanish," lacked any cautionary language (*171 Cal. App. 4th 912, 922)* .

In *McClain v. Octagon Plaza, LLC (2008) 159 Cal. App. 4th 784, 71 Cal. Rptr. 3d 885* , a commercial tenant in a shopping mall sued the landlord based on allegations that the landlord, when negotiating the lease, overstated the size of the rental space by 7.6 percent and understated the size of the shopping mall by 8.1 percent, resulting in plaintiff paying $90,000 more in rent over the course of the lease than she would have had the actual sizes been revealed. The trial court sustained defendant's demurrer without leave to amend based on a lease provision stating that the parties agreed that the sizes were "reasonable approximations" and payments based on these sizes were not subject to revision. The court of appeal reversed, concluding that the lease did not preclude plaintiff's cause of action for intentional or negligent misrepresentations. Noting that California courts had in the past concluded that contract terms neither bar fraud claims nor establish as a matter of law that reliance on a defendant's representations is unreasonable, the court of appeal held that the lease provision did not preclude plaintiff from supporting a cause of action by showing that the sizes were materially and unreasonably inaccurate (*159 Cal. App. 4th 784, 794-797)* .

In *Manderville v. PCG&S Group, Inc. (2007) 146 Cal. App. 4th 1486, 55 Cal. Rptr. 3d 59* , plaintiffs bought a plot of land with the intent to subdivide the plot and build two houses. Prior to making an offer to buy, the brokers for the sellers represented in their listing that the county had stated that the plot could be split and allegedly told the buyers' broker that the plot had already been approved for a split. However, the sales contract gave the buyers the right to investigate the laws limiting development on the property and strongly advised the buyers to do so, and also contained an integration clause stating that all understandings between the parties were contained in the written contract. After closing, plaintiffs discovered that the property was too small to be subdivided under applicable zoning laws. The trial court granted summary judgment for the brokers on plaintiffs' intentional misrepresentation claims after concluding that the plaintiffs could not prove justifiable reliance. The court of appeal reversed. The court held that, pursuant to *Civ. Code § 1668*, defendants could not rely on the contractual clauses to relieve them of liability for intentional misrepresentations. As such, the trial court erred in concluding that the buyers could not make a prima facie showing that they justifiably relied on the brokers' alleged intentional misrepresentations (*146 Cal. App. 4th 1486, 1500-1502)* .

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10-105 California Points & Authorities § 105.228

§ 105.228 Actual and Justifiable Reliance Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Indirect Reliance

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF _____ [SHOULD PREVAIL ON THE *or* HAS STATED FACTS SUFFICIENT TO CONSTITUTE A] CAUSE OF ACTION FOR FRAUD AND DECEIT EVEN THOUGH NO HUMAN BEING RECEIVED OR ACTED ON DEFENDANT'S MISREPRESENTATION, BECAUSE THE RELIANCE MAY OCCUR INDIRECTLY [AND MAY BE ACHIEVED THROUGH AN AGENT(, SUCH AS A COMPUTER NETWORK)].

A. Reliance May Be Indirect. California courts have recognized indirect reliance, and reliance by an agent may be imputed to the principal even though the misrepresentation is not communicated to the principal (*Thrifty-Tel, Inc. v. Bezenek (1996) 46 Cal. App. 4th 1559, 1568, 54 Cal. Rptr. 2d 468*).

[*Optional*] **B. Computer Network Equivalent to Plaintiff's Agent.** A computerized network may act as the legal equivalent of an agent for the plaintiff (*Thrifty-Tel, Inc. v. Bezenek (1996) 46 Cal. App. 4th 1559, 1568, 54 Cal. Rptr. 2d 468*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff or cross complainant has failed to establish a cause of action for fraud or deceit. The basis of this form is that the plaintiff may justifiably rely on a misrepresentation achieved through indirect means, such as through an agent or a computer network.

This form may be used to oppose the points and *authorities in § 105.200* et seq.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.220[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.220[2][b]*].

[c] Related Points and Authorities

For points and authorities contending that there may be recovery for fraud and deceit when the misrepresentation is implied by the defendant's conduct, see *§ 105.55*.

[3] Discussion of Authorities

[a] Reliance May Be Indirect

The facts and procedural status of ***Thrifty-Tel, Inc. v. Bezenek*** *(1996) 46 Cal. App. 4th 1559, 54 Cal. Rptr. 2d 468* , are discussed in *§ 105.55[3]*. The defendants contended that the element of reliance was not present because no human being received or acted on a misrepresentation made through computer codes. However, the court of appeal noted that California courts had already recognized indirect reliance, and reliance by an agent may be imputed to the principal even though the misrepresentation is not communicated to the principal. The court then found that the plaintiff's computerized network acted as the legal equivalent of an agent for the plaintiff (*46 Cal. App. 4th 1559, 1568)* .

[b] Computer Network Equivalent to Plaintiff's Agent

Thrifty-Tel, Inc. v. Bezenek *(1996) 46 Cal. App. 4th 1559, 54 Cal. Rptr. 2d 468* is discussed in *§ 105.228[3][a]*.

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10-105 California Points & Authorities § 105.229

§ 105.229 Pleading or Proof Shows Reliance Unnecessary When There Is Reasonable Reliance Shown by Third-Party Recipient of Defendant's Misrepresentations and Resulting Physical Injury to Plaintiff

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief*]

PLAINTIFF NEED NOT ACTUALLY RELY ON DEFENDANT'S MISREPRESENTATIONS WHEN HE/SHE HAS SUFFICIENTLY _____ [ALLEGED *or* ESTABLISHED] THAT A THIRD PARTY REASONABLY RELIED ON DEFENDANT'S MISREPRESENTATIONS RESULTING IN PHYSICAL INJURY TO PLAINTIFF.

No Reliance Is Necessary When There Was Reasonable Reliance by a Third-Party Recipient of Defendant's Misrepresentation and Resulting Physical Injury to Plaintiff. In an action for fraud and deceit resulting in physical injury to the plaintiff, it is unnecessary for plaintiff to plead his or her own reliance on defendants' misrepresentation, if plaintiff's injury resulted from action that the recipient of defendants' misrepresentation took in reliance on that misrepresentation (*Randi W. v. Muroc Joint Unified Sch. Dist. (1997) 14 Cal. 4th 1066, 1085, 60 Cal. Rptr. 2d 263*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff or cross complainant has failed to establish a cause of action for fraud or deceit. The basis of this form is that the plaintiff need not show reliance on the defendant's misrepresentation when a third party took action in reasonable reliance on that misrepresentation, resulting in physical injury to the plaintiff.

This form may be used to oppose the points and *authorities in § 105.200* et seq.

This form should be included with other points and authorities, depending on the procedural context in which the issue

is raised and on other substantive issues that may be involved [*see § 105.220[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.220[2][b]*].

[c] Related Points and Authorities

For a form and discussion of the decision in *Randi W. v. Muroc Joint Unified Sch. Dist. (1997) 14 Cal. 4th 1066, 60 Cal. Rptr. 2d 263* , as it relates to the issue of defendant's duty to disclose known facts to a third party, when the defendant sends a letter of recommendation to that third party and the known facts present a substantial and foreseeable risk of physical injury to persons not limited to the third-party recipient of the letter, see *§ 105.85*.

[3] Discussion of Authorities

[a] No Reliance Is Necessary When There Was Reasonable Reliance by a Third-Party Recipient of Defendant's Misrepresentation and Resulting Physical Injury to Plaintiff

In ***Randi W. v. Muroc Joint Unified Sch. Dist.*** *(1997) 14 Cal. 4th 1066, 60 Cal. Rptr. 2d 263* , plaintiff, a 13-year-old middle school student who had been sexually molested by a school vice principal, sought damages against the principal's former employers for failing to use reasonable care in recommending their former employee for employment without disclosing material information bearing on his fitness. Plaintiff claimed that defendants unreservedly recommended the vice principal for employment without disclosing known facts regarding prior charges or complaints of sexual misconduct and impropriety. Plaintiff further alleged that defendants' letters induced plaintiff's school district to hire the vice principal, and the vice principal later sexually assaulted plaintiff. Plaintiff's complaint alleged that the vice principal's current employer relied on defendants' letters of recommendation, in hiring him, but the complaint was silent regarding plaintiff's own reliance on those letters. The court of appeal ruled that, even though defendants made no misrepresentations directly to plaintiff, who probably never knew of, nor relied on, their statements, she was nonetheless entitled to protection in accordance with Sections 310 and 312 of the Restatement Second of Torts. Section 310 provides that an actor who makes a misrepresentation is subject to liability for physical harm which results from an act done by a third person in reliance upon the truth of the representation, if the actor intends his statement to induce action by the third person which involves an unreasonable risk of physical harm to the other, and knows that the statement is false. Section 312 of the Restatement (Second) of Torts, provides that one who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results to such third persons as the actor should expect to be put in peril by the action taken. Such negligence may consist of failure to exercise reasonable care in ascertaining the accuracy of the information or in the manner in which it is communicated.

The Supreme Court ruled that under Sections 310 and 312 of the Restatement (Second) of Torts, it was unnecessary for plaintiff to plead her own reliance on defendants' misrepresentations. Plaintiff needed only to allege that her injury resulted from action that the recipient of defendants' misrepresentations took in reliance on them (*14 Cal. 4th 1066, 1085)* .

The Court agreed with the court of appeal conclusions that the authors of the Restatement intended Section 310 to apply to cases in which third persons are endangered by the misrepresentation as well as Section 312. Thus, it was unnecessary for plaintiff to plead her own reliance on defendants' misrepresentations, as long as the recipient of those misrepresentations reasonably relied on them in hiring the vice principal (*14 Cal. 4th 1066, 1085)* .

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[Reserved]

§§ 105.230[Reserved]

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E. Causation of Resulting Harm

10-105 California Points & Authorities § 105.240

§ 105.240 Causation Is Not Sufficiently Pleaded or Proven--Pleading or Proof Fails to Show Misrepresentation Caused Resulting Harm

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO _____ [STATE FACTS SUFFICIENT TO CONSTITUTE *or* ESTABLISH] A CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE THE _____ [COMPLAINT FAILS TO ALLEGE *or* EVIDENCE FAILS TO SHOW] THAT THERE IS A CAUSE AND EFFECT RELATIONSHIP BETWEEN THE ALLEGED FRAUD AND THE ALLEGED DAMAGE.

Plaintiff Must Allege and Show Causal Connection. The plaintiff's asserted injury or damages must not only be directly alleged, but its causal connection with the plaintiff's reliance on the defendant's representations must be shown. That is, it must be shown in the pleading that the damages claimed were sustained by reason of the fraud and that the fraud and the damages have a cause and effect relationship (*Lesperance v. North Am. Aviation, Inc. (1963) 217 Cal. App. 2d 336, 345, 31 Cal. Rptr. 873* ; *see Maynes v. Angeles Mesa Land Co. (1938) 10 Cal. 2d 587, 589-590, 76 P.2d 109*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the plaintiff or cross complainant either has failed to allege sufficient facts to constitute a cause of action for fraud or has failed to present evidence to establish a fraud claim. The basis of this form is that the plaintiff either has failed to allege or establish that the defendant's alleged fraud caused the plaintiff's alleged damage.

This form should be included with other points and authorities, depending on the procedural context in which the issue

is raised and any other substantive issues that need to be addressed. For example, it may be submitted with other points and authorities supporting a demurrer or motion for summary judgment challenging, respectively, the sufficiency of the pleading or proof.

This form may be combined, if appropriate, with the points and authorities in *§ 105.30* et seq., which challenge the sufficiency of pleading or proof with regard to other aspects or elements in a cause of action for fraud and deceit. If this form is being used to support a demurrer, it may also be combined, if appropriate, with the *forms in § 105.10* et seq., which focus on the requirement that elements of an action for fraud and deceit, particularly the deceitful act or omission, be alleged in specific rather than general terms. For points and authorities supporting a general demurrer implying expiration of statute of limitations, see *§ 105.293*.

This form may also be adapted for a trial or appellate brief, or to support a motion for judgment on the pleadings, a motion for nonsuit, or any other request for relief based on the plaintiff's failure to show or establish the essential elements of the action for fraud or deceit.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, in the case of objection by demurrer, counsel for the demurring party would refer to the allegations of the complaint and point out the omission of any allegation connecting the plaintiff's alleged damage to the defendant's alleged misrepresentations.

Any statement of fact should be supported by adequate reference to the pleading (or matters subject to judicial notice), if the form is used in a memorandum supporting a demurrer or another challenge to the sufficiency of the pleading. Similarly, any statement of fact should be supported by adequate reference to evidence admitted or otherwise cognizable by the court, if the form is used in support of a motion challenging the adequacy of proof.

For example, a memorandum supporting a motion for summary judgment may refer to affidavits or declarations based on personal knowledge or matters subject to judicial notice [*see Code Civ. Proc. §§ 2009, 2015.5* (affidavits and declarations); *Evid. Code § 450 et seq.* (judicial notice)]. For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For legal background with detailed coverage of the elements of a tort action for fraud and deceit, see California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender).

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For additional points and authorities relating to demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Plaintiff Must Allege and Show Causal Connection

The facts and procedural background of ***Maynes v. Angeles Mesa Land Co.*** *(1938) 10 Cal. 2d 587, 76 P.2d 109* , are

discussed in *§ 105.100[3][a]*. The complaint was deemed fatally defective in its attempted pleading of damages, an essential element of the cause of action. There was no allegation in the complaint to show how any of the defendant's acts interfered with the plaintiffs' business or caused the expenditures in question (*10 Cal. 2d 587, 589-590)* .

The facts and procedural background of ***Lesperance v. North Am. Aviation, Inc.*** *(1963) 217 Cal. App. 2d 336, 31 Cal. Rptr. 873* , are discussed in *§ 105.10[3][d]*. The court of appeal found the statement of cause of action for fraud deficient because the plaintiff had failed to allege facts showing the existence of each of the elements of a cause of action for damages for fraud and deceit. The court noted that the plaintiff had failed to allege how the allegedly false terms of the employment termination statement sent to him had damaged him. The plaintiff's asserted injury or damages must not only be directly alleged, but its causal connection with the plaintiff's reliance on the defendant's representations must be shown. That is, the pleading must show that the damages claimed were sustained by reason of the fraud and that the fraud and the damages have a cause and effect relationship. Accordingly, it appeared that the count in fraud failed to state a sufficient basis for any relief against the defendant on a theory of fraud and deceit (*217 Cal. App. 2d 336, 344)* .

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E. Causation of Resulting Harm

10-105 California Points & Authorities §§ 105.241-105.249

[Reserved]

§§ 105.241[Reserved]

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CHAPTER 105 FRAUD AND DECEIT
PART II. FORMS
F. Damages

10-105 California Points & Authorities § 105.250

§ 105.250 Damages Are Not Sufficiently Pleaded or Proven--Pleading or Proof Fails to Show Damages

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO _____ [STATE FACTS SUFFICIENT TO CONSTITUTE *or* ESTABLISH] A CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE THE _____ [COMPLAINT FAILS TO ALLEGE *or* EVIDENCE FAILS TO SHOW] THAT THE ALLEGED FRAUD DAMAGED PLAINTIFF.

A. Damages for Deceit. One who willfully deceives another with intent to induce the other party to alter the other party's position to the other party's injury or risk is liable for any damages that the other party thereby suffers (*Civ. Code § 1709*).

B. Damages Resulting From Fraud Must Be Alleged. A complaint that does not allege facts showing that the alleged fraud has damaged the plaintiff does not state a cause of action based on fraud (*Maynes v. Angeles Mesa Land Co. (1938) 10 Cal. 2d 587, 589-590, 76 P.2d 109* ; *Fraker v. Sentry Life Ins. Co. (1993) 19 Cal. App. 4th 276, 285, 23 Cal. Rptr. 2d 372*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the plaintiff or cross complainant either has failed to allege sufficient facts to constitute a cause of action for fraud or has failed to present evidence to establish a fraud claim. The basis of this form is that the pleadings fail to allege or evidence fails to establish that the alleged fraud has damaged the plaintiff.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and on any other substantive issues that need to be addressed. For example, it may be submitted with other points and authorities supporting a demurrer or a motion for summary judgment challenging the sufficiency of, respectively, the pleading or the proof.

This form may be combined, if appropriate, with the points and authorities in *§ 105.30* et seq., which challenge the sufficiency of pleading or proof with regard to other aspects or elements in a cause of action for fraud and deceit. If this form is being used to support a demurrer, it may also be combined, if appropriate, with the forms in *§ 105.10 et seq.*, which focus on the requirement that elements of an action for fraud and deceit, particularly the deceitful act or omission, be alleged in specific rather than general terms. These points and authorities may also be combined with those in § 105.251 that support a defendant's contention that the plaintiff is barred from recovering damages allegedly sustained as a result of fraudulently asserted affirmative defenses.

This form may also be adapted for a trial or appellate brief or to support a motion for judgment on the pleadings, a motion for nonsuit, or any other request for relief based on the plaintiff's failure to show or establish the essential elements of the action for fraud or deceit.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, in the case of objection by demurrer, counsel for the demurring party would refer to the allegations of the complaint and point out the omission of any allegation that the alleged fraud has damaged the plaintiff.

Any statement of fact should be supported by adequate reference to the pleading (or matters subject to judicial notice), if the form is used in a memorandum supporting a demurrer or another challenge to the sufficiency of the pleading. Similarly, any statement of fact should be supported by adequate reference to evidence admitted or otherwise cognizable by the court, if the form is used in support of a motion challenging the adequacy of proof.

For example, a memorandum supporting a motion for summary judgment may refer to affidavits or declarations based on personal knowledge or matters subject to judicial notice [*see Code Civ. Proc. §§ 2009, 2015.5* (affidavits and declarations); *Evid. Code § 450 et seq.* (judicial notice)]. For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For legal background with detailed coverage of the elements of a tort action for fraud and deceit, see California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender).

[d] Related Points and Authorities

For memoranda of points and authorities dealing with the measure of damages applicable in fraud and deceit, see *§§ 105.252* and *105.253*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For additional points and authorities relating to demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[e] Opposing Points and Authorities

The points and *authorities in § 105.260* et seq. may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Damages Resulting From Fraud Must Be Alleged

The facts and procedural background of ***Maynes v. Angeles Mesa Land Co.*** *(1938) 10 Cal. 2d 587, 76 P.2d 109* , are discussed in *§ 105.100[3][a]*. The plaintiffs had attempted to plead a cause of action for fraud consisting of the making of a promise without any intention of performing it. The complaint was fatally defective in its attempted pleading of damages, an essential element of the cause of action. The complaint alleged the defendant's misrepresentations that it would lease certain premises to the plaintiffs without alleging the intent to deceive or the lack of intent to perform the promise. The complaint did show that the plaintiffs spent money to establish a business, but there was no showing that the alleged fraud deprived the plaintiffs of that business. The plaintiffs were not evicted from the premises, but remained in possession when they brought their suit. There was no allegation in the complaint to show how any of the defendant's acts interfered with their business or caused the expenditures in question (*10 Cal. 2d 587, 589-590)* .

In ***Fraker v. Sentry Life Ins. Co.*** *(1993) 19 Cal. App. 4th 276, 23 Cal. Rptr. 2d 372* , the court of appeal upheld the trial court's order granting the defendant's motion for judgment on the pleadings regarding the plaintiff's alleged cause of action for fraud. The plaintiff had purchased a group health insurance policy from the defendant. Subsequently, the plaintiff sustained an injury to his eye and received medical insurance benefits under the policy. The plaintiff was later given six weeks' advance notice that the group policy was being canceled and was given the option to convert the policy from group coverage to individual coverage. The plaintiff declined to exercise this option and brought an action for declaratory relief and for damages for fraud. The plaintiff's complaint alleged that the defendant had fraudulently represented when he purchased the policy that he would receive "lifetime" health benefits. The court of appeal noted that the essential allegations for a fraud action include, among other things, resulting damages. The court held that the plaintiff's complaint failed to state any facts connecting the alleged misrepresentation to his claimed damages because the plaintiff had not alleged any facts showing that his reliance on the misrepresentations affected his ability to obtain future insurance (*19 Cal. App. 4th 276, 285)* . Moreover, the plaintiff was given ample notice of the group policy's termination and an opportunity to purchase individual coverage from the defendant, which was all the defendant was required to do under the group policy (*19 Cal. App. 4th 276, 285-286)* .

[4] Additional Authorities

[a] Damages Resulting From Fraud Must Be Alleged

In *GN Mortgage Co. v. Fidelity Nat'l Title Ins. Co. (1994) 21 Cal. App. 4th 1802, 27 Cal. Rptr. 2d 47* , the plaintiff alleged that the defendants and others had conspired fraudulently to induce the plaintiff to finance a fictitious sale of real property at an inflated price. Relying on false loan documents, the plaintiff issued a promissory note secured by a trust deed on the property. Later, the note went into default, and the plaintiff initiated nonjudicial foreclosure proceedings. At the foreclosure sale, the plaintiff acquired the property by entering a bid equal to the full amount of the outstanding indebtedness, plus fees and expenses of foreclosure. Eventually, the plaintiff sold the property at a substantial loss. The plaintiff sued the defendants for breach of contract, fraud, and other tort causes of action. The trial court granted the defendants' motion for summary judgment, and the court of appeal affirmed. The court noted that in a tort action, there must be a causal relationship between the misconduct alleged and the damages sought (*21 Cal. App. 4th 1802, 1807)* . The court observed that the primary measure of damages for tortious acts against a secured lender is the extent of the impairment of security--that is, the amount by which the indebtedness exceeds the actual value of the security. A foreclosure sale establishes the actual value of the security. Thus, if the secured property is sold at auction for an amount sufficient to satisfy the indebtedness, there is no impairment of security, and the secured party is not

damaged. Any damages suffered thereafter are not a proximate result of the fraudulent transaction (*21 Cal. App. 4th 1802, 1808)* . In this case, once the plaintiff purchased the property, it obtained an asset presumably valued at the amount of the indebtedness plus accrued expenses. At that point, the plaintiff had not been damaged, and any losses incurred thereafter were not proximately caused by the defendants' tortious conduct, but by the plaintiff's business decisions in disposing of the property (*21 Cal. App. 4th 1802, 1809)* .

In *Wallis v. Farmers Group, Inc. (1990) 220 Cal. App. 3d 718, 269 Cal. Rptr. 299* , an insurance agent sued an insurance company, stating several causes of action based on the company's refusal to allow the agent's relative to assign his agency contract to her and the termination of her agency after she nevertheless contracted with the relative to purchase his agency and received his insurance files. The court of appeal reversed judgment for the plaintiff on the cause of action in fraud, holding that in an action for fraud, damages are an essential element. Because the plaintiff's compelled release of her relative's files was in compliance with the insurer's contract with the relative, it therefore was a legal obligation, which cannot constitute a legal injury (*220 Cal. App. 3d 718, 734)* .

In *Commonwealth Mortgage Assurance Co. v. Superior Court (1989) 211 Cal. App. 3d 508, 259 Cal. Rptr. 425* , the court of appeal affirmed a dismissal of the plaintiff's fraud cause of action. The plaintiff was a mortgage guaranty insurer that had paid a claim of the defendants' lender after the defendants defaulted on the loans (the defendants had executed an indemnity agreement with the guaranty insurer). The property was sold by the lender at a foreclosure sale, but the lender obtained the property by making a successful full-credit bid, which meant that it did not lose any money on the default. The plaintiff insurer paid the lender's claim under the guaranty agreement anyway. The court of appeal held that because the lender suffered no damage, the plaintiff's voluntary payment could not satisfy the requisite showing that damages resulted from the defendants' alleged fraud (*211 Cal. App. 3d 508, 520-521)* .

The facts and procedural background of *Kruse v. Bank of Am. (1988) 202 Cal. App. 3d 38, 248 Cal. Rptr. 217* , are discussed in *§105.200[3][b]*. Regarding the individual plaintiff's claims, the court of appeal said that the individual shareholder could not state a cause of action for denial of the corporation's loan request. The court also stated that the plaintiff's transfer of her controlling shares, at the defendant's request, to the cross complainant was not the proximate cause of the corporation's inability to arrange financing elsewhere, which in turn led to failure of the business, because the transfer could have been rescinded after the defendant denied the company's loan application (*202 Cal. App. 3d 38, 62-65)* .

Regarding the cross complainant's lack of proof on the issue of causation, the court of appeal first noted that in 1976 and 1977, the corporation repaid the advances made to it by the plaintiff. Thus, to that extent, the defendant's failure to disclose its lack of confidence in the corporate applicant to the cross complainant was the not proximate cause of the cross complainant's losses (*202 Cal. App. 3d 38, 53-54)* . The general rule is that no liability attaches for fraud if the only damages suffered by the plaintiff were inevitable or resulted from unrelated causes. The defendant's failure to promptly pay the proceeds of its collateral to the cross complainant's other creditors was not actionable because the cross complainant's loss was self-created indebtedness (*202 Cal. App. 3d 38, 60-62)* .

In *Zumbrun v. University of S. Cal. (1972) 25 Cal. App. 3d 1, 101 Cal. Rptr. 499* , the court of appeal reversed the trial court's judgment of dismissal entered after a general demurrer to the plaintiff's cause of action for fraud was sustained without leave to amend. The cause was remanded with directions to overrule the general demurrer as to all but one individual defendant and to grant the plaintiff leave to file an amended complaint. The complaint alleged that the defendants had warranted that a sociology course would be a full and complete course, but that the failure of a professor to finish teaching the course fraudulently deprived the plaintiff of her education and caused her mental and financial strain and distress, the waste of tuition and other fees, and loss of income. The court omitted detailed allegations concerning the alleged fraud because the vulnerability of the complaint went to the allegations concerning damages. There was, the court observed, no allegation that informed the defendants of the causal connection between the defendant's averred actions and the damages claimed. Allegations of damages without allegations of fact to support them are but conclusions of law, which are not admitted by demurrer. In fraud, the pleading must show a cause and

effect relationship between the fraud and the damages sought; otherwise, no cause of action is stated (*25 Cal. App. 3d 1, 12)* .

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10-105 California Points & Authorities § 105.251

§ 105.251 Damages Are Not Sufficiently Pleaded or Proven--Pleading or Proof Merely Shows Damages From Fraudulent Affirmative Defenses That Are Not Compensable

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO _____ [STATE FACTS SUFFICIENT TO CONSTITUTE *or* ESTABLISH] A CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE THE _____ [COMPLAINT FAILS TO ALLEGE *or* EVIDENCE FAILS TO SHOW] THAT THE ALLEGED FRAUD DAMAGED PLAINTIFF, IN THAT DAMAGES ARISING FROM FRAUDULENT AFFIRMATIVE DEFENSES ARE NOT COMPENSABLE.

Damages From Fraudulent Defenses Are Not Compensable. A plaintiff may not, in the same action, assert independent causes of action for fraud against the defendant and the defendant's attorneys for asserting false defenses to the plaintiff's main claim. Damages arising from a false defense, such as additional attorney's fees incurred by the plaintiff, are not normally compensable (*MacCharles v. Bilson (1986) 186 Cal. App. 3d 954, 957-958, 231 Cal. Rptr. 155*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the plaintiff or cross complainant either has failed to allege sufficient facts to constitute a cause of action for fraud or has failed to present evidence to establish a fraud claim. The basis of this form is that the pleadings fail to allege or evidence fails to establish that the alleged fraud damaged the plaintiff, because damages arising from fraudulent affirmative defenses are not compensable.

This form should be included with other points and authorities, depending on the procedural context in which the issue

is raised and on other substantive issues that may be involved [*see § 105.250[2][a]*].

This form may also be combined with points and authorities asserting the plaintiff's failure to allege damages generally [*see § 105.250*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.250[2][b]*].

[c] Related Points and Authorities

For memoranda of points and authorities dealing with the measure of damages applicable in fraud and deceit, see *§§ 105.252* and *105.253*.

[d] Opposing Points and Authorities

The points and *authorities in § 105.260* et seq. may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Damages From Fraudulent Defenses Are Not Compensable

In ***MacCharles v. Bilson*** *(1986) 186 Cal. App. 3d 954, 231 Cal. Rptr. 155* , the court of appeal affirmed the trial court's judgment of dismissal after demurrers to the plaintiff's causes of action for fraud and negligent representation were sustained. The plaintiff alleged that the defendants, who were attorneys for a party against whom the plaintiff had a personal injury claim, fraudulently procured a release of that claim. The plaintiff contended that he was entitled to damages because he would be forced to litigate the invalidity of the release in the trial of the personal injury action, which would cause a delay in recovery of judgment, extra litigation expense, attorney's fees, and mental and emotional distress. The plaintiff amended his original complaint for personal injuries to include additional causes of action for fraud and negligent misrepresentation.

Rejecting the plaintiff's arguments, the court of appeal held that a plaintiff may not, in the very same action, assert independent causes of action against the defendant and the defendant's attorneys for asserting false defenses to the plaintiff's claim. The court noted that there was a danger of confusion and prejudice of the issues, as well as a conflict of interest between attorney and client requiring retention of separate counsel and a risk that parties may deterred from asserting bona fide claims (*186 Cal. App. 3d 954, 957)* . Noting that the plaintiff could meet the defendants' defense in the trial of the personal injury action, the court concluded that the plaintiff suffered no compensable damages in reliance on the attorneys' alleged fraud (*186 Cal. App. 3d 954, 958)* .

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10-105 California Points & Authorities § 105.252

§ 105.252 Damages Are Not Sufficiently Pleaded or Proven--Pleading or Proof Damages for Fraud in Property Sale That Exceed Damages Permitted by Statute

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO ESTABLISH DAMAGES RESULTING FROM THE ALLEGED FRAUD AND DECEIT OF DEFENDANT BECAUSE THE DAMAGES CLAIMED IN CONNECTION WITH THE SALE AND EXCHANGE OF PROPERTY EXCEED THE DAMAGES PERMITTED BY *CIVIL CODE SECTION 3343*.

A. Statutory Measure of Damages. One defrauded in the purchase, sale, or exchange of property is entitled to recover the difference between the actual value of the property with which the defrauded person parted and the actual value of what the defrauded person received, together with any additional damages arising from the particular transaction, including (1) amounts actually and reasonably expended in reliance on the fraud, (2) compensation for loss of use and enjoyment of the property to the extent that the loss was caused by fraud, (3) profits or other gains that might reasonably have been earned by use of the property had the defrauded person retained it, and (4) any loss of profits or other gains that were reasonably anticipated and would have been earned from the use or sale of the property had it possessed the characteristics fraudulently attributed to it. However, lost profits from the use or sale of the property are recoverable only if and to the extent that (1) the defrauded party acquired the property for the purpose of using or reselling it for profit, (2) the defrauded party reasonably relied on the fraud in entering into the transaction and in anticipating profits from the subsequent use or sale of the property, and (3) any loss of profits for which damages are sought has been proximately caused by the fraud and the defrauded party's reliance on the fraud (*Civ. Code § 3343(a)*).

B. Statutory Limitation on Damages. The statute providing for damages for fraud in the sale or exchange of property does not permit the defrauded person to recover any amount measured by the difference between the value of the property as represented and the actual value of the property (*Civ. Code § 3343(b)(1)*).

C. Statutory Measure of Damages Exclusive. The provisions of *Civil Code Section 3343* were enacted to provide a uniform rule for all fraud cases involving the sale or exchange of property and provide the exclusive measure of damages in those cases (*Bagdasarian v. Gragnon (1948) 31 Cal. 2d 744, 759-762, 192 P.2d 935* ; *Cory v. Villa Props. (1986) 180 Cal. App. 3d 592, 599, 225 Cal. Rptr. 628*).

D. Out-of-Pocket Measure Appropriate Even in Action Involving Fraud by Fiduciary. The out-of-pocket measure of damages described in *Civ. Code § 3343* applies even if the action involves fraud by a fiduciary (*Hensley v. McSweeney (2001) 90 Cal. App. 4th 1081, 1085-1086, 109 Cal. Rptr. 2d 489*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the plaintiff or cross complainant either has failed to allege sufficient facts to constitute a cause of action for fraud or has failed to present evidence to establish a fraud claim. The basis of this form is that the pleadings allege, or evidence establishes, that the measure of damages sought by the plaintiff are not in accordance with the provisions of *Civ. Code § 3343*, which sets forth the measure of damages applicable when one is defrauded in the purchase, sale, or exchange of property.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.250[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.250[2][b]*].

[3] Discussion of Authorities

[a] Statutory Measure of Damages Exclusive

In ***Bagdasarian v. Gragnon*** *(1948) 31 Cal. 2d 744, 192 P.2d 935* , the facts and background of which are discussed in *§ 105.332[3][b]*, the Supreme Court ruled that *Civ. Code § 3343*, which provides for the measure of damages to be applied when one is defrauded in the purchase, sale, or exchange of property, and which is referred to as the "out of pocket loss rule," was enacted to provide a "uniform rule for all fraud cases." The Court added that it could see no reason for refusing to follow the decisions that had applied the rule as the exclusive measure of damages (*31 Cal. 2d 744, 762)* . The provisions of the statute--that the defrauded person may also recover any additional damages arising from the particular transaction and that nothing in the statute will be deemed to deny such a person any legal or equitable remedies to which the defrauded person may be entitled--do not indicate that any other measure of damages may be applied. The right to recover additional damages does not refer to the measure of damages, but, rather, to such matters as expenses or other consequential injury resulting from the fraud. The Court added that the statute does not preclude the allowance of exemplary damages (*31 Cal. 2d 744, 762-763)* .

In ***Cory v. Villa Props.*** *(1986) 180 Cal. App. 3d 592, 225 Cal. Rptr. 628* , the plaintiffs purchased residential property from the defendants. The defendants and their brokers misrepresented the size of the property to the plaintiffs. The plaintiffs sued the defendants and their brokers for fraud and for intentional and negligent misrepresentation. The trial court granted the defendants' motion for summary judgment, finding that the plaintiffs suffered no measurable damages.

The court of appeal affirmed in part. The court held that *Civ. Code § 3343* provides the exclusive measure of damages for fraud (*180 Cal. App. 3d 592, 599)* . It noted that *Civ. Code § 3343* follows the "out of pocket rule," which awards the difference between what the defrauded party has expended and what the defrauded party has received in value, plus additional damages arising from the transaction (*180 Cal. App. 3d 592, 600)* . Thus, because the value of the property

when the plaintiffs purchased it was equal to or greater than the price they paid for it, there was no "out of pocket" loss (*180 Cal. App. 3d 592, 601)* .

[b] Out-of-Pocket Measure Appropriate Even in Action Involving Fraud by Fiduciary

In ***Hensley v. McSweeney*** *(2001) 90 Cal. App. 4th 1081, 109 Cal. Rptr. 2d 489* , the plaintiff entered into an agreement to purchase property, with the defendant acting as escrow holder in connection with the transaction. Prior to completion of the transaction, the holder of a first deed of trust foreclosed on the property. When the plaintiff decided not to buy the property, he sought the return of money he had paid and that the defendant had been holding in escrow. After the defendant purchased the property at a foreclosure sale, she offered to sell it to the plaintiff, but he declined. However, the defendant did not return the money being held in escrow, because the original sellers had not signed a release enabling her to do so. The plaintiff then filed suit against the defendant. The case was submitted to the jury on the theories of breach of fiduciary duty, fraud by nondisclosure, fraud by intentional misrepresentation, and false promise. The jury returned special verdicts for the plaintiff, and the trial court entered judgment for the plaintiff for $130,000 and costs. The plaintiff appealed the trial court's calculation of damages based on the special verdicts returned by the jury. The defendant cross-appealed on the grounds, among others, that the trial court committed reversible error in instructing the jury on both the out-of-pocket and benefit-of-the-bargain measure of damages and allowing the jury to decide which measure to apply.

The court of appeals reversed the judgment, concluding that the trial court erred in allowing the jury to consider the benefit-of-the-bargain measure of damages. The court noted that in fraud cases involving the purchase, sale, or exchange of property, the out-of-pocket measure of damages as in *Civ. Code § 3343* applies. The court also noted that at least two published court of appeal opinions had already held that the measure of damages for fraud by a fiduciary remains out-of-pocket damages, not the benefit-of-the-bargain measure normally applied to contract causes of action. In one of those cases, *Overgaard v. Johnson (1977) 68 Cal. App. 3d 821, 137 Cal. Rptr. 412* , the court had specifically questioned the applicability of *BAJI No. 12.57,* which defines the benefit-of-the-bargain rule, to instances in which the defrauding party stands in a fiduciary relationship with the defrauded party, because the cases cited in the Use Note for this jury instruction do not support the proposition. Recognizing that a split of authority existed at the court of appeal level, the court agreed with the position of the court in *Overgaard* and concluded that the appropriate measure of damages in fiduciary tort actions is the out-of-pocket measure (*90 Cal. App. 4th 1081, 1085-1086)* .

[4] Additional Authorities

[a] Statutory Measure of Damages Exclusive

In *Stout v. Turney (1978) 22 Cal. 3d 718, 150 Cal. Rptr. 637, 586 P.2d 1228* , the Supreme Court held that *Civ. Code § 3343* does not require a plaintiff to show "out-of-pocket" loss--that the consideration paid exceeded the value of property received--to be entitled to recover any of the "additional damage arising from the particular transaction" referred to in that code section (*22 Cal. 3d 718, 729)* .

In *Saunders v. Taylor (1996) 42 Cal. App. 4th 1538, 50 Cal. Rptr. 2d 395* , the plaintiffs sued for fraud when they discovered that the house they had purchased had an improvement that had been made without a necessary permit. The defendants had signed a real estate disclosure form stating that they were not aware of any alterations without necessary permits. The defendants moved for nonsuit on the grounds that the plaintiffs did not show that they had suffered any damages as a result of the alleged misrepresentation, because the plaintiffs offered no evidence of what the market value of the house would have been had the true facts been known regarding the lack of permits. The trial court granted the motion for nonsuit and entered judgment for the defendants. The court of appeal agreed, noting that under *Civ. Code § 3343(a)* one defrauded in the purchase of real property is entitled to recover the difference between the actual value of the property with which the defrauded person parted and the actual value of what the defrauded person received (*42 Cal. App. 4th 1538, 1542)* . The plaintiffs contended that *Civ. Code § 3343* was not the correct measure of damages,

citing *Civ. Code § 1102.13*, which provides that any person who violates the real estate disclosure provisions is liable for actual damages suffered by the transferee. However, the court held that actual damages as stated in *Civ. Code § 1102.13* means compensatory damages as measured by *Civ. Code § 3343* (*42 Cal. App. 4th 1538, 1545)* .

In *Croeni v. Goldstein (1994) 21 Cal. App. 4th 754, 26 Cal. Rptr. 2d 412* , the plaintiffs sued the defendant for alleged fraudulent misrepresentations that induced them to sell their label printing business to another company, of which the defendant was an officer. The plaintiffs did not seek to rescind the contract, nor did they seek "out-of-pocket" loss damages (the difference between the value of the company sold and the amount they received), but instead sought lost profits that they would have earned had they not sold their business. The trial court granted the defendant's motion for summary judgment on the ground that there were no cognizable compensatory damages for fraud that the plaintiffs were entitled to recover. The court of appeal noted that *Civ. Code § 3343(a)(3)* authorizes the recovery by a defrauded seller of lost profits in certain circumstances (*21 Cal. App. 4th 754, 759)* . However, the court also noted that the statute did not repeal, amend, or affect the doctrine of election of remedies or authorize a double recovery. Thus, because the plaintiffs sought to enforce the sale and obtain the sale price to which they agreed, they cannot recover profits they would have earned had they kept the business. This would amount to a double recovery because the amount of the profit earned by the business is one of the factors taken into account in establishing its value and is therefore reflected in the sale price. Lost profits would be recoverable if the plaintiffs were seeking rescission (*21 Cal. App. 4th 754, 759-760)* .

The court noted, however, that *Civ. Code § 3343(b)(2)* does not require the denial to parties of any legal or equitable remedies to which they may be entitled. The court observed that because the defendant was not a party to the agreement, he could not be sued for its breach or for rescission, but he is liable for any other legal or equitable remedies to which the plaintiffs may be entitled. The court concluded, therefore, that, consistent with *Civ. Code § 3343*, the plaintiffs were entitled to proceed against the defendant for lost profits as though they were rescinding the contract, in which case the defendant would be entitled to a credit against any amount that the plaintiffs collected against the company that bought their business (*21 Cal. App. 4th 754, 760)* .

In *Kenly v. Ukegawa (1993) 16 Cal. App. 4th 49, 19 Cal. Rptr. 2d 771* , the plaintiff brought an action for fraud against an individual and two partnerships, alleging that the defendants induced him to buy a note secured by a farm to stave off an impending foreclosure. The defendants promised to sell the farm to him, but the plaintiff learned that the defendants were trying to sell the farm to third parties. The plaintiff filed his fraud action, and the defendants eventually paid the plaintiff the full amount due on the note. The court of appeal held that the language of *Civ. Code § 3343(a)(4)* clearly contemplates that a party cannot recover lost anticipated profits unless the party has actually acquired the property in question. Thus, because the only property acquired by a plaintiff was a note, it was improper for the trial court to award profits based on a farm that was to be acquired in the future (*16 Cal. App. 4th 49, 55)* .

In re Marriage of McNeill (1984) 160 Cal. App. 3d 548, 206 Cal. Rptr. 641 was a dissolution action consolidated with the husband's action for fraud, for cancellation of a deed, and to quiet title. The trial court awarded the husband rescission of the deed and damages based on fraud, including $30,000 for emotional distress (*160 Cal. App. 3d 548, 558)* . Citing *O'Neil v. Spillane (1975) 45 Cal. App. 3d 147, 159, 119 Cal. Rptr. 245* , the court of appeal reversed the award, stating that regardless of whether they were based on *Civ. Code § 1692* (rescission) or *Civ. Code § 3343* (damages for fraud in the purchase, sale, or exchange of property), the award of damages for emotional distress as an element of consequential damages could not be upheld (*160 Cal. App. 3d 548, 559)* .

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
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10-105 California Points & Authorities § 105.253

§ 105.253 Damages Are Not Sufficiently Pleaded or Proven--No "Cost of Repair" Recovery for Sale of Right of Way

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO ESTABLISH DAMAGES RESULTING FROM THE ALLEGED FRAUD AND DECEIT OF DEFENDANT BECAUSE THE DAMAGES CLAIMED IN CONNECTION WITH THE SALE AND EXCHANGE OF PROPERTY EXCEED THE DAMAGES PERMITTED BY *CIVIL CODE SECTION 3343*, IN THAT THERE CAN BE NO "COST OF REPAIR" RECOVERY FOR AN ALLEGED FRAUDULENT SALE OF RIGHT OF WAY.

No "Cost of Repair" Recovery for Sale of Right of Way. A landowner who is fraudulently induced to grant a right of way over his or her land by misrepresentations concerning the effect of the right of way on the land is limited by *Civil Code Section 3343* to recovery of the difference between the amount the landowner received and the value of the land that the landowner parted with. The landowner may not recover the "cost of repair," that is, the cost of restoring the land to the condition it would have been in had the effect of the right of way been as represented (*Housley v. City of Poway (1993) 20 Cal. App. 4th 801, 812-813, 24 Cal. Rptr. 2d 554*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the plaintiff or cross complainant either has failed to allege sufficient facts to constitute a cause of action for fraud or has failed to present evidence to establish a fraud claim. The basis of this form is that the plaintiff is seeking an impermissible measure of damages because there can be no "cost of repair" recovery for an alleged fraudulent sale of a right of way.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.250[2][a]*]. They may also be combined with the points and *authorities in § 105.252* asserting generally that an incorrect measure of damages for fraud in a property sale may be stricken.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.250[2][b]*].

[c] Opposing Points and Authorities

The points and *authorities in § 105.260* et seq. may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] No "Cost of Repair" Recovery for Sale of Right of Way

In ***Housley v. City of Poway*** *(1993) 20 Cal. App. 4th 801, 24 Cal. Rptr. 2d 554* , the city required the developer of a business park to widen a road. The developer contacted the plaintiff, who owned land adjoining the road, about obtaining a right-of-way, with necessary easements, to allow widening of the road. In negotiating with the plaintiff, the developer initially had requested an easement for a slope on the plaintiff's land, which would be necessary to support the widened road. Eventually, the parties agreed that the widening would be accomplished without any slope, and the final grant deed for the right-of-way signed by the plaintiff made no mention of a slope. The amount paid for the right-of-way reflected this limitation. However, when the widened road was actually constructed, the developer placed a huge slope on the plaintiff's property that, at its widest point, extended 42 feet onto the property and covered over 10,000 square feet. The plaintiff sued the city for inverse condemnation and the developer for fraud. At trial, the plaintiff introduced no evidence regarding the fair market value of the land covered by the slope, but instead introduced evidence regarding the "cost of repair"--that is, the cost of removing the slope and replacing it with a retaining wall to provide lateral support for the road. The jury was instructed that it could award "all damages legally caused by the misrepresentation" and returned a verdict against the developer for an amount based on the cost of repairing the property, on which the trial court entered judgment. The developer appealed, and the court of appeal reversed.

The court noted that under *Civ. Code § 3343*, damages for fraud in connection with the sale of property are measured by the difference between the value with which the victim parted and the value the victim received (the so-called "out-of-pocket losses"), together with certain additional damages. However, the trial court had rejected an instruction based on this statute and instead gave the instruction discussed above. The court observed that under the "out-of-pocket" measure, the plaintiff would be entitled to recover damages measured not by what he could have reaped had the promise to preserve the land been true, but by what he lost because of his reliance on the false promise (*20 Cal. App. 4th 801, 812*). In this case, the court stated, the fraud caused the plaintiff to part with the right-of-way and the area covered by the slope, yet receive payment only for the right-of-way. Under the "out-of-pocket" standard, the difference between that with which the plaintiff parted and what the plaintiff received was the value of the land buried by the slope *(20 Cal. App. 4th 801, 812-813*). The court noted that it was cited to no relevant authority in which either "cost of repair" or "benefit-of-the-bargain" damages were awarded for fraud occurring in an arm's length transaction. The cases cited by the plaintiff in which a "benefit-of-the-bargain" measure was awarded either involved fraud by a fiduciary or recovery based on a theory other than fraud. The court therefore concluded that "cost of repair" is not relevant in a case in which a property owner is induced by fraud to part with land and that damages are limited to those permitted by *Civ. Code § 3343* (*20 Cal. App. 4th 801, 813)* .

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[Reserved]

§§ 105.254[Reserved]

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10-105 California Points & Authorities § 105.260

§ 105.260 Damages Are Sufficiently Pleaded or Proven--Pleading or Proof Shows Damages

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF IS NOT LIMITED TO THE "OUT-OF-POCKET LOSS" MEASURE OF DAMAGES SET FORTH IN *CIVIL CODE SECTION 3343* BECAUSE THE ALLEGED FRAUD _____ [DOES NOT ARISE OUT OF THE SALE OR EXCHANGE OF PROPERTY *or* INVOLVES FRAUD COMMITTED BY A FIDUCIARY *or* INVOLVES THE SALE OF "GOODS" WITHIN THE MEANING OF THE COMMERCIAL CODE].

A. Compensation for All Detriment. For the breach of an obligation not arising from contract, the measure of damages, except when otherwise expressly provided by the Civil Code, is the amount that will compensate for all the detriment proximately caused thereby, whether or not it could have been anticipated (*Civ. Code § 3333*).

B. Damages for Inducing Reliance Through Deceit. One who willfully deceives another with intent to induce him or her to alter his or her position to his or her injury or risk, is liable for any damages that he or she thereby suffers (*Civ. Code § 1709*).

[*EITHER*]

C. Cases Not Involving Vendor and Vendee. Although the "out of pocket" rule of damages contained in *Civil Code Section 3343* applies in cases of fraud between a vendor and a vendee, the broader provisions of *Civil Code Sections 1709* and *3333* apply in cases not involving such parties (*Gagne v. Bertran (1954) 43 Cal. 2d 481, 490, 275 P.2d 15*).

[*OR*]

C. Fraud in Sale of Goods. Remedies for material misrepresentation or fraud in the sale of goods include all remedies available under the sale division of the Commercial Code for nonfraudulent breach (*Com. Code § 2721*), and all statutes inconsistent with this provision are repealed (*Com. Code § 13103*).

[*OR*]

C. Fraud of Fiduciary. The much broader provisions of *Civil Code Sections 1709* and *3333* apply to cases involving a fiduciary's fraud (*Salahutdin v. Valley of Cal., Inc. (1994) 24 Cal. App. 4th 555, 565-568, 29 Cal. Rptr. 2d 463* ; *Simone v. McKee (1956) 142 Cal. App. 2d 307, 315, 298 P.2d 667*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff or cross complainant has failed to establish that the plaintiff was damaged as a result of the defendant's fraud. This form asserts that the plaintiff is not limited to the "out-of-pocket loss" measure of damages in *Civil Code Section 3343*, because the evidence or the allegations are in accordance with *Civ. Code § 3333* and because the cause of action is not between vendor and vendee, but between persons who, for example, were an adviser and the person who was advised [*see § 105.260[3]*].

This form may be used to oppose the points and *authorities in § 105.250* et seq.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue--for example, by response to a demurrer or by opposition to a summary judgment motion. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, for example, in the case of opposition to a motion for summary adjudication of issues, supporting the contention that there is a triable issue of fact, counsel would refer to facts in declarations or deposition transcripts establishing that the plaintiff is not limited to the "out-of-pocket loss" measure of damages in *Civil Code § 3343*.

Any statement of fact should be supported by adequate reference to the pleading (or matters subject to judicial notice), if the form is used in a memorandum opposing a demurrer or another challenge to the sufficiency of the pleading. Similarly, any statement of fact should be supported by adequate reference to evidence admitted or otherwise cognizable by the court, if the form is used to oppose a motion challenging the adequacy of proof.

For example, a memorandum opposing a motion for summary judgment may refer to affidavits or declarations based on personal knowledge or matters subject to judicial notice [*see Code Civ. Proc. §§ 2009, 2015.5* (affidavits and declarations); *Evid. Code § 450 et seq.* (judicial notice)]. For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For additional discussion and litigation forms pertaining to damages in fraud actions, see California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender). For discussion and forms related to actions under the Commercial Code based on breach of warranty, see Ch. 502, *Sales: Warranties* , in that publication.

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For additional points and authorities relating to demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Cases Not Involving Vendor and Vendee

In ***Gagne v. Bertran*** *(1954) 43 Cal. 2d 481, 275 P.2d 15* , the facts and background of which are discussed in *§ 105.270[3][b],* the Supreme Court ruled that liability of the defendant, who had failed to exercise due care in testing certain real property for the depth of the fill on the property, whether for deceit or negligence, was to be measured by the actual losses suffered because of the misrepresentation, citing *Civ. Code §§ 1709* and *3333* (*43 Cal. 2d 481, 490)* .

[b] Fraud of Fiduciary

In ***Salahutdin v. Valley of Cal., Inc.*** *(1994) 24 Cal. App. 4th 555, 29 Cal. Rptr. 2d 463* , the plaintiffs sued their real estate broker for certain material misrepresentations made by the broker's sales representative concerning the size of a parcel of real property that the plaintiffs wished to purchase. The trial court entered judgment in favor of the plaintiffs against the broker and computed damages under *Civ. Code § 3333* based on the "benefit-of-the-bargain" measure--that is, the difference between the value of the property received by the plaintiffs and the value of the property they would have received had the sales representative's statements been true. The court of appeal affirmed.

On appeal, the defendant contended that the trial court erred in awarding the plaintiffs "benefit-of-the bargain" damages under *Civ. Code §§ 1709* and *3333*, rather than their "out-of-pocket" loss under *Civ. Code § 3343*. The court noted that the consensus of commentators is that *Civ. Code § 3343* governs the measure of damages for fraud in the purchase, sale, or exchange of real property, but that an exception is recognized if a fiduciary relationship existed between the parties. In the latter case, *Civ. Code §§ 1709* and *3333* provide the measure of damages. The court observed that the cases support this distinction (*24 Cal. App. 4th 555, 565)* . However, the court noted that there was a split of authority concerning whether *Civ. Code §§ 1709* and *3333* authorize a "benefit-of-the-bargain" measure of damages in cases of fiduciary fraud. The court followed the authority permitting the broader measure of damages for fiduciary fraud and refused to limit damages to "out-of-pocket" loss. The court noted that its division had consistently applied the broader measure of damages and that the broader measure was just in the case of a faithless fiduciary, who should be required to make good the full amount of the loss caused by the fiduciary's breach of duty (*24 Cal. App. 4th 555, 566-567)* . The court of appeal concluded that the trial court therefore did not err in refusing to limit the plaintiffs to their "out-of-pocket" loss. The court further held that the plaintiffs' "benefit-of-the-bargain" damages were appropriately calculated as of the date of discovery of the fraud, rather than as of the date of the transaction (*24 Cal. App. 4th 555, 568)* .

In ***Simone v. McKee*** *(1956) 142 Cal. App. 2d 307, 298 P.2d 667* , the court of appeal sustained a judgment for a real estate broker's client against the real estate broker in an action for fraud. The trial court awarded the plaintiff damages that the plaintiff sustained because of the defendant broker's fraud. The defendant contended that the "out-of-pocket" rule of *Civ. Code § 3343* should have been applied. However, all of the cases cited in support of this rule were cases between a vendor and a vendee. None of those cases involved a fiduciary's fraud. In such cases, the court held, the much broader provisions of *Civ. Code §§ 1709* and *3333* apply (*142 Cal. App. 2d 307, 315)* .

[4] Additional Authorities

[a] Damages for Inducing Reliance Through Deceit

In *Helmer v. Bingham Toyota Isuzu (2005) 129 Cal. App. 4th 1121, 29 Cal. Rptr. 3d 136* , the plaintiff left his previous employment as a parts and service manager with a car dealership after accepting a position in the parts department of another dealership. The plaintiff alleged that the service manager at the new employer had promised the plaintiff that he would earn at least $5700 per month if he came to work there, which was approximately the amount that the plaintiff had been earning with his prior employer and was the minimum amount that the plaintiff would accept to change employers. The plaintiff's checks in the first few months of his new employment averaged less than $5000 per month, however, and the plaintiff was fired after complaining that the compensation did not match the amount that he was allegedly promised. The plaintiff's prior employer had a strict no-rehire policy, and the plaintiff was unable to obtain comparable employment with another car dealership, the plaintiff was forced to take a job in another field with a much lower income. The plaintiff sued the car dealership that fired him, arguing that the dealership made false promises with no intention to perform in order to induce him to leave his prior employment and accept their offer of employment. The plaintiff was successful at trial, recovering compensatory damages that included the difference between what he was currently earning and what he would have expected to earn if he had stayed with the first employer. On appeal, the court of appeal affirmed these damages. The court held that in an action for promissory fraud, a plaintiff who leaves one employer to accept a position with another employer based on false promises of benefits to be obtained from the new employment may recover lost future income from the prior employment, if the damages are not too speculative or remote (*129 Cal. App. 4th 1121, 1130)* . In this particular case, the court of appeal concluded that the testimony of the plaintiff's former supervisor that the plaintiff was a good and reliable employee, that he was sad to see the plaintiff leave, and that he was not rehired solely because of the strict no-rehire policy, was sufficient evidence to prove these damages (*129 Cal. App. 4th 1121, 1131)* .

[b] Fraud in Sale of Goods

In *Continental Airlines, Inc. v. McDonnell Douglas Corp. (1989) 216 Cal. App. 3d 388, 264 Cal. Rptr. 779* , an airline company brought an action in fraud against the manufacturer of an airplane that was destroyed because of defects that caused the airplane to catch on fire. The plaintiff alleged that the defendant's misrepresentations regarding the safety of the features that ultimately failed induced reliance in the purchase of that particular type of airplane over other models. The trial court entered judgment for the plaintiff based on three counts of fraud and one count of breach of contract, and the court of appeal affirmed (after modifying the amount of prejudgment interest awarded). With regard to the measure of damages, the court of appeal rejected the defendant's contention that *Civ. Code § 3343* set forth the exclusive (out-of-pocket) measure of damages for fraud actions, holding that if the Commercial Code governs the sale of goods that is the basis of a fraud action, *Com. Code § 2721*, which gives the buyer the "benefit of the bargain," rather than *Civ. Code § 3343*, applies. The court also implied that *Civ. Code § 3343* should have been repealed, in light of its sharp conflict with the Commercial Code and the legislature's intent that the Commercial Code provision supersede the Civil Code provision with respect to actions regarding the sale of "goods" within the meaning of the *Com. Code § 2105* (*216 Cal. App. 3d 388, 429-431)* .

[c] Fraud of Fiduciary

In *Strebel v. Brenlar Invs., Inc. (2006) 135 Cal. App. 4th 740, 37 Cal. Rptr. 3d 699* , the plaintiff sold his house in reliance on representations from his real estate broker and another seller that the plaintiff would simultaneously be able to purchase the other seller's house. However, the plaintiff was unable to purchase that house because of undisclosed tax liens on the other seller's property. Despite searching for about two years, the plaintiff was also unable to find affordable replacement property in the same area due to rapidly escalating housing costs. The plaintiff sued the broker and the other seller and recovered in compensatory damages the appreciation in value of the property that the plaintiff sold, measured from the time he sold it to the time of trial. The court of appeal allowed this measure of compensatory damages. The court noted that *Civ. Code § 3343* did not apply because the action was predicated on the fraud of the real estate broker, who was a fiduciary. Therefore, the applicable damages statutes were *Civ. Code §§ 1709* and *3333*.

However, the court concluded that in this particular case, the appropriate measure of harm was neither a "benefit-of-the-bargain" measure nor an "out-of-pocket" loss measure. Because the plaintiff would otherwise have held onto his own property longer if he had not been told that he would definitely be able to purchase the other seller's property at the same time, the harm done to the plaintiff was to decrease his buying power in a rapidly appreciating housing market. To provide him with the same relative buying power that he lost, the court held that the trial court did not err in allowing the plaintiff to recover for the value of the appreciation of the property that he sold (*135 Cal. App. 4th 740, 748-750)* .

In *Fragale v. Faulkner (2003) 110 Cal. App. 4th 229, 1 Cal. Rptr. 3d 616* , the plaintiffs, the buyers of a house, brought suit against the seller and their real estate broker based on alleged misrepresentations made about structural defects in the house. The plaintiffs alleged that the real estate broker assured them that although additions made to the house had been made without the required permits, the construction was otherwise in accordance with the applicable codes. However, soon after purchasing the house, the plaintiffs removed paneling that covered some of the walls in the additions and discovered that the work was not up to code and would require thousands of dollars to remedy. At trial, the jury returned a verdict for the plaintiffs against both defendants on causes of action for intentional and negligent misrepresentation. However, the judge granted the real estate agent's motion for judgment notwithstanding the verdict on the ground that the plaintiffs failed to provide evidence of the market value of the house if the true state of the construction had been known, which was required to prove damages under *Civ. Code § 3343*. The court of appeal reversed the judgment in part, concluding that the proper measure of damages in the action against the real estate agent for intentional misrepresentation was a benefit-of-the-bargain measure under *Civ. Code § 3333*. The court of appeal recognized that although the California Supreme Court had held, in *Alliance Mortgage Co. v. Rothwell (1995) 10 Cal. 4th 1226, 1249-1250, 44 Cal. Rptr. 2d 352, 900 P.2d 601* , that only "out-of-pocket loss" may be recovered for negligent misrepresentations by a fiduciary, the Court had not ruled on whether a fiduciary may be liable for greater damages for committing intentional misrepresentations. The court of appeal noted that earlier court of appeal decisions were split on the issue, but sided with those opinions holding that a benefit-of-the-bargain measure was appropriate. Therefore, because the real estate agent was a fiduciary of the buyers, he could be liable for intentional misrepresentation under the benefit-of-the-bargain measure of damages regardless of whether a claim for breach of fiduciary duty was specifically pleaded. Because both the plaintiffs and the defendants had presented evidence of the cost to repair the house and bring it to a condition that the plaintiffs expected it to be in when they bought it, the plaintiffs had presented sufficient proof of damages to recover from the agent on that theory (*110 Cal. App. 4th 229, 236-239)* .

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10-105 California Points & Authorities § 105.261

§ 105.261 Damages Are Sufficiently Pleaded or Proven--Economic Loss Rule Inapplicable if Defendant's Intentional Fraud Exposed Plaintiff to Liability

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

THE ECONOMIC LOSS RULE DOES NOT APPLY TO PLAINTIFF'S CAUSE OF ACTION AGAINST DEFENDANT FOR FRAUD BECAUSE THE PLAINTIFF CAN ESTABLISH THAT DEFENDANT'S INTENTIONAL FRAUD EXPOSED PLAINTIFF TO LIABILITY.

Economic Loss Rule Inapplicable. The economic loss rule, which prevents a plaintiff from pursuing a cause of action for negligence or strict liability if the only damages suffered are economic loss without physical harm to persons or property, does not apply if the plaintiff is pursuing a cause of action for intentional fraudulent conduct and that fraudulent conduct exposed the plaintiff to liability to third parties (*County of Santa Clara v. Atlantic Richfield Co. (2006) 137 Cal. App. 4th 292, 328, 40 Cal. Rptr. 3d 313*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff has not sustained actionable damages because the plaintiff's only alleged damages are economic loss without physical harm to persons or property. This form asserts that the economic loss rule, under which economic loss alone is insufficient to support a cause of action without accompanying physical harm to persons or property, does not apply if the defendant's intentional fraudulent conduct has exposed the plaintiff to liability to third parties.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue--for example, by response to a demurrer or by opposition to a

summary judgment motion. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, for example, counsel should include facts showing that the defendant's conduct was intentional and fraudulent, and explain with specific details how this fraudulent conduct resulted in plaintiff being exposed to potential liability to third parties.

[3] Discussion of Authorities

[a] Economic Loss Rule Inapplicable

In ***County of Santa Clara v. Atlantic Richfield Co.*** *(2006) 137 Cal. App. 4th 292, 40 Cal. Rptr. 3d 313* , several California counties and related local entities brought a lawsuit against lead manufacturers that, prior to 1978, promoted lead for use in paint to be used in building interiors. The plaintiffs alleged that the defendants had promoted lead as safe for that use, even though they had known for years of lead's harmful health effects on humans and had actively concealed these known dangers and even campaigned against the regulation of lead. The plaintiffs' lawsuit, which was based on the presence of lead-based paint in public buildings, included causes of action for public nuisance, negligence, strict liability, unfair competition, and fraud. The trial court sustained the defendants' demurrer to the public nuisance causes of action and granted summary judgment on the remaining causes of action based on the applicable statute of limitations. The plaintiffs appealed.

The court of appeal reversed. In discussing the viability of the negligence and strict liability causes of action, the court reviewed the economic loss rule, which states that a plaintiff cannot pursue a cause of action for negligence or strict liability if the plaintiff's only damages consist of economic loss without physical damage to persons or property. The court noted that the plaintiffs in this case had not alleged that the lead paint in their buildings threatens the buildings themselves with physical harm, only that the presence of deteriorating paint poses an unreasonable danger to human beings and had required the plaintiffs to spend money to find and remove the lead paint. Although these allegations might support a cause of action brought by a person who had suffered adverse health effects from lead paint exposure in the buildings, the court, applying the economic loss rule, concluded that the plaintiffs had not yet suffered any compensable damages and that no cause of action for negligence or strict liability had accrued yet (*137 Cal. App. 4th 292, 325)* .

The court then addressed the plaintiffs' fraud cause of action, which had been predicated on the same damage allegations. The court reviewed a case [*Robinson Helicopter Co., Inc. v. Dana Corp. (2004) 34 Cal. 4th 979, 22 Cal. Rptr. 3d 352, 102 P.3d 268]* , in which the Supreme Court held that a helicopter manufacturer was not limited to a breach of contract action and could sue a component part supplier for fraud for knowingly supplying substandard parts that were not in conformity with the applicable contractual specifications. The Supreme Court concluded in that case that the component supplier's intentional fraud in concealing the nonconformity of the parts arose independently from the breach of contract, caused economic loss for the helicopter manufacturer, and subjected the helicopter manufacturer to potential liability to third parties if the substandard parts caused helicopter malfunctions resulting in personal injuries or death. For these reasons, the Supreme Court held that the economic loss rule would not preclude the helicopter manufacturer from pursuing the fraud action (*137 Cal. App. 4th 292, 327-328)* .

The court of appeal then held that the Supreme Court's holding, which precluded application of the economic loss rule, applied to any intentional affirmative fraud action in which the plaintiff can establish that the fraud exposed the plaintiff to liability. In this particular case, the plaintiffs had alleged that the defendant's affirmative misrepresentations about the dangers of low-level exposure to lead-based paint, on which the plaintiffs reasonably relied, had caused the plaintiffs to fail to make timely efforts to prevent and treat low-level lead exposure. This delay in instituting prevention and treatment caused more people to be exposed to the lead-based paint, increased the cost of treatment for those who had

been exposed, and exposed the plaintiffs to liability to persons who might become ill through low-level exposure to the paint in their buildings. Under these circumstances, the court, applying *Robinson Helicopter*, held that the economic loss rule did not apply to the plaintiffs' fraud cause of action (*137 Cal. App. 4th 292, 328-329)* . The court then held that the fraud action was not barred by the applicable three-year statute of limitations. The plaintiffs had alleged that they were not aware of the defendants' fraud in concealing the health dangers of low-level exposure to lead until 1998, when scientific studies finally demonstrated the falsity of the defendants' claim about the extent of danger caused by low-level exposure, and the action was initially filed in 2000 (*137 Cal. App. 4th 292, 330-331)* .

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F. Damages

10-105 California Points & Authorities §§ 105.262-105.269

[Reserved]

§§ 105.262[Reserved]

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CHAPTER 105 FRAUD AND DECEIT
PART II. FORMS
G. Negligent Misrepresentation

10-105 California Points & Authorities § 105.270

§ 105.270 Negligent Misrepresentation Is Not Sufficiently Pleaded or Proven--Pleading or Proof Fails to Show Lack of Reasonable Ground to Believe Truth of Representation

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO _____ [STATE FACTS SUFFICIENT TO CONSTITUTE *or* ESTABLISH] A CAUSE OF ACTION FOR NEGLIGENT MISREPRESENTATION BECAUSE THE _____ [COMPLAINT FAILS TO ALLEGE *or* EVIDENCE FAILS TO SHOW] THAT DEFENDANT HAD NO REASONABLE GROUNDS FOR DEFENDANT'S BELIEF THAT THE REPRESENTATION WAS TRUE.

A. Negligent Misrepresentation Defined. A deceit is the assertion as a fact of something that is not true by one who has no reasonable ground for believing it to be true (*Civ. Code § 1710(2)*).

B. Failure to Show No Reasonable Ground for Belief. In actions for negligent misrepresentation, the pleading must allege that the representation was an assertion as a fact of something that was not true and that it was made by one who had no reasonable ground for believing it to be true (*Gagne v. Bertran (1954) 43 Cal. 2d 481, 487, 275 P.2d 15* ; *Quality Wash Group V, Ltd. v. Hallak (1996) 50 Cal. App. 4th 1687, 1696-1697, 58 Cal. Rptr. 2d 592*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the plaintiff or cross complainant either has failed to allege sufficient facts to constitute a cause of action for deceit consisting of a negligent misrepresentation or has failed to present evidence to establish a claim of negligent misrepresentation. The particular basis of this form is that there is no allegation or proof that the representation was made by one who had no reasonable ground for believing

it to be true.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and on any other substantive issues that need to be addressed. For example, it may be submitted with other points and authorities supporting a demurrer or a motion for summary judgment challenging the sufficiency of, respectively, the pleading or the proof.

This form may be combined, if appropriate, with the points and authorities in *§ 105.30* et seq., which challenge the sufficiency of pleading or proof with regard to other aspects or elements in a cause of action for fraud and deceit. If this form is used to support a demurrer, it may also be combined, if appropriate, with the forms in *§ 105.10 et seq.*, which focus on the requirement that elements of an action for fraud and deceit, particularly the deceitful act or omission, be alleged in specific rather than general terms.

This form may also be adapted for a trial or appellate brief or to support a motion for judgment on the pleadings, a motion for nonsuit, or any other request for relief based on the plaintiff's failure to show or establish the essential elements of the action for fraud or deceit.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, in the case of objection by demurrer, counsel for the demurring party would refer to the allegations of the complaint and point out the omission of any allegation that the defendant had no reasonable grounds for the defendant's belief that the representation was true.

Any statement of fact should be supported by adequate reference to the pleading (or matters subject to judicial notice), if the form is used in a memorandum supporting a demurrer or another challenge to the sufficiency of the pleading. Similarly, any statement of fact should be supported by adequate reference to evidence admitted or otherwise cognizable by the court, if the form is used in support of a motion challenging the adequacy of proof.

For example, a memorandum supporting a motion for summary judgment may refer to affidavits or declarations based on personal knowledge or matters subject to judicial notice [*see Code Civ. Proc. §§ 2009, 2015.5* (affidavits and declarations); *Evid. Code § 450 et seq.* (judicial notice)]. For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For legal background with detailed coverage of the elements of a tort action for fraud and deceit, see California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender).

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For additional points and authorities relating to demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[e] Opposing Points and Authorities

The points and *authorities in § 105.280* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Failure to Show No Reasonable Ground for Belief

In ***Gagne v. Bertran*** *(1954) 43 Cal. 2d 481, 275 P.2d 15* , the Supreme Court ruled that the plaintiffs had established a cause of action for negligent misrepresentation, reversing judgment for the plaintiffs on other grounds. The plaintiffs had employed the defendant to test certain real property for depth of fill. Relying on the defendant's report as to the fill depth, the plaintiffs purchased the property and proceeded to install foundations. After it was discovered that there was fill to a greater depth than reported, the plaintiffs filed suit to recover the resulting extra costs. The Court ruled that to be an actionable deceit under *Civ. Code § 1710(2)*, a representation need not be made with knowledge of actual falsity, but need only be an assertion as a fact of something that is not true by one who has no reasonable ground for believing it to be true. Statements in a number of cases that scienter is an essential element of every cause of action for deceit were erroneous, and the Court disapproved them. The defendant had not given his statement as an opinion, but as a representation of fact obtained as the result of a negligently performed fill test. Because the defendant held himself out as an expert and the plaintiffs had hired him to supply information concerning matters of which they were ignorant and because his unequivocal statement necessarily implied that he knew facts that justified his statement, the plaintiffs had justifiably relied on the statement. Accordingly, they had established their cause of action for deceit (*43 Cal. 2d 481, 487)*

In ***Quality Wash Group V, Ltd. v. Hallak*** *(1996) 50 Cal. App. 4th 1687, 58 Cal. Rptr. 2d 592* , plaintiff, buyers of a car wash business, sued defendant for negligent misrepresentation based in part on its subsequent discovery that the car wash was encroaching on adjoining property. The trial court entered judgment in favor of defendant and plaintiff appealed.

The court of appeal affirmed, holding that the trial court did not misapply the law regarding negligent misrepresentation. Plaintiff contended that defendant was liable for negligent misrepresentation under the general rule that the owner of real estate, in the absence of facts to the contrary, was presumed to know the boundaries and area of his or her land, and a buyer was warranted in relying upon the owner's representations in respect to such facts. Plaintiff argued that defendant had a duty to be informed of the true boundaries of real property before making a representation regarding its location. The court responded that a landowner was entitled to rebut the presumption that he or she knew the boundaries and area of land by showing that the erroneous belief in that regard was reasonable under the facts and circumstances. If a landowner has an objectively reasonable basis for an inaccurate belief as to the location of boundaries or area, the landowner has not breached the duty to be informed regarding such matters (*50 Cal. App. 4th 1687, 1697)* . Turning to the facts of this case, the court determined that the trial court properly viewed the question of whether defendant made the misrepresentation regarding the boundaries of the property without reasonable grounds for believing it to be true as a question of fact. It noted that the trial court's statement of decision which concluded that the evidence showed that defendant did have a reasonable ground for believing the boundary line was located as represented, that all parties had that same belief, and that the car wash had been used for many years prior to defendant's purchase with the same reasonable belief. The court concluded that these findings were supported by substantial evidence (*50 Cal. App. 4th 1687, 1697)* .

[4] Additional Authorities

[a] Failure to Show No Reasonable Ground for Belief

In *Hale v. George A. Hormel & Co. (1975) 48 Cal. App. 3d 73, 121 Cal. Rptr. 144* , the plaintiffs had entered into a contract with a vending machine company under which the company was to provide the plaintiff with vending machines for distributing cans of fruit juice and assist the plaintiffs in finding suitable locations for those machines. After the

plaintiffs had made full payment of the purchase price, the company defaulted and never delivered any of the machines, but returned only a portion of the plaintiffs' purchase price. The plaintiffs then sued the fruit juice manufacturer and its local distributor for negligent misrepresentation on the basis that the manufacturer had allowed the vending machine company to use the manufacturer's name in advertising and that the distributor had recommended the vending machine company. The court of appeal noted that under *Civ. Code § 1710(2)*, negligent misrepresentation is the assertion as a fact of something that is not true by one who has no reasonable ground for believing it to be true and that scienter is not an element of such a cause of action (*48 Cal. App. 3d 73, 84)* . On analysis of the facts, the court of appeal concluded that the statements the defendant's agent made to the plaintiff were true and that the recommendation was an opinion with some basis in fact (*48 Cal. App. 3d 73, 87)* .

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G. Negligent Misrepresentation

10-105 California Points & Authorities § 105.271

§ 105.271 Negligent Misrepresentation Is Not Sufficiently Pleaded or Proven--Pleading or Proof Fails to Show Positive Assertion

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO _____ [STATE FACTS SUFFICIENT TO CONSTITUTE *or* ESTABLISH] A CAUSE OF ACTION FOR NEGLIGENT MISREPRESENTATION BECAUSE THE _____ [COMPLAINT FAILS TO ALLEGE *or* EVIDENCE FAILS TO SHOW] THAT DEFENDANT'S ALLEGEDLY UNTRUE REPRESENTATION WAS A POSITIVE ASSERTION.

Positive Assertion Required for Negligent Misrepresentation. If a deceit case is based on negligent misrepresentation, the plaintiff must allege that the defendant's untrue representation was a "positive assertion" (*Yanase v. Automobile Club of S. Cal. (1989) 212 Cal. App. 3d 468, 472-473, 260 Cal. Rptr. 513*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the plaintiff or cross complainant either has failed to allege sufficient facts to constitute a cause of action for fraud or has failed to present evidence to establish a fraud claim. The basis of this form is that the pleadings fail to allege, or evidence fails to establish, that the defendant's allegedly untrue representation was a positive assertion.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.270[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, in the case of objection by demurrer, counsel for the demurring party would refer to the allegations of the complaint and point out the omission of any allegation that the defendant's allegedly untrue representation was a positive assertion [*see § 105.270[2][b]*].

[c] Opposing Points and Authorities

The points and *authorities in § 105.280* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Positive Assertion Required for Negligent Misrepresentation

In ***Yanase v. Automobile Club. of S. Cal.*** *(1989) 212 Cal. App. 3d 468, 260 Cal. Rptr. 513* , the plaintiffs were the wife and children of the decedent, who was shot and killed in a motel parking lot. The decedent was a member of the defendant, an auto club. The motel was listed in the tourbook published and distributed by the defendant. The plaintiffs brought a cause of action against the defendant, alleging that the decedent had a special relationship with the defendant as a member, that the decedent relied on the defendant's recommendation and listing of the motel, and that the defendant had negligently failed to determine and publish information on the safety of the area and the existence of security measures by the motel. The trial court granted the defendant's motion for judgment on the pleadings on the ground that the complaint failed to state facts sufficient to constitute a cause of action against the defendant.

The court of appeal affirmed. The court stated that under *Civ. Code §§ 1710(1), (2)* and *1572*, in an action for negligent misrepresentation, the tort consists of making a false statement while honestly believing it is true, but without reasonable ground for such belief. The court added that the tort requires a "positive assertion" and does not apply to implied representations (*212 Cal. App. 3d 468, 472-473*). The court stated that there was nothing in the tourbook listing or rating that consisted of a positive assertion, or even an implied representation, concerning neighborhood safety or security measures taken by the motel. The tourbook only gave information on attractions and accommodations and did not, even in its "puffing" statements concerning the efforts of its representatives in searching for and inspecting accommodations, suggest that neighborhood safety or security measures were factors considered in making the listings. The court concluded that it therefore followed that any alleged special relationship between the decedent and the defendant based on reliance concerning vehicular travel and services, if it existed at all, was limited to the listing and rating of accommodations and did not include within its scope matters of neighborhood safety or security measures (*212 Cal. App. 3d 468, 473, 476*).

[4] Additional Authorities

[a] Positive Assertion Required for Negligent Misrepresentation

Diediker v. Peelle Fin. Corp. (1997) 60 Cal. App. 4th 288, 70 Cal. Rptr. 2d 442 , arose out of the actions of a title insurance company which issued a policy insuring title to a property without excepting an Internal Revenue Service (IRS) lien, despite its knowledge of the lien's existence. The insurance company sought to recover the amount eventually paid to the IRS on behalf of its policyholder from the trustee who, lacking knowledge of the existence of the lien, conducted a foreclosure sale years earlier without notifying the IRS. The policyholder joined in the suit against the trustee. The central issue on appeal was whether the trustee was "required" to notify the IRS under the terms of a federal statute. The trial court concluded there was no such requirement, and granted summary judgment to the trustee. The court of appeals affirmed. On appeal plaintiffs argued that by stating that it had complied "with all the requirements of law regarding the mailing of copies of the Notice of Default or the publication or delivery of the same, the making, posting and publication of copies of Notice of Trustee's Sale" prior to selling the subject property, the trustee was guilty

of negligent misrepresentation because he did not send notice to the IRS. The court determined that: there was no "requirement" under state or federal law that the IRS be notified prior to a foreclosure, so the representation made in the trustee's deed was not false on its face; and that plaintiffs could not read something into this neutral statement in order to justify their claim for negligent misrepresentation because the tort required a positive assertion (*60 Cal. App. 4th 288, 298)* .

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G. Negligent Misrepresentation

10-105 California Points & Authorities § 105.272

§ 105.272 Negligent Misrepresentation Is Not Sufficiently Pleaded or Proven--Pleading or Proof Shows Mere Gratuitous Promise

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO _____ [STATE FACTS SUFFICIENT TO CONSTITUTE *or* ESTABLISH] A CAUSE OF ACTION FOR NEGLIGENT MISREPRESENTATION BECAUSE THE _____ [COMPLAINT DISCLOSES *or* EVIDENCE SHOWS] THAT THE ALLEGED MISREPRESENTATION WAS A MERE GRATUITOUS PROMISE.

Gratuitous Promise Is Not Grounds for Negligent Misrepresentation. A mere gratuitous promise that is insufficient to support an action for breach of contract is likewise insufficient to support a tort action for negligent misrepresentation (*see Simonian v. Patterson (1994) 27 Cal. App. 4th 773, 782-783, 32 Cal. Rptr. 2d 722*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the plaintiff or cross complainant either has failed to allege sufficient facts to constitute a cause of action for fraud or has failed to present evidence to establish a fraud claim. The basis of this form is that the pleadings allege, or evidence establishes, that the representation was a mere gratuitous promise.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.270[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, in the case of objection by demurrer, counsel for the demurring party would refer to the allegations of the complaint and point out that the representation was a mere gratuitous promise [*see § 105.270[2][b]*].

[c] Opposing Points and Authorities

The points and *authorities in § 105.280* may be used in an appropriate case to oppose the points and authorities in this form.

[d] Related Points and Authorities

For related points and authorities that may be adapted to support a demurrer to a complaint for fraud alleging a promise made without intention to perform, see *§ 105.100* et seq.

[3] Discussion of Authorities

[a] Gratuitous Promise Is Not Grounds for Negligent Misrepresentation

In ***Simonian v. Patterson*** *(1994) 27 Cal. App. 4th 773, 780-783, 32 Cal. Rptr. 2d 722* , the plaintiff brought an action against his ex-fiancee's father for negligent misrepresentation, breach of oral contract, and other causes of action, arising out of his efforts to retrieve various items of personal property from his fiancee after their relationship had ended. The defendant had helped his daughter move various items of personal property from the apartment that the plaintiff and the daughter had shared to the daughter's new apartment. Although some of these items were ultimately returned to the plaintiff, the defendant's daughter refused to return other items. Before filing the lawsuit, the plaintiff had spoken with the defendant and asked for his assistance in recovering the items. The plaintiff alleged that the defendant had promised that he would "see to it" that his daughter returned the items and that, in reliance on the defendant's assurances, the plaintiff had delayed filing the lawsuit for approximately 24 days. Later, the plaintiff alleged, the defendant "repudiated his prior oral agreement," disclaimed any responsibility for his daughter's debts or actions, and refused to assist the plaintiff in recovering any property from the defendant's daughter. The trial court sustained the defendant's demurrer to all causes of action and dismissed the action, and the court of appeal affirmed.

The court first held that the trial court had properly sustained the demurrer to the contract causes of action for lack of consideration. The court noted that the promise made to help the plaintiff was one allegedly made between friends and that a gratuitous promise to help a friend collect a debt from a third party is unenforceable as a matter of law, notwithstanding the friend's forbearance from filing suit in reliance on the promise (*27 Cal. App. 4th 773, 780)* . The plaintiff contended that the same statements alleged to constitute a contract to return the property were also actionable in tort as negligent misrepresentations on which the plaintiff detrimentally relied by deferring the lawsuit for 24 days (*27 Cal. App. 4th 773, 782*). The court stated that the defendant's breach of promise to see to the return of the property was not actionable in contract and that calling that breach a tort did not make it one. The court held that because no legal duty arose as a result of the gratuitous promise, any failure by the defendant to assist in the return of the property was not recognizable as a tort cause of action (*27 Cal. App. 4th 773, 783*).

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10-105 California Points & Authorities § 105.273

§ 105.273 Negligent Misrepresentation Is Not Sufficiently Pleaded or Proven--Pleading or Proof Shows Mere Opinion as to Future Fact

[1] FORM

[*The following may be included in a memorandum of points and authorities or adopted for use in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO _____ [STATE FACTS SUFFICIENT TO CONSTITUTE *or* ESTABLISH] A CAUSE OF ACTION FOR NEGLIGENT MISREPRESENTATION BECAUSE _____ [THE ALLEGEDLY ACTIONABLE REPRESENTATIONS *or* THE EVIDENCE SHOWS THAT THE REPRESENTATIONS] MADE BY DEFENDANT WERE MERELY OPINIONS AS TO FUTURE FACTS.

Opinion as to Future Fact Is Not Actionable as Negligent Misrepresentation. A representation is not normally actionable as a negligent misrepresentation if it is merely an expression of opinion as to a future fact or occurrence (*Neu-Visions Sports, Inc. v. Soren/McAdams/Bartells (2000) 86 Cal. App. 4th 303, 309-310, 103 Cal. Rptr. 2d 159*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the representations made by the defendant, either as alleged in the complaint or as shown by the proof, are not actionable because the representations were merely the defendant's opinion as to future facts.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.270[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, in support of a motion for summary judgment, counsel for the defendant should refer to the allegations of misrepresentations in the complaint and the declarations or other proof in support of the motion and argue that the alleged misrepresentations are not actionable because they were merely the expression of opinion as to future facts [*see § 105.270[2][b]*].

[c] Opposing Points and Authorities

The points and *authorities in § 105.280* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Opinion as to Future Fact Is Not Actionable as Negligent Misrepresentation

In ***Neu-Visions Sports, Inc. v. Soren/McAdams/Bartells*** *(2000) 86 Cal. App. 4th 303, 103 Cal. Rptr. 2d 159* , the plaintiffs were developers of an ice and roller hockey arena project who brought an action for negligent misrepresentation against an accountant and his accounting firm, based on two alleged misrepresentations made by the accountant in connection with the arena project. The accounting firm had been hired by a third party who was in negotiations to buy property with an existing building that would be leased to the plaintiffs, who would then convert the building to the arena. During the period in which the plaintiffs sought the estimated $3 million needed to convert the building, the accountant had represented to them both that the building was worth $5 million and that clear title to the property, which would allow a first priority security interest in the property, would not be a problem in securing financing for the project. However, after the plaintiffs signed a lease to develop the property, the anticipated financing was not obtained because the building actually appraised at a lesser value and, apparently, there was an impediment to establishing clear title to the property. After suit was filed, the defendants moved for summary judgment on the grounds that the alleged misrepresentations were matters of opinion that were not actionable as a matter of law. The trial court granted the motion and the plaintiffs appealed, arguing that triable issues of fact existed.

The court of appeal affirmed. After reviewing relevant case law, the court noted that expressions of opinion are not generally treated as actionable representations of fact, and that representations of value are opinions. The court also noted exceptions if one party states an opinion as fact, or possesses or holds himself or herself out as possessing special information or superior knowledge. However, recognizing the established principle that an actionable representation must have been made about past or existing facts, and that statements regarding future events are deemed opinions, the court held that the alleged misrepresentations in this case were expressions of opinion as to future facts and not actionable (*86 Cal. App. 4th 303, 309-310)* . Accepting the facts as described in depositions of the plaintiffs' principals, the court concluded that the statement concerning the value of the property was merely a prediction of what the property would appraise at, and that the plaintiffs knew that the accountant had no special knowledge and was not a professional appraiser (*86 Cal. App. 4th 303, 310)* . Similarly, the representation that the lessor would have free and clear title to the property, allowing a first priority security interest for the lender, was also the expression of an opinion about a future fact and not actionable. Moreover, the plaintiffs knew that there were questions about the title that could cause a problem and that the accountant had no special knowledge about the state of the title (*86 Cal. App. 4th 303, 310)* .

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[Reserved]

§§ 105.274[Reserved]

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10-105 California Points & Authorities § 105.280

§ 105.280 Negligent Misrepresentation Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Third Party Auditor's Misrepresentation in Audit Report

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF _____ [SHOULD PREVAIL ON THE *or* HAS STATED FACTS SUFFICIENT TO CONSTITUTE A] CAUSE OF ACTION FOR NEGLIGENT MISREPRESENTATION BY AN AUDITOR IN THE PERFORMANCE OF AN AUDIT BECAUSE ALL OF THE ELEMENTS OF THAT CAUSE OF ACTION ARE SATISFIED, AND PLAINTIFF IS IN THE CLASS OF PERSONS ENTITLED TO RECOVER.

A. Class of Persons Entitled to Recover. Persons who, although not clients of an auditor, may reasonably come to receive and rely on an audit report, who are known to the auditor, and for whose benefit, specifically, the auditor renders the audit report, may recover on a theory of negligent misrepresentation by the auditor (*Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370, 406-407, 11 Cal. Rptr. 2d 51, 834 P.2d 745*).

B. Liability If Auditor Prepares Financial Records. If an independent accountant prepares a corporation's financial records, in addition to performing the audit on those records, the accountant is not acting as an independent auditor and may be liable for negligent misrepresentation to those third parties who reasonably and foreseeably relied on the financial records, the audit, or both (*Nutmeg Sec., Ltd. v. McGladrey & Pullen (2001) 92 Cal. App. 4th 1435, 1441-1444, 112 Cal. Rptr. 2d 657*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that an auditor is not liable to a plaintiff who is not the auditor's client for negligent misrepresentation contained in the defendant's audit of a person or entity

other than the plaintiff (for example, a company in which the plaintiff has invested).

This form may be used to oppose the points and *authorities in § 105.270* et seq.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue--for example, by response to a demurrer or by opposition to a summary judgment motion. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, in the case of opposition to a motion for summary of judgment or summary adjudication, counsel would refer to facts in declarations or deposition transcripts establishing that there is a triable issue of material fact regarding whether all of the elements of that cause of action are satisfied or whether the plaintiff is in the class of persons entitled to recover.

Any statement of fact should be supported by adequate reference to the pleading (or matters subject to judicial notice), if the form is used in a memorandum opposing a demurrer or another challenge to the sufficiency of the pleading. Similarly, any statement of fact should be supported by adequate reference to evidence admitted or otherwise cognizable by the court, if the form is used to oppose a motion challenging the adequacy of proof.

For example, a memorandum opposing a motion for summary judgment may refer to affidavits or declarations based on personal knowledge or matters subject to judicial notice [*see Code Civ. Proc. §§ 2009, 2015.5* (affidavits and declarations); *Evid. Code § 450 et seq.* (judicial notice)]. For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For legal background with detailed coverage of the elements of a tort action for fraud and deceit, see California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender).

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For additional points and authorities relating to demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Class of Persons Entitled to Recover

In ***Bily v. Arthur Young & Co.*** *(1992) 3 Cal. 4th 370, 11 Cal. Rptr. 2d 51, 834 P.2d 745* , an investor in a computer manufacturing company sued an accounting firm for damages on two theories: professional negligence and negligent misrepresentation. The gist of the complaint was that the accounting firm negligently performed an audit of the company, and in reliance on the audit, the plaintiff made and retained his investment, which was lost when the company soon thereafter became bankrupt. The trial court entered judgment on a jury verdict in the plaintiff's favor on the professional negligence theory, but against the plaintiff on the negligent misrepresentation theory. The court of appeal affirmed without reaching the issue, which the plaintiff raised on appeal, of whether the judgment against the plaintiff

on the negligent misrepresentation theory was in error.

The Supreme Court reversed and remanded with instructions that (1) the judgment on the professional negligence theory be vacated and directed in favor of the accounting firm, and (2) the judgment on the negligent misrepresentation theory be reviewed in accordance with the Court's opinion regarding who may be entitled to recover from an auditor on that theory (*3 Cal. 4th 370, 416)* . The Court reviewed the audit function in public accounting and cases that have concerned the extent of an auditor's duty of care in the performance of an audit (*3 Cal. 4th 370, 379-392)* . The Court also considered various provisions of the Restatement (Second) of Torts and federal securities laws (*3 Cal. 4th 370, 392-396)* . Then the Court analyzed the auditor's liability to third persons (that is, persons other than the auditor's client) for audit opinions and held that an auditor's liability for general negligence in the conduct of an audit of a client's financial statements is confined to the client--that is, the person who contracts for or engages the audit services. Other persons may not recover on a pure negligence theory (*3 Cal. 4th 370, 406)* . The reference to a "pure" negligence theory was intended simply to distinguish that holding from the Court's holding on the second issue. On that issue, the court ruled that there is a narrow class of persons who, although not clients, may reasonably come to receive and rely on an audit report. The existence of this narrow class is a risk of audit reporting that may fairly be imposed on the auditor. These persons are specifically intended beneficiaries of the audit report who are known to the auditor and for whose benefit the auditor renders the audit report. Although they may not recover on a general negligence theory, they may recover on a theory of negligent misrepresentation (*3 Cal. 4th 370, 406-407)* .

[b] Liability If Auditor Prepares Financial Records

In ***Nutmeg Sec., Ltd. v. McGladrey & Pullen*** *(2001) 92 Cal. App. 4th 1435, 112 Cal. Rptr. 2d 657* , the plaintiff, the underwriter of a corporation's initial public stock offering, brought suit against the accounting firm that both prepared and audited the corporation's financial records in anticipation of the corporation's initial stock offering. The complaint alleged that the corporation's financial report falsely represented that the corporation possessed $11 million in assets derived from the proceeds of the sale of a bearer note, and that the accounting firm both aided in the preparation of the report and later conducted the audit on the corporation's finances without properly confirming whether the funds even existed. The accounting firm also aided the corporation in preparing and filing other reports, which also contained materially false information concerning the corporation's financial health, with the Securities and Exchange Commission. In reliance on the accuracy of the materially false reports prepared and audited by the defendant, the plaintiff agreed to provide underwriting services for the corporation. When the plaintiff eventually questioned the corporation about its accounting practices, the corporation terminated the plaintiff's services and refused to pay the fees owed. The plaintiff's suit followed. The accounting firm demurred to the complaint on the grounds that the plaintiff could not allege that the plaintiff was the defendant's client, that the plaintiff had any direct contact with the defendant concerning any matters alleged in the complaint, or that the plaintiff was an intended recipient of the corporation's audit reports. The trial court sustained the demurrer, and the plaintiff appealed.

The court of appeal reversed. The court began by reviewing the Supreme Court's decision in *Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370, 11 Cal. Rptr. 2d 51, 834 P.2d 745* [*see § 105.280[3][a]*]. The court of appeal noted that the *Bily* decision dealt with the liability of an outside, independent auditor that performs an audit after the client prepares or otherwise supplies its own financial statements. The limitation on the liability of an outside auditor found in *Bily* was based on the fact that the client, rather than the outside auditor, is normally responsible for the contents of the financial statements and controls the environment for the audit. However, because the accounting firm in this case participated in the creation of the financial statements that formed the basis for the audit, the court of appeal concluded that the firm was not acting as an independent auditor and therefore that the limitations imposed by *Bily* did not apply. The court held that if an independent accountant prepares a corporation's financial records, in addition to performing the audit on those records, the accountant may be liable for negligent misrepresentation to those third parties who reasonably and foreseeably rely on the financial records, the audit, or both (*92 Cal. App. 4th 1435, 1441-1444)* .

[4] Additional Authorities

[a] Class of Persons Entitled to Recover

The facts and procedural background of *Nutmeg Sec., Ltd. v. McGladrey & Pullen (2001) 92 Cal. App. 4th 1435, 112 Cal. Rptr. 2d 657* , are discussed in *§ 105.280[3][b]*. After determining that the limitations imposed by *Bily* did not apply under the circumstances, the court of appeal nevertheless concluded that the allegations of the complaint were sufficient to meet the requirements of *Bily* and impose negligent misrepresentation liability on an auditor for damages caused to a third party such as the plaintiff. An auditor's liability for negligent misrepresentation does not require proof that the audit was intended to influence the particular plaintiff. A complaint is sufficient if it alleges that the audit was intended to influence the particular class of persons to which the plaintiff belongs, and IPO underwriters are a sufficiently narrow and circumscribed class for these purposes. The defendant was a large and experienced accounting firm, undoubtedly knew that one purpose of its audit was to attract a prestigious investment banker to underwrite the IPO, and could reasonably foresee that an underwriter would rely on the representations in its audit report (*92 Cal. App. 4th 1435, 1444-1445)* .

In *Arthur Andersen v. Superior Court (1998) 67 Cal. App. 4th 1481, 79 Cal. Rptr. 2d 879* , the state Insurance Commissioner brought suit against a large accounting firm for negligence and negligent misrepresentation based on an audit of an insurance company performed by the firm that had erroneously reported the financial health of the insurance company, which was in fact insolvent. The defendant moved for summary judgment and summary adjudication, arguing that it owed no duty to the Commissioner. The trial court denied the motion and the court of appeal affirmed. The court of appeal held that the auditor of an insurance company owes a duty of care not to make negligent misrepresentations to the Insurance Commissioner when the Commissioner is acting in the capacity of representative of policyholders and creditors. The court ruled that since *Ins. Code § 900.2* mandates that the report be filed with the Insurance Commissioner, who has a statutory duty to monitor insurance companies to ensure their ability to pay claims, the Commissioner was within the universe of persons to whom the auditor may be liable for negligent misrepresentation under the rule articulated in *Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370, 11 Cal. Rptr. 2d 51, 834 P.2d 745)* . The court in that case also rejected the auditor's argument that liability to the Commissioner could not be imposed if the auditor lacked knowledge that the report would be supplied to the Commissioner, since knowledge of the statutory filing requirement would be imputed to the auditor (*67 Cal. App. 4th 1481, 1506-1507)* .

In *Soderberg v. McKinney (1996) 44 Cal. App. 4th 1760, 52 Cal. Rptr. 2d 635* , the plaintiffs were investors in a deed of trust who sued a real estate appraiser for negligent misrepresentation, stemming from the appraiser's overvaluation of property securing the deed of trust. The trial court granted summary judgment to the defendant. The plaintiffs appealed, and the court of appeal ruled that the Supreme Court holding in *Bily v. Arthur Young (1996) 3 Cal. 4th 370* precluded summary judgment and compelled reversal. The court of appeal ruled that *Bily* applied to real estate appraisers as well as auditors and that even though appraisers hired by mortgage brokers may not know the potential investors by name or specific identity, the imposition of liability may be appropriate if the appraiser knows with substantial certainty that the particular class of persons to which the plaintiff belongs will rely on the representation in the course of the transaction. In addition, the court found that an appraiser need not contemplate the precise details of the transaction in which his or her report is ultimately used, but that liability may exist if the report is relied on in the type of transaction anticipated or in one substantially similar to it (*44 Cal. App. 4th 1760, 1769)* .

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PART II. FORMS
G. Negligent Misrepresentation

10-105 California Points & Authorities §§ 105.281-105.289

[Reserved]

§§ 105.281[Reserved]

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H. Defenses
1. Statute of Limitations

10-105 California Points & Authorities § 105.290

§ 105.290 Bar by Statute of Limitations Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Three-Year Statute of Limitations for Fraud Applies

[1] Pleading or Proof Shows Three-Year Statute of Limitations for Fraud Applies

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO _____ [STATE FACTS SUFFICIENT TO CONSTITUTE *or* ESTABLISH] A CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE THE _____ [COMPLAINT DISCLOSES *or* EVIDENCE SHOWS] THAT THE ACTION IS BARRED BY THE THREE-YEAR STATUTE OF LIMITATIONS.

A. Statute of Limitations. The period prescribed for commencing actions for relief on the ground of fraud is three years. The cause of action will accrue from the time that the aggrieved party discovers the facts constituting the fraud (*Code Civ. Proc. §§ 335, 338(d)*).

B. Application of Statute of Limitations. The limitations period contained in *Code of Civil Procedure Section 338(d)* commences to run after one has knowledge of facts sufficient to make a reasonably prudent person suspicious of fraud, thus putting that person on inquiry (*Hobart v. Hobart Estate Co. (1945) 26 Cal. 2d 412, 437, 159 P.2d 958*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the plaintiff or cross complainant either has failed to allege sufficient facts to constitute a cause of action for fraud or has failed to present evidence to establish a fraud claim. The basis of this form is that the plaintiff may not recover for fraud and deceit because the action was barred by the three-year statute of limitations.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and any other substantive issues that need to be addressed. For example, it may be submitted with other points and authorities supporting a demurrer or motion for summary judgment challenging the sufficiency of, respectively. the pleading or the proof.

This form may be combined, if appropriate, with the points and authorities in *§ 105.30* et seq., which challenge the sufficiency of pleading or proof with regard to other aspects or elements in a cause of action for fraud and deceit. If this form is used to support a demurrer, it may also be combined, if appropriate, with the forms in *§ 105.10* et seq., which focus on the requirement that elements of an action for fraud and deceit, particularly the deceitful act or omission, be alleged in specific rather than general terms. For points and authorities supporting a general demurrer implying expiration of the statute of limitations, see *§ 105.293*.

This form may also be adapted for a trial or appellate brief or to support a motion for judgment on the pleadings, a motion for nonsuit, or any other request for relief based on the plaintiff's failure to show or establish the essential elements of the action for fraud or deceit.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, in the case of objection by general demurrer, if expiration of the statute of limitations is evident from the allegations of the complaint, counsel for the demurring party would refer to the particular allegations indicating expiration of the applicable statute of limitations.

Any statement of fact should be supported by adequate reference to the pleading (or matters subject to judicial notice), if the form is used in a memorandum supporting a demurrer or another challenge to the sufficiency of the pleading. Similarly, any statement of fact should be supported by adequate reference to evidence admitted or otherwise cognizable by the court, if the form is used in support of a motion challenging the adequacy of proof.

For example, a memorandum supporting a motion for summary judgment may refer to affidavits or declarations based on personal knowledge or matters subject to judicial notice [*see Code Civ. Proc. §§ 2009, 2015.5* (affidavits and declarations); *Evid. Code § 450 et seq.* (judicial notice)]. For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For legal background with detailed coverage of the elements of a tort action for fraud and deceit, see California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender).

[d] Related Points and Authorities

For points and authorities asserting that the plaintiff may not recover for fraud and deceit because the action was barred by the two-year statute of limitations applying to an action stemming from breach of a real estate broker's duty to prospective purchasers, see *§ 105.291*.

For points and authorities asserting that the complaint shows on its face that the action is barred by the statute of limitations and fails to allege facts excusing the plaintiff's failure to discover the fraud, see *§ 105.292*.

The points and authorities in this form may be combined, if appropriate, with the points and authorities in *§ 105.10 et*

seq., which challenge the sufficiency of specific pleading with regard to particular elements of the cause of action for fraud and deceit.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For additional points and authorities relating to demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[e] Opposing Points and Authorities

The points and *authorities in § 105.300* et seq. may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Application of Statute of Limitations

In ***Hobart v. Hobart Estate Co.*** *(1945) 26 Cal. 2d 412, 159 P.2d 958* , the Supreme Court reversed a judgment for the plaintiff in an action for damages for fraudulent representations inducing the sale of corporate stock because of the trial court's errors in instructing the jury. The defendants had contended on appeal that the action was barred because it was not commenced for more than five years after the alleged fraud had taken place. The Court stated the general rule that under former Code Civ. Proc. § 338(4) [*now see Code Civ. Proc. § 338(d)*], application of the statute of limitations is tolled until after the discovery of the fraud if the plaintiff pleads and proves that the plaintiff did not make the discovery until within three years prior to the filing of the complaint and establishes facts showing that the plaintiff was not negligent in failing to make the discovery sooner and had no actual or presumptive knowledge of facts sufficient to put the plaintiff on inquiry (*26 Cal. 2d 412, 437)* .

Although the Court held that the plaintiff in this case had met this burden, the defendants contended that, in addition to those requirements, the plaintiff was also required to show that he had made diligent inquiry to discover whether he had been defrauded. Rejecting this contention, the Court held that the statute commences to run only after one has knowledge of facts sufficient to make a reasonably prudent person suspicious of fraud, thus putting that person on inquiry, citing *Civ. Code § 19* (actual notice of circumstances sufficient to put prudent person on inquiry as to particular fact as constructive notice of that fact if by pursuing that inquiry the person might have learned that fact). The circumstances must be such that the inquiry becomes a duty and the failure to make it a negligent omission, because courts should not lightly seize on some small circumstance to deny relief to a party plainly shown to have been actually defrauded on the ground that the party did not discover the fraud as soon as the party might have. Only if the defrauded party would have discovered the fraud, except for the party's own inexcusable inattention, will the defrauded party be charged with a discovery in advance of the party's actual knowledge (*26 Cal. 2d 412, 437-439)* . Therefore, the Court ruled that the plaintiff was not barred because the means of discovery were available at an earlier date, provided he showed that he was not put on inquiry by any circumstances known to him or his agents at any time prior to the commencement of the three-year period involved.

[4] Additional Authorities

[a] Application of Statute of Limitations

In *Kline v. Turner (2001) 87 Cal. App. 4th 1369, 105 Cal. Rptr. 2d 699* , the plaintiff was a talent agent who entered into a contract in 1990 with a recording company for the services of a musical group. In August 1990, the plaintiff sent an associate to pick up a $50,000 check due under the contract from the recording company. Pursuant to an earlier

agreement, the check was to be made payable to the plaintiff. However, the check was changed and made payable to the associate. When the plaintiff found out and told the recording company that the payee should not have been changed, the recording company said that they would stop payment on the check, although a few days later they stated that they were unable to do so because the check had been cashed the same day. When confronted about the check several days later, the associate apparently told the plaintiff that he took the money to cover legal expenses and threatened the plaintiff and his family. In 1996, the plaintiff discovered that the check had been cashed four days after it was issued, not the same day, and that on the day in 1990 when the associate had gone to pick up the check, the associate had actually signed a contract with the recording company to represent the musical group himself. In 1999, the plaintiff brought suit against the recording company and its president for fraud, believing that the recording company had concocted the story about changing the name on the check to conceal their fraudulent conduct in contractually shifting representation of the musical group to the associate. Summary judgment was granted to the defendants on the grounds that the statute of limitations had expired, and the court of appeal affirmed. The court noted that if the uncontradicted facts surrounding the discovery of the fraud were susceptible of only one legitimate inference, summary judgment was proper. The court then held that the only legitimate inference based on the uncontroverted facts was that in 1990 a reasonable person in the plaintiff's position would have concluded not only that he was injured through the associate's wrongdoing, but that he was injured through wrongdoing of the recording company as well. While the precise nature of the recording company's wrongdoing may not have been immediately apparent to the plaintiff in 1990, the plaintiff was on notice at that time that the company had committed some wrongdoing when the company changed the payee on the check without the plaintiff's approval, triggering a duty to conduct an investigation that would have uncovered the fraud (*87 Cal. App. 4th 1369, 1374-1375)* .

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10-105 California Points & Authorities § 105.291

§ 105.291 Bar by Statute of Limitations Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Two-Year Statute of Limitations for Breach of Real Estate Broker's Duty Applies

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief*].

PLAINTIFF HAS FAILED TO _____ [STATE FACTS SUFFICIENT TO CONSTITUTE *or* ESTABLISH] A CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE THE _____ [COMPLAINT DISCLOSES *or* EVIDENCE SHOWS] THAT THE ACTION IS BARRED BY THE TWO-YEAR STATUTE OF LIMITATIONS APPLYING TO AN ACTION STEMMING FROM BREACH OF A REAL ESTATE BROKER'S DUTY TO PROSPECTIVE PURCHASERS.

A. Two-Year Period for Breach of Real Estate Broker's Duty. If a negligent misrepresentation cause of action is derived from the duty of a real estate broker to inspect property and disclose defects under *Civil Code Section 2079*, the applicable limitation period is the two-year period of *Civil Code Section 2079.4*, rather than the three-year period under *Code of Civil Procedure Section 338* (*Loken v. Century 21-Award Props. (1995) 36 Cal. App. 4th 263, 273*).

B. Application of Statute of Limitations. [*See § 105.290*, Paragraph B].

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the plaintiff or cross complainant either has failed to allege sufficient facts to constitute a cause of action for fraud or has failed to present evidence to establish a fraud claim. The basis of this form is that the plaintiff may not recover for fraud and deceit because the action was barred by the two-year statute of limitations applying to an action stemming from breach of a real estate broker's duty to

prospective purchasers.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.290[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.290[2][b]*].

[c] Related Points and Authorities

For points and authorities supporting an objection based on expiration of the three year period of limitations, see *§ 105.290*. For points and authorities asserting that the complaint shows on its face that the action is barred by the statute of limitations and fails to allege facts excusing the plaintiff's failure to discover the fraud, see *§ 105.292*.

[d] Opposing Points and Authorities

The points and *authorities in § 105.300* et seq. may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Two-Year Period for Breach of Real Estate Broker's Duty

In ***Loken v. Century 21-Award Props.*** *(1995) 36 Cal. App. 4th 263* , the purchaser of a single family residence sued various individuals and real estate brokerages for negligent misrepresentation with regard to a crack in the cement slab of the residence. Before purchasing the property, the plaintiff had expressed concern that any residence he purchase be structurally sound and not have a defective slab. A real estate agent responded to this concern with the representation that the house, which the plaintiff subsequently purchased, had no problems and appeared to be in a very structurally sound condition. Slightly over two years after the close of escrow, the plaintiff discovered a major crack in the cement slab of the house and filed suit for misrepresentation. The trial court found all the defendants liable to the plaintiff and entered a judgment for damages. The defendants appealed on the ground that the negligent misrepresentation cause of action was time-barred by the two-year limitations period of *Civ. Code § 2079.4*. The plaintiff argued that the three-year limitations period of *Code Civ. Proc. § 338* applied because negligent misrepresentation is considered a species of fraud or deceit involving a false assertion.

The court of appeal reversed the judgment on the ground that the negligent misrepresentation cause of action was time-barred. According to the court, the basis of the cause of action was that it was unreasonable for the defendant to represent that the residence was structurally sound because he had a duty to inspect the property and disclose defects and he should have recognized problems indicating that the structural soundness was suspect. The court noted that the duty of a broker to inspect and disclose was first pronounced through case law and was subsequently codified in *Civ. Code § 2079* (*36 Cal. App. 4th 263, 269-270)* . Because the broker's duty to inspect and disclose arose under *Civ. Code § 2079*, the court deemed it appropriate to apply the two-year limitations period of *Civ. Code § 2079.4* (*36 Cal. App. 4th 263, 270)* . The court recognized that California law generally views negligent misrepresentation as a species of fraud or deceit, but reasoned that because the legislature provided for a two-year limitations period for actions stemming from the breach of duty imposed by *Civ. Code § 2079*, the specific statute prevailed over the general statute of limitations of three years for fraud and negligent misrepresentation (*36 Cal. App. 4th 263, 272-273)* .

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10-105 California Points & Authorities § 105.292

§ 105.292 Bar by Statute of Limitations Is Sufficiently Pleaded or Proven--Complaint Fails to Allege Facts Excusing Failure to Detect Fraud

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE THE COMPLAINT DISCLOSES THAT THE ACTION IS BARRED BY THE STATUTE OF LIMITATIONS AND FAILS TO ALLEGE FACTS THAT EXCUSE PLAINTIFF'S FAILURE TO LEARN OF THE FRAUD WITHIN THE STATUTORY PERIOD.

Pleading Facts Excusing Failure to Detect Fraud. If it appears on the face of a complaint for fraud that the time limit of the statute of limitations has run, the plaintiff must, to avoid the bar of the statute, state with particularity facts, rather than conclusions, that excuse the plaintiff's failure to learn of the fraud within the statutory period and that show specifically: (1) the plaintiff's lack of knowledge; (2) the plaintiff's lack of means of obtaining knowledge, that is, that in the exercise of reasonable diligence the facts could not have been discovered at an earlier date; and (3) how and when the plaintiff actually did discover the fraud (*Casualty Ins. Co. v. Rees Inv. Co. (1971) 14 Cal. App. 3d 716, 719, 92 Cal. Rptr. 857*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the plaintiff or cross complainant has failed to allege sufficient facts to constitute a cause of action for fraud. The basis of this form is that the complaint shows on its face that the action is barred by the statute of limitations and fails to allege facts excusing the plaintiff's failure to discover the fraud.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.290[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, in the case of objection by general demurrer, if expiration of the statute of limitations is evident from the allegations of the complaint, counsel for the demurring party would refer to the particular allegations indicating expiration of the applicable statute of limitations [*see § 105.290[2][b]*].

[c] Related Points and Authorities

For points and authorities supporting an objection based on expiration of the three-year period of limitations, see *§ 105.290*.

For points and authorities asserting that the plaintiff may not recover for fraud and deceit because the action was barred by the two-year statute of limitations applying to an action stemming from breach of a real estate broker's duty to prospective purchasers, see *§ 105.291*.

[d] Opposing Points and Authorities

The points and *authorities in § 105.300* et seq. may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Pleading Facts Excusing Failure to Detect Fraud

In ***Casualty Ins. Co. v. Rees Inv. Co.*** *(1971) 14 Cal. App. 3d 716, 92 Cal. Rptr. 857* , the court of appeal affirmed a judgment of dismissal of a cross complaint for fraud following the sustaining of a general demurrer, holding that the cross complainant's fraud count did not sufficiently allege facts to excuse the cross complainant's failure to discover the asserted fraud. In an action by an insurer's lessor seeking a declaration that the lease was valid and enforceable and seeking payment of the lease obligations, the insurer cross complained for fraud against its former executive officer who had executed the lease and against an investment company that was the former executive's alter ego and owned the leased property at the time. The fraud pleading alleged that the insurer did not learn of the unfair terms of the lease until almost five years after the officer had resigned. No other reason or explanation appeared in the cross complaint for the insurer's failure to discover the alleged fraud.

In upholding the trial court's action, the court ruled that if it appears on the face of a pleading that the time limit on at an applicable statute of limitations has run, the pleader must, to avoid the bar of the statute, state with particularity facts, rather than conclusions, that excuse the pleader's failure to learn of the fraud within the statutory period (*14 Cal. App. 3d 716, 719)* . The plaintiff must plead and prove facts showing: (1) lack of knowledge; (2) lack of means of obtaining knowledge (in the exercise of reasonable diligence the facts were not discoverable at an earlier date); and (3) how and when the plaintiff actually discovered the fraud. In the absence of the allegation of such facts, the court of appeal held that the statute of limitations barred the cause for fraud (*14 Cal. App. 3d 716, 719-720)* .

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10-105 California Points & Authorities § 105.293

§ 105.293 Bar by Statute of Limitations Is Sufficiently Pleaded or Proven--General Demurrer by Law Includes Bar of Statute of Limitations

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE THE COMPLAINT DISCLOSES THAT THE ACTION IS BARRED BY THE STATUTE OF LIMITATIONS.

Bar of Statute Deemed Included in General Demurrer. Objections that the statute of limitations bars an action must be deemed included in the grounds of a demurrer that the complaint does not state facts sufficient to constitute a cause of action (*Bell v. Bank of Cal. (1908) 153 Cal. 234, 245, 94 P. 889*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a demurrer to a complaint for fraud and deceit if the demurrer asserts that the complaint fails to state facts sufficient to constitute a cause of action in that it appears on the face of the complaint, or from any matter of which the court is required to or may take judicial notice, that the statute of limitations bars the action.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.290[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, in the case of objection by general demurrer, if expiration of the statute of limitations is evident from the allegations of the complaint, counsel for the demurring party would refer to the particular allegations indicating expiration of the applicable statute of limitations [*see § 105.290[2][b]*].

[c] Opposing Points and Authorities

The points and *authorities in § 105.300* et seq. may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Bar of Statute Deemed Included in General Demurrer

Bell v. Bank of Cal. *(1908) 153 Cal. 234, 94 P. 889* , was an action for the recovery of shares of stock. The defendant asserted in a general demurrer that the statute of limitations barred the action, and the trial court sustained the demurrer and dismissed the action. The method of asserting the defense of the bar of the statute of limitations was not, apparently, at issue either in the trial court or on appeal, but the Supreme Court said that the bar of the statute of limitations is not specified as a ground of demurrer in the code and that objection to a complaint, while required to be stated in the demurrer, must be deemed to be included within the ground of want of facts sufficient to constitute a cause action (*153 Cal. 234, 245)* .

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1. Statute of Limitations

10-105 California Points & Authorities §§ 105.294-105.299

[Reserved]

§§ 105.294[Reserved]

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10-105 California Points & Authorities § 105.300

§ 105.300 Bar by Statute of Limitations Is Not Sufficiently Pleaded or Proven--Pleading or Proof Shows Late Discovery Excused By Absence of Reasonable Notice

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF _____ [SHOULD PREVAIL ON THE *or* HAS STATED FACTS SUFFICIENT TO CONSTITUTE A] CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE PLAINTIFF DID NOT ACTUALLY DISCOVER THE FACTS CONSTITUTING THE FRAUD UNTIL _____ [*date*] AND THEREFORE THE STATUTE OF LIMITATIONS DID NOT BEGIN TO RUN ON PLAINTIFF'S CAUSE OF ACTION FOR FRAUD UNTIL THAT DATE. PLAINTIFF'S FAILURE TO DISCOVER THE TRUE FACTS PRIOR TO THAT DATE IS EXCUSED BECAUSE PLAINTIFF HAD NO NOTICE OR KNOWLEDGE OF FACTS SUFFICIENT TO PUT A REASON ABLE PERSON ON INQUIRY PRIOR TO THAT DATE.

A. Constructive Notice. Every person who has actual notice of circumstances sufficient to put a prudent person on notice as to a particular fact has constructive notice of the fact itself in all cases in which, by pursuing that inquiry, the person might have learned that fact (*Civ. Code § 19*).

B. Mere Fact of Available Means of Knowledge Is Insufficient. If the law imposes no duty on a person to make inquiry and if, under the circumstances, a prudent person would not be put on inquiry, the mere fact that means of knowledge are open to the plaintiff and plaintiff did not avail himself or herself of them does not bar the plaintiff from relief if thereafter the plaintiff makes actual discovery. The circumstances must be such that the inquiry becomes a duty and the failure to make it a negligent omission (*Hobart v. Hobart Estate Co. (1945) 26 Cal. 2d 412, 438-439, 159 P.2d 958* ; *Davis v. Kahn (1970) 7 Cal. App. 3d 868, 878, 86 Cal. Rptr. 872*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff or cross complainant has failed to establish a cause of action for fraud or deceit. The basis of this form is that the defendant may not escape liability by asserting a statute of limitations defense because the plaintiff lacked a prior duty to investigate, the statute of limitations had not run when the plaintiff discovered the fraud, and the suit was instituted within three years after that discovery.

This form may be used to oppose the points and authorities in *§ 105.290*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue--for example, by response to a demurrer or by opposition to a summary judgment motion. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Any statement of fact should be supported by adequate reference to the pleading (or matters subject to judicial notice), if the form is used in a memorandum opposing a demurrer or another challenge to the sufficiency of the pleading. Similarly, any statement of fact should be supported by adequate reference to evidence admitted or otherwise cognizable by the court, if the form is used to oppose a motion challenging the adequacy of proof.

For example, a memorandum opposing a motion for summary judgment may refer to affidavits or declarations based on personal knowledge or matters subject to judicial notice [*see Code Civ. Proc. §§ 2009, 2015.5* (affidavits and declarations); *Evid. Code § 450 et seq.* (judicial notice)]. For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For legal background with detailed coverage of the elements of a tort action for fraud and deceit, see California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities contending that the statute of limitations should not bar the plaintiff's action, see the following:

- The defendant's representations lulled the plaintiff into a sense of false security [*see § 105.301*].
- The defendant was in a fiduciary or confidential relationship with the plaintiff [see *§ 105.302*].
- The plaintiff's absence from the jurisdiction is a relevant factor in explaining the plaintiff's delay of discovery [*see § 105.303*].
- The defendant fraudulently concealed facts [*see § 105.304*].
- The defendant continued to make misrepresentations [*see § 105.305*].

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of

this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For additional points and authorities relating to demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Mere Fact of Available Means of Knowledge Is Insufficient

Hobart v. Hobart Estate Co. *(1945) 26 Cal. 2d 412, 159 P.2d 958* , is discussed in *§ 105.290[3][a]*.

In ***Davis v. Kahn*** *(1970) 7 Cal. App. 3d 868* , the court of appeal affirmed the trial court's judgment for the plaintiff in an action for damages for fraud for the defendants' failure to account to the plaintiff for his share of the profits of two joint ventures. The defendants contended that the three-year statute of limitations barred the action. However, the court, citing *Hobart v. Hobart Estate Co.*, ruled that in the absence of a duty to make inquiry, the statute does not run merely because the means of discovery were available and that the plaintiff is not compelled to disprove that those means existed. The plaintiff need only establish facts sufficient to show that the plaintiff made an actual discovery of hitherto unknown information within three years before filing the action. The court pointed out that on the formation of a joint venture, the joint adventurers assume the status of fiduciaries. Finding that there was a confidential relationship between the parties, the court of appeal concluded that *Hobart* governed the defendants' claim that the statute of limitations barred the action and held for the plaintiff (*7 Cal. App. 3d 868, 878*).

[4] Additional Authorities

[a] Mere Fact of Available Means of Knowledge is Insufficient

In *Cleveland v. Internet Specialties West, Inc. (2009) 171 Cal. App. 4th 24, 88 Cal. Rptr. 3d 892* , plaintiffs were investors in a business project under which plaintiffs would be repaid from the net cash receipts from the project. The investors learned later that year that the project was having financial difficulties, but the project principals would not return their calls for information or an accounting. Two years after that, plaintiffs were told by a lawyer that the project had failed. Approximately ten years after first investing their money, however, plaintiffs learned that the project enterprise was still doing business under another name and was making money. Plaintiffs sued for breach of contract and fraud. The trial court ruled as a matter of law that the statute of limitations began to run when plaintiffs first had problems getting financial information from the principals, and thus the action was time-barred. The court of appeal reversed. The court held that triable issues of fact existed as to when the investors had sufficient knowledge of fraud and resulting damage to trigger the running of the statute of limitations. The court noted that the mere belief that the investment funds had been lost, without more, did not trigger a duty to investigate whether actionable fraud had occurred, as the risk of loss of funds is inherent in such investments. In addition, even had plaintiffs conducted an investigation when first learning of the project's financial difficulties, they would not have discovered a cause of action for fraud, as the facts supporting that cause of action materialized subsequent to that period, at the earliest when the project began making money but failed to pay plaintiffs on their investments. While public court documents in other lawsuits available about two years after the investment was made would have informed plaintiffs that a new business entity had been formed to handle the business of the investment project, the issue was when plaintiffs learned of sufficient facts to create a duty to investigate for possible wrongdoing (*171 Cal. App. 4th 24, 32-33)* .

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1. Statute of Limitations

10-105 California Points & Authorities § 105.301

§ 105.301 Bar by Statute of Limitations Is Not Sufficiently Pleaded or Proven--Pleading or Proof Shows That Defendant's Statements Lulled Plaintiff Into Inaction

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF'S CAUSE OF ACTION FOR FRAUD AND DECEIT IS NOT BARRED BY THE STATUTE OF LIMITATIONS BECAUSE DEFENDANT'S REPRESENTATIONS WERE OF SUCH A NATURE THAT A REASONABLY PRUDENT PERSON IN PLAINTIFF'S CIRCUMSTANCES WOULD HAVE BEEN LULLED INTO A SENSE OF SECURITY OR A STATE OF INACTION AND WOULD NOT HAVE BEEN PUT ON INQUIRY.

Defendant's Statements Lulled Plaintiff Into Inaction. If the defendant's representations were of such a nature that they lulled the plaintiff into a sense of security or a state of inaction, it cannot be held, as a matter of law, that a reasonably prudent person would have been put on inquiry (*Hobart v. Hobart Estate Co. (1945) 26 Cal. 2d 412, 439, 159 P.2d 958*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff or cross complainant has failed to establish a cause of action for fraud or deceit. The basis of this form is that the defendant may not escape liability by asserting a statute of limitations defense because a reasonably prudent person would have been lulled into a sense of security or a state of inaction by the defendant's representations.

This form may be used to oppose the points and *authorities in § 105.290* et seq.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.300[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.300[2][b]*].

[3] Discussion of Authorities

[a] Defendant's Statements Lulled Plaintiff Into Inaction

In ***Hobart v. Hobart Estate Co.*** *(1945) 26 Cal. 2d 412, 159 P.2d 958* , the facts and background of which are discussed in *§ 105.290[3][a]*, the Supreme Court discussed the nature of the facts that would make a reasonable, prudent person suspicious and, thus, lead to a duty to inquire to determine whether the plaintiff was within the exception to the statute of limitations. The Court observed that the plaintiff's evidence, if believed, disclosed certain factors that may have tended to discourage the making of an exhaustive independent investigation. The jury could have found that the defendant's representations were of such a nature as to lull the plaintiff into a sense of security or a state of inaction--an important factor to be considered in determining whether or not the plaintiff was negligent in failing to investigate. The Court added that it could not hold, as a matter of law, that any of the circumstances known to the plaintiff should have put a reasonably prudent person on inquiry (*26 Cal. 2d 412, 439)* .

[4] Additional Authorities

[a] Defendant's Statements Lulled Plaintiff Into Inaction

In *E-Fab, Inc. v. Accountants, Inc. Services (2007) 153 Cal. App. 4th 1308, 64 Cal. Rptr. 3d 9* , plaintiff company hired an employment agency to provide an accountant. The employment agency placed a temporary accountant with plaintiff and told plaintiff that it had verified the accountant's background and qualifications. Plaintiff eventually hired the accountant as a full-time employee and over the course of the next seven years, this accountant embezzled over a million dollars from plaintiff. When the embezzlement was discovered, the police informed plaintiff that the accountant had a criminal record, had spent time in prison, and had falsified her academic credentials. Plaintiff sued the employment agency for negligence, negligent misrepresentation, and breach of contract, but the trial court sustained defendant's demurrer on the basis of statute of limitations. The court of appeal reversed. Applying the discovery rule, the court held that the claims against the employment agency did not accrue until the police notified plaintiff of the accountant's criminal record (*153 Cal. App. 4th 1308, 1323)* . In addressing the adequacy of plaintiff's pleading, the court noted that the pleading did not suggest any circumstances that should have alerted plaintiff earlier to defendant's misconduct, and in fact plaintiff's reliance on defendant's experience and expertise warranted the creation of a sense of reassurance on the part of plaintiff as to the accountant's qualifications and credentials (*153 Cal. App. 4th 1308, 1325)* .

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10-105 California Points & Authorities § 105.302

§ 105.302 Bar by Statute of Limitations Is Not Sufficiently Pleaded or Proven--Pleading or Proof Shows That Defendant Was Fiduciary or Confidential Relationship

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF'S CAUSE OF ACTION FOR FRAUD AND DECEIT IS NOT BARRED BY THE STATUTE OF LIMITATIONS. PLAINTIFF MAY NOT BE HELD TO THE USUAL DEGREE OF DILIGENCE BECAUSE DEFENDANT HAD A _____ [FIDUCIARY *or* CONFIDENTIAL] RELATIONSHIP WITH PLAINTIFF AT THE TIME OF DEFENDANT'S FRAUDULENT REPRESENTATION.

Fiduciary or Confidential Relationship Existed. A pertinent factor in determining if a reasonably prudent person would have investigated an allegedly fraudulently representation is whether or not there existed a fiduciary or confidential relationship between the parties at the time of the fraudulent representation. If such a relationship existed, facts that would ordinarily require investigation may not excite suspicion, and the ordinarily required degree of diligence is not required (*Hobart v. Hobart Estate Co. (1945) 26 Cal. 2d 412, 440, 159 P.2d 958* ; *Davis v. Kahn (1970) 7 Cal. App. 3d 868, 878, 86 Cal. Rptr. 872*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff or cross complainant has failed to establish a cause of action for fraud or deceit. The basis of this form is that the defendant may not escape liability by asserting a statute of limitations defense because the plaintiff may not be held to the usual degree of diligence to investigate if a fiduciary or confidential relationship between the plaintiff and the defendant existed when the defendant made the fraudulent representations.

This form may be used to oppose the points and *authorities in § 105.290* et seq.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.300[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.300[2][b]*].

[3] Discussion of Authorities

[a] Fiduciary or Confidential Relationship Existed

In ***Hobart v. Hobart Estate Co.*** *(1945) 26 Cal. 2d 412, 159 P.2d 958* , the facts and background of which are discussed in *§ 105.290[3][b]*, the Court noted that one factor that is pertinent to a determination as to whether the plaintiff was within the exception to the statute of limitations is the existence of a fiduciary relationship between the parties when the defendant made the fraudulent representations. In cases involving such a relationship, facts that would ordinarily require investigation may not excite suspicion, and the same degree of diligence is not required, even though an inquiry would have disclosed the true facts. The defendants argued that the plaintiff was no longer entitled to the benefit of this rule once the fiduciary relationship terminated. The Court disagreed, pointing out that the plaintiff was under no duty to reexamine the transaction immediately after it took place merely because the fiduciary relationship had terminated. Under these circumstances, it was for the jury to determine whether the plaintiff was negligent to continue to rely, after completion of the transaction, on the representations made to him while the relationship existed (*26 Cal. 2d 412, 440)* .

Davis v. Kahn *(1970) 7 Cal. App. 3d 868, 86 Cal. Rptr. 872* , is discussed in *§ 105.300[3][a]*.

[4] Additional Authorities

[a] Fiduciary or Confidential Relationship Existed

In *Lee v. Escrow Consultants, Inc. (1989) 210 Cal. App. 3d 915* , the court of appeal reversed a dismissal of a complaint for fraud brought against an escrow agent that had allegedly disbursed escrow funds pursuant to a forged amended instruction. The agent had argued that the action was time-barred, but the court of appeal held that because of the fiduciary relationship between the plaintiff and the escrow agent, albeit limited to the agent's carrying out of the escrow instructions, the plaintiff had a relaxed duty to inquire about the disbursal of the funds. Thus, the plaintiff had no duty to inquire whether any funds were improperly disbursed unless he was aware of facts that would make a reasonably prudent person suspicious (*210 Cal. App. 3d 915, 920-921*).

Rosenfeld, Meyer & Susman v. Cohen (1987) 191 Cal. App. 3d 1035, 237 Cal. Rptr. 14 , was an appeal considering three judgments in three separate actions between former partners after dissolution of their partnership. Some of the partners continued most of the business in a new partnership. One of the judgments appealed arose from a fraud action by the withdrawing partners against some of the continuing partners, based on the fact that the continuing partners owned the physical assets of the partnership and leased them to the partnership at a profit. The ownership and lease were disclosed in a footnote to an annual report that had been circulated at a partnership meeting more than three years before the case was filed. In affirming the trial court's determination that the withdrawing partners did not have actual notice of the ownership and lease until two years before commencement of the action, the court of appeal said that what constitutes notice among fiduciaries is generally a question of fact (*191 Cal. App. 3d 1035, 1059)* .

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10-105 California Points & Authorities § 105.303

§ 105.303 Bar by Statute of Limitations Is Not Sufficiently Pleaded or Proven--Pleading or Proof Shows That Defendant's Statements Lulled Plaintiff Into Inaction

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF'S CAUSE OF ACTION FOR FRAUD AND DECEIT IS NOT BARRED BY THE STATUTE OF LIMITATIONS BECAUSE PLAINTIFF'S ABSENCE FROM THE LOCALITY IS A RELEVANT FACTOR TO BE CONSIDERED BY THE TRIER OF FACT IN EXPLANATION OF THE PLAINTIFF'S DELAY IN DISCOVERY OF THE TRUE FACTS.

Delay of Discovery Explained by Plaintiff's Absence. Although the plaintiff's absence from the locality would not toll the statute of limitations if it had already commenced to run, it is a relevant factor to be considered by the trier of fact to explain the plaintiff's delay in discovering the true facts (*Hobart v. Hobart Estate Co. (1945) 26 Cal. 2d 412, 441, 159 P.2d 958*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff or cross complainant has failed to establish a cause of action for fraud or deceit. The basis of this form is that the defendant may not escape liability by asserting a statute of limitations defense because the plaintiff's absence from the locality is a relevant factor to be considered by the trier of fact in explanation of the plaintiff's delay in discovering the true facts.

This form may be used to oppose the points and *authorities in § 105.290* et seq.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.300[3][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.300[2][b]*].

[3] Discussion of Authorities

[a] Delay of Discovery Explained by Plaintiff's Absence

In ***Hobart v. Hobart Estate Co.*** *(1945) 26 Cal. 2d 412, 159 P.2d 958* , the facts and background of which are discussed in *§ 105.290[3][b]*, the Supreme Court ruled that the plaintiff's absence from the state would not toll the statute of limitations if it had already commenced to run (for example, if the plaintiff had been put on inquiry by facts known to him prior to his departure), but it was a relevant factor to be considered by the jury in explaining the plaintiff's delay in discovering the true facts. The evidence was clearly sufficient, the Court noted, to support the implied finding of the jury that the plaintiff learned nothing to arouse his suspicions during the period between the completion of the transaction involved and the alleged discovery of the fraud after he returned from a five-year stay in Europe (*26 Cal. 2d 412, 441)* .

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10-105 California Points & Authorities § 105.304

§ 105.304 Bar by Statute of Limitations Is Not Sufficiently Pleaded or Proven--Pleading or Proof Shows Defendant Fraudulently Concealed Facts

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF'S CAUSE OF ACTION FOR FRAUD AND DECEIT IS NOT BARRED BY THE STATUTE OF LIMITATIONS BECAUSE DEFENDANT CONCEALED A MATERIAL FACT OF THE TRANSACTION, KNOWING THAT PLAINTIFF WOULD ACT ON THE ASSUMPTION THAT NO SUCH FACT EXISTED.

Defendant Fraudulently Concealed Facts. If the defendant conceals a material fact of the transaction, knowing that the plaintiff acts on the assumption that no such fact exists, the concealment is as much a fraud as if the existence of the fact was expressly denied or the reverse expressly stated, and fraudulent concealment of the facts is a good answer to the defense of the statute of limitations (*Balfour, Guthrie & Co. v. Hansen (1964) 227 Cal. App. 2d 173, 189-190, 38 Cal. Rptr. 525*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff or cross complainant has failed to establish a cause of action for fraud or deceit. The basis of this form is that the defendant may not escape liability by asserting a statute of limitations defense because the defendant concealed a material fact of the transaction, knowing that the plaintiff would act on the assumption that no such fact existed.

This form may be used to oppose the points and *authorities in § 105.290* et seq.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.300[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.300[2][b]*].

[3] Discussion of Authorities

[a] Defendant Fraudulently Concealed Facts

In ***Balfour, Guthrie & Co. v. Hansen*** *(1964) 227 Cal. App. 2d 173, 38 Cal. Rptr. 525* , the facts and background of which are discussed in *§ 105.222[4][a]*, the court of appeal ruled that fraudulent concealment of the facts is a good answer to the defense of the statute of limitations. The court noted that the trial court had found that there were no circumstances to cause the plaintiffs or their agents to become suspicious. The court ruled that if there is a concealment of a material fact of the transaction by the defendant, knowing that the other party acts on the assumption that no such fact exists, the concealment is as much a fraud as if the existence of the fact was expressly denied or the reverse of it expressly stated (*227 Cal. App. 2d 173, 189-190)* .

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10-105 California Points & Authorities § 105.305

§ 105.305 Bar by Statute of Limitations Is Not Sufficiently Pleaded or Proven--Pleading or Proof Shows Defendant's Continued Fraud Tolled Statute

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF'S CAUSE OF ACTION FOR FRAUD AND DECEIT IS NOT BARRED BY THE STATUTE OF LIMITATIONS BECAUSE DEFENDANT'S CONTINUED MISREPRESENTATIONS CONCEALED THE FALSITY OF EARLIER MISREPRESENTATIONS AND TOLLED THE RUNNING OF THE STATUTE OF LIMITATIONS.

Defendant's Continued Fraud Tolled Statute. Allegations that the defendant's continued misrepresentations concealed the falsity of earlier misrepresentations can toll the running of the statute of limitations if the reliance on the later misrepresentations was reasonable (*Parsons v. Tickner (1995) 31 Cal. App. 4th 1513, 1529, 37 Cal. Rptr. 2d 810*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff or cross complainant has failed to establish a cause of action for fraud or deceit. The basis of this form is that the defendant may not escape liability by asserting a statute of limitations defense because the defendant's continued misrepresentations concealed the falsity of earlier misrepresentations and tolled the running of the statute of limitations.

This form may be used to oppose the points and *authorities in § 105.290* et seq.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and other substantive issues that may be involved [*see § 105.300[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.300[2][b]*].

[3] Discussion of Authorities

[a] Defendant's Continued Fraud Tolled Statute

In ***Parsons v. Tickner*** *(1995) 31 Cal. App. 4th 1513, 37 Cal. Rptr. 2d 810* , the daughter of a deceased musician sued her father's business managers for fraud and deceit in falsely representing that they owned the copyrights to her father's music and were entitled to publish his music catalog subject only to a limited obligation to distribute royalty payments to the estate and specified heirs. The plaintiff's complaint alleged that the defendants concealed the fact that they did not have any interest in the song catalog and that she did not become aware of the defendant's unlawful exploitations of the catalog until approximately eighteen years after the death of her father. The defendants generally demurred to the fraud and deceit causes of action on the ground that they were time barred, measuring the operative time for bringing the claims from the date of the musician's death. The trial court sustained the demurrers and entered judgments of dismissal.

The court of appeal reversed, holding that the claims were not time barred (*31 Cal. App. 4th 1513, 1529)* . The court noted that *Code Civ. Proc. § 338* delays the accrual of the limitation period if a plaintiff can establish ignorance of the facts, subject to a judicial limitation that the plaintiff must exercise diligence to discover the facts (*31 Cal. App. 4th 1513, 1525)* . Given the fact that the defendants held themselves out as if they were the producers of the catalog and had distributed royalty payments in that capacity, the court reasoned that it was not unreasonable for either the estate or the plaintiff to assume that the defendants had the right to do so (*31 Cal. App. 4th 1513, 1527)* . The court further ruled that there was no duty imposed by law or otherwise on the plaintiff to verify the representations of the defendants that they were the producers of the catalog, stating that "there is no reward for being slick" (*31 Cal. App. 4th 1513, 1529)* .

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10-105 California Points & Authorities §§ 105.306-105.319

[Reserved]

§§ 105.306[Reserved]

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2. Ratification or Waiver

10-105 California Points & Authorities § 105.320

§ 105.320 Bar by Ratification or Waiver Is Sufficiently Pleaded or Proven--Pleading or Proof Shows That Plaintiff Ratified Fraud

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO _____ [STATE FACTS SUFFICIENT TO CONSTITUTE *or* ESTABLISH] A CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE THE _____ [COMPLAINT DISCLOSES *or* EVIDENCE SHOWS] THAT PLAINTIFF RATIFIED THE FRAUD.

Plaintiff Ratified Fraud. Affirmative relief sought on the ground of fraud will be denied if the complaining party, with full knowledge of the fraud practiced, ratifies the fraud by his/her conduct (*First Nat'l Bank v. Thompson (1931) 212 Cal. 388, 407, 298 P. 808*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the plaintiff or cross complainant either has failed to allege sufficient facts to constitute a cause of action for fraud or has failed to present evidence to establish a fraud claim. The basis of this form is that the plaintiff's recovery is barred because the plaintiff, despite full knowledge of the fraud, ratified the alleged fraud by his or her conduct.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and any on other substantive issues that need to be addressed. For example, it may be submitted with other points and authorities supporting a demurrer or motion for summary judgment challenging the sufficiency of, respectively, the pleading or the proof.

This form may be combined, if appropriate, with the points and authorities in *§ 105.30* et seq., which challenge the sufficiency of pleading or proof with regard to other aspects or elements in a cause of action for fraud and deceit. If this form is used to support a demurrer, it may also be combined, if appropriate, with the forms in *§ 105.10* et seq., which focus on the requirement that elements of an action for fraud and deceit, particularly the deceitful act or omission, be alleged in specific rather than general terms.

This form may also be adapted for a trial or appellate brief, or to support of a motion for judgment on the pleadings, a motion for nonsuit, or any other request for relief based on the plaintiff's failure to show or establish the essential elements of the action for fraud or deceit.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Any statement of fact should be supported by adequate reference to the pleading (or matters subject to judicial notice), if the form is used in a memorandum supporting a demurrer or another challenge to the sufficiency of the pleading. Similarly, any statement of fact should be supported by adequate reference to evidence admitted or otherwise cognizable by the court, if the form is used in support of a motion challenging the adequacy of proof.

For example, a memorandum supporting a motion for summary judgment may refer to affidavits or declarations based on personal knowledge or matters subject to judicial notice [*see Code Civ. Proc. §§ 2009, 2015.5* (affidavits and declarations); *Evid. Code § 450 et seq.* (judicial notice)]. For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For legal background with detailed coverage of the elements of a tort action for fraud and deceit, see California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender).

[d] Related Points and Authorities

For points and authorities contending that the plaintiff waived any claim for damages, see *§ 105.321*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For additional points and authorities relating to demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[e] Opposing Points and Authorities

The points and *authorities in § 105.330* et seq. may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Plaintiff Ratified Fraud

In ***First Nat'l Bank v. Thompson*** *(1931) 212 Cal. 388, 298 P. 808* , the Supreme Court ruled that a the defendant/cross

complainant could not assert fraud in his cross complaint for recovery of money he paid on a note because he voluntarily paid the money after full knowledge of the fraud. Years after the defendant/cross complainant knew substantially what the true facts were respecting the fraud that procured the note and after he was fully cognizant of the fraud and was charged with knowing what his legal rights were, he continued from time to time, and without any duress, to renew his note and finally paid it. These affirmative acts, which continued for a time that seemed to the Court to be wholly unreasonable, supported application of the rule that one who makes a voluntary payment cannot recover. Therefore, the defendant/cross complainant was not entitled to affirmative relief because, with full knowledge of the fraud practiced on him, he ratified that fraud by repeated renewals of the obligation and his later voluntary discharge of that obligation in full. The Court concluded that the law withholds its aid from those who are so unmindful of their rights.

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H. Defenses
2. Ratification or Waiver

10-105 California Points & Authorities § 105.321

§ 105.321 Bar by Ratification or Waiver Is Sufficiently Pleaded or Proven--Pleading or Proof Shows Plaintiff Waived Fraud Claim

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO _____ [STATE FACTS SUFFICIENT TO CONSTITUTE *or* ESTABLISH] A CAUSE OF ACTION FOR FRAUD AND DECEIT BECAUSE THE _____ [COMPLAINT DISCLOSES *or* EVIDENCE SHOWS] THAT PLAINTIFF WAIVED PLAINTIFF'S CLAIM FOR DAMAGES FOR FRAUD BY ENTERING INTO A NEW ARRANGEMENT WITH DEFENDANT.

Waiver of Claim for Fraud. If a party who claims to have been defrauded, enters, after discovery of the fraud, into new arrangements or engagements concerning the subject matter of the contract to which the fraud applies, that party is deemed to have waived any claim for damages on account of the fraud (*Oakland Raiders v. Oakland-Alameda County Coliseum, Inc. (2006) 144 Cal. App. 4th 1175, 1185, 51 Cal. Rptr. 3d 144* ; *Schied v. Bodinson Mfg. Co. (1947) 79 Cal. App. 2d 134, 142-143, 179 P.2d 380*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the plaintiff or cross complainant either has failed to allege sufficient facts to constitute a cause of action for fraud or has failed to present evidence to establish a fraud claim. The basis of this form is that the plaintiff waived his or her claim for damages for fraud.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and other substantive issues that may be involved [*see § 105.320[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.320[2][b]*].

[c] Related Points and Authorities

For points and authorities supporting an objection based on expiration of the three year period of limitations, see *§ 105.320*. For points and authorities asserting that the complaint shows on its face that the action is barred by the statute of limitations and fails to allege facts excusing the plaintiff's failure to discover the fraud, see *§ 105.292*.

[d] Opposing Points and Authorities

The points and *authorities in § 105.330* et seq. may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Waiver of Claim for Fraud

In *Oakland Raiders v. Oakland-Alameda County Coliseum, Inc. (2006) 144 Cal. App. 4th 1175, 51 Cal. Rptr. 3d 144* , plaintiff, the Oakland Raiders National Football League team, sued the Oakland-Alameda County Coliseum for fraud in inducing the Raiders in 1995 to sign a long-term agreement to play at the Coliseum. The Raiders claimed that the Coliseum misrepresented the level of advance season ticket sales, inducing the Raiders to agree to return to Oakland rather than pursue other available options. A jury awarded the Raiders almost $35 million in damages for negligent misrepresentation, and the trial court denied the Coliseum's motion for judgment notwithstanding the verdict. Defendant appealed.

The court of appeal reversed, holding that the Raiders had waived the fraud claim and that the motion for JNOV should have been granted. The court, relying on *Schmidt v. Mesmer (1897) 116 Cal. 267, 48 P. 54* , and other cases, recognized the long-established rule that a plaintiff claiming to have been induced into signing a contract by fraud or deceit is deemed to have waived a claim for damages for that fraud if, after discovering the fraud, the plaintiff enters into a new agreement with the defendant regarding the same subject matter that supersedes the former agreement and confers significant benefits on the plaintiff (*144 Cal. App. 4th 1175, 1185)* . After learning during the 1995 season that season ticket sales were not as high as they had been told, the Raiders subsequently entered into a new contract with the Coliseum in September 1996. This new contract concerned the same subject matter as the previous contract, modified the rights of the parties, conferred significant financial benefits on the Raiders, and otherwise reaffirmed the validity and enforceability of the 1995 agreement (*144 Cal. App. 4th 1175, 1190-1191)* . The court noted that while the existence of waiver is generally a question of fact, implied waiver, when based on conduct that is manifestly inconsistent with the intent to enforce a known right, may be determined as a matter of law if the underlying facts are undisputed (*144 Cal. App. 4th 1175, 1191)* .

Schied v. Bodinson Mfg. Co. *(1947) 79 Cal. App. 2d 134* , the court of appeal affirmed a judgment against the purchaser of equipment, who had claimed that the seller was guilty of fraud and deceit in procuring the sale contract and who had claimed recovery of losses and damages occasioned by the fraud. The trial court found that the seller was guilty of fraud in orally misrepresenting the efficiency of the equipment that the purchaser alleged to be defective. However, with full knowledge of the fraud complained of, the purchaser subsequently bargained for and received from the seller advice, work, labor, repairs, and machinery of substantial value for which the original contract did not provide. Moreover, the purchaser deliberately withdraw in writing a previous written complaint of alleged deficiencies in the equipment and specifically acknowledged the validity of the original contract, agreeing to abide by its terms and to pay the stipulated installments without reservations or further conditions. The court noted that if a party has been induced by fraud to enter into a contract, that party may elect either to rescind the contract or to affirm the contract,

retain whatever advantage that party may have acquired, and still have an action for damages for deceit. However, this rule is subject to the limitation that if a party who claims to have been defrauded, enters, after discovery of the fraud, into new arrangements or engagements concerning the subject matter of the contract to which the fraud applies, that party is deemed to have waived any claim for damages on account of the fraud. The court therefore concluded that the purchaser's conduct clearly indicated an intention to waive the previous fraud and misrepresentations (*79 Cal. App. 2d 134, 142-143*).

[4] Additional Authorities

[a] Waiver of Claim for Fraud

In *Tucker v. Beneke (1919) 180 Cal. 588* , the Supreme Court affirmed a judgment for the defendants in an action for damages for fraud involving an exchange of real property. The fraud consisted of misrepresentations as to the dimensions and value of the property exchanged by the defendants. After obtaining knowledge of the true facts, the plaintiff requested an extension of time for the mortgage payments and that request was granted. The Court ruled that if the plaintiff knew of any fraud or believed that the defendants had practiced fraud, his conduct concerning the mortgage waived the fraud (*180 Cal. 588, 594-595*).

In *Burne v. Lee (1909) 156 Cal. 221, 104 P. 438* , the Supreme Court affirmed the trial court's judgment for the defendant in an action for damages for fraud, holding that the plaintiff had waived any claim for damages for deceit that he might otherwise have had. The complaint for damages for fraud alleged that the defendant, with intent to defraud the plaintiff and induce him to purchase stock, made misrepresentations about the value of the stock and the profits of the corporation involved. However, it appeared from the defense set up by the defendant's answer that subsequent to the discovery of the alleged fraud, the plaintiff entered into negotiations with the defendant by which the parties entered into a compromise agreement. Under that agreement, the plaintiff's claim against the defendant was to be settled. The Court observed that prior to the negotiations, the plaintiff might have stood on his original contract and sued for damages for deceit, or he might have rescinded the contract, but he did neither. Instead, the plaintiff entered into the compromise agreement that superseded the first contract and resulted in a waiver of any claim for damages for deceit. The Court ruled that if a party who claims to have been defrauded enters into new arrangements or engagements concerning the subject matter of the contract to which the fraud applies, that party is deemed to have waived any claim for damages on account of the fraud (*156 Cal. 221, 226)* .

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[Reserved]

§§ 105.322[Reserved]

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10-105 California Points & Authorities § 105.330

§ 105.330 Bar by Ratification or Waiver Is Not Sufficiently Pleaded or Proven--Contract Cannot Waive Fraud Claim

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF _____ [SHOULD PREVAIL ON THE *or* HAS STATED FACTS SUFFICIENT TO CONSTITUTE A] CAUSE OF ACTION FOR FRAUD AND DECEIT, DESPITE AN ALLEGED WAIVER OF LIABILITY BY CONTRACT, BECAUSE A CONTRACT IN WHICH PARTIES ATTEMPT TO EXEMPT ANYONE FROM RESPONSIBILITY FOR FRAUD IS UNLAWFUL.

Contract Cannot Waive Fraud Claim. All contracts that have for their object, directly or indirectly, the exemption of anyone from responsibility for his or her own fraud, willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law (*Civ. Code § 1668*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff or cross complainant has failed to establish a cause of action for fraud or deceit. The basis of this form is that a contract in which parties attempt to exempt anyone from responsibility for his or her fraud is unlawful under *Civ. Code § 1668* (precluding contractual waiver) [*see Continental Airlines, Inc. v. McDonnell Douglas Corp. (1989) 216 Cal. App. 3d 388, 404, 264 Cal. Rptr. 779* , discussed in *§ 105.331[3][a*]].

This form may be used to oppose the points and *authorities in § 105.320* et seq.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue, for example, by response to a demurrer or by opposition to summary judgment motion. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should show that the cause of action is encompassed within those listed in *Civ. Code § 1668*.

Any statement of fact should be supported by adequate reference to the pleading (or matters subject to judicial notice), if the form is used in a memorandum opposing a demurrer or another challenge to the sufficiency of the pleading. Similarly, any statement of fact should be supported by adequate reference to evidence admitted or otherwise cognizable by the court, if the form is used to oppose a motion challenging the adequacy of proof.

For example, a memorandum opposing a motion for summary judgment may refer to affidavits or declarations based on personal knowledge or matters subject to judicial notice [*see Code Civ. Proc. §§ 2009, 2015.5* (affidavits and declarations); *Evid. Code § 450 et seq.* (judicial notice)]. For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For legal background with detailed coverage of the elements of a tort action for fraud and deceit, see California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender).

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For additional points and authorities relating to demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

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10-105 California Points & Authorities § 105.331

§ 105.331 Bar by Ratification or Waiver Is Not Sufficiently Pleaded or Proven--Contract Cannot Waive Claim of Negligent Misrepresentation

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF _____ [SHOULD PREVAIL ON THE *or* HAS STATED FACTS SUFFICIENT TO CONSTITUTE A] CAUSE OF ACTION FOR NEGLIGENT MISREPRESENTATION, DESPITE AN ALLEGED WAIVER OF LIABILITY BY CONTRACT, BECAUSE A CONTRACT IN WHICH PARTIES ATTEMPT TO EXEMPT ANYONE FROM RESPONSIBILITY FOR HIS OR HER FRAUD IS UNLAWFUL.

A. "Fraud" Includes Negligent Misrepresentation. "Fraud," within the meaning of *Civil Code Section 1668*, includes negligent misrepresentation (*Blankenheim v. E.F. Hutton & Co. (1990) 217 Cal. App. 3d 1463, 1472-1473, 266 Cal. Rptr. 593* ; *Continental Airlines, Inc. v. McDonnell Douglas Corp. (1989) 216 Cal. App. 3d 388, 404, 264 Cal. Rptr. 779*).

B. Contract Cannot Waive Fraud Claim. [*See § 105.330*].

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff or cross complainant has failed to establish a cause of action for negligent misrepresentation. The basis of this form is that a contract in which parties attempt to exempt anyone from responsibility for his or her negligent misrepresentation or fraud is unlawful, under *Civ. Code § 1668* (precluding contractual waiver) [*see Continental Airlines, Inc. v. McDonnell Douglas Corp. (1989) 216 Cal. App. 3d 388, 404, 264 Cal. Rptr. 779* ; *see also § 105.330[2][a]*].

This form may be used to oppose the points and *authorities in § 105.320* et seq.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and other substantive issues that may be involved [*see § 105.330[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should show that the cause of action is encompassed within those listed in *Civ. Code § 1668* [*see § 105.330[2][b]*].

[3] Discussion of Authorities

[a] "Fraud" Includes Negligent Misrepresentation

In ***Blankenheim v. E.F. Hutton & Co.*** *(1990) 217 Cal. App. 3d 1463, 266 Cal. Rptr. 593* , two investors brought an action against their stock brokerage firm and an individual stockbroker, alleging various theories based on negligent misrepresentation, arising from a recommended investment that failed. The plaintiffs contacted the defendants regarding the prospective purchase of certain tax shelters and ultimately invested in a company that the individual defendant recommended, based on several representations made by this defendant regarding its financial soundness. The parties executed several "hold-harmless" agreements in which the plaintiffs agreed to hold the brokerage firm harmless for any loss arising out of their investments. After the investments became worthless, the plaintiffs brought suit. The trial court granted the defendants' summary judgment motion on the grounds that the plaintiffs' reliance on the broker's representations was unjustifiable as a matter of law and that the plaintiffs had waived their claims. The plaintiffs appealed.

The court of appeal reversed, holding that the hold-harmless agreements were void as against the policy of the State of California and that factual issues remained regarding the element of justifiable reliance. With regard to the hold-harmless agreements, the plaintiffs contended that the were contrary to law, based on *Civ. Code § 1668*. The court noted that *Civ. Code § 1668* reflects public policy disfavoring the attempt to "contract away" legal liability for the commission of torts, although a contract exempting liability for ordinary negligence is valid if no public interest is involved and no statute expressly prohibits it (*217 Cal. App. 3d 1463, 1471-1472)* . The issue on appeal therefore was whether negligent misrepresentation is ordinary negligence that a party may contract away or whether it constitutes fraud for which there can be no exemption from liability. The court noted that *Civ. Code § 1572* defines "fraud" as, among other things, the "positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, [although the person making it] believes it to be true" (*217 Cal. App. 3d 1463, 1472)* . Moreover, case law has long held that negligent misrepresentation is included within the definition of fraud. The court concluded that a contract that exempts a party from liability for his or her own positive assertions, which are made in a manner not warranted by the information and are untrue, is against the policy of the law. Consequently, the hold-harmless agreements that attempted to exempt the brokerage firm from all responsibility for its own misrepresentations were void as against the policy of the State of California (*217 Cal. App. 3d 1463, 1473)* .

In ***Continental Airlines, Inc. v. McDonnell Douglas Corp.*** *(1989) 216 Cal. App. 3d 388, 264 Cal. Rptr. 779* , a commercial airline company brought an action against an aircraft manufacturer, on fraud and contract theories, arising from alleged defects in an airplane that caused a fire and resulting damage to the airplane. The fraud theories were based on representations, made to the plaintiff in a series of briefings and sales brochures, that various structures on the airplane, including the landing gear and fuel tank, would with high probability withstand the impact of a crash. The finalized purchase agreement contained more equivocal language with regard to those structural aspects of the airplane--for example, stating that the landing gear was "not likely" to rupture the wing fuel tanks or fuel lines. Following an aborted takeoff because of tire failure, the landing gear of the airplane was severed from the wing, causing

fuel to escape, which resulted in a fire that irreparably damaged the airplane. The case ultimately submitted to the jury was based on five fraud theories and one breach of contract theory. The jury returned verdicts for the plaintiff on all but two counts, and judgment was granted on three counts of fraud, including negligent misrepresentation, and alternatively on the contract count, if the fraud verdicts did not withstand appeal. The defendant appealed.

The court of appeal affirmed the judgment after modifying the amount of prejudgment interest awarded. The defendant contended that the cause of action for negligent misrepresentation was barred by an exculpatory provision in the purchase agreement, in which the plaintiff expressly agreed to waive all claims for "negligence." The court then considered whether negligent misrepresentation is a species of fraud that, pursuant to statutory and case law, may not be waived by an exculpatory clause. Under *Civ. Code § 1668*, all contracts that have for their object, directly or indirectly, the exemption of anyone from responsibility for his or her own fraud, willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law. The defendant argued that the statute does not list "misrepresentation" among the kinds of conduct for which a party may not exculpate itself and that "fraud" within the meaning of that statute refers only to an intentional tort. However, negligent misrepresentation has been interpreted to be a form of fraud under *Civ. Code § 1572(2)*, which defines actual fraud, and *Civ. Code § 1710(2)*, which defines deceit (*216 Cal. App. 3d 388, 402)* . Although no other case has interpreted the relationship among *Civ. Code §§ 1572(2), 1668*, and *1710(2)*, cases that have interpreted those statutes in other contexts support the holding that a cause of action for negligent misrepresentation is included within the meaning of the word "fraud" in *Civ. Code § 1668* (*216 Cal. App. 3d 388, 403-404)* . Consequently, the exculpatory clause of the contract was not a bar to that cause of action (*216 Cal. App. 3d 388, 404)* .

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10-105 California Points & Authorities § 105.332

§ 105.332 Bar by Ratification or Waiver Is Not Sufficiently Pleaded or Proven--Pleading or Proof Merely Shows Continued Performance That Is Not Waiver

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF _____ [SHOULD PREVAIL ON THE *or* HAS STATED FACTS SUFFICIENT TO CONSTITUTE A] CAUSE OF ACTION FOR FRAUD AND DECEIT, DESPITE AN ALLEGED CONTINUED PERFORMANCE BY PLAINTIFF AFTER LEARNING OF THE FRAUD, BECAUSE _____ [PLAINTIFF HAS NOT INTENTIONALLY RELINQUISHED A KNOWN RIGHT *or* PLAINTIFF HAS ELECTED TO STAND ON THE CONTRACT AND SUE FOR DAMAGES].

A. Waiver of Fraud Requires Relinquishment of Right. There can be no waiver of fraud in the absence of an intentional relinquishment of a known right (*Lawson v. Town & Country Shops, Inc. (1958) 159 Cal. App. 2d 196, 201, 323 P.2d 843*).

B. Continued Performance Is Not Waiver. If a party learns that he or she has been defrauded, that party may, instead of rescinding, elect to stand on the contract and sue for damages, and in this case that party's continued performance of the agreement does not constitute a waiver of an action for damages (*Bagdasarian v. Gragnon (1948) 31 Cal. 2d 744, 750, 192 P.2d 935*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff or cross complainant has failed to establish a cause of action for negligent misrepresentation. The basis of this form is that the plaintiff's

continued performance does not constitute a knowing waiver of the plaintiff's cause of action for fraud [*see § 105.330[2][a]*].

This form may be used to oppose the points and *authorities in § 105.320* et seq.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and other substantive issues that may be involved [*see § 105.330[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.330[2][b]*].

[3] Discussion of Authorities

[a] Waiver of Fraud Requires Relinquishment of Right

Lawson v. Town & Country Shops, Inc. *(1958) 159 Cal. App. 2d 196, 323 P.2d 843* , is discussed in *§ 105.334[3][a]*.

[b] Continued Performance Is Not Waiver

In ***Bagdasarian v. Gragnon*** *(1948) 31 Cal. 2d 744, 192 P.2d 935* , the Supreme Court held in favor of the defendants on their cross complaint for fraud, reversing the trial court's judgment with directions that the trial court make certain additional findings and adjudge that the defendants were entitled on their cross complaint to damages in accordance with a specific formula. The controversy arose out of the plaintiff's sale of a farm to the defendants. After making partial payment on the note secured by the farm, the defendants defaulted, the plaintiff sued to foreclose, and the defendants cross complained for damages, alleging that they had been induced to buy through fraudulent representations. On appeal, one of the contentions of the plaintiff was that recovery by the defendants/cross complainants was barred by waiver, which was evidenced by the facts that the defendants/cross complainants continued to make payments, sought and received the plaintiff's advice and assistance in the operation of the farm, requested an extension of time for payment, and failed to make any claim of fraud until filing the cross complaint. The Court held that a party who learns that he or she has been defrauded, that party may, instead of rescinding, elect to stand on the contract and sue for damages. In this situation, the party's continued performance of the agreement does not constitute a waiver of the action for damages. The party must comply with the terms of the contract, must not offer to perform the contract on conditions that the party has no right to exact, and must not make any new agreement or engagement respecting the contract. Otherwise, the party waives the alleged fraud. However, said the Court, it is unjust and unreasonable to hold that the defrauded party's mere asking of a favor should deprive an innocent person of rights arising from an unquestionably fraudulent act (*31 Cal. 2d 744, 750)* .

[4] Additional Authorities

[a] Waiver of Fraud

In *Feckenscher v. Gamble (1938) 12 Cal. 2d 482, 85 P.2d 885* , the Supreme Court ruled that the plaintiff, who brought an action for fraud in the inducement of a real property exchange transaction, had not waived the fraud of the original representations made to her by entering into later contracts with the defendants because during the entire course of the transactions she remained unaware of the fraud. The Court noted that had she become aware of the false and fraudulent representations during the course of the negotiations and then, with this knowledge, entered into a subsequent contract, she would not thereafter be able to complain of the original fraud (*12 Cal. 2d 482, 497)* .

[b] Continued Performance Is Not Waiver

In *Brockway v. Heilman (1967) 250 Cal. App. 2d 807, 58 Cal. Rptr. 772* , the court of appeal affirmed a trial court's judgment for the plaintiffs in an action for damages for fraud, despite the defendant's contention that under the pleadings, the plaintiffs had restricted themselves to a cause of action for breach of contract. This argument overlooked the allegations of fraud, which claimed that when the defendants agreed to sell real and personal property and a liquor license, they did not intend to transfer the license. The plaintiffs did not allege rescission or tender because they elected to proceed on the ground of fraud. Under these circumstances, the plaintiffs had two choices: to rescind or to affirm and sue for damages. If a party learns that he or she has been defrauded, that party may, instead of rescinding, elect to stand on the contract and sue for damages, and in this situation, that party's continued performance of the agreement does not constitute a waiver of that party's action for damages (*250 Cal. App. 2d 807, 811)* .

In *Thompson Crane & Trucking Co. v. Eyman (1954) 123 Cal. App. 2d 904* , the court of appeal affirmed a trial court's judgment canceling a note and distributing the proceeds between the defendants, who were adverse to each other. The plaintiff alleged that the defendants, Eyman and Weller, claimed adverse interests in the proceeds of a note that the plaintiff gave Weller and that Weller assigned to Eyman to secure payment due Eyman for services rendered to Weller in a tax matter pursuant to a contingent fee contract allegedly obtained through duress. The trial court rendered judgment providing for cancellation of the note, the payment to of part of the money to Eyman and the payment of the balance to Weller. Eyman appealed, contending, among other things, that Weller was seeking rescission of the fee contract, but that Weller had waived the right to rescind by later paying Eyman the remainder of the fee involved. The court held that Weller was not necessarily barred from any relief because he did not rescind promptly or because he conclusively waived his rights. The court noted that this was not an action for rescission. However, Weller's position was similar to that involved in the recognized rule that if a party is placed in a position in which rescission would not afford an adequate remedy, the party may complete the contract without waiving the right to assert a claim for the fraud. The court concluded that it could not hold, as a matter of law, that Weller had waived his right to defend against Eyman's claim to a fee (*123 Cal. App. 2d 904, 910-911*).

In *Stevens v. Curtis (1953) 122 Cal. App. 2d 30, 264 P.2d 606* , the court of appeal reversed a judgment of nonsuit against the plaintiffs on their cause of action for fraud, holding that in electing to exercise an option, the plaintiffs had not waived their right to claim damages for the fraud. The defendant had leased land to the plaintiffs with an option to buy. The complaint alleged that the defendant had represented that an ample water supply was available, although he knew that both the available supply and the water utility's facilities were inadequate, that the plaintiffs believed and relied on the false statements, spending large sums of money, and that before they learned the truth, they had spent so much money that they were obliged to and did exercise the option. The trial court granted the defendant's motion for nonsuit on the ground that after learning that the water supply was insufficient, the plaintiffs had not rescinded, but had spent large sums of money and entered into a further contract with the defendant by exercising the option, thereby waiving any claim for misrepresentation. The court of appeal ruled that although a party generally waives any claim for damages for fraud by entering into a new arrangement concerning the subject matter of the contract at issue, if by the time that party had discovered the true conditions, the party has proceeded so far with plans and has so far obligated himself or herself that rescission would afford an inadequate remedy, that party may elect to complete the contract without waiving the right to claim damages for the fraud. The court pointed out that in electing to exercise the option, the plaintiffs were not entering into a new arrangement, but were merely exercising their right under the original contract. Moreover, before the escrow was closed, they had notified the defendant that they were not waiving any rights they might have respecting the misrepresentations. Accordingly, the court held that the plaintiffs had a right to affirm the contract and sue for damages instead of seeking rescission (*122 Cal. App. 2d 30, 35)* .

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CHAPTER 105 FRAUD AND DECEIT
PART II. FORMS
H. Defenses
2. Ratification or Waiver

10-105 California Points & Authorities § 105.333

§ 105.333 Bar by Ratification or Waiver Is Not Sufficiently Pleaded or Proven--Pleading or Proof Merely Shows Request for Favor in Continuing Performance That Is Not Waiver

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF _____ [SHOULD PREVAIL ON THE *or* HAS STATED FACTS SUFFICIENT TO CONSTITUTE A] CAUSE OF ACTION FOR FRAUD AND DECEIT, DESPITE A[N ALLEGED] REQUEST BY PLAINTIFF FOR A FAVOR IN CONNECTION WITH THE CONTINUED PERFORMANCE OF THE CONTRACT, BECAUSE A MERE REQUEST FOR A FAVOR DOES NOT CONSTITUTE A WAIVER OF THE REQUESTING PARTY'S RIGHT TO CLAIM DAMAGES FOR FRAUD.

Mere Request for Favor in Continuing Performance Is Not Waiver. The mere making of a request for a favor in connection with the continued performance of a contract does not constitute a waiver of the requesting party's right to claim damages for fraud, and there is serious doubt whether even a granted request of a favor, such as an extension of time, should be held to constitute a waiver in the absence of estoppel or the making of a new agreement (*Bagdasarian v. Gragnon (1948) 31 Cal. 2d 744, 751, 192 P.2d 935*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff or cross complainant has failed to establish a cause of action for negligent misrepresentation. The basis of this form is that the plaintiff's asking of a favor in connection with continued performance does not constitute a knowing waiver of the plaintiff's cause of action for fraud [*see § 105.330[2][a]*].

This form may be used to oppose the points and *authorities in § 105.320* et seq.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.330[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.330[2][b]*].

[3] Discussion of Authorities

[a] Mere Request for Favor in Continuing Performance Is Not Waiver

Bagdasarian v. Gragnon *(1948) 31 Cal. 2d 744, 192 P.2d 935* , is discussed in *§ 105.332[3][b]*. In ruling that it was unjust and unreasonable to hold that the defrauded party's mere asking of a favor should deprive an innocent person of rights arising from an unquestionably fraudulent act, the Supreme Court added, without deciding the issue, that there is serious doubt whether even a granted request of a favor, such as an extension of time, should be held to constitute a waiver in the absence of estoppel or the making of an agreement supported by new consideration (*31 Cal. 2d 744, 751)* .

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10-105 California Points & Authorities § 105.334

§ 105.334 Bar by Ratification or Waiver Is Not Sufficiently Pleaded or Proven--Pleading or Proof Merely Shows Modification of Contract That Is Not Necessarily Waiver of Fraud

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF _____ [SHOULD PREVAIL ON THE *or* HAS STATED FACTS SUFFICIENT TO CONSTITUTE A] CAUSE OF ACTION FOR FRAUD AND DECEIT, DESPITE A[N ALLEGED] _____ [REQUEST TO MODIFY CONTRACTUAL PROVISIONS *or* ACCEPTANCE OF A REQUEST TO MODIFY CONTRACTUAL PROVISIONS], BECAUSE SUCH A _____ [REQUEST *or* ACCEPTANCE] IS MERELY A FACTOR TO BE CONSIDERED IN DETERMINING WHETHER THERE WAS AN INTENT TO WAIVE FRAUD.

Modification of Contract Is Not Necessarily Waiver of Fraud. There can be no waiver of fraud in the absence of intentional relinquishment of a known right, and requests for modifications of contractual provisions or the acceptance of those requests are merely factors to be considered in determining whether there was such an intent (*Lawson v. Town & Country Shops, Inc. (1958) 159 Cal. App. 2d 196, 200-201, 323 P.2d 843*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff or cross complainant has failed to establish a cause of action for negligent misrepresentation. The basis of this form is that a modification of a contract is not necessarily a waiver of the plaintiff's cause of action for fraud [*see § 105.330[2][a]*].

This form may be used to oppose the points and *authorities in § 105.320* et seq.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.330[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.330[2][b]*].

[3] Discussion of Authorities

[a] Modification of Contract Is Not Necessarily Waiver of Fraud

In ***Lawson v. Town & Country Shops, Inc.*** *(1958) 159 Cal. App. 2d 196* , the court of appeal affirmed judgment for the plaintiffs in an action for damages for fraudulent misrepresentations inducing their execution of a lease, although the plaintiffs had remained on the leased premises for about 15 months after discovery of the fraud and had requested and received modifications of their obligations. The defendant argued that this indicated, as a matter of law, that the plaintiffs had waived and were estopped to rely on the alleged fraud. The court of appeal held that there can be no waiver in the absence of an intentional relinquishment of a known right and that requests for modifications of contractual provisions and even the acceptance of those requests are merely factors to be considered in determining whether or not the requisite intent was express or whether or not intent can be implied or inferred from the surrounding circumstances. The question of waiver, the court noted, is one of the facts on which the trial court must rule. It further noted that the question of whether delay renders it inequitable to grant relief from fraud is a question for the trial court's sound discretion (*159 Cal. App. 2d 196, 200-201*).

[4] Additional Authorities

[a] Modification of Contract Is Not Necessarily Waiver of Fraud

In *Friedberg v. Weissbuch (1955) 135 Cal. App. 2d 750, 287 P.2d 785* , the court of appeal affirmed judgment for the defendants in an action for damages for breach of a lease and purchase agreement in which the defendants had asserted a defense of fraud, holding that the defendants had not waived fraud by entering into a subsequent agreement with the plaintiffs for a reduction in the payments required by the original contract. The transaction involved the purchase of real and personal property, the goodwill of a medical practice, and the use of a trade name. The trial court rendered judgment for the defendants on the ground that the agreements were void because of the plaintiff's fraud. On appeal, the plaintiffs contended that the defendants had waived the fraud by entering into the subsequent agreement for the reduction of payments. The court of appeal stated that it did not agree with this contention. The subsequent agreement merely reduced the monthly payments required by the original contract and did not affect that contract's other provisions (*135 Cal. App. 2d 750, 755-756)* .

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10-105 California Points & Authorities § 105.335

§ 105.335 Bar by Ratification or Waiver Is Not Sufficiently Pleaded or Proven--Pleading or Proof Merely Shows New Agreement That Is Not Waiver Because Original Agreement Not Superseded

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

PLAINTIFF _____ [SHOULD PREVAIL ON THE *or* HAS STATED FACTS SUFFICIENT TO CONSTITUTE A] CAUSE OF ACTION FOR FRAUD AND DECEIT, DESPITE A[N ALLEGED] NEW AGREEMENT OR ENGAGEMENT, BECAUSE THE AGREEMENT OR ENGAGEMENT DID NOT RESULT IN A COMPROMISE AND ADJUSTMENT OF PLAINTIFF'S RIGHTS UNDER THE ORIGINAL CONTRACT, THEREBY SUPERSEDING THAT CONTRACT.

New Agreement Must Be With Defendant and Supersede Original Contract. A plaintiff only waives the right to seek damages for fraud if, after the plaintiff discovers the fraud, the plaintiff makes a new agreement or engagement with the other party to the original contract (the contract allegedly procured by the fraud of that party) and this new agreement or engagement results in a compromise and adjustment of the plaintiff's rights under the original contract, thereby superseding that contract (*Smith v. Roach (1975) 53 Cal. App. 3d 893, 898-899, 126 Cal. Rptr. 29*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff or cross complainant has failed to establish a cause of action for negligent misrepresentation. The basis of this form is that a new agreement is not a waiver of the plaintiff's cause of action for fraud if it does not supersede the original agreement [*see § 105.330[2][a]*].

This form may be used to oppose the points and *authorities in § 105.320* et seq.

This form should be included with other points and authorities, depending on the procedural context in which the issue is raised and on other substantive issues that may be involved [*see § 105.330[2][a]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 105.330[2][b]*].

[3] Discussion of Authorities

[a] New Agreement Must Be With Defendant and Supersede Original Contract

Smith v. Roach *(1975) 53 Cal. App. 3d 893, 126 Cal. Rptr. 29* , was an action for damages for fraud in connection with the sale of an apartment building to the plaintiffs. The trial court granted a nonsuit to the defendants based on the plaintiffs' opening statement, on the ground that the plaintiffs had waived damages for fraud by furnishing and renting the units in the building after they discovered the fraud. In reversing the judgment, the court of appeal stated the applicable general rule that if, after the plaintiff's knowledge of what the plaintiff claims to have been fraud, the plaintiff elects not to rescind but to adopt the contract and sue for damages, the plaintiff must stand toward the other party at arm's length and comply with the terms of the contract, the plaintiff must not offer to perform on conditions that the plaintiff has no right to exact, and the plaintiff must not make any new agreement respecting it the contract. Otherwise the plaintiff waives the alleged fraud. However, the court held that this rule applies only if, after the plaintiff discovers the fraud, the plaintiff makes a new agreement or engagement with the other party to the original contract (the contract allegedly procured by that party's fraud) and that new agreement or engagement results in a compromise and adjustment of the plaintiff's rights under the original contract, thereby superseding the original contract. The court found that the plaintiffs' opening statement did not show that they had entered into any new agreement or engagement with any of the defendants that altered or modified the terms of the original contract for purchase, but instead showed that the plaintiffs had continued to perform their contract by making the required payments for the building (*53 Cal. App. 3d 893, 898-899)* .

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CHAPTER 106 GUARDIANSHIP AND CONSERVATORSHIP

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§ 106.syn Synopsis to Chapter 106: GUARDIANSHIP AND CONSERVATORSHIP

§ 106.01 Scope of Chapter

§ 106.02 Governing Statutes

§ 106.03 Necessity of Supporting Memoranda

§ 106.04 Related Pleading and Practice Chapters

§ 106.05 Page Limits on Memoranda

§§ 106.06-106.19 [Reserved]

§ 106.20 Supporting Petition for Appointment of Guardian of Person and Estate of Minor [Prob. Code §§ 1510, 1514]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Appointment of Guardian of Minor When Necessary or Convenient

[4] Additional Authorities

[a] Appointment of Minor When Necessary or Convenient

§ 106.21 Supporting Petition for Appointment of Guardian of Minor [Prob. Code §§ 1510, 1514]--By Third Person Over Opposition of Parent [Fam. Code § 3041]

[1] FORM

[2] Comments

[a] Use of Form

[b] Attorney's Fees

[c] California Forms of Pleading and Practice

[3] Discussion of Authorities

[a] Finding of Detriment to Child Required

[b] "Detriment to the Child" Includes Harm of Removal From Stable Placement

[c] Finding of Unfitness Not Required

[d] Allegation of Serious Abuse, Neglect, or Abandonment Not Required

[e] Balancing of Parent's Constitutionally Protected Interest in Opportunity to Form Relationship with Child Not Required

[4] Additional Authorities

[a] Finding of Detriment to Child Required

[b] "Detriment to the Child" Includes Harm of Removal From Stable Placement

[c] Finding of Unfitness Not Required

§ 106.22 Supporting Petition for Order Regulating and Controlling the Disposition of the Person of the Ward [Prob. Code § 2102]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Court Authority to Control Guardian

[b] Court Authority to Grant Visitation Rights

§ 106.23 Supporting Petition to Court of Appeal for Writ of Prohibition [Code Civ. Proc. §§ 1102, 1103]--To Restrain Superior Court From Proceeding With Guardianship Proceeding Where Prior Custody Award Has Been Made in Different Court

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] First Court Has Exclusive Jurisdiction

[b] California Court Must Stay Proceedings and Contact Out-of-State Court Having Pending Custody Action

[4] Additional Authorities

[a] First Court Has Exclusive Jurisdiction

[b] California Court Must Stay Proceedings and Contact Out-of-State Court Having Pending Custody Action

§ 106.24 Supporting Petition to Court of Appeal for Writ of Prohibition [Code Civ. Proc. §§ 1102, 1103]--To Restrain Superior Court Sitting in Probate From Adjudicating Claim Against Stranger to Guardianship Proceeding

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] No Jurisdiction Over Claim Against Stranger

[4] Additional Authorities

[a] No Jurisdiction Over Claim by Stranger

§ 106.25 Code Civ. Proc. § 372(a)Supporting Motion to Vacate Judgment Against Minor on Ground He or She Was Not Represented by Guardian Ad Litem

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Minor Required to Appear by Guardian Ad Litem

[b] Disaffirmation of Judgment by Minor if Guardian Not Appointed

[c] Use of Motion Is Proper

[4] Additional Authorities

[a] Minor Required to Appear By Guardian Ad Litem

[b] Disaffirmation of Judgment by Minor if Guardian Not Appointed

[c] Use of Motion Is Proper

§ 106.26 Supporting Motion to Vacate Judgment Against Incompetent Person on Ground He or She Was Not Represented by Guardian Ad Litem [Code Civ. Proc. § 372(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Incompetent Required to Appear by Guardian Ad Litem

[b] Vacation of Judgment

[4] Additional Authorities

[a] Incompetent Required to Appear by Guardian Ad Litem

[b] Vacation of Judgment

§ 106.27 Supporting Demurrer to Complaint--To Vacate Judgment Against Incompetent Person on Ground He or She Was Not Represented by Guardian Ad Litem--Bar of Statute of Limitations [Code Civ. Proc. § 430.10(e)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Failure to State Cause of Action

[b] Applicable Statute of Limitations

§ 106.28 Supporting Demurrer to Complaint--Against Guardian for Money Not Accounted for by Guardian--Order Approving Final Account as Res Judicata

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[3] Discussion of Authorities

[a] Approval of Final Account as Res Judicata

[4] Additional Authorities

[a] Approval of Final Account as Res Judicata

§ 106.29 Supporting Demurrer to Complaint--Against Surety on Bond of Guardian--Failure to Allege Judicial Finding Against Guardian

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Necessity for Judicial Decree Establishing Liability

[4] Additional Authorities

[a] Necessity of Judicial Decree Establishing Liability

§ 106.30 Supporting Demurrer to Complaint--Against Surety on Bond of Guardian or Conservator--Bar of Statute of Limitations

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Statute of Limitations

[4] Additional Authorities

[a] Statute of Limitations

§ 106.31 Opposing Petition for Appointment of Proposed Guardian of Person and Estate of Minor [Prob. Code §§ 1510, 1514]--Guardian Not Suitable

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Proposed Guardian Is Unsuitable When He/She Is Unwilling to Obey Court Orders

§ 106.32 Opposing Petition to Court of Appeal for Writ of Prohibition [Code Civ. Proc. §§ 1102, 1103]--To Restrain Superior Court Sitting in Probate From Adjudicating Claim in Guardianship Proceeding--Third Party in Privity With Estate

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Jurisdiction of Probate Court

§ 106.33 Opposing Motion to Vacate Judgment Against Minor on Ground He or She Was Not Represented by Guardian Ad Litem [Code Civ. Proc. § 372(a)]--No Prejudice to Minor

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Judgment Voidable

[b] Judgment Not Vacated If No Substantial Prejudice

[4] Additional Authorities

[a] Judgment Not Vacated If No Substantial Prejudice

§ 106.34 Opposing Motion to Vacate Judgment Against Minor on Ground He or She Was Not Represented by Guardian Ad Litem [Code Civ. Proc. § 372(a)]-- Affirmation After Majority

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Judgment Not Vacated if Affirmed

[b] Participation in Trial After Majority as Sufficient Action

[4] Additional Authorities

[a] Participation in Trial After Majority as Sufficient Action

§ 106.35 Opposing Motion to Vacate Judgment Against Incompetent on Ground He or She Was Not Represented by Guardian Ad Litem [Code Civ. Proc. § 372(a)]--Third Party Acted in Good Faith Reliance on Validity of Judgment

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Judgment Voidable

[b] Innocent Purchaser Protected

§ 106.36 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10]--Against Guardian for Money Not Accounted for by Guardian--Final Account Is Not Bar to Further Action When Guardian Accidentally or Fraudulently Concealed Assets on Account

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Final Account Not Bar

[4] Additional Authorities

[a] Final Account Not Bar

§ 106.37 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10]--Against Guardian for Money Not Accounted for by Guardian--Intermediate Account Not Bar to Further Action

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Intermediate Account Not Bar

§ 106.38 Opposing Demurrer to Complaint--Against Surety on Bond of Guardian or Conservator--Statute of Limitations [Prob. Code § 2333] Does Not Begin to Run Until Guardian or Conservator Is Discharged or Removed or Order Surcharging Guardian or Conservator Becomes Final

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Statute of Limitations Commences With Order of Removal or Order Surcharging Guardian

[b] Appeal of Removal Order Tolls Statute

[4] Additional Authorities

[a] Statute of Limitations Commences With Order of Removal or Order Surcharging Guardian

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10-106 California Points & Authorities § 106.01

§ 106.01 Scope of Chapter

This chapter contains memoranda for use in supporting [*see §§ 106.20, 106.21*] and opposing [*see § 106.31*] petitions for appointment of guardians of minors. It also contains memoranda for use in supporting [*see § 106.22*] and opposing a petition for an order regulating and controlling the disposition of the person of the ward; in supporting [*see §§ 106.23, 106.24*] and opposing [*see § 106.32*] petitions for writs of prohibition to restrain the probate court from acting in excess of jurisdiction; and in supporting [*see §§ 106.25, 106.26*] and opposing [*see §§ 106.33 -106.35*] motions to set aside judgments because a minor or incompetent was not represented by a guardian ad litem. Finally, it contains memoranda for use in supporting [*see §§ 106.27 -106.30*] and opposing [*see §§ 106.36, 106.37,* 106.39] demurrers to complaints by wards against guardians and sureties.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersEstate, Gift & Trust LawConservators & GuardiansConservatorsAppointmentEstate, Gift & Trust LawConservators & GuardiansGuardians for MinorsFamily LawGuardiansGeneral OverviewFamily LawGuardiansAppointment

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10-106 California Points & Authorities § 106.02

§ 106.02 Governing Statutes

The relationship of guardian and ward generally is governed by *Prob. Code §§ 1500-1601, 2100-2893*. The relationship of conservator and conservatee generally is governed by *Prob. Code §§ 1800-1969, 2100-2893*. The necessity for and the appointment of guardians ad litem is governed by *Code Civ. Proc. §§ 372-374.5*. Sterilization of a ward or conservatee with a developmental disability is governed by *Prob. Code §§ 1950, 1969*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsAppointmentFamily LawGuardiansGeneral OverviewFamily LawGuardiansAppointment

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§ 106.03 Necessity of Supporting Memoranda

Most guardianship and conservatorship matters are handled by petitions which do not require memoranda. However, it is better practice to submit memoranda of points and authorities when a dispute may arise concerning the right to the relief requested in these petitions. This chapter contains memoranda for use in supporting and opposing petitions for the appointment of guardians of minors and a petition for an order regulating and controlling the disposition of the person of the ward. It also contains memoranda supporting and opposing petitions for writ of prohibition, demurrers, and a motion to set aside a judgment when such memoranda are required.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPleading & PracticeMotion PracticeSupporting MemorandaEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewFamily LawGuardiansGeneral Overview

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§ 106.04 Related Pleading and Practice Chapters

For discussion and forms for petitions, orders, and complaints involving guardianships and conservatorships, see California Forms of Pleading and Practice, Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* , and Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators* (Matthew Bender). For complaints and defenses in actions against sureties, see California Forms of Pleading and Practice, Ch. 538, *Suretyship, Bonds, andUndertakings* (Matthew Bender). For complaints and defenses involving minors, see California Forms of Pleading and Practice, Ch. 364, *Minors: Claims and Property of Minors* ; Ch. 365, *Minors: Contract Actions* ; and Ch. 367A, *Minors: Tort Actions* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewContracts LawFormationCapacity of PartiesAgeEstate, Gift & Trust LawConservators & GuardiansConservatorsAppointmentFamily LawFamily Relationships & TortsTort LiabilityChild TortsFamily LawGuardiansAppointment

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10-106 California Points & Authorities § 106.05

§ 106.05 Page Limits on Memoranda

A supporting or opposing memorandum must not exceed 15 pages in length. A reply or closing memorandum may not exceed 10 pages in length [*see* Cal. Rules of Ct., Rule 3.113(d)]. Any party desiring to file a longer memorandum must obtain leave of court [*see* Cal. Rules of Ct., Rule 3.113(d)]. For further discussion of the page limitations under Cal. Rules of Ct., Rule 3.113, and of other basic format requirements of memoranda 3.113, see *Ch. 1, Writing Legal Memoranda and Briefs, § 1.05*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaGovernmentsCourtsRule Application & Interpretation

California Points & Authorities

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 106 GUARDIANSHIP AND CONSERVATORSHIP
PART I. INTRODUCTION

10-106 California Points & Authorities §§ 106.06-106.19

[Reserved]

§§ 106.06[Reserved]

California Points & Authorities

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 106 GUARDIANSHIP AND CONSERVATORSHIP
PART II. FORMS

10-106 California Points & Authorities § 106.20

§ 106.20 Supporting Petition for Appointment of Guardian of Person and Estate of Minor [Prob. Code §§ 1510, 1514]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM IN SUPPORT OF MOTION TO
Guardianship of the	)	APPOINT GUARDIAN OF MINOR
_____ [Person and	)	Date: _____
Estate *or* Person *or* Estate] of	)	Time: _____
_____ [*name*],	)	Location: _____
a Minor.	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

IF APPOINTMENT OF A GUARDIAN IS NECESSARY OR CONVENIENT, THE COURT MUST GIVE CONSIDERATION TO THE PREFERENCE OF THE PROPOSED WARD IF THE PROPOSED WARD IS OF SUFFICIENT AGE TO FORM AN INTELLIGENT PREFERENCE AS TO THE PERSON TO BE APPOINTED AS GUARDIAN.

A. Appointment of Guardian of Minor When Necessary or Convenient. On hearing of the petition, the court may appoint a guardian of the person or estate of the proposed ward, or both, if it appears necessary or convenient (*Prob. Code § 1514(a)*; *Guardianship of Kentera (1953) 41 Cal. 2d 639, 642-643, 262 P.2d 317* ; *Guardianship of Phillip B. (1983) 139 Cal. App. 3d 407, 419, 188 Cal. Rptr. 781*)).

B. Court Must Consider Preference of Proposed Ward. If the appointment of a guardian is necessary or convenient, the court must consider and give due weight to the preference of the proposed ward if the proposed ward is of sufficient age to form an intelligent preference as to the person to be appointed as guardian (*Prob. Code § 1514(b), (e)(2)*; *Fam. Code § 3042*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for the appointment of a guardian of a minor when the proposed ward is of sufficient age to form an intelligent preference as to the person to be appointed as guardian [*see Prob. Code § 1514*; *Fam. Code § 3042*].

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For the Judicial Council Form petition for appointment of a guardian of a minor, see *California Forms of Pleading and Practice, Ch. 280, Guardianship and Conservatorship: Appointment of Guardians, § 280.110* (Matthew Bender).

[3] Discussion of Authorities

[a] Appointment of Guardian of Minor When Necessary or Convenient

In ***Guardianship of Kentera*** *(1953) 41 Cal. 2d 639, 262 P.2d 317* , a minor of more than 14 years filed a petition to have his paternal grandmother appointed guardian of his person. The petition was denied. The minor resided with his mother, stepfather, and stepbrothers, and the trial court ruled that the appointment of a guardian was not necessary or convenient because the minor had no property and had a suitable home with his mother. The Supreme Court affirmed. It held that former Prob. Code § 1406 [*see now Prob. Code § 1514*] required that the court must first find that the appointment of a guardian was necessary and convenient and only after such a finding did the minor have the right to have his nominee appointed. The Court also found that there was ample evidence to support the finding that the appointment of a guardian for the minor was not necessary or convenient (*41 Cal. 2d 639, 642-643)* .

In ***Guardianship of Phillip B.*** *(1983) 139 Cal. App. 3d 407, 188 Cal. Rptr. 781* , the trial court appointed nonparents as the guardians of a mentally retarded teenager over the objections of his parents. The parents had placed their son in institutions caring for the mentally retarded since birth, and he had formed a close emotional and psychological bond with the petitioners, who worked as volunteers at the institution where he resided. In upholding the trial court's order, the appellate court held that the finding that parental custody was detrimental to the child was supported by evidence of the profound emotional harm that would result if the parents retained custody and prevented the child from continuing

his regular visits with the petitioners and their children at their home. The finding of detriment was also supported by evidence that the parents had consciously avoided emotional attachment to their son, that he would experience educational and developmental injury if he remained in his parents' custody because they did not encourage the development of independent living skills, and by a reasonable inference that the parents' past conduct reflected a dangerously passive approach to his medical care (*139 Cal. App. 3d 407, 422-423)* .

[4] Additional Authorities

[a] Appointment of Minor When Necessary or Convenient

In *Guardianship of Kirkman (1914) 168 Cal. 688, 144 P. 745* , a case decided under the law in effect before January 1, 1981, a minor who was over 14 years of age petitioned for the appointment of a guardian to replace the guardian of his estate. The petition was denied. The Supreme Court reversed, holding that it was necessary and convenient to appoint a guardian because the minor had property (*168 Cal. 688, 688)* .

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10-106 California Points & Authorities § 106.21

§ 106.21 Supporting Petition for Appointment of Guardian of Minor [Prob. Code §§ 1510, 1514]--By Third Person Over Opposition of Parent [Fam. Code § 3041]

[1] FORM

[*Caption. See § 106.20.*]

AN AWARD OF CUSTODY TO A THIRD PERSON OVER A PARENT'S OBJECTION IS PROPER IF THE COURT FINDS THAT AN AWARD TO THE PARENT WOULD BE DETRIMENTAL TO THE CHILD AND THE AWARD TO THE THIRD PERSON IS IN THE BEST INTERESTS OF THE CHILD. NO FINDING OF PARENTAL UNFITNESS IS REQUIRED AND NO ALLEGATION OF SERIOUS ABUSE, NEGLECT, OR ABANDONMENT IS REQUIRED. FURTHER, NO BALANCING OF A PARENT'S CONSTITUTIONALLY PROTECTED INTEREST IN AN OPPORTUNITY TO FORM A RELATIONSHIP WITH THE CHILD IS REQUIRED.

A. Finding of Detriment to Child Required. Before the court makes any order awarding custody to a person or persons other than a parent, over a parent's objection, it must find that an award of custody to a parent would be detrimental to the child and the award to a third person is required to serve the best interestsof the child (*Fam. Code § 3041(a)*; *Guardianship of Z.C.W. (1999) 71 Cal. App. 4th 524, 527, 84 Cal. Rptr. 2d 48*).

B. "Detriment to the Child" Includes Harm of Removal From Stable Placement. "Detriment to the child" includes the harm of removal from a stable placement of a child with a person who has assumed, on a day-to-day basis, the role of his or her parent, fulfilling both the child's physical needs and the child's psychological needs for care and affection, and who has assumed that role for a substantial period of time. Moreover, if the court finds by a preponderance of the evidence that the person to whom custody may be given is a person described in the preceding sentence, this finding constitutes a finding that the custody is in the best interest of the child and that parental custody would be detrimental to the child absent a showing by a preponderance of the evidence to the contrary. A finding by clear and convincing evidence is not required (*Fam. Code § 3041(b), (c), (d)*).

C. Finding of Unfitness Not Required. The effect of *Family Code Section 3041* is that a third person may be

appointed guardian over the objections of a parent without a finding that the parent is unfit or has abandoned the child. The detriment test focuses on the needs of the child rather than the character of the parent (*In re G. (1974) 11 Cal. 3d 679, 694-698, 114 Cal. Rptr. 444, 523 P.2d 244* ; *Guardianship of Zachary H. (1999) 86 Cal. Rptr. 2d 7* ; *Guardianship of Simpson (1998) 67 Cal. App. 4th 914, 921, 932-933* ; *79 Cal. Rptr. 2d 389* ; *Guardianship of Kassandra H. (1998) 64 Cal. App. 4th 1228, 1239-1240, 75 Cal. Rptr. 2d 668*).

D. Allegation of Serious Abuse, Neglect, or Abandonment Not Required. Neither *Probate Code Section 1514(b)* nor *Family Code Section 3041* requires an allegation of serious abuse, neglect, or abandonment by the parent to sustain an allegation that parental custody is detrimental to the child (*Guardianship of Oliva J. (2000) 84 Cal. App. 4th 1146, 1155-1161*).

E. Balancing of Parent's Constitutionally Protected Interest in Opportunity to Form Relationship with Child Not Required. If a court finds that granting custody to a parent would be detrimental and granting custody to a nonparent would be in the child's best interests, the court may grant custody to the nonparent without further balancing the parent's constitutionally protected interest in an opportunity to form a relationship with the child (*Adoption of Danielle G. (2001) 87 Cal. App. 4th 1392, 1408, 105 Cal. Rptr. 2d 341*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for guardianship by a third person when a parent is expected to object to the appointment.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Attorney's Fees

If a family law proceeding relating to custody of the minor is pending, the guardianship proceeding may be consolidated with the family law proceeding and the guardianship petitioner may thereby be required to pay attorney's fees under *Fam. Code § 270* [*Guardianship of Paduano (1989) 215 Cal. App. 3d 346, 350-352, 263 Cal. Rptr. 589]* . For discussion and forms relating to motions for attorney's fees in family law proceedings, see *California Family Law Trial Guide, Ch. 3, Pendente Lite Orders, §§ 3.50 -3.56*, and Ch. 34, *Trial of Attorney's Fees and Costs* (Matthew Bender).

[c] California Forms of Pleading and Practice

For the Judicial Council Form petition for appointment of a guardian of a minor, see *California Forms of Pleading and Practice, Ch. 280, Guardianship and Conservatorship: Appointment of Guardians, § 280.110* (Matthew Bender).

[3] Discussion of Authorities

[a] Finding of Detriment to Child Required

Fam. Code § 3041(a) requires that before making an order granting custody to a person or persons other than a parent, over the objection of a parent, the court must make a finding that granting custody to a parent would be detrimental to the child and that granting custody to the nonparent is required to serve the best interest of the child. Allegations that parental custody would be detrimental to the child, other than a statement of that ultimate fact, are not permitted to appear in the pleadings. The court, in its discretion, may exclude the public from the hearing on this issue. Counsel should note that whether or not granting custody to a parent would be detrimental to the child ordinarily must be supported by clear and convincing evidence, except as noted in § 106.21[3][b] [*see Fam. Code § 3041(b)-(e)*].

In ***Guardianship of Z.C.W.*** *(1999) 71 Cal. App. 4th 524, 84 Cal. Rptr. 2d 48* , a petition for guardianship was filed by a woman seeking visitation rights withtwo children with whom she had previously lived during a lesbian relationship she had with their mother. The trial court denied the petition finding that there was no evidence of any detriment of significance to the children if they remained with their mother without visitation with the petitioner (*71 Cal. App. 4th 524, 527*). The court of appeal affirmed, noting that a finding that an award of custody to the parents would be detrimental to the child is essential before a court may make an order granting custody to a nonparent, and in this case there was no such evidence (*71 Cal. App. 4th 524, 527*). The court also noted that there is no statutory authority for a limited guardianship providing for visitation rights to a nonparent (*71 Cal. App. 4th 524, 527*). Finally, the court concluded that the petitioner could not be granted visitation rights as a de facto parent over the objection of the biological parent, in the absence of any showing of detriment to the child (*71 Cal. App. 4th 524, 528*).

Note, however, that since *Guardianship of Z.C.W* was decided, the California Supreme Court has recognized in a number of cases that a child may have two mothers. In *Sharon S. v. Superior Court (2003) 31 Cal. 4th 417, 2 Cal. Rptr. 3d 699, 73 P.3d 554* , the court upheld a "second parent" adoption in which the mother of a child conceived by artificial insemination consented to the child's adoption by the mother's lesbian partner. In *Elisa B. v. Superior Court (2005) 37 Cal. 4th 108, 33 Cal. Rptr. 3d 46, 117 P.3d 660* , the Court held that, under the Uniform Parentage Act, a woman may be a presumed mother of a child of her lesbian partner if they agree to raise the child together, she receives the child into her home, and she holds the child out as her natural child. In *K.M. v. E.G. (2005) 37 Cal. 4th 130, 33 Cal. Rptr. 3d 61, 117 P.3d 673* , the Court held that when a woman provides ova to her lesbian partner so that the partner can bear a child who will be raised in their joint home, both women are considered to be the child's parents. In *Kristine H. v. Lisa R. (2005) 37 Cal. 4th 156, 33 Cal. Rptr. 3d 81, 117 P.3d 690* , the Court held that the lesbian mother of a child was estopped from challenging the validity of a stipulated judgment declaring that she and her lesbian partner were the child's parents.

In ***Guardianship of Pankey*** *(1974) 38 Cal. App. 3d 919, 113 Cal. Rptr. 858* , a petition by a relative to be appointed guardian was opposed by the child's grandmother to protect the custodial rights of the child's father who did not appear. The petition for guardianship was granted. Evidence was presented at the hearing of the father's unfitness and abandonment of the children. On the grandmother's appeal, the court of appeal upheld the trial court. It first held that the grandmother had standing to appeal. It then reviewed the evidence and stated that it was of questionable sufficiency to show unfitness or abandonment. The court stated, however, that a finding of unfitness is not necessary to award custody to a third person because former Civ. Code § 4600 (*now see Fam. Code § 3041*) only requires a finding that the award to a parent would be detrimental to the child and the award to a nonparent would be in the child's best interests. Moreover, the court held that an express finding of detriment to the child was not necessary in this case because the father did not appear. The court found that the evidence was sufficient to show the necessity and convenience of appointment of a nonparent guardian because the parent did not appear and request custody and, therefore, that the relative was a proper person to be appointed guardian (*38 Cal. App. 3d 919, 934-935)* .

[b] "Detriment to the Child" Includes Harm of Removal From Stable Placement

Fam. Code § 3041(c) provides that "detriment to the child" includes the harm of removal from a stable placement of a child with a person who has assumed, on a day-to-day basis, the role of his or her parent, fulfilling both the child's physical needs and the child's psychological needs for care and affection, and who has assumed that role for a substantial period of time. *Fam. Code § 3041(d)* provides that finding by a preponderance of the evidence that a person is one described above constitutes a finding that custody by that person is in the child's best interest, and that parental custody would be detrimental to the child, unless a preponderance of the evidence supports a contrary result. *Fam. Code § 3041(c)* clarifies that the preceding requirement constitutes an exception to the general requirement that a finding that parental custody would be detrimental to the child must be supported by clear and convincing evidence. Note that if the child is an Indian child, before making an order granting custody to a person or persons other than a parent over the objection of a parent, the court is required to apply special evidentiary standards, and placement preferences and standards, specified in the federal Indian Child Welfare Act [see *25 U.S.C. §§ 1912 (d), (e), (f)* (evidentiary standards), 1922 (placement)] and California law [*Fam. Code § 3041(e)*; see *Welf. & Inst. Code §§ 224.6, 361.7* (evidentiary standards), 361.31 (placement)].

[c] Finding of Unfitness Not Required

In ***Guardianship of Zachary H.*** *(1999) 73 Cal. App. 4th 51, 86 Cal. Rptr. 2d 7* , the court rejected a father's contention that the federal Constitution embodies a parental preference doctrine that requires a showing of parental unfitness before a nonparent may be appointed as guardian of a child (*73 Cal. App. 4th 51, 61-62)* .

In ***Guardianship of Simpson*** *(1998) 67 Cal. App. 4th 914, 79 Cal. Rptr. 2d 389* , the court noted that when a parent seeks to terminate a guardianship under *Prob. Code § 1601*, the parent has the burden of showing sufficient overall fitness to justify the termination. In this case, the trial court erroneously put the burden on the guardians to prove by clear and convincing evidence that it was detrimental to the children to be returned to their father (*67 Cal. App. 4th 914, 921, 932-933)* .

In ***Guardianship of Kassandra H.*** *(1998) 64 Cal. App. 4th 1228, 75 Cal. Rptr. 2d 668* , the court held that the "no longer necessary" language of *Prob. Code § 1601* requires a showing of overall fitness on the part of the natural parentseeking to end the guardianship sufficient to overcome the inherent trauma of removing a successful caregiver as the child's guardian (*64 Cal. App. 4th 1228, 1239-1240)* . The overall moral fitness of the parent must be evaluated, not just the isolated aspects of the parent's life that led to the guardianship (*64 Cal. App. 4th 1228, 1238)* . In this case, the court found that although the child's father who was seeking termination of the guardianship had overcome his drinking problem,which had led to the guardianship, he had not bothered with any of the logistical details of parenthood, i.e., arranging appropriate housing, day care, school enrollment, and medical care, and more importantly had not developed a strong bond with his child that would overcome the upheaval of terminating the guardianship. Thus, the court concluded, he had not presented a picture of overall fitness sufficient to overcome the inherent trauma of a change of custody (*64 Cal. App. 4th 1228, 1241)* .

[d] Allegation of Serious Abuse, Neglect, or Abandonment Not Required

In ***Guardianship of Olivia J.*** *(2000) 84 Cal. App. 4th 1146, 101 Cal. Rptr. 2d 364* , the trial court dismissed a petition for guardianship of a child born while the petitioner was a domestic partner of the child's mother. The petition alleged that parental custody would be detrimental to the child under *Fam. Code § 3041*, but did not allege serious abuse, neglect, or abandonment by the parent. The court dismissed the petition on the ground that, since the petitioner was not a parent of the child, in the absence of an allegation of abuse, neglect, or abandonment, the petitioner could not, as a matter of law, establish that parental custody was detrimental to the child. The court of appeal reversed, holding that neither *Probate Code § 1514(b)* (appointment of guardians generally) nor *Family Code § 3041* (formerly Civ. Code § 4600) requires an allegation of serious abuse, neglect, or abandonment by the parent to sustain an allegation that parental custody is detrimental to the child. In addition, because the loss of a relationship with a nonparent may be a

factor supporting a finding of detriment, the court of appeal remanded the case for further proceedings (*84 Cal. App. 4th 1146, 1155-1161)* .

[e] Balancing of Parent's Constitutionally Protected Interest in Opportunity to Form Relationship with Child Not Required

In ***Adoption of Danielle G.*** *(2001) 87 Cal. App. 4th 1392, 105 Cal. Rptr. 2d 341* , a child of unwed parents was placed for adoption by the mother, but the father filed a paternity petition. In response, the adoption agency filed a petition to terminate the father's parental rights. The trial court ruled that since the father had a constitutionally protected interest in an opportunity to form a relationship with his child, the adoption could not proceed without his consent. The proposed adoptive parents instead filed a guardianship petition. The trial court found that it would be detrimental to the child to grant either parent custody, and that it would be in the child's best interests to grant custody to the couple with whom the child had been placed. Nevertheless, the court ruled that the father's constitutionally protected interest in an opportunity to form a relationship with the child compelled it to balance the detriment to the child against the preference for placement with a biological parent. As a result, the trial court denied the guardianship petition and granted temporary custody to the biological mother.

The court of appeal stated that if a court finds that granting custody to a parent would be detrimental and granting custody to a nonparent would be in the child's best interests, the court may grant custody to the nonparent without further balancing the parent's constitutionally protected interest in an opportunity to form a relationship with the child. Thus, the court reversed the trial court's decision, ruling that the guardianship petition should have been decided according to the standards set forth in *Fam. Code § 3041*, and remanded the case with directions to grant the guardianship petition (*87 Cal. App. 4th 1392, 1408)* .

[4] Additional Authorities

[a] Finding of Detriment to Child Required

In *Stanley v. Illinois (1972) 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551* , the United States Supreme Court held that the authority of a probate court to appoint a guardian for a minor is limited by the constitutional right of parents to have custody of their children (*405 U.S. 645, 649-659)* .

In *Troxel v. Granville (2000) 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49* , the United States Supreme Court invalidated a state statute authorizing any person to petition for visitation rights at any time, and providing that court may order visitation if it serves the child's best interests, on the grounds that the statute violates parents' right to substantive due process (*530 U.S. 57, 70-74)* . The statute accorded no deference to a parent's decision that visitation would not be in child's best interest, and imposed a burden on the parent of disproving that visitation with the nonparent would be in child's best interest (*530 U.S. 57, 63)* .

In *Guardianship of Olivia J. (2000) 84 Cal. App. 4th 1146, 101 Cal. Rptr. 2d 364* , discussed in *§ 106.21[3][d]*, the court held that the requirement of *Fam. Code § 3041(a)* that a nonparent may not be awarded custody of a child over a parent's objection unless the court finds that parental custody would be detrimental to the child and the award to a nonparent is required to serve the child's best interests, applies to guardianship proceedings under *Prob. Code § 1514(b)*. The court also noted that by enacting *Fam. Code § 3041*, the legislature changed the focus of a custody dispute between a parent and a nonparent from the unfitness of the parent to the detriment of the child. The legislature did not, however, intend to disturb the judicial practice of awarding custody or guardianship to nonparents in preference to parents only in unusual and extreme cases (*84 Cal. App. 4th 1146, 1153)* . The court also held that the question of whether parental custody is detrimental to the child is highly dependent on the facts that are unique to eachchild and parent (*84 Cal. App. 4th 1146, 1157)* .

In *Guardianship of Kaylee J. (1997) 55 Cal. App. 4th 1425, 64 Cal. Rptr. 2d 662* , discussed in *§ 106.22[3][b]*, the court observed that a court in a probate guardianship proceeding faces a difficult decision concerning the child's best interest in ruling on a contested guardianship petition arising from the placement of a child with a nonparent. The court stated that in determining such a case, a court must look to all of the circumstances bearing on the child's best interests, including the child's emotional well-being and need for continuity and stability in relationships and care (*55 Cal. App. 4th 1425, 1433)* .

In *Guardianship of Phillip B. (1983) 139 Cal. App. 3d 407, 188 Cal. Rptr. 781* , the trial court granted to a nonparent couple the guardianship of an institutionalized child with Down's Syndrome. The parents appealed the trial court's order on the ground of insufficiency of evidence. The court of appeal affirmed. It held that in a guardianship proceeding, an award of custody to nonparents must be based on a finding that awarding custody to the parents would be detrimental to the child, and that the award to a nonparent is required to serve the best interests of the child (*139 Cal. App. 3d 407, 419*). In this case, there was sufficient evidence to support such findings, since the parents failed to make any contact with the child or maintain any relationship with him, and refused to permit him to be trained or educated, to have contact with the couple he had become attached to, or to have medical treatment for his heart condition (*139 Cal. App. 3d 407, 421-424)* .

[b] "Detriment to the Child" Includes Harm of Removal From Stable Placement

In *Guardianship of Olivia J. (2000) 84 Cal. App. 4th 1146, 1159, 101 Cal. Rptr. 2d 364* , discussed in *§ 106.21[3][d]*, the court held that the loss of a relationship with a nonparent who has acted as a de facto or psychological parent is a factor the court may consider in determining whether parental custody is detrimental to the child (*84 Cal. App. 4th 1146, 1159)* .

[c] Finding of Unfitness Not Required

In *Guardianship of Marino (1973) 30 Cal. App. 3d 952, 106 Cal. Rptr. 655* , a child's aunt and uncle petitioned to be appointed guardian of a child that they had raised since he was an infant. The petition was opposed by the child's father who had originally placed the child with the aunt and uncle, had seen little of the child until he was six, and then had begun to visit the child. The child preferred to live with his aunt and uncle and was upset at the idea of living with his father. The trial court granted the petition of the aunt and uncle based on its finding that the award of custody to the aunt and uncle was in the best interests of the child. The court of appeal upheld the trial court. It held that a finding that a parent was unfit was no longer necessary as a prerequisite to the award of custody to a nonparent based on former Civ. Code § 4600 (*now see Fam. Code § 3041*). It held that an express finding that an award to the parent would be detrimental to the child, however, was required and had not been made. Nevertheless, it concluded that, in finding that the award to the aunt and uncle was in the best interests of the child, the trial court had actually also found that an award to the father would be detrimental and amended the findings of fact to include that finding.

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10-106 California Points & Authorities § 106.22

§ 106.22 Supporting Petition for Order Regulating and Controlling the Disposition of the Person of the Ward [Prob. Code § 2102]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Guardianship of the	)	MEMORANDUM IN SUPPORT OF PETITION
_____ [Person and	)	FOR ORDER REGULATING DISPOSITION OF
Estate *or* Person *or* Estate] of	)	PERSON OF WARD
_____ [*name*],	)	Date: _____
a[n] _____ [Minor *or*	)	Time: _____
Incompetent Person].	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

ON THE PETITION OF AN INTERESTED PERSON, A COURT HAS AUTHORITY TO MAKE ORDERS CONTROLLING THE DISPOSITION OF THE PERSON OF THE WARD.

A. Court Authority to Control Guardian. In the management and disposition of the person committed to him/her, a guardian may be regulated and controlled by the court (*Prob. Code § 2102*).

B. Order With Regard to Care or Custody. On the petition of an interested person, the probate court has the authority to make orders regulating and controlling the guardian's actions with regard to the care or custody of the ward (*Guardianship of Reynolds (1943) 60 Cal. App. 2d 669, 673-677, 141 P.2d 498*).

C. Court Authority to Grant Visitation Rights. The court has the continuing authority to grant visitation rights in a probate guardianship proceeding (*Guardianship of Kaylee J. (1997) 55 Cal. App. 4th 1425, 1431, 64 Cal. Rptr. 2d 662*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a petition for an order regulating or controlling the actions of a guardian with regard to the care or custody of a ward.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, this form may be used to support a conservatorship petition for an order regulating and controlling the disposition of the person of a conservatee [*see Prob. Code § 2102*].

[c] Related Pleading and Practice Forms

For a petition for instructions regarding the person of a ward, see California Forms of Pleading and Practice, Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* and Ch. 285, *Guardianship and Conservatorship: Care of Ward or Conservatee* (Matthew Bender).

[3] Discussion of Authorities

[a] Court Authority to Control Guardian

Guardianship of Reynolds *(1943) 60 Cal. App. 2d 669, 141 P.2d 498* , was a petition by maternal grandparents for visitation rights with their grandson, whose guardian was the paternal grandfather. The court granted the petition. On the grandfather's appeal, the court of appeal held that the probate court had authority to make such a visitation order on the petition of an interested person over the objections of the guardian based on its statutory authority under former Prob. Code § 1400 (*now see Prob. Code § 2102*, to regulate and control the guardian in the management and disposition of the person of the ward. It also held that the court did not abuse its discretion in awarding such visitation rights and upheld the grant of the petition (*60 Cal. App. 2d 669, 673-677)* .

[b] Court Authority to Grant Visitation Rights

In ***Guardianship of Kaylee J.*** *(1997) 55 Cal. App. 4th 1425, 64 Cal. Rptr. 2d 662* , the court noted that when a court appoints a nonparent as guardian of the person of a child (in this case, the child's stepgrandfather), the authority of the parent ceases under *Fam. Code § 7505(a)*. The guardian, not the parent, has the care, custody, and control of the child in accordance with *Prob. Code § 2351*. However, the guardian is subject to the regulation and control of the court in the performance of the duties of guardian (*Prob. Code § 2102*). The court has the continuing authority to grant visitation rights (in this case, to the child's mother) in a probate guardianship proceeding (*55 Cal. App. 4th 1425, 1431)* . A guardian in a probate proceeding may be ordered to accommodate reasonable requests for visitation and contact with the child's parents or other persons as may be in the child's best interests. The frequency, duration, and nature of the visits are within the court's discretion. However, once a permanent guardianship is established and a nonparent guardian is appointed in a probate proceeding, the court does not have the authority to take steps to return custody to a parent unless and until a proper petition for termination of the guardianship of the person under *Prob. Code § 1601* is before the court. Court-ordered visitation cannot be so extensive that it undercuts the probate guardianship (*55 Cal. App. 4th 1425, 1432)* . In addition, the court may not order reunification services in a probate guardianship proceeding. Reunification services only apply in juvenile court dependency proceedings (*55 Cal. App. 4th 1425, 1431-1433)* .

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10-106 California Points & Authorities § 106.23

§ 106.23 Supporting Petition to Court of Appeal for Writ of Prohibition [Code Civ. Proc. §§ 1102, 1103]--To Restrain Superior Court From Proceeding With Guardianship Proceeding Where Prior Custody Award Has Been Made in Different Court

[1] FORM

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA,
_____ APPELLATE DIVISION
[DIVISION _____]

_____ [*name*]	)	NO. _____
Petitioner,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION
vs.	)	
THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF _____	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

A WRIT OF PROHIBITION MAY BE ISSUED TO RESTRAIN A SUPERIOR COURT FROM PROCEEDING WITH A GUARDIANSHIP PROCEEDING WHERE THERE IS A VALID PRIOR CUSTODY AWARD FROM ANOTHER COURT.

A. Use of Writ of Prohibition to Arrest Proceedings in Excess of Jurisdiction. The writ of prohibition arrests the proceedings of any tribunal exercising judicial functions, when the proceedings are without or in excess of the

jurisdiction of such tribunal (*Code Civ. Proc. § 1102*). It may be issued by any court to an inferior tribunal in all cases in which there is not a plain, speedy, and adequate remedy in the ordinary course of law (*Code Civ. Proc. § 1103*).

B. No Adequate Remedy at Law. There is no adequate remedy at law when a court intends to proceed with a guardianship proceeding despite a valid prior custody award in a different court (*Greene v. Superior Court (1951) 37 Cal. 2d 307, 310, 231 P.2d 821*).

C. First Court Has Exclusive Jurisdiction. A court is without jurisdiction to appoint a guardian of the person of a child when there is a valid prior custody award in a divorce proceeding in another superior court (*Greene v. Superior Court (1951) 37 Cal. 2d 307, 310-312, 231 P.2d 821*).

[*Optional*] **D. California Court Must Stay Proceedings and Contact Out-of-State Court Having Pending Custody Action.** If the California court is informed during the course of the proceeding that a proceeding concerning the child custody was pending in another state before the California court assumed jurisdiction, the California court must stay the proceeding and communicate with the foreign state's court, so that the issue may be litigated in the more appropriate forum (*Fam. Code § 3406(c)*; *see Guardianship of Donaldson (1986) 178 Cal. App. 3d 477, 491-493, 223 Cal. Rptr. 707*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a petition for writ of prohibition to restrain a court from proceeding with a guardianship proceeding where there is a valid prior custody award from a different court. Optional Paragraph D may be used if an out-of-state court first assumed jurisdiction over custody of the minor in accordance with the provisions of the Uniform Child Custody Jurisdiction Act (*Fam. Code § 3400 et seq.*) and the California court has refused to stay its own proceedings in the face of the other court's action.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For petitions for writs of prohibition, see California Forms of Pleading and Practice, Ch. 358, *Mandate and Prohibition* (Matthew Bender).

[c] Related Points and Authorities

For memoranda supporting writs of prohibition, see Ch. 150, *Mandate and Prohibition* .

[3] Discussion of Authorities

[a] First Court Has Exclusive Jurisdiction

Greene v. Superior Court *(1951) 37 Cal. 2d 307, 231 P.2d 821* , was a proceeding to obtain a writ of prohibition in the Supreme Court. The writ was sought to arrest the proceedings in the Superior Court of the City and County of San Francisco to appoint the mother of her children as guardian of their persons. There was a valid prior custody award entered in a divorce proceeding in the Superior Court of Santa Barbara County; that award gave custody to the mother but allowed the father visitation rights for four months a year. In the guardianship proceeding, the mother sought to restrict the visitation rights to one month a year. The father objected to the jurisdiction in San Francisco and, when that objection was denied, petitioned for the writ of prohibition. The Supreme Court first held that the father's remedy at law of appeal was not adequate or speedy. It then held that the court which first obtained jurisdiction over the custody of the minors had exclusive jurisdiction over their custody, that the court in San Francisco did not have jurisdiction to appoint a guardian of the person of the minors, and that any modification of the custody would have to be made in Santa Barbara. Therefore, it issued a writ of prohibition restraining the superior court in San Francisco from proceeding with the guardianship proceedings (*37 Cal. 2d 307, 310*).

[b] California Court Must Stay Proceedings and Contact Out-of-State Court Having Pending Custody Action

Guardianship of Donaldson *(1986) 178 Cal. App. 3d 477, 223 Cal. Rptr. 707* , was a California proceeding brought by the paternal aunt of two children. Prior to the father's death, he obtained his children's sole custody in marital dissolution proceedings. After his death, a county protective services agency informally placed the children with the aunt. However, their mother made arrangements for them to live in Illinois with her parents. The grandparents took the children to Illinois during visitation. Both the aunt and the grandparents petitioned for guardianship. In the aunt's guardianship proceeding, the grandmother filed a motion to dismiss for lack of subject matter jurisdiction. At the hearing on this motion, the mother's attorney informed the court that the mother had executed an "Entry of Appearance, Waiver of [Service of] Summons, and Waiver of Notice" in the grandparents' Illinois proceeding. The California court ruled that it had subject matter jurisdiction and stated that the matter would be set for a contested hearing. At this hearing, the mother's attorney advised the court that the Illinois court had appointed the grandparents as co-guardians of the children a few days before. The trial court proceeded with the hearing and stated that it thought that California had superior jurisdiction under the Uniform Child Custody Jurisdiction Act (UCCJA-- former Civ. Code §§ 5150-5174 (*now see Fam. Code § 3400 et seq.*). It appointed the aunt as guardian and the mother appealed.

The court of appeal reversed the order appointing the aunt as guardian. It concluded that the UCCJA applies to guardianship proceedings and that the trial court failed to comply with the UCCJA. Specifically, reversal was required by the trial court's failure to contact the Illinois court to determine the more appropriate forum, as provided by the UCCJA. California properly assumed "home state" jurisdiction under former Civ. Code § 5152(1)(a) (*now see Fam. Code § 3403*) and Illinois properly assumed "significant connection" jurisdiction under former Civ. Code § 5152(1)(b). However, two courts may not exercise jurisdiction concurrently and when a trial court is informed of an action pending in another state, it is required to resolve the jurisdictional conflict by direct communication with the other state court to determine the most appropriate forum, under former Civ. Code § 5155(3) (*now see Fam. Code § 3406*). In this case, the trial court made no effort to contact the Illinois court, failed to seek information concerning the grandparents in Illinois, determined that it had jurisdiction, and set the case for a contested hearing. Furthermore, the trial court should have sought the Illinois court's cooperation in obtaining relevant evidence pursuant to the former Civ. Code § 5168. The failure to do so resulted in a custody determination based on inadequate information (*178 Cal. App. 3d 477, 491-493)* . Note that the provisions of the UCCJA discussed by the court, former Civ. Code §§ 5152, 5155, and 5168, are now set forth in *Fam. Code §§ 3403, 3406,* and *3420,* respectively.

[4] Additional Authorities

[a] First Court Has Exclusive Jurisdiction

Browne v. Superior Court (1940) 16 Cal. 2d 593, 107 P.2d 1, 131 ALR 276 , was a proceeding to obtain a writ of prohibition in the Supreme Court. The writ was sought to restrain habeas corpus proceedings in the Superior Court of the City and County of San Francisco which were brought to release an incompetent person from restraint by her guardian in a rest home. The guardian had been appointed in Santa Barbara County and the ward was confined to the rest home under an order from that court. The court held that the Santa Barbara court had exclusive jurisdiction over the custody of the ward and issued a writ of prohibition restraining the superior court in San Francisco from proceeding with the habeas corpus proceeding.

[b] California Court Must Stay Proceedings and Contact Out-of-State Court Having Pending Custody Action

In *Guardianship of Ariana K. (2004) 120 Cal. App. 4th 690, 15 Cal. Rptr. 3d 817* , a child's grandmother and aunt filed separate petitions for temporary guardianship and appointment of a guardian for the child following her mother's death. They subsequently entered into a conciliation court agreement with the child's father, which gave the father primary custody of the child and visitationrights to the grandmother and aunt. Four years later, the grandmother and aunt filed an ex parte application for temporary guardianship of the child, alleging that they had become the child's primary caretakers, that the father did not participate in any of the child's activities and did not provide any financial support for the child, and that the father had taken the child to Greece and refused to return her to California. At the hearing on the petitioners' subsequent petition for permanent guardianship of the child, the court held that it had subject matter jurisdiction over the proceedings based on its original assertion of jurisdiction over the matter four years before. It ordered the father to return the child to California and to deliver her to the petitioners, who were required to bring the child to court for a hearing on the guardianship petition. The father brought the child back from Greece, and all parties appeared at the hearing. The court ordered that physical custody of the child was to be shared equally between the parties at two-week intervals and that the child was not to be taken from California. Two weeks later, the grandmother and aunt filed an application to modify the existing custody order and to grant them sole legal and physical custody and guardianship based on the father's removal of the child to Greece. At the hearing on the application, the court awarded the applicants sole legal and physical custody of the child, ordered the father to return her to California, and issued letters of guardianship to the applicants (*120 Cal. App. 4th 690, 699-700)* .

The father appealed from the order, arguing that the court had no subject matter jurisdiction over the guardianship proceedings because of the Uniform Child Custody Jurisdiction and Enforcement Act [*Fam. Code § 3400 et seq.*] and the Hague Convention on the Civil Aspects of International Child Abduction [*42 U.S.C. § 11601 et seq.*] The appellate court found that there was no merit to the father's argument that the trial court did not have subject matter jurisdiction. It noted that the UCCJEA governs custody matters, which include guardianship proceedings, and that the UCCJEA is the exclusive method of determining subject matter jurisdiction in California custody cases, including international custody disputes [*Fam. Code § 3421*] The trial court had subject matter jurisdiction over the original guardianship proceeding, as provided by the UCCJEA, because California was the child's home state and she had lived in California for at least six months before the petition was filed [*Fam. Code §§ 3402(g), 3421(a)(1)*] Once the trial court acquired jurisdiction, it continued to retain the authority to adjudicate the custody and visitation disputes between the parties in the proceedings filed four years later. By the time the father took the child to Greece, the trial court had exercised its jurisdiction under the UCCJEA [*Fam. Code § 3402(c)*] by making an order provided for shared custody and explicitly ordering the parties not to take the child from California (*120 Cal. App. 4th 690, 704)* .

The appellate court also rejected the father's assertion that the potential remedies available to the grandmother and the aunt under the Hague Convention prevented the trial court from ruling on the guardianship petitions. It noted the two primary objects of the Hague Convention: (1) to secure the return of a wrongfully removed child who is retained in a nation that is a signatory to the treaty; and (2) to insure that custody and visitation rights under the law of treaty signatories are respected by other parties to the Hague Convention. It also noted that a judicially expressed purpose of

the Hague Convention is to deter a parent from fleeing to another jurisdiction in search of a more favorable decision. It concluded that the existence of the Hague Convention process for obtaining the return of a child from a country that is a treaty signatory did not deprive the trial court of subject matter jurisdiction, because California retains the authority to conduct guardianship proceedings. The remedies provided by the Convention are in addition to remedies available under other laws [*42 U.S.C. § 11603(h)*] (*120 Cal. App. 4th 690, 707)* .

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10-106 California Points & Authorities § 106.24

§ 106.24 Supporting Petition to Court of Appeal for Writ of Prohibition [Code Civ. Proc. §§ 1102, 1103]--To Restrain Superior Court Sitting in Probate From Adjudicating Claim Against Stranger to Guardianship Proceeding

[1] FORM

[*Caption. See § 106.23.*]

A WRIT OF PROHIBITION MAY BE ISSUED TO RESTRAIN A SUPERIOR COURT SITTING IN PROBATE FROM ADJUDICATING A CLAIM BETWEEN A GUARDIANSHIP ESTATE AND A STRANGER TO THE ESTATE.

A. Use of Writ of Prohibition to Arrest Proceedings in Excess of Jurisdiction. [*See § 106.23, Paragraph A.*]

B. No Jurisdiction Over Claim Against Stranger. A superior court sitting in probate does not have jurisdiction to decide a disputed claim between a guardianship estate and a stranger to the estate (*Central Bank v. Superior Court (1955) 45 Cal. 2d 10, 285 P.2d 906*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a petition for writof prohibition to restrain a court sitting in probate from proceeding with hearing a claim against a stranger to the estate.

When appropriate, counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

With appropriate modifications this form can be adapted to support a petition for a writ of prohibition to restrain a superior court from hearing a claim against a stranger to a conservatorship proceeding.

[b] Related Pleading and Practice Forms

For forms for petitions for writs of prohibition, see California Forms of Pleading and Practice, Ch. 358, *Mandate and Prohibition* (Matthew Bender).

[c] Related Points and Authorities

For forms for memoranda supporting writs of prohibition, see Ch. 150, *Mandate and Prohibition* .

[3] Discussion of Authorities

[a] No Jurisdiction Over Claim Against Stranger

Central Bank v. Superior Court *(1955) 45 Cal. 2d 10, 285 P.2d 906* , was a guardianship proceeding in which the guardian claimed that a bank had improperly paid guardianship funds to the guardian personally and, therefore, was liable to the estate for the funds. The bank was cited, appeared, and, when the court indicated it was going to rule that the bank had notice of the trust and was, therefore, liable, applied for a writ of prohibition. The Supreme Court granted the writ. It held that a superior court sitting in probate is without jurisdiction to decide a disputed claim between an estate and a stranger thereto. Such a claim must be litigated in an independent action between the parties in the proper court of general jurisdiction.

[4] Additional Authorities

[a] No Jurisdiction Over Claim by Stranger

In *Stevenson v. Superior Court (1970) 9 Cal. App. 3d 904, 88 Cal. Rptr. 462* , a creditor petitioned for an order requiring the payment of a debt by a conservator. The conservator objected on the basis that the court lacked jurisdiction to determine the validity of the claim that the conservator had rejected. When the court overruled the objection and began to hear the claim, the conservator petitioned for a writ of prohibition. The court of appeal granted the writ. It held that the superior court sitting in probate did not have jurisdiction to determine the validity of an indebtedness rejected by the conservator and that the validity of the claim must be determined in an independent proceeding. The court held that the provisions of former Prob. Code § 1859 (*now see Prob. Code § 2404*), which permit a creditor to petition to have a debt paid, apply only after the validity of the debt has been established in an independent proceeding and the conservator refuses to pay the debt.

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10-106 California Points & Authorities § 106.25

§ 106.25 Code Civ. Proc. § 372(a)Supporting Motion to Vacate Judgment Against Minor on Ground He or She Was Not Represented by Guardian Ad Litem

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Defendant.	)	IES IN SUPPORT OF MOTION TO VACATE
	)	JUDGMENT
	)	

_____

ON THE MOTION OF A MINOR, A JUDGMENT AGAINST THE MINOR WHO WAS NOT REPRESENTED BY A GUARDIAN AD LITEM MAY BE VACATED.

A. Minor Required to Appear by Guardian Ad Litem. When a minor is a party to an action, he/she must appear either by a guardian of the estate or by a guardian ad litem appointed by the court in which the action is pending (*Code Civ. Proc. § 372(a)*). The limited statutory exceptions to the foregoing requirement [*see Code Civ. Proc. § 372(b)(1)*] do not apply to this action.

B. Disaffirmation of Judgment by Minor if Guardian Not Appointed. A judgment against a minor for whom the court failed to appoint a guardian ad litem is voidable by the minor on reaching majority (In re Charles T. (2002),).

C. Use of Motion Is Proper. When the court that rendered the judgment possesses general jurisdiction in law and equity, a judgment obtained against an incompetent or minor without appointment of a guardian ad litem can be vacated on motion in the court that entered the judgment as well as by independent action (*see Olivera v. Grace (1942) 19 Cal. 2d 570, 575-576, 122 P.2d 564*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a petition to vacate a judgment against a minor who was not represented by a guardian or guardian ad litem.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. If necessary, counsel should attach affidavits or declarations which support the motion, including a declaration by the moving party that there is a valid defense to the action.

[b] Related Pleading and Practice Forms

For forms for the appointment of a guardian ad litem, and discussion of the qualification and powers of guardian ad litem see California Forms of Pleading and Practice, Ch. 291, *Guardians Ad Litem* (Matthew Bender).

[3] Discussion of Authorities

[a] Minor Required to Appear by Guardian Ad Litem

Civ. Code § 372(a) requires that minors must appear in an action through a guardian ad litem. The limited exceptions to this rule are listed in *Code Civ. Proc. § 372(b)(1)*], which provides that only in proceedings for injunction or temporary restraining orders against harassment or violence, or for protective orders under *Fam. Code § 6200* or *Fam. Code §§ 7710-7720*, may a minor 12 years of age or older appear in court without a guardian, counsel, or a guardian ad litem.

[b] Disaffirmation of Judgment by Minor if Guardian Not Appointed

In ***In re Charles T.*** *(2002) 102 Cal. App. 4th 869, 125 Cal. Rptr. 2d 868* , the court described the effect of a failure to appoint a guardian ad litem for a minor. This failure is not jurisdictional, but is merely an irregularity in the proceedings; absent prejudice, any error in failing to make the appointment is harmless. However, a judgment against a minor lacking a guardian ad litem is voidable by the minor on reaching majority. Because the defect is not jurisdictional, when the minor is the plaintiff, a guardian ad litem can be appointed at any time during the proceedings and, if one is not appointed and the minor has not reached majority and affirmed the proceedings prior to judgment, a defendant may attack the judgment as being erroneous but not void (*102 Cal. App. 4th 869, 876)* .

[c] Use of Motion Is Proper

Olivera v. Grace *(1942) 19 Cal. 2d 570, 122 P.2d 564* , was an action by an executor to set aside a judgment against a decedent on the basis that the decedentwas incompetent when the judgment was rendered and was not represented by a guardian or guardian ad litem. The trial court entered a demurrer to the complaint. The Supreme Court held a person who has been prevented by extrinsic factors from presenting his or her case to the court may bring an independent action in equity to secure relief from the judgment or, where the court that rendered the judgment possesses a general jurisdiction in law and equity, may bring a motion in that court to secure relief. The court then ruled that a judgment could be set aside when the plaintiff knew that the defendant was incompetent and no guardian ad litem had been appointed even if the defendant had not been judicially declared incompetent. Therefore, the complaint stated a cause of action and the judgment which was entered after the trial court sustained the demurrer was overruled.

[4] Additional Authorities

[a] Minor Required to Appear By Guardian Ad Litem

In *J.W. v. Superior Court (1993) 17 Cal. App. 4th 958, 22 Cal. Rptr. 2d 527* , the court stated that the essential difference between a general guardian and a guardian ad litem is that a general guardian is usually appointed to take care of the person or property of a minor, not for the purpose of prosecuting a lawsuit, while a guardian ad litem is appointed specifically to prosecute or defend a suit, and may be appointed even if the minor has a general guardian (*17 Cal. App. 4th 958, 964)* . The guardian ad litem has the power to assent to procedural steps that will facilitate a determination of the minor's case, subject to fiduciary duties owed to the minor and the requirement that court approval be obtained for certain acts (*17 Cal. App. 4th 958, 965)* . A guardian ad litem who is not an attorney may appear on behalf of the minor only through an attorney (*17 Cal. App. 4th 958, 969)* .

[b] Disaffirmation of Judgment by Minor if Guardian Not Appointed

Gouanillou v. Industrial Acc. Comm'n (1920) 184 Cal. 418 , was a proceeding in the Industrial Accident Commission involving an injury to a minor. A hearing was held at which the minor was not represented by a guardian ad litem. After reaching majority, the minor disaffirmed the award and filed a new application, on which a new award was granted. The employer appealed and contended that the first award was valid and the second was void. The Supreme Court held that the right of a minor to disaffirm an adjudication of his or her rights by a judicial tribunal in which he or she has not been represented by a guardian or guardian ad litem continues until barred by laches after the minor has reached majority. The right is not dependent on statute, but is a general rule enforced as a necessary incident to the status of majority. The court then held that the minor was entitled to disaffirm the first award even though the award was actually made after majority where she disaffirmed within a reasonable time. The second award was confirmed and the first was set aside.

[c] Use of Motion Is Proper

In *Garbutt v. Campbell (1955) 130 Cal. App. 2d 167, 278 P.2d 508* , a default judgment was entered against a minor who was not represented by a guardian or guardian ad litem. Within a year after attaining his majority, he moved to set aside the judgment. He established that he had not remembered the service of process and that he moved to set aside the default soon after he found out about the judgment when the judgment creditor levied on his property. The trial court set aside the default judgment and the court of appeal upheld the trial court. It stated that a minor must appear by a guardian ad litem and that there was no evidence of laches on the part of the minor.

In *Keane v. Penha (1946) 76 Cal. App. 2d 693, 173 P.2d 835* , a default was entered against a minor who was not represented by a guardian or guardian ad litem. She moved to set aside the default judgment within three weeks after the entry of judgment and within two weeks of her attaining majority. The trial court set aside the judgment and the court of appeal upheld the trial court. It held that a minor's right to disaffirm a judgment was absolute and continued throughout his or her minority.

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10-106 California Points & Authorities § 106.26

§ 106.26 Supporting Motion to Vacate Judgment Against Incompetent Person on Ground He or She Was Not Represented by Guardian Ad Litem [Code Civ. Proc. § 372(a)]

[1] FORM

[*Caption. See § 106.25.*]

JUDGMENT AGAINST AN INCOMPETENT OR PERSON FOR WHOM A CONSERVATOR HAS BEEN APPOINTED WHO WAS NOT REPRESENTED BY A CONSERVATOR OF THE ESTATE OR GUARDIAN AD LITEM SHOULD BE VACATED.

A. Incompetent Must Appear by Guardian Ad Litem. When an incompetent person or a person for whom a conservator has been appointed is a party, he/she must appear either by a conservator of the estate or by a guardian ad litem appointed by the court in which the action is pending (*Code Civ. Proc. § 372(a)*); *In re Daniel S. (2004) 115 Cal. App. 4th 903, 912, 9 Cal. Rptr. 3d 646* .

B. Vacation of Judgment. A judgment entered against an incompetent person who was not represented by a conservator of the estate or a guardian ad litem may be vacated in a proceeding for that purpose when properly disaffirmed and when the plaintiff or petitioner knew or should have known of the incompetency and did not inform the court (*see Briggs v. Briggs (1958) 160 Cal. App. 2d 312, 319, 325 P.2d 219*).

C. Use of Motion Is Proper. [*See § 106.25, Paragraph C.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion to vacate a judgment against an incompetent person or a person for whom a conservator has been appointed who was not represented by a conservator or a guardian ad litem.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. If necessary, counsel should attach affidavits or declarations which support the motion, including a declaration by the moving party that there is a valid defense to the action.

[b] Related Pleading and Practice Forms

For forms for the appointment of a guardian ad litem, see California Forms of Pleading and Practice, Ch. 291, *Guardians Ad Litem* (Matthew Bender).

[3] Discussion of Authorities

[a] Incompetent Required to Appear by Guardian Ad Litem

In ***In re Daniel S****. (2004) 115 Cal. App. 4th 903, 9 Cal. Rptr. 3d 646* , the court reiterated that under *Code Civ. Proc. § 372*, incompetents and persons for whom a conservator has been appointed lack the capacity to bring or defend an action in their own names. They must be represented either by a guardian or conservator of the estate, or by a guardian ad litem appointed by the court in which the action is pending (*115 Cal. App. 4th 903, 912)* . The court stated that the proper standard for determining competency is whether the individual has the capacity to understand the nature and consequences of the proceedings and is able to assist his or her attorney in preparation of the case (*115 Cal. App. 4th 903, 913)* . For example, a court need not appoint a guardian ad litem for a mentally disabled adult when the evidence shows that he or she understands the nature of the proceedings and is able to cooperate with his or her attorney in representing his or her interests (*115 Cal. App. 4th 903, 913)* .

[b] Vacation of Judgment

In ***Briggs v. Briggs*** *(1958) 160 Cal. App. 2d 312, 325 P.2d 219* , a wife moved to vacate a judgment of annulment of marriage obtained by her husband. The complaint was served on the wife when she was institutionalized. Application was made for appointment of a guardian ad litem by the husband, but the order appointing a guardian ad litem was never signed although an attorney thought he had been appointed and had appeared for the wife. Meanwhile, after service on the wife, the husband told her that he had dismissed the complaint. The purported guardian ad litem filed an answer but after a hearing a judgment of annulment was taken by default. The husband never told the wife about the annulment and continued to hold himself out as her husband. When she was released from the institution and pronounced cured, she found out about the judgment of annulment and moved to vacate the judgment. The trial court set aside the judgment and the husband appealed. The court of appeal held that the guardian ad litem was not validly appointed because the order was never signed. The court then held that the wife could disaffirm the judgment because she was incompetent and not represented by a guardian ad litem, because she was not allowed to have a fair trial, and because the husband told her that he had dismissed the proceeding and continued to hold himself out as her husband.

[4] Additional Authorities

[a] Incompetent Required to Appear by Guardian Ad Litem

In *In re Jessica G. (2001) 93 Cal. App. 4th 1180, 113 Cal. Rptr. 2d 714*), the court stated that a judge may appoint a guardian ad litem for an incompetent adult only on notice and hearing or with the incompetent person's consent. At the hearing, testimony may be presented on the limited issue of competency (*93 Cal. App. 4th 1180, 1187-1188)* .

In *Sarracino v. Superior Court (1974) 13 Cal. 3d 1, 118 Cal. Rptr. 21, 529 P.2d 53*), the California Supreme Court held that a prior independent adjudication of the individual's incompetency is not a prerequisite for the appointment of a guardian ad litem. The court may determine the individual's incompetency based on the application for the appointment and supporting declarations (*13 Cal. 3d 1, 11-12)* . The Court also held that a guardian ad litem who appears for an incompetent person in an action or proceeding does not thereby become a party to that action or proceeding. The guardian ad litem is both the incompetent's representative of record and a representative of the court (*13 Cal. 3d 1, 13)* .

[b] Vacation of Judgment

In re Christina B. (1993) 19 Cal. App. 4th 1441, 23 Cal. Rptr. 2d 918 , involved a dependency proceeding in which a mother's guardian ad litem waived her right to trial over her objection. The juvenile court declared the mother's children to be dependents, removed them from her physical custody, and placed them with their father. The mother appealed, and the court of appeal reversed. It observed that theguardian ad litem's purpose is to protect the rights of the incompetent person (*19 Cal. App. 4th 1441, 1453)* , and that the waiver in this case did not protect or benefit the mother, but rather operated to deprive her of fundamental constitutional rights to a hearing with no countervailing benefit (*19 Cal. App. 4th 1441, 1454)* .

In *In re Lisa M. (1986) 177 Cal. App. 3d 915, 225 Cal. Rptr. 7* , the court of appeal held that the juvenile court erred when it failed to appoint a guardian ad litem for a mentally retarded mother in dependency proceedings involving her daughter. Although the juvenile court had expressly found that the mother was incapable of understanding the dependency proceedings, it did not appoint a guardian ad litem. The child was declared a dependent of the juvenile court and her mother's parental rights were terminated. The appellate court concluded that when a trial court has knowledge of a defendant's incompetency and inability to understand the proceedings, it has an obligation to appoint a guardian ad litem on its own motion (*177 Cal. App. 3d 915, 919*). The court, however, found that the error was moot and dismissed the mother's appeal. The court in dictum concluded that the mother should have sought to disaffirm the parental termination order and its foundational dependency determinations through use of either a motion to vacate or set aside the judgment or an independent action in equity to set the judgment aside (*177 Cal. App. 3d 915, 919-920*). If the mother brought such a motion, the trial court would have to decide whether the appointment of a guardian ad litem at the underlying dependency proceeding or parental termination proceeding would likely have resulted in a different outcome (*177 Cal. App. 3d 915, 920* n.4).

Another court of appeal disagreed with In re Lisa M. regarding its holding that an appeal from an order initiating a *Civ. Code § 232* (operative until January 1, 1994) or a *Fam. Code § 7800 et seq.* (operative January 1, 1994) termination proceeding was moot after judgment pursuant to that section. In *In re Linda P. (1987) 195 Cal. App. 3d 99, 240 Cal. Rptr. 474* , the court held that finality of a judgment pursuant to *Civ. Code § 232* terminating parental custody does not render moot the appeal from an order in prior dependency proceedings continuing dependency and authorizing institution of proceedings under *Civ. Code § 232* (*195 Cal. App. 3d 99, 105-106)* .

In *Edison v. Edison (1960) 178 Cal. App. 2d 632, 3 Cal. Rptr. 201* , four years after the entry of an interlocutory judgment, the wife moved to vacate the interlocutory judgment. She alleged that she was incompetent when her default was entered and that her husband, who knew of her incompetency, concealed it from the court and prevented her from having a fair hearing. The husband conceded that he knew she had been committed and might still have been in the institution when the default was taken. He alleged that he had told his attorneys about his wife's incompetency. The trial

court vacated the judgment. The court of appeal upheld the trial court. It held that the wife, in order to prevail, had to establish that she was mentally incompetent at the time of the service and entry of default, that the husband either knew of the incompetency or knew facts, which if revealed to the court, would have resulted in a continuance until the wife or a guardian could appear for her, and that plaintiff concealed such information from the court. The court of appeal held that there was sufficient evidence to establish those facts. It also held that the fact the husband told his attorneys of his wife's incompetency did not discharge his duty to disclose the facts to the court or minimize the fraud on the court.

In *Saunders v. Saunders (1958) 157 Cal. App. 2d 67, 320 P.2d 131* , the wife first made a motion to vacate a judgment of divorce under *Code Civ. Proc. § 473*, which motion was denied. She then brought an independent action in equity to vacate the judgment. The trial court refused to permit the admission of any evidence, refused to grant leave to amend the complaint, and dismissed the complaint. The wife appealed and the court of appeal reversed and held that the wife had stated a cause of action based on her allegations that she was of unsound mind throughout all of the divorce proceedings, that her husband knew of her condition but her attorneys did not, that no guardian ad litem was appointed, and that her husband did not inform the court of her condition. The wife also alleged that there was a probability of a different result after a fair hearing.

California Points & Authorities

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
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PART II. FORMS

10-106 California Points & Authorities § 106.27

§ 106.27 Supporting Demurrer to Complaint--To Vacate Judgment Against Incompetent Person on Ground He or She Was Not Represented by Guardian Ad Litem--Bar of Statute of Limitations [Code Civ. Proc. § 430.10(e)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN SUPPORT OF DEMURRER TO COM-
vs.	)	PLAINT
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

PLAINTIFF'S COMPLAINT TO SET ASIDE THE JUDGMENT FAILS TO STATE A CAUSE OF ACTION IN THAT IT APPEARS ON THE FACE THEREOF THAT IT IS BARRED BY THE STATUTE OF LIMITATIONS.

A. Objection by Demurrer. The party against whom a complaint has been filed may object by demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action (*Code Civ. Proc. § 430.10(e)* when the ground for objection appears on the face thereof or from any matter of which the court is required to or may take judicial notice).

B. Failure to State Cause of Action. A complaint fails to state a cause of action when the dates alleged in the

complaint establish that the claim is barred by the applicable statute of limitations (*Guardian North Bay, Inc. v. Superior Court (2001) 94 Cal. App. 4th 963, 971-972, 114 Cal. Rptr. 2d 748*).

C. Applicable Statute of Limitations. The statute of limitations applicable to an equitable action to vacate a judgment because an incompetent person was not represented by a conservator or guardian ad litem is the four-year statute of limitations in *Code of Civil Procedure Section 343* governing actions not otherwise covered by statute (*Zastrow v. Zastrow (1976) 61 Cal. App. 3d 710, 716-717, 132 Cal. Rptr. 536*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a general demurrer to a complaint to vacate a judgment against an incompetent who was not represented by a conservator or guardian ad litem when the demurrer asserts that the complaint fails to state a cause of action in that it appears on its face that the action is barred by a statute of limitations.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Failure to State Cause of Action

In ***Guardian North Bay, Inc. v. Superior Court*** *(2001) 94 Cal. App. 4th 963, 114 Cal. Rptr. 2d 748* , the court set forth the well-established rule that a complaint fails to state a cause of action when the dates alleged in the complaint establish that the claim is barred by the applicable statute of limitations (*94 Cal. App. 4th 963, 971-972)* (*see also Traverso v. Department of Transportation (2001) 87 Cal. App. 4th 1142, 1144-1146, 105 Cal. Rptr. 2d 179*).

In ***Roman v. County of Los Angeles*** *(2000) 85 Cal. App. 4th 316, 102 Cal. Rptr. 2d 13* , the court stated the equally well-established rule that in order for the bar of the statute of limitations to be raised by demurrer, the defect must clearly and affirmatively appear on the face of the complaint. It is not enough that the complaint shows that the action may be barred (*85 Cal. App. 4th 316, 324-325*).

As held in ***Childs v. State*** *(1983) 144 Cal. App. 3d 155, 192 Cal. Rptr. 526* , any ambiguity or uncertainty regarding the date of the alleged wrong, which triggers the running of the statute, is a question of fact that may be properly resolved on a motion for summary judgment or at trial, but not on a demurrer (*144 Cal. App. 3d 155, 160-163*).

[b] Applicable Statute of Limitations

In ***Zastrow v. Zastrow*** *(1976) 61 Cal. App. 3d 710, 132 Cal. Rptr. 536* , a wifefiled an action to set aside a judgment of dissolution and to rescind a property settlement agreement incorporated therein on the ground that she was incompetent when the property settlement agreement was negotiated and when the decree was entered. The husband demurred on the ground of the statute of limitations arguing that the three-year statute of limitations governing actions for relief on the ground of fraud or mistake [*Code Civ. Proc. § 338(4)*; *now see Code Civ. Proc. § 338(d)*] was applicable and barred the action since it was filed three years and five months after the wife regained her competency. The trial court sustained the demurrer without leave to amend. It found that the four-year statute of limitations on actions for rescission, which the wife intended to be applicable, was not applicable because the property settlement agreement was merged in the decree and could not be rescinded, and thus held that the action was barred by the three-year fraud statute of limitations. The court of appeal reversed. It agreed with the trial court that the rescission statute of limitations was not applicable. It held, however, that fraud was not the only basis for an action to set aside a judgment when the person against whom it was taken was incompetent and not represented by a guardian or guardian ad litem. It found that the essence of the wife's claim for equitable relief was a disability that deprived her of a fair opportunity to present her case to the court. This ground is separate from fraud, and therefore is not covered by the fraud statute of limitations. Instead, it falls within the scope of *Code Civ. Proc. § 343*, the four-year statute of limitations governing actions not otherwise covered by statute. Since the four years had not run, the trial court erred in sustaining the demurrer and was reversed (*61 Cal. App. 3d 710, 716-717)* .

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10-106 California Points & Authorities § 106.28

§ 106.28 Supporting Demurrer to Complaint--Against Guardian for Money Not Accounted for by Guardian--Order Approving Final Account as Res Judicata

[1] FORM

[*Caption. See § 106.27.*]

PLAINTIFF'S COMPLAINT FOR MONEY NOT ACCOUNTED FOR BY GUARDIAN FAILS TO STATE A CAUSE OF ACTION IN THAT IT APPEARS ON ITS FACE THAT THE GUARDIAN'S FINAL ACCOUNT WAS APPROVED, WHICH APPROVAL IS RES JUDICATA.

A. Objection by Demurrer. [*See § 106.27, Paragraph A.*]

B. Approval of Final Account as Res Judicata. When complaint brought against a guardian by a ward for money not accounted for by the guardian shows on its face that there has been a court approved final account as between the guardian and the ward, it does not state a cause of action because the final account is res judicata as to the issue of the guardian's liability to the ward (*Adams v. Martin (1935) 3 Cal. 2d 246, 248, 44 P.2d 572*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a demurrer to a complaint against a guardian by a ward for money not accounted for by the guardian when the demurrer asserts that the complaint does not state a cause of action because it discloses on its face that there has been a final account as between the guardian and the ward.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, these points and authorities may be used to support a demurrer to a complaint against a conservator for money not accounted for by a conservator.

[3] Discussion of Authorities

[a] Approval of Final Account as Res Judicata

In ***Adams v. Martin*** *(1935) 3 Cal. 2d 246, 44 P.2d 572* , the guardian of an incompetent brought an action against the former guardian for misappropriation of the ward's money. Prior to the action, there had been a final accounting by the former guardian for misappropriation of the ward's money. Prior to the action, there had been a final accounting by the former guardian which had been approved and had not been appealed. The final account did not charge against the former guardian the amounts sought in the action by the new guardian. The trial court gave judgment for the new guardian. The Supreme Court reversed. It held that the final account was res judicata and conclusive against the ward. The Court pointed out that it was not contended that the former guardian had concealed property of the ward and failed to account for it or that there was any fraudulent prevention of a hearing. There was a hearing on the account, which was attended by the plaintiff's new guardian. The plaintiff's only contention was that the former guardian perjured himself at the hearing on the final account, which is intrinsic, not extrinsic fraud, and which is not sufficient basis for equitable relief against afinal judgment (*3 Cal. 2d 246, 248)* .

[4] Additional Authorities

[a] Approval of Final Account as Res Judicata

In *E. & J. Gallo Winery v. Gallo Cattle Company (9th Cir. 1992) 967 F.2d 1280* , a trademark infringement action, the defendant counterclaimed that he had inherited part of the winery and was thus entitled to use the name. However, the Ninth Circuit affirmed the district court's finding that the defendant's probate claims had been settled years before when the defendant attained his majority, and a final account by his defendant's guardians had been approved. The final accounting and the probate's court decree approving and settling the final account in the guardianship proceeding were res judicata with respect to the defendant's current claims (*967 F.2d 1280, 1287-1288)* .

In *Bank of America v. Superior Court (1986) 181 Cal. App. 3d 705, 226 Cal. Rptr. 685* , the court of appeal held that a ward's claim that her guardian had misrepresented its skill and improperly invested guardianship funds was barred by res judicata. The barred claim pertained to an account that had been previously settled by the probate court. The guardian demurred to the claim under *Prob. Code § 2103(a)*, which provides that an order settling a guardianship accounting releases the guardian from claims based on any act or omission directly approved or confirmed in the order. The ward claimed that the fraud exception to that provision [*see Prob. Code § 2103(b)*] precluded operation of res judicata. However, the court of appeal stated that the "fraud" specified in *Prob. Code § 2103(b)* is "extrinsic" fraud that occurs in obtaining the court order. The ward admitted that the accounting revealed the losses sustained by the guardianship funds. Because the alleged fraud did not prevent the ward from attending the hearing to settle the account or litigate any claims of wrongdoing against the guardian, it was not extrinsic and the res judicata exception did not

apply (*181 Cal. App. 3d 705, 714-715, 226 Cal. Rptr. 685*).

In *Hornaday v. Hornaday (1949) 95 Cal. App. 2d 384* , former wards brought an action against their former guardian for attorney's fees incurred by their estate in removing the former guardian. A demurrer to the complaint was sustained. The court of appeal affirmed. Among the bases for its affirmance was the fact that the final account of the former guardian was res judicata as to his liability to the wards and their estate.

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PART II. FORMS

10-106 California Points & Authorities § 106.29

§ 106.29 Supporting Demurrer to Complaint--Against Surety on Bond of Guardian--Failure to Allege Judicial Finding Against Guardian

[1] FORM

[*Caption. See § 106.27.*]

PLAINTIFF'S COMPLAINT AGAINST A SURETY ON THE BOND OF A GUARDIAN FAILS TO STATE A CAUSE OF ACTION IN THAT IT FAILS TO ALLEGE THAT THE GUARDIAN HAS BEEN FOUND LIABLE BY THE COURT.

A. Objection by Demurrer. [*See § 106.27, Paragraph A.*]

B. Necessity for Judicial Decree Establishing Liability. In an action against a surety on a bond of a guardian, a cause of action is not stated unless there is an allegation that there is an appropriate judicial decree establishing the fact of the breach by the guardian and the amount thereof (*Richardson v. Royal Indem. Co. (1943) 21 Cal. 2d 557, 560, 134 P.2d 1*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a demurrer to a complaint against a surety on the bond of a guardian when the demurrer asserts that the complaint does not state a cause of action because it fails to allege the existence of a judicial decree establishing the liability of the guardian.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, these points and authorities may be used to support a demurrer to a complaint against a conservator's surety.

[c] Related Pleading and Practice Forms

For a demurrer to a complaint against a surety on the bond of a guardian based on failure to allege a judicial decree, see California Forms of Pleading andPractice, Ch. 290, *Guardianship and Conservatorship: Maintenance of Ward or Conservatee* (Matthew Bender).

[3] Discussion of Authorities

[a] Necessity for Judicial Decree Establishing Liability

Richardson v. Royal Indem. Co. *(1943) 21 Cal. 2d 557, 134 P.2d 1* , was an action by the administrator of the estate of a deceased ward against the estate of a deceased guardian and the surety to recover money that was allegedly fraudulently appropriated by the guardian from the ward's estate. The plaintiff voluntarily dismissed the action against the administrator of the guardian's estate. At the trial the defendant surety objected to the introduction of evidence on the ground that a cause of action was not stated against the surety. The trial court sustained the objection and dismissed the action. The Supreme Court affirmed. It held that before a surety can be held for a breach of a bond filed by the guardian, there must be an appropriate judicial decree establishing the fact of the breach and the amount thereof. In the absence of an allegation of such a judicial decree, no cause of action against the surety is stated (*21 Cal. 2d 557, 560)* .

[4] Additional Authorities

[a] Necessity of Judicial Decree Establishing Liability

In *Price v. Fireman's Fund Ins. Companies (1987) 193 Cal. App. 3d 1536, 239 Cal. Rptr. 158* , the court of appeal held that a ward who sought recovery against a surety on a guardian's bond was not relieved of the requirement of obtaining an accounting and surcharge order against the guardian before bringing suit against the surety. Several exceptions to this requirement are recognized, including when the guardian has died, absconded, was removed before a final accounting, or is beyond the court's jurisdiction. Similarly, when an accounting is impossible or unnecessary, or the amount of liability can be ascertained without an accounting, none will be required. However, the guardian's mere avoidance of service of process and failure to appear in an action by the ward for conversion of estate assets does not render the guardian outside the court's jurisdiction and does not constitute absconding for this purpose (*193 Cal. App. 3d 1536, 1541-1542)* .

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10-106 California Points & Authorities § 106.30

§ 106.30 Supporting Demurrer to Complaint--Against Surety on Bond of Guardian or Conservator--Bar of Statute of Limitations

[1] FORM

[*Caption. See § 106.27.*]

PLAINTIFF'S COMPLAINT AGAINST A SURETY ON THE BOND OF A _____ [GUARDIAN *OR* CONSERVATOR] FAILS TO STATE A CAUSE OF ACTION IN THAT IT APPEARS ON THE FACE THEREOF THAT IT IS BARRED BY THE STATUTE OF LIMITATIONS.

A. Objection by Demurrer. [*See § 106.27, Paragraph A.*]

B. Failure to State Cause of Action. [*See § 106.27, Paragraph B.*]

C. Statute of Limitations. No action may be maintained against the sureties on a bond given by a guardian or conservator unless commenced within four years from the discharge or removal of the guardian or conservator or within three years from the date the order surcharging the guardian or conservator becomes final, whichever is later (*Prob. Code § 2333(b)*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a demurrer to a complaint against a surety for a guardian or conservator when the demurrer asserts that the action is barred by the statute of limitations.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Statute of Limitations

The limitation period described in Paragraph C of this form may be extended in cases of fraud, conspiracy, or misrepresentation [*see Prob. Code § 2103(b)*]. That is, *Prob. Code § 2103* provides that although final orders in a guardianship or conservatorship proceeding release sureties from claims of the ward or conservatee, this rule does not apply when the judgment or order is obtained by fraud, conspiracy, or misrepresentation. However, in any case, and notwithstanding *Prob. Code § 2103*, no action may be maintained against the sureties on the bond unless the action commences within six years from the date the judgment under *Prob. Code § 2103*, or the later of the orders under *Prob. Code § 2333(b)* becomes final [*Prob. Code § 2333(c)*]

[4] Additional Authorities

[a] Statute of Limitations

In *Keck v. Keck (1936) 16 Cal. App. 2d 521, 61 P.2d 79* , a former ward brought an action against his former guardian and her surety. The order appointing the guardian had been revoked more than three years before the action had been commenced. The trial court gave judgment for the surety based on the statute of limitations. The court of appeal affirmed. It held that the order revoking the guardianship removed the guardian and commenced the running of the statute of limitations. It also held that the fact that the ward had not procured the final account of the guardian until after the statute of limitations had run on an action against the surety was immaterial and that the proceedings to obtain an accounting did not toll the statute. The court indicated that no excuse had been raised by the former ward for the delay in obtaining the final account.

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10-106 California Points & Authorities § 106.31

§ 106.31 Opposing Petition for Appointment of Proposed Guardian of Person and Estate of Minor [Prob. Code §§ 1510, 1514]--Guardian Not Suitable

[1] FORM

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM OF POINTS AND AUTHORIT-
Guardianship of the	)	IES IN OPPOSITION TO APPOINTMENT OF
_____ [Person and	)	GUARDIAN FOR MINOR
Estate *or* Person *or* Estate] of	)	Date: _____
_____ [*name*],	)	Time: _____
a Minor.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

THE PROPOSED GUARDIAN IS NOT A SUITABLE PERSON TO BE APPOINTED WHEN HE/SHE IS UNWILLING TO OBEY COURT ORDERS.

A. Proposed Guardian of Minor Is Required to Be Suitable Person. In appointing a guardian of the person of a minor, the court is governed by the provisions of *Family Code § 3040* which requires that the person appointed as guardian of the person be deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child (*Fam. Code § 3040*; *Prob. Code § 1514(b)*). In appointing a guardian of the estate of a minor, the court is to be guided by what appears to be in the best interest of the proposed ward, taking into account the proposed guardian's ability to manage and to preserve the estate as well as the proposed guardian's concern for and interest in the welfare of

the proposed ward (*Prob. Code § 1514(e)(1)*).

B. Proposed Guardian Is Unsuitable When He/She Is Unwilling to Obey Court Orders. Where the proposed guardian has refused to obey prior court orders regarding the minor, he/she indicates a lack of amenability to court authority and, thus, is not a suitable person to be appointed guardian (*see Guardianship of MacLean (1952) 111 Cal. App. 2d 144, 145-147, 244 P.2d 63*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a petition for appointment of a person as guardian when the proposed guardian has refused to obey prior court orders with regard to the child.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

This form can be used in an appropriate situation to oppose the memorandum supporting the petition in *see §§ 106.20* and *106.21*.

[3] Discussion of Authorities

[a] Proposed Guardian Is Unsuitable When He/She Is Unwilling to Obey Court Orders

In ***Guardianship of MacLean*** *(1952) 111 Cal. App. 2d 144, 244 P.2d 63* , a minor of 14 years nominated as his guardian his sister-in-law with whom he had been living. She petitioned to be appointed guardian in place of the minor's father, who opposed her petition. The sister-in-law's petition was denied. In prior proceedings involving the custody of the minor, the sister-in-law had refused to obey court orders with regard to the minor's custody. The trial court based its decision that the sister-in-law was not a suitable person on that fact and on the fact that the sister-in-law held title to property which had belonged to the child's mother and in which the child had a claim adverse to the sister-in-law. The court of appeal upheld the trial court and stated that the sister-in-law's refusal to obey prior court orders was an index of her lack of amenability to the authority of the court of which she proposed to be a sworn officer (*111 Cal. App. 2d 144, 145-147*).

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10-106 California Points & Authorities § 106.32

§ 106.32 Opposing Petition to Court of Appeal for Writ of Prohibition [Code Civ. Proc. §§ 1102, 1103]--To Restrain Superior Court Sitting in Probate From Adjudicating Claim in Guardianship Proceeding--Third Party in Privity With Estate

[1] FORM

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA,
_____ APPELLATE DIVISION
[DIVISION _____]

_____ [*name*],	)	NO. _____
Petitioner,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PETITION FOR WRIT OF PROHIBITION
vs.	)	[*Code Civ. Proc. §§ 1102, 1103*]
THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF _____.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

A WRIT OF PROHIBITION SHOULD NOT BE ISSUED TO RESTRAIN A SUPERIOR COURT SITTING IN PROBATE FROM ADJUDICATING A CLAIM AGAINST A PERSON WHO IS IN PRIVITY WITH THE ESTATE.

[*EITHER*]

Jurisdiction of Probate Court. The Superior court sitting in probate has jurisdiction to adjudicate a controversy between an estate or those acting on its behalf and the guardian thereof acting in his/her personal capacity (*Central Bank v. Superior Court (1955) 45 Cal. 2d 10, 15, 285 P.2d 906*).

[*OR*]

Jurisdiction of Probate Court. The superior court sitting in probate has jurisdiction to adjudicate a controversy involving particular property claimed by the estate and others where the property involved is conceded by both parties to be or to have been acquired by the claimant in the course of the guardianship proceedings (*Central Bank v. Superior Court (1955) 45 Cal. 2d 10, 15-16, 285 P.2d 906*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a petition for a writ of prohibition where the probate court has jurisdiction over the claim because it is against someone in privity with the estate. The first alternative is for use when the third party is the guardian acting in his or her personal capacity; the second is for use when the property was acquired by the third party in the guardianship proceeding.

Where appropriate, counsel should insert argument in the memorandum showing the relationship between the facts of the case and the points of law stated.

This form can be used in appropriate situations to oppose the memorandum supporting the petition in § 106.24.

[3] Discussion of Authorities

[a] Jurisdiction of Probate Court

In ***Central Bank v. Superior Court*** *(1955) 45 Cal. 2d 10, 285 P.2d 906* , the Supreme Court granted a writ of prohibition restraining the superior court sitting in probate from adjudicating, against a bank, a claim that certain funds paid to the guardian personally were estate funds and that the bank was liable to the estate. The court held that the superior court sitting in probate did not have jurisdiction over a claim against a stranger. The court did, however, state in dicta that the probate court has jurisdiction over a contest between the estate and those in privity with the estate. The court cited two examples of those in privity with the estate. The first was a dispute between the estate or those acting on its behalf and the executor or administrator acting in his or her personal capacity. The second was a dispute over property that is conceded by both parties to be or to have been acquired in the course of the probate proceedings.

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Volume 10 Chapters 100-109 EMPLOYER & EMPLOYEE---to---GUARDIANSHIP
CHAPTER 106 GUARDIANSHIP AND CONSERVATORSHIP
PART II. FORMS

10-106 California Points & Authorities § 106.33

§ 106.33 Opposing Motion to Vacate Judgment Against Minor on Ground He or She Was Not Represented by Guardian Ad Litem [Code Civ. Proc. § 372(a)]--No Prejudice to Minor

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN OPPOSITION TO MOTION TO VACATE
vs.	)	JUDGMENT
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

A JUDGMENT AGAINST A MINOR WHO WAS NOT REPRESENTED BY A GUARDIAN AD LITEM SHOULD NOT BE SET ASIDE WHERE THE MINOR'S INTERESTS SUFFERED NO SUBSTANTIAL PREJUDICE.

A. Judgment Voidable. A judgment rendered against a minor who is not represented by a guardian or a guardian ad litem is not jurisdictional, but merely irregular, and is, therefore, not void (*Medical Legal Consulting Services, Inc. v. Covarrubias (1991) 234 Cal. App. 3d 80, 87-93, 285 Cal. Rptr. 559*).

B. Judgment Not Vacated If No Substantial Prejudice. If the minor's interests are not substantially prejudiced by the failure to appoint a guardian ad litem, the judgment should not be vacated (*Pacific Coast Joint Stock Land Bank of San Francisco v. Clausen (1937) 8 Cal. 2d 364, 366, 65 P.2d 352*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Respondent _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorites may be submitted in opposition to a petition to vacate a judgment against a minor who was not represented by a guardian or guardian ad litem on the ground that the minor was not substantially prejudiced thereby.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. If necessary, counsel should attach affidavits or declarations which oppose the motion.

This form can be used in appropriate situations to oppose the memorandum supporting the petition in § 106.25.

[3] Discussion of Authorities

[a] Judgment Voidable

In ***Medical Legal Consulting Services, Inc. v. Covarrubias*** *(1991) 234 Cal. App. 3d 80, 285 Cal. Rptr. 559* , the court held that the failure to appoint a guardian ad litem for a minor who is a defendant is not a jurisdictional defect. Thus, a money judgment against the minor is not void and may be enforced against the minor's estate by proceeding against the guardian of the estate (*234 Cal. App. 3d 80, 87-93)* .

[b] Judgment Not Vacated If No Substantial Prejudice

In ***Pacific Coast Joint Stock Land Bank of San Francisco v. Clausen*** *(1937) 8 Cal. 2d 364, 65 P.2d 352* , a default judgment on a foreclosure action was entered against a minor. The minor had a guardian of her estate who was also a defendant in the action. The guardian chose not to appear on behalf of the minor or on her own behalf. The minor moved to set aside the judgment on the ground of her minority when the judgment was entered. The trial court denied the motion. The Supreme Court upheld the trial court. It held there was no substantial prejudice to the minor's interests when the minor has a guardian who decides not to appear, when there is no showing that the guardian was either negligent or fraudulent, and when there was no showing of a valid defense to the action.

[4] Additional Authorities

[a] Judgment Not Vacated If No Substantial Prejudice

In Smith v. Wagner (1934), , judgment was rendered in a negligence case against a defendant who appealed on the ground that he was a minor when judgment was rendered and was not represented by a guardian ad litem. The court of appeal upheld the judgment and stated that there was no substantial prejudice to the minor's interest when he was represented by counsel, appeared at trial, and did not raise the issue of his minority until after judgment had been rendered against him.

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10-106 California Points & Authorities § 106.34

§ 106.34 Opposing Motion to Vacate Judgment Against Minor on Ground He or She Was Not Represented by Guardian Ad Litem [Code Civ. Proc. § 372(a)]-- Affirmation After Majority

[1] FORM

[*Caption. See § 106.33.*]

A JUDGMENT AGAINST A MINOR WHO WAS NOT REPRESENTED BY A GUARDIAN AD LITEM SHOULD NOT BE SET ASIDE WHERE THE MINOR AFFIRMED THE JUDGMENT AFTER REACHING MAJORITY.

A. Judgment Voidable. [*See § 106.33, Paragraph A.*]

B. Judgment Not Vacated if Affirmed. A judgment taken against a minor who was not represented by a guardian or a guardian ad litem will be considered affirmed by the minor if he/she takes any action with reference thereto after reaching majority which is only consistent with the validity of the judgment. If so affirmed, the judgment will not later be vacated (*Childs v. Lanterman (1894) 103 Cal. 387, 390-392, 37 P. 382*).

[*Optional*] **C. Participation in Trial After Majority as Sufficient Action.** If a judgment is taken against a minor for whom no guardian ad litem was appointed, the minor's further participation in the trial after reaching majority will bar a later motion to set aside the judgment (*Hughes v. Quackenbush (1934) 1 Cal. App. 2d 349, 362-363, 37 P.2d 99*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a petition to vacate a judgment against a minor who was not represented by a guardian or a guardian ad litem on the ground that the minor affirmed the judgment after majority.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. If necessary, counsel should attach affidavits or declarations which oppose the motion.

This form can be used in appropriate situations to oppose the memorandum supporting the petition in § 106.25.

[3] Discussion of Authorities

[a] Judgment Not Vacated if Affirmed

Childs v. Lanterman *(1894) 103 Cal. 387, 37 P. 382* , was a quiet title action. One of the defendants was a minor who was represented by an attorney but for whom no guardian ad litem was appointed. The judgment was filed and entered the day after the minor reached majority. Thereafter, he and the other defendants moved for a new trial and then appealed the judgment. The judgment was affirmed and then the former minor moved to vacate the judgment because he was not represented by a guardian ad litem. The motion was denied by the trial court. The Supreme Court upheld the denial. It held that a judgment taken against a minor who did not have a guardian ad litem is voidable and can be affirmed by the minor after majority if he takes action which is only consistent with the validity of the judgment. It held that the actions taken after majority in moving for a new trial and appealing the judgment constituted affirmation and, therefore, that the judgment should not have been set aside.

[b] Participation in Trial After Majority as Sufficient Action

In ***Hughes v. Quackenbush*** *(1934) 1 Cal. App. 2d 349, 37 P.2d 99* , a defendant against whom a judgment had been entered in a personal injury action, appealed from the trial court's denial of his motion to set aside the judgment because he was a minor unrepresented by a guardian ad litem. The court of appeal held that if the minor becomes of age during the pendency of the proceedings and continues to participate therein, through counsel, his subsequent disaffirmance will not be given effect. The court then held that the actions of the minor in participating in the trial and moving for a new trial after reaching majority barred him from disaffirming the judgment. The court pointed out that the minor who reaches majority during the pendency of a case against him should not be able to speculate on the outcome and then have the judgment vacated if it is against him.

[4] Additional Authorities

[a] Participation in Trial After Majority as Sufficient Action

Carver v. Donin (1934) 139 Cal. App 395, 33 P.2d 841 , was a personal injury action in which one of the defendants was a minor and was not represented by a guardian ad litem. The minor reached majority three days after the trial and before the judgment was entered and filed. After majority, her attorneys submitted points and authorities on her behalf in support of a motion for new trial. After the judgment was entered, a motion was made to set aside the judgment, which motion was denied. On appeal, the court of appeal held that the participation of the minor in the proceeding after her majority and the fact that she reached majority before the judgment was entered barred her from disaffirming the judgment.

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10-106 California Points & Authorities § 106.35

§ 106.35 Opposing Motion to Vacate Judgment Against Incompetent on Ground He or She Was Not Represented by Guardian Ad Litem [Code Civ. Proc. § 372(a)]--Third Party Acted in Good Faith Reliance on Validity of Judgment

[1] FORM

[*Caption. See § 106.33.*]

A JUDGMENT AGAINST AN INCOMPETENT WHO WAS NOT REPRESENTED BY A GUARDIAN AD LITEM SHOULD NOT BE VACATED AS AGAINST A THIRD PARTY WHO ACTED IN GOOD FAITH RELIANCE ON THE JUDGMENT.

A. Judgment Voidable. A judgment rendered against an incompetent person who is not represented by a conservator or guardian ad litem is irregular but not void (*Dunn v. Dunn (1896) 114 Cal. 210, 212, 46 P. 5*).

B. Innocent Purchaser Protected. A judgment obtained against an incompetent person for whom no guardian or guardian ad litem was appointed should not be vacated as against a third party who acted in good faith reliance on the judgment (*Dunn v. Dunn (1896) 114 Cal. 210, 211-212, 46 P. 5*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted by a third party in opposition to a motion to vacate the judgment against an incompetent person who was not represented by a conservator or guardian ad litem on the ground thatthe third party relied in good faith on the judgment.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. If necessary, counsel should attach affidavits or declarations which oppose the motion.

This form can be used in appropriate situations to oppose the memorandum supporting the petition in § 106.26.

[3] Discussion of Authorities

[a] Judgment Voidable

Dunn v. Dunn *(1896) 114 Cal. 210, 46 P. 5* , was an action to annul a mortgage and a judgment of foreclosure. It was brought by the heirs of a person who, when she was incompetent, had mortgaged property. While she was still incompetent, the mortgagor brought an action for judicial foreclosure and obtained a decree of foreclosure, without the appointment of a guardian ad litem. The defendant purchased the property from the purchaser at the foreclosure sale for valuable consideration, in good faith, and without knowledge that the former owner was incompetent when the decree of foreclosure was entered. The trial court entered judgment for the defendant and the Supreme Court affirmed. It held that the decree obtained against the incompetent was irregular and not void. It could have been vacated in a direct proceeding if no innocent purchaser had acquired rights under it, but its validity as to such an innocent purchaser cannot be raised by collateral attack because the judgment was regular on its face and the purchaser had no knowledge of the facts which made it irregular.

[b] Innocent Purchaser Protected

Dunn v. Dunn *(1896) 114 Cal. 210, 46 P. 5* , is discussed in *§ 106.35[3][a]*.

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10-106 California Points & Authorities § 106.36

§ 106.36 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10]--Against Guardian for Money Not Accounted for by Guardian--Final Account Is Not Bar to Further Action When Guardian Accidentally or Fraudulently Concealed Assets on Account

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Defendant.	)	IES IN OPPOSITION TO DEMURRER TO COM-
	)	PLAINT
	)	

_____

A FINAL ACCOUNTING IS NOT A BAR TO A FURTHER ACTION BY A WARD AGAINST A GUARDIAN WHERE THE GUARDIAN HAS ACCIDENTALLY OR FRAUDULENTLY CONCEALED ASSETS.

A. Final Account Not Bar. A final account is not a bar to a further action against a guardian as to property that a guardian accidentally or fraudulently withheld from the account and upon which the account did not pass (*Lataillade v. Orena (1891) 91 Cal. 565, 576-577, 27 P. 924*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a general demurrer to a complaint when the demurrer asserts that the complaint shows on its face that the action is barred by a prior final account between the guardian and the ward, but the complaint alleges facts showing that the guardian fraudulently or accidentally concealed property from the account.

Counsel should insert argument in this form showing the relationship betweenthe facts of the case and the points of law stated.

This form can be used in appropriate situations to oppose the memorandum supporting the demurrer in § 106.28.

[3] Discussion of Authorities

[a] Final Account Not Bar

In ***Lataillade v. Orena*** *(1891) 91 Cal. 565, 27 P. 924* , a former ward brought an action against his former guardian for an accounting after a final accounting in the guardianship proceeding. The defendant demurred to the complaint, the demurrer was sustained, and plaintiff appealed. One ground for the demurrer was that the final account in the guardianship matter was conclusive and barred the action. The Supreme Court held that such a final account was not a bar to the action when the complaint alleged that the interest of the ward in the assets was fraudulently concealed and was not included in the inventory or final account. Another ground for the demurrer was that the action was barred by the statute of limitations. The Supreme Court held that the action was based on fraud and, therefore, could be brought within three years of the discovery of the fraud and that the complaint adequately alleged that there was nothing to put the former ward on notice of the fraud before he actually discovered it, which was within three years of the commencement of the action. Based on these holdings, the Supreme Court reversed and held that the demurrer should have been overruled.

[4] Additional Authorities

[a] Final Account Not Bar

In *Conservatorship of Coffey (1986) 186 Cal. App. 3d 1431, 231 Cal. Rptr. 351* , the court of appeal affirmed a judgment in favor of a life insurance beneficiary surcharging a former conservator for loss of insurance policy benefits and interest [*see Prob. Code § 2625*]. The conservator failed to pay the conservatee's life insurance policy premiums on time, and the policy lapsed. Later, the conservator obtained an order settling his first and final accounting and discharging him as conservator. The court of appeal held that the conservator's failure to inform the probate court of the policy lapse constituted an omission of material fact within the meaning of *Prob. Code § 2103(b)*, and effectively negated the finality and releasing provisions of *Prob. Code § 2103(a)*, regarding the particular transaction that was the subject of the omission (*186 Cal. App. 3d 1431, 1436-1437)* . A guardian or conservator is not entitled to assert a res judicata bar to transactions that were not fully disclosed to the court (*186 Cal. App. 3d 1431, 1437)* .

In *Richardson v. Royal Indem. Co. (1943) 21 Cal. 2d 557, 134 P.2d 1* , the facts of which are discussed in *§ 106.29[3][a]* the court stated in dicta that equity will afford relief against a guardian who has fraudulently prevented a full disclosure of all the assets of the estate, and a decree of the probate court settling such a fraudulent account is not a bar to equitable relief.

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10-106 California Points & Authorities § 106.37

§ 106.37 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10]--Against Guardian for Money Not Accounted for by Guardian--Intermediate Account Not Bar to Further Action

[1] FORM

[*Caption. See § 106.36.*]

AN INTERMEDIATE ACCOUNT IS NOT A BAR TO A FURTHER ACTION BY A WARD AGAINST THE GUARDIAN BASED ON MATTERS SETTLED IN THE INTERMEDIATE ACCOUNT.

Intermediate Account Not Bar. An intermediate account is not a bar to a further action against the guardian by the ward based on matters settled in the intermediate account (*Guardianship of Di Carlo (1935) 3 Cal. 2d 225, 234-235, 44 P.2d 562* ; *Guardianship of Vucinich (1935) 3 Cal. 2d 235, 240, 44 P.2d 567*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a general demurrer to a complaint when

the demurrer asserts that the complaint shows on its face that the action is barred by a prior account between the guardian and ward but the complaint alleges that the account was an intermediate, not a final account.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

This form can be used in appropriate circumstances to oppose the memorandum supporting the demurrer in § 106.28.

[3] Discussion of Authorities

[a] Intermediate Account Not Bar

In ***Guardianship of Di Carlo*** *(1935) 3 Cal. 2d 225, 44 P.2d 562* , and ***Guardianship of Vucinich*** *(1935) 3 Cal. 2d 235, 44 P.2d 567* , the Supreme Court granted hearings to decide the question as to whether settlement of the annual or intermediate account of a guardian has the effect of a final judgment so that the items approved cannot be reexamined on a later or final account. In both cases the trial court had allowed the reexamination on the final account of matters settled at intermediate accounts, which ruling was upheld by the Court. The Court stated that such accounts are not conclusive against the ward and, therefore, may be reexamined.

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10-106 California Points & Authorities § 106.38

§ 106.38 Opposing Demurrer to Complaint--Against Surety on Bond of Guardian or Conservator--Statute of Limitations [Prob. Code § 2333] Does Not Begin to Run Until Guardian or Conservator Is Discharged or Removed or Order Surcharging Guardian or Conservator Becomes Final

[1] FORM

[*Caption. See § 106.36.*]

THE STATUTE OF LIMITATIONS HAS NOT RUN ON THE COMPLAINT AGAINST THE SURETY BECAUSE THE ACTION WAS BROUGHT WITHIN FOUR YEARS FROM THE _____ [*insert whichever of the following events occurred last:* DISCHARGE OR REMOVAL OF THE _____ (GUARDIAN or CONSERVATOR) *or* DATE THE ORDER SURCHARGING THE _____ (GUARDIAN or CONSERVATOR) BECAME FINAL].

A. Statute of Limitation Commences With Order of Removal or Order Surcharging Guardian. An action against sureties of a guardian or conservator is not barred until four years after a final order removing or discharging the guardian or four years from the date the order surcharging the guardian or conservator becomes final, whichever is later (*Prob. Code § 2333(b)*; *Estate of Mason (1990) 224 Cal. App. 3d 634, 639, 274 Cal. Rptr. 61*).

[*Optional*] **B. Statute of Limitations Extended for Judgments or Orders Obtained by Fraud, Conspiracy, or Misrepresentation.** Although a final judgment or order releases the sureties from claims of a ward or conservatee based on an act or omission authorized, approved, or confirmed in the judgment or order, this rule does not apply when the judgment or order is obtained by fraud, conspiracy, or misrepresentation (*Prob. Code § 2103(b)*). In those situations, an action may be maintained against the sureties on the bond if it commences within six years from the date the judgment under *Probate Code Section 2103*, or the later of the orders under *Probate Code Section 2333(b)* becomes final (*Prob. Code § 2333(c)*; *see Prob. Code § 2103(b)*).

[*Optional*] **C. Appeal of Removal Order Tolls Statute.** The statute of limitations contained in *Probate Code Section 2333(b)* is tolled during the period of an appeal by the ward or guardian from an order of the trial court removing the

guardian (*Burns v. Massachusetts etc. Ins. Co. (1944) 62 Cal. App. 2d 962, 966-972, 146 P.2d 24* ; *see Prob. Code § 1310(a)* (appeal stays operation and effect of judgment or order)).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a general demurrer to a complaint against a guardian's surety when the demurrer asserts that the complaint shows on its face that it is barred by the statute of limitations. These points and authorities may also be submitted in response to an objection by the surety to a ward's or conservatee's petition for an order surcharging the guardian or conservator and ordering payment from the bond.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

This form can also be used in appropriate situations to oppose the memorandum supporting the demurrer in § 106.30.

[3] Discussion of Authorities

[a] Statute of Limitations Commences With Order of Removal or Order Surcharging Guardian

In ***Estate of Mason*** *(1990) 224 Cal. App. 3d 634, 274 Cal. Rptr. 61* , a probate court ordered, in 1982, the distribution of guardianship property, but the guardian converted it to his own use and failed to seek a discharge. In 1988, his former ward successfully petitioned for surcharge and payment from his surety bond. The trial court held, over the surety's objection to the petition, that *Prob. Code § 2333* was the applicable statute of limitations under the facts. The court further held that the statute begins to run on discharge or removal of the guardian or on the date an order surcharging the guardian becomes final, whichever is later. Since the guardian had never been discharged or surcharged, the limitations period had not begun to run. The surety appealed, arguing that *Code Civ. Proc. § 337*, which is applicable generally to actions based on written contracts, was the applicablelimitations period under these facts and that its four-year limitation period had expired (*224 Cal. App. 3d 634, 636-637)* .

The court of appeal affirmed the order of the trial court. The court of appeal reasoned that under settled rules of statutory construction, the specific provisions of *Prob. Code § 2333*, rather than the general provisions of Civ. Code § 337, were controlling (*224 Cal. App. 3d 634, 638)* . Therefore, because *Prob. Code § 2333* did not begin to run until the guardian was discharged or surcharged, the ward's petition for a surcharge order was timely (*224 Cal. App. 3d 634, 639)* .

[b] Appeal of Removal Order Tolls Statute

In ***Burns v. Massachusetts etc. Ins. Co.*** *(1944) 62 Cal. App. 2d 962, 146 P.2d 24* , a surety was adjudged liable to the

ward. On appeal, the surety claimed that the action was barred by the statute of limitations. The order terminating the guardianship had been made more than three years before the commencement of the action. After that order, the ward objected to the guardian's accounts which objections were tried and appealed. On appeal the ward prevailed and the guardian was adjudged to be liable to the ward. However, this appeal was not finished until more than three years had passed since the order of discharge which commenced the running of the statute of limitations, and until the appeal was decided, the ward could not commence the action because the judgment of the guardian's liability was a prerequisite to the action against the surety. The court of appeal sustained the trial court and held that the statute of limitations was tolled during the period of appeal from the accounting and, therefore, that the action against the surety was timely commenced (*224 Cal. App. 3d 634)* .

[4] Additional Authorities

[a] Statute of Limitations Commences With Order of Removal or Order Surcharging Guardian

In *Cook v. Ceas (1904) 143 Cal. 221, 77 P. 65* , the Supreme Court reversed the trial court's judgment sustaining a demurrer to a complaint against a surety on the ground that the former three-year statute of limitations had run. The trial court had reasoned that the statute began to run when the ward reached majority and the guardian's authority ceased. The Supreme Court held that language in the statute stating that the limitations period commenced running on the discharge or removal of the guardian meant that the limitations period began to run on the issuance of a court order removing or discharging the guardian, rather than on the termination of the guardian's authority when the ward reaches majority. Because three years had not run since the court order of removal, the demurrer should have been overruled (*143 Cal. 221, 228-230*).

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
CHAPTER 110 HABEAS CORPUS

11-110 California Points & Authorities 110.syn

§ 110.syn Synopsis to Chapter 110: HABEAS CORPUS

§ 110.01 Scope of Chapter

§ 110.02 Governing Statutes

§ 110.03 Civil and Criminal Uses of the Writ

§ 110.04 Outline of Pleadings in Habeas Corpus Proceedings

§ 110.05 Memorandum Not Expressly Required

§ 110.06 Use of Chapter

§ 110.07 Related Pleading and Practice Chapters

§ 110.08 Related Points and Authorities Chapters

§§ 110.09-110.19 [Reserved]

§ 110.20 Caption for Memorandum in Support of Petition for Writ of Habeas Corpus or in Support of Return to Writ of Habeas Corpus--Superior Court

[1] FORM

[2] Comments

[a] Use of Form

[b] Appellate Courts

[c] Related Pleading and Practice Forms

§ 110.21 Supporting Petition for Writ of Habeas Corpus [Penal Code § 1474]--Availability of Writ--General Authority [Penal Code § 1473]

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

§ 110.22 Supporting Petition for Writ of Habeas Corpus [Penal Code § 1474]--Availability of Writ--Constructive Restraint or Reasonable Apprehension of Restraint

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[3] Discussion of Authorities

[a] Constraint by Reasonable Apprehension of Force

§ 110.23 Supporting Petition for Writ of Habeas Corpus [Penal Code § 1474]--Availability of Writ--Person Lawfully in Custody but Unlawfully Restrained

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Unlawful Restraint Within Lawful Custody

[b] Communication With Counsel

[c] Denial of Privileges Within Hospital

[4] Additional Authorities

[a] Unlawful Restraint Within Lawful Custody

§ 110.24 Supporting Petition for Writ of Habeas Corpus [Penal Code § 1474]--Availability of Writ--Person Committed to State Facility [Welf. & Inst. Code § 7250]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Person Committed Is Entitled to Writ

§ 110.25 Supporting Petition for Writ of Habeas Corpus [Penal Code § 1474]--Availability of Writ--Person Certified for Intensive Treatment as a Mental Patient [Welf. & Inst. Code § 5275]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Articles

[3] Discussion of Authorities

[a] Person Committed Is Entitled to Writ

§ 110.26 Welf. & Inst. Code § 4800Supporting Petition for Writ of Habeas Corpus [Penal Code § 1474]--Availability of Writ--Adult Admitted or Committed to a Facility as a Mental Patient []

[1] FORM

[2] Comments

[a] Use of Form

§ 110.27 Supporting Petition for Writ of Habeas Corpus [Penal Code § 1474]--Civil Commitment--Unconstitutionality of Civil Commitment Procedures

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Constitutionality of Civil Detention

[b] Due Process Right in Civil Detention

[c] Due Process in Civil Commitment Procedures

§ 110.28 Supporting Petition for Writ of Habeas Corpus [Penal Code § 1474]--Civil Commitment--Failure to Follow Statutory Procedures

[1] FORM

[2] Comments

[a] Use of form

[i] Related Uses

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Strict Compliance With Statutory Prerequisites

[b] Commitment As Mentally Disordered

[c] Commitment As Narcotic Addict Not Charged With Crime

[d] Commitment As Narcotic Addict Convicted of Crime

[e] Commitment of Mentally Disordered Juvenile Court Ward

§ 110.29 Supporting Petition for Writ of Habeas Corpus [Penal Code § 1474]--Civil Commitment--Commitment to Mental Hospital as Required to Have Reasonable Relationship to Purpose of Commitment

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Validity of Commitment

[b] Habeas Corpus Available

[c] Failure of Committed Person to Receive Treatment

[4] Additional Authorities

[a] Failure of Committed Person to Receive Treatment

§ 110.30 Supporting Petition for Writ of Habeas Corpus [Penal Code § 1474]--Civil Commitment--Person Committed to Mental Facility as Entitled to Writ to Test Recovery

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Recovery of Committed Person

[b] Person Incompetent to Stand Trial

§ 110.31 Supporting Petition for Writ of Habeas Corpus [Penal Code § 1474]--Civil Commitment--Challenge to Commitment or Continued Confinement as Mentally Disordered Sex Offender

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[3] Discussion of Authorities

[a] Challenge to Commitment or Continued Confinement as Mentally Disordered Sex Offender

[b] Failure to Follow Statutory Procedures

[c] Violation of Due Process

§ 110.32 Supporting Petition for Writ of Habeas Corpus [Penal Code § 1474]--Civil Commitment--Person Committed to Mental Facility as Entitled to Be Present at Commitment Hearing

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Right to Be Present at Commitment Hearing

§ 110.33 Supporting Petition for Writ of Habeas Corpus [Penal Code § 1474]--Trial Court Lacked Jurisdiction to Impose the Order or Judgment Confining Petitioner

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[3] Discussion of Authorities

[a] Habeas Corpus Where Court Lacked Jurisdiction

[b] Broad Meaning of Jurisdiction on Habeas Corpus

[4] Additional Authorities

[a] Habeas Corpus Where Court Lacked Jurisdiction

§ 110.34 Supporting Petition for Writ of Habeas Corpus [Penal Code § 1474]--Child Custody--Petitioner Entitled to Custody by Previous Order of Court

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Articles

[3] Discussion of Authorities

[a] Enforcement of Custody of Minor Child

[b] Enforcement of Previous Custody Order

[4] Additional Authorities

[a] Enforcement of Previous Custody Order

§ 110.35 Supporting Petition for Writ of Habeas Corpus [Penal Code § 1474]--Child Custody--Petitioner Entitled to Custody by Previous Order of Out-of-State Court

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[b] Related Pleading and Practice Articles

[3] Discussion of Authorities

[a] Sufficient Allegation of Unlawful Restraint

[b] Enforcement of Out-of-State Custody Order

[c] Prima Facie Right of Nonresident to Custody

[d] Resolution of Controversy by Out-of-State Court

[e] Out-of-State Decree Valid on Its Face

[4] Additional Authorities

[a] Enforcement of Out-of-State Custody Order

§ 110.36 Supporting Petition for Writ of Habeas Corpus [Penal Code § 1474]--Child Custody--Nonresident Entitled to Custody Pursuant to Out-of-State Decree--Applicable Law

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Standards and Procedures

§ 110.37 Supporting Petition for Writ of Habeas Corpus [Penal Code § 1474]--Child Custody--Determining Right to Custody--No Previous Court Order

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Determination of Custody of Child

[b] Full Hearing on Custody

[c] Statute Governing Proper Custody

[4] Additional Authorities

[a] Statute Governing Proper Custody

§ 110.38 Supporting Petition for Writ of Habeas Corpus [Penal Code § 1474]--Child Custody--Petitioner Entitled to Custody Despite Previous Order of Court

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Previous Custody Order Was Made Without Jurisdiction

§ 110.39 Supporting Petition for Writ of Habeas Corpus [Penal Code § 1474]--Jurisdiction--Original Proceeding in Superior Court

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Superior Court Jurisdiction Equal to Appellate Court Jurisdiction

[b] Factual Questions Require Application First in the Superior Court

§ 110.40 Supporting Petition for Writ of Habeas Corpus [Penal Code § 1474]--Jurisdiction--No Territorial Restriction on Jurisdiction of Superior Courts or Courts of Appeal

[1] FORM

[2] Comments

[a] Use of Form

[i] Special Habeas Corpus Proceedings

[3] Discussion of Authorities

[a] Absence of Territorial Limitation on Habeas Corpus Jurisdiction of Courts of Appeal

[b] Absence of Territorial Limitation on Habeas Corpus Jurisdiction of Superior Courts

[c] Petition Resolved Where Filed Absent Substantial Reason for Transfer

§ 110.41 Supporting Petition for Writ of Habeas Corpus [Penal Code § 1474]--Disposition of Case--Court's Power to Grant Relief Requested

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[3] Discussion of Authorities

[a] Court's Power to Grant Relief

§ 110.42 Supporting Petition for Writ of Habeas Corpus [Penal Code § 1474]--Disposition of Case--Authority for Discharge From Custody [Penal Code § 1487(1)-(6)]

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

§ 110.43 Supporting Petition for Writ of Habeas Corpus [Penal Code § 1474]--Review--Application to Court of Appeal After Denial by Superior Court

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Denial of Writ by Superior Court as Nonappealable

[b] Relief by New Proceeding in Court of Appeal

[4] Additional Authorities

[a] Denial of Writ by Superior Court as Nonappealable

§ 110.44 Supporting Petition for Writ of Habeas Corpus [Penal Code § 1974]--Review of Superior Court Determinations--Child Custody--Application to Higher Court After Denial of Writ by Lower Court

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[3] Discussion of Authorities

[a] Limited Res Judicata Effect of Denial of Writ

[b] Questions of Law Properly Raised With Appellate Court

[c] Substantial Evidence for Trial Court's Findings of Fact

[4] Additional Authorities

[a] Questions of Law Properly Raised With Appellate Court

[b] Substantial Evidence for Trial Court's Findings of Fact

§ 110.45 Supporting Return [Penal Code § 1480]--Petition for Writ Must Be Verified [Penal Code § 1474(3)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Unverified Petition May Be Rejected

§ 110.46 Supporting Return [Penal Code § 1480]--Petitioner Not Restrained

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Writ Not Available Where No Restraint

§ 110.47 Supporting Return [Penal Code § 1480]--Habeas Corpus Not Available to Legal Entities

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Writ of Habeas Corpus Not Available to Legal Entities

§ 110.48 Supporting Return [Penal Code § 1480]--Failure to Exhaust Administrative Remedies

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Exhaustion of Administrative Remedies Required

[b] Jurisdictional Requirement of Exhaustion of Administrative Remedies

§ 110.49 Supporting Return [Penal Code § 1480]--Application to Appellate Court Before Application to Superior Court

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Discretion to Refuse to Issue Writ

[b] Factual Questions Require Application First in Superior Court

§ 110.50 Supporting Return [Penal Code § 1480]--Child Custody--Respondent Entitled to Temporary Custody Despite Existing Out-of-State Decree

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Health and Safety of Child Jeopardized

§ 110.51 Supporting Return [Penal Code § 1480]--Child Custody--Proceedings in Appellate Court--Relitigation of Factual Issues Decided on Hearing in Superior Court

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Attempt to Relitigate Factual Issues Decided by Superior court

§ 110.52 Supporting Return [Penal Code § 1480]--Transfer of Proceeding

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Transfer

[b] Substantial Reason for Transfer

[c] Necessity for Evidentiary Hearing as Substantial Reason for Transfer

[d] Transfer to Judgment Court Where Judgment Challenged

[e] Transfer to Jurisdiction of Confinement Where Conditions of Confinement Challenged

§ 110.53 Supporting Traverse to Return [Penal Code § 1484]--Exception to Sufficiency of Return

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Exception to Sufficiency Similar to Demurrer

[b] Return Shows Right to Relief

[c] Return Must Allege Facts Showing Legality of Confinement

[4] Additional Authorities

[a] Exception to Sufficiency Similar to Demurrer

§ 110.54 Supporting Traverse to Return [Penal Code § 1484]--Habeas Corpus Appropriate Although Petitioner Released From Custody--Issue of Broad Public Interest Likely to Recur

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[3] Discussion of Authorities

[a] Habeas Corpus as Proper to Resolve Issue of Public Interest

§ 110.55 Supporting Traverse to Return [Penal Code § 1484]--Child Custody--Petitioner Entitled to Custody Pursuant to Out-of-State Custody Decree--Insufficient Allegation in Return to Writ

[1] FORM

[2] Comments

[a] Use of Form

[b] Insufficient Allegation in Return

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11-110 California Points & Authorities § 110.01

§ 110.01 Scope of Chapter

This chapter contains points and authorities for use in memoranda submitted in support of the petition for the writ of habeas corpus [*see §§ 110.21 -110.44*], in support of the return to the writ or to the order to show cause [*see §§ 110.45 -110.52*], and in support of the traverse to the return [*see §§ 110.53 -110.55*]. It also contains a form of caption for use with these memoranda [*see § 110.20*]. The chapter is limited to a discussion and memoranda filed in proceedings on the writ of habeas corpus involving civil matters such as child custody and civil commitment; it does not discuss or contain memoranda for use in proceedings involving criminal defendants and the review of criminal decisions.

For discussion and forms concerning habeas corpus proceedings involving criminal defendants and the review of criminal decisions, see California Criminal Defense Practice, Ch. 102 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCriminal Law & ProcedureHabeas CorpusCognizable IssuesDue ProcessCriminal Law & ProcedureHabeas CorpusProcedureFiling of PetitionJurisdictionFamily LawChild CustodyEnforcementHabeas Corpus Relief

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11-110 California Points & Authorities § 110.02

§ 110.02 Governing Statutes

The writ of habeas corpus generally is governed by *Penal Code §§ 1473-1508*. Certain acts in disobedience of the writ are misdemeanors under *Penal Code §§ 362-364*. Use of the writ by persons certified for involuntary intensive treatment in mental hospitals is governed by *Welf. & Inst. Code §§ 5275-5277*, and use of the writ by persons committed to institutions as developmentally disabled (mentally retarded) persons is governed by Health & Safety Code §§ 38450-38454. General procedural rules governing habeas corpus proceedings in superior courts are set forth in *Cal. Rules of Ct., Rules 4.550-4.552*. General requirements for habeas corpus proceedings in reviewing courts are set forth in *Cal. Rules of Ct., Rule 8.380*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCriminal Law & ProcedureHabeas CorpusCognizable IssuesDue ProcessCriminal Law & ProcedureHabeas CorpusProcedureCourt RulesCriminal Law & ProcedureHabeas CorpusProcedureFiling of PetitionJurisdiction

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11-110 California Points & Authorities § 110.03

§ 110.03 Civil and Criminal Uses of the Writ

Although the uses of the writ of habeas corpus can be generally divided into those which test the validity of criminal procedure or detention and those which test the validity of civil custody or detention, the procedures to be followed in both types of cases are those set forth in *Penal Code §§ 1473-1508*. Even a habeas corpus decision which deals with criminal procedure or criminal detention will, therefore, be applicable to a case involving a civil use of the writ as long as the decision deals with the procedures to be followed in habeas corpus matters or with the general availability of the writ. Some decisions dealing with criminal cases are inapplicable to civil uses of the writ, however, because they involve the validity of the rules of criminal procedure or the special limitations on collateral attack of criminal judgments.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCriminal Law & ProcedureHabeas CorpusCognizable IssuesDue ProcessCriminal Law & ProcedureHabeas CorpusProcedureCourt RulesCriminal Law & ProcedureHabeas CorpusProcedureFiling of PetitionJurisdiction

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11-110 California Points & Authorities § 110.04

§ 110.04 Outline of Pleadings in Habeas Corpus Proceedings

A complete discussion of habeas corpus procedure is set out in Ch. 292, *Habeas Corpus* in California Forms of Pleading and Practice(Matthew Bender). An outline of the basic pleadings used in such proceedings is set forth below as an aid in the use of this chapter:

1. Petition for writ of habeas corpus is filed by petitioner or by some person in his or her behalf [*see Penal Code § 1474*]. The function of the petition is to obtain issuance of the writ [*In re Egan (1944) 24 Cal. 2d 323, 330, 149 P.2d 693 , cert. denied, 323 U.S. 785, 65 S. Ct. 272, 89 L. Ed. 626]* .

2. The writ is issued or denied [*see Penal Code § 1476*] ex parte in chambers [*see Code Civ. Proc. §§ 165, 166(a)(1)*], or an order to show cause why the writ should not issue is granted [*see In re Hochberg (1970) 2 Cal. 3d 870, 874 n.2, 87 Cal. Rptr. 681, 471 P.2d 1]* . If the petition is filed in superior court, the court also has the option of requesting an informal response [*Cal. Rules of Ct., Rule 4.551(a)(3)(A), (4)*]. Generally, if the court fails to rule on the petition (by issuing an order to show cause, denying the writ, or requesting an informal response) within 60 days of its filing, the petitioner may file a notice and request for a ruling [*Cal. Rules of Ct., Rule 4.551(a)(3)(B), (4)*; *see Cal. Rules of Ct., Rule 4.550(b)(2)* (order to show cause may be referred to as "granting the writ")]. If the court has requested an informal response, the court must issue an order to show cause or deny the petition within 45 days after receipt of the informal response [*Cal. Rules of Ct., Rule 4.551(a)(5)*].

3. The respondent makes a return to the writ [*see Penal Code § 1480*] or to the order to show cause [*Cal. Rules of Ct., Rule 4.551(d)*; *see In re Hochberg (1970) 2 Cal. 3d 870, 874 n.2, 87 Cal. Rptr. 681, 471 P.2d 1]* . The return is analogous to the complaint in a civil proceeding [*In re Saunders (1970) 2 Cal. 3d 1033, 1047, 88 Cal. Rptr. 633, 472 P.2d 921]* . In superior court, any material allegation of the petition that is not controverted by the return is deemed admitted for purposes of the habeas corpus proceeding [*Cal. Rules of Ct., Rule 4.551(d)*].

4. Petitioner files a traverse to the return, which may deny or controvert any of the material facts or matters set forth in the return, except to the sufficiency of the return, or allege any fact to show either that

> the imprisonment or detention is unlawful or that the person detained is entitled to discharge [*see Penal Code § 1484*; *Cal. Rules of Ct., Rule 4.551(e)*]. The traverse is analogous to the answer in a civil proceeding. The petition may also be treated as a traverse either by stipulation or by acquiescence [*In re Saunders (1970) 2 Cal. 3d 1033, 1047, 88 Cal. Rptr. 633, 472 P.2d 921]* . When the petitioner excepts to the sufficiency of thereturn, questions of law are raised in a procedure analogous to a demurrer [*In re Saunders (1970) 2 Cal. 3d 1033, 1048, 88 Cal. Rptr. 633, 472 P.2d 921]* .

If an order to show cause has been issued by a superior court, the traverse (also called the "denial" in the California Rules of Court) must be served on the respondent and filed with the court within 30 days after service and filing of the return [*Cal. Rules of Ct., Rule 4.551(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCriminal Law & ProcedureHabeas CorpusProcedureFiling of PetitionJurisdictionCriminal Law & ProcedureHabeas CorpusProcedureFiling of PetitionPleadings

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11-110 California Points & Authorities § 110.05

§ 110.05 Memorandum Not Expressly Required

Neither the Code of Civil Procedure nor the California Rules of Court require that a memorandum be filed in support of a petition for writ of habeas corpus, in support of a return, or in support of a traverse in the superior court or in an appellate court. Moreover, if filed by a petitioner who is not represented by an attorney, a petition for a writ of habeas corpus is specifically exempted from the general requirement that memoranda accompany petitions to reviewing courts for writs within the original jurisdiction of those courts [*Cal. Rules of Ct., Rule 8.380(b)*]. Even if the petition is filed by an attorney for the petitioner, there is no specific requirement that a memorandum of points and authorities be filed [*see Cal. Rules of Ct., Rule 8.384*]. Nevertheless, the better practice, when time and circumstances allow, is to file a memorandum with the petition, the return, or the traverse, as the case may be, supporting the client's contention as to the availability of relief by writ of habeas corpus and as to the proper disposition of the case. Any memorandum an attorney submits with the petition must comply with *Cal. Rules of Ct., Rule 8.204(a)* and *(b)* (specifying contents and form of briefs), and any supporting documents submitted by the attorney must comply with *Cal. Rules of Ct., Rule 8.486(c)* (specifying form of supporting documents) [*Cal. Rules of Ct., Rule 8.384(a)(2), (b)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCriminal Law & ProcedureHabeas CorpusProcedureFiling of PetitionJurisdiction

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11-110 California Points & Authorities § 110.06

§ 110.06 Use of Chapter

No form in this chapter is intended to constitute a complete memorandum of in support of a pleading in a habeas corpus proceeding. Counsel should select the appropriate points and authorities from among those contained in this chapter to support the client's contention as to the availability of relief by habeas corpus and as to the propriety of the relief sought or opposed, and should thus construct a memorandum for use in supporting the petition, return, or traverse, as the case may be. The memorandum submitted with the petition for the writ should support the availability of the writ both generally and in the particular circumstances of the petitioner's case; should support the availability of the type of relief requested by petitioner; and should support the propriety of the court's granting the relief requested under the circumstances of the case. As a practical matter, the petition should be supported by a memorandum which is as completely supportive of all of petitioner's contentions as is possible, because the court may consider whether to grant or deny petitioner's application ex parte in chambers [*see Code Civ. Proc. §§ 165, 166(1)*], and because the petition and supporting documents may later by stipulation be used as the answer, or traverse, to respondent's return to the writ and should, therefore, support those of petitioner's contentions which are challenged by respondent.

The return to the writ should also be supported by a memorandum that includes support for the maintenance of custody by respondent, which opposes the relief requested by petitioner, and, in an appropriate case, which challenges the availability of the writ, and, particularly where an order to show cause has been issued and the writ has not been issued ex parte, the sufficiency of the petition for the writ.

The traverse to the return should be supported by a memorandum that supports any contentions of the petitioner which were not raised in the petition and incorporated by reference in the traverse or used as a traverse by stipulation. The petitioner may also, in the traverse, except to the sufficiency of the return in a procedure analogous to a demurrer.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewContracts LawFormationCapacity of PartiesMental CapacityCriminal Law & ProcedureHabeas CorpusProcedureFiling of PetitionJurisdictionCriminal Law & ProcedureHabeas

CorpusProcedureFiling of PetitionPleadings

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11-110 California Points & Authorities § 110.07

§ 110.07 Related Pleading and Practice Chapters

For a discussion and forms of petitions, allegations, writs, returns, and traverses involving the writ of habeas corpus, see Ch. 292, *Habeas Corpus* in California Forms of Pleading and Practice (Matthew Bender).

For discussion and forms for use in particular cases involving the writ of habeas corpus, see in that publication the following chapters:

- Ch. 59, *Assemblies, Meetings, and Demonstrations*.
- Ch. 135, *Contempt*.
- Ch. 304, *Insane and Other Incompetent Persons*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewContracts LawFormationCapacity of PartiesMental CapacityCriminal Law & ProcedureHabeas CorpusProcedureFiling of PetitionJurisdictionCriminal Law & ProcedureHabeas CorpusProcedureFiling of PetitionPleadings

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11-110 California Points & Authorities § 110.08

§ 110.08 Related Points and Authorities Chapters

Related memoranda that may be useful in particular proceedings on the writ of habeas corpus may be found in the following chapters in this publication:

- Ch. 47, *Contempt*.
- Ch. 117, *Insane and Incompetent Persons: Actions Involving Mental Patients*.
- Ch. 118, *Insane and Incompetent Persons: Capacity to Contract*.
- Ch. 132, *Jurisdiction: Personal Jurisdiction and Inconvenient Forum*.
- Ch. 133, *Jurisdiction: Subject Matter Jurisdiction*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewContracts LawFormationCapacity of PartiesMental CapacityCriminal Law & ProcedureHabeas CorpusProcedureFiling of PetitionJurisdiction

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11-110 California Points & Authorities §§ 110.09-110.19

[Reserved]

§§ 110.09[Reserved]

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11-110 California Points & Authorities § 110.20

§ 110.20 Caption for Memorandum in Support of Petition for Writ of Habeas Corpus or in Support of Return to Writ of Habeas Corpus--Superior Court

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____ _____

In the Matter of the Application of _____ [*name*], Petitioner, [on behalf of _____ (*name*)], for a Writ of Habeas Corpus.	)))))))	NO. _____ MEMORANDUM _____ [IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS *or* IN SUPPORT OF RETURN TO WRIT OF HABEAS CORPUS *or* IN SUPPORT OF TRAVERSE]

_____

[2] Comments

[a] Use of Form

The foregoing caption is for use in filing a memorandum submitted in support of the petition for the writ of habeas corpus, in support of the return to the writ of habeas corpus, or in support of the traverse, where such a memorandum is filed as a separate document. Such a memorandum may also be attached to a petition for the writ of habeas corpus, to a return to the writ of habeas corpus, or to the traverse, under the brief caption "Memorandum in Support of Petition," or "Memorandum in Support of Return," or "Memorandum in Support of Traverse," where the petition, return, or traverse, itself is introduced by the appropriate caption, and indicates that the document also contains a memorandum in its support.

[b] Appellate Courts

Where the petition and other pleadings are to be filed with a court of appeal or with the Supreme Court, the memorandum should be filed as a part of the pleading, under the appropriate brief heading, and the inclusion of the memorandum with the pleading should be indicated in the heading on the cover and in thetitle of the pleading. For a caption for a petition with memorandum for writ of habeas corpus to be filed in the court of appeal or in the Supreme Court, see Ch. 292, *Habeas Corpus* in California Forms of Pleading and Practice.

[c] Related Pleading and Practice Forms

For a form of caption for a petition for writ of habeas corpus filed in the Superior Court, see Ch. 292, *Habeas Corpus* in California Forms of Pleading and Practice.

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11-110 California Points & Authorities § 110.21

§ 110.21 Supporting Petition for Writ of Habeas Corpus [Penal Code § 1474]--Availability of Writ--General Authority [Penal Code § 1473]

[1] FORM

[*Caption. See § 110.20.*]

EVERY PERSON UNLAWFULLY IMPRISONED OR RESTRAINED UNDER ANY PRETENSE WHATEVER MAY PROSECUTE A WRIT OF HABEAS CORPUS TO INQUIRE INTO THE CAUSE OF THE IMPRISONMENT OR RESTRAINT.

Availability of Writ. Every person unlawfully imprisoned or restrained of his/her liberty, under any pretense whatever, may prosecute a writ of habeas corpus to inquire into the cause of the imprisonment or restraint (*Penal Code § 1473(a)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing form is for use in a memorandum submitted in support of the petition for the writ of habeas corpus. The foregoing statute supports the issuance of the writ wherever a person is unlawfully imprisoned or restrained. It may be used wherever no more specific authority supports the use of the writ in the factual situation in which petitioner is attempting to obtain relief by use of the writ, or this statute may be used together with more specific authority supporting the issuance of the writ in the particular factual situation.

[i] Related Uses

With appropriate modifications the foregoing form may also be used in a memorandum submitted in support of the traverse to the return to the writ, where the return alleges that use of the writ is inappropriate in the circumstances in which petitioner is seeking relief.

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11-110 California Points & Authorities § 110.22

§ 110.22 Supporting Petition for Writ of Habeas Corpus [Penal Code § 1474]--Availability of Writ--Constructive Restraint or Reasonable Apprehension of Restraint

[1] FORM

[*Caption. See § 110.20.*]

A WRIT OF HABEAS CORPUS IS A PROPER REMEDY EVEN THOUGH PETITIONER IS NOT IN ACTUAL PHYSICAL DETENTION OR RESTRAINT IF PETITIONER IS CONSTRUCTIVELY RESTRAINED OR HAS REASONABLE APPREHENSION OF PHYSICAL RESTRAINT.

Constraint by Reasonable Apprehension of Force. To justify issuance of the writ of habeas corpus, constraint need not consist of actual physical force. Conduct inducing a reasonable apprehension of force may be sufficient to restrain one of his/her liberty (*In re Rider (1920) 50 Cal. App. 797, 802, 195 P. 965*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing points and authorities are for use in a memorandum of points and authorities submitted in support of a petition for the writ of habeas corpus when the petitioner is not subject to actual physical restraint or imprisonment but is subject to a reasonable apprehension of restraint by force.

Counsel should include argument with the foregoing points and authorities showing the relationship between the facts

of the case and the points of law stated.

[i] Related Uses

With appropriate modifications the foregoing points and authorities may be used in a memorandum of points and authorities submitted in support of the traverse to the return to the writ of habeas corpus where the return alleges the impropriety of issuance of the writ because petitioner is not subject to physical restraint.

[3] Discussion of Authorities

[a] Constraint by Reasonable Apprehension of Force

In re Rider *(1920) 50 Cal. App. 797, 195 P. 965* , was a habeas corpus proceeding in which petitioner, a ward of the juvenile court being held in a juvenile hall prior to her preliminary examination on a complaint charging her with a felony, sought a writ of habeas corpus to compel respondent, the superintendent of the juvenile hall, to permit her to consult with her attorney without the presence of respondent or any other person whose presence was objectionable to petitioner. The superior court denied the petition for the writ, and petitioner applied to the court of appeal for the writ.

In issuing the writ, the court of appeal first determined that the right of an accused confined in a jail or other place of detention to consult with counsel without any third person objectionable to the prisoner being present is one of the fundamental rights guaranteed by American criminal law and by the California Constitution [decided under *Cal. Const., art. I, § 1*; now *Cal. Const., art. I, § 10*]. Respondent had conceded this right to petitioner but had argued that the writ of habeas corpus was not the proper remedy, since it will lie only where the person on whose behalf the writ is sought is unlawfully imprisoned and is entitled to release from custody. The court found that the language in *Penal Code § 1473* allowing the writ to issue in all cases where the petitioner is unlawfully "restrained" of his or her liberty under any pretense whatever, in addition to those cases in which the petitioner is unlawfully "imprisoned," should be construed in favor of the citizen so as to entitle the petitioner to the writ of habeas corpus when, although in lawful custody, petitioner is deprived of some right to which, even in confinement, he or she is lawfully entitled under the constitution or laws of the United States or California.

The court of appeal further indicated that the right which is denied should be one the deprivation of which serves to make the imprisonment more onerous than the law allows or which curtails, to a greater extent than the law permits even in confinement, the person's freedom to go when and where he or she likes. The court reasoned that petitioner in this case was deprived of the privilege of going when and where she pleased by being denied a place to consult privately with counsel. The court also found that the fact that petitioner was not physically constrained was not determinative because constraint need not consist of actual physical force, but rather conduct inducing a reasonable apprehension of force. The court concluded that, by respondent's insistence on being within the presence of petitioner and her counsel under circumstances where, if petitioner were to object, she would be deprived of all opportunity to consult with counsel, petitioner was restrained of her liberty within the meaning of *Penal Code § 1473*, so that she had the right to inquire into the legality of that restraint on the writ of habeas corpus. The court ordered respondent to permit petitioner to consult privately with counsel.

California Points & Authorities

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
CHAPTER 110 HABEAS CORPUS
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11-110 California Points & Authorities § 110.23

§ 110.23 Supporting Petition for Writ of Habeas Corpus [Penal Code § 1474]--Availability of Writ--Person Lawfully in Custody but Unlawfully Restrained

[1] FORM

[*Caption. See § 110.20.*]

A PERSON LAWFULLY IN CUSTODY MAY USE THE WRIT OF HABEAS CORPUS FOR THE PURPOSE OF VINDICATING RIGHTS TO WHICH HE/SHE IS ENTITLED IN CONFINEMENT.

A. Availability of Writ. [*See § 110.21.*]

B. Unlawful Restraint Within Lawful Custody. The writ of habeas corpus may be sought by one lawfully in custody for the purpose of vindicating rights to which he/she is entitled even in confinement (*In re Allison (1967) 66 Cal. 2d 282, 285, 57 Cal. Rptr. 593, 425 P.2d 193*).

[*Optional*] **C. Communication with Counsel.** An incarcerated person has the right to consult privately with counsel at reasonable times and that right is enforceable by writ of habeas corpus (*In re Allison (1967) 66 Cal. 2d 282, 286-287, 57 Cal. Rptr. 593, 425 P.2d 193* ; *In re Rider (1920) 50 Cal. App. 797, 801-802, 195 P. 965*).

[*Optional*] **D. Denial of Privileges Within Hospital.** Even though confinement of a person within a hospital for mental disorder is legal, the writ of habeas corpus is available to challenge an allegedly improper condition of confinement which interferes with the treatment and chances of recovery of the confined person (*In re Cirino (1972) 28 Cal. App. 3d 1009, 1012, 105 Cal. Rptr. 194*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing points and authorities are for use in a memorandum of points and authorities submitted in support of the petition for a writ of habeas corpus when the petitioner is lawfully in custody but wishes to challenge the terms or conditions of confinement by habeas corpus proceedings.

Counsel should include argument with the foregoing points and authorities showing the relation between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Unlawful Restraint Within Lawful Custody

In re Allison *(1967) 66 Cal. 2d 282, 57 Cal. Rptr. 593, 425 P.2d 193* , was a proceeding for the writ of habeas corpus in which a prisoner in a state prison petitioned for the writ on the grounds that he had been denied the right to communicate with counsel and the opportunity to engage in legal research, and had been subjected to brutality by prison personnel. The original application appears to have been made to the court of appeal, although it does not appear from the record whether the petitioner first applied to the superior court and was refused relief in that court. The court of appeal issued an order to show cause why the writ of habeas corpus should not issue rather than issuing the writ itself (a procedure often followed by appellate courts [*see In re Hochberg (1970) 2 Cal. 3d 870, 874 n.2, 87 Cal. Rptr. 681, 471 P.2d 1]*). Although the court of appeal decided that petitioner was not, in fact, entitled under the law and facts of his particular case to the relief he had requested, the court found that the writ of habeas corpus may be sought by one lawfully in custody for the purpose of vindicating rights to which he or she is entitled even in custody.

[b] Communication With Counsel

The facts of ***In re Allison*** *(1967) 66 Cal. 2d 282, 57 Cal. Rptr. 593, 425 P.2d 193* , are *§ 110.23[3][a*]. In considering petitioner's application for relief by habeas corpus, the Supreme Court stated that a prisoner is entitled to consult privately with counsel at reasonable times and can enforce that right by writ of habeas corpus. The right, the Court noted, is available not only where an appeal or other legal action is pending, but wherever the prisoner seeks to communicate with counsel to interest counsel in whatever remedies the prisoner may have.

Although In re Allison, *above*, dealt with the right of a prisoner to counsel, the principle should be applicable to a person confined in a hospital or other facility.

In re Rider *(1920) 50 Cal. App. 797, 195 P. 965* , is discussed in *§ 110.22[3][a]*.

[c] Denial of Privileges Within Hospital

In re Cirino *(1972) 28 Cal. App. 3d 1009, 105 Cal. Rptr. 194* , was a proceeding on habeas corpus in which an inmate of a state mental hospital, committed as a person found not guilty by reason of insanity pursuant to *Penal Code § 1026*, petitioned the Supreme Court for a writ of habeas corpus to have unlawful conditions of confinement, denying him grounds privileges at the hospital, removed. A superior court judge in the county in which the hospital was located had ordered that petitioner be confined without grounds privileges after the hospital personnel had granted petitioner those privileges. Although the Court denied the relief requested, the Court found that the petitioner had shown that a basic right was denied although he was legally in confinement. Under those circumstances, the court found even if a person in legal confinement were required to show the denial of a basic or fundamental right to be entitled to enforce that right by habeas corpus, petitioner had shown the denial of such a right when he alleged that grounds privileges were necessary to his further recovery.

[4] Additional Authorities

[a] Unlawful Restraint Within Lawful Custody

In re Jordan (1972) 7 Cal. 3d 930, 103 Cal. Rptr. 849, 500 P.2d 873 , was a proceeding in which two inmates of a state prison sought by petition for writ of habeas corpus to challenge rules of the prison authorities forbidding confidential correspondence by an inmate with an attorney. The procedures followed in the case were not further discussed in the Supreme Court's opinion, but the Court held that inmates have a right to confidential correspondence with their attorneys unread and unopened by prison officials. In reaching this issue, the Court held that it is a well established rule that habeas corpus may be sought by one lawfully in custody for the purpose of vindicating rights to which he is entitled even in confinement (*7 Cal. 3d 930, 932)* .

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11-110 California Points & Authorities § 110.24

§ 110.24 Supporting Petition for Writ of Habeas Corpus [Penal Code § 1474]--Availability of Writ--Person Committed to State Facility [Welf. & Inst. Code § 7250]

[1] FORM

[*Caption. See § 110.20.*]

ANY PERSON WHO HAS BEEN COMMITTED IS ENTITLED TO A WRIT OF HABEAS CORPUS ON PROPER APPLICATION TO THE SUPERIOR COURT OF THE COUNTY IN WHICH THE HOSPITAL IS LOCATED.

Person Committed Is Entitled to Writ. Any person who has been committed to a state mental hospital is entitled to a writ of habeas corpus on a proper application made by the Department of Health, by the person, or by a relative or friend in behalf of the person, to the judge of the superior court of the county in which the hospital is located, in order to inquire into the commitment and to determine whether the person has recovered (*Welf. & Inst. Code § 7250*; *Cal. Const., art. I, § 11*; *In re De La O (1963) 59 Cal. 2d 128, 141-142*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities are for use in a memorandum of points and authorities submitted in support of the petition for a writ of habeas corpus when the petitioner has been committed to a state mental hospital and wishes to have the court inquire into the truth of the allegations under which he or she was committed.

The petition supported by these points and authorities is generally filed in the superior court of the county in which the hospital is located [*see Welf. & Inst. Code § 7250*]. However, if the person was found incompetent to stand trial and committed in accordance with *Penal Code Section 1367 et seq.*, judicial review must be in the superior court for the county that determined the question of the person's mental competence [*Welf. & Inst. Code § 7250*].

Counsel should include argument with this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Person Committed Is Entitled to Writ

The facts and procedure of ***In re De La O*** *(1963) 59 Cal. 2d 128* are discussed in *§ 110.30[3][a]*. In considering a habeas petition filed by a person committed to the California Rehabilitation Center as a drug addict convicted of a crime, the Supreme Court held that, even in the absence of a specific statutory remedy, *Cal. Const., art. I, § 5* [*now see Cal. Const., art. I, § 11*] entitles a committed person to judicial review by a writ of habeas corpus to inquire into the fact of the commitment, including review of an administrative decision that the person could not yet be discharged (*59 Cal. 2d 128, 141-142)* .

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11-110 California Points & Authorities § 110.25

§ 110.25 Supporting Petition for Writ of Habeas Corpus [Penal Code § 1474]--Availability of Writ--Person Certified for Intensive Treatment as a Mental Patient [Welf. & Inst. Code § 5275]

[1] FORM

[*Caption. See § 110.20.*]

EVERY PERSON DETAINED BY CERTIFICATION FOR INTENSIVE TREATMENT IN A MENTAL INSTITUTION HAS A RIGHT TO A HEARING BY WRIT OF HABEAS CORPUS FOR HIS/HER RELEASE AFTER MAKING A REQUEST FOR RELEASE.

Right of Person Certified to Hearing by Writ of Habeas Corpus. Every person detained involuntarily by certification for intensive treatment pursuant to the Lanterman-Petris-Short Act (*Welf. & Inst. Code § 5000 et seq.*) has a right to a hearing by writ of habeas corpus for his/her release after he/she or any person acting on his/her behalf has made a request for release (*Welf. & Inst. Code § 5275*; *Thorn v. Superior Court (1970) 1 Cal. 3d 666, 673, 83 Cal. Rptr. 600, 464 P.2d 56*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities are for use in a memorandum of points and authorities submitted in support of a petition for a writ of habeas corpus when petitioner is a person who has been certified for involuntary intensive treatment in a mental treatment facility and has requested release from detention as provided in *Welf. & Inst. Code § 5275*.

Counsel should include argument with this form showing the relationship between the facts of the case and the points of law stated.

Such review by writ of habeas corpus will be had in the superior court of the county in which the facility is located, unless the patient or a person acting in his or her behalf informs the professional staff of the 72-hour evaluation facility in writing that judicial review will be sought, in which case review will be in the superior court of the county in which the 72-hour evaluation facility is located [*Welf. & Inst. Code § 5276*].

[b] Related Pleading and Practice Articles

For discussion and procedural guide relating to review of certification for involuntary intensive treatment by writ of habeas corpus, see Ch. 304, *Insane and Other Incompetent Persons* in California Forms of Pleading and Practice.

[3] Discussion of Authorities

[a] Person Committed Is Entitled to Writ

In ***Thorn v. Superior Court*** *(1970) 1 Cal. 3d 666, 83 Cal. Rptr. 600, 464 P.2d 56* , the staff of a legal services organization obtained an order from the superior court appointing them as attorneys for all persons being detained in a county's facilities for the 14-day intensive treatment authorized by the Lanterman-Petris-Short Act [*Welf. & Inst. Code § 5000 et seq.*]. The order directed the hospitals to admit the attorneys so that patients could be apprised of their legal rights, including the right to a writ of habeas corpus if they wished to leave, or else the court would issue a writ of habeas to have all such persons being treated brought before the court. Two hospitals sought a writ of prohibition seeking to nullify the order.

The court of appeal affirmed, holding that the court's order was an acceptable procedure to assure that the patients' rights received meaningful protection (*1 Cal. 3d 666, 675-676)* . The court recognized that the right to seek release on habeas corpus not only accords with the intent of the Legislature in enacting *Welf. & Inst. Code § 5275* but also protects the patients' right to due process (*1 Cal. 3d 666, 673)* .

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11-110 California Points & Authorities § 110.26

§ 110.26 Welf. & Inst. Code § 4800Supporting Petition for Writ of Habeas Corpus [Penal Code § 1474]--Availability of Writ--Adult Admitted or Committed to a Facility as a Mental Patient []

[1] FORM

[*Caption. See § 110.20.*]

EVERY ADULT ADMITTED OR COMMITTED TO A STATE HOSPITAL OR OTHER FACILITY AS A DEVELOPMENTALLY DISABLED PATIENT HAS A RIGHT TO A HEARING BY WRIT OF HABEAS CORPUS FOR HIS/HER RELEASE AFTER HE/SHE OR ANY PERSON ACTING IN HIS/HER BEHALF MAKES A REQUEST FOR RELEASE.

Right of Developmentally Disabled Adult to Hearing by Writ of Habeas Corpus. Every adult who is or has been admitted or committed to a _____ [state hospital, or community care facility as defined in *Section 1504 of the Health and Safety Code, or* health facility as defined in *Section 1250 of the Health and Safety Code*] as a developmentally disabled patient has a right to a hearing by writ of habeas corpus for his/her release from the _____ [hospital, or community care facility, *or* health facility] after he/she or any person acting on his/her behalf makes a request for release (*Welf. & Inst. Code § 4800*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing authority is for use in a memorandum of points and authorities in support of a petition for the writ of

habeas corpus when the petitioner is an adult who has been admitted or committed to a state hospital or other facility as a developmentally disabled patient and wishes to seek release.

Counsel should include with the foregoing authority argument showing the relationship between the facts of the case and the point of law stated.

Judicial review on the writ of habeas corpus under *Welfare & Institutions Code § 4800* generally must be sought in the county in which the hospital or other facility is located [*Welf. & Inst. Code § 4801(a)*]. However, if the adult has been found incompetent to stand trial and has been committed under *Penal Code § 1367 et seq.* , judicial review must be in the superior court of the county that determined the question of the mental competence of the defendant [*Welf. & Inst. Code § 4801(a)*].

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11-110 California Points & Authorities § 110.27

§ 110.27 Supporting Petition for Writ of Habeas Corpus [Penal Code § 1474]--Civil Commitment--Unconstitutionality of Civil Commitment Procedures

[1] FORM

[*Caption. See § 110.20.*]

THE WRIT OF HABEAS CORPUS LIES TO TEST THE CONSTITUTIONALITY OF CIVIL PROCEDURES UNDER WHICH PETITIONER HAS BEEN IMPRISONED OR CONSTRUCTIVELY RESTRAINED.

A. Constitutionality of Civil Detention. Habeas corpus lies to test the constitutionality of civil legislation under which the petitioner was imprisoned or constructively restrained (*In re Harris (1968) 69 Cal. 2d 486, 487-488, 72 Cal. Rptr. 340, 446 P.2d 148*).

B. Due Process Right in Civil Detention. A person who is deprived of his/her liberty by civil process is as much entitled to due process of law as a defendant who is deprived of his/her liberty because he/she is charged with a crime (*In re Harris (1968) 69 Cal. 2d 486, 491, 72 Cal. Rptr. 340, 446 P.2d 148*).

[*Optional*] **C. Due Process in Civil Commitment Procedures.** The writ of habeas corpus will lie to test the constitutionality of legislation under which persons may be civilly committed to hospitals or other institutions for mental illness (*see In re Lambert (1901) 134 Cal. 626, 634-635*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing points and authorities are for use in a memorandum of points and authorities submitted in support of a petition for the writ of habeas corpus where the petitioner seeks to test the constitutionality of civil commitment procedures pursuant to which he or she was committed or confined.

Where appropriate, counsel should include argument with the foregoing points and authorities showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Constitutionality of Civil Detention

In re Harris *(1968) 69 Cal. 2d 486, 72 Cal. Rptr. 340, 446 P.2d 148* , was a proceeding on the writ of habeas corpus, in which a person who was a party to a civil action sought to challenge the constitutionality of the civil arrest procedures under which he had been arrested and detained. Petitioner contended, and the Supreme Court agreed, that the procedures did not provide due process of law. In reaching this holding, the Court noted that habeas corpus lies to test the constitutionality of the legislation under which the petitioner was imprisoned and was then constructively restrained on bail. After examining the procedures followed under the statutes, the Court concluded that due process had not been afforded petitioner and that a defendant who is deprived of liberty by civil process is as much entitled to due process of law as a defendant who is deprived of liberty because he or she is charged with a crime.

[b] Due Process Right in Civil Detention

In re Harris *(1968) 69 Cal. 2d 486, 72 Cal. Rptr. 340, 446 P.2d 148* , is discussed in *§ 110.27[3][a]*.

[c] Due Process in Civil Commitment Procedures

In re Lambert *(1901) 134 Cal. 626* , was a habeas corpus proceeding in which petitioner sought release from a civil commitment to a state hospital for the insane. The Supreme Court issued the writ on the petition, and the respondent in the return alleged the order of commitment by a superior court authorizing the commitment and that the petitioner was still insane and not entitled to release. The petitioner challenged the sufficiency of the return on the ground that the statutes authorizing the commitment under which the proceedings for his commitment were had, were unconstitutional, in that he had been deprived of due process of law, and that the proceedings were, therefore, beyond the jurisdiction of the superior court. The Court considered the constitutionality of the questioned statutes and found that they did deprive persons committed of due process, in that there was no provision for notice of the proceedings to the person to be committed and in that the entire proceeding could be conducted ex parte. The only hearing provided for could be had on request of the person committed only after placement in the hospital and only if the person provided for the payment of costs. The Court noted that a commitment could be had on the certificate of two medical examiners without any independent examination by the court. The opinion of doctors on the question of sanity, the Court noted, is not always uniform or infallible, especially if the opinion is formed ex parte or without an opportunity for full investigation of the charge. The Court further found that the order of commitment is not made by the superior court in the exercise of any judicial authority of the state which the constitution has vested in the superior court, but in the exercise of a merely statutory authority conferred on the court by the insanity and commitment laws. In the exercise of such statutory authority, the Court found, it is essential that the facts on which te court's right to exercise sch authority depend must be se forth in the document by which the person is to be deprived of liberty. In discharging petitioner from the hospital, the Court held that the insanity law in question, to the extent that it authorized the confinement of a person in an insane asylum without giving notice and an opportunity to be heard on the charge, was unconstitutional, and that the proceedings by which petitioner had been held were invalid.

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11-110 California Points & Authorities § 110.28

§ 110.28 Supporting Petition for Writ of Habeas Corpus [Penal Code § 1474]--Civil Commitment--Failure to Follow Statutory Procedures

[1] FORM

[*Caption. See § 110.20.*]

A PERSON COMMITTED IN A CIVIL COMMITMENT PROCEEDING MAY SECURE RELEASE ON THE WRIT OF HABEAS CORPUS WHERE THERE WAS NOT STRICT COMPLIANCE WITH EACH OF THE SPECIFIC STATUTORY PREREQUISITES FOR MAINTENANCE OF THE PROCEEDING AND SUBSTANTIAL COMPLIANCE WITH ALL OF THE STATUTORY REQUIREMENTS.

A. Strict Compliance with Statutory Prerequisites. Where a person is committed pursuant to a statutory civil commitment proceeding which is in the nature of a special civil proceeding unknown at common law, jurisdiction to enter an order of commitment depends on strict compliance with each of the statutory prerequisites for maintenance of the proceeding, and the requirements of the statute must be at least substantially, if not strictly, followed in order to give the court hearing the proceedings jurisdiction. The lack of jurisdiction entitles the petitioner to relief by writ of habeas corpus (*In re Raner (1963) 59 Cal. 2d 635, 639, 30 Cal. Rptr. 814, 381 P.2d 638*).

[*Optional*] **B. Commitment As Mentally Disordered.** The authority of the court in commitment of persons as mentally disordered is statutory and depends on at least substantial compliance with the statutory procedures (*In re Hofmann (1955) 131 Cal. App. 2d 758, 761-762, 281 P.2d 96*).

[*Optional*] **C. Commitment As Narcotic Addict Not Charged With Crime.** The commitment procedures for narcotic addicts not charged with a crime (*see Welf. & Inst. Code §§ 3100-3111*) are in the nature of special civil proceedings unknown to the common law and are a creature of statute, so that jurisdiction to enter an order of commitment pursuant to these procedures depends on strict compliance with each of the specific statutory prerequisites for maintenance of the proceeding (*In re Raner (1963) 59 Cal. 2d 635, 639, 30 Cal. Rptr. 814, 381 P.2d 638* (decided under former Penal Code §§ 6500-6510).

[*Optional*] **D. Commitment As Narcotic Addict Convicted of Crime.** The commitment procedures for narcotic

addicts who have been convicted of a crime (*see Welf. & Inst. Code §§ 3050-3054*) are in the nature of special civil procedures unknown to the common law and are a creature of statute, so that jurisdiction to enter an order of commitment pursuant to these procedures depends on strict compliance with each of the specific statutory prerequisites for maintenance of the proceeding (*In re Johnson (1963) 59 Cal. 2d 644, 645-646, 30 Cal. Rptr. 819, 381 P.2d 643*).

[*Optional*] **E. Commitment of Mentally Disordered Juvenile Court Wart.** The commitment of a minor ward of the juvenile court to a state hospital can be lawfully accomplished only in accordance with the Lanterman-Petris-Short Act (*Welf. & Inst. Code § 5000 et seq.*), and when the protections afforded by that act are not accorded to petitioner, the writ of habeas corpus will lie (*In re E. (1975) 15 Cal. 3d 183, 189, 193, 123 Cal. Rptr. 103, 538 P.2d 231*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of form

The foregoing points and authorities are for use in a memorandum of points and authorities submitted in support of a petition for writ of habeas corpus where petitioner seeks to challenge the validity of a commitment pursuant to a civil commitment procedure on the ground that the committing court has exceeded its jurisdiction in that the statutory prerequisites for maintenance of the proceeding have not been strictly followed and the statutory requirements have not been substantially complied with.

Where appropriate, counsel should include argument with the foregoing points and authorities showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

With appropriate modifications the foregoing points and authorities may be used in a memorandum of points and authorities submitted in support of the traverse to the return to the writ of habeas corpus where the return alleges that habeas corpus is an inappropriate remedy for invalid civil commitment proceedings or that strict compliance with statutory procedures is unnecessary.

[b] Related Pleading and Practice Forms

For a petition for the writ of habeas corpus to test the validity of a civil commitment, see Ch. 304, *Insane and Other Incompetent Persons* in California Forms of Pleading and Practice.

[3] Discussion of Authorities

[a] Strict Compliance With Statutory Prerequisites

In re Raner *(1963) 59 Cal. 2d 635, 30 Cal. Rptr. 814, 381 P.2d 638* , was a petition for the writ of habeas corpus by a person confined as a narcotic addict for treatment in the California Rehabilitation Center under an order of commitment entered pursuant to former Penal Code §§ 6500-6510 (now *Welf. & Inst. Code §§ 3100-3111*) providing for commitment of narcotic addicts not charged with a crime. Petition for the writ of habeas corpus was made to the Supreme Court, which issued an order to show cause why the writ should not issue (a procedure often followed by

appellate courts [*see In re Hochberg (1970) 2 Cal. 3d 870, 874 fn. 2, 87 Cal. Rptr. 681, 471 P.2d 1]*) and appointed counsel for petitioner. Petitioner sought to challenge the constitutionality of the statutory procedures and also contended that the procedural safeguards set up by the statutes were disregarded in his case so that he was committed illegally and without due process of law. The court held that the statutory procedure in question is a creature of statute unknown at common law, so that jurisdiction to enter an order of commitment depends on strict compliance with each of the specific statutory prerequisites for maintenance of the proceeding. All the statutory requirements must be at least substantially, if not strictly, followed in order to give the court jurisdiction of the proceedings. The failure to give petitioner notice of the hearing in this case as required by statute, deprived the court of jurisdiction to enter the commitment order, the Court found. The Court further held that the right to notice of the time and place of the hearing, which had also not been given to petitioner, was essential to the fairness of the entire proceeding. The court granted the writ of habeas corpus and ordered petitioner discharged from custody.

[b] Commitment As Mentally Disordered

In re Hofmann *(1955) 131 Cal. App. 2d 758, 281 P.2d 96* , was a proceeding for the writ of habeas corpus in which the attorney for a person confined at a mental hospital as a mental patient petitioned the court of appeal for a writ of habeas corpus after an order of the superior court committing the person to the hospital. The court of appeal issued a writ of habeas corpus, to which return was filed, and on which a hearing was held. The court of appeal ordered the person released from confinement due to irregularities in the proceedings leading up to confinement. The superior court had failed to follow the statutory procedures for notice of the person to be confined and for the person to remain at home during the proceedings. The court of appeal, in granting the requested relief, held that the authority of the court in matters of civil commitment is statutory and found not even substantial compliance with the prescribed procedure.

[c] Commitment As Narcotic Addict Not Charged With Crime

In re Raner *(1963) 59 Cal. 2d 635, 30 Cal. Rptr. 814, 381 P.2d 638* , was discussed in *§ 110.28[3][a]*.

[d] Commitment As Narcotic Addict Convicted of Crime

In re Johnson *(1963) 59 Cal. 2d 644, 30 Cal. Rptr. 819, 381 P.2d 643* , was a proceeding on habeas corpus in which petitioner was committed to the California Rehabilitation Center for treatment as a narcotic addict by an order of the superior court pursuant to former Penal Code §§ 6500-6510 [now *Welf. & Inst. Code §§ 3050-3054*] providing for commitment of narcotic addicts convicted of a crime. The Supreme Court issued an order to show cause (a procedure often followed by appellate courts [*see In re Hochberg (1970) 2 Cal. 3d 870, 874 n.2, 87 Cal. Rptr. 681, 471 P.2d 1]*) and appointed counsel for petitioner. After the hearing on the order to show cause, the Court granted the writ of habeas corpus and discharged petitioner from custody, finding that he had not been given notice as required by the statute. The Court found that, as in the case of procedures for commitment of narcotic addicts not convicted of crimes, strict compliance with the specific statutory prerequisites for maintenance of the proceedings was required, and that without such compliance, the court was without jurisdiction to enter the order of commitment.

[e] Commitment of Mentally Disordered Juvenile Court Ward

In re E. *(1975) 15 Cal. 3d 183, 123 Cal. Rptr. 103, 538 P.2d 231* , was a habeas corpus proceeding in which petitioner, a ward of the juvenile court confined to a state mental hospital pursuant to an order of the juvenile court authorizing his placement for treatment of a mental disorder, sought release on the grounds that his commitment was effected without compliance with protections afforded to persons committed in analogous situations. A juvenile court referee had ordered petitioner placed in the care of a probation officer for commitment and instructed the officer to deliver petitioner to a hospital. A petition for rehearing was filed and heard before a juvenile court judge in which petitioner raised the contention that he could not be committed except in accordance with the Lanterman-Petris-Short Act [*Welf. & Inst. Code § 5000 et seq.*]. Petitioner was purportedly "voluntarily" admitted to the state hospital by the probation officer, in accordance with the order of the court after rehearing. The petitioner applied to the court of appeal

for a writ of habeas corpus, but relief was denied. He then petitioned the Supreme Court for a writ of habeas corpus, and the Supreme Court granted the writ and disapproved the opinion of the court of appeal in *In re M. J. E. (1974) 43 Cal. App. 3d 792, 118 Cal. Rptr. 398* , which had denied the writ. In granting the writ and discharging petitioner from the detention and commitment, the Court found that the actual commitment of a mentally disordered minor who is also a ward of the juvenile court can be accomplished only in accordance with the Lanterman-Petris-Short Act. The Court also found that the petitioner had not been committed in accordance with the Act and that none of the protections which would have been given to petitioner if the Act had been followed had been afforded him by the procedures followed by the juvenile court.

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11-110 California Points & Authorities § 110.29

§ 110.29 Supporting Petition for Writ of Habeas Corpus [Penal Code § 1474]--Civil Commitment--Commitment to Mental Hospital as Required to Have Reasonable Relationship to Purpose of Commitment

[1] FORM

[*Caption. See § 110.20.*]

A PERSON WHOSE COMMITMENT TO A STATE FACILITY AS A MENTAL PATIENT NO LONGER BEARS A REASONABLE RELATIONSHIP TO THE PURPOSE WHICH ORIGINALLY JUSTIFIED THE COMMITMENT IS ENTITLED TO SEEK RELEASE BY WRIT OF HABEAS CORPUS.

A. Validity of Commitment. Due process demands that the duration of a commitment to a state facility as a mental patient must bear some reasonable relation to the purpose which originally justified the commitment (*In re Davis (1973) 8 Cal. 3d 798, 805, 106 Cal. Rptr. 178, 505 P.2d 1018 , cert. denied, 414 U.S. 870, 94 S. Ct. 87, 38 L. Ed. 2d 88*).

B. Habeas Corpus Available. A person committed to a mental hospital may seek a writ of habeas corpus to test the continued validity of his/her commitment on the ground that it no longer bears a reasonable relationship to the purpose which originally justified the commitment (*In re Davis (1973) 8 Cal. 3d 798, 809-810, 106 Cal. Rptr. 178, 505 P.2d 1018 , cert. denied, 414 U.S. 870, 94 S. Ct. 87, 38 L. Ed. 2d 88* ; *In re Gary W. (1971) 5 Cal. 3d 296, 303, 96 Cal. Rptr. 1, 486 P.2d 1201*).

[*Optional*] **C. Failure of Committed Person to Receive Treatment.** Where detention of a person in a mental facility is authorized by statute for purposes of treatment, any person confined who is not receiving treatment may seek release through appropriate habeas corpus procedures (*In re Gary W. (1971) 5 Cal. 3d 296, 303, 96 Cal. Rptr. 1, 486 P.2d 1201*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing points and authorities are for use in a memorandum of points and authorities submitted in support of the petition for a writ of habeas corpus when the petitioner seeks release on the ground that the commitment does not bear a reasonable relation to the purpose for which he or she was originally committed.

Counsel should include argument with the foregoing points and authorities showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Validity of Commitment

In re Davis *(1973) 8 Cal. 3d 798, 106 Cal. Rptr. 178, 505 P.2d 1018 , cert. denied, 414 U.S. 870, 94 S. Ct. 87, 38 L. Ed. 2d 88* , was a proceeding for the writ of habeas corpus in which petitioners sought to review the constitutionality of procedures for the commitment to, and release from, state hospitals of defendants in criminal cases who have been found to lack sufficient mental competence to stand trial. The lower court proceedings, if any, do not appear from the opinion. The Supreme Court issued orders to show cause (a procedure frequently followed by appellate courts [*see In re Hochberg (1970) 2 Cal. 3d 870, 874 n.2, 87 Cal. Rptr. 681, 471 P.2d 1]*). In discharging the orders to show cause and denying the writ of habeas corpus, the Court nevertheless found that due process demands that the duration of commitments to state hospitals must bear some reasonable relation to the purpose which originally justified the commitment. As a result, the Court found, a person charged with a criminal offense who is committed solely on account of incapacity to proceed with trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that the person will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the state must either begin the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant. The Court also adopted the rule that even if it is determined that the defendant probably soon will be able to stand trial, continued commitment must be justified by progress toward that goal.

[b] Habeas Corpus Available

The facts of ***In re Davis*** *(1973) 8 Cal. 3d 798, 106 Cal. Rptr. 178, 505 P.2d 1018 , cert. denied, 414 U.S. 870, 94 S. Ct. 87, 38 L. Ed. 2d 88* , are discussed in *§ 110.29[3][a]*. In discharging the orders to show cause and denying the writ of habeas corpus, the Court also dealt with the petitioners' contentions that *Penal Code § 1370* (defendants incompetent to stand trial) was invalid for failing to provide opportunity for a defendant to initiate proceedings for release on the ground that he or she is now competent to stand trial. The Court held that there is ample opportunity to obtain release on this ground through the initiation of habeas corpus proceedings pursuant to *Welf. & Inst. Code § 7250*, among other procedures.

In re Gary W. *(1971) 5 Cal. 3d 296, 96 Cal. Rptr. 1, 486 P.2d 1201* , was an appeal from an order of the trial court that a minor remain subject to the control of the Youth Authority for two years pursuant to *Welf. & Inst. Code §§ 1800-1803*; on a finding that he was a person physically dangerous due to his mental deficiency. The minor appealed from the order of the trial court, and the Supreme Court ordered the juvenile court order vacated and the matter remanded to the juvenile court for proceedings not inconsistent with its decision, in which the Court had held that the minor was entitled to, among other safeguards, a jury trial on the issue of his dangerousness. The Court noted that the statutes under which the minor was to be held, *Welf. & Inst. Code §§ 1800-1803*, authorize detention only of wards for

whom treatment for the underlying cause of the dangerousness is provided. Since the Youth Authority is under an affirmative duty to provide treatment, the Court held that detention without treatment of such wards would be unauthorized by statute and that any person confined pursuant to those sections who is not receiving treatment may seek release through appropriate habeas corpus procedures.

[c] Failure of Committed Person to Receive Treatment

In re Gary W. *(1971) 5 Cal. 3d 296, 96 Cal. Rptr. 1, 486 P.2d 1201* , is discussed in *§ 110.29[3][b]*.

[4] Additional Authorities

[a] Failure of Committed Person to Receive Treatment

In ***People v. Feagley*** *(1975) 14 Cal. 3d 338, 121 Cal. Rptr. 509, 535 P.2d 373* , defendant was convicted of a misdemeanor, found to be a mentally disordered sex offender, and committed to an institutional unit of a state prison. On appeal from the judgment that he was a mentally disordered sex offender, defendant challenged the procedures under which he was committed and contended that he was illegally committed to an institution in which adequate treatment was not furnished. The Attorney General argued that defendant had a statutory right to treatment and, if confined without treatment, should enforce that right through a petition for the writ of habeas corpus. The Supreme Court, in reversing on appeal the commitment by the lower court, found that habeas corpus is an appropriate remedy to test a civil confinement which is in violation of a statutory right to treatment, but that defendant in this case was not required to use the remedy by writ of habeas corpus and reversed the commitment on appeal.

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11-110 California Points & Authorities § 110.30

§ 110.30 Supporting Petition for Writ of Habeas Corpus [Penal Code § 1474]--Civil Commitment--Person Committed to Mental Facility as Entitled to Writ to Test Recovery

[1] FORM

[*Caption. See § 110.20.*]

A PERSON COMMITTED PURSUANT TO A CIVIL COMMITMENT PROCEDURE IS ENTITLED TO A WRIT OF HABEAS CORPUS TO DETERMINE WHETHER HE/SHE HAS RECOVERED FROM THE CONDITION WHICH JUSTIFIED THE COMMITMENT.

Recovery of Committed Person. Pursuant to the constitutional guarantee found in *Article I, Section 11, of the California Constitution*, that the writ of habeas corpus may not be suspended unless required by public safety in cases of rebellion or invasion, a person committed pursuant to a civil commitment procedure which gives the person no specific remedy for determining the question of his/her recovery is entitled to have that question determined by writ of habeas corpus (*In re De La O (1963) 59 Cal. 2d 128, 142-143, 28 Cal. Rptr. 489, 378 P.2d 793*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities are for use in a memorandum of points and authorities in support of a petition for the writ of habeas corpus when the petitioner seeks to have the court determine the question of his or her eligibility for release from a civil commitment due to recovery from the condition which justified the commitment.

Counsel should include argument with this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Recovery of Committed Person

In re De La O *(1963) 59 Cal. 2d 128, 28 Cal. Rptr. 489, 378 P.2d 793* , was a proceeding on habeas corpus, in which petitioner, a person committed to the California Rehabilitation Center under an order of commitment pursuant to former Penal Code § 6450 [*see now Welf. & Inst. Code § 3050*] attacked the constitutionality of the statutes under which he was confined. Petitioner had been convicted of a misdemeanor and was certified to the superior court for proceedings for commitment as a narcotic addict convicted of a crime. The Supreme Court rejected petitioner's contention in a petition for writ of habeas corpus that the statutes in question were unconstitutional in that they provided a criminal penalty for an illness, narcotic addiction. In determining that the statutes did not provide a criminal penalty, the Court noted that the statutes did not provide a specific method for judicial review of an administrative determination not to release petitioner before a specified term had run. However, it concluded that the writ of habeas corpus is available to any person confined pursuant to a civil commitment procedure who seeks to have a court determine whether the person is, in fact, subject to commitment or whether the person has recovered from the condition which justified commitment. The Court found that this right flows not from any statutory provision but from the constitutional guarantee that the writ may not be suspended [*see Calif Const, Art I, § 11*] (*59 Cal. 2d 128, 142-143)* .

[b] Person Incompetent to Stand Trial

In re Davis *(1973) 8 Cal. 3d 798, 106 Cal. Rptr. 178, 505 P.2d 1018 , cert. denied, 414 U.S. 870, 94 S. Ct. 87, 38 L. Ed. 2d 88* is discussed in *§ 110.29[3][a]*.

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11-110 California Points & Authorities § 110.31

§ 110.31 Supporting Petition for Writ of Habeas Corpus [Penal Code § 1474]--Civil Commitment--Challenge to Commitment or Continued Confinement as Mentally Disordered Sex Offender

[1] FORM

[*Caption. See § 110.20.*]

THE WRIT OF HABEAS CORPUS IS AN APPROPRIATE REMEDY TO CHALLENGE THE VALIDITY OF COMMITMENT OR CONTINUED CONFINEMENT OF A PERSON AS A MENTALLY DISORDERED SEX OFFENDER.

A. Challenge to Commitment or Continued Confinement As Mentally Disordered Sex Offender. Habeas corpus is appropriate to challenge the validity of a person's commitment or continued confinement as a mentally disordered sex offender (*In re Bevill (1968) 68 Cal. 2d 854, 858, 69 Cal. Rptr. 599, 442 P.2d 679*).

[*Optional*] **B. Failure to Follow Statutory Procedures.** Jurisdiction to enter an order committing a person to custody as a mentally disordered sex offender depends on strict compliance with each of the specific statutory prerequisites for maintenance of the proceeding, and a commitment which fails to comply with these prerequisites may be set aside in a habeas corpus proceeding (*In re Kramer (1967) 257 Cal. App. 2d 287, 289, 64 Cal. Rptr. 686*).

[*Optional*] **C. Violation of Due Process.** Where the procedures followed by the trial court in a proceeding to commit a person as a mentally disordered sex offender were so inadequate as to be a violation of due process, the commitment may be set aside in a habeas corpus proceeding (*In re Kramer (1967) 257 Cal. App. 2d 287, 289, 64 Cal. Rptr. 686*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing points and authorities are for use in a memorandum of points and authorities submitted in support of the petition for the writ of habeas corpus where the petitioner wishes to use the writ to challenge the validity of commitment or continued confinement as a mentally disordered sex offender.

Where appropriate, counsel should include argument with the foregoing points and authorities showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

With appropriate modifications the foregoing points and authorities may be used in a memorandum of points and authorities supporting a traverse to the return to the writ of habeas corpus, where the return alleges that the writ is inappropriate to challenge commitment or continued confinement as a mentally disordered sex offender.

[3] Discussion of Authorities

[a] Challenge to Commitment or Continued Confinement as Mentally Disordered Sex Offender

In re Bevill *(1968) 68 Cal. 2d 854, 69 Cal. Rptr. 599, 442 P.2d 679* , was a proceeding for the writ of habeas corpus brought by a person confined as a mentally disordered sex offender on the ground that he was convicted under an unconstitutional statute. The Supreme Court issued an order to show cause why the writ should not issue (a procedure often followed by appellate courts [*see In re Hochberg (1970) 2 Cal. 3d 870, 874 fn. 2, 87 Cal. Rptr. 681, 471 P.2d 1]*). In granting the writ and discharging petitioner from custody, the Supreme Court found that the writ of habeas corpus is an appropriate remedy for challenging the validity of commitment or continued confinement as a mentally disordered sex offender.

[b] Failure to Follow Statutory Procedures

In re Kramer *(1967) 257 Cal. App. 2d 287, 64 Cal. Rptr. 686* , was a proceeding for the writ of habeas corpus in which petitioner had been committed to a state institution as a mentally disordered sex offender. Petitioner had not appealed from the order of commitment. The petition for the writ filed with the court of appeal alleged that petitioner was illegally confined in that the superior court had failed to conduct the proceedings as required by the statutory provisions. The facts appearing from the petition and the return showed that the proceedings were defective in that no form of certification was delivered to petitioner to give him notice as required by the statute, the judge failed to inform petitioner of his rights to make a reply and to produce witnesses as required by statute, and no sufficient hearing was held. In granting the writ of habeas corpus and ordering petitioner returned to superior court for proceedings to determine whether he was a mentally disordered sex offender, the court found that the failure to deliver to petitioner the necessary notice and to inform him of his rights constituted a denial of due process. In mentally disordered sex offender proceedings, the court found as in proceedings for commitment ofnarcotic addicts, jurisdiction to enter an order of commitment depends on strict complaince with each of the specific statutory prerequisites for maintenance of the proceeding.

[c] Violation of Due Process

In re Kramer *(1967) 257 Cal. App. 2d 287, 64 Cal. Rptr. 686* , is discussed in *§ 110.31[3][b]*.

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11-110 California Points & Authorities § 110.32

§ 110.32 Supporting Petition for Writ of Habeas Corpus [Penal Code § 1474]--Civil Commitment--Person Committed to Mental Facility as Entitled to Be Present at Commitment Hearing

[1] FORM

[*Caption. See § 110.20.*]

A PERSON COMMITTED IN A CIVIL COMMITMENT PROCEEDING MAY SECURE RELEASE BY WRIT OF HABEAS CORPUS WHEN THAT PERSON WAS DENIED HIS/HER RIGHT TO BE PRESENT AT HIS/HER COMMITMENT PROCEEDING.

Right to Be Present at Commitment Hearing. A hearing to determine a person's mental retardation and dangerousness may result in a substantial loss of personal liberty; therefore, a person subject to civil commitment proceedings is entitled to a hearing that complies with the due process requirements of the United States and California Constitutions, and absent waiver of the right to be present or evidence that the person was physically incapable of being present, that his or her attendance would aggravate his or her propensity for dangerous conduct, or that he or she was unable to understand and participate in the proceedings, the denial of a person's right to be present during the presentation of evidence against him or her deprives that person of his or her fundamental constitutional right to due process of law (*In re Watson (1979) 91 Cal. App. 3d 455, 459, 154 Cal. Rptr. 151*).

[2] Comments

[a] Use of Form

The foregoing points and authorities are for use in a memorandum of points and authorities submitted in support of a petition for writ of habeas corpus when petitioner seeks to challenge the validity of a commitment pursuant to *Welf. & Inst. Code § 6500.1* based on the ground that petitioner was denied his or her fundamental constitutional right to due process of law by being denied the right to be present at the commitment hearing.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Counsel should include discussion of facts in the record showing that petitioner did not waive his

or her right to be present at the commitment hearing and should point out the absence of any facts in the record affirmatively showing that the person is so mentally retarded as to be unable to comprehend the proceedings [*In re Watson (1979) 91 Cal. App. 3d 455, 462, 154 Cal. Rptr. 151]* .

[3] Discussion of Authorities

[a] Right to Be Present at Commitment Hearing

In re Watson *(1979) 91 Cal. App. 3d 455, 154 Cal. Rptr. 151* , involved a petition for a writ of habeas corpus. Petitioner was committed to the state hospital as a developmentally disabled person. She was not present at the committment hearing, although petitioner's counsel had discussed the proceedings with petitioner, petitioner knew that counsel would submit the matter on the papers and reports available, and petitioner was aware that the likely outcome would be her commitment to the state hospital. Petitioner contended that her constitutional rights were violated. The court of appeal agreed and granted the petition.

The court stated that habeas corpus is a proper remedy in California to collaterally attack a judgment of conviction that has been obtained in violation of fundamental constitutional rights. The court held that although petitioner was not convicted of a crime, she was no less entitled to the protection of her fundamental constitutional rights, and a judgment obtained in violation of those rights was vulnerable to collateral attack (*91 Cal. App. 3d 455, 458)* . The court noted that commitment under *Welf. & Inst. Code § 6500.1* is a commitment for placement in a state hospital, and no mentally retarded person may be so committed without proof of dangerousness to self or others (*91 Cal. App. 3d 455, 458-459)* . The court held that a hearing to determine a person's mental retardation and dangerousness may result in a substantial loss of personal liberty and that petititoner was therefore entitled to a hearing that complies with the due process requirements of the United States and California Constitituions (*91 Cal. App. 3d 455, 459)* . The court found that petitioner had not waived her right to be present and that there was no evidence to show that petitioner was physically incapable of being present, that her attendance would have aggravated her propensity for dangerous conduct, or that she was unable to understand and participate in the proceedings. Therefore, the court held that the denial of petitioner's right to be present during the presentation of evidence against her could and did result in a substantial loss of personal liberty and deprived her of her fundamental constitutional right to due process of law (*91 Cal. App. 3d 455, 460)* .

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11-110 California Points & Authorities § 110.33

§ 110.33 Supporting Petition for Writ of Habeas Corpus [Penal Code § 1474]--Trial Court Lacked Jurisdiction to Impose the Order or Judgment Confining Petitioner

[1] FORM

[*Caption. See § 110.20.*]

THE WRIT OF HABEAS CORPUS WILL LIE TO TEST THE JURISDICTION OF THE COURT UNDER WHOSE ORDER PETITIONER IS RESTRAINED, AND PETITIONER WILL BE RELEASED WHERE THE ORDER WAS BEYOND THE JURISDICTION OF THE COURT.

A. Habeas Corpus Where Court Lacked Jurisdiction. A writ of habeas corpus will lie where it appears on the face of the record that the trial court lacked jurisdiction to impose the order or judgment pursuant to which the petitioner is held in custody (*Penal Code § 1487(1)*; *In re Clark (1959) 51 Cal. 2d 838, 840, 337 P.2d 67* ; *In re Kowalski (1971) 21 Cal. App. 3d 67, 71, 98 Cal. Rptr. 444*).

B. Discharge From Custody Where Court Lacked Jurisdiction. If it appears on the return of the writ that the person is in custody by virtue of process from any court of this state or of any judge or other officer of such a court, the person may be discharged from custody when the jurisdiction of the court of officer has been exceeded (*Penal Code § 1487(1)*).

C. Broad Meaning of Jurisdiction on Habeas Corpus. For purposes of the writ of habeas corpus, as for purposes of prohibition or certiorari, the term "jurisdiction" is not limited to its fundamental meaning, and in such proceedings judicial acts may be restrained or annulled if they are determined to be in excess of the court's powers as defined by constitutional provision, statute, or rules developed by courts (*In re Zerbe (1964) 60 Cal. 2d 666, 667-668, 36 Cal. Rptr. 286, 388 P.2d 182*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing points and authorities are for use in a memorandum of points and authorities submitted in support of the petition for the writ of habeas corpus where the petitioner seeks relief on the basis that the court by virtue of whose process the petitioner is held in custody lacked jurisdiction or exceeded its jurisdiction in making the order of custody.

Where appropriate, counsel should include argument with the forgoing points and authorities showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

With appropriate modifications the foregoing points and authorities may be used in a memorandum of points and authorities submitted in support of a traverse to the return to the writ of habeas corpus, where the return has alleged that the custody is by virtue of the process of a court and the petitioner wishes to seek relief on the ground that the court lacked jurisdiction or exceeded its jurisdiction in entering the order in question.

[3] Discussion of Authorities

[a] Habeas Corpus Where Court Lacked Jurisdiction

In re Clark *(1959) 51 Cal. 2d 838, 337 P.2d 67* , was a habeas corpus proceeding in which an attorney filed a petition for the writ on behalf of a prisoner alleging that a trial court exceeded its jurisdiction in modifying the terms of probation of the prisoner. The Supreme Court held that the order modifying the terms of probation was beyond the jurisdiction of the court, since it was based on the same facts as the original order granting probation. Although the prisoner had not appealed the order, the Court held that habeas corpus would lie. The Court stated that, although habeas corpus is ordinarily not a substitute for an appeal, the writ will lie where it appears on the face of the record that the trial court lacked jurisdiction to impose the order or judgment pursuant to which the petitioner is held in custody, although an appeal was not taken. The Court discharged defendant from custody and granted the writ.

In re Kowalski *(1971) 21 Cal. App. 3d 67, 98 Cal. Rptr. 444* , was a proceeding on habeas corpus in which petitioner alleged that he was entitled to be released from custody since the trial court had granted a motion to set aside his indictment and ordered the case dismissed but another superior court judge had set aside the dismissal, fixing a date for trial and setting bail. Petitioner argued that the action of the second judge was without jurisdiction. The court of appeal granted the writ and discharged petitioner from custody, agreeing that the order setting aside the dismissal, was beyond the court's jurisdiction. In determining that the writ should be granted, the court noted that a writ of habeas corpus will lie where it appears on the face of the record that the trial court lacked jurisdiction to impose the order or judgment pursuant to which the petitioner is held in custody.

[b] Broad Meaning of Jurisdiction on Habeas Corpus

In re Zerbe *(1964) 60 Cal. 2d 666, 36 Cal. Rptr. 286, 388 P.2d 182* , was a habeas corpus proceeding to secure release of a prisoner from custody. Petitioner was convicted in a municipal court of a criminal offense. The judgment was affirmed by the appellate department of the superior court, which certified a transfer of the case to the court of appeal, which denied the transfer. Petitioner then began the habeas corpus proceeding in the Supreme Court, to secure release from custody. In granting the writ of habeas corpus, the Supreme Court found that habeas corpus is available in cases where the court has acted in excess of its jurisdiction, and that "jurisdiction," for purposes of the writ of habeas

corpus, as well as prohibition and certiorari, is not limited to its fundamental meaning. The Court found that in such proceedings judicial acts may be restrained or annulled if determined to be in excess of the court's powers as defined by constitutional provision, statute, or rules developed by courts. In discharging petitioner from custody, the Court found the act of the trial court to be beyond its jurisdiction and habeas corpus to be the proper remedy where there is no material dispute as to the facts of the conviction and it appears that the statute under which the petitioner was convicted did not prohibit the conduct.

[4] Additional Authorities

[a] Habeas Corpus Where Court Lacked Jurisdiction

People v. Mutch (1971) 4 Cal. 3d 389, 93 Cal. Rptr. 721, 482 P.2d 633 , was a proceeding by a person convicted of kidnapping under an overruled interpretation of the kidnapping statutes. Defendant petitioned the court of appeal for a recall of the remittitur or other appropriate relief, contending that he was entitled to a redetermination of his appeal in the light of an intervening case. In deciding that it could give relief to defendant despite the finality of the case for purposes of appeal, the court noted that habeas corpus or other appropriate extraordinary remedy will lie to rectify the error where defendant was convicted although what he did was not prohibited by the statute. The court noted that habeas corpus is available in cases where the court has acted in excess of its jurisdiction and that for purposes of this writ the term "jurisdiction" is not limited to its fundamental meaning, and in such proceedings judicial acts may be restrained or annulled if determined to be in excess of the court's powers as defined by constitutional provision, statute, or rules developed by courts.

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11-110 California Points & Authorities § 110.34

§ 110.34 Supporting Petition for Writ of Habeas Corpus [Penal Code § 1474]--Child Custody--Petitioner Entitled to Custody by Previous Order of Court

[1] FORM

[*Caption. See § 110.20.*]

A PERSON ENTITLED TO THE PHYSICAL CUSTODY OF A MINOR CHILD MAY ENFORCE THAT RIGHT AGAINST A PERSON WRONGFULLY WITHHOLDING THE CHILD BY PETITIONING FOR THE WRIT OF HABEAS CORPUS.

A. Availability of Writ. [*See § 110.21.*]

B. Enforcement of Custody of Minor Child. It is well settled that a person entitled to the physical custody of a minor child may enforce the right to custody against a person wrongfully withholding the child by a petition for writ of habeas corpus (*In re M. (1975) 14 Cal. 3d 783, 789, 122 Cal. Rptr. 531, 537 P.2d 363*).

C. Enforcement of Previous Custody Order. The writ of habeas corpus will lie to correct violations of a custody order, since the writ will lie when the person entitled to custody of a minor child is denied possession of the child (*In re Barr (1952) 39 Cal. 2d 25, 27, 243 P.2d 787*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing points and authorities are for use in a memorandum of points and authorities in support of the petition for the writ of habeas corpus where petitioner seeks to regain custody of a child against a person withholding custody of the child in violation of an order of a court.

Where appropriate, counsel should include argument with the foregoing points and authorities showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Articles

For a form of petition for writ of habeas corpus to regain custody of a child pursuant to a court order, see Ch. 292, *Habeas Corpus* in California Forms of Pleading and Practice.

[3] Discussion of Authorities

[a] Enforcement of Custody of Minor Child

In re M. *(1975) 14 Cal. 3d 783, 122 Cal. Rptr. 531, 537 P.2d 363* , was a proceeding on the writ of habeas corpus by the mother of an illegitimate child to have the child returned to her custody. Before filing her petition with the Supreme Court, petitioner had filed a petition with the superior court which had then issued a writ commanding respondent, the child's father, to appear with the child. In his return to the writ, the father alleged that he had legitimated the child and was entitled to custody. After an evidentiary hearing, the superior court found that the father had legitimated the child and had custody rights equal to those of the mother. The court referred the case for preparation of a custody report and, after considering that report, awarded permanent custody of the child to the father. The mother then sought a writ of habeas corpus in the court of appeal, which issued an order to show cause (a procedure frequently followed in appellate courts [*see In re Hochberg (1970) 2 Cal. 3d 870, 874 fn. 2, 87 Cal. Rptr. 681, 471 P.2d 1]*), a writ of habeas corpus ordering the father to deliver the child to the mother, and an auxilliary writ of prohibition restraining the superior court from enforcing its order. The Supreme Court granted a hearing. In deciding to what extent it should be bound by the determinations of the lower courts in previous habeas corpus proceedings, the Supreme Court held that it is well settled that a person entitled to the physical custody of a minor child may enforce the right to that custody as against one wrongfully withholding the child by a petition for writ of habeas corpus. The Court then found that there was substantial evidence to support the trial court's findings and that the mother was not entitled to return of the child from the father.

[b] Enforcement of Previous Custody Order

In re Barr *(1952) 39 Cal. 2d 25, 243 P.2d 787* , was a proceeding on habeas corpus brought by the mother of a child against her former husband, the father of the child, who had retained custody of the child pursuant to a modified custody order from which the petitioner had filed an appeal. Since at the time of this decision an appeal from a modified custody order automatically stayed enforcement of the modified order, the Supreme Court found that the petitioner was entitled to regain custody of the child by writ of habeas corpus and granted the writ. The Court held that the writ is a remedy to correct violations of court orders granting custody of children, since the writ will lie when a person entitled to custody of a child is denied possession of the child.

[4] Additional Authorities

[a] Enforcement of Previous Custody Order

Rose v. Superior Court (1948) 86 Cal. App. 2d 173, 194 P.2d 568 , was a proceeding in which petitioner sought a writ of certiorari for the purpose of annulling a writ of habeas corpus and all proceedings connected with the habeas corpus matter. Petitioner for certiorari was the mother of a child who had been adopted by the mother's parents in Kentucky. Petitioner had brought the child to California and refused to return the child to Kentucky. Her parents then petitioned

the superior court in California for a writ of habeas corpus to get custody of the child. After a hearing, the court ordered the child returned to the grandparents, and petitioner sought the writ of certiorari. (At the time, there was no appeal from an order granting the writ of habeas corpus.) The court of appeal held that the superior court had jurisdiction to entertain the petition for writ of habeas corpus, since it was well established that the superior court has jurisdiction to entertain an application for the writ of habeas corpus for the purpose of obtaining the custody of a minor child. Habeas corpus, the court held, was the proper procedure to release an infant from all manner of illegal restraint and to determine matters of custody. If the custody of the child has been awarded by a decree of a competent tribunal, the writ is available to compel delivery of the child to the one declared entitled to custody. The writ is also available to determine whether one who has custody without authority of legal proceedings is entitled to custody, and to release the child if the restraint is found unlawful.

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
CHAPTER 110 HABEAS CORPUS
PART II. FORMS

11-110 California Points & Authorities § 110.35

§ 110.35 Supporting Petition for Writ of Habeas Corpus [Penal Code § 1474]--Child Custody--Petitioner Entitled to Custody by Previous Order of Out-of-State Court

[1] FORM

[*Caption. See § 110.20.*]

A PERSON ENTITLED TO THE CUSTODY OF A CHILD PURSUANT TO THE VALID DECREE OF A COMPETENT OUT-OF-STATE TRIBUNAL MAY ENFORCE THAT RIGHT TO CUSTODY BY A WRIT OF HABEAS CORPUS IN A CALIFORNIA COURT.

A. Availability of Writ. [*See § 110.21.*]

B. Enforcement of Out-of-State Custody Order. Where an out-of-state court which had jurisdiction of the parties and subject matter has determined the custody of a minor child, the order of that court is entitled to full faith and credit in the California courts and is res judicata of the rights of the parties as of the date of the order (*Estate of Bauman (1947) 82 Cal. App. 2d 359, 361*).

C. Prima Facie Right of Nonresident to Custody. The petitioner for writ of habeas corpus to regain custody pursuant to an out-of-state decree which is entitled to full faith and credit in California courts states a prima facie case for an order directing the immediate return of the child to his/her care and the burden is then on the respondent resident to show why, despite the existing decree, he/she should be awarded temporary custody (*Ferreira v. Ferreira (1973) 9 Cal. 3d 824, 836, 109 Cal. Rptr. 80, 512 P.2d 304*).

D. Resolution of Controversy by Out-of-State Court. The courts ordinarily should refuse to reopen the question of the custody of a child whose custody is vested in a nonresident parent under an existing decree and should not resolve the merits of the controversy as to permanent custody, although it may stay its own proceedings to await determination of the matter by the court of the nonresident's domicile (*Ferreira v. Ferreira (1973) 9 Cal. 3d 824, 836, 109 Cal. Rptr. 80, 512 P.2d 304*).

[*Optional*] **E. Sufficient Allegation of Unlawful Restraint.** Where the custody of the child has been with petitioner

until respondent refused to return the child after a visit, allegations in a habeas corpus proceeding to obtain custody of a child which show that the petitioner has been awarded custody of the child and that the child is being held by respondent in violation of that order are sufficient allegations of unlawful restraint of liberty for issuance of the writ (*In re Kyle (1947) 77 Cal. App. 2d 634, 639, 176 P.2d 96*).

[*Optional*] **F. Out-of-state Decree Valid on Its Face.** Where the petition for the writ pleads a judgment and decree granting custody to petitioner, which is regular on its face, the judgment and decree of a court of general jurisdiction will be presumed to be valid in the absence of evidence to the contrary and will carry the presumption that the court had jurisdiction (*In re Kyle (1947) 77 Cal. App. 2d 634, 176 P.2d 96*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing points and authorities are for use in a memorandum of points and authorities submitted in support of the petition for a writ of habeas corpus to regain custody of a child where petitioner is entitled to custody pursuant to the valid decree of a court of competent jurisdiction in another state and the children are held in California in violation of that decree.

Where appropriate, counsel should include argument with the foregoing points and authorities showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

With appropriate modifications the foregoing points and authorities may be used in a memorandum of points and authorities submitted in support of the return to the writ of habeas corpus where the petitioner is not entitled to custody of the child and respondent seeks to retain custody pursuant to the out-of-state decree.

[b] Related Pleading and Practice Articles

For a form of petition for writ of habeas corpus which seeks to regain custody of a child pursuant to a court order, see Ch. 292, *Habeas Corpus* in California Forms of Pleading and Practice.

[3] Discussion of Authorities

[a] Sufficient Allegation of Unlawful Restraint

In re Kyle *(1947) 77 Cal. App. 2d 634, 176 P.2d 96* , was a proceeding in habeas corpus to recover the custody of a child, in which petitioner, the father, had been granted custody pursuant to a Nevada divorce decree. The child's mother retained the child after a visit in California, and the father filed his petition for writ of habeas corpus. Respondents excepted to the sufficiency of the petition for the writ on the ground that the petitioner based his claim to custody on a Nevada divorce decree and did not allege in the petition that the Nevada court had jurisdiction to render the judgment and decree. The court of appeal held, however, that the judgment was regular on its face and, therefore, presumed to be valid in the absence of evidence to the contrary. Such a judgment, the court held, carries with it the presumption that the

court had jurisdiction. The respondents also argued that the courts of California were not required to give full faith and credit to the judgment, but the court held that such a decree may be modified only on a showing of change of circumstances arising subsequent to the entry of the former decree. The respondents further argued that habeas corpus was not the proper remedy to determine custody in the absence of an issue as to the welfare of the child. In rejecting that argument, the court held that those cases which seemed to set forth that rule involved parents who had brought their children to California legally while entitled to custody of the children, after which time the court of the sister state had purported to modify the custody order, and the modified order's validity was questioned. In those cases custody had already been with the party for some time. The present case was distinguished because the custody of the child had been with petitioner until the respondents refused to return the child after a visit. In such a case, the court held, petitioner is entitled to rely on the previous custody order without alleging that the child is in some danger. The court returned custody of the child to petitioner, after upholding the jurisdiction of the Nevada court.

[b] Enforcement of Out-of-State Custody Order

Estate of Bauman *(1947) 82 Cal. App. 2d 359* , was a proceeding on habeas corpus in which petitioner, the father of a child, sought to secure custody of the child pursuant to a decree of an Oklahoma court granting him custody. In granting the writ and returning the child to its father, the court of appeal found that the order of the Oklahoma court, that court having had jurisdiction of the parties and the subject matter of the controversy, was entitled to full faith and credit and was res judicata of the rights of the parties, and that the California court would not go behind the Oklahoma decree. The only ground on which the mother could prevail, the court found, was a showing that since the date of the order a change warranted modification of the order. That change must be a change of conditions affecting the welfare of the child.

[c] Prima Facie Right of Nonresident to Custody

In ***Ferreira v. Ferreira*** *(1973) 9 Cal. 3d 824, 109 Cal. Rptr. 80, 512 P.2d 304* , an Idaho divorce decree gave custody of the children to the wife with reasonable visitation rights to the husband. Both husband and wife moved separately to California. The parties later stipulated to a modification of the decree in a California court. The wife moved to Alabama and the husband to Delaware. After a visit, the husband moved with the children to Los Angeles, California. Shortly thereafter, the husband filed a motion in San Francisco superior court bearing the number of the earlier stipulation to obtain custody of the children. The wife responded with a motion to dismiss on grounds of forum non conveniens, asserting that she and the children were residents of Alabama. The court granted the wife's motion despite allegations by the husband that the wife's new husband had physically mistreated the children. The husband appealed from the order dismissing his action. He also moved in Orange County, where he lived, for an order modifying the divorce decree, but that court dismissed for failure to make proper service on the wife. The wife petitioned the court of Orange County for a writ of habeas corpus to regain custody and physical possession of the childen. The husband's return alleged mistreatment of the children and requested sole custody. The wife filed a demurrer to the return and a motion to strike. The court ordered a probation report and awarded temporary custody of the children to the husband. The wife then petitioned the court of appeal for prohibition and mandate to compel the superior court to vacate its order awarding the husband temporary custody and to direct it to issue a writ ordering the husband to surrender custody of the children. The court of appeal denied the writ, and the Supreme Court granted a hearing and ordered the husband's appeal transferred to it from the San Francisco court. The Court found that, regardless of whether the issue of custody arises when a resident parent initates an action for modification of custody to keep the child or when the nonresident parent brings proceedings for habeas corpus to recover possession of the child pursuant to the foreign decree, the trial court employs the same standards and procedures. Once jurisdiction is established, the court must decide the temporary custody of the child, and generally the parent entitled to custody under the existing decree can enforce that right and secure temporary custody. Exceptions to the right of the parent to enforce the existing decree exist where a foreign decree attempts to affect custody lawfully held by a resident of the forum or a bona fide resident child, where the decree was procured by unclean hands of a nonresident parent, where the nonresident parent has delayed so that the child has acquired an etablished home and affectional relationships in California, or where the resident parent alleges and supports by proof that the health or safety of the child will be jeopardized by enforcement of the custody order. For the latter ground, the

resident parent must show that there will be substantial emotional harm or other forms of injury in addition to physical mistreatment. A mere allegation that an award of custody to the resident would further the best interest or welfare of the child is not sufficient grounds for denying enforcement of the foreign decree. The Court found that the Orange County court was correct in giving temporary custody of the children to the husband despite the wife's petition for the writ of habes corpus in that court seeking to enforce the previous custody decree, because the husband had supported allegations of mistreatment of the children with affidavits and suggested that return of the children to the wife would expose them to further danger. That superior court also had discretion to decide whether to hear the proceedings on their merits or to return the children to the wife's forum, staying its own proceedings.

[d] Resolution of Controversy by Out-of-State Court

Ferreira v. Ferreira *(1973) 9 Cal. 3d 824, 109 Cal. Rptr. 80, 512 P.2d 304* , is discussed in *§ 110.35[3][c]*.

[e] Out-of-State Decree Valid on Its Face

In re Kyle *(1947) 77 Cal. App. 2d 634, 176 P.2d 96* , is discussed in *§ 110.35[3][a]*.

[4] Additional Authorities

[a] Enforcement of Out-of-State Custody Order

In re Bergmann (1955) 133 Cal. App. 2d 323 , was a proceeding in habeas corpus in which petitioner, the father of children sought to have custody returned to him from the mother, who had the children in California. The court ordered the children returned to the father, holding that since the Michigan court had jurisdiction of the parties and of the subject matter, and since there was no evidence of any changed conditions, the court must return the children to the father and give full faith and credit to the Michigan decree.

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
CHAPTER 110 HABEAS CORPUS
PART II. FORMS

11-110 California Points & Authorities § 110.36

§ 110.36 Supporting Petition for Writ of Habeas Corpus [Penal Code § 1474]--Child Custody--Nonresident Entitled to Custody Pursuant to Out-of-State Decree--Applicable Law

[1] FORM

[*Caption. See § 110.20.*]

WHEN THE ISSUE OF CHILD CUSTODY BETWEEN A NONRESIDENT AND A RESIDENT PARENT ARISES ON WRIT OF HABEAS CORPUS, THE TRIAL COURT SHOULD EMPLOY THE SAME STANDARDS AND PROCEDURES IT WOULD EMPLOY IF THE QUESTION HAD ARISEN IN ANOTHER TYPE OF PROCEEDING.

Standards and Procedures. Regardless of whether the issue of child custody between a resident and nonresident parent arises on the writ of habeas corpus or on another type of procedure, the trial court employs the same standards and procedures (*Ferreira v. Ferreira (1973) 9 Cal. 3d 824, 834, 109 Cal. Rptr. 80, 512 P.2d 304*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing points and authorities are for use in a memorandum of points and authorities submitted in support of the petition for writ of habeas corpus, where a nonresident entitled to custody of a child pursuant to an out-of-state court decree seeks to enforce by writ of habeas corpus that decree in California against a person withholding custody of the child.

Where appropriate, counsel should include argument with the foregoing points and authorities showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Standards and Procedures

Ferreira v. Ferreira *(1973) 9 Cal. 3d 824, 109 Cal. Rptr. 80, 512 P.2d 304* , is discussed in *§ 110.35[3][c]*.

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PART II. FORMS

11-110 California Points & Authorities § 110.37

§ 110.37 Supporting Petition for Writ of Habeas Corpus [Penal Code § 1474]--Child Custody--Determining Right to Custody--No Previous Court Order

[1] FORM

[*Caption. See § 110.20.*]

THE WRIT OF HABEAS CORPUS PROCEEDING IS AVAILABLE TO DETERMINE THE PROPER CUSTODY OF CHILDREN.

A. Availability of Writ. [*See § 110.21.*]

B. Enforcement of Custody of Minor Child. [*See § 110.34, Paragraph B.*]

C. Determination of Custody of Child. The right to custody of a child may be enforced by writ of habeas corpus, and the court may inquire into proper custody in the proceeding on habeas corpus. The writ is a proper means of determining right to custody of minor children generally (*In re Croze (1956) 145 Cal. App. 2d 492, 495, 302 P.2d 595* ; *In re Bauman (1947) 82 Cal. App. 2d 359, 360*).

D. Full Hearing on Custody. In a habeas corpus proceeding to determine proper custody of a child, the court must consider all legally relevant evidence offered on proper custody (*In re Reyna (1976) 55 Cal. App. 3d 288, 301, 126 Cal. Rptr. 138*).

[*Optional*] **E. Statute Governing Proper Custody.** *Section 3040 et seq. of the Family Code* applies to any proceeding where there is at issue the custody of a minor child, including a proceeding on writ of habeas corpus (*see* *In re G. (1974) 11 Cal. 3d 679, 695-696, 114 Cal. Rptr. 444, 523 P.2d 244*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities are for use in a memorandum of points and authorities submitted in support of the petition for writ of habeas corpus when petitioner seeks custody of a child in the situation in which there is no previous court order determining custody.

Counsel should include argument with these points and authorities showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For allegations for a petition for writ of habeas corpus seeking determination of the custody of a child, see Ch. 292, *Habeas Corpus* in California Forms of Pleading and Practice(Matthew Bender). For forms and discussion relating to child custody generally, see Ch. 223, *Dissolution of Marriage: Child Custody* , in California Forms of Pleading and Practice.

[3] Discussion of Authorities

[a] Determination of Custody of Child

In re Croze *(1956) 145 Cal. App. 2d 492, 302 P.2d 595* , was a proceeding on habeas corpus in which petitioner was the mother of an illegitimate minor child. Petitioner sought to have custody of the child returned to her from respondents, persons with whom she had left the child while she was unable to care for it after its birth. Respondents contended that petitioner had abandoned the child and that she was an unfit mother. Because petitioner had first sought the writ from the superior court, respondents also contended that the order of the superior court denying custody to the mother on the grounds that she had abandoned the child was res judicata on the issue of custody. Although the court of appeal found that the superior court's order was res judicata on the issues tendered, tried, and decided in the superior court, it also found that the petitioner could present a petition to the court of appeal where there were changed circumstances or where the superior court decision had been a matter of law rather than fact. In deciding to appoint a referee to determine the issue of abandonment of the child by the petitioner, the court of appeal found that the trial court had failed to reach and determine that issue as required. The court of appeal found that the mother of an illegitimate child may enforce her right to custody by writ of habeas corpus, but that the court at the hearing should determine all of the issues affecting proper custody rather than simply determining the naked legal right to custody. It was error on the part of the superior court, the court of appeal held, to refuse to determine the issue of abandonment of the child by the mother (*145 Cal. App. 2d 492, 495)* .

Note that this decision was reached when former Civ. Code § 230 applied to determine the proper custody of an illegitimate child. Custody is no longer determined by that statute, which has been repealed [Stats. 1975, ch. 1244] but rather by *Fam. Code § 3010*. It should still be proper, however, to use the writ of habeas corpus to determine proper custody of a child.

Estate of Bauman *(1947) 82 Cal. App. 2d 359* , was a proceeding on habeas corpus in which petitioner sought to secure the custody of his daughter from his divorced wife, who had left the jurisdiction of the divorce action with the child and brought the child to California. The court of appeal noted that it is quite clear and that no contention had been made to the contrary that habeas corpus is a proper remedy to determine the right to custody of children (*82 Cal. App. 2d 359, 360)* .

[b] Full Hearing on Custody

In re Reyna *(1976) 55 Cal. App. 3d 288, 126 Cal. Rptr. 138* , was a proceeding in habeas corpus to secure custody of a child. The father of an illegitimate child filed a petition for writ of habeas corpus in a superior court seeking to obtain custody of his child from the welfare department adoption agency. At a hearing, the petition was denied by a minute order without findings of fact. Petitioner then filed a petition with the court of appeal, which issued an order to show cause (a procedure often followed by appellate courts [*see In re Hochberg (1970) 2 Cal. 3d 870, 874 n.2, 87 Cal. Rptr. 681, 471 P.2d 1]*) and scheduled a hearing as to why the petition should not be granted. The mother of the child had relinquished the child for adoption to the adoption agency, which placed the child with prospective adoptive parents. The father did not receive the notice sent by the adoption agency concerning his rights as a parent, but the father learned of the adoption from the mother and contacted the adoption agency. a home for the child. Although the writ proceeding in the court of appeal is an original proceeding, that court held, the court was not precluded from further consideration of questions of law, including whether there is substantial evidence to support the lower court's findings of fact. The court of appeal found that former Civ. Code § 4600 [*see now Fam. Code § 3040 et seq.*] had been applicable to the proceeding in the superior court and that a finding that custody in a parent would be detrimental to the child was therefore required, as well as a finding that the best interests of the child would be served by an award to a nonparent. Because the superior court had refused evidence that an award of custody would be detrimental to the child and this refusal was error, the court of appeal concluded that a referee should be appointed and a hearing conducted to receive whatever evidence any of the parties wished to present on the question of possible detriment to the child if it were placed with the father (*55 Cal. App. 3d 288, 301)* .

[c] Statute Governing Proper Custody

In re G. *(1974) 11 Cal. 3d 679, 114 Cal. Rptr. 444, 523 P.2d 244* , was a proceeding to determine the custody of two minor children. The father had come to the United States with his children, had died, and had left the children with their grandparents and with neighbors. The neighbors applied for a foster home license, the probation department scheduled a dependency hearing for the children, and notified the grandparents, but not the mother of the children, of the hearing. At the hearing the children were declared dependent children and placed in the custody of the welfare department to be maintained in the home of the foster parents. At an annual review the mother appeared by counsel, submitted to the jurisdiction of the court, and requested custody of the children. In deciding to apply former Civ. Code § 4600 [*see now Fam. Code § 3040 et seq.*] to the determination of proper custody of the children on appeal from the order of the superior court placing the children with the foster parents, the Supreme Court found that former Civ. Code § 4600 [*see now Fam. Code § 3040 et seq.*] governs all proceedings in which the custody of minor children is at issue, including proceedings on the writ of habeas corpus (*11 Cal. 3d 679, 695-696)* .

[4] Additional Authorities

[a] Statute Governing Proper Custody

In *In re Baby Girl M. (1984) 37 Cal. 3d 65* , the Supreme Court held that a nonpresumed natural father's rights to his minor child may not be terminated in a proceeding under former Civ. Code § 7017(d) [*see now Fam. Code § 7664*], and the child may not be placed in the custody of adoptive parents unless the court finds that granting custody to the father would be detrimental to the child, pursuant to former Civ. Code § 4600(c) [*see now Fam. Code § 3040 et seq.*], in addition to finding that adoption would be in the child's best interests. It reiterated that former Civ. Code § 7017(d) [*see now Fam. Code § 7664*] applies in any proceeding to determine child custody (*37 Cal. 3d 65, 68)* .

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11-110 California Points & Authorities § 110.38

§ 110.38 Supporting Petition for Writ of Habeas Corpus [Penal Code § 1474]--Child Custody--Petitioner Entitled to Custody Despite Previous Order of Court

[1] FORM

[*Caption. See § 110.20.*]

THE WRIT OF HABEAS CORPUS PROCEEDING IS AVAILABLE TO ATTACK A PREVIOUS CUSTODY ORDER MADE BY A COURT THAT HAD NO JURISDICTION TO MAKE THE ORDER.

A. Availability of Writ. [*See § 110.21.*]

B. Previous Custody Order Was Made Without Jurisdiction. The writ of habeas corpus will lie when a person entitled to child custody is denied possession of the child by a court order made without jurisdiction (*In re Barr (1952) 39 Cal. 2d 25, 27-28, 243 P.2d 787*).

C. Broad Meaning of Jurisdiction on Habeas Corpus. [*See § 110.33, Paragraph C.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities are for use in a memorandum of points and authorities submitted in support of a petition for the writ of habeas corpus when petitioner seeks to collaterally attack a previous order that grants custody of a child to

another person and that was made without jurisdiction.

Counsel should include argument with these points and authorities showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Previous Custody Order Was Made Without Jurisdiction

The facts and procedure in ***In re Barr*** *(1952) 39 Cal. 2d 25, 243 P.2d 787* are discussed in *§ 110.34[3][b]*. The court held that a writ of habeas corpus was an appropriate remedy to prevent enforcment of a modification order granting custody to the child's father when the mother, who had custody under the original divorce decree, had appealed the modification. The appeal suspended the power of the court to enforce the modification order or to further modify it (*39 Cal. 2d 25, 27-28)* . If the welfare of the child were endangered by remaining with the mother, the father's remedy would be to apply to the court having jurisdiction over the appeal, or to the juvenile court (*39 Cal. 2d 25, 29)* .

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11-110 California Points & Authorities § 110.39

§ 110.39 Supporting Petition for Writ of Habeas Corpus [Penal Code § 1474]--Jurisdiction--Original Proceeding in Superior Court

[1] FORM

[*Caption. See § 110.20.*]

THE SUPERIOR COURTS AND THEIR JUDGES HAVE ORIGINAL JURISDICTION IN HABEAS CORPUS PROCEEDINGS.

A. Original Jurisdiction of Superior Courts. The superior courts and their judges have original jurisdiction in habeas corpus proceeding (*Cal. Const., art. VI, § 10*).

B. Superior Court Jurisdiction Equal to Appellate Court Jurisdiction. The superior courts and their judges are expressly authorized to issue the writ of habeas corpus, and they have an equal right in this respect with the justices of the Supreme Court and the courts of appeal (*In re Elias (1962) 209 Cal. App. 2d 262, 264, 25 Cal. Rptr. 739*).

[*Optional*] **C. Factual Questions Require Applications First in Superior Court.** When factual questions are involved, petitioner is generally required first to seek relief by habeas corpus in the superior court (*In re M. (1975) 14 Cal. 3d 783, 789, 122 Cal. Rptr. 531, 537 P.2d 363*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities are for use in a memorandum of points and authorities submitted in support of a petition for the writ of habeas corpus where the petition is filed in the first instance with a superior court.

Counsel should include argument with these points and authorities showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

With appropriate modifications, these points and authorities may be used in a memorandum of points and authorities submitted in support of a traverse to the return to the writ of habeas corpus where the return alleges that the petition should not have been filed in the superior court.

[b] Related Pleading and Practice Forms

For a petition for the writ of habeas corpus for filing in a superior court in a civil use of the writ, see Ch. 292, *Habeas Corpus* in California Forms of Pleading and Practice(Matthew Bender).

[3] Discussion of Authorities

[a] Superior Court Jurisdiction Equal to Appellate Court Jurisdiction

In re Elias *(1962) 209 Cal. App. 2d 262, 25 Cal. Rptr. 739* , was a proceeding for the writ of habeas corpus by a petitioner who had been taken into custody by virtue of a warrant of commitment issued for contempt by a superior court. In his petition for the writ to the court of appeal, the petitioner alleged that he had presented a substantially similar petition to the superior court, which had refused to entertain the petition on the ground that it had no jurisdiction to hear the petition and that the petition should have been filed with the court of appeal.

The court of appeal held that the refusal of the superior court to entertain the petition was error if based solely on that ground and that the superior court had a duty to consider the application and, if the petition was meritorious, to issue the writ even though the legality of an order of commitment previously made by that same court was under attack. The court of appeal held that the superior court has an equal right to issue the writ with the Supreme Court and the courts of appeal. After considering the merits of the case, the court discharged petitioner from custody on the commitment of which he complained (*209 Cal. App. 2d 262, 264)* .

[b] Factual Questions Require Application First in the Superior Court

In re M. *(1975) 14 Cal. 3d 783, 122 Cal. Rptr. 531, 537 P.2d 363* , was a proceeding on the writ of habeas corpus in which petitioner, the mother of a minor, illegitimate child, sought by petition for the writ to have her child returned to her custody. The child's father had retained the child after a visit and the mother had filed a petition for the writ in the superior court, which had issued a writ commanding the father to appear with the child. After a hearing, the superior court returned custody of the child to the father. The mother then petitioned the court of appeal for a writ of habeas corpus. The court of appeal issued an order to show cause (a procedure which is often followed by appellate courts [*see In re Hochberg (1970) 2 Cal. 3d 870, 874 n.2, 87 Cal. Rptr. 681, 471 P.2d 1]*) a writ of habeas corpus ordering the father to return custody to the mother, and a writ of prohibition restraining the superior court from enforcing its order.

The Supreme Court then granted a hearing. In denying the writ of habeas corpus and discharging the order to show cause, the Supreme Court noted that a factual hearing had been held in the superior court on the issues of whether the father had legitimated the child and in whose custody the child should be placed for its best interests. The court stated that, although appellate as well as superior courts have jurisdiction to issue the writ, where factual questions are involved, a petitioner should generally seek relief first in the superior court (*14 Cal. 3d 783, 789)* .

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
CHAPTER 110 HABEAS CORPUS
PART II. FORMS

11-110 California Points & Authorities § 110.40

§ 110.40 Supporting Petition for Writ of Habeas Corpus [Penal Code § 1474]--Jurisdiction--No Territorial Restriction on Jurisdiction of Superior Courts or Courts of Appeal

[1] FORM

[*Caption. See § 110.20.*]

THERE IS NO TERRITORIAL LIMITATION ON THE JURISDICTION OF THE _____ [SUPERIOR COURTS *or* COURTS OF APPEAL] TO ENTERTAIN PROCEEDINGS ON THE WRIT OF HABEAS CORPUS, AND TRANSFER OF THE PROCEEDINGS IS THE PROPER PROCEDURE.

A. Original Jurisdiction in Habeas Corpus Proceedings in _____ [Superior Courts *or* Courts of Appeal]. _____ [Courts of appeal *or* Superior courts] and their judges have original jurisdiction in habeas corpus proceedings (*Cal. Const, art. VI, § 10*).

[*EITHER*]

B. Absence of Territorial Limitation on Habeas Corpus Jurisdiction of Courts of Appeal. *Section 10 of Article VI of the California Constitution*, adopted November 8, 1966, eliminated any territorial limitation on the jurisdiction of courts of appeal to entertain petitions for and to grant relief in habeas corpus proceedings, and there is no longer any territorial limitation on the exercise of habeas corpus jurisdiction by a court of appeal (*In re Van Heflin (1976) 58Cal. App. 3d 131, 135* ; *see Griggs v. Superior Court (1976) 16 Cal. 3d 341, 343, 128 Cal. Rptr. 223, 546 P.2d 727*).

[*OR*]

B. Absence of Territorial Limitation on Habeas Corpus Jurisdiction of Superior Courts. Any territorial limitations on the jurisdiction of superior courts to entertain petitions for and to grant relief in habeas corpus matters which may have existed prior to 1966 were eliminated by *Section 10 of Article VI of the California Constitution*, adopted November 8, 1966, and there is now no territorial limitation on the power of a superior court to entertain a

petition for habeas corpus relief. As a general rule the court in which the petition is presented must, if the petitioner has otherwise complied with pertinent rules, file the petition and determine whether it states a prima facie case for relief (*Griggs v. Superior Court (1976) 16 Cal. 3d 341, 343, 346-347, 128 Cal. Rptr. 223, 546 P.2d 727*).

C. Petition Resolved Where Filed Absent Substantial Reason for Transfer. Where the relief sought on petition for the writ of habeas corpus does not fall into the category of a challenge to a judgment or of a challenge to the conditions of confinement, unless there is a substantial reason for transferring the petition, it should be entertained and resolved in the court where it was filed (*Griggs v. Superior Court (1976) 16 Cal. 3d 341, 347, 128 Cal. Rptr. 223, 546 P.2d 727* ; *see Cal. Rules of Ct., Rules 4.552(c), 8.385(c)(2)*; *In re Roberts (2005) 36 Cal. 4th 575, 584-585, 588-594, 31 Cal. Rptr. 3d 458, 115 P.3d 1121*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This form is for use in a memorandum submitted in support of the petition for a writ of habeas corpus where petitioner seeks issuance of the writ from an appellate or superior court whose territorial jurisdiction does not include the place where the petitioner or other person in whose behalf the writ is brought is confined. The California Constitution formerly provided that a court of appeal had power to issue the writ only to any part of its appellate district and could make the writ returnable only before that court or any superior court in the district [*see* former Cal. Const, art VI, § 4(b)] and that a superior court had power to issue the writ only as to persons in custody in the county in which the court sat [*see* former Cal. Const, art VI, § 5]. These territorial restrictions have been removed by the adoption on November 8, 1966, of *Cal. Const, art VI, § 10* [*Griggs v. Superior Court (1976) 16 Cal. 3d 341, 343, 346-347, 128 Cal. Rptr. 223, 546 P.2d 727* ; *In re Van Heflin (1976) 58 Cal. App. 3d 131, 135, 128 Cal. Rptr. 257]* .

Unless there is a substantial reason for transferring the petition to another jurisdiction, it should be entertained and resolved where it was filed. Generally, when an evidentiary hearing is necessary and the persons who will participate in the hearing are more efficiently available to the court to which the proceedings are to be transferred or where that court is better situated to conduct a hearing on the issues raised, transfer is proper. In particular, a challenge to the proceedings under which the person was confined should be transferred to the jurisdiction of the court which rendered the judgment. Where the challenge is to conditions of confinement, the proceedings may be transferred to the jurisdiction in which the person is confined [*Griggs v. Superior Court (1976) 16 Cal. 3d 341, 347, 128 Cal. Rptr. 223, 546 P.2d 727]* .

This memorandum supports the ability of the court in which the petition is filed to entertain and resolve the petition for the writ of habeas corpus, or, if appropriate, to determine whether the petition presents a prima facie case for relief and, if so, to transfer the proceedings to a convenient jurisdiction.

Counsel should include argument with this form showing the relationship between the facts of the case and the points of law stated.

[i] Special Habeas Corpus Proceedings

Special statutory or decisional rules apply to certain proceedings on the writ of habeas corpus, such as those to test the

confinement of a person for involuntary treatment as mentally disordered pursuant to the Lanterman-Petris-Short Act [*Welf. & Inst. Code § 5000 et seq.*]. In such proceedings, jurisdiction and venue is governed by *Welf. & Inst. Code § 5276*. In proceedings on the writ of habeas corpus to test the confinement of a person as mentally retarded (developmentally disabled), jurisdiction is governed by Health & Safety Code § 38451.

[3] Discussion of Authorities

[a] Absence of Territorial Limitation on Habeas Corpus Jurisdiction of Courts of Appeal

In re Van Heflin *(1976) 58 Cal. App. 3d 131, 128 Cal. Rptr. 257* , was a proceeding on the writ of habeas corpus, in which a petition for the writ was filed by a prisoner in a state institution seeking an order striking from a judgment reference to a prior felony conviction and modifying his sentence. Petitioner first sought the writ in the superior court of the county in which he was confined. That court transferred the petition to the sentencing court, which summarily denied relief. Petitioner then filed a petition for the writ in the court of appeal for thedistrict in which the sentencing court was located. Since it determined that the petition stated a prima facie case for relief, the court of appeal had to decide whether to transfer the proceedings to the court of appeal for the district in which the petitioner was confined. In deciding to retain the proceedings and to issue an order to show cause (a procedure often followed by appellate courts where petitioner is in custody of a state institution [*see In re Hochberg (1970) 2 Cal. 3d 870, 874 fn. 2, 87 Cal. Rptr. 681, 471 P.2d 1]*) the court concluded that there is no longer any territorial limitation on the jurisdiction of courts of appeal to entertain proceedings on the writ of habeas corpus. The court based its conclusion on the Supreme Court's holding in *Griggs v. Superior Court (1976) 16 Cal. 3d 341, 343, 128 Cal. Rptr. 223, 546 P.2d 727* , that any territorial limitation on the exercise of habeas corpus jurisdiction by a superior court was eliminated by *Cal. Const, art VI, § 10*, adopted in 1966, and on the fact that the constitutional revision granted identical original jurisdiction to the superior courts and the courts of appeal (*58 Cal. App. 3d 131, 135)* .

Although the problem of transfers from one court of appeal to another was not directly dealt with in *In re Van Heflin, above*, the case does stand for the proposition that the rules set forth in *Griggs* (discussed in *§ 110.40[3][b]*), concerning transfer of cases between superior courts, should apply between courts of appeal, since the court of appeal found that the superior courts and courts of appeal were given identical original jurisdiction in habeas corpus proceedings by *Cal. Const, art. VI, § 10*. Note that the petitioner in this case was not entitled to release from confinement and that the order to show cause was discharged and the writ denied, although the relief requested concerning the correction of the judgment and sentence was granted.

[b] Absence of Territorial Limitation on Habeas Corpus Jurisdiction of Superior Courts

In ***Griggs v. Superior Court*** *(1976) 16 Cal. 3d 341, 128 Cal. Rptr. 223, 546 P.2d 727* , the superintendent of a prison sought a writ of mandate to compel the respondent superior court to quash orders to show cause and to dismiss proceedings in which inmates at the prison made applications for the writ of habeas corpus. Each of the prisoners who petitioned for the writ of habeas corpus filed the petition in the superior court of the county in which the prison was located. However, each was transferred in the normal course of prison administration to a prison outside the county in which the original petition had been filed by the time the orders to show cause were issued (issuance of the order to show cause why the writ should not issue rather than the writ itself as common procedure where the petitioner is in custody of a state institution [*see In re Hochberg (1970) 2 Cal. 3d 870, 874 fn. 2, 87 Cal. Rptr. 681, 471 P.2d 1]*). Each of the inmates moved in the superior court for the transfer of the proceedings to the superior court of the county in which he was confined. The respondent court denied the motion to quash in each case but did not rule on the motions to transfer. At that time the alternative writ of mandate issued from the Supreme Court, and the respondent court took no further action. Although the petitioners for the writ of habeas corpus had all either abandoned the proceedings or had conceded that the original superior court now lacked jurisdiction to issue the order to show cause, the Supreme Court, noting that the parties cannot effectively stipulate that a court has or lacks jurisdiction, decided that the 1966 constitutional revision effectively eliminated the express reservation of *Cal. Const, art. VII, § 5*, on the power of

superior courts to act only within their respective counties and imposed no express limitation on the current power of the courts to exercise origial jurisiction in habeas corpus proceedings. The Court decided, thus, that the former territorial limitation had been eliminated and that there was no longer any territorial limitation on the power of a superior court to entertain a petition for the writ of habeas corpus. The Court also decided, however, that, although a court has jurisdiction to entertain and adjudicate a petition, it should not do so in all instances. The procedure which the Court outlined was that the court to which the petition was presented must, if the petitioner has otherwise complied with pertinent rules, file the petition and determine whether it states a prima facie case for relief. If it does not, the petition should be denied. If it states a case, then the court must determine whether it will hear the matter on the merits. If the challenge is to a particular judgment, the petition should be transferred to the court which rendered the judgment if that court is not the one where the petition was filed. If the challenge is to conditions of confinement, then the petition should be transferred to the superior court of the county in which the person is confined if that court is a different court from the court in which the petition was filed. In cases which do not fall within one of these categories, unless there is substantial reason for transferring a petition it should be entertained and resolved in the court where it was filed. The Court did note, however, that a court should not be precluded from transferring the petition should it appear that an evidentiary hearing is necessary and that the persons who will participate in the hearing are more efficiently available to another court or that the other court is better situated to conduct a hearing (*16 Cal. 3d 341, 343-347)* .

NOTE:

The foregoing procedure was modified effective January 1, 2002, by *Cal. Rules of Ct., Rule 4.552(b)(2)*, which provides that the superior court may transfer a habeas petition without first determining whether a prima facie case for relief exists.

[c] Petition Resolved Where Filed Absent Substantial Reason for Transfer

Griggs v. Superior Court *(1976) 16 Cal. 3d 341, 128 Cal. Rptr. 223, 546 P.2d 727* , is discussed in *§ 110.40[3][b]*.

In re Roberts *(2005) 36 Cal. 4th 575, 31 Cal. Rptr. 3d 458, 115 P.3d 1121* , involved a petition for habeas corpus relief filed by a state prisoner to challenge a finding by the Board of Prison Terms that the petitioner was unsuitable for parole. In the years since his conviction and sentence, the petitioner had been incarcerated at several locations in different counties, and the petitioner had previously filed several habeas petitions challenging earlier denials of parole. The lower courts were in disagreement over whether the proper venue for a habeas petition challenging the denial of parole was in the county of confinement or the county in which the conviction and sentence were handed down. As a result, the courts had given the petitioner conflicting instructions about where to file. To resolve the conflict, the California Supreme Court granted review to determine which court is the proper venue to adjudicate a petition for a writ of habeas corpus challenging the denial of parole.

The Supreme Court began its analysis by noting that in *Griggs v. Superior Court (1976) 16 Cal. 3d 341, 347, 128 Cal. Rptr. 223, 546 P.2d 727* (discussed in *§ 110.40[3][b]*), the Court had held that in general, when a petitioner has complied with pertinent rules, the superior court in which the petition is presented should file and review the allegations of the petition in order to determine whether it states a prima facie case for relief. The *Griggs* Court explained that if the petition states a prima facie case, the superior court must determine whether to hear the matter on the merits. If the challenge is to *a particular judgment or sentence*, the petition should be transferred to the court that rendered judgment if that court is a different court from the court in which the petition was filed (*see Cal Rules of Ct., Rule 4.552(b)(2)(A)*). However, if the challenge is to *conditions of the petitioner's confinement*, then the petition should be transferred to the superior court of the county in which the petitioner is confined if that court is a different court from the court in which the petition was filed (*see Cal Rules of Ct., Rule 4.552(b)(2)(B)*). The question in the present case, therefore, was whether a habeas petition challenging the denial of parole more nearly corresponds to a petition challenging the conviction or sentence, or to a petition challenging the conditions of confinement (*36 Cal. 4th 575, 584-585)* .

The Supreme Court found that the determination by the Board of Prison Terms of a prisoner's suitability for parole is

analogous to a sentencing determination, and it is not the equivalent of individual correction officials' conduct affecting the prisoner's conditions of confinement. The Court remarked that the Board's determination is more appropriately determined in the county in which the sentence was imposed, rather than the county in which the petitioner is currently confined. The Court explained that in general, a sentence contemplates a period of parole, and the objectives of sentencing and parole are related. In essence, sentencing achieves mandatory separation of the offender from society. At the conclusion of that phase, parole assists in returning the prisoner to society while simultaneously affording some measure of continuing protection to society. The Court also found that having the court of commitment review all habeas petitions concerning the denial of parole will have the beneficial effect of producing consistent review of such claims. The Court also found it significant that a prisoner under consideration by the Board will, in most cases, return to and have ties to the county in which he or she formerly resided at the time of the offenses that resulted in the commitment. Therefore, assigning venue to the court of commitment serves the goal of locating the review of parole decisions where the release of the prisoner is most likely to have an impact on the community. Finally, the Court pointed out that assigning venue to the court of commitment lessens the burden on judicial resources in those counties that are small in population and contributing a minute percentage of the felony convictions that occur statewide, but that have large or numerous facilities for the incarceration of criminal defendants (*36 Cal. 4th 575, 588-592)* .

Accordingly, the Supreme Court prescribed the following procedures. First, the Court directed that a petitioner who seeks to challenge by means of habeas corpus the denial of parole (or his or her suitability for parole) should file the petition in the superior court located in the county in which the conviction and sentence arose, and the petition should be adjudicated in that venue. Second, the Court directed that when a habeas corpus petition challenging the denial of parole or suitability for parole is filed in the superior court in a county other than that in which the petitioner's conviction and sentence were imposed, the filing court should transfer the petition to the superior court in the county of commitment in the first instance, prior to any determination being made that the petitioner has made a prima facie case. Lastly, the Court directed that, among the three levels of state courts, a habeas corpus petition challenging a decision of the parole board should be filed in the superior court, which should entertain the petition in the first instance (*36 Cal. 4th 575, 593-594)* .

The foregoing procedures prescribed by the Supreme Court have since been incorporated in the California Rules of Court (*see Cal. Rules of Ct., Rules 4.552(c), 8.385(c)(2)*).

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
CHAPTER 110 HABEAS CORPUS
PART II. FORMS

11-110 California Points & Authorities § 110.41

§ 110.41 Supporting Petition for Writ of Habeas Corpus [Penal Code § 1474]--Disposition of Case--Court's Power to Grant Relief Requested

[1] FORM

[*Caption. See § 110.20.*]

WHEN A COURT HAS ISSUED A WRIT OF HABEAS CORPUS, ITS POWER IS NOT LIMITED TO EITHER DISCHARGING THE PETITIONER FROM OR REMANDING THE PETITIONER TO CUSTODY BUT EXTENDS TO DISPOSING OF THE PETITIONER AS THE JUSTICE OF THE CASE MAY REQUIRE.

Court's Power to Grant Relief. When a court has issued a writ of habeas corpus, its power is not limited to either discharging the petitioner from or remanding the petitioner to custody but extends to disposing of the petitioner as the justice of the case may require (*Penal Code § 1484*; *In re Crow (1971) 4 Cal. 3d 613, 619, 94 Cal. Rptr. 254, 483 P.2d 1206*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing points and authorities are for use in a memorandum of points and authorities submitted in support of the petition for writ of habeas corpus where the petitioner seeks relief other than discharge from illegal custody.

Where appropriate, counsel should include argument with the foregoing authority showing the relationship between the

facts of the case and the point of law stated.

[i] Related Uses

With appropriate modifications the foregoing authority may be used in a memorandum of points and authorities submitted in support of the traverse to the return to the writ of habeas corpus where the return alleges that the relief requested by petitioner is beyond the capacity of the court to grant.

[3] Discussion of Authorities

[a] Court's Power to Grant Relief

In re Crow *(1971) 4 Cal. 3d 613, 94 Cal. Rptr. 254, 483 P.2d 1206* , was a petition for the writ of habeas corpus brought by a prisoner in a state prison alleging that he had been deprived of the right to a speedy trial. The superior court granted the writ and found after hearing that petitioner was entitled to a new trial. The state did not appeal the decision. The court which was to give the new trial attempted to dismiss the superior court's order and remanded the petitioner to the state prison. The Supreme Court found that the granted relief lay within the superior court's jurisdiction, since the court's power once it has issued the writ of habeas corpus cannot be limited to either discharging the petitioner from or remanding the petitioner to custody but extends to disposing of petitioner as the justice of the case may require.

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
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PART II. FORMS

11-110 California Points & Authorities § 110.42

§ 110.42 Supporting Petition for Writ of Habeas Corpus [Penal Code § 1474]--Disposition of Case--Authority for Discharge From Custody [Penal Code § 1487(1)-(6)]

[1] FORM

[*Caption. See § 110.20.*]

WHERE IT APPEARS ON THE RETURN OF THE WRIT THAT THE PERSON IS IN CUSTODY BY VIRTUE OF PROCESS FROM ANY COURT OF THIS STATE OR FROM ANY JUDGE OR OFFICER OF SUCH A COURT, THE PERSON MAY BE DISCHARGED _____ [*specify condition met pursuant to Penal Code § 1487*].

[*EITHER*]

Restraint Has Become Unlawful. If it appears on the return of the writ that the person is in custody by virtue of process from any court of this state or from any judge or officer of such a court, the person may be discharged when the imprisonment was at first lawful but has, by some act, omission, or event which has taken place afterwards, become entitled to a discharge (*Penal Code § 1487(2)*).

[*OR*]

Process Is Defective in Substance. If it appears on the return of the writ that the person is in custody by virtue of process from any court of this state or from any judge or officer of such a court, the person may be discharged when the process is defective in some matter of substance required by law, rendering such process void (*Penal Code § 1487(3)*).

[*OR*]

Process Issued in Case Not Allowed by Law. If it appears on the return of the writ that the person is in custody by

virtue of process from any court of this state or from any judge or officer of such a court, the person may be discharged when the process, though proper in form, has been issued in a case not allowed by law (*Penal Code § 1487(4)*).

[*OR*]

Improper Custodian. If it appears on the return of the writ that the person is in custody by virtue of process from any court of this state or from any judge or officer of such a court, the person may be discharged when the person having custody of the person is not the one allowed by law to detain the person (*Penal Code § 1487(5)*).

[*OR*]

Unauthorized Process. If it appears on the return of the writ that the person is in custody by virtue of process from any court of this state or from any judge or officer of such a court, the person may be discharged when the process is not authorized by any order, judgment, or decree of any court, nor by any provision of law (*Penal Code § 1487(6)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing points and authorities are for use in a memorandum of points and authorities submitted in support of the petition for the writ of habeas corpus where the petitioner seeks to justify the granting of the relief sought pursuant to one of these statutory grounds for release.

Where appropriate, counsel should include argument with the foregoing points and authorities showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

With appropriate modifications the foregoing points and authorities may be used in a memorandum of points and authorities submitted in support of the traverse to the return to the writ of habeas corpus, where the return alleges that petitioner is in custody by virtue of process.

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
CHAPTER 110 HABEAS CORPUS
PART II. FORMS

11-110 California Points & Authorities § 110.43

§ 110.43 Supporting Petition for Writ of Habeas Corpus [Penal Code § 1474]--Review--Application to Court of Appeal After Denial by Superior Court

[1] FORM

[*Caption. See § 110.20.*]

THE DECISION OF A SUPERIOR COURT DENYING THE WRIT OF HABEAS CORPUS IS NOT APPEALABLE, BUT THE PETITIONER MAY SEEK THE SAME RELIEF BY PETITION FOR HABEAS CORPUS IN THE COURT OF APPEAL.

A. Denial of Writ by Superior Court As Nonappealable. The decision of a superior court denying the writ of habeas corpus is not appealable (*In re M. (1975) 14 Cal. 3d 783, 789, 122 Cal. Rptr. 531, 537 P.2d 363*).

B. Relief by New Proceeding in Court of Appeal. After denial of the writ of habeas corpus by a superior court, the petitioner may seek the same relief by instituting habeas corpus proceedings in the court of appeal (*In re M. (1975) 14 Cal. 3d 783, 789, 122 Cal. Rptr. 531, 537 P.2d 363*).

[*Optional*] **C. Point of Law Not Raised in Prior Proceeding.** Should the petitioner desire to raise some point of law not raised in the petition for or at the hearing on the return of the prior writ, then, if the prior writ was returned or returnable before the superior court or a superior court judge, no writ can be issued on a second or other application except by the appropriate court of appeal or some judge of that court of appeal, or by the Supreme Court or some judge of the Supreme Court. In that event, the writ must not be made returnable before any superior court or any judge of the superior court (*Penal Code § 1475*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing points and authorities are for use in a memorandum of points and authorities submitted in support of a petition for the writ of habeas corpus where the petition has been denied by a superior court and petitioner seeks the same relief by filing the petition for the writ of habeas corpus with the court of appeal as a new habeas corpus proceeding.

Where appropriate, counsel should include with the foregoing points and authorities argument showing the relationship between the facts of the case and the points of law stated.

It should be noted that the foregoing authorities are applicable only to the situation described above. Where any or all of the relief requested has been granted by the superior court, an appeal may be taken to the court of appeal from the final order of the superior court. Further, where such an appeal has been heard in the court of appeal, or where the application for the writ has been heard and determined by the court of appeal on a new petition for the writ of habeas corpus filed in that court, and where all or part of the relief has been granted by the court of appeal, an application may be made for a hearing (on appeal) in the Supreme Court [*Penal Code § 1507*].

Where the court of appeal has denied the relief requested on habeas corpus or has denied the writ, there is no specific statute indicating that a petition for hearing (on appeal) can be made to the Supreme Court. It might seem that a new petition for the writ of habeas corpus filed with the Supreme Court would therefore be the remedy on denial of the writ by a court of appeal. Such petitions may be made and can, where appropriate, be granted [*see In re E. (1975) 15 Cal. 3d 183, 193, 123 Cal. Rptr. 103, 538 P.2d 231]* . The Supreme Court has stated, however, that it disapproves of this procedure because rebriefing is wasteful and because a published opinion from the court of appeal denying the writ may remain on the books even though the Supreme Court would have granted a hearing and removed the opinion of the court of appeal. It is preferable, therefore, when the court of appeal has denied the writ, for petitioner to follow the procedure indicated by the Supreme Court by applying to the Court for a hearing on the denial of the writ, rather than filing a new petition for a writ of habeas corpus [*see In re E. (1975) 15 Cal. 3d 183, 193 fn. 15, 123 Cal. Rptr. 103, 538 P.2d 231]* .

[3] Discussion of Authorities

[a] Denial of Writ by Superior Court as Nonappealable

The facts of ***In re M.*** *(1975) 14 Cal. 3d 783, 122 Cal. Rptr. 531, 537 P.2d 363* , are discussed in *§ 110.34[3][a]*. In deciding to consider the merits of the mother's petition for custody of her minor child, the Supreme Court noted that although the mother had petitioned the superior court for the writ and the writ had been denied, the order denying the writ was nonappealable and the mother's proper remedy had been to make a new application for the writ to the appellate court.

[b] Relief by New Proceeding in Court of Appeal

In re M. *(1975) 14 Cal. 3d 783, 122 Cal. Rptr. 531, 537 P.2d 363* , is discussed in *§ 110.43[3][a]*.

[4] Additional Authorities

[a] Denial of Writ by Superior Court as Nonappealable

In *Bloom v. Municipal Court (1976) 16 Cal. 3d 71, 127 Cal. Rptr. 317, 545 P.2d 229* , plaintiff sought to prevent the municipal court from proceeding with a criminal prosecution by a writ of prohibition, which was denied by the superior

court. Plaintiff then appealed to the court of appeal from the denial of the writ. The court of appeal held that a superior court judgment denying a writ of prohibition to restrain a municipal court prosecution is not appealable, and that the only remedy is a petition in the court of appeal for an original writ of prohibition. The Supreme Court ordered a hearing and transferred the case to the Court on its own motion. In holding that the order denying the writ of prohibition is appealable, the Supreme Court rejected analogy to procedure on denial of the writ of habeas corpus as nonpersuasive. The Court found that the rule that a denial of the writ of habeas corpus can be challenged only by filing a new petition is a statutory rule applicable only to proceedings for habeas corpus.

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CHAPTER 110 HABEAS CORPUS
PART II. FORMS

11-110 California Points & Authorities § 110.44

§ 110.44 Supporting Petition for Writ of Habeas Corpus [Penal Code § 1974]--Review of Superior Court Determinations--Child Custody--Application to Higher Court After Denial of Writ by Lower Court

[1] FORM

[*Caption. See § 110.20.*]

ON A NEW PETITION FOR WRIT OF HABEAS CORPUS IN AN APPELLATE COURT AFTER DENIAL OF THE WRIT BY A SUPERIOR COURT IN A CHILD CUSTODY PROCEEDING, PETITIONER MAY PRESENT QUESTIONS OF LAW TO THE APPELLATE COURT INCLUDING THE QUESTION OF WHETHER THE TRIAL COURT'S DETERMINATION IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. Limited Res Judicata Effect of Denial of Writ. Where habeas corpus is used to assert custody rights to a minor child, rather than to secure relief from confinement resulting from criminal prosecution, the superior court's determination to deny the writ is given some weight. Appellate courts, however, recognize on denial of the writ in child custody cases an exception to the general rule giving full res judicata effect to a superior court order. The order denying the writ is given res judicata effect not in the broad sense that it bars further proceedings for the custody of the child, but in the very narrow sense that a petition for writ of habeas corpus cannot again litigate the issues of fact decided in the superior court (*In re M. (1975) 14 Cal. 3d 783, 790-791, 122 Cal. Rptr. 531, 537 P.2d 363*).

B. Questions of Law Properly Raised with Appellate Court. When the petitioner in a child custody case reapplies for the writ of habeas corpus to an appellate court, a denial of the writ by the superior court does not bar the petitioner from raising in the new proceeding a question of law rather than fact decided by the superior court (*In re M. (1975) 14 Cal. 3d 783, 791, 122 Cal. Rptr. 531, 537 P.2d 363*).

C. Substantial Evidence for Trial Court's Findings of Fact. The category of questions of law which may be raised on a new application for the writ of habeas corpus with an appellate court after denial of the writ by a superior court in a child custody case includes the question of whether the trial court's findings of fact were supported by substantial evidence (*In re M. (1975) 14 Cal. 3d 783, 791, 122 Cal. Rptr. 531, 537 P.2d 363*).

[*Optional*] **D. Changed Circumstances.** Where there is a change in the circumstances which affect the right to custody

after the hearing in the superior court, the petitioner may relitigate on petition to the appellate court the issues of fact decided in the superior court on the original application for the writ of habeas corpus in a child custody case (*In re M. (1975) 14 Cal. 3d 783, 791, 122 Cal. Rptr. 531, 537 P.2d 363*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing points and authorities are for use in a memorandum of points and authorities submitted in support of a petition for the writ of habeas corpus where the petitioner seeks to obtain custody of a minor child, where the petitioner has first applied to a superior court for a writ of habeas corpus but the writ has been denied, and where the petitioner is now seeking relief from an appellate court by a new petition for the writ on the grounds that the trial court's determinations of questions of law were erroneous or that the trial court's findings of fact were not supported by substantial evidence.

Where appropriate, counsel should include argument with the foregoing points and authorities showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

With appropriate modifications the foregoing points and authorities may be used in a memorandum of points and authorities in support of the traverse to the return to the writ where the return alleges that consideration of the case is barred by denial of the writ by a lower court.

[3] Discussion of Authorities

[a] Limited Res Judicata Effect of Denial of Writ

The facts of ***In re M.*** *(1975) 14 Cal. 3d 783, 122 Cal. Rptr. 531, 537 P.2d 363* , are discussed in *§ 110.34[3][a]*. The Supreme Court had to determine to what extent it was bound by the previous proceedings on the writ of habeas corpus to determine custody of the child in the superior court. The Court noted that the new proceeding in the appellate court is not a review of the superior court determination and that the doctrines of res judicata and collateral estoppel are not applicable and do not preclude reassertion of arguments rejected in the prior proceeding. Although the former rule had been that a petitioner in a child custody proceeding who had been unsuccessful in the superior court could not maintain a proceeding of the same nature in the court of appeal absent an allegation of changed circumstances, the Court noted, that rule had acted to wrongfully deprive an unsuccessful petitioner of review, since a denial of the writ of habeas corpus is not appealable. The Court approved of the rule that the order denying the writ is not res judicata in the broad sense that it bars further proceedings for the custody of the child, but in the very narrow sense that a petitioner for a writ of habeas corpus cannot, in an appellate court, again litigate the issues of fact decided in the superior court, unless after the hearing in the superior court there is a change of circumstances which affect the right to custody. The Court also approved the rule that a decision by the superior court which constitutes merely a decision of a question of law rather than a fact does not bar the petitioner from presenting the same question of law to an appellate court on an application for the writ filed in that court. Included within the category of questions of law, the Court found, is the determination of whether there is substantial evidence to support the trial court's findings of fact. The Court noted that this rule gives the

trial court primary esponsibility in the performance of the task for which it is best equipped, the resolution of questions of fact, and narrows the function of the appellate court to that of final arbiter of questions of law.

[b] Questions of Law Properly Raised With Appellate Court

In re M. *(1975) 14 Cal. 3d 783, 122 Cal. Rptr. 531, 537 P.2d 363* , is discussed in *§ 110.44[3][a]*.

[c] Substantial Evidence for Trial Court's Findings of Fact

In re Richard M. *(1975) 14 Cal. 3d 783, 122 Cal. Rptr. 531, 537 P.2d 363* , is discussed in *§ 110.44[3][a]*.

[4] Additional Authorities

[a] Questions of Law Properly Raised With Appellate Court

In re Reyna (1976) 55 Cal. App. 3d 288, 126 Cal. Rptr. 138 , was a proceeding on habeas corpus by the father of an illegitimate child to secure its custody. Petitioner first filed a petition for the writ in the superior court seeking to obtain custody of the child from the welfare department adoption agency with which the mother had placed the child for adoption. The superior court held a hearing and denied the petition by minute order without findings of fact. Petitioner then filed a petition for the writ with the court of appeals, which issued an order to show cause and scheduled a hearing as to why the petition should not be granted (a procedure often followed by appellate courts [*see In re Hochberg (1970) 2 Cal. 3d 870, 874 n.2, 87 Cal. Rptr. 681, 471 P.2d 1]*). In considering the issue of whether the father was entitled to custody of the child, the court of appeal first considered the scope of its review of the proceedings in the superior court. It found that the superior court's determination of the factual issues in the proceeding below was entitled to some weight but that the court of appeal was not foreclosed from further considerations of questions of law, including whether there is substantial evidence to support the lower court's findings of fact. The court found that although the trial court failed to make express findings in den ying the original petition for the writ, the court of appeal was permitted to review the evidence to determine if all the necessarily implied findings were supported by the evidence, resolving all doubts in favor of the trial court's decision.

[b] Substantial Evidence for Trial Court's Findings of Fact

In re Reyna (1976) 55 Cal. App. 3d 288, 126 Cal. Rptr. 138 , is discussed in *§ 110.44[4][a]*.

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
CHAPTER 110 HABEAS CORPUS
PART II. FORMS

11-110 California Points & Authorities § 110.45

§ 110.45 Supporting Return [Penal Code § 1480]--Petition for Writ Must Be Verified [Penal Code § 1474(3)]

[1] FORM

[*Caption. See § 110.20.*]

THE PETITION FOR THE WRIT OF HABEAS CORPUS MUST BE VERIFIED, AND AN UNVERIFIED PETITION MAY BE REJECTED.

A. Petition Must Be Verified. The petition for writ of habeas corpus must be verified by the oath or affirmation of the party making the application (*Pen. Code § 1474(3)*).

B. Unverified Petition May Be Rejected. A petition for writ of habeas corpus may be rejected on the basis that it is unverified (*People v. Manson (1976) 61 Cal. App. 3d 102, 169, 132 Cal. Rptr. 265* ; *In re Newell (1923) 64 Cal. App. 103, 220 P. 425*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Respondent _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing points and authorities are for use in a memorandum submitted in support of the return to the writ of habeas corpus or the return to an order to show cause why the writ should not issue when the respondent opposes the granting of relief on the ground that the petition was not verified. Appellate courts often follow the procedure of issuing an order to show cause [*see In re Hochberg (1970) 2 Cal. 3d 870, 874 n.2, 87 Cal. Rptr. 681, 471 P.2d 1]* ; this

procedure is expressly authorized by rule for superior courts [*see Cal. Rules of Ct., Rule 4.551(c), (d)*].

Where appropriate, counsel should include argument with the foregoing points and authorities showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Unverified Petition May Be Rejected

In ***People v. Manson*** *(1976) 61 Cal. App. 3d 102, 132 Cal. Rptr. 265* , a criminal defendant attempted, by petitioning for a writ of habeas corpus, to obtain a dismissal of the charges against her on the grounds that she had ineffective counsel and that she did not knowingly and voluntarily waive her *Fifth Amendment* right to remain silent. The trial court summarily denied the writ of habeas corpus. Petitioner, rather than filing a second petition for the writ in the appellate court as would have been her proper recourse, assigned the denial of the writ as error on an appeal of the criminal conviction. The court of appeal found, although it noted that it was unnecessary to determine the correctness of the trial court's ruling because the denial of the writ is not appealable, that the petition could have been properly rejected on the sole ground that it was not verified as required by *Penal Code § 1474(3)*.

In re Newell *(1923) 64 Cal. App. 103, 220 P. 425* , was a proceeding for the writ of habeas corpus in which the appellate court denied the petition for the writ summarily on the ground that it was not verified as required by *Penal Code § 1474*, although the court also noted that the question raised by the petition had already been disposed of on an application to the Supreme Court.

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
CHAPTER 110 HABEAS CORPUS
PART II. FORMS

11-110 California Points & Authorities § 110.46

§ 110.46 Supporting Return [Penal Code § 1480]--Petitioner Not Restrained

[1] FORM

[*Caption. See § 110.20.*]

HABEAS CORPUS IS NOT AVAILABLE WHERE _____ [PETITIONER *or* THE PERSON IN WHOSE BEHALF THE WRIT IS SOUGHT] IS NEITHER ACTUALLY NOR CONSTRUCTIVELY RESTRAINED.

Writ Not Available Where No Restraint. Where _____ [petitioner *or* the person in whose behalf the writ is sought] is neither actually nor constructively restrained, the writ is not available (*Williams v. Department of Motor Vehicles (1969) 2 Cal. App. 3d 949, 952, 83 Cal. Rptr. 76*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Respondent _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing points and authorities are for use in a memorandum of points and authorities submitted in support of the return to the writ of habeas corpus where respondent opposes use of the writ on the ground that petitioner or the person in whose behalf the writ is sought is neither actually nor constructively restrained or confined.

Where appropriate, counsel should include argument with the foregoing points and authorities showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For a return to the writ of habeas corpus in a civil use of the writ, see Ch. 292, *Habeas Corpus* in California Forms of Pleading and Practice.

[3] Discussion of Authorities

[a] Writ Not Available Where No Restraint

In ***Williams v. Department of Motor Vehicles*** *(1969) 2 Cal. App. 3d 949, 83 Cal. Rptr. 76* , the Department of Motor Vehicles had suspended defendant's driver's license because he had twice been convicted of driving under the influence of alcohol. Defendant filed a petition for writ of mandate in the superior court to command the Department to revoke its suspension of his license, and the court issued the alternative writ. The Department filed its return, and a hearing was held on the petition for the writ of mandate. The writ was granted, because defendant had not been represented by counsel at the first conviction. The Department contended on appeal that defendant should have sought a writ of habeas corpus rather than mandate. In rejecting this contention, the court of appeal noted that habeas corpus is not available to a petitioner who is neither actually nor constructively restrained, so that mandate was the proper remedy in this case.

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
CHAPTER 110 HABEAS CORPUS
PART II. FORMS

11-110 California Points & Authorities § 110.47

§ 110.47 Supporting Return [Penal Code § 1480]--Habeas Corpus Not Available to Legal Entities

[1] FORM

[*Caption. See § 110.20.*]

THE WRIT OF HABEAS CORPUS IS NOT AVAILABLE TO LEGAL ENTITIES BUT ONLY TO NATURAL PERSONS.

Writ of Habeas Corpus Not Available to Legal Entities. The writ of habeas corpus is not available to a legal entity such as a labor union (*In re Coleman (1974) 12 Cal. 3d 568, 572 fn. 2, 116 Cal. Rptr. 381, 526 P.2d 533*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Respondent _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing points and authorities are for use in a memorandum of points and authorities submitted in support of the return to the writ of habeas corpus where the writ is sought on behalf of or by a legal entity rather than a natural person, and the respondent argues that the writ is available only to natural persons.

Where appropriate, counsel should include argument with the foregoing points and authorities showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For a form of return to the writ of habeas corpus in civil uses of the writ, see Ch. 292, *Habeas Corpus* in California Forms of Pleading and Practice.

[3] Discussion of Authorities

[a] Writ of Habeas Corpus Not Available to Legal Entities

In re Coleman *(1974) 12 Cal. 3d 568, 116 Cal. Rptr. 381, 526 P.2d 533* , was a proceeding for the writ of habeas corpus, in which members of a striking union, who had been found in contempt of court for violation of a restraining order, sought to review their contempt convictions. The Court issued an order to show cause (a procedure often followed by appellate courts [*see In re Hochberg (1970) 2 Cal. 3d 870, 874 fn. 2, 87 Cal. Rptr. 681, 471 P.2d 1]*). On consideration of the merits, the Court discharged the order to show cause and granted the writ of habeas corpus to some individual petitioners. In denying the petition of the union for the writ, however, the Court noted that the writ of habeas corpus is not available to a legal entity such as a union.

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
CHAPTER 110 HABEAS CORPUS
PART II. FORMS

11-110 California Points & Authorities § 110.48

§ 110.48 Supporting Return [Penal Code § 1480]--Failure to Exhaust Administrative Remedies

[1] FORM

[*Caption. See § 110.20.*]

ADMINISTRATIVE REMEDIES MUST BE EXHAUSTED BEFORE RESORT IS HAD TO THE COURTS ON THE WRIT OF HABEAS CORPUS, AND EXHAUSTION OF ADMINISTRATIVE REMEDIES IS A JURISDICTIONAL PREREQUISITE TO RESORT TO THE COURTS.

A. Exhaustion of Administrative Remedies Reqired. The doctrine requiring exhaustion of available administrative remedies before an applicant seeks relief in the courts applies to applications for the writ of habeas corpus (*In re Muszalski (1975) 52 Cal. App. 3d 500, 506, 125 Cal. Rptr. 286*).

B. Jurisdictional Requirement of Exhaustion of Administrative Remedies. The rule that administrative remedies must be exhausted before relief may be sought in the courts is not a matter of judicial discretion, but is a fundamental rule of procedure laid down by courts of last resort, followed under the doctrine of stare decisis, and binding on all courts. Exhaustion of administrative remedies is a jurisdictional prerequisite to resort to the courts (*Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 293, 109 P.2d 942, 132 ALR 715* (relief by writ of mandate and temporary restraining order as improper)).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Respondent _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing points and authorities are for use in a memorandum of points and authorities submitted in support of the return to the writ of habeas corpus where respondent in the return to the writ alleges that relief by writ of habeas corpus is improper because petitioner has failed to exhaust available administrative remedies.

Where appropriate, counsel should include argument with the foregoing points and authorities showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Exhaustion of Administrative Remedies Required

In re Muszalski *(1975) 52 Cal. App. 3d 500, 125 Cal. Rptr. 286* , was a proceeding on the writ of habeas corpus, in which an inmate of a prison petitioned the superior court for a writ of habeas corpus seeking to inspect all of the documents pertaining to his case in preparation for a parole consideration hearing before the Adult Authority. The superior court held an evidentiary hearing and partially granted the requested relief. The Department of Corrections appealed from that order, and the court of appeal affirmed the order of the trial court. Insofar as the requested relief was denied, however, petitioner filed in the court of appeal a new petition for habeas corpus, and that court issued an order to show cause why the writ should not issue (a procedure frequently followed by the appellate courts [*see In re Hochberg (1970) 2 Cal. 3d 870, 874 fn. 2, 87 Cal. Rptr. 681, 471 P.2d 1]*). In denying the writ of habeas corpus and discharging the order to show cause, the court of appeal decided that the doctrine of exhaustion of administrative remedies is applicable to applications for habeas corpus relief. The question had not been previously considered in California. The court of appeal based its decision on the example of those federal cases which hold that a federal prisoner seeking relief similar to that sought by petitioner in this case must exhaust the administrative remedies made available by the regulations of the prison authority. The court also based its decision on the rationale behind the rule of exhaustion of administrative remedies. As the court noted, that rule is based on the consideration that the courts should not interfere with an agency until it has completed its action, or else has exceeded its jurisdiction, and on the further consideration that the agency should be allowed to develop the necessary factual background on which its decisions should be based.

Petitioner raised the contention that the requirement of exhaustion of administrative remedies should be waived where petitioner is seeking vindication of a constitutional right. The court denied this contention on the basis that cases had held that habeas corpus will not issue where the petitioner has failed to exhaust the remedy of appeal even though fundamental constitutional rights were involved.This holding may, however, be questionable since other cases have held that failure to take an appeal does not bar relief by writ of habeas corpus where special circumstances exist. Moreover, in this respect, the rule requiring exhaustion of remedies by appeal has been held to be a discretionary rule [*see In re Coughlin (1976) 16 Cal. 3d 52, 55]* .

By contrast, the requirement of exhaustion of administrative remedies has been held to be a jurisdictional requirement and not to be a discretionary matter [see *Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 293, 109 P.2d 942, 132 ALR 715]* , and the fact that a constitutional issue is involved would not cause the requirement of exhaustion of administrative remedies to be waived.

There is one further requirement for the applicability of the doctrine of exhaustion of administrative remedies beyond the availability of an administrative remedy. The administrative remedy set up must be efficacious and establish a clearly defined machinery for the submission, evaluation, and resolution of complaints [*see Endler v. Schutzbank (1968) 68 Cal. 2d 162, 168, 65 Cal. Rptr. 297, 436 P.2d 297]* . The court of appeal found that the procedure set up by the Department of Corrections for review of denials of access to information sought by inmates was such an administrative procedure and that petitioner, therefore, was required to follow that remedy before seeking relief by the writ of habeas corpus and, accordingly, denied the writ of habeas corpus and discharged the order to show cause. A

petition for rehearing was denied, and petitioner's application for a hearing by the Supreme Court was likewise denied.

The requirement of exhaustion of administrative remedies has usually been imposed to prevent judicial relief only where the statutes or regulations set up a complete administrative procedure fulfilling the requirements of due process of law [*see Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 292, 109 P.2d 942, 132 ALR 715]* and where the statute or regulation under which the procedure is offered establishes cleary defined machinery for the submission, evaluation, and resolution of complaints by aggrieved parties [*see Endler v. Schutzbank (1968) 68 Cal. 2d 162, 168, 65 Cal. Rptr. 297, 436 P.2d 297]* . Petitioner contended that the administrative procedures offered in this case were inadequate and therefore did not have to be exhausted before petitioner could seek relief by writ of habeas corpus. His contention was rejected by the court of appeal, which found the administrative procedures offered to be adequate. Although it rejected petitioner's argument, the court did accept petitioner's contention that inadequate administrative remedies need not be exhausted. In denying petitioner's application for the writ, the court found that the remedies were adequate as a matter of fact.

[b] Jurisdictional Requirement of Exhaustion of Administrative Remedies

Abelleira v. District Court of Appeal *(1941) 17 Cal. 2d 280, 109 P.2d 942, 132 ALR 715* , was a petition for a writ of prohibition before the Supreme Court to restrain the court of appeal from taking any steps toward the enforcement of a writ of mandate and temporary restraining order issued by the court of appeal and directed against an administrative agency. Before an administrative determination had been completed, one of the parties applied to a court of appeal for a writ of mandate and other incidental relief, stating that it had not exhausted its administrative remedies because the action of the agency would violate the statutes, that in prior decisions the agency had shown its position to be against its case on the issue raised, and that the decision of the agency would damage the fund maintained by the agency which was at issue. The court of appeal issued an alternative writ and a temporary restrainingorder. The party then filed an appeal with the agency from the decision of the agency, and the other party then petitioned the Supreme Court for a writ of prohibition. In holding that the court of appeal lacked jurisdiction to issue the writ of mandate concerning the administrative proceeding, the Supreme Court found that the requirement that the administrative remedies be exhausted is a jurisdictional prerequisite for the resolution of questions in a court. Moreover, the Court found that the exhaustion of administrative remedies is a jurisdictional rule and not a matter of discretion for the courts. The Court therefore issued the writ of prohibition to restrain the enforcement of the writ of mandate and temporary restraining order by the court of appeal.

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
CHAPTER 110 HABEAS CORPUS
PART II. FORMS

11-110 California Points & Authorities § 110.49

§ 110.49 Supporting Return [Penal Code § 1480]--Application to Appellate Court Before Application to Superior Court

[1] FORM

[*Caption. See § 110.20.*]

AN APPELLATE COURT HAS DISCRETION TO REFUSE TO ISSUE THE WRIT OF HABEAS CORPUS AS AN EXERCISE OF ORIGINAL JURISDICTION ON THE GROUND THAT APPLICATION HAS NOT BEEN MADE FOR THE WRIT IN A LOWER COURT.

A. Discretion to Refuse to Issue Writ. Although the appellate courts have jurisdiction to issue the writ of habeas corpus on a first application made in an appellate court, they have discretion to refuse to issue the writ as an exercise of original jurisdiction on the ground that application has not been made for the writ in a lower court in the first instance (*In re Hillery (1962) 202 Cal. App. 2d 293, 294, 20 Cal. Rptr. 759*).

[*Optional*] **B. Factual Questions Require Application First in Superior Court.** [*See § 110.39, Paragraph C.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing points and authorities are for use in a memorandum of points and authorities submitted in support of the return to the writ of habeas corpus where petitioner has applied in the first instance to an appellate court, not having

sought relief in a superiorcourt by application for the writ.

Where appropriate, counsel should include argument with the foregoing points and authorities showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Discretion to Refuse to Issue Writ

In re Hillery *(1962) 202 Cal. App. 2d 293, 20 Cal. Rptr. 759* , was a proceeding for the writ of habeas corpus in which petitioner, who had been imprisoned in a county jail without being charged with any crime or taken before a magistrate, sought release by a petition for the writ filed in the first instance with the court of appeal. In denying the writ, the court noted that petitioner had alleged that no prior application for the writ had been made. The court found that it had jurisdiction to issue the writ but that it had discretion to refuse to issue the writ as an exercise of original jurisdiction onthe ground that application had not been made for the writ in a lower court in the first instance. Since there was no showing in the petition of extraordinary circumstances justifying action by an appellate court, and since habeas corpus proceedings involving a factual situation should be first tried in the superior court rather than in an appellate court, except where questions of law are involved, the court held that petitioner should have applied to the superior court.

[b] Factual Questions Require Application First in Superior Court

In re M. *(1975) 14 Cal. 3d 783, 122 Cal. Rptr. 531, 537 P.2d 363* , was discussed in *§ 110.49[3][b]*.

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11-110 California Points & Authorities § 110.50

§ 110.50 Supporting Return [Penal Code § 1480]--Child Custody--Respondent Entitled to Temporary Custody Despite Existing Out-of-State Decree

[1] FORM

[*Caption. See § 110.20.*]

DESPITE THE EXISTENCE OF AN OUT-OF-STATE COURT DECREE AWARDING CUSTODY OF A CHILD TO PETITIONER, RESPONDENT MAY BE AWARDED TEMPORARY CUSTODY WHERE RESPONDENT ALLEGES AND PROVES JEOPARDY TO THE CHILD'S HEALTH OR SAFETY.

Health and Safety of the Child Jeopardized. Despite the existence of an out-of-state court decree awarding custody to petitioner, respondent may be awarded temporary custody of the child pending final determination of proper custody in another state where alleging and proving that the child's health or safety will be jeopardized and that some substantial harm will occur if respondent is not awarded temporary custody (*Ferreira v. Ferreira (1973) 9 Cal. 3d 824, 837, 109 Cal. Rptr. 80, 512 P.2d 304*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Respondent _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing points and authorities are for use in a memorandum of points and authorities submitted in support of the return to the writ of habeas corpus where petitioner is entitled to custody pursuant to a valid out-of-state court decree, but respondent wishes to retain temporary custody of the child pending final determination of the right to custody

because substantial harm will occur to the health or safety of the child if custody is returned to petitioner.

Where appropriate, counsel should include argument with the foregoing points and authorities showing the relationship between the facts of the case and the points of law stated. The foregoing authority should also be accompanied by affidavits showing the existence of facts which indicate that the health or safety of the child would suffer substantial harm if custody remained with petitioner.

[3] Discussion of Authorities

[a] Health and Safety of Child Jeopardized

Ferreira v. Ferreira *(1973) 9 Cal. 3d 824, 109 Cal. Rptr. 80, 512 P.2d 304* , is discussed in *§ 110.35[3][c]*.

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11-110 California Points & Authorities § 110.51

§ 110.51 Supporting Return [Penal Code § 1480]--Child Custody--Proceedings in Appellate Court--Relitigation of Factual Issues Decided on Hearing in Superior Court

[1] FORM

[*Caption. See § 110.20.*]

ON A NEW PETITION FOR WRIT OF HABEAS CORPUS FILED WITH AN APPELLATE COURT IN A CHILD CUSTODY CASE AFTER DENIAL OF THE WRIT BY THE SUPERIOR COURT, PETITIONER MAY NOT AGAIN LITIGATE THE ISSUES OF FACT DECIDED IN THE SUPERIOR COURT ABSENT CHANGED CIRCUMSTANCES.

Attempt to Relitigate Factual Issues Decided by Superior Court. Where habeas corpus has been used to assert custody rights to a minor child and the writ has been denied by the superior court, petitioner may not on a new application for the writ in an appellate court again litigate the issues of fact decided in the superior court unless after the hearing in the superior court there is a change of the circumstances which affect the right to custody (*In re M. (1975) 14 Cal. 3d 783, 790-791, 122 Cal. Rptr. 531, 537 P.2d 363*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Respondent _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing points and authorities are for use in a memorandum of points and authorities submitted in support of the return to a writ of habeas corpus where the petitioner is using the writ to determine an issue of child custody and has

previously applied for the writ in the superior court but has been unsuccessful on the factual issues in the case at the superior court level. If petitioner attempts to relitigate these issues at the appellate level, respondent can raise the bar of such relitigation by the doctrines of res judicata and collateral estoppel, unless changed circumstances are shown.

Where appropriate, counsel should include argument with the foregoing points and authorities showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For a return to the writ of habeas corpus in a child custody case, see Ch. 292, *Habeas Corpus* in California Forms of Pleading and Practice.

[3] Discussion of Authorities

[a] Attempt to Relitigate Factual Issues Decided by Superior court

In re M. *(1975) 14 Cal. 3d 783, 122 Cal. Rptr. 531, 537 P.2d 363* , is discussed in *§ 110.34[3][a], 110.44[3][a]*.

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
CHAPTER 110 HABEAS CORPUS
PART II. FORMS

11-110 California Points & Authorities § 110.52

§ 110.52 Supporting Return [Penal Code § 1480]--Transfer of Proceeding

[1] FORM

[*Caption. See § 110.20.*]

THE COURT SHOULD TRANSFER A HABEAS CORPUS PROCEEDING WHERE _____ [THERE IS SUBSTANTIAL REASON FOR TRANSFER *or* THE PROCEEDING SEEKS TO TEST THE CONDITIONS OF CONFINEMENT AND THE PETITIONER IS NOT CONFINED WITHIN THE TERRITORIAL JURISDICTION OF THE COURT WHERE THE WRIT IS FILED *or* THE PROCEEDING CHALLENGES THE JUDGMENT OF A COURT NOT WITHIN THE SAME TERRITORIAL JURISDICTION AS THE COURT IN WHICH THE PETITION IS FILED].

A. Transfer. The court in which the petition is filed should transfer the proceeding to another court if _____ [there is a substantial reason for the transfer *or* the proceeding challenges the conditions of confinement and petitioner is not confined within the territorial jurisdiction of the court where the petition is filed *or* the proceeding challenges the judgment of a court not within the same territorial jurisdiction as the court in which the petition is filed] (*Cal. Rules of Ct., Rule 4.552(b)(2)*; *Griggs v. Superior Court (1976) 16 Cal. 3d 341, 347, 128 Cal. Rptr. 223, 546 P.2d 727* (superior court); *In re Van Heflin (1976) 58 Cal. App. 3d 131, 134-135, 128 Cal. Rptr. 257* (court of appeal).

[*Optional*] **B. Substantial Reason for Transfer.** Where there is a substantial reason for transfer of the proceeding for writ of habeas corpus, the court in which the petition is filed need not resolve the petition and may transfer the proceeding (*Griggs v. Superior Court (1976) 16 Cal. 3d 341, 347, 128 Cal. Rptr. 223, 546 P.2d 727* (superior court); *see In re Van Heflin (1976) 58 Cal. App. 3d 131, 134-135, 128 Cal. Rptr. 257* (rule applied to court of appeal)).

[*Optional*] **C. Necessity for Evidentiary Hearing as Substantial Reason for Transfer.** Transfer of a proceeding on habeas corpus is proper where an evidentiary hearing is necessary and the persons who will participate in it are more efficiently available to the court to which the proceedings are transferred, or where that court is better situated to conduct a hearing (*Griggs v. Superior Court (1976) 16 Cal. 3d 341, 347, 128 Cal. Rptr. 223, 546 P.2d 727*).

[*Optional*] **D. Transfer to Judgment Court Where Judgment Challenged.** Although any _____ [superior court *or* court of appeal] has jurisdiction to entertain and adjudicate a petition for the writ of habeas corpus, the court must determine whether it will hear the matter on the merits or transfer the proceeding to another court. If the challenge is to a particular judgment, the petition should be transferred to the court which rendered judgment if that court is a different court from the court in which the petition was filed (*Cal. Rules of Ct., Rule 4.552(b)(1), (2)(A)*; *Griggs v. Superior Court (1976) 16 Cal. 3d 341, 347, 128 Cal. Rptr. 223, 546 P.2d 727* ; *In re Van Heflin (1976) 58 Cal. App. 3d 131, 134-135, 128 Cal. Rptr. 257* (rule applied to courts of appeal)).

[*Optional*] **E. Transfer to Jurisdiction of Confinement Where Conditions of Confinement Challenged.** Although any _____ [superior court *or* court of appeal] has jurisdiction to entertain and adjudicate a petition for the writ of habeas corpus, the court must determine whether it will hear the matter on the merits or transfer the proceeding to another court. If the challenge is to conditions of confinement, then the petition should be transferred to the jurisdiction in which the person in confined if that jurisdiction is different from that of the court in which the petition was filed (*Cal. Rules of Ct., Rule 4.552(b)(1), (2)(B)*; *Griggs v. Superior Court (1976) 16 Cal. 3d 341, 347, 128 Cal. Rptr. 223, 546 P.2d 727* ; *In re Van Heflin (1976) 58 Cal. App. 3d 131, 134-135, 128 Cal. Rptr. 257* (rule applied to courts of appeal)).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Respondent _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing points and authorities are for use in a memorandum of points and authorities submitted in support of the return to the writ of habeas corpus where the respondent wishes the court to transfer the proceedings to a more convenient forum.

Formerly, the superior court's determination that a habeas petition stated a prima facie case for relief was a prerequisite of transferring the petition [*see Griggs v. Superior Court (1976) 16 Cal. 3d 341, 343-347, 128 Cal. Rptr. 223, 546 P.2d 727]* . Effective January 1, 2002, that requirement was eliminated. Accordingly, the superior court may transfer a habeas petition without first determining whether a prima facie case for relief exists [*Cal. Rules of Ct., Rule 4.552(b)(1), (2)*].

Where appropriate, counsel should include argument with the foregoing points and authorities showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Transfer

Griggs v. Superior Court *(1976) 16 Cal. 3d 341, 128 Cal. Rptr. 223, 546 P.2d 727* , is discussed in *§ 110.40[3][b]*.

In re Van Heflin *(1976) 58 Cal. App. 3d 131, 128 Cal. Rptr. 257* , is discussed in *§ 110.40[3][b]*.

[b] Substantial Reason for Transfer

Griggs v. Superior Court *(1976) 16 Cal. 3d 341, 128 Cal. Rptr. 223, 546 P.2d 727* , is dicussed in § 110.40[3][b].

In re Van Heflin *(1976) 58 Cal. App. 3d 131, 128 Cal. Rptr. 257* , is discussed in *§ 110.40[3][b]*.

[c] Necessity for Evidentiary Hearing as Substantial Reason for Transfer

Griggs v. Superior Court *(1976) 16 Cal. 3d 341, 128 Cal. Rptr. 223, 546 P.2d 727* , is discussed in *§ 110.40[3][b]*.

In re Van Heflin *(1976) 58 Cal. App. 3d 131, 128 Cal. Rptr. 257* , is discussed in *§ 110.40[3][b]*.

[d] Transfer to Judgment Court Where Judgment Challenged

Griggs v. Superior Court *(1976) 16 Cal. 3d 341, 128 Cal. Rptr. 223, 546 P.2d 727* , is discussed in *§ 110.40[3][b]*.

In re Van Heflin *(1976) 58 Cal. App. 3d 131, 128 Cal. Rptr. 257* , is discussed in *§ 110.40[3]*b].

[e] Transfer to Jurisdiction of Confinement Where Conditions of Confinement Challenged

Griggs v. Superior Court *(1976) 16 Cal. 3d 341, 128 Cal. Rptr. 223, 546 P.2d 727* , is discussed in *§ 110.40[3][b]*.

In re Van Heflin *(1976) 58 Cal. App. 3d 131, 128 Cal. Rptr. 257* , is discussed in *§ 110.40[3][b]*.

California Points & Authorities

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
CHAPTER 110 HABEAS CORPUS
PART II. FORMS

11-110 California Points & Authorities § 110.53

§ 110.53 Supporting Traverse to Return [Penal Code § 1484]--Exception to Sufficiency of Return

[1] FORM

[*Caption. See § 110.20.*]

RESPONDENT'S RETURN TO THE WRIT IS INSUFFICIENT BECAUSE _____ [*specify reason(s) why return is insufficient, e.g.,* THE RETURN CONTAINS ONLY GENERAL DENIALS OF THE ALLEGATIONS IN THE PETITION AND CONTAINS NO (SUFFICIENT) ALLEGATIONS OF SPECIFIC FACTS SHOWING THE LEGALITY OF PETITIONER'S CONFINEMENT].

A. Exception to Sufficiency of Return. The party brought before the court or judge on the return to the writ may except the sufficiency of the return (*Penal Code § 1484*).

B. Exception to Sufficiency Similar to Demurrer. When petitioner to the sufficiency of the return in the traverse, petitioner raises questions of law in a procedure analogous to demurrer (*In re Saunders (1970) 2 Cal. 3d 1033, 1048, 88 Cal. Rptr. 633, 472 P.2d 921*).

[*EITHER*]

C. Return as Required to Be Verified. The return must be signed by the person making it, and, except when the person is a sworn public officer making the return in his or her official capacity, the return must be verified by his or her oath (*Penal Code § 1480(5)*).

[*AND/OR*]

D. Statement of Authority for Restraint. If the respondent has the party in his or her custody or power, or under his or her restraint, respondent must state the authority and cause of that imprisonment or restraint (*Penal Code § 1480(2)*).

[*AND/OR*]

E. Copy of Written Authority to Be Attached. If the party is detained by virtue of any writ, warrant, or other written authority, a copy of it must be attached to the return (*Penal Code § 1480(3)*).

[*AND/OR*]

F. Statement Concerning Transfer of Custody. If the person on whom the writ is served had the party in his or her power or custody, or under restraint, at any time prior or subsequent to the date of the writ of habeas corpus, but has transferred custody or restraint to another, the return must state particularly to whom, at what time and place, for cause, and by what authority the transfer took place (*Penal Code § 1480(4)*).

[*AND/OR*]

G. Statement of Custody. The person on whom the writ is served must state in the return plainly and unequivocally whether he or she has or has not the party in his or her custody, or under his or her power or restraint (*Penal Code § 1480(1)*).

[*AND/OR*]

H. Return Shows Right to Relief. In superior court, any material allegation of the petition that is not controverted by the return is deemed admitted for purposes of the habeas corpus proceeding (*Cal. Rules of Ct., Rule 4.551(d)*). When the return effectively acknowledges or admits allegation in the petition or traverse that, if true, justify the relief sought, the relief may be granted without a hearing on the other factual issues joined by the pleadings (*In re Saunders (1970) 2 Cal. 3d 1033, 1048, 88 Cal. Rptr. 633, 472 P.2d 921*).

[*AND/OR*]

I. Return Must Allege Facts Showing Legality of Confinement. A return containing only general denials of the factual allegations in the petition for habeas corpus is insufficient. The return must allege facts tending to establish the legality of petitioner's confinement. The allegations in the return must also specifically respond to the allegations of the petition that form the basis of the petitioner's claim that the confinement is unlawful (*People v. Duvall (1995) 9 Cal. 4th 464, 476, 480-481, 37 Cal. Rptr. 2d 259, 886 P.2d 1252*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a traverse to return to the writ of habeas corpus that excepts to the sufficiency of the return. The return is made in response to the writ of habeas corpus or to the order to show cause why the writ should not issue (a procedure often followed by appellate courts [*see In re Hochberg (1970) 2 Cal. 3d 870, 874 n.2, 87 Cal. Rptr. 681, 471 P.2d 1]*). Rather than functioning as an answer to the petition or to the writ itself, the return functions as a complaint would in a civil proceeding. The traverse is a response to the return and is subject to many of the rules applicable to answers, such as that new matter contesting the legality of the custody or restraint which appears in the travers is deemed denied, and the respondent is not required to file a response to the traverse [*see In re Egan (1944) 24 Cal. 2d 323, 330, 149 P.2d 693]* .

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For a form of traverse to the return to the writ of habeas corpus see California Forms of Pleading and Practice, Ch. 292, *Habeas Corpus* (Matthew Bender).

[3] Discussion of Authorities

[a] Exception to Sufficiency Similar to Demurrer

In re Saunders *(1970) 2 Cal. 3d 1033, 88 Cal. Rptr. 633, 472 P.2d 921* , was a habeas corpus proceeding in which petitioner sought a writ of habeas corpus on the ground that he was denied effective assistance of counsel at his trial. On petition for writ of habeas corpus, the Supreme Court issued an order to show cause and appointed counsel to represent petitioner. In determining to grant the writ and reverse the judgment of conviction, the Court considered the effect of the various pleadings filed in the writ proceeding. In a habeas corpus proceeding, the Court noted, the return to the writ or order to show cause alleges facts tending to establish the legality of the challenged detention and is analogous to the complaint in a civil proceeding. The Court observed that the traverse (or the petition when, by stipulation, it is treated as the traverse) is analogous to the answer in a civil proceeding, and the petitioner may deny or controvert any of the material facts or matters set forth in the return or allege any fact to show either that his imprisonment or detention is unlawful or that he is entitled to his discharge (*2 Cal. 3d 1033, 1047)* . The issues are joined in this manner, and new matter set up in the traverse is deemed denied and must be proved by the party alleging it, namely, the petitioner. The Court also stated that the petitioner may except to the sufficiency of the return in a proceeding analogous to the demurrer. The Court noted that when the return effectively acknowledges or admits allegations in the petition and traverse which, if true, justify the relief sought, the relief may be granted without a hearing on the other factual issues joined by the pleadings (*2 Cal. 3d 1033, 1047-1048)* .

[b] Return Shows Right to Relief

In re Saunders *(1970) 2 Cal. 3d 1033, 88 Cal. Rptr. 633, 472 P.2d 921* , is discussed in *§ 110.53[3][a]*.

[c] Return Must Allege Facts Showing Legality of Confinement

Petitioner in ***People v. Duvall*** *(1995) 9 Cal. 4th 464, 37 Cal. Rptr. 2d 259, 886 P.2d 1252* , was convicted of second-degree murder. Along with his direct appeal from the conviction, petitioner filed a petition for writ of habeas corpus challenging the legality of his conviction and subsequent imprisonment. The petition alleged that petitioner was denied effective assistance of counsel because defense counsel (who died sometime after the trial) had failed to adequately investigate and present a defense based on petitioner's alleged intoxication at the time of the crime. Before the court of appeal, the Attorney General, representing the Department of Corrections, filed a return that admitted some of the allegations of the petition, but simply denied the portions of the petition alleging that petitioner received ineffective assistance of trial counsel and that petitioner was prejudiced by any such ineffective assistance. The return

was accompanied by a verification executed by the deputy attorney general who prepared the return and a memorandum of points and authorities, which set forth in more detail the legal and factual basis for the Attorney General's opposition to the petition. The court of appeal, after considering the allegations of the petition, the return, and the traverse, and without holding an evidentiary hearing, issued the writ of habeas corpus and reversed petitioner's conviction.

On review, the California Supreme Court summarized the procedure applicable to writs of habeas corpus. The Court observed that if the court initially determines that the petitioner has pleaded sufficient facts in his or her petition that, if true, would entitle him or her to relief, the custodian of the confined person must then file a responsive pleading, called a return, justifying the confinement (*9 Cal. 4th 464, 475)* . The Court noted that its prior decisions have required more of the return than mere compliance with the literal language of *Penal Code § 1480* (which requires only that the custodian state whether or not he or she has the confined party in his or her custody or under his or her power and restrain, and, if he or she has custody of the party, the authority and cause of the imprisonment or restraint). The Court stated that return must allege facts tending to establish the legality of the petitioner's detention. Those facts are not simply the existence of a judgment of conviction and sentence when the petitioner challenges his restraint in prison. The factual allegations of a return must also respond to the allegations of the petition that form the basis of the petitioner's claim that the confinement is unlawful. Furthermore, the Court noted, the return should also, when appropriate, provide such documentary evidence, affidavits, or other materials as will enable the court to determine which issues are truly disputed (*9 Cal. 4th 464, 476)* .

The Court noted that following the filing of the return, the habeas corpus petitioner responds to the facts pleaded in the return in a pleading called a traverse. The requirement that the return allege facts responsive to the petition is critical because the factual allegations in the return are either admitted or disputed in the traverse, and this interplay frames the factual issues that the court must decide. Facts set forth in the return that are not disputed in the traverse are deemed true. Conversely, when the return effectively acknowledges or admits allegations in the petition and traverse that, if true, justify the relief sought, the court may grant the relief without a hearing on the other factual issues joined by the pleadings (*9 Cal. 4th 464, 476-477)* . If, after considering the return and the traverse, the court finds material facts in dispute, it may appoint a referee and order an evidentiary hearing to be held (*9 Cal. 4th 464, 478)* .

The Court further stated that by failing to allege facts demonstrating the lawfulness of the challenged detention, a return containing only general denials is deficient in two important ways. First, such a return fails to fulfil its function of narrowing the facts and issues to those that are truly in dispute. Second, failure to allege facts in the return prevents a habeas corpus petitioner from controverting those facts in his or her traverse. The traverse becomes a useless pleading, unable to assist the court in sharpening the issues that must be decided in an evidentiary hearing. Accordingly, the Court reiterated its past disapproval of the practice of filing returns that merely contain a general denial of a habeas corpus petitioner's factual allegations (*9 Cal. 4th 464, 480-481)* .

Examining the return filed in this case, the Court noted that although the return specifically denied the allegations of the key paragraphs of the petition that set forth the legal and factual basis for the requested relief (i.e., that petitioner received ineffective assistance of counsel), the return did not indicate the factual basis for the denials. The Court held that such assertions do not assist the court in identifying the material factual issues actually in dispute and therefore may be fairly characterized as general denials (*9 Cal. 4th 464, 481-482)* . However, the Court held that in cases (which will often include allegations of ineffective assistance of counsel) in which access to critical information is limited, in which it is unreasonable to expect a party to obtain information at the pleading stage, or in which the proper resolution of the case hinges on the credibility of witnesses, the general rule requiring the pleading of facts should not be enforced in such a draconian fashion as to defeat the ends of justice. If one party (the respondent in the return, or the petitioner in the traverse) can allege that (1) he or she has acted with due diligence; (2) crucial information is not available; and (3) there is good reason to dispute certain alleged facts or dispute the credibility of certain declarants, courts evaluating the return and the traverse should endeavor to determine whether there are facts legitimately in dispute that may require holding an evidentiary hearing (*9 Cal. 4th 464, 485)* . Applying this rule, the Court held that, although the return in this case was technically deficient, its contents, coupled with portions of the memorandum of points and authorities

accompanying the return, sufficiently identified the facts that the Attorney General wished to dispute. Moreover, given defense counsel's death and the Attorney General's argument's before the court, it appeared that the critical information was possessed by petitioner and was not reasonably available to the ttorney General. The Court therefore concluded that the court of appeal should have appointed a referee to hold an evidentiary hearing to determine the truth or falsity of the factual allegations regarding defense counsel's failure to investigate and present a defense based on petitioner's alleged diminished mental state. Therefore, the Court vacated the court of appeal's judgment and remanded the matter with directions to appoint a referee and order an evidentiary hearing (*9 Cal. 4th 464, 486)* .

[4] Additional Authorities

[a] Exception to Sufficiency Similar to Demurrer

In re Landry (1943) 61 Cal. App. 2d 230, 142 P.2d 432 , was a proceeding in habeas corpus to secure custody of a child. Petitioner had previously applied to the superior court for the writ but the petition had been denied on the ground that the child had expressed a desire not to return to petitioner. Petitioner, however, was entitled to custody pursuant to a Nevada divorce decree. Petitioner then filed a petition for the writ with the court of appeal. The return and the amended return to the writ alleged that habeas corpus was not a proper remedy and that the court of appeal was not a proper court, and also set forth facts showing the petitioner to be unfit to have custody of the child. Petitioner filed both a general demurrer and an answer to the return. The demurrer raised the issue of the sufficiency of the facts alleged to constitute a defense to the writ by respondent, among other issues. The court treated the demurrer as it would a demurrer to a complaint in a civil action, holding that the petitioner admitted the material facts alleged in the return by filing the demurrer and considering whether respondent had stated a sufficient case. The court also found that objections that essential facts appear only inferentially or as conclusions of law must be raised by special demurrer and cannot be reached by special demurrer (*61 Cal. App. 2d 230, 233)* . Overruling the demurrer to the return, the court of appeal appointed a referee to hear and take testimony (*61 Cal. App. 2d 230, 235)* .

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
CHAPTER 110 HABEAS CORPUS
PART II. FORMS

11-110 California Points & Authorities § 110.54

§ 110.54 Supporting Traverse to Return [Penal Code § 1484]--Habeas Corpus Appropriate Although Petitioner Released From Custody--Issue of Broad Public Interest Likely to Recur

[1] FORM

[*Caption. See § 110.20.*]

ALTHOUGH PETITIONER HAS BEEN RELEASED FROM CONFINEMENT, THE COURT MAY EXERCISE AN INHERENT DISCRETION TO ENTERTAIN A HABEAS CORPUS PROCEEDING IN ORDER TO RESOLVE AN ISSUE OF BROAD PUBLIC INTEREST THAT IS LIKELY TO RECUR.

Habeas Corpus as Proper to Resolve Issue of Public Interest. If a pending case poses an issue of broad public interest that is likely to recur, the court may exercise an inherent discretion to resolve that issue even though an event occurring during its pendency would normally render the matter moot. Questions of general public concern do not become moot by reason of the fact that the ensuing judgment may no longer be binding on a party to the action (*In re William M. (1970) 3 Cal. 3d 16, 23-25, 89 Cal. Rptr. 33, 473 P.2d 737*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a traverse to the return to the writ of habeas corpus if the petitioner has been released from custody before the court can reach a consideration of the petitioner's right to release, but the case poses an issue of broad public concern that is likely to recur with regard to petitioner or with regard to

others similarly situated.

Where appropriate, counsel should include argument with the foregoing points and authorities showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

With appropriate modifications the foregoing points and authorities may be used in a memorandum of points and authorities submitted in support of the petition for a writ of habeas corpus where the respondent may raise the mootness of the proceedings due to the release of petitioner or the granting of other relief requested.

[3] Discussion of Authorities

[a] Habeas Corpus as Proper to Resolve Issue of Public Interest

In re William M. *(1970) 3 Cal. 3d 16, 89 Cal. Rptr. 33, 473 P.2d 737* , was a proceeding brought by the father of a juvenile for the writ of habeas corpus. The probation officer for the juvenile department of the superior court had filed a petition alleging that the minor came within the provisions of *Welf. & Inst. Code § 602*. The minor was taken into custody on an arrest warrant, and the minor was not released on his promise, or that of his parents, that he would appear for further proceedings. The judge of the court refused to consider factors supporting the minor's release and continued the detention. The minor's father filed a petition for a writ of habeas corpus with the court of appeal, which denied the petition without an opinion. The father then filed a petition for a hearing with the Supreme Court, which granted the petition and transferred the matter to itself. The Court issued an order to show cause (a procedure frequently followed in the appellate courts [*see In re Hochberg (1970) 2 Cal. 3d 870, 874 fn. 2, 87 Cal. Rptr. 681, 471 P.2d 1]*). Pending determination of the petition, the Court directed that the minor be released from custody until the hearing in the juvenile court. The juvenile court found the allegations of the petition against the minor to be true and declared the minor a ward of the court. At the time of the decision of the Supreme Court in the habeas corpus proceeding, the minor had been placed in the home of his parents under the supervision of the probation officer. The district attorney asserted that the habeas corpus proceeding was therefore moot. In deciding to consider the case despite the release of the minor, the Court noted that if a pending case poses an issue of broad public interest that is likely to recur, the court may exercise an inherent discretion to resolve that issue even though an event occurring during its pendency would normally render the matter moot. Such questions of general public concern, the Court further noted do not become moot by reason of the fact that the ensuing judgment may no longer be binding on a party to the action. Habeas corpus may be used to obtain a declaration of rights, and such a use is particularly appropriate, despite mootness, where it is used to determine important issues which could not otherwise be decided because of the brevity of the sentence under review, the Court found. Although the Court ruled in favor of the rights sought by the petitioner on the writ, the Court discharged the order to show cause and denied the writ, since the purpose of the proceedings had been to obtain the determination which the Court had made, and since the petitioner had already obtained relief.

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CHAPTER 110 HABEAS CORPUS
PART II. FORMS

11-110 California Points & Authorities § 110.55

§ 110.55 Supporting Traverse to Return [Penal Code § 1484]--Child Custody--Petitioner Entitled to Custody Pursuant to Out-of-State Custody Decree--Insufficient Allegation in Return to Writ

[1] FORM

[*Caption. See § 110.20.*]

A MERE ALLEGATION THAT AN AWARD OF CUSTODY TO A PARENT RESIDING IN CALIFORNIA WOULD FURTHER THE BEST INTERESTS OF THE CHILD OR THE WELFARE OF THE CHILD IN THE RETURN TO THE WRIT IS NOT SUFFICIENT GROUND FOR DENYING ENFORCEMENT OF A FOREIGN CUSTODY DECREE.

A. Exception to Sufficiency of Return. [*See § 110.53, Paragraph A.*]

B. Insufficient Allegation in Return. A mere allegation in the return that an award of custody to the resident parent would further the best interests of the welfare of the child is not sufficient ground for denying enforcement of a foreign custody decree (*Ferreira v. Ferreira (1973) 9 Cal. 3d 824, 837, 109 Cal. Rptr. 80, 512 P.2d 304*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing points and authorities are for use in a memorandum of points and authorities submitted in support of the traverse to the return to the writ of habeas corpus where the return alleges that it would be for the welfare of the child or

in the best interest of the child for custody to remain with respondent despite the existence of a foreign court decree giving petitioner the right to custody.

Where appropriate, counsel should include argument with the foregoing points and authorities showing the relationship between the facts of the case and the points of law stated.

[b] Insufficient Allegation in Return

Ferreira v. Ferreira (1973) 9 Cal. 3d 824, 109 Cal. Rptr. 80, 512 P.2d 304 , is discussed in *§ 110.35[3][c]*.

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
CHAPTER 112 HOMESTEADS

11-112 California Points & Authorities 112.syn

§ 112.syn Synopsis to Chapter 112: HOMESTEADS

§ 112.01 Scope of Chapter

§ 112.02 Governing Statutes

§ 112.03 Page Limits on Points and Authorities

§ 112.04 Related Pleading and Practice Chapters

§ 112.05 Related Points and Authorities Chapters

§§ 112.06-112.19 [Reserved]

§ 112.20 Supporting Claim of Exemption [Code Civ. Proc. § 484.070] Submitted in Opposition to Application for Right to Attach Order [Code Civ. Proc. § 484.010]--Homestead Exemption Plus Amount of Encumbrances Exceeds Value of Homesteaded Property [Code Civ. Proc. § 704.730]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Property Exempt From Attachment

[b] Homestead Exempt From Enforcement of Judgment or Attachment

[c] Homestead as Sold Subject to Exemption and Encumbrances

[d] Rental of Portion of Building Not Impairing Homestead

[4] Additional Authorities

[a] Minimum Bid Requirement

§ 112.21 Supporting Application for Temporary Restraining Order and Preliminary Injunction [Code Civ. Proc. § 527(a)]--To Prevent Execution Sale of Homesteaded Property [Code Civ. Proc. §§ 699.510-701.830]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Threat of Sale of Homesteaded Property

[b] Controversy Over Validity of Homestead

[c] Homestead Awarded in Dissolution as Not Subject to Separate Debts of Other Spouse

§ 112.22 Opposing Defendant's Claim of Exemption Submitted in Opposition to Application for Right to Attach Order [Code Civ. Proc. § 484.070(f)]--Value of Property Exceeds Aggregate Amount of Homestead Exemption Plus Amount of Encumbrances [Code Civ. Proc. §§ 704.730, 704.950(c)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Excess Value of Homestead as Subject to Attachment

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CHAPTER 112 HOMESTEADS
PART I. INTRODUCTION

11-112 California Points & Authorities § 112.01

§ 112.01 Scope of Chapter

This chapter contains memoranda of points and authorities for use in opposing an application for a right to attach order on the grounds that the property is homesteaded and has no excess value [*see § 112.20*], in supporting an application for temporary restraining order and preliminary injunction to prevent the execution sale of homesteaded property [*see § 112.21*], and in opposing a defendant's claim of exemption [*see § 112.22*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of AttachmentReal Property LawHomestead Exemptions

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11-112 California Points & Authorities § 112.02

§ 112.02 Governing Statutes

The provisions governing the procedures and requirements for claiming a homestead exemption are set forth in *Code Civ. Proc. §§ 703.510-703.610*, *704.710-704.800*, and *704.965*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of AttachmentReal Property LawHomestead ExemptionsReal Property LawHomestead Exemptions

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11-112 California Points & Authorities § 112.03

§ 112.03 Page Limits on Points and Authorities

Generally, a memorandum must not exceed 15 pages, or in the case of a motion for summary judgment or summary adjudication, 20 pages. A reply or closing memorandum may not exceed 10 pages [*see Cal. Rules of Ct., Rule 3.1113(d)*]. Any party desiring to file a longer memorandum must obtain leave of court [*see Cal. Rules of Ct., Rule 3.1113(e)*]. For further discussion of the page limitations under *Cal. Rules of Ct., Rule 3.1113*, and of other basic format requirements of memoranda of points and authorities, see *Ch. 1, Writing Legal Memoranda and Briefs, § 1.05*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentSupporting MaterialsMemoranda of LawCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of AttachmentReal Property LawHomestead Exemptions

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11-112 California Points & Authorities § 112.04

§ 112.04 Related Pleading and Practice Chapters

For a discussion of the procedures and requirements for claiming a homestead, forms for filing declarations of homesteads, and forms of complaint involving homesteads, see California Forms of Pleading and Practice, Ch. 294, *Homesteads* (Matthew Bender).

For a discussion of, and forms for, supporting and opposing the issuance of a writ of attachment, see California Forms of Pleading and Practice, Ch. 62, *Attachment* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of AttachmentReal Property LawHomestead Exemptions

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11-112 California Points & Authorities § 112.05

§ 112.05 Related Points and Authorities Chapters

Related memoranda of points and authorities in support of, or in opposition to, a writ of attachment may be found in Ch. 23, *Attachment* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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11-112 California Points & Authorities §§ 112.06-112.19

[Reserved]

§§ 112.06[Reserved]

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11-112 California Points & Authorities § 112.20

§ 112.20 Supporting Claim of Exemption [Code Civ. Proc. § 484.070] Submitted in Opposition to Application for Right to Attach Order [Code Civ. Proc. § 484.010]--Homestead Exemption Plus Amount of Encumbrances Exceeds Value of Homesteaded Property [Code Civ. Proc. § 704.730]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,		
COUNTY OF _____		
_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM SUPPORTING CLAIM OF EX-
_____ [*name(s)*],	)	EMPTION IN OPPOSITION TO APPLICATION
Defendant(s).	)	FOR RIGHT TO ATTACH ORDER
	)	[*Code Civ. Proc. § 484.010*]
	)	

A WRIT OF ATTACHMENT MAY NOT ATTACH AND NO RIGHT TO ATTACH ORDER SHOULD BE ISSUED WHEN THE AGGREGATE AMOUNT OF A HOMESTEAD EXEMPTION PLUS THE AMOUNT OF ENCUMBRANCES EXCEEDS THE VALUE OF THE HOMESTEADED PROPERTY.

A. Notice of Opposition. A defendant who desires to oppose the issuance of the right to attach order sought by plaintiff, or who objects to the amount sought to be secured by the attachment, must file and serve on plaintiff, no later than five days prior to the date set for the hearing, a notice of opposition stating the grounds on which defendant opposes the issuance of the order or objects to the amount sought to be secured by the attachment. The notice must be accompanied by an affidavit supporting any factual issues raised and points and authorities supporting any legal issues raised (*Code Civ. Proc. § 484.060(a)*).

B. Claim of Exemption. If the defendant claims that the property described in the plaintiff's application, or a portion of such property, is exempt from attachment, the defendant must claim such exemption in accordance with the provisions set forth in Section 484.070(c)-(g) of the Code of Civil Procedure that provide for procedures by which a claim of exemption may be sought (*Code Civ. Proc. § 484.070*).

C. Property Exempt From Attachment. Except as provided under *Civil Code section 3439.07(a)(2)*, all property exempt from enforcement of a money judgment is also exempt from attachment (*Code Civ. Proc. § 487.020(a)*).

D. Homestead Exempt From Enforcement of Judgment or Attachment. Except as provided under *Civil Code section 3439.07(a)(2)*, a homestead is exempt from attachment or enforcement of a judgment other than the foreclosure of a mortgage, deed of trust, or other lien or encumbrance other than an attachment or enforcement lien (*Code Civ. Proc. §§ 487.020(a), 703.010*).

E. Minimum Bid Requirement. At an execution sale of homesteaded property no bid will be received unless it exceeds the amount of the homestead exemption plus the aggregate amount of all liens and encumbrances on the property (*Code Civ. Proc. § 704.800(a)*). If no bid is received that exceeds 90 percent of the appraised fair market value determined pursuant to *Section 704.780 of the Code of Civil Procedure*, the court, on motion of the judgment creditor, may grant permission to accept the highest bid that exceeds the amount of the homestead exemption plus the aggregate amount of all liens and encumbrances on the property, or the court may issue a new order for sale of the homestead (*Code Civ. Proc. § 704.800(b)*).

F. Claim of Exemption by Judgment Debtor or Spouse of Judgment Debtor. The judgment debtor or the spouse of the judgment debtor may claim an exemption of $75,000, unless the claimant is a member of a family unit and there is at least one member of the family unit who owns no interest in the homestead or whose only interest in the homestead is a community property interest with the judgment debtor, in which case the amount of the exemption is $100,000, or unless the claimant is 65 years of age or older or a person physically or mentally disabled who as a result of that disability is unable to engage in substantial gainful employment, or the claimant is a person 55 years old or older with a gross annual income of not more than $15,000 or, if married, a gross annual income, including the gross annual income of the judgment debtor's spouse, of not more than $20,000 and the sale is an involuntary sale, in which cases the exemption is $175,000 (*Code Civ. Proc. § 704.730*).

[*Optional*] **G. Increased Exemptions Applicable.** A homestead declaration was recorded before _____ [*specify operative date of amendment to Code Civ. Proc. § 704.730, e.g.,* January 1, 1998], the operative date of the amendment to *Section 704.730 of the Code of Civil Procedure* that increased the amount of the homestead exemption, and the judgment creditor did not obtain a lien on the declared homestead before that date; therefore, for purposes of *Sections 704.950(c)* and *704.960 of the Code of Civil Procedure*, the amount of the exemption is the increased amount (*see Code Civ. Proc. § 704.965*).

H. Homestead as Sold Subject to Exemption and Encumbrances. The law is well settled that property selected as a homestead and subject to an encumbrance must be sold subject to the encumbrance. Unless a bid is received that exceeds the homestead exemption and the encumbrance, no sale can be had and a showing that the value of the homestead does not exceed the exemption plus the encumbrances on the property is sufficient to discharge a levy of attachment (*Southern Pac. Milling Co. v. Milligan (1940) 15 Cal. 2d 729, 730-731, 104 P.2d 654* ; see also *Code Civ. Proc. § 487.025(b)*).

[*Optional*] **I. Rental of Portion of Building Not Impairing Homestead.** If there is one building, a portion of which is used as a family residence, the fact that other portions are rented to tenants does not impair the right of the claimant to select the structure and the land on which it is situated as a homestead (*Vincenzini v. Fiorentini (1934) 2 Cal. App. 2d 739, 741, 38 P.2d 876*).

[*Optional*] **J. Judgment Debtor Need Not Continuously Own Property to Obtain Homestead Exemption.** A judgment debtor need only reside at a property to obtain the benefits of a homestead exemption; the debtor need not own the property (*Broadway Foreclosure Investments, LLC v. Tarlesson (2010) 184 Cal. App. 4th 931, 936-938, 109 Cal. Rptr. 3d 319*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memoranda may be submitted in support of a claim of exemption that is submitted in opposition to the application for a right to attach order, or in opposition to the amount sought to be secured by the attachment [*Code Civ. Proc. § 484.060*], when the defendant asserts that he or she has a claim of exemption [*see Code Civ. Proc. § 484.070*] because the value of the property sought to be attached does not exceed the aggregate amount of the homestead exemption plus the encumbrances on the property [*see Code Civ. Proc. § 704.800*].

Optional Paragraph G should be used when the homestead exemption has been increased and the judgment debtor claims an exemption to a lien on the homestead or its proceeds for purposes of *Code Civ. Proc. §§ 704.950(c)* and *704.960*. The increased exemption will be allowed if a homestead declaration was recorded before the operative date of any amendment to *Code Civ. Proc. § 704.730* increasing the exemption, and the judgment creditor has not obtained a lien on the declared homestead prior to the operative date of that amendment.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should show that the value of the property for which the right to attach order is sought is less than the amount of the homestead exemption plus the sum of all liens andencumbrances on the property. In addition, counsel must include affidavits supporting any factual issues raised and points and authorities supporting any legal issues raised [*Code Civ. Proc. § 484.060(a)*]. In raising the claim of exemption, the documents must also include a description of the property claimed to be exempt and a citation of the statute section supporting the claim [*Code Civ. Proc. § 484.070(c)*].

[b] Related Pleading and Practice Forms

For forms and a discussion of the procedure for making a motion in opposition to the issuance of a right to attach order, see California Forms of Pleading and Practice, Ch. 62, *Attachment* (Matthew Bender).

[3] Discussion of Authorities

[a] Property Exempt From Attachment

The exclusion from the attachment exemption under *Code Civ. Proc. § 487.020(a)*, as provided under *Civ. Code §*

3439.07(a)(2), refers to actions under *Civ. Code §§ 3439-3439.12* for relief against fraudulent conveyances [see *Civ. Code § 3439.07(a)(2)*].

[b] Homestead Exempt From Enforcement of Judgment or Attachment

For a discussion of the exclusion from the attachment exemption, see *§ 112.20[3][a]*.

[c] Homestead as Sold Subject to Exemption and Encumbrances

In *Southern Pac. Milling Co. v. Milligan (1940) 15 Cal. 2d 729, 104 P.2d 654* , the Supreme Court affirmed the order granting the defendant's motion to quash a writ of attachment and vacate a levy on their homestead, the former common-law method of opposing a writ of attachment. Accompanying the motion was an affidavit stating that the homesteaded property had a fair market value of $5,000 but was subject to a $3,500 encumbrance, so that with the aggregate amount of the homestead exemption and the encumbrance of the property there was no excess value. In affirming the order of the trial court, the Court held that the law is well settled that property selected as a homestead and subject to an encumbrance must be sold subject to the encumbrance. Unless a bid is received that exceeds the homestead exemption and the encumbrance, no sale can be had, and a showing that value of the homestead does not exceed the exemption, plus the encumbrances on the property, is sufficient to discharge a levy of attachment (*15 Cal. 2d 729, 730-731*).

[d] Rental of Portion of Building Not Impairing Homestead

In *Vincenzini v. Fiorentini (1934) 2 Cal. App. 2d 739, 38 P.2d 876* , the court of appeal affirmed an order discharging a writ of attachment on property standing in the name of the defendant. The defendant filed an affidavit along with the motion to discharge the writ stating that a homestead had been filed on the property, that it consisted of a one-story residence and outbuildings, and that it had a total cash value of $4,000. The plaintiff filed a counter affidavit alleging that at the time of the filing of the homestead declaration and at all times thereafter there were two dwelling houses on the property. The defendant and her family occupied a portion of one building that contained a four-room dwelling. Several years after the construction of the building, another structure had been added which was, on different occasions, occupied either by the defendant's married daughter and her husband or by rent-paying tenants. The two structures shared a common wall and chimney but had separate entrances and separate gas and electric services. The court stated that when there is one building, a portion of which is occupied as a family residence, the fact that other portions are rented to tenant does not impair the right to select the structure and land as a homestead. It held that it was the role of the trial court to decide whether the property held one or two buildings and since the lower court had chosen to believe the affidavit of the defendant, the order to discharge the writ was correct (*2 Cal. App. 2d 739, 741*).

In ***Broadway Foreclosure Investments, LLC v. Tarlesson*** *(2010) 184 Cal. App. 4th 931, 936-938, 109 Cal. Rptr. 3d 319* , the judgment creditor argued that the judgment debtor was not entitled to claim a homestead exemption for her property because she deeded it to a third party. The creditor argued that a judgment debtor must at all relevant times own an interest in the property in order to claim a homestead exemption. The court of appeal disagreed. It held that there was no implicit or explicit requirement in *Code Civ. Proc. §§ 703.020* or *704.710* that the judgment debtor continuously own the property [*184 Cal. App. 4th 931, 937]* . The court held that a judgment debtor need only continuously reside in a dwelling to retain a sufficient equitable interest in the property to claim a homestead exemption even when they have conveyed title to another person [*184 Cal. App. 4th 931, 937]* .

[4] Additional Authorities

[a] Minimum Bid Requirement

In *Rourke v. Troy (1993) 17 Cal. App. 4th 880, 21 Cal. Rptr. 2d 660* , the trial court did not fix the amount of the homestead or the fair market value of the dwelling, because it concluded that *Code Civ. Proc. § 704.800(a)* prohibited it

from selling at a bid that does not exceed the amount of the homestead plus any additional liens and encumbrances including the lien of the judgment creditor seeking the sale. The court of appeal reversed, holding that "all liens and encumbrances" for purposes of *Code Civ. Proc. § 704.800(a)* should be interpreted as excluding the lien of the executing judgment creditor, and including only those liens senior to the lien of the executing judgment creditor. In enacting § 704.800(a), the Legislature was not attempting to ensure that all debts, including the judgment being executed by the sale, be satisfied by the sale of the dwelling. Rather, its purpose was to ensure that senior liens and encumbrances would be paid. The Legislature wanted to avoid a situation in which none of the sale proceeds went to pay debts (*17 Cal. App. 4th 880, 883-886)* .

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11-112 California Points & Authorities § 112.21

§ 112.21 Supporting Application for Temporary Restraining Order and Preliminary Injunction [Code Civ. Proc. § 527(a)]--To Prevent Execution Sale of Homesteaded Property [Code Civ. Proc. §§ 699.510-701.830]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name(s)*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Defendant(s).	)	IES IN SUPPORT OF APPLICATION FOR TEM-
	)	PORARY RESTRAINING ORDER AND PRELIM-
	)	INARY INJUNCTION
	)	[*Code Civ. Proc. § 527(a)*]

_____

AN INJUNCTION MAY ISSUE TO RESTRAIN AN EXECUTION SALE OF HOMESTEADED PROPERTY WHEN THE SALE WOULD OTHERWISE RESULT IN GREAT AND IRREPARABLE INJURY.

A. Obtaining Preliminary Injunction. A preliminary injunction may be granted at any time before judgment when it appears from the facts that great or irreparable injury would result to the applicant before the matter can be heard (Civ. Code § 527(a)).

B. Threat of Sale of Homesteaded Property. When the threat of an execution sale of property properly homesteaded and therefore exempt from execution would have clouded the claimant's title and caused irreparable injury, an

injunction may be granted by the trial court (*Roth v. Insley (1890) 86 Cal. 134, 139-140, 24 P 853*).

[*Optional*] **C. Controversy Over Validity of Homestead.** Where there is a controversy over the liability of a claim of homestead, a trial court may, in its discretion, restrain the execution proceedings by granting a preliminary injunction (*Oktanski v. Burn (1956) 138 Cal. App. 2d 419, 421-422, 291 P.2d 954*).

[*Optional*] **D. Homestead Awarded in Dissolution as Not Subject to Separate Debts of Other Spouse.** Where a spouse has been awarded a homestead for life in dissolution proceedings, the property may not be subjected to execution sale for the separate debts of the other spouse (*Robbins v. Bueno (1968) 262 Cal. App. 2d 79, 82-86, 68 Cal. Rptr. 347*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be used to support an application for a temporary restraining order and a preliminary injunction [*Code Civ. Proc. § 527*] enjoining an execution sale of homesteaded property on the grounds that the failure to restrain the sale would cause great and irreparable injury.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should include affidavits or declarations supporting any factual issues raised by the homestead claimant.

[b] Related Pleading and Practice Forms

For a discussion and related forms of injunctions, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender).

[3] Discussion of Authorities

[a] Threat of Sale of Homesteaded Property

In ***Roth v. Insley*** *(1890) 86 Cal. 134, 24 P 853* , the defendants appealed from an order refusing to dissolve an injunction. The defendants had caused an execution to be levied upon the homestead of the plaintiff based on a judgment obtained against him. In obtaining the injunction, the plaintiff complained that the defendant constable had levied upon the property and was about to sell it under execution; that the execution was issued without authority; that the constable had been informed that the property was homesteaded; but that the defendants insisted on continuing with the proposed sale; and that, unless restrained by the court, the defendants would sell the homestead. The plaintiff also alleged that the sale contemplated would cast a cloud on the title to the property and would cause irreparable injury and disturb plaintiff in the quiet enjoyment of the property and that plaintiff had no speedy or adequate remedy at law.

The trial court first granted a temporary injunction. A motion was made to dissolve the injunction on the grounds that, although the plaintiff had been the head of a family when he had made a homestead claim, the death of his mother, the only dependent, had removed any right of the plaintiff to claim the homestead as a head of a family, and, therefore, the property should be subject to any debtsfor which the plaintiff might be liable. The Supreme Court, in affirming the decision of the trial court, held that, given the admitted validity of the homestead at the time of the filing of the declaration, the exemption always remained as a protection against debts that did not come within the exceptions provided for in the homestead laws. The Court further held that an application for an injunction had been the proper procedure for the plaintiff to choose for relief, since the proposed sale, if completed, would have cast a cloud on the title to the property and any remedy at law, such as an action in ejectment, would have not been adequate because of the complicated evidentiary problems.

[b] Controversy Over Validity of Homestead

In ***Oktanski v. Burn*** *(1956) 138 Cal. App. 2d 419, 291 P.2d 954* , the respondents had instituted proceedings in the superior court for the purpose of restraining the sale of certain real property under a writ of execution. In the lower court proceedings an order to show cause and a temporary restraining order were issued, the defendants filed a general demurrer in opposition, and, after the hearing, a preliminary injunction was issued. In their demurrer and affidavits, the defendants alleged that the plaintiffs' property was not exempt since their declaration of homestead did not comply with the requisite statutory provisions in that it was void for uncertainty in its property description. The description contained the correct street address of the property but an incorrect property description. Applying the rule of liberal construction, the court of appeal held that the declaration of homestead was valid since the street address was correctly given and was sufficient to identify the property to be protected. It stated that absolute perfection in a declaration was not required, and that any inaccuracy thereafter occurring was surplusage. It also stated that the trial court did not abuse its discretion in granting a preliminary injunction under the facts and circumstances of the controversy which was before it, holding that, where there is a controversy over the validity of a claim of homestead, a trial court may, in its discretion, restrain the execution proceedings by granting a preliminary injunction.

[c] Homestead Awarded in Dissolution as Not Subject to Separate Debts of Other Spouse

In ***Robbins v. Bueno*** *(1968) 262 Cal. App. 2d 79, 68 Cal. Rptr. 347* , among other matters, the appellant appealed from an order enjoining him from selling or causing to be sold homesteaded property awarded to a respondent by a decree of divorce. Prior to instituting a suit for divorce from her spouse, the respondent recorded a declaration of homestead on property which was the separate property of her spouse. In the subsequent divorce proceedings, the homestead was awarded to respondent for life. After the entry of the divorce decree, the appellant commenced levy of execution on the residence for the separate debts of the husband and determined through the court-appointed appraisers that the property had a surplus value considerably in excess of the homestead exemption and encumbrances. The appellant then moved for the sale of the property. Respondent sued to have further efforts of the appellant to sell the property enjoined, and an order enjoining the appellant was issued. In affirming the decision of the lower court, the court of appeal held that the interlocutory decree of divorce had given the respondent the right to undisturbed possession and enjoyment of the property for her life. Any creditor attempting to subject the homestead to satisfaction of the separate debts of respondent's former spouse could only subject his interest in the property to execution. While that interest was potentially valuable, since the judgment debtor had still retained title to the property, it was subject to the respondent's interest in the property under the divorce decree.

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11-112 California Points & Authorities § 112.22

§ 112.22 Opposing Defendant's Claim of Exemption Submitted in Opposition to Application for Right to Attach Order [Code Civ. Proc. § 484.070(f)]--Value of Property Exceeds Aggregate Amount of Homestead Exemption Plus Amount of Encumbrances [Code Civ. Proc. §§ 704.730, 704.950(c)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*(*s*)],	)	IES IN OPPOSITION TO CLAIM OF EXEMPTION
Defendant(s).	)	[*Code Civ. Proc. § 484.070(f)*]
	)	
	)	

AN ATTACHING CREDITOR MAY, BY FORCED SALE, RECOVER THE VALUE OF HOMESTEADED PROPERTY IN EXCESS OF THE AMOUNT OF THE HOMESTEAD EXEMPTION AND ANY PRIOR ENCUMBRANCES.

A. Plaintiff's Opposition to Defendant's Claim of Exemption. If plaintiff desires to oppose the defendant's claim of exemption, he or she should file and serve on the defendant a notice of opposition to the claim of exemption accompanied by supporting documents not less than two days before the date set for the hearing on the right to attach (*Code Civ. Proc. § 484.070(f)*).

B. Burden of Proof on Defendant. If the plaintiff files and serves a notice of opposition to the defendant's claim of exemption, the defendant has the burden of proving that the property is exempt from attachment (*Code Civ. Proc. § 484.070(g)*).

C. Property Subject to Enforcement of Money Judgment as Subject to Attachment. All property not exempt from enforcement of a money judgment is subject to attachment (see *Code Civ. Proc. §§ 487.010, 487.020*).

D. Excess Value of Homestead as Subject to Attachment. The excess value of the homestead cannot be said to be exempt from, or not liable to, execution when the execution levy under *Sections 699.510-699.560 of the Code of Civil Procedure* (former Sections 1245-1259 of the Civil Code) is a necessary step to secure or preserve valuable rights for the judgment creditor, and not being exempt from execution, it is also subject to attachment (*Marelli v. Keating (1929) 208 Cal. 528, 530-531, 282 P 793* ; *see also Code Civ. Proc. § 487.025(b)*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in a hearing on an application for a right to attach order [*see Code Civ. Proc. §§ 484.010-484.060*] in support of a plaintiff's notice of opposition to defendant's claim of exemption [*see Code Civ. Proc. § 484.070*; § 112.20] when the plaintiff claims that the value of the homesteaded property exceeds the aggregate amount of the homestead exemption and the encumbrances on the property, and that he or she has the right to attach any such excess [*Code Civ. Proc. § 484.070(f)*; *see Code Civ. Proc. §§ 487.010, 487.020*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should show that the value of the property for which the right to attach order is sought exceeds the amount of the homestead exemption plus the sum of all liens and encumbrances on the property. In addition, counsel should include affidavits or declarations supporting any factual issues raised by the plaintiff [*see Code Civ. Proc. § 484.070(f)*].

[b] Related Pleading and Practice Forms

For a form and discussion of a notice of opposition to a claim of exemption, *see* California Forms of Pleading and Practice, Ch. 62, *Attachment* (Matthew Bender). For a discussion of proceedings for levying a writ of execution on homesteaded property, *see* California Forms of Pleading and Practice, Ch. 294, *Homesteads* (Matthew Bender).

[3] Discussion of Authorities

[a] Excess Value of Homestead as Subject to Attachment

In *Marelli v. Keating (1929) 208 Cal. 528, 282 P 793* , the Supreme Court affirmed a trial court decision to dissolve an

injunction restraining the sheriff from proceeding on an execution sale against property in the possession of the plaintiff for a debt that had been reduced to judgment and rendered against plaintiff's grantor. Plaintiff's grantor was his wife whom he had married after the institution of the defendant judgment creditor's suit. A writ of attachment had been levied on the property before the conveyance to plaintiff, but the judgment had been rendered after the conveyance. Plaintiff claimed that, since his grantor had a validdeclaration of homestead on the property, the house was exempt from forced sale and the court below was in error in not permanently restraining the sheriff. The defendants had filed an answer after the temporary restraining order had been granted, alleging that the value of the house was approximately $24,000, which greatly exceeded the then maximum exemption of $5,000, and that they had taken the required statutory steps to subject the excess to forced sale. In its discussion, the Court stated that the execution levy and proposed sale would have been unauthorized unless the attachment levied before the conveyance was effective in securing to the judgment creditor the right to hold the excess after ownership had passed from the judgment debtor to her grantee. The Court held that, since all property not exempt from execution is subject to attachment, the attachment was a proper method of reaching the nonexempt excess on the homestead. Thus, the plaintiff-grantee was charged with notice of the rights of the attaching creditor to the excess value and he took title to the property subject to the right of the judgment creditor to reach the excess value through the proceedings provided for in *Code Civ. Proc. §§ 699.510-699.550* (former Civ. Code §§ 1245-1259). The Court also held that the trial court was correct in dissolving the injunction and permitting the sale to go forward.

Counsel should note that the Court in *Marelli* relied on former Code Civ. Proc. § 541 (this may be a typographical error and the correct reference should probably be former Code Civ. Proc. § 542) in holding that plaintiff's attachment reached the nonexempt excess of the homestead. It would appear, however, from the reasoning of the case that the right to attach the excess value of a homestead would still be valid under the attachment statutes that became effective January 1, 1977 (amended as of July 1, 1983) [*see Code Civ. Proc. §§ 487.010, 487.020, 487.025(b)*].

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§ 114.syn Synopsis to Chapter 114: HUSBAND AND WIFE

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§ 114.03 Related Discussion and Forms

[1] Related Pleading and Practice Forms

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§ 114.04 Related Family Law Publications

§§ 114.05-114.19 [Reserved]

§ 114.20 Supporting Contention That Spouse's Earnings Are Not Liable for Other Spouse's Premarital Debt [Fam. Code § 911]

[1] FORM

[2] Comments

[a] Use of Form

[b] Procedural Context

[i] Generally

[ii] Nondebtor Spouse as Defendant in Action on Debt

[iii] Nondebtor Spouse as Plaintiff in Independent Collateral Action

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

§ 114.21 Supporting Contention That Spouse's Separate Property Is Not Liable for Other Spouse' Debt Incurred Before or During Marriage [Fam. Code § 913(b)(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] No Liability of Separate Property for Debts of Spouse

[b] Tracing Commingled Separate Property

[c] Expenses Paid From Commingled Account

[d] Negligible Amount of Commingled Community Property

[4] Additional Authorities

[a] No Liability of Separate Property for Debts of Spouse

[b] Tracing Commingled Separate Property

[c] Expenses Paid From Commingled Account

[d] Negligible Amount of Commingled Community Property

§ 114.22 Supporting Contention That Spouse Is Not Liable for Other Spouse's Debt for Necessaries [Fam. Code § 914] Unless Named as Party to Action on Debt

[1] FORM

[2] Comments

[a] Use of Form

[b] Procedural Context

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] No Personal Liability or Liability of Separate Property for Debt of Spouse Without Joinder

§ 114.23 Supporting Contention That Spouse Is Not Liable for Other Spouse's Debt for Necessaries [Fam. Code § 914]--Action Is For Debt of Deceased Spouse and Is Barred by Statute of Limitations

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Action for Necessaries Against Surviving Spouse Based on Marital Liability of Deceased Spouse Must Be Brought Within One-Year Period

§ 114.24 Supporting Contention That Community Property Is Not Liable for Spouse's Tort--Tortious Activity Not Performed for Benefit of Community [Fam. Code § 1000(b)(2)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Procedural Context

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

§ 114.25 Supporting Contention That Community Property Is Not Liable for Debt Incurred While Spouses Separated Before Judgment of Dissolution or Legal Separation [Fam. Code § 910]

[1] FORM

[2] Comments

[a] Use of Form

[b] Procedural Context

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Related Family Law Chapters

[3] Discussion of Authorities

[a] Nonliability of Community Property

§ 114.26 Supporting Contention That Property Received by Spouse in Property Division on Marital Dissolution Is Not Liable for Other Spouse's Debt Incurred Before or During Marriage [Fam. Code § 916(a)(2)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Procedural Context

[c] Assigned Debt--Joinder of Party

[d] Related Pleading and Practice Forms

[e] Related Points and Authorities

§§ 114.27-114.39 [Reserved]

§ 114.40 Opposing Spouse's Claim to Property Levied on for Satisfaction of Judgment Against Other Spouse--Property Levied on Is Community Property [Fam. Code § 910]

[1] FORM

[2] Comments

[a] Use of Form

[b] Procedural Context

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Liability of Community Property for Debt of Spouse

[b] When Community Debt for Contract Incurred

[c] Community Remains Liable Despite Set Aside of Unauthorized Transfer of Community Real Property

[4] Additional Authorities

[a] Liability of Community Property for Debt of Spouse

§ 114.41 Opposing Spouse's Claim to Earnings Levied on for Satisfaction of Judgment Against Other Spouse for Premarital Debt--Earnings Were Commingled With Other Community Property [Fam. Code § 911]

[1] FORM

[2] Comments

[a] Use of Form

[b] Procedural Context

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

§ 114.42 Opposing Spouse's Claim to Property Levied on for Satisfaction of Judgment Against Other Spouse--Separate Property Commingled, Is Not Traceable, and Is Liable as Community Property [Fam. Code § 910(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Procedural Context

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Commingled Separate Property

[4] Additional Authorities

[a] Commingled Separate Property

§ 114.43 Opposing Defendant Spouse's Contention of Nonliability for Debt--Debt for Necessaries Furnished to Other Spouse While Living Together During Marriage [Fam. Code § 914(a)(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Procedural Context

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Duty to Use Separate Property

[b] Meaning of "Necessaries of Life"

[4] Additional Authorities

[a] Meaning of "Necessaries of Life"

§ 114.44 Opposing Defendant Spouse's Contention of Nonliability for Debt--Debt for Common Necessaries of Life Furnished to Other Spouse While Spouses Living Separately [Fam. Code § 914(a)(2)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Procedural Context

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Meaning of "Common Necessaries of Life"

[4] Additional Authorities

[a] Liability of Separate Property

§ 114.45 Opposing Spouse's Motion to Quash Levy of Execution--Spouse Not Party to Action

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Lack of Standing

[4] Additional Authorities

[a] Lack of Standing

§ 114.46 Opposing Spouse's Contention of Nonliability of Community Property for Other Spouse's Tort--Liability Arose From Activity Performed for Benefit of Community [Fam. Code § 1000(b)(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Procedural Context

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Liability of Community Property for Tort

[4] Additional Authorities

[a] Liability of Community Property for Tort

§ 114.47 Opposing Spouse's Claim to Property Levied on for Satisfaction of Judgment Against Other Spouse--Property Levied on Acquired by Illegal Conduct

[1] FORM

[2] Comments

[a] Use of Form

[b] Procedural Context

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Proceeds of Illegal Conduct

[4] Additional Authorities

[a] Proceeds of Illegal Conduct

§§ 114.48-114.59 [Reserved]

§ 114.60 Opposing Demurrer [Code Civ. Proc. § 430.10(d)] to Complaint to Quiet Title [Code Civ. Proc. § 760.020] to, and Supporting Cancellation of Instrument [Civ. Code § 3412] Unilaterally Transferring, Community Real Property [Fam. Code § 1102(a)]--Consent of Both Spouses Required for Valid Transfer

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

[3] Discussion of Authorities

[a] Unilateral Transfer Is Voidable in Its Entirety During Marriage

[4] Additional Authorities

[a] Unilateral Transfer Is Voidable in Its Entirety During Marriage

§ 114.61 Opposing Demurrer [Code Civ. Proc. § 430.10(d)] to Complaint to Quiet Title [Code Civ. Proc. § 760.020] to, and Cancel Instrument [Civ. Code § 3412] Affecting, Interest in Community Real Property Held in One Spouse's Name Alone, on Basis That Action Is Barred by Statute of Limitations [Fam. Code § 1102(d)]--Limitation Inapplicable if Deed Not Recorded

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] One-Year Limitation Inapplicable if Deed Not Recorded

[b] Filing of Other Documents Is Insufficient to Commence Limitations Period

[4] Additional Authorities

[a] One-Year Limitation Inapplicable if Deed Not Recorded

§§ 114.62-114.79 [Reserved]

§ 114.80 Supporting Demurrer [Code Civ. Proc. § 430.10(d)] to Complaint to Quiet Title [Code Civ. Proc. § 760.020] to, and Cancel Instrument [Civ. Code § 3412] Affecting, Interest in Community Real Property Held in One Spouse's Name Alone [Fam. Code § 1102]--Nonjoinder of Transferor Spouse

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Transferring Spouse as Necessary Party

§ 114.81 Supporting Demurrer [Code Civ. Proc. § 430.10(d)] to Complaint to Quiet Title [Code Civ. Proc. § 760.020] to, and Cancel Instrument [Civ. Code § 3412] Affecting, Interest in Community Real Property Held in One Spouse's Name Alone [Fam. Code § 1102]--Action Not Commenced Within One Year of Recordation of Instrument [Fam. Code § 1102(d)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Limitation Period May Be Raised by Demurrer if Bar Appears on Face of Complaint

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11-114 California Points & Authorities § 114.01

§ 114.01 Scope of Chapter

This chapter contains points and authorities for use in actions involving the property rights of married persons. The primary focus of this chapter is on the liability of one spouse for the contract and tort debts of the other in relation to third parties, including the liability of community property and of a nondebtor spouse's separate property. Included are forms that may be used by a nondebtor spouse to resist liability for the debts of the other spouse [*see §§ 114.20 -114.26*] and forms that may be used by the creditor and the debtor spouse to impose this liability [*see §§ 114.40 -114.47*].

This chapter also discusses remedies of a married person for the transfer of property by one of the spouses without the consent of the other, including forms that may be used by the spouse who did not consent to the transfer [*see §§ 114.60 -114.61*] and forms that may be used by the transferor spouse [*see §§ 114.80 -114.81*]. This chapter does not address the basis for dividing debts between the spouses in proceedings for marital dissolution or legal separation.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewFamily LawFamily Relationships & TortsTort LiabilitySpousal TortsFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity PropertyFamily LawMarital Termination & Spousal SupportGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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11-114 California Points & Authorities § 114.02

§ 114.02 Governing Statutes

Usage of the terms "husband" and "wife" is governed by *Fam. Code § 11*. The rights and obligations of spouses, both between themselves and with respect to third parties, are governed primarily by Fam. Code *§ 720 et seq. Fam. Code* § 900 et seq. govern the liability of property of a married person for his or her debts and those of a spouse. "Debts" are defined by *Fam. Code § 902* to include obligations based on "contract[s], tort[s], other otherwise."

The statutes pertaining to debt liability [*see Fam. Code § 900 et seq.*] are generally applicable to debts enforced on or after January 1, 1985, regardless of whether the debt was incurred before, on, or after that date [*Fam. Code § 930*]. In addition, statutes governing a spouse's right to reimbursement for the satisfaction of certain debts apply to all of those debts, regardless of whether satisfied before, on, or after January 1, 1985 [*see Fam. Code §§ 920, 931*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewFamily LawFamily Relationships & TortsTort LiabilitySpousal TortsFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity PropertyFamily LawMarital Termination & Spousal SupportGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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11-114 California Points & Authorities § 114.03

§ 114.03 Related Discussion and Forms

[1] Related Pleading and Practice Forms

The general legal effects of marriage are discussed, and related forms are provided, in Ch. 359, *Marriage* in California Forms of Pleading and Practice. For consideration of the characterization of property of a married person, see Ch. 122, *Community Property* in that set. For discussion of debt liability between spouses, as well as division of such liability on marital dissolution or legal separation, see Ch. 222, *Dissolution of Marriage: Property Division and Valuation* .

For additional discussion and forms involving remedies that are applicable to the memoranda of points and authorities in this chapter, see, California Forms of Pleading and Practice Ch. 107, *Cancellation of Instruments* , Ch. 119, *Claim and Delivery* , Ch. 150, *Conversion* , Ch. 254, *Executions and Enforcement of Judgments* , and Ch. 482, *Quieting Title* .

[2] Related Points and Authorities

For points and authorities involving remedies that are related to the memoranda of points and authorities in this chapter, see Ch. 40, *Claim and Delivery* , Ch. 51, *Conversion* , and Ch. 198, *Quieting Title* in this set. For points and authorities involving the termination of an action without trial, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* and Ch. 221, *Summary Judgments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewFamily LawMarital Duties & RightsDebt LiabilityFamily LawMarital Termination & Spousal SupportGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationCommunity PropertyReal Property LawProperty Valuation

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11-114 California Points & Authorities § 114.04

§ 114.04 Related Family Law Publications

For a full discussion of spousal liability for debts, as well as discussion of dividing debts on marital dissolution or legal separation, see Kirkland, Lurvey & Richmond, CALIFORNIA FAMILY LAW PRACTICE AND PROCEDURE, 2nd ed. (Matthew Bender), ch. 23.

For discussion of the trial of issues regarding division of debt on dissolution or legal separation, including planning considerations, checklists, arguments, and authorities, see Denner, Rothschild & Johnson, CALIFORNIA FAMILY LAW GUIDE, Unit 48.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Duties & RightsGeneral OverviewFamily LawMarital Termination & Spousal SupportGeneral OverviewFamily LawMarital Termination & Spousal SupportGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationCommunity PropertyReal Property LawProperty Valuation

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11-114 California Points & Authorities §§ 114.05-114.19

[Reserved]

§§ 114.05[Reserved]

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PART II. FORMS
A. Liability Of Separate And Community Property For Spousal Debts
1. Spouses' Forms

11-114 California Points & Authorities § 114.20

§ 114.20 Supporting Contention That Spouse's Earnings Are Not Liable for Other Spouse's Premarital Debt [Fam. Code § 911]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE EARNINGS OF _____ [PLAINTIFF *or* DEFENDANT *or* CLAIMANT] SHOULD NOT BE LEVIED ON TO SATISFY THE JUDGMENT BECAUSE THE DEBT ON WHICH JUDGMENT _____ [WAS GIVEN *or* IS SOUGHT] WAS THE DEBT OF _____ [PLAINTIFF'S *or* DEFENDANT'S *or* CLAIMANT'S] SPOUSE AND WAS INCURRED BEFORE MARRIAGE.

Liability of Earnings for Premarital Debts of Spouse. The earnings of a married person during marriage are not liable for a debt incurred by the person's spouse before marriage. After the earnings of a married person are paid, they remain not liable so long as they are held in a deposit account in which the person's spouse has no right of withdrawal and are uncommingled with other property in the community estate, except property insignificant in amount (*Fam. Code § 911(a)*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that one spouse's earnings are not liable for the premarital debts of the other spouse. It may be combined with other points and authorities pertaining to the specific procedural context in which it is raised [*see discussion under § 114.20[2*][b][i]].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel's argument should establish (1) that earnings of the married person have been or may be subject to levy or garnishment in enforcement of a judgment; (2) that the judgment is for a debt of the person's spouse incurred

before marriage; and (3) that the married person's earnings are or were held in a deposit account in which the debtor spouse has no right of withdrawal and are or were uncommingled with other community property, except property insignificant in amount [*see Fam. Code § 911(a)*].

For the purpose of interpreting *Fam. Code § 911(a),* the term "during marriage" does not include the period during which the spouses are living separate and apart before a judgment of marital dissolution or legal separation [*Fam. Code § 910(b)*]. Thus, earnings "during marriage" and debts incurred "during marriage," for the purpose of *Fam. Code § 911(a),* would not include earnings earned or debts incurred after separation and before judgment of dissolution or legal separation.

[b] Procedural Context

[i] Generally

The liability of one spouse's earnings for the premarital debts of the other spouse may be raised in a number of different procedural contexts. The issue may arise in an action brought by a creditor on a premarital debt to which both spouses are made parties defendant [§ 114.20[2][b][ii]]. It may also arise in an independent collateral action brought by the nondebtor spouse to retain or recover earnings that have been improperly levied on to enforce a judgment on the debtor spouse's premarital debt [§ 114.20[2][b][iii]].

[ii] Nondebtor Spouse as Defendant in Action on Debt

The rule that a married person's segregated earnings are not liable for a premarital debt of his or her spouse is an exception to the general rule that community property is liable for a debt incurred by either spouse before or during marriage [*see § 114.40*]. In general, community property is liable for such a debt regardless of whether one or both spouses are parties to the debt or to a judgment for the debt [*see Fam. Code § 910(a)*; *see also* 1984 Legislative Committee Comment--Assembly, to former Civ. Code § 5120.110 (not necessary to join debtor's spouse as party for purpose of enforcing judgment from community property)]. Therefore, a creditor may bring an action on a premarital debt against only the debtor spouse, obtain judgment against that spouse, and enforce the judgment by levying on property that the creditor assumes to be community property, without any notice to the nondebtor spouse.

Note, however, that without joinder of the nondebtor spouse, there is no personal liability or liability of separate property of that spouse [*see* Cal. Law Rev. Comm'n. Comment to *Fam. Code § 914*; *Credit Bureau of Santa Monica Bay Dist. v. Terranova (1971) 15 Cal. App. 3d 854, 860, 93 Cal. Rptr. 538* ; *see §§ 114.21, 114.22*]. In addition, earnings withholding orders (wage garnishment orders) may not be issued against the earnings of the judgment debtor's spouse except by court order on noticed motion [*see Code Civ. Proc. § 706.109*].

On the other hand, the nondebtor spouse may be joined as a defendant in an action on the debtor spouse's premarital debt for the purpose of levying against community property, although no statute expressly makes the nondebtor spouse personally liable for the debt [*cf. Fam. Code § 914* (spouse is personally liable for necessaries furnished other spouse during marriage, and nondebtor spouse's separate property may be applied to satisfaction of debt; *see § 114.43*)]. For purposes of judicial economy, the existence of certain property, its character as community property, and its liability for the debt may be litigated in the action on the debt [*see Credit Bureau of Santa Monica Bay Dist., Inc. v. Terranova (1971) 15 Cal. App. 3d 854, 860-861, 93 Cal. Rptr. 538]* . Therefore, the creditor of a debtor spouse may choose to bring an action against both spouses jointly, even if only community property may be levied on to enforce the judgment.

If the nondebtor spouse is made a party for the purpose of levying against community property, the fact that his or her earnings are not liable for the debt would probably not be a sufficient ground to obtain dismissal by demurrer or summary judgment. However, the point may be raised in a trial brief in order to obtain a limitation in the judgment on the right of the creditor to levy against the earnings [*see Credit Bureau of Santa Monica Bay Dist., Inc., v. Terranova*

(1971) 15 Cal. App. 3d 854, 860, 93 Cal. Rptr. 538 (judgment may be specifically limited by direction that it be satisfied only out of property made liable for debt by statute)]. The point may also be raised on a motion to quash a writ of execution, which may be brought by a judgment debtor [*Blue v. Superior Court (1956) 147 Cal. App. 2d 278, 283, 305 P.2d 209]* .

[iii] Nondebtor Spouse as Plaintiff in Independent Collateral Action

If a creditor brings an action on a premarital debt against the debtor spouse only, and then levies on earnings of the nondebtor spouse who is not liable for the debt, the nondebtor spouse may be required to take action to retain or recover the earnings. If the money is still in the hands of the levying officer, the nondebtor spouse may file a third party claim of ownership and possession with the levying officer [*Code Civ. Proc. § 720.110, 720.120*], and the claim may be resolved by judicial hearing [*see Code Civ. Proc. § 720.310*]. This form may be used in a memorandum of points and authorities in support of such a claim.

If the money has already been turned over to the creditor by the levying officer, the nondebtor spouse must proceed against the creditor directly by way of an action for the recovery of personal property [*see Civ. Code §§ 3379, 3380*; *see also Code Civ. Proc. §§ 714.010-714.030*]. This form may be used in a memorandum of points and authorities in support of the claim.

A nondebtor spouse may not need to take independent action to retain or recover earnings when that spouse is an employee and a creditor seeks a wage garnishment. An earnings withholding order may not be issued against the earnings of the spouse of the judgment debtor, except by court order on noticed motion [*Code Civ. Proc. § 706.109*]. Earnings that are protected from liability for premarital debts include all compensation for personal services performed, whether as an employee or otherwise [*Fam. Code § 911(b)(2)*]. However, earnings that are not subject to wage garnishment [*see Code Civ. Proc. § 706.011(a)*] must be protected by preemptive action by the earning spouse.

[c] Related Pleading and Practice Forms

For forms of complaints for remedies for improper levy on property, see California Forms of Pleading and Practice, Chs. 107, *Cancellation of Instruments* , 119, *Claim and Delivery* , 150, *Conversion* , 254, *Executions and Enforcement of Judgments* , and 482, *Quieting Title* (Matthew Bender). For forms for the termination of an action without trial, see Chs. 206, *Demurrers and Motions for Judgment on the Pleadings* , and 537, *Summary Judgment* in that set.

[d] Related Points and Authorities

For points and authorities generally related to remedies for improper levy on property, see Ch. 40, *Claim and Delivery* Ch. 51, *Conversion* and Ch. 198, *Quieting Title*. For forms related to the termination of an action without trial, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* and Ch. 221, *Summary Judgments* .

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 114.41* may be used to oppose the contention supported by these points and authorities.

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A. Liability Of Separate And Community Property For Spousal Debts
1. Spouses' Forms

11-114 California Points & Authorities § 114.21

§ 114.21 Supporting Contention That Spouse's Separate Property Is Not Liable for Other Spouse' Debt Incurred Before or During Marriage [Fam. Code § 913(b)(1)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE SEPARATE PROPERTY OF _____ [PLAINTIFF *or* DEFENDANT *or* CLAIMANT] SHOULD NOT BE LEVIED ON TO SATISFY THE JUDGMENT BECAUSE THE DEBT ON WHICH JUDGMENT _____ [WAS GIVEN *or* IS SOUGHT] IS SOLELY THE DEBT OF _____ [PLAINTIFF'S *or* DEFENDANT'S *or* CLAIMANT'S] SPOUSE.

A. No Liability of Separate Property for Debts of Spouse. Except as otherwise provided by statute, the separate property of a married person is not liable for a debt incurred by the person's spouse before or during marriage (*Fam. Code § 913(b)(1)*; *Leasefirst v. Borrelli (1993) 13 Cal. App. 4th Supp. 28 , 17 Cal. Rptr. 2d 114*).

[*Optional*] **B. Encumbrance of Community Property.** The joinder or consent of a married person to an encumbrance of community property to secure payment of a debt incurred by the person's spouse does not subject the person's separate property to liability for the debt unless the person also incurred the debt (*Fam. Code § 913(b)(2)*).

[*Optional*] **C. Tracing Commingled Separate Property.** A spouse's separate property that appears to be commingled with community property, but that can be traced to its separate source, retains its character as separate property and is not liable for the debts of the other spouse contracted before or during marriage (*In re Marriage of Mix (1975) 14 Cal. 3d 604, 611, 122 Cal. Rptr. 79* ; *Hicks v. Hicks (1962) 211 Cal. App. 2d 144, 157, 27 Cal. Rptr. 307*).

[*Optional*] **D. Expenses Paid From Commingled Account.** If family living expenses exceed community income and are paid from a bank account in which community funds and a spouse's separate funds have been commingled, the balance in the account is presumed to be separate funds (*see Estate of Neilson (1962) 57 Cal. 2d 733, 742, 22 Cal.*

Rptr. 1, 371 P.2d 745).

[*Optional*] **E. Negligible Amount of Commingled Community Property.** If the proportion of community property commingled with separate property is negligible, all of the property will be regarded as separate property (*see Fam. Code § 911(a)*; *Kershman v. Kershman (1961) 192 Cal. App. 2d 18, 21, 13 Cal. Rptr. 288*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that one spouse's separate property is not liable for a debt of the other spouse, whether incurred before or during marriage. This form may be combined with other points and authorities pertaining to the specific procedural context in which it is raised. For discussion of the issues concerning various possible procedural contexts, see *§ 114.20[2][b][i]*.

The first option (Paragraph B) is for use if the creditor's claim is based on an encumbrance of community property agreed to by the nondebtor spouse to secure a debt of the other spouse [*see Fam. Code § 913(b)(2)*]. The other options are for use if the character of the property is in question because separate and community property have become commingled, most commonly in a bank account. On the duty of a spouse who commingles separate and community funds to keep adequate records, see See v. See *(1966) 64 Cal. 2d 778, 51 Cal. Rptr. 888* , under § 114.42[4]. The character of property as separate or community involves many complex issues, of which commingling is an example. For guidance on these issues, see Kirkland, Lurvey, & Richmond, California Family Law Practice and Procedure, 2nd ed. (Matthew Bender), Chs. 20 and 21.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Counsel's argument should establish (1) that property of the married person has been or may be subject to levy in enforcement of a judgment; (2) that the property is the separate property of the nondebtor spouse; and (3) that the judgment is for a debt incurred solely by the person's spouse either before or during marriage [*see Fam. Code § 913(b)(1)*].

[b] Related Pleading and Practice Forms

For forms of complaints for remedies for improper levy on property, see Ch. 107, *Cancellation of Instruments* , Ch. 119, *Claim and Delivery* Ch. 150, *Conversion*, Ch. 254, *Executions and Enforcement of Judgments* and Ch. 482, *Quieting Title* in California Forms of Pleading and Practice. For forms for the termination of an action without trial, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , and Ch. 537, *Summary Judgment* in that set.

[c] Related Points and Authorities

For memoranda of points and authorities generally related to remedies for improper levy on property, see Ch. 40, *Claim and Delivery* , Ch. 51, *Conversion* , and Ch. 198, *Quieting Title* . For forms related to the termination of an action without trial, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* and Ch. 221, *Summary Judgments* .

[d] Opposing Points and Authorities

Depending on the circumstances of the case, the points and authorities *set out in §§ 114.40, 114.42, 114.43* and *114.44* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] No Liability of Separate Property for Debts of Spouse

In ***Leasefirst v. Borrelli*** *(1993) 13 Cal. App. 4th Supp. 28* , a creditor obtained a judgment against a married man in a dispute over a lease agreement. Subsequently, the creditor filed a motion for an order allowing levy on the wages of the debtor's spouse. The debtor spouse opposed the motion on the ground that his was the only signature on the lease and that his wife's wages were separate property pursuant to a prenuptial agreement. The trial court granted the motion and ordered the levy, finding that, although the prenuptial agreement characterized the wife's wages as separate property, she treated her wages as community property by supporting the spouse with her wages. The debtor spouse appealed and the court of appeal reversed.

The court of appeal cited former Civ. Code § 5120.130(b) [*now see Fam. Code § 913(b)(1)*] for the proposition that a spouse's separate property is not liable for a debt incurred by the other spouse before or during marriage. Although former Civ. Code § 5110 [*now see Fam. Code § 760*] creates a presumption that all property acquired by a married person is community property, former Civ. Code § 5110.710 [*now see Fam. Code § 850*] and former Civ. Code § 5110.730 [*now see Fam. Code § 852*] allow spouses to transmute community property into separate property by a valid written agreement. In this case, the spouses executed a valid written prenuptial agreement transmuting what would be presumed community property into separate property. Furthermore, the debt did not come within the exception set forth in former Civ. Code § 5120.140 [*now see Fam. Code § 914*] (separate property of one spouse liable for debt incurred for necessaries of other spouse). The court noted that third party creditors can avoid this result by obtaining the signatures of both spouses on contracts or notes, citing *Kennedy v. Taylor (1984) 155 Cal. App. 3d 126, 201 Cal. Rptr. 779* , and *American Olean Tile Co. v. Schultze (1985) 169 Cal. App. 3d 359, 215 Cal. Rptr. 184* (*13 Cal. App. 4th Supp. 28, 30-32)* .

[b] Tracing Commingled Separate Property

In re Marriage of Mix *(1975) 14 Cal. 3d 604, 122 Cal. Rptr 79* , was an action for dissolution of marriage in which the trial court found that the wife, an attorney, had adequately traced the source of funds used by her to acquire and improve various property, both real and personal, and upheld the wife's claim that these assets were her separate property. The Supreme Court affirmed, stating that the wife had overcome the presumption that property acquired by purchase during marriage is community property.

Although the funds used to purchase the properties were kept in a bank account in which community and separate funds were commingled, such funds do not lose their separate or community character unless it is impossible to trace the source of the funds. Tracing of separate property funds may be accomplished in one of two ways, either by "direct tracing" [*see Hicks v. Hicks, below*], or by showing that all community income in the commingled account has been exhausted by family expenses (*see discussion under § 114.21[3*][c]). In this case, the trial court believed that the wife had met her burden of tracing the separate property source of funds used to purchase the properties by the introduction of a schedule showing separate property income and expenses and by her own testimony. The Supreme Court concluded that there was substantial evidence to support the trial court's finding (*14 Cal. 3d 604, 612)* .

In ***Hicks v. Hicks*** *(1962) 211 Cal. App. 2d 144, 27 Cal. Rptr. 307* , the court stated that separate funds do not lose their character as such if they become commingled with community funds in a bank account, as long as the amount of the separate funds can be ascertained. If the source of funds used for the purchase of certain property is traced to separate property, the purchased property is also separate property, even though the process of tracing may involve a withdrawal from a bank account consisting of commingled separate and community funds. Whether separate funds remain on deposit when a withdrawal is made for the purchase of specific property, and whether the intention of the drawer is to withdraw only that separate property, are questions of fact for determination by the trial court (*211 Cal. App. 2d 144, 157)* . This method of tracing is known as the "direct tracing test" (*see In re Marriage of Mix, above*).

[c] Expenses Paid From Commingled Account

Estate of Neilson *(1962) 57 Cal. 2d 733, 22 Cal. Rptr. 1, 371 P.2d 745* was an heirship proceeding to determine the rights of a decedent's second wife in his estate, which was claimed to consist entirely of the decedent's separate property. The Supreme Court stated, as part of its discussion, that property acquired during a marriage is presumed to be community property, and that this presumption applies when a spouse purchases property during the marriage with funds from a disputed source, such as an account in which community and separate funds have been commingled. However, the presumption of community property may be rebutted by proof that, at the time the property was acquired, all community income in the disputed account had been exhausted by community expenses. This method of tracing was used to establish that assets discovered after the husband's death had been acquired before the marriage (*57 Cal. 2d 733, 742)* .

[d] Negligible Amount of Commingled Community Property

In ***Kershman v. Kershman*** *(1961) 192 Cal. App. 2d 18, 13 Cal. Rptr. 288* , the court of appeal held that certain corporate stock and its proceeds were the wife's separate property because the time she spent in managing it was slight compared with the factors of income and appreciation. The court stated that if the community contribution in commingled separate and community property is insignificant in amount compared to the separate property contribution, the whole will be treated as separate property (*192 Cal. App. 2d 18, 21)* .

To the same effect are *Cone v. Cone (1955) 131 Cal. App. 2d 424, 430-431, 280 P.2d 871* , and *Cline v. Cline (1935) 4 Cal. App. 2d 626, 629, 41 P.2d 588* .

[4] Additional Authorities

[a] No Liability of Separate Property for Debts of Spouse

In *Abbett Electric Corp v. Storek (1994) 22 Cal. App. 4th 1460, 27 Cal. Rptr. 2d 845* , a judgment creditor sought an execution sale of a residence that the judgment debtor had purchased with his former wife. The creditor claimed that the residence was entirely community property subject to execution, although title to the residence was held in the names of the judgment debtor and his former wife as joint tenants. The appellate court upheld the trial court's findings that the presumption of community property was overcome by the fact that title was taken in joint tenancy, that each joint tenancy interest was held by the former spouses as separate property, and that only the debtor's one-half interest was subject to execution. However, the trial court's denial of the creditor's application for sale, on the ground that the debtor's one-half interest was less than the combined amount of his homestead exemption and all encumbrances, was reversed in view of applicable statutory requirements [*see Code Civ. Proc. § 704-780(b)*].

[b] Tracing Commingled Separate Property

In *Mears v. Mears (1960) 180 Cal. App. 2d 484, 4 Cal. Rptr. 618* , disapproved on other grounds in *See v. See (1966) 64 Cal. 2d 778, 785, 51 Cal. Rptr. 888, 415 P.2d 776* [*see* discussion of *See v. See* under § 114.42[4]], the court held that the wife in a divorce action must be credited with the amount of her separate property that was contributed to the purchase of an automobile. The court noted that the exact amount of funds allocable to separate and community property used to purchase the automobile could be readily traced and ascertained and that the value of the automobile had not changed (*180 Cal. App. 2d 484, 500, 503)* .

In *Thomasset v. Thomasset (1953) 122 Cal. App. 2d 116, 264 P.2d 626* , disapproved on other grounds in *See v. See (1966) 64 Cal. 2d 778, 786, 51 Cal. Rptr. 888, 415 P.2d 776* [*see* discussion of *See v. See* under § 114.42[4]], the wife contended on appeal from a disposition of property in a divorce action that property purchased with commingled funds was community property, even though the amounts of separate and community funds deposited in a commingled account were known. The court stated that the wife's contention was not the law. To the contrary, if separate and community funds are so commingled that it is impossible to trace the source of the funds, the whole is treated as community property. However, the presumption under former Civ. Code § 5110 [*now see Fam. Code § 760*)] that

property acquired during marriage is community property controls only when it is impossible to trace the source of the specific property (*122 Cal. App. 2d 116, 124)* .

[c] Expenses Paid From Commingled Account

In *Brown v. Meredith (1963) 220 Cal. App. 2d 762, 34 Cal. Rptr. 153* , the court affirmed a judgment for defendant wife in an action by her former husband for partition of personal property. The down payment on the property had been made from a common bank account into which the husband had deposited his community earnings and the wife had deposited her separate earnings, and the exact amount of community funds deposited in the account was shown. The court stated that all of the other funds deposited in the account thus came from the wife's separate property and that there was no inseparable commingling of separate and community funds. By applying the presumption that normal and ordinary living expenses were paid from community income, the court held that the trial court could properly find that the down payment was actually taken from the wife's separate funds (*220 Cal. App. 2d 762, 764-765)* .

In *Estate of McGee (1959) 168 Cal. App. 2d 670, 336 P.2d 622* , the wife had greatly increased the value of her separate property by reinvestments and astute management. The court rejected an argument that her savings, derived from rents, should be attributed to her services and treated as community property. It stated that there was no presumption that the wife supported her husband out of her separate funds and preserved intact the community estate (*168 Cal. App. 2d 670, 678)* .

In *Kenney v. Kenney (1954) 128 Cal. App. 2d 128, 274 P.2d 951* , disapproved on other grounds in *See v. See (1966) 64 Cal. 2d 778, 785-786, 51 Cal. Rptr. 888, 415 P.2d 776* [*see* discussion of *See v. See* under § 114.42[4]], the court upheld a finding that the husband had used his separate property funds to purchase certain property. These funds had been commingled in an account with community funds at a time when family expenses exceeded community income. The court stated that evidence showing no excess of community income over living expenses is considered effective to demonstrate the separate character of the remaining property (*128 Cal. App. 2d 128, 136-138)* .

[d] Negligible Amount of Commingled Community Property

Estate of Cudworth (1901) 133 Cal. 462, 65 P. 1041 , was an appeal by a devisee objecting to part of a decree finding certain property to have been community instead of separate property. The property in question consisted of a very large amount of cash that had been commingled with approximately $15 per month of the wife's separate property over the course of a 21-year marriage. The Supreme Court reversed the decree. Regarding the question of commingling of funds, the Supreme Court stated that if there were any commingling of the separate funds of the wife with the separate funds of the husband, it was a commingling of "such a trifling sum with such a large amount" that it would be inequitable to hold that the husband's property thus lost its separate character and became community property (*133 Cal. 462, 468)* .

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CHAPTER 114 HUSBAND AND WIFE
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A. Liability Of Separate And Community Property For Spousal Debts
1. Spouses' Forms

11-114 California Points & Authorities § 114.22

§ 114.22 Supporting Contention That Spouse Is Not Liable for Other Spouse's Debt for Necessaries [Fam. Code § 914] Unless Named as Party to Action on Debt

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [PLAINTIFF'S *or* CLAIMANT'S] SEPARATE PROPERTY SHOULD NOT BE LEVIED ON TO SATISFY THE JUDGMENT BECAUSE HE/SHE WAS NOT MADE A PARTY TO THE ACTION IN WHICH THE JUDGMENT WAS ENTERED AND IS NOT LIABLE ON THE JUDGMENT.

No Personal Liability or Liability of Separate Property for Debt of Spouse Without Joinder. The separate property of a married person may not be subjected to process under *Family Code Section 914(b)* by a creditor who has furnished necessaries to the person's spouse, unless the person was joined as a party defendant to the action on the debt and is a judgment debtor pursuant to that action (*Credit Bureau of Santa Monica Bay Dist. v. Terranova (1971) 15 Cal. App. 3d 854, 860, 93 Cal. Rptr. 538* ; *see* *Evans v. Noonan (1912) 20 Cal. App. 288, 295-298, 128 P. 794*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that one spouse's separate property cannot be levied on pursuant to a judgment on a debt of the other spouse incurred during marriage, even if the debt is for necessaries for which the nondebtor spouse and his or her separate property are otherwise liable, when the nondebtor spouse was not made a party to the action [*see* Cal. Law Rev. Comm'n. Comment to *Fam. Code § 914*; *Credit Bureau of Santa Monica Bay Dist. v. Terranova (1971) 15 Cal. App. 3d 854, 860, 93 Cal. Rptr. 538* ; *Evans v. Noonan (1912) 20 Cal. App. 288, 128 P. 794]* . This form may be combined with other points and authorities pertaining to the specific procedural context in which it is raised [*see discussion under § 114.22[2][b]*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Counsel's argument should establish (1) that separate property of the married person has been or may be subject to levy or garnishment in enforcement of a judgment; (2) that the judgment is for a debt incurred solely by the person's spouse; and (3) that the person was not a party to the action in which the judgment was entered against the debtor spouse and is not a judgment debtor pursuant to that action.

[b] Procedural Context

This form must be used in an independent collateral action brought by an owner of real or personal property that has been levied on to enforce a judgment against the person's spouse for the purpose of retaining or recovering the property. Such an action might be a third-party claim filed with the levying officer [*see Code Civ. Proc. §§ 720.110, 720.120*], an action against the creditor for a writ of possession to recover personal property [*see Civ. Code §§ 3379, 3380*], or an action to quiet title to real or personal property [*see Code Civ. Proc. § 760.020*].

[c] Related Pleading and Practice Forms

For forms of complaints for remedies for improper levy on property, see Ch. 107, *Cancellation of Instruments* , Ch. 119, *Claim and Delivery* , Ch. 150, *Conversion* , Ch. 254, *Executions and Enforcement of Judgments* and Ch. 482, *Quieting Title* in California Forms of Pleading and Practice.

[d] Related Points and Authorities

For memoranda of points and authorities generally related to remedies for improper levy on property, see Ch. 40, *Claim and Delivery* , Ch. 51, *Conversion* , and Ch. 198, *Quieting Title* . For forms related to the termination of an action without trial, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* and Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] No Personal Liability or Liability of Separate Property for Debt of Spouse Without Joinder

Credit Bureau of Santa Monica Bay Dist., Inc. v. Terranova *(1971) 15 Cal. App. 3d 854, 93 Cal. Rptr. 538* , involved an action by a dentist's assignee against a wife for dental services rendered to her deceased husband. The case was certified to the court of appeal to resolve the questions (1) whether the plaintiff's cause of action against the wife under former Civ. Code § 5121 [*now see Fam. Code § 914*] could establish personal liability or was in the nature of a quasi in rem action, and (2) whether the judgment should have been limited to specifically designated parcels of property owned by the wife.

In reviewing the history of case law interpreting the nature of a spouse's liability under former Civ. Code § 5121 [*now see Fam. Code § 914*], the appellate court stated the following principles applicable to actions under that statute: (1) a nondebtor spouse must be made a party to the action on the debt and have an opportunity to litigate the issues on which the liability of his or her separate property may depend; (2) it must be shown that the debt was for necessaries and that the spouses were living together at the time they were furnished [*see § 114.43*]; (3) former Civ. Code § 5121 (unlike its successor, *Fam. Code § 914(b)*), did not impose general personal liability on the nondebtor spouse; and (4) a judgment establishing liability under the former Civil Code section must be limited and conditional, rather than a general, unqualified personal judgment. The court concluded that, while the judgment should be against the wife rather than against her property, it should be specifically limited by a direction that it be satisfied only out that portion of her separate property made liable by the statute (*15 Cal. App. 3d 854, 857-860)* .

Note that the California Law Revision Commission Comment to *Fam. Code § 914(b)* recognizes the continuing applicability of *Credit Bureau of Santa Monica Bay District v. Terranova,* requiring joinder of a spouse for the purpose of subjecting that spouse's separate property to debts for necessaries of the other spouse, even though *Fam. Code §*

914(b) imposes personal liability on a married person for necessaries of life furnished to his or her spouse.

In ***Evans v. Noonan*** *(1912) 20 Cal. App. 288, 128 P. 794* , a plaintiff doctor sued a husband and wife jointly for medical services rendered to their children. Only the husband had dealt with the doctor, and the wife had made no promise or agreement to pay. The jury was instructed that the wife's liability depended on whether or not she had contracted for the services and, under this instruction, found for the wife.

The appellate court reversed on the ground that, under the applicable statute, some but not all of the wife's separate property could be taken in satisfaction of a debt for necessaries furnished to her children, and thus the statute made the wife personally liable for the debt. Among the arguments advanced by the wife in opposition to her personal liability was that, under the statute, it was not necessary to join the wife as a party in order to subject her separate property to liability on the judgment against the husband. However, the court rejected this premise, stating that in order to bind the separate property of the wife, it was in fact necessary to make her a party to the action. While the statute did not expressly provide for the wife's personal liability (unlike current *Fam. Code § 914(a)*), the court was of the opinion that personal liability, to the extent of the wife's separate property that was liable for the debt under the statute, was implied under the statute.

In order to levy against the wife's separate property, it was necessary that she be made a party to the action on the debt and given an opportunity to litigate the applicability of the statute to the facts of her case. The court concluded that a person or her property should under no circumstances be bound by a judgment in an action to which she has not been made a party and in which she has not had an opportunity to be heard (*20 Cal. App. 288, 295-298)* .

Note that the rule requiring joinder does not apply to the liability of community property for a debt of the other spouse incurred before or during marriage [*see Fam. Code § 910(a)*; § 114.40], and community property may be levied on without joining the nondebtor spouse as a party [*see* Cal. Law Rev. Comm'n. Comment to *Fam. Code § 910*; *see also § 114.20[2*][b][ii]]. However, much of the reasoning of *Credit Bureau of Santa Monica Bay Dist., Inc. v. Terranova* and *Evans v. Noonan* would seem to apply to the interest of the nondebtor spouse in community property, and counsel who is faced with a levy against community property pursuant to a judgment under which only one spouse is a judgment debtor [*see § 114.40*] may wish to advance an argument based on the due process overtones of these cases that joinder is required.

Note, also, that special procedural provisions may apply to a levy against community property when the nondebtor spouse was not joined in the debt action [*see, e.g., Code Civ. Proc. § 706.109* (issuance of earnings withholding order against spouse of judgment debtor); Cal. Law Rev. Comm'n. Comment to *Fam. Code § 910*].

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11-114 California Points & Authorities § 114.23

§ 114.23 Supporting Contention That Spouse Is Not Liable for Other Spouse's Debt for Necessaries [Fam. Code § 914]--Action Is For Debt of Deceased Spouse and Is Barred by Statute of Limitations

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

[PLAINTIFF'S *or* CLAIMANT'S] SEPARATE PROPERTY SHOULD NOT BE LEVIED ON TO SATISFY A JUDGMENT ON A DEBT FOR NECESSARIES OR COMMON NECESSARIES INCURRED BY HIS/HER DECEASED SPOUSE, BECAUSE IT IS BASED ON AN ACTION THAT WAS NOT COMMENCED WITHIN THE LIMITATIONS PERIOD SET FORTH IN SECTION 366.2 OF THE CALIFORNIA CODE OF CIVIL PROCEDURE, AND NO EXCEPTIONS TO THIS RULE APPLY.

Action for necessaries or common necessaries against surviving spouse based on marital liability of deceased spouse must be brought within one-year period. The limitations period set forth in *Section 366.2 of the California Code of Civil Procedure* applies with respect to an action against a surviving spouse on a debt for necessaries or common necessaries if the spouse who incurred the debt dies, unless the surviving spouse actually knew of the debt before expiration of this limitations period and the deceased spouse's personal representative failed to provide the creditor asserting the claim with a timely written notice of the probate administration of the decedent's estate [*Fam. Code § 914(c)*; *Collection Bureau of San Jose v. Rumsey (2000) 24 Cal. 4th 301, 99 Cal. Rptr. 2d 792, 6 P.3d 713]* .

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that one spouse's separate property cannot be levied on pursuant to a judgment on a debt that the other spouse incurred during marriage for necessaries or common necessaries of life if the incurring spouse has died and the action was brought after expiration of the one-year limitations period of *Code Civ. Proc. § 366.2* [*see Fam. Code § 914(c)(1)*].

Under *Fam. Code § 914(c)*, the one-year period of *Code Civ. Proc. § 366.2* applies, unless the surviving spouse had actual knowledge of the debt before expiration of the one-year period, and the decedent spouse's personal representative failed to provide the creditor asserting the claim with a timely written notice of the probate administration of the estate as required by statute [*see Prob. Code § 9050*], in which case the statute of limitations set forth in *Code Civ. Proc. § 337* or *339*, as applicable, would apply [*see Fam. Code § 914(c)(2)*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. This would include, for example, the fact and date of death of the spouse who incurred the debt; and any facts tending to show either the lack of knowledge of the surviving spouse of the debt (within the one-year limitation period) or, if the surviving spouse did have knowledge, that the decedent's personal representative gave timely written notice of any probate administration to the creditor asserting the claim [*see Fam. Code § 914(c)(2)*].

[3] Discussion of Authorities

[a] Action for Necessaries Against Surviving Spouse Based on Marital Liability of Deceased Spouse Must Be Brought Within One-Year Period

In *Collection Bureau of San Jose v. Rumsey (2000) 24 Cal. 4th 301, 99 Cal. Rptr. 2d 792, 6 P.3d 713* , the Supreme Court held that the one-year statute of limitations set forth in *Code Civ. Proc. § 366.2* applies in an action by a collection agency against a surviving spouse for recovery of the hospital and medical expenses of a deceased spouse's last illness. It reversed the judgment of the court of appeal, which held that although the agency's action was barred by the one-year limitations period of *Code Civ. Proc. § 366.2* because it had not been filed within one year from the date of the deceased spouse's death, the agency had an entirely separate and independent cause of action for recovery of the debt from the surviving spouse by virtue of *Fam. Code § 914*, which makes spouses personally liable for each other's debts incurred for "necessaries of life." An action under *Fam. Code § 914* would be governed by the four-year limitations period of *Code Civ. Proc. § 337*, which is generally applicable to open book accounts. In reviewing the legislative history of *Code Civ. Proc. § 366.2*, the Supreme Court found a clear legislative intent that this one-year statute would govern and apply to any action on a debt of the decedent, regardless of whom the action was brought against, and specifically including the decedent's surviving spouse. It noted that *Prob. Code § 13554(c)* expressly provides that the one-year limitations period of *Code Civ. Proc. § 366.2* applies to actions against a deceased debtor spouse, or derivatively, against the surviving spouse for any debt remaining unpaid on the death of the debtor spouse. This express provision, which specifically addresses the liability of a married person for the debts incurred by the other spouse on the death of that spouse, controls over *Fam. Code § 914*, which merely addresses the general liability of a spouse for the debts of the other spouse incurred during the marriage. In cases in which a debtor spouse has died, the one-year limitation period applies whether the action is brought under *Prob. Code § 13554* or *Fam. Code § 914* (*24 Cal. 4th 301, 306-313)* .

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11-114 California Points & Authorities § 114.24

§ 114.24 Supporting Contention That Community Property Is Not Liable for Spouse's Tort--Tortious Activity Not Performed for Benefit of Community [Fam. Code § 1000(b)(2)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

COMMUNITY PROPERTY SHOULD NOT BE LEVIED ON TO SATISFY THE JUDGMENT BECAUSE JUDGMENT WAS GIVEN FOR THE TORT LIABILITY OF _____ [PLAINTIFF'S *or* CLAIMANT'S] SPOUSE BASED ON AN _____ [ACT *or* OMISSION] ARISING FROM AN ACTIVITY NOT PERFORMED FOR THE BENEFIT OF THE COMMUNITY AND THE TORTFEASOR SPOUSE'S SEPARATE PROPERTY HAS NOT BEEN EXHAUSTED.

A. Damage Caused by Other Spouse. A married person is not liable for any injury or damage caused by the other spouse except in cases in which the married person would be liable therefor if the marriage did not exist (*Fam. Code § 1000(a)*).

B. Not Acting for Benefit of Community. If the liability of a married person for death or injury to person or property is not based on an act or omission that occurred while the married person was performing an activity for the benefit of the community, it must be satisfied first from the separate property of the married person and second from the community property (*Fam. Code § 1000(b)(2)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the tortfeasor spouse's separate property must be levied on first, before community property is levied on, to satisfy that spouse's tort liability, because the act or omission giving rise to the liability occurred in the course of an activity not for the benefit of the community [*see Fam.*

Code § 1000(b)(2)]. This form may be combined with other points and authorities pertaining to the specific procedural context in which it is raised [*see discussion under § 114.24[2][b]*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Counsel's argument should establish (1) that property of a married person has been or may be levied on or garnished in enforcement of a judgment; (2) that the property is community property; (3) that the judgment is for the tort liability of the person's spouse; (4) that the act of the spouse that gave rise to the liability was pursuant to an activity not for the benefit of the community; and (5) that the tortfeasor spouse has separate property that may be used to satisfy the judgment [*see Fam. Code § 1000(b)(2)*].

Note that cases decided prior to the 1985 enactment of former Civ. Code § 5122 [*now see Fam. Code § 1000*] provide for a right of reimbursement as between the spouses when community property is reached to pay a spouse's tort liability arising from an act or omission that was not for the benefit of the community [*see, e.g., In re Marriage of Stitt (1983) 147 Cal. App. 3d 579, 588, 195 Cal. Rptr. 172]* . However, no right of reimbursement may be exercised more than seven years after the spouse in whose favor the right arises has actual knowledge of the application of the property to the satisfaction of the debt. Additionally, note that the provisions of *Fam. Code § 1000* do not apply to the extent the liability is satisfied out of the proceeds of liability insurance, whether the proceeds are from property in the community estate or from separate property [*Fam. Code § 1000(c)*].

[b] Procedural Context

This form is designed for use in an independent collateral action brought by the nontortfeasor spouse for the purpose of retaining or recovering community property that has been levied on to enforce a tort judgment against the person's spouse. Such an action might be a third-party claim filed with the levying officer [*see Code Civ. Proc. §§ 720.110, 720.120*], an action against the creditor for a writ of possession to recover personal property [*see Civ. Code §§ 3379, 3380*], or an action to quiet title to real or personal property [*see Code Civ. Proc. § 760.020*]. For further discussion, see *§ 114.20[2][b][i]*.

It does not seem likely that the issue would be litigated in the original action against the tortfeasor spouse because the liability of community property depends on the nonavailability of separate property, a fact that cannot be determined until the time of levy. If both spouses are named as parties defendant in the original action, the proper response of the nontortfeasor spouse is to move for dismissal [*see Code Civ. Proc. § 430.10(d), (e)*] or summary judgment [*see Code Civ. Proc. § 437c*] on the ground that a married person is not liable for the torts of his or her spouse, absent some theory of liability independent of the marriage relationship (for example, agency or conspiracy) [*see Fam. Code § 1000(a)*].

[c] Related Pleading and Practice Forms

For forms of complaints for remedies for improper levy on property, see Ch. 107, *Cancellation of Instruments* , Ch. 119, *Claim and Delivery* , Ch. 150, *Conversion* , Ch. 254, *Executions and Enforcement of Judgments* and Ch. 482, *Quieting Title* in California Forms of Pleading and Practice.

[d] Related Points and Authorities

For memoranda of points and authorities generally related to remedies for improper levy on property, see Ch. 40, *Claim and Delivery* , Ch. 51, *Conversion* , and Ch. 198, *Quieting Title* .

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 114.46* may be used to oppose the contention supported by these points and authorities.

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11-114 California Points & Authorities § 114.25

§ 114.25 Supporting Contention That Community Property Is Not Liable for Debt Incurred While Spouses Separated Before Judgment of Dissolution or Legal Separation [Fam. Code § 910]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE DEBT TO _____ [*state person or entity to whom debt is owed*] WAS INCURRED BY _____ [HUSBAND *or* FORMER HUSBAND *or* WIFE *or* FORMER WIFE] WHILE THE _____ [SPOUSES *or* FORMER SPOUSES] WERE LIVING SEPARATE AND APART BEFORE A JUDGMENT FOR _____ [MARITAL DISSOLUTION *or* LEGAL SEPARATION]; THEREFORE, THE DEBT IS THE SEPARATE DEBT OF _____ [HUSBAND *or* FORMER HUSBAND *or* WIFE *or* FORMER WIFE], AND THE COMMUNITY PROPERTY OF THE _____ [SPOUSES *or* FORMER SPOUSES] IS NOT LIABLE FOR THE DEBT.

Nonliability of Community Property. Although community property is generally liable for a debt incurred by either spouse before or during marriage, the term "during marriage" as used in *Family Code Section 910* does not include the period during which the spouses are living separate and apart before a judgment for dissolution of marriage or a judgment for legal separation (*Fam. Code § 910(b)*; *see In re McCoy (1990) 111 Bankr. 276*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that community property should not be held liable for a debt incurred during marriage by one of the spouses when the debt was incurred while the spouses were separated before a judgment of marital dissolution or legal separation [*see Fam. Code § 910*]. It may be combined with other points and authorities pertaining to the specific procedural context in which it is raised [*see discussion under § 114.25[2][b]*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In particular, facts pertaining to the date on which the debt was incurred and the period during which the parties were separated should be set forth to demonstrate that the debt was incurred during a period of separation and before a judgment of marital dissolution or legal separation [*see Fam. Code § 910*].

[b] Procedural Context

The issue of liability of community property may be raised in the context of a family law proceeding between the spouses or in a proceeding against one or both spouses by a third-party creditor.

[c] Related Pleading and Practice Forms

For forms of complaints for remedies for improper levy on property, see California Forms of Pleading and Practice, Ch. 107, *Cancellation of Instruments* , Ch. 119, *Claim and Delivery* , Ch. 150, *Conversion* , Ch. 254, *Executions and Enforcement of Judgments* , and Ch. 482, *Quieting Title* .

[d] Related Points and Authorities

For memoranda of points and authorities generally related to remedies for improper levy on property, see Ch. 40, *Claim and Delivery* , Ch. 51, *Conversion* , and Ch. 198, *Quieting Title* .

[e] Related Family Law Chapters

For a general discussion of liability of community and separate property, see Kirkland, Lurvey, & Richmond, CALIFORNIA FAMILY LAW PRACTICE AND PROCEDURE, 2nd ed. (Matthew Bender), ch. 23.

[3] Discussion of Authorities

[a] Nonliability of Community Property

In re McCoy *(1990) 111 Bankr. 276* was a bankruptcy proceeding that was filed by a husband while a marital dissolution proceeding was pending in California. In April, 1987, the trial court in the dissolution action made an order *pendente lite* requiring the sale of the community property residence, with proceeds to be distributed to the parties equally after payment of community debts. In July, 1987, the federal bankruptcy court prohibited sale of the residence, but later authorized the sale in April, 1988. The debtor-husband sought to sell the residence to pay encumbrances and community debts, and to distribute one-half of the remaining proceeds to the wife. At a hearing regarding the proceeds, the bankruptcy court ruled (1) that the community property had not been divided as of the beginning of the bankruptcy case; (2) that, prior to entry of a decree of dissolution, community property is liable for all debts incurred during marriage, including post-separation debts; and (3) that the sale proceeds were therefore subject to the claims of the husband's creditors for debts he incurred after separation but before judgment of dissolution. The wife appealed.

The Ninth Circuit Bankruptcy Appellate Panel reversed the judgment, holding that, as a result of 1989 legislation amending former Civ. Code § 5120.110 [*now see Fam. Code § 910*], the wife's share of the community property was not liable for the husband's post-separation debts. The court noted that, before the statutory amendment, the sale proceeds of the couple's residence would have been liable for the post-separation business debts. However, the language of the amended provision defined the term "during marriage" as not including the period during which the spouses are living separate and apart before a judgment for dissolution of marriage or a judgment for legal separation. By amending former Civ. Code § 5120.110 [*now see Fam. Code § 910*], the Legislature clearly mandated that a separated spouse's share of the community property is not reachable to satisfy the other spouse's post-separation debts. Moreover, even though the amended provision did not go into effect until January 1, 1990, former Civ. Code §§ 5120.010-5122 [*now see Fam. Code §§ 900-1000*] apply to all debts enforced on or after January 1, 1985, regardless of when the debt was

incurred [*see Fam. Code §§ 930, 931*]. Therefore, because the debts in this case were all enforced after January 1, 1985, the provisions of former Civ. Code § 5120.110(c) [*now see Fam. Code § 910*] applied retroactively.

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11-114 California Points & Authorities § 114.26

§ 114.26 Supporting Contention That Property Received by Spouse in Property Division on Marital Dissolution Is Not Liable for Other Spouse's Debt Incurred Before or During Marriage [Fam. Code § 916(a)(2)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE SEPARATE PROPERTY OF _____ [PLAINTIFF *or* DEFENDANT *or* CLAIMANT], AND HIS/HER SHARE OF COMMUNITY PROPERTY RECEIVED IN THE DIVISION OF COMMUNITY PROPERTY PURSUANT TO _____ [DISSOLUTION OF MARRIAGE *or* LEGAL SEPARATION], SHOULD NOT BE LEVIED ON TO SATISFY THE JUDGMENT BECAUSE THE DEBT ON WHICH JUDGMENT _____ [WAS GIVEN *or* IS SOUGHT] WAS INCURRED BY _____ [PLAINTIFF'S *or* DEFENDANT'S *or* CLAIMANT'S] SPOUSE AND THE DEBT WAS NOT ASSIGNED FOR PAYMENT BY _____ [PLAINTIFF *or* DEFENDANT *or* CLAIMANT] IN THE DIVISION OF COMMUNITY PROPERTY; _____ [PLAINTIFF *or* DEFENDANT *or* CLAIMANT] IS THEREFORE NOT LIABLE FOR THE DEBT.

A. Liability of Separate Property and Share of Community Property Received in Property Division for Debts of Spouse. The separate property owned by a married person at the time of a division of community and quasi-community property between spouses pursuant to dissolution of marriage or legal separation, and the property received by the person in the division, is not liable for a debt incurred by the person's spouse or former spouse before or during the marriage, unless the debt was assigned for payment by the person in the division of the property (*Fam. Code § 916(a)(2)*; *see Gagan v. Gouyd (1999) 73 Cal. App. 4th 835, 841-842, 86 Cal. Rptr. 2d 733*).

B. Personal Liability of Spouse for Debt of Other Spouse After Property Division. After a division of community and quasi-community property pursuant to dissolution of marriage or legal separation, a person is not personally liable for a debt incurred by the person's spouse or former spouse before or during marriage, unless the debt was assigned for payment by that person in the division of property (*Fam. Code § 916(a)(2)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a person's separate property and share of community property received under a property division pursuant to dissolution of marriage or legal separation is not liable for a debt of his or her spouse incurred before or during the marriage. This form may be combined with other points and authorities pertaining to the specific procedural context in which it is raised [*see discussion under § 114.26[2][b]*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Counsel's argument should establish (1) that the person's property has been or may be subject to levy or garnishment in enforcement of a judgment; (2) that the judgment is for a debt incurred solely by the person's spouse before or during marriage; (3) that the marriage has either been dissolved or is in the process of being dissolved, or that a judgment of legal separation has been, or is in the process of being, entered; (4) that, pursuant to the dissolution or legal separation, a division of the parties' community and quasi-community property has been effected; (5) that the property subject to levy either was the person's separate property at the time of the division or was the person's share of community property received pursuant to the division; and (6) that the debt was not assigned for payment by the person in the division of property [*see Fam. Code § 916(a)(2)*; *see also Fam. Code § 2620 et seq.*; *but see Kenney v. U.S. (N.D. Cal. 2004) 329 F.Supp.2d 1193, 1196* (transfer of wife's interest in property under marital settlement agreement did not extinguish federal tax liens that attached to property before agreement)].

[b] Procedural Context

After a division of property pursuant to a dissolution of marriage or legal separation, *Fam. Code § 916(a)(2)* establishes both the nonliability of property and personal nonliability for the debt of a spouse incurred before or during marriage. Therefore, if an action is brought on a debt for which personal nonliability can be established, this form may be used in support of a demurrer [*see Code Civ. Proc. § 430.10(e)*] or motion for summary judgment [*see Code Civ. Proc. § 437c*]. It may also be used in a trial brief or in support of a motion to quash a levy against exempt property [*see Blue v. Superior Court (1956) 147 Cal. App. 2d 278, 283, 305 P.2d 209]* .

If an action is brought and judgment is entered solely against the debtor spouse, and enforcement of the judgment is then sought against the separate property or community property share of the nondebtor spouse, this form may be used in an independent collateral action brought for the purpose of retaining or recovering the property. Such an action might be a third-party claim filed with the levying officer [*see Code Civ. Proc. §§ 720.110, 720.120*], an action against the creditor for a writ of possession to recover personal property [*see Civ. Code §§ 3379, 3380*], or an action to quiet title to real or personal property [*see Code Civ. Proc. § 760.020*]. For further discussion, see *§ 114.20[2][b][i]*.

[c] Assigned Debt--Joinder of Party

After division of community and quasi-community property pursuant to *Fam. Code § 2550*, the separate property owned by a married person at the time of the division, and the community property received by the person in the division, is liable for a debt incurred by the person's spouse before or during marriage, and the person is personally liable for the debt, if the debt was assigned for payment by the person in the division of the property [*Fam. Code § 916(a)(3)*]. Nevertheless, if a money judgment for the debt is entered *after* the division, such property is not subject to enforcement of the judgment and the judgment may not be enforced against the married person unless the person was made a party to the judgment [*Fam. Code § 916(a)(3)*; *see In re Chenich (Bankr. 9th Cir. 1988) 87 Bankr. 101]* . When levy is sought against the property of the assignee spouse without him or her having been joined as a party to the action in which judgment was rendered, § 114.22 can be adapted for use in such a case.

[d] Related Pleading and Practice Forms

For forms of complaints for remedies for improper levy on property, see California Forms of Pleading and Practice, Ch. 107, *Cancellation of Instruments* , Ch. 119, *Claim and Delivery* , Ch. 150, *Conversion* , Ch. 254, *Executions and Enforcement of Judgments* and Ch. 482, *Quieting Title* (Matthew Bender). For forms for the termination of an action without trial, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , and Ch. 537, *Summary Judgment* in that publication.

[e] Related Points and Authorities

For memoranda of points and authorities generally related to remedies for improper levy on property, see Ch. 40, *Claim and Delivery* , Ch. 51, *Conversion* , and Ch. 198, *Quieting Title* . For forms related to the termination of an action without trial, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* and Ch. 221, *Summary Judgments* .

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[Reserved]

§§ 114.27[Reserved]

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11-114 California Points & Authorities § 114.40

§ 114.40 Opposing Spouse's Claim to Property Levied on for Satisfaction of Judgment Against Other Spouse--Property Levied on Is Community Property [Fam. Code § 910]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

LEVY ON _____ [*describe property*] WAS PROPER BECAUSE COMMUNITY PROPERTY IS LIABLE FOR THE DEBTS OF EITHER SPOUSE CONTRACTED _____ [BEFORE *or* DURING] MARRIAGE.

A. Liability of Community Property for Debt of Spouse. A judgment against a spouse for a debt contracted by the spouse before or during marriage may be satisfied out of the community property of the marriage (*Fam. Code § 910*; *Century Sur. Co. v. Polisso (2006) 139 Cal. App. 4th 922, 942, 944, 43 Cal. Rptr. 3d 468* ; *In re Marriage of Feldner (1995) 40 Cal. App. 4th 617, 622-624, 47 Cal. Rptr. 2d 312* ; *In re Marriage of Orchard (1990) 224 Cal. App. 3d 155, 157, 161, 273 Cal. Rptr. 499*).

[*Optional*] **B. When Community Debt for Contract Incurred.** A contract made during marriage and before a spousal separation creates a community liability even if the time set for performance falls after that separation, because a contract debt is incurred when the contract is "made"--that is, when the contractual consideration is exchanged, without regard to the time of performance (*In re Marriage of Feldner (1995) 40 Cal. App. 4th 617, 622-624, 47 Cal. Rptr. 2d 312*).

[*Optional*] **C. Community Remains Liable Despite Set Aside of Unauthorized Transfer of Community Real Property.** Although a spouse may set aside in its entirety a transfer of community realty made without that spouse's consent in violation of *Fam. Code § 1102(a)* by a timely action during marriage, the set aside does not extinguish the underlying community debt, or prevent the maintenance of a lien on the property when a judgment for the debt has been rendered (*Lezine v. Security Pacific Financial Services, Inc. (1996) 14 Cal. 4th 56, 73-74, 58 Cal. Rptr. 2d 76, 925*

P.2d 1002).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention of a married person that a levy on property in enforcement of a judgment against the person's spouse was improper, on the ground that the property levied on is community property. This form may be combined with other points and authorities pertaining to the specific procedural context in which it is raised [*see discussion under § 114.40[2][b]*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Counsel's argument should establish (1) that defendant is a judgment creditor under a judgment against the plaintiff's or claimant's spouse; (2) that the judgment is for a debt of the spouse incurred before or during marriage; (3) that, in enforcing the judgment, defendant levied on the property at issue; and (4) that the property is community property of the judgment debtor, other than the segregated earnings of the plaintiff or claimant [*see Fam. Code §§ 910, 911*].

Optional Paragraph B may be used in opposition to the claim that a spouse's contract debt is not a community debt because the time set for performance takes place after a spousal separation. It is based on the premise that liability under the contract is incurred as of the time the contract is made, rather than as of the time set for performance, so that if the contract is made during marriage and before separation, the liability flows to the community [*see In re Marriage of Feldner (1995) 40 Cal. App. 4th 617, 622-624, 47 Cal. Rptr. 2d 312]* .

Optional Paragraph C may be used in opposition to a spouse's claim that setting aside a transfer of community real property made in violation of *Fam. Code § 1102(a)* precludes a creditor's action to recover the amount of the underlying community debt or maintenance of a lien on community realty if a money judgment for the debt has already been rendered [*see Lezine v. Security Pacific Financial Services, Inc. (1996) 14 Cal. 4th 56, 73-74, 58 Cal. Rptr. 2d 76, 925 P.2d 1002]* . Optional Paragraph C directly opposes the points and authorities *set out in § 114.60*.

[b] Procedural Context

This form may be used by a judgment creditor to oppose an independent collateral action brought by a married person for the purpose of retaining or recovering property that has been levied on to enforce a judgment against the person's spouse. Such an action might be a third-party claim filed with the levying officer [*see Code Civ. Proc. §§ 720.110, 720.120*], an action against the creditor for a writ of possession to recover personal property [*see Civ. Code §§ 3379, 3380*], or an action to quiet title to real or personal property [*see Code Civ. Proc. § 760.020*].

With appropriate modifications, this form may be used to oppose a motion to quash levy of execution when the nondebtor spouse was a party to the original action in which the judgment was entered [*see Blue v. Superior Court (1956) 147 Cal. App. 2d 278, 283, 305 P.2d 209* ; for opposition to motion to quash levy of execution when the nondebtor spouse was not a party to the original action, *see § 114.45*]. For further discussion, see *§ 114.20[2][b][i]*.

[c] Related Pleading and Practice Forms

For forms to oppose an action alleging improper levy on property, see California Forms of Pleading and Practice, Ch. 107, *Cancellation of Instruments ;* Ch. 119, *Claim and Delivery ;* Ch. 150, *Conversion ;* Ch. 254, *Executions and Enforcement of Judgments ;* and Ch. 482, *Quieting Title* (Matthew Bender).

For forms for the termination of an action without trial, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , and Ch. 537, *Summary Judgment* .

[d] Related Points and Authorities

For memoranda of points and authorities generally related to actions for alleged improper levy on property, see Ch. 40, *Claim and Delivery ;* Ch. 51, *Conversion ;* and Ch. 198, *Quieting Title ,* in this set. For forms related to the termination of an action without trial, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* , and Ch. 221, *Summary Judgments* .

[e] Opposing Points and Authorities

Depending on the facts of the case, the points and authorities *set out in §§ 114.20 through 114.26* may be used to oppose the contention supported by these points and authorities.

In addition, the points and authorities set out in Form No. 40 may be used in opposition to the contention in Optional Paragraph C.

[3] Discussion of Authorities

[a] Liability of Community Property for Debt of Spouse

In *Century Sur. Co. v. Polisso (2006) 139 Cal. App. 4th 922, 43 Cal. Rptr. 3d 468* , an insurer sued its insureds for reimbursement of legal fees and a declaration as to its duty to defend a third party action. The insureds, a business operated as a sole proprietorship, its owner, and his wife, cross-complained against the insurer for breach of contract and breach of the covenant of good faith and fair dealing. Judgment was awarded in favor of the insureds. The appellate court affirmed the judgment, holding that under the policy, the insurer had a duty to defend the wife in the third party breach of contract action against her husband and his business, even though she was not named as a defendant in that action, because there was a possibility that she would become legally obligated to pay damages. The court noted that community property is liable for a money judgment against one spouse whether or not the other spouse is a named defendant in the underlying action. The business was a family owned business and the contract with the third party was entered into and performed for the benefit of the community. Because the spouses purchased and operated the business during their marriage, it was community property. As her husband's spouse with a community property interest in the business, the wife would be legally obligated under Fam. Code §§ 810 and *1000(b)(1)* to pay any judgment against him (*139 Cal. App. 4th 922, 942-944)* .

In ***In re Marriage of Feldner*** *(1995) 40 Cal. App. 4th 617, 47 Cal. Rptr. 2d 312* , one of the issues in the parties' dissolution trial involved characterization of liability for a lawsuit brought against the husband for failing to satisfactorily complete a home that he had contracted to build. The husband had made the contract before separating from his wife. A referee in the suit found he had acted as a general contractor, had breached the contract (after the parties' separation) by, among other things, failing to complete the home on time, and not completing all work required. The dissolution court determined that the lawsuit was a community obligation, and the wife appealed.

The appellate court affirmed the judgment, holding that the contractual liability incurred by the husband was community in character. Construing *Fam. Code §§ 903* and *910* together, the court reasoned that a contract debt is incurred at the time the contract is "made," and a contract is made when the consideration is given and received. Here the promise to build (and, if necessary, do any remedial work to assure compliance with agreed on plans), and the right to payment, respectively, were exchanged before the spouses separated. Thus, a post-separation breach of a contract "made during marriage" gives rise to a community liability, subject to rules for credit and reimbursement as between the spouses if the community is diminished for a separate wrongful act. In this case, credit and reimbursement were not awarded, because both spouses had failed to raise these issues, and therefore had waived their respective rights to assert them (*40 Cal. App. 4th 617, 623-625)* .

In ***In re Marriage of Orchard*** *(1990) 224 Cal. App. 3d 155, 273 Cal. Rptr. 499* , a former wife sought collection of past-due child support under her dissolution judgment from her former husband through a district attorney's office. The district attorney obtained an enforcement order, recorded it, and claimed a judgment lien against six acres of unimproved real estate that the former husband and his current wife had purchased during marriage. Thereafter, the husband quitclaimed his interest in the property to his current wife, who later claimed that the acreage had become her separate property by oral agreement. In the meantime, a writ of execution against the property had been issued. Ultimately, a court ordered the property sold to satisfy the husband's support obligation (for arrearages over $14,000), and denied the current wife's third-party claim to sole ownership. She appealed.

The court of appeal affirmed a finding that the real estate at issue was community property despite the quitclaim, and therefore was liable for the support debt under former Civ. Code §§ 5120.110(a), 5120.150 [*now see Fam. Code §§ 910(a), 915(a)*]. Title to the property had been taken by the spouses as "husband and wife," their promissory note was executed by them "jointly and severally," and their trust deed was made out as husband and wife. Finally, the quitclaim deed was recorded after a lien was filed against the property for payment of the child support. Thus, the property could properly be sold to satisfy the lien for the premarital debt (*224 Cal. App. 3d 155, 161)* .

[b] When Community Debt for Contract Incurred

The facts and procedural background of ***In re Marriage of Feldner*** *(1995) 40 Cal. App. 4th 617, 47 Cal. Rptr. 2d 312* , are *discussed under § 114.40[3][a]*. In *Feldner*, the court of appeal concluded that a contract debt is incurred at the time the contract is "made," and a contract is made when the consideration is given and received, without regard to the time of performance. Therefore, even though the husband's breach of contract took place after the couple separated, the community was liable because he had made the contract before their separation (*40 Cal. App. 4th 617, 623-625)* .

[c] Community Remains Liable Despite Set Aside of Unauthorized Transfer of Community Real Property

In ***Lezine v. Security Pacific Financial Services, Inc.*** *(1996) 14 Cal. 4th 56, 58 Cal. Rptr. 2d 76, 925 P.2d 1002* , a wife brought an action against her husband and trust deed beneficiaries seeking a determination that two trust deeds securing loans encumbered by the couple's residence were void because the debt was incurred without the wife's knowledge and consent, in violation of former Civ. Code § 5127 (*now see Fam. Code § 1102(a)*). A trial court ruled that the trust deeds were void, and ultimately awarded the trust deed beneficiaries money judgments against the husband. Abstracts of judgment were recorded in the county recorder's office. Subsequently, in a separate marital dissolution proceeding, the family law court awarded the residence to the wife as her separate property, and ordered the husband to pay the debts incurred without the wife's knowledge and consent. The wife sought a clarification in the judgment in the civil action that the trust deed beneficiaries' abstracts of judgment did not constitute liens against her house. The trial court granted the relief sought, ruling that the abstract "shall not constitute [a lien]" on the property. One of the trust deed beneficiaries appealed, and the court of appeal reversed the judgment. The California Supreme Court later granted review.

The Supreme Court affirmed the judgment of the court of appeal. It held that the setting aside, alone, of a security interest in community real property pursuant to former Civ. Code § 5127, does not cancel the underlying obligation or liability of the community property for satisfaction of that obligation. In this instance, while it was legally correct to set aside the creditor's security interest under former Civ. Code § 5127 and *Droeger v. Friedman, Sloan & Ross (1991) 54 Cal. 3d 26, 30, 46, 283 Cal. Rptr. 584, 812 P.2d 931* , the set aside did not affect the liability of the community realty for satisfaction of the money judgment against the husband for the amount of the loan obligation. In other words, the loss of security does not extinguish the underlying debt, or the character of that unsecured debt as one for which the community estate is liable. In addition, the creditor's recordation of the abstract of judgment, prior to the division of property in the couple's marital dissolution proceeding, created a judgment lien that attached to the property and was enforceable for satisfaction of the money judgment against the husband. Through *Code Civ. Proc. § 695.020*, the Legislature has expressly established the liability of community real property for the satisfaction of money judgments

rendered against either spouse, including a nondebtor spouse's one-half community interest. A creditor who loses its security interest under former Civ. Code § 5127 retains the rights of any other unsecured creditor to resort to the community real property for satisfaction of the underlying debt. Thus, the Supreme Court found that the trial court exceeded its authority in declaring the community realty awarded to the wife free of any judgment lien in favor of the creditor (*14 Cal. 4th 56, 63-75)* .

[4] Additional Authorities

[a] Liability of Community Property for Debt of Spouse

In *Mejia v. Reed (2003) 31 Cal. 4th 657, 3 Cal. Rptr. 3d 390, 74 P.3d 166* , a married man had an extramarital relationship with the plaintiff that led to the birth of a child. In a subsequent dissolution proceeding, the man and his wife entered into a marital settlement agreement under which he transferred all of his interest in jointly held real property to the wife. The plaintiff claimed that the purpose of this transfer was to prevent her from collecting child support, and she asked the court to impose a lien on the real property. The Supreme Court held that a transfer of real property under a marital settlement agreement may be found invalid under the Uniform Fraudulent Transfer Act (*Civ. Code §§ 3439-3439.12*) (*31 Cal. 4th 657, 661, 668)* . The case was remanded for further proceedings on the issue of actual fraud (*31 Cal. 4th 657, 672)* .

In *In re Marriage of Leni (2006) 144 Cal. App. 4th 1087, 50 Cal. Rptr. 3d 886* , the wife in a proceeding for dissolution of marriage sought an order compelling the husband to reimburse the community for the proceeds of the sale of their community property that he used to take care of his mother. The court of appeal held that the trial court erred in treating the expenditures on behalf of the husband's infirm mother as an unauthorized gift of community funds, because the husband had an obligation under *Fam. Code § 4400* to support his indigent mother to the extent he was able. The court concluded that an obligation imposed by statute is a "debt" within the meaning of *Fam. Code § 910*. The husband's support obligation was a community obligation for which he was not required to reimburse the community (*144 Cal. App. 4th 1087, 1096-1098)* .

In *Filip v. Bucurenciu (2005) 129 Cal. App. 4th 825, 28 Cal. Rptr. 3d 884* , a judgment creditor sued a judgment debtor's former wife and her daughter under the Uniform Fraudulent Transfer Act (UFTA), alleging that they had conspired with the judgment debtor to prevent the creditor from collecting on a judgment owed by the debtor by transferring property to a corporation in which they were the sole shareholders. The defendants claimed that the transfer was merely part of a property settlement agreement and part of the former wife's financial planning needs, not evidence of a plan to defraud the creditor. The trial court entered judgment in favor of the creditor and the court of appeal affirmed the judgment. It found that there was abundant evidence that the defendants worked together to hide assets from the plaintiff, such that a finding of actual intent to defraud "was virtually compelled" (*129 Cal. App. 4th 825, 834)* . It also rejected the defendants' contention that specified real property transferred to them was not an asset for purposes of the UFTA by virtue of *Civ. Code § 3439.01(a)(1)* because it was encumbered for more than its fair market value. While the record reflected that the property was transferred in exchange for a note equivalent to the amount of the encumbrance on the property, the evidence also suggested that this transaction was not "above board" (*129 Cal. App. 4th 825, 835)* . Thus, the trial court properly set aside the transfers of the property and authorized the plaintiff to foreclose on those properties to satisfy its judgment (*129 Cal. App. 4th 825, 839-840)* .

Mehrtash v. Mehrtash (2001) 93 Cal. App. 4th 75, 112 Cal. Rptr. 2d 802 involved an action by a former wife to set aside a conveyance of her former husband's home to his stepsons. She alleged that this was a fraudulent conveyance by her former husband for the purpose of avoiding his obligations under a money judgment for spousal support. The trial court granted judgment in the defendants' favor, because the plaintiff failed to prove that the value of the property exceeded encumbrances and senior liens. The appellate court held this was a proper basis for a judgment in the defendants' favor and affirmed the judgment (*93 Cal. App. 4th 75, 77, 81-82)* .

Sanwa Bank California v. Chang (2001) 87 Cal. App. 4th 1314, 105 Cal. Rptr. 2d 330 was an appeal after a trial court found a married woman liable for a fraudulent conveyance as the transferee of the family residence from her husband, prior to her husband's filing for bankruptcy. The trial court found that the residence was actually community property and remained liable for a debt incurred by a husband, despite his transfer of it to the wife as her separate property prior to bringing bankruptcy proceedings. The residence was never listed in the bankruptcy estate, and because it was listed as separate property of the wife it was liable for the community debts as if it remained community property. The appellate court affirmed, holding that the injunction created by husband's bankruptcy discharge did not protect the residence from a fraudulent conveyance action because it was pre-bankruptcy property, not after-acquired property, and it was never made a part of the bankruptcy estate. Thus, the appellant wife remained personally liable for the community debt (*87 Cal. App. 4th 1314, 1319)* .

In *State Bd. of Equalization v. Woo (2000) 82 Cal. App. 4th 481, 98 Cal. Rptr. 2d 206* , a wife appealed from an earnings withholding order imposed against her for delinquent sales taxes owed by her husband to the State Board of Equalization. The court of appeal affirmed the order, rejecting the wife's contention that a marital agreement she entered into with her husband transmuting their community property to the separate property of each spouse precluded the Board from garnishing her wages. The court held that the wife's attempt to transmute community property earnings to her separate property constituted a fraudulent transfer in violation of *Civ. Code § 3439.04(a)* and *Fam. Code § 851,* because she acknowledged that the community estate was liable for her husband's tax debt under *Fam. Code § 910* and entered into the marital agreement after learning that the Board intended to garnish her wages (*82 Cal. App. 4th 481, 483-484)* .

In *Gagan v. Gouyd (1999) 73 Cal. App. 4th 835, 86 Cal. Rptr. 2d 733* , defendant couples appealed from judgments setting aside interspousal transfers of property and imposing constructive trusts on that property in favor of a judgment creditor. Although the court of appeal reversed the judgment with respect to one of the couples, who had transferred assets in the course of a divorce, it affirmed the judgment with respect to the couple who remained married (Victor and Mary). A trial court had found that certain personalty transfers by husband Victor to wife Mary were fraudulent with respect to the plaintiff, a judgment creditor of Victor's. On appeal, the only issue was whether Mary's interest in a transferred limited partnership (Apache Cablevision) was her separate property or community property. Only if it were her separate property would it not be liable for the underlying debt of her husband. The court of appeal found that Mary had the burden of proving by clear and convincing evidence that the property was separate and not community and she had not met this burden. Mary had relied on her husband's testimony, which established only the length of marriage and that the property had been acquired during marriage. Given that there was substantial evidence of community property, the trial court's finding was upheld. The appellate court noted that it was actually unnecessary to frame the issue in terms of fraudulent conveyance because the defendants retained their assets and all were available to satisfy plaintiff's underlying judgment, but the trial court's order imposing a constructive trust for plaintiff's benefit was not prejudicial. Therefore, the appellate court affirmed the judgment against that couple (*73 Cal. App. 4th 835, 843-844)* .

In *11601 Wilshire Assocs. v. Grebow (1998) 64 Cal. App. 4th 453, 74 Cal. Rptr. 2d 912* , a lessor of commercial property sought a judgment against a wife solely on the basis that her husband had personally guaranteed the obligations of the tenant under the lease, the husband's law corporation. The trial court granted summary judgment to the wife, finding that the lessor did not, and could not, state a cause of action against her. The court of appeal affirmed the judgment, rejecting the lessor's contention that the wife was liable on the husband's personal guaranty because they were married and, as such, she was responsible for his obligations to the extent of their community property under *Fam. Code § 910*. The lessor admitted that it named the wife as a defendant in the action not because she was personally liable on the husband's guaranty, but to facilitate its postjudgment recovery of money damages should it prevail on its claim against the husband. The court concluded that the lessor could not state a cause of action against the wife under *Fam. Code § 910* merely in her capacity as a community representative. Instead, her share of the community estate would be liable for any judgment against the husband to the extent permitted under *Fam. Code § 910* (*64 Cal. App. 4th 453, 455-458)* .

In *In re Marriage of Hargrave (1995) 36 Cal. App. 4th 1313, 43 Cal. Rptr. 2d 474* , the court of appeal upheld a trial court's order that an ex-wife pay her share of federal income taxes pursuant to the parties' interlocutory dissolution judgment and agreement, even though she was later designated an "innocent spouse" pursuant to the Internal Revenue Code. The interlocutory judgment imposed one-half of "all income tax liabilities" on each party, and the trial court correctly interpreted this to mean that each of the parties was obligated to pay one-half of the *federal* income tax liabilities. The wife could have reached a compromise with the IRS, thus halting the rapid accumulation of penalizing interest on her share of the liability. Instead of doing so, she waited to see what kind of arrangement her ex-husband could make with the Internal Revenue Service, in an attempt to avoid responsibility for any portion of her liability. She was, therefore, properly assessed a share of the accumulating interest, in addition to her share of the taxes due. The appellate court rejected the contention that provisions of the Internal Revenue Code concerning "innocent spouse" status preemp t a state court's power to impose tax liability as between the divorcing parties (*36 Cal. App. 4th 1313, 1322)* .

In *Hunting World, Inc. v. Superior Court (1994) 22 Cal. App. 4th 67, 26 Cal. Rptr. 2d 923* , a debtor husband quitclaimed his interest in the family residence to his wife after the husband's creditor filed suit in federal court for trademark infringement. The creditor also filed suit in state court to set aside the transfer as fraudulent. On the husband's motion, the trial court expunged a notice of lis pendens filed by the creditor. The appellate court issued a writ of mandate directing the trial court to vacate its order, holding that the fraudulent transfer action constituted a "real property claim" under the lis pendens statute [*Code Civ. Proc. § 405.4*].

In *Kirkeby v. Superior Court (2004) 33 Cal. 4th 642, 15 Cal. Rptr. 3d 805, 93 P.3d 395* , a shareholder of a close corporation brought a fraudulent conveyance action against the majority shareholders, a husband and wife, alleging that they obtained a loan from the corporation by representing they would use the borrowed funds to construct a building to house the corporation's operations, but instead used the loan to purchase residential income property for themselves, which they transferred to a family limited partnership. Before this purchase, they had also transferred their family residence to the family limited partnership. The plaintiff alleged that the defendants made both of these transfers in order to defraud creditors in the collection of their claims, and requested that the transfers be voided to the extent necessary to satisfy the claims set forth in her complaint. After filing the action, the plaintiff recorded a notice of lis pendens on both properties. The trial court granted the defendants' motion to expunge the lis pendens. The Supreme Court reversed, holding that a fraudulent conveyance action seeking avoidance of a transfer of title of specific real property under *Civ. Code § 3439.07(a)(1)* is a real property claim for purposes of the lis pendens statute (*33 Cal. 4th 642, 652)* . To be entitled to a lis pendens the plaintiff must establish, by a preponderance of the evidence, the probable validity of the real property claim. This requires the court to consider the merits of the plaintiff's claim (*33 Cal. 4th 642, 651)* .

In *In re Soderling, 998 F. 2d 730 (9th Cir. 1993)* , the appellate court held that a federal criminal restitution judgment was nondischargeable in bankruptcy and constituted a debt under state community property law. Since the debt was incurred during the parties' marriage, the community property of the parties was potentially liable for payment of the claim.

In *Bales v. Farley (1951) 107 Cal. App. 2d 642, 237 P.2d 686* , a judgment was entered against the wife before the marriage, and the judgment creditor levied on an automobile purchased in the husband's name. The appellate court affirmed denial of the husband's third-party claim to recover the automobile, holding that the evidence supported a finding that the automobile was community property not exempt under former Civ. Code § 170 [*now see Fam. Code § 910*] (*107 Cal. App. 2d 642, 643, 646)* .

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§ 114.41 Opposing Spouse's Claim to Earnings Levied on for Satisfaction of Judgment Against Other Spouse for Premarital Debt--Earnings Were Commingled With Other Community Property [Fam. Code § 911]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

LEVY ON _____ [PLAINTIFF'S *or* CLAIMANT'S] EARNINGS WAS PROPER BECAUSE THE EARNINGS WERE COMMINGLED WITH OTHER COMMUNITY PROPERTY OF A SIGNIFICANT AMOUNT.

Liability of Commingled Earnings for Premarital Debt of Other Spouse. The earnings of a married person are liable for a debt incurred by the person's spouse before marriage if they are commingled with other community property, except property insignificant in amount (*see Fam. Code § 911(a)*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention of a married person that a levy on his or her earnings, in enforcement of a judgment against the person's spouse for a premarital debt, was improper. The ground of the contention is that the earnings have been commingled with other community property of a significant amount [*Fam. Code § 911(a)*]. This form may be combined with other points and authorities pertaining to the specific procedural context in which it is raised [*see discussion under § 114.41[2][b]*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Counsel's argument should establish (1) that defendant is a judgment creditor under a judgment against the plaintiff's or claimant's spouse; (2) that the judgment is for a debt of the spouse incurred before marriage; (3) that, in enforcing the judgment, defendant levied on the earnings at issue; and (4) that the earnings were held in an account in which they were commingled with other community property of a significant amount (most commonly, a joint account

into which each spouse deposits his or her earnings) [*see Fam. Code § 911(a)*].

[b] Procedural Context

This form may be used by a judgment creditor to oppose an independent collateral action brought by a married person for the purpose of retaining or recovering earnings that have been levied on to enforce a judgment against the person's spouse for a premarital debt. Such an action might be a third-party claim filed with the levying officer [*see Code Civ. Proc. §§ 720.110, 720.120*], an action against the creditor for a writ of possession to recover personal property [*see Civ. Code §§ 3379, 3380*], or an action to quiet title to real or personal property [*see Code Civ. Proc. § 760.020*].

With appropriate modifications, this form may be used to oppose a motion to quash levy of execution when the nondebtor spouse was a party to the original action in which the judgment was entered [*see Blue v. Superior Court (1956) 147 Cal. App. 2d 278, 283, 305 P.2d 209* ; for opposition to motion to quash levy of execution when the nondebtor spouse was not a party to the original action, *see § 114.45*]. For further discussion, see *§ 114.20[2][b][i]*.

[c] Related Pleading and Practice Forms

For forms to oppose an action alleging improper levy on property, see California Forms of Pleading and Practice, Ch. 107, *Cancellation of Instruments* , Ch. 119, *Claim and Delivery* , Ch. 150, *Conversion* , Ch. 254, *Executions and Enforcement of Judgments* and Ch. 482, *Quieting Title* (Matthew Bender). For forms for the termination of an action without trial, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender).

[d] Related Points and Authorities

For memoranda of points and authorities generally related to actions for alleged improper levy on property, see Ch. 40, *Claim and Delivery* , Ch. 51, *Conversion* , and Ch. 198, *Quieting Title* . For forms related to the termination of an action without trial, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* and Ch. 221, *Summary Judgments* .

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 114.20* may be used to oppose the contention supported by these points and authorities.

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11-114 California Points & Authorities § 114.42

§ 114.42 Opposing Spouse's Claim to Property Levied on for Satisfaction of Judgment Against Other Spouse--Separate Property Commingled, Is Not Traceable, and Is Liable as Community Property [Fam. Code § 910(a)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

LEVY ON _____ [*describe property*] WAS PROPER BECAUSE, EVEN THOUGH [*describe property*] MAY ONCE HAVE BEEN _____ [PLAINTIFF'S *or* CLAIMANT'S] SEPARATE PROPERTY, IT HAS BEEN COMMINGLED WITH COMMUNITY PROPERTY AND CAN NO LONGER BE TRACED; THEREFORE, _____ [*describe property*] IS NOW LIABLE AS COMMUNITY PROPERTY.

Commingled Separate Property. If a spouse's separate property is so commingled with community property that it cannot be traced, the entire commingled property will be treated as community property and will be held liable for the debts of the other spouse (*Nichols v. Mitchell (1948) 32 Cal. 2d 598, 197 P.2d 550* ; *Grolemund v. Cafferata (1941) 17 Cal. 2d 679, 683-684, 111 P.2d 641* ; *see Fam. Code §§ 850, 852(d), 910(a)*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention of a married person that a levy on property in enforcement of a judgment against the person's spouse was improper. The ground of the opposing contention is that the levy was proper because any separate property character of the property levied on was lost once the property was commingled with community property and was unable to be traced. When the character of the property as community property is established, it becomes liable for any debt of either spouse incurred before or during marriage [*Fam. Code § 910(a)*; *see § 114.40*]. This form may be combined with other points and authorities pertaining to the specific procedural context in

which it is raised [*see discussion under § 114.42[2][b]*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Counsel's argument should establish (1) that defendant is a judgment creditor pursuant to a judgment against the plaintiff's or claimant's spouse; (2) that the judgment is for a debt of the spouse incurred before or during marriage; and (3) that, in enforcing the judgment, defendant levied on the property at issue.

[b] Procedural Context

This form may be used by a judgment creditor to oppose an independent collateral action brought by a married person for the purpose of retaining or recovering property that has been levied on to enforce a judgment against the person's spouse. Such an action might be a third-party claim filed with the levying officer [*see Code Civ. Proc. §§ 720.110, 720.120*], an action against the creditor for a writ of possession to recover personal property [*see Civ. Code §§ 3379, 3380*], or an action to quiet title to real or personal property [*see Code Civ. Proc. § 760.020*].

With appropriate modifications, this form may be used to oppose a motion to quash levy of execution when the nondebtor spouse was a party to the original action in which the judgment was entered [*see Blue v. Superior Court (1956) 147 Cal. App. 2d 278, 283, 305 P.2d 209* ; for opposition to motion to quash levy of execution when the nondebtor spouse was not a party to the original action, *see § 114.45*]. For further discussion, see *§ 114.20[2][b][i]*.

[c] Related Pleading and Practice Forms

For forms to oppose an action alleging improper levy on property, see Ch. 107, *Cancellation of Instruments* , Ch. 119, *Claim and Delivery* , Ch. 150, *Conversion* , Ch. 254, *Executions and Enforcement of Judgments* and Ch. 482, *Quieting Title* in California Forms of Pleading and Practice. For forms for the termination of an action without trial, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , and Ch. 537, *Summary Judgment* in that set.

[d] Related Points and Authorities

For memoranda of points and authorities generally related to actions for alleged improper levy on property, see Ch. 40, *Claim and Delivery* , Ch. 51, *Conversion* , and Ch. 198, *Quieting Title* . For forms related to the termination of an action without trial, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* and Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Commingled Separate Property

Nichols v. Mitchell *(1948) 32 Cal. 2d 598, 197 P.2d 550* , was an action by a husband's judgment creditor for declaratory relief and to quiet title to real property purchased at an execution sale; both husband and wife were made parties to the action. The wife cross-complained on the ground that she had furnished the consideration for the purchase of the real property and that it was her separate property. The trial court found that any separate property of the wife had become commingled with the parties' community property to such an extent that its identity was "absolutely lost," that it was impossible to trace any such separate property, and that the real property was therefore entirely the community property of the parties.

The Supreme Court affirmed judgment for the plaintiff creditor, stating that the evidence supported a finding that the property, although standing in the wife's name alone, was acquired by the expenditure of community funds. Although the wife had maintained a separate bank account, and funds from the account had been used to purchase and maintain the property, the court found that funds deposited into the account were both separate and community in character. Substantial evidence existed to support the trial court's finding that any separate property that the wife may have had in the account was no longer identifiable as such, but had instead become commingled with, and a part of, the community

estate. Accordingly, the real property was deemed liable for satisfaction of the husband's debt (*32 Cal. 2d 598, 609-610)* .

In ***Grolemund v. Cafferata*** *(1941) 17 Cal. 2d 679, 111 P.2d 641* , the defendants had obtained a judgment against the husband in an action for damages arising out of an automobile accident. When the defendants sought to execute on the judgment by selling certain real and personal property owned by the husband and his wife, the spouses instituted an action seeking to enjoin the sale. The trial court found for the defendants, and the husband and wife appealed.

The Supreme Court affirmed, holding that the evidence supported a finding that the property was acquired by the husband and wife with commingled funds. The Court stated that, with regard to the blending of separate and community property, the general rule is that when the two are made indistinguishable from each other, the entire mass is rendered community property. The Court explained that when the owner of separate property is not able either to establish a separate right to any article of the mass or to prove the right to a computable share of it, the general presumption applies that property acquired during marriage is community property [*now see Fam. Code § 760*]. Thus, the property in question was held to be community property and liable for the payment of the tort claim against the husband (*17 Cal. 2d 679, 683-684)* .

[4] Additional Authorities

[a] Commingled Separate Property

See v. See *(1966) 64 Cal. 2d 778, 51 Cal. Rptr. 888* , involved a husband who deposited his community property earnings into various accounts that also contained separate property funds. The trial court held that community expenses had exceeded community income during marriage and, as a result, that all property acquired with funds from the commingled accounts was the husband's separate property.

The appellate court reversed, holding that property acquired during marriage is presumed to be community property, and the burden of proving otherwise is on the spouse who asserts its separate property character. The presumption of community property may be rebutted by tracing the source of assets acquired during marriage to separate funds, and one method of doing so is to prove that, at the time the property was acquired, community income was exhausted by family expenses. A spouse who commingles separate and community property assumes the burden of keeping records adequate to establish the balance of community income and expenditures at the time the asset is acquired with commingled funds. By failing to keep adequate records, the husband had failed to meet his burden of proving an excess of community expenses over community income at the time the assets were purchased, and the judgment finding them to be his separate property was reversed (*64 Cal. 2d 778, 784)* .

Note

that there are limitations on the doctrine of tracing set forth in *See v. See*. For discussion of these limitations, see Kirkland, Lurvey & Richmond, CALIFORNIA FAMILY LAW PRACTICE AND PROCEDURE, 2nd ed. (Matthew Bender), ch. 20.

In *Patterson v. Patterson (1966) 242 Cal. App. 2d 333, 51 Cal. Rptr. 339* , the court stated that if separate and community property or funds are commingled in such a manner that it is impossible to trace the source of the property or funds, the whole will be treated as community property. The burden is on the claimant to establish that certain property is separate property and, if he or she fails to do so, the presumption that it is community property is controlling (*242 Cal. App. 2d 333, 341-342)* .

In *Tedder v. Johnson (1951) 105 Cal. App. 2d 734, 234 P.2d 149* , the appellate court affirmed a judgment quieting title to an undivided one-half interest in real property in favor of the purchaser at an execution sale of the husband's interest in property held in joint tenancy. The judgment debtor's wife contended that the property was really purchased

with her separate funds and held in joint tenancy for convenience only, although she could not document her claim. The court stated that when separate and community property is thus commingled, the wife may not thereafter claim an exemption for a sum equalling the amount of her earnings which she had placed in the common fund (*105 Cal. App. 2d 734, 738)* .

In *Truelson v. Nelson (1941) 42 Cal. App. 2d 750, 109 P.2d 996* , the court affirmed a judgment quieting title to real property in favor of the purchaser at an execution sale and against the claim of the judgment debtor's wife that the property was her separate property. It stated that if separate and community property are so commingled that they cannot be traced and the identity of each has been lost, the whole will be treated as community property because the burden to establish that fact is on the party who claims that the property is separate (*42 Cal. App. 2d 750, 754)* .

Fountain v. Maxim (1930) 210 Cal. 48, 290 P. 576 , was an action by an administratrix against the surviving husband of decedent to quiet title to decedent's real property. The court affirmed judgment for the defendant, holding that accumulations of the husband and wife during their marriage were so pooled and mixed with the wife's separate property that the court could not distinguish any part in the real property in question. The Supreme Court stated the principle that was later restated in the *Truelson* case, *above* (*210 Cal. 48, 51)* .

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11-114 California Points & Authorities § 114.43

§ 114.43 Opposing Defendant Spouse's Contention of Nonliability for Debt--Debt for Necessaries Furnished to Other Spouse While Living Together During Marriage [Fam. Code § 914(a)(1)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT'S SEPARATE PROPERTY SHOULD BE HELD LIABLE BECAUSE THE DEBT WAS INCURRED FOR NECESSARIES OF LIFE FURNISHED TO DEFENDANT'S SPOUSE WHILE THE SPOUSES WERE LIVING TOGETHER.

A. Personal Liability. A married person is personally liable for a debt incurred for necessaries of life of the person's spouse while the spouses are living together (*Fam. Code § 914(a)(1)*).

B. Liability of Separate Property. The separate property of a married person may be applied to the satisfaction of a debt incurred for necessaries of life of the person's spouse while the spouses are living together (*Fam. Code § 914(b)*; *see Fam. Code § 4301*).

C. Duty to Use Separate Property. A married person must support his or her spouse while they are living together out of the married person's separate property when there is no community or quasi-community property (*Fam. Code § 4301*; *see In re Marriage of Epstein (1979) 24 Cal. 3d 76, 154 Cal. Rptr. 413*).

[*Optional*] **D. Meaning of "Necessaries of Life."** A debt is incurred for a "necessary of life" when it is reasonably necessary for the support of a spouse according to the parties' station in life (*In re Marriage of Higgason (1973) 10 Cal. 3d 476, 110 Cal. Rptr. 897, 516 P.2d 289*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention of a married person that he or she, and his or her separate property, are not liable for a debt of the person's spouse incurred during marriage. The ground of the contention is that defendant's separate property is liable because the debt was incurred for necessaries of life of the other spouse while the spouses were living together [*Fam. Code § 914(a)(1)*]. This form may be combined with other points and authorities pertaining to the specific procedural context in which it is raised [*see discussion under § 114.43[2][b]*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Counsel's argument should establish (1) that the action is for a debt incurred by a married person during marriage; (2) that the debt was incurred for necessaries of life of the other spouse; and (3) that the spouses were living together at the time the debt was incurred [*Fam. Code § 914(a)(1)*; *see Fam. Code § 4301*].

Note that if separate property of the nondebtor spouse is applied to satisfy such a debt at a time when nonexempt community property, or separate property of the debtor spouse, is available but not so applied, the nondebtor spouse is entitled to reimbursement to the extent such property was available [*Fam. Code § 914(b)*].

[b] Procedural Context

This form may be used by a judgment creditor in opposition to a demurrer or motion for summary judgment in which the defendant asserts the general rule that separate property of a married person is not liable for a debt incurred by the person's spouse before or during marriage [*Fam. Code § 913(b)(1)*; *see § 114.21*]. This general rule is subject to the following statutory exceptions relevant to this form: (1) *Fam. Code § 914(a)* provides that a married person is personally liable for debts incurred for necessaries of life of the person's spouse while living together during marriage; and (2) *Fam. Code § 4301* provides that a married person must support his or her spouse, while they are living together, out of the married person's separate property when there is no community or quasi-community property.

Note that the term "necessary of life" is used in the context of married persons who are living *together* [*Fam. Code § 914(a)(1)*], and that the meaning of the term may vary depending on the circumstances and standard of living of the parties [*see Wisnom v. McCarthy (1920) 48 Cal. App. 697, 701, 192 P. 337* , discussing "station of life" test]. In contrast, the term "common necessaries of life" is used in the context of married persons who are living *separately* [*Fam. Code § 914(a)(2)*], and refers to those things necessary to sustain life in a most basic sense [*see* Cal. Law Rev. Comm'n. Comment to *Fam. Code § 914*, indicating that the "station of life" test does not apply in the case of common necessaries of life; on distinction between the two types of necessaries, *see Ratzlaff v. Portillo (1971) 14 Cal. App. 3d 1013, 92 Cal. Rptr. 722* , discussed in *§ 114.44[3][a]*]. Thus, construction of the term and resolution of the issue would seem appropriate on demurrer or summary judgment rather than at trial.

Note, further, that the separate property of a married person may not be levied on to enforce a judgment for necessaries unless the person was joined as a party to the action on the debt [*Evans v. Noonan (1912) 20 Cal. App. 288, 295-298, 128 P. 794* ; *see § 114.22*]. Therefore, the question of whether a given debt was for necessaries must be litigated in the action on the debt and cannot properly be raised in an independent collateral action or claim in response to a levy on property.

[c] Related Pleading and Practice Forms

For a form for a complaint against a spouse for the value of necessaries furnished to the other spouse, see Ch. 359, *Marriage* in California Forms of Pleading and Practice. For forms generally related to the termination of an action without trial, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* in that set.

[d] Related Points and Authorities

For forms generally related to the termination of an action without trial, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* and Ch. 221, *Summary Judgments* .

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 114.21* and *114.22* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Duty to Use Separate Property

In re Marriage of Epstein *(1979) 24 Cal. 3d 76, 154 Cal. Rptr. 413* involved, among other issues, reimbursement sought by the husband of separate property funds he had expended for community purposes *pendente lite.* The trial court allowed reimbursement and the wife appealed this and other issues. The Supreme Court referred to former Civ. Code § 5100 [*now see Fam. Code § 720*] for the statutory rule that married persons assume a mutual obligation of support during marriage. When community funds are exhausted, a spouse must utilize his or her separate property to provide for the support of the other (*24 Cal. 3d 76, 83)* .

The Court cited See v. See *(1966) 64 Cal. 2d 778, 51 Cal. Rptr. 888* [*see discussion under § 114.42[4][a]*] for the proposition that a party who utilizes separate property for community purposes is presumed to intend a gift to the community and is not entitled to reimbursement from the community, unless there is an agreement between the parties to that effect. Absent a statutory right of reimbursement, a spouse who elects to use separate property to meet community expenses is not entitled to reimbursement from the community.

Note that *In re Marriage of Epstein* was decided prior to the enactment of *Fam. Code § 914(b)*, which became operative January 1, 1994. This statute *does* create a statutory right of reimbursement to the extent that a married person applies his or her separate property to the satisfaction of the other spouse's debt at a time when nonexempt property in the community estate, or separate property of the debtor spouse, is available but not applied to the satisfaction of the debt. Since, under *Fam. Code § 4301*, a married person's duty to use separate property for the support of the other spouse while living together is expressly made subject to *Fam. Code § 914*, it appears that the holding of *Epstein* with respect to the issue of reimbursement has been abrogated, and reimbursement would be allowed, to the extent that nonexempt community property, or separate property of the other spouse, was available but not used at the time the nondebtor spouse used separate property to pay for his or her spouses's necessaries while living together.

[b] Meaning of "Necessaries of Life"

In ***In re Marriage of Higgason*** *(1973) 10 Cal. 3d 476, 110 Cal. Rptr. 897, 516 P.2d 289* , the issue was the right of one spouse to be supported by the other from the other's separate property in the absence of community property [*see Fam. Code § 4301*]. During marriage, the wife had considerable separate property, and the husband had incurred major medical expenses that remained unpaid at the time of dissolution. The court held that, to the extent the husband's obligations were incurred during marriage and were reasonably necessary for his support according to the parties' station in life, the wife owed a duty to provide the support (*10 Cal. 3d 476, 488)* .

[4] Additional Authorities

[a] Meaning of "Necessaries of Life"

In *Wisnom v. McCarthy (1920) 48 Cal. App. 697, 192 P. 337* , the plaintiff sued a married couple jointly for the reasonable value of domestic services provided to them. The trial court found the services to be necessaries of life for persons in the economic and social position of the defendants. The appellate court accepted this finding as correct

without discussion (*48 Cal. App. 697, 701)* .

The facts and procedural background of *Evans v. Noonan (1912) 20 Cal. App. 288, 128 P. 794* , are discussed in *§ 114.22[3][a]*. The proceeding involved an action by a physician against a husband and wife for medical services provided to their children. The court held that medical services were necessaries of life, and that the spouses were jointly liable for medical services provided to their children. In so holding, the court noted, without relying on, unspecified cases that held that the word "necessaries" is a relative term that has been restricted or enlarged according to the circumstances and conditions of the parties, and that necessaries could include many of the conveniences of refined society, such as ornaments of dress that are usually worn by persons of rank and position (*20 Cal. App. 288, 292-293)* .

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11-114 California Points & Authorities § 114.44

§ 114.44 Opposing Defendant Spouse's Contention of Nonliability for Debt--Debt for Common Necessaries of Life Furnished to Other Spouse While Spouses Living Separately [Fam. Code § 914(a)(2)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT AND HIS/HER SEPARATE PROPERTY SHOULD BE HELD LIABLE BECAUSE THE DEBT WAS INCURRED FOR THE COMMON NECESSARIES OF LIFE FURNISHED TO DEFENDANT'S SPOUSE WHILE THE SPOUSES WERE LIVING SEPARATELY.

A. Personal Liability. A married person is personally liable for a debt incurred for the common necessaries of life of the person's spouse while the spouses are living separately (*Fam. Code § 914(a)(2)*).

B. Liability of Separate Property. The separate property of a married person may be applied to the satisfaction of a debt for which the person is personally liable because the debt is for the common necessaries of life furnished to the person's spouse (*Fam. Code § 914(b)*).

[*Optional*] **C. Meaning of "Common Necessaries of Life."** The term "common necessaries of life" means those things that are regarded universally, or substantially so, as necessary to sustain life (*Ratzlaff v. Portillo (1971) 14 Cal. App. 3d 1013, 92 Cal. Rptr. 722* ; *Evans v. Noonan (1912) 20 Cal. App. 288, 295-298, 128 P. 794*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention of a married person that he or she, and his or her separate property, is not liable for a debt of the person's spouse incurred during marriage, but while the spouses were living separately. The ground of the contention is that the defendant's separate property is liable for the debt

because it was incurred for common necessaries of life furnished to the other spouse [*Fam. Code § 914(a)(2)*]. This form may be combined with other points and authorities pertaining to the specific procedural context in which it is raised [*see discussion under § 114.44[2][b]*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Counsel's argument should establish (1) that the action is for a debt incurred by a married person while still married but living separately; (2) that the separation is not by agreement of the parties; and (3) that the debt was for common necessaries of life furnished to the person's spouse. If spouses are separated under an agreement, and the agreement makes no provision for support, the duty of support is terminated [*see Fam. Code § 4302*; *see also Fam. Code § 914(a)(2)* and Cal. Law Rev. Comm'n. Comment to *Fam. Code § 914*].

[b] Procedural Context

This form may be used by a judgment creditor in opposition to a demurrer or motion for summary judgment in which the defendant asserts the general rule that separate property of a married person is not liable for a debt incurred by the person's spouse during marriage [*Fam. Code § 913(b)(1)*; *see § 114.21*]. Note that the term "common necessaries of life" is used in the context of married persons who are living separately [*Fam. Code § 914(a)(2)*], and refers to those things necessary to sustain life in a most basic sense [*see* Cal. Law Rev. Comm'n. Comment to *Fam. Code § 914*, indicating that the "station of life" test [discussed in *§ 114.43*] does not apply in the case of common necessaries of life; *see also Ratzlaff v. Portillo (1971) 14 Cal. App. 3d 1013, 92 Cal. Rptr. 722]* . Thus, construction of the term and resolution of the issue would seem appropriate on demurrer or summary judgment rather than at trial.

Note that the separate property of a married person may not be levied on to enforce a judgment for necessaries, unless the person was joined as a party to the action on the debt [*Evans v. Noonan (1912) 20 Cal. App. 288, 295-298, 128 P. 794* ; *see § 114.22*]. Therefore, the question of whether a given debt was for common necessaries must be litigated in the action on the debt and cannot properly be raised in an independent collateral action or claim in response to a levy on property.

[c] Related Pleading and Practice Forms

For a form for a complaint against a spouse for the value of necessaries furnished to the other spouse, see Ch. 359, *Marriage* in California Forms of Pleading and Practice. For forms generally related to the termination of an action without trial, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* and Ch. 537, *Summary Judgment* in that set.

[d] Related Points and Authorities

For forms generally related to the termination of an action without trial, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* and Ch. 221, *Summary Judgments* .

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 114.21* and *114.22* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Meaning of "Common Necessaries of Life"

Ratzlaff v. Portillo *(1971) 14 Cal. App. 3d 1013, 92 Cal. Rptr. 722* , involved construction of a wage garnishment statute making earnings exemptions inapplicable in the case of a debt incurred for the common necessaries of life [*now*

see Code Civ. Proc. § 706.051(c)(1)]. The debt at issue was for the purchase of an automobile. The court distinguished between "necessaries" and "common necessaries of life," holding that the latter term referred only to those articles that are regarded universally, or substantially so, as necessary to sustain life. The court held that, because of the availability of public transportation, home delivery service, and neighborhood shopping centers, the automobile, although a great convenience, is not necessary to sustain life and cannot be viewed as a common necessary of life within the contemplation of the garnishment statute. The court also rejected the proposition that something that is not, of itself, a common necessary of life becomes one if it is used to earn a living (*14 Cal. App. 3d 1013, 1015-1016)* .

Note that the legislative history suggests that the construction of "common necessaries of life" given in *Ratzlaff v. Portillo* is applicable to the use of the same term in *Fam. Code § 914(a)(2)* [*see* Cal. Law Rev. Comm'n. Comment to *Fam. Code § 914*].

The facts and procedural background of ***Evans v. Noonan*** *(1912) 20 Cal. App. 288, 128 P. 794* , are discussed in *§ 114.22[3][a]*. The proceeding involved an action by a physician against a husband and wife for medical services provided to their children. In holding that medical expenses furnished to the children of a married couple were necessaries of life for which the spouses were jointly liable, the court distinguished between the terms "necessaries of life" and "common necessaries of life." While the former is a relative term according to the circumstances and conditions of the parties, the latter refers only to those things that are proper and requisite for human sustenance. These include food, clothing, shelter, and such medical attention in case of illness as is absolutely requisite to relieve physical suffering and pain and to overcome or conquer disease (*20 Cal. App. 288, 292-293)* .

[4] Additional Authorities

[a] Liability of Separate Property

In re Marriage of Epstein (1979) 24 Cal. 3d 76, 154 Cal. Rptr. 413 , involved, among other issues, reimbursement sought by the husband of separate property funds he had expended for community purposes after the parties had separated but before judgment for dissolution. The Supreme Court referred to former Civ. Code § 5100 [*now see Fam. Code § 720*] for the statutory rule that married persons assume a mutual obligation of support during marriage. When community funds are exhausted, a spouse must utilize his or her separate property to provide for the support of the other. The Court cited See v. See *(1966) 64 Cal. 2d 778, 51 Cal. Rptr. 888* [*see discussion under § 114.42[4][a]*] for the proposition that a party who utilizes separate property for community purposes is presumed to intend a gift to the community and is not entitled to reimbursement from the community, unless there is an agreement between the parties to that effect. Absent a statutory right of reimbursement, a spouse who elects to use separate property to meet community expenses is not entitled to reimbursement from the community (*24 Cal. 3d 76, 83)* .

Note

that *In re Marriage of Epstein* was decided prior to the enactment of *Fam. Code § 914(b)*, which became operative January 1, 1994. This statute *did* create a statutory right of reimbursement to the extent that a married person applies his or her separate property to the satisfaction of the other spouse's debt at a time when nonexempt property in the community estate, or separate property of the debtor spouse, is available but not applied to the satisfaction of the debt.

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11-114 California Points & Authorities § 114.45

§ 114.45 Opposing Spouse's Motion to Quash Levy of Execution--Spouse Not Party to Action

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE MOTION TO QUASH LEVY OF EXECUTION SHOULD BE DENIED BECAUSE THE MOVING PARTY IS NOT A PARTY TO THIS ACTION AND HAS NO STANDING TO SO MOVE.

Lack of Standing. A married person who is not a party to the action has no standing to move the court for an order quashing a levy of execution made on that person's allegedly separate property under a writ of execution issued on a judgment against that person's spouse (*Blue v. Superior Court (1956) 147 Cal. App. 2d 278, 283, 305 P.2d 209*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion to quash a levy of execution on a married person's allegedly separate property, based on a judgment against that person's spouse. The ground of the contention is that the person making the motion is not a party to the action.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Counsel's argument should establish (1) that an action was brought and judgment was entered against a married person on a debt incurred by that person; (2) that, in enforcing the judgment, the plaintiff levied on certain property considered to be liable for the debt; (3) that a motion to quash the levy was brought by the judgment debtor's spouse on the ground that the property levied on was the spouse's separate property and was not liable for the debt; and (4) that the moving party spouse was not a party to the action in which the judgment was entered.

[3] Discussion of Authorities

[a] Lack of Standing

Blue v. Superior Court *(1956) 147 Cal. App. 2d 278, 305 P.2d 209* , involved a creditor who secured a judgment against the husband; the wife was not made a party to the action. Prior to entry of the judgment, the husband conveyed his interest in the property to the wife, and the wife recorded a declaration of homestead on the property. When the creditor moved the court for an appraisal to determine whether the property's value exceeded the homestead, the wife filed an answer, alleging that she was not a party to the creditor's action and that she held the property as her separate property and homestead. The trial court found that the creditor's judgment was solely against the husband, that the husband had no interest in the property, and that the execution levied upon the property should be quashed.

The appellate court reversed, holding that the Civil Code statutes regarding execution of judgment make no provision for trying the question of whether the judgment debtor has any interest in the subject real property. Rather, a purchaser at an execution sale acquires only such interest as the judgment debtor had in the property. In an execution proceeding, the court may not define the interest of the judgment debtor in the property, and a levy cannot be quashed on the grounds that the judgment debtor has no interest in the property levied on. No one except the judgment debtor may move to quash a writ of execution or the levy thereof, unless the judgment on which it is issued, or the writ, is void on its face. The appellate court held that the trial court had exceeded its jurisdiction by trying the question of title, by terminating the lien which the creditor had acquired on the property, and by quashing the execution levied thereon.

[4] Additional Authorities

[a] Lack of Standing

In *Vest v. Superior Court (1956) 140 Cal. App. 2d 91, 294 P.2d 988* , a creditor had obtained a judgment for community debts against the husband prior to a divorce decree between the husband and the wife. The wife had not been made a party to the creditor's action. Pursuant to the divorce decree, the property was held to be community in character and was awarded to the wife. When the judgment creditor caused a writ of execution to be levied on the husband's former interest in the property, which now stood in the wife's name, the wife moved to quash the writ. The appellate court stated that, as a general rule, no one but those parties to the action who are liable to be injured can move for recall of the writ, unless the judgment or writ is void on its face. A levy cannot be quashed on the ground that a judgment debtor has no interest in the property levied on. The property awarded to the wife in the divorce action was held to be subject to the burdens with which it was encumbered at the time of the award, and the creditor's levy was upheld (*140 Cal. App. 2d 91, 93)* .

For a discussion of the remedies available to a nondebtor spouse who faces execution on property for debts of the other spouse, see *§ 114.20[2][b][i]*.

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§ 114.46 Opposing Spouse's Contention of Nonliability of Community Property for Other Spouse's Tort--Liability Arose From Activity Performed for Benefit of Community [Fam. Code § 1000(b)(1)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

COMMUNITY PROPERTY SHOULD BE LEVIED ON BEFORE SEPARATE PROPERTY TO SATISFY THE JUDGMENT BECAUSE THE _____ [ACT *or* OMISSION] GIVING RISE TO LIABILITY ON WHICH THE JUDGMENT IS BASED OCCURRED WHILE THE TORTFEASOR SPOUSE WAS PERFORMING AN ACTIVITY FOR THE BENEFIT OF THE COMMUNITY.

Liability of Community Property for Tort. If the liability of a married person for death or injury to person or property is based on an act or omission that occurred while the person was performing an activity for the benefit of the community, the liability must be satisfied first from the community property and second from the separate property of that person (*Fam. Code § 1000(b)(1)*; *see In re Marriage of Bell (1996) 49 Cal. App. 4th 300, 310, 56 Cal. Rptr. 2d 623* ; *In re Marriage of Hirsch (1989) 211 Cal. App. 3d 104, 110-111, 259 Cal. Rptr. 39*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention of a married person that community property is not liable to satisfy a judgment in tort against his or her spouse. The ground of the contention is that the community property is liable because liability was incurred while the tortfeasor spouse was performing an act for the benefit of the community [*see Fam. Code § 1000(b)(1)*]. This form may be combined with other points and authorities pertaining to the specific procedural context in which it is raised [*see discussion under § 114.46[2][b]*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law

stated. Counsel's argument should establish (1) that the plaintiff's or claimant's spouse is a judgment debtor under a judgment fixing liability for death or injury to person or property; (2) that, in enforcing this judgment, defendant has levied on community property of the tortfeasor and his or her spouse; and (3) that the act giving rise to the tortfeasor spouse's liability occurred while that spouse was performing an act for the benefit of the community [*see Fam. Code § 1000(b)(1)*].

[b] Procedural Context

This form may be used by a judgment creditor to oppose an independent collateral action brought by a married person for the purpose of retaining or recovering property that has been levied on to enforce a judgment against the person's spouse. Such an action might be a third-party claim filed with the levying officer [*see Code Civ. Proc. §§ 720.110, 720.120*], an action against the creditor for a writ of possession to recover personal property [*see Civ. Code §§ 3379, 3380*], or an action to quiet title to real or personal property [*see Code Civ. Proc. § 760.020(a)*]. For further discussion, see *§ 114.20[2][b][i]*.

[c] Related Pleading and Practice Forms

For forms to oppose an action alleging improper levy on property, see Ch. 107, *Cancellation of Instruments ;* Ch. 119, *Claim and Delivery ;* Ch. 150, *Conversion ;* Ch. 254, *Executions and Enforcement of Judgments ;* and Ch. 482, *Quieting Title ,* in California Forms of Pleading and Practice (Matthew Bender). For forms for the termination of an action without trial, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings ,* and Ch. 537, *Summary Judgment ,* in that set.

[d] Related Points and Authorities

For memoranda of points and authorities generally related to actions for alleged improper levy on property, see Ch. 40, *Claim and Delivery ;* Ch. 51, *Conversion ;* and Ch. 198, *Quieting Title* . For forms related to the termination of an action without trial, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings ,* and Ch. 221, *Summary Judgments* .

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 114.24* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Liability of Community Property for Tort

In re Marriage of Bell *(1996) 49 Cal. App. 4th 300, 56 Cal. Rptr. 2d 623* , involved characterization and division of liability for settlement of a civil case arising out of the wife's embezzlement from an employer. The case had settled for some $150,000, and $55,000 in legal fees were incurred in the process. In their property division, a trial court assigned responsibility for both the attorney's fees and the settlement, along with a related income tax liability, to the wife's share of community property. She then appealed.

The court of appeal reversed the judgment, finding that the trial court incorrectly attributed to the wife all legal costs and the settlement amount. The trial court's ruling was in error because the community benefited from the proceeds of the embezzlement. Under *Fam. Code § 1000(b),* if a married person's liability is based on an act or omission that occurred while he or she was performing an activity for the benefit of the community, that liability must first be satisfied from the community estate and secondarily from the separate property of the tortfeasor spouse. Regarding the settlement amount, the evidence demonstrated that the community received a major infusion of funds as a result of the

wife's conduct, and that those funds had been utilized by the community. The appellate court, citing *In re Marriage of Hirsch (1989) 211 Cal. App. 3d 104, 259 Cal. Rptr. 39* , determined that, because the community had shared in the benefit, it was equitable that it also share in its cost. However, under *In re Marriage of Stitt (1983) 147 Cal. App. 3d 579, 195 Cal. Rptr. 172* , it found that the trial court had correctly decided that the wife was liable for the attorney's fees in both the civil and criminal actions, as well as the tax arising from the embezzlement. The appellate court reasoned that, because the husband did not participate in the fraud and so could do nothing to avoid it, he should not in fairness bear the same burden as the wife (*49 Cal. App. 4th 300, 309-310)* .

In re Marriage of Hirsch *(1989) 211 Cal. App. 3d 104, 259 Cal. Rptr. 39* , involved a post-dissolution motion by a former husband to classify a debt, which had been satisfied with his post-dissolution separate property, as a community obligation. The debt sought to be classified as community arose from a settlement of lawsuits against the husband in connection with his tenure as a member of the board of directors of a bank. His service on the board began before marriage and continued during the marriage and after the parties separated. The husband sought reimbursement for one-half the amount he expended in settling the lawsuits, including attorney's fees and costs. A trial court denied his motion, finding that his actions were tortious and should not be charged against the community.

The court of appeal reversed the order of denial, holding that litigation debts arising from the tortious conduct of a spouse while engaged in an activity for the benefit of the community are community debts, regardless of whether that conduct was negligent or intentional. The appellate court criticized the case on which the trial court had relied, *In re Marriage of Stitt (1983) 147 Cal. App. 3d 579, 195 Cal. Rptr. 172* , which held that losses arising from the negligent conduct of a spouse engaged in an activity for the benefit of the community are a separate obligation of the tortfeasor spouse. Although an innocent spouse is not required to share in losses incurred by intentionally tortious or criminal conduct of a spouse when there is no benefit to the community, losses caused by either negligent or intentionally tortious conduct are a community debt when the activities benefitted the community. In this case, the court concluded, there was evidence that the husband's activities had benefitted the community, and the remuneration he received was undisputedly community property. Furthermore, his former wife presented no evidence that his service on the board was to protect his separate property interests; thus, there was no legitimate basis on which to characterize the settlement obligation as his separate debt (*211 Cal. App. 3d 104, 110-111)* .

[4] Additional Authorities

[a] Liability of Community Property for Tort

In *In re Marriage of Partridge (1990) 226 Cal. App. 3d 120, 276 Cal. Rptr. 8* , the trial court ordered the husband to hold the wife harmless from certain tax liabilities arising from the husband's contracting business during marriage, citing the husband's failure to cooperate in filing a tax return. The appellate court reversed, citing *In re Marriage of Hirsch, above,* for the proposition that, as long as the community receives *some* benefit from a spouse's actions, regardless of whether those actions are negligent or intentional, the community is properly chargeable with liabilities arising from those actions. Although, in a proceeding under the Family Code, the court may order an unequal division of community property when one spouse has "deliberately misappropriated" community assets [*see Fam. Code § 2602*], the appellate court here found no factors to justify such an unequal division (*226 Cal. App. 3d 120, 126)* .

In *Century Sur. Co. v. Polisso (2006) 139 Cal. App. 4th 922, 43 Cal. Rptr. 3d 468* , an insurer sued its insureds for reimbursement of legal fees and a declaration as to its duty to defend a third party action. The insureds, a business operated as a sole proprietorship, its owner, and his wife, cross-complained against the insurer for breach of contract and breach of the covenant of good faith and fair dealing. Judgment was awarded in favor of the insureds. The appellate court affirmed the judgment, holding that under the policy, the insurer had a duty to defend the wife in the third party breach of contract action against her husband and his business, even though she was not named as a defendant in that action, because there was a possibility that she would become legally obligated to pay damages. The court noted that community property is liable for a money judgment against one spouse whether or not the other spouse is a named

defendant in the underlying action. The business was a family owned business and the contract with the third party was entered into and performed for the benefit of the community. Because the spouses purchased and operated the business during their marriage, it was community property. As her husband's spouse with a community property interest in the business, the wife would be legally obligated under Fam. Code §§ 810 and *1000(b)(1)* to pay any judgment against him (*139 Cal. App. 4th 922, 942-944)* .

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CHAPTER 114 HUSBAND AND WIFE
PART II. FORMS
A. Liability Of Separate And Community Property For Spousal Debts
2. Creditors' Forms

11-114 California Points & Authorities § 114.47

§ 114.47 Opposing Spouse's Claim to Property Levied on for Satisfaction of Judgment Against Other Spouse--Property Levied on Acquired by Illegal Conduct

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

LEVY ON _____ [*describe property*] WAS PROPER BECAUSE _____ [*describe property*] CAN BE TRACED TO THE PROCEEDS OF ILLEGAL CONDUCT BY THE DEBTOR SPOUSE, AND THE NONDEBTOR SPOUSE SHOULD NOT BE ENTITLED TO RETAIN THE PROCEEDS OF HIS/HER SPOUSE'S ILLEGAL CONDUCT.

Proceeds of Illegal Conduct. A spouse may not retain the proceeds of his or her spouse's fraudulent conduct, even though the former did not participate in the fraud (*Tinsley v. Bauer (1954) 125 Cal. App. 2d 724, 728-729, 271 P.2d 116*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention of a married person that a levy on property in enforcement of a judgment against the person's spouse was improper. The ground of the contention is that the levy was proper because the property levied on can be traced to the proceeds of illegal conduct by the debtor spouse, and the nondebtor spouse should not be permitted to retain any benefit from that conduct. This form may be combined with other points and authorities pertaining to the specific procedural context in which it is raised [*see discussion under § 114.47[2][b]*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Counsel's argument should establish (1) that defendant is a judgment creditor under a judgment against the plaintiff's or claimant's spouse; (2) that, in enforcing the judgment, defendant levied on the property at issue; and (3)

that since the property was procured by the illegal conduct of the debtor spouse, it is liable to satisfy the debt (even though, under otherwise applicable law, the property might not be so liable).

[b] Procedural Context

This form may be used by a judgment creditor to oppose an independent collateral action brought by a married person for the purpose of retaining or recovering property that has been levied on to enforce a judgment against the person's spouse. Such an action might be a third-party claim filed with the levying officer [*see Code Civ. Proc. §§ 720.110, 720.120*], an action against the creditor for a writ of possession to recover personal property [*see Civ. Code §§ 3379, 3380*], or an action to quiet title to real or personal property [*see Code Civ. Proc. § 760.020(a)*].

With appropriate modifications, this form may be used to oppose a motion to quash levy of execution when the nondebtor spouse was a party to the original action in which the judgment was entered [*see Blue v. Superior Court (1956) 147 Cal. App. 2d 278, 283, 305 P.2d 209* ; for opposition to motion to quash levy of execution when the nondebtor spouse was not a party to the original action, *see § 114.45*]. For further discussion, see *§ 114.20[2][b][i]*.

[c] Related Pleading and Practice Forms

For forms to oppose an action alleging improper levy on property, see Ch. 107, *Cancellation of Instruments* , Ch. 119, *Claim and Delivery* , Ch. 150, *Conversion* , Ch. 254, *Executions and Enforcement of Judgments* and Ch. 482, *Quieting Title* in California Forms of Pleading and Practice. For forms for the termination of an action without trial, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* and Ch. 537, *Summary Judgment* in that set.

[d] Related Points and Authorities

For memoranda of points and authorities generally related to actions for alleged improper levy on property, see Ch. 40, *Claim and Delivery* , Ch. 51, *Conversion*, and Ch. 198, *Quieting Title*. For forms related to the termination of an action without trial, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* and Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Proceeds of Illegal Conduct

Tinsley v. Bauer *(1954) 125 Cal. App. 2d 724, 271 P.2d 116* , involved a husband's third-party claim to property levied on in enforcement of a judgment against the wife [*now see Code Civ. Proc. § 720.110*]. Under then-applicable law, the husband was required to prove, in order to establish his claim, that the property in question was either his separate property or community property not derived from his wife's earnings. His claim was denied, and he appealed.

In affirming, the appellate court stated that one spouse will not be permitted to hide behind statutory rules of exemption from levy if he or she will reap the fruits of the other spouse's illegal conduct, especially if the fruits can be traced to the property levied on. The husband was entitled to release of only so much of the property levied on as he could prove not to be derived from the illegal conduct of the wife, even if the property was otherwise exempt from levy (*125 Cal. App. 2d 724, 728-729)* .

[4] Additional Authorities

[a] Proceeds of Illegal Conduct

Kemp v. Enemark (1924) 194 Cal. 748, 230 P. 441 , was an action by a wife to enjoin the execution sale of property on which she had declared a homestead. The purpose of the execution was to satisfy a judgment against the husband on a loan obtained by the husband through fraud, the proceeds of which loan were used to purchase the property in

question. Although the wife did not participate in the fraud, the Supreme Court affirmed a denial of relief because she should not be permitted to reap the fruit of the fraud (*194 Cal. 748, 753-754)* .

In *South v. Wishard (1958) 165 Cal. App. 2d 8, 331 P.2d 227* , the court reversed a judgment of dismissal. It noted that the complaint stated a cause of action against a wife when it alleged that her husband misused funds held as a constructive trustee for the benefit of the plaintiff, and that the wife shared in the misuse of those funds with full knowledge of her husband's breach of trust. The court stated that, even though the wife may not have committed a fraud on the plaintiff, she had no legal protection when she knowingly retained the fruits of her husband's fraud (*165 Cal. App. 2d 8, 16)* .

Demetris v. Demetris (1954) 125 Cal. App. 2d 440, 270 P.2d 891 , was an action by a father to reform a deed in which title was mistakenly taken in the names of the plaintiff, his son, and his daughter-in-law as joint tenants, instead of in the names of plaintiff and his son as tenants in common. The court stated that the law of California is that a wife, although herself innocent, will not be protected in retaining the fruits of her husband's fraud (*125 Cal. App. 2d 440, 444)* .

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[Reserved]

§§ 114.48[Reserved]

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PART II. FORMS
B. Transfer Of Property By Spouse Without Consent Of Other Spouse
1. Remedies Of Nonconsenting Spouse

11-114 California Points & Authorities § 114.60

§ 114.60 Opposing Demurrer [Code Civ. Proc. § 430.10(d)] to Complaint to Quiet Title [Code Civ. Proc. § 760.020] to, and Supporting Cancellation of Instrument [Civ. Code § 3412] Unilaterally Transferring, Community Real Property [Fam. Code § 1102(a)]--Consent of Both Spouses Required for Valid Transfer

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

DEFENDANT'S _____ [DEMURRER *or* MOTION FOR SUMMARY JUDGMENT] SHOULD BE DENIED BECAUSE THE _____ [LEASE FOR A PERIOD EXCEEDING ONE YEAR *or* ENCUMBRANCE *or* SALE *or* CONVEYANCE] OF THE COMMUNITY REAL PROPERTY OCCURRED DURING THE SPOUSES' MARRIAGE WITHOUT THE PLAINTIFF'S CONSENT. IT THEREFORE VIOLATES FAMILY CODE SECTION 1102 AND GIVES RISE TO A TIMELY ACTION BY THE NONCONSENTING SPOUSE, DURING MARRIAGE, TO INVALIDATE THE TRANSFER IN ITS ENTIRETY.

Unilateral Transfer Is Voidable in Its Entirety During Marriage. Under *Family Code Section 1102(a)*, both spouses must join in executing an instrument by which community real property (or any interest in that property) is leased for a longer period than one year, or is sold, conveyed, or encumbered. When a nonconsenting spouse, during the marriage, timely challenges a transfer made in violation of *Family Code Section 1102(a)*, the transfer is voidable in its entirety (*Droeger v. Friedman, Sloan & Ross (1991) 54 Cal. 3d 26, 30, 46, 283 Cal. Rptr. 584* , decided under former Civ. Code § 5127; *In re Marriage of Brooks & Robinson (2008) 169 Cal. App. 4th 176, 183, 86 Cal. Rptr. 3d 624*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a demurrer [*see Code Civ. Proc. § 430.10*] or motion for summary judgment [*see Code Civ. Proc. § 437c*] to a complaint to quiet title to, and in support of the cancellation of an instrument purporting to unilaterally transfer an interest in, community real property. Opposition to the transfer is based

on the ground that the consent of both spouses is required to make a valid transfer of an interest in community real property during marriage [*see Fam. Code § 1102(a)*; *see also Civ. Code § 3412*; *Code Civ. Proc. § 760.020*].

A transfer made in violation of *Fam. Code § 1102(a)* is voidable, and when a timely challenge to the transfer is brought by the nonconsenting spouse during marriage, the transfer may be invalidated in its entirety [*Droeger v. Friedman, Sloan & Ross (1991) 54 Cal. 3d 26, 30, 46, 283 Cal. Rptr. 584, 812 P.2d 931* ; *In re Marriage of Brooks & Robinson (2008) 169 Cal. App. 4th 176, 183, 86 Cal. Rptr. 3d 624*]. Notwithstanding *Fam. Code § 1102(a)*, either party may encumber his or her interest in community real property to pay reasonable attorney's fees in order to retain or maintain counsel in a proceeding for dissolution of marriage, nullity, or legal separation [*Fam. Code §§ 1102(e), 2033(a)*].

Additional remedies are provided for a breach of fiduciary duties between spouses, including the transfer by one spouse of community real or personal property without the consent of the other. The court may order an accounting and may determine the parties' rights of ownership in, beneficial enjoyment of, or access to, community property; and may determine the classification of all of the spouses property [*Fam. Code § 1101(b)*]. The court may also order that the name of a spouse be added to community property held in the name of the other spouse alone, or otherwise reform title to community property to reflect its community character, except as to certain business interests [*Fam. Code § 1101(c)*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Counsel's argument should indicate (1) the nature of the transfer; (2) the time at which the transfer occurred in relation to the period of the marriage; (3) the fact that the plaintiff's consent to the transfer was not obtained; and (4) the fact that the action is being brought during the marriage [*see Fam. Code § 1102(a)*; *Droeger v. Friedman, Sloan & Ross (1991) 54 Cal. 3d 26, 30, 46, 283 Cal. Rptr. 584, 812 P.2d 931]* .

For memoranda in opposition to the contentions raised in this form, see *§ 114.40*, Optional Paragraph C [*see Lezine v. Security Pacific Financial Services, Inc. (1996) 14 Cal. 4th 56, 58 Cal. Rptr. 2d 76, 925 P.2d 1002]* .

[b] Related Pleading and Practice Forms

For a form of complaint to cancel an instrument transferring an interest in community real property in violation of Fam. Code § 1102(a), see Ch. 122, *Community Property* , in California Forms of Pleading and Practice (Matthew Bender).

[c] Related Memoranda

For memoranda generally related to actions to quiet title and to cancel an instrument affecting title, see Ch. 198, *Quieting Title* .

[3] Discussion of Authorities

[a] Unilateral Transfer Is Voidable in Its Entirety During Marriage

In ***Droeger v. Friedman, Sloan & Ross*** *(1991) 54 Cal. 3d 26, 283 Cal. Rptr. 584, 812 P.2d 931* , a husband brought an action during marriage to quiet title to two parcels of community real property. His estranged wife had encumbered the property without his consent in order to secure the payment of attorney's fees in a pending marital dissolution proceeding. The wife executed a promissory note and a deed of trust for both parcels, and the husband had not joined in the execution of these instruments. The defendant law firm demurred, claiming that the deed of trust was enforceable against the wife's one-half interest in the property. The trial court sustained the demurrer without leave to amend and entered a judgment of dismissal; it also denied the husband's motion for reconsideration. The court of appeal reversed the judgment, and the California Supreme Court then granted review.

The Supreme Court affirmed the judgment of the court of appeal. It held that under former Civ. Code § 5127 [*now see Fam. Code § 1102(a)*], both spouses must consent to the transfer during marriage of community real property. It further

stated that when a nonconsenting spouse, during the marriage, timely challenges a transfer made in violation of that section, the transfer is voidable in its entirety. Thus, the husband was able to invalidate the encumbrance in its entirety. In reaching this conclusion, the Court discussed the significance of 1975 legislation that granted both spouses equal management and control of community property [*now see Fam. Code §§ 1100, 1102*] (*54 Cal. 3d 26, 30)* .

Before 1975 the law was clear. If an action was brought under former Civ. Code § 5127 [*now see Fam. Code § 1102(a)*] to set aside an unauthorized transfer after dissolution or after the transferor spouse's death, the nonconsenting spouse could recover his or her one-half interest in the transferred property. If, however, the action was brought during marriage, the nonconsenting spouse could set the transfer aside in its entirety. After 1975, a split of authority developed. *Mitchell v. American Reserve Ins. Co. (1980) 110 Cal. App. 3d 220, 167 Cal. Rptr. 760* , held that if a spouse makes an unauthorized transfer of community real property, a nonconsenting spouse may recover only his or her one-half interest in the property transferred (*54 Cal. 3d 26, 35-36)* . On the other hand, *Andrade Development Co. v. Martin (1982) 138 Cal. App. 3d 330, 187 Cal. Rptr. 863* held that a nonconsenting spouse may void a spouse's unauthorized transfer in its entirety, because California prefers a rule that protects each spouse from the other's unauthorized acts that defeat community real property interests. The Court concluded that *Andrade* is correct (*54 Cal. 3d 26, 36-39)* .

Either party may unilaterally encumber his or her interest in community real property to pay reasonable attorney's fees in order to retain or maintain counsel in a proceeding for dissolution of marriage, for nullity of marriage, or for legal separation of the parties [*Fam. Code §§ 1102(e), 2033(a)*], provided that all notice requirements for recordation of the encumbrance are satisfied [*see Fam. Code §§ 1102(e)*, 2033(a), (b)]. This encumbrance is known as a "family law attorney's real property lien" and attaches only to the encumbering spouse's interest in the community real property [*Fam. Code §§ 1102(e), 2033(a)*].

Fam. Code § 1102(e) and *2033* appear to abrogate *Droeger, above*, to the extent that it applies to an encumbrance of community real property for the payment of attorney's fees in an action under the Family Code. Nonetheless, the *Droeger* ruling appears to remain intact with respect to the Court's general analysis of consent issues.

In ***In re Marriage of Brooks & Robinson*** *(2008) 169 Cal. App. 4th 176, 86 Cal. Rptr. 3d 624*, a husband sought a declaration that certain real property his wife sold shortly before he filed a petition for dissolution of their marriage was community property, and requested that the sale be set aside because he had not joined in the conveyance. The court rejected the husband's claims and entered judgment for the purchaser of the property, which was affirmed on appeal. The court noted that the wife took title to the property solely in her name without reference to her marriage to the husband, and that the husband had agreed that title would be held in the wife's name (169 Cal. App. 4th 176, 179-180).

The appellate court acknowledged that a conveyance in violation of *Fam. Code § 1102(a)* is generally voidable by the spouse who did not join in the conveyance. It also noted, however, that under *Fam. Code § 1102(c)(2)*, a deed to community real property given to a third-party purchaser is presumed valid if the purchaser received the deed in good faith without knowledge of the marriage relationship. In addition, a bona fide purchaser for value that acquires its interest in real property without notice of another's asserted rights in the property takes that property free of these unknown rights. Because the purchaser in this case was a bona fide purchaser of the property, it therefore acquired its title free of the husband's claim (*169 Cal. App. 4th 176, 183)* .

The appellate court also held that the husband did not have an interest in the property as a matter of law (*169 Cal. App. 4th 176, 184)* . When the wife took title to the property solely in her name, a presumption arose that the property was her separate property (169 Cal. App. 4th 176, 186). The fact that the property was acquired during marriage does not rebut the form-of-title presumption. The act of taking title to property in the name of one spouse during marriage with the other spouse's consent effectively removes that property from the general community property presumption, and the property is presumably the separate property of the spouse in whose name title is taken (*169 Cal. App. 4th 176, 186-187*). The party asserting that title is other than as stated in the deed has the burden of proving that fact by clear and convincing evidence. The form-of-title presumption can be overcome only by clear and convincing evidence of an

agreement or understanding between the parties that the title specified in the deed is not what the parties intended (169 Cal. App. 4th 176, 189-190). The husband presented no such evidence in this case. The presumption was not overcome by tracing the source of the funds used to purchase the property to the husband's employment earnings, by the fact that the parties were married at the time the wife acquired the property, by the husband's unilateral belief that the property belonged to both of them, or by the husband's assertion that title was taken in the wife's name to facilitate financing of the property (*169 Cal. App. 4th 176, 190-192)* .

[4] Additional Authorities

[a] Unilateral Transfer Is Voidable in Its Entirety During Marriage

In *Hyatt v. Mabie (1994) 24 Cal. App. 4th 541, 29 Cal. Rptr. 2d 447* , a husband encumbered community real property with a second deed of trust without the wife's knowledge or consent. The existence of the encumbrance was not disclosed at trial. The judgment of dissolution awarded the real property to both parties as tenants in common, ordered that the property be sold and the first deed of trust paid, and divided the net proceeds equally between the parties. The wife discovered the existence of the second deed of trust four months later, but permitted the encumbrance to be paid through escrow. She then brought suit for reimbursement against the husband and the beneficiaries of the second deed of trust. The appellate court affirmed the trial court's decision against the wife, holding that a nonconsenting spouse's right to invalidate an encumbrance under former Civ. Code § 5127 [*now see Fam. Code § 1102(a)*] must be exercised *during marriage*. After dissolution of the community, a nonconsenting spouse's right to void an encumbrance is limited to the extent of his or her interest in the property. Since, in this case, the encumbrance did not affect the wife's interest in the property, her only remedy was to move for a modification of the dissolution judgment. The court held that, by allowing the encumbrance to be paid through escrow, the wife had waived this remedy (*24 Cal. App. 4th 541, 547)* .

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11-114 California Points & Authorities § 114.61

§ 114.61 Opposing Demurrer [Code Civ. Proc. § 430.10(d)] to Complaint to Quiet Title [Code Civ. Proc. § 760.020] to, and Cancel Instrument [Civ. Code § 3412] Affecting, Interest in Community Real Property Held in One Spouse's Name Alone, on Basis That Action Is Barred by Statute of Limitations [Fam. Code § 1102(d)]--Limitation Inapplicable if Deed Not Recorded

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

DEFENDANT'S _____ [DEMURRER *or* MOTION FOR SUMMARY JUDGMENT] SHOULD BE DENIED BECAUSE THE ONE-YEAR LIMITATION PERIOD TO BRING AN ACTION TO AVOID AN INSTRUMENT AFFECTING COMMUNITY REAL PROPERTY STANDING IN THE NAME OF ONE SPOUSE ALONE IS INAPPLICABLE IF THE INSTRUMENT IS NOT RECORDED.

A. One-Year Limitation Inapplicable if Deed Not Recorded. A spouse is not barred by the one-year limitation period of *Family Code Section 1102(d)* from bringing an action to avoid an instrument affecting community real property standing in the name of the other spouse alone if the instrument is not recorded (*Waldeck v. Hedden (1928) 89 Cal. App. 485, 491, 265 P. 340*).

[*Optional*] **B. Filing of Other Documents Is Insufficient to Commence Limitations Period.** The filing of documents, such as a complaint or lis pendens, other than the instrument affecting community real property, is not recognized as a substitute for the recordation of the instrument itself for the purpose of commencing the one-year period of limitations (*Waldeck v. Hedden (1928) 89 Cal. App. 485, 491, 265 P. 340*).

[2] Comments

[a] Use of Form

This form may be submitted in an action by a spouse to quiet title to community real property and to cancel an

instrument executed solely by the other spouse in opposition to a demurrer [*see Code Civ. Proc. § 430.10*] or motion for summary judgment [*see Code Civ. Proc. § 437c*] which raises the one-year statute of limitations of *Fam. Code § 1102(d)* [*see § 114.81*]. The ground of the contention is that the limitation period is inapplicable if the instrument sought to be canceled was not recorded.

Optional paragraph B may be used to overcome the contention that the limitations period began by filing a complaint or lis pendens, rather than by recording the instrument that is sought to be canceled.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For a form of complaint to cancel an instrument affecting title to real property held in the name of one spouse only, see Ch. 122, *Community Property* in California Forms of Pleading and Practice. For forms of complaints to quiet title and to cancel an instrument generally, see Ch. 107, *Cancellation of Instruments* and Ch. 482, *Quieting Title* in that set. For forms for general use to oppose the termination of an action without trial, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* and Ch. 537, *Summary Judgment* in that set. For forms to oppose the applicability of statutes of limitations, see Ch. 345, *Limitation of Actions* .

[c] Related Points and Authorities

For memoranda of points and authorities generally related to actions to quiet title and to cancel an instrument affecting title, see Ch. 198, *Quieting Title* in this set. For forms related to the termination of an action without trial, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* and Ch. 221, *Summary Judgments* . For memoranda of points and authorities opposing the applicability of statutes of limitation, see Ch. 143, *Limitation of Actions* .

[d] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 114.81* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] One-Year Limitation Inapplicable if Deed Not Recorded

In ***Waldeck v. Hedden*** *(1928) 89 Cal. App. 485, 265 P. 340* , plaintiffs brought an action for specific performance of an exchange agreement between themselves and the defendants, a married couple. In the agreement, defendant husband had agreed to exchange several pieces of real property in Los Angeles and $5,000 for plaintiff's stock ranch in Tulare County and personal property on the ranch. The trial court gave judgment to plaintiffs for partial specific performance of the exchange agreement, including a parcel that the trial court found to be the community property of defendants. Defendants appealed. Defendant wife contended, in part, that the trial court erred in decreeing specific performance with regard to the community property because she had not joined in signing the exchange agreement.

The court of appeal reversed, holding in part that the exchange agreement was not enforceable regarding the community property unless the wife had joined in execution of the agreement. It found that the wife was not estopped from setting aside the exchange agreement merely because she had yielded possession with the defendant. Furthermore, the defendant's spouse was not barred by the one-year limitation imposed by former Civ. Code § 172 [*now see Fam. Code § 1102(d)*] because the exchange agreement was not recorded. The court stated that the statute was plain and specific in requiring the recording of the instrument affecting the community real property interest, such as the exchange agreement, in order to begin the period of limitation. It did not recognize the filing of other documents, such as the

complaint and lis pendens, as substitutes for the recordation (*89 Cal. App. 485, 491)* .

[b] Filing of Other Documents Is Insufficient to Commence Limitations Period

The facts and procedural background of ***Waldeck v. Hedden*** *(1928) 89 Cal. App. 485, 265 P. 340* , are set forth under § 114.61[3][a]. The court of appeal concluded that the defendant's spouse was not barred by the one-year limitation period imposed by statute because the operative instrument, an exchange agreement, was not recorded. It reasoned that filing of documents other than the instrument affecting community real property, such as the complaint and lis pendens, is not recognized as a substitute for the recordation of the instrument itself for the purpose of commencing the one-year period of limitation (*89 Cal. App. 485, 491)* .

[4] Additional Authorities

[a] One-Year Limitation Inapplicable if Deed Not Recorded

In *Gantner v. Johnson (1969) 274 Cal. App. 2d 869, 79 Cal. Rptr. 381* , the husband quitclaimed his interest in real property to the sellers after defaulting on a conditional land sale contract. After the husband's death, his widow sought to set aside the quitclaim on the ground that she had not joined in the conveyance. The court held that the husband's transfer of the real property was valid only as to his one-half interest therein. Since neither the conditional sales agreement nor the quitclaim deed had been recorded at the time the widow brought her action to set aside the transfer, the one-year limitation period [*now see Fam. Code § 1102(d)*] did not preclude her from having the quitclaim deed set aside as to her one half of the community interest in the real property (*274 Cal. App. 2d 869, 878)* .

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[Reserved]

§§ 114.62[Reserved]

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11-114 California Points & Authorities § 114.80

§ 114.80 Supporting Demurrer [Code Civ. Proc. § 430.10(d)] to Complaint to Quiet Title [Code Civ. Proc. § 760.020] to, and Cancel Instrument [Civ. Code § 3412] Affecting, Interest in Community Real Property Held in One Spouse's Name Alone [Fam. Code § 1102]--Nonjoinder of Transferor Spouse

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION BECAUSE IT FAILS TO JOIN PLAINTIFF'S SPOUSE AS A DEFENDANT.

A. Transferring Spouse as Necessary Party. In a spouse's action to avoid the transfer of community real property standing in the name of the other spouse alone, the transferor spouse is a necessary party, and the failure to join that spouse is a ground for granting a demurrer (*see Vanasek v. Pokorny (1925) 73 Cal. App. 312, 319-321, 238 P. 798* ; *see also Fam. Code § 1102*).

B. Objection by Demurrer. The party against whom a complaint has been filed may object to the complaint on the ground that there is a defect or misjoinder of parties (*Code Civ. Proc. § 430.10(d)*). If the ground for the objection to the complaint appears on the face thereof, or from any matter of which the court is required to take judicial notice, the objection may be taken by demurrer (*Code Civ. Proc. § 430.30(a)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a demurrer to a complaint by a spouse seeking to avoid an instrument affecting community real property if the transferor spouse has not been joined as a party to the action. Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For a form of demurrer based on a spouse's failure to join the other spouse in an action to avoid an instrument affecting community real property, see Ch. 122, *Community Property* in California Forms of Pleading and Practice. For forms of demurrers generally, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

[c] Related Points and Authorities

For memoranda of points and authorities generally related to demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For memoranda of points and authorities relating to joinder of parties, see Ch. 168, *Parties* .

[3] Discussion of Authorities

[a] Transferring Spouse as Necessary Party

In ***Vanasek v. Pokorny*** *(1925) 73 Cal. App. 312, 238 P. 798* , plaintiff commenced an action to quiet title to certain real property against a married couple and a third defendant (Strybl). The property, which was in the name of the husband but was community property, had been conveyed by the husband to Strybl without the wife's consent. The wife answered the complaint, denying plaintiff's title to the property, and also filed a cross-complaint against Strybl to avoid her husband's deed to him. Styrbl demurred to the cross-complaint, in part, on the ground that the wife failed to join the husband as a necessary party. The trial court overruled the demurrer and subsequently found the deed void as to Strybl, who was found to have had knowledge of the marriage. The court canceled the deed and quieted title to the property in the wife. Strybl appealed.

The court of appeal reversed the judgment against him. The court reasoned that the husband was a necessary party to the cross action so that (1) he would be bound by a judgment determining the character of the property transferred, (2) there would be a complete determination of the controversy, and (3) any title adjudged to revest in him could be revested. The court stated that, because the husband was a necessary party to the action, Strybl's demurrer on the ground of his nonjoinder was proper and should have been sustained (*73 Cal. App. 312, 319-321)* .

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
CHAPTER 114 HUSBAND AND WIFE
PART II. FORMS
B. Transfer Of Property By Spouse Without Consent Of Other Spouse
2. Remedies Of Transferor Spouse

11-114 California Points & Authorities § 114.81

§ 114.81 Supporting Demurrer [Code Civ. Proc. § 430.10(d)] to Complaint to Quiet Title [Code Civ. Proc. § 760.020] to, and Cancel Instrument [Civ. Code § 3412] Affecting, Interest in Community Real Property Held in One Spouse's Name Alone [Fam. Code § 1102]--Action Not Commenced Within One Year of Recordation of Instrument [Fam. Code § 1102(d)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT'S _____ [DEMURRER *or* MOTION FOR SUMMARY JUDGMENT] SHOULD BE GRANTED BECAUSE THE ACTION IS BARRED BY THE ONE-YEAR LIMITATION PERIOD CONTAINED IN SECTION 1102(d) OF THE FAMILY CODE.

A. One Year in Which to Commence Action. No action to avoid any instrument affecting community real property standing of record in the name of either spouse alone, and executed by the spouse alone, may be commenced after the expiration of one year from the filing for record of the instrument in the recorder's office in the county in which the land is situated [*Fam. Code § 1102(d)*].

B. Limitation Period May Be Raised by Demurrer if Bar Appears on Face of Complaint. The limitation period of *Family Code Section 1102(d)* may be raised by demurrer if the complaint shows on its face that the action is barred, otherwise the bar may be raised by summary judgment (*see Brown v. Brown (1932) 125 Cal. App. 429, 435, 13 P.2d 1004* , decided under former Civ. Code § 5127; *see Code Civ. Proc. § 430.30(a)*).

[2] Comments

[a] Use of Form

These points and authorities may be used in an action by a spouse to quiet title to community real property and to cancel an instrument executed solely by the other spouse when the action was not commenced within one year from the

recordation of the instrument [*Fam. Code § 1102(d)*]. They may be submitted in support of a demurrer [*see Code Civ. Proc. § 430.10*] or motion for summary judgment [*see Code Civ. Proc. § 437c*]. Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For a form of demurrer based on a spouse's failure to commence an action to avoid an instrument affecting community real property within one year of recordation of the instrument, see Ch. 122, *Community Property* in California Forms of Pleading and Practice. For forms generally related to dispositions without trial, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , Ch. 375, *Motions to Strike* , Ch. 389, *Nonsuit and Motions for Judgment* , and Ch. 537, *Summary Judgment* in that set.

[c] Related Points and Authorities

For memoranda of points and authorities generally related to disposition without trial, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* and Ch. 221, *Summary Judgments* in this set. For memoranda of points and authorities supporting the applicability of statutes of limitation, see Ch. 143, *Limitation of Actions* .

[d] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 114.61* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Limitation Period May Be Raised by Demurrer if Bar Appears on Face of Complaint

In ***Brown v. Brown*** *(1932) 125 Cal. App. 429, 13 P.2d 1004* , a wife commenced an action under former Civ. Code § 172a [*now see Fam. Code § 1102(d)*] against her husband and his grantee to cancel a deed executed by the husband in favor of his son. The property covered by the deed was alleged to be community real property of the plaintiff and her husband. The deed had been properly recorded. The son demurred to the complaint, in part, for uncertainty in failing to set forth facts from which it could be ascertained whether record title was held by the parties jointly or by the husband alone. His argument was that if title was held by the husband alone, the one-year limitation period of the statute was applicable, and that therefore the complaint was defective for failure to plead facts from which the applicability of the limitation could be determined. The trial court overruled the demurrer and, when the son failed to answer, entered judgment decreeing the deed void.

The court of appeal affirmed, stating in part that the complaint was not uncertain. The court held that the limitation period of the statute could be raised by demurrer if the complaint showed on its face that the action was barred. However, since the complaint did not show on its face that title to the real property stood in the husband's name alone, it could not be determined from the face of the complaint that the action was barred and, therefore, the demurrer was not well taken. The failure of a complaint to allege facts that would enable a defendant to raise the bar of the statute by demurrer, rather than by answer, is not in itself a valid ground for demurrer (*125 Cal. App. 429, 434-436)* .

California Points & Authorities

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
CHAPTER 115 INDEMNITY AND CONTRIBUTION

11-115 California Points & Authorities 115.syn

§ 115.syn Synopsis to Chapter 115: INDEMNITY AND CONTRIBUTION

§ 115.01 Scope of Chapter

§ 115.02 Governing Law

§ 115.03 Page Limits on Memoranda

§ 115.04 Indemnity and Contribution Distinguished

§ 115.05 Express and Implied Indemnity

§ 115.06 Total and Partial Indemnity

§ 115.07 Effect of Good-Faith Settlement

§ 115.08 Overpayment by Settling Defendant

§ 115.09 Effect of Fair Responsibility Act of 1986

§ 115.10 Proceedings to Enforce Indemnity Rights

§ 115.11 Related Pleading and Practice Chapters

§ 115.12 Related Points And Authorities Chapters

§§ 115.13-115.29 [Reserved]

§ 115.30 Supporting Contention That Indemnitee Is Entitled to Indemnification Under Express Indemnity Agreement--Parties May Contract for Total Indemnity, and Principles of Comparative Negligence Do Not Apply to Express Indemnity Agreements

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Contractual Right to Total Indemnity

[4] Additional Authorities

[a] Contractual Right to Total Indemnity

§ 115.31 Supporting Contention That Indemnitee Is Entitled to Indemnification Under Express Indemnity Agreement--Agreement Providing for Indemnity Against Indemnitee's Own Negligence Does Not Violate Public Policy

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Public Policy

[4] Additional Authorities

[a] Public Policy

§ 115.32 Supporting Contention That Indemnitee Is Entitled to Indemnification Under Express Indemnity Agreement--General Indemnity Agreement Provides Indemnity for Indemnitee's Passive Negligence

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Indemnity Under General Indemnity Agreement Not Barred By Indemnitee's Passive Negligence

[b] Passive Negligence Defined

[c] Nonfeasance

[d] Landowner's Failure to Fulfill Duty of Care Imposed By Law

§ 115.33 Supporting Contention That Indemnitee Is Entitled to Indemnification Under Express Indemnity Agreement--Agreement Not Expressly Providing for Indemnitee's Negligence May Be Construed to Extend to Any

Negligence of Indemnitee If Parties So Intended

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Intention of Parties Controls

[b] Indemnity for Active Negligence Under General Indemnity Clause

[c] Obvious Risk Within Contemplation of Parties and Bargained for by Indemnitee

[4] Additional Authorities

[a] Intention of Parties Controls

§ 115.34 Supporting Contention That Indemnitee Is Entitled to Indemnification Under Express Indemnity Agreement--Written Indemnity Agreement Is Sufficient to Impose Indemnity Obligation on Injured Person's Employer [Lab. Code § 3864]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Specific Reference to Employees Not Required

[b] Unnamed Third Party Beneficiary May Enforce Written Indemnity Agreement Against Employer

§ 115.35 Supporting Contention That Indemnitee Is Entitled to Indemnification Under Express Indemnity Agreement--Clause Providing for Indemnity Unless Liability Results From Indemnitee's Sole Negligence or Willful Misconduct is Valid and Enforceable if Parties Are Concurrently Negligent

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Agreement Excepting Sole Negligence and Willful Misconduct of Indemnitee

[4] Additional Authorities

[a] Agreement Excepting Sole Negligence and Willful Misconduct of Indemnitee

§ 115.36 Supporting Contention That Indemnitee Is Entitled to Indemnification Under Express Indemnity Agreement--Indemnity Clause At Issue Is One Expressly Excepted From Public-Policy Bar to Enforceability [Civ. Code §§ 2782, 2784.5]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Agreement on Liability for Design Defect

§ 115.37 Supporting Contention That Indemnitee Is Entitled to Indemnification Under Express Indemnity Agreement--Collateral Estoppel Bars Relitigation of Indemnitor's Liability to Third Person if Indemnitor Was Party to Prior Action

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Relitigation of Indemnitor's Negligence

§ 115.38 Supporting Contention That Indemnitee Is Entitled to Indemnification Under Express Indemnity Agreement--Indemnitee Was Justified In Incurring Attorneys' Fees to Defend Claim Covered by Indemnity Agreement

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Sufficient Justification for Indemnitee's Defense

[b] Indemnitor's Refusal to Defend Action

[c] Conflict of Interest

[d] Liability to Provide Defense When No Liability for Indemnity

[e] Underlying Complaint Need Not Specifically Allege Negligence of Indemnitor

[f] Indemnitee's Failure to Tender Defense

[4] Additional Authorities

[a] Indemnitor's Refusal to Defend Action

§ 115.39 Opposing Contention That Indemnitee Is Entitled to Indemnification Under Express Indemnity Agreement--Indemnitee May Not Recover for Loss That Is Beyond Terms of Agreement

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Losses Beyond Scope of Indemnity Agreement

§ 115.40 Opposing Contention That Indemnitee Is Entitled to Indemnification Under Express Indemnity Agreement--Agreement Is General and Does Not Provide Indemnity for Active Negligence of Indemnitee

[1] FORM

[2] Comments

[a] Use of Form

[b] Active and Passive Negligence

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Strict Construction of Indemnity Agreement Against Indemnitee

[b] General Indemnity Clause

[c] Active Negligence

[d] Knowledge of or Acquiescence in Act as Active Negligence

[e] Strict Liability as Active Negligence

[4] Additional Authorities

[a] Active Negligence

§ 115.41 Opposing Contention That Indemnitee Is Entitled to Indemnification Under Express Indemnity Agreement--Indemnitee's Active Negligence Was Adjudicated in Prior Action and Collateral Estoppel Bars Relitigation of Issue

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Collateral Estoppel to Relitigate Negligence

[b] Collateral Estoppel to Relitigate Character of Negligence as Active

§ 115.42 Opposing Contention That Indemnitee Is Entitled to Indemnification Under Express Indemnity Agreement--Clause in Construction Contract [Civ. Code § 2782] or Contract for Hauling, Trucking, or Cartage [Civ. Code § 2784.5] Providing for Indemnity Based on Indemnitee's Sole Negligence or Willful Misconduct Is Against Public Policy

[1] FORM

[2] Comments

[a] Use of Form

[b] Definition of Construction Contract

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Void Indemnity Provisions in Construction Contracts

§ 115.42A Opposing Contention That Indemnitee Is Entitled to Indemnification Under Express Indemnity Agreement--Clause in Residential Construction Contract [Civ. Code § 2782] Providing for Indemnity of Builder or Contractor by Subcontractor for Negligence of Builder or Contractor Is Unenforceable

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

§ 115.43 Opposing Contention That Indemnitee Is Entitled to Indemnification Under Express Indemnity

Agreement--Agreement Does Not Provide for Recovery of Costs of Defense Voluntarily Assumed by Indemnitee

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Cost of Indemnitee's Voluntary Defense of Third-Party Claim Not Recoverable

§ 115.44 Opposing Contention That Indemnitee Is Entitled to Indemnification Under Express Indemnity Agreement--Licensing Statute Bars Recovery by Unlicensed Contractors/Developers [Bus. & Prof. Code § 7031]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[3] Discussion of Authorities

[a] Express Contractual Indemnity Unavailable Between Unlicensed Contractor/Developer and Subcontractor

§§ 115.45-115.59 [Reserved]

§ 115.60 Supporting Contention That Indemnitee Is Entitled to Partial Indemnification Under Principles of Comparative Indemnity--Tortfeasor May Seek Comparative Indemnity To Apportion Liability In Proportion to Fault

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Comparative Partial Indemnity Authorized

[b] Tortfeasor's Right to Assign Indemnity Cause of Action

[c] Award of Damages Directly to Assignee

§ 115.61 Supporting Contention That Indemnitee Is Entitled to Partial Indemnification Under Principles of Comparative Indemnity--Comparative Indemnity Is Available From Subsequent Medical Malpractice Tortfeasor

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Subsequent Medical Malpractice as Basis for Comparative Indemnity

§ 115.62 Supporting Contention That Indemnitee Is Entitled to Partial Indemnification Under Principles of Comparative Indemnity--Limitations Period for Filing Indemnity Action Against Medical Malpractice Tortfeasor Tolled by Notice Provisions of Code Civ. Proc. § 364(d)

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

[3] Discussion of Authorities

[a] MICRA Tolling Period Applies to Non-MICRA Limitations Period Applicable in Equitable Indemnity Action

§ 115.63 Supporting Contention That Indemnitee Is Entitled to Partial Indemnification Under Principles of Comparative Indemnity--Right of Comparative Indemnity Is Not Precluded by Indemnity Agreement With Limited Scope

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Limited Scope of Indemnity Agreement

[4] Additional Authorities

[a] Limited Scope of Indemnity Agreement

§ 115.64 Supporting Contention That Indemnitee Is Entitled to Partial Indemnification Under Principles of Comparative Indemnity--Shortfall Is to Be Apportioned According to Comparative-Fault Ratio of Remaining Codefendants

[1] FORM

[2] Comments

[a] Use of Form

[b] Shortfall Limited to Economic Damages

[3] Discussion of Authorities

[a] Shortfall Caused by Insolvent Tortfeasor

[b] Shortfall Caused Because Comparative Indemnity Is Barred Against Tortfeasor Who Entered Into Good-Faith Settlement

§ 115.65 Supporting Contention That Indemnitee Is Entitled to Partial Indemnification Under Principles of Comparative Indemnity--Comparative Indemnity Applies Between Negligent and Strictly Liable Cotortfeasors

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Comparative Indemnity Available Between Negligent and Strictly Liable Tortfeasors

[b] Comparative Indemnity Available Between Unlicensed Contractor/Developer and Subcontractor

[4] Additional Authorities

[a] Comparative Indemnity Available Between Negligent and Strictly Liable Tortfeasors

§ 115.66 Supporting Contention That Indemnitee Is Entitled to Partial Indemnification Under Principles of Comparative Indemnity--Comparative Indemnity Is Available From Nonsettling Concurrent Tortfeasors in Favor of Settling Tortfeasors

[1] FORM

[2] Comments

[a] Use of Form

[b] Settlements and Proposition 51

[3] Discussion of Authorities

[a] Right of Settling Tortfeasor to Pursue Claim for Comparative Indemnity

§ 115.67 Supporting Contention That Indemnitee Is Entitled to Partial Indemnification Under Principles of Comparative Indemnity--Comparative Indemnity Is Available From Tortfeasor Not Sued by Tort Victim in Favor of Defendant Tortfeasor

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Cross Complaint for Indemnity Against Tortfeasor Not Sued By Tort Victim

[b] Separate Action for Comparative Indemnity Against Tortfeasor Not Sued by Tort Victim

[c] Comparative Indemnity Available Despite Statute of Limitations Bar to Tort Victim's Action

[4] Additional Authorities

[a] Comparative Indemnity Available Despite Statute of Limitations Bar to Tort Victim's Action

§ 115.68 Supporting Contention That Indemnitee Is Entitled to Partial Indemnification Under Principles of Comparative Indemnity--Collateral Estoppel Principles Do Not Preclude Comparative Indemnity Despite Finding in Pretrial Proceeding That Indemnitor Was Not Liable to Plaintiff

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Different Theory of Liability

[b] Lack of Privity

§ 115.69 Opposing Contention That Indemnitee Is Entitled to Partial Indemnification Under Principles of Comparative Indemnity--No Right of Comparative Indemnity Exists If Parties Are Not Jointly and Severally Liable for Loss Incurred

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Joint and Several Liability Required

[b] No Right of Indemnity If Indemnitor Is Not Liable to Tort Victim

[c] Lack of Duty to Tort Victim

[d] No Right of Indemnity If Indemnitee Is Not Liable to Tort Victim

[e] No Right of Indemnity From Tort Victim

[f] Equitable Indemnity Not Available to Malpractice Tortfeasor

[g] Contractual Duties Owed by Indemnitor to Tort Victim Not Basis for Comparative Indemnity to Tortfeasor

[4] Additional Authorities

[a] Joint and Several Liability Required

[b] Contractual Duties Owed by Indemnitor to Tort Victim Not Basis for Comparative Indemnity to Tortfeasor

§ 115.70 Opposing Contention That Indemnitee Is Entitled to Partial Indemnification Under Principles of Comparative Indemnity--No Right of Comparative Indemnity Exists if Neither Party Is at Fault

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[3] Discussion of Authorities

[a] No Indemnity Without Fault

§ 115.71 Opposing Contention That Indemnitee Is Entitled to Partial Indemnification Under Principles of Comparative Indemnity [Civ. Code § 1431 et seq.]--Statutory Immunity from Liability Precludes Assignment of Comparative Fault for Non-Economic Damages [Civ. Code § 1714.45]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] No Right of Indemnity for Non-Economic Damages if Indemnitor Is Statutorily Immune From Liability

§ 115.71A Opposing Contention That Indemnitee Is Entitled to Partial Indemnification Under Principles of Comparative Indemnity [Civ. Code § 1431 et seq.]--Party Liable for Intentional Tort Not Entitled to Apportionment of Liability for Noneconomic Damages Based on Negligence of Another Party

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Liability for Intentional Tort Not Subject to Apportionment

§ 115.71B Opposing Contention That Indemnitee is Entitled to Partial Indemnification Under Principles of Comparative Indemnity [Civ. Code § 1431 et seq.]--Party Vicariously Liable Under Doctrine of Nondelegable Duty for Negligence of Another Not Entitled to Apportionment of Liability for Noneconomic Damages

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Hirer Liable for Nondelegable Duty Not Entitled to Apportionment of Liability for Noneconomic Damages

§ 115.72 Opposing Contention That Indemnitee Is Entitled to Partial Indemnification Under Principles of Comparative Indemnity--Comparative Indemnity Should Be Denied Because of Public Policy or Equitable Considerations

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Public Policy

[b] Equitable Considerations

[c] Attorney-Client Relationship

[4] Additional Authorities

[a] Equitable Considerations

[b] Attorney-Client Relationship

§ 115.73 Opposing Contention That Indemnitee Is Entitled to Partial Indemnification Under Principles of Comparative Indemnity--Comparative Indemnity Is Not Available Because Parties Have Entered Into Express Indemnity Agreement

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Rights Determined by Contract

§ 115.74 Opposing Contention That Indemnitee Is Entitled to Partial Indemnification Under Principles of Comparative Indemnity--Claim for Comparative Indemnity Against Injured Person's Employer Is Barred Absent Written Agreement [Lab. Code § 3864]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Lab. Code § 3864 Applies to Comparative Indemnity

[b] Requirement That Agreement Be Signed Before Injury

[c] Agreement Not Executed by Performance

[d] Lab. Code § 3864 Precludes Indemnity From Employer's Public Liability Carrier

§ 115.75 Opposing Contention That Indemnitee Is Entitled to Partial Indemnification Under Principles of

Comparative Indemnity--Collateral Estoppel Principles Preclude Comparative Indemnity Because Indemnitor Was Found to Be Not Liable to Plaintiff in Pretrial Proceeding

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Comparative Indemnity Precluded by Collateral Estoppel

[4] Additional Authorities

[a] Comparative Indemnity Precluded by Collateral Estoppel

§ 115.76 Opposing Contention That Indemnitee is Entitled to Partial Indemnification Under Principles of Comparative Indemnity for Amounts Paid by Indemnitee's Insurer

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] No Right to Indemnity for Amounts Paid by Insurer

§§ 115.77-115.89 [Reserved]

§ 115.90 Supporting Contention That Indemnitee Is Entitled to Total Indemnification Under Principles of Comparative Indemnity--Right to Total Indemnity May Exist Under Principles of Comparative Fault

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Implied Total Indemnity

[b] Vicarious Liability

§ 115.91 Supporting Contention That Indemnitee Is Entitled to Total Indemnification Under Principles of Comparative Indemnity--Right of Total Indemnity May Be Implied From Breach of Contractual Duty

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Implied Contractual Indemnity as Form of Equitable Indemnity

[b] Negligent Performance of Contractual Duty

[c] Total Indemnity Implied From Contract

§ 115.92 Supporting Contention That Indemnitee Is Entitled to Total Indemnification Under Principles of Comparative Indemnity--Right of Total Indemnity in Favor of Public Entity Indemnitee May Be Implied From Licensor-Licensee Relationship

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Licensor-Licensee Relationship With Public Entity as Basis for Implied Indemnity

§ 115.93 Supporting Contention That Indemnitee Is Entitled to Total Indemnification Under Principles of Comparative Indemnity--Right of Total Indemnity Against Employee or Agent and in Favor of Indemnitee Who Is Employer or Principal Arises From Employment or Agency Relationship

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Employer-Employee Relationship as Basis for Implied Indemnity

[b] Principal-Agent Relationship as Basis for Implied Indemnity

§ 115.94 Supporting Contention That Indemnitee Is Entitled to Total Indemnification Under Principles of Comparative Indemnity--Right of Total Indemnity Against Employer or Principal and in Favor of Indemnitee Who Is Employee or Agent Arises From Employment or Agency Relationship

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Employee's Right to Indemnity From Employer

[b] Agent-Principal Relationship as Basis for Implied Indemnity

[4] Additional Authorities

[a] Employee's Right to Indemnity From Employer

§ 115.95 Supporting Contention That Indemnitee Is Entitled to Total Indemnification Under Principles of Comparative Indemnity--Right of Total Indemnity Is Available From Intentional Tortfeasor in Favor of Negligent Indemnitee

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Total Indemnity From Intentional Tortfeasor

§ 115.96 Supporting Motion by Indemnitee for Award of Attorney's Fees in Action for Implied Total Indemnity [Code Civ. Proc. § 1021.6]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Attorney's Fees Incurred in Defending or Bringing Third-Party Suit Allowed to Person Who Prevails on Claim for Implied Indemnity

[b] Defendant Prevailing in Underlying Action Is Party Prevailing on Claim for Implied Indemnity

[c] Defendant Found Liable as Matter of Law for Acts of Indemnitor in Underlying Action Is Without Fault

[d] "Principal Case" Is Action in Which Defendant Incurred Attorney's Fees

§ 115.97 Opposing Contention That Indemnitee is Entitled to Total Indemnification Under Principles of Comparative Indemnity--Indemnitor Cannot be Liable for Implied Contractual Indemnity When Indemnitor Has Complete Defense Against Liability to Injured Third Party

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Implied Contractual Indemnity Barred When Indemnitor Cannot be Held Directly Liable to Injured Third Party

§§ 115.98- 115.109 [Reserved]

§ 115.110 Supporting Contention That Nontort Obligor Is Entitled to Contribution [Civ. Code § 1432]--Party to Joint or Joint and Several Obligation Has Paid More Than Proportionate Share of Obligation

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Contribution Among Obligors

§ 115.111 Supporting Motion for Contribution [Code Civ. Proc. §§ 882, 883]--Nontort Judgment Debtor Who Has Satisfied Judgment May Seek Contribution from Judgment Debtor Who Is Jointly Liable for Judgment

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Proportionate Liability

§ 115.112 Opposing Contention That Nontort Obligor Is Entitled to Contribution [Civ. Code § 1432]--No Showing of Payment on Underlying Joint or Joint and Several Obligation in Excess of Proportionate Share

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] No Payment

[b] Payment of No More Than Proportionate Share

§ 115.113 Opposing Contention That Nontort Obligor Is Entitled to Contribution [Civ. Code § 1432]--Obligation Is Several Only and Not Joint

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] No Right to Contribution on Several Obligation

[b] Several Obligation

§ 115.114 Opposing Contention That Nontort Obligor Is Entitled to Contribution [Civ. Code § 1432]--Party From Whom Contribution Is Sought Has Paid Proportionate Share of Joint Obligation

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Payment of Proportionate Share

§§ 115.115- 115.129 [Reserved]

§ 115.130 Supporting Motion for Contribution [Code Civ. Proc. § 878]--Tort Judgment Debtor Is Entitled to Contribution From Cotortfeasor Judgment Debtors According to Comparative-Fault Principles

[1] FORM

[2] Comments

[a] Use of Form

[b] Motion for Contribution or Action for Comparative Indemnity

[c] Service of Notice of Motion and Supporting Papers

[3] Discussion of Authorities

[a] Principles of Comparative Fault Applicable to Contribution

§§ 115.131-115.149 [Reserved]

§ 115.150 Supporting Contention That Good-Faith Settlement Precludes Indemnity or Contribution--Good-Faith Settlement [Code Civ. Proc. §§ 877(b), 877.6(c)] Bars Claim for Comparative Indemnity or Contribution

[1] FORM

[2] Comments

[a] Use of Form

[b] Applicability of Form to Contribution

[c] Good-Faith Settlements and Proposition 51

[3] Discussion of Authorities

[a] Effect of Good-Faith Settlement

[b] "Joint Tortfeasors" Defined

[c] Claims Barred If Essentially Indemnification Claims

[d] Insurer May Be Precluded From Seeking Equitable Indemnity

[e] Good Faith of Out-of-State Settlements May Be Determined

[f] No Requirement That Tortfeasors Be Defendants in Single Action

[4] Additional Authorities

[a] Claims Barred if Essentially Indemnification Claims

§ 115.151 Supporting Contention That Good Faith Settlement Precludes Indemnity or Contribution--Good Faith Settlement [Code Civ. Proc. § 877.6(c)] Bars Claim for Total Comparative Indemnity

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Claim for Total Indemnity

§ 115.152 Supporting Contention That Good-Faith Settlement Precludes Indemnity or Contribution--Settlement Made After Jury in Bifurcated Trial Determines Liability but Before Jury Assesses Damages Is "Before Verdict or Judgment"

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Settlement Made Before Jury in Bifurcated Trial Assesses Damages Based on Finding of Liability Is "Before Verdict or Judgment"

§ 115.153 Opposing Contention That Good-Faith Settlement Precludes Indemnity or Contribution--Good-Faith Settlement [Code Civ. Proc. § 877.6] Does Not Bar Action for Express Contractual Indemnity

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Good-Faith Settlement Does Not Bar Right to Express Contractual Indemnity

§ 115.154 Opposing Contention That Good-Faith Settlement Precludes Indemnity or Contribution--Good-Faith Settlement Made After Verdict or Judgment Does Not Bar Indemnity Rights [Code Civ. Proc. §§ 877(b), 877.6]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Settlement Is Required to Be Made Before Verdict or Judgment

[4] Additional Authorities

[a] Settlement Is Required to Be Made Before Verdict or Judgment

§ 115.155 Opposing Contention That Good-Faith Settlement Precludes Indemnity or Contribution--Good-Faith Settlement [Code Civ. Proc. § 877.6] Is Not Binding on Party Who Had No Opportunity to Be Heard

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Finding of Good-Faith Settlement Not Binding on Unnamed Joint Tortfeasor or Co-Obligor Who Had No Opportunity to Be Heard

§ 115.156 Supporting Motion to Deny Judicial Confirmation of Good Faith of Settlement [Code Civ. Proc. § 877.6]--Settlement Is Not In Reasonable Range of Settling Party's Liability

[1] FORM

[2] Comments

[a] Use of Form

[b] Burden of Proof and Evidentiary Material

[c] Applicability of Form to Contribution

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Reasonable-Range Requirement

[b] Settlement Involving Dismissal Based On Determination of Lack of Liability

[c] Computation Involving Error of Law

[d] Settling Defendant's Potential Culpability Should be Considered

[4] Additional Authorities

[a] Reasonable-Range Requirement

[b] Computation Involving Error of Law

§ 115.157 Supporting Motion to Deny Judicial Confirmation of Good Faith of Settlement [Code Civ. Proc. § 877.6]--Settlement Is Aimed At Injuring Interests of Nonsettling Parties

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Requirement of Good Faith Extends to Nonsettling Parties

[b] Intent to Injure Nonsettling Defendants

[c] Tactical Considerations Unrelated to Liability

[4] Additional Authorities

[a] Intent to Injure Nonsettling Defendants

§ 115.158 Supporting Motion to Deny Judicial Confirmation of Good Faith of Settlement [Code Civ. Proc. § 877.6]--Sliding-Scale Agreement Must Meet Tech-Bilt Standards

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Sliding Scale Settlement Agreements Must Meet Tech-Bilt Standards

§ 115.159 Supporting Motion to Deny Judicial Confirmation of Good Faith of Settlement [Code Civ. Proc. § 877.6]--Settling Parties Have Not Provided Sufficient Information Regarding Allocation of Settlement

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Inadequate Information Regarding Settlement's Apportionment of Damages

[b] Settlement Sought to Be Confirmed Cannot Be Withheld on Confidentiality Grounds

[4] Additional Authorities

[a] Inadequate Information Regarding Settlement's Apportionment of Damages

§ 115.160 Supporting Motion for Judicial Confirmation of Good Faith of Settlement [Code Civ. Proc. § 877.6]--Amount Represents Reasonable Apportionment Based on Information Available At Time of Settlement

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Time of Evaluation

[4] Additional Authorities

§ 115.161 Supporting Motion for Judicial Confirmation of Good Faith of Settlement [Code Civ. Proc. § 877.6]--Settlement With Underinsured Judgment-Proof Tortfeasor for Liability Policy Limits Is in Good Faith Regardless of Whether Settlement Is in Reasonable Range

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Financial Condition of Settling Party Is Factor to Be Considered

[b] Underinsured and Judgment-Proof Tortfeasors

§ 115.162 Supporting Motion for Judicial Confirmation of Good Faith of Settlement [Code Civ. Proc. § 877.6]--Provision Requiring Settling Tortfeasor to Participate at Trial Does Not Preclude Finding of Good Faith

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Settling Defendant May Participate in Trial

[b] Participation at Trial by Settling Defendants Does Not Deprive Non Settling Defendant's of Fair Trial

§ 115.163 Supporting Contention That Indemnitee's Payment Precludes Indemnity or Contribution--Payment Was Made Voluntarily, Without Regard to Legal Liability

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] No Indemnity for Voluntary Payment

[b] No Contribution for Voluntary Payment

§ 115.164 Opposing Contention That Indemnitee's Payment Precludes Indemnity or Contribution--Good-Faith Settlement Does Not Constitute Voluntary Payment

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Good-Faith Settlement Is Not Voluntary Payment

[b] Settlement Following Refusal of Tendered Defense

[4] Additional Authorities

[a] Settlement Following Refusal of Tendered Defense

§ 115.165 Opposing Contention That Indemnitee's Payment Precludes Indemnity or Contribution--Waiver of Statute of Limitations Does Not Constitute Voluntary Payment

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Valid Waiver of Statute of Limitations Does Not Result in Voluntary Payment

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§ 115.01 Scope of Chapter

This chapter contains memoranda for use with regard to the loss-sharing or loss-shifting doctrines of indemnity and contribution. Subpart A of Part II relates to express indemnity agreements, and contains forms of memoranda supporting [*see §§ 115.30 -115.38*] and opposing [*see §§ 115.39 -115.44*] the contention that an indemnitee may recover under an express contractual indemnity agreement.

Subpart B of Part II relates to comparative indemnity, or implied equitable indemnity. It contains forms of memoranda supporting [*see §§ 115.60 -115.68*] and opposing [*see §§ 115.69 -115.76*] the contention that an indemnitee may recover partial indemnity under a theory of comparative indemnity. It also contains forms of memoranda supporting [*see §§ 115.90 -115.95*] the contention that an indemnitee may recover total indemnity under a theory of comparative indemnity, and a form of memorandum supporting a motion by the indemnitee for an award of attorney's fees in an action for total indemnity [*see § 115.96*].

Subpart C of Part II relates to contribution. It contains forms of memoranda supporting [*see § 115.110*] and opposing [*see §§ 115.112 -115.114*] the contention that a nontort obligor is entitled to contribution, and a form of memorandum supporting a motion for contribution under *Code Civ. Proc. §§ 882, 883* by a nontort obligor [*see § 115.111*]. It also contains a form of memorandum supporting a motion by a tort judgment debtor for contribution under *Code Civ. Proc. § 878* [*see § 115.130*].

Subpart D of Part II considers the effect of a settlement entered into by the plaintiff and one or more, but less than all, defendants on a claim for indemnity or contribution. It contains forms of memoranda supporting [*see §§ 115.150 -115.152*] and opposing [*see §§ 115.153 -115.155*] the contention that a good-faith settlement precludes recovery under a claim for indemnity or contribution, and forms of memoranda supporting [*see §§ 115.156 -115.159*] and opposing [*see §§ 115.160 -115.162*] a motion for judicial confirmation of the good faith of a settlement. It also contains forms of memoranda supporting [*see § 115.163*] and opposing [*see §§ 115.164, 115.165*] the contention that a "voluntary payment" precludes recovery under a claim for indemnity or contribution.

Although an insurance policy is an express indemnity agreement, the many requirements of the Insurance Code make insurance policies different from other indemnity agreements. For discussion of insurance contracts, see Ch. 120,

Insurance . Bonds and guarantee agreements are covered in Ch. 222, *Suretyship* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewTortsProcedureMultiple DefendantsIndemnityGeneral OverviewTortsProcedureMultiple DefendantsIndemnityNoncontractual IndemnityTortsProcedureSettlementsMultipartiesGeneral OverviewTortsProcedureSettlementsMultipartiesContribution

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11-115 California Points & Authorities § 115.02

§ 115.02 Governing Law

Civ. Code § 2772 et seq. governs the interpretation of express indemnity agreements. The interpretation of express indemnity agreements is also governed by *Civ. Code § 1549 et seq.*, the statutes applicable to interpretation of contracts generally. Public-policy limitations on contracts for indemnity are set forth in *Civ. Code §§ 1668* (contracts exempting one from liability for fraud, willful injury, or violation of law), 2773 (agreement to indemnify against unlawful act), 2782-2782.5 (construction contracts), and 2784.5 (hauling, trucking, or cartage contracts).

The right of comparative indemnity (also referred to as implied equitable indemnity) is a judicially created doctrine. It has its antecedents in the landmark California Supreme Court case of *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226* , which abolished contributory negligence as a complete bar to recovery in California, and introduced the concept of comparative negligence in its place. *Subsequently, in American Motorcycle Ass'n v. Superior Court (1978) 20 Cal. 3d 578, 598, 146 Cal. Rptr. 182, 578 P.2d 899* [*see § 115.60*], the California Supreme Court restructured the right of implied equitable indemnity from a method to effect a complete shift of loss depending on relative degrees of culpability to a method to achieve equitable apportionment of loss among multiple tortfeasors based on principles of comparative fault.

A general right of contribution among joint obligors is provided for in *Civ. Code § 1432*. Contribution among joint judgment debtors is governed by *Code Civ. Proc. §§ 875-883*. Contribution among judgment debtors other than joint tortfeasors is governed by *Code Civ. Proc. §§ 881-883*.

Contribution among joint tortfeasor judgment debtors is governed by *Code Civ. Proc. §§ 875-880*. However, various of these statutes predate the advent of comparative negligence and comparative equitable indemnity as set forth in *American Motorcycle Association v. Superior Court* [*see, e.g., Code Civ. Proc. §§ 875, 876*]. The continuing validity of these statutes to the extent that they conflict with principles of comparative negligence and comparative indemnity is questionable [*see Safeway Stores, Inc. v. Nest-Kart (1978) 21 Cal. 3d 322, 327-328, 146 Cal. Rptr. 550, 579 P.2d 441* ; *see also §§ 115.04, 115.130[3]*]. The effect of a release of one of two or more joint debtors on contribution rights is stated in *Civ. Code § 1543*.

The Fair Responsibility Act of 1986 (Proposition 51), which abolishes the rule of joint and several liability with regard

to certain "noneconomic" damages, is found in *Civ. Code §§ 1431.1-1431.5* [*see § 115.09*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract InterpretationGeneral OverviewContracts LawDebtor & Creditor RelationsTortsNegligenceDefensesComparative NegligenceGeneral OverviewTortsNegligenceDefensesContributory NegligenceGeneral OverviewTortsProcedureMultiple DefendantsIndemnityGeneral Overview

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§ 115.03 Page Limits on Memoranda

Generally, a supporting or opposing memorandum must not exceed 15 pages in length, or, in the case of a motion for summary judgment or summary adjudication, 20 pages in length. A reply or closing memorandum may not exceed 10 pages in length [*see Cal. Rules of Ct., Rule 3.1113(d)*]. Any party desiring to file a longer memorandum must obtain leave of court [*see Cal. Rules of Ct., Rule 3.1113(e)*]. For further discussion of the page limitations under *Cal. Rules of Ct., Rule 3.1113*, and of other basic format requirements of memoranda, see *Ch. 1, Writing Legal Memoranda and Briefs § 1.05*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentSupporting MaterialsMemoranda of LawTortsNegligenceDefensesComparative NegligenceGeneral OverviewTortsNegligenceDefensesComparative NegligenceMultiple PartiesIndemnityTortsProcedureMultiple DefendantsContributionGeneral OverviewTortsProcedureMultiple DefendantsIndemnityGeneral Overview

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§ 115.04 Indemnity and Contribution Distinguished

Indemnity is an obligation resting on one party (the indemnitor) to make good a loss or damage that another party (the indemnitee) has incurred [*Rossmoor Sanitation, Inc. v. Pylon, Inc. (1975) 13 Cal. 3d 622, 628, 119 Cal. Rptr. 449, 532 P.2d 97* ; *see Civ. Code § 2772*]. Indemnity may operate to effect a complete shift of loss from the indemnitee to the indemnitor, or it may operate to effect a partial shifting of loss according to the respective shares of comparative fault of the various tortfeasors [*Far W. Fin. Corp. v. D & S Co. (1988) 46 Cal. 3d 796, 808, 251 Cal. Rptr. 202, 760 P.2d 399* ; *see § 115.06*]. In contrast, contribution generally distributes a loss equally among all who are liable, each bearing a pro rata share [*Herrero v. Atkinson (1964) 227 Cal. App. 2d 69, 73, 38 Cal. Rptr. 490]* . For example, if there are two judgment debtors, under contribution, each would ultimately pay half of the judgment [*see Code Civ. Proc. § 876*]. Under indemnity, the loss would either be entirely shifted from one to the other, or each would bear the percent of the loss that corresponded to that defendant's percentage of fault as found by the trier of fact.

Contribution is a right that continues to apply to nontort judgment debtors [*see Code Civ. Proc. §§ 881-883*]. *Prior to American Motorcycle Ass'n v. Superior Court (1978) 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899* , a right of contribution existed among tort, as well as nontort judgment debtors [*see, e.g., Caterpillar Tractor Co. v. Teledyne Indus., Inc. (1975) 53 Cal. App. 3d 693, 698, 126 Cal. Rptr. 455]* , and California statutes continue to provide for a right of contribution among joint tortfeasors [*see Code Civ. Proc. §§ 875-878*]. Since the decision in *American Motorcycle*, most courts have construed the word "contribution" in these statutes as now referring to the right of comparative indemnity created by the California Supreme Court in that case [*see Safeway Stores, Inc. v. Nest-Kart (1978) 21 Cal. 3d 322, 327-328, 146 Cal. Rptr. 550, 579 P.2d 441* ; *see also § 115.38[3][a*]]. Courts have essentially ignored *Code Civ. Proc. § 876(a)*, which continues to provide for pro rata contribution among tortfeasor judgment debtors. However, at least two courts have found *Code Civ. Proc. § 876(a)* to still provide for a pro rata distribution of loss among tortfeasors in some situations [*see Coca-Cola Bottling Co. v. Lucky Stores, Inc. (1992) 11 Cal. App. 4th 1372, 1378-1381, 14 Cal. Rptr. 2d 673* ; *Lamberton v. Rhodes-Jamieson (1988) 199 Cal. App. 3d 748, 750-755, 245 Cal. Rptr. 162]* .

Legal Topics:

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

TortsNegligenceDefensesComparative NegligenceGeneral OverviewTortsNegligenceDefensesComparative NegligenceMultiple PartiesIndemnityTortsProcedureMultiple DefendantsContributionGeneral OverviewTortsProcedureMultiple DefendantsIndemnityGeneral Overview

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11-115 California Points & Authorities § 115.05

§ 115.05 Express and Implied Indemnity

Under California law, a right of indemnity is either express [*see § 115.30* et seq.] or implied [*see Rossmoor Sanitation, Inc. v. Pylon, Inc. (1975) 13 Cal. 3d 622, 628, 119 Cal. Rptr. 449, 532 P.2d 97]* . In *Bay Dev. Ltd. v. Superior Court (1990) 50 Cal. 3d 1012, 1028-1029, 269 Cal. Rptr. 720, 791 P.2d 290* , the California Supreme Court clarified that all implied indemnity finds its source in equitable considerations brought into play either by contractual language not specifically dealing with indemnification or by the equities of the particular case. That is, all implied indemnity, including implied contractual indemnity, is equitable indemnity [*see § 115.60* et seq.]. In *Far W. Fin. Corp. v. D & S Co. (1988) 46 Cal. 3d 796, 808, 251 Cal. Rptr. 202, 760 P.2d 399* , the Court held that there is a single equitable or "comparative" indemnity doctrine in California, which permits partial indemnification on a comparative fault basis, or a total shift of liability, depending on the facts and circumstances of a given case [*see § 115.06*]. Thus, "implied" indemnity, "equitable" indemnity, and "comparative" indemnity, or any combination of these terms, refers to the same doctrine [*see Bay Dev. Ltd. v. Superior Court (1990) 50 Cal. 3d 1012, 1028-1029, 269 Cal. Rptr. 720, 791 P.2d 290* ; *Far W. Fin. Corp. v. D & S Co. (1988) 46 Cal. 3d 796, 808, 251 Cal. Rptr. 202, 760 P.2d 399]* . The term "comparative indemnity" is used by the Supreme Court to describe the doctrine and will be the principal one used in this chapter.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDefensesComparative NegligenceGeneral OverviewTortsNegligenceDefensesComparative NegligenceGeneral OverviewTortsNegligenceDefensesComparative NegligenceMultiple PartiesIndemnityTortsNegligenceDefensesComparative NegligenceMultiple PartiesIndemnityTortsProcedureMultiple DefendantsIndemnityContractual Indemnity

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11-115 California Points & Authorities § 115.06

§ 115.06 Total and Partial Indemnity

Express contractual indemnity operates to effect a complete shift of the loss from the indemnitee to the indemnitor [*Rodriguez v. McDonnell Douglas Corp. (1978) 87 Cal. App. 3d 626, 676, 151 Cal. Rptr. 399]* . By contrast, comparative indemnity is based on principles of comparative fault. A concurrent tortfeasor is entitled to obtain partial indemnity from other concurrent tortfeasors for that part of a settlement or judgment paid to a tort plaintiff that exceeds the indemnitee's comparative share of liability to the plaintiff [*American Motorcycle Assn. v. Superior Court of Los Angeles County (1978) 20 Cal. 3d 578, 598]* .

Although the operative principle of comparative indemnity is fair allocation and apportionment of loss, comparative indemnity includes the entire range of possible apportionments, from no right to any indemnity to a right to complete indemnity [*Far W. Fin. Corp. v. D & S Co. (1988) 46 Cal. 3d 796, 808, 251 Cal. Rptr. 202, 760 P.2d 399* ; *see Standard Pac. of San Diego v. A.A. Baxter Corp. (1986) 176 Cal. App. 3d 577, 587-588, 222 Cal. Rptr. 106]* . Thus, under appropriate circumstances, a complete shift of a loss may be accomplished under either express or comparative indemnity principles (*see §§ 115.90 -115.95*).

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDefensesComparative NegligenceGeneral OverviewTortsNegligenceDefensesComparative NegligenceMultiple PartiesIndemnityTortsNegligenceDefensesComparative NegligenceMultiple PartiesRelease & SettlementTortsProcedureMultiple DefendantsIndemnityGeneral OverviewTortsProcedureMultiple DefendantsIndemnityContractual Indemnity

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11-115 California Points & Authorities § 115.07

§ 115.07 Effect of Good-Faith Settlement

A tortfeasor may be discharged from any liability for all comparative indemnity claims, including claims seeking total indemnity, by entering into a good-faith settlement with the tort plaintiff [*Bay Dev. Ltd. v. Superior Court (1990) 50 Cal. 3d 1012, 1028-1035, 269 Cal. Rptr. 720, 791 P.2d 290* ; *Far W. Fin. Corp. v. D & S Co. (1988) 46 Cal. 3d 796, 817, 251 Cal. Rptr. 202, 760 P.2d 399* ; [*Code Civ. Proc. § 877(b)*; *see Code Civ. Proc. § 877.6*; *see also § 115.151*]. However, settlement has no effect on a right to indemnity arising from an express indemnity agreement [*Bay Dev. Ltd. v. Superior Court (1990) 50 Cal. 3d 1012, 1032, 269 Cal. Rptr. 720, 791 P.2d 290* ; *C.L. Peck Contractors v. Superior Court (1984) 159 Cal. App. 3d 828, 834-835, 205 Cal. Rptr. 754* ; *see § 115.153*]. An indemnity claim based on statute also survives a good-faith settlement by the statutory indemnitor [*Kantor v. Housing Auth. (1992) 8 Cal. App. 4th 424, 430-431, 10 Cal. Rptr. 2d 695* (allowing indemnity claimed under *Gov. Code § 825*, which provides for public entity's indemnification of employee or former employee)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsIndemnityTortsProcedureMultiple DefendantsIndemnityGeneral OverviewTortsProcedureMultiple DefendantsIndemnityContractual IndemnityTortsProcedureSettlementsGeneral Overview

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11-115 California Points & Authorities § 115.08

§ 115.08 Overpayment by Settling Defendant

A defendant who enters into a good-faith settlement for more than what it believes to be its fair share of liability, or for more than what the trier of fact ultimately determines its fair share to be, may seek indemnity from nonsettling tortfeasors [*Far W. Fin. Corp. v. D & S Co. (1988) 46 Cal. 3d 796, 801-802, 251 Cal. Rptr. 202, 760 P.2d 399]* . A settling defendant who overpays may seek equitable indemnity from concurrent tortfeasors or may assign its indemnity claims to the plaintiff [*Bush v. Superior Court (1992) 10 Cal. App. 4th 1374, 13 Cal. Rptr. 2d 382]* .

Legal Topics:

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

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11-115 California Points & Authorities § 115.09

§ 115.09 Effect of Fair Responsibility Act of 1986

Under the Fair Responsibility Act of 1986 (Proposition 51) [*Civ. Code §§ 1431.1-1431.5*], the doctrine of joint and several liability does not extend to all damages. In actions based on principles of comparative fault for personal injury, property damages, or wrongful death, the liability of each defendant for noneconomic damages is several only and is not joint, so that each defendant is liable to the plaintiff only for that proportion of the plaintiff's noneconomic damages that is attributable to the defendant under comparative fault principles [*Civ. Code § 1431.2(a)* ; *see Civ. Code § 1431.2(b)(2)* (definition of "noneconomic" damages). Although the comparative fault of all tortfeasors must be considered, including the fault of those tortfeasors who are immune from suit [*DaFonte v. Up-Right, Inc. (1992) 2 Cal. 4th 593, 601-604, 7 Cal. Rptr. 2d 238, 828 P.2d 140* (fault of employer must be considered, even though immune from suit under workers' compensation law)], a party who owes no duty of care as a matter of law cannot be assigned a share of fault for purposes of reducing a tortfeasor's liability for noneconomic damages [*Richards v. Owens-Illinois, Inc. (1997) 14 Cal. 4th 985, 1000-1001, 60 Cal. Rptr. 2d 103, 928 P.2d 1181* (when tobacco companies owed no duty due to statutory protection, asbestos manufacturer could not shift share of fault for causing plaintiff's illness); *Ford v. Polaris Industries, Inc. (2006) 139 Cal. App. 4th 755, 778-779, 43 Cal. Rptr. 3d 215* (when party owed no duty under primary assumption of risk doctrine, no portion of fault could be assigned to that party); *see also Munoz v. City of Union City (2007) 148 Cal. App. 4th 173, 182, 55 Cal. Rptr. 3d 393* (in absence of statutory basis for liability, public entity was not tortfeasor and could not be assigned percentage of fault); *but see Ovando v. County of Los Angeles (2008) 159 Cal. App. 4th 42, 71-72, 71 Cal. Rptr. 3d 415* (fault could be apportioned to public employees who were personally immune from liability for prosecutorial actions under *Gov. Code § 821.6*, as statute reflects no legislative determination that immune employee has breached no legal duty and bears no "fault" for any injury caused)]. Joint or concurrent tortfeasors remain jointly liable for a plaintiff's economic damages [*see Civ. Code §§ 1431, 1431.2(b)(1)* (definition of "economic" damages)].

The effect of Proposition 51 on indemnity rights under many circumstances will have to be determined by the courts. Particularly, there are unresolved issues with regard to the effect of settlement on indemnity rights under Proposition 51. For discussion of these issues, see *§§ 115.66[2][b]* and *115.150[2][c]*. As a general principle, prior indemnity law should still remain valid with regard to economic damages. However, there may no longer be indemnity rights with regard to noneconomic damages because defendants are no longer jointly liable for these damages, and indemnity is based on joint and several liability [*see Civ. Code § 1431.2(a)*; *Munoz v. Davis (1983) 141 Cal. App. 3d 420, 425, 190*

Cal. Rptr. 400 ; *see also § 115.69*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesGeneral OverviewTortsNegligenceDefensesAssumption of RiskElements & NaturePrimary Assumption of RiskTortsNegligenceDefensesComparative NegligenceGeneral OverviewTortsNegligenceDefensesComparative NegligenceMultiple PartiesGeneral OverviewTortsProcedureMultiple DefendantsJoint & Several Liability

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PART I. INTRODUCTION

11-115 California Points & Authorities § 115.10

§ 115.10 Proceedings to Enforce Indemnity Rights

Any party may obtain a determination of indemnity rights by filing a cross complaint for declaratory relief in an action brought by a third party [*People ex rel. Dep't of Transp. v. Superior Court (1980) 26 Cal. 3d 744, 758-760, 163 Cal. Rptr. 585, 608 P.2d 673* ; *see* *Valley Circle Estates v. VTN Consol., Inc. (1983) 33 Cal. 3d 604, 611-612, 189 Cal. Rptr. 871, 659 P.2d 1160* (noting that proper form of cross complaint for indemnity is one for declaratory relief); *Rimington v. General Accident Group of Ins. Cos. (1962) 205 Cal. App. 2d 394, 397, 23 Cal. Rptr. 40* (express indemnity by cross complaint); *Code Civ. Proc. §§ 428.10* (permissive cross complaints), 1060 (declaratory relief)]. However, this right to seek indemnity by cross complaint does not alter the general rule that indemnity rights do not accrue until the indemnitee suffers actual loss by paying a claim. Therefore, an indemnitee may also enforce indemnity rights in a subsequent action after paying the claim [*E.L. White, Inc. v. City of Huntington Beach (1978) 21 Cal. 3d 497, 506, 146 Cal. Rptr. 614, 579 P.2d 505* ; *see* *Mascarin Prof'l Pharmacy v. Hart (1970) 13 Cal. App. 3d 462, 464, 91 Cal. Rptr. 560]* . A party may also bring a separate action for a declaratory judgment as to contractual indemnity rights [*Indenco, Inc. v. Evans (1962) 201 Cal. App. 2d 369, 373, 374, 20 Cal. Rptr. 90]* .

Thus, either the indemnitee or the indemnitor could be a plaintiff, defendant, cross complainant, or cross defendant under a pleading for declaratory relief. The indemnitee might also be a plaintiff in a separate action for direct enforcement of indemnity rights, in which the indemnitor would be the defendant. Therefore, forms in this chapter have been cast as to be used by either the indemnitee or indemnitor, without further attempt to identify a status as a party.

A party who believes itself to be entitled to total comparative indemnity may be compelled to litigate its indemnity rights at a hearing to confirm a settlement as in good faith under *Code Civ. Proc. § 877.6*. If a settlement is confirmed between the potential indemnitor and the plaintiff, the indemnitee's rights are terminated. Therefore, the indemnitee must be prepared to present at the § 877.6 hearing the facts that justify or require a total shift of the loss to the indemnitor [*see* *Bay Dev. Ltd. v. Superior Court (1990) 50 Cal. 3d 1012, 1034-1035, 269 Cal. Rptr. 720, 791 P.2d 290* (implied contractual indemnity); *Far W. Fin. Corp. v. D & S Co. (1988) 46 Cal. 3d 796, 814-817, 251 Cal. Rptr. 202, 760 P.2d 399* (vicarious liability); *see §§ 115.90 -115.95*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsComplaintsCross-ComplaintsCivil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewCivil ProceduresPretrial JudgmentsGeneral OverviewCivil ProceduresPretrial JudgmentsJudgment on the Pleadings

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11-115 California Points & Authorities § 115.11

§ 115.11 Related Pleading and Practice Chapters

For a discussion and forms for use in indemnity actions and actions seeking contribution among joint nontort judgment debtors, see California Forms of Pleading and Practice. Ch. 300, *Indemnity and Contribution* (Matthew Bender). For forms for use with regard to settlement, see California Forms of Pleading and Practice, Ch. 520, *Settlement and Release* (Matthew Bender). For consideration of indemnity rights in the insurance field, California Forms of Pleading and Practice, see Ch. 308, *Insurance* (Matthew Bender). For consideration of indemnity rights under sureties and bonds, see California Forms of Pleading and Practice, Ch. 538, *Suretyship, Bonds, and Undertakings* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticePleadingsComplaintsCross-ComplaintsCivil ProceduresPretrial JudgmentsGeneral OverviewCivil ProceduresPretrial JudgmentsJudgment on the Pleadings

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11-115 California Points & Authorities § 115.12

§ 115.12 Related Points And Authorities Chapters

For a discussion and sample forms showing how to use the forms in this chapter to draft a complete memorandum or brief, and for further discussion of law and motion procedure and strategy, see Ch. 1, *Writing Legal Memoranda and Briefs* . For forms for the various procedural contexts within which the forms in this chapter may be used, see Ch. 61, *Cross Complaints* , Ch. 67, *Declaratory Relief* , Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* , and Ch. 221, *Summary Judgments* . For forms for use with regard to insurance policies, see Ch. 120, *Insurance* . For forms for use with regard to bonds and guaranty agreements, see Ch. 222, *Suretyship* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticePleadingsComplaintsCross-ComplaintsCivil ProceduresPretrial JudgmentsGeneral OverviewCivil ProceduresPretrial JudgmentsJudgment on the Pleadings

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11-115 California Points & Authorities §§ 115.13-115.29

[Reserved]

§§ 115.13[Reserved]

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A. Express Indemnity

11-115 California Points & Authorities § 115.30

§ 115.30 Supporting Contention That Indemnitee Is Entitled to Indemnification Under Express Indemnity Agreement--Parties May Contract for Total Indemnity, and Principles of Comparative Negligence Do Not Apply to Express Indemnity Agreements

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE COURT SHOULD GIVE FULL EFFECT TO THE EXPRESS INDEMNITY AGREEMENT BETWEEN THE PARTIES BECAUSE INDEMNITY RIGHTS CREATED BY CONTRACT ARE NOT SUBJECT TO REDUCTION BASED ON PRINCIPLES OF COMPARATIVE NEGLIGENCE

Contractual Right to Total Indemnity. An "all or nothing" right of indemnity that is not affected by the principle of partial indemnity between concurrent tortfeasors on a comparative fault basis may be created by the parties to an indemnity contract (*Rodriguez v. McDonnell Douglas Corp. (1978) 87 Cal. App. 3d 626, 676, 151 Cal. Rptr. 399*).

[2] Comments

[a] Use of Form

This form may be submitted in support of an indemnitee's contention that a written indemnity agreement should be enforced and the indemnitor required to completely indemnify the indemnitee for a loss that is within the scope of the agreement. The specific argument made by the form is that the principle of partial indemnity between concurrent tortfeasors on a comparative fault basis, as established by the *California Supreme Court in American Motorcycle Ass'n v. Superior Court (1978) 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899* [*see § 115.60*], does not apply to express indemnity rights created by contract [*Rodriguez v. McDonnell Douglas Corp. (1978) 87 Cal. App. 3d 626, 676, 151 Cal. Rptr. 399]* .

This form is for use by the express indemnitee to establish a right to contractual indemnity. The express indemnitor should use § 115.73 to oppose a claim for implied indemnity made by the express indemnitor.

This form may be combined with points and authorities pertaining to the specific procedural context in which the validity and scope of an express indemnity agreement is brought before the court [*see § 115.10*]. It may be used in a memorandum in connection with a pretrial motion, such as a demurrer or motion for summary judgment, if the indemnitor's liability may be established as a matter of law from the four corners of the indemnity agreement. It may also be used in a trial or an appellate brief. For discussion of the procedures by which the validity and scope of an indemnity agreement may be litigated, see *§ 115.10*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. It should be established that: (1) the parties entered into an agreement by which the indemnitor agreed to indemnify the indemnitee from loss incurred under certain express contractual conditions; (2) there is or was a claim against the indemnitee that is within the scope of the indemnity agreement; and (3) the resolution of the claim, but for the indemnity agreement, would involve allocation of responsibility between the indemnitee and indemnitor as joint or concurrent tortfeasors under the principles of comparative negligence.

[3] Discussion of Authorities

[a] Contractual Right to Total Indemnity

In ***Rodriguez v. McDonnell Douglas Corp.*** *(1978) 87 Cal. App. 3d 626, 151 Cal. Rptr. 399* , the court of appeal affirmed the trial court's judgment that Norman, a general contractor, was entitled to indemnity from Bethlehem and Orvin, both subcontractors, under indemnity agreements that required Bethlehem and Orvin to indemnify Norman for the latter's liability arising out of the negligent acts or omissions (as the Bethlehem contract provided), or just acts or omissions (as the Orvin contract provided), of the indemnitors, including their employees. Norman, which was found to have been negligent and adjudged liable to Rodriguez, the injured plaintiff, was still found to be entitled to indemnity because its negligence was characterized as only passive [*see § 115.32*].

Among the arguments that Bethlehem and Orvin presented on appeal was that adoption of the principle of partial indemnity between concurrent tortfeasors on a comparative fault basis in *American Motorcycle Assn. v. Superior Court of Los Angeles County (1978) 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899* [*see § 115.60*], mandated that their indemnity obligation be analyzed under comparative fault principles. Because Norman had been found liable to Rodriguez, it was alleged that Norman could only obtain indemnity from other defendants based on comparative fault and not pursuant to the indemnity agreements. In rejecting this argument, the court stated that *American Motorcycle* did away with the all-or-nothing doctrine of equitable indemnity, but did not purport to affect the rules governing contractual indemnity (*87 Cal. App. 3d 626, 676)* .

NOTE:

A subsequent case may have opened the door to the possible development of a doctrine of "proportional contractual indemnity." In that case, an equipment lease provided for the lessee to indemnify the lessor only for liability or loss caused by the lessee; it did not provide for any right of indemnity for liability for the lessor's own negligence. The equipment caused injury, and the jury apportioned fault 55 percent to the lessee and 20 percent to the lessor. The lessor was required to pay the lessee's share of the joint and several judgment for economic damages [*see Civ. Code § 1431.2* (Proposition 51)] because the lessee was the plaintiff's employer and therefore immune from liability to the plaintiff under workers' compensation's exclusive remedy principle [*see Lab. Code § 3600*]. The lessor then sought indemnity under the agreement, but the trial court denied it, applying the rule that the lessor's active negligence bars indemnity under a general indemnity clause [*Hernandez v. Badger Constr. Equip. Co. (1994) 28 Cal. App. 4th 1791, 1818 n.21, 34 Cal. Rptr. 2d 732* ; *see § 115.40*].

On appeal, the lessor argued that the agreement required the lessee to indemnify it for the percentage of

the plaintiff's damages that represented the lessee's comparative share of liability that the lessor was required to pay on account of joint and several liability. The court of appeal agreed. It construed the agreement under contract principles as requiring the lessee to indemnify the lessor for the portion of the lessor's liability attributable to the lessee's fault. It further held that the lessor was not entitled to indemnity from the lessee for the portion of its liability attributable to its own negligence [*Hernandez v. Badger Constr. Equip. Co. (1994) 28 Cal. App. 4th 1791, 1818-1823, 34 Cal. Rptr. 2d 732]* .

Whether this case has any relevance beyond its facts remains to be seen. It rests solely on contractual interpretation of a fairly nontypical indemnity agreement; one that does not purport to create any right of indemnity for the indemnitee's own negligence. However, it represents yet another step away from the legal distinction between active and passive negligence [*see § 115.33*], and at least introduces the possibility that equitable loss-sharing may be appropriate between joint tortfeasor contractual indemnitors and indemnitees under some circumstances, regardless of the characterization of the indemnitee's negligence.

[4] Additional Authorities

[a] Contractual Right to Total Indemnity

Regional Steel Corp. v. Superior Court (1994) 25 Cal. App. 4th 525, 32 Cal. Rptr. 2d 417 , is discussed in *§ 115.73[3][a]*. An express indemnity agreement between a general contractor (as indemnitee) and Regional Steel Corporation, a subcontractor (as indemnitor), read as follows: "Regional Steel Corporation will indemnify others only to the extent that damage is caused in whole by any negligent act or omission by anyone directly employed by or under the control of Regional Steel Corporation" (*25 Cal. App. 4th 525, 527)* . In a subsequent action against both the general and subcontractor, the general contractor cross complained against Regional Steel for comparative equitable indemnity. The court of appeal affirmed summary judgment for Regional Steel, citing the rule that if the parties have expressly contracted with respect to the duty to indemnify, the extent of that duty must be determined from the contract and not by reliance on the independent doctrine of equitable indemnity. The court held that the language "caused in whole" meant that the general contractor had bargained away its right to seek comparative indemnity under situations in which the negligence of both general and subcontractors contributed to the injury (*25 Cal. App. 4th 525, 529)* .

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11-115 California Points & Authorities § 115.31

§ 115.31 Supporting Contention That Indemnitee Is Entitled to Indemnification Under Express Indemnity Agreement--Agreement Providing for Indemnity Against Indemnitee's Own Negligence Does Not Violate Public Policy

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE INDEMNITY AGREEMENT BETWEEN THE PARTIES, WHICH PROVIDES FOR TOTAL INDEMNITY FROM ALL LIABILITY, INCLUDING ALL LIABILITY ARISING FROM THE INDEMNITEE'S OWN NEGLIGENCE, DOES NOT VIOLATE PUBLIC POLICY.

Public Policy. A contract by which the indemnitor agrees to indemnify the indemnitee for loss caused by the indemnitee's own negligence does not violate public policy (*Goldman v. Ecco-Phoenix Elec. Corp. (1964) 62 Cal. 2d 40, 48, 41 Cal. Rptr. 73, 396 P.2d 377* ; *County of San Joaquin v. Stockton Swim Club (1974) 42 Cal. App. 3d 968, 972-973, 117 Cal. Rptr. 300* ; *John E. Branagh & Sons v. Witcosky (1966) 242 Cal. App. 2d 835, 837-844, 51 Cal. Rptr. 844*).

[2] Comments

[a] Use of Form

This form may be submitted in support of an indemnitee's contention that an indemnity agreement that shifts the indemnitee's loss entirely to the indemnitor, even though the indemnitee's own negligence was a proximate cause of the loss, does not violate public policy and should be enforced. The points and authorities in this form should be used to set forth the general principle that there is no public policy bar to indemnity for one's own negligence. It should be used together with other points and authorities that address the construction of the indemnity agreement to encompass the particular negligence involved [*see § 115.33*] or that characterize the indemnitee's negligence as merely passive [*see § 115.32*].

This form may be combined with points and authorities pertaining to the specific procedural context in which the validity and scope of an express indemnity agreement is brought before the court. It may be used in a memorandum in connection with a pretrial motion, such as a demurrer or motion for summary judgment, if the indemnitor's liability may be established as a matter of law from the four corners of the indemnity agreement. It may also be used in a trial or an appellate brief. For discussion of the proceedings in which the validity and scope of an indemnity agreement may be litigated, see *§ 115.10*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. It should be established that: (1) the parties entered into an indemnity agreement under which the indemnitor agreed to indemnify the indemnitee for loss; (2) that the scope of the agreement extended to loss proximately caused by the indemnitee's own negligence; and (3) that the particular loss incurred for which indemnity is sought is one for which the parties intended to provide indemnity even though the loss was proximately caused by the indemnitee's negligence.

[3] Discussion of Authorities

[a] Public Policy

The facts and principal holding of ***Goldman v. Ecco-Phoenix Elec. Corp.*** *(1964) 62 Cal. 2d 40, 41 Cal. Rptr. 73, 396 P.2d 377* , are discussed in *§ 115.40[3][a]*. One argument presented by the indemnitor for the nonenforceability of the indemnity agreement was that an agreement to relieve a party from the effects of its own negligence is against public policy [*see* *Tunkl v. Regents of Univ. of Cal. (1963) 60 Cal. 2d 92, 32 Cal. Rptr. 33, 383 P.2d 441* (certain preinjury releases from liability were void as against public policy)]. The California Supreme Court, having found no indemnity right for the indemnitee's negligence under the agreement for other reasons, rejected the public policy argument in dicta. The Court distinguished between an exculpatory agreement and an indemnification agreement. While the former provides no remedy to the injured party, the latter resembles an insurance agreement. The purpose is to allocate the loss rather than to avoid it. The true effect of an indemnity agreement is to transfer the burden of providing liability insurance for the loss in question (*62 Cal. 2d 40, 48-49)* .

County of San Joaquin v. Stockton Swim Club *(1974) 42 Cal. App. 3d 968, 117 Cal. Rptr. 300* , is discussed in *§ 115.38[3][b]*. The indemnitee was a consortium of public entities, and the indemnitor was a private swim club that was required to execute an indemnity agreement in consideration for the right to use public swimming pools in connection with their program. In that case, the indemnitor also raised a public-policy defense based on *Tunkl*, contending that the indemnification clause was an illegal contract of adhesion. The court rejected the public policy argument, citing *Goldman* (*42 Cal. App. 3d 968, 972-973)* .

In ***John E. Branagh & Sons v. Witcosky*** *(1966) 242 Cal. App. 2d 835, 51 Cal. Rptr. 844* , the court also confronted the indemnitor's argument that to allow indemnity for the indemnitee's own negligent conduct was contrary to public policy. In this case, the indemnitee's conduct at issue was a violation of a state safety order. The indemnitor sought to avoid application of *Goldman* because the rejection of the public-policy argument in that case was only dicta. In enforcing the indemnity agreement, the court of appeal rejected the public policy argument and applied the Supreme Court's reasoning in *Goldman* (*242 Cal. App. 2d 835, 837-844)* .

NOTE:

The vast majority of express indemnity cases arise from provisions in a commercial contract that may be viewed as the product of arms-length negotiations between commercial entities regarding the allocation of responsibility for loss among the parties respective insurance carriers [*see* *Guy F. Atkinson Co. v. Schatz (1980) 102 Cal. App. 3d 351, 356, 161 Cal. Rptr. 436]* . In this context, courts are generally reticent to disregard a commercial agreement reached by business entities regarding the allocation of loss, at least when the allocation involves only the economic loss sustained by the parties [*see, e.g., CAZA Drilling (California), Inc. v. TEG Oil & Gas U.S.A., Inc. (2006) 142 Cal. App. 4th 453, 475, 48*

Cal. Rptr. 3d 271] . The public-policy considerations might be different with regard to an indemnity clause inserted in a preprinted contract of adhesion in a noncommercial context, such as a residential lease or a consumer contract.

[4] Additional Authorities

[a] Public Policy

In *CAZA Drilling (California), Inc. v. TEG Oil & Gas U.S.A., Inc. (2006) 142 Cal. App. 4th 453, 48 Cal. Rptr. 3d 271* , an oil company hired a drilling company to drill an oil well. The contract between the parties contained several paragraphs allocating responsibility for different types of loss to one party or the other under particular circumstances. Subsequently, an accident allegedly caused by the drilling company's negligence killed one worker and injured others, and caused economic losses. The drilling company sued the oil company for an unpaid amount owed under the contract. The oil company cross-complained to recover for its economic loss, arguing that the drilling company was negligent and in violation of certain regulations. The trial court entered judgment for the drilling company on the cross-complaint, concluding that the contract placed responsibility for the economic loss on the oil company. The court of appeal affirmed. The court concluded that the drilling contract did not implicate the public interest and the parties were of relatively equal bargaining strength and free to negotiate the terms of the agreement. Thus, there was no reason to void the agreement's allocation of responsibility for the loss (*142 Cal. App. 4th 453, 469)* . The court also noted that the drilling company was responsible under the agreement for damage to its own equipment, for injury to its employees, and for certain pollution and contamination removal costs. Moreover, the drilling company had accepted liability for personal injuries that had occurred. Recognizing that courts have generally been reluctant to disregard a commercial agreement reached by business entities regarding the allocation of loss - at least when the allocation involves only the economic loss sustained by the parties - the court of appeal concluded that the challenged contract provisions represented a valid limitation on liability, rather than an impermissible attempt to shield a contracting party from liability for a violation of the law (*142 Cal. App. 4th 453, 475)* . The court also concluded that the oil company had failed to identify any specific law or regulation that the drilling company allegedly violated (*142 Cal. App. 4th 453, 476-478)* .

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11-115 California Points & Authorities § 115.32

§ 115.32 Supporting Contention That Indemnitee Is Entitled to Indemnification Under Express Indemnity Agreement--General Indemnity Agreement Provides Indemnity for Indemnitee's Passive Negligence

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

INDEMNITEE'S CLAIM FOR EXPRESS INDEMNITY SHOULD BE ALLOWED BECAUSE ANY NEGLIGENCE OF INDEMNITEE THAT MAY HAVE PROXIMATELY CAUSED THE LOSS FOR WHICH INDEMNITY IS SOUGHT IS PASSIVE NEGLIGENCE ONLY.

A. Indemnity Under General Indemnity Agreement Not Barred By Indemnitee's Passive Negligence. An indemnitee under a general indemnity agreement is not prohibited from recovering indemnity for loss caused in part by its own negligence if its negligence can be characterized as only "passive" (*Rossmoor Sanitation, Inc. v. Pylon, Inc. (1975) 13 Cal. 3d 622, 628, 119 Cal. Rptr. 449, 532 P.2d 97*).

B. Passive Negligence Defined. Passive negligence is the omission or failure to perform a duty of care imposed by law, but in which there is no participation with another in any affirmative act of negligence that is the proximate cause of the injury to a third person (*Rossmoor Sanitation, Inc. v. Pylon, Inc. (1975) 13 Cal. 3d 622, 629, 119 Cal. Rptr. 449, 532 P.2d 97* ; *Jimenez v. Pacific W. Constr. Co. (1986) 185 Cal. App. 3d 102, 112, 229 Cal. Rptr. 575*).

[*Optional*] **C. Nonfeasance.** Mere nonfeasance, such as a failure to discover a dangerous condition, is passive negligence and does not preclude indemnity under a general indemnity clause (*Markley v. Beagle (1967) 66 Cal. 2d 951, 962*).

[*Optional*] **D. Landowner's Failure to Fulfill Duty of Care Imposed By Law.** A failure to act in fulfillment of a duty of care that devolves on an indemnitee by law as the owner or occupier of land is passive negligence (*Harvey Mach. Co. v. Hatzel & Buehler, Inc. (1960) 54 Cal. 2d 445, 448, 6 Cal. Rptr. 284, 353 P.2d 924*).

[2] Comments

[a] Use of Form

This form may be submitted in support of an indemnitee's contention that any negligence of the indemnitee that may have proximately caused the loss for which indemnity is sought is passive negligence only, and that therefore, indemnity may be recovered under a general indemnity clause. This form may be submitted in opposition to the contention supported by the points and *authorities in § 115.40*, that the indemnitee's negligence should be characterized as active and indemnity disallowed under a general indemnity agreement. For points and authorities related to the characterization of an indemnity clause as general, see also *§ 115.40*.

As an alternative to the use of this form, the indemnitee may contend that it was the intent of the parties to provide for indemnity for the particular negligence of the indemnitee involved, regardless of whether the negligence might be characterized as active or passive [*see § 115.33*]. For further discussion of the importance of the distinction between active and passive negligence, see *§ 115.40[2][b]*.

This form may be combined with points and authorities pertaining to the specific procedural context in which the validity and scope of an express indemnity agreement is brought before the court. It may be used in a memorandum in connection with a pretrial motion, such as a demurrer or motion for summary judgment, if the indemnitee's negligence may be characterized as passive as a matter of law [*see Gonzales v. R.J. Novick Constr. Co. (1978) 20 Cal. 3d 798, 810, 144 Cal. Rptr. 408, 575 P.2d 1190]* . It may also be used in a trial or an appellate brief. For discussion of the proceedings in which the validity and scope of an indemnity agreement may be litigated, see *§ 115.10*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. The particular acts of the indemnitee's alleged negligence should also be set forth. A connection should then be made between these acts and one or more of the characterizations of passive negligence set forth in this form.

[3] Discussion of Authorities

[a] Indemnity Under General Indemnity Agreement Not Barred By Indemnitee's Passive Negligence

Rossmoor Sanitation, Inc. v. Pylon, Inc. *(1975) 13 Cal. 3d 622, 119 Cal. Rptr. 449, 532 P.2d 97* , was an appeal by Pylon from a judgment of the superior court requiring Pylon to indemnify Rossmoor for certain sums expended in satisfying a prior tort judgment. Rossmoor had employed Pylon to construct a sewage pump station on its property. In the contract, Pylon agreed to indemnify Rossmoor against all claims for damages arising out of the work and for attorney's fees and costs that might be incurred in the event of a damage suit, and to obtain insurance for itself and to name Rossmoor in the policy as an additional insured. During construction, one Pylon employee was killed and another was injured when a trench collapsed. The trench had been negligently constructed by Pylon. A successful personal injury and wrongful death action was brought against Rossmoor [*see Widman v. Rossmoor Sanitation, Inc. (1971) 19 Cal. App. 3d 734, 97 Cal. Rptr. 52]* . Rossmoor satisfied the judgment and then brought this declaratory action for express indemnity against Pylon. Trial to the court resulted in a judgment in favor of Rossmoor, based in part on a finding that Rossmoor's negligence consisted of failing to discover that Pylon employees intended to enter the trench, and that this negligence was only passive (*13 Cal. 3d 622, 625-628)* .

The Supreme Court affirmed the judgment. First it found that the language of the indemnity agreement was general because it did not state what effect Rossmoor's negligence would have on the indemnity obligation. It then noted that under existing case law, Rossmoor could not recover indemnity if its negligence was deemed to be "active" [*see § 115.40*]. However, a general indemnity clause may be construed to provide indemnity for a loss resulting in part from an indemnitee's passive negligence (*13 Cal. 3d 622, 628)* .

[b] Passive Negligence Defined

The facts of ***Rossmoor Sanitation, Inc. v. Pylon, Inc.*** *(1975) 13 Cal. 3d 622, 119 Cal. Rptr. 449, 532 P.2d 97* , are discussed in *§ 115.32[3][a]*. With regard to the distinction between active and passive negligence, the court stated that passive negligence is found in mere nonfeasance, such as the failure to discover a dangerous condition or to perform a duty imposed by law. Active negligence is found if an indemnitee has personally participated in an affirmative act of negligence, was connected with negligent acts or omissions by knowledge or acquiescence, or has failed to perform a precise duty that the indemnitee has agreed to perform. The crux of the inquiry is to determine whether there is participation in some manner by the person seeking indemnity in the conduct or omission that caused the injury beyond the mere failure to perform a duty imposed by law (*13 Cal. 3d 622, 629)* . The Court then deferred to the trial court's determination that Rossmoor's negligence was passive, based on its findings that (1) Rossmoor had no supervisory personnel at the site at the time of the accident; (2) that Pylon alone knew that its employees intended to enter the trench; and (3) that Pylon was directly responsible for the trench remaining unshored (*13 Cal. 3d 622, 630-631)* .

In ***Jimenez v. Pacific W. Constr. Co.*** *(1986) 185 Cal. App. 3d 102, 229 Cal. Rptr. 575* , discussed in *§ 115.40[3][b]*, the indemnitee requested and the court gave a jury instruction that set forth the following definition of passive negligence, based on *Rossmoor:* "Passive negligence is the omission or failure to perform a duty of care imposed by law in which there is no participation with another in any affirmative act of negligence which is the proximate cause of injury to a third person" (*185 Cal. App. 3d 102, 112)* . The court of appeal accepted this instruction, although the issue in the case revolved around other language in the instruction.

NOTE:

In *Rossmoor*, there was substantial evidence from which the Court could have found Rossmoor to have been actively negligent as a matter of law [*cf. Morgan v. Stubblefield (1972) 6 Cal. 3d 606, 625, 100 Cal. Rptr. 1, 493 P.2d 465* ; *see generally § 115.40*]. Pylon presented evidence that the trenches were excavated in accordance with plans and specifications provided by Rossmoor; that the plans were prepared by an engineering firm retained by Rossmoor; that Rossmoor approved the plans; that Rossmoor and the engineering firm had numerous supervisory personnel on the job site at various stages of construction; that Rossmoor's supervisory personnel knew of, permitted, and approved the excavation of the trench; that Rossmoor had experienced considerable difficulty with land slippage and excavation collapse during construction; that Rossmoor was conducting dynamiting operations in the area that caused the ground to shake; and that Rossmoor was worried about delays in construction [*Rossmoor Sanitation, Inc. v. Pylon, Inc. (1975) 13 Cal. 3d 622, 630, 119 Cal. Rptr. 449, 532 P.2d 97]* . Nevertheless, the Court deferred to the trial court's finding of passive negligence based principally on the fact that Rossmoor did not know that the employees intended to enter the trench.

The *Rossmoor* case is very difficult to accept with regard to its application of a distinction between active and passive negligence to the facts. However, its greater significance lies in its language that the active-passive dichotomy is never wholly dispositive of any case. Instead, the crucial point of inquiry is the intent of the parties with regard to the acts and omissions that caused the injury. The court found that the parties intended that Pylon assume the entire burden of liability for injury occurring during construction [*Rossmoor Sanitation, Inc. v. Pylon, Inc. (1975) 13 Cal. 3d 622, 632-633,119 Cal. Rptr. 449, 532 P.2d 97* ; *see § 115.33*].

Although not expressly noted by the court, another important consideration in *Rossmoor* was probably that Pylon was required to obtain insurance and name Rossmoor as an additional insured. The parties' respective insurers were also parties to the case, and the real issue was over whose insurer should bear the loss. Viewed from the perspective of allocation of insurance risk, the result is arguably more reasonable.

[c] Nonfeasance

Gonzales v. R.J. Novick Constr. Co. *(1978) 20 Cal. 3d 798, 144 Cal. Rptr. 408, 575 P.2d 1190* , is discussed in *§ 115.34*. The indemnitee's job superintendent discovered the condition, but did not discover that it was dangerous. The California Supreme Court held that this conduct was mere nonfeasance, and therefore, passive negligence (*20 Cal. 3d 798, 810-811)* .

Markley v. Beagle *(1967) 66 Cal. 2d 951, 59 Cal. Rptr. 809, 429 P.2d 129* , was a premises liability action for personal injuries suffered when a railing collapsed. The defendants were a contractor, who allegedly created the dangerous condition, and the owners of the premises. The owners cross complained against the contractor on an express indemnity agreement. The jury returned a verdict for plaintiff against both defendants and for the owners on the cross complaint. The verdict against the owners was based on their negligent failure to discover the dangerous condition on their property.

The California Supreme Court affirmed the trial court's refusal to grant the contractor's motion for judgment notwithstanding the verdict on the cross complaint. Although the Court held that an indemnity clause phrased in general terms and providing that the indemnitor hold the indemnitee harmless for damages arising in connection with certain work would not provide indemnity for consequences resulting from an indemnitee's own actively negligent acts, it stated that mere nonfeasance, such as the negligent failure to discover a dangerous condition, would be covered under such an agreement (*66 Cal. 2d 951, 961-962)* .

[d] Landowner's Failure to Fulfill Duty of Care Imposed By Law

Harvey Mach. Co. v. Hatzel & Buehler, Inc. *(1960) 54 Cal. 2d 445, 6 Cal. Rptr. 284, 353 P.2d 924* , is discussed in *§ 115.33[3][c]*. In finding a right of indemnity for a property owner against a construction contractor, the court noted certain significant facts that allowed it to characterize the owner's negligence as passive. The owner did not continue to maintain independent operations on the premises while construction was in progress. The injuries did not result from some conduct or omission unrelated to the contractor's performance of the contract. Most significantly, the claimed breach of duty by the owner was a failure to act in fulfillment of a duty of care that devolved on it by law as the owner of the land on which the injury occurred. The negligence was not active, affirmative misconduct, but at most, passive negligence (*54 Cal. 2d 445, 448)* .

NOTE:

Other cases finding passive negligence based on a failure to fulfill a duty of care include *Muth v. Urricelqui (1967) 251 Cal. App. 2d 901, 911, 60 Cal. Rptr. 166* (failure to inspect and specify changes) and *Safeway Stores, Inc. v. Massachusetts Bonding & Ins. Co. (1962) 202 Cal. App. 2d 99, 111-113, 20 Cal. Rptr. 820* (failure to exercise supervisory right to order removal of defective material) [*see § 115.38*].

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
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A. Express Indemnity

11-115 California Points & Authorities § 115.33

§ 115.33 Supporting Contention That Indemnitee Is Entitled to Indemnification Under Express Indemnity Agreement--Agreement Not Expressly Providing for Indemnitee's Negligence May Be Construed to Extend to Any Negligence of Indemnitee If Parties So Intended

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

IF THE CIRCUMSTANCES INDICATE THAT A LOSS RESULTING FROM THE INDEMNITEE'S NEGLIGENCE WAS INTENDED TO BE WITHIN THE SCOPE OF THE PARTIES' INDEMNITY AGREEMENT, ANY CLAIM ARISING FROM THAT NEGLIGENCE IS A PROPER BASIS FOR INDEMNITY EVEN IF THE AGREEMENT DID NOT EXPRESSLY COVER THE INDEMNITEE'S NEGLIGENCE AND EVEN IF THAT NEGLIGENCE MIGHT POSSIBLY BE CHARACTERIZED AS "ACTIVE."

A. Intention of Parties Controls. In determining whether an indemnity clause covers a given case turns primarily on contractual interpretation; the dichotomy of active and passive negligence is never wholly dispositive, and it is the intent of the parties as expressed in the agreement that should control (*Rossmoor Sanitation, Inc. v. Pylon, Inc. (1975) 13 Cal. 3d 622, 632-633, 119 Cal. Rptr. 449, 532 P.2d 97* ; *Morton Thiokol, Inc. v. Metal Bldg. Alteration Co. (1987) 193 Cal. App. 3d 1025, 1030, 238 Cal. Rptr. 722*).

B. Indemnity for Active Negligence Under General Indemnity Clause. Indemnity for the indemnitee's active negligence is not precluded under an indemnity clause that does not expressly provide for indemnity in the case of the indemnitee's negligence, if the parties intended that the agreement allow such a recovery (*Schackman v. Universal Pictures Co. (1967) 255 Cal. App. 2d 857, 860, 63 Cal. Rptr. 607*).

C. Obvious Risk Within Contemplation of Parties and Bargained for by Indemnitee. An indemnity clause that does not expressly mention the indemnitee's negligence protects an indemnitee from liability for injuries sustained as a result of the indemnitee's negligence if the circumstances of the loss were within the contemplation of the parties as one of the obvious risks against which the indemnitee sought to be covered, and it reasonably could be concluded that the

parties knowingly bargained for the very protection at issue (*Harvey Mach. Co. v. Hatzel & Buehler, Inc. (1960) 54 Cal. 2d 445, 448, 6 Cal. Rptr. 284, 353 P.2d 924* ; *Ralph M. Parsons Co. v. Combustion Equip. Assocs., Inc. (1985) 172 Cal. App. 3d 211, 221-222, 218 Cal. Rptr. 170* ; *Schackman v. Universal Pictures Co. (1967) 255 Cal. App. 2d 857, 862, 63 Cal. Rptr. 607*).

[2] Comments

[a] Use of Form

This form may be submitted in support of an indemnitee's contention that an indemnity agreement should be enforced despite the lack of express language covering the indemnitee's negligence because the circumstances of the indemnitee's liability that caused the loss were within the contemplation of the parties, and the parties intended to provide for indemnity under these circumstances. The points and authorities in this form may be submitted in opposition to those in § 115.40, which advance the proposition that an indemnity clause that does not expressly mention the indemnitee's negligence is general and does not provide indemnity if the indemnitee is actively negligent. These points and authorities should be submitted as an alternative argument to the narrower contention for enforcement of a general indemnity clause made in § 115.32, that the indemnitee's negligence should be characterized as merely passive.

This form may be combined with points and authorities pertaining to the specific procedural context in which the validity and scope of an express indemnity agreement is brought before the court. It may be used in a memorandum in connection with a pretrial motion, such as a demurrer or motion for summary judgment, if the intent of the parties may be determined from the agreement as a matter of law. It may also be used in a trial or an appellate brief. For discussion of the proceedings in which the validity and scope of an indemnity agreement may be litigated, see *§ 115.10*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. It should be established that: (1) the parties entered into an agreement by which the indemnitor agreed to indemnify the indemnitee from loss incurred under certain express contractual conditions; (2) the indemnitee incurred a loss for which it is seeking indemnity pursuant to the agreement; and (3) although the agreement did not expressly provide for indemnity from the indemnitee's own negligence and the indemnitee's own negligence allegedly was a proximate cause of the loss for which indemnity is sought, the loss is one for which the parties intended to provide for a right of indemnity in the agreement.

[3] Discussion of Authorities

[a] Intention of Parties Controls

The facts and principal holding of ***Rossmoor Sanitation, Inc. v. Pylon, Inc.*** *(1975) 13 Cal. 3d 622, 119 Cal. Rptr. 449, 532 P.2d 97* , are discussed in *§ 115.32[3][b]*. The California Supreme Court enforced a right of indemnity under an indemnity agreement that did not expressly provide for indemnity in the case of the indemnitee's own negligence. The court deferred to the determination of the trier of fact that the indemnitee was only passively negligent (*13 Cal. 3d 622, 630-631)* .

As an alternative argument, the indemnitor argued for the abolition of the distinction of active and passive negligence in favor of a rule denying recovery under an indemnity clause to any negligent indemnitee unless its negligence was wholly derivative, such as under the doctrine of respondeat superior. They characterized the distinction between active and passive negligence as illusory and urged that indemnity should not depend on mere labels (*13 Cal. 3d 622, 631-632)* .

The Court adhered to the underlying distinction between active and passive negligence. Nevertheless, it stated that it did not employ the active-passive dichotomy as wholly dispositive of this or any other case. The issue of whether the indemnity clause in question operates to exculpate the indemnitee from the consequences of its own alleged breach of

duty is one of contract interpretation. It is the intent of the parties as expressed in the agreement that should control. If the parties knowingly bargain for the protection at issue, the protection should be afforded. The proper inquiry is into the circumstances of the damage or injury and the language of the contract. Of necessity, each case will turn on its own facts (*13 Cal. 3d 622, 632-633)* .

Morton Thiokol, Inc. v. Metal Bldg. Alteration Co. *(1987) 193 Cal. App. 3d 1025, 238 Cal. Rptr. 722* , was an action brought by a worker against the owner of a building, on which a new roof was being installed, for injuries sustained in a fall from the roof. Despite an extremely hazardous roof surface (the result of salt accumulation, a condition created by the owner), safety equipment that would have prevented the accident was not provided.

The owner cross complained against the contractor for contractual indemnity. The contract required the contractor: (1) to supervise and direct the work using its best skill and attention; (2) to take all necessary precautions during the progress of the work to protect all persons and the property of others from injury or damages; and (3) to indemnify and hold harmless the owner and its agents and employees from any and all liability, loss, damage, cost and expense (including attorney's fees) sustained by reason of the contractor's breach of warranty, breach of contract, misrepresentation or false certification, or failure to exercise due care. The contractor subcontracted the entire job to another company that employed the injured worker.

The trial court found the contractual provision to be a "general" indemnity agreement and, based on the jury's verdict, that the owner was "actively" negligent, denied the owner's claim for indemnity. The court of appeal reversed and enforced the indemnity clause because the precautions that would have prevented the accident were bargained for and were the responsibility of the indemnitor under the contract. The court cited the admonition from *Rossmoor,* that the active-passive rubric ought not to be wholly dispositive, but that the enforceability of an indemnity agreement should instead turn primarily on a reasonable interpretation of the intent of the parties. Because the agreement clearly indicated that the owner was to be indemnified for damages sustained because of the contractor's breach of the agreement, and the accident would not have happened but for that breach, indemnity was viable notwithstanding the jury's finding of the indemnitee's "active" negligence (*193 Cal. App. 3d 1025, 1030)* .

[b] Indemnity for Active Negligence Under General Indemnity Clause

Schackman v. Universal Pictures Co. *(1967) 255 Cal. App. 2d 857, 63 Cal. Rptr. 607* , was an appeal from a judgment of the superior court awarding the owner of an amusement arcade (Schackman) indemnity from a motion picture studio (Universal) that had rented the arcade for a brief period in order to film a scene. The plaintiff in the underlying action was injured during the filming and obtained a judgment for personal injuries against Schackman and Universal. In a cross action, Schackman was awarded indemnity from Universal on the basis of the written agreement between the parties. The agreement was on a printed form prepared by Universal. It provided that Universal would indemnify Schackman against all loss, damages, costs, and expenses incurred by him because of any injury to property or injury to or death of any person occurring on leased property during its use by Universal. It did not expressly mention the effect that Schackman's negligence would have on his right to indemnity.

The court of appeal affirmed the judgment in the cross action, finding that the indemnification clause provided for indemnity against loss and damages proximately caused by the combined negligence of the parties. The court found it unnecessary to characterize Schackman's negligence as passive or active. Assuming, *arguendo,* that Schackman's negligence was active, it would not necessarily preclude him from a recovery under the indemnity agreement if the parties intended that the agreement allow such a recovery (*255 Cal. App. 2d 857, 858-860)* .

[c] Obvious Risk Within Contemplation of Parties and Bargained for by Indemnitee

Harvey Mach. Co. v. Hatzel & Buehler, Inc. *(1960) 54 Cal. 2d 445, 6 Cal. Rptr. 284, 353 P.2d 924* , was an action for a declaratory judgment for a determination of rights under an indemnity agreement. A landowner (Harvey)

contracted with various contractors, including H & B, for the complete construction of its plant, and indemnity agreements were included in the contracts in favor of Harvey as indemnitee. The agreement between Harvey and H & B protected the owner from liability for injury arising from the use of the premises of the owner and did not mention the owner's own negligence. An employee of H & B was injured in a fall into an open elevator pit while on the job and brought a third-party negligence action against Harvey pursuant to workers' compensation law.

The California Supreme Court affirmed the judgment declaring that the agreement provided for total indemnity should Harvey be found liable to the injured employee. In so holding, the Court stated that the question of whether an indemnity clause operates to exculpate the indemnitee from the consequences of its own breach of duty is one of contract interpretation. If it can be determined that the parties intended by their agreement to protect the indemnitee against claims of damage caused by any or even all types of negligent conduct on its part, the agreement would effectively accomplish that purpose (*54 Cal. 2d 445, 447)* . In this case, Harvey had no actual occupancy of the premises or control over the construction activities. Therefore, the court determined that the intent of the parties was to place the risk of all construction-related injury on the contractors (*54 Cal. 2d 445, 448-449)* .

The court found that the terms and circumstances of the agreement required a realistic conclusion that the parties knowingly bargained for the very protection at issue, that is, the owner's potential premises liability to workers. H & B had practical control of the structures on the premises and any negligence for the condition of the structures would obviously not be that of the owner alone. The accident, in these circumstances, was one of the risks, if not the most obvious risk, against which the owner sought to be covered. The court found it unnecessary to label the indemnity clause as "general" or to determine whether the owner's negligence might be active or passive (*54 Cal. 2d 445, 446-448)* .

The principal holding of ***Ralph M. Parsons Co. v. Combustion Equip. Assocs., Inc.*** *(1985) 172 Cal. App. 3d 211, 218 Cal. Rptr. 170* , is discussed in *§ 115.35[3][a]*. Parsons, a general contractor (and a settling defendant), had subcontracted with Combustion (another defendant) to perform certain tasks. The agreement contained an indemnity clause under which Combustion agreed to indemnify Parsons for liability arising out of Combustion's performance of the contract unless Parsons was the sole cause of the accident. Also under the contract, Combustion was required to carry comprehensive public liability insurance covering the work. An employee of another subcontractor was injured in the course of the work, and the jury found both Parsons and Combustion to have been negligent.

The trial court awarded Parsons indemnity from Combustion based on the contract, and the court of appeal affirmed. The court's principal holding was that the indemnity clause was not a general one because it expressly provided for the indemnitee's negligence, and that, therefore, the distinction between active and passive negligence was of no import (*172 Cal. App. 3d 211, 220-221)* . The court found that Combustion's obligation to indemnify Parsons for liability resulting from the violation of safety regulations was specifically considered and bargained for by the parties. The evidence, including the surrounding circumstances such as the magnitude of the job and the relative situation of the parties, as well as the insurance requirement in the contract amply supported the trial court's finding on this point (*172 Cal. App. 3d 211, 222)* .

The facts and principal holding of ***Schackman v. Universal Pictures Co.*** *(1967) 255 Cal. App. 2d 857, 63 Cal. Rptr. 607* , are discussed in *§ 115.33[3][b]*. The court of appeal affirmed the trial court's determination that the hazard of accidental injury in the shooting gallery was within the contemplation of the parties as one of the most obvious risks against which Schackman sought to be covered. The contract provided for only a small payment for the use of the premises. When weighed against the virtually unlimited liability to which Schackman might be subjected for injuries while Universal was carrying on its filming, it would seem reasonable, under these circumstances, that the parties intended that Schackman be indemnified from all loss regardless of his own negligence (*255 Cal. App. 2d 857, 862-863)* .

The court also construed the printed agreement against its preparer, Universal. The court stated that had Universal

intended to exclude injury partially caused by Schackman's negligence from the coverage of the indemnification paragraph, it would have been a simple matter for it to have so stated in the agreement (*255 Cal. App. 2d 857, 862)* .

[4] Additional Authorities

[a] Intention of Parties Controls

In *Maryland Cas. Co. v. Bailey & Sons, Inc. (1995) 35 Cal. App. 4th 856, 41 Cal. Rptr. 2d 519* , a 1978 indemnity agreement was construed as a general agreement. The indemnitee argued that the line of cases beginning with *Rossmoor* and including *Morton Thiokol* [*see § 115.33[3][a]*] should be construed as permitting an actively negligent party to seek contractual indemnity on a comparative fault basis from the indemnitor. The court of appeal rejected such a broad reading. It reaffirmed the basic principles that although an actively negligent tortfeasor cannot recover under a general indemnity provision that is silent on the issue of the indemnitee's negligence, the general rule is merely a tool to be used to ascertain the intent of the parties. In this case, because the agreement was executed when the general rule reflected the most likely commercial expectations of the parties to an agreement, the burden was on the indemnitee to offer evidence that the parties' intent was otherwise (*35 Cal. App. 4th 856, 868-869)* .

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11-115 California Points & Authorities § 115.34

§ 115.34 Supporting Contention That Indemnitee Is Entitled to Indemnification Under Express Indemnity Agreement--Written Indemnity Agreement Is Sufficient to Impose Indemnity Obligation on Injured Person's Employer [Lab. Code § 3864]

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

INDEMNITY RIGHTS AGAINST THE INJURED PERSON'S EMPLOYER ARE NOT EXTINGUISHED BY SECTION 3864 OF THE LABOR CODE BECAUSE, PRIOR TO THE TIME OF THE INJURY, THE EMPLOYER SIGNED A WRITTEN INDEMNITY AGREEMENT.

A. Written Indemnity Agreement Makes *Labor Code Section 3864* Inapplicable. One against whom a judgment has been entered or who has settled a claim for personal injury may seek indemnity from the injured person's employer if the employer executed a written indemnity agreement prior to the injury (*Lab. Code § 3864*).

[*Optional*] **B. Specific Reference to Employees Not Required.** A general indemnity agreement may be sufficient to fulfill the requirements of *Labor Code Section 3864* even in the absence of express reference to a right of indemnity for injury to the indemnitor's employees (*Gonzales v. R.J. Novick Constr. Co. (1978) 20 Cal. 3d 798, 808-809, 144 Cal. Rptr. 408, 575 P.2d 1190* ; *Herman Christensen & Sons, Inc. v. Paris Plastering Co. (1976) 61 Cal. App. 3d 237, 246, 132 Cal. Rptr. 86*).

[*Optional*] **C. Unnamed Third Party Beneficiary May Enforce Written Indemnity Agreement Against Employer.** A third-party beneficiary of an indemnity agreement executed between an employer and another party before an injury to an employee of the employer is entitled to enforce the indemnity agreement against the employer even though the beneficiary is not named or identified individually in the agreement (Kaiser Eng'rs, Inc. v. Grinnell Fire Prot. *Sys. Co. (1985) 173 Cal. App. 3d 1050, 1054-1055, 219 Cal. Rptr. 626*).

[2] Comments

[a] Use of Form

This form may be submitted in support of an indemnitee's contention that indemnity may be recovered from the employer of an injured party, despite *Lab. Code § 3864*, because of a sufficient written agreement between the indemnitee and the employer as indemnitor. *Lab. Code § 3864* bars indemnity claims against an injured person's employer in absence of a written indemnity agreement executed prior to the injury. This form may be submitted in opposition to the contention supported by the points and *authorities in § 115.74*, that *Lab. Code § 3864* bars indemnity rights.

This form may be combined with points and authorities pertaining to the specific procedural context in which the validity and scope of an express indemnity agreement is brought before the court. It may be used in a memorandum in connection with a pretrial motion, such as a demurrer or motion for summary judgment, if the validity of the agreement may be determined as a matter of law. It may also be used in a trial or an appellate brief. For discussion of the proceedings in which the validity and scope of an indemnity agreement may be litigated, see *§ 115.10*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. It should be established that: (1) the parties entered into an agreement by which the indemnitor agreed to indemnify the indemnitee from loss incurred under certain express contractual conditions; (2) subsequently, an employee of the indemnitor was injured and that the indemnitee incurred a loss as a result of that injury, for which it is seeking indemnity pursuant to the agreement; and (3) the scope of the agreement extended to liability of the indemnitee arising from injury to employees of the indemnitee.

[3] Discussion of Authorities

[a] Specific Reference to Employees Not Required

Gonzales v. R.J. Novick Constr. Co. *(1978) 20 Cal. 3d 798, 144 Cal. Rptr. 408, 575 P.2d 1190* , was an appeal from a judgment on a cross complaint for indemnity. Gonzales, an employee of a subcontractor (Vienna) brought an action against the general contractor (Novick) for damages for personal injuries he suffered when he fell from a scaffold while working for Vienna. Novick cross complained against Vienna for indemnity based on an indemnity clause in the construction contract. Under the clause, Vienna agreed to indemnify for all claims for damages to persons or to property growing out of the execution of Vienna's work. The trial court awarded Novick indemnity, and Vienna appealed.

The California Supreme Court affirmed. Vienna argued that the agreement was insufficient to meet the requirements of *Lab. Code § 3864* (no indemnity from employer for injury to employee absent written indemnity agreement) because it did not expressly provide that the indemnity rights created in the agreement extended to loss incurred due to injury to Vienna's employees. The Court discussed the history of the statute and the intent of the legislature to abolish the double burden placed on the employer through the doctrine of implied indemnity in contravention of the exclusive remedy theory of the workers' compensation statutes. It then concluded that the language of the agreement was sufficient to create an indemnity agreement covering employees of the indemnitor and fulfill the requirements of *Lab. Code § 3864* (*20 Cal. 3d 798, 807-809)* .

NOTE:

The fact that the language of an indemnity clause is sufficient to meet the requirement of a written agreement as set forth in *Lab. Code § 3864* does not automatically mean that the indemnitee is entitled to recover for loss proximately caused by its own negligence. Once the court determines that indemnity rights are not barred by the statute, it must then construe the agreement, as in the case of any other indemnity clause, to determine whether its language and intent provide for indemnity on the facts at issue [*see Gonzales v. R.J. Novick Constr. Co. (1978) 20 Cal. 3d 798, 809-812, 144 Cal. Rptr. 408, 575 P.2d 1190* (indemnity provided under general indemnity clause because indemnitee's negligence was only

passive); *cf. Widson v. International Harvester Co. (1984) 153 Cal. App. 3d 45, 58-61, 200 Cal. Rptr. 136* (indemnity clause that does not specifically provide for indemnity from employer for injuries to employee does not meet requirements of *Lab. Code § 3864*)]. Thus, the points and authorities *set forth in §§ 115.32, 115.33,* and *115.40* are relevant in an indemnity action on an agreement with the injured person's employer.

Herman Christensen & Sons, Inc. v. Paris Plastering Co. *(1976) 61 Cal. App. 3d 237, 132 Cal. Rptr. 86* , was an appeal from a judgment on a cross complaint for indemnity. The injured employee was employed as a hod carrier for a subcontractor and was injured while working on a scaffolding furnished by a general contractor. He sued the general contractor for damages, and the general contractor cross complained against the employer subcontractor for express indemnity. The injured plaintiff recovered a judgment against the general contractor, and the general contractor was awarded indemnity from the employer. The court of appeal affirmed the judgment of indemnity. The court ruled that the agreement language "any and all claims, suits, or liability for injuries to persons" was broad enough to cover persons employed by the indemnitor, and that the agreement previously executed by the employer therefore fulfilled the requirements of *Lab. Code § 3864*.

[b] Unnamed Third Party Beneficiary May Enforce Written Indemnity Agreement Against Employer

In ***Kaiser Eng'rs, Inc. v. Grinnell Fire Prot. Sys. Co.*** *(1985) 173 Cal. App. 3d 1050, 219 Cal. Rptr. 626* , an injured employee of Grinnell Fire Protection Systems (Grinnell) sued Kaiser Engineers, Inc. (Kaiser). Both Kaiser and Grinnell were working on a government project at the time. Grinnell had contracted to perform certain work for the agency in charge of the project. The contract included an indemnity provision under which Grinnell promised to indemnify and hold harmless the government and its agents for all injuries arising out if its performance of the contract. Grinnell's employee was injured in the performance of the contract and sued Kaiser for personal injury. Kaiser cross complained against Grinnell, alleging that it (Kaiser) was an agent of the government and thus entitled to indemnity as a third party beneficiary under Grinnell's contract with the government. The trial court sustained Grinnell's demurrer without leave to amend on the ground that *Lab. Code § 3864* did not allow an unnamed party to assert a right to indemnity against an employer under a third party beneficiary theory (*173 Cal. App. 3d 1050, 1053)* .

The court of appeal reversed. It held that *Lab. Code § 3864* does not prohibit an employer from entering into a written indemnity agreement with another for the express benefit of a third party (*173 Cal. App. 3d 1050, 1055)* . The court held that an unnamed third party beneficiary can enforce a contract by showing that he or she is a member of the class for whose express benefit the contract was made, and that the allegations in Kaiser's cross complaint were sufficient to withstand the demurrer (*173 Cal. App. 3d 1050, 1055-1056)* .

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11-115 California Points & Authorities § 115.35

§ 115.35 Supporting Contention That Indemnitee Is Entitled to Indemnification Under Express Indemnity Agreement--Clause Providing for Indemnity Unless Liability Results From Indemnitee's Sole Negligence or Willful Misconduct is Valid and Enforceable if Parties Are Concurrently Negligent

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE COURT SHOULD GIVE FULL EFFECT TO THE EXPRESS INDEMNITY AGREEMENT BETWEEN THE PARTIES BECAUSE THE LOSS FOR WHICH INDEMNITY IS SOUGHT AROSE FROM THE CONCURRENT NEGLIGENCE OF THE PARTIES AND THE AGREEMENT EXCEPTS ONLY LIABILITY ARISING FROM THE INDEMNITEE'S SOLE NEGLIGENCE OR WILLFUL MISCONDUCT.

Agreement Excepting Sole Negligence and Willful Misconduct of Indemnitee. An indemnity clause that provides a right of indemnity for all claims except claims arising through the sole negligence or willful misconduct of the indemnitee is not a general indemnity clause, and is enforceable if the loss is caused by the parties' concurrent negligence regardless of whether the indemnitee's negligence might be characterized as active or passive (*C. I. Eng'rs & Constructors, Inc. v. Johnson & Turner Painting Co. (1983) 140 Cal. App. 3d 1011, 1015-1018, 189 Cal. Rptr. 824* ; *see Ralph M. Parsons Co. v. Combustion Equip. Assocs., Inc. (1985) 172 Cal. App. 3d 211, 220, 218 Cal. Rptr. 170*).

[2] Comments

[a] Use of Form

This form may be submitted in support of an indemnitee's contention that an indemnity clause that provides for indemnity from all loss except that caused by the indemnitee's sole negligence or willful misconduct is enforceable in a case of concurrent negligence. Such a clause in a construction or hauling, trucking or cartage contract expresses the statutory rule that no right of indemnity may be provided for the indemnitee's sole negligence or willful misconduct [*see Civ. Code §§ 2782, 2784.5* (§ 115.42)]. In an appropriate case, this memorandum may be submitted in opposition to the contention supported by the points and *authorities in § 115.40*.

This form may be combined with points and authorities pertaining to the specific procedural context in which the validity and scope of an express indemnity agreement is brought before the court. It may be used in a memorandum in connection with a pretrial motion, such as a demurrer or motion for summary judgment if the validity of the agreement may be established as a matter of law. It may also be used in a trial or appellate brief. For discussion of the proceedings in which the validity and scope of an indemnity agreement may be litigated, see the § 115.10.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. It should be established that: (1) the parties entered into an agreement by which the indemnitor agreed to indemnify the indemnitee from all loss incurred under certain express contractual conditions, except loss arising from the indemnitee's sole negligence or willful misconduct; (2) the indemnitee has incurred or may incur a loss that was, in part, allegedly caused by its own negligence; and (3) the loss for which indemnity is sought was proximately cause, at least in part, by the indemnitor's negligence.

[3] Discussion of Authorities

[a] Agreement Excepting Sole Negligence and Willful Misconduct of Indemnitee

C. I. Eng'rs & Constructors, Inc. v. Johnson & Turner Painting Co. (1983) *140 Cal. App. 3d 1011, 189 Cal. Rptr. 824* , was an appeal from a summary judgment awarding express indemnity to a general contractor on its cross complaint against a subcontractor under an indemnity clause in a construction contract. The contract required the subcontractor to indemnify the contractor against, among other things, all liability for injury to or death of persons, including the subcontractor's employees, arising out of the subcontractor's performance of the contract, except liability arising through the sole negligence or the sole willful misconduct of the contractor. The subcontractor's foreman had been injured on the job as a result of his own negligence and that of the contractor-indemnitee and had sued the contractor.

The court of appeal affirmed. It held that the indemnity clause at issue was not a general one [*see § 115.40*], but rather one that did address itself to the issue of the indemnitee's own negligence. A right of indemnity for all liability except that arising from the indemnitee's sole negligence or willful misconduct is the functional equivalent of a clause that would provide for indemnity against any and all liability, including that arising from the indemnitee's own negligence. Under the latter language, the public policy expressed in *Civ. Code § 2782* [*see § 115.42*] would limit the operation of the clause, as a matter of law, in the case of the indemnitee's sole negligence or willful misconduct. Because the clause was not a general one, characterization of the indemnitee's negligence as active or passive was irrelevant (*140 Cal. App. 3d 1011, 1014-1018)* .

NOTE:

In *C.I. Engineers and Constructors, Inc.,* the court imputed the employee's own negligence to the employer with the result that the parties to the indemnity agreement were concurrently negligent [*C. I. Eng'rs & Constructors, Inc. v. Johnson & Turner Painting Co. (1983) 140 Cal. App. 3d 1011, 1016-1017, 189 Cal. Rptr. 824]* .

In ***Ralph M. Parsons Co. v. Combustion Equip. Assocs., Inc.*** *(1985) 172 Cal. App. 3d 211, 218 Cal. Rptr. 170* , a general contractor (Parsons) sought indemnity from a subcontractor (Combustion) under the terms of an indemnity provision in the subcontract for the amount of a settlement paid by Parsons to an injured employee of another subcontractor. The agreement contained an indemnity clause under which Combustion agreed to indemnify Parsons for liability arising out of Combustion's performance of the contract unless Parsons was the sole cause of the accident. The jury determined that the negligence of both Parsons and Combustion proximately caused the plaintiff's injuries.

The court of appeal enforced the indemnity provision and awarded Parsons total indemnity from Combustion. The court

found that the agreement reflected the intent of the parties to contract for indemnity should they be joint or concurrent tortfeasors (*172 Cal. App. 3d 211, 218-222)* .

[4] Additional Authorities

[a] Agreement Excepting Sole Negligence and Willful Misconduct of Indemnitee

In *Smoketree-Lake Murray, Ltd. v. Mills Concrete Constr. Co. (1991) 234 Cal. App. 3d 1724, 286 Cal. Rptr. 435* , a developer incurred liability to a homeowners's association for construction defects. The developer cross complained for indemnity against certain subcontractors based on several express indemnity agreements.

The subcontractors asserted that the indemnity agreements were unenforceable, on the ground that the developer had made misrepresentations and concealed information from the condominium purchasers. The trial court ruled that a finding of such fraud would preclude indemnity, and the jury found that the developer had committed fraud.

The court of appeal reversed, holding that the fraud finding did not preclude enforcement of the indemnity agreement. The court construed *Civ. Code § 2782* as prohibiting indemnity only if the liability was due to the indemnitee's sole negligence or sole willful misconduct, meaning that the situation in which the liability resulted from the indemnitors' negligence and the indemnitee's negligence and willful misconduct was not within the prohibition of the statute (*234 Cal. App. 3d 1724, 1737-1738)* .

The court essentially viewed the fraud as collateral conduct, not directly relevant to the liability for which indemnity was sought. The indemnity agreements did not purport to provide indemnity for fraud, but rather for damages other than those due to the developer's sole negligence or misconduct or due to the fault or failure of the subcontractors to meet the requirements of the particular specifications. The developer was not seeking indemnity for damages paid to the owners for fraud, but rather for losses due, at least in part, to the negligence and failure to meet the specifications of the subcontractors (*234 Cal. App. 3d 1724, 1741-1742)* .

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A. Express Indemnity

11-115 California Points & Authorities § 115.36

§ 115.36 Supporting Contention That Indemnitee Is Entitled to Indemnification Under Express Indemnity Agreement--Indemnity Clause At Issue Is One Expressly Excepted From Public-Policy Bar to Enforceability [Civ. Code §§ 2782, 2784.5]

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE COURT SHOULD GIVE FULL EFFECT TO THE EXPRESS INDEMNITY AGREEMENT BETWEEN THE PARTIES BECAUSE THE INDEMNITY AGREEMENT INVOLVED IN THIS ACTION IS EXPRESSLY EXCEPTED FROM THE PROVISIONS OF SECTION _____ [2872 *or* 2784.5] OF THE CIVIL CODE.

[*EITHER*]

Inapplicability to Insurance Contracts. *Sections 2782* and *2784.5 of the Civil Code* expressly exclude from their provisions insurance contracts, workers' compensation insurance contracts, and agreements issued by an admitted insurer (*Civ. Code §§ 2782(a), 2784.5*).

[*OR*]

Accommodation Agreement. *Section 2782 of the Civil Code* does not prevent a contractor responsible for the performance of a construction contract from fully indemnifying a person, firm, corporation, state, or other agency for whose account the construction contract is not being performed but who, as an accommodation, enters into an agreement with the contractor permitting the contractor to enter on or adjacent to its property for the purpose of performing the construction contract for others (*Civ. Code § 2782.1*).

[*OR*]

Agreement on Liability for Design Defect. *Section 2782 of the Civil Code* does not prevent a party to a construction contract and the owner or other party for whose account the construction contract is being performed from negotiating and expressly agreeing with respect to the allocation, release, liquidation, exclusion, or limitation as between the parties of any liability (1) for design defects or (2) of the promisee to the promisor arising out of or relating to the construction contract (*Civ. Code § 2782.5*; *Markborough Cal., Inc. v. Superior Court (1991) 227 Cal. App. 3d 705*).

[*OR*]

Agreement to Indemnify Professional Engineer. *Section 2782(a) of the Civil Code* does not prevent an agreement to indemnify a professional engineer against liability for the negligence (but not willful misconduct) of the engineer or the engineer's agents or employees in providing inspection services to plants or other facilities if all of the following criteria are satisfied: (1) the promisor is the owner of the plants or facilities inspected; (2) the promisor is audited annually by an independent certified public accountant, public accountant, or accounting licentiate of another state authorized by the laws of that state to perform the audit; (3) the net worth of the promisor as of the time the contract for indemnification was entered into exceeded $10 million, as determined by the promisor's most recent annual independent audit; (4) the promisor is self-insured with respect to liability arising from ownership of the plant or facility; and (5) the indemnification does not apply to the first $250,000 of liability (*Civ. Code § 2782.2*).

[*OR*]

Professional Services Regarding Hazardous Materials. *Section 2782(a) of the Civil Code* does not prevent an agreement, other than an agreement by a public entity, to indemnify a professional engineer or geologist (or their agents, employees, independent contractors, or subsidiaries) from liability for damages in excess of $250,000 that are caused by the sole negligence (but not gross negligence or willful misconduct) of the engineer or geologist in providing hazardous materials identification, evaluation, preliminary assessment, design, remediation services, or other services as described in *Sections 25322* and *25323 of the Health & Safety Code* or the federal National Oil and Hazardous Substances Pollution Contingency Plan, *Section 300.1 et seq. of Title 40 of the Code of Federal Regulations*, if the services, in whole or in part, address subterranean contamination or other concealed conditions caused by the hazardous materials, and the promisor is responsible, or potentially responsible, for all or part of the contamination (*Civ. Code § 2782.6*).

[2] Comments

[a] Use of Form

This form may be submitted in support of an indemnitee's contention that the indemnity provision on which the claim is based is expressly excepted by statute from the provisions of *Civ. Code § 2782* or *2784.5*. These statutes provide that unless one of the statutory exceptions applies, an indemnity agreement that purports to relieve the indemnitee of responsibility for its sole negligence or willful misconduct is against public policy and unenforceable [*see Civ. Code §§ 2782(a), 2784.5*; *see also § 115.42*]. The various alternative provisions set forth the statutory exception for insurance contracts [*see Civ. Code §§ 2782(b), 2784.5* (first alternative paragraph)]; accommodation agreements [*see Civ. Code § 2782.1* (second alternative paragraph)]; design defects [*see Civ. Code § 2782.5* (third alternative paragraph)]; inspection services of professional engineers [*see Civ. Code § 2782.2* (fourth alternative paragraph)]; and certain services of professional engineers or geologists with regard to the clean-up of hazardous materials, as defined [*see Civ. Code § 2782.6* (fifth alternative paragraph)]. In an appropriate case, this memorandum may be submitted in opposition to the

contention supported by the points and *authorities in § 115.42*.

This form may be combined with points and authorities pertaining to the specific procedural context in which the validity and scope of an express indemnity agreement is brought before the court. It may be used in a memorandum in connection with a pretrial motion, such as a demurrer or motion for summary judgment, if the applicability of the statutory exception to the nonenforceability may be established as a matter of law. It may also be used in a trial or appellate brief. For discussion of the proceedings in which the validity and scope of an indemnity agreement may be litigated, see *§ 115.10*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. It should be established that: (1) the parties entered into an agreement by which the indemnitor agreed to indemnify the indemnitee from all loss incurred under certain express contractual conditions; (2) the agreement in question is contained in, is collateral to, or affects a construction contract [*see Civ. Code §§ 2782, 2783*] or a hauling, trucking, or cartage contract [*see Civ. Code § 2784.5*]; and (3) the agreement either expressly provides for or may be construed to provide for indemnity for loss arising from the indemnitee's sole negligence or willful misconduct, or, in the case of a construction contract, for defects in design furnished by the indemnitee. The facts that bring the agreement within one or more of the express statutory exceptions to nonenforceability, as set forth in the alternate paragraphs above, should then be established.

[3] Discussion of Authorities

[a] Agreement on Liability for Design Defect

Markborough Cal., Inc. v. Superior Court *(1991) 227 Cal. App. 3d 705, 277 Cal. Rptr. 919* , involved a dispute between a developer of real property (Markborough) and an engineering firm (Glenn) that had designed an artificial lake which the developer subsequently constructed on the property. The contract contained a clause limiting Glenn's liability to Markborough for professional negligence to the greater of $50,000 or Glenn's consulting fee on the project. The clause was not expressly bargained for between the parties, but was one of a number of fine-print, boilerplate provisions on the reverse of Glenn's standard form agreement. The lake design was flawed; the lake liner failed; and Markborough incurred over $5 million in costs to remedy the problem. Markborough sued Glenn for breach of contract, but the trial court enforced the limitation of liability and awarded Markborough only the consulting fee of $67,640 in damages. Markborough sought review by writ of mandate.

The court of appeal affirmed, rejecting all of Markborough's arguments that the limitation-of-liability clause was outside the scope of *Civ. Code § 2782.5* and thus unenforceable under *Civ. Code § 2782* [*see § 115.42*]. The court surveyed the legislative history and concluded that *Civ. Code § 2782* was intended to prohibit one party to a construction contract from avoiding liability to third parties because of its sole negligence (or willful misconduct) by forcing the other party to provide indemnification. *Civ. Code § 2782.5* was intended to reaffirm and clarify that limitation-of-liability provisions between a property owner and a contractor remain valid. Thus, *Civ. Code § 2782* speaks to liability of the parties to third persons; *Civ. Code § 2782.5* speaks to allocation of liability as between the parties themselves (*227 Cal. App. 3d 705)* . As the provision at issue was a limitation-of-liability clause between the parties themselves and not an indemnity clause with regard to liability to third parties, it was within *Civ. Code § 2782.5* and not invalid under *Civ. Code § 2782*.

The court then held that there is no affirmative duty to specifically advise the other party of the inclusion of a limitation of liability clause in a construction contract, or to inform the other party of the risks involved in the project (*227 Cal. App. 3d 705)* . Finally, the court construed the word "negotiate" in *Civ. Code § 2782.5* to simply mean that each party had an opportunity to accept, reject, or modify the provision. If the parties had such an opportunity, the provision is valid even if there was no actual discussion regarding the provision. Whether the parties had that ability or right depends on a consideration of all the facts surrounding the transaction, including, but not limited to, whether the parties

were of relatively equal bargaining power and whether it was an arm's length transaction (*227 Cal. App. 3d 705)* .

In the case before it, the court found that two equal bargainers had, by contract, agreed concerning the allocation of risk (and to the responsibility to insure against that risk) between them. There was no justification for transferring the risk in any manner other than as the parties had agreed (*227 Cal. App. 3d 705)* .

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11-115 California Points & Authorities § 115.37

§ 115.37 Supporting Contention That Indemnitee Is Entitled to Indemnification Under Express Indemnity Agreement--Collateral Estoppel Bars Relitigation of Indemnitor's Liability to Third Person if Indemnitor Was Party to Prior Action

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

INDEMNITOR IS COLLATERALLY ESTOPPED FROM RELITIGATING ANY ELEMENT OF ITS NEGLIGENCE IN THIS ACTION TO ENFORCE THE PARTIES' INDEMNITY AGREEMENT BECAUSE LITIGATION OF AN UNDERLYING ACTION TO WHICH INDEMNITOR WAS A PARTY RESULTED IN A FINAL JUDGMENT DETERMINING THAT INDEMNITOR WAS NEGLIGENT.

Relitigation of Indemnitor's Negligence. Under the doctrine of collateral estoppel, a determination in a prior action that an indemnitor was negligent bars relitigation of any element of its negligence in a subsequent action on an indemnity agreement (*see San Diego Gas & Elec. Co. v. Davey Tree Surgery Co. (1970) 11 Cal. App. 3d 1096, 1101*).

[2] Comments

[a] Use of Form

This form may be submitted in support of an indemnitee's contention that a prior judgment conclusively determines that the indemnitor's negligence proximately caused the loss for which indemnity is sought, and that the indemnitor is collaterally estopped from relitigating any element of its negligence in a subsequent proceeding on an indemnity agreement. Under the doctrine of collateral estoppel, judgment in a prior action bars the party against whom it was entered from relitigating any issue in a subsequent action that was actually litigated and determined in the prior action [*Saunders v. New Capital for Small Businesses, Inc. (1964) 231 Cal. App. 2d 324, 330, 41 Cal. Rptr. 703]* . For further discussion, see California Forms of Pleading and Practice, Ch. 491, *Res Judicata* (Matthew Bender).

This form may be combined with points and authorities pertaining to the specific procedural context in which the

validity and scope of an express indemnity agreement is brought before the court. It may be used in a memorandum in connection with a pretrial motion, such as a demurrer, motion for summary judgment, or motion for summary adjudication of issues, depending on whether the operation of collateral estoppel will resolve all issues in the second action. For discussion of the proceedings in which the validity and scope of an indemnity agreement may be litigated, see *§ 115.10*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. It should be established that: (1) the parties entered into an agreement by which the indemnitor agreed to indemnify the indemnitee from loss incurred under certain express contractual conditions; (2) an action was brought against both the indemnitee and the indemnitor on a claim for which the indemnitee now seeks indemnity under the agreement; (3) pursuant to that action, the indemnitor was determined, either by the trier of fact or as a matter of law, to have been negligent; and (4) the action by the claimant resulted in a judgment, now final, against the indemnitor on the claim. The effect of this conclusive determination of negligence on the indemnity claim should also be shown. For example, in an appropriate case counsel should argue that the prior determination of the indemnitor's negligence forecloses a claim that indemnity should be denied because of the indemnitee's sole negligence.

[3] Discussion of Authorities

[a] Relitigation of Indemnitor's Negligence

San Diego Gas & Electric Co. v. Davey Tree Surgery Co. (1970) 11 Cal. App. 3d 1096, 89 Cal. Rptr. 702 , involved an injury suffered by an avocado picker when his picking pole came into contact with power lines that passed near the top of the tree in which he was working. The picker sued both the public utility responsible for the lines (SDG&E) and the company with which the utility had contracted for tree-trimming services along its right of way (Davey). SDG&E cross complained for express indemnity against Davey based on an indemnity clause in the contract. The clause required Davey to indemnify SDG&E from liability arising out of or connected in any manner with the performance of the work specified in the agreement.

Trial resulted in a verdict for the picker against both defendants, and Davey satisfied the judgment, reserving its right to seek contribution from SDG&E. It defended against SDG&E's cross complaint for indemnity on the ground that, under its contract with SDG&E, it assumed only a duty to keep trees from coming in contact with the wires to prevent the trees from endangering the lines and interrupting electrical service. It had no duty to keep the trees a safe distance from the power lines to protect pickers, and therefore, liability to the picker did not arise out of the performance of the work specified in the contract. The trial court rejected this argument and awarded SDG&E indemnity.

In affirming the judgment of indemnity, the court of appeal noted that Davey had presented the same argument regarding the scope of its duty under the contract in the trial on the picker's claim. Davey had moved for judgment notwithstanding the verdict for the picker on the ground that the contract imposed no duty on Davey to the picker. The motion was denied, judgment against Davey was entered, and Davey took no appeal from that judgment. Under the doctrine of collateral estoppel, the prior judgment was a conclusive determination of Davey's duty under the tree-trimming contract to trim trees in such a way as to protect the safety of persons working in the trees. This duty having been conclusively determined, Davey could not assert in a subsequent action on the indemnity clause that liability for the picker's injuries was not covered by the indemnity clause (*11 Cal. App. 3d 1096, 1100-1101)* .

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11-115 California Points & Authorities § 115.38

§ 115.38 Supporting Contention That Indemnitee Is Entitled to Indemnification Under Express Indemnity Agreement--Indemnitee Was Justified In Incurring Attorneys' Fees to Defend Claim Covered by Indemnity Agreement

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

AN INDEMNITEE MAY RECOVER ATTORNEY'S FEES UNDER AN INDEMNITY AGREEMENT FOR COSTS INCURRED FOR THE DEFENSE OF A THIRD-PARTY CLAIM, IN GOOD FAITH AND IN THE EXERCISE OF REASONABLE DISCRETION, IF THERE IS SUFFICIENT JUSTIFICATION FOR THE DEFENSE.

A. Express Indemnity Embraces Costs of Defense. A contract of indemnity embraces the costs of defense against claims, demands, or liability incurred by the indemnitee in good faith and in the exercise of reasonable discretion (*Civ. Code § 2778(3)*).

B. Sufficient Justification for Indemnitee's Defense. An indemnitee may recover attorney's fees from the indemnitor for its defense of a third-party action if it can show a contractual right or sufficient justification or need for a separate defense (*Buchalter v. Levin (1967) 252 Cal. App. 2d 367, 371, 60 Cal. Rptr. 369*).

[*Optional*] **C. Indemnitor's Refusal to Defend Action.** If an indemnitor is properly notified of an action brought against the indemnitee by a third-party and does not defend the action, thus causing the indemnitee to incur the costs and attorneys' fees necessary in presenting its own defense, the costs are considered as incurred in good faith and in the exercise of reasonable discretion, and may be recovered from the indemnitor (*Buchalter v. Levin (1967) 252 Cal. App. 2d 367, 371, 60 Cal. Rptr. 369* ; *see County of San Joaquin v. Stockton Swim Club (1974) 42 Cal. App. 3d 968, 973, 117 Cal. Rptr. 300*).

[*Optional*] **D. Conflict of Interest.** An indemnitee may recover attorney's fees for the costs of a separate defense of a third-party action, even though the indemnitor undertakes the defense of the indemnitee, if there is a conflict of interest

between the parties and the defense provided by the indemnitor is not fully protective of the indemnitee's interests (*see Safeway Stores, Inc. v. Massachusetts Bonding & Ins. Co. (1962) 202 Cal. App. 2d 99, 114-116, 20 Cal. Rptr. 820*).

[*Optional*] **E. Liability to Provide Defense When No Liability for Indemnity.** An indemnitor may be required by contract to provide a defense, or failing to do so, pay costs incurred by the indemnitee in providing its own defense, even when the indemnitor is ultimately found not to be liable to provide indemnity (*Crawford v. Weather Shield Mfg., Inc. (2008) 44 Cal. 4th 541, 553, 79 Cal. Rptr. 3d 721, 187 P.3d 424*).

[*Optional*] **F. Underlying Complaint Need Not Specifically Allege Negligence of Indemnitor.** The underlying complaint need not allege negligence specifically on the part of the indemnitor in order to trigger a duty to defend on the part of that indemnitor, and it is sufficient that the complaint describe factual circumstances that suggest the possible negligence of the indemnitor, and the indemnitee then specify in a cross-complaint or otherwise that at least some of the damage would have been caused by the indemnitor's negligence (UDC-Universal Development, L.P. v. CH2M *Hill (2010) 181 Cal. App. 4th 10, 21, 103 Cal. Rptr. 3d 684*).

[*Optional*] **G. Indemnitee's Failure to Tender Defense.** If the indemnitor does not offer to provide a defense, the fact that the indemnitee provides its own defense without first tendering defense of the action to the indemnitor will not preclude the indemnitee from recovering its defense costs, at least in the absence of language in the indemnity agreement that demonstrates a contrary intent (*City of Watsonville v. Corrigan (2007) 149 Cal. App. 4th 1542, 1548-1552, 58 Cal. Rptr. 3d 458*).

[2] Comments

[a] Use of Form

This form may be submitted in support of an indemnitee's contention that the costs of its separate defense of a third-party claim are recoverable from the indemnitor under an indemnity agreement. In an appropriate case, this memorandum may be submitted in opposition to the contention supported by the points and *authorities in § 115.43*, that if the indemnitor provides a defense of the claim, the indemnitee is not entitled to recover the cost of its separate, voluntary, defense.

Paragraph A sets forth the basic statutory rule that an indemnitor is liable for the costs of defense incurred by an indemnitee in good faith and in the exercise of reasonable discretion [*Civ. Code § 2778(3)*]. Paragraph B sets forth the basic principle that the indemnitee may recover the costs of a separate defense if the right is provided for in the agreement or if there is sufficient justification for the separate defense. Optional Paragraphs C and D set forth two situations that have been found to constitute sufficient justification; the indemnitor's refusal to defend (Paragraph C), and the existence of a conflict of interest (Paragraph D). Optional Paragraphs E and F support the contention that a duty to defend is separate from a duty to indemnify and arises even if the indemnitor is ultimately found not to be negligent. Optional Paragraph G states that the indemnitee's failure to tender the defense to the indemnitor does not preclude the recovery of defense costs.

This form may be combined with points and authorities pertaining to the specific procedural context in which the validity and scope of an express indemnity agreement is brought before the court. It may be used in a memorandum in connection with a pretrial motion, such as a demurrer, motion for summary judgment, or motion for summary adjudication of the issue of damages recoverable under the indemnity agreement, if the indemnitee's right to a separate defense at the indemnitor's expense may be established as a matter of law. It may also be used in a trial or an appellate brief. For discussion of the proceedings in which the validity and scope of an indemnity agreement may be litigated, see *§ 115.10*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law

stated. It should be established that: (1) the parties entered into an agreement by which the indemnitor agreed to indemnify the indemnitee from loss incurred under certain express contractual conditions; (2) an action was brought against the indemnitee on a claim that was within the scope of the indemnity agreement; and (3) the indemnitee provided its own defense of that claim for which it now seeks indemnity under the agreement. The facts that indicate why the indemnitee was justified in conducting its own separate defense, for example, that the indemnitor refused to defend or that the indemnitor's defense did not adequately protect the indemnitee's interests, should also be established.

[3] Discussion of Authorities

[a] Sufficient Justification for Indemnitee's Defense

Buchalter v. Levin *(1967) 252 Cal. App. 2d 367, 60 Cal. Rptr. 369* , is discussed in *§ 115.43[3][a]*. This case holds against the indemnitee and establishes the principle that the indemnitee is generally not entitled to reject the indemnitor's tendered defense, conduct its own defense, and then recover the cost of that defense from the indemnitor under the indemnity agreement. In so holding, the court noted two basic exceptions to the general rule; first, such a right might be expressly provided for in the indemnity agreement; and second, the indemnitee might be able to make a showing of sufficient justification or need for a separate defense that would bring the cost of the defense within the rule of *Civ. Code § 2778(3)*, that an indemnitee may recover costs of defense incurred in good faith, and in the exercise of a reasonable discretion (*252 Cal. App. 2d 367, 371)* .

[b] Indemnitor's Refusal to Defend Action

County of San Joaquin v. Stockton Swim Club *(1974) 42 Cal. App. 3d 968* , *117 Cal. Rptr. 300* , involved an indemnity agreement under which a private swim club agreed to indemnify various public entities with regard to its use of public swimming facilities. A member of the swim club was injured at one of the facilities and brought suit against the club and the public entities. The public entities called on the swim club to defend the action pursuant to the indemnity agreement, but the club refused. The entities then conducted their own defense of the action and also cross complained against the swim club for indemnity, including the costs of defense. The plaintiff's action resulted in a judgment in favor of all defendants, including the swim club. However, the court awarded the public entities judgment on the cross complaint against the swim club for the cost of the defense.

One reason that the swim club had rejected the defense was its belief that the indemnity agreement did not extend to the public entities' own negligence or the defective condition of its property. On appeal, the court found this question to be irrelevant. The question was only whether the public entities' cost of defending themselves was within the contract language as a "cost or expense that may arise during or be caused in any way by such use or occupancy of the property." The court affirmed the trial court's holding that the expenses were covered by the agreement (*42 Cal. App. 3d 968, 973)* . No reference is made in the opinion to *Civ. Code § 2778(3)* and *(4)*, but the result is consistent with the statutes.

Buchalter v. Levin *(1967) 252 Cal. App. 2d 367, 60 Cal. Rptr. 369* , is discussed in *§§ 115.38[3][a]* and *115.43[3][a]*. The court offered the following dicta: "If the indemnitor is properly notified and does not avail itself of the opportunity to defend an action, thus causing the indemnitee to incur the costs and attorneys' fees necessary in presenting his own defense, this is considered a cost of defense incurred in good faith and in the exercise of reasonable discretion, for which the indemnitee may recover" (*252 Cal. App. 2d 367, 371)* .

[c] Conflict of Interest

Safeway Stores, Inc. v. Massachusetts Bonding & Ins. Co. *(1962) 202 Cal. App. 2d 99, 20 Cal. Rptr. 820* , was an appeal from a superior court judgment in an action for indemnity. Safeway Stores and defendant King, a general contractor, had entered into a written contract for the construction of a new store. The contract contained a hold-harmless and indemnification clause that imposed on King the obligation of furnishing a performance bond, which the contractor secured from a bonding company. In construction of the store, King used poor quality roof trusses. The

trusses collapsed, and six of King's employees were injured. They brought suit for damages against Safeway and the supplier of the trusses. Safeway called on King to defend the action under the indemnity agreement. King accepted the defense without qualification, and his attorney undertook the joint representation of the two parties. However, it soon became apparent to Safeway that there was a conflict between its interests and the defense being provided by King. The attorney was taking the position that if it should be determined that Safeway was negligent in causing the accident, regardless of the character of that negligence as active or passive, King would deny liability under the indemnity agreement. Safeway felt that there was a conflict of interest and retained its own attorney, who assumed the active control of the defense.

The trial court adjudged that Safeway was entitled to be indemnified under the provisions of the construction contract for all loss, damage, and expense, including legal fees. The court of appeal affirmed this judgment, holding that Safeway was justified in providing its own defense. The defense provided to Safeway by King was qualified and technical and not fully promotive of Safeway's interests. King's defense for Safeway amounted to a refusal to defend Safeway's real interests; King failed to perform his obligations under the indemnity contract; and Safeway did not, as a result, voluntarily employ its own counsel (*202 Cal. App. 2d 99,114-116*).

NOTE:

A conflict of interest would seem to be present if the indemnitor may be able to deny liability under the agreement based on the indemnitee's sole or active negligence or willful misconduct [*see §§ 115.40* and *115.42*]. It is in the interests of the indemnitor to attach the greatest degree of culpability possible to the conduct of the indemnitee, in order to increase the likelihood that indemnity is not available. The situation in *Safeway Stores, Inc. v. Massachusetts Bonding and Insurance Co.*, in which the indemnitee's counsel took over the entire defense from the indemnitor's counsel, seems only to reverse, rather than resolve, the conflict of interest.

[d] Liability to Provide Defense When No Liability for Indemnity

In ***Crawford v. Weather Shield Mfg., Inc.*** *(2008) 44 Cal. 4th 541, 79 Cal. Rptr. 3d 721, 187 P.3d 424* , a housing developer had a contract with a subcontractor, a window manufacturer, under which the subcontractor agreed to both indemnify the developer for damage caused by the subcontractor's work and also defend the developer against any claims growing out of the execution of the subcontractor's work. The developer and the subcontractor were sued by homeowners for damage caused by allegedly defective windows and window framing, claims which came under the contractual language obligating the subcontractor to provide a defense for the developer. The subcontractor refused to provide a defense, the developer settled, and the developer then sought to recover its defense costs under the agreement. However, in the homeowners' suit against the subcontractor, the subcontractor was eventually found not to be negligent and thus owed no actual indemnity to the developer. The trial court nonetheless awarded the developer its defense costs from the subcontractor and another subcontractor. The window manufacturer subcontractor appealed. The court of appeal held that under the language of the particular indemnity agreement, the subcontractor was liable for its share of the developer's defense costs. Another appeal followed.

The California Supreme Court affirmed. The Court held that, unless the indemnity agreement provides otherwise, *Civ. Code § 2778(4)* effectively places in every indemnity contract a duty on the part of the indemnitor to assume the indemnitee's defense, if tendered, against all claims embraced by the indemnity agreement. This duty arises immediately upon a proper tender of defense by the indemnitee and does not first require a determination of whether indemnity is actually owed. Thus, this duty to defend does not depend on the outcome of the litigation for which defense is tendered (*44 Cal. 4th 541, 557-558)* . The Court also concluded that an indemnitor who refuses to provide a defense without a contractual basis for such refusal may subsequently owe damages in the form of reimbursement of defense costs to the indemnitee, even when the indemnitor is not otherwise liable for indemnity under the agreement because the indemnitee was not found liable to the third party (*44 Cal. 4th 541, 557-558)* .

[e] Underlying Complaint Need Not Specifically Allege Negligence of Indemnitor

In **UDC-Universal Development, L.P. v. CH2M** ***Hill*** *(2010) 181 Cal. App. 4th 10, 103 Cal. Rptr. 3d 684* , a homeowner's association brought suit for construction defects against the developer of the condominium complex. The developer brought a cross-complaint for indemnity against subcontractor engineering consultants and other subcontractors, also tendering defense of the underlying action to the subcontractors pursuant to provisions in the hiring contracts. The engineering consultants generally denied the allegations of the cross-complaint and refused to provide a defense on the grounds that the underlying complaint did not allege that they were negligent. The developer eventually settled the underlying lawsuit and all cross-complaints except the one against the engineering consultants and trial proceeded on that action alone. A jury eventually found that the engineering consultants were not negligent and owed no indemnity to the developer. However, pursuant to the then-recent decision of the *California Supreme Court in Crawford v. Weather Shield Mfg., Inc. (2008) 44 Cal. 4th 541, 79 Cal. Rptr. 3d 721, 187 P.3d 424* , described in [d], *above*, the trial court ruled that despite the eventual finding that no indemnity was owed, the subcontractor had breached its contractual duty to provide the developer with a defense in the underlying action. The subcontractor appealed.

The court of appeal affirmed. The subcontractor argued that the contract between the parties called for a defense only when the underlying claims arose out of its negligence, and that in this case, the jury had found that the subcontractor had not been negligent or breached its contract with the developer. Thus, according to the subcontractor, because the underlying complaint had not contained allegations that the subcontractor had been negligent, no duty to provide a defense arose. The court rejected this argument. The court noted that while the jury may have found that the subcontractor was not negligent and had not breached the subcontract during performance of the construction work, the issue of whether the refusal to provide a defense constituted a breach of contract was not submitted to the jury but was retained for decision by the trial judge. The court also noted that the contract with the consultants required them to defend any suit or action "aris[ing] out of or ... in any way connected with any negligent act or omission by" the subcontractor. Applying the Supreme Court's rationale in *Crawford v. Weather Shield Mfg., Inc.*, the court concluded that the contactual language was broad enough to generate a duty to defend whenever the underlying claims arose from work performed by the consultants, even though the consultants might eventually be found not to have been negligent (*181 Cal. App. 4th 10, 18-21)* . The court also concluded that the underlying complaint need not have alleged negligence specifically on the part of the consultants in order to trigger a duty to defend on their part, and it was sufficient that the complaint described factual circumstances that suggested their possible negligence. In the instant case, the developer's cross-complaint, filed in response to the underlying complaint, specified that at least some of the damage would have been caused by the indemnitor's negligence, and this was sufficient to trigger the consultants' duty to defend (*181 Cal. App. 4th 10, 21)* .

[f] Indemnitee's Failure to Tender Defense

In *City of Watsonville v. Corrigan (2007) 149 Cal. App. 4th 1542, 58 Cal. Rptr. 3d 458* , a city incurred defense costs after it was named a defendant in an action brought by property owners stemming from soil instability and landslides. The city eventually settled and an insurance payment was made on its behalf to the plaintiffs. The city filed a cross-action to recover its defense costs and attorney fees under express indemnity agreements with certain developers. The trial court ruled that the city could not recover its defense costs from the developers because it had failed to tender defense of the action against it to those developers. The city appealed.

The court of appeal reversed. The court rejected arguments based on the duty to defend imposed on insurers, noting that indemnity agreements are not construed like insurance policies, which are adhesion contracts and require an insured to tender defense of a claim to the insurer (*149 Cal. App. 4th 1542, 1548-1549)* . The court noted that the indemnity agreement between the parties was silent on the issue of defense costs, and thus, the provisions of *Civ. Code § 2778* were applicable when determining the rights of the parties (*149 Cal. App. 4th 1542, 1548-1549)* . Under *Civ. Code § 2778(3)*, indemnity against claims includes recovery of the costs of defense incurred in good faith and in the exercise of reasonable discretion. Although *Civ. Code § 2778(4)* obligates the indemnitor to provide a defense for the indemnitee, it

does not mandate that the indemnitee tender defense of the claim to the indemnitor (*149 Cal. App. 4th 1542, 1549)* . The court concluded that if the indemnitor does not offer to provide a defense, the fact that the indemnitee provides its own defense without first tendering defense of the action to the indemnitor will not preclude the indemnitee from recovering its defense costs, at least in the absence of language in the indemnity agreement that demonstrates a contrary intent. The court of appeal remanded to the trial court to rule on the good faith and reasonableness of the costs and fees claimed by the city (*149 Cal. App. 4th 1542, 1552-1553)* .

[4] Additional Authorities

[a] Indemnitor's Refusal to Defend Action

In *United States Elevator Corp. v. Pacific Inv. Co. (1994) 30 Cal. App. 4th 122, 35 Cal. Rptr. 2d 382* , the indemnitee under an express indemnity agreement tendered its defense of a third party action to the indemnitor, but the indemnitor refused it. The indemnitee then provided for its own defense and cross complained against the indemnitor for its costs and attorney's fees incurred in the defense. The indemnitor settled the matter, paid the entire settlement amount, and obtained a dismissal with prejudice as to all defendants including the indemnitee. On trial of the cross complaint, the court held that the indemnitor had no obligation to indemnify the indemnitee because there was neither a judgment against the indemnitee nor any payment made by the indemnitee on the liability (*30 Cal. App. 4th 122, 124-125)* .

The court of appeal reversed. It held that under *Civ. Code § 2778(4)*, unless there is a contrary intention in the agreement, the indemnitor under an express indemnity must defend the indemnitee on demand. The duty to defend is imposed independently of any duty to indemnify; therefore, the fact that the case was settled without the indemnitee's incurring any liability was irrelevant to the duty to assume the indemnitee's defense (*30 Cal. App.4th 122, 126-129)* .

California Points & Authorities

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
CHAPTER 115 INDEMNITY AND CONTRIBUTION
PART II. FORMS
A. Express Indemnity

11-115 California Points & Authorities § 115.39

§ 115.39 Opposing Contention That Indemnitee Is Entitled to Indemnification Under Express Indemnity Agreement--Indemnitee May Not Recover for Loss That Is Beyond Terms of Agreement

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

INDEMNITEE'S CLAIM FOR EXPRESS INDEMNITY SHOULD BE DENIED BECAUSE IT SEEKS INDEMNIFICATION FOR A LOSS THAT IS NOT WITHIN THE SCOPE OF THE INDEMNITY AGREEMENT.

Losses Beyond Scope of Indemnity Agreement. An indemnity agreement is to be construed like any other contract with a view to determining the actual intention of the parties, and the terms of the writing will not be extended by implication; therefore, an indemnitee cannot recover beyond the terms of the agreement (*Southern Cal. Gas Co. v. Ventura Pipe Line Constr. Co. (1957) 150 Cal. App. 2d 253, 257, 309 P.2d 849*).

[2] Comments

[a] Use of Form

This form may be submitted in support of an indemnitor's contention that the indemnitee's claim for indemnity exceeds the scope of an express indemnity agreement between the parties. The points and *authorities in § 115.63* are for use by the express indemnitor in support of its claim for implied indemnity with regard to the same occurrence, based on the limited scope of the indemnity agreement.

This form may be combined with points and authorities pertaining to the specific procedural context in which the validity and scope of an express indemnity agreement is brought before the court. It may be used in a memorandum in connection with a pretrial motion, such as a demurrer or motion for summary judgment, if the indemnitor's nonliability may be established as a matter of law from the four corners of the indemnity agreement. It may also be used in a trial or an appellate brief. For discussion of the procedures by which the validity and scope of an indemnity agreement may be litigated, see *§ 115.10*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. It should be established that: (1) the parties entered into an agreement by which the indemnitor agreed to indemnify the indemnitee from loss incurred under certain express contractual conditions; (2) that the indemnitee incurred a loss for which it is seeking indemnity pursuant to the agreement; and (3) the loss for which indemnity is sought is not one for which the agreement, expressly or by implication, provides a right of indemnity.

[b] Opposing Memoranda

For points and authorities supporting the contention that an indemnitee is entitled to indemnification on the same basis, see *§ 115.30*.

[3] Discussion of Authorities

[a] Losses Beyond Scope of Indemnity Agreement

Southern Cal. Gas Co. v. Ventura Pipe Line Constr. Co. *(1957) 150 Cal. App. 2d 253, 309 P.2d 849* , was an appeal from a judgment of the trial court for plaintiff-indemnitee (Gas Co.) on a written indemnity agreement given by defendant-indemnitor (Ventura). The owner of certain land had granted an easement to Gas Co. for laying a pipeline across the land. Gas Co. executed an indemnity agreement with the landowner under which Gas Co. agreed to indemnify the landowner against claims arising from exercise of the easement rights, regardless of any negligence of the owner. Gas Co. then hired Ventura to install the pipeline, and Ventura, in turn, executed an indemnity agreement with Gas Co.

This agreement contained two pertinent provisions. Under the first, Ventura agreed to indemnify Gas Co. from liability and claims for injury or death of any employee of Ventura or any subcontractor. Under the second, Ventura agreed to indemnify Gas Co. against claims for injury or death of all other persons and property, including employees and property of Gas Co., but excluding claims resulting solely from negligence on the part of Gas Co.'s employees or representatives. No mention was made in the Ventura-Gas Co. agreement of the liability that Gas Co. had agreed to assume under its easement with the landowner, and Ventura had no knowledge of this agreement (*150 Cal. App.2d 253, 255-256)* .

During construction, an employee of Ventura was killed, and the employee's widow brought a third party wrongful death action under workers' compensation law against the landowner, but not Gas Co. The landowner called on Gas Co. to defend the action under the terms of the indemnity agreement between them, and Gas Co. agreed to pay the expenses of the defense. Gas Co. then called on Ventura to assume the defense and its costs pursuant to their indemnity agreement, but Ventura refused. A verdict in the wrongful death action for the widow was reversed on appeal. Gas Co. then sued Ventura for recovery of the defense costs.

In reversing the judgment for Gas Co., the court of appeal discussed the rules governing the construction of contracts, particularly the controlling issue of the intent of the parties, and stated that an indemnitee could not recover beyond the terms of the indemnity contract. The court construed the first provision of Ventura's indemnity agreement with Gas Co. as intended to indemnify Gas Co. in the case of a third party action against Gas Co. by an employee whose exclusive remedy against Ventura was under workers' compensation [*see Lab. Code § 3864* (requiring express agreement in order for liable third party to recover indemnity from employer of injured employee); *see also §§ 115.34, 115.74*]. The second provision was also construed as referring only to liability incurred by Gas Co. pursuant to a claim that Gas Co. itself had been negligent. The expense that was incurred by Gas Co. did not arise in any way from any claim of negligence against Gas Co., but solely from the separate agreement between it and the landowner. Protection against liability arising from that agreement could not be implied with respect to Ventura because it had no knowledge of the agreement. It was not within the scope of the Ventura-Gas Co. agreement because it was not one of the things concerning which the parties

intended to contract (*150 Cal. App.2d 253, 257-260)* .

California Points & Authorities

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CHAPTER 115 INDEMNITY AND CONTRIBUTION
PART II. FORMS
A. Express Indemnity

11-115 California Points & Authorities § 115.40

§ 115.40 Opposing Contention That Indemnitee Is Entitled to Indemnification Under Express Indemnity Agreement--Agreement Is General and Does Not Provide Indemnity for Active Negligence of Indemnitee

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

INDEMNITEE'S CLAIM FOR EXPRESS INDEMNITY SHOULD BE DENIED BECAUSE THE AGREEMENT BETWEEN THE PARTIES IS A GENERAL INDEMNITY AGREEMENT, WHICH DOES NOT EXPRESSLY PROVIDE INDEMNITY FOR LOSS CAUSED, WHOLLY OR IN PART, BY THE INDEMNITEE'S OWN NEGLIGENCE, AND INDEMNITEE WAS ACTIVELY NEGLIGENT.

A. Strict Construction of Indemnity Agreement Against Indemnitee. A contract of indemnity that purports to relieve the indemnitee from the results of a failure to exercise ordinary care should be strictly construed against the indemnitee, and will not be held to provide indemnity unless so expressed in clear and unequivocal terms (*Goldman v. Ecco-Phoenix Elec. Corp. (1964) 62 Cal. 2d 40, 44, 41 Cal. Rptr. 73, 396 P.2d 377*).

B. General Indemnity Clause. An indemnity clause that is phrased in general terms and does not expressly state that damage caused by the indemnitee's negligence is included in the indemnity coverage does not indemnify against liability or loss caused by the indemnitee's active negligence (*Jimenez v. Pacific W. Constr. Co. (1986) 185 Cal. App. 3d 102, 114, 229 Cal. Rptr. 575* ; *see Vinnell Co. v. Pacific Elec. Ry. Co. (1959) 52 Cal. 2d 411, 415, 340 P.2d 604*).

C. Active Negligence. An indemnitee who participates in some manner in the conduct or omission that caused the injury, beyond the mere failure to perform a duty imposed by law, is actively negligent (*Morgan v. Stubblefield (1972) 6 Cal. 3d 606, 625, 100 Cal. Rptr. 1, 493 P.2d 465* ; *MacDonald & Kruse, Inc. v. San Jose Steel Co. (1972) 29 Cal. App. 3d 413, 105 Cal. Rptr. 725*).

[*Optional*] **D. Knowledge of or Acquiescence in Act as Active Negligence.** Active negligence may consist of the actual connection with an act or omission of another by knowledge of or acquiescence in the act or omission (*Jimenez*

v. Pacific W. Constr. Co. (1986) 185 Cal. App. 3d 102, 112, 229 Cal. Rptr. 575).

[*Optional*] **E. Strict Liability as Active Negligence.** An indemnitor is not liable to indemnify an indemnitee under a general indemnity agreement if the indemnitee is found passively negligent but strictly liable, because strict liability is equated with active negligence for purposes of construing an indemnification agreement (*Widson v. International Harvester Co. (1984) 153 Cal. App. 3d 45, 59-60, 200 Cal. Rptr. 136* ; *see* *Price v. Shell Oil Co. (1970) 2 Cal. 3d 245, 85 Cal. Rptr. 178, 466 P.2d 722*).

[2] Comments

[a] Use of Form

This form may be submitted in support of an indemnitor's contention that its indemnity agreement is general and does not provide for indemnity if the indemnitee's own active negligence was a proximate cause of the loss. Paragraph A sets forth the basic principle that an indemnity agreement that purports to indemnify the indemnitee for its own negligence is to be construed strictly against the indemnitee. Paragraph B sets forth the principle that a general indemnity agreement--that is, one that does not expressly provide indemnity for loss caused by the indemnitee's own negligence--does not protect the indemnitee from its "active" negligence. Paragraph C sets forth a general definition of active negligence. Optional Paragraphs D and E are for use with regard to particular conduct that is considered to be active negligence: knowledge of or acquiescence in the negligent act of another (Paragraph D), and strict liability (Paragraph E).

This form may be combined with points and authorities pertaining to the specific procedural context in which the validity and scope of an express indemnity agreement is brought before the court. It may be used in a memorandum in connection with a pretrial motion, such as a demurrer or motion for summary judgment, if the character of the indemnity agreement as general and the character of the indemnitee's negligence as active may be established as a matter of law. It may also be used in a trial or an appellate brief. For discussion of the proceedings in which the validity and scope of an indemnity agreement may be litigated, see *§ 115.10*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. It should be established that: (1) the parties entered into an indemnity agreement under which the indemnitor agreed to indemnify the indemnitee for loss; (2) the agreement made no mention of indemnity for the indemnitee's own negligence; and (3) the particular loss incurred for which indemnity is sought was proximately caused by the indemnitee's own negligence. The particular negligent acts of the indemnitee should then be established. Finally, a connection should be made between these acts and one or more of the characterizations of active negligence set forth in this form.

[b] Active and Passive Negligence

The decision in *American Motorcycle Assn. v. Superior Court of Los Angeles County (1978) 20 Cal. 3d 578, 591-598, 146 Cal. Rptr. 182, 578 P.2d 899* , discarded the use of an active-passive distinction of negligence insofar as the distinction required an all-or-nothing result with regard to comparative indemnity [*see § 115.60*]. However, *American Motorcycle* did not involve express contractual indemnity and did not alter the rule of general indemnity agreements and active and passive negligence.

Almost immediately after *American Motorcycle*, the California Supreme Court reaffirmed the rule that an indemnity clause that does not address itself to the issue of an indemnitee's negligence is a general indemnity clause, which may be construed to provide indemnity for a loss resulting in part from an indemnitee's passive negligence but not active negligence [*Gonzales v. R.J. Novick Constr. Co. (1978) 20 Cal. 3d 798, 809-810* , P.2d 1190; *see* *Jimenez v. Pacific W. Constr. Co. (1986) 185 Cal. App. 3d 102, 111-117, 229 Cal. Rptr. 575* ; *see also § 115.40[3][d*]]. However, the

Court previously made it clear that the above rule is simply one in aid of construction of the agreement, and that the determination as to whether an indemnity clause is general or specific or whether negligence is active or passive is never wholly dispositive. The proper approach is to determine whether the parties intended that the agreement provide indemnity for the particular liability of the indemnitee that is at issue [*Rossmoor Sanitation, Inc. v. Pylon, Inc. (1975) 13 Cal. 3d 622, 632-633, 119 Cal. Rptr. 449, 532 P.2d 97* ; *see § 115.33*]. If so, under traditional contract and insurance principles, the agreement should be enforced.

In such an inquiry, the result does not rest on whether the indemnitee's negligence is characterized as active, passive, vicarious, contractual, or otherwise. Therefore, it would seem that the continuing validity of the active-passive distinction with regard to express indemnity agreements may be questioned.

[c] Opposing Memoranda

The points and *authorities in § 115.33* may be used to oppose the analytical approach taken by the contentions supported by these points and authorities [*see* § 115.140[3][b]]. The points and *authorities in § 115.32* may be used to oppose the narrower contention supported by the points and authorities of this form, that the indemnitee's negligence should be characterized as active.

[3] Discussion of Authorities

[a] Strict Construction of Indemnity Agreement Against Indemnitee

Goldman v. Ecco-Phoenix Elec. Corp. *(1964) 62 Cal. 2d 40, 41 Cal. Rptr. 73, 396 P.2d 377* , was an appeal from a judgment of the superior court in an action for declaratory relief. General contractors (Clovis) had contracted with the City of San Francisco to build a firehouse, and a subcontractor (Ecco) had agreed to do all the electrical work in the construction of the building. The vice-president and foreman of Ecco was injured on the job site, and he brought an action for personal injuries against Clovis. On the basis of a provision in the subcontract, Clovis demanded that Ecco defend and indemnify it against any liability in the personal injury action. The provision stated that Ecco agreed "[t]o be bound to Clovis ... in the same manner and to the same extent as Clovis is bound to the Owner under the general contract, to the extent of work provided for in this agreement." Clovis argued that this language incorporated its own indemnity obligation to the city contained in the general contract (*62 Cal. 2d 40, 42, ns.1, 2*).

The trial court made no findings as to whether or not the negligence of either contractor contributed to the accident, but it held Ecco was obligated to indemnify Clovis. The Supreme Court reversed the judgment and remanded the case for a determination of whether or not the negligence of the general contractor contributed to the accident.

The Court held that the language of the contract was insufficient to provide indemnity for the indemnitee's own negligence. It stated that a contract of indemnity that purports to relieve the indemnitee from the results of a failure to use ordinary care, by himself or his employees, should be strictly construed against the indemnitee. The agreement will not be held to provide such indemnification unless so expressed in clear and unequivocal terms (*62 Cal. 2d 40, 44, n.3*).

[b] General Indemnity Clause

In ***Jimenez v. Pacific W. Constr. Co.*** *(1986) 185 Cal. App. 3d 102, 229 Cal. Rptr. 575* , cross defendant, a subcontractor, had contracted with cross complainant, a general contractor, to provide a general right of indemnity in favor of the general contractor. The agreement apparently made no mention of a right of indemnity for the general contractor's own negligence. Two employees of the subcontractor were injured in a collapsed trench (one fatally), and plaintiffs brought actions against the general contractor for wrongful death and personal injuries. The trial court found that the general contractor was guilty of active negligence and denied its claim for indemnity against the subcontractor. The court of appeal affirmed. The court stated that an indemnity clause phrased in general terms will not be interpreted

to provide indemnity for consequences resulting from the indemnitee's own actively negligent acts (*185 Cal. App. 3d 102, 114)* . The issue in the case, therefore, was whether there was evidence to support the finding that the general contractor was actively negligent [*see § 115.40[3][d]*].

NOTE:

The following language has been held to be general and insufficient to impose indemnity for active negligence: "in any suit at law," "from all claims for damages to persons," and "from any cause whatsoever" [*Rossmoor Sanitation, Inc. v. Pylon, Inc. (1975) 13 Cal. 3d 622, 628-629, 119 Cal. Rptr. 449, 532 P.2d 97* ; *see Markley v. Beagle (1967) 66 Cal. 2d 951, 961, 59 Cal. Rptr. 809, 429 P.2d 129* ; *Morgan v. Stubblefield (1972) 6 Cal. 3d 606, 626, 100 Cal. Rptr. 1, 493 P.2d 465]* ; *MacDonald & Kruse, Inc. v. San Jose Steel Co. (1972) 29 Cal. App. 3d 413, 422-423, 105 Cal. Rptr. 725* ; *see also MacDonald & Kruse, Inc. v. San Jose Steel Co. (1972) 29 Cal. App. 3d 413, 422-423, 105 Cal. Rptr. 725]* . However, a clause that provides for indemnity "except for loss caused solely by the negligence of the indemnitee" is not a general clause. It is not silent with respect to the issue of the indemnitee's negligence, and therefore, provides for indemnity for loss resulting from the combined negligence of the indemnitor and the indemnitee, whether the indemnitee's negligence is characterized as active or passive [*Ralph M. Parsons Co. v. Combustion Equip. Assocs., Inc. (1985) 172 Cal. App. 3d 211, 220, 218 Cal. Rptr. 170* ; *C.I. Eng'rs & Constructors, Inc. v. Johnson & Turner Painting Co. (1983) 140 Cal. App. 3d 1011, 1014-1018, 189 Cal. Rptr. 824* ; *see § 115.35*].

In ***Vinnell Co. v. Pacific Elec. Ry. Co.*** *(1959) 52 Cal. 2d 411, 340 P.2d 604* , a railroad granted permission to a construction contractor to build a drain ditch across the railroad's yard and received an indemnity agreement in return. The agreement provided for indemnity for liability "howsoever same may be caused," but made no further mention of liability proximately caused by the railroad's own negligence. While the ditch was under construction, the railroad continued to operate in the yard, and negligently switched a string of its cars into an excavation, injuring an employee of the contractor.

On appeal, the California Supreme Court affirmed judgment for the contractor denying indemnity. The Court stated that the rule in California is that if the parties fail to refer expressly to negligence in their contract, the failure is evidence of the parties' intention not to provide for indemnity for the indemnitee's negligent acts. Had the railroad, which drafted the agreement, intended to provide for indemnity for its own negligence, it could have plainly so stated in the agreement (*52 Cal. 2d 411, 415)* .

CAUTION:

A court of appeal decision has criticized the Court's construction of the language of the agreement in *Vinnell*. In that case, the court of appeal stated, "To require that an express indemnity clause be cast in the rote form suggested by *Vinnell* is to compel contracting parties to lie upon a procrustean bed of linguistic formalism that inhibits the clear meaning of plain English" [*C.I. Eng'rs & Constructors, Inc. v. Johnson & Turner Painting Co. (1983) 140 Cal. App. 3d 1011, 1018, 189 Cal. Rptr. 824* ; *see also §§ 115.35, 115.40[2][b]*].

[c] Active Negligence

Morgan v. Stubblefield *(1972) 6 Cal. 3d 606, 100 Cal. Rptr. 1, 493 P.2d 465* , was an appeal from a judgment of the superior court in an action brought by employees of a subcontractor against the general contractor and the lessor of a rolling scaffold. The plaintiffs were injured when a wheel of the scaffold on which they were standing fell into a hole in the floor while it was being moved. Both defendants cross complained against the subcontractor, seeking express indemnity on the basis of separate indemnity clauses contained in the subcontract and the equipment lease. The superior court entered judgments in favor of the general contractor and against the scaffold lessor on the cross actions.

On appeal, the California Supreme Court held in favor of the indemnitor subcontractor on both agreements, affirming the judgment against the equipment lessor and reversing the judgment in favor of the general contractor. The Court construed both indemnity clauses at issue as general and not providing indemnity for the indemnitee's active negligence. The court stated that a party seeking indemnity who personally participates in an affirmative act of negligence, or who is physically connected with an act or omission by knowledge or acquiescence in it, or who fails to perform some duty in connection with the omission that the party may have undertaken under the agreement, may not obtain indemnity. The crux of the inquiry is to determine whether there is participation in some manner by the person seeking indemnity in the conduct or omission that caused the injury, beyond the mere failure to perform a duty imposed by law (*6 Cal. 3d 606, 625)* .

The Court then found both indemnitees to be actively negligent as a matter of law. The subcontractor had relied on the equipment lessor to select the scaffold components that it deemed appropriate for the job. The lessor was familiar with the job site and aware of the safety regulations for scaffolds, but nevertheless chose components that did not meet the safety requirements (*6 Cal. 3d 606, 625-626)* . The general contractor had cut a hole in the floor and had not properly covered it in a building with insufficient lighting, all in violation of construction safety orders. Thus, the general contractor had negligently created the condition that was the cause of the injuries (*6 Cal. 3d 606, 626-627)* .

In ***MacDonald & Kruse, Inc. v. San Jose Steel Co.*** *(1972) 29 Cal. App. 3d 413, 105 Cal. Rptr. 725* , the court of appeal reached the question of whether the indemnitee's negligence was active or passive only in dicta, having previously held that the terms of the agreement did not extend to the liability at issue. The indemnitee was a general contractor on a freeway-widening project. On the job site, an employee of a subcontractor was injured in a 32-foot fall. In its contract with the state, the general contractor had agreed to provide all safety devices and protective equipment. A safety order required the use of safety nets for elevations above 25 feet. The general contractor did not have enough safety nets for the entire project. The court stated that the failure to provide safety equipment as required in its contract with the state was active negligence (*29 Cal. App. 3d 413, 424-425)* .

[d] Knowledge of or Acquiescence in Act as Active Negligence

The procedural background and construction of the indemnity clause in ***Jimenez v. Pacific W. Constr. Co.*** *(1986) 185 Cal. App. 3d 102, 229 Cal. Rptr. 575* are discussed in *§ 115.40[3][b]*. One employee of a subcontractor was killed and another injured when a trench in which they were standing caved in. The sides of the trench had a vertical slope, in violation of safety regulations, which required that the trench be either shored or sloped back.

The issue was whether the general contractor was barred from obtaining indemnity because of its active negligence. The general contractor's foreman and safety inspector was on the job site, daily and had observed the trench. There was evidence to support the inference that the foreman had actual knowledge of the dangerous condition of the trench. On these facts, the court of appeal held that active negligence was established and denied indemnity. The court felt compelled by stare decisis to hold that active negligence is established if the indemnitee has actual knowledge of a dangerous condition (*185 Cal. App. 3d 102, 111-113)* .

Nevertheless, the court strongly expressed the opinion that the rule should be reexamined to the extent that it applies to cases in which the dangerous condition was created by the indemnitor. The court stated that a rule of law that permits a party who creates a dangerous condition to be relieved of financial responsibility for injuries caused by the condition if the indemnitee's negligence consists of no more than inaction is unsound (*185 Cal. App. 3d 102, 115-117)* .

[e] Strict Liability as Active Negligence

Widson v. International Harvester Co. *(1984) 153 Cal. App. 3d 45, 200 Cal. Rptr. 136* , was an action for injuries based on both product defect and negligence theories. A worker at a construction site was injured when an earth-moving machine backed over him. His employer had leased the machine directly from the manufacturer (Harvester). The

employee brought suit against Harvester and others. Harvester filed a cross complaint against the employer-lessee for express indemnity based on the terms of its lease. The jury found that the machine had a design defect and that Harvester, although strictly liable, was only passively negligent. The trial court denied Harvester's indemnity claim against the employer.

The court of appeal affirmed. It construed the indemnity agreement as general because it did not expressly provide for indemnification with regard to a defective product furnished by Harvester. The characterization of Harvester's liability as passive was of no significance. Under California law, a manufacturer is strictly liable for injuries resulting from a defectively manufactured product, and the manufacturer may not limit or abrogate that liability by contract. The court stated that it would thwart basic public policy behind strict liability to permit indemnification of a strictly liable manufacturer under a general indemnity clause (*153 Cal. App. 3d 45, 58-61)* .

Price v. Shell Oil Co. *(1970) 2 Cal. 3d 245, 85 Cal. Rptr. 178, 466 P.2d 722* , also involved an indemnity agreement contained in an equipment lease. Shell, as lessor-indemnitee, had furnished a defective ladder that had caused personal injury. The California Supreme Court construed the indemnity clause as general and denied indemnity. The court stated that it thwarts the basic purpose of the strict liability doctrine to interpret a general clause as transferring the liability for a defective article from the party putting the article in the stream of commerce to the user or consumer of the article, who is within the class that the doctrine was designed to protect (*2 Cal. 3d 245, 256-258)* .

CAUTION:

In *Maryland Cas. Co. v. Bailey & Sons, Inc. (1995) 35 Cal. App. 4th 856, 41 Cal. Rptr. 2d 519* , the court limited the rule of *Widson* and *Price* to cases involving strict products liability involving injury to the user of the product. In this case, Kelly was the general contractor and owner of a condominium project. The homeowers' association sued Kelly for construction defects alleging the strict liability of residential real estate developer for any defect in the project, regardless of whether the developer had any involvement in the conduct causing the defect. Maryland, Kelly's insurer, settled with the association on behalf of Kelly, and took an assignment of Kelly's rights against the subcontractors, several of whom had written indemnity agreements running in favor of Kelly.

The court of appeal found the agreements to be general agreements, on which recovery would be barred if it were determined that Kelly had been actively negligent [*see § 115.33*]. The indemnitors then relied on *Widson* and *Price* for the proposition that Kelly's strict liability was to be equated with active negligence, but the court rejected the proposition.

The court found that *Widson* and *Price* involved circumstances in which the strictly liable party who had put the defective product into the stream of commerce was seeking indemnity from the user of the product. To allow indemnification under these circumstances would permit that party to abrogate by contract its liability to the consumer, the party within the class that the strict liability doctrine was specifically intended to protect.

However, the court found these underlying policy considerations to be inapplicable to the case before it. Maryland did not seek indemnity from a consumer of a product; rather, it sought it from parties (subcontractors) who played an integral part in the creation of the product (condominiums). Because the subcontractors were involved exclusively in the production, rather than the use, of the final product, permitting a general contractor to seek indemnity from the culpable subcontractors was in no way inconsistent with *Widson* and *Price.* Instead, allowing indemnity furthered another important policy consideration; the sharing of fault among those whose conduct causes injury. General contractors ought to be allowed to spread the cost of their strict liability to culpable subcontractors [*Maryland Cas. Co. v. Bailey & Sons, Inc. (1995) 35 Cal. App. 4th 856, 870-872, 41 Cal. Rptr. 2d 519]* .

[4] Additional Authorities

[a] Active Negligence

In *McCrary Constr. Co. v. Metal Deck Specialists, Inc. (2005) 133 Cal. App. 4th 1528, 35 Cal. Rptr. 3d 624* , a construction worker was killed when he fell through a hole cut into a roof by a roofing subcontractor. Employees of the roofing subcontractor had left the work site with the hole uncovered, and the superintendent of the general contractor, knowing of the danger, asked an employee for another subcontractor to cover the hole. However, that employee did not secure the plywood covering and the decedent, not knowing that there was a hole underneath, fell through the hole when attempting to lift the plywood. The general contractor and the roofing subcontractor were both found partly liable for wrongful death damages, and each paid their share of the damages in proportion to their assigned percentages of fault. The general contractor then sought indemnity from the roofing subcontractor, arguing that such indemnity was owed under their contract of hire. The indemnity agreement in that contract provided in general that the subcontractor would be liable to indemnify the general contractor for injuries cause by acts or omissions of the subcontractor or the agents or employees of the subcontractor. The court of appeal held that indemnity was inappropriate under this general indemnity clause, which did not specifically make the subcontractor liable for the general contractor's own negligence. The court noted that the general contractor was responsible for work place safety due to its status as general contractor, even though that responsibility was shared with its subcontractors under their contractual agreements. When the general contractor specifically assumed responsibility for eliminating the known danger of the hole left in the roof after the roofing subcontractor failed to correct the dangerous condition, the general contractor engaged in active negligence when it failed to ensure that the hole was covered and marked appropriately. Because the indemnity agreement with the subcontractor did not specifically cover the general contractor's own negligence, indemnity was inappropriate (*133 Cal. App. 4th 1528, 1540-1541)* .

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§ 115.41 Opposing Contention That Indemnitee Is Entitled to Indemnification Under Express Indemnity Agreement--Indemnitee's Active Negligence Was Adjudicated in Prior Action and Collateral Estoppel Bars Relitigation of Issue

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

AN INDEMNITEE IS COLLATERALLY ESTOPPED FROM RELITIGATING THE ISSUE OF WHETHER ITS CONDUCT AMOUNTED TO ACTIVE NEGLIGENCE IN AN ACTION FOR EXPRESS INDEMNITY IF LITIGATION OF AN UNDERLYING CLAIM RESULTED IN A FINAL JUDGMENT CONCLUSIVELY DETERMINING THAT INDEMNITEE WAS ACTIVELY NEGLIGENT.

A. Collateral Estoppel to Relitigate Negligence. An indemnitee may be collaterally estopped from relitigating the issue of its negligence if, in a prior action or proceeding within the same action that resulted in a judgment against the indemnitee, the indemnitee was found to have been negligent (*King v. Timber Structures, Inc. (1966) 240 Cal. App. 2d 178, 182-184, 49 Cal. Rptr. 414*).

B. Collateral Estoppel to Relitigate Character of Negligence as Active. An indemnitee who has been found to have been actively negligent in a prior action or proceeding within the same action is collaterally estopped from relitigating the issue of the characterization of its negligence as active or passive (*see Burlingame Motor Co. v. Peninsula Activities, Inc. (1971) 15 Cal. App. 3d 656, 663-664, 93 Cal. Rptr. 376*).

[2] Comments

[a] Use of Form

This form may be submitted in support of an indemnitor's contention that the indemnitee is collaterally estopped from relitigating the issue of whether its negligence should be characterized as active or passive because the issue was determined in a prior action. Under the doctrine of collateral estoppel, judgment in a prior action bars the party against

whom it was entered from relitigating any issue in a subsequent action that was actually litigated and determined in the prior action [*Saunders v. New Capital for Small Businesses, Inc. (1964) 231 Cal. App. 2d 324, 330, 41 Cal. Rptr. 703]* . For further discussion, see California Forms of Pleading and Practice, Ch. 491, *Res Judicata* (Matthew Bender).

This form may be combined with points and authorities pertaining to the specific procedural context in which the validity and scope of an express indemnity agreement is brought before the court. It may be used in a memorandum in connection with a pretrial motion, such as a demurrer, motion for summary judgment, or motion for summary adjudication of issues, depending on whether the operation of collateral estoppel will resolve all issues in the second action. For discussion of the proceedings in which the validity and scope of an indemnity agreement may be litigated, see *§ 115.10*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. It should be established that: (1) the parties entered into an agreement by which the indemnitor agreed to indemnify the indemnitee from loss incurred under certain express contractual conditions; (2) an action was brought against the indemnitee on a claim for which it now seeks indemnity under the agreement; (3) pursuant to that action, the indemnitee was determined, either by the trier of fact or as a matter of law, to have been actively negligent [*see § 115.40*]; (4) the action by the claimant against the indemnitee resulted in a judgment, now final, against the indemnitee on the claim; and (5) this finding of active negligence precludes indemnity under the general language of the indemnity agreement between the parties [*see § 115.40*].

[3] Discussion of Authorities

[a] Collateral Estoppel to Relitigate Negligence

King v. Timber Structures, Inc. *(1966) 240 Cal. App. 2d 178, 49 Cal. Rptr. 414* , was an appeal from a judgment of the superior court in an indemnity action. Six employees of a general contractor (King) were injured when the roof collapsed while they were constructing a building for Safeway Stores, Inc., and they brought an action against Safeway as owner of the building. Safeway settled and then brought an action against King and his surety on a contract of indemnity. In the same action, King cross complained against the subcontractor who had produced and erected the roof trusses (Timber Structures).

Timber Structures' motion for severance of the cross complaint was granted, and the main action of Safeway against King was tried first [*see Safeway Stores, Inc. v. Massachusetts Bonding & Ins. Co. (1962) 202 Cal. App. 2d 99, 114-116, 20 Cal. Rptr. 820* ; *see also § 115.38*]. The court found that King was negligent in installing inferior materials in the roof; by failing to install required bracing; by failing to maintain safeguards against accidents and injuries; and by overloading the building in a manner that endangered its safety. The court also found that King was in violation of several safety ordinances. No specific finding was made as to the character of King's negligence as active or passive because it was not at issue in the action on the agreement between King and Safeway (*240 Cal. App. 2d 178, 180-181)* .

King's cross complaint against Timber Structures then came to trial before a different judge. That judge reviewed the record in the Safeway-King trial and determined that the findings of negligence against King in that trial operate as a conclusive determination that King was guilty of active negligence. Indemnity on King's cross complaint was denied because it was based on a general indemnity agreement [*see § 115.40*], and the court of appeal affirmed. The court held that it was proper for the second judge to invoke collateral estoppel to bar King from relitigating the issue of his negligence. Further, it was also proper for the second judge to decide as a matter of law that King's negligence was active, based on the findings of the prior trial (*240 Cal. App. 2d 178, 182-185)* .

[b] Collateral Estoppel to Relitigate Character of Negligence as Active

Burlingame Motor Co. v. Peninsula Activities Inc. *(1971) 15 Cal. App. 3d 656, 93 Cal. Rptr. 376* , involved a number of leases and subleases for commercial property. Burlingame, the original lessee, subleased the premises first to Peninsula, and then to Dick Bullis, Inc., (Bullis) a corporation closely related to Peninsula. The subleases both contained indemnity clauses in favor of Burlingame as sublessor-indemnitee.

After the term of the Peninsula sublease and during the term of the Bullis sublease, an employee of Bullis was injured as a result of an explosion caused by two shortcircuiting wires. The employee sued Burlingame and Peninsula. Burlingame cross complained for express indemnity against Bullis and for implied indemnity against Peninsula. The three separate pleadings were trifurcated for trial.

In the trial of the employee's action, evidence established that the explosion was due to the negligent removal of certain equipment by Burlingame some years earlier, resulting in a dangerous condition of which both Peninsula and Bullis were aware during their subtenancies, but had taken insufficient steps to remedy. The employee recovered against both Burlingame and Peninsula.

The same jury next considered Burlingame's implied indemnity claim against Peninsula. It reached a determination that Burlingame's negligence should be characterized as active, which under the then-applicable law, constituted a complete bar to implied indemnity. The court of appeal upheld this finding (*15 Cal. App. 3d 656, 660-662)* .

In the third part of the trial, the court considered Burlingame's express indemnity claim against Bullis based on the sublease. The judge construed the indemnity clause as general, meaning that Burlingame could be indemnified only if its negligence were characterized as passive rather than active [*see § 115.40*]. He then made an independent finding, over and above the previous jury finding but based on the record of the previous trials, that Burlingame was actively negligent, and denied indemnity.

In affirming, the court of appeal held that the principle of collateral estoppel applied. The jury's finding of Burlingame's active negligence with regard to Peninsula was a final adjudication of the issue with regard to Bullis also. The court stated that negligence cannot be active as to one person and inactive as to another. The very nature of the inquiry into the character of negligence as active or passive is to determine whether the fault was that of an actor in the events or that of a person on whom responsibility has been fastened by operation of law due to mere inaction, such as a failure to make a discovery. The court also noted that the judge's independent finding of active negligence was not without effect because the question may be one of mixed fact and law, and that the court itself might be persuaded to regard Burlingame's negligence as active as a matter of law (*15 Cal. App. 3d 656, 663-664)* .

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11-115 California Points & Authorities § 115.42

§ 115.42 Opposing Contention That Indemnitee Is Entitled to Indemnification Under Express Indemnity Agreement--Clause in Construction Contract [Civ. Code § 2782] or Contract for Hauling, Trucking, or Cartage [Civ. Code § 2784.5] Providing for Indemnity Based on Indemnitee's Sole Negligence or Willful Misconduct Is Against Public Policy

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

INDEMNITEE'S CLAIM FOR EXPRESS INDEMNITY SHOULD BE DENIED BECAUSE THE INDEMNITY CLAUSE ON WHICH IT IS BASED _____ [IS CONTAINED IN *or* IS COLLATERAL TO *or* AFFECTS] A _____ [CONSTRUCTION *or* HAULING *or* TRUCKING *or* CARTAGE) CONTRACT AND PURPORTS TO PROVIDE INDEMNITY FOR THE INDEMNITEE'S SOLE NEGLIGENCE AND WILLFUL MISCONDUCT, AND IS AGAINST PUBLIC POLICY, VOID, AND UNENFORCEABLE UNDER CALIFORNIA LAW.

[*EITHER*]

Void Indemnity Agreements in Construction Contracts. Provisions, clauses, covenants, or agreements contained in, collateral to, or affecting any construction contract and that purport to indemnify the promisee against liability for damages for death or bodily injury to persons, injury to property, or any other loss, damage, or expense arising from the sole negligence or willful misconduct of the promisee or the promisee's agents, servants, or independent contractors who are directly responsible to the promisee, are against public policy and are void and unenforceable (*Civ. Code § 2782(a)*; *Southern Pacific Transportation Co. v. Sandyland Protective Assn. (1990) 224 Cal. App. 3d 1494, 1497-1498* ; *see Gonzales v. R. J. Novick Constr. Co. (1978) 20 Cal. 3d 798, 809 n.8, 144 Cal. Rptr. 408, 575 P.2d 1190*).

[*OR*]

Void Indemnity Provisions in Hauling, Trucking, or Cartage Contract. Any provision, promise, agreement, clause, or covenant contained in, collateral to, or affecting any hauling, trucking, or cartage contract or agreement is against public policy and is void and unenforceable if it purports to indemnify the promisee against liability that is caused by the sole negligence or willful misconduct of the promisee, or the agents, servants, or independent contractors directly responsible to the promisee, unless the agents, servants, or independent contractors are under the direct supervision and control of the promisor (*Civ. Code § 2784.5*).

[2] Comments

[a] Use of Form

This form may be submitted in support of an indemnitor's contention that the indemnity clause on which the indemnitee's claim is based is against public policy, void, and unenforceable because it purports to relieve the indemnitee from responsibility for its own sole negligence or willful misconduct. Such a clause is made void by statute in the case of construction contracts [*see Civ. Code § 2782* (first alternative paragraph) and hauling, trucking, or cartage contracts [*see Civ. Code § 2784.5* (second alternative paragraph)]].

This form may be combined with points and authorities pertaining to the specific procedural context in which the invalidity of the indemnity clause is alleged as a matter of law. It may be used in a memorandum in connection with a pretrial motion, such as a demurrer or motion for summary judgment, or in an appellate brief. For discussion of the proceedings in which the validity and scope of an indemnity agreement may be litigated, see *§ 115.10*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. It should be established that: (1) the parties entered into an agreement by which the indemnitor agreed to indemnify the indemnitee from loss incurred under certain express contractual conditions; (2) the agreement is contained in either a construction contract [*see § 115.42[2][b]*] or a hauling, trucking, or cartage contract; (3) either expressly or by implication, the agreement purports to extend to the indemnitee's sole negligence or willful misconduct; and (4) the loss for which indemnity was sought was proximately caused by the indemnitee's sole negligence or willful misconduct.

[b] Definition of Construction Contract

As used in *Civ. Code § 2782*, a "construction contract" is any written or oral agreement or understanding, respecting the construction, surveying, design, specifications, alteration, repair, improvement, maintenance, removal of or demolition of any building, highway, road, parking facility, bridge, railroad, airport, pier or dock, excavation or other structure, development or other improvement to real or personal property, or an agreement to perform any portion thereof or any act collateral thereto, or to perform any service reasonably related thereto, including, but not limited to, the erection of all structures or performance of work in connection therewith, the rental of all equipment, all incidental transportation, crane, and rigging service, and other goods and services furnished in connection therewith [*Civ. Code § 2783*].

[c] Opposing Memoranda

In an appropriate case, the points and *authorities in § 115.36* may be used to oppose these points and authorities.

[3] Discussion of Authorities

[a] Void Indemnity Provisions in Construction Contracts

In ***Southern Pacific Transportation Co. v. Sandyland Protective Assn.*** *(1990) 224 Cal. App. 3d 1494* , a homeowners association and a railroad entered into an agreement under which the association agreed to construct and maintain a

roadway so that its members would have access to their property across the railroad's tracks. The agreement provided that the association would also install and maintain signs, gates, or barricades as the railroad might designate or require, and that the railroad would maintain existing protective devices at the association's expense. The agreement also contained an express indemnity clause that required the association to indemnify the railroad for any negligence of the railroad.

Subsequently, a car was struck by a train at the crossing. The driver and passenger sued the railroad for personal injuries, alleging negligent operation of the train and negligent maintenance of the train, tracks, crossing, and signaling devices. The railroad cross complained against the association under the indemnity clause contained in the agreement.

The trial court granted summary judgment for the association under *Civ. Code § 2782* on the express indemnity claim, and the court of appeal affirmed. The court rejected the railroad's claim that the statute invalidated indemnity only for negligence in breach of duties established by the agreement. The court read the statute broadly as extending to indemnity for any negligence of the indemnitee, no matter how arising, as long as it was "contained in, collateral to, or affecting" the construction contract. The court also rejected the railroad's argument that the railroad was not solely negligent because the injured plaintiffs in the action were concurrently negligent. The court construed the term "sole negligence" in the statute to mean that, as between the indemnitor and indemnitee under the contract, the indemnitee was solely negligent. Absent negligence on the part of the association, the negligence of the plaintiffs or of other third parties was immaterial (*224 Cal. App. 3d 1494, 1498-1499)* .

NOTE:
The railroad apparently did not cross complain under any theory of comparative indemnity or implied contractual indemnity arising from the association's possible negligent performance of its duties under the agreement [*see § 115.60* et seq.].

Gonzales v. R. J. Novick Constr. Co. *(1978) 20 Cal. 3d 798, 144 Cal. Rptr. 408, 575 P.2d 1190* , is discussed in *§ 115.34[3][a]*. The Supreme Court held that the indemnitor's contention that the indemnity clause involved was rendered wholly void by the provisions of *Civ. Code § 2782* was without merit. The Court commented, however, that the purpose of the legislature in passing *Civ. Code § 2782* was to insure that an indemnitee would not, by contractual language, however specific, require indemnity for damages sustained as a result of its sole negligence or willful misconduct (*20 Cal. 3d 798, 809 n.8*).

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsContracts LawTypes of ContractsCovenantsTortsNegligenceGeneral OverviewTortsNegligenceProofGeneral OverviewTortsProcedureMultiple DefendantsIndemnityGeneral Overview

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11-115 California Points & Authorities § 115.42A

§ 115.42A Opposing Contention That Indemnitee Is Entitled to Indemnification Under Express Indemnity Agreement--Clause in Residential Construction Contract [Civ. Code § 2782] Providing for Indemnity of Builder or Contractor by Subcontractor for Negligence of Builder or Contractor Is Unenforceable

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

INDEMNITEE'S CLAIM FOR EXPRESS INDEMNITY SHOULD BE DENIED BECAUSE THE INDEMNITY CLAUSE ON WHICH IT IS BASED _____ [IS CONTAINED IN *or* IS COLLATERAL TO *or* AFFECTS] A RESIDENTIAL CONSTRUCTION CONTRACT THAT WAS ENTERED INTO AFTER JANUARY 1, 2009, PURPORTS TO INDEMNIFY THE BUILDER OR A GENERAL CONTRACTOR OR CONTRACTOR NOT AFFILIATED WITH THE BUILDER BY A SUBCONTRACTOR AGAINST LIABILITY FOR CONSTRUCTION DEFECTS, AND IS UNENFORCEABLE UNDER *CIVIL CODE SECTION 2782(c).*

A. Indemnity of Residential Builder by Subcontractor for Builder's Negligence Unenforceable. For residential construction contracts entered into after January 1, 2009, provisions, clauses, covenants, and agreements contained in, collateral to, or affecting the construction contract and any amendments to the contract that purport to insure or indemnify, including the cost to defend, the builder or a general contractor or contractor not affiliated with the builder by a subcontractor against liability for claims of construction defects are unenforceable to the extent that those claims arise out of, pertain to, or relate to the negligence of the builder, or contractor or the builder's or contractor's other agents, servants, or independent contractors who are directly responsible to the builder, or are for defects in design furnished by those persons, or to the extent those claims do not arise out of, pertain to, or relate to the scope of work in the written agreement between the parties (*Civ. Code § 2782(c)*).

B. Waiver Prohibited. The provisions of *Civil Code Section 2782(c)* may not be waived or modified by contractual agreement, act, or omission of the parties (*Civ. Code § 2782(c)*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention by an alleged indemnitor that the indemnity agreement is unenforceable because it is contained in, collateral to, or affects a residential construction contract, or its amendment, entered into after January 1, 2009, and purports to indemnify the builder or general contractor or other contractor not affiliated with the builder by a subcontractor against claims for construction defects. Such indemnity agreements are unenforceable under *Civ. Code § 2782(c)* to the extent that the underlying claims arise out of, pertain to, or relate to the negligence of the builder or contractor or the builder's or contractor's other agents, servants, or independent contractors who are directly responsible to the builder, or are for defects in design furnished by those persons, or to the extent that those claims do not arise out of, pertain to, or relate to the scope of work in the written agreement between the parties.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which these points are raised. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form showing the relationship between the facts of the case and the point of law stated. Thus, counsel should include facts showing that: (1) the indemnity provision was contained in, was collateral to, or affects a residential construction contract entered into after January 1, 2009; (2) this indemnity agreement purports to indemnify the builder or general contractor or other contractor not affiliated with the builder by the subcontractor for construction defects; and (3) the underlying claims on which the indemnity claim is based arise out of, pertain to, or relate to the negligence of the builder or contractor or the builder's or contractor's other agents, servants, or independent contractors who are directly responsible to the builder, or are for defects in design furnished by those persons, or do not arise out of, pertain to, or relate to the scope of work in the written agreement between the parties.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawTypes of ContractsConstruction ContractsTortsProcedureMultiple DefendantsIndemnityGeneral OverviewTortsProcedureMultiple DefendantsIndemnityContractual IndemnityTortsProducts LiabilityDesign Defects

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11-115 California Points & Authorities § 115.43

§ 115.43 Opposing Contention That Indemnitee Is Entitled to Indemnification Under Express Indemnity Agreement--Agreement Does Not Provide for Recovery of Costs of Defense Voluntarily Assumed by Indemnitee

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

UNDER THE PARTIES' INDEMNITY AGREEMENT, INDEMNITEE IS PRECLUDED FROM RECOVERING ATTORNEYS' FEES INCURRED IN DEFENSE OF A THIRD-PARTY ACTION BECAUSE INDEMNITEE VOLUNTARILY INCURRED THESE COSTS DESPITE INDEMNITOR'S OFFER TO ASSUME THE DEFENSE, AND THE INDEMNITY AGREEMENT MAKES NO EXPRESS PROVISION FOR THEIR RECOVERY.

A. Indemnitor Must Assume Defense of Third-Party Action. An indemnitor is bound, on an indemnitee's request, to defend actions or proceedings brought against the indemnitee in respect to matters covered by the indemnity agreement (*Civ. Code § 2778(4)*).

B. Cost of Indemnitee's Voluntary Defense of Third-Party Claim Not Recoverable. Although an indemnitee has the right to conduct a defense of a third-party claim that is within the scope of an indemnity agreement, the indemnitor is not responsible for the costs of the defense if (1) the indemnitee has voluntarily assumed defense of the claim without sufficient justification, and (2) the indemnity agreement did not expressly provide for the recovery of such costs (*Buchalter v. Levin (1967) 252 Cal. App. 2d 367, 371-374, 60 Cal. Rptr. 369* ; *see Civ. Code § 2778(3), (4)*; *Goodman v. Severin (1969) 274 Cal. App. 2d 885, 897, 79 Cal. Rptr. 555*).

[2] Comments

[a] Use of Form

This form may be submitted in support of an indemnitor's contention that the indemnitee may not recover its cost of defending a third-party claim that is within the scope of an express indemnity agreement between the parties because it voluntarily assumed that defense. Paragraph A sets forth the basic statutory policy requiring an indemnitor under an

express indemnity agreement to assume the cost of defending a third-party claim [*Civ. Code § 2778(4)*]. Paragraph B sets forth the basic principle that the indemnitee is generally required to tender the defense to and accept the defense of the indemnitor, and that the failure to tender the defense will constitute a voluntary assumption of the defense costs.

This form may be combined with points and authorities pertaining to the specific procedural context in which the validity and scope of an express indemnity agreement is brought before the court. It may be used in a memorandum in connection with a pretrial motion, such as a demurrer, motion for summary judgment, or motion for summary adjudication of the issue of damages recoverable under the indemnity agreement, if the voluntary nature of the indemnitee's defense may be established as a matter of law. It may also be used in a trial or an appellate brief. For discussion of the proceedings in which the validity and scope of an indemnity agreement may be litigated, see *§ 115.10*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. It should be established that: (1) the parties entered into an agreement by which the indemnitor agreed to indemnify the indemnitee from loss incurred under certain express contractual conditions, but that did not require the indemnitor to pay the cost of the indemnitee's voluntarily assumed defense of a claim; (2) an action was brought against the indemnitee on a claim that was within the scope of the indemnity agreement; and (3) the indemnitee provided its own defense of that claim for which it now seeks indemnity under the agreement. The facts that indicate that the indemnitee's assumption of the defense was entirely voluntary--for example, that it gave the indemnitor no notice of the claim nor request to defend, or that it refused the indemnitor's tendered defense without justification--should also be established.

[b] Opposing Memoranda

In an appropriate case, the points and *authorities in § 115.38* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Cost of Indemnitee's Voluntary Defense of Third-Party Claim Not Recoverable

Buchalter v. Levin *(1967) 252 Cal. App. 2d 367, 60 Cal. Rptr. 369* , was an appeal from a judgment denying indemnity under an indemnity agreement for attorneys' fees incurred by the indemnitee in defending a third-party action. Indemnitees were buyers of certain real property. Previously, they had inspected the property with a real estate broker (Driscoll) for the purpose of possibly leasing it, but decided against the lease. They later contacted another broker (Levin) concerning the purchase of the property, and a sale was arranged with the owners. Advised that Driscoll might claim a commission on the sale of the property, buyers and Levin executed an indemnity agreement that required Levin to indemnify buyers against any liability to Driscoll for a commission on the sale. Driscoll did file suit against buyers, Levin, and others, and Levin offered to provide legal representation for buyers. Buyers, however, rejected this offer and hired other counsel, who filed a cross complaint against Levin for indemnity under the agreement. Levin subsequently negotiated a settlement of Driscoll's claim, and the action was dismissed with prejudice.

Buyers proceeded to trial on their cross complaint against Levin, seeking the cost of defending the Driscoll claim under the indemnity agreement. The court refused to award indemnity and the court of appeal affirmed. The court noted that under *Civ. Code § 2778(3)*, an indemnitor is only liable for the indemnitee's costs of defense incurred in good faith and in the exercise of reasonable discretion. Under *Civ. Code § 2778(4)*, it is clear that the indemnitee has the right to refuse the indemnitor's proffered defense and conduct its own defense. However, the court refused to construe this statute as giving the indemnitee the right to reject the indemnitor's defense without cause and still recover the separate costs of a defense voluntarily incurred (*252 Cal. App2d 367, 374)* . Absent some contractual privilege to do so or some showing of sufficient justification or need, the indemnitee may not refuse to join in or cooperate with the indemnitor's defense and still recover its separate and redundant attorneys' fees and costs. The indemnitee may not recover attorneys' fees for

its own participation in the defense if the intervention is not required by the terms of the agreement and was wholly voluntary and gratuitous (*252 Cal. App.2d 367, 371)* .

In this case, the indemnity agreement stated that the buyers wished to avoid litigation. In light of such an understanding, they could not refuse Levin's offer of defense (*252 Cal. App.2d 367, 375)* . Because the buyers had no reason to believe that Levin would not provide them with a full and adequate defense or that he would be unable or unwilling to satisfy in full any judgment that might be rendered, there was no justification for a separate defense, and their attorney's fees were not incurred in good faith (*252 Cal. App.2d 367, 373)* .

Goodman v. Severin *(1969) 274 Cal. App. 2d 885, 79 Cal. Rptr. 555* , involved a complex set of financial transactions involving a stock pledge for security for a loan. Severin gave a promise to the lender to repurchase the stock for the outstanding amount on the loan should the borrowers default. Ultimately, this agreement was construed as one for indemnity, and enforced against Severin. However, the court of appeal held that the agreement did not extend to the borrowers' costs of defending the action brought by the lender on their note. The court found that the stock repurchase-indemnity agreement was silent on the question of attorney's fees and that *Civ. Code § 2778* therefore controlled. With respect to *Civ. Code § 2778(4),* the court relied on the language from *Buchalter v. Levin,* that absent some contractual privilege or sufficient justification, an indemnitee ordinarily may not refuse to join with the indemnitor's proffered defense and still recover its separate counsel fees. Because the officers had neither pleaded nor proved sufficient justification for a separate defense to the main action, there was no entitlement to indemnity for the costs of the defense (*274 Cal. App.2d 885, 896-897)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentSupporting MaterialsMemoranda of LawContracts LawContract Conditions & ProvisionsIndemnityContracts LawContract InterpretationGeneral OverviewContracts LawTypes of ContractsGeneral OverviewReal Property LawBrokersRight to Commissions

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
CHAPTER 115 INDEMNITY AND CONTRIBUTION
PART II. FORMS
A. Express Indemnity

11-115 California Points & Authorities § 115.44

§ 115.44 Opposing Contention That Indemnitee Is Entitled to Indemnification Under Express Indemnity Agreement--Licensing Statute Bars Recovery by Unlicensed Contractors/Developers [Bus. & Prof. Code § 7031]

[1] FORM

[*The following may be included in a memorandum or points and authorities, or in a trial or appellate brief*].

PLAINTIFFS ARE PRECLUDED BY BUSINESS AND PROFESSIONS CODE SECTION 7031 FROM SEEKING EXPRESS INDEMNITY FROM SUBCONTRACTORS FOR NEGLIGENT PERFORMANCE BECAUSE PLAINTIFFS ARE UNLICENSED CONTRACTORS.

Express Contractual Indemnity Unavailable Between Unlicensed Contractor/Developer and Subcontractor. *Business And Professions Code Section 7031* bars express indemnity claims by unlicensed general contractors against negligent subcontractors (*Ranchwood Communities Limited Partnership v. Jim Beat Construction Co. (1996) 49 Cal. App. 4th 1397, 1418*).

[2] Comments

[a] Use of Form

This form may be submitted in support of an indemnitor's contention that the claim for indemnity is barred by licensing laws.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which comparative indemnity rights are brought before the court. They may be used in a memorandum in connection with a pretrial motion, such as a demurrer or motion for summary judgment, if indemnity rights may be determined as a matter of law. They may also be adapted for use in a trial or appellate brief.

For discussion of the procedures by which comparative indemnity rights may be litigated, see *§ 115.10*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should include specific facts showing that (1) the parties entered into an indemnity agreement by which the indemnitor agreed to indemnify the indemnitee from loss incurred under certain express contractual conditions; (2) the indemnitee incurred a loss for which it is seeking indemnity pursuant to the agreement; and (3) indemnity is not available because the indemnitee was unlicensed.

[c] Related Pleading and Practice Forms

For detailed discussion and practice forms relating to indemnity generally, see California Forms of Pleading and Practice, Ch. 300, *Indemnity and Contribution* (Matthew Bender).

[d] Related Memoranda

For points and authorities relating to an indemnitee's right to comparative indemnity on the same basis, see *§ 115.65*.

[3] Discussion of Authorities

[a] Express Contractual Indemnity Unavailable Between Unlicensed Contractor/Developer and Subcontractor

In ***Ranchwood Communities Limited Partnership v. Jim Beat Construction Co.***. *(1996) 49 Cal. App. 4th 1397* , the trial court granted summary judgments in favor of numerous cross-defendant subcontractors and against cross-complainants, the developers/general contractors of two separate condominium projects. The trial court found that since neither of the developers/general contractors possessed contractors' licenses, their cross-complaints for equitable and implied contractual indemnity against the allegedly negligent subcontractors who worked on the projects were necessarily barred by *Bus. & Prof. Code § 7031* as "actions for compensation" for services rendered and work performed by those cross-complainant developers/general contractors.

The court of appeal upheld the trial court's ruling as to the express indemnity claim, ruling that *Bus. & Prof. Code § 7031* barred express indemnity claims by unlicensed general contractors against negligent subcontractors (*49 Cal. App. 4th 1397, 1404)* . Section 7031 bars a person from suing in a California court to recover compensation for any act or contract that requires a California contractor's license, unless the person alleges and proves that he or she was licensed at all times during the performance. The court determined that the express indemnity claim was fundamentally based in contract since the developers/contractors sought to recover money from the subcontractors, and that the contracts were illegal because the developers/contractors were unlicensed. Accordingly, the cause of action for express indemnity was barred by the statutory licensing requirements (*49 Cal. App. 4th 1397, 1418)* .

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11-115 California Points & Authorities §§ 115.45-115.59

[Reserved]

§§ 115.45[Reserved]

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11-115 California Points & Authorities § 115.60

§ 115.60 Supporting Contention That Indemnitee Is Entitled to Partial Indemnification Under Principles of Comparative Indemnity--Tortfeasor May Seek Comparative Indemnity To Apportion Liability In Proportion to Fault

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

INDEMNITEE IS ENTITLED TO SEEK PARTIAL INDEMNITY FROM INDEMNITOR IN ORDER TO OBTAIN AN EQUITABLE APPORTIONMENT OF LIABILITY ACCORDING TO PRINCIPLES OF COMPARATIVE FAULT.

A. Comparative Partial Indemnity Authorized. The doctrine of comparative partial indemnity provides that each concurrent tortfeasor bear liability for an indivisible injury in direct proportion to his or her fault (*American Motorcycle Assn. v. Superior Court of Los Angeles County (1978) 20 Cal. 3d 578, 598*).

B. Tortfeasors Right to Assign Indemnity Cause of Action. A tortfeasor may assign a cause of action for equitable indemnity for the contingent damages it faces as a result of litigation, even though actions for indemnity do not typically accrue for the purposes of the statute of limitations until payment of a judgment or settlement (*Fleck v. Bollinger Home Corp. (1997) 54 Cal. App. 4th 926, 933, 63 Cal. Rptr. 2d 407*).

C. Award of Damages Directly to Assignee. As long as the assignment carries with it the burden to prove liability and damages, a court may properly award damages directly to an assignee of an indemnity cause of action (*Fleck v. Bollinger Home Corp. (1997) 54 Cal. App. 4th 926, 935, 63 Cal. Rptr. 2d 407*).

[2] Comments

[a] Use of Form

This form may be submitted in support of an indemnitee's contention that it is entitled, under principles of implied equitable indemnity and comparative fault, to an apportionment of liability with the indemnitor for a loss that it has incurred or may incur. This form should be used to establish a basic entitlement to partial indemnity under current law. It may be combined with other points and authorities that establish more specific grounds for partial indemnity [*see §§ 115.61 -115.67*].

This form may be combined with points and authorities pertaining to the specific procedural context in which comparative indemnity rights are brought before the court. It may be used in a memorandum in connection with a pretrial motion, such as a demurrer or motion for summary judgment, if partial indemnity rights may be determined as a matter of law. It may also be used in a trial or an appellate brief. For discussion of the procedures by which indemnity rights may be litigated, see *§ 115.10*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. It should be established that: (1) the indemnitee incurred or may incur a loss to a third party for which the indemnitor is or may also be liable; and (2) there is no express agreement between the indemnitor and the indemnitee that provides for a right of indemnity with regard to the loss in question.

[3] Discussion of Authorities

[a] Comparative Partial Indemnity Authorized

American Motorcycle Assn. v. Superior Court of Los Angeles County *(1978) 20 Cal. 3d 578* , determined one of the collateral issues raised by the adoption of comparative negligence in *California in Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226* , specifically the issue of apportionment of damages among multiple tortfeasors. In *American Motorcycle*, plaintiff, a teenage boy, brought an action to recover damages for personal injuries suffered in a cross-country motorcycle race. The American Motorcycle Association (AMA), a defendant, had been one of the sponsors of the race. Defendant AMA sought leave of court to file a cross complaint against plaintiff's parents for negligent supervision and for either total equitable indemnity, on the theory that the parents' negligence was "active" while AMA's negligence, if any, was only "passive" (*see §§ 115.32, 115.40*), or for a reduction of any damages awarded against AMA by the percentage of damages allocable to the parents' negligence. The trial court concluded that existing legal doctrines did not support AMA's proposed cross complaint and denied leave to file it. The common law doctrine of implied equitable indemnity was available only as a complete loss-shifting device based on relative degrees of culpability expressed in terms such as active or passive negligence, or primary and secondary liability. AMA sought a writ of mandate.

The California Supreme Court granted the writ and directed the court to allow the cross complaint, determining that the adoption of principles of comparative negligence between plaintiff and defendant (replacing the former rule, which imposed an absolute bar to recovery if the plaintiff was contributorily negligent) called for a fundamental modification of the doctrine of equitable indemnity. The doctrine was found to suffer from the same "all or nothing" deficiency as the contributory negligence doctrine, and was held to be incompatible with the goal of *Li v. Yellow Cab* that liability for damages should be borne by those whose negligence causes the damages, in proportion to the parties' respective fault. The Court concluded that California's common law equitable indemnity doctrine should be modified to permit a concurrent tortfeasor to obtain partial indemnity from other concurrent tortfeasors on a comparative fault basis (*20 Cal. 3d 578, 591)* .

[b] Tortfeasor's Right to Assign Indemnity Cause of Action

In ***Fleck v. Bollinger Home Corp.*** *(1997) 54 Cal. App. 4th 926, 63 Cal. Rptr. 2d 407* , a land developer sold a lot which contained a residential building pad to a builder who constructed a house on the pad. Plaintiff bought the house which suffered damage from subsidence. The 10 year statute of limitations prevented plaintiff from suing the developer.

Plaintiff sued the builder and the builder cross complained for indemnity against the developer. Defendant builder stipulated to liability on plaintiff's complaint and assigned its cross complaint for indemnity to plaintiff in a settlement agreement. The trial court ruled that the assignment was proper, but that the stipulated settlement was not made in good faith and did not bind the developer. The agreement provided that if the settlement were not approved, plaintiff would defend and indemnify the builder against all related cross complaints against it. Plaintiff proceeded to trial. The jury issued a judgment in favor of plaintiff finding that the tort damages suffered by plaintiff were completely caused by the defective building lot. The trial court concluded that plaintiff, as the assignee of builder's cross complaint for equitable indemnity against developer, was entitled to judgment directly against developer for the full amount of the judgment.

The court of appeal affirmed, holding that even though actions for indemnity do not typically accrue for the purposes of the statute of limitations until payment of a judgment or settlement, the trial court did not err in permitting defendant builder to assign to plaintiff its cause of action for equitable indemnity for the contingent damages it faced as a result of the litigation (*54 Cal. App. 4th 926, 933)* . On appeal the developer argued that the builder's assignment of its cross complaint for indemnity did not entitle plaintiff to the direct money judgment he obtained here because builder never suffered an indemnifiable loss through settlement or judgment. The developer asserted that the assignment of the cross complaint before the builder's liability had been incurred or paid violated indemnity principles, circumvented the spirit of the statute of limitations and permitted plaintiff to obtain a double recovery. The court responded that: (1) because the builder bore potential liability for damages to plaintiff, it had the right to cross complain against developer for the right to equitable indemnity to recoup damages which might be assessed against it by any previous tortfeasors who caused the subsidence; and (2) there was no reason why an improver of property which had a latent defect caused by a former tortfeasor could not assign its cross complaint for indemnity before being found liable for damages. The court went on to state that after the trial court in this case refused to approve the settlement between plaintiff and defendant builder, plaintiff had to prove both liability and damages against defendant for the injuries to his property. Because plaintiff had not given builder a convenant not to execute if liability were found against it, it remained at risk to pay its comparative fault in the instant situation. According to the court, plaintiff could not receive the windfall of a double recovery, because the trial court disapproved the settlement between plaintiff and defendant builder and ruled that the agreement would only bind the builder. The court therefore concluded that since the jury determined that the entire cause of the damages in this case was due to the developer's negligence in creating the defective building pad, and since the primary purpose of the statutory provision allowing cross complaints for indemnity was to insure that the 10-year statute did not insulate the previous tortfeasor actually at fault when another, subsequent tortfeasor is timely sued and found liable, equity and judicial economy dictated that plaintiff need not file additional proceedings to collect on the judgment in this case (*54 Cal. App. 4th 926, 934)* .

[c] Award of Damages Directly to Assignee

The facts of ***Fleck v. Bollinger Home Corp.*** *(1997) 54 Cal. App. 4th 926, 63 Cal. Rptr. 2d 407* , are discussed in *§ 115.60[3][b]*. The court held that as long as the assignment carries with it the burden to prove liability and damages, a court may properly award damages directly to an assignee of an indemnity cause of action. The court reasoned that there was no sound reason in law or equity why damages had to be funneled through builder to plaintiff (*54 Cal. App. 4th 926, 935)* .

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11-115 California Points & Authorities § 115.61

§ 115.61 Supporting Contention That Indemnitee Is Entitled to Partial Indemnification Under Principles of Comparative Indemnity--Comparative Indemnity Is Available From Subsequent Medical Malpractice Tortfeasor

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

INDEMNITEE IS ENTITLED TO COMPARATIVE INDEMNITY FROM INDEMNITOR ON ACCOUNT OF INDEMNITOR'S SUBSEQUENT PROFESSIONAL MEDICAL NEGLIGENCE WITH REGARD TO THE DAMAGES INCURRED BECAUSE OF THE AGGRAVATED INJURY CAUSED BY THAT NEGLIGENCE.

Subsequent Medical Malpractice as Basis for Comparative Indemnity. Under principles of comparative negligence, partial indemnification is available to the party who first caused an injury against a medical professional whose subsequent negligence aggravated the injury (*Blecker v. Wolbart (1985) 167 Cal. App. 3d 1195, 1202-1203, 213 Cal. Rptr. 781*).

[2] Comments

[a] Use of Form

This form may be submitted in support of an indemnitee's contention that he or she is entitled to seek partial indemnity on a comparative fault basis from a medical professional whose subsequent negligence aggravated the victim's injuries. In an appropriate case, this memorandum may be submitted in opposition to the contention supported by the points and *authorities in § 115.69.*

It should be noted that pursuant to Proposition 51, as codified in *Civ. Code § 1431.2*, a defendant in a personal injury suit is only severally liable for non-economic damages based on the percentage of fault apportioned to that defendant. However, the defendant remains jointly and severally liable for any economic damages awarded, and thus this form may

be used to seek partial indemnification for those economic damages from a medical professional whose subsequent negligence aggravates the original injury [*see Henry v. Superior Court (2008) 160 Cal. App. 4th 440, 455, 72 Cal. Rptr. 3d 808*].

This form may be combined with points and authorities pertaining to the specific procedural context in which implied indemnity rights are brought before the court. It may be used in a memorandum in connection with a pretrial motion, such as a demurrer or motion for summary judgment, if indemnity rights may be determined as a matter of law. It may also be used in a trial or an appellate brief. For discussion of the procedures by which indemnity rights may be litigated, see *§ 115.10*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. It should be established that: (1) the alleged negligence of the indemnitee caused an injury for which the indemnitee is or may be liable; and (2) the injuries were aggravated by the professional medical negligence of the indemnitor.

[3] Discussion of Authorities

[a] Subsequent Medical Malpractice as Basis for Comparative Indemnity

In ***Blecker v. Wolbart*** *(1985) 167 Cal. App. 3d 1195, 213 Cal. Rptr. 781* , Blecker's negligent driving was a proximate cause of an injury to a motorcyclist (Cole). Cole subsequently underwent surgery, suffered cardiac arrest, and died. Blecker's employer settled with Cole's estate, and Blecker brought an action for indemnity against various medical defendants, alleging their subsequent negligence. The case was tried to a jury. The court accepted Blecker's stipulation that her negligence was a proximate cause of Cole's original injuries but not his death and refused the doctors' offer of evidence with regard to her collision with the motorcycle.

On appeal, the court held that this failure to accept the evidence was error. Resolution of the issue revolved around the effect of the adoption of principles of comparative negligence in *American Motorcycle Assn. v. Superior Court of Los Angeles County (1978) 20 Cal. 3d 578, 598* (*see § 115.60*) on prior law. Prior to *American Motorcycle*, California law provided that an original tortfeasor was also liable for the damages caused by subsequent negligent medical treatment as a matter of law [*Ash v. Mortensen (1944) 24 Cal. 2d 654, 657, 150 P.2d 876]* . However, the subsequent medical tortfeasor was liable only for the aggravation of damages caused by the malpractice. Therefore, an apportionment was required by the trier of fact between the amount of damages attributable to the original injury and the amount of damages caused by the subsequent malpractice [*Niles v. San Rafael (1974) 42 Cal. App. 3d 230, 240, 116 Cal. Rptr. 733]* . The original tortfeasor then was entitled to complete indemnity from the malpractice tortfeasor with regard to the damages attributed to the malpractice [*Niles v. San Rafael (1974) 42 Cal. App. 3d 230, 237-240, 116 Cal. Rptr. 733* ; *Herrero v. Atkinson (1964) 227 Cal. App. 2d 69, 74-77, 38 Cal. Rptr. 490]* . There was no right of indemnity on behalf of the medical defendant against the original tortfeasor because the medical defendant had no liability for the original injuries, and equity, under the all-or-nothing indemnity rule of prior law, required that the medical defendant bear the entire loss for the damages attributable to aggravation [*see Munoz v. Davis (1983) 141 Cal. App. 3d 420, 429, 190 Cal. Rptr. 400* ; *see also § 115.69*].

The court in *Blecker* noted that the parties and the trial court were confused over whether, after *American Motorcycle*, a jury could apportion the liability of successive tortfeasors, or whether *American Motorcycle* even applied to successive tortfeasors. The court found comparative negligence to be essentially harmonious with the prior system, rather than in conflict with it. It stated that successive acts, each of which has a discernible effect contributing to the ultimate loss, do not militate against comparative indemnification. Cases prior to *American Motorcycle* support the availability of equitable indemnification, comparative or otherwise, as between parties who made separate contributions to the loss (*167 Cal. App. 3d 1195, 1202-1203)* .

The confusion appeared to revolve around the difference between apportionment of damages and comparison of the respective tortious conduct of the parties. What is required by *American Motorcycle* is that the respective conduct of concurrent tortfeasors be considered by the trier of fact in ascertaining fault. In the case of successive tortfeasors, this question is distinct from the question of the particular injuries that the conduct of each caused. Under comparative negligence, it was for the jury to consider the respective degree of fault as between Blecker's driving and the doctors' medical procedures, not the extent of Cole's injuries before and after treatment (*167 Cal. App. 3d 1195, 1203-1204)* .

NOTE:

As an example of the operation of the principles set forth in *Blecker v. Wolbart*, suppose that *A*, while driving at an excessive rate of speed and under the influence of alcohol and drugs, sideswipes a vehicle driven by *B*. *B* suffers only minor injuries and seeks treatment from Dr. *C*. While under treatment, *B* suffers an extremely rare reaction to medication of which Dr. *C* was unaware and dies. The jury establishes damages for wrongful death at $1,000,000 dollars and apportions only $1,000 to the initial injury and $999,000 to the subsequent aggravation. However, in comparing the respective conduct of *A* and Dr. *C*, the jury finds *A* to be 90 percent negligent and Dr. *C* to be only 10 percent negligent. *A* pays all of the $1,000 allocated to the original injury and 90 percent of the $999,000 allocated to aggravation. Dr. *C* pays only 10 percent of the $999,000.

NOTE:

Dicta in Munoz v. Davis (1983) 141 Cal. App. 3d 420, 190 Cal. Rptr. 400 [*see § 115.69*], a post-*American Motorcycle* case, suggests that in the case of original and subsequent tortfeasors who are jointly and severally liable, comparative indemnity is never available to the subsequent tortfeasor from the original tortfeasor because the subsequent tortfeasor is not liable for the original injury. Under the principles of *Blecker v. Wolbart*, this proposition would not be correct. The subsequent tortfeasor should be as entitled as the original tortfeasor to a comparison of the respective fault of the parties because that comparison is applicable to the apportionment of liability for the damages due to aggravation [*see Munoz v. Davis (1983) 141 Cal. App. 3d 420, 429, 190 Cal. Rptr. 400]* .

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11-115 California Points & Authorities § 115.62

§ 115.62 Supporting Contention That Indemnitee Is Entitled to Partial Indemnification Under Principles of Comparative Indemnity--Limitations Period for Filing Indemnity Action Against Medical Malpractice Tortfeasor Tolled by Notice Provisions of Code Civ. Proc. § 364(d)

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE 90-DAY STATUTE OF LIMITATIONS TOLLING PERIOD FOLLOWING NOTICE OF INTENT TO SUE, WHICH APPLIES TO ACTIONS BASED ON A HEALTH CARE PROVIDER'S PROFESSIONAL NEGLIGENCE, APPLIES ALSO TO EQUITABLE INDEMNITY ACTIONS BASED ON PROFESSIONAL NEGLIGENCE, EVEN IF THE ACTION IS GOVERNED BY A LIMITATIONS PERIOD OTHER THAN THE GENERAL MEDICAL MALPRACTICE LIMITATIONS PERIOD OF CODE OF CIVIL PROCEDURE SECTION 340.5.

MICRA Tolling Period Applies to Non-MICRA Limitations Period Applicable in Equitable Indemnity Action. The 90-day statute of limitations tolling period following notice of intent to sue, which applies to actions based on a health care provider's professional negligence, applies also to equitable indemnity actions based on professional negligence, even if the action is governed by a limitations period other than the general medical malpractice limitations period of *Code of Civil Procedure Section 340.5* (*Preferred Risk Mut. Ins. Co. v. Reiswig (1999) 21 Cal. 4th 208, 218, 87 Cal. Rptr. 2d 187, 980 P.2d 895* ; *see Code Civ. Proc. § 364(d)*).

[2] Comments

[a] Use of Form

This form may be submitted in support of an indemnitee's contention that an action for indemnity filed against a health care provider, and based on the health care provider's professional negligence, is not untimely because notice of intent to sue was given to the health care provider within the last 90 days of the limitations period and therefore the applicable limitations period was tolled for 90 days [*see Code Civ. Proc. § 364(d)*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion of the facts showing that the action for indemnity is based on the health care provider's professional negligence, that notice of intent to sue was provided to the health care provider within 90 days prior to expiration of the applicable limitations period, and that the indemnity action was timely after taking into consideration the 90-day tolling period.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the indemnity action was not untimely under the applicable limitations period. They may also be adapted for use in a trial or appellate brief. For a discussion of the procedures by which indemnity rights may be litigated, see *§ 115.10*.

[b] Related Pleading and Practice Forms

For discussion relating to comparative indemnity, see California Forms of Pleading and Practice, Ch. 300, *Indemnity and Contribution* (Matthew Bender), and for discussion relating to actions based on the professional negligence of health care providers, see California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice* (Matthew Bender).

[c] Related Memoranda

For points and authorities relating to actions based on the professional negligence of health care providers, see Ch. 175, *Physicians and Surgeons: Medical Malpractice* .

[3] Discussion of Authorities

[a] MICRA Tolling Period Applies to Non-MICRA Limitations Period Applicable in Equitable Indemnity Action

In ***Preferred Risk Mut. Ins. Co. v. Reiswig*** *(1999) 21 Cal. 4th 208, 87 Cal. Rptr. 2d 187, 980 P.2d 895* , a woman's hand was slammed in the door of a van owned by a church, and the injury was later seriously exacerbated by the alleged negligence of the woman's treating physicians. The church's insurer eventually paid the woman its $1 million dollar policy limit in exchange for a release of all claims against the church. The woman sued her treating physicians for malpractice. The insurer then filed an action against the physicians asserting the church's right to equitable indemnity for the subsequent negligence of the physicians that contributed to the woman's injuries. Prior to filing suit, the insurer and the woman had both complied with the notice of intent to sue requirement of *Code Civ. Proc. § 364*, which is part of the Medical Injury Compensation Reform Act (MICRA). Under *Code Civ. Proc. § 364*, providing notice of intent to sue is a prerequisite to filing suit against a health care provider for injuries based on the professional negligence of the health care provider, and if the notice is provided within 90 days prior to expiration of "the applicable statute of limitations," the limitations period is tolled for 90 days. The indemnity action was not filed within the general one-year personal injury limitations period of former Code Civ. Proc. § 340(3) [*now see Code Civ. Proc. § 335.1* (two-year period, beginning in 2003)], although it was timely filed as to two doctors if the limitations period was tolled for 90 days after the insurer provided notice of intent to sue. The doctors demurred to the insurer's complaint, and the trial court granted the demurrer on the grounds that because the applicable statute of limitations was former Code Civ. Proc. § 340(3) [*now see Code Civ. Proc. § 335.1*] and that statute was not part of MICRA, the MICRA tolling provision did not apply. The insurer appealed, and the court of appeal affirmed, holding that *Code Civ. Proc. § 364* did not apply to indemnity actions. The insurer again appealed.

The Supreme Court reversed, holding that MICRA's 90-day tolling period following notice of intent to sue applies to equitable indemnity actions based on professional negligence, even if the action is governed by a limitations period other than MICRA's general medical malpractice limitations period of *Code Civ. Proc. § 340.5*. The Court noted that

prior decisions had held that MICRA provisions may apply to equitable indemnity actions, including its own decision in *Western S.S. Lines, Inc. v. San Pedro Peninsula Hosp. (1994) 8 Cal. 4th 100, 32 Cal. Rptr. 2d 263, 876 P.2d 1062* , which held that the $250,000 MICRA limitation on noneconomic damages applied to derivative actions for equitable indemnity. The Court also rejected the argument that because the opinion in *Western Steamship* had differentiated between substantive questions involving MICRA, such as the damages limitation, and simple procedural ones, such as those involving statutes of limitations, the *Western Steamship* decision did not support the conclusion that MICRA limitations provisions could apply to indemnity actions (*21 Cal. 4th 208, 215-217)* . The Supreme Court then concluded that an equitable indemnity action that flows from professional negligence actions, as opposed to flowing from unrelated tort actions, is "based upon" professional negligence (*21 Cal. 4th 208, 217-218)* .

Finally, the Court reasoned that if the legislature had intended the tolling provision of *Code Civ. Proc. § 364(d)* to apply only to *Code Civ. Proc. § 340.5*, rather than providing that it applied to the "applicable statute of limitations," it could have stated so. The Court also concluded that applying *Code Civ. Proc. § 364(d)* to cases based on a health care provider's professional negligence, including derivative claims for equitable indemnity that follow settlement of the original action, would further the legislative purpose of the 90-day tolling period, and MICRA in general, to give doctors and their insurers an opportunity to negotiate with prospective plaintiffs and settle derivative claims without unnecessary litigation (*21 Cal. 4th 208, 218-219)* .

NOTE:

Although the Supreme Court in *Preferred Risk Mutual Insurance Co. v. Reiswig* applied the general one-year personal injury limitations period of former Code Civ. Proc. § 340(3) [*now see Code Civ. Proc. § 335.1* (two-year period, beginning in 2003)], to the equitable indemnity action brought by the insurance company, the Court did not specifically hold that this is the applicable limitations period for actions for equitable indemnity. In that case, at the time of the appeal to the Supreme Court, both parties agreed that former Code Civ. Proc. § 340(3) [*now see Code Civ. Proc. § 335.1*] was the applicable limitations period, rather than the MICRA limitations period of *Code Civ. Proc. § 340.5* [*Preferred Risk Mutual Ins. Co. v. Reiswig (1999) 21 Cal. 4th 208, 213]* . Although the Supreme Court agreed, without providing analysis, that *Code Civ. Proc. § 340.5* was inapplicable to the case before it [*Preferred Risk Mut. Ins. Co. v. Reiswig (1999) 21 Cal. 4th 208, 213 n.2, 87 Cal. Rptr. 2d 187, 980 P.2d 895]* , the Court did not otherwise specifically address the general applicability of former Code Civ. Proc. § 340(3) [*now see Code Civ. Proc. § 335.1*].

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
CHAPTER 115 INDEMNITY AND CONTRIBUTION
PART II. FORMS
B. Comparative Indemnity
1. Partial Indemnity

11-115 California Points & Authorities § 115.63

§ 115.63 Supporting Contention That Indemnitee Is Entitled to Partial Indemnification Under Principles of Comparative Indemnity--Right of Comparative Indemnity Is Not Precluded by Indemnity Agreement With Limited Scope

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE INDEMNITY AGREEMENT BETWEEN THE PARTIES WAS NOT INTENDED TO PROVIDE FOR INDEMNITY WITH RESPECT TO THE PARTICULAR OCCURRENCE AT ISSUE AND DOES NOT PRECLUDE INDEMNITEE FROM SEEKING COMPARATIVE INDEMNITY FROM INDEMNITOR.

Indemnity Agreement That Is Limited in Scope. If an indemnity agreement, construed as a whole, does not provide for a right of indemnity with respect to the particular incident at issue, a party to the contract may recover implied equitable indemnity from the other contracting party (*E.L. White, Inc. v. City of Huntington Beach (1978) 21 Cal. 3d 497, 506-510, 146 Cal. Rptr. 614, 579 P.2d 505* ; *People ex rel. Dep't of Pub. Works v. Daly City Scavenger Co. (1971) 19 Cal. App. 3d 277, 280-281, 96 Cal. Rptr. 669*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that a right of comparative indemnity is not barred on account of an express indemnity agreement between the parties. In an appropriate case, this memorandum may be submitted in opposition to the contention supported by the points and *authorities in § 115.73*.

This form is for the use of the comparative indemnitee, that is, the party who is seeking a right to comparative indemnity despite the agreement. The comparative indemnitee may be either party to the indemnity agreement, the express indemnitee or the express indemnitor. If the form is used by the express indemnitor, it should be used together

with § 115.39, which advances the point that a right of express indemnity arising from contract does not extend beyond the scope of the agreement.

This form may also be combined with points and authorities pertaining to the specific procedural context in which implied indemnity rights are brought before the court. It may be used in a memorandum in connection with a pretrial motion, such as a demurrer or motion for summary judgment, if implied indemnity rights may be determined as a matter of law. It may also be used in a trial or an appellate brief. For discussion of the procedures by which indemnity rights may be litigated, see *§ 115.10*.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. It should be established that: (1) the parties entered into an agreement that provided for a right of indemnity under certain express and limited circumstances; and (2) the loss for which comparative indemnity is sought is not within the scope of the agreement.

[3] Discussion of Authorities

[a] Limited Scope of Indemnity Agreement

In ***E.L. White, Inc. v. City of Huntington Beach*** *(1978) 21 Cal. 3d 497, 146 Cal. Rptr. 614, 579 P.2d 505* , the city had contracted with White, a general contractor, for the construction of certain public improvements that included a storm drain. The contract provided for a right of indemnity in favor of the city from White for claims arising out of the performance of or in consequence of the work contemplated. After construction was completed and the city had accepted the work, the drain malfunctioned and the city arranged for repairs with the particular subcontractor who had constructed it. In the course of repairs, one employee of the subcontractor was killed and another injured, and actions were brought against the city and White. The malfunction was later found to be due to the faulty work of the subcontractor. The city filed a separate action for indemnity under the contract against White, but lost because the agreement was construed as general and the city's negligence was found to be active [*see § 115.40*]. White then brought the instant action against the city for implied equitable indemnity. White's action was dismissed by the trial court.

On appeal, the city contended that the indemnity clause in the contract effectively operated to preclude any claim for implied indemnity in favor of White. The city argued that by agreeing to the particular language, the parties memorialized the entire agreement between them regarding indemnity. By excluding any right of indemnity in favor of White, they indicated their intention that no such right should exist.

The court of appeal reversed and remanded the matter for trial [*see § 115.90*]. The court stated that the city's contention found no support in California law. Implied equitable indemnity and contractual indemnity are each subject to their own distinct legal rules and limitations. Within the limitations of the language used, an express indemnity clause is accorded a certain preemptive effect, displacing any implied rights that might otherwise arise within the scope of its operation [*see § 115.73*]. If, however, the duty established by contract is, by its terms and conditions, inapplicable to the particular factual setting before the court, the equitable principles of implied indemnity may indeed come into play (*21 Cal. 3d 497, 506-508)* .

In the prior action, it had been determined that the indemnity clause was not intended to and did not create an obligation in White to indemnify the city for the city's active negligence. It was also determined that the city was actively negligent and that its negligence was a cause of the underlying liability. Any preemptive effect that the clause might have had did not extend to the instant situation. Accordingly, the principles of implied equitable indemnity did apply, the scope of which were to be determined at trial in the manner required by *American Motorcycle Assn. v. Superior Court of Los Angeles County (1978) 20 Cal. 3d 578* [*see § 115.60*] (*21 Cal. 3d 497, 510)* .

People ex rel. Dep't of Pub. Works v. Daly City Scavenger Co. *(1971) 19 Cal. App. 3d 277, 96 Cal. Rptr. 669* , was

an appeal from a judgment of the superior court in an action for declaratory relief brought by the State of California. The state had closed a portion of a highway by placing hinged fence gates at two points on the road. In order to provide cross defendant company with access to its property located within the barricaded highway, the state and company entered into a written agreement that provided that the company would receive keys for the locked gates and that the company would indemnify the state for injury to any person using the barricaded portion of the highway pursuant to the purposes of the agreement. This agreement also provided that the company need not indemnify the state for injury to a person using the highway for his or her own purposes. Subsequent to the execution of this agreement, the company erected a chain fence across the highway south of the state's southerly fence. Two individuals, using the highway for their own purposes, were killed when a motorcycle on which they were riding collided with the chain barrier. The state and company settled the resulting wrongful death actions filed against them, and the state sought to recover its payment from the company by a cross complaint for declaratory relief. The trial court ruled for the company and the state appealed. The court of appeal held that the state was not precluded from seeking implied equitable indemnity because the express indemnity agreement was not intended to provide for indemnity rights with respect to the particular occurrence at issue. The court held that because the incident occurred at a geographical location removed from the area expressly covered by the agreement and was only remotely related to the subject matter of the agreement, it was not included within the scope of the indemnity obligations of the agreement, and the state was not precluded by the agreement from seeking implied indemnity (*19 Cal. App. 3d 277, 280-281)* .

[4] Additional Authorities

[a] Limited Scope of Indemnity Agreement

In *Maryland Cas. Co. v. Bailey & Sons, Inc. (1995) 35 Cal. App. 4th 856, 41 Cal. Rptr. 2d 519* , an express indemnity agreement ran in favor of CMA as indemnitee and against Kelly, as indemnitor. The court found the facts of this case to be indistinguishable from *E.L. White* [*see § 115.63[3][a]*]. It reaffirmed that the existence of the agreement did not preclude the contract indemnitor from seeking equitable indemnity from the contract indemnitee if the duties established by contract are, by their terms and conditions, inapplicable to the particular factual setting (*35 Cal. App. 4th 856, 873-875)* .

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11-115 California Points & Authorities § 115.64

§ 115.64 Supporting Contention That Indemnitee Is Entitled to Partial Indemnification Under Principles of Comparative Indemnity--Shortfall Is to Be Apportioned According to Comparative-Fault Ratio of Remaining Codefendants

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

INDEMNITEE IS ENTITLED TO EQUITABLE INDEMNITY FROM INDEMNITOR TO APPORTION LIABILITY ACCORDING TO THE COMPARATIVE FAULT OF THE PARTIES, EXCLUDING THE PERCENTAGE LIABILITY OF; _____ [*name of insolvent tortfeasor or tortfeasor against whom indemnity is barred*].

[*EITHER*]

Shortfall Caused by Insolvent Tortfeasor. An insolvent defendant's shortfall must be shared proportionately by the solvent defendants, as though the insolvent person had originally not participated (*Paradise Valley Hosp. v. Schlossman (1983) 143 Cal. App. 3d 87, 93, 191 Cal. Rptr. 531* ; *see Ambriz v. Kress (1983) 148 Cal. App. 3d 963, 969, 196 Cal. Rptr. 417*).

[*OR*]

Shortfall Caused Because Comparative Indemnity Is Barred Against Tortfeasor Who Entered Into Good-Faith Settlement. If indemnity is barred against one or more tortfeasors who entered into a good-faith settlement, liability is to be apportioned among the remaining tortfeasors in direct proportion to their respective percentages of fault, computed as though the settling tortfeasors had not been involved in the action (*Lyly & Sons Trucking Co. v. State of California (1983) 147 Cal. App. 3d 353, 358, 195 Cal. Rptr. 116* ; *see Code Civ. Proc. § 877.6(c)*).

[2] Comments

[a] Use of Form

This form may be submitted in support of an indemnitee's contention that it is entitled to comparative indemnity from another tortfeasor due to a shortfall caused by an "absent" tortfeasor. This form is for use after the trier of fact has determined the percentages of comparative fault of joint or concurrent tortfeasors in the tort action, including at least one tortfeasor who is absent from the case in some sense. This absence may be simply an economic absence, as in the case of an insolvent party [*see, e.g., Paradise Valley Hosp. v. Schlossman (1983) 143 Cal. App. 3d 87, 191 Cal. Rptr. 531]* , or it may be because a tortfeasor is not subject to the jurisdiction of the court, or because one or more tortfeasors previously entered into a good-faith settlement with the original plaintiff and are protected from a claim for comparative indemnity by *Code Civ. Proc. § 877.6(c)* [*see, e.g., Lyly & Sons Trucking Co. v. State of California (1983) 147 Cal. App. 3d 353, 195 Cal. Rptr. 116]* .

This form may be combined with points and authorities pertaining to the specific procedural context in which the scope of comparative indemnity rights are brought before the court. It may be used in a memorandum in connection with a motion, such as a motion for summary judgment, in which the apportionment of a shortfall is sought as a matter of law. It may also be used in an appellate brief. For discussion of the proceedings in which indemnity rights may be litigated, see *§ 115.10*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. It should be established that: (1) in the underlying or an independent tort action, a trier of fact has apportioned liability among multiple tortfeasors in percentages totaling 100 percent; and (2) one or more of the tortfeasors against whom comparative fault was apportioned is not available to satisfy its share of the judgment and the reason for the unavailability. The comparative fault of the remaining judgment debtors should then be recomputed according to their ratio of comparative fault and restated to total 100 percent.

For example, assume a $100,000 judgment for the tort victim. The jury finds *A* to be 30 percent responsible, *B* to be 20 percent responsible, and *C* to be 50 percent responsible, but *C* is judgment proof. *A* and *B* are liable in a ratio of 3 to 2. To total 100 percent, *A*'s liability is 60 percent and *B*'s liability is 40 percent. If *A* has paid more than $60,000, *A* is entitled to equitable comparative indemnity from *B* for the amount paid that exceeds $60,000.

[b] Shortfall Limited to Economic Damages

Comparative equitable indemnity is available only if the parties are jointly and severally liable [*Munoz v. Davis (1983) 141 Cal. App. 3d 420, 425, 190 Cal. Rptr. 400* ; *see § 115.69*]. In actions covered by the Fair Responsibility Act of 1986 (Proposition 51) [*Civ. Code §§ 1431.1-1431.5*; *see § 115.09*], a defendant's liability for noneconomic damages is several only and not joint [*Civ. Code § 1431.2(a)*]. Therefore, there can no longer be a shortfall after trial with regard to noneconomic damages because the plaintiff bears any loss caused by an absent tortfeasor. Thus, the principles of comparative indemnity that are set forth in this form are limited to the apportionment of liability for a plaintiff's economic damages.

[3] Discussion of Authorities

[a] Shortfall Caused by Insolvent Tortfeasor

In ***Paradise Valley Hosp. v. Schlossman*** *(1983) 143 Cal. App. 3d 87, 191 Cal. Rptr. 531* , plaintiffs sued a hospital and two doctors for negligence. A $1.5 million judgment was apportioned 10 percent ($150,000) against the hospital, 40 percent ($600,000) against Dr. *L*, and 50 percent ($750,000) against Dr. *S*. Dr. *S* was insolvent and presumably judgment proof. The hospital paid 33 percent of the judgment ($500,000) and Dr. *L* paid 67 percent ($1 million). The hospital claim for contribution from Dr. L, to be apportioned according to principles of comparative fault, was denied

by the trial court.

Relying on both *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 823-826, 119 Cal. Rptr. 858, 532 P.2d 1226* , and *American Motorcycle Assn. v. Superior Court of Los Angeles County (1978) 20 Cal. 3d 578, 589-598, 146 Cal. Rptr. 182, 578 P.2d 899* [*see § 115.60*], the court of appeal reversed and extended the doctrine of comparative fault to require that the shortfall of an insolvent cotortfeasor judgment debtor be borne by the solvent cotortfeasors in proportion to their respective fault as though the insolvent party had not participated. The ratio of liability between the hospital and Dr. *L* was 1 to 4, which when recomputed in terms of 100 percent was 20 to 80. The hospital was entitled to contribution from Dr. *L* for the amount in excess of 20 percent of the total judgment that it had paid ($500,000 minus 20 percent of $1.5 million ($300,000) equals $200,000 contribution) (*143 Cal. App. 3d 87, 89-93)* .

In ***Ambriz v. Kress*** *(1983) 148 Cal. App. 3d 963, 196 Cal. Rptr. 417* , Mrs. Ambriz was driving a car in which her son was a passenger when an accident occurred in front of their home. Mr. Ambriz observed the immediate aftermath of the accident. All three brought suit against two defendants, McDowell and Kress. Kress was essentially judgment-proof and his insurer was insolvent.

The jury awarded damages to all three plaintiffs. It apportioned fault 20 percent to Mrs. Ambriz, 70 percent to Kress, and 10 percent to McDowell. McDowell paid the judgment and brought a motion against Mrs. Ambriz for contribution with regard to the amounts paid to Mr. Ambriz and the child. He argued that under *Paradise Valley Hospital*, the shortfall due to Kress' insolvency should be apportioned in a 2-to-1 ratio, to reflect the comparative fault ratio between Mrs. Ambriz and McDowell.

The trial court agreed and the court of appeal affirmed. The court agreed with the result of *Paradise Valley Hospital* and found no reason why the result should be different simply because Mrs. Ambriz was also a plaintiff. It saw nothing inconsistent or paradoxical in Mrs. Ambriz' being both a plaintiff and a cross defendant. She was a cross defendant vis-a-vis her coplaintiffs and must bear the burden of a shortfall caused by the insolvency of another defendant in direct proportion to her respective degree of culpability (*148 Cal. App. 3d 963, 968-972)* .

[b] Shortfall Caused Because Comparative Indemnity Is Barred Against Tortfeasor Who Entered Into Good-Faith Settlement

In ***Lyly & Sons Trucking Co. v. State of California*** *(1983) 147 Cal. App. 3d 353, 196 Cal. Rptr. 116* , a driver and his passenger were injured in a motor vehicle accident that was within workers' compensation coverage. Driver sued the owner of the other vehicle involved (Lyly) and Country Club. Passenger sued these parties and Driver. The plaintiffs' employer's workers' compensation carrier intervened for subrogation in the actions. Lyly cross complained against the State of California for equitable indemnity based on negligent maintenance, design, and control of the highway. Before trial, all parties except the State entered into good-faith settlements that completely discharged all liability to both plaintiffs. Thus, both Country Club and Driver were immune from any liability for comparative indemnity or contribution [*see Code Civ. Proc. § 877.6(c)*]. Of the $920,000 total awards paid, Lyly paid $875,000. Lyly then proceeded on its cross complaint against State based on a stipulated apportionment of fault that gave 10 percent to State, 40 percent to Lyly, and 50 percent to the other settling parties. The parties further stipulated that the reasonable net damages to all plaintiffs was $875,000, providing for a reduction of the total damages by the amount of settlements paid by the other parties. Under the stipulation, there was a significant shortfall because the actual amounts of settlements paid by the other parties ($45,000) was far below 50 percent of the total damages ($920,000/2 = $460,000). The trial court awarded Lyly only $87,500 in indemnity, or 10 percent of the amount of the stipulated net damages.

The court of appeal reversed and held that the respective shares of Lyly and State should be determined without reference to the shares of the settling parties. Because they had stipulated that their relative ratio of fault was 1 to 4, or 20 to 80 in terms of 100 percent, State was liable for comparative indemnity to Lyly for 20 percent of the stipulated net damages (*147 Cal. App. 3d 353, 356-358)* .

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11-115 California Points & Authorities § 115.65

§ 115.65 Supporting Contention That Indemnitee Is Entitled to Partial Indemnification Under Principles of Comparative Indemnity--Comparative Indemnity Applies Between Negligent and Strictly Liable Cotortfeasors

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

INDEMNITEE IS ENTITLED TO COMPARATIVE INDEMNITY FROM INDEMNITOR EVEN THOUGH _____ [INDEMNITEE *or* INDEMNITOR] IS LIABLE UNDER PRINCIPLES OF STRICT LIABILITY AND _____ [INDEMNITOR *or* INDEMNITEE] IS LIABLE UNDER PRINCIPLES OF NEGLIGENCE.

A. Comparative Indemnity Available Between Negligent and Strictly Liable Tortfeasors. The doctrine of partial or comparative indemnity applies even if one tortfeasor is held liable on a strict liability theory and the other tortfeasor is liable only for negligence (*Safeway Stores, Inc. v. Nest-Kart (1978) 21 Cal. 3d 322, 327-332, 146 Cal. Rptr. 550, 579 P.2d 441*).

[*Optional*] **B. Comparative Indemnity Available Between Unlicensed Contractor/Developer and Subcontractor.** Unlicensed general contractors who also act as developers, and thus may be held strictly liable for damages to homeowners in actions for defective construction, are not barred from seeking indemnity from negligent subcontractors by reason of their lack of contractors' license (*Ranchwood Communities Limited Partnership v. Jim Beat Construction Co. (1996) 49 Cal. App. 4th 1397, 1404, 57 Cal. Rptr. 2d 386*).

[2] Comments

[a] Use of Form

This form may be submitted in support of an indemnitee's contention that principles of comparative indemnity should be applied to apportion liability between a negligent and a strictly liable tortfeasor. This form may be used by either the

negligent or the strictly liable tortfeasor, depending on which one would benefit from comparative indemnity.

This form may be adapted for use if both the indemnitee and the indemnitor are alleged to be liable to the plaintiff on a strict liability theory. Comparative indemnity is available, under the reasoning of *Safeway v. Nest-Kart*, between strictly liable defendants, including commercial defendants who are barred from recovering under strict liability as plaintiffs [*GEM Developers v. Hallcraft Homes of San Diego, Inc. (1989) 213 Cal. App. 3d 419, 425-430, 261 Cal. Rptr. 626* ; *Gentry Constr. Co. v. Superior Court (1989) 212 Cal. App. 3d 177, 180-183, 260 Cal. Rptr. 421]* .

This form may be combined with points and authorities pertaining to the specific procedural context in which comparative indemnity rights are brought before the court. It may be used in a memorandum in connection with a pretrial motion, such as a demurrer or motion for summary judgment, if indemnity rights may be determined as a matter of law. It may also be used in a trial or appellate brief. For discussion of the proceedings in which indemnity rights may be litigated, see *§ 115.10*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. It should be established that: (1) in an underlying tort action, the trier of fact has found or may find both the parties to be liable to the same person; and (2) the basis of liability with regard to one of the parties is negligence, and with regard to the other party is strict liability.

[3] Discussion of Authorities

[a] Comparative Indemnity Available Between Negligent and Strictly Liable Tortfeasors

In ***Safeway Stores, Inc. v. Nest-Kart*** *(1978) 21 Cal. 3d 322, 146 Cal. Rptr. 550, 579 P.2d 441* , a shopper was injured in a Safeway store when the shopping cart that she was using broke and fell on her foot. The shopper brought suit against, among others, Safeway and Nest-Kart, the manufacturer of the cart. The jury returned a verdict against Safeway and Nest-Kart, apportioning fault 80 percent to Safeway and 20 percent to Nest-Kart. Special findings disclosed that the jury had found Safeway liable under both negligence and strict liability theories and Nest-Kart liable under strict liability and breach of warranty theories. Safeway and Nest-Kart satisfied the judgment on an 80/20 apportionment. Safeway then moved in the trial court for a judgment of contribution to require Nest-Kart to pay an additional 30 percent to Safeway so as to achieve a 50-50 apportionment between the tortfeasors, claiming a 50-50 apportionment was required by California's contribution statutes [*Code Civ. Proc. §§ 875, 876*; *see § 115.130*]. The case was tried before the decision in *American Motorcycle Assn. v. Superior Court of Los Angeles County (1978) 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899* [*see § 115.60*], and the trial court felt compelled by the contribution statutes and past decisions to order contribution from Nest-Kart in order to achieve a pro rata (equal) apportionment of liability. Nest-Kart appealed.

In reversing the trial court order, the Supreme Court found that nothing in the contribution statutes prevented the apportionment of liability between negligent and strictly liable tortfeasors on a comparative fault basis [*see § 115.130*] (*21 Cal.3d 322, 327-328)* . In cases in which one or more tortfeasors' liability rests on the principle of strict liability, fairness and other tort policies, such as deterrence of dangerous conduct or encouragement of accident-reducing behavior, frequently call for an apportionment of liability among multiple tortfeasors. In the instant case, the jury concluded that while the defectiveness of the shopping cart partially caused the accident, the primary fault lay with Safeway because of its negligent failure to properly maintain the cart in safe working condition. Under these circumstances, both common sense and equitable considerations suggested that Safeway should bear a proportionately greater share of liability for the accident than Nest-Kart (*21 Cal.3d 322, 330)* .

The Court also was unconcerned with any fundamental doctrinal obstacle to comparing the relative fault of a negligent defendant with that of a defendant whose liability rests on the no-fault concept of strict products liability. The Court considered the difficulties to be more theoretical than practical. Experience in other jurisdictions demonstrated that

juries are fully competent to apply comparative fault principles between negligent and strictly liable defendants (*21 Cal.3d 322, 331)* .

NOTE:

Under pre-*American Motorcycle* law, strict liability was considered as primary or active negligence, precluding a shift of liability onto a negligent cotortfeasor under the all-or-nothing equitable indemnity doctrine [*see Ford Motor Co. v. Robert J. Poeschl, Inc. (1971) 21 Cal. App. 3d 694, 698-699, 98 Cal. Rptr. 702* ; *see also § 115.40[2][b]*]. However, pro rata contribution from a negligent cotortfeasor was available, so that the strictly liable tortfeasor could reduce its liability to half in the case of two tortfeasors, 25 percent in the case of four, etc. [*see, e.g., Kerr Chems., Inc. v. Crown Cork & Seal Co. (1971) 21 Cal. App. 3d 1010, 1014-1017, 99 Cal. Rptr. 162]* . Thus, in *Safeway v. Nest-Kart*, comparative negligence worked to the benefit of the strictly liable Nest-Kart and against the negligent Safeway. However, the interests would have been reversed had the jury's apportionment of percentage fault to Nest-Kart exceeded its pro rata share under contribution, for example, if Nest-Kart had been apportioned 40 percent fault, and there had been three tortfeasors instead of two.

NOTE:

A subsequent court of appeal decision presents a possible deviation from the rule of *Safeway v. Nest-Kart*. Although the matter was not an issue and therefore was not discussed in the case, the procedures employed to reach the issue of comparative indemnity may indicate a different view of the relationship between negligent and strictly liable tortfeasors. In that court of appeal case, farmers sued the manufacturer, wholesaler, and retailer of a chemical that caused crop damage. Theories of liability included strict liability, breach of warranty, negligence, and misrepresentation. The defendants all filed cross complaints against each other for comparative indemnity. The jury returned a defense verdict for the retailer; found the manufacturer and wholesaler liable (the facts do not disclose on what theory or theories); and found the farmers 45 percent comparatively negligent. The jury apparently did not compare the negligence of the manufacturer and wholesaler with that of the plaintiffs. Rather, it next took up their cross complaints and awarded the wholesaler total comparative indemnity against the manufacturer [*Uniroyal Chem. Co., Inc. v. American Vanguard Corp. (1988) 203 Cal. App. 3d 285, 289-290, 249 Cal. Rptr. 787* ; *see § 115.96[3][b]*]. The only reasonable explanation for these results was that the jury was comparing the manufacturer's negligence with the wholesaler's strict liability; otherwise, principles of comparative fault between two negligent tortfeasors would have required some apportionment of fault to the wholesaler.

The procedure used to determine comparative indemnity rights would seem to be improper under *Safeway v. Nest-Kart*. If the wholesaler were liable to the farmers under any theory, including strict liability, the jury should have assigned a percentage of comparative fault to the acts of each. Comparative indemnity rights would have been fixed according to those percentages, and any claim for total indemnity would have been foreclosed. As the case actually proceeded, it suggests that a defendant who is strictly liable to a tort victim solely for having been in the chain of distribution may obtain total indemnity from the manufacturer of the product [*see Uniroyal Chem. Co., Inc. v. American Vanguard Corp. (1988) 203 Cal. App. 3d 285, 293, 249 Cal. Rptr. 787]* .

[b] Comparative Indemnity Available Between Unlicensed Contractor/Developer and Subcontractor

In ***Ranchwood Communities Limited Partnership v. Jim Beat Construction Co.*** *(1996) 49 Cal. App. 4th 1397* , construction defect actions consolidated on appeal, the trial court granted summary judgments in favor of numerous cross-defendant subcontractors and against cross-complainants, the developers/general contractors of two separate condominium projects. The trial court found that since the developers/general contractors did not possess contractors' licenses, their cross-complaints for equitable and implied contractual indemnity against the allegedly negligent

subcontractors who worked on the projects were necessarily barred by *Bus. & Prof. Code § 7031* as "actions for compensation" for services rendered and work performed by those cross-complainant developers/general contractors.

The court of appeal held that the trial court's ruling was erroneous because it disregarded the dual nature of the developers'/general contractors' functions in these cases. They acted, according to the court, not only as general contractors, who had to be licensed in order to pursue an action for compensation for their work, but also acted as developers, who could be held strictly liable in damages to the homeowners/plaintiffs in the actions for defective construction, and who would normally be allowed to seek to spread that loss among all culpable parties. Under these circumstances, the court stated that the developers' implied indemnity claims were not barred by reason of their lack of contractors' licenses (*49 Cal. App. 4th 1397, 1403-1404)* .

[4] Additional Authorities

[a] Comparative Indemnity Available Between Negligent and Strictly Liable Tortfeasors

In *Greystone Homes, Inc. v. Midtec, Inc. (2008) 168 Cal. App. 4th 1194, 86 Cal. Rptr. 3d 196* , a homebuilder that had paid to replace faulty plumbing fittings in a condominium complex, including those that had not yet failed, brought suit for indemnity against the component manufacturer of the fittings and the manufacturer of the plumbing systems that utilized the fittings. The builder settled with the systems manufacturer for an amount that exceeded the cost of replacing the fittings that had already failed. The trial court then granted summary judgment for the component manufacturer after concluding that, given the settlement, the builder's remaining claim was one for economic loss without actual property damage and as such was not compensable in tort. The court of appeals reversed. The court held that the homebuilder could seek equitable indemnity from the component manufacturer under the Right to Repair Act, codified at *Civ. Code § 895 et seq.* The court noted that under that Act, which establishes a set of building standards for new residential construction, homeowners have a cause of action against builders, subcontractors, individual product manufacturers, and others for violation of the standards provided in the Act (*see Civ. Code §§ 896, 936*). On a showing that a defendant has violated a particular standard, a homeowner may recover for economic loss from a builder, including the reasonable value of repairing any violation of the standards provided in the Act, without having to show that the violation caused property damage or personal injury (*see Civ. Code §§ 896, 942*). The court then held that a builder, who is strictly liable under the Act if the standards imposed by the Act are violated, may in turn recover for economic loss from a product manufacturer through an action for equitable indemnity, if the manufacturer's negligence or breach of contract caused a violation of the standards provided by the Act (*168 Cal. App. 4th 1194, 1216-1219)* .

In *Expressions at Rancho Niguel Ass'n v. Ahmanson Devs., Inc. (2001) 86 Cal. App. 4th 1135, 103 Cal. Rptr. 2d 895* , the owner of a residential housing project was a settling defendant in a construction defects action brought by a homeowners association. After most of the subcontractors who were joint tortfeasors settled for their share of liability with the owner and the developer, the owner brought an action for indemnity against the one roofing subcontractor who failed to settle. The trial court agreed with the owner, who was strictly liable to the homeowners, that the subcontractor's negligence liability was joint and several and that the subcontractor was liable for the full amount of the settlement proceeds allocated to roofing damages, offset by payments received from the other roofing subcontractors. The court of appeal reversed. Citing existing case discussions, including *Safeway Stores, Inc. v. Nest-Kart*, the court of appeal concluded that comparative fault principles, rather than principles of joint and several liability, govern a claim for indemnity made by a strictly liable defendant against joint tortfeasors whose liability is based on negligence. The court rejected the claim that as a matter of law, a strictly liable defendant is entitled to recover full indemnity from a joint tortfeasor whose negligence is a proximate cause of the underlying injuries, although the court recognized that under the appropriate facts, full indemnity may result (*86 Cal. App. 4th 1135, 1140-1143)* .

In *Yamaha Motor Corp. v. Paseman (1990) 219 Cal. App. 3d 958, 268 Cal. Rptr. 514* , plaintiff was injured while riding a moped that his parents had bought for him seven years earlier. Plaintiff sued the moped manufacturer (Yamaha) on various theories, including strict product liability, alleging that the moped was a defective product. Yamaha cross

complained for comparative indemnity against the plaintiff's parents, alleging negligent maintenance and failure to repair the moped (*219 Cal. App. 3d 958, 962)* . The court of appeal found no legal impediment to the cross complaint, finding that Yamaha and the parents could be jointly and severally liable to the plaintiff, and following the rule of *Safeway v. Nest-Kart* (*219 Cal. App. 3d 958, 966-971)* .

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1. Partial Indemnity

11-115 California Points & Authorities § 115.66

§ 115.66 Supporting Contention That Indemnitee Is Entitled to Partial Indemnification Under Principles of Comparative Indemnity--Comparative Indemnity Is Available From Nonsettling Concurrent Tortfeasors in Favor of Settling Tortfeasors

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

INDEMNITEE, AFTER ENTERING INTO A GOOD-FAITH SETTLEMENT, IS ENTITLED TO SEEK EQUITABLE INDEMNITY FROM THE REMAINING DEFENDANTS IN ORDER TO APPORTION LIABILITY ACCORDING TO THE COMPARATIVE FAULT OF THE PARTIES.

Right of Settling Tortfeasor to Pursue Claim for Comparative Indemnity. A settling concurrent tortfeasor may pursue a right of equitable indemnity against other concurrent tortfeasors who have not entered into a good-faith settlement (*Bolamperti v. Larco Mfg. (1985) 164 Cal. App. 3d 249, 252, 255, 210 Cal. Rptr. 155* ; *see Far W. Fin. Corp. v. D & S Co. (1988) 46 Cal. 3d 796, 801-802, 251 Cal. Rptr. 202, 760 P.2d 399* ; *American Bankers Ins. Co. v. Avco-Lycoming Div. (1979) 97 Cal. App. 3d 732, 736, 159 Cal. Rptr. 70*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a settling tort defendant's contention that it may seek equitable indemnity from tortfeasors who have not settled with the tort plaintiff.

This form may be combined with points and authorities pertaining to the specific procedural context in which comparative indemnity rights are brought before the court. It may be used in a memorandum in connection with a pretrial motion, such as a demurrer or motion for summary judgment, if comparative indemnity rights may be determined as a matter of law. It may also be used in a trial or an appellate brief. For discussion of the procedures by

which indemnity rights may be litigated, see *§ 115.10*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. It should be established that: (1) the indemnitee was a defendant in the same action or in an underlying tort action; (2) the indemnitee settled with the plaintiff in that action; (3) the settlement was confirmed as in good faith under *Code Civ. Proc. § 877.6*; and *(4)* the indemnitor is a concurrent tortfeasor who is also liable to the tort plaintiff for the injuries on which the indemnitee reached a settlement. It may also be necessary to show that the amount of the settlement exceeded the settling party's fair share of the tort plaintiff's damages [*see Far W. Fin. Corp. v. D & S Co. (1988) 46 Cal. 3d 796, 826-827, 251 Cal. Rptr. 202, 760 P.2d 399* (Kaufman, J., concurring and dissenting); *see also § 115.66[3][a*]].

[b] Settlements and Proposition 51

Comparative indemnity is available only with regard to amounts for which cotortfeasors are jointly and severally liable [*Munoz v. Davis (1983) 141 Cal. App. 3d 420, 425, 190 Cal. Rptr. 400* ; *see § 115.69*]. Under the Fair Responsibility Act of 1986 (Proposition 51) [*Civ. Code §§ 1431.1-1431.5*], the doctrine of joint and several liability does not extend to all damages. In actions based on principles of comparative fault for personal injury, property damages, or wrongful death, the liability of each defendant for noneconomic damages is several only and is not joint, so that each defendant is liable to the plaintiff only for that proportion of the plaintiff's noneconomic damages that is attributable to the defendant under comparative-fault principles [*Civ. Code § 1431.2(a)*]. Joint or concurrent tortfeasors remain jointly liable for a plaintiff's economic damages [*see Civ. Code §§ 1431, 1431.2(b)(1)*; *see also § 115.09*].

Before Proposition 51, if one of multiple defendants settled with the plaintiff before trial, the entire amount of a settlement was credited to reduce the total damages awarded by the trier of fact against nonsettling defendants, and a joint and several judgment for the balance was entered against the nonsettling defendants [*see* Civ. Code § 877(a)]. The settling defendants were then entitled to indemnity from the nonsettling defendants for any amount by which the settlement exceeded the settling defendant's liability as ultimately found by the trier of fact [*see Bolamperti v. Larco Mfg. (1985) 164 Cal. App. 3d 249, 255, 210 Cal. Rptr. 155]* . Thus, a settling defendant could settle for more than what ultimately proved to be its comparative share of liability, and subsequently obtain indemnity from nonsettling defendants (the proposition of this form). A defendant could even settle the plaintiff's entire claim, obtaining a dismissal as to all defendants, and then seek indemnity from the nonsettling defendants to apportion the damages [*see American Bankers Ins. Co. v. Avco-Lycoming Div. (1979) 97 Cal. App. 3d 732, 736, 159 Cal. Rptr. 70]* .

Under Proposition 51, the interaction of the indemnity requirement of joint and several liability and the elimination of joint liability for noneconomic damages forecloses the right of a settling defendant to recover comparative indemnity from other nonsettling tortfeasors for any part of the settlement that is apportioned to noneconomic damages [*Union Pac. Corp. v. Wengert (2000) 79 Cal. App. 4th 1444, 1447-1449, 95 Cal. Rptr. 2d 68]* . To facilitate this restriction, settlements will have to be apportioned between economic and noneconomic damages in some manner [*see Espinoza v. Machonga (1992) 9 Cal. App. 4th 268, 11 Cal. Rptr. 2d 498* (calculating the effect of an unapportioned settlement on a nonsettling defendant's liability for an award of economic and noneconomic damages so as to make an allocation in accord with proportionate fault and avoid a setoff of noneconomic damages)]. For discussion of possible apportionment methods, see Levy, Golden & Sacks, California Torts, Ch. 73 (Matthew Bender). After apportionment, comparative indemnity rights are limited to the amount of the settlement allocated to economic damages that exceeds the comparative share of the settling defendant of the plaintiff's economic damages, as found ultimately by a trier of fact.

Proposition 51 does not provide any guidance regarding its interaction with settlement and indemnity. Numerous complex issues remain to be resolved by the courts or by the legislature. These issues are discussed in Levy, Golden & Sacks, California Torts, Ch. 74 (Matthew Bender). The points and authorities set forth in this form must be considered in light of the changes made by and the uncertainties raised by Proposition 51.

[3] Discussion of Authorities

[a] Right of Settling Tortfeasor to Pursue Claim for Comparative Indemnity

In ***Bolamperti v. Larco Mfg.*** *(1985) 164 Cal. App. 3d 249, 210 Cal. Rptr. 155* , plaintiff sued a hospital, a radiologist, and others for personal injuries suffered when she was struck by an electronically operated door on the premises of the hospital. After service but before pleading, the hospital and the radiologist settled with the plaintiff. The settlements were confirmed as in good faith under *Code Civ. Proc. § 877.6*, and the hospital and radiologist were dismissed from the action. The hospital then filed a motion to intervene back into the same action for the purpose of pursuing a proposed declaratory relief action for equitable indemnity against the other defendants. The trial court denied the motion.

The court of appeal reversed. The court reviewed *Sears, Roebuck & Co. v. International Harvester Co. (1978) 82 Cal. App. 3d 492, 147 Cal. Rptr. 262* , decided before the enactment of *Code Civ. Proc. § 877.6*, which had held that a settling concurrent tortfeasor may pursue a right of equitable partial indemnity against other concurrent tortfeasors. The court's holding in *Sears* was grounded on a hierarchy of interests: (1) the maximization of recovery to the injured party; (2) the encouragement of settlement; and (3) the equitable apportionment of liability among the tortfeasors. Permitting post-settlement claims for indemnity is in harmony with all three policies. It in no way impinges on the maximization of recovery to the injured person; it encourages settlement in that if indemnity were barred, a defendant would be inhibited in settling because it would defeat recourse to other solvent concurrent tortfeasors in order to share the loss; and it effects the policy of equitable apportionment of the loss among all parties responsible for it. The court held that these policies were in no way changed by the enactment of *Code Civ. Proc. § 877.6*, and that the holding of *Sears* was as valid after enactment of the statute as it was before (*164 Cal. App. 3d 249, 252-255)* .

The facts and principal holding of ***Far W. Fin. Corp. v. D & S Co.*** *(1988) 46 Cal. 3d 796, 251 Cal. Rptr. 202, 760 P.2d 399* , are discussed in *§ 115.151[3][a]*. Far West entered into a settlement agreement with the plaintiff, the settlement was confirmed as in good faith, and Far West was dismissed from the action as a defendant. Far West then continued to pursue its own cross complaint in the same action against other defendants, seeking equitable indemnity for the amount that had been paid to the plaintiff.

Although it was not an issue in the case, the majority opinion stated, "It is clear under existing precedent that Far West had the right to continue to seek indemnification in this manner ... and no party challenges Far West's indemnity claim in this respect" (*46 Cal. 3d 796, 801-802)* .

In his concurring and dissenting opinion, Justice Kaufman responded to this dictum. He wrote, "Were the issue presented, I would be inclined to hold that a settling defendant's right to pursue a claim for comparative indemnity is not absolute but depends on whether the settlement amount substantially exceeds the settlor's fair share of the plaintiff's damages. ... A tortfeasor who has settled for an amount within the reasonable range of his liability has no claim in equity to partial reimbursement from other defendants in the event plaintiff's damages or the settlor's percentage of fault is determined at trial to be less than anticipated" (*46 Cal. 3d 796, 826-827)* .

NOTE:

The position of Justice Kaufman is probably best viewed as standing for the proposition that the right to pursue equitable indemnity after settlement is not necessarily a right to prevail on the claim. A settling tortfeasor may seek equitable indemnity, but should be allowed to collect it only if the tortfeasor has settled the entire claim or paid substantially in excess of its fair share under principles of comparative fault.

In ***American Bankers Ins. Co. v. Avco-Lycoming Div.*** *(1979) 97 Cal. App. 3d 732, 159 Cal. Rptr. 70* , one defendant's insurer, American Bankers, settled the plaintiff's claim for the full amount and obtained the plaintiff's dismissal of the

action with prejudice in regard to all defendants. American Bankers then filed a separate action for equitable indemnity against, among others, Avco, who had been dismissed from the prior action [*see E.L. White, Inc. v. City of Huntington Beach (1978) 21 Cal. 3d 497, 506, 146 Cal. Rptr. 614, 579 P.2d 505* (independent action for equitable indemnity may be filed against alleged concurrent tortfeasor after judgment in underlying tort case)]. Avco's demurrer was sustained without leave to amend by the trial court.

The court of appeal reversed. The court found that the policy considerations enumerated in *Sears, Roebuck & Co. v. International Harvester Co. (1978) 82 Cal. App. 3d 492, 147 Cal. Rptr. 262* , maximization of recovery to the injured party, settlement, and equitable apportionment of liability, supported the right of a settling tortfeasor to seek indemnity in an independent action. No element of collateral estoppel or res judicata was present because Avco was entitled to a trial on the merits regarding its liability to the original plaintiff. A dismissal with prejudice in one action does not require the termination of all litigation involving the same facts. It bars the dismissing plaintiff from further proceedings against the dismissed defendants, but has no effect on the rights of the defendants with regard to each other. In addition, the nonsettling defendants had the added benefit that the negotiated settlement imposed a lid on damages, which, in all likelihood, would be a sum less than what might be awarded by a jury at trial of the injured party's action (*97 Cal. App. 3d 732, 736-737)* .

NOTE:

A settling defendant may bring an independent action for indemnity against other alleged concurrent tortfeasors even if it does not settle the plaintiff's entire claim. However, a defendant in the indemnity action may defeat the claim for indemnity by settling in good faith with the tort plaintiff before verdict or judgment [*see Code Civ. Proc. § 877(b)*]. The settlement may be confirmed as in good faith in the original tort action unless that action has been dismissed, in which case it may be confirmed in the indemnity action [*Regal Recovery Agency, Inc. v. Superior Court (1989) 207 Cal. App. 3d 693, 694-695, 255 Cal. Rptr. 34]* .

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§ 115.67 Supporting Contention That Indemnitee Is Entitled to Partial Indemnification Under Principles of Comparative Indemnity--Comparative Indemnity Is Available From Tortfeasor Not Sued by Tort Victim in Favor of Defendant Tortfeasor

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

A TORT DEFENDANT RETAINS THE RIGHT TO SEEK COMPARATIVE INDEMNITY FROM ANOTHER TORTFEASOR WHO WAS NOT SUED BY THE TORT VICTIM, EVEN IF THE TORT VICTIM'S ACTION AGAINST THAT TORTFEASOR IS BARRED BY THE STATUTE OF LIMITATIONS.

[*EITHER*]

A. Cross Complaint for Indemnity Against Tortfeasor Not Sued By Tort Victim. A tort defendant is generally authorized to file a cross complaint against a concurrent tortfeasor for comparative indemnity, even if the concurrent tortfeasor has not been named a defendant in the original complaint (*American Motorcycle Assn. v. Superior Court of Los Angeles County (1978) 20 Cal. 3d 578, 607, 146 Cal. Rptr. 182, 578 P.2d 899*).

[*OR*]

A. Separate Action for Comparative Indemnity Against Tortfeasor Not Sued by Tort Victim. A tort defendant may bring a separate suit for comparative indemnity after settlement or satisfaction of judgment against an alleged concurrent tortfeasor who was not named by the tort victim in the original action (*Teachers Ins. Co. v. Smith (1982) 128 Cal. App. 3d 862, 865-866, 180 Cal. Rptr. 701*).

[*CONTINUE*]

B. Comparative Indemnity Available Despite Statute of Limitations Bar to Tort Victim's Action. A defendant in a tort action may seek comparative indemnity from another concurrent tortfeasor not originally named as a defendant by the tort victim despite the fact that the victim's claim against the tortfeasor is barred by the statute of limitations (*People ex rel. Dep't of Transp. v. Superior Court (1980) 26 Cal. 3d 744, 752, 163 Cal. Rptr. 585, 608 P.2d 673* ; *see Valley Circle Estates v. VTN Consol., Inc. (1983) 33 Cal. 3d 604, 611, 189 Cal. Rptr. 871, 659 P.2d 1160*).

[2] Comments

[a] Use of Form

This form may be submitted in support of an indemnitee's contention that it may seek comparative indemnity from a tortfeasor who was not sued by the tort victim. The first alternative of Paragraph A is for use if the indemnitee is proceeding by cross complaint. The second alternative is for use if the indemnitee is proceeding by a separate suit. Paragraph B asserts the availability of such a right even if the applicable statute of limitations now bars the victim from proceeding directly against the indemnitor.

This form may be combined with points and authorities pertaining to the specific procedural context in which comparative indemnity rights are brought before the court. It may be used in a memorandum in connection with a pretrial motion, such as a demurrer or motion for summary judgment, if comparative indemnity rights may be determined as a matter of law. It may also be used in a trial or an appellate brief. For discussion of the procedures by which indemnity rights may be litigated, see *§ 115.10*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. It should be established that: (1) the indemnitee is or may be liable for damages to a tort victim as a result of its tortious conduct; (2) the indemnitor is also a tortfeasor with regard to the tort victim for the same damages; and (3) the tort victim did not proceed against the indemnitor with regard to the damages in question. The facts that establish the running of the statute of limitations with regard to the victim and the timeliness of the indemnity action should then be established. The general rule is that a cause of action for comparative indemnity does not accrue until the indemnitee has actually incurred the loss through payment [*E.L. White, Inc. v. City of Huntington Beach (1978) 21 Cal. 3d 497, 506, 146 Cal. Rptr. 614, 579 P.2d 505]* .

[3] Discussion of Authorities

[a] Cross Complaint for Indemnity Against Tortfeasor Not Sued By Tort Victim

The facts and procedural background of *American Motorcycle Assn. v. Superior Court of Los Angeles County (1978) 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899* , are discussed in *§ 115.60[3][a]*. The Supreme Court ordered issuance of a peremptory writ of mandate directing the trial court to permit defendant to file a cross complaint for comparative equitable indemnity against plaintiff's parents, who were not defendants in the action. The Court noted that as early as its opinion in *Roylance v. Doelger (1962) 57 Cal. 2d 255, 19 Cal. Rptr. 7, 368 P.2d 535* , a defendant could file a cross complaint for declaratory relief against a previously unnamed party on allegations that the defendant would be entitled to indemnity from the party if the plaintiff prevails on the underlying complaint. The Court found the *Roylance* rule to have been codified in the 1972 revision of the cross-complaint statutes [*see Code Civ. Proc. §§ 428.10(b), 428.20, 428.70*; *see also Code Civ. Proc. § 1060* (declaratory relief to ascertain status)]. The Court stated that a plaintiff's legitimate concerns about control of litigation may be partially obviated by providing for separate trial of a cause of action for comparative indemnity asserted in a cross complaint [*see Code Civ. Proc. § 1048(b)* (discretionary severance)] (*20 Cal. 3d 578, 604-607)* .

[b] Separate Action for Comparative Indemnity Against Tortfeasor Not Sued by Tort Victim

In ***Teachers Ins. Co. v. Smith*** *(1982) 128 Cal. App. 3d 862, 180 Cal. Rptr. 701* , an insurance company negotiated a settlement on behalf of its insureds with the parents of a child injured by the insureds and then brought an independent action for partial indemnity against the parents, alleging comparative fault based on negligent supervision. The trial court sustained defendants' demurrer on the ground that the insurance company was a volunteer and had unilaterally entered into the settlement [*see § 115.163*].

The court of appeal reversed. The court noted that it is established California law that a suit for partial indemnity may be brought against a concurrent tortfeasor not named by the tort plaintiff in the original complaint; that a claim for partial indemnity is independent and can be brought in a separate suit after settlement or after satisfaction of judgment in the underlying suit. There need not be a judgment against a settling tortfeasor seeking indemnity (*128 Cal. App. 3d 862, 865)* . Although as a general rule it may be simpler and more expeditious for a settling tortfeasor to file a presettlement cross complaint in the principal action, if it fails to do so it should not forfeit its right to pursue partial indemnity based on comparative fault in an independent action (*128 Cal. App. 3d 862, 866)* .

[c] Comparative Indemnity Available Despite Statute of Limitations Bar to Tort Victim's Action

In ***People ex rel. Dep't of Transp. v. Superior Court*** *(1980) 26 Cal. 3d 744, 163 Cal. Rptr. 585, 608 P.2d 673* , plaintiff, injured in an automobile accident on a public highway, filed an action against several individuals but did not file a timely claim against the State of California under the California Tort Claims Act and did not name the state as a defendant. Two of the defendants filed a cross complaint against the state, alleging that the state's negligence in blocking several lanes of the highway was a proximate cause of plaintiff's injuries, and seeking partial equitable indemnity from the state. Although the cross complaint was filed more than four years after the accident, the state's demurrer to the cross complaint was based only on the failure of the plaintiff to file a claim against the state within 100 days of the accident as required by *Gov. Code §§ 901, 911.2*. The trial court overruled the state's demurrer, and the state sought a writ of prohibition or mandate.

The Supreme Court denied the writ. The Court held that a tort defendant's claim for equitable indemnity is separate and distinct from the injured party's claim, is not lost because the injured party's claim is barred by the applicable statute of limitations, and does not come into existence until the indemnitee has suffered actual loss through payment of a settlement or judgment (*26 Cal. 3d 744, 750-752)* .

NOTE:

The general rule that a cause of action for indemnity does not accrue until payment has been made, as stated in the above case, remains true. However, with respect to public entities, *Gov. Code § 901* was amended in 1981 to provide that the date on which a cause of action for equitable indemnity or partial equitable indemnity accrues is the date on which a defendant is served with the complaint giving rise to the defendant's claim for equitable indemnity or partial equitable indemnity against the public entity.

Valley Circle Estates v. VTN Consol., Inc. *(1983) 33 Cal. 3d 604, 189 Cal. Rptr. 871, 659 P.2d 1160* , was an action by homebuyers against a general contractor and a subcontractor for negligent construction. The general contractor filed a cross complaint for declaratory relief concerning its right to implied equitable indemnity against the subcontractor. The action against the general contractor was timely in that it was filed within ten years from the date of substantial completion, but it was untimely as against the subcontractor because the subcontractor's performance was substantially completed 12 years before the complaint was filed [*see Code Civ. Proc. § 337.15(a)*]. The subcontractor moved for summary judgment on both the complaint and cross complaint on the ground the action and cross action were barred by the provisions of *Code Civ. Proc. § 337.15(a)*. The motions were granted and the subcontractor was dismissed from both the complaint and cross complaint. The general contractor appealed.

The Supreme Court reversed and held that the cross complaint was timely under *Code Civ. Proc. § 337.15(c)*. This statute provides that a cross complaint for indemnity may be filed pursuant to *Code Civ. Proc. § 428.10(b)* in an action that has been brought within the time period set forth in *Code Civ. Proc. § 337.15(a)*, that is, 10 years. The Court interpreted this language to mean that a cross complaint for indemnity may be filed more than 10 years after the alleged indemnitor has substantially completed its services, provided the underlying action giving rise to the claim for indemnity was itself brought within the 10-year limitation period of the statute (*33 Cal. 3d 604, 609)* . The court held that permitting the cross complaint for indemnity under the statute was consistent with the common-law rule that a cause of action for indemnity does not accrue until the indemnitee has suffered a loss through payment of an adverse judgment or settlement (*33 Cal. 3d 604, 611)* .

NOTE:

In a subsequent case, the court of appeal refused to extend the rule of *Valley Circles Estates* to a cross complaint against a cross defendant who had no connection or relationship to the acts of the defendant cross complainant that were the subject of the original complaint. In the original action, various condominium owners timely sued a developer who had converted an apartment building into condominiums, alleging negligence at the time of the conversion. The developer then filed a cross complaint for indemnity against the original architect of the building, whose alleged negligent acts had been performed more than 10 years before the original complaint was filed, and thus were barred by the limitation period of *Code Civ. Proc. § 337.15*. The court held that the cross complaint was likewise barred. The exception in *Code Civ. Proc. § 337.15(c)* was held to be limited to acts arising from the same transaction or occurrence under *Code Civ. Proc. § 428.10(b)*. The court considered the original design and the conversion to be separate transactions or occurrences. Because the original plaintiffs were barred by limitation from suing the developer for acts arising from the original design, the developer could not cross complain against the architect for these acts [*Sandy v. Superior Court (1988) 201 Cal. App. 3d 1277, 1282-1284, 247 Cal. Rptr. 677]* .

[4] Additional Authorities

[a] Comparative Indemnity Available Despite Statute of Limitations Bar to Tort Victim's Action

In *Crouse v. Brobeck, Phleger, & Harrison (1998) 67 Cal. App. 4th 1509, 80 Cal. Rptr. 2d 94* , plaintiff brought a malpractice action against her attorney, the attorney's former law firm, and the attorney's current firm, alleging a single injury caused by the negligence of the defendant attorney and his former law firm in misplacing and not safeguarding a promissory note, as well as by the attorney and his current law firm in not acting appropriately when informed of the missing note. Defendant attorney and his current firm cross-complained for equitable indemnity against the attorney's former law firm. Former law firm successfully moved for summary judgment against plaintiff on the grounds that, as to it, the one-year statute of limitations had expired prior to suit being filed. Attorney's former law firm also obtained summary adjudication and judgment on the cross-claims for equitable indemnity when the trial court concluded in part that *Code Civ. Proc. § 340.6*, the statute of limitations in attorney malpractice actions, barred all suits for indemnity. The court of appeal affirmed that plaintiff's claim against the attorney's former law firm was barred by the one-year statute of limitations. However, the court reversed the trial court's ruling that all claims for equitable indemnity were also time-barred. Instead the court noted that the established rule was that a tort defendant's equitable indemnity action is separate and distinct from the tort plaintiff's action against the defendant and the indemnity action is governed by its own limitations period, even though the tort plaintiff's direct action against the indemnitor may be barred by its own statute of limitations. Moreover, the court noted that an indemnity action does not accrue for purposes of the statute of limitations until the defendant pays a judgment or settlement for which the defendant is entitled to indemnity. Thus, in the absence of language in the statute suggesting it was intended to apply to indemnity actions, *Code Civ. Proc. § 340.6* did not apply to claims for equitable indemnity brought by one liable attorney against other potentially liable attorneys (*67 Cal. App. 4th 1509, 1542-1544)* .

In *West v. Superior Court (1994) 27 Cal. App. 4th 1625, 34 Cal. Rptr. 2d 409* , buyers of real property sued the sellers and the broker. The sellers cross complained against the broker for implied contractual indemnity based on the broker's negligent performance of the seller-broker contract. The buyers' action against the broker was barred by the limitation period of *Civ. Code § 2079.4* (two years from date of possession of real property for action against broker based on duty to buyer). Nevertheless, the court allowed the seller's indemnity action against the broker to proceed. The court held that *Civ. Code § 2079.4* did not apply to an action for implied contractual indemnity by the sellers against the broker (*27 Cal. App. 4th 1625, 1632-1635)* .

In *Time for Living, Inc. v. Guy Hatfield Homes/All Am. Dev. Co. (1991) 230 Cal. App. 3d 30, 280 Cal. Rptr. 904* , homeowners sued their developer for latent construction defects within the 10-year period of *Code Civ. Proc. § 337.15(a)*. The developer cross complained against a prior owner of the land who had graded the property for improvement and then sold it more than 10 years earlier, arguing that the indemnity action was timely under *Code Civ. Proc. § 337.15(c)*. In reversing summary judgment for the grader, the court stated that a cross complaint for indemnity is, almost by definition, transactionally related to the claims asserted by the plaintiff, because the claim depends on the allegation that the same harm for which the plaintiff seeks to hold the defendant liable is attributable, in part, to the acts of the cross defendant. An indemnity action seeks to apportion among the parties the precise liability claimed by the plaintiff in the main action; therefore, it necessarily arises out of the same occurrence or series of occurrences as asserted by the plaintiff (*230 Cal. App. 3d 30, 39)* . The only possible limitation is that under *Sandy v. Superior Court (1988) 201 Cal. App. 3d 1277, 247 Cal. Rptr. 677* [*see § 115.67[3][c]*], the respective work of the cross complainant and cross defendant on the same land must be on the same development or improvement of that land. Whether the development or improvement is the same is essentially a question of fact (*230 Cal. App. 3d 30, 42)* .

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CHAPTER 115 INDEMNITY AND CONTRIBUTION
PART II. FORMS
B. Comparative Indemnity
1. Partial Indemnity

11-115 California Points & Authorities § 115.68

§ 115.68 Supporting Contention That Indemnitee Is Entitled to Partial Indemnification Under Principles of Comparative Indemnity--Collateral Estoppel Principles Do Not Preclude Comparative Indemnity Despite Finding in Pretrial Proceeding That Indemnitor Was Not Liable to Plaintiff

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

INDEMNITEE IS NOT PRECLUDED FROM SEEKING COMPARATIVE INDEMNITY FROM INDEMNITOR BY _____ [*kind of motion, e.g.,* A MOTION FOR SUMMARY JUDGMENT] IN _____ [THIS *or* ANOTHER] ACTION PURSUANT TO WHICH IT WAS DETERMINED THAT INDEMNITOR HAD NO LIABILITY TO THE TORT VICTIM BECAUSE _____ [*specify missing element of collateral estoppel, e.g.,* INDEMNITEE WAS NEITHER A PARTY TO, NOR IN PRIVITY WITH, A PARTY TO THAT PROCEEDING].

[*EITHER*]

Different Theory of Liability. In an action for comparative indemnity, the indemnitee is not collaterally estopped from asserting the indemnitor's liability to the tort victim by a prior adjudication of the indemnitor's nonliability unless the identical issue is presented in the two proceedings (*Frank v. State of California (1988) 205 Cal. App. 3d 488, 494-495, 252 Cal. Rptr. 410*).

[*OR*]

Lack of Privity. An indemnitee is not collaterally estopped in an action for comparative indemnity from asserting the indemnitor's liability to the tort victim by a prior adjudication of nonliability unless the indemnitee was a party or in

privity with a party to the prior adjudication (*see White Motor Corp. v. Teresinski (1989) 214 Cal. App. 3d 754, 763, 263 Cal. Rptr. 26*).

[2] Comments

[a] Use of Form

This form may be submitted in support of an indemnitee's contention that it is not collaterally estopped from seeking comparative indemnity by a final judgment under which the indemnitor was adjudged to have no liability to the tort victim. In an appropriate case, the points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 115.75*.

The alternative points and authorities assert the absence of different elements required to invoke collateral estoppel. The first alternative alleges a difference between the issue decided in the prior matter and the issue to be decided in the indemnity action. The second alternative alleges a lack of privity between the party alleged to be collaterally estopped and the parties to the prior matter.

This form may be combined with points and authorities pertaining to the specific procedural context in which the doctrine of collateral estoppel is sought to be invoked. It may be used in a memorandum in opposition to a pretrial motion, such as a demurrer or motion for summary judgment, that seeks to establish a bar of collateral estoppel as a matter of law. It may also be used in an appellate brief. For discussion of the procedures by which indemnity rights may be litigated, see *§ 115.10*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. The particular facts that establish the nonapplicability of collateral estoppel should be developed. For example, if a lack of privity is alleged, the status of the indemnitee with regard to the prior proceeding should be developed. If a lack of identity of issues is alleged, the exact issues determined in the prior proceeding should be set forth and distinguished from the issues to be determined in the indemnity action.

[3] Discussion of Authorities

[a] Different Theory of Liability

In ***Frank v. State of California*** *(1988) 205 Cal. App. 3d 488, 252 Cal. Rptr. 410* , Mitchell sued Frank and the Department of Motor Vehicles (DMV), as a department of the State of California, for injuries suffered in a motor vehicle accident. Mitchell's theory of liability as alleged in his complaint against the DMV was based on negligence in issuing a driver's license to a person (Frank) who, because of age and diminished physical and mental abilities, was incapable of safely operating a motor vehicle. Frank cross complained against the state for comparative indemnity.

The state's demurrer to Mitchell's complaint was granted with leave to amend. Mitchell failed to amend, and judgment was entered for the state. The state then demurred to the cross complaint, alleging that Frank was collaterally estopped from seeking indemnity from a party who had been determined to have no liability to the plaintiff. Frank filed an amended cross complaint against the state, among others, alleging a dangerous condition by failure to control the intersection where the accident occurred. The trial court granted the state's demurrer on the ground that it was barred by the doctrine of res judicata.

The court of appeal reversed. The court held that equitable indemnity against the state was not barred by res judicata or collateral estoppel by the judgment in favor of the state on the complaint. *Unlike Columbus Line, Inc. v. Gray Line Sight-Seeing Cos. Associated, Inc. (1981) 120 Cal. App. 3d 622, 174 Cal. Rptr. 527* [*see § 115.75*], there was no adjudication that the state was not responsible in any manner for Mitchell's injuries. The only issue that was resolved was Mitchell's allegation of the DMV's negligence in the issuance of the driver's license to Frank. The dismissal was not

tantamount to an adjudication of the issue of whether the state was responsible for Mitchell's injuries due to a dangerous condition in a traffic intersection, which was the basis of the cross complaint for indemnity. The first requirement for res judicata or collateral estoppel, a prior adjudication of an issue identical with the one presented in the action in question, was not satisfied. The court said that a contrary result would be inequitable in that Frank's rights against the state would be entirely dependent on Mitchell's litigation strategy, and would be cut off simply because Mitchell chose not to pursue various legal theories of liability (*205 Cal. App. 3d 488, 494-495)* .

[b] Lack of Privity

White Motor Corp. v. Teresinski *(1989) 214 Cal. App. 3d 754, 263 Cal. Rptr. 26* , involved an attempted "offensive" use of collateral estoppel by an indemnitee, rather than a "defensive" use by an indemnitor. White and Vic's Auto Sales (Vic's) were among the defendants sued in a personal injury action. White cross complained for indemnity against several defendants, not including Vic's. Vic's also cross complained for indemnity against other defendants, including White.

White successfully moved for summary judgment against plaintiffs on the complaint, and a judgment was entered dismissing White from the plaintiffs' action. Plaintiffs appealed, but abandoned the appeal in consideration of a $50,000 payment from White. Eight months after summary judgment was entered, White added Vic's as a cross defendant on its cross complaint for indemnity.

Plaintiffs proceeded to trial against Vic's only, and the jury found Vic's share of comparative fault to be 60 percent. White then moved for summary judgment on its cross complaint for indemnity against Vic's. The trial court found that because White was determined to have no liability and Vic's was determined to be 60 percent responsible, White was entitled to total indemnity from Vic's as a matter of law.

The court of appeal reversed, finding that because the element of privity was lacking, collateral estoppel principles did not preclude Vic's from litigating White's and Vic's comparative liability to the plaintiffs. The court noted that notice of White's motion for summary judgment against plaintiffs was given to Vic's. However, at the time of the motion, Vic's was not named as a cross defendant in White's cross complaint for equitable indemnity. Under these circumstances, Vic's would have no reason to anticipate that a successful summary judgment motion by White against plaintiffs would someday be used as a basis for White's obtaining indemnity from Vic's. To the contrary, if White were successful in its summary judgment motion, the logical assumption would be that White would not pay any funds to plaintiffs and there would be nothing to indemnify. Because there was no privity, Vic's could not be collaterally estopped by the determination that White was not liable to the plaintiffs (*214 Cal. App. 3d 754, 763)* .

The court recognized the validity of White's interests in settling in exchange for an abandonment of the appeal and refused to deny indemnity on the basis that the payment was "voluntary" [*see § 115.164*]. However, it found it highly illogical and manifestly inequitable to permit White to take the inconsistent positions that, on one hand, it faced potential liability should its summary judgment have been reversed (and therefore, was not a volunteer), but, on the other hand, that the same summary judgment was a final determination that it was not at fault (and therefore, entitled to full equitable indemnity as a matter of law). To affirm such a judgment would increase the potential for collusion and other abuses of the system (*214 Cal. App. 3d 754, 763-764)* .

NOTE:

At the time of White's summary judgment motion against plaintiffs, Vic's had a cross complaint for indemnity from White pending, although the court labelled it as "dormant" [*White Motor Corp. v. Teresinski (1989) 214 Cal. App. 3d 754, 763, n.12, 263 Cal. Rptr. 26]* . Thus, had Vic's subsequently sought comparative indemnity from White, it would have been in exactly the same position as the indemnitees in *Columbus Lines v. Gray Lines* and would have been collaterally estopped from relitigating White's liability to the plaintiffs in the indemnity action. The distinction between the two

cases lies in the difference between offensive and defensive use of collateral estoppel. In *Columbus Lines v. Gray Lines*, Gray Lines used collateral estoppel defensively, that is, having established its nonliability to the plaintiffs, it sought to also escape liability for indemnity. In *White Motor Corp.*, White sought to use collateral estoppel offensively--that is, armed with a judgment of nonliability, it nevertheless paid plaintiffs $50,000 and sought to recover the payment from Vic's.

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11-115 California Points & Authorities § 115.69

§ 115.69 Opposing Contention That Indemnitee Is Entitled to Partial Indemnification Under Principles of Comparative Indemnity--No Right of Comparative Indemnity Exists If Parties Are Not Jointly and Severally Liable for Loss Incurred

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

INDEMNITEE'S CLAIM FOR COMPARATIVE INDEMNITY SHOULD BE DENIED BECAUSE INDEMNITOR AND INDEMNITEE ARE NOT JOINTLY AND SEVERALLY LIABLE FOR THE LOSS FOR WHICH INDEMNITY IS SOUGHT.

A. Joint and Several Liability Required. Unless the prospective indemnitor and indemnitee are jointly and severally liable to the plaintiff, there is no basis for equitable indemnity (*Munoz v. Davis (1983) 141 Cal. App. 3d 420, 425, 190 Cal. Rptr. 400*).

[*Optional*] **B. No Right of Indemnity If Indemnitor Is Not Liable to Tort Victim.** Parties are not jointly and severally liable, and thus there is no right of comparative indemnity between them, if the indemnitor is determined to have no liability to the tort victim (*Allis-Chalmers Corp. v. Superior Court (1985) 168 Cal. App. 3d 1155, 1157-1159, 214 Cal. Rptr. 615*).

[*Optional*] **C. Lack of Duty to Tort Victim.** A party who owes no duty of care to the tort plaintiff has no liability to that plaintiff, and therefore, cannot be liable to a tortfeasor for equitable indemnity (*Seamen's Bank v. Superior Court (1987) 190 Cal. App. 3d 1485, 1491-1492, 236 Cal. Rptr. 31* ; *Munoz v. Davis (1983) 141 Cal. App. 3d 420, 425-427, 190 Cal. Rptr. 400*).

[*Optional*] **D. No Right of Indemnity If Indemnitee Is Not Liable to Tort Victim.** Parties are not jointly and severally liable, and thus there is no right of comparative indemnity between them, with regard to amounts paid to the

tort victim by the indemnitee for which the indemnitee has no liability (*Woodward-Gizienski & Assocs. v. Geotechnical Exploration, Inc. (1989) 208 Cal. App. 3d 64, 68, 255 Cal. Rptr. 800*).

[*Optional*] **E. No Right of Indemnity From Tort Victim.** There is no equitable basis for a tortfeasor's claim for indemnity from the victim of his or her tortious conduct (*Seamen's Bank v. Superior Court (1987) 190 Cal. App. 3d 1485, 1492-1493, 236 Cal. Rptr. 31*).

[*Optional*] **F. Equitable Indemnity Not Available to Malpractice Tortfeasor.** Equitable indemnity is not available to shift a subsequent medical provider's liability to the initial medical provider (*Children's Hosp. v. Sedgwick (1996) 45 Cal. App. 4th 1780, 1789* , *53 Cal. Rptr. 2d 725*).

[*Optional*] **G. Contractual Duties Owed by Indemnitor to Tort Victim Not Basis for Comparative Indemnity to Tortfeasor.** If the only duties allegedly violated by the indemnitor are contractual duties owed to the tort victim, the indemnitor had no contractual relationship with the tortfeasor, and there is no other basis for the indemnitor to be liable in tort, the indemnitor cannot be liable for comparative indemnity to the tortfeasor (*BFGC Architects Planners, Inc. v. Forcum/Mackey Constr., Inc. (2004) 119 Cal. App. 4th 848, 852-853, 14 Cal. Rptr. 3d 721*).

[2] Comments

[a] Use of Form

This form may be submitted in support of an indemnitor's contention that comparative equitable indemnity is not available because the indemnitor and indemnitee are not jointly and severally liable to the injured party. Paragraph A should be used to establish the basic principle that there is no indemnity without joint and several liability. Optional paragraphs B through G set forth various situations under which a lack of joint and several liability may be found so as to defeat comparative indemnity rights.

This form may be combined with points and authorities pertaining to the specific procedural context in which comparative indemnity rights are brought before the court. It may be used in a memorandum in connection with a pretrial motion, such as a demurrer or motion for summary judgment, if indemnity rights may be determined as a matter of law. It may also be used in a trial or an appellate brief. For discussion of the procedures by which comparative indemnity rights may be litigated, see the § 115.10.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. The particular facts that establish a lack of joint and several liability under one of the optional paragraphs of this form should be set forth. For example, if the indemnitor's position is that it has no liability to the injured person because of a lack of duty to the tort victim (optional Paragraph C), the alleged acts of the indemnitor toward the victim should be set forth and the legal principles that establish a lack of duty should be developed.

[3] Discussion of Authorities

[a] Joint and Several Liability Required

In ***Munoz v. Davis*** *(1983) 141 Cal. App. 3d 420, 190 Cal. Rptr. 400* , one Rodriguez and Davis were involved in an automobile accident. Rodriguez retained attorney Munoz to bring an action against Davis. Munoz failed to bring the action within the time required by the applicable statute of limitation, and Rodriguez sued Munoz for legal malpractice. Munoz cross complained against Davis for equitable indemnification. The trial court sustained Davis' demurrer to the cross complaint.

The court of appeal affirmed. It stated that there can be no indemnity without liability. In other words, unless the prospective indemnitor and indemnitee are jointly and severally liable to the plaintiff, there is no basis for indemnity (

141 Cal. App. 3d 420, 425) . The court held that Davis and Munoz were not jointly and severally liable because Davis had no duty to Munoz [*see § 115.69[3][c]*].

NOTE:

Under the Fair Responsibility Act of 1986 (Proposition 51), the liability of each defendant for noneconomic damages is several only and not joint [*Civ. Code § 1431.2*; *see § 115.09*]. Therefore, if Proposition 51 applies, there is no longer any right of comparative indemnity with regard to noneconomic damages [*Union Pac. Corp. v. Wengert (2000) 79 Cal. App. 4th 1444, 1447-1449, 95 Cal. Rptr. 2d 68]* . For discussion of the interrelation among settlement, indemnity, and Proposition 51, see *115.66[2][b]* and *§ 115.150[2][c]*.

It is not clear whether or not joint and several liability to the tort victim is required if the right to indemnity is to be implied from contractual duties between the indemnitor and the indemnitee [*see Bear Creek Planning Com. v. Title Ins. & Trust Co. (1985) 164 Cal. App. 3d 1227, 1238-1241* , *disapproved on other grounds, Bay Dev. Ltd. v. Superior Court (1990) 50 Cal. 3d 1012, 1032 n.12, 269 Cal. Rptr. 720, 791 P.2d 290* ; *see generally § 115.91*].

[b] No Right of Indemnity If Indemnitor Is Not Liable to Tort Victim

In ***Allis-Chalmers Corp. v. Superior Court*** *(1985) 168 Cal. App. 3d 1155, 214 Cal. Rptr. 615* , the indemnitor obtained summary judgment against the plaintiff with regard to the underlying claim and then brought a motion for summary judgment on the indemnitee's cross complaint for indemnity. The trial court denied the motion, but the court of appeal reversed. It held that because there can be no right of indemnity without joint and several liability, once the nonliability of the indemnitor to the plaintiff was established, any claim for comparative indemnity was destroyed (*168 Cal. App. 3d 1155, 1159)* . For consideration of this same result as an application of the doctrine of collateral estoppel, see *§ 115.75*.

NOTE:

An indemnitor may be granted summary judgment as to the plaintiff and still be potentially liable for comparative indemnity if the indemnitee asserts a theory of liability different from that propounded by the plaintiff and adjudicated with regard to the motion leading to dismissal [*Frank v. State of California (1988) 205 Cal. App. 3d 488, 491-495, 252 Cal. Rptr. 410* ; *see also § 115.68*] .

[c] Lack of Duty to Tort Victim

Seamen's Bank v. Superior Court *(1987) 190 Cal. App. 3d 1485, 236 Cal. Rptr. 31* was essentially an indemnity action within an indemnity action. A bank (Bank of America) brought an indemnity action against three of its employees [*see § 115.93*] to recover amounts that it was required to pay to certain investors (Seamen's) because of the employees' alleged failure to use due care in performing their duties as bank officers in the operation of the real estate loan pool. The defendant bank officers cross complained against Seamen's for equitable indemnity. The officers' equitable indemnity claim was based on allegations that the investors failed to act as reasonably prudent investors with regard to the underlying transaction. Seamen's demurrer to the cross complaint was overruled by the trial court.

The court of appeal issued an alternative writ of mandate to review the trial court's order, and later discharged the alternative writ and issued a peremptory writ of mandate directing the trial court to sustain the demurrers. The court noted that there can be no indemnity without liability, and that equitable indemnity required joint and several liability. On the facts before it, the officers and Seamen's would have to be jointly and severally liable to Bank of America in order to support the officers' claim to equitable indemnity from Seamen's. Because an investor owes no duty of care to an escrow agent or trustee to investigate a deal before or after investing, Seamen's could not be liable to Bank of America; Seamen's and the officers could not be jointly and severally liable to Bank of America; and there could be no basis for equitable indemnity between the officers and Seamen's (*190 Cal. App. 3d 1485, 1491-1492)* .

The facts of ***Munoz v. Davis*** *(1983) 141 Cal. App. 3d 420, 190 Cal. Rptr. 400* , are discussed in *§ 115.69[3][a]*. The court held that the original tortfeasor (Davis) and the subsequent tortfeasor attorney (Munoz) could not be jointly and severally liable to the injured party (Rodriguez) because Davis owed no duty to Rodriguez to ensure that his legal claims were being competently prosecuted. The court distinguished *Ash v. Mortensen (1944) 24 Cal. 2d 654, 657, 150 P.2d 876* , in which it was held that an original tortfeasor is also liable for the aggravation of the original injury caused by subsequent medical malpractice because the malpractice is reasonably foreseeable. In contrast, in the case before it, the court found that the nexus between Davis' conduct and the risk of the injury that ultimately occurred to Rodriguez (legal malpractice) was too tenuous to support the imposition of a duty on Davis (*141 Cal. App. 3d 420, 425-427)* .

NOTE:

In a case involving original and subsequent tortfeasors, such as *Munoz v. Davis*, there is a two-step duty analysis. First, there must be a duty on the part of the original tortfeasor toward the tort victim to establish the original tort. In *Munoz v. Davis*, it was Davis's duty to use due care in driving his automobile, a point not at issue in the case. Second, there must also be a duty on the part of the original tortfeasor with regard to the aggravated injury suffered by the tort victim because of the acts of the subsequent tortfeasor. Such a duty usually exists only if it is foreseeable to the original tortfeasor that the subsequent tort might occur. It was this duty that the court found to be lacking.

The court's effort in *Munoz v. Davis* to distinguish the prior authority involving medical malpractice on the grounds of joint and several liability, duty, and foreseeability is not convincing. It is not readily apparent why subsequent medical malpractice is foreseeable and subsequent legal malpractice is not. Nevertheless, the result in *Munoz v. Davis* is more arguably correct under the court's alternate holding on public policy grounds [*see* *Munoz v. Davis (1983) 141 Cal. App. 3d 420, 429-430, 190 Cal. Rptr. 400* ; *see also § 115.72*].

[d] No Right of Indemnity If Indemnitee Is Not Liable to Tort Victim

In ***Woodward-Gizienski & Assocs. v. Geotechnical Exploration, Inc.*** *(1989) 208 Cal. App. 3d 64, 255 Cal. Rptr. 800* , a condominium homeowners' association sued the developers of the project for damages arising from soil settlement. The developers cross complained against the soils engineering firm that they had retained prior to construction on the project (W-G). The association retained another soils engineering firm (Geotech) to make repairs. In reliance on Geotech, the association implemented repairs costing about $1,000,000. The developers, including W-G, settled with the association for $731,400. W-G then cross complained against Geotech for equitable indemnity, alleging that the excessive cost of repairs caused it to incur a liability for which Geotech should be liable. W-G alleged that the reasonable cost of repairs was only $100,000.

The trial court granted Geotech's demurrer and the court of appeal affirmed. It held that the excessive cost of repairs could not legally cause detriment to W-G. Under fundamental principles of damages, W-G were only liable for reasonable costs of repairs, and it has no liability for excessive costs. Because the W-G and Geotech were not jointly and severally liable for the increased damages due to the alleged excessive repairs, there was no basis to apportion their liability (*208 Cal. App. 3d 64, 68)* .

NOTE:

Although it is not expressed in the opinion, the court's holding appears to be an application of the rule that there is no right to equitable indemnity with regard to a voluntary payment, that is, one that the indemnitee has no legal duty to make [*see* *Mullin Lumber Co. v. Chandler (1986) 185 Cal. App. 3d 1127, 1133, 230 Cal. Rptr. 122* ; *see also § 115.164[3][a]*]. W-G was under no legal compulsion to settle with the association for an amount that reflected an excessive cost of repairs; therefore, it had no right to recover those amounts through equitable indemnity.

[e] No Right of Indemnity From Tort Victim

The facts of ***Seamen's Bank v. Superior Court*** *(1987) 190 Cal. App. 3d 1485, 236 Cal. Rptr. 31* , are discussed in *§ 115.69[3][c]*. The court essentially viewed the bank officers' cross complaint against the investors (Seamen's) as a procedural device to establish that the investors were also negligent with regard to the transaction. The officers sought a reduction of their liability to Bank of America by the percentage that Seamen's recovery from Bank of America might have been reduced on account of Seamen's negligence had the matter proceeded to trial rather than been settled. The court stated that the officers had a legitimate interest in establishing Seamen's negligence. However, the place to litigate their fault was in the Bank of America's action for indemnity against its officers, not in an indemnity action by the officers against Seamen's under the fiction that Seamen's itself is a tortfeasor. The fact that Seamen's was not a party in the litigation between Bank of America and the officers does not prejudice the officers. It is not necessary that a person be a party to an action in order for the court to assess that person's proportion of fault. Thus, there is no equitable basis for a tortfeasor's claim for indemnity from a victim (*190 Cal. App. 3d 1485, 1492-1493)* .

[f] Equitable Indemnity Not Available to Malpractice Tortfeasor

In ***Children's Hosp. v. Sedgwick*** *(1996) 45 Cal. App. 4th 1780, 53 Cal. Rptr. 2d 725* , plaintiff hospital brought an action for equitable indemnity against an anesthesiologist alleging that the doctor negligently administered anesthesia to a patient which caused the patient serious physical injuries. The hospital sought indemnity from the doctor for the settlement payment it made on the patient's behalf in an earlier malpractice action against the hospital. The hospital alleged that the damages were caused primarily and ultimately by the doctor's negligence. The doctor moved for summary judgment, and presented evidence of a favorable judgment in an earlier action concerning her asserted medical negligence and patient's injuries. The jury in that action found that the doctor negligently treated the patient but that the negligence was not a legal cause of the patient's injuries. The doctor also presented evidence of the jury's verdict in the malpractice action against the hospital to the effect that the hospital could have prevented the patient's injuries by treating her with reasonable care. The hospital responded that since the trial court precluded evidence of the doctor's alleged negligence in the original malpractice action against it, it should be able to litigate this issue on appeal. The trial court granted summary judgment, reasoning that a cause of action for equitable indemnity required the indemnitor to be jointly and severally liable to the injured party. Since it was undisputed that the jury found no liability by the doctor to the plaintiff in the underlying action, the court concluded that there was no basis for the claim of shared or joint or several liability.

The court of appeal affirmed, holding that the hospital's indemnity claim lacked the essential element of common liability to an injured person. The court reasoned that the doctor was entitled to raise against the hospital any substantive defense to liability that she could assert against the patient in the underlying action. Her exoneration from liability after trial on the merits of her alleged malpractice precluded the patient, and derivatively, the hospital from relitigating her alleged negligence. As an independent ground for affirming the trial court's judgment the court of appeal held as a matter of law that equitable indemnity was not available to shift a subsequent medical provider's liability to the initial medical provider. According to the court if the rule were otherwise, every alleged tortfeasor would be a malpractice insurer, and equity would not permit such a result (*45 Cal. App. 4th 1780, 1789)* .

[g] Contractual Duties Owed by Indemnitor to Tort Victim Not Basis for Comparative Indemnity to Tortfeasor

In ***BFGC Architects Planners, Inc. v. Forcum/Mackey Constr., Inc.*** *(2004) 119 Cal. App. 4th 848, 14 Cal. Rptr. 3d 721* , a school district entered into a contract with an architectural firm to design and supervise construction of a high school. The district also entered into contracts with two general contractors for the site and construction phases of the project. After construction was completed, one of the general contractors sought $11,000,000 from the district for delays and disruptions allegedly caused by the architects' defective designs. The district and the contractor settled. The district then sued the architects for breach of contract and professional negligence, and the architects filed

cross-complaints seeking equitable (comparative) indemnity from the two general contractors based on their negligence. The trial court sustained demurrers on the cross-complaints without leave to amend, and the architects appealed.

The court of appeal affirmed. The court noted the established principle that equitable indemnity is only appropriate if the indemnitor and indemnitee are jointly and severally liable in tort to a third party. Thus, for the contractors to be liable to the architects for equitable indemnity, there must be some basis for the contractors being liable in tort to the district. Because no basis existed for imposing tort liability under theories of vicarious liability, strict liability, or implied contractual indemnity, the architects were required to show that the contractors owed and a tort duty directly to the district and breached that duty. The architects failed to do so. Their allegations of misconduct on the part of the contractors were nothing more than claims that the contractors breached contractual duties owed to the district. Because a breach of contractual duties would not support the imposition of tort liability, there was no way for the architects and the contractors to be jointly and severally liable in tort to the district. Therefore, there was no basis for allowing the architects' claim for equitable indemnity against the contractors (*119 Cal. App. 4th 848, 852-853)* .

[4] Additional Authorities

[a] Joint and Several Liability Required

In *Fieldstone Co. v. Briggs Plumbing Prods., Inc. (1997) 54 Cal. App. 4th 357, 62 Cal. Rptr. 2d 701* , the court of appeal affirmed the trial court's grant of summary judgment for defendant, manufacturer of inexpensive bathroom sinks, in plaintiff's action to recoup the costs of replacing sinks that prematurely rusted and chipped. Plaintiff's complaint did not contain negligence causes of action against defendants, but alleged that defendants' "breaches" created the sink defects, and that therefore it was entitled to complete or partial implied equitable indemnity or contribution from them for any damages sustained. The trial court determined that defendants could not be liable for indemnity, because they were not liable for plaintiff's economic damages under either a strict liability or negligence theory as a matter of law. The court of appeal agreed, stating that there can be no indemnity without joint and several liability by the prospective indemnitor and indemnitee. In this case the court found specifically that: (1) strict liability had no application; (2) plaintiff was precluded from recovering economic losses under a negligence theory; (3) there was no special relationship between the parties justifying the recovery of economic damages in a negligence action, despite the absence of physical or personal injury; and (4) even if a case could be made for a duty of care, it would still conclude that no duty existed, for if a duty of care to avoid economic injury existed in the circumstances of this case, every manufacturer would become an insurer, potentially forever, against economic losses from negligent defects in a product used for its intended purpose (*54 Cal. App. 4th 357, 368)* .

[b] Contractual Duties Owed by Indemnitor to Tort Victim Not Basis for Comparative Indemnity to Tortfeasor

In *Stop Loss Ins. Brokers, Inc. v. Brown & Toland Medical Group (2006) 143 Cal. App. 4th 1036, 49 Cal. Rptr. 3d 609* , the Regents of the University of California had retained an insurance broker to obtain a $1 million-per-claim insurance policy for patients receiving health services through University providers. Under the policy the broker obtained, the Regents were required to notify the insurer of any potential or actual claims exceeding 50 percent of the policy's deductible. A medical group retained by the Regents worked together with the broker to provide this information to the insurer. The medical group analyzed the Regents' claims each month and sent the necessary information the broker, who then prepared the necessary claim forms and sent them to the medical group, who approved the forms and sent them to the insurer. In 2001, a new policy expressly excluded coverage for preexisting claims not disclosed by the Regents. The Regents signed a binder purporting to disclose all preexisting claims, but one claim was omitted. Because of this omission, coverage was denied when the claim was submitted later that year. The Regents, after incurring unreimbursed expenses for treatment provided to the patient, sued the insurance broker for breach of contract and negligence, and the broker cross-complained for indemnity against the medical group. In the cross-complaint, the broker alleged that the medical group owed a duty to the Regents to analyze the claims properly and provide all relevant claims information to

the broker in a timely manner, and that the medical group breached this duty to the Regents, which obligated the group to pay full or partial indemnity for any damages that the broker might be compelled to pay to the Regents. The trial court sustained a demurrer on the cross-complaint in favor of the medical group and the court of appeal affirmed. The court concluded that the duties that the medical group allegedly breached were contractual duties, and did not constitute a breach of a legal duty of care (which would have given rise to an equitable indemnity cause of action under tort law). Consequently, the medical group was not a joint tortfeasor with the broker. Because equitable indemnity is only available between joint tortfeasors and cannot be based upon a negligent breach of contractual duties, the broker had not stated a valid cause of action for equitable indemnity and the sustaining of the medical group's demurrer was proper as a matter of law (*143 Cal. App. 4th 1036, 1040-1044)* .

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11-115 California Points & Authorities § 115.70

§ 115.70 Opposing Contention That Indemnitee Is Entitled to Partial Indemnification Under Principles of Comparative Indemnity--No Right of Comparative Indemnity Exists if Neither Party Is at Fault

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

INDEMNITEE'S CLAIM FOR COMPARATIVE INDEMNITY SHOULD BE DENIED BECAUSE THE POTENTIAL INDEMNITOR WAS NOT DETERMINED TO BE AT FAULT.

No Indemnity Without Fault. At a minimum equitable indemnity requires a determination of fault on the part of the alleged indemnitor. In the absence of a contractual agreement between the parties concerning allocation of fault, a court determination that neither party was at fault precludes either from obtaining indemnity against the other (*City of Huntington Beach v. City of Westminster (1997) 57 Cal. App. 4th 220, 225*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that indemnitee is entitled to partial indemnification under principles of comparative indemnity because neither the indemnitee nor the indemnitor were found to be at fault.

This form may be combined with points and authorities pertaining to the specific procedural context in which comparative indemnity rights are brought before the court. It may be used in a memorandum in connection with a pretrial motion, such as a demurrer or motion for summary judgment, if indemnity rights may be determined as a matter of law. It may also be used in a trial or an appellate brief. For discussion of the procedures by which comparative indemnity rights may be litigated, see *§ 115.10*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should set forth particular facts showing a lack of fault on the part of indemnitee and indemnitor and a lack of any contractual agreement between the parties allocating fault, and then argue that these facts preclude either party from obtaining indemnity against the other.

[c] Related Pleading and Practice Forms

For discussion relating to comparative indemnity, see California Forms of Pleading and Practice, Ch. 300, *Indemnity and Contribution* (Matthew Bender).

[d] Related Memoranda

For a memoranda relating to the necessity of joint and several liability for entitlement to partial indemnity, see *§ 115.69*.

[3] Discussion of Authorities

[a] No Indemnity Without Fault

In ***City of Huntington Beach v. City of Westminster*** *(1997) 57 Cal. App. 4th 220, 66 Cal. Rptr. 2d 286* , two cities settled a lawsuit brought by a robbery victim who was accidentally bitten by a police dog and the court entered judgment pursuant to the stipulated settlement, holding both cities jointly and severally liable. Several months later the cities tried their respective indemnity cross complaints before a judge. The judge found no negligence on the part of any employee of either police department, but ordered one city to bear 100 percent of the responsibility because using the police dog lessened the exposure of the other city's police officers to deadly harm thereby greatly benefiting that city. The trial court concluded that by asking for assistance and using that assistance, the requesting agency should bear the financial responsibility for unfortunate and unforeseen consequences of the inherent risk of police activities which are not caused by the assisting agency's negligence. The trial court entered judgment in favor of one city and the other city appealed.

The court of appeal reversed, holding that there was no equitable basis for a total shifting of a loss from one fault-free party to another, and that the statutory right of contribution required the cities to share the burden of the judgment equally between them (*57 Cal. App. 4th 220, 222)* . The court reasoned that California has but a single comparative indemnity doctrine which permits partial indemnification on a comparative fault basis in appropriate cases. At the heart of the doctrine is apportionment based on fault. At a minimum equitable indemnity requires a determination of fault on the part of the alleged indemnitor. None of these circumstances applied here. Neither city was determined to be more directly culpable than the other, and there was no contractual agreement between the parties concerning allocation of fault. The court ruled that in the absence of a contractual agreement between the parties concerning allocation of fault, a court determination that neither party was at fault precluded either from obtaining indemnity against the other (*57 Cal. App. 4th 220, 225)* . The court concluded that as joint judgment debtors in a tort action the cities each had a right of contribution against the other. Thus, the burden of the judgment should have been distributed equally between the two. In closing it noted that courts should be reluctant to impose all-or-nothing liability in municipal aid situations without some direction and guidance from the involved cities themselves or the legislature (*57 Cal. App. 4th 220, 226-227)* .

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11-115 California Points & Authorities § 115.71

§ 115.71 Opposing Contention That Indemnitee Is Entitled to Partial Indemnification Under Principles of Comparative Indemnity [Civ. Code § 1431 et seq.]--Statutory Immunity from Liability Precludes Assignment of Comparative Fault for Non-Economic Damages [Civ. Code § 1714.45]

[1] FORM

[*The following may be included in a memorandum or points and authorities, or in a trial or appellate brief*].

PLAINTIFF'S CLAIM FOR COMPARATIVE INDEMNITY MUST BE DENIED BECAUSE STATUTORY IMMUNITY FROM LIABILITY PRECLUDES ASSIGNMENT OF COMPARATIVE FAULT FOR NON-ECONOMIC DAMAGES.

A. Several Liability for Non-Economic Damages. In a tort action governed by principles of comparative fault, a defendant is severally liable for plaintiff's non-economic damages in direct proportion to that defendant's percentage of fault (*Civ. Code § 1431.2 (a)*).

[*Optional*] **B. No Right of Indemnity for Non-Economic Damages if Indemnitor Is Statutorily Immune from Liability.** To the extent that prospective indemnitor's are statutorily immune from liability under *Civil Code Section 1714.45*, on the grounds that the immunized conduct breached no duty and constituted no tort, the statute also precludes indirect assignment of comparative fault for non-economic damages under the Fair Responsibility Act of 1986, *Civil Code Section 1431 et seq.* (*Richards v. Owens-Ill., Inc. (1997) 14 Cal. 4th 985, 1001, 60 Cal. Rptr. 2d 103*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a defendant's contention that comparative indemnity for non-economic damages is not available because the prospective indemnitor is statutorily immune from liability. Paragraph A should be used to establish the statutory principle that in a tort action governed by principles of

comparative fault, a defendant is severally liable for plaintiff's non-economic damages in direct proportion to that defendant's percentage of fault. Optional Paragraph B can be used to defeat comparative indemnity claims where the prospective indemnitor is statutorily immune from liability.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which comparative indemnity rights are brought before the court. It may be used in a memorandum in connection with a pretrial motion, such as a demurrer or motion for summary judgment, if indemnity rights may be determined as a matter of law. It may also be adapted for use in a trial or appellate brief. For discussion of the procedures by which comparative indemnity rights may be litigated, see *§ 115.10*.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. The particular facts that establish the statutory immunity of the prospective indemnitor should be set forth.

[3] Discussion of Authorities

[a] No Right of Indemnity for Non-Economic Damages if Indemnitor Is Statutorily Immune From Liability

In ***Richards v. Owens-Ill., Inc.*** *(1997) 14 Cal. 4th 985, 60 Cal. Rptr. 2d 103* , a shipyard worker sued a manufacturer of an asbestos product for damages from a respiratory injury. Defendant claimed that, since plaintiff was a smoker, cigarette manufacturers shared fault for plaintiff's injury. Defendant thus contended that its liability should be reduced under *Civ. Code § 1431 et seq.*, which provides that a defendant is liable for non-economic damages only in direct proportion to the defendant's percentage of fault. Plaintiff disagreed, relying on *Civ. Code § 1714.45*, which provides immunity from suit to suppliers of certain unhealthy consumer products such as tobacco. Plaintiff argued that since the law immunizes tobacco companies, they cannot be part of a shared fault. The trial court agreed with plaintiff, and excluded evidence concerning the fault of tobacco manufacturers. However, the court of appeal reversed, relying on a holding in *DaFonte v. Up-Right, Inc. (1992) 2 Cal. 4th 593, 7 Cal. Rptr. 2d 238* that apportionment of non-economic damages for purposes of *Civ. Code § 1431 et seq.* must include the "universe of tortfeasors," including those immune from suit. In *DaFonte*, an action by a farm employee against a harvester manufacturer for injury caused by a defect in the machines design, the defendant was allowed to limit its liability for non-economic damages by showing that the plaintiff's employer's negligence contributed to the injury, even though the employer was statutorily immune from tort damages.

The Supreme Court reversed the court of appeal, concluding that the *DaFonte* holding did not apply. The court reasoned that the employer's immunity at issue in *DaFonte* derived from an alternate scheme of workers' compensation that did not imply that a negligent employer lacked legal fault. On the other hand, the immunity accorded by *Civ. Code § 1714.45* to suppliers of tobacco represented a legislative judgment that such companies had no fault for harm caused by their products. Therefore, such companies were not tortfeasors to whom comparative fault could be assigned. The Court concluded that to the extent *Civ. Code § 1714.45* afforded tobacco suppliers immunity from liability in direct actions against them, on grounds that the immunized conduct breached no duty and constituted no tort, the statute also precluded indirect assignment of comparative fault to such entitles for purposes of *Civ. Code § 1431 et seq.* (*14 Cal. 4th 985, 1001)* .

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§ 115.71A Opposing Contention That Indemnitee Is Entitled to Partial Indemnification Under Principles of Comparative Indemnity [Civ. Code § 1431 et seq.]--Party Liable for Intentional Tort Not Entitled to Apportionment of Liability for Noneconomic Damages Based on Negligence of Another Party

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

DEFENDANT'S CLAIM FOR COMPARATIVE INDEMNITY MUST BE DENIED BECAUSE, UNDER PROPOSITION 51, A DEFENDANT WHOSE LIABILITY IS BASED ON AN INTENTIONAL TORT IS NOT ENTITLED TO APPORTIONMENT OF LIABILITY FOR NONECONOMIC DAMAGES WHEN ANOTHER PARTY IS ASSIGNED LIABILITY BASED ON NEGLIGENCE.

Liability for Intentional Tort Not Subject to Apportionment. Under Proposition 51 (codified at *Civil Code Section 1431.2*), an intentional tortfeasor is not entitled to apportionment of liability for noneconomic damages when the negligence of another contributed to the injury, regardless of whether the negligent person is the plaintiff or a third-party tortfeasor (*Thomas v. Duggins Construction Co., Inc. (2006) 139 Cal. App. 4th 1105, 1112-1113, 44 Cal. Rptr. 3d 66*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a claim for comparative indemnity for noneconomic damages when the claim for comparative indemnity is made by a party whose liability is based on an intentional tort and the other party's conduct only constituted negligence.

This form may be combined with points and authorities pertaining to the specific procedural context in which the claim for an apportionment of damages by the defendant is made. It may also be used in an appellate brief. For discussion of

the procedures by which indemnity rights may be litigated, *see § 115.10*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include facts showing that the liability of the defendant making the indemnity claim is based on an intentional tort and that the liability assigned to other parties is based on conduct that was merely negligent. If necessary, counsel should also include facts and argument establishing that the case is governed by *Civ. Code § 1431.2*.

[3] Discussion of Authorities

[a] Liability for Intentional Tort Not Subject to Apportionment

In *Thomas v. Duggins Construction Co., Inc. (2006) 139 Cal. App. 4th 1105, 44 Cal. Rptr. 3d 66* , plaintiffs were two workers injured when a scissor lift they were using tipped over, causing them to fall 20 to 25 feet to a concrete floor. Plaintiffs' employer had purchased the scissor lift two days earlier from a construction company based on representations made by employees of the construction company as to the lift's capabilities. Plaintiffs collected workers' compensation benefits for their injuries and brought suit against the construction company that sold the lift, as well as against several of that company's employees. At trial, the jury found in favor of the plaintiffs on claims for breach of implied warranty, negligence, and intentional misrepresentation, and awarded approximately $1.9 million in damages. The jury assigned 40 percent responsibility to the construction company that sold the lift, 40 percent to plaintiffs' own employer, and 10 percent each to two employees of the construction company. The jury also found that one of the two liable employees had made intentional misrepresentations about the lift to the plaintiffs' employer in connection with the sale. The parties agreed that the employees of the construction company were acting in the course of their employment at all relevant times and that the construction company was vicariously liable for their share of liability. The construction company argued to the court that its liability for noneconomic damages should be reduced in accordance with Proposition 51, under which a tortfeasor is generally only liable for noneconomic damages in proportion to that tortfeasor's share of fault. The trial court disagreed that apportionment under Proposition 51 was required and entered a judgment against the construction company for the entire amount of plaintiffs' damages. The construction company appealed.

The court of appeal affirmed the judgment. The court noted that, prior to the passage of Proposition 51, an intentional tortfeasor was not entitled to a reduction of liability for damages based on the fault of other tortfeasors or the plaintiff's own negligence. The court concluded that Proposition 51 did not change this principle. Noting that an intentional actor cannot rely on someone else's negligence to shift responsibility for his or her own conduct, the court held that an intentional tortfeasor is not entitled to apportionment of liability for noneconomic damages when the negligence of another contributed to the injury, regardless of whether the negligent person is the plaintiff or a third-party tortfeasor. Although the construction company's own negligence would ordinarily have warranted apportionment of its liability for noneconomic damages, because the construction company was vicariously liable for the intentional misconduct of one of its employees, the court concluded that the construction company could be held liable for the entire award of noneconomic damages, without apportionment (*139 Cal. App. 4th 1105, 1112-1113)* .

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§ 115.71B Opposing Contention That Indemnitee is Entitled to Partial Indemnification Under Principles of Comparative Indemnity [Civ. Code § 1431 et seq.]--Party Vicariously Liable Under Doctrine of Nondelegable Duty for Negligence of Another Not Entitled to Apportionment of Liability for Noneconomic Damages

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

A DEFENDANT WHOSE VICARIOUS LIABILITY FOR THE CONDUCT OF AN INDEPENDENT CONTRACTOR IS BASED ON THE NONDELEGABLE DUTY DOCTRINE IS NOT ENTITLED TO APPORTIONMENT OF LIABILITY FOR NONECONOMIC DAMAGES.

Hirer Liable for Nondelegable Duty Not Entitled to Apportionment of Liability for Noneconomic Damages. Proposition 51 (codified at *Civil Code Section 1431.2*) does not limit the vicarious liability of the hirer of an independent contractor when the hirer's liability is based on the nondelegable duty doctrine (*Koepnick v. Kashiwa Fudosan America, Inc. (2009) 173 Cal. App. 4th 32, 35, 92 Cal. Rptr. 3d 453*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that defendant is entitled to apportionment of liability for noneconomic damages. The basis for the opposition is that because defendant is vicariously liable for the negligence of an independent contractor that defendant hired, no apportionment is required under Proposition 51.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the contention that no apportionment is permitted. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law stated. Thus, counsel should include facts establishing that defendant's vicarious liability is based on a nondelegable duty.

[3] Discussion of Authorities

[a] Hirer Liable for Nondelegable Duty Not Entitled to Apportionment of Liability for Noneconomic Damages

In ***Koepnick v. Kashiwa Fudosan America, Inc.*** *(2009) 173 Cal. App. 4th 32, 92 Cal. Rptr. 3d 453* , plaintiff was injured in an elevator accident after an independent contractor hired by the building's owner to maintain the elevators failed to detect and replace a faulty plastic liner, which caused the elevator cable to loosen and the elevator to stop suddenly. Plaintiff settled with the independent contractor and went to trial against the building owner. At trial, the jury found that the negligence of both the owner and the independent contractor contributed to plaintiff's injury, and it apportioned 75 percent of the fault to the owner and 25 percent to the elevator contractor. The owner argued to the court that Proposition 51 applied to limit its liability for noneconomic damages based on its share of apportioned liability as found by the jury. The court disagreed, concluding that defendant was liable for 100 percent of the noneconomic damages awarded because it was vicariously liable for the contractor's negligence based on the nondelegable duty doctrine. Defendant appealed.

The court of appeal affirmed. Citing a previous court of appeal opinion, the court held that because Proposition 51 does not limit a defendant's vicarious liability for the tortious acts of another, the building owner's vicarious liability for noneconomic damages was not subject to apportionment. Under the nondelegable duty doctrine, the building owner owed a nondelegable duty to maintain its land in a reasonably safe condition, and thus the owner remained answerable for harm caused by the negligent failure of its contractor to maintain the building in a reasonably safe condition. As the owner was vicariously liability for the negligence of the contractor, the owner could be held liable for 100 percent of the noneconomic damages, without apportionment (*173 Cal. App. 4th 32, 35-38)* . The court also rejected the owner's argument that 2002 amendments to *Lab. Code § 7300 et seq.* abrogated the nondelegable duty doctrine as applied to elevator maintenance and repair. The court concluded that nothing in those amendments prevented a property owner from continuing to be responsible for elevator maintenance, although proper certification might be required (*173 Cal. App. 4th 32, 39-40)* .

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§ 115.72 Opposing Contention That Indemnitee Is Entitled to Partial Indemnification Under Principles of Comparative Indemnity--Comparative Indemnity Should Be Denied Because of Public Policy or Equitable Considerations

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

INDEMNITEE'S CLAIM FOR COMPARATIVE INDEMNITY SHOULD BE DENIED BECAUSE TO ALLOW A RIGHT OF INDEMNITY UNDER THESE FACTS AND CIRCUMSTANCES WOULD VIOLATE _____ [PUBLIC POLICY *or* EQUITABLE PRINCIPLES].

[*EITHER*]

A. Public Policy. A right of comparative indemnity may be denied if there are strong public policy reasons for not permitting it (*Munoz v. Davis (1983) 141 Cal. App. 3d 420, 429-430, 190 Cal. Rptr. 400*).

[*OR*]

A. Equitable Considerations. Because indemnification is an equitable doctrine that exists only to correct potential injustice, indemnity may be denied if there is no such potential (*Jaffe v. Huxley Architecture (1988) 200 Cal. App. 3d 1188, 1192, 246 Cal. Rptr. 432*).

[*Optional*] **B. Attorney-Client Relationship.** Public policy prohibits an action for indemnity against the attorney who is representing the tort victim because such an action intrudes on the attorney-client relationship (*Goldfisher v. Superior Court (1982) 133 Cal. App. 3d 12, 22-23, 183 Cal. Rptr. 609*).

[2] Comments

[a] Use of Form

This form may be submitted in support of an indemnitor's contention that a right of comparative indemnity that might otherwise be available should be denied because of public policy or equitable considerations. Optional Paragraph B sets forth a particular example of the public policy rule precluding a claim for indemnity from counsel for the injured party.

This form may be combined with points and authorities pertaining to the specific procedural context in which implied indemnity rights are brought before the court. It may be used in a memorandum in connection with a pretrial motion, such as a demurrer or motion for summary judgment, in which the public policy or equitable bar to indemnity rights is sought to be established as a matter of law. It may also be used in an appellate brief. For discussion of the procedures by which indemnity rights may be litigated, see *§ 115.10*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. It should be established that, under the otherwise applicable law, indemnitee has a cognizable claim for comparative indemnity from indemnitor with regard to liability that has been or may be incurred. Then, the particular facts that establish the public policy or equitable considerations that make allowance of such a right inappropriate should then be developed.

[3] Discussion of Authorities

[a] Public Policy

Munoz v. Davis *(1983) 141 Cal. App. 3d 420, 190 Cal. Rptr. 400* , is discussed in *§ 115.69[3][a]* and *§ 115.69[3][c]*. An attorney (Munoz) was sued for legal malpractice for failing to file an action against Davis within the time required by the statute of limitations. Munoz cross complained against Davis for equitable indemnity.

As an alternate ground for affirming dismissal of the cross complaint, the court of appeal stated that there are strong public policy reasons for not permitting a negligent attorney to recover equitable indemnity from the client's adversary. The effect of allowing a negligent attorney to recover indemnity from the adversary would be to judicially repeal the statutes of limitation, make every tortfeasor the guarantor of the victim's adequate compensation as well as the malpractice insurer of the victim's attorney, and undermine the fiduciary duty of the nonnegligent attorney to his or her client. If Munoz's cross complaint were permitted, Davis would lose the protection of the statute of limitations and would be required to defend against the charge of negligence handicapped by the disappearance of witnesses, fading memories of the events, loss or destruction of physical evidence--all the impediments that the statutes of limitation are designed to avoid (*141 Cal. App. 3d 420, 429-430)* .

[b] Equitable Considerations

Jaffe v. Huxley Architecture *(1988) 200 Cal. App. 3d 1188, 246 Cal. Rptr. 432* , involved an underlying action by a condominium homeowners association against the developers for construction defects. The developers settled, reserving the right to proceed by way of equitable indemnity against current and former directors and officers of the association, limited to the liability limits of the directors' errors and omissions policy. The developers then filed their cross complaint under the reservation, alleging that the board had negligently managed the complex and had contributed to the damages suffered by the association. The cross defendants' demurrer was granted.

In affirming, the court of appeal stated that, quite simply, equitable indemnification is a matter of fairness. In the great majority of cases, equity and fairness call for an apportionment of loss among wrongdoers in proportion to their relative culpability, rather than by placing the entire loss on one of them. But because indemnification is an equitable doctrine existing only to correct potential injustice, it has no utility if there is no such potential. In the present case, there was no

potential for injustice to the developers, and there was no reason to allow them to interfere with the relationship between the association and its present and past boards. In the legal sense, the alleged negligent acts of the board were the acts of the association itself. These acts could have been raised under a defense of comparative negligence or avoidable consequences in the association's action against the developers. Thus, fairness to the developers did not depend on the availability of equitable indemnity against individual board members. To allow indemnity might jeopardize or entangle a special relationship that strong policies dictate be preserved. The specter of personal liability would serve to discourage active and meaningful participation by those most capable of shaping and directing homeowner activities. There is also a potential conflict of interest if third parties are allowed to pit the association against its directors by way of an action for indemnity. The directors might permit their personal potential liability interests to intrude into settlement considerations to the detriment of their fiduciary duty to the association (*200 Cal. App. 3d 1188, 1191-1193)* .

NOTE:

In a subsequent case, a cross defendant who was sued for comparative indemnity argued that *Jaffe* should be broadly construed to stand for the proposition that whenever resolution of the main action apportions liability according to fault, a cross complaint for indemnity is improper [*Platt v. Coldwell Banker Residential Real Estate Servs. (1990) 217 Cal. App. 3d 1439, 1446, 266 Cal. Rptr. 601]* . The court of appeal rejected the argument, finding that *Jaffe* should not be extended beyond its facts, which involved the special relationship between homeowners and their association. The court refused to find the same special relationship between a general partner and the limited partners of a real estate venture [*Platt v. Coldwell Banker Residential Real Estate Servs. (1990) 217 Cal. App. 3d 1439, 1448-1449, 266 Cal. Rptr. 601]* .

[c] Attorney-Client Relationship

Goldfisher v. Superior Court *(1982) 133 Cal. App. 3d 12, 183 Cal. Rptr. 609* , was the last of a group of cases, all involving the same issue, that were decided within three years of *American Motorcycle Assn. v. Superior Court of Los Angeles County (1978) 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899* . Each involved an action (in most cases against an attorney by a former client for legal malpractice) in which a party cross complained for indemnity from the attorney who represented the opposing party in the action [*see* *Pollack v. Lytle (1981) 120 Cal. App. 3d 931, 175 Cal. Rptr. 81* ; *Parker v. Morton (1981) 117 Cal. App. 3d 751, 173 Cal. Rptr. 197* ; *Rowell v. TransPacific Life Ins. Co. (1979) 94 Cal. App. 3d 818, 156 Cal. Rptr. 679* ; *Gibson, Dunn & Crutcher v. Superior Court (1979) 94 Cal. App. 3d 347, 156 Cal. Rptr. 326* ; *Commercial Standard Title Co. v. Superior Court (1979) 92 Cal. App. 3d 934, 155 Cal. Rptr. 393* ; *see also* *Held v. Arant (1977) 67 Cal. App. 3d 748, 134 Cal. Rptr. 422]* . In each case, the indemnitee alleged some act of counsel that actually caused or contributed to the loss suffered by the client for which indemnity was sought. In *Goldfisher*, the indemnitee, the client's original attorney, alleged that subsequent (and present) counsel could have successfully defended a prior action for injunctive relief and that the damages that the client claimed were caused by the professional negligence of the original attorney were, in fact, caused by the professional negligence of the subsequent attorney.

The court in *Goldfisher* canvassed all of the prior cases and found that only *Parker v. Morton* allowed a party to seek indemnity from the attorney for the injured party. It quoted language from *Held v. Arant* (actually decided before *American Motorcycle*), that reasons of public policy peculiar to the tripartite relationship of attorney-client-adversary override the principle of equitable indemnity (*133 Cal. App. 3d 12, 15)* . It also quoted language from *Rowell* that re-affirmed the same policy after *American Motorcycle*. The potential conflict of interest between the client's best interest and the course that the lawyer must take to minimize his or her own exposure to an indemnitee is untenable in view of the lawyer's duty of undivided loyalty to the client (*133 Cal. App. 3d 12, 18)* .

The court adopted the majority view and directed the respondent court to vacate its order overruling the demurrer to the indemnitee's cross complaint. In so holding, the court determined that public policy should and does prohibit indemnity

rights against counsel for the injured party (*133 Cal. App. 3d 12, 23)* .

[4] Additional Authorities

[a] Equitable Considerations

In *Children's Hosp. v. Sedgwick (1996) 45 Cal. App. 4th 1780, 53 Cal. Rptr. 2d 725*), a hospital brought an action for equitable indemnity against an anesthesiologist, alleging that the doctor negligently administered anesthesia to a patient which caused the patient serious physical injuries. The hospital sought indemnity from the doctor for the settlement payment it made on the patient's behalf in an earlier malpractice action against the hospital. The hospital alleged that the damages were caused primarily and ultimately by the doctor's negligence. The doctor moved for summary judgment, presenting evidence of a favorable judgment in the underlying action concerning her asserted medical negligence and patient's injuries. The trial court granted summary judgment, reasoning that a cause of action for equitable indemnity required the indemnitor to be jointly and severally liable to the injured party. The court of appeal affirmed, holding that equitable considerations supported preclusion of the hospital's equitable indemnity claim. In particular, permitting the hospital to proceed against the doctor would allow recovery for a tortfeasor under circumstances where the injured plaintiff failed to recover following a trial on the merits (*45 Cal. App. 4th 1780, 1787)* .

[b] Attorney-Client Relationship

California State Auto. Assn. Inter-Ins. Bureau v. Bales (1990) 221 Cal. App. 3d 227 , was an insurance bad faith case in which the insurer cross complained against the attorney who originally represented the plaintiff, alleging that his professional negligence in representing her on the claim contributed to her alleged loss. The court of appeal rejected the indemnity claim on public policy grounds. The court stated that the ordinary rules of comparative indemnity in tort do not apply if the claim is made against an attorney, is based on a breach of the attorney's duty to the client, and is brought by an adverse party in litigation that is the same as or related to that in which the alleged professional negligence occurred (*221 Cal. App. 3d 227, 230)* .

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11-115 California Points & Authorities § 115.73

§ 115.73 Opposing Contention That Indemnitee Is Entitled to Partial Indemnification Under Principles of Comparative Indemnity--Comparative Indemnity Is Not Available Because Parties Have Entered Into Express Indemnity Agreement

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

INDEMNITEE'S CLAIM FOR COMPARATIVE INDEMNITY SHOULD BE DENIED BECAUSE THE PARTIES HAVE EXPRESSLY CONTRACTED WITH RESPECT TO THEIR RIGHTS AND DUTIES OF INDEMNITY, AND THE EXTENT OF THE DUTY MUST BE DETERMINED FROM THE CONTRACT AND NOT FROM ANY DOCTRINE OF IMPLIED INDEMNITY.

Rights Determined by Contract. If the parties have expressly contracted with respect to a duty of indemnity, the extent of that duty must be determined from the contract and not from the independent doctrine of implied indemnity (*Regional Steel Corp. v. Superior Court (1994) 25 Cal. App. 4th 525, 529, 32 Cal. Rptr. 2d 417* ; *Davidson v. Welch (1969) 270 Cal. App. 2d 220, 232, 75 Cal. Rptr. 676* ; *see Markley v. Beagle (1967) 66 Cal. 2d 951, 961, 59 Cal. Rptr. 809, 429 P.2d 129*).

[2] Comments

[a] Use of Form

This form may be submitted in support of an indemnitor's contention that indemnity is not available under principles of comparative fault because the parties have expressly contracted with regard to indemnity rights. The points and authorities set forth in this form involve the same basic issue as those *set forth in § 115.30*, which asserts that express contractual indemnification is unaffected by comparative negligence. § 115.30, however, is for use by an express indemnitee to defend a claim for contractual indemnity. This form is for use by the same party in the position of implied indemnitor to attack a claim of the express indemnitor for comparative indemnity.

This form may be combined with points and authorities pertaining to the specific procedural context in which implied indemnity rights are brought before the court. It may be used in a memorandum in connection with a pretrial motion, such as a demurrer or motion for summary judgment, if implied indemnity rights may be determined as a matter of law based on an express indemnity agreement. It may also be used in a trial or an appellate brief. For discussion of the procedures by which indemnity rights may be litigated, see *§ 115.10*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. It should be established that: (1) the parties entered into an agreement by which the party now seeking comparative indemnity agreed to indemnify the party from whom comparative indemnity is sought from loss incurred under certain express contractual conditions; and (2) the claim for which comparative indemnity is sought is one that is within the scope of the indemnity agreement.

[b] Opposing Memoranda

In an appropriate case, the points and *authorities in § 115.63* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Rights Determined by Contract

The factual background of ***Markley v. Beagle*** *(1967) 66 Cal. 2d 951, 59 Cal. Rptr. 809, 429 P.2d 129* , is discussed in *§ 115.32[3][c]*. In discussing the contractors' duty to indemnify the owners, the Supreme Court stated that the duty must be determined from the parties' contract and not from the independent doctrine of equitable indemnity because the parties had expressly contracted with respect to the contractors' duty to indemnify the owners (*66 Cal. 2d 951, 961)* .

In ***Regional Steel Corp. v. Superior Court*** *(1994) 25 Cal. App. 4th 525, 32 Cal. Rptr. 2d 417* , a general contractor (McCarthy) and a subcontractor (Regional Steel) entered into an express indemnity agreement providing for a right of indemnity in favor of McCarthy from Regional Steel. The parties subsequently amended the agreement to include the following language: "Regional Steel Corporation will indemnify others only to the extent that damage is caused in whole by any negligent act or omission by anyone directly employed by or under the control of Regional Steel Corporation."

A worker on the project was injured and filed suit against McCarthy. McCarthy cross complained against Regional Steel for comparative indemnity, but the trial court granted summary judgment for Regional Steel, and the court of appeal affirmed.

The court cited the rule that if the parties have expressly contracted with respect to the duty to indemnify, the extent of that duty must be determined from the contract and not by reliance on the independent doctrine of equitable indemnity. The court held that the language "*caused in whole* by any negligent act or omission by anyone directly employed by or under the control of Regional" (emphasis by the court) meant that McCarthy had bargained away its right to seek comparative indemnity under situations in which both its negligence and that of Regional Steel contributed to the injury (*25 Cal. App. 4th 525, 529)* .

In ***Davidson v. Welch*** *(1969) 270 Cal. App. 2d 220, 75 Cal. Rptr. 676* , the owner of certain garage premises (Welch) leased them to an automobile dealership (Arrow), which in turn agreed to employ him to operate a body shop on the premises. The lease agreement provided for a right of indemnity in favor of Welch from Arrow for all liability from any cause while in or on the premises. Welch subsequently got into a fight with a customer on the premises. The customer sued and recovered damages from Welch and also from Arrow, as employer, under the doctrine of respondeat superior.

Arrow cross complained against Welch for implied equitable indemnity on the ground that a vicariously liable employer was entitled to indemnity from a primarily liable employee tortfeasor [*see § 115.93*]. In turn, Welch claimed a right to express indemnity from Arrow under the indemnity clause in the lease agreement. The trial court ruled against Arrow and in favor of Welch on both indemnity claims.

The court of appeal affirmed. The court construed the indemnity clause and determined that the customer's claim was within the scope of the agreement (*270 Cal. App. 2d 220, 228-232)* . Because the parties expressly contracted with respect to Arrow's duty to indemnify Welch, the extent of that duty must be determined by the contract and not by the usual rules of implied indemnity that would otherwise govern in the case of employer vicarious liability for the torts of an employee (*270 Cal. App. 2d 220, 232)* .

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11-115 California Points & Authorities § 115.74

§ 115.74 Opposing Contention That Indemnitee Is Entitled to Partial Indemnification Under Principles of Comparative Indemnity--Claim for Comparative Indemnity Against Injured Person's Employer Is Barred Absent Written Agreement [Lab. Code § 3864]

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

INDEMNITEE'S CLAIM FOR COMPARATIVE INDEMNITY IS BARRED BY SECTION 3864 OF THE LABOR CODE BECAUSE THERE IS NO WRITTEN AGREEMENT WITHIN THE EXCEPTION OF THAT SECTION THAT WOULD ALLOW A RIGHT OF INDEMNITY.

A. No Indemnity From Employer of Injured Person in Absence of Written Agreement. One against whom a judgment has been entered or who has settled a claim for personal injury may not seek indemnity from the injured person's employer unless the employer executed a written indemnity agreement prior to the injury (*Lab. Code § 3864*).

B. *Labor Code Section 3864* Applies to Comparative Indemnity. *Section 3864 of the Labor Code* precludes a third-party tortfeasor from seeking partial indemnification from an injured party's employer under the comparative negligence doctrine (*Arbaugh v. Proctor & Gamble Mfg. Co. (1978) 80 Cal. App. 3d 500, 506, 145 Cal. Rptr. 608*).

[*Optional*] **C. Requirement That Agreement Be Signed Before Injury.** An employer's immunity from indemnity liability as provided by *Section 3864 of the Labor Code* is not waived by a written agreement that was prepared before an employee was injured, but signed by the parties after the injury, if there was no showing that the employer either knew of his or her rights under the statute or intended to waive them (*Solano Concrete Co. v. Lund Constr. Co. (1976) 64 Cal. App. 3d 572, 575, 134 Cal. Rptr. 552* ; *see Nielsen Constr. Co. v. International Iron Prods. (1993) 18 Cal. App. 4th 863, 866-869, 22 Cal. Rptr. 2d 497*).

[*Optional*] **D. Agreement Not Executed by Performance.** An employer's immunity from indemnity liability as

provided by *Section 3864 of the Labor Code* is not waived by an unsigned contract that contains an indemnification clause that was not fully performed on both sides prior to the employee's injury (*Lockheed Missiles & Space Co. v. Gilmore Indus., Inc. (1982) 135 Cal. App. 3d 556, 558-560, 185 Cal. Rptr. 409*).

[*Optional*] **E. *Lab. Code § 3864* Precludes Indemnity From Employer's Public Liability Carrier.** The reference in *Labor Code Section 3864* to the employer is sufficiently broad to bar any derivative liability of the employer's public liability carrier (*Pacific Gas & Elec. Co. v. Morse (1970) 6 Cal. App. 3d 707, 712, 86 Cal. Rptr. 7*).

[2] Comments

[a] Use of Form

This form may be submitted in support of an indemnitor's contention that *Lab. Code § 3864* precludes the indemnitee's right of comparative indemnity because the person whose injury gave rise to the loss for which indemnity is sought is the indemnitor's employee. *Lab. Code § 3864* bars indemnity claims against an injured person's employer in absence of a written indemnity agreement executed prior to the injury.

This form may be combined with points and authorities pertaining to the specific procedural context in which the scope of comparative indemnity rights is brought before the court. It may be used in a memorandum in connection with a pretrial motion, such as a demurrer or motion for summary judgment, if the applicability of *Lab. Code § 3864* may be determined as a matter of law. It may also be used in a trial or an appellate brief. For discussion of the proceedings in which the validity and scope of an indemnity agreement may be litigated, see *§ 115.10*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. It should be established that: (1) the person whose injury caused a loss to the indemnitee for which it is seeking indemnity was an employee of the indemnitor at the time of the injury; and (2) either there is no agreement between the parties that provides for a right of indemnity in favor of the indemnitee, or, if there is such a contract, it was not executed or fully performed until after the injury in question occurred.

[b] Opposing Memoranda

In an appropriate case, the points and *authorities in § 115.34* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Lab. Code § 3864 Applies to Comparative Indemnity

In ***Arbaugh v. Procter & Gamble Mfg. Co.*** *(1978) 80 Cal. App. 3d 500, 145 Cal. Rptr. 608* , a worker (Arbaugh) brought an action against Procter & Gamble (P & G) for personal injuries that he sustained at a warehouse owned by P & G while in the course of his employment for a trucking company (Signal). The jury decided that Arbaugh had not been negligent but that both P & G and Signal were 50-percent responsible under principles of comparative fault. The court then entered judgment against P & G and in favor of plaintiff for the full amount of damages less the amounts of workers' compensation benefits and of a settlement with another party that Arbaugh had previously received. Under principles of joint and several liability, P & G was required to pay 100 percent of the judgment even though it was only 50-percent responsible. This result occurred in this case because of the operation of *Lab. Code § 3864*, prohibiting indemnity rights against an employer of the injured party in absence of a written agreement.

P & G appealed its liability for more than a 50-percent share of the damages, alleging essentially that the rules of joint and several liability should be dispensed with in a case in which *Lab. Code § 3864* prohibited indemnity. While noting the inequitable apportionment, the court of appeal rejected the argument. *Under American Motorcycle Ass'n v.*

Superior Court (1978) 20 Cal. 3d 578, 582, 146 Cal. Rptr. 182, 578 P.2d 899 [*see § 115.60*], it is clear that joint and several liability was unaffected by the adoption of comparative negligence. Also, nothing in the adoption of comparative negligence and comparative indemnity altered the rule of *Lab. Code § 3864* (*80 Cal. App. 3d 500, 506-507)* .

[b] Requirement That Agreement Be Signed Before Injury

Solano Concrete Co. v. Lund Constr. Co. *(1976) 64 Cal. App. 3d 572, 134 Cal. Rptr. 552* , was an appeal from a judgment of dismissal entered after the trial court sustained a demurrer to a cross complaint for indemnity without leave to amend. The cross complaint, filed by a contractor, requested a declaration of indemnity rights against a subcontractor, the employer of a deceased party, on the basis of a written agreement signed by the parties after the accident in which the employee was killed. The court of appeal affirmed the judgment, ruling that even though the agreement was prepared before the accident, it was signed after the accident and, therefore, did not overcome the indemnity immunity provided employers by *Lab. Code § 3864*. The court further held that the subsequent signing of the agreement did not waive the benefit of the statute's protection because there was no showing that the subcontractor either knew of its rights under the statute or intended to waive them (*64 Cal. App. 3d 572, 574-575)* .

In ***Nielsen Constr. Co. v. International Iron Prods.*** *(1993) 18 Cal. App. 4th 863, 22 Cal. Rptr. 2d 497* , an employee of a subcontractor was injured on November 5. An indemnity agreement that would have required the subcontractor-employer to indemnify and defend the general contractor was under negotiation at the time of the injury. It had been signed by the subcontractor on November 2, but the general contractor did not sign until November 20. The injured employee later sued the general contractor, who cross complained against the employer based on the indemnity agreement.

The trial court dismissed the cross complaint and the court of appeal affirmed. Because the proposed indemnitee did not sign until after the injury, there was no agreement executed before the injury, as is required by *Lab. Code § 3864*. The court rejected the argument that only the party to be charged (the indemnitor) need sign before injury (*18 Cal. App. 4th 863, 866-869)* .

[c] Agreement Not Executed by Performance

Lockheed Missiles & Space Co. v. Gilmore Indus., Inc. *(1982) 135 Cal. App. 3d 556, 185 Cal. Rptr. 409* , was an appeal from a summary judgment entered in an action brought by an owner of a shaker-amplifier system (Lockheed), seeking indemnification from a contractor hired to repair the system (Gilmore). Lockheed's claim was based on a written purchase order sent by Lockheed to Gilmore that contained a clause indemnifying Lockheed against all liability from harm arising out of the repair work. The order provided for acceptance by acknowledgment or commencement of performance. Gilmore did not sign the purchase order, but commenced performance by sending a service representative, who was electrocuted while performing tests on the system. The deceased's heirs brought a wrongful death action against Lockheed. Lockheed settled and sued Gilmore for indemnity.

The court of appeal affirmed the summary judgment, ruling that the purchase order for the repairs containing the indemnification clause was not an executed indemnity agreement under *Lab. Code § 3864*. "Executed" is defined in Black's Law Dictionary as "completed; carried into full effect; already done or performed." Because it did not appear from the record that the agreement was fully performed on both sides prior to the injury, the agreement was not executed (*135 Cal. App. 3d 556, 558-560)* . The court further held that even if the purchase agreement had been fully executed in the sense of being performed on both sides, it was not the type of executed agreement intended by *Lab. Code § 3864*. Such a view would result in a rule that any written contract containing an indemnity provision would be fully enforceable on completion of performance by both parties regardless of whether the indemnitor had signed, read, or even received the written contract. This could not have been the intent of the statute (*135 Cal. App. 3d 556, 560)* .

[d] Lab. Code § 3864 Precludes Indemnity From Employer's Public Liability Carrier

Pacific Gas & Elec. Co. v. Morse *(1970) 6 Cal. App. 3d 707, 86 Cal. Rptr. 7* , was an appeal from a judgment of dismissal in an action for equitable indemnity. An employee of the Flintkote Company was severely injured when a crane that was being operated by a co-employee came in contact with a power line. Pacific Gas & Electric Company settled with the injured party and then brought this action against the co-employee for equitable indemnity and against Flintkote's public liability carrier for a declaration establishing its liability in the claim against the co-employee.

The court of appeal affirmed the dismissal. The court held that Lab. Code § 3864, which eliminates an employer's liability for implied indemnification in absence of a written agreement, was designed to affect the liability of the employer's public liability carrier, and that its reference to the employer was sufficiently broad to bar any derivative liability of the carrier. Whether the nominal defendant is the employer or a co-employee, the claim is barred if the actual target of indemnification is the public liability carrier. The legislative objective should not be defeated by the choice of one conduit rather than another as a means of reaching the insurer (*6 Cal. App. 3d 707, 712-713)* .

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11-115 California Points & Authorities § 115.75

§ 115.75 Opposing Contention That Indemnitee Is Entitled to Partial Indemnification Under Principles of Comparative Indemnity--Collateral Estoppel Principles Preclude Comparative Indemnity Because Indemnitor Was Found to Be Not Liable to Plaintiff in Pretrial Proceeding

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

INDEMNITEE IS PRECLUDED FROM SEEKING COMPARATIVE INDEMNITY FROM INDEMNITOR BECAUSE PURSUANT TO _____ [*kind of motion, e.g.,* A MOTION FOR SUMMARY JUDGMENT] IN _____ [THIS *or* ANOTHER] ACTION, IT WAS DETERMINED THAT INDEMNITOR HAD NO LIABILITY TO THE TORT VICTIM.

Comparative Indemnity Precluded by Collateral Estoppel. Collateral estoppel precludes relitigating an alleged tortfeasor's liability to a tort victim in an indemnity action if the matter was resolved by final judgment favorable to the tortfeasor in the same or a prior action to which the indemnitee was a party or in privity with a party (*Columbus Line, Inc. v. Gray Line Sight-Seeing Cos. Associated, Inc. (1981) 120 Cal. App. 3d 622, 628-629, 174 Cal. Rptr. 527*).

[2] Comments

[a] Use of Form

This form may be submitted in support of an indemnitor's contention that the indemnitee is collateral estopped from seeking comparative indemnity because there is a final judgment under which the indemnitor has no liability to the tort victim. The points and authorities in this form are for use together with alternate Paragraph B of § 115.69, that the parties cannot be jointly and severally liable because the indemnitor has no liability to the tort victim.

This form may be combined with points and authorities pertaining to the specific procedural context in which the doctrine of collateral estoppel is invoked. It may be used in a memorandum in connection with a pretrial motion, such as

a demurrer or motion for summary judgment, to establish a bar of collateral estoppel as a matter of law. It may also be used in an appellate brief. For discussion of the procedures by which indemnity rights may be litigated, see *§ 115.10*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. It should be established that: (1) the indemnitor was a defendant who was alleged to be liable to the plaintiff in the instant action or in a prior action; (2) pursuant to a pretrial motion, the indemnitor was found not to be liable to the plaintiff as a matter of law; (3) pursuant to the ruling on that motion, a judgment of dismissal was entered that has become final; and (4) the indemnitee was either a party to or in privity with a party to the action in which the indemnitor's nonliability was determined.

[b] Opposing Memoranda

In an appropriate case, the points and *authorities in § 115.68* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Comparative Indemnity Precluded by Collateral Estoppel

In ***Columbus Line, Inc. v. Gray Line Sight-Seeing Cos. Associated, Inc.*** *(1981) 120 Cal. App. 3d 622, 174 Cal. Rptr. 527* , plaintiffs were passengers on a cruise ship. They had taken a shore excursion in a foreign port of call, during which they were injured in a tour bus accident. They sued Royal Viking (the cruise ship owner), Columbus (the managing agent for shore excursions for Royal Viking), the local bus company (who was beyond the jurisdiction of the court), and Gray Lines, a trade association for the sight-seeing and tour service industry. Gray Lines was alleged to be both directly liable and liable based on an alleged agency relationship between it and the local bus company. Columbus and Royal Viking also cross complained against Gray Lines for comparative indemnity.

Gray Lines moved for summary judgment on the complaint, arguing that it was not negligent toward plaintiff in any manner and that there was no agency relationship with the local bus company as a matter of law. Notice of the motion was served on all parties, and the other defendants were represented by counsel at the hearing. The motion was granted and judgment was entered for Gray Lines on the complaint. The judgment became final, and Gray Lines also moved for summary judgment on all cross complaints for indemnity. The trial court granted the motion.

The court of appeal affirmed, finding that the requirements of collateral estoppel had been met. The court said that the application of the doctrine in a given case depends on an affirmative answer to three questions: (1) was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) was there a final judgment on the merits? and (3) was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? (*120 Cal. App. 3d 622, 628)* In the case, the issues determined were Gray Lines' direct and vicarious liability to the plaintiff. These were precisely the issues raised by the cross complaints for indemnity. There was no question but that the prior summary judgment was on the merits and had become final (*120 Cal. App. 3d 622, 629)* .

The principal issue was whether Columbus and Royal Viking were in privity with the plaintiffs with regard to summary judgment on the complaint. The court found such privity based on a commonality of interest in establishing Gray Lines' liability to the plaintiffs. It was incumbent on the cross complainants to protect their own interests by vigorously opposing the summary judgment motion on all possible grounds instead of relying on plaintiffs' opposition. Were collateral estoppel not applied, there could be inconsistent judgments in two phases of the same lawsuit (*120 Cal. App. 3d 622, 630-631)* .

[4] Additional Authorities

[a] Comparative Indemnity Precluded by Collateral Estoppel

In *Children's Hosp. v. Sedgwick (1996) 45 Cal. App. 4th 1780, 53 Cal. Rptr. 2d 725* , a hospital brought an action for equitable indemnity against an anesthesiologist, alleging that the doctor negligently administered anesthesia to a patient, causing the patient serious physical injuries. The hospital sought indemnity from the doctor for the settlement payment it made on the patient's behalf in an earlier malpractice action against the hospital. The hospital alleged that the damages were caused primarily and ultimately by the doctor's negligence. The doctor moved for summary judgment, presenting evidence of a favorable judgment in the underlying action concerning her asserted medical negligence and patient's injuries. The hospital argued that barring the hospital from relitigating the doctor's liability offended constitutional principles of due process. The trial court granted summary judgment, and the court of appeal affirmed. The court held that it was fair to apply collateral estoppel and bind the hospital with the prior judgment in the malpractice action against the doctor since the hospital had the opportunity in the prior action to prove that the patient's injuries were caused by the doctor's care (*45 Cal. App. 4th 1780, 1788)* .

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11-115 California Points & Authorities § 115.76

§ 115.76 Opposing Contention That Indemnitee is Entitled to Partial Indemnification Under Principles of Comparative Indemnity for Amounts Paid by Indemnitee's Insurer

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

A TORTFEASOR MAY NOT RECOVER EQUITABLE INDEMNITY FROM A COTORTFEASOR FOR AMOUNTS THAT THE TORTFEASOR'S INSURER PAID TO THE UNDERLYING PLAINTIFF.

No Right to Indemnity for Amounts Paid by Insurer. If a tortfeasor's insurer has made a payment to the underlying plaintiff on behalf of the insured, that tortfeasor, when seeking equitable indemnity from a cotortfeasor, may only seek indemnity for those amounts actually paid out of the tortfeasor's own pocket, in proportion to the allocation of fault between the tortfeasors (*Miller v. Ellis (2002) 103 Cal. App. 4th 373, 380-382, 126 Cal. Rptr. 2d 667*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to the contention that a tortfeasor seeking equitable indemnity from a cotortfeasor may recover for amounts that were paid by the indemnitee's insurer, rather than actually by the indemnitee.

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law stated. Thus, counsel should include facts showing the amounts that were paid by the indemnitee's insurer to the underlying plaintiff for the indemnitee's liability in the underlying case, and also include facts showing the amounts that were actually paid by the indemnitee out-of-pocket.

[3] Discussion of Authorities

[a] No Right to Indemnity for Amounts Paid by Insurer

In ***Miller v. Ellis*** *(2002) 103 Cal. App. 4th 373, 126 Cal. Rptr. 2d 667* , the plaintiff was an attorney seeking equitable indemnity from two other attorneys for their share of liability in a malpractice action brought by a former client for the attorneys' failure to bring the client's suit to trial prior to expiration of a five-year deadline. In the underlying malpractice action, the plaintiff's insurer eventually settled the underlying claim, on behalf of all parties, for $75,000. In conjunction with achieving the settlement, the plaintiff incurred over $13,000 in attorney's fees, of which the plaintiff paid $5,000, which was the deductible amount on his malpractice policy. The plaintiff then brought an indemnity action, which resulted in a finding at trial that the plaintiff and one of the other attorneys were each 50 percent liable for the legal malpractice. Based on the collateral source rule, the trial court entered judgment for the plaintiff and ordered the other attorney to pay $40,000 to the plaintiff, which represented half of the combined amount paid by the plaintiff's insurer to settle the underlying claim and the $5,000 deductible paid by the plaintiff. The indemnifying attorney appealed.

The court of appeal reversed. The court noted first that the trial court erred in applying the collateral source rule to the indemnity claim, because that rule only applies to an injured party who is seeking to recover damages. The plaintiff was not an injured party seeking damages, but a cotortfeasor seeking indemnity, and thus the collateral source rule was inapplicable (*103 Cal. App. 4th 373, 378-379)* . The court then applied principles of equitable indemnity and concluded that if a tortfeasor's insurer has made a payment to the underlying plaintiff on behalf of the insured, that tortfeasor, when seeking equitable indemnity from a cotortfeasor, may only seek indemnity for those amounts actually paid out of the tortfeasor's own pocket, in proportion to the allocation of fault between the tortfeasors. The tortfeasor may not seek indemnity for the amounts paid by the insurer, although the tortfeasor may seek indemnity for the amount of any deductible that the tortfeasor was required to pay under the insurance policy. A contrary rule would essentially allow the tortfeasor seeking indemnity to benefit financially from his or her own wrongdoing. Thus, the plaintiff was entitled to indemnity in the amount of $2,500, which represented half of the deductible that the plaintiff paid out of his own pocket (*103 Cal. App. 4th 373, 380-382)* .

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[Reserved]

§§ 115.77[Reserved]

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11-115 California Points & Authorities § 115.90

§ 115.90 Supporting Contention That Indemnitee Is Entitled to Total Indemnification Under Principles of Comparative Indemnity--Right to Total Indemnity May Exist Under Principles of Comparative Fault

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

INDEMNITEE IS ENTITLED TO RECOVER TOTAL INDEMNITY FROM INDEMNITOR BECAUSE A SHIFT OF AN ENTIRE LOSS FROM ONE PARTY TO ANOTHER IS PERMITTED UNDER PRINCIPLES OF IMPLIED EQUITABLE INDEMNITY AND COMPARATIVE FAULT.

A. Implied Total Indemnity. In a comparative indemnity action based on implied equitable principles, a trier of fact may determine that the facts and equities of the case support a complete shifting of a loss from one tortfeasor to another (*Far W. Fin. Corp. v. D & S Co. (1988) 46 Cal. 3d 796, 808, 251 Cal. Rptr. 202, 760 P.2d 399*).

[*Optional*] **B. Vicarious Liability.** A vicariously liable tortfeasor may obtain full indemnity from the party whose acts gave rise to the liability imputed to the indemnitee (*E.L. White, Inc. v. City of Huntington Beach (1982) 138 Cal. App. 3d 366, 376, 187 Cal. Rptr. 879*).

[2] Comments

[a] Use of Form

This form may be submitted in support of an indemnitee's contention that it is entitled, under principles of implied equitable indemnity and comparative fault, to shift a loss that it has incurred or may incur entirely to the indemnitor. Paragraph A should be used to establish a basic entitlement to total indemnity under current law. It should be combined with other points and authorities that establish the particular basis for total indemnity. Optional Paragraph B expresses the general principle that total indemnity is available with regard to any doctrine under which the indemnitee would be considered to be only vicariously liable for the acts of the indemnitor. For more specific situations justifying total

indemnity, see *§§ 115.91* (implied contractual indemnity), 115.92 (indemnity implied from a license with a public entity), 115.93 and 115.94 (indemnity implied from principal-agent or employer-employee relationship), and 115.95 (negligent tortfeasor's right to indemnity from intentional joint tortfeasor).

This form may be combined with points and authorities pertaining to the specific procedural context in which implied indemnity rights are brought before the court. It may be used in a memorandum in connection with a pretrial motion, such as a demurrer or motion for summary judgment, if rights to implied total indemnity may be determined as a matter of law. It may also be used in a trial or an appellate brief. For discussion of the procedures by which indemnity rights may be litigated, see *§ 115.10*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. It should be established that: (1) the indemnitee incurred or may incur a loss to a third party for which the indemnitor is or may also be liable; and (2) there is no express agreement between the indemnitor and the indemnitee that provides for a right of indemnity with regard to the loss in question. The particular basis for a right of implied total indemnity in favor of the indemnitee should then be set forth, such as the facts that would establish that the indemnitee is only vicariously liable for the acts of the indemnitor.

[3] Discussion of Authorities

[a] Implied Total Indemnity

In ***Far W. Fin. Corp. v. D & S Co.*** *(1988) 46 Cal. 3d 796, 251 Cal. Rptr. 202, 760 P.2d 399* , a condominium association sued the developer (Far West) and the contractors of the condominium project, alleging a number of defects in the project. The developer settled with the association, and cross complained for complete indemnification from the general contractor (D & S). Far West's theory was that it was, at the most, only vicariously liable to the association for the negligence of D & S.

The principal issue in the case was whether D & S's good-faith settlement with the association under *Code Civ. Proc. § 877.6* barred Far West's indemnity rights [*see § 115.151*]. Far West's position was that total equitable indemnity arising from vicarious liability was a different concept from the doctrine of comparative (or partial) equitable indemnity as enunciated in *American Motorcycle Assn. v. Superior Court of Los Angeles County (1978) 20 Cal. 3d 578* [*see § 115.60*] and should not be treated similarly for purposes of *Code Civ. Proc. § 877.6* (*46 Cal. 3d 796, 806)* .

The California Supreme Court rejected this view, but in a manner that reaffirmed the basic right to seek total equitable indemnity under appropriate circumstances. The Court said that there are not two separate equitable indemnity doctrines in California, but a single "comparative indemnity" doctrine, which permits partial indemnification on a comparative fault basis in appropriate cases. To be sure, there is nothing in *American Motorcycle* that suggests that it would necessarily be improper in a comparative indemnity action for a trier of fact to determine that the facts and equities in a particular case support a complete shifting of a loss from one tortfeasor to another, rather than, for example, a 60 percent/40 percent or 95 percent/5 percent division of the loss. Even if such a total shift of loss may be appropriate, however, the indemnitee's equitable indemnity claim does not differ in its fundamental nature from other comparative equitable indemnity claims. Comparative equitable indemnity includes the entire range of possible apportionments, from no right to indemnity to a right of complete indemnity. Total indemnification is just one end of the spectrum of comparative equitable indemnification (*46 Cal. 3d 796, 808)* .

CAUTION:

The Court held that a good faith settlement under *Code Civ. Proc. § 877.6* terminates all equitable indemnity rights, including a right to total equitable indemnity [*Far W. Fin. Corp. v. D & S Co. (1988) 46 Cal. 3d 796, 817, 251 Cal. Rptr. 202, 760 P.2d 399* ; *see § 115.151*]. Therefore, counsel representing a defendant who claims to be entitled to total indemnity from a settling defendant should make sure that

a hearing is held under *Code Civ. Proc. § 877.6* to determine the good faith of the settlement at which its claim can be presented [*see Code Civ. Proc. § 877.6(a)(2)* (placing burden of noticing hearing on nonsettling defendants under some circumstances)].

[b] Vicarious Liability

E.L. White, Inc. v. City of Huntington Beach *(1982) 138 Cal. App. 3d 366, 187 Cal. Rptr. 879* , was an appellate opinion after remand to the trial court on the California Supreme Court's holding that an indemnitor under an express indemnity agreement (White) could seek implied equitable indemnity from the indemnitee (city) for liability not within the scope of the indemnity agreement [*see E.L. White, Inc. v. City of Huntington Beach (1978) 21 Cal. 3d 497, 146 Cal. Rptr. 614, 579 P.2d 505* ; *see also § 115.63*]. The city had contracted with White, a general contractor, for the construction of certain public improvements that included a storm drain. After construction was completed and the city had accepted the work, the drain malfunctioned and the city arranged for repairs with the particular subcontractor who had constructed it. In the course of repairs, one employee of the subcontractor was killed and another injured, and actions were brought against the city and White. The malfunction was later found to be due to the faulty work of the subcontractor. On remand, the trial court held that White was entitled to total implied equitable indemnity from the city.

The court of appeal affirmed, disagreeing with the city's contention that there can never be full equitable indemnity after *American Motorcycle Assn. v. Superior Court of Los Angeles County (1978) 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899* . The court concluded that a vicariously liable tortfeasor may still obtain full indemnity even though *American Motorcycle* allows partial indemnity to be obtained on a comparative fault basis in appropriate cases. The court further found that there was substantial evidence to support the conclusion that White was only vicariously liable for the city's negligence. White, unlike the city, had no personnel at the accident site during the repair operations. It was reasonable to conclude that White was held liable based solely on the peculiar-risk doctrine, which imposes vicarious liability on the employer of an independent contractor for the contractor's negligence. Further, the city had been found actively negligent in the accident [*see § 115.40*]. Because the city was actively negligent and White was only vicariously liable, White was entitled to full indemnity. The court said that to conclude otherwise would counter basic principles of common-law indemnification between vicariously liable tortfeasors and tortfeasors guilty of the acts and omissions causing the harm (*138 Cal. App. 3d 366, 375-376)* .

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11-115 California Points & Authorities § 115.91

§ 115.91 Supporting Contention That Indemnitee Is Entitled to Total Indemnification Under Principles of Comparative Indemnity--Right of Total Indemnity May Be Implied From Breach of Contractual Duty

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

INDEMNITEE IS ENTITLED TO TOTAL IMPLIED INDEMNITY FROM INDEMNITOR AS A RESULT OF INDEMNITOR'S BREACH OF A CONTRACTUAL DUTY OWED TO INDEMNITEE THAT RESULTED IN DAMAGE OR INJURY TO A THIRD PERSON FOR WHICH INDEMNITEE _____ [MAY BE *or* HAS BEEN] HELD LIABLE.

A. Implied Contractual Indemnity as Form of Equitable Indemnity. A right of indemnity may arise from equitable considerations brought into play by contractual language not expressly mentioning indemnification (*Bay Dev. Ltd. v. Superior Court (1990) 50 Cal. 3d 1012, 1029, 269 Cal. Rptr. 720, 791 P.2d 290*).

B. Negligent Performance of Contractual Duty. Implied contractual indemnity is based on the premise that a contractual obligation to perform carries with it an implied agreement to indemnify and to discharge foreseeable damages resulting from negligent performance (*Bear Creek Planning Com. v. Title Ins. & Trust Co. (1985) 164 Cal. App. 3d 1227, 1237 , disapproved on other grounds, Bay Dev. Ltd. v. Superior Court (1990) 50 Cal. 3d 1012, 269 Cal. Rptr. 720, 791 P.2d 290* ; *see also West v. Superior Court (1994) 27 Cal. App. 4th 1625, 1633, 34 Cal. Rptr. 2d 409*).

C. Total Indemnity Implied From Contract. An indemnitee who has incurred liability to a third party because of the indemnitor's negligent performance of a contractual obligation, but who has not otherwise acted negligently or unreasonably, may be awarded total indemnity (*Bear Creek Planning Com. v. Title Ins. & Trust Co. (1985) 164 Cal. App. 3d 1227, 1237, 1240-1243, 211 Cal. Rptr. 172 , disapproved on other grounds, Bay Dev. Ltd. v. Superior Court (1990) 50 Cal. 3d 1012, 269 Cal. Rptr. 720, 791 P.2d 290*)).

[2] Comments

[a] Use of Form

This form may be submitted in support of an indemnitee's contention that it is entitled, under the doctrine of implied contractual indemnity, to shift a loss that it has incurred or may incur entirely to the indemnitor. The indemnitee's contention is that the loss was incurred as a proximate result of the indemnitor's negligent performance of a contractual obligation to the indemnitee.

This form may be combined with points and authorities pertaining to the specific procedural context in which implied indemnity rights are brought before the court. It may be used in a memorandum in connection with a pretrial motion, such as a demurrer or motion for summary judgment, if a right to implied contractual indemnity may be determined as a matter of law. It may also be used to oppose confirmation of a settlement entered into between the indemnitor and the plaintiff as in good faith under *Code Civ. Proc. § 877.6*, or in a trial or an appellate brief. For discussion of the procedures by which indemnity rights may be litigated, see *§ 115.10*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. It should be established that: (1) the parties entered into an agreement by which the indemnitor, agreed to perform certain obligations to the indemnitee; (2) the agreement did not contain any express right to indemnity in favor of either party; (3) the indemnitor negligently performed its obligations required under the contract; (4) as a result of the indemnitor's negligent performance, the indemnitee incurred or may incur a loss to a third party; and (5) the indemnitee itself was otherwise blameless in causing the third party's loss.

[3] Discussion of Authorities

[a] Implied Contractual Indemnity as Form of Equitable Indemnity

In ***Bay Dev. Ltd. v. Superior Court*** *(1990) 50 Cal. 3d 1012, 269 Cal. Rptr. 720, 791 P.2d 290* , current and former owners of condominium units sued the seller of the units (Bay) for fraudulently misrepresenting the total number of parking spaces for the units. Bay then filed a cross complaint for indemnity from the company from which Bay had itself purchased the property (Home). In the cross complaint, Bay asserted that Home had breached an implied warranty in the sales contract between Bay and Home by having previously incorrectly represented the number of parking places to the California Department of Real Estate in the course of preparing a public report on the project. Bay alleged that should it be found liable to the homeowners, Home should be required to totally indemnify Bay under the doctrine of implied contractual indemnity.

The principal issue decided by the California Supreme Court in the case was whether Home's good-faith settlement with the plaintiff unit owners barred Bay's claim for implied contractual indemnity under *Code Civ. Proc. §§ 877(b)* and *877.6(c)* [*see § 115.151*]. In holding that the indemnity claim was so barred, the Court was required to resolve a conflict at the appellate level concerning the nature of the doctrine of implied contractual indemnity. Some courts had held that implied contractual indemnity was a form of equitable indemnity, and thus within the purview of *Code Civ. Proc. § 877.6* [*see Stratton v. Peat, Marwick, Mitchell & Co. (1987) 190 Cal. App. 3d 286, 291-292, 235 Cal. Rptr. 374* ; *IRM Corp. v. Carlson (1986) 179 Cal. App. 3d 94, 109-110, 224 Cal. Rptr. 438* ; *Kramer v. Cedu Found., Inc. (1979) 93 Cal. App. 3d 1, 12-13, 155 Cal. Rptr. 552]* . Others found the doctrine to be more closely akin to express contractual indemnity [*see Bear Creek Planning Com. v. Title Ins. & Trust Co. (1985) 164 Cal. App. 3d 1227, 1237-1239, 211 Cal. Rptr. 172* ; *County of Los Angeles v. Superior Court (1984) 155 Cal. App. 3d 798, 802-804, 202 Cal. Rptr. 444]* , which is not affected by any settlement entered into by the indemnitor [*see C.L. Peck Contractors v. Superior Court (1984) 159 Cal. App. 3d 828, 834, 205 Cal. Rptr. 754* ; *see also § 115.153[3][a]*].

The Court held that implied contractual indemnity is a form of equitable indemnity subject to the rules governing

equitable indemnity claims (*50 Cal. 3d 1012, 1033)* . In reaching this conclusion, the Court relied heavily on language from its earlier opinion in *E.L. White, Inc. v. City of Huntington Beach (1978) 21 Cal. 3d 497, 506-507, 146 Cal. Rptr. 614, 579 P.2d 505* . In *E.L. White*, the Court discussed the various sources from which a duty to indemnify could arise under California law. First, the obligation of indemnity may arise by virtue of express contractual language establishing a duty in one party to save another harmless on the occurrence of specified circumstances. Second, it may find its source in equitable considerations brought into play either by contractual language not specifically dealing with indemnification, or by the equities of the particular case (*50 Cal. 3d 1012, 1029)* . Thus, there is a distinction between an indemnity claim based on an express contract to indemnity, that is, an express contractual indemnity claim, and an indemnity claim based on contractual language not specifically dealing with indemnification, that is, an implied contractual indemnity claim. Unlike express contractual indemnity, implied contractual indemnity is a form of equitable indemnity (*50 Cal. 3d 1012, 1029)* .

[b] Negligent Performance of Contractual Duty

Bear Creek Planning Com v. Title Ins. & Trust Co. *(1985) 164 Cal. App. 3d 1227, 211 Cal. Rptr. 172* , was an action by a homeowners association (Bear Creek) against a title company for implied contractual indemnity for damages and attorney's fees assessed against Bear Creek in a prior slander of title action [*see Riley v. Bear Creek Planning Comm. (1976) 17 Cal. 3d 500, 131 Cal. Rptr. 381, 551 P.2d 1213]* . Bear Creek's liability was imposed because of the title company's failure to have certain covenants, conditions, and restrictions (CC&R's) timely recorded. Because of this failure, a unit was sold free of the CC&R's. When the new owners (Rileys) violated the CC&R's, Bear Creek recorded a notice of violation against them. The Rileys sued to quiet title and for slander of title, and ultimately obtained a judgment against Bear Creek.

In the subsequent indemnity action, judgment was entered for Bear Creek for amounts including damages and attorney's fees awarded against it in the slander of title action. In affirming that portion of the judgment granting indemnity for these amounts, the court of appeal stated that the right to implied indemnity is predicated on the indemnitor's breach of a contract with the indemnitee, the rationale being that a contract under which a party undertakes to do work or perform services necessarily implies an obligation to do the work involved in a proper manner and to discharge foreseeable damages resulting from improper performance absent any participation by the indemnitee in the wrongful act precluding recovery. In short, implied contractual indemnity is based on the premise that a contractual obligation to perform carries with it an implied agreement to indemnify and to discharge foreseeable damages resulting to the indemnitee from the indemnitor's negligent performance (*164 Cal. App. 3d 1227, 1237)* .

The court found that: (1) the title company was contractually bound to record the CC&R's in a timely manner, and breached its contract by failing to do so; (2) the damage suffered by Bear Creek in being found liable for slander of title was clearly a foreseeable result of that breach; (3) the title company's breach was the sole cause of the invalidity of the CC&R's with respect to the Rileys' unit; (4) in recording the notice of violation, Bear Creek was acting reasonably in fulfillment of its own obligations; and, accordingly, (5) it was foreseeable that Bear Creek would attempt to enforce the CC&R's and thereby be exposed to liability for falsely disparaging the new owners' title (*164 Cal. App. 3d 1227, 1240-1241)* . The court said that, although plaintiff's actions were essential to the disparagement of the new owners' title, the chain of causation was not broken since Bear Creek's act was reasonably foreseeable at the time of the title company's negligent conduct (*164 Cal. App. 3d 1227, 1241)* . Accordingly, the court held that the trial court properly determined that the title company was obligated to indemnify Bear Creek on the basis of an implied contract to discharge damages foreseeably sustained by Bear Creek as a result of the title company's negligent performance of a contractual duty (*164 Cal. App. 3d 1227, 1243)* .

NOTE:

In *Bay Dev. Ltd. v. Superior Court (1990) 50 Cal. 3d 1012, 1032 n.12, 269 Cal. Rptr. 720, 791 P.2d 290* [*see § 115.91[3][a]*], the California Supreme Court disapproved *Bear Creek* to the extent that it was inconsistent with the views expressed in *Bay Development.* In *Bear Creek*, the court reasoned that

implied contractual indemnity was not a form of equitable indemnity, but rather to be analyzed under the rules of express contractual indemnity [*Bear Creek Planning Com v. Title Ins. & Trust Co. (1985) 164 Cal. App. 3d 1227, 1236-1243, 211 Cal. Rptr. 172]* , a view expressly rejected by the Court in *Bay Development.* However, nothing in *Bay Development* suggests that a party to a contract may not recover implied indemnity from another party whose breach of the contract causes the nonbreaching party to be liable to a third party. In fact, the Supreme Court clearly confirmed the continuing validity of implied contractual indemnity, albeit as a form of equitable indemnity subject to bar by a good-faith settlement [*see* *Bay Dev. Ltd. v. Superior Court (1990) 50 Cal. 3d 1012, 1034-1035, 269 Cal. Rptr. 720, 791 P.2d 290]* . Thus, the above discussion of *Bear Creek* is unaffected by *Bay Development.*

West v. Superior Court *(1994) 27 Cal. App. 4th 1625, 34 Cal. Rptr. 2d 409* , involved an action by buyers of real property against the sellers and the broker who represented both parties in the transaction based on undisclosed subsidence damage to the property. The sellers cross complained against the broker for implied contractual indemnity, alleging that any liability that they might incur to the buyers was the result of the broker's negligent performance of the listing agreement (*27 Cal. App. 4th 1625, 1628-1630)* .

In upholding the right of the sellers to proceed with their indemnity claim, the court reaffirmed the continued validity of *Bear Creek*. The court stated that the right to implied contractual indemnity is predicated on the indemnitor's breach of contract, the rationale being that a contract under which the indemnitor undertook to do work or perform services necessarily implied an obligation to do the work involved in a proper manner and to discharge foreseeable damages resulting from improper performance. The court then quoted language from *Bear Creek* that "An action for implied contractual indemnity is not a claim for contribution from a joint tortfeasor; it is not founded upon a tort or upon any duty which the indemnitor owes to the injured third party. It is grounded upon the indemnitor's breach of a duty *owing to the indemnitee* to properly perform its contractual duties" (emphasis in original). The court then cited *Bear Creek* as disapproved on other grounds in *Bay Development* (*27 Cal. App. 4th 1625, 1633)* .

The court went on to hold that the sellers' action for implied contractual indemnity was not barred by the two-year limitation period of *Civ. Code § 2079.4* [*see § 115.67*] and that a cost-waiver-only settlement between the broker and the buyer based on the fact that the buyers' direct action against the broker was time barred was not in good faith within the meaning of *Code Civ. Proc. § 877.6(c)* and did not bar the indemnity claim (*27 Cal. App. 4th 1625, 1632-1637)* .

[c] Total Indemnity Implied From Contract

The facts and principal holding of ***Bear Creek Planning Com. v. Title Ins. & Trust Co.*** *(1985) 164 Cal. App. 3d 1227, 211 Cal. Rptr. 172* , are discussed in *§ 115.91[3][b]*. The court of appeal viewed the issue not as one of implied equitable indemnity involving the comparative negligence of joint tortfeasors, but rather as a right to effect a complete shift of the loss from the essentially blameless homeowners association (Bear Creek) to the negligent title company. In the view of the court, Bear Creek had incurred liability not due to any negligent or improper act of its own, but solely because of the title company's breach of its contract to record the covenants, conditions, and restrictions (*164 Cal. App. 3d 1227, 1238-1242)* . The parties were not joint tortfeasors with regard to the plaintiffs in the slander-of-title action. Implied contractual indemnity was viewed not as a claim for contribution (or equitable indemnity) from a joint tortfeasor; it is not founded on any duty that the indemnitor owes to the injured party. Rather, it is grounded on the indemnitor's breach of a duty owing to the indemnitee to properly perform its contractual duties (*164 Cal. App. 3d 1227, 1238-1239)* . Therefore, the court of appeal affirmed indemnity to Bear Creek for the entire amount of damages and attorneys' fees incurred in the slander-of-title action (*164 Cal. App. 3d 1227, 1243)* .

NOTE:

To the extent that it rests on a view that implied contractual indemnity is not a form of equitable indemnity, this analysis of *Bear Creek* was disapproved by the *California Supreme Court in Bay Dev. Ltd. v. Superior Court (1990) 50 Cal. 3d 1012, 1032 n.12, 269 Cal. Rptr. 720, 791 P.2d 290* [*see §*

115.91[3][a]]. However, in *Bay Development*, the Court affirmed a continuing right to total implied contractual indemnity on appropriate facts. In discussing the proper scope of a good-faith settlement confirmation hearing under *Code Civ. Proc. § 877.6*, the Court stated that in evaluating a settling defendant's proportionate liability for purposes of determining good faith, the trial court must take into account any contractual relationship between the settling and nonsettling defendants and must consider how each party's performance of its contractual obligations relates to its share of liability. If the court concludes that the nonsettling defendant's liability to the plaintiff is wholly attributable to the settling defendant's contractual breach, the court may decline to find the settlement to be in good faith unless the settlement provides for the dismissal of the action against the nonsettling defendant [*Bay Dev. Ltd. v. Superior Court (1990) 50 Cal. 3d 1012, 1034-1035, 269 Cal. Rptr. 720, 791 P.2d 290* ; *see* *Far W. Fin. Corp. v. D & S Co. (1988) 46 Cal. 3d 796, 815 n.15, 251 Cal. Rptr. 202, 760 P.2d 399* (rights of vicariously liable defendant with regard to settlement between actively negligent party and plaintiff); *see also § 115.90*].

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11-115 California Points & Authorities § 115.92

§ 115.92 Supporting Contention That Indemnitee Is Entitled to Total Indemnification Under Principles of Comparative Indemnity--Right of Total Indemnity in Favor of Public Entity Indemnitee May Be Implied From Licensor-Licensee Relationship

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

A RIGHT TO TOTAL INDEMNITY MAY BE IMPLIED IN FAVOR OF A PUBLIC ENTITY AS INDEMNITEE FROM A LICENSOR-LICENSEE RELATIONSHIP WITH THE INDEMNITOR.

Licensor-Licensee Relationship With Public Entity as Basis for Implied Indemnity. A public entity is entitled to total indemnity from a licensee whose negligent performance of its obligations under the license causes the public entity to incur liability to a third party who is injured as a result of the negligence (*Alameda County v. Southern Pac. Co. (1961) 55 Cal. 2d 479, 484-485, 11 Cal. Rptr. 751, 360 P.2d 327*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a public entity's contention that it is entitled, as an implied indemnitee, to shift a loss that it has incurred or may incur entirely to the indemnitor. The entity's contention is that the loss was incurred as a proximate result of the indemnitor's negligent performance of its obligations under a license agreement with the public entity.

This form may be combined with points and authorities pertaining to the specific procedural context in which implied indemnity rights are brought before the court. It may be used in a memorandum in connection with a pretrial motion, such as a demurrer or motion for summary judgment, if indemnity rights implied from a license may be determined as a matter of law. It may also be used in a trial or an appellate brief. For discussion of the procedures by which the validity

and scope of indemnity rights may be litigated, see *§ 115.10*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. It should be established that: (1) the public entity granted a license to the indemnitor for a particular purpose related to the use of public property; (2) the license was either oral or set forth in a writing that did not contain a provision expressly granting the public entity indemnity rights from the licensee; (3) the indemnitor negligently performed its obligations required under the license; and (4) as a result of the indemnitor's negligent performance, the public entity incurred or may incur a loss to a third party.

[3] Discussion of Authorities

[a] Licensor-Licensee Relationship With Public Entity as Basis for Implied Indemnity

In ***Alameda County v. Southern Pac. Co.*** *(1961) 55 Cal. 2d 479, 11 Cal. Rptr. 751, 360 P.2d 327* , County, by resolution, granted a rock and gravel company (Rock) a permit to construct, maintain, and operate, a spur railroad track across a county road from Southern Pacific tracks to its property. The permit required that Rock restore the roadway to its preconstruction condition, but apparently contained no express provisions regarding the maintenance of the crossing. It may also be assumed that there was no written indemnity agreement between the county and Rock arising from the resolution or the permit.

The track was constructed, and Southern Pacific and Rock, subsequently entered into an agreement by which Southern Pacific agreed to operate the track. The crossing fell into disrepair, and County gave notice to Southern Pacific of the need for repair. Southern Pacific gave notice to Rock that it would make them at Rock's expense. No agreement was reached, no repairs were made, and a third party subsequently suffered property damage as a result of the condition of the crossing. The third party recovered a judgment against County and Southern Pacific. County paid half of the judgment and then sued Southern Pacific and Rock for indemnity. Judgment was entered against both defendants and they appealed.

Rock argued that it was under no duty to maintain the crossing under the terms of its permit with County. In rejecting this argument, the Supreme Court stated that Rock, as the property owner that had constructed the track, was under a common-law duty to maintain the crossing in a safe condition for travel. The Court further noted that this right of indemnity extended against any person or corporation placing or maintaining a structure in the highway for his, her, or its own purpose. Southern Pacific, having obtained the right to operate the track from Rock, was under the same duty to maintain the track. The county was entitled to total indemnity from both defendants (*55 Cal. 2d 479, 483-485)* .

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§ 115.93 Supporting Contention That Indemnitee Is Entitled to Total Indemnification Under Principles of Comparative Indemnity--Right of Total Indemnity Against Employee or Agent and in Favor of Indemnitee Who Is Employer or Principal Arises From Employment or Agency Relationship

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

A RIGHT TO TOTAL INDEMNITY MAY BE IMPLIED IN FAVOR OF _____ [AN EMPLOYER *or* A PRINCIPAL] AS INDEMNITEE FROM AN _____ [EMPLOYEE *or* AGENT] AS INDEMNITOR ARISING OUT OF THE _____ [EMPLOYMENT *or* AGENCY] RELATIONSHIP.

[*EITHER*]

Employer-Employee Relationship as Basis for Implied Indemnity. If a judgment has been rendered against an employer for damages caused by the unauthorized negligent act of an employee, the employer has a right to be indemnified by the employee for the loss (*Continental Cas. Co. v. Phoenix Constr. Co. (1956) 46 Cal. 2d 423, 428, 296 P.2d 801*).

[*OR*]

Principal-Agent Relationship as Basis for Implied Indemnity. A principal who is liable for damages caused by the negligent acts of an agent solely because of the relationship of principal and agent may be indemnified by the negligent agent (*Herrero v. Atkinson (1964) 227 Cal. App. 2d 69, 77, 38 Cal. Rptr. 490* ; *see Fireman's Fund Ins. Co. v. Haslam (1994) 29 Cal. App. 4th 1347, 1353-1356, 35 Cal. Rptr. 2d 135*).

[2] Comments

[a] Use of Form

This form may be submitted in support of an employer's or principal's contention that it is entitled, as an implied indemnitee, to shift a loss that it has incurred or may incur entirely to its employee or agent, as indemnitor. The indemnitee's contention is that the loss was incurred as a sole proximate result of the indemnitor's negligence, for which the indemnitee is liable to the third party under the doctrine of respondeat superior.

This form may be combined with points and authorities pertaining to the specific procedural context in which implied indemnity rights are brought before the court. It may be used in a memorandum in connection with a pretrial motion, such as a demurrer or motion for summary judgment, if indemnity rights implied from an employment or agency relationship may be determined as a matter of law. It may also be used in a trial or an appellate brief. For discussion of the procedures by which the validity and scope of indemnity rights may be litigated, see *§ 115.10*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. It should be established that: (1) at relevant times, the indemnitor was either the employee or the agent of the indemnitee; (2) the indemnitor acted negligently while in the course and scope of his or her employment or agency; (3) as a result of the indemnitor's negligent conduct, the indemnitee incurred or may incur a loss to a third party; and (4) the indemnitee was not itself negligent with regard to the third party, but is liable only vicariously through the doctrine of respondeat superior.

[b] Related Pleading and Practice Forms

For discussion and forms for use with regard to the vicarious liability of an employer for the torts of an employee under the doctrine of respondeat superior, see California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts* (Matthew Bender). For discussion and forms for use with regard to the vicarious liability of a principal for the torts of an agent, see California Forms of Pleading and Practice, Ch. 427, *Principal and Agent* (Matthew Bender).

[3] Discussion of Authorities

[a] Employer-Employee Relationship as Basis for Implied Indemnity

Continental Cas. Co. v. Phoenix Constr. Co. *(1956) 46 Cal. 2d 423, 296 P.2d 801* , was an appeal from a judgment of the superior court in an action for declaratory relief regarding the respective obligations of insurers. A construction company (Phoenix) and a trucking company (Oilfields) entered into an agreement for certain joint ventures. They then contracted with the State of California to do certain highway construction work. A judgment was subsequently entered against both for liability caused by the negligence of one of Oilfield's employees (Mason). Phoenix's insurer Continental Casualty Company then brought an action against Oilfield and its insurers for a declaration of rights under the various policies.

In reversing the trial court's judgment that liability should be prorated, the Supreme Court held that because Mason bore the primary responsibility in the personal injury suit, Oilfield's insurers must pay the entire award to the personal injury plaintiff. In so holding, the Court noted an employer's right to recoup his or her loss in an action against a negligent employee if the loss was caused by the unauthorized, negligent act of the employee (*46 Cal. 2d 423, 428)* . Therefore, under equitable principles of subrogation, the employer's insurer who has been compelled to pay the judgment may recover against the negligent employee or the employee's insurer (*46 Cal. 2d 423, 429)* .

[b] Principal-Agent Relationship as Basis for Implied Indemnity

In ***Herrero v. Atkinson*** *(1964) 227 Cal. App. 2d 69, 38 Cal. Rptr. 490* , Herrero was involved in an automobile accident with a vehicle in which Lorenzo was a passenger. Eighteen months after the accident, Lorenzo died in the

course of surgery related to injuries received in the accident. Lorenzo's estate brought a wrongful death action against Herrero and numerous medical defendants involved in the surgery (doctors). One of the doctors cross complained against the others on the ground that if he were liable to the Lorenzo estate, it would only be because of his vicarious liability for the negligence of the other doctors. The trial court granted a demurrer to this cross complaint.

In reversing and upholding a cause of action on this ground, the court of appeal set forth the rule that a principal, liable for the negligent acts of an agent solely because of the relationship of principal and agent, may have indemnity against the negligent agent. In such a case, the liability of the agent is considered primary and that of the principal as secondary, although both are equally liable to the injured party (*227 Cal. App. 2d 69, 77)* .

Fireman's Fund Ins. Co. v. Haslam *(1994) 29 Cal. App. 4th 1347, 1353-1356, 35 Cal. Rptr. 2d 135* , involved an action for indemnity by an insurance company against one of its agents. A dispute between the insurer and an insured under a fire insurance policy arose from the agent's errors in filling out both the original application for insurance, which contained the wrong address of the insured property, and in filling out a notice of cancellation on discovering the first error, which notice did not have the date of cancellation properly entered. The insurer settled the underlying action with its insured for the $250,000 policy limits and an additional amount of $800,000 in consideration of the insurer's potential liability for bad faith practices (*29 Cal. App. 4th 1347, 1350-1353)* .

On trial of the indemnity action, the jury allocated 100 percent of the insurer's loss to the agent and entered a judgment of indemnity for the total amount of $1,050,000. On appeal, the agent sought to overturn only that part of the judgment that represented the $800,000 paid on account of possible exposure for bad faith claims practices. However, the judgment was affirmed in its entirety. The court rejected the argument that an agent should not be liable, as a matter of law, for damages that represent the insurer's bad faith. It upheld the jury instruction that allowed the insurer to recover all damages in indemnity for which the agent was the legal cause. The agent's liability arose not from the insurer's bad faith, but from his own negligence (*29 Cal. App. 4th 1347, 1354)* .

Finally, the agent argued that it should be against public policy to require him to indemnify the insurer because he owed no duty of good faith and fair dealing to the insured. But the court also rejected that argument. The basis of the agent's liability was not any duty toward the insured; rather, he was liable because he breached duties owed directly to the insurer (as principal), which breach caused loss to the principal. Whether or not the agent owed any additional or special duty to the insured was deemed irrelevant because it was not the breach of any such duty that was the basis of liability (*29 Cal. App. 4th 1347, 1355-1356)* .

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2. Total Indemnity

11-115 California Points & Authorities § 115.94

§ 115.94 Supporting Contention That Indemnitee Is Entitled to Total Indemnification Under Principles of Comparative Indemnity--Right of Total Indemnity Against Employer or Principal and in Favor of Indemnitee Who Is Employee or Agent Arises From Employment or Agency Relationship

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

A RIGHT TO TOTAL INDEMNITY MAY BE IMPLIED IN FAVOR OF AN _____ [EMPLOYEE *or* AGENT] AS INDEMNITEE FROM _____ [AN EMPLOYER *or* A PRINCIPAL] AS INDEMNITOR ARISING OUT OF THE _____ [EMPLOYMENT *or* AGENCY] RELATIONSHIP.

[*EITHER*]

Employee's Right to Indemnity From Employer. An employer must indemnify an employee for all that the employee necessarily expends or loses in direct consequence of the discharge of employment duties or of obedience to the directions of the employer (*Lab. Code § 2802*; *see Douglas v. Los Angeles Herald-Examiner (1975) 50 Cal. App. 3d 449, 461, 123 Cal. Rptr. 683*).

[*OR*]

Agent-Principal Relationship as Basis for Implied Indemnity. An agent pursuing the instructions of a principal and acting within the scope of his or her authority, who then becomes personally liable for the performance of the contract made for the principal, can look to the principal for indemnity for the damage sustained (*Rimington v. General Accident Group of Ins. Cos. (1962) 205 Cal. App. 2d 394, 397, 23 Cal. Rptr. 40* ; *see Fidelity Mortgage Trustee Service, Inc. v. Ridgegate East Homeowners Assn. (1994) 27 Cal. App. 4th 503, 509-511*).

[2] Comments

[a] Use of Form

This form may be submitted in support of an employee's or agent's contention that it is entitled, as an implied indemnitee, to shift a loss that it has incurred, or may incur, entirely to the employer or principal, as indemnitor. The indemnitee's contention is that the loss was incurred in the course of following the directions of the employer or principal.

This form may be combined with points and authorities pertaining to the specific procedural context in which implied indemnity rights are brought before the court. It may be used in a memorandum in connection with a pretrial motion, such as a demurrer or motion for summary judgment, if indemnity rights implied from an employment or agency relationship may be determined as a matter of law. It may also be used in a trial or an appellate brief. For discussion of the procedures by which the validity and scope of indemnity rights may be litigated, see *§ 115.10*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. It should be established that: (1) at relevant times, the indemnitor was either the employer or the principal of the indemnitee; (2) while acting in the course and scope of his or her employment or agency, the indemnitee incurred or may incur a loss to a third party; and (3) in incurring the loss, the employee or agent was acting under the instructions of the employer or principal.

[b] Related Pleading and Practice Forms

For discussion and forms for use with regard to the direct liability of an employer for the acts of an employee, see California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts* (Matthew Bender). For discussion and forms for use with regard to the liability of a principal to an agent for liability incurred while acting within the scope of the agency, see California Forms of Pleading and Practice, Ch. 427, *Principal and Agent* (Matthew Bender).

[3] Discussion of Authorities

[a] Employee's Right to Indemnity From Employer

In ***Douglas v. Los Angeles Herald-Examiner*** *(1975) 50 Cal. App. 3d 449, 123 Cal. Rptr. 683* , Douglas was a reporter and employee of the Herald-Examiner (Herald). A third party brought a federal court action against Douglas for various causes of action based on an article written by Douglas and published in the Herald. Douglas tendered the defense to the Herald, which refused. Douglas then obtained a dismissal of the third-party action and sued the Herald for indemnity for his costs of defending the action, alleging that *Lab. Code § 2802* required the Herald to pay these costs. The trial court entered judgment for the Herald, finding that, with regard to the acts Douglas was alleged in the federal court action to have committed, Douglas was not acting within the scope of his employment, the Herald did not authorize or direct the acts, and the Herald had no knowledge of whether or not Douglas actually committed them.

The court of appeal reversed, holding that *Lab. Code § 2802* requires an employer to defend or indemnify an employee who is sued by third persons for conduct in the course and scope of employment (*50 Cal. App. 3d 449, 461)* . The court noted that the Restatement (Second) of Law of Agency § 439(d) provides that a principal is subject to a duty to exonerate an agent for the expenses of defending actions brought by third persons because of the agent's authorized conduct (*50 Cal. App. 3d 449, 459-460)* . The court concluded that if the federal court suit was brought solely and exclusively because of acts performed for, at the direction of, and with the authorization and approval of the Herald, and the acts were specifically ratified and approved by the Herald, Douglas would be entitled to indemnity from the Herald for the costs and expenses incurred in defending the federal court action (*50 Cal. App. 3d 449, 462)* .

NOTE:

Douglas involved only a claim for costs of defense and not a claim for indemnity for liability incurred to the third party. *Lab. Code § 2802* would seem to embrace two distinct duties of the employer; (1) a duty to defend any claim brought against the employee for an act committed while within the scope of employment; and (2) a duty to indemnify an employee for liability incurred because of an act that was expressly authorized or directed by the employer, similar to the rule expressed in Restatement (Second) of Agency § 439(d). Thus, an employee who is sued for negligent driving while on the employer's business is entitled to a defense but not to indemnity for liability; indeed the indemnity rights in that situation are in favor of the employer [*see § 115.93*; *but see Holt v. Booth (1991) 1 Cal. App. 4th 1074, 1080 n.6, 2 Cal. Rptr. 2d 727* (dicta in footnote suggesting that statute may require vicariously liable employer to indemnify negligent employee for liability to third party arising from conduct within scope of employment)]. However, if the employee is driving negligently under the express instructions of the employer, such as under an order to make a delivery within a given time regardless of the risk that it might entail to the public, the employee should be entitled to indemnity for any liability to a third party who is injured due to the employee's negligent driving [*see Jensen v. Southern Pac. Co. (1954) 129 Cal. App. 2d 67, 70-71, 276 P.2d 703]* .

[b] Agent-Principal Relationship as Basis for Implied Indemnity

In ***Fidelity Mortgage Tr. Serv., Inc. v. Ridgegate E. Homeowners Ass'n*** *(1994) 27 Cal. App. 4th 503, 32 Cal. Rptr. 2d 521* , a homeowners association and its property management company hired a foreclosure trustee to foreclose on a lien for unpaid homeowners' fees against a condominium unit. The unit owner brought an action against all three entities for various alleged wrongs committed in the course of the foreclosure. The management company prevailed on summary judgment, and the association and trustee won a complete defense jury verdict at trial. The foreclosure trustee then brought an indemnity action against the association and management company for reimbursement of its costs and attorney's fees incurred in defending the underlying action (*27 Cal. App. 4th 503, 506-507)* .

The trial court summarily adjudicated that there was no right to indemnity for attorney's fees under *Code Civ. Proc. § 1021.6* because the prospective indemnitee (foreclosure trustee) had not tendered the defense of the underlying action to the alleged indemnitors (association and management company) [*see Code Civ. Proc. § 1021.6(b)*]. In reversing, the court of appeal found the potential right to indemnity in agency law principles rather than in the statute. It assumed for purposes of the appeal that the trustee was the agent of both indemnitors (*see 27 Cal. App. 4th 503, 508 n.6*). It cited the general agency rule that an agent is entitled to indemnification by its principal for losses incurred by the agent in the execution of the agency [*see* Restatement (Second) of Agency, § 438]. For example, an agent that becomes personally liable for the performance of a contract entered into for its principal is entitled to indemnification by the principal for damages sustained because of the breach of that agreement (*27 Cal. App. 4th 503, 509)* .

The court also cited the agency rule that a principal has a duty to its agent, who is not barred by the illegality of his or her conduct, to indemnify the agent for expenses of defending actions by third persons brought because of the agent's authorized conduct [*see* Restatement (Second) of Agency § 439(d)]. It held that the scope of indemnity recoverable extended to attorney's fees incurred, and that the agent's failure to notify the principal and tender the defense to the principal meant only that the agent was required to prove that he had made a reasonable defense (*27 Cal. App. 4th 503, 510-511)* .

Rimington v. General Accident Group of Ins. Cos. *(1962) 205 Cal. App. 2d 394, 23 Cal. Rptr. 40* , was an appeal from an order of the superior court striking a cross complaint for declaratory relief and sustaining a demurrer to the cross complaint without leave to amend. Plaintiff company had filed a complaint by which it sought to determine the rights and liabilities of several insurance companies and Rimington, the alleged agent of the insurance companies. Rimington filed a cross complaint against the insurance companies seeking a declaration of his right to indemnification from the insurers for any judgment rendered against him. The trial court granted cross defendants' motions to strike and

sustained their demurrers without leave to amend. The court of appeal reversed. The court noted that an agent pursuing the instructions of his or her principal and acting within the scope of his or her authority who becomes personally liable for the performance of the contract made for his or her principal, can look to the principal for indemnity for the damage sustained (*205 Cal. App. 2d 394, 397)* .

[4] Additional Authorities

[a] Employee's Right to Indemnity From Employer

In *Jacobus v. Krambo Corp. (2000) 78 Cal. App. 4th 1096, 93 Cal. Rptr. 2d 425* , an employee was sued by a co-worker for sexual harassment, and the employer chose not to tender a defense for the employee. After the employee was found not to be liable, the employee sought indemnification from his employer under *Lab. Code § 2802* for the legal costs incurred in defending the suit. The trial court granted summary judgment for the employer, but the court of appeal reversed. The court of appeal noted that even though sexual misconduct falls outside the course and scope of employment, the employee's acts were found not to constitute sexual misconduct, the allegedly actionable behavior was simply part of the social intercourse that occasionally occurs in the office setting, and the co-worker's suit was apparently a response to an adverse employment evaluation. Therefore, under these facts, the court held that the employee could recover the expenses incurred in defending the suit from his employer (*78 Cal. App. 4th 1096, 1104)* .

In *Grissom v. Vons Cos., Inc. (1991) 1 Cal. App. 4th 52, 1 Cal. Rptr. 2d 808* , a truck driver who was acting within the scope of his employment was injured in an accident and claimed workers' compensation from his employer. He also sued various parties for his injuries, who, in turn, cross complained against him for their injuries. He demanded that his employer defend him under *Lab. Code § 2802* on the cross complaints. The employer provided him with the same counsel who was representing the employer on the workers' compensation claim. The employee rejected this counsel and brought an action for declaratory relief that the employer was required to provide him with independent counsel. The court of appeal determined that whether independent counsel was "necessary" under *Lab. Code § 2802* on the facts presented was not adequately pleaded, and remanded for an opportunity to amend the complaint (Cal. App. 4th 52, 57-59).

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11-115 California Points & Authorities § 115.95

§ 115.95 Supporting Contention That Indemnitee Is Entitled to Total Indemnification Under Principles of Comparative Indemnity--Right of Total Indemnity Is Available From Intentional Tortfeasor in Favor of Negligent Indemnitee

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

INDEMNITEE IS ENTITLED TO RECOVER TOTAL INDEMNITY FROM INDEMNITOR WITH REGARD TO THE LIABILITY AT ISSUE BECAUSE INDEMNITEE'S CONDUCT WAS MERELY NEGLIGENT, WHILE INDEMNITOR ACTED INTENTIONALLY AND WILLFULLY.

Total Indemnity From Intentional Tortfeasor. The entire liability for a loss may be shifted from a tortfeasor who was only negligent to a tortfeasor whose intentional conduct also gave rise to the liability (*Cicone v. URS Corp. (1986) 183 Cal. App. 3d 194, 212-213, 227 Cal. Rptr. 887*).

[2] Comments

[a] Use of Form

This form may be submitted in support of an indemnitee's contention that it is entitled, as an implied indemnitee, to shift a loss that it has incurred, or may incur, entirely to another tortfeasor. The indemnitee's contention is that its conduct toward the injured party was only negligent, while the conduct of the indemnitor was intentional.

This form may be combined with points and authorities pertaining to the specific procedural context in which implied indemnity rights are brought before the court. It may be used in a memorandum in connection with a pretrial motion, such as a demurrer or motion for summary judgment, if the respective negligent and intentional conduct may be determined as a matter of law. It may also be used in a trial or an appellate brief. For discussion of the procedures by which the validity and scope of indemnity rights may be litigated, see *§ 115.10*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. It should be established that: (1) the indemnitee incurred or may incur a loss to a third party for which the indemnitor is or may also be liable; (2) the conduct of the indemnitee that may have proximately caused the loss may only be characterized as negligent; (3) conduct of the indemnitor was also a proximate cause of the loss; and (4) the conduct of the indemnitor may only be characterized as intentional.

[3] Discussion of Authorities

[a] Total Indemnity From Intentional Tortfeasor

In ***Cicone v. URS Corp.*** *(1986) 183 Cal. App. 3d 194, 227 Cal. Rptr. 887* , former clients sued an attorney for legal malpractice arising from his representation in the sale of the clients' business. The attorney cross complained against the buyer of the business and their counsel, alleging various causes of action, including one for fraud based on statements made in the course of negotiations. The attorney also cross complained for both partial and total equitable indemnity. The trial court granted a general demurrer to the cross complaint.

The court of appeal reversed as to all causes of action. With regard to the claim for total equitable indemnity, the court agreed with the court in *E.L. White, Inc. v. City of Huntington Beach (1982) 138 Cal. App. 3d 366, 375-376, 187 Cal. Rptr. 879* [*see § 115.90*], that a complete shift of loss is still possible under principles of comparative fault. The court stated that indemnity only requires a significant difference in the kind or quality of the conduct of each tortfeasor. Here, the attorney was alleged only to have been negligent, while the buyers were alleged to have intentionally deceived the attorney and the sellers. Should fraud be proved at trial, the entire liability may be shifted to the buyers. On the other hand, if the buyers were to be found to have been only negligent in their representations to the attorney, partial indemnity under principles of comparative negligence would come into play (*183 Cal. App. 3d 194, 211-213)* .

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§ 115.96 Supporting Motion by Indemnitee for Award of Attorney's Fees in Action for Implied Total Indemnity [Code Civ. Proc. § 1021.6]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*]	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ATTORNEYS' FEES
vs.	)	[*Code Civ. Proc. § 1021.6*]
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

A PREVAILING IMPLIED INDEMNITEE MAY BE AWARDED ATTORNEY'S FEES FOR _____ [DEFENSE *or* PROSECUTION] OF A THIRD-PARTY SUIT IF, ON MOTION, THE COURT FINDS THAT THE INDEMNITOR'S TORT REQUIRED THE INDEMNITEE TO PROTECT ITS INTERESTS BY _____ [BRINGING AN ACTION AGAINST *or* DEFENDING AN ACTION BY] A THIRD PARTY, THE INDEMNITOR WAS PROPERLY NOTIFIED OF THE DEMAND _____ [TO BRING THE

ACTION *or* PROVIDE THE DEFENSE] AND DID NOT DO SO, AND THE INDEMNITEE _____ [WAS WITHOUT FAULT IN THE PRINCIPAL CASE THAT WAS THE BASIS FOR THE ACTION IN INDEMNITY *or* HAD A FINAL JUDGMENT ENTERED IN HIS/HER FAVOR GRANTING _____ (A SUMMARY JUDGMENT *or* A NONSUIT *or* A DIRECTED VERDICT)].

A. Attorney's Fees Incurred in Defending or Bringing Third-Party Suit Allowed to Person Who Prevails on Claim for Implied Indemnity. A court may award attorney's fees to a person who prevails on a claim for implied indemnity if, on motion, the court reviews the evidence in the principal case and finds that (1) the tort of the indemnitor required the indemnitee to act in protection of his or her own interests by bringing an action against or defending an action by a third party; (2) the indemnitor was properly notified of the demand to bring the action or provide the defense and did not do so; and (3) the trier of fact determined that the indemnitee was without fault in the principal case that is the basis for the action in indemnity or that the indemnitee had a final judgment entered in his or her favor granting a summary judgment, a nonsuit, or a directed verdict (*Code Civ. Proc. § 1021.6*).

[*Optional*] **B. Defendant Prevailing in Underlying Action Is Party Prevailing on Claim for Implied Indemnity.** If a defendant is found to be without fault and prevails in the underlying action, and therefore does not have occasion to prevail on a claim for indemnity against the party at fault, the defendant is still entitled to seek attorney's fees under *Code Civ. Proc. § 1021.6*; in such a case, the defendant is deemed to have "prevailed on a claim for indemnity" (*Uniroyal Chem. Co., Inc. v. American Vanguard Corp. (1988) 203 Cal. App. 3d 285, 294-296, 249 Cal. Rptr. 787* ; *see Bay Dev. Ltd. v. Superior Court (1990) 50 Cal. 3d 1012, 269 Cal. Rptr. 720, 791 P.2d 290*).

[*Optional*] **C. Defendant Found Liable as Matter of Law for Acts of Indemnitor in Underlying Action Is Without Fault.** An implied indemnitee who is liable for the acts of another as a matter of law may be without "fault" in the principal case within the meaning of *Code Civ. Proc. § 1021.6*, and therefore entitled to attorneys' fees incurred in defending the case (*Bear Creek Planning Com. v. Title Ins. & Trust Co. (1985) 164 Cal. App. 3d 1227, 1245, 211 Cal. Rptr. 172* ; *see Uniroyal Chem. Co., Inc. v. American Vanguard Corp. (1988) 203 Cal. App. 3d 285, 297-301, 249 Cal. Rptr. 787*).

[*Optional*] **D. "Principal Case" Is Action in Which Defendant Incurred Attorney's Fees.** The "principal case" referred to in *Code of Civil Procedure Section 1021.6* is the action that caused the innocent indemnitee to defend itself and thereby incur attorney fees, as distinguished from the action for indemnity in which the Section 1021.6 fees are sought. The reference is not necessarily to the original action brought by a plaintiff, but may refer to a cross complaint triggered by that original action (*Wilson, McCall & Daoro v. American Qualified Plans, Inc. (1999) 70 Cal. App. 4th 1030, 1036, 83 Cal. Rptr. 2d 192*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion by a prevailing indemnitee on a claim for total implied indemnity for attorneys' fees incurred in bringing or defending an underlying tort action [*see Code Civ. Proc. § 1021.6*]. The most common situation for this form is one in which the indemnitee was sued by a tort victim based on some legal or alleged responsibility for the indemnitor's acts [*see, e.g., Bear Creek Planning Com. v. Title Ins. & Trust Co. (1985) 164 Cal. App. 3d 1227, 211 Cal. Rptr. 172]* . However, another situation would be one in which the indemnitee was required by the tort of another to bring an action against a third person--for example, an action to quiet title that was made necessary because of a negligently prepared and recorded document [*see, e.g., Prentice v. North Am. Title Guar. Corp. (1963) 59 Cal. 2d 618, 620, 30 Cal. Rptr. 821, 381 P.2d 645]* .

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. It should be established that: (1) because of the indemnitor's tortious conduct, the indemnitee was either required

to bring an action against a third party or defend an action brought by a third party in which it was alleged that the indemnitee was responsible for the conduct of the indemnitor; (2) the indemnitor refused the indemnitee's demand to either bring or defend the action on behalf of the indemnitee; and (3) either the indemnitee was determined to be without fault in underlying action, or there is a final judgment in the indemnitee's favor after summary judgment, nonsuit, or directed verdict. If the indemnitee was determined to be without fault, it should be established whether that determination also resulted in no liability to the indemnitee, so as to make moot the actual claim for indemnity, or whether the indemnitee, even though faultless, remains liable to the third party and thus entitled to implied indemnity from the indemnitor.

[b] Related Pleading and Practice Forms

For a form of notice of motion, declaration, and order for attorney's fees under Code Civ. Proc. § 1021.6, see California Forms of Pleading and Practice, Ch. 300, *Indemnity and Contribution* (Matthew Bender).

[3] Discussion of Authorities

[a] Attorney's Fees Incurred in Defending or Bringing Third-Party Suit Allowed to Person Who Prevails on Claim for Implied Indemnity

The legislature enacted *Code Civ. Proc. § 1021.6* in 1979 to reverse the Supreme Court's ruling in *Davis v. Air Technical Indus., Inc. (1978) 22 Cal. 3d 1, 148 Cal. Rptr. 419, 582 P.2d 1010* . *Davis* was a products liability case in which both Davis and Air Technical were sued on causes of action for negligence, breach of express warranty, and strict liability arising out of defects in an elevator that caused plaintiff's injuries. When Air Technical refused Davis's request to defend him, Davis cross complained against it for indemnity and attorney's fees incurred in defending the principal action. The jury had found both Air Technical and Davis strictly liable, but the trial court had already granted Davis's motion for nonsuit on the breach of warranty and plaintiff had voluntarily dismissed the negligence claim. In a separate trial on the cross complaint, the court found that Davis had not been actively negligent and awarded Davis both indemnification for the amount of the damages ($7,516) and attorney's fees ($19,804.77). On Air Technical's appeal, the Supreme Court ruled that because it was clear that Davis did not defend on Air Technical's behalf but was concerned exclusively with contesting the allegations of his own negligence and breach of warranty, the basic American rule applied that even if vindicated, tort defendants must pay their own attorney's fees. The Court found inapposite the statement in *Prentice v. North Am. Title Guar. Corp. (1963) 59 Cal. 2d 618, 620, 30 Cal. Rptr. 821, 381 P.2d 645* , that a person who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover compensation for the reasonably necessary loss of time, attorney's fees, and other expenditures thereby suffered or incurred. In *Prentice*, the Court had held that plaintiffs were entitled to recover attorney's fees because an escrow holder's negligence in closing a land sale forced plaintiffs to bring a quiet title action against third parties. In *Davis*, the Court stated that these were exceptional circumstances (the basis for one common-law exception to the application of the American rule) because if plaintiffs had not been entitled to attorney's fees, they would have only recovered their court costs as damages.

The enactment of *Code Civ. Proc. § 1021.6* (Stats. 1979, ch. 289) requires an opposite result under the facts of *Davis.* The tort of Air Technical required Davis to act in his own interests, Air Technical had been requested to defend Davis, and Davis was found not to be at fault in the principal case (although, in fact, the jury did not make such a determination because the warranty and negligence claims against Davis had already been dismissed).

NOTE:

The equitable "tort of another" doctrine as articulated in *Prentice* is an alternative ground for attorneys' fees apart from the statute. Under the doctrine, one who through the tort of another has been required to act in the protection of his or her own interests by bringing or defending an action against a third person is entitled to recover compensation for attorneys' fees incurred as an element of damages and not as attorneys' fees qua attorneys' fees [*Prentice v. North Am. Title Guar. Corp. (1963) 59 Cal. 2d 618,*

620, 30 Cal. Rptr. 821, 381 P.2d 645 ; *Heckert v. MacDonald (1989) 208 Cal. App. 3d 832, 836-838, 256 Cal. Rptr. 369]* . Proof of a demand to bring or defend the action is not required [*see Code Civ. Proc. § 1021.6(b)*] However, the "tort of another" doctrine applies only when the potential indemnitor owed a legal duty of care to the indemnitee that can serve as a basis for the right to indemnification. It cannot be used by all exonerated defendants in commonplace, multiparty tort litigation to recover attorney's fees from unrelated codefendants who are held liable [*Watson v. Department of Transp. (1998) 68 Cal. App. 4th 885, 893-894, 80 Cal. Rptr. 2d 594]* .

General principles of agency law provide another, alternative route to attorney's fees apart from the statute. The court of appeal has held that an agent may seek indemnity from its principal for expenses incurred in defending a third-party action, and that the agent need not have tendered its defense of the action to the principal as an absolute prerequisite to indemnification [*Fidelity Mortgage Trustee Service, Inc. v. Ridgegate East Homeowners Assn. (1994) 27 Cal. App. 4th 503, 509-511, 32 Cal. Rptr. 2d 521* ; *see § 115.94[3][b]*].

[b] Defendant Prevailing in Underlying Action Is Party Prevailing on Claim for Implied Indemnity

In ***Uniroyal Chem. Co., Inc. v. American Vanguard Corp.*** *(1988) 203 Cal. App. 3d 285, 249 Cal. Rptr. 787* , the underlying action was a products liability case in which two farmers sued the manufacturer (Amvac), wholesaler (Leffingwell), and retailer (Helena) of an allegedly defective chemical. The defendants filed cross complaints against one another seeking indemnity and declaratory relief. The jury found in favor of the farmers against Amvac and Leffingwell, but returned a defense verdict in favor of Helena.

In addition, as between Amvac and Leffingwell, the jury determined that Amvac was 100 percent at fault, and that Leffingwell was entitled to total indemnity from Amvac. However, the jury never reached Helena's indemnity claims, having been instructed that this resolution would be irrelevant if it found that the farmers were not entitled to judgment against Helena. After the entry of judgment, Helena and Leffingwell filed motions for attorneys' fees incurred in defending the farmers' action pursuant to *Code Civ. Proc. § 1021.6*.

The court denied Helena's claim on the ground that Helena had not prevailed on a claim for implied indemnity against Amvac as required by the statute because the farmers did not obtain a judgment against Helena in the underlying action. The court of appeal reversed the denial of the motion. It stated that if the trial court's reasoning were correct, the obvious purpose of *Code Civ. Proc. § 1021.6* would be thwarted. On one hand, a defendant who is successful at trial and receives a defense verdict on plaintiff's cause of action would not be entitled to attorneys' fees. On the other hand, a defendant who is found liable to the plaintiff under some theory of law, but prevails on its claim for total implied indemnity may recover its attorney's fees incurred in defending against plaintiff's tort claim. The court noted that in amending *Code Civ. Proc. § 1021.6*, the legislature provided for attorneys' fees if the indemnitee had a final judgment entered in his or her favor granting a summary judgment, a nonsuit, or a directed verdict. Thus, the statute contemplates that one may recover attorney's fees after a favorable judgment entered without trial in the principal case. It would be unfair and incongruous to deny the same relief to one who prevailed to the same extent by reason of a verdict. Courts have a duty to interpret statutes in a way that makes them workable and reasonable; a court's interpretation should not frustrate the manifest purposes of the legislation or lead to absurd results (*203 Cal. App. 3d 285, 294-296)* .

The facts and principal holding of ***Bay Dev. Ltd. v. Superior Court*** *(1990) 50 Cal. 3d 1012, 269 Cal. Rptr. 720, 791 P.2d 290* , are discussed in *§ 115.91[3][a]*. Bay's cross complaint for implied contractual indemnity from another defendant (Home) was dismissed after Home's settlement with the plaintiffs was confirmed as in good faith under *Code Civ. Proc. § 877.6*. Bay initiated writ proceedings to review the dismissal, and while the proceedings were pending in the court of appeal, plaintiffs proceeded to trial against Bay. Bay was absolved of all liability by the jury. The issue of mootness was then presented in the writ proceeding in that Bay, having no liability, had nothing to be indemnified for.

The California Supreme Court refused to dismiss for mootness. It stated that Bay continued to have a substantial economic interest in proceeding on its indemnity claim because if it were entitled to indemnity, it could recover its attorneys' fees under *Code Civ. Proc. § 1021.6*. The Court then cited *Uniroyal Chemical v. American Vanguard* for its holding that a would-be indemnitee may be eligible to recover attorneys' fees under *Code Civ. Proc. § 1021.6* even if it has been absolved of all liability for the plaintiff's injuries, as long as the indemnitee demonstrates that it would have been entitled to indemnity for any judgment that might have been rendered against it (*50 Cal. 3d 1012, 1026-1027)* .

NOTE:

The court of appeal has clarified that application of *Code Civ. Proc. § 1021.6* to the situation in which a claim for indemnity is rendered unnecessary due to a finding that the indemnitee is not liable presupposes that a valid claim for indemnity would have existed. A faultless defendant who cannot show a right to indemnification from the party at fault cannot recover attorney's fees under *Code Civ. Proc. § 1021.6* [*Watson v. Department of Transp. (1998) 68 Cal. App. 4th 885, 890-891, 80 Cal. Rptr. 2d 594]* .

[c] Defendant Found Liable as Matter of Law for Acts of Indemnitor in Underlying Action Is Without Fault

The facts and procedural background of *Bear Creek Planning Com. v. Title Ins. & Trust Co. (1985) 164 Cal. App. 3d 1227, 211 Cal. Rptr. 172* , are discussed in *§ 115.91[3][b]*. In the underlying action, the homeowners association (Bear Creek) had been found liable for slander of title due to the negligence of the title company in failing to record certain conditions, covenants, and restrictions. The title company argued that Bear Creek was not entitled to attorneys' fees incurred in defending the slander of title action under *Code Civ. Proc. § 1021.6* because the trier of fact determined that Bear Creek was at fault in that action. The trial court disagreed, and the court of appeal affirmed.

The court construed the statute as referring to the trier of fact in the indemnity action, not in the principal action. It is in the indemnity action in which the trier of fact must determine whether the indemnitee's conduct was of a nature that would preclude recovery of implied indemnity. That the indemnitee was found liable for damages in the principal action forms no basis for denying attorneys' fees in the indemnity action; rather, it is the basis for the indemnity action and the award of attorneys' fees therein (*164 Cal. App. 3d 1227, 1245)* . Thus, any theory under which the indemnitee is found to be entitled to total implied indemnity (*see § 115.90-* 95) meets the requirements of *Code Civ. Proc. § 1021.6*.

The facts of ***Uniroyal Chem. Co., Inc. v. American Vanguard Corp.*** *(1988) 203 Cal. App. 3d 285, 249 Cal. Rptr. 787* , are discussed in *§ 115.96[3][b]*. The trial court had denied Leffingwell's motion for attorneys' fees under *Code Civ. Proc. § 1021.6* because the jury had found Leffingwell liable to the farmers in the underlying action, and thus, it could not be said that Leffingwell was without fault (*203 Cal. App. 3d 285, 298)* .

The court of appeal reversed under the reasoning of *Bear Creek*. The finding that the indemnitee is without fault is the finding made in the indemnity claim. In this case, although the jury had found Leffingwell to be liable to the farmers, in considering Leffingwell's and Amvac's respective cross complaints for indemnity it had awarded Leffingwell total indemnity. Thus, Leffingwell was determined by the trier of fact to have been without fault (*203 Cal. App. 3d 285, 299-301)* .

NOTE:

The court in *Uniroyal* stressed that *Code Civ. Proc. § 1021.6* is a discretionary statute. If its requirements are met, the court may award attorneys' fees after reviewing the evidence in the principal case [*Uniroyal Chem. Co., Inc. v. American Vanguard Corp. (1988) 203 Cal. App. 3d 285, 301, 249 Cal. Rptr. 787]* .

[d] "Principal Case" Is Action in Which Defendant Incurred Attorney's Fees

In ***Wilson, McCall & Daoro v. American Qualified Plans, Inc.*** *(1999) 70 Cal. App. 4th 1030, 83 Cal. Rptr. 2d 192* ,

an accounting firm and a law firm were sued for professional negligence based on allegations that they failed to properly advise on the differences between federal and California law when stock was sold through an employee stock ownership plan. The accounting firm and the law firm filed separate cross complaints for indemnity and declaratory relief against each other and against a consulting firm who was not named as a defendant in the professional negligence action. In their individual cross complaints against the consulting firm, both the accounting firm and the law firm alleged that if they were found liable, that liability was the result of the consulting firm's failure to properly advise the malpractice plaintiff of the tax consequences of his stock sale. After unsuccessfully tendering defense of the law firm's cross complaint to the accounting firm, and the accounting firm's cross complaint to the law firm, the consulting firm cross complained against the accounting firm and law firm seeking indemnity and attorney's fees under *Code Civ. Proc. § 1021.6*. The consulting firm then moved for summary judgment on the cross complaints brought against it on the basis that it owed no duty to the malpractice plaintiff and thus could not be liable. The trial court granted summary judgment for the consulting firm on both cross complaints brought against it. The consulting firm then settled the cross complaint that it had brought against the law firm, with the law firm agreeing to pay $30,000 to the consulting firm to help pay for the attorney fees the consulting firm had incurred. The accounting firm then moved for summary judgment on the cross complaint brought against it by the consulting firm. The trial court granted the motion on the grounds that the consulting firm had never paid a judgment or settlement in the litigation, was never adjudicated a joint tortfeasor, and did not bring or defend an action against a third party within the meaning of *Code Civ. Proc. § 1021.6*. The consulting firm appealed.

The court of appeal reversed with directions to the trial court to entertain the consulting firm's motion for attorney's fees under *Code Civ. Proc. § 1021.6*. The consulting firm argued that, when the accounting firm refused to defend it, it was required to defend at its own expense the cross complaint brought by the law firm and that the need to defend the action was due to the negligence of the accounting firm. As such, it was entitled to attorney's fees under *Code Civ. Proc. § 1021.6*. The accounting firm countered that *Code Civ. Proc. § 1021.6* was inapplicable to the consulting firm's claim for attorney's fees, arguing in part that the "principal case" for purposes of applying *Code Civ. Proc. § 1021.6* was the professional negligence action and that, under that interpretation, the consulting firm was not forced to bring an action against or defend an action brought by a "third party" and thus did not meet the requirements for recovery of attorney's fees under *Code Civ. Proc. § 1021.6*. The court of appeal disagreed with the accounting firm, holding that the "principal case" referred to in *Code Civ. Proc. § 1021.6* is the action that causes the innocent indemnitee to defend itself and thereby incur attorney fees, as distinguished from the indemnitee's action for indemnity in which the *Code Civ. Proc. § 1021.6* fees are sought (*70 Cal. App. 4th 1030, 1036)* . The reference does not necessarily mean the original action brought by a plaintiff, and in this case, did not refer to the professional negligence action. A cross complaint is a separate pleading based on an independent cause of action, and since the consulting firm tendered defense of the cross complaint brought against it by the law firm to the accounting firm, and the accounting firm refused to defend the consulting firm, *Code Civ. Proc. § 1021.6* applied to the consulting firm's claim for attorney's fees. For these purposes, the consulting firm was forced to defend an action brought by a "third party" when it was forced to defend the action brought by the law firm. The court rejected the argument that the consulting firm had to have been named as a defendant in the professional negligence action in order to seek attorney's fees under *Code Civ. Proc. § 1021.6* (*70 Cal. App. 4th 1030, 1036-1037)* . The court noted, however, that the consulting firm would still have to establish on remand that the law firm's cross complaint against the consulting firm arose from the tortious conduct of the accounting firm (*70 Cal. App. 4th 1030, 1038)* .

Applying Bay Dev., Ltd. v. Superior Court (1990) 50 Cal. 3d 1012, 269 Cal. Rptr. 720, 791 P.2d 290 [*see § 115.96[3][b]*], the court also rejected the argument that the consulting firm could not recover attorney's fees under *Code Civ. Proc. § 1021.6* because it never paid a judgment or settlement and was never adjudicated to be a joint tortfeasor in the litigation (*70 Cal. App. 4th 1030, 1037-1038)* .

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11-115 California Points & Authorities § 115.97

§ 115.97 Opposing Contention That Indemnitee is Entitled to Total Indemnification Under Principles of Comparative Indemnity--Indemnitor Cannot be Liable for Implied Contractual Indemnity When Indemnitor Has Complete Defense Against Liability to Injured Third Party

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

A DEFENDANT CANNOT BE HELD LIABLE FOR IMPLIED CONTRACTUAL INDEMNITY WHEN DEFENDANT HAS A COMPLETE DEFENSE TO DIRECT LIABILITY TO THE INJURED THIRD PARTY.

Implied Contractual Indemnity Barred When Indemnitor Cannot be Held Directly Liable to Injured Third Party. As with any claim for equitable indemnity, in a claim for implied contractual indemnity, the alleged indemnitor does not owe indemnity for liability imposed on the indemnitee if the indemnitor cannot be held liable directly to the injured third party, as, for example, when the indemnitor is statutorily immune from liability to the injured third party (*Prince v. Pacific Gas & Electric Co. (2009) 45 Cal. 4th 1151, 1165, 90 Cal. Rptr. 3d 732, 202 P.3d 1115*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that defendant may be held liable for implied contractual indemnity. The basis for the opposition is that defendant cannot be held liable for indemnity to a tortfeasor when defendant has a complete defense that would prevent being held directly liable to the injured third party.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the contention that the claim for implied contractual indemnity must fail. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law stated. Thus, counsel should include facts establishing that defendant has a complete defense to direct liability to the injured third party.

[c] Opposing Points and Authorities

For points and authorities supporting the contention that implied contractual indemnity may be pursued, see *§ 115.91*.

[3] Discussion of Authorities

[a] Implied Contractual Indemnity Barred When Indemnitor Cannot be Held Directly Liable to Injured Third Party

In ***Prince v. Pacific Gas & Electric Co.*** *(2009) 45 Cal. 4th 1151, 90 Cal. Rptr. 3d 732, 202 P.3d 1115* , a 10-year-old boy was injured when he used a metal pole to try to retrieve his kite from a power line. He filed suit against the landowner, who filed a cross-complaint for implied contractual indemnity against the electric utility company, which had an easement on the land for purposes of erecting and maintaining the power lines. The parties agreed that the utility company could not be directly liable to the boy due to *Civ. Code § 846*, which generally provides that a landowner owes no duty of care to keep premises safe for entry or use for recreational purposes. The landowner argued, however, that the utility company could be liable to indemnify her for any liability she would incur based on the company's breach of contractual duties owed to her to maintain the power lines in repair. The trial court granted summary judgment in favor of the utility company on the indemnity claim, concluding that the because the company had a complete defense to direct liability to the injured boy, the company was not jointly and severally liable for the injury and could not owe equitable indemnity, which included implied contractual indemnity, to the landowner. The court of appeal reversed, holding that the utility's contactual duties to the landowner arising from the easement were separate from any duties owed to the boy, and thus were unaffected by the recreational-use immunity of *Civ. Code § 846*. The utility company appealed.

The California Supreme Court reversed the court of appeal. After reviewing the general principles of indemnity as developed in earlier case law, the Court concluded that implied contractual indemnity has always been a species of equitable, or comparative, indemnity. The Court also noted that, under established case law, a party can recover equitable indemnity only if the indemnitor shares with the indemnitee a joint legal obligation to the injured party (*45 Cal. 4th 1151, 1160-1161)* . Consistent with these established principles, the Court held that a claim for implied contractual indemnity is subject to the rule that "there can be no indemnity without liability." Thus, because the utility company was immune from liability to the injured boy, the landowner could not recover implied contractual indemnity from the company (*45 Cal. 4th 1151, 1165)* . The Court also noted that implied contractual indemnity is restitutionary in nature, meaning that the indemnitor would otherwise be unjustly enriched at the expense of the indemnitee when the latter discharges a liability that should be the responsibility of the indemnitor. By recognizing the restitutionary nature of this remedy and requiring a joint liability to the injured third party, the Court stated its intent to prevent parties from turning what would otherwise essentially be contractual claims into vehicles for the recovery of tort damages (*45 Cal. 4th 1151, 1166* & n.10). Finally, the Court rejected the landowner's assertions that it would be inequitable to bar indemnity from the utility company. The Court noted that the landowner herself still had a potential defense to liability under *Civ. Code § 846*, subject to further fact-finding, and that if her defense under that statute failed, it would be solely due to her own conduct in expressly inviting the boy onto the property, thus bringing the boy's claim against her within a statutory exception to immunity. The utility company, however, did nothing to compromise either its own immunity or that of the landowner (*45 Cal. 4th 1151, 1168-1169)* .

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[Reserved]

§§ 115.98[Reserved]

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11-115 California Points & Authorities § 115.110

§ 115.110 Supporting Contention That Nontort Obligor Is Entitled to Contribution [Civ. Code § 1432]--Party to Joint or Joint and Several Obligation Has Paid More Than Proportionate Share of Obligation

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

_____ [*Party seeking contribution, e.g.,* PLAINTIFF], ONE OF _____ [*number, e.g.,* TWO] JOINT AND SEVERAL OBLIGORS, HAS PAID _____ [ALL *or* MORE THAN ITS PROPORTIONATE SHARE] OF THE OBLIGATION AND IS ENTITLED TO CONTRIBUTION FROM THE OTHER OBLIGOR(S).

Contribution Among Obligors. A party to a joint, or joint and several, obligation who satisfies more than his or her share of the claim against all may require a proportionate contribution from all the parties joined in the obligation (*Civ. Code § 1432*; *see Murchison v. Murchison (1963) 219 Cal. App. 2d 600, 604, 33 Cal. Rptr. 285*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a right of contribution between nontort obligors resting on other than satisfaction of a judgment. *Civ. Code § 1432* provides for such a right. *Code Civ. Proc. §§ 881-883* provide a post-judgment procedure for contribution among judgment debtors [*see § 115.111*].

Unlike Code Civ. Proc. *§§ 881-883, Civ. Code* § 1432 is not expressly limited to nontort obligations. However, it is the predominant view that apportionment of liability among tortfeasors is to be accomplished under principles of comparative indemnity and not under principles of contribution [*see Safeway Stores, Inc. v. Nest-Kart (1978) 21 Cal. 3d 322, 325-328, 146 Cal. Rptr. 550, 579 P.2d 441* ; *see also §§ 115.04, 115.130[3][a*]].

This form may be combined with points and authorities pertaining to the specific procedural context in which a right to contribution is brought before the court. It may be used in a memorandum in connection with a pretrial motion, such as a demurrer or motion for summary judgment, if contribution rights may be determined as a matter of law. It may also be used in a trial or an appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. It should be established that: (1) the party seeking contribution is one of a number of joint or joint and several obligors under an obligation; (2) the obligation arises other than in tort; and (3) the party has paid the obligation in full or in an amount that exceeds his or her proportionate share. The computation of the proportionate share of each joint obligor should be the same as with joint judgment debtors [*see § 115.111[3][a]*].

[b] Opposing Memoranda

In appropriate cases, the points and *authorities in §§ 115.112 -115.114* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Contribution Among Obligors

Murchison v. Murchison *(1963) 219 Cal. App. 2d 600, 33 Cal. Rptr. 285* , was a divorce action. After divorce, the husband paid an income tax deficiency under joint returns filed during marriage. He then claimed that he was entitled to offset a part of this payment against the balance due to the wife under the divorce judgment. On the wife's application, a writ of execution on the unpaid amount of the judgment was issued, and the husband moved to quash the writ and enter satisfaction of judgment. The trial court denied the husband's motion, finding, as a question of fact, that there was no agreement between the parties entitling the husband to an offset.

The court of appeal reversed, considering the presence or absence of agreement to be irrelevant. Obligations under a joint income tax return are joint and several. The husband was compelled to make the payment, and the wife benefited from the payment. Under *Civ. Code § 1432*, the husband was entitled to contribution regardless of whether there was an agreement or contract between the parties with regard to paying the claim. Contribution is an equitable doctrine, and the statute is consistent with the doctrine's equitable origins. Its application is not limited to cases in which consent, express or implied, can be found. When the husband paid the full amount of the parties' joint and several tax obligations, a new claim or cause of action arose by operation of law in his favor against the wife (*219 Cal. App. 2d 600, 604-605)* .

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11-115 California Points & Authorities § 115.111

§ 115.111 Supporting Motion for Contribution [Code Civ. Proc. §§ 882, 883]--Nontort Judgment Debtor Who Has Satisfied Judgment May Seek Contribution from Judgment Debtor Who Is Jointly Liable for Judgment

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*]	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR CONTRIBUTION [*Code Civ. Proc. §§ 882, 883*]
vs.	)	
_____ [*name*],	)	
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
		Date Action Filed: _____

_____

A JUDGMENT DEBTOR, OTHER THAN A JOINT TORTFEASOR, WHO HAS PAID MORE THAN ITS SHARE OF A JUDGMENT ON WHICH SEVERAL PERSONS ARE LIABLE IS ENTITLED TO CONTRIBUTION FROM THE OTHER JUDGMENT DEBTORS.

A. Right to Contribution. If two or more judgment debtors, other than joint tortfeasors, are jointly liable on a money judgment, one who has satisfied more than his or her due proportion of the judgment, whether voluntarily or through enforcement procedures, may compel contribution from another judgment debtor who has satisfied less than his or her

due proportion of the judgment (*Code Civ. Proc. § 882*).

B. Motion for Contribution. A judgment debtor who is entitled to compel contribution may apply on noticed motion to the court that entered the judgment for an order determining liability for contribution (*Code Civ. Proc. § 883*).

C. Proportionate Liability. If there is no apportionment of joint liability made by the judgment itself, or dictated by the terms of an underlying instrument, the due proportion of the liability of the several judgment debtors must be calculated on a pro rata basis (*Young v. Rosenthal (1989) 212 Cal. App. 3d 96, 130, 260 Cal. Rptr. 369* ; *see Tucker v. Nicholson (1938) 12 Cal. 2d 427, 432-434, 84 P.2d 1045* ; *Woolley v. Seijo (1964) 224 Cal. App. 2d 615, 621-623, 36 Cal. Rptr. 762*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a nontort joint judgment debtor's motion for contribution from other judgment debtors [*see Code Civ. Proc. §§ 882, 883*]. The motion may be made at any time before the judgment is satisfied in full or within 30 days thereafter [*Code Civ. Proc. § 883(a)*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. It should be established that: (1) the moving party is one of several debtors under a money judgment; (2) the judgment is for an obligation based on grounds other than tort; and (3) the moving party has satisfied or is about to satisfy the judgment in full or in an amount that exceeds the debtor's proportionate share.

[b] Opposing Memoranda

In appropriate cases, the points and *authorities in §§ 115.112 -115.114* may be adapted for use to oppose the motion supported by these points and authorities.

[3] Discussion of Authorities

[a] Proportionate Liability

Young v. Rosenthal *(1989) 212 Cal. App. 3d 96, 260 Cal. Rptr. 369* , involved two orders for sanctions under *Code Civ. Proc. § 128.5* against a client and his counsel for bad-faith litigation tactics. The first order was against the client and the particular attorney who represented him at a hearing. The second order was against the client, the law partnership that was his counsel of record, and the three named partners of the partnership. The attorneys paid the sanctions and then moved for contribution from the client under *Code Civ. Proc. §§ 882* and *883*. The motion was denied.

The court of appeal reversed. It first held that *Code Civ. Proc. §§ 882* and *883* applied not only to final judgments, but also to final orders on collateral matters directing the payment of money. Because an award of sanctions under *Code Civ. Proc. § 128.5* was such an order, contribution was available (*212 Cal. App. 3d 96, 129)* .

The court then noted that the Law Revision Commission Comment to the 1982 addition to *Code Civ. Proc. § 882* stated that the statute does not determine the proportionate shares of the obligations on the judgment. Each joint judgment debtor's share depends on the circumstances of the case. The court construed the comment to support its view that if no apportionment of joint liability is made in the judgment or order itself, or is dictated by the terms of some underlying agreement, such as a partnership agreement, the due proportion of the liability of the several judgment debtors must be calculated on a pro rata basis (*212 Cal. App. 3d 96, 129-130)* [*cf. Code Civ. Proc. § 876(a)* (pro rata share of joint tortfeasors is determined by dividing entire judgment equally among all who are liable)].

With regard to the order against the client and the single attorney, the attorney was entitled to contribution for one-half of the amount of the sanctions ordered. With regard to the other order, it was unclear whether the trial court intended that all of the lawyers should constitute one entity and the client the other, or whether it intended that each named individual partner be considered separately as a different debtor. The court remanded for a clarification of the trial court's intent (*212 Cal. App. 3d 96, 130)* .

Tucker v. Nicholson *(1938) 12 Cal. 2d 427, 84 P.2d 1045* , was an action brought by three plaintiffs who had paid a deficiency judgment that had been entered against them, the defendant, and five other persons following a mortgage foreclosure sale. Following payment of the judgment, the judgment creditor assigned the judgment to plaintiffs' nominee. Plaintiffs then filed a notice of payment and claim to contribution from defendant under former Code Civ. Proc. § 709 [*now see Code Civ. Proc. §§ 882, 883*]. The trial court entered judgment against defendant for one-fourth of the deficiency judgment.

The court of appeal reversed on the ground that the judgment required the defendant to pay too large a portion. The land that was sold in the foreclosure sale was bought by 10 persons. Two of them were interested in the purchase to the extent of a two-twelfths interest each, while the other eight, including the defendant, were interested to the extent of a one-twelfth interest each. The court stated that the liability, as among themselves, of co-makers of a note given for the purchase of land is presumptively proportionate to their interest in the land. If liability is to be apportioned among all ten purchasers, the defendant's share would be one-twelfth. If contribution cannot be obtained from any joint debtor because of insolvency, that debtor's share is to be borne proportionately by the solvent obligors (*12 Cal. 2d 427, 432-434)* .

Woolley v. Seijo *(1964) 224 Cal. App. 2d 615, 36 Cal. Rptr. 762* , was an appeal by the executrix of an estate from a judgment of the trial court in an action brought against the executrix to obtain the estate's share of an admiralty judgment that had been previously entered against the deceased and others. The original admiralty action involved deceased Seijo and 16 other persons who were joint venturers in the ownership and operation of a tuna fishing vessel. Seijo had a 10-percent interest. A mortgage on the vessel had been foreclosed and the boat sold to pay the mortgage and other intervening claims. A deficiency judgment also had been entered against the vessel owners jointly and severally for the balance of the mortgage, and another judgment was entered against them for the amount of other debts asserted by intervening creditors in the admiralty action.

Two of the joint owners then paid the entire amount of the judgment in favor of the intervening creditors and most of the judgment in favor of the mortgagee, and they arranged to have the intervenors' satisfied judgment assigned to the plaintiff as their trustee. The plaintiff then brought the present action on that judgment against the executrix for the total amount of the intervenors' judgment under the theory that this judgment approximated the decedent's proportionate share of the total venture liability discharged by the trust beneficiaries. The trial court entered judgment in favor of the plaintiff for that amount, and the executrix appealed.

The court of appeal ruled that plaintiff was entitled to recover only that portion of the intervenors' judgment that was commensurate with the deceased's percentage interest in the joint venture. The court held that if one of several joint judgment debtors pays more than his or her proportionate share of a judgment, he or she is entitled to obtain a proportionate contribution from those jointly liable with him or her. Because the suit against the executrix was not based on the entire debt discharged by the beneficiaries, but was brought on the intervenors' judgment only, the estate was liable only for its proportionate share of the intervenors' judgment. Seijo had a 10-percent interest in the vessel, and his estate was liable, therefore, for only 10 percent of the intervenors' judgment (*224 Cal. App. 2d 615, 621-623)* .

NOTE:

The moving party must allege facts that show what the proportion of the indebtedness is as among the joint debtors. It may not be assumed that a pro rata apportionment is appropriate [*Stowers v. Fletcher (1948) 84 Cal. App. 2d Supp. 845, 848* , *190 P.2d 338]* .

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11-115 California Points & Authorities § 115.112

§ 115.112 Opposing Contention That Nontort Obligor Is Entitled to Contribution [Civ. Code § 1432]--No Showing of Payment on Underlying Joint or Joint and Several Obligation in Excess of Proportionate Share

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

_____ [*Party seeking contribution, e.g.,* PLAINTIFF] IS NOT ENTITLED TO CONTRIBUTION BECAUSE IT HAS NOT PAID MORE THAN ITS PROPORTIONATE SHARE OF THE UNDERLYING OBLIGATION.

[*EITHER*]

No Payment. An obligor who has paid nothing on an obligation cannot recover contribution from co-obligors for their proportionate share of the debt (*Hosking v. Spartan Props., Inc. (1969) 275 Cal. App. 2d 152, 157, 79 Cal. Rptr. 893*).

[*OR*]

Payment of No More Than Proportionate Share. A debtor who has not paid more than his or her proportionate share of a joint or joint and several obligation may not recover contribution from co-obligors on the obligation (*Burstein v. Zelman (1960) 182 Cal. App. 2d 1, 3-4, 5 Cal. Rptr. 829* ; *Jackson v. Lacy (1940) 37 Cal. App. 2d 551, 559, 100 P.2d 313*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a claim for contribution, on the ground that the party seeking contribution has not paid the underlying obligation. The first alternative alleges that the party seeking contribution has made no payment at all on the underlying contribution. The second alternative alleges that the payments made by the party do not exceed that party's proportionate share.

In an appropriate case, this memorandum may be submitted in opposition to the contention supported by the points and *authorities in § 115.110*. The second alternative may also be submitted in opposition to the motion supported by the points and *authorities in § 115.111*. The first alternative would not apply to a motion for post-judgment contribution under *Code Civ. Proc. §§ 882* and *883*, because the motion may be brought before the judgment is satisfied [*Code Civ. Proc. § 883(a)*].

This form may be combined with points and authorities pertaining to the specific procedural context in which a right to contribution is brought before the court. It may be used in a memorandum in connection with a pretrial motion, such as a demurrer or motion for summary judgment, if contribution rights may be determined as a matter of law. It may also be used in a trial or an appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. It should be established that: (1) the party seeking contribution is one of a number of joint or joint and several obligors under an obligation; (2) the obligation arises other than in tort; and (3) either the party seeking contribution has not paid the obligation or payments on the obligation made by the party do not exceed that party's proportionate share of the obligation. For consideration of the amount of an obligor's proportionate share, see *§ 115.111[3][a]*.

[3] Discussion of Authorities

[a] No Payment

Hosking v. Spartan Props., Inc. *(1969) 275 Cal. App. 2d 152, 79 Cal. Rptr. 893* , was an appeal from an order of the trial court granting a motion to strike a cross complaint. An action was brought on a promissory note against the maker of the note and the guarantors, including appellant. Appellant filed an answer and cross complained for contribution against the other parties who demurred to the cross complaint and moved to have it struck. The trial court granted the motion to strike.

In affirming, the court of appeal stated that the law in California is well settled that an obligor who has paid nothing on an obligation cannot recover from co-obligors for their proportionate share of a debt, citing *Civ. Code § 1432*. It ruled that because appellant had not alleged his payment of the note and his counsel had admitted that appellant had not yet paid the note, appellant had no right to reimbursement from his co-obligors and had not stated a cause of action for contribution (*275 Cal. App. 2d 152, 157)* .

NOTE:

Under current law, the defendants could have waited until judgment had been entered and then brought a motion under *Code Civ. Proc. § 883* for contribution at any time before the judgment was satisfied in full or within 30 days thereafter [*see Code Civ. Proc. § 883(a)*; *see also Borba Farms, Inc. v. Acheson (1988) 197 Cal. App. 3d 597, 603-606, 242 Cal. Rptr. 880]* .

[b] Payment of No More Than Proportionate Share

Burstein v. Zelman *(1960) 182 Cal. App. 2d 1, 5 Cal. Rptr. 829* was an action brought by a partner against another partner for contribution of the defendant's proportionate share of partnership losses after termination of the partnership. After the initial hearing, the court determined that the defendant had a 27-percent share of the partnership and rendered judgment against him for 27 percent of the losses. Defendant moved for a new trial. The trial judge then concluded that

the plaintiff's right of contribution rested on actual payment made in excess of his share. Because there was no evidence in the record to sustain a finding that the plaintiff had paid partnership losses in excess of his share (50 percent), the court vacated the judgment previously made and reopened the case for introduction of additional evidence solely on that point. The court then found that the plaintiff had not paid more than his share and denied contribution. The court of appeal affirmed, stating that the trial judge's conclusion that a right of contribution rests on actual payment in excess of one's share, was correct, citing *Civ. Code § 1432* (*182 Cal. App. 2d 1, 3-4)* .

Jackson v. Lacy *(1940) 37 Cal. App. 2d 551, 100 P.2d 313* , was an appeal from a judgment of the trial court after it had sustained a demurrer to an amended and supplemental complaint and dismissed the action. In the complaint, which was based on a series of complicated transactions, plaintiff sought to establish a claim for contribution against an executrix on a note executed to a bank by a corporation on which the executrix's testator was a co-guarantor with plaintiff. Plaintiff's claim to contribution was based on allocation of the proceeds of a foreclosure sale of real property under a mortgage that secured several obligations, including the note in question. The foreclosure sale brought less money than was involved in all the obligations.

The court of appeal stated that it is elementary that a party acquires a right of contribution as soon as he or she pays more than his or her share, but not until then, citing *Civ. Code § 1432*. The court found that because there was no allegation in the complaint that a particular method of allocation of the proceeds of the sale satisfied the particular debt on which the executrix's testator was also obligated, and the judgment on that obligation remained unsatisfied, plaintiff had not paid more than his proportionate share of the debt, and no right of contribution could possibly arise on the basis of the obligation (*37 Cal. App. 2d 551, 559-560)* .

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
CHAPTER 115 INDEMNITY AND CONTRIBUTION
PART II. FORMS
C. Contribution
1. Contribution Among Nontort Obligors

11-115 California Points & Authorities § 115.113

§ 115.113 Opposing Contention That Nontort Obligor Is Entitled to Contribution [Civ. Code § 1432]--Obligation Is Several Only and Not Joint

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

_____ [*Party seeking contribution, e.g.,* PLAINTIFF] IS NOT ENTITLED TO CONTRIBUTION BECAUSE THE UNDERLYING OBLIGATION WAS SEVERAL AND NOT JOINT OR JOINT AND SEVERAL.

A. No Right to Contribution on Several Obligation. If the obligation of co-obligors is several and not joint or joint and several, there is no right of contribution among them (*Garcia v. Superior Court (1941) 45 Cal. App. 2d 31, 35, 113 P.2d 470* ; *see* *Weinberg Co. v. Heller (1925) 73 Cal. App 769, 779, 239 P. 358*).

B. Several Obligation. If two or more parties to a contract promise separate performances, to be rendered respectively by each of them, or if each of them makes only a separate promise that the performance will be rendered, each is severally bound only and is not bound jointly with any others (*Douglas v. Bergere (1949) 94 Cal. App. 2d 267, 270, 210 P.2d 727* ; *see* *George Herz & Co. v. Solt (1937) 23 Cal. App. 2d 178, 180, 72 P.2d 251*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a claim for contribution on the ground that the underlying obligation on which contribution is sought is not a joint or joint and several obligation of the parties. In an appropriate case, this memorandum may be submitted in opposition to the contention supported by the points and *authorities in § 115.110*. They may also be adapted for use in opposition to the motion supported by the points and *authorities in § 115.111*.

Paragraph A sets forth the basic premise that there is no right of contribution among obligors who are severally liable

only. Paragraph B then sets forth the common contractual basis for liability that is several only, that the promisors have agreed to be bound only for a severable part of the performance of the agreement.

This form may be combined with points and authorities pertaining to the specific procedural context in which a right to contribution is brought before the court. It may be used in a memorandum in connection with a pretrial motion, such as a demurrer or motion for summary judgment, if contribution rights may be determined as a matter of law. It may also be used in a trial or an appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. It should be established that: (1) the parties are or may be both liable to the same person under an obligation; (2) the obligation arises other than in tort; and (3) under the express terms of the contract or according to the intent of the parties to be implied from the circumstances, the parties are not jointly liable for the entire obligation, but are each only severally liable for a divisible share of the obligation.

[3] Discussion of Authorities

[a] No Right to Contribution on Several Obligation

Garcia v. Superior Court *(1941) 45 Cal. App. 2d 31, 113 P.2d 470* , was a proceeding in mandate brought to compel the superior court to permit the filing of a cross complaint. A county filed suit against petitioner to obtain reimbursement for welfare payments made and to be made to petitioner's mother, an aged widow without means of support. Petitioner sought leave to file a cross complaint against his three sisters, but leave was denied. Petitioner then brought this proceeding.

The court of appeal stated that the right to cross complain depended on whether the obligation of adult children to support parents was joint or several. If it is several, there could be no contribution from one to the other; if it is joint, one who satisfies more than his or her share might claim contribution from the other, citing *Civ. Code § 1432*. Further, if different persons are severally, but not jointly obligated, the obligee may sue one or more of them at his or her discretion. The court then held that the obligation to support a parent was a several obligation resting on each child, and that a child named as a defendant in a reimbursement suit by the county had no right to force the trial judge to bring other children into the action as defendants to a cross complaint because the obligations of the children are to their parent and to the county and not to each other (*45 Cal. App. 2d 31, 35-36)* .

George Herz & Co. v. Solt *(1937) 23 Cal. App. 2d 178, 72 P.2d 251* , was an appeal from a judgment of the trial court in an action brought by plaintiff to recover money alleged to be due for street improvements. Plaintiff's assignor had done the work on the basis of a contract signed by defendants as directors of the Fifth Street Improvement Association. Defendants and other residents of the area supported the project by signing subscription lists on which they agreed to pay the amount listed opposite their names. The court of appeal found that these lists created several obligations among the signers and did not create a joint liability (*23 Cal. App. 2d 178, 180)* .

[b] Several Obligation

Douglas v. Bergere *(1949) 94 Cal. App. 2d 267, 210 P.2d 727* , was an appeal from a judgment of the trial court in an action for damages for the alleged breach of an oral contract to deliver shares of stock. Pursuant to a preorganization agreement between plaintiff Douglas, defendants Bergere and Andrews, and one Stratton, common shares of stock of a corporation were issued to defendants Bergere and Andrews. Later, when the corporation needed additional funds, Douglas and Stratton made an oral contract with Bergere and Andrews whereby Douglas and Stratton agreed to assist in raising additional funds, and Bergere and Andrews each agreed to transfer half of their stock to them. The money was raised, and Bergere transferred the required shares to Stratten, but Douglas did not receive his full share of the stock because Andrews and his limited partner were adjudicated bankrupt. Douglas then brought this action for damages

directed at Bergere. The trial court found that the contract created only a several obligation and that Bergere had performed all of his obligations under the contract, and entered judgment for defendants.

The court of appeal affirmed. The court first noted that under *Civ. Code § 1430*, an obligation imposed on several persons may be joint, several, or joint and several. It then noted the presumption of *Civ. Code § 1659*, that if all the parties who unite in a promise receive some benefit from the consideration, whether past or present, the promise is presumed to be joint and several. However, it further noted that the presumption was rebuttable and may be controverted by evidence to the contrary.

The court then set forth the definition of a several obligation from the Restatement of Contracts § 113: "Where two or more parties to a contract promise separate performances, to be rendered respectively by each of them, or where each of them makes only a separate promise that the same performance shall be rendered, each is severally bound for the performance [that he or she] promises and is not bound jointly with any of the others." In determining whether promises are several or joint and several and uncertainty arises concerning the meaning of a contract, the language used by the parties is to be considered in the light of the surrounding circumstances as shown by their acts and conduct before any controversy has arisen between them (*94 Cal. App. 2d 267, 269-270)* .

The court then ruled that the evidence was sufficient to rebut the statutory presumption and support the trial court's finding that the contract was several and not joint and several. The evidence supported the conclusion that Bergere and Andrews each promised a separate performance to be rendered respectively by each of them, that is, each was to transfer half of his shares of stock and no more. Failure of Andrews to perform could not enlarge the liability incurred by Bergere. Because Bergere performed his part of the contract, he had no further liability on account of Andrews' bankruptcy (*94 Cal. App. 2d 267, 270-271)* .

Weinberg Co. v. Heller *(1925) 73 Cal. App. 769, 239 P. 358* , was an appeal by defendant from a judgment for plaintiff in an action brought to recover, pursuant to a written agreement between plaintiff and defendant, seven-fifteenths of the costs and expenses incurred in the appeal of a suit plaintiff had brought previously against a third party. The court of appeal found that plaintiff and defendant had contracted concerning the payment of suit costs in actions filed by either of them and that defendant had expressly agreed to pay seven-fifteenths of all costs of suit, including appeal costs (*73 Cal. App. 769, 775)* . In reply to defendant's contention that plaintiff should have brought an action for contribution rather than the present action, the court stated that a suit for contribution would not have been appropriate because plaintiff's right of action was founded on express contract and not on contribution. Although plaintiff and defendant both had causes of action against the third party, the suit brought by the plaintiff against that party was brought in its name only and was not a joint action with a joint interest. Because the present suit was based not on a joint obligation but rather on the several obligation of the defendant for a specific portion of a debt, there was no action for contribution (*73 Cal. App. 769, 777-779)* .

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11-115 California Points & Authorities § 115.114

§ 115.114 Opposing Contention That Nontort Obligor Is Entitled to Contribution [Civ. Code § 1432]--Party From Whom Contribution Is Sought Has Paid Proportionate Share of Joint Obligation

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

_____ [*Party seeking contribution, e.g.,* PLAINTIFF] IS NOT ENTITLED TO CONTRIBUTION BECAUSE _____ [*e.g.,* DEFENDANT] HAS ALREADY PAID ITS PROPORTIONATE SHARE OF THE OBLIGATION.

Payment of Proportionate Share. A defendant who has paid his or her proportionate share of an obligation is absolved from further liability to a joint obligor for contribution (*Wray v. Chatterson (1929) 101 Cal. App. 291, 294, 281 P. 628*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a claim for contribution, on the ground that the party from whom contribution is sought has already paid an amount equal to his or her proportionate share of the obligation. In an appropriate case, this memorandum may be submitted in opposition to the contention supported by the points and *authorities in § 115.110*. They may also be adapted for use in opposition to the motion supported by the points and *authorities in § 115.111*.

This form may be combined with points and authorities pertaining to the specific procedural context in which a right to contribution is brought before the court. It may be used in a memorandum in connection with a pretrial motion, such as a demurrer or motion for summary judgment, if contribution rights may be determined as a matter of law. It may also be used in a trial or an appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. It should be established that: (1) the party seeking contribution is one of a number of joint or joint and several obligors under an obligation; (2) the obligation arises other than in tort; and (3) the party from whom contribution is sought has made a payment on the obligation in an amount that equals or exceeds the party's proportionate share of the obligation. For consideration of the amount of an obligor's proportionate share, see *§ 115.111[3][a]*.

[3] Discussion of Authorities

[a] Payment of Proportionate Share

Wray v. Chatterson *(1929) 101 Cal. App. 291, 281 P. 628* , was an appeal from a judgment of the trial court awarding plaintiffs contribution for defendant's share of a liability claimed under a joint and several obligation entered into by plaintiffs and defendant under a contract. Plaintiffs and defendant were engaged in subdividing and developing certain tracts of land. In order to secure certain street extensions, they entered into a contract with the owners of land needed for the extension. Plaintiffs and Defendant jointly and severally agreed to purchase the land for $2,500 and to complete the extension project. The land was purchased for the amount stated, and the project was completed at an additional cost of $1792.60. The only controversy in the case involved the liability for apportionment of the payments between plaintiffs and defendant. The parties disagreed over whether there was a verbal agreement under which the defendant was to assume half of the obligations under the contract. The trial court found such a verbal agreement and entered judgment for plaintiffs for contribution to achieve a 50-50 division of the $1792.60. The cost of acquiring the land, which had been borne entirely by defendant, was ignored in the court's findings.

The court of appeal reversed without deciding the issue of the verbal agreement. The court assumed, *arguendo*, that there was such an agreement. However, the parties' obligations under the contract involved both the cost of the land acquisition and the additional costs, a total of $4,292.60. In that defendant had paid the $2,500 for the land, its payment exceeded 50 percent of the total. Therefore, its payments exceeded its proportionate share even under the plaintiffs' alleged verbal agreement, and there was no entitlement to contribution (*101 Cal. App. 291, 294-295)* .

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[Reserved]

§§ 115.115[Reserved]

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2. Contribution Among Tort Obligors

11-115 California Points & Authorities § 115.130

§ 115.130 Supporting Motion for Contribution [Code Civ. Proc. § 878]--Tort Judgment Debtor Is Entitled to Contribution From Cotortfeasor Judgment Debtors According to Comparative-Fault Principles

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*]	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR CONTRIBUTION
vs.	)	[*Code Civ. Proc. § 878*]
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

DEFENDANT _____ [*name of moving party*] IS ONE OF _____ [TWO *or more*] JUDGMENT DEBTORS IN THIS TORT ACTION AND HAS PAID _____ [THE ENTIRE JUDGMENT *or* MORE THAN HIS/HER COMPARATIVE SHARE OF THE JUDGMENT] RENDERED FOR PLAINTIFF AND IS ENTITLED TO CONTRIBUTION FROM THE OTHER JUDGMENT DEBTOR(S) IN ORDER TO APPORTION LIABILITY AMONG THEM ACCORDING TO THEIR COMPARATIVE FAULT.

A. Statutory Authority for Contribution Among Joint Tortfeasors. If a money judgment has been rendered jointly against two or more defendants in a tort action, there is a right of contribution among them, and the right of contribution may be enforced after one tortfeasor has, by payment, discharged the joint judgment or has paid more than his or her share of it (*Code Civ. Proc. § 875(a), (c)*).

B. Statutory Procedure for Enforcing Contribution. Judgment for contribution may be entered by one tortfeasor judgment debtor against other tortfeasor judgment debtors by motion on notice (*Code Civ. Proc. § 878*).

C. Principles of Comparative Fault Apply to Contribution. A joint tortfeasor debtor who has paid more than the percentage of the judgment that corresponds to his or her percentage of comparative fault may recover the difference from cotortfeasor judgment debtors pursuant to a motion for contribution (*Safeway Stores, Inc. v. Nest-Kart (1978) 21 Cal. 3d 322, 325-328, 146 Cal. Rptr. 550, 579 P.2d 441*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion by a tortfeasor judgment debtor for contribution from a cotortfeasor judgment debtor if, by the use of special verdicts or jury interrogatories, the jury has allocated responsibility among defendants on a percentage basis and the moving defendant has paid the entire judgment or more than his or her comparative share [*see Code Civ. Proc. § 878*; *Safeway Stores, Inc. v. Nest-Kart (1978) 21 Cal. 3d 322, 328, 334, 146 Cal. Rptr. 550, 579 P.2d 441]* .

Counsel should insert argument in the forgoing form to show the relationship between the facts of the case and the points of law stated. Discussion should set forth the apportionment of fault by the finder of fact among all joint tortfeasors found liable to the plaintiff in their percentage shares. It should also disclose all payments that have been made, including whether any of the judgment debtors from whom contribution is sought have paid any part of the judgment.

[b] Motion for Contribution or Action for Comparative Indemnity

The use of a motion for contribution to obtain apportionment of liability according to principles of comparative fault and equitable indemnity as set down in *American Motorcycle Association* [*American Motorcycle Assn v. Superior Court of Los Angeles County (1978) 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899]* has been accepted by the California Supreme Court and several courts of appeals under the theory that with the advent of comparative negligence, contribution for tort judgments and equitable indemnity have merged as indistinguishable remedies [*see Safeway Stores, Inc. v. Nest-Kart (1978) 21 Cal. 3d 322, 325-328, 146 Cal. Rptr. 550, 579 P.2d 441* ; *Ambriz v. Kress (1983) 148 Cal. App. 3d 963, 969-970, 196 Cal. Rptr. 417* ; *Paradise Valley Hosp. v. Schlossman (1983) 143 Cal. App. 3d 87, 91-93, 191 Cal. Rptr. 531]* . These courts have essentially ignored the statutory rule of contribution that states that a joint tortfeasor's pro rata share of a judgment is determined by dividing the entire judgment equally among all tortfeasors [*Code Civ. Proc. § 876(a)*], because the contribution statutes predate comparative negligence [*see Paradise Valley Hosp. v. Schlossman (1983) 143 Cal. App. 3d 87, 92, 191 Cal. Rptr. 531]* . However, one court refused to ignore this rule and denied contribution to a defendant whose payment did not exceed its pro rata share under an equal division, although it did exceed its percentage share under comparative fault [*see Lamberton v. Rhodes-Jamieson (1988) 199 Cal. App. 3d 748, 750-755, 245 Cal. Rptr. 162]* . Another court has held that statutory contribution claims are barred only if a right to indemnity has been established [*Coca-Cola Bottling Co. v. Lucky Stores, Inc. (1992) 11 Cal. App. 4th 1372, 1379, 14 Cal. Rptr. 2d 673]* . For this reason, it is usually more advisable for a judgment debtor to proceed by cross complaint or independent action for comparative indemnity rather than by way of a motion for contribution in order to seek apportionment of liability according to principles of comparative fault.

[c] Service of Notice of Motion and Supporting Papers

Notice of the motion for contribution must be given to all parties in the action, including the plaintiff or plaintiffs, at least ten days before the hearing. The notice must be accompanied by an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) setting forth any information that the moving party may have as to the assets of defendants available for satisfaction of the judgment or claim for contribution [*Code Civ. Proc. § 878*].

[3] Discussion of Authorities

[a] Principles of Comparative Fault Applicable to Contribution

The facts and principal holding of ***Safeway Stores, Inc. v. Nest-Kart*** *(1978) 21 Cal. 3d 322, 146 Cal. Rptr. 550, 579 P.2d 441* , are discussed in *§ 115.65[3][a]*. The jury apportioned liability for plaintiff's injuries 80 percent to Safeway and 20 percent to Nest-Kart, and each defendant satisfied its percentage share of the judgment. Thereafter, Safeway moved in the trial court under *Code Civ. Proc. § 878* for a judgment of contribution to require Nest-Kart to pay an additional 30 percent of the judgment to Safeway so as to achieve an equal 50-50 apportionment between the two tortfeasors. The trial court, while indicating that common sense called for an apportionment of the judgment on a comparative-fault basis, concluded that such an apportionment was not permissible in light of *Code Civ. Proc. § 876(a)*, which requires apportionment of liability under contribution in equal shares (*21 Cal. 3d 322, 325-327)* .

The California Supreme Court, apparently on direct appeal, reversed the judgment of contribution, restoring the apportionment of liability according to each defendant's comparative percentage of fault. In so holding, the court stated that California's contribution statutes should not be interpreted to preclude the evolution of a common-law doctrine of comparative indemnity. The existing contribution statutes do not, in themselves, necessarily prohibit apportionment of liability among multiple tortfeasors on a comparative fault basis. Thus, even under a motion for a judgment of contribution, the proper allocation of liability is according to comparative fault and not in equal shares. The Court essentially read the equal-share requirement of *Code Civ. Proc. § 876(a)* out of the law (*21 Cal. 3d 322, 327-328)* .

NOTE:

Three court of appeal cases [*Ambriz v. Kress (1983) 148 Cal. App. 3d 963, 969-970, 196 Cal. Rptr. 417* ; *Lyly & Sons Trucking Co. v. State of California (1983) 147 Cal. App. 3d 353, 358-359, 195 Cal. Rptr. 116* ; *Paradise Valley Hosp. v. Schlossman (1983) 143 Cal. App. 3d 87, 93, 191 Cal. Rptr. 531* ; *see § 115.64*] all followed the approach of *Safeway v. Nest-Kart* and found no distinction between comparative indemnity and contribution among joint tortfeasors after *American Motorcycle*. However, two court of appeal cases have essentially refused to follow *Safeway v. Nest-Kart* and instead, under unusual fact situations, applied *Code Civ. Proc. § 876(a)* to apportion liability on a pro rata basis.

In the first of these two cases, the jury found the plaintiff's employer, who was not a party in the case, to be 40 percent at fault for plaintiff's injuries. Two other defendants were found to be each 25 percent responsible, and a third defendant was found to be 10 percent responsible. To avoid an appeal, the plaintiff offered to settle with each of the three defendants for an amount representing a 14-percent reduction of the dollar amount that corresponded to each defendant's percentage share of liability. The two 25-percent liable defendants accepted, but the 10-percent liable defendant rejected the offer and pursued its appeal. Almost two years later, this defendant abandoned its appeal and settled by paying more than $40,000 in excess of its original 10 percent of the judgment. It then brought a motion for contribution against the other two defendants. The trial court denied the motion without comment [*Lamberton v. Rhodes-Jamieson (1988) 199 Cal. App. 3d 748, 245 Cal. Rptr. 162]* .

The court of appeal affirmed. Although the parties did not raise the issue, the court applied the pro rata share rule to deny contribution. Under *Code Civ. Proc. § 876(a)*, each defendant's pro rata share for

contribution purposes was one-third. Because the amount actually paid by the 10-percent liable defendant did not exceed one-third, there was no right to contribution. In so holding, the court noted *Safeway v. Nest-Kart* and its contrary result. The court stated, "*Safeway* does not undertake to rewrite the pro rata statute, but instead manifests a continuing resolve by the Supreme Court to ignore it. *Safeway* affirms the court's equitable power to refrain from applying the contribution statutes where payment has been made in accordance with comparative responsibility." The court did not explain further any distinctions between the two cases. In the opinion of the court, the language of the pro rata statute was unambiguous and could only be changed by the legislature [*Lamberton v. Rhodes-Jamieson (1988) 199 Cal. App. 3d 748, 750-755, 245 Cal. Rptr. 162]* .

In the second of these two cases, a motorcyclist was injured when struck by a car on a street next to a Lucky supermarket. The cyclist's view had been obstructed by a Coca-Cola delivery truck parked in a red zone. A Lucky employee had instructed the truck driver to park the truck on the street. Coca-Cola cross complained for equitable indemnity against Lucky in the cyclist's action against Lucky and Coca-Cola. The trial court granted Lucky summary judgment and dismissed the cross complaint on the ground that the illegal parking of the truck was an act for which Lucky bore no responsibility. After trial, a jury returned a verdict against both Coca-Cola and Lucky. It made no apportionment of fault. Coca-Cola paid the entire judgment and then brought an action for contribution against Lucky [*Coca-Cola Bottling Co. v. Lucky Stores, Inc. (1992) 11 Cal. App. 4th 1372, 14 Cal. Rptr. 2d 673]* .

The court of appeal held that Coca-Cola was entitled to contribution. The adverse determination on Coca-Cola's right to partial equitable indemnification did not bar the claim for contribution, which was an entirely different right that did not come into existence until the judgment was entered. The court stated that while the doctrine of contribution has been made subordinate to the right of indemnity, it is still available when a defendant who unsuccessfully sought indemnification meets the requirements for contribution set forth in *Code Civ. Proc. § 875* *Coca-Cola Bottling Co. v. Lucky Stores, Inc. (1992) 11 Cal. App. 4th 1372, 1378-1379, 14 Cal. Rptr. 2d 673]* .

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[Reserved]

§§ 115.131[Reserved]

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D. Effects of Settlement

11-115 California Points & Authorities § 115.150

§ 115.150 Supporting Contention That Good-Faith Settlement Precludes Indemnity or Contribution--Good-Faith Settlement [Code Civ. Proc. §§ 877(b), 877.6(c)] Bars Claim for Comparative Indemnity or Contribution

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

_____ [*Party, e.g.,* CROSS COMPLAINANT] IS BARRED FROM SEEKING _____ [COMPARATIVE INDEMNITY *or* CONTRIBUTION] FROM _____ [*party, e.g.,* CROSS DEFENDANT] BECAUSE _____ [*party, e.g.,* CROSS DEFENDANT] HAS ENTERED INTO A SETTLEMENT THAT HAS BEEN JUDICIALLY DETERMINED TO HAVE BEEN IN GOOD FAITH UNDER CODE OF CIVIL PROCEDURE SECTION 877.6(c).

[*EITHER*]

A. Effect of Good-Faith Settlement on Comparative Indemnity. A release, dismissal with or without prejudice, or a covenant not to sue or not to enforce a judgment that is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort discharges the party to whom it is given from all liability for any comparative indemnity to any other party (*Code Civ. Proc. § 877(b)*; *see American Motorcycle Assn v. Superior Court of Los Angeles County (1978) 20 Cal. 3d 578, 603-604, 146 Cal. Rptr. 182, 578 P.2d 899*).

[*OR*]

A. Effect of Good-Faith Settlement on Contribution. A release, dismissal with or without prejudice, or a covenant not to sue or not to enforce a judgment that is given in good faith before verdict or judgment to one or more co-obligors mutually subject to contribution rights discharges the party to whom it is given from all liability for any contribution to any other party (*Code Civ. Proc. § 877(b)*).

[*CONTINUE*]

B. Determination of Good-Faith Settlement. Any party to an action in which it is alleged that two or more parties are joint tortfeasors or co-obligors on a contract debt may seek a judicial determination that a settlement was made in good faith; such a determination bars any other joint tortfeasor or co-obligor from any further claims against the settling tortfeasor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negli gence or comparative fault (*Code Civ. Proc. § 877.6(a), (c)*).

[*Optional*] **C. "Joint Tortfeasors" Defined.** The term "joint tortfeasors," as used in *Section 877.6(c) of the Code of Civil Procedure*, means joint, concurrent, and successive tortfeasors (*Standard Pac. of San Diego v. A.A. Baxter Corp. (1986) 176 Cal. App. 3d 577, 589-592, 222 Cal. Rptr. 106* ; *Turcon Constr., Inc. v. Norton-Villiers, Ltd. (1983) 139 Cal. App. 3d 280, 282-283, 188 Cal. Rptr. 580*).

[*Optional*] **D. Claims Barred If Essentially Indemnification Claims.** A claim pleaded as something other than as a claim for indemnification, such as a claim for negligence, is barred by a good faith settlement if the claim is essentially a claim for indemnification (*Ratcliff Architects v. Vanir Constr. Mgmt., Inc. (2001) 88 Cal. App. 4th 595, 607, 106 Cal. Rptr. 2d 1*).

[*Optional*] **E. Insurer May Be Precluded From Seeking Equitable Indemnity.** An insurer that settles a claim asserted against its insured stemming from allegedly actionable conduct by the insured may not pursue equitable indemnity from other tortfeasors in the action who also settle in good faith with the plaintiff (*Mid-Century Ins. Exch. v. Daimler-Chrysler Corp. (2001) 93 Cal. App. 4th 310, 315-316, 112 Cal. Rptr. 2d 880*).

[*Optional*] **F. Good Faith of Out-of-State Settlements May Be Determined.** If an indemnity action is brought in California following settlement of an underlying tort action brought in another state, a good-faith determination of the out-of-state settlement may be made in the California indemnity action pursuant to *Code of Civil Procedure Sections 877* and *877.6* (*Nutrition Now, Inc. v. Superior Court (2003) 105 Cal. App. 4th 209, 213, 129 Cal. Rptr. 2d 266*).

[Optional] **G. No Requirement That Tortfeasors Be Defendants in Single Action.** There is no requirement that there must have been a single lawsuit in which the joint tortfeasors were sued by the injured party for *Code Civ. Proc. § 877.6* to apply (*Bob Parrett Construction, Inc. v. Superior Court (2006) 140 Cal. App. 4th 1180, 1187, 45 Cal. Rptr. 3d 250*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that a claim for comparative indemnity among tortfeasors or a claim for contribution among nontort obligors is barred because the party from whom indemnity or contribution is sought has entered into a good-faith settlement with the tort victim or contract obligee. These points and authorities are not for use with regard to express contractual indemnity [*see § 115.153*]. Optional Paragraph D should be used if a claim pleaded as something other than an indemnification claim is essentially a barred claim for indemnification.

This form may be combined with points and authorities pertaining to the specific procedural context in which a right to indemnity or contribution is brought before the court. Commonly, a motion for summary judgment on a cause of action for comparative indemnity or contribution is brought contemporaneously with or immediately following a hearing determining the good faith of a settlement [*City of Grand Terrace v. Superior Court (1987) 192 Cal. App. 3d 1251, 1266, 238 Cal. Rptr. 119* ; *Shane v. Superior Court (1984) 160 Cal. App. 3d 1237, 1245, 207 Cal. Rptr. 210]* . They

may be also used in a memorandum in connection with any other kind of pretrial motion alleging that indemnity or contribution rights are foreclosed as a matter of law by a good-faith settlement. It may also be used in an appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. It should be established that: (1) the party using the form was one of multiple parties alleged to be liable, either in tort or on a nontort obligation, to a third party; (2) the party using the form is also a cross defendant or defendant in an action for implied indemnity or contribution with regard to the occurrence giving rise to the liability; (3) the party using the form entered into a settlement with the third party; and (4) the settlement was judicially confirmed as in good faith under *Code Civ. Proc. § 877.6* [*see §§ 115.156 -115.162*].

[b] Applicability of Form to Contribution

Code Civ. Proc. § 877 discharges liability for contribution among co-obligors mutually subject to contribution rights [*Code Civ. Proc. § 877(a), (b)*]. However, it does not apply to co-obligors who have expressly agreed in writing to an apportionment of liability for losses or claims among themselves [*Code Civ. Proc. § 877(c)*]; or to a co-obligor on an alleged contract debt if the contract was made prior to January 1, 1988 [*Code Civ. Proc. § 877(d)*].

As originally enacted, *Code Civ. Proc. § 877.6* applied only to settlements by joint tortfeasors. As amended in 1987, it now also applies to settlements by co-obligors on a contract debt [*Code Civ. Proc. § 877.6(a)*]. This statute bars claims for "equitable comparative contribution" against a co-obligor who has settled in good faith [*Code Civ. Proc. § 877.6(c)*]. The adjectives "equitable" and "comparative" are generally used to describe rights of implied indemnity among tortfeasors; they have not appeared in the law of contribution among nontort obligors [*see Code Civ. Proc. §§ 881-883*]. Nevertheless, reading *Code Civ. Proc. §§ 877* and *877.6* together, it seems clear that a judicially confirmed good-faith settlement bars a claim for contribution from a co-obligor on a nontort obligation, except as limited by *Code Civ. Proc. § 877(c)* and *(d)*.

[c] Good-Faith Settlements and Proposition 51

There is a good-faith issue with regard to apportionment of a settlement between economic and noneconomic damages under the Fair Responsibility Act of 1986 (Proposition 51) [*see Civ. Code §§ 1431.1-1431.5*]. Under the Act, the settling party's indemnity rights against other defendants are limited to the part of a settlement allocated to economic damages, because defendants are not jointly liable for noneconomic damages [*Union Pac. Corp. v. Wengert (2000) 79 Cal. App. 4th 1444, 1447-1449* , *95 Cal. Rptr. 2d 68* ; *see Civ. Code § 1431.2(a)*; *Munoz v. Davis (1983) 141 Cal. App. 3d 420, 425, 190 Cal. Rptr. 400* (indemnity requires joint and several liability); *see also §§ 115.66[2][b], 115.69*]. A settlement that is unreasonably apportioned to economic damages may preserve the settling party's indemnity rights to the inequitable detriment of the nonsettling defendants. Thus, the question arises whether a good-faith determination has any effect on the settling defendant's indemnity rights arising from the apportionment.

There is no statutory authority, either in Proposition 51 or in *Code Civ. Proc. § 877.6* for consideration of the settling parties' apportionment between economic and noneconomic damages as an element of the good-faith determination. Further, it is not clear that an apportionment made by the settling parties would be controlling, even if made in good faith. An alternate apportionment method is simply to apportion the settlement in the same ratio as that found by the trier of fact after trial. Nevertheless, it could be argued that a settlement that has been apportioned by the parties between economic and noneconomic damages in a manner that distorts the facts is not in good faith and should not be confirmed.

[3] Discussion of Authorities

[a] Effect of Good-Faith Settlement

American Motorcycle Assn. v. Superior Court of Los Angeles County (1978) 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578

P.2d 899 , is discussed in *§ 115.60[3][a]*. In fashioning the doctrine of comparative partial indemnity, the California Supreme Court was faced with the question of whether California's contribution statutes [*Code Civ. Proc. §§ 875-880*], which provided for contribution among tortfeasors on a pro rata (equal) rather than a comparative basis [*see Code Civ. Proc. § 876(a)*], foreclosed judicially created comparative indemnity. The court concluded that in enacting the 1957 contribution statutes, the legislature did not intend to prevent the judiciary from expanding the common law equitable indemnity doctrine. With regard to *Code Civ. Proc. § 877*, which provides that a good-faith settlement discharges the settling party from all liability for contribution to any other parties, the court stated that the principle of the statute should be preserved as an integral part of the partial indemnity doctrine. The Court recognized that the statute, by its terms, releases a settling tortfeasor only from liability for contribution and not for partial comparative indemnity. However, it concluded that, from a realistic perspective, the legislative policy underlying the provision dictated that a tortfeasor who has entered into a good-faith settlement with the tort victim must also be discharged from any claim for partial or comparative indemnity that might be pressed by a concurrent tortfeasor (*20 Cal. 3d 578, 599-604)* .

NOTE:

The effect of *American Motorcycle* and cases following it has been to effectively limit pro rata contribution to obligations arising other than in tort [*see Safeway Stores, Inc. v. Nest-Kart (1978) 21 Cal. 3d 322, 327-332, 146 Cal. Rptr. 550, 579 P.2d 441* ; *see also § 115.130*] .

[b] "Joint Tortfeasors" Defined

In ***Standard Pac. of San Diego v. A.A. Baxter Corp.*** *(1986) 176 Cal. App. 3d 577, 222 Cal. Rptr. 106* , plaintiffs were homeowners whose homes were damaged by soil subsidence. Defendant builder originally owned the undeveloped land underlying plaintiffs' homes and contracted with defendant consultants to perform soil testing and engineering and with defendant contractor to perform grading to the consultant's specifications. The builder then sold some of the manufactured lots to the developers, who built single-family residences on the lots and sold them to plaintiffs. The various defendants filed cross complaints against each other for indemnity.

The consultants and contractors then entered into settlement agreements with many of the plaintiffs and sought a judicial determination that those settlements were made in good faith. The trial court approved the settlements as made in good faith and dismissed the cross complaints. The nonsettling defendant appealed on various grounds.

On appeal, the developer contended that *Code Civ. Proc. § 877.6* did not bar it from seeking equitable indemnification based on strict liability because it is not a tortfeasor within the meaning of the statute. The court disagreed, explaining that the historical meaning of "joint tortfeasor" has been expanded to include joint, concurrent, and successive tortfeasors, and that this broader concept is encompassed within the statute. The court cited several cases that had concluded *Code Civ. Proc. §§ 877* and *877.6* were very broad. Indeed, *Code Civ. Proc. § 877* applies to "tortfeasors claimed to be liable for the same tort." The court stated that this language was meant to eliminate the distinction between joint tortfeasors and concurrent or successive tortfeasors. Comparative fault principles apply to strict liability cases [*see § 115.65*], and reason and logic compel the conclusion that, equitably interpreted, the statute's broad language includes those parties whose legal responsibilities are derivative or vicarious in nature (*176 Cal. App. 3d 577, 589-592)* . The court reversed on other grounds.

Turcon Constr., Inc. v. Norton-Villiers, Ltd. *(1983) 139 Cal. App. 3d 280, 188 Cal. Rptr. 580* , arose out of a collision between a motorcycle and an automobile. The injured cyclist sued the car owner, the driver, and the companies allegedly liable for the defective manufacture and design of the motorcycle and its gas tank. The car owner cross complained against the companies for indemnity. Plaintiff first settled with the car owner and the car driver and later with the other defendants. The latter defendants then moved to dismiss the car owner's cross complaint for indemnity on the ground it was barred by their good-faith settlement with plaintiff. The trial court granted the motion.

The car owner appealed, contending, among other things, that the term "joint tortfeasors" should be construed to mean

only those who act in concert in causing an injury. As so construed, it and the company were not joint tortfeasors within the meaning of *Code Civ. Proc. § 877.6(c)*. The court of appeal rejected this contention and affirmed the judgment of dismissal. The court said that although the car owner's contended construction was the historical definition of the term, careless usage has expanded its meaning considerably and that today "joint tortfeasor" is commonly used interchangeably with the term "concurrent tortfeasor" to denote defendants whose negligence has concurred to produce injury. The court said that under accepted principles of statutory construction it had to presume that the legislature had acted in light of the decisions directly bearing on the language at issue and that when the legislature drafted *Code Civ. Proc. § 877.6(c)* it was aware that the modern usage of the term embraced joint, concurrent, and successive tortfeasors (*139 Cal. App. 3d 280, 282-283)* .

[c] Claims Barred If Essentially Indemnification Claims

In ***Ratcliff Architects v. Vanir Constr. Mgmt., Inc.*** *(2001) 88 Cal. App. 4th 595, 106 Cal. Rptr. 2d 1* , a school district brought suit against an architect and a construction manager for cost overruns on a school construction project. The school district settled with the construction manager, and the trial court found, pursuant to *Code Civ. Proc. § 877.6*, that the settlement was made in good faith. The architect brought a cross-action against the construction manager, including claims for express contractual indemnity, breach of written contract brought by a third-party beneficiary, and negligence. The negligence claim was based on allegations that the construction manager mismanaged the school construction project, causing the architect to incur additional uncompensated costs, and that this conduct violated a duty of care owed by the construction manager to the architect. The trial court sustained a demurrer for the construction manager, and the architect appealed.

The court of appeal affirmed. The court first concluded that the contract claims failed because the contract between the school district and the construction manager did not provide the architect with the right to indemnification and because the contract expressly stated that it did not create rights in third-party beneficiaries (*88 Cal. App. 4th 595, 600-604)* . Addressing the negligence claim, the court recognized that courts have been hesitant to impose a duty to prevent economic harm to a third party if there is no privity of contract between the parties, unless the third party was an intended beneficiary of a contract between the defendant and another party. However, in this case, the architect was not an intended beneficiary of the contract between the school district and the construction manager (*88 Cal. App. 4th 595, 605)* . Therefore, the issue was whether or not a duty should be imposed under the circumstances as a matter of public policy. The court concluded that a duty should not be imposed. First noting other policy reasons for not imposing a duty under the circumstances, the court concluded that the most significant reason that the action for negligence should not be allowed was that the negligence claim was essentially a claim for indemnification. Because a claim for indemnification would be barred by *Code Civ. Proc. § 877.6*, allowing the architect to pursue the negligence claim would enable the architect to avoid the consequences of the good faith settlement and subvert the policy of encouraging good faith settlements (*88 Cal. App. 4th 595, 607)* .

[d] Insurer May Be Precluded From Seeking Equitable Indemnity

In ***Mid-Century Ins. Exch. v. Daimler-Chrysler Corp.*** *(2001) 93 Cal. App. 4th 310, 112 Cal. Rptr. 2d 880* , an automobile insurer paid its policy limits to an individual injured when the insured's car battery exploded in the individual's face. As part of the claim settlement, the insurer was given a complete release of all claims. The injured individual then brought suit against other parties, including the car manufacturer and the battery manufacturer. The insurer who paid the claim also filed suit for equitable indemnification against those two defendants, and the two actions were consolidated. After eight days of trial, the two defendants settled with the injured individual, and the settlements were determined to be in good faith. Based on these good-faith settlements, the actions were dismissed. The insurer appealed the dismissal of its indemnity claims.

The court of appeal affirmed. Under *Code Civ. Proc. § 877.6*, a settlement in good faith bars any other joint tortfeasor from any further claims for contribution or indemnity based on comparative fault or negligence. An insurer that

provides coverage to an alleged or actual tortfeasor steps into the shoes of its insured, and therefore it is entitled to no greater rights than the insured and is subject to the same defenses that may be asserted against the insured (*93 Cal. App. 4th 310, 315)* . Even though the insured was not a party to the lawsuit, because the insurance claim settled before suit was brought, the insured was an alleged joint tortfeasor under the statute and would have been a named defendant absent the settlement. The issue of whether the insured was actually negligent was irrelevant to the application of *Code Civ. Proc. § 877.6*, and the insured's status as a potential tortfeasor was sufficient. Therefore, because the insured could not have recovered indemnity from the other alleged joint tortfeasors who settled in good faith, the insurer standing in the insured's shoes was also precluded from seeking indemnification (*93 Cal. App. 4th 310, 315-316)* . The court also noted that the insurer had the opportunity to challenge the good faith determination on the grounds that the settlement amount was insufficient, but chose not to do so (*93 Cal. App. 4th 310, 316-317)* .

[e] Good Faith of Out-of-State Settlements May Be Determined

In ***Nutrition Now, Inc. v. Superior Court*** *(2003) 105 Cal. App. 4th 209* ,, a marketer of nutritional supplements was sued in Connecticut by a plaintiff seeking to recover for injuries allegedly caused by nutritional supplement capsules. The marketer settled that Connecticut action for $1.4 million and then brought an action for equitable indemnity and contribution in California against another alleged tortfeasor. That alleged tortfeasor responded by filing a cross-complaint for indemnity against the marketer, who responded in turn by filing a motion for a determination that the Connecticut settlement was made in good faith. The trial court denied the motion without reaching the merits, concluding that the settlement was "too remote."

The court of appeal ordered that a writ of mandate be issued directing the trial court to vacate its order and consider the merits of the motion for a determination of good faith. The court held that if an indemnity action is brought in California following settlement of an underlying tort action brought in another state, a good-faith determination of the out-of-state settlement may be made in the California indemnity action pursuant to *Code Civ. Proc. §§ 877* and *877.6*. The court concluded that the place of settlement was irrelevant to the good-faith determination, which turns on the trial court's analysis of the amount of the settlement and whether it is within the reasonable range of the settling tortfeasor's proportionate share of comparative liability for the plaintiff's injuries. The court also noted that generalized valuation criteria recognized by the California personal injury bar, insurance claims departments, and trial courts are presumably the same or similar in other states, and that a California trial court is free to consider a declaration from an expert familiar with the evaluation process in the state where the settlement was made (*105 Cal. App. 4th 209, 213)* . The court also noted that Connecticut does not have a similar statute for determining the good faith of a settlement, which eliminated the possibility of a conflict of laws issue in this case (*105 Cal. App. 4th 209, 214)* .

[f] No Requirement That Tortfeasors Be Defendants in Single Action

In *Bob Parrett Construction, Inc. v. Superior Court (2006) 140 Cal. App. 4th 1180, 45 Cal. Rptr. 3d 250* , the employees of two corporations were convicted of defrauding the United States government. Although no charges were ever brought against the employing corporations, they settled with the government to avoid potential tort damages and civil fines. One of those corporations then sued the other for indemnity and damages totaling the amount of the plaintiff corporation's settlement payment. Defendant corporation moved for a determination that its settlement with the government was in good faith and barred plaintiff's claims under *Code Civ. Proc. §§ 677* and 677.6. The trial court held that those statutes did not apply under the facts of the case and did not determine the merits of the motion. Defendant filed a petition for writ of mandate.

The court of appeal issued a writ of mandate ordering the trial court to determine the merits of the good-faith motion. Plaintiff argued in part that the good faith settlement statutes did not apply because there was never an action in which the United States alleged that the two corporations were joint tortfeasors or joint obligors on a contract debt, but the court of appeal rejected this argument. The court noted that equitable indemnity claims do not have to be pursued in an action in which the injured party names the tortfeasors as defendants, and in fact there is no requirement that there even

has to be a single action in which the joint tortfeasors were sued by the injured party (*140 Cal. App. 4th 1180, 1187)* . So long as the fundamental requirements of the statutes are met, *Code Civ. Proc. §§ 677* and 677.6 apply. Although the United States never referred to the two corporations as joint tortfeasors, the corporations separately settled with the government and obtained releases covering their civil liability stemming from their employees' joint efforts to defraud the government. Under these circumstances, the court held that the defendant corporation was entitled to a determination of the good faith of its settlement (*140 Cal. App. 4th 1180, 1188)* .

[4] Additional Authorities

[a] Claims Barred if Essentially Indemnification Claims

In *Gackstetter v. Frawley (2006) 135 Cal. App. 4th 1257, 38 Cal. Rptr. 3d 333* , trust beneficiaries sued a trustee in probate for dereliction of certain trust duties after the attorneys for the trust erroneously transferred certain residential property to the wrong trust and then concealed that error. That suit was settled. The trust beneficiaries also sued the attorneys directly. That suit was also settled, and a good faith determination was made under *Code Civ. Proc. § 877.6.* The trustee then sued the attorneys for various torts related to the services provided by the attorneys for the trust. All of the claims brought by the trustee against the attorneys alleged essentially that one of the attorneys conveyed the residential property to the wrong trust, that the attorney failed to disclose the error, that the attorney knew or should have known that the trustee would be sued and be subject to possible civil or criminal liability for trust management under the supervision of the attorney, and that as a result of the improper conveyance, the trustee made improper expenditures. Even though few of these claims were labeled as claims for indemnity, the court of appeal held that all of these claims were barred by the attorneys' good faith settlement with the beneficiaries. Most, if not all, of the damages sought by the trustee arose from the improper conveyance of the residential property and its subsequent concealment, and that conduct was also the basis of the suits brought by the beneficiaries (*135 Cal. App. 4th 1257, 1274-1279)* .

California Points & Authorities

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
CHAPTER 115 INDEMNITY AND CONTRIBUTION
PART II. FORMS
D. Effects of Settlement

11-115 California Points & Authorities § 115.151

§ 115.151 Supporting Contention That Good Faith Settlement Precludes Indemnity or Contribution--Good Faith Settlement [Code Civ. Proc. § 877.6(c)] Bars Claim for Total Comparative Indemnity

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

INDEMNITEE IS BARRED FROM SEEKING TOTAL IMPLIED INDEMNITY FROM INDEMNITOR BECAUSE INDEMNITOR HAS ENTERED INTO A SETTLEMENT THAT HAS BEEN JUDICIALLY DETERMINED TO HAVE BEEN IN GOOD FAITH UNDER CODE OF CIVIL PROCEDURE SECTION 877.6(c).

Claim for Total Indemnity. A tort defendant who has entered into a good faith settlement within the meaning of *Code Civ. Proc. § 877.6(c)* is absolved of any further liability for all comparative indemnity claims, including claims seeking total equitable indemnity (*Far W. Fin. Corp. v. D & S Co. (1988) 46 Cal. 3d 796, 817, 251 Cal. Rptr. 202, 760 P.2d 399*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that a claim for total implied equitable indemnity is barred because the party from whom indemnity is sought has entered into a good faith settlement with the tort victim. These points and authorities are not for use with regard to a right of total indemnity that arises from an express indemnity agreement [*see § 115.153*].

This form may be combined with points and authorities pertaining to the specific procedural context in which a right to indemnity is brought before the court [*see § 115.150[2]*]. It may be used in a memorandum in connection with a pretrial motion alleging that indemnity rights are foreclosed as a matter of law by a good-faith settlement. It may also be used in an appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. It should be established that: (1) the indemnitor is one of multiple parties alleged to be liable in tort to a third party; (2) the indemnitor is also a cross defendant or defendant in an action for implied indemnity, with regard to the occurrence giving rise to the liability, under which the indemnitee alleges a theory of indemnity that would provide for a complete shift of any loss incurred by the indemnitee to the indemnitor [*see §§ 115.90 -115.95*]; (3) the indemnitor entered into a settlement with the third party; and (4) the settlement was judicially confirmed as in good faith under *Code Civ. Proc. § 877.6*.

[3] Discussion of Authorities

[a] Claim for Total Indemnity

The facts of ***Far W. Fin. Corp. v. D & S Co.*** *(1988) 46 Cal. 3d 796, 251 Cal. Rptr. 202, 760 P.2d 399* are discussed in *§ 115.90[3][a]*. The issue in the case was whether a judicially confirmed good-faith settlement under *Code Civ. Proc. § 877.6* barred a claim for total implied indemnity. Far West's position, as proposed indemnitee, was that it was only vicariously liable for the negligence of others. As such, a settlement entered into by the actively negligent parties should not relieve them of liability for indemnity to those who were only derivatively liable. In essence, Far West contended that the doctrine of comparative partial indemnity as enunciated in *American Motorcycle Assn. v. Superior Court of Los Angeles County (1978) 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899* , did not apply to a total shift of loss, through implied equitable indemnity, in the case of a vicariously liable defendant.

The California Supreme Court rejected this position. It concluded that the language in § 877.6 referring to "partial or comparative" indemnity claims was not intended to exclude claims for total indemnity. Rather, claims for total indemnity were viewed by the Court as one possible result at the end of the spectrum of comparative equitable indemnification, which ranges from no right to any indemnity to a right of complete indemnity (*46 Cal. 3d 796, 808-809)* . The Court held that a contrary result would inhibit settlement, because parties could not be sure that a good-faith settlement would end their participation in litigation if they could still be subject to cross complaints for total indemnification (*46 Cal. 3d 796, 810-814)* . The Court concluded that the proper forum for a party who may be entitled to total indemnity to protect its rights is at the hearing on the good faith of the settlement. At the hearing, a party that claims it is liable only vicariously or derivatively may argue that the settlement does not require the more culpable tortfeasor to bear its fair share of the loss, and if the trial court agrees and holds that the settlement was not in good faith, the equitable indemnity claim will not be barred (*46 Cal. 3d 796, 815)* . Although in some cases a nonsettling defendant may be required to bear slightly more than its fair share of the loss, the Court held that in order to promote the settlement of litigation, this is the price that nonsettling defendants uniformly bear (*46 Cal. 3d 796, 816-817)* . Therefore, the Court concluded that a tort defendant who has entered into a good-faith settlement within the meaning of *Code Civ. Proc. § 877.6(c)* is absolved of any further liability for all equitable indemnity claims, including claims seeking total equitable indemnity (*46 Cal. 3d 796, 817)* .

California Points & Authorities

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
CHAPTER 115 INDEMNITY AND CONTRIBUTION
PART II. FORMS
D. Effects of Settlement

11-115 California Points & Authorities § 115.152

§ 115.152 Supporting Contention That Good-Faith Settlement Precludes Indemnity or Contribution--Settlement Made After Jury in Bifurcated Trial Determines Liability but Before Jury Assesses Damages Is "Before Verdict or Judgment"

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

_____ [*Party, e.g.,* CROSS COMPLAINANT] IS BARRED FROM SEEKING _____ [COMPARATIVE INDEMNITY *or* CONTRIBUTION] FROM _____ [*party, e.g.,* CROSS DEFENDANT] BECAUSE THE SETTLEMENT, FOUND BY THE COURT TO HAVE BEEN MADE IN GOOD FAITH, WAS MADE BEFORE THE JURY ASSESSED DAMAGES BASED ON ITS FINDING THAT _____ [*party, e.g.,* CROSS DEFENDANT] WAS LIABLE TO _____ [*party, e.g.,* PLAINTIFF].

Settlement Made Before Jury in Bifurcated Trial Assesses Damages Based on Finding of Liability Is "Before Verdict or Judgment." A settlement made in a bifurcated trial after the jury has found the settling defendant liable, but before the jury has assessed damages, is "before verdict or judgment" under *Code of Civil Procedure Sections 877* and *877.6*, and bars claims for indemnity against the settling defendant (*Price Pfister, Inc. v. William Lyon Co. (1993) 14 Cal. App. 4th 1643, 1647-1650, 18 Cal. Rptr. 2d 437*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that a claim for equitable comparative contribution, or partial or comparative indemnity, is barred because the party from whom indemnity is sought entered into a good-faith settlement with the tort victim. The specific contention made is that the settlement is within the terms of *Code Civ. Proc. § 877*, which requires that the settlement was given before verdict or judgment, because the settlement was given before the jury in a bifurcated trial assessed damages, even though it was given after the jury found that the settling

tortfeasor was liable [Price Pfister, *Inc. v. William Lyon Co. (1993) 14 Cal. App. 4th 1643, 1647-1650, 18 Cal. Rptr. 2d 437]* . This contention can be combined with the more general contention in § 115.151.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts tending to show that the settlement was in fact made before the jury assessed damages based on its findings regarding liability.

[b] Opposing Memoranda

In an appropriate case, the points and *authorities in § 115.154* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Settlement Made Before Jury in Bifurcated Trial Assesses Damages Based on Finding of Liability Is "Before Verdict or Judgment"

In ***Price Pfister, Inc. v. William Lyon Co.*** *(1993) 14 Cal. App. 4th 1643, 18 Cal. Rptr. 2d 437* , a plaintiff was injured when the bathroom ceiling in her home collapsed on her. She brought an action for damages against the owner and developer of the housing tract and against the plumbing contractor. The complaint did not name the manufacturer of the plumbing products as a defendant, but the other defendants cross-complained against the manufacturer; the cross complaints were severed from the plaintiff's action. The trial was bifurcated, and the jury found the developer 100 percent liable. Before the damage phase was completed, both defendants settled with plaintiff; the trial court found the settlement to be in good faith, over the objection of the manufacturer. After the good-faith finding became final, the plaintiff filed an action against the manufacturer; the manufacturer cross complained against the developer and the contractor for indemnity. The trial court granted the cross defendants' motions to strike the cross complaint on the ground that the settlement in the first action barred any subsequent indemnity claim, and the manufacturer appealed.

The court of appeal affirmed, holding that the settlement met the requirements of *Code Civ. Proc. § 877* because it was made before the jury had decided all issues essential to the rendering of a judgment (*14 Cal. App. 4th 1643, 1649)* . The court based this conclusion on its determination that the legislature had not considered bifurcated trials when it used the language "before verdict or judgment," but that the legislature was contemplating some kind of finality, which does not exist when a jury has determined liability but not damages in a bifurcated trial (*14 Cal. App. 4th 1643, 1649)* . The court also noted that permitting settlement at that point in a birurcated trial advanced the equitable policies encouraging settlement, and encouraging equitable allocation of costs among joint tortfeasors. However, precluding settlement would force all defendants in multiparty tort litigation to litigate to the bitter end, a result the court was unwilling to reach (*14 Cal. App. 4th 1643, 1649)* .

The court distinguished *Halpin v. Superior Court (1971) 14 Cal. App. 3d 530, 543, 92 Cal. Rptr. 329* , which had construed "before verdict or liability" to mean "before establishment of liability." The court of appeal stated that the result could be rationalized on the ground that the settlement there was not in good faith, and in fact that case was decided before the enactment of *Code Civ. Proc. § 877.6* (*14 Cal. App. 4th 1643, 1648)* . The court also distinguished *Southern Cal. White Trucks v. Teresinski (1987) 190 Cal. App. 3d 1393, 1405, 236 Cal. Rptr. 159* [see *§ 115.154[3][a]*], on the ground that in that case, a bifurcated trial was not involved; the verdict was final, in that the jury had nothing more to decide (*14 Cal. App. 4th 1643, 1649)* .

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
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D. Effects of Settlement

11-115 California Points & Authorities § 115.153

§ 115.153 Opposing Contention That Good-Faith Settlement Precludes Indemnity or Contribution--Good-Faith Settlement [Code Civ. Proc. § 877.6] Does Not Bar Action for Express Contractual Indemnity

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

INDEMNITEE IS NOT BARRED FROM SEEKING TOTAL INDEMNITY FROM INDEMNITOR ON ACCOUNT OF A SETTLEMENT AGREED TO BY INDEMNITOR BECAUSE CODE OF CIVIL PROCEDURE SECTION 877.6(c) DOES NOT APPLY TO INDEMNITY RIGHTS ARISING FROM EXPRESS INDEMNITY AGREEMENTS.

Good-Faith Settlement Does Not Bar Right to Express Contractual Indemnity. An indemnity claim based on express contract survives a good-faith settlement under *Code Civ. Proc. § 877.6* (*C. L. Peck Contractors v. Superior Court (1984) 159 Cal. App. 3d 828, 834, 205 Cal. Rptr. 754*).

[2] Comments

[a] Use of Form

This form may be submitted in support of an express indemnitee's contention that a good-faith settlement entered into by the express indemnitor does not bar the indemnity claim under *Code Civ. Proc. § 877.6(c)*. The points and authorities in this form may be used together with those in § 115.30, which advances the general principle that comparative fault does not apply to express indemnity agreements.

This form may be combined with points and authorities pertaining to the specific procedural context in which a right to indemnity is brought before the court [*see § 115.150[2]*]. It may be used in a memorandum in opposition to a pretrial motion, such as a demurrer or motion for summary judgment, alleging that indemnity rights are foreclosed as a matter of law by a good-faith settlement. It may also be used in an appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. It should be established that: (1) the parties entered into an agreement by which the indemnitor agreed to indemnify the indemnitee from loss incurred under certain express contractual conditions; (2) the indemnitor and indemnitee are both alleged to be liable in tort to a third party; (3) the basis of the indemnitee's liability to the third party is within the scope of the indemnity agreement; (4) the indemnitor entered into a settlement with the third party that was judicially confirmed as in good faith under *Code Civ. Proc. § 877.6*.

[3] Discussion of Authorities

[a] Good-Faith Settlement Does Not Bar Right to Express Contractual Indemnity

C.L. Peck Contractors v. Superior Court *(1984) 159 Cal. App. 3d 828, 205 Cal. Rptr. 754* , arose out of an action by a worker injured at a construction site against the general contractor, the property owner, and a subcontractor. The contract between the general contractor and the subcontractor contained an indemnity clause under which the subcontractor expressly agreed to indemnify the contractor and owner from and against any liability arising out of the performance of the subcontract work. Plaintiff settled his claim against the subcontractor. Pursuant to a *Code Civ. Proc. § 877.6* hearing, the trial court determined the settlement was made in good faith and, reasoning that all claims for indemnity, even those provided by contract, were extinguished by *Code Civ. Proc. § 877.6(c)*, granted the subcontractor's motion to dismiss the cross complaint against the subcontractor for express contractual indemnity. The contractor and property owner filed a petition for writ of mandate.

The court of appeal granted a peremptory writ of mandate directing the trial court to vacate its order granting the motion to dismiss and to enter an order denying the motion. The court of appeal held that an indemnity claim based on express contract survives a good-faith *Code Civ. Proc. § 877.6* settlement, that the legislature, by specifying "equitable comparative indemnity" in that statute, evidenced its intention to exclude contractual indemnity, and that *Code Civ. Proc. § 877.6*, by its terms, has no application to contractual indemnity claims (*159 Cal. App. 3d 828, 834-835)* .

NOTE:

In *Bay Dev. Ltd. v. Superior Court (1990) 50 Cal. 3d 1012, 1032, 269 Cal. Rptr. 720, 791 P.2d 290* , the California Supreme Court cited and agreed with the holding in *Peck* that indemnity rights arising under an express contractual provision are unaffected by a good-faith settlement [*see § 115.91*].

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11-115 California Points & Authorities § 115.154

§ 115.154 Opposing Contention That Good-Faith Settlement Precludes Indemnity or Contribution--Good-Faith Settlement Made After Verdict or Judgment Does Not Bar Indemnity Rights [Code Civ. Proc. §§ 877(b), 877.6]

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

_____ [*Party, e.g.,* CROSS COMPLAINANT] IS NOT BARRED FROM SEEKING _____ [COMPARATIVE INDEMNITY *or* CONTRIBUTION] FROM _____ [*party, e.g.,* CROSS DEFENDANT] ON ACCOUNT OF A SETTLEMENT AGREED TO BY _____ [*e.g.,* CROSS DEFENDANT] BECAUSE THE SETTLEMENT WAS NOT MADE BEFORE VERDICT OR JUDGMENT.

Settlement Is Required to Be Made Before Verdict or Judgment. A "settlement" under *Code of Civil Procedure Section 877.6* is as defined in *Code of Civil Procedure Section 877*; that is, a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment, given in good faith before verdict or judgment (*Southern Cal. White Trucks v. Teresinski (1987) 190 Cal. App. 3d 1393, 1405, 236 Cal. Rptr. 159*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a contention that a settlement is not effective under *Code Civ. Proc. § 877.6* to bar indemnity rights because the settlement was not entered into before verdict or judgment. The form may be used by an indemnitee tortfeasor seeking comparative indemnity or by a co-obligor seeking contribution.

This form may be combined with points and authorities pertaining to the specific procedural context in which a right to indemnity or contribution is brought before the court [*see § 115.150[2]*]. It may be used in a memorandum in opposition to a pretrial motion, such as a demurrer or motion for summary judgment, alleging that indemnity or contribution rights are foreclosed as a matter of law by a good faith settlement. It may also be used in an appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. It should be established that: (1) the party using the form was one of multiple parties alleged to be liable, either in tort or on a nontort obligation, to a third party; (2) the party using the form is also a cross complainant or plaintiff in an action for comparative indemnity or contribution with regard to the occurrence giving rise to the liability; (3) the defendant or cross defendant entered into a settlement with the third party that was judicially confirmed as in good faith under *Code Civ. Proc. § 877.6*; and *(4)* the settlement occurred after the jury had returned a verdict or a judgment had been entered in the underlying action.

[3] Discussion of Authorities

[a] Settlement Is Required to Be Made Before Verdict or Judgment

In ***Southern Cal. White Trucks v. Teresinski*** *(1987) 190 Cal. App. 3d 1393, 236 Cal. Rptr. 159* , plaintiff was injured in an automobile collision with a garbage truck and sued a number of defendants, including the manufacturer and retailer of the garbage truck, and the seller of the automobile. These defendants cross complained against each other for comparative indemnity. Before trial, the manufacturer obtained a summary judgment and was dismissed, and the retailer of the garbage truck settled with plaintiff.

Trial proceeded against the auto seller alone. The jury returned a special verdict against the seller on which a partial judgment was entered. Plaintiff and the seller then entered into a settlement agreement, conditioned on a stipulation that the judgment be vacated. Pursuant to that stipulation, the trial judge vacated the judgment. The seller then moved for a determination that its settlement was in good faith under *Code Civ. Proc. § 877.6*. The trial judge found the settlement to be in good faith and ordered the cross complaints for indemnity dismissed.

The court of appeal reversed, finding that the trial court erred in dismissing the cross complaints, because the settlement with plaintiff was entered into after the verdict and judgment (*190 Cal. App. 3d 1393, 1400)* . The court analyzed *Code Civ. Proc. §§ 877* and *877.6* in the context of both statutory framework and case law. *Code Civ. Proc. § 877* clearly states it applies when a settlement or other agreement is given "before verdict or judgment." The language is clear and unambiguous, and statutory construction is not necessary (*190 Cal. App. 3d 1393, 1402-1405)* .

Even though *Code Civ. Proc. § 877.6* does not contain the same language, the court held that *Code Civ. Proc. § 877.6* implements *Code Civ. Proc. § 877* and does not need to redefine the type of settlement to which it applies. The court concluded that a "settlement" under *Code Civ. Proc. § 877.6* is that which is defined in *Code Civ. Proc. § 877* and must be given before verdict or judgment (*190 Cal. App. 3d 1393, 1405-1407)* . The court explained that it is the establishment of liability that is the crux of the issue. Liability is established either by verdict or judgment, depending on whether trial is by jury or by the court; at that point settlement is no longer covered by *Code Civ. Proc. § 877* (*190 Cal. App. 3d 1393, 1404-1405)* .

The court was not persuaded by the argument that the settlement was entered into before the verdict or judgment because the judgment had been vacated prior to the settlement agreement. It found that the trial court lacked the authority to vacate the judgment; therefore, the verdict and judgment preceded the settlement agreement and *Code Civ. Proc. § 877.6* did not apply to bar cross complaints for partial indemnity. The court of appeal said that a trial court may set aside a judgment only on motion on statutory grounds or to correct its records; consent to vacate does not give the court power to act if that power is not otherwise provided (*190 Cal. App. 3d 1393, 1407-1408)* . The court also addressed the "partial" nature of the judgment, noting that it was partial only in the sense that it did not finally determine the amount of the setoff against the damages awarded against cross defendant. The prior jury verdict was the final determination of cross defendant's liability for plaintiff's injuries (*190 Cal. App. 3d 1393, 1408)* .

NOTE:

A subsequent court of appeal case distinguished *Southern California White Trucks v. Teresinski*. That

case involved a bifurcated trial, and the settlement was made after the jury had found the settling defendant liable, but before the damages phase was complete, and the court of appeal in that case held that because no "final" verdict had been entered, the public policies in favor of settlements justified a rule permitting settlement between the liability and damages segments of a bifurcated trial [*Price Pfister, Inc. v. William Lyon Co. (1993) 14 Cal. App. 4th 1643, 1647-1650, 18 Cal. Rptr. 2d 437* ; *see § 115.152[3][a]*].

[4] Additional Authorities

[a] Settlement Is Required to Be Made Before Verdict or Judgment

In *Jhaveri v. Teitelbaum (2009) 176 Cal. App. 4th 740, 98 Cal. Rptr. 3d 268* , plaintiffs were judgment creditors after having received a jury verdict in their favor against multiple parties. Plaintiffs then brought a second suit against those parties and their spouses for alleged fraudulent transfers to the defendants' spouses in order to shield assets from being used to satisfy the first judgment. In this second action, plaintiffs reached a $1 million settlement with one defendant from the first action and his spouse, and the scope of the settlement included liability from the first action. Before a judicial determination of good-faith could be made, however, those defendants, having paid only $254,000 of the amount due under the settlement, filed for bankruptcy. After apportioning part of the settlement to the action against the wife, and part to the husband's liability for punitive damages awarded in the first action, the trial court ordered that plaintiffs execute a partial satisfaction of judgment in the amount of $61,000. Non-settling defendants appealed, arguing that under *Code Civ. Proc. §§ 877* and *877.6*, the full $1 million settlement amount should have been offset against their joint liability from the first lawsuit. The court of appeal disagreed, finding that those statutes did not apply under the facts of the case. The court noted that under the clear statutory language, *Code Civ. Proc. §§ 877* and *877.6* apply only to settlements entered into before a verdict or judgment has been reached in a case and have no application to a settlement or compromise reached after a judgment has been entered. Thus, regardless of whether the settlement was found to be in good faith, those statutes did not apply to the settlement at issue in relation to the judgment from the first lawsuit (*176 Cal. App. 4th 740, 750-751)* .

In *Be v. Western Truck Exch. (1997) 55 Cal. App. 4th 1139, 64 Cal. Rptr. 2d 527* , plaintiff was badly injured when the wheel of a truck traveling in the opposite direction on the freeway suddenly flew off and landed on the roof of the pickup truck in which he was riding. The roof collapsed, the wheel struck plaintiff's head, fracturing plaintiff's neck and leaving him paralyzed. Plaintiff sued among others, the truck's manufacturer. The manufacturer cross-complained against leasing company for indemnity. The manufacturer settled with plaintiff, and that settlement was found by the trial court to be in good faith. Plaintiff's case went to trial against the other defendants, plaintiff prevailed, and the manufacturer was found to be 10 percent at fault. Judgment was entered and the leasing company filed a motion seeking a determination that a settlement between the leasing company and plaintiff was a good faith settlement under *Code Civ. Proc. § 877*. The trial court found the settlement to be in good faith and dismissed manufacturer's cross-complaint for indemnity against leasing company pursuant to *Code Civ. Proc. § 877.6*. The manufacturer appealed the ruling of the trial court, contending that *Code Civ. Proc. § 877* applied only to preverdict settlements. The court of appeal agreed and held that the trial court erred in granting leasing company's motion for good faith settlement and dismissal of the cross-complaint (*55 Cal. App. 4th 1139, 1142)* . The court began by stating that since the issue was one of statutory interpretation and application of the statute to undisputed facts, the question was one of law subject to the court of appeal's independent review. It then said that it agreed with *Southern Cal. White Trucks v. Teresinski (1987) 190 Cal. App. 3d 1393, 236 Cal. Rptr. 159* [*see § 115.154[3][a]*], that postjudgment settlements were not permitted by *Code Civ. Proc. § 877*.

The court found that this reading of the statute was supported by the unfair result in this case: leasing company knew when it settled with plaintiff the amount of its exposure in the cross-complaint filed by manufacturer; leasing company also knew that it could no longer be sued by plaintiff; any amount leasing company offered to plaintiff would be a windfall, so plaintiff would not necessarily drive a hard bargain; nevertheless that amount, however small, would

protect leasing company from having to pay anything at all against manufacturer. Thus, by paying a small amount of money to plaintiff, leasing company was able to discharge its great potential exposure from the cross-complaint. The leasing company had every advantage over manufacturer when leasing company settled with plaintiff. The court concluded by dismissing leasing company's arguments that *Teresinski* was not controlling and that it should instead apply the law as stated in two other cases. It found that neither case permitted the trial court to find that the settlement between leasing company and plaintiff was a good faith settlement under Civ. Code §§ 877, 877.6 (*53 Cal. App. 4th 1139, 1148)* .

In *John Hancock Mut. Life Ins. Co. v. Setser (1996) 42 Cal. App. 4th 1524, 50 Cal. Rptr. 2d 413* , an insurance company was named as a defendant in an underlying action for fraud on the basis that the active defendants were its agents and had used its letterhead. The insurance company cross-complained against the active defendants, claiming that it did not know about their tortious conduct. In the underlying action, the insurance company was granted a summary judgment, with the trial court concluding that it neither knew about nor ratified the transaction. The active defendant subsequently served the insurance company with a motion to determine that a settlement in the underlying action was in good faith within *Code Civ. Proc. § 877.6*. The insurance company countered this with a motion for attorney fees under *Code Civ. Proc. § 1021.6*. The trial court granted the motion for good faith settlement, and denied the motion for attorney fees. The court of appeal concluded that the claim for attorney fees was a form of implied equitable indemnity which would be barred by *Code Civ. Proc. § 877.6* if it was a further claim of a joint tortfeasor against the settling defendants. However, the court reasoned that the insurance company's indemnity claim became established when it obtained summary judgment in the underlying action on the ground that it was without fault and there was no viable theory of vicarious or strict liability (*42 Cal. App. 4th 1524, 1534)* . Since the claim was not a "further claim," but rather one which had been perfected before the trial court made its good faith determination, the trial court erred in rejecting the application for attorney fees on the ground that it was barred by *Code Civ. Proc. § 877.6*.

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11-115 California Points & Authorities § 115.155

§ 115.155 Opposing Contention That Good-Faith Settlement Precludes Indemnity or Contribution--Good-Faith Settlement [Code Civ. Proc. § 877.6] Is Not Binding on Party Who Had No Opportunity to Be Heard

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

_____ [*Party, e.g.,* CROSS COMPLAINANT] IS NOT BARRED FROM SEEKING _____ [COMPARATIVE INDEMNITY *or* CONTRIBUTION] FROM _____ [*party, e.g.,* CROSS DEFENDANT] ON ACCOUNT OF A SETTLEMENT AGREED TO BY _____ [*e.g.,* CROSS DEFENDANT] BECAUSE _____ [*e.g.,* CROSS COMPLAINANT] WAS NOT A PARTY TO THE ACTION AT THE TIME WHEN THE SETTLEMENT WAS DETERMINED TO BE IN GOOD FAITH AND DID NOT HAVE AN OPPORTUNITY TO BE HEARD ON THE ISSUE OF THE GOOD FAITH OF THE SETTLEMENT.

Finding of Good-Faith Settlement Not Binding on Unnamed Joint Tortfeasor or Co-Obligor Who Had No Opportunity to Be Heard. Due process dictates that an unnamed joint tortfeasor or co-obligor whose potential liability is known or reasonably should have been known to the settling parties, but who is given no opportunity to be heard on the good faith of a prior settlement, is not bound by a good faith determination made under *Section 877.6 of the Code of Civil Procedure*, and has a right to challenge that finding once brought into the litigation (*Singer Co. v. Superior Court (1986) 179 Cal. App. 3d 875, 881, 890-893, 225 Cal. Rptr. 159* ; *see U.S. Const. amend. XIV*; *Calif. Const. art. I, § 17*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a contention that a settlement is not effective under *Code Civ. Proc. § 877.6* to bar indemnity rights because the party against whom the settlement is asserted had no notice nor opportunity to be heard with regard to the judicial determination of good faith. This form may be used by an indemnitee tortfeasor

seeking comparative indemnity or by a co-obligor seeking contribution.

This form may be combined with points and authorities pertaining to the specific procedural context in which a right to indemnity or contribution is brought before the court [*see § 115.150[2]*]. It may be used in a memorandum in opposition to a pretrial motion, such as a demurrer or motion for summary judgment, alleging that indemnity or contribution rights are foreclosed as a matter of law by a good faith settlement. It may also be used in an appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. It should be established that: (1) the party using the form was one of multiple parties alleged to be liable, either in tort or on a nontort obligation, to a third party; (2) the party using the form is also a cross complainant or plaintiff in an action for comparative indemnity or contribution with regard to the occurrence giving rise to the liability; (3) the defendant or cross defendant entered into a settlement with the third party that was judicially confirmed as in good faith under *Code Civ. Proc. § 877.6*; and *(4)* the party using the form had no notice of nor opportunity to be heard with regard to the question of the good faith of the settlement. The particular facts that establish this lack of opportunity should be developed. For example, the party using the form may not have been made a party to the action until after the good-faith hearing.

[3] Discussion of Authorities

[a] Finding of Good-Faith Settlement Not Binding on Unnamed Joint Tortfeasor or Co-Obligor Who Had No Opportunity to Be Heard

In ***Singer Co. v. Superior Court*** *(1986) 179 Cal. App. 3d 875, 225 Cal. Rptr. 159* , Singer, an unnamed joint tortfeasor, was not initially brought into a personal injury lawsuit. Plaintiff and defendant in that suit entered into a settlement, and the trial court determined that the settlement had been entered into in good faith, pursuant to *Code Civ. Proc. § 877.6*. At the time, plaintiff and defendant knew or should reasonably have known of the potential liability of Singer, but had not given Singer an opportunity to be heard at the good-faith determination hearing. After the good-faith determination had been made, Singer was served as a cross defendant in the action. Singer answered, and filed a cross complaint for indemnity and contribution against defendant. Singer also sought discovery of evidence relevant to the good-faith determination. Defendant moved to dismiss Singer's cross complaint on the grounds that it was barred by the good-faith determination. The trial court agreed, and dismissed. Singer sought a writ of mandate in the court of appeal.

The court of appeal granted the petition for a peremptory writ of mandate, holding that the good-faith determination was not binding on Singer, and that Singer was entitled to further discovery. Specifically, the court held that due process under *U.S. Const. amend. XIV* and *Calif. Const. art. I, § 17*, dictates that an unnamed joint tortfeasor whose potential liability is known, or reasonably should have been known, to the settling parties but who is given no opportunity to be heard on the good faith of a prior settlement is not bound by a good faith determination under *Code Civ. Proc. § 877.6*. The party has a right to challenge that finding once he or she has been brought into the litigation. Furthermore, the court held that Singer was entitled to engage in limited discovery against the settling defendant to elicit evidence relevant to the determination of good faith as was available at the time of settlement, whether or not the evidence was then actually presented (*179 Cal. App. 3d 875, 890-895)* .

NOTE:

The proper remedy to afford a party who had no opportunity to be heard with regard to the good-faith determination has been troublesome. In *Singer*, the court of appeal issued a writ directing the trial court to vacate its order finding that the settlement was in good faith. This order had the effect of at least temporarily reinstating the indemnity rights of Singer with regard to the settling defendant, but apparently did not nullify the settlement itself as between the settling parties. However, Singer was required to proceed to hearing on the issue of whether the settlement was, in fact, in good faith. Thus, the trial court was required to take a second look at the good-faith issue, with Singer's indemnity rights

depending on the outcome [*Singer Co. v. Superior Court (1986) 179 Cal. App. 3d 875, 895-898, 225 Cal. Rptr. 159]* .

In a subsequent court of appeal case, on similar facts involving a party with no meaningful opportunity to be heard on the good-faith issue, the majority fashioned the same remedy as the court in *Singer*, requiring the trial court to vacate the order finding good faith [*Rankin v. Curtis (1986) 183 Cal. App. 3d 939, 948, 228 Cal. Rptr. 753]* . However, according to the dissenting opinion, the settlement was expressly contingent on the court's finding it to be in good faith [*Rankin v. Curtis (1986) 183 Cal. App. 3d 939, 949, 228 Cal. Rptr. 753* (Stanforth, Acting P.J., dissenting)]. Thus, vacating the order finding good faith had the effect of nullifying the settlement between the plaintiff and the settling defendant (apparently unlike the situation in *Singer*). The dissenting opinion vigorously objected to this disposition, stating that the excluded party had no right to challenge the good-faith determination as between the settling parties. Instead, the dissent argued, the appropriate remedy should be to allow the excluded party to seek indemnity from the settling defendant if pursued to judgment by the settling parties. In other words, the court should simply refuse to give effect to the bar to the excluded party's indemnity rights that would otherwise flow from the good-faith determination under *Code Civ. Proc. §§ 877(b)* and *877.6(c)* [*Rankin v. Curtis (1986) 183 Cal. App. 3d 939, 950-951, 228 Cal. Rptr. 753* (Stanforth, Acting P.J., dissenting)].

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11-115 California Points & Authorities § 115.156

§ 115.156 Supporting Motion to Deny Judicial Confirmation of Good Faith of Settlement [Code Civ. Proc. § 877.6]--Settlement Is Not In Reasonable Range of Settling Party's Liability

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*]	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN SUPPORT OF MOTION TO DENY JUDI-
vs.	)	CIAL CONFIRMATION OF GOOD FAITH OF
_____ [*name*]	)	SETTLEMENT [*Code Civ. Proc. § 877.6*]
Defendant.	)	
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THIS MOTION FOR AN ORDER DETERMINING THAT THE SETTLEMENT OF PLAINTIFF'S CLAIM AGAINST _____ [*name of settling defendant*] WAS NOT MADE IN GOOD FAITH SHOULD BE GRANTED BECAUSE THE AMOUNT OF THE SETTLEMENT IS NOT IN A REASONABLE RANGE OF _____ [*name of settling defendant*] LIABILITY TO THE PLAINTIFF.

A. Reasonable-Range Requirement. In determining the good faith of a settlement, the court may inquire, among

other things, whether the amount of the settlement is within the reasonable range of the settling tortfeasor's proportional share of comparative liability for the plaintiff's injuries; the defendant's settlement figure must not be grossly disproportionate to what a reasonable person at the time of settlement would estimate the settling defendant's liability to be (*Tech-Bilt, Inc. v. Woodward-Clyde & Assocs. (1985) 38 Cal. 3d 488, 499, 213 Cal. Rptr. 256, 698 P.2d 159* ; *Gehl Bros. Mfg. Co. v. Superior Court (1986) 183 Cal. App. 3d 178, 182-183, 228 Cal. Rptr. 19*).

[*Optional*] **B. Settlement Involving Dismissal Based On Determination of Lack of Liability.** A settlement under which the plaintiff dismisses a defendant from the action for little or no consideration based on an alleged determination that the defendant has no liability is not in good faith if substantial uncontroverted evidence is presented that the defendant is liable (*see* *Greshko v. County of Los Angeles (1987) 194 Cal. App. 3d 822, 834-835, 239 Cal. Rptr. 846*).

[*Optional*] **C. Computation Involving Error of Law.** Computation of a settling party's potential liability to the plaintiff may not be based on an error of law (*Minnesota Mining & Mfg. Co. v. Superior Court (1988) 206 Cal. App. 3d 1025, 1028-1029, 253 Cal. Rptr. 908*).

[*Optional*] **D. Settling Defendant's Potential Culpability Should be Considered.** When determining the good faith of a settlement, the court must consider not only the settling defendant's potential liability to the plaintiff, but also the settling defendant's proportionate share of culpability (*TSI Seismic Tenant Space, Inc. v. Superior Court (2007) 149 Cal. App. 4th 159, 166, 56 Cal. Rptr. 3d 751*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion for denial of judicial confirmation of a settlement under *Code Civ. Proc. § 877.6* as not in good faith. The ground of the form is that the amount of the settlement is not within a reasonable range of the settling defendant's liability. The form may be used by a joint tortfeasor or co-obligor on a nontort obligation who wishes to preserve rights to comparative indemnity or contribution that will be extinguished if the good faith of the settlement is confirmed [*see Code Civ. Proc. §§ 877(b), 877.6(c)*].

Except in the case of a settlement involving confidentiality, the settling parties may submit an application to the court disclosing the terms and amount of the settlement and a proposed order confirming the settlement as in good faith. Notice must be given to all parties. Nonsettling parties who object to confirmation must notice a hearing within 25 days after the date on which the notice was mailed. If no opposing motion is filed, the court may confirm the good faith of the settlement [*Code Civ. Proc. § 877.6(a)(2)*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. It should be established that: (1) the settling defendant and the party opposing the motion are both alleged to be liable to the plaintiff, either as joint or concurrent tortfeasors or as co-obligors on a nontort obligation; (2) the plaintiff

and the settling party have entered into a settlement agreement involving a release and dismissal with prejudice, or other device that will terminate the litigation with regard to the settling party [*see Code Civ. Proc. § 877*]; and (3) the amount that the settling party is to pay to the plaintiff under the settlement does not reflect a reasonable range of the settling defendant's potential liability to the plaintiff. To establish this last point, counsel should be prepared to make some showing of the settling party's potential liability and of the plaintiff's damages.

[b] Burden of Proof and Evidentiary Material

The issue of the good faith of a settlement may be determined by the court on the basis of affidavits, or declarations under *Code Civ. Proc. § 2015.5,* served with the notice of hearing and any counter-affidavits filed in response [*Code Civ. Proc. § 877.6(b)*]. However, the party asserting the lack of good faith of a settlement has the burden of proof on the issue [*Code Civ. Proc. § 877.6(d)*].

Because many 877.6 applications are uncontested, the papers in support of the application need to contain only minimal information. A "barebones" motion that sets forth the ground of good faith, accompanied by a declaration that gives a brief background of the case, is sufficient [*City of Grand Terrace v. Superior Court (1987) 192 Cal. App. 3d 1251, 1261, 238 Cal. Rptr. 119]* . At a minimum, a party seeking confirmation of a settlement must explain: (1) who has settled with whom; (2) the dollar amount of each settlement; (3) if any settlement is allocated and how it is allocated between issues or parties; and (4) what nonmonetary consideration has been included and how the parties to the settlement value the nonmonetary consideration [*Alcal Roofing & Insulation v. Superior Court (1992) 8 Cal. App. 4th 1121, 1129, 10 Cal. Rptr. 2d 844]* . The opposing party must initiate a contested hearing by filing a motion to establish the lack of good faith. If no such contesting papers are filed, the court may grant the application summarily without considering the *Tech-Bilt* requirements [*see Tech-Bilt, Inc. v. Woodward-Clyde & Assocs. (1985) 38 Cal. 3d 488, 499, 213 Cal. Rptr. 256, 698 P.2d 159* ; *see also § 115.156[3][a*]]. If contesting papers are filed, the applying party must then be prepared to meet the arguments made by the opposing party with valid evidence [*City of Grand Terrace v. Superior Court (1987) 192 Cal. App. 3d 1251, 1261-1262, 238 Cal. Rptr. 119* ; *see Greshko v. County of Los Angeles (1987) 194 Cal. App. 3d 822, 834-835, 239 Cal. Rptr. 846* ; *see also § 115.156[3][b*]]. The court may, in its discretion, receive evidence at the hearing [*Code Civ. Proc. § 877.6(b)*].

In some cases, the objecting nonsettlor may not have sufficient information at the time of the hearing to carry its burden of proof regarding lack of good faith. In this event, the objecting nonsettlor may move for a continuance of the hearing for the purpose of conducting discovery to meet its statutory burden of proof [*City of Grand Terrace v. Superior Court (1987) 192 Cal. App. 3d 1251, 1265, 238 Cal. Rptr. 119]* .

[c] Applicability of Form to Contribution

Code Civ. Proc. § 877.6 applies to settlements by co-obligors on a contract debt, as well as to settlements by joint tortfeasors [*Code Civ. Proc. § 877.6(a)*]. A finding of good faith then has the effect of terminating any right of contribution of the other obligors [*Code Civ. Proc. § 877.6(c)*; *see § 115.150[2][b]*].

The question of whether a contract obligor's settlement is within a reasonable range of liability might arise if the obligee settles with one obligor for less than a pro rata (equal) share of the debt or for a share that is less than that obligor's proportionate share of liability under some other method of apportionment [*see Minnesota Mining & Mfg. Co. v. Superior Court (1988) 206 Cal. App. 3d 1025, 1028-1029, 253 Cal. Rptr. 908* ; *see also §§ 115.111[3][a], 115.156[3][c]*]. For example, if there are three solvent obligors, each would be liable for a one-third pro rata share. A settlement with one of them for considerably less than one-third would not be within a reasonable range of liability.

[d] Opposing Memoranda

In an appropriate case, the points and *authorities in §§ 115.160* and *115.161* may be used to oppose the contention

supported by these points and authorities.

[3] Discussion of Authorities

[a] Reasonable-Range Requirement

Tech-Bilt, Inc. v. Woodward-Clyde & Assocs. *(1985) 38 Cal. 3d 488, 213 Cal. Rptr. 256, 698 P.2d 159* is the California Supreme Court's landmark delineation of the question of what constitutes a good-faith settlement. In the case, owners of residential property sued the developer, an association of soils engineers, and others to recover damages on various theories for structural defects in their residence. The action against the developer was timely in that it was filed within 10 years after the developer had substantially completed its work [*see Code Civ. Proc. § 337.15(a)*]. However, the action against the soils engineers appeared to be barred by the 10-year period. Plaintiffs, therefore, accepted their offer to waive any claim against plaintiffs for costs in defending the action if plaintiffs would dismiss their claim against it. The developer, who had not settled with plaintiffs, thereafter filed an amended cross complaint for declaratory relief regarding its right to be indemnified by the soils engineers. The soils engineers then moved for an order to confirm its agreement with plaintiffs as a good-faith settlement under *Code Civ. Proc. § 877.6* and for summary judgment on the cross complaint. The trial court found the settlement to have been made in good faith and granted summary judgment dismissing the cross complaint, and the developer appealed.

The Supreme Court reversed on the ground the settlement was not a good-faith settlement within the meaning of *Code Civ. Proc. § 877.6*. Preliminarily, the Court pointed out that had the soils engineers obtained a summary judgment on plaintiff's claim on the basis of the statute of limitations, it would not have barred the developer's cross complaint against the soils engineers for equitable indemnity [*see Valley Circle Estates v. VTN Consol., Inc. (1983) 33 Cal. 3d 604, 189 Cal. Rptr. 871, 659 P.2d 1160* ; *see also § 115.67*] (*38 Cal. 3d 488, 492)* . It then concluded that the developer's right to indemnity should not be terminated simply because the soils engineers obtained dismissal by settlement rather than by summary judgment.

In reaching this decision, the Court noted that the major goals of the 1957 tort contribution legislation [*see Code Civ. Proc. § 877*] were (1) equitable sharing of costs among the parties at fault, and (2) encouragement of settlements. Neither goal should be applied to defeat the other, and courts should review agreements purportedly made under its aegis to insure that they appropriately balance the statute's dual objectives (*38 Cal. 3d 488, 494)* .

The Court further stated that the formulation of a precise definition of good faith is neither possible nor practicable. However, general equitable principles dictate that a settlement is unfair if it is so poorly related to the value of the case that it imposes a potentially disproportionate cost on the defendant ultimately selected for suit (*38 Cal. 3d 488, 495* , quoting *River Garden Farms, Inc. v. Superior Court (1972)26 Cal. App. 3d 986, 997, 103 Cal. Rptr. 498*).

The Court then set forth the basic framework of a good-faith determination. In determining whether the settlement was in good faith, the trial court may inquire, among other things, into whether the amount of the settlement is within the reasonable range of the settling tortfeasor's proportional share of comparative liability for the plaintiff's injuries. Bad faith is not necessarily established by a showing that a settling defendant paid less than his or her theoretical proportionate or "fair" share, because such a rule would unduly discourage settlements. Damages are often speculative and the probability of legal liability for them is often uncertain or remote. Even if the claimant's damages are obviously great, and the liability for them certain, a disproportionately low settlement figure is often reasonable in the case of a relatively insolvent and uninsured, or underinsured, joint tortfeasor. Moreover, such a rule would tend to convert the good-faith hearing into a full-scale minitrial (*38 Cal. 3d 488, 499)* .

However, these considerations do not lead to the conclusion that the amount of a settlement is irrelevant in determining good faith. Rather, the intent and the policies underlying *Code Civ. Proc. § 877.6* require that a number of factors be taken into account, including a rough approximation of plaintiff's total recovery and the settlor's proportionate liability,

the amount paid in settlement, the allocation of settlement proceeds among plaintiffs, and a recognition that a settlor should pay less in settlement than it would if it were found liable after trial. Other relevant considerations include the financial conditions and insurance policy limits of settling defendants, as well as the existence of collusion, fraud, or tortious conduct aimed to injure the interests of nonsettling defendants. Finally, practical considerations obviously require that the evaluation be made on the basis of information available at the time of settlement. A defendant's settlement figure must not be grossly disproportionate to what a reasonable person, at the time of the settlement, would estimate the settling defendant's liability to be. The party asserting the lack of good faith, who has the burden of proof, should be permitted to demonstrate that the settlement is so far "out of the ballpark" in relation to these factors that it is inconsistent with the equitable objectives of the statute (*38 Cal. 3d 488, 499-500)* .

Gehl Bros. Mfg. Co. v. Superior Court *(1986) 183 Cal. App. 3d 178, 228 Cal. Rptr. 19* , was an action for damages for negligence, strict products liability, and breach of warranty against three manufacturers that had fabricated the finished product that caused serious injury to the plaintiff. Plaintiff settled with one of the manufacturers for $10,000, which represented less than one percent of the total settlement liability, estimated by the trial court to be approximately $1,500,000. The trial court granted a motion for an order declaring the settlement was entered into in good faith.

On petition of one of the other joint tortfeasors, the court of appeal issued a peremptory writ of mandate, directing the trial court to vacate its order. The court considered whether the amount of the settlement was within the reasonable range of the settling tortfeasor's proportional share of comparative liability for plaintiff's injuries, according to the *Tech-Bilt* factors. The court concluded that the settlement did not meet good-faith requirements, because such a small settlement would require the conclusion that it was a "cost of defense settlement" predicated on no liability as a matter of law (*183 Cal. App. 3d 178, 183)* . However, liability devolving on a product manufacturer by reason of design defects or failure to warn or to provide a safety device falls in some proportion on all parties who have mutually participated in designing, assembling, and marketing the offending product. Therefore, the manufacturer's potential share of a total settlement liability estimated to be in seven figures would surely exceed by a substantial amount the $10,000 settlement (*183 Cal. App. 3d 178, 186)* .

[b] Settlement Involving Dismissal Based On Determination of Lack of Liability

Greshko v. County of Los Angeles *(1987) 194 Cal. App. 3d 822, 239 Cal. Rptr. 846* , was a personal injury action originally brought against a motorist for negligent operation of a motor vehicle, and against a city and county based on allegations of negligent design of an intersection. Shortly before trial, the plaintiff dismissed the public entities from the action in exchange for a waiver of costs only. Subsequently, the defendant motorist filed a separate action for partial equitable indemnity against the public entities based on the principles of comparative negligence. The defendant public entities moved for determination that their dismissal from the action constituted a good-faith settlement. The defendant motorist presented expert testimony that the intersection involved was poorly designed, and further evidence that the dismissal had resulted in the suppression of evidence and an inability to make a proper evaluation of the dangerous character of the intersection. The public entities presented only declarations of plaintiff's attorney stating that he had consulted with experts and had determined that the public entities were not liable. The trial court rejected the motorist's evidence as "self-serving," confirmed the settlement as in good faith based on its finding of nonliability of the public entities, and dismissed the motorist's action for equitable indemnity.

The court of appeal found an abuse of discretion and reversed on the issue of good faith. The court found that the motorist had presented competent evidence of the liability of the public entities. In contrast, the declarations of plaintiff's counsel that were relied on by the public entities were found to be lacking a proper factual foundation for the conclusion of nonliability, and therefore insufficient to overcome the motorist's substantial evidence of the public entities' liability (*194 Cal. App. 3d 822, 834-835)* .

[c] Computation Involving Error of Law

In ***Minnesota Mining & Mfg. Co. v. Superior Court*** *(1988) 206 Cal. App. 3d 1025, 253 Cal. Rptr. 908* , the settling defendant (Schwartz) was a 40-percent shareholder in a corporation. Finch owned 20 percent and Pankin owned the remaining 40 percent. Pankin was not a defendant to the suit. Schwartz's liability was dependent on the plaintiff's success in piercing the corporate veil. The settling parties and the trial court calculated the defendant's potential liability as 40 percent of the corporation's debt.

The court of appeal rejected the settlement as not in good faith because it was based on a mistake of law. Under the law, should the corporate veil be pierced, all shareholders would be jointly and severally liable for corporate debts. Schwartz and the court assumed that Pankin and Finch would be required to contribute in proportion to their shares in the corporation and that Schwartz would ultimately pay only 40 percent of any award. However, Pankin was not a named defendant. Thus, the burden would be apportioned only among Schwartz and Finch. Thus, the court erred in basing its determination on a mathematical formula that was based on an incorrect legal assumption (*206 Cal. App. 3d 1025, 1028-1029)* .

[d] Settling Defendant's Potential Culpability Should be Considered

In *TSI Seismic Tenant Space, Inc. v. Superior Court (2007) 149 Cal. App. 4th 159, 56 Cal. Rptr. 3d 751* , plaintiff developer hired a company to provide geotechnical services prior to the construction of an apartment complex. As part of their contract, plaintiff had agreed to limit any potential liability of this company for negligent performance to $50,000. This company allegedly was negligent in analyzing the soil, resulting in cracking in the complex's stairs and flatwork. Plaintiff sued the geotechnical company, as well as the general contractor and structural engineer on the project. Plaintiff settled with the geotechnical company for the $50,000 limit provided in the limitation of liability agreement, and these parties then sought a judicial determination that the settlement was in good faith. The trial court found that the settlement was in good faith. The non-settling defendants filed petitions for writ of mandate seeking to set aside the finding that the settlement was in good faith.

The court of appeal granted writ of mandate ordering the trial court to vacate its finding of good faith. The court held that when determining the good faith of a settlement, the court must consider not only the settling defendant's potential liability to the plaintiff, but also the settling defendant's proportionate share of culpability and potential claims for indemnity to other liable parties (*149 Cal. App. 4th 159, 166)* . Even though the settlement amount was only $50,000, plaintiff had claimed that the geotechnical company was responsible for over $3 million in damages. Given this disparity, the trial court abused its discretion in relying solely on the limitation of liability agreement to find that the settlement was in good faith. The court noted, however, that while it was error to find that the settlement was made in good faith, the settling defendant could still ultimately be protected by the plaintiff from further liability pursuant to the limitation of liability clause (*149 Cal. App. 4th 159, 167-168)* .

[4] Additional Authorities

[a] Reasonable-Range Requirement

In *Long Beach Memorial Medical Center v. Superior Court (2009) 172 Cal. App. 4th 865, 91 Cal. Rptr. 3d 494* , plaintiffs brought a medical malpractice action against a hospital, a doctor, and related entities based on alleged negligence when monitoring plaintiff mother and her fetal heart monitors while she was in labor, resulting in birth-related injuries to plaintiff child. During settlement negotiations at which plaintiffs were seeking $8 million, the doctor's attorney discussed the possibility of contributing $1.5 million to a global settlement fund, with a nursing entity contributing another $2 million and the hospital $4 million. After several weeks of talks, plaintiffs threatened to retract their settlement offer and submit a higher offer, prompting the hospital and nursing entity to agree to settle for $5.25 million and $2.5 million respectively. Although the hospital had understood that the doctor's attorney had no settlement authority, the very next day that attorney offered to settle the claims against the doctor for $200,000. Plaintiffs accepted, and the trial court determined that this settlement with the doctor was made in good faith, thereby preventing the other

settling defendants from seeking indemnity from the doctor. However, the court of appeal reversed this good-faith determination. Noting that the doctor agreed to settle for $200,000 on a claim valued at $8 million, the court of appeal concluded that the doctor's settlement amount was disproportionately small as the evidence would support a finding that the doctor was substantially liable for the injuries. The doctor was the sole physician responsible for the high-risk labor and delivery, he knew about plaintiffs' abnormal fetal heart tracings for several hours without taking any action, and ongoing readings from the fetal heart monitors were available in multiple locations in the hospital, including the doctor's lounge. Nonetheless, the doctor failed to take timely action to address the problems experienced during the labor. Moreover, during settlement negotiations, the doctor's own attorney effectively admitted that the doctor's fair share of responsibility was around $1.5 million (*172 Cal. App. 4th 865, 874)* . In reversing the good-faith determination, the court also noted that the doctor's $200,000 settlement amount was only 10 percent of his $2 million insurance coverage limits. Moreover, the timing of the doctor's modest settlement offer, coming one day after the other defendants agreed to settle for much larger amounts, supported the conclusion that the doctor's offer to settle was calculated only to prevent the other settling defendants from seeking a much larger sum from the doctor through exercise of their indemnity rights (*172 Cal. App. 4th 865, 875-876)* .

[b] Computation Involving Error of Law

In *Toyota Motor Sales U.S.A., Inc. v. Superior Court (1990) 220 Cal. App. 3d 864, 269 Cal. Rptr. 647* , the plaintiff was injured in an collision with a pizza delivery vehicle. She sued the driver, the pizza franchisee for whom the driver was working at the time, and the manufacturer of her vehicle, alleging that a seat belt defect contributed to her injuries. The franchisee settled for an amount far under the plaintiff's damages and moved for good-faith settlement confirmation under *Code Civ. Proc. § 877.6*. The trial court granted the motion because it was persuaded that the driver was an independent contractor and not the franchisee's employee. As the hirer of an independent contractor, the franchisee would not be vicariously liable for the driver's torts, and thus a low settlement was in good faith (*220 Cal. App. 3d 864, 869 n.4*). The vehicle manufacturer sought a writ of mandate vacating the good-faith determination order.

The court of appeal issued the writ. It agreed that the trial court was required to resolve the question of the driver's status as employee or independent contractor to make a good-faith determination, but reached the opposite conclusion. On the undisputed facts presented to the trial court, the court of appeal found no substantial evidence to support the finding that the driver was an independent contractor and not an employee. Therefore, the legal basis on which the good-faith determination was made was incorrect, and the order could not stand (*220 Cal. App. 3d 864, 870-878)* .

NOTE:

For discussion of the substantive law of respondeat superior and the distinction between an employee and an independent contractor, see California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts* (Matthew Bender).

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
CHAPTER 115 INDEMNITY AND CONTRIBUTION
PART II. FORMS
D. Effects of Settlement

11-115 California Points & Authorities § 115.157

§ 115.157 Supporting Motion to Deny Judicial Confirmation of Good Faith of Settlement [Code Civ. Proc. § 877.6]--Settlement Is Aimed At Injuring Interests of Nonsettling Parties

[1] FORM

[*Caption. See § 115.156.*]

THIS MOTION FOR AN ORDER DETERMINING THAT THE SETTLEMENT OF PLAINTIFF'S CLAIM AGAINST _____ [*name of settling defendant*] WAS NOT MADE IN GOOD FAITH SHOULD BE GRANTED BECAUSE THE SETTLEMENT IS INTENDED TO INJURE THE INTERESTS OF _____ [*name of party opposing settlement*].

A. Requirement of Good Faith Extends to Nonsettling Parties. To entitle a settling defendant to discharge from claims for proportional indemnity or contribution by nonsettling defendants under *Section 877 of the Code of Civil Procedure*, the settlement must be in good faith not only in respect to the settling plaintiff, but also in respect to the nonsettling defendants (*Southern Cal. Gas Co. v. Superior Court (1986) 187 Cal. App. 3d 1030, 1036, 232 Cal. Rptr. 320* ; *River Garden Farms, Inc. v. Superior Court (1972) 26 Cal. App. 3d 986, 996, 103 Cal. Rptr. 498*).

B. Intent to Injure Nonsettling Defendants. Among the factors that the court should consider in determining whether a settlement is in good faith is the existence of any collusion, fraud, or tortious conduct aimed to injure the nonsettling defendants (*Tech-Bilt, Inc. v. Woodward-Clyde & Assocs. (1985) 38 Cal. 3d 488, 499, 213 Cal. Rptr. 256, 698 P.2d 159* ; *Henderson v. Superior Court (1984) 162 Cal. App. 3d 297, 300, 208 Cal. Rptr. 485*).

[*Optional*] **C. Tactical Considerations Unrelated to Liability.** A settlement entered into for a tactical reason unrelated to the settling defendant's liability does not necessarily reflect a good-faith determination of relative liabilities (*Greshko v. County of Los Angeles (1987) 194 Cal. App. 3d 822, 835-836, 239 Cal. Rptr. 846*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion for denial of judicial confirmation of a settlement under *Code Civ. Proc. § 877.6* as not in good faith. The ground of the form is that the settlement reflects the intent of the settling parties to injure the nonsettling defendant. The form may be used by a joint tortfeasor, or by a co-obligor on a nontort obligation, who wishes to preserve rights to comparative indemnity or contribution that will be extinguished if the good faith of the settlement is confirmed [*see Code Civ. Proc. §§ 877(b), 877.6(c)*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. It should be established that: (1) the settling defendant and the party opposing the motion are both alleged to be liable to the plaintiff, either as joint or concurrent tortfeasors or as co-obligors on a nontort obligation; (2) the plaintiff and the settling party have entered into a settlement agreement involving a release and dismissal with prejudice, or other device that will terminate the litigation with regard to the settling party [*see Code Civ. Proc. § 877*]; and (3) the settlement involves collusion between the parties to injure the interests of the party opposing the motion.

[3] Discussion of Authorities

[a] Requirement of Good Faith Extends to Nonsettling Parties

Southern Cal. Gas Co. v. Superior Court *(1986) 187 Cal. App. 3d 1030, 232 Cal. Rptr. 320* involved a settlement that included an assignment to the plaintiffs of the settling defendants' rights under an insurance policy. One person was killed and another seriously injured in a construction accident. Plaintiffs sued numerous defendants, who all cross complained against each other for comparative indemnity. A group of defendants who were insureds under the same insurance policies settled with the plaintiffs for the policy limits of two of the policies. As a part of the settlement, these defendants also assigned plaintiffs their rights under a third policy for which the insurer had denied coverage. The assignment covered causes of action for both breach of contract and insurance bad faith. There was no dollar value assigned to the assignment nor was there any allocation of the rights between the two plaintiffs. The settling defendants moved for a judicial determination that the settlement was in good faith under *Code Civ. Proc. § 877.6*. The nonsettling defendants opposed the motion on the ground that the assignment of rights, being an asset of undetermined value and being unallocated between the plaintiffs and wholly within the power of the plaintiffs to pursue or abandon, deprived the nonsettling defendants of their statutory right to credit for the full value of the settlement against any eventual judgment against them [*see Code Civ. Proc. § 877(a)*]. The trial court confirmed the settlement as in good faith.

The court of appeal reversed, agreeing with the nonsettling defendants that the trial court should have included in its order provisions that would ensure that the nonsettling defendants would obtain credit for the value of the assigned rights (*187 Cal. App. 3d 1030, 1035)* . The court noted that, if there were ever any question on the matter, it is now clear that to entitle a settling defendant to a discharge of claims for proportional indemnity or contribution by nonsettling defendants under *Code Civ. Proc. § 877*, the settlement entered into must be in good faith not only in respect to the settling plaintiff but also in respect to the nonsettling defendants, citing *Tech-Bilt Inc. v. Woodward-Clyde & Assocs. (1985) 38 Cal. 3d 488, 494-495, 213 Cal. Rptr. 256, 698 P.2d 159* [*see § 115.156*] and other cases. The problems that the court saw with the settlement were that (1) the court left the decision whether or not

to pursue the assigned rights wholly to the discretion of the plaintiffs; and (2) there was no allocation of any recovery on the assigned rights as between the plaintiffs so as to permit appropriate credit should they both recover judgment against the nonsettling defendants (*187 Cal. App. 3d 1030, 1036)* .

River Garden Farms, Inc. v. Superior Court *(1972) 26 Cal. App. 3d 986, 103 Cal. Rptr. 498* predated the enactment of *Code Civ. Proc. § 877.6* and construed the good-faith clause of *Code Civ. Proc. § 877*]. The appeal arose out of an action by two minors against four business firms for personal injuries and wrongful death resulting from a fire in which their parents died and the minors were seriously injured. Three of the business firms settled with plaintiffs for both the personal injury and wrongful death claims for a total of $1,290,000 and obtained releases pursuant to *Code Civ. Proc. § 877*. After receiving court approval of the settlement agreements, the attorneys offered to settle with the nonsettling defendant for $3,850,000 (about twice their original offer for settling with all defendants) less the $1,290,000 received from the other defendants. This would have required the nonsettling defendant to bear about two-thirds of the liability it once shared with three other defendants. The nonsettling defendant sought a writ of mandate, charging that the releases were not given in good faith as required by *Code Civ. Proc. § 877*. Plaintiffs contended that the duty of good faith was limited to the parties to the settlement and did not extend to nonsettling parties.

The court of appeal rejected the contention. Although it denied the writ as inappropriate under the circumstances, it held that the nonsettling defendant was entitled to assert invalidity of the releases by showing that they did not comply with the statutory good-faith requirement and that, on such a showing, it would be entitled to appropriate relief. In so holding, the court considered the legislative history of *Code Civ. Proc. § 877*. The good-faith clause in that statute was designed to give the court the power to reject a discharge from liability for indemnity in the case of a settlement involving collusion (*26 Cal. App. 3d 986, 995)* . The good-faith clause extends the obligation of good faith beyond the parties to the negotiations and embraces an absent tortfeasor. The latter has a financial stake in the amount of the settlement, and thus, a justifiable interest in the question of good faith (*26 Cal. App. 3d 986, 995-996)* .

[b] Intent to Injure Nonsettling Defendants

Tech-Bilt, Inc. v. Woodward-Clyde & Assocs. *(1985) 38 Cal. 3d 488, 213 Cal. Rptr. 256, 698 P.2d 159* is discussed in *§ 115.156[3][a]*. In delineating the factors that a court should take into account in considering whether a settlement is in good faith, the Court stated that relevant considerations include the existence of collusion, fraud, or tortious conduct aimed to injure the interests of nonsettling defendants (*38 Cal. 3d 488, 499)* .

NOTE:

Prior to *Tech-Bilt*, courts of appeal had held that the settling parties owe the nonsettling defendants a legal duty to refrain from tortious or other wrongful conduct, but that absent conduct violative of this duty, the settling parties may act to further their respective interests without regard to the effect of their settlement on other defendants [*see Dompeling v. Superior Court (1981) 117 Cal. App. 3d 798, 809-810, 173 Cal. Rptr. 38]* . *Tech-Bilt* broadened the duty of good faith beyond the limited area of wrongful conduct, while retaining the prior standard as one element of the good-faith inquiry.

Henderson v. Superior Court *(1984) 162 Cal. App. 3d 297, 208 Cal. Rptr. 485* , involved a claim for personal injuries suffered by one Fallon when one Zimmelman drove his automobile into a group of persons. Zimmelman cross complained against Henderson and Fallon's sister, alleging that he had been attacked by them and was attempting to escape from further assault. Zimmelman was a member of one gang, and Henderson and the Fallons were affiliated with another.

Henderson and Fallon's sister then entered into a settlement with Fallon, even though Fallon asserted no claim against them. There was a question concerning whether the amount of the settlement would actually be paid to Fallon. However, the effect of the settlement would be to foreclose Zimmelman from obtaining indemnity from the settling defendants, should he be found liable to Fallon. The trial court refused to confirm the settlement, and the court of appeal

denied mandate. The court found that the settlement involved collusion, which was tantamount to bad faith (*162 Cal. App.3d 297, 300)* .

[c] Tactical Considerations Unrelated to Liability

The facts of ***Greshko v. County of Los Angeles*** *(1987) 194 Cal. App. 3d 822, 239 Cal. Rptr. 846* , are discussed in *§ 115.156[3][b]*. Plaintiff elected to dismiss the public entity defendants and proceed solely against the allegedly negligent motorist and her insurer. At the good-faith determination hearing, plaintiff's counsel conceded that his theory of recovery included an eventual action against the motorist's insurer on a bad-faith theory (*194 Cal. App. 3d 822, 833)* . In reversing the finding of good faith, the court of appeal stated that the plan could be perceived as evidence of a motivation entirely unrelated to a good-faith determination of relative liabilities. Viewed in this light, the dismissals were simply tactical decisions designed to pave the way for a subsequent bad-faith lawsuit against the insurer. The court noted that although no case addressed the issue of whether this type of motivation constitutes fraudulent, collusive, or tortious conduct aimed to injure the interests of nonsettling defendants, such a purpose does not necessarily reflect a good-faith determination of relative liabilities. The court held that a dismissal designed to avoid complicating a case against a defendant in order to set up a later bad-faith insurance claim is fundamentally unfair to the insured defendant, with whom a plaintiff would have little incentive to settle. Such a dismissal also burdens the courts with more litigation and does not further the equitable policies of *Code Civ. Proc. §§ 877, 877.6* (*194 Cal. App. 3d 822, 835-836)* .

NOTE:

In *Torres v. Union Pac. R.R. Co. (1984) 157 Cal. App. 3d 499, 504, 203 Cal. Rptr. 825* , the court stated that it is well settled that certain settlement tactics or motives constitute bad faith. For example, a plaintiff might single out the most unpopular of several codefendants and settle with all other defendants, leaving the unpopular party to face the jury alone. Or, a plaintiff might settle with a defendant capable of providing crucial witnesses, in order to deprive the defense of these witnesses' testimony. Another wrongful tactic is seen in multiple-count lawsuits if a codefendant and plaintiff settle after conspiring to assign a disproportionately large amount of the settlement to the plaintiff's least valuable counts, leaving the nonsettling defendants fully exposed to the plaintiff's most valuable counts.

By contrast, another court has held that a provision of a settlement under which the settling tortfeasor is required to remain as a defendant and participate in the trial to deprive the remaining defendants of the trial tactic of using the "empty chair" to ascribe fault to an actor who is not there to defend himself or herself does not, in itself, preclude a finding of good faith [*see Everman v. Superior Court (1992) 8 Cal. App. 4th 466, 470-471, 473, 10 Cal. Rptr. 2d 176* ; *see also § 115.162*].

[4] Additional Authorities

[a] Intent to Injure Nonsettling Defendants

In *Bobrow/Thomas & Assocs. v. Superior Court (1996) 50 Cal. App. 4th 1654, 58 Cal. Rptr. 2d 626* , the trial court confirmed a settlement as a good faith settlement even though the settlement had the objective of abridging a non-settling defendant's indemnification claims and insurance coverage. The court of appeal reversed, holding that the settlement could not be confirmed without a full explanation of how the agreement would affect the action against the non-settling defendant, and a requirement that plaintiff make a firm commitment to limit its recovery against the non-settling defendant. The matter was thus remanded for presentation of the full details of the settlement, including how the continuing trial was to proceed and what commitments plaintiff had made about its recovery. The court noted that the trial court was entitled to confirm the settlement again if the settlement met the requirements for good faith (*50 Cal. App. 4th 1654, 1664)* .

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D. Effects of Settlement

11-115 California Points & Authorities § 115.158

§ 115.158 Supporting Motion to Deny Judicial Confirmation of Good Faith of Settlement [Code Civ. Proc. § 877.6]--Sliding-Scale Agreement Must Meet *Tech-Bilt* Standards

[1] FORM

[*Caption. See § 115.156.*]

THIS MOTION FOR AN ORDER DETERMINING THAT THE SETTLEMENT OF PLAINTIFF'S CLAIM AGAINST _____ [*name of settling defendant*] WAS NOT MADE IN GOOD FAITH SHOULD BE GRANTED BECAUSE THE SETTLEMENT IS A SLIDING-SCALE AGREEMENT THAT DOES NOT MEET THE STANDARDS OF GOOD FAITH AS SET FORTH BY THE CALIFORNIA SUPREME COURT IN *TECH-BILT, INC. V. WOODWARD-CLYDE & ASSOCIATES.*

Sliding-Scale Settlement Agreements Must Meet *Tech-Bilt* Standards. A sliding-scale settlement agreement that fails to meet the standards articulated in *Tech-Bilt, Inc. v. Woodward-Clyde & Associates* is not in good faith (*see Abbott Ford, Inc. v. Superior Court (1987) 43 Cal. 3d 858, 875, 239 Cal. Rptr. 626, 741 P.2d 124*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion for denial of judicial confirmation of a settlement under *Code Civ. Proc. § 877.6* as not in good faith. The ground of the form is that the settlement is a sliding-scale agreement that does not meet the standards for good faith as set forth in *Tech-Bilt* [*see Tech-Bilt, Inc. v. Woodward-Clyde & Assocs. (1985) 38 Cal. 3d 488, 213 Cal. Rptr. 256, 698 P.2d 159* ; *see also § 115.156[3][a*]]. The form may be used by a joint tortfeasor or co-obligor on a nontort obligation who wishes to preserve rights to comparative indemnity or contribution that will be extinguished if the good faith of the settlement is confirmed [*see Code Civ. Proc. §§ 877(b), 877.6(c)*].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. It should be established that: (1) the settling defendant and the party opposing the motion are both alleged to be liable to the plaintiff, either as joint or concurrent tortfeasors or as co-obligors on a nontort obligation; (2) the plaintiff and the settling party have entered into a settlement agreement involving a release and dismissal with prejudice, or other device that will terminate the litigation with regard to the settling party [*see Code Civ. Proc. § 877*]; and (3) the settlement is a "sliding-scale" agreement--that is, one that essentially guarantees the plaintiff a certain recovery, with the settling defendant's payment to be reduced by amounts ultimately recovered from other defendants. The particular way in which the agreement fails the *Tech-Bilt* standards should then be developed. For example, the agreement may give the settling defendant unreasonable veto power over any subsequent settlement to which the plaintiff might otherwise agree with other defendants.

[3] Discussion of Authorities

[a] Sliding Scale Settlement Agreements Must Meet *Tech-Bilt* Standards

In ***Abbott Ford, Inc. v. Superior Court*** *(1987) 43 Cal. 3d 858, 239 Cal. Rptr. 626, 741 P.2d 124* , plaintiff had sustained serious injuries when the left rear wheel of a van came off and crashed through the windshield of the car that she was driving. Plaintiff sued: (1) the driver of the van (Sneed) for negligent maintenance and continued operation of the van after hearing sounds indicating there might be some difficulty with the wheels; (2) the car dealer (Abbott), which had purchased the van used and customized it by replacing the original wheels and tires with "deep dish mag wheels" and oversized tires and resold it to the driver, for negligence in installing the wheels contrary to the express warnings in the owner's manual provided by the manufacturer, which the dealer had received, and in failing to give the purchaser any warning that because of the installation, the lug nuts would have a tendency to come loose; (3) the manufacturer of the van (Ford), which was also the manufacturer of plaintiff's car, for negligence and strict liability with respect to the van and for strict liability with respect to plaintiff's car because of a defect in the design of the windshield that led it to shatter on impact by the wheel and tire, thereby aggravating plaintiff's injuries; and (4) the company that had serviced the van some three months before the accident (Sears), for negligence.

Sneed's insurer settled with plaintiff for his insurance policy limits of $25,000. At a meeting among the remaining defendants held before the scheduled mandatory settlement conference, Abbott assessed the reasonable settlement value of the case at $2.5 million and offered to contribute 70 percent of that sum (its liability insurance policy provided coverage of $3.25 million); Ford and Sears, maintaining they had only minimal, if any, responsibility for the accident, were unwilling to bear 30 percent ($750,000) of the settlement. At about the same time, plaintiffs offered to settle with Ford and Sears if they would enter into a sliding-scale agreement guaranteeing plaintiff $1.5 million. Both defendants declined the offer. Abbott subsequently entered into a sliding-scale agreement with plaintiff, guaranteeing a recovery of $3 million, if at the conclusion of the lawsuit, she failed to collect the guaranteed amounts from the remaining defendants. In addition, the dealer's insurer agreed to make substantial, periodic, no-interest loans to plaintiffs and their attorneys during the course of the litigation and was obligated to pay the full $3 million, in the form of a no-interest loan, by a specified date if the action was not then terminated.

Abbott subsequently moved for a good-faith determination of the agreement. The trial court ruled the settlement was not

a good-faith settlement and Abbott sought review by writ of mandate. The court of appeal held that the agreement constituted a good-faith settlement as a matter of law. The Supreme Court granted a hearing, held the case pending release of its decision in *Tech-Bilt* [*Tech-Bilt, Inc. v. Woodward-Clyde & Assocs. (1985) 38 Cal. 3d 488, 213 Cal. Rptr. 256, 698 P.2d 159]* , which, when issued, disapproved the line of cases relied on by the court of appeal, and then remanded the case to the court of appeal to reconsider it in light of *Tech-Bilt*. On remand, the court of appeal concluded the good-faith standard enunciated in *Tech-Bilt* applies to sliding-scale agreements, but held that even under that standard, the agreement constituted a good-faith settlement as a matter of law. The Supreme Court granted review. While review was pending, the case was fully settled. Because important issues of law were involved, the Court, at the parties' urging, retained jurisdiction.

The Court agreed with the court of appeal that *Tech-Bilt* applies to sliding-scale agreement because neither *Code Civ. Proc. § 877* nor *Code Civ. Proc. § 877.6* exempts them from the good-faith requirement, and nothing in *Code Civ. Proc. § 877.5*, a provision enacted to protect against the unfair consequences that may flow from undisclosed sliding-scale agreements, indicated that they need not meet the generally applicable good-faith standard (*43 Cal. 3d 858, 875)* .

The Court, however, declined either to condemn or condone categorically sliding-scale agreements (commonly known throughout the country as "Mary Carter agreements," sometimes referred to as "Gallagher covenants," and occasionally as "guaranteed verdict agreements" (*43 Cal. 3d 858, 863 n.1, 869 n.9*)) for the following reasons: (1) an enormous variety of contractual arrangements fall within the general rubric of sliding-scale agreements and, although in all such agreements the settling defendant's ultimate liability to the plaintiff is dependent, at least in part, on the amount of money that the plaintiff recovers from the nonsettling defendants, there are a virtually unlimited number of additional provisions that may be included in such an agreement that will often affect substantially the operation and validity of the agreements (*43 Cal. 3d 858, 863 n.1, 870)* ; (2) the content and effect of the sliding-scale provision itself and the factual background against which the agreement is negotiated frequently vary significantly from case to case, and may also have a significant bearing on the fairness and propriety of a particular agreement (*43 Cal. 3d 858, 870-871)* ; and (3) a broad ruling on the inherent validity or invalidity of sliding-scale agreements in general is inappropriate because such an agreement may have a variety of effects at different stages of the litigation process--discovery, settlement, trial, or appeal (*43 Cal. 3d 858, 871)* .

The Court then discussed the *Tech-Bilt* factors and how they applied to sliding-scale agreements, and held that in order for the nonsettling defendants to be given credit against any judgment against them for the amount of consideration given for the sliding-scale settlement, the plaintiff and the settling tortfeasor would have to agree to a value, which would have to meet *Tech-Bilt's* "ballpark" standard if it were to constitute a good-faith settlement relieving the settling defendant from any claims for contribution or indemnity by the nonsettling defendants (*43 Cal. 3d 858, 871-884)* . The Court in sum concluded the following: (1) *Tech-Bilt's* good-faith standard applies to sliding-scale agreements; (2) to satisfy the statutory objective of a fair apportionment of loss, the "consideration" paid by a defendant who enters into a sliding-scale agreement must fall within the *Tech-Bilt* "ballpark" and the plaintiffs' claims against the remaining defendants must be reduced by the amount of the "consideration paid" by the settling defendant; (3) any unreasonable or bad-faith conduct of the nonsettling defendants that impeded the settlement process and led to the sliding-scale agreement may be taken into account in determining whether the agreement satisfies the "ballpark" standard; and (4) any provision that purports to give a settling defendant a "veto" over subsequent settlements is valid only if it is limited to settlements that would leave the earlier settling defendant to bear more than its fair share of liability for the plaintiffs' damages (*43 Cal. 3d 858, 886-887)* . The Court further said that the settling parties had placed no value on the sliding-scale agreement and that, had the case not been settled, it would have ordered the court of appeal to remand it to the trial court for further consideration of this issue (*43 Cal. 3d 858, 880)* .

NOTE:

In actions based on acts or omissions occurring on or after January 1, 1988, a sliding-scale recovery agreement is not effective unless, at least 72 hours prior to entering into the agreement, a notice of intent to enter into an agreement is served on all nonsignatory alleged defendant tortfeasors. On a showing of

good cause, the court or a judge thereof may allow a shorter time for notification. Failure to comply with this notice requirement does not constitute good cause to delay commencement of trial [*Code Civ. Proc. § 877.5(c)*; *see* Stats. 1987, ch. 1202, § 2 (limiting effectiveness to acts or omissions occurring on or after January 1, 1988)] .

NOTE:

In order to meet its burden of proving that a sliding-scale settlement is not in good faith, a non-settling defendant is entitled to discover all of the provisions of the agreement [*J. Allen Radford Co. v. Superior Court (1989) 216 Cal. App. 3d 1418, 1423,-1424* ; *see § 115.159*].

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11-115 California Points & Authorities § 115.159

§ 115.159 Supporting Motion to Deny Judicial Confirmation of Good Faith of Settlement [Code Civ. Proc. § 877.6]--Settling Parties Have Not Provided Sufficient Information Regarding Allocation of Settlement

[1] FORM

[*Caption. See § 115.150.*]

THE SETTLEMENT AT ISSUE CANNOT BE CONFIRMED AS HAVING BEEN MADE IN GOOD FAITH BECAUSE THE PARTIES TO THE SETTLEMENT HAVE NOT PROVIDED THE COURT AND OPPOSING PARTIES WITH ADEQUATE INFORMATION REGARDING THE VALUATION OF THE VARIOUS ELEMENTS OF THE SETTLEMENT AND/OR THE ALLOCATION AMONG THE ISSUES AND/OR PARTIES.

A. Inadequate Information Regarding Settlement's Apportionment of Damages. A settlement agreement that does not completely describe how it allocates amounts between issues or parties, and describe the nature and value of any nonmonetary consideration, cannot be confirmed as having been made in good faith (*Alcal Roofing & Insulation v. Superior Court (1992) 8 Cal. App. 4th 1121, 1128-1129, 10 Cal. Rptr. 2d 844*).

[*Optional*] **B. Settlement Sought to Be Confirmed Cannot Be Withheld on Confidentiality Grounds.** The parties to a settlement may not both seek confirmation of the agreement and withhold the agreement from nonsettling defendants on the grounds of confidentiality (*Alcal Roofing & Insulation v. Superior Court (1992) 8 Cal. App. 4th 1121, 1127, 10 Cal. Rptr. 2d 844* ; *J. Allen Radford Co. v. Superior Court (1989) 216 Cal. App. 3d 1418, 1423-1424, 265 Cal. Rptr. 535*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to an application pursuant to *Code Civ. Proc. § 877.6* for judicial confirmation of a settlement as in good faith. The ground of the form is that the settling parties have not disclosed to the court and to opposing parties sufficient information concerning the terms of the settlement to permit the court to determine whether or not the settlement was made in good faith. The form is appropriate in a case in which defendants are not all potentially liable to plaintiff for the same amount, either because different defendants are alleged to be responsible for different measures of damages, or because different defendants are alleged to be responsible based on different legal theories. The optional paragraph is for use if the settling parties assert that all or part of the settlement agreement is confidential and should not be disclosed to the other parties or to the court. The nonsettling defendant would use this form in order to preserve rights to comparative indemnity or contribution that will be extinguished if the good faith of the settlement is confirmed [*see Code Civ. Proc. §§ 877(b), 877.6(c)*].

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should establish the apportionment issues that are not addressed by the information on the settlement agreement accompanying the motion to confirm the settlement as in good faith, and should set forth the factors tending to indicate that the confirmation of the settlement would be unfair to the nonsettling party's position in the lawsuit.

[3] Discussion of Authorities

[a] Inadequate Information Regarding Settlement's Apportionment of Damages

Alcal Roofing & Insulation v. Superior Court *(1992) 8 Cal. App. 4th 1121, 10 Cal. Rptr. 2d 844* , was an action brought by a homeowners' association against Sears Savings Bank (developer), the developer of a condominium development, and other parties, seeking damages for construction defects. The complaint alleged various defects in the development, including defects in the roofs, gutters, soil, and foundations. The developer cross complained against contractors and subcontractors, including Alcal Roofing & Insulation (roofer), which had also been served with the original complaint. Several settlement conferences followed, under the supervision of a special master, and developer settled with plaintiff for $4.4 million; under the terms of the agreement, all other parties, with the exception of roofer, agreed to contribute $1.3 million of that amount to settle developer's cross complaint. The settling parties agreed that $100,000 of the settlement amount would cover roofing damages. The trial court granted the settling parties' motion to confirm the settlement as in good faith over the objection of roofer, and roofer sought a writ of mandate to vacate the confirmation.

The court of appeal issued the writ. The court noted that the roofer, as the party asserting the lack of good faith, had the burden of proof pursuant to Code Civ. Proc. § 877.6(d) (*8 Cal. App. 4th 1121, 1125)* . Roofer produced evidence that plaintiff's original settlement demand was for $6 million, of which $2 million was for roofing issues. Developer had argued that roofer had substantial statute of limitations defenses to plaintiff's claims, which justified the low allocation to roofing issues in the settlement. However, the court of appeal noted that the written settlement agreement was not before the trial court (or the court of appeal). Although the written agreement itself need not be before the court, the court and all parties must be timely advised of the important terms of the settlement (*8 Cal. App. 4th 1121, 1127)* . The court stated that it was not clear whether any of the $1.3 million contributed by the other settling parties should have been offset against roofer's potential liability, and whether a settlement between a subcontractor and developer (that was not a settlement with plaintiff) could be the basis for precluding indemnity from that subcontractor (*8 Cal. App. 4th*

1121, 1127-1128) .

The court concluded that the roofer's burden to show that the allocation was improper did not arise, because the settling parties failed to present to roofer and to the court a clear and complete picture of the settlement or settlements. At a minimum, a party seeking confirmation must explain to the court and to all other parties: who has settled with whom, the dollar amount of each settlement, if any settlement is allocated, how it is allocated between issues and/or parties, what nonmonetary consideration has been included, and how the parties to the settlement value the nonmonetary consideration (*8 Cal. App. 4th 1121, 1129)* . Because the court could not determine (1) what settlement or settlements the court approved, (2) when and in what way the subcontractors joined in the settlement, and (3) the value of the assigned rights, the court issued a writ of mandate compelling the trial court to vacate its confirmation of the settlement (*8 Cal. App. 4th 1121, 1129)* .

[b] Settlement Sought to Be Confirmed Cannot Be Withheld on Confidentiality Grounds

The facts and procedural background of ***Alcal Roofing & Insulation v. Superior Court*** *(1992) 8 Cal. App. 4th 1121, 10 Cal. Rptr. 2d 844* , are discussed in *§ 115.159[3][a]*. The court relied on *J. Allen Radford Co. v. Superior Court (1989) 216 Cal. App. 3d 1418, 1423-1424, 265 Cal. Rptr. 535* , for the proposition that a party may not both seek confirmation of a settlement agreement and withhold it from nonsettling defendants on grounds of confidentiality (*8 Cal. App. 4th 1121, 1127)* .

In ***J. Allen Radford Co. v. Superior Court*** *(1989) 216 Cal. App. 3d 1418, 265 Cal. Rptr. 535* , a lessee and sublessee of commercial property were sued by the lessor for rescission of the lease, ejectment, and an injunction, based on the sublessee's construction that allegedly violated the lease rights of other tenants. The lessee and sublessee cross complained against the lessor and its managing agent and others on various tort and contract causes of action, and entered into a sliding scale settlement agreement with the lessor (who had cross complained against the managing agent). In the motion to confirm the settlement, the lessor disclosed that it would pay the lessee and sublessee a specified amount, which could be reduced (by undisclosed amounts) on the happening of various contingencies. The managing agent argued that it could not adequately oppose the motion without seeing the agreement. The trial court declined to order the agreement produced, and entered an order finding the settlement to have been in good faith. The managing agent petitioned for a writ of mandate.

The court of appeal issued the writ. The court noted that there are valid reasons that parties may wish to maintain the confidentiality of a settlement agreement, but held that they may not claim a privilege of nondisclosure when they move to confirm the good faith of the settlement under *Code Civ. Proc. § 877.6* (*216 Cal. App. 3d 1418, 1423)* . No statute allows the moving party under *Code Civ. Proc. § 877.6* to refuse to disclose the terms of the settlement agreement that it contends was made in good faith, so the agreement's terms should have been disclosed (*216 Cal. App. 3d 1418, 1423)* . The court did state that the lessor remains free to withdraw its motion if it does not wish to disclose the document (*216 Cal. App. 3d 1418, 1424)* .

NOTE:

There appears to be a split of authority as to whether the written settlement agreement must be revealed in its entirety in order for it to be confirmed as in good faith. In *Mediplex of California, Inc. v. Superior Court,* the court of appeal held that the agreement itself must be produced, and that it is not sufficient to merely summarize what the settling parties claim to be the important terms. The court noted the possibility of *in camera* review of the agreement by the court, but neither expressly sanctioned nor rejected this procedure as a way of maintaining a certain amount of confidentiality [*Mediplex of Cal., Inc. v. Superior Court (1995) 34 Cal. App. 4th 748, 750 n.2, 750-754, 40 Cal. Rptr. 2d 397]* . However, in *Alcal Roofing and Insulation v. Superior Court,* the court of appeal stated that the agreement itself need not be executed and presented to the court as long as all of the parties are timely advised of the important terms of the settlement [***Alcal Roofing & Insulation v. Superior Court*** *(1992) 8 Cal. App.*

4th 1121, 1127, 10 Cal. Rptr. 2d 844] .

[4] Additional Authorities

[a] Inadequate Information Regarding Settlement's Apportionment of Damages

In *Franklin Mint Co. v. Superior Court (2005) 130 Cal. App. 4th 1550, 31 Cal. Rptr. 3d 319* , the plaintiffs brought a malicious prosecution action against the defendants and their former attorneys. The plaintiffs reached a settlement with the defendants, although the attorneys did not settle. Under the terms of the settlement, the defendants agreed to pay $25 million into an escrow account. Of this amount, $1 million would be paid to a charity selected by the plaintiffs in their name. The remaining $24 million would eventually be distributed to charities selected by the defendants, with the charitable donations being made in the name of both the defendants and the plaintiffs. In addition, the defendants would ensure that their CEO testified at trial against their former attorneys and would assist in obtaining the testimony of third-party witnesses. The trial court determined that the settlement was made in good faith and determined that the non-settling defendants, the attorneys, would be allowed to set off $25 million against any recovery made against them. The plaintiffs sought a writ of mandate challenging the amount of the set off, arguing that because only $1 million would be under their control, that should have been the amount of the set off. The court of appeal granted the writ, although the court disagreed with the plaintiff that the amount of the set off should be limited to $1 million. The court held that the trial court erred in determining that the settlement was made in good faith because the parties failed to provide any evidence of intangible elements that materially affected the valuation of the settlement. The court noted that some value must be placed on the intangible benefits that would accrue to both of the parties by virtue of having large donations made in their respective names to various charities. In addition, some value must be placed on the assistance promised to be provided by the defendants' CEO in testifying and obtaining witnesses at the trial against their former attorneys. Although the court recognized that it might be difficult to provide valuation evidence for these elements of the settlement, some valuation was required and the trial court erred in approving a $25 million valuation without taking these elements into consideration (*130 Cal. App. 4th 1550, 1558-1561)* .

In *United Servs. Auto. Ass'n v. Superior Court (2001) 93 Cal. App. 4th 633, 113 Cal. Rptr. 2d 328* , the plaintiffs suffered a $13 million judgment in an underlying action and then brought suit against their insurer and their attorneys. The attorneys settled with the plaintiffs for $4.5 million, which included a payment of $1 million and an interest-free loan of $3.5 million, with repayment on the loan contingent on the amount of any recovery against the insurer. The settling parties sought and gained a determination that the settlement was in good faith, even though they placed, and the trial court accepted, a total value of only $1 million on the consideration for the settlement. However, the court of appeal, relying primarily on *Abbott Ford, Inc. v. Superior Court (1987) 43 Cal. 3d 858, 239 Cal. Rptr. 626, 741 P.2d 124* [*see § 115.158*], held that the trial court erred in approving the settlement. Rather than trying to assign a fair value to the $3.5 million loan, the parties to the settlement essentially conceded that they used the value of the noncontingent $1 million payment as the value of the settlement consideration. The court held that the loan must be fairly valued and rejected the settling parties' approach as too mechanical to demonstrate any real effort to realize a fair and equitable valuation. Because the settling parties provided no meaningful analysis, expert opinion, or other evidence to support their valuation, the court reversed the good-faith determination (*93 Cal. App. 4th 633, 642-644)* .

In *Brehm Cmtys. v. Superior Court (2001) 88 Cal. App. 4th 730, 105 Cal. Rptr. 2d 918* , the plaintiffs were investors who filed a class action lawsuit against dozens of defendants allegedly responsible for a scheme to defraud the plaintiffs in the sale of securities. The plaintiffs settled with a financial investment firm and its three principals, although no money was to be paid to the plaintiffs under the terms of the settlement. Instead, the settlement consisted entirely of unvalued assets and other intangibles, including such items as waivers and transfers of claims, guaranteed access to information and persons in preparation for the litigation against the remaining defendants, and similar items. Although no evidence was produced placing a valuation on the nonmonetary settlement elements, the trial court determined that the settlement was in good faith. The court of appeal reversed. The court of appeal held that even if making a valuation is difficult, a trial court cannot make a determination that a settlement is in good faith without requiring a valuation of

nonmonetary settlement elements, based on competent, admissible evidence. A hearsay statement by a retired judge that the settlement terms were fair was not sufficient (*88 Cal. App. 4th 730, 735-736)* .

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11-115 California Points & Authorities § 115.160

§ 115.160 Supporting Motion for Judicial Confirmation of Good Faith of Settlement [Code Civ. Proc. § 877.6]--Amount Represents Reasonable Apportionment Based on Information Available At Time of Settlement

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*]	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN SUPPORT OF MOTION FOR JUDICIAL
vs.	)	DETERMINATION OF GOOD-FAITH SETTLE-
_____ [*name*],	)	MENT
Defendant.	)	[*Code Civ. Proc. § 877.6*]
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE MOTION FOR AN ORDER DETERMINING THAT THE SETTLEMENT OF PLAINTIFF'S CLAIM AGAINST _____ [*name of settling defendant*] WAS MADE IN GOOD FAITH SHOULD BE GRANTED BECAUSE THE AMOUNT OF THE SETTLEMENT REFLECTS A REASONABLE EVALUATION OF LIABILITY ON THE BASIS OF AVAILABLE INFORMATION.

Time of Evaluation. The evaluation must be made on the basis of information available at the time of settlement (

Tech-Bilt, Inc. v. Woodward-Clyde & Assocs. (1985) 38 Cal. 3d 488, 499, 213 Cal. Rptr. 256, 698 P.2d 159 ; *County of Los Angeles v. Guerrero (1989) 209 Cal. App. 3d 1149, 1156, 257 Cal. Rptr. 787*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion for judicial confirmation that a settlement was in good faith under *Code Civ. Proc. § 877.6*. The ground of the form is that the amount of the settlement is not disproportionate to what a reasonable person, at the time of the settlement, would estimate the settling defendant's liability to be. The form may be used by a joint tortfeasor or co-obligor on a nontort obligation who wishes to extinguish any potential liability to the nonsettling defendants for comparative indemnity or contribution [*see Code Civ. Proc. §§ 877(b), 877.6(c)*]. In an appropriate case, this memorandum may be submitted in opposition to the contention supported by the points and *authorities in § 115.156*.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. It should be established that: (1) the settling defendant and the party opposing the motion are both alleged to be liable to the plaintiff, either as joint or concurrent tortfeasors or as co-obligors on a nontort obligation; (2) the plaintiff and the settling party have entered into a settlement agreement involving a release and dismissal with prejudice, or other device that will terminate the litigation with regard to the settling party [*see Code Civ. Proc. § 877*]; and (3) the amount that the settling party is to pay to the plaintiff under the settlement reflects a reasonable range of the settling defendant's potential liability to the plaintiff.

The objecting party bears the burden of proof to establish bad faith [*Code Civ. Proc. § 877.6(d)*; *see § 115.156[2]*]. However, if the objecting party puts forth credible evidence that the settlement is not based on a reasonable evaluation of the settling defendant's liability, the settling parties must be prepared to present contrary evidence based on a sufficient factual foundation [*see Greshko v. County of Los Angeles (1987) 194 Cal. App. 3d 822, 834-835, 239 Cal. Rptr. 846* ; *see also § 115.156*].

When making a determination that a settlement is made in good faith, the trial court may make an initial allocation of settlement proceeds between issues or parties only to change the allocation based on evidence produced at trial against non-settling defendants [*see § 115.159*]. For example, if the evidence produced at trial shows that the defendants should not be held liable for one claimed category of damage, settlement amounts initially allocated to compensate for that type of damage may be allocated by the trial court to other categories of damage [*see, e.g., El Escorial Owners' Assn. v. DLC Plastering, Inc. (2007) 154 Cal. App. 4th 1337, 1351-1352, 65 Cal. Rptr. 3d 524]* .

[3] Discussion of Authorities

[a] Time of Evaluation

Tech-Bilt, Inc. v. Woodward-Clyde & Assocs. *(1985) 38 Cal. 3d 488, 213 Cal. Rptr. 256, 698 P.2d 159* , is discussed in *§ 115.156[3][a]*. In delineating the factors that a court should take into account in considering whether a settlement is in good faith, the Court stated that practical considerations obviously require that the evaluation be made on the basis of information available at the time of settlement. A defendant's settlement figure must not be grossly disproportionate to what a reasonable person, at the time of the settlement, would estimate the settling defendant's liability to be (*38 Cal. 3d 488, 499)* .

The facts of ***County of Los Angeles v. Guerrero*** *(1989) 209 Cal. App. 3d 1149, 257 Cal. Rptr. 787* , are discussed in *§ 115.161[3][b]*. An underinsured but judgment-proof tortfeasor (Guerrero) entered into a settlement entered for liability insurance policy limits. It was conceded that the amount of the settlement was not within a reasonable range of Guerrero's proportional share of comparative liability. The nonsettling tortfeasor posited that Guerrero might someday win the lottery or receive some other windfall. Because it is conceivable that he might be able, at some point, to satisfy a judgment, he should not be dismissed out of the case. The court of appeal rejected the argument, citing *Tech-Bilt* for its statement that practical considerations obviously require that the evaluation of good faith be made on the basis of information available at the time of the settlement (*209 Cal. App. 3d 1149, 1158)* .

[4] Additional Authorities

Erreca's v. Superior Court (1993) 19 Cal. App. 4th 1475, 24 Cal. Rptr. 2d 156 , involved an action by a homeowners' association and various individuals against the developers and the graders of a residential subdivision. The plaintiffs reached a settlement agreement with the developers and a number of the defendants who had worked on the structures. The settlement agreement apportioned the settlement (which totalled $6.8 million) between "soils" and "non-soils" issues at $1.5 million for soils issues and the rest to non-soils issues, and valued the plaintiff's assigned rights to seek the settling defendants' indemnity rights from the non-settling soils defendant at $300,000. The grader, who was the only defendant not to settle, contested the good faith of the settlement, but the trial court confirmed the settlement as in good faith, and also purported to order that the grader would receive only $500,000 credit on any judgment, based on the $1.5 million soils settlement. The grader sought a writ of mandate to reverse the good-faith determination.

The court of appeal issued the writ to the extent that the good-faith determination granted the grader only $500,000 credit on the $1.5 million soils portion of the settlement, but held that substantial evidence supported the finding that the settlement was otherwise made in good faith (*19 Cal. App. 4th 1475, 1496, 1499)* . With respect to the valuation of the indemnity rights, the court of appeal rejected the grader's contention that the valuation should await the trial; to do so would eliminate the incentive to accept such indemnity rights as consideration for a pre-trial settlement (*19 Cal. App. 4th 1475, 1498-1499)* .

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11-115 California Points & Authorities § 115.161

§ 115.161 Supporting Motion for Judicial Confirmation of Good Faith of Settlement [Code Civ. Proc. § 877.6]--Settlement With Underinsured Judgment-Proof Tortfeasor for Liability Policy Limits Is in Good Faith Regardless of Whether Settlement Is in Reasonable Range

[1] FORM

[*Caption. See § 115.160.*]

THE MOTION FOR AN ORDER DETERMINING THAT THE SETTLEMENT OF PLAINTIFF'S CLAIM AGAINST _____ [*name of settling defendant*] WAS MADE IN GOOD FAITH SHOULD BE GRANTED BECAUSE _____ [*name of settling defendant*] HAS NO ASSETS SUBJECT TO EXECUTION BEYOND THE LIMITS OF HIS/HER LIABILITY INSURANCE POLICY.

A. Financial Condition of Settling Party Is Factor to Be Considered. The financial condition and insurance policy limits of the settling party are relevant considerations in determining whether a settlement was made in good faith (*Tech-Bilt, Inc. v. Woodward-Clyde & Assocs. (1985) 38 Cal. 3d 488, 499, 213 Cal. Rptr. 256, 698 P.2d 159* ; *City of Grand Terrace v. Superior Court (1987) 192 Cal. App. 3d 1251, 1265, 238 Cal. Rptr. 119*).

B. Underinsured and Judgment-Proof Tortfeasors. A settlement entered into by an underinsured but judgment-proof tortfeasor for insurance liability limits is in good faith (*County of Los Angeles v. Guerrero (1989) 209 Cal. App. 3d 1149, 1155-1158, 257 Cal. Rptr. 787* ; *Schmid v. Superior Court (1988) 205 Cal. App. 3d 1244, 1247-1249, 253 Cal. Rptr. 137*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion for judicial confirmation that a settlement was made in good faith under *Code Civ. Proc. § 877.6*. The ground of the form is that the settling defendant is judgment proof except for liability insurance coverage and the policy limits are to be paid in the settlement. In an appropriate case, this memorandum may be submitted in opposition to the contention supported by the points and *authorities in § 115.156*.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. It should be established that: (1) the settling defendant and the party opposing the motion are both alleged to be liable to the plaintiff; (2) the plaintiff and the settling party have entered into a settlement agreement involving a release and dismissal with prejudice, or other device that will terminate the litigation with regard to the settling party [*see Code Civ. Proc. § 877*]; and (3) the settlement involves payment of liability insurance policy limits by the settling party; and (4) the settling party is otherwise judgment proof--that is, he or she has no other assets that are subject to process from which a judgment could be satisfied.

The objecting party bears the burden of proof to establish bad faith [*Code Civ. Proc. § 877.6(d)*; *see § 115.156[2]*]. However, it may be a relatively simple matter for a nonsettling party to prove that the insurance policy limits are far below the settling party's reasonable range of liability. Therefore, the settling party effectively bears the burden of proving that he or she has no other assets.

[3] Discussion of Authorities

[a] Financial Condition of Settling Party Is Factor to Be Considered

Tech-Bilt, Inc. v. Woodward-Clyde & Assocs. *(1985) 38 Cal. 3d 488, 213 Cal. Rptr. 256, 698 P.2d 159* , is discussed in *§ 115.156[3][a]*. In delineating the factors that a court should take into account in considering whether a settlement is in good faith, the Court stated that relevant considerations include the financial conditions and insurance policy limits of settling defendants (*38 Cal. 3d 488, 499)* .

City of Grand Terrace v. Superior Court *(1987) 192 Cal. App. 3d 1251, 238 Cal. Rptr. 119* , was a proceeding in mandate to review the propriety of the trial court's order determining that plaintiff's settlement with her defendant-husband had been entered into in good faith. The action was based on a single-car accident in which plaintiff was a passenger and her husband was the driver. The action against the cities of Grand Terrace and Colton was based on the assertion of a dangerous condition in that the roadway was not properly designed, maintained, marked, barricaded, or lighted. Both cities filed cross complaints for indemnity against the husband.

Plaintiff claimed damages of $225,000 in her claim against the public entities. She settled her claim against her husband for $60,000, which her husband's insurer had agreed to pay. The policy limits were $300,000, but coverage was contested by the insurer on the ground that the policy contained a valid family-exclusion clause. The husband had been employed as an airline pilot for 23 years, but neither his salary nor his net worth were before the trial court at the good-faith hearing.

In the mandate proceeding, the cities contended that the husband was primarily liable for the accident, and the settlement did not reflect a reasonable range of his liability for the wife's damages. They claimed that there was insufficient evidence presented concerning the husband's financial condition and the availability of additional money

from the insurer, both of which could have been added to the settlement, if available, to make up the husband's proportionate share in settlement.

The court of appeal agreed (*192 Cal. App. 3d 1251, 1263)* . In granting the writ of mandate, the court of appeal said that the financial condition of the settling defendant was a relevant factor for the trial court to consider under *Tech-Bilt* (*192 Cal. App. 3d 1251, 1265)* . The court stated that, "Assuming settlor was a person of wealth, at first blush it would appear ridiculous to require him to contribute personal assets to plaintiff, his wife, in order to obtain good faith settlement approval. However, such could be required in order to protect the nonsettlors, who under section 877, subdivision (a), would be entitled to a set-off for amounts previously paid against any judgment ultimately rendered against them" (*192 Cal. App. 3d 1251, 1264)* .

NOTE:

In *Grand Terrace*, the court's language suggests that an injured spouse may actually be compelled to execute against the property of his or her tortfeasor spouse pursuant to a settlement. Thus, under the court's view, a nonsettling defendant may compel one spouse to transfer his or her separate property and interest in community property to the other, even if the injured spouse, for reasons related to the marriage relationship, does not wish to proceed against the spouse [*see Fam. Code § 781(c)* (damages paid by one spouse to another for personal injury are separate property)]. The public-policy concerns of such a rule, involving a possibly unwarranted intrusion into the private marriage relationship, were not considered by the court in *Grand Terrace* [*see Barbara A. v. John G. (1983) 145 Cal. App. 3d 369, 380, 193 Cal. Rptr. 422* (constitutional right of privacy extends to all matters related to marriage, family, and sex)] .

One possible approach that might protect the interests of both the nonsettling defendants and the marital partners is to require the spouse's settlement figure to be within a reasonable range of liability, but to accept a covenant by which the injured spouse agrees not to execute on the tortfeasor spouse's property other than insurance proceeds. In that way, the nonsettling defendants would get a reasonable credit against judgment, but the settlement process would not intrude on the marital relationship and property rights between the spouses.

In any case, the interests of the nonsettling defendants are less prejudiced now than at the time of *Grand Terrace* because of the Equal Responsibility Act of 1986 (Proposition 51) [*see Civ. Code §§ 1431.1-1431.5*]. Regardless of the amount of any settlement, a nonsettling defendant will be severally liable only for its comparative share of noneconomic damages as found by the trier of fact at trial [*Civ. Code § 1431.2(a)*; *see § 115.09*]. The concerns expressed by the court in *Grand Terrace* are still relevant to economic damages, because tortfeasors are still jointly liable for these damages [*Civ. Code §§ 1431, 1431.2(a)*]. Thus, an unduly low settlement still leaves a nonsettling tortfeasor to pay a disproportionate share of economic damages.

[b] Underinsured and Judgment-Proof Tortfeasors

In ***County of Los Angeles v. Guerrero*** *(1989) 209 Cal. App. 3d 1149, 257 Cal. Rptr. 787* , Russo was severely injured in a collision with an automobile driven by Guerrero. Russo claimed against Guerrero's liability insurance, and the insurer paid the policy limits of $30,000 in exchange for a release of Guerrero. Russo then brought an action against the county, among others (not including Guerrero), alleging negligent maintenance and design of the roadway. The county cross complained against Guerrero for comparative indemnity. Guerrero then filed a motion under *Code Civ. Proc. § 877.6* to confirm the prior settlement as in good faith and to dismiss the cross complaint. In support of the motion, he alleged that, apart from the insurance proceeds, his only assets were his wages ($550 gross weekly), $11,000 equity in his home, two 8-year-old vehicles, and $100 in a checking account. He conceded that the $30,000 settlement was below his probable proportionate liability for damages, but submitted that in view of his limited assets, the settlement was in

good faith. The trial court granted the motion, and the county appealed.

The court of appeal affirmed. It first held that a settlement entered into before suit was filed could be confirmed afterwards. With regard to the conceded failure of the settlement to reach a reasonable range, the court cited *Tech-Bilt*'s language that, even if the claimant's damages are obviously great and the liability certain, a disproportionately low settlement figure is often reasonable in the case of a relatively insolvent, and uninsured or underinsured, joint tortfeasor [*see Tech-Bilt, Inc. v. Woodward-Clyde & Assocs. (1985) 38 Cal. 3d 488, 499, 213 Cal. Rptr. 256, 698 P.2d 159]* . The court found that *Tech-Bilt* addressed the very fact situation before it, and that Guerrero's modest financial condition and insurance policy limits were necessarily controlling and effectively overrode the reasonable range requirement. The injustice in the result was no different from any other case involving jointly liable tortfeasors, one of whom was insolvent, leaving the other to pay the entire judgment without a meaningful action for comparative indemnity (*204 Cal. App. 3d 1148, 1156-1158)* .

Schmid v. Superior Court *(1988) 205 Cal. App. 3d 1244, 253 Cal. Rptr. 137* , involved a fact situation very similar to that in *County of Los Angeles v. Guerrero*. The defendants were the driver of the automobile in which the plaintiff was a passenger, and the county, which was sued on allegations regarding the condition of the highway. The driver, who had been intoxicated at the time of the accident, had no assets other than her insurance policy limits. The plaintiff settled with the driver for the policy limits and moved for confirmation of the settlement as in good faith. In the moving papers, the parties allocated potential liability 10 to 20 percent to the driver and 80 to 90 percent to the county. Despite the fact that the county did not oppose the petition, the trial court rejected the settlement.

On mandate, the court of appeal reversed and issued a writ directing an order granting the motion. The court of appeal agreed with the trial court that the apportionment of fault was "facially preposterous," but nevertheless found the settlement to have been in good faith. The court held that a disproportionately low settlement figure is reasonable in the case of a relatively insolvent and underinsured joint tortfeasor (*205 Cal. App.3d 1244, 1248)* .

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11-115 California Points & Authorities § 115.162

§ 115.162 Supporting Motion for Judicial Confirmation of Good Faith of Settlement [Code Civ. Proc. § 877.6]--Provision Requiring Settling Tortfeasor to Participate at Trial Does Not Preclude Finding of Good Faith

[1] FORM

[*Caption. See § 115.160.*]

THE MOTION FOR AN ORDER DETERMINING THAT THE SETTLEMENT OF PLAINTIFF'S CLAIM AGAINST _____ [*name of settling defendant*] WAS MADE IN GOOD FAITH SHOULD BE GRANTED BECAUSE THE REQUIREMENT THAT _____ [*name of settling defendant*] PARTICIPATE IN THE TRIAL IS REASONABLE AND NONCOLLUSIVE AND THE SETTLEMENT IN ALL OTHER RESPECTS SATISFIES THE STATUTORY GOOD-FAITH REQUIREMENT.

A. Settling Defendant May Participate in Trial. A provision in a settlement agreement requiring that the settling tortfeasor participate in the trial (to deprive the remaining defendants of the trial tactic of using the "empty chair" to ascribe fault to an actor who is not there to defend himself or herself) does not preclude a finding that the settlement was in good faith, as long as the jury is informed of the nature and terms of the settlement (*Everman v. Superior Court (1992) 8 Cal. App. 4th 466, 471-472, 473, 10 Cal. Rptr. 2d 176*).

B. Participation at Trial by Settling Defendants Does Not Deprive Non Settling Defendant's of Fair Trial. The participation of settling defendants at trial does not deprive the nonsettling defendants of a fair trial as long as the nature of their interest is fully disclosed to the jury (*Alcala Co. v. Superior Court (1996) 49 Cal. App. 4th 1308, 1318, 57 Cal. Rptr. 2d 349*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion for judicial confirmation that a settlement was in good faith under *Code Civ. Proc. § 877.6*. The point set forth in the form is for use in cases in which the settlement agreement requires the settling tortfeasor to remain in the case and actively participate as a defendant. The point is intended to counter any argument by nonsettling defendants that such a provision precludes a finding that the settlement is in good faith so as to shelter the settling defendant from liability for comparative indemnity. In an appropriate case, this memorandum may be submitted in opposition to the contention supported by the points and *authorities in § 115.157*. It may be combined, in an appropriate case, with the points and authorities *set forth in §§ 115.160* and *115.161*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Settling Defendant May Participate in Trial

In ***Everman v. Superior Court*** *(1992) 8 Cal. App. 4th 466, 471-472, 473, 10 Cal. Rptr. 2d 176* , a personal injury action arising from an automobile accident, the plaintiff entered into proposed settlements with the driver of the car that struck him and the driver's employer. The city and another driver remained in the action as defendants. Plaintiff's agreement with the driver contained a covenant not to execute on any judgment against the driver and required the driver to participate and be represented at trial. The trial court denied the settling defendants' motion for a determination of good faith on the ground that leaving the driver in the case was inconsistent with the concept underlying *Code Civ. Proc. § 877.6* that a "settling defendant is then insulated from further litigation and is taken out of the lawsuit" and on the ground that the settlement was collusive because the driver, insulated from liability, was essentially participating on behalf of the plaintiff.

The court of appeal initially denied the settling defendants a writ. Review was granted by the California Supreme Court and the matter was retransferred to the court of appeal with direction to issue an alternative writ. The court of appeal issued the writ. It held that the participation of the driver did not preclude a finding that the settlement was in good faith (*8 Cal. App. 4th 466, 473)* . The court found that the driver was kept in the trial not as a matter of collusion but simply to deprive the remaining defendants of the trial tactic of using the "empty chair" to ascribe fault to an actor who was not there to defend himself. Any misconception or bias arising from the participation of the settling defendant would be avoided by disclosure to the jury of the nature and terms of the settlement (*8 Cal. App.4th 466, 471-472)* . The court also concluded that the driver's participation did not defeat the policy goal of finalizing involvement in litigation through settlement, stating that the driver's participation involved no less finality than a settling defendant's participation under a sliding scale agreement (*8 Cal. App.4th 466, 472-473)* .

[b] Participation at Trial by Settling Defendants Does Not Deprive Non Settling Defendant's of Fair Trial

In ***Alcala Co. v. Superior Court*** *(1996) 49 Cal. App. 4th 1308, 57 Cal. Rptr. 2d 349* , a homeowners association sued the developers and two general contractors for construction defects in a condominium development. The developers and general contractors in turn filed cross-complaints against the subconcontractors. The developers and one general

contractor entered into a sliding scale or "Mary Carter" settlement agreement with the plaintiff which the trial court found to be in good faith. The trial court allowed the settling defendants to remain as defendants in the direct action brought by the association. The nonsettling defendants petitioned for a writ of mandate directing the trial court to vacate this order.

The court of appeal ruled that the trial court did not abuse its discretion in allowing the settling developers and general contractor to continue as defendants in the direct action. Rather, it held that adequate disclosure of the settlement agreement and the true interests of the parties to the jury could adequately protect the interest of the nonsettling parties (*49 Cal. App. 4th 1308, 1310)* . In the course of its ruling the court rejected both of plaintiffs' arguments, that there was no justiciable controversy remaining between the homeowners association and the settling defendants, and that the continued participation of settling defendants was collusive, fraudulent and injurious to the nonsettling cross-defendants since the settling defendants and homeowners association's interests were aligned to maximize the homeowners association's recovery against the settling defendants so that they could all ultimately share in a greater recovery against the nonsettling defendants. The court responded that the settling defendants remained interested parties in the action and that as long as the nature of their interest was fully disclosed to the jury, their presence at trial would facilitate full consideration of all relevant evidence and the determination of the association's damages (*49 Cal. App. 4th 1308, 1319)* .

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11-115 California Points & Authorities § 115.163

§ 115.163 Supporting Contention That Indemnitee's Payment Precludes Indemnity or Contribution--Payment Was Made Voluntarily, Without Regard to Legal Liability

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

_____ [*Party, e.g.,* PLAINTIFF] IS NOT ENTITLED TO _____ [EXPRESS INDEMNITY *or* IMPLIED INDEMNITY *or* CONTRIBUTION] BECAUSE _____ [*party, e.g.,* PLAINTIFF'S] PAYMENT WAS MADE VOLUNTARILY WITHOUT REGARD TO LEGAL LIABILITY.

[*EITHER*]

No Indemnity for Voluntary Payment. Indemnity against loss does not cover losses for which the indemnitee is not liable to a third person, but nevertheless pays (*Southern Cal. Gas. Co. v. Ventura Pipe Line Constr. Co. (1957) 150 Cal. App. 2d 253, 257, 309 P.2d 849*).

[*OR*]

No Contribution for Voluntary Payment. A party is entitled to contribution only if payment was made under a legal obligation and not as a volunteer (*Schlitz v. Thomas (1923) 61 Cal. App 635, 638, 216 P. 51*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a claim for indemnity or contribution on the ground that the indemnitee or party seeking contribution was a "volunteer." A volunteer has been defined as a mere stranger or intermeddler who has

no interest to protect and no moral or legal obligation to pay [*see Mullin Lumber Co. v. Chandler (1986) 185 Cal. App. 3d 1127, 1133, 230 Cal. Rptr. 122]* .

This form may be combined with points and authorities pertaining to the specific procedural context in which a right to indemnity or contribution is brought before the court. It may be used in a memorandum in connection with a pretrial motion, such as a demurrer or motion for summary judgment, if rights may be determined as a matter of law. It may also be used in a trial or an appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. It should be established that: (1) the indemnitee or party seeking contribution has made a payment to a third party that it seeks to recover, entirely or in part; and (2) the payor was under no legal obligation to make the payment at issue.

[b] Opposing Memoranda

In an appropriate case, the points and *authorities in §§ 115.164* and *115.165* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] No Indemnity for Voluntary Payment

The facts and holding of ***Southern Cal. Gas Co. v. Ventura Pipe Line Constr. Co.*** *(1957) 150 Cal. App. 2d 253, 309 P.2d 849* , are discussed in *§ 115.39[3][a]*. The court held that an express indemnity agreement does not extend to payments that the indemnitee is contractually obligated to make if the indemnitor had no knowledge of the contract at the time when the indemnity agreement is signed. In reaching its conclusion, the court noted that an indemnitee cannot recover beyond the terms of the indemnity contract, and a voluntary payment made by the indemnitee without regard to its legal liability is not recoverable. The general rule is that an indemnity against losses does not cover losses for which the indemnitee is not liable to a third person and for which he or she improperly pays (*150 Cal. App. 2d 253, 257)* .

CAUTION:

Since the advent of comparative indemnity in 1978 [*see American Motorcycle Assn. v. Superior Court of Los Angeles County (1978) 20 Cal. 3d 578, 598, 146 Cal. Rptr. 182, 578 P.2d 899* ; *see also § 115.60*], the voluntary-payment limitation has often been cited, but almost never applied to deny indemnity [*see §§ 115.164, 115.165*]. In the modern world of crowded court dockets and public policy favoring settlement, it is questionable whether the rule has much applicability to the comparative indemnity rights of alleged tortfeasors [*see § 115.164*]. The one case that appears to have applied the rule to deny comparative indemnity did so without reciting it. In *Woodward-Gizienski & Assocs. v. Geotechnical Exploration, Inc. (1989) 208 Cal. App. 3d 64, 68, 255 Cal. Rptr. 800* [*see § 115.69[3][d]*], the court denied comparative indemnity on the ground that the indemnitee had settled for damages for which it was not legally liable. The court framed its holding, however, in terms of a lack of joint and several liability, rather than as involving a voluntary payment.

[b] No Contribution for Voluntary Payment

In ***Schlitz v. Thomas*** *(1923) 61 Cal. App. 635, 216 P. 51* plaintiffs were the guarantors of a promissory note executed by a corporation to a bank, and defendants were stockholders of the corporation. The bank brought suit to collect the note, judgment was entered in favor of the bank, and plaintiffs satisfied the judgment. They then brought the instant action for reimbursement. The complaint failed to disclose whether plaintiffs were parties to the prior action in which the judgment was rendered on the note. The defendants contended that the liability of the corporation to pay the note had been extinguished by the statute of limitations, and that therefore, payment was voluntary and gave the plaintiffs no

cause of action. The trial court found for plaintiffs and entered judgment accordingly.

The court of appeal reversed, finding that the corporation's liability to pay the $4,000 note had been extinguished by the statute of limitations before the alleged payment by plaintiffs and that the payment was, therefore, voluntary and gave plaintiffs no cause of action against defendants. The court based its decision on the principle that a guarantor or surety is entitled to contribution, reimbursement, or subrogation on account of payments made in behalf of his or her principal only if the payments are made under a legal obligation (*61 Cal. App. 635, 638-639)* .

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11-115 California Points & Authorities § 115.164

§ 115.164 Opposing Contention That Indemnitee's Payment Precludes Indemnity or Contribution--Good-Faith Settlement Does Not Constitute Voluntary Payment

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

_____ [*Party, e.g.,* PLAINTIFF] IS NOT PRECLUDED FROM RECOVERING _____ [EXPRESS INDEMNITY *or* IMPLIED INDEMNITY *or* CONTRIBUTION] FROM _____ [*nonsettling party*] BECAUSE _____ [*party, e.g.,* PLAINTIFF'S] PAYMENT TO _____ [*settling party*] WAS NOT "VOLUNTARY," BUT WAS MADE AS PART OF A GOOD FAITH SETTLEMENT MADE IN THE FACE OF ACTUAL, POTENTIAL, OR REASONABLY APPARENT LIABILITY.

A. Good-Faith Settlement Is Not Voluntary Payment. One acting in good faith in making payment under a reasonable belief that it is necessary to his or her protection is entitled to indemnity, even if it later develops that he or she had no interest to protect (*Mullin Lumber Co. v. Chandler (1986) 185 Cal. App. 3d 1127, 1133, 230 Cal. Rptr. 122* ; *see Fidelity & Deposit Co. v. Whitson (1960) 187 Cal. App. 2d 751, 757-758, 10 Cal. Rptr. 6*).

[*Optional*] **B. Settlement Following Refusal of Tendered Defense.** If an indemnitor refuses to defend a third-party action against the indemnitee, the indemnitee may conduct its own defense of the action, and a good-faith settlement of the action creates a presumption as to the indemnitee's liability and the amount of liability (*Peter Culley & Assocs. v. Superior Court (1992) 10 Cal. App. 4th 1484, 1497, 13 Cal. Rptr. 2d 624* ; *see People ex rel. Dep't of Pub. Works v. Daly City Scavenger Co. (1971) 19 Cal. App. 3d 277, 282, 96 Cal. Rptr. 669* ; *Pacific Tel. & Tel. Co. v. Pacific Gas & Elec. Co. (1959) 170 Cal. App. 2d 387, 392, 338 P.2d 984* ; *Civ. Code § 2778(5)*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that indemnity is appropriate because a good-faith settlement is not a voluntary payment. In an appropriate case, this memorandum may be submitted in opposition to the contention supported by the points and *authorities in § 115.163*.

The authorities that support the points set forth in this form all involve claims for either express or implied indemnity. The voluntary payment rule has, however, also been applied as a limitation on contribution rights [*see, e.g., Schlitz v. Thomas (1923) 61 Cal. App. 635, 216 P. 51* ; *see also § 115.163[3][b*]]. Therefore, the points set forth in this form may be adapted for use in support of a claim for contribution among nontort obligors [*cf. Code Civ. Proc. § 877.6(a)* (co-obligors on contract debt may obtain judicial confirmation of settlement as in good faith)].

This form may be combined with points and authorities pertaining to the specific procedural context in which a right to indemnity or contribution is brought before the court. It may be used in a memorandum in connection with a pretrial motion, such as a demurrer or motion for summary judgment, if rights may be determined as a matter of law. It may also be used in a trial or an appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. It should be established that: (1) the indemnitee or party seeking contribution was alleged to be liable to a third party; (2) in settlement of this alleged liability, the indemnitee or party seeking contribution made the payment for which it now seeks indemnity or contribution; and (3) the settlement was entered into under a good-faith belief of potential liability to the third party. If the settlement has been judicially confirmed as made in good faith under *Code Civ. Proc. § 877.6*, that fact should also be established.

[3] Discussion of Authorities

[a] Good-Faith Settlement Is Not Voluntary Payment

In ***Mullin Lumber Co. v. Chandler*** *(1986) 185 Cal. App. 3d 1127, 230 Cal. Rptr. 122* , one Burton was severely injured when a scaffolding collapsed while he was working as a carpenter, building a home for Chandler. Burton sued Mullin Lumber under a strict liability theory, alleging that Mullin had sold Chandler the wood that was used in the scaffolding. Chandler initially alleged that he could not find the particular piece of lumber in question. Mullin had supplied 84 percent of the particular kind of lumber in question that was used in constructing the house. Under the assumption that the particular piece was lost, Mullin settled Burton's entire claim and pursued a cause of action for comparative indemnity against Chandler [*see § 115.66*]. Mullin alleged that Chandler was negligent in using the lumber in a scaffolding, in failing to take other safety precautions to avoid injury to persons using the scaffolding, and in failing to hire competent subcontractors to supervise construction.

After Mullin's opening statement, Chandler revealed that he had found the broken board. Mullin declined the court's invitation to move for a mistrial, contending that the facts as they actually were had no relevance to its indemnity rights as long as there was a probability of liability at the time of settlement. Chandler then moved for nonsuit, contending that Mullin could not recover indemnity unless it could prove its own liability, and it could not prove that it had supplied the board in question. The trial court granted the motion.

The court of appeal reversed. It first held that the policies behind tort law would be undermined if settling defendants were required to prove their own liability in order to recover comparative indemnity. The court noted that the public-policy considerations underlying multiparty tort litigation were (1) the maximization of recovery to the injured party; (2) settlement of the injured party's claim; and (3) equitable apportionment of liability among concurrent tortfeasors. These policies would be seriously impaired if a settling defendant were required to prove its own fault before seeking indemnity against other alleged to have contributed to the plaintiff's injury. The court stated that every effort should be made to foster fair resolution of disputes and to avoid needless, time-consuming litigation. If a defendant concludes, for any of a variety of legitimate reasons, that it is in its best interest to settle with the injured

party, it should be encouraged to do so. If a settling defendant must nevertheless prove its own fault to a trier of fact in order to obtain indemnity, it has little incentive to settle. From a defendant's point of view, settlement avoids a finding of fault. It also avoids the publicity, costs, and inconvenience of trial (*185 Cal. App. 3d 1127, 1131-1132)* .

The court then found no merit in Chandler's contention that Mullin must prove its own liability or be treated as a mere volunteer not entitled to indemnity. The court noted that a volunteer settlor has been defined as a mere stranger or intermeddler who has no interest to protect and no moral or legal obligation to pay. It recognized the rule that equitable indemnity is not available to a volunteer, but extends only to those who pay in performance of a legal duty in order to protect their own rights or interests. However, it noted the qualification on this rule, that one acting in good faith in making payment under a reasonable belief that it is necessary to his or her protection is entitled to indemnity, even if it develops that he or she, if fact, had no interest to protect. A settling party is not a volunteer if it settled in the face of actual, potential, or reasonably apparent liability. It then held that in an action for equitable indemnity based on comparative fault, a settling defendant need only prove that the settlement was based on a reasonable estimate of its liability at the time of settlement (*185 Cal. App. 3d 1127, 1133-1134)* .

NOTE:

The analysis of *Mullin Lumber* and the policies enumerated by the court have prevailed in a long line of cases involving unsuccessful challenges to settlements as alleged voluntary payments [*see White Motor Corp. v. Teresinski (1989) 214 Cal. App. 3d 754, 764, 263 Cal. Rptr. 26* (settlement agreed to by party who had been dismissed from action in consideration of dropped appeal is not voluntary payment); *State Farm & Cas. Co. v. Cooperative of Am. Physicians, Inc. (1984) 163 Cal. App. 3d 199, 203-204, 209 Cal. Rptr. 251* (settlement agreed to by premises liability insurer with duty to defend but who disputed coverage with professional liability insurer is not voluntary payment); *Teachers Ins. Co. v. Smith (1982) 128 Cal. App. 3d 862, 864-866, 180 Cal. Rptr. 701* (insurer may settle and then allege insured's nonliability in independent action for indemnity); *see also Aetna Life & Cas. Co. v. Ford Motor Co. (1975) 50 Cal. App. 3d 49, 52-53, 122 Cal. Rptr. 852* ; *Mabie & Mintz v. B & E Installers (1972) 25 Cal. App. 3d 491, 496-497, 101 Cal. Rptr. 919* ; *Great W. Furniture Co. v. Porter Corp. (1965) 238 Cal. App. 2d 502, 512, 48 Cal. Rptr. 76]* . If the voluntary payment rule has any applicability to settlement, the court in *Mullin Lumber* found it in the area of a settlement involving payment of damages that the law does not recognize as compensable. The court gave the example of a settlement that encompassed payment for loss of parental consortium [*see Nix v. Preformed Line Prods. Co. (1985) 170 Cal. App. 3d 975, 986, 216 Cal. Rptr. 581]* .

An actual application of the voluntary payment limitation on this ground might be found in *Woodward-Gizienski & Assocs. v. Geotechnical Exploration, Inc. (1989) 208 Cal. App. 3d 64, 68, 255 Cal. Rptr. 800* [*see § 115.69[3][d]*]. Without mentioning the voluntary payment rule, the court held that a settling defendant could not recover indemnity with regard to a settlement that included alleged excessive cost of repairs because, under California law, the settling defendant was liable only for the reasonable cost of repairs. The court framed its holding in terms of a lack of joint and several liability for the amount of the settlement that represented the excessive cost.

Fidelity & Deposit Co. v. Whitson *(1960) 187 Cal. App. 2d 751, 10 Cal. Rptr. 6* , involved an express indemnity agreement. A contractor had entered into a written contract with a school district to construct a building. The contractor then asked plaintiff bonding company (Fidelity) to execute and furnish the performance, labor, and material bonds required by law. Defendant Whitson also requested Fidelity to execute the required bonds for and on behalf of the contractor. Whitson contractually agreed to indemnify Fidelity on the bonds. The terms of the agreement gave Fidelity the right to compromise and settle claims on the bonds. After the bonds were issued, the contractor failed to pay the claims of laborers, materialmen, and subcontractors. These claims were asserted against Fidelity, who notified Whitson. All but one of the claims were paid without resort to the bonds. On that last claim, Fidelity settled before trial for $2,500 and then sought reimbursement from Whitson. The trial court entered judgment for Fidelity, and Whitson appealed.

The court of appeal affirmed. It noted that an indemnitee is not bound to submit to suit before paying a claim, but if it settles without suit, it must prove its liability for the amount paid in order to recover from the indemnitor. However, if there is no trial and no judgment establishing liability, but a settlement of the litigation is made, the settlement becomes presumptive evidence of the liability and the amount thereof, which may be overcome by evidence submitted at trial. There was no evidence that the settlement was entered into other than as a good-faith effort to resolve the claim and under the honest belief that Fidelity was liable on the bond (*187 Cal. App. 2d 751, 757-758)* .

NOTE:

In *Mullin Lumber Co. v. Chandler*, the court limited its holding to claims for equitable indemnity based on comparative fault. The court distinguished (without citation) contractual indemnity, stating that in such a case, proof of the settling defendant's fault is necessary to trigger the obligation of a third person to indemnify [*Mullin Lumber Co. v. Chandler (1986) 185 Cal. App. 3d 1127, 1134, 230 Cal. Rptr. 122]* . This statement is, at best, overbroad. *Fidelity v. Whitson* essentially reaches the same result as *Mullin Lumber* with regard to contractual indemnity. Although the court in *Fidelity v. Whitson* agrees that proof is required, the burden is met by proof that a settlement was made in good faith, essentially the same holding as in *Mullin Lumber* [*see Civ. Code § 2778(5)*; *see also § 115.164[3][b]*].

[b] Settlement Following Refusal of Tendered Defense

Peter Culley & Assocs. v. Superior Court *(1992) 10 Cal. App. 4th 1484, 13 Cal. Rptr. 2d 624* , concerned an express indemnity agreement by which Culley, a structural engineer hired by architect Kaplan to design foundations for a condominium project, agreed to indemnify Kaplan for any "loss, damage, injury or liability, real or alleged" resulting from Culley's negligent performance of services under the agreement. When Kaplan sued the project developer to collect fees owed on the project, the developer cross-complained, alleging that foundation design flaws had resulted in delays and increased construction costs. Kaplan tendered defense of the cross-complaint to Culley but did not cross-complain against Culley. Culley declined the tender. The developer and Kaplan settled the cross-complaint for $225,000, allocating $200,000 to issues concerning Culley's foundation design work and $25,000 to other issues in the case. Kaplan assigned its indemnity rights to the developer, who brought an action against Culley. Using the *Code Civ. Proc. § 877.6* procedures applicable to a determination of a good faith settlement in the equitable indemnity context, the trial court found that the settlement, including the allocation of $200,000 to the foundation issue, was in good faith and conclusive against Culley under *Civ. Code § 2778(5)*, which provides that if, after request, the person indemnifying neglects to defend the person indemnified, a recovery against the latter suffered by him or her in good faith is conclusive in his or her favor against the former.

The court of appeal reversed and remanded. It held that a court's good faith determination in a contractual indemnity case is not similar to a good faith determination in *Code Civ. Proc. § 877.6* proceedings. The court concluded that so far as *Civ. Code § 2778(5)* makes a "recovery" suffered in good faith conclusive, it refers only to a recovery by judgment against the indemnitee (*10 Cal. App. 4th 1484, 1495)* . When an indemnitee settles without a trial, the principles concerning the effect of a settlement on an insurer's duty to indemnify come into play [*see Isaacson v. California Ins. Guarantee Assn. (1988) 44 Cal. 3d 775, 791]* (*10 Cal. App. 4th 1484, 1497)* . Pursuant to those principles, the indemnitee must show that the liability is covered by the contract, that liability existed, and the extent of liability. The settlement is presumptive evidence of liability of the indemnitee and of the amount of liability, but it may be overcome by proof from the indemnitor that the settlement was unreasonable (*10 Cal. App. 4th 1484, 1497)* . Presumptive effect will not be given to an allocation in the settlement that is not the product of adverse negotiation (*10 Cal. App. 4th 1484, 1497)* . The reasonableness of the settlement is to be determined at trial, and not in a separate good faith hearing to confirm the settlement (*10 Cal. App. 4th 1484, 1498)* .

The court explained that *Pacific Tel. & Tel. Co. v. Pacific Gas & Elec. Co. (1959) 170 Cal. App. 2d 387, 392, 338 P.2d 984* ; *Mabie & Mintz v. B & E Installers (1972) 25 Cal. App. 3d 491, 496-497, 101 Cal. Rptr. 919* ; and *Safeway*

Stores, Inc. v. Massachusetts Bonding & Ins. Co. (1962) 202 Cal. App. 2d 99, 117, 20 Cal. Rptr. 820 , were not in conflict with its decision because in none of those cases did the court enforce an indemnity contract merely because the indemnitee had settled: in *Safeway*, the trial court had found the indemnitor at fault, and the court of appeal sustained the lower court's determination of the amount of settlement; in *Pacific Telephone & Telegraph Co.*, the trial court found the indemnitor at fault and the amount of settlement was not in question; and in *Mabie*, the trial court in the indemnity phase of trial had found the settlement to be reasonable (*10 Cal. App. 4th 1484, 1496-1497)* .

The factual background of ***People ex rel. Dep't of Pub. Works v. Daly City Scavenger Co.*** *(1971) 19 Cal. App. 3d 277, 96 Cal. Rptr. 669* , is discussed in *§ 115.63[3][a]*. In discussing whether the State of California was entitled to implied indemnity, the court of appeal noted that both parties had settled a third-party wrongful death action filed against them, and that the indemnitor had refused to defend the wrongful death action on behalf of the state. The court then ruled that a good-faith settlement of an action after a party refuses a tendered defense entitles the other party to seek indemnity (*19 Cal. App. 3d 277, 282)* .

Pacific Tel. & Tel. Co. v. Pacific Gas & Elec. Co. *(1959) 170 Cal. App. 2d 387, 338 P.2d 984* , was an appeal from a judgment of the superior court in an action brought to recover sums paid by plaintiff to settle a wrongful death action. Following the settlement, plaintiff filed this suit for indemnity on the basis of a written indemnity agreement between the parties. The trial court found that the agreement required complete indemnity and entered judgment accordingly.

The court of appeal affirmed. It held that if an indemnitee notifies the indemnitor of a pending claim and the indemnitor denies liability under the indemnity contract and refuses to assume defense of the claim, the indemnitee is in full charge of the matter and may make a good-faith settlement without assuming the risk of being able to prove absolute legal liability or the actual amount of the damage (*170 Cal. App. 2d 387, 392)* .

NOTE:

This holding is cited in *Mabie & Mintz v. B & E Installers (1972) 25 Cal. App. 3d 491, 496-497, 101 Cal. Rptr. 919* (implied indemnity), and *Safeway Stores, Inc. v. Massachusetts Bonding & Ins. Co. (1962) 202 Cal. App. 2d 99, 117, 20 Cal. Rptr. 820* (express indemnity). The court in *Mabie & Mintz* rejected the reasoning of *Raynolds v. Volkswagenwerk Aktiengesellschaft (1969) 275 Cal. App. 2d 997, 1005, 80 Cal. Rptr. 610* , that the rule applies only to express indemnity agreements and that an implied indemnitee makes a good faith settlement at the peril of later being found not liable.

[4] Additional Authorities

[a] Settlement Following Refusal of Tendered Defense

In *Mel Clayton Ford v. Ford Motor Co. (2002) 104 Cal. App. 4th 46, 127 Cal. Rptr. 2d 759* , a car dealer sought indemnity from a car manufacturer for the costs of settling and defending a third-party personal injury action. The dealer and the manufacturer had an existing contract with an express indemnity provision under which the manufacturer agreed to defend and indemnify the dealer against claims for injury caused solely by a product or design defect attributable to the manufacturer. However, when the dealer submitted defense of the underlying claim to the manufacturer, the manufacturer refused the tender because the underlying plaintiff had alleged that the dealer was also negligent in its maintenance of the car involved in causing the underlying injury. The dealer eventually settled the underlying claim. The trial court in the indemnity action found that the settlement was in good faith and awarded the dealer the costs of its defense and settlement in the underlying action. The court of appeal reversed. Relying on established case law, including *Peter Culley & Assocs. v. Superior Court (1992) 10 Cal. App. 4th 1484, 13 Cal. Rptr. 2d 624* [*see § 115.164[3][b]*], the court of appeal held that a good-faith settlement finding under *Code Civ. Proc. § 877.6* could not be used offensively to establish conclusively an amount owed under an express indemnity provision. Because the manufacturer in this case agreed to defend and indemnify only if the dealer was not also negligent, the dealer could not establish its right to indemnity under the contract unless it could prove that any negligence on its part

was not a cause of the underlying personal injury (*104 Cal. App. 4th 46, 56-60)* .

CC-Cal. Plaza Assocs. v. Paller & Goldstein (1996) 51 Cal. App. 4th 1042, 59 Cal. Rptr. 2d 382 , arose after a contractor settled a claim by a building owner on a construction contract. This settlement occurred after the subcontractor indemnitor had failed to defend the action by the owner against the contractor. As part of the settlement, the contractor assigned its indemnity rights to the owner, and the owner then prosecuted those rights against the subcontractor. After trial had begun, the trial court granted the subcontractor's motion for nonsuit on the ground that the assigned indemnity rights had no value because proof of damages was impossible. The trial court based its ruling on *Peter Culley & Assocs. v. Superior Court (1992)10 Cal. App. 4th 1484, 13 Cal. Rptr. 2d 624.* The court of appeal reversed, stating that the rule from *Peter Culley* is that a settlement by an indemnitee with a party asserting a claim is presumptive evidence of liability and of the amount of liability, although this evidence may be overcome by proof from the indemnitor that the settlement was unreasonable. The court concluded that there was no principle to support a ruling depriving the owner its right to prove its assigned indemnity claim, and that, on the contrary, the case supported the opposite conclusion (*51 Cal. App. 4th 1042, 1053*).

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
CHAPTER 115 INDEMNITY AND CONTRIBUTION
PART II. FORMS
D. Effects of Settlement

11-115 California Points & Authorities § 115.165

§ 115.165 Opposing Contention That Indemnitee's Payment Precludes Indemnity or Contribution--Waiver of Statute of Limitations Does Not Constitute Voluntary Payment

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

A RIGHT TO INDEMNITY MAY ARISE, EVEN IF THE RIGHT IS BASED ON A THIRD-PARTY CLAIM ON WHICH AN ACTION WAS FILED AGAINST THE INDEMNITEE AFTER THE PERIOD OF LIMITATION HAD PASSED, IF THE STATUTE OF LIMITATIONS DEFENSE WAS WAIVED BY THE INDEMNITEE FOR A VALID PURPOSE.

Valid Waiver of Statute of Limitations Does Not Result in Voluntary Payment. An action for indemnity may be based on a payment pursuant to an action filed against the indemnitee after the statute of limitations has run if the indemnitee waived the limitation of time in furtherance of a duty to minimize the loss (*Fidelity & Deposit Co. v. Whitson (1960) 187 Cal. App. 2d 751, 758, 10 Cal. Rptr. 6*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that indemnity is appropriate even though the third-party claim on which the right is based was potentially barred by a statute of limitations. The proposition of the form is that a valid waiver of the statute granted by the indemnitee to the third party does not make any subsequent payment of the claim a voluntary payment for which indemnity is foreclosed. In an appropriate case, this memorandum may be submitted in opposition to the contention supported by the points and *authorities in § 115.163*.

The authority that supports the point set forth in this form involves a claim for express indemnity. The voluntary payment rule has, however, also been applied as a limitation on contribution rights in a case involving a limitations-barred claim [*see Schlitz v. Thomas (1923) 61 Cal. App. 635, 216 P. 51* ; *see also § 115.163[3][b*]].

Therefore, the points and authorities set forth in this form may be adapted for use in support of a claim for contribution among nontort obligors [*cf. Code Civ. Proc. § 877.6(a)* (co-obligors on contract debt may obtain judicial confirmation of settlement as in good faith)].

This form may be combined with points and authorities pertaining to the specific procedural context in which a right to indemnity or contribution is brought before the court. It may be used in a memorandum in connection with a pretrial motion, such as a demurrer or motion for summary judgment, if rights may be determined as a matter of law. It may also be used in a trial or an appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. It should be established that: (1) the indemnitee or party seeking contribution was alleged to be liable to a third party; (2) pursuant to the indemnitee's waiver of the defense, the third party did not bring an action on the claim until after the applicable statute of limitations had run; (3) in settlement of this alleged liability, the indemnitee or party seeking contribution then made the payment for which it now seeks indemnity or contribution. The reasons why the indemnitee was justified in waiving the limitations defense should then be set forth.

[3] Discussion of Authorities

[a] Valid Waiver of Statute of Limitations Does Not Result in Voluntary Payment

The factual background of ***Fidelity & Deposit Co. v. Whitson*** *(1960) 187 Cal. App. 2d 751, 10 Cal. Rptr. 6* , is discussed in *§ 115.164[3][a]*. The court of appeal discussed the fact that the underlying claim was, in fact, filed against the indemnitee after the statute of limitation had run. It was conceded that the indemnitee was subject to the third-party suit only because of its waiver of the limitations defense. The indemnitor argued that, under these circumstances, the indemnitee's subsequent payment of the claim made it a volunteer and thus barred it from seeking indemnity [*see § 115.163*].

The court of appeal rejected the argument. The indemnitee was faced with numerous claims on bonds issued in connection with the construction project. Under the applicable law, the claimants would have been entitled to attorneys' fees if successful after trial. Thus, it was sound practice to waive the statute of limitations and attempt to resolve as many of the claims as possible without litigation. The indemnitor was under a duty to minimize the loss that was subject to indemnity, and, in fact, all claims except the one were resolved without the necessity of filing suit. Under these circumstances, the conduct of the indemnitee's counsel in waiving the statute of limitations was reasonable and did not make the indemnitee a volunteer (*187 Cal. App. 2d 751, 758)* .

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CHAPTER 116 INJUNCTIONS

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§ 116.syn Synopsis to Chapter 116: INJUNCTIONS

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§ 116.03 Use of Points and Authorities

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§ 116.20 Supporting Application for Temporary Restraining Order and Preliminary Injunction [Code Civ. Proc. § 527]--Right to Relief Apparent From Complaint and Relief Consists in Restraining Commission or Continuance of Act [Code Civ. Proc. § 526(a)(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Restraining Commission or Continuance of Act

§ 116.21 Supporting Application for Temporary Restraining Order and Preliminary Injunction [Code Civ. Proc. § 527]--Act Would Produce Waste, or Great or Irreparable Injury to Party During Litigation [Code Civ. Proc. § 526(a)(2)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Great or Irreparable Injury or Waste

[4] Additional Authorities

[a] Great or Irreparable Injury or Waste

§ 116.22 Supporting Application for Temporary Restraining Order and Preliminary Injunction [Code Civ. Proc. § 527]--Act Tending to Render Judgment Ineffectual [Code Civ. Proc. § 526(a)(3)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Rendering Judgment Ineffectual

[4] Additional Authorities

[a] Rendering Judgment Ineffectual

§ 116.23 Supporting Application for Temporary Restraining Order and Preliminary Injunction [Code Civ. Proc. § 527]--Monetary Compensation (Damages) Inadequate or Unascertainable [Code Civ. Proc. § 526(a)(4), (5)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Monetary Compensation Inadequate or Unascertainable

[b] Insolvency of Defendant

[4] Additional Authorities

[a] Monetary Compensation Inadequate or Unascertainable

[b] Insolvency of Defendant

§ 116.24 Supporting Application for Temporary Restraining Order and Preliminary Injunction [Code Civ. Proc. § 527]--Prevent Multiplicity of Judicial Proceedings [Code Civ. Proc. § 526(a)(6)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Prevent Multiplicity of Judicial Proceedings

[4] Additional Authorities

[a] Prevent Multiplicity of Judicial Proceedings

§ 116.25 Supporting Application for Temporary Restraining Order and Preliminary Injunction [Code Civ. Proc. § 527]--Obligation Arising From Trust [Code Civ. Proc. § 526(a)(7)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Obligation Arising From Trust

§ 116.26 Supporting Application for Temporary Restraining Order and Preliminary Injunction [Code Civ. Proc. § 527]--Preservation of Status Quo

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Preservation of Status Quo

[b] Continuance of Regular and Usual Procedures

[4] Additional Authorities

[a] Preservation of Status Quo

§ 116.27 Supporting Application for Temporary Restraining Order and Preliminary Injunction [Code Civ. Proc. § 527]--Action by Municipal Corporation or Inferior Board or Tribunal in Excess of Jurisdiction

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Action in Excess of Jurisdiction and Without Authority

§ 116.28 Supporting Application for Temporary Restraining Order and Preliminary Injunction [Code Civ. Proc. § 527]--Completed Acts That Will Probably Recur

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Completed Acts That Will Probably Recur

[b] Disregard of Intention to Discontinue Transgressions

[4] Additional Authorities

[a] Completed Acts That Will Probably Recur

§ 116.29 Supporting Application for Temporary Restraining Order and Preliminary Injunction [Code Civ. Proc. § 527]--Changed Factual Situation Requires Issuance of Previously Denied Preliminary Injunction

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Changed Factual Context

§ 116.30 Supporting Motion for Injunction Pending Appeal by Party Denied Injunctive Relief

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Injunction Pending Appeal From Judgment

[b] Injunction Pending Appeal From Order Denying Preliminary Injunction

§ 116.31 Supporting Application for Temporary Restraining Order and Preliminary Injunction [Code Civ. Proc. § 527]--Act Would Destroy Potential Evidence Pending Discovery Order

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Protect Potential Evidence

§ 116.32 Opposing Application for Preliminary Injunction [Code Civ. Proc. § 527]--Injunction Not Issued to Stay Judicial Proceeding Pending at Commencement of Action [Civ. Code § 3423(a); Code Civ. Proc. § 526(b)(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Stay of Pending Judicial Proceeding Prohibited

[b] Multiplicity of Proceedings Not Present

[c] Enjoining of Federal Actions Prohibited

[4] Additional Authorities

[a] Stay of Pending Judicial Proceeding Prohibited

§ 116.33 Opposing Application for Preliminary Injunction [Code Civ. Proc. § 527]--Injunction Not Issued to Prevent Exercise of Public or Private Office [Civ. Code § 3423(f); Code Civ. Proc. § 526(b)(6)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Preventing Exercise of Public or Private Office

[4] Additional Authorities

[a] Preventing Exercise of Public or Private Office

§ 116.34 Opposing Application for Preliminary Injunction [Code Civ. Proc. § 527]--Injuction Not Issued to Prevent Legislative Act by Municipal Corporation [Civ. Code § 3423(g); Code Civ. Proc. § 526(b)(7)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Preventing Legislative Act by Municipal Corporation

[4] Additional Authorities

[a] Preventing Legislative Act by Municipal Corporation

§ 116.35 Opposing Application for Preliminary Injunction [Code Civ. Proc. § 527]--Absence of Factual Showing of Grounds on Which Preliminary Injunction May Be Granted [Code Civ. Proc. § 527(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Absence of Grounds for Preliminary Injunction

§ 116.36 Opposing Application for Preliminary Injunction [Code Civ. Proc. § 527]--Completed Acts

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Completed Acts

[4] Additional Authorities

[a] Completed Acts

§ 116.37 Opposing Application for Preliminary Injunction [Code Civ. Proc. § 527]--Preliminary Injunction Not Issued If Plaintiff Has Not Shown Either Existing or Threatened Irreparable Injury

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] No Irreparable Injury

[b] Taxpayer Must Demonstrate Actual or Threatened Harm

[4] Additional Authorities

[a] No Irreparable Injury

§ 116.38 Opposing Application for Preliminary Injunction [Code Civ. Proc. § 527]--Plaintiff's Laches

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Plaintiff's Laches

§ 116.39 Opposing Application for Preliminary Injunction [Code Civ. Proc. § 527]--Plaintiff's Unclean Hands

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Plaintiff's Unclean Hands

§ 116.40 Opposing Application for Preliminary Injunction [Code Civ. Proc. § 527]--No Cause of Action Stated

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Failure to State Cause of Action Prohibits Issuance of Preliminary Injunction

§ 116.41 Opposing Application for Preliminary Injunction [Code Civ. Proc. § 527]--Adequate Legal Remedy--Damages

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Damages as Adequate Legal Remedy

[4] Additional Authorities

[a] Damages as Adequate Legal Remedy

§ 116.42 Opposing Application for Preliminary Injunction [Code Civ. Proc. § 527]--Adequate Legal Remedy--Mandate

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Mandate as Adequate Legal Remedy

§ 116.43 Opposing Application for Preliminary Injunction [Code Civ. Proc. § 527]--Adequate Legal Remedy--Quo Warranto

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Quo Warranto as Adequate Legal Remedy

§ 116.44 Opposing Application for Preliminary Injunction [Code Civ. Proc. § 527]--Adequate Legal Remedy--Claim and Delivery

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Claim and Delivery as Adequate Legal Remedy

§ 116.45 Opposing Application for Preliminary Injunction [Code Civ. Proc. § 527]--Public Interest

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Public Interest

§ 116.46 Opposing Application for Preliminary Injunction [Code Civ. Proc. § 527]--Changed Circumstances

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Changed Circumstances

[4] Additional Authorities

[a] Changed Circumstances

§ 116.47 Opposing Application for Preliminary Injunction [Code Civ. Proc. § 527]--Plaintiff Not Likely to Prevail on Merits at Trial, and Balance-of-Hardships Weighs in Defendant's Favor

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Court Must Consider Likelihood That Plaintiff Will Prevail and Balance Hardships of Parties

[b] Plaintiff's Recovery Doubtful

[c] Plaintiff's Recovery Impossible

[4] Additional Authorities

[a] Court Must Consider Likelihood That Plaintiff Will Prevail and Balance Hardships of Parties

[b] Plaintiff's Recovery Doubtful

[c] Plaintiff's Recovery Impossible

§ 116.48 Opposing Application for Preliminary Injunction [Code Civ. Proc. § 527]--Injunction Not Issued if Restraint Interferes With Freedom of Speech

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Interference With Freedom of Speech

[4] Additional Authorities

[a] Interference With Freedom of Speech

§ 116.49 Opposing Application for Preliminary Injunction [Code Civ. Proc. § 527]--Lack of Personal Jurisdiction

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Lack of Personal Jurisdiction

§ 116.50 Opposing Application for Preliminary Injunction [Code Civ. Proc. § 527]--No Acts Threatened to Be Committed in Future

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] No Acts Threatened to Be Committed in Future

§ 116.51 Opposing Application for Preliminary Injunction [Code Civ. Proc. § 527]--Mandatory Preliminary Injunction Rarely Issued

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Mandatory Preliminary Injunction Rarely Issued

[4] Additional Authorities

[a] Mandatory Preliminary Injunction Rarely Issued

§ 116.52 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10]--No Cause of Action Stated for Injunctive Relief

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Elements of Cause of Action for Injunctive Relief

[b] Complaint Shows on Its Face That Damages Provide Adequate Remedy

§ 116.53 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10]--Injunctive Relief Not Warranted if Complaint Contains Only Unsupported General Conclusions

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] General Conclusions in Complaint Not Sufficient to Issue Injunction

[4] Additional Authorities

[a] General Conclusions in Complaint Not Sufficient to Issue Injunction

§ 116.54 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10]--Injunctive Relief Not Warranted If Injury Alleged in Complaint Does Not Appear Irreparable

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] No Irreparable Injury

§ 116.55 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10]--Injunctive Relief Not Warranted if Complaint Contains Only Unsupported General Conclusions of Irreparable Injury

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] General Conclusions Concerning Irreparable Injury Not Sufficient

[4] Additional Authorities

[a] General Conclusions in Complaint Not Sufficient to Issue Injunction

§ 116.56 Supporting Motion for Dissolution of Preliminary Injunction--Preliminary Injunction Granted Without Notice to Party Enjoined [Code Civ. Proc. § 527(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Preliminary Injunction Void When No Notice Given

§ 116.57 Supporting Motion for Dissolution of Preliminary Injunction--Preliminary Injunction Granted Without Undertaking [Code Civ. Proc. § 529(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Preliminary Injunction Void When Undertaking Not Required

[4] Additional Authorities

[a] Preliminary Injunction Void When Undertaking Not Required

§ 116.58 Supporting Motion for Dissolution of Preliminary Injunction--Bond Furnished in Support of Preliminary Injunction Is Deficient

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Dissolution of Preliminary Injunction Supported by Deficient Bond

§ 116.59 Supporting Motion for Dissolution or Modification of Preliminary Injunction or Temporary Restraining Order--Required by Change in Facts or Law, or to Serve Ends of Justice [Code Civ. Proc. § 533]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Court's Inherent Power When There Has Been Change in Circumstances

§ 116.60 Supporting Motion for Dissolution or Modification of Permanent Injunction--Required by Change in Facts or Law, or to Serve Ends of Justice [Civ. Code § 3424(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Court's Inherent Power When There Has Been Change in Circumstances

§ 116.61 Supporting Motion for Stay of Permanent Injunction Pending Appeal From Judgment

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Stay of Injunction Pending Appeal

§ 116.62 Opposing Application for Dissolution of Preliminary Injunction--Undertaking Waived or Forfeited by Party to Be Enjoined [Code Civ. Proc. § 529(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Party to be Enjoined Waived or Forfeited Undertaking Requirement

§§ 116.63-116.79 [Reserved]

§ 116.80 Supporting Application for Temporary Restraining Order and Preliminary Injunction [Code Civ. Proc. § 527]--Unconstitutional or Invalid Statute or Ordinance

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Unconstitutional or Invalid Enactment

[4] Additional Authorities

[a] Unconstitutional or Invalid Enactment

§ 116.81 Supporting Application for Temporary Restraining Order and Preliminary Injunction [Code Civ. Proc. § 527]--Statute Not Applicable to Plaintiff's Actions

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Statute Not Applicable to Plaintiff's Conduct

[4] Additional Authorities

[a] Statute Not Applicable to Plaintiff's Conduct

§ 116.82 Supporting Application for Temporary Restraining Order and Preliminary Injunction [Code Civ. Proc. § 527]--Unconstitutional Application of Facially Valid Statute

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Unconstitutional Application of Statute

[4] Additional Authorities

[a] Unconstitutional Application of Statute

§ 116.83 Opposing Application for Preliminary Injunction [Code Civ. Proc. § 527]--Injunction Not Issued to Prevent Execution of Public Statute or Ordinance for Public Benefit [Civ. Code § 3423(d); Code Civ. Proc. § 526(b)(4)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Preventing Execution of Public Statute

[b] Enjoining Valid Public Statute or Ordinance as Excess of Jurisdiction

[c] No Showing of Irreparable Harm

[4] Additional Authorities

[a] Preventing Execution of Public Statute

§ 116.84 Opposing Application for Preliminary Injunction [Code Civ. Proc. § 527]--Injunction Is Not Issued to Enforce Criminal Law Unless Nuisance Demonstrated or as Otherwise Provided by Law [Civ. Code § 3369]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Enforcing Criminal Law Prohibited

[4] Additional Authorities

[a] Enforcing Criminal Law Prohibited

§§ 116.85-116.99 [Reserved]

§ 116.100 Supporting Application for Temporary Restraining Order and Preliminary Injunction [Code Civ. Proc. § 527]--Contract Capable of Specific Enforcement [Civ. Code § 3423(e); Code Civ. Proc. § 526(b)(5)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Contract Can Be Specifically Enforced

[b] Terms of Contract Provide for Specific Enforcement

§ 116.101 Supporting Application for Temporary Restraining Order and Preliminary Injunction [Code Civ. Proc. § 527]--Unique Personal Service Contract With Statutory Minimum Compensation [Civ. Code § 3423(e); Code Civ. Proc. § 526(b)(5)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Unique Personal Service Contract With Statutory Minimum Compensation

[b] Minimum Compensation Satisfied When Party Has Exclusive Control of Production Costs

[4] Additional Authorities

[a] Unique Personal Service Contract With Statutory Minimum Compensation

§ 116.102 Supporting Application for Temporary Restraining Order and Preliminary Injunction [Code Civ. Proc. § 527]--Restrictive Covenant in Deed

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Violation of Restrictive Covenant

§ 116.103 Opposing Application for Preliminary Injunction [Code Civ. Proc. § 527]--Injunction Not Issued to Prevent Breach of Contract That Would Not Be Specifically Enforced [Civ. Code § 3423(e); Code Civ. Proc. § 526(b)(5)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Preventing Breach of Contract

[b] Affirmative and Negative Covenants in Contract

[c] Exception for Unique Personal Services Not Applicable

[4] Additional Authorities

[a] Preventing Breach of Contract

[b] Affirmative and Negative Covenants in Contract

[c] Exception for Unique Personal Services Not Applicable

§§ 116.104-116.119 [Reserved]

§ 116.120 Supporting Petition for Injunction and Temporary Restraining Order to Prevent Harassment [Code Civ. Proc. § 527.6]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Harassment Defined

§ 116.121 Opposing Petition for Injunction and Temporary Restraining Order to Prevent Harassment [Code Civ. Proc. § 527.6]--No Course of Conduct Shown [Code Civ. Proc. § 527.6(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Course of Conduct Defined

[b] Constitutionally Protected Activity

[c] Single Incident Is Not Course of Conduct

§ 116.122 Opposing Petition for Temporary Restraining Order and Injunction to Prevent Violence Against Employer's Employees at the Workplace [Civ. Proc. § 527.8]--No Unlawful Violence or Credible Threat of Violence, or No Threat of Future Harm [Code Civ. Proc. § 527.8]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Reasonable Probability That Wrongful Acts Will Be Repeated In Future Required

[b] Single Incident Insufficient For Injunctive Relief

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11-116 California Points & Authorities § 116.01

§ 116.01 Scope of Chapter

This chapter contains general forms of memoranda of points and authorities for use in supporting [*see §§ 116.20 -116.31*] and opposing [*see §§ 116.32 -116.51*] applications for preliminary injunctions and related temporary restraining orders. These general forms also include memoranda that may be used in supporting demurrers to complaints that seek injunctive relief [*see §§ 116.52 -116.55*], as well as motions for the dissolution or modification of a preliminary or permanent injunction [*see §§ 116.56 -116.60*]. In addition, a memorandum in support of a stay of a permanent injunction pending appeal is included [*see § 116.61*].

This chapter also contains forms of memoranda for use in supporting [*see §§ 116.80 -116.82*] and opposing [*see §§ 116.83 -116.84*] applications for temporary restraining orders and preliminary injunctions concerning the application of statutes, as well as forms supporting [*see §§ 116.100 -116.102*] and opposing [*see § 116.103*] injunctions for the enforcement of contractual rights. The chapter also contains memoranda supporting [*see § 116.120*] and opposing [*see §§ 116.121, 116.122*] petitions for an injunction prohibiting harassment.

For injunctive relief dealing with specific subjects treated elsewhere in this publication [*see § 116.05*].

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11-116 California Points & Authorities § 116.02

§ 116.02 Governing Statutes

The granting of injunctive relief is governed generally by *Civ. Code § 3420 et seq.* and by *Code Civ. Proc. § 525 et seq.* There are, however, many additional statutes governing injunctive relief that are related to the specific underlying subject matter of the action. For a listing of the most frequently encountered of these in general civil litigation, see *California Forms of Pleading and Practice, Ch. 303, Injunctions, § 303.100 et seq.* (Matthew Bender).

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11-116 California Points & Authorities § 116.03

§ 116.03 Use of Points and Authorities

[1] Supporting Issuance of TRO or Preliminary Injunction

With a few exceptions, a memorandum must be included (served and filed) with any noticed motion for a preliminary injunction [*see Cal. Rules of Ct., Rule 3.1113(a)*]. A memorandum is not required for a petition for an injunction prohibiting harassment or a petition for an injunction prohibiting workplace violence [*Cal. Rules of Ct., Rule 3.1114(a)(7), (a)(9)*].

In addition, a memorandum should, and possibly must, be included with an application for a temporary restraining order (TRO) and order to show cause for a preliminary injunction. Although this requirement is not expressly set forth by statute or court rule regarding applications for a TRO and order to show cause, it can reasonably be implied from the Code of Civil Procedure and California Rules of Court. Under *Cal. Rules of Ct., Rule 3.1113(a)*, a party filing a motion, except for a motion listed in *Cal. Rules of Ct., Rule 3.1114*, must serve and file a memorandum.

Code Civ. Proc. § 527(d) sets forth additional relevant provisions that pertain to the issuance of a TRO without notice to an opposing party. In those circumstances, the party who obtained the TRO must serve on the opposing party, within five days from the date the TRO is issued or two days prior to the hearing, whichever is earlier (and subject to an order shortening time), a copy of the complaint if not previously served, the order to show cause, any affidavits to be used in the application, and a copy of the memorandum in support of the application. When the matter first comes up for hearing, if the party who obtained the TRO is not ready to proceed or failed to effect service of the above items, the court must dissolve the TRO [*Code Civ. Proc. § 527(d)(2), (3)*].

In short, the applicant's counsel should plan on serving and filing a memorandum regardless of whether the moving papers are a notice of motion or application for an order to show cause for a preliminary injunction, or involve an application for a TRO coupled with an order to show cause for a preliminary injunction. One notable exception to the filing requirement involves those special proceedings in which a memorandum is *specifically excepted* by statute or rule [*see, e.g., Cal. Rules of Ct., Rule 3.1114(a)(7), (a)(9)* (memorandum not required for petition for injunction prohibiting harassment or petition for injunction prohibiting workplace violence)].

For further discussion of utilizing memoranda including a discussion of applicable page limitations [*see Cal. Rules of Ct., Rule 3.1113(d)*], see Ch. 1, *Writing Legal Memoranda and Briefs* . For a complete discussion of rules and procedures for obtaining injunctive relief, including forms, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender).

[2] Preserving Relief Already Granted

A plaintiff who has already obtained a temporary restraining order may be faced with having either to oppose a defendant's demurrer, motion for summary judgment, or petition for a writ of prohibition, or to oppose a motion to dissolve or modify the temporary restraining order (or preliminary injunction). In these situations, although an opposing memorandum is not expressly required, the plaintiff may desire to serve and file one. In general, once the moving party has filed a memorandum, it is not only good practice, but is usually a tactical necessity for the opponent to also do so in order to present a balanced view of the issues to the court.

[3] Defending Against Preliminary or Permanent Injunction

The Code of Civil Procedure does not require that a defendant prepare a memorandum to oppose an application for a preliminary injunction. However, when there is a defense available, or when the plaintiff (applicant) has misstated a legal point in the memorandum served on defendant, counsel for defendant should prepare a memorandum in opposition to the application for the preliminary injunction. From a tactical standpoint, use of the memorandum also may be necessity.

In addition, because memoranda are generally required when filing demurrers and motions [*see Cal. Rules of Ct., Rule 3.1113(a)*], counsel should refer to the memoranda in this chapter that oppose the issuance of injunctive relief in preparing demurrers, motions for summary judgment, petitions for a writ of prohibition, or to plead affirmative defenses. Also, if the defendant notices a motion for an order either to dissolve or modify a temporary restraining order, preliminary injunction, or permanent injunction, the notice of motion must be accompanied by a memorandum [*Cal. Rules of Ct., Rule 3.1113(k)*].

The same authority that is used to defend against provisional injunctive relief usually may, with appropriate modifications in the wording, be used to defend against actions for permanent injunctive relief. That is, the memoranda in this chapter that supply authorities for opposing applications for preliminary injunctions may be transformed into (1) memoranda supporting demurrers to complaints for permanent injunctive relief if the defects are shown on the face of the complaint, (2) affirmative defenses for use in answers, (3) memoranda supporting motions for summary judgment, or (4) memoranda in support of petitions for writs of prohibition.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentOppositionGeneral OverviewCivil ProcedureRemediesInjunctionsElementsGeneral OverviewCivil ProcedureRemediesInjunctionsPermanent InjunctionsCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesWritsCommon Law WritsProhibition

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11-116 California Points & Authorities § 116.04

§ 116.04 Related Pleading and Practice Chapters

For a discussion, procedural checklists, and forms for use in applying for or in opposing injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender). For forms for use in particular factual situations involving injunctive relief, see the following chapters in that publication:

- Ch. 11, *Adjoining Landowners*.
- Ch. 13, *Adverse Possession*.
- Ch. 14, *Advertising*.
- Ch. 19, *Alcoholic Beverages: Civil Liability*.
- Ch. 23, *Animals: Civil Liability*.
- Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration*.
- Ch. 59, *Assemblies, Meetings, and Demonstrations*.
- Ch. 61, *Associations and Clubs*.
- Ch. 62, *Attachment*.
- Ch. 110, *Churches and Religious Organizations*.
- Ch. 112, *Civil Rights: Government-Funded Programs and Activities*.
- Ch. 113, *Civil Rights: The Post -Civil War Civil Rights Statutes*.

- Ch. 114, *Civil Rights: Prisoners' Rights*.
- Ch. 115, *Civil Rights: Employment Discrimination*.
- Ch. 116, *Civil Rights: Discrimination in Business Establishments*.
- Ch. 117, *Civil Rights: Housing Discrimination*.
- Ch. 117A, *Civil Rights: Interference With Civil Rights by Threats, Intimidation, Coercion, or Violence*.
- Ch. 119, *Claim and Delivery*.
- Ch. 124, *Condominiums and Other Common Interest Developments*.
- Ch. 127, *Consumer Contracts and Loans*.
- Ch. 160, *Corporations*.
- Ch. 183, *Dedication*.
- Ch. 184, *Deeds*.
- Ch. 221, *Dissolution of Marriage: Procedure*.
- Ch. 240, *Easements*.
- Ch. 243, *Elections*.
- Ch. 254, *Executions and Enforcement of Judgments*.
- Ch. 256, *Explosives*.
- Ch. 266, *Fences*.
- Ch. 268, *Food*.
- Ch. 293, *Harassment And Domestic Violence*.
- Ch. 294, *Homesteads*.
- Ch. 307, *Insolvency*.
- Ch. 314, *Interpleader*.
- Ch. 315, *Irrigation*.
- Ch. 333, *Landlord and Tenant: Eviction Actions*.
- Ch. 344, *Life Estates and Remainders*.

- Ch. 349, *Literary Property and Copyright*.
- Ch. 357, *Malicious Prosecution and Abuse of Process*.
- Ch. 364, *Minors: Claims and Property of Minors*.
- Ch. 365, *Minors: Contract Actions*.
- Ch. 366, *Minors: Court Consent for Medical Care or Enlistment*.
- Ch. 367, *Minors: Disaffirmation of Judgements*.
- Ch. 367A, *Minors: Tort Actions*.
- Ch. 391, *Nuisance*.
- Ch. 393, *Oil and Gas*.
- Ch. 406, *Partnerships: Dissolution*.
- Ch. 411, *Patents and Inventions*.
- Ch. 418, *Pollution and Environmental Matters*.
- Ch. 429, *Privacy*.
- Ch. 464, *Public Entities and Officers: California Tort Claims Act*.
- Ch. 465, *Public Entities and Officers: Civil Claims Arising from Criminal Acts*.
- Ch. 466, *Public Entities and Officers: Taxpayer's Actions*.
- Ch. 467, *Public Entities and Officers: Enforcement of Judgements Against Public Entities*.
- Ch. 468, *Public Entities and Officers: False Claims Actions*.
- Ch. 469, *Public Entities and Officers: Conflicts of Interest*.
- Ch. 480, *Public Utilities*.
- Ch. 484, *Radio and Television*.
- Ch. 503, *Sales: Secured Transactions*.
- Ch. 504, *Sales: Consumers Legal Remedies Act*.
- Ch. 512, *Schools*.
- Ch. 527, *Social Services*.

- Ch. 528, *Specific Performance*.
- Ch. 531, *Statutes and Ordinances*.
- Ch. 538, *Suretyship, Bonds, and Undertakings*.
- Ch. 549, *Trademarks and Trade Names*.
- Ch. 550, *Trespass*.
- Ch. 555, *Trust Deeds and Real Property Mortgages*.
- Ch. 560, *Trusts*.
- Ch. 565, *Unfair Competition*.
- Ch. 568, *Usury*.
- Ch. 575, *Waters*.
- Ch. 579, *Zoning and Planning*.

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11-116 California Points & Authorities § 116.05

§ 116.05 Related Points and Authorities Chapters

Related forms of memoranda of points and authorities that may prove useful in particular factual situations in which injunctive relief is being sought or opposed may be found in the following chapters:

- Ch. 14, *Advertising*.
- Ch. 24, *Attorneys at Law: Substitution, Withdrawal, Disqualification, and Authority to Appear*.
- Ch. 24A, *Attorneys at Law: Malpractice*.
- Ch. 35, *Civil Rights: Unruh Civil Rights Act*.
- Ch. 35A, *Civil Rights: Equal Protection*.
- Ch. 41, *Class and Representative Actions*.
- Ch. 95, *Eminent Domain*.
- Ch. 112, *Homesteads*.
- Ch. 131, *Judgments*.
- Ch. 155, *Motions After Trial*.
- Ch. 167, *Nuisance*.
- Ch. 170, *Partnerships and Joint Ventures*.
- Ch. 230, *Trust Deeds and Real Property Mortgages*.

- Ch. 235, *Unfair Competition*.
- Ch. 236, *Unlawful Detainer*.

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11-116 California Points & Authorities §§ 116.06-116.19

[Reserved]

§§ 116.06[Reserved]

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A. Injunctive Relief in General

11-116 California Points & Authorities § 116.20

§ 116.20 Supporting Application for Temporary Restraining Order and Preliminary Injunction [Code Civ. Proc. § 527]--Right to Relief Apparent From Complaint and Relief Consists in Restraining Commission or Continuance of Act [Code Civ. Proc. § 526(a)(1)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM OF POINTS
	)	AND AUTHORITIES IN
_____ [*name*],	)	SUPPORT OF
Plaintiff,	)	APPLICATION
vs.	)	FOR [TEMPORARY
_____ [*name*],	)	RESTRAINING ORDER
Defendant.	)	AND] PRELIMINARY
	)	INJUNCTION
	)	Date: _____
	)	Time: _____
	)	Dept.: _____
	)	Trial Date: _____
	)	

_____

A PRELIMINARY INJUNCTION SHOULD BE ISSUED IF PLAINTIFF'S RIGHT TO RELIEF IS APPARENT

FROM THE COMPLAINT AND THE RELIEF CONSISTS IN RESTRAINING THE COMMISSION OR CONTINUANCE OF THE ACT COMPLAINED OF. IN THIS CASE, PLAINTIFF'S COMPLAINT DEMONSTRATES THAT _____ [*set forth facts from complaint showing basis for injunctive relief*]. THEREFORE, THE COURT SHOULD GRANT THE RELIEF REQUESTED.

Restraining Commission or Continuance of Act. An injunction may be granted when it appears by the complaint that the plaintiff is entitled to the relief demanded and the relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually (*Code Civ. Proc. § 526(a)(1)*; *Dingley v. Buckner (1909) 11 Cal. App. 181, 183-184, 104 P. 478* ; *see Southern Christian Leadership Conference v. Al Malaikah Auditorium Co. (1991) 230 Cal. App. 3d 207, 223, 281 Cal. Rptr. 216*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of an application for injunctive relief when a plaintiff's right to relief is apparent from the complaint and the relief consists in restraining the commission or continuance of an act [*see Code Civ. Proc. § 526(a)(1)*]. Counsel may submit these points and authorities with (1) an application for a temporary restraining order and preliminary injunction, (2) an application for a preliminary injunction alone, or (3) after appropriate modification of the caption, with a motion for a preliminary injunction.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth those facts in the complaint that clearly give rise to injunctive relief [*see Code Civ. Proc. § 526(a)(1)* (authorizing injunctive relief based on grounds apparent from complaint)]. If a TRO is being sought, counsel should point out any particular facts that show the need for such immediate relief. Note that if notice to the opposing party has not been given in connection with an ex parte application for a TRO, special pleading and certification requirements must be met [*see Code Civ. Proc. § 527(c)*].

[c] Related Pleading and Practice Forms

For a general form of complaint for provisional and permanent injunctive relief, as well as other forms for use in obtaining provisional injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender).

[3] Discussion of Authorities

[a] Restraining Commission or Continuance of Act

In ***Dingley v. Buckner*** *(1909) 11 Cal. App. 181, 104 P. 478* , plaintiffs were owners of equipment that was necessary for conducting a creamery business. They purchased cream from neighboring farmers and dairymen, manufactured it into butter, and shipped it to Los Angeles for sale. The complaint alleged that defendant sheriff was threatening to take possession of the building in which their creamery business was conducted and close it under a writ of attachment unless he was restrained from doing so. The superior court had dissolved a preliminary injunction, but the court of appeal stated that the complaint presented one of the most unquestioned grounds for the writ of injunction. Thus, it reversed the order dissolving the preliminary injunction.

The court of appeal stated that no proceeding at law could afford an adequate remedy for the destruction of one's business. It quoted from former Code Civ. Proc. § 526 first subd. (1) (now relettered as *Code Civ. Proc. § 526(a)(1)*), and stated that not only a part, but virtually all of the relief demanded by plaintiffs consisted in "restraining the continuance of the act complained of," namely, the possession of the property, and thereby, an interference with the operation of the plant and the consequent destruction of the business. Defendant's suggestion that plaintiffs could go out into the market and replace the equipment was refuted with the court's statement that it would be just as legitimate to argue that the plaintiffs might lease other premises or go into some other business. The court observed that if the fundamental rights of the individual to liberty and the possession of property are to be regarded, plaintiffs obviously could not be precluded by a trespasser from conducting that particular business at that particular place and with the equipment of their own choosing (*11 Cal. App. 181, 183-184)* .

In ***Southern Christian Leadership Conference v. Al Malaikah Auditorium Co.*** *(1991) 230 Cal. App. 3d 207, 281 Cal. Rptr. 216* , plaintiff brought an action for damages for anticipatory breach of contract involving the renting of an auditorium on a specified date. The complaint also sought specific performance, a temporary restraining order, and a preliminary and a permanent injunction. The trial court granted a preliminary injunction enjoining defendants from using or allowing any person other than plaintiffs to use the auditorium on the specified date. However, before the specified date, the injunction was dissolved and vacated on the stipulation of the parties. Judgment was for plaintiffs, and defendants appealed, contending, among other things, that plaintiffs should not have been permitted under the election-of-remedies doctrine to proceed to trial for damages based on anticipatory breach, because plaintiffs had elected to seek relief based on specific performance and obtained a preliminary injunction to defendants' injury.

The court of appeal affirmed the judgment, rejecting the defendants' contentions. The court of appeal said that if the main action seeks another remedy, a preliminary injunction simply forms a provisional or auxiliary remedy to preserve the status quo until a final judgment. With regard to the injunction, the court explained that a plaintiff is not required to wait until he or she suffers actual harm but may seek injunctive relief against threatened infringement of the plaintiff's rights. In ruling on a motion for a preliminary injunction, the trial court considers whether a greater injury will result to the defendant from granting the injunction than to the plaintiff from refusing it. The trial court considers the probability of the plaintiff's ultimately prevailing in a trial on the merits and will deny a preliminary injunction unless there is a reasonable probability that plaintiff will successfully assert his or her rights. The granting or denial of a preliminary injunction on a verified complaint, together with oral testimony or affidavits, rests in the trial court's discretion. Here, the fact that the action was for breach of contract did not preclude issuance of a preliminary injunction (*230 Cal. App. 3d 207, 223)* .

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11-116 California Points & Authorities § 116.21

§ 116.21 Supporting Application for Temporary Restraining Order and Preliminary Injunction [Code Civ. Proc. § 527]--Act Would Produce Waste, or Great or Irreparable Injury to Party During Litigation [Code Civ. Proc. § 526(a)(2)]

[1] FORM

[*Caption. See § 116.20.*]

A PRELIMINARY INJUNCTION SHOULD BE ISSUED IF AN ACT WOULD PRODUCE WASTE, OR GREAT OR IRREPARABLE INJURY TO A PARTY DURING LITIGATION. IN THIS CASE, AS SHOWN BY THE _____ [COMPLAINT *and/or* AFFIDAVITS *or* DECLARATIONS], PLAINTIFF WILL SUFFER SUCH HARM BECAUSE _____ [*set forth factual basis for alleging waste or great/irreparable injury*]. THEREFORE, THE COURT SHOULD GRANT THE RELIEF REQUESTED.

Great or Irreparable Injury or Waste. An injunction may be granted when it appears by the complaint or affidavits (or declarations) that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury to a party to the action (*Code Civ. Proc. §§ 526(a)(2), 2015.5*; *Volpicelli v. Jared Sydney Torrance Memorial Hosp. (1980) 109 Cal. App. 3d 242, 167 Cal. Rptr. 610* ; *Smith v. Smith (1942) 49 Cal. App. 2d 716, 718-719, 122 P.2d 346*). The term "irreparable injury" means that species of damages, whether great or small, that ought not to be submitted to on the one hand or inflicted on the other (*Wind v. Herbert (1960) 186 Cal. App. 2d 276, 285, 8 Cal. Rptr. 817*). This definition warrants the use of the injunctive power of the court against a wrong that a trial judge deems insufferable because it constitutes an overbearing assumption by one person of superiority and domination over the rights and property of others (*Fretz v. Burke (1967) 247 Cal. App. 2d 741, 746, 55 Cal. Rptr. 879*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of an application for injunctive relief when an act would produce waste, or great or irreparable injury to a party during litigation [*Code Civ. Proc. § 526(a)(2)*]. Counsel may submit these points and authorities with (1) an application for a temporary restraining order and preliminary injunction; (2) an application for a preliminary injunction alone; or (3) after appropriate modification of the caption (*see § 116.20*), with a motion for a preliminary injunction.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth specific facts from the verified complaint, or in any accompanying affidavits or declarations, that establish how the commission or continuance of some act by the defendant during the litigation will result in waste, or in great or irreparable injury to a party unless injunctive relief is granted [*see Code Civ. Proc. §§ 526(a)(2), 2015.5*].

[c] Related Pleading and Practice Forms

For a general form of complaint for provisional and permanent injunctive relief as well as other forms for use in obtaining provisional injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender).

[3] Discussion of Authorities

[a] Great or Irreparable Injury or Waste

In ***Volpicelli v. Jared Sydney Torrance Memorial Hosp.*** *(1980) 109 Cal. App. 3d 242, 167 Cal. Rptr. 610* , a trial court granted a preliminary injunction in a case involving the termination of plaintiff physician from the defendant hospital's medical staff due to a dispute over staff dues. Plaintiff alleged that he was entitled to be temporarily reinstated to the staff pending adequate notice and hearing on the matter. Defendants argued, however, that injunctive relief was not proper because plaintiff failed to show irreparable injury. Defendants contended that plaintiff's fundamental right to practice his profession was not impaired because plaintiff still retained staff membership at two other hospitals.

The court of appeal upheld the injunction, reasoning that plaintiff had the right to fully and capably practice his profession, and an exclusion from one hospital out of three could substantially bear on plaintiff's right to fully practice. Furthermore, defendant hospital had a unique burn center. Because it was clear that plaintiff may have been deprived of a valuable right without due process of law, the court concluded that there was a sufficient showing of irreparable injury, thereby justifying the issuance of the preliminary injunction (*109 Cal. App. 3d 242, 248)* .

In ***Smith v. Smith*** *(1942) 49 Cal. App. 2d 716, 122 P.2d 346* , appellant contended that the trial court did not have jurisdiction to order him to remove himself from the family home pending the trial of a divorce action. The complaint had alleged that appellant had committed acts of violence about the residence, had threatened the life of respondent and the children, and had destroyed property. There was also testimony that appellant had on one occasion discharged

firearms in the home, destroyed property, and threatened the lives of his family to the extent that it was necessary to summon the police to disarm him.

In affirming the order, the court of appeal stated that the trial court acted within its jurisdiction in entering an order in the nature of a preliminary injunction excluding appellant from the residence during the pendency of the action because power to issue such an order is specifically granted to the courts by statute (citing former Code Civ. Proc. § 526 first subd (2); now relettered as *Code Civ. Proc. § 526(a)(2)* (*49 Cal. App. 2d 716, 718-719)* .

Note that, while the *Smith* case validly illustrates the concept of irreparable injury, the specific form of injunctive relief obtained in that case, a dwelling exclusion order, is now governed by *Fam. Code §§ 6321, 6340*. For a complete discussion of the requirements for obtaining such an order, see California Forms of Pleading and Practice, Ch. 293, *Harassment and Domestic Violence* (Matthew Bender).

In ***Wind v. Herbert*** *(1960) 186 Cal. App. 2d 276, 8 Cal. Rptr. 817* , the superior court had granted a preliminary injunction ancillary to an accounting, declaratory relief, and dissolution of a limited partnership. The defendants argued in appealing the order granting the injunction that plaintiffs had failed to show that a preliminary injunction was necessary to prevent irreparable injury to the partnership assets. They contended that any conceivable future injury would be readily ascertainable and could be compensated by money damages and that there was no claim that defendants could not respond in damages.

In affirming the preliminary injunction, the court of appeal stated that this argument was without merit. It explained that the concept of irreparable injury does not concern itself entirely with injury beyond the possibility of repair or beyond possible compensation in damages. Rather, as defined by *Civ. Code § 3422*, an injunction properly issues in any case in which it would be extremely difficult to ascertain the amount of compensation that would afford adequate relief. Quoting from *Anderson v. Souza (1952) 38 Cal. 2d 825, 834, 243 P.2d 497* , it defined the term "irreparable injury" as meaning that species of damages, whether great or small, that ought not to be submitted to on the one hand or inflicted on the other.

It further stated that the argument that there is no "irreparable damage" would not be so often used by wrongdoers if they would take the trouble to observe that the word "irreparable" is a very unhappily chosen one used in expressing the rule that an injunction may issue to prevent wrongs of a repeated and continuing character or which occasion damages estimable only by conjecture and not by any accurate standard. Thus, because in the instant case the wrongs complained of were obviously of a repeated and continuing character, the preliminary injunction was properly issued by the trial court (*186 Cal. App. 2d 276, 285)* .

In ***Fretz v. Burke*** *(1967) 247 Cal. App. 2d 741, 55 Cal. Rptr. 879* , plaintiffs obtained a preliminary injunction requiring defendants to pay their respective shares of profits of a corporation. They appealed from this part of the order, and one of the points that defendant argued was that plaintiffs did not show any irreparable injury.

The court of appeal rejected this argument and affirmed the order granting the preliminary injunction. It quoted the definition of "irreparable injury" set forth in *Anderson v. Souza (1952) 38 Cal. 2d 825, 834, 243 P.2d 497* , as that species of damages, whether great or small, that ought not to be submitted to on the one hand or inflicted on the other. The court rejected the assertion by defendants that under this definition all injuries approach the status of "irreparability." The court stated that this definition should be deemed as warranting the use of the injunctive power of the court against a wrong that a trial judge deems insufferable because it constitutes an overbearing assumption by one person of superiority and domination over the rights and property of others (*247 Cal. App. 2d 741, 746)* .

[4] Additional Authorities

[a] Great or Irreparable Injury or Waste

In *Rudel v. Los Angeles County (1897) 118 Cal. 281, 50 P. 400* , plaintiff brought an action to restrain the supervisors of Los Angeles County from diverting the waters of the Rubio Canyon and causing them to flow into and through the Eaton Canyon. The Supreme Court affirmed a judgment so restraining the defendants. It stated that the facts entitled plaintiff to an injunction under the provision of *Code Civ. Proc. § 526* first subd (2), and brought the case within the scope of the general rules under which courts of equity restrain the doing of wrongful acts which necessarily result in irreparable injury to others (*118 Cal. 281, 289)* .

In *Brookshire Oil Co. v. Casmalia etc. Co. (1907) 151 Cal. 577, 91 P. 383* , defendant had torn up an oil pipeline on the assertion that he held paramount title to the property through which the line passed. Plaintiff alleged that he was entitled to an easement for his pipeline and that, therefore, defendant should be enjoined from interfering with the pipeline. The superior court granted a preliminary injunction to restrain the defendant from interfering with the relaying and reestablishment of the pipeline. The defendant appealed to the Supreme Court after the trial court denied its motion to dissolve the preliminary injunction. The Supreme Court affirmed the order denying the motion. It stated that the continuance of the use of the pipeline would not materially interfere with defendant's use of the land, even if it ultimately prevailed, but that if plaintiff prevailed and the preliminary injunction had been dissolved, it would have suffered great and irreparable damages (*151 Cal. 577, 580)* .

Ketchens v. Reiner (1987) 194 Cal. App. 3d 470, 239 Cal. Rptr. 549 involved a plaintiff charged with violation of certain Education Code provisions pertaining to verbal and related abuse of teachers. Plaintiff claimed that the statutes under which she was cited were unconstitutionally vague and overbroad. Although a TRO was initially granted, after an order to show cause hearing, a preliminary injunction was denied, and the TRO was dissolved. The court of appeal reversed. It said that trial courts should evaluate two interrelated factors in deciding whether to issue a preliminary injunction: (1) the likelihood that the plaintiff will prevail on the merits at trial, (2) the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm that the defendant is likely to suffer if the preliminary injunction were issued (*194 Cal. App. 3d 470, 474)* . The court held that it was likely that plaintiff would prevail at trial and the loss of *First Amendment* freedoms (freedom of speech) for even minimal periods of time unquestionably constitutes irreparable injury (*194 Cal. App. 3d 470, 480)* .

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11-116 California Points & Authorities § 116.22

§ 116.22 Supporting Application for Temporary Restraining Order and Preliminary Injunction [Code Civ. Proc. § 527]--Act Tending to Render Judgment Ineffectual [Code Civ. Proc. § 526(a)(3)]

[1] FORM

[*Caption. See § 116.20.*]

A PRELIMINARY INJUNCTION SHOULD BE ISSUED WHEN A PARTY'S ACT WOULD TEND TO RENDER THE JUDGMENT INEFFECTUAL. IN THIS CASE, THE _____ [*specify party, e.g.,* DEFENDANT] IS/HAS _____ [*specify act that is ongoing/threatened/otherwise about to take place*], AND THIS WILL RENDER THE JUDGMENT PRAYED FOR INEFFECTUAL BECAUSE _____ [*state reason*].

Rendering Judgment Ineffectual. An injunction may be granted when it appears, during the litigation, that a party to the action is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the rights of another party to the action respecting the subject of the action, and tending to render the judgment ineffectual (*Code Civ. Proc. § 526(a)(3)*; *Heckmann v. Ahmanson (1985) 168 Cal. App. 3d 119, 136* ; *Lenard v. Edmonds (1957) 151 Cal. App. 2d 764, 769, 312 P.2d 308* ; *Rossi v. Rossi (1955) 134 Cal. App. 2d 639, 641, 286 P.2d 563*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of an application for injunctive relief when a defendant is doing or threatening to do an act that would tend to render the judgment ineffectual [*Code Civ. Proc. § 526(a)(3)*]. Counsel may submit these points and authorities with (1) an application for a temporary restraining order and preliminary injunction; (2) an application for a preliminary injunction alone; or (3) after appropriate modification of the caption (*see § 116.20*), with a motion for a preliminary injunction.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts from the complaint or from plaintiff's affidavits or declarations [*see Code Civ. Proc. § 2015.5*] that establish what actions the defendant has done, or is about to do, that would tend to render ineffectual the judgment prayed for in the underlying complaint.

[c] Related Pleading and Practice Forms

For a general form of complaint for provisional and permanent injunctive relief as well as other forms for use in obtaining provisional injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender).

[3] Discussion of Authorities

[a] Rendering Judgment Ineffectual

In ***Heckmann v. Ahmanson*** *(1985) 168 Cal. App. 3d 119, 214 Cal. Rptr. 177* , plaintiff stockholders in Walt Disney Productions sued to recover the payoff in the "greenmailing" of Disney. Defendants were Disney directors who paid the "greenmail," and the "Steinberg Group" was the "greenmailer" to whom the money was paid. Plaintiffs obtained a preliminary injunction that, in effect, imposed a constructive trust on the profit from the Disney-Steinberg transaction, and required the Steinberg Group to render periodic accountings of the proceeds. The Steinberg Group appealed from the preliminary injunction.

The court of appeal affirmed the trial court's grant of the preliminary injunction. The profits were made by defendants (Steinberg Group) when, after posing a threat to take over Disney, they sold their stock in Disney back to Disney at a healthy profit. Plaintiffs established a reasonable probability that, in so doing, defendants breached a fiduciary duty owed to the corporation. The court held that the preliminary injunction was necessary to protect plaintiffs' right to the remedy of a constructive trust. If the profits of the sale were intermingled with other assets of the defendants or were dissipated, there would be no *res* to constitute the body of the constructive trust, and a subsequent judgment granting a constructive trust would thus be rendered ineffectual (*168 Cal. App. 3d 119, 136)* .

In ***Lenard v. Edmonds*** *(1957) 151 Cal. App. 2d 764, 312 P.2d 308* , plaintiffs obtained a preliminary injunction that restrained defendant from disposing of certain third-party promissory notes and deeds of trust, and also restraining him from taking any action under a notice of default and election to sell given on the deed of trust involved. The superior court continued the preliminary injunction in effect after the jury returned a verdict for the plaintiffs. Defendant appealed.

The court of appeal affirmed the judgment and the granting of the injunction. It observed that defendant was threatening

to sell the property that was the basis of the action and threatening to transfer the third-party notes given in partial payment for the property. If these acts were allowed to be completed, it noted, defendant might well have rendered himself unable to pay the judgment, if one were secured, and deprive plaintiffs not only of the fruits of the judgment but also of the property. Thus, the precise situation contemplated by former Code Civ. Proc. § 526 first subd (3) (now relettered as *Code Civ. Proc. § 526(a)(3)*) was present (*151 Cal. App. 2d 764, 769)* .

In ***Rossi v. Rossi*** *(1955) 134 Cal. App. 2d 639, 286 P.2d 563* , plaintiff sued for the rescission of an executed contract under which he and another person relinquished and transferred fractional portions of their stockholdings in the corporation. Defendant answered and filed a cross complaint seeking specific performance of the contract and an injunction to restrain plaintiff and others from holding a directors' meeting. The superior court granted a preliminary injunction restraining plaintiff and other persons from acting as directors of the corporation on the basis that they were not legally qualified directors.

The court of appeal affirmed the trial court's order. It stated that the injunction prevented interlopers from interfering with the orderly procedure of admittedly qualified directors of the corporation. Thus, the superior court had jurisdiction to issue the preliminary injunction pursuant to *Code Civ. Proc. § 526* (*134 Cal. App. 2d 639, 641-642)* .

[4] Additional Authorities

[a] Rendering Judgment Ineffectual

Farnum v. Clarke (1906) 148 Cal. 610, 84 P. 166 , involved an action for a permanent injunction to restrain defendants from breaching a contract by disposing of property they had agreed to acquire and sell to plaintiff. The superior court had originally issued a preliminary injunction that restrained defendants from dealing in any manner with the land and premises described, or in any manner interfering with or disposing of the selections involving the land, but it later issued an order that vacated and dissolved the preliminary injunction. The plaintiffs appealed, and the Supreme Court ultimately reversed the order. It stated that it was the duty of the superior court to continue in force the preliminary injunction because, if it were not so continued, plaintiffs' efforts to obtain the relief that the complaint showed they were entitled to would be abortive. If unrestrained, the threatened breach of the contract could be committed by defendants, irreparable injury would follow, and any judgment obtained would be ineffectual (*148 Cal. 610, 620-622)* .

In *Wilkins v. Oken (1958) 157 Cal. App. 2d 603, 321 P.2d 876* , plaintiffs had instituted an action against defendants for rescission of a sale of real property. The superior court granted an order restraining the parties from taking possession of those portions of an eminent domain award to which they were held to be entitled in an eminent domain proceeding. Defendants appealed, but the court of appeal affirmed the order granting the preliminary injunction. It stated that former Code Civ. Proc. § 526 first subd (3) (now relettered as *Code Civ. Proc. § 526(a)(3)*) authorized the injunction because plaintiffs contended that the defendants could and would secure and misapply and disburse the funds resulting from the condemnation award. Thus, if the plaintiffs prevailed in the recission action, any judgment would not adequately protect their rights insofar as the specific funds were concerned and, afterward, they would be relegated to the position of common creditors of the defendants (*157 Cal. App. 2d 603, 606-607)* .

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11-116 California Points & Authorities § 116.23

§ 116.23 Supporting Application for Temporary Restraining Order and Preliminary Injunction [Code Civ. Proc. § 527]--Monetary Compensation (Damages) Inadequate or Unascertainable [Code Civ. Proc. § 526(a)(4), (5)]

[1] FORM

[*Caption. See § 116.20.*]

A PRELIMINARY INJUNCTION SHOULD BE ISSUED IF _____ [MONETARY COMPENSATION IN THE FORM OF DAMAGES IS AN INADEQUATE REMEDY *or* IT WOULD BE EXTREMELY DIFFICULT TO ASCERTAIN AN AMOUNT OF MONETARY COMPENSATION THAT WOULD AFFORD ADEQUATE RELIEF]. IN THIS CASE, MONETARY DAMAGES _____ [IS AN INADEQUATE REMEDY *or* CANNOT BE ASCERTAINED WITHOUT EXTREME DIFFICULTY] BECAUSE _____ [*state reason, e.g.,* DEFENDANT IS INSOLVENT].

A. Monetary Compensation Inadequate or Unascertainable. An injunction may be granted when pecuniary compensation would not afford adequate relief (*Code Civ. Proc. § 526(a)(4)*) or when it would be extremely difficult to ascertain the amount of compensation that would afford adequate relief (*Code Civ. Proc. § 526(a)(5)*; *Union Oil Co. v. Domengeaux (1939) 30 Cal. App. 2d 266, 270-271, 86 P.2d 127*).

[*Optional*] **B. Insolvency of Defendant.** The insolvency of a defendant may justify a court in granting a preliminary injunction because, in such a situation, plaintiff obviously would not be able to recover any damages (*West Coast Constr. Co. v. Oceano Sanitary Dist. (1971) 17 Cal. App. 3d 693, 700, 95 Cal. Rptr. 169* ; *Union Oil Co. v. Domengeaux (1939) 30 Cal. App. 2d 266, 272, 86 P.2d 127*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of an application for injunctive relief when the remedy of monetary damages is inadequate, or when the amount of monetary damages required to afford adequate relief is extremely difficult to ascertain [*Code Civ. Proc. § 526(a)(4), (5)*]. Counsel may submit these points and authorities with (1) an application for a temporary restraining order and preliminary injunction; (2) an application for a preliminary injunction alone; or (3) after appropriate modification of the caption (*see § 116.20*), with a motion for a preliminary injunction. Optional Paragraph B may be utilized when the insolvency of the defendant makes the remedy of monetary damages inadequate.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts that establish the reason why monetary damages are an inadequate remedy under the circumstances, or cannot otherwise be ascertained without extreme difficulty [*see Code Civ. Proc. § 526(a)(4), (5)*].

[c] Related Pleading and Practice Forms

For a general form of complaint for provisional and permanent injunctive relief as well as other forms for use in obtaining provisional injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender).

[3] Discussion of Authorities

[a] Monetary Compensation Inadequate or Unascertainable

In ***Union Oil Co. v. Domengeaux*** *(1939) 30 Cal. App. 2d 266, 86 P.2d 127* , defendants' slant-drilling of an oil and gas well was the basis for a permanent injunction against their maintenance or operation of an oil and gas well below a certain depth. They also had been ordered to plug and abandon all of the well below that depth. Defendants contended on appeal that the damages were too trifling and inconsequential to justify the granting of injunctive relief.

The court of appeal rejected the contention and affirmed the judgment. It stated that the trespass involved was a subsurface trespass in an oil- and gas-producing area and that plaintiffs had conceded at trial that they could not make a showing as to actual damage that would justify an award of damages in any specific amount. The court held that the evidence brought the case within *Civ. Code § 3422(2)*, which, like *Code Civ. Proc. § 526(a)(5)*, permits injunctive relief when it would be extremely difficult to ascertain the amount of compensation that would afford adequate relief (*30 Cal. App. 2d 266, 270-271)* .

[b] Insolvency of Defendant

In ***West Coast Constr. Co. v. Oceano Sanitary Dist.*** *(1971) 17 Cal. App. 3d 693, 95 Cal. Rptr. 169* , plaintiff brought an action against defendant district and others in which it demanded damages and an injunction to prevent the district from expending or disbursing any monies for the construction of a sewer system except as it would be necessary to

maintain it in its current condition. The superior court granted plaintiff a preliminary injunction, and a number of months thereafter the injunction was expanded on plaintiff's motion to enjoin the district during the pendency of the action from expending monies from a certain construction fund, either for payments to any contractor other than plaintiff or for the costs inherent to the current litigation between plaintiff and defendant. Defendant appealed.

The court of appeal affirmed the order granting the preliminary injunction. One of the principles it noted was that mere monetary loss is not irreparable for purposes of the remedy of an injunction unless there is an averment or a showing that the parties causing the loss are insolvent or in any manner unable to respond in damages. Hence, the asserted insolvency of the defendant is a proper matter for a court's consideration. In the present litigation, plaintiff's counsel filed a declaration stating that defendant was insolvent by reason of its alleged indebtedness to plaintiff. Hence, the trial court was justified in balancing the equities in favor of plaintiff and in granting it the preliminary injunction (*17 Cal. App. 3d 693, 700)* .

The facts and procedural background of ***Union Oil Co. v. Domengeaux*** *(1939) 30 Cal. App. 2d 266, 86 P.2d 127* , are discussed in *§ 116.23[3][a]*. In that case, a judgment was entered that enjoined defendants from maintaining or operating an oil and gas well below a certain depth and required them to plug and abandon all of the well below that depth. In affirming the judgment, the appellate court commented that, under the circumstances of the case, and in giving consideration to the fact that the persons who had actually drilled the well were insolvent, there was no doubt that the superior court properly granted the injunction (*30 Cal. App. 2d 266, 272)* .

[4] Additional Authorities

[a] Monetary Compensation Inadequate or Unascertainable

Brownfield v. Daniel Freeman Marina Hospital (1989) 208 Cal. App. 3d 405, 256 Cal. Rptr. 240 , was an action for declaratory relief and an injunction to require a hospital to provide rape victims with information and access to estrogen pregnancy prophylaxis, including the "morning after" pill, or to discontinue the treatment of rape victims. Plaintiff sought no monetary damages. In her appeal from a stipulated judgment for defendant, she contended that the trial court erred in sustaining a demurrer against her complaint. Although the appellate court affirmed the judgment, it stated the following general principles with respect to obtaining injunctive relief. The elements of a cause of action for injunctive relief are a tort or other wrongful act constituting a cause of action, and irreparable injury, that is, a factual showing that the wrongful act constitutes an actual or threatened injury to property or personal rights that cannot be compensated by an ordinary damages award (*208 Cal. App. 3d 405, 410)* . In this case, the court concluded that plaintiff could have filed an action for damages under the circumstances (*208 Cal. App. 3d 405, 414)* .

[b] Insolvency of Defendant

In *De Groot v. Peters (1899) 124 Cal. 406, 57 P. 209* , plaintiff sued his alleged partner for dissolution of the partnership and for an accounting. Defendant answered and filed a cross complaint for an injunction to restrain plaintiff's conduct, in which he alleged that plaintiff was hired as a salesman and was not a copartner. Defendant also sought a preliminary injunction to restrain plaintiff from entering his business. The superior court granted the preliminary injunction to defendant, and plaintiff then appealed from the order granting it. The Supreme Court affirmed the order. It stated that ejectment of the plaintiff from the business premises would not necessarily prevent the continuance of his conduct and that, because plaintiff was admittedly insolvent, an action by defendant for damages would not afford adequate relief to him (*124 Cal. 406, 408)* .

California Points & Authorities

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
CHAPTER 116 INJUNCTIONS
PART II. FORMS
A. Injunctive Relief in General

11-116 California Points & Authorities § 116.24

§ 116.24 Supporting Application for Temporary Restraining Order and Preliminary Injunction [Code Civ. Proc. § 527]--Prevent Multiplicity of Judicial Proceedings [Code Civ. Proc. § 526(a)(6)]

[1] FORM

[*Caption. See § 116.20.*]

A PRELIMINARY INJUNCTION SHOULD BE ISSUED WHEN THE RESTRAINT IS NECESSARY TO PREVENT A MULTIPLICITY OF JUDICIAL PROCEEDINGS. IN THIS CASE, THE INJUNCTIVE RELIEF PRAYED FOR SHOULD BE GRANTED BECAUSE, IN THE ABSENCE OF SUCH RELIEF, _____ [*state consequences relating to existence of multiple court actions regarding same underlying subject matter*].

Prevent Multiplicity of Judicial Proceedings. An injunction may be granted when the restraint is necessary to prevent a multiplicity of judicial proceedings (*Code Civ. Proc. § 526(a)(6)*; *Rynsburger v. Dairymen's Fertilizer Coop., Inc. (1968) 266 Cal. App. 2d 269, 279, 72 Cal. Rptr. 102* ; *Aldrich v. Transcontinental Land & Water Co. (1955) 131 Cal. App. 2d 788, 796-797, 281 P.2d 362*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of an application for injunctive relief in order to prevent a multiplicity of judicial proceedings from occurring [*Code Civ. Proc. § 526(a)(6)*]. Counsel may submit these points and authorities with (1) an application for a temporary restraining order and preliminary injunction; (2) an application for a preliminary injunction alone; or (3) after appropriate modification of the caption (*see § 116.20*), with a motion for a preliminary injunction.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should present facts demonstrating why a mulitiplicity of legal actions will be filed in the absence of the injunctive relief requested and why the existence of multiple actions poses adverse consequences.

[c] Related Pleading and Practice Forms

For a general form of complaint for provisional and permanent injunctive relief as well as other forms for use in obtaining provisional injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender).

[3] Discussion of Authorities

[a] Prevent Multiplicity of Judicial Proceedings

In ***Rynsburger v. Dairymen's Fertilizer Coop., Inc.*** *(1968) 266 Cal. App. 2d 269, 72 Cal. Rptr. 102* , plaintiffs were homeowners who resided in close proximity to defendant's fertilizer plant. They filed suit in the superior court of Orange County for an injunction to abate a nuisance. The court granted an ex parte temporary restraining order prohibiting defendant from conducting fertilizer operations on the new site, but that order was dissolved and a preliminary injunction denied on the ground that any harm to plaintiffs was outweighed by the sanitary utility of defendant's function in removing the daily manure deposits of the thousands of cattle maintained in the community and its environs.

Several months later, plaintiff's counsel appeared before several city councils and requested that an action be initiated by the municipalities to abate defendant's operations. The cities agreed and filed two actions that were consolidated into one action. After a month-long trial, the San Bernardino superior court determined that defendant's operation had not created, and did not constitute a public nuisance. Thereafter, plaintiffs took steps to reactivate their first action in Orange County, but they were enjoined from doing so by the San Bernardino court. They appealed from that injunction and contended that the determination that defendant's operations did not constitute a public nuisance was not res judicata in a suit by private property owners for abatement of a private nuisance.

The court of appeal held that the San Bernardino court had jurisdiction to make such orders as were necessary to preserve its jurisdiction so as to prevent impairment of its judgment, to avoid conflicting regulations and vexatious litigation, and to make a complete adjudication of the controversy. It observed that the propriety of injunctive relief to prevent conflicting or vexatious litigation has long been established, citing *Civ. Code § 3422* and former Code Civ. Proc. § 526 first subd (6) (now relettered as *Code Civ. Proc. § 526(a)(6)*). Thus, when there exist two or more actions involving the same subject matter or the same facts or principles, restraint is necessary to prevent a multiplicity of judicial proceedings; restraint is also necessary to avoid unseemly conflict between courts that might arise if they were free to make contradictory decisions relating to the same controversy. In summary, the court of appeal noted that the San Bernardino superior court's action in restraining the Orange County suit was fully justified because its judgment

was res judicata on the nuisance issue and because it was empowered to make such orders as necessary to prevent impairment of its judgment and to avoid conflicting regulations and vexatious litigation (*266 Cal. App. 2d 269, 279)* .

In ***Aldrich v. Transcontinental Land & Water Co.*** *(1955) 131 Cal. App. 2d 788, 281 P.2d 362* , the superior court granted a preliminary injunction that enjoined defendants from prosecuting certain municipal court actions or bringing further actions against plaintiffs in the superior court action involving the contracts that were the subject of the pending superior court action. Defendants appealed and contended that the superior court did not have jurisdiction to enjoin them from proceeding in the municipal court actions.

The court of appeal rejected this contention. It held that the superior court had jurisdiction of the subject matter, and therefore also had jurisdiction to enjoin defendants from proceeding with the municipal court actions. It reasoned that (1) the causes of action presented questions of law and fact common to all parties, (2) the causes of action arose out of the same series of transactions, (3) the causes within the municipal court's jurisdictional amount were properly joined with those within the superior court's jurisdictional amount, and (4) there was no misjoinder of parties plaintiff. It stated that jurisdiction was proper under former Code Civ. Proc. § 526 first subd (3) (now relettered as *Code Civ. Proc. § 526(a)(3)*). It also noted that when it is essential to promote the ends of justice that an entire controversy be determined in one proceeding, so that the rights and duties of all interested parties may be finally settled, it may be necessary to restrain other suits to prevent the pendency of two or more actions involving the same subject matter, to prevent a partial litigation of the controversy, or to prevent a multiplicity of suits that depend on the same facts or principles (*131 Cal. App. 2d 788, 796-797)* .

[4] Additional Authorities

[a] Prevent Multiplicity of Judicial Proceedings

In *Glade v. Glade (1995) 38 Cal. App. 4th 1441, 45 Cal. Rptr. 2d 695* , a wife commenced a marital dissolution action in the family law court. Thereafter, a foreclosure action was instituted by a trustee of a trust (hereafter trust) concerning a community property residence owned by the spouses. The wife then moved the family law court to consolidate the foreclosure action with the marital dissolution action because of overlapping issues and later moved the family law court to join the trust and others as parties in the marital dissolution action. The trust then moved for summary judgment in the foreclosure action. Before the hearing on the summary judgment motion, the wife filed an application in the family law court seeking an order to stay further prosecution of the foreclosure action based on among other grounds that failure to grant a stay would force needless and duplicative litigation of overlapping issues in the two actions leading to the possibility of inconsistent results. Ultimately, the family law court joined the trust and others in the marital dissolution action and stayed the foreclosure action except to discovery. At the hearing on the trust's motion for summary judgment in the foreclosure action the next day, however, the wife's counsel appeared five minutes after the matter had been called and after the court had granted the summary judgment motion without plaintiff's counsel having advised the court as to the stay order issued the day before. The same judge thereafter denied the wife's motion for reconsideration under *Code Civ. Proc. § 1008* based on the reasoning that the family court had no authority to issue a stay and such an order was invalid because the judge's court and the family law court were of equal jurisdiction.

The court of appeal reversed the orders denying the motion for reconsideration and granting of summary judgment because the existence of a triable material fact issue precluded summary judgment and the family law court's joinder and stay order barred the judge from proceeding further with the foreclosure action (*38 Cal. App. 4th 1441, 1449)* . With regard to the latter point, the court noted that an injunction is proper under *Code Civ. Proc. § 526(a)* when necessary to prevent a multiplicity of judicial proceedings (*38 Cal. App. 4th 1441, 1455)* . The court concluded that a threat of multiple actions and inconsistent verdicts that could undermine the family law court's ability to characterize and dispose of community existed. Because the dissolution action was pending first, which vested the family law court with jurisdiction over alleged community property before the foreclosure was commenced, the family law court had priority of jurisdiction and its stay order of the foreclosure action was proper (*38 Cal. App. 4th 1441, 1456)* .

In *Dennis v. Overholtzer (1957) 149 Cal. App. 2d 101, 307 P.2d 1012* , plaintiff commenced an action in which she asked for the specific performance of an alleged contract to sell certain real property or, in the alternative, for damages. The superior court issued a preliminary injunction under which it restrained defendants from commencing or maintaining any action or proceeding in unlawful detainer against one of the cross defendants, for ejectment or eviction of him from the property held by him under the relevant lease, or for the recovery of possession of that property from him. Defendants appealed and among other things, contended that equity cannot enjoin an action at law when the issues involved in the equity suit can be adjudicated in such action. The court of appeal replied that this rule does not apply when the equity court has first obtained jurisdiction. In order to avoid a multiplicity of actions, it may then enjoin the initiation and prosecution of a suit at law involving the same issues. Therefore, it affirmed the order granting the preliminary injunction (*149 Cal. App. 2d 101, 105)* .

In *Wellborn v. Wellborn (1945) 67 Cal. App. 2d 540, 155 P.2d 95* , a former wife instituted an action against her former husband and others to determine the right to certain real estate and the rentals therefrom. Plaintiff had already obtained a judgment that established her title to the property, but defendants instituted unlawful detainer actions against plaintiff's tenants in the justice court. The defendants' only claim to the title to the property was through a void execution sale to the former husband. The superior court issued a preliminary injunction based on its equitable power to try, in a single action, the issues involved in a multitude of actions at law and to put an end to unnecessary and vexatious litigation. The court of appeal affirmed the order. It stated that the various unlawful detainer actions against plaintiff's tenants were indirectly against plaintiff. They were even more vexatious from the fact that plaintiff was not in a position to defend them. The basic controversy was not within the jurisdiction of the justice court, and it was proper to stay the hand of that court until the question of title had been decided as between plaintiff and the defendants in the instant case (*67 Cal. App. 2d 540, 544)* .

In *Lincoln v. Superior Court (1942) 51 Cal. App. 2d 61, 124 P.2d 179* , the superior court of Madera County entered a preliminary injunction that prohibited defendants from prosecuting or taking any further steps for the prosecution of certain actions pending in the superior court of Los Angeles County and in the municipal court of the City of Los Angeles. Defendants petitioned the court of appeal for a writ of prohibition to restrain the superior court of Madera County from continuing in force the preliminary injunction. The court of appeal denied the petition. It stated that the objective of the suit filed in Madera County was to dissolve the partnership involved and to revest the partnership property that had been held in trust in the persons entitled to it. The purpose of the preliminary injunction was to keep the partnership property intact until the dissolution of the partnership could be effected. The court of appeal concluded that a multiplicity of proceedings was involved and that, therefore, the Madera County superior court had properly exercised its power in restraining the suits filed in Los Angeles County (*51 Cal. App. 2d 61, 68-69)* .

In *Taylor v. Hawley (1935) 6 Cal. App. 2d 576, 45 P.2d 226* , the superior court issued a final judgment restraining defendants from interfering with the plaintiff's title and right of possession by maintaining litigation or otherwise. The court of appeal affirmed the judgment and stated that injunctive relief incident to a decree quieting title is an ancient remedy growing out of what has been termed the "bill of peace in a court of chancery." It is a proper inherent remedy to terminate expensive and troublesome interference with the ownership and right of possession of property by one who has been regularly determined by a court of equity to be entitled thereto. It stated that former Code Civ. Proc. § 526 first subd (6) (now relettered as *Code Civ. Proc. § 526(a)(6)*) authorized an injunction in such a situation (*6 Cal. App. 2d 576, 580)* .

In *Gardner v. Superior Court (1929) 97 Cal. App. 713, 276 P. 363* , four actions had been pending in the superior court, all of which in some way related to the title or right of possession to certain real property. The court issued an order that restrained certain persons from interfering, hindering, or molesting plaintiff in the peaceable and quiet possession of the premises. The petitioner violated that order, was found guilty of contempt, and was sentenced to five days' imprisonment in the county jail. He sought, by a writ of certiorari, to have the judgment annulled by the court of appeal on the ground that the superior court had no jurisdiction to pronounce the judgment. One of the arguments

advanced in support of that contention was that the original restraining order, which he was claimed to have violated, was void on its face because it attempted to enjoin the exercise of a legal right. The court of appeal rejected this argument and held that former Code Civ. Proc. § 526 first subd (6) (now relettered as *Code Civ. Proc. § 526(a)(6)*) authorized the restraining order. It observed that it was plainly apparent that the court intended to enjoin the petitioner and the other persons from cluttering the courts with further proceedings--not actions but mere attempts to secure possession pendente lite--until their claim of title and of right to possession should be determined in the actions then pending. It was neither intended nor stated that the petitioner and other persons enjoined should be precluded from asserting their rights in the actions (*97 Cal. App. 713, 716-717)* .

In *Harlow v. Feder (1928) 89 Cal. App. 435, 264 P. 782* , plaintiff sued defendant for injunctive relief and damages arising out of a breach of contract for the development of a patent. The trial court granted preliminary and permanent injunctions that enjoined defendant from operating under a certain company name; from making, using, and operating certain apparatus, machines, and parts thereof; and from selling or otherwise disposing of the same. It also awarded damages to plaintiff. Defendant argued on appeal that plaintiff had an adequate remedy at law in that he could bring an action for money had and received, an action for damages, and also an action for claim and delivery. The court of appeal rejected this argument. It stated that the trial court had found that, as a result of defendant's breach of the contract, plaintiff had suffered substantial injury in a number of different ways, the redress of which would require several actions. This alone, it concluded, justified the issuance of the judgment granting the permanent injunction under former Code Civ. Proc. § 526 first subd. (6) (now relettered as *Code Civ. Proc. § 526(a)(6)*) (*89 Cal. App. 435, 439-440)* .

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11-116 California Points & Authorities § 116.25

§ 116.25 Supporting Application for Temporary Restraining Order and Preliminary Injunction [Code Civ. Proc. § 527]--Obligation Arising From Trust [Code Civ. Proc. § 526(a)(7)]

[1] FORM

[*Caption. See § 116.20.*]

A PRELIMINARY INJUNCTION SHOULD BE ISSUED WHEN THE OBLIGATION ARISES FROM A TRUST. IN THIS CASE, THE OBLIGATION CONSISTS OF _____ [*specify trust nature of obligation*], AND A FIDUCIARY RELATIONSHIP EXISTS BETWEEN _____ [*specify involved individuals/entities*]. THE INJUNCTIVE RELIEF PRAYED FOR IS NECESSARY _____ [*specify reason, e.g.,* IN ORDER TO PREVENT THE DEFENDANT FROM ENTERING INTO UNAUTHORIZED TRANSACTIONS THAT DEPLETE THE PLAINTIFF'S FINANCIAL RESOURCES].

Obligation Arising From Trust. An injunction may be granted when the obligation arises from a trust (*Code Civ. Proc. § 526(a)(7)*; *St. James Church v. Superior Court (1955) 135 Cal. App. 2d 352, 360-361, 287 P.2d 387* ; *see Heckmann v. Ahmanson (1985) 168 Cal. App. 3d 119, 136, 214 Cal. Rptr. 177*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of an application for injunctive relief when an obligation arises from a trust [*Code Civ. Proc. § 526(a)(7)*]. Counsel may submit these points and authorities with (1) an application for a temporary restraining order and preliminary injunction; (2) an application for a preliminary injunction alone; or (3) after appropriate modification of the caption (*see § 116.20*), with a motion for a preliminary injunction.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should present facts establishing the nature of the trust relationship involved and why injunctive relief is necessary in the context of that relationship, such as, for example, to prevent the breach of a fiduciary duty [*see, e.g., St. James Church v. Superior Court (1955) 135 Cal. App. 2d 352, 360, 287 P.2d 387* (on church's behalf, four church trustees sued fifth trustee to enjoin him from breach of fiduciary duty)].

[c] Related Pleading and Practice Forms

For a general form of complaint for provisional and permanent injunctive relief as well as other forms for use in obtaining provisional injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* . For discussion and forms related to trusts generally, see Ch. 560, *Trusts* in that publication.

[3] Discussion of Authorities

[a] Obligation Arising From Trust

In ***St. James Church v. Superior Court*** *(1955) 135 Cal. App. 2d 352, 287 P.2d 387* , plaintiff was a religious corporation and defendant was one of five trustees of the plaintiff corporation. A complaint, brought in superior court by the four other trustees, sought to enjoin defendant from representing that he was authorized to act on behalf of the plaintiff and its trustees. The superior court refused to hear the action on the assumption that the municipal court had exclusive jurisdiction over the matter. Plaintiff then sought a writ of mandate from the court of appeal to compel the superior court to assume jurisdiction over the action.

The appellate court granted the writ. In discussing the reasons why the superior court had jurisdiction over the action, the court of appeal stated that the relation of the defendant to the plaintiff, its trustees, and its members was of a fiduciary nature. Because the action was brought by four of the plaintiff's trustees against the fifth to enjoin him from committing a breach of trust, the court of appeal held that the complaint clearly and unmistakably pleaded a cause of action for equitable relief. The court cited *Civ. Code § 3422(4)* which, like former Code Civ. Proc. § 526 first subd (7) (now relettered as *Code Civ. Proc. § 526(a)(7)*), provides that an injunction may be granted to prevent the breach of an obligation existing in favor of the applicant when the obligation arises from a trust. The court then quoted from the Restatement of Trusts: "If there are several trustees, one or more of them can maintain a suit against another to compel him to perform his duties under the trust, or to enjoin him from committing a breach of trust, or to compel him to redress a breach of trust committed by him. A trustee is not precluded from maintaining such a suit by the fact that he himself participated in the breach of trust, since the suit is on behalf of the beneficiary" [Restatement of Trusts, § 200, comment d.] (*135 Cal. App. 2d 352, 360)* .

The facts and procedural background of ***Heckmann v. Ahmanson*** *(1985) 168 Cal. App. 3d 119, 214 Cal. Rptr. 177* , are discussed in *§ 116.22[3][a]*. In that case, the court of appeal affirmed a trial court's grant of a preliminary injunction against "greenmailers" of a corporation (Disney). The profits were made by defendants (Steinberg Group) when, after posing a threat to take over Disney, they sold their stock in Disney back to Disney at a healthy profit. Plaintiffs

established a reasonable probability that, in so doing, defendants breached a fiduciary duty owed to the corporation. The court held that the preliminary injunction was necessary to protect plaintiffs' right to the remedy of a constructive trust. If the profits of the sale were intermingled with other assets of the defendants or were dissipated, there would be no *res* to constitute the body of the constructive trust and a subsequent judgment granting a constructive trust would thus be rendered ineffectual (*168 Cal. App. 3d 119, 136)* .

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11-116 California Points & Authorities § 116.26

§ 116.26 Supporting Application for Temporary Restraining Order and Preliminary Injunction [Code Civ. Proc. § 527]--Preservation of Status Quo

[1] FORM

[*Caption. See § 116.20.*]

A PRELIMINARY INJUNCTION SHOULD BE ISSUED IN ORDER TO PRESERVE THE STATUS QUO UNTIL A FINAL DETERMINATION OF THE MERITS OF THE ACTION. IN THIS CASE, THE STATUS QUO, NAMELY _____ [*specify factual situation jeopardized by actual/threatened action of other party*], WILL BE DISRUPTED TO THE DETRIMENT OF _____ [*specify party, e.g.,* PLAINTIFF] PENDING THE OUTCOME OF THE ACTION UNLESS INJUNCTIVE RELIEF IS GRANTED, BECAUSE _____ [*specify reason*].

A. Preservation of Status Quo. A preliminary injunction may be granted to preserve the status quo until a final determination of the merits of the action (*Continental Baking Co. v. Katz (1968) 68 Cal. 2d 512, 528, 67 Cal. Rptr. 761, 439 P.2d 889* ; *People v. Black's Food Store (1940) 16 Cal. 2d 59, 62, 105 P.2d 361* ; *O'Connell v. Superior Court (2006) 141 Cal. App. 4th 1452, 1471, 47 Cal. Rptr. 3d 147*).

[*Optional*] **B. Continuance of Regular and Usual Procedures.** Preserving the status quo may encompass a court order that continues regular and usual procedures as well as an order that compels inaction (*Fretz v. Burke (1967) 247 Cal. App. 2d 741, 746, 55 Cal. Rptr. 879*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of an application for injunctive relief that is sought in order to preserve the status quo until a hearing on the merits of the underlying action. Counsel may submit these points and authorities with (1) an application for a temporary restraining order and preliminary injunction; (2) an application for a preliminary injunction alone; or (3) after appropriate modification of the caption (*see § 116.20*), with a motion for a preliminary injunction.

This memorandum may be of use to counsel in a variety of situations, and may be combined with other memoranda in this chapter, as appropriate.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts that establish (1) what the status quo is, and (2) why injunctive relief is necessary to preserve it, including the adverse consequences posed to counsel's client if the relief sought is not granted.

[c] Related Pleading and Practice Forms

For a general form of complaint for provisional and permanent injunctive relief as well as other forms for use in obtaining provisional injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender).

[3] Discussion of Authorities

[a] Preservation of Status Quo

In ***Continental Baking Co. v. Katz*** *(1968) 68 Cal. 2d 512, 67 Cal. Rptr. 761, 439 P.2d 889* , both parties sought injunctive relief with respect to an easement. The superior court granted plaintiff a preliminary injunction restraining defendants from interfering with plaintiff's use of the easement, and defendants appealed.

The Supreme Court affirmed the order granting the preliminary injunction. The Court noted that the general purpose of a preliminary injunction is the preservation of the status quo until a final determination of the merits of the action. In this case, the Supreme Court determined, the superior court had properly evaluated the reasonable probability of plaintiff's success and correctly balanced the equities of the parties in favor of plaintiff after a consideration of the injuries that each might incur as a result of the denial of their respective motions. Thus, the Court found no abuse of discretion in the granting of the preliminary injunction to plaintiff (*68 Cal. 2d 512, 528)* .

In ***People v. Black's Food Store*** *(1940) 16 Cal. 2d 59, 105 P.2d 361* , the superior court granted preliminary injunctions in two consolidated actions that restrained defendants from selling products as loss leaders for the purpose of injuring competitors and destroying competition in violation of the Unfair Practices Act [*see generally* Ch. 235, *Unfair Competition* in this publication].

The Supreme Court affirmed the orders granting the preliminary injunctions. It stated that the superior court did not abuse its discretion in issuing the orders. The orders did not determine the merits of the controversies. Rather, they had the effect of merely maintaining the status quo until the cases were decided on their merits (*16 Cal. 2d 59, 62)* .

In ***O'Connell v. Superior Court*** *(2006) 141 Cal. App. 4th 1452, 47 Cal. Rptr. 3d 147* , plaintiff students claimed it was a violation of the state *constitution's Equal Protection Clause* to apply the California high school exit exam (CAHSEE) diploma requirement, *Ed. Code § 60851(a)*, to students who had passed all the course requirements for graduation, but who had not passed the CAHSEE. The trial court issued a preliminary injunction restraining the California Board of Education from denying diplomas to members of the 2006 graduating class at California public high schools who were otherwise eligible to graduate, but who had not passed the CAHSEE. The defendants sought a writ of mandate to vacate the order.

The court of appeal granted the defendants' request and vacated the trial court's order. One issue the court examined was whether the injunction maintained the status quo while the litigation was pending. The plaintiffs argued that the injunction preserved the status quo, premised on their definition of the status quo as the historical practice of granting students diplomas based on their completion of local school district requirements, without requiring them to pass a statewide test (*141 Cal. App. 4th 1452, 1472)* . The court held that ordering that the plaintiffs be given diplomas did not maintain the status quo, but in fact ended the litigation. Surely, the court held, the trial court did not expect that if defendants ultimately prevailed in the litigation, plaintiffs would give back the diplomas they had received under the mandate of the court's preliminary injunction. The court of appeal held that by failing to consider the effect of its interim relief on the status quo of the litigation, the trial court ignored the foundational legal principle that the general purpose of a preliminary injunction is to preserve the status quo pending a final adjudication of the claims on the merits (*141 Cal. App. 4th 1452, 1472)* .

[b] Continuance of Regular and Usual Procedures

The facts and procedural background of ***Fretz v. Burke*** *(1967) 247 Cal. App. 2d 741, 55 Cal. Rptr. 879* , are discussed in *§ 116.21[3][a]*. In *Fretz*, the superior court granted preliminary and partial injunctive relief to plaintiffs pending final judgment in an action for dissolution of a partnership. Defendants were required to pay their respective shares of the profits of a corporation, but a specified amount was ordered retained in trust for plaintiffs. In addition, defendants were ordered to pay plaintiffs their proportionate shares of all future profits of the corporation. The defendant general partner appealed from the order granting the preliminary injunction, but the court of appeal affirmed the order. It stated that it regarded the order granting the injunction as preserving the status quo, namely the procedure of disbursing profits as that procedure had existed before commencement of the action. It noted that the term "status quo" does not necessarily refer to inaction and that it may encompass the continuing of regular and usual procedures (*247 Cal. App. 2d 741, 746)* .

[4] Additional Authorities

[a] Preservation of Status Quo

In *Nyman v. The Desert Club (1952) 109 Cal. App. 2d 63, 240 P.2d 37* , plaintiffs brought an action for a declaration of their rights in the defendant club, for damages for being deprived of such claimed rights, and for injunctive relief. A superior court granted a preliminary injunction that restrained defendants from interfering with the plaintiffs' full use and enjoyment of the club facilities pending a determination of the case on its merits. The injunction was conditioned on the plaintiffs conducting themselves properly in the use of the club's facilities while the injunction was in effect. Defendants appealed, but the court of appeal affirmed the order granting the preliminary injunction. It stated that the purpose of a preliminary injunction is to preserve the status quo until the merits of the action can be determined. Thus, because the injunction served this purpose and the superior court did not abuse its discretion in granting the injunction, the order granting it was affirmed (*109 Cal. App. 2d 63, 66-67)* .

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11-116 California Points & Authorities § 116.27

§ 116.27 Supporting Application for Temporary Restraining Order and Preliminary Injunction [Code Civ. Proc. § 527]--Action by Municipal Corporation or Inferior Board or Tribunal in Excess of Jurisdiction

[1] FORM

[*Caption. See § 116.20.*]

A PRELIMINARY INJUNCTION SHOULD BE ISSUED WHEN DEFENDANT IS ACTING IN EXCESS OF ITS JURISDICTION AND WITHOUT AUTHORITY. IN THIS CASE, THE DEFENDANT _____ [*specify nature of public entity, e.g.,* A MUNICIPAL CORPORATION] IS EXCEEDING ITS JURISDICTION AND AUTHORITY BY _____ [*specify grounds, e.g.,* DIRECTING EMPLOYEES OF ITS PUBLIC WORKS DEPARTMENT, ON AN ONGOING BASIS, TO FORCIBLY ENTER PRIVATE DWELLINGS UNANNOUNCED AT ANY HOUR FOR THE PURPOSE OF CONDUCTING BUILDING INSPECTIONS], [IN VIOLATION OF _____(*specify constitution, statute, ordinance, or other law violated*)].

Action in Excess of Jurisdiction and Without Authority. A preliminary injunction may be granted in cases in which a municipal corporation or an inferior board or tribunal is acting, or proposing to act, in excess of its jurisdiction and without authority (*San Ysidro Irr. Dist. v. Superior Court (1961) 56 Cal. 2d 708, 720, 16 Cal. Rptr. 609, 365 P.2d 753*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of an application for injunctive relief when plaintiff is seeking to restrain action by a municipal corporation or an inferior board or tribunal that is in excess of its jurisdiction and without authority. Counsel may submit these points and authorities with (1) an application for a temporary restraining order and preliminary injunction; (2) an application for a preliminary injunction alone; or (3) after appropriate modification of the caption (*see § 116.20*), with a motion for a preliminary injunction.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts that establish how the defendant's ongoing (or imminent) conduct exceeds (or will exceed) its lawful authority, and how the injunctive relief being sought addresses that situation.

[c] Related Pleading and Practice Forms

For a general form of complaint for provisional and permanent injunctive relief as well as other forms for use in obtaining provisional injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender).

[3] Discussion of Authorities

[a] Action in Excess of Jurisdiction and Without Authority

In ***San Ysidro Irr. Dist. v. Superior Court*** *(1961) 56 Cal. 2d 708, 16 Cal. Rptr. 609, 365 P.2d 753* , the City of San Diego brought an action against the San Ysidro Irrigation District and its board of directors for a declaration to the effect that the district was dissolved by operation of law when it was annexed to the city. The city also sought a preliminary and a permanent injunction enjoining the district and its directors from entering into any contracts for the construction of any new water lines and facilities and from disposing of any assets of the district. A superior court issued a temporary restraining order against the district and its directors that enjoined them from constructing water facilities and from disposing of the district's cash and assets pending a further hearing on an order to show cause as to why a preliminary injunction to the same effect should not be issued. The district and its directors moved to dissolve the temporary restraining order on the ground that the court lacked jurisdiction to enjoin legislative and administrative acts of public officers until it was judicially determined that the district had been dissolved. The court denied the motion and then granted the city's request for a preliminary injunction. The district and its directors then petitioned the court of appeal for a writ of prohibition, claiming that unless restrained by the appellate court the superior court would proceed to trial on the merits and enforce the preliminary injunction to petitioners' irrevocable injury. The petitioners argued, among other things, that issuance of the temporary restraining order and preliminary injunction was in excess of the superior court's jurisdiction because it prohibited substantially all of the legislative functions of the district's directors.

The court of appeal rejected this argument. It stated that the situation could involve one in which the district's actions were in excess of its jurisdiction; that is, if the district was in fact dissolved by operation of law by its annexation to the city, then all activities of the district's directors would be in excess of their jurisdiction. Therefore, the court of appeal denied the petition for a writ of prohibition because the case came within the principle that a court of equity is justified in interfering when municipal corporations or inferior boards or tribunals are acting, or proposing to act, in excess of their jurisdiction and without authority (*56 Cal. 2d 708, 720)* .

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A. Injunctive Relief in General

11-116 California Points & Authorities § 116.28

§ 116.28 Supporting Application for Temporary Restraining Order and Preliminary Injunction [Code Civ. Proc. § 527]--Completed Acts That Will Probably Recur

[1] FORM

[*Caption. See § 116.20.*]

A PRELIMINARY INJUNCTION SHOULD BE ISSUED WHEN EVIDENCE INDICATES THAT COMPLETED ACTS WILL PROBABLY RECUR. IN THIS CASE, THE _____ [*specify party, e.g.,* DEFENDANT] HAS _____ [*specify completed act(s) complained of*] AND THERE IS A SUBSTANTIAL PROBABILITY THAT THESE ACTS WILL RECUR BECAUSE _____ [*specify reason(s)*].

A. Completed Acts That Will Probably Recur. An injunction may be granted in cases in which evidence exists that completed acts will probably recur (*Rosicrucian Fellow. v. Rosicrucian Etc. Ch. (1952) 39 Cal. 2d 121, 144, 245 P.2d 481* ; *Feminist Women's Health Center v. Blythe (1993) 17 Cal. App. 4th 1543, 1555, 22 Cal. Rptr. 2d 184* ; *Phipps v. Saddleback Valley Unified School Dist. (1988) 204 Cal. App. 3d 1110, 1117-1119, 251 Cal. Rptr. 720*).

B. Great or Irreparable Injury. [*See § 116.21.*]

[*Optional*] **C. Disregard of Intention to Discontinue Transgressions.** When a guilty party retains the means of so continuing his or her transgressions, a court is not required to accept his or her statement that he or she no longer intends to do so (*Wood v. Peffer (1942) 55 Cal. App. 2d 116, 124, 130 P.2d 220*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of an application for injunctive relief when the evidence indicates that, even though the acts complained of have already occurred, they will probably recur. Counsel may submit these points and authorities with (1) an application for a temporary restraining order and preliminary injunction; (2) an application for a preliminary injunction alone; or (3) after appropriate modification of the caption (*see § 116.20*), with a motion for a preliminary injunction.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts that establish the nature of the acts complained of and why it is highly probable that they will recur unless the injunctive relief sought is granted.

[c] Related Pleading and Practice Forms

For a general form of complaint for provisional and permanent injunctive relief as well as other forms for use in obtaining provisional injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender).

[3] Discussion of Authorities

[a] Completed Acts That Will Probably Recur

Rosicrucian Fellow. v. Rosicrucian Etc. Ch. *(1952) 39 Cal. 2d 121, 245 P.2d 481* , involved a controversy between religious societies with regard to the use of property as well as the exercise of other rights. Plaintiff filed an action to enjoin the use of a name in response to which defendants filed a cross complaint for declaratory relief.

The Supreme Court modified and affirmed the superior court's judgment for defendants. Part of the judgment granted defendants the declaratory relief they were seeking and restrained plaintiff from doing certain specified things. Plaintiff objected to the propriety of the injunctive provisions, but the Supreme Court affirmed the injunctive part of the judgment except for one provision that it held violated the guarantee of freedom of speech. The Court stated that, while it is true that an injunction is ordered against past acts only if there is evidence that they will probably recur, it noted that the record sufficiently indicated that the acts enjoined would probably recur and that it was not unreasonable to suppose that future assertions of claims to the contested property would be injurious to the defendants (*39 Cal. 2d 121, 144)* .

In ***Feminist Women's Health Center v. Blythe*** *(1993) 17 Cal. App. 4th 1543, 22 Cal. Rptr. 2d 184* , the trial court granted a permanent injunction imposing time, place, and manner restrictions on the activities of anti-abortion demonstrators at a women's health clinic. On appeal defendants contended, among other things, that a permanent injunction was inappropriate because no evidence had been presented at trial that the conduct supporting the temporary restraining order and preliminary injunction would be resumed if not permanently enjoined. In support of this claim, the defendants pointed out that there was no evidence of any prohibited conduct for over a year before trial. The appeals

court affirmed the injunctive relief on grounds that it did not violate the demonstrators *First Amendment* rights and held that, while the injunctive remedy should not be exercised unless there is a reasonable probability that the acts complained of will recur, the divisive and passionate nature of the abortion issue made it reasonable for the trial court to conclude that the prohibited conduct would continue unless permanently enjoined (*17 Cal. App. 4th 1543, 1555-1556)* .

In ***Phipps v. Saddleback Valley Unified School Dist.*** *(1988) 204 Cal. App. 3d 1110, 251 Cal. Rptr. 720* , a trial court issued a permanent injunction against a school district compelling it to allow a hemophiliac student who had tested positive for the Acquired Immune Deficiency Syndrome (AIDS) virus to remain in school in regular attendance. The district had required the student to study at home while it formulated a policy relating to AIDS, and allowed the student to return to class only after the trial court had issued a preliminary injunction compelling it to do so. The trial court had found that whether or not the district school board would correctly perform its duties or abuse its discretion in the future was a matter of speculation, and the trial court would not so speculate.

The court of appeal, in affirming the judgment, explained that an injunction is an extraordinary power that is to be exercised always with great caution and rarely, if ever, in a doubtful case. If at the time of the order or judgment there is no reasonable probability that past acts complained of will recur, injunctive relief will be denied. The court said that injunctive power is not used as punishment for past acts and is ordered against them only if there is evidence they will probably recur, and that a court of equity will not afford an injunction to prevent in the future that which in good faith has been discontinued in the absence of any evidence that the acts are likely to be repeated in the future. The court nevertheless pointed out that the district had not voluntarily decided to abandon its closed-door policy and allow the student to attend regular classes, and that the issuance of the preliminary injunction compelling it to do so played a crucial role. The court further pointed out that the district, though faced with an extremely delicate situation, had acted unreasonably in delaying, at the student's expense, formulation of its policy as to how it would handle students with AIDS, and that while the student was back in school by the time of trial, there was no guarantee the district would not change its practices. The court concluded that, simply stated, the record suggested the student's attendance was permitted solely because it was mandated by the preliminary injunction (*204 Cal. App. 3d 1110, 1117-1119)* .

[b] Disregard of Intention to Discontinue Transgressions

Wood v. Peffer *(1942) 55 Cal. App. 2d 116, 130 P.2d 220* , involved an action for an injunction against unfair competition and for damages. Plaintiff was the administratrix of the estate of her late husband who, during his lifetime, had conducted a profitable household and electrical appliance business. Defendant was an electric refrigerator dealer who had acquired a number of the refrigerators that comprised a part of the business of plaintiff's husband. Defendant unfairly advertised on the radio that plaintiff had no refrigerators to sell because he had purchased her entire stock and that he was selling them at a reduced price. The superior court gave judgment for plaintiff that enjoined defendant from committing acts of unfair competition. Defendant appealed and, among other things, argued that the superior court was not justified in granting the injunction because, inasmuch as defendant had testified that all the refrigerators had already been sold, the transaction was completed before the injunction was granted.

The court of appeal rejected this contention. The court observed that the record showed that three refrigerators remained in defendant's possession at the time judgment was rendered. It stated that this fact alone negated the argument that the transaction was necessarily completed and that defendant no longer possessed the means of continuing in his course of conduct. It commented that when a guilty party retains the means of so continuing his transgressions, a court is not required to accept his statement that he no longer intends to do so (*55 Cal. App. 2d 116, 124)* .

[4] Additional Authorities

[a] Completed Acts That Will Probably Recur

In *Feminist Women's Health Center v. Blythe (1995) 32 Cal. App. 4th 1641, 39 Cal. Rptr. 2d 189* , the trial court issued a permanent injunction imposing time, place, and manner restrictions on the activities of antiabortion demonstrators at plaintiff's clinic. Defendants contended that a permanent injunction was inappropriate because no evidence was presented suggesting that the conduct supporting the temporary restraining order and preliminary injunction would be resumed if not permanently enjoined. The court of appeal determined, however, that it was reasonable for the trial court to conclude that the prohibited conduct would resume unless permanently enjoined because of (1) the intensely divisive nature of the issue involved, (2) the persistent and prolonged nature of the defendants' activities at the clinic before issuance of the temporary restraining order and preliminary injunction, and (3) that the prior conduct was discontinued at least in part because of the legal prohibition (*32 Cal. App. 4th 1641, 1658-1659)* .

The facts and procedural background of *Volpicelli v. Jared Sydney Torrance Memorial Hosp. (1980) 109 Cal. App. 3d 242, 167 Cal. Rptr. 610* are discussed in *§ 116.21[3][a]*. In *Volpicelli,* a trial court granted a preliminary injunction in a case involving the termination of plaintiff physician from the medical staff due to a dispute over staff dues. The injunction ordered plaintiff's reinstatement to the staff, pending adequate notice and hearing on the matter. Because plaintiff had already been terminated, the defendants argued that an injunction should not be granted to give redress to a completed act. However, the court of appeal noted that the hospital's continuing pattern of conduct brought the case within the exception to the completed acts rule. The record disclosed that the hospital, in an effort to prevent plaintiff from returning to the staff, continued to harass plaintiff. Because the wrongful acts were likely to be repeated, the appellate court upheld the trial court's order (*109 Cal. App. 3d 242, 251)* .

The facts and procedural background of *Fretz v. Burke (1967) 247 Cal. App. 2d 741, 55 Cal. Rptr. 879* , are discussed in *§ 116.21[3][a]*. In *Fretz,* the superior court granted preliminary and partial injunctive relief to plaintiffs pending final judgment in an action for dissolution of a partnership. Defendants were required to pay their respective shares of the profits of a corporation, but a specified amount was ordered retained in trust for plaintiffs. In addition, defendants were ordered to pay plaintiffs their proportional shares of all future profits of the corporation. The defendant general partner appealed from the order granting the preliminary injunction. He argued that an injunction is to be granted only to direct or to prevent future acts or omissions, not to undo what has been done because this is the function of other actions, such as one for damages. The court of appeal concluded that there was no merit to this argument. It stated that, while it is true that the office of injunction is preventive rather than remedial, an injunction may be granted as to past acts that will probably recur. Reviewing the evidence, the court stated that the injunction properly directed that the part of the profits that belonged to the plaintiffs should be paid to them and not held by the defendant in a suspense account. Because the superior court was enjoining defendant to pay future installments of profits, it could order disbursed to the owners the simple transfer of funds theretofore placed in suspense by the unilateral act of the defendant (*247 Cal. App. 2d 741, 744)* .

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11-116 California Points & Authorities § 116.29

§ 116.29 Supporting Application for Temporary Restraining Order and Preliminary Injunction [Code Civ. Proc. § 527]--Changed Factual Situation Requires Issuance of Previously Denied Preliminary Injunction

[1] FORM

[*Caption. See § 116.20.*]

A PRELIMINARY INJUNCTION SHOULD BE ISSUED WHEN THE FACTUAL CONTEXT HAS CHANGED TO SUCH AN EXTENT AS TO REQUIRE THE ISSUANCE OF A PREVIOUSLY DENIED PRELIMINARY INJUNCTION. IN THIS CASE, WHEN _____ [*specify party, e.g.,* PLAINTIFF] INITIALLY APPLIED FOR A PRELIMINARY INJUNCTION, _____ [*describe pertinent facts existing when injunction first denied*]. SINCE THAT TIME, _____ [*describe changed situation*]. IN VIEW OF THESE CHANGED CIRCUMSTANCES, THE INJUNCTIVE RELIEF PRAYED FOR SHOULD BE ISSUED.

A. Changed Factual Context. A preliminary injunction may be granted when a factual situation has changed to such an extent as to require the issuance of a preliminary injunction that was previously denied (*Brunzell Constr. Co. v. Harrah's Club (1967) 253 Cal. App. 2d 764, 772, 62 Cal. Rptr. 505*).

B. Great or Irreparable Injury. [*See § 116.21.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of an application for injunctive relief when, following an initial denial of the relief requested, the factual context has changed to such an extent as to now more clearly merit that relief. Counsel may submit these points and authorities with (1) an application for a temporary restraining order and preliminary injunction; (2) an application for a preliminary injunction alone; or (3) after appropriate modification of the caption (*see § 116.20*), with a motion for a preliminary injunction.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts that establish the nature of change in the applicant's situation that has occurred since the time the injunctive relief was first denied and that demonstrates his or her entitlement to that relief. In other words, counsel must show why the court should reexamine the situation and now grant relief that was previously denied.

[c] Related Pleading and Practice Forms

For a general form of complaint for provisional and permanent injunctive relief as well as other forms for use in obtaining provisional injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender).

[3] Discussion of Authorities

[a] Changed Factual Context

In ***Brunzell Constr. Co. v. Harrah's Club*** *(1967) 253 Cal. App. 2d 764, 62 Cal. Rptr. 505* , plaintiff brought an action in Los Angeles based on a contract involving the construction of a casino for defendant in Reno, Nevada. One month later, defendant filed an action in Reno against plaintiff and an insurance company as its surety. After a number of legal maneuvers in both California and Nevada by both parties, the Los Angeles court granted a preliminary injunction to plaintiff that it had previously denied. This injunction restrained defendant from prosecuting the Nevada case against plaintiff and its surety.

The main appeal (the second appeal involved the denial of defendant's application to require plaintiff to arbitrate) was from the order granting this preliminary injunction. The court of appeal affirmed the order. It noted the principle that, when there has been a change in the controlling facts on which an injunction was granted or the law has been changed, modified, or extended, or when the ends of justice would be served by modifying or vacating a previous order granting or denying injunctive relief, the court has inherent power to vacate or modify its previous order when the circumstances and situation of the parties have so changed as to render such action just and equitable. It stated that this case presented a classic example of a factual situation having changed to such an extent as to require the issuance of a preliminary injunction that was previously denied. When the court originally made its order denying the preliminary injunction sought by plaintiff in California, there was still in force in the Nevada action a preliminary injunction enjoining plaintiff from proceeding with the Los Angeles action (*253 Cal. App. 2d 764, 772)* .

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11-116 California Points & Authorities § 116.30

§ 116.30 Supporting Motion for Injunction Pending Appeal by Party Denied Injunctive Relief

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM OF POINTS
_____ [*name*]	)	AND AUTHORITIES IN
Plaintiff,	)	SUPPORT OF
vs.	)	APPLICATION
_____ [*name*],	)	FOR INJUNCTION
Defendant.	)	PENDING APPEAL
	)	Date: _____
	)	Time: _____
	)	Dept.: _____
	)	Trial Date: _____
	)	

_____

[*EITHER*]

AN INJUNCTION MAY BE GRANTED TO PRESERVE THE STATUS QUO WHEN A PARTY WHO WAS DENIED INJUNCTIVE RELIEF PLANS TO APPEAL FROM THE JUDGMENT. IN THIS CASE, THE COURT

DENIED _____ [*specify party's, e.g.,* PLAINTIFF'S] REQUEST FOR _____ [*specify nature of injunctive relief requested*] ON _____ [*date*], AND _____ [*specify party, e.g.,* PLAINTIFF] HAS FILED A NOTICE OF APPEAL FROM THE JUDGMENT DENYING THAT RELIEF. INJUNCTIVE RELIEF IS REQUIRED TO PRESERVE THE STATUS QUO PENDING THIS APPEAL BECAUSE _____ [*state reason*].

Injunction Pending Appeal From Judgment. When a court has entered a judgment denying injunctive relief and the party denied relief plans to appeal from the judgment, the court may, in order to preserve the status quo between the parties, enjoin the adverse party from committing the acts against which injunctive relief is being sought until such time as the appeal is determined. This may be accomplished either by continuing in force a preliminary injunction previously granted or by making an original order restraining the successful party (*City of Pasadena v. Superior Court (1910) 157 Cal. 781, 783-797, 109 P. 620* ; *see Addiego v. Hill (1968) 268 Cal. App. 2d 280, 289-290, 73 Cal. Rptr. 901*).

[*OR*]

AN INJUNCTION MAY BE GRANTED TO PRESERVE THE STATUS QUO WHEN A PARTY WHO WAS DENIED PRELIMINARY INJUNCTIVE RELIEF PLANS TO APPEAL FROM THE ORDER DENYING THE PRELIMINARY INJUNCTION. IN THIS CASE, THE COURT DENIED _____ [*specify party's, e.g.,* PLAINTIFF'S] REQUEST FOR A PRELIMINARY INJUNCTION ON _____ [*date*], AND _____ [*specify party, e.g.,* PLAINTIFF] HAS FILED A NOTICE OF APPEAL FROM THE ORDER DENYING THAT RELIEF. INJUNCTIVE RELIEF IS REQUIRED TO PRESERVE THE STATUS QUO PENDING THIS APPEAL BECAUSE _____ [*state reason*].

Injunction Pending Appeal From Order Denying Preliminary Injunction. When a court has made an order denying preliminary injunctive relief and the party denied relief plans to appeal from the order, the court may, in order to preserve the status quo between the parties, enjoin the adverse party from committing the acts against which injunctive relief is being sought until such time as the appeal is determined (*American Trading Co. v. Superior Court (1923) 192 Cal. 770, 771-772, 222 P. 142*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for an injunction pending appeal when either an order or a judgment has been entered denying the injunctive relief sought by the moving party [*see generally Code Civ. Proc. §§ 904.1(a)(6), 904.2(g)* (right to appeal from denial of injunction)]. For a form of caption that may be adapted for use in presenting a memorandum of points and authorities in support of such a motion, see *§ 116.20*.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts that establish the need to preserve the status quo pending the outcome of the appeal. In other words, even though the court has previously denied injunctive relief, counsel must show that despite this denial, the facts are compelling enough to merit the issuance of an injunction pending an appeal.

[c] Related Pleading and Practice Forms

For a general form of complaint for provisional and permanent injunctive relief as well as other forms for use in obtaining provisional injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender). For discussion and forms related to appeals from judgments and orders of the superior court in civil actions, see California Forms of Pleading and Practice, Ch. 41, *Appeal: Review Standards and Appellate Rules of Law* (Matthew Bender).

[3] Discussion of Authorities

[a] Injunction Pending Appeal From Judgment

In ***City of Pasadena v. Superior Court*** *(1910) 157 Cal. 781, 109 P. 620* , plaintiff telephone and telegraph companies brought an action against the City of Pasadena to restrain the city from enforcing one of its municipal ordinances regarding the use of its streets by plaintiffs. A temporary restraining order and preliminary injunction were issued, but after the trial of the action the superior court entered an order that directed a judgment for the city for costs and specified that the preliminary injunction previously issued was dissolved. Immediately thereafter, the city began to destroy the companies' telephone system in the city by cutting 12 of their cables and disconnecting 2,400 subscribers, three exchanges, and four toll lines. The superior court then granted plaintiffs' motion to restore and continue in force the preliminary injunction pending the final determination of the action. The court stated that it believed that the preliminary injunction was necessary to maintain the status quo between the parties pending that determination. Defendant city applied for a writ of prohibition, contending that the superior court lacked the power to continue the injunction pending appeal. The Supreme Court denied the writ.

The Supreme Court stated that the main question was whether a superior court in an action brought to obtain a final injunction can, by an order made concurrently with the granting of the final judgment in the action denying the injunction, continue in force a preliminary injunction or make an original order restraining the successful party, pending an appeal by his adversary against whom the judgment denying a right to any injunction whatever runs. After examining the relevant authorities, the Court held that it was hardly open to serious question but that the superior court had that power. It stated that a superior court has the power, in its final judgment, to continue in force a preliminary injunction so as to maintain the status quo of the subject matter of litigation pending an appeal, notwithstanding that the right to a perpetual injunction that was the primary object of the action may have been denied by the judgment itself (*157 Cal. 781, 783-797)* .

In ***Addiego v. Hill*** *(1968) 268 Cal. App. 2d 280, 73 Cal. Rptr. 901* , plaintiffs brought an action for specific performance of a written agreement to sell stock in a closed corporation. A trial court granted a preliminary injunction against the sale of stock by defendants to a third party, and later entered judgment for plaintiffs, which included, in part, a permanent injunction that enjoined the defendants from selling their shares in the corporation (to anyone but plaintiffs). The trial court denied defendants' new trial motion and, after it was learned that defendants had declared a stock dividend over plaintiffs' objection, later issued a postjudgment injunction that restrained defendants from all activities in relation to the corporation. This injunction was issued to preserve the status quo until the judgment became final. Defendants appealed.

The court of appeal affirmed the judgment. With respect to the postjudgment injunction, the appellate court stated that the trial court had authority to take whatever steps were necessary to preserve the corporation and its assets during the pendency of the defendants' appeal. Otherwise, in view of the defendants' actions in calling a corporate board meeting and declaring a dividend (by exercising their controlling interests), they could easily have drained all the cash out of the corporation pending the appeal. Thus, it concluded that issuance of the postjudgment injunction was proper and in no way constituted an abuse of discretion (*268 Cal. App. 2d 280, 289-290)* .

[b] Injunction Pending Appeal From Order Denying Preliminary Injunction

In ***American Trading Co. v. Superior Court*** *(1923) 192 Cal. 770, 222 P. 142* , petitioner sought a writ of certiorari (review) to annul an order of the superior court that had continued in force a restraining order even though the application for a preliminary injunction had been denied. The parties conceded at oral argument that the superior court had authority to grant an injunction pending the appeal in order to preserve the status quo. Petitioner's contentions were that the order granting the injunction was void because no notice of the application was given and because the bond did not protect it.

The court of appeal rejected these contentions. It held that sufficient notice was afforded petitioner by the notice and hearing of the application for the preliminary injunction and that, because the court was acting pursuant to its inherent power to preserve the status quo pending the appeal and not acting under *Code Civ. Proc. § 527*, it was not necessary that petitioner be protected by a bond (*192 Cal. 770, 771-772)* .

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11-116 California Points & Authorities § 116.31

§ 116.31 Supporting Application for Temporary Restraining Order and Preliminary Injunction [Code Civ. Proc. § 527]--Act Would Destroy Potential Evidence Pending Discovery Order

[1] FORM

[*Caption. See § 116.20.*]

A PRELIMINARY INJUNCTION SHOULD BE ISSUED TO PROTECT POTENTIAL EVIDENCE PENDING A DISCOVERY ORDER. IN THIS CASE, AS SHOWN BY THE _____ [COMPLAINT *and/or* AFFIDAVITS *or* DECLARATIONS], PLAINTIFF WILL SUFFER IRREPARABLE HARM BECAUSE _____ [*set forth factual basis for alleging waste or great/irreparable injury*]. PLAINTIFF HAS NO ADEQUATE REMEDY AT LAW INSOFAR AS THE CODE OF CIVIL PROCEDURE DOES NOT PROVIDE A MECHANISM FOR PRESERVING EVIDENCE. THEREFORE, THE COURT SHOULD GRANT THE RELIEF REQUESTED.

Protect Potential Evidence. An injunction may be granted when it appears, during the litigation, that a party to the action is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the rights of another party to the action respecting the subject of the action, and tending to render the judgment ineffectual (*Code Civ. Proc. § 526(a)(3)*). The purpose of a preliminary injunction is to preserve the status quo pending a determination on the merits of the claim, i.e., the right to discovery (*Dodge, Warren & Peters Insurance Services, Inc. v. Riley (2003) 105 Cal. App. 4th 1414, 1418, 130 Cal. Rptr. 2d 385* (court affirms preliminary injunction requiring preservation of electronic evidence by prohibiting defendants from destroying, deleting or secreting from discovery any of their electronic storage media)).

No Adequate Remedy at Law. The Code of Civil Procedure does not provide a mechanism for preserving evidence [*see* Code of Civ. Proc. § 2019 (*Code of Civ. Proc. § 2019.010* effective July 1, 2005)]. The availability of sanctions for misuse of the discovery statutes does not establish an adequate remedy at law for preserving evidence (*Dodge, Warren & Peters Insurance Services, Inc. v. Riley (2003) 105 Cal. App. 4th 1414, 1419, 130 Cal. Rptr. 2d 385*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of an application for injunctive relief when an act would destroy evidence pending a discovery order. Counsel may submit these points and authorities with (1) an application for a temporary restraining order and preliminary injunction; (2) an application for a preliminary injunction alone; or (3) after appropriate modification of the caption (*see § 116.20*), with a motion for a preliminary injunction.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth specific facts in any accompanying affidavits or declarations that establish how the commission or continuance of some act by the defendant during the litigation will destroy evidence to which the plaintiff is entitled.

[c] Related Pleading and Practice Forms

For a general form for a complaint for provisional and permanent injunctive relief as will as other forms for use in obtaining provisional injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender).

For discussion of the duty to preserve electronic evidence and sanctions for e-discovery abuses, as well as other issues arising in e-discovery, see *Ch. 80, Discovery: Scope, Regulation, and Timing, § 80.03A*. For more detailed discussion of e-discovery generally, see California Forms of Pleading and Practice, Ch. 190, *Discovery: Scope, Regulation, and Timing* (Matthew Bender). For a step-by-step guide to responding to e-discovery requests, see Matthew Bender(R) Practice Guide: California Civil Discovery, Ch. 5, *Discovery of Electronic Information* .

[3] Discussion of Authorities

[a] Protect Potential Evidence

In ***Dodge, Warren & Peters Insurance Services, Inc. v. Riley*** *(2003) 105 Cal. App. 4th 1414, 130 Cal. Rptr. 2d 385* , a trial court granted a preliminary injunction in a case involving an employer suing former employees for misappropriation of trace secrets and unfair business practices. The plaintiff employer claimed the defendants obtained copies of documents maintained in the employer's files and computer storage media. The defendant sought an ex parte application seeking to freeze defendants' electronically stored data so that it would be available for future discovery, if appropriate, and claimed that even defendants' innocent use of the media could result in the destruction of potential evidence. Prior to requesting the injunction, plaintiff had served defendants with requests for production, seeking to

obtain the computer and other electronic storage media that were the subject of the injunction.

The court of appeal upheld the injunction, reasoning that the purpose of a preliminary injunction is to preserve the status quo pending a determination on the merits of the claim. The court clarified that it was not dealing with a determination on the merits of, or a final judgment on, the entire action. Rather, the claim was the right to discovery (*105 Cal. App. 4th 1414, 1418)* . The court of appeal also reasoned that the Code of Civil Procedure did not provide an adequate remedy at law for destruction of evidence and that the availability of sanctions for discovery abuses did not create an adequate remedy at law (*105 Cal. App. 4th 1414, 1419)* .

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
CHAPTER 116 INJUNCTIONS
PART II. FORMS
A. Injunctive Relief in General

11-116 California Points & Authorities § 116.32

§ 116.32 Opposing Application for Preliminary Injunction [Code Civ. Proc. § 527]--Injunction Not Issued to Stay Judicial Proceeding Pending at Commencement of Action [Civ. Code § 3423(a); Code Civ. Proc. § 526(b)(1)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN OPPOSITION TO APPLICA-
Plaintiff,	)	TION FOR PRELIMINARY INJUNCTION
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

A PRELIMINARY INJUNCTION MAY NOT BE ISSUED TO STAY A JUDICIAL PROCEEDING PENDING AT THE COMMENCEMENT OF THE ACTION IN WHICH THE INJUNCTION WAS DEMANDED UNLESS IT IS NECESSARY TO PREVENT A MULTIPLICITY OF SUCH PROCEEDINGS. IN THIS CASE, _____ [*describe factual situation, e.g.,* THERE IS ONLY ONE LEGAL PROCEEDING INVOLVED]. THEREFORE, ISSUANCE OF A PRELIMINARY INJUNCTION WOULD BE IMPROPER.

A. Stay of Pending Judicial Proceeding Prohibited. An injunction cannot be granted to stay a judicial proceeding pending at the commencement of the action in which the injunction is demanded unless such restraint is necessary to prevent a multiplicity of such proceedings (*Civ. Code § 3423(a)*; *Code Civ. Proc. § 526(b)(1)*; *Spreckels v. Hawaiian*

Comm. and Sugar Co. (1897) 117 Cal. 377, 378-382, 49 P. 353 ; *Stearns v. Los Angeles City School Dist. (1966) 244 Cal. App. 2d 696, 744-745, 53 Cal. Rptr. 482*).

B. Multiplicity of Proceedings Not Present. Injunctions are issued to prevent a multiplicity of actions in only two general classes of cases: first, those cases in which many claims that have not been adjudicated are brought into equity to be made the subject of a single trial and decree and, second, those that are enjoined because they are shown to be vexatious suits on causes of action that have been settled by former adjudication (*Verdier v. Verdier (1962) 203 Cal. App. 2d 724, 735, 22 Cal. Rptr. 93* ; *Bartholomew v. Bartholomew (1942) 56 Cal. App. 2d 216, 225, 132 P.2d 297*).

An injunction is not available to prevent multiple suits absent evidence that the controversy involves the same parties, subject matter, or facts (*Planned Parenthood Golden Gate v. Foti (2003) 107 Cal. App. 4th 345, 358, 132 Cal. Rptr. 2d 46*).

[*Optional*] **C. Enjoining of Federal Actions Prohibited.** State courts do not have the power to prevent litigants from filing and prosecuting pending or prospective actions in the federal courts (*General Atomic Co. v. Felter (1977) 434 U.S. 12, 16-19, 98 S. Ct. 76, 54 L. Ed 2d 199* ; *see also Civ. Code § 3423(b)*; *Code Civ. Proc. § 526(b)(2)*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to an application for a preliminary injunction when that relief has been sought to stay judicial proceedings that were pending at the commencement of the action [*see Civ. Code § 3423(a)*; *Code Civ. Proc. § 526(b)(1)*]. In particular, they may be submitted in opposition to the points and authorities *set out in § 116.24*.

With appropriate modifications, these points and authorities may be used (1) in support of a demurrer to a complaint for injunctive relief [*see Code Civ. Proc. § 430.10(e)*], (2) as an affirmative defense in an answer to such a complaint [*see Code Civ. Proc. § 431.30(b)(2)*], (3) in support of a motion for summary judgment in such an action [*see Code Civ. Proc. § 437c*], or (4) in support of a petition for a writ of prohibition [*see Code Civ. Proc. §§ 1102, 1103*] seeking to restrain a court from enforcing injunctive relief.

Optional Paragraph C should be included if the opposing party is attempting to enjoin a pending federal court action, since California courts are entirely without power to enjoin such actions [*see General Atomic Co. v. Felter (1977) 434 U.S. 12, 16-19, 98 S. Ct. 76, 54 L. Ed 2d 199* ; *see also Civ. Code § 3423(b)*; *Code Civ. Proc. § 526(b)(2)*].

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law

stated. Thus, counsel should state, for example, that, except for the present case, there are no other proceedings pending that affect the outcome of the litigation [*see Civ. Code § 3423(a)*; *Code Civ. Proc. § 526(b)(1)*].

[c] Related Pleading and Practice Forms

For discussion of the various methods of opposing applications for provisional and permanent injunctive relief as well as for a form of declaration to oppose an application for a preliminary injunction and a form of demurrer to a complaint for injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender). For discussion, procedural checklist, and forms for use in obtaining a writ of prohibition, see California Forms of Pleading and Practice, Ch. 358, *Mandate and Prohibition* (Matthew Bender).

[3] Discussion of Authorities

[a] Stay of Pending Judicial Proceeding Prohibited

In ***Spreckels v. Hawaiian Comm. and Sugar Co.*** *(1897) 117 Cal. 377, 49 P. 353* , a corporate defendant had commenced an action in a Hawaiian court at the time plaintiff brought the instant action in the San Francisco County Superior Court. In the San Francisco action, plaintiff obtained a preliminary injunction that restrained the corporate defendant from further prosecuting the action in Hawaii and restrained the other defendants, as directors of the corporate defendant, from furthering the prosecution of that action. Defendants moved to dissolve the preliminary injunction, but the superior court refused to dissolve it. Defendants appealed the order refusing to dissolve the preliminary injunction, and the Supreme Court reversed.

Defendants argued on appeal that former Civ. Code § 3423(1) (now relettered as *Civ. Code § 3423(a)*) applied only to California courts, but the Supreme Court disagreed. It stated that this statute was not so limited, that it was a general rule of universal application. The Court rejected the defendants' contention that other subsections of the statute would be useless if former Civ. Code § 3423(1) had universal operation. The Court stated that the first three subdivisions of *Civ. Code § 3423* constitute a harmonious whole and are constitutional (*117 Cal. 377, 378-382)* .

Stearns v. Los Angeles City School Dist. *(1966) 244 Cal. App. 2d 696, 53 Cal. Rptr. 482* , involved a complex series of proceedings ultimately involving, on appeal, a judgment for plaintiffs in an action in Mendocino County to quiet title to certain real property as well as a judgment dismissing defendants' cross complaints after demurrers thereto were sustained. One of the defendant school districts' contentions on appeal was that the complaint did not contain a prayer for injunctive relief and that, therefore, such relief was not proper.

The court of appeal rejected that argument, but it noted that of more serious concern was the fact that the judgment by its terms would restrain the further prosecution of prior Los Angeles County action by defendants. The court stated that it was error on the part of the Mendocino County Superior Court to word the injunction so broadly as to restrain the prosecution of an action already pending. It noted the general statutory rule that one court cannot enjoin the prosecution of an action that is pending in a court of concurrent jurisdiction (citing former Civ. Code § 3423(1) and former Code Civ. Proc. § 526 second subd (1), which have been relettered as *Civ. Code § 3423(a)* and *Code Civ. Proc. § 526(b)(1)*). It also observed the statutory exception that this prohibition does not apply when there is a multiplicity of cases. Because one court had to decide whether the issues raised in the second action in Mendocino County barred the first action in Los Angeles County, the proper court to do that was the Los Angeles court. Any judgment properly obtained in the Mendocino County action could be presented in the prior Los Angeles action for a determination of its effect on the issues pending therein (*244 Cal. App. 2d 696, 744-745)* .

[b] Multiplicity of Proceedings Not Present

Planned Parenthood Golden Gate v. Foti *(2003) 107 Cal. App. 4th 345, 132 Cal. Rptr. 2d 46* involved a permanent injunction that plaintiff Planned Parenthood Association of San Mateo County obtained limiting demonstration activity

outside its clinic. The injunction was entered against two named parties, Operation Rescue of California and Robert Cochran. According to its terms, the injunction applied to: "Defendants and their agents, employees, representatives and all persons acting in concert or participation with them, or either of them, and all persons with actual notice of this judgment." About six years later, plaintiff sought a declaration that the injunction applied to certain other named individuals, the defendants in the present action. Those individuals challenged the injunction, claiming that it did not apply to them because they were not specifically named in it and were not parties to the action in which it was issued. Plaintiff argued that the injunction applied to the defendants because they had actual notice of it. Plaintiff also argued that the defendants should be subject to the injunction in order to uphold the policy against multiplicity of lawsuits. The trial court granted plaintiff's motion for summary judgment.

The court of appeal held that the policy against multiplicity of judicial proceedings was intended to prevent conflicting or vexatious litigation. However, it held that this policy was not effectuated by the actual notice provision which purports to bind a nonparty to a judgment solely on the basis that the nonparty has notice of the judgment. The court of appeal held that, absent evidence that the defendants acted together with or on behalf of parties enjoined by the injunction, the controversy between the defendants and plaintiff did not involve the same parties, subject matter, or facts which supported the judgment pursuant to which the injunction was entered (*107 Cal. App. 4th 345, 358)* .

Verdier v. Verdier *(1962) 203 Cal. App. 2d 724, 22 Cal. Rptr. 93* , involved, in part, an appeal from an order granting a preliminary injunction that prohibited plaintiff from prosecuting an action for divorce in France. The French action was based on a cause of action for divorce for adultery and had been filed before commencement of the California action. In the California action, a judgment of dismissal had been entered that denied judgment of a divorce to plaintiff, but that judgment had been premised on a cause of action for divorce based on extreme cruelty.

The court of appeal held that the policy to prevent multiplicity of actions was not available to support the preliminary injunction for two reasons: first, the California action had not been settled or adjudicated because the judgment of dismissal stemmed from plaintiff's attempted withdrawal from the action and, second, even if it had been adjudicated, the judgment pertained to a different cause of action than that involved in the French action. Thus, the court reversed the order granting the preliminary injunction. The court of appeal recognized the rule stated in *Bartholomew v. Bartholomew (1942) 56 Cal. App. 2d 216, 225, 132 P.2d 297* , the facts and procedural background of which are discussed *below:* "There are two general classes of cases in which injunctions are issued to prevent a multiplicity of actions, namely, those in which many claims which have not been adjudicated are brought into equity to be made the subject of a single trial and decree, ... and those that are enjoined because they are shown to be vexatious suits upon causes of action that have been settled by former adjudication." The court of appeal stated that the case did not fall within the first class and that it did not meet the requisite of the second class that the proceedings in which the injunction issues must have been settled or, in other words, that there has to have been a former adjudication of the issues involved (*203 Cal. App. 2d 724, 735)* .

Counsel should note that the *Verdier* case was decided before the passage of legislation eliminating "fault" as a ground for marital dissolution [*see* former Civ. Code § 4501 et seq. (superseded on and after January 1, 1994, by *Fam. Code § 2300 et seq.*)]. Nevertheless, the case still serves to illustrate the reasoning process a court will undertake in applying the "mulitiplicity of proceedings" concept.

In ***Bartholomew v. Bartholomew*** *(1942) 56 Cal. App. 2d 216, 132 P.2d 297* , defendants appealed from a judgment that permanently enjoined them from further prosecuting certain litigation against a minor plaintiff and his guardian as well as from commencing, prosecuting, or suffering to be prosecuted any other actions or proceedings in which it would be asserted that defendants or either of them had any interest in the assets of the plaintiff's estate or in which it would be asserted that any of the proceedings theretofore taken in the matter of the guardianship of the minor or the adoption proceeding were procured by fraud, collusion, conspiracy, or false testimony, or that the same were made or taken by the court without jurisdiction.

The court of appeal reversed the judgment. It stated that there are two general classes of cases in which injunctions are issued to prevent a multiplicity of actions, namely those in which many claims that have not been adjudicated are brought into equity to be made the subject of a single trial and decree and those that are enjoined because they are shown to be vexatious suits on causes of action that have been settled by former adjudication. An injunction enjoining a multiplicity of actions cannot stand unless it falls into one of these two classes. The judgment involved did not belong to the first class because of the nature of the relief applied for and that was granted; and it did not belong in the second class because the matters in issue had not been adjudicated between the parties and, thus, the principle of res judicata was not applicable (*56 Cal. App. 2d 216, 225)* .

[c] Enjoining of Federal Actions Prohibited

In ***General Atomic Co. v. Felter*** *(1977) 434 U.S. 12, 98 S. Ct. 76, 54 L. Ed 2d 199* , a New Mexico state court issued an injunction restraining litigants from filing and prosecuting actions against each other in federal court.

The U.S. Supreme Court held that state courts do not have the power to prevent litigants from filing and prosecuting pending or prospective actions in the federal courts (*434 U.S. 12, 16-19)* .

Note that another case arose out of the same litigation and raised similar issues, but involved arbitration questions [*see General Atomic Co. v. Felter (1978) 436 U.S. 493, 496, 98 S. Ct. 1939, 56 L. Ed. 2d 480]* .

[4] Additional Authorities

[a] Stay of Pending Judicial Proceeding Prohibited

In *Wright v. Superior Court (1941) 43 Cal. App. 2d 181, 110 P.2d 529* , the petitioner was general partner in a limited partnership who brought an action in San Francisco to dissolve the partnership and to require the sale and distribution of its assets. All members of the partnership, including another partner (Morrison), answered and joined in the relief sought. The superior court in San Francisco ordered the dissolution of the partnership and the sale of the assets. Morrison attempted to persuade the court to stay its order, but the court refused. He then filed an action in the Calaveras County superior court seeking to enjoin the sale that the San Francisco superior court had ordered and asking that a receiver be appointed. A temporary restraining order and order to show cause were issued by the Calaveras County court, and they were served on petitioners shortly before the time for the sale of the property. An ex parte application was made by petitioners to vacate the temporary restraining order on the ground that the court was without jurisdiction, but the application was refused and the matter set for a hearing on its merits. Petitioners then sought a writ of prohibition from the court of appeal.

The court of appeal granted the writ. It stated that the superior court in San Francisco acquired and had exclusive jurisdiction over the matters involved in the partnership dissolution. It stated that the San Francisco court was qualified to afford all the relief sought, and that no proceeding to enjoin the execution of an order or judgment of one court may be brought in a court of coordinate jurisdiction; any relief must be sought in the court whose order or command is involved. Hence, if Morrison felt aggrieved by the action of the superior court in San Francisco, the court of appeal was the proper forum to consider his complaint (*43 Cal. App. 2d 181, 183-184)* .

In *Associated Plumbing Contractors of Marin etc. Counties, Inc. v. F. W. Spencer & Son, Inc. (1963) 213 Cal. App. 2d 1, 28 Cal. Rptr. 425* , plaintiffs filed an action in the superior court of Marin County by which they sought to enjoin defendant from the further prosecution of an action pending before the superior court of San Mateo County, in which defendant was seeking damages for breach of contract. The superior court of Marin County denied the injunctive relief sought by plaintiffs, and defendant appealed. The court of appeal affirmed the judgment. It stated that the superior court had correctly denied plaintiff request for an injunction because an injunction will not be granted to stay judicial proceedings already pending (*213 Cal. App. 2d 1, 7)* .

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A. Injunctive Relief in General

11-116 California Points & Authorities § 116.33

§ 116.33 Opposing Application for Preliminary Injunction [Code Civ. Proc. § 527]--Injunction Not Issued to Prevent Exercise of Public or Private Office [Civ. Code § 3423(f); Code Civ. Proc. § 526(b)(6)]

[1] FORM

[*Caption. See § 116.32.*]

A PRELIMINARY INJUNCTION MAY NOT BE ISSUED TO PREVENT THE EXERCISE OF A PUBLIC OR PRIVATE OFFICE IN A LAWFUL MANNER BY THE PERSON IN POSSESSION. IN THIS CASE, THE APPLICANT IS SEEKING TO ENJOIN _____ [*specify action that is sought to be enjoined, e.g.,* CERTIFICATION OF AN INITIATIVE FOR THE BALLOT IN THE GENERAL ELECTION], WHICH IS A LAWFUL ACTION TAKEN IN THE EXERCISE OF THE OFFICE OF _____ [*state public or private office involved, e.g.,* SECRETARY OF STATE]. THEREFORE, THE REQUEST FOR INJUNCTIVE RELIEF SHOULD BE DENIED.

Preventing Exercise of Public or Private Office. An injunction cannot be granted to prevent the exercise of a public or private office, in a lawful manner, by the person in possession (*Civ. Code § 3423(f)*; *Code Civ. Proc. § 526(b)(6)*; *Somo v. Superior Court (1933) 135 Cal. App. 584, 586, 27 P.2d 790* ; *Purviance v. Compton (1928) 94 Cal. App. 277, 280, 271 P. 120*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to an application for a preliminary injunction when that relief is being sought to prevent the exercise of a public or private office, in a lawful manner, by the person in possession [*Civ. Code § 3423(f)*; *Code Civ. Proc. § 526(b)(6)*].

With appropriate modifications, these points and authorities may be used (1) in support of a demurrer to a complaint for injunctive relief [*see Code Civ. Proc. § 430.10(e)*], (2) as an affirmative defense in an answer to such a complaint [*see Code Civ. Proc. § 431.30(b)(2)*], (3) in support of a motion for summary judgment in such an action [*see Code Civ. Proc. § 437c*], or (4) in support of a petition for a writ of prohibition [*see Code Civ. Proc. §§ 1102, 1103*] seeking to restrain a court from enforcing injunctive relief.

For related points and authorities that concern execution of of a public statute or ordinance for public benefit [*see Code Civ. Proc. § 526(b)(4), see also § 116.83*].

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts that establish how the conduct that is sought to be enjoined is being (or about to be) performed in the lawful exercise of a public or private office. When the right of the office holder to perform the conduct is clear but the manner of carrying it out is subject to dispute, counsel should explain why the method proposed to perform the conduct is lawful or otherwise proper under the circumstances.

[c] Related Pleading and Practice Forms

For discussion of the various methods of opposing applications for provisional and permanent injunctive relief as well as for a form of declaration to oppose an application for a preliminary injunction and a form of demurrer to a complaint for injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender).

[3] Discussion of Authorities

[a] Preventing Exercise of Public or Private Office

In ***Somo v. Superior Court*** *(1933) 135 Cal. App. 584, 27 P.2d 790* , the incumbent president and secretary of a water company faced the prospect of having to surrender their offices and corporate equipment to two other men who were asserting a right to act in those capacities on the basis of a referendum election as well as a meeting of the corporate stockholders. This was to be accomplished by the issuance of a writ of mandate and, incidental thereto, a preliminary injunction. The president and secretary answered the petition for the writ of mandate and the application for injunctive relief by denying every issue of fact. They then petitioned the court of appeal for a writ of prohibition to prevent the superior court from issuing either a temporary restraining order or preliminary injunction. The court of appeal granted the writ.

The court referred to former Civ. Code § 3423(6) and former Code Civ. Proc. § 526 second subd (6) (now relettered as *Civ. Code § 3423(f)*; *Code Civ. Proc. § 526(b)(6)*, respectively). These sections provide that an injunction cannot be granted to prevent the exercise of a public or private office, in a lawful manner, by the person in possession. Because many issues of fact as well as questions of law were involved in the proceeding, and the petitioners were currently in possession of the respective offices, the statutes mentioned above were so clearly applicable that they indicated a lack of

jurisdiction in the superior court. The court of appeal, therefore, granted a writ of prohibition by which the superior court was prohibited from making or issuing or entering any order by which the petitioners would be restrained or prevented from exercising the duties of their offices (*135 Cal. App. 584, 586)* .

In ***Purviance v. Compton*** *(1928) 94 Cal. App. 277, 271 P. 120* , plaintiff was a chiropractor who sought to enjoin defendant members of the State Board of Chiropractic Examiners from trying plaintiff's right to practice chiropractic medicine in California. Defendants' demurrer to the complaint was sustained, and plaintiff appealed. The court of appeal affirmed the demurrer. It noted that defendants had been appointed to the board by the governor, had entered into the duties and held indicia of that office, and were actually serving the public as members of the board when plaintiff sought relief by injunction. The court held that they were at least de facto officers and that, therefore, even if they were not qualified as such, the functioning of the office and the officers could not be controlled by an action for an injunction (*94 Cal. App. 277, 280)* .

[4] Additional Authorities

[a] Preventing Exercise of Public or Private Office

In *Randolph v. County of Stanislaus (1919) 44 Cal. App. 322, 186 P. 625* , plaintiff taxpayers brought an action to enjoin the Stanislaus County board of supervisors from calling an election for directors of a proposed public utility district and from expending any county monies for that purpose. After trial, the court refused to issue the injunction and entered judgment for defendants. Plaintiffs appealed, but the court of appeal affirmed the judgment. Plaintiffs claimed that the district had been illegally formed and that no election of directors should have been held for several reasons. However, the court of appeal noted the principles set forth in former Civ. Code § 3423(4), *(6)* (now relettered as *Civ. Code § 3423(d), (f)*). The court stated it agreed with defendants' position that the proceeding was one to prevent officers of the law, namely the board of supervisors, from executing a public statute passed for the public benefit. They were simply threatening to perform a duty enjoined on them by law; that was, to call an election of directors of a public utility district, the creation of which had already been declared by the board of supervisors and by the Secretary of State (*44 Cal. App. 322, 325-326)* .

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11-116 California Points & Authorities § 116.34

§ 116.34 Opposing Application for Preliminary Injunction [Code Civ. Proc. § 527]--Injuction Not Issued to Prevent Legislative Act by Municipal Corporation [Civ. Code § 3423(g); Code Civ. Proc. § 526(b)(7)]

[1] FORM

[*Caption. See § 116.32.*]

A PRELIMINARY INJUNCTION MAY NOT BE ISSUED TO PREVENT A LEGISLATIVE ACT BY A MUNICIPAL CORPORATION. IN THIS CASE, THE ACT SOUGHT TO BE ENJOINED CONSISTS OF _____ [*describe act*], WHICH IS OF A LEGISLATIVE NATURE AND WITHIN THE PURVUE OF _____ [*describe public entity involved, e.g.,* THE CITY COUNCIL]. THEREFORE, THE REQUEST FOR INJUNCTIVE RELIEF SHOULD BE DENIED.

Preventing Legislative Act by Municipal Corporation. An injunction cannot be granted to prevent a legislative act by a municipal corporation (*Civ. Code § 3423(g)*; *Code Civ. Proc. § 526(b)(7)*; *Glide v. Superior Court (1905) 147 Cal. 21, 24-26, 81 P. 225* ; *Agnew v. City of Los Angeles (1961) 190 Cal. App. 2d 820, 828, 12 Cal. Rptr. 507*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to an application for a preliminary injunction when that relief is being sought to prevent a legislative act by a municipal corporation [*Civ. Code § 3423(g)*; *Code Civ. Proc. § 526(b)(7)*].

With appropriate modifications, these points and authorities may be used (1) in support of a demurrer to a complaint for injunctive relief [*see Code Civ. Proc. § 430.10(e)*], (2) as an affirmative defense in an answer to such a complaint [*see Code Civ. Proc. § 431.30(b)(2)*], (3) in support of a motion for summary judgment in such an action [*see Code Civ. Proc. § 437c*], or (4) in support of a petition for a writ of prohibition [*see Code Civ. Proc. §§ 1102, 1103*] seeking to restrain a court from enforcing injunctive relief.

For related points and authorities concerning execution of a statute or ordinance for public benefit, see *§ 116.83*.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts that establish that the act sought to be enjoined is of a legislative nature and properly within the authority of the municipal corporation involved.

[c] Related Pleading and Practice Forms

For discussion of the various methods of opposing applications for provisional and permanent injunctive relief, as well as for a form of declaration to oppose an application for a preliminary injunction and a form of demurrer to a complaint for injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender).

[3] Discussion of Authorities

[a] Preventing Legislative Act by Municipal Corporation

In ***Glide v. Superior Court*** *(1905) 147 Cal. 21, 81 P. 225* , plaintiff had commenced an action to restrain the Yolo County board of supervisors from acting on petitioner Glide's application for the formation of a reclamation district out of a tract of land that belonged to him. The superior court issued a preliminary injunction to that effect, and then petitioner sought a writ of prohibition from the Supreme Court to prohibit the superior court from proceeding any further with the trial of the action for the injunction.

The Supreme Court issued the writ. It noted the principle that legislative discretion, whether rightfully or wrongfully exercised, is not subject to interference by the judiciary and stated that this principle is crystallized in former Civ. Code § 3423(7) (now relettered as *Civ. Code § 3423(g)*). The Court had no doubt but that the jurisdiction over the matters involved was primarily vested with the board of supervisors and that so long as the board was acting within the scope of its jurisdiction, judicial interference with its proceedings was improper and could not be tolerated (*147 Cal. 21, 24-26)* .

In ***Agnew v. City of Los Angeles*** *(1961) 190 Cal. App. 2d 820, 12 Cal. Rptr. 507* , plaintiff was a licensed electrical contractor who brought suit to enjoin the enforcement of certain ordinances of defendant city on the ground that they conflicted with general law and were thus unconstitutional. The superior court sustained defendants' demurrer, and plaintiff appealed.

The court of appeal noted the principle of former Civ. Code § 3423(4), *(7)* and *Code Civ. Proc. § 526* second subds (4), (7) (now relettered as *Civ. Code § 3423(d), (g)*; *Code Civ. Proc. § 526(b)(4), (7)*), that an injunction will not issue to prevent a legislative act by a municipal corporation unless a showing of invalidity is made. Because the court held that

the ordinances did not conflict with general laws and that, therefore, they were valid, the demurrer to the complaint was properly sustained (*190 Cal. App. 2d 820, 828)* .

[4] Additional Authorities

[a] Preventing Legislative Act by Municipal Corporation

In *Cooke v. Superior Court (1989) 213 Cal. App. 3d 401, 261 Cal. Rptr. 706* , a trial court denied a preliminary injunction that had been sought to enjoin a county from failing to provide dental care to indigent county residents that complied with the county's statutory duty. In denying a writ of mandate that was sought to compel the county to provide such care (on the ground that the subsequent enactment by the county of a resolution, on its face, provided a level of care sufficient to satisfy the requirements of the statutes), the court of appeal said that in an ordinary case it would simply review the trial court's exercise of discretion in refusing the preliminary injunction. However, here, the county's subsequent resolution had to be considered in determining whether to grant a writ of mandate. The court pointed out that the separation of powers doctrine prohibits judicial interference with legislative action, including the legislative function of a local body, in the absence of fraud, corruption, or action exceeding legislative powers, and ruled that because the county had made a reasonable effort to comply with its statutory duty, the court would not interfere (*213 Cal. App. 3d 401, 418)* .

In *Harbor Center L. Co. v. Richmond (1918) 38 Cal. App. 315, 176 P. 50* , plaintiff brought two actions for an injunction restraining the City of Richmond and its officers from removing the municipal offices from a certain building situated on lands that the plaintiff claimed were donated to the city by it for use as a city hall, as well as from entering into a contract for the erection of a city hall. Judgment was entered for defendant, and the court of appeal affirmed. It stated that the injunction was properly refused by the superior court because under former Code Civ. Proc. § 526 second subd (7) (now relettered as *Code Civ. Proc. § 526(b)(7)*) an injunction cannot be granted to prevent a legislative act by a municipal corporation that is within the scope of its powers. Moreover, no act could be more clearly within the scope of the powers of defendant than the selection of a location for its city hall (*38 Cal. App. 315, 317)* .

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
CHAPTER 116 INJUNCTIONS
PART II. FORMS
A. Injunctive Relief in General

11-116 California Points & Authorities § 116.35

§ 116.35 Opposing Application for Preliminary Injunction [Code Civ. Proc. § 527]--Absence of Factual Showing of Grounds on Which Preliminary Injunction May Be Granted [Code Civ. Proc. § 527(a)]

[1] FORM

[*Caption. See § 116.32.*]

A PRELIMINARY INJUNCTION MAY NOT BE ISSUED WHEN THE APPLICANT HAS FAILED TO MAKE ANY VERIFIED FACTUAL SHOWING OF ANY GROUNDS ON WHICH IT MAY BE GRANTED. IN THIS CASE, THE APPLICANT HAS _____ [*summarize assertion of applicant*], BUT HAS FAILED TO SET FORTH FACTS THAT ESTABLISH A RIGHT TO INJUNCTIVE RELIEF. THEREFORE, THE REQUEST FOR RELIEF SHOULD BE DENIED.

Absence of Grounds for Preliminary Injunction. A preliminary injunction may be granted at any time before judgment if the verified complaint or affidavits show satisfactorily that sufficient grounds exist therefor (*Code Civ. Proc. § 527(a)*). If an applicant for a preliminary injunction fails to make such a verified factual showing that grounds for the granting of such relief exist, a court is not authorized to issue a preliminary injunction (Levy v. City of Santa Monica (2004) *114 Cal. App. 4th 1252, 1262, 8 Cal. Rptr. 3d 507* ; *San Francisco Newspaper Printing Co. v. Superior Court (1985) 170 Cal. App. 3d 438, 441-444, 216 Cal. Rptr. 462* ; *Harlan v. Superior Court (1949) 94 Cal. App. 2d 902, 904-905, 211 P.2d 942*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to an application for a preliminary injunction when the applicant has failed to make any verified factual showing that sufficient grounds exist for it as required by *Code Civ. Proc. § 527(a)*.

With appropriate modifications, these points and authorities may be used (1) in support of a demurrer to a complaint for injunctive relief [*see Code Civ. Proc. § 430.10(e)*], (2) as an affirmative defense in an answer to such a complaint [*see Code Civ. Proc. § 431.30(b)(2)*], (3) in support of a motion for summary judgment in such an action [*see Code Civ. Proc. § 437c*], or (4) in support of a petition for a writ of prohibition [*see Code Civ. Proc. §§ 1102, 1103*] seeking to restrain a court from enforcing injunctive relief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts that demonstrate how the applicant's moving papers fail to establish any grounds for relief. This might be done, for example, by showing that the applicant has simply made a claim without setting forth a factual basis for that claim, or that the nature of the claim is such that, even if supported by facts, it does not constitute a recognized basis for injunctive relief.

[c] Related Pleading and Practice Forms

For discussion of the various methods of opposing applications for provisional and permanent injunctive relief as well as for a form of declaration to oppose an application for a preliminary injunction and a form of demurrer to a complaint for injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender).

[3] Discussion of Authorities

[a] Absence of Grounds for Preliminary Injunction

In ***Levy v. City of Santa Monica*** *(2004) 114 Cal. App. 4th 1252, 8 Cal. Rptr. 3d 507* , the plaintiffs were homeowners who built a large playhouse in their backyard. The plaintiffs' neighbor complained to the defendant City of Santa Monica about the playhouse. After the Levy's modified the playhouse to meet city requirements, the neighbor again complained to the City's building and safety department. She also complained to defendant Ken Genser, her city council representative, who was also the mayor. In response, Genser sent an e-mail to the City's director of planning and community development, that said, "[C]ould you look into this? Is this structure being built without permits? And could it be built with a permit? Please feel free to contact [the neighbor] directly."

A section of the city charter stated that "Except for the purpose of inquiry, the City Council and its members shall deal with the administrative service under the City Manager solely through the City Manager and neither the City Council nor any member shall give orders to any subordinates of the City Manager, either publicly or privately." In light of this, the plaintiffs filed a complaint for injunctive relief against the City and Genser. They sought a permanent injunction precluding city council members from engaging in acts designed to influence City administrative staff through direct communication regarding zoning enforcement matters. The City filed a motion to strike the lawsuit under "SLAPP" (Strategic Lawsuit Against Public Participation) (*Code Civ. Proc. § 425.16*). The trial court held in favor of the

plaintiffs and granted the injunction. The City appealed.

The court of appeal reversed. It held that the plaintiffs did not meet their evidentiary burden for injunctive and declaratory relief. Their complaint alleged an ongoing "pattern of intervention" by council members in "City staff's performance." However, the court held, the plaintiffs made these general allegations on information and belief and did not produce admissible evidence to support them. Their declarations were insufficient because they relied on conclusory statements, hearsay, and speculation (*114 Cal. App. 4th 1252, 1262)* .

In ***San Francisco Newspaper Printing Co. v. Superior Court*** *(1985) 170 Cal. App. 3d 438, 216 Cal. Rptr. 462* , a trial court issued an injunction pendente lite restraining defendant newspaper publisher from terminating the dealership of a deceased dealer. The plaintiff, widow of the deceased dealer, had sought a declaration that the agreement between the deceased and SFNA survived his death and that she be substituted as dealer. She also charged that the agreement was a restraint of trade and an unfair business practice.

The court of appeal, on petition from defendant, ordered the trial court to dissolve the injunction. The court reasoned that there was no evidence as to decedent's expectation, if any, that the contract survive him. The contract had an unambiguous nonassignability clause and required decedent to find a temporary replacement acceptable to defendant if ever he was unable to perform his obligations under the contract (*170 Cal. App. 3d 438, 443-444)* . The allegations of the complaint that supported an inference that the nonassignability clause was unenforceable as adhesive were made on information and belief, and as such, were inadequate as a matter of law. Further, because the widow was not a party to the contract, her declaration regarding her expectation that she would succeed her husband as dealer was irrelevant (*170 Cal. App. 3d 438, 441-442)* .

In ***Harlan v. Superior Court*** *(1949) 94 Cal. App. 2d 902, 211 P.2d 942* , plaintiff sought an order to require her husband to show cause why he should not be required to pay support and be restrained from molesting or interfering with plaintiff or the minor child of the parties. An order to show cause was issued to that effect. The husband filed an affidavit in which he alleged that he desired that his wife be restrained from doing certain things, but there was no showing by answer, cross complaint, or affidavit that his wife had committed or threatened to commit all or any of the acts that the husband wished to restrain. No order to show cause was issued and no notice was given the wife with respect to any application for an injunction. Nevertheless, the superior court issued a preliminary injunction that enjoined both parties from doing the things the husband had requested. In addition, plaintiff was ordered to return all of her husband's personal effects and business records to him. Plaintiff was subsequently held in contempt for violating the preliminary injunction, and she petitioned the court of appeal for a writ of prohibition to restrain the superior court from her conviction of contempt. The court of appeal granted the writ.

The court stated that the adjudication was void because the superior court was not authorized to issue the preliminary injunction and because no facts were found that would constitute willful violation of a court order. With respect to the first reason, it stated that the requirements of *Code Civ. Proc. § 527* were not complied with because the record disclosed a complete absence of any factual showing by pleading or affidavit on which the court could have based a finding of existence or nonexistence of grounds for granting the preliminary injunction. Moreover, because there was no verified showing, which is indispensable to the exercise of injunctive power, the procedural prerequisites of *Code Civ. Proc. § 527* were not met. Therefore, it had no jurisdiction to render an order, on the basis of the alleged violation of which the petitioner was adjudged guilty of contempt. And because disobedience of a void order does not constitute contempt, the court of appeal issued the writ of prohibition (*94 Cal. App. 2d 902, 904-905)* .

Counsel should note that the grounds for issuing restraining orders involving personal conduct and the disposition of property in the context of domestic relations proceedings are presently governed by the Family Code. However, the underlying reasoning of the *Harlan* case with respect to the need for a factual basis for issuing a preliminary injunction, appears to remain viable.

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11-116 California Points & Authorities § 116.36

§ 116.36 Opposing Application for Preliminary Injunction [Code Civ. Proc. § 527]--Completed Acts

[1] FORM

[*Caption. See § 116.32.*]

A PRELIMINARY INJUNCTION MAY NOT BE ISSUED TO RESTRAIN THE COMMISSION OF COMPLETED ACTS. IN THIS CASE, THE _____ [*specify party applying for injunction, e.g.,* PLAINTIFF] HAS SOUGHT TO ENJOIN _____ [*specify subject of injunctive relief sought*],AN EVENT THAT PREVIOUSLY OCCURRED AND IS NOT LIKELY TO RECUR. THEREFORE, THE REQUEST FOR INJUNCTIVE RELIEF SHOULD BE DENIED.

Completed Acts. A preliminary injunction may not be granted to restrain the commission of acts that have already been completed (*Gold v. Los Angeles Democratic League (1975) 49 Cal. App. 3d 365, 372-373, 122 Cal. Rptr. 732* ; *McManus v. KPAL Broadcasting Corp. (1960) 182 Cal. App. 2d 558, 563-564, 6 Cal. Rptr. 441*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to an application for a preliminary injunction when the applicant is attempting to enjoin acts that have already been completed. They specifically oppose the contentions made in § 116.28.

With appropriate modifications, these points and authorities may be used (1) in support of a demurrer to a complaint for injunctive relief [*see Code Civ. Proc. § 430.10(e)*], (2) as an affirmative defense in an answer to such a complaint [*see Code Civ. Proc. § 431.30(b)(2)*], (3) in support of a motion for summary judgment in such an action [*see Code Civ. Proc. § 437c*], or (4) in support of a petition for a writ of prohibition [*see Code Civ. Proc. §§ 1102, 1103*] seeking to restrain a court from enforcing injunctive relief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should establish that the event or action that the opposing party is seeking to enjoin has already occurred, and that it is not probable it will recur [*cf.* § 116.28].

[c] Related Pleading and Practice Forms

For discussion of the various methods of opposing applications for provisional and permanent injunctive relief as well as for a form of declaration to oppose an application for a preliminary injunction and a form of demurrer to a complaint for injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender).

[3] Discussion of Authorities

[a] Completed Acts

In ***Gold v. Los Angeles Democratic League*** *(1975) 49 Cal. App. 3d 365, 122 Cal. Rptr. 732* , a trial court sustained a demurrer to a complaint, without leave to amend, brought by an unsuccessful candidate for the office of Los Angeles City Controller. One of the counts in the complaint alleged an Elections Code violation. The section allegedly violated provided that no candidate or committee, in his or her behalf, may misrepresent that the candidate has the support of a county or state central committee of a party with which he or she is not affiliated. That section also provided that any member of a county or state central committee may commence an action to enjoin the acts prohibited by the statute.

The court of appeal affirmed the demurrer with regard to that count. It reasoned that an injunction lies only to prevent threatened injury and has no application to wrongs that have been completed. Therefore, because the complaint showed on its face that the acts sought to be enjoined were committed by defendants in connection with a municipal election that took place a year before the present action was commenced, and plaintiff did not allege that defendants threatened to repeat such acts, there was no basis on which the superior court could have granted any injunctive relief (*49 Cal. App. 3d 365, 372-373)* .

In ***McManus v. KPAL Broadcasting Corp.*** *(1960) 182 Cal. App. 2d 558, 6 Cal. Rptr. 441* , plaintiff land owners sought to permanently enjoin defendant from constructing or proceeding with construction of a radio transmitting tower on land that adjoined theirs. The superior court issued a preliminary injunction to that effect, and defendant moved to vacate the order granting it. The superior court denied that motion, and defendant appealed from the order issuing the preliminary injunction and the order denying its motion to vacate. One of the grounds on which defendant appealed was the assertion that a preliminary injunction will not lie to prevent a completed act and, therefore, such relief should not be granted in this case because the tower had been erected before any order was issued.

The court of appeal agreed with defendant and reversed the orders. It stated that, as a general rule, an injunction lies to

prevent threatened injuries and has no application to completed wrongs for the redress of which the plaintiff is relegated to an action at law. Obviously, a completed wrong cannot be corrected by a preliminary injunction, the purpose of which is to preserve the status quo until after final judgment. Because it affirmatively appeared that the construction of the tower was completed before any order of restraint was served, the orders were reversed (*182 Cal. App. 2d 558, 563-564)* .

[4] Additional Authorities

[a] Completed Acts

In *Scripps Health v. Marin (1999) 72 Cal. App. 4th 324, 85 Cal. Rptr. 2d 86* , an employer petitioned for an injunction to prohibit defendant from harassing its employees under *Code Civ. Proc. § 527.8*. At the temporary restraining order (TRO) hearing, defendant appeared ex parte and obtained an order vacating the TRO pending the order to show cause hearing. The court conditioned the order on defendant's representation that defendant would stay away from the employer's facilities pending the hearing. At the conclusion of the evidentiary hearing, the court imposed a three year permanent injunction barring defendant from contacting any of the employer's employees or coming within 500 yards of its facility or institution unless defendant had a medical emergency and was taken to the employer's facility. Defendant appealed (*72 Cal. App. 4th 324, 327-331)* . The court of appeal, in holding that the injunction was improperly issued, noted that injunctive relief lies only to prevent threatened injury and has no application to completed wrongs. It should neither serve as punishment for past acts, nor be exercised in the absence of any evidence establishing the reasonable probability the acts will be repeated in the future. Indeed, a change of circumstances at the time of the hearing, rendering injunctive relief moot or unnecessary, justifies denial of the request. Moreover, not only can injunctive relief be denied when the defendant has voluntarily discontinued the wrongful conduct, there exists no equitable reason for ordering it when the defendant has in good faith discontinued the proscribed conduct. Thus, to authorize the issuance of an injunction, it must appear with reasonable certainty that the wrongful acts will be continued or repeated (*72 Cal. App. 4th 324, 332-333)* .

In *Griffith v. Dept. of Public Works (1959) 52 Cal. 2d 848, 345 P.2d 469* , plaintiff brought an action to enjoin defendants from constructing a freeway through a park in Los Angeles in which he asserted a contingent remainder interest. The superior court granted defendants' motion for summary judgment. It stated that it appeared that the state had already taken possession of all of the subject property and had duly completed or partially completed on it the freeway in question. Thus, an injunction against erecting the freeway would then be useless. Defendant appealed, but the Supreme Court affirmed. It noted the principle that an injunction will not generally be issued to prohibit a completed act. Hence, it followed that the superior court was correct in its determination that an injunction against erecting the freeway involved should not have been issued at that time (*52 Cal. 2d 848, 854)* .

In *Blackmore Investment Co. v. Johnson (1931) 213 Cal. 148, 1 P.2d 978* , plaintiff corporation purchased some real property from defendants. A portion was paid in cash and the balance was assumed in the form of a promissory note executed by the president and secretary of the corporation and was secured by a deed of trust on the property that was also executed by those two officers. Plaintiff defaulted, and when the trustee noticed the property for sale, plaintiff commenced an action to enjoin the sale on the ground that the officers had not been duly authorized to execute the deed of trust in question. No preliminary injunction was obtained, and the sale took place on the date fixed, more than one year before the action came to trial. After trial, the superior court entered judgment for defendants. They appealed, but the Supreme Court affirmed the judgment. It noted that it is elementary that an injunction cannot be granted to stay an act that has already been committed (*213 Cal. 148, 150-151)* .

In *Flood v. Goldstein Co. (1910) 158 Cal. 247, 110 P. 916* , plaintiff obtained a preliminary injunction that enjoined defendants from wrecking and removing a building as well as from removing plaintiff's implements and furniture from the building. Defendant moved to have the preliminary injunction dissolved, and the superior court granted the motion. Plaintiff appealed, but the Supreme Court affirmed the order. It observed that the building had been completely

dismantled, the roof was gone, the doors, windows, and floors removed, and access to it was rendered dangerous by the excavation. Thus, the principle that rights already lost and wrongs already perpetrated cannot be corrected by injunction applied. The party so aggrieved must seek some other remedy (*158 Cal. 247, 251-252)* .

In *Gardner v. Stroever (1889) 81 Cal. 148, 22 P. 483* , defendant had constructed a building across a road that obstructed plaintiff's access to his place of business. Plaintiff brought an action to restrain defendant from obstructing a road by erecting a building over it. Plaintiff obtained a preliminary injunction that commanded that defendant and his agents desist and refrain from obstructing or interfering with the road. Defendant moved to dissolve the injunction, but the superior court denied the motion. The Supreme Court held that the motion should have been granted for two reasons. First, the preliminary injunction was mandatory and, therefore, required a very strong and urgent case in order to justify its issuance. Such a case was not present in the instant situation. Second, a preliminary injunction must not be retained when the acts, the performance of which is sought to be restrained, have been performed before the order for the injunction is made or served (*81 Cal. 148, 151)* .

In *Engle v. City of Oroville (1965) 238 Cal. App. 2d 266, 47 Cal. Rptr. 630* , plaintiff obtained a judgment that permanently enjoined defendant city from discharging sewage effluent from its sewage plant into the Feather River and awarded damages to plaintiffs. The court of appeal reversed the judgment. It stated that the question involved concerning the injunctive portion of the judgment was that when, during the course of litigation, and before final judgment, the conditions on a previously issued injunction no longer exist and cannot recur, should the injunction be dissolved? The court answered that question affirmatively. It noted that an injunction will not be granted when, at the time of the hearing, conditions have so changed that no unlawful act is threatened. Moreover, injunctive power is not wielded as punishment for past acts. It will be exercised only when there is evidence that the acts enjoined will probably recur (*238 Cal. App. 2d 266, 270)* .

In *People v. Paramount Citrus Asso. (1957) 147 Cal. App. 2d 399* , the attorney general brought an action to enjoin the violation of lemon marketing orders by defendant. The superior court granted plaintiff a judgment that granted both mandatory and preventive relief. The defendant appealed, and the court of appeal reversed that portion of the judgment granting mandatory injunctive relief but affirmed that portion of the judgment that granted preventive relief. It stated that an injunction lies only to prevent injury and has no application to wrongs that have been completed. Further, it observed that while a court of equity has power to issue a mandatory injunction when the wrong is continuing in character and can only be remedied by requiring affirmative action on the part of the wrongdoer (such as nuisances, continuing trespasses, and encroachments on easements), in this situation the wrongs that the court sought to correct were not continuing ones but completed ones. Because the prohibitory provisions of the injunction adequately prohibited defendant from a repetition of those wrongs, it was error to grant the mandatory portion of the judgment (*147 Cal. App. 2d 399, 411-413)* .

In *Anderson v. Fay Improvement Co. (1955) 134 Cal. App. 2d 738, 286 P.2d 513* , plaintiffs brought an action against defendants for an injunction to compel the removal of a public street and for damages. The superior court granted a judgment to that effect, and defendants appealed. The court of appeal reversed the portion of the judgment that granted injunctive relief to plaintiffs. It stated that it was quite clear that the injunctive provisions of the judgment were erroneous because they purported to compel the contractors and subdividers to remove a completed and accepted public street that had been built according to government-approved plans and specifications. This, the court held, could not be done legally (*134 Cal. App. 2d 738, 743-744)* .

In *Allen v. Hotel & Restaurant etc. Alliance (1950) 97 Cal. App. 2d 343, 217 P.2d 699* , plaintiffs were expelled from defendant unions. Two months later, they brought an action to compel defendants to restore them to membership because they contended that they had been expelled from the union without due process. The superior court issued a preliminary injunction to compel defendants to advise plaintiffs' last employers that they could employ plaintiffs as well as to suspend the expulsion orders. The injunction also prohibited defendants from interfering with plaintiffs' employment or jobs. The court of appeal affirmed this latter prohibitory portion of the order granting the injunction but

reversed the mandatory portions. It noted the principle that an injunction cannot be granted to stay an act already committed and has no application to wrongs that have been completed. Here, when the defendants had sent notices of expulsion to plaintiffs before the action was commenced, and there was no evidence that more notices would be sent to other union members, the acts complained of had been completed and the mandatory portions of the injunction could not be sustained (*97 Cal. App. 2d 343, 348-349)* .

In *Thome v. Honcut Dredging Co. (1941) 43 Cal. App. 2d 737, 111 P.2d 368* , plaintiffs brought an action to enjoin defendants from polluting the water of a creek and its upper tributary streams by depositing therein mining debris. They recovered such a judgment against some of the defendants, but the superior court rejected that relief against three of the defendants on the ground that they had ceased mining operations and had not subsequently threatened to resume those enterprises. Plaintiffs appealed from that portion of the judgment denying injunctive relief against those three defendants, but the court of appeal affirmed. The court noted the principle that an injunction should issue for wrongful acts that have been completely performed when it appears that they are likely to be repeated or continued. When the act complained of has been fully performed, the injured party is ordinarily compelled to seek redress in a suit for damages. In order to authorize the issuing of an injunction, it should appear with reasonable certainty that the wrongful acts will be continued or repeated. If there is no showing that such action is being continued or repeated, or that defendant is threatening or intending to repeat the injury, the injunction should be denied. Because the three defendants in this situation had not conducted their mining enterprises for several months and there was no evidence to indicate they intended to continue to pollute the stream in the manner alleged, the superior court was warranted in refusing to apply the injunction against them (*43 Cal. App. 2d 737, 740)* .

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11-116 California Points & Authorities § 116.37

§ 116.37 Opposing Application for Preliminary Injunction [Code Civ. Proc. § 527]--Preliminary Injunction Not Issued If Plaintiff Has Not Shown Either Existing or Threatened Irreparable Injury

[1] FORM

[*Caption. See § 116.32.*]

A PRELIMINARY INJUNCTION MAY NOT BE ISSUED WHEN PLAINTIFF HAS FAILED TO DEMONSTRATE EITHER EXISTING OR THREATENED IRREPARABLE INJURY. IN THIS CASE, PLAINTIFF HAS ALLEGED ONLY THAT _____ [*summarize moving party's alleged harm*], WHICH, EVEN IF TRUE, DOES NOT CONSTITUTE AN EXISTING OR THREATENED IRREPARABLE INJURY. PLAINTIFF'S REQUEST FOR INJUNCTIVE RELIEF SHOULD THEREFORE BE DENIED.

A. No Irreparable Injury. A preliminary injunction cannot be granted when plaintiff has not shown that either existing or threatened irreparable injury will result from defendants' conduct (*Tahoe Keys Property Owners' Ass'n v. State Water Resources Control Bd. (1994) 23 Cal. App. 4th 1459, 1472* ; *Triple A Machine Shop, Inc. v. State of California (1989) 213 Cal. App. 3d 131, 138, 261 Cal. Rptr. 493* ; *7978 Corporation v. Pitchess (1974) 41 Cal. App. 3d 42, 46, 115 Cal. Rptr. 746*).

[*Optional*] **B. Taxpayer Must Demonstrate Actual or Threatened Harm.** A court may not find that the "balance of interim harm" is in favor of a taxpayer suing in a representative capacity under *Code of Civil Procedure Section 526a* when the taxpayer claims no further actual or threatened harm to himself or herself and fails to show that other persons in the community at large feel imminently threatened by defendant's conduct (*Cohen v. Board of Supervisors (1986) 178 Cal. App. 3d 447, 453-455, 225 Cal. Rptr. 114* ; *see* *Cohen v. Board of Supervisors (1985) 40 Cal. 3d 277, 286-290, 219 Cal. Rptr. 467, 707 P.2d 840*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to an application for a preliminary injunction when plaintiff has not shown that either existing or threatened irreparable injury will result from defendant's conduct. Specifically, they may be presented in opposition to the contentions *set forth in § 116.21*.

Note that when defendant is attacking a complaint seeking a permanent injunction that fails to state a cause of action because it does not appear from the complaint that defendant's conduct will cause plaintiff any irreparable injury, § 116.54 should be used. When defendant is attacking a complaint that fails to state a cause of action because plaintiff has alleged only general conclusions and not specific facts regarding the irreparable injury to be suffered, § 116.55 should be used.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts demonstrating that the harm alleged by the plaintiff, even if true (a matter counsel may not otherwise want to concede), does not amount to an irreparable injury, either presently or prospectively.

[3] Discussion of Authorities

[a] No Irreparable Injury

In ***Tahoe Keys Property Owners' Ass'n v. State Water Resources Control Bd.*** *(1994) 23 Cal. App. 4th 1459* , a property owners' association brought an action against state agencies seeking various forms of relief for allegedly unlawful mitigation fees charged as a condition of obtaining building permits. The trial court denied the association's request for a preliminary injunction which would have prevented the continued collection of mitigation fees and prevented expenditures from the fund created by collection of the mitigation fees. The court of appeal affirmed the denial of the preliminary injunction. In concluding that there was little risk of irreparable injury to the owners' association, the court of appeal pointed out that "if the plaintiff may be fully compensated by the payment of damages in the event he prevails, then preliminary injunctive relief should be denied." The court noted that continued collection of the mitigation fees did not preclude property owners from utilizing their property and that in the event the owners' association prevailed legal damages would be easily ascertainable (*23 Cal. App. 4th 1459, 1472)* .

In ***Triple A Machine Shop, Inc. v. State of California*** *(1989) 213 Cal. App. 3d 131, 261 Cal. Rptr. 493* , a trial court granted a preliminary injunction prohibiting the State of California and others from contacting all present and certain former employees of plaintiff in connection with civil and criminal proceedings defendants were prosecuting against the plaintiff for alleged unlawful disposal of hazardous wastes.

In reversing the order granting the injunction, the court of appeal said that before a trial court can exercise its discretion to grant a preliminary injunction, the applicant must make a prima facie showing of entitlement to injunctive relief. The applicant must demonstrate a real threat of immediate and irreparable injury due to the inadequacy of legal remedies. It

noted that the existence of other effective judicial remedies may compel denial of injunctive relief (*213 Cal. App. 3d 131, 138)* .

In ***7978 Corporation v. Pitchess*** *(1974) 41 Cal. App. 3d 42, 115 Cal. Rptr. 746* , plaintiffs obtained a preliminary injunction that restrained the sheriff of Los Angeles County from enforcing certain sections of a county licensing ordinance involving public dancing and live public entertainment. Defendant sheriff appealed, contending that a preliminary injunction was not an appropriate remedy in this situation.

The court of appeal agreed with defendant and reversed the order granting the preliminary injunction. It pointed out that to qualify for preliminary injunctive relief, a plaintiff must show either existing or threatened irreparable injury. In this case, plaintiffs had failed to show any pressing injury that would result from delay in obtaining relief. Rather, they had merely asserted their desire to engage in the business of conducting dancing and presenting entertainment during hours prohibited under the licensing ordinance. Hence, there was no showing of any irreparable injury and the order granting the relief was reversed (*41 Cal. App. 3d 42, 46)* .

For forms of contentions related specifically to the enforcement of statutes [*see §§ 116.83 -116.84*].

[b] Taxpayer Must Demonstrate Actual or Threatened Harm

In ***Cohen v. Board of Supervisors*** *(1986) 178 Cal. App. 3d 447, 225 Cal. Rptr. 114* , a taxpayer and an attorney filed a taxpayers' action under *Code Civ. Proc. § 526a*, seeking a preliminary injunction against the enforcement of a San Francisco city ordinance requiring escort services and their employees to obtain permits from the city to operate.

On appeal of the decision in favor of defendants, plaintiffs contended that the policy requiring liberal construction of *Code Civ. Proc. § 526a* to achieve its purpose of allowing taxpayers to challenge illegal government activity without a showing of special damage to the particular taxpayer, requires that the court conclusively presume irreparable injury and a balance of interim harm in their favor. All that is required to trigger the presumption, plaintiffs claimed, is a bare showing that public funds are about to be expended in an unconstitutional or otherwise illegal manner.

Rejecting this contention, the court of appeal pointed out that this proposed standard would automatically equate illegal spending with a right to preliminary injunctive relief. Citing *Cohen v. Board of Supervisors (1985) 40 Cal. 3d 277, 219 Cal. Rptr. 467, 707 P.2d 840* (discussed *below*), the appellate court noted that the Supreme Court requires a court to consider interim harm as a related but distinct question from the underlying merits of the challenge. Accordingly, the proposed rule would leave only the consideration of illegality, and the balance of harms would automatically follow in every case. In addition, treating the balance of interim harms as a conclusive presumption leaves no room for a true balancing, thereby requiring a court to issue a preliminary injunction in every case in which some illegality appeared no matter how strong the countervailing showing of harm. The court concluded that in the case at bench, plaintiffs could not prevail under the balance of interim harm test by virtue of their taxpayers' status alone. Moreover, they were not otherwise entitled to interim relief, because they had neither claimed further actual or threatened harm to themselves nor shown that persons in the community at large felt imminently threatened by defendant's conduct (*178 Cal. App. 3d 447, 454-455)* .

In ***Cohen v. Board of Supervisors*** *(1985) 40 Cal. 3d 277, 219 Cal. Rptr. 467, 707 P.2d 840* , the Supreme Court addressed the issue of whether a local ordinance was preempted by state law. It then retransferred the case to the court of appeal for an opinion on whether the trial court abused its discretion in implicitly finding for the city on the "interim harm" and "likelihood of prevailing on the merits" factors. The court of appeal in the earlier opinion had failed to employ an abuse-of-discretion analysis.

In its analysis, the Supreme Court stated that when a trial court denies an application for a preliminary injunction, it implicitly determines that plaintiffs have failed to satisfy either or both of the factors. On appeal, the question becomes

whether the trial court has abused its discretion in ruling on *both* factors. On retransfer, the Court explained, if it is determined that the trial court abused its discretion on the "interim harm" factor, the only remaining question will be whether the court abused its discretion on the "likelihood of prevailing on the merits" factor. The Court concluded that, because appellant's claim constituted a facial attack on the ordinance and presented only questions of law, the court of appeal on retransfer could then determine the constitutionality of the ordinance as though the case had proceeded to trial (*40 Cal. 3d 277, 286-290)* . The court of appeal opinion *above* resulted after the retransfer.

[4] Additional Authorities

[a] No Irreparable Injury

In *Lezama v. Justice Court (1987) 190 Cal. App. 3d 15, 235 Cal. Rptr. 238* , the court of appeal upheld a trial court ruling denying injunctive or declaratory relief against a justice court. The justice court had assessed attorney's fees against indigent defendants for the costs of appointed legal counsel but had given no notice of hearing and had not advised defendants of their right to contest the fees as required by state and federal statutes. Defendants petitioned for a writ of mandate to have the fee assessments set aside, for a declaration that the justice court had violated the statutes involved, for an injunction against further violations of the statutes, and for an award of attorney's fees. The superior court sustained a demurrer to the writ petition and after trial set aside the assessment of fees, but denied the injunctive and declaratory relief, and denied attorney's fees. The court of appeal held that because the county had deferred collection of the fees, there was no showing of irreparable harm as required for injunctive relief. Additionally, appellants had an adequate remedy at law in that they could have appealed or moved to vacate or set aside the judgments (*190 Cal. App. 3d 15, 21)* .

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11-116 California Points & Authorities § 116.38

§ 116.38 Opposing Application for Preliminary Injunction [Code Civ. Proc. § 527]--Plaintiff's Laches

[1] FORM

[*Caption. See § 116.32.*]

A PRELIMINARY INJUNCTION MAY NOT BE ISSUED WHEN PLAINTIFF HAS BEEN GUILTY OF LACHES. IN THIS CASE, THE ALLEGED CONDUCT CONCERNING WHICH PLAINTIFF COMPLAINS OCCURRED, IF AT ALL, _____ [*state date or other time reference*], AND PLAINTIFF DID NOT COMMENCE THIS ACTION UNTIL _____ [*state time differential*]. IN THE INTERIM, _____ [*specify interim events that now make plaintiff's action unreasonable*], WHICH MAKES PLAINTIFF'S ACTION UNREASONABLE. THEREFORE, THE REQUEST FOR INJUNCTIVE RELIEF SHOULD BE DENIED.

Plaintiff's Laches. An injunction cannot be granted when plaintiff has been guilty of laches prior to initiating an action against defendant (*Holt v. County of Monterey (1982) 128 Cal. App. 3d 797, 801, 180 Cal. Rptr. 514* ; *Vesper v. Forest Lawn Cemetery Asso. (1937) 20 Cal. App. 2d 157, 165-166* ; *Los Angeles Athletic Club v. Long Beach (1932) 128 Cal. App. 427, 433, 17 P.2d 1061*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to an application for a preliminary injunction when that relief is barred by plaintiff's laches in bringing the action. In an appropriate case, the contentions *set forth in § 116.36* may be combined with those set forth in this form.

In addition, these points and authorities may, with appropriate modifications, be used (1) in support of a demurrer to a complaint for injunctive relief [*see Code Civ. Proc. § 430.10(e)*], (2) as an affirmative defense in an answer to such a complaint [*see Code Civ. Proc. § 431.30(b)(2)*], (3) in support of a motion for summary judgment in such an action [*see Code Civ. Proc. § 437c*], or (4) in support of a petition for a writ of prohibition [*see Code Civ. Proc. §§ 1102, 1103*] seeking to restrain a court from enforcing injunctive relief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts that establish why the plaintiff's delay in seeking relief is unreasonable under the circumstances.

[c] Related Pleading and Practice Forms

For discussion of various methods of opposing applications for provisional and permanent injunctive relief, a form of declaration to oppose an application for a preliminary injunction, and a form of demurrer to a complaint for injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender).

[3] Discussion of Authorities

[a] Plaintiff's Laches

In ***Holt v. County of Monterey*** *(1982) 128 Cal. App. 3d 797, 180 Cal. Rptr. 514* , plaintiff brought an action for mandamus and injunctive relief to compel a county to set aside its decision approving a specific plan for development of a subdivision and granting of a use permit for the first phase of construction. The trial court denied relief, upholding several affirmative defenses raised by the county, including laches.

The court of appeal affirmed, stating that the issue of laches was dispositive. Plaintiff knew of the proposed project and its approval by the county for over 2 1/2 years prior to filing suit, and during that time the developers expended over $4 million in development costs in reliance on the county's earlier approval of the plan. The court found that plaintiff's delay in filing suit was unreasonable and that the developers substantially and justifiably relied to their detriment on the adoption of the specific plan. Therefore, because the unjustified delay caused injury to another, the defense of laches was properly sustained, even though plaintiff's suit was brought within the statutory time limits (*128 Cal. App. 3d 797, 800-801)* .

In ***Vesper v. Forest Lawn Cemetery Asso.*** *(1937) 20 Cal. App. 2d 157* , plaintiff brought an action for an injunction to prevent defendants from engaging in the undertaking business in a particular building. Defendants demurred to the complaint, and the superior court sustained the demurrer, denied plaintiff's motion to reconsider and for permission to file an amended complaint, and then entered a judgment of dismissal.

The court of appeal affirmed on two grounds. First, it stated that the complaint indicated on its face that plaintiff had not sustained any injury. Second, it noted that the superior court had the right to consider the laches of plaintiff in passing on the request for the injunction. Plaintiff had not commenced his action against defendants until nearly two years after

the lease was entered into, under which the lessor agreed to build a structure to be used exclusively as a mortuary, and more than a year after the business of the funeral parlor was instituted. Plaintiffs had stood by while defendants had constructed and occupied a large building to carry on the business of a funeral parlor and for a considerable period of time had made no complaint while the business was being operated. Therefore, plaintiff could not, after having passively permitted defendants to spend money and effort, then enjoin defendants from carrying on their business. The court also noted that something more was present in this case than mere delay on plaintiff's part; defendants had expended large sums of money in equipping the building as well as carrying on long and expensive litigation concerning the mortuary (*20 Cal. App. 2d 157, 165-166)* .

In ***Los Angeles Athletic Club v. Long Beach*** *(1932) 128 Cal. App. 427, 17 P.2d 1061* , plaintiff maintained a club building on oceanfront property that was adjacent to a lot owned by defendant city on which the city had constructed a crescent-shaped breakwater and, within this breakwater, a fill on which it was planning to construct a municipal auditorium. Plaintiff brought an action in which it sought to compel the city to abate and remove the breakwater and the fill or, in the alternative, erect some type of work to adequately protect plaintiff's property. Defendant's demurrer to the first amended complaint was sustained by the superior court, which then entered a judgment of dismissal. Plaintiff appealed from this dismissal.

The court of appeal affirmed. The court observed that the breakwater was constructed more than six months prior to the filing of the complaint. The complaint indicated that plaintiff had stood by and done nothing during the entire course of construction as well as during the more than six months after the breakwater was completed. Hence, because plaintiff had failed to plead facts legally excusing this inaction, plaintiff's laches and conduct amounted to an estoppel that appeared on the face of the complaint. Thus, the judgment of dismissal was affirmed (*128 Cal. App. 427, 433)* .

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11-116 California Points & Authorities § 116.39

§ 116.39 Opposing Application for Preliminary Injunction [Code Civ. Proc. § 527]--Plaintiff's Unclean Hands

[1] FORM

[*Caption. See § 116.32.*]

A PRELIMINARY INJUNCTION MAY NOT BE ISSUED WHEN PLAINTIFF IS BARRED BY THE DOCTRINE OF UNCLEAN HANDS. IN THIS CASE, PLAINTIFF _____ [*describe conduct amounting to unclean hands*], WHICH BRINGS PLAINTIFF'S CONDUCT WITHIN THE UNCLEAN HANDS DOCTRINE. THEREFORE, THE REQUEST FOR INJUNCTIVE RELIEF SHOULD BE DENIED.

Plaintiff's Unclean Hands. A party seeking the interposition of a court of equity must come into court with clean hands. When plaintiff's conduct shows that he or she has unclean hands, a preliminary injunction will be denied (*London v. Marco (1951) 103 Cal. App. 2d 450, 453, 229 P.2d 401*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to an application for a preliminary injunction when that relief is barred by plaintiff's unclean hands.

With appropriate modifications, these points and authorities may be used (1) in support of a demurrer to a complaint for injunctive relief [*see Code Civ. Proc. § 430.10(e)*], (2) as an affirmative defense in an answer to such a complaint [*see Code Civ. Proc. § 431.30(b)(2)*], (3) in support of a motion for summary judgment in such an action [*see Code Civ. Proc. § 437c*], or (4) in support of a petition for a writ of prohibition [*see Code Civ. Proc. §§ 1102, 1103*] seeking to restrain a court from enforcing injunctive relief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts that establish unclean hands on the part of the plaintiff, including any facts that show that defendant was prejudiced by plaintiff's actions.

[c] Related Pleading and Practice Forms

For discussion of the various methods of opposing applications for provisional and permanent injunctive relief, as well as for a form of declaration to oppose an application for a preliminary injunction and a form of demurrer to a complaint for injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender).

[3] Discussion of Authorities

[a] Plaintiff's Unclean Hands

In ***London v. Marco*** *(1951) 103 Cal. App. 2d 450, 229 P.2d 401* , defendants had sold a single-family dwelling to plaintiffs. Because of plaintiffs' failure to pay one of the installments of the promissory note that secured the deed of trust on the property, defendants published a notice of trustee's sale. Shortly before the date fixed for the sale, plaintiffs filed an action to restrain the sale in the Los Angeles branch of the Los Angeles County superior court. Plaintiffs also sought a preliminary injunction to that effect. At the hearing on the order to show cause why a preliminary injunction should not issue, plaintiffs' counsel stated that all property taxes, including those due the preceding April, had been paid. The court issued an order granting a preliminary injunction that enjoined the sale of the property and directed that plaintiffs make all payments of taxes assessed or payable against the property when the same were required and due. Several weeks after the issuance of the preliminary injunction, defendants ascertained that the taxes had not been paid and that an income tax lien had been filed against the property. Defendants then moved to dissolve the preliminary injunction on the ground that plaintiffs had misrepresented essential facts to the court with reference to the taxes. That motion was granted on the ground that plaintiffs had perpetrated a fraud on the court. Thereafter, another notice of sale was published by the trustee. This time, plaintiffs filed a dismissal of the Los Angeles action and simultaneously filed another nearly identical action in the Santa Monica branch of the Los Angeles County superior court. They did not, however, disclose the facts that the former action had been heard in the Los Angeles branch and that the preliminary injunction had been dissolved because of the fraud perpetrated on the court. On defendants' motion, the Santa Monica action was transferred for hearing before the court in Los Angeles. There, plaintiffs' application for a preliminary injunction was denied. Plaintiffs appealed from that order denying a preliminary injunction to restrain the foreclosure sale under the deed of trust.

The court of appeal affirmed the order denying the preliminary injunction. It noted the familiar rule that one who seeks the interposition of a court of equity must come into court with clean hands. It further noted that plaintiffs' hands were more than slightly soiled (1) by the false statements made in the first action concerning the payment of taxes, and (2) by the dismissal of the first action and the filing of the second in a branch court in the same jurisdiction without disclosing that the former action had been dismissed and that the first court had dissolved the preliminary injunction by reason of

the false statements. Given this record, the court of appeal could not say that the superior court had abused its discretion in denying a preliminary injunction for plaintiffs (*103 Cal. App. 2d 450, 453)* .

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11-116 California Points & Authorities § 116.40

§ 116.40 Opposing Application for Preliminary Injunction [Code Civ. Proc. § 527]--No Cause of Action Stated

[1] FORM

[*Caption. See § 116.32.*]

A PRELIMINARY INJUNCTION MAY NOT PROPERLY BE ISSUED WHEN THE COMPLAINT FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION. IN THIS CASE, THE COMPLAINT ALLEGES ONLY THAT _____ [*summarize allegations of complaint*], WHICH, EVEN IF TRUE, IS INSUFFICIENT TO STATE A CAUSE OF ACTION. THEREFORE, THE INJUNCTIVE RELIEF SHOULD BE DENIED.

Failure to State Cause of Action Prohibits Issuance of Preliminary Injunction. A preliminary injunction is not warranted if there is not on file a complaint that states facts sufficient to constitute a cause of action for injunctive relief of the character embraced in the preliminary injunction (*Moreno Mut. Irr. Co. v. Beaumont Irr. Dist. (1949) 94 Cal. App. 2d 766, 778, 211 P.2d 928*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in response to a temporary restraining order and order to show cause why a preliminary injunction should not be granted or in opposition to a motion for preliminary injunction. Additional points and authorities should be added showing that the specific facts alleged fail to constitute a cause of action. For the essential elements of a cause of action for injunctive relief [*see § 116.52*; *see also §§ 116.53 -116.55*].

If the defendant is opposing the preliminary injunction on the ground that the complaint contains no factual showing of irreparable injury, § 116.37 should be used. If the opposition is grounded on the objection that the complaint shows on its face that plaintiff has an adequate remedy at law for damages, § 116.41 should be used.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts establishing that even if the allegations of the complaint are true (for the sake of argument only), they fail to state a cause of action on the basis of which injunctive relief can be granted.

[c] Related Pleading and Practice Forms

For discussion of the various methods of opposing applications for provisional and permanent injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender).

[3] Discussion of Authorities

[a] Failure to State Cause of Action Prohibits Issuance of Preliminary Injunction

In ***Moreno Mut. Irr. Co. v. Beaumont Irr. Dist.*** *(1949) 94 Cal. App. 2d 766, 211 P.2d 928* , plaintiff brought an action to quiet title to alleged water rights and to set aside a prior stipulated judgment between plaintiff and the defendants. The superior court issued a preliminary injunction that prohibited defendants from enforcing portions of the stipulated judgment. Defendants appealed. They contended that the prior judgment controlled the entire situation and that, therefore, no cause of action had been stated in the complaint that would have permitted the court to issue the preliminary injunction.

The court of appeal agreed with this contention. It observed that a preliminary injunction is warranted only if there is on file a complaint that states a sufficient cause of action for injunctive relief of the character embraced in the preliminary injunction. Because the prior judgment was not void on its face, there could be no collateral attack on its validity. Hence, the order granting the preliminary injunction prevented the enforcement of the stipulated judgment and was not authorized. Thus, the order had to be reversed (*94 Cal. App. 2d 766, 778)* .

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11-116 California Points & Authorities § 116.41

§ 116.41 Opposing Application for Preliminary Injunction [Code Civ. Proc. § 527]--Adequate Legal Remedy--Damages

[1] FORM

[*Caption. See § 116.32.*]

A PRELIMINARY INJUNCTION MAY NOT BE ISSUED WHEN THE LEGAL REMEDY OF DAMAGES IS AVAILABLE TO PLAINTIFF. IN THIS CASE, INJUNCTIVE RELIEF SHOULD BE DENIED BECAUSE EVEN IF THE ALLEGATIONS OF PLAINTIFF'S COMPLAINT ARE TRUE, THE REMEDY OF DAMAGES IS ADEQUATE TO FULLY COMPENSATE PLAINTIFF, GIVEN THE TYPE OF INJURY ALLEGED, NAMELY _____ [*describe plaintiff's purported injury*].

Damages as Adequate Legal Remedy. An injunction cannot be granted when damages would afford an adequate legal remedy to plaintiff (*Brownfield v. Daniel Freeman Marina Hospital (1989) 208 Cal. App. 3d 405, 410, 414, 256 Cal. Rptr. 240* ; *Thayer Plymouth Center, Inc. v. Chrysler Motors Corp. (1967) 255 Cal. App. 2d 300, 306-307, 63 Cal. Rptr. 148* ; *Pellissier v. Whittier Water Co. (1922) 59 Cal. App. 1, 6-7, 209 P. 593*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to an application for a preliminary injunction when that relief is barred by the fact that plaintiff has an adequate remedy at law, namely, monetary damages. In particular, they may be submitted in opposition to the contentions made in § 116.23.

With appropriate modifications, these points and authorities may be used (1) in support of a demurrer to a complaint for injunctive relief [*see Code Civ. Proc. § 430.10(e)*], (2) as an affirmative defense in an answer to such a complaint [*see Code Civ. Proc. § 431.30(b)(2)*], (3) in support of a motion for summary judgment in such an action [*see Code Civ. Proc. § 437c*], or (4) in support of a petition for a writ of prohibition [*see Code Civ. Proc. §§ 1102, 1103*] seeking to restrain a court from enforcing injunctive relief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts establishing that, even if plaintiff's allegations are true (for the sake of argument), the remedy of damages is clearly adequate in view of the type of injury alleged.

[c] Related Pleading and Practice Forms

For discussion of the various methods of opposing applications for provisional and permanent injunctive relief as well as for a form of declaration to oppose an application for a preliminary injunction and a form of demurrer to a complaint for injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender).

[3] Discussion of Authorities

[a] Damages as Adequate Legal Remedy

The facts and procedural background of ***Brownfield v. Daniel Freeman Marina Hospital*** *(1989) 208 Cal. App. 3d 405, 256 Cal. Rptr. 240* , are discussed in *§ 116.23[4][a]*. In that case, plaintiff sought, in part, an injunction to require a hospital to provide rape victims with information and access to estrogen pregnancy prophylaxis, including the "morning after" pill.

Acting on plaintiff's appeal, the appellate court affirmed the judgment for defendant, and stated the following general principles with respect to obtaining injunctive relief. The elements of a cause of action for injunctive relief are a tort or other wrongful act constituting a cause of action, and irreparable injury, that is, a factual showing that the wrongful act constitutes an actual or threatened injury to property or personal rights that cannot be compensated by an ordinary damages award (*208 Cal. App. 3d 405, 410)* . In this case, the court concluded that plaintiff could have filed an action for damages under the circumstances (*208 Cal. App. 3d 405, 414)* .

In ***Thayer Plymouth Center, Inc. v. Chrysler Motors Corp.*** *(1967) 255 Cal. App. 2d 300, 63 Cal. Rptr. 148* , plaintiff automobile dealer brought an action for specific performance of a dealership contract and for damages. Plaintiff obtained a preliminary injunction against defendant corporation that enjoined defendant from terminating the dealership agreement existing between the two parties. Defendant appealed from the order granting the preliminary injunction.

One of its three contentions with which the court of appeal agreed was that plaintiff had an adequate remedy at law for damages and that, consequently, an injunction, the effect of which was to decree specific performance, should not have been issued. The court of appeal thus reversed the order granting the preliminary injunction. The court stated that specific performance of a contract will not be compelled when an adequate remedy exists at law; it also stated that if

monetary damages afford adequate relief and are not extremely difficult to ascertain, an injunction cannot be granted. It noted that, generally, when damages afford an adequate remedy by way of compensation for breach of a contract, equitable relief will be denied. It observed, moreover, that an automobile dealer's remedy at law for damages for the breach of a distributorship contract ordinarily affords adequate relief (*255 Cal. App. 2d 300, 306-307)* .

In ***Pellissier v. Whittier Water Co.*** *(1922) 59 Cal. App. 1, 209 P. 593* , plaintiff brought an action against defendants to have the court declare that, by reason of a contract entered into between his predecessor and the defendant water company, he was entitled to a preferential water rate. Prior to a trial on the merits, plaintiff sought a preliminary injunction to restrain either of the defendants from shutting off his water supply or disconnecting his water lines from defendants' conduit or ditch so long as he paid the preferential rate to the defendants. The superior court denied the preliminary injunction, and plaintiff appealed.

The court of appeal affirmed the order denying the injunction. It stated that injunctive relief will ordinarily be granted only when there can be no adequate pecuniary compensation because it would be difficult or impossible to ascertain the damages resulting from an act; in such a case, the legal remedy fails. But when damages can be accurately measured and will fully compensate for any loss that may be suffered by plaintiff, an injunction is not proper. In this case, the damages that plaintiff would have suffered could have been accurately measured and would have fully compensated for any loss that he might have suffered. Hence, the superior court's order denying the preliminary injunction was affirmed (*59 Cal. App. 1, 6-7)* .

[4] Additional Authorities

[a] Damages as Adequate Legal Remedy

In *Cox Cable San Diego, Inc. v. Bookspan (1987) 195 Cal. App. 3d 22, 240 Cal. Rptr. 407* , the court of appeal affirmed a trial court's denial of a preliminary injunction to a cable television company to allow it to reconnect subscribers at an apartment complex after the owner of the complex had disconnected them, in breach of contract. The court of appeal said that when money damages would be adequate, the cable company had no *First Amendment* right to connect its equipment, and the permanent physical intrusion required for reconnection would be more harmful to the complex owner and a competing cable company than exclusion would be to plaintiff (*195 Cal. App. 3d 22, 25-32)* .

In *Parker v. Pacific G. & E. Co. (1920) 50 Cal. App. 264, 195 P. 60* , plaintiff brought an action for an injunction to restrain defendants from discharging water from a dam over plaintiff's property. Plaintiff also sought a preliminary injunction to the same effect, but the superior court issued an order denying it. Plaintiff appealed, but the court of appeal affirmed the order. It noted that plaintiff had failed to show that defendants were insolvent or unable to respond in damages. In fact, if plaintiff suffered any monetary loss it would be negligible and defendants would be able to respond in damages. In addition, there was no showing that any damages could not be readily ascertained. Therefore, the superior court did not abuse its discretion in denying plaintiff the preliminary injunction that he sought (*50 Cal. App. 264, 268)* .

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11-116 California Points & Authorities § 116.42

§ 116.42 Opposing Application for Preliminary Injunction [Code Civ. Proc. § 527]--Adequate Legal Remedy--Mandate

[1] FORM

[*Caption. See § 116.32.*]

A PRELIMINARY INJUNCTION MAY NOT BE ISSUED WHEN THE LEGAL REMEDY OF A WRIT OF MANDATE IS AVAILABLE TO PLAINTIFF. IN THIS CASE, THE NATURE OF RELIEF SOUGHT BY PLAINTIFF, NAMELY, _____ [*describe type of relief sought*] MAY BE OBTAINED BY SECURING A WRIT OF MANDATE, IN VIEW OF THE PRIMA FACIE REQUIREMENTS FOR ISSUANCE OF THAT WRIT. THEREFORE, THE REQUEST FOR INJUNCTIVE RELIEF SHOULD BE DENIED.

Mandate as Adequate Legal Remedy. An injunction cannot be granted when a writ of mandate would afford an adequate legal remedy to plaintiff (*Moore v. Superior Court (1936) 6 Cal. 2d 421, 423-424, 57 P.2d 1314*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to an application for a preliminary injunction when that relief is barred by the fact that plaintiff has an adequate remedy at law, namely a writ of mandate.

With appropriate modifications, these points and authorities may be used (1) in support of a demurrer to a complaint for injunctive relief [*see* Code Civ. Proc. § 430.10(e)], (2) as an affirmative defense in an answer to such a complaint [*see Code Civ. Proc. § 431.30(b)(2)*], (3) in support of a motion for summary judgment in such an action [*see Code Civ. Proc. § 437c*], or (4) in support of a petition for a writ of prohibition [*see Code Civ. Proc. §§ 1102, 1103*] seeking to restrain a court from enforcing injunctive relief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts establishing that the type of relief being sought is consistent with that afforded by issuance of a writ of mandate, and that any related statutory prerequisites to issuance of the writ (apart from the writ petition itself) are satisfied.

[c] Related Pleading and Practice Forms

For discussion of the various methods of opposing applications for provisional and permanent injunctive relief as well as for a form of declaration to oppose an application for a preliminary injunction and a form of demurrer to a complaint for injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender). For discussion, procedural checklist, and forms for use in obtaining a writ of prohibition or mandate, see California Forms of Pleading and Practice, Ch. 358, *Mandate and Prohibition* (Matthew Bender).

[3] Discussion of Authorities

[a] Mandate as Adequate Legal Remedy

In ***Moore v. Superior Court*** *(1936) 6 Cal. 2d 421, 57 P.2d 1314* , at issue was a statute that authorized the Fish and Game Commission to grant permits for the taking of fish for reduction or extraction purposes. Under the statute, the commission was required to limit the taking of fish in order to prevent waste or depletion of a species. In granting permits to various persons during the seasons of 1933-1934 and 1934-1935, the commission made equal allotments among the various plants. For the 1935-1936 season, however, the commission determined that permittees who had not previously engaged in the business should be permitted to take only half the amount allowed to those previously operating. Three new plants brought an action to enjoin the members of the commission from enforcing the terms of their permits; they alleged that the action of the commission amounted to an arbitrary and unjustifiable discrimination against them. A superior court issued a preliminary injunction that restrained the commission from interfering with the operations of the plants so long as they did not take a certain amount of fish during the season in question. The members of the commission applied for a writ of prohibition from the Supreme Court to restrain the superior court from enforcing the preliminary injunction. The Supreme Court issued the writ.

The Court stated that if a review of the commission's determination was desired, it had to be in a proper proceeding. That proceeding was a proceeding in mandamus to compel the granting of the permits sought. Hence, an appropriate legal remedy was available, and the equitable remedy of an injunction was not proper (*6 Cal. 2d 421, 423-424)* .

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CHAPTER 116 INJUNCTIONS
PART II. FORMS
A. Injunctive Relief in General

11-116 California Points & Authorities § 116.43

§ 116.43 Opposing Application for Preliminary Injunction [Code Civ. Proc. § 527]--Adequate Legal Remedy--Quo Warranto

[1] FORM

[*Caption. See § 116.32.*]

A PRELIMINARY INJUNCTION MAY NOT BE ISSUED WHEN THE LEGAL REMEDY OF QUO WARRANTO IS AVAILABLE TO PLAINTIFF. IN THIS CASE, THE NATURE OF RELIEF SOUGHT BY PLAINTIFF, NAMELY, _____ [*describe type of relief sought*] MAY BE OBTAINED IN AN ACTION FOR QUO WARRANTO. THEREFORE, THE REQUEST FOR INJUNCTIVE RELIEF SHOULD BE DENIED.

Quo Warranto as Adequate Legal Remedy. An injunction cannot be granted when quo warranto would afford an adequate legal remedy to plaintiff (*Hallinan v. Mellon (1963) 218 Cal. App. 2d 342, 344-348, 32 Cal. Rptr. 446*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to an application for a preliminary injunction when that relief is barred by the fact that plaintiff has an adequate remedy at law, namely, an action for quo warranto.

With appropriate modifications, these points and authorities may be used (1) in support of a demurrer to a complaint for injunctive relief [*see Code Civ. Proc. § 430.10(e)*], (2) as an affirmative defense in an answer to such a complaint [*see Code Civ. Proc. § 431.30(b)(2)*], (3) in support of a motion for summary judgment in such an action [*see Code Civ. Proc. § 437c*], or (4) in support of a petition for a writ of prohibition [*see Code Civ. Proc. §§ 1102, 1103*] seeking to restrain a court from enforcing injunctive relief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts establishing that the relief sought by the plaintiff is of a kind that is appropriately sought by utilizing a quo warranto action rather than by applying for an injunction. Note that special requirements must be met in order to utilize a quo warranto action [*see generally Code Civ. Proc. § 803 et seq.*].

[c] Related Pleading and Practice Forms

For discussion of the various methods of opposing applications for provisional and permanent injunctive relief as well as for a form of declaration to oppose an application for a preliminary injunction and a form of demurrer to a complaint for injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender). For a discussion of the situations in which quo warranto is an appropriate remedy, see California Forms of Pleading and Practice, Ch. 483, *Quo Warranto* (Matthew Bender).

[3] Discussion of Authorities

[a] Quo Warranto as Adequate Legal Remedy

In ***Hallinan v. Mellon*** *(1963) 218 Cal. App. 2d 342, 32 Cal. Rptr. 446* , plaintiff brought a taxpayer's action against a police commissioner and his surety to enjoin the alleged wrongful payment of monies and for the return of monies allegedly wrongfully procured. Defendants demurred on the grounds that plaintiff lacked legal capacity to sue and that the court lacked jurisdiction over the subject matter. The superior court sustained the demurrer for the reason that quo warranto was the only legal method of determining title to office. Plaintiff appealed from the judgment of dismissal.

The court of appeal affirmed. It observed that, while a taxpayer may attack the legality of the office, he may not attack the right of an incumbent to an office; this was what plaintiff was attempting in this situation. Because the right to receive salary is an incident to the title to the office and not an incident to the exercise of its duties, an action to determine the de facto officer's right to salary is, therefore, an action to try title to the office. Thus, the action was actually one to try title to the defendant's office of police commissioner, something that could only be done by quo warranto. For this reason, the court of appeal affirmed the judgment of dismissal (*218 Cal. App. 2d 342, 344-348)* .

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11-116 California Points & Authorities § 116.44

§ 116.44 Opposing Application for Preliminary Injunction [Code Civ. Proc. § 527]--Adequate Legal Remedy--Claim and Delivery

[1] FORM

[*Caption. See § 116.32.*]

A PRELIMINARY INJUNCTION MAY NOT BE ISSUED WHEN THE LEGAL REMEDY OF AN ACTION FOR CLAIM AND DELIVERY IS AVAILABLE TO PLAINTIFF. IN THIS CASE, THE NATURE OF PLAINTIFF'S CLAIM, NAMELY, _____ [*summarize plaintiff's claim for relief*] IS APPROPRIATELY ADDRESSED, IF AT ALL, BY AN ACTION FOR CLAIM AND DELIVERY. THEREFORE, THE REQUEST FOR INJUNCTIVE RELIEF SHOULD BE DENIED.

Claim and Delivery as Adequate Legal Remedy. An injunction cannot be granted when an action for claim and delivery would afford an adequate legal remedy to plaintiff (*Richards v. Kirkpatrick (1879) 53 Cal. 433, 434-435)* .

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to an application for a preliminary injunction when that relief is barred by the fact that plaintiff has an adequate remedy at law, namely, an action for claim and delivery.

With appropriate modifications, these points and authorities may be used (1) in support of a demurrer to a complaint for injunctive relief [*see Code Civ. Proc. § 430.10(e)*], (2) as an affirmative defense in an answer to such a complaint [*see Code Civ. Proc. § 431.30(b)(2)*], (3) in support of a motion for summary judgment in such an action [*see Code Civ. Proc. § 437c*], or (4) in support of a petition for a writ of prohibition [*see Code Civ. Proc. §§ 1102, 1103*] seeking to restrain a court from enforcing injunctive relief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts that establish why plaintiff's claim, assuming its validity (for the sake of argument), is appropriately addressed by an action for claim and delivery rather than through injunctive relief.

[c] Related Pleading and Practice Forms

For discussion of the various methods of opposing applications for provisional and permanent injunctive relief as well as for a form of declaration to oppose an application for a preliminary injunction and form of demurrer to a complaint for injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender). For discussion and forms related to actions for possession of personal property, as well as to the provisional remedy of claim and delivery, see California Forms of Pleading and Practice, Ch. 119, *Claim and Delivery* (Matthew Bender).

[3] Discussion of Authorities

[a] Claim and Delivery as Adequate Legal Remedy

In ***Richards v. Kirkpatrick*** *(1879) 53 Cal. 433* , one of the defendants had obtained a judgment against a person named Ivy and had caused a writ of execution to be issued on the personal property in question. The other defendant was a constable who had levied the execution on the property and was about to sell it in satisfaction of the execution. Two days after the levy, the plaintiff in *Richards* commenced an action for claim and delivery against the constable in order to recover the property; process was issued, and the sheriff took possession of the property. Then, another two days thereafter, Richards commenced an action to restrain the sale of the property under the execution of the action in which the writ of execution had issued. The trial court issued a preliminary injunction, and defendants demurred to the complaint and sought to have the preliminary injunction dissolved. The trial court overruled the demurrer and denied the motion to dissolve the injunction. Defendants appealed, and the Supreme Court reversed.

The Supreme Court noted that a person is not entitled to an injunction in a case when he has a plain, speedy, and adequate remedy at law. Here, there was no reason given why the plaintiff could not obtain all the relief to which he was entitled in the pending claim and delivery action. While the property was being held by the sheriff under the process in that action, the constable could not sell it. Moreover, should the property be redelivered by the sheriff to the constable on his execution of the statutory undertaking, that undertaking was presumptively sufficient protection to the plaintiff if he recovered a judgment in that action (*53 Cal. 433, 434-435)* .

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11-116 California Points & Authorities § 116.45

§ 116.45 Opposing Application for Preliminary Injunction [Code Civ. Proc. § 527]--Public Interest

[1] FORM

[*Caption. See § 116.32.*]

A PRELIMINARY INJUNCTION MAY NOT BE ISSUED WHEN ITS ISSUANCE WOULD BE CONTRARY TO THE PUBLIC INTEREST. IN THIS CASE, THE INJUNCTIVE RELIEF SOUGHT BY THE PLAINTIFF WOULD BE INJURIOUS TO THE PUBLIC INTEREST BECAUSE _____ [*specify reason*]. THEREFORE, THE REQUEST FOR RELIEF SHOULD BE DENIED.

Public Interest. An injunction cannot be granted when its issuance would be contrary to public policy and the public interest (*Loma Portal Civic Club v. American Airlines, Inc. (1964) 61 Cal. 2d 582, 588-591, 594, 39 Cal. Rptr. 708, 394 P.2d 548* ; *Triple A Machine Shop, Inc. v. State of California (1989) 213 Cal. App. 3d 131, 144-145, 261 Cal. Rptr. 493*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to an application for a preliminary injunction when that relief would be contrary to public policy and the public interest.

With appropriate modifications, these points and authorities may be used (1) in support of a demurrer to a complaint for injunctive relief [*see Code Civ. Proc. § 430.10(e)*], (2) as an affirmative defense in an answer to such a complaint [*see Code Civ. Proc. § 431.30(b)(2)*], (3) in support of a motion for summary judgment in such an action [*see Code Civ. Proc. § 437c*], or (4) in support of a petition for a writ of prohibition [*see Code Civ. Proc. §§ 1102, 1103*] seeking to restrain a court from enforcing injunctive relief.

For related points and authorities utilizing public interest grounds in opposing an injunction against execution of a statute, see *§ 116.83*.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts and legal argument establishing why issuance of an injunction would be injurious to the public interest or otherwise against public policy, as opposed to the narrow interest of a party.

[c] Related Pleading and Practice Forms

For discussion of the various methods of opposing applications for provisional and permanent injunctive relief as well as for a form of declaration to oppose an application for a preliminary injunction and a form of demurrer to a complaint for injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender).

[3] Discussion of Authorities

[a] Public Interest

In ***Loma Portal Civic Club v. American Airlines, Inc.*** *(1964) 61 Cal. 2d 582, 39 Cal. Rptr. 708, 394 P.2d 548* , plaintiffs were owners of property near the San Diego public airport who brought an action to enjoin certain flight operations as a claimed nuisance. The superior court granted defendants' motion for summary judgment, and plaintiffs appealed.

The Supreme Court affirmed the judgment. It noted that under the pleadings and the uncontradicted affidavits filed by the defendants, there was no substantial issue to be tried. Hence, summary judgment was appropriate. The Supreme Court observed that when a prima facie case has otherwise been made out, an injunction will be granted only when such a remedy is appropriate; in determining the availability of injunctive relief, the court must consider the interests of third persons and of the general public.

In this situation, the national interest in commerce, transportation, and defense was being furthered by the operation of scheduled passenger, freight, and postal jet carriage into and out of San Diego. The people of San Diego and of California were benefitting from these operations, and plaintiffs did not contend that defendants' operations were not in furtherance of the public interest. Defendants' jet services were in the public interest, and the public had come to rely on and have a substantial stake in the continuation of that service. Therefore, it was clear to the Supreme Court that it would be contrary to the policy of California to grant an injunction against flight operations in the vicinity of a public airport, conducted by regularly scheduled, certificated airlines, not alleged to be conducted in violation of federal orders and regulations or in an imminently dangerous manner and not alleged to be carried on in a manner inconsistent with the public interest inhering in the continuation of such service. Hence, an injunction was not available to plaintiffs (*61 Cal. 2d 582, 588-591)* .

The facts and procedural background of ***Triple A Machine Shop, Inc. v. State of California*** *(1989) 213 Cal. App. 3d 131, 261 Cal. Rptr. 493* , are discussed in *§ 116.37[3][a]*. In that case, the court of appeal said that overriding public interests may compel denial of injunctive relief. Although the court reversed because the specific grounds relied on in granting the injunction did not exist, the court said the most significant effect of the injunction lay in its impact on the investigation and prosecution of criminal charges in that case; and that the separation of powers doctrine requires judicial restraint in enjoining criminal investigations or prosecutions. It said that the prosecutor's authority stems from the executive branch of government, and the investigation and gathering of evidence relating to criminal offenses is the prosecutor's responsibility and rests solely within his or her discretion; that the discretionary authority vested in the district attorney to investigate and prosecute criminal conduct is considered too vital to the interest of public order to be subjected to prior restraint by the courts except under extraordinary circumstances, and that the balance between the executive and judicial branches would be profoundly upset if the judiciary assumed superintendence over the law enforcement activities of the executive branch on nothing more than a vague fear or suspicion that its officers will be unfaithful to their oaths or unequal to their responsibility (*213 Cal. App. 3d 131, 144-145)* .

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11-116 California Points & Authorities § 116.46

§ 116.46 Opposing Application for Preliminary Injunction [Code Civ. Proc. § 527]--Changed Circumstances

[1] FORM

[*Caption. See § 116.32.*]

A PRELIMINARY INJUNCTION MAY NOT BE ISSUED WHEN CIRCUMSTANCES HAVE SO CHANGED AFTER THE FILING OF THE COMPLAINT THAT NO UNLAWFUL ACT IS THREATENED OR THAT INJUNCTIVE RELIEF WOULD BE UNNECESSARY. IN THIS CASE, EVEN IF PLAINTIFF'S COMPLAINT INITIALLY MADE OUT A PRIMA FACIE SHOWING OF ENTITLEMENT TO INJUNCTIVE RELIEF, THE CIRCUMSTANCES HAVE SO CHANGED SINCE THE COMPLAINT WAS FILED AS TO MAKE THE ISSUANCE OF AN INJUNCTION INAPPROPRIATE. THESE CHANGED CIRCUMSTANCES INCLUDE _____ [*specify facts showing changed circumstances*]. THEREFORE, THE REQUEST FOR A PRELIMINARY INJUNCTION SHOULD BE DENIED.

Changed Circumstances. An injunction cannot be granted when circumstances have so changed after the filing of the complaint that no unlawful act is threatened or that injunctive relief would be unnecessary (*Engle v. City of Oroville (1965) 238 Cal. App. 2d 266, 270, 47 Cal. Rptr. 630* (no unlawful act threatened); *Mallon v. City of Long Beach (1958) 164 Cal. App. 2d 178, 186-190, 330 P.2d 423* (injunctive relief unnecessary)).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to an application for a preliminary injunction when circumstances have so changed after the filing of the complaint that no unlawful act is threatened and that injunctive relief would be unnecessary.

With appropriate modifications, these points and authorities may be used (1) in support of a demurrer to a complaint for injunctive relief [*see Code Civ. Proc. § 430.10(e)*], (2) as an affirmative defense in an answer to such a complaint [*see Code Civ. Proc. § 431.30(b)(2)*], (3) in support of a motion for summary judgment in such an action [*see Code Civ. Proc. § 437c*], or (4) in support of a petition for a writ of prohibition [*see Code Civ. Proc. §§ 1102, 1103*] seeking to restrain a court from enforcing injunctive relief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts that establish how the circumstances of the parties have changed since the complaint was first filed and why this change removes the need for injunctive relief.

[c] Related Pleading and Practice Forms

For discussion of the various methods of opposing applications for provisional and permanent injunctive relief as well as for a form of declaration to oppose an application for a preliminary injunction and a form of demurrer to a complaint for injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender).

[3] Discussion of Authorities

[a] Changed Circumstances

In ***Engle v. City of Oroville*** *(1965) 238 Cal. App. 2d 266, 47 Cal. Rptr. 630* , plaintiff obtained a judgment that permanently enjoined defendant city from discharging sewage effluent from its sewage plant into the Feather River and that awarded damages to plaintiffs.

The court of appeal reversed the judgment. Concerning the injunctive portion of the judgment, the court stated when, during the course of litigation and before final judgment, the conditions on which a previously issued injunction no longer exist and cannot recur, the injunction should be dissolved. It noted that an injunction will not be granted when, at the time of the hearing, conditions have so changed that no unlawful act is threatened. In the present situation, the city had been guilty of no bad faith and had abated the nuisance as governmental process would permit. There was no possibility that the nuisance would or could recur. Therefore, the court reversed the judgment (*238 Cal. App. 2d 266, 270)* .

In ***Mallon v. City of Long Beach*** *(1958) 164 Cal. App. 2d 178, 330 P.2d 423* , plaintiff brought an action to enjoin defendant city from using certain oil and gas revenues, other than for trust purposes, that had been developed on tide and other submerged lands deeded to the city in trust. After the time that the complaint was filed, a Supreme Court decision, a legislative enactment, and a final stipulated judgment in an action between the city and state had settled, once and for all, the dispute between the defendants over the ownership of the funds accrued and accruing. These events foreclosed defendants' further use of the funds in question for the city's general use, and the city consequently filed an amended answer that stated that it would no longer continue to use the monies in the ways that it had previously done.

The superior court took notice of these changed circumstances and ruled that there was no reasonable expectation or probability that the acts complained of would be either repeated or continued and that no necessity for granting the injunctive relief existed at that time. Thus, it denied plaintiff a permanent injunction and entered judgment accordingly. Plaintiff appealed, but the court of appeal affirmed.

The court stated that a court of equity will not afford an injunction to prevent in the future that which in good faith has been discontinued in the absence of any evidence that the acts are likely to be repeated in the future. Accordingly, when events occur after the filing of the complaint that render an injunction unnecessary, it will ordinarily be refused. In the present situation, there was nothing in the record to indicate a probability of either a disposition of or an opportunity for the city in the future to abandon its declared intention to abide by the legislative enactment and the Supreme Court decision. Without such a probability, an injunction is not necessary. Thus, the superior court did not abuse its discretion denying the injunctive relief sought (*164 Cal. App. 2d 178, 190)* .

[4] Additional Authorities

[a] Changed Circumstances

In East Bay Mun. Utility Dist. v. Department of Forestry & Fire Protection *(1996) 43 Cal. App. 4th 1113, 51 Cal. Rptr. 2d 299* , plaintiff, a water district, brought a mandamus action against a defendant, an administrative agency, to challenge its approval under the Z'Berg-Negedly Forest Protect Act of 1973 (*Pub. Res. Code § 5411 et seq.*) of a particular timber harvest plan and a separate declaratory relief action which sought to challenge the legality of the administrative agency's practice or policy under the California Environmental Quality Act (CEQA). Plaintiff sought in the declaratory relief action to establish that the defendant was following a pattern and practice of improperly approving other timber harvest plans, all of which were submitted by an intervener in the action. Plaintiff alleged in its first cause of action in its complaint for declaratory relief that the defendant had a pattern and practice of improperly assessing the cumulative impacts of logging and was as a consequence improperly issuing timber harvest permits in the Mokelumne River watershed and thus improper logging practices posed a risk to downstream fisheries and to plaintiff's drinking water supplies. The second cause of action alleged that recently adopted cumulative impact assessment regulations governing the defendant were void because they were inconsistent with the California Environmental Quality Act (CEQA). The writ action had been filed the day before the declaratory relief action and the proceedings were coordinated. Ultimately, the writ action was tried and a writ of mandamus was issued, the trial court concluding that the defendant had abused its discretion in approving the particular timber harvest plan in that, among other things, the intervener had not provided sufficient information about reasonably foreseeable future projects. The defendant did not appeal. Subsequently, the first cause of action in the declaratory relief action was tried and thereafter the second cause of action was resolved by summary adjudication, the court finding that the cumulative impact rules were consistent with CEQA. As to the first cause of action, the court concluded that the defendant had impermissibly used guidelines for watershed assessment areas that had not been formally adopted under the Administrative Procedures Act (*Gov. Code § 11500 et seq.*) and directed the agency to comply with the act. However, the court declined to enjoin the defendant's use of them in the interim. The court concluded that the agency's cumulative impacts analysis was legally adequate despite the agency's improper use of the guidelines (*43 Cal. App. 4th 1113, 1120)* .

Plaintiff appealed raising may claims of error, one of which concerned the trial court's conclusion concerning the watershed assessment guidelines and another concerning the trial court's denial of declaratory relief or injunctive relief. The court of appeal affirmed the trial court's judgment. With regard the watershed assessment guidelines, the court of appeal pointed out that after the trial court issued its tentative decision in which it found the guidelines to be illegal underground regulations, the agency's director sent a mailing to all licensed timber operators and all professional foresters which informed them that the guidelines would not be used as the criteria for judging whether assessment areas are correct in the timber harvest plan, but would be based on other criteria (*43 Cal. App. 4th 1113, 1125-1126)* . The court noted that an injunction properly issues only when the right to be protected is clear, injury is impending and so immediately likely that issuance of an injunction is the only way to avoid it. A corollary to this rule is that denial of

an injunction is justified when changed circumstances render injunctive relief unnecessary. An injunction should not issue as a remedy for past acts that are not likely to recur. Here the defendant publicly announced that the guidelines would no longer be used to evaluate the adequacy of watershed assessment areas as defined in the timber harvest plans submitted to it. Plaintiff made absolutely no showing to the trial court that in the past the defendant had been duplicitous nor was there any evidence to suggest that for some reason the defendant would begin to measure the adequacy of watershed assessment areas solely against the guideline standards. Under these circumstances the court of appeal could not say that the trial court abused its discretion in refusing to enjoin future application of watershed assessment area guidelines that the defendant had expressly disavowed (*43 Cal. App. 4th 1113, 1126)* . With regard to claimed error in the trial court not having issued a declaratory judgment or declining to grant injunctive relief to force the defendant to require disclosure of future plans and of emergency harvest notices, the court pointed out that the trial court at the conclusion of the writ action had issued a proposed statement of decision to the effect that the interveners failure to provide at least the public information concerning reasonably foreseeable probable future projects and the defendant's failure to gather the information itself supported the conclusion that the defendant did not proceed in the manner required by law. However, by the time the declaratory relief action was tried the defendant had changed its requirements and accordingly at the trial's conclusion the trial court stated in effect that defendant had imposed certain informational requirements in its timber harvest plan decision and in light of the courts conclusion that the defendant had changed its policies and that there was no of evidence to show that defendant would continue to commit the error once it was pointed out, the trial court saw no bases for issuing an injunction (*43 Cal. App. 4th 1113, 1131)* . The court of appeal noted that the function of a declaratory relief action is to resolve an on going controversy and that the trial court could reasonably conclude that once the defendant had change its policy no ongoing controversy still existed because the challenged practice had been abandoned. Moreover, although injunctive relief is appropriate when unlawful conduct is likely to recur, the court of appeal must presume that the defendant agency will follow the law. Thus, the trial court did not abuse its discretion by declining to exercise its equitable powers to direct policy changes already implemented by the defendant (*43 Cal. App. 4th 1113, 1132)* .

In *Cisneros v. U. D. Registry, Inc. (1995) 39 Cal. App. 4th 548, 574, 46 Cal. Rptr. 2d 233* , plaintiffs brought suit against a corporation and its president for alleged violations of the federal Fair Credit Reporting Act (*15 U.S.C. §§ 1681-1681t*), the California Consumer Credit Reporting Agencies Act (*Civ. Code § 1785.1 et seq.*) and the Investigative Consumer Reporting Agencies Act (*Civ. Code § 1786 et seq.*). The corporation gathered information regarding residential renters and sold that information to its subscribers, mainly landlords and their agents, who screened applicants to fill a vacancy. Plaintiffs sought damages and injunctive relief. In addition, plaintiffs sought injunctive relief for violation of the Unfair Business Practices Act (*Bus. & Prof. Code § 17200 et seq.*) and damages for intentional and negligent infliction of emotional distress. The trial court sustained a demurrer without leave to amend to plaintiffs' Unfair Business Practices Act and negligent infliction of emotional distress claims. Plaintiffs' remaining claims were tried before the court which ultimately found for the defendants on all but two claims. Both sides appealed.

The court of appeal in affirming in part, reversing in part and remanding the case for retrial of plaintiffs' claims under the Unfair Business Practices Act and for retrial of certain other claims discussed several issues that plaintiffs raised on appeal. Plaintiffs, among other points raised, contended that the trial court should have granted an injunction prohibiting the defendant corporation from reporting unlawful detainer or other action that only possibly related to a consumer ("possibles"). The trial court by an order prior to the trial date had granted summary adjudication in plaintiffs' favor on this pertinent issue which provided in part that defendants could not make a report about a consumer unless defendants had positively identified that consumer as the party involved in the unlawful detainer or other action. At trial the court refused to grant injunctive relief, in part, because the evidence at trial showed that since the corporation had received the preliminary order it had ceased reporting or discussing possibles. Although a permanent injunction was involved, in affirming the trial court's determination the appellate court noted that a denial of an injunction is justified when changed circumstances render injunctive relief moot or unnecessary. Injunctive relief should not be granted as punishment for past acts in the absence of any evidence that the acts are likely to recur in the future. Injunctive relief can be denied when defendant's wrongful conduct voluntarily ceases. Thus, implicit in the trial court's determination in denying the injunction was that the acts were not likely to recur and that a permanent injunction would have no impact other than as

punishment for past acts (*39 Cal. App. 4th 548, 573-574)* .

Donald v. Cafe Royale, Inc. (1990) 218 Cal. App. 3d 168, 266 Cal. Rptr. 804 , was an action by a disabled person against a restaurant for (1) damages for noncompliance with equal access statutes; (2) damages pursuant to *Civ. Code § 54.3* for interference with a disabled person's admittance to or enjoyment of a public facility; and (3) an injunction pursuant to *Civ. Code § 55* prohibiting the defendant restaurant from operating in violation of the statutory regulations. With regard to the injunction cause of action, the superior court had determined it would be an idle act to invoke such a remedy against the defendant because the defendant was insolvent, no longer in business, and had dissolved as a corporation. The court of appeal affirmed this portion of the judgment. Although the case involved a permanent, rather than a preliminary, injunction, the court said that (1) a change in circumstances, rendering injunctive relief moot or unnecessary, justifies the denial of an injunction; (2) injunctive relief will be denied when, at the time of the *order* or judgment, no reasonable probability exists of the recurrence of the past acts; and (3) an injunction should not be granted as punishment for past acts when it is unlikely that they will recur (*218 Cal. App. 3d 168, 184)* .

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11-116 California Points & Authorities § 116.47

§ 116.47 Opposing Application for Preliminary Injunction [Code Civ. Proc. § 527]--Plaintiff Not Likely to Prevail on Merits at Trial, and Balance-of-Hardships Weighs in Defendant's Favor

[1] FORM

[*Caption. See § 116.32.*]

A PRELIMINARY INJUNCTION MAY NOT BE ISSUED WHEN IT IS UNLIKELY THAT PLAINTIFF WILL PREVAIL ON THE MERITS, AND THE COMPARATIVE HARM TO BE SUFFERED BY DEFENDANTS IF THE INJUNCTION IS ISSUED IS GREATER THAN THE HARM TO PLAINTIFFS IF THE INJUNCTION IS DENIED. IN THIS CASE, IT IS UNLIKELY THAT PLAINTIFF WILL PREVAIL ON THE MERITS BECAUSE _____ [*specify reason*]. FURTHERMORE, THE HARM TO DEFENDANTS IF THE INJUNCTION IS ISSUED, NAMELY _____ [*specify harm*], IS GREATER THAN THAT PLAINTIFFS WOULD PURPORTEDLY SUFFER IN THE ABSENCE OF INJUNCTIVE RELIEF, NAMELY _____ [*specify harm*]. THEREFORE, THE INJUNCTION SHOULD BE DENIED.

A. Court Must Consider Likelihood That Plaintiff Will Prevail and Balance Hardships of Parties. In exercising its discretion, the trial court must consider two interrelated factors: (1) the likelihood that plaintiffs will prevail on the merits of the case at trial, and (2) the harm to be suffered by plaintiffs if the injunction does not issue as compared to the harm to be suffered by defendants if it does (*Common Cause v. Board of Supervisors (1989) 49 Cal. 3d 432, 441-442, 261 Cal. Rptr. 574, 777 P.2d 610* ; *King v. Meese (1987) 43 Cal. 3d 1217, 1226, 240 Cal. Rptr. 829, 743 P.2d 889* ; *Right Site Coalition v. Los Angeles Unified School Dist. (2008) 160 Cal. App. 4th 336, 341-344, 72 Cal. Rptr. 3d 678* ; *Board of Supervisors v. McMahon (1990) 219 Cal. App. 3d 286, 295, 268 Cal. Rptr. 219*).

[*Optional*] **B. Plaintiff's Recovery Doubtful.** An injunction cannot be granted when plaintiff's ultimate right to relief is doubtful (*Thayer Plymouth Center, Inc. v. Chrysler Motors Corp. (1967) 255 Cal. App. 2d 300, 305, 63 Cal. Rptr. 148* ; *West v. Lind (1960) 186 Cal. App. 2d 563, 569, 9 Cal. Rptr. 288*).

[*Optional*] **C. Plaintiff's Recovery Impossible.** When, as a matter of law, there is no possibility that the relief sought by the plaintiff can be properly granted after a trial on the merits, the preliminary injunction should be denied (*Common Cause v. Board of Supervisors (1989) 49 Cal. 3d 432, 443, 447, 261 Cal. Rptr. 574, 777 P.2d 610*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to an application for a preliminary injunction on the ground that the plaintiff is not likely to prevail on the merits at trial, and that the defendant will suffer greater harm if the injunction is issued than the plaintiff will if it is not [*see King v. Meese (1987) 43 Cal. 3d 1217, 1226, 240 Cal. Rptr. 829, 743 P.2d 889]* , or that there is no possibility that plaintiff will prevail on the merits at trial [*Common Cause v. Board of Supervisors (1989) 49 Cal. 3d 432, 443, 447, 261 Cal. Rptr. 574, 777 P.2d 610]* .

With appropriate modifications, these points and authorities may be used (1) in support of a demurrer to a complaint for injunctive relief [*see Code Civ. Proc. § 430.10(e)*], (2) as an affirmative defense in an answer to such a complaint [*see Code Civ. Proc. § 431.30(b)(2)*], (3) in support of a motion for summary judgment in such an action [*see Code Civ. Proc. § 437c*], or (4) in support of a petition for a writ of prohibition [*see Code Civ. Proc. §§ 1102, 1103*] seeking to restrain a court from enforcing injunctive relief.

These points and authorities may also be modified for use in an appellate brief regarding whether a trial court abused its discretion in granting or denying a preliminary injunction.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. For example, counsel should discuss facts regarding comparative harm to the defendant on issuance of the injunction, as opposed to harm to the plaintiff if it is denied.

[c] Related Pleading and Practice Forms

For discussion of the various methods of opposing applications for provisional and permanent injunctive relief, as well as a form of declaration to oppose an application for a preliminary injunction and a form of demurrer to a complaint for injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender).

[3] Discussion of Authorities

[a] Court Must Consider Likelihood That Plaintiff Will Prevail and Balance Hardships of Parties

Common Cause v. Board of Supervisors *(1989) 49 Cal. 3d 432, 261 Cal. Rptr. 574, 777 P.2d 610* , was an action by

a county taxpayer and several voting rights organizations. Plaintiffs sought declaratory relief, a writ of mandate, and a preliminary and permanent injunction requiring a county to implement its voter outreach program by deputizing as voter registrars certain county employees who had frequent contact with low-income and minority citizens. Plaintiffs contended that the county had not complied with Elections Code provisions that required counties to develop and implement voter outreach programs, hence authorizing county clerks to deputize citizens as deputy registrars. The trial court granted a preliminary, mandatory injunction requiring the county to deputize as voting registrars certain county employees who had frequent contact with low-income and minority citizens. The preliminary injunction was affirmed by the court of appeal.

In reversing the court of appeal and directing it to remand the matter to the trial court with directions to vacate the preliminary injunction, the Supreme Court pointed out that it was unnecessary to reach the question whether plaintiffs had standing to seek an injunction under *Code Civ. Proc. § 526a*, because the ultimate relief sought in the action included a writ of mandate compelling adoption of the employee deputization program. Accordingly, it was unnecessary for plaintiffs to show a separate basis for standing to obtain a preliminary injunction, distinct from the basis for their standing to seek a writ of mandate at a trial on the merits. With respect to the preliminary injunction, the Court said that in deciding whether to issue a preliminary injunction, a trial court must evaluate two interrelated factors: (1) the likelihood that the party seeking the injunction will ultimately prevail on the merits of his or her claim, and (2) the balance of harm presented, that is, the comparative consequences of the issuance and nonissuance of the injunction (*49 Cal. 3d 432, 439-442)* .

In ***King v. Meese*** *(1987) 43 Cal. 3d 1217, 240 Cal. Rptr. 829, 743 P.2d 889* , several licensed drivers who were unable to afford automobile insurance in a high-premium area brought an action against various government officials regarding enforcement of the 1984 Robbins-McAlister Financial Responsibility Act (Stats. 1984, ch. 1322). The Act required that a motorist show proof of insurance when issued a citation, and provides that failure to do so is itself an infraction. The trial court denied plaintiffs' request for a temporary restraining order enjoining the operation of the Act, then denied their motion for a preliminary injunction, on the ground that a balancing of hardships favored defendants. Plaintiffs unsuccessfully petitioned the court of appeal, then successfully petitioned the Supreme Court for review.

The Supreme Court initially stayed the enforcement of the Act, and transferred the appeal from the court of appeal. In an unusual determination, the Court decided the case on its merits, and ultimately affirmed the trial court's denial of the injunction (*43 Cal. 3d 1217, 1225-1235)* . The Court reasoned that an order denying a preliminary injunction must be affirmed unless the trial court abused its discretion in making its determination. In exercising its discretion, a trial court must consider two interrelated factors: (1) the likelihood that plaintiffs will prevail on the merits at trial, and (2) the harm to be suffered by plaintiffs if the injunction does not issue as compared to the harm to be suffered by defendants if it does (*43 Cal. 3d 1217, 1226)* . The trial court did not err in finding that the balance of hardships favored defendants, after weighing the burden on victims of accidents caused by noninsured drivers against the ramifications of enforcement of the act on plaintiffs.

However, the trial court must also determine the likelihood of plaintiff prevailing on the merits. Although consideration of this issue does not entail final adjudication of the ultimate rights in controversy, it does affect the showing necessary to a balancing-of-hardships analysis. That is, the more likely it is that plaintiffs will ultimately prevail, the less severe must be the harm that they allege will occur if the injunction does not issue. This is especially true when the requested injunction maintains, rather than alters, the status quo. In the instant case, an injunction would have maintained the status quo. On review, a trial court's order regarding a preliminary injunction may be affirmed if either the balance-of-hardships analysis or plaintiffs' likelihood of success considerations would alone support the ruling. If, however, the trial court relies on only one of the foregoing, the reviewing court must determine whether that reliance conclusively supports the trial court's determination regardless of the remaining considerations. Normally, it would be appropriate to remand the case to the trial court for consideration of the remaining issue. Because, however, there were no contested factual questions necessary to resolve the case, and the legal issues had been exhaustively briefed, the Court proceeded to determine the case on its merits (*43 Cal. 3d 1217, 1227-1228)* . After determining that the Act

comports with all procedural due process and delegation-of-power requirements, the Court concluded that plaintiff would not prevail on the merits, and affirmed the trial court's denial of the motion for injunction (*43 Cal. 3d 1217, 1235)* .

In ***Right Site Coalition v. Los Angeles Unified School Dist****. (2008) 160 Cal. App. 4th 336, 341-344, 72 Cal. Rptr. 3d 678* , the plaintiff sought a preliminary injunction preventing the defendant school district from demolishing 49 units of housing to make way for a new school. At the hearing on the preliminary injunction, the trial court denied the plaintiff's motion stating "I just can't see the harm in this situation," thus, ruling that the balance of hardships favored the defendant. The trial court refused to consider the likelihood of the plaintiff's success on the merits, stating "I don't think it's necessary." The plaintiff appealed, arguing that the trial court erred in denying the motion for preliminary injunction without considering the likelihood the Coalition will prevail on the merits of its case at trial. The court of appeal reviewed the record and held that the trial court's denial of the preliminary injunction, without any consideration of the potential merit of the plaintiff's claims, was clearly erroneous (*160 Cal. App. 4th 336, 343-344)* . The court of appeal remanded the matter to the trial court.

Board of Supervisors v. McMahon *(1990) 219 Cal. App. 3d 286, 268 Cal. Rptr. 219* , was an appeal by the Director of the state Department of Social Services and others from a preliminary injunction granted a county in a dispute involving the state's power to require the county to contribute local funds to a state-mandated program (Aid to Families with Dependent Children--AFDC).

The court of appeal reversed, concluding that the trial court erred by finding that the county would probably prevail on its claim (*219 Cal. App. 3d 286, 296-303)* . The court stated the often-repeated rule that trial courts should evaluate two interrelated factors when deciding whether or not to issue a preliminary injunction. The first is the likelihood that the plaintiff will prevail on the merits at trial. The second is the interim harm that the plaintiff is likely to sustain if the injunction is denied as compared to the harm that the defendant is likely to suffer if the preliminary injunction is issued. In general, the appellate court explained, by balancing the respective equities of the parties, a trial court determines whether, pending a trial on the merits, the defendant should or should not be restrained from exercising the right claimed by him or her. An appellate court must reverse an order granting a preliminary injunction if it determines that either of the two interrelated factors does not support the trial court's order (*219 Cal. App. 3d 286, 295-296)* . The court added that when the preliminary injunction mandates an affirmative act that changes the status quo, the appellate court scrutinizes it even more closely for an abuse of discretion (*219 Cal. App. 3d 286, 295)* .

[b] Plaintiff's Recovery Doubtful

In ***Thayer Plymouth Center, Inc. v. Chrysler Motors Corp.*** *(1967) 255 Cal. App. 2d 300, 63 Cal. Rptr. 148* , plaintiff automobile dealer brought an action for specific performance of a dealership contract and for damages. Plaintiff obtained a preliminary injunction against defendant corporation that enjoined defendant from terminating the dealership agreement existing between the two parties. Defendant appealed from the order granting the preliminary injunction.

The court of appeal reversed the order granting the preliminary injunction. One of defendant's three contentions with which the court of appeal agreed was that plaintiff had failed to make a showing of probable ultimate success in the action and that such a showing is a necessary condition to the issuance of a preliminary injunction. The court noted that the relief that plaintiff sought in the action was primarily specific performance of a dealership contract, and it was obvious to the court that plaintiff would not be successful in obtaining any permanent equitable relief. Because a preliminary injunction will not issue in a doubtful case, the denial of a preliminary injunction is amply justified when it is doubtful what the outcome may be on a final hearing of the action. Hence, because it appeared that all that plaintiff could ultimately recover were damages, the order granting the preliminary injunction was reversed (*255 Cal. App. 2d 300, 305-307)* .

In ***West v. Lind*** *(1960) 186 Cal. App. 2d 563, 9 Cal. Rptr. 288* , plaintiff Mae West sought, in part, a preliminary

injunction that would have restrained defendant Marie Lind from using the name "Diamond Lil" and the corporate defendant from billing and advertising defendant Lind as "Diamond Lil" or "The One and Only Diamond Lil." After an order to show cause hearing, a trial court denied the preliminary injunction. It found that the designation "Diamond Lil" involved words of common usage in the public domain that would not be susceptible of appropriation by the plaintiff in the manner she asserted. Plaintiff appealed.

The court of appeal affirmed the order denying the preliminary injunction. The court noted that it was doubtful, both on the evidence and considering California law, that plaintiff had a property right in the title "Diamond Lil" and that she could thus prevail on the merits. Because an injunction should rarely, if ever, be issued in a doubtful case, the order denying the preliminary injunction was not an abuse of discretion (*186 Cal. App. 2d 563, 569-570)* .

[c] Plaintiff's Recovery Impossible

The facts and procedural background of ***Common Cause v. Board of Supervisors*** *(1989) 49 Cal. 3d 432, 261 Cal. Rptr. 574, 777 P.2d 610* , are discussed in *§ 116.47[3][a]*. In reversing the court of appeal and directing it to remand the matter to the trial court with directions to vacate the preliminary injunction, the Supreme Court said that the scope of available preliminary relief is necessarily limited by the scope of the relief likely to be obtained at trial on the merits (*49 Cal. 3d 432, 442)* . The Court explained that the ultimate relief sought in plaintiffs' complaint included an injunction and a writ of mandate to compel the county to fulfill its duties under the Elections Code, but that mandamus, rather than mandatory injunction, is the traditional remedy for the failure of a public official to perform a legal duty, that an order after trial requiring the implementation of an employee deputization program, even if entitled an injunction, would be identical in purpose and function to a writ of mandate, and that the Court therefore evaluated the merits of plaintiffs' claim for this relief in light of the legal principles governing mandamus actions (*49 Cal. 3d 432, 442)* .

The Court held that the Elections Code does not require the deputization of county employees as voting registrars, even if such deputization would substantially further the statutory goal of maximum registration (*49 Cal. 3d 432, 443)* , and that because, as a matter of law, there was no possibility that the relief sought could be properly awarded after a trial on the merits, such relief could not be awarded on a provisional basis (*49 Cal. 3d 432, 443)* . The Court said that whether counties have a ministerial duty to implement voter outreach programs or to deputize qualified citizens as registrars, the Elections Code provision at issue is, in essence, enabling legislation that authorizes counties to deputize their employees should they decide to do so, and that the decision whether to take advantage of the authority granted by the Elections Code is not an administrative, but a quasi-legislative decision entrusted solely to local elected officials (*49 Cal. 3d 432, 445)* . The Court explained that the likelihood of success on the merits and the balance-of-harm analysis are ordinarily interrelated factors in the decision whether to issue a preliminary injunction, that the presence of each factor is usually a matter of degree, and that if the party seeking the injunction can make a sufficiently strong showing of likelihood of success on the merits, the trial court has discretion to issue the injunction notwithstanding that party's inability to show that the balance of harms tips in his or her favor. In the present case, however, there was no likelihood that plaintiffs would prevail on their claim for specific injunctive relief under either theory asserted, and a preliminary injunction could not issue without some showing of potential entitlement to such relief (*49 Cal. 3d 432, 447)* .

[4] Additional Authorities

[a] Court Must Consider Likelihood That Plaintiff Will Prevail and Balance Hardships of Parties

In *Teachers Ins. & Annuity Assn. v. Furlotti (1999) 70 Cal. App. 4th 1487, 83 Cal. Rptr. 2d 455* , a dead-end alley ran between the plaintiff's property, a residential apartment building, and the defendant's property, a commercial building. The alley constituted a boundary between the commercial zone to the south and the residential zone to the north. A previous owner of both properties had executed a declaration of reciprocal easement (hereafter DRE) covering the alley which specified specific service areas to be used for installation and storage of loading trucks, trash collection bins, and the like, and for access to and use of such equipment by service personnel, vendors and suppliers. Beginning in 1987,

the commercial building's use of the alley for deliveries, pickup and trash collection combined with smoking and noisy workmen in the area between midnight and 4:00 a.m., created such noise, smoke and dirt that the defendants, on behalf of the residents of the apartment complex, complained to the managers of the commercial property. Frustrated with the increasing noise and the magnitude of the use of the commercial property, defendants announced their intention to construct a fence in the alley. The managers of the commercial property responded that such a fence would violate the easement and demanded that defendants desist. Nonetheless, the defendants constructed a chain link fence down the center of the alley. Thereafter, plaintiff sued defendants for damages for breach of the DRE, nuisance and trespass. The defendants also sought declaratory and injunctive relief. Simultaneously, plaintiff applied for a preliminary injunction to require removal of the fence and repair of the easement area to return it to the condition it was in before erection of the fence. Plaintiff's application was made on the ground that the DRE was an enforceable agreement that entitled the parties to use the easement area for access, but was violated by the defendants when they constructed the fence. Plaintiff also made a showing as to irreparable harm. Defendants' position was that the DRE was void ab initio and therefore illegal because it purported to allow use for commercial purposes on that portion of the alley that was zoned for residential use only and therefore violated the Los Angeles municipal code. After a hearing, the trial court found that plaintiff suffered harm and ordered an injunction to issue, among other things, ordering the defendants to remove the fence (*70 Cal. App. 4th 1487, 1489-1492)* .

The court of appeal reversed the order (*70 Cal. App. 4th 1487, 1499)* . The court noted that trial courts must evaluate two interrelated factors in determining whether to grant a preliminary injunction application. The first is the reasonable probability that the plaintiff will prevail on the merits at trial. The second is the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm that the defendant is likely to suffer if the preliminary injunction were issued (*70 Cal. App. 4th 1487, 1493, 1498)* . The relationship of these factors is such that an injunction should not issue when there is no possibility of success even though issuance might prevent irreparable harm. Trial courts must evaluate the possibility of success on the merits (*70 Cal. App. 4th 1487, 1498)* . The court, based on the Los Angeles municipal code and case law, initially concluded that the plaintiff's use of the residential half of the alley was commercial in nature and thus violated the municipal code. Therefore, plaintiff could not rely on the DRE to use the residential half of the alley (*70 Cal. App. 4th 1487, 1496)* . Accordingly, the court ultimately concluded that the trial court abused its discretion in ordering the injunction to issue without considering the likelihood of plaintiff's success on the merits (*70 Cal. App. 4th 1487, 1497)* . Plaintiff had not demonstrated a reasonable probability that it would prevail on the merits at trial (*70 Cal. App. 4th 1487, 1489)* . Moreover, even if defendants resorted to self-help, if plaintiff could not prevail on the merits at trial the injunction application should not have been granted (*70 Cal. App. 4th 1487, 1497-1498)* .

14859 Moorpark Homeowner's Assn. v. VRT Corp. (1998) 63 Cal. App. 4th 1396, 74 Cal. Rptr. 2d 712 , involved the purported conveyance of a condominium complex, including the common areas, to a third party developer (hereafter purchaser) without obtaining a judicial partition pursuant to *Civ. Code § 1359*. The complex had been damaged in an earthquake. Its covenants, conditions and restrictions gave the homeowner's association an irrevocable power of attorney to sell the complex "when partition of the [complex] may be had" under *Civ. Code § 1359*, but only after recordation of a certificate setting forth compliance with the foregoing condition. After agreeing to sell the complex to a developer, the association and its president initiated an action for partition and sought injunctive relief against the owners and several mortgage holders including VRT Corporation (hereafter VRT) barring the foreclosure on first deeds of trust on units in the complex. Before resolution of the partition action, the association recorded a deed conveying the complex to the purchaser. The purchaser brought an action to quiet title as well as for injunctive and declaratory relief. Willis Investment Group (hereafter Willis), an affiliate of VRT, cross-complained for quiet title, alleging it owned two units in the complex.

In the partition action, the trial court granted the association's and its president's request for a preliminary injunction, and VRT appealed. In the quiet title action, Willis sought a preliminary injunction precluding the purchaser and the association from asserting the validity or effectiveness of the grant deed by which the purchaser allegedly took title to the complex. The trial court denied Willis's request for a preliminary injunction and Willis appealed. The appeals were

consolidated (*63 Cal. App. 4th 1396, 1400-1402)* .

The court of appeal reversed the order granting the association's request for a preliminary injunction in the partition action and reversed the order denying Willis's request for a preliminary injunction in the quiet title action (*63 Cal. App. 4th 1396, 1411)* . In reaching its conclusion, the court noted that in determining whether to grant a preliminary injunction the trial court considers two related factors: (1) the likelihood plaintiff will prevail on the merits of its case at trial, and (2) the interim harm that the plaintiff is likely to sustain if the injunction is denied as compared to harm the defendant is likely to suffer if court grants preliminary injunction. The latter factor involves consideration of such things as the inadequacy of other remedies, the degree of irreparable harm, and the necessity of preserving the status quo. The determination whether to grant a preliminary injunction generally rests in the sound discretion of the trial court. Discretion abused when a court exceeds the bounds of reason or contravenes uncontradicted evidence (*63 Cal. App. 4th 1396, 1402)* . The more likely it is that the plaintiff will ultimately prevail, the less severe must be the harm that the plaintiff alleges will occur if injunction does not issue. This is especially true when the requested injunction maintains rather than alters, the status quo. Thus, if the party seeking an injunction can a make sufficiently strong showing of the likelihood of success on the merits, the trial court has discretion to issue an injunction notwithstanding that party's inability to show that the balance of harms tips in his or her favor (*63 Cal. App. 4th 1396, 1407)* .

With regard to the denial of the preliminary injunction in the quiet title action, the court concluded that the association's attempt to sell the complex was barred by *Civ. Code §§ 1358* and *1359* (*63 Cal. App. 4th 1396, 1406)* , so that there was no likelihood that the purchaser would ultimately prevail on the merits of its claim for quiet title (*63 Cal. App. 4th 1396, 1407)* . The court noted that when the party seeking the injunction will not succeed on the merits, an injunction should not issue even thought its issuance might prevent irreparable harm, because there is no justification in delaying that harm where, although irreparable, it is also inevitable (*63 Cal. App. 4th 1396, 1408)* . This case presents a different but closely related issue, namely, whether an injunction should issue because the purchaser, which opposed the injunction, could not prevail on the strength of its title, even though the purchaser's assertion of its manifestly infirm title would prevent damage by a third party (threatened demolition of the complex by the city). The court applied the same reasoning as above. Because the purchaser's title is infirm and the potential damage to the complex is avoided solely by the purchaser's flimsy assertion of that title, there is no justification in delaying harm which, although perhaps irreparable, is also inevitable. Accordingly, the trial court abused its discretion in denying Willis's request for injunctive relief (*63 Cal. App. 4th 1396, 1409)* .

With regard to the grant of the preliminary injunction in the partition action, because VRT did not dispute that the association has a reasonable likelihood of success in the partition action, the key issue is whether the association established that the balance of harms favored it. On this matter the association argued that VRT intended to foreclose on liens, take control of the association and prevent the sale to the purchaser. Absent injunctive relief, the parties holding interests in the complex would lose not only proceeds from the sale to the purchaser, but also their equity and security because the city planned to demolish the complex if the purchaser halted repairs. The association's showing thus hinges on the key legal issue presented by the purchaser's claim to the complex in the quiet title action, namely whether the association could convey the complex to the purchaser in the absence of judicial partition. As already explained, the purchaser's claim to the complex must fail. Because the association's attempt to protect this sale has no reasonable probability of success, there is no justification in barring foreclosures by VRT, even though the foreclosures may cause irreparable harm. The lienholder's interest cannot be impaired on the grounds presented by the association. Accordingly, the trial court abused its discretion in granting the preliminary injunction (*63 Cal. App. 4th 1396, 1409-1411)* .

In *Shoemaker v. County of Los Angeles (1995) 37 Cal. App. 4th 618, 43 Cal. Rptr. 2d 774* , plaintiff had been a university faculty member with an academic appointment as a professor of surgery and also had been a civil service employee for the county medical center employed as a physician specialist. The university was affiliated with a county medical center and had a department of emergency medicine that conducted a residency training program at the medical center whereby residents from the university helped staff the medical center's emergency medicine services department. In 1991 plaintiff was appointed to fill vacant administrative positions of chairman of the university's department of

emergency medicine and chief of the medical center's emergency medicine services department. However, in 1993, a review committee concluded that the plaintiff was not sufficiently qualified for the positions he held and that the Accreditation Council intended to withdraw accreditation of the residency program effective June 30, 1995, but the Council gave the program officials until January 4, 1994, to respond to the proposed loss of accreditation. By separate letters from the university and medical center plaintiff was thereafter removed from plaintiff's administrative positions at the university and medical center effective January 3, 1994, but plaintiff retained plaintiff's previous status as a professor of surgery with the university and as a physician specialist with the medical center. On plaintiff's application, the trial court granted plaintiff's application for a preliminary injunction, ordering defendants to (1) refrain from removing plaintiff from the administrative positions at the university and medical center unless and until defendant complied with due process and complied with civil service rules; (2) refrain from appointing a replacement for plaintiff unless and until plaintiff was properly removed from plaintiff's positions; and (3) rescind all orders removing plaintiff from plaintiff's administrative posts. Defendants appealed.

In reversing the trial court's order granting the preliminary injunction based on the trial court having abused its discretion, the court of appeal noted that when deciding whether or not to issue a preliminary injunction trial courts should evaluate two interrelated factors: (1) the likelihood plaintiff will prevail on the merits at trial; and (2) the interim harm likely to be sustained by plaintiff if the injunction is denied compared with the harm likely to be suffered by defendant if the preliminary injunction were issued (*37 Cal. App. 4th 618, 624-625)* . The Court of Appeal further noted that it must reverse if the trial court abused its discretion as to either factor (*37 Cal. App. 4th 618, 625)* . Under the facts the court concluded that plaintiff was not likely to prevail on the causes of action supporting the injunction (although the court had no occasion to evaluate plaintiff's likelihood of success on plaintiff's substantive claims) and the factors of interim harm favored the defendants.

In *Abrams v. St. John's Hospital & Health Center (1994) 25 Cal. App. 4th 628, 30 Cal. Rptr. 2d 603* , a medical doctor and a medical corporation sued a hospital for breach of contract. The plaintiffs sought a preliminary injunction prohibiting the hospital from terminating a contract for the operation of the hospital's pathology department without first complying with certain contract provisions, hospital bylaws and case law relating to due process hearing rights. The trial court denied the motion for preliminary injunction. In affirming the trial court's denial of the preliminary injunction, the court of appeal pointed out that in considering whether or not to issue a preliminary injunction the trial court considers two factors; (1) the likelihood that the plaintiff will prevail on the merits and (2) the interim harm that the plaintiff is likely to sustain if the injunction is denied as compared to the harm that the defendant is likely to suffer if the court grants a preliminary injunction (*25 Cal. App. 4th 628, 635-636)* .

The facts and procedural background of *Southern Christian Leadership Conference v. Al Malaikah Auditorium Co. (1991) 230 Cal. App. 3d 207, 281 Cal. Rptr. 216* , are discussed in *§ 116.20[3][a]*. In that case, defendants appealed the granting of a preliminary injunction and contended, among other things, that plaintiffs should not have been permitted under the election-of-remedies doctrine to proceed to trial for damages based on anticipatory breach of contract, because plaintiffs had elected to seek relief based on specific performance and obtained a preliminary injunction to defendants' detriment.

In rejecting the contention and affirming the judgment, the court of appeal said that if the main action seeks another remedy, a preliminary injunction simply forms a provisional or auxiliary remedy to preserve the status quo until a final judgment. The court said: (1) the grant or denial of a preliminary injunction does not adjudicate the ultimate rights in controversy, but merely reflects the court's determination, after balancing the respective parties' equities, that pending a trial on the merits the defendant should or should not be restrained from exercising a right claimed by that defendant; (2) the preliminary injunction does not create a right, but merely undertakes to protect a right from unlawful or injurious interference; and (3) the fate of a preliminary injunction, having a strictly adjunct character, depends on the main action. The court explained that in ruling on a motion for a preliminary injunction, the trial court considers whether a greater injury will result to the defendant from granting the injunction than to the plaintiff from refusing it. The trial court considers the probability of the plaintiff's ultimately prevailing in a trial on the merits and will deny a preliminary

injunction unless there is a reasonable probability that plaintiff will successfully assert his or her rights (*230 Cal. App. 3d 207, 223)* .

Savage v. Trammell Crow Co. (1990) 223 Cal. App. 3d 1562, 273 Cal. Rptr. 302 , was an action against a shopping center and its security service for preventing plaintiff from placing religious tracts on automobiles in the center's parking lot. Plaintiff claimed that defendants' conduct violated his constitutional rights. In opposing plaintiff's application for a preliminary injunction, the shopping center submitted the declaration of one of its partners showing that litter and traffic problems created by distributing leaflets in the parking lot justified the prohibition. The application was denied and plaintiff appealed. In affirming the order, the court of appeal said that in seeking a preliminary injunction, plaintiff bears the burden of demonstrating both likely success on the merits and the occurrence of irreparable harm before a final judgment can be entered. Quoting *Cohen v. Board of Supervisors (1985) 40 Cal. 3d 277, 286-287, 219 Cal. Rptr. 467, 707 P.2d 840* , the court explained that when a trial court denies an application for a preliminary injunction, it implicitly determines that the plaintiffs have failed to show interim harm or the likelihood of prevailing on the merits, or both; that on appeal the question becomes whether the trial court abused its discretion in ruling on both factors; and that even if the appellate court finds that the trial court abused its discretion regarding one of the factors, it nevertheless may affirm the trial court's order if it finds no abuse of discretion regarding the other. The court held that the partner's declaration in opposition to the application for preliminary injunction was sufficient to defeat plaintiff's request for a preliminary injunction, because it demonstrated that plaintiff was not likely to succeed in establishing a right to distribute his tracts, and that the ban on parking-lot leafletting was a valid regulation of the time, place, or manner of activity otherwise protected by the California and federal constitutions (*23 Cal. App. 3d 1099, 1571)* .

Counsel should note, however, that the appellate court reversed the judgment of dismissal following the trial court's sustaining of a demurrer without leave to amend, on the ground that the complaint could be amended to state a cause of action under *Cal. Const., art. I, § 2(a)* (relating to liberty of speech or press), with respect to the center's prohibition against the distribution of any matter other than political matter in other parts of the center (*223 Cal. App. 3d 1562, 1576-1581)* .

In *Lubavitch Congregation v. City of Long Beach (1990) 217 Cal. App. 3d 1388, 266 Cal. Rptr. 513* , in affirming an order denying a preliminary injunction in an action by religious organizations challenging a municipal ordinance prohibiting "break-open bingo," in which participants purchase a sealed bingo card that is a predetermined winner or loser, the court of appeal said that the general purpose of a preliminary injunction is the preservation of the status quo pending a final determination on the merits of the action. Accordingly, in deciding whether such an injunction should issue the trial court must evaluate two interrelated factors: (1) the likelihood that the plaintiff will prevail on the merits at trial and (2) the interim harm that plaintiff is likely to sustain if the injunction is denied compared to the harm that defendant is likely to suffer if the injunction is issued (*217 Cal. App. 3d 1388, 1391-1392)* . The court pointed out that *Penal Code § 326.5* was enacted in 1975 in anticipation of the approval by the electorate of *Cal. Const., art. IV, § 19(c)*, which was approved in 1976, and that provides that the Legislature by statute may authorize cities and counties to provide for bingo games, but only for public purposes (*217 Cal. App. 3d 1388, 1392)* .

The court held that, even though *Penal Code § 326.5* permits charitable organizations to conduct bingo games and defines bingo as including break-open bingo, it does not require that if a city or county provides for bingo it must permit bingo in both of the forms defined by the statute, and it was therefore not likely that plaintiffs would prevail on the merits (*217 Cal. App. 3d 1388, 1394)* . The court further noted that, while the trial court's order was based on the foregoing ground, there was uncontradicted evidence supporting the trial court's implied finding that the city (that is, residents of the city) would suffer greater harm if the injunction were granted than would the plaintiff if it were denied (*217 Cal. App. 3d 1388, 1392 n.4*).

In *Loder v. City of Glendale (1989) 216 Cal. App. 3d 777, 265 Cal. Rptr. 66* , the appellate court reversed an order granting a preliminary injunction restraining defendant city from enforcing its drug testing program pending trial, on the

ground that plaintiff had presented insufficient evidence on the necessary element of interim harm to support the granting of the preliminary injunction (*216 Cal. App. 3d 777, 786)* . The court of appeal said trial courts should evaluate two interrelated factors when deciding whether or not to issue a preliminary injunction. The first is the likelihood that the plaintiff will prevail on the merits at trial. The second is the interim harm that the plaintiff is likely to sustain if the injunction is denied as compared to the harm that the defendant is likely to suffer if the preliminary injunction is issued. The theory behind this two-pronged test is that by balancing the respective equities of the parties the court concludes that, pending a trial on the merits, the defendant should or should not be restrained from exercising the right claimed by him or her. The court added that to qualify for preliminary injunctive relief, a plaintiff must show irreparable injury, either existing or threatened (*216 Cal. App. 3d 777, 782)* .

[b] Plaintiff's Recovery Doubtful

The facts and procedural background of *Willis v. Lauridson (1911) 161 Cal. 106, 118 P. 530* , are discussed in *§ 116.53[3][a]*. In that case, plaintiff stockholder brought an action against defendant association and other individual stockholders to enjoin the voting of certain allegedly illegal certificates at a board of directors election. A court issued a preliminary injunction, and defendants moved to dissolve it. The superior court refused, and they appealed. The Supreme Court reversed the order. It observed that to issue an injunction is the exercise of a delicate power requiring great caution and sound discretion that rarely, if ever, should be exercised in a doubtful case (*161 Cal. 106, 117)* .

In *Scaringe v. J.C.C. Enterprises, Inc. (1988) 205 Cal. App. 3d 1536, 253 Cal. Rptr. 344* , the court of appeal pointed out that the granting of a preliminary injunction does not constitute a final adjudication of the controversy and said that a trial court should grant a preliminary injunction only if the plaintiff would prevail at trial and would suffer more harm from its denial than the defendant would suffer from its grant (*205 Cal. App. 3d 1536, 1542-1543)* . Holding that there was no reasonable probability that plaintiffs would prevail at trial in their attempt to enforce a certain declaration of conditions, covenants, and restrictions on real property, the appellate court reversed the trial court's order granting a preliminary injunction halting all construction of a home that would obstruct the plaintiff homeowners' view (*205 Cal. App. 3d 1536, 1547)* .

In *Hueneme etc. Ry. v. Fletcher (1924) 65 Cal. App. 698, 224 P. 774* , plaintiff brought an action for the purpose of enjoining defendants from taking plaintiff's property in a right-of-way without the commencement of an eminent domain action in order to condemn it. The superior court issued a temporary restraining order, but at the hearing on the order to show cause it denied plaintiff's application for a preliminary injunction. Plaintiff appealed, but the court of appeal affirmed the order denying the preliminary injunction. The court stated that it is well settled that a preliminary injunction will not issue in a doubtful case. Such injunctive relief will not issue when the right that the plaintiff seeks to have protected is in doubt, when the right to the relief asked is doubtful, or except in a clear case of right. Considering all the matters of fact and of law that were contained in the record, it appeared that the superior court was amply justified in refusing the preliminary injunction on the ground that it was doubtful what the outcome may have been on a final hearing of the action. Therefore, the court of appeal could not say that the superior court had abused its discretion in issuing the order denying the preliminary injunction (*65 Cal. App. 698, 703-704)* .

[c] Plaintiff's Recovery Impossible

In *Hunt v. Superior Court (1999) 21 Cal. 4th 984, 90 Cal. Rptr. 2d 236, 987 P.2d 705* , plaintiffs brought a class action for declaratory and injunctive relief and a writ of mandate to preclude a county from implementing a new eligibility standard for medical care for indigent residents that would reduce the number of eligible recipients. The trial court entered a preliminary injunction precluding the county from implementing the eligibility standard, or any other standard that failed to consider a resident's financial ability to pay the actual costs of obtaining subsistence medical care (*21 Cal. 4th 984, 990, 995)* . The court of appeal, however, concluded that plaintiffs had no likelihood of success on the merits and directed the trial court to dissolve the injunction (*21 Cal. 4th 984, 990, 1000-1001)* . The Supreme Court reversed, holding that the court of appeal erred in concluding that the plaintiffs had no likelihood of success on the

merits of their claims and that the trial court had not abused its discretion in issuing the preliminary injunction (*21 Cal. 4th 984, 1006, 1015)* . In discussing the standard of review the Court noted that a trial court may not grant a preliminary injunction regardless of the balance of harm unless there is some possibility that the plaintiff would ultimately prevail on the merits of claim (*21 Cal. 4th 984, 999)* .

The facts and procedural background of *Teachers Ins. & Annuity Assn. v. Furlotti (1999) 70 Cal. App. 4th 1487, 83 Cal. Rptr. 2d 455* , are discussed in *§ 116.47[4][a]*. In reversing an order granting a preliminary injunction, the court of appeal noted that an injunction should not issue when there is no possibility of success even though issuance might prevent irreparable harm. Trial courts must evaluate the possibility of success on the merits (*70 Cal. App. 4th 1487, 1498)* .

The facts and procedural background of *14859 Moorpark Homeowner's Assn. v. VRT Corp. (1998) 63 Cal. App. 4th 1396, 74 Cal. Rptr. 2d 712* , are discussed in *§ 116.47[4][a]*. In reversing the granting of injunctive relief in the partition action and reversing the denial of injunctive relief in the quiet title action, the court found that there was no likelihood that the purchaser would ultimately prevail on the merits of its claim for quiet title (*63 Cal. App. 4th 1396, 1407)* . The court noted that when the party seeking the injunction will not succeed on the merits, an injunction should not issue even thought its issuance might prevent irreparable harm, because there is no justification in delaying that harm where, although irreparable, it is also inevitable (*63 Cal. App. 4th 1396, 1408)* .

In *Pro-Family Advocates v. Gomez (1996) 46 Cal. App. 4th 1674, 54 Cal. Rptr. 2d 600* , the trial court modified an existing preliminary injunction that it had issued to bar enforcement of a 1995 administrative regulation excluding certain classified prisoners from participating in an overnight family visiting program. The Director of the State Department of Corrections appealed. The court of appeal limited its inquiry into the constitutionality of the challenged regulation, that is, whether the regulation constituted an ex poste facto law in violation of the state or federal constitution, or violated the *equal protection clauses* of the state or federal constitution. In reversing the trial court's order modifying the preliminary injunction the court of appeal noted, among other things, that the decision to grant a preliminary injunction rests in the trial court's sound discretion. An abuse of discretion occurs if the trial court exceeds the bounds of reason or contravenes uncontradicted evidence. If no issue of fact is involved, the reviewing court determines as a matter of law whether the granting of the preliminary injunction was error. Trial courts evaluate the following two interrelated factors when deciding whether to issue a preliminary injunction: (1) the likelihood that the plaintiff will prevail on the merits, and (2) the likely interim harm that plaintiff will suffer if the injunction is denied compared to the likely harm defendant will suffer if the injunction is granted. The trial court by balancing the respective equities should conclude whether or not an injunction should be granted restraining the defendant's rights pending the trial. The question on a typical appeal from an order granting a preliminary injunction is whether both the likelihood of prevailing on the merits and irreparable harm are established. Thus, if the party that sought the preliminary injunction has no likelihood of prevailing at trial, the trial court has committed an error of law and the reviewing court must reverse the order granting the preliminary injunction (*46 Cal. App. 4th 1674, 1680-1681)* . The court of appeal held that the regulation neither constituted an ex post facto law nor did it violate equal protection (*46 Cal. App. 4th 1674, 1679)* . Thus, because there was no likelihood of prevailing at trial on the merits of the ex post facto or equal protection causes of action, the trial court necessarily erred in granting the motion for a preliminary injunction and the order modifying the preliminary injunction was reversed (*46 Cal. App. 4th 1674, 1687)* .

The facts and procedural background of *Abrams v. St. John's Hospital & Health Center (1994) 25 Cal. App. 4th 628, 30 Cal. Rptr. 2d 603* , are discussed in *§ 116.47[4][a]*. In affirming the trial court's denial of a preliminary injunction the court of appeal considered the likelihood of plaintiffs' success on the merits. The court noted that the due process requirements for terminating the staff privileges of a doctor do not apply when the termination is made incidental to a hospital's administrative decision rather than an adjudicatory decision (*25 Cal. App. 4th 628, 636)* . Because the plaintiff doctor had been terminated incidental to an administrative decision of the hospital and the doctor had waived his rights to hearing under hospital bylaws the court found that the plaintiffs could not prevail against the hospital on their breach of contract cause of action for denying the doctor a hearing on terminating his privileges (*25 Cal. App. 4th*

628, 638) . The court of appeals then stated that having determined that plaintiffs had no likelihood of prevailing on the merits of their breach of contract cause of action it could affirm the trial court's denial of the preliminary injunction without considering the trial court's alternative reason for denying the injunction (*25 Cal. App. 4th 628, 639)* .

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
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A. Injunctive Relief in General

11-116 California Points & Authorities § 116.48

§ 116.48 Opposing Application for Preliminary Injunction [Code Civ. Proc. § 527]--Injunction Not Issued if Restraint Interferes With Freedom of Speech

[1] FORM

[*Caption. See § 116.32.*]

A PRELIMINARY INJUNCTION MAY NOT BE ISSUED WHEN IT WOULD INTERFERE WITH FREEDOM OF SPEECH. IN THIS CASE, ISSUANCE OF AN INJUNCTION WOULD UNREASONABLY INTERFERE WITH _____ [*specify party's, e.g.,* DEFENDANT'S] RIGHT TO FREE SPEECH UNDER THE FEDERAL AND STATE CONSTITUTIONS BECAUSE _____ [*state reason(s)*]. THEREFORE, THE REQUEST FOR INJUNCTIVE RELIEF SHOULD BE DENIED.

Interference With Freedom of Speech. An injunction cannot be granted when it would interfere with the constitutional guarantees of freedom of speech (*U.S. Const., amend. I*; *Cal. Const., art. I, § 2*; *Rosicrucian Fellow. v. Rosicrucian Fellow. Non-Sectarian Church (1952) 39 Cal. 2d 121, 145, 245 P.2d 481* ; *Evans v. Evans (2008) 162 Cal. App. 4th 1157, 1166, 76 Cal. Rptr. 3d 859* ; *Planned Parenthood Golden Gate v. Foti (2003) 107 Cal. App. 4th 345, 354-355, 132 Cal. Rptr. 2d 46* ; *Chico Feminist Women's Health Center v. Scully (1989) 208 Cal. App. 3d 230, 247-248, 256 Cal. Rptr. 194*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to an application for a preliminary injunction when that relief would interfere with the constitutional guarantees of freedom of speech [*see U.S. Const., amend. I*; *Cal. Const., art. I, § 2*].

With appropriate modifications, these points and authorities may be used (1) in support of a demurrer to a complaint for injunctive relief [*see Code Civ. Proc. § 430.10(e)*], (2) as an affirmative defense in an answer to such a complaint [*see Code Civ. Proc. § 431.30(b)(2)*], (3) in support of a motion for summary judgment in such an action [*see Code Civ. Proc. § 437c*], or (4) in support of a petition for a writ of prohibition [*see Code Civ. Proc. §§ 1102, 1103*] seeking to restrain a court from enforcing injunctive relief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts that establish how issuance of a preliminary injunction would unreasonably interfere with the free speech rights of his or her client.

[c] Related Pleading and Practice Forms

For discussion of the various methods of opposing applications for provisional and permanent injunctive relief, as well as a form of declaration to oppose an application for a preliminary injunction and a form of demurrer to a complaint for injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender).

[3] Discussion of Authorities

[a] Interference With Freedom of Speech

Rosicrucian Fellow. v. Rosicrucian Fellow. Non-Sectarian Church *(1952) 39 Cal. 2d 121, 245 P.2d 481* , involved a controversy between religious societies with regard to the use of property as well as the exercise of other rights. Plaintiff filed an action to enjoin the use of a name in response to which defendants filed a cross complaint for declaratory relief.

The Supreme Court modified and affirmed the superior court's judgment for defendants. Part of the judgment granted defendants the declaratory relief they were seeking and restrained plaintiff from doing certain specified things. Plaintiff objected to the propriety of the injunctive provisions, and the Supreme Court ordered stricken that portion of the judgment that restrained plaintiff from making either oral or written statements that the individual defendant was untruthful, had a selfish purpose in organizing the defendant corporation, or that defendant corporation was an outlaw organization or otherwise was doing acts to deter followers from becoming members of the defendant corporation. After noting the principle that an injunction will not be granted when the restraint interferes with freedom of speech, the Court held that this portion of the judgment was too broad and impinged on freedom of speech. This was true especially when the Court considered that religious controversies were also concerned (*39 Cal. 2d 121, 145)* .

In ***Evans v. Evans*** *(2008) 162 Cal. App. 4th 1157, 76 Cal. Rptr. 3d 859* , a deputy sheriff sued his ex-wife for harassment, defamation, and breach of privacy. The trial court granted the plaintiff's motion for preliminary injunction, enjoining the defendant publishing "false and defamatory statements" about the plaintiff on the Internet and publishing "confidential personal information" about the plaintiff on the Internet. The defendant appealed the preliminary

injunction, arguing that it was an unconstitutional prior restraint on speech, vague and ambiguous, and overbroad.

The court of appeal held that the trial court's preliminary injunction prohibiting the defendant from publishing any "false and defamatory" statements on the Internet was constitutionally invalid because there had been no trial and no determination on the merits that any statement the defendant made was defamatory (*162 Cal. App. 4th 1157, 1167-1168)* . The court further held that this portion of the order was also invalid as unconstitutionally vague and overbroad because it failed to adequately delineate which of the defendant's future comments might violate the injunction and lead to contempt of court (*162 Cal. App. 4th 1157, 1169)* .

The court of appeal also held that the portion of the order preventing the defendant from placing any "confidential personal information" about the plaintiff on the Internet was vague, overbroad, and not narrowly tailored (*162 Cal. App. 4th 1157, 1169*). On remand, the court held, the trial court should conduct a balancing test to determine whether there is a compelling reason that such information be kept private, such as facts showing the disclosure of information would jeopardize the personal safety of the plaintiff or his family and/or would lead him to fear for his or his family's personal safety (*162 Cal. App. 4th 1157, 1171-1172*).

Planned Parenthood Golden Gate v. Foti *(2003) 107 Cal. App. 4th 345, 132 Cal. Rptr. 2d 46* , involved a permanent injunction that plaintiff Planned Parenthood Association of San Mateo County obtained limiting demonstration activity outside its clinic. The injunction was entered against two named parties, Operation Rescue of California and Robert Cochran. According to its terms, the injunction applied to: "Defendants and their agents, employees, representatives and all persons acting in concert or participation with them, or either of them, and all persons with actual notice of this judgment." About six years later, plaintiff sought a declaration that the injunction applied to certain other named individuals, the defendants in the present action. Those individuals challenged the injunction, claiming that it did not apply to them because they were not specifically named in it and were not parties to the action in which it was issued. The defendants also argued that the injunction violated their *First Amendment* right to protest outside an abortion clinic. Plaintiff argued that the injunction applied to the defendants because they had actual notice of it. Plaintiff also argued that the defendants should be subject to the injunction in order to uphold the policy against multiplicity of lawsuits. The trial court granted plaintiff's motion for summary judgment.

The court of appeal held that as a general matter, protestors enjoy full constitutional protection for the expression and communication of their views concerning the public issue of abortion. The court held that this was particularly true when these protected activities occur on public streets and sidewalks, traditionally viewed as the quintessential public forum. The court held that an injunction curtailing protected expression will be upheld only if the challenged provisions of the injunction burden no more speech than necessary to serve a significant governmental interest. In this case, the court held, the actual notice provision could not satisfy this requirement; because it purported to enjoin all demonstrators in addition to the enjoined parties, the restriction was overbroad on its face (*107 Cal. App. 4th 345, 354)* .

In ***Chico Feminist Women's Health Center v. Scully*** *(1989) 208 Cal. App. 3d 230, 256 Cal. Rptr. 194* , plaintiff brought an action to enjoin picketing in front of an abortion clinic. A trial court issued an order granting a preliminary injunction that precluded the defendants from photographing or otherwise harassing patrons of the clinic and imposed other restrictions on defendants in the vicinity of the clinic. The injunction was later modified, and both the plaintiff and defendants appealed.

The court of appeal affirmed the order as modified, and dismissed plaintiff's appeal from the original preliminary injunction as untimely. The court reasoned, in part, that the defendants' right to free speech was implicated in their picketing activities, and the extent to which their free speech rights could be curtailed required analysis of the "forum" used to communicate with the clinic patrons. Here, the "public forum" doctrine was involved and mandated a high level of scrutiny of any abridgement of speech. Ample alternative means of communication must be afforded before speech in a public forum can be restricted. Ample alternative means do not exist if a speaker's "target audience" is altogether

insulated from the speaker's message, which was the case here. Abortions at the center were performed only on Saturdays and the plaintiff made no showing that defendants had any means of reaching their target audience, women seeking abortions, if defendants were excluded from the vicinity of the center on Saturdays. Under *Code Civ. Proc. § 527(a)* it was incumbent on plaintiffs to show "satisfactorily that sufficient grounds exist" for issuance of the injunction. Because the availability of alternative means of communication with patrons of the center was indispensable to the injunctive relief sought by plaintiffs, it was plaintiff's burden to show the available alternative. The appellate court concluded that the plaintiffs had not met this burden. Therefore, the trial court had not abused its discretion in declining to enjoin *all* communication between defendants and the center's patrons and by fashioning narrower orders aimed specifically at the causes of the patrons' emotional distress (*208 Cal. App. 3d 230, 245-248)* .

[4] Additional Authorities

[a] Interference With Freedom of Speech

In *Levy v. City of Santa Monica (2004) 114 Cal. App. 4th 1252, 8 Cal. Rptr. 3d 507* , the plaintiffs were homeowners who built a large playhouse in their backyard. The plaintiffs' neighbor complained to the defendant City of Santa Monica about the playhouse. After the Levy's modified the playhouse to meet city requirements, the neighbor complained again to the City's building and safety department. She also complained to defendant Ken Genser, her city council representative, who was also the mayor. In response, Genser sent an e-mail to the City's director of planning and community development, that said, "[C]ould you look into this? Is this structure being built without permits? And could it be built with a permit? Please feel free to contact [the neighbor] directly."

A section of the city charter stated that "Except for the purpose of inquiry, the City Council and its members shall deal with the administrative service under the City Manager solely through the City Manager and neither the City Council nor any member shall give orders to any subordinates of the City Manager, either publicly or privately." In light of this, the plaintiffs filed a complaint for injunctive relief against the City and Genser. They sought a permanent injunction precluding city council members from engaging in acts designed to influence City administrative staff through direct communication regarding zoning enforcement matters. The City filed a motion to strike the lawsuit under "SLAPP" (Strategic Lawsuit Against Public Participation) (*Code Civ. Proc. § 425.16*). The trial court held in favor of the plaintiffs and granted the injunction. The City appealed.

The court of appeal reversed. It held that the neighbor's act of contacting her representative and the councilperson's act of contacting planning staff were petitions for grievances against the government protected by the *First Amendment*. Under the *First Amendment*, the court held, legislators are given broad latitude to express their views and there are no stricter free speech standards on them than on the general public. Laws that restrict that freedom must be narrowly construed. City officials have *First Amendment* protection when they respond to inquiries from the public about the city's actions on construction projects. The plaintiffs sought to enjoin council members from advocating their constituents' positions, applying "direct pressure" or "engaging in acts designed to influence" City administrative staff. The court held that was an overly broad restraint on speech which would inhibit constitutionally protected activity (*114 Cal. App. 4th 1252, 1261-1262)* .

In *San Diego Unified Port Dist. v. U.S. Citizens Patrol (1998) 63 Cal. App. 4th 964, 74 Cal. Rptr. 2d 364* , defendant was an association of citizens concerned about problems associated with illegal immigration in San Diego County. The organization was formed to monitor whether commercial airlines at San Diego airport were complying with a Federal Aviation Administration (FAA) requirement that airlines check passengers' photographic identification before allowing them to board airplanes or check baggage. Members of the defendant, wearing tee shirts bearing defendant's name, observed the various airlines' baggage check-in and boarding procedures. When they observed noncompliance they brought it to the attention of the noncomplying ticket agents or other airline representatives. The defendant limited its activities in the airport to walking through the terminals and speaking with airline employees. They did not contact any other people in the airport. Members of the Chicano Federation (Federation) held a press conference in one of the

airport terminals to protest the defendant's activities. When one of the defendant's members walked over to the area where the press conference was being held, members of the Federation moved toward him and began shouting, chanting and clapping in a loud and disruptive manner and followed him when he left the area continuing to chant and shout at him in a threatening manner in a disturbance that continued until he departed the terminal area. The next day San Diego Unified Port District filed a complaint for injunctive relief seeking to restrain the Federation and defendant from causing further disturbance at the airport. The trial court granted the application for a temporary restraining order and later granted the plaintiff's motion for a preliminary injunction. Defendant appealed challenging two paragraphs of the preliminary injunction (*63 Cal. App. 4th 964, 967-969)* .

The court of appeal reversed the order granting the preliminary injunction as to the two challenged paragraphs. Those paragraphs were vacated and the order otherwise affirmed (*63 Cal. App. 4th 964, 967-973)* . The court noted that the right to free speech is constitutionally protected from censorship by hostile reaction, sometimes referred to as a "heckler's veto." The plaintiff did not contend that defendant engaged in any conduct that was in and of itself enjoinable, improper, or illegal nor did the record reflect it. The injunction of the defendant was based solely on the Federation's hostile reaction to the defendant's presence at the airport. The preliminary injunction attempts to prevent future disruptions by casting too fine a net. Defendant, engaging in lawful and passive conduct, was scooped up with the Federation, some of whose supporters aggressively confronted a member of the defendant. Because the injunction subjects the defendant's right to engage in protected speech to the censorship of a group who disagrees with its content, it constitutes an impermissible "heckler's veto" of defendant's protected speech (*63 Cal. App. 4th 964, 970-971)* . Moreover, even if there is a basis to enjoin certain conduct by defendant's members, the injunction goes much further than necessary to provide the relief sought by the plaintiff. The challenged portions of the preliminary injunction unnecessarily burden defendant's speech (*63 Cal. App. 4th 964, 971)* .

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11-116 California Points & Authorities § 116.49

§ 116.49 Opposing Application for Preliminary Injunction [Code Civ. Proc. § 527]--Lack of Personal Jurisdiction

[1] FORM

[*Caption. See § 116.32.*]

A PRELIMINARY INJUNCTION CANNOT BE ISSUED WHEN THE COURT LACKS PERSONAL JURISDICTION OVER THE PARTY TO BE ENJOINED. IN THIS CASE, THE COURT DOES NOT HAVE PERSONAL JURISDICTION OVER _____ [*specify party, e.g.,* DEFENDANT] BECAUSE _____ [*state grounds*]. THEREFORE, THE REQUEST FOR INJUNCTIVE RELIEF SHOULD BE DENIED.

Lack of Personal Jurisdiction. An injunction cannot be granted when the court lacks personal jurisdiction over the party sought to be enjoined by the injunction (*Rothschild v. Erda (1968) 258 Cal. App. 2d 750, 753-756, 66 Cal. Rptr. 209*).

[*Add points and authorities supporting contention that no personal jurisdiction exists over party to be enjoined. For examples of such points and authorities, see Ch. 132, Jurisdiction: Personal Jurisdiction and Inconvenient Forum.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to an application for a preliminary injunction when that relief is barred by the fact that the court lacks personal jurisdiction over the party sought to be enjoined. With appropriate modifications, the same principle could be used in support of a motion to quash service of summons for lack of personal jurisdiction [*see Code Civ. Proc. § 418.10(a)(1)*].

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts and legal arguments that establish why the court lacks jurisdiction over the party sought to be enjoined. For points and authorities pertaining to jurisdiction over the person, see Ch. 132, *Jurisdiction: Personal Jurisdiction and Inconvenient Forum* .

[c] Related Pleading and Practice Forms

For discussion of the various methods of opposing applications for provisional and permanent injunctive relief, as well as a form of declaration to oppose an application for a preliminary injunction and a form of demurrer to a complaint for injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender). For discussion of personal jurisdiction generally and discussion and forms pertaining to motions to quash service of summons for lack of personal jurisdiction, see California Forms of Pleading and Practice, Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances* (Matthew Bender).

[3] Discussion of Authorities

[a] Lack of Personal Jurisdiction

In ***Rothschild v. Erda*** *(1968) 258 Cal. App. 2d 750, 66 Cal. Rptr. 209* , a temporary administrator of a New York estate made a special appearance at a hearing in a California superior court in order to contest the court's jurisdiction to hear an application for a preliminary injunction in a quiet title action involving securities located in California. Nevertheless, the superior court issued a preliminary injunction that restrained the administrator from prosecuting all suits or claims in the probate proceedings that the administrator had instituted in New York. The administrator appealed from the order granting the preliminary injunction on the ground that the superior court lacked personal jurisdiction over him.

The court of appeal reversed the order. The court stated that there were no statutory or constitutional grounds by which personal jurisdiction over the defendant had been obtained. Thus, because an order granting a preliminary injunction is a decree *in personam* and because plaintiff had made only a special appearance for the purpose of challenging the jurisdiction of the superior court, that court did not have jurisdiction over the administrator's person. Therefore, it was precluded from granting the preliminary injunction (*258 Cal. App. 2d 750, 753-756)* .

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11-116 California Points & Authorities § 116.50

§ 116.50 Opposing Application for Preliminary Injunction [Code Civ. Proc. § 527]--No Acts Threatened to Be Committed in Future

[1] FORM

[*Caption. See § 116.32.*]

A PRELIMINARY INJUNCTION MAY NOT BE GRANTED TO RESTRAIN THE COMMISSION OF ACTS WHEN NO SIMILAR ACTS HAVE BEEN COMMITTED IN THE PAST, NONE ARE THREATENED TO BE COMMITTED IN THE FUTURE, AND IT REASONABLY APPEARS THAT THEY WILL NOT BE COMMITTED. IN THIS CASE, _____ [*specify party, e.g.,* PLAINTIFF] SEEKS TO ENJOIN _____ [*specify type of conduct/activity sought to be enjoined*], BUT THERE IS NO EVIDENCE THAT _____ [*specify opposing party, e.g.,* DEFENDANT] HAS ENGAGED IN THIS CONDUCT/ACTIVITY, OR THREATENED TO DO SO, AND THERE IS NO REASONABLE POSSIBILITY THAT _____ [*specify party, e.g.,* DEFENDANT] WILL DO SO HEREAFTER. THEREFORE, THE REQUEST FOR INJUNCTIVE RELIEF SHOULD BE DENIED.

No Acts Threatened to Be Committed in Future. An injunction cannot be granted to restrain the commission of acts in the future unless there is good reason to believe that they will be committed if there is no restraint. When no similar acts have been committed in the past and none are threatened to be committed in the future and when it appears reasonable to believe that they will not be committed, there is no occasion for an injunction and no right to one (*De Haviland v. Warner Bros. Pictures (1944) 67 Cal. App. 2d 225, 238, 153 P.2d 983*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to an application for a preliminary injunction when that relief is being sought to restrain acts in the future, but when such acts have not been committed in the past and none are threatened to be committed in the future.

With appropriate modifications, these points and authorities may be used (1) in support of a demurrer to a complaint for injunctive relief [*see Code Civ. Proc. § 430.10(e)*], (2) as an affirmative defense in an answer to such a complaint [*see Code Civ. Proc. § 431.30(b)(2)*], (3) in support of a motion for summary judgment in such an action [*see Code Civ. Proc. § 437c*], or (4) in support of a petition for a writ of prohibition [*see Code Civ. Proc. §§ 1102, 1103*] seeking to restrain a court from enforcing injunctive relief.

For related points and authorities, see *§ 116.37*.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts establishing that the moving party is seeking relief pertaining to conduct or activity of a kind that the other party has neither engaged in, threatened to engage in, or with respect to which there is no reasonable likelihood he or she will engage in thereafter. In an appropriate case, this may entail describing how the party's past or ongoing conduct or activity differs significantly from that sought to be enjoined.

[c] Related Pleading and Practice Forms

For discussion of the various methods of opposing applications for provisional and permanent injunctive relief, as well as a form of declaration to oppose an application for a preliminary injunction and a form of demurrer to a complaint for injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender).

[3] Discussion of Authorities

[a] No Acts Threatened to Be Committed in Future

In ***De Haviland v. Warner Bros. Pictures*** *(1944) 67 Cal. App. 2d 225, 153 P.2d 983* , plaintiff brought an action seeking a declaration that a contract for her services as a motion picture actress was terminated. Plaintiff obtained a judgment to that effect, and defendant producer appealed.

The court of appeal declared that the sole question on appeal was whether certain provisions in the contract by which defendant could suspend the operation of the contract were lawful and effective insofar as they purported to bind plaintiff beyond seven years from the date her services were commenced. The court answered that question negatively and held that a provision of the Labor Code prevented her from being bound to the contract beyond seven years after her services commenced. Thus, it affirmed the judgment insofar as it granted plaintiff the declaratory relief she was seeking.

However, the court of appeal observed that the portion of the judgment that enjoined defendant from interfering with

plaintiff's rendition of services for persons, firms, or corporations other than defendant was not justified. It pointed out that there was nothing in the record that would justify a belief or even a suspicion that defendant would not respect and abide by the final declaration of the court as to the rights of the parties. It noted that an injunction is not proper to restrain the commission of acts in the future unless there is good reason to believe that they will be committed if there is no restraint. When no similar acts have been committed in the past and none are threatened to be committed in the future, and when it appears reasonable to believe that they will not be committed, there is no occasion for an injunction and no right to one. Thus, the court of appeal modified the judgment by striking out that portion of it that granted plaintiff injunctive relief (*67 Cal. App. 2d 225, 238)* .

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11-116 California Points & Authorities § 116.51

§ 116.51 Opposing Application for Preliminary Injunction [Code Civ. Proc. § 527]--Mandatory Preliminary Injunction Rarely Issued

[1] FORM

[*Caption. See § 116.32.*]

A MANDATORY PRELIMINARY INJUNCTION WILL RARELY ISSUE WHEN ITS EFFECT IS TO GRANT PLAINTIFF ALL OF THE INJUNCTIVE RELIEF REQUESTED AND TO ACCOMPLISH THE MAIN PURPOSE OF THE ACTION IN ADVANCE OF A TRIAL ON THE MERITS. IN THIS CASE, IF A PRELIMINARY INJUNCTION IS GRANTED, THE _____ [*specify party sought to be enjoined, e.g.,* DEFENDANT] WILL BE REQUIRED TO _____ [*specify action/conduct prospectively required*], AND DOING SO ESSENTIALLY AFFORDS _____ [*specify other party, e.g.,* PLAINTIFF] ALL THE RELIEF HE/SHE/IT COULD OTHERWISE OBTAIN BY A JUDGMENT ON THE MERITS. THEREFORE, THE REQUEST FOR INJUNCTIVE RELIEF SHOULD BE DENIED.

Mandatory Preliminary Injunction Rarely Issued. A mandatory preliminary injunction will rarely issue when its effect is to grant plaintiff all of the injunctive relief requested in the complaint and to accomplish the main purpose of the action in advance of a trial on the merits (*City of Santa Monica v. Superior Court (1964) 231 Cal. App. 2d 223, 227, 41 Cal. Rptr. 824* ; *Paramount Pictures Corp. v. Davis (1964) 228 Cal. App. 2d 827, 838-839, 39 Cal. Rptr. 791*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to an application for a mandatory preliminary injunction on the ground that granting the injunction will afford the moving party with essentially all the relief he or she could otherwise obtain after a trial on the merits of the action.

With appropriate modifications, these points and authorities may be used (1) in support of a demurrer to a complaint for injunctive relief [*see Code Civ. Proc. § 430.10(e)*], (2) as an affirmative defense in an answer to such a complaint [*see Code Civ. Proc. § 431.30(b)(2)*], (3) in support of a motion for summary judgment in such an action [*see Code Civ. Proc. § 437c*], or (4) in support of a petition for a writ of prohibition [*see Code Civ. Proc. §§ 1102, 1103*] seeking to restrain a court from enforcing injunctive relief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts establishing that the nature of the relief being sought by means of a preliminary injunction will obviate the need for obtaining a judgment on the merits, because the moving party will have essentially secured the relief that a judgment would otherwise provide.

[c] Related Pleading and Practice Forms

For discussion of the various methods of opposing applications for provisional and permanent injunctive relief, as well as a form of declaration to oppose an application for a preliminary injunction and a form of demurrer to a complaint for injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender).

[3] Discussion of Authorities

[a] Mandatory Preliminary Injunction Rarely Issued

In ***City of Santa Monica v. Superior Court*** *(1964) 231 Cal. App. 2d 223, 41 Cal. Rptr. 824* , plaintiff commenced an action against defendant city and some of its officials seeking declaratory, as well as, preliminary and permanent injunctive, relief against the enforcement of certain of the city's gambling ordinances. The complaint alleged that plaintiff had operated a cocktail lounge and bar business in the city for many years and desired to conduct on its premises a game of cards commonly called "Panguingui" that would be played for money. Plaintiff alleged that the ordinances it was challenging were unconstitutional and that, because of the threatened enforcement of them, it was not able to determine the legality of its conducting such card games. Plaintiff did not allege that, while awaiting a trial on the merits, it would suffer any irreparable injury. Despite this omission, the superior court announced that it would issue a preliminary injunction restraining defendant city from enforcing the ordinances in question. The issuance of a formal preliminary injunction was stayed to enable the city to petition the court of appeal for a writ of prohibition.

The court of appeal issued a writ of prohibition that compelled the superior court to refrain from issuing the preliminary injunction. It noted that with all presumptions favoring the validity and constitutionality of the enactments of various legislative bodies, it should be only under extraordinary circumstances that anyone challenging the validity of a law should be granted the ultimate relief sought prior to any trial on the merits. It also noted that even in the case of an ordinary civil action in which no attack is made on the validity of a duly enacted ordinance, rarely will a mandatory

preliminary injunction issue when its effect is to grant plaintiff all of the injunctive relief requested in the complaint and to accomplish the main purpose of the action in advance of a trial on the merits. The court of appeal further pointed out that, in this situation, the plaintiff not only had failed to allege any injury of an irreparable type, it had not even represented that it was either suffering from or threatened with substantial harm of any kind (*231 Cal. App. 2d 223, 227)* .

In ***Paramount Pictures Corp. v. Davis*** *(1964) 228 Cal. App. 2d 827, 39 Cal. Rptr. 791* , plaintiff brought an action against defendant actress to compel her performance of a contract. The superior court issued a preliminary injunction that restrained her from rendering her services in connection with any motion picture other than the one contracted for unless she filed a statement with the court to the effect that she would render her services for plaintiff at plaintiff's studios in connection with the taking of an added scene for the motion picture for which she had contracted. Defendant moved for a stay of the preliminary injunction pending appeal, but the superior court denied the motion. Defendant never filed the required statement, so the preliminary injunction became effective subject to subsequent stays issued by the superior court and the court of appeal. Defendant then petitioned the court of appeal for a writ of supersedeas to stay the enforcement of the preliminary injunction pending an appeal.

The court of appeal issued a writ of prohibition regarding mandatory portions of the preliminary injunction, but refused to issue the writ regarding the prohibitory portions. The court first observed that the portion of the preliminary injunction that would have commanded defendant to perform additional services for plaintiff was automatically stayed on appeal, whereas the portion that was prohibitory was not stayed. With regard to the mandatory portion, the court of appeal noted that its effect was to grant plaintiff all of the injunctive relief requested in its complaint and to accomplish the main purpose of the action in advance of a trial on the merits. It observed that rarely will such a mandatory injunction issue. However, whether or not the circumstances of the particular situation involved justified such a mandatory preliminary injunction was a question to be determined on appeal. Both parties, the court stated, had presented strong arguments in support of their respective positions. However, because the mandatory portion of the injunction was stayed during appeal, the court of appeal did not believe it necessary to resolve those arguments in determining whether to issue the writ of supersedeas. It did issue the writ with respect to the mandatory portion of the preliminary injunction so that there would be no confusion regarding it. With regard to the prohibitory portions of the preliminary injunction, defendant had made no showing as to why they should be stayed. Therefore, the court of appeal refused to issue the writ with regard to those portions (*228 Cal. App. 2d 827, 838-839)* .

[4] Additional Authorities

[a] Mandatory Preliminary Injunction Rarely Issued

The facts and procedural background of *Teachers Ins. & Annuity Assn. v. Furlotti (1999) 70 Cal. App. 4th 1487, 83 Cal. Rptr. 2d 455* , are discussed in *§ 116.47[4][a]*. In reversing an order granting a mandatory preliminary injunction, the court of appeal noted that a court will rarely grant such an injunction and on appeal a stricter review will be applied. The granting of a mandatory injunction pending trial is not permitted except in extreme cases where the right thereto is clearly established (*70 Cal. App. 4th 1487, 1493)* .

The facts and procedural background of *Shoemaker v. County of Los Angeles (1995) 37 Cal. App. 4th 618, 43 Cal. Rptr. 2d 774* , are discussed in *§ 116.47[4][a]*.

The court of appeal reversed the trial court's order granting the preliminary injunction based on the trial court having abused its discretion. The court concluded that plaintiff was not likely to prevail on the causes of action supporting the injunction (although the court had no occasion to evaluate plaintiff's likelihood of success on plaintiff's substantive claims) and the factors of interim harm favored the defendants (*37 Cal. App. 4th 618, 626)* . In discussing the preliminary injunction, the court of appeal noted that it was undoubtedly mandatory in nature in that defendants were ordered to take affirmative steps to restore plaintiff to the administrative positions and that it changed the status quo in

that plaintiff had already been removed from the positions at the time of the trial court's order granting the preliminary injunction (*37 Cal. App. 4th 618, 625 n.4*). A court will seldom grant a preliminary mandatory injunction. A preliminary injunction that mandates affirmative acts that change the status quo is subject to stricter appellate review, it being scrutinized even more closely for an abuse of discretion. A mandatory injunction pending trial is not permitted to be granted except in extreme circumstances when the right for such relief is clearly established (*37 Cal. App. 4th 618, 625)* .

In *Bo Kay Chan v. Gerdon Land Co. (1951) 103 Cal. App. 2d 724, 230 P.2d 1* , plaintiffs were lessees who had obtained leased premises from defendant company that owned the real property involved. Plaintiffs brought an action for preliminary and permanent injunctive relief to restrain defendants' alleged breach of their implied covenant of quiet enjoyment as well as defendants' alleged invasion of their rights as lessees. The superior court issued a preliminary injunction that enjoined defendants from interfering with plaintiffs' rights; it also ordered them to remove all structures and other buildings that they had constructed that covered up plaintiffs' lightwell and ordered them to restore the lightwell to its previous condition. Defendants appealed, and the court of appeal reversed that portion of the preliminary injunction that was mandatory in effect. The court noted that it was well settled that a very strong and urgent case is required to justify a mandatory preliminary injunction. A clear case of prospective injury for which the plaintiff will have no adequate remedy at law is indispensable. Because there was no such showing in the present situation, the court of appeal reversed the mandatory portion of the injunction (*103 Cal. App. 2d 724, 727-728)* .

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PART II. FORMS
A. Injunctive Relief in General

11-116 California Points & Authorities § 116.52

§ 116.52 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10]--No Cause of Action Stated for Injunctive Relief

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORIT-
vs.	)	IES IN SUPPORT OF DEMURRER TO COM-
_____ [*name*],	)	PLAINT FOR INJUNCTIVE RELIEF
Defendant.	)	Date: _____
	)	Time: _____
	)	Dept.: _____
		Trial Date: _____

_____

DEFENDANT'S DEMURRER TO THE COMPLAINT SHOULD BE SUSTAINED [WITHOUT LEAVE TO AMEND] BECAUSE THE COMPLAINT, WHICH ALLEGES ONLY _____ [*summarize allegation*], FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION FOR INJUNCTIVE RELIEF [AND SHOWS ON ITS FACE THAT IT CANNOT BE AMENDED TO STATE ONE].

A. Objection by Demurrer. The party against whom a complaint has been filed may object, by demurrer, as provided in *Code of Civil Procedure Section 430.30*, to the complaint on the ground that it does not state facts sufficient to constitute a cause of action (*Code Civ. Proc. § 430.10(e)*). When any ground for objection to a complaint appears on the

face thereof or from any matter of which the court is required to or may take judicial notice, the objection on that ground may be taken by a demurrer to the complaint (*Code Civ. Proc. § 430.30(a)*).

B. Elements of Cause of Action for Injunctive Relief. The elements of a cause of action for injunctive relief are (1) a tort or other wrongful act constituting a cause of action, and (2) irreparable injury, that is, a factual showing that the wrongful act constitutes an actual or threatened injury to property or personal rights that cannot be compensated for by an ordinary damage award (*Brownfield v. Daniel Freeman Marina Hospital (1989) 208 Cal. App. 3d 405, 410, 256 Cal. Rptr. 240*).

[*ADD point and authority showing that complaint is insufficient, such as the following:*]

C. Complaint Shows on Its Face That Damages Provide Adequate Remedy. A complaint that shows on its face that plaintiff's remedy is an action for damages and that damages provide an adequate remedy fails to state facts sufficient to constitute a cause of action for injunctive relief (*Brownfield v. Daniel Freeman Marina Hospital (1989) 208 Cal. App. 3d 405, 414, 256 Cal. Rptr. 240*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a general demurrer to a complaint for injunctive relief when the complaint fails to allege facts sufficient to constitute a cause of action for injunctive relief based on a tort or other wrongful act. If the complaint shows on its face that it cannot be amended to state such an action, defendant may request that the demurrer be sustained without leave to amend.

If plaintiff's failure to state facts sufficient to constitute a cause of action is raised as an objection to the issuance of a preliminary injunction, § 116.40 should be used either in conjunction with Paragraphs B and C in this form, or in conjunction with §§ 116.52-116.55, or in conjunction with other points and authorities showing why the complaint fails to state facts sufficient to constitute a cause of action.

For a form of caption that may be modified for use with these points and authorities, see *§ 116.32*.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts establishing that, even if the allegations of the complaint are true (for the sake of argument only), the complaint fails to state a cause of action for injunctive relief. If counsel's position is that the complaint fails to state any underlying cause of action in tort, counsel should add points and authorities pertaining to the underlying tort cause of action that support this position. Counsel should consult the appropriate substantive chapter in

this publication containing points and authorities pertaining to the underlying tort action [*see, e.g.,* Ch. 105, *Fraud and Deceit* ; Ch. 167, *Nuisance* , and Ch. 225, *Trespass*].

[c] Related Pleading and Practice Forms

For discussion and forms of demurrer, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

[d] Related Points and Authorities

For points and authorities supporting and opposing demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* in this publication.

[3] Discussion of Authorities

[a] Elements of Cause of Action for Injunctive Relief

The facts and procedural background of ***Brownfield v. Daniel Freeman Marina Hospital*** *(1989) 208 Cal. App. 3d 405, 256 Cal. Rptr. 240* , are discussed in *§ 116.23[4][a]*. In that case, judgment for defendant was entered pursuant to stipulation after the trial court had sustained defendant's demurrer to the complaint with leave to amend for failure to state a cause of action for injunctive or declaratory relief. In affirming the judgment, the court of appeal said that the elements of a cause of action for injunctive relief are (1) a tort or other wrongful act constituting a cause of action, and (2) irreparable injury, that is, a factual showing that the wrongful act constitutes an actual or threatened injury to property or personal rights that cannot be compensated for by an ordinary damage award (*208 Cal. App. 3d 405, 410)* .

[b] Complaint Shows on Its Face That Damages Provide Adequate Remedy

The facts and procedural background of ***Brownfield v. Daniel Freeman Marina Hospital*** *(1989) 208 Cal. App. 3d 405, 256 Cal. Rptr. 240* , are discussed in *§ 116.23[4][a]*. In affirming the judgment, the court of appeal held that the complaint stated neither a cause of action under the Unfair Practices Act nor a cause of action for tortious breach of contract (*208 Cal. App. 3d 405, 411-412)* .

The court concluded that when a rape victim can allege that a skilled practitioner of good standing would have provided her with information concerning and access to estrogen pregnancy prophylaxis under similar circumstances, that if such information had been provided to her she would have elected such treatment, and that damages have proximately resulted from the failure to provide her with information concerning this treatment option, the rape victim can state a cause of action for damages for medical malpractice. Having concluded that a rape victim who was denied the requested information may file an action for damages, the court said that it necessarily follows that plaintiff did not and could not allege facts demonstrating that she or the general public had, or would, suffer injuries that could not be compensated for by an award of damages (*208 Cal. App. 3d 405, 414)* .

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11-116 California Points & Authorities § 116.53

§ 116.53 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10]--Injunctive Relief Not Warranted if Complaint Contains Only Unsupported General Conclusions

[1] FORM

[*Caption. See § 116.52.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION FOR INJUNCTIVE RELIEF BECAUSE IT CONTAINS ONLY GENERAL CONCLUSIONS, NAMELY _____ [*summarize complaint's conclusions*], WHICH ARE NOT SUPPORTED EITHER BY FACTS IN THE COMPLAINT OR BY AFFIDAVITS/DECLARATIONS. THEREFORE, DEFENDANT'S DEMURRER SHOULD BE SUSTAINED.

A. Objection by Demurrer. [*See § 116.52[1], Paragraph A.*]

B. General Conclusions in Complaint Not Sufficient to Issue Injunction. A verified complaint, not supported by affidavits, is tested by the same rules that are applicable to oral testimony. Conclusions that might stand as a matter of pleading are not competent to justify the issuance of an injunction (*Bank of America v. Williams (1948) 89 Cal. App. 2d 21, 23, 200 P.2d 151*). Unless a statement that is in the nature of a conclusion is supported by the facts or circumstances on which it rests, it is insufficient to sustain an application for an injunction (*Willis v. Lauridson (1911) 161 Cal. 106, 108, 118 P. 530*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a general demurrer to a complaint seeking injunctive relief when the complaint on file does not state a cause of action because it contains only general conclusions that are not supported by facts. The memorandum may be used when defendant is attacking a cause of action that is seeking a preliminary injunction and a permanent injunction or is seeking only a permanent injunction.

When defendant is attacking only an application for a preliminary injunction on the ground that no allegations of irreparable injury are contained therein, *§ 116.37* should be used. When defendant is attacking an application for a preliminary injunction because the complaint does not state a cause of action in general, § 116.52 should be used. When defendant is attacking a complaint for injunctive relief because it appears that defendant's conduct will not cause plaintiff any irreparable injury, § 116.54 should be used. When defendant is attacking a complaint for injunctive relief for failure to state a cause of action because it contains only general conclusions that plaintiff will suffer irreparable injury from defendant's conduct without supporting those conclusions with facts, § 116.55 should be used.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts, based on allegations in the complaint, demonstrating that the complaint only contains unsupported conclusions.

[c] Related Pleading and Practice Forms

For discussion of the various methods of opposing applications for provisional and permanent injunctive relief, as well as a form of demurrer to a complaint for injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender).

[3] Discussion of Authorities

[a] General Conclusions in Complaint Not Sufficient to Issue Injunction

In ***Bank of America v. Williams*** *(1948) 89 Cal. App. 2d 21, 200 P.2d 151* , plaintiff bank had brought an action to have certain partnership properties standing in the defendants' names as well as a certain check declared to be the property of defendant Williams. It also sought to have this property applied to the payment of two judgments previously obtained by the plaintiff against defendant Williams on which Williams had made no payments. No affidavits were filed by any of the parties. The superior court issued an order granting plaintiff a preliminary injunction that enjoined defendants from paying to Williams any of the partnership assets involved and that also restrained defendants Williams and Fruhling from disposing of Williams' interest in any of the property involved. The order granting the preliminary injunction was subsequently modified, but Williams' general and special demurrers to the complaint were overruled. Williams' motion to dissolve and vacate the order granting the preliminary injunction was denied. Williams appealed, and the court of appeal reversed.

The court of appeal first noted the law applicable to the appeal. While it is permissible to grant a preliminary injunction based solely on the allegations of a verified complaint, it is improper to grant an injunction based on those allegations if the complaint does not state a cause of action. Furthermore, if the complaint is the sole basis for the order and is treated

as an affidavit, its sufficiency must be tested by the same rules applicable to oral testimony. Conclusions that might stand as a matter of pleading are not competent to justify the issuance of a preliminary injunction.

Tested by these standards, the court of appeal held that the complaint was insufficient to support the preliminary injunction. It noted that unless the complaint alleged that Williams had property during the five-year period after the last judgment involved and either had made false statements concerning the property or had concealed it during that period, the action was barred by a limitations statute, which provided that actions on judgments are normally barred within five years from their rendition. In this situation, the plaintiff's complaint had obviously refrained from making any positive statement with regard to Williams owning or possessing property prior to the time when the statute of limitations ran on the last judgment; it had also refrained from making any allegations that defendant Williams had made representations that were false and fraudulent prior to the time the statute of limitations had run on the last judgment. Hence, the court of appeal reversed the orders that granted the preliminary injunction and that denied the motion to vacate it (*89 Cal. App. 2d 21, 23)* .

In ***Willis v. Lauridson*** *(1911) 161 Cal. 106, 118 P. 530* , plaintiff stockholder brought an action to restrain defendant cooperative association and certain stockholders from voting alleged illegal shares at the association's annual meeting to elect a board of directors. After the election, plaintiff's complaint alleged, the elected directors would vote into effect an illegal plan to declare a dividend to certain illegal shareholders. The superior court granted a preliminary injunction based on plaintiff's verified complaint; there were no affidavits filed in support of the complaint. Defendants moved to dissolve the preliminary injunction, but the superior court issued an order refusing to dissolve it. Defendants appealed from this order, and the Supreme Court reversed it.

Before examining the complaint, the Supreme Court stated some of the rules that govern the sufficiency of a complaint on which a preliminary injunction has issued. It observed that when a verified complaint is the basis for the relief sought, it takes the place of an affidavit and must be treated as such. The facts stated in such a complaint must stand the test to which oral testimony would be subjected. Averments that are but conclusions of law are not competent testimony even though they might stand as a matter of pleading. Unless a statement that is in the nature of a conclusion is supported by the facts or circumstances on which it rests, it is insufficient to sustain an application for an injunction. If the complaint otherwise unsupported is open to attack on a general demurrer, it is insufficient.

Even though the complaint alleged that defendants' acts would cause plaintiff great and irreparable injury and that no compensation could afford plaintiff adequate relief, the Supreme Court held that it failed to state facts sufficient to determine how plaintiff's property would be injured by the acts complained of. The Court pointed out that general conclusions as to the multiplicity of suits and irreparable injury that would be caused to plaintiff by defendant's acts do not state facts sufficient to constitute a cause of action (*161 Cal. 106, 108)* .

[4] Additional Authorities

[a] General Conclusions in Complaint Not Sufficient to Issue Injunction

In *Provident L. Corp. v. Provident I. Dist. (1937) 22 Cal. App. 2d 105, 79 P.2d 392* , plaintiff was a holder of bonds issued by defendant district. It brought an action to restrain defendant from entering into a certain lease. The superior court issued a temporary restraining order based on the complaint, but at the hearing on the order to show cause it dissolved that order and sustained the defendant's demurrer to the amended and supplemental complaints filed by plaintiff. It then entered a judgment of dismissal. Plaintiff appealed from the judgment, but the court of appeal affirmed. It observed that plaintiff's complaint contained only general allegations. Absolutely no specific facts were stated from which the court could infer that the conclusions drawn by the plaintiff were correct. Hence, the complaint was insufficient either to justify the issuance of an injunction or to state a cause of action therefor and, thus, the demurrer was properly sustained (*22 Cal. App. 2d 105, 106-109)* .

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11-116 California Points & Authorities § 116.54

§ 116.54 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10]--Injunctive Relief Not Warranted If Injury Alleged in Complaint Does Not Appear Irreparable

[1] FORM

[*Caption. See § 116.52.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION FOR INJUNCTIVE RELIEF BECAUSE IT APPEARS FROM THE FACE OF THE COMPLAINT THAT DEFENDANT'S CONDUCT WILL NOT CAUSE PLAINTIFF ANY IRREPARABLE INJURY. FAIRLY READ, THE COMPLAINT STATES ONLY THAT _____ [*summarize allegations regarding defendant's conduct*], AND THE CONDUCT DESCRIBED, EVEN IF TRUE, WOULD NOT REASONABLY LEAD TO IRREPARABLE INJURY TO PLAINTIFF. THEREFORE, DEFENDANT'S DEMURRER SHOULD BE SUSTAINED.

A. Objection by Demurrer. [*See § 116.52[1], Paragraph A.*]

B. No Irreparable Injury. A complaint does not state a cause of action for an injunction when it does not appear therefrom that plaintiff would be irreparably damaged by the conduct of defendant (*Mechanics' Foundry v. Ryall (1882) 62 Cal. 416, 417-419* ; *Duvall v. White (1920) 46 Cal. App. 305, 307-308, 189 P. 324*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a general demurrer to a complaint seeking injunctive relief when it appears from the complaint that defendant's conduct will not cause plaintiff any irreparable injury. This form may be used when defendant is attacking a cause of action that is seeking a preliminary injunction and a permanent injunction or is seeking only a permanent injunction.

When defendant is attacking only an application for a preliminary injunction on the ground that the application contains no sufficient allegations of irreparable injury, § 116.37 should be used. When defendant is attacking an application for a preliminary injunction because the complaint does not state a cause of action in general, § 116.52 should be used. When defendant is attacking a complaint that does not state a cause of action for injunctive relief because it contains only general conclusions that are not supported by facts, § 116.53 should be used. When defendant is attacking a complaint for injunctive relief for failure to state a cause of action because it contains only general conclusions that plaintiff will suffer irreparable injury from defendant's conduct without supporting those conclusions with facts, § 116.55 should be used.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts from the complaint demonstrating that even if the allegations are true (for the sake of argument), the conduct described by the complaint would not reasonably lead to irreparable injury to the plaintiff.

[c] Related Pleading and Practice Forms

For discussion of the various methods of opposing applications for provisional and permanent injunctive relief, as well as a form of demurrer to a complaint for injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender).

[3] Discussion of Authorities

[a] No Irreparable Injury

In ***Mechanics' Foundry v. Ryall*** *(1882) 62 Cal. 416* , plaintiff brought an action for an injunction and for damages to enjoin a former employee from trespassing on its premises. The superior court awarded a judgment in which it permanently restrained the employee from intruding into plaintiff's shop and awarded plaintiff damages. Defendant appealed, and the Supreme Court reversed.

The Court stated that the complaint failed to state facts sufficient to warrant the interposition of a court of equity. Only by inference did the complaint charge defendant with committing a trespass. Moreover, it did not state that plaintiff's trespasses constituted irreparable injury or were destructive of plaintiff's property in its nature and substance. The Court held that plaintiff's remedies at law were adequate. Thus, the judgment was reversed (*62 Cal. 416, 417-419)* .

In ***Duvall v. White*** *(1920) 46 Cal. App. 305, 189 P. 324* , plaintiffs brought an action to enjoin defendants from obstructing, diverting, or in any way interfering with the flow of oil away from plaintiffs' property. Defendants demurred, and the superior court sustained the demurrer and then entered judgment for defendants. Plaintiffs appealed.

The court of appeal affirmed the judgment. The court held that the complaint failed to state a cause of action for an injunction. It did not appear from the complaint that the plaintiffs would be irreparably damaged by the threatened acts of the defendants. To the contrary, the complaint showed that plaintiffs would lose oil every day of the value of $15. Mere monetary loss is not ordinarily irreparable in the contemplation of the remedy of injunction, at least in situations when there is no showing that the parties causing the loss are insolvent or in any manner unable to respond in damages. In this situation, nothing in the complaint was inconsistent with the view that an action at law would afford a complete remedy for any injury that had been or would be suffered by plaintiffs (*46 Cal. App. 305, 307-308)* .

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11-116 California Points & Authorities § 116.55

§ 116.55 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10]--Injunctive Relief Not Warranted if Complaint Contains Only Unsupported General Conclusions of Irreparable Injury

[1] FORM

[*Caption. See § 116.52[1].*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION FOR INJUNCTIVE RELIEF BECAUSE IT CONTAINS ONLY GENERAL CONCLUSIONS THAT PLAINTIFF WILL SUFFER IRREPARABLE INJURY FROM DEFENDANT'S CONDUCT WITHOUT SUPPORTING THOSE CONCLUSIONS EITHER BY FACTS IN THE COMPLAINT OR BY AFFIDAVITS/DECLARATIONS. THEREFORE, DEFENDANT'S DEMURRER SHOULD BE SUSTAINED.

A. Objection by Demurrer. [*See § 116.52[1], Paragraph A.*]

B. General Conclusions in Complaint Not Sufficient to Issue Injunction. [*See § 116.53[1], Paragraph B.*]

C. General Conclusions Concerning Irreparable Injury Not Sufficient. General statements in a complaint that "great and irreparable injury will result" from the acts described are not sufficient. Such averments, standing alone, have no probative force and cannot be made the basis for injunctive relief. Facts concerning the irreparable injury that allegedly will result to the plaintiff unless injunctive relief is extended to him or her must be pleaded in order that the court may consider whether the plaintiff's apprehensions are well founded. A mere allegation that such injury will result is not sufficient (*E. H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a general demurrer to a complaint seeking injunctive relief when the complaint on file does not state a cause of action because it contains only general conclusions that plaintiff will suffer irreparable injury from defendant's conduct without supporting those conclusions with facts. This form may be used when the defendant is attacking a cause of action that is seeking a preliminary injunction and a permanent injunction or is seeking only a permanent injunction.

When defendant is attacking only an application for a preliminary injunction on the ground that no allegations of irreparable injury are contained in it, § 116.37 should be used. When defendant is attacking an application for a preliminary injunction because the complaint does not state a cause of action in general, § 116.52 should be used. When defendant is attacking a complaint that does not state a cause of action for injunctive relief because it contains only general conclusions that are not supported by facts, § 116.54 should be used. When defendant is attacking a complaint for injunctive relief because it appears from it that defendant's conduct will not cause plaintiff any irreparable injury, § 116.53 should be used.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should establish, by reference to matters contained in the complaint, that the allegations of irreparable injury are actually unsupported by any facts in the complaint or in any accompanying affidavits or declarations. Therefore, counsel will be demonstrating that the complaint merely alleges general conclusions about irreparable injury.

[c] Related Pleading and Practice Forms

For discussion of the various methods of opposing applications for provisional and permanent injunctive relief, as well as a form of demurrer to a complaint for injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender).

[3] Discussion of Authorities

[a] General Conclusions Concerning Irreparable Injury Not Sufficient

In ***E. H. Renzel Co. v. Warehousemen's Union*** *(1940) 16 Cal. 2d 369, 106 P.2d 1* , plaintiff corporation brought an action to restrain defendants from picketing its place of business and from conducting a secondary boycott by representing to plaintiff's customers that it was "unfair to organized labor." No affidavits were filed in support of the complaint. On the basis of the verified complaint and oral testimony at the hearing on the order to show cause, the superior court issued a preliminary injunction to that effect. Defendants appealed from the order granting the preliminary injunction, and the Supreme Court reversed.

The Supreme Court observed that neither the complaint nor the oral testimony included facts showing that the plaintiff had suffered or would suffer any damage as a result of defendant's action. The Court declared that it is not enough to

prove that one person did certain acts with an intent to injure another person. In order to entitle a plaintiff to injunctive relief, the burden is on the plaintiff to prove actual or threatened injury; a court may not infer this from mere proof of acts intended to harm. This omission is not cured by general statements in a complaint "that great and irreparable injury will result" from the acts described by the plaintiff. It has always been the rule in California that such averments, standing alone, have no probative force and cannot be made the basis for injunctive relief. Facts concerning the irreparable injury that, it is asserted, will result to the complainant unless protection is extended to him or her must be pleaded in order that the court may consider whether the plaintiff's apprehensions are well founded. A mere allegation that such injury will result is not sufficient. A complaint that alleges only general conclusions, not warranted by any pleading of facts, does not state a cause of action to enjoin the acts complained of. Hence, the Supreme Court reversed the order granting the preliminary injunction (*16 Cal. 2d 369, 373)* .

[4] Additional Authorities

[a] General Conclusions in Complaint Not Sufficient to Issue Injunction

In *California etc. Co. v. Union etc. Co. (1898) 122 Cal. 641, 55 P. 591* , plaintiff brought an action to restrain defendant from making landings by vessel on certain real property bordering on the San Joaquin River and then receiving and delivering freight and passengers. Defendant interposed a general demurrer that was sustained by the superior court. After plaintiff refused to amend, the superior court entered judgment for defendant. Plaintiff appealed, but the Supreme Court affirmed. The Court observed that the complaint contained only a general averment as to the injury that had been or would be caused by defendant's acts. No facts were set out showing how or why the supposed injury would be irreparable. The Court stated, though, that in order to obtain an injunction when irreparable injury is relied on as the basis for granting it, such a showing is necessary. An injunction is never granted unless the complaint shows some vested right in the plaintiff that is likely to suffer great or irreparable injury from the act complained of. The mere allegation of such injury is insufficient. The facts stated must satisfy the court that such apprehension is well founded (*122 Cal. 641, 643)* .

In *Golden Gate S. T., Inc., v. San Francisco (1937) 21 Cal. App. 2d 582, 69 P.2d 899* , plaintiff brought an action that sought to restrain the defendant city from enforcing a certain ordinance. Defendant's general demurrer to the complaint was sustained by the superior court, and a judgment of dismissal was entered. Plaintiff appealed from the judgment, but the court of appeal affirmed. The court of appeal noted that plaintiff had attempted to state a cause of action for injunctive relief by alleging that it would suffer irreparable injury if the ordinance were enforced. However, the court of appeal declared that merely using the expression "irreparable injury" is not sufficient. In this situation, plaintiff was not an established business. Hence, it could not suffer any irreparable injury because of the ordinance. Therefore, the demurrer was properly sustained (*21 Cal. App. 2d 582, 586)* .

In *Martin v. Danziger (1913) 21 Cal. App. 563, 132 P. 284* , plaintiffs brought an action to obtain the right to possession of certain real property and ownership of the mineral deposits on it; the possession of the property was asserted on the basis of a mining claim. Defendants also asserted the right to possess the real property on the basis of a mining claim. The superior court granted a preliminary injunction on the basis of a verified complaint, and defendants appealed. The court of appeal reversed the order granting the preliminary injunction. The court noted that the complaint consisted of mere conclusions and that a mere allegation of irreparable injury does not constitute a ground for granting an injunction. Facts must be stated from which the court itself may see that irreparable injury will follow unless the commission thereof is restrained. The court pointed out that it was impossible to conceive how the plaintiffs could be irreparably injured by defendants' actions pending a determination of the merits of the action. Defendants only had been in possession of the real property and had been erecting an oil drilling rig thereon; they were not extracting or threatening to extract or take oil from the ground. Therefore, the order granting the preliminary injunction was reversed (*21 Cal. App. 563, 564-566)* .

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
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A. Injunctive Relief in General

11-116 California Points & Authorities § 116.56

§ 116.56 Supporting Motion for Dissolution of Preliminary Injunction--Preliminary Injunction Granted Without Notice to Party Enjoined [Code Civ. Proc. § 527(a)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORIT-
vs.	)	IES IN SUPPORT OF MOTION FOR DISSOLU-
_____ [*name*],	)	TION OF PRELIMINARY INJUNCTION
Defendant.	)	Date: _____
	)	Time: _____
	)	Dept.: _____
		Trial Date: _____

_____

A PRELIMINARY INJUNCTION GRANTED WITHOUT PRIOR NOTICE TO THE OPPOSITE PARTY AS REQUIRED BY CODE OF CIVIL PROCEDURE SECTION 527(a) IS VOID. IN THIS CASE, PLAINTIFF _____ [*specify action taken, e.g.,* OBTAINED AN ORDER TO SHOW CAUSE FOR ISSUANCE OF A PRELIMINARY INJUNCTION], BUT NEVER SERVED DEFENDANT WITH THE MOVING PAPERS OR OTHERWISE NOTIFIED DEFENDANT OF THE APPLICATION FOR INJUNCTIVE RELIEF. THEREFORE, THE PRELIMINARY INJUNCTION SHOULD BE DISSOLVED.

Preliminary Injunction Void When No Notice Given. No preliminary injunction can be granted without notice to the

opposite party (*Code Civ. Proc. § 527(a)*). A preliminary injunction that is granted without the prior notice required by *Code of Civil Procedure Section 527(a)* is void (*Oksner v. Superior Court (1964) 229 Cal. App. 2d 672, 687, 40 Cal. Rptr. 621* ; *Thompson & Holmes v. Superior Court (1960) 184 Cal. App. 2d 306, 307, 7 Cal. Rptr. 386*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities are for use in supporting a motion to dissolve a preliminary injunction when that relief has been granted without the prior notice required by *Code Civ. Proc. § 527(a)*.

[B] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts that establish a lack of proper notice of the moving party's application for injunctive relief to the other party.

[c] Related Pleading and Practice Forms

For discussion of the various methods of opposing applications for provisional and permanent injunctive relief, as well as a form of a notice of motion for an order dissolving or modifying a preliminary injunction and a form of such an order, see California Forms Of Pleadings And Practice, Ch. 303, *Injunctions* (Matthew Bender).

[3] Discussion of Authorities

[a] Preliminary Injunction Void When No Notice Given

In ***Oksner v. Superior Court*** *(1964) 229 Cal. App. 2d 672, 40 Cal. Rptr. 621* , the superior court had issued a preliminary injunction that enjoined the sale of a note and trust deed in an action to set aside a fraudulent conveyance. The preliminary injunction was granted on oral motion in open court without any previous notice as required by *Code Civ. Proc. § 527(a)*. The right to notice was not waived because the motion was made on the spur of the moment and without any information given to the party enjoined and its attorney prior to their appearing in court. Therefore, a judgment of contempt that subsequently had issued was annulled by the court of appeal. The court also issued a writ of mandate ordering the superior court to vacate the order granting the preliminary injunction (*229 Cal. App. 2d 672, 687)* .

In ***Thompson & Holmes v. Superior Court*** *(1960) 184 Cal. App. 2d 306, 307, 7 Cal. Rptr. 386* , the superior court had issued a preliminary injunction that restrained the sale of certain real property under a deed of trust. The preliminary injunction was made on the court's own motion and not on notice as required by *Code Civ. Proc. § 527(a)*. The persons restrained sought a writ of prohibition from the court of appeal to prevent the superior court from enforcing the

preliminary injunction.

The court of appeal noted that the preliminary injunction was void because it had not been made with the required notice. It observed that because the preliminary injunction was void, there was nothing to prohibit. However, because it was possible that further matters might arise under the order granting the preliminary injunction and because petitioners had shown a basis for relief, it issued a writ of mandate directing the superior court to vacate the order granting the preliminary injunction (*184 Cal. App. 2d 306, 307)* .

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11-116 California Points & Authorities § 116.57

§ 116.57 Supporting Motion for Dissolution of Preliminary Injunction--Preliminary Injunction Granted Without Undertaking [Code Civ. Proc. § 529(a)]

[1] FORM

[*Caption. See § 116.56.*]

A PRELIMINARY INJUNCTION GRANTED WITHOUT THE UNDERTAKING REQUIRED BY CODE OF CIVIL PROCEDURE SECTION 529(a) IS VOID. IN THIS CASE, _____ [*specify details involving lack of undertaking, e.g.,* THE INJUNCTION WAS GRANTED BUT NO UNDERTAKING WAS REQUIRED BY THE COURT AND THE CASE DOES NOT OTHERWISE COME WITHIN AN EXCEPTION TO THE UNDERTAKING REQUIREMENT]. THEREFORE, THE PRELIMINARY INJUNCTION SHOULD BE DISSOLVED.

Preliminary Injunction Void When Undertaking Not Required. On granting a preliminary injunction, the court or judge must require a written undertaking on the part of the applicant, with sufficient sureties, to the effect that the applicant will pay to the party enjoined any damages, not exceeding an amount to be specified, that the enjoined party may sustain as a result of the injunction if the court finally decides that the applicant was not entitled to the injunction (*Code Civ. Proc. § 529(a)*). A preliminary injunction that is granted without the undertaking required by *Code of Civil Procedure Section 529(a)* is void (*Oksner v. Superior Court (1964) 229 Cal. App. 2d 672, 687, 40 Cal. Rptr. 621* ; *Miller v. Santa Margarita Land etc. Co. (1963) 217 Cal. App. 2d 764, 765-766, 31 Cal. Rptr. 866*) and must be dissolved on the motion of the party enjoined (*Casitas Inv. Co. v. Charles L. Harney, Inc. (1962) 203 Cal. App. 2d 811, 815, 21 Cal. Rptr. 821*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities are for use in supporting a motion to dissolve a preliminary injunction when that relief has been granted without the undertaking required by *Code Civ. Proc. § 529(a)*.

Counsel should note that certain types of proceedings are exempt from the undertaking requirement, and that the undertaking may be waived for indigent persons [*see Code Civ. Proc. §§ 529(b), 995.240*].

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts that establish that the court failed to require an undertaking, and the case does not fall within a statutory exception to the undertaking requirement. Reference to the order granting the injunction should be made to show the court's failure to require an undertaking.

[c] Related Pleading and Practice Forms

For discussion of the various methods of opposing applications for provisional and permanent injunctive relief, as well as a form of a notice of motion for an order dissolving or modifying a preliminary injunction and a form of such an order, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender).

[3] Discussion of Authorities

[a] Preliminary Injunction Void When Undertaking Not Required

The facts and procedural background of ***Oksner v. Superior Court*** *(1964) 229 Cal. App. 2d 672, 40 Cal. Rptr. 621* , are discussed in *§ 116.56[3][a]*. In that case, although the superior court had issued a preliminary injunction to enjoin the sale of a note and trust deed, it did not require plaintiff to post a bond, something that plaintiff had earlier stated to the court that he would be unable to do.

The court of appeal held that, without the required bond, the preliminary injunction was a nullity. Therefore, a judgment of contempt that subsequently had issued was annulled by the court. It also issued a writ of mandate ordering the superior court to vacate its order granting the preliminary injunction that had enjoined the party from disposing of the note and trust deed (*229 Cal. App. 2d 672, 687)* .

In ***Miller v. Santa Margarita Land etc. Co.*** *(1963) 217 Cal. App. 2d 764, 31 Cal. Rptr. 866* , plaintiff brought an action to quiet his title to an easement in a roadway over defendant's real property as well as to restrain that defendant and other defendants from interfering with the plaintiff's use of the road. The superior court issued an order that continued in effect a previously dissolved temporary restraining order that had enjoined defendants from interfering with plaintiff's use of the road. Defendants appealed from the order continuing in effect the temporary restraining order. The court of appeal treated the order as an order granting a preliminary injunction. It observed that the order was of no effect because it did not require the undertaking on the part of the plaintiff that is required by *Code Civ. Proc. § 529*. Hence, the order was reversed (*217 Cal. App. 2d 764, 765-766)* .

In ***Casitas Inv. Co. v. Charles L. Harney, Inc.*** *(1962) 203 Cal. App. 2d 811, 21 Cal. Rptr. 821* , plaintiff brought an action to recover damages from one defendant for loss of lateral support of plaintiff's land and for a mandatory injunction ordering that defendant to provide satisfactory lateral support along the boundaries adjoining plaintiff's property. The action also sought to enjoin two other defendants from selling their property without first providing satisfactory support for plaintiff's land. The superior court issued a temporary restraining order against the two defendants as requested; it required a $10,000 bond when it originally issued the temporary restraining order against them. After the hearing on the order to show cause, the superior court issued preliminary injunctions that required the first defendant to provide the support necessary to stabilize the plaintiff's property and that required the other two defendants to permit access to and use of their property to accomplish the stabilization. However, the superior court failed to make any further reference to a bond when it dissolved the temporary restraining order after the hearing on the order to show cause; it also failed to mention a bond when it issued the preliminary injunction against the first defendant. The superior court later attempted to remedy that oversight by issuing a nunc pro tunc order that provided that the $10,000 bond filed pursuant to the temporary restraining order against the two defendants would continue in effect as security for the mandatory injunction against the first defendant.

On appeal from the order granting the mandatory preliminary injunction, the first defendant contended that the order had to be set aside because the superior court had issued the preliminary injunction without the bond or undertaking required by *Code Civ. Proc. § 529*. The court of appeal agreed with this contention. It noted the well-established rule that a preliminary injunction issued pending final determination of the cause of action must be supported by a bond or undertaking and, in the absence of such a bond, must be dissolved on the application of the party involved. It also observed that a bond given on the issuance of a temporary restraining order is not sufficient to support a preliminary injunction that is subsequently issued without requiring a new bond. Hence, it held that the trial court's nunc pro tunc order was clearly ineffectual to extend the bond to the mandatory preliminary injunction against defendant. Therefore, it reversed the order granting the preliminary injunction (*203 Cal. App. 2d 811, 815-816)* .

[4] Additional Authorities

[a] Preliminary Injunction Void When Undertaking Not Required

In *Condor Enterprises, Ltd. v. Valley View State Bank (1994) 25 Cal. App. 4th 734, 30 Cal. Rptr. 2d 613* , the trial court granted a preliminary injunction in favor of plaintiff, a junior lienholder, to redeem property from defendant, a senior lienholder bank. The trial court neglected to require a bond in accordance with *Code Civ. Proc. § 529*. When the defendant failed to obey the injunction the trial court found it in contempt but declined to hold it in contempt because of the earlier failure to require a bond. Regardless of the acknowledged nullity of the injunction the trial court awarded sanctions under *Code Civ. Proc. § 128.5* to plaintiff for the failure of the defendant to comply with the preliminary injunction. The court of appeal reversed the order for sanctions. The court held that the defendant could not commit a "punishable wrong" subject to sanctions under *Code Civ. Proc. § 128.5* for refusing to obey an injunction which was invalid and void because of the failure to require a bond (*25 Cal. App. 4th 734, 741-742)* .

In *City of South San Francisco v. Cypress Lawn Cemetery Ass'n (1992) 11 Cal. App. 4th 916* , a trial court issued a temporary restraining order on the complaint of plaintiff city and required it to provide an undertaking under *Code Civ. Proc. § 529(a)*. Plaintiff complied, but later, the trial court dissolved the TRO and denied plaintiff's request for a preliminary injunction. After plaintiff dismissed the complaint, defendant association moved for an order to enforce the surety's liability on the city's undertaking, to the extent of the association's economic loss because of a construction delay caused by the TRO. A trial court granted the motion and entered a money judgment against the surety despite the city's and surety's objection that the court never had authority to require the city to provide the undertaking [*see Code Civ. Proc. §§ 529(b)(3), 995.220*]. Although the court of appeal reversed the judgment, thereby upholding the policy that creates an exemption from the undertaking requirement for public entities, it noted that the purpose of requiring security is to afford compensation to the party wrongly enjoined or restrained, and that a trial court possesses inherent

power to condition the issuance of an injunction in favor of a private party on the posting of security; however, the Legislature regulates the operation of that power (*11 Cal. App. 4th 916, 920-923)* .

In *Neumann v. Moretti (1905) 146 Cal. 31, 79 P. 512* , plaintiff brought an action to secure the cancellation of a certain note and mortgage executed by plaintiff to defendant. The superior court issued a preliminary injunction that restrained defendant and his agents from assigning or transferring or disposing of the promissory note and mortgage. Defendant moved to dissolve the preliminary injunction on the ground that the court had failed to require a written undertaking as required by statute. The superior court issued an order refusing to dissolve the preliminary injunction, and defendant appealed. The Supreme Court reversed that order. It noted that it was the duty of the court to require an undertaking pursuant to *Code Civ. Proc. § 529*, and that a preliminary injunction will be dissolved in case of a failure to give such an undertaking. It stated that, if a preliminary injunction is improperly issued without complying with *Code Civ. Proc. § 529*, a defendant has the right to have it dissolved. Hence, the Supreme Court reversed the order refusing to dissolve the preliminary injunction (*146 Cal. 31, 33-34)* .

In *Federal Automotive Services v. Lane Buick Co. (1962) 204 Cal. App. 2d 689, 22 Cal. Rptr. 603* , plaintiff brought an action against defendant for tortious interference with its contractual relations by falsely representing to many of plaintiff's customers that plaintiff was unreliable, insolvent, and unable to perform its contracts for delivery of automobiles, thereby inducing the customers to breach their contracts or to refrain from doing business with plaintiff and to purchase automobiles from defendant on the further representation by defendant that it would secure a refund of any down payment that had been made to plaintiff under the contracts involved. Plaintiff obtained a preliminary injunction that enjoined defendant from interfering with plaintiff's customers or prospective customers by making representations, through its agents or employees, that plaintiff was insolvent and could not furnish goods and services contracted for, and from persuading and inducing plaintiff's customers to breach and cancel their contracts with plaintiff by making false and malicious representations for the purpose of injuring competitors and destroying competition. Defendant appealed, and the court of appeal reversed. The court observed that the order granting the preliminary injunction did not provide for a bond as required by *Code Civ. Proc. § 529*. Hence, the court held that the preliminary injunction issued was inoperative and of no effect because it did not provide for the required bond (*204 Cal. App. 2d 689, 694-695)* .

In *Griffin v. Lima (1954) 124 Cal. App. 2d 697, 269 P.2d 191* , plaintiff filed a complaint for specific performance of an alleged collective bargaining agreement and for preliminary and permanent injunctions. The superior court issued a preliminary injunction as prayed for in the complaint. Defendants appealed, and the court of appeal reversed the order granting the preliminary injunction. One of the defendants' contentions was that the order granting the preliminary injunction was void and inoperative because no bond was required from plaintiffs pursuant to *Code Civ. Proc. § 529*. The court of appeal agreed with this contention. It noted that it is clear that a preliminary injunction does not become operative until a bond is furnished and that such a bond is expressly required. Hence, the court held that the order granting the preliminary injunction was inoperative and of no effect (*124 Cal. App. 2d 697, 699-700)* .

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11-116 California Points & Authorities § 116.58

§ 116.58 Supporting Motion for Dissolution of Preliminary Injunction--Bond Furnished in Support of Preliminary Injunction Is Deficient

[1] FORM

[*Caption. See § 116.56.*]

A PRELIMINARY INJUNCTION THAT IS SUPPORTED BY A DEFICIENT BOND OR UNDERTAKING MUST BE DISSOLVED. IN THIS CASE, ALTHOUGH THE COURT ORDERED THAT AN UNDERTAKING BE POSTED IN THE AMOUNT OF $_____, THE _____ [*specify party, e.g.,* PLAINTIFF] POSTED AN UNDERTAKING IN THE AMOUNT OF $_____, WHICH IS CLEARLY DEFICIENT AND NOT IN COMPLIANCE WITH THE COURT'S ORDER. THEREFORE, THE INJUNCTION SHOULD BE DISSOLVED.

Dissolution of Preliminary Injunction Supported by Deficient Bond. A preliminary injunction that is supported by a bond that is deficient because it does not equal the amount required by the court must be dissolved on motion of the enjoined party (*Rees v. Gardner (1961) 197 Cal. App. 2d 469, 471, 17 Cal. Rptr. 93*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities are for use in supporting a motion to dissolve a preliminary injunction when that relief has been granted without the full amount of the undertaking required by the court. In other words, the bond supporting the preliminary injunction is deficient. If no undertaking was ordered at all, the points and *authorities in § 116.57* should be used.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts that establish the amount of the undertaking ordered by the court and the amount of the undertaking, if any, actually furnished.

[c] Related Pleading and Practice Forms

For discussion of the various methods of opposing applications for provisional and permanent injunctive relief, as well as a form of a notice of motion for an order dissolving or modifying a preliminary injunction and a form of such an order, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender).

[3] Discussion of Authorities

[a] Dissolution of Preliminary Injunction Supported by Deficient Bond

In ***Rees v. Gardner*** *(1961) 197 Cal. App. 2d 469, 17 Cal. Rptr. 93* , plaintiffs brought an action for an injunction and for damages. They also sought a preliminary injunction requiring reinstatement of two of defendant's employees. Defendant cross complained and also sought a preliminary injunction to prohibit plaintiffs' picketing of his business. The superior court granted both preliminary injunctions. The employees were ordered reinstated, and the number and location of pickets were restricted. The court required bonds in the amount of $1,000 on each injunction. Defendant subsequently moved for a preliminary injunction against all picketing under a then-recent decision of the Supreme Court. The superior court granted this preliminary injunction as well. It required a $3,000 bond that was later reduced to $2,000. Defendant, however, only posted a $1,000 bond. Plaintiff moved to vacate the preliminary injunction on the ground that the bond had been tardily posted and was insufficient. This motion was denied, and plaintiffs appealed from the order granting the preliminary injunction as well as the order denying the motion to vacate it.

One of plaintiffs' contentions on appeal was that the bond posted in support of the preliminary injunction was insufficient. The court of appeal agreed and reversed the orders. The court observed that defendant did not account for the fact that only a bond of $1,000 was posted in response to the order fixing a bond at $2,000. Hence, the bond was deficient and the motion to dissolve the preliminary injunction should have been granted on that ground. Therefore, the preliminary injunction was ineffective because of the defendant's failure to comply with its terms as to the bond required. Thus, the court of appeal reversed both orders (*197 Cal. App. 2d 469, 471)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions to Alter & AmendCivil ProcedureJudgmentsRelief From JudgmentMotions to VacateCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsLabor & Employment LawCollective Bargaining & Labor RelationsStrikes & Work Stoppages

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11-116 California Points & Authorities § 116.59

§ 116.59 Supporting Motion for Dissolution or Modification of Preliminary Injunction or Temporary Restraining Order--Required by Change in Facts or Law, or to Serve Ends of Justice [Code Civ. Proc. § 533]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR _____ [DISSOLUTION *or* MODIFICATION] OF _____ [(PRELIMINARY) INJUNCTION *or* TEMPORARY RESTRAINING ORDER]
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	Date: _____
	)	Time: _____
	)	Dept.: _____
		Trial Date: _____

_____

THE COURT MAY _____ [MODIFY *or* DISSOLVE] A PRELIMINARY INJUNCTION OR TEMPORARY RESTRAINING ORDER ON A SHOWING THAT _____ [THERE HAS BEEN A MATERIAL CHANGE IN FACTS *and/or* THE LAW HAS CHANGED *and/or* THE ENDS OF JUSTICE WOULD BE SERVED]. IN THIS CASE, _____ [*set forth applicable changes in facts or law or other reasons why justice would be served by modifying or dissolving the injunction or restraining order*]. THEREFORE, UNDER

THE CIRCUMSTANCES, THE ENDS OF JUSTICE WOULD BE BEST SERVED BY _____ [MODIFYING *or* DISSOLVING] THE _____ [PRELIMINARY INJUNCTION *or* TEMPORARY RESTRAINING ORDER] IN THIS ACTION.

A. Dissolution or Modification of Preliminary Injunction or Temporary Restraining Order. In any action, the court may on notice modify or dissolve an injunction or temporary restraining order upon a showing that there has been a material change in the facts upon which the injunction or temporary restraining order was granted, that the law upon which the injunction or temporary restraining order was granted has changed, or that the ends of justice would be served by the modification or dissolution of the injunction or temporary restraining order (*Code Civ. Proc. § 533*).

[*Optional*] **B. Court's Inherent Power When There Has Been Change in Circumstances.** A trial court has the inherent power to dissolve or modify a preliminary injunction in order to preserve the status quo when there has been a change in circumstances after the time it was originally issued (*Union Interchange, Inc. v. Savage (1959) 52 Cal. 2d 601, 604, 342 P.2d 249* ; *Lee v. Gates (1983) 141 Cal. App. 3d 989, 994, 190 Cal. Rptr. 682* ; Harbor Chevrolet Corp. v. Machinists Local Union 1484 *(1959) 173 Cal. App. 2d 380, 384, 343 P.2d 640*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memoranda is for use in supporting a motion for the dissolution or modification of a preliminary injunction or temporary restraining order based on a showing that there has been a material change in the facts on which the injunction or temporary restraining order was granted, that the law on which the injunction or temporary restraining order was granted has changed, or that the ends of justice would be served by the modification or dissolution of the injunction or temporary restraining order [*Code Civ. Proc. § 533*].

The *form in § 116.60* should be used to seek dissolution or modification of a permanent injunction.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts that establish how the facts or law on which the injunction or temporary restraining order was granted have changed, how the change merits modification or dissolution of the preliminary injunction or temporary restraining order, or how the ends of justice would otherwise be served by the modification or dissolution of the injunction or temporary restraining order. Note that the party moving to dissolve the injunction has the burden of proof on these issues [*Loeffler v. Medina (2009) 174 Cal. App. 4th 1495, 1504, 95 Cal. Rptr. 3d 343*].

[c] Related Pleading and Practice Forms

For discussion of the dissolution or modification of injunctions and for forms of notice for an order dissolving or

modifying a preliminary injunction, as well as such an order, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender).

[3] Discussion of Authorities

[a] Court's Inherent Power When There Has Been Change in Circumstances

In ***Union Interchange, Inc. v. Savage*** *(1959) 52 Cal. 2d 601, 342 P.2d 249* , plaintiffs filed a complaint for declaratory relief and an injunction. They sought a declaration that their business operations were outside the scope of certain amendments to the Business and Professions Code relating to the regulation of real estate and business opportunities transactions. In the alternative, they sought a declaration that those sections were unconstitutional. They sought a preliminary injunction to stay enforcement of the amendments pending the action for declaratory relief and a permanent injunction restraining such enforcement after hearing and decision on the merits. The superior court granted the preliminary injunction. Nearly two years later, defendants presented a motion to vacate the preliminary injunction, together with supporting affidavits and points and authorities. The motion was based on the grounds that plaintiffs' activities were unlawful under legislation enacted before the effective date of the amendments and that there had been a recent decision in another state holding plaintiffs' activities unlawful. The trial court denied the motion to vacate the preliminary injunction, and the defendants appealed. The Supreme Court affirmed the order.

The Supreme Court rejected plaintiffs' contention that the order had to be affirmed on the ground that the trial court lacked jurisdiction to vacate the preliminary injunction pending the trial on the merits. It held that the principle first enunciated in *Sontag Chain Stores Co. v. Superior Court (1941) 18 Cal. 2d 92, 94-95, 113 P.2d 689* , discussed in *§ 116.60[3][a]*, was applicable to preliminary injunctions as well as permanent injunctions. Under that principle, a trial court has inherent power to modify or vacate a permanent preventive injunction on a showing that there has been a change in the controlling facts on which the injunction rested, or the law has been changed, modified, or extended, or when there the ends of justice would be served by modification. Applying this principle to preliminary injunctions, the Court stated that whether a preventive injunction is permanent or preliminary in form is not significant. Unforeseeable circumstances necessitating modification or dissolution of the injunction may occur in either case. When the decree is continuing in nature, directed at future events, it must be subject to adaptation as events may shape the need. In the case of a preliminary injunction, there may be need for adaptability to maintain the status quo pending final determination of the matter in controversy.

Nevertheless, the Supreme Court concluded that the superior court did not abuse its discretion in refusing to vacate the preliminary injunction pending a hearing on the merits. Such decisions rest in the sound discretion of the trial court on a consideration of all the particular circumstances of each individual case, and they will not be modified or dissolved on appeal except for an abuse of discretion (*52 Cal. 2d 601, 604-606)* .

In ***Lee v. Gates*** *(1983) 141 Cal. App. 3d 989, 190 Cal. Rptr. 682* , the trial court had granted plaintiffs a preliminary injunction against the enforcement of city ordinances banning nude dancing. While the case was on appeal, the California Supreme Court decided the case of *Morris v. Municipal Court (1982) 32 Cal. 3d 553, 186 Cal. Rptr. 494, 652 P.2d 51* , holding such ordinances unconstitutional, and transferred this case again to the court of appeal for reconsideration in light of *Morris.* Defendants argued that, because they had ceased to enforce the now unconstitutional ordinances, the case should be dismissed and the preliminary injunction dissolved. The court of appeal reversed and ordered the case dismissed.

The court noted the differences between the federal and California rules for mootness, primarily the federal requirement that the effects of the alleged violation be completely and irrevocably eradicated by the changed circumstances, a requirement not adopted by the California authorities [citing *County of Los Angeles v. Davis (1979) 440 U.S. 625, 99 S. Ct. 1379, 59 L. Ed. 2d 642* (federal rule), and *People v. National Association of Realtors (1981) 120 Cal. App. 3d 459, 476, 174 Cal. Rptr. 728 (California rule)]* . As the city had in good faith discontinued enforcement of the

ordinances, and as there was no indication that the acts would probably recur, the court held that under California law the action was moot. Under the circumstances, the court concluded that dismissal of the action was the proper result given the changed circumstances caused by the *Morris* decision and the city's response to it (*141 Cal. App. 3d 989, 993-994)* .

In **Harbor Chevrolet Corp. v. Machinists Local Union 1484** *(1959) 173 Cal. App. 2d 380, 343 P.2d 640* , plaintiff corporation brought an action for breach of contract against defendant unions. The superior court issued a preliminary injunction enjoining defendants from picketing in violation of their alleged agreement with plaintiff. The court of appeal observed that the preliminary injunction was obviously granted by the court for the purpose of preventing injury to plaintiff's business pending an early trial. After eight months had passed, the superior court granted defendants' motion to dissolve the preliminary injunction.

Plaintiff appealed, but the court of appeal affirmed the order dissolving the preliminary injunction. It noted that the general purpose of a preliminary injunction is to preserve the status quo until the merits of the action can be determined. Further, the granting of a preliminary injunction is within the discretion of the trial court; its action with respect to the denying or dissolving of a preliminary injunction theretofore granted will not be disturbed on appeal except when it appears that the trial court has abused its discretion. In the present case, there was no such abuse of discretion because plaintiff could show no effort on its part to have the matter set for trial even though the preliminary injunction had been in effect for eight months (*173 Cal. App. 2d 380, 384)* .

California Points & Authorities

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
CHAPTER 116 INJUNCTIONS
PART II. FORMS
A. Injunctive Relief in General

11-116 California Points & Authorities § 116.60

§ 116.60 Supporting Motion for Dissolution or Modification of Permanent Injunction--Required by Change in Facts or Law, or to Serve Ends of Justice [Civ. Code § 3424(a)]

[1] FORM

[*Caption. See § 116.59.*]

THE COURT MAY _____ [MODIFY *or* DISSOLVE] A FINAL INJUNCTION ON A SHOWING THAT _____ [THERE HAS BEEN A MATERIAL CHANGE IN FACTS *and/or* THE LAW HAS CHANGED *and/or* THE ENDS OF JUSTICE WOULD BE SERVED. IN THIS CASE, _____ [*set forth applicable changes in facts or law or other reasons why justice would be served by modifying or dissolving the injunction*]. THEREFORE, UNDER THE CIRCUMSTANCES, THE ENDS OF JUSTICE WOULD BE BEST SERVED BY _____ [MODIFYING *or* DISSOLVING] THE INJUNCTION IN THIS ACTION.

A. Dissolution or Modification of Final Injunction. Upon notice and motion, the court may modify or dissolve a final injunction upon a showing that there has been a material change in the facts upon which the injunction was granted, that the law upon which the injunction was granted has changed, or that the ends of justice would be served by the modification or dissolution of the injunction (*Civ. Code § 3424(a)*).

[*Optional*] **B. Court's Inherent Power When There Has Been Change in Circumstances.** A trial court has the inherent power to dissolve or modify a permanent injunction when the circumstances and situations of the parties have so changed as to render such action just and equitable. This power may be exercised either when there has been a change in the controlling facts on which the injunction rested, when the law has been changed, modified, or extended, or when the ends of justice would be served by modification (*Sontag Chain Stores Co. v. Superior Court (1941) 18 Cal. 2d 92, 95, 113 P.2d 689* ; *Welsch v. Goswick (1982) 130 Cal. App. 3d 398, 404-405, 181 Cal. Rptr. 703* ; *Little v. Schwartz (1960) 182 Cal. App. 2d 594, 597-598, 6 Cal. Rptr. 40*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities are for use in supporting a motion for either the dissolution or the modification of a permanent injunction based on a showing that there has been a material change in the facts on which the injunction was granted, that the law on which the injunction was granted has changed, or that the ends of justice would be served by the modification or dissolution of the injunction [*Civ. Code § 3424(a)*]. Note that this provision does not apply to any final injunction issued pursuant to the Family Code [*Civ. Code § 3424(c)*].

§ 116.59 should be used to seek dissolution or modification of a preliminary injunction or temporary restraining order.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts that establish how the facts or law on which the injunction was granted have changed, how the change merits modification or dissolution of the injunction, or how the ends of justice would otherwise be served by the modification or dissolution of the injunction.

[c] Related Pleading and Practice Forms

For discussion of the dissolution or modification of injunctions and for a form of notice for an order dissolving or modifying a preliminary injunction as well as a form of such an order, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender).

[3] Discussion of Authorities

[a] Court's Inherent Power When There Has Been Change in Circumstances

In ***Sontag Chain Stores Co. v. Superior Court*** *(1941) 18 Cal. 2d 92, 113 P.2d 689* , plaintiff brought an action to restrain defendant labor unions from picketing its place of business. It obtained a judgment to that effect, and several months later defendant unions moved the superior court to vacate or set aside the injunction. When the court indicated its intention to entertain the motion and act on it, plaintiff petitioned the Supreme Court for a writ of prohibition. The basis of the petition was plaintiff's contention that the decree granting the injunction was a final judgment that could not later be vacated or modifed.

The Supreme Court rejected this argument and therefore refused to issue the writ. It held that such a decree is always subject, on a proper showing, to modification or dissolution by the court that rendered it. A trial court has the inherent power to vacate or modify a judgment granting an injunction when the circumstances and situation of the parties have so changed as to render such action just and equitable. This power may be exercised either when there has been a change in the controlling facts on which the injunction rested, when the law has been changed, modified, or extended, or when the ends of justice would be served by modification (*18 Cal. 2d 92, 95)* .

In ***Welsch v. Goswick*** *(1982) 130 Cal. App. 3d 398, 181 Cal. Rptr. 703* , the owners of a plot of land had stipulated to a permanent injunction enforcing a land use prohibition in a restrictive covenant. The court of appeal stated that while a court's decision to continue, modify, or dissolve a permanent injunction will not be set aside on appeal absent a showing of abuse of discretion, sound judicial discretion calls for modification of a stipulated injunction decree when circumstances of law existing at the time of issuance have changed, making the original decree inequitable. In the present case, the court held that due to a change in circumstances of law, the reasonable interpretation of the restrictive covenant on which the injunction was based had changed, making enforcement of the prohibition against the owners of the plot inequitable. Thus, the court held that the trial court had abused its discretion in declining to modify the stipulated injunction (*130 Cal. App. 3d 398, 404-405, 408)* .

In ***Little v. Schwartz*** *(1960) 182 Cal. App. 2d 594, 6 Cal. Rptr. 40* , plaintiff brought a quiet title action against defendant. Plaintiff recovered a judgment quieting his title to a right-of-way passing over defendant's real property and also enjoining defendant from maintaining a lock on the gates of his property. Ten years after plaintiff recovered this judgment, defendant moved the superior court to modify the injunctive portion of the judgment to permit him to lock the gates to the driveway on the basis of a change of circumstances that had resulted in considerable damage to his property over which the right of way passed. The superior court denied the motion on the ground that there was no way in which the modification could lawfully be effected. Defendant appealed and contended that any kind of permanent preventive injunction--even one incorporated in a quiet title judgment--may be modified on an adequate showing of a change of circumstances. It noted the principle that the trial court has the inherent power to modify a permanent, preventive injunction on a showing that there has been a change in the controlling facts on which the injunction rested, when the law has been changed, modified, or extended, or when the ends of justice would be served by modification.

The court of appeal noted that the record demonstrated without question a change in the controlling facts (from relatively uninhabited ranch land to relatively populated subdivisions) on which the injunction rested. Because the sole purpose for which defendant desired to install locks was to keep trespassers off his property and was not to interfere with plaintiff's use of the right-of-way, the court of appeal held that the injunction portion of the original judgment was subject to modification to serve the ends of justice and that the superior court had the power to change or amend that judgment (*182 Cal. App. 2d 594, 597-598)* .

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CHAPTER 116 INJUNCTIONS
PART II. FORMS
A. Injunctive Relief in General

11-116 California Points & Authorities § 116.61

§ 116.61 Supporting Motion for Stay of Permanent Injunction Pending Appeal From Judgment

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*],	)	IES IN SUPPORT OF MOTION FOR STAY OF
Defendant.	)	PERMANENT INJUNCTION PENDING APPEAL
	)	Date: _____
	)	Time: _____
		Dept.: _____

_____

A PERMANENT INJUNCTION MAY BE STAYED BY THE COURT ON MOTION OF THE PARTY AFFECTED BY THE INJUNCTION TO PRESERVE THE STATUS QUO PENDING AN APPEAL OF THE JUDGMENT GRANTING THE INJUNCTION. IN THIS CASE, A STAY OF THE INJUNCTION IS NEEDED TO PRESERVE THE STATUS QUO, BECAUSE _____ [*specify reason(s)*]. THEREFORE, THE MOTION FOR A STAY SHOULD BE GRANTED.

Stay of Injunction Pending Appeal. When a court has entered a judgment granting injunctive relief and the party affected by the judgment plans to appeal from the judgment, the court may, in order to preserve the status quo between the parties, stay the effect of the judgment granting the injunction until such time as the appeal is determined (*City of San Diego v. Southern etc. Tel. Corp. (1954) 42 Cal. 2d 110, 120, 266 P.2d 14* ; *Tulare Irr. Dist. v. Superior Court*

(1925) 197 Cal. 649, 665, 242 P. 725).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for a stay of a permanent injunction pending appeal from the judgment.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts that establish why a stay should be granted to preserve the status quo pending appeal.

[c] Related Pleading and Practice Forms

For a general form of complaint for provisional and permanent injunctive relief as well as other forms for use in obtaining provisional injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender). For discussion and forms for use in obtaining a stay of enforcement of a superior court judgment, see California Forms of Pleading and Practice, Ch. 43, *Appeal: Stay of Proceedings* (Matthew Bender).

[3] Discussion of Authorities

[a] Stay of Injunction Pending Appeal

In ***City of San Diego v. Southern etc. Tel. Corp.*** *(1954) 42 Cal. 2d 110, 266 P.2d 14* , plaintiff city and defendant company were involved in a controversy over the amount that the company had to pay the city for the use of its public streets. The superior court had issued a judgment that computed the amount owed to the city by the company; it also had issued a conditional injunction. The injunction had been conditioned on the company's paying, under the terms of an expired franchise, for the use of the city's streets pending determination of the appeal. Even though the court of appeal reversed the method of computation utilized by the superior court, it held that the type of conditional injunction issued by the superior court was proper. It rejected the city's contention that the superior court did not have the power to stay the injunction unless it required the company to continue to use the same method of accounting that it had used previously. The court of appeal stated that the superior court's jurisdiction was not so limited. It noted that a superior court may protect the parties on appeal by providing that its injunction or order is stayed under conditions that protect the appellant by preserving the subject matter of the appeal pending the outcome thereof and, at the same time, that protect the respondent by saving to it the benefits of the judgment in the event of an affirmance (*42 Cal. 2d 110, 120)* .

In ***Tulare Irr. Dist. v. Superior Court*** *(1925) 197 Cal. 649, 242 P. 725* , plaintiffs had commenced an action against

defendant irrigation district to obtain a permanent injunction restraining it from pumping water from certain property for use in its district. The superior court had decided to enter a judgment granting the injunction, but on motion of defendant it also decided to enter an order staying the injunction pending appeal. Plaintiffs petitioned the court of appeal for a writ of prohibition to restrain the trial court from making the order.

The court of appeal stated that the question before it was whether the superior court had the power, in the exercise of sound discretion, to suspend the operation of the injunction to which it had decided the plaintiff was entitled pending an appeal from the judgment. After examining the relevant authorities, the court answered that question in the affirmative and thus denied the writ. It noted that to recognize the constitutional right of a defendant to appeal from a judgment and at the same time deny the right of a trial court to prevent the appeal from becoming nugatory would be, in effect, to deny the right to appeal itself (*197 Cal. 649, 673)* .

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A. Injunctive Relief in General

11-116 California Points & Authorities § 116.62

§ 116.62 Opposing Application for Dissolution of Preliminary Injunction--Undertaking Waived or Forfeited by Party to Be Enjoined [Code Civ. Proc. § 529(a)]

[1] FORM

[*Caption. See § 116.56* .]

A PRELIMINARY INJUNCTION MAY BE WAIVED OR FORFEITED BY THE PARTY TO BE ENJOINED. IN THIS CASE, THE _____ [*specify party, e.g.*, DEFENDANT] WAIVED AN UNDERTAKING BY _____ [*specify details involving waiver, e.g.,* FAILING TO _____].

Preliminary Injunction May be Granted Without Undertaking When Undertaking Waived. On granting a preliminary injunction, the court or judge must require a written undertaking on the part of the applicant, to the effect that the applicant will pay to the party enjoined any damages, not exceeding an amount to be specified, that the enjoined party may sustain as a result of the injunction if the court finally decides that the applicant was not entitled to the injunction (*Code Civ. Proc. § 529(a)*). However, the undertaking may be waived or forfeited by the party to be enjoined (*Smith v. Adventist Health System/West (2010) 182 Cal. App. 4th 729, 740-744, 106 Cal. Rptr. 3d 318*).

[2] Comments

[a] Use of Form

This form is for use in opposing a motion to dissolve a preliminary injunction when that relief has been granted without the undertaking required by *Code Civ. Proc. § 529(a).*

Counsel should further note that certain types of proceedings are exempt from the undertaking requirement, and that the undertaking may be waived for indigent persons [*see Code Civ. Proc. §§ 529(b), 995.240*].

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts that establish that the party to be enjoined waived the requirement of an undertaking in by *Code Civ. Proc. § 529(a)*.

[3] Discussion of Authorities

[a] Party to be Enjoined Waived or Forfeited Undertaking Requirement

In ***Smith v. Adventist Health System/West*** *(2010) 182 Cal. App. 4th 729, 740-744, 106 Cal. Rptr. 3d 318* , the plaintiff and the defendants had ongoing disputes about the plaintiff's privileges and medical staff membership at the defendant hospitals. When the plaintiff reapplied to the defendants for privileges, the defendants rejected the application because the plaintiff did not satisfy a 36-month waiting period. The plaintiff filed an action for a preliminary injunction, a permanent injunction, and damages. The plaintiff's brief in support of the preliminary injunction stated that a bond was unnecessary. The defendants' opposing briefs did not mention the bond issue. During the hearing on the injunction, the parties argued the merits of the plaintiff's claims, but did not discuss the injunction bond issue. The trial court granted the injunction and held that an injunction bond was not required. On appeal, the defendants argued that pursuant to *Code Civ. Proc. § 529(a)*, the injunction was invalid if not accompanied by a bond.

The court of appeal first noted that *Civil Code § 3513* provides that "Any one may waive the advantage of a law intended solely for his benefit" [*182 Cal. App. 4th 729, 740]* . The court then noted that there are exceptions to the bond requirement as set forth in Civil Code § 995.230 (consent to bond in lesser amount) and § 995.240 (waiver of bond for indigents) [*182 Cal. App. 4th 729, 740]* . Thus, the court concluded that waiver or forfeiture of the bond requirement is possible. On the facts of the case, the court concluded that the defendants were aware of the plaintiff's position regarding the bond, but did not oppose that position in writing or at the hearing. Therefore, the court concluded, substantial evidence supported the trial court's implied finding that the defendants waived the bond requirement [*182 Cal. App. 4th 729, 745-747*].

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A. Injunctive Relief in General

11-116 California Points & Authorities §§ 116.63-116.79

[Reserved]

§§ 116.63[Reserved]

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CHAPTER 116 INJUNCTIONS
PART II. FORMS
B. Injunctive Relief Against Statutes

11-116 California Points & Authorities § 116.80

§ 116.80 Supporting Application for Temporary Restraining Order and Preliminary Injunction [Code Civ. Proc. § 527]--Unconstitutional or Invalid Statute or Ordinance

[1] FORM

[*Caption. See § 116.20.*]

A PRELIMINARY INJUNCTION SHOULD BE ISSUED TO RESTRAIN THE EXECUTION OF AN UNCONSTITUTIONAL OR INVALID STATUTE OR ORDINANCE. IN THIS CASE, THE _____ [STATUTE *or* ORDINANCE] IS CLEARLY UNCONSTITUTIONAL BECAUSE _____ [*specify grounds*]. THEREFORE, THE APPLICATION FOR INJUNCTIVE RELIEF SHOULD BE GRANTED.

Unconstitutional or Invalid Enactment. A preliminary injunction may be granted to restrain the execution of an unconstitutional or invalid statute or ordinance (*Conover v. Hall (1974) 11 Cal. 3d 842, 849-850, 114 Cal. Rptr. 642, 523 P.2d 682* ; *Hillman v. Britton (1980) 111 Cal. App. 3d 810, 826, 168 Cal. Rptr. 852*).

[*Add points and authorities supporting argument that statute or ordinance at issue is unconstitutional or otherwise invalid.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of an application for injunctive relief in order to restrain the execution of an unconstitutional or invalid statute or ordinance. Counsel may submit these points and authorities with (1) an application for a temporary restraining order and preliminary injunction; (2) an application for a preliminary injunction alone; or (3) after appropriate modification of the caption (*see § 116.20*), with a motion for a preliminary injunction.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts and legal arguments establishing that the statute or ordinance in question is unconstitutional, or otherwise in contravention of supervening legal authority. If any prior cases have already held the particular statute or ordinance unconstitutional, counsel should cite those cases in the argument.

[c] Related Pleading and Practice Forms

For a general form of complaint for provisional and permanent injunctive relief as well as other forms for use in obtaining provisional injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender).

[3] Discussion of Authorities

[a] Unconstitutional or Invalid Enactment

In ***Conover v. Hall*** *(1974) 11 Cal. 3d 842, 114 Cal. Rptr. 642, 523 P.2d 682* , the superior court issued a preliminary injunction that restrained defendant state officials from implementing *Welf. & Inst. Code § 11451.6* [repealed by Stats. 1997, ch. 270, § 139], insofar as the action would result in the imposition of a $50.00 maximum allowance on work-related expenses exclusive of child care.

The Supreme Court affirmed the issuance of the preliminary injunction. Defendants argued that former Code Civ. Proc. § 526 second subd, (4) and former Civ. Code § 3423(4) (now relettered as *Code Civ. Proc. § 526(b)(4)* and *Civ. Code § 3423(d)*, respectively) prohibited the superior court from enjoining the administration of a duly-enacted statute. The Supreme Court observed, however, that many cases interpreting those sections hold that their provisions do not apply to an unconstitutional or invalid statute or ordinance and that courts have full authority to enjoin the execution of such enactments. Thus, because the superior court had properly found that the challenged statute was invalid under federal law, it had jurisdiction to restrain its execution (*11 Cal. 3d 842, 849-850)* .

In ***Hillman v. Britton*** *(1980) 111 Cal. App. 3d 810, 168 Cal. Rptr. 852* , a Fresno municipal ordinance prohibited charitable or religious solicitations without a license. Violations were subject to misdemeanor prosecution. When plaintiffs engaged in charitable solicitations to support their church without having first obtained a license, they were threatened with criminal prosecution. They requested a preliminary injunction to enjoin enforcement of the ordinance, alleging that it was unconstitutional. However, the trial court denied their request.

On appeal, respondents contended that appellants lacked standing to bring the action because they never applied for or were denied a license, nor were they under arrest for engaging in solicitation. However, the court of appeal held that plaintiffs had standing because the threat of imminent criminal prosecution if they asserted their *First Amendment* rights

was an adequate showing of irreparable injury. The court also held that the ordinance violated plaintiffs' procedural due process rights since it contained no limitation on the time period in which the controller could approve or deny the license. Procedural due process, it explained, required a prompt administrative decision and reasonably prompt access to the courts. This ordinance, they noted, provided neither. The court also found that plaintiffs' substantive due process rights were violated since the ordinance failed to provide narrow, objective standards to guide the controller's decisions. Since many of the standards enumerated in the ordinance were vague and overbroad, the controller had excessive discretion in determining which application would gain approval.

Based on the constitutional defects in the ordinance, the court concluded that there was a substantial likelihood that plaintiffs would prevail on the merits. Since irreparable injury was shown, the court reversed and remanded to the trial court with directions that a preliminary injunction be issued (*111 Cal. App. 3d 810, 826)* .

[4] Additional Authorities

[a] Unconstitutional or Invalid Enactment

In *Wheeler v. Herbert (1907) 152 Cal. 224, 92 P. 353* , the Legislature had passed a statute providing that, on the passing of a proposition at a special election, a portion of the territory in Fresno County would be transferred to Kings County. Plaintiff was a resident and taxpayer in the territory that would be subject to this transfer, and he brought suit to enjoin defendant public officials from proceeding any further under authority of the statute, which, he alleged, was unconstitutional and void. The superior court issued a judgment as prayed, and defendants appealed to the Supreme Court. They contended that former Civ. Code § 3423(4), *(6)* (now relettered as *Civ. Code § 3423(d), (f)*), prohibited the issuance of the injunction.

The Supreme Court reversed the judgment, but enunciated several principles concerning injunctions against statutes. It stated that defendants' argument necessarily assumed that the statute had validity and created public offices, the incumbents of which were authorized to perform the acts complained of. The statutes refer solely to injunctions against the execution of valid statutes and the exercise of offices having a legal existence. The Court stated that a suit for injunctive relief by a person specially interested to prevent the attempted execution of a void statute and the exercise of an office claimed to have been created thereby but, in fact and in law, nonexistent, is a proper remedy to obtain the relief required. However, the Court concluded that the statute was valid and that the superior court should not have enjoined the execution of it (*152 Cal. 224, 227-228, 241)* .

Hunter v. City of Whittier (1989) 209 Cal. App. 3d 588, 257 Cal. Rptr. 559 , was an action by homeowners to enjoin enforcement of a city ordinance regulating installation of satellite television receiving antennas on residentially owned property. The basis for the action was that that local regulation was preempted by regulations of the Federal Communications Commission unless local law met specific standards set forth in the regulations, and the local ordinance, enacted prior to adoption of the federal regulations, did not comply with those regulations.

In affirming the trial court's order granting a preliminary injunction, the court of appeal said that although ordinarily an appeal from the granting of a preliminary injunction involves a very limited review of the trial court's exercise of discretion concerning two factors (likelihood that plaintiffs will ultimately prevail and interim harm plaintiffs will sustain if preliminary injunction is denied compared to interim harm defendant will suffer if injunction is granted), occasionally the likelihood of prevailing on the merits depends on a question of pure law rather than on evidence to be introduced at a subsequent full trial. The court said the issue can arise, for example, when it is contended that an ordinance or statute is unconstitutional on its face and that no factual controversy remains to be tried. If such a question of pure law is presented, it can sometimes be determinative over the other factor as, for example, when the defendant shows that the plaintiff's interpretation is wrong as a matter of law and thus the plaintiff has no possibility of success on the merits. The court explained that even when the question of law is not entirely determinative, it may be appropriate for an appellate court to express its opinion in order to clarify or narrow the issues for trial. The court concluded that

this was such a case and that the city ordinance did not comply with the federal regulations (*209 Cal. App. 3d 588, 595-599)* .

The facts and procedural background of *Ketchens v. Reiner (1987) 194 Cal. App. 3d 470, 239 Cal. Rptr. 549* are discussed in *§ 116.21[3][a]*. In that case, plaintiff was charged with violation of certain Education Code provisions and requested that prosecution cease on the ground that the provisions were unconstitutionally vague and overbroad. Plaintiff (and a co-plaintiff taxpayer) moved for a preliminary injunction, and their application for a temporary restraining order was granted. However, after the hearing on the order to show cause, a preliminary injunction was denied and the temporary restraining order was dissolved.

The court of appeal reversed. The court said that trial courts should evaluate two interrelated factors when deciding whether to issue a preliminary injunction. The first is the likelihood that the plaintiff will prevail on the merits at trial. The second is the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm that the defendant is likely to suffer if the preliminary injunction were issued (*194 Cal. App. 3d 470, 474)* . After concluding that the statutes were both unconstitutionally overbroad and vague, the court held that it was likely that plaintiffs would prevail at trial and that the loss of *First Amendment* freedoms (freedom of speech) for even minimal periods of time, unquestionably constitutes irreparable injury. Thus, said the court, plaintiffs satisfied both elements necessary for the issuance of a preliminary injunction, and found that the trial court abused its discretion in denying their motion (*194 Cal. App. 3d 470, 478-480)* .

In *American Booksellers Assn., Inc. v. Superior Court (1982) 129 Cal. App. 3d 197, 181 Cal. Rptr. 33* , two cities passed ordinances, aimed at protecting minors, that restricted the display of sexually explicit material in retail stores. The ordinances imposed various requirements on merchants to seal, cover, or place the materials out of reach of minors. Merchants who chose not to comply with the ordinance had to exclude minors that were unaccompanied by an adult. The court of appeal granted a preliminary injunction staying the enforcement of both ordinances because it concluded that they were overbroad and had a pervasive chilling effect on the exercise of free speech (*129 Cal. App. 3d 197, 206-207)* .

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
CHAPTER 116 INJUNCTIONS
PART II. FORMS
B. Injunctive Relief Against Statutes

11-116 California Points & Authorities § 116.81

§ 116.81 Supporting Application for Temporary Restraining Order and Preliminary Injunction [Code Civ. Proc. § 527]--Statute Not Applicable to Plaintiff's Actions

[1] FORM

[*Caption. See § 116.20.*]

A PRELIMINARY INJUNCTION SHOULD BE ISSUED TO PROHIBIT THE INTERFERENCE WITH OR PROSECUTION OF A PERSON UNDER COLOR OF A STATUTE WHEN THAT STATUTE IS INAPPLICABLE TO THE PERSON'S CONDUCT. IN THIS CASE, _____ [*specify circumstances of plaintiff's prosecution/interference*]. HOWEVER, THE STATUTE UNDER THE AUTHORITY OF WHICH THE DEFENDANT IS TAKING THESE ACTIONS IS CLEARLY INAPPLICABLE TO PLAINTIFF'S CONDUCT, BECAUSE _____ [*specify reason(s)*]. THEREFORE, THE INJUNCTIVE RELIEF SHOULD BE GRANTED.

Statute Not Applicable to Plaintiff's Conduct. A preliminary injunction may be granted to restrain defendant public officials from interfering with or prosecuting criminal or other actions against plaintiff when there is no statute that renders plaintiff's acts unlawful (*Svenson v. Engelke (1931) 211 Cal. 500, 501-502, 506, 296 P. 281*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of an application for injunctive relief when the defendant is attempting to enforce a statute against plaintiff that is not applicable to plaintiff's conduct and, therefore, there is no statute that renders plaintiff's acts unlawful. Counsel may submit these points and authorities with (1) an application for a temporary restraining order and preliminary injunction; (2) an application for a preliminary injunction alone; or (3) after appropriate modification of the caption (*see § 116.20*), with a motion for a preliminary injunction.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts that establish how the plaintiff's conduct falls outside the scope of the statute sought to be enforced, and therefore why interference with or prosecution of plaintiff is unlawful or otherwise inappropriate.

[c] Related Pleading and Practice Forms

For a general form of complaint for provisional and permanent injunctive relief as well as other forms for use in obtaining provisional injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender).

[3] Discussion of Authorities

[a] Statute Not Applicable to Plaintiff's Conduct

In ***Svenson v. Engelke*** *(1931) 211 Cal. 500, 296 P. 281* , plaintiffs were commercial salmon fishermen and defendants were members and officers of the Fish and Game Commission. Plaintiffs commenced the action to restrain defendants from interfering with or prosecuting criminal or other actions against the plaintiffs on account of the transportation or possession by the plaintiffs of fresh salmon caught on the high seas and in the course of being transported over and across certain fish and game districts in which the taking or possession of fresh salmon was at the time prohibited by state law. The superior court issued a temporary restraining order and, after a hearing, issued a preliminary injunction that granted the relief sought pendente lite. Defendants appealed, but the Supreme Court affirmed.

Defendant's first contention was that under former Code Civ. Proc. § 526 second subd. (4) (now relettered as *Code Civ. Proc. § 526(b)(4)*) an injunction cannot be granted to prevent the execution of a public statute by officers of the law for the public benefit. The Supreme Court noted that the difficulty with this contention was that it assumed the existence of a fact that was the very fact in controversy in the proceeding, namely, whether or not there was an existing public statute covering the situation presented by plaintiffs' complaint and that defendants, as officers of the law, were attempting or were threatening to enforce at the time the preliminary injunction was sought and obtained by the plaintiffs. The principle that statutory offenses that officers of the law are engaged in enforcing, and which the persons against whom such enforcement is sought are seeking to evade prosecution on the showing either that they are not guilty of such statutory offense or that the law defining the same does not apply to such a person or class of persons, had no application to the present situation. Here, plaintiffs were contending that there was no statute that rendered unlawful the acts of the plaintiffs in seeking to transport the salmon that they had lawfully taken on the high seas and that, at the time of their attempted or threatened prosecution, they were engaged in transporting to a place in which they were lawfully entitled to possess and sell the fish thus lawfully taken.

The Supreme Court concluded that at the time of the commencement of the present action there was no existing statute that prohibited or rendered unlawful the possession or transportation of salmon lawfully taken or caught on the high seas across any of the fish and game districts referred to. Moreover, the fish could be carried to the City of Eureka in which it could, at that time, be lawfully possessed and sold. Hence, the granting of the preliminary injunction was not erroneous (*211 Cal. 500, 501-502, 506)* .

[4] Additional Authorities

[a] Statute Not Applicable to Plaintiff's Conduct

In *Novar Corp. v. Bureau of Collection & Investigative Services (1984) 160 Cal. App. 3d 1, 206 Cal. Rptr. 287* , the court of appeal affirmed the issuance of a preliminary injunction by the trial court in an action for declaratory relief. Plaintiff was seeking a declaration that it was not an alarm company operator, and an injunction to restrain defendant from making statements that plaintiff was required to be licensed as an alarm company operator pursuant to the appropriate licensing statute governing such operators. After reviewing the general rules concerning injunctive relief, the court noted that injunctive relief may be granted against illegal enforcement of valid statutes. The court rejected defendant's argument that former Code Civ. Proc. § 526 first subd. (4) and former Civ. Code § 3423(4) (*now see Code Civ. Proc. § 526(a)(4)* and *Civ. Code § 3426(d)*) prevent the issuance of an injunction to prevent the execution of a public statute by officers of the law for the public benefit. The court stated that those sections do not apply when the conduct sought to be enjoined does not fall within the terms of the statutes (*160 Cal. App. 3d 1* , p.6).

In *MacLeod v. City of Los Altos (1960) 182 Cal. App. 2d 364, 6 Cal. Rptr. 326* , plaintiffs were officers of and sued on behalf of a local political association affiliated with the Democratic Party. Defendants were the City of Los Altos and some of its officials. Plaintiffs obtained a judgment by which defendants were enjoined from applying or enforcing, or attempting to apply or enforce, a particular ordinance against defendants. Defendants appealed, but the court of appeal affirmed. It held that former Civ. Code § 3423(4) and former Code Civ. Proc. § 526 second subd. (4) (now relettered as Civ. Code § 3423(d), *Code Civ. Proc. § 526(b)(4)*) do not apply when the activity sought to be enjoined by public officials is an attempt to apply a statute or ordinance to conduct not within its terms. An injunction issues in such a case because the public officials are not enforcing a public statute but, rather, are acting without authority. They act without authority in such situations not because of the claimed invalidity of the statute or ordinance but because it does not by its own terms apply to the plaintiffs. Because the plaintiffs' conduct was not covered by the ordinance in the instant situation, the judgment was affirmed (*182 Cal. App. 2d 364, 369-370)* .

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CHAPTER 116 INJUNCTIONS
PART II. FORMS
B. Injunctive Relief Against Statutes

11-116 California Points & Authorities § 116.82

§ 116.82 Supporting Application for Temporary Restraining Order and Preliminary Injunction [Code Civ. Proc. § 527]--Unconstitutional Application of Facially Valid Statute

[1] FORM

[*Caption. See § 116.20.*]

A PRELIMINARY INJUNCTION SHOULD BE ISSUED TO RESTRAIN THE UNCONSTITUTIONAL APPLICATION OF A STATUTE EVEN THOUGH IT IS VALID ON ITS FACE. IN THIS CASE, ALTHOUGH _____ [*specify statute or ordinance at issue*] APPEARS VALID ON ITS FACE, ITS APPLICATION IS ACTUALLY UNCONSTITUTIONAL BECAUSE _____ [*specify grounds*]. THEREFORE, THE APPLICATION FOR INJUNCTIVE RELIEF SHOULD BE GRANTED.

Unconstitutional Application of Statute. A preliminary injunction may be issued to restrain the unconstitutional application of a statute valid on its face (*Brock v. Superior Court (1939) 12 Cal. 2d 605, 610, 86 P.2d 805*).

[*Add points and authorities supporting argument that defendant's enforcement of the statute or ordinance at issue is unconstitutional.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of an application for injunctive relief that is sought to restrain an unconstitutional application of a statute even though the statute is valid on its face. Counsel may submit these points and authorities with (1) an application for a temporary restraining order and preliminary injunction; (2) an application for a preliminary injunction alone; or (3) after appropriate modification of the caption (*see § 116.20*), with a motion for a preliminary injunction.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts and legal argument that establish how the application of the statute or ordinance involved, which is facially valid, is unconstitutional. This may entail, for example, showing that its application unreasonably burdens a particular class of persons without an adequate showing of a state interest.

[c] Related Pleading and Practice Forms

For a general form of complaint for provisional and permanent injunctive relief as well as other forms for use in obtaining provisional injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender).

[3] Discussion of Authorities

[a] Unconstitutional Application of Statute

In ***Brock v. Superior Court*** *(1939) 12 Cal. 2d 605, 86 P.2d 805* , plaintiffs brought an action against defendant officers of the Department of Agriculture to enjoin the enforcement of a plan for the regulation of intrastate marketing of grapefruit. The superior court issued a preliminary injunction to that effect, and the defendants petitioned the Supreme Court for a writ of prohibition to compel the superior court to dissolve the injunction. They contended that the validity of the statute in question had been upheld by the Supreme Court in an earlier opinion and that the current action by defendants presented no new questions of fact.

The Supreme Court denied the petition for the writ. It noted that, while certain provisions of the statute under which petitioners had acted had been upheld in its earlier opinion, nevertheless a statute valid on its face may be unconstitutionally applied. Hence, if the complaint in the present action by plaintiffs showed that petitioners threatened to enforce an unconstitutional law against them, or that their acts in the attempted application of a valid law violated rights guaranteed to all citizens by either the federal or state Constitutions, then the superior court had jurisdiction to issue a preliminary injunction. After examining the complaint, the Supreme Court stated that the allegations of the plaintiffs' complaint tendered as an issue of fact the question whether the marketing of certain grapefruit was an agricultural trade or industry distinctly different from that of marketing other products and, also, whether the producers of grapefruit were being discriminated against to the profit and advantage of the orange growers and their property taken without due process of law. Therefore, the Court held that plaintiffs were entitled to findings by the trial court on those issues and the Court denied the petition for writ of prohibition (*12 Cal. 2d 605, 610)* .

[4] Additional Authorities

[a] Unconstitutional Application of Statute

In *Midget Products, Inc. v. Jacobsen (1956) 140 Cal. App. 2d 517, 295 P.2d 542* , plaintiff intended to manufacture and sell a dessert topping that contained no milk or milk fat. Defendant Director of Agriculture was of the opinion that the plaintiff's product was an imitation milk product and, thus, statutorily required to be labeled as such and that plaintiff was statutorily required to obtain a license. Plaintiff brought an action for declaratory relief with respect to the issue in controversy and for an injunction to restrain defendant from enforcing the relevant statutes against it. Plaintiff contended that the statutes were not applicable to its product and that, if they were applicable thereto, they were unconstitutional. The superior court made findings for plaintiff and issued a judgment that enjoined defendant from prosecuting plaintiff or any other person for distributing, marketing, or selling plaintiff's product as well as restraining defendant from interfering with the distribution, use, or sale of the product. Defendant appealed, but the court of appeal affirmed the judgment. The court of appeal held that to require the plaintiff to label its product an "imitation" when it is not an imitation of any milk product would be an unconstitutional application of the relevant statutes (*140 Cal. App. 2d 517, 520-523)* .

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CHAPTER 116 INJUNCTIONS
PART II. FORMS
B. Injunctive Relief Against Statutes

11-116 California Points & Authorities § 116.83

§ 116.83 Opposing Application for Preliminary Injunction [Code Civ. Proc. § 527]--Injunction Not Issued to Prevent Execution of Public Statute or Ordinance for Public Benefit [Civ. Code § 3423(d); Code Civ. Proc. § 526(b)(4)]

[1] FORM

[*Caption. See § 116.32.*]

A PRELIMINARY INJUNCTION CANNOT BE ISSUED TO PREVENT THE EXECUTION OF A PUBLIC _____ [STATUTE *or* ORDINANCE] BY OFFICERS OF THE LAW FOR THE PUBLIC BENEFIT. IN THIS CASE, EXECUTION OF _____ [*specify statute/ordinance*], A LAWFUL ENACTMENT OF _____ [*state enacting entity*], IS FOR THE PUBLIC BENEFIT [AND GRANTING AN INJUNCTION CONTRAVENES PUBLIC POLICY]. THEREFORE, THE REQUEST FOR INJUNCTIVE RELIEF SHOULD BE DENIED.

A. Preventing Execution of Public Statute. An injunction cannot be granted to prevent the execution of a public statute by officers of the law for the public benefit (*Civ. Code § 3423(d)*; *Code Civ. Proc. § 526(b)(4)*; *City of Los Angeles v. Superior Court (1959) 51 Cal. 2d 423, 430, 333 P.2d 745* ; *Alfaro v. Terhune (2002) 98 Cal. App. 4th 492, 500-501, 120 Cal. Rptr. 2d 197* ; *Xiloj-Itzep v. City of Agoura Hills (1994) 24 Cal. App. 4th 620, 635-636, 29 Cal. Rptr. 2d 879* ; *7978 Corporation v. Pitchess (1974) 41 Cal. App. 3d 42, 46, 115 Cal. Rptr. 746*).

B. Enjoining Valid Public Statute or Ordinance as Excess of Jurisdiction. A court that attempts to enjoin the enactment or enforcement of a valid public statute or ordinance acts in excess of its jurisdiction (*City of Los Angeles v. Superior Court (1959) 51 Cal. 2d 423, 430, 333 P.2d 745*).

[*Optional*] **C. No Showing of Irreparable Harm.** Even if the statute or ordinance is invalid, an injunction may not be issued to prevent its execution when there is no showing that the plaintiff will suffer irreparable harm if injunctive relief is denied (*Leach v. City of San Marcos (1989) 213 Cal. App. 3d 648, 660-661, 261 Cal. Rptr. 805*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be used in opposition to an application for injunctive relief when that relief is being sought to prevent the execution of a public statute or ordinance by officers of the law for the public benefit [*see Civ. Code § 3423(d)*; *Code Civ. Proc. § 526(b)(4)*].

With appropriate modifications, these points and authorities may be used (1) in support of a demurrer to a complaint for injunctive relief [*see Code Civ. Proc. § 430.10(e)*], (2) as an affirmative defense in an answer to such a complaint [*see Code Civ. Proc. § 431.30(b)(2)*], (3) in support of a motion for summary judgment in such an action [*see Code Civ. Proc. § 437c*], or (4) in support of a petition for a writ of prohibition [*see Code Civ. Proc. §§ 1102, 1103*] seeking to restrain a court from enforcing injunctive relief.

In an appropriate case, these points and authorities may be submitted in opposition to an application for a preliminary injunction supported by the points and authorities *set out in § 116.80*.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts that establish that the statute or ordinance was lawfully enacted and is being executed under authority vested in the public officers responsible for carrying out its terms. If counsel concedes that the statute or ordinance is not valid, but its execution will not cause irreparable injury to plaintiff, facts should be set forth that establish why no such injury will occur.

[c] Related Pleading and Practice Forms

For discussion of the various methods of opposing applications for provisional and permanent injunctive relief as well as for a form of declaration to oppose an application for a preliminary injunction and a form of demurrer to a complaint for injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender).

[3] Discussion of Authorities

[a] Preventing Execution of Public Statute

In ***City of Los Angeles v. Superior Court*** *(1959) 51 Cal. 2d 423, 333 P.2d 745* , the city council adopted an ordinance that authorized execution of a contract between the city and the Brooklyn Dodgers baseball club that provided, among other things, for the exchange of certain properties and for the ball club to erect a stadium and procure the transfer of the franchise from Brooklyn to Los Angeles. After the filing of a referendum petition, the city council voted to place the

ordinance on the ballot for approval or disapproval by the voters; at the ensuing referendum election a majority of the voters favored adoption of the ordinance. Thereafter, plaintiff taxpayers brought suit to enjoin certification of the result of the election. In that action, the superior court granted a temporary restraining order and preliminary injunction restraining the city council from declaring the result of the referendum election. The city sought a writ of prohibition to restrain the superior court from enforcing the preliminary injunction or from taking further action in the suit. The Supreme Court agreed with the city and issued the writ as prayed.

The Court pointed out that former Civ. Code § 3423(7) and former Code Civ. Proc. § 526, second subd. (7) (now relettered as *Civ. Code § 3423(g)* and *Code Civ. Proc. § 526(b)(7)*), provide that an injunction cannot be granted to "prevent a legislative act by a municipal corporation" and that former Code Civ. Proc. § 3423(4) and *Code Civ. Proc. § 526*, second subd. (4) (now relettered as *Civ. Code § 3423(d)* and *Code Civ. Proc. § 526(b)(4)*), similarly provide that an injunction cannot be granted to "prevent the execution of a public statute by officers of the law for the public benefit." The Court stated that the basis for these statutory provisions is found in the doctrine of separation of powers of government into three independent departments. Because only legal issues and no questions of fact were involved, a writ of prohibition was available to test the validity of the ordinance. Because the Court found the contract and the ordinance adopted to authorize the execution of the contract to be valid, it issued the writ (*51 Cal. 2d 423, 430-438)* .

In ***Alfaro v. Terhune*** *(2002) 98 Cal. App. 4th 492, 120 Cal. Rptr. 2d 197* , plaintiffs were female death row inmates who tried to obtain a preliminary injunction against the enforcement of a state act that required prisoners convicted of certain crimes to submit blood samples, saliva samples, thumbprints, and palm prints to a DNA data bank. The plaintiffs argued that the act was an unconstitutional search and seizure as applied to them because one of the key purposes justifying the act, the deterrence of future crimes, was inapplicable. They also argued that the act could not be implemented without further regulations. The trial court granted the State's demurrer to the cause of action seeking the preliminary injunction on the ground that the act was facially valid, but denied the State's motion for summary judgment on the cause of action regarding the regulations.

The court of appeal agreed with the State and reversed the order granting the preliminary injunction. It held that the rule against enjoining the execution of a public statute (*Code Civ. Proc. § 526(b)(4)*; *Civ. Code § 3423(d)*) is subject to four judicially recognized exceptions: (1) where the statute is unconstitutional and there is a showing of irreparable injury; (2) where the statute is valid but is enforced in an unconstitutional manner; (3) where the statue is valid but, as construed, does not apply to the plaintiff; and (4) where the public official's action exceeds his or her authority. The court limited its inquiry to the second and fourth exceptions, i.e., whether applying the act to plaintiffs without implementing administrative regulations would be unconstitutional or would exceed the authority of defendants. It held that the test is whether, giving due deference to the discretion of the agencies charged with implementing the act, it can be said that the act is too vague and indefinite to be implemented without administrative regulations. Applying that test, the court held that the act was comprehensive, detailed, and specific (*98 Cal. App. 4th 492, 500-504)* .

In ***Xiloj-Itzep v. City of Agoura Hills*** *(1994) 24 Cal. App. 4th 620, 29 Cal. Rptr. 2d 879* , plaintiffs tried to gain a preliminary injunction against the enforcement of a city ordinance that regulated the solicitation of day laborers by people in vehicles on city streets. The stated purpose of the ordinance was to alleviate the traffic hazards caused by persons seeking day laborers. The trial court denied the preliminary injunction. The court of appeal affirmed, finding the ordinance constitutional and pointing out that it is well settled that courts lack jurisdiction to enjoin the enforcement of a validly adopted, constitutional ordinance (*24 Cal. App. 4th 620, 635-636)* .

In ***7978 Corporation v. Pitchess*** *(1974) 41 Cal. App. 3d 42, 115 Cal. Rptr. 746* , plaintiffs obtained a preliminary injunction that restrained the sheriff of Los Angeles County from enforcing certain sections of a county licensing ordinance involving public dancing and live public entertainment. Defendant sheriff appealed, and one of his contentions was that a preliminary injunction was not an appropriate remedy in this situation.

The court of appeal agreed with defendant and reversed the order granting the preliminary injunction. It noted that,

under former Civ. Code § 3423(4) and former Code Civ. Proc. § 526 second subd. (4) (now relettered as *Civ. Code § 3423(d)* and *Code Civ. Proc. § 526(b)(4)*), a preliminary injunction is not an appropriate remedy to prevent the execution of a public statute, by officers of the law, for the public benefit; in addition, under former Civ. Code § 3423(6) and former Code Civ. Proc. § 526 second subd. (6) (now relettered as *Civ. Code § 3423(f)* and *Code Civ. Proc. § 526(b)(6)*), it is not proper to prevent the exercise of a public or private office, in a lawful manner, by the person in possession. The court of appeal observed that while these general strictures do not preclude the issuance of preliminary injunctive relief when the constitutionality of a statute or ordinance is challenged, nevertheless trial courts should be extremely cautious prior to a trial on the merits to enjoin law enforcement officials from enforcing an ordinance obviously approved and adopted by duly elected representatives of the people for the purpose of promoting and protecting public morality (*41 Cal. App. 3d 42, 46)* .

[b] Enjoining Valid Public Statute or Ordinance as Excess of Jurisdiction

The facts and procedural background of ***City of Los Angeles v. Superior Court*** *(1959) 51 Cal. 2d 423, 333 P.2d 745* , are discussed in *§ 116.83[3][a]*. In ordering the issuance of a writ of prohibition restraining the superior court from enforcing a preliminary injunction against the city, the Supreme Court said that a court acts in excess of its jurisdiction if it attempts to enjoin a valid public statute or ordinance (*51 Cal. 2d 423, 430)* .

[c] No Showing of Irreparable Harm

Leach v. City of San Marcos *(1989) 213 Cal. App. 3d 648, 261 Cal. Rptr. 805* , was an action for injunctive relief by a taxpayer challenging the validity of a redevelopment plan adopted by defendant city. Two years after the complaint was filed, plaintiff moved for a preliminary injunction preventing the city from taking any further action to implement the disputed plan. Although plaintiff presented evidence that suggested that the plan might not conform with the Community Redevelopment Law, he presented no evidence that an injunction was necessary to prevent irreparable harm pending a trial on the merits of his claim. The trial court denied the preliminary injunction.

The appellate court affirmed. The court of appeal said that in seeking injunctive relief before a trial on the merits, a taxpayer must demonstrate both a likely violation of law and the likelihood that he or she will suffer irreparable harm. The court said that under Code Civ. Proc. § 526, second subd. (4), and former Civ. Code § 3423(4) (now relettered as *Civ. Code § 3423(d)* and *Code Civ. Proc. § 526(b)(4)*), an injunction cannot be granted to prevent execution of a public statute but that, nevertheless, an injunction may issue when the statute or ordinance is invalid and a showing is made of irreparable injury to property or business (*213 Cal. App. 3d 648, 660-661)* . Quoting *E. H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* , the court explained that facts concerning the irreparable injury that allegedly will result to the complainant unless protection is extended to him or her must be pleaded in order that the court may consider whether his or her apprehensions are well founded, that a mere allegation that such injury will result is insufficient, and that a complaint for an injunction that alleges only general conclusions, not warranted by any pleading of facts, does not state a cause of action to enjoin the acts complained of. The court concluded that because plaintiff had not demonstrated any harm he might suffer pending disposition of his case on the merits, and because harm may not be presumed when the plaintiff is not a governmental agency, plaintiff was not entitled to a preliminary injunction (*213 Cal. App. 3d 648, 661-663)* .

[4] Additional Authorities

[a] Preventing Execution of Public Statute

In *Carson Mobilehome Park Owners' Assn. v. City of Carson (1983) 35 Cal. 3d 184, 197 Cal. Rptr. 284, 672 P.2d 1297* , plaintiff had obtained a preliminary injunction against enforcement by defendant city of a rent-control ordinance. The Supreme Court, after discussing the issue at length, held the ordinance to be constitutional on its face. The court then stated that it is well settled that courts lack jurisdiction to enjoin the enforcement of a validly adopted constitutional ordinance and on this ground reversed the trial court's order granting the preliminary injunction (*35 Cal. 3d 184, 195)* .

In *Moore v. Superior Court (1936) 6 Cal. 2d 421, 57 P.2d 1314* , the Legislature had enacted a statute that authorized the Fish and Game Commission to grant permits for the taking of fish for reduction or extraction purposes. Under the statute, the commission was required to limit the taking of fish in order to prevent waste or depletion of a species. In granting permits to various persons during the seasons of 1933-1934 and 1934-1935, the commission made equal allotments among the various plants. For the 1935-1936 season, however, the commission determined that permittees who had not theretofore engaged in the business should be permitted to take only half the amount allowed to those previously operating. Three new plants brought an action to enjoin the members of the commission from enforcing the terms of their permits; they alleged that the action of the commission amounted to an arbitrary and unjustifiable discrimination against them. The superior court issued a preliminary injunction that restrained the commission from interfering with the operations of the plants so long as they did not take a certain amount of fish during the season in question. The members of the commission applied for a writ of prohibition from the Supreme Court to restrain the superior court from enforcing the preliminary injunction. The Supreme Court ordered issuance of the writ.

The Court stated that, under former Civ. Code § 3423(4) and former Code Civ. Proc. § 526 second subd. (4) (now relettered as *Civ. Code § 3423(d)* and *Code Civ. Proc. § 526(b)(4)*), an injunction cannot be issued to prevent the enforcement of a public statute. The preliminary injunction clearly operated to defeat the statute involved because it increased the fish allotment of the three parties who obtained it without reducing the amount allotted to other applicants who were not before the court with the result that the total amount permitted for the season was beyond the limit found by the commission as the maximum permissible without depletion or waste. Hence, because the superior court lacked jurisdiction to grant the preliminary injunction, the Court ordered that a writ of prohibition issue restraining the respondents from taking any further proceedings against petitioners on the basis of the complaint (*6 Cal. 2d 421, 424)* .

In *Reclamation District v. Superior Court (1916) 171 Cal. 672, 154 P. 845* , the plaintiff was Sutter County and the defendant was a reclamation district. Plaintiff instituted an action by which it sought to enjoin the district and its trustees from constructing certain levees or completing their construction. The statute that created the district made the construction of the levee in question the duty of the district. Nevertheless, the superior court issued a preliminary injunction restraining the construction of the greater part of the levee work despite the district's objections that the court did not have jurisdiction in undertaking to restrain the acts complained of on the basis of former Civ. Code § 3423(4) and former Code Civ. Proc. § 526 second subd. (4) (now relettered as *Civ. Code § 3423(d)* and *Code Civ. Proc. § 526(b)(4)*). Defendant district then petitioned the Supreme Court for a writ of prohibition to restrain further prosecution of the action.

The Supreme Court agreed with petitioner district. The Court held that the statute creating the district and imposing on it to build the levee was constitutional, that the injunction sought by the plaintiff was prohibited by former Civ. Code § 3423(4) (now relettered as *Civ. Code § 3423(d)*), and that the superior court was exceeding its jurisdiction in entertaining the application for the permanent injunction. Thus, the Court ordered issuance of a writ for the purpose of prohibiting the further prosecution of the action (*171 Cal. 672, 676-683)* .

In *Sundance Saloon, Inc. v. City of San Diego (1989) 213 Cal. App. 3d 807, 261 Cal. Rptr. 841* , plaintiffs sought a preliminary injunction to restrain enforcement pendente lite of a city ordinance requiring cabarets, with certain exceptions, to close between the hours of two and six a.m., on the ground that the ordinance violated the free speech guaranties of both the federal and state constitutions. In affirming an order denying the injunction, the court of appeal, citing *Civ. Code § 3423* and *Code Civ. Proc. § 526*, said that in general a preliminary injunction may not be issued to prevent the execution of a public statute, by officers of the law, for the public benefit or to prevent the exercise of a public or private office, in a lawful manner, by the person in possession (*213 Cal. App. 3d 807, 812)* . The court added that while these general strictures do not preclude the issuance of preliminary injunctive relief when the constitutionality of a statute or ordinance is challenged, nevertheless trial courts should be extremely cautious to enjoin law enforcement officials from enforcing, before a trial on the merits, an ordinance obviously approved and adopted by duly elected representatives of the people for the purpose of promoting and protecting public morality. The court held that plaintiff

had failed to show that it would suffer irreparable harm by the denial of the injunction or that plaintiff was likely to prevail at the trial on the merits. In other words, it was the opinion of the court that the validity of the ordinance would be upheld at trial (*213 Cal. App. 3d 807, 813-818)* .

In *DeMott v. Board of Police Commissioners (1981) 122 Cal. App. 3d 296, 175 Cal. Rptr. 879* , the court of appeal reversed an order granting a preliminary injunction preventing enforcement of a city ordinance that regulated the operation of picture arcades operated by respondent. Relying on *City of Santa Monica v. Superior Court (1964) 231 Cal. App. 2d 223, 226, 41 Cal. Rptr. 824* , the court noted that trial courts should be extremely cautious when asked to enjoin law enforcement officials from enforcing an ordinance obviously approved and adopted by duly-elected representatives of the people for the purpose of promoting and protecting public morality prior to a trial on the merits. With all presumptions favoring the validity and constitutionality of such enactments, it should be only under extraordinary circumstances that anyone challenging the validity of such a law should immediately be granted the ultimate relief he or she seeks prior to any trial on the merits (*122 Cal. App. 3d 296, 300)* .

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
CHAPTER 116 INJUNCTIONS
PART II. FORMS
B. Injunctive Relief Against Statutes

11-116 California Points & Authorities § 116.84

§ 116.84 Opposing Application for Preliminary Injunction [Code Civ. Proc. § 527]--Injunction Is Not Issued to Enforce Criminal Law Unless Nuisance Demonstrated or as Otherwise Provided by Law [Civ. Code § 3369]

[1] FORM

[*Caption. See § 116.32[1].*]

A PRELIMINARY INJUNCTION CANNOT BE ISSUED TO ENFORCE THE CRIMINAL LAW EXCEPT IN THE CASE OF A NUISANCE, OR AS OTHERWISE PROVIDED BY LAW. IN THIS CASE, THE STATUTE AT ISSUE, NAMELY _____ [*specify statute or ordinance*] DOES NOT INVOLVE NUISANCE AND NO OTHER PROVISION OF LAW AUTHORIZES ISSUANCE OF AN INJUNCTION TO ENFORCE IT. THEREFORE, THE REQUEST FOR INJUNCTIVE RELIEF SHOULD BE DENIED.

Enforcing Criminal Law Prohibited. Preventive relief cannot be granted to enforce a penalty or forfeiture in any case, nor to enforce a penal law except in the case of nuisance or as otherwise provided by law (*Civ. Code § 3369*). This statutory enactment is but the expression of the fundamental rule that courts of equity are not concerned with criminal matters, and they cannot be resorted to for the prevention of criminal acts except when property rights are involved (*Perrin v. Mountain View Mausoleum Assn. (1929) 206 Cal. 669, 671, 674, 275 P. 787* ; *People v. Steele (1935) 4 Cal. App. 2d 206, 208-213, 40 P.2d 959*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

CAUTION:

Although the above authorities still appear to be valid in a general sense, in many cases injunctive relief against conduct that violates a criminal statute may now be obtained under *Bus. & Prof. Code § 17203*, which broadly permits injunctive relief against "unfair competition." "Unfair competition" for this purpose is defined as including "any unlawful, unfair or fraudulent business act or practice" [*see Bus. & Prof. Code § 17200*]. For points and authorities pertaining to such injunctive relief, see Ch. 235, *Unfair Competition* , in this publication.

[a] Use of Form

These points and authorities may be submitted in opposition to an application for a preliminary injunction when that relief is being sought to enforce a criminal statute or ordinance and does not fall within the exception provided for nuisances or for other statutes expressly permitting enforcement by injunction [*see Civ. Code § 3369*].

With appropriate modifications, these points and authorities may be used (1) in support of a demurrer to a complaint for injunctive relief [*see Code Civ. Proc. § 430.10(e)*], (2) as an affirmative defense in an answer to such a complaint [*see Code Civ. Proc. § 431.30(b)(2)*], (3) in support of a motion for summary judgment in such an action [*see Code Civ. Proc. § 437c*], or (4) in support of a petition for a writ of prohibition [*see Code Civ. Proc. §§ 1102, 1103*] seeking to restrain a court from enforcing injunctive relief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts that establish that the statute or ordinance at issue does not involve the enforcement of nuisance laws, and point out the absence of any other provisions of law that authorize injunctive relief for the conduct in question.

[c] Related Pleading and Practice Forms

For discussion of the various methods of opposing applications for provisional and permanent injunctive relief as well as for a form of declaration to oppose an application for a preliminary injunction and a form of demurrer to a complaint for injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender).

[3] Discussion of Authorities

[a] Enforcing Criminal Law Prohibited

In ***Perrin v. Mountain View Mausoleum Asso.*** *(1929) 206 Cal. 669, 275 P. 787* , plaintiff brought an action to obtain an injunction restraining defendants from continuing to construct, maintain, and operate on property owned by defendant association any tombs, crypts, and niches for the interment of bodies of dead human beings and for the recovery of $5,000 damages alleged to have been caused to plaintiff's adjoining property. The superior court granted a judgment dismissing the action after sustaining defendant's objection to the introduction of any evidence on the ground that the complaint failed to state a cause of action. Plaintiff appealed, but the court of appeal affirmed the judgment.

It stated that, basically, plaintiff was seeking by his action to enforce certain ordinances that purported to establish a residence district in a portion of Los Angeles County, any violation of which was a misdemeanor. It then observed that *Civ. Code § 3369* expresses the fundamental rule that courts of equity are not concerned with criminal matters and they

cannot be resorted to for the prevention of criminal acts except when property rights are involved. Moreover, because the mausoleum was not a nuisance per se, and because plaintiff had not indicated facts that would indicate that he had suffered some exceptional damages other than that suffered by the public generally, property rights were not involved. Hence, the judgment was affirmed (*206 Cal. 669, 671-674)* .

In ***People v. Steele*** *(1935) 4 Cal. App. 2d 206, 40 P.2d 959* , defendants were licensed chiropractors. They were appealing from a judgment that enjoined them from practicing or attempting to practice or advertising or holding themselves out as practicing certain designated modes of treating the sick and afflicted. The state had successfully argued to the superior court that a license to practice under the Chiropractic Act did not authorize the use by the licensed person of any of the modes of treatment enumerated in the injunction and that, consequently, the practice of such modes of treatment by defendants constituted a public nuisance that could be enjoined by the state. Phrased differently, the state contended that the practice of medicine without a license was a menace to public health and, hence, a public nuisance capable of being enjoined. Defendants appealed and contended that there was no basis for the superior court's finding that the practices enjoined constituted a nuisance; therefore, they asserted that an injunction was not available to the state.

The court of appeal agreed with defendants and reversed the judgment. It observed the general rule that the violation of a penal statute (in this case practicing medicine without a license) does not constitute a nuisance unless the doing of the prohibited acts constitutes a nuisance in the absence of a statute. The court held that the practicing of a healing art without a statutorily required license was not a nuisance per se merely because it violated a penal statute. Therefore, it reversed the judgment (*4 Cal. App. 2d 206, 208-213)* .

[4] Additional Authorities

[a] Enforcing Criminal Law Prohibited

In *Carter v. Chotiner (1930) 210 Cal. 288, 291 P. 577* , plaintiffs owned property adjacent to defendants' cemetery. They brought an action to restrain and enjoin defendants from using certain real property for cemetery purposes on the ground that such use would be a nuisance and cause irreparable injury and damages to the premises and health of plaintiffs. They pleaded that defendants were violating two ordinances that required that a permit be obtained prior to the operation of cemeteries located within certain areas of Los Angeles County. Violation of the ordinances was made a misdemeanor. The superior court issued a preliminary injunction, but after a lengthy trial the court dismissed the injunction and denied the application of the plaintiffs for a permanent injunction to prohibit defendants from operating a cemetery at all. It did, however, enjoin defendants from interring any bodies within a strip of land 40 feet wide encircling the cemetery grounds. Plaintiffs appealed, but the court of appeal affirmed the judgment.

The court of appeal noted that the ordinances were penal in nature. Furthermore, it stated, it is elementary that the violation of a penal ordinance does not of itself create a private nuisance per se and that, in the absence of special injury, an injunction will not be granted on the application of a private individual merely to prevent violation of a penal statute. Hence, the main question involved was whether the superior court's findings that the maintaining of the cemetery would not constitute a nuisance were supported by the evidence. Determining that they were so supported, the court of appeal affirmed the judgment (*210 Cal. 288, 291-292)* .

In *People v. Seccombe (1930) 103 Cal. App. 306, 284 P. 725* , the district attorney and city attorney brought an action to obtain an injunction restraining the defendant from continuing to pursue the occupation of a usurer. Defendant's demurrer was sustained, and the superior court entered a judgment of dismissal. Plaintiffs appealed. They contended that the injunction was justified by *Code Civ. Proc. § 731*, which permits the bringing of a civil action to abate a public nuisance as defined by *Civ. Code § 3480*. Specifically, they contended that defendant's activities constituted a public nuisance under a statute that defined a public nuisance as anything that is an obstruction to the free use of property. Moreover, they argued that defendant had committed two separate misdemeanors and intended to commit further crimes

of the same type. The court of appeal rejected this reasoning, however, and affirmed the judgment of dismissal.

The court noted that criminal conduct may be coupled with the maintenance of a nuisance, that a nuisance may exist without a concomitant crime, and that criminality may exist without the criminal act or course of conduct constituting a nuisance as defined by the laws of California. Hence, when an action is for abatement of a nuisance by injunction or otherwise, facts that bring the act or course of conduct within the definition of a nuisance must be pleaded; it is not sufficient to allege merely that the defendant has committed and intends to commit additional criminal acts. The court also noted that while equity will not withhold the remedy of injunctive relief merely because the acts constituting a nuisance are also of a criminal nature, it must appear that the act, condition of property, or course of conduct complained of falls within the definition of a nuisance as stated by statute; it must also appear that the injury is, and if the wrong is persisted in will continue to be, of a tangible character affecting (when property is involved) some designated property (*103 Cal. App. 306,309-311*).

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PART II. FORMS
B. Injunctive Relief Against Statutes

11-116 California Points & Authorities §§ 116.85-116.99

[Reserved]

§§ 116.85[Reserved]

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11-116 California Points & Authorities § 116.100

§ 116.100 Supporting Application for Temporary Restraining Order and Preliminary Injunction [Code Civ. Proc. § 527]--Contract Capable of Specific Enforcement [Civ. Code § 3423(e); Code Civ. Proc. § 526(b)(5)]

[1] FORM

[*Caption. See § 116.20.*]

A PRELIMINARY INJUNCTION SHOULD BE ISSUED BECAUSE THE CONTRACT IS CAPABLE OF BEING SPECIFICALLY ENFORCED. THE CONTRACT IS SUBJECT TO SPECIFIC ENFORCEMENT BECAUSE _____ [*specify reason(s), e.g.,* IT EXPRESSLY PROVIDES FOR SUCH ENFORCEMENT].

A. Contract Can Be Specifically Enforced. The prohibition stated in *Civil Code Section 3423(e)* and *Code of Civil Procedure Section 526(b)(5)* against injunctive relief to enforce a contract does not apply when the performance of the subject contract is capable of being specifically enforced (*see Zakaria v. Lincoln Property Co. (1986) 185 Cal. App. 3d 500, 510, 229 Cal. Rptr. 669* ; *Nadell & Co. v. Grasso (1959) 175 Cal. App. 2d 420, 427, 346 P.2d 505*).

[*Optional*] **B. Terms of Contract Provide for Specific Enforcement.** The contention that an injunction cannot be granted because of *Civil Code Section 3423(e)* and *Code of Civil Procedure Section 526(b)(5)* lacks merit when the agreement itself provides that in the event of default a party may proceed in law or equity to require the defendant to perform his or her obligations (*see Zakaria v. Lincoln Property Co. (1986) 185 Cal. App. 3d 500, 510, 229 Cal. Rptr. 669*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of an application for a preliminary injunction, or for a temporary restraining order and a preliminary injunction, when it has been asserted that an injunction cannot be issued to prevent the breach of a contract that would not be specifically enforced, pursuant to *Civ. Code § 3423(e)* or *Code Civ. Proc. § 526(b)(5)*.

These points and authorities may also be presented in reply to a party's opposition to an initial application for injunctive relief. For tactical purposes, they may be more commonly used as part of such a reply, because they address an issue that an opponent would likely raise. In addition, they may be used in opposition to a demurrer or as part of a respondent's brief on appeal. In an appropriate case, they may be combined with the points and authorities *set out in § 116.101*.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts and the points of law stated. Thus, counsel should set forth facts that establish why a particular contract is capable of specific enforcement, in order to overcome the statutory limitations on preventing breaches of contract by using injunctive relief [*see Civ. Code § 3423(e)*; *Code Civ. Proc. § 526(b)(5)*].

[c] Related Pleading and Practice Forms

For a general form of complaint for provisional and permanent injunctive relief, as well as other forms for use in obtaining provisional injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender). For discussion of the situations in which specific performance may and may not be granted, see California Forms of Pleading and Practice, Ch. 528, *Specific Performance* (Matthew Bender).

[d] Opposing Points and Authorities

The points and authorities *set out in § 116.103* may be used in an appropriate case to oppose an application supported by the points and authorities in this form.

[3] Discussion of Authorities

[a] Contract Can Be Specifically Enforced

In ***Zakaria v. Lincoln Property Co.*** *(1986) 185 Cal. App. 3d 500, 229 Cal. Rptr. 669* , plaintiff, an applicant for federally subsidized ("Section 8") housing, sued the defendant owners of an apartment building for breach of a contract between defendants and the city, of which plaintiff was a third-party beneficiary, seeking preliminary injunctive relief to enjoin defendants from renting the next available unit during the course of litigation and to order defendants to rent it to plaintiff on plaintiff's prevailing in the action. The trial court granted the injunction. Defendants appealed, contending that the court erred because, under former Civ. Code § 3423(5) (now relettered as *Civ. Code § 3423(e)*), an injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced.

The court of appeal affirmed the order granting the preliminary injunction. The court stated that defendants' contention

lacked merit, because the agreement provided that in the event of default, the city was permitted to proceed by mandamus or by other proceeding in law or equity to require the defendants to perform their obligations. Thus, said the court, the contract could be specifically enforced (*185 Cal. App. 3d 500, 510)* .

In ***Nadell & Co. v. Grasso*** *(1959) 175 Cal. App. 2d 420, 346 P.2d 505* , plaintiff, a trader of goods damaged in transit, sued a purchaser of goods who acquired the damaged goods with a proviso that the goods not be resold in their original containers. The defendant indicated his intention to resell the goods without regard to the restriction imposed by plaintiff. A trial court granted a permanent injunction. Defendant appealed, arguing that a prohibitory injunction will not lie to prevent the breach of a contract the performance of which would not be specifically enforced, and because the duty to be performed is a long, continuous one, requiring constant court supervision, specific enforcement would not be granted.

The court of appeal affirmed the judgment granting the permanent injunction. The court suggested that the contract could, in fact, be specifically enforced, stating that because the merchandise involved would ordinarily be capable of disposal in one transaction, or at most a very few transactions, defendant's reliance on former Code Civ. Proc. § 526 second subd. (5) (now relettered as *Code Civ. Proc. § 526(b)(5)*) was misplaced (*175 Cal. App. 2d 420, 426)* .

[b] Terms of Contract Provide for Specific Enforcement

In ***Zakaria v. Lincoln Property Co.*** *(1986) 185 Cal. App. 3d 500, 229 Cal. Rptr. 669* , is discussed in *§ 116.100[3][a]*.

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11-116 California Points & Authorities § 116.101

§ 116.101 Supporting Application for Temporary Restraining Order and Preliminary Injunction [Code Civ. Proc. § 527]--Unique Personal Service Contract With Statutory Minimum Compensation [Civ. Code § 3423(e); Code Civ. Proc. § 526(b)(5)]

[1] FORM

[*Caption. See § 116.20.*]

A PRELIMINARY INJUNCTION SHOULD BE ISSUED TO _____ [*specify conduct sought to be enjoined, e.g.,* TO PREVENT DEFENDANT FROM RECORDING HIS NEW SONG WITH ACME RECORDING COMPANY]. THE INJUNCTION SHOULD BE GRANTED BECAUSE (1) THE CONTRACT BETWEEN _____ [*specify contracting parties, e.g.,* PLAINTIFF AND DEFENDANT] IS A WRITTEN CONTRACT FOR PERSONAL SERVICE OF A SPECIAL, UNIQUE, UNUSUAL, EXTRAORDINARY, OR INTELLECTUAL CHARACTER, NAMELY _____ [*specify type of contract, e.g.,* A CONTRACT TO RECORD MUSIC], (2) THE LOSS OF THE PROMISED SERVICE CANNOT BE ADEQUATELY COMPENSATED IN DAMAGES, AND (3) THE CONTRACT GUARANTEES AT LEAST THE MINIMUM ANNUAL COMPENSATION REQUIRED BY STATUTE, NAMELY $_____.

A. Unique Personal Service Contract With Statutory Minimum Compensation. Although, in general, an injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced, a person may be enjoined from rendering personal service to another when (1) the person is a party to a contract in writing for the rendition or furnishing of personal service from one to another; (2) the contract guarantees the person the minimum annual compensation as established by *Civil Code Section 3423(e)* and *Code of Civil Procedure Section 526(b)(5)*; and *(3)* the promised service is of a special, unique, unusual, extraordinary, or intellectual character that gives it peculiar value, the loss of which cannot be reasonably or adequately compensated in damages in an action at law (*see Civ. Code § 3423(e)*; *Code Civ. Proc. § 526(b)(5)*; *MCA Records, Inc. v. Newton-John (1979) 90 Cal. App. 3d 18, 22, 153 Cal. Rptr. 153*).

[*Optional*] **B. Minimum Compensation Satisfied When Party Has Exclusive Control of Production Costs.** An injunction is not improperly granted under the requirement that the agreement guarantee payment of the statutory minimum amount when, under the terms of the agreement, the exclusive control of production costs remained in defendant's hands at all times, and defendant could have performed at costs that would net the defendant the statutory minimum compensation (*MCA Records, Inc. v. Newton-John (1979) 90 Cal. App. 3d 18, 22, 153 Cal. Rptr. 153*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of an application for a preliminary injunction, or for a temporary restraining order and a preliminary injunction, to prevent breach of a contract involving personal services of a special, unique, unusual, extraordinary, or intellectual character [*see Civ. Code § 3423(e)* and *Code Civ. Proc. § 526(b)(5)*].

These points and authorities may also be presented in reply to a party's opposition to an initial application for injunctive relief. For tactical purposes, they may be more commonly used as part of such a reply, because they address an issue that an opponent would likely raise. They may also be used in opposition to a demurrer or as part of a respondent's brief on appeal. In an appropriate case, these points and authorities may be combined with the points and authorities *set out in § 116.100*.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts establishing that the contract is in writing for unique personal services; why an award of damages would be inadequate compensation; and how the contract meets the statutory requirements for minimum compensation [*see Civ. Code § 3423(e)*; *Code Civ. Proc. § 526(b)(5)*].

[c] Related Pleading and Practice Forms

For a general form of complaint for provisional and permanent injunctive relief, as well as other forms for use in obtaining provisional injunctive relief, see California Forms of Pleading and Practice Ch. 303, *Injunctions* (Matthew Bender).

[d] Opposing Points and Authorities

The points and authorities *set out in § 116.103* may be used in an appropriate case to oppose an application supported by the points and authorities in this form.

[3] Discussion of Authorities

[a] Unique Personal Service Contract With Statutory Minimum Compensation

In ***MCA Records, Inc. v. Newton-John*** *(1979) 90 Cal. App. 3d 18, 153 Cal. Rptr. 153* , plaintiff record company sought and obtained a preliminary injunction against defendant singer, restraining defendant from recording for anyone other than plaintiff while plaintiff's action was pending. Defendant appealed, asserting that the injunction was improperly granted, because the agreement failed to guarantee payment of the minimum compensation then required by statute, namely, $6,000, under former Civ. Code § 3423(5) and former Code Civ. Proc. § 526 second subd. (5) (now relettered as *Civ. Code § 3423(e)* and *Code Civ. Proc. § 526(b)(5)*, and providing differing minimal amounts, depending on the date of contracting).

The court of appeal affirmed the order granting the preliminary injunction (after an unrelated modification). The court, citing the above sections, stated that a party to a personal service contract may not be enjoined from rendering personal services to others unless, under the terms of the contract, he or she is guaranteed the statutory minimum annual compensation (at that time, $6,000). Defendant argued that she was advanced $200,000 to produce recordings and the cost of production exceeded $194,000; hence, her net compensation became less than $6,000. The court agreed with the trial court's finding that (1) the "minimum compensation" referred to in the statute does not mean "net profits"; and (2) even if it did, a suitable recording could be made at costs that would net defendant the minimum compensation of $6,000 a year. The court considered as decisive the fact that under the terms of the agreement, exclusive control of production costs remained in defendant's hands at all times. Defendant's interpretation of the minimum-compensation statutes, the court reasoned, would allow her to nullify her contract at any time merely by increasing her production expenses. It did not believe the Legislature intended to sanction such a one-sided bargain (*90 Cal. App. 3d 18, 22)* .

[b] Minimum Compensation Satisfied When Party Has Exclusive Control of Production Costs

MCA Records, Inc. v. Newton-John *(1979) 90 Cal. App. 3d 18, 153 Cal. Rptr. 153* , is discussed in *§ 116.101[3][a], [4][a]*.

[4] Additional Authorities

[a] Unique Personal Service Contract With Statutory Minimum Compensation

In *Leach v. Drummond Medical Group, Inc. (1983) 144 Cal. App. 3d 362, 192 Cal. Rptr. 650* , plaintiffs brought an action against a hospital and medical group for various civil rights and other violations based on the hospital's notice that it would no longer service plaintiffs' family after plaintiffs wrote to the state Health Services concerning the hospital's emergency room practices. Plaintiffs' complaint sought injunctive relief and damages. Defendants demurred, arguing that plaintiffs could never amend their complaint so as to be entitled to injunctive relief, because the physician-patient relationship is characterized as one requiring personal services. The demurrer was sustained without leave to amend and plaintiffs appealed. The court of appeal reversed, stating that the basis for strictures against judicial compulsion of personal service contracts did not exist in the case, because the defendants were two interrelated corporations with medical doctors as employees, and defendants could be compelled to provide medical services to plaintiffs without the court ordering performance of such service by a specific doctor (*144 Cal. App. 3d 362, 368-369)* .

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11-116 California Points & Authorities § 116.102

§ 116.102 Supporting Application for Temporary Restraining Order and Preliminary Injunction [Code Civ. Proc. § 527]--Restrictive Covenant in Deed

[1] FORM

[*Caption. See § 116.20.*]

A PRELIMINARY INJUNCTION MAY BE ISSUED TO ENJOIN VIOLATION OF RESTRICTIVE COVENANT. IN THIS CASE, _____ [*specify party, e.g.,* DEFENDANT] ACQUIRED THE PROPERTY WITH KNOWLEDGE THAT A COVENANT IN THE DEED TO THE PROPERTY _____ [*specify restriction, e.g.,* PRECLUDED USE OF THE PROPERTY FOR THE RETAIL SALE OF GROCERIES]. NEVERTHELESS, HE/SHE/IT _____ [*specify conduct that is subject of injunctive relief sought that would violate covenant*]. THEREFORE, THE INJUNCTION SHOULD BE ISSUED.

Violation of Restrictive Covenant. An injunction should be issued to prevent the violation by a grantee with notice of a restrictive covenant in a deed (*Mullally v. Ojai Hotel Co. (1968) 266 Cal. App. 2d 9, 11-14, 71 Cal. Rptr. 882* ; *Doo v. Packwood (1968) 265 Cal. App. 2d 752, 755-757, 71 Cal. Rptr. 477*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of an application for injunctive relief when a defendant grantee is violating a restrictive covenant, of which he or she has notice, in a deed. Counsel may submit these points and authorities with (1) an application for a temporary restraining order and preliminary injunction; (2) an application for a preliminary injunction alone; or (3) after appropriate modification of the caption (*see § 116.20*), with a motion for a preliminary injunction.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts establishing the nature of the restrictive covenant, the defendant's knowledge of it, and his or her conduct that is violative of the covenant.

[c] Related Pleading and Practice Forms

For a general form of complaint for provisional and permanent injunctive relief as well as other forms for use in obtaining provisional injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender). For discussion and forms relating to litigation involving restrictive covenants, see California Forms of Pleading and Practice, Ch. 184, *Deeds* (Matthew Bender).

[3] Discussion of Authorities

[a] Violation of Restrictive Covenant

In ***Mullally v. Ojai Hotel Co.*** *(1968) 266 Cal. App. 2d 9, 71 Cal. Rptr. 882* , plaintiffs were the owners of lots in a subdivision that protruded onto defendant's property on which it operated a hotel. Defendant owned several lots in the subdivision that defendant caused to be annexed to the City of Ojai on the condition that it grant defendant a conditional use permit that allowed defendant to operate tennis courts on two of the lots as an integral part of its business. The lots, however, were subject to a covenant covering the subdivision that restricted the use of the lots to single-family residences. In addition, defendant owned a private residence on several additional lots in the subdivision. The manager of the hotel used the residence as his home, but occasionally rooms in the residence were rented to hotel guests. Plaintiffs sued to enjoin the hotel from violating the restrictive covenant by constructing tennis courts on some of the lots and by using the residence for hotel guests. The superior court granted a judgment as prayed, and the court of appeal affirmed.

The court of appeal disagreed with defendant's contention that *Code Civ. Proc. § 731a* forbids the use of the injunctive process against a land use permitted by city zoning. The court stated that it is a matter of common knowledge that restrictive covenants quite frequently forbid land uses that, if permitted, would make the property far more valuable (*266 Cal. App. 2d 9, 11-14)* .

In ***Doo v. Packwood*** *(1968) 265 Cal. App. 2d 752, 71 Cal. Rptr. 477* , plaintiffs were partners in the retail grocery business. They were building a larger and more modern market and, thus, anticipated the sale of one of their stores on the same street. They executed a deed to defendants that proscribed the use of the property or any of the buildings on it for use in the retail sale of groceries. Soon after the deed was executed, defendants leased the property to another defendant who began to operate a retail grocery business on the property. The superior court rendered a judgment by which the plaintiffs recovered nothing, and they appealed.

The court of appeal reversed the judgment for defendants. The court observed that the plaintiffs intended to protect

themselves through the restrictive covenant against competition in the retail grocery business in the neighborhood of the lot that they sold. It noted that this desire was legitimate and was protected by the restrictive covenant set forth in the deed. Therefore, plaintiffs should have been entitled to an injunction preventing defendants and their lessee and anyone succeeding defendants as a grantee with notice of the restriction in the title from carrying on a retail grocery business on the premises. In addition, they were entitled to such damages arising out of the operation of such retail grocery business in the lot conveyed to the defendants as might be proved (*265 Cal. App. 2d 752, 755-757)* .

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11-116 California Points & Authorities § 116.103

§ 116.103 Opposing Application for Preliminary Injunction [Code Civ. Proc. § 527]--Injunction Not Issued to Prevent Breach of Contract That Would Not Be Specifically Enforced [Civ. Code § 3423(e); Code Civ. Proc. § 526(b)(5)]

[1] FORM

[*Caption. See § 116.32.*]

A PRELIMINARY INJUNCTION CANNOT BE ISSUED TO PREVENT ACTIONS IN PURPORTED BREACH OF CONTRACT IF THE CONTRACT IS OF A KIND THAT IS NOT SUBJECT TO SPECIFIC ENFORCEMENT. IN THIS CASE, _____ [*specify party, e.g.,* PLAINTIFF] SEEKS TO ENJOIN _____ [*specify party, e.g.,* DEFENDANT] FROM _____ [*specify action that applicant seeks to enjoin*]. HOWEVER, THE UNDERLYING CONTRACT _____ [*state defense, e.g.,* IS NOT ONE FOR UNIQUE PERSONAL SERVICES]. [IN ANY EVENT, THE ACTIONS COMPLAINED OF DO NOT AMOUNT TO A BREACH OF CONTRACT.] THEREFORE, THE REQUEST FOR INJUNCTIVE RELIEF SHOULD BE DENIED.

A. Preventing Breach of Contract. An injunction cannot be granted to prevent the breach of a contract, the performance of which would not be specifically enforced, except for certain contracts involving unique personal services (*Civ. Code § 3423(e)*; *Code Civ. Proc. § 526(b)(5)*; *Thayer Plymouth Center, Inc. v. Chrysler Motors Corp. (1967) 255 Cal. App. 2d 300, 303-305, 63 Cal. Rptr. 148* ; *Adams v. Williams Resorts, Inc. (1962) 210 Cal. App. 2d 456, 462-463, 26 Cal. Rptr. 656*).

[*Optional*] **B. Affirmative and Negative Covenants in Contract.** When a contract contains both affirmative and negative covenants, equity will not interfere to prevent a breach of the negative covenant when the affirmative covenant is of such a nature that it cannot be specifically enforced (*Long Beach Drug Co. v. United Drug Co. (1939) 13 Cal. 2d 158, 168-172, 88 P.2d 698* ; *Anderson v. Neal Institutes Co. (1918) 37 Cal. App. 174, 177-179, 173 P. 779*).

[*Optional*] **C. Exception for Unique Personal Services Not Applicable.** The prohibition against an injunction being

granted to prevent the breach of a contract, the performance of which would not be specifically enforced, does not apply to a contract in writing for the rendition or furnishing of personal services from one to another when the minimum compensation for such service is at the rate set forth in *Civil Code Section 3423(e)* and *Code of Civil Procedure Section 526(b)(5)*, and when the promised service is of a special, unique, unusual, extraordinary, or intellectual character that gives it peculiar value, the loss of which cannot be reasonably or adequately compensated in damages in an action at law (*Civ. Code § 3423(e)*; *Code Civ. Proc. § 526(b)(5)*). In order to qualify for this exception, the contract in question must specifically guarantee the person furnishing such services at least the amount required by statute per year and satisfy a minimum standard of fairness as set forth in *Civil Code Section 3391(2)* (*Motown Record Corp. v. Brockert (1984) 160 Cal. App. 3d 123, 135-140, 207 Cal. Rptr. 574* ; *Foxx v. Williams (1966) 244 Cal. App. 2d 223, 235-236, 52 Cal. Rptr. 896*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to an application for a preliminary injunction when that relief is being sought to prevent the breach of a contract. They are based on the premise that the contract is one that would not be specifically enforced, and that it does not otherwise qualify for injunctive relief under the exception for written contracts for rendition of certain unique personal services and guaranteeing at least the statutory minimum amount of compensation for those services [*see Civ. Code § 3423(e)*; *Code Civ. Proc. § 526(b)(5)*].

With appropriate modifications, these points and authorities may be used (1) in support of a demurrer to a complaint for injunctive relief [*see Code Civ. Proc. § 430.10(e)*], (2) as an affirmative defense in an answer to such a complaint [*see Code Civ. Proc. § 431.30(b)(2)*], (3) in support of a motion for summary judgment in such an action [*see Code Civ. Proc. § 437c*], or (4) in support of a petition for a writ of prohibition [*see Code Civ. Proc. §§ 1102, 1103*] seeking to restrain a court from enforcing injunctive relief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts establishing why the nature of the contract is such that its purported breach cannot be enjoined. If counsel claims that no breach actually occurred (or will occur), facts establishing why the conduct complained of does not amount to a breach should also be included.

[c] Related Pleading and Practice Forms

For discussion of the various methods of opposing applications for provisional and permanent injunctive relief as well as for a form of declaration to oppose an application for a preliminary injunction and a form of demurrer to a complaint for injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender).

[3] Discussion of Authorities

[a] Preventing Breach of Contract

In ***Thayer Plymouth Center, Inc. v. Chrysler Motors Corp.*** *(1967) 255 Cal. App. 2d 300, 63 Cal. Rptr. 148* , plaintiff automobile dealer brought an action for specific performance of a dealership contract and for damages. Plaintiff obtained a preliminary injunction against defendant corporation that enjoined defendant from terminating the dealership agreement existing between the two parties. Defendant appealed from the order granting the preliminary injunction.

The court of appeal reversed the order. One of its three contentions with which the court of appeal agreed was that the dealership agreement was a contract that required continuing, cooperative performance by the parties and, thus, was not subject to specific performance. Hence, under former Civ. Code § 3423(5) and former Code Civ. Proc. § 526 second subd. (5) (now relettered as *Civ. Code § 3423(e)* and *Code Civ. Proc. § 526(b)(5)*), which state that an injunction cannot be granted to prevent the breach of a contract, the performance of which would not be specifically enforced, the preliminary injunction was improperly issued. The court stated that a contract that requires a continuing series of acts and demands cooperation between the parties for the successful performance of those acts is not subject to specific performance. Because the dealership contract provided for the maintenance of extensive and continuous transactions between the parties, the contract necessarily had to be continuous in nature. Thus, the order granting the preliminary injunction had to be reversed (*255 Cal. App. 2d 300, 303-305)* .

In ***Adams v. Williams Resorts, Inc.*** *(1962) 210 Cal. App. 2d 456, 26 Cal. Rptr. 656* , plaintiffs were licensed real estate brokers. They brought an action against defendant, a corporation engaged in the business of subleasing lots as home sites, on the basis of a written contract entitled "Agreement of Exclusive Agency and Sublease." The superior court granted plaintiffs a judgment that declared the rights of the parties under the contract, awarded them damages, and enjoined defendant from breaching the contract. Defendant appealed.

The court of appeal affirmed the judgment except that portion of the judgment that granted the injunctive relief. Defendant had contended that the superior court erred in granting plaintiffs a prohibitory injunction because, as to plaintiffs, the contract was one for personal services that could not be specifically enforced indirectly by an injunction against its breach. Plaintiffs, on the other hand, had contended that the agreement was a sublease and hence a proper subject for specific performance. The court of appeal agreed with defendant. It examined the contract and observed that the main purpose of defendant in entering into the agreement was to secure the services of plaintiffs even though as an incident it bore some aspects of a sublease. The court also noted the rule under former Civ. Code § 3423(5) and former Code Civ. Proc. § 526 second subd. (5) (now relettered as *Civ. Code § 3423(e)* and *Code Civ. Proc. § 526(b)(5)*) that, with exceptions not relevant to the case, an injunction cannot be granted to prevent the breach of a contract that would not be specifically enforced (*210 Cal. App. 2d 456, 462-463)* .

[b] Affirmative and Negative Covenants in Contract

In ***Long Beach Drug Co. v. United Drug Co.*** *(1939) 13 Cal. 2d 158, 88 P.2d 698* , plaintiff and defendant entered into a written agreement under which plaintiff was appointed the exclusive agent in Long Beach for the sale of defendant's drug products. Defendant gave notice that it would no longer be bound by the agreement and started to sell to other drug stores in Long Beach; later, it refused to make further sales to plaintiff. Plaintiff then brought an action for an accounting, for damages found due to it by the accounting, and for a permanent injunction to enjoin defendant from directly or indirectly selling its drug products to any dealer in Long Beach other than plaintiff and its agents. The superior court rendered judgment as prayed, and defendant appealed. The Supreme Court held that the contract was a valid one not void for uncertainty, but it held that the contract was not specifically enforceable and, hence, could not support the granting of permanent injunctive relief.

The Court noted the rule of former Civ. Code § 3423(5) and former Code Civ. Proc. § 526 second subd (5) (now

relettered as *Civ. Code § 3423(e)* and *Code Civ. Proc. § 526(b)(5)*), that an injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced. It also noted the doctrine that when a contract contains both affirmative and negative stipulations, equity will not interfere to prevent a breach of the negative covenant when the affirmative covenant is of such a nature that it cannot be specifically enforced. The Court noted that the contract in question was not wholly negative in character; it also contained affirmative covenants that required defendant to sell to plaintiff as its special agent and on the part of plaintiff to purchase from defendant and have available for resale a sufficient supply of its drug products to meet the demands of the retail trade as well as to uphold all of the products to the full list retail prices set by defendant. These covenants would not be specifically enforced because courts of equity will not decree the specific performance of contracts which by their terms stipulate for a succession of acts whose performance cannot be consummated by one transaction, but rather, will be continuous and require protracted supervision and direction. Thus, it was clear to the Court that the contract was specifically unenforceable and that plaintiff was not, therefore, entitled to the injunction (*13 Cal. 2d 158, 168-172)* .

In ***Anderson v. Neal Institutes Co.*** *(1918) 37 Cal. App. 174, 173 P. 779* , plaintiff and defendant entered into a contract by which defendant granted to plaintiff the exclusive right to advertise and use its remedies and method of drug and alcoholic treatment in Northern California. Plaintiff established an institute for such treatment in San Francisco, but several years thereafter defendant established a similar institute in San Francisco in violation of the contract. After defendant established its institute, defendant also refused to furnish any of its remedies to plaintiff. Plaintiff brought an action for an accounting and an injunction. The superior court entered judgment for defendant after sustaining defendant's demurrer to the complaint. Plaintiff appealed.

The court of appeal affirmed the judgment. It noted the principle under former Civ. Code § 3423(5) and former Code Civ. Proc. § 526 second subd (5) (now relettered as *Civ. Code § 3423(e)* and *Code Civ. Proc. § 526(b)(5)*), that an injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced. The contract in this situation could not be specifically enforced for two reasons. First, its enforcement would have required defendant to prepare the remedies used in the treatment of patients at plaintiff's institute; such service is of a character that a court could not make an effective decree for its performance. Second, even though the contract contained both affirmative and negative covenants, because of the statutory principle quoted above a court of equity will not interfere to prevent a breach of the negative covenant when the affirmative covenant is of such a nature that it cannot be specifically enforced by judicial decree (*37 Cal. App. 174, 176-179)* .

[c] Exception for Unique Personal Services Not Applicable

In ***Motown Record Corp. v. Brockert*** *(1984) 160 Cal. App. 3d 123, 207 Cal. Rptr. 574* , defendant entered into a contract as a recording artist with plaintiff record companies. Defendant's contract contained an exclusivity clause providing that she could not perform similar services for another employer. The contract further provided plaintiffs with the option, exercisable at any time, to pay defendant compensation at the rate of not less than $6,000 per annum. Defendant later became a successful recording artist and gave written notice of rescission, after which plaintiffs sued for breach of contract and injunctive relief. Plaintiffs then exercised their options to pay defendant. The trial court granted a preliminary injunction restraining defendant from performing for any one other than plaintiffs. Defendant appealed.

The court of appeal reversed the order granting a preliminary injunction. The court framed the issue as whether a clause in a personal services contract giving the employer the option to pay the employee a minimum of $6,000 a year satisfies the (then applicable) statutory minimum compensation requirement for an injunction restraining breach of contract. Concluding that such an option clause did not satisfy the statutory requirement of minimum compensation, the court reviewed the history of the minimum compensation requirement of former Civ. Code § 3423(5) (now relettered as *Civ. Code § 3423(e)*). It also discussed *MCA Records Inc. v. Newton-John (1979) 90 Cal. App. 3d 18, 153 Cal. Rptr. 153* , discussed in *§ 116.101[3][a]*, and *Foxx v. Williams (1966) 244 Cal. App. 2d 223, 52 Cal. Rptr. 896* (discussed *below*). The court in *Motown* noted that many record companies responded to those decisions by including a clause in their contracts giving the company the right at any time during the contract to agree to pay the artist a minimum

compensation of $6,000 a year. The company would then exercise its option to pay only if the artist was successful, to stop the artist from jumping to another label. The court said that to be subject to specific enforcement, a contract must have as one of its terms a compensation provision providing for payment at the minimum rate of $6,000 per year. But agreeing to payment of the minimum compensation is not a condition precedent to the granting of injunctive relief; it is a threshold requirement for admission of the contract into the class of contracts subject to injunctive relief under the statute. Former Civ. Code § 3423(5) (now relettered as *Civ. Code § 3423(e)*) must be read in conjunction with *Civ. Code § 3391(2)* (no specific performance enforced against party as to whom contract is not just and reasonable). The two statutes demand a minimum standard of fairness as a condition on equitable enforcement of an exclusivity clause in a personal services contract (*160 Cal. App. 3d 123, 135, 139)* .

In ***Foxx v. Williams*** *(1966) 244 Cal. App. 2d 223, 52 Cal. Rptr. 896* , plaintiff entertainer brought an action against defendants for a declaration of rights, an accounting, and for other relief under a written contract. The corporate defendant cross complained to recover money paid by mistake, for damages, and for an injunction to prohibit plaintiff from breaching the contract. After a court trial, judgment was entered declaring the rights of the parties, awarding a money judgment in favor of the cross complainant for overpayments, and enjoining plaintiff from making records for any other entity so long as the royalties earned by plaintiff under the contract equalled or exceeded $3,000 for the specified six-month periods. Plaintiff appealed, and the court of appeal reversed.

The court noted the provision of former Civ. Code § 3423(5) and *Code Civ. Proc. § 526* second subd (5) (now relettered as *Civ. Code § 3423(e)* and *Code Civ. Proc. § 526(b)(5)*) which then provided, in part, that an injunction cannot be granted to prevent the breach of a contract unless it is a contract in writing for the rendition or furnishing of personal services when the minimum compensation for such service is at the rate of not less than $6,000 per year and when the promised service is of a special, unique, unusual, extraordinary, or intellectual character that gives it peculiar value the loss of which cannot be reasonably or adequately compensated in damages. The court also recognized the familiar rule that a contract to render personal services cannot be specifically enforced. Thus, it followed that the breach of such a contract may not be enjoined except in cases falling within the statutory exception under which a contract guarantees the person furnishing such personal services at least $6,000 per year. Because the royalty contract in question did not meet the then-applicable statutory requirement that plaintiff receive such a sum each year, the court deleted that portion of the judgment that enjoined plaintiff (*244 Cal. App. 2d 223, 235-236)* .

[4] Additional Authorities

[a] Preventing Breach of Contract

In Poultry Producers etc. v. *Barlow (1922) 189 Cal. 278, 208 P. 93* , plaintiff was a corporation organized by poultrymen for cooperative effort in marketing their products. The stockholders of the corporation were all producers holding one share of stock each for every thousand hens owned. Each stockholder was obligated, under what was termed a produce sale agreement, to sell all eggs produced from his poultry through plaintiff. Plaintiff brought an action against one of the contracting stockholders by which it recovered a judgment that awarded certain stipulated damages for breach of contract by reason of the sale of eggs to other purchasers; the judgment also required the specific performance of the produce sale contract to sell and deliver eggs to plaintiff during the unexpired term covered by the contract and enjoined him from making sales of his product to other persons. Defendant appealed, and the Supreme Court affirmed the judgment's award of damages but reversed that portion of it that decreed specific performance and the injunction. The Court noted that under former Civ. Code § 3423(5) and former Code Civ. Proc. § 526 second subd (5) (now relettered as *Civ. Code § 3423(e)* and *Code Civ. Proc. § 526(b)(5)*) an injunction cannot be granted to prevent the breach of a contract when its performance would not be specifically enforced. Because the contract lacked a mutuality of remedy, required the rendering of personal services, and would require constant personal supervision and oversight by the Court if it were to be enforced, the Court reversed the granting of specific performance and injunctive relief (*189 Cal. 278, 281-283)* .

In *Lovelace v. Free (1934) 140 Cal. App. 264, 35 P.2d 342* , plaintiff brought an action for an injunction to enforce an alleged agreement between defendant and plaintiff by which defendant agreed to devise to plaintiff certain real property and to continue in force a certain joint policy of life insurance issued on the lives of the parties in return for personal services rendered by plaintiff. Defendant demurred to the complaint, and after plaintiff's failure to amend, a judgment was entered in favor of defendant. Plaintiff appealed, but the court of appeal affirmed the judgment. It stated that it was clear that plaintiff would not have been entitled to specific performance of the agreement because the agreement was one under which plaintiff engaged to render personal services to defendant. Thus, it was likewise clear that an injunction to restrain a threatened breach of the contract alleged in the complaint would not be authorized because former Civ. Code § 3423(5) and former Code Civ. Proc. § 526 second subd (5) (now relettered as *Civ. Code § 3423(e)* and *Code Civ. Proc. § 526(b)(5)*) provide that an injunction cannot be granted to prevent the breach of a contract whose performance is not specifically enforceable (*140 Cal. App. 264, 269)* .

[b] Affirmative and Negative Covenants in Contract

In *Whipple Rd. Quarry Co. v. L.C. Smith Co. (1952) 114 Cal. App. 2d 214, 249 P.2d 854* , plaintiff had leased property from defendant; the property was to be operated as a rock quarry. Defendant gave notice of the termination of the lease, after which plaintiff brought an action for declaratory relief and for an injunction enjoining the removal of rock crushing material from the quarry that it had leased from defendant. It applied for a preliminary injunction that the superior court denied, and it then appealed from the order denying the preliminary injunction. The court of appeal affirmed the order. It stated that the case was governed by the rule that when a contract contains both affirmative and negative stipulations, equity will not interfere to prevent a breach of the negative covenant when the affirmative covenant is of such a nature that it cannot be specifically enforced. The court examined the affirmative covenants relevant to the case and noted that they were covenants to operate the property as a commercial quarry, to sell to the public at prevailing rates, and to pay royalties to plaintiff. Thus, they were covenants that fell within the rule that courts of equity will not decree the specific performance of contracts that by their terms stipulate for a succession of acts whose performance cannot be consummated by one transaction but will be continuous and require protracted supervision and direction (*114 Cal. App. 2d 214, 216)* .

[c] Exception for Unique Personal Services Not Applicable

In *Beverly Glen Music, Inc. v. Warner Communications, Inc. (1986) 178 Cal. App. 3d 1142, 224 Cal. Rptr. 260* , the court of appeal affirmed the trial court's denial of an injunction preventing another recording company from hiring an artist who was contractually bound to plaintiff. The court reasoned that since plaintiff's contract did not guarantee the performer the $6,000 annual minimum then required by former Civ. Code § 3423(5) (now relettered as *Civ. Code § 3423(e)*) and the performer could therefore not be enjoined from working for the defendant company, an injunction against the competitor would achieve the same coercive effect and was similarly prohibited (*178 Cal. App. 3d 1142, 1145)* .

California Points & Authorities

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
CHAPTER 116 INJUNCTIONS
PART II. FORMS
C. Injunctive Relief Involving Contracts and Covenants

11-116 California Points & Authorities §§ 116.104-116.119

[Reserved]

§§ 116.104[Reserved]

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
CHAPTER 116 INJUNCTIONS
PART II. FORMS
D. Injunctive Relief Against Harassment

11-116 California Points & Authorities § 116.120

§ 116.120 Supporting Petition for Injunction and Temporary Restraining Order to Prevent Harassment [Code Civ. Proc. § 527.6]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Petitioner,	)	IES IN SUPPORT OF PETITION FOR
vs.	)	[TEMPORARY RESTRAINING ORDER AND] IN-
_____ [*name*],	)	JUNCTION AGAINST HARASSMENT
Respondent.	)	Date: _____
	)	Time: _____
	)	Dept.: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

AN INJUNCTION [AND TEMPORARY RESTRAINING ORDER] SHOULD BE ISSUED BECAUSE PETITIONER HAS SUFFERED HARASSMENT BY RESPONDENT AS SET FORTH IN PETITIONER'S DECLARATION, [AND GREAT *and/or* IRREPARABLE HARM WOULD RESULT TO HIM/HER IF A TEMPORARY RESTRAINING ORDER WAS NOT ISSUED, BECAUSE _____ (*describe prospective harm*)].

A. TRO and Injunction Available for Harassment. A person who has suffered harassment, as that term is defined in *Code of Civil Procedure Section 527.6(b)*, may seek a temporary restraining order and an injunction prohibiting harassment (*Code Civ. Proc. § 527.6(a)*).

B. Harassment Defined. "Harassment," for purposes of *Code of Civil Procedure Section 527.6*, is unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress (*Code Civ. Proc. § 527.6(b)*; *Brekke v. Wills (2005) 125 Cal. App. 4th 1400, 1412-1414, 23 Cal. Rptr. 3d 609*).

[*Optional*] **C. Temporary Restraining Order.** A temporary restraining order may be issued with or without notice on an affidavit (or declaration) that, to the satisfaction of the court, shows reasonable proof of harassment of the plaintiff by defendant, and that great or irreparable harm would result to the plaintiff (*Code Civ. Proc. § 527.6(c)*; *see Code Civ. Proc. § 2015.5* (use of declaration in lieu of affidavit)).

[*Optional*] **D. Inclusion of Family or Household Members Residing With Plaintiff.** In the court's discretion, and on a showing of good cause, a temporary restraining order or injunction issued under *Code Civ. Proc. § 527.6* may include other named family or household members who reside with the plaintiff (*Code Civ. Proc. § 527.6(c)*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for an injunction prohibiting harassment and an application for a temporary restraining order [*see Code Civ. Proc. § 527.6*].

Memoranda are not required on a petition and application for temporary restraining order under *Code Civ. Proc. § 527.6(c)*, unless otherwise ordered [*see Cal. Rules of Ct., Rule 3.1152(b)*]. In addition, a supporting memorandum is not required for an injunction prohibiting harassment [*Cal. Rules of Ct., Rule 3.1114(a)(7)*]. Memoranda are not expressly forbidden, however, and there may be circumstances in which their inclusion could assist the court and may otherwise be desirable. With appropriate modifications, the points and authorities in this form may be used in an appellate brief in support of an injunction.

Code Civ. Proc. § 527.8 does not apply to conduct that is covered by the Domestic Violence Prevention Act (*Fam. Code § 6200 et seq.*) [*see Code Civ. Proc. § 527.6(k)*]. For discussion of procedures and forms for obtaining injunctive relief against domestic violence, see *California Forms of Pleading and Practice, Ch. 293, Harassment and Domestic Violence, §§ 293.10 et seq., 293.100* et seq. (Matthew Bender).

In 1994, *Code Civ. Proc. § 527.8* was enacted to establish parallel provisions to *Code Civ. Proc. § 527.6*. It authorizes any employer, as defined in *Code Civ. Proc. § 527.8(d)*, to pursue a temporary restraining order and an injunction on behalf of its employees to prevent threats or acts of violence by either another employee or a third person [*Robinzine v. Vicory (2006) 143 Cal. App. 4th 1416, 1423-1424, 50 Cal. Rptr. 3d 65* ; *USS-Posco Industries v. Edwards (2003) 111 Cal. App. 4th 436, 442-443, 4 Cal. Rptr. 3d 54* (section 527.8 does not require threats of violence to be against particular employee); *Scripps Health v. Marin (1999) 72 Cal. App. 4th 324, 333, 85 Cal. Rptr. 2d 86* ; *see § 116.122[3][a]*]. Accordingly, this form memorandum of points and authorities may be modified so as to comply with *Code Civ. Proc. § 527.8* when an employer, as defined in *Code Civ. Proc. § 527.8(d)*, seeks a temporary restraining order and an injunction on behalf of its employee under *Code Civ. Proc. § 527.8(a)* to prohibit further unlawful violence or threats of violence by an individual.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts establishing the nature of the conduct that constitutes harassment and, when a TRO is sought, why the conduct sought to be restrained would otherwise cause great or irreparable harm.

[c] Related Pleading and Practice Forms

For discussion of the procedure for obtaining a temporary restraining order and injunction against harassment, as well as an illustration of the Judicial Council forms of petition for injunction, application for temporary restraining order, order to show cause, and proof of service, see *California Forms of Pleading and Practice, Ch. 293, Harassment and Domestic Violence, §§ 293.10 et seq., 293.100* et seq. (Matthew Bender).

[d] Opposing Memoranda

In an appropriate case, the memoranda *set out in § 116.121* may be used to oppose the petition supported by this memorandum.

[3] Discussion of Authorities

[a] Harassment Defined

In ***Brekke v. Wills*** *(2005) 125 Cal. App. 4th 1400, 23 Cal. Rptr. 3d 609* , a mother sought an injunction against her 16-year-old daughter's boyfriend. The mother had told her daughter and the daughter's boyfriend that they could no longer see each other because the mother believed the boyfriend was causing the daughter's behavior problems. The boyfriend then wrote three nasty letters to the daughter, anticipating that the mother would read them, including one that contemplated killing the mother. The trial court granted the injunction, ordering the boyfriend to stay at least 100 yards away from the family, except at school where he must stay at least 20 feet away. The boyfriend appealed.

The court of appeal upheld the injunction. It first found that the injunction did not violate the boyfriend's constitutional rights. Specifically, the court held that there was no free-speech concern because the speech involved was purely private (*125 Cal. App. 4th 1400, 1409)* . The court also held that the boyfriend's freedom of association rights were not weightier than the parents' right and responsibility to control their minor daughter and that the boyfriend had no right of privacy in letters to the girlfriend (*125 Cal. App. 4th 1400, 1410-1411)* .

The court also held that the injunction met the requirements of *Code Civ. Proc. § 527.6*. The court held that the boyfriend's actions constituted a "credible threat of violence," which is defined as "a knowing and willful statement or course of conduct that would place a reasonable person in fear for his or her safety, or the safety of his or her immediate family, and that serves no legitimate purpose" (*125 Cal. App. 4th 1400, 1412)* . A "course of conduct" that seriously alarms, annoys, or harasses a person and serves no legitimate purpose is defined as "a pattern of conduct composed of a

series of acts over a period of time, however short, evidencing a continuity of purpose, including following or stalking an individual, making harassing telephone calls to an individual, or sending harassing correspondence to an individual by any means, including, but not limited to, the use of public or private mails, interoffice mail, fax, or computer e-mail" (*125 Cal. App. 4th 1400, 1412)* . While the boyfriend claimed his threat to kill his girlfriend's parents was a joke, the plaintiff testified that she took the threat seriously. The court held that in the post-Columbine High School world, threats that once were taken lightly now cause reasonable persons to pause and become fearful (*125 Cal. App. 4th 1400, 1413)* .

California Points & Authorities

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11-116 California Points & Authorities § 116.121

§ 116.121 Opposing Petition for Injunction and Temporary Restraining Order to Prevent Harassment [Code Civ. Proc. § 527.6]--No Course of Conduct Shown [Code Civ. Proc. § 527.6(b)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN OPPOSITION TO PETITION
Petitioner,	)	FOR [TEMPORARY RESTRAINING ORDER
vs.	)	AND] PRELIMINARY INJUNCTION AGAINST
_____ [*name*],	)	HARASSMENT
Respondent.	)	Date: _____
	)	Time: _____
	)	Dept.: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

PLAINTIFF'S PETITION FOR AN INJUNCTION PROHIBITING HARASSMENT [AND APPLICATION FOR TEMPORARY RESTRAINING ORDER] SHOULD BE DENIED BECAUSE THERE HAS BEEN NO "UNLAWFUL VIOLENCE," "CREDIBLE THREAT OF VIOLENCE," OR "COURSE OF CONDUCT" CONSTITUTING HARASSMENT ON DEFENDANT'S PART, AS THAT TERM IS DEFINED BY STATUTE. [DEFENDANT HAS, IN FACT, NOT COMMITTED ANY ACTS OF HARASSMENT].

A. Unlawful Violence. "Unlawful violence" is any assault or battery, or stalking as prohibited in *Penal Code § 646.9*,

but does not include lawful acts of self-defense or defense of others (*Code Civ. Proc. § 527.6(b)(1)*).

B. Credible Threat of Violence. "Credible threat of violence" is a knowing and willful statement or course of conduct that would place a reasonable person in fear of his or her safety, or the safety of his or her immediate family, and that serves no legitmate purpose (*Code Civ. Proc. § 527.6(b)(2)*).

C. Course of Conduct Defined. "Course of conduct" is a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose including following or stalking an individual, making harassing telephone calls to an individual, or sending harassing correspondence to an individual by any means, including, but not limited to, the use of the public or private mails, interoffice mail, fax or computer e-mail (*Code Civ. Proc. § 527.6(b)(3)*; *Leydon v. Alexander (1989) 212 Cal. App. 3d 1, 4, 260 Cal. Rptr. 253*).

[*EITHER*]

D. Constitutionally Protected Activity. Constitutionally protected activity is not included within the meaning of "course of conduct" (*Code Civ. Proc. § 527.6(b)*; *Leydon v. Alexander (1989) 212 Cal. App. 3d 1, 4-5, 260 Cal. Rptr. 253* ; *Smith v. Silvey (1983) 149 Cal. App. 3d 400, 406, 197 Cal. Rptr. 15*).

[*AND/OR*]

E. Single Incident Is Not Course of Conduct. When the evidence shows only a single incident, it is insufficient to meet the statutory requirement of a course of conduct (*Russell v. Douvan (2003) 112 Cal. App. 4th 399, 402-404, 5 Cal. Rptr. 3d 137* ; *Leydon v. Alexander (1989) 212 Cal. App. 3d 1, 4, 260 Cal. Rptr. 253*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Respondent _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a petition for injunction prohibiting harassment and application for temporary restraining order under *Code Civ. Proc. § 527.6*. Although the California Rules of Court provide that memoranda are not required to obtain a temporary restraining order under *Code Civ. Proc. § 527.6(c)* unless otherwise ordered, neither the statute nor the California Rules of Court specify any procedure for a defendant who wishes to submit an opposing memoranda [*see Cal. Rules of Ct., Rule 3.1152(b)*].

Code Civ. Proc. § 527.6 does provide, however, that a defendant in a lawsuit to prohibit harassment may file a response that explains, excuses, justifies, or denies the alleged harassment or may file a cross complaint [*Code Civ. Proc. § 527.6(d)*]. In addition to the response, the defendant may file and serve declarations. It seems logical, therefore, that a

memorandum, applying the law to the facts stated in the response and declarations, could also accompany the defendant's response. Counsel should consult the local court rules and policies regarding the submission of points and authorities in these cases.

In an appropriate case, these memoranda may be used to oppose an application for injunctive relief that is supported by the memorandum *set out in § 116.120*.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts establishing that his or her client's behavior does not amount to a "knowing and willful course of conduct," as that term is used in Code Civ. Proc. § 526.7(b), that harasses another person.

[c] Related Pleading and Practice Forms

For discussion of the procedure for responding to a petition for injunction prohibiting harassment, as well as an illustration of the Judicial Council forms of a response to a petition for injunction, see *California Forms of Pleading and Practice, Ch. 293, Harassment and Domestic Violence, §§ 293.14, 293.103* (Matthew Bender).

[3] Discussion of Authorities

[a] Course of Conduct Defined

In ***Leydon v. Alexander*** *(1989) 212 Cal. App. 3d 1, 260 Cal. Rptr. 253* , a former employer filed a petition under *Code Civ. Proc. § 527.6* against a former employee for a temporary restraining order and an injunction prohibiting harassment. At the hearing, the trial court enjoined both the former employer and the employee from contacting or harassing each other at home and at work. The former employee appealed.

The court of appeal reversed the judgment. The former employee urged that the evidence showed only a single incident in which the former employee went to the employer's place of business and shouted obscenities at her, and that this is insufficient to meet the statutory requirement of a course of conduct. The court concluded that the employee was correct, citing the statute's definition of "course of conduct" as a series of acts over a period of time, however short, evidencing a continuity of purpose (*212 Cal. App. 3d 1, 4)* .

[b] Constitutionally Protected Activity

The facts and procedural background of ***Leydon v. Alexander*** *(1989) 212 Cal. App. 3d 1, 260 Cal. Rptr. 253* , are discussed in *§ 116.121[3][a]*. In considering whether there was a course of conduct within the meaning of *Code Civ. Proc. § 527.6(a)*, the only evidence of conduct other than an incident at the appellant's former workplace was a lawsuit filed in federal court. In reversing the judgment granting an injunction to prohibit harassment, the court did not consider this, however, because the employee had a constitutional right to petition the court for redress of grievances and the statute does not include constitutionally protected activity within the term "course of conduct" (*212 Cal. App. 3d 1, 4-5)* .

In ***Smith v. Silvey*** *(1983) 149 Cal. App. 3d 400, 197 Cal. Rptr. 15* , a mobile home park owner sought and obtained an injunction under *Code Civ. Proc. § 527.6* against a former resident of the park that restrained the former resident from initiating complaints with public agencies against plaintiff and from contacting any residents of the park. Defendant appealed.

The court of appeal reversed the judgment and dissolved the injunction. The court of appeal stated that the defendant had a fundamental right to petition the government for redress of grievances and that the trial court's order prohibiting

the defendant from "contacting" any of the residents of the mobile home park was infirm as unconstitutionally overbroad, because its vague wording appeared to prohibit lawful as well as unlawful activity. The court cited *Code Civ. Proc. § 527.6(b)*, which states that constitutionally protected activity is not included within the meaning of "course of conduct" (*149 Cal. App. 3d 400, 406-407)* .

[c] Single Incident Is Not Course of Conduct

In ***Russell v. Douvan*** *(2003) 112 Cal. App. 4th 399, 5 Cal. Rptr. 3d 137* , after a court appearance, one lawyer followed an opposing lawyer into an elevator and forcefully grabbed his arm. The plaintiff filed a petition for an injunction prohibiting harassment under *Civ. Proc. § 527.6*. The trial court granted the injunction, despite testimony that the plaintiff no longer represented a party in the underlying action and the lawyers did not regularly do business with each other or oppose each other.

The court of appeal reversed. It held that injunctive relief lies only to prevent threatened injury. It has no application to wrongs that have been completed. The court held that it should neither serve as punishment for past acts, nor be exercised in the absence of any evidence establishing the reasonable probability the acts will be repeated in the future (*112 Cal. App. 4th 399, 401)* .

Leydon v. Alexander *(1989) 212 Cal. App. 3d 1, 260 Cal. Rptr. 253* , is discussed in *§ 116.121[3][a]*.

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
CHAPTER 116 INJUNCTIONS
PART II. FORMS
D. Injunctive Relief Against Harassment

11-116 California Points & Authorities § 116.122

§ 116.122 Opposing Petition for Temporary Restraining Order and Injunction to Prevent Violence Against Employer's Employees at the Workplace [Civ. Proc. § 527.8]--No Unlawful Violence or Credible Threat of Violence, or No Threat of Future Harm [Code Civ. Proc. § 527.8]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN OPPOSITION TO PETITION
Petitioner,	)	FOR [TEMPORARY RESTRAINING ORDER
vs.	)	AND] INJUNCTION TO PREVENT VIOLENCE
_____ [*name*],	)	AGAINST EMPLOYEES AT THE WORKPLACE
Respondent.	)	Date: _____
	)	Time: _____
	)	Dept.: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

[*EITHER*]

PLAINTIFF'S PETITION FOR AN INJUNCTION TO PREVENT VIOLENCE AGAINST PLAINTIFF'S EMPLOYEES AT THE WORKPLACE [AND APPLICATION FOR TEMPORARY RESTRAINING ORDER] SHOULD BE DENIED BECAUSE THERE HAS BEEN NO "UNLAWFUL VIOLENCE," OR "CREDIBLE THREAT

OF VIOLENCE," ON DEFENDANT'S PART, AS THOSE TERMS ARE DEFINED BY STATUTE. [DEFENDANT HAS, IN FACT, NOT COMMITTED ANY UNLAWFUL VIOLENCE OR CREDIBLE THREATS OF VIOLENCE AGAINST ANY OF PLAINTIFF'S EMPLOYEES].

A. Unlawful Violence. "Unlawful violence" is any assault or battery, or stalking as prohibited in *Penal Code § 646.9*, but does not include lawful acts of self-defense or defense of others (*Code Civ. Proc. § 527.8(b)(1)*).

B. Credible Threat of Violence. "Credible threat of violence" is a knowing and willful statement or course of conduct that would place a reasonable person in fear of his or her safety, or the safety of his or her immediate family, and that serves no legitimate purpose (*Code Civ. Proc. § 527.8(b)(2)*).

C. Course of Conduct Defined. "Course of conduct" is a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose, including following or stalking an employee to or from the place of work; entering the workplace; following an employee during hours of employment; making telephone calls to an employee; or sending correspondence to an employee by any means, including, but not limited to, the use of the public or private mails, interoffice mail, fax or computer e-mail (*Code Civ. Proc. § 527.8(b)(3)*).

[*Optional*] **D. Constitutionally Protected Activity.** Nothing in *Code of Civil Procedure § 527.8* shall be construed to permit a court to issue a temporary restraining order or injunction prohibiting speech or other activities that are constitutionally protected, or otherwise protected by *Code of Civil Procedure § 527.3* or any other provision of law (*Code Civ. Proc. § 527.8(c)*).

[*OR*]

PLAINTIFF'S PETITION FOR AN INJUNCTION TO PREVENT VIOLENCE AGAINST PLAINTIFF'S EMPLOYEES AT THE WORKPLACE [AND APPLICATION FOR TEMPORARY RESTRAINING ORDER] SHOULD BE DENIED BECAUSE PLAINTIFF CANNOT ESTABLISH A THREAT OF FUTURE HARM TO PLAINTIFF'S EMPLOYEES

A. Reasonable Probability That Wrongful Acts Will Be Repeated In Future Required. Under *Code Civ. Proc. § 527.8(e)*, a plaintiff may obtain a temporary restraining order if it files an affidavit (or declaration, *see Code Civ. Proc. § 2015.5*) establishing reasonable proof an employee has suffered unlawful violence or a credible threat of violence by defendant and that great or irreparable harm would result to an employee. This latter requirement requires plaintiff to show to the satisfaction of the court it is likely that harm will occur from future unlawful violence in the absence of a restraining order. Similarly, to obtain a permanent injunction under *Code Civ. Proc. § 527.8(f)*, a plaintiff must establish by clear and convincing evidence not only that a defendant engaged in unlawful violence or made credible threats of violence, but also that great or irreparable harm would result to an employee if a prohibitory injunction were not issued due to the reasonable probability unlawful violence will occur in the future (*Scripps Health v. Marin (1999) 72 Cal. App. 4th 324, 334-335, 85 Cal. Rptr. 2d 86*).

[*Optional*] **B. Single Incident Insufficient For Injunctive Relief.** A single incident of harassment does not constitute a course of conduct entitling the applicant to injunctive relief (*Scripps Health v. Marin (1999) 72 Cal. App. 4th 324, 333, 85 Cal. Rptr. 2d 86* ; *see* *Leydon v. Alexander (1989) 212 Cal. App. 3d 1, 4, 260 Cal. Rptr. 253*).

[*CONTINUE*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Respondent _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to an employer's petition for injunction and application for temporary restraining order under *Code Civ. Proc. § 527.8* to prohibit further unlawful violence or threats of violence against its employees by an individual. If the facts warrant, this form may be modified to combine the points of law stated. Although the California Rules of Court provide that memoranda are not required to obtain a temporary restraining order under *Code Civ. Proc. § 527.8(e)* unless otherwise ordered, neither the statute nor the California Rules of Court specify any procedure for a defendant who wishes to submit an opposition memorandum [*see Cal. Rules of Ct., Rule 3.1152(b)*].

Code Civ. Proc. § 527.8 does provide, however, that a defendant in a lawsuit by an employer to prohibit further unlawful violence or threats of violence against its employees may file a response that explains, excuses, justifies, or denies the alleged unlawful violence or credible threats of violence or may file a cross complaint [*Code Civ. Proc. § 527.8(f)*]. In addition to the response, the defendant may file and serve declarations. It seems logical, therefore, that a memorandum, applying the law to the facts stated in the response and declarations, could also accompany the defendant's response. Counsel should consult the local court rules and policies regarding the submission of memoranda in these cases.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, *e.g.*, counsel should set forth facts establishing his or her client's behavior does not amount to "unlawful violence" or a "credible threat of violence" as those terms are used in Code Civ. Proc. § 526.8(b).

[3] Discussion of Authorities

[a] Reasonable Probability That Wrongful Acts Will Be Repeated In Future Required

In ***Scripps Health v. Marin*** *(1999) 72 Cal. App. 4th 324, 85 Cal. Rptr. 2d 86* , defendant's mother was a patient in plaintiff's hospital. After she had undergone cardiac surgery, defendant objected to her discharge from the hospital. Defendant filed a complaint with the Medical Review Board in Sacramento alleging the hospital was attempting to dump his mother from the hospital. Thereafter defendant went with his father to drop off the complaint. A hospital employee contacted them and attempted to arrange a discussion regarding the discharge plans for defendant's mother. Defendant at that time was unable to do so because he was on his way to court to be appointed guardian ad litem for his mother. Defendant and his father returned in the afternoon and requested a meeting advising he intended to record the meeting. After a brief initial meeting with two of the hospital's employees the defendant and his father and the two employees entered into an empty patient room to conduct the hearing at which time defendant produced a tape recorder and repeated his intent to record the meeting. One of the employees told defendant she would not permit the meeting to be recorded. Defendant put away the tape recorder declaring that they would take care of this in writing and started to walk out of the room at which point the other employee closed the door to the room and stated "We need to discuss your

mother." She positioned herself between defendant and the door rendering it impossible for defendant to leave the room. Defendant responded that there was nothing to talk about and that he was going to open the door. Again the employee stated "We really need to discuss your mother." Defendant pulled the door open striking the employee and pushing her into the wall. Defendant, visibly angered, left the premises with his father. The employees notified security and one of the employees announced she intended to get a restraining order against defendant. On May 23, 1997, plaintiff petitioned for an injunction to prohibit defendant from harassing its employees under *Code Civ. Proc. § 527.8* alleging that defendant had struck its employee with the door. Plaintiff concurrently applied for a temporary restraining order (TRO), ex parte, under that section alleging defendant may continue to assault or batter an employee of plaintiff. A TRO and an order to show cause were issued on May 23, with a hearing set for June 5. On May 27, defendant appeared ex parte and obtained an order vacating the TRO pending the order to show cause hearing. In doing so, the court relied on defendant's representation that maintenance of the TRO could jeopardize his security clearance. The court, however, conditioned its order on defendant's representation he would stay away for plaintiff's facilities pending the factual hearing. For the next two months, no restraining order was in effect and there was no acts or threats of violence by defendant at any time during this period. During this period defendant's mother was again taken to a plaintiff's facility and remained overnight before being discharged. Thereafter, defendant's mother transferred her health insurance rendering it unlikely she would have to return as a patient to a plaintiff facility. On July 24, the evidentiary hearing was held. At the conclusion of the hearing the court imposed a three year permanent injunction against defendant enjoining him from contacting any of plaintiff's employees or coming within 500 yards of any plaintiff facility or institution unless defendant had a medical emergency and was taken to a plaintiff facility. Defendant appealed (*72 Cal. App. 4th 324, 327-331, 336)* .

The court of appeal reversed (*72 Cal. App. 4th 324, 336)* . In holding that the injunction was improperly issued, the court noted that injunctive relief lies only to prevent threatened injury and has no application to completed wrongs. It should neither serve as punishment for past acts, nor be exercised in absence of any evidence establishing reasonable probability the acts will be repeated in the future. Indeed, a change of circumstances at the time of the hearing, rendering injunctive relief moot or unnecessary, justifies denial of the request. Moreover, not only can injunctive relief be denied when defendant voluntarily discontinued the wrongful conduct, there exists no equitable reason for ordering it when defendant has in good faith discontinued the proscribed conduct. Thus, to authorize issuance of an injunction, it must appear with reasonable certainty that the wrongful acts will be continued or repeated (*72 Cal. App. 4th 324, 332-333)* .

The legislature has declared the availability of injunctive relief in particular situations in a series of statutes such as *Code Civ. Proc. § 527.6* (threat of harm due to harassment) or *Code Civ. Proc. § 527.8* (violence towards employees at the workplace). In 1994, *Code Civ. Proc. § 527.8* was enacted to establish parallel provisions to *Code Civ. Proc. § 527.6*. It authorizes any employer, as defined in *Code Civ. Proc. § 527.8(d)*, to pursue a temporary restraining order and an injunction on behalf of its employees to prevent threats or acts of violence by either another employee or third person. Given *Code Civ. Proc. § 527.6* only allowed injunctive relief for natural persons (*see Diamond View Limited v. Herz (1986) 180 Cal. App. 3d 612, 618-619*), *Code Civ. Proc. § 527.8* was enacted to allow a corporate employer to bring such an action on behalf of an employee. *Code Civ. Proc. § 527.8* was thus intended to enable employers to seek the same remedy as *Code Civ. Proc. § 527.6* provides for its employee. The express intent of the author of the legislation was to address the growing phenomenon in California of workplace violence by providing employers with injunctive relief so as to prevent such acts of workplace violence (72 App. 4th 324, 333-334). Consistent with the foregoing, *Code Civ. Proc. § 527.8(a)* expressly declares the Legislative's intent to provide employers with traditional prohibitory injunctive relief on behalf of their employees who have suffered unlawful violence or a credible threat of such violence from facing more in the future. Under *Code Civ. Proc. § 527.8(e)*, a plaintiff may obtain a temporary restraining order if it files an affidavit [or declaration, *see Code Civ. Proc. § 2015.5*] establishing reasonable proof an employee has suffered unlawful violence or a credible threat of violence by defendant and that great or irreparable harm would result to an employee. This latter requirement requires plaintiff to show to the satisfaction of the court it is likely that harm will occur from future unlawful violence in the absence of a restraining order. This interpretation of *Code Civ. Proc. § 527.8(e)* is consistent with the express language of *Code Civ. Proc. § 527.8(a)* and the cited underlying

legislative intent (72 App. 4th 324, 334).

Similarly, review of the underlying legislative history and documents relevant to enactment of *Code Civ. Proc. § 527.8* has disclosed no evidence of a legislative intent to alter the traditional nature of prohibitory injunctive relief in this setting. Accordingly, to obtain a permanent injunction under *Code Civ. Proc. § 527.8(f)*, a plaintiff must establish by clear and convincing evidence not only that a defendant engaged in unlawful violence or made credible threats of violence, but also that great or irreparable harm would result to an employee if a prohibitory injunction were not issued due to the reasonable probability unlawful violence will occur in the future (72 App. 4th 324, 335). Thus, a permanent injunction could only issue in this case if the evidentiary record established the reasonable probability defendant's wrongful acts would be repeated in the future. There was no such evidence (72 App. 4th 324, 336).

[b] Single Incident Insufficient For Injunctive Relief

The facts and procedural background of ***Scripps Health v. Marin*** *(1999) 72 Cal. App. 4th 324, 85 Cal. Rptr. 2d 86* , are discussed in *§ 116.122[3][a]*. The court noted that at the time *Code Civ. Proc. § 527.8* was enacted, *Code Civ. Proc. § 527.6* prevented harassment when there has been a knowing and willful course of conduct directed at a specific person which annoys or harasses the person and serves no legitimate purpose. The reasonable construction of this harassment provision required the applicant to establish a course of conduct giving rise to a threat of future harm necessitating injunctive relief. In other words, the course of conduct must be ongoing at the time the injunction is sought, as a single incident of harassment does not constitute a course of conduct entitling the applicant to injunctive relief. The court cited *Leydon v. Alexander (1989) 212 Cal. App. 3d 1, 4, 260 Cal. Rptr. 253* , as authority for this point (*72 Cal. App. 4th 324, 333)* . The court further noted that in 1994, *Code Civ. Proc. § 527.8* was enacted to establish parallel provisions to *Code Civ. Proc. § 527.6*. Indeed, the early version of Assembly Bill No. 68 (1993-1994 First Ex. Sess.) in 1994 paralleled the precise language, terminology and process in *Code Civ. Proc. § 527.6*, including the definition of "harassment" and "[c]ourse of conduct" (*72 Cal. App. 4th 324, 333 n.8*). *Code Civ. Proc. § 527.6* was amended in 1998 to parallel the provisions of *Code Civ. Proc. § 527.8* regarding the definitions of "[u]nlawful violence," "[c]redible threat of violence," and "[c]ourse of conduct" (Stats. 1998, ch. 581, § 2) (*72 Cal. App. 4th 324, 333 n.7*). Thus, presumably the holding in *Leydon* also applies when injunctive relief is sought by an employer under *Code Civ. Proc. § 527.8*.

Leydon v. Alexander *(1989) 212 Cal. App. 3d 1, 260 Cal. Rptr. 253* , is discussed in *§ 116.121[3][a]*.

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
CHAPTER 117 INSANE AND INCOMPETENT PERSONS: ACTIONS INVOLVING MENTAL PATIENTS

11-117 California Points & Authorities 117.syn

§ 117.syn Synopsis to Chapter 117: INSANE AND INCOMPETENT PERSONS: ACTIONS INVOLVING MENTAL PATIENTS

§ 117.01 Scope of Chapter

§ 117.02 Governing Statutes

§ 117.03 Rules of Court

§ 117.04 Page Limits on Points and Authorities

§ 117.05 Related Pleading and Practice Chapters

§ 117.06 Related Points and Authorities Chapters

§§ 117.07-117.19 [Reserved]

§ 117.20 Supporting Demurrer to Complaint for False Imprisonment--Complaint Shows Existence of Probable Cause to Detain Person as Mentally Disordered [Welf. & Inst. Code §§ 5150, 5278]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Complaint Showing Probable Cause Fails to State Cause of Action

[b] Probable Cause as a Matter of Law

[c] Immunity for Mental Health Professional

§ 117.21 Supporting Demurrer to Complaint for False Imprisonment--Public Entity or Employee Diagnosing Mental Illness [Gov. Code § 855.8(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Immunity From False Imprisonment Liability

[4] Additional Authorities

[a] Immunity From False Imprisonment Liability

§ 117.22 Supporting Demurrer to Complaint for Damages for Negligence--Public Entity Defendant Immune From Direct Liability [Gov. Code § 854.8(d)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[3] Discussion of Authorities

[a] Direct Suit Against Public Entity Not Permitted

[4] Additional Authorities

[a] Direct Suit Against Public Entity Not Permitted

§ 117.23 Supporting Demurrer to Complaint for Damages for Negligence--Public Entity or Employee Determining Whether to Confine Person for Mental Illness [Gov. Code § 856(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[3] Discussion of Authorities

[a] Immunity of Therapist Failing to Confine Patient

[4] Additional Authorities

[a] Immunity of Therapist Failing to Confine Patient

§ 117.24 Supporting Demurrer to Complaint for Damages for Negligence--Public Entity or Employee Determining Whether to Release Person From Confinement for Mental Illness [Gov. Code § 856(a)(3)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Immunity From Liability for Release of Patient

§ 117.25 Supporting Demurrer to Complaint for Damages for Negligence--Public Entity Defendant Immune From Liability for Escape of Person Confined for Mental Illness [Gov. Code § 856.2]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[3] Discussion of Authorities

[a] Immmunity of Public Entity From Liability for Injuries to Escaping Mental Patient

§ 117.26 Supporting Demurrer to Complaint for Damages for Negligence--Professional Person, Designee, or Peace Officer Releasing Person Before End of 72-Hour Detention

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Immunity for Mental Health Professional

[b] Demurrer on Ground of Immunity

[4] Additional Authorities

[a] Immunity for Mental Health Professional

§ 117.27 Supporting Demurrer to Complaint for Damages for Negligence--Defendant Relatives Caring for Mentally Disordered Person Not Dangerous to Self or Others

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[3] Discussion of Authorities

[a] Caring for Nondangerous Relative at Home

§ 117.28 Opposing Demurrer to Complaint for False Imprisonment--Complaint Shows Failure to Serve Order and Petition for Commitment [Welf. & Inst. Code § 5208]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Failure to Comply With Statutory Prerequisites

[b] Liability for Failure to Serve Order and Petition

§ 117.29 Opposing Demurrer to Complaint for False Imprisonment--Complaint Alleges Detention Without Process, Plaintiff's Confinement, and Damages

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Sufficient Complaint for False Imprisonment

[b] Defendant to Prove Justification for Arrest

[c] Detention for Mental Illness

§ 117.30 Opposing Demurrer to Complaint for Damages for Negligence--Complaint Alleges Failure to Predict, and Warn of, and Protect From Patient's Threatened Violent Behavior After Patient Communicated to Psychotherapist Serious Threat of Physical Violence Against Reasonably Identifiable Victim or Victims [Civ. Code § 43.92]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Duty of Psychotherapist to Reasonably Identifiable Victims

[b] Duty to Others Who Are Close to Victim

[c] No Immunity for Failure to Warn by Public Employee

[4] Additional Authorities

[a] Duty of Psychotherapist to Reasonably Identifiable Victims

§ 117.31 Opposing Demurrer to Complaint for Damages for Negligence--Against Public Employee

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Policy of Liability for Negligence

[b] Diagnosis or Failure to Diagnose Mental Illness or Addiction

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PART I. INTRODUCTION

11-117 California Points & Authorities § 117.01

§ 117.01 Scope of Chapter

This chapter contains points and authorities for use in supporting [*see §§ 117.20 -117.27*] and opposing [*see §§ 117.28 -117.31*] a demurrer to a complaint for false imprisonment or negligence concerning a mental patient.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsGeneral OverviewHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationTortsIntentional TortsFalse ImprisonmentGeneral Overview

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11-117 California Points & Authorities § 117.02

§ 117.02 Governing Statutes

The involuntary commitment of mentally disordered persons to hospitals and institutions is governed by *Welf. & Inst. Code § 5000 et seq.* The detention and treatment of mentally disordered juveniles is governed by *Welf. & Inst. Code §§ 6550-6552*. Receipt of services by developmentally disabled (mentally retarded) persons is governed by *Welf. & Inst. Code §§ 4500-4846*, and the judicial commitment of mentally retarded persons to state hospitals is governed by *Welf. & Inst. Code § 6500 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsGeneral OverviewHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentGeneral OverviewPublic Health & Welfare LawSocial ServicesGeneral Overview

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11-117 California Points & Authorities § 117.03

§ 117.03 Rules of Court

Cal. Rules of Ct., Rules 8.304-8.450 and 8.508 govern appeals from orders establishing conservatorships under *Welf. & Inst. Code § 5350 et seq.*, except when otherwise expressly provided by Cal. Rules of Ct., Rule 8.480 [Cal. Rules of Ct., Rule 8.480(a)].

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11-117 California Points & Authorities § 117.04

§ 117.04 Page Limits on Points and Authorities

Generally, a supporting or opposing memorandum must not exceed 15 pages in length, or in the case of a motion for summary judgment or summary adjudication, 20 pages in length. A reply or closing memorandum may not exceed 10 pages in length [*see Cal. Rules of Ct., Rule 3.1113(d)*]. Any party desiring to file a longer memorandum must obtain leave of court [*see Cal. Rules of Ct., Rule 3.1113(d)*]. For further discussion of the page limitations under *Cal. Rules of Ct., Rule 3.1113*, and of other basic format requirements of memoranda, see *Ch. 1, Writing Legal Memoranda and Briefs, § 1.05*.

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11-117 California Points & Authorities § 117.05

§ 117.05 Related Pleading and Practice Chapters

For a discussion and forms for use in actions and proceedings involving mentally disordered, developmentally disabled, and other incompetent persons, see California Forms of Pleading and Practice, Ch. 304, *Insane and Other Incompetent Persons* (Matthew Bender).

For discussion and forms for use in particular cases involving mentally disordered and other incompetent persons, see the following chapters in California Forms of Pleading and Practice:

- Ch. 257, *False Imprisonment.*
- Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians*.
- Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators*.
- Ch. 282, *Guardianship and Conservatorship: Temporary Guardians and Conservators*.
- Ch. 283, *Guardianship and Conservatorship: Bonds*.
- Ch. 284, *Guardianship and Conservatorship: Notice*.
- Ch. 285, *Guardianship and Conservatorship: Care of Ward or Conservatee*.
- Ch. 290, *Guardianship and Conservatorship: Maintenance of Ward or Conservatee*.
- Ch. 290H, *Guardianship and Conservatorship: Termination of Guardianships and Conservatorships*.
- Ch. 291, *Guardians Ad Litem*.

- Ch. 292, *Habeas Corpus*.
- Ch. 415, *Physicians: Medical Malpractice*.

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11-117 California Points & Authorities § 117.06

§ 117.06 Related Points and Authorities Chapters

Related memoranda of points and authorities that may be useful in particular actions and proceedings concerning insane and incompetent persons may be found in the following chapters:

- Ch. 10, *Abatement and Survival of Actions*.
- Ch. 13, *Adverse Possession*.
- Ch. 71, *Demurrers and Motions for Judgment on the Pleadings*.
- Ch. 81, *Discovery: Privileges and Other Discovery Limitations*.
- Ch. 106, *Guardianship and Conservatorship*.
- Ch. 110, *Habeas Corpus*.
- Ch. 118, *Insane and Incompetent Persons: Capacity to Contract*.
- Ch. 132, *Jurisdiction: Personal Jurisdiction and Inconvenient Forum*.
- Ch. 133, *Jurisdiction: Subject Matter Jurisdiction*.
- Ch. 143, *Limitation of Actions*.

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11-117 California Points & Authorities §§ 117.07-117.19

[Reserved]

§§ 117.07[Reserved]

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11-117 California Points & Authorities § 117.20

§ 117.20 Supporting Demurrer to Complaint for False Imprisonment--Complaint Shows Existence of Probable Cause to Detain Person as Mentally Disordered [Welf. & Inst. Code §§ 5150, 5278]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF DEMURRER
Plaintiff,	)	TO COMPLAINT
vs.	)	Date: _____
_____ [*name*(*s*)],	)	Time: _____
Defendant(s).	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT APPEARS ON THE FACE OF THE COMPLAINT THAT THERE WAS PROBABLE CAUSE TO DETAIN PLAINTIFF AS A MENTALLY DISORDERED PERSON DANGEROUS TO _____ [HIMSELF/HERSELF *or* OTHERS].

A. Objection by Demurrer. The party against whom a complaint has been filed may object by demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action when this ground appears on the face of the complaint [or from any matter of which the court is required to or may take judicial notice] (*Code Civ. Proc. §§ 430.30(a), 430.10(e)*).

B. Complaint Showing Probable Cause Fails to State Cause of Action. When the complaint for false imprisonment shows on its face that there was probable cause for the detention of the plaintiff under *Welfare and Institutions Code Section 5150*, in that there was probable cause to believe that plaintiff was, as a result of mental disorder, a danger to _____ [himself/herself *or* others], the complaint fails to state a cause of action (*Heater v. Southwood Psychiatric Center (1996) 42 Cal. App. 4th 1068, 1083, 49 Cal. Rptr. 2d 880*).

Persons and entities, such as hospitals and clinics, authorized to detain a mentally disordered person for a 72-hour period may not be held criminally or civilly liable for exercising this authority in accordance with the law (*Welf. & Inst. Code § 5278*). This immunity applies to institutions and agencies with which health care professionals are associated, affiliated, or employed (*Cruze v. National Psychiatric Services, Inc. (2003) 105 Cal. App. 4th 48, 54-57, 129 Cal. Rptr. 2d 65*). Immunity also extends to peace officers, members of attending staff at designated facilities, members of a mobile crisis team, and other professionals designated by the county (*Jacobs v. Grossmont Hospital (2003) 108 Cal. App. 4th 69, 74, 133 Cal. Rptr. 2d 9*).

To eliminate any concern for possible liability related to the decision to detain a person involuntarily for 72 hours, *Welfare and Institutions Code Section 5278* affords immunity to those individuals who exercise the authority to detain in accordance with the law. This immunity allows those individuals to make the decision to impose a 72-hour hold for treatment and evaluation, without fear of exposure to criminal or civil liability. The immunity applies to individuals or entities that make the decision to detain, when that decision is supported by probable cause (*Jacobs v. Grossmont Hospital (2003) 108 Cal. App. 4th 69, 76, 133 Cal. Rptr. 2d 9*).

The immunity provided by *Welfare and Institutions Code Section 5278* is not absolute (*Jacobs v. Grossmont Hospital (2003) 108 Cal. App. 4th 69, 77, 133 Cal. Rptr. 2d 9*). It extends to claims based on circumstances that are inherent in the involuntary detention, evaluation, and treatment, but it does not confer blanket immunity for any act or omission occurring during the 72-hour hold, no matter how negligent, wrongful, or criminal (*Jacobs v. Grossmont Hospital (2003) 108 Cal. App. 4th 69, 78-79, 133 Cal. Rptr. 2d 9* (rejecting hospital's suggestion that liability should be limited to extreme or outrageous acts not rationally related to a therapeutic purpose of necessary to maintain detention for required period)). For example, the statute does not insulate from liability negligent medical treatment that falls below the standard of professional care (*Jacobs v. Grossmont Hospital (2003) 108 Cal. App. 4th 69, 79 fn. 3, 133 Cal. Rptr. 2d 9*).

C. Probable Cause as a Matter of Law. In an action for false imprisonment, the question of probable or reasonable cause is ordinarily one for the court and not the jury. When the facts are admitted or are beyond controversy, the question is to be determined by the court alone (*Whaley v. Jansen (1962) 208 Cal. App. 2d 222, 227, 25 Cal. Rptr. 184*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a general demurrer to a complaint for false imprisonment when the demurrer asserts that the complaint fails to state facts sufficient to constitute a cause of action in that it appears on the face of the complaint, or from any matter of which the court is required to or may take judicial notice, that the

complaint alleges facts sufficient to show that there was probable cause for the detention of the person as mentally disordered under to *Welf. & Inst. Code § 5150*.

When appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications these points and authorities may be used to support a motion for summary judgment in an action for false imprisonment where the defendant can show that there was probable cause for the detention as a matter of law.

[c] Related Pleading and Practice Forms

For forms of complaints and affirmative defenses for use in actions for false imprisonment, see Ch. 257, *False Imprisonment* in California Forms of Pleading and Practice.

[3] Discussion of Authorities

[a] Complaint Showing Probable Cause Fails to State Cause of Action

In ***Heater v. Southwood Psychiatric Center*** *(1996) 42 Cal. App. 4th 1068, 49 Cal. Rptr. 2d 880* , the plaintiff was placed on a 72-hour hold under *Welf. & Inst. Code § 5150*. In accordance with doctors' orders, the plaintiff was medicated because he was struggling and was highly agitated (*42 Cal. App. 4th 1068, 1076)* . After his release, the plaintiff sued the hospital and its staff for false imprisonment, assault and battery, and medical malpractice. The trial court rules that the defendants were immune from liability under *Welf. & Inst. Code § 5278* and entered judgment for them on all causes of action (*42 Cal. App. 4th 1068, 1078)* .

On appeal, the plaintiff asserted that (1) he was falsely imprisoned because he was admitted to the hospital without a doctor's order, (2) the defendants committed a battery because he did not consent to having a tranquilizer administered to him, and (3) the immunity conferred by *Welf. & Inst. Code § 5278* does not apply to medical malpractice (*42 Cal. App. 4th 1068, 1079)* . In affirming the trial court's judgment, the court of appeal held that the uncontradicted evidence demonstrated that the plaintiff had been properly detained under *Welf. & Inst. Code § 5150*, and therefore no false imprisonment had occurred (*42 Cal. App. 4th 1068, 1081)* . As to the battery, the court held that an involuntary detainee need not consent to administration of the type of medication the plaintiff received. In any event, administering medication under the particular circumstances of this case was within the scope of the immunity conferred by § 5278 (*42 Cal. App. 4th 1068, 1081-1083)* . Finally, the court held that under the circumstances of this case, the immunity afforded by § 5278 also applied to the plaintiff's medical malpractice claim. It stated that this immunity extends to the detention of persons for treatment and evaluation. When read together with *Welf. & Inst. Code § 5152*, which mandates that treatment be provided to involuntary detainees, no other conclusion is possible than that § 5278 means precisely what it says it means, and that civil liability, whether for false imprisonment, battery, or medical malpractice is precluded insofar as the detention is in accordance with the law (*42 Cal. App. 4th 1068, 1083)* .

In ***Whaley v. Jansen*** *(1962) 208 Cal. App. 2d 222, 25 Cal. Rptr. 184* , plaintiff brought an action in propria persona for false imprisonment against defendants, police officers and their supervisors and employing government entities. Plaintiff alleged in the complaint the facts of his detention, including the fact that he carried a letter from house to house which alleged wrongdoing in government and listed his grievances against various officials, that police officers approached plaintiff and arrested him for vagrancy and took him to the county psychiatric unit, and that plaintiff was released from the psychiatric unit without being charged with a crime or with mental illness. Although plaintiff alleged that there was no probable cause for the detention, defendants demurred to the complaint on the ground that its allegations showed probable cause for the arrest and detention of plaintiff. The trial court sustained the demurrer

without further leave to amend and dismissed the complaint as to all defendants. Plaintiff appealed from the judgment of dismissal. The court of appeal affirmed the trial court's actions. In upholding the demurrer, the court found that the question of the existence of probable cause is ordinarily a question for the court rather than the jury and that when the facts are admitted or are beyond controversy, the question is to be determined by the court alone. Basing its determination on the facts as alleged in the complaint as a whole, the court found that the complaint showed probable cause in its allegations which showed the behavior of plaintiff and that the complaint, therefore, failed to state a cause of action for false imprisonment.

This case was decided under former Welf. & Inst. Code § 5050.3, which provided that when any person becomes so mentally ill as to be likely to cause injury to himself or others and to require immediate care, treatment, or restraint, a peace officer who has reasonable cause to believe that such is the case may take the person into custody. *Welf. & Inst. Code § 5050.3* was the predecessor to present *Welf. & Inst. Code § 5150*, which authorizes the detention for 72-hour treatment and evaluation of persons who are, as a result of mental disorder, a danger to themselves or to others or gravely disabled, on probable cause for a police officer to believe that such is the case. The change in the statute should not affect the validity of the case, since detention is still justified by the existence of reasonable cause or probable cause. Any difference between the standard for the existence of reasonable cause and that for probable cause should likewise not affect the usefulness of the case, since the court of appeal found that the complaint showed both reasonable and probable cause for the detention on its face.

[b] Probable Cause as a Matter of Law

Whaley v. Jansen *(1962) 208 Cal. App. 2d 222, 25 Cal. Rptr. 184* , is *discussed under § 117.20[3][a]*.

[c] Immunity for Mental Health Professional

Cruze v. National Psychiatric Services, Inc. *(2003) 105 Cal. App. 4th 48, 129 Cal. Rptr. 2d 65* was a medical malpractice action against a hospital arising out of the plaintiff's commitment to the hospital for a 72-hour hold and psychiatric evaluation under *Welf. & Inst. Code § 5150*. The plaintiff's physician, who was concerned that the plaintiff might be suicidal, contacted the hospital, which dispatched a licensed clinical social worker who was a member of its staff authorized to evaluate and assess persons for possible psychiatric intervention. After conferring with the physician and speaking with the plaintiff, the social worker concluded there was probable cause to believe the plaintiff was a danger to herself or others and, therefore, authorized her admission to the hospital. After admission, the plaintiff was evaluated by a registered nurse and a psychiatrist, who were both on the hospital's staff, and who both concluded the plaintiff met the criteria for involuntary commitment under *Welf. & Inst. Code § 5150*. The plaintiff was released the next day (*105 Cal. App. 4th 48, 50-52)* .

The trial court granted the hospital's motion for summary judgment, concluding that it was immune from suit under *Welf. & Inst. Code § 5278*. On appeal, the plaintiff asserted that this immunity did not apply to the hospital because it was not an "individual" as that term is used in the statute (*105 Cal. App. 4th 48, 53-54)* . In affirming the summary judgment, the appellate court held that the term "individual" applied to the hospital, even though it was not a natural person, because nothing in the statute suggests that the legislature intended to limit immunity to natural persons. The word "individual" embraces corporations, partnerships, and associations, unless the context indicates otherwise (*105 Cal. App. 4th 48, 55-56)* . *Welf. & Inst. Code § 5278* includes within its plain meaning individual entities such as hospitals and clinics (*105 Cal. App. 4th 48, 56)* . In addition, the purpose of the procedures under the LPS Act would be defeated if immunity only applied to individual professionals, but not to the institutions with which they are affiliated or employed (*105 Cal. App. 4th 48, 56)* .

Jacobs v. Grossmont Hospital *(2003) 108 Cal. App. 4th 69, 133 Cal. Rptr. 2d 218* was an action for professional negligence and premises liability brought against a hospital by a patient who sustained injuries when she fell during a 72-hour hold under *Welf. & Inst. Code § 5150* (*108 Cal. App. 4th 69, 71-72)* . The trial court granted summary

judgment for the hospital on the ground that the immunity afforded by *Welf. & Inst. Code § 5278* applies to all civil tort liability related to an admission under a lawful Section 5150 hold and that if the initial detention was lawful, that is supported by probable cause, there could be no civil liability for anything that might occur during the detention (*108 Cal. App. 4th 69, 72-73)* .

The court of appeal reversed. It concluded that to effectuate the legislature's purpose of obtaining prompt evaluation and treatment for persons detained under a 72-hour hold, the immunity of *Welf. & Inst. Code § 5278* applies to individuals who initiate and maintain a detention under *Welf. & Inst. Code § 5150*. However, Section 5278 does not confer immunity for negligent or other wrongful conduct that may occur in evaluating or treating involuntarily detained patients (*108 Cal. App. 4th 69, 72)* . The court of appeal was unwilling to give the statute the broad interpretation advocated by the defendant, *i.e.*, that the scope of the immunity provided by the statute is not limited to the decision to detain, but includes all acts or omissions rationally related to providing treatment and evaluation, or reasonably incidental to maintain the hold (*108 Cal. App. 4th 69, 76)* . Instead, the court concluded that *Welf. & Inst. Code § 5278* does not immunize from liability *any* act or omission that may occur during a lawfully initiated 72-hour holder under *Welf. & Inst. Code § 5150*. Interpreting *Welf. & Inst. Code § 5278* to confer absolute immunity would not protect, but would instead expose to the possibility of abuse, the mentally disordered (*108 Cal. App. 4th 69, 77)* . The immunity of *Welf. & Inst. Code § 5278* extends only to claims based on circumstances that are inherent in an involuntary detention under *Welf. & Inst. Code § 5150*. *Welf. & Inst. Code § 5278* was intended to provide immunity for claims based on conduct that is expressly authorized by the LPS Act, but that would otherwise constitute a civil or criminal wrong; a plaintiff who is properly detained in accordance with the Act may not assert any civil claim based solely on the fact that he or she was detained, evaluated, or treated without his or her consent (*108 Cal. App. 4th 69, 78)* . *Welf. & Inst. Code § 5278* does not, however, confer blanket immunity for any act or omission that might occur during a 72-hour hold, no matter how negligent, wrongful, of even criminal. The court specifically rejected the defendant's assertion that liability should be limited to extreme or outrageous acts not rationally related to either a therapeutic purpose or necessary to maintain the detention for the required period, finding that such a construction of the statute would subvert the intent of the LPS Act to protect the mentally disordered by exposing them to the possibility of grossly negligent or intentional mistreatment, with no legal recourse (*108 Cal. App. 4th 69, 78)* . A more reasonable interpretation of the statute compels the conclusion that immunity under *Welf. & Inst. Code § 5278* extends to claims based on facts that are inherent in an involuntary detention under *Welf. & Inst. Code § 5150*. If there is probable cause for the detention, the statute provides immunity for the decision to detain, as well as for the detention and its inherent attributes, including the fact that a patient must necessarily be evaluated and treated without his or her consent. Because these are all inherent aspects of the statutory scheme, they cannot provide the basis for a civil suit (*108 Cal. App. 4th 69, 78)* . However, immunity does not extend to other negligent acts, intentional torts, or criminal wrongs committed during the course of detention, evaluation, or treatment (*108 Cal. App. 4th 69, 78-79)* . The court concluded that *Welf. & Inst. Code § 5278* does not provide immunity for injuries proximately caused by negligence or other wrongful acts or omissions that may occur during the course of an otherwise valid detention, and that the legislature did not intend to exonerate health care providers from all liability, including liability for injuries proximately caused by their negligent or criminal acts or omissions in implementing the terms and conditions of a 72-hour hold (*108 Cal. App. 4th 69, 79)* .

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11-117 California Points & Authorities § 117.21

§ 117.21 Supporting Demurrer to Complaint for False Imprisonment--Public Entity or Employee Diagnosing Mental Illness [Gov. Code § 855.8(a)]

[1] FORM

[*Caption. See § 117.20[1].*]

NEITHER A PUBLIC ENTITY NOR A PUBLIC EMPLOYEE ACTING WITHIN THE SCOPE OF EMPLOYMENT IS LIABLE FOR INJURY RESULTING FROM DIAGNOSING THAT A PERSON IS AFFLICTED WITH MENTAL ILLNESS OR ADDICTION.

A. Objection by Demurrer. [*See § 117.20]1], Paragraph A.*]

B. Immunity of Public Entity or Employee. Neither a public entity nor a public employee acting within the scope of employment is liable for injury resulting from diagnosing that a person is afflicted with mental illness or addiction (*Gov. Code § 855.8(a)*).

C. Immunity From False Imprisonment Liability. *Section 855.8(a) of the Government Code* immunizes a government employee from liability for false imprisonment resulting from a diagnosis of mental illness which results in the confinement of the plaintiff as a mental patient (*Fish v. Regents of Univ. of Cal. (1966) 246 Cal. App. 2d 327, 333-334, 54 Cal. Rptr. 656*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a demurrer to a complaint for false imprisonment brought against a public employee or public entity when the public employee has diagnosed that the plaintiff has a mental illness or addiction and the diagnosis has resulted in the confinement of the plaintiff.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For a discussion and forms for complaints for false imprisonment against a public employee, see Ch. 257, *False Imprisonment* in California Forms of Pleading and Practice.

[3] Discussion of Authorities

[a] Immunity From False Imprisonment Liability

Fish v. Regents of Univ. of Cal. *(1966) 246 Cal. App. 2d 327, 54 Cal. Rptr. 656* , was an action for false imprisonment and malicious prosecution by a person who had been detained in a mental hospital for evaluation and released because there was insufficient reason for commitment. Defendants in the false imprisonment action were the doctor who had given certain information to a doctor who had committed plaintiff, the committing doctor, and the public entity employer of the doctors. Defendant moved for a nonsuit, and the trial court granted the motion. Plaintiff appealed. After finding that the action for malicious prosecution was barred by *Gov. Code § 821.6*, providing that a public employee is not liable for instituting a judicial or administrative proceeding, the court of appeal considered whether the nonsuit had been properly sustained by the trial court. As for the doctor who had reported the information which had led to plaintiff's detention, the court of appeal found that the reporting of facts which precipitate a detention does not constitute false imprisonment, even if the information is mistakenly given and even though it is the principal cause of the detention (in the absence of bad faith and where the doctor did not take an active part in the detention). The court then found that the doctor who had recommended the detention was not liable for false imprisonment. In part, the court based the finding on the immunity granted by *Gov. Code § 820.2* for a public employee's act or omission which was the result of the exercise of discretion vested in him or her, whether or not the discretion was abused. The court found, however, that even if that section did not confer immunity, *Gov. Code § 855.8*, which provides immunity for injury resulting from diagnosing or failing to diagnose mental illness, precluded liability on the part of the doctor. The court further found that *Gov. Code § 855.8* confers immunity for a preliminary diagnosis of mental illness which results in the detention of a person for observation and diagnosis.

[4] Additional Authorities

[a] Immunity From False Imprisonment Liability

In *Gonzalez v. Paradise Valley Hospital (2003) 111 Cal. App. 4th 735, 3 Cal. Rptr. 3d 903* , the appellate court held that in the plaintiffs' action against a psychiatrist and a hospital for professional negligence arising from their son's death after he escaped from the hospital's psychiatric unit during an involuntary 72-hour hold under *Welf. & Inst. § 5150*, the trial court erred in ruling that under *Heater v. Southwood Psychiatric Center*, discussed *below*, the defendants were immunized by *Welf. & Inst. Code § 5278* from any breaches of the applicable standards of care during the detention. The appellate court held that *Welf. & Inst. Code § 5278* is inapplicable to actions for negligence stemming from acts or omissions in evaluation or treatment during a 72-hour hold. Protected conduct is confined to the exercise of statutory authority to detain, evaluate, and treat against a patient's wishes; immunity does not extend to the manner in which evaluation and treatment are conducted (*111 Cal. App. 4th 735, 741-742)* .

In *Heater v. Southwood Psychiatric Center (1996) 42 Cal. App. 4th 1068, 49 Cal. Rptr. 2d 880* , a young man whose brother had been murdered became withdrawn and despondent and began to drink to excess. After he began to cry and told his mother that he needed help, his mother and stepfather brought him to the defendant psychiatric center, where he told an intake counselor that he wanted to get the people who had murdered his brother. He also expressed suicidal thoughts. The intake counselor contacted the center's medical director and relayed the facts to him, after which the director ordered that the young man be detained for 72 hours under the authority of *Welf. & Inst. Code § 5150*. Some time later, the young man attempted to force his way out of the center, but a nurse prevented him from leaving by closing the door. After other hospital employees were called to the scene, the young man threatened them with violence. He was physically restrained, and the nurse injected him with a tranquilizer. After examining the young man and consulting with his mother and stepfather, two other doctors certified that he met the criteria for a 14-day hold. At a court hearing, the doctors testified that they no longer believed he was a danger to himself or others and could be safely released. After the court released the young man, he filed a civil complaint against the psychiatric center, the doctors, and others, alleging false imprisonment, assault and battery, negligent and intentional infliction of emotional distress, medical malpractice, libel, and conspiracy. The court found that he had been detained in accordance with the legal requirements of the Lanterman-Petris-Short Act and concluded that the individual defendants were immune from liability under *Welf. & Inst. Code § 5278*, which states that individuals authorized to detain will not be held either criminally or civilly liable for exercising this authority in accordance with the law. The court held that this immunity extends to all forms of civil liability, including liability for medical malpractice (*42 Cal. App. 4th 1068, 1083)* .

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11-117 California Points & Authorities § 117.22

§ 117.22 Supporting Demurrer to Complaint for Damages for Negligence--Public Entity Defendant Immune From Direct Liability [Gov. Code § 854.8(d)]

[1] FORM

[*Caption. See § 117.20[1].*]

UNDER SECTION 854.8(d) OF THE GOVERNMENT CODE, A PUBLIC ENTITY CANNOT BE DIRECTLY SUED TO ENFORCE ITS LIABILITY FOR NEGLIGENCE OR THE WRONGFUL ACT OR OMISSION OF ITS EMPLOYEE.

A. Objection by Demurrer. [*See § 117.20]1], Paragraph A.*]

B. Immunity of Public Entity From Liability. Although a public employee is not exonerated from liability except as provided in *Government Code Section 854.8(a)* for injury proximately caused by his/her negligent or wrongful act or omission, a public entity is required only to pay judgment, as provided in *Government Code Sections 825 through 825.6* (indemnification of public employees), based on a claim against a public employee who is lawfully engaged in the practice of one of the healing arts under any law of this state for malpractice arising from an act or omission in the scope of his/her employment, and to pay any compromise or settlement of a claim or action based on the malpractice, to which the public entity has agreed (*Gov. Code § 854.8(a), (d)*).

C. Direct Suit Against Public Entity Not Permitted. Under *Government Code Section 854.8(d)*, the public entity employing a negligent public employee defendant cannot be sued directly to enforce its liability for that negligence. There must first be a _____ [judgment *or* settlement to which the public entity has agreed] (*Los Angeles County v. Superior Court (1965) 62 Cal. 2d 839, 844, 44 Cal. Rptr. 796, 402 P.2d 868*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a demurrer to a complaint for damages against a public entity employer of an allegedly negligent employee arising out of the injury of a mental patient or caused by a patient in a mental institution.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, these points and authorities may be used in an action against a public entity for the negligence of an employee to support defendant public entity's motion for judgment on the pleadings or motion for summary judgment [*see Code Civ. Proc. § 437c*].

[3] Discussion of Authorities

[a] Direct Suit Against Public Entity Not Permitted

In ***Los Angeles County v. Superior Court*** *(1965) 62 Cal. 2d 839, 44 Cal. Rptr. 796, 402 P.2d 868* , petitioner, the County of Los Angeles, sought a writ of prohibition to restrain the trial court from proceeding further with an action brought by the real party in interest, a former patient in a mental hospital, who had alleged in a complaint that she had suffered injuries caused by the negligence of the employees of the county hospital in failing to protect her from injury as her condition warranted. The county contended that the action should be dismissed insofar as it purported to go directly against the county because it was barred by *Gov. Code § 854.8(d)*. Although *Gov. Code § 854.8(d)* was subsequently amended, the provisions relevant to the case with respect to the liability of a public entity for the negligence of a public employee and any judgment entered against a public employee remain substantially the same as those set forth in Paragraph C of this form.

The Supreme Court found that *Gov. Code § 854.8* and other sections of the Government Code concerning mental institutions reflect the policy of the Legislature that provides immunity for diagnosing, treating, confining, and releasing the mentally ill but makes clear that public entities and employees are liable for injuries caused by negligent or wrongful acts or omissions in administering or failing to administer prescribed treatment or confinement. Although the Court found that the acts of the employees were negligent in this case and that the employees were, therefore, liable, the Court held that the public entity could not be directly sued to enforce its liability for that negligence under the provisions of *Gov. Code § 854.8(d)*. The Court held that there must first be a judgment against the employees in order for the public entity to be required to pay. The Court also considered and rejected the plaintiff's contention that *Gov. Code § 854.8* was a denial of equal protection of the laws to mental patients. The Court found a rational basis for the distinction between mental patients and other patients. The Court, therefore, issued the peremptory writ of mandate as prayed by the county.

[4] Additional Authorities

[a] Direct Suit Against Public Entity Not Permitted

In *Hata v. Los Angeles County Harbor/UCLA Medical Center (1995) 31 Cal. App. 4th 1791, 1804, 37 Cal. Rptr. 2d 630* , the court held that the failure to raise the immunity set forth in *Gov. Code § 854.8(d)* as an affirmative defense

does not waive the immunity, because the immunity is jurisdictional and may be raised at any time.

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11-117 California Points & Authorities § 117.23

§ 117.23 Supporting Demurrer to Complaint for Damages for Negligence--Public Entity or Employee Determining Whether to Confine Person for Mental Illness [Gov. Code § 856(a)]

[1] FORM

[*Caption. See § 117.20[1].*]

NEITHER A PUBLIC ENTITY NOR A PUBLIC EMPLOYEE ACTING WITHIN THE SCOPE OF EMPLOYMENT IS LIABLE FOR ANY INJURY RESULTING FROM DETERMINING IN ACCORDANCE WITH ANY APPLICABLE ENACTMENT WHETHER TO CONFINE A PERSON FOR MENTAL ILLNESS.

A. Objection by Demurrer. [*See § 117.20]1], Paragraph A.*]

B. Decision Whether to Confine. Neither a public entity nor a public employee acting within the scope of employment is liable for any injury resulting from determining in accordance with any applicable enactment whether to confine a person for mental illness or addiction (*Gov. Code § 856(a)(1)*).

C. Immunity of Therapist Failing to Confine Patient. A therapist who fails to recommend that a patient be confined for mental illness is immune pursuant to *Government Code Section 856(a)* from liability to a person harmed by the patient after the failure to confine the person for mental illness and a demurrer of a defendant

therapist to a complaint by a person injured by the person who was not confined will be sustained (*Tarasoff v. Regents of University of California (1976) 17 Cal. 3d 425, 448, 131 Cal. Rptr. 14, 551 P.2d 334*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a demurrer to a complaint for false imprisonment when the complaint alleges that a public employee is liable for false imprisonment as a result of a determination whether to confine a person for mental illness, a determination concerning the terms of the confinement, or a decision whether to release, parole, or grant a leave of absence to the person.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, this memorandum may be used to support a demurrer to a complaint for damages for negligence against a therapist who has made one of the enumerated determinations concerning a patient who has then injured a third party.

[3] Discussion of Authorities

[a] Immunity of Therapist Failing to Confine Patient

In ***Tarasoff v. Regents of the University of California*** *(1976) 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334* , plaintiffs' daughter had been killed by the patient of defendant psychotherapist. The plaintiffs brought an action for wrongful death against the treating psychotherapist, other psychotherapists at the university hospital where the patient was treated, the university employer of the therapists, and the police officers who had released the patient from confinement after an attempt to confine him for mental illness. Plaintiffs alleged in the complaint that the patient threatened to kill their daughter and confided his intention to the therapist treating him as an outpatient; that the campus police briefly detained the patient at the therapist's request but released him when he appeared rational; that the therapist's superior ordered that no further action be taken to detain the patient; and that no one warned the daughter of the danger to her. The superior court sustained defendants' demurrers to plaintiffs' second amended complaints without leave to amend. Plaintiffs appealed. The Supreme Court found that plaintiffs could amend their complaint to state a cause of action if they alleged that, regardless of the therapists' unsuccessful attempt to confine the patient, since they knew the patient was at large and dangerous, their failure to warn the daughter or other person likely to inform her of the danger constituted a breach of the therapists' duty to exercise reasonable care to protect the daughter. Although the Court thus found that there was liability for the therapists' failure to warn, it found that *Gov. Code § 856* insulated them from liability for failing to confine the patient. In reaching this conclusion, the Court determined that the immunity provided by the statute is not limited to those public employees designated by *Welf. & Inst. Code § 5150* as authorized finally to adjudicate a patient's confinement. The Court found that *Gov. Code § 856* covers any government employee who requests or initiates confinement, not only an employee who makes the final determination whether to confine the patient. The action of the therapist's supervisor, in recommending that the patient not be confined, therefore, fell within the statutory immunity as interpreted by the Court. As a result, the Court upheld the demurrer to the complaint to the extent that it alleged a cause of action based on the therapists' failure to confine the patient (*17 Cal. 3d 425, 448)* .

NOTE:

In response to *Tarasoff*, the legislature enacted *Civ. Code § 43.92*, which provides immunity to psychotherapists for liability in failing to warn of and protect from a patient's threatened violent behavior, or in failing to predict and warn of and protect from a patient's violent behavior, except when the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims. When there is a duty to warn and protect under these limited circumstances, a psychotherapist discharges this duty by making reasonable efforts to communicate the

threat to the victim or victims and to a law enforcement agency. No monetary liability or cause of action can be brought against a psychotherapist who discharges his or her duty to warn [Code § 43.92(b)].

[4] Additional Authorities

[a] Immunity of Therapist Failing to Confine Patient

Bragg v. Valdez (2003) 111 Cal. App. 4th 421, 3 Cal. Rptr. 3d 804 was an action for damages by the surviving heirs at law of a decedent against two psychotherapists who had undertaken the care and treatment of an individual who was subject to a 72-hour hold under *Welf. & Inst. Code § 5150* and to a subsequent 14-day hold under *Welf. & Inst. Code § 5250*. This individual was released because he did not have medical insurance. Following his release, he killed the decedent (*111Cal. App. 4th 421, 425-427)* . The court held that the plaintiffs alleged two viable legal theories that would support a cause of action against the defendants: (1) the defendants' failure to advise the individual being treated and his family of the grave consequences that could occur if he were to discontinue his antipsychotic medications; and (2) the defendants' release of this individual who was a danger to himself and others for a non-medical reason, lack of insurance, without taking steps to protect the public (*111 Cal. App. 4th 421, 429)* . The court held that an action by a person the patient injures based on a psychiatrist's failure to comply with the duties imposed under the involuntary commitment procedures of the LPS Act is not barred by *Civ. Code § 43.92* or by *Tarasoff*. It noted that the complaint in this case did not allege a failure to warn a known victim, but instead alleged a negligent release based on factors other than the professional judgment that is required when a psychiatrist treats an individual who is a danger to self or others (*111 Cal. App. 4th 421, 433-435)* .

Ewing v. Goldstein (2004) 120 Cal. App. 4th 807, 15 Cal. Rptr. 3d 864 was an action by a victim's parents against a therapist for wrongful death based on professional negligence, alleging that the therapist's patient posed a foreseeable danger to the victim and the therapist failed to discharge his duty to warn the victim or a law enforcement agency as required by *Civ. Code § 43.92*. Following the patient's release from the hospital, he murdered the victim and then committed suicide. The issue was whether the therapist's duty to warn could be based on a communication the patient's father made to the therapist to the effect that his son had expressed an intention to harm the victim. The appellate court held that a communication made by a member of the patient's family to the patient's therapist for the purpose of advancing the patient's therapy is a patient communication within the meaning of *Civ. Code § 43.92*. Thus, a therapist's duty to warn a victim arises if the information communicated by the family member leads the therapist to believe or predict that the patient poses a serious risk of grave bodily injury to this individual (*120 Cal. App. 4th 807, 817-820)* . The statute only applies, however, to statements by family members of a threat made by the patient, not to statements of a mere belief that the patient poses a danger (*120 Cal. App. 4th 807, 820 fn.12*).

The court also held that a therapist has a duty to warn if, and only if, the threat the therapist has learned--whether from the patient or a family member--actually leads the therapist to believe the patient poses a risk of grave bodily injury to another person (*120 Cal. App. 4th 807, 821)* . A threat to take another's life, if believed, is sufficient to trigger a therapist's duty to warn the intended victim and a law enforcement agency. The duty to warn can also arise if the therapist becomes aware that the patient intends to commit an act of grave bodily injury, akin to "mayhem" as defined by *Pen. Code § 203* or "serious bodily injury" as defined by *Pen. Code § 243(f)(4)* (*120 Cal. App. 4th 807, 821, 15 Cal. Rptr. 3d 864*).

Calderon v. Glick (2005) 131 Cal. App. 4th 224, 31 Cal. Rptr. 3d 707 was an action against two psychotherapists for wrongful death and personal injuries based on failure to warn and professional malpractice. Their patient shot and killed three members of his former girlfriend's family and wounded two more. Summary judgment was granted to the defendants on the cause of action for failure to warn, based on the court's conclusion that liability was precluded by *Civ. Code § 43.92(a)* because the patient had not communicated to the defendants any threats of physical violence against the former girlfriend or members of her family (*131 Cal. App. 4th 224, 230-232)* . Summary judgment also was granted to the defendants on the cause of action for professional malpractice, because the defendants did not owe a duty

of care to the plaintiffs. The transaction between the defendants and the patient was not intended to affect or benefit the plaintiffs in any way, but was intended to benefit the patient by providing him with therapy for his mental problems. The defendants could not have reasonably foreseen that their patient would harm members of his former girlfriend's family because they had no information indicating that he had been violent in the past, he always insisted that he did not intend to harm his former girlfriend or anyone else, and his family never indicated to the defendants that he might harm another person. Although the plaintiffs unquestionably suffered injury, the connection between the defendants' conduct and the injury was not sufficiently close to impose on the defendants a duty of care to the plaintiffs. Their patient inflicted the injuries because of his mental illness and his delusional belief that his former girlfriend had deliberately infected him with HTLV (human T-cell lymphotropic virus). The defendants were not responsible for his mental illness or delusional belief, which existed before he entered therapy (*131 Cal. App. 4th 224, 232-234)* .

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11-117 California Points & Authorities § 117.24

§ 117.24 Supporting Demurrer to Complaint for Damages for Negligence--Public Entity or Employee Determining Whether to Release Person From Confinement for Mental Illness [Gov. Code § 856(a)(3)]

[1] FORM

[*Caption. See § 117.20[1].*]

NEITHER A PUBLIC ENTITY NOR A PUBLIC EMPLOYEE ACTING WITHIN THE SCOPE OF EMPLOYMENT IS LIABLE FOR ANY INJURY RESULTING FROM DETERMINING IN ACCORDANCE WITH ANY APPLICABLE ENACTMENT WHETHER TO _____ [PAROLE *or* GRANT A LEAVE OF ABSENCE TO *or* RELEASE] A PERSON CONFINED FOR MENTAL ILLNESS OR ADDICTION.

A. Objection by Demurrer. [*See § 117.20]1], Paragraph A.*]

B. Parole, Leave of Absence, or Release. Neither a public entity nor a publicemployee acting within the scope of employment is liable for any injury resulting from determining in accordance with any applicable enactment whether to parole, grant a leave of absence to, or release a person confined for mental illness or addiction (*Gov. Code § 856(a)(3)*).

C. Immunity From Liability for Release of Patient. *Government Code Section 856(a)(3)* creates an absolute immunity in a public entity and its employees for injuries which result from a determination to release a person from confinement in a medical facility for mental illness. Hence, a demurrer of defendant public employees and entities to a complaint brought by persons injured by a person released from confinement for mental illness should be sustained (*Hernandez v. California (1970) 11 Cal. App. 3d 895, 899, 90 Cal. Rptr. 205*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a demurrer to a complaint for damages against a public employee or public entity based on the determination to parole, grant a leave of absence to, or release a person confined for mental illness or addiction.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Immunity From Liability for Release of Patient

Hernandez v. California *(1970) 11 Cal. App. 3d 895, 90 Cal. Rptr. 205* , was an action for damages for negligence brought by the heirs of a person killed by a mental patient released from a state institution. Plaintiffs alleged that the employees of the institution had a duty to maintain proper records of the treatment, care, and testing of inmates and that, if they perform that duty negligently, they are liable for damages to a person injured as a result. Plaintiffs further contended that whenever negligent maintenance of records deprives the releasing authority of full information about the true condition of an inmate and results in release of the inmate in a dangerous condition, the state and its employees are liable in damages for injuries to third persons brought about by the release. The state demurred to plaintiffs' complaint on the ground of the immunity conferred by *Gov. Code §§ 856* and *855.8*. The trial court sustained the demurrer and dismissed the action. The court of appeal affirmed and found that *Gov. Code § 856(a)(3)*, which creates an absolute immunity in a public entity and its employees for injuries which result from a determination to release a person from confinement in a medical facility for mental illness, specifically controlled the issue of liability in this case. The court further rejected plaintiffs' attempt to circumvent the immunity provided by that statute by arguing that the public employees were liable for failure to maintain records adequately, resulting in the premature release of the patient. The court found that *Gov. Code § 856* provides a broad immunity covering all those involved in the process leading to release and that its protection is not restricted to the custodial officer who makes the final decision to release. The court considered that the legislative policy was to protect a patient from malpractice and not to protect the patient or the public from unwarranted release from confinement. It explained that the Legislature intended to encourage a policy of free release from confinement and that adoption of a system of liability for improper release would have some inhibiting effect on the speed and frequency with which inmates are released from confinement. Thus, the order of dismissal of the trial court was affirmed.

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11-117 California Points & Authorities § 117.25

§ 117.25 Supporting Demurrer to Complaint for Damages for Negligence--Public Entity Defendant Immune From Liability for Escape of Person Confined for Mental Illness [Gov. Code § 856.2]

[1] FORM

[*Caption. See § 117.20[1].*]

UNDER GOVERNMENT CODE SECTION 856.2(a)(2), A PUBLIC ENTITY IS NOT LIABLE FOR INJURY CAUSED BY OR TO AN ESCAPED PERSON WHO HAS BEEN CONFINED FOR MENTAL ILLNESS.

A. Objection by Demurrer. [*See § 117.20]1], Paragraph A.*]

[*EITHER*]

B. Immunity of Public Entity From Liability for Injuries Caused by Escaping Mental Patient. A public entity is not liable for an injury caused by an escaping or escaped person who has been confined for mental illness (*Gov. Code § 856.2(a)(1)*).

[*AND/OR*]

C. Immunity of Public Entity From Liability for Injuries to Escaping Mental Patient. A public entity is not liable for an injury to, or the wrongful death of, an escaping or escaped person who has been confined for mental illness (*Gov. Code § 856.2(a)(2)*; *Los Angeles County-U.S.C. Medical Center v. Superior Court (1984) 155 Cal. App. 3d 454, 460-463, 202 Cal. Rptr. 222*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a demurrer to a complaint for negligence when the complaint alleges that a public entity is liable for damages as a result of negligence in allowing a person confined for mental illness to escape from custody [*see Gov. Code § 856.2(a)*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications these points and authorities may be used to suppport a defendant's motion for summary judgment [*see Code Civ. Proc. § 437c*].

[3] Discussion of Authorities

[a] Immmunity of Public Entity From Liability for Injuries to Escaping Mental Patient

In ***Los Angeles County-U.S.C. Medical Center v. Superior Court*** *(1984) 155 Cal. App. 3d 454, 202 Cal. Rptr. 222* , plaintiff was injured after escaping from a county medical center where she was receiving tests after being held at a county mental health unit. In plaintiff's action against the mental health unit and the medical center for negligence, the center moved for summary judgment on the ground that it was immunized under *Gov. Code § 856.2* from injuries to escaped persons confined for mental illness. The trial court denied the motion on the ground that a triable issue of material fact existed whether or not plaintiff was confined when she left the facility. Defendant petitioned for a writ of mandate to vacate the trial court order.

The court of appeal issued a peremptory writ of mandate, directing the trial court to vacate its order denying defendant's motion and enter a new order granting the motion. Plaintiff had first been placed on a 72-hour detention for evaluation at a county mental health unit before being transferred to defendant medical center for tests. The court held that this detention constituted a confinement within the meaning of *Gov. Code § 856.2* (*155 Cal. App. 3d 454, 460-461)* . The court then held that defendant's negligence in restraining plaintiff did not serve to vitiate the escape immunity under *Gov. Code § 856.2* (*155 Cal. App. 3d 454, 461-463)* . The court also held that the immunity is not limited to escapes from a licensed mental health facility (*155 Cal. App. 3d 454, 463)* .

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11-117 California Points & Authorities § 117.26

§ 117.26 Supporting Demurrer to Complaint for Damages for Negligence--Professional Person, Designee, or Peace Officer Releasing Person Before End of 72-Hour Detention

[1] FORM

[*Caption. See § 117.20[1].*]

_____ [THE PROFESSIONAL PERSON IN CHARGE OF THE FACILITY PROVIDING 72-HOUR TREATMENT *and/or* THE PROFESSIONAL PERSON'S DESIGNEE *and/or* THE MEDICAL DIRECTOR OF THE FACILITY *and/or* THE MEDICAL DIRECTOR'S DESIGNEE *and/or* THE PSYCHIATRIST DIRECTLY RESPONSIBLE FOR THE PERSON'S TREATMENT *and/or* THE PSYCHOLOGIST WHO HAS PERSONALLY EVALUATED THE PERSON *and/or* THE PEACE OFFICER RESPONSIBLE FOR THE PERSON'S DETAINMENT] SHOULD NOT BE HELD CIVILLY LIABLE FOR ANY ACTION BY A PERSON RELEASED _____ [BEFORE THE END *or* AT THE END] OF 72 HOURS PURSUANT TO WELFARE AND INSTITUTIONS SECTIONS 5150-5156.

A. Objection by Demurrer. [*See § 117.20]1], Paragraph A.*]

[*EITHER*]

B. Immunity for Mental Health Professional. Notwithstanding *Welfare and Institutions Code Section 5113*, if the provisions of *Welfare and Institutions Code Section 5152* have been met, the professional person in charge of the facility providing 72-hour treatment and evaluation, his or her designee, the medical director of the facility or his or her designee described in *Welfare and Institutions Code Section 5152*, and the psychiatrist or psychologist directly responsible for the person's treatment may not be held civilly or criminally liable for any action by a person released before the end or at the end of 72 hours (*Welf. & Inst. Code § 5154(a), (b)*; *see Welf. & Inst. Code § 5152(a)* (psychologist who has personally evaluated or examined person, and who has collaborative relationship with psychiatrist, may authorize early release after consulting with psychiatrist); *Lowe v. County of San Diego (1986) 183 Cal. App. 3d 515, 527-530, 228 Cal. Rptr. 139*). This immunity applies to institutions and agencies with which health care professionals are associated, affiliated, or employed (*Cruze v. National Psychiatric Services, Inc. (2003) 105 Cal.*

App. 4th 48, 54-57, 129 Cal. Rptr. 2d 65).

[*AND/OR*]

C. Immunity for Peace Officer. The peace officer responsible for the detainment of the person shall not be civilly or criminally liable for any action by a person released at or before the end of 72 hours (*Welf. & Inst. Code § 5154(c)*).

[*CONTINUE*]

D. Demurrer on Ground of Immunity. The demurrer of a defendant entitled to the immunity provided by *Section 5154 of the Welfare and Institutions Code* from civil liability for actions by a person released at or before the end of 72 hours to a complaint brought by a plaintiff injured by the action of a person so released will be sustained on the ground of the immunity (*Tarasoff v. Regents of University of California (1976) 17 Cal. 3d 425, 449-450, 131 Cal. Rptr. 14, 551 P.2d 334*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a demurrer to a complaint for damages for negligence brought by a person injured by a person released at or before the end of a 72-hour detention for evaluation and treatment pursuant to *Welf. & Inst. Code §§ 5150-5156*. Defendant demurs on the ground that the immunity provided by *Welf. & Inst. Code § 5154* is applicable.

Similar immunities are provided by *Welf. & Inst. Code §§ 5173* (detention of inebriates), 5259.3 (release of person certified for intensive treatment at or before the end of 14 days), 5267 (release of person held for further intensive treatment at or before end of 14 days), 5270.50 (release of person held for further intensive treatment at or before end of 30 days), 5306 (release of person held for 90-day involuntary treatment at or before the end of 90 days), and 5278 (immunity for exercise of authority to detain person in accordance with law). In appropriate instances this form may be adapted to support demurrers based on these similar statutes.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should argue that *Welf. & Inst. Code § 5154* is applicable to the facts, that is, he or she should show that the medical professional or peace officer is within the class of persons immunized from liability and that the allegedly negligent conduct is within the range of acts immunized [*see Tarasoff v. Regents of University of California (1976) 17 Cal. 3d 425, 461-463, 131 Cal. Rptr. 14, 551 P.2d 334]* .

[3] Discussion of Authorities

[a] Immunity for Mental Health Professional

Lowe v. County of San Diego *(1986) 183 Cal. App. 3d 515, 228 Cal. Rptr. 139* , was a negligence action brought by a

guardian on behalf of a child against defendant county, based on the failure of a county-employed physician to warn or otherwise use reasonable care to protect the child's mother from the child's father. The father had stated to police officers that he wanted to kill the mother. The officers involuntarily committed the father to a mental facility operated by the county. A physician at the facility released the father the following day, prior to the end of the 72-hour treatment and evaluation period allowed under *Welf. & Inst. Code § 5152* for involuntary commitments. The releasing physician had knowledge of the father's desire to kill the mother, and was aware that another physician at the clinic had diagnosed the father as having a latent type of schizophrenia. Approximately one month after the father's release, the father shot and killed the mother and then shot and killed himself. The trial court granted a nonsuit regarding the county's liability and plaintiff appealed.

The court of appeal affirmed. The court first addressed the issue of whether the treating physician owed a duty to the mother, noting the rule in *Tarasoff v. Regents of University of California (1976) 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334* (*see § 117.30[3][a]*), that a psychotherapist must take steps to protect a third party when the psychotherapist knows that a patient poses a serious danger of violence to another (*183 Cal. App. 3d 515, 522)* . Concluding that the *Tarasoff* duty applied, the court found that the trier of fact should be allowed to determine whether reasonable protective steps were taken (*183 Cal. App. 3d 515, 523, 524)* . The court then analyzed the applicability of *Welf. & Inst. Code § 5154* to the psychotherapist's conduct. Plaintiff contended that the father's commitment was voluntary, and that consequently *Welf. & Inst. Code § 5154* did not immunize the conduct of the treating physicians (*183 Cal. App. 3d 515, 525)* . Rejecting this argument, the court found that there was no evidence of a voluntary commitment (*183 Cal. App. 3d 515, 526)* . The court also noted that, according to plaintiff's opening statement, the father's release tracked the requirements of *Welf. & Inst. Code § 5152* for early release from 72-hour confinements, and that the releasing physician was acting as the professional person in charge of the mental facility or as the designee of such a person, and was therefore entitled to immunity under *Welf. & Inst. Code § 5154* (*183 Cal. App. 3d 515, 528)* . Plaintiff argued that *Welf. & Inst. Code § 5154* was inapplicable because plaintiff's claims were not based on the father's postrelease action (killing the mother) but on the releasing physician's failure to do anything to protect the mother from danger. The court rejected this argument, noting that a policy behind the Lanterman-Petris-Short Act (*Welf. & Inst. Code § 5000 et seq.*) is to prevent inappropriate, indefinite, and ivoluntary commitment of mentally disordered persons and others. The court stated that immunization of the shooting without immunization of the activities that "loaded the gun" would defeat the purpose of the act, which is to encourage early release (*183 Cal. App. 3d 515, 530)* .

Cruze v. National Psychiatric Services, Inc. *(2003) 105 Cal. App. 4th 48, 129 Cal. Rptr. 2d 65* was a medical malpractice action against a hospital arising out of the plaintiff's commitment to the hospital for a 72-hour hold and psychiatric evaluation under *Welf. & Inst. Code § 5150*. The plaintiff's physician, who was concerned that the plaintiff might be suicidal, contacted the hospital, which dispatched a licensed clinical social worker who was a member of its staff authorized to evaluate and assess persons for possible psychiatric intervention. After conferring with the physician and speaking with the plaintiff, the social worker concluded there was probable cause to believe the plaintiff was a danger to herself or others and, therefore, authorized her admission to the hospital. After admission, the plaintiff was evaluated by a registered nurse and a psychiatrist, who were both on the hospital's staff, and who both concluded the plaintiff met the criteria for involuntary commitment under *Welf. & Inst. Code § 5150*. The plaintiff was released the next day (*105 Cal. App. 4th 48, 50-52)* .

The trial court granted the hospital's motion for summary judgment, concluding that it was immune from suit under *Welf. & Inst. Code § 5278*. On appeal, the plaintiff asserted that this immunity did not apply to the hospital because it was not an "individual" as that term is used in the statute (*105 Cal. App. 4th 48, 53-54)* . In affirming the summary judgment, the appellate court held that the term "individual" applied to the hospital, even though it was not a natural person, because nothing in the statute suggests that the Legislature intended to limit immunity to natural persons. The word "individual" embraces corporations, partnerships, and associations, unless the context indicates otherwise (*105 Cal. App. 4th 48, 55-56)* . *Welf. & Inst. Code § 5278* includes within its plain meaning individual entities such as hospitals and clinics (*105 Cal. App. 4th 48, 56)* . In addition, the purpose of the procedures under the LPS Act would be defeated if immunity only applied to individual professionals, but not to the institutions with which they are affiliated

or employed (*105 Cal. App. 4th 48, 56)* .

[b] Demurrer on Ground of Immunity

The facts of ***Tarasoff v. Regents of University of California*** *(1976) 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334* , are discussed in *§ 117.23[3][a]*.

In that case, the trial court had also sustained the demurrer of the campus police officer defendants to the complaint, on the ground that the campus police were immunized from liability for acts of the patient whom they had failed to confine pursuant to the order of the therapist. The officers had determined when they detained the patient that he was rational and had released him. The Supreme Court upheld the trial court's sustaining of the demurrer of the campus police defendants and found that the immunity provided by *Welf. & Inst. Code § 5154* covered the decision of peace officers to release a person as not suitable for 72-hour detention for mental disorder and that the campus police officers, although not technically within the definition then set forth by statute [*see Welf. & Inst. Code § 5008(i)*; former Penal Code §§ 830.1, *830.2*], were immune under the terms of *Welf. & Inst. Code § 5154* because plaintiffs sought to charge them with the duty set forth under the Welfare and Institutions Code and they were, therefore, entitled to the applicable immunities. The Court found that the plaintiffs had failed on appeal to show that the trial court erred in sustaining the demurrer of the peace officers without leave to amend.

[4] Additional Authorities

[a] Immunity for Mental Health Professional

Coburn v. Sievert (2005) 133 Cal. App. 4th 1483, 35 Cal. Rptr. 3d 596 was an action for damages by a patient and his father against a psychiatrist who had treated and released the patient early from an involuntary 72-hour detention under *Welf. & Inst. Code § 5150*. The day after his release, the patient had a violent outburst on an airplane with his father. The patient and the father alleged causes of action for negligent treatment and premature release and sought damages arising from the acts the patient committed on the airplane. The trial court granted summary judgment in favor of the psychiatrist on the ground that under *Welf. & Inst. Code § 5154(a)*, the psychiatrist was immune from liability as a treating psychiatrist who authorized early release based on his personal observations of the patient (*133 Cal. App. 4th 1483, 1488-1489)* .

The court of appeal affirmed, finding that the psychiatrist had satisfied the conditions imposed by *Welf. & Inst. Code § 5152(a)* for an early release, including having a subjective belief that the patient no longer required evaluation or treatment. Summary judgment was properly granted because the patient failed to show a triable issue of fact regarding the psychiatrist's subjective belief (*133 Cal. App. 4th 1483, 1498-1505)* .

Bragg v. Valdez (2003) 111 Cal. App. 4th 421, 3 Cal. Rptr. 3d 804 was an action for damages by the surviving heirs at law of a decedent against two psychotherapists who had undertaken the care and treatment of an individual who was subject to a 72-hour hold under *Welf. & Inst. Code § 5150* and to a subsequent 14-day hold under *Welf. & Inst. Code § 5250*, and who killed the decedent following his release. During the detention period, this individual communicated several serious threats of physical violence against third parties, struck a security guard, and threatened to hurt himself. He was physically restrained and was prescribed antipsychotic medications. This individual was discharged at the beginning of the 14-day hold because he did not have medical insurance. Immediately following his release, he stopped taking his prescribed medications. Within days, he attacked and killed the decedent (*111 Cal. App. 4th 421, 425-427)* .

The court held that the plaintiffs had alleged two viable legal theories that would support a cause of action against the defendants: (1) the defendants' failure to advise the individual being treated and his family of the grave consequences that could occur if he were to discontinue his medications; and (2) the defendants' release of this individual who was a danger to himself and others for a non-medical reason--lack of insurance--without taking steps to protect the public (

111 Cal. App. 4th 421, 429) . A treating psychiatrist who releases a patient who has been involuntarily committed under the LPS Act, merely because the patient does not have insurance, may be liable to the patient and any person the patient injures. The immunities for treating psychiatrists contained in the Act are not applicable, unless the treating psychiatrist complies with the requirements of the Act before releasing a patient, *i.e.*, the psychiatrist must believe, based on his or her own personal observations, that the patient is no longer a danger (*111 Cal. App. 4th 421, 425, 433)* . A psychiatrist's decision to release a patient under the Act must be made on medical, not monetary, grounds (*111 Cal. App. 4th 421, 431-432)* . An action by a person the patient injures based on a psychiatrist's failure to comply with the duties imposed under the involuntary commitment procedures of the LPS Act is not barred by *Civ. Code § 43.92* or *Tarasoff v. Regents of University of California (1976) 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334* , which preclude a cause of action against a psychotherapist for failing to warn of a patient's threatened violent behavior unless the patient has made a serious threat of physical violence against a reasonably identifiable victim (*111 Cal. App. 4th 421, 433-435)* .

Ford v. Norton (2001) 89 Cal. App. 4th 974, 107 Cal. Rptr. 2d 776 was a medical malpractice action against a psychiatrist and a psychologist. The plaintiff had been involuntarily detained in the intensive care unit of a psychiatric hospital under *Welf. & Inst. Code § 5150*. The following morning, after spending 30 to 40 minutes with the plaintiff, the defendant psychologist determined that the plaintiff should be released from involuntary detention. The psychologist phoned the psychiatrist on call, who wrote the plaintiff a prescription for an anti-psychotic medication and medically cleared him for discharge. The psychologist then discharged the plaintiff, less than 12 hours after his detention. Within five hours of his discharge, the plaintiff returned to his apartment and stabbed his roommate, seriously injuring him.

The trial court granted the defendants' motion for nonsuit based upon their immunity under *Welf. & Inst. Code § 5154*. The court ruled that wherever the term "psychiatrist" is found in *Welf. & Inst. Code §§ 5152* and *5154*, it must be replaced with "psychologist or psychiatrist." The appellate court reversed. Under *Welf. & Inst. Code § 5154*, immunity applies only if the provisions of *Welf. & Inst. Code § 5152* are met. That section provides that an early release may occur only if "the psychiatrist directly responsible for the person's treatment believes, as a result of his or her personal observations, that the person no longer requires evaluation or treatment." Thus, a psychiatrist must make the decision to release the individual. In this case, this requirement was not met. As a result, neither the psychologist who recommended early release, nor the psychiatrist who authorized the release, qualified for immunity.

NOTE:

After *Ford v. Norton* was decided, the legislature amended *Welf. & Inst. Code § 5152(a)* to provide that if both a psychiatrist and a psychologist have personally evaluated or examined the person and there is a collaborative treatment relationship between them, either may authorize the person's release, but only after they have consulted with each other. In the event of a clinical or professional disagreement about an early release, the 72-hour hold must be maintained unless the facility's medical director overrules the decision of the psychiatrist or psychologist who opposes the release. Both the psychiatrist and the psychologist must enter their findings, concerns, or objections into the person's medical record [*Welf. & Inst. Code § 5152(a)*].

For discussion of *Heater v. Southwood Psychiatric Center (1996) 42 Cal. App. 4th 1068, 49 Cal. Rptr. 2d 880* , which held that a psychiatric center, doctors, and others were immune under *Welf. & Inst. Code § 5278* from liability in an action *by the detained person* alleging false imprisonment, assault and battery, negligent and intentional infliction of emotional distress, medical malpractice, libel, and conspiracy, see *§ 117.21[4][a]*.

In *Michael E.L. v. County of San Diego (1986) 183 Cal. App. 3d 515, 228 Cal. Rptr. 139* , the court held that the immunity afforded by *Welf. & Inst. Code § 5154 does* apply in a case in which a psychiatrist fails to warn an individual of a patient's specific threats of harm against that individual, and the patient harms the individual, as long as the psychiatrist authorized release of the patient in accordance with the required statutory findings, *i.e.*, that the patient no longer posed a threat to self or others. A psychiatrist owes a duty under *Tarasoff* to take reasonable care to protect an

intended victim from the danger of serious violence he or she perceives in a person placed under a 72-hour hold for evaluation and treatment, but is immune from liability if the person's release complies with the statutory requirements (*183 Cal. App. 3d 515, 523-524, 527, 530)* .

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11-117 California Points & Authorities § 117.27

§ 117.27 Supporting Demurrer to Complaint for Damages for Negligence--Defendant Relatives Caring for Mentally Disordered Person Not Dangerous to Self or Others

[1] FORM

[*Caption. See § 117.20[1].*]

A COMPLAINT FOR DAMAGES BY A PERSON INJURED BY A MENTALLY DISORDERED RELATIVE FOR WHOM DEFENDANT IS CARING DOES NOT STATE A CAUSE OF ACTION IF NO FACTS ARE ALLEGED SHOWING THAT THE MENTALLY DISORDERED PERSON WAS SUFFICIENTLY DANGEROUS TO HIMSELF/HERSELF OR OTHERS THAT A PETITION FOR EVALUATION OR COMMITMENT UNDER THE LANTERMAN-PETRIS-SHORT ACT WOULD BE GRANTED.

A. Objection by Demurrer. [*See § 117.20]1], Paragraph A.*]

B. Caring for Nondangerous Relative at Home. The demurrer of a defendant may be sustained where the complaint by a plaintiff injured by the act of a mentally disordered person and brought against relatives caring for the person in their home does not allege ultimate facts showing that the mentally disordered person was dangerous to himself/herself or others at least sufficient to warrant a reasonable assumption that a petition for evaluation or commitment under the Lanterman-Petris-Short Act (*see Welf. & Inst. Code §§ 5200-5213*) would be granted. The assumption of a moral obligation to care for an ill relative should not be equated to a guarantee and indemnification agreement with respect to the ill person's conduct on or off the relatives' premises (*Alva v. Cook (1975) 49 Cal. App. 3d 899, 909, 123 Cal. Rptr. 166*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a demurrer to a complaint for damages for injury to a third person resulting from the negligence of defendants in caring for a mentally disordered relative on their premises, when the complaint does not allege ultimate facts showing that the mentally disordered person was dangerous to himself or herself or others at least sufficient to warrant a reasonable assumption that a petition for evaluation or commitment under *Welf. & Inst. Code §§ 5200-5213* would be granted.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, these points and authorities may be used to support a motion by defendant for summary judgment when there are no ultimate facts showing that the mentally disordered person for whom defendant was caring was dangerous to himself or herself or others.

[3] Discussion of Authorities

[a] Caring for Nondangerous Relative at Home

In ***Alva v. Cook*** *(1975) 49 Cal. App. 3d 899, 123 Cal. Rptr. 166* , plaintiffs' decedent was shot and killed by defendants' brother while turning his car around in the driveway of defendants' home. Defendants' brother had been mentally disordered for many years but had not previously injured anyone or shown a tendency to be violent. The complaint alleged that defendants owned and managed the premises on which the incident occurred; that the mentally disordered person was the brother of defendants; that the brother was unable to care for himself due to mental illness which gave him the impression that the ordinary acts of others were a danger to him; that the brother had an extreme propensity to injure others; and that respondents, with knowledge of these propensities and knowledge that the brother had a high-powered rifle, voluntarily assumed care and custody of the brother in their home, knowing that the brother had a history of injuring persons. Plaintiffs then alleged that defendants failed to supervise or control the brother so that he could not commit a violent act, specifically by failing to control his access to the rifle, and that the defendants negligently failed to have the brother committed to a proper custodial facility. The trial court sustained defendants' demurrer to the complaint. The court of appeal found that the allegations that the brother suffered from mental illness were supported only by conclusionary allegations and that there was no allegation that the brother had ever before injured or attempted to injure others due to his mental illness or had ever before used or brandished the rifle in his possession. The court of appeal found that there was no allegation from which defendants or anyone else could have had the brother committed or even detained for evaluation as a mentally disordered person dangerous to himself or others under the Lanterman-Petris-Short Act [*Welf. & Inst. Code §§ 5000-5404.1* (now *Welf. & Inst. Code § 5000 et seq.*)]. In the absence of allegations showing that the defndants knew or should have known that the brother was dangerous to himself or others so that a petition for his detention for evaluation or for his commitment could have been granted or that they could foresee or should have been able to foresee that the brother would, while he was their charge, with or without a firearm, inflict injuries on a person who came on the premises, the demurrer was properly sustained. The court of appeal also considered the fact that the plaintiffs' decedent was a trespasser on the premises and the fact that the brother had a legal right to possess the rifle. That relatives should be encouraged to care for ill members of their families was also considered by the court to be a matter of public policy. In reaching its decision, the court also took individual

notice of the superior court file, which showed that the brother was not violent before the incident which killed plaintiffs' decedent and that the brother had been found sane at a sanity hearing prior to sentencing. There was little in the record of the brother's previous hospitalization for mental illness which suggested violence. Therefore, the court of appeal upheld the trial court's decision sustaining the demurrer without leave to amend (*49 Cal. App. 3d 899, 909)* .

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11-117 California Points & Authorities § 117.28

§ 117.28 Opposing Demurrer to Complaint for False Imprisonment--Complaint Shows Failure to Serve Order and Petition for Commitment [Welf. & Inst. Code § 5208]

[1] FORM

	)	
SUPERIOR COURT OF CALIFORNIA,	)	
COUNTY OF _____	)	
_____ [*name*]	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORIT-
vs.	)	IES IN OPPOSITION TO DEMURRER TO COM-
_____ [*name*(*s*)],	)	PLAINT
Defendant(s).	)	
	)	

THE FAILURE TO STRICTLY COMPLY WITH EACH STATUTORY PREREQUISITE FOR MAINTENANCE OF A SPECIAL CIVIL PROCEEDING RENDERS ANY DETENTION OF A PERSON AS A RESULT OF SUCH PROCEEDING WRONGFUL FOR PURPOSES OF A FALSE IMPRISONMENT ACTION.

A. Failure to Comply With Statutory Prerequisites. Where a person is imprisoned or detained pursuant to a special civil proceeding in which jurisdiction to proceed depends on strict compliance with each of the statutory prerequisites for maintenance of the proceeding, the failure of the defendants to so comply renders the detention wrongful for purposes of a false imprisonment action (*Culbertson v. County of Santa Clara (1968) 261 Cal. App. 2d 274, 275-276, 67 Cal. Rptr. 752*).

[*Optional*] **B. Liability for Failure to Serve Order and Petition.** The failure of the sheriff to effect service of the order and petition on a person allegedly mentally disordered prior to the detention of the person pursuant to the

provisions in *Sections 5200 through 5213 of the Welfare and Institutions Code* for court-ordered evaluation of allegedly mentally disordered persons, as specifically required by *Welfare and Institutions Code Section 5208*, will, if proven, necessarily render wrongful the detention of the person (*Culbertson v. County of Santa Clara (1968) 261 Cal. App. 2d 274, 276, 67 Cal. Rptr. 752* (decided under former Welf. & Inst. Code § 5050.2).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These memorandum of points and authorities may be submitted in opposition to a demurrer to a complaint for false imprisonment where plaintiff has alleged in the complaint the failure of defendant to comply with the statutory prerequisites for maintenance of the civil commitment or detention proceedings.

When appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications these points and authorities may be used to support a motion for summary judgment in an action for false imprisonment when the defendant has failed to comply with the statutory prerequisites for maintenance of the special civil detention proceeding.

[c] Related Pleading and Practice Forms

For forms of complaints and affirmative defenses for use in actions for damages for false imprisonment, see Ch. 257, *False Imprisonment* in California Forms of Pleading and Practice.

[3] Discussion of Authorities

[a] Failure to Comply With Statutory Prerequisites

In ***Culbertson v. County of Santa Clara*** *(1968) 261 Cal. App. 2d 274, 67 Cal. Rptr. 752* , plaintiff brought an action for false imprisonment against defendant, the county which employed the deputy sheriff who filed a petition for the examination and detention of plaintiff as a mentally ill person and who detained plaintiff in a state hospital. The complaint alleged that, on the filing of a petition by the deputy sheriff for the examination and detention of plaintiff, plaintiff was taken into custody at his home and delivered to a state hospital where he was held for some days and that a hearing was noticed and held at which plaintiff was released and the proceedings dismissed without a finding of mental illness. The county demurred to the complaint, and the trial court sustained the demurrer without leave to amend. Plaintiff appealed. The court of appeal found that the allegation that plaintiff was never served with any order of detention or petition for his examination and the concession that neither was any friend or relative of plaintiff's served created a cause of action in plaintiff. The court stated that service of a notice of hearing is essential to a valid detention order in the mental illness proceeding in question. The sheriff, the court stated, had a duty specifically imposed on him by statute to serve the notice of hearing and the petition. The court noted that jurisdiction for the proceeding depended on strict compliance with each of the specific statutory prerequisites for maintenance of the proceeding, since the

proceeding was a special civil proceeding for the detention of plaintiff. The failure of the deputy sheriff to serve the order and petition, the court found, therefore necessarily rendered wrongful the detention of plaintiff. Thus, the court of appeal reversed the trial court's ruling sustaining the demurrer to the plaintiff's complaint insofar as it stated a count for false imprisonment against the county.

Defendant had argued that the order of detention itself was valid on its face and that there could, therefore, be no liability for its execution by the deputy sheriff. The court found, however, that the defect alleged was not in the court order but rather in the failure of the deputy sheriff to perform the duty specifically imposed by statute to serve on the plaintiff the order and petition prior to the detention.

It should be noted that the case was decided under former Welf. & Inst. Code § 5050.2. However, this should not affect its continued validity since that statute has been replaced by *Welf. & Inst. Code § 5208*, which imposes a substantially similar requirement for service.

[b] Liability for Failure to Serve Order and Petition

Culbertson v. County of Santa Clara *(1968) 261 Cal. App. 2d 274, 67 Cal. Rptr. 752* , is *discussed under § 117.28[3][a]*.

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11-117 California Points & Authorities § 117.29

§ 117.29 Opposing Demurrer to Complaint for False Imprisonment--Complaint Alleges Detention Without Process, Plaintiff's Confinement, and Damages

[1] FORM

[*Caption. See § 117.28[1].*]

A COMPLAINT STATES A CAUSE OF ACTION FOR FALSE IMPRISONMENT, EVEN THOUGH IT DOES NOT ALLEGE FACTS SHOWING NO PROBABLE CAUSE EXISTED FOR PLAINTIFF'S DETENTION WHEN IT ALLEGES THAT DEFENDANT ARRESTED OR DETAINED PLAINTIFF WITHOUT PROCESS, THAT THE DETENTION WAS AN INVOLUNTARY CONFINEMENT OF PLAINTIFF, AND THAT PLAINTIFF SUFFERED DAMAGES AS A RESULT.

A. Sufficient Complaint for False Imprisonment. A cause of action for false imprisonment is stated where the complaint alleges that there was an arrest without process, followed by imprisonment and damages (*Dragna v. White (1955) 45 Cal. 2d 469, 471, 289 P.2d 428*).

B. Defendant to Prove Justification for Arrest. Where plaintiff shows arrest without process, plaintiff's imprisonment, and damages, the burden is on defendant to prove justification for the arrest or that probable cause existed (*Dragna v. White (1955) 45 Cal. 2d 469, 471-472, 289 P.2d 428*).

C. Detention for Mental Illness. When a detention for mental illness without process is shown, together with the other elements of an action for false imprisonment, the burden is on defendant to show justification for the detention, for example, that probable cause existed (*Collins v. Jones (1933) 131 Cal. App. 747, 750-751, 22 P.2d 39*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a demurrer to a complaint for false imprisonment when the demurrer is based on plaintiff's failure to allege in the complaint that there was no probable cause for the detention of plaintiff for mental disorder.

[3] Discussion of Authorities

[a] Sufficient Complaint for False Imprisonment

In ***Dragna v. White*** *(1955) 45 Cal. 2d 469, 289 P.2d 428* , plaintiff brought an action for damages for false imprisonment against police officers who had arrested him without a warrant. Defendants did not demur, but when the case came on for trial they objected to the introduction of evidence on the ground that the complaint did not state a cause of action. The objection was sustained, and defendants' motion for judgment on the pleadings was granted without leave to amend. On appeal, the Supreme Court found that the complaint stated a cause of action. The Court held that a police officer who makes an arrest without a warrant and without justification may be liable for false arrest and imprisonment and that a cause of action for false imprisonment based on unlawful arrest is stated where it is alleged that there was an arrest without process, followed by imprisonment and damages. The Court also found that the burden is on defendants to prove justification for the arrest. The judgment of the trial court was, therefore, reversed.

[b] Defendant to Prove Justification for Arrest

Dragna v. White *(1955) 45 Cal. 2d 469, 289 P.2d 428* , is *discussed under § 117.29[3][a]*.

[c] Detention for Mental Illness

Collins v. Jones *(1933) 131 Cal. App. 747, 22 P.2d 39* , was an action for false imprisonment brought by a person confined in a mental hospital at the request of a police officer who believed that she was mentally ill because she would not accept as her lost son a boy thought by the officer to be her returned son. Plaintiff was held in the hospital for three days without a warrant or any other process. The case was tried by jury, and a verdict was returned in favor of plaintiff. Defendant appealed after denial of his motion for a new trial. The court of appeal upheld the judgment, although it reduced the amount of damages. The court found that there was no evidence or claim that plaintiff had committed any offense or that she was disordered mentally to an extent that would or might render her dangerous either to herself or to others and that she had, nevertheless, been held at the mental hospital for several days. Since the arrest had been shown, the court found, the burden was on the defendant to show justification for the detention. The trial court had found, as a matter of law, that there was no probable cause for the detention.

Although the court stated that lack of probable cause is not an element of a cause of action for false imprisonment, and it is true that lack of probable cause for arrest is not one of the elements required to be pleaded by plaintiff to state a cause of action for false imprisonment resulting from arrest without a warrant [*see* *Dragna v. White (1955) 45 Cal. 2d 469, 471, 289 P.2d 428]* , probable cause for a detention for mental disorder would be a defense which could be raised to an action for false imprisonment brought by a person detained pursuant to *Welf. & Inst. Code § 5150* for 72-hour evaluation of mental condition. That statute allows detention on probable cause to believe that a person is, as a result of mental disorder, a danger to himself or herself or others or is gravely disabled.

There are statements in ***Whaley v. Kirby*** *(1962) 208 Cal. App. 2d 232, 25 Cal. Rptr. 50* and in *Wilson v. Los Angeles County (1971) 21 Cal. App. 3d 308, 315, 98 Cal. Rptr. 525* which indicate that plaintiff must plead and prove lack of probable cause for a detention or arrest without process. The court of appeal said, by way of dictum, that the weight of authority is that the establishment of lack of probable or reasonable cause is a necessary element of an action for false

arrest or imprisonment, overruling *Collins.* The court of appeal in *Whaley* also found that there was reasonable and probable cause for the detention and psychiatric examination which were the subject of the suit. The dictum in *Whaley* appears to be based on *Coverstone v. Davies (1952) 38 Cal. 2d 315, 319, 239 P.2d 876* , in which a nonsuit was granted at the close of plaintiff's case in an action for false arrest on a misdemeanor charge and affirmed on appeal. The Supreme Court in *Coverstone, above,* said that, while for the purposes of pleading it has been held that the illegality of an arrest is presumed from allegations of an arrest without a warrant and a subsequent confinement, such presumption cannot warrant submission of the case to the jury where the record demonstrates the legality of the arrest. The holding in *Coverstone, above,* therefore concerned not the pleading of the case for false imprisonment but whether the evidence showed the existence of probable cause. That case also concerned the fact that warrantless arrest was justified for a misdemeanor offense.

The *Wilson* case likewise concerned a motion by defendants to dismiss at the close of plaintiff's case rather than a demurrer to the complaint for false imprisonment. Its holding was relevant to the court's determination that it was not error for the trial court to have considered evidence of probable cause under *Evid. Code § 776* on defendant's motion to dismiss, which the court of appeal considered as if it were a motion for nonsuit. In considering whether plaintiff had given evidence which showed the existence of probable cause which would have justified the arrest as a matter of law, the court of appeal upheld the dismissal of the action and stated that it is now recognized that the establishment of lack of probable or reasonable cause is a necessary element in an action for false arrest or imprisonment and cited *Whaley* for that proposition.

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11-117 California Points & Authorities § 117.30

§ 117.30 Opposing Demurrer to Complaint for Damages for Negligence--Complaint Alleges Failure to Predict, and Warn of, and Protect From Patient's Threatened Violent Behavior After Patient Communicated to Psychotherapist Serious Threat of Physical Violence Against Reasonably Identifiable Victim or Victims [Civ. Code § 43.92]

[1] FORM

[*Caption. See § 117.28[1].*]

PLAINTIFF'S COMPLAINT STATES A CAUSE OF ACTION IN THAT IT ALLEGES FACTS SHOWING THAT THE PATIENT COMMUNICATED TO DEFENDANT A SERIOUS THREAT OF PHYSICAL VIOLENCE AGAINST A VICTIM REASONABLY IDENTIFIABLE AS PLAINTIFF, AND THAT DEFENDANT FAILED TO MAKE REASONABLE EFFORTS TO COMMUNICATE THE THREAT TO PLAINTIFF AND A LAW ENFORCEMENT AGENCY.

A. Duty of Psychotherapist to Reasonably Identifiable Victims. A psychotherapist, as defined in *Section 1010 of the Evidence Code*, does have a duty to warn of and protect from a patient's threatened violent behavior or to predict and warn of and protect from a patient's violent behavior if the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims (*Civ. Code § 43.92(a)*; *see also Hedlund v. Superior Court (1983) 34 Cal. 3d 695, 700-701, 194 Cal. Rptr. 805, 669 P.2d 41* ; *Tarasoff v. Regents of University of California (1976) 17 Cal. 3d 425, 436-437, 131 Cal. Rptr. 14, 551 P.2d 334* (cases decided prior to enactment of *Civ. Code § 43.92*).

B. Duty Not Discharged If No Reasonable Efforts Made to Communicate Threats. In order for the duty to warn and protect a reasonably identifiable victim to be discharged pursuant to *Section 43.92(b) of the Civil Code*, the psychotherapist must make reasonable efforts to communicate the threat to the victim or victims and to a law enforcement agency (*Civ. Code § 43.92(b)*).

[*Optional*] **C. Duty to Others Who Are Close to Victim.** A therapist who negligently fails to fulfill his or her duty to warn an identifiable potential victim that a patient has threatened violence may also be liable to that person's young child who may be injured if the threat is carried out because it is foreseeable as a matter of law that a young child will

not be far from his or her mother and may be injured or suffer emotional trauma on witnessing the event (*see Hedlund v. Superior Court (1983) 34 Cal. 3d 695, 705-706, 194 Cal. Rptr. 805, 669 P.2d 41* (case decided prior to enactment of *Civ. Code § 43.92*).

[*Optional*] **D. No Immunity for Failure to Warn by Public Employee.** When the therapist is a public employee, there may be immunity from any liability arising from a failure to have the patient detained or committed for mental illness pursuant to *Section 856 of the Government Code*, but there is no immunity from liability for failure to warn the third person victim (*see Tarasoff v. Regents of University of California (1976) 17 Cal. 3d 425, 444-445, 131 Cal. Rptr. 14, 551 P.2d 334* (no immunity granted by *Gov. Code § 820.2*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a demurrer to a complaint for damages based on the harm inflicted on a third person victim by a patient of a psychotherapist, when the demurrer is on the ground that the complaint fails to state a cause of action in that there is no duty of the therapist to notify the victim or a law enforcement agency. The ground for opposing the demurrer is that the psychotherapist did have a duty to the patient because the patient communicated to the psychotherapist a serious threat of physical violence against plaintiff, who was the reasonably identifiable victim, and that the psychotherapist failed to take reasonable steps to communicate the threat to plaintiff and to a law enforcement agency [*see Civ. Code § 43.92*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Duty of Psychotherapist to Reasonably Identifiable Victims

It should be noted that both *Hedlund* and *Tarasoff* (discussed *below*) were decided before the enactment of *Civ. Code § 43.92* in 1985. That section establishes a statutory immunity for psychotherapists (as defined in *Evid. Code § 1010*) for failure to warn and protect unless the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims [*Civ. Code § 43.92(a)*]. Even then, the psychotherapist may discharge the duty to warn and protect by making reasonable efforts to communicate the threat to the victim or victims and to a law enforcement agency [*Civ. Code § 43.92(b)*]. The statutory duty controls over the cases to any extent the cases may imply a broader duty or require the therapist to do more to discharge the duty.

No monetary liability or cause of action can be brought against a psychotherapist who discharges his or her duty to warn [Code § 43.92(b)].

Hedlund v. Superior Court *(1983) 34 Cal. 3d 695, 194 Cal. Rptr. 805, 669 P.2d 41* , was an action for professional malpractice against two psychotherapists by a woman and her minor child for injuries inflicted by a patient of the psychotherapists. The suit was based on the negligent failure of the psychotherapists to diagnose and warn the woman of the threat of danger to her by the patient. The suit by the child was based on mental distress from witnessing the

event. The suit alleged that the patient told his therapists of his intent to commit serious injury on plaintiff in the course of his counseling and treatment and that defendants did not take steps to notify plaintiff of the danger. Subsequently, the patient seriously injured plaintiff by shooting her with a shotgun. At the time of the shooting, plaintiff's two-year-old son was sitting next to plaintiff, who threw herself over the child to prevent him from getting hurt. Defendants' demurrer to the complaint was overruled by the trial court. Defendants petitioned for a writ of mandate to compel the trial court to vacate its order and sustain their demurrer on the ground that the action was barred by *Code Civ. Proc. § 340(3)*, which established a one-year statute of limitations (*now* a two-year statute of limitations under *CCP § 335.1*) for actions for personal injury. The Supreme Court held that the applicable statute of limitations is the three-year period set forth in *Code Civ. Proc. § 340.5* for actions for professional negligence (*34 Cal. 3d 695, 705)* .

The Court first analyzed whether the failure to comply with the duty enunciated in ***Tarasoff v. Regents of University of California*** *(1976) 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334* (discussed *below*), to predict whether a patient poses a serious danger to others and then to exercise reasonable care to protect the foreseeable victim of the danger, constitutes ordinary or professional negligence. Defendants had argued that professional negligence involves only acts in the course of diagnosis or treatment, and that a failure to warn is ordinary negligence. The Court concluded that the negligence involved was professional negligence because the warning aspect of the duty is inextricably interwoven with the diagnostic function. The Court said that the diagnosis and prediction of danger is an essential element of a cause of action for failure to warn and that it is not separate and severable from the duty to take steps to warn. The Court further stated that the decision to warn and the manner in which the warning is given may also involve professional judgment (*34 Cal. 3d 695, 703)* . With regard to the son's cause of action, the Court held that the therapists' duty extended to the son because there could be no reasonable difference of opinion that the risk of harm to him was foreseeable (*34 Cal. 3d 695, 705)* . The Court compared the situation to that in *Dillon v. Legg (1968) 68 Cal. 2d 728, 69 Cal. Rptr. 72, 441 P.2d 912* , which allowed recovery to a mother in an action in which the mother was mentally distressed from witnessing the death of her child, and held that it is equally foreseeable that a small child of a person who is injured will not be far from his or her mother. The Court stated that it is not unreasonable to recognize the existence of a duty to persons in close relationship to the object of a patient's threat, and that the therapist must consider the existence of those persons both in evaluating the seriousness of the dange posed by the patient and in determining the appropriate steps to be taken to potect the named victim (*34 Cal. 3d 695, 705-706)* .

The facts of ***Tarasoff v. Regents of University of California*** *(1976) 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334* , are discussed in *§ 117.23[3][a]*. In considering whether the complaint could state a cause of action, the Supreme Court found that a therapist, by virtue of the relationship of therapist and patient, owes a duty to foreseeable victims of a patient to protect them from the conduct of a patient whom the therapist knew, or should reasonably have known, was violent. Although the Court noted that predictions of violence by psychotherapists are frequently inaccurate, the Court held, first, that the therapist who in fact knows of the dangerousness of the patient owes a duty to the foreseeable victim and, second, that the therapist is not required, in making a determination of dangerousness, to perform perfectly, but need only exercise that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of that professional specialty under similar circumstances (*17 Cal. 3d, 425, 438)* . Further, the Court held that, since the reasonable steps which may be taken to protect the victim may include such steps as warning the victim, which do not interfere with the liberty of the patient, the possibility that unnecessary warnings may be given is a reasonable price to pay for the lives of possible victims that may be saved (*17 Cal. 3d, 425, 439-440)* . Thus, the judgment of dismissal by the superior court based on the sustained demurrer of defendants was reversed by the Supreme Court insofar as it dismissed the action against the psychotherapists and their employing public entity. The Court held that plaintiffs could amend their complaint to state a cause of action by alleging that defendants in fact determined that the patient presented a serious danger of violence to the victim, or pursuant to the standards of their profession should have so determined, but nevertheless failed to exercise reasonable care to protect her from that danger (*17 Cal. 3d, 425, 450)* .

[b] Duty to Others Who Are Close to Victim

The facts of ***Hedlund v. Superior Court*** *(1983) 34 Cal. 3d 695, 194 Cal. Rptr. 805, 669 P.2d 41* , are *discussed under*

§ 117.30[3][a].

[c] No Immunity for Failure to Warn by Public Employee

The facts of ***Tarasoff v. Regents of University of California*** *(1976) 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334* , are discussed in *§§ 117.23[3][a], 117.30[3][a]*. In determining that the plaintiffs could state a cause of action against the defendant therapists, the Supreme Court also considered defendants' contention that liability for failure to warn the victim was precluded by the *Gov. Code § 820.2* immunity from liability for public employees performing discretionary acts. The Court concluded that the statute supplies immunity only for basic policy decisions and does not supply immunity for the failure of a public employee therapist to warn the foreseeable victim of a patient. The statutory immunity did not, therefore, prevent plaintiffs from amending their complaint to state a cause of action. Note, however, that this case was decided prior to the enactment of *Civ. Code § 43.92*. However, it appears that the Court's holding as to the applicability of the government immunity for discretionary acts may still apply.

[4] Additional Authorities

[a] Duty of Psychotherapist to Reasonably Identifiable Victims

Calderon v. Glick (2005) 131 Cal. App. 4th 224, 31 Cal. Rptr. 3d 707 is discussed in *§ 117.23[4]*. In *Calderon*, the court held that two psychotherapists were not liable for a failure to warn their patient's former girlfriend and members of her family, whom the patient shot, because the patient had not communicated to the defendants any threats of physical violence against the former girlfriend or members of her family. Thus, liability was precluded by *Civ. Code § 43.92(a)* (*131 Cal. App. 4th 224, 230-232)* . The psychotherapists also were not liable for professional malpractice, because they did not owe a duty of care to the plaintiffs. They could not have reasonably foreseen that their patient would harm members of his former girlfriend's family because they had no information indicating that he had been violent in the past, he always insisted that he did not intend to harm his former girlfriend or anyone else, and his family never indicated to the defendants that he might harm another person. Although the plaintiffs unquestionably suffered injury, the connection between the defendants' conduct and the injury was not sufficiently close to impose on the defendants a duty of care to the plaintiffs (*131 Cal. App. 4th 224, 232-234)* .

Ewing v. Goldstein (2004) 120 Cal. App. 4th 807, 15 Cal. Rptr. 3d 864 is *discussed under § 117.23[4][a]*. In *Ewing*, the court held that a therapist's duty under *Civ. Code § 43.92* to warn a victim arises if information communicated by the family member leads the therapist to believe or predict that the patient poses a serious risk of grave bodily injury to this individual (*120 Cal. App. 4th 807, 817-820)* . The statute only applies, however, to statements by family members of a threat made by the patient, not to statements of a mere belief that the patient poses a danger (*120 Cal. App. 4th 807, 820 fn.12*). The court held that a therapist has a duty to warn if, and only if, the threat the therapist has learned--whether from the patient or a family member--actually leads the therapist to believe the patient poses a risk of grave bodily injury to another person (*120 Cal. App. 4th 807, 821)* .

Bragg v. Valdez (2003) 111 Cal. App. 4th 421, 3 Cal. Rptr. 3d 804 was an action for damages by the surviving heirs at law of a decedent against two psychotherapists who had undertaken the care and treatment of an individual who was subject to a 72-hour hold under *Welf. & Inst. Code § 5150* and to a subsequent 14-day hold under *Welf. & Inst. Code § 5250*. This individual was released because he did not have medical insurance. Following his release, he killed the decedent (*111 Cal. App. 4th 421, 425-427)* . The court held that the plaintiffs alleged two viable legal theories that would support a cause of action against the defendants: (1) the defendants' failure to advise the individual being treated and his family of the grave consequences that could occur if he were to discontinue his antipsychotic medications; and (2) the defendants' release of this individual who was a danger to himself and others for a non-medical reason, lack of insurance, without taking steps to protect the public (*111 Cal. App. 4th 421, 429)* . The court held that an action by a person the patient injures based on a psychiatrist's failure to comply with the duties imposed under the involuntary commitment procedures of the LPS Act is not barred by *Civ. Code § 43.92* or by *Tarasoff*. It noted that the complaint in

this case did not allege a failure to warn a known victim, but instead alleged a negligent release based on factors other than the professional judgment that is required when a psychiatrist treats an individual who is a danger to self or others (*111 Cal. App. 4th 421, 433-435)* .

In *Barry v. Turek (1990) 218 Cal. App. 3d 1241, 267 Cal. Rptr. 553* , plaintiff, a hospital office manager, brought a negligence action against a psychiatrist whose office was on the same floor as hers, after she was sexually assaulted by one of the psychiatrist's patients. The trial court granted summary judgment for defendant based on the immunity provided under *Civ. Code § 43.92*, and plaintiff appealed. The court of appeal determined that based on the patient's previous pattern of making sexual advances to women on plaintiff's floor, plaintiff was a "reasonably identifiable victim" to whom defendant would owe a duty of care if defendant had reason to believe that patient posed a serious threat of physical violence. The court affirmed the judgment, however, concluding that the patient's conduct prior to the assaults did not constitute a "serious threat of physical violence" for the purposes of establishing an exception to the immunity provided by *Civ. Code § 43.92* (*218 Cal. App. 3d 1241, 1245-1246)* .

In *Michael E.L. v. County of San Diego (1986) 183 Cal. App. 3d 515, 228 Cal. Rptr. 139* , the court held that the immunity afforded by *Welf. & Inst. Code § 5154* applies in a case in which a psychiatrist fails to warn an individual of a patient's specific threats of harm against that individual, and the patient harms the individual, as long as the psychiatrist authorized release of the patient in accordance with the required statutory findings, *i.e.*, that the patient no longer posed a threat to self or others. A psychiatrist owes a duty under *Tarasoff* to take reasonable care to protect an intended victim from the danger of serious violence he or she perceives in a person placed under a 72-hour hold for evaluation and treatment, but is immune from liability if the person's release complies with the statutory requirements (*183 Cal. App. 3d 515, 523-524, 527, 530)* .

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
CHAPTER 117 INSANE AND INCOMPETENT PERSONS: ACTIONS INVOLVING MENTAL PATIENTS
PART II. FORMS

11-117 California Points & Authorities § 117.31

§ 117.31 Opposing Demurrer to Complaint for Damages for Negligence--Against Public Employee

[1] FORM

[*Caption. See § 117.28[1].*]

ALTHOUGH PUBLIC EMPLOYEES IN MENTAL INSTITUTIONS ARE PROVIDED IMMUNITY FOR DIAGNOSING, TREATING, CONFINING, AND RELEASING THE MENTALLY ILL, THEY ARE LIABLE FOR INJURIES CAUSED BY NEGLIGENT OR WRONGFUL ACTS OR OMISSIONS IN ADMINISTERING OR FAILING TO ADMINISTER PRESCRIBED TREATMENT.

A. Policy of Liability for Negligence. *Government Code Sections 854 through 856.4*, concerning mental institutions, reflect the policy of the Legislature to provide immunity for diagnosing, treating, confining, and releasing the mentally ill, but make clear that public entities and employees are liable for injuries caused by negligent or wrongful acts or omissions in administering or failing to administer prescribed treatment or confinement, such as medical malpractice (*Los Angeles County v. Superior Court (1965) 62 Cal. 2d 839, 843-844, 44 Cal. Rptr. 796, 402 P.2d 868* ; *Hernandez v. California (1970) 11 Cal. App. 3d 895, 899, 90 Cal. Rptr. 205*).

[*Optional*] **B. Negligent Administration of Treatment.** Although a public entity is not liable for an injury proximately caused by a patient of a mental institution or for an injury to an inpatient of a mental institution, nothing in the section providing for this immunity exonerates a public employee from liability for injury proximately caused by his/her negligent or wrongful act or omission (*Gov. Code § 854.8(a), (d)*).

[*Optional*] **C. Examination for Purpose of Treatment.** Although public entities and public employees are exempted from liability for injury caused by the failure to make a physical or mental examination for the purpose of determining whether the person has a disease or mental condition that would constitute a hazard to the health or safety of himself/herself or others, liability arising from an examination or diagnosis for the purpose of treatment is excepted from this immunity (*Gov. Code § 855.6*).

[*Optional*] **D. Diagnosis or Failure to Diagnose Mental Illness or Addiction.** Although neither a public entity nor a public employee acting within the scope of employment is liable for injury resulting from diagnosing or failing to

diagnose that a person is afflicted with mental illness or addiction or from failing to prescribe for mental illness or addiction, and although a public employee acting within the scope of employment is not liable for administering with due care the treatment prescribed for mental illness or addiction, a public employee who has undertaken to prescribe for mental illness or addiction is not exonerated from liability for injury proximately caused by his/her negligence or by his/her wrongful act in so prescribing, and a public employee is not exonerated from liability for injury proximately caused by his/her negligent or wrongful act or omission in administering any treatment prescribed for mental illness or addiction (*Gov. Code § 855.8*; *Los Angeles County v. Superior Court (1965) 62 Cal. 2d 839, 844, 44 Cal. Rptr. 796, 402 P.2d 868*).

[*Optional*] **E. Negligence or Wrongful Act or Omission in Carrying out or Failing to Carry out Determinations.** Although neither a public entity nor a public employee acting within the scope of employment is liable for any injury resulting from determining in accordance with any applicable enactment whether to confine a person for mental illness or addiction or whether to parole, grant a leave of absence to, or release such a person, or for carrying out with due care such a determination, nothing in the section so providing exonerates a public employee from liability for injury proximately caused by his/her negligent or wrongful act or omission in carrying out or failing to carry out a determination to confine or not to confine a person for mental illness or addiction or the terms and conditions of confinement of a person so confined or a determination to parole, grant a leave of absence to, or release a person so confined (*Gov. Code § 856*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a demurrer to a complaint against a public employee or public entity based on the negligence of the public employee resulting in damages to plaintiff in administering or failing to administer prescribed treatment.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Policy of Liability for Negligence

Los Angeles County v. Superior Court *(1965) 62 Cal. 2d 839, 44 Cal. Rptr. 796, 402 P.2d 868* , is discussed in *§ 117.22[3][a]*.

Hernandez v. California *(1970) 11 Cal. App. 3d 895, 90 Cal. Rptr. 205* is discussed in *§ 117.24[3][a]*.

[b] Diagnosis or Failure to Diagnose Mental Illness or Addiction

Los Angeles County v. Superior Court *(1965) 62 Cal. 2d 839, 44 Cal. Rptr. 796, 402 P.2d 868* , is discussed in *§ 117.22[3][a]*.

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CHAPTER 118 INSANE AND INCOMPETENT PERSONS: CAPACITY TO CONTRACT

11-118 California Points & Authorities 118.syn

§ 118.syn Synopsis to Chapter 118: INSANE AND INCOMPETENT PERSONS: CAPACITY TO CONTRACT

§ 118.01 Scope of Chapter

§ 118.02 Governing Statutes

§ 118.03 Page Limits on Points and Authorities

§ 118.04 Related Pleading and Practice Chapters

§ 118.05 Related Points and Authorities Chapters

§§ 118.06-118.19 [Reserved]

§ 118.20 Supporting Demurrer to Complaint to Recover Sums Paid Pursuant to Contract--No Allegation of Plaintiff's Incapacity to Make Contract in Question [Civ. Code §§ 38-40]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Failure to Plead Incapacity to Contract

§ 118.21 Supporting Demurrer to Complaint for Cancellation of Instrument [Civ. Code § 3412]--Failure to Allege That Plaintiff Was Entirely Without Understanding [Civ. Code § 38]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[3] Discussion of Authorities

[a] Failure to Allege Plaintiff Entirely Without Understanding

[4] Additional Authorities

[a] Failure to Allege Plaintiff Entirely Without Understanding

§ 118.22 Supporting Demurrer to Answer to Complaint Alleging Void Contract--Good Faith of Competent Party Not a Defense to Action to Declare Contract Void

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Good Faith of Competent Party Immaterial

§ 118.23 Supporting Demurrer to Answer to Action Based on Contract--Civ. Code § 38 Cannot Be Invoked by Competent Party Against Incompetent Party

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Person of Sound Mind

§ 118.24 Supporting Demurrer to Answer to Action Based on Contract--Civ. Code § 39 Cannot Be Invoked by Competent Party Against Incompetent Party

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Person of Sound Mind

§ 118.25 Supporting Motion for Summary Judgment--By Plaintiff--Action to Have Contract or Conveyance Declared Void or Cancelled [Civ. Code § 3412]--Incapacity of Plaintiff Judicially Determined [Civ. Code § 40]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Incompetency Adjudicated

[b] Establishment of Probate Code Conservatorship

[c] LPS Conservatee Found Incompetent to Contract

[d] Person Found Incompetent in Sister State

§ 118.26 Supporting Motion for Summary Judgment--By Defendant in Action to Set Aside Conveyance of Property at Trustee's Sale--Supervening Insanity of Debtor Does Not Deprive Trustee of Power to Convey Title to Property in Trustee's Sale Pursuant to Civ. Code § 2924

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Supervening Insanity

[b] Order of Commitment Not Constructive Notice

[c] Summary Judgment for Purchaser

§ 118.27 Opposing Demurrer to Complaint--For Cancellation of Deed Obtained From Incompetent Person [Civ. Code § 38]--Deed Void If Plaintiff Totally Without Understanding

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Cause of Action Stated for Cancellation of Deed

§ 118.28 Opposing Demurrer to Complaint for Rescission of Contract [Civ. Code § 1689(b)] Based on Undue Influence [Civ. Code § 1575(2)]--Weakness of Mind of Plaintiff

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Undue Influence

[b] Undue Susceptibility

[c] Taking Advantage of Weakness of Mind as Undue Influence

[d] Weakness of Mind and Inadequacy of Consideration or Undue Influence

§ 118.29 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Based on Rescission of Contract or Conveyance--Civ. Code § 39 Authorizes Rescission

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Person Not Entirely Without Understanding but of Unsound Mind

[b] Person Substantially Unable to Manage Own Financial Resources, or to Resist Fraud or Undue Influence

[c] Partial Incapacity Sufficient for Rescission

§ 118.30 Opposing Motion for Summary Judgment--In Action to Void Contract--Plaintiff Estopped to Assert That Contract Is Void

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Estoppel to Assert That Contract Is Void

§ 118.31 Opposing Motion for Summary Judgment--In Action to Have Contract Declared Void Pursuant to Civ. Code § 40--Insanity Commitment Proceedings Are Not Judicial Determination of Incapacity

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Insanity Commitment Proceedings Insufficient to Show Judicial Determination of Incapacity

[4] Additional Authorities

[a] Insanity Commitment Proceedings Insufficient to Show Judicial Determination of Incapacity

§ 118.32 Opposing Motion for Summary Judgment--In Action to Rescind Contract Pursuant to Civ. Code § 39--Insanity Commitment Proceedings Are Not Judicial Determination of Incapacity or of Unsoundness of Mind

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Insanity Commitment Proceedings Insufficient to Show Unsound Mind

§ 118.33 Opposing Motion for Summary Judgment--In Action to Rescind Contract Pursuant to Civ. Code § 39--Diagnosis of Mental or Physical Disorder Is Insufficient to Support Determination of Unsound Mind or Lack of Capacity--Evidence of Deficit in One or More Specific Mental Functions Required [Prob. Code § 811]

[1] FORM

[2] Comments

[a] Use of Form

[b] Evidence of Deficit in Mental Functions

§ 118.34 Opposing Motion for Summary Judgment--In Action on Contract With Person Entirely Without Understanding--Person Entirely Without Understanding Liable for Necessaries [Civ. Code § 38]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Liability of Person Entirely Without Understanding for Necessaries

[b] Legal Services for Restoration of Capacity

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11-118 California Points & Authorities § 118.01

§ 118.01 Scope of Chapter

This chapter contains points and authorities for use in supporting [*see §§ 118.20, 118.21*] and opposing [*see §§ 118.27 -118.29*] a demurrer to a complaint to cancel a contract for incapacity; in supporting a demurrer to an answer to an action to have a contract declared void [*see § 118.22*]; in supporting a demurrer to an answer to an action based on a contract [*see §§ 118.23, 118.24*]; in supporting motions for partial summary judgment with respect to capacity [*see § 118.25*]; and in supporting a motion for summary judgment on the validity of a trustee's sale [*see § 118.26*]. This chapter also contains memoranda for use in opposing a motion for summary judgment based on incapacity to contract [*see §§ 118.30 -118.34*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresSummary JudgmentOppositionGeneral OverviewCivil ProceduresSummary JudgmentPartial Summary JudgmentsCivil ProceduresSummary JudgmentSupporting MaterialsMemoranda of Law

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11-118 California Points & Authorities § 118.02

§ 118.02 Governing Statutes

Vitiation of contracts by persons of unsound mind is governed by *Civ. Code § 38 et seq.* Tort liability of persons of unsound mind is governed by *Civ. Code § 41*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedureSummary JudgmentPartial Summary JudgmentsCivil ProcedureSummary JudgmentSupporting MaterialsMemoranda of Law

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11-118 California Points & Authorities § 118.03

§ 118.03 Page Limits on Points and Authorities

Generally, a supporting or opposing memorandum must not exceed 15 pages in length, or in the case of a motion for summary judgment or summary adjudication, 20 pages in length. A reply or closing memorandum may not exceed 10 pages in length [*see Cal. Rules of Ct., Rule 3.1113(d)*]. Any party desiring to file a longer memorandum must obtain leave of court [*see Cal. Rules of Ct., Rule 3.1113(e)*]. For further discussion of the page limitations under *Cal. Rules of Ct., Rule 3.1113*, and of other basic format requirements for memoranda, see *Ch. 1, Writing Legal Memoranda and Briefs, § 1.05*.

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11-118 California Points & Authorities § 118.04

§ 118.04 Related Pleading and Practice Chapters

For a discussion and forms for use in actions and proceedings involving mentally disordered, developmentally disabled, and other incompetent persons, see California Forms of Pleading and Practice, Ch. 304, *Insane and Other Incompetent Persons* (Matthew Bender).

For discussion and forms for use in particular cases involving mentally disordered and other incompetent persons, see the following chapters in California Forms of Pleading and Practice:

- Ch. 107, *Cancellation of Instruments*.
- Ch. 140, *Contracts*.
- Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians*.
- Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators*.
- Ch. 282, *Guardianship and Conservatorship: Temporary Guardians and Conservators*.
- Ch. 283, *Guardianship and Conservatorship: Bonds*.
- Ch. 284, *Guardianship and Conservatorship: Notice*.
- Ch. 285, *Guardianship and Conservatorship: Care of Ward or Conservatee*.
- Ch. 286, *Guardianship and Conservatorship: Inventory and Appraisal*.
- Ch. 287, *Guardianship and Conservatorship: General Management Powers*.
- Ch. 288, *Guardianship and Conservatorship: Independent Exercise of Powers*.

- Ch. 289, *Guardianship and Conservatorship: Management of Community Property*.
- Ch. 290, *Guardianship and Conservatorship: Maintenance of Ward or Conservatee*.
- Ch. 290A, *Guardianship and Conservatorship: Asset Management and Investment*.
- Ch. 290B, *Guardianship and Conservatorship: Substituted Judgment*.
- Ch. 290C, *Guardianship and Conservatorship: Actions and Disputed Claims*.
- Ch. 290D, *Guardianship and Conservatorship: Actions Against Guardians, Conservators, and Sureties*.
- Ch. 290E, *Guardianship and Conservatorship: Accounts*.
- Ch. 290F, *Guardianship and Conservatorship: Compensation of Guardian or Conservator*.
- Ch. 290G, *Guardianship and Conservatorship: Removal or Resignation of Guardians and Conservators*.
- Ch. 290H, *Guardianship and Conservatorship: Termination of Guardianships and Conservatorships*.
- Ch. 415, *Physicians: Medical Malpractice*.
- Ch. 440, *Probate*.
- Ch. 490, *Rescission and Restitution*.

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11-118 California Points & Authorities § 118.05

§ 118.05 Related Points and Authorities Chapters

Related memoranda of points and authorities that may be useful in particular actions and proceedings concerning insane and incompetent persons may be found in the following chapters in this publication:

- Ch. 10, *Abatement and Survival of Actions*.
- Ch. 13, *Adverse Possession*.
- Ch. 71, *Demurrers and Motions for Judgment on the Pleadings*.
- Ch. 81, *Discovery: Privileges and Other Discovery Limitations*.
- Ch. 106, *Guardianship and Conservatorship*.
- Ch. 110, *Habeas Corpus*.
- Ch. 117, *Insane and Incompetent Persons: Actions Involving Mental Patients*.
- Ch. 132, *Jurisdiction: Personal Jurisdiction and Inconvenient Forum*.
- Ch. 133, *Jurisdiction: Subject Matter Jurisdiction*.
- Ch. 143, *Limitation of Actions*.

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11-118 California Points & Authorities §§ 118.06-118.19

[Reserved]

§§ 118.06[Reserved]

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11-118 California Points & Authorities § 118.20

§ 118.20 Supporting Demurrer to Complaint to Recover Sums Paid Pursuant to Contract--No Allegation of Plaintiff's Incapacity to Make Contract in Question [Civ. Code §§ 38-40]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER TO COMPLAINT
vs.	)	[*Code Civ. Proc. § 430.10(e)*]
_____ [*name*(*s*)],	)	Date: _____
Defendant(s).	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THE COMPLAINT TO RECOVER SUMS PAID BY PLAINTIFF TO DEFENDANT PURSUANT TO A CONTRACT ON THE GROUND OF PLAINTIFF'S INCAPACITY TO CONTRACT FAILS TO STATE A CAUSE OF ACTION IN THAT PLAINTIFF FAILS TO ALLEGE FACTS SHOWING HIS/HER INCAPACITY TO MAKE THE CONTRACT.

A. Objection by Demurrer. The party against whom a complaint has been filed may object by demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action when this ground appears on

the face of the complaint [or from any matter of which the court is required to or may take judicial notice] (*Code Civ. Proc. §§ 430.30(a), 430.10(e)*).

B. Failure to Plead Incapacity to Contract. When the plaintiff in an action to recover payments made to defendant on the ground of plaintiff's incapacity to contract both fails to allege in the complaint facts showing his/her total incapacity to contract so as to come within the provisions of *Civil Code Section 38* or *Civil Code Section 40*, and fails to allege that at the time of making the instrument in question, he/she was lacking in understanding and did not comprehend the meaning of his/her acts, so as to come within the provisions of *Civil Code Section 39*, defendant's demurrer to the complaint should be sustained (*Fetterley v. Randall (1928) 92 Cal. App. 411, 416-417, 268 P. 434*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a demurrer to a complaint which seeks to recover sums paid by plaintiff to defendant pursuant to a contract on the ground that plaintiff lacked capacity to make the contract and that it is therefore void [*Civ. Code §§ 38, 40*; *see §§ 118.21 -118.23, 118.27, 118.30, 118.34, 118.25, 118.26, 118.31*, respectively] or voidable [*Civ. Code § 39*].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[A] Failure to Plead Incapacity to Contract

In ***Fetterley v. Randall*** *(1928) 92 Cal. App. 411, 268 P. 434* , plaintiff had been committed to a state hospital for the insane pursuant to the procedures authorized by former Political Code §§ 2168-2170 [*now Welf. & Inst. Code § 5000 et seq.*], with a hearing by jury. Some time before that hearing, plaintiff had made and delivered to defendant a bank draft as payment to defendant of attorney's fees for the hearing. Plaintiff brought an action for the return of the fees on the ground that at the time he drew the check or draft, he was legally incapacitated to enter into a contract. The trial court gave judgment for plaintiff on the ground that plaintiff had been judged insane at the time he delivered the draft. Defendant appealed. The court of appeal noted that the complaint failed to allege that plaintiff was insane when he made and delivered the bank draft and that no evidence was received by the court that plaintiff was insane. The trial judge had decided that plaintiff was incompetent on the basis of plaintiff's commitment pursuant to the Political Code. In deciding that defendant's general demurrer to the complaint, which the trial court had overruled, should have been sustained, the court of appeal found that the commitment proceeding was a summary proceeding for the purpose of determining whether or not the person charged with being insane is, in fact, in such a mental condition as to justify the state in depriving him or her of liberty andaffording him or her treatment. Such a proceeding, the court held, is not a conclusive determination of sanity or insanity. Since the plaintiff had not, therefore, shown that he had been adjudged incompetent, and since plaintiff had not alleged in the complaint that he was lacking in understanding and did not comprehend the meaning of his acts, the court of appeal found that there was no basis for finding that plaintiff lacked capacity to make the draft. Plaintiff, the court found, had not been judicially determined to be incompetent within the meaning of *Civ. Code § 40*, or to be totally without understanding so as not to have the power to make a contract of any

kind, within the meaning of *Civ. Code § 38*. He would, therefore, have had to show that when he made the draft, he was lacking in understanding and did not comprehend the meaning of the acts, so as to come within the provisions of *Civ. Code § 39*. The court stated that a person may be insane in the general meaning of the term and yet not be entirely without the power of knowing and understanding the nature of ordinary business transactions, so that the insanity will not render the person legally incapable of entering into a valid contract. Thus, the court of appeal reversed the judgment of the trial court (*92 Cal. App. 411, 416-417)* .

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
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11-118 California Points & Authorities § 118.21

§ 118.21 Supporting Demurrer to Complaint for Cancellation of Instrument [Civ. Code § 3412]--Failure to Allege That Plaintiff Was Entirely Without Understanding [Civ. Code § 38]

[1] FORM

[*Caption. See § 118.20[1].*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT FAILS TO ALLEGE FACTS SHOWING THAT PLAINTIFF WAS ENTIRELY WITHOUT UNDERSTANDING SO THAT THE DEED WAS VOID UNDER *CIVIL CODE SECTION 38*.

A. Objection by Demurrer. [*See § 118.20[1], Paragraph A.*]

B. Failure to Allege Plaintiff Entirely Without Understanding. In an action to cancel a deed on the ground that plaintiff was of unsound mind when it was executed, the complaint fails to state a cause of action if it fails to allege that plaintiff was entirely without understanding, when the incompetence of plaintiff has not been judicially determined within the meaning of *Civil Code Section 40* and it is not alleged that the deed is voidable under the provisions of *Civil Code Section 39* (*More v. Calkins (1890) 85 Cal. 177, 190, 24 P. 729*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a demurrer to a complaint to have a deed or contract

cancelled on the ground that the plaintiff was entirely without understanding, when the plaintiff fails to allege that he or she was entirely without understanding.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, these points and authorities may be used in an action based on a contract or instrument to support a demurrer to a defendant's answer, when the answer alleges the defendant's incapacity to execute the contractor instrument but fails to allege that the defendant was entirely without understanding.

[3] Discussion of Authorities

[a] Failure to Allege Plaintiff Entirely Without Understanding

In ***More v. Calkins*** *(1890) 85 Cal. 177, 24 P. 729* , plaintiff sought an accounting of funds from a property subject to a deed of trust made to defendant and sought to have the deed declared void due to his mental incompetency. Defendant's demurrer to plaintiff's count to declare the deed void was sustained. In affirming the sustaining of the demurrer, the Supreme Court found that the complaint had been based on *Civ. Code §§ 38* and *39*, allowing avoidance of a deed executed when a person is of unsound mind. The Court found, however, that the plaintiff had not alleged that he was "entirely without understanding" when the deed was executed and, therefore, had not stated facts sufficient to show that the deed was void pursuant to *Civ. Code § 38* [*see §§ 118.21 -118.23, 118.30, 118.34*]. Since the mental incompetency was not alleged to be of that degree, the most plaintiff would have been entitled to would have been rescission pursuant to *Civ. Code § 39* [*see §§ 118.23 -118.24, 118.29, 118.32*], but plaintiff had not pleaded the necessary prerequisites for such relief. The Court therefore affirmed the judgment of the trial court with regard to the count to have the deed declared void (*85 Cal. 177, 190)* .

[4] Additional Authorities

[a] Failure to Allege Plaintiff Entirely Without Understanding

In *Maionchi v. Nicholini (1905) 1 Cal. App. 690, 82 P. 1052* , the complaint alleged that plaintiff was the owner and holder of a note executed and delivered to him, that he had endorsed and delivered the note to defendant, and that at the time of the endorsement plaintiff was old, infirm, feeble in mind and body, and unable to attend to his property or to attend to any business affairs without independent advice due to weakness of mind. The complaint further alleged that defendant fraudulently procured and induced plaintiff to indorse and deliver the note, that plaintiff had never received any value for the note, and prayed that defendant be restrained from collecting the note. After the action was begun, plaintiff was adjudged insane and a guardian ad litem was appointed. The trial court found against the defendant on the issues and rendered judgment that the plaintiff was the owner of the note. After judgment plaintiff amended the complaint to allege that he was entirely without understanding at the time of delivery to defendant of the note and that he was of unsound mind and entirely without the capacity to understand and comprehend the nature of the transaction. Defendant contended on appeal that the complaint as amended did not conform to the proof at the trial and that the judgment was not supported by the evidence. The court of appeal noted that *Civ. Code §§ 38* and *39* emphasize the difference between contracts made by persons of unsound mind who are entirely without understanding and contracts by persons of unsound mind who are not entirely without understanding (made before incapacity has been judicially determined, so as to bring them within the provisions of *Civ. Code § 40*). The court found that the original complaint had stated only a sufficient cause of action for rescission pursuant to *Civ. Code § 39* and that the evidence in the trial supported only the conclusion that plaintiff came within the terms of *Civ. Code § 39* covering persons of unsound mind but not entirely without understanding. The court therefore found that plaintiff was entitled only to rescission of the note and not to have the note declared void, which had been the effect of the trial court's judgment. The amendment to the

pleadings was therefore improper, and the court of appeal reversed the judgment.

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
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11-118 California Points & Authorities § 118.22

§ 118.22 Supporting Demurrer to Answer to Complaint Alleging Void Contract--Good Faith of Competent Party Not a Defense to Action to Declare Contract Void

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*], Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORIT-
vs.	)	IES IN SUPPORT OF DEMURRER TO ANSWER
_____ [*name*(*s*)],	)	Date: _____
Defendant(s).	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THE ANSWER TO THE COMPLAINT FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE A DEFENSE IN THAT THE GOOD FAITH OF DEFENDANT COMPETENT PARTY TO THE CONTRACT IS IMMATERIAL TO THE VALIDITY OF A VOID CONTRACT.

A. Objection by Demurrer to Answer. A party against whom an answer has been filed may object, by demurrer as provided in Code of Civil Procedure Section 430.3, to the answer on the ground that the answer does not state facts sufficient to constitute a defense (*Code Civ. Proc. § 430.20(a)*).

B. Good Faith of Competent Party Immaterial. When a contract is void under the terms of *Civil Code Section 38*, the good faith of the other party to the contract is immaterial to the validity of the contract, since the contract is

completely void (*Jacks v. Estee (1903) 139 Cal. 507, 512-513, 73 P. 247*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a demurrer to the answer to a complaint to have a contract declared void or cancelled when the answer attempts to raise as a defense the good faith of the competent party to the contract.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Good Faith of Competent Party Immaterial

In ***Jacks v. Estee*** *(1903) 139 Cal. 507, 73 P. 247* , plaintiff brought an action to foreclose a mortgage on the property of an intestate. Defendant sought by filing a cross complaint to have the mortgage and note declared void on the ground that the intestate was, at the date of their alleged execution, unable to understand the transaction or any other transaction on account of age and mental infirmity. The trial court found that the instruments were void due to lack of capacity of the intestate as alleged by defendant. On appeal by plaintiff, the Supreme Court found that the findings of the trial court were sufficient to support the conclusion that the intestate was entirely without understanding within the meaning of *Civ. Code § 38*, providing that contracts made by such persons are void. The Court discussed the meaning of the term "entirely without understanding" as used in *Civ. Code § 38* and found that the term "understanding" is used to mean not the act of understanding but the capacity or faculty of doing so and that the expression "without understanding" is understood to refer to persons without such capacity. The expression, the Court found, is not intended to be used in its literal and extreme sense, for even the most insane person has some degree of understanding, but is intended to be restricted to the subject matter to which the section relates, that of contracts, and hence as applying to all persons who are entirely without the capacity of understanding or comprehending such transactions. The Court further found that the cross complaint sufficiently alleged the general incapacity of the intestate. The findings of the trial court did not seem to the Court to go as far as total incapacity within the terms of *Civ. Code § 38*, but the Court found that the facts found were sufficient to support the conclusion that the intestate was not competent to understand transactions in general within the meaning of that statute. The Court therefore found that he good faith of the plaintiff was immaterial to the validity of the contracts, since they were void and there were therefore no contracts. Although the Court stated that judgment for the defendant on the cross complaint would ordinarily be proper in this case, the Court reversed the judgmentfor the defendant because necessary parties to the action had not been joined (*139 Cal. 507, 512-513)* .

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11-118 California Points & Authorities § 118.23

§ 118.23 Supporting Demurrer to Answer to Action Based on Contract--Civ. Code § 38 Cannot Be Invoked by Competent Party Against Incompetent Party

[1] FORM

[*Caption. See § 118.22[1].*]

CIVIL CODE SECTION 38 WAS ENACTED FOR THE BENEFIT OF PERSONS ENTIRELY WITHOUT CAPACITY TO COMPREHEND THE NATURE OF A CONTRACT AND CANNOT BE INVOKED BY A PERSON OF SOUND MIND TO AVOID A CONTRACT WHICH HE/SHE MAY HAVE WITH A PERSON OF UNSOUND MIND.

A. Objection by Demurrer to Answer. [*See § 118.22[1], Paragraph A.*]

B. Person of Sound Mind. *Civil Code Section 38*, which provides that a person entirely without understanding has no power to make a contract of any kind, was enacted for the benefit and protection of persons who are entirely devoid of capacity to comprehend the nature and substance of a contract, and it cannot be invoked by a person of sound mind in an attempt to avoid a contract which he/she may have with a person subsequently ascertained to be of unsound mind (*San Francisco Credit Clearing-House v. MacDonald (1912) 18 Cal. App. 212, 215, 122 P. 964*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a demurrer to an answer to a complaint based on a contract which a person of sound mind may have with a person of unsound mind where the person of unsound mind seeks relief and the answer attempts to assert the incapacity of plaintiff under *Civ. Code § 38* as a defense.

Counsel should insert argument in the form showing the relationship betweenthe facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Person of Sound Mind

San Francisco Credit Clearing-House v. MacDonald *(1912) 18 Cal. App. 212, 122 P. 964* , was an action on a promissory note in which the plaintiff recovered judgment against the defendant and from which judgment the defendant appealed. Plaintiff's assignor of the note had been committed to a private insane asylum shortly before the note was made and delivered. Defendant had pleaded as a defense to the action on the note that the payee was mentally ill prior to and at the time the note was made so that he was incompetent and incapable of entering into a contract of any kind. The court of appeal found, however, that *Civ. Code § 38* was enacted for the benefit and protection of persons who are entirely without capacity to comprehend the nature and subject of a contract, and that it cannot be invoked by a person of sound mind in an attempt to avoid a contract which he or she may have with a person subsequently found to be of unsound mind. Even assuming that the evidence showed plaintiff's assignor to have been completely without understanding within the meaning of *Civ. Code § 38*, the court found that that fact could not be properly pleaded and proven as a legal defense to the note. The court further found that the right to rescind a contract entered into with a person of unsound mind pursuant to *Civ. Code § 39* [*see §§ 118.23 -118.24, 118.29, 118.32*] is likewise for the benefit of the person of unsound mind and that it may be exercised solely by the person of unsound mind or his or her representatives and not by the other party (*18 Cal. App. 212, 215)* . The court therefore affirmed the judgment of the trial court.

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11-118 California Points & Authorities § 118.24

§ 118.24 Supporting Demurrer to Answer to Action Based on Contract--Civ. Code § 39 Cannot Be Invoked by Competent Party Against Incompetent Party

[1] FORM

[*Caption. See § 118.22[1].*]

CIVIL CODE SECTION 39 WAS ENACTED FOR THE BENEFIT OF INCOMPETENT PERSONS AND CANNOT BE INVOKED BY A PERSON OF SOUND MIND TO AVOID A CONTRACT WHICH HE/SHE MAY HAVE WITH A PERSON OF UNSOUND MIND.

A. Objection by Demurrer to Answer. [*See § 118.22[1], Paragraph A.*]

B. Person of Sound Mind. *Civil Code Section 39*, which provides that a contract or conveyance of a person of unsound mind but not entirely without understanding, made before incapacity has been judicially determined, is subject to rescission, cannot be invoked by a person of sound mind in support of an answer to a complaint based on a contract which that person may have with a person of unsound mind. The provisions of *Civil Code Section 39* are solely for the benefit of the person of unsound mind, and, until that person exercises the right, the contract is binding on the party of sound mind (*San Francisco Credit Clearing-House v. MacDonald (1912) 18 Cal. App. 212, 217-218, 122 P. 964* (dictum)).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a demurrer to an answer to a complaint based on a contract that a person of sound mind may have with a person of unsound mind, when the person of unsound mind seeks relief and the answer attempts to assert the incapacity of plaintiff under *Civ. Code § 39* as a defense.

Counsel should insert argument in the form showing the relationship betweenthe facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Person of Sound Mind

San Francisco Credit Clearing-House v. MacDonald *(1912) 18 Cal. App. 212, 122 P. 964* , is discussed in *§ 118.23[3][a]*.

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11-118 California Points & Authorities § 118.25

§ 118.25 Supporting Motion for Summary Judgment--By Plaintiff--Action to Have Contract or Conveyance Declared Void or Cancelled [Civ. Code § 3412]--Incapacity of Plaintiff Judicially Determined [Civ. Code § 40]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*], Plaintiff,	)	IES IN SUPPORT OF MOTION FOR SUMMARY
vs.	)	JUDGMENT
_____ [*name*(*s*)], Defendant(s).	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

A JUDICIAL DETERMINATION OF INCOMPETENCY IS NOTICE TO THE WORLD OF PLAINTIFF'S INCAPACITY TO MAKE A VALID CONTRACT, AND NO FURTHER EVIDENCE IS REQUIRED TO SHOW THAT THE CONTRACT SUED IS VOID UNDER *CIVIL CODE SECTION 40*.

A. Summary Judgment. A plaintiff may move for summary judgment in any action or proceeding if the plaintiff contends that there is no defense to the action or proceeding (*Code Civ. Proc. § 437c(a)*). The material factual claims put in issue by the pleadings are not in dispute, and the plaintiff is entitled to judgment as a matter of law (*see Code Civ. Proc. § 437c(c)*).

B. Void Contract. Subject to *Probate Code Section 1871,* and to *Welfare and Institutions Code Section 5000 et seq.,* after his or her incapacity has been judicially determined, a person of unsound mind can make no conveyance or other contract, nor delegate any power or waive any right, until his or her restoration to capacity (*Civ. Code § 40*).

C. Incompetency Adjudicated. When a court has adjudged a person to be incompetent and to lack the mental capacity to understand the nature and effect of a contract, that person thereby becomes incapable of making a valid contract. Thecontract is void because the decree of incompetency is notice to the world of the person's incapacity to make a valid contract, and no further evidence of mental incapacity is required to show that the contract is void under *Civil Code Section 40* (*Hellman Commercial T. & S. Bank v. Alden (1929) 206 Cal. 592, 604-605, 275 P. 794* ; *Gibson v. Westoby (1953) 115 Cal. App. 2d 273, 276, 251 P.2d 1003*).

[*Optional*] **D. Establishment of Probate Code Conservatorship.** Subject to *Probate Code Sections 1873 through 1876*, the establishment of a conservatorship under *Probate Code Sections 1400 through 2808* is a judicial determination of the incapacity of the conservatee (*Civ. Code § 40*). The appointment of a conservator of the estate is an adjudication that the conservatee lacks the legal capacity to enter into or make any transaction that binds or obligates the conservatorship estate *Prob. Code § 1872(a)*.

[*Optional*] **E. LPS Conservatee Found Incompetent to Contract.** The report of the LPS conservatorship investigation must recommend for or against the restriction of the proposed conservatee's right to enter into contracts (*Welf. & Inst. Code § 5357(b)*). The officer preparing the report may recommend against the proposed conservatee having the right to enter specified types of transactions or transactions in excess of specified money amounts (*Welf. & Inst. Code § 5357(b)*).

[*Optional*] **F. Person Found Incompetent in Sister State.** A finding and adjudication of incompetency in a sister state is entitled to the same faith and credit it receives in the state where it was made as to the issues decided. When a person has been found by a sister state to be a person in need of a guardian of the estate or to be incompetent, with the effect that he/she is incompetent to enter into contracts, that adjudication will be effective in California (*Gibson v. Westoby (1953) 115 Cal. App. 2d 273, 275, 251 P.2d 1003*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for summary judgment in an action to void or cancel a contract or conveyance where the motion asserts that plaintiff is entitled to a determination as a matter of law on the issue of his or her incapacity to contract since incapacity has been judicially determined.

A plaintiff may move for summary judgment in any action or proceeding if the plaintiff contends that there is no defense to the action or proceeding [*Code Civ. Proc. § 437c(a)*]. The summary judgment procedure is statutory [*Code Civ. Proc. § 437c*], and strict compliance with the statute is required [*Bahl v. Bank of America (2001) 89 Cal. App. 4th 389, 394-395, 107 Cal. Rptr. 2d 270]* .

A summary judgment motion must be supported by a memorandum [*Cal. Rules of Ct., Rule 3.1350(c)(3)*]. The

memorandum may not exceed 20 pages [*Cal. Rules of Ct., Rule 3.1113(d)*]. A memorandum is not a substitute for the separate statement required by *Code Civ. Proc. § 437c(b)(1)* [*Blackman v. Burrows (1987) 193 Cal. App. 3d 889, 894-895, 238 Cal. Rptr. 642]* . Representations of fact in the memorandum do not constitute evidence in support of a summary judgment motion and may not be considered by the court [*Vaughn v. Dame Construction Co. (1990) 223 Cal. App. 3d 144, 146-147 fn.2, 272 Cal. Rptr. 261]* . A party moving for summary judgment is not required to repeat in the memorandum specific citations to the record, which are noted in the party's separate statement [*Basich v. Allstate Ins. Co. (2001) 87 Cal. App. 4th 1112, 1118, 105 Cal. Rptr. 2d 153]* . A party moving for summary judgment is not entitled to rely on its own pleadings, even if verified, to support the motion [*Code Civ. Proc. § 437c(o)*], but instead must support the motion with affidavits, declarations, discovery responses, or matters of which judicial notice must or may be taken [*Code Civ. Proc. § 437c(b)(1)*].

The notice of motion for summary judgment and supporting papers must be served on all other parties at least 75 days before the hearing [*Code Civ. Proc. § 437c(a)*].

[3] Discussion of Authorities

[a] Incompetency Adjudicated

In ***Hellman Commercial T. & S. Bank v. Alden*** *(1929) 206 Cal. 592, 275 P. 794* , a petition had been filed to have a person declared an incompetent person and for the appointment of a guardian of his person and estate. In that proceeding, the court had found the person to be unable to care for himself and to be a person likely to be imposed upon by designing and artful persons and, therefore, had appointed a guardian. Thereafter, a bank issued to the ward a cashier's check payable to the ward. The ward then endorsed the cashier's check without receiving any value and delivered it to a company which endorsed and delivered the check to plaintiff bank. Plaintiff gave the company a credit in the amount of the check on their account. Plaintiff then allowed the company to withdraw half of that amount from their account. When the ward's bank refused to honor the cashier's check, plaintiff brought suit to recover the amount withdrawn by the company from the ward's bank and from the company. The guardian interposed an answer to the company and was substituted for the ward's bank as a party defendant.

The trial court found that plaintiff should recover nothing from the ward's estate on account of the incompetency. The plaintiff appealed from that part of the judgment. Plaintiff contended on appeal that the ward's incompetency to endorse the check had not been properly determined at trial. Defendant rested the claim of incompetency solely on the determination that an adjudication of incompetency had been made and was in force at the time of the endorsement of the check.

The Supreme Court found that, although the trial court did not specifically find that the incompetent lacked understanding of the nature or effect of the endorsement or that the transaction was void, it did find that the ward received nothing of value for the check and that he was unable to care properly for himself and his property and was likely to be imposed on by designing and artful persons. The Court further found that a guardian of the person and estate of the ward was appointed and qualified. The Court stated that, in the absence of an adjudication of incompetency, it is necessary to allege and prove that the transaction was void for lack of understanding of its nature and effect.

The test in such a case is whether the party was mentally competent to deal with the subject before him with a full understanding of his rights or whether he actually understood the nature, purpose, and effect of the contract. However, the Court stated that when a court has regularly adjudged a person to be incompetent, he becomes incapable of making a valid contract, simply because the decree of incompetency is notice to the world of his incapacity to make a valid contract.

Civ. Code § 40 was found by the Court to apply not only to insane persons but to all those for whom a guardian has been appointed. The Court stated that no further evidence of incapacity is required than evidence of an adjudication of

incapacity and the appointment of a guardian. Appellant further contended that rescission was the proper remedy for avoiding the check in question. Although the Court found that rescission is a proper remedy where a contracting party is of unsound mind but not entirely without understanding, before the party's incapacity has been judicially determined, the Court also found that this is not the only remedy.

When affirmative relief is sought, the Court stated that a defense to an action on a contract may be made by setting up fraud, undue influence, or mental incapacity, without the necessity of showing rescission (*206 Cal. 592, 605)* . The Court finally determined that the endorsement of the check after the adjudication of incompetency was totally void and that the trial court's finding of the existence of the adjudication of incompetency was equivalent to holding that the transaction was void for lack of capacity. Since it found that the check was endorsed while the endorser was under a guardianship, the judgment of the trial court was thus affirmed (*206 Cal. 592, 608-609)* .

In ***Gibson v. Westoby*** *(1953) 115 Cal. App. 2d 273, 251 P.2d 1003* , plaintiff brought an action for a decree that a conveyance made by him was void. Plaintiff had been adjudged by a New Mexico court to be a person of unsound mind, insane, and incompetent to look after his own affairs, and the court had appointed a guardian for him. After the making of the conveyance, the probate court of California found that plaintiff was incompetent and appointed a guardian. The New Mexico decree was in effect at the time of the conveyance. Plaintiff's guardian did not join in the deed, and no court order was ever made authorizing its execution. The grantee of plaintiff conveyed the property to defendant. At trial, the court found the facts stated and rendered judgment for plaintiff quieting his title in the realty. Defendant was granted a new trial, but the plaintiff appealed from the order granting the new trial.

The court of appeal found that, as a matter of law, there was no evidence to support a judgment for defendant. The incompetency finding of the New Mexico court was entitled to the same faith and credit in California that it would have received in the state where the findings were made (*115 Cal. App. 2d 273, 275)* . Since the New Mexico finding appeared to deprive the plaintiff of the ability to make a contract, the court of appeal found that the New Mexico decree operated to deprive plaintiff of power to make the conveyance in question in California as well. Under *Civ. Code § 40,* providing that after incapacity has been judicially determined, a person of unsound mind can make no conveyance or other contract until his restoration to capacity, the plaintiff could not validly make the conveyance in question. The contract or conveyance, in such a case, the court found, is deemed void, not because the incompetent person is unable, unassisted, properly to care for his or her property, or lacks understanding of the nature and effect of the particular transaction, but because the decree of incompetency is notice to the world of his incapacity to make a valid contract. The court stated that the decree of incompetency may be relied on alone to establish incapacity as a matter of law. Further, the court found that the judgment that a person is incompetent constitutes notice to all the world of the incapacity of the person to make a valid conveyance. Since the conveyance is void, it passes no title and cannot be made the foundation of a good title even under the doctrine of bona fide purchaser (*115 Cal. App. 2d 273, 275-276)* . Since the court was unable to find any basis for the conclusion that the evidence was insufficient to support the findings and found that, in fact, there was no evidence at all to support a judgment for defendants, the court reversed the order of the superior court granting a new trial (*115 Cal. App. 2d 273, 277)* .

NOTE:

When mental competence or capacity is at issue, counsel needs to be aware that a determination that a person is of unsound mind or lacks the capacity to contract must be supported by evidence of a deficit in at least one or more specific mental functions and evidence of a correlation between the deficit and thedecision or acts in question [*see Prob. Code § 811(a)*]. The diagnosis of a mental or physical disorder is not sufficient in and of itself to support a determination that a person is of unsound mind [*Prob. Code § 811*; *see Prob. Code § 810(c)* (legislative declaration); *see also Prob. Code § 810(a)* (rebuttable presumption that all persons have the capacity to make decisions and to be responsible for their own acts or decisions)]. For additional discussion, see *§ 118.33[2][b]*.

[b] Establishment of Probate Code Conservatorship

Except as otherwise provided in the order of the court, the appointment of a limited conservator does not limit the conservatee's legal capacity to enter into transactions [*Prob. Code § 1872(b)*].

[c] LPS Conservatee Found Incompetent to Contract

Although the establishment of a Probate Code conservatorship is an adjudication that the conservatee lacks the legal capacity to enter into a contract [*see Civ. Code § 40*; *Prob. Code § 1872*], it appears that the conservatee in an LPS conservatorship proceeding pursuant to *Welf. & Inst. Code § 5000 et seq.* retains the right to enter into contracts unless such right is restricted by the court. As noted by the California Supreme Court in *Board of Regents v. Davis (1975) 14 Cal. 3d 33, 42, 120 Cal. Rptr. 407, 533 P.2d 1047* (dictum), a case decided before the enactment of current *Civ. Code § 40* and Prob. Code § 1872, Welf. & Inst. Code § 5357 would be inappropriate if the conservatee were presumed incapable of contracting, since it provides that the LPS conservatorship report must recommend for or against restricting the proposed conservatee's right to contract. Furthermore, *Civ. Code § 40* does not state that the establishment of a conservatorship under the Welfare and Institutions Code is a judicial determination of the incapacity of the conservatee.

[d] Person Found Incompetent in Sister State

Gibson v. Westoby *(1953) 115 Cal. App. 2d 273, 251 P.2d 1003* , is *discussed under § 118.25[3][a]*.

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
CHAPTER 118 INSANE AND INCOMPETENT PERSONS: CAPACITY TO CONTRACT
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11-118 California Points & Authorities § 118.26

§ 118.26 Supporting Motion for Summary Judgment--By Defendant in Action to Set Aside Conveyance of Property at Trustee's Sale--Supervening Insanity of Debtor Does Not Deprive Trustee of Power to Convey Title to Property in Trustee's Sale Pursuant to Civ. Code § 2924

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION FOR
vs.	)	SUMMARY JUDGMENT
_____ [*name(s)*],	)	Date: _____
Defendant(s).	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

SUMMARY JUDGMENT FOR DEFENDANT IS PROPER BECAUSE PLAINTIFF SEEKS RELIEF FROM A TRUSTEE'S SALE OF HIS/HER PROPERTY ON THE GROUND THAT PLAINTIFF HAS BEEN JUDICIALLY COMMITTED FOR INSANITY BETWEEN THE TIME OF THE EXECUTION OF THE TRUST DEED ON WHICH THE SALE WAS BASED AND THE TIME OF THE TRUSTEE'S SALE, WHICH IS NOT GROUNDS FOR SETTING ASIDE A TRUSTEE'S SALE.

A. Summary Judgment. A defendant may move for summary judgment in any action or proceeding if it is contended

that the action has no merit. The motion must be granted if all of the papers submitted show that there is no triable issue as to any material fact and that the defendant is entitled to a judgment as a matter of law (*Code Civ. Proc. § 437c(a), (c)*).

B. Supervening Insanity. The insanity of a property owner supervening between the time of either the purchase of property subject to a deed of trust or the execution of a deed of trust and the default of the owner on the mortgage payments does not deprive the trustee of the power to convey title to the propertyin a trustee's sale in accordance with *Civil Code Section 2924* and the terms of the deed of trust (*Civ. Code §§ 1216, 2356*; *Strutt v. Ontario Sav. & Loan Assn (1970) 11 Cal. App. 3d 547, 553, 90 Cal. Rptr. 69*).

C. Order of Commitment Not Constructive Notice. Since actions and judgments directly affecting the title to real property do not constitute constructive notice unless recorded in the office of the recorder, an order of commitment for mental incompetency or insanity does not, in the absence of recordation, constitute constructive notice to a purchaser of real property at a trustee's sale who is not dealing with and has never dealt with the person affected by the order who formerly owned the property (*Strutt v. Ontario Sav. & Loan Assn (1970) 11 Cal. App. 3d 547, 555-556, 90 Cal. Rptr. 69*).

D. Summary Judgment for Purchaser. Summary judgment for defendant purchaser of real property at a trustee's sale is proper where plaintiff alleges an adjudication of his/her incompetency after the assumption or execution of the deed of trust pursuant to which the property was sold at the trustee's sale and where the defendant purchaser did not deal with and never dealt with the person allegedly incompetent and the order of commitment was not recorded in the office of the recorder (*Strutt v. Ontario Sav. & Loan Assn (1970) 11 Cal. App. 3d 547, 550, 556, 90 Cal. Rptr. 69*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of defendant's motion for summary judgment when plaintiff brings an action for quiet title and damages against defendant who purchased the property from a trustee on a deed of trust taken from plaintiff before there was any adjudication of plaintiff's incompetency or insanity where defendant was without notice of plaintiff's infirmity.

A summary judgment motion must be supported by a memorandum [*Cal. Rules of Ct., Rule 3.1350(c)(3)*]. The memorandum may not exceed 20 pages [*Cal. Rules of Ct., Rule 3.1113(d)*]. A memorandum is not a substitute for the separate statement required by *Code Civ. Proc. § 437c(b)(1)* [*Blackman v. Burrows (1987) 193 Cal. App. 3d 889, 894-895, 238 Cal. Rptr. 642]* . Representations of fact in the memorandum do not constitute evidence in support of a summary judgment motion and may not be considered by the court [*Vaughn v. Dame Construction Co. (1990) 223 Cal. App. 3d 144, 146-147 fn.2, 272 Cal. Rptr. 261]* . A party moving for summary judgment is not required to repeat in the memorandum specific citations to the record, which are noted in the party's separate statement [*Basich v. Allstate Ins. Co. (2001) 87 Cal. App. 4th 1112, 1118, 105 Cal. Rptr. 2d 153]* .

A party moving for summary judgment is not entitled to rely on its own pleadings, even if verified, to support the motion [*Code Civ. Proc. § 437c(o)*], but instead must support the motion with affidavits, declarations, discovery

responses, or matters of which judicial notice must or may be taken [*Code Civ. Proc. § 437c(b)(1)*].

The notice of motion for summary judgment and supporting papers must be served on all other parties at least 75 days before the hearing [*Code Civ. Proc. § 437c(a)*].

[3] Discussion of Authorities

[a] Supervening Insanity

In ***Strutt v. Ontario Sav. & Loan Assn*** *(1970) 11 Cal. App. 3d 547, 90 Cal. Rptr. 69* , plaintiff sought to quiet title to real property and damages against defendants Ontario Savings and Loan, Ontario Title, and an individual who had purchased the property at the trustee's sale. Plaintiff had purchased the apartment property and assumed an existing promissory note and deed of trust in favor of Ontario Savings and Ontario Title as trustee. Plaintiff defaulted in making payments due on the promissory note and deed of trust. In keeping with *Civ. Code § 2924* and the terms of the deed of trust, a notice of default was recorded and notice of sale was posted and published. The property was then sold by the trustee to Ontario Savings. By grant deed, Ontario Savings sold the property to the individual defendant through a real estate broker. Neither the broker nor the individual defendant had any legal relationship to Ontario Savings or to Ontario Title, nor did they have any knowledge of plaintiff. The complaint alleged that before defaulting on payments plaintiff became legally insane and that he was afterwards arrested and incarcerated. The trial court took judicial notice of plaintiff's arrest for felony bad check charges and that proceedings were then instituted under *Penal Code § 1368*, by which plaintiff was committed to a state hospital as unable to assist counsel in his defense. Plaintiff alleged that the Savings and Loan and Title Company defendants had constructive and actual knowledge of plaintiff's alleged legal disabilities but nevertheless collected rentals on the property and refused to apply those rentals to the payment of the promissory note and deed of trust and proceeded with the foreclosure and sale. Plaintiff contended that because both Ontario Savings and Ontario Title had constructive and actual knowledge of plaintiff's alleged legal disabilities, the trustee's sale was invalid, and that thesubsequent sale to the individual defendant conveyed no title. Plaintiff further contended that the individual defendant was chargeable with constructive notice of plaintiff's adjudication of insanity. Defendant contended that he was a bona fide purchaser for value and had obtained valid title to the property, that the adjudication under *Penal Code § 1368* of incompetency to stand trial was not an adjudication of incompetency, and that he was not chargeable with notice of it in any case. The trial court granted a motion for summary judgment by the individual defendant.

In affirming the trial court's judgment, the court of appeal found it unnecessary to determine the rights and liabilities of plaintiff against the Ontario Savings and Ontario Title defendants or to determine the effect of the *Penal Code § 1368* determination. The court found that the individual defendant was not chargeable with notice of plaintiff's alleged legal disability, that he was a bona fide purchaser without notice of any fraud, and that the sale was, therefore, not avoidable by plaintiff. The court found that plaintiff's alleged supervening insanity would not deprive the trustee of the power to convey title to the property in a trustee's sale in accordance with *Civ. Code § 2924* and the terms of the deed of trust [*see Civ. Code §§ 1216, 2356*]. The court further found that *Civ. Code § 40*, providing that, after incapacity has been judicially determined, a person of unsound mind can make no conveyance or other contract, nor delegate any power or waive any right, until restoration to capacity, was inapplicable, since, even if the commitment pursuant to *Penal Code § 1368* constitutes an adjudication of incapacity within the meaning of *Civ. Code § 40*, plaintiff in this case made no conveyance or other contract nor delegated any power nor waived any right after the order of commitment. The deed of trust, the court stated, existed before plaintiff purchased the property. Even if the Ontario Savings and Ontario Title defendants were guilty of some fraud or imposition on plaintiff, the subsequent sale to the individual defendant was valid. The court further found that even if *Penal Code § 1368* determinations were adjudications of insanity, a purchaser could not be charged with constructive notice of such a proceeding, since no notice of such a proceeding was recorded in the office of the county recorder, and since the defendant had never dealt with the plaintiff. Thus, the judgment of the trial court rendering a summary judgment for the individual defendant was affirmed.

[b] Order of Commitment Not Constructive Notice

Strutt v. Ontario Sav. & Loan Assn (1970) 11 Cal. App. 3d 547, 90 Cal. Rptr. 69 , is *discussed under § 118.26[3][a]*.

[c] Summary Judgment for Purchaser

Strutt v. Ontario Sav. & Loan Assn (1970) 11 Cal. App. 3d 547, 90 Cal. Rptr. 69 , is *discussed under § 118.26[3][a]*.

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11-118 California Points & Authorities § 118.27

§ 118.27 Opposing Demurrer to Complaint--For Cancellation of Deed Obtained From Incompetent Person [Civ. Code § 38]--Deed Void If Plaintiff Totally Without Understanding

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*]	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*(*s*)],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Defendant(s).	)	IES IN OPPOSITION TO DEMURRER TO COM-
	)	PLAINT
	)	

_____

A COMPLAINT STATES A CAUSE OF ACTION FOR CANCELLATION OF A VOID DEED WHEN' THE COMPLAINT ALLEGES FACTS SHOWING THAT DEFENDANT HAD PURCHASED THE PROPERTY FROM A GRANTOR WHO PROCURED HIS/HER DEED FROM THE PLAINTIFF AT A TIME WHEN THE PLAINTIFF WAS TOTALLY WITHOUT UNDERSTANDING.

Cause of Action Stated for Cancellation of Deed. Where plaintiff alleged that one defendant had procured from her without consideration a deed for property at a time when plaintiff was totally without understanding and by fraud so that plaintiff did not know that he/she was executing a deed and had then conveyed the property by deed for consideration to another defendant, plaintiff has stated a cause of action against the defendant who finally bought the property, because the initial deed was void and passed no title to the defendant even if the defendant was a bona fide purchaser (*Erickson v. Bohne (1955) 130 Cal. App. 2d 553, 557, 279 P.2d 619*).

Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a demurrer toa complaint for cancellation of a deed and reconveyance of property when the action is brought against a bona fide purchaser of the property which was purchased from a person who obtained the property by a void conveyance from plaintiff who was without the capacity to convey.

When appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Cause of Action Stated for Cancellation of Deed

In ***Erickson v. Bohne*** *(1955) 130 Cal. App. 2d 553, 279 P.2d 619* , plaintiff filed a complaint against defendants who had procured from her a deed to property while she was incompetent and totally without understanding of the transaction and by fraud. She also complained against a third person defendant who had purchased the property from the other defendants after the deed had been recorded. She sought money damages for the purchase price from the first defendants and cancellation of the deed against the other defendant. Defendants demurred to the complaint and filed a motion for change of venue on the ground that no cause of action had been stated against the third person defendant and that there was, therefore, no proper venue in the county where the action had been filed since the defendant third party was the basis for venue in that county. The trial court overruled the demurrer and denied the motion for change of venue, and defendants appealed. The court of appeal found that plaintiff had stated a cause of action against the third person defendant. Since the deed was allegedly completely void under *Civ. Code § 38*, providing that the contract of a person completely without understanding is void, the court found that the deed could pass no interest at all to the third person, even if she were a bona fide purchaser. A good cause of action for cancellation of the deed had therefore been stated against her, and the court affirmed the orders of the trial court.

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11-118 California Points & Authorities § 118.28

§ 118.28 Opposing Demurrer to Complaint for Rescission of Contract [Civ. Code § 1689(b)] Based on Undue Influence [Civ. Code § 1575(2)]--Weakness of Mind of Plaintiff

[1] FORM

[*Caption. See § 118.27[1].*]

WHEN RESCISSION PURSUANT TO SECTION 1689(b) OF THE CIVIL CODE IS SOUGHT ON THE GROUND THAT PLAINTIFF'S CONSENT TO THE CONTRACT WAS OBTAINED THROUGH UNDUE INFLUENCE, PLAINTIFF ALLEGES SUFFICIENT FACTS TO SHOW MENTAL WEAKNESS BY ALLEGING FACTS WHICH SHOW THAT PLAINTIFF HAD A LESSENED CAPACITY TO MAKE A FREE CONTRACT.

A. Undue Influence on Person of Weak Mind. Undue influence consists of taking an unfair advantage of another's weakness of mind (*Civ. Code § 1575(2)*).

B. Rescission for Undue Influence. A party to a contract may rescind the contract if the consent of the party rescinding was obtained through undue influence, exercised by or with the connivance of the party as to whom he/she rescinds or of any other party to the contract interested with the party (*Civ. Code § 1689(b)(1)*).

C. Undue Influence. Undue influence means persuasion which tends to be coercive in nature, which overcomes the will without convincing the judgment, and which works on a mental, moral, or emotional weakness to such an extent that it approaches the boundaries of coercion (*Odorizzi v. Bloomfield School Dist. (1966) 246 Cal. App. 2d 123, 130, 54 Cal. Rptr. 533*).

D. Undue Susceptibility. The undue susceptibility of the plaintiff which is one of the elements of undue influence in the formation of a contract may consist of total weakness of mind which leaves the person entirely without understanding or of a lesser weakness which destroys the capacity of a person to make a contract even though he or she is not totally incapacitated, or of a still lesser weakness which provides sufficient grounds to rescind the contract for undue influence. This lesser weakness need not be long-lasting or wholly incapacitating, but may be merely a lack of full vigor due to age, physical condition, emotional anguish, or a combination of factors (*Odorizzi v. Bloomfield School Dist. (1966) 246 Cal. App. 2d 123, 131, 54 Cal. Rptr. 533*).

[*Optional*] **E. Taking Advantage of Weakness of Mind as Undue Influence.** In the absence of an allegation that plaintiff was actually of unsound mind or incompetent, an allegation that plaintiff was suffering from weakness of mind which made plaintiff unfit to transact business coupled with an allegation of lack of consideration for the transaction or grossly inadequate consideration so that itwill be inferred that the defendant took unfair advantage of plaintiff's weakness of mind states a cause of action against defendant to avoid the transaction (*Moore v. Moore et al. (1880) 56 Cal. 89, 94)* .

[*Optional*] **F. Weakness of Mind and Inadequacy of Consideration or Undue Influence.** When there is weakness of mind arising from old age, sickness, intemperance, or other cause, coupled with plain inadequacy of consideration, or where there is weakness of mind and circumstances of undue influence and advantage, a contract may be set aside (*Hays v. Gloster (1891) 88 Cal. 560, 566, 26 P. 367*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a demurrer to a complaint for rescission of a contract where defendant contends that plaintiff has inadequately shown grounds for rescission for undue influence because plaintiff has shown inadequate mental susceptibility.

When appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Undue Influence

In ***Odorizzi v. Bloomfield School Dist.*** *(1966) 246 Cal. App. 2d 123, 54 Cal. Rptr. 533* , plaintiff had been employed as a teacher by the school district and was under a contract with the defendant district to continue as a teacher the following year as a permanent employee. Plaintiff had been arrested on criminal charges, and, during his release on bail and before he had a chance to consult a lawyer, defendant's employees persuaded him to sign a resignation. The criminal charges were dismissed, but plaintiff was denied reemployment by defendant. Plaintiff then filed suit for declaratory and other relief and sought to rescind his resignation on the ground that his consent had been obtained through duress, menace, fraud, undue influence, or mistake. Plaintiff's complaint alleged that his consent to the resignation was given at a time when he lacked capacity to make a valid contract because he was under severe mental and emotional strain, having just completed the process of arrest, questioning by the police, booking, and release on bail, and having gone for 40 hours without sleep. The complaint also alleged that, while plaintiff was in this condition, defendant's employees came to his apartment and persuaded him that he should resign immediately to avoid public exposure and that there was no time to consult an attorney before signing the resignation letter, and that because of his faith and confidence in defendant's employees' representations they were able to substitute their will and judgment in place of his own and thus to obtain his signature to the resignation. Defendant demurred to the complaint, and the trial court sustained the demurrer to the amended complaint without further leave to amend. Although the court of appeal found that the facts in the amended complaint were insufficient to state a cause of action for duress, menace, fraud, or

mistake, the court found that they did set out sufficient elements to justify rescission of consent on the ground of undue influence. The hallmark of undue influence, the court found, is high pressure persuasion which works on mental, moral, or emotional weakness to such an extent that it approaches the boundaries of coercion. Undue susceptibility may consist of total weakness of mind which leaves the person entirely without understanding or of a lesser weakness which destroys the capacity of the person to make a contract even though he is not totally incapacitated. It may also consist of a still lesser weakness which provides sufficient grounds to rescind a contract for undue influence. This latter weakness, the court found, need not be long-lasting or wholly incapacitating, but may be merely a lack of full vigor due to age, physical condition, emotional anguish, or a combination of such factors. The court found that plaintiff had pleaded such weakness at the time he signed the resignation and thus had pleaded sufficient allegations to state a case for rescission. The court of appeal, therefore, reversed the judgment of the trial court.

[b] Undue Susceptibility

Odorizzi v. Bloomfield School Dist. *(1966) 246 Cal. App. 2d 123, 54 Cal. Rptr. 533* , is *discussed under § 118.28[3][a]*.

[c] Taking Advantage of Weakness of Mind as Undue Influence

In ***Moore v. Moore et al.*** *(1880) 56 Cal. 89* , plaintiff sought to avoid a conveyance of all of her property which she had made to defendants on the second day after the burial of her husband. The complaint alleged that plaintiff was unfit in her body and mind due to shock from the death of her husband to transact business but that the brothers and two brothers-in-law of her deceased husband, accompanied by an attorney and a notary, approached her two days after her husband's burial and requested her to sign instruments conveying all of her property. She did so but then sought to avoid the instruments by this complaint. The complaint also alleged that there was no consideration for the transfer, that it was made without negotiation or explanation, that the time chosen by defendants for the transfer was inappropriate and that plaintiff was suffering from the illeffects of her husband's death. Defendant's demurrer to the complaint on the ground that it did not state a cause of action was sustained. On appeal by plaintiff, the Supreme Court held that the complaint did state a cause of action. The Court stated that it is not necessary to show that the plaintiff was insane or in such a state of mental incapacity as to render her entirely incapable of executing a valid contract or deed. It was sufficient to show that, from her sickness or infirmity, she had been at the time in a condition of great mental weakness and that there had been gross inadequacy of consideration. From those circumstances, imposition or undue influence could be inferred so that plaintiff could obtain relief in equity from the contract or conveyance. Therefore, the Court reversed the judgment of the trial court.

[d] Weakness of Mind and Inadequacy of Consideration or Undue Influence

In ***Hays v. Gloster*** *(1891) 88 Cal. 560, 26 P. 367* , plaintiff brought an action to have a trust declared on property and for an accounting and reconveyance and related relief. The complaint alleged that plaintiff was owner of the property but was in poor health and feeble mentally and physically, that his mind was so far deranged that he was entirely incompetent to transact any business, and that defendant knew of this weakness. The complaint further alleged that defendant falsely represented that he was plaintiff's friend and would pay plaintiff's debts if plaintiff would turn over to defendant his property and that, in reliance on that promise and representation, plaintiff conveyed the property to defendant. Defendant was then alleged to have failed to perform the promises and to have reconveyed the property. Although defendant did not demur to the complaint, the trial judge refused all of plaintiff's offered evidence, discharged the jury, and found for defendant. In reversing the judgment on appeal and remanding the case for a new trial, the Court considered the complaint as if a demurrer had been made by defendant, since the trial judge had refused plaintiff's evidence on grounds which were tantamount to holding that the complaint failed to state a cause of action. The Supreme Court then found that the alleged mental weakness of plaintiff, coupled with inadequacy of consideration or coupled with undue influence and advantage, showed a case for setting aside the conveyance.

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11-118 California Points & Authorities § 118.29

§ 118.29 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] Based on Rescission of Contract or Conveyance--Civ. Code § 39 Authorizes Rescission

[1] FORM

[*Caption. See § 118.27[1].*]

PLAINTIFF HAS STATED A CAUSE OF ACTION FOR RELIEF BASED ON RESCISSION BECAUSE HE/SHE WAS A PERSON OF UNSOUND MIND WHO WAS NOT ENTIRELY WITHOUT UNDERSTANDING BUT WAS ENTITLED TO RESCIND THE CONTRACT PURSUANT TO *CIVIL CODE SECTION 39*.

A. Relief by Rescission. A conveyance or other contract of a person of unsound mind, but not entirely without understanding, made before his or her incapacity has been judicially determined, is subject to rescission as provided in *Civil Code Section 1688 et seq.*, governing rescission (*Civ. Code § 39(a)*).

B. Person Not Entirely Without Understanding but of Unsound Mind. When the complaint alleges that the plaintiff was a person of unsound mind, although not entirely without understanding, and that plaintiff has met the other requirements for rescission, the complaint states a cause of action for relief based on rescission (*Wilson v. Moriarty (1888) 77 Cal. 596, 600, 20 P. 134*).

C. Person Substantially Unable to Manage Own Financial Resources, or to Resist Fraud or Undue Influence. For purposes of *Civil Code Section 39*, there is a rebuttable presumption that a person is of unsound mind if the person is substantially unable to manage his or her own financial resources or resist fraud or undue influence (*Civ. Code § 39(b)*).

D. Partial Incapacity Sufficient for Rescission. To make use of the relief based on rescission provided for by *Civil Code Section 39*, it is not necessary for a person to be incompetent to make any kind of a contract or to transact any business. Rather, the test is whether the party was mentally competent to deal with the subject before him or her at the time with a full understanding of his or her rights or whether the person could understand the nature, purpose, and effect of the contract (*Pomeroy v. Collins (1926) 198 Cal. 46, 69, 243 P. 657*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a demurrer to a complaint for relief based on the rescission of a contract made by a person of unsound mind on the ground that *Civ. Code § 39* entitles the plaintiff to relief by rescission.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Person Not Entirely Without Understanding but of Unsound Mind

In ***Wilson v. Moriarty*** *(1888) 77 Cal. 596, 20 P. 134* , plaintiff sought to have a lease rescinded. Defendant demurred to the complaint on the ground that it did not state a cause of action. The complaint alleged that plaintiff was an illiterate and ignorant woman of weak understanding and unable to fix her attention on or to understand the effect of legal documents who had been deceived by defendant, a person of greater than average business ability, into leasing to defendant her property for a rental far below the rental value of the property for a long period of time. Defendant, the complaint further alleged, had acted on plaintiff through her husband, who was a person ignorant of business and had a relationship of friendship with defendant. Plaintiff had found out from friends how she had been deceived and had notified the defendant that she was rescinding the contract at once. The trial court sustained the demurrer, but the Supreme Court reversed, finding that the complaint was not subject to demurrer for uncertainty and stated a cause of action for rescission of the contract, since it alleged the lease which gave plaintiff a rental far below value, that the plaintiff, although not totally incapacitated, was of great mental weakness, and that the lease was executed under the influence of defendant acting with fraudulent intent (*77 Cal. 596, 600)* . The case was remanded for further proceedings.

[b] Person Substantially Unable to Manage Own Financial Resources, or to Resist Fraud or Undue Influence

For purposes of the rebuttable presumption created by by *Civ. Code § 39(b)* [*see* Paragraph C of form], "substantial inability" may not be proved solely by isolated instances of negligence or improvidence [*Civ. Code § 39(b)*]. Moreover, a determination that a person is of unsound mind or lacks the capacity to contract must be supported by evidence of a deficit in at least one or more specific mental functions and evidence of a correlation between the deficit and the decision or acts in question [*see Prob. Code § 811(a)*]. The diagnosis of a mental or physical disorder is not sufficient in and of itself to support a determination that a person is of unsound mind [*Prob. Code § 811(d)*; *see Prob. Code § 810(c)* (legislative declaration); *see also Prob. Code § 810(a)* (rebuttable presumption that all persons have the capacity to make decisions and to be responsible for their own acts or decisions)]. For additional discussion, see *§ 118.33[2][b]*.

[c] Partial Incapacity Sufficient for Rescission

In ***Pomeroy v. Collins*** *(1926) 198 Cal. 46, 243 P. 657* , the executor of a person who had executed trust instruments brought an action to compel the cancellation and annulment of those instruments on the ground that the person who had

executed them was, at the time he did so, mentally incompetent and of unsound mind. The trial court annulled the instruments, and defendant appealed. The Supreme Court found that the judgment was supported by the evidence. The Court also found that to make use of the remedy of rescission provided by *Civ. Code § 39*, which provides that a conveyance or other contract of a person of unsound mind but not entirely without understanding made before incapacity has been judicially determined is subject to rescission, it is not necessary for the person to be incompetent to make any kind of a contract or to transact any kind of business, however simple. Rather, the test is whether the person was mentally competent to deal with the subject before him or her with a full understanding of his or her rights. The test may also be stated as whether the person understood the nature, purpose, and effect of the contract (*198 Cal. 46, 69)* . The Court found that there was sufficient evidence to support the trial court's conclusion that the maker of the instruments lacked capacity to do so. The Court therefore upheld the judgment of the trial court cancelling the instruments.

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
CHAPTER 118 INSANE AND INCOMPETENT PERSONS: CAPACITY TO CONTRACT
PART II. FORMS

11-118 California Points & Authorities § 118.30

§ 118.30 Opposing Motion for Summary Judgment--In Action to Void Contract--Plaintiff Estopped to Assert That Contract Is Void

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____ _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN OPPOSITION TO MOTION
Plaintiff,	)	FOR SUMMARY JUDGMENT
vs.	)	Date: _____
_____ [*name(s)*],	)	Time: _____
Defendant(s).	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE PLAINTIFF IS ESTOPPED FROM RELYING ON PLAINTIFF'S INCAPACITY AS GROUNDS FOR AVOIDING THE CONTRACT UNDER *CIVIL CODE SECTION 38*.

Estoppel to Assert That Contract Is Void. The doctrine of estoppel, which is properly pleaded as a special defense, is applicable to prevent the contract which was made by a person who was entirely without understanding from being declared void and therefore unenforceable under *Civil Code Section 38*. The doctrine will be applied when the person formerly without understanding has acted, after the disability has ended, towards the other party to the contract in such a way as to make the doctrine of estoppel applicable to prevent an injustice to the other party (*Dool v. First Nat'l Bank*

of Calexico (1930) 209 Cal. 717, 724-725, 290 P. 15).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion for summary judgment on an action to have declared void a contract entered into between plaintiff and defendant when the defendant asserts that plaintiff is estopped to assert its voidness due to acts on his or her part after the incapacity to contract due to incompetency has ended.

Opposition to a summary judgment motion must be supported by a memorandum [*Cal. Rules of Ct., Rule 3.1350(e)*]. The memorandum may not exceed 20 pages [*Cal. Rules of Ct., Rule 3.1113(d)*]. A memorandum is not a substitute for the separate statement required by *Code Civ. Proc. § 437c(b)(3)* [*Blackman v. Burrows (1987) 193 Cal. App. 3d 889, 894-895, 238 Cal. Rptr. 642]* . Representations of fact in the memorandum do not constitute evidence in opposition to a summary judgment motion and may not be considered by the court [*Vaughn v. Dame Construction Co. (1990) 223 Cal. App. 3d 144, 146-147 fn.2, 272 Cal. Rptr. 261]* .

[3] Discussion of Authorities

[a] Estoppel to Assert That Contract Is Void

In ***Dool v. First Nat'l Bank of Calexico*** *(1930) 209 Cal. 717, 290 P. 15* , plaintiffs were the executors of the estate of a deceased person. They began an action to have declared void a set of promissory notes and a deed of trust to secure them which had been executed by deceased, on the ground that at the time of their execution the deceased had been of unsound mind and entirely without understanding. Defendants appealed from a judgment in favor of plaintiffs concerning the notes in question. The Supreme Court found that the deceased had affirmed the notes and deeds after he had regained competency and was therefore estopped to assert that the notes and deed were void. Plaintiffs had contended that the doctrine of estoppel was not applicable, since the contracts in question were absolutely void and not merely voidable or rescindable, but the Court rejected that contention and found that, whereas the doctrine of ratification is not applicable to such contracts, the doctrine of estoppel may be invoked. In this case, the Court found, deceased and the plaintiffs had induced defendant to believe that the contracts would be honored and were, therefore, estopped to deny their validity (*209 Cal. 717, 724-725)* . The Court reversed the judgment of the trial court.

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
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PART II. FORMS

11-118 California Points & Authorities § 118.31

§ 118.31 Opposing Motion for Summary Judgment--In Action to Have Contract Declared Void Pursuant to Civ. Code § 40--Insanity Commitment Proceedings Are Not Judicial Determination of Incapacity

[1] FORM

[*Caption. See § 118.30[1].*]

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE COMMITMENT PROCEEDINGS FOR INSANITY ARE NOT A JUDICIAL DETERMINATION OF INCAPACITY TO CONTRACT WITHIN THE MEANING OF *CIVIL CODE SECTION 40*.

Insanity Commitment Proceedings Insufficient to Show Judicial Determination of Incapacity. Commitment proceedings for insanity are summary proceedings instituted for a particular purpose, and do not constitute a judicial determination of incapacity within the meaning of *Civil Code Section 40* (*Carroll v. Carroll (1940) 16 Cal. 2d 761, 766, 108 P.2d 420 , cert. denied, 314 U.S. 611, 62 S. Ct. 74, 86 L. Ed. 491* (decided under former Political Code provisions; *now see Welf. & Inst. Code § 5000 et seq.*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion for summary judgment brought by a plaintiff who is seeking to cancel a contract on the ground that the contract is void under *Civ. Code § 40* because there has been a judicial determination of incapacity, when the basis for the claim of incapacity is based on the fact that plaintiff has

been committed for insanity. The grounds for opposition to the motion are than commitment proceedings do not constitute a judicial determination of incapacity for purposes of *Civ. Code § 40*.

Opposition to a summary judgment motion must be supported by a memorandum [*Cal. Rules of Ct., Rule 3.1350(e)*]. The memorandum may not exceed 20 pages [*Cal. Rules of Ct., Rule 3.1113(d)*]. A memorandum is not a substitute for the separate statement required by *Code Civ. Proc. § 437c(b)(3)* [*Blackman v. Burrows (1987) 193 Cal. App. 3d 889, 894-895, 238 Cal. Rptr. 642]* . Representations of fact in the memorandum do not constitute evidence in opposition to a summary judgment motion and may not be considered by the court [*Vaughn v. Dame Construction Co. (1990) 223 Cal. App. 3d 144, 146-147 fn.2, 272 Cal. Rptr. 261]* .

[3] Discussion of Authorities

[a] Insanity Commitment Proceedings Insufficient to Show Judicial Determination of Incapacity

In ***Carroll v. Carroll*** *(1940) 16 Cal. 2d 761, 108 P.2d 420 , cert. denied, 314 U.S. 611, 62 S. Ct. 74, 86 L. Ed. 491* , plaintiff brought an action against her husband and other defendants for various forms of relief. As to the husband, the complaint sought cancellation of a deed, a declaration of trust as to all property described in the complaint, an accounting, a decree quieting title, and a money judgment. As to the other defendants, it sought an injunction restraining the foreclosure of a deed of trust and a decree cancelling the deed of trust which had been executed by plaintiff. A trial of the action resulted in a judgment for plaintiff and against her husband quieting her title to the several parcels of property described in the complaint and awarding her a money judgment. No appeal was taken from those portions of the judgment. The judgment also provided that plaintiff take nothing against the other defendants and that one parcel of the property was subject to the deed of trust which was given to secure a note. During the action, the deed of trust was foreclosed and the property sold. Plaintiff appealed from that portion of the judgment which held that the deed of trust was valid. Plaintiff's claim of invalidity was based on certain proceedings relating to her competency at the time of the signing of the deed of trust. Plaintiff had been at one time committed to a mental hospital pursuant to the former Political Code. An incompetency proceeding had also been commenced against her, and she had been found incompetent and a guardian had been appointed for her under former Code Civ. Proc. §§ 1763-1767 [*now see Prob. Code § 1801 et seq.*]. The day before the signing of the deed of trust, however, plaintiff had been restored to mental competency by the probate court. Some time after the signing of the deed of trust, the court dismissed the proceedings against her pursuant to the former Political Code [*now see Welf. & Inst. Code § 5000 et seq.*]. On appeal, plaintiff contended that the insanity proceeding pursuant to the former Political Code [*now see Welf. & Inst. Code § 5000 et seq.*] was a judicial determination of her incapacity to contract under *Civ. Code § 40*, providing that once incapacity has been judicially determined, the incompetent person can make no contract or conveyance. The Supreme Court found that it is settled law that proceedings for commitment pursuant to the former Political Code [*now see Welf. & Inst. Code § 5000 et seq.*] are not determinations of incapacity for purposes of *Civ. Code § 40* (*16 Cal. 2d 761, 766)* . The Court further found that the allegation ofcommitment proceedings is insufficient even to bring into play *Civ. Code § 39*, providing that the conveyance or contract of a person of unsound mind, but not entirely without understanding, made before incapacity has been judicially determined, is subject to rescission, in the absence of allegation or proof that the plaintiff had in fact been of unsound mind at the time of the execution of the deed of trust in question (*16 Cal. 2d 761, 766-767)* .

NOTE:

A determination that a person is of unsound mind or lacks the capacity to contract must be supported by evidence of a deficit in at least one or more specific mental functions and evidence of a correlation between the deficit and the decision or acts in question [*see Prob. Code § 811(a)*]. The diagnosis of a mental or physical disorder is not sufficient in and of itself to support a determination that a person is of unsound mind [*Prob. Code § 811(d)*; *see Prob. Code § 810(c)* (legislative declaration); *see also Prob. Code § 810(a)* (rebuttable presumption that all persons have the capacity to make decisions and to be responsible for their own acts or decisions)]. For additional discussion, see *§ 118.33[2][b]*.

[4] Additional Authorities

[a] Insanity Commitment Proceedings Insufficient to Show Judicial Determination of Incapacity

Hitch v. Superior Court (1934) 2 Cal. App. 2d 406, 38 P.2d 190 , was a proceeding in mandate to compel the respondent superior court to set a divorce case for trial. The wife had filed an action for divorce on the ground of extreme cruelty. Defendant in that action had filed an answer and added a cross complaint also seeking divorce. No default or other judgment was entered. After the filing of that action, the wife was committed by respondent court to a state hospital for the insane. She was later released in the custody of her husband, although no discharge was ever filed. Later the wife filed another action for divorce, which was tried in respondent court. The wife was denied relief. In the meantime, petitioner for the writ of mandate, the brother of the wife, was appointed guardian ad litem of the wife by reason of the previous insanity proceedings. He sought the writ of mandate to compel the court to set the original divorce action for trial contending, in part, that the wife's commitment to the state hospital rendered her incompetent to commence and carry on litigation in courts. Respondent court demurred. In denying the writ, the court of appeal stated in response to petitioner's contention, that it had been clearly decided that it is of no material consequence that the wife had been committed to a state hospital and that such a commitment is not a judicial determination of insanity so as to make a person incompetent to make contracts within the meaning of *Civ. Code § 40*. The court therefore found that she had not been incompetent to commence litigation in the courts (*2 Cal. App. 2d 406, 410)* .

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
CHAPTER 118 INSANE AND INCOMPETENT PERSONS: CAPACITY TO CONTRACT
PART II. FORMS

11-118 California Points & Authorities § 118.32

§ 118.32 Opposing Motion for Summary Judgment--In Action to Rescind Contract Pursuant to Civ. Code § 39--Insanity Commitment Proceedings Are Not Judicial Determination of Incapacity or of Unsoundness of Mind

[1] FORM

[*Caption. See § 118.30[1].*]

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE COMMITMENT PROCEEDINGS FOR INSANITY ARE NOT A JUDICIAL DETERMINATION OF INSANITY OR OF UNSOUNDNESS OF MIND AT THE TIME OF EXECUTION OF THE INSTRUMENT OR CONTRACT SUFFICIENT TO SHOW THAT THE PERSON IS ENTITLED TO RESCIND THE CONTRACT ON THAT BASIS.

Insanity Commitment Proceedings Insufficient to Show Unsound Mind. The special proceedings for the purpose of commitment of a person for mental illness or insanity are not a judicial determination of incapacity or unsoundness of mind for purposes of *Civil Code Section 39*, in the absence of allegation or proof that the person committed was in fact of unsound mind at the time of execution of the instruments that are the subject of the action (*Carroll v. Carroll (1940) 16 Cal. 2d 761, 766-767, 108 P.2d 420 , cert. denied, 314 U.S. 611* (decided under former Political Code provisions; *see Welf. & Inst. Code § 5000 et seq.*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion for summary judgment made by the plaintiff in

an action for relief based on rescission of a contract pursuant to *Civ. Code § 39*, when the plaintiff asserts as a basis for the rescission that he or she has been committed pursuant to civil commitment proceedings for insanity.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Insanity Commitment Proceedings Insufficient to Show Unsound Mind

Carroll v. Carroll *(1940) 16 Cal. 2d 761, 108 P.2d 420 , cert. denied, 314 U.S. 611* , is discussed in *§ 118.31[3][a]*.

NOTE:

A determination that a person is of unsound mind or lacks the capacity to contract must be supported by evidence of a deficit in at least one or more specific mental functions and evidence of a correlation between the deficit and the decision or acts in question [***see*** *Prob. Code § 811(a)*]. The diagnosis of a mental or physical disorder is not sufficient in and of itself to support a determination that a person is of unsound mind [*Prob. Code § 811(d)*; *see Prob. Code § 810(c)* (legislative declaration); *see also Prob. Code § 810(a)* (rebuttable presumption that all persons have the capacity to make decisions and to be responsible for their own acts or decisions)]. For additional discussion, see *§ 118.33[2][b]*.

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
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11-118 California Points & Authorities § 118.33

§ 118.33 Opposing Motion for Summary Judgment--In Action to Rescind Contract Pursuant to Civ. Code § 39--Diagnosis of Mental or Physical Disorder Is Insufficient to Support Determination of Unsound Mind or Lack of Capacity--Evidence of Deficit in One or More Specific Mental Functions Required [Prob. Code § 811]

[1] FORM

[*Caption. See § 118.30[1].*]

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE THE FACT THAT PLAINTIFF HAS BEEN DIAGNOSED AS HAVING A PARTICULAR MENTAL OR PHYSICAL CONDITION, EVEN IF TRUE, IS INSUFFICIENT TO PROVE THAT PLAINTIFF IS OF UNSOUND MIND OR LACKS THE CAPACITY TO CONTRACT.

A. Diagnosis of Mental or Physical Disorder Does Not Prove Unsound Mind. The mere diagnosis of a mental or physical disorder is not sufficient in and of itself to support a determination that a person is of unsound mind of lacks the capacity to do a certain act (*Prob. Code § 811(d)*).

B. Evidence of Deficit in One or More Specified Mental Functions Required to Show Unsound Mind or Lack of Capacity. A determination that a person is of unsound mind or lacks the capacity to make a decision or do a certain act, including the capacity to contract, must be supported by evidence of a deficit in at least one of the mental functions specified in *Probate Code Section 811(a)* and evidence of a correlation between the deficit and the decision or acts in question. Such a deficit may be considered only if the deficit, by itself or in combination with one or more other mental function deficits, significantly impairs the person's ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question (*Prob. Code § 811(a), (b)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion for summary judgment made by the plaintiff in an action for relief based on rescission of a contract under *Civ. Code § 39*, when the plaintiff asserts as the basis for rescission that he or she had been diagnosed with a mental or physical disorder, but fails to allege or offer evidence that he or she suffered from a deficit in one or more of the specific mental functions listed in *Prob. Code § 811* that significantly impaired his or her ability to understand and appreciate his or her actions with regard to the type of act or decision question, and evidence of a correlation between the deficit and the decision or acts in question.

These points and authorities may also be used in other situations in which an individual's capacity to contract is at issue and a question exists as to whether the allegations or evidence are sufficient to support a finding of incapacity. The party using these points and authorities should add argument showing that no allegations or evidence of a specified mental deficit sufficient to support a finding of incapacity were presented.

[b] Evidence of Deficit in Mental Functions

The diagnosis of a mental or physical disorder will not be sufficient in and of itself to support a determination that a person is of unsound mind or lacks the capacity to contract [*Prob. Code § 811(d)*; *see also Prob. Code § 810(c)* (legislative declaration); *see also Prob. Code § 810(a)* (rebuttable presumption for purposes of *Prob. Code § 810 et seq.* that all persons have the capacity to make decisions and to be responsible for their own acts or decisions)]. *Prob. Code § 811* provides that a determination that a person is of unsound mind or lacks the capacity to make a decision or do a certain act, including the incapacity to contract, must be supported by evidence of a deficit in at least one of the following mental functions, and evidence of a correlation between the deficit and the decision or acts in question [*Prob. Code § 811(a)*]:

(1) Alertness and attention, including, but not limited to:

(a) Level of arousal or consciousness.

(b) Orientation to time, place, person, and situation.

(c) Ability to attend and concentrate.

(2) Information processing, including, but not limited to:

(a) Short- and long-term memory, including immediate recall.

(b) Ability to understand or communicate with others, either verbally or otherwise.

(c) Recognition of familiar objects and familiar persons.

(d) Ability to understand and appreciate quantities.

(e) Ability to reason using abstract concepts.

(f) Ability to plan, organize, and carry out actions in one's own rational self-interest.

(g) Ability to reason logically.

(3) Thought processes. Deficits in these functions may be demonstrated by the presence of:

(a) Severely disorganized thinking.

(b) Hallucinations.

(c) Delusions.

(d) Uncontrollable, repetitive, or intrusive thoughts.

(4) Ability to modulate mood and affect. Deficits in this ability may be demonstrated by the presence of a pervasive and persistent or recurrent state of euphoria, anger, anxiety, fear, panic, depression, hopelessness or despair, helplessness, apathy, or indifference, which is inappropriate in degree to the individual's circumstances.

A deficit in the mental functions listed above may be considered only if the deficit, by itself or in combination with one or more other mental function deficits, significantly impairs the person's ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question [*Prob. Code § 811(b)*]. In determining whether a person suffers from a deficit in mental function so substantial that the person lacks the capacity to do a certain act, the court may take into consideration the frequency, severity and duration of periods of impairment [*Prob. Code § 811(c)*].

Prob. Code § 811 does not alter the statutory definition of the circumstances under which a person is deemed to lack the capacity to contract under *Civ. Code § 39*. However, it does prescribe a minimum level of evidence that must be presented to support a determination that person is of unsound mind.

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Volume 11 Chapters 110-119 HABEAS CORPUS---to---INSANE PERSONS
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PART II. FORMS

11-118 California Points & Authorities § 118.34

§ 118.34 Opposing Motion for Summary Judgment--In Action on Contract With Person Entirely Without Understanding--Person Entirely Without Understanding Liable for Necessaries [Civ. Code § 38]

[1] FORM

[*Caption. See § 118.30[1].*]

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE EVEN A PERSON ENTIRELY WITHOUT UNDERSTANDING WHOSE CONTRACTS ARE VOID PURSUANT TO *CIVIL CODE SECTION 38* IS NEVERTHELESS LIABLE FOR THE REASONABLE VALUE OF THINGS FURNISHED FOR HIS/HER SUPPORT OR THE SUPPORT OF HIS/HER FAMILY.

A. Liability of Person Entirely Without Understanding for Necessaries. An insane person entirely without understanding under *Civil Code Section 38* is liable for the reasonable value of things furnished to him or her that are necessary for his or her support (*Estate of Yturburru (1901) 134 Cal. 567, 568, 66 P. 729*).

[*Optional*] **B. Legal Services for Restoration of Capacity.** Legal services rendered to an incompetent person in proceedings to restore his or her capacity are necessaries within the meaning of *Civil Code Section 38*, so that a contract to pay the reasonable value of such services will be implied by law and may be enforced in suitable proceedings (*Stone v. Conkle (1939) 31 Cal. App. 2d 348, 351, 88 P.2d 197*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted by a plaintiff in opposition to a motion for summary judgment made by a defendant in an action for the reasonable value of necessaries furnished for his or her support or the support of his or her family, when defendant contends that the contract under which the necessaries were furnished is void because defendant was entirely without understanding under *Civ. Code § 38*.

Counsel should insert argument in this form showing the relationship betweenthe facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Liability of Person Entirely Without Understanding for Necessaries

In ***Estate of Yturburru*** *(1901) 134 Cal. 567, 66 P. 729* , the guardian of an insane person appealed from an order of the superior court directing the guardian to pay the state hospital where the insane person was held for the care and support of the person at the hospital. In rejecting the guardian's contention that the statutes providing that an insane person's estate is liable to the hospital were unconstitutional, the Supreme Court found that an insane person is always liable for the reasonable value of necessary things furnished to him or her, pursuant to *Civ. Code § 38* and to the common law. The Court further found that those things, such as care at a state hospital, which are required by law to be furnished to an insane person, are necessaries within the meaning of the statute (*134 Cal. 567, 568)* .

[b] Legal Services for Restoration of Capacity

In ***Stone v. Conkle*** *(1939) 31 Cal. App. 2d 348, 88 P.2d 197* , plaintiff brought an action for payment of attorney's fees incurred by a formerly incompetent person in a proceeding in which she had been restored to competency. Although an expert testified at the trial that the attorney had been hired for the purpose of the restoration to capacity and as to the reasonable value of the services, the trial court granted defendant's motion for nonsuit as to all legal services rendered to her prior to restoration to competency. The court of appeal reversed the judgment of nonsuit and found that the attorney's fees for the proceeding for restoration of competency were necessaries for which the law implies a promise and creates an obligation on the part of the incompetent to pay the reasonable value. Whether these necessaries are requested by the incompetent or by a third party, the court found that the estate of the incompetent is liable for them (*31 Cal. App. 2d 348, 351)* .

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CHAPTER 120 INSURANCE

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§§ 120.05-120.09 [Reserved]

§ 120.10 Insurer Is Not Bound by Unauthorized Oral Representations of Soliciting Agent

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Unauthorized Oral Statements or Agreements Not Binding

[4] Additional Authorities

[a] Unauthorized Oral Statements or Agreements Not Binding

§ 120.11 Application for Insurance Negated Apparent Authority

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Application for Insurance Negated Apparent Authority

§ 120.12 Parties Agreed That Insurance Would Not Be Effective Until Policy Issues

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Agreement That Insurance Is Not Effective Until Policy Issues Binding on Parties

§ 120.13 Mere Delay in Issuing Policy Does Not Create Contractual Insurance Obligation

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Delay in Issuing Policy Does Not Create a Contract

[4] Additional Authorities

[a] Delay in Issuing Policy Does Not Create a Contract

§ 120.14 Insurer Is Bound by Its Oral Agreement to Insure Loss

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Oral Insurance Contracts Valid

[4] Additional Authorities

[a] Oral Insurance Contracts Valid

§ 120.15 Insurer Is Bound by Its Oral Binder Pending Issuance of Written Policy

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Oral Binder Is Enforceable

[b] Insurer Is Bound Even Though Policy Not Yet Delivered

[4] Additional Authorities

[a] Oral Binder Is Enforceable

§ 120.16 Insurer Is Bound by Continuing, Collateral, Oral Contract to Insure

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Insurer Is Bound by Continuing Contract to Insure

§ 120.17 Insurer Is Bound by Its Oral Agreement to Renew Policy

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Oral Contract to Renew Policy Valid

§ 120.18 Actions By Agents Outside Scope of Actual Authority

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Insurer Bound by Agent Acting Outside Scope of Actual Authority

[4] Additional Authorities

[a] Insurer Bound by Agent Acting Outside Scope of Actual Authority

§ 120.19 Insurer Unreasonably Delayed Acting on Application

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Unreasonable Delay in Acting on Insurance Application

[4] Additional Authorities

[a] Unreasonable Delay in Acting on Insurance Application

§ 120.20 Personal Representative of Life Insurance Applicant May Assert Prejudice From Delay in Acting on Application

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Standing by Personal Representative of Deceased Applicant for Life Insurance

§§ 120.21-120.29 [Reserved]

§ 120.30 Liability Is Excluded From Coverage or Not Covered by Policy

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Duty to Defend Is Not Absolute

[b] No Potential Relief Within Policy Coverage

[c] Causal Connection Required Between Policy and Claim

[4] Additional Authorities

[a] No Potential Relief Within Policy Coverage

§ 120.31 Occurrence Outside Policy Period Is Not Covered

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Occurrence Outside Policy Period Not Covered

[4] Additional Authorities

[a] Occurrence Outside Policy Period Not Covered

§ 120.32 Standard California Land Title Association Policy Does Not Cover Defects That Survey Can Disclose

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Standard California Land Title Association Policy Does Not Cover Defects That Survey Can Disclose

§ 120.33 Business Owner's Comprehensive Liability Policy Does Not Cover Off-Premises Accident

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Business Owner's Comprehensive Liability Policy Does Not Cover Off-Premises Accident

§ 120.34 Commercial General Liability Policy Excludes Or Does Not Cover Faulty Workmanship

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Comprehensive Liability Policy Excludes Coverage for Faulty Workmanship

[b] Commercial General Liability Policy Does Not Cover Insured's Faulty Workmanship

§ 120.35 Specialty Business Insurance Policy Excludes Coverage of Criminal Acts of Employees

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Specialty Business Insurance Policy Excludes Coverage of Criminal Acts of Employees

§ 120.36 Homeowner's Policy Excludes Coverage of Claims Arising From Business Ventures

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Homeowner's Policy Excludes Coverage of Claims Arising From Business Ventures

[4] Additional Authorities

[a] Homeowner's Policy Excludes Coverage of Claims Arising From Business Ventures

§ 120.37 Homeowner's Policy Excludes Motor Vehicle Claims

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Homeowner's Policy Excludes Motor Vehicle Claims

[4] Additional Authorities

[a] Homeowner's Policy Excludes Motor Vehicle Claims

§ 120.38 Policy Covering Only "Accidents" Does Not Cover Negligent Misrepresentation Claims

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Policy Covering Only "Accidents" Does Not Cover Negligent Misrepresentation Claims

§ 120.39 Predecessor Corporation's Product Is Not "Named Insured Product" Under Successor Corporation's Policy

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Predecessor Corporation's Product Is Not "Named Insured Product" Under Successor Corporation's Policy

§ 120.40 No Duty to Defend When Coverage Is Precluded as Matter of Law

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] No Duty to Defend When Coverage Precluded as Matter of Law

[4] Additional Authorities

[a] No Duty to Defend When Coverage Precluded as Matter of Law

§ 120.41 No Duty to Defend Coercive Administrative Action Under Comprehensive General Liability Policy

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] No Duty to Defend Against Coercive Administrative Action Under Comprehensive General Liability Policy

[4] Additional Authorities

[a] No Duty to Defend Against Coercive Administrative Action Under Comprehensive General Liability Policy

§ 120.42 "Absolute" Pollution Exclusion in Comprehensive General Liability Policies Applies Only to Environmental Pollution

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] "Absolute" Pollution Exclusion Limited to Environmental Pollution

[4] Additional Authorities

[a] "Absolute" Pollution Exclusion Limited to Environmental Pollution

§ 120.43 Insured Has Not Shown That "Sudden and Accidental" Exception to "Qualified Pollution Exclusion" in Comprehensive General Liability Policy Applies

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Burden Is on Insured to Establish That "Occurrence" Is Covered Under Policy

[b] Burden Shifts to Insurer to Prove Exclusion After Insured Shows That "Occurrence" Is Covered

[c] After Insurer Shows That General Pollution Exclusion Applies in Comprehensive General Liability Policy, Insured Bears Burden of Showing That Pollution Was "Sudden and Accidental"

[d] No Coverage if "Sudden and Accidental" Exception Does Not Apply

[e] "Sudden and Accidental" Has Temporal Meaning

[4] Additional Authorities

[a] After Insurer Shows That General Pollution Exclusion Applies in Comprehensive General Liability Policy, Insured Bears Burden of Showing That Pollution Was "Sudden and Accidental"

[b] "Sudden and Accidental" Has Temporal Meaning

§ 120.44 Business Liability Policy Does Not Cover Particular Claim Under "Advertising Injury" Clause

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[3] Discussion of Authorities

[a] Business Liability Policy Does Not Cover Particular Claim Under "Advertising Injury" Clause

[4] Additional Authorities

[a] Business Liability Policy Does Not Cover Particular Claim Under "Advertising Injury" Clause

§ 120.45 Commercial General Liability Policy Coverage for Sums That Insured Is "Legally Obligated to Pay as Damages" Is Limited to Money Ordered by Court

[1] Form

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Commercial General Liability Insurance Policy Providing Coverage for Sums That Insured Is "Legally Obligated to Pay as Damages" Is Limited to Money Ordered by Court

[b] Commercial General Liability Insurance Policy Providing Coverage for Sums That Insured Is "Legally Obligated to Pay as Damages" Does Not Require Insurer to Indemnify for Administratively Required Expenses Pursuant to Environmental Statute

§§ 120.46-120.49 [Reserved]

§ 120.50 Liability Partially or Wholly Within Potential Coverage of Policy

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Insurer Has Duty to Defend Against Claim Potentially Within Policy Coverage

[b] Insurer Ascertained Facts Giving Rise to Potential Liability

[c] Insurer's Duty to Defend Is Broader Than Its Duty to Indemnify

[4] Additional Authorities

[a] Insurer Has Duty to Defend Against Claim Potentially Within Policy Coverage

[b] Insurer Ascertained Facts Giving Rise to Potential Liability

[c] Insurer's Duty to Defend Is Broader Than Its Duty to Indemnify

§ 120.51 One of Several Causes of Action Alleged in Third-Party Complaint Was Covered by Policy

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] One of Several Causes of Action Alleged in Third-Party Complaint Covered by Policy

[b] Obligation to Defend Extends to Entire Action Involving Covered and Uncovered Claims

§ 120.52 Third-Party Complaint Supports Partial Recovery Under Policy

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Third-Party Complaint Supports Partial Recovery Under Policy

[4] Additional Authorities

[a] Third-Party Complaint Supports Partial Recovery Under Policy

§ 120.53 Insurer May Not Deny Recovery Without Investigating Facts

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Insurer Breached Duty to Investigate Facts

§ 120.54 Exclusionary Clause Must Be Liberally Construed in Favor of Insured

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Exclusionary Clause Must Be Liberally Construed in Favor of Insured

[4] Additional Authorities

[a] Exclusionary Clause Must Be Liberally Construed in Favor of Insured

§ 120.55 Potential Liability Is Not Conclusively Refuted by Undisputed Facts

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Potential Liability Not Conclusively Refuted by Undisputed Facts

[4] Additional Authorities

[a] Potential Liability Not Conclusively Refuted by Undisputed Facts

§ 120.56 Duty to Defend Is Implied, and Not Expressly Excluded, in Contract

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Policy Does Not Explicitly Exclude Implied Duty to Defend

[b] Policy Does Not Explicitly Waive Implied Duty to Defend

§ 120.57 Duty to Defend Extends to Prosecuting Appeal of Adverse Judgment

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Insurer Has Duty to Appeal Adverse Judgment

§ 120.58 The Policy Does Not Explicitly Preclude Duty to Appeal

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] The Policy Does Not Explicitly Preclude Duty to Appeal

§ 120.59 Insurer Not Exonerated When Conduct Was Mere Negligence

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Insurer Is Not Exonerated From Liability for Insured's Negligence

§ 120.60 Commercial General Liability Policy Coverage for Sums That Insured Is "Legally Obligated to Pay as Damages" Not Limited to Tort Damages

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[3] Discussion of Authorities

[a] Commercial General Liability Insurance Policy Providing Coverage for Sums Insured Is "Legally Obligated to Pay as Damages" Not Categorically Limited to Tort Damages

§§ 120.61-120.69 [Reserved]

§ 120.70 User of Vehicle Was Excluded From Coverage Under Policy

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Exclusion of Named Person From Coverage

[4] Additional Authorities

[a] Exclusion of Named Person From Coverage

§ 120.71 Exclusion of Named User Driving Without Permission

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Exclusion of User Driving Without Permission

[b] Insured Cannot Ratify Nonpermitted Use of Vehicle

§ 120.72 Exclusion of User From Coverage When Named Insured Is Engaged in Specified Business

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Exclusion of User From Coverage When Named Insured Is Engaged in Specified Business

§§ 120.73-120.79 [Reserved]

§ 120.80 Motor Vehicle Liability Policy Insures Permissive User

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Motor Vehicle Liability Policy Insures Permissive User

[b] Judgment Creditor Has Standing to Sue

[c] Permissive User Liability Exclusion Unenforceable if Inconspicuously Located in Policy

[4] Additional Authorities

[a] Motor Vehicle Liability Policy Insures Permissive User

§ 120.81 No Exclusion May Be Based on Insured's Incidental Business

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] No Exclusion May Be Based on Insured's Incidental Business

§ 120.82 [Reserved]

§ 120.83 Insurer Must Defend or Indemnify Person Legally Responsible for Use of Vehicle

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Insurer Must Defend or Indemnify Person Legally Responsible for Use of Vehicle

[b] Employee's Motor Vehicle Policy Fulfills Public Entity's Statutory Obligation

§ 120.84 Commercial Policy Cannot Exclude Driver Based on Nonserious Personal Traffic Violations

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Commercial Policy Cannot Exclude Driver Based on Nonserious Personal Traffic Violations

[b] Prohibition Against Exclusion Is Not Limited to Any Particular Type of Policy

§ 120.85 Exclusion of Named Person Does Not Apply to "Motor Vehicle Liability Policy" for Commercial Passenger Vehicles

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

§§ 120.86-120.89 [Reserved]

§ 120.90 Insurer Has No Duty to Defend/Indemnify Insured When Liability or Loss Results From Willful Act

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Statutory Exclusion Is Implied in Every Policy

[b] Intentional Act Is Excluded by Policy Language

[4] Additional Authorities

[a] Statutory Exclusion Implied in Every Policy

[b] Intentional Act Is Excluded by Policy Language

§ 120.91 Agreements Waiving Fraud or Willful Injury Are Illegal

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Agreements Waiving Fraud or Willful Injury Are Illegal

§ 120.92 Policy Purporting Coverage for Willful Acts Is Prohibited

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Policy Purporting Coverage for Willful Acts Is Prohibited

§ 120.93 Coverage for Child Sexual Molestation Is Precluded as Matter of Law

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Coverage for Child Sexual Molestation Precluded as Matter of Law

[4] Additional Authorities

[a] Coverage for Child Sexual Molestation Precluded as Matter of Law

§ 120.94 Coverage for Sanctions Imposed for Bad-Faith Litigation Is Precluded as Matter of Law

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Coverage for Sanctions Imposed for Bad-Faith Litigation Is Precluded as Matter of Law

§ 120.95 Coverage for Criminal Fines or Restitution Is Precluded as a Matter of Law

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Coverage for Criminal Fines or Restitution Is Precluded as a Matter of Law

§ 120.96 Coverage for Intentional Sexual Harassment Is Precluded as a Matter of Law

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Coverage for Intentional Sexual Harassment Precluded as a Matter of Law

§ 120.97 Coverage for Inducing Patent Infringement Is Precluded as a Matter of Law

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Coverage for Inducing Patent Infringement Precluded as a Matter of Law

§§ 120.98-120.99 [Reserved]

§ 120.100 Policy Language Led Insured to Expect Defense in Third-Party Action Based on Willful Act

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Ambiguity in Policy Led Insured to Reasonably Expect Coverage

[4] Additional Authorities

[a] Ambiguity in Policy Led Insured to Reasonably Expect Coverage

§ 120.101 Statutes Forbidding Indemnification Do Not Preclude Defense

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Statutory Prohibitions Do Not Apply

[b] Duty to Defend Does Not Conflict Policy of Statutes

§ 120.102 Liability of Insured Was Vicarious Only

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Ins. Code § 533 Does Not Apply to Vicarious Liability

[4] Additional Authorities

[a] Ins. Code § 533 Does Not Apply to Vicarious Liability

§ 120.103 Local Public Entity Insured Against Expense of Defending Third-Party Action

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Local Public Entity Insured Against Expense of Defending Third-Party Action

[b] Public Entity May Insure Against Intentional Tort

§ 120.104 State Agency Insured Against Expense of Defending Third-Party Action

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] State Agency Insured Against Expense of Defending Third-Party Action

[b] Agency May Insure Against Intentional Tort

§ 120.105 Insurer Failed to Meet its Burden of Proving Willful Conduct

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Insurer Failed to Meet its Burden of Proving Willful Conduct

§ 120.106 Insurer Has Failed to Establish Preconceived Design to Inflict Injury

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Insurer Has Failed to Establish Preconceived Design to Inflict Injury

§ 120.107 Insured's Conduct Is Not Inherently Wrongful and Insurer Has Failed to Show Intent

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Insured's Conduct Is Not Inherently Wrongful and Insurer Has Failed to Show Intent

§ 120.108 Insured Acted in Self-Defense

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Insured Acted in Self-Defense

§ 120.109 Alleged Misconduct Was Independent of Any Proven Sexual Molestation

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Alleged Misconduct Was Independent of Any Proven Sexual Molestation

[4] Additional Authorities

[a] Alleged Misconduct Was Independent of Any Proven Sexual Molestation

§ 120.110 Unauthorized and Nonratified Act of Insured's Agent Does Not Preclude Recovery Under Policy

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Unauthorized and Nonratified Act of Insured's Agent Does Not Preclude Recovery Under Policy

§ 120.111 Exclusion for "Illegal Act" Is Ambiguous and Therefore Inapplicable to Insured's Unintentional Conduct

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Ambiguous Exclusion for "Illegal Act" Does Not Apply to Insured's Unintentional Conduct

[4] Additional Authorities

[a] Ambiguous Exclusion for "Illegal Act" Does Not Apply to Insured's Unintentional Conduct

§§ 120.112-120.114 [Reserved]

§ 120.115 Insurer Has No Duty to Indemnify Insured for Punitive Damages Portion of Third-Party Judgment

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] No Duty to Indemnify Insured for Punitive Damages

[4] Additional Authorities

[a] No Duty to Indemnify Insured for Punitive Damages

§§ 120.116-120.119 [Reserved]

§ 120.120 Limitations Period Under Homeowner's Policy Tolled From Notification to Denial

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Inception of Loss Is Based on Occurrence of Appreciable Damage

[b] Limitations Period Was Tolled on Notice of Damage to Insurer

[4] Additional Authorities

[a] Inception of Loss Is Based on Occurrence of Appreciable Damage

[b] Limitations Period Was Tolled on Notice of Damage to Insurer

§ 120.121 Manifestation Rule Applies When Loss Occurs Over Multiple Policy Periods

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Manifestation Rule Applies When Loss Occurs Over Multiple Policy Periods

§ 120.122 Under Title Insurance Policy, Limitations Tolled From Notification to Denial

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Limitations Period Tolled on Notice of Damage to Insurer

§§ 120.123-120.129 [Reserved]

§ 120.130 Liability Policy Requires Defense/Indemnification Under Continuous Injury Trigger of Coverage

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Liability Policy Requires Defense/Indemnification Under Continuous Injury Trigger of Coverage

§§ 120.131-120.139 [Reserved]

§ 120.140 Loss In Progress Rule Does Not Apply When Insured Had No Legal Obligation to Third Party at Inception of Policy Period

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Risk Is Insurable Because Insured Had No Legal Obligation to Third Party at Inception of Policy Period

§§ 120.141-120.149 [Reserved]

§ 120.150 Comprehensive General Liability Policy Requires Defense/Indemnification Because "Damages" Includes Environmental Cleanup Costs

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] "Damages" Under Comprehensive General Liability Policy Includes Environmental Cleanup Costs in Absence of Narrower Policy Definition

[b] "Damages" Includes Reimbursement of Government Response Costs

[4] Additional Authorities

[a] "Damages" Under Comprehensive General Liability Policy Includes Environmental Cleanup Costs in Absence of Narrower Policy Definition

§§ 120.151-120.159 [Reserved]

§ 120.160 Improved Property Is Nonvacant Land for Purposes of Coverage Under Homeowner's Policy

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Beneficial Use or Improvement of Property Rendered Property Nonvacant

§ 120.161 Artificial Structures on Untenanted Property

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Artificial Structures Render Untenanted Property Nonvacant

§ 120.162 Improvement Caused Damage That Is Subject of Claim

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Improvement Caused Damage That Is Subject of Claim

§§ 120.163-120.164 [Reserved]

§ 120.165 Insurer Estopped From Raising Limitations Period Defense for Failure to Notify Insured of Relevant Policy Terms

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Insurer Must Notify Insured of Policy Terms

[b] Estoppel to Assert Limitations Defense After Failing to Notify Insured of Policy Terms

[4] Additional Authorities

[a] Estoppel to Assert Limitations Defense After Failing to Notify Insured of Policy Terms

§§ 120.166-120.169 [Reserved]

§ 120.170 Liability Insurer's Agent/Employee Is Not Liable for Breach of Implied Covenant of Good Faith When

Not Party to Contract

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Agent or Employee Is Not Liable for Breach of Covenant of Good Faith

[4] Additional Authorities

[a] Agent or Employee Is Not Liable for Breach of Covenant of Good Faith

§ 120.171 Covenant Extends Only to Limits of Contract

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Covenant Extends Only to Limits of Contract

§ 120.172 Plaintiff Lacks Standing to Bring Action Because He/She Is Neither Insured Nor Intended Third-Party Beneficiary

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Plaintiff Fails to Satisfy Basic Requirement for Standing

[b] Parties Did Not Intend to Make Plaintiff Third-Party Beneficiary

[c] Incidental Reference or Benefit Is Insufficient to Confer Standing

§ 120.173 Plaintiff Judgment Creditor's Collusion With Insured Renders Underlying Judgment Unenforceable

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Plaintiff's Agreement With Insured Constitutes Collusion

[b] Insurer May Raise Defense of Collusion in Suit to Recover Under Policy

§ 120.174 Casualty Insurer's Handling of Claim Was Reasonable as Matter of Law

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Casualty Insurer Did Not Breach Covenant of Good Faith

[b] Insurer Is Not Liable For Mere Negligent Handling of Claim

[c] Insurer Is Not Liable For Negligent Handling of Claim

[4] Additional Authorities

[a] Casualty Insurer Did Not Breach Covenant of Good Faith

[b] Reasonableness Appears as Matter of Law

§ 120.175 Claim Preempted by ERISA

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] ERISA Preempts Insured's State Law Claim

[4] Additional Authorities

[a] ERISA Preempts Insured's State Law Claim

§ 120.176 Insurer Did Not Breach Covenant By Failing to Investigate Loss That Was Not Covered

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Insurer Did Not Breach Covenant By Failing to Investigate Loss That Was Not Covered

§ 120.177 Insurer's Precontractual Conduct Does Not Support Bad Faith Claim

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Insurer's Precontractual Conduct Not Actionable

§ 120.178 "Bad Faith" Action Is Actually Fire Policy Action Barred by Statute of Limitations

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Insured's Claim Is Barred by Statute of Limitations

[b] So-Called "Bad-Faith Claim" Is Essentially Claim on Fire Insurance Policy

[4] Additional Authorities

[a] So-Called "Bad Faith Claim" Is Essentially Claim on Fire Insurance Policy

§ 120.179 Property and Multi-Peril Policy Action Is Barred by Policy Limitations Clause

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Insured's Claim Is Barred by Policy Limitations Clause Based on Ins. Code § 2071

[b] So-Called "Bad-Faith Claim" Is Essentially Claim on Underlying Policy

§ 120.180 Defensive Pleading Was Absolutely Privileged

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Defensive Pleading Is Absolutely Privileged

§ 120.181 [Reserved]

§ 120.182 Insurer Acted Unreasonably by Denying or Delaying Benefit Payments

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Insurer Breached Covenant of Good Faith

[b] Insurer Failed to Consider Insured's Interests

[c] Insurer is Liable for Failing to Pay Loss

[4] Additional Authorities

[a] Insurer Breached Covenant of Good Faith

[b] Insurer Failed to Consider Insured's Interests

§ 120.183 No Affirmative Defense of Insured's Comparative Bad Faith in Tort Bad Faith Action Against Insurer

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] No Affirmative Defense of Insured's Comparative Bad Faith in Tort Bad Faith Action Against Insurer

§ 120.184 Insurer Conducted an Inadequate Investigation of Insured's Claim

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Insurer Conducted an Inadequate Investigation of Insured's Claim

[4] Additional Authorities

[a] Insurer Conducted Inadequate Investigation of Insured's Claim

§ 120.185 Action Not on Policy Is Not Barred by Statute of Limitations or Policy Limitations Clause

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Bad-Faith Claim Not on the Policy Is Not Subject to Statutory Limitation Period

§ 120.186 Insured's Judgment Creditor Has Direct Right of Action Against Insurer

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Judgment Creditor Has Direct Right of Action

[b] Insurer Is Liable to Judgment Creditor for Postjudgment Refusal to Pay Amount of Judgment

[4] Additional Authorities

[a] Judgment Creditor Has Direct Right of Action

§§ 120.187-120.194 [Reserved]

§ 120.195 Insurer Did Not Refuse to Accept a Valid and Reasonable Settlement Offer

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Insured Failed to Show That Reasonable Settlement Offer Was Made

[b] There Is No Conflict of Interest Between Insurer and Insured

[c] Insurer Had Bona Fide Belief That Recovery Would Be Within Policy Limits

[d] No Settlement Offer Was Made

[e] The Settlement Offer Was Not Valid

[f] The Settlement Offer Did Not Completely Release All Insureds

[g] Defending Insurer Did Not Participate in Settlement

[h] Rule That Insurer Is Not Bound by Settlement Without Its Participation Applies Whether Claim Against Insurer Is Based on Contract or Tort

[4] Additional Authorities

[a] Insurer Had Bona Fide Belief That Recovery Would Be Within Policy Limits

[b] Rule That Insurer Is Not Bound by Settlement Without Its Participation Applies Whether Claim Against Insurer Is Based on Contract or Tort

§ 120.196 Third-Party Judgment Creditor Lacks Standing to Sue Insurer Without Valid Assignment

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Insured Made No Valid Assignment

[4] Additional Authorities

[a] Insured Made No Valid Assignment

§ 120.197 Stipulated Judgment With Covenant Not to Execute Is Not Valid Assignment

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Stipulated Judgment With Covenant Not to Execute Is Not Valid Assignment

[4] Additional Authorities

[a] Stipulated Judgment With Covenant Not to Execute Is Not Valid Assignment

§ 120.198 Insured Waived Claim for Personal Damages by Assigning Rights to Judgment Creditor

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Insured Waived Claim for Personal Damages by Assigning Rights to Judgment Creditor

[4] Additional Authorities

[a] Insured Waived Claim for Personal Damages by Assigning Rights to Judgment Creditor

§ 120.199 In Action by Insured Against Insurer for Failure to Settle, Insured May Not Recover Punitive Damages Awarded Against Insured in Underlying Action if Punitive Damages Award Was Based on Insured's Conduct

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] In Action by Insured Against Insurer for Failure to Settle, Insured May Not Recover Punitive Damages Awarded Against Insured in Underlying Action if Punitive Damages Award Was Based on Insured's Conduct

§§ 120.200-120.204 [Reserved]

§ 120.205 Insurer Did Not Act in Act Good Faith in Rejecting Settlement Offer

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Insurer Failed to Act in Good Faith

[b] Insurer Breached Its Duty By Failing to Settle Claim

[c] Insurer Failed to Take Insured's Interest Into Consideration

[d] Insurer's Breach Established by Factors

[e] Insurer's Conduct Fails Objective Test

[f] Insurer Is Liable for Entire Judgment

[4] Additional Authorities

[a] Insurer Failed to Act in Good Faith

[b] Insurer Breached Its Duty By Failing to Settle Claim

[c] Insurer Failed to Take Insured's Interest Into Consideration

[d] Insurer's Conduct Fails Objective Test

[e] Insurer Is Liable for Entire Judgment

§ 120.206 Insured Properly Assigned Claim to Judgment Creditor

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Insured Properly Assigned Claim to Judgment Creditor

[4] Additional Authorities

[a] Insured Properly Assigned Claim to Judgment Creditor

§ 120.207 Insured's Failure to Pay Excess Judgment Does Not Exonerate Insurer's Wrongful Refusal to Settle

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Nonpayment of Excess Judgment by Insured

§ 120.208 Insurer's Breach of Covenant Is Not Excused by Insured's Failure to Perform Contractual Obligation

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Insurer Breached Its Unconditional Duty of Good Faith

§ 120.209 Good-Faith Denial of Coverage Is No Defense

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Good-Faith Belief in Noncoverage as No Defense

§ 120.210 Insurer Is Not Exonerated by Its Unilateral Delegation of Duty to Make Independent Risk Evaluation

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Insurer Is Not Exonerated by Its Unilateral Delegation of Duty to Make Independent Risk Evaluation

§ 120.211 Insured's Assignment of Claim Is Valid Because Stipulated Judgment Was Approved by Court

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Insured Properly Assigned Rights in Consideration of Personal Release

[b] Assignment Is Valid With Court Approval

§ 120.212 Insured Did Not Waive Claim for Personal Damages Because Assignor and Assignee Are Joined as Plaintiffs

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Insured Did Not Waive Personal Damages Claim Because Assignor and Assignee Are Joined

§§ 120.213-120.214 [Reserved]

§ 120.215 Attorney's Fees Are Improper in Action by Insurer Against Consecutive or Concurrent Insurers

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Attorney's Fees Not Recoverable as Damages by Insurer

§ 120.216 Attorney's Fees Recoverable as Damages Only for Work Attributable to Recovery of Amount Due On Policy

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Attorney's Fees Recoverable as Damages Only for Work Attributable to Recovery of Amount Due on Policy

§§ 120.217-120.219 [Reserved]

§ 120.220 Attorney's Fees Expended to Recover Policy Benefits Are Proper Element of Damages in Action for Tortious Breach of Insurance Contract

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Attorney's Fees Are Recoverable as Damages

[b] Insured's Assignment of Bad Faith Cause of Action Carries With It Right to Brandt Fees.

[4] Additional Authorities

[a] Attorney's Fees Are Recoverable as Damages.

§§ 120.221-120.229 [Reserved]

§ 120.230 Insurer Made Wrongful Misrepresentation Regarding Existence of Insured's Right to Obtain Review of Denial of Claim

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Insurer's Wrongful Misrepresenting Regarding Insured's Right to Review of Denial of Claim

§§ 120.231-120.239 [Reserved]

§ 120.240 Statute Does Not Confer Any Private Right of Action on Plaintiff in Unfair Claims Settlement Practices Under Ins. Code § 790.03(h)

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Plaintiff as Private Litigant May Not Bring Action for Damages Under Ins. Code § 790.03(h)

[4] Additional Authorities

[a] Plaintiff as Private Litigant May Not Bring Action for Damages Under Ins. Code § 790.03(h)

§§ 120.241-120.249 [Reserved]

§ 120.250 Policy Was Rescinded on Ground of Insured's Material Concealment

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Misrepresentation Not Required

[b] Questions in Insurance Application are Material

[c] "Action on the Contract"

[d] Rescission Applies to Assigned Risk Motor Vehicle Policy

[e] Insurer May Raise Defense of Rescission After Insured Commences Action

[4] Additional Authorities

[a] Insurer's Right to Rescind for Concealment

[b] Insured Failed to Communicate Material Facts

[c] Insured Failed to Communicate Material Facts

[d] Questions in Insurance Application are Material

[d] Rescission Is Proper Prior to Commencement of Action on Contract

§ 120.251 Policy Was Rescinded on Ground of Material Misrepresentation

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Insurer Has Right to Rescind

[b] No Intent to Deceive Required

[c] Severable Endorsement Subject to Rescission

[d] Insurer May Rescind if Applicant for Life Insurance Misrepresented Smoking History to Obtain Nonsmoker Rate

[4] Additional Authorities

[a] Insurer Has Right to Rescind

§§ 120.252-120.259 [Reserved]

§ 120.260 Purported Rescission Was Not Effective Because Concealed or Misrepresented Fact Was Immaterial

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Material Concealment Required

[b] Materiality From Standpoint of Insurer

[4] Additional Authorities

[a] Material Concealment Required

[b] Determination of Materiality

[c] Materiality From Standpoint of Insurer

§ 120.261 Nondisclosure of Temporary Indispositions of Health in Insurance Application Does Not Constitute Concealment

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Nondisclosure of Temporary Indispositions in Insurance Application

[4] Additional Authorities

[a] Nondisclosure of Temporary Indispositions in Insurance Application

§ 120.262 No Disclosure Was Required

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Knowledge Presumed

[b] Waiver of Disclosure by Insurance Contract or by Implication

[4] Additional Authorities

[a] Waiver of Disclosure by Insurance Contract or by Implication

§ 120.263 Insured May Rebut Statutory Presumption That Representation Refers to Time Insurance Contract Is Completed

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Statutory Presumption as Rebuttable

§ 120.264 Ambiguous Representation Is Construed in Favor of Insured

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Construction of Uncertain Terms

[b] Ambiguous Representations Drafted by Insurer to be Construed in Favor of Insured

§ 120.265 Purported Representation Was Mere Hearsay Statement and That Fact Was Made Known to Insurer

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Representation on Hearsay

§ 120.266 Representation Was Altered or Withdrawn

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Alteration or Withdrawal of Representation

§ 120.267 Incorrect or Incomplete Answers in Insurance Application Were Due to Insured's Ignorance of Fact or Failure to Appreciate Significance of Information

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Applicant's Ignorance of Facts or Their Significance

[4] Additional Authorities

[a] Applicant's Ignorance of Facts or Their Significance

§ 120.268 Insurer Estopped from Rescinding Policy Because it Failed to Make Reasonable Investigation of Risk Prior to Accident

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Insurer Failed to Take Prompt Action on Application for Insurance

[b] Insurer Did Not Promptly Investigate Risk

[c] Due Diligence Requires Investigation of Risk Within Reasonable Time

[d] Effect of Failure to Make Reasonable Investigation of Risk

[e] Estoppel to Plead Rescission Where Rights of Third Party Have Intervened

[f] Reasonableness of Investigation as Question of Fact

[g] Rule Requiring Investigation Applies to Adding Vehicles to Existing Policy

§ 120.269 Knowledge of Independent Contractor Hired by Insurer to Conduct Investigation Is Imputed to Insurer

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Knowledge of Independent Contractor Hired by Insurer to Conduct Investigation Is Imputed to Insurer

§§ 120.270-120.279 [Reserved]

§ 120.280 Policy Was Rescinded on Ground of Breach of Material Express Warranty

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Breach of Express Warranty by Insured

§ 120.281 Policy Was Rescinded on Ground of Willful Concealment of Matter Relating to Falsity of Warranty

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Warranty False at Time Made Voids Policy

[4] Additional Authorities

[a] Warranty False at Time Made as Voiding Policy

§§ 120.282-120.289 [Reserved]

§ 120.290 Purported Rescission Was Not Effective Because Performance Became Unlawful or Impossible

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Performance Became Unlawful or Impossible

§ 120.291 Purported Rescission Was Not Effective Because Breach Was of an Immaterial Policy Provision

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Applicability to Warranties

[b] Breach of Coinsurance Warranty as Immaterial

§ 120.292 Purported Rescission Was Not Effective Because There Was No Breach When Ambiguous Warranty Is Construed in Favor of Insured

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Ambiguity in Warranty Resolved in Favor of Insured

§ 120.293 Purported Rescission Was Not Effective Because Loss Occurred Prior to Breach

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Loss Occurred Before Warranty Was to Be Performed

§ 120.294 Purported Rescission Was Not Effective Because Express Warranty Was Not in Writing

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Requirement That Express Warranty Be Contained in Policy or Writing

§§ 120.295-120.299 [Reserved]

§ 120.300 Policy Was Canceled Before Liability Arose or Loss Occurred

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Insurer Terminated Policy by Prescribed Notice

[b] Policy Was Canceled by Its Terms or Mutual Agreement

[4] Additional Authorities

[a] Insurer Terminated Policy by Prescribed Notice

§§ 120.301-120.309 [Reserved]

§ 120.310 Purported Cancellation Was Not Effective Because Policy Was Not Canceled Before Loss Occurred

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Summary Judgment for Insurer Improper When Triable Issue Exists Regarding Whether Policy Was Canceled

§§ 120.311-120.319 [Reserved]

§ 120.320 Motor Vehicle Policy Expired at End of Policy Term Because of Insured's Defective Attempt to Accept Renewal Offer

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Policy Expired at End of Term

[b] There Was No "Renewal" as Defined

[c] Insurer Offered to Renew Policy or Gave Nonrenewal Notice

[d] Insured Did Not Accept Renewal Offer

[e] Attempted Acceptance Did Not Comply With Terms of Offer

§§ 120.321-120.329 [Reserved]

§ 120.330 Insurer's Cancellation of Policy Breached Covenant of Good Faith

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Covenant of Good Faith Applies to Insurer's Cancellation of Policy

[b] Improper Exercise of Discretionary Power to Cancel Breaches Covenant

[c] Bad-Faith Cancellation Subjects Insurer to Liability

§§ 120.331-120.339 [Reserved]

§ 120.340 Coverage Under Motor Vehicle Policy Continued After Policy Expiration Date Because of Insurer Failed to Give Notice of Renewal or Nonrenewal to Insured

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Policy Renewed by Insurer's Failure to Give Notice of Nonrenewal

§§ 120.341-120.349 [Reserved]

§ 120.350 Insured Engaged in Motor Vehicle-Related Business and Operated Vehicle

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Public Policy

[b] Conclusive Presumption Applies to Adverse Insurer

[c] Nature of Insured's Business as Determinative Factor

§ 120.351 Presumption Applies Even Though Insured and Permissive User Both Engaged in Motor-Vehicle Related Businesses

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Both Vehicle Owner and Permissive User Engaged in One of Specified Automotive Businesses

§ 120.352 Insured Was Owner or Lessee of Premises Where Loss Occurred During Loading or Unloading of Vehicle

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

§ 120.353 Policy Describes or Rates Motor Vehicle as Owned Automobile

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Motor Vehicle Described in Policy as Owned or Rated Automobile

[b] Insurance Code Section 11580.9(a)-(c)Inapplicable

[c] Tractor/Trailer Is Treated as One Vehicle

[4] Additional Authorities

[a] Motor Vehicle Described in Policy as Owned or Rated Automobile

§ 120.354 Statutory Presumptions Apply to Self-Insurers and Public Entities

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Statutory Presumptions Apply to Self-Insurers and Public Entities

§§ 120.355-120.369 [Reserved]

§ 120.370 Operator Was Not Insured Engaged in Motor Vehicle-Related Business or Insured's Employee

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Operator Was Not Insured Engaged in Motor Vehicle-Related Business or Insured's Employee

§ 120.371 Insured Is Lessor of Commercial Vehicles or Long-Term Lessor of Motor Vehicles

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Named Insured Is Engaged in Specified Motor Vehicle Leasing Business

[b] Meaning of "Policies" as Used in Insurance Code Section 11580.9(b)-(d)

§ 120.372 Policy Covers Motor Vehicle When Loss Occurred During Loading or Unloading of Vehicle

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Named Insured Owns or Rents Premises Where Loss Occurred During Loading or Unloading of Vehicle

[4] Additional Authorities

[a] Named Insured Owns or Rents Premises Where Loss Occurred During Loading or Unloading of Vehicle

§ 120.373 Policies Do Not Cover Same Insured for Same Loss When Loss Occurred During Loading or Unloading of Vehicle

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Statutory Presumption Inapplicable to Policies Covering Independent Tortfeasors

§ 120.374 All Insurers and Insureds Modified Statutory Presumption

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

§§ 120.375-120.379 [Reserved]

§ 120.380 Tort Committed Against Insured Is Independent of Insurance Contract

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Insurer's Agent/Employee Is Liable for Tort Not Arising From Insurance Contract

[4] Additional Authorities

[a] Insurer's Agent/Employee Is Liable for Tort Not Arising From Insurance Contract

§ 120.381 Liability for Conspiracy to Defraud Insured

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Agents and Employees of Insurer Are Subject to Liability for Conspiracy to Defraud Insured

§ 120.382 Liability for Actual Fraud Against Insured

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Agents and Employees of Insurer Are Subject to Liability for Actual Fraud Against Insured

§ 120.383 Agent Breached Duty to Insured to Inform Insured Accurately of Policy Provisions

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Agent Owes Insured Duty of Due Care

[b] Agent for Several Insurance Companies Who Selects Insured's Company Is Agent of Insured

[c] Agent Who Prepares Insurance Proposal Is Under Duty of Due Care to Inform Insured Accurately of Policy Provisions

[d] Insured Entitled to Reasonably Rely on Agent's Representations Regarding Scope of Coverage

[e] Agent Prohibited From Misrepresenting Policy Terms

[f] Misrepresentation to Induce Another to Take Out Policy Prohibited

§ 120.384 Agent Breached Duty to Insured to Explain Policy Limitations When Silence Would Mislead Insured to Believe Certain Coverage Existed

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Agent Breached Duty to Explain Limiting Provisions if Silence Is Misleading Under Circumstances

§ 120.385 Agent Liable to Insurer for Negligently Inducing Insurer to Provide Coverage

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Agent Liable to Insurer for Loss Resulting From Negligent Inducement to Provide Coverage

§ 120.386 Agent Liable to Insurer for Extra-Contractual Damages Incurred by Insurer as Result of Agent's Wrongful Conduct Resulting in Insurer's Denial of Underlying Claim

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Agent's Liability for Losses Incurred by Principal

[b] Extra-Contractual Damages

§§ 120.387-120.389 [Reserved]

§ 120.390 Insurer Has No Duty to Advise Insured Regarding Adequacy of Coverage Limits Absent Promise to the Contrary

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] No Fiduciary Duty to Advise Insured Regarding Adequacy of Coverage

[b] No Special Duty to Advise Insured Regarding Adequacy of Coverage

§ 120.391 Insurance Agent Owes No Duty to Insured to Provide Complete Protection Under Insurance Policy

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Agent Does Not Have Duty to Provide Complete Protection

[b] Mere Agency Relationship Does Not Imply Duty to Advise of Additional Coverage

[c] Previous Reliance on Agent's Advice Insufficient to Impose Greater Duty

[d] Agent's Assurance That Coverage Is Adequate Does Not Imply Broader Agency Relationship

§ 120.392 Insurer's Agent or Employee Is Not Party to Insurance Contract and Therefore Is Not Subject to Liability for Constructive Fraud

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Agents and Employees of Insurer Not Subject to Liability for Constructive Fraud

§§ 120.393-120.399 [Reserved]

§ 120.400 Broker Negligently Obtained Inadequate Coverage

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Broker Liable for Negligently Obtaining Inadequate Coverage

§ 120.401 Presumption of Negligence for Obtaining Insurance From Out-of-State Carrier

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Presumption of Negligence for Obtaining Insurance From Out-of-State Carrier

§ 120.402 Broker Failed to Obtain Promised Coverage

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Broker Liable in Negligence for Failing to Obtain Promised Coverage

[b] Broker Liable in Fraud Based on Misrepresentation That Requested Coverage Was Obtained

§ 120.403 Insured's Reliance on Broker's Representation of Coverage Justifiable if Supported by History of Similar Reliance

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Insured's Reliance on Broker's Representation of Coverage Justifiable if Supported by History of Similar Reliance

§ 120.404 Two-Year Limitations Period Applies to Action Against Broker Based on Broker's Failure to Execute Professional Duties

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Two-Year Limitations Period Applies to Action Against Broker for Failure to Execute Professional Duties

§§ 120.405-120.409 [Reserved]

§ 120.410 Director or Officer of Corporate Insurance Agent Is Not Liable to Insurer for Negligent Inducement to Provide Coverage--Director or Officer Is Not Bound Individually

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Directors and Officers of Corporate Agent Not Individually Liable

§§ 120.411-120.419 [Reserved]

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12-120 California Points & Authorities § 120.01

§ 120.01 Scope of Chapter

This article contains points and authorities for use in actions against insurance companies. It also contains points and authorities for use in tort actions against insurance agents, employees, and brokers. The forms are grouped in six parts.

Part II, Subpart A [*see § 120.10* et seq.] contains forms for use in actions on oral or implied insurance contracts; Subpart B [*see § 120.30* et seq.] contains forms for use in actions involving policy coverage and exclusions; Subpart C [*see § 120.170* et seq.] contains forms for use in actions based on improper claims settlement practices, including breach of the implied covenant of good faith and fair dealing; Subpart D [*see § 120.250* et seq.] contains forms for use in actions involving rescission, cancellation, and renewal of policies; Subpart E [*see § 120.350* et seq.] contains forms for use in actions between motor vehicle liability insurers, or involving motor vehicle insurers, for a judicial determination as to which policy provides primary, and which excess, coverage for the liability loss; and Subpart F [*see § 120.380* et seq.] contains forms for use in tort actions against insurance agents, brokers, and employees, and against insurers in tort actions other than those for breach of the covenant of good faith and fair dealing.

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12-120 California Points & Authorities § 120.02

§ 120.02 Governing Law

The subject of insurance is governed generally by the Insurance Code, which is divided into General Provisions (*Ins. Code § 1 et seq.*) and four divisions. Division 1 (*Ins. Code § 100 et seq.*) sets forth general rules governing insurance; Division 2 (*Ins. Code § 1880 et seq.*) covers classes of insurance; Division 3 (*Ins. Code § 12900 et seq.*) sets forth the rules applicable to the Insurance Commissioner; and Division 5 (*Ins. Code § 14000 et seq.*) covers insurance adjusters. Former Division 4 (Civil Disorders, *Ins. Code § 13000 et seq.*) was repealed by Stats. 1979, ch. 345, and former Division 6 (Repeals, *Ins. Code §§ 15000-15003*) was repealed by Stats. 1979, ch. 373. Agency is governed generally by *Civ. Code § 2295 et seq.*, indemnity by *Civ. Code § 2772 et seq.*, and suretyship by *Civ. Code § 2787 et seq.* and *Code Civ. Proc. § 1912*.

Preemption by federal law of state bad-faith law remedies by ERISA (*29 U.S.C.S. § 1001 et seq.*) is governed by *Pilot Life Ins. Co. v. Dedeaux (1987) 481 U.S. 41, 107 S. Ct. 1549, 95 L. Ed. 2d 39* , and *Metropolitan Life Ins. Co. v. Taylor (1987) 481 U.S. 58, 107 S. Ct. 1542, 95 L. Ed. 2d 55* .

Broadly, insurance is a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from a contingent or unknown event [*Ins. Code § 22*]. A person who undertakes to indemnify another by insurance is the insurer and the person indemnified is the insured [*Ins. Code § 23*]. Any person capable of making a contract [*see Civ. Code §§ 38-40, 1556, 1557*; *Fam. Code §§ 6701, 6710, 7051*] may, subject to the restrictions imposed by the Insurance Code, be an insurer [*Ins. Code § 150*] and any person, except a public enemy, may be insured [*Ins. Code § 151*]. But if the insured has no insurable interest, the contract is void [*Ins. Code § 280*]. Insurable interests are defined in *Ins. Code § 281 et seq.* (insurable interest in property) and *Ins. Code §§ 10110, 10130* (insurable interest in life and health of person).

The written instrument in which a contract of insurance is set forth is called the policy [*Ins. Code § 380*]. The required contents of a policy are set forth generally in *Ins. Code § 381*. An open policy is one in which the value of the subject matter is not agreed on but is left to be ascertained in case of loss [*Ins. Code § 411*]. A valued policy is one which expresses on its face an agreement that the thing insured shall be valued at a specified sum [*Ins. Code § 412*]. A running policy is one which contemplates successive insurances and which provides that the object of the policy may be from time to time defined, especially as to the subjects of insurance, by additional statements or endorsements [*Ins. Code §*

413].

The execution of an instrument is defined as the subscribing and delivering of the instrument with or without affixing a seal [*Code Civ. Proc. § 1933*], and the persons who must subscribe a policy issued by a corporate insurer are identified in *Ins. Code § 386*.

An insurance agent is a person authorized, by and on behalf of an insurer, to transact all classes of insurance other than life insurance, and to transact 24-hour care coverage as defined in *Ins. Code § 1749.02* [*Ins. Code § 31*]. An insurance broker is a person who, for compensation and on behalf of another person, transacts insurance other than life with, but not on behalf of, an insurer [*Ins. Code § 33*]. An insurance solicitor is a natural person employed to aid a fire and casualty broker-agent acting as an insurance agent or insurance broker in transacting insurance other than life [*Ins. Code § 34*]. A fire and casualty broker-agent is a person licensed pursuant to *Ins. Code § 1625* [*Ins. Code § 33.5*].

The classes of insurance are listed in *Ins. Code § 100* and separately defined in *Ins. Code §§ 101-120*. Events that may be insured against are set forth in *Ins. Code §§ 250-252*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGeneral OverviewInsurance LawIndustry RegulationGeneral Overview

California Points & Authorities

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12-120 California Points & Authorities § 120.03

§ 120.03 How to Use the Forms in This Chapter

[1] Page Limits on Points and Authorities

One of the more significant drafting requirements to keep in mind are page limits: opening or responding memoranda of points and authorities must not exceed 15 pages, or 20 pages if used in a summary judgment or summary adjudication proceedings. A reply or closing memorandum may not exceed 10 pages. Exhibits, declarations, attachments, a table of contents, a table of authorities, and the proof of service are excluded when calculating pages. Any party desiring to file a longer memorandum must obtain leave of court [*see* Cal. Rules of Ct., Rule 313(d)]. These and other drafting requirements are discussed in further detail in Ch. 1, *Writing Legal Memoranda and Briefs* .

[2] Using the Forms to Build a Draft Memorandum

The forms included in this chapter are designed to be combined with other points and authorities to form a complete memorandum. For a detailed discussion on how to select and use the forms in the publication to build a draft memorandum and complete the draft, with detailed discussion of all drafting requirements and strategic or stylistic considerations, see Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedureSummary JudgmentSupporting MaterialsMemoranda of Law

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12-120 California Points & Authorities § 120.04

§ 120.04 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

For detailed discussion and forms relating generally to insurance, see the following chapters in California Forms of Pleading and Practice (Matthew Bender):

- Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration.*
- Ch. 33, *Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding.*
- Ch. 34, *Contractual Arbitration: Judicial Review.*
- Ch. 182, *Declaratory Relief* .
- Ch. 269, *Fraud and Deceit.*
- Ch. 300, *Indemnity and Contribution.*
- Ch. 427, *Principal and Agent.*
- Ch. 536, *Subrogation.*
- Ch. 537, *Summary Judgment* .
- Ch. 538, *Suretyship, Bonds, and Undertakings* .

[2] Related Points and Authorities

Memoranda of points and authorities that may be combined with the forms in this chapter, relating to various aspects of insurance proceedings generally, may be found in Ch. 105, *Fraud and Deceit* ; Ch. 115, *Indemnity and Contribution* ;

Ch. 182, *Principal and Agent* , Ch. 220, *Subrogation* , Ch. 221, *Summary Judgments* , and Ch. 222, *Suretyship* .

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12-120 California Points & Authorities §§ 120.05-120.09

[Reserved]

§§ 120.05[Reserved]

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PART II. FORMS
A. Oral and Implied Insurance Contracts

12-120 California Points & Authorities § 120.10

§ 120.10 Insurer Is Not Bound by Unauthorized Oral Representations of Soliciting Agent

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER IS NOT BOUND BY AGENT'S ORAL STATEMENTS SINCE INSURANCE APPLICATION EXPRESSLY STATED INSURER WAS NOT BOUND BY ANY STATEMENT MADE BY AGENT UNLESS WRITTEN IN THE APPLICATION.

Unauthorized Oral Statements or Agreements Not Binding. Oral statements or purported agreements by agents authorized only to solicit or accept applications for insurance do not establish binding oral insurance coverage (*Toth v. Metropolitan Life Ins. Co. (1932) 123 Cal. App. 185, 192-193, 11 P.2d 94* ; *see also Linnastruth v. Mutual Benefit Health & Accident Ass'n (1943) 22 Cal. 2d 216, 218, 137 P.2d 833*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a defendant insurer's contention that it is not bound by the unauthorized oral representations of its soliciting agent.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should include specific facts showing that the defendant insurer is not liable in an action on a contract of insurance, because there is no showing of a contractual relation between the parties at the time the loss was sustained or the liability incurred, in that the agent who allegedly entered into the oral contract of insurance on defendant's behalf was a mere solicitor without actual or apparent authority to do so.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.11* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be a motion by a defendant insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. In this context counsel would need to submit a statement of undisputed facts supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Pleading and Practice Chapters

For a form of complaint, and forms of allegations for use in a complaint, by a beneficiary, insured, or loss-payable payee against an insurance company for damages for breach of contract, see California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender).

For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender). For a discussion of the rules applicable to summary judgment, a form of notice of motion for summary judgment, and related forms, see also California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[d] Related Points and Authorities

For complete discussion of the format requirements and strategic considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion of requirements and considerations for completing a memorandum, together with a general skeletal form of memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* . For forms relating specifically to the procedural context of a motion for summary judgment or summary adjudication, see Ch. 221, *Summary Judgments* .

[e] Opposing Points and Authorities

The points and *authorities in § 120.16* et seq. and § 120.24 et seq. may be used in an appropriate case to oppose the points and authorities set out in this form.

[3] Discussion of Authorities

[a] Unauthorized Oral Statements or Agreements Not Binding

Toth v. Metropolitan Life Ins. Co. *(1932) 123 Cal. App. 185, 11 P.2d 94* , was an action by plaintiff as beneficiary of an alleged oral contract of life insurance. Plaintiff offered no evidence concerning the actual or ostensible authority of the agent whom she claimed made the oral agreement, and defendant's evidence was that the agent was authorized only to take and submit insurance applications. Judgment for plaintiff was reversed. The court of appeal said that a mere soliciting agent or other intermediary operating between the insured and the insurer has authority only to initiate contracts but not to consummate them and cannot bind his or her principal by anything he or she may say or do during the preliminary negotiations (*123 Cal. App. 185, 192)* . The court added that an insurer is not bound by representations or purported agreements made by an unauthorized agent (*123 Cal. App. 185, 193)* .

Linnastruth v. Mutual Benefit Health & Accident Ass'n *(1943) 22 Cal. 2d 216, 137 P.2d 833* , was an action by plaintiff as beneficiary of accident insurance contracts. The applications, signed by plaintiff's decedent, stated: "I understand and agree that this application shall not be binding upon the Association until the policy is issued to me." The initial premiums were paid to the insurance solicitor, who dated the applications July 20 and sent them and premiums to the company's Los Angeles office, which in turn sent them to the home office in Omaha, Nebraska, for approval of the policies. The applications arrived at the home office on August 1, were approved on August 2, and the two policies were issued, dated August 5, for a term commencing on the date of issue. On August 6, they were taken to the applicant's home in Hynes, California, where the applicant was lying unconscious from staphylococcic septicemia contracted from bodily injuries received in falls that had occurred on July 26 and 30. The applicant died on August 6 without regaining consciousness. Plaintiff had sent notice of the accidents to the association's Los Angeles office on July 30. The notice was received by the home office on August 2. On August 10, defendant denied liability for the reason that the injuries which resulted in death occurred prior to the date the policies were issued. For the same reason, the trial court sustained the defense of nonliability interposed by defendant. The trial court's judgment for defendant association was affirmed. Defendant's solicitor had told plaintiff's decedent that coverage would commence from the date of application, contrary to the statement in the applications quoted above. The Supreme Court rejected plaintiff's contention that coverage commenced from the date the applications were made because the solicitor said it did. The court said that plaintiff did not attempt to show by any evidence, except the solicitor's remark, that the solicitor had any authorityto bind the associations to the time when liability commenced and concluded that the agent had no authority, actual or apparent, to bind the association on a contract of insurance (*22 Cal. 2d 216, 218)* .

[4] Additional Authorities

[a] Unauthorized Oral Statements or Agreements Not Binding

In *Browne v. Commercial Union Assurance Co. (1916) 30 Cal. App 547, 158 P. 765* , the court of appeal noted the settled rule that the authority to complete contracts primarily differentiates a general agent having power to bind his or her principal from mere soliciting agents and other intermediaries operating between the insured and the insurer, who have authority only to initiate contracts and, consequently, cannot bind their principals by anything they may say or do during the preliminary negotiations.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewInsurance LawClaims & ContractsGeneral OverviewInsurance LawClaims & ContractsContract FormationGeneral OverviewInsurance LawClaims & ContractsContract FormationApplicationsInsurance LawClaims & ContractsGood Faith & Fair DealingAgents & Brokers

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A. Oral and Implied Insurance Contracts

12-120 California Points & Authorities § 120.11

§ 120.11 Application for Insurance Negated Apparent Authority

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURANCE APPLICATION NEGATED APPARENT AUTHORITY OF AGENT ORALLY TO BIND INSURER.

Application for Insurance Negated Apparent Authority. A statement in an insurance application that the insurer is not bound by any oral statement or representation made by or to its agent constitutes notice to the applicant that the soliciting agent is without authority to alter the terms of the written application. (*Linnastruth v. Mutual Benefit Health & Accident Ass'n (1943) 22 Cal. 2d 216, 218, 137 P.2d 833* ; *Toth v. Metropolitan Life Ins. Co. (1932) 123 Cal. App 185, 193, 11 P.2d 94*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a defendant insurer's contention that it is not bound by the unauthorized representations of its soliciting agent. They should be included only if the insurance application contained a statement that the insurer is not bound by anyoral statement or representation made by or to its agent, or a variation of that statement. Such a statement would constitute notice to the applicant that the agent has no authority, actual or ostensible, to enter into a contract on the insurer's behalf.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should include specific facts showing that the defendant insurer is not liable in an action on a contract of insurance, because there is no showing of a contractual relation between the parties at the time the loss was sustained or the liability incurred, in that the application expressly states that any oral statement or representation by its agent is not

binding, and provides notice to the applicant that the agent has not authority to enter into a binding agreement on the insurer's behalf.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be a motion by a defendant insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclosing no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. In this context counsel would need to submit a statement of undisputed facts supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Pleading and Practice Chapters

For a form of complaint, and forms of allegations for use in a complaint, by a beneficiary, insured, or loss-payable payee against an insurance company for damages for breach of contract, see California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender).

For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender). For a discussion of the rules applicable to summary judgment, a form of notice of motion for summaryjudgment, and related forms, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[d] Related Points and Authorities

For complete discussion of the format requirements and strategic considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion of requirements and considerations for completing a memorandum, together with a general skeletal form of memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* . For forms relating specifically to the procedural context of a motion for summary judgment or summary adjudication, see Ch. 221, *Summary Judgments* .

[e] Opposing Points and Authorities

The points and *authorities in § 120.16* may be used in an appropriate case to oppose the points and authorities set out in this form.

[3] Discussion of Authorities

[a] Application for Insurance Negated Apparent Authority

The factual background of ***Linnastruth v. Mutual Benefit Health & Accident Ass'n*** *(1943) 22 Cal. 2d 216, 137 P.2d 833* , is discussed in *§ 120.10[3][a]*. The Supreme Court pointed out that, in addition to the statement that the application would not be binding until the policy was issued, each application contained the applicant's agreement that the association was not bound by any statement made by or to any agent unless written in the application. The Court, therefore, concluded that the agent had no actual authority to bind the association on a contract of insurance and that the agreement gave notice that he had no such apparent authority (*22 Cal. 2d 216, 218)* .

The factual background of ***Toth v. Metropolitan Life Ins. Co.*** *(1932) 123 Cal. App 185, 11 P.2d 94* , is discussed in *§ 120.10[3][a]*. The court of appeal pointed out that the application for insurance signed by the decedent contained the provisions that no agent or any other person except officers of defendant company had power to "Make, modify or discharge any contract of insurance" or to bind the defendant in any way "by making any promises respecting any benefits under any policy issued hereunder" and that defendant would incur no liability under the application until it had been received and approved and a policy issued and delivered with a full first premium paid to and accepted by defendant. The court said that decedent signed the application and is presumed to have known its contents and that, by these provisions, express notice was given to decedent that defendant's officers reserved the exclusive right to determinewhether or not defendant would insure him and that the soliciting agent had no right or authority to bind defendant by any promises or purported oral agreements. The court concluded that the agent had neither actual nor ostensible authority to make the purported oral contract relied on by plaintiff and consequently that no completed contract of insurance on decedent's life, either oral or written, was ever entered into by decedent and defendant (*123 Cal. App 185, 193)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGeneral OverviewInsurance LawClaims & ContractsContract FormationApplications

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 120 INSURANCE
PART II. FORMS
A. Oral and Implied Insurance Contracts

12-120 California Points & Authorities § 120.12

§ 120.12 Parties Agreed That Insurance Would Not Be Effective Until Policy Issues

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER IS NOT LIABLE FOR THE _____ [LOSS SUSTAINED *or* LIABILITY INCURRED] BECAUSE THE PARTIES AGREED THAT THE INSURANCE WOULD NOT BE EFFECTIVE UNTIL THE POLICY ISSUES, AND THE _____ [LOSS *or* LIABILITY] WAS _____ [SUSTAINED *or* INCURRED] BEFORE THE INSURER ACCEPTED THE APPLICATION AND ISSUED THE POLICY.

Agreement That Insurance Is Not Effective Until Policy Issues Binding on Parties. An agreement between the parties that insurance is not effective until a policy issues does not violate public policy and is binding on the parties (*see Linnastruth v. Mutual Benefit Health & Accident Ass'n (1943) 22 Cal. 2d 216, 218-219, 137 P.2d 833*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of an insurer's contention that the insurer is not liable for the loss because the parties agreed that the insurance would not be effective until the policy issues, and the loss was sustained after the application for insurance was made but before the insurer accepted the application and issued the policy.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. In particular, counsel should include specific facts showing that the insurer is not liable in an action on a contract of insurance, because liability was conditionedon the issuance of the policy and no policy had been issued at

the time of loss.

For example, in his or her argument counsel would:

- Refer to or quote the express language in the application stating that the insurance would not be effective until the policy issued.

- State the date the policy was issued, if applicable.

- Identify the date the loss was sustained or liability incurred, pointing out that the date of loss precedes the date the policy was issued.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.11* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be a motion by a defendant insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclosing no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. In this context counsel would need to submit a statement of undisputed facts supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Pleading and Practice Chapters

For a form of complaint, and forms of allegations for use in a complaint, by a beneficiary, insured, or loss-payable payee against an insurance company for damages for breach of contract, see California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender).

For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender). For a discussion of the rules applicable to summary judgment, a form of notice of motion for summary judgment, and related forms, see also Ch. 537, *Summary Judgment* , in that publication.

[d] Related Points and Authorities

For complete discussion of the format requirements and strategic considerations for drafting memoranda, discussion on how to combine the formsof this publication in drafting, and discussion of requirements and considerations for completing a memorandum, together with a general skeletal form of memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* . For forms relating specifically to the procedural context of a motion for summary judgment or summary adjudication, see Ch. 221, *Summary Judgments* .

[e] Opposing Points and Authorities

The points and authorities in §§ 120.25 and 120.26, based an insurer's unreasonable delay may be used in an appropriate case to oppose the points and authorities set out in this form.

[3] Discussion of Authorities

[a] Agreement That Insurance Is Not Effective Until Policy Issues Binding on Parties

The factual background of ***Linnastruth v. Mutual Benefit Health & Accident Ass'n*** *(1943) 22 Cal. 2d 216, 137 P.2d 833* , is discussed in *§ 120.10[3][a]*. The Supreme Court, by implication, held that the statement in the applications that, in effect, the insurance was not to be effective until the policies were issued did not violate law or public policy and was binding on the parties. The Court said that any reader of the applications must be deemed to be placed with certainty on notice that coverage commenced not when the agent said it did, but on the issuance of the policies. It explained that if no insurance was to be in effect until issuance or delivery of the policy, the effective date of insurance coverage must coincide with the effective date of liability and to say that liability does not attach until a certain date, and when it does attach on that date it attaches as of an earlier date, is to place a strained and unwarranted construction on the plain language employed (*22 Cal. 2d 216, 219)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsContract FormationGeneral OverviewInsurance LawClaims & ContractsContract FormationApplications

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 120 INSURANCE
PART II. FORMS
A. Oral and Implied Insurance Contracts

12-120 California Points & Authorities § 120.13

§ 120.13 Mere Delay in Issuing Policy Does Not Create Contractual Insurance Obligation

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER'S DELAY IN APPROVING THE APPLICATION AND ISSUING POLICY DOES NOT CREATE A CONTRACT.

Delay in Issuing Policy Does not Create a Contract. Mere delay, without more, in passing on an application for and issuing a policydoes not create a contractual insurance obligation (*Linnastruth v. Mutual Benefit Health & Accident Ass'n (1943) 22 Cal. 2d 216, 220-221, 137 P.2d 833*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of an insurer's argument that a mere delay in passing on an application for and issuing a policy does not create a contractual insurance obligation. These points and authorities should be included only when there was some delay on the part of the insurer in acting on the application and issuing the policy and the delay was not unreasonable as a matter of law.

Counsel may wish to use this form in a reply memorandum to respond to an opposing party's contention that the insurer is contractually bound even though the insurer had not issued the policy at the time of loss because of some delay by the insurer [*see, e.g.,* § 120.25].

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. In particular, counsel should include specific facts showing that any delay on the part of the defendant

insurer was not unreasonable, therefore, the insurer is not contractually liable to the insured for the loss sustained prior to issuance of the policy.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.11* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be a motion by a defendant insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclosing no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. In this context counsel would need to submit a statement of undisputed facts supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Pleading and Practice Chapters

For a form of complaint, and forms of allegations for use in a complaint, by a beneficiary, insured, or loss-payable payee against an insurance company for damages for breach of contract, see California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender).

For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender). For a discussion of the rules applicable to summary judgment, a form of notice of motion for summary judgment, and related forms, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[d] Related Points and Authorities

For complete discussion of the format requirements and strategic considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion of requirements and considerations for completing a memorandum, together with a general skeletal form of memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* . For forms relating specifically to the procedural context of a motion for summary judgment or summary adjudication, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Delay in Issuing Policy Does Not Create a Contract

The factual background of ***Linnastruth v. Mutual Benefit Health & Accident Ass'n*** *(1943) 22 Cal. 2d 216, 137 P.2d 833* , is discussed in *§ 120.10[3][a]*. In affirming the judgment for defendant association, the Supreme Court in *Linnastruth*, noted that no facts were presented which would justify a finding of negligence, waiver, or estoppel on the part of the insurer and said that delay alone is not sufficient to create a contract of insurance (*22 Cal. 2d 216, 220)* . The Court explained that considering the geographical distances involved, no more than a reasonable time elapsed between the date of the applications and the issuance of the policies, that neither the retention of the premium until return of the policies was tendered at trial nor the issuance of the policies after notice of the accidents sufficed to impose liability prior to the date of the policies in view of the statement in the applications that liability would not attach until the policies were issued, and that neither the insured nor the beneficiary could have been misled by any act of the association (*22 Cal. 2d 216, 221)* .

[4] Additional Authorities

[a] Delay in Issuing Policy Does Not Create a Contract

Lucas v. Metropolitan Life Ins. Co (1936) 14 Cal. App. 2d 676, 58 P.2d 934 , was an action by the widow of a deceased applicant for an accident insurance policy. The applicant had been injured and died while defendant insurer was investigating the risk. One of plaintiff's theories of recovery was based on the agent's delay in communicating with the insurance company. The trial court found that there was no negligence. In affirming the judgment for defendant, the court of appeal said that mere delay in acting on an application for insurance does not create a contract of insurance and that, as a matter of law, it is settled, with rare exceptions, that what is a reasonable lapse of time is within the sound discretion of the trial court (*14 Cal. App. 2d 676, 680)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsContract FormationGeneral Overview

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 120 INSURANCE
PART II. FORMS
A. Oral and Implied Insurance Contracts

12-120 California Points & Authorities § 120.14

§ 120.14 Insurer Is Bound by Its Oral Agreement to Insure Loss

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. These points and authorities may be combined, if appropriate, with other points and authorities that contend that an oral agreement to insure is enforceable in specific instances. See §§ 120.17 et seq. and 120.24 et seq.*]

Oral Insurance Contracts Valid. An oral contract of insurance is valid and enforceable (*Kazanteno v. California-W. States Life Ins. Co. (1955) 137 Cal. App. 2d 361, 370, 290 P.2d 332*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's contention that it is not bound by the oral representations of its soliciting agent. The basis for this form is that oral agreements to insurer are enforceable.

These points and authorities may be combined, if appropriate, with other points and authorities that contend that an oral agreement to insure is enforceable in specific instances [*see § 120.17* et seq.], and with other points and authorities that contend that the soliciting agent had authority to bind the insurer [*see* § 120.24 et seq.].

This form may be used to oppose the points and authorities *set forth in § 120.10* et seq.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should include specific facts showing that the parties have entered into an enforceable oral contract of insurance, or agreement to issue, renew, or make an indorsement on a policy, or to waive a provision or condition or a provision [*see Kazanteno v. California-W. States Life Ins. Co. (1955) 137 Cal. App. 2d 361, 370, 290 P.2d 332* ; *see also §*

120.14[3][a]].

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.17* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be a motion by a defendant insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclosing no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. In this context counsel would need to submit a statement of undisputed facts supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Pleading and Practice Chapters

For a form of complaint, and forms of allegations for use in a complaint, by a beneficiary, insured, or loss-payable payee against an insurance company for damages for breach of contract, see California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender).

For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender). For a discussion of the rules applicable to summary judgment, a form of notice of motion for summary judgment, and related forms, see also Ch. 537, *Summary Judgment* , in that publication.

[d] Related Points and Authorities

For complete discussion of the format requirements and strategic considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion of requirements and considerations for completing a memorandum, together with a general skeletal form of memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* . For forms relating specifically to the procedural context of a motion for summary judgment or summary adjudication, see Ch. 221, *Summary Judgments* .

[e] Opposing Points and Authorities

The points and *authorities in § 120.10* and *§ 120.11* may be used in an appropriate case to oppose the points and authorities set out in this form.

[3] Discussion of Authorities

[a] Oral Insurance Contracts Valid

Kazanteno v. California-W. States Life Ins. Co. *(1955) 137 Cal. App. 2d 361, 290 P.2d 332* , arose out of an oral agreement made on or about June 25, 1952, between plaintiff and defendant insurer's agent to reinstate a life insurance policy on the plaintiff, increase the amounts payable under two rider policies (one an accident monthly income policy and the other a health income policy) from $100 to $300 per month, and to issue a life policy covering plaintiff's son. Plaintiff expressly conditioned reinstatement of the life policy and issuance of the policy covering his son's life on defendant increasing the monthly benefit payments under the rider policies. On July 2, 1952, defendant reinstated the policy on plaintiff's life, and on July 7 sent plaintiff notice of the reinstatement with premium paid until July 18, 1952, and a notice of premiums due on July 18, 1952. Plaintiff paid the required premiums. On July 16, 1952, the policy

covering the son's life was issued. On August 25, 1952, plaintiff was totally disabled by an accident. On October 17, 1952, defendant, with knowledge of plaintiff's accident, issued new rider policies with increased benefits dated July 18, 1953, but effective October 18, 1952, a date after the accident, and refused to pay the increased benefits under the accident rider policy.

Judgment for plaintiff was affirmed on appeal. The court of appeal noted that both sides admitted that oral agreements for insurance are valid in California and added that the rule appears equally applicable to all phases of insurance contracts; hence, a parol contract of insurance, or agreement to issue, renew, or make an indorsement on a policy, or to waive a provision or condition thereof, is valid and enforceable (*137 Cal. App. 2d 361, 370)* . Quoting from *Marderosian v. National Cas. Co. (1929) 96 Cal. App 295, 303, 273 P. 1093* [*see § 120.14[4][a]*], the court explained that when a valid parol contract of insurance has been entered into, the policy to be issued is simply the memorial of the prior parol contract, and even though the policy is not delivered until after the loss occurs, the insurance is deemed effective from the time agreed on in the parol agreement, irrespective of any delivery of the policy (*137 Cal. App. 2d 361, 370)* .

[4] Additional Authorities

[a] Oral Insurance Contracts Valid

In *Marderosian v. National Cas. Co. (1929) 96 Cal. App. 295, 273 P. 1093* , an action to recover under an accident insurance policy which had not been issued until after the death of plaintiff's decedent (the alleged insured), the court of appeal, in affirming judgment for plaintiff, stated that when a valid parol contract of insurance has been entered into, the policy to be issued is simply the memorial of the prior parol contract and that the insurance is deemed effective from the time agreed on in the parol agreement, irrespective of any delivery of the policy (*96 Cal. App. 295, 303)* .

In *Smith v. Massachusetts Bonding & Ins. Co. (1925) 71 Cal. App. 661, 236 P. 176* , an action arising out of a vehicle accident involving a trailer owned by plaintiff's assignor, plaintiff sought recovery under an alleged oral insurance contract covering both the assignor's trucks and his trailers which was entered into between plaintiff's assignor and defendant insurer before the accident. The policy was not delivered until after the accident and then covered only the trucks. The court of appeal, in affirming judgment for plaintiff, rejected the insurer's contention that the action was actually one to reform a written insurance contract and that substantially all the evidence introduced at the trial was objectionable because it sought to vary the terms of a written instrument. The court explained that there was no attempt to change the terms of a written instrument because at the time of the accident no policies had been issued; the action was based on an oral contract which was in effect at the time of the accident and which insured the trailers as well as the trucks (*71 Cal. App. 661, 667)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsContract FormationGeneral OverviewInsurance LawClaims & ContractsContract FormationOral ContractsInsurance LawClaims & ContractsContract FormationPolicy Delivery

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 120 INSURANCE
PART II. FORMS
A. Oral and Implied Insurance Contracts

12-120 California Points & Authorities § 120.15

§ 120.15 Insurer Is Bound by Its Oral Binder Pending Issuance of Written Policy

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. These points and authorities may also be combined with points and authorities generally contending that the parties entered into an enforceable oral agreement to insure. See § 120.16*].

A. Oral Binder Is Enforceable. A binder is a temporary contract of insurance, and an oral binder is valid and enforceable (*Spott Elec. Co. v. Industrial Indem. Co. (1973) 30 Cal. App. 3d 797, 805, 106 Cal. Rptr. 710*).

B. Insurer Is Bound Even Though Policy Not Yet Delivered. When a valid parol contract of insurance has been entered into, the policy to be issued is simply the memorial of the prior parol contract, and even though the policy is not delivered until after the loss occurs, the insurance is deemed effective from the time agreed on in the parol agreement, irrespective of any delivery of the policy (*Spott Elec. Co. v. Industrial Indem. Co. (1973) 30 Cal. App. 3d 797, 805, 106 Cal. Rptr. 710*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's contention that it is not bound by the oral representations of its soliciting agent. The basis for this form is that the insurer has issued an oral binder pending delivery of the formal policy.

These points and authorities may also be combined with points and authorities generally contending that the parties entered into an enforceable oral agreement to insure [*see § 120.16*], and that the soliciting agent had authority to bind the insurer [*see* § 120.24 et seq.].

This form may be used to oppose the points and authorities *set forth in § 120.10* et seq.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should include specific facts showing, for example, that the insurer has obligated itself to issue a policy retroactive to the date of the oral agreement of its agent [*see Spott Elec. Co. v. Industrial Indem. Co. (1973) 30 Cal. App. 3d 797, 805, 106 Cal. Rptr. 710* ; see also *§ 120.15[3][a]*].

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.16* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be a motion by a defendant insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclosing no triable issue as to any material fact [*see* Code *Civ. Proc. § 437c*]. In this context counsel would need to submit a statement of undisputed facts supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Pleading and Practice Chapters

For a form of complaint, and forms of allegations for use in a complaint, by a beneficiary, insured, or loss-payable payee against an insurance company for damages for breach of contract, see California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender).

For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender). For a discussion of the rules applicable to summary judgment, a form of notice of motion for summary judgment, and related forms, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[d] Related Points and Authorities

For complete discussion of the format requirements and strategic considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion of requirements and considerations for completing a memorandum, together with a general skeletal form of memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* . For forms relating specifically to the procedural context of a motion for summary judgment or summary adjudication, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Oral Binder Is Enforceable

Spott Elec. Co. v. Industrial Indem. Co. *(1973) 30 Cal. App. 3d 797, 106 Cal. Rptr. 710* , was an action by insureds against an insurer. Defendant had originally insured plaintiffs under a comprehensive liability policy but plaintiffs, through their insurance broker, had invited bids for the policy when their current policy with defendant expired. Defendant hadissued a written binder for the 30 days immediately following the expiration period pending ultimate placement of the policy, and also submitted a bid for this policy. A second insurer submitted a lower bid and gave an oral binder covering plaintiffs for the same period. A fire occurred during the binder period which exposed the insureds to liability. The broker thereafter accepted the policy proposed by the second insurer and canceled the binder with

defendant. The second insurer, about two weeks after the fire, issued its policy which was retroactive to the expiration date of the prior policy. Defendant insurer cross complained against the second insurer for a declaration that the second insurer was obligated to defend and indemnify plaintiffs under its oral binder and policy. After a trial by the court, judgment was entered declaring that defendant insurer had no obligation to defend or indemnify the insureds and that the second insurer (cross defendant) was solely liable.

The court of appeal affirmed. It held that the second insurer, by its oral binder, had obligated itself to issue a policy retroactive to the date the prior policy expired and that, under the facts of the case, the second insurer's binder canceled defendant's binder by substitution (*30 Cal. App. 3d 797, 805-806)* . The court said that a "binder" is a temporary contract of insurance and that the second insurer's contract, whether it be characterized as a binder or as an oral contract to insure, was valid (*30 Cal. App. 3d 797, 805)* .

[b] Insurer Is Bound Even Though Policy Not Yet Delivered

The factual background of ***Spott Elec. Co. v. Industrial Indem. Co.*** *(1973) 30 Cal. App. 3d 797, 106 Cal. Rptr. 710* , is discussed in *§ 120.15[3][a]*. The court cited *Kazanteno v. California-W. States Life Ins. Co. (1955) 137 Cal. App. 2d 361, 370, 290 P.2d 332* , discussed in *§ 120.16[3][a]*, explaining that when a valid parol contract of insurance has been entered into, the policy to be issued thereon is simply the memorial of the prior parol contract, and even though the policy is not delivered until after the loss occurs, the insurance is deemed effective from the time agreed on in the parol agreement, irrespective of any delivery of the policy (*30 Cal. App. 3d 797, 805)* . The court, quoting 27 Cal. Jur 2d, Insurance, § 182 and citing *Civ. Code § 1625*, explained that the rationale behind this rule is the notion that since the execution of a contract in writing supersedes all the negotiations or stipulations concerning its subject which preceded or accompanied the execution of the instrument, whether the law requires it to be written or not, an oral contract of insurance is merged into a subsequent written contract (*30 Cal. App. 3d 797, 805)* .

[4] Additional Authorities

[a] Oral Binder Is Enforceable

In *Granco Steel, Inc. v. Workmen's Comp. Appeals Bd. (1968) 68 Cal. 2d 191, 65 Cal. Rptr. 287, 436 P.2d 287* , a proceeding to review an order of the Workers' Compensation Appeals Board dismissing an insurer from liability for injuries sustained by one of petitioner's employees on the ground there was no insurance coverage at the time the injuries were sustained, the Supreme Court annulled the board's order. The Court held that on the basis of facts found by the board, a valid oral binder had been given by the insurer's agent prior to the accident. The Court restated the rule that insurance companies may enter into binding parol contracts to issue new policies, renew existing policies, or transfer existing insurance from one location to another (*68 Cal. 2d 191, 197)* . It added that, as with all insurance contracts, the identity of the insurer must be established if liability is to be predicated on an alleged oral binder and that some difficulty exists where, as here, the agent represents more than one insurance company (*68 Cal. 2d 191, 198)* . The Court nevertheless held that, under the facts of the case, there was a sufficient designation of the insurer as the company that was to carry the insurance (*68 Cal. 2d 191, 198-206)* .

In *Zander v. Texaco, Inc. (1968) 259 Cal. App. 2d 793, 66 Cal. Rptr. 561* , defendant insurer had given an oral binder covering the owner and operators of a service station for fire, public liability, and property damage. Plaintiff was subsequently injured on the premises, recovered judgment against the service station owner and operators, and then sued to compel the insurer to pay the judgment. The court of appeal, in affirming judgment for plaintiff, explained that the issuance of binders, called covering notes in the Insurance Code, has statutory authorization with their duration limited to 90 days unless extended as provided by law [*Ins. Code § 382*], that California case law covers the issuance of binders, that binders may be oral and cover new policies, that the rationale for their issuance is that the parties have the benefit of them during that incipient period when the papers are being perfected and transmitted, and that oral binders are a common and necessary part of the insurance business (*259 Cal. App. 2d 793, 800)* .

In *Parlier Fruit Co. v. Fireman's Fund Ins. Co. (1957) 151 Cal. App. 2d 6, 311 P.2d 62* , plaintiff insured recovered judgment against several insurers under fire insurance policies issued by them, but judgment was rendered against plaintiff in its action against the insurers for losses under oral use and occupancy binder coverages. The court of appeal, in affirming that part of the judgment for plaintiff and reversing that part against it, explained that binders necessarily are of the most informal character, that a valid binder may be made orally as well as in writing, or partly in paroland partly in writing, and that oral binders are a common and necessary part of the insurance business (*151 Cal. App. 2d 6, 20, 25-26)* . Rejecting the trial court's finding that the binders were too uncertain to be enforceable, the court of appeal pointed out that the insurers must have known the type of insurance sought when they accepted the request for coverage and that it would necessarily be the type and form usually issued to an insured in the same type and class of business as plaintiff (*151 Cal. App. 2d 6, 21)* . With respect to the amount of insurance, the court said that plaintiff had expressly agreed to accept a total insurance amount up to $75,000 and impliedly agreed to accept from each company the amount allocated to it by the agent, provided only that the total from all companies did not exceed $75,000, and that each defendant had agreed to coverage in a particular sum (*151 Cal. App. 2d 6, 22-23)* . The court further explained that when a binder does not specify the terms and conditions, the general rule is that the parties will be presumed to have contemplated a form of policy containing such conditions and limitations as are usual in such cases (*151 Cal. App. 2d 6, 21)* and that the premium rate would necessarily be the company's usual rate for the type of coverage received (*151 Cal. App. 2d 6, 22)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsBindersInsurance LawClaims & ContractsContract FormationGeneral OverviewInsurance LawClaims & ContractsContract FormationOral ContractsInsurance LawClaims & ContractsContract FormationPolicy Delivery

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 120 INSURANCE
PART II. FORMS
A. Oral and Implied Insurance Contracts

12-120 California Points & Authorities § 120.16

§ 120.16 Insurer Is Bound by Continuing, Collateral, Oral Contract to Insure

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. These points and authorities may also be combined with points and authorities generally contending that the parties entered into an enforceable oral agreement to insure. See § 120.16*].

Insurer Is Bound by Continuing Contract to Insure. An oral agreement under the terms of which an insurer undertakes to keep the insured covered with insurance, to be terminated only by a notice in writing, is valid as a continuing collateral contract to insure (*Dutton D. Co. v. United States Fid. & Guar. Co. (1934) 136 Cal. App 574, 576-577, 29 P.2d 316*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's contention that it is not bound by the oral representations of its solicitingagent. The basis for this form is that the insurer has issued a continuing, collateral, oral contract to insure.

These points and authorities may also be combined with points and authorities generally contending that the parties entered into an enforceable oral agreement to insure [*see § 120.16*], and that the soliciting agent had authority to bind the insurer [*see* § 120.24 et seq.].

This form may be used to oppose the points and authorities *set forth in § 120.10* et seq.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel

should include specific facts showing that the insurer has obligated itself to keep the insured covered with insurance, to be terminated only by a notice in writing.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.16* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be a motion by a defendant insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclosing no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. In this context counsel would need to submit a statement of undisputed facts supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Pleading and Practice Chapters

For a form of complaint, and forms of allegations for use in a complaint, by a beneficiary, insured, or loss-payable payee against an insurance company for damages for breach of contract, see California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender).

For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender). For a discussion of the rulesapplicable to summary judgment, a form of notice of motion for summary judgment, and related forms, see also Ch. 537, *Summary Judgment* , in that publication.

[d] Related Points and Authorities

For complete discussion of the format requirements and strategic considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion of requirements and considerations for completing a memorandum, together with a general skeletal form of memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* . For forms relating specifically to the procedural context of a motion for summary judgment or summary adjudication, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Insurer Is Bound by Continuing Contract to Insure

Dutton D. Co. v. United States Fid. & Guar. Co. *(1934) 136 Cal. App. 574, 29 P.2d 316* , was an action for damages for breach of an alleged oral contract under the terms of which defendant insurer undertook to keep plaintiff covered with workers' compensation insurance, to be terminated only by a notice in writing. Defendant complied with the agreement for several years and then, without plaintiff's knowledge, allowed the insurance to lapse. Thereafter, one of plaintiff's employees was injured. In a proceeding before the Industrial Accident Commission (*now* Workers' Compensation Appeals Board), in which both plaintiff and defendant were defendants, the employee procured an award of $2,990.05 against plaintiff. The commission in that proceeding found that defendant was not plaintiff's insurance carrier at the time of the accident and ordered that it be released and discharged from liability. In the present action, plaintiff sought recovery of the amount of the award it had to pay. Defendant's demurrer to the complaint on the ground of lack of jurisdiction was overruled, and defendant petitioned for a writ of prohibition to restrain the trial court from proceeding with the action on the ground that the matter of its liability had been concluded by the Industrial Accident Commission's exercise of jurisdiction over it.

The Supreme Court denied the writ on the ground that the issue before the Industrial Accident Commission was whether or not a policy issued by defendant covering plaintiff was in existence at the time of the accident, whereas the issue before the trial court was whether defendant had breached its contract to issue and keep in effect compensation insurance [*see United States Fid. & Guar. Co. v. Superior Court (1931) 214 Cal. 468, 470-471, 6 P.2d 243]* . The action in the trial court thereafter proceeded and resulted in a verdict for plaintiff. Although the court of appeal reversed thejudgment for retrial on the issue of damages only, it upheld the validity of the agreement, which it characterized as a continuing collateral contract to insure (*136 Cal. App. 574, 579)* , distinguishing this kind of contract from a parol contract of insurance (*136 Cal. App. 574, 576)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsContract FormationGeneral OverviewInsurance LawClaims & ContractsContract FormationOral Contracts

California Points & Authorities

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CHAPTER 120 INSURANCE
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A. Oral and Implied Insurance Contracts

12-120 California Points & Authorities § 120.17

§ 120.17 Insurer Is Bound by Its Oral Agreement to Renew Policy

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. These points and authorities may also be combined with points and authorities generally contending that the parties entered into an enforceable oral agreement to insure. See § 120.16*].

Oral Contract to Renew Policy Valid. An oral contract to renew an insurance policy is valid and enforceable (*Gold v. Sun Ins. Co. (1887) 73 Cal. 216, 218, 14 P. 786*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's contention that it is not bound by the oral representations of its soliciting agent. The basis for this form is that an oral contract to renew an insurance policy is valid and enforceable.

These points and authorities may also be combined with points and authorities generally contending that the parties entered into an enforceable oral agreement to insure [*see § 120.16*], and that the soliciting agent had authority to bind the insurer [*see* § 120.24 et seq.].

This form may be used to oppose the points and authorities *set forth in § 120.10* et seq.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should include specific facts showing that the insurer entered into an oral contract to renew an insurance policy. For example, counsel may refer to facts tending to show that the insurer had orally agreed to renew the insured's original

policy on a specified date in the same amount and covering the same property as the original policy, that the agreement was for a valuable consideration, that the insured had relied on that promise by failing to secure insuranceelsewhere, that the insurer had failed to perform, and that the insured suffered loss of his or her property [*see Gold v. Sun Ins. Co. (1887) 73 Cal. 216, 218, 14 P. 786* ; *see also § 120.17[3][a]*].

The form should be combined with other forms in this publication as necessary to complete argument as to all issues [*see, e.g., § 120.16* et seq.] and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be a motion by a defendant insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclosing no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. In this context counsel would need to submit a statement of undisputed facts supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Pleading and Practice Chapters

For a form of complaint, and forms of allegations for use in a complaint, by a beneficiary, insured, or loss-payable payee against an insurance company for damages for breach of contract, see California Forms of Pleading of Practice, Ch. 308, *Insurance* (Matthew Bender).

For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading of Practice, Ch. 15, *Affidavits, Certificates, and Declarations,* and Ch. 321, *Judicial Notice* (Matthew Bender). For a discussion of the rules applicable to summary judgment, a form of notice of motion for summary judgment, and related forms, see also Ch. 537, *Summary Judgment* , in that publication.

[d] Related Points and Authorities

For complete discussion of the format requirements and strategic considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion of requirements and considerations for completing a memorandum, together with a general skeletal form of memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* . For forms relating specifically to the procedural context of a motion forsummary judgment or summary adjudication, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Oral Contract to Renew Policy Valid

Gold v. Sun Ins. Co. *(1887) 73 Cal. 216, 14 P. 786* , was an action for damages resulting from defendant insurer's failure to renew a fire insurance policy covering plaintiff's property. The complaint alleged that defendant, for a valuable consideration, had orally agreed to renew plaintiff's original policy on a specified date in the same amount and covering the same property as the original policy, that plaintiff had relied on that promise by failing to secure insurance elsewhere, that defendant had failed to perform, and that the property had subsequently been destroyed by fire. Plaintiff sought recovery of the full amount of the policy agreed to be renewed. Defendant's general demurrer to the complaint was overruled, and judgment was entered for plaintiff on defendant's failure to answer. Defendant appealed, contending that the demurrer should have been sustained because (1) the complaint failed to state the terms and conditions of the policy as originally issued, (2) it was not alleged that the renewal premium was paid, and (3) no proof of loss was furnished as required under the original policy.

The Supreme Court affirmed the judgment. It held that the complaint sufficiently stated the terms of the contract, that a "valuable consideration" was alleged, that it was therefore unnecessary to specifically allege that the premium had been paid, and that proof of loss was not necessary as required under the terms of the renewed policy because defendant had repudiated its contract and refused to renew the policy (*73 Cal. 216, 218-219)* . With respect to the oral nature of the agreement to renew, the Court said that a parol contract to issue a fire policy, made by an insurer authorized to issue policies of that kind, is valid, and that it can be enforced by compelling specific performance by the company or in an action for breach of the agreement (*73 Cal. 216, 218)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGeneral OverviewInsurance LawClaims & ContractsContract FormationOral Contracts

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CHAPTER 120 INSURANCE
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12-120 California Points & Authorities § 120.18

§ 120.18 Actions By Agents Outside Scope of Actual Authority

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. These points and authorities may also be combined with points and authorities generally contending that the parties entered into an enforceable oral agreement to insure. See § 120.16*].

INSURER IS BOUND BY _____ [INSURANCE POLICY ISSUED BY, OR MODIFICATION TO INSURANCE CONTRACT MADE BY] INSURER'S AGENT WHERE AGENT HAD APPARENT AUTHORITY TO _____ [ISSUE THE POLICY, OR MODIFY THE INSURANCE CONTRACT] AND INSURED HAD NO KNOWLEDGE OF LIMITATIONS ON AGENT'S AUTHORITY.

Insurer Bound by Agent Acting Outside Scope of Actual Authority. Where an agent has apparent authority to act in the business entrusted to the agent, and the insured has no knowledge, actual or constructive, of limitations on agent's authority, the agent's authority is coextensive with that of the principal notwithstanding limits placed on the agent's authority by principal (*Skyways Aircraft Ferrying Serv., Inc. v. Stanton (1966) 242 Cal. App. 2d 272, 281, 51 Cal. Rptr. 352*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's contention that it is not bound by the oral representations of its soliciting agent. The basis for this form is that the insurer's agent has apparent authority to bind the insurer.

These points and authorities may also be combined with points and authorities generally contending that the parties entered into an enforceable oral agreement to insure [*see § 120.16*].

This form may be used to oppose the points and authorities *set forth in § 120.10* et seq.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should include specific facts showing that the insurer has actually conferred authority on the agent to bind the insurer, that agent held him or herself out as an agent of the insured, and that the agent had the apparent authority to make the transaction in question.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.16* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be a motion by a defendant insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclosing no triable issue as to any material fact [*see* Code *Civ. Proc. § 437c*]. In this context counsel would need to submit a statement of undisputed facts supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Pleading and Practice Chapters

For a form of complaint, and forms of allegations for use in a complaint, by a beneficiary, insured, or loss-payable payee against an insurance company for damages for breach of contract, see California Forms of Pleading of Practice, Ch. 308, *Insurance* (Matthew Bender).

For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading of Practice, Ch. 15, *Affidavits, Certificates, and Declarations*, and Ch. 321, *Judicial Notice* (Matthew Bender). For a discussion of the rules applicable to summary judgment, a form of notice of motion for summary judgment, and related forms, see also Ch. 537, *Summary Judgment* , in that publication. For further legal background, research guides, and forms relating to Agency, see Ch. 427, *Principal and Agent* .

[d] Related Points and Authorities

For complete discussion of the format requirements and strategic considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion of requirements and considerations for completing a memorandum, together with a general skeletal form of memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* . For forms relating specifically to the procedural context of a motion for summary judgment or summary adjudication, see Ch. 221, *Summary Judgments* . For discussion and forms on principles of agency, see Ch. 182, *Principal and Agent* .

[3] Discussion of Authorities

[a] Insurer Bound by Agent Acting Outside Scope of Actual Authority

In ***Skyways Aircraft Ferrying Serv., Inc. v. Stanton*** *(1966) 242 Cal. App. 2d 272, 51 Cal. Rptr. 352* the court held that an agent for an insurercan bind the insurer even when acting outside the scope of the agent's actual authority if the agent had the apparent authority to make the transaction in question and the insured had no notice of limitations on the agent's authority (*242 Cal. App. 2d 272, 280-281* ; *see also Civ. Code § 2334*). Whether an intermediary is an agent of the

insurer with the apparent authority to bind the insurer is a question of fact (*242 Cal. App. 2d 272, 284)* .

In *Skyways*, the plaintiff was engaged in the business of ferrying and delivering planes on a worldwide basis. It carried a life insurance policy on its president, who piloted the planes. On the day the policy expired, plaintiff sought immediate coverage from a broker who had procured insurance coverage for plaintiff previously. The broker, who held himself out as an agent of the defendant insurer, gave an oral binder over the telephone that he would cover the risk beginning that day until they entered into a written contract. Plaintiff assumed the coverage promised by the broker was coextensive with his earlier policy because the broker knew plaintiff and its president were still in the same business when the broker offered to cover the risk, and he did not mention any limitations on coverage. However, while the broker was authorized to bind over the telephone and to issue certificates of insurance, the coverage of the type of flights plaintiff's president made was beyond the scope of the broker's actual authority to offer. When plaintiff's president was killed the day after the oral binder was made, the insurance company subsequently denied liability (*242 Cal. App. 2d 272, 275-277)* .

The court found that the broker had apparent authority to bind the insurer because he had worked with defendant insurance company for about 20 years, had an extensive aviation background and familiarity with the industry, and generally held himself out as an agent of the insurance company by such actions as using letterhead with the insurance company's name on it for five years prior to the transaction with plaintiff. The court held that the insurer was bound by the oral binder made by the broker as its agent because he was acting with apparent authority on insurer's behalf, and plaintiff had no knowledge of the agent's limited authority (*242 Cal. App. 2d 272, 281)* .

[4] Additional Authorities

[a] Insurer Bound by Agent Acting Outside Scope of Actual Authority

In *Frasch v. London & Lancashire Fire Ins. Co. (1931) 213 Cal. 219, 2 P.2d 147* , a declaratory relief action in which plaintiff sought a declaration that defendant insurer was liable under the terms of a fire insurance policy alleged to have been issued by it, the person who solicited the insurance and delivered the policy collected the premium, but absconded with themoney. The insurer denied liability unless plaintiff again paid the premium. In reversing the judgment of dismissal, the Supreme Court said that as a general rule the powers of an agent of an insurance company are governed by the general law of agency, that the agent's powers are varied by the character of the functions he or she is employed to perform, that he or she may be a general agent with general powers, or the powers may be limited by the company, or he or she may be a special agent with authority limited to a specific transaction. The Court stated that in any event, an insurance agent, whether general or special, possesses such powers as have been conferred by the company, or as third persons have a right to assume that the agent possesses under the circumstances of the case and that, as a general rule, the agent's powers, as to those dealing with the agent, are determined by the nature of the business entrusted to the agent and are prima facie coextensive with its requirements (*213 Cal. 219, 223)* .

In Guipre v. Kurt Hitke & Co. (1952) 109 Cal. App. 2d 7 , an action to recover on a substandard insurance agreement for automobile insurance covering public liability and property damage based on plaintiff's allegation and proof that immediate coverage had been orally agreed to by personnel in the office of an insurance general agent whose authority to "bind" on such policies was limited, the court of appeal affirmed judgment for plaintiff. The court said that when the assured has no notice of any limitation on the powers of the general agent, any act within the scope of the insurance business is binding on the insurance company, although it is in fact in violation of the agent's authority. Since new insurance in various forms, as well as increased coverage on existing insurance, is commonly ordered by phone, an enforceable insurance contract results if an application is accepted by a clerk who undertakes to speak for the agent (109 Cal. App. 2d 7, 15). The court said that in view of the conflicting testimony in this case, the question of whether the general agent had authority, either actual or apparent, was for the jury to determine. The court explained that secret limitations on an agent's power do not prevent a party from dealing with the agent to the full extent of the agent's apparent authority, and the parties dealing with an insurance agent having apparent authority to enter into an insurance

contract cannot be affected by special instructions to the contrary (*109 Cal. App. 2d 7, 16)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActApparent AuthorityGeneral OverviewInsurance LawClaims & ContractsContract FormationGeneral OverviewInsurance LawIndustry RegulationInsurance Company OperationsRepresentativesAgentsGeneral OverviewInsurance LawIndustry RegulationInsurance Company OperationsRepresentativesAgentsGeneral Agents

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12-120 California Points & Authorities § 120.19

§ 120.19 Insurer Unreasonably Delayed Acting on Application

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. These points and authorities may also be combined with points and authorities generallycontending that the parties entered into an enforceable oral agreement to insure. See § 120.16*].

INSURER IS LIABLE FOR INSURED'S LOSSES BECAUSE INSURER UNREASONABLY DELAYED ISSUING THE POLICY, AND THE DELAY PREJUDICED INSURED'S RIGHTS.

Unreasonable Delay in Acting on Insurance Application. The failure of an insurance company either to issue a requested policy or to reject an application for insurance within a reasonable time will support an action against the insurer in either contract or tort if the delay prejudiced the applicant (*see Snyder v. Redding Motors (1955) 131 Cal. App. 2d 416, 422-424, 280 P.2d 811* ; *Stark v. Pioneer Cas. Co. (1934) 139 Cal. App 577, 580, 34 P.2d 731*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's contention that it is not bound by the oral representations of its soliciting agent. The basis for this form is that the insurer delayed approving the application and issuing the policy to the prejudice of its insured.

These points and authorities may be combined with points and authorities supporting the contention that a personal representative of the decedent has standing to assert the descendant's rights under an application for life insurance when the insurer unreasonably delayed issuing the policy to the decedent's prejudice [*see* § 120.26].

These points and authorities may also be combined with points and authorities generally contending that the parties entered into an enforceable oral agreement to insure [*see § 120.16*], and that the soliciting agent had authority to bind

the insurer [*see* § 120.24 et seq.].

This form may be used to oppose the points and authorities *set forth in § 120.10* et seq. In particular, this form may be used to oppose the contention that the parties agreed that insurance would not be effective until a policy has been issued [*see § 120.11*].

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should refer to facts showing that:

- The insurer delayed issuing the policy.
- The delay was unreasonable.
- The delay prejudiced the insured.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.16* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be a motion by a defendant insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclosing no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. In this context counsel would need to submit a statement of undisputed facts supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Pleading and Practice Chapters

For a form of complaint, and forms of allegations for use in a complaint, by a beneficiary, insured, or loss-payable payee against an insurance company for damages for breach of contract, see California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender).

For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender). For a discussion of the rules applicable to summary judgment, a form of notice of motion for summary judgment, and related forms, see also Ch. 537, *Summary Judgment* , in that publication.

[d] Related Points and Authorities

For complete discussion of the format requirements and strategic considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion of requirements and considerations for completing a memorandum, together with a general skeletal form of memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* . For forms relating specifically to the procedural context of a motion for summary judgment or summary adjudication, see Ch. 221, *Summary Judgments* .

[e] Opposing Points and Authorities

The points and *authorities in § 120.12[1]* may be used in an appropriate case to oppose the points and authorities set out in this form. For example, if the points and authorities in this form are used in a memorandum opposing the contention that there is no insurance because a policy had not been issued before the loss was incurred, the *form in § 120.12[1]* would be used in a reply memorandum.

[3] Discussion of Authorities

[a] Unreasonable Delay in Acting on Insurance Application

Snyder v. Redding Motors *(1955) 131 Cal. App. 2d 416, 280 P.2d 811* , was an action against an insurance company and its agents. Plaintiffs, in connection with their purchase of a car, had applied through defendant insurance company's agent, defendant car dealer, for insurance against liability for personal injuries and property damage. The agent forwarded plaintiffs' application to the insurer, but the insurer failed to act on it. Almost three months after their application had been forwarded to the insurer, plaintiffs suffered liability for property damage. Defendant insurer denied any liability for the property damage and refused to defend the third-party action against plaintiffs. The third party recovered judgment against plaintiffs who then brought this action to recover the amount of that judgment and the attorney's fees and costs they incurred in defending the prior action.

The court of appeal affirmed judgment for plaintiffs. The court held that the failure to issue the policy or to reject the application and return the premium within a reasonable time after receipt of the application, which delay misled the applicants to their prejudice, gave rise to an implied acceptance of the application which would support an action against the insurer outside the contract and that the same facts would allow recovery on the theory of negligence (*131 Cal. App. 2d 416, 422)* . The court of appeal found ample evidence to support the trial court's conclusion that there was an implied contractual duty on the part of the insurer to either accept or reject the application within a reasonable time and to notify the applicants of such action (*131 Cal. App. 2d 416, 423-424)* .

Stark v. Pioneer Cas. Co. *(1934) 139 Cal. App. 577, 34 P.2d 731* , was an action by an applicant for accident insurance against an insurance company and its agent predicated on the agent's negligence in withholding the application and premium delivered to him for transmission to the insurer. The applicant did not learn of the delay until after he demanded insurance following an accident. Judgment was for plaintiff. The insurance company appealed, contending, among other things, that the agent'sauthority was limited to soliciting and receiving the application and premium, and that since the application was merely an offer from which no contract could be implied until accepted, no liability could arise because no policy had been issued or delivered.

The court of appeal affirmed. It held that mere delay in passing on an application cannot be construed as an acceptance which will support an action outside the contract, but the applicant will not be charged with the same degree of diligence as an insurer organized for profit, and the latter may be held liable for actual damage not exceeding the amount of insurance purchased if it be shown to have delayed notice of rejection. The court further held that the insurer may not complain of inexcusable delay caused by its agent's dilatory conduct or inefficiency (*139 Cal. App. 577, 580-581)* .

[4] Additional Authorities

[a] Unreasonable Delay in Acting on Insurance Application

In *Loree v. Robert F. Driver Co. (1978) 87 Cal. App. 3d 1032, 151 Cal. Rptr. 557* , an action against insurance brokers for damages for negligent failure to have procured a Small Business Administration (SBA) guaranty policy in addition to a performance bond, the court of appeal reversed summary judgment for defendants. Quoting from *Barrera v. State Farm Mut. Auto. Ins. Co. (1969) 71 Cal. 2d 659, 673, 79 Cal. Rptr. 106, 456 P.2d 674* , the court of appeal said that California has developed a line of decisions imposing a duty on all insurers to act promptly on an application for insurance, that the rule finds its source in the quasi-public nature of the insurance business and the reasonable

expectation of the applicant and the general public, and that since insurance companies are held to a broader legal responsibility than are parties to purely private contracts, they are bound either to furnish indemnity or decline to do so within a reasonable time after soliciting and obtaining an application for insurance and receiving payment of a premium (*87 Cal. App. 3d 1032, 1037)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsContract FormationGeneral OverviewInsurance LawClaims & ContractsContract FormationApplicationsInsurance LawIndustry RegulationInsurance Company OperationsRepresentativesAgentsGeneral Agents

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 120 INSURANCE
PART II. FORMS
A. Oral and Implied Insurance Contracts

12-120 California Points & Authorities § 120.20

§ 120.20 Personal Representative of Life Insurance Applicant May Assert Prejudice From Delay in Acting on Application

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. These points and authorities may also be combined with points and authorities generally contending that the parties entered into an enforceable oral agreement to insure. See § 120.16. They may also be combined with pointsand authorities contending that the insured by prejudiced by the insurer's delay, generally. See § 120.25.*]

THE PERSONAL REPRESENTATIVE OF THE DECEDENT HAS STANDING TO ASSERT THE DECENDANT'S RIGHTS UNDER THE APPLICATION FOR LIFE INSURANCE WHEN THE INSURER UNREASONABLY DELAYED ISSUING THE POLICY, AND THE DELAY PREJUDICED THE DECEDENT.

Standing by Personal Representative of Deceased Applicant for Life Insurance. An action for damages for unreasonable delay in acting on an application for life insurance and issuing a policy may be maintained by the deceased applicant's personal representative (*Smith v. Minnesota Mut. Life Ins. Co. (1948) 86 Cal. App. 2d 581, 591-592, 195 P.2d 457*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's contention that it is not bound by the oral representations of its soliciting agent. The basis for this form is that the personal representative of the decedent has standing to assert the decendant's rights under the application for life insurance when the insurer unreasonably delayed issuing the policy to the decedent's prejudice.

These points and authorities may be combined with points and authorities contending that the insured by prejudiced by the insurer's delay, generally [*see* § 120.25]. They may also be combined with points and authorities generally

contending that the parties entered into an enforceable oral agreement to insure [*see § 120.16*], and that the soliciting agent had authority to bind the insurer [*see* § 120.24 et seq.].

This form may be used to oppose the points and authorities *set forth in § 120.10* et seq. In particular, this form may be used to oppose the contention that the parties agreed that insurance would not be effective until a policy has been issued [*see § 120.11*].

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. See *comments in § 120.11*.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.16* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be amotion by a defendant insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclosing no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. In this context counsel would need to submit a statement of undisputed facts supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Pleading and Practice Chapters

For a form of complaint, and forms of allegations for use in a complaint, by a beneficiary, insured, or loss-payable payee against an insurance company for damages for breach of contract, see California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender).

For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender). For a discussion of the rules applicable to summary judgment, a form of notice of motion for summary judgment, and related forms, see also Ch. 537, *Summary Judgment* , in that publication.

[d] Related Points and Authorities

For complete discussion of the format requirements and strategic considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion of requirements and considerations for completing a memorandum, together with a general skeletal form of memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* . For forms relating specifically to the procedural context of a motion for summary judgment or summary adjudication, see Ch. 221, *Summary Judgments* .

[e] Opposing Points and Authorities

The points and *authorities in § 120.12[1]*. may be used in an appropriate case to oppose the points and authorities set out in this form. For example, if the points and authorities in this form are used in a memorandum opposing a contention that there is no insurance because a policy was notbeen issued before the loss was incurred, the *form in § 120.12[1]* would be used in a reply memorandum.

[3] Discussion of Authorities

[a] Standing by Personal Representative of Deceased Applicant for Life Insurance

Smith v. Minnesota Mut. Life Ins. Co. *(1948) 86 Cal. App. 2d 581, 195 P.2d 457* , was an action against an insurance company for negligent delay in passing on the application of plaintiffs' decedent for life insurance. The decedent had applied for life insurance, paid a premium, and been given a medical examination, but died some three months after the application date without having received any notice as to defendant's action, if any, on his application. The complaint set forth two causes of action. The first was by decedent's widow who was the beneficiary named in the application. The second was by the administratrix of decedent's estate. Defendant's demurrer to the complaint was sustained without leave to amend, and plaintiffs appealed from the subsequent judgment of dismissal.

The court of appeal reversed. It found the action stated by the administrator to be good as against a general demurrer. The court said that it appeared from the pleadings that a cause of action did exist immediately prior to the applicant's death and that, although sounding in tort, the cause of action was connected with and primarily based on contract, either express or implied, and that the applicant sustained an injury to his property and estate, either in being or expectancy, and, therefore, a cause of action survived to the administrator of his estate (*86 Cal. App. 2d 581, 591-592*). The court reversed the judgment against the widow, however, only for the purpose of allowing her to file an amended complaint, if she so desired, to allege any community property interest she might have had in the policy if issued or that she might have in the applicant's cause of action (*86 Cal. App. 2d 581, 592*).

It should be noted that in *Smith*, the court of appeal was faced with the question of survivorship of what appeared to be a tort action (negligence), came up with a quasi-contractual relationship, and held the action survived and could be maintained by the deceased's personal representative. The court was applying the provisions of former Prob. Code § 574 on survivability of actions. Under the current provisions of *Code Civ. Proc. § 377.20 et seq.*, substantially all causes of action today survive death. *Code Civ. Proc. § 377.20* states that, except as provided by statute and subject to the applicable limitations period, a cause of action for or against a person is not lost by reason of the person's death.

The more fundamental problem with *Smith* is its holding that decedent, himself, who had suffered no loss or damage, other than nominal, from defendant's failure to act on his application, had a cause of action whichcould survive to his personal representative, and the further holding that the widow, by the mere fact that she was the beneficiary named in the insurance application, in itself, gave her no right of action against the insurer (*86 Cal. App. 2d 581, 586)* . For the requirements that both a breach of duty and injury are essential to the accrual of a cause of action and the statement that mere possibility, or even probability, that an event causing damage will result from a wrongful act does not render the act actionable, see *Walker v. Pacific Indem. Co. (1960) 183 Cal. App. 2d 513, 517, 6 Cal. Rptr. 924* .

In *Smith* it was the widow, the intended beneficiary of the policy, who sustained the loss and not the decedent's estate. This point was noted in *Orcutt v. Ferranini (1965) 237 Cal. App. 2d 216, 226, 46 Cal. Rptr. 715* . It appears that a more satisfactory result would have been to hold that just as the duty of the promisor in the context of a third-party beneficiary contract runs to the third-party beneficiary [*see Civ. Code § 1559*] as well as to the promisee, the duty of the insurer to act on a life insurance application likewise runs both to the applicant for the insurance and the third-party beneficiary and that a breach of this duty, which operates to the prejudice of either, would support a cause of action by either against the insurer for negligence [*see, e.g.,* *Barrera v. State Farm Mut. Auto. Ins. Co. (1969) 71 Cal. 2d 659, 663, 79 Cal. Rptr. 106, 456 P.2d 674* (involving an automobile liability policy)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityStandingGeneral OverviewInsurance LawClaims & ContractsContract FormationGeneral OverviewInsurance LawClaims & ContractsContract FormationApplicationsInsurance LawClaims & ContractsGood

Faith & Fair DealingGeneral OverviewInsurance LawLife InsuranceGeneral Overview

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12-120 California Points & Authorities §§ 120.21-120.29

[Reserved]

§§ 120.21[Reserved]

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 120 INSURANCE
PART II. FORMS
B. Coverage and Exclusions
1. General Exclusions

12-120 California Points & Authorities § 120.30

§ 120.30 Liability Is Excluded From Coverage or Not Covered by Policy

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [HAS *or* HAD] NO DUTY TO DEFEND INSURED IN THE UNDERLYING ACTION BECAUSE THE UNDERLYING ACTION DOES NOT POTENTIALLY SEEK ANY RELIEF THAT IS WITHIN THE POLICY COVERAGE.

A. Duty to Defend Not Absolute. The insurer's duty to defend is not without limits, but rather is limited by the nature and kind of risk covered by the policy (*La Jolla Beach & Tennis Club, Inc. v. Industrial Indem. Co. (1994) 9 Cal. 4th 27, 39, 36 Cal. Rptr. 2d 100, 884 P.2d 1048*).

B. No Potential Relief Within Policy Coverage. The test of an insurer's defense obligation is whether the underlying action for which defense and indemnity is sought potentially seeks relief within the coverage of the policy. If the underlying action does not potentially seek relief within the coverage of the policy, the insurer has no duty to defend the action (*Kazi v. State Farm Fire & Cas. Co. (2001) 24 Cal. 4th 871, 882, 103 Cal. Rptr. 2d 1, 15 P.3d 223* ; *Waller v. Truck Ins. Exch. (1995) 11 Cal. 4th 1, 37, 44 Cal. Rptr. 2d 370, 900 P.2d 619* ; *Truck Ins. Exch. v. Bennett (1997) 53 Cal. App. 4th 75, 61 Cal. Rptr. 2d 497*).

C. Causal Connection Required Between Policy and Claim. An insurer's duty to defend does not arise unless there is a causal connection between the insuring clause of the policy and the claim against the insured (*Turner v. State Farm Fire & Cas. Co. (2001) 92 Cal. App. 4th 681, 689-690, 112 Cal. Rptr. 2d 277*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to support the contention that an insurer has no duty to defend its insured under an insurancepolicy. The basis of these points and authorities is that the underlying action does not potentially seek relief within the coverage of the policy.

This form may be used by an insurer in various procedural contexts, such as:

- In an action by an insured against an insurer for breach of the insurer's duty to defend or indemnify the insured, this form may be used in a memorandum supporting the insurer's motion for summary judgment. For this use, the form should be modified to contend that no triable issues of material fact remain regarding the insurer's duty to defend [*see § 120.30[2][b]*].

- In a declaratory relief action by an insurer seeking a declaration that the insurer has no duty to defend the insured, this form may be used in a memorandum opposing the insured's motion for summary judgment.

- In an insurer's trial brief.

- In an insurer's appellate brief.

These points and authorities should be combined with other points and authorities setting forth the appropriate procedural context. For example, points and authorities supporting and opposing motions for summary judgment or summary adjudication are set forth in Ch. 221, *Summary Judgments* .

Many complex issues can arise in the context of the duty to defend, and discussion of these is beyond the scope of this comment. For a detailed discussion of the duty to defend, and issues arising in the context of that duty, see *California Insurance Law and Practice, Ch. 13, §§ 13.08, 13.09* (Matthew Bender) and Levy, Golden, & Sacks, CALIFORNIA TORTS, Ch. 82 (Matthew Bender).

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. For example, counsel would:

- Identify the specific relief sought in the underlying action against the insured;

- Refer to the specific coverage portions of the policy;

- Point out that the policy does not provide coverage for the relief sought in the underlying action; and

- Conclude that the insurer has no duty to defend the underlying action because the relief sought is beyond the scope of the policy.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.31* et seq.) and to place the argument within its proper procedural context.

An appropriate procedural context for this contention, for example, would be a defendant insurer's motion for summary judgment or summary adjudication when the evidentiary facts clearly support the contention. In this context, counsel would modify the form to assert that there is no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts supporting the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or

declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Pleading and Practice Chapters

For complaints by an insured against an insurer for damages for breach of contract because of the insurer's refusal to pay a third-party judgment against the insured or to defend the insured in a third-party action, see California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender). For a discussion of the rules applicable to summary judgment, a form of notice of motion for summary judgment, and related forms, see Ch. 537, *Summary Judgment* , in that publication.

For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender). For a discussion of the rules applicable to summary judgment, a form of notice of motion for summary judgment, and related forms, see also Ch. 357, *Summary Judgment* , in that publication.

[d] Related Points and Authorities

For complete discussion of the format requirements and strategic considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion of requirements and considerations for completing a memorandum, together with a general skeletal form of memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* . For forms relating specifically to the procedural context of a motion for summary judgment or summary adjudication, see Ch. 221, *Summary Judgments* .

[e] Opposing Points and Authorities

The points and *authorities in § 120.50* et seq. may be used in an appropriate case to oppose the points and authorities set out in this form.

[3] Discussion of Authorities

[a] Duty to Defend Is Not Absolute

In ***La Jolla Beach & Tennis Club, Inc. v. Industrial Indem. Co.*** *(1994) 9 Cal. 4th 27, 36 Cal. Rptr. 2d 100, 884 P.2d 1048* , the underlying complaint against an employer alleged that an employee had suffered emotional distress due to wrongful termination in violation of public policy. The employer's workers' compensation insurer refused to defend the action and the employer brought a declaratory relief and bad faith action against the workers' compensation insurer. The trial court granted the insurer summary judgment, but the court of appeal reversed, concluding that the complaint set forth claims that would support a potential claim under the workers' compensation policy.

The Supreme Court reversed. Concluding that the workers' compensation policy was not ambiguous and did not provide coverage for an employee's civil suit for damages (*9 Cal. 4th 27, 41-43, 46)* , the Court examined case law dealing with the basic nature of the duty to defend, and emphasized that the duty to defend is not without limits. The Court noted that an insurer is not required to defend if the third party complaint can by no conceivable theory raise a single issue that could bring it within policy coverage. The Court stated that the test for determining whether or not the duty to defend exists is whether the underlying action for which defense and indemnity is sought potentially seeks relief within

the coverage of the policy (*9 Cal. 4th 27, 44)* . Applying this test to the facts, the Court concluded that since the policy did not provide coverage for an employee's civil action for damages, it did not present a potentiality of a judgment within the indemnity provisions of the policy because workers' compensation benefits can never be awarded in a civil suit (*9 Cal. 4th 27, 46)* . The workers' compensation insurer had no duty to defend the tort action merely because the plaintiff might later file a covered workers' compensation claim (*9 Cal. 4th 27, 43-44)* .

[b] No Potential Relief Within Policy Coverage

In ***Kazi v. State Farm Fire & Cas. Co.*** *(2001) 24 Cal. 4th 871, 103 Cal. Rptr. 2d 1, 15 P.3d 223* , two property owners shared a common driveway 20 feet in width that straddled the boundary line between the two parcels. Litigation ensued between them that stated causes of action for declaratory and injunctive relief, quiet title, trespass to the common driveway easement, and ejectment from the common driveway easement. Each cause ofaction alleged that the access road of Parcel B obstructed the alleged implied easement over Parcel A. The owners of Parcel A alleged that the owners of Parcel B denied the existence of an easement over their parcel for purposes of the common driveway, that they had been grading and constructing on Parcel A in contravention of the existence of the common driveway easement, and that they had obstructed the easement, denying the owners of Parcel A the benefits of the easement. The owners of Parcel B tendered defense of the suit to their comprehensive general liability insurers. Their policies covered property damage and personal injury, including a duty to defend and indemnify them in an underlying lawsuit involving third party property damage or personal injury. After settlement of the easement suit, one of the insurers reimbursed the insureds for the fees and costs attributable to the defense and settlement. Not satisfied with the reimbursement, the insureds filed a bad faith action against their insurers for breach of contract, breach of the duty of good faith and fair dealing, and negligent handling of their claim. The trial court granted the insurers' motions for nonsuit, finding that because the easement dispute involved intangible property rights only, and no physical damage or occurrence on the insureds' property, the complaint on its face did not trigger the duty to defend. The court of appeal reversed. The California Supreme Court granted review.

The California Supreme Court reversed, holding that comprehensive liability insurers who insure only for tangible property losses do not owe a duty to defend in a dispute involving the right to use an implied easement. The Court held that interference with an easement right is not property damage to tangible property giving rise to a duty to defend (*24 Cal. 4th 871, 879-882)* . The Court stated that actions over easement ownership, interference with an easement, or the right to use an easement concern "pure rights in property" or intangible rights only (*24 Cal. 4th 871, 882)* . An easement is a nonpossessory interest in the land of another that gives its owner the right to use the land of another or to prevent the property owner from using his or her land. It represents a limited privilege to use the land of another for the benefit of the easement holder's land, but does not create an interest in the land itself. An easement is therefore an incorporeal or intangible property right that does not relate to physical objects but is instead imposed on the servient land to benefit the dominant tenement land (*24 Cal. 4th 871, 880-881)* .

Waller v. Truck Ins. Exch. *(1995) 11 Cal. 4th 1, 44 Cal. Rptr. 2d 370, 900 P.2d 619* , involved a commercial general liability policy. Plaintiff sought damages based on the insurer's refusal to defend plaintiff in a third party action that sought incidental emotional distress damages caused by the insured's noncovered economic or business torts. The trial court found for plaintiff, but the court of appeal reversed on the ground that the policy did not provide coverage for the economic loss, and therefore did not coverthe incidental emotional and physical distress; without that potential for coverage, there could be no duty to defend. The Supreme Court granted review, and affirmed the judgment of the court of appeal.

The Supreme Court held that the damages were derivative of and inseparable from the third party's allegations of intentional and business torts and thus did not give rise to coverage (*11 Cal. 4th 1, 23)* . Without the potential for coverage, there could be no duty to defend, and the insurer could not be liable for breach of the duty of good faith and fair dealing by declining to defend the action (*11 Cal. 4th 1, 37)* .

In ***Truck Ins. Exch. v. Bennett*** *(1997) 53 Cal. App. 4th 75, 61 Cal. Rptr. 2d 497* , the insurers brought a declaratory relief action against their insured, alleging that the insurers had no obligation under a personal injury liability clause in the insurance policies to defend or indemnify the insured against an underlying slander of title action. The trial court granted summary judgment motions in favor of the insurers. The Court of Appeal affirmed, holding that the insurers' policies that indemnified the insured against "disparaging material" and "slander" did *not* provide coverage for an action based on disparagement or slander of title, and thus the insurers had no duty to defend the insured against that claim (*53 Cal. App. 4th 75, 77)* . In these policies, the words "disparaging" and "slander" applied unambiguously to defamation of a person's reputation, not to an action for disparagement or slander of title to property.

The thrust of the tort of disparagement or slander of title is protection from injury to the salability of property, which is pecuniary damage, explained the court. Defamation, by contrast, injures a person's reputation, vindicates personal interests, and is a personal injury. Hence, there is a distinction between the property or economic interest at stake in a slander or disparagement of title cause of action, and the personal interest in reputation at stake in a defamation cause of action (*53 Cal. App. 4th 75, 77-78)* . Given the "defamation" context in which these words appeared in the policies, the personal injury liability clause was not ambiguous, and it would not have been reasonable for the insured to have expected coverage (*53 Cal. App. 4th 75, 76-77)* .

[c] Causal Connection Required Between Policy and Claim

In ***Turner v. State Farm Fire & Cas. Co.*** *(2001) 92 Cal. App. 4th 681, 112 Cal. Rptr. 2d 277* , a husband and wife obtained a rental dwelling insurance policy for property that they owned. While at their own home, and not on the rental property, they engaged in a "verbal dispute" over new rental terms for tenants of the rental property. The dispute escalated to physical violence, which culminated in the wife's arrest. At the jail following the arrest, she claimed that a male deputy sheriff had performed an inappropriate strip search on her. This deputy sheriff filed a lawsuit against both the insureds for defamation. The insureds tendered the defense of the action to the insurer, which declined. The insureds sued their insurer for failure to defend, breach of the duty of good faith and fair dealing, and negligence. The trial court sustained a demurrer to the complaint and entered judgment in favor of the insurer. The insureds appealed.

The court of appeal affirmed, holding that there was an insufficient causal relationship between the defamatory statements in the third-party claim and the insured rental property. The policy language on which the insureds relied was contained in two separate sections of the policy. The first section, which describes the business liability coverage, provides: "If ... a suit is brought against any insured for damages because of ... personal injury ... to which this coverage applies, caused by an occurrence, and which arises from the ownership, maintenance, or use of the insured premises, we will: [P] ... [P] 2. provide a defense at our expense by counsel of our choice ... ." The second section defines "personal injury" as an "injury arising out of one or more of the following offenses: [P] ... [P] b. libel, slander or defamation of character ... ." The court of appeal ruled that to trigger a duty to defend, there must be a causal connection between the insuring clause of the policy and the slanderous statements (*92 Cal. App. 4th 681, 686)* . The court also ruled that if a rental dwelling policy affords coverage for damages because of personal injury caused by an occurrence that "arises from" the ownership, maintenance, or use of the insured premises, the occurrence must be logically and more than incidentally or parenthetically connected to that ownership, maintenance, or use. In this case, the insureds' slanderous statements could have occurred after an argument about anything. The nature of the violent quarrel, rather than the topic of the argument, required the police's involvement. Moreover, the first slanderous statement was removed in time from the argument because the wife made the statement only after she was interviewed at the scene, arrested, transported to jail, and booked. The court concluded that there was no potential for coverage under the insurance policy. Accordingly, no duty to defend ever arose (*92 Cal. App. 4th 681, 689-690)* .

[4] Additional Authorities

[a] No Potential Relief Within Policy Coverage

Storek v. Fidelity & Guaranty Ins. Underwriters, Inc. *(N.D. Cal. 2007) 504 F. Supp. 2d 803* , involved an insurance policy covering some of the owners of a family-owned commercial building to protect them against losses they might sustain in connection with ownership. The federal district court held that the insurer had no duty to defend the insured based on a cross-complaint in a suit by family members regarding the insured's alleged mismanagement of the family-owned property. The cross-complaint asserted only economic causes of action, all of which pertained solely to financial management of property, not covered by the policy (*504 F. Supp. 2d 803, 807-809)* .

In ***Miller v. Allstate Ins. Co.*** *(S.D. Cal. 2007) 489 F. Supp. 2d 1133* , plaintiffs (the insured's granddaughters), as assignees, brought an action against the insurer under a homeowners' policy for failure to defend and indemnify the insured regarding their underlying lawsuit. After repressing childhood memories, the granddaughters claimed that their grandfather had molested them. They sought damages for negligence, negligent infliction of emotional distress, and breach of fiduciary duty from the insured grandmother, for her part in the grandfather's conduct. The federal district court granted the defense motion to dismiss claims for breach of contract and breach of the implied covenant of good faith and fair dealing without leave to amend, holding that the homeowner's policy did not cover acts intended to cause bodily injury. Child molestation is always intentional. Because the grandmother's potential liabilitystemmed from her husband's sexual assault, which was intentional, not accidental conduct, the insurance company owed no duty to defend (*489 F. Supp. 2d 1133, 1137)* .

In ***Loughney v. Allstate Ins. Co.*** *(S.D. Cal. 2007) 465 F. Supp. 2d 1039* , the federal district court granted the insurer's motion for judgment on the pleadings. The insureds' home suffered damages from a landslide allegedly caused by the city's negligent maintenance of water and sewage lines. The homeowners' policy excluded coverage for damage caused by earth movement/landslide and third-party negligence. Coverage for "sudden and accidental direct physical loss caused by fire explosion, theft, or breakage of glass or safety glazing materials resulting from earth movement" did not apply to the insureds' loss. There is no coverage under an insurance policy when the cause of damage is an excluded peril (*465 F. Supp. 2d 1039, 1042-1043)* .

In ***Delgado v. Interinsurance Exch. of Auto. Club of So. Cal.*** *(2009) 47 Cal. 4th 302, 97 Cal. Rptr. 3d 298, 211 P.3d 1083* , the insured under a homeowner's policy hit and kicked a person, who brought suit against the insured, alleging among other causes of actions, that the insured negligently and unreasonably believed he was engaging in self-defense, and unreasonably acted in self-defense when he struck the plaintiff. The insurer denied coverage and refused to defend, asserting that the assault was not an "occurrence," defined in the policy as an "accident," and that the allegations arose out of the insured's intentional acts, which were excluded from coverage. The injured party brought an action against the insurer following an agreement with the insured to accept partial satisfaction of the claim in exchange for an assignment of claims against the insurer. The injured party alleged that the insured's actions constituted an accident (*47 Cal. 4th 302, 305-306, 317)* . The California Supreme Court held that there was no potential for coverage, and that the insurer had no duty to defend (*47 Cal. 4th 302, 305-308, 317)* . In the context of liability insurance, an accident is an unexpected, unforeseen, or undesigned happening or consequence from either a known or an unknown cause. The Court held that whether there was an accident within the policy language need not be determined from the injured party's perspective. An insured's unreasonable, subjective belief in the need for self-defense does not convert into "an accident" an act that is purposeful and intended to inflict injury (*47 Cal. 4th 302, 308-311)* .

In ***Fire Ins. Exch. v. Superior Court*** *(2010) 181 Cal. App. 4th 388, 104 Cal. Rptr. 3d 534 , reh'g denied, 2010 Cal. App. LEXIS 282 (2010)* , homeowners insured under a homeowners' policy (the insureds) obtained a lot line adjustment from the city with the cooperation of the owner of adjacent property, concerning a strip of property along the border of both properties. Apparently because of their own mistakes and those of their architect, they inadvertently encroached on the adjacent property when rebuilding their residence. When purchasers of the adjoining property discovered a cloud on the title, they obtained an assignment of rights by the sellers, then disputed the validity of the lot line adjustment. The insureds brought suit for quiet title and adverse possession of the border strip. The adjoining property owners cross-complained for quiet title, declaratory relief, and fraud. The insureds brought an action against their insurer for breach of contract and bad faith for refusal to defend on the ground that it had no potential liability under the policy.

The trial court denied summary judgment for the insurer, finding a triable issue fact whether the insureds' act of constructing their home could constitute an accident based on their mistaken belief they had legally acquired title to the disputed property, with no intent to encroach. The appellate court issued a peremptory writ of mandate directing the trial court to set aside that order, and to issue a new order granting the motion. The appellate court held that the insureds' act of construction was intentional and not an accident, even though they acted under a mistaken belief that they had the right to do so. The reason for their failure to obtain title was irrelevant to the determination whether the act of building in that location could be characterized as an accident. There was no unexpected and unintended event between the intentional construction of the building and the encroachment. The trial court therefore erred in denying summary judgment because, based on uncontested facts, there was no potential for coverage (***Hentzel v. Singer Co.*** *(1982) 138 Cal. App. 3d 290, 188 Cal. Rptr. 159* .

In ***Baker v. National Interstate Ins. Co.*** *(2009) 180 Cal. App. 4th 1319, 103 Cal. Rptr. 3d 565* , a company operating a school bus business that primarily transported school children, was insured under a CGL that contained an exclusion entitled, "Products-Completed Operations Hazard." It excluded coverage for bodily injury damages caused by the insured's "products" and "completed operations," stated that it did not cover bodily injury arising out of "your product" or "your work," and provided separate definitions of "your product" and "your work." After selling one of its used buses to another bus company, the insured performed, for payment, a CHP-mandated inspection and maintenance service on the bus. While driving the bus, the new owner collided with a truck. The driver's seat of the bus then broke loose from the floor and propelled her through the windshield. In the ensuing wrongful death suit, the complaint alleged among other things negligent repair and maintenance of the driver's seat. The insurer refused to defend based on the completed-operations exclusion. A judgment against the insured based on negligent inspection or maintenance in connection with the sale of the bus, resulted in a $9 million damages award. The parties exchanged an agreement not to execute on the judgment for an assignment of rights against the insurer. In the suit against the insurer, the trial court found for plaintiffs, awarding $12 million in damages. The appellate court reversed and remanded, holding that the insured's inspection of the bus in conjunction with the sale was a work-related, "completed operation," even though the damages occurred after the sale. When a person provides a service for a customer for payment from that customer, the person is "working" or otherwise "performing an operation" in the context of his or her business activities. The trial court therefore erred in denying the insurer's motion for summary judgment (*180 Cal. App. 4th 1319, 1339)* .

In ***Griffin Dewatering Corp. v. Northern Ins. Co. of N.Y.*** *(2009) 176 Cal. App. 4th 172, 97 Cal. Rptr. 3d 568* , the insurer under a CGL refused to defend the insured, which was a contractor whose primary work involved movement of water, in a suit by a water district arising from the insured's work on a manhole feeding into a main sewer that resulted in sewer-water damage to a residence. The appellate court held that the refusal to defend was reasonable in that it was rooted in the literal language of the absolute pollution exclusion (*176 Cal. App. 4th 172, 197-198)* . When the third-party suit never presents any potential for coverage, the duty to defend does not arise in the first instance, and the insurer may property deny a defense (*176 Cal. App. 4th 172, 209)* .

In ***Venoco, Inc. v. Gulf Underwriters Ins. Co.*** *(2009) 175 Cal. App. 4th 750, 96 Cal. Rptr. 3d 409* , the liability policy issued to an oil company contained a "toxic pollution exclusion." An exception to the exclusion applies under limited circumstances provided that the insured notify the insurer of a claim within 60 days of an occurrence. In the insured's declaratory judgment action against the insurer, the appellate court held that the insurer had no duty to defend the underlying suit (*175 Cal. App. 4th 750, 754, 758-765)* . The exclusion applied to claims by third parties for injuries caused by toxic chemical contamination of property adjacent to the location of the insured's oil and gas operations. The exception regarding the 60-day notice provision did not apply because the insured failed to make the required notification (*175 Cal. App. 4th 750, 758-763)* . Moreover, the insurer's duty to defend a groundless action, set forth in the policy, applies only to claims covered by policy (*175 Cal. App. 4th 750, 765)* .

In ***GGIS Ins. Svcs. v. Superior Court*** *(2008) 168 Cal. App. 4th 1493, 86 Cal. Rptr. 3d 515* , the insured, an insurance company, brought an action against its insurer under an agents and brokers professional liability policy, seeking indemnity and defense in an underlying action brought by the Pennsylvania insurance commissioner. The policy

provided coverage for losses and defense expenses arising from claims first made during the policy period, with additional limited coverage for defense expenses in certain circumstances. The policy excluded any claim, loss, or defense expenses regarding certain specified matters, including the commingling of, or inability or failure to pay, collect, safeguard, or return any money (Exclusion G). A claim was defined to exclude criminal proceedings of any type, or regulatory investigations, or any proceeding seeking injunctive, declaratory, equitable, or nonpecuniary relief or remedies. "Wrongful act" was defined as any actual or alleged negligent act, error, or omission of an insured arising solely from the insured's rendering or failing to render professional services. The underlying action concerned alleged wrongful conduct regarding the collection, retention, and payment of premiums; and demanded a monetary payment to the commission and an accounting of all premium amounts for canceled policies. The trial court denied plaintiff's motion for summary adjudication, noting that it had already determined that triable issues of fact existed with regard to the issues raised. The trial court also declined to stay the trial of indemnity issues pending the outcome of the Pennsylvania action.

On petition for writ of mandate, the court of appeal held that a stay is not required if the court in the coverage action may resolve the coverage question as a matter of law without making any factual determinations that would prejudice the insured in the third-party action. The court also stated that if, as a matter of law, neither the complaint nor the known extrinsic facts indicate any basis for potential coverage, the duty to defend does not arise in the first instance (*168 Cal. App. 4th 1493, 1506)* . The court concluded that the insurer owed no duty of defense. All counts alleged by the commissioner arose from the alleged failure to pay it money due the insurers. Absent a potential for coverage, the insurer had no duty to defend in the Pennsylvania action. Exclusion G precludes coverage for any liability or defense costs arising from the insured's failure to pay money. The trial court properly denied the motion for summary adjudication (*168 Cal. App. 4th 1493, 1508)* .

In ***Medill v. Westport Ins. Corp.*** *(2006) 143 Cal. App. 4th 819, 49 Cal. Rptr. 3d 570* , former directors and officers of a nonprofit organization sought coverage under a "Nonprofit Organization Liability Insurance" policy for an underlying action alleging negligence and breach of fiduciary duty because the organization defaulted on contractual payment obligations on municipal bonds. The trial court granted summary judgment for the insurer. The court of appeal affirmed, holding that the insurer had no duty to defend when the policy did not cover damages arising out of breach of contract, and the plaintiffs in the underlying suit sought to recover damages for failure of the defendants to perform their contractual obligations to make repayments on the bonds (*143 Cal. App. 4th 819, 829-831)* .

In ***Ortega Rock Quarry v. Golden Eagle Ins. Co.*** *(2006) 141 Cal. App. 4th 969, 46 Cal. Rptr. 3d 517* , the trial court granted summary judgment for the insurer in a suit by the insured seeking defense and indemnity regarding an EPA order and corresponding civil lawsuit. The EPA actions were based on the insured's placement of dredged fill material (pollutants within meaning of the Clean Water Act) on its leased property to replace a road washed out by storms, which subsequently filled an adjacent creek with that material. The court of appeal affirmed, holding that the unambiguous "total pollution" exclusion excluded coverage under the relevant CGL and excess policies (*141 Cal. App. 4th 969, 980-990)* .

In ***August Entm't, Inc. v. Philadelphia Indem. Ins. Co.*** *(2007) 146 Cal. App. 4th 565, 52 Cal. Rptr. 3d 908* , an officer under a directors' and officers' liability policy sued the insurer for bad faith, alleging that the insurer wrongfully refused to pay a claim and provide a defense based on a third-party suit for contract breach seeking the contract price. The court of appeal affirmed summary judgment for the insurer on the ground that the D&O policy did not cover the insured corporation's contractual debt or the officer's liability for contract breach. The breach of the contractual obligation asserted in the underlying action did not give rise to a loss caused by a wrongful act within the meaning of the policy. Rather, the corporation was simply being required to pay an amount it voluntarily contracted to pay (*146 Cal. App. 4th 565, 579, 582-584)* .

In ***Oak Park Calabasas Condo. Ass'n v. State Farm Fire & Cas. Co.*** *(2006) 137 Cal. App. 4th 557, 40 Cal. Rptr. 3d 263* , the insurer issued a D&O policy to a condominium association covering "wrongful acts." When the association

failed to pay a construction company the full amount due under a contract, the company sued the association for breach of contract. After the insurer refused to defend the action, which resulted in a judgment against the association, the association sued the insurer. On the coverage issue, the trial court concluded that "wrongful acts" included only negligent breaches of duty, not breaches of contractual duties, and therefore that the policy did not provide any potential coverage. The court of appeal affirmed, holding that "wrongful acts" refers to negligent acts, negligent errors, and negligent omissions, and does not cover claims by contractors for breach of contract (*137 Cal. App. 4th 557, 563-565)* .

In ***Garamendi v. Golden Eagle Ins. Co.*** *(2005) 127 Cal. App. 4th 480, 25 Cal. Rptr. 3d 642* , underlying complaints were filed against an insured company by two groups of workers, who alleged that the company sold defective sandblasting products that caused bodily injury after the workers inhaled sandblasted silica particles over a period of years. The company tendered defense of the complaints to the administrator of its insurer (after liquidation proceedings had commenced). The administrator denied coverage and defense based on the "total pollution exclusion" in the company's CGL policy, and the company filed applications for orders to show cause why the claims should not be allowed. The exclusion applied to bodily injury that "would not have occurred in whole or part but for the actual, alleged or threatened discharge [or] dispersal ... of pollutants at any time." The court of appeal affirmed denial of the applications, holding that because the discharge of silica dust, a pollutant, caused the injuries, the pollution exclusion excluded coverage for the claims and therefore that the administrator had properly rejected tenders of defense (*127 Cal. App. 4th 480, 487-488)* .

In ***Ace Am. Ins. Co. v. Walker*** *(2004) 121 Cal. App. 4th 1017, 18 Cal. Rptr. 3d 1* , the insured under a commercial general liability (CGL) policy owned a car purchased for the use of the insured's son. While driving the car, the son was involved in an automobile collision that injured his passenger. The passenger sued the corporation that obtained the CGL policy, the insured (who formed the corporation), the son, for negligence and negligent entrustment, and the car owner's automobile insurer undertook defense of the claim. However, the automobile insurance policy limit was $25,000, and the CGL limit was $1 million. The CGL insurer filed a complaint for declaratory relief against the insured, his corporation, and the passenger, seeking a declaration that it had no duty to defend or indemnify the underlying claims. The trial court dismissed the complaint after granting the insurer summary judgment, finding that the automobile exclusion in the CGL policy precluded coverage and the duty to defend. The trial court also sustained the insurer's demurrer to the passenger's cross-complaint for breach of the duty to defend, negligence, misrepresentation, breach of contract, and bad faith. The demurrer stated that the insurer could not be liable for breaching a duty to defend if the court had already ruled there was no actual or potential coverage under the policy. The court of appeal affirmed (*121 Cal. App. 4th 1017, 1025-1026)* .

In ***Swain v. California Cas. Ins. Co.*** *(2002) 99 Cal. App. 4th 1, 120 Cal. Rptr. 2d 808* , the insureds had obtained a homeowner's policy on a recently purchased house that provided coverage for "personal liability." They then served an eviction notice on the tenants living in the house on the ground that they themselves intended to occupy the house, but instead they rented the house to other tenants in violation of a local rent-stabilization ordinance. The evicted tenants sued the insureds, alleging fraud, wrongful eviction, and related claims, and the insurer refused to defend. The insureds filed an action against the insurer for wrongful denial of coverage and bad faith, and the insurer filed a cross-complaint seeking declaratory relief as to its coverage obligations. The trial court granted summary judgment for the insurer, and the plaintiffs appealed. The court of appeal held that the claims asserted by the evicted tenants did not arise, even potentially, from an "occurrence" as defined in the policy. It modified the judgment, nunc pro tunc to the date of the summary judgment order, to provide that the plaintiffs take nothing, that the main action be dismissed, and that the insurer have judgment on its cross-complaint by way of a declaration that it was not obligated to defend or indemnify the insureds in connection with the underlying claims and otherwise affirmed (*99 Cal. App. 4th 1, 8-16*).

In ***Cunningham v. Universal Underwriters*** *(2002) 98 Cal. App. 4th 1141, 120 Cal. Rptr. 2d 162* , the insured had entered into a lease agreement with a car dealership with regard to real property of the insured that was currently occupied by another tenant, but which the insured promised to be vacant and available by a specified date. The former

tenant's failure to vacate the premises until six weeks past the promised date caused the car dealership to incur business losses, for which the dealership sued the insured. Following the insurer's refusal to defend, the insured settled the dealership's claim, then sued the insurer for breach of duty to defend, based on potential coverage under the policy's personal injury "wrongful eviction" coverage and property damage coverage. The court of appeal reversed the trial court's grant of summary judgment for the insured, holding that the insured's conduct did not constitute "wrongful eviction," and that no tangible property damage occurred within the meaning of the policy. Moreover, a policy exclusion for "loss of use of property not physically damaged, if caused by: (1) [the insured's] delay or failure in performing any agreement or contract ..." applied as a matter of law (*98 Cal. App. 4th 1141, 1150-1156)* .

In ***Ananda Church of Self-Realization v. Massachusetts Bay Ins. Co.*** *(2002) 95 Cal. App. 4th 1273, 116 Cal. Rptr. 2d 370* , an ex-employee of a subsidiary of the insured company sued both companies, alleging wrongful discharge and other causes of action, based on sexual harassment by the subsidiary company's vice president. In a subsequent suit, the same plaintiff alleged that an agent of a private investigator hired by the defendants' counsel trespassed on her attorneys' property and ransacked her attorneys' trash. The defendants' agent allegedly tried to hit one of the plaintiff's attorneys as he drove away, then delivered two bags of trash to the private investigator. The investigator in turn delivered "selected documents" from the trash to members of the defense litigation team. The plaintiff stated causes of action, including conversion and invasion of privacy, against the defendants and their litigation team. In a third suit, the plaintiff's attorneys sued the same defendants for the same acts alleged in the second suit--that is, trespass and theft of documents contained in their trash, which had been located in a gated, secured, and enclosed area on their property. The defendants' insurer refused to defend and indemnify in the second and third suits. In a fourth suit, the defendants sued their insurer for breach of contract, bad faith, and related claims. The trial court sustained the insurer's demurrer to the complaint without leave to amend. The court of appeal affirmed, holding that if there is no potential for *coverage,* there is no duty to defend, regardless of whether the alleged loss took place during the policy period (*95 Cal. App. 4th 1273, 1280)* . The court concluded that because the only awardable damages were for harm to the plaintiffs' intangible rights, principally the right to have their trashed documents properly destroyed and otherwise kept from the view of prying eyes, there was no potential coverage for, or duty to defend against, "injury to" or "loss of use of" tangible property within the meaning of the policy (*95 Cal. App. 4th 1273, 1285)* .

Continental Cas. Co. v. Superior Court *(2001) 92 Cal. App. 4th 430, 111 Cal. Rptr. 2d 849* , initially involved third party suits for construction defects against a partnership engaged in real estate development and construction. The partnership was formed from two business entities insured by a commercial general liability (CGL) carrier, which assumed defense of the third-party suits. One of the companies forming the partnership sued the other company, its business partner, to resolve economic disputes involving the construction defect claims, to dissolve the partnership, and for an accounting. Shortly before a jury trial was to commence on that suit, the defendant in that suit tendered defense to the CGL carrier, which refused. The defendant in that suit then became the plaintiff in a suit against the carrier for breach of contract and bad faith. The trial court granted the plaintiff's motion for summary adjudication, finding a duty to defend. The court of appeal issued a writ of mandate compelling the trial court to vacate its order granting the plaintiff's motion and to enter a new order denying the plaintiff's motion and granting summary judgment in favor of the insurer. The court of appeal held that the construction company's CGL policy, which covered bodily injury and property damage, did not cover the claims by the insured's business partner--that is, intangible economic losses. The insured could not possibly be held liable to the partner for causing property damage because the partner made no claim for physical injury to tangible property. Moreover, all asserted construction defect claims that were potentially covered under the policy were already being defended by the insurer in the third-party suits (*92 Cal. App. 4th 430, 439-441)* .

In ***Century-Nat'l Ins. Co. v. Glenn*** *(2001) 86 Cal. App. 4th 1392, 104 Cal. Rptr. 2d 73* , the insured had a homeowner's policy that contained an exclusion for bodily injury that is "a foreseeable result of an intentional or criminal act of any insured." The insured discharged a firearm in his backyard, allegedly to frighten away a group of youths, and the bullet struck one of the youths as he fled. The insured pled guilty to felony willful discharge of a firearm. In a declaratory judgment action between the insured and the insurer, the trial court granted summary judgment for the insurer. On appeal, the court affirmed, holding that the criminal acts exclusion barred coverage. The court

concluded that the bodily injury suffered by the victim was a "foreseeable result" of a criminal act by the insured (*86 Cal. App. 4th 1392, 1397-1398)* .

In ***Tosco Corp. v. General Ins. Co.*** *(2000) 85 Cal. App. 4th 1016, 102 Cal. Rptr. 2d 657* , an insured brought an action against numerous insurers to establish insurance coverage under comprehensive general liability policies for environmental cleanup costs. Two insurers asserted that they had no duty to indemnify or defend the insured because, as of the stated policy period, the insured neither owned nor had any other relationship to any of the properties from which the claims arose. The insurers contended that its coverage did not extend to claims arising from property acquired by the insured after the policy period. The trial court granted summary judgment in favor of three insurers, based on *A. C. Label Co. v. Transamerica Ins. Co. (1996) 48 Cal. App. 4th 1188, 56 Cal. Rptr. 2d 207* , which held that a comprehensive general liability insurer could not be required to defend or indemnify an insured with respect to liabilities arising from property that the insured did not own during the policy period. On appeal, the court affirmed, rejecting the insured's assertion that the holding of *A. C. Label* was incorrect. The court of appeal held in accordance with *A. C. Label* that liability insurance coverage cannot be created after the fact (*85 Cal. App. 4th 1016, 1020)* .

In ***Belmonte v. Employers Ins. Co.*** *(2000) 83 Cal. App. 4th 430, 99 Cal. Rptr. 2d 661* , the insured's teenaged niece took his van keys without permission from his business office, drove his van around the parking lot, and ran into her friend, who sued the insured for negligence in the use of premises, negligent entrustment of the van, negligent failure to supervise the use of the van, and vicarious liability. The insurer under the relevant commercial general liability (CGL) policy refused to defend or indemnify because the injuries resulted solely from niece's use of the insured's van, coverage of which was precluded by the automobile exclusion clause in the policy. In an action by the insured for breach of contract and related causes of action, the trial court granted the insurer's motion for summary judgment, finding that the policy's automobile exclusion clause precluded coverage. The court of appeal affirmed, noting that the fact that the niece found the keys at the insured's desk rather than in the parking lot or in the van's ignition was irrelevant to the coverage issue, as was the fact that someone other than the insured used the van. Because the injuries alleged in the underlying complaint resulted solely from the niece's use of the insured's van, the automobile exclusion precluded coverage (*83 Cal. App. 4th 430, 435)* .

In ***Afrasiabi v. State Farm Fire & Cas. Co.*** *(1999) 73 Cal. App. 4th 1183, 86 Cal. Rptr. 2d 926* , the insured's nephew sued the insured for injuries received after four men, including the insured, threw the nephew into the swimming pool of a family friend. The insured sought defense and indemnity under his homeowner's policy. The insurer refused, contending that the policy excluded coverage for bodily injury claims made by relatives who were residents of the insured's household, which included his nephew. The nephew then released the insured from any responsibility in return for assignment of the insured's rights, if any, against the insurer. Following a default judgment entered against the insured for some $2 million, the nephew sued the insurer. The trial court found that the exclusion applied, because the nephew was a resident relative of the insured's household, despite his payment of rent to the insured. The court of appeal affirmed (*73 Cal. App. 4th 1183, 1186-1187)* .

Ray v. Valley Forge Ins. Co. *(1999) 77 Cal. App. 4th 1039, 92 Cal. Rptr. 2d 473* , was an action by a roofing consultant against its commercial general liability (CGL) insurer for breach of contract and bad faith, based on the insurer's refusal to defend an action against the insured by a homeowner's association. The underlying action alleged that the insured gave bad advice about materials for re-roofing. The trial court granted summary judgment for the insurer, and the court of appeal affirmed, holding that the policy afforded no coverage for bad advice (*77 Cal. App. 4th 1039, 1045-1046)* .

Peters v. Firemen's Ins. *(1998) 67 Cal. App. 4th 808, 79 Cal. Rptr. 2d 326* , was an action in which an insured sought indemnity and defense of an underlying action brought by a woman alleging torts stemming from his alleged transmission to her of the herpes virus. The insured sought coverage under his yacht insurance policy, asserting that the sexual activity occurred while they were sailing on the yacht, which "was a sign of his wealth and status" that "fostered romance and sexual conduct." When the insurer refused coverage and defense, the insured brought an action for breach

of contract and bad faith. The trial court granted the insurer's summary judgment motion and entered judgment accordingly. The court of appeal affirmed, holding that an insurer has a duty to defend an insured if it becomes aware of, or if the third party lawsuit pleads facts giving rise to the potential for coverage under the insuring agreement. However, when there is no possibility of coverage, there is no duty to defend. The court concluded that the yacht insurance policy provided no possible coverage for the insured's liability for allegedly transmitting the herpes virus to plaintiff, when the only connection with the boat was the allegation that plaintiff and defendant were sailing on her while sexual relations allegedly occurred. Nothing in the complaint involved defendant's "use" of the boat within the meaning of the liability coverage under the policy (*67 Cal. App. 4th 808, 812-814)* .

In *Lunsford v. American Guarantee & Liab. Ins. Co. (9th Cir. 1994) 18 F.3d 653* , a liability policy covered "malicious prosecution." The insured was sued for abuse of process. The insurer refused to defend, contending that abuse of process was not covered, and the insured sued for bad faith. The district court entered summary judgment in favor of the insurer. The Ninth Circuit reversed in part, holding that abuse of process was in fact covered under the policy. The court determined that "malicious prosecution" was ambiguous because a layperson's understanding of the term would differ from the legal definition. Construing the term based on the probable reasonable expectations of a layperson, the court concluded that a layperson would expect a defense for claims that technically qualified as abuse of process rather than malicious prosecution (*18 F.3d 653, 655-656)* . However, the court also held that denial of coverage had not been in bad faith, since there was a legitimate question as to whether coverage had been present (*18 F.3d 653, 656)* .

In Safeco Ins. Co. of Am. v. Andrews (9th Cir. 1990) 915 F.2d 500 , the federal court of appeals affirmed summary judgment for the insurer in a declaratory relief action, holding that the insurer had no duty to defend or indemnify the insured under a homeowner's policy that provided coverage for a claim made because of "property damage," defined as "physical injury to or destruction of tangible property, including loss of this property," caused by an "occurrence," defined as "an accident, including exposure to conditions which results, during the policy period, in bodily injury or property damage." The underlying action brought against the insured arose from the insured's sale of real property, alleged negligent failure to inspect property, misrepresentation, breach of contract, and rescission, which the court held was outside the scope of the policy (*Safeco Ins. Co. of Am. v. Andrews (9th Cir. 1990) 915 F.2d 500, 501-502*).

In *Gulf Ins. Co. v. L.A. Effects Group, Inc. (9th Cir. 1987) 827 F.2d 574* , the insurer under a comprehensive liability policy issued to a motion picture special-effects company brought a declaratory relief action to determine its duty to defend or indemnify the insured in underlying actions regarding the insured's failure to complete work on a motion picture. The federal court of appeal affirmed the federal district court's granting of summary judgment in favor of the insurer, holding that "property damage" covered under the policy did not include the type of harm incurred, because there was no physical injury to the film (*827 F.2d 574, 577-578)* .

In *Cutler-Orosi Unified Sch. Dist. v. Tulare County Sch. Dists. Liab./Prop. Self-Ins.-Auth. (1994) 31 Cal. App. 4th 617, 37 Cal. Rptr. 2d 106* , three public school districts were sued in federal court by district residents seeking declaratory and injunctive relief under the federal Voting Rights Act of 1965. The districts tendered their defenses of the actions to the joint powers agencies(JPA) to which they belonged and to the liability insurance carrier from which the JPA purchased insurance for the districts. The insurance policies covered "all sums which the Insured shall become obligated to pay as damages ... by reason of the liability imposed by law." The insurer and JPA refused to defend (*31 Cal. App. 4th 617, 622-625*). The court of appeal affirmed the trial court's grant of a motion for summary judgment. The court noted that that a liability insurer owes a duty to defend its insured against all actions that potentially seek damages covered by the insured's policy (*31 Cal. App. 4th 617, 625*). However, it held that the only remedies available in an action to enforce the Voting Rights Act are declaratory and injunctive relief, and those remedies are not the functional equivalent of a form of monetary indemnification or recoupment that may be classified as damages (*31 Cal. App. 4th 617, 629)* .

In *Alta Cal. Reg'l Ctr. v. Fremont Indem. Co. (1994) 25 Cal. App. 4th 455, 30 Cal. Rptr. 2d 841* , the issue was whether the insurer waived policy-based defenses that were not articulated at the time defense was tendered by an

insured. The insured tendered defense of a claim to its professional liability insurer. The malpractice carrier declined the tender on the ground that the claim did not involve the negligent provision of medical services and therefore was not covered under the professional liability policy, contending that the insured's general liability insurer was responsible for the defense. The insured brought a declaratory relief action to determine the malpractice insurer's coverage and defense obligations. After the declaratory relief action had been instituted, the professional liability carrier apparently dropped its contention that its policy did not cover the claims in question. Instead, it contended that an "other insurance" clause in its policy rendered the policy excess only. The superior court, in granting summary judgment in favor of the insured, held that the carrier had waived that defense by not raising it when it had originally denied coverage. The court of appeal reversed. It held that an "other insurance" provision in a policy only limited the amount of benefits available, not coverage itself. Such a limitation, said the court, is not waived by a failure to raise it upon tender of defense (*25 Cal. App. 4th 455, 464-467)* . An insurer that simply denies coverage, without expressly reserving the right to assert defenses based on policy provisions that could limit the amount of benefits available under the policy in the event coverage ultimately is found to exist, does not waive the right to assert those defenses in the event coverage is found (*25 Cal. App. 4th 455, 459)* .

In *State Farm Fire & Cas. Co. v. Jioras (1994) 24 Cal. App. 4th 1619* , an insurer issued both primary and umbrella policies to the principals of a partnership that had built a house. The purchasers of the house later sued the partnership for construction defects. The builders tendered the claim to the insurer, which advised the partners that it was providing a defense and reserving its rights under the primarypolicies. It later declined coverage and filed a declaratory relief action against the assignees of the builders' policy rights. The claimants contended that since the insurer had not reserved its rights under the umbrella policy, it was estopped to deny coverage. The trial court held that no estoppel had occurred. The court of appeal affirmed. It held that since the insureds had been told that they were being defended under the primary policies, no detrimental reliance on the umbrella policy could be shown. Absent such reliance, no estoppel arose (*24 Cal. App. 4th 1619, 1626-1628)* . Defense under a primary policy, accompanied by a reservation of rights, did not constitute an estoppel against denial of coverage under an excess policy written by the same insurer (*24 Cal. App. 4th 1619, 1626, 1627)* .

In *Hartford Accident & Indem. Co. v. Superior Court (1994) 23 Cal. App. 4th 1774, 29 Cal. Rptr. 2d 32* , a primary carrier's policy contained a "per occurrence" limit but no aggregate limit. More than 60 private actions alleging contamination were against the insured. When the carrier believed it had exhausted the policy limits through settlement, it brought a declaratory relief action against the insured, seeking a determination that coverage no longer existed. The superior court granted the insured's summary adjudication motion, ruling that the carrier had prematurely withdrawn its defense. The Court of Appeal denied that carrier's petition for writ of mandate. The court held that because there was no aggregate limit, it was a triable issue as to exactly how many "occurrences" there had been. Therefore the duty to defend would exist as a matter of law until the insurer could prove in a coverage action that the policy limits had been exhausted. The court also held that a primary insurer who ultimately proves earlier exhaustion of limits may obtain reimbursement for expenses for which other insurers are obligated (*23 Cal. App. 4th 1774, 1777, 1781-1782)* .

In *Prudential-LMI Commercial Ins. Co. v. Reliance Ins. Co. (1994) 22 Cal. App. 4th 1508, 27 Cal. Rptr. 2d 841* , the issue was the applicability of "premises alienated" exclusion and a "work performed" exclusion in a liability policy. The former excluded coverage for alienated property; the latter excluded coverage on premises in which work had been performed by an entity or person other than the insured. The policy covered a marketer of condominiums that had been sued by a homeowners' association seeking recovery for construction defects. The underlying action was settled, and one of the marketer's liability insurers sought equitable subrogation from a successor liability insurer whose policy contained the exclusions noted above. The successor insurer successfully moved for summary judgment based on the "premises alienated" and "work performed" exclusions. However, the court of appeal reversed. The court of appeal reasoned that because a marketer of condominiums by necessity permits another entity (the builder) to perform work, and by definitionalienates the property, invocation of the exclusions defeats reasonable expectations of the insured (*22 Cal. App. 4th 1508, 1513)* . See also *Maryland Cas. Co. v. Reeder (1990) 221 Cal. App. 3d 961, 270 Cal. Rptr. 719* .

In *Collin v. American Empire Ins. Co. (1994) 21 Cal. App. 4th 787, 810-814, 26 Cal. Rptr. 2d 391* , there was no coverage under a contractor's liability policy for damages arising out of the contractor's alleged conversion of a homeowner's personal property. In reversing the judgment in favor of the homeowner, the court of appeal held that damages allegedly arising out of conversion of personal property did not constitute "property damage," which was defined in the policy as injury, destruction or loss of use of tangible property. Conversion does not involve physical injury to property, but rather the taking or deprivation of property. Nor does conversion constitute loss of use of property, which is the rental value of the property, not the value of the property itself. The court also stated that in California, the term "accident" as used in a liability policy refers to the insured's intent to commit the act creating liability, not the intent to cause the consequences of that act. Conversion, which requires intent, cannot be an accident.

In *American Motorists Ins. Co v. Allied-Sysco Food Servs., Inc. (1993) 19 Cal. App. 4th 1342, 1348-1356, 24 Cal. Rptr. 2d 106* , an excess policy covering personal injury, defined as injury arising out of racial or religious discrimination and humiliation caused by injury to character or reputation, did not cover damages for humiliation and emotional distress arising from discriminatory hiring practices. The provision specifically listed certain types of discrimination and the court refused to expand it to cover all types of discrimination. Damages arising from the alleged humiliation were covered only if the humiliation arose out of torts against character or reputation, which did not include discriminatory hiring. The court also held that there was no potential for coverage, and therefore no duty to defend. Moreover, there was no right to reimbursement for defense costs because there was no understanding between the parties to that effect.

In *Utley v. Allstate Ins. Co. (1993) 19 Cal. App. 4th 815, 821, 24 Cal. Rptr. 2d 1* , an adult son of the insured was injured in a fall from the insured's bicycle. The son sued the city and the distributor of the bicycle, who in turn cross-complained against the insured for indemnity. The court of appeal affirmed the trial court's determination that the son was a resident of the insured's home and fell within the resident relative exclusion of the insured's homeowner's policy. The term "residence" is not ambiguous as used in the exclusion, and the meaning of the term varies according to the facts and circumstances of the case. There was substantial evidence that the son was a resident relative at the insured's house when the son ate, slept, kept his belongings, received mail, and lived at the house after his military discharge. The court further held that the resident relativeexclusion applied to indemnification claims by third parties against the insured.

In *Chadwick v. Fire Ins. Exch. (1993) 17 Cal. App. 4th 1112, 1119-1126, 21 Cal. Rptr. 2d 871* , insureds under a broad peril homeowner's policy sought coverage for cracks in the interior of their home. The insurer denied coverage, citing the exclusions for cracking, latent defects, and inherent vice. The court of appeal reversed a summary judgment in favor of the insurer. The court held that a latent defect or inherent vice was one that was not apparent by reasonable inspection. However, for purposes of coverage under homeowner's insurance, this test includes a reasonable inspection with expert assistance. The insureds did not have the benefit of expert assistance prior to seeking coverage for the loss, and a declaration of an expert that the cracking was caused by defective design and construction raised a triable issue of fact as to whether an expert inspection would have revealed the defect.

In *Fibreboard Corp. v. Hartford Accident & Indem. Co. (1993) 16 Cal. App. 4th 492, 497, 20 Cal. Rptr. 2d 376* , an insured manufacturer of products containing asbestos sought coverage for numerous claims based on product liability and conspiracy theories. The court of appeal affirmed the entry of summary judgment in favor of the insurer. Claims based on conspiracy theories cannot be "occurrences," defined in the policy as "an accident," because conspiracy cannot occur by accident. In addition, the claims all arose out of the insured's products, and therefore fell within the policy's product hazard coverage, which was subject to annual limitations of liability.

In *Shell Oil Co. v. Winterthur Swiss Ins. Co. (1993) 12 Cal. App. 4th 715, 15 Cal. Rptr. 2d 815* , a chemical manufacturer brought a declaratory relief action against insurers who sold it comprehensive general liability policies, seeking a declaration that the insurers had a duty to defend and indemnify it in actions for environmental damage and remediation costs. The court of appeal held that "willful act" under *Ins. Code § 533* includes a "deliberate,

liability-producing act that the individual, before acting, expected to cause harm," and thus the jury was properly instructed that for coverage to exist the property damage must have been neither expected nor intended by the insured (*12 Cal. App. 4th 715, 743)* . However, the jury was improperly instructed that the test for "expected damage" uses an objective, rather than subjective, standard (*12 Cal. App. 4th 715, 748-749* . The court also held that the jury was properly instructed that policies defining "occurrence" as "an accident or continuous repeated exposure to conditions that resulted in property damage during the policy period" require that only the resulting damage be unexpected or unintended, while policies defining "occurrence" as "an accident, including continuous or repeated exposure," require that both the events or event causing the damage and the damage itself be unexpected and unintended (*12 Cal. App. 4th 715, 748-749)* .

In *Canadian Ins. Co. v. Ehrlich (1991) 229 Cal. App. 3d 383, 280 Cal. Rptr. 141* , a declaratory relief action regarding coverage, the court of appeal affirmed the trial court's grant of summary judgment in favor of the insured, based on an automobile liability policy exclusion regarding nonowned vehicles when used by a person who was not entitled to do so, when the claim arose from the use of a nonowned vehicle by a person who was expressly forbidden by the insured from ever doing so (*229 Cal. App. 3d 383, 387-392)* .

In *Aim Ins. Co. v. Culcasi (1991) 229 Cal. App. 3d 209, 280 Cal. Rptr. 766* , the insurer brought a declaratory relief action regarding its duty to defend and indemnify the insured in an underlying action brought by the insured's employee for negligent breach of fiduciary duty, breach of contract, and infliction of emotional distress, based on the insured's failure to provide promised health-insurance coverage and the employee's consequent liability for medical expenses arising from a car accident. The court of appeal affirmed summary judgment in favor of the insurer, holding that there was no reasonable expectation of coverage for economic loss or emotional distress under the policy, which covered "bodily injury" (*229 Cal. App. 3d 209, 217-228)* .

In *Reliance Ins. Co. v. Alan (1990) 222 Cal. App. 3d 702, 272 Cal. Rptr. 65* , the insured under an all-risk yacht policy was sued in an underlying wrongful-death action arising from his alleged shooting of a person aboard his yacht. In the ensuing declaratory relief action, the court of appeal affirmed summary judgment for the insurer, holding that the "protection and indemnity" provision of the policy specifically limited coverage to liability arising from the ownership, operation, or maintenance of the insured vessel. The court held that the insured's conduct was an act not related to the vessel (*222 Cal. App. 3d 702, 706-708)* .

In *State Farm Fire & Casualty Co. v. Salas (1990) 222 Cal. App. 3d 268, 271 Cal. Rptr. 642* , the court of appeal reversed the trial court's denial of summary judgment for the insurer, holding that the homeowner's policy exclusion, regarding bodily injury arising out of maintenance of motor vehicle, applied to the underlying action brought by a third party who was injured while repairing a tire on the insured's automobile (*222 Cal. App. 3d 268, 273-274*).

In *Loyola Marymount Univ. v. Hartford Accident & Indem. Co. (1990) 219 Cal. App. 3d 1217, 271 Cal. Rptr. 528* , a university brought a declaratory relief action against its insurer to determine the insurer's duty to defend two wrongful-discharge actions under a policy that excluded coverage for personal injury "directly or indirectly related to the employment" of the injured person by the insured. The court of appeal affirmed summary judgment for the defendant insurer, holding that the exclusion precluded the insurer's duty to provide coverage or a defense, because itexcludes all personal injuries arising from or deriving from the third parties' employment and termination (*219 Cal. App. 3d 1217, 1222-1223)* .

In *Waranch v. Gulf Ins. Co. (1990) 218 Cal. App. 3d 356, 266 Cal. Rptr. 827* , the trial court found that the insurer had no duty under a personal injury liability policy to indemnify or defend the insured in an underlying action arising from repossession of an automobile. The court of appeal affirmed, holding that the policy definition of "personal injury," which included "wrongful entry or eviction, or other invasion of the right of private occupancy" referred only to torts directed against another's real property, and therefore did not include a tort relating to an automobile (*218 Cal. App. 3d 356, 359-361)* .

In *Inglewood Radiology Med. Group, Inc. v. Hospital Shared Servs., Inc. (1989) 217 Cal. App. 3d 1366, 266 Cal. Rptr. 501* , an insured under a medical-malpractice policy brought suit against the insurer for failure to indemnify or defend with regard to an underlying action brought against her for wrongful termination. The court of appeal affirmed summary judgment in favor of the defendant on the ground that neither the wrongful-termination claim, nor the related slander claim, in the underlying action concerned the "rendering of professional services" within the meaning of coverage provided under the policy (*217 Cal. App. 3d 1366, 1370)* .

In *California Ins. Guarantee Assn v. Wood (1990) 217 Cal. App. 3d 944* , the court of appeal affirmed summary judgment in favor of the insurer in a declaratory relief action filed by the successor insurer to determine the predecessor's duty to defend under a general comprehensive policy. The court held that the exclusion in the policy regarding coverage of personal injuries arising out of business pursuits of insured precluded coverage of the underlying claim for negligent infliction of emotional distress arising from the insured's alleged wrongful discharge of the claimant's husband (*217 Cal. App. 3d 944, 949*).

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsEstoppel & WaiverGeneral OverviewInsurance LawClaims & ContractsGood Faith & Fair DealingDuty to DefendInsurance LawClaims & ContractsPolicy InterpretationGeneral OverviewInsurance LawClaims & ContractsPolicy InterpretationExclusions

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 120 INSURANCE
PART II. FORMS
B. Coverage and Exclusions
1. General Exclusions

12-120 California Points & Authorities § 120.31

§ 120.31 Occurrence Outside Policy Period Is Not Covered

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [HAS *or* HAD] NO DUTY TO DEFEND INSURED BECAUSE OCCURRENCE WAS OUTSIDE THE POLICY PERIOD.

Occurrence Outside Policy Period Not Covered. When an insurance policy specifies that it applies only to occurrences during the term of the policy, no coverage exists for liability predicated onevents that transpire after the policy has expired, and the insurer has no obligation to defend such claims (*Remmer v. Glens Falls Indem. Co. (1956) 140 Cal. App. 2d 84, 90, 295 P.2d 19*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to support the contention that an insurer has no duty to defend its insured under an insurance policy. The basis of these points and authorities is that the events on which the claim was based occurred after the policy had expired.

This form may be used by an insurer in various procedural contexts, such as in memoranda supporting or opposing a motion for summary judgment, in a trial brief, or in an appellate brief. For further discussion, see *§ 120.30[2][a]*.

For references to related Pleading and Practice chapters, see *§ 120.30[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. For example, counsel would:

- Identify the date the policy had expired.
- Identify the date the event occurred.
- Point out that the event occurred after the policy had expired.
- Conclude that the insurer has no duty to defend because the event occurred after the policy had expired.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.10* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be a motion by a defendant insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.30[2][b]*.

[c] Related Points and Authorities

For complete discussion of the format requirements and strategic considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion of requirements and considerations for completing a memorandum, together with a general skeletal form of memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* . Forforms relating specifically to the procedural context of a motion for summary judgment or summary adjudication, see Ch. 221, *Summary Judgments* .

[d] Opposing Points and Authorities

The points and *authorities in § 120.50* et seq. may be used in an appropriate case to oppose the points and authorities set out in this form.

[3] Discussion of Authorities

[a] Occurrence Outside Policy Period Not Covered

Remmer v. Glens Falls Indem. Co. *(1956) 140 Cal. App. 2d 84, 295 P.2d 19* , was an action brought by plaintiffs, insureds under a comprehensive liability policy, following entry of a judgment against them in an action for damages for nuisance brought by a neighbor of plaintiffs. Plaintiffs had graded and filled portions of their lot in 1947. In 1952, large quantities of earth and rock slid from the fill onto the neighbor's property. The insurance policy was issued to plaintiffs in 1945 for a three-year period, but it was canceled in January 1948, and was not thereafter renewed. The policy provided that defendant would pay on behalf of the insured all sums which the insured became obligated to pay by reason of the liability imposed by law for damages because of injury to or destruction of property, including the loss of use thereof. The policy further provided that defendant would defend any suit against the insured alleging such injury or destruction and seeking damages on account thereof, even if the suit was groundless, false, or fraudulent, and would pay all costs taxed against the insured in any such suit and all interest accruing after entry of judgment. The policy also provided, however, that it applied only to occurrences during the policy period (*140 Cal. App. 2d 84, 85)* . It defined "occurrence" as an accident, or a continuous or repeated exposure to conditions, which results in injury during the policy period.

The court appeal affirmed the judgment for the insurer. The court held that the cause of action against the insureds was for then presently occurring damage not covered by the policy which had long since been canceled and that there was,

therefore, no duty to defend. The court acknowledged the rule that under a policy requiring the insurer to defend an action against the insured alleging an injury under the policy even if the suit is groundless, false, or fraudulent, it is the duty of the insurer to defend the insured when sued in any action when the facts alleged in the complaint support a recovery for an occurrence covered by the policy, regardless of the fact that the insurer has knowledge that the injury is not in fact covered. However, the court held that it is equally true that the insurer is not required to defend an action against the insured when the complaint in that action shows on its face that the injury complained ofis not only not covered by, but is excluded from, the policy (*140 Cal. App. 2d 84, 90)* .

[4] Additional Authorities

[a] Occurrence Outside Policy Period Not Covered

In *Buena Vista Mines, Inc. v. Industrial Indem. Co. (2001) 87 Cal. App. 4th 482, 104 Cal. Rptr. 2d 557* , an insured sued several CGL insurance carriers, claiming that they breached the insurance contracts and violated the implied covenant of good faith and fair dealing by refusing to defend the insured in a lawsuit for violation of the Clean Water Act previously brought against the insured in federal court. The trial court sustained demurrers to the complaint, ruling that the claims alleged against the insured in the prior action were outside the period of coverage under the policies at issue, there was no potential for coverage, and the insurers therefore owed no duty to defend. The insured appealed. The court of appeal affirmed, noting that the earliest alleged violations of the Clean Water Act occurred in 1992, and that the policies expired, at the latest, in 1983. The trial court therefore properly sustained the demurrer to the contract cause of action. Moreover, if there is no potential for coverage and, hence, no duty to defend under the terms of the policy, there can be no action for breach of the implied covenant of good faith and fair dealing, because the covenant is based on the contractual relationship between the insured and the insurer (*87 Cal. App. 4th 482, 487-490)* .

Cooper Companies. v. Transcontinental Ins. Co. (1995) 31 Cal. App. 4th 1094, 37 Cal. Rptr. 2d 508 , involved an action for declaratory relief by a company against its insurer seeking coverage under two "occurrence" liability policies for claims against two subsidiaries the company acquired after the policies had expired. The named insured in these policies was defined as the insured and "any organization, association or business entity now existing or hereafter acquired, in which [the insured] owns an interest of fifty percent (50%) or more over which [the insured] exercises active management and control," specifically including subsidiaries. In 1987, almost two years after both policies had expired, the insured acquired two companies that manufactured breast implants. These companies were later sold, but the insured retained their liabilities. By 1993, over 1,400 claims had been filed against the insured and its two subsidiaries. The insurer denied coverage and a declaratory relief action followed.

The insured argued that the "hereafter acquired" language in the policy extended coverage to any subsidiary whenever acquired by the insured because the language did not define how long after the inception of the policies coverage would apply. However, following the framework for policy interpretation set forth in *AIU Ins. Co. v. Superior Court (1990) 51 Cal. 3d 807, 821-823, 274 Cal. Rptr. 820, 799 P.2d 1253* , the court held thatthe only interpretation of the policy consistent with the objectively reasonable expectations of the insured and common sense is one that extends coverage only for the activities of acquisitions made during the policy period (*31 Cal. App. 4th 1094, 1103)* . The insured could not have had an objectively reasonable expectation that the policies covered pre-acquisition torts of after-acquired companies when such coverage was not available in the marketplace at the time the policies were written (*31 Cal. App. 4th 1094, 1109)* . The manner in which premiums were assessed also supported the court's conclusion with respect to the insured's objectively reasonable expectations regarding policy coverage (*31 Cal. App. 4th 1094, 1108)* .

In *Larkspur Isle Condo. Owners' Assn v. Farmers Ins. Group (1994) 31 Cal. App. 4th 106, 37 Cal. Rptr. 2d 3* , the court held that under the manifestation rule, the insurer was not liable for water damage thathad manifested itself prior to the inception of the policy period. Moreover, it rejected the insured's attempt to characterized the discovery of rain-damaged asbestos ceiling materials as a separate loss, ruling that a portion of the total damage may not be separated out as a distinct loss when it proceeds from the same progressive destruction as the other damage (*31 Cal. App. 4th*

106, 111) .

In *Whittaker Corp. v. Allianz Underwriters, Inc. (1992) 11 Cal. App. 4th 1236, 14 Cal. Rptr. 2d 659* , a manufacturer of a sealing compound for beverage cans brought a bad faith action against two of its commercial liability excess insurers, after the insurers denied coverage under policies issued for the manufacturer's 1983 fiscal year. An anti-oxidant the manufacturer had begun using in its sealant in 1983 had proved ineffective, causing some of the manufacturer's customers to suffer losses during 1984 and 1985. The trial court rendered judgment in favor of the manufacturer on the ground its decision to change anti-oxidants was the relevant "occurrence" for coverage purposes under the 1983 policies. The court of appeal reversed, holding that the trial court had confused the different uses of the term "occurrence" for purposes of determining coverage and limitations on liability. The court held that the time of the injury itself, rather than the cause of the injury, is the relevant occurrence for purposes of determining coverage (*11 Cal. App. 4th 1236, 1241-1242)* .

In *Hallmark Ins. Co. v. Superior Court (1988) 201 Cal. App. 3d 1014, 247 Cal. Rptr. 638* , a manufacturer of hang gliders brought an action against its liability insurer for bad faith refusal to defend or indemnify it regarding a third-party action stemming from the wrongful death of the user of one of its hang gliders. The court of appeal reversed the trial court's denial of the insurer's motion for summary judgment, holding that the policy had lapsed when the accident occurred, and the accident was therefore outside the policy period. The fact that the policy was in effect at the time the hang glider was manufactured was not controlling, because the time that the accident occurred was the time when the complaining party was actually damaged, not the time the wrongful act was committed (*201 Cal. App. 3d 1014, 1017-1019)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGeneral OverviewInsurance LawClaims & ContractsGood Faith & Fair DealingDuty to DefendInsurance LawClaims & ContractsPolicy InterpretationGeneral OverviewInsurance LawClaims & ContractsPolicy InterpretationExclusions

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CHAPTER 120 INSURANCE
PART II. FORMS
B. Coverage and Exclusions
1. General Exclusions

12-120 California Points & Authorities § 120.32

§ 120.32 Standard California Land Title Association Policy Does Not Cover Defects That Survey Can Disclose

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [HAS *or* HAD] NO DUTY TO DEFEND INSURED BECAUSE THE STANDARD CALIFORNIA LAND TITLEASSOCIATION POLICY DOES NOT COVER DEFECTS THAT A CORRECT SURVEY WOULD DISCLOSE.

Standard California Land Title Association Policy Does Not Cover Defects That Survey Can Disclose. An owner's standard California Land Title Association (CLTA) policy of title insurance does not insure against conflicts in boundary lines, encroachments, shortages in area, or any other facts that a correct survey would disclose. Thus, a title insurer is not required to defend claims relating to the location of a structure on the property (*Walters v. Marler (1978) 83 Cal. App. 3d 1, 29, 147 Cal. Rptr. 655*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a defendant insurer's contention that the owner's standard California Land Title Association (CLTA) policy of title insurance. The basis of the form is that the policy does not insure against conflicts in boundary lines, encroachments, shortages in area, or any other facts that a correct survey would disclose.

This form may be used by an insurer in various procedural contexts, such as in memoranda supporting or opposing a motion for summary judgment, in a trial brief, or in an appellate brief. For further discussion, see *§ 120.30[2][a]*.

For references to related Pleading and Practice chapters, see *§ 120.30[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.10* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be a motion by a defendant insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.30[2][b]*.

[c] Related Points and Authorities

For complete discussion of the format requirements and strategic considerations for drafting memoranda, discussion on how to combine the formsof this publication in drafting, and discussion of requirements and considerations for completing a memorandum, together with a general skeletal form of memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* . For forms relating specifically to the procedural context of a motion for summary judgment or summary adjudication, see Ch. 221, *Summary Judgments* .

[d] Opposing Points and Authorities

The points and *authorities in § 120.50* et seq. may be used in an appropriate case to oppose the points and authorities set out in this form.

[3] Discussion of Authorities

[a] Standard California Land Title Association Policy Does Not Cover Defects That Survey Can Disclose

Walters v. Marler *(1978) 83 Cal. App. 3d 1, 147 Cal. Rptr. 655* , involved an owner's standard California Land Title Association (CLTA) policy of title insurance. The insured, purchaser of a house and lot, sued the sellers, the title insurer, and others, and the sellers cross complained against the buyer, the title insurer, and others. The action arose out of the fact that due to a misdescription in the deed, only a small portion of the house was located on the designated lot. The jury returned a verdict for plaintiff buyer on the complaint against all defendants for the purchase price of the property and awarded punitive damages against the title insurer. The trial court also awarded plaintiff buyer attorney's fees against all defendants. The court of appeal reversed the judgment in favor of plaintiff against the title insurer. The title policy obligated the insurer to defend plaintiff in all actions commenced against plaintiff and to commence such action as may be appropriate to establish title to the estate as insured in plaintiff. Excluded from coverage were discrepancies, conflicts in boundary lines, shortage in area, encroachments, or any other facts which a correct survey would disclose and which are not shown by the public records. The court of appeal held that by reason of the exclusionary clause, the insurer was not required to defend or prosecute any action arising out of misunderstandings concerning the location of the house and that neither plaintiff's complaint nor the seller's cross complaint (against which the title insurer refused to defend plaintiff) alleged facts which would support recovery on risks covered by the policy in favor of plaintiff (*83 Cal. App. 3d 1, 29)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGood Faith & Fair DealingDuty to DefendInsurance LawProperty InsuranceTitle InsuranceInsurance LawProperty InsuranceTitle Insurance Exclusions

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12-120 California Points & Authorities § 120.33

§ 120.33 Business Owner's Comprehensive Liability Policy Does Not Cover Off-Premises Accident

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [HAS *or* HAD] NO DUTY TO DEFEND INSURED BECAUSE ACCIDENTS OCCURRING OFF PREMISES ARE EXCLUDED FROM COVERAGE UNDER THE POLICY.

Business Owner's Comprehensive Liability Policy Does Not Cover Off-Premises Accident. Accidents occurring outside the business premises are not covered by a business owner's comprehensive liability policy that clearly defines the business premises and in unambiguous language excludes coverage for accidents occurring away from the premises (*Ins. Code § 11580.1(e)*; *State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co. (1970) 9 Cal. App. 3d 508, 517, 88 Cal. Rptr. 246*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to support the contention that an insurer has no duty to defend its insured under an insurance policy. The basis of these points and authorities is that that accidents occurring outside the business premises were not covered by the business owner's comprehensive liability policy.

This form may be used by an insurer in various procedural contexts, such as in memoranda supporting or opposing a motion for summary judgment, in a trial brief, or in an appellate brief. For further discussion, see *§ 120.30[2][a]*.

For references to related Pleading and Practice chapters, see *§ 120.30[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should refer to the coverage provisions in the policy, showing that the policy does not cover losses which occurred off the premises of the insured.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.10* et seq.)and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be a motion by a defendant insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.30[2][b]*.

[c] Related Points and Authorities

For complete discussion of the format requirements and strategic considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion of requirements and considerations for completing a memorandum, together with a general skeletal form of memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* . For forms relating specifically to the procedural context of a motion for summary judgment or summary adjudication, see Ch. 221, *Summary Judgments* .

[d] Opposing Points and Authorities

The points and *authorities in § 120.50* et seq. may be used in an appropriate case to oppose the points and authorities set out in this form.

[3] Discussion of Authorities

[a] Business Owner's Comprehensive Liability Policy Does Not Cover Off-Premises Accident

Ins. Code § 11580.1(e) is discussed in *§ 120.37[3][a]*.

State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co. *(1970) 9 Cal. App. 3d 508, 88 Cal. Rptr. 246* , was a declaratory relief action for a determination of the obligations of five insurance companies for the payment of personal injury judgments against a business owner and his employee arising out of an accident which occurred while the employee was driving one of the owner's trucks. The owner was covered by the following policies: (1) a policy covering another truck, designated cars, and a temporary substitute; (2) a policy covering a station wagon and a temporary substitute vehicle, but which limited coverage to vehicles of three-quarter ton capacity and excluded owned vehicles from the category of temporary substitute automobiles; (3) a comprehensive liability policy covering the owner's business premises, but which covered automobile-related accidents only on the insured's business premises and the ways immediately adjoining them; and (4) a homeowner's policy. A fifth insurer, plaintiff, had issued policies to the driver's father covering homeowner's liability and three designated vehicles but excluded from coverage nonowned vehicles usedin business and nonowned vehicles with more than four wheels. The driver was a minor at the time of the accident and a resident of his father's household. The truck insurer (first policy listed above) refused defense of the owner in the third-party action but undertook defense of the driver. The insurer of the business premises undertook defense of the owner reserving the right to disclaim coverage. The trial court ruled that the truck involved in the accident was a temporary substitute vehicle within the meaning of the first-described policy above and that both the truck insurer and the insurer of the business premises were obligated to defend and indemnify the owner.

The court of appeal reversed that portion of the judgment declaring the liability of the insurer of the business premises with direction to enter judgment declaring that company's nonliability. The court of appeal affirmed the judgment in all other respects, but remanded the case to the trial court for a retrial limited to the issue of whether the truck insurer was liable for payment of the judgments in excess of the policy limit (*9 Cal. App. 3d 508, 531)* .

In affirming the judgment for the insurer of the business premises, the court noted that the comprehensive liability policy at issue covered automobile accidents on the insured's premises and "the ways immediately adjoining," a phrase which at the time had been recently determined in *Herzog v. National Am. Ins. Co. (1970) 2 Cal. 3d 192, 84 Cal. Rptr. 705, 465 P.2d 841* , and *Huggins v. Yoshiwara (1970) 2 Cal. 3d 200, 84 Cal. Rptr. 709, 465 P.2d 845* [*see § 120.37[3][a]*], not to be so ambiguous as to defy reasonable construction in the context of a particular case. The policy at issue in *State Farm* described the hazards insured as those arising from "the ownership, maintenance or use of the premises, and all operations necessary or incidental thereto," the premises being defined, as noted above, to include "the ways immediately adjoining." The policy listed various exclusions, among them the operation of automobiles "if the accident occurs away from the premises." As the accident occurred several hundred miles from the business premises, the court concluded that the clear and plain language of the policy excluded coverage (*9 Cal. App. 3d 508, 516-517)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBusiness InsuranceGeneral OverviewInsurance LawGeneral Liability InsuranceCoverageGeneral OverviewInsurance LawGeneral Liability InsuranceExclusionsGeneral OverviewInsurance LawGeneral Liability InsuranceOccurrences

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CHAPTER 120 INSURANCE
PART II. FORMS
B. Coverage and Exclusions
1. General Exclusions

12-120 California Points & Authorities § 120.34

§ 120.34 Commercial General Liability Policy Excludes Or Does Not Cover Faulty Workmanship

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [HAS *or* HAD] NO DUTY TO DEFEND INSURED BECAUSE THE POLICY _____ [EXCLUDES *or* DOES NOT COVER] LIABILITY FOR FAULTY WORKMANSHIP.

[*EITHER*]

Commercial General Liability Policy Excludes Coverage for Faulty Workmanship. Claims arising from faulty workmanship by the insured are not covered by a comprehensive liability policy or commercial general liability policy that properly excludes injury to or destruction of property, the restoration, repair, or replacement of which was necessitated by the faulty workmanship of the insured (*St. Paul Fire & Marine Ins. Co. v. Coss (1978) 80 Cal. App. 3d 888, 892-897, 145 Cal. Rptr. 836* ; *Rafeiro v. American Employers' Ins. Co. (1970) 5 Cal. App. 3d 799, 808-809, 85 Cal. Rptr. 701*).

[*OR*]

Commercial General Liability Policy Does Not Cover Insured's Faulty Workmanship. The risk of inferior or defective workmanship is not covered by commercial general liability insurance (*F & H Constr. v. ITT Hartford Ins. Co. (2004) 118 Cal. App. 4th 364, 377, 12 Cal. Rptr. 3d 896*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to support the contention that an insurer has no duty to defend its insured under an insurance policy. The basis of these points and authorities is that claims arising from faulty workmanship by the insured are not covered by a comprehensive liability policy. The first alternate paragraph should be used if the policy expressly excludes coverage for losses arising from the insured's faulty workmanship. The second alternate paragraph should be used if there is no such exclusion, but if the policy merely does not cover that risk.

This form may be used by an insurer in various procedural contexts, such as in memoranda supporting or opposing a motion for summary judgment, in a trial brief, or in an appellate brief. For further discussion, see *§ 120.30[2][a]*.

For references to related Pleading and Practice chapters, see *§ 120.30[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. For example, if the policy contains an exclusion for faulty workmanship, counsel may:

- Refer to specific language in the policy that excludes injury to or destruction of property, the restoration, repair, or replacement of which is necessitated by the faulty workmanship of the insured.

- Refer to evidence establishing that the property damage was caused by the insured's faulty workmanship.

- Argue that consequently, under the policy, the insurer has no obligation to defend the insurer under these circumstances.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.10* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be a motion by a defendant insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.30[2][b]*.

[c] Related Points and Authorities

For complete discussion of the format requirements and strategic considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion of requirements and considerations for completing a memorandum, together with a general skeletal form of memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* . For forms relating specifically to the procedural context of a motion for summary judgment or summary adjudication, see Ch. 221, *Summary Judgments* .

[d] Opposing Points and Authorities

The points and *authorities in § 120.50* et seq. may be used in an appropriate case to oppose the points and authorities set out in this form.

[3] Discussion of Authorities

[a] Comprehensive Liability Policy Excludes Coverage for Faulty Workmanship

St. Paul Fire & Marine Ins. Co. v. Coss *(1978) 80 Cal. App. 3d 888, 145 Cal. Rptr. 836* , involved a declaratory relief action by an insurance company against its insured, a building contractor to whom the company had issued a

comprehensive liability insurance policy insuring against bodily injury and property damage. Plaintiff sought a determination that it had neither the duty to defend nor the obligation to indemnify the insured with respect to a third-party action against the insured in which the third party recovered a $60,000 judgment based on the insured's use of defective materials in, and performance of defective work on, a house and garage constructed by the insured on property owned by the third parties. The policy excluded from coverage expenditures required to correct the insured's own defective product resulting from his use of defective materials and poor workmanship.

The court of appeal affirmed judgment for the insurer. The court held that the policy excluded the liability sued on (*80 Cal. App. 3d 888, 892-894)* , that there was no ambiguity in the policy that could be resolved in favor of the insured (*80 Cal. App. 3d 888, 895-896)* , and that because of the express exclusion, the insured could have no reasonable expectations of coverage for products liability (*80 Cal. App. 3d 888, 896-897)* .

In ***Rafeiro v. American Employers' Ins. Co.*** *(1970) 5 Cal. App. 3d 799, 85 Cal. Rptr. 701* , plaintiff, the owner of apartment buildings, brought an action to recover from the insurer of the contractor who constructed the buildings the amount of a judgment previously recovered by plaintiff against the contractor for unworkmanlike service and negligent selection of defective materials. The contractor's comprehensive liability policy obligated the insurer to pay sums which the insured became legally obligated to pay as damages because of injury to or destruction of property resulting from an occurrence. Excluded from coverage was injury to or destruction of property, the restoration, repair, or replacement of which was made necessary by reason of faulty workmanship thereon by or on behalf of the insured and injury to or destruction of any goods or products manufactured, sold, handled, or distributed by the named insured, or work completed by or for the named insured, out of which the accident arises.

The court of appeal affirmed summary judgment for defendant insurer. The court said that it appeared from the policy provisions that the insurance was not intended to indemnify the contractor (and through him the owner) for direct damages resulting because the contractor furnished defective materials or workmanship (*5 Cal. App. 3d 799, 808)* and that the insurer had not undertaken to indemnify the contractor with respect to any claim or suit alleging that construction or repair did not comply with customers' specifications (*5 Cal. App. 3d 799, 809)* . The court distinguished those cases holding the insurer liable for diminution in the value of real property in which a defective product was installed and for damage to other real or personal property resulting from installation of a defective product or negligent workmanship (*5 Cal. App. 3d 799, 809)* .

[b] Commercial General Liability Policy Does Not Cover Insured's Faulty Workmanship

In ***F & H Constr. v. ITT Hartford Ins. Co.*** *(2004) 118 Cal. App. 4th 364, 12 Cal. Rptr. 3d 896* , a contractor sued its subcontractor's insurer after suing the subcontractor, which filed bankruptcy and then defaulted in the civil suit, resulting in a judgment against the subcontractor. The subcontractor, which had been insured under a commercial general liability policy, had provided substandard-grade steel pile caps to the contractor, which welded most of the defective pile caps to driven piles at a water-facility pumping plant before realizing that the grade of steel was inferior. The policy defined property damage primarily as "physical injury to tangible property." The contractor brought suit for damages and breach of contract, seeking from the insurer the amount of the underlying default judgment against the subcontractor. Both parties filed cross-motions for summary judgment. The trial court found in favor of the insurer on both summary judgment motions. The contractor appealed.

The court of appeal affirmed, holding that the incorporation of a defective component or product into a larger structure does not constitute property damage unless and until the defective component causes physical injury to tangible property in at least some other part of the system (*118 Cal. App. 4th 364, 371, 372)* . The court held that the contractor's welding of the defective pile caps did not constitute "property damage" under the primary definition of that term solely because the welded unit was inadequate to meet the contractual design specifications, if there was no physical injury to the piles or to other property, and if the defective pile caps were ultimately used as modified to meet design specifications (*118 Cal. App. 4th 364, 371, 377)* . The court also held that the contractor did not suffer

"property damage" under the second definition of that term: "loss of use of tangible property that is not physically injured." The contractor did not seek damages (measured by rental value or its equivalent) for the loss of the use of the water facility while modifications were made to the pile caps, or even for a period of time caused by delay. The court noted that the failure to seek those damages was probably due to the timely completion of the project. The only costs claimed by the contractor were the costs of repairing and modifying the defective caps and for loss of the early completion bonus, caused by the need for repair and modification of the pile caps. Those costs are unrelated to rental value and are not recoverable as property damagebecause they are intangible economic damages rather than damages "to tangible property" (*118 Cal. App. 4th 364, 373-377)* . In so holding, the court stated that liability policies are not designed to provide contractors and developers with coverage against claims that their work is inferior or defective. The risk of replacing and repairing defective materials or poor workmanship has generally been considered a commercial risk that is not passed on to the liability insurer. Instead, liability coverage applies if the insured's defective materials or work cause injury to property other than the insured's own work or products (*118 Cal. App. 4th 364, 372-373)* . A liability insurance policy is not designed to serve as a performance bond or a warranty of a contractor's product (*118 Cal. App. 4th 364, 373)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGood Faith & Fair DealingDuty to DefendInsurance LawGeneral Liability InsuranceCoverageGeneral OverviewInsurance LawGeneral Liability InsuranceExclusionsGeneral Overview

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12-120 California Points & Authorities § 120.35

§ 120.35 Specialty Business Insurance Policy Excludes Coverage of Criminal Acts of Employees

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [HAS *or* HAD] NO DUTY TO DEFEND INSURED BECAUSE THE POLICY EXCLUDES CRIMINAL ACTS OF EMPLOYEES.

Specialty Business Insurance Policy Excludes Coverage of Criminal Acts of Employees. Criminal acts of employees may be properly excluded under a specialty business policy (*see Atlas Assurance Co. v. McCombs Corp. (1983) 146 Cal. App. 3d 135, 142, 194 Cal. Rptr. 66*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to support the contention that an insurer has no duty to defend its insured under an insurance policy. The basis of these points and authorities is that criminal acts of employees are excluded from coverage of specialty business insurance policy, such as a self-service storage operator's policy [*see Atlas Assurance Co. v. McCombs Corp. (1983) 146 Cal. App. 3d 135, 142, 194 Cal. Rptr. 66* (claim arising from theft of patron's property by employee was properly excluded); *see also § 120.35[3][a]*].

This form may be used by an insurer in various procedural contexts, such as in memoranda supporting or opposing a motion for summary judgment, in a trial brief, or in an appellate brief. For further discussion, see *§ 120.30[2][a]*.

For references to related Pleading and Practice chapters, see *§ 120.30[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should refer to specific to provisions of the policy that exclude the activity which the insured asserts should be covered.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.10* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be a motion by a defendant insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.30[2][b]*.

[c] Related Points and Authorities

For complete discussion of the format requirements and strategic considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion of requirements and considerations for completing a memorandum, together with a general skeletal form of memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* . For forms relating specifically to the procedural context of a motion for summary judgment or summary adjudication, see Ch. 221, *Summary Judgments* .

[d] Opposing Points and Authorities

The points and *authorities in § 120.50* et seq. may be used in an appropriate case to oppose the points and authorities set out in this form.

[3] Discussion of Authorities

[a] Specialty Business Insurance Policy Excludes Coverage of Criminal Acts of Employees

In ***Atlas Assurance Co. v. McCombs Corp.*** *(1983) 146 Cal. App. 3d 135, 194 Cal. Rptr. 66* , an insurer brought an action for declaratory relief against its insured, the owners of a self-service storage facility, for determination of whether plaintiff had a duty to defend defendant in a lawsuit brought by tenants of the facility after valuable items were stolen from thetenants' locker by an employee of defendant. At the time of the theft, defendants were insured by plaintiff under a self-service storage operator's policy that included a promise to defend against any suit seeking damages payable under the terms of the policy. Excluded under the policy was coverage for liability arising from any dishonest or criminal act of the insured or their employees or agents. Plaintiff wrote defendants that it felt there was no coverage for the theft, but stated that it would undertake the defense, reserving the right to have the question of coverage judicially determined. Subsequently, in a criminal prosecution, the employee pleaded nolo contendere to a charge of grand theft and plaintiff informed defendants by letter on its belief that the exclusion applied to the lawsuit and gave notice of its intention to withdraw from the defense. Defendant did not agree and demanded full coverage. Plaintiff then continued the defense, subject to its original reservation of rights, and filed an action for declaratory relief. The trial court granted summary judgment for plaintiff, finding it had no duty to defend or indemnify defendants in the underlying lawsuit, and defendants appealed.

The court of appeal affirmed the judgment. The court concluded that the trial court correctly found that the exclusion unambiguously placed the underlying lawsuit outside the coverage of the policy (*146 Cal. App. 3d 135, 142)* . The court reiterated the general rules for construing the provision of insurance policies (*146 Cal. App. 3d 135, 143)* , and found that if the court accepted the insured's interpretation of the exclusion clause, it would lead to inconsistent coverage and require an assumption that the policy adopted an incorrect sentence construction. The court stated that an ambiguity cannot be based on a strained and grammatically incorrect reading of the policy's terms (*146 Cal. App. 3d 135, 144)* .

Defendants also contended that even assuming the applicability of the exclusion, plaintiff was required to provide

coverage because defendants' liability in the underlying lawsuit was premised on their negligent acts (negligent hiring and breach of contract through the conversion by the employee) and not on the theft by the employee, and these negligent acts were not excluded from the policy. The court stated that when two risks constitute concurrent proximate causes of an accident, the insurer is liable as long as one of the causes is covered by the policy. However, it is crucial that the two causes of the injury be separate and independent of one another. In this case, no liability could arise from the claimed risk in negligently hiring a thief unless the thief actually stole something. It was the basing of liability specifically on the negligent hiring of a thief that rendered defendants' alleged negligent act dependent on the excluded theft as concurrent causes of the loss (*146 Cal. App. 3d 135, 148)* . The breach of contract theory was even more dependent on the employee's theft because the theft was the very act which was alleged as the breach, and the only way that defendants could be liable for the claimed breach of contract was through the theft. Therefore, under the facts of the case neither the breach of con tract theory nor the negligent hiring theory were independent of the theft by defendants' employee (*146 Cal. App. 3d 135, 149)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBusiness InsuranceGeneral OverviewInsurance LawClaims & ContractsGood Faith & Fair DealingDuty to DefendInsurance LawClaims & ContractsPolicy InterpretationAmbiguous TermsGeneral OverviewInsurance LawGeneral Liability InsuranceCoverageGeneral OverviewInsurance LawGeneral Liability InsuranceExclusionsCriminal Acts

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12-120 California Points & Authorities § 120.36

§ 120.36 Homeowner's Policy Excludes Coverage of Claims Arising From Business Ventures

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [HAS *or* HAD] NO DUTY TO DEFEND INSURED BECAUSE THE POLICY EXCLUDES CLAIMS ARISING FROM BUSINESS VENTURES.

Homeowner's Policy Excludes Coverage of Claims Arising From Business Ventures. An insurer is not obligated to defend its insured on a claim involving a business activity, including a part-time or supplemental income project, that is specifically excluded from coverage under a homeowner's policy (*Morris v. Atlas Assurance Co. (1984) 158 Cal. App. 3d 8, 14-15, 204 Cal. Rptr. 95* ; *State Farm Fire & Cas. Co. v. Drasin (1984) 152 Cal. App. 3d 864, 869-870, 199 Cal. Rptr. 749*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to support the contention that an insurer has no duty to defend its insured under an insurance policy. The basis of these points and authorities is that the insurer it is not obligated to defend its insured on a claim involving a business activity when that coverage was specifically excluded under the homeowner's policy.

This form may be used by an insurer in various procedural contexts, such as in memoranda supporting or opposing a motion for summary judgment, in a trial brief, or in an appellate brief. For further discussion, see *§ 120.30[2][a]*.

For references to related Pleading and Practice chapters, see *§ 120.30[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel would refer to specific to provisions of the policy that exclude the activity which the insured asserts should be covered.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.10* et seq.)and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be a motion by a defendant insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.30[2][b]*.

[c] Related Points and Authorities

For complete discussion of the format requirements and strategic considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion of requirements and considerations for completing a memorandum, together with a general skeletal form of memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* . For forms relating specifically to the procedural context of a motion for summary judgment or summary adjudication, see Ch. 221, *Summary Judgments* .

[d] Opposing Points and Authorities

The points and *authorities in § 120.50* et seq. may be used in an appropriate case to oppose the points and authorities set out in this form.

[3] Discussion of Authorities

[a] Homeowner's Policy Excludes Coverage of Claims Arising From Business Ventures

In ***West Am. Ins. Co. v. California Mut. Ins. Co.*** *(1987) 195 Cal. App. 3d 314, 240 Cal. Rptr. 540* , the insured operated his contractor's business out of his house, and routinely entertained his employees at his house on payday. Two employees who remained after working hours on a payday became drunk and fought, ultimately bringing an action against the insured. In an action for declaratory relief brought by the insured's comprehensive-liability insurer against the homeowner's-policy insurer, the trial court found that the "business pursuit" exception in the homeowner's policy did not apply.

The court of appeal reversed. The court held that the "business pursuit" exception is broader than the "employment exception" in the comprehensive liability policy and logically includes any activity that arises from and is in the course of an employee's employment (*195 Cal. App. 3d 314, 323-324)* .

In ***Fire Ins. Exch. v. Jiminez*** *(1986) 184 Cal. App. 3d 437, 229 Cal. Rptr. 83* , the insured had a homeowner's policy with exclusions for business pursuits and commercial rentals. The insured brought an action fordeclaratory relief against the insurer to determine whether the insurer had the duty to indemnify or defend the insured with regard to a personal injury action brought by a third party regarding wreckage of a nuisance structure on the insured's commercial premises. The trial court held that the insurer did not have a duty to indemnify, but did have a duty to defend.

The court of appeal affirmed with respect to indemnification, but reversed with respect to the duty to defend. The court held that the policy's exclusions could not impose a duty to defend when the accident occurred on commercial property (*184 Cal. App. 3d 437, 439-443)* .

[4] Additional Authorities

[a] Homeowner's Policy Excludes Coverage of Claims Arising From Business Ventures

In *Amex Assurance Co. v. Allstate Ins. Co. (2003) 112 Cal. App. 4th 1246, 5 Cal. Rptr. 3d 744* , a plumber installed a propane water heater for a friend, from whom he sometimes but not always received payment for his professional work. The friend had a homeowner's insurance policy. After the work the plumber had done caused a fire that destroyed the friend's home, litigation ensued, which included a cross-complaint against the plumber by the insurer that issued the homeowner's policy. In the resulting settlement, the insurer paid the friend a sum in excess of $1.5 million, and it received an assignment of the friend's claims against third parties. The insurer then pursued its cross-complaint against the plumber, resulting in the entry of a default judgment against the plumber for $1.3 million. The insurer then obtained an assignment of the plumber's rights, and it made a claim against the insurer that provided homeowner's insurance to the plumber. The plumber's insurer denied that claim. The friend's insurer sued the plumber's insurer for breach of contract and bad faith refusal to defend. The trial court awarded summary judgment to the plumber's insurer because its homeowner's policy excluded coverage for professional services, business activities, and damages arising out of any premises other than the insured premises. On appeal, the friend's insurer argued that plumbing is not a professional service, but rather a craft or trade. Although the term "professional service" was not defined in the policy, the court of appeal stated that the ordinary meaning includes plumbing (*112 Cal. App. 4th 1246, 1252)* . In addition, the friend's insurer argued that the plumber was providing services as a friend, not as a professional for compensation. The court noted, however, that he was hoping that the friend would pay him, at least for other professional services performed previously. Moreover, the type of activity, rather than actual compensation, controls. The court of appeal affirmed, holding that the undisputed facts showed that the professional services and business activities exclusions eliminated any potential for coverage (*112 Cal. App. 4th 1246, 1252)* . Because the underlying suit did not potentially seek damages within the coverage of the policy, the plumber's insurer had no duty to defend (*112 Cal. App. 4th 1246, 1253)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGood Faith & Fair DealingDuty to DefendInsurance LawProperty InsuranceHomeowners InsuranceBusiness Activities

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12-120 California Points & Authorities § 120.37

§ 120.37 Homeowner's Policy Excludes Motor Vehicle Claims

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [HAS *or* HAD] NO DUTY TO DEFEND INSURED BECAUSE POLICY EXCLUDES MOTOR VEHICLE CLAIMS THAT ARISE FROM ACCIDENTS THAT OCCUR AWAY FROM THE PREMISES.

Homeowner's Policy Excludes Motor Vehicle Claims. Claims arising from automobile accidents occurring away from the premises may be properly excluded from the coverage of a homeowner's policy (*Ins. Code § 11580.1(e)*; *Herzog v. National Am. Ins. Co. (1970) 2 Cal. 3d 192, 198-199, 84 Cal. Rptr. 705, 465 P.2d 841* ; *Huggins v. Yoshiwara (1970) 2 Cal. 3d 200, 203-204, 84 Cal. Rptr. 709, 465 P.2d 845*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to support the contention that an insurer has no duty to defend its insured under an insurance policy. The basis of these points and authorities is that claims arising from automobile accidents occurring away from the premises may be properly excluded from the coverage of the homeowner's policy.

This form may be used by an insurer in various procedural contexts, such as in memoranda supporting or opposing a motion for summary judgment, in a trial brief, or in an appellate brief. For further discussion, see *§ 120.30[2][a]*.

For references to related Pleading and Practice chapters, see *§ 120.30[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should refer to specific toprovisions of the policy that exclude the activity which the insured asserts should be covered.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.10* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be a motion by a defendant insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.30[2][b]*.

[c] Related Points and Authorities

For complete discussion of the format requirements and strategic considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion of requirements and considerations for completing a memorandum, together with a general skeletal form of memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* . For forms relating specifically to the procedural context of a motion for summary judgment or summary adjudication, see Ch. 221, *Summary Judgments* .

[d] Opposing Points and Authorities

The points and *authorities in § 120.50* et seq. may be used in an appropriate case to oppose the points and authorities set out in this form.

[3] Discussion of Authorities

[a] Homeowner's Policy Excludes Motor Vehicle Claims

Herzog v. National Am. Ins. Co. *(1970) 2 Cal. 3d 192, 84 Cal. Rptr. 705, 465 P.2d 841* , involved the death of plaintiff's son in a motorcycle accident. The motorcycle driver and his father were named insureds under the father's homeowner's policy. The personal liability provisions of the policy in question provided coverage for all sums which the insured became obligated to pay as damages because of bodily injury. Expressly excluded from coverage were damages resulting from "the ownership, maintenance, operation, use, loading, or unloading of land motor vehicles while away from the premises or the ways immediately adjoining ... ." Theaccident having occurred on a freeway some distance from the insured's home, the trial court granted judgment for the insurer. Plaintiff appealed.

The Supreme Court affirmed. In affirming, the Court stated that the term "the ways immediately adjoining" was unambiguous and that the reasonable expectations of the policyholder did not contemplate that a homeowner's policy would provide extended automobile coverage (*2 Cal. 3d 192, 197-198*). The court distinguished and overruled *Pacific Employers Ins. Co. v. Maryland Cas. Co. (l966) 65 Cal. 2d 318* , to the extent of any inconsistency and refused to apply the doctrine of *Wildman v. Government Employees' Ins. Co. (1957) 48 Cal. 2d 31, 307 P.2d 359* , to extend coverage to the accident in question (*2 Cal. 3d 192, 198-199)* .

Huggins v. Yoshiwara *(1970) 2 Cal. 3d 200, 84 Cal. Rptr. 709, 465 P.2d 845* , involved a fatal accident between the plaintiff's decedent and the insured in Oxnard. The insured's automobile liability insurer settled for the policy limits. The insured also had a homeowner's policy on his Los Angeles residence. The policy provisions, including the exclusions, were worded exactly as those in *Herzog*. Plaintiff sought recovery under the homeowner's policy. Judgment was for cross defendant insurer. On appeal and in the Supreme Court, after considering the same grounds advanced in *Herzog*, and applying the same reasoning, the judgment was affirmed (*2 Cal. 3d 200, 203-204)* .

The "anti-Wildman" holdings of *Herzog* and *Huggins* were later codified at *Ins. Code § 11580.1(e)*, which specifies that neither *Ins. Code § 11580.1* nor *Veh. Code §§ 16054, 16450* shall be construed to constitute any of the types of policies

therein enumerated, including homeowner's policies and comprehensive liability policies, as an automobile or vehicle liability policy and therefore subject to the requirements of *Veh. Code § 16054* or *Veh. Code § 16450* merely because the policy, or some endorsement to it, provides incidental coverage for automobile liability.

[4] Additional Authorities

[a] Homeowner's Policy Excludes Motor Vehicle Claims

In *State Farm Mut. Auto. Ins. Co. v. Partridge (1973) 10 Cal. 3d 94, 109 Cal. Rptr. 811, 514 P.2d 123* , the insured under a homeowner's policy was a hunting enthusiast who had filed the trigger mechanism of his gun so that it had a hair-trigger action. The insured and his friends were hunting by shooting from the windows of the insured's vehicle. The vehicle hit a bump and the weapon discharged, hitting one of the passengers, who was paralyzed as a result (*10 Cal. 3d 94, 97-98)* . Although the insured's homeowner's policy contained an exclusion for injuries arising out of the use of a motor vehicle, the court held that the policy provided coverage forthe injuries. The court found that "although the accident occurred in a vehicle, the insured's negligent modification of the gun suffices, in itself, to render him fully liable for the resulting injuries ... . [I]nasmuch as the liability of the insured arises from his non-auto-related conduct, and exists independently of any 'use' of his car, we believe the homeowner's policy covers that liability" (*10 Cal. 3d 94, 103)* .

In *Gurrola v. Great Sw. Ins. Co. (1993) 17 Cal. App. 4th 65, 21 Cal. Rptr. 2d 749* , an insured negligently drove his car, killing himself and his passenger and injuring another driver. It was found that the insured's negligence in welding the chassis to the frame of his 1934 car during the process of restoring it was also a cause of the accident. The injured third party and the deceased party's estate brought a third-party action against the insurer. The only issue was whether there was coverage under the insured's general liability policy, which contained an exclusion for injury or damage arising out of the ownership, maintenance, operation, or use of any automobile owned or operated by the insured. The court of appeal affirmed a judgment for the insurer. After analyzing the decisions in *State Farm Mut. Auto. Ins. Co. v. Partridge (1973) 10 Cal. 3d 94, 109 Cal. Rptr. 811, 514 P.2d 123* , and *State Farm Fire & Cas. Co. v. Camara (1976) 63 Cal. App. 3d 48, 133 Cal. Rptr. 600* , the court rejected plaintiff's argument that the exclusion was inapplicable because the negligent welding was a non-vehicle cause of the injury. The court held that the only way plaintiffs could have been exposed to the negligent welding was through the use and operation of the vehicle, and that the negligent welding therefore failed to meet the requirement that the nonvehicle-related cause must be independent of the vehicle-related cause for liability to be covered by the homeowner's policy (*17 Cal. App. 4th 65, 67-68)* .

In *Safeco Ins. Co. v. Gilstrap (1983) 141 Cal. App. 3d 524, 190 Cal. Rptr. 425* , the insurer brought a declaratory relief action, seeking a declaration that it owed no duty of defense or indemnification under the personal liability portion of a homeowner's policy. The policy specifically excluded coverage for injuries arising out of the ownership and use of a motor vehicle. The son of the insured couple borrowed the insureds' motorcycle, causing injury to a third party. The third party sued the insured couple and their son, alleging negligence on the son's part and negligent entrustment of the motorcycle on the part of the insureds. In the insurer's declaratory relief action, the trial court determined that under the exclusion in the policy, the insurer had no obligation to defend the son, but it had an obligation to defend the insured parents. The court of appeal reversed regarding the defense of the parents, holding that the act of negligently entrusting a motor vehicle cannot be disassociated from use of the vehicle itself. The exclusion in the policy therefore precluded coverage (*141 Cal. App. 3d 524, 527-528)* .

In *State Farm Fire & Cas. Co. v. Camara (1976) 63 Cal. App. 3d 48, 133 Cal. Rptr. 600* , the court distinguished *State Farm Mut. Auto. Ins. Co. v. Partridge (1973) 10 Cal. 3d 94, 109 Cal. Rptr. 811, 514 P.2d 123* . In *Camara,* the insured under a homeowner's policy with an auto use exclusionary clause was driving a dune buggy when a collision occurred injuring plaintiff, the insured's passenger. Plaintiff alleged that the insured had negligently designed, constructed, and assembled the vehicle so as to "proximately cause the vehicle to overturn" (*63 Cal. App. 3d 48, 50)* . The court held that under *Partridge,* the nonvehicle-related cause must be independent of the vehicle-related cause in

order for the liability to be covered by the homeowner's policy (*63 Cal. App. 3d 48, 54-55)* and found no coverage under the policy. The court pointed out that "the only way in which plaintiff could have been exposed to the claimed design risk was through the operation or use of the motor vehicle" (*63 Cal. App. 3d 48, 55)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceHomeowners InsuranceGeneral OverviewInsurance LawProperty InsuranceHomeowners InsurancePersonal Property

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 120 INSURANCE
PART II. FORMS
B. Coverage and Exclusions
1. General Exclusions

12-120 California Points & Authorities § 120.38

§ 120.38 Policy Covering Only "Accidents" Does Not Cover Negligent Misrepresentation Claims

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [HAS *or* HAD] NO DUTY TO DEFEND INSURED BECAUSE POLICY DOES NOT COVER CLAIMS BASED ON INSURED'S NEGLIGENT MISREPRESENTATION.

Policy Covering Only "Accidents" Does Not Cover Negligent Misrepresentation Claims. Claims arising from negligent misrepresentations are not covered under a comprehensive general liability policy, because misrepresentations are not "accidents" for purposes of coverage. Negligent misrepresentation requires intent to induce reliance, and is therefore a subspecies of fraud excluded from policy coverage (*Dykstra v. Foremost Ins. Co. (1993) 14 Cal. App. 4th 361, 366-368, 17 Cal. Rptr. 2d 543*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to support the contention that an insurer has no duty to defend its insured under an insurance policy. The basis of these points and authorities is that claims arising fromalleged negligent misrepresentations are not covered under the comprehensive general liability policy.

This form may be used by an insurer in various procedural contexts, such as in memoranda supporting or opposing a motion for summary judgment, in a trial brief, or in an appellate brief. For further discussion, see *§ 120.30[2][a]*.

For references to related Pleading and Practice chapters, see *§ 120.30[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel would refer to specific to provisions of the policy that exclude the activity which the insured asserts should be covered.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.10* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be a motion by a defendant insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.30[2][b]*.

[c] Related Points and Authorities

For complete discussion of the format requirements and strategic considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion of requirements and considerations for completing a memorandum, together with a general skeletal form of memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* . For forms relating specifically to the procedural context of a motion for summary judgment or summary adjudication, see Ch. 221, *Summary Judgments* .

[d] Opposing Points and Authorities

The points and *authorities in § 120.50* et seq. may be used in an appropriate case to oppose the points and authorities set out in this form.

[3] Discussion of Authorities

[a] Policy Covering Only "Accidents" Does Not Cover Negligent Misrepresentation Claims

In ***Dykstra v. Foremost Ins. Co.*** *(1993) 14 Cal. App. 4th 361, 17 Cal. Rptr. 2d 543* , Dykstra was the insured under a series of generalcomprehensive liability (GCL) policies issued by Foremost Insurance Company (Foremost), that defined a covered occurrence as an "accident ... which results in bodily injury, property damage or advertising liability neither expected nor intended from the standpoint of the insured." A third party filed a complaint alleging that Dykstra had induced him to enter into a partnership with Dykstra's son and acquire a mobilehome franchise. The suit alleged that Dykstra was liable for the losses suffered by the franchise, due to Dykstra's negligent misrepresentations regarding his son's experience in mobilehome sales and in management of mobilehome dealerships. Dykstra tendered defense of the action to Foremost; Foremost responded by letter stating that it appeared that no coverage existed, but that Foremost would investigate and would reimburse Dykstra for attorneys' fees if coverage were found. Dykstra settled the action, and then demanded reimbursement from Foremost for the amount of the settlement and attorneys' fees. When Foremost rejected the demand on the ground, among others, that no "occurrence" as defined by the policy gave rise to the third party's claims, Dykstra filed a complaint alleging that Foremost had breached its duty of good faith and fair dealing by refusing to defend the action. The trial court granted Foremost's motion for summary judgment and dismissed the action. Dykstra appealed.

The court of appeal affirmed, holding that Foremost had no duty to defend Dykstra under its comprehensive general liability policies because the misrepresentations were not "accidents" for purposes of coverage (*14 Cal. App. 4th 361, 364)* . Fraudulent acts are deemed purposeful rather than accidental, and therefore are not covered under a GCL policy (*14 Cal. App. 4th 361, 366)* . The court relied on *Chatton v. National Union Fire Ins. Co. (1992) 10 Cal. App. 4th 846, 860-861, 13 Cal. Rptr. 2d 318* , for the proposition that negligent misrepresentation requires intent to induce reliance; this intent requirement precludes a finding that a negligent misrepresentation cause of action can be based on an "accident," but instead makes the cause of action a subspecies of fraud that is excluded from policy coverage (*14 Cal. App. 4th 361, 366-367)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGood Faith & Fair DealingDuty to DefendInsurance LawGeneral Liability InsuranceCoverageAccidentsInsurance LawGeneral Liability InsuranceExclusionsGeneral OverviewInsurance LawGeneral Liability InsuranceExclusionsIntentional Acts

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1. General Exclusions

12-120 California Points & Authorities § 120.39

§ 120.39 Predecessor Corporation's Product Is Not "Named Insured Product" Under Successor Corporation's Policy

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [HAS *or* HAD] NO DUTY TO DEFEND INSURED BECAUSE PRODUCT MANUFACTURED BY A PREDECESSOR CORPORATION IS NOT A "NAMED INSURED PRODUCT" UNDER THE POLICY.

Predecessor Corporation's Product Is Not a "Named Insured Product" Under Successor Corporation's Policy. A product manufactured by a predecessor corporation is not a "named insured product" under an insurance policy carried by a successor corporation so as to obligate the insurer to provide coverage and defend the additional insured on that policy (*Oliver Mach. Co. v. United States Fid. & Guar. Co. (1986) 187 Cal. App. 3d 1510, 1515-1520, 232 Cal. Rptr. 691*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to support the contention that an insurer has no duty to defend its insured under an insurance policy. The basis of these points and authorities is that the insurer is not obligated to defend an action because the product which is the subject of the suit was manufactured by a predecessor corporation and is therefore not a "named insured product" under the policy carried by the successor corporation.

This form may be used by an insurer in various procedural contexts, such as in memoranda supporting or opposing a motion for summary judgment, in a trial brief, or in an appellate brief. For further discussion, see *§ 120.30[2][a]*.

For references to related Pleading and Practice chapters, see *§ 120.30[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel would refer to specific to provisions of the policy that exclude the activity which the insured asserts should be covered.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.10* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be a motion by a defendant insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.30[2][b]*.

[c] Related Points and Authorities

For complete discussion of the format requirements and strategic considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion of requirements and considerations for completing a memorandum, together with a general skeletal form of memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* . For forms relating specifically to the procedural context of a motion for summary judgment or summary adjudication, see Ch. 221, *Summary Judgments* .

[d] Opposing Points and Authorities

The points and *authorities in § 120.50* et seq. may be used in an appropriate case to oppose the points and authorities set out in this form.

[3] Discussion of Authorities

[a] Predecessor Corporation's Product Is Not "Named Insured Product" Under Successor Corporation's Policy

In ***Oliver Mach. Co. v. United States Fid. & Guar. Co.*** *(1986) 187 Cal. App. 3d 1510, 232 Cal. Rptr. 691* , defendant manufacturing corporation, which was the named insured under the policy in question, purchased a machine-manufacturing corporation, after which time the purchased corporation dissolved. The named insured continued to manufacture a line of woodworking machines, and sold them to defendant vendor under its own name. The named insured obtained a comprehensive general liability policy, and designated the vendor as an additional insured on a vendor's broad form endorsement to the policy, for which coverage the vendor paid the named insured a sum of money, based on the estimated value of purchase of the woodworking machines. In pertinent part, the policy provided that the vendor's coverage applied only to the distribution or sale in the vendor's business of the "named insured's products." A machine that was sold by the dissolved corporation prior to its sale to the named insured injured the plaintiff, who brought an action against the named insured and the additional insured (the vendor). The insurer assumed defense of the named insured, but refused to represent the vendor. The vendor and the insurer brought cross-motions for summary judgment seeking a declaration of the insurer's duty to defend and indemnify the vendor. The trial court ruled that as a matter of law, the insurer had no duty to defend or indemnify the vendor under the broad form endorsement for injuries caused by products manufactured and sold by a predecessor corporation to the named insured. The vendor appealed.

The court of appeal affirmed. The court held that a product manufactured by a predecessor corporation is not a "named insured's product" and therefore is not covered by the insurance contract (*187 Cal. App. 3d 1510, 1515-1520)* . The court rejected the vendor's contention that machines manufactured by the predecessor corporation constituted "named insured's products" under the policy because they were being traded under the named insured's name. Words in an

insurance policy are to be read in their plain and ordinary sense, unless there is a clear indication to the contrary. "Named insured's products" as defined in the policy referred to goods or products manufactured by the insured, and not by its predecessor. It strains logic and the ordinary meaning of language to conclude that the product was sold by the predecessor company while trading under the name of the insured, because the product was sold to the vendor prior to the insured's purchase of the predecessor company (*187 Cal. App. 3d 1510, 1516-1517)* . The court distinguished the California Supreme Court's holding in *Ray v. Alad Corp. (1977) 19 Cal. 3d 22, 25, 34* , which states that under certain circumstances the liabilities of a predecessor corporation may be imposed on its successor corporation. The successor corporation in Alad acquired the plant, equipment, inventory, trade name, and good will, and continued to manufacture the same product under the predecessor's name, with no outward indication of any change in ownership of the business. The court declined to extend the narrow exception for successor liability in Alad to insurance coverage for sellers of products that were manufactured by a predecessor company. Coverage is a question of contract interpretation, and the duty to defend is based on the subject insurance contract (*187 Cal. App. 3d 1510, 1517*). The vendor in the instant case paid the named insured for its coverage based on an estimated value of the purchase of woodworking machines. It is therefore reasonable to infer that the insurer contemplated coverage in the policy of only those risks arising from the sales made by the named insured to the vendor during the coverage period. To include coverage for products manufactured by the predecessor company, perhaps years prior to the purchase of the policy, is an irrational construction of both the insured's and insurer's reasonable expectations for coverage (*187 Cal. App. 3d 1510, 1518)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGood Faith & Fair DealingDuty to DefendInsurance LawGeneral Liability InsuranceCoverageGeneral OverviewInsurance LawGeneral Liability InsuranceExclusionsGeneral Overview

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12-120 California Points & Authorities § 120.40

§ 120.40 No Duty to Defend When Coverage Is Precluded as Matter of Law

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [HAS *or* HAD] NO DUTY TO DEFEND INSURED BECAUSE COVERAGE IS PRECLUDED AS MATTER OF LAW.

No Duty to Defend When Coverage Precluded as Matter of Law. If the only potential for an insurer's liability under the policy depends on the resolution of a legal question, rather than on disputed facts known to the insurer or pleaded in the complaint, and the legal issue is resolved against coverage, there is no duty to defend (*State Farm Mut. Auto. Ins. Co. v. Longden (1987) 197 Cal. App. 3d 226, 233, 242 Cal. Rptr. 726*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to support the contention that an insurer has no duty to defend its insured under an insurance policy. The basis of these points and authorities is that there is no duty to defend because the only potential for the insurer's liability under the policy depends on the resolution of a legal question and the legal issue has been resolved against coverage.

This form may be used by an insurer in various procedural contexts, such as in memoranda supporting or opposing a motion for summary judgment, in a trial brief, or in an appellate brief. For further discussion, see *§ 120.30[2][a]*.

For references to related Pleading and Practice chapters, see *§ 120.30[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel would:

- Refer to the specific legal question on which insurer's liability under the policy depends.
- Identify how the legal issue has been resolved against coverage.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.10* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be a motion by a defendant insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.30[2][b]*.

[c] Related Points and Authorities

For complete discussion of the format requirements and strategic considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion of requirements and considerations for completing a memorandum, together with a general skeletal form of memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* . For forms relating specifically to the procedural context of a motion for summary judgment or summary adjudication, see Ch. 221, *Summary Judgments* .

[d] Opposing Points and Authorities

The points and *authorities in § 120.50* et seq. may be used in an appropriate case to oppose the points and authorities set out in this form.

[3] Discussion of Authorities

[a] No Duty to Defend When Coverage Precluded as Matter of Law

In ***State Farm Mut. Auto. Ins. Co. v. Longden*** *(1987) 197 Cal. App. 3d 226, 242 Cal. Rptr. 726* , the insurer issued an automobile policy insuring the insured's truck. Three months later, the insured traded his truck for another person's car, and transferred his coverage to the car, removing coverage from the truck. Two months later, the new owner of the truck was severely injured in a traffic collision while driving the truck. He filed a complaint against the insured, claiming that his injuries were caused by the insured's negligent maintenance of the truck and failure to disclose defects in the brakes. The insured's counsel requested the insurer to defend the action. The insurer filed a declaratory relief action against the insured and the injured party, seeking a determination that it had no duty to either defend or indemnify the insured. The defendants answered, and the injured party filed a cross complaint for declaratory relief against the insurer. The trial court found in favor of the insurer, holding that it had no duty to defend or indemnify the insured, and the injured party appealed.

The court of appeal affirmed. The court rejected the injured party's contention that coverage of an "accident" under the policy included liability for negligent maintenance of the truck or failure to disclose brake defects, which allegedly occurred prior to the accident and while the insured's policy on the truck was still in force. Noting that a conflict exists in appellate interpretation of the definition of "accident" within the meaning of indemnity policies, the court approved the holding of *Maples v. Aetna Casualty & Surety Co. (1978) 83 Cal. App. 3d 641, 644-650, 148 Cal. Rptr. 80* , which stated the general rule that the time of the occurrence of an accident is not the time the wrongful act was committed, but rather the time when the complaining party was actually damaged (*197 Cal. App. 3d 226, 231*). Consequently, the court found no duty of indemnification. In so doing, the court rejected contrary holdings in a line of cases typified by *Sylla v. United States Fid. & Guar. Co. (1976) 54 Cal. App. 3d 895, 901, 127 Cal. Rptr. 38* , stating that "accident" as

commonly used in liability policies is predicated on an occurrence that is the cause of the injury, rather than the effect (*197 Cal. App. 3d 226, 230-231)* .

The court then discussed an insurer's duty to defend pursuant to *Gray v. Zurich Ins. Co. (1966) 65 Cal. 2d 263, 275, 54 Cal. Rptr. 104, 419 P.2d 168* , which held that potential liability depends on whether the insurer owes coverage to the insured based on the facts known to the insurer or facts pleaded in the complaint, even if false. In the instant case, any potential for liability did not arise from disputed facts, but depended rather on resolution of a legal question, that is, whether the undisputed facts constituted an "accident" during the policy period. There are apparently no cases suggesting that an insurer has a duty to defend when the only potential for liability turns on resolution of a legal, rather than factual, question. Inasmuch as the policy, as a matter of law, did not cover the risk as contended by the injured party, the insurer had no duty to defend (*197 Cal. App. 3d 226, 233-234)* .

[4] Additional Authorities

[a] No Duty to Defend When Coverage Precluded as Matter of Law

In ***GGIS Ins. Svcs. v. Superior Court*** *(2008) 168 Cal. App. 4th 1493, 86 Cal. Rptr. 3d 515* , the insured, an insurance company, brought an action against its insurer under an agents and brokers professional liability policy, seeking indemnity and defense in an underlying action brought by the Pennsylvania insurance commissioner. The policy provided coverage for losses and defense expenses arising from claims first made during the policy period, with additional limited coverage for defense expenses in certain circumstances. The policy excluded any claim, loss, or defense expenses regarding certain specified matters, including the commingling of, or inability or failure to pay, collect, safeguard, or return any money (Exclusion G). A claim was defined to exclude criminal proceedings of any type, or regulatory investigations, or any proceeding seeking injunctive, declaratory, equitable, or nonpecuniary relief or remedies. "Wrongful act" was defined as any actual or alleged negligent act, error, or omission of an insured arising solely from the insured's rendering or failing to render professional services. The underlying action concerned alleged wrongful conduct regarding the collection, retention, and payment of premiums; and demanded a monetary payment to the commission and an accounting of all premium amounts for canceled policies. The trial court denied plaintiff's motion for summary adjudication, noting that it had already determined that triable issues of fact existed with regard to the issues raised. The trial court also declined to stay the trial of indemnity issues pending the outcome of the Pennsylvania action. On petition for writ of mandate, the court of appeal held that a stay is not required if the court in the coverage action may resolve the coverage question as a matter of law without making any factual determinations that would prejudice the insured in the third-party action. The court also stated that if, as a matter of law, neither the complaint nor the known extrinsic facts indicate any basis for potential coverage, the duty to defend does not arise in the first instance (*168 Cal. App. 4th 1493, 1506)* . The court concluded that the insurer owed no duty of defense. All counts alleged by the commissioner arose from the alleged failure to pay it money due the insurers. Absent a potential for coverage, the insurer had no duty to defend in the Pennsylvania action. Exclusion G precludes coverage for any liability or defense costs arising from the insured's failure to pay money. The trial court properly denied the motion for summary adjudication (*168 Cal. App. 4th 1493, 1508)* .

In *Golden Eagle Ins. Corp. v. Cen-Fed, Ltd. (2007) 148 Cal. App. 4th 976, 56 Cal. Rptr. 3d 279* , a bank sued the insured company for breach of a lease and for declaratory relief. The insurer, which provided policies with general liability and commercial general liability coverage, undertook a defense under a complete reservation of rights in the underlying action. In the instant suit, the insurer sued the insured seeking a declaratory judgment that the insurer had no duty of indemnity for various of the underlying allegations, nor for any contractual attorney's fees that might be awarded to the bank; nor any duty to defend. The appellate court upheld the trial court's grant of the insurer's motion for summary adjudication, holding that as a matter of law, there was no actual or potential coverage, and therefore the insurer owed no duty of indemnification or defense (*148 Cal. App. 4th 976, 989-992)* . Furthermore, because no defense liability ever existed, the insurer had no obligation under the supplementary payments provision, regarding attorney fees (*148 Cal. App. 4th 976, 996)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGeneral OverviewInsurance LawClaims & ContractsGood Faith & Fair DealingDuty to Defend

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12-120 California Points & Authorities § 120.41

§ 120.41 No Duty to Defend Coercive Administrative Action Under Comprehensive General Liability Policy

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [HAS *or* HAD] NO DUTY UNDER THE COMPREHENSIVE GENERAL LIABILITY POLICY TO DEFEND INSURED IN THE ADMINISTRATION ACTION FOR WHICH THE INSURED _____ [SEEKS *or* SOUGHT] DEFENSE, BECAUSE THE ACTION DOES NOT CONSTITUTE A "SUIT" WITHIN THE MEANING OF THE POLICY. THE DUTY TO DEFEND DOES NOT ARISE UNLESS THE ADMINISTRATIVE AGENCY FILES A COMPLAINT INITIATING COURT PROCEEDINGS AGAINST THE INSURED SEEKING DAMAGES COVERED UNDER THE POLICY.

No Duty to Defend Against Coercive Administrative Action. Under a comprehensive general liability insurance policy that requires the insurer to defend the insured against a "suit" when the term is undefined in the policy, the insurer is under no obligation to defend a coercive administrative action if the administrative agency has not filed a complaint for relief that initiates court proceedings (*Foster-Gardner, Inc. v. Nat'l Union Fire Ins. Co. (1998) 18 Cal. 4th 857, 888-889, 77 Cal. Rptr. 2d 107, 959 P.2d 265*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to support the contention that an insurer has no duty to defend a coercive administrative action (e.g., an EPA order to clean up hazardous waste) that has not resulted in the filing of a complaint initiating court proceedings, when the insured seeks defense under a comprehensive general liability policy. The basis of these points and authorities is that there is no duty to defend because although the policy requires defense against a "suit" that seeks damages covered the policy, the action that has been taken against the insured is a coercive administrative action (e.g., an EPA order) rather than a suit, and that the third party has not filed a complaint initiating

court proceedings in the matter. This contention is therefore appropriate when the term "suit" is not defined in the policy, but is distinguished from the term "claim," and the policy treats theduty of defense within the context of a third-party "suit."

This form may be used by an insurer in various procedural contexts, such as in a memorandum supporting or opposing a motion for summary judgment, in a trial brief, or in an appellate brief. For further discussion, see *§ 120.30[2][a]*.

For references to related Pleading and Practice chapters, see *§ 120.30[2][c]*.

[b] Argument

Counsel should insert argument linking the points and authorities in this form with the facts of the case. In particular, counsel would:

- Refer to the specific legal question on which insurer's duty to defend under the policy depends.
- Identify how the legal issue has been resolved against finding the duty to defend.

The form should be combined with other forms in this publication as necessary to complete the argument as to all issues (*see, e.g., § 120.10* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be a motion by a defendant insurer for summary judgment or opposition to a summary judgment motion by a plaintiff, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact. For further discussion, see *§ 120.30[2][b]*.

[c] Related Points and Authorities

For complete discussion of the format requirements and strategic considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion of requirements and considerations for completing a memorandum, together with a general skeletal form of memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* . For forms relating specifically to the procedural context of a motion for summary judgment or summary adjudication, see Ch. 221, *Summary Judgments* .

[d] Opposing Points and Authorities

The points and *authorities in § 120.50* et seq. may be used in an appropriate case to oppose the points and authorities set out in this form.

[3] Discussion of Authorities

[a] No Duty to Defend Against Coercive Administrative Action Under Comprehensive General Liability Policy

In ***Foster-Gardner, Inc. v. Nat'l Union Fire Ins. Co.*** *(1998) 18 Cal. 4th 857, 77 Cal. Rptr. 2d 107, 959 P.2d 265* , four insurers issued consecutive comprehensive general liability policies covering the insured's wholesale pesticide and fertilizer business during the relevant time period. The policies, which did not define the terms "suit" or "claim," contained essentially the following language:

> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damages, and may make such

> investigation and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements.

During the relevant time period, the Department of Toxic Substances Control (DTSC) of the California Environmental Protection Agency issued to the insured an "Imminent and Substantial Endangerment Order and Remedial Action Order" pursuant to the Carpenter-Presley-Tanner Hazardous Substance Account Act (HSAA), California's "Superfund law" (*see Health & Saf. Code § 25300 et seq.*). (HSAA is similar to CERCLA (*42 U.S.C.S. § 9601 et seq.*) (*see 18 Cal. 4th 857, 865 n.4*).) The order concluded many years of investigation and monitoring of hazardous substances on the insured property by city and county agencies, and the insured's failure adequately to rid the site of contamination. The Order stated as a finding of fact that the insured was the owner and operator of the site, was a responsible party, and had incurred liability for cleaning up the site. As a conclusion of law, the insured was named a "responsible party" or "liable person" within the meaning of the HSAA. The DTSC determined that during the ownership and operation of the site by the insured, the site ground had been used for disposal of hazardous substances (or waste), which were being released (or threatened to be released) from the site, presenting an imminent and substantial endangerment to the public health or welfare, or to the environment. The Order required the insured to clean up and abate the contamination, to submit notices of intent to comply with the various agency directives, and to file specified remedial studies and proposals. The order also stated that (1) the DTSC or any other agency is not precluded from "taking any action authorized by law to protect the public health or safety or the environment and recovering the cost thereof"; (2) the insured is liable for any cleanup costs incurred by the DTSC, recoverable in a civil action; (3) nothing in the order constitutes a satisfaction or release from liability for any conditions r claims arising as a result of past, current, or future operations of the insured; and (4) the insured may be liable for penalties of up to $25,000 for each day it refuses to comply with the order, and for statutory punitive damages for noncompliance. The insured tendered the defense to its insurers, which either refused to defend, or agreed to defend subject to a reservation of rights. Theinsured filed an action seeking a declaration of the insurers' defense obligations and recovery of defense costs; and subsequently filed a motion for summary judgment or summary adjudication, to which the insurers filed objections (*18 Cal. 4th 857, 861-864)* . The trial court entered summary judgment in favor of the insurers in part on the ground that the insurer had no duty to defend because the DTSC order was not a "suit." The court of appeal reversed, holding that the order constituted a suit within the meaning of the policy, giving rise to the duty to defend. The Supreme Court granted review to resolve a conflict in appellate decisions on this issue of first impression in California (*18 Cal. 4th 857, 864-865)* .

The California Supreme Court reversed, holding that the coercive administrative action did not initiate a "suit" within the meaning of the policies, and therefore did not give rise to the insurers' duty to defend (*18 Cal. 4th 857, 889)* . A "suit" is a court proceeding initiated by the filing of a complaint (*18 Cal. 4th 857, 888)* . (This issue arises only with respect to policies issued before 1986, when the standard insurance form was amended to define suit as a civil proceeding, including arbitration proceedings (*see 18 Cal. 4th 857, 864 n.3*).) Under the policies, the insurers were required to defend a "suit," but had discretion to investigate and settle a "claim" (*18 Cal. 4th 857, 878)* . Although the insured asserted that the Order is the substantive equivalent of a "suit" because it is an attempt to gain an end by legal process, the Court found this construction unreasonable: "There is nothing in the policy language to support the interpretation that some precomplaint notices are "suits" and some are not. Rather, the unambiguous language of the policies obligated the insurers to defend a "suit," not the substantive or functional equivalent of a suit (*18 Cal. 4th 857, 878-879, 888)* ." Although the Court acknowledged the seriousness and coerciveness of the Order in question, it held that the construction of a particular notice or order as a suit or claim cannot be grounded on its degree of coerciveness, because courts would be required to "rewrite unambiguous policy language on a case-by-case basis under the guise of interpretation." The seriousness of an administrative order, and the paucity of defenses allowed the violator do not serve to elevate the order to a "suit" for purposes of interpretation of the insurance policy. Nor could courts provide an exception for environmental agency notices, because other agency orders are equally coercive in nature. The Court noted that an insured could contract to expand the scope of the insurer's duty to defend: policies expanded to include defense coverage of third-party demands or in response to government investigations, by contrast to lawsuits, have proportionally larger premiums for that purpose (*18 Cal. 4th 857, 881-882)* .

The Court further stated that although the insurers might ultimately be obligated to indemnify costs incurred as a result of the Order, that possibility does not alter the scope of their duty to defend; rather, it might give them an incentive, in their discretion, to intervene prior to the filing of a civil suit. Moreover, the Court's decision, rather than providing an "unintended windfall" for insurers in the form of reduced indemnity obligations, prevents a windfall that the insured might have gained by obtaining a scope of defense obligations for which it did not contract or pay premiums (*18 Cal. 4th 857, 883)* .

The Court rejected the argument that construing coercive administrative action as a suit would curb litigation by deterring insureds from purposely ignoring an administrative order, instigating the agency to sue and triggering the insurer's duty to defend. The Court stated rather that its definition of "suit" as a court proceeding initiated by the filing of a complaint creates a "bright-line rule" that, by clearly delineating the scope of risk, *reduces* the need for future litigation (*18 Cal. 4th 857, 888)* .

The Court also stated that under *AUI Ins. Co. v. Superior Court (1990) 51 Cal. 3d 807, 274 Cal. Rptr. 820, 799 P.2d 1253* , discussed in *§ 120.150[3]*, it did not conclude that cleanup costs ordered by a state agency *prior* to the filing of any civil suit are "damages." Rather, the proceedings in AUI in which "damages" were sought were civil actions, not administrative proceedings. Furthermore, the Court's holding in *AUI* that "if the insured was not 'legally obligated' to pay the relevant costs, the insurers had no duty to provide coverage," referred to relief *ordered by a court of law* (*18 Cal. 4th 857, 885-886)* . Similarly, the Court's holding in Aerojet-Gen. Corp. v. Transport Indem. Co., that "environmental investigation expenses may constitute defense costs that the insurer must pay in fulfilling its duty to defend," did not involve the insurer's duty to defend. Rather, it involved the issue of whether site investigation expenses may constitute defense costs, with respect to an insurer's duty to defend following the filing of state and federal court complaints. The duty to defend arises when the insured tenders defense of the third-party lawsuit to the insurer. Prior to the filing of a complaint, there is nothing for which the insured requires a defense, and hence, no duty to defend (*18 Cal. 4th 857, 886-887)* . Although the Court agreed that it is in the nation's best interests to have hazardous waste cleaned up, it held that courts may not rewrite an insurance policy for that purpose (or for any purpose) (*18 Cal. 4th 857, 889)* . (All italics are in the original.)

[4] Additional Authorities

[a] No Duty to Defend Against Coercive Administrative Action Under Comprehensive General Liability Policy

In *Bullock v. Maryland Cas. Co. (2001) 85 Cal. App. 4th 1435, 102 Cal. Rptr. 2d 804* , the owners of a residential hotel, sued by a city for violating an ordinance requiring that a certain percentage of hotel rooms be rented to permanent residents, tendered the costs of its defense of the suit to its CGL policy carriers. The trial court sustained demurrers to the complaint, and the insureds appealed. The court of appeal affirmed, holding that the action by the city did not invoke the insurer's coverage with respect to claiming damages that the insured was "obligated to pay" under the policy. The court noted that the only coercive tool employed against the insureds was a traditional prohibitory injunction barring them, on pain of contempt, from continuing to rent rooms to nonresidents without a permit (*85 Cal. App. 4th 1435, 1444-1449)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGood Faith & Fair DealingDuty to DefendInsurance LawGeneral Liability InsuranceCoverageGeneral OverviewInsurance LawGeneral Liability InsuranceCoverageAdministrative Actions

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 120 INSURANCE
PART II. FORMS
B. Coverage and Exclusions
1. General Exclusions

12-120 California Points & Authorities § 120.42

§ 120.42 "Absolute" Pollution Exclusion in Comprehensive General Liability Policies Applies Only to Environmental Pollution

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE "ABSOLUTE" POLLUTION EXCLUSION CONTAINED IN THE POST-1985 POLLUTION EXCLUSION CLAUSE OF COMPREHENSIVE GENERAL LIABILITY POLICIES APPLIES ONLY TO ENVIRONMENTAL POLLUTION.

"Absolute" Pollution Exclusion Limited to Environmental Pollution. The "absolute" pollution exclusion contained in the post-1985 standard pollution exclusion clause of comprehensive general liability policies pertains only to environmental pollution (*MacKinnon v. Truck Ins. Exch. (2003) 31 Cal. 4th 635, 645-653, 3 Cal. Rptr. 3d 228, 73 P.3d 1205*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in a case concerning a comprehensive general liability policy that contains the "absolute" or current pollution exclusion clause drafted in 1985, to support the contention that the exception applies only to environmental pollution and not, for example, to ordinary acts of negligence involving harmful substances [*see, e.g., MacKinnon v. Truck Ins. Exch. (2003) 31 Cal. 4th 635, 653, 3 Cal. Rptr. 3d 228, 73 P.3d 1205]* .

This form may be used in various procedural contexts, such as a memorandum in support of a summary judgment motion in favor of the insurer, or in a trial or appellate brief.

[b] Argument

Counsel should insert argument connecting the points in this form with the facts of the case--for example, by setting forth the pollution exclusion provision of the policy to show that it contains the "absolute" pollution clause.

The form should be combined with other forms in this publication as necessary to complete argument with respect to all issues, and to place the argument within its proper procedural context.

[c] Related Points and Authorities

For complete discussion of the format requirements and strategic considerations for drafting memoranda, discussion on how to combine the formsof this publication in drafting, and discussion of requirements and considerations for completing a memorandum, together with a general skeletal form of memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] "Absolute" Pollution Exclusion Limited to Environmental Pollution

MacKinnon v. Truck Ins. Exch. *(2003) 31 Cal. 4th 635, 3 Cal. Rptr. 3d 228, 73 P.3d 1205* , was an action by the owner of an apartment building against his comprehensive general liability (CGL) insurer for bad faith, breach of contract, and declaratory relief regarding the "absolute" pollution exclusion clause in his policy (*31 Cal. 4th 635, 645-653)* . The owner caused an exterminator to spray pesticides in his apartment building to eradicate yellowjackets, at least partly in response to a complaint about yellowjackets from one tenant. That same tenant died, allegedly from pesticide exposure, resulting in a wrongful death suit by her survivors against the owner, the exterminator, and others, based on the allegedly negligent use of pesticides. In the wrongful death suit, the owner tendered defense of the action to his comprehensive general liability insurer, which initially retained counsel for the insured under reservation of rights, but then withdrew its defense, asserting no coverage pursuant to the pollution exclusion clause. The CGL policy contained the post-1985 "absolute" pollution exclusion, which provided: "We do not cover Bodily Injury or Property Damage ... (2) Resulting from the actual, alleged, or threatened discharge, dispersal, release or escape of pollutants: (a) at or from the insured location." The terms "Pollution or Pollutants" were defined, in the definitions section at the beginning of the policy, as "mean[ing] any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste materials. Waste materials include materials [that] are intended to be or have been recycled, reconditioned or reclaimed." (*31 Cal. 4th 635, 639, 655-656).* The owner then retained his own counsel and entered into a settlement with the plaintiffs in the wrongful death suit (*31 Cal. 4th 635, 655-656)* . In the owner's action against the CGL insurer, based on the insurer's alleged breach of its duty to defend and indemnify the owner, the trial court granted the insurer's summary judgment motion based on the pollution exclusion. The court of appeal affirmed. The trial court's principal basis for granting summary judgment, and the court of appeal's principal basis for affirming the trial court, was a determination that the pollution exclusion found in the CGL policy excluded coverage for the injury claimed in the wrongful death complaint (*31 Cal. 4th 635, 641)* .

The California Supreme Court granted review and reversed, interpreting the exclusion in favor of coverage and adopting a narrow interpretation ofthe pollution exclusion that limits the scope of the pollution exclusion to injuries arising from events commonly thought of as pollution--that is, environmental pollution (*31 Cal. 4th 635, 645-653)* . The Court held that the exclusion does not apply to ordinary acts of negligence involving harmful substances. The Court noted that this case involves the post-1985 pollution exclusion clause often referred to as the "absolute" or "current" pollution exclusion. The two most notable features of this version of the exclusion are: (1) the lack of any exception for the "sudden and accidental" release of pollution; and (2) the elimination of the requirement that the pollution be discharged "into or upon land, the atmosphere or any watercourse or body of water." (*31 Cal. 4th 635, 644).* The Court noted that courts interpreting the scope of the current pollution exclusion are roughly divided into two camps. One camp maintains

that the exclusion applies only to traditional environmental pollution into the air, water, and soil, but not to all injuries involving the negligent use or handling of toxic substances that occurs in the normal course of business. These courts generally find ambiguity in the wording of the pollution exclusion if it is applied to that type of negligence and interpret the ambiguity against the insurer in favor of coverage. The other camp maintains that the clause applies equally to negligence involving toxic substances and traditional environmental pollution and that the clause is as unambiguous in excluding the former as the latter (*31 Cal. 4th 635, 641-642)* . After discussing the conflicting authorities at length, the Court agreed with those courts that narrowly interpreted the exclusion, limiting the scope of the pollution exclusion to injuries arising from events commonly thought of as pollution--that is, environmental pollution (*31 Cal. 4th 635, 645-653)* . The Court interpreted the term "pollution" in light of the purpose of CGL policies, which is to provide the insured with the broadest spectrum of protection against liability for unintentional and unexpected personal injury or property damage arising out of the conduct of the insured's business (*31 Cal. 4th 635, 653-654)* . If the pollution exclusion does not plainly and clearly exclude coverage, it must be interpreted in favor of coverage. The Court stated that the term "disperse pesticides" is generally not used as a substitute for "spray" or "apply" pesticides, except perhaps if the pesticides are being spread throughout a large area. In this particular case, the application of pesticides in and around an apartment building does not plainly signify to the common understanding the "dispersal" of a pollutant. In other words, the term "discharge" is commonly used with pesticides to describe pesticide runoff behaving as a traditional environmental pollutant, rather than pesticides being normally applied (*31 Cal. 4th 635, 651, n.6*). The Court concluded that it is far from clear that the owner's claim (based on the wrongful death action), for injuries arising from the normal, though negligent, residential application of pesticides, would be commonly thought of as pollution. Although pesticides may be pollutants under some circumstances, it is unlikely that a reasonable policyholder would think of the act of spraying pesticides under these circumstances as an act of pollution. The common understanding of the word "pollute" indicates that it is "something creating impurity, something objectionable and unwanted." The normal application of pesticides around an apartment building to kill yellowjackets would not comport with the common understanding of the word "pollute" (*31 Cal. 4th 635, 654)* .

[4] Additional Authorities

[a] "Absolute" Pollution Exclusion Limited to Environmental Pollution

In *American Casualty Co. of Reading, Pa. v. Miller (2008) 159 Cal. App. 4th 501, 71 Cal. Rptr. 3d 571* , a furniture-stripping company released methylene chloride into a public sewer system, injuring a worker in the sewer. The company was insured under a commercial general liability policy that contained an "absolute pollution exclusion" clause similar to that in *MacKinnon v. Truck Insurance Exchange (2003) 31 Cal. 4th 635, 3 Cal. Rptr. 3d 228, 73 P.3d 1205* . Following a criminal conviction against the owner of the company in which the owner pled guilty to negligently discharging pollutants into a public sewer system, the injured party's workers' compensation insurer brought a lawsuit against the furniture-stripping company for reimbursement; the injured party then brought a separate action against the company. That company sought coverage and defense for both actions under its CGL insurer, which refused on the ground that coverage was excluded by the "absolute pollution exclusion" clause. In the ensuing declaratory relief action by the CGL insurer, the trial court granted summary judgment for the insurer with respect to both actions. The appellate court affirmed, holding that the policy at issue was similar to that in *MacKinnon*, the release of methylene chloride constituted "environmental pollution," and the pollution exclusion clause excluded coverage for injuries arising from the discharge (*159 Cal. App. 4th 501, 515-516, 71 Cal. Rptr. 3d 571*).

In *Titan Corp. v. Aetna Cas. & Sur. Co. (1994) 22 Cal. App. 4th 457, 27 Cal. Rptr. 2d 476* , the issue was the applicability of the version of the pollution exclusion appearing in the standard 1986 ISO policy form. An insured, faced with liability for toxic waste cleanup, sought indemnity from its insurer. The trial court held that coverage existed under the personal injury endorsement of the policy. The court of appeal reversed, holding that the 1986 exclusion was unambiguous and applied to the cost of an operation to clean up soil and groundwater contaminated with a hazardous substance. The policy unambiguously declared that it would not pay for bodily injury or property damage if that damage arose from pollution. To hold otherwise would render the pollution exclusion inoperative in almost all cases and would

be inconsistent with the principle of contractual interpretation that ascribes to terms their clear meaning (*22 Cal. App. 4th 457, 473-476)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawGeneral Liability InsuranceExclusionsGeneral OverviewInsurance LawGeneral Liability InsuranceExclusionsPollution

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 120 INSURANCE
PART II. FORMS
B. Coverage and Exclusions
1. General Exclusions

12-120 California Points & Authorities § 120.43

§ 120.43 Insured Has Not Shown That "Sudden and Accidental" Exception to "Qualified Pollution Exclusion" in Comprehensive General Liability Policy Applies

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE INSURED HAS NOT MET THE BURDEN OF SHOWING THAT THE INSURED'S CLAIM COMES WITHIN THE "SUDDEN AND ACCIDENTAL" EXCEPTION OF THE "QUALIFIED POLLUTION EXCLUSION."

A. Burden Is on Insured to Establish That "Occurrence" Is Covered Under Policy. The burden is on an insured to establish that the occurrence forming the basis of its claim is within the basic scope of insurance coverage (*Aydin Corp. v. First State Ins. Co. (1998) 18 Cal. 4th 1183, 1188, 77 Cal. Rptr. 2d 537, 959 P.2d 1213*).

B. Burden Shifts to Insurer to Prove Exclusion After Insured Shows That "Occurrence" Is Covered. Once an insured has shown that the occurrence forming the basis of the insured's claim is within the basic scope of insurance coverage, the burden is on the insurer to prove that the claim is specifically excluded (*Aydin Corp. v. First State Ins. Co. (1998) 18 Cal. 4th 1183, 1188, 77 Cal. Rptr. 2d 537, 959 P.2d 1213*).

C. After Insurer Shows That General Pollution Exclusion Applies in Comprehensive General Liability Policy, Insured Bears Burden of Showing That Pollution Was "Sudden and Accidental." In an action seeking indemnity under a standard commercial general liability insurance policy, once the insurer carries its burden of proving that the general pollution exclusion applies, the insured bears the burden of proving that a claim comes within the "sudden and accidental" exception (*Aydin Corp. v. First State Ins. Co. (1998) 18 Cal. 4th 1183, 1194, 77 Cal. Rptr. 2d 537, 959 P.2d 1213*).

D. No Coverage if "Sudden and Accidental" Exception Does Not Apply. There is no coverage under a comprehensive general liability policy if the "sudden and accidental" exception to the "qualified pollution exclusion"

clause is inapplicable to the facts of the case [*see Smith v. Hughes Aircraft Co. (9th Cir. 1993) 22 F.3d 1432, 1437]* .

E. "Sudden and Accidental" Has Temporal Meaning. "Sudden and accidental," for purposes of the exception to the standard pollution exclusion, connotes a temporal quality of short duration (*Smith v. Hughes Aircraft Co. (9th Cir. 1993) 22 F.3d 1432, 1437)* .

[2] Comments

[a] Use of Form

These points and authorities may be submitted in a case concerning a comprehensive general liability policy in which the "sudden and accidental" exception to the pollution exclusion is at issue, to support the contention that the insured has the burden of proving the application of that exception to the exclusion. The basis of these points and authorities is that the insurer has met its burden of showing that the pollution exclusion applies, and therefore that the burden shifts to the insured to show that coverage exists pursuant to the exception.

This form may be used in various procedural contexts, such as a memorandum in support of jury instructions with respect to the burden of proof, or in a trial or appellate brief.

[b] Argument

Counsel should insert argument connecting the points in this form with the facts of the case--for example, by setting forth the pollution exclusion provision of the policy to show that it is a broad exclusion [*see § 120.43[3][c]*].

The form should be combined with other forms in this publication as necessary to complete argument with respect to all issues, and to place the argument within its proper procedural context.

[c] Related Points and Authorities

For complete discussion of the format requirements and strategic considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion of requirements and considerations for completing a memorandum, together with a general skeletal form of memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Burden Is on Insured to Establish That "Occurrence" Is Covered Under Policy

Aydin Corp. v. First State Ins. Co. *(1998) 18 Cal. 4th 1183, 77 Cal. Rptr. 2d 537, 959 P.2d 1213* , was a declaratory relief action brought by an insured seeking a judgment with respect to the coverage provided by comprehensive general liability policies issued by its primary and excess insurers. The crucial issue at trial was the burden of proof with respect to the "sudden and accidental" exception to the general pollution exclusion. The trial court gave the advisory jury the following instruction on that issue:

> The policies issued by First State contain pollution exclusions. To establish its defense based on the pollution exclusions, First State has the burden of proving by a preponderance of the evidence (1) that Aydin Corporation's liability arises out of the "discharge, dispersal, release or escape" of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, solids, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; and (2) that the discharge, dispersal, release or escape of [those pollutants] was not "sudden and accidental."

The jury answered "No" to special interrogatories inquiring whether the insurer met its burden of proving that the insured's legal liability arose out of the discharge, dispersal, release or escape of contaminants, on land or water, that were not "sudden and accidental." Based on the jury's findings, the trial court entered a declaratory judgment in favor of the insured. The insurer appealed, and the court of appeal reversed (*18 Cal. 4th 1183, 1186-1188)* .

The California Supreme Court affirmed the decision of the court of appeal, holding that once an insurer has met its burden of showing that a claim is specifically excluded, the burden shifts to the insured to show that the pollution activity was "sudden and accidental," so as to provide coverage (*18 Cal. 4th 1183, 1194)* . In its preliminaryreasoning, the Court stated that the burden is on an insured to establish that the occurrence forming the basis of its claim is within the basic scope of insurance coverage (*18 Cal. 4th 1183, 1188)* .

[b] Burden Shifts to Insurer to Prove Exclusion After Insured Shows That "Occurrence" Is Covered

The factual and procedural background of ***Aydin Corp. v. First State Ins. Co.*** *(1998) 18 Cal. 4th 1183, 77 Cal. Rptr. 2d 537, 959 P.2d 1213* , is discussed in *§ 120.43[3][a]*. The California Supreme Court held that once an insured has established that the occurrence forming the basis of the insured's claim is within the basic scope of insurance coverage, the burden is on the insurer to prove that the claim is specifically excluded (*18 Cal. 4th 1183, 1188)* .

[c] After Insurer Shows That General Pollution Exclusion Applies in Comprehensive General Liability Policy, Insured Bears Burden of Showing That Pollution Was "Sudden and Accidental"

The factual and procedural background of ***Aydin Corp. v. First State Ins. Co.*** *(1998) 18 Cal. 4th 1183, 77 Cal. Rptr. 2d 537, 959 P.2d 1213* , is discussed in *§ 120.43[3][a]*. The central ruling of this case involved whether the "sudden and accidental" exception in the pollution exclusion should be considered as a coverage provision or an exclusionary provision when allocating the burden of proof. Noting that no California published opinions had yet decided this issue and that the courts in other states that have done so have all ruled that the burden rests with the insured, the Court explained its decision in line with the other state courts. The policy language itself, rather than the location of the language in an insurance policy, controls. The language of the exclusion [see *§ 120.43[3][a]*], creates a broad exclusion from coverage for any liability resulting from pollution (*18 Cal. 4th 1183, 1191)* . Read in the context of this broad exclusionary language, the "sudden and accidental" exception serves to reinstate coverage when it would otherwise not exist. Once the insurer has established that the pollution exclusion applies, coverage depends on the applicability of the exception. Because the insured bears the burden of establishing coverage under an insurance policy, the insured must also prove that the exception affords coverage after an exclusion is triggered. The Court observed that this broad construction will aid insureds in meeting their burden of proof, ensuring that the end result (coverage or noncoverage) conforms to the insured's objectively reasonable expectations (*18 Cal. 4th 1183, 1192)* . The Court concluded that the "sudden and accidental" exception must be construed as a coverage provision as to which the insured would ordinarily bear the burden of proof, and that no compelling reason exists to alter the normal allocation of burden on this question (*18 Cal. 4th 1183, 1193)* . The Court therefore held that in an action seeking indemnity under a standard commercial general liability insurance policy, once the insurer carries its burden of proving that the general pollution exclusion applies, the insured bears the burden of proving that a claim comes within the "sudden and accidental" exception (*18 Cal. 4th 1183, 1194)* .

[d] No Coverage if "Sudden and Accidental" Exception Does Not Apply

The factual background and holding of ***Smith v. Hughes Aircraft Co.*** *(9th Cir. 1993) 22 F.3d 1432* , are discussed in *§ 120.43[3][e]*.

[e] "Sudden and Accidental" Has Temporal Meaning

In ***Smith v. Hughes Aircraft Co.*** *(9th Cir. 1993) 22 F.3d 1432* , residents of an Arizona city filed suit against an aircraft manufacturer for damages caused by contamination of their drinking water. After that case settled, various

insurers of the manufacturer brought a declaratory relief action to determine their respective liability for the water-contamination claims. The federal district court granted summary judgment for the insurers with respect to policies issued between 1971 and 1985 and granted summary judgment for two of the insurers with respect to policies issued between 1956 and 1971. The manufacturer appealed.

The Ninth Circuit affirmed with respect to the summary judgment motions granted on the ground that the policies in question precluded coverage because of the pollution exclusion clause. The pollution exclusion clause in question stated that the insurance does not apply (*22 F.3d 1432, 1437* (emphasis in original)):

> (f) to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, *toxic chemicals, liquids* or gases, *waste materials or other irritants,* contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; *but this exclusion shall not apply if such discharge, dispersal, release or escape is sudden and accidental*.

The Ninth Circuit held that "sudden and accidental" for purposes of the exception to the standard pollution exclusion (the pre-1986 "qualified pollution exclusion") connotes a temporal quality of short duration under both Arizona and California law (*22 F.3d 1432, 1437)* . Moreover, an insured cannot break down its long-term waste disposal practices into temporal components to bring its activities within the exception for "sudden and accidental" activities. For example, discharges that occurred when a waste treatment plant broke down or became incapacitated could not be characterized as "sudden" and segregated from the insured's long-term waste practices if evidence clearly indicated that the pollution was gradualand the result of those long-term practices (*22 F.3d 1432, 1438)* . Finally, the fact that a chemical is not listed as a pollutant by the Environmental Protection Agency until after the discharges in question occur is irrelevant, because the language of the standard pollution exclusion does not require such a listing (*22 F.3d 1432, 1438)* .

[4] Additional Authorities

[a] After Insurer Shows That General Pollution Exclusion Applies in Comprehensive General Liability Policy, Insured Bears Burden of Showing That Pollution Was "Sudden and Accidental"

In *Aeroquip Corp. v. Aetna Cas. & Sur. Co., Inc. (9th Cir. 1994) 26 F.3d 893* , an insured under a comprehensive general liability policy was faced with liability for a leak of diesel fuel that occurred for an undetermined but lengthy period. After the insurer denied, coverage, the insured filed a declaratory relief action. The federal district court entered a judgment in favor of the insurer. The insured appealed, contending that the insurer had not proven that the "sudden and accidental" exception to the "qualified pollution exclusion" (pre-1986) was inapplicable. The Ninth Circuit affirmed, holding that the insured bore the burden of demonstrating the applicability of the exception to the exclusion (*26 F.3d 893, 895)* .

[b] "Sudden and Accidental" Has Temporal Meaning

In *ACL Techs., Inc. v. Northbrook Prop. & Cas. Ins. Co. (1993) 17 Cal. App. 4th 1773, 22 Cal. Rptr. 2d 206* , a purchaser of property containing underground storage tanks that released pollutants sought coverage for clean-up costs under its comprehensive general liability insurance. The court declined to find coverage under the "sudden and accidental" exception to the standard pollution exclusion because the pollutants were released gradually by the corroding, rusting storage tanks. The court held that the term "sudden and accidental" is not ambiguous, and that the term "sudden" does not merely mean "unexpected," but is temporal in meaning and indicates something that happens quickly or abruptly. Even if the phrase "sudden and accidental" was ambiguous, interpreting these terms to cover gradual pollution would not be within the objectively reasonable expectations of the insured. No ordinary person would think that something that happens gradually also happened suddenly (*17 Cal. App. 4th 1773, 1788)* .

In *Truck Ins. Exch. v. Pozzuoli (1993) 17 Cal. App. 4th 856, 21 Cal. Rptr. 2d 650* , the insureds had purchased a comprehensive general liability policy to cover their car wash, where they also sold gasoline. An underground gasoline storage tank developed a leak, which continuedduring a 60-day period. The issue was whether the phrase "sudden and accidental" (in the exception to the standard pollution exclusion in the policy) was ambiguous. The insureds argued that "sudden" should be interpreted as not having any temporal meaning. However, the trial court granted summary judgment to the insurer, holding that the phrase had a temporal meaning and was not ambiguous, and that a leak of 60 days' duration was not "sudden" as that term was used in the policy. Therefore, the damage from the leak did not fall within the exception to the pollution exclusion and was not covered under the policy. The court of appeal affirmed, finding that the term "sudden" was defined in the policy as "not continuous," and therefore it was a weak argument to contend that the term was ambiguous. The court also held that the insureds had no reasonable expectation of coverage for a long-term pollution process (*17 Cal. App. 4th 856, 860-861)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGood Faith & Fair DealingIndemnificationInsurance LawGeneral Liability InsuranceCoverageGeneral OverviewInsurance LawGeneral Liability InsuranceCoverageAccidentsInsurance LawGeneral Liability InsuranceExclusionsPollution

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 120 INSURANCE
PART II. FORMS
B. Coverage and Exclusions
1. General Exclusions

12-120 California Points & Authorities § 120.44

§ 120.44 Business Liability Policy Does Not Cover Particular Claim Under "Advertising Injury" Clause

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

THE BUSINESS LIABILITY INSURANCE POLICY THAT IS AT ISSUE IN THIS ACTION DOES NOT COVER THE INSURED'S CLAIM UNDER ITS "ADVERTISING INJURY" CLAUSE BECAUSE THE CLAIM IS FOR _____ [*describe, e.g.,* TRADEMARK INFRINGEMENT], WHICH IS NOT A COVERED LOSS.

Business Liability Policy at Issue Does Not Cover This Particular Claim Under "Advertising Injury" or "Advertising Liability" Clause. The "advertising injury" or "advertising liability" coverage clauses in the business liability policy at issue do not include coverage for the insured's claim. [The relevant exclusion clauses in this policy exclude the insured's claim.] Under this policy, no coverage exists for this claim, and therefore the insurer is under no duty to defend or indemnify the insured (*see Palmer v. Truck Ins. Exch. (1999) 21 Cal. 4th 1109, 1116, 90 Cal. Rptr. 2d 647, 988 P.2d 568*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention by an insurance company that the business liability policy at issue(for example, a commercial general liability or similar policy) does not cover the claimed loss under its "advertising injury" or "advertising liability" clause (*see Palmer v. Truck Ins. Exch. (1999) 21 Cal. 4th 1109, 1116, 90 Cal. Rptr. 2d 647, 988 P.2d 568*).

[b] Argument

Counsel should insert argument linking the points in this form with the facts of its case. In particular, counsel should set

forth the relevant policy provisions and contrast them with the insured's claim, arguing that under the relevant coverage and exclusion clauses, the claim is not a covered loss.

The form should be combined with other forms in this publication, as necessary, to complete argument with respect to all issues and to place the argument within its proper procedural context.

[c] Related Pleading and Practice Chapters

For discussion relating to insurance liability policies, see California Forms of Pleading and Practice, Ch. 308, *Insurance* , Part I, Subpart E.

[3] Discussion of Authorities

[a] Business Liability Policy Does Not Cover Particular Claim Under "Advertising Injury" Clause

Palmer v. Truck Ins. Exch. *(1999) 21 Cal. 4th 1109, 90 Cal. Rptr. 2d 647, 988 P.2d 568* , was an action by the insured, a real estate developer, against several of its business liability insurers (only one of which appealed), alleging causes of action for declaratory relief and breach of the implied covenant of good faith and fair dealing. In the underlying third-party action, another real estate developer sued the insured for (1) infringement of the registered trademark "Valencia"; (2) false designation of origin and false representation; and (3) unfair competition. The third-party complaint alleged that the defendant used the Valencia mark and used colored flags, signs, and slogans that were "remarkably similar" to those used by the plaintiff for its own real estate projects. At trial, the jury found for the plaintiff, awarding it almost $1 million in damages for infringement by one of the insured's companies and over $1 million in damages for infringement by another of the insured's companies. The jury returned special verdict forms finding that the insured's use of the Valencia mark was "likely to cause confusion," "infringing"; and "a false representation or a false designation of origin." The jury also found the insured's conduct willful. The district court entered judgment against the insured for trademark infringement, false designation or origin, and false representation. After the jury verdict, the insured tendered the action to various insurance carriers, including the insurer in this appeal, which agreed to pay a portionof the costs on appeal, but reserved the right to contest coverage. During the pendency of the appeal, the insured settled with the plaintiff in the underlying action for $1,590,000. The insurer denied coverage and refused to contribute to the settlement. The insured then filed this suit. The only policy at issue was the comprehensive umbrella liability policy issued to one of the insured's companies. That policy provided coverage for "advertising liability," including "infringement of copyright or of title or of slogan," but excluded coverage "with respect to advertising activities" for "infringement of registered trade mark, service mark or trade name." The exclusion specifically did "not relate to titles or slogans." The trial court sustained the insurer's demurrer without leave to amend on the grounds that the insured lacked standing and had breached the "no action" clauses of the policies. The court entered judgment of dismissal as to the insurer. The court of appeal affirmed the dismissal of most claims but reversed dismissal of all claims relating to the umbrella policy. The court of appeal held that the underlying judgment fell within the scope of the policy language requiring coverage for infringement "of title or of slogan," despite the language excluding coverage for trademark infringement.

The California Supreme Court granted review to determine whether the policy language providing coverage for advertising liability caused by infringement of "trade mark, service mark or trade name [except relating to] titles or slogans" covers infringement of any name. (The Court also entertained an issue regarding willful infringement under *Ins. Code § 533*, but did not ultimately reach that issue.) After reviewing the relevant policy language, the Court found that this language only provides coverage for infringement of a name of a literary or artistic work or a name that is also a slogan (*21 Cal. 4th 1109, 1114)* . The only applicable coverage clause provided coverage for "advertising liability" resulting from infringement "of title or of slogan." The Court concluded that the coverage clause, when read in conjunction with the clause excluding coverage for trademark infringement, did not cover the underlying judgment because the mark "Valencia" is neither the name of a literary or artistic work, nor is it a slogan (*21 Cal. 4th 1109,*

1116) . Nothing in the policy suggested that the coverage clause and exclusion clause define "title" differently. Therefore, it was reasonable to assume that "title" had the same meaning in both clauses. The exclusion clause stated:

> This insurance does not apply ... with respect to advertising activities, to claim made against the insured for ... infringement of registered trade mark, service mark or trade name by use thereof as the registered trade mark, service mark or trade name of goods or services sold, offered for sale or advertised, but this shall not relate to titles or slogans ...

Interpreted in its ordinary sense, this clause excludes coverage for infringement of a "registered trade mark, service mark or trade name," unless that "trade mark, service mark or trade name" is a title or slogan. To be consistent with this interpretation, the definition of "title" cannot subsume the definitions of "trade mark," "service mark," or "trade name" as understood in the policy. Otherwise, all or part of the exclusion clause becomes meaningless. Only one definition fits: the name of a literary or artistic work. Because these names can be trademarked, adopting this definition of "title" carves out a limited exception and gives effect to every part of the policy's trademark exclusion clause (*21 Cal. 4th 1109, 1117)* . The Court therefore held that the policy provision covering infringement of title did not require the insurer to provide reimbursement (*21 Cal. 4th 1109, 1120)* . The Court also held that the mere fact that the plaintiff in the underlying action used the mark Valencia in a slogan did not bring the judgment within the scope of coverage for infringement of slogan (*21 Cal. 4th 1109, 1120)* .

[4] Additional Authorities

[a] Business Liability Policy Does Not Cover Particular Claim Under "Advertising Injury" Clause

In *Hayward v. Centennial Ins. Co. (9th Cir. 2005) 430 F.3d 989* , the complaint language in the underlying suit was virtually identical to that in *Hameid v. Nat'l Fire Ins. of Hartford (2003) 31 Cal. 4th 16, 1 Cal. Rptr. 3d 401, 71 P.3d 761* . The third party sued a former employee who worked for the insured, for breach of contract and breach of fiduciary duty, and the third party sued the former employee and the insured for misappropriation of trade secrets and violation of the California Business and Professions Code, based on wrongful solicitation of the third party's customers. The insured and the former employee sued the insurer for breach of contract and bad faith, after the insurer refused to indemnify or defend them. After removal to federal court, the district court found for the insurer on all claims. The Ninth Circuit affirmed, holding that under *Hameid,* there was no advertising injury as defined in the policy (*430 F.3d 989, 992)* .

In *Homedics, Inc. v. Valley Forge Ins. Co. (9th Cir. 2002) 315 F.3d 1135* , the insured was sued for patent infringement by virtue of offering to sell products through advertising. The insured's commercial general liability (CGL) policy covered "advertising injury," which was defined to include injury arising from "misappropriation of advertising ideas or style of doing business," and "personal injury," which was defined to include nonbodily injury arising out of "oral or written publication of material that ... disparages an organization's goods, products or services." After the CGL insurer refused to defend the patent infringement suit, the insured filed an action against the insurer for declaratory relief on that issue, and the district court dismissed the complaint pursuant to Fed. R. *Civ. Proc. 12(b)(6)*. The Ninth Circuit Court of Appeal affirmed, holding that although the Patent Act includes some conduct involving advertising, thus allowing patent infringement to arise out of an insured's advertising activities in some instances, in this case the conduct alleged in the underlying complaint (direct infringement of patent by offering to sell infringing products through advertising) did not include the advertising injury of "misappropriation of advertising idea or style of doing business" (*315 F.3d 1135, 1139-1141)* .

In *Intex Plastics v. United Nat'l Ins. (9th Cir. 1994) 23 F.3d 254* , an insured tendered defense of a patent infringement claim to its general liability carrier, which denied coverage. The insured sued for declaratory relief. The district court concluded that the insured was covered under the "advertising injury" endorsement to the policy and entered judgment in favor of the insured. The Ninth Circuit reversed, holding that direct infringement involves the making, using, or selling of a patented product, and none of these activities constitutes an advertising injury (*23 F.3d 254, 255-256)* .

In *Hameid v. National Fire Ins. of Hartford (2003) 31 Cal. 4th 16, 1 Cal. Rptr. 3d 401, 71 P.3d 761* , the "Business Account Package Policy" held by the insured covered "advertising injury" arising out of the "misappropriation of advertising ideas or style of doing business." A competing company brought an action against the insured, alleging various causes of action based on allegations that the insured misappropriated the plaintiff's trade secrets by using the plaintiff's customer list to identify and solicit the plaintiff's customers and engage in unfair competition. After the insurer refused to defend, the insured prevailed at trial and then sued the insurer for bad faith, seeking to recover its defense costs and punitive damages. The court of appeal reversed judgment for the insurer. The California Supreme Court granted review, reversing the decision of the court of appeal. The Supreme Court delivered a narrow ruling, holding that because coverage for "advertising injury" arising out of the "misappropriation of advertising ideas or style of doing business" under a commercial general liability policy requires widespread promotion to the public, the one-on-one solicitation of a few customers in this case did not give rise to the insurer's duty to defend the underlying lawsuit. Allegations that the insured took a competitor's customer list and solicited customers from it did not give rise to insurer's duty to defend because the insured's alleged act was not misappropriation of advertising ideas under the policy definition (*31 Cal. 4th 16, 22-30)* .

In *Total Call Int'l, Inc. v. Peerless Ins. Co. (2010) 181 Cal. App. 4th 161, 104 Cal. Rptr. 3d 319* , the insured under a CGL policy provided telecommunication services and products, including prepaid phone cards. The CGL policy included advertising-injury coverage, and excluded coverage for personal and advertising injury arising out of the failure of goods, products, or services to conform with any statement of quality or performance in the insured's advertisement (nonconformity exclusion). In the underlying action, competitors of the insured alleged that they suffered damages because of the insured's advertising activities solely because the insured's advertising misrepresented its own phone cards. The underlying suit was settled. In its action against the insurer, the insured stated causes of action for breach of contract, bad faith, unfair business practices, and declaratory relief, based on the insurer's refusal to defend. The trial court sustained the insurer's demurrer to the complaint without leave to amend. The appellate court affirmed, holding that the complaint did not potentially allege an advertising injury under the policy. The court also held that there was no potential for policy coverage in view of the nonconformity exclusion. This exclusion precludes coverage for third-party claims predicated on allegations that the insured's advertising misrepresented the quality or price of the insured's own product (*181 Cal. App. 4th 161, 169-172)* .

In *Kim Seng Co. v. Great American Ins. Co. of N.Y. (2009) 179 Cal. App. 4th 186, 101 Cal. Rptr. 3d 537* , *reh'g denied, 2009 Cal. App. LEXIS 1971 (2009)* , primary and umbrella CGL policies issued by related insurers covered "advertising injury." Both policies contained an exclusion for prior publication, excluding coverage for advertising injuries arising from material first published before inception of the policy. Following trial of the underlying trademark infringement action, other insurers that paid for the defense sought equitable contribution and subrogation from insurers that had refused defense and indemnity, including the two described above, which cross-complained for declaratory relief regarding the applicability of the prior-publication exclusion. The trial court granted the related CGL insurers' motion for summary judgment, holding that the prior-publication exclusion applied to exclude coverage; the Court of Appeal affirmed (*179 Cal. App. 4th 186, 192-193, 200)* . The appellate court held that the exclusion applied to trademark infringement actions and was not limited to defamation and privacy claims. In the policies, "advertising injury" was surrounded by quotation marks, and appeared with quotation marks in the prior-publication exclusion. Consequently, "advertising injury" had the same meaning when used in the exclusion that it had whenever it appeared in the policy enclosed in quotation marks (*179 Cal. App. 4th 186, 195)* .

In *ACS Sys., Inc. v. St. Paul Fire & Marine Ins. Co. (2007) 147 Cal. App. 4th 137, 53 Cal. Rptr. 3d 786* , a software company insured under a commercial general liability policy was sued for sending unsolicited advertisements to fax machines, allegedly in violation of federal and state statutes. The policy included the insurer's duty to defend in suits alleging injury or damage resulting from property damage caused by an event, or caused by an advertising injury offense committed during the policy term. The appellate court affirmed the trial court's sustaining of a demurrer without leave to amend and consequent dismissal, because neither the advertising-injury nor the property-damage coverage

provisions applied to the wrongful sending of the faxes (*147 Cal. App. 4th 137, 154-155)* .

Rombe Corp. v. Allied Ins. Co. (2005) 128 Cal. App. 4th 482, 27 Cal. Rptr. 3d 99 , a company that was a franchisee corporation invited its customers and employees to a breakfast meeting at a hotel, where one of the company's principals announced that the company would no longer be affiliated with the franchisor corporation and that it would start a new company engaged in the same business as a temporary employment agency. This person also asked the attendees to become customers and employees of the new company. The meeting and its agenda were later reported in an Internet newsletter. The company's business insurance policy included within the definition of advertising: "a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters." The company's insurer refused to indemnify or defend the underlying suit brought by the franchisor for breach of contract, misappropriation of trade secrets, and unfair competition. In the subsequent suit for breach of contract and bad faith brought by the company against its insurer, the trial court granted summary judgment for the insurer. The court of appeal affirmed, holding that the policy did not cover the injuries alleged in the underlying complaint. The term "specific market segments" does not relieve an insured of the burden of demonstrating that it was engaged in relatively wide dissemination of its advertisements, even if the distribution was focused on recipients with particular characteristics or interests (*128 Cal. App. 4th 482, 492-494)* .

In *We Do Graphics, Inc. v. Mercury Cas. Co. (2004) 124 Cal. App. 4th 131, 21 Cal. Rptr. 3d 9* , the underlying third-party complaint alleged that the third party's former employee, who currently worked for the plaintiff, stole trade secrets and attempted to solicit the third party's customers. Advertising injury was defined in the policy insuring the defendant as:

[P] (a) Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; [P] (b) Oral or written publication of material that violates a person's right of privacy; [P] (c) Misappropriation of advertising ideas or style of doing business; or [P] (d) Infringement of copyright, title or slogan.

In the ensuing action by the plaintiff against its insurer for refusal to defend and indemnify, the insurer successfully moved for summary judgment. The trial court found that the underlying action did not trigger coverage. The court of appeal affirmed, holding that the former employee's conduct did not involve any advertising injury (*124 Cal. App. 4th 131, 136-138)* .

In *Lomes v. Hartford Fin. Servs. Group, Inc. (2001) 88 Cal. App. 4th 127, 105 Cal. Rptr. 2d 471* , the ousted president of a corporation, who remained a director and shareholder, brought a federal suit against the corporation and the individual controlling the corporation for securities fraud and related claims. When the defendants filed a counterclaim for defamation, the corporation's commercial general liability policy insurer (which was providing a defense to the defendants) refused to provide a defense to the plaintiff as counterclaim defendant (although it partially funded his defense under a reservation of rights). The policy provided coverage for "personal and advertising injury," including defamation. The counterclaim alleged that after leaving the corporation, the counterclaim defendant telephoned a lender and made false and defamatory statements that caused the corporation to lose its financing. In the subsequent state court action to determine the insurer's duty to defend the counterclaim defendant in the federal action, the court of appeal, reversing the trial court, noted that the named insured under the policy was the corporation and that the only counterclaim arguably covered by the policy was defamation. Although the counterclaim defendant alleged that it was within the realm of "possibility" that he made the statements in question in the course of advertising or soliciting lending activity for the corporation as one of its directors, the court found as a matter of law that he was sued in an individual capacity with respect to the counterclaim and therefore that the insurer owed him no duty of defense or indemnification. Specifically, hecould not reasonably be said to have been acting in his capacity as a director when he allegedly defamed the corporation. Moreover, the allegation of breach of fiduciary duty did not render him an insured under the corporation's policy (*88 Cal. App. 4th 127, 134-135)* .

In *Peerless Lighting Corp. v. American Motorists Ins. Co. (2000) 82 Cal. App. 4th 995, 98 Cal. Rptr. 2d 753* , the insurer refused to defend an underlying action for infringement of "trade dress" that allegedly arose from the insured's solicitation of a single customer through a competitive bidding process with a product specifically designed for that customer. The liability policy involved provided "advertising injury" coverage for offenses "committed in the course of advertising ... goods, products, or services." In the declaratory relief action between the insurer and the insured, the trial court granted summary judgment in favor of the insured on the issue of the insurer's duty to defend the underlying action, but after trial found the insurer had no duty to indemnify the insured for the amount it paid to settle the underlying suit. The court of appeal affirmed, holding, among other things, that the term "advertising" as used in the standard commercial general liability (CGL) policy does not include responding to a single customer in a competitive bidding process with a product tailor-made for that customer (*82 Cal. App. 4th 995, 1012)* .

In *Maxconn Inc. v. Truck Ins. Exch. (1999) 74 Cal. App. 4th 1267, 88 Cal. Rptr. 2d 750* , the insurer denied coverage under a commercial general liability policy for a patent infringement suit against the insured regarding an electronic product invention. The insured sued the insurer for declaratory relief with respect to the duty to defend the underlying lawsuit. The court of appeal reversed the trial court's finding that the insurer was required to defend the suit. Under the policy, "advertising injury" insurance applied to "advertising injury caused by an offense committed in course of advertising your goods, products or services ... ." The court held that if "infringement of ... title," included in the "advertising injury" clause, encompassed patent infringement, the word "patent" would appear in the infringement clauses. However, there was no mention of patent infringement anywhere in this policy. The absence of any express reference to patent infringement in the policy would lead a reasonable layperson to the conclusion that patent infringement was not covered (*74 Cal. App. 4th 1267, 1275-1276)* . Inasmuch as there was no potential for coverage under the policy, the insurer had no duty to defend a patent infringement suit (*74 Cal. App. 4th 1267, 1279)* .

In *Ziman v. Fireman's Fund Ins. Co. (1999) 73 Cal. App. 4th 1382, 87 Cal. Rptr. 2d 397* , the insured, which owned and managed commercial office buildings, borrowed through an art broker an original copyrighted painting for display in a building lobby, on the promise that the insured would seriously consider buying the work. After the insured informed the broker that the insured would not buy the painting because it was tooexpensive, the broker picked up the painting. In its place she noticed an unauthorized copy of the same painting. The artist brought a federal suit against the insured, alleging copyright infringement, fraud, negligent misrepresentation, and unfair competition. The insured tendered the suit to its insurer under a general comprehensive liability policy. The "advertising injury coverage" applied to "advertising injury caused by an offense committed in the course of advertising your goods, products or services." "Advertising injury" was defined as "injury arising out of ... Infringement of copyright, title or slogan." The insurer denied coverage and refused to provide a defense. The insured sued the insurer for breach of contract, tortious breach of the covenant of good faith, and constructive fraud. The trial court granted summary judgment to the insurer. The court of appeal affirmed, holding that there was no potential coverage, and hence no duty to defend, under the advertising injury provision of the policy. The alleged copyright infringement had nothing to do with any advertising by the insured (*73 Cal. App. 4th 1382, 1389)* .

In *Aetna Cas. & Sur. v. Superior Court (1993) 19 Cal. App. 4th 320, 23 Cal. Rptr. 2d. 442* , a manufacturer was sued for patent infringement. It tendered defense to its comprehensive general liability carrier, alleging that the loss fell within the "advertising injury" endorsement in the policy. The insurer rejected the tender, and the insured filed a declaratory relief action. The trial court held that coverage existed, but the court of appeal reversed, holding that as a matter of law patent infringement could not be considered "advertising injury" (*19 Cal. App. 4th 320, 328)* . The court concluded that decisions in the wake of the California Supreme Court's ruling in *Bank of W. v. Superior Court (1992) 2 Cal. 4th 1254, 10 Cal. Rptr. 2d 538, 833 P.2d 545* , have confirmed that except perhaps in very unusual circumstances, it is now settled law that there is no coverage for patent infringement under the advertising injury coverage of a business general liability policy (*see Iolab Corp. v. Seaboard Sur. Co. (9th Cir. 1994) 15 F.3d 1500, 1506-1507* ; *Gitano Group, Inc. v. Kemper Group (1994) 26 Cal. App. 4th 49, 59-60, 31 Cal. Rptr. 2d 271*). Coverage for inducing patent infringement, as opposed to patent infringement itself, is barred by *Ins. Code § 533*. To be liable for inducing infringement, a party must have the specific intent to induce another to infringe. Therefore, such an act must

be intentionally performed, with knowledge of its harmful nature (*19 Cal. App. 4th 320, 331)* .

In *Mez Indus., Inc. v. Pacific Nat'l Ins. Co. (1999) 76 Cal. App. 4th 856, 90 Cal. Rptr. 2d 721* , the insured filed a declaratory relief and breach of contract action against the insurer with respect to a commercial general liability (CGL) policy, based on the insurer's refusal to defend a third-party action for patent infringement and inducement of patent infringement. The trial court sustained the defendant's demurrer without leave to amend and entered a judgment of dismissal. The court of appeal affirmed, holding thatwith respect to coverage for advertising injury, neither "misappropriation of advertising ideas or style of doing business" nor "infringement of copyright, title or slogan" applied to the claims against the insured in the underlying action. The insured was not claimed to have directly violated any patents by its advertising activities. Moreover, coverage for inducement of patent infringement would have been barred by *Ins. Code § 533* (*76 Cal. App. 4th 856, 865-866, 874-877)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGood Faith & Fair DealingDuty to DefendInsurance LawClaims & ContractsGood Faith & Fair DealingIndemnificationInsurance LawGeneral Liability InsuranceCoverageGeneral OverviewInsurance LawGeneral Liability InsuranceCoverageAdvertising Injuries

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 120 INSURANCE
PART II. FORMS
B. Coverage and Exclusions
1. General Exclusions

12-120 California Points & Authorities § 120.45

§ 120.45 Commercial General Liability Policy Coverage for Sums That Insured Is "Legally Obligated to Pay as Damages" Is Limited to Money Ordered by Court

[1] Form

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE COMMERCIAL GENERAL LIABILITY INSURANCE POLICY THAT IS AT ISSUE IN THIS ACTION, PROVIDING COVERAGE FOR SUMS THE INSURED IS "LEGALLY OBLIGATED TO PAY AS DAMAGES," IS LIMITED TO MONEY ORDERED BY A COURT.

A. Commercial General Liability Insurance Policy Providing Coverage for Sums That Insured Is "Legally Obligated to Pay as Damages" Is Limited to Money Ordered by Court. A commercial general liability insurance policy providing coverage for sums that an insured is "legally obligated to pay as damages" is limited to money ordered by a court (*Certain Underwriters at Lloyd's of London v. Superior Court (2001) 24 Cal. 4th 945, 960, 103 Cal. Rptr. 2d 672, 16 P.3d 94*).

B. Commercial General Liability Insurance Policy Providing Coverage for Sums That Insured Is "Legally Obligated to Pay as Damages" Does Not Require Insurer to Indemnify for Administratively Required Expenses Pursuant to Environmental Statute. The duty to indemnify under a commercial general liability insurance policy providing coverage for sums that an insured is "legally obligated to pay as damages" does not extend to any expenses required by an administrative agency pursuant to an environmental statute (*Certain Underwriters at Lloyd's of London v. Superior Court (2001) 24 Cal. 4th 945, 966, 103 Cal. Rptr. 2d 672, 16 P.3d 94*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insured's contention that a commercial general liability

insurance policy providing coverage for sums that the insured is "legally obligated to pay as damages" is not limited to money ordered by a court. The basis of these points and authorities is that the provision imposing the duty to defend expressly links "damages" to a "suit"--that is, a civil action prosecuted in a court.

This form may be used by an insurer in various procedural contexts, such as in a memorandum supporting or opposing a motion for summary judgment, in a trial brief, or in an appellate brief. For further discussion, see *§ 120.30[2][a]*.

[b] Argument

Counsel should insert argument linking the points and authorities in this form with the facts of the case. In particular, counsel should describe facts showing generally that the sums for which the insured is seeking indemnity were not money that the insured was ordered by a court to pay, and facts showing specifically, if appropriate, that those sums were expenses required by an administrative agency pursuant to an environmental statute coverage.

The form should be combined with other forms in this publication as necessary to complete the argument as to all issues (*see, e.g., § 120.10* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be a motion by the insurer for summary judgment on the issue of whether the commercial general liability insurance policy in question covers the insured's obligation to pay administrative expenses required by an environmental agency.

[c] Related Points and Authorities

For complete discussion of the format requirements and strategic considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion of requirements and considerations for completing a memorandum, together with a general skeletal form of memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* . For forms relating specifically to the procedural context of a motion for summary judgment or summary adjudication, see Ch. 221, *Summary Judgments* .

[d] Opposing Points and Authorities

The points and *authorities in § 120.50* et seq. may be used in an appropriate case to oppose the points and authorities set out in this form.

[3] Discussion of Authorities

[a] Commercial General Liability Insurance Policy Providing Coverage for Sums That Insured Is "Legally Obligated to Pay as Damages" Is Limited to Money Ordered by Court

In ***Certain Underwriters at Lloyd's of London v. Superior Court*** *(2001) 24 Cal. 4th 945, 103 Cal. Rptr. 2d 672, 16 P.3d 94* , an insurer filed a declaratory relief action against its insured, an oil refinery, alleging that (1) it had issued the insured various comprehensive general liability insurance policies; (2) the United States Environmental Protection Agency (EPA) had instituted a proceeding against the insured pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) (*42 U.S.C.S. § 9601 et seq.*) regarding the cleanup of a contaminated site and the abatement of contamination. The insurer sought a declaration that it did not owe any duty to defend or any duty to indemnify in this pending proceeding. The insured filed a cross-complaint, initiating a cross-action essentially for damages and declaratory relief against the insurer, alleging that (1) the insurer had issued it various insurance policies, including a CGL policy; (2) the EPA had instituted a proceeding against the insured pursuant to CERCLA for the cleanup of two contaminated sites, and for the abatement of contamination, and had required the continuing expenditure of funds for the cleanup and abatement; and (3) the California regional water quality control boards had initiated at least one proceeding against the insured by means of a cleanup and abatement order pursuant to the Porter-Cologne Water Quality Control Act (Porter-Cologne Act) (*Water Code § 13000 et seq.*) regarding the

contaminated soil and groundwater of one or more sites, and had required the continuing expenditure of funds for it. In addition, several persons or entities had prosecuted to conclusion civil actions in court against the insured based on allegations of contamination. The insured also alleged that the insurer owed a duty to defend in the past actions, but denied it, and owed a duty to indemnify in the past actions and the pending proceedings, but denied it. The insured sought a declaration that the insurer owed it a duty to indemnify in the pending EPA/CERCLA and regional water board proceedings, and also prayed for damages for harm arising from the insurer's breach of the duty to defend in the past civil actions. The insurer filed an answer to the cross-complaint, asserting as an affirmative defense that they did not owe any duty to defend in any proceeding conducted before an administrative agency pursuant to an environmental statute, as opposed to a civil action prosecuted in a court, because its duty was limited to a civil action. Another affirmative defense asserted that they did not owe any duty to indemnify for any expenses required by an administrative agency pursuant to an environmental statute, as opposed to money ordered by a court, because the duty was limited to money ordered by a courtand hence could not extend to administrative expenses. The insurer filed a motion for summary judgment regarding whether they owed any duty to defend in any of the pending proceedings and whether they owed any duty to indemnify for any expenses required in those proceedings. The trial court ruled that the insurer did not owe any duty to defend in any of the identified pending proceedings, but also ruled that were not entitled as a matter of law to an adjudication that they did not owe any duty to indemnify for any expenses. The insurer submitted a petition for writ of mandate. The Court of Appeal ordered issuance of a peremptory writ of mandate directing the superior court to vacate its order denying the insurer's motion for summary judgment on the issue of the insurer's duty to indemnify, and to make a new order granting the relief that the insurer sought. The California Supreme Court granted the insured's petition for review.

The California Supreme Court affirmed. The Court held that the insurer's duty to indemnify the insured for "all sums that the insured becomes legally obligated to pay as damages" under the standard comprehensive general liability insurance policy is limited to money ordered by a court (*24 Cal. 4th 945, 960)* . The provision imposing the duty to defend expressly links "damages" to a "suit"--that is, a civil action prosecuted in a court--because it is in a "suit" that "damages" are fixed in their amount through the court's order. Moreover, "damages" exist traditionally only inside of court (*24 Cal. 4th 945, 962)* . The duty to indemnify under a CGL policy containing this provision therefore does not extend to any expenses required by an administrative agency pursuant to an environmental statute (and specifically, proceedings conducted before the Regional Water Quality Control Boards pursuant to the Porter-Cologne Act) (*24 Cal. 4th 945, 966)* .

[b] Commercial General Liability Insurance Policy Providing Coverage for Sums That Insured Is "Legally Obligated to Pay as Damages" Does Not Require Insurer to Indemnify for Administratively Required Expenses Pursuant to Environmental Statute

The factual background of ***Certain Underwriters at Lloyd's of London v. Superior Court*** *(2001) 24 Cal. 4th 945, 103 Cal. Rptr. 2d 672, 16 P.3d 94* , is discussed in *§ 120.45[3][a]*.

The Supreme Court held in this case that the duty to indemnify under a commercial general liability insurance policy providing coverage for sums that insured is "legally obligated to pay as damages" does not extend to any expenses required by an administrative agency pursuant to an environmental statute (and specifically, proceedings conducted before the Regional Water Quality Control Boards pursuant to the Porter-Cologne Act) (*24 Cal. 4th 945, 966)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGood Faith & Fair DealingIndemnificationInsurance LawGeneral Liability InsuranceCoverageDamagesInsurance LawGeneral Liability InsuranceObligationsIndemnification

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California Points & Authorities

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CHAPTER 120 INSURANCE
PART II. FORMS
B. Coverage and Exclusions
1. General Exclusions

12-120 California Points & Authorities §§ 120.46-120.49

[Reserved]

§§ 120.46[Reserved]

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 120 INSURANCE
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12-120 California Points & Authorities § 120.50

§ 120.50 Liability Partially or Wholly Within Potential Coverage of Policy

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [IS *or* WAS] BOUND TO DEFEND THE ACTION BECAUSE AT THE TIME IT REFUSED TO UNDERTAKE DEFENSE OF INSURED IN THE THIRD-PARTY ACTION, INSURER KNEW THAT THE POTENTIAL FOR LIABILITY UNDER THE POLICY EXISTED.

A. Insurer Is Bound Under Contract of Indemnity. The indemnitor under a contract of indemnity is bound, on request of the indemnitee, to defend actions or proceedings brought against the indemnitee regarding in respect to the matters embraced by the contract of indemnity, unless a contrary intention appears (*see Civ. Code § 2778(4)*).

B. Insurer Has Duty to Defend Against Claim Potentially Within Policy Coverage. When an insurer is required under the terms of a liability policy that it has issued to defend its insured in any action for an occurrence covered by the policy, the insurer must defend an action against the insured that seeks damages potentially within the coverage of the policy (*Gray v. Zurich Ins. Co. (1966) 65 Cal. 2d 263, 275, 54 Cal. Rptr. 104, 419 P.2d 168* ; *Miller v. Elite Ins. Co. (1980) 100 Cal. App. 3d 739, 753, 161 Cal. Rptr. 322*).

C. Insurer Ascertained Facts Giving Rise to Potential Liability. The duty to defend is fixed by the facts which the insurer learns from the complaint, the insured, or other sources, and the insurer's duty to defend arises whenever it ascertains facts which give rise to the potential of liability under the policy (*Gray v. Zurich Ins. Co. (1966) 65 Cal. 2d 263, 276-277, 54 Cal. Rptr. 104, 419 P.2d 168* ; *Mullen v. Glens Falls Ins. Co. (1977) 73 Cal. App. 3d 163, 169-170, 140 Cal. Rptr. 605*).

D. Insurer's Duty to Defend Is Broader Than Its Duty to Indemnify. The duty to defend is broader than the duty to indemnify. When there is doubt as to whether the duty to defend exists, the doubt should be resolved in favor of the

insured and against the insurer (*Eichler Homes, Inc. v. Underwriters at Lloyd's, London (1965) 238 Cal. App. 2d 532, 538, 47 Cal. Rptr. 843*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's the contention that an insurer has no duty to defend its insured under an insurance policy. The basis of these points and authorities is that the insurer ascertained facts that give rise to the potential of liability under the policy from the complaint, the insured, or other sources.

This form may be used in various procedural contexts, such as:

- In an action by an insured against an insurer for breach of the insurer's duty to defend or indemnify the insured, this form may be used in a memorandum opposing the insurer's motion for summary judgment. For this use, the form should be modified to contend that triable issues of material fact remain regarding the insurer's duty to defend.

- In a declaratory relief action by an insurer seeking a declaration that the insurer has no duty to defend the insured, this form may be used in a memorandum supporting the insured's motion for summary judgment.

- In an insured's trial brief.

- In an insured's appellate brief.

These points and authorities should be combined with other points and authorities setting forth the appropriate procedural context. For example, points and authorities supporting and opposing motions for summary judgment or summary adjudication are set forth in Ch. 221, *Summary Judgments* .

These points and authorities may be combined, if appropriate, with other points and authorities that contend that the insured has wrongfully refused to defend its insured in a third-party action [*see § 120.51* et seq.].

This form may be used to oppose the points and authorities *set forth in § 120.30* et seq.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should include specific facts that show that the insurer ascertained facts that give rise to the potential of liability under the policy. For example, counsel would refer a specific paragraph in the complaint in the third party action, by number, from which the insurer reasonably should have ascertained the insured's potential liability under the policy.

An appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposingan insurer's motion for summary judgment or summary adjudication when the evidentiary facts clearly support the contention. In this context, counsel would modify the form to assert that there remain triable issues of material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts opposing the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(e)-(h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary

evidence attached in the form of an exhibit.

[c] Related Pleading and Practice Chapters

For complaints by an insured against an insurer for damages for breach of contract because of the insurer's refusal to pay a third-party judgment against the insured or to defend the insured in a third-party action, see California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender). For a discussion of the rules applicable to summary judgment, a form of notice of motion for summary judgment, and related forms, see Ch. 537, *Summary Judgment* , in that publication.

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Insurer Has Duty to Defend Against Claim Potentially Within Policy Coverage

Gray v. Zurich Ins. Co. *(1966) 65 Cal. 2d 263, 54 Cal. Rptr. 104, 419 P.2d 168* , was an action against an insurance company for damages for failure to defend a third-party action against plaintiff, defendant's insured, for assault and battery. Plaintiff, a doctor, had been driving a car on a residential street when another car narrowly missed colliding with his. The driver of the other car left his vehicle, approached plaintiff's car in a menacing manner, and jerked open the door. Plaintiff, fearing physical harm to himself and his passengers, rose from his seat and struck the other driver. The other driver filed a complaint in Missouri against plaintiffalleging that plaintiff willfully, maliciously, brutally, and intentionally assaulted him and prayed for $50,000 actual damages and $50,000 punitive damages. Under a comprehensive personal liability policy issued by defendant, defendant agreed to pay on behalf of plaintiff insured all sums which the insured should become legally obligated to pay as damages because of bodily injury or property damage and to defend any suit against the insured alleging such injury or damage and seeking damages which were payable under the terms of the policy, even if any of the allegations were groundless, false, or fraudulent. The policy provided that it did not apply to bodily injury or property damage caused intentionally by or at the direction of the insured. Plaintiff notified defendant of the suit, stated that he had acted in self-defense, and asked the company to defend. When the insurer refused to defend, plaintiff unsuccessfully defended the third-party action, which resulted in a judgment against him for $6,000 actual damages, but no punitive damages. Plaintiff then brought an action against defendant for damages for failing to defend him and for refusing to pay the judgment rendered.

The Supreme Court reversed judgment for defendant with instructions to the trial court to take evidence solely on the issue of damages. The Court found that the policy provisions as to the duty to defend were uncertain and that, in light of the insured's reasonable expectation, they required performance of that duty (*65 Cal. 2d 263, 267, 271)* . The Court pointed out that the carrier must defend a suit which seeks damages potentially within the coverage of the policy (*65 Cal. 2d 263, 275)* and that defendant could not construct a formal fortress of the third-party's pleadings and retreat behind its walls, since pleadings are malleable, changeable, and amendable (*65 Cal. 2d 263, 276)* . The Court held that the third-party action presented the potentiality of a judgment based on nonintentional conduct and that since liability for such conduct would fall within the indemnification coverage, the duty to defend became manifest at the outset (*65 Cal. 2d 263, 276)* .

Miller v. Elite Ins. Co. *(1980) 100 Cal. App. 3d 739, 161 Cal. Rptr. 322* , was an action by an insured against his

motorcycle liability insurance carrier for breach of the implied covenant of good faith and fair dealing in defendant's handling of a claim against plaintiff resulting from a fire which plaintiff accidentally caused while using his motorcycle. The fire caused $11,000 worth of damage for which the insured parties were reimbursed by their own fire insurer. Plaintiff's policy limit was $5,000 and the policy covered the cost of defense and indemnity for occurrences covered by the policy. Defendant rejected the fire insurer's offer to settle its subrogated claim against plaintiff for $5,000, made in response to defendant's offer to settle for $3,000. Although defendant had accepted the $11,000 figure as the amount for which plaintiff was potentially liable for the fire damage, it had, prior to the time it made its offer, set up a reserve fund of only$2,000 for the claim and determined that there was a 50 percent chance plaintiff would be held liable. One of the reasons for the reduced amount of $2,000 for the reserve fund was the assessment of defendant's claim manager that there was a strong possibility that defendant could avoid coverage under one of the exclusionary clauses in the policy. However, defendant did not advise plaintiff of the possible noncoverage.

On defendant's rejection of the fire insurer's settlement offer, the fire insurer sued plaintiff for $11,000. Defendant refused to undertake defense of the action on the ground of noncoverage. Plaintiff retained private counsel and, under a negotiated agreement, agreed to pay the fire insurer $3,000 plus attorney's fees. The fire insurer agreed that it would seek recovery of the balance of the claim from defendant and that plaintiff would retain any punitive damages that might be awarded. The trial court directed a verdict for plaintiff on the issue of compensatory damages, and the jury awarded him $150,000 punitive damages.

The court of appeal affirmed. The court said that an insurer must defend a suit which seeks damages potentially within the coverage of the policy. The court noted that the obligation to defend is measured by the terms of the policy and the allegations of the complaint against the insured, and that where the complaint reveals potential liability within the policy, the duty to defend arises (*100 Cal. App. 3d 739, 753)* . Applying these rules to the evidence, the court held that there was a potential liability under the policy and that defendant had a duty to defend (*100 Cal. App. 3d 739, 753)* . It further held that the duty to defend, where it exists, exists at the prelitigation as well as at the litigation stages (*100 Cal. App. 3d 739, 755)* .

[b] Insurer Ascertained Facts Giving Rise to Potential Liability

The factual background of ***Gray v. Zurich Ins. Co.*** *(1966) 65 Cal. 2d 263, 54 Cal. Rptr. 104, 419 P.2d 168* , is discussed in *§ 120.50[3][a]*. In reversing the judgment for defendant insurer, the Court said that since modern procedural rules focus on the facts of a case rather than on the theory of recovery in the complaint, the duty to defend should be fixed by the facts which the insurer learns from the complaint, the insured, or other sources and that an insurer, therefore, bears a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy (*65 Cal. 2d 263, 276-277)* . The Court held that the complaint itself in the third-party action, as well as the facts known to the insurer, sufficiently apprised the insurer of the possibility of recovery under the policy (*65 Cal. 2d 263, 277)* .

Mullen v. Glens Falls Ins. Co. *(1977) 73 Cal. App. 3d 163, 140 Cal. Rptr. 605* , was an action against an insurance company brought by an injured party who had recovered a judgment against defendant's insured in a prior action which defendant allegedly had wrongfully refused to defend. The insured had assigned to plaintiff all rights which he might have against the insurer for its refusal to defend. Defendant had issued a comprehensive personal liability policy to Joe and Dorothy Santos which named the Santoses as the insureds and included as additional insureds all residents of their household who were related to, or were under the age of 21 years and in the care of, either of them. Under the terms of the policy, the insureds' minor son, Anthony, who was living with them, was an additional insured. The policy required the insurer to pay on behalf of the insured all sums which the insured should become legally obligated to pay as damages because of bodily injury or property damage caused by an occurrence and to defend any suit seeking such damages. "Occurrence" was defined as including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured. Excluded from coverage was bodily injury or property damages arising out of the ownership, maintenance, operation, use,

loading, or unloading of any car or out of a business pursuit of the insured.

Plaintiff was a service station attendant who had been struck with a tire iron by Anthony Santos. Plaintiff filed a complaint against Anthony and against Gary Witt and Gary's father, Paul Witt, to recover compensatory and punitive damages for personal injuries. The complaint contained four causes of action. The first alleged that Paul and Gary were the owners of a specified car, that on a specified date Gary and Anthony "drove, operated, maintained, propelled, controlled, and parked" the car at a service station, and that as a direct and proximate result thereof, plaintiff received certain specified personal injuries when Anthony negligently struck plaintiff's left arm as plaintiff was loading the car with gas. The second and third causes of action alleged that, at the time of the negligent act described in the first cause of action, Anthony was an employee of Paul and Gary and was acting in the course and scope of his employment. The fourth cause of action alleged that while plaintiff was in the process of loading the car with gas, he was "intentionally assaulted and struck on the left arm" by Anthony.

Relying on the allegations in the third-party complaint and the policy provisions, defendant, without investigating the facts, denied coverage and refused to defend the insured. That action resulted in a judgment against Anthony for $16,144 general damages and $5,000 punitive damages. The action against the insurer was submitted to the trial court on an agreed statement of facts and resulted in a judgment for defendant insurer.

The court of appeal reversed with instructions to the trial court to take evidence solely on the issue of damages. The court held that an insurance company must defend any lawsuit brought against its insured which seeks damages potentially within the coverage of the policy and, quoting from *Gray v. Zurich Ins. Co. (1966) 65 Cal. 2d 263, 276-277* , said that since modern procedural rules focus on the facts of a case rather than the theory of recovery in the complaint, the duty to defend should be fixed by the facts which the insurer learns from the complaint, the insured, or other sources, and that an insurer bears a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy (*73 Cal. App. 3d 163, 169-170*). The court said that, at the time defendant refused the defense of Anthony, it possessed factual information which gave rise to potential liability under the policy. Defendant knew that the use of the car had no causal connection with plaintiff's injuries, that the injuries were the result of a fight, and that, for all defendant knew, the fight had been started by plaintiff who was struck by Anthony in self-defense (*73 Cal. App. 3d 163, 170)* . The court said that injuries resulting from acts of self-defense are not "intended" or "expected" as those terms are customarily used in insurance policies and that those terms exclude from coverage only injuries and damages resulting from acts involving an element of wrongfulness or misconduct on the part of the insured and not acts otherwise intentionally performed (*73 Cal. App. 3d 163, 170-171)* .

[c] Insurer's Duty to Defend Is Broader Than Its Duty to Indemnify

Eichler Homes, Inc. v. Underwriters at Lloyd's, London *(1965) 238 Cal. App. 2d 532, 47 Cal. Rptr. 843* , was an action to determine whether defendant insurers were, under insurance certificates issued by them, obligated to defend plaintiff, their insured, a builder and seller of homes, in third-party lawsuits brought against plaintiff. The suits resulted from the rupture and leaking of radiant heating systems installed by plaintiff in the homes that it had built and sold. The trial court entered judgment declaring that defendants were obligated to defend certain of the actions and were liable for attorney's fees, court costs, and expenses incurred by plaintiff because of defendants' failure to accept the defense of those claims.

The court of appeal affirmed. The insurance certificates provided coverage for loss sustained or incurred by plaintiff as a result of any liability imposed by law or loss of, damage to, or destruction of property of others arising from any cause whatsoever out of the operations, activities, work, and/or business of the assured. The certificates also required defendant to defend all claims or suits for such injury or damage for which the assured was alleged to be liable. Excluded from coverage were claims for repairing or replacing any defective product or part manufactured, sold, or supplied by the assured and the cost of repair or replacement, for the loss of use of any such defective product or part, and for damage to the particular part of any property on which the assured was working that was caused by the faulty

manner in which the work was performed. The court pointed out that the claims against plaintiff for which a duty to defend was adjudged to exist alleged damage (impairment of market value of homes, damage to real property, and damage to other personal property) that was entirely unrelated to damage resulting from the cost of repairs and replacement of defective products (the heating systems) and, hence, was a claim for a loss or damage covered by the policy. The court said that the duty to defend is broader than the duty to indemnify and that any doubt as to whether the duty exists should be resolved in favor of the insured (*238 Cal. App. 2d 532, 538)* .

[4] Additional Authorities

[a] Insurer Has Duty to Defend Against Claim Potentially Within Policy Coverage

In *Align Tech., Inc. v. Federal Ins. Co. (N.D. Cal 2009) 673 F. Supp. 2d 957* , the insured, which produced orthodontic appliances, sought defense and indemnity of cross-claims in an underlying action it had brought against a competitor for unfair competition and related claims. The cross-complaint alleged causes of action including unfair competition, defamation, and contract breach. In its denial letter, the insurer acknowledged that some of the claims in the cross-complaint fell within the policy definition of covered "personal injury," but denied coverage and defense on the ground that the "intellectual property laws or rights" ("IP") exclusion applied to preclude coverage in its entirety. The federal district court held that under California law, an insurer owes a broad duty to defend its insured against claims that create a potential for indemnity. To trigger the defense duty, there need be nothing more than a bare potential or possibility of coverage (*673 F. Supp. 2d 957, 967)* . The court also held that a single intellectual property claim does not automatically disqualify the entire suit from coverage. In this case, the "IP" exclusions did not conclusively apply to all the alleged defamation in the cross-complaint; and the insurer breached its duty to defend by declining coverage (*673 F. Supp. 2d 957, 968-972)* .

In *Hyundai Motor America v. National Union Fire Ins. Co. (9th Cir. 2010) 600 F.3d 1092* , the insured automobile manufacturer offered on its website two interactive features that infringed on another company's patents. The CGL policy covered "advertising injury," including among other things, "misappropriation of advertising ideas or style of doing business." The insurer refused to defend the underlying action for patent infringement, asserting that no advertising injury was alleged. In the subsequent action by the insured against the insurer, the federal district court granted summary judgment to the insurer, holding that patent infringement is not an advertising injury. The Ninth Circuit Court of Appeals reversed, holding that the infringement claims constituted "misappropriation of advertising ideas" within the scope of the advertising injury clause. The insurer therefore had a duty to defend (*600 F.3d 1092, 1104)* . The Court of Appeals noted that both it and California courts have rejected past claims that a patent infringement constitutes an advertising injury, but stated that a contextual analysis applies, recognizing that infringement of a patented advertising method could constitute a misappropriation of advertising ideas, as in this case (*600 F.3d 1092, 1101)* .

In *Rojo v. Kliger (1990) 52 Cal. 3d 65, 87-88, 276 Cal. Rptr. 130, 801 P.2d 373* , a diversity action brought in federal district court, the insured alleged breach of contract and sought declaratory relief against the insurer under a CGL policy containing a "personal injury liability" and "advertising injury" clause. The underlying complaint against the insured, brought by the insured's competitor in software products, stated causes of action for false advertising and unfair competition. The bases of the complaint involved the insured's alleged representations regarding the technological architecture of its own products; but the complaint did not allege that the publication expressly identified a disparaged product or business. The question arose whether disparagement, which was covered under the "personal injury" and "advertising injury" provisions, was pleaded in the underlying complaint. The district court noted that precedent under California law suggests that disparagement by implication is actionable. Inasmuch as the complaint makes numerous allegations that suggest a claim for disparagement by implication, the claims implicated coverage for personal injury and advertising injury, triggering the insurer's duty to defend (*52 Cal. 3d 65, 88*).

In *American States Ins. Co. v. Progressive Casualty Ins. Co. (2009) 180 Cal. App. 4th 18, 102 Cal. Rptr. 3d 591* , a

self-employed trucker was driving his truck onto a construction site when the trailer attached to the truck hit and injured a pedestrian. The driver was the sole owner and operator of his truck; a trucking company was the sole owner of the trailer. The driver was hauling dirt under an agreement with the trailer owner, which had an oral agreement with the grading contractor on the construction project. The contractor was a named insured under a commercial automobile policy; the general contractor and developer were additional insureds. The underlying suit by the injured person alleged in part a cause of action for motor vehicle negligence against the contractor, the general contractor, and the developer, claiming that they employed the driver and that the driver and the trailer owner were their agents. It also claimed that they were liable for failing to take necessary safety precautions at the construction site entrance. The driver and trailer owner cross-complained against each other and the contractor/developer defendants, alleging that those defendants were vicariously liable. The trial court denied a motion for summary judgment brought by the contractor/developer defendants, finding triable issues of material fact concerning, among other things, whether the peculiar risk doctrine applied. The contractor's insurer then brought a declaratory relief action concerning whether the insurers of the driver and trailer owner had a duty to defend the contractor/developer defendants in the underlying suit. The trial court found as a matter of law that the truck/trailer insurers did not have a duty to defend the contractor/developer defendants, and that the peculiar risk doctrine did not apply. The appellate court reversed with respect to the truck/trailer insurers' duty to defend, concluding that the contractor/developer defendants were potentially liable for the accident under the vicarious liability theory of the peculiar risk doctrine. Therefore, the truck/trailer insurers owed them a duty to defend, which was triggered by the potential vicarious liability (*180 Cal. App. 4th 18, 32)* .

In *State Farm Fire and Casualty Co. v. Superior Court (2008) 164 Cal. App. 4th 317, 78 Cal. Rptr. 3d 828* , the insured under a homeowner's policy threw a person into a swimming pool, intending to get him wet, but by mistake did not throw hard enough, so that the person landed on the cement step and suffered injuries. In the action for damages for personal injuries and declaratory relief brought by the real party in interest against the insured and his insurer, the trial court ruled that the insurer owed a duty to defend. The insurer filed a petition for writ of mandate seeking an order directing the trial court to vacate its order and enter a judgment declaring that it had no duty to defend. The appellate court affirmed, holding that an insurer has a duty to defend an insured when facts give rise to the potential for coverage. Because the policy covered damages for injuries arising from an "accident," and that word was not defined, the potential for coverage existed, and the insurer had a duty to defend (*164 Cal. App. 4th 317, 323-329)* .

In *Frontier Oil Corp. v. RLI Ins. Co. (2007) 153 Cal. App. 4th 1436, 63 Cal. Rptr. 3d 816 , rev. denied, 2007 Cal. LEXIS 12848 (2007)* , the underlying complaints against the insured alleged that it conducted oil and gas exploration, production, processing, and storage activities at a certain drill site, which resulted in the release and discharge of pollutants that caused plaintiffs personal injury. The complaints alleged damage of a nature and kind covered by the "pollution incident" coverage clause in the commercial general liability policy, and did not foreclose the possibility that the damage was caused by a sudden and accidental release. They therefore created a potential for coverage under the policy. The potential for coverage was sufficient to establish the insurer's duty to defend (*153 Cal. App. 4th 1436, 1467-1468)* .

In *Standard Fire Ins. Co. v. Spectrum Cmty. Ass'n (2006) 141 Cal. App. 4th 1117, 46 Cal. Rptr. 3d 804 , rev. denied, 2006 Cal. LEXIS 12875 (2006)* , a condominium association brought an action against the developers and contractors for multiple causes of action based on construction defects. The insurer that had issued an occurrence-based commercial general liability policy covering the construction project for approximately ten months filed a complaint for declaratory relief seeking a determination that it had no duty to defend in connection with the construction-defect litigation. The trial court granted summary judgment for the insurer; the condominium association appealed. The court of appeal reversed, holding that the alleged property damage occurred at least in part during the policy period. Moreover, although the condominium association was not formed until after the policy was canceled and therefore owned no property until after the damage occurred, the critical question was when the property damage occurred (*141 Cal. App. 4th 1117, 1130-1131)* .

Atlantic Mut. Ins. Co. v. J. Lamb, Inc. (2002) 100 Cal. App. 4th 1017, 123 Cal. Rptr. 2d 256 , involved consolidated

cases among the insured and two successive insurers, regarding potential coverage under the policies and rights of equitable subrogation and equitable contribution between the insurers. With respect to the coverage issue, the court of appeal reversed summary judgment for the insurer in its declaratory relief action. The underlying federal suit against the insured sought declaratory relief regarding the enforceability of a patent and stated causes of action for unfair competition and interference with prospective advantage. The complaint in that suit alleged that the insured had contacted the plaintiff's customers, telling them that plaintiff was infringing its patent and threatening legal action. The court in this case held that a liability policy potentially covered the underlying claim under the clauses covering personal injury. "Personal injury" was defined to mean "injury other than 'bodily injury,' arising out of one or more of the following offenses: *... oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services*" (italics added by court). The court distinguished this holding from its prior holding in *Truck Ins. Exch. v. Bennett (1997) 53 Cal. App. 4th 75, 61 Cal. Rptr. 2d 497* , because in this case the policy language expressly went beyond coverage for purely defamatory statements to also include the disparagement of a party's business or products (*100 Cal. App. 4th 1017, 1032-1037)* .

In *La Jolla Beach & Tennis Club, Inc. v. Industrial Indem. Co. (1994) 9 Cal. 4th 27, 36 Cal. Rptr. 2d 100, 884 P.2d 1048* , the underlying complaint against the employer alleged that the employee had suffered emotional distress due to wrongful termination in violation of public policy. The employer's worker's compensation insurer refused to defend the action and the employer brought a bad faith action against the workers' compensation insurer. The Supreme Court held that while the insurer has a duty to defend when the claim is potentially covered, to protect the reasonable expectation of the insured (*9 Cal. 4th 27, 37)* , a possible future claim based on similar factual allegations is not sufficient to trigger the duty to defend. The test is "whether the underlying action for which defense and indemnity is sought potentially seeks relief within the coverage of the policy." Therefore, the workers' compensation insurer had no duty to defend the tort action merely because the plaintiff might later file a covered workers' compensation claim (*9 Cal. 4th 27, 44)* .

In *Horace Mann Ins. Co. v. Barbara B. (1993) 4 Cal. 4th 1076, 17 Cal. Rptr. 2d 210, 846 P.2d 792* , discussed in *§ 120.109[3][a]*, the underlying complaint alleged that a teacher "negligently, carelessly, recklessly, and wantonly engaged in sexual and nonsexual acts with the minor plaintiff." The teacher had previously plead nolo contendere to one count of committing lewd acts with a minor. The school's insurer sought declaratory relief that it had no duty to defend or indemnify the teacher because his acts were intentional under *Ins. Code § 533*. The trial court agreed and granted summary judgment for the insurer, and the court of appeal affirmed. The Supreme Court reversed, ruling that the teacher's conviction did not eliminate the insurer's duty to defend against other allegations of misconduct that did not amount to criminal molestation (*4 Cal. 4th 1076, 1083)* . The test is not whether noncovered acts predominate in the third party action, but rather whether there is any potential for liability under the policy (*4 Cal. 4th 1076, 1084)* . In this case, the possibility of a duty to indemnify remained because some of the alleged acts arose from the teacher's interaction with students in the course of his educational activities, and conceivably could support a finding of negligence. Since the parties disputed whether the insured's alleged misconduct was a part of a proven sexual molestation, or whether instead was independent of the molestation and so potentially within policy coverage, summary judgment was improper (*4 Cal. 4th 1076, 1085)* . The Court noted, however, that in many cases the plaintiff's allegations of molestation and other misconduct may be "inseparably intertwined" and therefore not separable for purposes of the insurer's defense obligation (*4 Cal. 4th 1076, 1085, 1087)* . See also *Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co. (1993) 14 Cal. App. 4th 1595, 1608, 18 Cal. Rptr. 2d 692* (allegedly negligent conduct that was part of a consistent course of sexual harassment in an employment setting was inseparable from the intentional wrongful acts and did not give rise to a duty to defend).

In *El-Com Hardware, Inc. v. Fireman's Fund Ins. Co. (2001) 92 Cal. App. 4th 205, 111 Cal. Rptr. 2d 670* , a fastener manufacturer included in one of its products a handle for which another company claimed to own a patent. That company brought an action for "trade dress" infringement against the fastener manufacturer, which tendered defense to its commercial general liability (CGL) policy carrier. The insurer refused to defend because the claim did not involve trade dress infringement, and even if it did, the infringement did not occur in the course of the insured's advertising

activities. The insured sued the insurer for breach of contract, breach of the duty to defend, and breach of the covenant of good faith and fair dealing, based on the insurer's failure to defend the trade dress claim under the CGL advertising injury liability coverage. The trial court entered summary judgment for the insurer, finding that it owed no duty to defend, because the third party's damages from the insured's alleged trade dress infringement arose not from the insured's advertising activities, but from its copying and selling the allegedly infringing handle. The court of appeal reversed, holding that in light of the complaint's allegations for trade dress infringement, certain extrinsic evidence known to the insurer when the insured tendered its defense of the claim implicated potential advertising-injury liability coverage. The extrinsic evidence showed that the product was possibly depicted in a sales catalog (that is, advertised), which was distributed prior to the suit. Therefore, the insurer had a duty to defend (*92 Cal. App. 4th 205, 215-219)* .

In *Barnett v. Fireman's Fund Ins. Co. (2001) 90 Cal. App. 4th 500, 108 Cal. Rptr. 2d 657* , a medical practice management company, which was the named insured under a comprehensive general liability (CGL) policy, and a professional medical corporation (filing a separate complaint in intervention) sued two of the executive officers and one of the employees of the management company, alleging breach of fiduciary duty, breach of the implied covenant of good faith and fair dealing, and related torts. Thesuit was based on comments made by the defendants criticizing the restructuring of a subsidiary management company on the basis that the changes compromised patient care and violated California insurance laws. The defendants asked the CGL policy insurer to defend and indemnify them against both complaints, as additional insureds under the policy, asserting that the allegations of the complaint created a potentially covered claim for personal injury or advertising injury within the meaning of the policy. When the insurer declined to defend or indemnify them, the defendants in the underlying action filed suit against the insurer for breach of the contractual and good faith obligations owed to them under the policy. The court of appeal, reversing dismissal of all claims following the sustaining of a demurrer, held that if a person seeks coverage as an additional insured under a policy issued to a corporation as the named insured, an officer or employee of the corporation is entitled to a defense if he or she was acting in an insured capacity when allegedly engaged in the injury-producing conduct. Because the complaint alleged that the executive officers were seeking to further the corporation's interests when they criticized the restructuring of the subsidiary management company, it is possible that they were engaged with respect to their duties as executive officers when they committed the alleged misconduct. The court therefore held that for purposes of surviving a demurrer, a potential for coverage existed with respect to the officers (although the policy excluded from coverage any claim against an employee for defaming the named insured) (*90 Cal. App. 4th 500, 512-513)* .

In *Alpine Ins. Co. v. Planchon (1999) 72 Cal. App. 4th 1316, 85 Cal. Rptr. 2d 777* , homeowners sued a roofing company for damages arising from the destruction of their home by fire. While the defendant was repairing the homeowners' roof, its standard pick-up truck, which was modified with a hydraulic scissors lift, was overloaded with gravel. The truck bed consequently toppled into burning propane, causing the fire. The defendant tendered defense to its commercial general liability insurer. The insurer accepted with reservation of rights, then brought an action for declaratory relief, seeking a declaration that it had no duty to defend or indemnify. The policy provisions in question excluded coverage for property damage arising out of "ownership, maintenance, use or entrustment to others of any ... auto ... owned or operated by or rented or loaned to any insured." However, the definition of an "auto" specifically did not include "mobile equipment." The trial court found that the pickup truck was mobile equipment rather than an "auto" and therefore that the policy covered the claim, and the insurer appealed. The court of appeal affirmed the trial court's factual finding that the vehicle was sufficiently modified and used in such a fashion as to transform it into "mobile equipment" rather than a standard pickup truck. The insurer therefore had a duty to defend the underlying lawsuit (*72 Cal. App. 4th 1316, 1323-1324)* .

In *Amato v. Mercury Cas. Co. (1993) 18 Cal. App. 4th 1784, 1789, 23 Cal. Rptr. 2d 73* , an insurer breached its duty to defend a permissive user who was sued by his mother-in-law for injuries resulting from an auto accident caused by the permissive user. Although the policy excluded liability coverage for bodily injury to a resident relative of an insured, which would exclude coverage for injury to the mother-in-law, the insurer possessed evidence suggesting that the insured permissive user did not reside with the mother-in-law. This information created a potential for coverage and triggered the duty to defend, even though the jury ultimately found that the two parties did in fact reside together.

In *Smith Kandal Real Estate v. Continental Cas. Co. (1998) 67 Cal. App. 4th 406, 79 Cal. Rptr. 2d 52* , professional liability policies covered a licensed real estate broker partnership as the named insured. The policies covered claims against the partnership for negligence and errors or omissions in rendering or failing to render professional services as a real estate broker, agent, or salesperson, subject to specific exclusions in policy. "Exclusion O" excluded coverage for claims arising from the sale of any property owned by "any entity in which you have a [greater than 10 percent] financial interest." Another exclusion stated that the insurance did not apply to claims arising out of activities performed by or on behalf of Ventana Ranch, an enterprise in which one of the partners held a financial interest. In the underlying action plaintiffs brought a claim against the partnership acting as their real estate broker in the purchase of seven homes as part of a tax-deferred exchange of homes. They alleged that as the result of the partnership's negligence in structuring the sale, they lost the tax benefits they had sought by the exchange. The seller of the homes was Ventana Ranch. The insurer asserted that the exclusions mentioned above precluded coverage. The court of appeal reversed judgment in favor of the insurer, holding that the plaintiffs in the underlying action could potentially recover against the partnership by proving that the acts performed on their behalf were negligent, without proving that the negligent conduct was also designed or intended to benefit or be on behalf of Ventana Ranch. Because this potential exists, the insurer has a duty to provide a defense, regardless whether the Ventana Ranch exclusion ultimately provides grounds for the insurer to refuse to indemnify the partnership (*67 Cal. App. 4th 406, 422)* .

In *Republic Indem. Co. v. Superior Court (1990) 224 Cal. App. 3d 492, 273 Cal. Rptr. 331* , the insurer sought a writ of mandate to overturn the trial court's order granting summary adjudication for the insured on the issue of the insurer's duty to defend an underlying wrongful termination action under an employer's liability policy. The court of appeal rejected the insurer's contention that *Ins. Code § 533* precluded a duty to defend as a matter of law; the court held that an insurer is not absolved from the duty to defend, merely because indemnification for that conduct is forbidden by law or contract, and that the insurer is excused from defending anaction premised on willful conduct only if the policy expressly excludes that duty, or if the insured does not reasonably expect a defense (*224 Cal. App. 3d 492, 497-498)* . The court noted that it need not determine the insured's reasonable expectations in this case because the underlying action was not premised entirely on willful conduct, in that the third party could potentially recover from the insured on the basis of the insured's unreasonable, rather than willful, conduct (*224 Cal. App. 3d 492, 501-502)* .

Garriott Crop Dusting Co. v. Superior Court (1990) 221 Cal. App. 3d 783, 270 Cal. Rptr. 678 , arose from a third party action against the insured seeking damages for soil contamination on plaintiff's property. The third party purchased the property some 15 years after the insured allegedly contaminated the soil by polluting the water supply on adjacent property. The insured's current insurer brought a declaratory relief action against several parties, including several insurers under successive policies issued over the 15-year period. The trial court granted summary judgment in favor of the insurer that had a policy in force during the commission of the wrongful acts and ensuing damage, on the ground that the third party sustained no injury during the policy period. The court of appeal (granting the insured's petition for writ of mandate) vacated the summary judgment order, holding that that policy, which provided coverage for damages "caused by an occurrence," defined as "physical injury to or destruction of tangible property ... during the policy period," required that insurer to indemnify and defend the insured, despite that fact that the third party claimant did not own the property at the time of the occurrence (*221 Cal. App. 3d 783, 793-795)* .

In *State Farm Fire & Cas. Co. v. Eddy (1990) 218 Cal. App. 3d 958, 267 Cal. Rptr. 379* , a third party complaint alleged negligent and intentional torts arising from the defendant insured's transmission of a venereal disease. The insurer filed a declaratory relief action to determine its duty to indemnify and defend under the insured's homeowner's policy. The court of appeal reversed a summary judgment that the trial court had granted in favor of the insurer, holding that the insurer had a duty to defend based on its potential liability for the insured's negligent conduct (*218 Cal. App. 3d 958, 965-966)* .

In *Sunseri v. Camperos Del Valle Stables, Inc. (1986) 185 Cal. App. 3d 559, 230 Cal. Rptr. 23* , the insurer refused to defend the insured in an action brought by an injured third party, who later obtained an assignment from the insured of

rights against the insurer and then entered into a stipulated judgment with the insured. Subsequently, the third party brought an action against the insurer for the amount of the stipulated judgment, and the insurer filed a motion to set aside the stipulated judgment on grounds of fraud and collusion. The trial court denied the motion; the insurer appealed. The court of appeal affirmed, holding that the insurer bears a duty to defend its insured whenever it ascertains factsthat give rise to a potential of liability under the policy. The insurer's failure to bring a declaratory relief action, or to defend the action under a reservation of rights, rendered it susceptible to liability for the amount of the stipulated judgment between the insured and the third party (*185 Cal. App. 3d 559, 561-562)* .

In *CNA Cas. of Cal. v. Seaboard Sur. Co. (1986) 176 Cal. App. 3d 598, 222 Cal. Rptr. 276* , the court of appeal found that the factual allegations in the complaint against the insured created a potential for coverage under the policy, and concluded that a duty to defend therefore arose, notwithstanding that the allegations might have been unmeritorious (*176 Cal. App. 3d 598, 607-609)* .

In *Central Mutual Ins. Co. v. Del Mar Beach Club Owners Assn. (1981) 123 Cal. App. 3d 916, 176 Cal. Rptr. 895* , the court of appeal reversed a summary judgment in favor of plaintiff insurers in an action for a declaration of rights under liability insurance policies issued to defendants, developers of residential real property. The policies excluded coverage for various forms of product liability. The trial court held that the complaint in the underlying action alleged claims that were within the exclusions contained in the policies and that plaintiffs had no duty to defend. In reversing, the court of appeal held that a liberal reading of the complaint revealed additional claims that presented a potential for liability that was not subject to the exclusions and for which the insurers should have provided a defense (*123 Cal. App. 3d 916, 928)* .

[b] Insurer Ascertained Facts Giving Rise to Potential Liability

In *CNA Cas. of Cal. v. Seaboard Sur. Co. (1986) 176 Cal. App. 3d 598, 222 Cal. Rptr. 276* , the court of appeal rejected the insurer's contention that the complaint's "Antitrust" title precluded any duty to defend. The court instead examined the factual allegations contained in the complaint, and concluded that because those allegations could have been the basis of recovery covered by the policy, a duty to defend arose (*176 Cal. App. 3d 598, 607-609)* .

[c] Insurer's Duty to Defend Is Broader Than Its Duty to Indemnify

In ***Food Pro Int'l, Inc. v. Farmers Ins. Exch.*** *(2008) 169 Cal. App. 4th 976, 89 Cal. Rptr. 3d 1* , a food processing and distribution consulting firm tendered defense of a tort action to its insurer under a CGL policy. The underlying action arose when the insured's employee, acting in the capacity of a consultant during the process of relocating the client's food-processing plant to another city, noticed that an electrical contractor hired by the client disconnected the electrical system for a fruit extruder machine while leaving a large hole in the floor. The insured's employee apprised the client's mechanics so that they would address the problem. The mechanics covered the hole but did not secure the covering; and a week later the electrical contractor's foreman fell through the hole to the lower floor, although he had been aware of the hole when he was at the site the previous week. The CGL contained an exclusion entitled "Exclusion--Engineers, Architects or Surveyors Professional Liability," which the insurer contended applied to preclude a duty to defend. The trial court found for the insurer, holding that the bodily injury in the underlying action arose out of the insured's supervisory services, which was excluded. The court of appeal reversed, holding that the duty to defend is both separate from and broader than a duty to indemnify (*169 Cal. App. 4th 976, 985)* . The court construed the exclusion narrowly, noting that to do otherwise would render the CGL policy inapplicable to any incident that occurs while the insured is on a project site as an engineering consultant. Because the insured is an engineering firm, its general liability policy would be essentially useless. To prevail on a claim for breach of duty to defend, the insured need not prove coverage, but only the possibility of coverage at the time the claim is raised (*169 Cal. App. 4th 976, 992)* .

The factual background of *Miller v. Elite Ins. Co. (1980) 100 Cal. App. 3d 739, 161 Cal. Rptr. 322* , is discussed in *§ 120.50[4][a]*. In affirming the judgment for plaintiff, the court of appeal said that if there is a doubt as to whether the

insurer must defend, the doubt should be resolved in the insured's favor (*100 Cal. App. 3d 739, 753)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGood Faith & Fair DealingDuty to DefendInsurance LawGeneral Liability InsuranceCoverageGeneral OverviewInsurance LawGeneral Liability InsuranceObligationsDefenseInsurance LawGeneral Liability InsuranceObligationsIndemnificationInsurance LawGeneral Liability InsurancePersons InsuredThird Parties

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 120 INSURANCE
PART II. FORMS
B. Coverage and Exclusions
1. General Exclusions

12-120 California Points & Authorities § 120.51

§ 120.51 One of Several Causes of Action Alleged in Third-Party Complaint Was Covered by Policy

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [IS *OR* WAS] BOUND TO DEFEND THE ACTION BECAUSE ONE OF SEVERAL CAUSES OF ACTION ALLEGED IN THE THIRD-PARTY COMPLAINT AGAINST THE INSURED IS COVERED BY THE POLICY.

A. One of Several Causes of Action Alleged in Third-Party Complaint Covered by Policy. If one of several causes of action alleged in the third-party complaint against the insured is covered by the policy, the insurer is bound to defend the action (*Blackfield v. Underwriters at Lloyd's, London (1966) 245 Cal. App. 2d 271, 275, 53 Cal. Rptr. 838*).

B. Obligation to Defend Extends to Entire Action Involving Covered and Uncovered Claims. If an insurer has a duty to defend, the obligation generally applies to the entire action, even though the suit involves both covered and uncovered claims or a single claim only partially covered by the policy (*Presley Homes, Inc. v. American States Ins. Co. (2001) 90 Cal. App. 4th 571, 575, 108 Cal. Rptr. 2d 686*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's the contention that an insurer has no duty to defend its insured under an insurance policy. The basis of these points and authorities is that at least one of several causes of action alleged in the third-party complaint against the insured is covered by the policy, and that if an insurer has a duty to defend, the obligation generally applies to the entire action, even though the suit involves both covered and uncovered claims.

This form may be used by an insured in various procedural contexts, such as in memoranda supporting or opposing a motion for summary judgment, in a trial brief, or in an appellate brief. For further discussion, see *§ 120.50[2][a]*.

These points and authorities may be combined, if appropriate, with other points and authorities that contend that the insured has wrongfully refused to defend its insured in a third-party action [*see § 120.50* et seq.].

This form may be used to oppose the points and authorities *set forth in § 120.30* et seq.

For references to related Pleading and Practice chapters, see *§ 120.50[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel would refer to the specific cause of action in the complaint in the third party action that is covered by the complaint. Reference to pleading should be clear enough to assist the court in locating the applicable cause of action, for example, "the Second Cause of Action of the Complaint, alleging negligence by Defendant Corporation."

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.20* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing an insurer's motion for summary judgment or summary adjudication when the evidentiary facts clearly support the contention and disclose triable issues of any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.50[2][b]*.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] One of Several Causes of Action Alleged in Third-Party Complaint Covered by Policy

Blackfield v. Underwriters at Lloyd's, London *(1966) 245 Cal. App. 2d 271, 53 Cal. Rptr. 838* , was an action by an insured, a builder and seller of tract homes, to determine whether defendant insurers were obligated to defend a third-party action against it. The third party (a husband and wife) had purchased one of the tract homes. They sued the insured for damages, alleging that the insured had so defectively constructed the foundation of their home and compacted the fill on which it was placed that the foundation had settled unevenly, causing the house to slant, thestucco portion of the house to crack, and the windows and sliding doors not to open or close properly. The complaint separately alleged seven theories of liability. The policy provisions in question were identical to those involved in *Eichler Homes, Inc. v. Underwriters at Lloyd's, London (1965) 238 Cal. App. 2d 532, 47 Cal. Rptr. 843* [*see § 120.50[4][c]*]. The trial court rendered judgment for plaintiff, and defendants appealed. The evidentiary record before the court of appeal consisted only of the second amended complaint filed in the third-party action, defendants' denial of coverage and refusal to defend, and the insurance policy.

The court of appeal modified the judgment to strike a paragraph relating to the issue of indemnity and affirmed the judgment, as modified. With respect to the duty to defend, the court pointed out that the parties agreed that the

obligation to defend must be measured by comparing the allegations of the third-party's pleading with the terms of the insurance policy (*245 Cal. App. 2d 271, 272*). The court stated that if the allegations of the claimant's complaint would support a recovery on a risk covered by the insurer's policy, then the duty to defend is present (*245 Cal. App. 2d 271, 274*). The court held that at least one of the counts in the third-party complaint was for damage to those parts of the house that were not defective, and hence was damage apparently within the policy coverage. It found it unnecessary to review the remaining counts of that complaint, since the insurer is bound to defend the action if one of several causes of action alleged against the insured is covered by the policy (*245 Cal. App. 2d 271, 275)* .

[b] Obligation to Defend Extends to Entire Action Involving Covered and Uncovered Claims

In ***Presley Homes, Inc. v. American States Ins. Co.*** *(2001) 90 Cal. App. 4th 571, 108 Cal. Rptr. 2d 686* , a real estate developer was named as an additional insured in two contractors' policies issued by the same insurer, pursuant to endorsements amending the policy definition of the term "insured." Home buyers sued the real estate developer for construction defects. The developer cross-complained for indemnity against several subcontractors, including the two contractors whose policies had included the developer as an additional insured. With respect to the home in question, the two contractors had provided only (1) concrete foundations, driveways, walkways, and stoops, and (2) rough carpentry (framing). The developer tendered the defense to the insurer, which agreed to share in the developer's defense, but denied having a duty to defend against all of the underlying claims. With respect to the framing contractor, the insurer proposed to retain separate counsel on the issues relevant to that contractor. The parties also discussed the possibility of the insurer's paying a percentage of the developer's defense costs based on the two contractors' work on the residence. When the parties failed to reach agreement, thedeveloper sent the insurer a letter demanding that it provide a "full and complete defense" and agree to reimburse the developer for attorney's fees and costs incurred. The insurer contended that it had a duty to defend the developer against only the claims relating to the two contractors' work. The third-party suit settled. Although the developer did not contribute to settlement, it did incur legal costs. The insurer settled the developer's indemnification claims for defense costs attributable to the two contractors' work. The developer sued the insurer seeking both damages and declaratory and injunctive relief. The insurer cross-complained against the developer for declaratory relief. Both parties moved for summary adjudication of issues. The trial court denied the developer's motion, granted the insurer's motion, and directed a judgment be entered for the insurer on each of the developer's causes of action. The insurer dismissed the cross-complaint, and the developer appealed the trial court's judgment.

The court of appeal reversed, noting that although the endorsements limited the coverage for the developer to "liability" arising from the insured contractors' work, nothing in either the policies or the endorsements limited the insurer's obligation to provide the developer with a defense. If an insurer has a duty to defend, the obligation generally applies to the entire action, even though the suit involves both covered and uncovered claims or a single claim only partially covered by the policy (*90 Cal. App. 4th 571, 575)* . Citing *Buss v. Superior Court (1997) 16 Cal. 4th 35, 48-49, 65 Cal. Rptr. 2d 366, 939 P.2d 766* , the court further stated that an insurer's duty to defend the entire action is based on public policy, not the terms of the parties' contract (*90 Cal. App. 4th 571, 576)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGood Faith & Fair DealingDuty to DefendInsurance LawGeneral Liability InsuranceObligationsDefenseInsurance LawGeneral Liability InsurancePersons InsuredThird Parties

California Points & Authorities

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CHAPTER 120 INSURANCE
PART II. FORMS
B. Coverage and Exclusions
1. General Exclusions

12-120 California Points & Authorities § 120.52

§ 120.52 Third-Party Complaint Supports Partial Recovery Under Policy

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [IS *or* WAS] BOUND TO DEFEND THE ACTION BECAUSE THE COMPLAINT SUPPORTS AT LEAST PARTIAL LIABILITY UNDER THE POLICY.

Third-Party Complaint Supports Partial Recovery Under Policy. If the complaint against the insured seeks recovery of damages on a liability covered by the policy, the duty to defend exists even though the insurer is not liable under its policy for all the damages sought (*Hogan v. Midland Nat'l Ins. Co. (1970) 3 Cal. 3d 553, 563, 91 Cal. Rptr. 153, 476 P.2d 825*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's the contention that an insurer has no duty to defend its insured under an insurance policy. The basis of these points and authorities is that the insurer has a duty to defend because the complaint against the insured seeks recovery of damages on a liability covered by the policy, even though the insurer is not liable under its policy for all the damages sought.

This form may be used by an insured in various procedural contexts, such as in memoranda supporting or opposing a motion for summary judgment, in a trial brief, or in an appellate brief. For further discussion, see *§ 120.50[2][a]*.

These points and authorities may be combined, if appropriate, with other points and authorities that contend that the insured has wrongfully refused to defend its insured in a third-party action [*see § 120.50* et seq.].

This form may be used to oppose the points and authorities *set forth in § 120.30* et seq.

For references to related Pleading and Practice chapters, see *§ 120.50[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel would refer to the specific causes of action in the complaint in the third party action that are covered by the complaint. Reference to pleading should be clear enough to assist the court in locating the applicable cause of action or causes of action (*see, e.g., § 120.51[2][b]*).

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.20* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing an insurer's motion for summary judgment or summary adjudication when the evidentiary facts clearly support the contention and disclose triable issues of any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.50[2][b]*.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Third-Party Complaint Supports Partial Recovery Under Policy

Hogan v. Midland Nat'l Ins. Co. *(1970) 3 Cal. 3d 553, 91 Cal. Rptr. 153, 476 P.2d 825* , was an action by an insured's assignee against the insurer to recover the amount paid in satisfaction of a former judgment against the insured and the amount expended by the insured for attorneys' fees and costs in defending the third-party suit after defendant insurer had refused to defend. The insured was a manufacturer of wood processing machinery, including saws. One of its saws was purchased by the Kaufmans for use in their lumber business. The Kaufmans suffered substantial monetary loss because of defects in the saw and sued the insured. Judgment was rendered against the insured in the sum of $30,195.61, which included:

- $8,038.49 for lumber undercut by the saw,

- $7,850 for the cost of lumber deliberately overcut to prevent its rejection for undercutting and additional freight charges incident to the overcutting,

- $6,793.88 for wages and other expenses paid for periods when the saw failed to operate altogether, and

- $5,449.49 for the cost of leasing and cancelling the lease on a machine which was to be used in conjunction with the saw.

Also awarded were the cost of the saw and freight charges for shipping, but these items of damages were not involved

in the action against the insurer. The policy provided that the insurer must pay all sums which the insured should become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of defined hazards. Excluded was liability for repairing or replacing any defective products manufactured by the insured or any defective part thereof and for the loss of use of any such defective product or part thereof. The policy required the insurer to defend suits against the insured seeking damages within the policy's coverage. The trial court in the action against the insurer rendered judgment for plaintiff in the sum of $57,064.91, and the insured appealed

The Supreme Court reversed the judgment insofar as it allowed recovery for the deliberate overcutting of lumber and additional freight charges incident to the overcutting, the wages, and other expenses paid during the period the saw failed to operate, and the cost of leasing and cancelling the lease on the machine to be used in conjunction with the saw on the groundthese damages were not the result of an "accident" within the meaning of the policy (*3 Cal. 3d 553, 560-563*). However, the Court affirmed the judgment with respect to the undercut lumber, since that was the result of an "accident" within the meaning of the policy (*3 Cal. 3d 553, 559-560*). The Court also affirmed the award of attorneys' fees and costs in defending the third-party suit (*3 Cal. 3d 553, 563-564*) on the ground that the insurer was required to defend that action since the policy covered the damages suffered as a result of the undercutting (*3 Cal. 3d 553, 561, 563)* . The Court said that the rule is settled that an insurer is under a duty to defend a claim whenever the allegations of a complaint would support a recovery on a risk covered by the policy and that in the cases supporting the rule, various theories of recovery were asserted by the plaintiff, only one or more of which were within the coverage of the policy (*3 Cal. 3d 553, 563)* . The Court stated that the duty also existed in the present case since the complaint alleged facts bringing the action within the policy's coverage, that is, it alleged that the saw damaged the wood which it processed and that the damages were continuing in nature--which at least potentially asserted injury to property as the result of an accident (*3 Cal. 3d 553, 563 n.7*), although the proof at trial indicated that the insurer was not liable for some of the damages suffered by the third-party plaintiffs (*3 Cal. 3d 553, 563)* .

The Court, however, rejected plaintiff's argument that the insurer was liable for the full amount of the judgment in the third-party action because of its wrongful refusal to defend. The Court held that although the insurer was bound, in the absence of fraud or collusion, as to all material findings of fact essential to the judgment of liability of the insured in the third-party action, it was not bound by issues not adjudicated in the prior action, such as the scope of policy coverage (*3 Cal. 3d 553, 564-565)* .

It should be noted that the Court also rejected defendant's contention that the fees and costs in the third-party action should be apportioned (*3 Cal. 3d 553, 563)* and held that the insurer is liable for the total amount of the fees despite the fact that some of the damages recovered were outside policy coverage (*3 Cal. 3d 553, 564)* . The Court explained that, in its pragmatic aspect, any precise allocation of expenses in this context would be extremely difficult and, even if feasible, could be made only if the insurer produces "undeniable evidence" (*see Bertero v. National Gen. Corp. (1974) 13 Cal. 3d 43, 63, 118 Cal. Rptr. 184, 529 P.2d 608*) of the allocability of specific expenses. The insurer, having breached its contract to defend, should be charged with a heavy burden of proof of even partial freedom from liability for harm to the insured which ostensibly flowed from the breach (*3 Cal. 3d 553, 564)* .

[4] Additional Authorities

[a] Third-Party Complaint Supports Partial Recovery Under Policy

The facts and procedural background of *Eichler Homes, Inc. v. Underwriters at Lloyd's, London (1965) 238 Cal. App. 2d 532, 47 Cal. Rptr. 843* , are discussed in *§ 120.50[3][d]*. The court of appeal affirmed the lower court's judgment. The court said that the insurer's obligation to defend must be measured by the terms of the insurance policy and the pleading of the claimant who sues the insured and that if the allegations of the claimant's complaint would support recovery on a covered risk, the duty to defend is present (*238 Cal. App. 2d 532, 538)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGood Faith & Fair DealingDuty to DefendInsurance LawClaims & ContractsGood Faith & Fair DealingThird Party ClaimantsInsurance LawGeneral Liability InsuranceObligationsDefenseInsurance LawGeneral Liability InsurancePersons InsuredThird Parties

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B. Coverage and Exclusions
1. General Exclusions

12-120 California Points & Authorities § 120.53

§ 120.53 Insurer May Not Deny Recovery Without Investigating Facts

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [IS *or* WAS] BOUND TO DEFEND THE ACTION BECAUSE THE INSURER DENIED RECOVERY WITHOUT FIRST INVESTIGATING THE FACTS ON WHICH THE CLAIM WAS BASED.

Insurer Breached Duty to Investigate Facts. An insurer may not, without making an investigation of any kind, deny an insured a defense at a time when it has reason to believe that there is potential liability under the policy and then rely on the results of the third-party action and subsequent factors to prove that there was, in reality, no potential for liability in the first instance (*Mullen v. Glens Falls Ins. Co. (1977) 73 Cal. App. 3d 163, 173, 140 Cal. Rptr. 605*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's the contention that an insurer has no duty to defend its insured under an insurance policy. The basis of these points and authorities is that an insurer may not, without making an investigation of any kind, deny an insured a defense at a time when it has reason to believe that there is potential liability under the policy.

This form may be used by an insured in various procedural contexts, such as in memoranda supporting or opposing a motion for summary judgment, in a trial brief, or in an appellate brief. For further discussion, see *§ 120.50[2][a]*.

These points and authorities may be combined, if appropriate, with other points and authorities that contend that the insured has wrongfully refused to defend its insured in a third-party action [*see § 120.50* et seq.].

This form may be used to oppose the points and authorities *set forth in § 120.30* et seq.

For references to related Pleading and Practice chapters, see *§ 120.50[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. For example, in a case in which an insurer is attempting to rely on a third-party judgment against the insured based on willful misconduct to establish that there was a lack of potential liability at the time it denied defense of the third party action, counsel would refer to facts showing that the insurer was in possession of sufficient facts at the time it denied the defense to believe there was a potential liability under the policy.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.20* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing an insurer's motion for summary judgment or summary adjudication when the evidentiary facts clearly support the contention and disclose triable issues of any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.50[2][b]*.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Insurer Breached Duty to Investigate Facts

The facts and procedural background of ***Mullen v. Glens Falls Ins. Co.*** *(1977) 73 Cal. App. 3d 163, 140 Cal. Rptr. 605* , are discussed in *§ 120.50[3][c]*. In *Mullen,* the court of appeal reversed the judgment for defendant insurer. The court, quoting from *Gray v. Zurich Ins. Co. (1966) 65 Cal. 2d 263, 278, 54 Cal. Rptr. 104, 419 P.2d 168* [discussed in *§ 120.50[3][b]*], said that it could not accept the insurer's argument that the duty to defend dissolved simply because the insured was unsuccessful in his defense and because the injured party recovered on the basis of a finding of the assured's willful conduct (*73 Cal. App. 3d 163, 170, 174)* .

The court held that an insurer may not, without making an investigation of any kind, deny an insured a defense at a time when it has reason to believe that there is a potential liability under the policy and then rely on the results of the third-party action and subsequent factors to prove that there was, in reality, no potential for liability in the first instance (*73 Cal. App. 3d 163, 173)* . To hold otherwise, the court explained, would permit the insurer to refuse to defend its insured on the slightest provocation and then resort to hindsight for the justification, and this would thus force the insured to finance his or her own investigation and defense of the lawsuit and then seek reimbursement in a second lawsuit against the insurance company. This, in turn, could not only impose an undue financial burden on the persons who have purchased insurance protection, but it could deprive them of the expertise and resources available to insurance carriers in making prompt and competent investigations as to the merits of lawsuits filed against their insureds (*73 Cal. App. 3d 163, 173-174)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGood Faith & Fair DealingGeneral OverviewInsurance LawClaims & ContractsGood Faith & Fair DealingDuty to DefendInsurance LawGeneral Liability InsuranceObligationsGeneral Overview

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12-120 California Points & Authorities § 120.54

§ 120.54 Exclusionary Clause Must Be Liberally Construed in Favor of Insured

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [IS *or* WAS] BOUND TO DEFEND THE ACTION BECAUSE THAT DUTY IS ESTABLISHED WHEN, AS REQUIRED BY LAW, THE POLICY'S EXCLUSIONARY CLAUSE IS CONSTRUED IN FAVOR OF THE INSURED.

Exclusionary Clause Must Be Liberally Construed in Favor of Insured. Any ambiguity in an insurance policy is to be resolved against the insurer, and the language of an exclusionary clause must be construed liberally in favor of the insured (*Crane v. State Farm Fire & Cas. Co. (1971) 5 Cal. 3d 112, 115-116, 95 Cal. Rptr. 513, 485 P.2d 1129* ; *Morris v. Atlas Assurance Co. (1984) 158 Cal. App. 3d 8, 12-13, 204 Cal. Rptr. 95*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's the contention that an insurer has no duty to defend its insured under an insurance policy. The basis of these points and authorities is that any ambiguity in an insurance policy is to be resolved against the insurer.

This form may be used by an insured in various procedural contexts, such as in memoranda supporting or opposing a motion for summary judgment, in a trial brief, or in an appellate brief. For further discussion, see *§ 120.50[2][a]*.

These points and authorities may be combined, if appropriate, with other points and authorities that contend that the insured has wrongfully refused to defend its insured in a third-party action [*see § 120.50* et seq.].

This form may be used to oppose the points and authorities *set forth in § 120.30* et seq.

For references to related Pleading and Practice chapters, see *§ 120.50[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should:

- Refer to a specific portion of the policy that is ambiguous, making reference to any appropriate paragraph or clause number to assist the court.

- Describe how the clause is susceptible of interpretation in favor of a duty to defend.

- Conclude that under *Crane v. State Farm Fire & Cas. Co. (1971) 5 Cal. 3d 112, 115-116, 95 Cal. Rptr. 513, 485 P.2d 1129* , any ambiguity in an insurance policy is to be resolved against the insurer.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.20* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing an insurer's motion for summary judgment or summary adjudication when the evidentiary facts clearly support the contention and disclose triable issues of any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.50[2][b]*.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication indrafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Exclusionary Clause Must Be Liberally Construed in Favor of Insured

Crane v. State Farm Fire & Cas. Co. *(1971) 5 Cal. 3d 112, 95 Cal. Rptr. 513, 485 P.2d 1129* , involved construction of the exclusionary language in a homeowner's policy. The mother of a minor injured in the home of defendant's insured brought an action for declaratory relief. The insured provided child care services for plaintiff's two daughters in her home for minimal compensation ($25 per week plus groceries). Because the insured had children of her own, while she cared for plaintiff's children she was simultaneously supervising her own. The trial court ruled for defendant insurer and the plaintiff appealed.

The Supreme Court reversed. The exclusionary clause provided that coverage did not apply "to any business pursuits of an Insured, other than activities therein which are ordinarily incident to non-business pursuits." Noting that reasonable doubt as to uncertain language must be resolved against the insurer and that exclusionary language must be conspicuous, plain, and clear, and is to be construed strictly against the insurer, the Court found that at the time of the accident the insured was engaged in an activity "ordinarily incident to non-business pursuits" and that the claim was therefore covered (*5 Cal. 3d 112, 115-116)* .

In ***Morris v. Atlas Assurance Co.*** *(1984) 158 Cal. App. 3d 8, 204 Cal. Rptr. 95* , the court of appeal reversed the decision as to one of the insurers. The court noted that although personal liability clauses in a homeowner's policy usually apply to accidents incident to the home, they are construed by the courts to apply to all personal liability not falling within specific exclusions (*158 Cal. App. 3d 8, 13)* . The exclusion here covered "business pursuits of any kind conducted by any person on premises." The policy defined premises to included "out-buildings incidental" to the main dwelling (*158 Cal. App. 3d 8, 15)* . The court ruled that the restaurant was not "incidental" to the dwelling in the sense that it was not dependent on or related to the principal use of the residence (*158 Cal. App. 3d 8, 16)* . Because the business exclusion was limited to business conducted on the insured premises, the policy covered the claim at issue. The court rejected the insurer's argument that the doctrine of reasonable expectations precluded coverage, stating that the doctrine only is applicable when there exists an ambiguity which defies interpretation (*158 Cal. App. 3d 8, 16-17)* .

[4] Additional Authorities

[a] Exclusionary Clause Must Be Liberally Construed in Favor of Insured

In *Meraz v. Farmers Ins. Exch. (2001) 92 Cal. App. 4th 321, 111 Cal. Rptr. 2d 804* , the plaintiff was injured after pouring gasoline into the carburetor of a nonoperating van that was used only as toolshed and parked on the insured's property. In an assigned action brought by the plaintiff against the homeowner's policy carrier for breach of contract and bad faith after the carrier denied coverage, the trial court granted summary judgment for the insurer, based on application of the motor vehicle exclusion. The court of appeal reversed, holding that the exception to the motor vehicle exclusion for a vehicle not subject to motor vehicle registration and used only on an insured location might apply. The court stated that coverage exclusions and limitations are strictly construed against the insurer and liberally interpreted in favor of the insured (*92 Cal. App. 4th 321, 324-327)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsPolicy InterpretationAmbiguous TermsGeneral OverviewInsurance LawClaims & ContractsPolicy InterpretationAmbiguous TermsConstruction Against InsurersInsurance LawClaims & ContractsPolicy InterpretationExclusions

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12-120 California Points & Authorities § 120.55

§ 120.55 Potential Liability Is Not Conclusively Refuted by Undisputed Facts

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [IS *or* WAS] BOUND TO DEFEND THE ACTION BECAUSE THE INSURER'S POTENTIAL LIABILITY IS NOT CONCLUSIVELY REFUTED BY THE FACTS.

Potential Liability Not Conclusively Refuted by Undisputed Facts. An insurance carrier may escape its presumptive obligation to defend its insured against claims arguably covered by its policy only if undisputed facts conclusively refute any potential for liability (*Montrose Chem. Corp. v. Superior Court (1993) 6 Cal. 4th 287, 299-300, 24 Cal. Rptr. 2d 467, 861 P.2d 1153*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's the contention that an insurer has no duty to defend its insured under an insurance policy. The basis of these points and authorities is that an insurance carrier may escape its presumptive obligation to defend itsinsured against claims arguably covered by its policy only if undisputed facts conclusively refute any potential for liability.

This form may be used by an insured in various procedural contexts, such as in memoranda supporting or opposing a motion for summary judgment, in a trial brief, or in an appellate brief. For further discussion, see *§ 120.50[2][a]*.

These points and authorities may be combined, if appropriate, with other points and authorities that contend that the insured has wrongfully refused to defend its insured in a third-party action [*see § 120.50* et seq.].

This form may be used to oppose the points and authorities *set forth in § 120.30* et seq.

For references to related Pleading and Practice chapters, see *§ 120.50[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. For example, if the insurer has asserted facts whichit contends refutes any potential for liability, counsel would refer to other facts that dispute those asserted by the insurer, and point out that the insurer has not, therefore, conclusively refuted any potential for liability.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.20* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing an insurer's motion for summary judgment or summary adjudication when the evidentiary facts clearly support the contention and disclose triable issues of any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.50[2][b]*.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Potential Liability Not Conclusively Refuted by Undisputed Facts

In ***Montrose Chem. Corp. v. Superior Court*** *(1993) 6 Cal. 4th 287, 24 Cal. Rptr. 2d 467, 861 P.2d 1153* , an insured brought a declaratory relief action to compel its insurers to defend it in an underlying third-party lawsuit alleging that the insured was liable for pollution cleanup costs under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (*42 U.S.C.S. § 9607 et seq.*). The insured moved for summary judgment, arguing that under *Gray v. Zurich Ins. Co. (1966) 65 Cal. 2d 263, 54 Cal. Rptr. 104, 419 P.2d 168* [discussed in *§ 120.50[3][b]*], it was entitled as a matter of law to have the insurers defend the underlying CERCLA action because the allegations of the complaint created a potential for liability under the CGL policies. The insurer argued that extrinsic evidence raised a triable issue of fact on the existence of liability; specifically, whether the damage resulted from the insured's deliberate management practices rather than from an accident or occurrence. In denying the insured's summary judgment motion, the trial court ruled that the insured could not simply rely on the allegations of the complaint, which the opinion characterized as "neutral" regarding whetherthe alleged contamination was caused by covered or noncovered activities. The trial court ruled that (1) absent an affirmative evidentiary showing that the contamination resulted from an accident or occurrence within the meaning of the policies, the insured could not show a potential for coverage; and (2) the insurers had adduced extrinsic evidence creating a triable issue of fact as to whether the CERCLA complaint alleged acts within the policy's coverage (*6 Cal. 4th 287, 293-294)* . The insured sought a writ in the court of appeal.

The Court of Appeal issued a writ of mandate ordering the trial court to set aside and reconsider its order. While agreeing with the insurers that facts extrinsic to the underlying complaint may defeat as well as trigger a duty to defend, the court concluded that the insurers' extrinsic evidence did no more than put in dispute whether the acts alleged in the underlying complaint would come within one or more exceptions to the coverage. The court concluded that such a

dispute could not defeat the potential for coverage that the insured had established and so could not eliminate the duty to defend. The Supreme Court granted review.

The Supreme Court affirmed the judgment of the court of appeal. The Court held that evidence extrinsic to the complaint may defeat as well as trigger an insurer's duty to defend, when the issue of coverage can be determined as a matter of law on undisputed facts (*6 Cal. 4th 287, 296, 298-299)* . However, in this case the evidence offered by the insurers simply created a dispute as to whether the insured's actions were intentional and therefore not an "occurrence" under the liability policy, and did not defeat the potential for coverage (*6 Cal. 4th 287, 299-300)* . The Court further held that although the allegations in the underlying CERCLA complaint were neutral as to coverage (in that they did not specify whether the insured's conduct was negligent or intentional), by alleging that the insured caused environmental contamination, the complaint sufficiently raised the possibility that the insured could be liable for property damage covered by the policy (*6 Cal. 4th 287, 304-305)* .

[4] Additional Authorities

[a] Potential Liability Not Conclusively Refuted by Undisputed Facts

In *Haskel, Inc. v. Superior Court (1995) 33 Cal. App. 4th 963, 39 Cal. Rptr. 2d 520* , the court ruled that a trial court could not delay consideration of an insured's motion for summary judgment on the issue of the duty to defend until after the conclusion of discovery. The trial court had granted the defendant insurers' ex parte request to have the insured's summary judgment motion taken off calendar after the insurers claimed they could not file an opposition to the motion until the insured hadresponded to all their discovery requests. The court of appeal reversed, ruling that the insured had right to have the duty to defend issue adjudicated. Discovery was irrelevant because an insurer's defense obligation turns on those facts known by the insurer at the inception of the underlying lawsuit. If the claims asserted in the underlying action raise a potential for coverage, the insurer has a duty to defend the insured upon tender of the claims, unless and until it produces in court undisputed extrinsic evidence conclusively establishing that there was no potential for coverage (*33 Cal. App. 4th 963, 976-977)* .

The court said that the insurer is either aware of such evidence at the time of tender or not; it does not need discovery to determine the existence of that evidence. The court observed that the insurers' unstated proposition was, in effect, that they should be permitted to delay adjudication of their defense obligation until they developed sufficient evidence to retroactively justify their refusal to defend (*33 Cal. App. 4th 963, 977)* . This, in the court's view, was contrary to the principles in *Montrose Chem. Corp. v. Superior Court (1993) 6 Cal. 4th 287, 24 Cal. Rptr. 2d 467, 861 P.2d 1153* [*see § 120.55 [3][a]*]. The court also held that the insured was entitled to a stay of discovery on issues that would prejudice its defense of the underlying action (*33 Cal. App. 4th 963, 978-980)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGood Faith & Fair DealingDuty to DefendInsurance LawGeneral Liability InsuranceObligationsGeneral OverviewInsurance LawGeneral Liability InsuranceObligationsAllegations in ComplaintsInsurance LawGeneral Liability InsuranceObligationsDefense

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12-120 California Points & Authorities § 120.56

§ 120.56 Duty to Defend Is Implied, and Not Expressly Excluded, in Contract

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [IS *or* WAS] BOUND TO DEFEND THE ACTION BECAUSE THE INSURER'S DUTY TO DEFEND IS IMPLIED IN THE INSURANCE POLICY, AND THE POLICY DOES NOT EXPLICITLY EXCLUDE THE DUTY TO DEFEND.

A. Policy Does Not Explicitly Exclude Implied Duty to Defend. The law imposes an implied obligation to defend when it is not expressly and clearly omitted from the particular risk. If the exclusion is unclear or uncertain, and coverage is reasonably to be expected by the insured, the obligation will be implied by law and included as part of the agreement (*Interstate Fire & Cas. Co. v. Stuntman, Inc. (9th Cir. 1988) 861 F.2d 203, 205)* .

B. Policy Does Not Explicitly Waive Implied Duty to Defend. An insurer's implied duty to defend may only be waived by anexplicit provision to that effect (*Interstate Fire & Cas. Co. v. Stuntman, Inc. (9th Cir. 1988) 861 F.2d 203, 205)* .

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's contention that an insurer has no duty to defend its insured under an insurance policy. The basis of these points and authorities is that the policy does not explicitly exclude the duty to defend from the particular risk. Therefore, the duty to defend is implied in the absence of an express waiver [*see Interstate Fire & Cas. Co. v. Stuntman, Inc. (9th Cir. 1988) 861 F.2d 203, 205* ; *see also § 120.56[3][a]*]].

This form may be used by an insured in various procedural contexts, such as in memoranda supporting or opposing a

motion for summary judgment, in a trial brief, or in an appellate brief. For further discussion, see *§ 120.50[2][a]*.

These points and authorities may be combined, if appropriate, with other points and authorities that contend that the insured has wrongfully refused to defend its insured in a third-party action [*see § 120.50* et seq.].

This form may be used to oppose the points and authorities *set forth in § 120.30* et seq.

For references to related Pleading and Practice chapters, see *§ 120.50[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. For example, counsel should refer to particular provisions of the policy to show that the policy does not clearly omit a duty to defend with respect to the particular risk involved, and point out the absence of any express waiver by insured of that duty.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.20* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing an insurer's motion for summary judgment or summary adjudication when the evidentiary facts clearly support the contention and disclose triable issues of any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.50[2][b]*.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Policy Does Not Explicitly Exclude Implied Duty to Defend

In ***Interstate Fire & Cas. Co. v. Stuntman, Inc.*** *(9th Cir. 1988) 861 F.2d 203* , an excess insurer of a stunt-performing company brought a declaratory relief action in federal district court to determine the existence of its duty to defend and indemnify the insured regarding an underlying action brought by an injured stunt performer. In the underlying action, the multimillion-dollar damages award was appealed, and at the time of the declaratory relief action, the possibility remained that liability could exceed primary insurance coverage or benefits. The district court granted summary judgment for the insured. With regard to the duty to indemnify, the district court construed the relevant coverage and exclusion clauses to allow coverage for only certain damages (ordering supplemental hearings in the district court to determine that portion of the damages awarded). With regard to the duty to defend the policy provided in relevant part that "[t]he insured shall be responsible for the investigation, settlement or defense of any claim made or suit brought or proceeding instituted against the insured which no underlying insurer is obligated to defend." It also provided that "[t]he [insurance] company shall have the right and shall be given the opportunity to associate with the insured or its underlying insurers, or both, in the defense and control of any claim, suit or proceeding which involves or appears reasonably likely to involve the company." The district court held that the insurer had a duty to defend the insured on the exhaustion of the insured's primary insurance. The insurer appealed.

The federal court of appeals affirmed, holding that the insurer had an implied duty to defend, which had not been

waived. The court rejected the insurer's argument that the policy established only an optional duty to defend. The court noted that, under California law, an insurer's implied duty to defend may not be waived absent an explicit provision to that effect. The law imposes an implied obligation to defend when it is not expressly and clearly omitted from the particular risk. If the exclusion is unclear oruncertain, and coverage is reasonably to be expected by the insured, the obligation will be implied by law and included as part of the agreement (*861 F.2d 203, 205)* . The insurer cited authority for the holding that the excess insurer does not have a duty to defend. However, in the case on which the insurer relied, the relevant policy provision contained the following language: "[The insurer] shall not be obligated to assume charge of the settlement or defense of any claim or suit brought or proceeding instituted against the Insured, but [the insurer] shall have the right to and be given the opportunity to associate with the insured in the defense or control of any claim, suit or proceeding which appears reasonably likely to involve [the insurer]" (emphasis added).

The court rejected the application of that authority to the instant case, because the policy before it contained no explicit reservation of rights such as that italicized in the quotation above. In contrast, the provision in question refers to claims in which "no underlying insurer is obligated to defend," but does not mention situations such as this one, in which an underlying insurer's initial obligation to defend has been exhausted. In addition, the reservation of rights provision permits the insurer to associate with the insured in the defense and control of any claim "which involves or appears reasonably likely to involve the company." The court held that this language certainly applies to a situation such as the one before it, in which the primary insurance policy limits may well have been reached, and the excess insurance policy triggered (*861 F.2d 203, 206)* .

[b] Policy Does Not Explicitly Waive Implied Duty to Defend

The factual and procedural background of ***Interstate Fire & Cas. Co. v. Stuntman, Inc.*** *(9th Cir. 1988) 861 F.2d 203* are discussed in *§ 120.56[3][a]*. The court noted that an exclusion in an insurance policy must be conspicuous, plain, and clear, and that ambiguities are construed against the insurer. The court stated that the fact that the insurer used a standard policy form does not excuse the existence of the ambiguities in the insured's contract. The court also noted that it would have been a simple matter to amend the standard language to state clearly that the insurer and insured agree that the insurer is not required to defend any claim. The court concluded that the policy's reservation of rights provision was not sufficiently explicit to put the insured on notice that the insurer had no duty to defend in this case (*861 F.2d 203, 206)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGood Faith & Fair DealingDuty to DefendInsurance LawClaims & ContractsPolicy InterpretationGeneral OverviewInsurance LawClaims & ContractsPolicy InterpretationAmbiguous TermsConstruction Against InsurersInsurance LawClaims & ContractsPolicy InterpretationExclusionsInsurance LawGeneral Liability InsuranceObligationsDefense

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1. General Exclusions

12-120 California Points & Authorities § 120.57

§ 120.57 Duty to Defend Extends to Prosecuting Appeal of Adverse Judgment

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [IS *or* WAS] BOUND TO PROSECUTE THE APPEAL OF THE ADVERSE JUDGMENT IN THE ACTION BECAUSE THERE WERE REASONABLE GROUNDS FOR APPEAL, AND THE INSURER'S DUTY TO DEFEND EXTENDS TO PROSECUTING AN APPEAL.

Insurer Has Duty to Appeal Adverse Judgment. An insurer is obliged to pursue an appeal on behalf of its insured if there are reasonable grounds for appeal, and the policy does not provide that the insurer need not do so (*Jenkins v. Insurance Co. of N. Am. (1990) 220 Cal. App. 3d 1481, 1490-1492, 272 Cal. Rptr. 7*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's the contention that an insurer has no duty to defend its insured under an insurance policy. The basis of these points and authorities is that the insurer has wrongfully refused to appeal an underlying judgment against the insured, when reasonable grounds for appeal existed, and the policy did not provide that the insurer need not do so [*see Jenkins v. Insurance Co. of N. Am. (1990) 220 Cal. App. 3d 1481, 1490-1492, 272 Cal. Rptr. 7* ; *see also § 120.57[3][a]*].

This form may be used by an insured in various procedural contexts, such as in memoranda supporting or opposing a motion for summary judgment, in a trial brief, or in an appellate brief. For further discussion, see *§ 120.50[2][a]*.

These points and authorities may be combined, if appropriate, with other points and authorities that contend that the insured has wrongfully refused to defend its insured in a third-party action [*see § 120.50* et seq.].

This form may be used to oppose the points and authorities *set forth in § 120.30* et seq.

For references to related Pleading and Practice chapters, see *§ 120.50[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. For example, counsel should refer to specific clauses in the policy that either expressly require the insurer to bring an appeal of an adverse judgment under the circumstances, or point out that the policy does not expressly preclude that duty, and the policy language otherwise supports a finding of that duty.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.20* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing an insurer's motion for summary judgment or summary adjudication when the evidentiary facts clearly support the contention and disclose triable issues of any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.50[2][b]*.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Insurer Has Duty to Appeal Adverse Judgment

In ***Jenkins v. Insurance Co. of N. Am.*** *(1990) 220 Cal. App. 3d 1481, 272 Cal. Rptr. 7* , an insured brought an action against the insurer seeking declaratory relief and damages for bad faith, arising from the insurer's failure to bring an appeal of an underlying judgment against the insured. Plaintiff, a housing contractor, purchased a series of primary and excess liability insurance policies from various insurers, including two successive $300,000 policies from defendant, covering a housing development that he constructed. Subsidence problems, causing substantial structural damage to the homes, began to occur shortly after the buyers moved in, and several homeowners sued the insured in two actions. Defendant insurer ultimately provided a defense after initially refusing to do so. Before trial, the insurer settled a portion of the claims against the insured; following trial on the remaining claims, a jury rendered an aggregate judgment of $716,000 against the insured.

The trial court entered judgment against the insured in the total sum of $761,000, which included an indemnity claim on a cross complaint. The insurer filed an interpleader action and deposited $383,000 with the court, consisting of the $375,000 remaining policy limits plus interest. During the trial, the attorney provided by the insurer to represent the insured stated that several of the rulings made by the trial court provided grounds for appeal. However, after the verdict was returned, the insurer declined to appeal because of the cost of obtaining a trial transcript. The insured retained his own counsel to defend the interpleader action and to appeal the indemnity judgment, which was reversed on appeal. The insured sued the insurer, and was awarded $500,000 in compensatory damages and $2,500,000 in punitive damages after a jury trial. The insurer appealed.

The court of appeal affirmed, holding that under the policy, the duty to defend included the duty to appeal when reasonable grounds for an appeal exist (*220 Cal. App. 3d 1481, 1491)* . The court rejected defendant's claim of error in the jury instructions concerning its duty to appeal either or both of the judgments entered against the insured in the homeowners' lawsuits. The challenged instruction stated that one element that the plaintiff was required to prove was that defendant refused to appeal either of the judgments, knowing there were reasonable grounds for appeal. The trial court had also instructed the jury that defendant's good-faith belief that it had no duty to prosecute an appeal after exhaustion of its policy limits is a proper cause for refusing to pay the costs of appeal, provided defendant's interpretation of its insurance contract was not unreasonable (*220 Cal. App. 3d 1481, 1488)* . The court observed that the duty to defend is broader than the duty to indemnify, and continues until a judgment has been entered and has become final. An insurer may not escape the duty by paying its policy limits and then abandoning its insured. The duty to defend may include the duty to appeal when reasonable grounds for an appeal exist. Defendant, relying on *Johnson v. Continental Ins. Companies (1988) 202 Cal. App. 3d 477, 248 Cal. Rptr. 412* , contended that by interpleading its policy limits it had avoided its duty to appeal.

The court disagreed, distinguishing Johnson in that the insurer in that case, unlike defendant, paid the policy limits within two weeks of the insured's demand. The insurer in Johnson had no further duty to defend when, six months after it paid the policy limits, the insured filed a products liability action and certain defendants initiated cross actions against her. By contrast, defendant in this case never paid the policy limits, choosing instead to interplead the policy limits some four years after the insured's demand, leaving plaintiff subject to liability for the amount of any excess judgment. The court noted that the defendant's own counsel believed the indemnity judgment to be erroneous and subject to appeal. The defendant's refusal to follow its own attorney's advice, which left plaintiff tofinance his appeal personally, was evidence of bad faith. The extent of defendant's duty to appeal was not clear from its policy, which provided that defendant would pay premiums on appeal bonds, but was not required to apply for or to furnish such bonds. The court found the effect of that provision to be ambiguous (*220 Cal. App. 3d 1481, 1490)* .

However, the court held that the duty to appeal is not precluded by contract unless the contract very specifically exempts the insurer from the duty to appeal. The court noted that there is a diversity of opinion regarding whether an insurer is obligated to prosecute an appeal from an adverse judgment, although there is no California case directly on point. The court concluded that there is a general consensus in other jurisdictions that an insurer is obliged to pursue an appeal on behalf of its insured when there are reasonable ground for appeal (citing *Cathay Mortuary (Wah Sing), Inc. v. United Pacific Ins. Co. (N.D. Cal. 1984) 582 F. Supp. 650, 655) (220 Cal. App. 3d 1481, 1491)* . The court noted that the trial court did not instruct the jury that defendant had a duty to appeal under all circumstances. Rather, the jury was told that plaintiff had the burden of proving that the defendant refused to appeal when there were reasonable grounds to do so; and that instruction was correct (*220 Cal. App. 3d 1481, 1491-1492)* . Additionally, the court noted that the basis of the finding that defendant breached its duty of good faith was the insurer's failure to consider in good faith whether to appeal (*220 Cal. App. 3d 1481, 1492 n.1*).

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGeneral OverviewInsurance LawClaims & ContractsGood Faith & Fair DealingDuty to DefendInsurance LawGeneral Liability InsuranceObligationsDefense

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12-120 California Points & Authorities § 120.58

§ 120.58 The Policy Does Not Explicitly Preclude Duty to Appeal

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [IS *or* WAS] BOUND TO DEFEND THE ACTION BECAUSE NO EXPLICIT POLICY LANGUAGE PRECLUDES THE DUTY TO APPEAL.

The Policy Does Not Explicitly Preclude Duty to Appeal. The duty to appeal is not precluded by contract unless the contract very specifically exempts the insurer from that duty (*Jenkins v. Insurance Co. of North America (1990) 220 Cal. App. 3d 1481, 1491, 272 Cal. Rptr. 7*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's the contention that an insurer has no duty to defend its insured under an insurance policy. The basis of these points and authorities is that the insurer has wrongfully refused to appeal an underlying judgment against the insured, because the policy did not provide that the insurer need not prosecute an appeal.

This form may be used by an insured in various procedural contexts, such as in memoranda supporting or opposing a motion for summary judgment, in a trial brief, or in an appellate brief. For further discussion, see *§ 120.50[2][a]*.

These points and authorities may be combined, if appropriate, with other points and authorities that contend that the insured has wrongfully refused to defend its insured in a third-party action [*see § 120.50* et seq.].

This form may be used to oppose the points and authorities *set forth in § 120.30* et seq.

For references to related Pleading and Practice chapters, see *§ 120.50[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. For example, counsel should show that the policy either expressly requires the insurer to bring an appeal of an adverse judgment under the circumstances, or that the policy does not expressly preclude that duty, and the policy language supports a finding of that duty.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.20* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing an insurer's motion for summary judgment or summary adjudication when the evidentiary facts clearly support the contention and disclose triable issues of any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.50[2][b]*.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] The Policy Does Not Explicitly Preclude Duty to Appeal

Jenkins v. Insurance Co. of N. Am. *(1990) 220 Cal. App. 3d 1481, 272 Cal. Rptr. 7* , is discussed in *§ 120.57[3][a]*. The court stated that the duty to appeal is not precluded by contract unless the contract very specifically exempts the insurer from the duty to appeal (*220 Cal. App. 3d 1481, 1491)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGeneral OverviewInsurance LawClaims & ContractsGood Faith & Fair DealingDuty to DefendInsurance LawGeneral Liability InsuranceObligationsDefense

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12-120 California Points & Authorities § 120.59

§ 120.59 Insurer Not Exonerated When Conduct Was Mere Negligence

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [IS *or* WAS] BOUND TO DEFEND THE ACTION BECAUSE THE LOSS RESULTED FROM INSURED'S NEGLIGENCE AT MOST, NOT FROM ANY WILLFUL ACT.

Insurer Is Not Exonerated From Liability for Insured's Negligence. An insurer is not exonerated from liability under its policy by the negligence of the insured or his or her agent (*Ins. Code § 533*; *see also Nuffer v. Insurance Co. of N. Am. (1965) 236 Cal. App. 2d 349, 358-360, 45 Cal. Rptr. 918*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's the contention that an insurer has no duty to defend its insured under an insurance policy. The basis of these points and authorities is that the act of the insured on which the insurer relies constituted negligence at most.

These points and authorities may be submitted in various procedural contexts. For example, it may be submitted:

- By a plaintiff-insured, in an action by the insured under a liability policy for damages for wrongful refusal to defend the insured in athird-party action, or under a casualty policy for wrongful refusal to pay the loss, or

- By the third-party judgment creditor of the insured under a liability policy in an action to recover the amount of the judgment up to the policy limit [*see Ins. Code § 11580(b)(2)*].

This form may be used by an insured in various procedural contexts, such as in memoranda supporting or opposing a motion for summary judgment, in a trial brief, or in an appellate brief. For further discussion, see *§ 120.50[2][a]*.

These points and authorities may be combined, if appropriate, with other points and authorities that contend that the insured has wrongfully refused to defend its insured in a third-party action [*see § 120.50* et seq.].

This form may be used to oppose the points and authorities *set forth in § 120.30* et seq.

For references to related Pleading and Practice chapters, see *§ 120.50[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. For example, counsel may point out that opposing counsel has failed to meet his or her burden of establishing that the conduct of the insured amounted to willful conduct.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.20* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing an insurer's motion for summary judgment or summary adjudication when the evidentiary facts clearly support the contention and disclose triable issues of any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.50[2][b]*.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Insurer Is Not Exonerated From Liability for Insured's Negligence

In ***Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.*** *(1987) 189 Cal. App. 3d 1072, 234 Cal. Rptr. 835* , a savings and loan association brought an action against its insurer for breach of contract and bad faith resulting from the insurer's failure to indemnify the association in its defense regarding an employee's dishonest act. The trial court refused to instruct the jury about the association's purported negligence in failing to mitigate its damages. The court of appeal affirmed, noting that even if the association's conduct constituted negligence, it would not have exonerated the insurer because an insurer is not exonerated by the negligence of the insured, the insured's agents, or others, pursuant to *Ins. Code § 533* (*189 Cal. App. 3d 1072, 1095)* .

Ins. Code § 533 provides that an insurer is not liable for a loss caused by the willful act of the insured, but he or she is not exonerated by the negligence of the insured, or of the insured's agents or others.

Nuffer v. Insurance Co. of N. Am. *(1965) 236 Cal. App. 2d 349, 45 Cal. Rptr. 918* , was an action to recover under fire insurance policies covering a hotel destroyed by fire. The origin of the fire was in a basement corridor where several pieces of furniture were stacked up. Defendants denied liability on the ground that the fire resulted from the willful acts

of the insured and his agent, consisting, among other things, of having failed to have installed a sprinkler system. From a judgment on a directed verdict for plaintiff, defendant appealed, contending that the insured's failure to install a sprinkler system was a willful act within the meaning of *Ins. Code § 533* and that had the area where the fire originated been equipped with a sprinkler system as required by statute, the fire could have been confined to that area and the loss would have been negligible. The court of appeal affirmed the judgment. It said, after quoting the provisions on *Ins. Code § 533*, that a determinative issue was whether the insured's failure to equip the hotel basement with a sprinkler system was a willful act within the meaning of that section, as distinguished from a negligent act (*236 Cal. App. 2d 349, 358)* . The court pointed out that a willful act as that term is used in *Ins. Code § 533*, connotes something more blameworthy than the sort of misconduct involved in ordinary negligence and something more than the mere intentional doing of an act constituting such negligence (*236 Cal. App. 2d 349, 359)* . It held that the insured's failure to install a sprinkler system in the basement corridor, even though assumed to be a technical violation of the statute sufficient to support afinding of negligence, did not amount to willful misconduct and would not have supported a finding of the willful act contemplated by *Ins. Code § 533*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGood Faith & Fair DealingDuty to DefendInsurance LawGeneral Liability InsuranceObligationsGeneral OverviewInsurance LawGeneral Liability InsuranceObligationsDefense

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12-120 California Points & Authorities § 120.60

§ 120.60 Commercial General Liability Policy Coverage for Sums That Insured Is "Legally Obligated to Pay as Damages" Not Limited to Tort Damages

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

THE COMMERCIAL GENERAL LIABILITY INSURANCE POLICY THAT IS AT ISSUE IN THIS ACTION, PROVIDING COVERAGE FOR SUMS THE INSURED IS "LEGALLY OBLIGATED TO PAY AS DAMAGES," IS NOT CATEGORICALLY LIMITED TO DAMAGES SOUNDING IN TORT. INSTEAD, COVERAGE IS DETERMINED BY THE NATURE OF THE DAMAGE AND THE RISK INVOLVED, IN LIGHT OF ALL RELEVANT POLICY PROVISIONS.

Commercial General Liability Insurance Policy Providing Coverage for Sums That Insured Is "Legally Obligated to Pay as Damages" Not Categorically Limited to Tort Damages. A commercial general liability insurance policy providing coverage for sums that the insured is "legally obligated to pay as damages" is not categorically limited to damages sounding in tort. Instead, coverage is determined by the nature of the damage and the risk involved, in light of all relevant policy provisions (*Vandenberg v. Superior Court (1999) 21 Cal. 4th 815, 839, 88 Cal. Rptr. 2d 366, 982 P.2d 229*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's contention that a commercial general liability insurance policy providing coverage for sums that the insured is "legally obligated to pay as damages" is categorically limited to damages sounding in tort.

This form may be used by an insured in various procedural contexts, such as in memoranda opposing a motion for

summary judgment, in a trial brief, or in an appellate brief.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of the case. For example, counsel should set forth the relevant policy provisions and show that the type of damages sought is not precluded under the policy. Counsel should also argue that the nature of the damages and the risk involved, in light of all relevant policy provisions, rather than the theory of recovery chosen by the third party, controls (*see Vandenberg v. Superior Court (1999) 21 Cal. 4th 815, 839, 88 Cal. Rptr. 2d 366, 982 P.2d 229*).

The form should be combined with other forms in this publication as necessary to complete argument with respect to all issues and to place the argument within its proper procedural context.

[c] Related Pleading and Practice Chapters

For discussion relating to insurance liability policies, see California Forms of Pleading and Practice, Ch. 308, *Insurance* , Part I, Subpart E.

[3] Discussion of Authorities

[a] Commercial General Liability Insurance Policy Providing Coverage for Sums Insured Is "Legally Obligated to Pay as Damages" Not Categorically Limited to Tort Damages

In *Vandenberg v. Superior Court (1999) 21 Cal. 4th 815, 88 Cal. Rptr. 2d 366, 982 P.2d 229* , the insured was a lessee of land that he had used for several decades as an automobile sales and service facility. When the owners took possession of the land to sell it, they discovered contamination of the soil and groundwater. The landowners sued the insured, alleging causes of action for breach of contract, breach of the covenant of good faith and fair dealing, public and private nuisance, negligence, waste, trespass, strict liability, equitable indemnity, declaratory relief, and injunctive relief, based on the insured's alleged installation and operation of waste oil storage tanks that caused petroleum contamination. A settlement between the plaintiff, the defendant, and the sole insurer that agreed to provide a defense disposed of all claims except those based on the theory that the contamination constituted a breach of the lease agreement. The parties agreed to resolve those claims through binding arbitration. Although the insurer agreed to provide a defense, it reserved the ultimate issues of coverage and indemnity for further resolution (*21 Cal. 4th 815, 826)* . Following the arbitrator's ruling for the plaintiff, all of the insurers rejected the insured's request for indemnification, and the insured then sued the insurers for failure to defend, settle, or indemnify. All the insurers sought summary judgment on the basis that the arbitrator awarded damages forbreach of lease, a contractual cause of action, and that contractual damages were not covered by the policies. The trial court granted that motion, but the court of appeal reversed. The court of appeal ruled that coverage under the insurance policies could not be determined by the "general rule" that damages for an insured's nonperformance of a contract are not covered under commercial general liability (CGL) policies (*21 Cal. 4th 815, 827)* .

The California Supreme Court granted review. The insurers contended that CGL policies limiting coverage to amounts that the insured is "legally obligated to pay as damages," or using similar language, refer to tort liability and not contract liability. The Court held that the long line of cases so holding misread the seminal case of *Ritchie v. Anchor Cas. Co. (1955) 135 Cal. App. 2d 245, 286 P.2d 1000* , which held that the phrase "liability imposed by law" as used in that policy related to the nature of the liability to be defended rather than the result of the lawsuit. In *Ritchie*, the phrase "liability imposed ... by written contract" occurred in one coverage provision, but not in the coverage provision in question. Subsequent cases erroneously generalized that the phrase "damages for a liability imposed by law" uniformly refers to a liability arising *ex delicto* as distinguished from *ex contractu* (*21 Cal. 4th 815, 839)* . The Supreme Court held that policy language limiting coverage to amounts the insured is "legally obligated to pay as damages," does not necessarily refer to tort liability, to the exclusion of a claim that involves a contract. The Court stated that the nature of

the damages and the risk involved, in light of particular policy provisions, control coverage. Coverage is determined not by the injured's party's choice of remedy, or the form of action, but rather by the nature of the risk and injury in question (*21 Cal. 4th 815, 838-841)* . In so holding, the Court disapproved a line of appellate cases that held that the phrase "legally obligated to pay as damages" in this context uniformly referred to a liability arising *ex delicto* as distinguished from *ex contractu*. These cases erroneously established an arbitrary distinction between tort and contract damages, categorically precluding coverage pleaded on a theory of breach of contract (*21 Cal. 4th 815, 839-841)* . The Court noted that the same act ay constitute both a breach of contract and a tort. The coverage agreement that embraces "all sums [that] the insured shall become legally obligated to pay as damages ..." is intentionally broad enough to include the insured's obligation to pay damages for breach of contract as well as for tort, within limitations imposed by other terms of the coverage agreement (for example, bodily injury and property damage as defined, caused by an occurrence) and by the exclusions. The Court therefore affirmed the court of appeal (*21 Cal. 4th 815, 840-841)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawGeneral Liability InsuranceCoverageDamagesInsurance LawGeneral Liability InsuranceObligationsDefense

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12-120 California Points & Authorities §§ 120.61-120.69

[Reserved]

§§ 120.61[Reserved]

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2. Exclusions in Motor Vehicle Policies

12-120 California Points & Authorities § 120.70

§ 120.70 User of Vehicle Was Excluded From Coverage Under Policy

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE OPERATOR OF THE INSURED'S CAR WAS EXPRESSLY EXCLUDED [BY NAME] FROM COVERAGE UNDER THE POLICY.

Exclusion of Named Person From Coverage. An insurer and any named insured may, by the terms of any automobile liability insurance policy issued or delivered in California or by a separate writing, agree that coverage and the insurer's obligation to defend under the policy shall not apply or accrue to the benefit of any insured or any third-party claimant while any insured motor vehicle is being used or operated by a natural person or persons designated by name, and that agreement is binding on every insured to whom the policy applies and on every third-party claimant (*Ins. Code § 11580.1(d)(1)*; *Hitchcock v. Mercury Ins. Co. (1997) 54 Cal. App. 4th 303, 62 Cal. Rptr. 2d 681* ; *Associated Indem. Corp. v. King (1973) 33 Cal. App. 3d 470, 472-474, 109 Cal. Rptr. 190*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention by the insurer that the user of a vehicle was excluded from coverage under the insurance policy. The basis of these points and authorities is that the operator of the insured's car was expressly excluded from coverage under the policy.

This form may be used, for example, in an action against the insurer for damages for breach of its alleged duty under a motor vehicle liability policy to defend an action brought against the operator of the insured's vehicle or to indemnify the user on the judgment entered. These points and authorities may be combined, if appropriate, with other points and authorities that contend that the insurance policy excludes from coverage the driver of the insured vehicle [*see § 120.71*

et seq.].

This form may be used by an insurer in various procedural contexts, such as in memoranda supporting or opposing a motion for summaryjudgment, in a trial brief, or in an appellate brief. For further discussion, see *§ 120.30[2][a]*.

It should be noted that in some instances *Ins. Code § 11580.1(d)(1)* will require the insurer to defend the named insured (*see Safeco Ins. Co. v. Gilstrap (1983) 141 Cal. App. 3d 524, 190 Cal. Rptr. 425*).

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should:

- Refer to the specific portion of the policy that excludes the driver of the insured vehicle, and

- Argue that under the policy, therefore, the insurer has no duty to defend or indemnify the insured for claims arising out of that driver's operation of the insured vehicle.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.10* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be a motion by a defendant insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.30[2][b]*.

[c] Related Pleading and Practice Chapters

For complaints by an insured against an insurer for damages for breach of contract because of the insurer's refusal to pay a third-party judgment against the insured or to defend the insured in a third-party action, see California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender). For a discussion of the rules applicable to summary judgment, a form of notice of motion for summary judgment, and related forms, see Ch. 537, *Summary Judgment* , in that publication.

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[e] Opposing Points and Authorities

The points and *authorities in § 120.80* et seq. may be used in an appropriate case to oppose these points and authorities.

[3] Discussion of Authorities

[a] Exclusion of Named Person From Coverage

Ins. Code § 11580.1(d) provides, in pertinent part, that notwithstanding the provisions of *Ins. Code § 11580.1(b)(4)* (requiring coverage for permissive users) or of *Veh. Code §§ 16450-16457* and *17150-17159* (relating to insurance

policies under the Financial Responsibility Law and civil liability, respectively), the insurer and any named insured may, by the terms of any automobile liability insurance policy to which *Ins. Code § 11580.1(a)* applies, or by a separate writing relating to it, agree that coverage and the insurer's obligation to defend under the policy shall not apply or accrue to the benefit of any insured or any third-party claimant while any insured motor vehicle is being used or operated by a natural person or persons designated by name and that such agreement is binding on every insured to whom the policy applies and on every third-party claimant. *Ins. Code § 11580.1(d)* further provides that the agreement shall remain in force as long as the policy remains in force and shall apply to any continuation, renewal, or replacement of such policy by the named insured, or reinstatement of such policy made within 30 days of any lapse thereof.

Ins. Code § 11580.1(a) applies to automobile liability insurance policies issued or delivered in California after January 1, 1971.

Ins. Code § 11580.1(d) further provides, however, that the insurer shall be obligated to defend the named insured when all of the following apply to the designated natural person:

(1) He or she is a resident of the same household as the named insured;

(2) As a result of operating the insured motor vehicle of the named insured, he or she is jointly sued with the named insured; and

(3) He or she is an insured under a separate automobile liability policy issued to him as a named insured, which policy does not provide a defense to the named insured.

In ***Hitchcock v. Mercury Ins. Co.*** *(1997) 54 Cal. App. 4th 303, 62 Cal. Rptr. 2d 681* , after plaintiff and her fiance, the registered owners of an automobile insured by defendant, were involved in an automobile accident while plaintiff was driving, and plaintiff's fiance filed a personal injury action against her, which defendant refused to defend or indemnify, based on policy provisions specifically excluding coverage for bodily injury claimsbrought by an "insured," defined as all persons "legally responsible" for the car (*Ins. Code § 11580.1(c)(5)*), the trial court granted summary judgment for defendant in plaintiff's breach of contract action against it.

The Court of Appeal affirmed, holding that the trial court properly granted summary judgment for defendant since under *Veh. Code § 17150*, a vehicle owner who knowingly lends his or her car to another person is legally responsible for damages occurring during its use (*54 Cal. App. 4th 303, 304)* . It was undisputed that plaintiff's fiance was a registered owner of the car, and that plaintiff was driving it with his permission at the time of the accident. The fiance was therefore deemed "legally responsible" and fell within the definition of an "insured." Insurance carriers are not precluded from relying on existing law in interpreting statutorily imposed definitions (*54 Cal. App. 4th 303, 303-304)* . The legislature's later amendment of *Ins. Code § 11580.1*, former subd. (b)(4), to delete the phrase "legally responsible" from the definition of "persons insured" could *not* be viewed as a statement of public policy which could be applied retroactively (*54 Cal. App. 4th 303, 304)* .

Associated Indem. Corp v. King *(1973) 33 Cal. App. 3d 470, 109 Cal. Rptr. 190* , was a declaratory relief action by an insurer seeking a determination of its rights and liabilities under an automobile liability insurance policy issued by the insurer to defendant Price. Joined as additional defendants were Price's son, Michael, the third-party claimants, and the latter's insurer as subrogee of their claims against the Prices. The policy covered three cars owned by defendant Price but contained the following restrictive endorsement: "Except as respects Fire, Theft and Comprehensive; no insurance is afforded by the policy to the named insured or any other insured while any automobile is being operated or driven by any of the following persons: Michael Lawrence Price." While the policy was in effect, one of the cars, while being driven by Michael, collided with a car occupied by the third-party claimants. Plaintiff insurer denied coverage and the third-party claimants' insurer paid the claimants $19,000 and expended $2,280.30 in attorney's fees and costs, pursuant to the uninsured motorist coverage contained in their policy. The third-party claimants sued the Prices. The

trial court in the declaratory relief action determined that plaintiff insurer had no duty to indemnify its insured, or defend the third-party action, or to reimburse the third-party claimants' insurer on the ground that the restrictive covenant was valid and effectively limited plaintiff's liability.

The court of appeal affirmed the judgment. The court pointed out that *Ins. Code § 11580.1(d)* authorized the limitation on coverage (*33 Cal. App. 3d 470, 473)* and, declining to follow *Abbott v. Interinsurance Exch. (1968) 260 Cal. App. 2d 528, 67 Cal. Rptr. 220* , the court held that the exclusion of coverage whenever the insured car was being operated or driven by defendant's son was valid (*33 Cal. App. 3d 470, 472-474)* .

An agreement made by the insurer and any named insured more than 60 days following the inception of the policy excluding a designated person by name is effective from the date of the agreement and is, with the signature of a named insured, conclusive evidence of the validity of the agreement (*Ins. Code § 11580.1(d)(1)*).

[4] Additional Authorities

[a] Exclusion of Named Person From Coverage

Farmers Ins. Exch. v. Cocking (1981) 29 Cal. 3d 383, 173 Cal. Rptr. 846, 628 P.2d 1 , was a declaratory relief action by an insurer against its named insured and the insured's wife for a declaration of the validity of an exclusionary clause contained in an automobile liability insurance policy issued by it. The policy defined "named insured," if an individual, as including his spouse if a resident of the same household, and excluded from coverage liability of any insured for bodily injury to the named insured or a relative of the named insured who was a resident of the same household. The wife was injured while she was a passenger in a car driven by her husband and sued her husband for damages, alleging that her injuries were caused by his negligence. The exclusion in the policy was one expressly authorized by *Ins. Code § 11580.1(c)(5)*. That section provides in relevant part, that in addition to any exclusion provided in *Ins. Code § 11580.1(b)(3)* (requiring designation by explicit description of purposes for which coverage for motor vehicles is specifically excluded), the insurance afforded by any automobile liability insurance policy may, by appropriate policy provision, be made inapplicable to liability for bodily injury to an insured. The wife acknowledged that this statute purported to authorize the insurer to exclude coverage for bodily injury to an insured such as herself, but argued that the provision contravened public policy and was void as a denial of equal protection under both federal and state Constitutions.

The trial court accepted her constitutional argument and granted a summary judgment in her favor. The Supreme Court reversed with directions to enter judgment for plaintiff. The Court held that the exclusion was expressly sanctioned by state statute and, accordingly, could not be struck down on public policy grounds (*29 Cal. 3d 383, 387)* . The Court explained that the wife's reliance on general principles favoring recovery for injuries was misplaced because, with respect to the specific issue before the Court, the public policy of California was contained not in broadly expressed generalized abstractions, but in the applicable statutory provisions themselves. The Court then quoted the pertinent portions of *Ins. Code § 11580.05* and concluded that *Ins. Code § 11580.1(c)* is not only consistent with state policy, but that it itself constitutes and expresses that policy (*29 Cal. 3d 383, 388)* . The Court further rejected the wife's constitutional challenge (*29 Cal. 3d 383, 389-390)* .

State Farm Mut. Auto. Ins. Co. v. MacKenzie (1978) 85 Cal. App. 3d 727, 149 Cal. Rptr. 747 , was a declaratory relief action by which the insurer sought to determine the total insurance coverage available for an automobile accident, in which a passenger in a car owned by Low and driven by MacKenzie was killed when the car crashed. Both Low and MacKenzie had automobile liability insurance with plaintiff. The policy issued and delivered to Low in California expressly covered liability for the permissive use of the car with bodily injury limits of $15,000 for each person and $30,000 for each accident. The policy issued to MacKenzie, which was not delivered in California, had $10,000/$20,000 limits and insured against liability to third persons for the use of a designated vehicle and other vehicles driven by the insured with the permission of the owner. A wrongful death action against Low and MacKenzie

was filed by the victim's widow who rejected plaintiff's offer in settlement of $25,000, representing the combined total of the stated limits of both policies, on the ground that the minimum limit of each policy was $15,000. Plaintiff then commenced the declaratory relief action against MacKenzie and the third-party plaintiff. Defendants contended that California public policy required reformation of the policy to increase coverage for liability arising out of the insured's permissive use of another's vehicle to $15,000, citing the minimum coverage required by statute (*former* Veh. Code §§ 16057, *16059* (*now see Veh. Code §§ 16054, 16056*); *Ins. Code § 11580.1*).

The trial court declared $10,000 to be the policy limit, and the court of appeal affirmed. The court of appeal said that the total public policy in regard to provisions required to be included in voluntary automobile liability insurance policies issued or delivered in California is contained in the Insurance Code (citing *Ins. Code §§ 11580.05* and *11580.1*) and that this legislatively declared policy affecting automobile insurance policies taken out before an accident replaced the judicially determined policy of *Wildman v. Government Employees' Ins. Co. (1957) 48 Cal. 2d 31, 39, 307 P.2d 359* . The court held that *Ins. Code § 11580.1* does not require coverage for the permissive use of nonowned vehicles, that an insurer has a right to limit coverage in plain and understandable language and is at liberty to limit the character and extent of the risk it undertakes to assume, and that public policy, therefore, did not require reformation of the policy (*85 Cal. App. 3d 727, 732)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawMotor Vehicle InsuranceExclusionsGeneral OverviewInsurance LawMotor Vehicle InsuranceObligationsDefenseInsurance LawMotor Vehicle InsuranceObligationsIndemnificationInsurance LawMotor Vehicle InsuranceVehicle UsePermissive UsersGeneral Overview

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12-120 California Points & Authorities § 120.71

§ 120.71 Exclusion of Named User Driving Without Permission

[1] FORM

INSURER _____ [HAS *or* HAD] NO DUTY TO DEFEND INSURED [IN THE UNDERLYING ACTION] BECAUSE THE OPERATOR OF THE INSURED'S CAR WAS DRIVING WITHOUT THE INSURED'S PERMISSION.

A. Exclusion of Named User Driving Without Permission. *Insurance Code Section 11580.1(d)(1)* clearly and unambiguously provides that the exclusion of a named user from coverage applies whether the user was driving the vehicle with or without permission (*Yamasaki v. Mercury Cas. Ins. Co. (1992) 11 Cal. App. 4th 830, 833, 14 Cal. Rptr. 2d 577*).

B. Insured Cannot Ratify Nonpermitted Use of Vehicle. An insured cannot ratify a nonpermitted use of a vehicle after an accident so as to impose liability on the insurer (*Allied Mut. Ins. Co. v. Webb (2001) 91 Cal. App. 4th 1190, 1194-1196, 111 Cal. Rptr. 2d 426*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention by the insurer that the user of a vehicle was excluded from coverage under the insurance policy. The basis of these points and authorities is that the user of a vehicle was driving without permission.

This form may be used, for example, in an action against the insurer for damages for breach of its alleged duty under a motor vehicle liability policy to defend an action brought against the operator of the insured's vehicle or to indemnify the user on the judgment entered. These points and authorities may be combined, if appropriate, with other points and authorities that contend that the insurance policy excludes from coverage the driver of the insured vehicle [*see § 120.70*

et seq.].

This form may be used by an insurer in various procedural contexts, such as in memoranda supporting or opposing a motion for summary judgment, in a trial brief, or in an appellate brief. For further discussion, see *§ 120.30[2][a]*.

For references to related Pleading and Practice chapters, see *§ 120.70[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should:

- Refer to facts showing that the driver of the insured vehicle was driving without the insured's permission, and

- Argue that under the policy, therefore, the insurer has no duty to defend or indemnify the insured for claims arising out of that driver's operation of the insured vehicle.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.10* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be a motion by a defendant insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.30[2][b]*.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[d] Opposing Points and Authorities

The points and *authorities in § 120.80* et seq. may be used in an appropriate case to oppose these points and authorities.

[3] Discussion of Authorities

[a] Exclusion of User Driving Without Permission

In ***Yamasaki v. Mercury Cas. Ins. Co.*** *(1992) 11 Cal. App. 4th 830, 14 Cal. Rptr. 2d 577* , the insured's policy contained an exclusion that followed the language of *Ins. Code § 11580.1(d)(1)*, stating, "it is agreed that coverage and the insurer's obligation to defend, under this policy, shall not apply nor accrue to the benefit of any insured or any third party claimant while any motor vehicle is being used or operated by a natural person or persons designated above ... This limitation shall apply to any use or operation of a motor vehicle including the negligent or alleged negligent entrustment of a motor vehicle to any designated person." Adriver specifically named under the exclusion was involved in an accident while driving the insured's car without permission. The insurer denied coverage. The insured brought an action against the insurer seeking a declaration that the exclusion applied only to permissive users. The insured argued that the exclusion had to be strictly construed because it limited the insurer's liability. Thus, the insured argued that the clause had to be read to provide coverage because it did not specifically state it was applicable when an excluded driver

takes the vehicle without permission. The trial court granted the insurer summary judgment.

The court of appeal affirmed. It held that the exclusion and *Ins. Code § 11580.1(d)(1)* are both clear and unambiguous. The court stated that the plain meaning of "any use or operation" as used in the exclusion is that all kinds of use or operation, including permissive and non-permissive use, are excluded (*11 Cal. App. 4th 830, 833)* .

[b] Insured Cannot Ratify Nonpermitted Use of Vehicle

In ***Allied Mut. Ins. Co. v. Webb*** *(2001) 91 Cal. App. 4th 1190, 111 Cal. Rptr. 2d 426* , a family operated a farming business through several partnerships. A partnership formed by two brothers employed a worker who was permitted to drive the partnership's vehicles for business purposes, but whose compensation did not include the personal use of a partnership vehicle. Another partnership included the brothers and the father, who owned a truck that the father kept on the farm property, with the understanding that it would not regularly be used for farm business, but that the brothers' partnership could use it as a spare vehicle. An employee of the brothers' partnership used the truck without permission when his own car broke down. He used it for both personal and employment purposes over the course of several days, driving it on one occasion to a friend's home where he consumed alcohol. Afterwards he returned to the farm, then drove the vehicle to a relative's house, en route to which he collided with another vehicle. He sustained extensive injuries and was arrested and convicted of driving under the influence. The occupants of the other vehicle filed a complaint for personal injuries against the employee. They contended that the business automobile liability insurance policy issued to the brothers' partnership provided coverage--that is, that the vehicle was covered as a borrowed automobile that was used by the employee with the insureds' permission. The insurer filed this action for declaratory relief, seeking a declaration that the policy did not provide coverage for the third-party claims against the employee. The trial court entered judgment for the insurer, after determining that the brothers' partnership borrowed the truck from the father and that the truck was potentially insured under that partnership's business automobile policy. The court also found that the employee did not have permission to use the vehicle, but that even if he were a permissive user, his conduct exceededthe scope of the implied permission. The court further found that permission was not supplied by the insureds' postaccident conduct--failing either to reprimand or to discharge the employee following the accident. The defendants appealed.

The court of appeal affirmed, rejecting the defendants' argument that the brothers' partnership granted the employee permission to use the truck by ratifying his conduct after the accident. The held that an insured cannot ratify the nonpermitted use of a vehicle after an accident so as to impose liability on the insurer. The court also held that the trial court correctly found no coverage under the automobile policy, and consequently it did not decide whether the employee's conduct would have exceeded the scope of the permission if permission had been granted (*91 Cal. App. 4th 1190, 1193)* . The court stated that although an agent's originally unauthorized act may be ratified by implication if the only reasonable interpretation of the principal's conduct is consistent with approval or adoption, that rule does not apply if a third party is involved. Specifically, ratification does not apply to permit the insured to examine the alternatives after the loss has occurred. This result would be unfair to the insurer and has the potential to foster collusion between the insured and the permittee. Inasmuch as the employee in this case did not have permission to use the truck at the time of the accident, there is no coverage under the business automobile policy. Ratification cannot date back to destroy intervening rights of third persons or otherwise to achieve an inequitable result (*91 Cal. App. 4th 1190, 1194-1196)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawMotor Vehicle InsuranceExclusionsGeneral OverviewInsurance LawMotor Vehicle InsuranceObligationsDefenseInsurance LawMotor Vehicle InsuranceVehicle UseGeneral OverviewInsurance LawMotor Vehicle InsuranceVehicle UsePermissive UsersGeneral Overview

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12-120 California Points & Authorities § 120.72

§ 120.72 Exclusion of User From Coverage When Named Insured Is Engaged in Specified Business

[1] FORM

INSURER _____ [HAS *or* HAD] NO DUTY TO DEFEND INSURED [IN THE UNDERLYING ACTION] BECAUSE THE NAMED INSURED OPERATING THE CAR WHILE ENGAGED IN A SPECIFIED BUSINESS.

Exclusion of User From Coverage When Named Insured Is Engaged in Specified Business. An insurer and a named insured engaged in the business of leasing vehicles for a term in excess of six months, or selling, repairing, servicing, delivering, testing, road-testing, parking, or storing automobiles, may agree that coverage shall not apply to any person other than the named insured or his or her agent or employee except to the extent that the limits of liability of any other insurance available to such person are not equal to the minimum coverage specified in Vehicle Code Section16056(a). If an insurer and its named insured so agree, that agreement is binding on every insured to whom the policy applies and on every third-party claimant (*Ins. Code § 11580.1(d)(2)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention by the insurer that the user of a vehicle was excluded from coverage under the insurance policy. The basis of these points and authorities is that the insured was engaged in a specified business.

If the permissive user was one of a class of users excluded by a named insured primarily engaged in one of the businesses specified in Ins. Code§ 11580.1(d)(2), these points and authorities will apply (regarding requirement that named insured's primary business be one enumerated in *Ins. Code § 11580.1(d)(2), see Powell v. Premier Ins. Co. (1981) 118 Cal. App. 3d 336, 173 Cal. Rptr. 383*).

This form may be used, for example, in an action against the insurer for damages for breach of its alleged duty under a motor vehicle liability policy to defend an action brought against the operator of the insured's vehicle or to indemnify the user on the judgment entered.

This form may be used by an insurer in various procedural contexts, such as in memoranda supporting or opposing a motion for summary judgment, in a trial brief, or in an appellate brief. For further discussion, see *§ 120.30[2][a]*.

These points and authorities may be combined, if appropriate, with other points and authorities that contend that the insurance policy excludes from coverage the driver of the insured vehicle [*see § 120.70* et seq.].

For references to related Pleading and Practice chapters, see *§ 120.70[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should:

- Refer to facts showing that the permissive user was one of a class of users excluded by a named insured primarily engaged in one of the businesses specified in *Ins. Code § 11580.1(d)(2)*, and

- Argue that under the policy, therefore, the insurer has no duty to defend or indemnify the insured for claims arising out of that driver's operation of the insured vehicle.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.10* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be a motion by a defendant insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.30[2][b]*.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[d] Opposing Points and Authorities

The points and *authorities in § 120.80* et seq. may be used in an appropriate case to oppose these points and authorities.

[3] Discussion of Authorities

[a] Exclusion of User From Coverage When Named Insured Is Engaged in Specified Business

Ins. Code § 11580.1(d)(2) provides that with regard to any automobile liability insurance policy issued to a named insured engaged in the business of leasing vehicles for those vehicles that are leased for a term in excess of six months, or selling, repairing, servicing, delivering, testing, road testing, parking, or storing automobiles, the named insured and the insurer may agree that coverage does not apply to any person other than the named insured or his or her agent or employee, except to the extent that the limits of liability of any other valid and collectible insurance available to such

person are not equal to the limits of liability specified in *Veh. Code § 16056(a)* (not less than $15,000 for bodily injury to or death of one person, $30,000 for bodily injury to or death of two or more persons, and $5,000 for property damage in any one accident). *Ins. Code § 11580.1(d)(2)* also provides that if the policy is issued to a named insured engaged in the business of leasing vehicles, which includes the leasing of vehicles for a term in excess of six months, and the lessor includes in the lease automobile liability insurance, the terms and limits of which are not otherwise specified in the lease, the named insured must incorporate a provision in each vehicle lease contract advising the lessee of the provisions of *Ins. Code § 11580.1(d)(2)* and of the fact that this limitation is applicable except as otherwise provided for by statute or federal law.

It should be noted that prior to January 1, 1982, leasing was not included as one of the businesses in which a named insured had to be engaged in order to exclude permissive user coverage in excess of financial responsibility minimums.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawMotor Vehicle InsuranceExclusionsGeneral OverviewInsurance LawMotor Vehicle InsuranceExclusionsBusiness UseInsurance LawMotor Vehicle InsuranceObligationsDefenseInsurance LawMotor Vehicle InsuranceObligationsIndemnification

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12-120 California Points & Authorities §§ 120.73-120.79

[Reserved]

§§ 120.73[Reserved]

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12-120 California Points & Authorities § 120.80

§ 120.80 Motor Vehicle Liability Policy Insures Permissive User

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [HAS *or* HAD] THE DUTY TO DEFEND OR INDEMNIFY INSURED BECAUSE MOTOR VEHICLE LIABILITY POLICIES ARE REQUIRED TO COVER PERMISSIVE USERS.

A. Motor Vehicle Liability Policy Insures Permissive User. With exceptions not applicable here, no automobile liability insurance policy may be issued or delivered in California unless it covers permissive users of the covered motor vehicle (*Ins. Code § 11580.1(a), (b)(4)*; *Metz v. Universal Underwriters Ins. Co. (1973) 10 Cal. 3d 45, 55-56, 109 Cal. Rptr. 698, 513 P.2d 922*).

[*Optional*] **B. Judgment Creditor Has Standing to Sue.** A judgment creditor may sue the judgment debtor's insurer under a liability policy to recover the amount of a judgment up to the policy limits (*Ins. Code § 11580(b)(2)*).

[*Optional*] **C. Permissive User Liability Exclusion Unenforceable if Inconspicuously Located in Policy.** Exclusions or limitations on permissive user liability coverage that are not clearly and conspicuously stated and located in the policy are ineffective and unenforceable (*Haynes v. Farmers Ins. Exch. (2004) 32 Cal. 4th 1198, 1206-1212, 13 Cal. Rptr. 3d 68, 89 P.3d 381* ; *Thompson v. Mercury Cas. Co. (2000) 84 Cal. App. 4th 90, 97, 100 Cal. Rptr. 2d 596*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's the contention that an insurer has no duty to defend its insured under an insurance policy. The basis of these points and authorities is that the driver of the insured's

vehicle at the time of the accident was a permissive user.

These points and authorities may be submitted by a plaintiff, for example, in an action for damages for wrongful refusal to defend or to indemnify either the named insured under a motor vehicle liability policy or a person who incurred potential liability while operating a vehicle with the insured'spermission [*see Ins. Code § 11580.1(b)(4)*], in opposition to a motion by defendant insurer for summary judgment pursuant to *Code Civ. Proc. § 437c*, when the defendant contends that the particular liability sued on was not covered, or was excluded from coverage, by the policy. They may also be used in a trial or appellate brief in such an action. In addition, they may be used in support of a motion for summary judgment in favor of the insured in a declaratory relief action seeking a declaration that there is no duty to defend.

These points and authorities may be combined, if appropriate, with other points and authorities that contend that the insured has wrongfully refused to defend its insured in a third-party action [*see §§ 120.50 et seq. and 120.81* et seq.].

This form may be used to oppose the points and authorities *set forth in § 120.70* et seq.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should:

- Refer to specific facts that show the driver of the vehicle is properly considered a permissive user, and

- Argue that under the policy, therefore, the insurer is bound to defend or indemnify the insured for claims arising out of that driver's operation of the insured vehicle.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.20* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing an insurer's motion for summary judgment or summary adjudication when the evidentiary facts clearly support the contention and disclose triable issues of any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.50[2][b]*.

[c] Related Pleading and Practice Chapters

For complaints by an insured against an insurer for damages for breach of contract because of the insurer's refusal to pay a third-party judgment against the insured or to defend the insured in a third-party action, see California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender). For a discussion of the rules applicable to summary judgment, a form of notice of motion for summary judgment, and related forms, see Ch. 537, *Summary Judgment* , in that publication.

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Motor Vehicle Liability Policy Insures Permissive User

Ins. Code § 11580.1(a) provides in part that a policy of automobile liability insurance described in *Veh. Code § 16054* (liability policy or bond as proof of financial responsibility under Financial Responsibility Law) covering liability arising out of the ownership, maintenance, or use of any motor vehicle may not be issued or delivered in California on or after the effective date of the section (January 1, 1971) unless it contains the provisions set forth in *Ins. Code § 11580.1(b). Ins. Code § 11580.1(b)* provides that every policy of automobile liability insurance to which *Ins. Code § 11580.1(a)* applies must contain, among other things, a provision affording insurance to the named insured with respect to any motor vehicle covered by the policy, and to the same extent that insurance is afforded to the named insured, to any other person using, or legally responsible for the use of, the motor vehicle, provided that such use is by the named insured or with his or her permission express or implied, and within the scope of such permission [*Ins. Code § 11580.1(b)(4)*].

Ins. Code § 11580.1(a) further provides that none of the provisions set forth in *Ins. Code § 11580.1(b)* shall apply to the insurance afforded under any such policy (1) to the extent that such insurance exceeds the limits specified in *Veh. Code § 16056*, or *(2)* if such policy contains an underlying insurance requirement, or provides for a retained limit of self-insurance, equal to or greater than the limits specified in *Veh. Code § 16056(a).*

The circumstances under which coverage of permissive users may be excluded are discussed in *§ 120.72[3][a]*.

In ***Metz v. Universal Underwriters Ins. Co.*** *(1973) 10 Cal. 3d 45, 109 Cal. Rptr. 698, 513 P.2d 922* , Metz sustained severe injuries in a collision of his motorcycle with a car driven by Hamlin, who had leased the car from a leasing corporation. Universal Underwriters Insurance Company had insured all cars owned by the lessor, but excluded from coverage were vehicles "while rented to others by the named insured." Hamlin was covered by two other insurance policies, both of which named Hamlin and the lessor as insureds. After the accident, Metz's father, individually andas guardian ad litem, sued Hamlin and the lessor and recovered judgment in excess of the limits of the two policies covering Hamlin. Hamlin's insurers paid plaintiff the limits of their policies in partial satisfaction of the judgment. One of Hamlin's insurers then initiated a declaratory relief action in which Metz filed a cross complaint against Universal to recover the balance of the judgment after crediting the amounts paid by Hamlin's insurers. The trial court granted Metz's motion for summary judgment against Universal, finding Universal liable for the unsatisfied balance of the judgment plus accrued interest.

On appeal, the Supreme Court modified the judgment to eliminate the accrued interest and affirmed the judgment as modified. The Court held that the exclusionary clause, "while rented to others," was ineffective. Reviewing the development of the law on this issue, the Court held that not only did the statute proscribe policy provisions which by their terms excluded coverage for permissive users, but that it also invalidated provisions which, by defining a class of excluded vehicles in terms of their operation by permissive users, served effectively to deny coverage to those users (*10 Cal. 3d 45, 53)* . The Court then concluded that the exclusion did not come within the provisions of former Ins. Code § 11580.1(f) (*now see Ins. Code § 11580.1(d)(2)*) since the insured was not engaged in any of the businesses specified in that section (*10 Cal. 3d 45, 54-56)* .

[b] Judgment Creditor Has Standing to Sue

Ins. Code § 11580 provides, in relevant part, that a policy insuring against loss or damage resulting from liability for injury suffered by another person, other than a workers' compensation policy or a policy issued by a nonadmitted Mexican insurer solely for use in the Republic of Mexico, may not be issued or delivered to any person in this state unless it contains the provisions set forth in *Ins. Code § 11580(b)* and that such a policy, whether or not actually containing such provisions, must be construed as if such provisions were embodied in the policy. *Ins. Code §*

11580(b)(2) provides that such a policy may not be issued or delivered to any person in this state unless it contains a provision that whenever judgment is secured against the insured or the executor or administrator of a deceased insured in an action based on bodily injury, death, or property damage, then an action may be brought against the insurer on the policy, subject to its terms and limitations, by the judgment creditor to recover on the judgment.

[c] Permissive User Liability Exclusion Unenforceable if Inconspicuously Located in Policy

Haynes v. Farmers Ins. Exch. *(2004) 32 Cal. 4th 1198, 13 Cal. Rptr. 3d 68, 89 P.3d 381* concerned the provisions of liability coverage for permissive users under an "E-Z Reader Car Policy" issued to the ownerof a vehicle involved in an accident. The policy was 39 pages long. The first page consisted of a declarations page that stated that "COVERAGES" are $250,000 per person and $500,000 per occurrence for bodily injury, and $100,000 for property damage. The declarations page also provided the insurer's company name, the insured's name and address, the policy number, the insurance agent's name and contact information, a description of the insured vehicle, and other miscellaneous information. Two-thirds down the declarations page on the left-hand side appeared a box labeled "ENDORSEMENT NUMBERS." Within this box were 11 alphanumeric entries, each containing a letter followed by four digits. The eighth alphanumeric entry was the relevant entry. Nothing in the box, or anywhere on the declarations page, defined or explained "ENDORSEMENTS" or indicated the title, location, subject matter, or substance of the relevant alphanumeric entry, or any of the other entries in the box. Inserted between the second and fourth pages was a letter to "Dear Customer," which stated:

> The accompanying Declarations Page shows your current coverages resulting from recent changes made to your policy. Please review your policy changes and file them in a safe place with your original policy document.

No specific changes were identified. The fourth page (numbered "1") was entitled "Index of Policy Provisions." Under part I, "Liability," the index contains entries for "Coverage," "Exclusions," "Limits of Liability," and "Other Insurance," providing page numbers for each. No reference to permissive users, or any limitation on permissive-user coverage, appeared in the index. On the seventh page (numbered "4"), in the "LIABILITY" section, "insured person" was defined as including "Any person using your insured car." On the ninth page (numbered "6"), under "Limits of Liability," was an explanation of the bodily injury and property damage liability limits for "each person" and "each occurrence" shown in the declarations on the first page. There was no indication, either on the declarations page or in the "Limits of Liability" section, that limits were different for persons "using your insured car." Also in the "LIABILITY" section, on the 10th page (numbered "7") under the subheading "Other Insurance," the policy advised that for "an insured person, other than you or a family member," coverage was provided "up to the limits of the Financial Responsibility Law only." The relevant endorsement was on the 24th page. Entitled "PART I--LIABILITY--PERMISSIVE USER LIMITATION," the endorsement was contained within a box occupying the upper half of the page, the lower half of which was blank, and included 19 lines of text. Various purported amendments to "Your E-Z Reader Car Policy, Your E-Z Reader Motorcycle Policy and Your Motor Home Plus Policy" were stated in those 19 lines. The relevant endorsement in its eighth paragraph (lines 11 and 12) stated: "In Your E-Z Reader Car Policy, the second paragraph under PART I--LIABILITY," Other Insurance" is deleted" and in its penultimate paragraph (lines 15 through 17) stated:

> We will provide insurance for an Insured person, other than you, a family member or a listed driver, but only up to the minimum required limits of your state's Financial Responsibility Law of $15,000 per person and $30,000 per occurrence for bodily injury, and $5,000 for property damage.

A permissive user of the vehicle insured under this policy became involved in an accident, injuring a passenger in the insured vehicle. The injured person sued the owner and the permissive user, and the insurer defended the action. In response to interrogatories, the insurer stated that the pertinent coverage was provided in the endorsement described above, which limits permissive-user coverage. The injured person then filed an action for declaratory relief, specifically seeking a declaration that the endorsement's limitation of permissive-user coverage was unenforceable. The trial court

granted the insurer's motion for summary judgment, and the court of appeal reversed.

The California Supreme Court affirmed the decision of the court of appeal, holding that the endorsement regarding limitations on coverage for permissive users was unenforceable. The Court began by noting that any exception to the performance of the basic underlying obligation must clearly apprise the insured of its effect. Coverage may be limited by a valid endorsement, and if a conflict exists between the main body of the policy and an endorsement, the endorsement prevails. However, any provision that takes away or limits coverage reasonably expected by an insured is not enforceable unless it is conspicuous, plain, and clear. Any such limitation must therefore be placed and printed so that it will attract the reader's attention. It must also be stated precisely and understandably, in words that are part of the working vocabulary of the average lay person. The burden of making coverage exceptions and limitations conspicuous, plain, and clear rests with the insurer (*32 Cal. 4th 1198, 1204)* . The Court stated that in this particular policy, the permissive-user language in the main body of the policy, located on the 10th page (numbered "7") as the second of four paragraphs under the heading "Other Insurance," was not conspicuous, plain, and clear. There was nothing in the heading to alert a reader that it limits permissive-user coverage, and nothing in the section attracted a reader's attention to the limiting language (*32 Cal. 4th 1198, 1204-1205)* .

The permissive-user language in the endorsement was similarly unenforceable because it was not inconspicuous, plain, and clear. With respect to the conspicuousness requirement, the endorsement was listed on the policy's declarations page only by its alphanumeric designation, along with 10 other endorsements. Actual dollar coverages for permissive users could have been placed with the policy coverages on the declarations page, where one would expect an insured to look to determine the policy limits. Moreover, nothing on the declarations page alerted a reader to the fact that theendorsement in question contains a paragraph limiting coverage for permissive users to amounts less than the policy coverages prominently displayed in specific dollar amounts on that same page. The declarations page did not reveal the subject matter or substance of any of the endorsements, nor did it state that the endorsements constituted part of the policy and amended the policy. To receive this latter notification, a reader was required to proceed to the bottom of the fourth page (numbered "1"). The only apparent references to the policy's endorsements that appeared on the declarations page, except for the alphanumeric list, were two phrases placed among others in a box positioned immediately to the right of the "ENDORSEMENT NUMBERS" box. Labeled "MESSAGES / RATING INFORMATION," the box, which was only half full, contained only a cryptic notation referring to numerical and letter designations. The "MESSAGES /RATING INFORMATION" box contained no message informing a reader that the relevant endorsement discussed permissive users or limited coverage. Not unless or until a reader had turned to and examined the policy's 24th page--after perusing pages containing language relating to "MEXICO COVERAGE," "BUSINESS USE," and "CUSTOMIZING EQUIPMENT," along with a page "LEFT INTENTIONALLY BLANK"--did the reader learn that the policy contained an endorsement entitled "PART I--LIABILITY--PERMISSIVE USER LIMITATION" (*32 Cal. 4th 1198, 1206-1207)* . Within the endorsement, the language of the permissive-user limitation was not in boldface, italicized, enlarged, underlined, in a different font, capitalized, boxed, set apart, or in any other way distinguished from the rest of the fine print. The title also indicated that the endorsement contained a "LIMITATION," but did not state that the limitation concerned liability coverage amounts. The text of the permissive-user limitation contained a few scattered terms that were in boldface, apparently because they were terms defined elsewhere within the policy, but because the other 10 paragraphs in the endorsement do so as well, nothing about this scattered use of boldface attracted attention to the permissive-user limitation. Consequently, the permissive-user limitation was not positioned in a place and printed in a form that would attract a reader's attention. Although California insurers may rely on endorsements to modify printed terms of a form policy, and if the terms of an effective endorsement conflict with terms in the main body of such a policy, the endorsement controls, neither the prevalence of endorsements in the insurance industry nor the Court's recognition that they may validly modify an insurance policy diminishes an insurer's burden of notifying insureds of reductions in otherwise reasonably expected coverage. Although an insurer has the right to sell insurance policies by methods of mechanization, the insurer cannot then rely on esoteric provisions to limit coverage. If an insurer deals with the public on a mass basis, any notice of the policy's lack of coverage, in a situation in which the public may reasonably expect coverage, must be conspicuous, plain, and clear. Other deficiencies in the language regardingpermissive-user coverage included: (1) the definition of the insured, appearing at the outset of the liability section, gave every indication

that a permissive driver stood in the same position as the insured and received the same coverage; and (2) the permissive-user limitation was found in the subsection on "Other Insurance," even though it has nothing to do with insurance from any other source. The Court agreed with the court of appeal that burying the permissive-user limitation among unrelated provisions rendered it inconspicuous and potentially confusing to the average lay reader (*32 Cal. 4th 1198, 1208-1209)* .

With respect to the requirements of plainness and clarity, the language itself must be plain and clear. Although the term "permissive user" appeared in the title of the endorsement containing the limitation, the term was nowhere defined, either in the policy or the endorsement, for the average lay reader. Moreover, the endorsement contained confusing language surrounding and introducing the actual text of the permissive-user limitation, along with confusing cross-references to other insurance policies that the insured did not possess. Therefore, contrary to the claim on the cover page of the E-Z Reader Car Policy, the policy was not "written in non-technical easy-to-read style" (*32 Cal. 4th 1198, 1211-1212)* . Although the endorsement purports to effect insertion of the permissive-user limitation at two different points in the policy, the purported insertion points were difficult to understand and confusing (*32 Cal. 4th 1198, 1212)* .

Because the policy in this case provided the named insured with liability insurance greater than the minimum requirements of the Financial Responsibility Law, the insurer had no initial duty to indemnify a permissive user for damages exceeding those requirements, pursuant to *Ins. Code § 11580.1(a), (b)(4)*. However, the insurer included "[a]ny person using your insured car" within its definition of "Insured person," thus raising a reasonable expectation that permissive-user coverage would be coextensive with the coverage for other insureds. Consequently, any limitation on permissive-user coverage was not enforceable unless it was conspicuous, plain, and clear (*32 Cal. 4th 1198, 1213)* .

In ***Thompson v. Mercury Cas. Co.*** *(2000) 84 Cal. App. 4th 90, 100 Cal. Rptr. 2d 596* , the insureds' automobile policy provided liability insurance on their pickup truck. After they increased their policy limits, the new bodily injury liability limits were $100,000 per person up to $300,000 per accident. On the first page, the policy included the following language:

> Persons Insured: Subject to Condition 23 on page 6 of this policy, the following are insured under Part I:
>
> (a) With respect to the owned automobile:
>
> (1) the named insured and any relative,
>
> (2) persons listed as drivers in the policy declarations,
>
> (3) any other person, provided it is used with the permission of the named insured. ...

On the sixth and last page, Condition 23 provided:

> Permissive User Coverage--Coverages A and B: If this policy provides coverage with bodily injury liability limits in excess of $15,000 per person and $30,000 per accident and/or a property damage liability limit in excess of $5,000 per accident, then the coverage in excess of those limits shall not apply to the operation or use of a motor vehicle by any person other than the named insured, a relative as defined in Part I of this policy, or an agent or employee of the named insured in the scope of his employment. This limitation shall not apply to liability incurred by the named insured or by such relative.

With the insured's permission, another person (the permissive user), who was not a relative nor a named insured, drove the vehicle with his friend's son as a passenger. He encountered icy road conditions and slid into opposing traffic, causing a head-on collision with another car. The permissive user, his passenger, and the driver of the other car (the third party) were all injured. The third party filed a claim with the insurer for $100,000, the per-person liability limit as shown on the declarations page. After initial attempts at settlement, the parties could not agree on whether the third party was entitled to claim $100,000 or $15,000, the permissive user coverage limit as stated in Condition 23. The third party sued for declaratory relief, claiming that the automobile insurance policy failed to state clearly and conspicuously the limitations on permissive user coverage. The third party further claimed that as a result of the ineffective limiting language contained in the policy, she was entitled to recover the full amount of the policy limits ($100,000). The insurer filed a cross-complaint against the insureds, the permissive user, his passenger, and the third party. The insurer sought a declaration stating that Condition 23 applied to all bodily injury claims arising out of the accident. The trial court held that the policy language limiting liability for permissive users was inconspicuous and thus unenforceable. The court found that the limiting or exclusionary language affecting liability was not within the liability section of the policy, where one would expect to find it, but was instead on the last page, in the last part of a little-consulted section of the policy that lumps together miscellaneous and unrelated provisions. Although the "persons insured" section of the policy begins with "Subject to Condition 23 on page 6 ...", the first subparagraphs describe insured persons who do not fall within Condition 23. In the two subparagraphs that do describe the permissive users, no hint is given that their coverage is limited in any way. Condition 23 itself refers only to "Part [I]" of the policy, a part that is a full page in length, and it nowhere refers to the specific subparagraphs that describe the permissive users whose limits of liability are less than those of the policy.

On the insurer's appeal, the court of appeal noted that the case presented a narrow legal question: whether Condition 23, the exclusionary orlimiting language on permissive user coverage contained in the automobile liability insurance policy, was conspicuous. Affirming the trial court's ruling, the court of appeal analyzed the exclusionary clauses in light of controlling rules of construction. In this case, the permissive-user coverage clause of the automobile liability insurance policy was inconspicuously located on the last page of the policy. Permissive users were included in the definition of "Persons Insured" on the first page of the policy, but the liability limitations for permissive users was not in the "Liability" section of the policy. Strangely enough, the court noted, the policy contained two numbered sections and one unnumbered section entitled "Conditions." The unnumbered section contained 30 random and unrelated subsections, which contained the permissive user coverage provision. Furthermore, the language in Condition 23 was not in boldface, italicized, enlarged, underlined, in different font, capitalized, boxed, set apart, or in any other way distinguished from the rest of the fine print. Although certain parts of this Conditions section, aside from the headings, were in boldface for emphasis, Condition 23 was not. The subsection immediately above the permissive user coverage provision was in boldface, which hid, to some extent, the heading for Condition 23. Significant because of its limitations on the insurer's liability, the permissive-user coverage clause should be included in the "Liability" section of the policy, where an average layperson would expect to find it. The liability limits are among the few policy features actually bargained for between the insurer and insured. The court concluded that in this case, Condition 23 in the automobile liability insurance policy was not sufficiently conspicuous to apprise the average layperson of the limitations on permissive user coverage. The court rejected the insurer's contention that this defect is cured by its repeated references to Condition 23 in the policy. Instead, the cross-references merely underscore the importance of the clause without revealing the nature of its content. The court also rejected the insurer's contention that Condition 23 was not an exclusion from the agreed-on policy limits, as provided on the declarations page of the policy. At minimum, the court stated, it is a limitation on or partial exclusion from coverage. The court concluded that the insurer failed to satisfy its burden of conspicuously displaying exclusionary language (*84 Cal. App. 4th 90, 96-99)* .

[4] Additional Authorities

[a] Motor Vehicle Liability Policy Insures Permissive User

In *Mercury Ins. Group v. Checkerboard Pizza (1993) 12 Cal. App. 4th 495, 15 Cal. Rptr. 2d 657* , the insured leased

an automobile while the family car was being repaired. The insured's son was involved in an accident while using the leased car to deliver pizzas. The court held that the leased automobile was a "nonowned" vehicle for purposes of a policyexclusion for business use of a nonowned vehicle (*12 Cal. App. 4th 495, 498)* . However, the car came within the exclusion's exception for private passenger vehicles driven by the named insured. The court held that the exclusion was unenforceable because it treated a permissive user differently than a named insured. Thus, the exclusion did not preclude coverage of the insured's son as a permissive user (*12 Cal. App. 4th 495, 499-500)* .

In ***Ohio Farmers Ins. Co. v. Quin*** *(1988) 198 Cal. App. 3d 1338, 244 Cal. Rptr. 359* insurer brought an action for declaratory relief to determine whether coverage was excluded because a person expressly excluded from coverage had entrusted the insured's vehicle to another. The court of appeal affirmed the trial court's determination that coverage existed, holding that the public policy of California requires every automobile liability policy, as a matter of law, to cover permissive users, and that any provision in the policy excluding them is illegal (*198 Cal. App. 3d 1338, 1344* ; interpreting 1982 version of *Ins. Code § 11580.1(d)(1)*).

In *Lovy v. State Farm Ins. Co. (1981) 117 Cal. App. 3d 834, 173 Cal. Rptr. 307* , the court of appeal stated that *Ins. Code § 11580.1,* a part of this state's financial responsibility law, is to be liberally construed to provide monetary protection for that ever-changing and tragically large group of persons who suffer grave injury (*117 Cal. App. 3d 834, 843)* , that any attempt to exclude coverage for permissive users of insured automobiles is viewed with disfavor, that all ambiguities and doubts must be resolved in favor of coverage (*117 Cal. App. 3d 834, 844-845)* , and that the attempts of the insurer to exclude coverage for certain permissive users in cases involving the renting of dealer automobiles was not permissible under *Ins. Code § 11580.1(b)(4),* specifying requirements for liability coverage for permissive users of insured automobiles (*117 Cal. App. 3d 834, 845-851)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsPolicy InterpretationGeneral OverviewInsurance LawClaims & ContractsPolicy InterpretationExclusionsInsurance LawMotor Vehicle InsuranceObligationsGeneral OverviewInsurance LawMotor Vehicle InsuranceVehicle UsePermissive UsersGeneral Overview

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 120 INSURANCE
PART II. FORMS
B. Coverage and Exclusions
2. Exclusions in Motor Vehicle Policies

12-120 California Points & Authorities § 120.81

§ 120.81 No Exclusion May Be Based on Insured's Incidental Business

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [HAS *or* HAD] THE DUTY TO DEFEND OR INDEMNIFY INSURED BECAUSE EXCLUSIONS CANNOT BE BASED ON THE INCIDENTAL BUSINESS OF THE NAMED INSURED.

No Exclusion May Be Based on Insured's Incidental Business. Exclusion of coverage of permissive users under the provisions of *Ins. Code § 11580.1(d)(2)* is not permitted if the named insured is only incidentally or occasionally involved in one of the businesses enumerated therein (*Powell v. Premier Ins. Co. (1981) 118 Cal. App. 3d 336, 343-344, 173 Cal. Rptr. 383*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's the contention that an insurer has no duty to defend its insured under an insurance policy. The basis of these points and authorities is that the named insured is only incidentally or occasionally involved in one of the businesses enumerated in *Ins. Code § 11580.1(d)(2)*.

This form may be used by an insured in various procedural contexts, such as in memoranda supporting or opposing a motion for summary judgment, in a trial brief, or in an appellate brief. For further discussion, see *§ 120.50[2][a]*.

These points and authorities may be combined, if appropriate, with other points and authorities that contend that the insured has wrongfully refused to defend its insured in a third-party action [*see §§ 120.50 et seq. and 120.80* et seq.].

This form may be used to oppose the points and authorities *set forth in § 120.72*.

For references to related Pleading and Practice chapters, see *§ 120.80[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should:

- Refer to specific facts that show that the named insured is only incidentally or occasionally involved in one of the businesses enumerated in *Ins. Code § 11580.1(d)(2)*, and

- Argue that under the policy, therefore, the insurer is bound to defend or indemnify the insured for claims arising out of operation of the insured vehicle.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.20* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing an insurer's motion for summary judgment or summary adjudication when the evidentiary facts clearly support the contention and disclose triable issues of anymaterial fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.50[2][b]*.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] No Exclusion May Be Based on Insured's Incidental Business

Powell v. Premier Ins. Co. *(1981) 118 Cal. App. 3d 336, 173 Cal. Rptr. 383* , a declaratory relief action, was decided before *Ins. Code § 11580.1(d)(2)* permitted exclusion of permissive-user coverage because the named insured is in the automobile leasing business. Plaintiff's conservatee had been injured while riding in a car owned by defendant's insured, a leasing company, and driven by Hatch with the permission of the lessee. The parties had stipulated that the named insured was in the business of selling and leasing automobiles. The word "primary" was not used in the stipulation, but evidence before the court clearly indicated that the named insured was primarily a leasing company. The trial court entered judgment for plaintiff.

The court of appeal affirmed. The court held that to claim the protection of *Ins. Code § 11580.1(d)(2)*, the business activity of the named insured must have been one of those enumerated in the statute. Additionally, something more is required than a showing that the named insured engaged in the enumerated business incident to a principal business not enumerated in the statute (*118 Cal. App. 3d 336, 343)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawMotor Vehicle InsuranceExclusionsGeneral OverviewInsurance LawMotor Vehicle

InsuranceExclusionsBusiness UseInsurance LawMotor Vehicle InsuranceObligationsDefenseInsurance LawMotor Vehicle InsuranceObligationsIndemnification

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12-120 California Points & Authorities § 120.82

[Reserved]

§ 120.82[Reserved]

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CHAPTER 120 INSURANCE
PART II. FORMS
B. Coverage and Exclusions
2. Exclusions in Motor Vehicle Policies

12-120 California Points & Authorities § 120.83

§ 120.83 Insurer Must Defend or Indemnify Person Legally Responsible for Use of Vehicle

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [HAS *or* HAD] THE DUTY TO DEFEND OR INDEMNIFY INSURED BECAUSE _____ [*name*] IS LEGALLY RESPONSIBLE FOR THE USE OF THE VEHICLE DESCRIBED INTHE POLICY, AND MOTOR VEHICLE LIABILITY POLICIES MUST COVER ANY SUCH PERSONS.

A. Insurer Must Defend or Indemnify Person Legally Responsible for Use of Vehicle. Every motor vehicle liability policy must provide coverage, to the same extent that insurance is afforded to the named insured, to any other person legally responsible for the use of the motor vehicle, provided the use is by the named insured (*Ins. Code § 11580.1(b)(4)*; *Younker v. County of San Diego (1991) 233 Cal. App. 3d 1324, 1328, 285 Cal. Rptr. 319*).

[*Optional*] **B. Employee's Motor Vehicle Policy Fulfills Public Entity's Statutory Obligation.** When a public entity is required by statute to defend and indemnify an employee regarding third-party liability incurred during the course of employment, it may satisfy that obligation through funds available to it through any insurance policy, whether the public entity is the named insured or merely an additional insured under the policy (*Younker v. County of San Diego (1991) 233 Cal. App. 3d 1324, 1330, 285 Cal. Rptr. 319*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's the contention that an insurer has no duty to defend its insured under an insurance policy. The basis of these points and authorities is that the insurer is required by statute to provide coverage to the person legally responsible for the use of the vehicle if the named insured was using

the vehicle at the relevant time [*see Ins. Code § 11580.1(b)(4)*; *Younker v. County of San Diego (1991) 233 Cal. App. 3d 1324, 1328, 285 Cal. Rptr. 319]* .

Paragraph B is for use if the insurer asserts that it is not obligated to defend or indemnify a public entity that is legally responsible within the meaning of *Ins. Code § 11580.1(b)(4)*, because a public entity has a separate statutory obligation to defend and indemnify the named insured. The ground of the opposition is that a public entity is not prevented by any statute from satisfying obligations to its employees through any insurance policy, whether as a named insured or additional insured (including the personal motor vehicle liability policy of the employee). For a memorandum of points and authorities that includes the assertion that a public entity may insure against the expense of defending a claim against itself or an employee, *see § 120.82[1]*.

These points and authorities may be submitted, for example, in opposition to a defense motion for summary judgment in an action against amotor vehicle liability insurer based on defendant's refusal to defend or indemnify the person (or organization) legally responsible for the use of the vehicle. They may also be used in a trial or appellate brief in such an action. In addition, they may be used in support of a motion for summary judgment in favor of the insured in a declaratory relief action seeking a declaration that there is no duty to defend.

These points and authorities may be combined, if appropriate, with other points and authorities that contend that the insured has wrongfully refused to defend its insured in a third-party action [*see §§ 120.50 et seq. and 120.80* et seq.].

This form may be used to oppose the points and authorities *set forth in § 120.70* et seq.

For references to related Pleading and Practice chapters, see *§ 120.80[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should:

- Refer to specific facts that show that the person asserting coverage is legally responsible for the use of the vehicle, and

- Argue that, consequently, pursuant to statute and the corresponding policy provision, that person is an additional insured under the policy and the insurer is bound to defend or indemnify the insured for claims arising out of operation of the insured vehicle.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.20* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing an insurer's motion for summary judgment or summary adjudication when the evidentiary facts clearly support the contention and disclose triable issues of any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.50[2][b]*.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary*

Judgments .

[3] Discussion of Authorities

[a] Insurer Must Defend or Indemnify Person Legally Responsible for Use of Vehicle

In ***Younker v. County of San Diego*** *(1991) 233 Cal. App. 3d 1324, 285 Cal. Rptr. 319* , a named insured (the insured) under an automobile liability insurance policy (the policy) brought an action against his employer, a self-insured county (the county), seeking settlement and expense costs that he and his insurer (the insurer) incurred based on a third-party action arising from an accident in which he was driving his own car while acting in the scope of his employment. The insured, a volunteer fireman, responded to a report of a fire while driving his personal vehicle. While driving toward the fire, he received a radio message cancelling his response. En route to his home he struck and injured a pedestrian. The county initially admitted its responsibility to defend and indemnify the insured if a claim were filed, but when a claim was filed, it refused to do so, asserting that the insurer provided primary coverage. The third party sued the insured for negligence, and the parties to that action settled. The insured filed a claim with the county, seeking reimbursement for expenses, and the county returned the claim without taking action. The insured and his insurer sued the county to recover the amount paid in settling the lawsuit plus attorney's fees and expenses. Plaintiffs alleged they were forced to incur expenses because the county violated its statutory duty to defend and indemnify its employee. The trial court entered judgment for the insurer against the county for the costs of settlement and attorney's fees. Defendant appealed.

The court of appeal reversed, holding that the insurer was required to cover the county as an entity responsible for the use of the vehicle by the insured (*233 Cal. App. 3d 1324, 1329)* . The county contended on appeal that the policy extended coverage to the county as the insured's employer, and that the insurer's obligation prevailed over the county's general obligation to defend and indemnify the insured (*233 Cal. App. 3d 1324, 1327)* . Plaintiffs contend that the fact that the insured obtained his own automobile liability insurance policy should not permit the county to avoid its obligations under the Government Code, the relevant provisions of which require a public entity to defend and indemnify employees acting within the scope of employment [*see Gov. Code §§ 825, 825.2, 825.4, 995, 996, 996.4*]. The court found the facts identical to those in *Government Employees Ins. Co. v. Gibraltar Cas. Co. (1986) 184 Cal. App. 3d 163, 229 Cal. Rptr. 57* , in which a teacher driving her private vehicle struck and injured a person while acting within the scope of employment. In that case, the employee's insurer settled with the third party and sued the insured's employer, a school district, to recover the amount of the settlement and attorney's fees. The court of appeal affirmed summary judgment for thedefendant. The court in the instant case stated that *Ins. Code § 11580.1(b)(4)* requires every motor vehicle liability policy to provide coverage for anyone legally responsible for use of the vehicle described in the policy (*233 Cal. App. 3d 1324, 1328)* . Accordingly, the policy in question defined as "persons insured," in addition to the named insured, "any other person or organization but only with respect to his or its liability because of acts or omissions of an insured." The court stated that under the policy, the county was clearly a "person or organization" liable because of the named insured's "acts or omissions" in operating his vehicle in the scope of his employment at the time of the accident. Therefore, the policy insured not only the named insured, a public employee, but also the county, as his employer. Therefore, the policy coverage was an asset of the county as well as of the named insured (*233 Cal. App. 3d 1324, 1329)* .

The court noted that defendant was statutorily obligated to defend and indemnify the insured with respect to the third-party claim (citing *Gov. Code §§ 825, 825.2, 825.4, 995, 996, 996.4*) (*233 Cal. App. 3d 1324, 1329)* . The court rejected plaintiffs' contention that the county refused to defend or indemnify the insured in violation of its statutory obligations, holding that the county satisfied those statutory obligations through the insured's policy. Pursuant to the holding of Government Employees, nothing in the Government Code prevents a public entity from satisfying a judgment or other obligation through funds available to it through any insurance policy, whether the public entity is the named insured or merely an additional insured (citing *Government Employees Ins. Co. v. Gibraltar Cas. Co. (1986) 184 Cal. App. 3d 163, 167, 229 Cal. Rptr. 57*).

Plaintiffs also contended that the county is required to bear the entire loss based on the Government Code goals of protecting public employees from financial burden resulting from third-party claims, and encouraging zealous job performance. The court rejected that argument also, stating that the satisfaction of the county's obligation to its employee does not depend on whether the loss was paid by the employee's insurer or by the county directly as self-insurer, nor on the fact that the employee may have paid the premium for the policy used to pay the settlement (*233 Cal. App. 3d 1324, 1330-1331)* . Further, because the county had an asset (the insured's policy) available to pay the settlement, the insured did not incur any financial burden beyond the premium already paid. (Plaintiffs' contentions that the insured was subjected to higher premiums, cancellation, or difficulty in finding coverage were unsupported.) The court concluded that if a public employee is fully covered, there is no proscription against the public entity satisfying its statutory obligation by availing itself of insurance designating its employee as the named insured. Therefore, the county properly relied on the policy to comply with its statutory obligation to the insured. The insurer had a clear duty under the policy to pay on behalfof the county as well as on behalf of the named insured the amount of the settlement and the attorney's fees incurring in defending the third-party claim. Consequently, the trial court erred in concluding that the insurer was entitled to reimbursement from the county (*233 Cal. App. 3d 1324, 1331)* . The court rejected plaintiff's reliance on *Pacific Indem. Co. v. American Mut. Ins. Co. (1972) 28 Cal. App. 3d 983, 105 Cal. Rptr. 295* , in which the insurer of a government employer was found to have no contribution rights against the private insurer of an employee regarding a third-party malpractice action. The court in the instant case held that case distinguishable because no other insurance covered the government's obligations (*233 Cal. App. 3d 1324, 1331-1332)* .

[b] Employee's Motor Vehicle Policy Fulfills Public Entity's Statutory Obligation

Younker v. County of San Diego *(1991) 233 Cal. App. 3d 1324, 285 Cal. Rptr. 319* , is discussed in *§ 120.83[3][a]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawMotor Vehicle InsuranceCoverageGeneral OverviewInsurance LawMotor Vehicle InsuranceObligationsDefenseInsurance LawMotor Vehicle InsuranceObligationsIndemnificationInsurance LawMotor Vehicle InsuranceVehicle UseGeneral Overview

California Points & Authorities

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CHAPTER 120 INSURANCE
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B. Coverage and Exclusions
2. Exclusions in Motor Vehicle Policies

12-120 California Points & Authorities § 120.84

§ 120.84 Commercial Policy Cannot Exclude Driver Based on Nonserious Personal Traffic Violations

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [HAS *or* HAD] THE DUTY TO DEFEND OR INDEMNIFY INSURED BECAUSE THE PURPORTED EXCLUSION OF _____ [*name*] AS A NAMED INSURED IS INVALID BECAUSE THE PURPORTED EXCLUSION IS BASED ON HIS/HER COMMISSION OF NONSERIOUS TRAFFIC VIOLATIONS WHILE OPERATING A PERSONAL PASSENGER VEHICLE NOT OWNED OR LEASED BY INSURED.

A. Commercial Policy Cannot Exclude Driver Based on Nonserious Personal Traffic Violations. No admitted insurer licensed to issue motor vehicle liability policies, as defined in *Section 16450 of the Vehicle Code*, shall cancel, or refuse to renew, a motor vehicle liability insurance policy covering drivers hired to drive by a commercial business establishment, nor execute the agreement specified in *Section 11580.1(d)(1) of the Insurance Code* with respect to those drivers for the reason that those drivers have been convicted of violation of the Vehicle Code or the traffic laws of any subdivision of the state that were committed while operating private passengervehicles not owned or leased by their employer, subject to exceptions regarding serious offenses enumerated under *Section 670(b) of the Insurance Code* (*Ins. Code § 670(a)*; *State Farm Mut. Auto. Ins. Co. v. Haight (1988) 205 Cal. App. 3d 223, 231, 252 Cal. Rptr. 162*).

B. Prohibition Against Exclusion Is Not Limited to Any Particular Type of Policy. *Section 670 of the Insurance Code* does not specify the type of motor vehicle policy to which its prohibition applies, beyond simply stating that the policy must cover drivers hired by commercial business establishments, with certain specified exceptions (*State Farm Mut. Auto. Ins. Co. v. Haight (1988) 205 Cal. App. 3d 223, 231, 252 Cal. Rptr. 162*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's the contention that an insurer has no duty to defend its insured under an insurance policy. The basis of these points and authorities is that the exclusion was impermissibly based on the driver's past commission of minor traffic offenses while operating a personal passenger vehicle that was not owned or leased by the employer, in violation of *Ins. Code § 670* [*see Ins. Code § 670*; *State Farm Mut. Auto. Ins. Co. v. Haight (1988) 205 Cal. App. 3d 223, 231, 252 Cal. Rptr. 162* ; *see also § 120.84[3][a]*].

These points and authorities may be used by plaintiff, for example, to oppose a defendant insurer's motion for summary judgment in an action for damages for wrongful refusal to defend or to indemnify a driver excluded by name in a vehicle liability policy. They may also be used in a trial or appellate brief in such an action. In addition, they may be used in support of a motion for summary judgment in favor of the insured in a declaratory relief action seeking a declaration that there is no duty to defend.

These points and authorities may be combined, if appropriate, with other points and authorities that contend that the insured has wrongfully refused to defend its insured in a third-party action [*see §§ 120.50 et seq. and 120.80* et seq.].

This form may be used to oppose the points and authorities *set forth in § 120.70* et seq.

For references to related Pleading and Practice chapters, see *§ 120.80[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should:

- Refer to specific facts that show that the violations on which the insurer is applying its purported exclusion are nonserious traffic violations while the driver was operating a personal passenger vehicle not owned or leased by insured, and

- Argue that, consequently, under the policy the insurer is bound to defend or indemnify the insured for claims arising out of operation of the insured vehicle.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.20* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing an insurer's motion for summary judgment or summary adjudication when the evidentiary facts clearly support the contention and disclose triable issues of any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.50[2][b]*.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Commercial Policy Cannot Exclude Driver Based on Nonserious Personal Traffic Violations

In ***State Farm Mut. Auto. Ins. Co. v. Haight*** *(1988) 205 Cal. App. 3d 223, 252 Cal. Rptr. 162* , the insurer under a vehicle liability policy brought a declaratory relief action regarding its duty of defense or indemnity regarding a third-party claim arising from an accident involving a driver who was excluded by name under the policy. The insurer filed the action against the insured (a construction company), the driver (an employee of the insured), and the injured third party, among others. The insured cross complained for bad faith. The trial court severed the bad-faith cause of action, and tried the declaratory relief action without a jury. The policy purported to exempt the driver who was ultimately involved in the accident, because he had received several speeding tickets while driving his personal vehicle on his own time. The accident occurred while the driver was returning home from a job site while driving a company vehicle during work hours, after stopping at the office and then at a grocery store. He was usinga company vehicle only because his own vehicle was temporarily disabled; he was otherwise required to use his own vehicle at work.

The injured third party contended that the purported exclusion of the driver was invalid pursuant to *Ins. Code § 670*. *Ins. Code § 670(a)* provides that no admitted insurer licensed to issue motor vehicle liability policies, as defined in *Veh. Code § 16450*, shall cancel, or refuse to renew, a motor vehicle liability insurance policy covering drivers hired to drive by a commercial business establishment, nor execute the agreement specified in *Ins. Code § 11580.1(d)(1)* with respect to those drivers for the reason that those drivers have been convicted of violation of the Vehicle Code, or the traffic laws of any subdivision of California, that were committed while operating private passenger vehicles not owned or leased by their employer. (That prohibition is inapplicable if the exclusion was based on a conviction for certain serious offenses enumerated under *Ins. Code § 670(b)*, none of which pertains to mere speeding offenses.) *Veh. Code § 16450* provides that a "motor vehicle liability policy" means an owner's policy or an operator's policy, or both, of liability insurance, certified as provided in former Veh. Code § 16431 (subsequently amended by 1989 and 1990 legislation), as proof of "ability to respond in damages" (later amended to "proof of financial responsibility"), issued by an insurance carrier authorized to transact that business in California to or for the benefit of the person named as the insured.

The version of *Veh. Code § 16431* in effect at the time provided that proof of ability to respond in damages may be given by the written certificate of any insurance carrier duly authorized to do business within California that it has issued to or for the benefit of the named person in a motor vehicle liability policy as defined in *Veh. Code § 16450*, which at the date of the certificate is in full force and effect. *Veh. Code § 16431(a)*, as amended, provides that proof of financial responsibility may be given by one or more written certificates of any insurance carrier duly authorized to do business within California, stating that the carrier has issued to or for the benefit of the person named in those certificates a motor vehicle liability policy as defined in *Veh. Code § 16450*, an automobile liability policy as defined in *Veh. Code § 16054*, or any other liability policy issued for vehicles with fewer than four wheels that meets the requirements of *Veh. Code § 16056*, which, at the date of the certificates, is in full force and effect [*see* Stats 2003, ch. 594, § 43].

Ins. Code § 11580.1(d)(1) provides that an automobile liability policy can exclude coverage regarding a driver designated by name. The insurer also argued that the driver was not "hired to drive," within the meaning of *Ins. Code § 670*, but rather was "hired to supervise" certain work, and further asserted that he was not acting within the scope of his employment at the time of the accident. The trial court found that no coverage existed, on the ground that the driver was not "hired to drive," within the meaning of *Ins. Code § 670*. The injured third party appealed.

The court reversed, holding that *Ins. Code § 670* specifically prohibits by its plain language this class of insurers from executing a driving exclusion agreement as specified in *Ins. Code § 11580.1(d)* (with regard to the exclusion of specified drivers for reasons stated in *Ins. Code § 670*) (*205 Cal. App. 3d 223, 231)* . It also held that the driver was "hired to drive" within the meaning of *Ins. Code § 670*, and that he was acting within the scope of his employment when the accident occurred (*205 Cal. App. 3d 223, 240-244)* . Consequently, the court reversed the judgment (*205 Cal. App. 3d 223, 244)* .

[b] Prohibition Against Exclusion Is Not Limited to Any Particular Type of Policy

In ***State Farm Mut. Auto. Ins. Co. v. Haight*** *(1988) 205 Cal. App. 3d 223, 252 Cal. Rptr. 162* , the insurer argued that *Ins. Code § 670* is applicable only to motor vehicle liability policies issued after an accident has occurred. It based this argument on the premise that the required "certificate" of financial responsibility under *Veh. Code § 16370* (referred to under its Vehicle Code chapter by *Veh. Code § 16450*) refers only to a policy issued after an accident.

The court of appeal held that *Ins. Code § 670* is not limited in its applicability to any particular type of motor vehicle liability policies, that is, to policies issued only after an accident has occurred (*205 Cal. App. 3d 223, 231)* . Concerning the applicability of *Ins. Code § 670* to the policy in the instant case, the court discussed that statute as well as those referred to within it (*205 Cal. App. 3d 223, 230-239)* . The court rejected the insurer's contention that *Ins. Code § 670(a)* applies only to a policy issued after an accident, and not to motor vehicle liability policies generally. The court stated that the language of that statute clearly contains no such limitation to postaccident specifications of insurance. Rather, it describes the class of insurers that *Veh. Code § 16450* defines and to which it applies. It applies to insurers that are "admitted" and "licensed to issue motor vehicle liability policies," as defined in *Veh. Code § 16450*. Thus, *Ins. Code § 670* does not specify the type of motor vehicle policy to which its prohibition applies beyond simply stating that the policy must cover drivers hired to drive by commercial business establishments. The indefinite article "a" is used to describe "motor vehicle liability policy" without any specification as to the time when the policy was issued. *Ins. Code § 670* specifically declares that the defined class of insureds may not execute a driver exclusion agreement with regard to a driver hired to drive, when the exclusion is based on the driver's private-vehicle driving records. The court noted that the insurer's purported construction results in an absurd meaning, out of step and context with the manifest purpose of the financial responsibility laws of California (*205 Cal. App. 3d 223, 231)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawMotor Vehicle InsuranceExclusionsGeneral OverviewInsurance LawMotor Vehicle InsuranceObligationsGeneral OverviewInsurance LawMotor Vehicle InsuranceVehicle UseGeneral OverviewInsurance LawMotor Vehicle InsuranceVehicle UseScope of Employment

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12-120 California Points & Authorities § 120.85

§ 120.85 Exclusion of Named Person Does Not Apply to "Motor Vehicle Liability Policy" for Commercial Passenger Vehicles

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [HAS *or* HAD] THE DUTY TO DEFEND OR INDEMNIFY INSURED BECAUSE _____ [*name*] INSURANCE CODE SECTION 11580.1, WHICH ALLOWS AN EXCLUSION FOR A NAMED DRIVER, APPLIES ONLY TO AN "AUTOMOBILE LIABILITY POLICY," NOT TO A "MOTOR VEHICLE LIABILITY POLICY" FOR COMMERCIAL PASSENGER VEHICLES.

Exclusion of Named Person Does Not Apply to Commercial Passenger "Motor Vehicle Liability Policy." The driver exclusion endorsement authorized by *Insurance Code Section 11580.1(d)(1)* applies only to an "automobile liability policy," not to a "motor vehicle liability policy" for commercial passenger vehicles (*Empire Fire & Marine Ins. Co. v. Bell (1997) 55 Cal. App. 4th 1410, 1416, 64 Cal. Rptr. 2d 749*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's the contention that an insurer has no duty to defend its insured under an insurance policy. The basis of these points and authorities is that the driver exclusion endorsement authorized by *Ins. Code § 11580.1(d)(1)* applies only to an "automobile liability policy," not to a "motor vehicle liability policy" for commercial passenger vehicles.

These points and authorities may be submitted, for example, in opposition to a defense motion for summary judgment in an action against a motor vehicle liability insurer based on an insurer's refusal to defend or indemnify the person (or organization) legally responsible for the use of the vehicle. They may also be used in a trial or appellate brief in such an

action. In addition, they may be used in support of a motion for summary judgment in favor of the insured in a declaratory relief action seeking a declaration that there is no duty to defend.

These points and authorities may be combined, if appropriate, with other points and authorities that contend that the insured has wrongfully refused to defend its insured in a third-party action [*see §§ 120.50 et seq. and 120.80* et seq.].

This form may be used to oppose the points and authorities *set forth in § 120.70*.

For references to related Pleading and Practice chapters, see *§ 120.80[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should:

- Refer to provisions of the policy that establish that the policy issued by the insurer is a "motor vehicle liability policy" for commercial passenger vehicles, under *Veh. Code § 16450 et seq.*

- Argue that pursuant to *Empire Fire & Marine Ins. Co. v. Bell (1997) 55 Cal. App. 4th 1410, 1418, 64 Cal. Rptr. 2d 749* [*see § 120.85[3][a]*], the driver exclusion endorsement does not apply and, consequently, the insurer is bound to defend or indemnify the insured for claims arising out of operation of the insured vehicle.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.20* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing an insurer's motion for summary judgment or summary adjudication when the evidentiary facts clearly support the contention and disclose triable issues of any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.50[2][b]*.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

In ***Empire Fire & Marine Ins. Co. v. Bell*** *(1997) 55 Cal. App. 4th 1410, 64 Cal. Rptr. 2d 749* , the defendant ambulance service was the named insured of an insurance policy labeled a "business automobile" policy issued by the plaintiff insurance company. During the policy period, a driver employed by the ambulance service lost his driver's license, and in December 1992 he signed a "Driver Exclusion" endorsement excluding from coverage any accidents involving the driver. Approximately two monthslater, plaintiff was injured in an accident caused by the driver while he was operating an ambulance owned by the ambulance service. The insurer filed a declaratory relief action and moved for summary judgment, asserting that pursuant to the driver exclusion, the insurer had no duty to defend or indemnify the ambulance service. The trial court granted the insurer's motion for summary judgment, concluding that there were no disputed issues of fact and as a matter of law the insurer had no duty to defend or indemnify.

The court of appeal reversed the judgment entered in favor of the insurer. The court stated that the legislature has distinguished in the Insurance Code and the Vehicle Code between an automobile liability policy and a motor vehicle liability policy. An automobile liability insurance policy is essentially defined by *Ins. Code § 11580.1*, which lists various provisions that must be contained within an automobile liability policy. *Ins. Code, § 11580.05* expressly excepts from compliance with section 11580.1 policies to which *Veh. Code § 16450 et seq.* applies. *Veh. Code § 16450*, in turn, defines a "motor vehicle liability policy." The distinction coincides with the different financial responsibility requirements imposed on commercial and noncommercial vehicles (*55 Cal. App. 4th 1410, 1416-1417)* . A second key difference between the two types of policies pertains to the extent of coverage (*55 Cal. App. 4th 1410, 1418)* . The court concluded that *Ins. Code § 11580.1* defines the contents of an automobile liability policy but not a motor vehicle liability policy. Under the financial responsibility laws, the ambulance company's insurer was obligated to maintain a motor vehicle liability policy for its commercial passenger vehicles pursuant to *Veh. Code § 16500* (*55 Cal. App. 4th 1410, 1418)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawMotor Vehicle InsuranceExclusionsGeneral OverviewInsurance LawMotor Vehicle InsuranceObligationsDefenseInsurance LawMotor Vehicle InsuranceObligationsIndemnificationInsurance LawMotor Vehicle InsuranceVehicle OwnershipFleet Vehicles

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12-120 California Points & Authorities §§ 120.86-120.89

[Reserved]

§§ 120.86[Reserved]

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3. Exclusions for Willful Acts

12-120 California Points & Authorities § 120.90

§ 120.90 Insurer Has No Duty to Defend/Indemnify Insured When Liability or Loss Results From Willful Act

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [HAS *or* HAD] NO DUTY TO _____ [DEFEND *or* INDEMNIFY] INSURED [IN THE UNDERLYING ACTION] BECAUSE THE _____ [CLAIM SUED ON *or* LOSS] RESULTED FROM INSURED'S OWN WILLFUL ACT.

A. Insurer Is Not Liable for Willful Act of Insured. An insurer is not liable for a loss caused by the willful act of the insured (*Ins. Code § 533*).

B. Statutory Exclusion Is Implied in Every Policy. *Insurance Code Section 533* is an implied exclusionary clause that by statute is to be read into all insurance policies (*J. C. Penney Cas. Ins. Co. v. M. K. (1991) 52 Cal. 3d 1009, 1019, 278 Cal. Rptr. 64, 804 P.2d 689*).

C. Intentional Act Is Excluded by Policy Language. An insurer is not required to indemnify a loss resulting from the insured's intentional conduct if the policy excludes coverage for intentional conduct (*Tradewinds Escrow, Inc. v. Truck Ins. Exch. (2002) 97 Cal. App. 4th 704, 714-715, 118 Cal. Rptr. 2d 561*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention by the insurer that it has no duty to defend a prior action brought against the insured or to indemnify the insured, or both. The basis of these points and authorities is that the claim on which plaintiff was sued or the loss for which recovery under the policy is sought was caused by plaintiff's own willful wrong.

These points and authorities may be combined, if appropriate, with other points and authorities that contend that the insurance policy excludes from coverage the willful acts of the insured [*see § 120.91* et seq.].

This form may be used by an insurer in various procedural contexts, such as in memoranda supporting or opposing a motion for summaryjudgment, in a trial brief, or in an appellate brief. For further discussion, see *§ 120.30[2][a]*.

The California Supreme Court has held that an insurer may have a duty to defend an action against an insured even if the action alleges willful conduct (such as sexual molestation), if the action also alleges conduct for which potential coverage under the policy exists [*Horace Mann Ins. Co. v. Barbara B. (1993) 4 Cal. 4th 1076, 1082-1086, 17 Cal. Rptr. 2d 210, 846 P.2d 792]* . For a form setting forth points and authorities in support of the contention that such a duty to defend exists, *see § 120.109*.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In particular, counsel should:

- Refer to facts showing that the loss or liability resulted from the insured's willful conduct, and

- Argue that, consequently, under the policy the insurer has no duty to defend or indemnify the insured for claims arising out of those willful acts.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.10* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be a motion by a defendant insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.30[2][b]*.

[c] Related Pleading and Practice Chapters

For complaints by an insured against an insurer for damages for breach of contract because of the insurer's refusal to pay a third-party judgment against the insured or to defend the insured in a third-party action, see California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender). For a discussion of the rules applicable to summary judgment, a form of notice of motion for summary judgment, and related forms, see Ch. 537, *Summary Judgment* , in that publication.

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[e] Opposing Points and Authorities

The points and *authorities in § 120.100* et seq. may be used in an appropriate case to oppose these points and authorities.

[3] Discussion of Authorities

[a] Statutory Exclusion Is Implied in Every Policy

J. C. Penney Cas. Ins. Co. v. M. K. *(1991) 52 Cal. 3d 1009, 278 Cal. Rptr. 64, 804 P.2d 689* , is discussed in *§ 120.93[3][a]*. The Court noted that *Ins. Code § 533* is an implied exclusionary clause, and must be read into all insurance policies (*52 Cal. 3d 1009, 1019)* . Pursuant to *Ins. Code § 533*, which reflects a fundamental public policy of denying coverage for willful wrongs, and *Civ. Code § 1667*, which provides that a contract contrary to express law is unlawful, the parties to an insurance policy cannot contract for that coverage (*52 Cal. 3d 1009, 1019-1020 n.8*).

[b] Intentional Act Is Excluded by Policy Language

In ***Tradewinds Escrow, Inc. v. Truck Ins. Exch.*** *(2002) 97 Cal. App. 4th 704, 118 Cal. Rptr. 2d 561* , the underlying complaint against the insured, an escrow company, alleged causes of action for breach of contract, intentional misrepresentation, intentional infliction of emotional distress, unfair business practices, constructive trust, accounting, and conversion, based on the insured's failure to close escrow on a transaction. The insured tendered defense initially to another insurer (covering errors and omissions (E&O)), then to the defendant, which had issued a commercial general liability (CGL) and automobile policy. The E&O insurer contributed to the settlement ultimately reached, but refused to pay attorney's fees accrued prior to the insured's tender of the defense. In this action, the insured sued the defendant for breach of contract and breach of its good faith duty, because it refused to defend the underlying action. The trial court granted the defendant's motion for summary judgment, and the insured appealed.

The court of appeal affirmed, holding that: (1) the insured's pre-tender payment of defense costs could not be recovered because of the "no voluntary payments" provision in the CGL policy; (2) the costs of defense could not be recovered from one insurer if other insurers were on the risk and assumed the insured's defense; and (3) the defendant had no duty to indemnify the insured (*97 Cal. App. 4th 704, 710-712)* . On the third point, the court further held that CGL policies are limited to providing coverage for accidental occurrences and do not provide coverage for professionalnegligence claims. Moreover, the policy excluded intentional conduct by expressly not covering "bodily injury or property damage expected or intended from the standpoint of the insured." This phrase covers intentional, as opposed to negligent, conduct. The underlying claims for misrepresentation, conversion, unfair business practices, and intentional infliction of emotional distress would be excluded by the plain language of the policy because the conduct alleged was intentional. In addition, to the extent that the underlying action stated a claim for intentional infliction of emotional distress, coverage would be excluded. Furthermore, intentional acts of the type alleged in the complaint are not covered by standard CGL policies, based on the rationale that the intentional conduct does not constitute an "accident" or "occurrence" within the meaning of the policy. Finally, extra-contractual limitations on the provision of indemnity for intentionally wrongful conduct are embodied in *Ins. Code § 533*, which is implied in every contract and provides that an insurer is not liable for a loss caused by the willful act of the insured. This limitation, in addition to all of the conclusions above, would also apply to the insured's assertion that its automobile policy somehow covered the conduct at issue because one of the acts complained of was committed while the insured was in a car (*97 Cal. App. 4th 704, 713-714)* .

[4] Additional Authorities

[a] Statutory Exclusion Implied in Every Policy

In *California Amplifier, Inc. v. RLI Ins. Co. (2001) 94 Cal. App. 4th 102, 113 Cal. Rptr. 2d 915* , an excess insurer under a directors and officers' liability insurance policy refused to indemnify its insured for the settlement of an action alleging market manipulation of stock in violation of *Corp. Code §§ 25400* and *25500*. In an action by the insured against the insurer for bad faith, breach of contract, and unfair business practices, the trial court granted the insurer's motion for judgment on the pleadings on the ground that the alleged securities fraud was uninsurable under *Ins. Code § 533*. The court of appeal affirmed, concluding that liability under Section 25500 requires a "wilful act" within the

meaning of *Ins. Code § 533*, which precludes coverage under the policy (*94 Cal. App. 4th 102, 117)* .

In *Northland Ins. Co. v. Briones (2000) 81 Cal. App. 4th 796, 97 Cal. Rptr. 2d 127* , an insurer brought a declaratory relief action to determine its rights under a mobile homeowner's policy. The policy provided personal liability coverage to the insured for damages because of bodily injury or property damage, but an endorsement provided that physical/sexual abuse was not covered. A third-party suit against the insured alleged personal injury damages caused by the insured based on sexual assaults against the plaintiff. In its summary judgment motion, the insurer assertedthat coverage was excluded based on the exclusion for sexual abuse in the policy, and on *Ins. Code § 533*. The court of appeal affirmed the trial court's granting of the summary judgment motion, and its refusal to grant a stay pending the outcome of the third-party action to determine the scope of coverage. The court of appeal held that there was no accident or occurrence within the meaning of the policy and *Ins. Code § 533* (*81 Cal. App. 4th 796, 812)* .

In *Fire Ins. Exch. v. Altieri (1991) 235 Cal. App. 3d 1352, 1 Cal. Rptr. 2d 360* , the plaintiff, an adolescent boy, brought an action seeking damages for injuries sustained when another boy punched him. The court of appeal reversed the trial court's ruling that the homeowners policy insuring the assailant and his parents provided indemnity for the damages awarded. The trial court had reasoned that although the assailant intentionally hit the plaintiff, he did not do so with a preconceived design to inflict injury. The court of appeal held that insurance coverage under the policy is precluded if the assault was intentional and that the motive of the person who committed the assault is relevant only to the issue of whether the conduct was wrongful in the first instance (in other words, whether the act was in self-defense). The assault in this case, which was without any legal justification, was an uninsurable willful act under *Ins. Code § 533* (*235 Cal. App. 3d 1352, 1359-1360)* .

In *State Farm Fire & Cas. Co. v. Drasin (1984) 152 Cal. App. 3d 864, 199 Cal. Rptr. 749* , the court of appeal affirmed a summary judgment that declared that the insurer under a homeowner's policy had no duty to defend or indemnify the insured against a third-party action. The court affirmed on the ground that the third-party action was one for malicious prosecution, which constituted willful misconduct for which the insurer was not liable, under both the policy's provisions and *Ins. Code § 533* (*152 Cal. App. 3d 864, 867-869)* .

State Farm Fire & Cas. Co. v. Dominguez (1982) 131 Cal. App. 3d 1, 182 Cal. Rptr. 109 , was a declaratory relief action by an insurer to determine whether or not a policy required it to defend its insured in a wrongful death action filed after insured was convicted of the first degree murder of the decedent. On appeal from a judgment entered for the insurer, defendants (plaintiffs in the wrongful death action) contended that, since the wrongful death action was based on negligence, the insurer was required to show that the insured's conduct was nonnegligent. The court of appeal disagreed, stating that under an exclusion in the policy and *Ins. Code § 533*, the insurer need only show that the insured committed an intentional wrong (*131 Cal. App. 3d 1, 4)* . The court agreed that mere proof of the insured's conviction was insufficient to prove intentional conduct (*131 Cal. App. 3d 1, 5)* . However, taking judicial notice of the record in the insured's criminal appeal, the court ruled that, since the insured's only defense was self-defense, the killing was clearly an intentional act (*131 Cal. App. 3d 1, 5)* . Lastly, distinguishing *Clemmer v. Hartford Ins. Co. (1978) 22 Cal. 3d 865, 151 Cal. Rptr. 285, 587 P.2d 1098* , the court held that collateral estoppel applied to make the criminal judgment binding on defendant (*131 Cal. App. 3d 1, 6)* .

[b] Intentional Act Is Excluded by Policy Language

In *Western Mut. Ins. Co. v. Yamamoto (1994) 29 Cal. App. 4th 1474, 35 Cal. Rptr. 2d 698* , an action against a child who intentionally shot another with his parents' gun, and against the child's parents for negligent supervision, the court held that a finding of intentional shooting made in a juvenile proceeding may be binding on a juvenile in a subsequent declaratory relief action to determine coverage or exclusion for the act under a homeowner's policy. Although juvenile proceedings differ from adult criminal proceedings in that they are nonadversarial in nature, when a contested matter has been adjudicated in a juvenile court proceeding under *Welf. & Inst. Code § 602*, following the same formalities, rights, and processes as an adult criminal trial, the findings of the juvenile court are entitled to the same collateral

estoppel effect that would be afforded findings made in an adult criminal court (*29 Cal. App. 4th 1474, 1484-1485)* . Thus, there was no coverage for the child because the homeowner's policy contained an exclusion that precluded coverage for injuries "expected or intended" and injuries arising out of criminal acts of "an insured." There was likewise no coverage for the claim of negligent supervision by the parents because the injury resulted from an intentional act of an insured (*29 Cal. App. 4th 1474, 1486)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsPolicy InterpretationExclusionsInsurance LawGeneral Liability InsuranceExclusionsIntentional ActsInsurance LawLife InsuranceAccidental DeathIntentional ActsInsurance LawMotor Vehicle InsuranceExclusionsIntentional ActsInsurance LawProperty InsuranceCoverageArson & Intentional LossIntentional Acts Exclusion

California Points & Authorities

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CHAPTER 120 INSURANCE
PART II. FORMS
B. Coverage and Exclusions
3. Exclusions for Willful Acts

12-120 California Points & Authorities § 120.91

§ 120.91 Agreements Waiving Fraud or Willful Injury Are Illegal

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [HAS *or* HAD] NO DUTY TO _____ [DEFEND *or* INDEMNIFY] INSURED [IN THE UNDERLYING ACTION], EVEN THOUGH INSURED ASSERTS AN AGREEMENT WAIVING LIABILITY FOR FRAUD OR WILLFUL INJURY, BECAUSE SUCH AGREEMENTS ARE ILLEGAL.

Agreements Waiving Fraud or Willful Injury Are Illegal. All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his or her own fraud, or willful injury to the person or property of another, or violation of law,whether willful or negligent, are against the policy of the law (*Civ. Code § 1668*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention by the insurer that it has no duty to defend a prior action brought against the insured or to indemnify the insured, or both. The basis of these points and authorities is that an agreement by the insured and a third party that the third party waives any right to recover from the insured from acts of fraud or willful misconduct, does not create a duty on the part of the insurer defend or indemnify the insured, because such agreements are illegal.

This form may be used by an insurer in various procedural contexts, such as in memoranda supporting or opposing a motion for summaryjudgment, in a trial brief, or in an appellate brief. For further discussion, see *§ 120.30[2][a]*.

The California Supreme Court has held that an insurer may have a duty to defend an action against an insured even if

the action alleges willful conduct (such as sexual molestation), if the action also alleges conduct for which potential coverage under the policy exists [*Horace Mann Ins. Co. v. Barbara B. (1993) 4 Cal. 4th 1076, 1082-1086, 17 Cal. Rptr. 2d 210, 846 P.2d 792]* . For a form setting forth points and authorities in support of the contention that such a duty to defend exists, *see § 120.109*.

These points and authorities may be combined, if appropriate, with other points and authorities that contend that the insurance policy excludes from coverage the willful acts of the insured [*see § 120.90* et seq.].

For references to related Pleading and Practice chapters, see *§ 120.90[2][c]*.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In particular, counsel should:

- Refer to the agreement that by which the insured contends the third party has waived any rights based on fraud or willful misconduct by the insured, and

- Argue that such agreements are illegal, consequently, under the policy the insurer has no duty to defend or indemnify the insured for claims arising out of those willful acts.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.10* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be a motion by a defendant insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.30[2][b]*.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[d] Opposing Points and Authorities

The points and *authorities in § 120.100* et seq. may be used in an appropriate case to oppose these points and authorities.

[3] Discussion of Authorities

[a] Agreements Waiving Fraud or Willful Injury Are Illegal

Under *Civ. Code § 1668*, all contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his or her own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesIllegal BargainsInsurance LawClaims & ContractsGeneral OverviewInsurance LawClaims & ContractsGood Faith & Fair DealingDuty to DefendInsurance LawClaims & ContractsGood Faith & Fair DealingIndemnification

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12-120 California Points & Authorities § 120.92

§ 120.92 Policy Purporting Coverage for Willful Acts Is Prohibited

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [HAS *or* HAD] NO DUTY TO _____ [DEFEND *or* INDEMNIFY] INSURED [IN THE UNDERLYING ACTION] BECAUSE A POLICY PROVISION CONTRARY TO INSURANCE CODE SECTION 533 IS PROHIBITED.

Policy Purporting Coverage for Willful Acts Is Prohibited. The parties to an insurance policy cannot contract for coverage for acts excluded by *Insurance Code Section 533* (*J. C. Penney Cas. Ins. Co. v. M. K. (1991) 52 Cal. 3d 1009, 1019-1020 n.8, 278 Cal. Rptr. 64, 804 P.2d 689*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention by the insurer that it has no duty to defend a prior action brought against the insured or to indemnify the insured, or both. The basis of these points and authorities is that *Ins. Code § 533* precludes a contractual agreement for coverage of liability arising from willful acts.

This form may be used by an insurer in various procedural contexts, such as in memoranda supporting or opposing a motion for summaryjudgment, in a trial brief, or in an appellate brief. For further discussion, see *§ 120.30[2][a]*.

The California Supreme Court has held that an insurer may have a duty to defend an action against an insured even if the action alleges willful conduct (such as sexual molestation), if the action also alleges conduct for which potential coverage under the policy exists [*Horace Mann Ins. Co. v. Barbara B. (1993) 4 Cal. 4th 1076, 1082-1086, 17 Cal. Rptr. 2d 210, 846 P.2d 792]* . For a form setting forth points and authorities in support of the contention that such a duty

to defend exists, *see § 120.109*.

These points and authorities may be combined, if appropriate, with other points and authorities that contend that the insurance policy excludes from coverage the willful acts of the insured [*see § 120.90* et seq.].

For references to related Pleading and Practice chapters, see *§ 120.90[2][c]*.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In particular, counsel should:

- Refer to facts showing that the policy purports to provide coverage for willful acts, and

- Argue that such coverage is illegal by statute and, consequently, the insurer has no duty to defend or indemnify the insured for claims arising out of those willful acts.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.10* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be a motion by a defendant insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.30[2][b]*.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[d] Opposing Points and Authorities

The points and *authorities in § 120.100* et seq. may be used in an appropriate case to oppose these points and authorities.

[3] Discussion of Authorities

[a] Policy Purporting Coverage for Willful Acts Is Prohibited

J. C. Penney Cas. Ins. Co. v. M. K. (1991) 52 Cal. 3d 1009, 278 Cal. Rptr. 64, 804 P.2d 689 , is discussed in *§ 120.93[3][a]*. In discussing the insurer's reliance on both the statute and the language of the policy at issue, the Court noted that *Ins. Code § 533* reflects a fundamental public policy of denying coverage for willful wrongs, and that *Civ. Code § 1667* precludes a contractual agreement for such coverage (*52 Cal. 3d 1009, 1019-1020 n.8*).

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGeneral OverviewInsurance LawGeneral Liability InsuranceExclusionsIntentional Acts

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12-120 California Points & Authorities § 120.93

§ 120.93 Coverage for Child Sexual Molestation Is Precluded as Matter of Law

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [HAS *or* HAD] NO DUTY TO _____ [DEFEND *or* INDEMNIFY] INSURED [IN THE UNDERLYING ACTION] BECAUSE COVERAGE FOR CHILD SEXUAL MOLESTATION IS PRECLUDED AS A MATTER OF LAW.

Coverage for Child Sexual Molestation Precluded as Matter of Law. As a matter of law, *Insurance Code Section 533* precludes insurance coverage for damages arising from child sexual molestation, because that conduct is inherently harmful (*J. C. Penney Cas. Ins. Co. v. M. K. (1991) 52 Cal. 3d 1009, 1025, 1028, 278 Cal. Rptr. 64, 804 P.2d 689*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention by the insurer that it has no duty to defend a prior action brought against the insured or to indemnify the insured, or both. The basis of thesepoints and authorities is that *Ins. Code § 533* precludes insurance coverage for damages arising from child sexual molestation, because that conduct is inherently harmful.

This form may be used by an insurer in various procedural contexts, such as in memoranda supporting or opposing a motion for summary judgment, in a trial brief, or in an appellate brief. For further discussion, see *§ 120.30[2][a]*.

These points and authorities may be combined, if appropriate, with other points and authorities that contend that the insurance policy excludes from coverage the willful acts of the insured [*see § 120.90* et seq.].

The California Supreme Court has held that an insurer may have a duty to defend an action against an insured even if the action alleges willful conduct (such as sexual molestation), if the action also alleges conduct for which potential coverage under the policy exists [*Horace Mann Ins. Co. v. Barbara B. (1993) 4 Cal. 4th 1076, 1082-1086, 17 Cal. Rptr. 2d 210, 846 P.2d 792]* . For a form setting forth points and authorities in support of the contention that such a duty to defend exists, *see § 120.109*.

For references to related Pleading and Practice chapters, see *§ 120.90[2][c]*.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In particular, counsel should:

- Refer to the specific provision of the policy purporting to cover the insured for child sexual molestation, and

- Argue that such coverage is precluded as a matter of law and, consequently, under the policy the insurer has no duty to defend or indemnify the insured for claims arising out of those willful acts.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.10* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be a motion by a defendant insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.30[2][b]*.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication indrafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[d] Opposing Points and Authorities

The points and *authorities in § 120.100* et seq. may be used in an appropriate case to oppose these points and authorities.

[3] Discussion of Authorities

[a] Coverage for Child Sexual Molestation Precluded as Matter of Law

In ***J. C. Penney Cas. Ins. Co. v. M. K.*** *(1991) 52 Cal. 3d 1009, 278 Cal. Rptr. 64, 804 P.2d 689* , the insurer under a homeowner's policy brought a declaratory relief action to determine coverage regarding an underlying action against the insured based on the insured's sexual molestation of a minor. The homeowner's policy contained an exclusion of "bodily injury or property damage which is either expected or intended from the standpoint of the insured." The insured molested a young girl on several occasions. He asserted that he intended to molest the child, but did not intend to cause her harm. He was convicted of violation of *Penal Code § 288(a)* (lewd conduct with child under age of 14 with intent to arouse lust) based on that conduct. The child and her mother successfully sued the insured, proceeding to trial only on theories of negligence and negligent infliction of emotional distress. In a declaratory relief action brought by the insurer,

the trial court concluded that the insured's conduct constituted a willful act as a matter of law within the meaning of *Ins. Code § 533*, even though a psychologist at the trial of the negligence action had testified that the insured intended no harm, the trial court concluded that coverage was precluded by *Ins. Code § 533*, and that coverage under the liability insurance policy was therefore precluded.

The insurer appealed. (The child also appealed, regarding the collateral estoppel issue based on the effectiveness of the insurer's reservation of rights.) The court of appeal held, with respect to the *Ins. Code § 533* issue, that the intentional-act exclusion in the policy and in *Ins. Code § 533* does not bar coverage unless the insured acts with a dual intent: (1) the intent to commit the act itself, and (2) a preconceived intent to injure. That court held that the insured's admission of his intent to sexually molest the child does not necessarily establish that he also had a preconceived intent to harm her. Both parties sought review.

The California Supreme Court reversed the judgment of the court of appeal to the extent that it reversed the trial court judgment in favor of theinsurer with respect to the *Ins. Code § 533* issue. The Court held that *Ins. Code § 533* precludes coverage for child sexual molestation as a matter of law (*52 Cal. 3d 1009, 1028, 1029)* . The Court first disposed of the issue of collateral estoppel raised by the child and her mother against the insurer regarding the underlying action; the Court held that the insurer, which provided a defense in that action, effectively reserved its right to deny coverage (*52 Cal. 3d 1009, 1017-1018)* . The Court then discussed the effect of *Ins. Code § 533* on conduct constituting child sexual molestation. *Ins. Code § 533* provides that "[a]n insurer is not liable for a loss caused by the wilful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured's agents or others." The Court found the entirety of *Ins. Code § 533* to be internally inconsistent when read literally, in that its first part purports to exclude coverage for all willful acts, but the second part expressly provides that the insured's negligence does not allow an insurer to disclaim coverage (*52 Cal. 3d 1009, 1019-1020)* . It noted that negligence is often the result of a "willful act"; for example, a traffic accident may result from intentionally driving an automobile in excess of the speed limit (*52 Cal. 3d 1009, 1020)* . However, a "willful act" under *Ins. Code § 533* means something more than mere intentional conduct that constitutes negligence; and the statute does not preclude coverage for acts that are negligent or reckless. The Court found nothing in the statute to support the view that a child molester can disclaim an intent to harm the victim, because the act in itself is the harm, and the intent to molest is, by itself, the same as the intent to harm (*52 Cal. 3d 1009, 1021)* .

Both the insured and the third party relied on *Clemmer v. Hartford Ins. Co. (1978) 22 Cal. 3d 865, 151 Cal. Rptr. 285, 587 P.2d 1098* , in support of the contention that coverage exists unless the insurer proves that the insured acted with a "preconceived design to inflict injury," and the Court discussed that decision at great length. It rejected the request (by insurance interests appearing as amici curiae) to overrule or limit *Clemmer*, and instead explained the holding in that case, and clarified its applicability to the instant case. In *Clemmer*, which arose from the killing of a physician by his employee (the insured) after an employment dispute, the jury was properly allowed to determine if the insured had the mental capacity to intend to shoot and harm the victim, as well as the mental capacity to govern his own conduct, for the purpose of determining whether or not the insured had acted "willfully." The Court in *Clemmer* rejected the contention that the instruction to the jury improperly required the jury to find a specific intent to kill in order to find a willful act, noting that under the language of the instruction, the jury determined only the mental capacity "to shoot and harm."

It was in this context that the Court held that even an intentional act is not excluded from coverage under *Ins. Code § 533* unless the act is donewith a "preconceived design to inflict injury." The Court in the instant case rejected the contention that this holding supports the argument that coverage for child sexual molestation is not excluded unless the insurer can show that the molester had a preconceived design to inflict injury on the child. Rather, the Court held, the inquiry in *Clemmer* was limited to the unresolved mental capacity of the insured, that is, whether he was legally sane when he committed the killing; and the discussion on subjective and objective intent is misplaced unless one has evidence regarding a lack of intent t commit the act itself. The Court held that, properly understood, *Clemmer* does not support a finding of coverage if there was no preconceived design to injure in the instant case, because the wrongful act of child molestation is itself the harm.

Thus, *Ins. Code § 533* does not require a showing of the insured's subjective intent to harm with respect to that conduct (*52 Cal. 3d 1009, 1022-1025)* . Similarly, Clemmer does not require a showing by the insurer of the insured's preconceived design to inflict harm when the insured seeks coverage for an intentional and wrongful act if the harm is inherent in the act itself. *Ins. Code § 533* precludes coverage in the instant case because child molestation is "always intentional, it is always wrongful, and it is always harmful" (*52 Cal. 3d 1009, 1025* (italics in original)).

The Court noted that with the exception of the instant case, California court of appeal decisions and Ninth Circuit court of appeals decisions were unanimous in finding that *Ins. Code § 533* precluded coverage for child sexual molestation [citing, e.g., *Allstate Ins. Co. v. Kim W. (1984) 160 Cal. App. 3d 326, 332-333, 206 Cal. Rptr. 609]* . The Court further noted that, properly understood, the insured's argument is based not on his intent but on his motive. However, it held, motive is irrelevant for purposes of *Ins. Code § 533*; motive is relevant only to the different question of whether the conduct was wrongful, giving rise to liability. For example, an insured who when sane shoots someone at point-blank range, intends to injure; and the wrongfulness of the conduct depends on the insured's motive, because if the insured acted justifiably, as would be true if the insured acted in self-defense, the act is not wrongful. However, there is no motive that can justify child sexual molestation; and the insured's professed motive is therefore entirely irrelevant for purposes of *Ins. Code § 533* (*52 Cal. 3d 1009, 1026-1027)* . In concluding that *Ins. Code § 533* excludes liability insurance coverage for an insured's sexual molestation of a child, the Court also held that an insured therefore cannot show or attempt to show a subjective intent not to cause harm (*52 Cal. 3d 1009, 1028)* .

[4] Additional Authorities

[a] Coverage for Child Sexual Molestation Precluded as Matter of Law

In *State Farm Fire & Cas. Co. v. Abraio (9th Cir. 1989) 874 F.2d 619* , the insured under a homeowner's policy was criminally charged with violating *Penal Code § 288* (lewd acts against child under age of 14), a felony, and entered a plea of guilty to former Penal Code § 647a [*now see Penal Code § 647.6*] (molestation of child under age of 18), a misdemeanor. In a declaratory-relief brought by the insurer, regarding coverage in an underlying third-party action brought by the victim, the federal court of appeals affirmed the trial court's grant of summary judgment to the insurer, holding that the insured's conduct gave rise to an irrebuttable presumption of intent to harm, and that coverage for damages arising from that conduct was therefore excluded. The court found it irrelevant that the insured was convicted of a general-intent crime, instead of the special-intent crime with which he was charged (*874 F.2d 619, 622-623)* .

In *State Farm Fire & Cas. Co. v. Estate of Jenner (9th Cir. 1989) 874 F.2d 604* , the insured under a mobilehome owner's policy committed acts in violation of *Penal Code §§ 288(a)* (lewd act with child under age of 14 with intent to arouse lust) and 288a(c) (oral copulation by person more than 10 years older than victim who is under age of 14). After the insured's suicide, the insurer brought a declaratory-relief action against his estate, asserting exclusion of coverage under *Ins. Code § 533* with regard to an underlying action by the victim for damages; the trial court granted the insurer's motion for summary judgment. The federal court of appeals affirmed, holding that acts in violation of *Penal Code § 288* create an inference of an intent to injure, and are thus willful as a matter of law, within the meaning of *Ins. Code § 533* (*874 F.2d 604, 606-607)* .

In *Allstate Ins. Co. v. Gilbert (9th Cir. 1988) 852 F.2d 449* , an insured under a homeowner's policy was criminally charged with violation of *Penal Code § 288* (lewd acts with child under 14 years of age), then sued by the victim and her parents for damages arising from the same acts. The federal court of appeals affirmed summary judgment for the insurer in its declaratory-relief action against the insured, holding that there was no duty to defend or indemnify because coverage was precluded by the policy exclusion regarding injuries intentionally caused by the insured (also noting that coverage was precluded by *Ins. Code § 533*). The court stated that intent to harm is inferred by the nature of the act of sexual assault (*852 F.2d 449, 451-453)* .

In *State Farm & Cas. Co. v. Bomke (9th Cir. 1988) 849 F.2d 1218* , the insurer brought a declaratory relief action to determine its obligation to defend the insured in a third-party civil action alleging injuries arising froma sexual assault. One insured had pleaded guilty to kidnapping, rape, and forced oral copulation (*Penal Code §§ 207, 261(2)* (now *Penal Code § 261(a)*), 288a, respectively) based on the same acts, and another insured pleaded guilty to aiding and abetting those acts. The federal district court granted summary judgment in favor of the insurer, holding that both insureds' acts demonstrated an intent to harm as a matter of law, and thus were excluded from coverage under *Ins. Code § 533* and by the policy provisions. The federal court of appeals affirmed, agreeing with the trial court's analysis (*849 F.2d 1218, 1218-1220)* . The court also found no exception under the rule for aiding and abetting as opposed to direct commission of the acts themselves (*849 F.2d 1218, 1220)* .

In *Farmer v. Allstate Ins. Co. (C.D. Cal. 2004) 311 F. Supp. 2d 884* , a husband and wife provided day care for children in their home and had a homeowner's insurance policy that included an endorsement for home day care. The plaintiff, alleging sexual molestation by the husband, sued the husband for assault and battery and sued both the husband and wife for intentional infliction of emotional distress, negligent infliction of emotional distress, negligence, and premises liability, including negligent supervision of a minor. The insurer refused defense and indemnity because: (1) there was no "occurrence" under the policy, (2) *Ins. Code § 533* precluded coverage, (3) the "intentional or criminal acts" exclusion precluded coverage, and (4) the home day care endorsement excluded coverage for sexual molestation. The federal district court held that as a matter of law, both the Sexual Molestation Exclusion and the Intentional or Criminal Acts Exclusion precluded coverage for the wife (*311 F. Supp. 2d 884, 897*).

In *Jane D. v. Ordinary Mut. (1995) 32 Cal. App. 4th 643, 38 Cal. Rptr. 2d 131* , a woman sued a priest, alleging that, beginning at age 15, she sought counseling from him and he induced her to have sexual relations. The suit sought recovery for negligence, negligent infliction of emotional distress, and breach of fiduciary duty. The woman obtained a default judgment and then brought a declaratory relief action seeking to establish coverage for the judgment under a liability policy. An endorsement to the policy covered liability arising out of the performance of professional services in the insured's capacity as a pastor or counselor. However, the endorsement excluded coverage for behavior culminating in any sexual act. The trial court granted the insurer's motion for summary judgment finding that there was coverage under this endorsement only if the default judgment was based on a claim of other than sexual misconduct and that the priest was not a named insured under a second policy endorsement that covered named insureds for liability arising out of sexual misconduct. The court ruled in favor of the insurer, and plaintiff appealed.

On appeal, plaintiff argued that the insurer had a duty to defend the priest, and was liable for the default judgment because it breached that duty. Plaintiff further contended that there was coverage under the policybecause it was the mishandling of the counseling relationship, not the sexual act, that formed the basis for the negligence claim (*32 Cal. App. 4th 643, 651)* . The court of appeal noted that the California Supreme Court's analysis in *Horace Mann Ins. Co. v. Barbara B. (1993) 4 Cal. 4th 1076, 17 Cal. Rptr. 2d 210, 846 P.2d 792* [*see § 120.109[3][a]*], was applicable. In applying that analysis, the court concluded that the facts in this case, unlike those in *Horace Mann*, indicated that the allegations of nonsexual conduct--obtaining information about plaintiff during counseling, and misusing this information and counseling techniques to create transference and control and induce plaintiff's behavior--were "inseparably intertwined" with the sexual misconduct. Thus, the court concluded that there was no coverage under the policy (*32 Cal. App. 4th 643, 652-653)* .

In *National Union Fire Ins. Co. v. Lynette C. (1991) 228 Cal. App. 3d 1073, 279 Cal. Rptr. 394* ("National Union I"), the court held that *Ins. Code § 533* did not preclude insurance coverage for the negligence of a wife in failing to warn or protect a foster child from her husband's pedophilic tendencies. Subsequently, in *National Union Fire Ins. Co. v. Lynette C. (1994) 27 Cal. App. 4th 1434, 1463-1465, 33 Cal. Rptr. 2d 496* ("National Union II"), the court held that the insured's negligence in allowing a child to be placed with her for foster care, and subsequent negligence in failing to protect the child from repeated sexual molestations committed by the insured's husband, constituted a distinct series of acts and omissions, rather than a single act.

In *Fire Ins. Exch. v. Abbott (1988) 204 Cal. App. 3d 1012, 251 Cal. Rptr. 620* , the court of appeal reversed a trial court judgment in favor of the insureds (in a consolidated action) regarding coverage for damages arising from the insureds' conduct constituting violations of child molestation statutes, including *Penal Code § 288(a)* (prohibiting lewd acts on child under age of 14 years). The court of appeal held that with regard to an insured's act that constitutes adult criminal sexual misconduct against a minor, intent to harm is inferred, and the act is "willful" under *Ins. Code § 533* (*204 Cal. App. 3d 1012, 1019-1029)* .

In *Allstate Ins. Co. v. Kim W. (1984) 160 Cal. App. 3d 326, 206 Cal. Rptr. 609* , the court of appeal affirmed the trial court's judgment in favor of the insurer with regard to noncoverage under a homeowner's policy for damages arising from the insured's conduct constituting violation of *Penal Code § 288* (lewd acts against child under age of 14). The court of appeal held that with respect to that conduct, the intent to harm is inferred as a matter of law, and the act is construed to be a willful act within the meaning of *Ins. Code § 533* (*160 Cal. App. 3d 326, 332-333)* .

NOTE:

The line of reasoning used in the cases discussed above has not been extended to cases that involve neither sexual misconduct against minors nor forcible sexual assault [*see, e.g.,* *State Farm Fire & Cas. Co. v. Eddy (1990) 218 Cal. App. 3d 958, 969-970, 267 Cal. Rptr. 379* (action alleging negligent and intentional torts, arising from transmission of venereal disease between consenting adults)]. In such cases, a duty to defend may exist [*State Farm Fire & Cas. Co. v. Eddy (1990) 218 Cal. App. 3d 958, 971-972, 267 Cal. Rptr. 379]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGeneral OverviewInsurance LawGeneral Liability InsuranceExclusionsGeneral OverviewInsurance LawGeneral Liability InsuranceExclusionsCriminal ActsInsurance LawProperty InsuranceHomeowners InsuranceGeneral Overview

California Points & Authorities

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12-120 California Points & Authorities § 120.94

§ 120.94 Coverage for Sanctions Imposed for Bad-Faith Litigation Is Precluded as Matter of Law

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [HAS *or* HAD] NO DUTY TO _____ [DEFEND *or* INDEMNIFY] INSURED [IN THE UNDERLYING ACTION] BECAUSE COVERAGE FOR SANCTIONS IMPOSED FOR BAD-FAITH LITIGATION ARE PRECLUDED AS MATTER OF LAW.

Coverage for Sanctions Imposed for Bad-Faith Litigation Is Precluded as Matter of Law. *Insurance Code Section 533* bars coverage of sanctions imposed against the insured under *Code of Civil Procedure Section 128.7* for bad-faith conduct in engaging in meritless litigation. Bad-faith actions or tactics are acts that are always intentional and wrongful and in which harm is always inherent as a matter of law, and thus are patently "willful" acts for which insurance coverage is always proscribed by *Insurance Code Section 533* (*California Cas. Mgmt. Co. v. Martocchio (1992) 11 Cal. App. 4th 1527, 1534, 15 Cal. Rptr. 2d 277*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention by the insurer that it has no duty to defend a prior action brought against the insured or to indemnify the insured, or both. The basis of these points and authorities is that *Ins. Code § 533* bars coverage of sanctions imposed against the insured under *Code Civ. Proc. § 128.7* for bad-faith conduct in engaging in meritless litigation [*see* California Forms of Pleading and Practice, Ch. 510, *Sanctions*] for bad-faith conduct in engaging in meritless litigation.

This form may be used by an insurer in various procedural contexts, such as in memoranda supporting or opposing a motion for summary judgment, in a trial brief, or in an appellate brief. For further discussion, see *§ 120.30[2][a]*.

The California Supreme Court has held that an insurer may have a duty to defend an action against an insured even if the action alleges willful conduct (such as sexual molestation), if the action also alleges conduct for which potential coverage under the policy exists [*Horace Mann Ins. Co. v. Barbara B. (1993) 4 Cal. 4th 1076, 1082-1086, 17 Cal. Rptr. 2d 210, 846 P.2d 792]* . For a form setting forth points and authorities in support of the contention that such a duty to defend exists, *see § 120.109*.

These points and authorities may be combined, if appropriate, with other points and authorities that contend that the insurance policy excludes from coverage the willful acts of the insured [*see § 120.90* et seq.].

For references to related Pleading and Practice chapters, see *§ 120.90[2][c]*.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In particular, counsel should:

- Refer to facts showing that the insured is seeking coverage for sanctions imposed against the insured under *Code Civ. Proc. § 128.7* for bad-faith conduct in engaging in meritless litigation [*see* California Forms of Pleading and Practice, Ch. 510, *Sanctions*] for bad-faith conduct in engaging in meritless litigation, and

- Argue that, consequently, under the policy the insurer has no duty to defend or indemnify the insured for claims arising out of those willful acts.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.10* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be a motion by a defendant insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.30[2][b]*.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[d] Opposing Points and Authorities

The points and *authorities in § 120.100* et seq. may be used in an appropriate case to oppose these points and authorities.

[3] Discussion of Authorities

[a] Coverage for Sanctions Imposed for Bad-Faith Litigation Is Precluded as Matter of Law

In ***California Cas. Mgmt. Co. v. Martocchio*** *(1992) 11 Cal. App. 4th 1527, 15 Cal. Rptr. 2d 277* , Martocchio was the plaintiff in a libel action against a newspaper. The action was dismissed for failure to prosecute, and the newspaper

sought and was granted an award of attorneys' fees under former Code Civ. Proc. § 128.5 (*now see Code Civ. Proc. § 128.7*), based on Martocchio's bad-faith conduct. Martocchio then demanded that California Casualty Management Co. (CCM) pay the sanctions award under an insurance policy that covered liability against malicious prosecution. CCM brought an action seeking declaratory relief that the sanctions were not covered. The trial court granted CCM's summary judgment motion and entered judgment in its favor, and Martocchio appealed.

The court of appeal affirmed. The court held that *Ins. Code § 533* bars the attempt to shift to an insurer the losses occasioned by the willful act of a violation of former Code Civ. Proc. § 128.5 (*11 Cal. App. 4th 1527, 1533)* . The court held that a predicate condition for the imposition of sanctions under former § 128.5 is a finding that the expenses that are the basis of the sanctions order were incurred because of Martocchio's bad-faith actions or tactics, and that such acts are always intentional and wrongful and therefore covered by the prohibition of *Ins. Code § 533* (*11 Cal. App. 4th 1527, 1534)* . The court also rejected the contention that, because the policy covered claims for malicious prosecution, that the sanctions at issue should also be covered. The court noted that the case before it did not concern a malicious prosecution claim, but stated that even if it had, *Ins. Code § 533* would preclude insurance coverage for a malicious prosecution action based on defendant's willful conduct (*11 Cal. App. 4th 1527, 1534-1535)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGood Faith & Fair DealingDuty to DefendInsurance LawClaims & ContractsGood Faith & Fair DealingIndemnification

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12-120 California Points & Authorities § 120.95

§ 120.95 Coverage for Criminal Fines or Restitution Is Precluded as a Matter of Law

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [HAS *or* HAD] NO DUTY TO _____ [DEFEND *or* INDEMNIFY] INSURED [IN THE UNDERLYING ACTION] BECAUSE COVERAGE FOR FINES OR RESTITUTION IMPOSED AS A RESULT OF CRIMINAL CONVICTION ARE PRECLUDED AS MATTER OF LAW.

Coverage for Criminal Fines or Restitution Is Precluded as a Matter of Law. As a matter of law, *Insurance Code Section 533* precludes insurance coverage for fines or restitution imposed as a result of a criminal conviction, including attorney's fees imposed as a fine or restitution (*Baker v. Mid-Century Ins. Co. (1993) 20 Cal. App. 4th 921, 924-925, 25 Cal. Rptr. 2d 34*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention by the insurer that it has no duty to defend a prior action brought against the insured or to indemnify the insured, or both. The basis of these points and authorities is that as a matter of law, *Ins. Code Section 533* precludes insurance coverage for fines or restitution imposed as a result of a criminal conviction, including attorney's fees imposed as a fine or restitution.

This form may be used by an insurer in various procedural contexts, such as in memoranda supporting or opposing a motion for summary judgment, in a trial brief, or in an appellate brief. For further discussion, see *§ 120.30[2][a]*.

These points and authorities may be combined, if appropriate, with other points and authorities that contend that the

insurance policy excludes from coverage the willful acts of the insured [*see § 120.90* et seq.].

The California Supreme Court has held that an insurer may have a duty to defend an action against an insured even if the action alleges willful conduct (such as sexual molestation), if the action also alleges conduct for which potential coverage under the policy exists [*Horace Mann Ins. Co. v. Barbara B. (1993) 4 Cal. 4th 1076, 1082-1086, 17 Cal. Rptr. 2d 210, 846 P.2d 792]* . For a form setting forth points and authorities in support of the contention that such a duty to defend exists, *see § 120.109*.

For references to related Pleading and Practice chapters, see *§ 120.90[2][c]*.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In particular, counsel should:

- Refer to facts showing that the insured is seeking insurance coverage for fines or restitution imposed as a result of a criminal conviction, and

- Argue that, consequently, under the policy the insurer has no duty to defend or indemnify the insured for claims arising out of such a circumstance.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.10* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be a motion by a defendant insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.30[2][b]*.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[d] Opposing Points and Authorities

The points and *authorities in § 120.100* et seq. may be used in an appropriate case to oppose these points and authorities.

[3] Discussion of Authorities

[a] Coverage for Criminal Fines or Restitution Is Precluded as a Matter of Law

In ***Baker v. Mid-Century Ins. Co.*** *(1993) 20 Cal. App. 4th 921, 25 Cal. Rptr. 2d 34* , the court held that attorney's fees imposed on an insured as a fine or restitution for felony drunk driving were not covered under the insured's liability policy because *Ins. Code § 533* precludes insurance coverage for policy fines or restitution imposed as a result of a criminal conviction, and the deterrent effect of the restitution would be undermined if a defendant could pass the cost on to an insurer (*20 Cal. App. 4th 921, 924-925)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGeneral OverviewInsurance LawGeneral Liability InsuranceExclusionsEquitable Relief

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12-120 California Points & Authorities § 120.96

§ 120.96 Coverage for Intentional Sexual Harassment Is Precluded as a Matter of Law

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [HAS *or* HAD] NO DUTY TO _____ [DEFEND *or* INDEMNIFY] INSURED [IN THE UNDERLYING ACTION] BECAUSE COVERAGE FOR INTENTIONAL SEXUAL HARASSMENT IS PRECLUDED AS MATTER OF LAW.

Coverage for Intentional Sexual Harassment Precluded as a Matter of Law. As a matter of law, *Insurance Code Section 533* precludes insurance coverage for intentional sexual harassment and associated employment-related torts (*Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co. (1993) 14 Cal. App. 4th 1595, 18 Cal. Rptr. 2d 692*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention by the insurer that it has no duty to defend a prior action brought against the insured or to indemnify the insured, or both. The basis of these points and authorities is that *Ins. Code § 533* precludes insurance coverage for intentional sexual harassment and associated employment-related torts.

This form may be used by an insurer in various procedural contexts, such as in memoranda supporting or opposing a motion for summary judgment, in a trial brief, or in an appellate brief. For further discussion, see *§ 120.30[2][a]*.

The California Supreme Court has held that an insurer may have a duty to defend an action against an insured even if the action alleges willful conduct (such as sexual molestation), if the action also alleges conduct for which potential coverage under the policy exists [*Horace Mann Ins. Co. v. Barbara B. (1993) 4 Cal. 4th 1076, 1082-1086, 17 Cal.*

Rptr. 2d 210, 846 P.2d 792] . For a form setting forth points and authorities in support of the contention that such a duty to defend exists, *see § 120.109*.

These points and authorities may be combined, if appropriate, with other points and authorities that contend that the insurance policy excludes from coverage the willful acts of the insured [*see § 120.90* et seq.].

For references to related Pleading and Practice chapters, see *§ 120.90[2][c]*.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In particular, counsel should:

- Refer to facts showing that the insured is seeking insurance coverage for intentional sexual harassment or another associated employment-related tort, and

- Argue that, consequently, under the policy the insurer has no duty to defend or indemnify the insured for claims arising out of such acts.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.10* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be a motion by a defendant insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.30[2][b]*.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[d] Opposing Points and Authorities

The points and *authorities in § 120.100* et seq. may be used in an appropriate case to oppose these points and authorities.

[3] Discussion of Authorities

[a] Coverage for Intentional Sexual Harassment Precluded as a Matter of Law

In ***Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co.*** *(1993) 14 Cal. App. 4th 1595, 18 Cal. Rptr. 2d 692* , a corporation, its president, and another managerial level employee sued the corporation's insurer for breach of contract and bad faith refusal to defend and indemnify in a sexual harassmentand wrongful termination action brought by a former employee. The president, well known for his harassment of female employees, made continuous advances towards the employee and sexually assaulted her, aided at times by the managerial level employee who acted as a procuress. The harassed employee was terminated when she refused the advances. The trial court granted the insurer's motion for directed verdict.

The court of appeals affirmed. The court held that there is no duty to defend and indemnify a corporate insured when the corporation is aware of sexual harassment by its officers and employees and that conduct is ratified or condoned by the corporation. The court concluded that the conduct at issue in the case occurred "in the context of a policy of quid pro quo, where corporate funds, employment, and advancement were used or withheld, as a matter of common knowledge and routine, to coerce sexual favors for a high managerial employee." The court found that the corporation, "in allowing, condoning, and ratifying such intentional conduct as a matter of corporate policy, triggered the prohibition against intentional wrongful conduct embodied in [Ins. Code S]ection 533."

The recharacterization of intentional sexual harassment as negligent in order to trigger coverage was futile in light of *Ins. Code § 533*, which prohibits attempts to shift liability for intentional conduct. The court of appeals also rejected the insured's attempt to seek coverage on a negligent supervision theory, concluding that under the facts outlined above, the corporation had ratified the harassment. Thus, the insurer was not required either to indemnify or to defend the claim.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGeneral OverviewInsurance LawGeneral Liability InsuranceExclusionsIntentional ActsInsurance LawGeneral Liability InsuranceObligationsDefenseInsurance LawGeneral Liability InsuranceObligationsIndemnification

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12-120 California Points & Authorities § 120.97

§ 120.97 Coverage for Inducing Patent Infringement Is Precluded as a Matter of Law

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [HAS *or* HAD] NO DUTY TO _____ [DEFEND *or* INDEMNIFY] INSURED [IN THE UNDERLYING ACTION] BECAUSE COVERAGE FOR INDUCING PATENT INFRINGEMENT IS PRECLUDED AS A MATTER OF LAW.

Coverage for Inducing Patent Infringement Precluded as a Matter of Law. As a matter of law, *Insurance Code Section 533* precludes insurance coverage for inducing patent infringement (*Aetna Casualty & Sur. Co. v. Superior Court (1993) 19 Cal. App. 4th 320, 331*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention by the insurer that it has no duty to defend a prior action brought against the insured or to indemnify the insured, or both. The basis of these points and authorities is that as a matter of law, *Ins. Code § 533* precludes insurance coverage for inducing patent infringement.

This form may be used by an insurer in various procedural contexts, such as in memoranda supporting or opposing a motion for summary judgment, in a trial brief, or in an appellate brief. For further discussion, see *§ 120.30[2][a]*.

The California Supreme Court has held that an insurer may have a duty to defend an action against an insured even if the action alleges willful conduct (such as sexual molestation), if the action also alleges conduct for which potential coverage under the policy exists [*Horace Mann Ins. Co. v. Barbara B. (1993) 4 Cal. 4th 1076, 1082-1086, 17 Cal. Rptr. 2d 210, 846 P.2d 792]* . For a form setting forth points and authorities in support of the contention that such a duty

to defend exists, *see § 120.109*.

These points and authorities may be combined, if appropriate, with other points and authorities that contend that the insurance policy excludes from coverage the willful acts of the insured [*see § 120.90* et seq.].

For references to related Pleading and Practice chapters, see *§ 120.90[2][c]*.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In particular, counsel should:

- Refer to facts showing that the insured is seeking insurance coverage for its inducement of patent infringement, and

- Argue that, consequently, under the policy the insurer has no duty to defend or indemnify the insured for claims arising out of those acts.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.10* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be a motion by a defendant insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.30[2][b]*.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[d] Opposing Points and Authorities

The points and *authorities in § 120.100* et seq. may be used in an appropriate case to oppose these points and authorities.

[3] Discussion of Authorities

[a] Coverage for Inducing Patent Infringement Precluded as a Matter of Law

In ***Aetna Cas. & Sur. Co. v. Superior Court*** *(1993) 19 Cal. App. 4th 320, 23 Cal. Rptr. 2d. 442* , a manufacturer was sued for patent infringement. It tendered defense to its comprehensive general liability carrier, alleging that the loss fell within the "advertising injury" endorsement in the policy. The insurer rejected the tender, and the insured filed a declaratory relief action. The trial court held that coverage existed, but the court of appeal reversed, holding that as a matter of law patent infringement could not be considered "advertising injury" (*19 Cal. App. 4th 320, 328)* . The court concluded that decisions in the wake of the California Supreme Court's ruling in *Bank of W. v. Superior Court (1992) 2 Cal. 4th 1254, 10 Cal. Rptr. 2d 538, 833 P.2d 545* have confirmed that except perhaps in very unusual circumstances, it is now settled law that there is no coverage for patent infringement under the advertising injury coverage of a business general liability policy.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawGeneral Liability InsuranceCoverageAdvertising InjuriesInsurance LawGeneral Liability InsuranceExclusionsIntentional ActsInsurance LawGeneral Liability InsuranceObligationsDefenseInsurance LawGeneral Liability InsuranceObligationsIndemnification

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12-120 California Points & Authorities §§ 120.98-120.99

[Reserved]

§§ 120.98[Reserved]

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12-120 California Points & Authorities § 120.100

§ 120.100 Policy Language Led Insured to Expect Defense in Third-Party Action Based on Willful Act

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [HAS *or* HAD] THE DUTY TO DEFEND INSURED BECAUSE AMBIGUOUS LANGUAGE IN THE POLICYREASONABLY LED INSURED TO BELIEVE THAT INSURER WOULD DEFEND INSURED IN THE THIRD-PARTY ACTION.

Ambiguity in Policy Led Insured to Reasonably Expect Coverage. The meaning of an insurance policy which does not clearly define the application of the clause excluding coverage for intentional conduct to the duty of the insurance company to defend the insured in an action against the insured is tested according to the insured's reasonable expectation of coverage; if the language of the policy would lead the insured to expect the defense, the insurer is required to defend or be liable to the insured for its failure to do so (*Gray v. Zurich Ins. Co. (1966) 65 Cal. 2d 263, 266-267, 54 Cal. Rptr. 104, 419 P.2d 168*).

[*These points and authorities should be combined with points and authorities contending that the policy is not prohibited by statutes forbidding contracts which indemnify for "loss" or "responsibility" resulting from willful wrongdoing. See, e.g., § 120.101.*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's the contention that an insurer has no duty to defend its insured under an insurance policy. The basis of these points and authorities is that ambiguous language in the policy reasonably led insured to believe that insurer would defend the insured in the third-party action.

This form may be used by an insured in various procedural contexts. For example, these points and authorities may be submitted by plaintiff, in an action against plaintiff's liability insurer for damages for wrongful refusal to defend or indemnify plaintiff in a third-party action, in opposition to a motion by defendant insurer for summary judgment pursuant to *Code Civ. Proc. § 437c*, when defendant contends that it had no duty to defend or indemnify because the third-party action sought recovery of damages based on a willful wrong. For use in this context, counsel should modify the form to contend that triable issues of material fact remain regarding the insurer's duty.

This form may also be used in a trial brief, or in an appellate brief. For further discussion, see *§ 120.50[2][a]*.

These points and authorities should be combined with additional points and authorities contending that the policy is not prohibited by *Civ. Code § 1668* and *Ins. Code § 533* (forbidding contracts which indemnify for "loss" or "responsibility" resulting from willful wrongdoing) [*See, e.g., § 120.101*].

These points and authorities may be combined, if appropriate, with other points and authorities that contend that the insured has wrongfully refused to defend its insured in a third-party action [*see, e.g., §§ 120.50 et seq., 120.80 et seq., and 120.101* et seq.].

In an appropriate case, these points and authorities may be submitted in opposition to a motion for summary judgment supported by the points and *authorities in § 120.90* et seq.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should:

- Refer to the specific provisions of the policy that may reasonably be construed to provide for coverage of the underlying third-party action, and

- Argue that, consequently, under the policy the insurer is bound to defend the insured in the third party action.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.20* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing an insurer's motion for summary judgment or summary adjudication when the evidentiary facts clearly support the contention and disclose triable issues of any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.50[2][b]*.

[c] Related Pleading and Practice Chapters

For complaints by an insured against an insurer for damages for breach of contract because of the insurer's refusal to pay a third-party judgment against the insured or to defend the insured in a third-party action, see California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender). For a discussion of the rules applicable to summary judgment, a form of notice of motion for summary judgment, and related forms, see Ch. 537, *Summary Judgment* , in that publication.

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing*

Legal Memoranda and Briefs .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Ambiguity in Policy Led Insured to Reasonably Expect Coverage

In ***Gray v. Zurich Ins. Co.*** *(1966) 65 Cal. 2d 263, 54 Cal. Rptr. 104, 419 P.2d 168* , the liability policy provided coverage for bodily injury, except that which is caused intentionally, and required the insurer to defend any suit against the insurer in which bodily injury was alleged, even if the allegations were groundless, false, or fraudulent. The insurer refused to undertake defense of the third-party action on the ground that the complaint in that action alleged an intentional tort and was excluded from coverage (*65 Cal. 2d 263, 267)* . The Supreme Court, in reversing the judgment for defendant insurer with instructions to the trial court to take evidence solely on the issue of damages, pointed out that the language of the policy did not clearly define the application of the exclusionary clause to the duty to defend, that the meaning of the policy must, therefore, be tested according to the insured's reasonable expectation of coverage, and that since the language of the policy would lead the insured to expect defense of the third-party suit, the insurer could not be exonerated from rendering such protection (*65 Cal. 2d 263, 267)* .

[4] Additional Authorities

[a] Ambiguity in Policy Led Insured to Reasonably Expect Coverage

In *Miller v. Elite Ins. Co. (1980) 100 Cal. App. 3d 739, 161 Cal. Rptr. 322* , affirming the judgment for plaintiff, the court of appeal said that insurance policies must be interpreted so as to protect the reasonable expectations of the insured and that where the parties are of unequal bargaining strength, and the more powerful party offers a standardized, written contract, the court will interpret the contract according to the weaker party's expectations (*100 Cal. App. 3d 739, 753)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsPolicy InterpretationGeneral OverviewInsurance LawClaims & ContractsPolicy InterpretationReasonable ExpectationsGeneral OverviewInsurance LawGeneral Liability InsuranceCoverageGeneral OverviewInsurance LawGeneral Liability InsuranceObligationsDefense

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CHAPTER 120 INSURANCE
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B. Coverage and Exclusions
3. Exclusions for Willful Acts

12-120 California Points & Authorities § 120.101

§ 120.101 Statutes Forbidding Indemnification Do Not Preclude Defense

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

STATUTES PROHIBITING CONTRACTS THAT INDEMNIFY FOR "LOSS" OR "RESPONSIBILITY" RESULTING FROM WILLFUL WRONGDOING DO NOT PRECLUDE INSURER'S DUTY TO DEFEND INSURED IN THE THIRD-PARTY ACTION.

A. Statutory Prohibitions Do Not Apply. *Civil Code Section 1668* and *Insurance Code Section 533* forbid only contracts that indemnify for "loss" or "responsibility" resulting from willful wrongdoing; a policy providing for legal defense of an action charging such conduct does not call for indemnification of the insured if the third party prevails and, hence, is not prohibited by those sections (*Gray v. Zurich Ins. Co. (1966) 65 Cal. 2d 263, 277-278, 54 Cal. Rptr. 104, 419 P.2d 168*).

B. Duty to Defend Does Not Conflict Policy of Statutes. The public policy established by *Civil Code Section 1668* and *Insurance Code Section 533* is to prevent insurance coverage from encouraging willful torts, and a contract to defend an insured on a mere accusation of a willful tort does not encourage such willful conduct (*Gray v. Zurich Ins. Co. (1966) 65 Cal. 2d 263, 277, 54 Cal. Rptr. 104, 419 P.2d 168*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's the contention that an insurer has no duty to defend its insured under an insurance policy. The basis of these points and authorities is that statutes prohibiting contracts that indemnify for "loss" or "responsibility" resulting from willful wrongdoing do not preclude insurer's duty to defend insured in the third-party action.

This form may be used by an insured in various procedural contexts, such as in memoranda supporting or opposing a motion for summary judgment, in a trial brief, or in an appellate brief. For further discussion, see *§ 120.50[2][a]*.

These points and authorities may be combined, if appropriate, with other points and authorities that contend that the insured has wrongfully refused to defend its insured in a third-party action [*see, e.g., §§ 120.50 et seq., 120.80 et seq., and 120.100* et seq.].

This form may be used to oppose the points and authorities *set forth in § 120.90* et seq.

For references to related Pleading and Practice chapters, see *§ 120.100[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should:

- Refer to specific provisions in the policy showing that it provides for legal defense against an action charging conduct and does not call for indemnification of the insured if the third party prevailed;

- Argue that, consequently, under the policy the insurer is bound to defend the insured in the underlying third party action.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.20* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing an insurer's motion for summary judgment or summary adjudication when the evidentiary facts clearly support the contention and disclose triable issues of any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.50[2][b]*.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Statutory Prohibitions Do Not Apply

The facts and procedural background of ***Gray v. Zurich Ins. Co.*** *(1966) 65 Cal. 2d 263, 54 Cal. Rptr. 104, 419 P.2d 168* are discussed in *§ 120.50[3][a]*. The insurer argued that the policy could not be read to require it to defend an action seeking damages for an intentional wrong because such an obligation would violate the public policy set forth in *Ins. Code § 533* and *Civ. Code § 1668* (*65 Cal. 2d 263, 277)* . The Supreme Court rejected the contention on two grounds: (1) the statutes forbid only contracts which indemnify for "loss" or "responsibility" resulting from willful wrongdoing, and the policy before it provided for legal defense against an action charging such conduct and did not call for indemnification of the insured if the third party prevailed; and (2) the public policy established by the statutes is to prevent insurance coverage from encouraging willful torts, and a contract to defend an insured on a mere accusation of a

willful tort does not encourage such willful conduct (*65 Cal. 2d 263, 277-278)* . The Court further rejected the insurer's argument that the duty to defend dissolves when the insured suffers a judgment against him or her in the third-party action, since to sanction such a construction would defeat the very purpose or object of the insurance (*65 Cal. 2d 263, 278)* .

[b] Duty to Defend Does Not Conflict Policy of Statutes

Gray v. Zurich Ins. Co. *(1966) 65 Cal. 2d 263, 54 Cal. Rptr. 104, 419 P.2d 168* is discussed in *§ 120.101[3][a]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawGeneral Liability InsuranceExclusionsCriminal ActsInsurance LawGeneral Liability InsuranceExclusionsIntentional ActsInsurance LawGeneral Liability InsuranceObligationsIndemnification

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12-120 California Points & Authorities § 120.102

§ 120.102 Liability of Insured Was Vicarious Only

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [HAS *or* HAD] THE DUTY TO DEFEND INSURED BECAUSE THE WILLFUL ACT SUED ON IN THE THIRD-PARTY ACTION WAS COMMITTED BY A PERSON OTHER THAN INSURED, THUS THE LIABILITY OF INSURED IN THE THIRD-PARTY ACTION IS VICARIOUS ONLY.

***Ins. Code § 533* Does Not Apply to Vicarious Liability.** The provisions of *Section 533 of the Insurance Code*, providing that an insurer is not liable for a loss caused by the willful act of the insured, does not apply where the insured's liability is vicariously imposed for the willful wrong of another (*Arenson v. National Auto. & Cas. Ins. Co. (1955) 45 Cal. 2d 81, 84, 286 P.2d 816*).

[*These points and authorities should be combined with points and authorities contending that the policy is not prohibited by statutesforbidding contracts which indemnify for "loss" or "responsibility" resulting from willful wrongdoing. See, e.g., § 120.101.*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's the contention that an insurer has no duty to defend its insured under an insurance policy. The basis of these points and authorities is that the alleged willful wrong was committed by another person and the insured's liability for that wrong is vicarious only.

This form may be used by an insured in various procedural contexts. For example, these points and authorities may be submitted by plaintiff, in an action against plaintiff's liability insurer for damages for wrongful refusal to defend or

indemnify plaintiff in a third-party action, in opposition to a motion by defendant insurer for summary judgment pursuant to *Code Civ. Proc. § 437c*, when defendant contends that it had no duty to defend or indemnify because the third-party action sought recovery of damages based on a willful wrong. For use in this context, counsel should modify the form to contend that triable issues of material fact remain regarding the insurer's duty.

These points and authorities should be combined with additional points and authorities contending that the policy is not prohibited by *Civ. Code § 1668* and *Ins. Code § 533* (forbidding contracts which indemnify for "loss" or "responsibility" resulting from willful wrongdoing) [*See, e.g., § 120.101*].

This form may also be used in a trial brief, or in an appellate brief. For further discussion, see *§ 120.50[2][a]*.

These points and authorities may be combined, if appropriate, with other points and authorities that contend that the insured has wrongfully refused to defend its insured in a third-party action [*see, e.g., §§ 120.50 et seq., 120.80 et seq., and 120.100* et seq.].

This form may be used to oppose the points and authorities *set forth in § 120.90* et seq.

For references to related Pleading and Practice chapters, see *§ 120.100[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should:

- Refer to specific facts that show that the willful act sued on in the third-party action was committed by a person other than insured, andtherefore, the liability of insured in the third-party action is vicarious only.

- Argue that, consequently, under the policy the insurer is bound to defend or indemnify the insured.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.20* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing an insurer's motion for summary judgment or summary adjudication when the evidentiary facts clearly support the contention and disclose triable issues of any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.50[2][b]*.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Ins. Code § 533 Does Not Apply to Vicarious Liability

Arenson v. National Auto. & Cas. Ins. Co. *(1955) 45 Cal. 2d 81, 286 P.2d 816* , was an action by the holder of a

personal liability insurance policy issued by defendant company for a determination of the insurer's liability under the policy. The policy was issued to plaintiff as the named insured and stated that the unqualified word "insured" included the named insured and, if residents of his household, his spouse, the relatives of either, and any other person under the age of 21 in the care of the insured. Under the policy, defendant agreed to pay all sums which the insured should become obligated to pay because of liability imposed on him by law, including damages for injury to property, and to defend any suit brought against him in which such injury was alleged. Excluded from coverage was injury or destruction "caused intentionally by or at the direction of the insured." Plaintiff's minor son started a fire which injured school property, and the school district obtained a judgment against plaintiff for the amount of the damage. The insurance company refused to defend the suit or to pay the amount of the judgment, claiming that the injury was caused intentionally by an insured and therefore came within the exclusion provision.The insurer contended that the quoted phrase referred to a class composed of all those covered by the policy so that none of them could recover where an injury was caused intentionally by any member of the class. Plaintiff contended that the exclusion did not preclude an insured who did not participate in an intentional injury from being indemnified against liability for an injury intentionally committed by another insured (*45 Cal. 2d 81, 83)* .

Judgment was entered for defendant, and plaintiff appealed. In reversing the judgment, the Supreme Court concluded that the policy protected the named insured against liability for intentional injury committed by another insured (*45 Cal. 2d 81, 83)* . The Court based its conclusion on: (1) the rule that the understanding of an ordinary erson is the standard used in construing an insurance contract, and any ambiguity in language must be resolved against the insurer; (2) the rule that exceptions and exclusions are construed strictly against the insurer and liberally in favor of the insured; and (3) the holding of cases from other jurisdictions involving a similar exclusion that such an exclusion is reasonably understood as designed to prevent indemnifying one against loss from his or her own wrongful acts and could not be construed to exclude coverage for the willful acts of another in the absence of a clear expression showing such intent (*45 Cal. 2d 81, 83-84)* .

The Court pointed out that *Ins. Code § 533*, which provides that an insurer is not liable for a loss caused by the willful act of the insured and which codifies the general rule that an insurance policy indemnifying the insured against liability due to his or her own willful wrong is void as against public policy, has no application to a situation where the insured is not personally at fault (*45 Cal. 2d 81, 84)* . The Court held that plaintiff was entitled to recover the principal amount of the judgment against him with interest, together with court costs and attorneys' fees properly incurred by him in defense of the school district's claim (*45 Cal. 2d 81, 84)* .

[4] Additional Authorities

[a] Ins. Code § 533 Does Not Apply to Vicarious Liability

In *American States Ins. Co. v. Borbor (9th Cir. 1987) 826 F.2d 888* , insureds were named in a liability policy in their individual capacities, doing business as a named nursery school, which was actually a partnership. One insured was convicted of *Penal Code § 288* (lewd acts on children) for molestations on the children enrolled at the school. In a declaratory relief action filed by the insurer to determine its rights and duties regarding a third-party action brought by the children, a federal district court held that *Ins. Code § 533* barred coverage for both insureds. The Ninth Circuit Court of Appeals affirmed with regard to the insured who committed theacts, but reversed with regard to the co-insured, who, according to the conclusions of the trial court, was either innocent or negligent. The court of appeal held that *Ins. Code § 533* does not preclude insurance coverage for a negligent insured; moreover, it expressly provides that an insurer is not exonerated by the negligence of the insured. A partner's liability for the other's acts may be distinguished from that partner's ability to insure against that liability (*826 F.2d 888 892-895)* .

Legal Topics:

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

Insurance LawGeneral Liability InsuranceExclusionsIntentional ActsInsurance LawGeneral Liability InsuranceObligationsDefenseTortsVicarious LiabilityGeneral Overview

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12-120 California Points & Authorities § 120.103

§ 120.103 Local Public Entity Insured Against Expense of Defending Third-Party Action

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [HAS *or* HAD] THE DUTY TO DEFEND INSURED [AND ITS EMPLOYEE] BECAUSE THE PUBLIC ENTITY HAS INSURED ITSELF [AND ITS EMPLOYEE] AGAINST THE EXPENSE OF DEFENDING A CLAIM AGAINST IT [OR ITS EMPLOYEE][, INCLUDING A CLAIM FOR PUNITIVE DAMAGES AGAINST ITS EMPLOYEE] IF THE LIABILITY AROSE FROM CONDUCT IN THE SCOPE OF EMPLOYMENT.

A. Local Public Entity Insured Against Expense of Defending Third-Party Action. A local public entity may insure, contract, or provide against the expense of defending a claim against the local public entity or its employee, whether or not liability exists on such claim, including a claim for damages under *Civil Code Section 3294* or otherwise for the sake of example or by way of punishment, when such liability arose from an act or omission in the scope of the employment, and an insurance contract for such purpose is valid and binding notwithstanding Civil Code *Section 1668, Insurance Code* Section 533, or any other provision of law (*Gov. Code § 990(c)* (not applicable to workers' compensation); *see also Gov. Code § 996*).

B. Public Entity May Insure Against Intentional Tort. The intent of *Government Code Section 990* is that a public entity's authority to insure be as broad as its potential liability, whether that liability arises from a negligent or an intentional tort (*see* 4 Cal. L. Rev. Comm. Reports, Recommendations, and Studies 1201, 1206 (1963); *see also* 10 Cal. L. Rev. Comm. Reports, Recommendations, and Studies 1051, 1056 (1971)).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's the contention that an insurer has no duty to defend its insured under an insurance policy. The basis of these points and authorities is that:

(1) A local public entity is authorized by statute to insure itself against any tort liability and its employee against liability for injury resulting from an act or omission within the scope of employment, and to insure against expenses incurred in defending a third-party action against it or its employee, including a claim for punitive damages.

(2) The liability arose from an act or omission in the scope of employment.

(3) Civ. Code *§ 1668, Ins. Code* § 533, or any other provision of law do not preclude such coverage.

Additional paragraphs should be included if it is necessary to establish that plaintiff is a local public entity within the meaning of *Gov. Code § 990* [*see Gov. Code §§ 989, 11000*].

This form may be used by an insured in various procedural contexts. For example, these points and authorities may be submitted by plaintiff, in an action against plaintiff's liability insurer for damages for wrongful refusal to defend or indemnify plaintiff in a third-party action, in opposition to a motion by defendant insurer for summary judgment pursuant to *Code Civ. Proc. § 437c*, when defendant contends that it had no duty to defend or indemnify because the third-party action sought recovery of damages based on a willful wrong. For use in this context, counsel should modify the form to contend that triable issues of material fact remain regarding the insurer's duty.

This form may also be used in a trial brief, or in an appellate brief. For further discussion, see *§ 120.50[2][a]*.

These points and authorities may be combined, if appropriate, with other points and authorities that contend that the insured has wrongfully refused to defend its insured in a third-party action [*see, e.g., §§ 120.50 et seq., 120.80 et seq., and 120.100* et seq.].

This form may be used to oppose the points and authorities *set forth in § 120.90* et seq.

For references to related Pleading and Practice chapters, see *§ 120.100[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should:

- Refer to specific provisions of the insurance policy which establish that the local public entity and its employee are insured against the tort liability alleged in the underlying third party action, including expenses incurred in defending the action against itself or its employee.

- Refer to facts that establish that the liability arose from an act or omission in the scope of employment.

- Argue that, consequently, under the policy the insurer is bound to defend the insured public entity and/or its employee.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.20* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing an

insurer's motion for summary judgment or summary adjudication when the evidentiary facts clearly support the contention and disclose triable issues of any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.50[2][b]*.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Local Public Entity Insured Against Expense of Defending Third-Party Action

Gov. Code § 996, relating to defense of public employees, provides that a public entity may provide for a defense by its own attorney or by employing other counsel for this purpose or by purchasing insurance which requires that the insurer provide the defense, that all of the expenses of providing a defense are proper charges against a public entity, and that a public entity has no right to recover such expenses from the employee or former employee defended.

[b] Public Entity May Insure Against Intentional Tort

The California Law Revision Commission drafted, among other code provisions relating to insurance, ***Gov. Code § 990*** , which was enacted in1963 [Stats. 1963, ch 1682]. As originally enacted, *Gov. Code § 990* provided as follows:

"Except for a liability which may be insured against pursuant to Division 4 (commencing with Section 3201) of the Labor Code, a local public entity may:

> "(a) Insure itself against all or any part of any liability for any injury.
>
> "(b) Insure any employee of the local public entity against all or any part of his liability for injury resulting from an act or omission in the scope of his employment.
>
> "(c) Insure against the expense of defending a claim against the local public entity or its employee, whether or not liability exists on such claim."

The commission explained that the purpose of the legislation was to achieve certain specified objectives, including the following:

> (1) All types of public entities should be expressly authorized to insure themselves against liability. All public entities may have this authority now, but an express statutory provision is desirable to make clear that a public entity's authority to insure is as broad as its potential liability.
>
> (2) All types of public entities should be expressly authorized to purchase insurance to cover the personal liability of their officers, agents, and employees for all types of torts committed in the scope of their public employment. All public entities now have authority to insure public personnel against liability for negligent acts and omissions and for false arrest and false imprisonment. Authority to provide public personnel with insurance protection against their liability for other intentional torts, however, is presently enjoyed only by school districts and a few other public entities. Giving all public entities authority to

provide their officers, agents, and employees with adequate insurance coverage will enable a public entity, if it so chooses, to encourage its personnel to perform their duties diligently without fear of liability. Moreover, the distinction between an intentional tort and a negligent one is not always clear; it sometimes depends on how the plaintiff phrases his complaint. Coverage of all tort liability would provide protection without regard to how the complaint is phrased.

(3) Not only should public entities be authorized to insure against any liability, but they also should be authorized to insure against the expense of defending claims, whether or not liability exists on such claims. In a footnote, the commission noted that this would codify the holding in *Burns v. American Cas. Co. (1954) 127 Cal. App. 2d 198, 273 P.2d 605* , that a county board of supervisors had authorityto purchase insurance to cover all risks for which the county and its employees might be liable and also to purchase protection against the expense of litigation on claims against the county where it was protected by sovereign immunity [4 Cal. L. Rev. Comm. Reports, Recommendations, and Studies 1201, 1206 (1963)].

The commission also drafted the 1971 amendment to *Gov. Code § 990(a)* [Stats. 1971, ch 140] to delete "for any injury" and to add "tort or inverse condemnation" so that the subdivision now reads: "(a) Insure itself against all or any part of any tort or inverse condemnation liability." In recommending this amendment, the commission explained that "[t]his effectuates the original intent of Section 990 that 'a public entity's authority to insure is as broad as its potential liability' " [10 Cal. L. Rev. Comm. Reports, Recommendations, and Studies 1051, 1056 (1971)].

The 1967 amendment to *Gov. Code § 990* changed the period at the end of *Gov. Code § 990(c)* to a comma and added, "including a claim for damages under *Section 3294 of the Civil Code* or otherwise for the sake of example or by way of punishment, where such liability arose from an act or omission in the scope of his employment, and an insurance contract for such purpose is valid and binding notwithstanding *Section 1668 of the Civil Code*, *Section 533 of the Insurance Code*, or any other provision of law" [Stats. 1967, ch 298]. This amendment does not, however, authorize a public entity to insure its officers or employees against a punitive damages award [*see Gov. Code § 990*, last paragraph; *59 Ops. Cal. Atty. Gen. 204, 210 (1976)]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsClaims By & AgainstInsurance LawGeneral Liability InsuranceCoverageGeneral OverviewTortsPublic Entity LiabilityLiabilityGeneral Overview

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12-120 California Points & Authorities § 120.104

§ 120.104 State Agency Insured Against Expense of Defending Third-Party Action

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [HAS *or* HAD] THE DUTY TO DEFEND INSURED [AND ITS EMPLOYEE] BECAUSE THE STATE AGENCY HAS INSURED ITSELF [AND ITS EMPLOYEE] AGAINST THE EXPENSE OF DEFENDING A CLAIM AGAINST IT [OR ITS EMPLOYEE].

A. State Agency Insured Against Expense of Defending Third-Party Action. Any state agency may insure against the expense of defending a claim against the state agency or its employee, whether or not liability exists on such claim (*Gov. Code § 11007.4(b)(3)* (section not applicable to workers' compensation)).

B. Agency May Insure Against Intentional Tort. The intent of *Government Code Section 11007.4* is that a public entity's authority to insure be as broad as its potential liability, whether that liability arises from a negligent or an intentional tort (*see* 4 Cal. L. Rev. Comm. Reports, Recommendations, and Studies 1201, 1206 (1963); *see also* 10 Cal. L. Rev. Comm. Reports, Recommendations, and Studies 1051, 1057 (1971)).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's the contention that an insurer has no duty to defend its insured under an insurance policy. The basis of these points and authorities is that:

(1) A state agency is authorized by statute to insure itself against any tort liability and its employee against liability for injury resulting from an act or omission within the scope of employment, and to insure against expenses incurred in defending a third-party action against it or its employee.

(2) The liability arose from an act or omission in the scope of employment.

Additional paragraphs should be included if there is any doubt about whether the public officer or entity is a state agency [*see Gov. Code §§ 11000, 11007.4*], or if the state agency is a state officer who was sued in the third-party action for an act omitted or committed within the scope of his or her employment [*see Gov. Code § 11007.4(a)(2)*].

This form may be used by an insured in various procedural contexts. For example, these points and authorities may be submitted by plaintiff, in an action against plaintiff's liability insurer for damages for wrongful refusal to defend or indemnify plaintiff in a third-party action, in opposition to a motion by defendant insurer for summary judgment pursuant to *Code Civ. Proc. § 437c*, when defendant contends that it had no duty to defend or indemnify because the third-party action sought recovery of damages based on a willful wrong. For use in this context, counsel should modify the form to contend that triable issues of material fact remain regarding the insurer's duty.

This form may also be used in a trial brief, or in an appellate brief. For further discussion, see *§ 120.50[2][a]*.

These points and authorities should be combined with additional points and authorities contending that the policy is not prohibited by *Civ. Code § 1668* and *Ins. Code § 533* (forbidding contracts which indemnify for "loss" or "responsibility" resulting from willful wrongdoing) [*See, e.g., § 120.101*].

These points and authorities may be combined, if appropriate, with other points and authorities that contend that the insured has wrongfully refused to defend its insured in a third-party action [*see, e.g., §§ 120.50 et seq., 120.80 et seq., and 120.100* et seq.].

This form may be used to oppose the points and authorities *set forth in § 120.90* et seq.

For references to related Pleading and Practice chapters, see *§ 120.100[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should:

- Refer to specific provisions of the insurance policy establishing that the state agency and its employee are insured against the tort liability alleged in the underlying third party action, including expenses incurred in defending the action against itself or its employee.

- Refer to facts that establish that the liability arose from an act or omission in the scope of employment.

- Argue that, consequently, under the policy the insurer is bound to defend the insured state agency and/or its employee.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.20* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing an insurer's motion for summary judgment or summary adjudication when the evidentiary facts clearly support the contention and disclose triable issues of any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.50[2][b]*.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] State Agency Insured Against Expense of Defending Third-Party Action

The California Law Revision Commission drafted, among other code provisions relating to insurance, *Gov. Code § 11007.4*, which was enacted in 1963 [Stats. 1963, ch. 1682].

The commission explained that the purpose of the legislation was to achieve certain specified objectives, including the following:

> (1) All types of public entities should be expressly authorized to insure themselves against liability. All public entities may have this authority now, but an express statutory provision is desirable to make clear that a public entity's authority to insure is as broad as its potential liability.
>
> (2) All types of public entities should be expressly authorized to purchase insurance to cover the personal liability of their officers, agents, and employees for all types of torts committed in the scope of their public employment. All public entities now have authority to insure public personnel against liability for negligent acts and omissions and for false arrest and false imprisonment. But authority to provide public personnel with insurance protection against their liability for other intentional torts is presently enjoyed only by school districts and a few other public entities. Giving all public entities authority to provide their officers, agents, and employees with adequate insurance coverage will enable a public entity, if it so chooses, to encourage its personnel to perform their duties diligently without fear of liability. Moreover, the distinction between an intentional tort and a negligent one is not always clear; it sometimes depends on how the plaintiff phrases his complaint. Coverage of all tort liability would provide protection without regard to how the complaint is phrased.
>
> (3) Not only should public entities be authorized to insure against any liability, but they also should be authorized to insure against the expense of defending claims, whether or not liability exists on such claims [4 Cal. L. Rev. Comm. Reports, Recommendations, and Studies 1201, 1206 (1963)].

[b] Agency May Insure Against Intentional Tort

The commission also drafted the 1971 amendment to *Gov. Code § 11007*.4 [Stats. 1971, ch 140], substituting "tort or inverse condemnation liability" for "liability for any injury" in Ins. Code § 11007.4(b)(1). The commission, in recommending this amendment, explained that "[t]his effectuates the original intent of Section 11007.4 that 'a public entity'sauthority to insure is as broad as its potential liability' " [10 Cal. L. Rev. Comm. Reports, Recommendations, and Studies 1051, 1057 (1971)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawGeneral Liability InsuranceCoverageGeneral OverviewInsurance LawGeneral Liability

InsuranceObligationsDefenseTortsPublic Entity LiabilityLiabilityGeneral Overview

California Points & Authorities

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12-120 California Points & Authorities § 120.105

§ 120.105 Insurer Failed to Meet its Burden of Proving Willful Conduct

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [HAS *or* HAD] THE DUTY TO DEFEND INSURED BECAUSE INSURER HAS FAILED TO MEET ITS BURDEN OF PROVING THAT THE INSURED'S ACT WAS WILLFUL WITHIN THE MEANING OF INSURANCE CODE SECTION 533.

Insurer Failed to Meet its Burden of Proving Willful Conduct. The burden of proving that the insured's act was willful within the meaning of *Section 533 of the Insurance Code*, thereby exonerating the insurer from liability under the policy, is on the insurer (*Clemmer v. Hartford Ins. Co. (1978) 22 Cal. 3d 865, 880, 151 Cal. Rptr. 285, 587 P.2d 1098*).

[*These points and authorities should be combined with points and authorities contending that the policy is not prohibited by statutes forbidding contracts which indemnify for "loss" or "responsibility" resulting from willful wrongdoing. See, e.g., § 120.101.*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's the contention that an insurer has no duty to defend its insured under an insurance policy. The basis of these points and authorities is that insurer failed to meet its burden of proving willful conduct.

This form may be used by an insured in various procedural contexts. For example, these points and authorities may be submitted by plaintiff, in an action against plaintiff's liability insurer for damages for wrongful refusal to defend or

indemnify plaintiff in a third-party action, in opposition to a motion by defendant insurer for summary judgment pursuant to *Code Civ. Proc. § 437c*, when defendant contends that it had no duty to defend or indemnify because the third-party action sought recovery of damages based on a willful wrong. For use in this context, counsel should modifythe form to contend that triable issues of material fact remain regarding the insurer's duty.

These points and authorities should be combined with additional points and authorities contending that the policy is not prohibited by *Civ. Code § 1668* and *Ins. Code § 533* (forbidding contracts which indemnify for "loss" or "responsibility" resulting from willful wrongdoing) [*See, e.g., § 120.101*].

This form may also be used in a trial brief, or in an appellate brief. For further discussion, see *§ 120.50[2][a]*.

These points and authorities may be combined, if appropriate, with other points and authorities that contend that the insured has wrongfully refused to defend its insured in a third-party action [*see, e.g., §§ 120.50 et seq., 120.80 et seq., and 120.100* et seq.].

This form may be used to oppose the points and authorities *set forth in § 120.90* et seq.

For references to related Pleading and Practice chapters, see *§ 120.100[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should point out that the insurer has failed to meet its burden of proving willful conduct.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.20* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing an insurer's motion for summary judgment or summary adjudication when the evidentiary facts clearly support the contention and disclose triable issues of any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.50[2][b]*.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Insurer Failed to Meet its Burden of Proving Willful Conduct

In ***Clemmer v. Hartford Ins. Co.*** *(1978) 22 Cal. 3d 865, 151 Cal. Rptr. 285, 587 P.2d 1098* , the Court held that the provisions of *Ins. Code § 533* were the equivalent of an exclusionary or exculpatory clause in the policy, and that the insurer has the burden of showing that the insured's act is willful (*22 Cal. 3d 865, 880)* .

Legal Topics:

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

Insurance LawClaims & ContractsGood Faith & Fair DealingDuty to DefendInsurance LawGeneral Liability InsuranceExclusionsGeneral OverviewInsurance LawGeneral Liability InsuranceExclusionsIntentional Acts

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12-120 California Points & Authorities § 120.106

§ 120.106 Insurer Has Failed to Establish Preconceived Design to Inflict Injury

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [HAS *or* HAD] THE DUTY TO DEFEND INSURED BECAUSE INSURER HAS FAILED TO ESTABLISH A PRECONCEIVED DESIGN TO INFLICT INJURY.

Insurer Has Failed to Establish Preconceived Design to Inflict Injury. If the insured's mental capacity to commit an intentional act is at issue, coverage is not excluded under *Section 533 of the Insurance Code* unless the act is done with a preconceived design to inflict injury (*Clemmer v. Hartford Ins. Co. (1978) 22 Cal. 3d 865, 886-887, 151 Cal. Rptr. 285, 587 P.2d 1098*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's the contention that an insurer has no duty to defend its insured under an insurance policy. The basis of this form is that the insurer has failed to establish a preconceived design to inflict injury.

The rule stated in this form does not apply when the issue is whether the insured intended to commit the harm (as opposed to the act) and the harm is "inherent in the act itself." Under the latter circumstances, the insurer is not required to show any "preconceived design to inflict injury" [*J. C. Penney Cas. Ins. Co. v. M. K. (1991) 52 Cal. 3d 1009, 1025, 278 Cal. Rptr. 64, 804 P.2d 689* ; *see §§ 120.93[3][a], 120.106[3][a]*]. Thus, for example, as in *J. C. Penney,* an insured charged with sexual molestation cannot circumvent *Ins. Code § 533* by claiming that he or she intended to commit the molestation, but not to inflict harm on the victim.

This form may be used by an insured in various procedural contexts. For example, these points and authorities may be submitted by plaintiff, in an action against plaintiff's liability insurer for damages for wrongful refusal to defend or indemnify plaintiff in a third-party action, in opposition to a motion by defendant insurer for summary judgment pursuant to *Code Civ. Proc. § 437c*, when defendant contends that it had no duty to defend or indemnify because the third-party action sought recovery of damages based on a willful wrong. For use in this context, counsel should modify the form to contend that triable issues of material fact remain regarding the insurer's duty.

This form may also be used in a trial brief, or in an appellate brief. For further discussion, see *§ 120.50[2][a]*.

These points and authorities may be combined, if appropriate, with other points and authorities that contend that the insured has wrongfully refused to defend its insured in a third-party action [*see, e.g., §§ 120.50 et seq., 120.80 et seq., and 120.100* et seq.].

This form may be used to oppose the points and authorities *set forth in § 120.90* et seq.

For references to related Pleading and Practice chapters, see *§ 120.100[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should point out the absence of evidence of a preconceived design to inflict injury.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.20* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing an insurer's motion for summary judgment or summary adjudication when the evidentiary facts clearly support the contention and disclose triable issues of any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.50[2][b]*.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication indrafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Insurer Has Failed to Establish Preconceived Design to Inflict Injury

Jacobs v. Fire Ins. Exch. *(1995) 36 Cal. App. 4th 1258, 42 Cal. Rptr. 2d 906* , arose from an incident in which an insured killed a minor child and then subsequently committed suicide. The victim's family filed suit under the insured's homeowners policy. The trial court granted FIE's summary judgment motion on the basis the shooting was wilful and therefore excluded. Plaintiff attempted to argue that an "irresistible impulse" would negate a "wilful act" and therefore a triable issue of fact as to the insured's mental state existed and summary judgment was improper. The court concluded that volitional incapacity or "irresistible impulse" does not negate a "wilful act" if the insured retains cognitive capacity (*36 Cal. App. 4th 1258, 1287)* .

Clemmer v. Hartford Ins. Co. *(1978) 22 Cal. 3d 865, 151 Cal. Rptr. 285, 587 P.2d 1098* , arose from the insured's

killing of his employer following an employment dispute. The incident resulted in a second-degree murder conviction against the insured. The victim's widow and son brought a wrongful death action against the insured, and then sought to recover the amount of that judgment from the insurer. The insurer asserted that the killing was a willful act, and therefore excluded from coverage by law, citing *Ins. Code § 533* (insurer not liable for loss caused by insured's willful act). The trial court instructed the jury that a finding that the insured had the mental capacity to intent to shoot and harm the victim, and the mental capacity to govern his own conduct, would result in a determination of willful conduct. Following a jury verdict that the act was not willful, the trial court entered judgment against the insurer, but subsequently granted a defense motion for a new trial limited to the issue of whether the death was caused by a willful act. Plaintiffs appealed from the order granting the motion, and defendant filed a protective cross-appeal.

The California Supreme Court affirmed the new-trial order and the portion of the judgment not affected by that order. The Court rejected the insurer's contention that the jury instruction regarding willfulness constituted prejudicial error in that it required the jury to find the existence of the specific intent to kill in order to find willfulness. The Court noted that the insurer's arguments ignore the specific language of the instruction,which is stated in terms of intent to "shoot and harm," not in terms of intent to kill. The Court stated that even an act that is "intentional" or "willful" within the meaning of traditional tort principles will not exonerate the insurer from liability under *Ins. Code § 533* unless it is done with a "preconceived design to inflict injury." The Court held that the instruction in question simply applied this principle to a situation in which the actor's capacity to harbor the requisite "design" was placed in issue through evidence bearing on his mental state (*22 Cal. 3d 865, 887)* .

The Supreme Court in J. C. Penney Cas. Ins. Co. v. M. K. (1991) 52 Cal. 3d 1009, 278 Cal. Rptr. 64, 804 P.2d 689 , later clarified its holding in *Clemmer* in connection with a case involving noncoverage of acts of child sexual molestation. In *J. C. Penney,* the Court emphasized that the inquiry in *Clemmer* was limited to the unresolved "mental capacity" of the insured, that is, whether he was legally sane when he committed the killing. In the context of child molestation, *Clemmer* does not require any showing that the molester subjectively intended to harm the child. The Court in *J. C. Penney* concluded that the act of child molestation is inherently harmful, and that the issue of whether or not the molester subjectively intended to cause harm therefore was irrelevant. As discussed in *§ 120.106[2],* subsequent decisions by other courts have extended the rationale applied in *J. C. Penney* to other contexts besides child molestation. Thus, before using this form to support the proposition that *Ins. Code § 533* requires a showing of a "preconceived design to inflict injury," counsel should make certain that the insured's underlying conduct is not of a type that has been held "inherently wrongful" under the line of cases construing *J. C. Penney.* However, some cases decided after *J. C. Penney* have still fallen back on the requirement of a "preconceived design to inflict injury" when the insured's underlying conduct is not "inherently wrongful" (*see, e.g.,* *Zurich Ins. Co. (U.S. Branch) v. Killer Music Inc. (9th Cir. 1993) 998 F.2d 674* , discussed in *§ 120.107[3][a]*).

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGood Faith & Fair DealingGeneral OverviewInsurance LawGeneral Liability InsuranceExclusionsGeneral OverviewInsurance LawGeneral Liability InsuranceObligationsDefenseInsurance LawGeneral Liability InsuranceObligationsIndemnificationInsurance LawProperty InsuranceHomeowners InsuranceGeneral Overview

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12-120 California Points & Authorities § 120.107

§ 120.107 Insured's Conduct Is Not Inherently Wrongful and Insurer Has Failed to Show Intent

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [HAS *or* HAD] THE DUTY TO INDEMNIFY AND/OR DEFEND INSURED BECAUSE INSURED'S CONDUCT IS NOT INHERENTLY WRONGFUL AND INSURER HAS FAILED TO SHOW INTENT.

Insured's Conduct Is Not Inherently Wrongful and Insurer Has Failed to Show Intent. When the liability of an insured is predicated on conduct that is not inherently wrongful and that can be either intentional or unintentional, the insured's conduct cannot be characterized as "willful" as a matter of law. Under these circumstances, evidence that the insured intended to commit a wrongful act is required before the insured's conduct will constitute a "willful act" under *Insurance Code Section 533* (*Zurich Ins. Co. (U.S. Branch) v. Killer Music, Inc. (9th Cir. 1993) 998 F.2d 674, 678-679* ; *Save Mart Supermarkets v. Underwriters at Lloyd's London (N. D. Ca. 1994) 843 F. Supp. 597, 606-607* ; *see J. C. Penney Casualty Ins. Co. v. M. K. (1991) 52 Cal. 3d 1009, 1026-1027, 278 Cal. Rptr. 64, 804 P.2d 689*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's the contention that an insurer has no duty to defend its insured under an insurance policy. The basis of these points and authorities is that a showing of intent is required when the insured's conduct is not inherently wrongful, and the insurer has failed to make that showing.

In the leading case of *J. C. Penney Cas. Ins. Co. v. M. K. (1991) 52 Cal. 3d 1009, 278 Cal. Rptr. 64, 804 P.2d 689* , the California Supreme Court held that coverage for child molestation is automatically precluded as a matter of law because child molestation is "always intentional, ... always wrongful, and ... always harmful" [*J. C. Penney Cas. Ins.*

Co. v. M. K. (1991) 52 Cal. 3d 1009, 1025, 278 Cal. Rptr. 64, 804 P.2d 689] . Subsequent decisions have applied that reasoning to a variety of other contexts outside the sexual molestation context [*see § 120.70*]. However, the Court recognized that motive can be relevant to the issue of the wrongfulness of an act, as when an insured intentionally shoots another person but does so in justifiable self-defense [*J. C. Penney Cas. Ins. Co. v. M. K. (1991) 52 Cal. 3d 1009, 1026-1027, 278 Cal. Rptr. 64, 804 P.2d 689]* .

In addition, at least two cases, both federal, have held that when liability can be imposed based on conduct that can be either intentional or unintentional and that is not inherently harmful, summary judgment for the insurer would be inappropriate [*Zurich Ins. Co. (U.S. Branch) v. Killer Music, Inc. (9th Cir. 1993) 998 F.2d 674, 678-679* ; *Save Mart Supermarkets v. Underwriters at Lloyd's London (N.D. Ca. 1994) 843 F. Supp. 597, 606-607]* .

This form may be used by an insured in various procedural contexts. For example, these points and authorities may be submitted by plaintiff, in an action against plaintiff's liability insurer for damages for wrongful refusal to defend or indemnify plaintiff in a third-party action, in opposition to a motion by defendant insurer for summary judgment pursuant to *Code Civ. Proc. § 437c*, when defendant contends that it had no duty to defend or indemnify because the third-party action sought recovery of damages based on a willful wrong. For use in this context, counsel should modify the form to contend that triable issues of material fact remain regarding the insurer's duty.

This form may also be used in a trial brief, or in an appellate brief. For further discussion, see *§ 120.50[2][a]*.

These points and authorities may be combined, if appropriate, with other points and authorities that contend that the insured has wrongfully refused to defend its insured in a third-party action [*see, e.g., §§ 120.50 et seq., 120.80 et seq., and 120.100* et seq.].

This form may be used to oppose the points and authorities *set forth in § 120.90* et seq.

For references to related Pleading and Practice chapters, see *§ 120.100[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should:

- Refer to specific facts that show that the insured's conduct is not inherently wrongful.
- Refer to a lack of proof that the conduct by the insured was intentional.
- Argue that, consequently, under the policy the insurer is bound to defend or indemnify the insured.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.20* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing an insurer's motion for summary judgment or summary adjudication when the evidentiary facts clearly support the contention and disclose triable issues of any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.50[2][b]*.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing*

Legal Memoranda and Briefs .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Insured's Conduct Is Not Inherently Wrongful and Insurer Has Failed to Show Intent

In ***Zurich Ins. Co. (U.S. Branch) v. Killer Music Inc.*** *(9th Cir. 1993) 998 F.2d 674* , the insured was sued for copyright infringement, unfair competition, and related torts in connection with a sale of song rights. The insurer refused to defend, claiming noncoverage. The action subsequently was settled, and the insured sought reimbursement from the insurer for the amount of the settlement plus defense costs. The insurer responded by filing a declaratory relief action on the coverage and defense issues. The district court granted the insurer's motion for summary judgment after finding that there was no potential for coverage under the "advertising injury" coverage of the insured's policy, and therefore no duty to defend.

The Ninth Circuit reversed, however, ruling that there was at least a potential for liability under the policy and that the insurer therefore was required to defend. In reaching this result, the court rejected the insurer's contention that liability for copyright infringement was barred by *Ins. Code § 533*. Relying on cases requiring that there be a "preconceived design to inflict injury," the court found that a fact question existed as to whether or not the insured had intended to engage in unauthorized use of the work at issue. Although the court did not cite *J. C. Penney Cas. Ins. Co. v. M. K. (1991) 52 Cal. 3d 1009, 278 Cal. Rptr. 64, 804 P.2d 689* , discussed in *§ 120.93[3][a]*, it did refer to cases that followed the *J. C. Penney* rule in finding wilfulness as a matter of law when the harm was inherent in the act itself. However, the court held that copyright infringement is not harmful per se because it can be innocent as well as intentional, and that coverage for innocent infringement is not barred by *Ins. Code § 533* (*998 F.2d 674, 678-679)* .

In ***Save Mart Supermarkets v. Underwriters at Lloyd's London*** *(N.D. Cal. 1994) 843 F. Supp. 597* , an insured faced with a discrimination suit tendered defense to its insurer. The insurer denied coverage, contending that discrimination is willful and therefore barred from coverage under *Ins. Code § 533*. The insured then instituted an action to determine coverage,and the insurer moved for summary judgment. The district court denied the motion. The court held that under federal antidiscrimination law, a discrimination case can be stated not only through intentional discrimination, but also by "disparate impact." Disparate impact may be unintentional, so a triable issue of fact existed as to whether coverage was barred under *Ins. Code § 533* (*843 F. Supp. 597, 606-607)* .

J. C. Penney Cas. Ins. Co. v. M. K. *(1991) 52 Cal. 3d 1009, 278 Cal. Rptr. 64, 804 P.2d 689* , is discussed in *§ 120.93[3][a]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawGeneral Liability InsuranceExclusionsIntentional ActsInsurance LawGeneral Liability InsuranceObligationsDefenseInsurance LawGeneral Liability InsuranceObligationsIndemnification

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12-120 California Points & Authorities § 120.108

§ 120.108 Insured Acted in Self-Defense

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [HAS *or* HAD] THE DUTY TO INDEMNIFY AND/OR DEFEND INSURED BECAUSE INSURED ACTED IN SELF-DEFENSE.

Insured Acted in Self-Defense. "Wilful act" as used in *Insurance Code Section 533* implies an element of wrongfulness or misconduct. An insured who intentionally injures another while acting in self-defense does not act wrongfully for purposes of *Insurance Code Section 533* (*Walters v. American Ins. Co. (1960) 185 Cal. App. 2d 776, 783, 8 Cal. Rptr. 665* ; *see J. C. Penney Cas. Ins. Co. v. M. K. (1991) 52 Cal. 3d 1009, 1025-1027, 278 Cal. Rptr. 64, 804 P.2d 689*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's the contention that an insurer has no duty to defend its insured under an insurance policy. The basis of these points and authorities is that insured acted in self-defense.

This form may be used by an insured in various procedural contexts. For example, these points and authorities may be submitted by plaintiff, in an action against plaintiff's liability insurer for damages for wrongful refusal to defend or indemnify plaintiff in a third-party action, in opposition to a motion by defendant insurer for summary judgment pursuant to *Code Civ. Proc. § 437c*, when defendant contends that it had no duty to defendor indemnify because the third-party action sought recovery of damages based on a willful wrong. For use in this context, counsel should modify the form to contend that triable issues of material fact remain regarding the insurer's duty.

These points and authorities should be combined with additional points and authorities contending that the policy is not prohibited by *Civ. Code § 1668* and *Ins. Code § 533* (forbidding contracts which indemnify for "loss" or "responsibility" resulting from willful wrongdoing) [*see, e.g., § 120.101*].

This form may also be used in a trial brief, or in an appellate brief. For further discussion, see *§ 120.50[2][a]*.

These points and authorities may be combined, if appropriate, with other points and authorities that contend that the insured has wrongfully refused to defend its insured in a third-party action [*see, e.g., §§ 120.50 et seq., 120.80 et seq., and 120.100* et seq.].

This form may be used to oppose the points and authorities *set forth in § 120.90* et seq.

For references to related Pleading and Practice chapters, see *§ 120.100[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should:

- Refer to specific facts that show the defense of self-defense applies to the conduct of the insured, and
- Argue that, consequently, under the policy the insurer is bound to defend or indemnify the insured.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.20* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing an insurer's motion for summary judgment or summary adjudication when the evidentiary facts clearly support the contention and disclose triable issues of any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.50[2][b]*.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Insured Acted in Self-Defense

The facts of ***J. C. Penney Cas. Ins. Co. v. M. K.*** *(1991) 52 Cal. 3d 1009, 278 Cal. Rptr. 64, 804 P.2d 689* , are discussed in *§ 120.93[3][a]*. While rejecting the relevance of motive to acts that are inherently wrongful, the Court confirmed that motive can be relevant in determining whether an act is wrongful or not. In discussing this issue, the Court specifically used self-defense as an example. The Court stated that if a court found that an insured acted justifiably in self-defense, it necessarily follows that the insured did not act wrongfully (*52 Cal. 3d 1009, 1026)* .

In ***Walters v. American Ins. Co.*** *(1960) 185 Cal. App. 2d 776, 8 Cal. Rptr. 665* , a third party sued the insured for

assault. The insured contended that he had acted in self defense, but the insurer denied coverage on the grounds that the damages suffered by the plaintiff were the result of an intentionally inflicted injury. Faced with the prospect of undertaking his own defense, and concerned about preserving his credit standing, the insured settled with the third party and then instituted an action to obtain reimbursement from the insurer. After trial, the court found in favor of the insurer, and the insured appealed. The court of appeal reversed. It rejected the insurer's contention that the insured's motive was irrelevant. Rather, it stated that *Ins. Code § 533* connotes some element of wrongfulness or misconduct; something more blameworthy than the sort of misconduct involved in ordinary negligence. Acts committed in self-defense are not unlawful, and even if the insured intended the act, he acted by chance and without a preconceived design to inflict injury, "just as though he were acting intentionally, although negligently, and injured someone" (*185 Cal. App. 2d 776, 783)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGood Faith & Fair DealingDuty to DefendInsurance LawGeneral Liability InsuranceObligationsIndemnification

California Points & Authorities

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12-120 California Points & Authorities § 120.109

§ 120.109 Alleged Misconduct Was Independent of Any Proven Sexual Molestation

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [HAS *or* HAD] THE DUTY TO DEFEND INSURED BECAUSE INSURED'S ALLEGED CONDUCT WAS POTENTIALLY WITHIN THE POLICY COVERAGE, AND ANY AL LEGED MISCONDUCT WAS NOT ESSENTIALLY A PART OF A PROVEN SEXUAL MOLESTATION, BUT WAS INDEPENDENT OF IT.

Alleged Misconduct Was Independent of Any Proven Sexual Molestation. If the parties dispute whether the insured's alleged misconduct was essentially a part of a proven sexual molestation, or instead was independent of it and so potentially within the policy coverage, and if the evidence pertaining to the alleged misconduct does not permit the court to eliminate either of these views, the duty to defend is then established, absent additional evidence bearing on the issue (*Horace Mann Ins. Co. v. Barbara B. (1993) 4 Cal. 4th 1076, 1085, 17 Cal. Rptr. 2d 210, 846 P.2d 792*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's the contention that an insurer has no duty to defend its insured under an insurance policy. The basis of these points and authorities is that any alleged misconduct on the part of the insured was independent of any proven sexual molestation.

This form may be used by an insured in various procedural contexts. For example, these points and authorities may be submitted by plaintiff, in an action against plaintiff's liability insurer for damages for wrongful refusal to defend or indemnify plaintiff in a third-party action, in opposition to a motion by defendant insurer for summary judgment pursuant to *Code Civ. Proc. § 437c*, when defendant contends that it had no duty to defend or indemnify because the

third-party action sought recovery of damages based on a willful wrong. For use in this context, counsel should modify the form to contend that triable issues of material fact remain regarding the insurer's duty.

The pivotal issue in cases seeking coverage or defense in cases involving sexual misconduct by an insured is likely to be whether or not related nonsexual conduct forming the basis for negligence and other claims is "inseparably intertwined" with the sexual conduct. If the nonsexual and sexual conduct are found to be "inseparably intertwined," no coverage or defense obligation will exist [*see Jane D. v. Ordinary Mut. (1995) 32 Cal. App. 4th 643, 653, 38 Cal. Rptr. 2d 131* (discussed in *§§ 120.70[4][a]* and *120.109[4][a*]); *see also Horace Mann Ins. Co. v. Barbara B. (1993) 4 Cal. 4th 1076, 1085, 17 Cal. Rptr. 2d 210, 846 P.2d 792* (discussed in *§ 120.109[3][a]*]. On the other hand, if the sexual and nonsexual conduct are not "inseparably intertwined," coverage (or at least adefense obligation) may be found [*see Horace Mann Ins. Co. v. Barbara B. (1993) 4 Cal. 4th 1076, 1085, 17 Cal. Rptr. 2d 210, 846 P.2d 792]* .

This form may also be used in a trial brief, or in an appellate brief. For further discussion, see *§ 120.50[2][a]*.

These points and authorities may be combined, if appropriate, with other points and authorities that contend that the insured has wrongfully refused to defend its insured in a third-party action [*see, e.g., §§ 120.50 et seq., 120.80 et seq., and 120.100* et seq.].

This form may be used to oppose the points and authorities *set forth in § 120.90* et seq.

For references to related Pleading and Practice chapters, see *§ 120.100[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should:

- Refer to specific facts that show the alleged misconduct on which the underlying action was based was independent of any proven sexual molestation, and

- Argue that, consequently, under the policy the insurer is bound to defend or indemnify the insured.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.20* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing an insurer's motion for summary judgment or summary adjudication when the evidentiary facts clearly support the contention and disclose triable issues of any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.50[2][b]*.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Alleged Misconduct Was Independent of Any Proven Sexual Molestation

In ***Horace Mann Ins. Co. v. Barbara B.*** *(1993) 4 Cal. 4th 1076, 17 Cal. Rptr. 2d 210, 846 P.2d 792* , a junior high school teacher pleaded nolo contendere to one count of violating *Penal Code § 288*. The minor student involved, and her parents, sued the teacher, alleging sexual molestation and other harassing conduct. The teacher tendered the defense of the action to the insurer under an educator's liability policy. The insurer accepted the tender under a reservation of rights to disclaim coverage or the obligation to defend and then filed a declaratory relief action, arguing that the teacher's conduct was intentional within the meaning of *Ins. Code § 533* and therefore was not covered and gave rise to no duty to defend. The trial court granted the insurer's motion for summary judgment on that ground, and the court of appeal affirmed.

The California Supreme Court reversed, holding that the conviction for sexual molestation did not excuse the insurer from providing a defense in the action. The Court found that allegations in the complaint that the teacher had engaged in "negligent, careless, reckless and wanton ... sexual and nonsexual misconduct" raised the possibility that the teacher would be held liable for damages within the coverage of the policy stemming from the teacher's negligent nonsexual conduct in his public relationship with the student. The evidence before the trial court on the summary judgment motion did not permit the court to eliminate the possibility that all of the conduct was part of the sexual molestation, as opposed to being independent of the molestation and so potentially within the policy coverage, so the Court concluded that factual issues existed that precluded summary judgment in the insurer's favor; in fact, the Court held, the duty to defend is established in such a case, absent additional evidence bearing on the issue (*4 Cal. 4th 1076, 1085)* .

[4] Additional Authorities

[a] Alleged Misconduct Was Independent of Any Proven Sexual Molestation

In *Jane D. v. Ordinary Mut. (1995) 32 Cal. App. 4th 643, 38 Cal. Rptr. 2d 131* , the court applied the analysis used in *Horace Mann Ins. Co. v. Barbara B. (1993) 4 Cal. 4th 1076, 17 Cal. Rptr. 2d 210, 846 P.2d 792* (discussed in *§ 120.109[3][a]*) and concluded that the facts, unlike those in Horace Mann, indicated that allegations of nonsexual conduct--obtaining information about plaintiff during counseling, and misusing this information and counseling techniques to create transference and controland induce plaintiff's behavior--were "inseparably intertwined" with the sexual misconduct. Thus, the court concluded that there was no coverage under the policy (*32 Cal. App. 4th 643, 652-653)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGood Faith & Fair DealingDuty to DefendInsurance LawGeneral Liability InsuranceCoverageGeneral OverviewInsurance LawGeneral Liability InsuranceExclusionsCriminal Acts

California Points & Authorities

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12-120 California Points & Authorities § 120.110

§ 120.110 Unauthorized and Nonratified Act of Insured's Agent Does Not Preclude Recovery Under Policy

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [HAS *or* HAD] THE DUTY TO DEFEND INSURED BECAUSE THE LOSS RESULTED FROM AN ACT OF INSURED'S AGENT OUTSIDE THE SCOPE OF THE AGENT'S AUTHORITY, AND THE ACT WAS NEITHER AUTHORIZED NOR RATIFIED BY INSURED.

Unauthorized and Nonratified Act of Insured's Agent Does Not Preclude Recovery Under Policy. *Insurance Code Section 533* does not foreclose recovery by an insured under a policy for a loss or liability caused by the tortious act of the insured's agent, if the act was neither authorized nor ratified by the insured (*Nuffer v. Insurance Co. of N. Am. (1965) 236 Cal. App. 2d 349, 354-356, 45 Cal. Rptr. 918*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's the contention that an insurer has no duty to defend its insured under an insurance policy. The basis of these points and authorities is that the loss resulted from an act of insured's agent outside the scope of the agent's authority, and the act was neither authorized nor ratified by insured.

This form may be used by an insured in various procedural contexts. For example, these points and authorities may be submitted by plaintiff, in an action against plaintiff's liability insurer for damages for wrongful refusal to defend or indemnify plaintiff in a third-party action, in opposition to a motion by defendant insurer for summary judgment pursuant to *Code Civ. Proc. § 437c*, when defendant contends that it had no duty to defend or indemnify because the third-party action sought recovery of damages based on a willful wrong. For use in this context, counsel should

modifythe form to contend that triable issues of material fact remain regarding the insurer's duty.

This form may also be used in a trial brief, or in an appellate brief. For further discussion, see *§ 120.50[2][a]*.

These points and authorities may be combined, if appropriate, with other points and authorities that contend that the insured has wrongfully refused to defend its insured in a third-party action [*see, e.g., §§ 120.50 et seq., 120.80 et seq., and 120.100* et seq.].

This form may be used to oppose the points and authorities *set forth in § 120.90* et seq.

For references to related Pleading and Practice chapters, see *§ 120.100[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should:

- Refer to specific facts that show that the loss resulted from an act of insured's agent outside the scope of the agent's authority, and the act was neither authorized nor ratified by insured, and

- Argue that, consequently, under the policy the insurer is bound to defend or indemnify the insured.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.20* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing an insurer's motion for summary judgment or summary adjudication when the evidentiary facts clearly support the contention and disclose triable issues of any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.50[2][b]*.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Unauthorized and Nonratified Act of Insured's Agent Does Not Preclude Recovery Under Policy

In ***Nuffer v. Insurance Co. of N. Am.*** *(1965) 236 Cal. App. 2d 349, 45 Cal. Rptr. 918* , affirming the judgment for plaintiff insured, the court rejected the argument that an insured may not recover under a fire insurance policy for a loss caused by the arson of the insured's agent appointed under a general power of attorney. The court pointed out that:

(1) The provisions of *Ins. Code § 533* are a codification of the general rule that an insurance policy indemnifying the insured against liability due to his or her own willful wrong is void as against public policy (*236 Cal. App. 2d 349, 354)* .

(2) The courts of all states but one which have considered the issue have held that recovery on a fire

insurance policy is not defeated by the fact that the loss resulted from the intentional burning of the insured property by the insured's agent, unless the insured personally participated in the arson or ratified it, or the agent would benefit substantially from recovery on the policy (*236 Cal. App. 2d 349, 354)* .

(3) The basis for this holding is that a general power of attorney does not confer on an agent authority to commit arson (*236 Cal. App. 2d 349, 355)* .

(4) The liability of a third person contracting with a principal is affected by the conduct of the agent in relation to the contract subsequent to its making, absent elements of estoppel or ratification, only if such conduct is authorized (*236 Cal. App. 2d 349, 355)* .

(5) While an agent by statute in California has authority to do everything necessary or proper and usual in the ordinary course of business for effecting the purpose of the agency [*Civ. Code § 2319(1)*], the commission of arson may not be classified as a thing necessary or proper and usual to effect such purposes (*236 Cal. App. 2d 349, 355)* .

(6) The authority to do a criminal act will not be presumed (*236 Cal. App. 2d 349, 355)* , and

(7) This concept conforms to the settled rule of law that a principal is not liable criminally for a criminal act of his agent unless he authorized, consented to, advised, aided, or encouraged the specific act (*236 Cal. App. 2d 349, 355)* .

The court distinguished the rules governing a determination of the scope of an agent's authority for the purpose of ascertaining the responsibility of the principal on account of wrongs committed by the agent in the transaction of the business of the agency on the ground that the presentcase did not concern the responsibility of the principal to a third person for a loss occasioned by an agent's wrongs but, rather, the responsibility of a third person under a contract of indemnity to the principal for a loss sustained as a result of the agent's act (*236 Cal. App. 2d 349, 355-356)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActGeneral OverviewInsurance LawClaims & ContractsGood Faith & Fair DealingDuty to DefendInsurance LawClaims & ContractsGood Faith & Fair DealingIndemnification

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12-120 California Points & Authorities § 120.111

§ 120.111 Exclusion for "Illegal Act" Is Ambiguous and Therefore Inapplicable to Insured's Unintentional Conduct

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

THE POLICY EXCLUSION FOR AN "ILLEGAL ACT" IS AMBIGUOUS AND THEREFORE INAPPLICABLE TO THE UNINTENTIONAL CONDUCT OF THE INSURED.

Ambiguous Exclusion for "Illegal Act" Does Not Apply to Insured's Unintentional Conduct. An insurance policy that excludes coverage for an "illegal act," but leaves the term undefined or defined ambiguously, may be construed to require the defense and indemnity of an underlying action based on the unintentional conduct of the insured (*see Safeco v. Robert S. (2001) 26 Cal. 4th 758, 763-767, 110 Cal. Rptr. 2d 844, 28 P.3d 889*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's contention that an insurer has no duty to defend its insured under an insurance policy. The basis of these points and authorities is that the insurer's reliance on an exclusion for an "illegal act" is unfounded because the exclusion is ambiguous and should therefore be construed to allow coverage. This issue generally arises in the context of the liability portion of a homeowners policy.

This form may be used by an insured in various procedural contexts. For example, these points and authorities may be submitted by an insured who is the plaintiff in an action against the liability insurer for damages for the insurer's wrongful refusal to defend or indemnify the plaintiff in a third-party action. They may be submitted in opposition to a motion by an insurer for summary judgment pursuant to *Code Civ. Proc. § 437c*, if the insurer contends that it had no duty to defend or indemnify because the policy excludes coverage for an "illegal act," and that the insured committed an

illegal act. For use in this context, counsel should modifythe form to contend that triable issues of material fact remain regarding the insurer's duty.

This form may also be used in a trial brief, or in an appellate brief. For further discussion, see *§ 120.50[2][a]*.

These points and authorities may be combined, if appropriate, with other points and authorities that contend that an insurer has wrongfully refused to defend its insured in a third-party action [*see, e.g., §§ 120.50 et seq., 120.80 et seq., and 120.100* et seq.].

This form may be used to oppose the points and authorities *set forth in § 120.90*.

For references to related Pleading and Practice chapters, see *§ 120.100[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should refer to the policy language and argue that the term "illegal act" is ambiguous. This argument may be made, for example, if the term is not defined in the policy.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.20* et seq.), and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing an insurer's motion for summary judgment or summary adjudication, if the evidentiary facts support the contention and disclose triable issues of any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.50[2][b]*.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgment* .

[3] Discussion of Authorities

[a] Ambiguous Exclusion for "Illegal Act" Does Not Apply to Insured's Unintentional Conduct

In ***Safeco v. Robert S.*** *(2001) 26 Cal. 4th 758, 110 Cal. Rptr. 2d 844, 28 P.3d 889* , the insured's minor son accidentally shot and killed hisfriend. The boy was charged in juvenile court with a petition alleging the commission of involuntary manslaughter in violation of *Penal Code § 192(b)*. The petition was sustained, and the boy was made a ward of the court and placed on probation. The friend's parents brought a wrongful death suit against the insured, who tendered defense to the insurer that had issued the insured's homeowners policy. The insurer undertook defense under a reservation of rights and then brought a declaratory relief action against the insured and third parties to determine whether it had a duty to defend or indemnify its insured. The insurer asserted that it had no duty to defend or indemnify the insured because the policy in question excluded coverage for an "illegal act." Both the insurer and the insured moved for summary judgment. The trial court granted summary judgment to the insured on the ground that the "illegal act" exclusion could reasonably be interpreted to exclude coverage only for an intentional illegal act, and that the conduct of the insured's son was unintentional. The court of appeal reversed, and the California Supreme Court granted review.

The Supreme Court reversed the decision of the court of appeal, holding that because the homeowners policy in question expressly covered accidental bodily injury, but excluded coverage for bodily injury arising out of an "illegal act" without defining that term, the insurer was obligated to defend and indemnify the insureds. Because the term "illegal act," left undefined, is subject to many definitions, some of which would cover the shooting incident, and some of which would exclude it, the Court ruled that the policy must be construed against the insurer to allow coverage. The Court noted that the insurer could have inserted an exclusion for "criminal acts" instead of "illegal acts," which would have allowed the Court to accept the insurer's definition of the term as a violation of criminal law, as opposed to a violation of any act prohibited by civil or criminal law (*26 Cal. 4th 758, 763-767)* .

[4] Additional Authorities

[a] Ambiguous Exclusion for "Illegal Act" Does Not Apply to Insured's Unintentional Conduct

In *Kerns v. CSE Ins. Group (2003) 106 Cal. App. 4th 368, 130 Cal. Rptr. 2d 754* , the insured's minor daughter broke into a house and stabbed the occupant, ultimately pleading "no contest" to criminal charges for attempted second-degree murder. A mental examination revealed that she was delusional and possibly psychotic. The daughter's victim brought suit against the insured for assault and battery, negligence, and negligent supervision, and the insurer that had issued the insured's homeowners policy refused to defend or indemnify the insured in the suit for based on exclusions in the policy for "illegal acts" and willful acts under *Ins. Code § 533*. A judgment was entered according to a settlement in which theplaintiff agreed not to execute the judgment against the insured in exchange for an assignment of rights against the insurer. In the resultant declaratory relief action brought by the plaintiff against the insurer, the trial court granted summary judgment for the insurer. The court of appeal reversed (on grounds of lack of jurisdiction), remanding the case for further determination of triable disputed issues of material fact. The court of appeal held that the "illegal acts" exclusion (essentially the same as that in *Safeco v. Robert S. (2001) 26 Cal. 4th 758, 110 Cal. Rptr. 2d 844, 28 P.3d 889* , discussed in *§ 120.111[3][a]*) was unenforceable under the controlling principles for the construction and interpretation of insurance contracts (*106 Cal. App. 4th 368, 394-395)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsPolicy InterpretationAmbiguous TermsGeneral OverviewInsurance LawGeneral Liability InsuranceExclusionsCriminal ActsInsurance LawGeneral Liability InsuranceObligationsDefense

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12-120 California Points & Authorities §§ 120.112-120.114

[Reserved]

§§ 120.112[Reserved]

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12-120 California Points & Authorities § 120.115

§ 120.115 Insurer Has No Duty to Indemnify Insured for Punitive Damages Portion of Third-Party Judgment

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [HAS *or* HAD] NO DUTY TO INDEMNIFY INSURED FOR THE PUNITIVE DAMAGES PORTION OF THE THIRD-PARTY JUDGMENT.

No Duty to Indemnify Insured for Punitive Damages. The public policy of this state prohibits insurance covering punitive damages awarded against an insured (*City Prods. Corp. v. Globe Indem. Co. (1979) 88 Cal. App. 3d 31, 42, 151 Cal. Rptr. 494*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention by the insurer that it has no duty to defend or indemnify the insured. The basis of these points and authorities is that the insurer has paid the entire judgment entered against the insured in the third-party action, except that portion awarded as exemplary or punitive damages, and that indemnification for punitive damages is prohibited by law.

This form may be used by an insurer in various procedural contexts, such as in memoranda supporting or opposing a motion for summary judgment, in a trial brief, or in an appellate brief. For further discussion, see *§ 120.30[2][a]*.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In particular, counsel should:

- Refer to facts showing that the insured is seeking coverage for a punitive damages portion of a third-party judgment against the insured, and

- Argue that, consequently, under the policy the insurer has no duty to defend or indemnify the insured for claim that punitive damages award.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.10* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be a motion by a defendant insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.30[2][b]*.

[c] Related Pleading and Practice Chapters

For complaints by an insured against an insurer for damages for breach of contract because of the insurer's refusal to pay a third-party judgment against the insured or to defend the insured in a third-party action, see California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender). For a discussion of the rules applicable to summary judgment, a form of notice of motion for summary judgment, and related forms, see Ch. 537, *Summary Judgment* , in that publication.

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] No Duty to Indemnify Insured for Punitive Damages

City Prods. Corp. v. Globe Indem. Co. *(1979) 88 Cal. App. 3d 31, 151 Cal. Rptr. 494* , was an action by plaintiff insured to recover from the insurer the amount of a punitive damages award against plaintiff in a prior third-party action. In the prior action, plaintiff had been sued for malicious prosecution and judgment was entered against it for $2,725 compensatory damages and $30,000 punitive damages. The punitive damages award was reduced to $10,000 on appeal. The insurer paid the compensatory damages award, but refused to pay the punitive damages. Plaintiff paid the punitive damages award and then brought this suit. The insurance policy issued by defendant expressly covered "all sums which the insuredshall become legally obligated to pay as damages because of injury sustained by any person or organization and arising out of one or more of the following offenses: Group A--false arrest, detention or imprisonment, or malicious prosecution." Defendant's demurrer to the complaint was sustained without leave to amend, and plaintiff appealed from the subsequent judgment of dismissal.

The court of appeal affirmed. Holding that plaintiff had been assessed punitive damages on account of its own willful tort, and an element of that tort being "malice in fact," and quoting from *Maxon v. Security Ins. Co. (1963) 214 Cal. App. 2d 603, 615-616, 29 Cal. Rptr. 586* , the court of appeal held that "malice" constituted a willful act within the meaning of *Ins. Code § 533* and hence indemnification by the insurer was precluded by the provisions of that section (*88 Cal. App. 3d 31, 36-37)* . The court explained that there is a sharp split of authority nationwide as to whether insurance may validly cover liability for punitive damages and that, while the issue had never before been squarely

addressed in any California appellate decision, the policy of this state wit respect to punitive damages, which, unlike other jurisdictions, can be awarded only where fraud, oppression, or malice are shown, would be frustrated by permitting the party against whom they are awarded to pass on the liability to an insurance carrier (*88 Cal. App. 3d 31, 39, 41-42)* .

The court stated that the objective is to impose punitive damages in an amount that will appropriately punish the defendant in view of the actual damages sustained, the magnitude and flagrancy of the offense, the importance of the policy violated, and the wealth of the defendant, and that consideration of this latter element would be pointless if such damages could be covered by insurance. The court concluded, therefore, that the public policy of this state prohibits insurance covering the punitive damages levied against plaintiff (*88 Cal. App. 3d 31, 42)* .

[4] Additional Authorities

[a] No Duty to Indemnify Insured for Punitive Damages

In *Stonewall Surplus Lines Ins. Co. v. Johnson Controls, Inc. (1993) 14 Cal. App. 4th 637, 17 Cal. Rptr. 2d 713* , a jury awarded $6.5 million in punitive damages against a Wisconsin corporation in an action for personal injuries resulting from an exploding car battery. The corporation's excess liability insurers brought an action seeking a declaration that they were not required to indemnify the corporation for the punitive damages award. There was no choice of law provision in the insurance policies. The corporation argued that its rights under the policies were governed by the laws of Wisconsin, which unlike the laws of California do not prohibit indemnification by an insurer for punitive damages (*14 Cal. App. 4th 637, 642)* . Thetrial court granted the insurers' motion for summary adjudication on the ground California law was controlling. The court of appeal affirmed. It found there was a true conflict between the laws of California and Wisconsin (*14 Cal. App. 4th 637, 642-645)* . It noted that when a casualty insurance contract is in dispute, the location of the insured risk is of particular importance in determining the applicable law. The court adopted the approach set forth in Restatement (Second) of Conflict of Laws, § 193, Comment f: when a multiple risk policy insures against risks in several states, the transaction should be viewed as if it involved separate policies insuring an individual risk, and the court should apply the law of the state of the particular risk involved (*14 Cal. App. 4th 637, 647)* .

The record showed that the defendant was a large corporation with worldwide operations and that the defendant and its insurers had considered the complexity of the corporation's activities at the time the policies were issued. Under these circumstances, the corporation and its insurers would reasonably expect not only that the corporation's liability to a third party might be governed by the law of a state with significant interests at stake, but also that the corporation's right to indemnity would be governed by that state's laws. The court concluded that in this case, the corporation did not obtain a single policy that would be governed by the law of one state, but rather obtained separate policies that insured separate risks located in states where the corporation does business (*14 Cal. App. 4th 637, 648)* . It then found that, as the corporation would reasonably expect California law to apply to batteries it manufactured and sold in that state, application of California law would not seriously impair Wisconsin's interest in protecting the reasonable expectations of its insured. However, failure to apply California law would severely impair California's interest in deterring tortfeasors by compelling payment of punitive damages directly from a defendant rather than from its insurers (*14 Cal. App. 4th 637, 648-649)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGood Faith & Fair DealingIndemnificationInsurance LawClaims & ContractsPunitive Damages Exclusions

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PART II. FORMS
B. Coverage and Exclusions
4. Exclusions for Punitive Damages Awards

12-120 California Points & Authorities §§ 120.116-120.119

[Reserved]

§§ 120.116[Reserved]

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5. Tolling of Limitations Period Based on Coverage Denial

12-120 California Points & Authorities § 120.120

§ 120.120 Limitations Period Under Homeowner's Policy Tolled From Notification to Denial

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURED'S ACTION IS TIMELY BECAUSE INSURED'S CLAIM WAS BASED ON A FIRST-PARTY PROGRESSIVE PROPERTY LOSS UNDER A HOMEOWNER'S POLICY, HIS/HER ACTION WAS FILED WITHIN ONE YEAR OF THE INCEPTION OF THE LOSS, AND THE LIMITATIONS PERIOD WAS TOLLED FROM THE TIME INSURED GAVE NOTICE OF THE DAMAGE TO THE INSURER UNTIL FORMAL WRITTEN DENIAL OF THE CLAIM.

A. Inception of Loss Is Based on Occurrence of Appreciable Damage. In a case involving a first-party progressive property-loss claim under a homeowner's policy, the one-year suit provision of *Insurance Code Section 2071* begins to run from the date of "inception of the loss," defined as that point in time when appreciable damage occurs and is or should be known to the insured, such that a reasonable insured would be aware that the notification duty under the policy has been triggered (*Prudential-LMI Commercial Ins. v. Superior Court (1990) 51 Cal. 3d 674, 686-687, 274 Cal. Rptr. 387, 798 P.2d 1230*).

B. Limitations Period Was Tolled on Notice of Damage to Insurer. The one-year suit provision of *Insurance Code Section 2071* is tolled from the time an insured gives notice of the damage to the insurer, pursuant to applicable policy notice provisions, until formal written denial of the claim (*Prudential-LMI Commercial Ins. v. Superior Court (1990) 51 Cal. 3d 674, 679, 693, 274 Cal. Rptr. 387, 798 P.2d 1230*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's the contention that an insured's claim is untimely.

The basis of these points and authorities is that the limitations period was tolled from the time theinsured gave the insurer notice of the damage until the time the insurer denied the claim, and that the limitations period had therefore not run when insured filed the action.

This form may be used by an insured in various procedural contexts. For example, these points and authorities may be submitted by the insured in opposition to defendant's motion for summary judgment in an action brought by an insured under a homeowner's policy, regarding a first-party progressive property-loss claim, when the motion for summary judgment is based on the one-year suit provision under *Ins. Code § 2071* [*see Prudential-LMI Commercial Ins. v. Superior Court (1990) 51 Cal. 3d 674, 679, 693, 274 Cal. Rptr. 387, 798 P.2d 1230]* . For use in this context, counsel should modify the form to contend that triable issues of material fact remain regarding the insurer's duty.

This form may also be used in a trial brief, or in an appellate brief. For further discussion, see *§ 120.50[2][a]*.

These points and authorities may be combined, if appropriate, with other points and authorities that contend that the insured has wrongfully refused to defend its insured in a third-party action [*see, e.g., §§ 120.50 et seq., 120.80 et seq., and 120.100* et seq.].

When appropriate, this form may be used to oppose the points and authorities *set forth in § 120.30* et seq.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should:

- Refer to specific facts that show that the insured's claims false within the triggering requirements of *Prudential-LMI Commercial Ins. v. Superior Court (1990) 51 Cal. 3d 674, 686-687, 274 Cal. Rptr. 387, 798 P.2d 1230* [*see § 120.120[3][a]*]; and

- Argue that, consequently, under the policy the insurer is bound to defend or indemnify the insured.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.20* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing an insurer's motion for summary judgment or summary adjudication when the evidentiary facts clearly support the contention and disclose triable issues of any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.50[2][b]*.

[c] Related Pleading and Practice Chapters

For complaints by an insured against an insurer for damages for breach of contract because of the insurer's refusal to pay a third-party judgment against the insured or to defend the insured in a third-party action, see California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender). For a discussion of the rules applicable to summary judgment, a form of notice of motion for summary judgment, and related forms, see Ch. 537, *Summary Judgment* , in that publication.

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Inception of Loss Is Based on Occurrence of Appreciable Damage

In ***Prudential-LMI Commercial Ins. v. Superior Court*** *(1990) 51 Cal. 3d 674, 274 Cal. Rptr. 387, 798 P.2d 1230* , insureds under an all-risk homeowner's policy brought an action against the insurer based on denial of a claim arising from damage to the foundation of the insured structure. Plaintiffs obtained successive insurance policies through their insurance broker, providing all-risk coverage of their apartment house, which was built in 1970 and 1971. In November 1985, while replacing carpet in one of the units, plaintiffs noticed a foundation crack. In December 1985 they contacted their brokers, who immediately notified the insurers that had issued policies during plaintiff's ownership of the property. Defendant insurer, whose policy insured the risk from October 1977 through October 1980, investigated the claim, ultimately concluding in 1987 that the loss was excluded under the policy (under the earth-movement exclusion) in that it was caused by soil expansion. In August 1987, shortly before receiving formal written notice of the claim denial, plaintiffs brought action against defendant insurer and other insurers, alleging theories of breach of contract, bad faith, breach of fiduciary duties, and negligence.

Defendant insurer sought summary judgment (and, alternatively, summary adjudication regarding several issues), contending there was no evidence of loss suffered during its policy period. Defendant observed that carpeting had been installed in 1982, covering the area later damaged, andasserted that at the time of installation (nearly two years after its coverage ended), plaintiffs observed no damage. Defendant also claimed that the action was barred by the standard one-year suit provision contained in its policy, pursuant to *Ins. Code § 2071*. That statute provides, as part of the California Standard Form Fire Insurance Policy, that no suit or action on the policy is sustainable unless all the policy requirements are met, and the suit is commenced within 1 months after inception of the loss. The trial court denied summary judgment, holding that triable issues existed regarding application of the earth-movement exclusion, whether the damage occurred during the policy period, and when the foundation crack first appeared. Defendant sought a writ of mandate, arguing only that the action was time-barred under *Ins. Code § 2071*; the court of appeal issued a peremptory writ of mandate directing the trial court to vacate its order, and to grant summary judgment. Defendant and the insureds, as real parties in interest, sought review.

The California Supreme Court reversed and remanded the case, holding that the one-year suit provision of *Ins. Code § 2071* runs from the date of "inception of the loss," as defined by the Court, but is tolled from the time the insured notifies the insurer of the damage, until formal written denial of the claim (*51 Cal. 3d 674, 693)* . The Court discussed the definition of "inception of the loss" for purposes of triggering *Ins. Code § 2071* when the loss occurs before the discovery of damage. Although some courts have strictly construed inception of the loss to mean the occurrence of the physical event causing the loss, California courts have more leniently interpreted the provision in property-loss cases not involving fire. Several first-party cases followed a delayed-discovery rule that holds an insured responsible for initiating a claim based on the date on which the insured could reasonably have concluded that the insured property suffered a loss. Under that rule, inception of the loss means that point in time at which appreciable damage occurs so that a reasonable insured would be on notice of a potentially insured loss (*51 Cal. 3d 674, 684-685)* .

The Court agreed that inception of the loss should be determined by reference to reasonable discovery of the loss, and not necessarily turn on the occurrence of the physical event causing the loss. Accordingly, the Court held that the insured's suit on the policy is timely if it is filed within one year after "inception of the loss," defined as that point in time when appreciable damage occurs and is or should be known to the insured, such that a reasonable insured would be aware that the notification duty under the policy has been triggered (*51 Cal. 3d 674, 686-687)* . To take advantage of the benefits of a delayed-discovery rule, however, the insured is required to be diligent when confronted with the

discovered facts. The Court held that determination of when appreciable damage occurs within the meaning of the definition is a factual matter, and the inured's unreasonablenessin delaying notification of the loss until a particular time may be raised as a separate affirmative defense by an insurer in response to a complaint by the insured to recover policy benefits. The Court noted that a factual question remained with regard to the properly calculated accrual date under the delayed-discovery principles, and directed that the plaintiffs be allowed to amend the complaint to allege facts showing that the timing of discovery of the loss was reasonable (*51 Cal. 3d 674, 687)* .

However, even under the delayed-discovery rule, the one-year suit provision would, unless otherwise inapplicable or excused, bar plaintiffs from pursuing the action. The Court noted that a strict interpretation of the limitations period under *Ins. Code § 2071* results in the seemingly anomalous conclusion that an insured must file a lawsuit before the insurer has completed its investigation and denied the claim (*51 Cal. 3d 674, 687*). Some jurisdictions have rejected the strict-interpretation approach, applying instead the doctrine of equitable tolling of the limitations period until formal denial of the claim. The Court noted with approval one such court's reasoning that "the period during which an insured's right to bring suit is postponed is for the benefit of the company so that it can pursue its statutory and contractual rights. Accordingly, it ought not to be charged against the insured's time to bring suit" (*51 Cal. 3d 674, 688*). The Court also discussed conflicting California decisions on this issue, which variously applied such doctrines as waiver, estoppel, and equitable tolling in extending the limitations period (*51 Cal. 3d 674, 689-690*). The Court concluded that the legislature intended to provide insureds with a full year (excluding the tolling period) in which to commence suit, because the limitations period under *Ins. Code § 2071* is considerably shorter than the usual four years applicable to ordinary contracts (under *Code Civ. Proc. § 337*) and ten years for an action against developers for property damage caused by latent defects (*51 Cal. 3d 674, 691)* .

The Court rejected plaintiff's contention that suspension of the one-year suit provision during the insurer's investigation of the claim will frustrate the provision's primary purpose of preventing the revival of stale claims, noting that the purpose of a shortened limitations period is to obtain the advantage of an early trial and access to evidence, not to achieve a technical forfeiture of the insured's rights (*51 Cal. 3d 674, 691)* . Moreover, the principle of equitable tolling provides the following advantages: (1) allows the claims process to function effectively, instead of requiring the insured to file suit before the claim has been investigated and determined; (2) protects the reasonable expectations of the insured by requiring the insurer to investigate the claim without later invoking a technical rule that may result in forfeiture of policy benefits; and (3) encourages settlements and discourages unnecessary bad-faith suits that are often the only recourse for indemnity if the insurer denies coverage after the limitationsperiod has expired. Equitable tolling is also consistent with the policies underlying the claim and limitations periods, e.g., the insurer is entitled to receive prompt notice of a claim and the insured is penalized for waiting too long after discovery to make a claim). Further, the Court described the anomaly in the instant case. Plaintiffs notified defendant in December 1985, one month after discovery of the loss. Under the policy, plaintiffs had 60 days to file a proof of loss, after which defendant had 60 days to determine liability. During this time, any suit filed on the policy would have been premature. Negotiations continued until January 1987, when defendant indicated that the loss was excluded. At that point, plaintiffs sought counsel. Defendant did not deny the claim unequivocally until September 1987 (*51 Cal. 3d 674, 692)* . Thus, if the one-year suit provision were literally applied, plaintiff's suit would have been untimely before the insurer had denied coverage (*51 Cal. 3d 674, 692-693)* .

Therefore, the Court concluded, the one-year suit provision of *Ins. Code § 2071* runs from the date of "inception of the loss," as defined, but is tolled from the time an insured gives notice of the damage to the insurer, pursuant to applicable policy notice provisions, until coverage is formally denied in writing (*51 Cal. 3d 674, 678, 693)* . The court emphasized that its holding is limited in application to the first-party progressive property-loss cases in the context of a homeowner's insurance policy (*51 Cal. 3d 674, 679*). The Court remanded the case, allowing plaintiffs to amend their complaint, and for determinations in accordance with its holdings (*51 Cal. 3d 674, 700*).

[b] Limitations Period Was Tolled on Notice of Damage to Insurer

Prudential-LMI Commercial Ins. v. Superior Court *(1990) 51 Cal. 3d 674, 274 Cal. Rptr. 387, 798 P.2d 1230* , is discussed in *§ 120.120[3][a]*.

[4] Additional Authorities

[a] Inception of Loss Is Based on Occurrence of Appreciable Damage

In *Larkspur Isle Condominium Owners' Assn. v. Farmers Ins. Group (1994) 31 Cal. App. 4th 106, 37 Cal. Rptr. 2d 3* , a condominium owner's association sued its property insurer for failure to pay the cost of abating asbestos ceiling materials damaged by rainwater leakage. The project had an extensive history of water damage problems, and the association had sued the developers over the problems in May 1985. In August 1985, defendant insurer issued the association a one-year property insurance policy. Although the association was familiar with the water damage problem, it allegedly first became aware of the presence of asbestos-containing materials in 1986 or 1987 when reports recommended removalof those materials from damaged ceilings. The association claimed recovery only for the cost of abating the asbestos-containing ceiling materials damaged by rainwater leakage, not for other water damage. The insurer denied the claim. A jury awarded the association damages, and the insurer appealed.

The court of appeal reversed. Discussing the "manifestation rule," the court ruled that the water damage had manifested itself prior to the issuance of the insurer's policy, making it a "loss in progress" at the time the policy was issued. *Under Prudential-LMI Commercial Ins. v. Superior Court (1990) 51 Cal. 3d 674, 274 Cal. Rptr. 387, 798 P.2d 1230* , insurers who issue policies after "initial manifestation" of the loss bear no responsibility for claims "relating to" that loss. The court rejected the association's attempt to characterize the asbestos damage as a separate and distinct loss, noting that water damage to one particular element, such as the asbestos-containing material, may not be separated out as a distinct loss when it proceeds from the same progressive destruction as the other water damage. A contrary result, the court stated, would defeat the purposes of certainty, reliability, and efficiency underlying the manifestation rule (*31 Cal. App. 4th 106, 111)* .

[b] Limitations Period Was Tolled on Notice of Damage to Insurer

In *Aliberti v. Allstate Ins. Co. (1999) 74 Cal. App. 4th 138, 87 Cal. Rptr. 2d 645* , the insured sued its insurer over alleged inadequate policy coverage on the insured's building, which was destroyed by fire. The trial court found for the insurer, based on the untimely filing of the suit. The court of appeal reversed because the insurer had never formally denied the claim in writing, and therefore the limitations period was tolled and the suit timely filed. Although this case did not involve progressive damage, as did *Prudential-LMI,* it did involve the contractual limitations period of a fire policy and the construction of *Ins. Code § 2071*. The insured had notified the insurer of the loss on the day after the fire. Protracted disagreements between the insured and the insurer, regarding whether the insurer owed the replacement value or simple policy limits, led to the filing of suit by the insured beyond the one-year period following the fire. Although the insurer had paid the policy limits, the insurer had never formally denied the total requested claim in writing. The court stated that the *Prudential* court "meant what it said when it held that the one-year statute was tolled to the time the insurer formally denies the claim in writing" (*74 Cal. App. 4th 138, 146-149)* .

In *San Jose Crane & Rigging, Inc. v. Lexington Ins. Co. (1991) 227 Cal. App. 3d 1314, 278 Cal. Rptr. 301* , summary judgment was entered in favor of the insured in an action brought against the insurer under a commercialall-risk policy. Analyzing the case in light of *Prudential-LMI Com. Insurance v. Superior Court (1990) 51 Cal. 3d 674* , the court of appeal reversed, essentially on the ground that the determination of when appreciable damage occurs, which would trigger the running of the 12-month limitation period, is an issue of fact (*227 Cal. App. 3d 1314, 1316*). The court also held that the equitable-tolling rule under Prudential applies to commercial all-risk policies as well as to homeowner's all-risk policies, and that the rule applies retroactively (*227 Cal. App. 3d 1314, 1319-1321)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsNotice to InsurersGeneral OverviewInsurance LawProperty InsuranceHomeowners InsuranceGeneral Overview

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12-120 California Points & Authorities § 120.121

§ 120.121 Manifestation Rule Applies When Loss Occurs Over Multiple Policy Periods

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURED'S CLAIM IS TIMELY EVEN THOUGH THE LOSS OCCURRED OVER SEVERAL POLICY PERIODS WAS NOT DISCOVERED UNTIL SEVERAL YEARS AFTER IT COMMENCED, BECAUSE INSURER'S POLICY WAS IN FORCE WHEN THE DAMAGE BECAME APPRECIABLE.

Manifestation Rule Applies When Loss Occurs Over Multiple Policy Periods. In first-party progressive property-loss cases, when the loss occurs over several policy periods and is not discovered until several years after it commences, the manifestation rule applies, which fixes liability on the insurer whose policy was in force when the damage became appreciable, or manifest (*Prudential-LMI Commercial Ins. v. Superior Court (1990) 51 Cal. 3d 674, 694, 699, 274 Cal. Rptr. 387, 798 P.2d 1230*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's the contention that an insurer has no duty to defend or indemnify its insured under an insurance policy. The basis of these points and authorities is that the insurer is not exonerated from liability even though the loss occurred over several policy periods was not discovered until several years after it commenced, because the insurer's policy was in force when the damage became appreciable.

This form may be used by an insured in various procedural contexts. For example, these points and authorities may be submitted by the insured in opposition to defendant's motion for summary judgment in an action brought by an insured under a homeowner's policy, regarding a first-party progressive property-loss claim, when the motion for summary judgment is based on the one-year suit provision under *Ins. Code § 2071* [*see* *Prudential-LMI Commercial Ins. v.*

Superior Court (1990) 51 Cal. 3d 674, 679, 693, 274 Cal. Rptr. 387, 798 P.2d 1230] . For use in this context, counsel should modify the form to contend that triable issues of material fact remain regarding the insurer's duty.

This form may also be used in a trial brief, or in an appellate brief. For further discussion, see *§ 120.50[2][a]*.

These points and authorities may be combined, if appropriate, with other points and authorities that contend that the insured has wrongfully refused to defend its insured in a third-party action [*see, e.g., §§ 120.50 et seq., 120.80 et seq., and 120.100* et seq.].

When appropriate, this form may be used to oppose the points and authorities *set forth in § 120.30* et seq.

For references to related Pleading and Practice chapters, see *§ 120.120[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. For example, counsel should show that in first-party progressive property-loss cases, when the loss occurs over several policy periods and is not discovered until several years after it commences, the manifestation rule applies, which fixes liability on the insurer whose policy was in force when the damage became appreciable, or manifest.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.20* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing an insurer's motion for summary judgment or summary adjudication when the evidentiary facts clearly support the contention and disclose triable issues of any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.50[2][b]*.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Manifestation Rule Applies When Loss Occurs Over Multiple Policy Periods

The facts and procedural background of ***Prudential-LMI Commercial Ins. v. Superior Court*** *(1990) 51 Cal. 3d 674, 274 Cal. Rptr. 387, 798 P.2d 1230* , are discussed in *§ 120.120[3][a]*. The California Supreme Court held that for purposes of a first-party progressive property-loss claim, the inception of the loss, triggering the limitations period under *Ins. Code § 2071*, occurs when appreciable damage occurs sufficient to alert a reasonable insured that the notification duty under the policy has been triggered (*51 Cal. 3d 674, 686-687)* , and that the limitations period is tolled from the time the insured notifies the insurer of the damage, until the formal written denial of the claim (*51 Cal. 3d 674, 693)* . The Court also held that in first-party progressive property-loss cases, when the loss occurs over multiple policy periods and is not discovered until several years after it commences, the manifestation rule applies (*51 Cal. 3d 674, 699)* .

Defendant insurer argued that even assuming the applicable one-year suit provision does not bar suit, it should not be

responsible for any covered loss, because its policy ended five years before plaintiff's discovery of the loss. Defendant asserted application of the manifestation rule, claiming that liability for first-party property losses rests solely on the insurer whose policy was in force at the time the progressive damage became appreciable or manifest (*51 Cal. 3d 674, 694)* . The court of appeal, in dictum, had indicated that the loss should be allocated among all insurers that insured the risk during the time of development of the injury, on the basis of the "continuous exposure theory."

In determining whether the manifestation rule or the continuous-exposure theory should apply, the Court noted that an important distinction exists between first-party property damage cases and third-party liability cases (*51 Cal. 3d 674, 694)* . The continuous-exposure theory has been applied to third-party liability cases in which bodily injury was immediate, cumulative, and exacerbated by repeated exposure, for example, when bodily injury was caused by exposure to asbestos (*51 Cal. 3d 674, 696-698)* . The Court noted, however, that property damage cases, even those involving continuous damage, are distinguishable from those cases, and that application of the manifestation rule in the first-party context promotes certainty in the insurance industry and allows insurers to gauge premiums with greater accuracy, presumably reducing costs for consumers (*51 Cal. 3d 674, 698-699)* .

The Court concluded that in first-party progressive property-loss cases, when the loss occurs over multiple policy periods and is not discovered until several years after it commences, the manifestation rule applies. Before the manifestation of damage, the loss is still a contingency under the policy and the insured has not suffered a compensable loss. Once the loss is manifested, however, the risk is no longer contingent. The Court further held that the definition of "manifestation of the loss," is the same as that for "inception of the loss," that is, that point in time when appreciable damage occurs and is or should be known to the insured, such thata reasonable insured would be aware that the notification duty under the policy has been triggered. The Court noted that in many cases, this date will be an issue of fact. When, however, the evidence supports only one conclusion, summary judgment may be appropriate (*51 Cal. 3d 674, 699)* . The Court emphasized that its holding is limited in application to the first-party progressive property-loss cases in the context of a homeowner's insurance policy (*51 Cal. 3d 674, 679, 694*). The Court remanded the case, noting that plaintiffs joined other insurers in the litigation and declining, in the absence of conclusive evidence, to speculate concerning the date manifestation of the loss occurred (*51 Cal. 3d 674, 700)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawGeneral Liability InsuranceCoverageTriggersExposure TriggersInsurance LawGeneral Liability InsuranceCoverageTriggersManifestation TriggersInsurance LawGeneral Liability InsuranceCoverageTriggersMultiple TriggersInsurance LawGeneral Liability InsuranceObligationsDefenseInsurance LawGeneral Liability InsuranceObligationsIndemnification

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12-120 California Points & Authorities § 120.122

§ 120.122 Under Title Insurance Policy, Limitations Tolled From Notification to Denial

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER IS LIABLE TO INSURED BECAUSE THE LIMITATIONS PERIOD WAS TOLLED FROM THE TIME INSURED NOTIFIED INSURER OF THE DAMAGE UNTIL COVERAGE WAS DENIED.

A. Time for Bringing Action on Title Insurance Policy. An action based on a policy of title insurance accrues upon discovery of the loss or damage suffered by the aggrieved party thereunder and must be brought within two years of discovery (*Code Civ. Proc. § 339(1)*).

B. Limitations Period Tolled on Notice of Damage to Insurer. The statute of limitations period on a title insurance policy is equitably tolled while the insurer determines whether to honor or reject a timely filed insurance claim under that policy (*Forman v. Chicago Title Ins. Co. (1995) 32 Cal. App. 4th 998, 1000, 38 Cal. Rptr. 2d 790*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's the contention that an insurer breached no duty toward its insured under an insurance policy. The basis of these points and authorities is that the limitations period was tolled from the time the plaintiff insured gavedefendant insurer notice of the damage until the time insurer denied the claim, and that the limitations period therefore had not run when the insured filed the action.

This form may be used by an insured in various procedural contexts. For example, these points and authorities may be submitted by a plaintiff insured in opposition to a defendant title insurer's motion for summary judgment in an action brought by an insured under a title insurance policy, when the motion for summary judgment is based on expiration of

the two-year statute of limitations under *Code Civ. Proc. § 339(1)* [*see Forman v. Chicago Title Ins. Co. (1995) 32 Cal. App. 4th 998, 1000, 38 Cal. Rptr. 2d 790]* . For use in this context, counsel should modify the form to contend that triable issues of material fact remain regarding the insurer's duty.

This form may also be used in a trial brief, or in an appellate brief. For further discussion, see *§ 120.50[2][a]*.

These points and authorities may be combined, if appropriate, with other points and authorities that contend that the insured has wrongfully refused to defend its insured in a third-party action [*see, e.g., §§ 120.50 et seq., 120.80 et seq., and 120.100* et seq.].

This form may be used to oppose the points and authorities *set forth in § 120.30* et seq.

For references to related Pleading and Practice chapters, see *§ 120.120[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. For example, counsel would identify the following dates:

- When the insured gave insured notice of the damage.
- When the insurer denied the claim.
- When the insured filed its action against the insurer.

Counsel would argue that, consequently the limitations period therefore had not run when the insured filed the action.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.20* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing an insurer's motion for summary judgment or summary adjudication when the evidentiary facts clearly support the contention and disclose triable issues of any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.50[2][b]*.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Limitations Period Tolled on Notice of Damage to Insurer

In ***Forman v. Chicago Title Ins. Co.*** *(1995) 32 Cal. App. 4th 998, 38 Cal. Rptr. 2d 790* , the court of appeal held that the two-year statute of limitations period to bring an action on a title insurance policy under *Code Civ. Proc. § 339(1)* is equitably tolled while the insurer determines whether to honor or reject a timely filed insurance claim under that policy (*32 Cal. App. 4th 998, 1000)* . In *Forman*, the plaintiff discovered in 1989 that the 1987 title report on his property,

prepared by the defendant, omitted a blanket easement recorded in 1930. The plaintiff filed a timely claim under the title insurance policy in 1989. The defendant denied the claim in 1990, after a 16-month investigation. The plaintiff filed a complaint for breach of title contract against defendant in 1991. The defendant asserted as an affirmative defense that the two-year statute of limitations provided by *Code Civ. Proc. § 339(1)* had expired before the plaintiff filed the complaint.

The court, applying the holding and rationale of *Prudential-LMI Com. Insurance v. Superior Court (1990) 51 Cal. 3d 674* , stated that the complaint was timely filed because the statute of limitations was equitably tolled during the 16-month investigation by defendant and until the claim was denied (*32 Cal. App. 4th 998, 1001*). The court explained that this tolling minimizes unnecessary lawsuits, protects the reasonable expectations of the insured, and discourages unnecessary bad faith actions (*32 Cal. App. 4th 998, 1004)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTollingInsurance LawClaims & ContractsNotice to InsurersGeneral OverviewInsurance LawProperty InsuranceTitle Insurance

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
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B. Coverage and Exclusions
5. Tolling of Limitations Period Based on Coverage Denial

12-120 California Points & Authorities §§ 120.123-120.129

[Reserved]

§§ 120.123[Reserved]

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B. Coverage and Exclusions
6. Progressive Damage Rule

12-120 California Points & Authorities § 120.130

§ 120.130 Liability Policy Requires Defense/Indemnification Under Continuous Injury Trigger of Coverage

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [HAS *or* HAD] THE DUTY TO DEFEND/INDEMNIFY THE INSURED-INSURED IN THE UNDERLYING ACTION[S] BECAUSE THE CLAIMS IN THE UNDERLYING ACTION[S] AGAINST INSURED INVOLVE ALLEGATIONS OF CONTINUOUS OR PROGRESSIVE _____ [PROPERTY DAMAGE *and/or* BODILY INJURY] THAT OCCURRED WHILE INSURED WAS COVERED BY INSURER'S _____ [POLICY *or* POLICIES].

Liability Policy Requires Defense/Indemnification Under Continuous Injury Trigger of Coverage. With respect to third-party claims under a general liability policy, property damage and/or bodily injury that is continuous or progressively deteriorating throughout several policy periods is potentially covered by all policies in effect during those periods (*Montrose Chem. Corp. v. Admiral Ins. Co. (1995) 10 Cal. 4th 645, 689, 42 Cal. Rptr. 2d 324, 913 P.2d 878*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's the contention that an insurer has no duty to defend its insured under an insurance policy. The basis of these points and authorities is that third-party claims for bodily injury and/or property damage that is continuous and progressive and occurs throughout several policy periods are potentially covered by all policies in effect during those periods. This rule is known as the "continuous injury" trigger of coverage, and has been adopted by the California Supreme Court for third-party claims under general liability policies in California [*Montrose Chem. Corp. v. Admiral Ins. Co. (1995) 10 Cal. 4th 645, 689, 42 Cal. Rptr. 2d 324, 913 P.2d 878]* .

This form may be used by an insured in various procedural contexts. For example, these points and authorities may be submitted by an insuredin opposition to a defendant insurer's motion for summary judgment, in an action based on a refusal to defend and/or indemnify. For use in this context, counsel should modify the form to contend that triable issues of material fact remain regarding the insurer's duty.

These points and authorities may be used in appropriate cases when an insurer attempts to assert that its policy does not cover continuous or progressive damage occurring during its policy period, or asserts the "manifestation theory" applicable to first-party claims involving continuous or progressive damage, under which the insurer whose policy is in effect at the time the damage first becomes manifested is solely liable for the damage [*see Prudential-LMI Commercial Ins. v. Superior Court (1990) 51 Cal. 3d 674, 274 Cal. Rptr. 387, 798 P.2d 1230]* . This form should be used only when the action involves an underlying claim under a third-party general liability policy.

This form may also be used in a trial brief, or in an appellate brief. For further discussion, see *§ 120.50[2][a]*.

These points and authorities may be combined, if appropriate, with other points and authorities that contend that the insured has wrongfully refused to defend its insured in a third-party action [*see, e.g., §§ 120.50 et seq., 120.80 et seq., and 120.100* et seq.].

This form may be used to oppose the points and authorities *set forth in § 120.30* et seq.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should:

- Refer to specific facts that show that the loss is governed by the continuous injury trigger of coverage, and

- Argue that, consequently, under the policy the insurer is bound to defend or indemnify the insured.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.20* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing an insurer's motion for summary judgment or summary adjudication when the evidentiary facts clearly support the contention and disclose triable issues of any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.50[2][b]*.

[c] Related Pleading and Practice Chapters

For complaints by an insured against an insurer for damages for breach of contract because of the insurer's refusal to pay a third-party judgment against the insured or to defend the insured in a third-party action, see California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender). For a discussion of the rules applicable to summary judgment, a form of notice of motion for summary judgment, and related forms, see Ch. 537, *Summary Judgment* , in that publication.

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing*

Legal Memoranda and Briefs .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Liability Policy Requires Defense/Indemnification Under Continuous Injury Trigger of Coverage

In ***Montrose Chem. Corp. v. Admiral Ins. Co.*** *(1995) 10 Cal. 4th 645, 42 Cal. Rptr. 2d 324, 913 P.2d 878* , a chemical company that had manufactured the pesticide DDT from 1947 until 1982 was sued in various underlying actions. These actions included, among others, suits alleging that defendant shipped chemicals to another company prior to 1965 for use in formulating other chemical products, that the formulator's disposal of chemical waste byproducts contributed to contamination of property owned by the second company, and that this property was subsequently sold, without disclosure of the contamination, to a purchaser who discovered the contamination no later than August 1982. Defendant, one of seven insurers that issued policies covering plaintiff during the years when the acts in question occurred, had issued four CGL policies to plaintiff, covering the years from October 1982 to March 1986. The manufacturer sued its carriers in a declaratory relief action, seeking a declaration that the insurers were required to defend it in all the pending actions. All the insurers except defendant thereafter agreed to defend under a reservation of rights. Defendant refused to defend and sought summary judgment in the declaratory relief action, arguing that it had no duty to defend or indemnity plaintiff in any of the underlying actions. With respect to the actions noted above, defendant claimed that the circumstances thattriggered coverage, within the meaning of coverage clauses and definitions in its policies, did not occur during the policy periods.

The trial court granted defendant summary judgment, ruling that with respect to the actions noted above, coverage is triggered when the damage is first discovered, and since that discovery occurred before the inception of the policy, there was no coverage. This rule applied by the trial court is generally referred to as the "manifestation rule." The court of appeal reversed, rejecting the "manifestation rule" on the grounds that continuing damage occurred throughout defendant's policy period. The California Supreme Court granted review.

In analyzing the "trigger of coverage" issue, the Court emphasized the distinction between first-party and third-party insurance policies. Although the court had previously adopted the "manifestation rule" for first-party policies [*see Prudential-LMI Commercial Ins. v. Superior Court (1990) 51 Cal. 3d 674, 274 Cal. Rptr. 387, 798 P.2d 1230]* , it determined that the policy language and the expectation of the parties did not support adoption of that rule for third-party liability policies. First, case law and the drafting history of the standard CGL policy language confirmed that coverage was triggered by the occurrence of bodily injury or property damage during the policy periods as the result of an accident or the "continuous or repeated exposure to conditions" (*10 Cal. 4th 645, 673)* .

Moreover, practical and policy considerations support adoption of the "continuous injury" approach, under which bodily injury and property damage that are continuous or progressively deteriorating throughout successive policy periods are covered by all policies in effect during those periods (*10 Cal. 4th 645, 675, 689)* . Accordingly, the Court rejected the "manifestation rule" in favor of the "continuous injury" approach in third-party policies (*10 Cal. 4th 645, 689)* . The decision of the court of appeal, reversing the trial court's grant of summary judgment, was affirmed (*10 Cal. 4th 645, 694)* .

The Montrose case also involved important issues relating to the "loss in progress" rule of *Ins. Code §§ 22* and *250*.

Legal Topics:

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

Insurance LawGeneral Liability InsuranceCoverageTriggersContinuous TriggersInsurance LawGeneral Liability InsuranceObligationsDefenseInsurance LawGeneral Liability InsuranceObligationsIndemnification

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12-120 California Points & Authorities §§ 120.131-120.139

[Reserved]

§§ 120.131[Reserved]

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7. Loss in Progress Rule Inapplicable

12-120 California Points & Authorities § 120.140

§ 120.140 Loss In Progress Rule Does Not Apply When Insured Had No Legal Obligation to Third Party at Inception of Policy Period

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [HAS *or* HAD] THE DUTY TO DEFEND/INDEMNIFY INSURED, NOTWITHSTANDING THE "LOSS IN PROGRESS RULE" BECAUSE AT THE INCEPTION OF THE POLICY PERIOD, IT HAD NOT BEEN ESTABLISHED THAT INSURED HAD A LEGAL OBLIGATION TO PAY DAMAGES TO _____ [*name of third party*] IN CONNECTION WITH THE UNDERLYING CLAIM.

Risk Is Insurable Because Insured Had No Legal Obligation to Third Party at Inception of Policy Period. The "loss in progress" rule of *Insurance Code Sections 22* and *250* will not defeat coverage for a claimed loss when it had yet to be established, at the time the insurer entered into the contract of insurance with the policyholder, that the insured had a legal obligation to pay damages to a third party in connection with the loss. As long as there remains uncertainty about damage or injury that may occur during the policy period and the imposition of liability upon the insured, and no legal obligation to pay third party claims has been established, there is a potentially insurable risk within the meaning of *Insurance Code Sections 22* and *250* (*Montrose Chem. Corp. v. Admiral Ins. Co. (1995) 10 Cal. 4th 645, 693, 42 Cal. Rptr. 2d 324, 913 P.2d 878*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's the contention that an insurer has no duty to defend its insured under an insurance policy. The basis of these points and authorities is that at the time the insurer and insured entered into the insurance contract, it had yet to be established that the insured had a legal obligation to pay

damages to a third party in connection with the loss, even if the parties were aware at that time of the possibility that such liability would be found [*see Montrose Chem. Corp. v. Admiral Ins. Co. (1995) 10 Cal. 4th 645, 693, 42 Cal. Rptr. 2d 324, 913 P.2d 878]* .

The "loss in progress" rule may be raised by the insurer when some evidence of a potential loss existed at the time the insurer and insured entered into the insurance contract. Under these circumstances, an insurer may sometimes assert that the loss was known at the inception of the insurance contract, and that therefore it was a "loss in progress" and not a contingent event for purposes of *Ins. Code §§ 22* and *250*.

This form may be used by an insured in various procedural contexts. For example, these points and authorities may be submitted by an insured in opposition to a defendant insurer's motion for summary judgment, in an action based on a refusal to defend and/or indemnify. For use in this context, counsel should modify the form to contend that triable issues of material fact remain regarding the insurer's duty.

This form may also be used in a trial brief, or in an appellate brief. For further discussion, see *§ 120.50[2][a]*.

These points and authorities may be combined, if appropriate, with other points and authorities that contend that the insured has wrongfully refused to defend its insured in a third-party action [*see, e.g., §§ 120.50 et seq., 120.80 et seq., and 120.100* et seq.].

This form may be used to oppose the points and authorities *set forth in § 120.30* et seq.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should refer to facts demonstrating that the insured's legal obligation to pay damages to the third party had not been established at the time the parties entered into the insurance contract.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.20* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing an insurer's motion for summary judgment or summary adjudication when the evidentiary facts clearly support the contention and disclose triable issues of any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.50[2][b]*.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication indrafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Risk Is Insurable Because Insured Had No Legal Obligation to Third Party at Inception of Policy Period

The facts and procedural background of ***Montrose Chem. Corp. v. Admiral Ins. Co.*** *(1995) 10 Cal. 4th 645, 42 Cal. Rptr. 2d 324, 913 P.2d 878* , are discussed in *§ 120.130[3][a]*. Some of the claims at issue included (1) government actions seeking damages and cleanup under CERCLA at a hazardous waste disposal site that operated between 1956

and 1972 and where defendant deposited waste between 1968 and 1972; and (2) private actions for bodily injury and property damage from the same waste disposal site between 1956 and the time suit was filed, as well as wrongful deaths occurring between 1982 and 1986. The insurer claimed that the contamination alleged in those actions was an uninsurable loss in progress prior to the effective date of the first policy issued by defendant in 1982. The trial court held that coverage was barred under the "loss in progress" rule of *Ins. Code §§ 22* and *250*, but the court of appeal reversed.

In analyzing the "loss in progress" rule, the California Supreme Court noted that all that is required to establish an insurable risk is that there be some contingency. Even when subsequent damage might be deemed inevitable, that inevitability does not alter the fact that at the time the contract was entered into, the event was only a contingency or risk that might or might not occur within the term of the policy. Applying these principles to the facts, the Court concluded that although an action under CERCLA might have been an inevitability at the time defendant issued its first policy, plaintiff's liability in such an action was not a certainty; thus, there was still a contingency. Moreover, with respect to coverage for bodily injuries and damages that might occur during the policy periods, the existence of any such prospective injuries was clearly unknown and contingent (*10 Cal. 4th 645, 690-691)* . The Court also observed that loss in progress issues generally present questions of fact that cannot be resolved on a motion for summary judgment (*10 Cal. 4th 645, 691)* .

The Court concluded that in the context of continuous or progressively deteriorating property damage or bodily injury insurable under a third party CGL policy, as long as there remains uncertainty about damage orinjury that may occur during the policy period and the imposition of liability on the insured, and no legal obligation to pay third party claims has been established, there is a potentially insurable risk within the meaning of *Ins. Code §§ 22* and *250*. "Stated differently, the loss-in-progress rule will not defeat coverage for a claimed loss where it had yet to be established, at the time the insurer entered into the contract of insurance with the policyholder, that the insured had a legal obligation to pay damages to a third party in connection with a loss" (*10 Cal. 4th 645, 693)* . Thus, the loss in progress rule did not bar coverage for the claims against plaintiff.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGood Faith & Fair DealingDuty to DefendInsurance LawClaims & ContractsGood Faith & Fair DealingIndemnificationInsurance LawClaims & ContractsKnown Loss DoctrineInsurance LawGeneral Liability InsuranceCoverageDamages

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7. Loss in Progress Rule Inapplicable

12-120 California Points & Authorities §§ 120.141-120.149

[Reserved]

§§ 120.141[Reserved]

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B. Coverage and Exclusions
8. Damages as Including Environmental Cleanup

12-120 California Points & Authorities § 120.150

§ 120.150 Comprehensive General Liability Policy Requires Defense/Indemnification Because "Damages" Includes Environmental Cleanup Costs

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [HAS *or* HAD] THE DUTY TO DEFEND/INDEMNIFY INSURED BECAUSE "DAMAGES" UNDER THE POLICY INCLUDES ENVIRONMENTAL CLEANUP COSTS.

A. "Damages" Under Comprehensive General Liability Policy Includes Environmental Cleanup Costs in Absence of Narrower Policy Definition. In the absence of a specific policy definition to the contrary, "damages" that the insured is legally obligated to pay because of property damage, within the meaning of a comprehensive general liability policy, includes the insured's expenses in providing environmental cleanup pursuant to a court order adverse to the insured in a third-party action arising from the insured's violation of environmental-protection laws (*AIU Ins. Co. v. Superior Court (1990) 51 Cal. 3d 807, 843, 274 Cal. Rptr. 820, 799 P.2d 1253*).

[*Optional*] **B. "Damages" Includes Reimbursement of Government Response Costs.** "Damages" under a comprehensive general liability policy that does not provide a definition to the contrary, includes reimbursement of government response costs in a third-party action brought by the government against the insured arising from the insured's violation of environmental-protection laws (*AIU Ins. Co. v. Superior Court (1990) 51 Cal. 3d 807, 833, 274 Cal. Rptr. 820, 799 P.2d 1253*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's the contention that an insurer has no duty to defend its insured under an insurance policy. The basis of these points and authorities is that the insurer's obligation to

indemnify the insured for "damages" that theinsured is legally obligated to pay because of property damage, includes the expenses of environmental cleanup, within the meaning of the policy.

This form may be used by an insured in various procedural contexts. For example, these points and authorities may be submitted by an insured in opposition to a defendant insurer's motion for summary judgment, in an action based on a refusal to defend and/or indemnify. For use in this context, counsel should modify the form to contend that triable issues of material fact remain regarding the insurer's duty.

This form may also be used in a trial brief, or in an appellate brief. For further discussion, see *§ 120.50[2][a]*.

These points and authorities may be combined, if appropriate, with other points and authorities that contend that the insured has wrongfully refused to defend its insured in a third-party action [*see, e.g., §§ 120.50 et seq., 120.80 et seq., and 120.100* et seq.].

This form may be used to oppose the points and authorities *set forth in § 120.30* et seq.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. For example, counsel should show that the nature of the remedies sought in the underlying suit constitutes damages, that is, compensation in money, recovered for loss or detriment suffered through another's acts, within the meaning of the policy, because of policy ambiguity and the reasonable expectation of the insured.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.20* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing an insurer's motion for summary judgment or summary adjudication when the evidentiary facts clearly support the contention and disclose triable issues of any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.50[2][b]*.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] "Damages" Under Comprehensive General Liability Policy Includes Environmental Cleanup Costs in Absence of Narrower Policy Definition

In ***AIU Ins. Co. v. Superior Court*** *(1990) 51 Cal. 3d 807, 274 Cal. Rptr. 820, 799 P.2d 1253* , the insured under several comprehensive general liability (CGL) policies brought a declaratory relief action against its several insurers to determine the insurers' duties of indemnification regarding environmental cleanup expenses pursuant to third-party actions brought by governmental agencies. Plaintiff company held over 60 primary and excess CGL policies issued by several insurers. The policies contained several common elements. They provided coverage for sums that the insured was "legally obligated" or "obligated ... by law" to pay, and required that the sums paid be the result of insured's liability for "property damage." Two policies limited coverage to sums paid as or for "damages." None of these terms was

defined in any of the policies. The only relevant definition contained in any of the policies was of "ultimate net loss," which included both "damages" and "expenses."

The United States and local administrative agencies filed suits against the insured, seeking relief for alleged violations of various environmental-protection laws (e.g., the Comprehensive Environmental Response Compensation Liability Act (CERCLA) (*42 U.S.C.S. § 9601 et seq.*), arising from the insured's contamination of numerous hazardous-waste disposal sites and adjacent property and water sources. Plaintiffs in the third-party suit sought injunctions compelling the insured to terminate disposal of further hazardous waste and to remove contaminants already present in and around the disposal sites, and reimbursement of their costs of investigating, monitoring, and initiating cleanup of the waste. The insured filed a declaratory relief action against the insurers, seeking a declaration that the policies cover costs it may become obligated to pay as a result of the injunctive relief and reimbursement ordered in the third-party suits.

Defendants sought summary adjudication that as a matter of law, the CGL policies do not cover costs of abating and cleaning up hazardous wastes and reimbursing governmental agencies for their cleanup efforts. The trial court denied the motion, and defendants appealed. The court of appeal reversed, issuing a preemptory writ of mandate directing the trial court to vacate its order, and to grant the motion for summary adjudication. Plaintiffs sought review.

The California Supreme Court reversed, holding that the CGL policy language is ambiguous as applied to remedial and mitigative costs incurred pursuant to injunction under CERCLA and similar statutes, and therefore must be construed in favor of coverage to satisfy the reasonable expectations of the insured (*51 Cal. 3d 807, 841)* . The Court noted that variousstatutory and dictionary definitions of "damages" all include the elements of "compensation" in "money," "recovered" by a party for "loss" or "detriment" that the insured has suffered through the acts of another (*51 Cal. 3d 807, 826)* . For insurance purposes, courts have applied various definitions, which the Supreme Court found to be either overly broad or too narrow in the context of the coverage provision in the instant case, noting that, to the extent that policy language is ambiguous in light of relief under environmental statutes, it must protect the objectively reasonable expectations of the insured (*51 Cal. 3d 807, 827-828)* .

The Court noted that in numerous CERCLA suits seeking recovery from responsible parties, courts have routinely referred to reimbursement of response costs as "damages," regardless of the nature of the cleanup performed or property interest possessed by the plaintiff. The agencies' expenditure of federal funds to investigate and initiate cleanup of hazardous waste constitutes "loss" or "detriment"; furthermore, reimbursement by responsible parties is monetary "compensation" for the loss (*51 Cal. 3d 807, 828)* .

The Court rejected defendants' argument that reimbursement of response costs does not constitute "damages" in that (1) the statute distinguishes response costs from damages; (2) they are a cost of "doing business"; and (3) they constitute restitution, which is mutually exclusive from damages. Taking these arguments in turn, the Court concluded (1) that the statute does not foreclose response costs from being characterized as "damages" in a generic sense under CGL policies, and that policies must be interpreted according to state law; (2) that the third-party suits concern reimbursement for remedial and mitigative, rather than prophylactic, purposes, and therefore regard an insurable interest, rather than an uninsurable cost of doing business; and (3) that the label of "restitution" does not preclude characterization of amounts of money awarded to compensate a plaintiff for out-of-pocket expenses as "damages" (*51 Cal. 3d 807, 830-837)* . The Court concluded that reimbursement of environmental response costs constitutes "damages" under the terms of the CGL policies at issue (*51 Cal. 3d 807, 837)* .

The Court then discussed the issue of whether "damages" includes the cost of compliance with injunctions, noting initially the costs of injunctive relief, whether incurred for prophylactic, mitigative, or remedial purposes, do not readily satisfy the statutory or dictionary definition of damages. Because those costs are paid to employees or independent contractors rather than aggrieved parties, they do not directly compensate the aggrieved persons for loss or detriment, although, in economic terms it makes little difference whether the insured performs the cleanup, or reimburses the governmental agency for the same activity. The Court noted that it is unlikely that the parties to CGL policies intended

to cover reimbursement of response costs but not the costs of injunctive relief, at least when theinjunctive relief costs are incurred for exactly the same purposes. In this respect the third-party actions are distinguishable from ordinary tort actions, in which injunctive relief is generally available only if legal remedies (e.g., monetary compensation) are inadequate (*51 Cal. 3d 807, 838)* .

The Court noted that the mere fact that the agencies seek an injunction in an environmental-protection action does not indicate an absence of cognizable property damage or personal injury. In its remedial aspects, the injunction results in exactly the type of expenditures involved in reimbursement of response costs, whether or not the agencies have an adequate remedy in the form of reimbursement. Consequently, the Court held, it would exalt form over substance to interpret CGL policies to cover one remedy but not the other. Given the practical similarity of remedies available under the environmental statutes at issue, the Court found that a reasonable insured would expect both remedies to fall within coverage as "damages" (*51 Cal. 3d 807, 840)* .

The Court concluded that the CGL policy language is ambiguous as applied to remedial and mitigative costs incurred pursuant to injunction under CERCLA and similar statutes, and therefore must be construed in favor of coverage to satisfy the reasonable expectations of the insured. The Court noted that some costs required under environmental injunctions are prophylactic in nature (e.g., altering dumping practices to prevent recurrences of leakage). These costs are not incurred "because of property damage," and therefore are not covered by CGL policies. Nevertheless, environmental injunctions requiring remedial and mitigative action result in costs that constitute "damages" under CGL policies (*51 Cal. 3d 807, 841)* . Because an insured would reasonably expect equal coverage of the costs of equivalent or alternative remedies, the costs of injunctive relief under the statutes in question are "damages." The Court rejected the argument that government claims for injunctive relief and reimbursement of costs incurred in cleaning up disposal sites and water surrounding them are not covered, because they do not allege "property damage," holding that this view either misperceives the basic character of remedies available under environmental statutes or applies an unduly narrow definition of "property damage." The Court held that contamination constitutes property damage within the meaning of the CGL policies in question, and that reimbursement of response costs and the costs of injunctive relief under CERCLA (and related statutes) are incurred because of property damage. The mere fact that the governments may seek reimbursement of response costs and injunctive relief without themselves having suffered any tangible harm to a proprietary interest does not exclude the recovery of cleanup costs from coverage under the "damages" provision of CGL policies. For similar reasons, the recovery is "because of" property damage (*51 Cal. 3d 807, 842)* . It is immaterial whether motivations other than protection of property (e.g., protection of the health of persons living near hazardous waste sites) also contribute to the agencies' pursuit of statutory relief (*51 Cal. 3d 807, 842-843)* . By contrast, prophylactic costs are not incurred "because of property damage." Until the damage has occurred, there can be no coverage under the policies (*51 Cal. 3d 807, 843)* .

Accordingly, the Court reversed the decision of the court of appeal, and vacated its order issuing a writ of mandate, directing the court of appeal to remand the case for further proceedings consistent with its opinion (*51 Cal. 3d 807, 843-844)* .

NOTE:

This case refers to relief ordered by a court of law. It does not conclude that cleanup costs ordered by a state agency prior to the filing of any civil suit are "damages." A coercive administrative action such as an order by the California EPA or CERCLA does not initiate a "suit" within the meaning of CGL policies that do not define the term. Rather, a "suit" is a court proceeding initiated by the filing of a complaint [*Foster-Gardner, Inc. v. Nat'l Union Fire Ins. Co. (1998) 18 Cal. 4th 857, 77 Cal. Rptr. 2d 107, 959 P.2d 265* ; *see § 120.41[3][a]*].

[b] "Damages" Includes Reimbursement of Government Response Costs

AIU Ins. Co. v. Superior Court *(1990) 51 Cal. 3d 807, 274 Cal. Rptr. 820, 799 P.2d 1253* , is discussed in *§*

120.150[3][a].

[4] Additional Authorities

[a] "Damages" Under Comprehensive General Liability Policy Includes Environmental Cleanup Costs in Absence of Narrower Policy Definition

The facts and procedural background of *Montrose Chemical Corp. v. Superior Court (1993) 6 Cal. 4th 287* , are discussed in *§ 120.54[3][a]*. The insurers offered evidence extrinsic to the complaint which, they argued, defeated coverage under the policies. The insurers contended that evidence that the toxic discharges occurred over a lengthy period of time showed that the damage was expected and intended by the insured, and evidence that the insured's regular business practices involved the disposal of toxic wastes eliminated the possibility that the property damage resulted from non-accidental causes.

In affirming an order by the court of appeal requiring the trial court to set aside and reconsider its order denying the insured's motion for summary adjudication on the issue of the duty to defend, the Supreme Court held that the extrinsic evidence offered by the insurers simply created a dispute as to whether the insured's actions were intentional and therefore not an "occurrence" under the liability policies, and did not defeat the potential for coverage (*6 Cal. 4th 287, 299-300)* . An insurer may useextrinsic evidence to defeat the duty to defend, but the evidence must be undisputed and negate the duty to defend as a matter of law (*6 Cal. 4th 287, 296-299)* .

The Court further held that although the allegations in the underlying CERCLA complaint were neutral as to coverage, by alleging that the insured caused environmental contamination, the complaint sufficiently raised the possibility that the insured could be liable for property damage covered by the policy (*6 Cal. 4th 287, 304-305)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsPolicy InterpretationAmbiguous TermsConstruction Against InsurersInsurance LawGeneral Liability InsuranceCoverageDamagesInsurance LawGeneral Liability InsuranceCoverageEnvironmental ClaimsInsurance LawGeneral Liability InsuranceObligationsDefenseInsurance LawGeneral Liability InsuranceObligationsIndemnification

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 120 INSURANCE
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B. Coverage and Exclusions
8. Damages as Including Environmental Cleanup

12-120 California Points & Authorities §§ 120.151-120.159

[Reserved]

§§ 120.151[Reserved]

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9. Coverage of Nonvacant Land

12-120 California Points & Authorities § 120.160

§ 120.160 Improved Property Is Nonvacant Land for Purposes of Coverage Under Homeowner's Policy

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [HAS *or* HAD] NO DUTY TO _____ [DEFEND *or* INDEMNIFY] INSURED [IN THE UNDERLYING ACTION] BECAUSE COVERAGE UNDER THE HOMEOWNER'S POLICY IS LIMITED TO VACANT LAND, AND _____ INSURED'S [BENEFICIAL USE *and/or* IMPROVEMENT] OF THE LAND RENDERED IT NONVACANT.

Beneficial Use or Improvement of Property Rendered Property Nonvacant. The beneficial use or improvement of untenanted property renders it nonvacant for purposes of a homeowner's policy that extends coverage to insured premises described as "vacant land" owned by or rented to the insured (*Bianchi v. Westfield Ins. Co. (1987) 191 Cal. App. 3d 287, 293, 236 Cal. Rptr. 343*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention by the insurer that it has no duty to defend a prior action brought against the insured or to indemnify the insured, or both. The basis of these points and authorities is that property owned by an insured who is covered under a homeowner's policy that includes "vacant land" is not considered vacant land if the property is subject to the beneficial use of the insured, or if the owner has improved the land.

This form may be used by an insured in various procedural contexts. For example, these points and authorities may be submitted by an insurer in support of a motion for summary judgment, in an action based on a refusal to defend and/or indemnify. For use in this context, counsel should modify the form to contend that triable issues of material fact remain

regarding the insurer's duty.

This form may also be used in a trial brief, or in an appellate brief. For further discussion, see *§ 120.30[2][a]*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which the substantive issue is raised, for example, in a motion for summary judgment or summary adjudication of issues in a declaratory relief action, or in an appellate brief.

These points and authorities may be combined, if appropriate, with other points and authorities that contend that the insured has wrongfully refused to defend its insured in a third-party action [*see, e.g., §§ 120.50 et seq., 120.80 et seq., and 120.100* et seq.].

This form may be used to oppose the points and authorities *set forth in § 120.30* et seq.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. Therefore, counsel should describe the insured's beneficial use of or improvements to the land, specifying any artificial structures or roads thereon, and specifying the frequency of their use and maintenance. If appropriate, counsel should also specify that the insured's beneficial use or the improvements made to the property were instrumental in causing the damage that is the subject of underlying claims by the insured or by third parties [*see, e.g., Bianchi v. Westfield Ins. Co. (1987) 191 Cal. App. 3d 287, 293, 236 Cal. Rptr. 343]* .

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.10* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be a motion by a defendant insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.30[2][b]*.

[c] Related Pleading and Practice Chapters

For complaints by an insured against an insurer for damages for breach of contract because of the insurer's refusal to pay a third-party judgment against the insured or to defend the insured in a third-party action, see California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender). For a discussion of the rules applicable to summary judgment, a form of notice of motion for summary judgment, and related forms, see Ch. 537, *Summary Judgment* , in that publication.

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication indrafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Beneficial Use or Improvement of Property Rendered Property Nonvacant

In ***Bianchi v. Westfield Ins. Co.*** *(1987) 191 Cal. App. 3d 287, 236 Cal. Rptr. 343* , one of the plaintiffs, the owner of a

large parcel of land, constructed an earth and clay dam on that property to impound a reservoir, and built roads for access to the dam for its construction and maintenance. His original reason for the dam was to irrigate a grove of trees for future income purposes for use by a proposed nonprofit organization on the premises, but he subsequently abandoned the plans for the grove. He obtained a comprehensive insurance policy from coplaintiff for his personal liability for bodily injury or property damage occurring on that property. That policy contained an "other insurance" clause requiring duplicative insurance to prorate liability. The insured also obtained a homeowner's insurance policy from defendant on his residence, located elsewhere.

The homeowner's policy covered, in pertinent part, "vacant land, other than farm land," owned by or rented to the insured. The dam began leaking and subsequently burst, causing property damage to neighboring landowners, who filed claims against plaintiffs and ultimately brought suit against them. Plaintiffs then filed an action for declaratory relief against defendant to determine its liability in the underlying action. The trial court found that the property was vacant land, and ruled that defendant was liable on an equal basis with plaintiff insurer for compensatory damages as well as continuing appeal expenses in the underlying action. Defendant appealed.

The court of appeal reversed, holding that beneficial use or improvement of untenanted property renders it nonvacant, particularly if the use has accompanied the introduction of artificial structures (*191 Cal. App. 3d 287, 293)* . The court noted that the issue was one of first impression in California (*191 Cal. App. 3d 287, 290-291*). Persuasive authority from other jurisdictions indicated that vacant land means land that is both unoccupied and unused (*191 Cal. App. 3d 287, 292)* . With regard to the principles discussed, the insured's (*191 Cal. App. 3d 287, 291-293)* property was clearly not vacant. The insured built the dam in order to improve the property materially, despite the fact that he abandoned his original purpose for the dam, and despite the nonprofit nature of the proposed facilityon the property. Moreover, it was the construction and maintenance of the property's most significant improvement that proximately caused the damage, i.e., the dam and the reservoir (*191 Cal. App. 3d 287, 293)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceCoverageGeneral OverviewInsurance LawProperty InsuranceCoverageReal PropertyGeneral OverviewInsurance LawProperty InsuranceHomeowners InsuranceGeneral Overview

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12-120 California Points & Authorities § 120.161

§ 120.161 Artificial Structures on Untenanted Property

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [HAS *or* HAD] NO DUTY TO _____ [DEFEND *or* INDEMNIFY] INSURED [IN THE UNDERLYING ACTION] BECAUSE COVERAGE UNDER THE HOMEOWNER'S POLICY IS LIMITED TO VACANT LAND, AND THE PRESENCE OF ARTIFICIAL STRUCTURES ON THE LAND RENDERS IT NONVACANT.

Artificial Structures Render Untenanted Property Nonvacant. Untenanted property that contains artificial structures is nonvacant land (*Bianchi v. Westfield Ins. Co. (1987) 191 Cal. App. 3d 287, 293, 236 Cal. Rptr. 343*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention by the insurer that it has no duty to defend a prior action brought against the insured or to indemnify the insured, or both. The basis of these points and authorities is that property owned by an insured who is covered under a homeowner's policy that includes "vacant land" is not considered vacant land if the property contains artificial structures.

This form may be used by an insured in various procedural contexts. For example, these points and authorities may be submitted by an insurer in support of a motion for summary judgment, in an action based on a refusal to defend and/or indemnify. For use in this context, counsel should modify the form to contend that triable issues of material fact remain regarding the insurer's duty.

This form may also be used in a trial brief, or in an appellate brief. For further discussion, see *§ 120.30[2][a]*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which the substantiveissue is raised, for example, in a motion for summary judgment or summary adjudication of issues in a declaratory relief action, or in an appellate brief.

These points and authorities may be combined, if appropriate, with other points and authorities that contend that the insured has wrongfully refused to defend its insured in a third-party action [*see, e.g., §§ 120.50 et seq., 120.80 et seq., and 120.100* et seq.].

This form may be used to oppose the points and authorities *set forth in § 120.30* et seq.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. Therefore, counsel should refer to evidence of artificial structures on the land.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.10* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be a motion by a defendant insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.30[2][b]*.

[c] Related Pleading and Practice Chapters

For complaints by an insured against an insurer for damages for breach of contract because of the insurer's refusal to pay a third-party judgment against the insured or to defend the insured in a third-party action, see California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender). For a discussion of the rules applicable to summary judgment, a form of notice of motion for summary judgment, and related forms, see Ch. 537, *Summary Judgment* , in that publication.

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Artificial Structures Render Untenanted Property Nonvacant

Bianchi v. Westfield Ins. Co. *(1987) 191 Cal. App. 3d 287, 236 Cal. Rptr. 343* , is discussed in *§ 120.160[3][a]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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12-120 California Points & Authorities § 120.162

§ 120.162 Improvement Caused Damage That Is Subject of Claim

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER _____ [HAS *or* HAD] NO DUTY TO _____ [DEFEND *or* INDEMNIFY] INSURED [IN THE UNDERLYING ACTION] BECAUSE COVERAGE UNDER THE HOMEOWNER'S POLICY IS LIMITED TO VACANT LAND, THE PROPERTY MAY NOT BE CONSIDERED VACANT LAND SINCE AN IMPROVEMENT ON THE PROPERTY CAUSED THE DAMAGES.

Improvement Caused Damage That Is Subject of Claim. Property that contains an improvement that caused damage that is the subject of an insured's claim is not "vacant land" covered under a homeowner's policy (*Bianchi v. Westfield Ins. Co. (1987) 191 Cal. App. 3d 287, 293, 236 Cal. Rptr. 343*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention by the insurer that it has no duty to defend a prior action brought against the insured or to indemnify the insured, or both. The basis of these points and authorities is that property owned by an insured who is covered under a homeowner's policy that contains an improvement that caused damage which is the subject of an insured's claim is not "vacant land" covered under a homeowner's policy.

This form may be used by an insured in various procedural contexts. For example, these points and authorities may be submitted by an insurer in support of a motion for summary judgment, in an action based on a refusal to defend and/or indemnify. For use in this context, counsel shouldmodify the form to contend that triable issues of material fact remain regarding the insurer's duty.

This form may also be used in a trial brief, or in an appellate brief. For further discussion, see *§ 120.30[2][a]*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which the substantive issue is raised, for example, in a motion for summary judgment or summary adjudication of issues in a declaratory relief action, or in an appellate brief.

These points and authorities may be combined, if appropriate, with other points and authorities that contend that the insured has wrongfully refused to defend its insured in a third-party action [*see, e.g., §§ 120.50 et seq., 120.80 et seq., and 120.100* et seq.].

This form may be used to oppose the points and authorities *set forth in § 120.30* et seq.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. Therefore, counsel should describe the way in which the improvements made to the property were instrumental in causing the damage that is the subject of underlying claims by the insured or by third parties [*see, e.g., Bianchi v. Westfield Ins. Co. (1987) 191 Cal. App. 3d 287, 293, 236 Cal. Rptr. 343]* .

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.10* et seq.) and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be a motion by a defendant insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. For further discussion, see *§ 120.30[2][b]*.

[c] Related Pleading and Practice Chapters

For complaints by an insured against an insurer for damages for breach of contract because of the insurer's refusal to pay a third-party judgment against the insured or to defend the insured in a third-party action, see California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender). For a discussion of the rules applicable to summary judgment, a form of notice of motion for summary judgment, and related forms, see Ch. 537, *Summary Judgment* , in that publication.

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Improvement Caused Damage That Is Subject of Claim

Bianchi v. Westfield Ins. Co. *(1987) 191 Cal. App. 3d 287, 236 Cal. Rptr. 343* , is discussed in *§ 120.160[3][a]*.

Legal Topics:

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

Insurance LawProperty InsuranceCoverageGeneral OverviewInsurance LawProperty InsuranceCoverageReal PropertyGeneral OverviewInsurance LawProperty InsuranceHomeowners InsuranceGeneral OverviewInsurance LawProperty InsuranceObligationsGeneral Overview

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12-120 California Points & Authorities §§ 120.163-120.164

[Reserved]

§§ 120.163[Reserved]

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10. Estoppel to Raise Contractual Limitations Defense

12-120 California Points & Authorities § 120.165

§ 120.165 Insurer Estopped From Raising Limitations Period Defense for Failure to Notify Insured of Relevant Policy Terms

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE INSURER IS ESTOPPED FROM RAISING THE DEFENSE OF THE ELAPSING OF THE CONTRACTUAL LIMITATIONS PERIOD BECAUSE IT FAILED TO NOTIFY THE INSURED OF THAT PROVISION IN THE POLICY.

A. Insurer Must Notify Insured of Policy Terms. Every insurer must disclose to a first-party claimant or beneficiary all benefits, coverage, time limits, or other provisions of any insurance policy issued by that insurer that may apply to the claim presented by the claimant or beneficiary (*Spray, Gould & Bowers v. Associated Int'l Ins. Co. (1999) 71 Cal. App. 4th 1260, 1264, 84 Cal. Rptr. 2d 552* ; *10 Cal. Code Reg. § 2695.4(a)*).

B. Estoppel to Assert Limitations Defense After Failing to Notify Insured of Policy Terms. An insurer may be estopped from raising the one-year suit provision as a defense if it has not complied with regulations requiring every insurer to disclose to a first-party claimant all time limits that might apply to the claim presented by the claimant (*Spray, Gould & Bowers v. Associated Int'l Ins. Co. (1999) 71 Cal. App. 4th 1260, 1264, 84 Cal. Rptr. 2d 552*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's contention that an insured's claim is untimely. The basis of these points and authorities is that the insurer cannot raise the elapse of the limitations period as a defense, because the insurer failed to notify the insured of the relevant timing provisions of the insurance policy [*see Spray, Gould & Bowers v. Associated Int'l Ins. Co. (1999) 71 Cal. App. 4th 1260, 1264, 84 Cal. Rptr. 2d 552* ; *10 Cal. Code*

Reg. § 2695.4(a)].

This form may be used by an insured in various procedural contexts. For example, an insured may submit these points and authorities insupport of a motion for summary judgment on the grounds that the affirmative defense of the complaint's untimeliness is untenable, or in opposition to an insurer's summary judgment motion on the grounds that the complaint is time-barred [*see Spray, Gould & Bowers v. Associated Int'l Ins. Co. (1999) 71 Cal. App. 4th 1260, 84 Cal. Rptr. 2d 552* ; *see also Code Civ. Proc. § 437c*].

This form may also be used in a trial brief or in an appellate brief. For further discussion, see *§ 120.50[2][a]*.

These points and authorities may be combined, if appropriate, with other points and authorities that contend that the limitations period asserted by the insurer was tolled [*see, e.g., § 120.120*].

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should argue that the insurer failed to notify the insured of the relevant policy terms as required by California regulations [*Spray, Gould & Bowers v. Associated Int'l Ins. Co. (1999) 71 Cal. App. 4th 1260, 84 Cal. Rptr. 2d 552* ; *10 Cal. Code Reg. § 2695.4(a)*].

The form should be combined with other forms as necessary to complete argument as to all issues (*see § 120.20* et seq.), and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities in support of summary adjudication on the grounds that the insurer's affirmative defense of the lapsing of the contractual limitations period is not available to the insurer [*see Code Civ. Proc. § 437c(f)*]. Similarly, these points and authorities may be used in opposition to the insurer's summary judgment motion in an action by the insured based on the insurer's failure to pay benefits under the policy [*see Spray, Gould & Bowers v. Associated Int'l Ins. Co. (1999) 71 Cal. App. 4th 1260, 84 Cal. Rptr. 2d 552* ; *see also Code Civ. Proc. § 437c*].

[c] Related Pleading and Practice Chapters

For complaints, answers, and motions between the insurer and insured, see California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender). For a discussion of rules applicable to summary judgment, a form of notice of motion for summary judgment, and related forms, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine forms of this publication in drafting,and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Insurer Must Notify Insured of Policy Terms

In ***Spray, Gould & Bowers v. Associated Int'l Ins. Co.*** *(1999) 71 Cal. App. 4th 1260, 84 Cal. Rptr. 2d 552* , an insured sued its insurer for wrongfully refusing to pay benefits with respect to losses caused by the 1994 Northridge earthquake.

The complaint stated causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, and declaratory relief. In its answer, the insurer raised a contract limitations affirmative defense and subsequently filed a summary judgment motion on that ground. The policy contained a contractual limitations clause, which provided:

> [N]o suit, action or proceeding for the recovery of any claim under this policy shall be sustainable in any court of law or equity unless the same shall be commenced within twelve (12) months next after discovery by the insured of the occurrence which gives rise to the claim, provided however, that if by the laws of the State within which this policy is issued such limitation is invalid, then any such claims shall be void unless such action, suit or proceeding be commenced within the shortest period of time permitted by the laws of such State.

The loss occurred on January 17, 1994, and was discovered by the insured on January 17 and 18, 1994. The insured made a claim under the policy on November 21, 1994. On April 18, 1995, the insurer denied the claim, and the insured sued on September 16, 1996. The insurer contended that under the computation standards set forth in *Prudential-LMI Commercial Ins. v. Superior Court (1990) 51 Cal. 3d 674, 274 Cal. Rptr. 387, 798 P.2d 1230* (*see § 120.120*), approximately ten months of the 12-month limitation period elapsed between January 18, 1994 (the discovery of the loss) and November 21, 1994 (the date of the claim). The limitation period was then tolled until April 18, 1995 (the date that the insurer denied the claim), and therefore the filing of the action an additional 17 months later on September 16, 1996, was untimely because of a net elapsed period of approximately 27 months. In its opposition to the motion, the insured submitted declarations and discovery responses stating that its employees charged with the responsibility for the claim were unaware of the 12-month policy limitations period and that the insurer did not advise the insured of the 12-month limit in the exchange of correspondence relating to the claim. The insured submitted in evidence *10 Cal. Code Reg. §§ 2695.1* and2695.4, which are part of the Fair Claims Settlement Practices Regulations (*10 Cal. Code Reg. §§ 2695.1-2695.17*) issued by the California Insurance Commissioner. *10 Cal. Code Reg. § 2695.4(a)* (in effect at the time of the issuance of the policy, the loss, and the submission and denial of the claim) required insurers to disclose to insureds time limits applicable to submitted claims. The insured contended that although the time-limitation was admittedly a policy provision, in light of the insured's lack of actual knowledge of the time limit, the insurer should be estopped from relying on the policy limitations provision. In its reply, the insurer denied that *10 Cal. Code Reg. § 2695.4(a)* applied, under traditional contract and estoppel principles, to the limitations dispute, but did not dispute its own violation of the regulation. The trial court agreed with the insurer, essentially on the ground that the consequence of a regulatory violation is solely administrative action by the Insurance Commissioner. The trial court therefore granted the summary judgment motion and entered judgment for the insurer. The insured appealed.

The court of appeal reversed summary judgment and remanded, holding that a triable issue of fact was raised as to whether the insurer should be estopped from raising the limitations defense (*71 Cal. App. 4th 1260, 1273)* . The court noted that in the absence of statutory provisions to the contrary, 12-month contractual limitation provisions in insurance policies are generally valid, provided they are plain, clear and conspicuous, and reasonable. Under *Prudential-LMI,* the one-year period is equitably tolled between the time that the insured notifies the insurer of the loss and the written denial of the claim. Therefore, the period was indisputably tolled for the 10-month period between November 21, 1994 (the date of the claim), and April 18, 1995 (the date of denial), although the action was filed an additional 17 months later, on September 16, 1996. This was a net elapsed period of approximately 27 months, well beyond the contract limitations limit of 12 months. The insured's major contention was that the insurer should be estopped from relying on the contract limitations defense, because (1) the insured was unaware of the 12-month limitations period, and (2) the insurer failed to disclose the short limitations period to the insured, despite (3) the requirement of *10 Cal. Code Reg. § 2695.4(a),* which provides that:

> [e]very insurer shall disclose to a first party claimant ... all ... time limits ... of any insurance policy issued by that insurer that may apply to the claim presented by the claimant.

The court noted that an estoppel may arise from silence if there is a duty to speak and agreed with the insured that in this case, a duty to speak arose from the regulation. The regulation imposes on insurers an unmistakable duty to advise its insureds of applicable claim time limits. Its purpose is salutary, designed to alert insureds to their insurance policy obligations, and to foster equity, fairness, and plain-dealing in claimshandling. This and related regulations flesh out the statutory public policy of the Unfair Practices Act, the purpose of which is to regulate trade practices in the business of insurance (*see Ins. Code § 790* (specifically forbidding certain unfair claims settlement practices)). The court held that this public policy gives rise to a duty to speak for the purpose of applying the doctrine of equitable estoppel. The court noted that the object and purpose of the time-limit disclosure requirement contained in the regulations is to preserve claims for resolution on the merits and remedy the trap for the unwary. Yet the limit of the Insurance Commissioner's administrative authority is to impose monetary penalties and adverse licensure action to coerce future compliance. Therapeutic as this may be, its effect is prospective only. The after-the-fact administrative sanction does nothing to rectify the very wrong the regulation was designed to prevent. Only if the courts, through their equitable powers, require compliance with the regulation will its purpose of claim preservation be achieved (*71 Cal. App. 4th 1260, 1268-1271)* .

The court stated that it is "simply unacceptable" for an insurer to take advantage of its own misconduct and thereby succeed in defeating an otherwise legitimate claim because the insured did not comply with a policy time limit of which it was not actually aware, due to the insurer's failure to provide the required notice. The court also found that nothing in *Moradi-Shalal v. Fireman's Fund Ins. Cos. (1988) 46 Cal. 3d 287, 250 Cal. Rptr. 116, 758 P.2d 58* (*see § 120.240*) suggests that insurer violations of the Unfair Practices Act or its enabling regulations may not have consequences short of an independent private right of action (*71 Cal. App. 4th 1260, 1271-1272)* . Moreover, if the policy reference to "the laws of the State" is construed to include the Commissioner's Fair Claims Settlement Practices Regulations, then the 12-month period would be invalid absent compliance with the regulations, and the insured's action would appear to be timely under the policy. In response to the insurer's assertion that the insured is charged with constructive knowledge of policy provisions that are plain, clear, and conspicuous, the court pointed out that *10 Cal. Code Reg. § 2695.4(a)* requires the insurer to "disclose to" a claimant insured all policy "time limits." This obviously implies a type of notice, communicated independently of the policy itself, which is calculated to achieve actual rather than constructive knowledge. The implicit assumption of the regulation is that the mere existence of the policy provision is not enough, no matter how "plain, clear and conspicuous." The whole purpose of this notice is to assure actual, not merely constructive, knowledge, of the contractual limitations period within which an insured must bring suit. To permit an insurer to enforce a time limit provision based solely on evidence of constructive notice would eviscerate the purpose of the regulation (*71 Cal. App. 4th 1260, 1272-1273)* . The court of appeal therefore reversed, and remanded the case for further proceedings (*71 Cal. App. 4th 1260, 1275)* .

[b] Estoppel to Assert Limitations Defense After Failing to Notify Insured of Policy Terms

Spray, Gould & Bowers v. Associated Int'l Ins. Co. *(1999) 71 Cal. App. 4th 1260, 84 Cal. Rptr. 2d 552* , is discussed in *§ 120.165[3][a]*.

[4] Additional Authorities

[a] Estoppel to Assert Limitations Defense After Failing to Notify Insured of Policy Terms

In *Neufeld v. Balboa Ins. Co. (2000) 84 Cal. App. 4th 759, 101 Cal. Rptr. 2d 151* , an insured filed suit against her insurer in March 1997, based on the insurer's denial of a claim in October 1995. The insurer obtained summary judgment based on the policy's contractual one-year statute of limitations. The court of appeal noted that the opinion in *Spray, Gould & Bowers v. Associated Int'l Ins. Co. (1999) 71 Cal. App. 4th 1260, 84 Cal. Rptr. 2d 552* , in combination with the regulations of the Insurance Commissioner on which that opinion relies, has "pretty much vitiated the one-year suit provision as a defense in first party insurance cases." The court therefore reversed, finding that the insurer did not notify the insured of the one-year suit provision and that no correspondence with the insurer mentioned the one-year suit provision. Following *Spray,* the court held that the insurer was estopped from raising that defense and that the ruling in

Spray may properly be raised retroactively (*84 Cal. App. 4th 759, 761-766)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGeneral OverviewInsurance LawClaims & ContractsEstoppel & WaiverGeneral OverviewInsurance LawClaims & ContractsEstoppel & WaiverPolicy CoverageInsurance LawClaims & ContractsGood Faith & Fair DealingGeneral Overview

California Points & Authorities

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10. Estoppel to Raise Contractual Limitations Defense

12-120 California Points & Authorities §§ 120.166-120.169

[Reserved]

§§ 120.166[Reserved]

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CHAPTER 120 INSURANCE
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C. Improper Claims Settlement Practices
1. General Defenses

12-120 California Points & Authorities § 120.170

§ 120.170 Liability Insurer's Agent/Employee Is Not Liable for Breach of Implied Covenant of Good Faith When Not Party to Contract

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [AGENT *or* EMPLOYEE] IS NOT LIABLE TO INSURED FOR INSURER'S BREACH OF THE COVENANT OF GOOD FAITH IMPLIED IN THE INSURANCE CONTRACT, BECAUSE _____ [AGENT *or* EMPLOYEE] WAS NOT A PARTY TO THE INSURANCE CONTRACT.

Agent or Employee Is Not Liable for Breach of Covenant of Good Faith. Neither an agent nor an employee of an insurance company is liable to the insured for the company's breach of the covenant of good faith implied in the insurance contract to which the agent or employee is not a party (*Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 824, 169 Cal. Rptr. 691, 620 P.2d 141* ; *Gruenberg v. Aetna Ins. Co. (1973) 9 Cal. 3d 566, 576, 108 Cal. Rptr. 480, 510 P.2d 1032*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention by an agent or employee of an insurance company, that the agent or employee is not liable for breach of the implied covenant of good faith. The basis for these points and authorities is that the agent or employee was not a party to the contract.

This form may be used by an insurer in various procedural contexts, such as in memoranda supporting or opposing a motion for summary judgment, in a trial brief, or in an appellate brief.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should refer to facts showing that the agent or employee was at all times acting solely in his or her capacity as an agent or employee of the insurer.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.171* et seq.) and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be a motion by a defendant agent or employee of the insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that there is no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts supporting the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Pleading and Practice Chapters

For legal background related to actions by and against insurance agents, brokers, and employees, and the insurer's duty of good faith and fair dealing, including related forms of complaint, see California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender).

For a discussion of the rules applicable to summary judgment, a form of notice of motion for summary judgment, and related forms, see Ch. 537, *Summary Judgment* , in that publication.

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[e] Opposing Points and Authorities

The points and *authorities in § 120.186* et seq., may be used in an appropriate case to oppose these points and authorities.

[3] Discussion of Authorities

[a] Agent or Employee Is Not Liable for Breach of Covenant of Good Faith

Egan v. Mutual of Omaha Ins. Co. *(1979) 24 Cal. 3d 809, 169 Cal. Rptr. 691, 620 P.2d 141* , was an action against an insurance company, its agency claims manager, and its agency claims adjuster for compensatory and punitive

damages arising out of a breach of the covenant of good faith and fair dealing implied in a health and disability insurance policy. The trial court directed a verdict against defendants, ruling, as a matter of law, that defendants' failure to have plaintiff examined by a doctor of their choice or to consult with plaintiff's treating physicians and surgeon violated the covenant of good faith and fair dealing. The trial court submitted to the jury the issues of causation and compensatory and punitive damages. The jury returned verdicts against all defendants. General damages of $500 and punitive damages of $400 were assessed against the agency claims adjuster; general damages of $1,000 and punitive damages of $500 were assessed against the agency claims manager; and general damages of $45,600, damages for emotional distress of $78,000, and punitive damages of $5 million were assessed against the insurance company. Defendants appealed.

The Supreme Court affirmed the judgment insofar as it awarded compensatory damages against the insurance company, but reversed the judgment in all other respects. The Court held that the punitive damages award against the insurer was excessive as a matter of law. With respect to the individual defendants, the Court pointed out that they acted as the insurer's agents and, as such, were not parties to the insurance contract and not subject to the implied covenant of good faith. Because the only ground for imposing liability on either of them was breach of that promise, the Court, citing *Gruenberg v. Aetna Ins. Co. (1973) 9 Cal. 3d 566, 576, 108 Cal. Rptr. 480, 510 P.2d 1032* , concluded that the judgments against them as individuals could not stand (*24 Cal. 3d 809, 824)* .

Gruenberg v. Aetna Ins. Co. *(1973) 9 Cal. 3d 566, 108 Cal. Rptr. 480, 510 P.2d 1032* , was an action by an insured against three insurancecompanies which had insured his business premises against fire loss in the aggregate sum of $35,000, an adjusting firm and one of its claims adjusters, and a law firm and one of its attorney employees. The insured premises were damaged by fire. Defendant insurers engaged defendant adjusting firm which sent defendant claims adjuster to the scene to investigate the fire and inspect the premises. While there, the adjuster stated to a fire department arson investigator that the premises had excessive coverage under the fire policies. Plaintiff was subsequently charged in a felony complaint with the crimes of arson [*Penal Code § 451*] and defrauding an insurer [*Penal Code § 548*]. Defendant insurers retained defendant law firm to represent them in the matter of plaintiff's claim of fire loss. Defendant attorney, an employee of defendant law firm, demanded that plaintiff appear on a specified date to submit to an examination under oath and to produce certain documents [*see Ins. Code § 2071*]. Plaintiff's attorney responded by letter stating that he had advised plaintiff not to make any statements concerning the fire loss while criminal charges were pending and requested that the insurers waive the requirement of an examination until the criminal charges were concluded. Defendant attorney refused the request and warned that failure to appear would void coverage under the policies. On plaintiff's failure to appear, defendant attorney advised plaintiff's attorney in writing that the insurers were denying liability under the policies because of plaintiff's failure to submit to an examination under oath and to produce documents.

At the preliminary hearing in the criminal matter, defendant claims adjuster testified for the prosecution that it was his belief that plaintiff had excessive fire coverage. The criminal charge were dismissed for lack of probable cause. Plaintiff's attorney then advised defendant insurers that plaintiff was ready to submit himself for an examination. The insurers, however, reaffirmed their position that they were denying liability because of plaintiff's failure to appear. Plaintiff then sued the insurance companies, the adjusting firm, the individual claims adjuster, the law firm, and the individual attorney for compensatory and punitive damages alleging that, as a direct and proximate result of the outrageous conduct and bad faith of defendants, plaintiff suffered severe economic damage, severe emotional upset and distress, loss of earnings, and various special damages. The complaint, which was in one count, alleged that all defendants other than the insurers were the agents and employees of the insurers and were acting within the scope of their agency and employment when the acts attributed to them were committed. It was further alleged that the defendants and each of them joined together and acted in concert to falsely imply that plaintiff had a motive to deliberately set fire to and burn down his place of business and that the purpose of the defendants in creating such false implication was to establish a ground on which defendant insurers could avoid paying the amounts due plaintiff under the insurance policies issued by them. Defendants' general demurrers to the complaint were sustainedwith leave to amend and, on plaintiff's electing to stand on his complaint, an order of dismissal was entered.

The Supreme Court reversed the judgment as to defendant insurance companies and remanded the cause with directions to the trial court to overrule the demurrers and allow defendants a reasonable time to answer. As to the remaining defendants, the judgment of dismissal was affirmed. With respect to the other defendants (the adjusting firm, its claims adjuster, the law firm, and the law firm's attorney employee), the Court pointed out that plaintiff alleged that they were the agents and employees of defendant insurers and of each other and were acting within the scope of that agency and employment when they committed the acts attributed to them and that, since plaintiff contended that the noninsurer defendants breached only the duty of good faith and fair dealing, the Court need not consider the possibility that they might have committed another tort in their respective capacities as total strangers to the contracts of insurance. The Court said that the noninsurer defendants obviously were not parties to the insurance agreements and were not, as such, subject to an implied duty of good faith and fair dealing and that, as agents and employees of defendant insurers, they could not be held accountable on a theory of conspiracy. The Court explained that this rule derives from the principle that corporate agents and employees acting for and on behalf of the corporation cannot ordinarily be held liable for inducing a breach of the corporation's contract since, being in a confidential relationship to the corporation, their action in this respect is privileged. The Court concluded that, accordingly, the judgment of dismissal in favor of the noninsurer defendants must be affirmed (*9 Cal. 3d 566, 576)* .

[4] Additional Authorities

[a] Agent or Employee Is Not Liable for Breach of Covenant of Good Faith

In *Iversen v. Superior Court (1976) 57 Cal. App. 3d 168, 127 Cal. Rptr. 49* , a mandate proceeding arising out of an action by an insured against its liability insurer and the insurer's claims supervisor for damages for breach of the duty of good faith and fair dealing by reason of the insurer's failure to accept a settlement offer within policy limits, the court of appeal ordered issuance of the writ directing the trial court to vacate its order denying the claims supervisor's motion for summary judgment and to enter an order granting the motion. The court explained that the supervisor's uncontradicted declaration in support of his motion established that he was not liable on a cause of action asserting breach of the obligation to deal fairly and act in good faith with respect to an insurance claim, that, while breach of that obligation sounds both in contract and tort, the existence of the duty which is the subject of the breach depends on acontractual relationship, and that the particular relationship is that created by the contract of insurance in which a covenant of good faith and fair dealing is implied as a matter of law. The court held that, since the supervisor was an agent of the insurer and not a party to the contract of insurance, he was not bound by the implied covenant and owed no duty to the insured not to breach it (*57 Cal. App. 3d 168, 171)* .

The court also rejected as inapplicable plaintiff's argument that an employee is always liable for his own torts regardless of whether his employer is also liable [*see Civ. Code § 2343(3)* (specifying acts for which an agent is responsible)]. The court said that the argument ignored the proposition that the employee is liable only if his conduct is a tortious breach of duty, that the supervisor did not breach a duty of good faith owed by him, and that no other tort was alleged by plaintiff (*57 Cal. App. 3d 168, 172)* .

In *Hale v. Farmers Ins. Exch. (1974) 42 Cal. App. 3d 681, 117 Cal. Rptr. 146* (disapproved on another point in *Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 822 n.5, 169 Cal. Rptr. 691, 620 P.2d 141*), an action by an insured against his insurer and the insurer's attorney in fact and against their claims supervisor and their claims examiner for bad-faith refusal to pay medical benefits due plaintiff under his automobile liability policy, the court of appeal reversed that portion of the judgment awarding compensatory and punitive damages against the claims supervisor and claims examiner, after their motion for judgment notwithstanding the verdict had been denied, with instructions to enter judgment for these defendants. The court held on the authority of the *Supreme Court in Gruenberg v. Aetna Ins. Co. (1973) 9 Cal. 3d 566, 108 Cal. Rptr. 480, 510 P.2d 1032* [*see § 120.170[3][a]*], that the motions of the claims supervisor and claims examiner for judgment notwithstanding the verdict should have been granted and that the judgment against them must be reversed (*42 Cal. App. 3d 681, 702)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGood Faith & Fair DealingGeneral OverviewInsurance LawClaims & ContractsGood Faith & Fair DealingAgents & Brokers

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1. General Defenses

12-120 California Points & Authorities § 120.171

§ 120.171 Covenant Extends Only to Limits of Contract

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER DID NOT BREACH THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING, BECAUSE THE COVENANT EXTENDS ONLY TO THE LIMITS OF THE CONTRACT, AND THE ALLEGED BREACH WAS BEYOND THE TERMS OF THECONTRACT AND WAS NOT WITHIN THE EXPECTATIONS OF EITHER PARTY TO THE CONTRACT.

Covenant Extends Only to Limits of Contract. The implied covenant of good faith and fair dealing extends only to the limits of the contract. The insurer's fiduciary duty is coextensive with the four corners of the contract entered into between the parties, and does not extend beyond faithfulness to an agreed common purpose and consistency with the justified expectations of the other party (*Gibson v. Government Employees Ins. Co. (1984) 162 Cal. App. 3d 441, 446-448, 208 Cal. Rptr. 511*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention by an insurer that the insurer is not liable for breach of the implied covenant of good faith. The basis of these points and authorities is that the covenant extends only to the limits of the contract, and the alleged breach was beyond the terms of the contract and was not within the expectations of either party to the contract.

This form may be used by an insurer in various procedural contexts, such as in memoranda supporting or opposing a motion for summary judgment, in a trial brief, or in an appellate brief.

For references to related Pleading and Practice chapters, see *§ 120.170[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should refer to facts showing that and the alleged breach was beyond the terms of the contract and was not within the expectations of either party to the contract.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.170* et seq.) and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be a motion by an insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that there is no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts supporting the motion. The statement must be supportedby cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[d] Opposing Points and Authorities

The points and *authorities in § 120.186* et seq., may be used in an appropriate case to oppose these points and authorities.

[3] Discussion of Authorities

[a] Covenant Extends Only to Limits of Contract

In ***Gibson v. Government Employees Ins. Co.*** *(1984) 162 Cal. App. 3d 441, 208 Cal. Rptr. 511* , plaintiffs, insured by defendant for over 20 years, were injured by a motorist while crossing the street. They had never increased their original medical payments benefit and incurred $55,000 in unreimbursed medical damages as a result of the accident. Plaintiffs brought an action against defendant for breach of fiduciary duty in failing to inform them of the availability and potential need for underinsured motorist coverage and the inadequacy of their medical payments benefit. The trial court sustained defendant's demurrer and gave plaintiffs 30 days to amend their complaint. When plaintiffs filed an amendment more than 30 days later, defendant's motion for dismissal was granted. Plaintiffs appealed from the dismissal.

The court of appeal affirmed. After reviewing case law the court concluded that defendant had a fiduciary duty to plaintiff as its insured. It went on to review the insurance cases discussing the tort caused by breach of the implied covenant of good faith and fair dealing, concluding that thecovenant extended only to the limits of the insurance coverages afforded by the insurer to the insured. The insurer's fiduciary duty is coextensive with the four corners of the insurance contract entered into between the parties. Good faith performance emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party (*162 Cal. App. 3d 441, 446-447)* . If any breach by defendant of its fiduciary duty and violation of the covenant of good faith and fair dealing occurred, it did not arise under the contract, but outside of it. Plaintiffs did not allege any failure to perform pursuant to the contract terms, but contended that defendant failed to make underinsured motorist coverage available or, alternatively, to inform them of its existence, and failed to inform them that their medical pay coverage was inadequate. The only allegation based on their expectations was that defendant would advise them or make available coverage beyond that for which they had contracted. Defendant never represented to provide comprehensive advice and coverage (*162 Cal. App. 3d 441, 447-448)* . Any fiduciary duty existing between an insurer and its insured is governed by the terms of the contract in effect between them and to the extent there is no contract, the relationship between them is not controlled by principles of strict fiduciary responsibility (*162 Cal. App. 3d 441, 449-450)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGood Faith & Fair DealingGeneral OverviewInsurance LawClaims & ContractsPolicy InterpretationEntire Contract

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12-120 California Points & Authorities § 120.172

§ 120.172 Plaintiff Lacks Standing to Bring Action Because He/She Is Neither Insured Nor Intended Third-Party Beneficiary

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF LACKS STANDING TO BRING THIS ACTION BECAUSE HE/SHE IS NEITHER AN INSURED NOR AN INTENDED THIRD-PARTY BENEFICIARY OF THE INSURANCE POLICY ISSUED BY DEFENDANT.

A. Plaintiff Fails to Satisfy Basic Requirement for Standing. In order to have standing to sue an insurer for breach of the insurer's duty to pay benefits due to an insured under an insurance policy, a plaintiff must be either a party to the insurance contract or an intended third-party beneficiary of that contract (*Jones v. Aetna Cas. & Sur. Co. (1994) 26 Cal. App. 4th 1717, 1724-1725, 33 Cal. Rptr. 2d 291*).

[*Optional*] **B. Parties Did Not Intend to Make Plaintiff Third-Party Beneficiary.** Whether a third party is an intended beneficiaryor an incidental beneficiary to an insurance policy involves construction of the parties' intent, gleaned from reading the contract as a whole in light of the circumstances under which it was rendered (*Jones v. Aetna Cas. & Sur. Co. (1994) 26 Cal. App. 4th 1717, 1725, 33 Cal. Rptr. 2d 291*).

[*Optional*] **C. Incidental Reference or Benefit Is Insufficient to Confer Standing.** The fact that a third party is incidentally named in an insurance policy, or that the policy, if carried out to its terms, would inure to a third party's benefit, is insufficient to entitle the third party to demand enforcement (*Jones v. Aetna Cas. & Sur. Co. (1994) 26 Cal. App. 4th 1717, 1724-1725, 33 Cal. Rptr. 2d 291*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention by an insurer that the insurer is not liable for breach of the implied covenant of good faith. The basis of these points and authorities is that the plaintiff lacks standing to bring the action because he or she is neither an insured nor an intended third-party beneficiary of the insurance policy issued by the defendant insurer.

These points and authorities may be submitted in support of an insurer's contention in an action by someone other than an insured seeking damages from the insurer for breach of the covenant of good faith and fair dealing arising out of the insurer's failure or refusal to pay benefits allegedly due under the policy. Typically, such an action will be brought by a third party with some stake in the payment of benefits under the policy, such as a lessee who stands to benefit directly or indirectly from the insurer's payment of policy proceeds to the lessor. The ground for the contention is that the plaintiff is neither an insured nor an intended beneficiary of the insurance contract, but rather, at most, merely an incidental beneficiary, and that the plaintiff therefore lacks standing to bring the action.

For references to related Pleading and Practice chapters, see *§ 120.170[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should refer to facts demonstrating conclusively that the parties to the insurance contract did not enter the contract with the intent of benefitting the plaintiff, and that anybenefit under the policy that would accrue to the plaintiff was purely incidental to the contract. This issue is determined based on reading the insurance contract as a whole, in light of the circumstances under which it was entered [*Jones v. Aetna Cas. & Sur. Co. (1994) 26 Cal. App. 4th 1717, 1724-1725, 33 Cal. Rptr. 2d 291]* .

The form should be combined with other forms in this publication as necessary to complete argument as to all issues [*see, e.g., § 120.170* et seq.] and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be a motion by an insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that there is no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts supporting the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[d] Opposing Points and Authorities

The points and *authorities in § 120.186* et seq., may be used in an appropriate case to oppose these points and authorities.

[3] Discussion of Authorities

[a] Plaintiff Fails to Satisfy Basic Requirement for Standing

In ***Jones v. Aetna Cas. & Sur. Co.*** *(1994) 26 Cal. App. 4th 1717, 33 Cal. Rptr. 2d 291* , the plaintiff leased commercial property for the operation of a restaurant. The lease obligated the lessor to maintain rental income insurance providing coverage for damage or destruction from fire or other perils. The lease also stated that during any repairs to the premises after damage or destruction from a peril, the lessee's rent would be equitably reduced to the extent the lessor received proceeds from the rental income insurance. The lessor obtained insurance from defendant insurer. The property thereafter sustained water damage. A claim was made against the insurer, and the insurer denied coverage. Thereafter, the lessee sued the insurer, claiming that the insurer breached the covenant of good faith and fair dealing and that as a result of that breach, the lessor had sued plaintiff for nonpayment of rent and structural damage to the premises. Plaintiff claimed that he was entitled to maintain the bad faith action (1) as an "implied-in-law co-insured" under the insurance policy; and (2) as a third party beneficiary of the policy. The insurer's general demurrer was sustained without leave to amend, on the ground that plaintiff had no standing to sue.

The court of appeal affirmed, ruling that plaintiff's complaint stated no cause of action under any legal theory, and could not reasonably be cured by amendment. The court noted that while an action for breach of the covenant of good faith and fair dealing sounds in tort, it exists solely because of the contractual relationship between the parties. A nonparty who is entitled to policy benefits has standing only if that party is a claimant whose benefits are wrongfully withheld. Plaintiff did not allege that he was either a contracting party or a claimant (*26 Cal. App. 4th 1717, 1722)* . The argument that plaintiff was an "implied-in-law coinsured" was rejected because cases adopting the latter principle arose in a subrogation context and were equitable in nature, having no application to a claim for breach of the covenant of good faith and fair dealing, which is a tort claim based on contractual principles (*26 Cal. App. 4th 1717, 1723-1724)* .

The court also rejected plaintiff's claim to be a third-party beneficiary of the contract, noting that in order to qualify, the contract must have been made expressly for plaintiff's benefit. The court determined that the insurance policy was not made expressly for plaintiff's benefit and therefore held that the demurrer was properly sustained (*26 Cal. App. 4th 1717, 1724-1725)* .

[b] Parties Did Not Intend to Make Plaintiff Third-Party Beneficiary

The facts and background in ***Jones v. Aetna Cas. & Sur. Co.*** *(1994) 26 Cal. App. 4th 1717, 33 Cal. Rptr. 2d 291* , are discussed in *§ 120.173[3][a]*. In determining whether or not plaintiff qualified as a third-party beneficiary of the insurance policy, the court held that determination of whether a third party is an intended beneficiary or an incidental beneficiary involves construction of the parties' intent, gleaned from reading the contract as a whole in light of the circumstances under which it was entered (*26 Cal. App. 4th 1717, 1725)* .

[c] Incidental Reference or Benefit Is Insufficient to Confer Standing

The facts and background in ***Jones v. Aetna Cas. & Sur. Co.*** *(1994) 26 Cal. App. 4th 1717, 33 Cal. Rptr. 2d 291* , are discussed in *§ 120.173[3][a]*. The court held that the fact that a third party is incidentally named in an insurance policy, or that the policy, if carried out to its terms, would inure to a third party's benefit, is insufficient to entitle the third party to demand enforcement (*26 Cal. App. 4th 1717, 1724)* . The court concluded that it was apparent from the terms of the policy that the plaintiff lessee was not an intended beneficiary. The fact that the lease itself would have caused plaintiff to receive a rent reduction had the insurer compensated the lessor for the damage was only enough to make plaintiff an incidental beneficiary (*26 Cal. App. 4th 1717, 1725)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawThird PartiesBeneficiariesClaims & EnforcementInsurance LawClaims & ContractsGeneral OverviewInsurance LawClaims & ContractsPolicy InterpretationGeneral Overview

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 120 INSURANCE
PART II. FORMS
C. Improper Claims Settlement Practices
1. General Defenses

12-120 California Points & Authorities § 120.173

§ 120.173 Plaintiff Judgment Creditor's Collusion With Insured Renders Underlying Judgment Unenforceable

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF, AS ASSIGNEE OF INSURED, MAY NOT RECOVER FROM INSURER ON THE POLICY BECAUSE THE UNDERLYING JUDGMENT WHICH PLAINTIFF SEEKS TO ENFORCE IS UNENFORCEABLE AS THE RESULT OF PLAINTIFF'S COLLUSION WITH INSURED.

A. Plaintiff's Agreement With Insured Constitutes Collusion. What constitutes collusion will differ with each fact situation. Collusion has been variously defined as (1) a deceitful agreement orcompact between two or more persons, for the one party to bring an action against the other for some evil purpose, as to defraud a third party of his right; (2) a secret arrangement between two or more persons, whose interests are apparently conflicting, to make use of the forms and proceedings of law in order to defraud a third person, or to obtain that which justice would not give them, by deceiving a court or its officers; and (3) a secret combination, conspiracy, or concert of action between two or more persons for fraudulent or deceitful purposes (*Andrade v. Jennings (1997) 54 Cal. App. 4th 307, 327, 62 Cal. Rptr. 2d. 787*).

B. Insurer May Raise Defense of Collusion in Suit to Recover Under Policy. Insurer may raise the defense of collusion against an insured's assignee because as against the injured person an insurer may assert a defense based on breach by the insured of the cooperation clause of the policy. Collusive assistance in the procurement of a judgment not only constitutes a breach of the cooperation clause but also is a breach of the covenant of good faith and fair dealing (*Andrade v. Jennings (1997) 54 Cal. App. 4th 307, 327, 62 Cal. Rptr. 2d. 787*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention by an insurer that a judgment creditor who is assigned the rights of the insured against the insurer may not recover from the carrier if in obtaining the judgment, the judgment creditor and the insured engaged in collusion against the insurer.

For references to related Pleading and Practice chapters, see *§ 120.170[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be a motion by an insurer for summary judgment or opposition to such a motion, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see* Code Civ. Proc.§ 437c]. In this context, counsel would modify the form to assert that there remain triable issues of material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts opposing the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Plaintiff's Agreement With Insured Constitutes Collusion

In ***Andrade v. Jennings*** *(1997) 54 Cal. App. 4th 307, 62 Cal. Rptr. 2d. 787* , an insurer issued an excess liability policy to the employer of the injured party. The injured party was a tuna boat captain who suffered shipboard injury and made a claim against his employer and the vessel. The injured employee filed state and federal lawsuits. Since the employer's primary insurer was insolvent, the employer and the vessel's lienholders sought to settle the injured employee's claim without impairing their interests in the vessel. Eventually, without informing the excess insurer, the insured settled with the injured employee for an amount invoking the excess policy. The injured employee agreed not to execute against the insured's assets including the vessel, with the insured assigning to the injured employee all its rights against the excess insurer. Under the settlement agreement, the injured employee dismissed his state lawsuit against the insured. However, agreeing that the injured employee could obtain judgment in his federal lawsuit against the insured in an amount invoking the excess policy issued by the excess insurer, the injuredemployee and the insured scheduled a prove-up hearing in the federal court. At the prove-up hearing the injured employee presented evidence and the insured offered no defense. The excess insurer declined to attend. The federal court entered judgment favoring the injured employee in the

requested amount.

The injured employee then intervened in the insured employer's state lawsuit against the excess insurer. After the superior court granted summary adjudication/judgment favoring the plaintiff, the court of appeal reversed and remanded on the limited ground the record contained evidence raising triable factual issues on insurer's defense of collusion. On remand, the defense of collusion was tried to a jury. After a jury trial awarding a defense verdict to the insurer, the insured's assignee appealed.

The court of appeal affirmed. The court considered whether there was substantial evidence to support the jury's finding of collusion. Citing *Span, Inc. v. Associated Int'l Ins. Co. (1991) 227 Cal. App. 3d 463, 484* , the court stated that what constitutes collusion will differ with each fact situation. Collusion has been variously defined as (1) a deceitful agreement or compact between two or more persons, for the one party to bring an action against the other for some evil purpose, as to defraud a third party of his right; (2) a secret arrangement between two or more persons, whose interests are apparently conflicting, to make use of the forms and proceedings of law in order to defraud a third person, or to obtain that which justice would not give them, by deceiving a court or its officers; and (3) a secret combination, conspiracy, or concert of action between two or more persons for fraudulent or deceitful purposes (*54 Cal. App. 4th 307, 327)* . The court observed that the attorneys representing the insured violated the assistance and cooperation clauses of the excess policy issued by the excess insurer and thus committed a fraud on the excess insurer by not providing the excess insurer with a copy of the injured employee's initial offer to settle for $950,000, not providing the excess insurer with a copy of the injured employee's proposal to settle by stipulated judgment for $1.5 million, not immediately providing the excess insurer with a copy of the economist's report indicating that the injured employees wage loss exceeded $1.2 million, entering into the settlement agreement, and not presenting a defense at the federal prove-up hearing (*54 Cal. App. 4th 307, 327*). The court held that substantial evidence and reasonable inferences supported the jury's findings that the insured's misconduct prejudiced the excess insurer (*54 Cal. App. 4th 307, 336)* .

[b] Insurer May Raise Defense of Collusion in Suit to Recover Under Policy

The facts and procedural background of ***Andrade v. Jennings*** *(1997) 54 Cal. App. 4th 307, 62 Cal. Rptr. 2d. 787* , are discussed in *§ 120.173[3][a]*. The court of appeal held that there was substantialevidence to support the finding of collusion between the insured under an excess liability policy in which the primary insurer was insolvent, and the injured party who sued the excess injurer to recover under the policy. The court stated that the insurer may raise the defense of collusion against the assignee because as against the injured person an insurer may assert a defense based on breach by the insured of the cooperation clause of the policy. Collusive assistance in the procurement of a judgment not only constitutes a breach of the cooperation clause but also is a breach of the covenant of good faith and fair dealing (*54 Cal. App. 4th 307, 327)* . As the insured, the employer of the injured party owed its excess insurer the duty of good faith and fair dealing. An insured may not manipulate claims to an excess carrier's detriment. The issue of collusion subsumes the issue whether the insured Jorge breached the contractual assistance and cooperation clauses or the implied covenant of good faith and fair dealing (*54 Cal. App. 4th 307, 328)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGeneral OverviewInsurance LawClaims & ContractsDisclosure ObligationsMaterialityTortsBusiness TortsFraud & MisrepresentationGeneral Overview

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CHAPTER 120 INSURANCE
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1. General Defenses

12-120 California Points & Authorities § 120.174

§ 120.174 Casualty Insurer's Handling of Claim Was Reasonable as Matter of Law

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

CASUALTY INSURER DID NOT BREACH THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING, BECAUSE INSURER'S HANDLING OF INSURED'S CLAIM WAS REASONABLE AS A MATTER OF LAW.

A. Casualty Insurer Did Not Breach Covenant of Good Faith. A casualty insurer, unlike a liability insurer, breaches its covenant of good faith and fair dealing only when its denial of, or delay in making, payment of benefits under a policy is unreasonable (*Austero v. National Cas. Co. (1978) 84 Cal. App. 3d 1, 25, 148 Cal. Rptr. 653* (disapproved on another point in *Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 824 n.7, 169 Cal. Rptr. 691, 620 P.2d 141*)).

B. Reasonableness Appears as Matter of Law. When the facts presented clearly show that the insurer acted reasonably in the handling of the claim, the court may so rule as a matter of law (*Austero v. National Cas. Co. (1978) 84 Cal. App. 3d 1, 35-36, 148 Cal. Rptr. 653 , disapproved on other grounds, Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 824 n.7, 169 Cal. Rptr. 691, 620 P.2d 141* ; *see West v. State Farm Fire & Cas. Co. (9th Cir. 1989) 868 F.2d 348, 350-352)* .

[*Optional*] **C. Insurer Is Not Liable For Mere Negligent Handling of Claim.** An insurer under a first-party policy does not breach its covenant of good faith and fair dealing by conduct in the handling of a claim that is negligent at most and not unreasonable (*see National Life & Accident Ins. Co. v. Edwards (1981) 119 Cal. App. 3d 326, 339, 174 Cal. Rptr. 31*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention by a casualty insurer that the insurer is not liable for breach of the implied covenant of good faith. The basis for these points and authorities is that the action has no merit because the insurer at all times acted reasonably in handling the claim and took into account equally and fairly the insured's interest as well as its own.

This form may be used by an insurer in various procedural contexts, such as in memoranda supporting or opposing a motion for summary judgment, in a trial brief, or in an appellate brief. For example, these points and authorities may be submitted, in an action to recover damages from a casualty insurer for alleged bad-faith denial of, or delay in making, payment of benefits under a casualty policy or the casualty provisions of a liability policy, in support of the contention that the action has no merit since the defendant insurer at all times acted reasonably in handling the claim and took into account equally and fairly the insured's interest as well as its own, and that defendant is, therefore, entitled to judgment as a matter of law.

Paragraph C should be included when liability for bad-faith denial of, or delay in making, payment of benefits is based on mere negligence of the insurer in acting or failing to act.

For references to related Pleading and Practice chapters, see *§ 120.170[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should refer to facts showing that the insurer's conduct and discussing the reasonableness of that conduct.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.170* et seq.) and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be a motion by an insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that there is no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts supporting the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

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[c] Related Points and Authorities

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For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[d] Opposing Points and Authorities

The points and *authorities in § 120.186* may be used in an appropriate case to oppose these points and authorities.

[3] Discussion of Authorities

[a] Casualty Insurer Did Not Breach Covenant of Good Faith

Austero v. National Cas. Co. *(1978) 84 Cal. App. 3d 1, 148 Cal. Rptr. 653* , was an action by an attorney, who had been diagnosed as suffering from presenile dementia, against his disability insurer for refusal to pay his disability claim. The action was for declaratory relief and for damagesfor breach of contract, emotional distress, bad-faith failure to pay, and fraud. The insurer had refused to pay because it had, after conducting an extensive investigation, concluded that the insured's illness did not result in total disability, within the meaning of the policy, until some months after the policy had lapsed for nonpayment of premium. The evidence presented at trial was sharply conflicting as to whether plaintiff had become totally disabled before or after the lapse of the policy. The jury returned a verdict for plaintiff for $67,200 compensatory damages and $336,000 exemplary damages. By later stipulation of counsel, $2,800 in interest was added to the award. The insurance company appealed. The court of appeal modified the judgment awarding disability payments due under the policy to delete the award as to payments to become due in the future and affirmed this portion of the judgment as modified. It reversed the judgment in all other respects.

The trial court had instructed the jury that when an insurance company unreasonably denies or delays payment of benefits due under an insurance policy and does so without giving the insured's interests at least as much consideration as its own, the insurance company has breached its duty imposed by law of good faith and fair dealing and that if the jury found that defendant had breached the duty of good faith and fair dealing with respect to the disability policy, then plaintiff was entitled to recover all damage legally caused by the breach. The court of appeal held that this instruction informed the jury that to hold the insurer liable for breach of the covenant of good faith and fair dealing, it must find that the insurer unreasonably denied or delayed payment of benefits due under the policy, and that this is a correct statement of the law (*84 Cal. App. 3d 1, 25)* .

The court explained that there are two classes of cases in which an insurer may be held liable on the so-called theory of "bad faith." The first of these is a third-party case typically involving a liability insurer which refuses to accept the third party's offer to settle his or her claim against the insured, either because the insurer erroneously denies coverage, or under circumstances which make the refusal unreasonable, that is, the settlement offer was a reasonable one (*84 Cal. App. 3d 1, 26, 28-29)* . The second of these classes is a first-party case typically involving a casualtyinsurer insuring, for example, against sickness and accident, fire, uninsured motorist, and occupational disability. The contractual obligation of the insurer is to pay money directly to the insured, not to a third party, and to do so only if the terms and conditions for payment have been fulfilled (*84 Cal. App. 3d 1, 27)* . The court carefully distinguished these two classes of cases and the rules applicable to each (*84 Cal. App. 3d 1, 27-31)* .

The court held that in the second class of cases, the substance or gravamen of the wrong is an unreasonable refusal to pay benefits due under the terms of the policies (*84 Cal. App. 3d 1, 31)* and that the ultimate test of liability in these cases is whether the refusal to pay policy benefits was unreasonable (*84 Cal. App. 3d 1, 32)* . The court, after reviewing the evidence, held that the insurer's refusal to pay disability benefits was not, under the facts of the case, unreasonable (*84 Cal. App. 3d 1, 32-36)* .

It should be noted that with respect to the court of appeal's deletion from the award of future benefits under the policy, the *Supreme Court, in Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 824 n.7, 169 Cal. Rptr. 691, 620 P.2d 141* , held that in a valid tort cause of action for breach of the implied covenant of good faith and fair dealing, the jury may include in the compensatory damage award future policy benefits that they reasonably conclude, after examination of the policy's provisions and other evidence, the policy holder would have been entitled to receive had the

contract been honored by the insurer. The Court disapproved *Austero* to the extent that it was inconsistent with this holding.

[b] Insurer Is Not Liable For Mere Negligent Handling of Claim

In ***West v. State Farm Fire & Cas. Co.*** *(9th Cir. 1989) 868 F.2d 348* , an insured brought an action against the insurer based on the insurer's refusal to pay a claim for residential theft loss. The theft resulted from an alleged burglary, after which the insured filed a police report, and submitted a claim to the insurer in excess of $10,000. During a preliminary interview of the insured conducted by the insurer, the insured stated that he would submit documentation to substantiate the loss. He did not do so. The insurer then requested that the insured submit to an examination under oath, as provided for in the policy. An attorney for the insurer conducted the examination in the presence of a court reporter. The insured, accompanied by his attorney, refused to answer any question that he had been asked during the preliminary interview, claiming that the interview had been a statement under oath. He based that assertion on his statement at the preliminary interview that he had answered those questions truthfully. After the sworn examination, the insurer requested, and was refused, interviews with the insured's spouse and teenagedchildren. The insurer then sent the insured a letter stating that it would deny the claim until the insured complied with the terms of the policy. The letter further stated that satisfaction of those terms was a prerequisite to any lawsuit against the insurer, and that it would be willing to review the claim if further information was provided. The insured failed to provide further information, and filed the action in state court two months later, alleging causes of action for breach of contract, breach of fiduciary duty, breach of the covenant of good faith and fair dealing, violation of *Ins. Code § 790.03*, and intentional and negligent infliction of emotional distress. The insurer removed the case to federal court, basing jurisdiction on diversity of citizenship. The district court granted the insurer's motion for dismissal for failure to state a claim, with regard to the causes of action for breach of fiduciary duty and negligent infliction of emotional distress. The district court then granted the insurer's motion for summary judgment, finding that:

(1) The insurance policy required the insured and members of his household to submit to examinations under oath on reasonable request by the insurer,

(2) The insured's spouse and children refused to submit to the examinations after reasonable requests,

(3) The insured refused to answer questions at the only examination of him that was conducted under oath,

(4) Even if the preliminary interview was under oath, the insurer's request for another interview was reasonable, and

(5) The requirement that the insured and his household members submit to statements under oath was a condition precedent to the insurer's duty to pay and, therefore, the insurer breached no duty to the insured by its refusal to pay his claim. The insured appealed.

The federal court of appeals affirmed, holding that under California law and the circumstances of the case, reasonableness was properly determined as a matter of law. The court of appeals noted that the only contention on appeal is that reasonableness is always a question of fact that precludes summary judgment. However, the insured cited no authority to support that contention, and the court noted that both California and federal courts have held that in certain circumstances reasonableness may be decided as a matter of law (citing, e.g., *Terry v. Atlantic Richfield Co. (1977) 72 Cal. App. 3d 962, 966-967, 140 Cal. Rptr. 510* (*868 F.2d 348, 350*)). The court concluded that reasonableness becomes a question of law appropriate for determination on motion for summary judgment when only one conclusion about the conduct's reasonableness is possible. The court found that the district court's determination that the insurer's actions were reasonable as a matter of law is supported by the record. The court noted that the insured made a claim to the insurer for over $10,000. The recordwas undisputed that the insured submitted no canceled checks,

receipts, or other documentation proving the existence or value of the items he alleged were stolen. The only substantiation the insurer was given to verify the claim was the insured's statement at the preliminary interview of what disappeared, and how much the missing items were worth. That statement did not constitute a statement under oath pursuant to *Code Civ. Proc. §§ 2093-2097*. The insurer scheduled an examination under oath because the insured failed to provide the documentation he said he would, and because the insurer felt that some of the information given was inconsistent. The court noted that the insured's assertion that the scheduled examination under oath was unreasonable is tantamount to a claim that insurance companies are always required to pay claims at their face value on the basis of a preliminary interview. Besides being patently illogical, this argument is controverted by the insurance policy in the instant case, and by California law (*citing Hickman v. London Assurance Corp. (1920) 184 Cal. 524, 529, 195 P. 45*).

Therefore, in view of the fact that the insured had not yet submitted to any statement under oath, and had not submitted any documentation, the insurer's request that he submit to a sworn examination was entirely reasonable. It was also reasonable for the insurer to request statements from the family members because of the lack of information provided by the insured (*868 F.2d 348, 351*). The court concluded that the district court was correct in determining that the insurer's requests were reasonable as a matter of law, noting that no reasonable jury could find that the insurer's requests for statements under oath were unreasonable (*868 F.2d 348, 351-352)* .

The factual background of ***Austero v. National Cas. Co.*** *(1978) 84 Cal. App. 3d 1, 148 Cal. Rptr. 653 , disapproved on other grounds, Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 824 n.7, 169 Cal. Rptr. 691, 620 P.2d 141* , is discussed in *§ 120.174[3][a]*. The court of appeal explained that in evaluating the evidence to see if there was any unreasonable conduct by the insurer, it is essential that no hindsight test be applied and that the reasonableness or unreasonableness of the action by the insurer must be measured as of the time the insurer was confronted with a factual situation to which it was called on to respond (*84 Cal. App. 3d 1, 32)* . The court then summarized the evidence (*84 Cal. App. 3d 1, 32-35)* and concluded that there was no evidence, not even an implication, that the company acted unreasonably in denying the claim (*84 Cal. App. 3d 1, 35)* . The court held, as a matter of law, that the insurer's conduct in handling plaintiff's claim was eminently reasonable and took into account equally and fairly both the interests of the insured and the insurer, and reversed the award of damages for emotional distress on this ground (*84 Cal. App. 3d 1, 35-36*). The court reversed the award of exemplary damages on the ground that there was no evidence whatsoever to support it (*84 Cal. App. 3d 1, 36)* .

[c] Insurer Is Not Liable For Negligent Handling of Claim

National Life & Accident Ins. Co. v. Edwards *(1981) 119 Cal. App. 3d 326, 174 Cal. Rptr. 31* , was an interpleader action by an insurer against the wife and against the aunt of its deceased insured to determine their respective rights in the proceeds of a life insurance policy purchased from plaintiff by the deceased. The policy was for $8,000 and contained a double indemnity provision should the insured die from injuries sustained in a vehicular accident if death resulted within 90 days of the injuries. The wife was the named beneficiary and paid all the premiums on the policy from its inception until October 1974, when, by the terms of the policy, premiums were waived because of the insured's total disability. During the same month, the insured sent a written request to the insurer that his aunt be named beneficiary. The insurer apparently conceded that the request had been received at its district office prior to the insured's death but was not received at the insurer's home office, as required by the policy, until after his death, which occurred some 17 months after the request was originally sent.

The insured and his wife had separated in October 1971, and did not thereafter live together. On March 2, 1974, the insured was involved in a motor vehicle accident and was rendered a quadriplegic. He died 751 days later on March 22, 1976. The parties stipulated that the disabling effects of the deceased's injuries were continuous until his death. The death certificate stated the cause of death as bilateral bronchopneumonia as a consequence of a spinal cord injury due to blunt force trauma.

The insurer paid into court the sum of $8,365.96 as the death benefit due on the insured's life. The wife and aunt each

cross complained against the insurer claiming additional payment under the double indemnity provision and each alleging a tort action against the insurer for bad faith and unfair dealing. They also stipulated that each would receive one half of all sums collected under the policy, including any monies collected under the double indemnity provision. The insurer's motion for summary judgment on the double indemnity issue was granted on the ground the deceased had not died within 90 days from the date he sustained his injuries, the trial court concluding as a matter of law that the "process of nature rule" (rule used in appropriate cases involving disability policies to defeat applicability of period specified in policy between injury and death) did not apply to life insurance policies. The insurer's motion on the tort causes of action after completion of opening statements for nonsuit was granted, and the wife and aunt appealed.

The court of appeal reversed the summary judgment on the double indemnity issue, holding that the trial court erred in concluding as a matter of law that the process of nature rule did not apply, that the rule would apply, and that it was a question of fact to be determined by the jury whether the deceased died solely as a result of the injuries he sustained in the vehicular accident (*119 Cal. App. 3d 326, 332-336*). The court, however, affirmed the judgments of nonsuit on the tort actions. The court pointed out that the cases that have dealt with the covenant of good faith and fair dealing have for the most part been cases involving the insurer's duty to accept reasonable settlement or duty not to unreasonably withhold payments due under the policy, although in one case the Supreme Court found a violation of fair dealing where the insurer adopted a course of conduct for the purpose of inducing subscribers to give up their rights to arbitration under the insurance contract (*119 Cal. App. 3d 326, 338-339)* . The court rejected the aunt's contentions that the inaction of the insurer regarding the request for change of beneficiaries was not an oversight but deliberate, based on the insurer's suspicions that she had unduly influenced the deceased and that the insurer was guilty of bad faith and unfair dealing in failing to investigate its suspicions or otherwise act when the request for change of beneficiary was received. The court held that while the failure of the insurer to take affirmative action in response to the request may have constituted negligent behavior, it was not shown to be unreasonable behavior as defined by the cases and did not constitute a violation of the covenant of fair dealing; no evidence was alluded to in the opening statement of either defendant which would support a finding of more than negligent conduct on the part of the insurer in failing to act (*119 Cal. App. 3d 326, 339)* .

The court also disagreed with the wife's contention that the insurer had an affirmative duty to resolve any conflict of claims as between beneficiaries at the time the request for change of beneficiary was received and that its refusal to pay her the policy benefits was a violation of its covenant of good faith and fair dealing. The court pointed out that the wife was the named beneficiary in the policy, that the insurer took no action to change her status, and that the wife had demonstrated no conduct on the insurer's part which would support her allegation of bad faith (*119 Cal. App. 3d 326, 339)* .

The court further held that a bad-faith action could not be predicated on the insurer's filing an interpleader unless there was a showing that the claims of the interpleading parties were not asserted in good faith, and that there was no such showing here (*119 Cal. App. 3d 326, 340)* .

[4] Additional Authorities

[a] Casualty Insurer Did Not Breach Covenant of Good Faith

In *Tomaselli v. Transamerica Ins. Co. (1994) 25 Cal. App. 4th 1269, 31 Cal. Rptr. 2d 433* , homeowners sued their insurance carrier for bad faith after the carrier denied their first-party casualty claim based on failure to file the action within one year following discovery of the damage. The carrier asserted that the insureds reasonably should have discovered damage to the foundation of their home more than one year before they filed suit. A trial jury awarded compensatory and punitive damages upon finding a breach of the implied covenant of good faith and fair dealing. The Court of Appeal found that sufficient evidence existed to support a jury finding that the handling and ultimate denial of the claim were unreasonable and in bad faith. However, the court reversed as to the punitive damages. The court held that although the evidence supported a finding that the carrier had been negligent, overzealous, legally incorrect, and

callous, no evidence existed of behavior that was evil, criminal, recklessly indifferent, or done with an intent to injure (*25 Cal. App. 4th 1269, 1286-1288)* .

In *McMillin Scripps N. P'ship v. Royal Ins. Co. (1993) 19 Cal. App. 4th 1215, 1220, 23 Cal. Rptr. 2d 243* , an insured under a first party property insurance policy sought recovery of the costs of investigating whether gasoline storage tanks on the property were leaking. The investigation ultimately revealed that leakage had occurred prior to the inception of the policy. The insurer failed to investigate whether the claim was covered, and the insured brought an action for breach of the covenant of good faith and other causes of action. The court of appeal affirmed the granting of the insurer's summary judgment, holding that there cannot be bad faith when there is no covered loss during the policy period, absent misrepresentation or conduct on the insurer's part that prevents the insured from protecting its interests (*19 Cal. App. 4th 1215, 1220)* . The court further held that there is no private right of action under *Ins. Code § 790.03(h)*, which requires prompt investigation of insurance claims (*19 Cal. App. 4th 1215, 1221-1222)* .

C & H Foods Co. v. Hartford Ins. Co. (1984) 163 Cal. App. 3d 1055, 211 Cal. Rptr. 765 , arose from several marine insurance policies purchased by plaintiffs from defendant to cover the shipment of pails of cured beef. The policies insured the beef against all risks of physical loss or damage from any external cause, but warranted free from any claims arising out of the inherent vice of the goods. After the beef arrived in a spoiled condition, plaintiffs sued for declaratory relief, bad faith, and refusal to pay benefits. The trial court sustained defendant's demurrers without leave to amend, and ordered dismissal of the causes of action. The court of appealaffirmed, holding that no cause of action for bad faith was stated. Since defective pails constituted an inherent vice of the goods themselves, and not damage from an external cause, and since the policy clearly excluded that type of damage, there was no coverage for the loss, and no bad faith in denying coverage on that ground (*163 Cal. App. 3d 1055, 1067)* .

Blake v. Aetna Life Ins. Co. (1979) 99 Cal. App. 3d 901, 160 Cal. Rptr. 528 , was an action by the widow of an insured against an insurance company to recover an accidental death benefit provided by the policy (first count) and for damages for emotional distress allegedly caused by the insurer's bad-faith failure to settle her claim (second count). The deceased had been insured under a group life insurance policy written for his employer. The policy provided for basic coverage of $10,000, which the insurer had promptly paid, and an equal amount for accidental death. By its own express terms, however, the policy placed on plaintiff the burden of proving that death was caused by accident and that it was not caused, contributed to, or a consequence of suicide or medical treatment. The coroner had been unable to determine whether death was an accident or suicide, although it was determined that the deceased had probably ingested a lethal dose of barbiturates. Plaintiff neither made any showing to the insurer to support her claim of accidental death, nor did she, her father (who had taken the bottle containing the barbiturates), or her attorney aid the insurer in its ongoing investigation to determine whether death was accidental.

Throughout this investigation, defendant remained willing to pay the claim on discovery of persuasive facts that death was accidental. The jury returned a verdict for plaintiff of $10,000 on the first count and $10,000 on the second count. Defendant's motion for judgment notwithstanding the verdict on the second count was denied. The court of appeal, after a detailed examination of the evidence, concluded that the insurer's contention that the evidence as a matter of law was insufficient to show that it acted unreasonably in its handling of the claim was irrefutable (*99 Cal. App. 3d 901, 921*). The court reversed the judgment on the second count with directions to the trial court to vacate its order denying the motion for judgment notwithstanding the verdict on that count, to grant the motion, and to enter judgment for the insurer on that count (*99 Cal. App. 3d 901, 926-927*). The court said that the gravamen of tortious behavior in so-called "bad faith" cases decided against insurance companies is found in the unreasonable conduct of the carrier measured against its duty arising under the implied covenant of good faith and fair dealing present in every insurance contract (*99 Cal. App. 3d 901, 918)* and held that, as a matter of law, there was no evidence that defendant acted unreasonably in withholding payment of the accidental death benefit claim (*99 Cal. App. 3d 901, 921, 926)* .

[b] Reasonableness Appears as Matter of Law

Strauss v. Farmers Ins. Exch. (1994) 26 Cal. App. 4th 1017, 31 Cal. Rptr. 2d 811 , involved an action by one driver against three individuals insured by the same carrier under a business liability policy. At one point the plaintiff offered to settle with the carrier for policy limits in exchange for a release of one (but not all) of the defendant insureds. The carrier refused to settle in this fashion. The plaintiff eventually settled with one of the defendants under his personal auto policy, and received an assignment of bad faith rights. He then sued the insurer for bad faith refusal to settle.

The court of appeal affirmed a trial court's grant of summary judgment. The court held that a carrier is under a duty to consider the interests of all its insureds. To settle a claim against less than all insureds would leave the nonsettling defendants functionally uninsured, in clear violation of those defendant's interests. Consequently, the court held that as a matter of law, it could not have been bad faith for the carrier to have refused to settle (*26 Cal. App. 4th 1017, 1021-1023)* . Since there was no triable issue of fact over whether the insurer's handling of the claim was reasonable, a grant of summary judgment was held appropriate (*26 Cal. App. 4th 1017, 1020, 1023)* .

In *Twaite v. Allstate Ins. Co. (1989) 216 Cal. App. 3d 239, 264 Cal. Rptr. 598* , the insured brought an action against the insurer alleging breach of the covenant of good faith and fair dealing, among other causes of action, based on the insurer's conduct with respect to a claim filed after the insured's vehicle was "totaled." The court of appeal affirmed summary judgment for defendant, holding that the insurer's conduct with regard to the claim was "exemplary" and did not constitute bad faith as a matter of law, when the insurer promptly offered to replace the vehicle with a mechanically superior vehicle, and, on the insured's rejection and request for cash, promptly tendered a draft in an amount that the insured did not dispute. The court rejected the insured's contention that the insurer breached a duty to inform the insured of his appraisal rights, because the issue of the cash value did not arise, given that the insured accepted tender of the draft without dispute (*216 Cal. App. 3d 239, 252-253)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBad Faith & Extracontractual LiabilityPayment Delays & DenialsInsurance LawClaims & ContractsGood Faith & Fair DealingGeneral OverviewInsurance LawClaims & ContractsGood Faith & Fair DealingPayments

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 120 INSURANCE
PART II. FORMS
C. Improper Claims Settlement Practices
1. General Defenses

12-120 California Points & Authorities § 120.175

§ 120.175 Claim Preempted by ERISA

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURED'S STATE LAW ACTION FOR BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING BASED ONHIS/HER ASSERTION OF AN IMPROPERLY PROCESSED CLAIM FOR BENEFITS UNDER AN EMPLOYEE BENEFIT PLAN, IS PREEMPTED BY FEDERAL LAW UNDER ERISA.

ERISA Preempts Insured's State Law Claim. An action brought under state law, asserting the improper processing of a claim for benefits under an employee benefit plan subject to the Employee Retirement Income Security Act of 1974, set forth in Title *29, United States Code, Section 1001 et seq.*, is preempted by federal law (*Pilot Life Ins. Co. v. Dedeaux (1987) 481 U.S. 41, 57, 107 S. Ct. 1549, 95 L. Ed. 2d 39, 54* ; *Metropolitan Life Ins. Co. v. Taylor (1987) 481 U.S. 58, 62, 107 S. Ct. 1542, 95 L. Ed. 2d 55, 62)* .

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention of an insurer, in a bad faith action by its insured arising out of an insurance policy under an employee benefits plan subject to regulation by the Employee Retirement Income Security Act of 1974 (*29 U.S.C.S. § 1001 et seq.*), that the state-law action is preempted by federal law.

This form may be used by an insurer in various procedural contexts, such as in memoranda supporting or opposing a motion for summary judgment, in a trial brief, or in an appellate brief.

For references to related Pleading and Practice chapters, see *§ 120.170[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should discuss facts showing that the insurance policy is part of an employee benefits plan that is subject to ERISA, and that the state law is not excepted from preemption under the ERISA savings clause [*see, e.g., Pilot Life Ins. Co. v. Dedeaux (1987) 481 U.S. 41, 57, 107 S. Ct. 1549, 95 L. Ed. 2d 39, 54]* . Note that the decision in *Pilot Life* is fully retroactive in effect, based on the unsettled nature of the law prior to the decision and a plaintiff's consequent inability to reasonably rely on prior law [*Faria v. Northwestern Nat'l Life Ins. Co. (1989) 216 Cal. App. 3d 1129, 1134, 265 Cal. Rptr. 309]* .

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.170* et seq.) and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be a motion by an insurer for summary judgment or opposition tosuch a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that there is no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts supporting the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[d] Opposing Points and Authorities

The points and *authorities in § 120.186* et seq., may be used in an appropriate case to oppose these points and authorities.

[3] Discussion of Authorities

[a] ERISA Preempts Insured's State Law Claim

In ***Pilot Life Ins. Co. v. Dedeaux*** *(1987) 481 U.S. 41, 107 S. Ct. 1549, 95 L. Ed. 2d 39* , the insured injured his back in an employment-related accident, and applied for benefits under a long term disability employee benefit plan, which was established by the employer's purchase of a group insurance policy from the insurer. The insurer allowed the claim, but terminated benefits after two years, and in succeeding years reinstated and terminated them several times. The insured instituted a diversity action against the insurer, alleging tortious breach of contract, breach of fiduciary duties, and fraud in the inducement, seeking to recover policy benefits, general and incidental damages, and punitive damages under Mississippi law. After discovery, defendant moved for summary judgment on theground that the Employee Retirement

Income Security Act of 1974 (*29 U.S.C.S. § 1001 et seq.*) preempted plaintiff's common law claim for failure to pay benefits on the group insurance policy. The district court granted the motion, and plaintiff appealed. The court of appeals reversed, primarily on the basis of the United States Supreme Court's decision in *Metropolitan Life Ins. Co. v. Massachusetts (1985) 471 U.S. 724, 105 S. Ct. 2380, 85 L. Ed. 2d 728* , which held that the state law "regulated insurance" and was therefore saved from preemption, pursuant to the ERISA saving clause provision. Defendant brought a petition for writ of certiorari.

The United States Supreme Court granted certiorari, and reversed the decision of the court of appeals, holding that an action brought under state law that asserts improper processing of a claim for benefits under an employee benefit plan subject to the Employee Retirement Income Security Act of 1974 (*29 U.S.C.S. § 1001 et seq.*) is preempted by federal law (*481 U.S. 41*). The Supreme Court noted that three ERISA provisions relate to preemption: the preemption clause (*29 U.S.C.S. § 1144(a)*), the savings clause (*29 U.S.C.S. § 1144(b)(2)(A)*) and the deemer clause (*29 U.S.C.S. § 1144(b)(2)(B)*). The Supreme Court summarized the mechanics of those provisions as follows:

> (1) If a state law "relates to employee benefit plans," it is preempted.
>
> (2) The savings clause excepts from the preemption clause laws that "regulate insurance."
>
> (3) The deemer clause makes clear that a state law that "purports to regulate insurance" cannot deem an employee benefit plan to be an insurance company.

A common-sense understanding of the phrase "regulates insurance" could not support the argument that the Mississippi law of bad faith fell under the savings clause. Any breach of contract, and not merely breach of an insurance contract, may lead to liability for punitive damages under the state law. Therefore, even though the Mississippi Supreme Court had identified its bad faith law with the insurance industry, the roots of the law were firmly planted in the general principles of Mississippi tort and contract law (*481 U.S. 41, 45-51)* .

The Supreme Court also applied case law interpreting the phrase "business of insurance" under the McCarran-Ferguson Act (*15 U.S.C.S. § 1011 et seq.*), which concerns regulation and taxation of the business of insurance (*see 15 U.S.C.S. § 1011*). Three criteria have been used to determine whether a practice falls under the "business of insurance" for purposes of the act:

> (1) Whether the practice has the effect of transferring or spreading a policyholder's risk;
>
> (2) Whether the practice is an integral part of the policy relationship between the insurer and the insured; and
>
> (3) Whether the practice is limited to entities within the insurance industry.

McCarran-Ferguson Act factors did not support the assertion that the Mississippi law of bad faith "regulates insurance." Unlike the mandated-benefits law at issue in *Metropolitan Life Ins. Co. v. Massachusetts (1985) 471 U.S. 724, 105 S. Ct. 2380, 85 L. Ed. 2d 728* , the Mississippi common law of bad faith did not effect a spreading of policy-holder risk. Although the state common law of bad faith may be said to concern "the policy relationship between the insurer and the insured," the connection to the insurer-insured relationship was attenuated at best, and the common law of bad faith did not define the terms of the relationship between the insurer and insured. It declared only that, whatever terms have been agreed on in the insurance contract, a breach of that contract may in certain circumstances allow the policy-holder to obtain punitive damages.

Therefore, the state common law of bad faith was no more "integral" to the insurer-insured relationship than any state's general contract law is integral to a contract made in that state. Mississippi's law of bad faith, even if associated with the

insurance industry, developed from general principles of tort and contract law available in any Mississippi breach of contract case (*481 U.S. 41, 50-51*). The question whether a certain state action is preempted by federal law is one of congressional intent, and express provisions of ERISA are deliberately expansive, and designed to establish pension plan regulation as exclusively a federal concern (*481 U.S. 41, 44-46*). Moreover, Congress clearly intended that the civil enforcement provisions under ERISA (*29 U.S.C.S. § 1132(a)*) be the exclusive vehicle for actions by ERISA-plan participants and beneficiaries asserting the improper processing of a claim for benefits, and that allowing state causes of action for claims within the scope of the civil enforcement provision would pose an obstacle to the purposes and objectives of Congress (*481 U.S. 41, 51-57)* .

In ***Metropolitan Life Ins. Co. v. Taylor*** *(1987) 481 U.S. 58, 107 S. Ct. 1542, 95 L. Ed. 2d 55* , the insured's employer, a corporation, set up an employee benefit plan, subject to the provisions of ERISA, for its salaried employees. The plan paid benefits to salaried employees disabled by sickness or accident and was insured by defendant insurer. The insured received disability benefits under the terms of the plan, until the insurer's and employer's physicians determined that he was no longer disabled, at which time his benefits were terminated. When the insured refused to return to work, the employer terminated his employment. The insured then sued the employer and the insurer in Michigan state court, asserting improper processing of the claim, wrongful termination of employment, and retaliation for filing a workers' compensation claim. Defendants removed the action to federal court, alleging federal question jurisdiction over the disability benefits claim pursuant to ERISA, and pendent jurisdictionover the remaining claims. The district court found the case properly removable and granted defendants summary judgment on the merits. The federal court of appeals reversed, on the ground that the district court lacked removal jurisdiction, because the insured's complaint stated only state law causes of action subject to the federal defense of ERISA preemption, and removal was precluded if based only on a federal defense.

The United States Supreme Court granted certiorari, and reversed the decision of the court of appeals, holding that, under its decision in *Pilot Life Ins. Co. v. Dedeaux (1987) 481 U.S. 41, 107 S. Ct. 1549, 95 L. Ed. 2d 39* , plaintiff's common law contract and tort claims were preempted by ERISA. The action related to an employee benefit plan, pursuant to *29 U.S.C.S. § 1144(a)*. The action was based on common law of general application, not a law regulating insurance, and consequently was preempted, and not saved by the ERISA savings clause. Moreover, as a suit by a beneficiary to recover benefits from a covered plan, it was an exclusively federal cause of action (*481 U.S. 41, 56-57)* . The Supreme Court discussed whether a cause of action is removable if the complaint purports to raise only state law causes of action, and only the defense arises under federal law. It concluded that the federal district court's removal jurisdiction depends not on the obviousness of the preemption defense, but rather on congressional intent. Insofar as the action was necessarily federal in character under the clearly manifested intent of Congress, it was removable to federal court (*481 U.S. 58, 63-67)* .

[4] Additional Authorities

[a] ERISA Preempts Insured's State Law Claim

In *Peterson v. American Life & Health Ins. Co. (9th Cir. 1995) 48 F.3d 404* , the insured's firm, consisting of the insured, his business partner, and their employee, took out a short-term group policy to provide coverage while they secured a long-term policy with another insurer. The other partner and employee subsequently moved their coverage to a long term insurer, but the insured did not do so because he did not pass a required medical exam. He then underwent emergency quintuple coronary bypass surgery. The insurer claimed that expenses related to this procedure were excluded from the plan. The insured filed a complaint against the insurer in California state court alleging various state law claims. The insurer moved to dismiss on the ground that the state law claims were preempted by ERISA.

The court held that the plan was covered by ERISA because it had been established by an employer for the purpose of proving medical insurance for its participants and employees, and the employee was still being provided with such insurance, albeit under another policy. The insured therefore had standing to bring an ERISA action because he was a

persondesignated to receive benefits from an ERISA plan (*48 F.3d 404, 408-409)* . Because he had standing to bring an ERISA action, the insured's state-law claims were preempted by ERISA (*48 F.3d 404, 412)* . He could not use *Ins. Code § 12921.5(b)(7)* to require the insurer to provide coverage for costs associated with the particular condition he suffered because this would "reform the nature of his policy and obtain benefits for which he never bargained" (*48 F.3d 404, 410)* .

In *Qualls v. Blue Cross of Cal. (9th Cir. 1994) 22 F.3d 839* , an insured was covered under a small group health policy. After electrocution by a faulty electric fan, he lapsed into a coma and suffered permanent brain damage. The insured, through his guardian ad litem, filed an action to enforce his rights under the policy. Among the causes of action were state law claims. The district court granted summary judgment in favor of the insurer holding, among other things, that the state law claims were preempted by ERISA because the policy was a "plan" for ERISA purposes. The Ninth Circuit agreed. The individual policy was subject to employer contributions, and coverage was free and automatic for all full time employees. This was sufficient to bring the policy within ERISA (*22 F.3d 839, 843-844)* . Moreover, the fact that the insured was no longer employed by the employer was irrelevant. If the policy was governed by ERISA during the insured's employment, it continued to be governed by ERISA once he left (*22 F.3d 839, 843 n.4*).

In *Spain v. Aetna Life Ins. Co. (9th Cir. 1993) 11 F.3d 129* , the wife and daughter of an employee benefit plan participant sued the plan administrator for the wrongful death of the participant. After the participant was diagnosed with cancer, the plan administrator first denied coverage for a bone marrow transplant, then later approved the procedure. The participant died in spite of receiving the transplant, and his wife and daughter sued for common law wrongful death arising out of negligent administration of the plan, alleging that the initial denial of the procedure led to the participant's death. Stating that ERISA's preemption clause is deliberately expansive, and following *Pilot Life Ins. Co v. Dedeaux, 481 U.S. 41, 45-46* , the Ninth Circuit affirmed that the state common law action was preempted by federal law because, even though no benefits were sought under the plan, the claim arose from the negligent administration of benefits claims (*11 F.3d 129, 131-132*).

In *Kanne v. Connecticut Gen. Life Ins. Co. (9th Cir. 1988) 867 F.2d 489* , an insured under a group health insurance policy, which he purchased through his employer, sued his insurer for breach of contract, breach of the duty of good faith and fair dealing, and violation of *Ins. Code § 790.03(h)(3)* (before the effective date of *Moradi-Shalal v. Fireman's Fund Ins. Cos. (1988) 46 Cal. 3d 287, 297-305, 250 Cal. Rptr. 116, 758 P.2d 58* , discussed in *§ 120.230*, which prospectively abrogated a privatestatutory cause of action under that section). The district court awarded compensatory and punitive damages, but the Ninth Circuit reversed, holding that under the Supreme Court's holdings in *Pilot Life Ins. Co. v. Dedeaux (1987) 481 U.S. 41, 107 S. Ct. 1549, 95 L. Ed. 2d 39* , and *Metropolitan Life Ins. Co. v. Taylor (1987) 481 U.S. 58, 107 S. Ct. 1542, 95 L. Ed. 2d 55* , the insured's state common-law claims arising out of delay in payment were claims for improper processing and therefore were preempted by ERISA (*867 F.2d 489, 491-493)* . The Ninth Circuit also held the statutory claim under *Ins. Code § 790.03(h)(3)* preempted under *Pilot Life* (*867 F.2d 489, 493-494)* .

In *Hughes v. Blue Cross of N. Cal. (1989) 215 Cal. App. 3d 832, 263 Cal. Rptr. 850* (in which opening appellate briefs were filed prior to the decision in *Pilot Life Ins. Co. v. Dedeaux (1987) 481 U.S. 41, 107 S. Ct. 1549, 95 L. Ed. 2d 39*), the defendant insurer raised the issue of preemption by ERISA for the first time on appeal. The court of appeal noted that although a question of federal subject-matter jurisdiction involves a choice of forum, and is a nonwaivable issue, the case before it did not involve subject-matter jurisdiction. Subject-matter jurisdiction questions arise when federal courts have exclusive jurisdiction, for example, in bankruptcy and patent law. Inasmuch as this case concerned concurrent state and federal jurisdiction, based on the denial of a claim for benefits under a group insurance policy, it presented a question of choice of law, a waivable issue at trial, rather than choice of forum. After weighing the circumstances of the case, including the insured's lack of an opportunity to refute an ERISA defense at trial, the court of appeal concluded that the insurer had waived that issue at trial, and also refused to remand the matter for a hearing on that issue, noting an absence of precedent to remand a case for further hearing to determine the possible application of a new legal theory not raised in the trial court (*215 Cal. App. 3d 832, 849-859)* .

In *Lambert v. Pacific Mut. Life Ins. Co. (1989) 211 Cal. App. 3d 456, 259 Cal. Rptr. 398* , an insured under a group insurance plan secured by his stepfather's employer brought an action against the insurer stating causes of action for common-law bad faith and violation of *Ins. Code § 790.03(h)*, arising from the denial of insurance benefits. The trial court granted defendant's motion for summary judgment on the ground that the action was preempted by ERISA. The court of appeal affirmed, rejecting plaintiff's contention that triable issues of fact existed regarding whether the group insurance plan was an employee welfare benefit plan under *29 U.S.C.S. § 1002(1)*, and holding that factors such as the employer's payment of policy premiums and other involvement, and its administration of the plan, demonstrated the existence of an ERISA plan as a matter of law (*211 Cal. App. 3d 456, 463-465)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBad Faith & Extracontractual LiabilityGeneral OverviewInsurance LawClaims & ContractsGood Faith & Fair DealingGeneral OverviewInsurance LawDisability InsuranceGeneral OverviewPensions & Benefits LawEmployee Retirement Income Security Act (ERISA)General OverviewPensions & Benefits LawEmployee Retirement Income Security Act (ERISA)Federal PreemptionGeneral Overview

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 120 INSURANCE
PART II. FORMS
C. Improper Claims Settlement Practices
1. General Defenses

12-120 California Points & Authorities § 120.176

§ 120.176 Insurer Did Not Breach Covenant By Failing to Investigate Loss That Was Not Covered

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER DID NOT BREACH THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING WHEN IT ALLEGEDLY FAILED TO INVESTIGATE A FIRST-PARTY CLAIM, BECAUSE AT NO TIME DID THE POLICY COVER THE CLAIM.

Insurer Did Not Breach Covenant By Failing to Investigate Loss That Was Not Covered. In the context of first-party claims, the insurer's duty to investigate is an auxiliary duty that arises as a consequence of the insurer's primary duty to promptly indemnify a covered loss. When this primary duty is absent, such as when there is no coverage, the auxiliary duty to investigate is likewise absent (*McMillin Scripps N. P'ship v. Royal Ins. Co. (1993) 19 Cal. App. 4th 1215, 1222, 23 Cal. Rptr. 2d 243, 247* ; *Love v. Fire Ins. Exch. (1990) 221 Cal. App. 3d 1136, 1153, 271 Cal. Rptr. 246, 256)* .

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention by an insurer that the insurer is not liable for breach of the implied covenant of good faith. The basis for these points and authorities is that an insurer's alleged failure to adequately investigate the insured's claim, when the insurer contends that the claim ultimately was found to be outside policy.

These points and authorities may be submitted in a first-party bad faith action based in whole or in part on an insurer's alleged failure to adequately investigate the insured's claim, when the insurer contends that the claim ultimately was found to be outside policy.

This form may be used by an insurer in various procedural contexts, such as in memoranda supporting or opposing a motion for summary judgment, in a trial brief, or in an appellate brief.

For references to related Pleading and Practice chapters, see *§ 120.170[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should refer to facts to demonstrate that the policy does not provide coverage for the insured's claim. If the insurer is moving for summary judgment, to establish that the claim was not covered, the moving party should attach a copy of the policy as an exhibit to the moving papers, along with any other relevant materials, such as a judgment for the insurer in a prior action on the claim.

This form should be used only in connection with a first-party claim--that is, a claim by an insured against the insurer arising out of injuries or damages suffered directly by the insured. Typically, first-party claims arise under property and casualty insurance policies or health insurance policies.

These points and authorities should never be used in connection with a third-party claim--that is, a claim under a liability insurance policy arising out of damages to the person or property of another caused by the insured. As discussed in *§ 120.176[3][a]*, the nature of liability policies completely differs, in that the terms of the policies typically require the insurer to defend (and therefore investigate) even false, groundless, or fraudulent claims against the insured. Thus, in the third party contest the insurer often has a duty to investigate a claim even when the claim ultimately proves groundless, and the issues raised in this form therefore have no application.

Counsel should also bear in mind that when coverage does in fact exist, the failure to investigate a claim may properly form the basis for a bad faith complaint. When coverage does exist, the insurer has a duty to pay the insured's claim promptly, and the lack of proper investigation is relevant to the issue of the insurer's bad faith [*McMillin Scripps N. P'ship v. Royal Ins. Co. (1993) 19 Cal. App. 4th 1215, 1222* ; *23 Cal. Rptr. 2d 243, 247* ; *see also Opsal v. United Services Auto. Assn. (1991) 2 Cal. App. 4th 1197, 1205, 10 Cal. Rptr. 2d 352* (refusal to pay benefits must be unreasonable)].

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.170* et seq.) and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be a motion by an insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that there is no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts supporting the motion. The statement must be supportedby cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[d] Opposing Points and Authorities

The points and *authorities in § 120.186* et seq., may be used in an appropriate case to oppose these points and authorities.

[3] Discussion of Authorities

[a] Insurer Did Not Breach Covenant By Failing to Investigate Loss That Was Not Covered

In ***McMillin Scripps N. P'ship v. Royal Ins. Co.*** *(1993) 19 Cal. App. 4th 1215, 23 Cal. Rptr. 2d 243* , a property owner incurred significant investigation costs to determine the source of leaking gasoline on his property. Ultimately, it was determined that his insurance did not cover this type of loss. Nevertheless, he sued his property insurance carrier, alleging that the insurer breached the insurance contract by failing to pay for the investigation costs. The trial court granted summary judgment in favor of the carrier.

The Court of Appeal affirmed, predicating its holding on several grounds. First, the policy did not expressly provide for recoupment of investigative costs if coverage was found to be nonexistent (*19 Cal. App. 4th 1215, 1220)* . Second, the court found no basis for any implied right to payment of investigation costs. While courts are free to find implied rights in contracts, those rights must be closely connected to the express provisions of the contract (*19 Cal. App. 4th 1215, 1220)* . In this case, the insurance policypromised only to pay for enumerated casualty losses (*19 Cal. App. 4th 1215, 1220)* . In contrast, a liability policy provides "radically different" benefits; typically, it requires an insurer to defend any suit against the insured, regardless of whether the suit is groundless, false, or fraudulent. From this express duty to defend, courts have implied a duty to provide a defense whenever the insurer's investigation discloses a potentially covered claim (*19 Cal. App. 4th 1215, 1220-1221* , citing *Gray v. Zurich Ins. Co. (1966) 65 Cal. 2d 263, 267, 54 Cal. Rptr. 104, 419 P.2d 168*). The court concluded that the "sharp differences between first and third party polic[i]es" prevented it from creating any new implied right to payment for investigation costs in first-party policies. Such a right would, in effect, give first party policies a fundamental characteristic of liability policies: payment not only for covered casualties, but also for the cost of resolving a dispute (*19 Cal. App. 4th 1215, 1221)* .

Moreover, the court concluded that failure to investigate the claim did not amount to a breach of the contract of good faith and fair dealing. Relying on *Love v. Fire Ins. Exch. (1990) 221 Cal. App. 3d 1136, 1153, 271 Cal. Rptr. 246, 256* , the court concluded that the covenant is implied as a "supplement" to the express contractual covenants to prevent a party from engaging in conduct that frustrates the other party's primary right to benefits under the contract. Absent such a right, however, the court concluded that the "auxiliary" implied covenant "nothing upon which to act as a supplement, and should not be endowed with an existence independent of its contractual underpinnings" (*19 Cal. App. 4th 1215, 1222)* .

The court did suggest, however, that under unusual circumstances an insurer might still be liable for tortious bad faith despite the fact that the policy did not provide coverage. For instance, an intentional course of conduct designed to impede the insured's claim and mislead the insured as to the available coverage might amount to bad faith in any event (*19 Cal. App. 4th 1215, 1222-1223* citing out-of-state authority). The court noted that while *Ins. Code § 790.03(h)(3)* does require prompt investigation of all claims, that statute does not create any private right of action and cannot be privately enforced by the insured (*19 Cal. App. 4th 1215, 1221-1222* , citing *Moradi-Shalal v. Fireman's Fund Ins.*

Cos. (1988) 46 Cal. 3d 287, 307, 250 Cal. Rptr. 116, 758 P.2d 58).

In ***Love v. Fire Ins. Exch.*** *(1990) 221 Cal. App. 3d 1136, 271 Cal. Rptr. 246* , an insured submitted a claim that was denied. Five years later the claim was resubmitted, and again denied. A first-party bad faith action was filed, based on breach of the implied covenant of good faith and fair dealing. One of the alleged bases for breach of the covenant was a failure to investigate. The trial court granted summary judgment dismissing the case.

The Court of Appeal affirmed. It held that the second claim was not filed in a timely fashion, so no benefits were due under the policy. The duty to investigate was only ancillary to the primary duty to pay benefits. Since the primary duty did not exist, the duty to investigate was likewise nonexistent (*221 Cal. App. 3d 1136, 1153)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBad Faith & Extracontractual LiabilityGeneral OverviewInsurance LawClaims & ContractsGood Faith & Fair DealingGeneral OverviewInsurance LawClaims & ContractsPolicy InterpretationGeneral Overview

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 120 INSURANCE
PART II. FORMS
C. Improper Claims Settlement Practices
1. General Defenses

12-120 California Points & Authorities § 120.177

§ 120.177 Insurer's Precontractual Conduct Does Not Support Bad Faith Claim

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER DID NOT BREACH THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING, BECAUSE ALLEGED CONDUCT OF INSURER OCCURRED BEFORE THE CONTRACT WAS FORMED.

Insurer's Precontractual Conduct Not Actionable. Precontractual conduct cannot support a cause of action for breach of the implied covenant of good faith and fair dealing (*Hess v. Transamerica Occidental Life Ins. Co. (1987) 190 Cal. App. 3d 941, 945, 235 Cal. Rptr. 715*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention by an insurer that the insurer is not liable for breach of the implied covenant of good faith. The basis for these points and authorities is that the alleged conduct occurred prior to the formation of the insurance contract.

This form may be used by an insurer in various procedural contexts, such as in memoranda supporting or opposing a motion for summary judgment, in a trial brief, or in an appellate brief.

For references to related Pleading and Practice chapters, see *§ 120.170[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel

should set forth the effective date of the insurance contract, and show that the insurer's conduct occurred prior to that date.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.170* et seq.) and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be a motion by a defendant insurer for summary judgment or opposition to such a motion by a plaintiff insured, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that there is no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts supporting the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[d] Opposing Points and Authorities

The points and *authorities in § 120.186* et seq., may be used in an appropriate case to oppose these points and authorities.

[3] Discussion of Authorities

[a] Insurer's Precontractual Conduct Not Actionable

In ***Hess v. Transamerica Occidental Life Ins. Co.*** *(1987) 190 Cal. App. 3d 941, 235 Cal. Rptr. 715* , an individual sought "key person" coverage from defendant's predecessor insurance company as a condition for loan approval on behalf of a company of which she was the sole shareholder, chief executive officer, and chairperson of the board. After examining her,the insurer's doctor discovered that she had higher than normal blood pressure. The insurer then agreed to issue the policy only on the condition that she and the company (plaintiffs) pay additional monthly premiums. Several years later, at plaintiffs' urging, the insurer reviewed her condition, and lowered the premium payment. Plaintiffs then brought an action against the successor insurance company, seeking reformation of the contract and return of excess premium payments, as well as damages for breach of its duty of good faith. The trial court sustained defendant's demurrer without leave to amend, and plaintiffs appealed.

The court of appeal affirmed, holding that a bad-faith action does not arise prior to the existence of a contractual relationship between the contracting parties (*190 Cal. App. 3d 941, 945)* . The court rejected plaintiffs' argument that defendant had a duty of good faith and fair dealing during the period prior to the inception of the contract (*190 Cal.*

App. 3d 941, 944-945) . An insured's initial decision to obtain insurance and the corresponding decision of an insurer to offer coverage remain, at least at the inception of the contract, an arm's length transaction governed by traditional standards of freedom of contract. Consequently, precontractual conduct in evaluating the health of an applicant for insurance is not conduct that will support a cause of action for bad faith, although that conduct may be actionable under theories of fraud or fraudulent inducement (*190 Cal. App. 3d 941, 945)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBad Faith & Extracontractual LiabilityGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilityElements of Bad FaithInsurance LawClaims & ContractsGood Faith & Fair DealingGeneral Overview

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 120 INSURANCE
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C. Improper Claims Settlement Practices
1. General Defenses

12-120 California Points & Authorities § 120.178

§ 120.178 "Bad Faith" Action Is Actually Fire Policy Action Barred by Statute of Limitations

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURED'S CLAIM IS BARRED BY INSURANCE CODE SECTION 2071, BECAUSE THE ACTION IS A "TRANSPARENT ATTEMPT TO RECOVER ON THE POLICY" AND INSURED FAILED TO COMMENCE SUIT WITHIN ONE YEAR OF ACCRUAL.

A. Insured's Claim Is Barred by Statute of Limitations. No suit or action on a fire insurance policy for the recovery of any claim is sustainable in any court of law or equity unless all the requirements of the policy have been complied with, and unless commenced within 12 months next after inception of the loss (*Ins. Code § 2071*; *Prieto v. State Farm Fire & Cas. Co. (1990) 225 Cal. App. 3d 1188, 1192, 275 Cal. Rptr. 362*).

B. So-Called "Bad-Faith Claim" Is Essentially Claim on Fire Insurance Policy. In actions involving a fire insurance policy, the12-month limitation period of *Insurance Code Section 2071* governs a bad-faith claim as well as a contractual claim based on failure to pay benefits under the policy, when the bad-faith claim is, in essence, an action on the policy, and an attempt to recover policy benefits (*Prieto v. State Farm Fire & Casualty Co. (1990) 225 Cal. App. 3d 1188, 1192-1196, 275 Cal. Rptr. 362*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention by an insurer that the insurer is not liable for breach of the implied covenant of good faith. The basis for these points and authorities is that the claim denominated as a bad faith claim is actually a claim on the fire insurance policy, and is therefore subject to the one-year statute of limitations of *Ins. Code § 2071*.

This form may be used by an insurer in various procedural contexts, such as in memoranda supporting a general demurrer to a complaint, in a memoranda supporting or opposing a motion for summary judgment, in a trial brief, or in an appellate brief.

For references to related Pleading and Practice chapters, see *§ 120.170[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. For example, if appropriate, counsel should show that plaintiff failed to file a breach-of-contract action to recover benefits under the policy within the statutory 12-month limitation period, and is actually attempting to circumvent the statute by relabelling a contract cause of action as a bad-faith claim [*see, e.g., Abari v. State Farm Fire & Casualty Co. (1988) 205 Cal. App. 3d 530, 536, 252 Cal. Rptr. 565* (causes of action for bad faith and unfair practices sought damages in amount equal to policy benefits plus interest)].

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.170* et seq.) and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be a motion by an insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that there is no triable issue as to any material fact [*see* Code Civ. Proc.§ 437c]. Counsel would need to submit a separate statement of undisputed material facts supporting the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[d] Opposing Points and Authorities

The points and authorities in § 120.189 may be used in an appropriate case to oppose these points and authorities.

[3] Discussion of Authorities

[a] Insured's Claim Is Barred by Statute of Limitations

The factual and procedural background of ***Prieto v. State Farm Fire & Cas. Co.*** *(1990) 225 Cal. App. 3d 1188, 275 Cal. Rptr. 362* , is discussed in *§ 120.178[3][b]*. The court noted that *Ins. Code § 2071* prescribes as part of the standard

form for fire insurance policies in California the following limitation of action: "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within 12 months next after inception of the loss" (*225 Cal. App. 3d 1188, 1192)* . However, the court also stated that the rules of flexible accrual and equitable tolling set forth in *Prudential-LMI Commercial Ins. v. Superior Court (1990) 51 Cal. 3d 674, 274 Cal. Rptr. 387, 798 P.2d 1230* provides policyholders under *Ins. Code § 2071* with protections similar to those granted under the common law by the case of *Frazier v. Metropolitan Life Ins. Co. (1985) 169 Cal. App. 3d 90, 103, 214 Cal. Rptr. 883* . Therefore, an insured who makes a timely claim willhave a right to wait until denial of the claim before the statute begins running again, but the statute will have commenced running, as its terms require, on inception of the loss. The court in Prieto therefore concluded that plaintiff's bad-faith cause of action based on failure to pay benefits, and the emotional distress cause, are governed by the one-year limitation prescribed by *Ins. Code § 2071* for actions on the policy. However, the court reversed the order of dismissal for further determination, as required under Prudential, regarding application of its notification rules to the facts: specifically, whether plaintiffs gave notice immediately after the loss as required (*225 Cal. App. 3d 1188, 1196-1197*).

[b] So-Called "Bad-Faith Claim" Is Essentially Claim on Fire Insurance Policy

In ***Prieto v. State Farm Fire & Cas. Co.*** *(1990) 225 Cal. App. 3d 1188, 275 Cal. Rptr. 362* , the insureds under a fire insurance policy brought an action against the insurer primarily for breach of the implied covenant of good faith and fair dealing. After a fire destroyed the business insured under the policy, plaintiffs demanded benefits under it. The insurer ultimately mailed plaintiffs a letter refusing to pay any sums under the policy, on the sole ground that they suspected the plaintiffs set the fire intentionally. Plaintiffs filed suit almost one year later, alleging that despite its actual or constructive knowledge that the fire was accidental, the insurer refused to pay any benefits or sums under the policy, in violation of the implied covenant of good faith and fair dealing. Plaintiffs claimed losses including indebtedness, loss of business income, and emotional distress; and sought punitive damages. Plaintiffs also stated a cause of action for intentional infliction of emotional distress against the insurer as well as the company that investigated the claim, based on the same facts, and again sought punitive damages. Both defendants demurred generally to the complaint. The insurer's demurrer was based primarily on the one-year limitation period for actions on fire insurance policies, prescribed by *Ins. Code § 2071*. The trial court sustained the demurrer without leave to amend, and dismissed. Plaintiffs appealed.

The court of appeal agreed that the action was barred by *Ins. Code § 2071*, but reversed with directions to grant plaintiffs leave to amend to establish, if possible, that the action was in fact filed within the one-year limitation period (*225 Cal. App. 3d 1188, 1196-1197)* . The court stated that the primary issue on appeal is whether the provision applies to plaintiffs' bad faith and emotional distress causes of action, which were commenced more than 12 months after the fire that initiated plaintiffs' loss. Defendants cited several cases strongly indicating that plaintiffs' claims were "on the policy" and hence covered by the statute. In *Lawrence v. Western Mut. Ins. Co. (1988) 204 Cal. App. 3d 565, 571-573, 575, 251 Cal. Rptr. 319* , the court of appeal held that "inception of the loss"occurs at the time of the damage or of its discovery, not when plaintiff later becomes aware of his or her legal rights. Therefore, it held that plaintiff's claim for recovery under the policy was time-barred. It also held that the additional tortious bad-faith claim, alleging misrepresentations in the policy, was barred as well because it related to the "complete denial of the claim on the underlying policy" and was "fundamentally a claim on the policy" (*225 Cal. App. 3d 1188, 1192-1193)* . In *Abari v. State Farm Fire & Cas. Co. (1988) 205 Cal. App. 3d 530, 536, 252 Cal. Rptr. 565* , the court of appeal affirmed a demurrer based on the limitation under *Ins. Code § 2071* when the facts showed the loss occurred and was discovered well more than a year before the suit. The court also held that plaintiff's concurrent causes of action for bad faith and unfair insurance practices were as vulnerable under the limitation as the breach of contract claim. The court in *Abari* rejected plaintiff's argument that the cause of action were not "on the policy," because plaintiff sought by them to recover essentially the same damages; it stated that the bad faith and related claims were "a transparent attempt to recover on the policy." In addition, the court in *Magnolia Square Homeowners Assn. v. Safeco Ins. Co. (1990) 221 Cal. App. 3d 1049, 1063, 271 Cal. Rptr. 1* , affirmed a declaratory judgment that an insurer had no duty to indemnify

because the limitation under *Ins. Code § 2071* had expired before suit. The court in *Magnolia* also affirmed dismissal of the insured's cross complaint for bad faith and breach of fiduciary and statutory duties, because "the essence of those claims is an attempt to recover damages for failure to provide benefits under subject contract of insurance."

The court in the instant case rejected plaintiff's reliance on one case involving a fire insurance policy, in which an insured's claims for bad faith, intentional infliction of emotional distress, and fraud were held not subject to the limitation period under the statute [*see Murphy v. Allstate Ins. Co. (1978) 83 Cal. App. 3d 38, 49, 147 Cal. Rptr. 565]* . That case was held to be distinguishable, factually and legally, because the alleged breaches of covenant derived from activities that occurred long after the fire loss and related to the repair and restoration of the insureds' home. Although the claims arose out of the contractual relationship, the damages were not attributable to a risk covered by the policy, and hence the action was not one "on the policy." For the same reason, the statute did not bar the emotional distress claim based on the same facts [*225 Cal. App. 3d 1188, 1193]* . The court in *Prieto* concluded that case is distinguishable from the instant case because it was based on a subsequent event that occurred after the initial policy coverage was triggered. Plaintiff also relied on *Frazier v. Metropolitan Life Ins. Co. (1985) 169 Cal. App. 3d 90, 103, 214 Cal. Rptr. 883* , a case based on a life-insurance policy, in which the insurer immediately paid the basic death benefit, but investigated the possibility of the decedent's suicide. In *Frazier,* although the court found the two-year policy limitation period applicable to the insured's bad-faith claim, it concludedthat the bad-faith claim was timely filed, despite the fact that the contract claim was untimely, because the bad-faith cause of action did not accrue until after formal denial of the claim.

Therefore, *Frazier* is distinguishable because it involved a subsequent event, that is, the bad-faith claim arose after the insurer paid on the policy, based on the insurer's unsatisfactory conduct after that point in time. In addition, the court in *Prieto* noted, the claim in Frazier involved a policy limitation that did not (apparently) derive from statutory prescription, in that it concerned a life insurance policy, rather than a fire insurance policy, which is governed by the limitation provision of *Ins. Code § 2071* (*225 Cal. App. 3d 1188, 1194*). However, the court stated, *Frazier* is relevant to the instant case because the insurer's alleged misconduct involved breach of a primary obligation to pay policy benefits (*225 Cal. App. 3d 1188, 1194-1195*). *Frazier* found, however, that the cause of action did not accrue until the insurer refused to pay. The court in *Prieto* observed that analytical approach would violate *Ins. Code § 2071* if applied to a claim governed by that provision, because the statute provides that claims for policy benefits regarding covered losses accrue on inception of the loss. The court further recognized that the obligation to pay benefits due under the policy also constitutes a component of the duty of good faith and fair dealing imposed by law on insurers.

However, the court found no authority for the proposition that plaintiff's election to seek redress under the implied covenant rather than the express contract should nullify the legislatively prescribed limitation for actions that are "on the policy." The court expressed the opinion that the *California Supreme Court, in Prudential-LMI Commercial Ins. v. Superior Court (1990) 51 Cal. 3d 674, 274 Cal. Rptr. 387, 798 P.2d 1230* supported its conclusion that *Ins. Code § 2071* applies to plaintiffs' bad faith and related causes of action. In Prudential, the Court defined "inception of the loss" with respect to the insured's duty to notify the insurer, which bears on the accrual of the limitations period; and also established equitable tolling principles with regard to that statute. In the course of that decision, the Court specifically endorsed the decisions in *Lawrence* and *Abari,* including *Abari's* holding that *Ins. Code § 2071* applied to the bad-faith claims asserted in that case. Although implying that some bad-faith suits might survive the limitation, the Court cited *Abari* to the effect that the rule that the one-year suit provision does not apply to bad-faith suits is inapplicable when the insured's bad-faith action is a "transparent attempt to recover on the policy" notwithstanding the insured's failure to commence suit within one year of accrual (*225 Cal. App. 3d 1188, 1195)* .

[4] Additional Authorities

[a] So-Called "Bad Faith Claim" Is Essentially Claim on Fire Insurance Policy

In *Jang v. State Farm Fire & Cas. Co. (2000) 80 Cal. App. 4th 1291, 95 Cal. Rptr. 2d 917* , the purchaser and former

mortgage-holder of property damaged in a fire cross-complained against the insurance company that had issued the relevant fire insurance on that property. This action, which also involved the former owners and the former owners' attorneys, followed a settlement agreement concerning the appropriate amount of fire insurance benefits. The cross-complaint alleged civil conspiracy and bad faith, based on the disputed amount of benefits offered by the insurer. The insurer was awarded summary judgment against the purchaser on the ground that the limitations period had expired, based on the one-year period designated by *Ins. Code § 2071*. The court of appeal affirmed, holding that if the gravamen of a bad faith action pertains to the insurer's handling of the initial claim, the cause of action is governed by the policy's limitations period, pursuant to *Ins. Code § 2071* (*80 Cal. App. 4th 1291, 1303-1304)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilityGeneral OverviewInsurance LawProperty InsuranceGeneral Overview

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
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1. General Defenses

12-120 California Points & Authorities § 120.179

§ 120.179 Property and Multi-Peril Policy Action Is Barred by Policy Limitations Clause

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURED'S CLAIM IS BARRED BY INSURANCE CODE SECTION 2071, BECAUSE THE ACTION IS A "TRANSPARENT ATTEMPT TO RECOVER ON THE POLICY" AND INSURED FAILED TO COMMENCE SUIT WITHIN ONE YEAR OF ACCRUAL.

A. Insured's Claim Is Barred by Policy Limitations Clause Based on *Ins. Code § 2071*. A limitations clause in a property and multi-peril policy taken word for word from *Insurance Code Section 2071* is a valid provision, and any action not brought within the limitations period is barred, unless the limitations clause was inapplicable due to estoppel or waiver (*Velasquez v. Truck Ins. Exch. (1991) 1 Cal. App. 4th 712, 717-718, 5 Cal. Rptr. 2d 1*).

B. So-Called "Bad-Faith Claim" Is Essentially Claim on Underlying Policy. In actions involving a property and multi-peril policy, a limitations clause, based on *Insurance Code Section 2071*, appliesto a bad-faith claim based on the denial of a claim in the underlying policy when none of the actions alleged by plaintiffs as bad faith relate to events subsequent to initial policy coverage so as to convert their action from one on the policy to one which is not. The two claims are inextricably bound (*Velasquez v. Truck Ins. Exch. (1991) 1 Cal. App. 4th 712, 722, 5 Cal. Rptr. 2d 1*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention by an insurer that the insurer is not liable for breach of the implied covenant of good faith. The basis for these points and authorities is that the claim denominated a bad faith claim is actually a claim on the property and multi-peril policy, and is therefore subject to the one-year statute of limitations of *Ins. Code § 2071*.

This form may be used by an insurer in various procedural contexts, such as in memoranda supporting a general demurrer to a complaint, in a memoranda supporting or opposing a motion for summary judgment, in a trial brief, or in an appellate brief.

For references to related Pleading and Practice chapters, see *§ 120.170[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should:

- Refer to the limitations clause in the property and multi-peril policy, showing that the clause is taken word for word from *Ins. Code § 2071*.

- Identify the last date under the clause that the complaint must be filed.

- Identify the date the complaint was actually filed.

- Point out that the date was filed after the expiration of the limitation period and, consequently, the insurer is barred from bringing his or her claim.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.170* et seq.) and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be a motion by an insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that there is no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts supporting the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Pleading and Practice Chapters

For legal background regarding the insurer's duty of good faith and fair dealing, including related forms of complaint, see California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender).

For a discussion of the rules applicable to summary judgment, a form of notice of motion for summary judgment, and related forms, see Ch. 537, *Summary Judgment* , in that publication.

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing*

Legal Memoranda and Briefs .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[e] Opposing Points and Authorities

The points and authorities in § 120.189 may be used in an appropriate case to oppose these points and authorities.

[3] Discussion of Authorities

[a] Insured's Claim Is Barred by Policy Limitations Clause Based on Ins. Code § 2071

In ***Velasquez v. Truck Ins. Exch.*** *(1991) 1 Cal. App. 4th 712* , the insureds under a property and multi-peril policy filed a complaint alleging causes of action for breach of the implied covenant of good faith and fair dealing and breach of statutory duties. Plaintiffs filed a claim with the insurer after a fire damaged a portion of an apartment building they owned The insurer first sent a reservation of rights letter to plaintiffs indicating that the policy had been canceled more than six months prior to the fire but that they would investigate the occurrence "to determin[e] the facts of the loss and the coverage issue." Subsequently, the insurer sent plaintiffs a letter denying their claim on the ground that the policy had been canceled. Plaintiffs' counsel sent a letter to insurer challenging the denial of coverage on the ground that plaintiffs had never received either a cancellation notice or a refund check. Counsel's letter warned that unless documentation was provided to establish cancellation, plaintiffs would file "a bad faith lawsuit" against insurers (*1 Cal. App. 4th 712, 716*). Two years after the denial of their claim, plaintiffs filed a complaint against insurers alleging causes of action for "breach of fair dealing and good faith" and "breach of statutory duties," the latter being violations of *Ins. Code § 790.03(h)*. The conduct that the complaint alleged as the basis for the action was the insurer's denial of the claims on the ground that the policy was canceled for nonpayment of premiums. Plaintiffs sought damages under the policy, plus interest, as well as other compensatory and punitive damages.

Insurer's amended answer to the complaint raised a number of affirmative defenses, including a defense based on the limitations clause contained in the insurance policy. The clause stated, "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all requirements of the policy shall have been complied with, and unless commenced within twelve months next after inception of the loss." This clause is taken word for word from *Ins. Code § 2071*, which sets forth the standard form for fire insurance policies. The insurer moved for summary judgment, arguing that the action was barred by the limitations clause. The trial court granted the motion (*1 Cal. App. 4th 712, 717)* .

The court of appeal affirmed the summary judgment, stating that because the plaintiffs did not file their action until more than two years after the occurrence of the loss and two years after denial of their claim, it was barred by the limitations clause, unless the limitations clause was inapplicable due to estoppel or waiver. Plaintiffs had contended that the insurer's cancellation of the policy voided the limitations provision, precluding insurer's reliance on it for purposes of summary judgment. However, plaintiffs' entire action rested on the premise that the policy was in effect at the time of the loss, notwithstanding insurer's assertions to the contrary. As the plaintiffs' complaint asserted the validity of the policy, it was perfectly proper for the insurer to move for summary judgment on the grounds that the action was barred by the policy's limitations clause (*1 Cal. App. 4th 712, 718)* . Plaintiffs further argued that if the limitations clause applied, the insurer waived its right to assert it by purportedly canceling the policy. However, the insurer's reservation letter expressly reserved to it "its rights under the law and under the insurance policy." The court of appeal concluded that the fact that the limitations period was not raised in insurer's subsequent denial letter did not constitute a waiver (*1 Cal. App. 4th 712, 722)* . Plaintiffs also argued that by canceling the contract, insurer was estopped to raise the limitations clause. However, plaintiffs never accepted the cancellation and subsequent denial of benefits as valid, so the court concluded that there was no detrimental reliance, and hence, no estoppel (*1 Cal. App. 4th 712, 723)* .

[b] So-Called "Bad-Faith Claim" Is Essentially Claim on Underlying Policy

The factual background of ***Velasquez v. Truck Ins. Exch.*** *(1991) 1 Cal. App. 4th 712, 5 Cal. Rptr. 2d 1* , is discussed in *§ 120.179[3][a]*. The plaintiffs sought to avoid the limitations bar in the policy by contending that such limitations apply only to bad-faith actions that are "on the policy." They maintained that their actions for "breach of fair dealing and good faith" and "breach of statutory duties" were not "on the policy" and were therefore exempt from the policy limitations clause. Plaintiffs reliedon *Frazier v. Metropolitan Life Ins. Co. (1985) 169 Cal. App. 3d 90, 103-104, 214 Cal. Rptr. 883* , and *Murphy v. Allstate Ins. Co. (1978) 83 Cal. App. 3d 38, 147 Cal. Rptr. 565* . In both cases a limitations clause similar to the one in the instant case was held not to bar bad-faith actions alleging conduct by the insurer occurring after the initial policy coverage. The insurer in the instant case relied on *Lawrence v. Western Mut. Ins. Co. (1988) 204 Cal. App. 3d 565, 251 Cal. Rptr. 319* , and *Abari v. State Farm Fire & Cas. Co. (1988) 205 Cal. App. 3d 530, 252 Cal. Rptr. 565* , which both held that if the bad-faith action is based on allegations relating to the handling of a claim or the manner in which it is processed, it is an action "on the policy" and, therefore, subject to the limitations bar.

The court of appeal found that the plaintiffs' action here more closely fit the cases relied on by the insurer, and that the policy's limitations clause applied (*1 Cal. App. 4th 712, 719)* . Further, after recognizing that the *Lawrence* and *Abari* decisions evince a trend by courts of appeal to limit the exemption from the limitations clauses set forth in *Murphy* and *Frazier* to the facts of those cases, the court of appeal concluded that, if denial of the claim in the first instance is the alleged bad faith and the insured seeks policy benefits, the bad-faith action is on the policy and the limitations provision applies (*1 Cal. App. 4th 712, 721)* . In comparing the instant case to *Abari*, the court of appeal said that although plaintiffs sought compensatory and punitive damages as well as damages under the policy, plus interest (*1 Cal. App. 4th 712, 717)* , the damages related solely to their allegations of denial of their claim and wrongful cancellation and not to any additional acts by insurer. The two claims are inextricably bound. None of the actions alleged by plaintiffs as bad faith related to events subsequent to initial policy coverage that would convert their action from one "on the policy" to one that is not (*1 Cal. App. 4th 712, 722)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilityGeneral OverviewInsurance LawClaims & ContractsGood Faith & Fair DealingGeneral OverviewInsurance LawProperty InsuranceGeneral OverviewInsurance LawProperty InsuranceCoverageGeneral Overview

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 120 INSURANCE
PART II. FORMS
C. Improper Claims Settlement Practices
1. General Defenses

12-120 California Points & Authorities § 120.180

§ 120.180 Defensive Pleading Was Absolutely Privileged

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER'S _____ [*identify defensive pleading, e.g.,* ANSWER SETTING FORTH A GENERAL DENIAL AND AFFIRMATIVE DEFENSES] CANNOT BE THE BASIS FOR AN ACTION FOR DAMAGES FOR BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING BECAUSE A DEFENSIVE PLEADING IS ABSOLUTELY PRIVILEGED UNDER *CIVIL CODE SECTION 47(b)* AS A PUBLICATION MADE IN A JUDICIAL PROCEEDING.

Defensive Pleading Is Absolutely Privileged. Defensive pleadings in a lawsuit are absolutely privileged under *Civil Code Section 47(b)* as communications made in the course of a judicial proceeding and as such cannot be used as the basis for allegations of ongoing bad faith (*Civ. Code § 47(b)*; *California Physicians' Serv. v. Superior Court (1992) 9 Cal. App. 4th 1321, 1330, 12 Cal. Rptr. 2d 95*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention by an insurer that the insurer is not liable for breach of the implied covenant of good faith. The basis for these points and authorities is that defensive pleadings in a lawsuit are absolutely privileged under *Civ. Code § 47(b)* as communications made in the course of a judicial proceeding and as such cannot be used as the basis for allegations of ongoing bad faith.

This form may be used, for example, in a case in which an insured amends his or her complaint to allege bad faith after a defendant insurer's has filed its answer interposing a general denial and alleging certain affirmative defenses [*see, e.g., California Physicians' Serv. v. Superior Court (1992) 9 Cal. App. 4th 1321, 1330, 12 Cal. Rptr. 2d 95* (discussed in *§*

120.180[3][a])].

For references to related Pleading and Practice chapters, see *§ 120.170[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.170* et seq.) and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be a motion by an insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that there is no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts supporting the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of theaffiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[d] Opposing Points and Authorities

The points and *authorities in § 120.186* et seq., may be used in an appropriate case to oppose these points and authorities.

[3] Discussion of Authorities

[a] Defensive Pleading Is Absolutely Privileged

In ***California Physicians' Serv. v. Superior Court*** *(1992) 9 Cal. App. 4th 1321, 12 Cal. Rptr. 2d 95* , plaintiff father purchased from defendant a medical health-coverage insurance policy for the care of his minor son. During the period that the policy was in effect, the son suffered an injury and required medical treatment. Although properly notified of the claim, defendant failed to pay in accordance with the terms of the policy. Plaintiff's amended complaint alleged a variety of tort causes of action for damages based on this failure to pay. Defendant answered with a general denial and several specific affirmative defenses. Plaintiff then sought and obtained permission to file, and filed, a supplemental complaint seeking damages for breach of the duty of good faith and fair dealing and for the intentional infliction of emotional distress. The genesis of these additional damages actions was defendant's filing of its general denial and affirmative defenses. As examples of defendant's allegedly tortious pleading, the supplemental complaint pointed to

defendant's denial of agency by the person who sold the policy, defendant's assertions that the father had no standing as plaintiff, that the father made misrepresentations in purchasing the policy, that plaintiffs acted negligently and improperly, and that the trial court lacked jurisdiction over the claim by reason of ERISA.

Defendant filed a general demurrer to the supplemental complaint. After full briefing and oral argument, the court took the demurrer under submission and subsequently issued a written order overruling the demurrer. The court ruled that an insurer's duty to act in good faith continues after litigation is filed, that the interposition of defenses that are patently untenable would constitute bad faith, and that it would be inappropriate to attempt to determine which, if any, defenses fit this category at the demurrer stage. Defendant then sought review of the trial court's action by extraordinary writ.

The court of appeal issued a writ of mandate requiring the trial court to sustain defendant's demurrer. The court of appeal held that the answer, including the general denial and the affirmative defenses, constituted defensive pleading and as such was an absolutely privileged communication under *Civ. Code § 47(b)*. The court explained that, because of the privilege, defensive pleading, even though allegedly false, interposed in bad faith, or even asserted for inappropriate purposes, cannot be used as the basis for allegations of ongoing bad faith (*9 Cal. App. 4th 1321, 1330)* . The court also distinguished the facts of the instant case from those in *White v. Western Title Ins. Co. (1985) 40 Cal. 3d 870, 221 Cal. Rptr. 509, 710 P.2d 309* , in which the Supreme Court distinguished between a cause of action based squarely on a privileged communication (communication inadmissible) and one based on an underlying course of conduct evidenced by the communication (communication admissible). In the instant case, the court noted that plaintiffs sought to utilize the pleading as the basis for a claim of bad faith, rather than only as evidence of prior bad faith (*9 Cal. App. 4th 1321, 1327, 1330)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAnswersInsurance LawBad Faith & Extracontractual LiabilityGeneral OverviewInsurance LawClaims & ContractsGood Faith & Fair DealingGeneral Overview

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12-120 California Points & Authorities § 120.181

[Reserved]

§ 120.181[Reserved]

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12-120 California Points & Authorities § 120.182

§ 120.182 Insurer Acted Unreasonably by Denying or Delaying Benefit Payments

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURED BREACHED THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING WHEN IT ACTED UNREASONABLY IN _____ [DENYING *or* DELAYING] PAYMENT OF BENEFITS UNDER THE POLICY.

A. Insurer Breached Covenant of Good Faith. There is, in every insurance contract, an implied covenant of good faith and fair dealing and this is so whether the policy purchased is a third-party(liability) policy or a first-party (casualty) policy (*Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 818, 169 Cal. Rptr. 691, 620 P.2d 141* ; *Neal v. Farmers Ins. Exch. (1978) 21 Cal. 3d 910, 920, 148 Cal. Rptr. 389, 582 P.2d 980* ; *Silberg v. California Life Ins. Co. (1974) 11 Cal. 3d 452, 460-461, 113 Cal. Rptr. 711, 521 P.2d 1103* ; *Gruenberg v. Aetna Ins. Co (1973) 9 Cal. 3d 566, 575, 108 Cal. Rptr. 480, 510 P.2d 1032*).

B. Insurer Failed to Consider Insured's Interests. The covenant of good faith requires that each contracting party refrain from doing anything to injure the right of the other to receive the benefits of the agreement, and, for the insurer to fulfill its obligation, it must give at least as much consideration to the insured's interests as it does to its own (*Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 818-819, 169 Cal. Rptr. 691, 620 P.2d 141* ; *Silberg v. California Life Ins. Co. (1974) 11 Cal. 3d 452, 460, 113 Cal. Rptr. 711, 521 P.2d 1103*).

C. Insurer is Liable for Failing to Pay Loss. When an insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort (*Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 818, 169 Cal. Rptr. 691, 620 P.2d 141* ; *Silberg v. California Life Ins. Co. (1974) 11 Cal. 3d 452, 460, 113 Cal. Rptr. 711, 521 P.2d 1103* ; *Gruenberg v. Aetna Ins. Co (1973) 9 Cal. 3d 566, 575, 108 Cal. Rptr. 480, 510 P.2d 1032*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose a contention by an insurer that the insurer handled the insured's claim in a reasonable manner.

This form may be used by an insured in various procedural contexts. For example, in an action against a first party (casualty) insurer for damages for breach of the implied covenant of good faith in denying or delaying payment of benefits, it may be used by a plaintiff insured to oppose a defendant insurer's motion for summary judgment pursuant to *Code Civ. Proc. § 437c* in which the insurer contends that its handling of the insured's claim was reasonable as a matter of law. In this instance, the grounds of opposition are:

- The covenant of good faith and fair dealing applies to casualty policies, or to the casualty provisions of a liability policy, as well as to liability policies,

- Whether defendant acted unreasonably in denying or delaying benefit payments under its policy is a material fact, and

- There are triable issues with respect to this fact.

This form may also be used in a trial brief, or in an appellate brief.

When appropriate, this form may be used to oppose the points and authorities *set forth in § 120.174*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.186* et seq.) and to place the argument within its proper procedural context.

An appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing an insurer's motion for summary judgment or summary adjudication when the evidentiary facts clearly support the contention. In this context, counsel would modify the form to assert that there remain triable issues of material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts opposing the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(e)-(h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Pleading and Practice Chapters

For legal background related to an insurer's duty of good faith and fair dealing, including related forms of complaint, see California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender).

For a discussion of the rules applicable to summary judgment, a form of notice of motion for summary judgment, and related forms, see Ch. 537, *Summary Judgment* , in that publication.

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Insurer Breached Covenant of Good Faith

The factual background of ***Egan v. Mutual of Omaha Ins. Co.*** *(1979) 24 Cal. 3d 809, 169 Cal. Rptr. 691, 620 P.2d 141* , is discussed in *§ 120.170[3][a]*. In *Egan,* the Supreme Court affirmed judgment for the insured in part and reversed in part. The Court pointed out that in addition to the duties imposed on contracting parties by the express terms of their agreement, the law implies in every contract a covenant of good faith and fair dealing and that the precise nature and extent of the duty imposed by the implied promise will depend on the contractual purpose. With respect to insurance policies, the Court said that the implied covenant imposes obligations not only as to claims by a third party (liability policies) but also as to those by the insured (first party, or casualty policies) and that, in both contexts, the obligations of the insurer are merely two different aspects of the same duty (*24 Cal. 3d 809, 818)* .

Neal v. Farmers Ins. Exch. *(1978) 21 Cal. 3d 910, 148 Cal. Rptr. 389, 582 P.2d 980* , was an action by an insured for compensatory and punitive damages against an insurer for bad-faith failure to pay uninsured motorist benefits under an automobile insurance policy in which plaintiff was the named insured. Plaintiff was seriously injured in an intersection accident when the car in which she was riding and which was being driven by her husband was, while making a left turn, hit broadside by an uninsured motorist. Plaintiff's policy included a medical payment provision with a $5,000 limit and an uninsured motorist provision with a $15,000 limit. Some three months after the accident, defendant paid $5,000 pursuant to the medical payment coverage but declined to pay the policy limit of $15,000 under the uninsured motorist coverage on the ground, among others, that the uninsured motorist coverage was to be decreased by the amount paid under the medical coverage. Almost three years after the accident, an arbitrator rendered a decision in plaintiff's favor on the issue of liability and reserved his decision on the question of offset. At the request of plaintiff's attorney, defendant then paid the first $10,000 and six months later when the arbitrator issued his decision on the question of offset onfavor of plaintiff, it paid the final $5,000. Plaintiff then sued the insurer for damages for its prior bad faith in failing to pay the benefits. Plaintiff died from cancer during the pendency of the action and her husband, as administrator of her estate, was substituted as plaintiff.

At trial, plaintiff proved compensatory damages of about $10,000 and that the insurer had gross assets of some $765 million, net assets of approximately $211 million, and a net income of nearly $45 million. The jury returned an undifferentiated verdict in plaintiff's favor for $1,548,211.35. The insurer's motion for new trial was denied on plaintiff's agreeing to remit all but $749,011.48 and judgment was entered accordingly. Defendant appealed from the judgment and plaintiff filed a cross appeal.

The Supreme Court affirmed on the ground that there was substantial evidence in the record of defendant's bad faith (*21 Cal. 3d 910, 921-922)* . The Court said that in *Gruenberg v. Aetna Ins. Co (1973) 9 Cal. 3d 566, 108 Cal. Rptr. 480, 510 P.2d 1032* , it had made it clear that the duty of an insurer to accept reasonable settlements of third-party claims against its insured is but one aspect of its obligation, imposed by law, to act fairly and in good faith in discharging its contractual responsibilities to its insured and that another aspect of that obligation is the duty of the insurer to act fairly and in good faith in handling claims submitted by its insured, which it characterized as a duty not to withhold unreasonably payments due under a policy. Thus, when an insurer fails to deal fairly and in good faith with its

insured by refusing, without proper cause, to compensate its insured for a loss covered by the policy, such conduct may give rise to a cause of action in tort for breach of an implied covenant of good faith and fair dealing (*21 Cal. 3d 910, 920)* .

Silberg v. California Life Ins. Co. *(1974) 11 Cal. 3d 452, 113 Cal. Rptr. 711, 521 P.2d 1103* , was an action by an insured against an insurer under a hospital and surgical policy in which plaintiff sought both a declaration that defendant was liable under the policy and damages for physical and mental distress. The policy provided that defendant would pay the cost of hospital care, including surgeon's fees, up to a limit of $5,000 with $100 deductible. It contained an exclusion for losses caused by injuries for which compensation was payable under any workers' compensation law. While the policy was in effect, plaintiff was seriously injured and ultimately incurred $6,900 in medical charges. Defendant insurer refused to make any payments under the policy because plaintiff had filed a claim for workers' compensation benefits. The company insisted that there could be no final determination as to its liability under the policy until the workers' compensation proceeding was concluded.

At the same time, the workers' compensation carrier denied liability because of defendant's questionable employment status. The compensation aspect was ultimately determined nearly two years after the injurywhen a compromise and release was approved by the Workers' Compensation Appeals Board, settling the case for $3,700. Of this recovery, $1,000 was in payment of hospital bills through a lien by one hospital. The balance of $5,800 in hospital bills remained unpaid. Defendant denied liability under the policy on the ground that the $3,700 paid under the compensation settlement rendered the exclusion applicable. The trial court sitting without a jury determined in the declaratory relief count that the policy was ambiguous and therefore defendant was obligated under the policy to pay $4,900 of plaintiff's medical costs ($5,000 less $100 deductible).

A jury found for plaintiff on the second cause of action and awarded $75,000 compensatory damages and $500,000 punitive damages. Defendant's motion for a new trial on the grounds of insufficiency of the evidence to support the verdict, error in law, and excessive damages was granted. Plaintiff appealed from the order granting the new trial and defendant cross appealed from the judgment. The Supreme Court reversed the order granting a new trial insofar as it granted a new trial on defendant's liability for compensatory damages and the amount of compensatory damages and affirmed it in all other respects. On the cross appeal, the Court affirmed the judgment insofar as it awarded $75,000 in compensatory damages and $4,900 as benefits under the policy. The Supreme Court, in holding the insurer liable, stated that the covenant of good faith and fair dealing applies to cases in which the insurer unreasonably and in bad faith withholds payment of the claim of the insured (*11 Cal. 3d 452, 460-461)* .

The factual background of ***Gruenberg v. Aetna Ins. Co.*** *(1973) 9 Cal. 3d 566, 108 Cal. Rptr. 480, 510 P.2d 1032* , is discussed in *§ 120.170[3][a]*. In reversing the judgment of dismissal with respect to defendant insurance companies, the Supreme Court, after reviewing the holdings in several cases, said that it was manifest that a common legal principle underlay all of those decisions; namely, that in every insurance contract there is an implied covenant of good faith and fair dealing, and that the duty to so act is imminent in the contract whether the insurance company is attending to the claims of third persons against the insured of the claim of the insured itself (*9 Cal. 3d 566, 575)* .

[b] Insurer Failed to Consider Insured's Interests

The factual background of ***Egan v. Mutual of Omaha Ins. Co.*** *(1979) 24 Cal. 3d 809, 169 Cal. Rptr. 691, 620 P.2d 141* , is discussed in *§ 120.170[3][a]*. The Supreme Court affirmed judgment for the insured in part and reversed in part. The Court said that the implied promise of good faith and fair dealing requires each contracting party to refrain from doing anything to injure the right of the other to receive the benefits of the agreement (*24 Cal. 3d 809, 818)* and that for the insurer to fulfill its obligation not to impair the right of the insured to receive thebenefits of the agreement, it must give at least as much consideration to the latter's interests as it does to its own (*24 Cal. 3d 809, 818-819)* .

The factual background of ***Silberg v. California Life Ins. Co.*** *(1974) 11 Cal. 3d 452, 113 Cal. Rptr. 711, 521 P.2d*

1103 , is discussed in *§ 120.182[3][a]*. In reversing in part the order for new trial and affirming in part the judgment, the Supreme Court said that the covenant of good faith and fair dealing requires that neither party will do anything to injure the right of the other to receive the benefits of the agreement and that an insurer is obligated to give the interests of the insured at least as much consideration as it gives to its own interests (*11 Cal. 3d 452, 460)* .

[c] Insurer is Liable for Failing to Pay Loss

The factual background of ***Egan v. Mutual of Omaha Ins. Co.*** *(1979) 24 Cal. 3d 809, 169 Cal. Rptr. 691, 620 P.2d 141* , is discussed in *§ 120.170[3][a]*. The Supreme Court affirmed judgment for the insured in part and reversed in part. The Court, quoting from *Gruenberg v. Aetna Ins. Co. (1973) 9 Cal. 3d 566, 575, 108 Cal. Rptr. 480, 510 P.2d 1032* , said that when the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort (*24 Cal. 3d 809, 818)* .

The factual background of ***Silberg v. California Life Ins. Co.*** *(1974) 11 Cal. 3d 452, 113 Cal. Rptr. 711, 521 P.2d 1103* , is discussed in *§ 120.182[3][a]*. In reversing in part the order granting a new trial and affirming in part the judgment, the Supreme Court said that the insurer's breach of its covenant of good faith sounds in tort and that the insured may recover for all detriment resulting from the breach (*11 Cal. 3d 452, 460)* . The Court held that defendant's failure to afford relief to its insured against the very eventuality insured against by the policy amounted to a violation as a matter of law of its duty of good faith and fair dealing implied in every policy (*11 Cal. 3d 452, 460, 462)* .

The factual background of ***Gruenberg v. Aetna Ins. Co.*** *(1973) 9 Cal. 3d 566, 108 Cal. Rptr. 480, 510 P.2d 1032* , is discussed in *§ 120.170[3][a]*. In reversing the judgment of dismissal in favor of defendant insurers, the Supreme Court said that when the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort (*9 Cal. 3d 566, 575)* .

[4] Additional Authorities

[a] Insurer Breached Covenant of Good Faith

In *Davis v. Blue Cross of N. Cal. (1979) 25 Cal. 3d 418, 158 Cal. Rptr. 828, 600 P.2d 1060* , the Supreme Court, quoting from *Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 818, 169 Cal. Rptr. 691, 620 P.2d 141* [*see § 120.182[3][a]*], said that in addition to the duties imposed on contracting parties by the express terms of their agreement, the law implies in every contract a covenant of good faith and fair dealing (*25 Cal. 3d 418, 427)* .

[b] Insurer Failed to Consider Insured's Interests

The factual background of *Gruenberg v. Aetna Ins. Co (1973) 9 Cal. 3d 566, 108 Cal. Rptr. 480, 510 P.2d 1032* , is discussed in *§ 120.170[3][a]*. In reversing the judgment of dismissal as to defendant insurers, the Supreme Court, quoting from *Fletcher v. Western Nat'l Life Ins. Co. (1970) 10 Cal. App. 3d 376, 401, 89 Cal. Rptr. 78* , said that an insurer owes to its insured an implied-in-law duty of good faith and fair dealing that it will do nothing to deprive the insured of the benefits of the policy (*9 Cal. 3d 566, 575)* and, citing *Comunale v. Traders & Gen. Ins. Co. (1958) 50 Cal. 2d 654, 658, 328 P.2d 198* , the court explained that the duty had been characterized as an implied covenant that neither party will do anything which will injure the right of the other to receive the benefits of the agreement (*9 Cal. 3d 566, 576-577)* .

In *Century Sur. Co. v. Polisso (2006) 139 Cal. App. 4th 922, 43 Cal. Rptr. 3d 468* , the United States Forest Service contracted with a construction company to install an underground stream profile in a creek. The construction company entered into a subcontract with a glass company to install glass panels in the viewing chamber of the creek. After the glass installation, a dispute arose between the construction company and the glass company over the glass company's duty to apply a sealant to the seams. Before the dispute was settled and after both parties attempted to rectify the sealant problem, the creek flooded, ruining the glass panels. The construction company filed suit against the glass company,

which sought coverage and defense from its insurer under a CGL policy and an installation floater endorsement that covered the glass prior to installation. The insurer denied coverage and provided a defense under a reservation of rights, and the glass company retained independent counsel following problematic communications with the insurer's counsel. Neither party prevailed in the underlying action, but the glass company incurred considerable debt, and the company's individual co-owners suffered great emotional distress. In the declaratory relief action filed by the insurer, the glass company and its owners (the insureds) cross-complained for bad faith and other torts. The jury awarded the insureds $57,000 in compensatory and $2 million in punitive damages. In discussing the required factors for the award of punitive damages, the court of appeal stated that if an insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort. For the insurer to fulfill its obligation not to impair the right of the insured to receive the benefits of the agreement, it must give at least as much consideration to the insured's interests as it does to its own (*139 Cal. App. 4th 922, 949*). In affirming the judgment, the court concluded that although the insurer knew that it had a duty to defend, it took every opportunity to "stall, stonewall, and engage in scare tactics" and then refused to pay the insureds' attorney in full or in a timely manner. It did this so that the insureds'attorney would withdraw from the underlying action, leaving the insureds' defense in the insurer's hands, thus allowing it to deny coverage rather than defend them (*139 Cal. App. 4th 922, 965*).

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBad Faith & Extracontractual LiabilityPayment Delays & DenialsInsurance LawClaims & ContractsGood Faith & Fair DealingGeneral OverviewInsurance LawClaims & ContractsGood Faith & Fair DealingThird Party Claimants

California Points & Authorities

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C. Improper Claims Settlement Practices
1. General Defenses

12-120 California Points & Authorities § 120.183

§ 120.183 No Affirmative Defense of Insured's Comparative Bad Faith in Tort Bad Faith Action Against Insurer

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

IN AN ACTION BY AN INSURED AGAINST AN INSURER FOR BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING, THE INSURER MAY NOT ASSERT THE INSURED'S COMPARATIVE BAD FAITH AS AN AFFIRMATIVE DEFENSE.

No Affirmative Defense of Comparative Bad Faith. In an action by an insured against an insurer for breach of the covenant of good faith and fair dealing that sounds in tort, the insurer may not assert as a defense the insured's comparative bad faith (*Kransco v. American Empire Surplus Lines Ins. Co. (2000) 23 Cal. 4th 390, 411, 97 Cal. Rptr. 2d 151, 2 P.3d 1*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that an insurer may not raise as an affirmative defense the insured's comparative bad faith in a bad faith action brought by the insured [*see Kransco v. American Empire Surplus Lines Ins. Co. (2000) 23 Cal. 4th 390, 411, 97 Cal. Rptr. 2d 151, 2 P.3d 1]* . It should be combined with any of the forms *set forth in §§ 120.182 -120.186* that are applicable to the particular case.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may argue that because the action by the insured sounds in tort, the insurer may not raise the defense of comparative bad faith.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of complaints against liability insurers, see California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender), Part IE.

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] No Affirmative Defense of Insured's Comparative Bad Faith in Tort Bad Faith Action Against Insurer

In ***Kransco v. American Empire Surplus Lines Ins. Co.*** *(2000) 23 Cal. 4th 390, 411, 97 Cal. Rptr. 2d 151, 2 P.3d 1* , a manufacturing company sued its primary insurer for bad faith failure to settle, following a claim and resultant lawsuit by an adult who was injured while using the insured's product. Michael Hubert had jumped headfirst onto his neighbor's backyard water slide toy, known as a "Slip'N Slide," sustaining cervical injuries that rendered him a partial quadriplegic. Hubert brought a personal injury action against Kransco, which the toy. Kransco tendered defense to its primary liability carrier, American Empire Surplus Lines Ins. Co. (AES), whose policy provided coverage limits of $900,000 ($1 million,less Kransco's self-insured retention of $100,000). Kransco also had three excess policies with other carriers totaling $4 million. During the discovery phase, Hubert asked Kransco in an interrogatory if it had knowledge of prior Slip'N Slide accidents resulting in cervical injuries to adults. Kransco initially denied any such knowledge, but later amended its response to admit knowledge of two accidents, one of which resulted in death. The other accident, which caused quadriplegia, involved a slide manufactured by the corporation that sold the manufacturing rights to Kransco and resulted in a $1.5 million settlement. Kransco's amended response misstated the date of one of these accidents by ten years. During the jury trial Hubert offered to settle for $750,000, but AES rejected the offer. Based on Kransco's willingness to contribute its $100,000 self-insurance and an excess carrier's proffered $100,000, AES counter-offered $450,000, which Hubert rejected. The jury awarded Hubert roughly $2.3 million in compensatory damages and $10 million in punitive damages, a "record-breaking" award. While post-verdict motions were pending, Kransco settled with Hubert. Kransco and its insurers paid $7.5 million: the excess insurers paid a total of $35 million; Kransco paid $3.1 million; and AES paid its policy limits of $900,000, although objecting to the settlement as unreasonable. At Hubert's insistence, Kransco stipulated to entry of judgment against it in the full amount of the jury verdict, plus interest, but Hubert agreed not to execute on the judgment. Additionally, under the terms of the settlement, Kransco agreed to prosecute a bad faith action against AES, and to split equally with Hubert any net proceeds from the litigation.

Kransco sued AES for breach of the implied covenant of good faith and fair dealing for failure to settle during trial. AES argued that Kransco's false interrogatory responses constituted either a breach of the insured's covenant of good faith and fair dealing or negligence in the handling of the Hubert action. According to the subsequent appellate record in the bad faith action, a Kransco product development vice president knew of two adult cervical injuries that had occurred when the water slide was made by another toy manufacturer, prior to Kransco's acquisition of that manufacturer's assets. (Kransco had subsequently reintroduced the toy.) In the Hubert action, defense counsel learned of the vice president's knowledge when preparing him for a deposition, at which time counsel immediately informed Hubert's counsel. Kransco subsequently filed an amended response, which was inaccurate with respect to the date of one accident. AES was therefore informed of the prior injuries before trial, and before Hubert's settlement offer, but asserted during the bad faith trial that Hubert's counsel exploited Kransco's pretrial "blunders," resulting in the excess verdict.

During the bad faith trial, the trial court instructed the jury on both of AES's comparative fault theories. Regarding comparative bad faith, the trial court instructed the jury:

> I have already described the implied covenant of good faith and fair dealing that the law implies in every insurance contract. Because that implied covenant of good faith and fair dealing applies to both the insurer and the insured, Kransco had a duty to AES not to do anything that would injure AES's right to receive the benefits of their agreement. To do so would constitute bad faith on Kransco's part. Comparative bad faith does not relieve AES of its obligations or bar a recovery by Kransco against AES, but the total amount of damages to which Kransco would otherwise be entitled shall be reduced in proportion to the amount of comparative fault attributable to Kransco, Kransco's attorneys, or Kransco's agent.

Regarding comparative negligence, the trial court instructed the jury:

> Comparative negligence is the failure, if any, on the part of Kransco to exercise ordinary care, which when combined with AES's breach, if any, of its obligations of good faith and fair dealing contributed to cause Kransco's injury. The negligence referred to here is not any lack of care or breach of any legal duty owed by Kransco to Michael Hubert or other Hubert plaintiffs involved in the 1991 Wisconsin trial. It is the negligence, if any, of Kransco in the preparation and trial of the *Hubert v. Kransco* case, and then only if it was a legal cause of the plaintiffs' verdict in the amount returned and entered. Comparative negligence, if any, on the part of Kransco does not bar a recovery against AES, but the total amount of damages to which Kransco would otherwise be entitled shall be reduced in proportion to the amount of fault attributable to Kransco.

The jury returned a special verdict finding that AES had breached its duty of good faith and fair dealing toward Kransco in its handling of Hubert's personal injury claim. However, it also found that Kransco had breached the duty of good faith and fair dealing owed to AES or had failed to exercise ordinary care for its own safety in its handling of Hubert's claim before the verdict. The jury assessed compensatory damages at over $13.6 million, apportioning fault at 90 percent to Kransco and 10 percent to AES. (The jury further found Kransco did not act unreasonably in agreeing to the post-verdict settlement with Hubert.) Kransco moved for judgment notwithstanding the verdict or for a new trial, on the ground, among others, that the trial court had erred in instructing on both comparative bad faith and comparative negligence theories. The trial court granted the motion for judgment n.o.v. It concluded that comparative negligence was wholly inapplicable to the case and that its instruction on comparative fault should have been limited to "whether Kransco contributed to AES's failure to settle by impairing its assessment of the risk of a substantial likelihoodof an excess judgment." The court found that the jury verdicts finding comparative fault were unsupported by the evidence because "AES presented no substantial evidence that Kransco's failure promptly to convey to AES its knowledge of prior cervical injuries contributed to AES's failure to recognize the substantial likelihood of excess judgment." Judgment was entered in favor of Kransco for the full amount of damages as calculated by the jury, plus prejudgment interest and costs. Both parties appealed. The court of appeal affirmed, holding that in an insured's action against its insurer for breach of the implied covenant of good faith and fair dealing, the insurer may not raise the insured's comparative bad faith as an affirmative defense. The court further held that on the facts of this case, comparative negligence was not an available defense. The California Supreme Court granted review on the issue of comparative bad faith.

The Supreme Court affirmed, holding that in an action against an insurer for breach of the covenant of good faith and fair dealing, the insurer may not raise as an affirmative defense the insured's comparative bad faith. The Court held that because of the disparate scopes and natures of the insurer's and insured's obligations of good faith, an insurer's breach sounds in tort, while the insured's arises strictly from contractual provisions (*23 Cal. 4th 390, 401-402, 411)* . The Supreme Court noted that it has long been recognized in California that there is an implied covenant of good faith and fair dealing in every contract that neither party will do anything that will injure the right of the other to receive the benefits of the agreement. This principle applies equally to insurance policies, which are a category of contracts. Because the covenant is a contract term, in most cases compensation for its breach is limited to contract rather than tort remedies. However, an exception to this general rule has developed in the context of insurance contracts. For a variety

of policy reasons, courts have held that an insurer's breach of the implied covenant will provide the basis for an action in tort (*23 Cal. 4th 390, 400)* .

The Court also stated that the scope of the duty of good faith and fair dealing depends on the purposes of the particular contract because the covenant is aimed at making effective the agreement's promises. In the context of an insurance policy, the terms and conditions of the policy define the duties and performance to which the insured is entitled. One of the most important benefits of a maximum limit insurance policy is the assurance that the company will provide the insured with defense and indemnification for the purpose of protecting the insured from liability (*23 Cal. 4th 390, 400-401)* . An insured therefore has the legitimate right to expect that the method of settlement within policy limits will be employed to give him or her that protection. A liability insurance policy's express promise to defend and indemnify the insured against injury claims implies a duty to settle third party claims in an appropriate case. More specifically, the insurer must settle within policy limits if there is substantial likelihoodof recovery in excess of those limits. The duty to settle is implied in law to protect the insured from exposure to liability in excess of coverage as a result of the insurer's gamble, on which only the insured might lose. An insurer that breaches its implied duty of good faith and fair dealing by unreasonably refusing to accept a settlement offer within policy limits may be held liable for the full amount of the judgment against the insured in excess of its policy limits (*23 Cal. 4th 390, 401)* .

In this case, the jury concluded that AES breached its duty of good faith and fair dealing owed to Kransco by rejecting Hubert's $750,000 settlement offer, which was within the $900,000 policy limits, despite a substantial likelihood of recovery in excess of those limits. AES did not challenge that conclusion on appeal, but instead argued it should not be liable for the full amount of the judgment because Kransco's own litigation misconduct or comparative fault contributed to the excess verdict. Specifically, AES claimed that the jury in the personal injury action assessed $10 million in punitive damages to punish Kransco for its false and incorrect interrogatory responses made during pretrial discovery. The Court acknowledged that the duty of good faith and fair dealing in an insurance policy is a two-way street, running from the insured to the insurer and vice versa. However, the scope of the insured's duty of good faith and fair dealing, and the remedies available to the insurer for a breach of that duty, are fundamentally and conceptually distinct from the insurer's reciprocal duty, and the remedies available to the insured for breach of that duty, under the insurance policy. It is an *insurer's* breach of the covenant of good faith that is governed by tort principles, at least as concerns the availability of tort damages. In contrast, an *insured's* breach of the covenant is not a tort, and therefore does not give rise to tort damages recoverable by the insurer (*23 Cal. 4th 390, 401-402)* .

The Court therefore disapproved *California Cas. Gen. Ins. Co. v. Superior Court (1985) 173 Cal. App. 3d 274, 218 Cal. Rptr. 817* , to the extent that it is inconsistent with this holding (*23 Cal. 4th 390, 407 n.11*). *California Casualty,* the only published California case holding that in a bad faith action the insurer may assert the affirmative defense of comparative bad faith, was grounded on the faulty premise that the obligations of insurer and insured, and thus their bad faith, are comparable. The parties are bound by a reciprocal obligation of good faith and fair dealing, but the particular duties differ given the differing performance due under the contract of insurance. A fundamental disparity exists between the insured, who performs its basic duty of paying the policy premium at the outset, and the insurer, which hopes never to perform its basic duties of defense and indemnification. An insured is thus not on equal footing with its insurer. The relationship between insured and insurer is inherently unequal, the inequality resting on contractual asymmetry. An insurer's tort liability for breach of the covenant is thus predicated on special policyfactors inapplicable to the insured. The scope of the *insured's* duty of good faith and fair dealing in turn is confined by the express contractual provisions of the policy (*23 Cal. 4th 390, 404-405)* . An insured's reciprocal duty of good faith and fair dealing does not always necessitate reciprocal conduct. Because an insured's breach of the covenant does not sound in tort, the insured's contractual breach of an *express* policy provision cannot be raised by the insurer as a defense in a bad faith action brought against it by the insured. It would be illogical to allow the insurer in such a suit instead to interpose as a defense the insured's contractual breach of an *implied* policy provision (the covenant of good faith and fair dealing) based on those same express policy terms. The Court held that the jury should not have been instructed at all with principles of comparative bad faith. Accordingly it rejected AES's argument that it was error to affirm the trial court's judgment n.o.v. entered in Kransco's favor (*23 Cal. 4th 390, 405, 408)* .

The Court observed that rejection of comparative bad faith in this context does not leave the insurer without remedies for an insured's breach of the covenant of good faith and fair dealing. Evidence of an insured's misconduct may factually disprove the insurer's liability for bad faith by showing the insurer acted reasonably under the circumstances. The insured's breach of the covenant of good faith and fair dealing is also separately actionable as a contract claim. Some forms of misconduct by an insured will void coverage altogether under the insurance policy, and without coverage there can be no liability for bad faith on the part of the insurer. Moreover, an insured's *fraudulent* misconduct is separately actionable and can give rise to tort damages. These remedies adequately serve to protect an insurer from the insured's misconduct without creating the logical inconsistencies and troublesome complexities of a defense of comparative bad faith. The Court also noted that AES's argument was factually flawed--the jury was not presented with direct evidence that Kransco's counsel had been advised of the prior accidents before answering the interrogatories in dispute. In addition, as a matter of law, AES's assertion that Kransco's two false interrogatory responses alone resulted in the jury's punitive damages award is likewise flawed. Generally, punitive damages may be awarded only if it is proven that the defendant engaged in conduct intended to cause injury or engaged in despicable conduct with a conscious disregard of the rights or safety of others. It is questionable whether Kransco's two false interrogatory responses, exploited (in the eyes of the jury) largely through the plaintiff counsel's impassioned arguments, could themselves validly be deemed a legal proximate cause of the jury's punitive damages award and verdict. Most importantly however, to have any meaning, the express promise of a liability insurer to defend and indemnify the insured against injury claims, and the implied duty to reasonably and in good faith settle third party claims within policy limits in an appropriate case, must extend to insureds that are less than perfect litigants. An insured's knownweaknesses as a litigant should inform the insurer's assessment of the likelihood of an excess judgment, not diminish the insurer's obligation reasonably to accept settlement offers within policy limits. An insurer legitimately expects its insured's cooperation in defending third party injury claims, but cooperation does not demand flawless discovery responses (*23 Cal. 4th 390, 408-410)* .

The Supreme Court also discussed the comparative negligence instruction. AES based this defense on *Patrick v. Maryland Cas. Co. (1990) 217 Cal. App. 3d 1566, 267 Cal. Rptr. 24* , a first-party bad faith action holding that the insured's negligence in walking backward on a roof while dragging a heavy sheet of plywood warranted jury instructions on comparative fault. The Court stated, however, that it did not grant review on the propriety of the comparative negligence instructions and accordingly did not address that issue. Moreover, extension of comparative negligence principles in *Patrick* to first party insurance bad faith actions is inapposite to a third party insurance bad faith action case, which is factually distinguishable. The Court stated, however, that *Patrick* does not shield a third-party insurer from full responsibility for its bad faith failure to settle a case, even if the insured's litigation misconduct or mishandling of the claim inflated the size of the verdict, although evidence of misconduct may support contract defenses, cross-claims, or separate causes of action for breach of the terms of the insurance contract that are otherwise available to the insurer (*23 Cal. 4th 390, 411-412)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBad Faith & Extracontractual LiabilityGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilityElements of Bad FaithInsurance LawClaims & ContractsGood Faith & Fair DealingGeneral Overview

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 120 INSURANCE
PART II. FORMS
C. Improper Claims Settlement Practices
1. General Defenses

12-120 California Points & Authorities § 120.184

§ 120.184 Insurer Conducted an Inadequate Investigation of Insured's Claim

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER BREACHED THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING WHEN IT CONDUCTED AN INADEQUATE INVESTIGATION OF THE INSURED'S CLAIM.

Insurer Conducted an Inadequate Investigation of Insured's Claim. An insurer may breach the covenant of good faith and fair dealing when it fails to properly investigate its insured's claim for benefits under a policy (*Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 817, 169 Cal. Rptr. 691, 620 P.2d 141* ; *see Paulfrey v. Blue Chip Stamps (1983) 150 Cal. App. 3d 187, 194-196, 197 Cal. Rptr. 501*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose a contention by an insurer that the insurer handled the insured's claim in a reasonable manner. The basis of these points and authorities is that the insurer failed to properly investigate the insured's claim.

This form may be used by an insured in various procedural contexts. For example, in an action against a first party (casualty) insurer for damages for breach of the implied covenant of good faith in denying or delaying payment of benefits, it may be used by a plaintiff insured to oppose a defendant insurer's motion for summary judgment pursuant to *Code Civ. Proc. § 437c* in which the insurer contends that its handling of the insured's claim was reasonable as a matter of law. In this instance, the grounds of opposition are:

- The failure of the insurer to properly investigate the insured's claim may constitute a breach of the

covenant of good faith,

- Whether the insurer failed to properly investigate the insured's claim and if so whether the failure constituted a breach of the covenant of good faith are material facts, and

- There are triable issues with respect to these facts.

This form may also be used in a trial brief, or in an appellate brief.

When appropriate, this form may be used to oppose the points and authorities *set forth in § 120.174*. This form may also be modified to oppose the points and authorities *set forth in § 120.176*. For this latter use, counsel will need to include points and authorities that contending that there is coverage under the policy [*see, e.g., §§ 120.50* et seq.].

For references to related Pleading and Practice chapters, see *§ 120.186[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.186* et seq.) and to place the argument within its proper procedural context.

An appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing an insurer's motion for summary judgment or summary adjudication when the evidentiary facts clearly support the contention. In this context, counsel would modify the form to assert that there remain triable issuesof material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts opposing the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(e)-(h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Insurer Conducted an Inadequate Investigation of Insured's Claim

The factual background of *Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 169 Cal. Rptr. 691, 620 P.2d 141* , is discussed in *§ 120.170[3][a]*. In *Egan*, the Supreme Court affirmed judgment for the insured in part and reversed in part. The Court pointed out that the directed verdict on the issue of breach of covenant of good faith rested

on the insurer's inadequate investigation of plaintiff's claim for benefits under the policy and held that an insurer may breach the covenant of good faith and fair dealing when it fails to properly investigate its insured's claim (*24 Cal. 3d 809, 817)* . The Court said that the insured in a contract like the one before it (a health and disability policy) does not seek to obtain a commercial advantage, but, rather, protection against calamity and that, as insurers are well aware, the major motivation for obtaining disability insurance is to provide funds during periods when the ordinary source of the insured's income--his or her earnings--has stopped.

The purchase of such insurance provides peace of mind and security in the event the insured is unable to work and, to protect these interests, it is essential that an insurer fully inquire into possible bases that might support the insured's claim. The Court acknowledged that distinguishing fraudulent from legitimate claims may occasionally be difficult for insurers, especially in the context of disability policies, but that an insurer cannot reasonably and in good faith deny payments to its insured without thoroughly investigating the foundation for its denial (*24 Cal. 3d 809, 819)* . The Court noted that the evidence that the insurer failed to properly investigate plaintiff's claim was undisputed and held that the trial court, therefore, had correctly instructed the jury that a breach of the implied covenant of good faith and fair dealing was established (*24 Cal. 3d 809, 819)* .

In ***Paulfrey v. Blue Chip Stamps*** *(1983) 150 Cal. App. 3d 187, 197 Cal. Rptr. 501* , the court of appeal extended, in theory though not in the instant fact situation, the ruling of *Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 169 Cal. Rptr. 691, 620 P.2d 141* , to claims under health and accident insurance policies. Plaintiff in *Paulfrey* sued two insurers, Aetna and Blue Chip, for breach of her health and accident policy's implied covenant of good faith and fair dealing based on an alleged failure to investigate her claim. The trial court granted plaintiff's motion for directed verdict, and after insurer-defendants' motion for new trial was denied, an appeal ensued.

The court of appeal reversed the judgment. In reviewing the law regarding when the duty to investigate is triggered, the court cited *Egan* for the rule that an insurer may breach the covenant of good faith and fair dealing by failing to properly investigate an insured's claim (*150 Cal. App. 3d 187, 194)* . The court stated that there was no reason to limit the applicability of such a duty to investigate to disability cases, since the purpose of health and accident insurance is also to protect the insured against calamity and to provide peace of mind and security (*150 Cal. App. 3d 187, 195)* . However, the court went on to cite *Austero v. National Cas. Co. (1978) 84 Cal. App. 3d 1, 26, 148 Cal. Rptr. 653* as spelling out a test of reasonableness to be applied to issues of proper investigation by insurers. The court stated that whether an insured's denial of a claim is unreasonable is dependent on the facts in each case, and that whether an insurer breached its duty to investigate is also a question of fact to be determined by the particular circumstances of each case (*150 Cal. App. 3d 187, 195-196)* .

Examining the facts, the court found that the evidence was conflicting regarding whether the insurers were placed on notice of plaintiff's claims under the policies. Because of the conflict, the factual issues should have gone to a jury rather than being resolved by directed verdict (*150 Cal. App. 3d 187, 199)* . In dicta, the court went on to state that even though the law interprets insurance contracts more favorably to insureds when a conflict arises, nonetheless, an insurance contract is a bona fide contract between the insurer and the insured, and the insured has certain obligations to perform before an insured's duty to pay benefits will arise (*150 Cal. App. 3d 187, 199)* . It seems reasonable that any responsibility to investigate onan insurer's part would not arise until the threshold issue of whether a claim was filed, or whether a good-faith effort o comply with the claims procedure was made, had been determined. In no event could an insured fail to keep his or her part of the bargain in the first instance and thereafter seek recovery for breach of a duty to pay and punitive damages based on an insurer's failure to investigate a nonclaim (*150 Cal. App. 3d 187, 199-200)* .

[4] Additional Authorities

[a] Insurer Conducted Inadequate Investigation of Insured's Claim

In *Estate of Parker v. AIG Life Ins. (C.D. Cal. 2004) 317 F. Supp. 2d 1167* , the estate of a deceased insured pursued a

claim for death benefits under the insured's life insurance policy, which provided death benefits coverage for specific and limited hazards, including "Freeway Coverage." The insured was killed in a vehicle collision in Cuba. The estate asserted that the insured was killed on a freeway (a divided highway) as defined in the policy. Based on an analysis of the scene of the accident by a representative of the Swiss Embassy in Havana (not provided to the court by the insurer and not authenticated), the insurer determined that the accident did not occur on a freeway as defined in the policy. In the resulting breach of contract and declaratory relief action, the court noted that an insurer owes its insured the same duty of investigation that is implied in the insurance contract under the covenant of good faith and fair dealing, separate and apart from that covenant (*317 F. Supp. 2d 1167, 1171)* . The duty to investigate a possible basis for an insured's claim includes the duty to investigate grounds for denying the claim (*317 F. Supp. 2d 1167, 1172)* . In response to the insurer's motion for summary judgment, the court held that the insurer's failure to investigate whether the road in Cuba was a "freeway" within the meaning of the "Freeway Coverage" provision precluded summary judgment. Although the insurer need not have traveled to Cuba itself to investigate the accident scene to satisfy its affirmative duty to investigate the claim that the road was a freeway, it needed to present some reasonable basis for its denial, which it failed to do (*317 F. Supp. 2d 1167, 1173-1175)* .

In *Amerigraphics, Inc. v. Mercury Cas. Co. (2010) 182 Cal. App. 4th 1538, 107 Cal. Rptr. 3d 307* , the insured printing and design company brought an action for bad faith and contract breach against the insurer with respect to a "California Special Multi-Peril Policy" (insuring business personal property), based on conduct regarding the insured's claim for flood damage. Among other things, the insurer failed adequately to investigate the claim for replacement or repair of the damaged printer and scanner, which contributed significantly to the failure of the insured's business. The insurer's conduct included violation of California's regulatory standards, failure to advise the insured of potential available coverage, and failure to investigate the claim promptly. A jury trial resulted in a special verdict for the insured, awarding compensatory and punitive damages. The appellate court confirmed that the insurer had acted in bad faith (while reducing the amount of punitive damages), based on the insurer's unreasonable failure to pay, unreasonably delay in paying, and failure properly to investigate the loss (*182 Cal. App. 4th 1538, 1556)* .

In *McCormick v. Sentinel Life Ins. Co. (1984) 153 Cal. App. 3d 1030, 200 Cal. Rptr. 732* , a bad-faith action was brought by an insured who was not given payments on his claim under a disability insurance policy. The policy had secured plaintiff's loan on his camper truck, which was also security on the loan. Plaintiff became disabled and submitted a claim, but certain information was left off his doctor's report, and defendant insurer refused to pay. The trial court granted defendant's motion for summary judgment. The court of appeal reversed, holding, among other things, that the defendant had a duty to investigate the claim because the omissions in the claim form were so minor that they could have been easily cleared up by a phone call or by later asking the doctor to supply the omitted information (*153 Cal. App. 3d 1030, 1047-1048)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBad Faith & Extracontractual LiabilityInsurance LawClaims & ContractsGood Faith & Fair DealingGeneral Overview

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 120 INSURANCE
PART II. FORMS
C. Improper Claims Settlement Practices
1. General Defenses

12-120 California Points & Authorities § 120.185

§ 120.185 Action Not on Policy Is Not Barred by Statute of Limitations or Policy Limitations Clause

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURED IS NOT BARRED FROM PURSUING HIS/HER BAD-FAITH CLAIM BECAUSE THE ACTION WAS/IS NOT A CLAIM ON THE POLICY.

Bad-Faith Claim Not on the Policy Is Not Subject to Statutory Limitation Period. In actions involving a homeowner's insurance policy, a bad-faith claim for actions by the insurer that occurred subsequent to the initial loss is not an action on the policy and not barred by the statutorily mandated 12-month limitation period (*Murphy v. Allstate Ins. Co. (1978) 83 Cal. App. 3d 38, 46-50, 147 Cal. Rptr. 565*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose a contention that an insured is barred from pursuing his or her bad faith claim. The basis of these points and authorities is that the action is not one that is "on the policy" and therefore is not subject to the statutory limitation period governing the policy, or the limitations clause in the policy.

This form may be used by an insured in various procedural contexts, such as in memoranda opposing a general demurrer to a complaint, in a memoranda supporting or opposing a motion for summary judgment, in a trial brief, or in an appellate brief.

When appropriate, this form may be used to oppose the points and authorities *set forth in §§ 120.178* and *120.179*.

For references to related Pleading and Practice chapters, see *§ 120.186[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. For example, if appropriate, counsel should showthat the insurer's actions that are the basis of the bad-faith action occurred subsequent to the initial loss suffered by the plaintiff [*see, e.g., Murphy v. Allstate Ins. Co. (1978) 83 Cal. App. 3d 38, 46-50, 147 Cal. Rptr. 565* (discussed in *§ 120.185[3][a]*)].

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.186* et seq.) and to place the argument within its proper procedural context.

An appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing an insurer's motion for summary judgment or summary adjudication when the evidentiary facts clearly support the contention. In this context, counsel would modify the form to assert that there remain triable issues of material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts opposing the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(e)-(h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Bad-Faith Claim Not on the Policy Is Not Subject to Statutory Limitation Period

In ***Murphy v. Allstate Ins. Co.*** *(1978) 83 Cal. App. 3d 38, 147 Cal. Rptr. 565* , the insureds under a homeowner's insurance policy brought an action against the insurer for five separate causes of action. The trial court granted insurer's motion for summary judgment on the basis of two statutes of limitation (*83 Cal. App. 3d 38, 41)* . Plaintiffs appealed.

The court of appeal reversed the judgment, stating that the conduct complained of occurred subsequent to the fire loss, the damages claimed were not recoverable under the policy, and the actions were not barred by the statute of limitation (*83 Cal. App. 3d 38, 47, 49, 50)* . Plaintiffs' first cause of action was apparently based on a theory of fraudulent misrepresentation, in that the insurer falsely represented that the contractors hired by insurer were licensed, competent, and qualified to do the repair and restoration work on insured's house. In the second cause of action, plaintiffs alleged that the insurer and others conspired to defraud plaintiffs by making the allegations discussed in the first cause of action. The conduct complained of in both causes of action occurred subsequent to the fire loss. The damages claimed were not recoverable under the insurance policy, and the action was not "on the policy" (*83 Cal. App. 3d 38, 46, 47)* . The third and fourth causes of action stated causes of action for bad faith. The court of appeal stated that much of the conduct complained of occurred long after the fire loss.

The court concluded that the third and fourth causes of action were not actions "on the policy" and were not barred by the statutorily mandated 12-month limitation provision (*83 Cal. App. 3d 38, 47-49)* . The fifth cause of action was for intentional infliction of emotional distress. The court said that this was also not an action "on the policy" and not barred by the statutorily mandated 12-month limitation period (*83 Cal. App. 3d 38, 49-50)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilityGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilityElements of Bad Faith

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 120 INSURANCE
PART II. FORMS
C. Improper Claims Settlement Practices
1. General Defenses

12-120 California Points & Authorities § 120.186

§ 120.186 Insured's Judgment Creditor Has Direct Right of Action Against Insurer

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF, AS A JUDGMENT CREDITOR OF DEFENDANT'S INSURED, HAS A DIRECT RIGHT OF ACTION AGAINST DEFENDANT FOR DEFENDANT'S UNREASONABLE _____ [REFUSAL TO PAY *or* DELAY IN PAYING] THE JUDGMENT OBTAINED BY PLAINTIFF AGAINST DEFENDANT'S INSURED.

A. Judgment Creditor Has Direct Right of Action. Every policy of liability insurance issued or delivered in California must contain a provision requiring that whenever judgment is secured against the insured or the executor or administrator of a deceased insured in an action based on bodily injury or property damage, an action may be brought against the insurer on the policy and subject to its terms and conditions, by the judgment creditor to recover on the judgment (*Ins. Code § 11580(b)(2)*).

B. Insurer Is Liable to Judgment Creditor for Postjudgment Refusal to Pay Amount of Judgment. *Insurance Code Section 11580(b)(2)* confers upon the judgment creditor of an insured a direct right of action for breach of the covenant of good faith and fair dealing against an insurer that unreasonably refuses to pay the judgment creditor the amount of a judgment against the insured after the judgment becomes final. Because the judgment creditor has a direct right of action against the insurer under these circumstances, it is unnecessary for the judgment creditor to obtain an assignment of the insured's rights before bringing suit (*Hand v. Farmers Ins. Exch. (1994) 23 Cal. App. 4th 1847, 1857, 29 Cal. Rptr. 2d 258*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to an insurer's contention that a party lacks standing to

bring an action against the insured for breach of the implied covenant of good faith and fair dealing. The basis of these points and authorities is that a judgment creditor has a direct right of action against the insurer for the insurer's breach of thecovenant of good faith and fair dealing because of the insurer's unreasonable and bad-faith refusal to pay the amount of the judgment against the insured after the judgment became final.

This form may be used in various procedural contexts. For example, it may be used to oppose an insurer's motion for summary judgment, or to support a motion for summary judgment by the judgment creditor against the insurer.

These points and authorities will not support a denial of summary judgment in an action based on an insurer's alleged bad-faith failure to settle a claim *prior* to entry of judgment, as opposed to paying a final judgment against its insured. As discussed in *§§ 120.186[3][b]* and 120.189[2], the duty to settle runs to the insured, not judgment creditors, and a judgment creditor therefore cannot maintain a direct action against an insurer for failure to accept a reasonable settlement offer.

When appropriate, this form may be used to oppose the points and authorities *set forth in § 120.172*.

For references to related Pleading and Practice chapters, see *§ 120.186[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. To prevail on the claim, counsel will need to refer to facts that establish that:

- Show that the plaintiff obtained a judgment against the insured,
- The judgment was covered under the terms of the defendant insurer's policy,
- The insurer refused or delayed in paying the judgment, and
- This refusal was unreasonable and in bad faith.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.186* et seq.) and to place the argument within its proper procedural context.

As stated in § 120.186[2][a], an appropriate procedural context for this contention, for example, would be a judgment creditor's memorandum of points and authorities opposing an insurer's motion for summary judgment or summary adjudication when the evidentiary facts clearly support the contention. In this context, counsel would modify the form to assert that there remain triable issues of material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts opposing the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(e)-(h)].The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of

this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Judgment Creditor Has Direct Right of Action

The language of ***Ins. Code § 11580(b)(2)*** is substantially identical to that quoted in the form. That section basically gives judgment creditors of insureds a direct right of action against insurers to recover the amount of any judgments against the insureds, to the extent that the judgments are covered by the policies. This right exists with regard to every liability insurance policy [*see Ins. Code § 11580(a)* (policies subject to requirement)] issued or delivered to any person in California [*Ins. Code § 11580(b)*].

[b] Insurer Is Liable to Judgment Creditor for Postjudgment Refusal to Pay Amount of Judgment

In ***Hand v. Farmers Ins. Exch.*** *(1994) 23 Cal. App. 4th 1847, 29 Cal. Rptr. 2d 258* , the plaintiff was injured in an auto accident with a car driven by defendant's insured. Plaintiff alleged that after the accident, defendant admitted coverage on several occasions, and made several settlement offers. The case ultimately went to trial and plaintiff obtained a judgment against defendant. After the judgment had become final, defendant refused to pay the bulk of the judgment, claiming for the first time that the insured had been only a permissive user and that substantially lower coverage limits therefore were applicable. Plaintiff then brought an action against defendant under *Ins. Code § 11580(b)(2)* for the amount of the judgment, and also asserted tort claims for bad faith refusal to pay the judgment and intentional infliction of emotional distress.

The trial court granted plaintiff's summary judgment motion with respect to the underlying judgment, ruling that defendant's insured had been fully covered as a named insured under the policy and that plaintiff was entitled to recover the full amount of the judgment from defendant. However, the trial court also granted defendant summary judgment with respect to plaintiff's remaining causes of action, ruling that the duty of good faith and fair dealing could not be grafted onto the relationship created by *Ins. Code § 11580* and that an insurer's failure to pay or settle could not form the basis of a claim for intentional infliction of emotional distress (*23 Cal. App. 4th 1847, 1852-1852)* . Plaintiff appealed the grant of summary judgment on the tort claims.

In the published portion of the opinion, the Court of Appeal reversed the grant of summary judgment on the bad faith claim. The court stated that while *Murphy v. Allstate Ins. Co. (1976) 17 Cal. 3d 937, 132 Cal. Rptr. 424, 553 P.2d 584* is often cited for the general proposition that third party claimants may not bring bad faith claims, Murphy also stands for the proposition that by virtue of *Ins. Code § 11580*, a judgment creditor of an insured enjoys third party beneficiary status and rights under the policy. The court concluded that under Murphy, a third party beneficiary, and in particular one so situated by virtue of *Ins. Code § 11580*, may enforce extra-contractual covenants, including the covenant of good faith, to the extent that those covenants or duties run in its favor (*23 Cal. App. 4th 1847, 1857)* .

The court then held that unlike the duty to settle that was at issue in Murphy, the duty not to withhold payment of an adjudicated claim in bad faith runs not only in favor of the insured, but also in favor of a judgment creditor (*23 Cal. App. 4th 1847, 1858)* . Therefore, notwithstanding the general rule that third parties have no standing to bring a direct action against an insurer for breach of the covenant of good faith and fair dealing, judgment creditors of an insured may maintain a direct action for breach of the covenant of good faith and fair dealing against an insurer that refuses, unreasonably and in bad faith, to pay the entire amount of a judgment after it becomes final (*23 Cal. App. 4th 1847, 1857)* . In this limited situation, since a direct right of action exists, it is unnecessary for the insurer to obtain an

assignment of the claim from the insured.

[4] Additional Authorities

[a] Judgment Creditor Has Direct Right of Action

In *Pruyn v. Agricultural Ins. Co. (1995) 36 Cal. App. 4th 500, 42 Cal. Rptr. 2d 295* , the court of appeal held that a stipulated judgment may be sufficient for a direct action if it is procured under circumstances that protect against the potential for fraud and collusion. A good faith settlement pursuant to *Code Civ. Proc. § 877.6* does not preclude litigation asto whether or not the settlement was free from fraud and collusion, but it does shift the burden to the insurer to show by a preponderance of the evidence that the settlement was not reasonable or was the product of fraud or collusion (*36 Cal. App. 4th 500, 530)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBad Faith & Extracontractual LiabilityPayment Delays & DenialsInsurance LawClaims & ContractsGood Faith & Fair DealingPayments

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12-120 California Points & Authorities §§ 120.187-120.194

[Reserved]

§§ 120.187[Reserved]

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C. Improper Claims Settlement Practices
2. Refusal to Settle

12-120 California Points & Authorities § 120.195

§ 120.195 Insurer Did Not Refuse to Accept a Valid and Reasonable Settlement Offer

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER DID NOT BREACH THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING BECAUSE _____ [THE SETTLEMENT OFFER MADE WAS NOT A REASONABLE (AND VALID) SETTLEMENT OFFER *or* NO SETTLEMENT OFFER WAS MADE].

A. Insured Failed to Show That Reasonable Settlement Offer Was Made. To hold an insurer liable for payment of a judgment against its insured in excess of the policy limits (or if action is by insured or by both insured and insured's judgment creditor and insured seeks recovery of damages in addition to amount of judgment against him or her in excess of policy limits, payment of other damages sustained by the insured in excess of policy limits), it must be shown that the insurer's failure to settle the case was a result of bad faith on its part (*see Merritt v. Reserve Ins. Co. (1973) 34 Cal. App. 3d 858, 876, 880, 110 Cal. Rptr. 511* ; *Hodges v. Standard Accident Ins. Co. (1961) 198 Cal. App. 2d 564, 571, 574, 18 Cal. Rptr. 17*). In other words, it must be shown that the insurer unwarrantedly rejected a reasonable settlement offer, thereby breaching a duty to its insured under the implied covenant of good faith and fair dealing (***Crisci v. Security Ins. Co.*** *(1967) 66 Cal. 2d 425, 430, 58 Cal. Rptr. 13, 426 P.2d 173*).

B. There Is No Conflict of Interest Between Insurer and Insured. The legal rules relating to the liability of an insurer for failure to settle a case against its insured come into play only when a conflict of interest develops between the insurance carrier and its insured. A conflict of interest develops only when (1) an offer to settle an excess claim is made within policy limits, or (2) a settlement offer is made in excess of policy limits and the insured is willing and able to pay the excess (*Merritt v. Reserve Ins. Co. (1973) 34 Cal. App. 3d 858, 877, 110 Cal. Rptr. 511*).

[*EITHER*]

C. Insurer Had Bona Fide Belief That Recovery Would Be Within Policy Limits. An insurer does not breach its covenant of good faith in rejecting a settlement offer within policy limits when it honestly believes, and has cause to believe, that any recovery against its insured will be within the policy limits (*Hodges v. Standard Accident Ins. Co. (1961) 198 Cal. App. 2d 564, 574, 18 Cal. Rptr. 17*).

[*OR*]

C. No Settlement Offer Was Made. When there is no conflict of interest between the insurer because no settlement offer is made by the third-party plaintiff, the issue of whether the insurer is liable for failure to settle the case does not arise (*Merritt v. Reserve Ins. Co. (1973) 34 Cal. App. 3d 858, 877, 110 Cal. Rptr. 511*).

[*OR*]

C. The Settlement Offer Was Not Valid. The nonacceptance of a settlement offer on the ground that the offer failed to indicate that the approval of a third party, whose approval is necessary for the contract to take effect, had been obtained does not constitute a bad-faith refusal to settle so as to render the insurer liable for the excess judgment recovered against its insured in a third-party action or for other damages sustained by the insured (*see Coe v. State Farm Mut. Auto. Ins. Co. (1977) 66 Cal. App. 3d 981, 992-994, 136 Cal. Rptr. 331*).

[*OR*]

C. The Settlement Offer Did Not Completely Release All Insureds. An insurer's duty to settle extends to all of its insureds. Therefore, an insurer may, within the boundaries of good faith, reject a settlement offer that does not include a complete release of all of its insureds (*Strauss v. Farmers Ins. Exch. (1994) 26 Cal. App. 4th 1017, 1021, 31 Cal. Rptr. 2d 811* ; *see Lehto v. Allstate Ins. Co. (1994) 31 Cal. App. 4th 60, 73-74, 36 Cal. Rptr. 2d 814*).

[*OR*]

C. Defending Insurer Did Not Participate in Settlement. A defending insurer cannot be bound to a settlement made without the insurer's participation and without any actual commitment on the insured's part to pay the judgment, even if the settlement has been found to be in good faith for purposes of *Code Civ. Proc. § 877.6* (*Hamilton v. Maryland Cas. Co. (2002) 27 Cal. 4th 718, 730, 117 Cal. Rptr. 2d 318, 41 P.3d 128*).

D. Rule That Insurer Is Not Bound by Settlement Without Its Participation Applies Whether Claim Against Insurer Is Based on Contract or Tort. The rule that a defending insurer is not bound by a settlement made without its participation applies whether the claim against the insurer to recover on an agreed or stipulated judgment is based on breach of contract or on tortious bad faith (*Wolkowitz v. Redland Ins. Co. (2003) 112 Cal. App. 4th 154, 164, 5 Cal. Rptr. 3d 95*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention by an insurer that the insurer is not liable for breach of the implied covenant of good faith and fair dealing. The basis for these points and authorities is that the

insurer did not refuse to accept a valid and reasonable settlement offer.

This form may be used in various procedural contexts. For example, they may be used in an action:

- Brought by an insured against a liability insurer to recover damages sustained as a result of alleged bad faith.

- Brought by a third-party judgment creditor suing on the insured's claim to recover the amount of a third-party judgment in excess of policy limits.

- In an action by both the third-party judgment creditor suing as a partial assignee of the insured's claim against the insurer to recover the amount of the judgment in excess of the policy limits, on the one hand; and the insured seeking to recover damages, other than the excess judgment, on the other hand; both sustained as a result of the insurer's alleged breach of the covenant of good faith.

This form may also be used in a trial brief or in an appellate brief.

When using these points in support of a motion for summary judgment by a defendant insurer the ground of the motion, for example, would be that the action has no merit because it indisputably appears from the papers submitted on the motion that the defendant insurer did not refuse to accept a reasonable settlement offer [*see Hodges v. Standard Accident Ins. Co. (1961) 198 Cal. App. 2d 564, 574, 18 Cal. Rptr. 17* (determination of whether or not insurer has breached its duty to insured in failing to settle case is question of law when, from uncontroverted evidence, reasonable person following law can draw but one conclusion on issue)].

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.170* et seq.) and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be a motion by an insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that there is no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts supporting the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Pleading and Practice Chapters

For complaints by an insured against an insurer for damages for breach of contract because of the insurer's refusal to pay a third-party judgment against the insured or to defend the insured in a third-party action, see California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender). For a discussion of the rules applicable to summary judgment, a form of notice of motion for summary judgment, and related forms, see Ch. 537, *Summary Judgment* , in

that publication.

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[e] Opposing Points and Authorities

The points and *authorities in § 120.205* et seq., may be used in an appropriate case to oppose these points and authorities.

[3] Discussion of Authorities

[a] Insured Failed to Show That Reasonable Settlement Offer Was Made

Although the court of appeal opinions in both the *Merritt* and *Hodges* cases imply that dishonesty, fraud, or concealment are necessary to establish bad faith on the part of an insurer, the Supreme Court has indicated to the contrary in ***Crisci v. Security Ins. Co.*** *(1967) 66 Cal. 2d 425, 58 Cal. Rptr. 13, 426 P.2d 173* . *Crisci* involved an action by an insured against her insurer to recover damages proximately resulting from the insurer's refusal to settle a claim against the insured within policy limits. In affirming the judgment for plaintiff, the Supreme Court noted that several cases [*see, e.g.,* *Critz v. Farmers Ins. Group (1964) 230 Cal. App. 2d 788, 796, 41 Cal. Rptr. 401* ; *Palmer v. Financial Indem. Co. (1963) 215 Cal. App. 2d 419, 429, 30 Cal. Rptr. 204* ; *Davy v. Public Nat'l Ins. Co. (1960) 181 Cal. App. 2d 387, 396, 5 Cal. Rptr. 488]* , in considering the liability of the insurer for failure to accept a settlement offer, contain language to the effect that bad faith is the equivalent of dishonesty, fraud, and concealment. The Court said that obviously a showing that the insurer has been guilty of actual dishonesty, fraud, or concealment is relevant to the determination whether it has given consideration to the insured's interest in considering a settlement offer within the policy limits, but that the language used in the cases should not be understood as meaning that in the absence of evidence establishing actual dishonesty, fraud, or concealment, no recovery may be had for a judgment in excess of the policy limits.

The Court added that *Comunale v. Traders & Gen. Ins. Co. (1958) 50 Cal. 2d 654, 658-659, 328 P.2d 198* makes it clear that liability based on an implied covenant exists whenever the insurer refuses to settle in an appropriate case and that liability may exist when the insurer unwarrantedly refuses an offered settlement when the most reasonable manner of disposing of the claim is by accepting the settlement. Liability is imposed, the Court explained, not for a bad faith breach of the contract, but for failure to meet the duty to accept reasonable settlements, a duty included within the implied covenant of good faith and fair dealing. The Court concluded that examination of the balance of the *Palmer, Critz,* and *Davy* opinions makes it abundantly clear that recovery may be based on unwarranted rejection of a reasonable settlement offer and that the absence of evidence, circumstantial or direct, showing actual dishonesty, fraud, or concealment is not fatal to the cause of action.

Merritt v. Reserve Ins. Co. *(1973) 34 Cal. App. 3d 858, 110 Cal. Rptr. 511* , was an action on an assigned claim to recover from defendant insurer the amount of a judgment in excess of policy limits previously recovered by plaintiff against defendant's insured. The litigation arose out of a nighttime collision of trucks, one of which was driven by plaintiff who was seriously injured in the accident. The other truck was driven by an employee of defendant's insured. Plaintiff sued both the insured and its employee. The insurer engaged a law firm to represent the defendants in that action. The law firm concluded that the accident was caused by an improper lane change by plaintiff and so advised the

insurer. It also advised the insurer that settlement was out of the question because of the substantial sums already spent and those expected to be spent in the care of plaintiff by the workers' compensation carrier for plaintiff's employer. Plaintiff recovered judgment for $434,000. The insurer paid plaintiff $100,000, the full policy limit. In exchange for a covenant not to execute against it on the unsatisfied judgment, defendant's insured paid plaintiff $20,000 and assigned to him its claim for damages as an insured against defendant insurer. Plaintiff's complaint against the insurer was in two counts, one based on bad faith and the other on negligent defense. Defendant's motion for judgment on the pleadings on the negligent defense count was granted, and the jury returned a verdict for plaintiff on the bad-faith count in the amount of $499,000.

The court of appeal affirmed the judgment for defendant on the negligent defense cause of action, but reversed the judgment for plaintiff on the bad-faith count with directions to enter judgment for defendant on that count as well (*34 Cal. App. 3d 858, 884)* . In the course of its opinion, the court of appeal said that the cases unanimously agree that in considering an insurance carrier's liability for rejection of an offer to settle within policy limits, the test is bad faith and not negligence (*34 Cal. App. 3d 858, 873)* . Quoting from *Davy v. Public Nat'l Ins. Co. (1960) 181 Cal. App. 2d 387, 396, 5 Cal. Rptr. 488* , the court said that good faith implies honesty, fair dealing, and full revelation; that bad faith implies dishonesty, fraud, and concealment, and that neither mistaken judgment nor unreasonable judgment is the equivalent of bad faith (*34 Cal. App. 3d 858, 876)* . Quoting from *Brown v. Guarantee Ins. Co. (1957) 155 Cal. App. 2d 679, 688, 319 P.2d 69* , the court said that to justify liability in excess of policy limits, substantial culpability (bad faith rather than mere negligence) on the part of the insurer is required, and that negligence alone is insufficient to render the insurer liable (*34 Cal. App. 3d 858, 880)* .

Hodges v. Standard Accident Ins. Co. *(1961) 198 Cal. App. 2d 564, 18 Cal. Rptr. 17* , was an action on an assigned claim to recover from defendant insurer and its adjuster the amount of a judgment in excess of policy limits previously recovered by plaintiff against defendant insurer's insured. The action was based on the insurer's alleged bad-faith rejection of a prejudgment settlement offer within policy limits in the previous action. The insured's trustee in bankruptcy had assigned to plaintiff any cause of action that the insured might have against the insurer. The previous action arose out of an intersection collision in which both parties, entering the intersection at a right angle to each other, claimed to have entered the intersection with the green light. The action was tried three times. The first two trials were in the insured's favor, but the third trial resulted in a verdict for plaintiff for $35,721.20, reduced by consent to $27,721.20. The insurer paid plaintiff $12,003.26 (the policy limits of $10,000 plus interest and costs), in partial satisfaction of the judgment.

The insurer had refused a settlement offer of $5,000 made prior to the first trial and not withdrawn until after verdict in the third trial, after being advised by its adjuster that the case had a settlement value of $500 and by its attorney that liability was 50-50 and that, assuming liability, the case was worth from $2,500 to $3,500. The trial court found that the insurer had acted in bad faith and rendered judgment for plaintiff. The court of appeal reversed with directions to enter judgment for defendants (*198 Cal. App. 2d 564, 581)* . The court acknowledged that liability of an insurer for failure to exercise good faith to the insured in acting on a settlement offer within policy limits is well established in California, and, quoting from *Davy v. Public Nat'l Ins. Co. (1960) 181 Cal. App. 2d 387, 396, 5 Cal. Rptr. 488* , the court said that good faith implies honesty, fair dealing, and full revelation, that bad faith implies dishonesty, fraud, and concealment, and that neither mistaken judgment nor unreasonable judgment is the equivalent of bad faith (*198 Cal. App. 2d 564, 574)* .

[b] There Is No Conflict of Interest Between Insurer and Insured

The facts and procedural background of ***Merritt v. Reserve Ins. Co.*** *(1973) 34 Cal. App. 3d 858, 110 Cal. Rptr. 511* , are discussed in *§ 120.195[3][a]*. The court of appeal affirmed the judgment for defendant on the negligent defense cause of action, but reversed the judgment for plaintiff on the bad-faith count with directions to enter judgment for defendant on that count as well (*34 Cal. App. 3d 858, 884)* . The court concluded that, while much remains obscure in this field of the law, it is apparent that the legal rules relating to bad faith come into effect only when a conflict of

interest develops between the carrier and its insured. The court held that such a conflict of interest develops only when an offer to settle an excess claim is made within policy limits or when a settlement offer is made in excess of policy limits and the insured is willing and able to pay the excess (*34 Cal. App. 3d 858, 877)* .

[c] Insurer Had Bona Fide Belief That Recovery Would Be Within Policy Limits

The factual background of ***Hodges v. Standard Accident Ins. Co.*** *(1961) 198 Cal. App. 2d 564, 18 Cal. Rptr. 17* , is discussed in *§ 120.195[3][a]*. The court of appeal reversed the judgment for plaintiff with directions to enter judgment for defendants. The court said that liability on the part of the insurer for refusal to accept an offer of settlement may not be predicated on its failure to correctly predict the outcome of the action it is defending and that an insurer does not act in bad faith to the insured when it honestly believes and has cause to believe that any probable liability will be less than the policy limits (*198 Cal. App. 2d 564, 574)* . It added that the exercise of good faith does not require that the unusual, out-of-the-ordinary verdict be anticipated (*198 Cal. App. 2d 564, 575)* . The court explained that the act of appraising a case is not an exact science and that there is room for a variety of honest judgments. It said that the insurer must appraise the case prior to the trial on its general experience and that the insurer should not be penalized for its failure to predict accurately the action of a jury (*198 Cal. App. 2d 564, 575)* .

[d] No Settlement Offer Was Made

The factual background of ***Merritt v. Reserve Ins. Co.*** *(1973) 34 Cal. App. 3d 858, 110 Cal. Rptr. 511* , is discussed in *§ 120.195[3][a]*. In reversing judgment for plaintiff on the bad-faith count with directions to enter judgment for defendant insurer, the court of appeal noted that plaintiff at no time made any offer to settle, that neither he, nor his counsel, nor the worker's compensation carrier ever advanced any suggestion that settlement could be profitably discussed, and that since no offer to settle was ever made, either within policy limits (the normal prerequisite for a conflict of interest) or above policy limits but within feasibility limits of the insured's resources, no conflict of interest ever developed between the insured and the carrier. Therefore, the court concluded, the issue of the carrier's bad faith in relation to its insured never arose (*34 Cal. App. 3d 858, 877)* .

[e] The Settlement Offer Was Not Valid

Coe v. State Farm Mut. Auto. Ins. Co. *(1977) 66 Cal. App. 3d 981, 136 Cal. Rptr. 331* , was an action by the insured's assignee against defendant insurance company to recover the amount of a judgment previously recovered by the assignee against the insured in excess of policy limits. The third-party action arose out of a collision between the insured's car and a truck being driven by Richard Coe, who was seriously injured. The circumstances of the collision indicated that the insured negligently caused the accident. Coe was covered by workers' compensation and the compensation carrier notified defendant insurer that it intended to assert against any recovery a lien for money paid out on account of Coe's injuries. An attorney, acting in behalf of Coe and members of Coe's family, sent defendant insurer a letter which contained an offer to settle the claim against defendant's insured for $25,000, the policy limit. The offer was received by defendant at its home office April 8 and, by its terms, required acceptance by April 15. No mention was made in the offer regarding the compensation carrier's claim. On April 9, defendant wrote the attorney stating that the settlement demand was premature for a number of specified reasons, including the fact the attorney had not indicated that a release would be executed by the compensation carrier. The attorney did not reply to this letter. Coe subsequently died from his injuries, and a wrongful death action was brought by his widow for herself and her children, as decedent's heirs. The wrongful death action resulted in a judgment against the insured for $250,000. The widow then gave the insured a covenant not to execute on the judgment, took an assignment of the insured's rights against the insurer for bad-faith refusal to settle, and commenced the present action, which resulted in a judgment against the insurer in an amount in excess of $300,000.

The court of appeal reversed. It held, as a matter of law, that the letter from the attorney was not a settlement offer because the worker's compensation carrier was neither a party to it nor mentioned in it and no provision had been made

for its consent or for disposition of its right to reimbursement for the benefits paid on the Coe claims. Citing *Lab. Code § 3859* and *Lab. Code § 3860* and cases, the court said that no settlement of any of the Coe claims against the insured could have been effective at any time without the written consent of the workers' compensation carrier. The court noted that when the approval of a third party is necessary for a contract to take effect, there is no contract until the approval has been obtained (*66 Cal. App. 3d 981, 992)* and that the attorney's failure to offer or guarantee the compensation carrier's consent and release meant that none of his clients made an offer whose acceptance by the insurer would have produced a valid settlement of the claims against the insured (*66 Cal. App. 3d 981, 992-993)* . The court explained that acceptance of the offer as made would have left the insured exposed to a recoupment action by the compensation carrier and would have amounted to an abdication by the insurer of its responsibilities to its own insured (*66 Cal. App. 3d 981, 994)* .

[f] The Settlement Offer Did Not Completely Release All Insureds

Strauss v. Farmers Ins. Exch. *(1994) 26 Cal. App. 4th 1017, 31 Cal. Rptr. 2d 811* , involved an action by one driver against three individuals insured by the same carrier under a business liability policy. At one point the plaintiff offered to settle with the carrier for policy limits in exchangefor a release of one (but not all) of the defendant insureds. The carrier refused to settle in this fashion. The plaintiff eventually settled with one of the defendants under his personal auto policy, and received an assignment of bad faith rights. He then sued the insurer for bad faith refusal to settle.

The court of appeal affirmed a trial court's grant of summary judgment. The court held that a carrier is under a duty to consider the interests of all its insureds. To settle a claim against less than all insureds would leave the nonsettling defendants functionally uninsured, in clear violation of those defendant's interests. Consequently, the court held that as a matter of law, it could not have been bad faith for the carrier to have refused to settle (*26 Cal. App. 4th 1017, 1021-1023)* .

In ***Lehto v. Allstate Ins. Co.*** *(1994) 31 Cal. App. 4th 60, 36 Cal. Rptr. 2d 814* , plaintiff was injured in a head-on collision. The driver of the other car and his father, the car's owner, were insured under a policy providing limits of $25,000 per person and $50,000 per accident. Plaintiff's medical bills exceeded those limits. The insurer filed an interpleader action in order to apportion the policy limits among the five claimants. An agreement was reached as to apportionment, but because plaintiff refused to release the insureds, the court ordered that plaintiff's share of the proceeds be held by the court pending resolution of the action. Plaintiff then offered to release just the father in exchange for the $25,000 policy limits. Both the insureds and the insurer rejected this offer. The insureds settled for $2,635,000 and plaintiff filed a bad faith claim seeking $2.5 million in damages on the insured's assigned bad faith claim against the insurer, plus additional compensatory and punitive damages. The jury awarded $2.5 million in damages on the assigned claim and an additional $1 million on a statutory bad faith claim.

The court of appeal reversed. The court held that plaintiff's argument that he should be able to release one insured in return for the policy limits while maintaining his tort action against the other insured was contrary to sound public policy. First, it would permit the claimant to inject himself into the insurance relationship, and to direct the insurer to favor one insured over the other. Thus, the claimant would determine which insured would receive the full benefits of the insurance policy. Such a result, stated the court, could hardly be said to be within the reasonable expectations of the insured (*31 Cal. App. 4th 60, 73*). The court further stated that acceptance by the insurer of the "offer," as made, would have amounted to an abdication of its responsibilities to its own insured. Specifically, it would have breached its implied covenant of good faith and fair dealing not to injure the insured's rights under the policy, and its obligation to consider the interests of the insured equally with its own. The court held that bad faith refusal to accept a settlement offer cannot occur when acceptance of the offer would itself constitute bad faith (*31 Cal. App. 4th 60, 74*).

[g] Defending Insurer Did Not Participate in Settlement

In ***Hamilton v. Maryland Cas. Co.*** *(2002) 27 Cal. 4th 718, 117 Cal. Rptr. 2d 318, 41 P.3d 128* , a liability insurer

agreed to defend the insured against a personal injury suit. The insurer refused a settlement demand within policy limits. The claimant and the insured, without the insurer's participation, agreed on a settlement, under which the claimant agreed not to execute judgment against the insured, and the insured assigned to the claimant the insured's cause of action for breach of the insurer's duty to accept a reasonable settlement demand. The trial court approved the settlement as made in good faith under *Code Civ. Proc. § 877.6*. In an action by the claimant, as the insured's assignee, against the insurer for breach of contract based on the insurer's failure to accept the claimant's settlement offer, the trial court denied the insurer's motion for summary judgment. Following the plaintiff's motion for summary judgment, the trial court entered judgment in favor of the plaintiff. The court of appeal reversed, and the California Supreme Court granted review.

The Supreme Court affirmed the court of appeal, holding that a defending insurer cannot be bound to a settlement made without its participation and without any actual commitment on its insured's part to pay the judgment, even if the settlement has been found to be in good faith for purposes of *Code Civ. Proc. § 877.6* (*27 Cal. 4th 718, 730)* . Although an assignment may be made before trial, the assignment does not become operative, and the claimant's action against the insurer does not mature, until a judgment in excess of policy limits has been entered against the insured (*27 Cal. 4th 718, 725)* . Settlements reached without the consent or participation of the defending insurer, and incorporating a covenant not to execute or a similar device, are entitled to no weight in a later action against the insurer for failure to settle (*27 Cal. 4th 718, 726)* . The claimant in this case may not maintain an action for breach of duty to settle because, in light of the settlement before trial and the covenant not to execute against the insured, the stipulated judgment is insufficient to prove that the insured suffered any damages from the insurer's breach of its settlement duty (*27 Cal. 4th 718, 729-734)* .

[h] Rule That Insurer Is Not Bound by Settlement Without Its Participation Applies Whether Claim Against Insurer Is Based on Contract or Tort

In ***Wolkowitz v. Redland Ins. Co.*** *(2003) 112 Cal. App. 4th 154, 164, 5 Cal. Rptr. 3d 95* , the bankruptcy trustee for an insured company sued the company's insurer for bad faith refusal to accept a pretrial offer to settle a personal injury action against the company within policy limits and related causes of action. The trustee sought to recover as damages the amount of an allowed claim filed by the personal injury plaintiff. Theallowance of the claim (in excess of $26 million) was the result of an agreement between the personal injury plaintiff and the trustee, and occurred on the bankruptcy court's granting of the trustee's motion seeking the allowance. The trial court sustained the demurrer to the complaint, and dismissed the complaint.

The court of appeal affirmed, holding that the complaint failed to state a cause of action against the insurer (and its attorneys) because it failed to allege facts sufficient to establish that the insured suffered any claimed damages as a result of the refusal to settle the personal injury plaintiff's action. Until a judgment has been entered against the insured after a trial, there is no assurance that the insured will suffer any damage from the insurer's breach of its implied obligation to accept a reasonable settlement offer. If the insurer has accepted defense of the action, no trial has been held to determine the insured's liability, and a covenant not to execute excuses the insured from bearing any actual liability from a stipulated judgment, the entry of a stipulated judgment is insufficient to show, even rebuttably, that the insured has been injured to any extent by the failure to settle, much less in the amount of the stipulated judgment (*112 Cal. App. 4th 154, 163)* . Without a judicial determination of the insured's actual liability, the claimants as assignees could not establish either that the insured was damaged as a result of the insurer's refusal to settle or the amount of damages. In addition, the court held that if, as in this case, an insured, without an insurer's agreement, stipulates to a judgment against it in excess of both the policy limits and the previously rejected settlement offer, and if that stipulated judgment is coupled with a covenant not to execute, the agreed judgment cannot fairly be attributed to the insurer's conduct, even if the insurer's refusal to settle within the policy limits was unreasonable (*112 Cal. App. 4th 154, 164)* . Therefore, it does not matter whether the claim that is asserted against the insurer to recover on an agreed or stipulated judgment is based on an alleged breach of contract or, as in this case, a claim of tortious bad faith (*112 Cal. App. 4th 154, 164)* . Furthermore, for purposes of an action against the debtor's insurer based on an unreasonable refusal to settle,

the bankruptcy court's approval of an uncontested claim without an evidentiary hearing provides no reliable basis to establish damages resulting from the refusal to settle (*112 Cal. App. 4th 154, 166)* .

[4] Additional Authorities

[a] Insurer Had Bona Fide Belief That Recovery Would Be Within Policy Limits

In *Western Polymer Tech., Inc. v. Reliance Ins. Co. (1995) 32 Cal. App. 4th 14, 38 Cal. Rptr. 2d 78* , the court rejected an insured's attempt to hold an insurer liable for bad faith on the theory that the insurer unreasonably accepted a settlement offer within policy limits (*32 Cal. App. 4th 14, 23)* . While noting that an insurer should not be able to further its own interest by settling a claim within policy limits through use of the insured's money without some form of consent by the insured, the court rejected the insured's contention that injury to the insured's business reputation was a sufficient basis to hold the insurer liable. The court held that no reasonable reading of the policy language in question would create an expectation that the insurer has to forgo settlement in favor of vindicating the insured's reputation (*32 Cal. App. 4th 14, 26-27)* .

Camelot by the Bay Condominium Owners' Assn. v. Scottsdale Ins. Co. (1994) 27 Cal. App. 4th 33, 32 Cal. Rptr. 2d 354 , was an action by an insured's assignee against an insurer for damages for breach of the covenant of good faith and fair dealing. The underlying action was a construction defect case in which there were questions as to whether some defects were covered by the insurance policy. The total damages in the case were never greater than $937,245. In the course of the litigation, the plaintiff made a settlement offer of $300,000, well within policy limits of $1,000,000. However, the insurer refused to accept the offer. The insured and the plaintiff then entered into a stipulated judgment for $675,000 in exchange for a covenant not to execute and an assignment of rights. In the subsequent bad faith action, the trial court held that the insurer improperly allowed coverage issues to interfere with its settlement considerations. The insurer appealed. The court of appeal reversed, stating that even when coverage issues were present, there was no duty to settle within policy limits because there was never any threat of an excess judgment against the insured (*27 Cal. App. 4th 33, 53-54)* .

[b] Rule That Insurer Is Not Bound by Settlement Without Its Participation Applies Whether Claim Against Insurer Is Based on Contract or Tort

In *Mercado v. Allstate Ins. Co. (9th Cir. 2003) 340 F.3d 824* , an assigned insurance bad faith case removed to federal district court, the Ninth Circuit Court of Appeals affirmed summary judgment for the defendant, an automobile policy insurer. The insured had struck a pedestrian and, ultimately and without the insurer's participation, entered into a stipulated judgment with the pedestrian against the insured in excess of the policy limits, which the insurer had already offered in an attempt to settle. The insured had also assigned to the pedestrian all claims against the insurer. The Court of Appeals held that because the insurer had not participated in the settlement, the insurer's liability for the stipulated judgment was foreclosed by *Hamilton v. Maryland Cas. Co. (2002) 27 Cal. 4th 718, 117 Cal. Rptr. 2d 318, 41 P.3d 128* (*340 F.3d 824, 826-827)* . Furthermore, the holding in *Hamilton* applies not only to contract claims for bad faith, but also to tort claims for bad faith, such as the claim in this case (*340 F.3d 824, 827)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBad Faith & Extracontractual LiabilitySettlement ObligationsGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilitySettlement ObligationsGood Faith & Fair DealingInsurance LawBad Faith & Extracontractual LiabilitySettlement ObligationsPolicy LimitsInsurance LawClaims & ContractsGood Faith & Fair DealingGeneral Overview

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 120 INSURANCE
PART II. FORMS
C. Improper Claims Settlement Practices
2. Refusal to Settle

12-120 California Points & Authorities § 120.196

§ 120.196 Third-Party Judgment Creditor Lacks Standing to Sue Insurer Without Valid Assignment

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF, AS THIRD PARTY CREDITOR, LACKS STANDING TO SUE INSURER BECAUSE THE CAUSE OF ACTION SUED ON BELONGS TO DEFENDANT'S INSURED AND NOT TO PLAINTIFF AND _____ [THE INSURED HAS NOT MADE A VALID ASSIGNMENT OF THE CAUSE OF ACTION TO PLAINTIFF *or* THE INSURED'S PURPORTED ASSIGNMENT OF THE CAUSE OF ACTION TO PLAINTIFF IS INVALID].

Insured Made No Valid Assignment. A third-party judgment creditor of defendant's insured may not sue a liability insurer to recover the amount of its judgment in excess of policy limits without first obtaining from the insured an assignment of the latter's cause of action, if any, against the insurer for breach of its covenant of good faith in failing to accept a reasonable settlement offer (*Murphy v. Allstate Ins. Co. (1976) 17 Cal. 3d 937, 942-944, 132 Cal. Rptr. 424, 553 P.2d 584*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention by an insurer that the insurer is not liable for breach of the implied covenant of good faith for failing to accept a settlement. The basis for these points and authorities is that the plaintiff judgment creditor lacks standing to sue the insurer because the insured has not made a valid assignment of the insured's cause of action against the insurer.

This form may be combined with points and authorities contending that a stipulated judgment with covenant not to execute is not a valid transfer without court approval [*see* § 170.197].

This form may be used by an insurer in various procedural contexts, such as in memoranda supporting or opposing a motion for summary judgment, in a trial brief, or in an appellate brief. For example, if this form is being used in support of an insurer's motion for summary judgment, the ground of the motion may be that the action has no merit because it indisputably appears from the papers submitted on the motion that:

- The insurer paid the full policy limit on the judgment together with interest and costs,
- Any cause of action against the insurer based on its alleged breach of its covenant of good faith with its insured resides in the insured and not in the insured's judgment creditor,
- The insured has not made a valid assignment to the judgment creditor of the insured's cause of action, if any, against defendant,
- There are, therefore, no triable issues as to any material fact, and
- The insurer is entitled to judgment as a matter of law.

This form may also be used in a trial brief or in an appellate brief.

For legal background relating to when assignment is necessary for an insured's judgment creditor to be permitted to sue an insurer on behalf of the insured, see California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender).

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.170* et seq.) and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be a motion by an insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that there is no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts supporting the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[d] Opposing Points and Authorities

The points and authorities in §§ 120.190 and *120.206* may be used in an appropriate case to oppose these points and authorities.

[3] Discussion of Authorities

[a] Insured Made No Valid Assignment

Murphy v. Allstate Ins. Co. *(1976) 17 Cal. 3d 937, 132 Cal. Rptr. 424, 553 P.2d 584* , was an action against an insurer brought by the third-partyjudgment creditor of defendant's insured. The complaint alleged that plaintiff, in a prior action, had sued defendant's insured for wrongful death of her nine-year-old son, that defendant in that action had rejected settlement demands for $23,500 and $25,000 (the policy limit), and that plaintiff thereafter received a verdict of $85,000 but remitted all over $42,000 on the insurer's motion for new trial. That judgment was affirmed on appeal, and the insurer paid plaintiff the policy limit plus interest. Plaintiff then sued defendant insurer to recover the unpaid portion of the judgment in excess of the policy limit alleging that defendant had breached its duty of good faith to its insured by having refused to settle the prior action within policy limits. Plaintiff did not, however, allege that the insured had assigned to her his cause of action against the insurer, and the trial court granted defendant's motion for judgment on the pleadings on this ground. Plaintiff appealed.

The Supreme Court affirmed. The Court pointed out that when an insurance carrier breaches its duty to its insured to settle (1) the insured may recover the excess award over policy limits (*17 Cal. 3d 937, 941)* , (2) the insured may assign his or her cause of action against the insurer to the third-party judgment creditor, (3) the assignment is permitted without the consent of the insurance carrier, even when the policy provides to the contrary (*17 Cal. 3d 937, 942)* , (4) a third-party judgment creditor of the insured may, under the provisions of *Ins. Code § 11580(b)(2),* without an assignment, sue the insurer to recover the judgment up to the policy limits, but that this section does not authorize the third-party judgment creditor to proceed against the insurer for the excess of the judgment over the policy limits (*17 Cal. 3d 937, 944)* , (5) while a third-party beneficiary may enforce a contract expressly made for his other benefit under *Civ. Code § 1559* (*17 Cal. 3d 937, 943*), he or she may not enforce covenants made not for his or her benefit but, rather, for the benefit of others, and (6) the duty to settle is intended to benefit the insured and not the injured claimant (*17 Cal. 3d 937, 944*).

[4] Additional Authorities

[a] Insured Made No Valid Assignment

In *Clemmer v. Hartford Ins. Co. (1978) 22 Cal. 3d 865* , the Supreme Court stated that in the absence of an assignment, a third-party claimant cannot bring an action on a duty owed to the insured by the insurer and that the plaintiffs, standing in the place of the injured party, could claim no duty owing to the insured to defend since no assignment of the insured's right was claimed (*22 Cal. 3d 865, 889*).

In *Shaolian v. Safeco Ins. Co. (1999) 71 Cal. App. 4th 268, 83 Cal. Rptr. 2d 702* , the insured, who had liability insurance in a homeowner's insurance policy, injured a third party who then attempted to sue the insurerbased on the medical coverage provisions in the policy. The court of appeal stated that inasmuch as the insurer's duties flow to its insured alone, a third party claimant may not bring a direct action against an insurance company. As a general rule, a third party may directly sue an insurer only if there has been an assignment of rights by, or a final judgment against, the insured (*71 Cal. App. 4th 268, 271-272)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawThird PartiesGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilityAssignment of ClaimsInsurance LawClaims & ContractsGood Faith & Fair DealingGeneral OverviewInsurance LawClaims & ContractsGood Faith & Fair DealingThird Party Claimants

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 120 INSURANCE
PART II. FORMS
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12-120 California Points & Authorities § 120.197

§ 120.197 Stipulated Judgment With Covenant Not to Execute Is Not Valid Assignment

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF, AS THIRD PARTY CREDITOR, LACKS STANDING TO SUE INSURER BECAUSE THE STIPULATED JUDGMENT WITH COVENANT NOT TO EXECUTE, ENTERED INTO BY PLAINTIFF JUDGMENT CREDITOR AND DEFENDANT'S INSURED, IS NOT VALID ASSIGNMENT OF THE INSURED'S CLAIM.

Stipulated Judgment With Covenant Not to Execute Is Not Valid Assignment. A stipulated judgment with a covenant not to execute against the insured will not support an assignment of the insured's cause of action to the judgment creditor unless the stipulated judgment and assignment is specifically approved by the court as a good faith settlement under *Code of Civil Procedure Section 877.6* after a hearing on that issue, or has otherwise been found by a court to satisfy the criteria for a good-faith settlement, so that there is no basis for concern over the possibility of collusive conduct (*Smith v. State Farm Mut. Auto. Ins. Co. (1992) 5 Cal. App. 4th 1104, 1114, 7 Cal. Rptr. 2d 131* ; *see Roman v. Unigard Ins. Group (1994) 26 Cal. App. 4th 177, 184, 31 Cal. Rptr. 2d 501*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention by an insurer that the insurer is not liable for breach of the implied covenant of good faith for failing to accept a settlement. The basis for these points and authorities is that the stipulated judgment with covenant not to execute is not a valid assignment, without approval by the court under *Code Civ. Proc. § 877.6*.

This form may be combined with points and authorities generally contending that there was no valid assignment of

insured's claim against the insurer [*see* § 170.196].

This form may be used by an insurer in various procedural contexts, such as in memoranda supporting or opposing a motion for summary judgment, in a trial brief, or in an appellate brief. For example, if this form is being used in support of an insurer's motion for summary judgment, the ground of the motion may be that the action has no merit because it indisputably appears from the papers submitted on the motion that:

- The insurer paid the full policy limit on the judgment together with interest and costs,
- Any cause of action against the insurer based on its alleged breach of its covenant of good faith with its insured resides in the insured and not in the insured's judgment creditor,
- The insured has not made a valid assignment to the judgment creditor of the insured's cause of action, if any, against defendant,
- There are, therefore, no triable issues as to any material fact, and
- The insurer is entitled to judgment as a matter of law.

This form may also be used in a trial brief or in an appellate brief.

For legal background relating to when assignment is necessary for an insured's judgment creditor to be permitted to sue an insurer on behalf of the insured, see California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender).

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.170* et seq.) and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be a motion by an insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that there is no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts supporting the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of theaffiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[d] Opposing Points and Authorities

The points and authorities in §§ 120.190 and *120.206* may be used in an appropriate case to oppose these points and authorities.

[3] Discussion of Authorities

[a] Stipulated Judgment With Covenant Not to Execute Is Not Valid Assignment

In ***Smith v. State Farm Mut. Auto. Ins. Co.*** *(1992) 5 Cal. App. 4th 1104, 1114, 7 Cal. Rptr. 2d 131* , the insured was convicted of drunken driving, manslaughter, and felony hit and run driving after being involved in an accident in which another person was killed. The parents of the accident victim sued the insured for wrongful death. Two insurance policies potentially applied. One insurer undertook the insured's defense, but the other relied on a policy exclusion to deny coverage. Before the wrongful death action went to trial, the plaintiffs, insured, and participating insurer reached a settlement under which the parties stipulated to a judgment in favor of plaintiffs. As part of this settlement, the insured assigned to plaintiffs all claims that he might have against the nonparticipating insurer based on its failure to defend or settle the action. In consideration for this assignment, plaintiffs agreed not to execute on the stipulated judgment against the insured personally. Plaintiffs then sued the nonparticipating insurer for breach of the covenant of good faith and fair dealing. The trial court sustained a demurrer to the action, and plaintiffs appealed (*5 Cal. App. 4th 1104, 1108-1109)* .

The court of appeal concluded that while case law permits assignments in consideration of covenants not to execute (*5 Cal. App. 4th 1104, 1110-1111)* , policy considerations make it undesirable to allow assignment of bad faith actions prior to a judgment in the underlying action. The court reasoned that if an assignment were permitted prior to judgment, the assignee could then litigate both the insured's liability and the insurance coverage issue in a single action, in contravention of *Evid. Code § 1155* and public policy articulated in case law (*5 Cal. App. 4th 1104, 1112)* . Moreover, the liability issue could not be litigated in an adversarial context because the insured may appear as an ally of the claimant, thereby putting the insurer at an unfair disadvantage (*5 Cal. App. 4th 1104, 1113)* . Accordingly, a stipulated judgment with a covenant not to execute would not be sufficient to support an assignment of the insured's bad faith claim to plaintiffs. A judgment against the insured, or payment by the insured in settlement of the claim, would be required to support such an assignment (*5 Cal. App. 4th 1104, 1114)* .

However, the court accepted plaintiffs' alternative argument that the insured's criminal conviction for manslaughter constituted an adjudication of liability sufficient to support the assignment. The court agreed that under the doctrine of collateral estoppel, the jury trial in which the insured was convicted would conclusively establish his negligence in the civil action. Such an adjudication of liability would remove the court's objection to assignment of the bad faith claim because the issue of liability would not have to be litigated in a nonadversarial context, and the insurer would not be put to an unfair disadvantage (*5 Cal. App. 4th 1104, 1115-1116)* .

In ***Roman v. Unigard Ins. Group*** *(1994) 26 Cal. App. 4th 177, 184, 31 Cal. Rptr. 2d 501* , an arson fire in an apartment building killed or injured several members of a family. The surviving family members sued the building owners and manager. Claiming noncoverage, the manager's insurer refused to participate in negotiations that resulted in a settlement by the other parties. Subsequently the manager, without its insurer's participation, also settled under an arrangement whereby a stipulated judgment was entered in a specified amount. This settlement was subject to a court determination, on submission of evidence by plaintiffs, that the judgment was fair and reasonable. The manager also assigned all its rights against its insurer to plaintiffs, and plaintiffs agreed not to execute against the manager personally. After a hearing, the court found that the settlement was in good faith under *Code Civ. Proc. § 877.6* and was not the

result of collusion or fraud. Subsequently, plaintiffs sued the manager's insurer for bad faith, breach of contract, and other claims. The court granted the insurer's motion for summary judgment on the grounds that plaintiffs had no standing to sue because the management company's assignment of its claims against the insurer was invalid under *Smith v. State Farm Mut. Auto. Ins. Co. (1992) 5 Cal. App. 4th 1104, 1114, 7 Cal. Rptr. 2d 131* , and plaintiffs appealed (*26 Cal. App. 4th 177, 179-183)* .

The court of appeal reversed. Relying on *Sanchez v. Truck Ins. Exchange (1994) 21 Cal. App. 4th 1778* , the court held that astipulated judgment and covenant not to execute, when approved by a court as a good faith settlement under *Code Civ. Proc. § 877.6*, is sufficient to support an assignment because it eliminates any concern that the parties engaged in collusive or abusive conduct (*26 Cal. App. 4th 177, 184)* .

[4] Additional Authorities

[a] Stipulated Judgment With Covenant Not to Execute Is Not Valid Assignment

In *Sanchez v. Truck Ins. Exchange (1994) 21 Cal. App. 4th 1778* , an insurer refused to defend a wrongful death action. The action resulted in a stipulated judgment that was approved by the court as a good-faith settlement under *Code Civ. Proc. § 877.6*. The stipulated judgment contained a covenant not to execute against the insured until after the plaintiff's action against the insurer was resolved. Plaintiff filed a direct action against the insurer and the insurer demurred on the basis of the "no action" clause in its policy, which prohibited actions against the insurer until after the insurer's obligation was determined by a judgment following actual trial or a written agreement of the insurer, insured, and claimant. The trial court sustained the demurrer, but the court of appeal reversed, holding that a stipulated judgment approved by a court under *Code Civ. Proc § 877.6* is sufficient to support an action under the "no action" clause and *Ins. Code § 11580(b)(2)* (the "direct action") statute because the court review of the claim eliminated concern over potential collusion, fraud, or tortious conduct in connection with the settlement (*21 Cal. App. 4th 1778, 1788-1789)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewContracts LawPerformanceAssignmentGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilityAssignment of ClaimsInsurance LawBad Faith & Extracontractual LiabilityCovenants Not to ExecuteInsurance LawClaims & ContractsGood Faith & Fair DealingGeneral Overview

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
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C. Improper Claims Settlement Practices
2. Refusal to Settle

12-120 California Points & Authorities § 120.198

§ 120.198 Insured Waived Claim for Personal Damages by Assigning Rights to Judgment Creditor

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURED WAIVED ANY CLAIM HE/SHE MIGHT HAVE AGAINST INSURER FOR PURELY PERSONAL DAMAGES WHEN HE/SHE ASSIGNED HIS/HER CLAIM TO INSURED'S THIRD-PARTY JUDGMENT CREDITOR.

Insured Waived Claim for Personal Damages by Assigning Rights to Judgment Creditor. An insured who assigns to his or her judgment creditor the insured's claim against the insurer for damages for the insurer's breach of its covenant of good faiththereby waives any claim for purely personal damages that the insured might have against the insurer (*Purcell v. Colonial Ins. Co. (1971) 20 Cal. App. 3d 807, 814, 97 Cal. Rptr. 874*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention by an insurer that the insurer is not liable for breach of the implied covenant of good faith for failing to accept a reasonable settlement. The basis for these points and authorities is that the insured is no longer the real party in interest because the insured assigned whatever cause of action he or she might have against the insurer, to his or her third-party judgment creditor, and the assignee thereafter sued the insurer on the assigned claim. In doing this, the insured waived any claim he or she might have to recover damages against the insurer for any purely personal wrong.

This form may be used by an insurer in various procedural contexts. For example, these points and authorities may be submitted by defendant insurer in an action by its insured to recover damages for breach of the implied covenant of good faith in failing to accept a reasonable offer to settle the case against the insured in a third-party action which

resulted in a judgment against the insured in excess of the policy limits. The grounds for the motion would be, for example, that the action has no merit because it indisputably appears from the papers submitted on the motion:

- The insured has assigned to his or her third-party judgment creditor whatever cause of action he or she might have against the insurer for failure to settle,
- The assignee thereafter sued defendant in the assigned claim,
- Plaintiff is, therefore, not the real party in interest and has waived any claim he or she might have to recover damages for any purely personal wrong,
- There are no triable issues as to any material fact, and
- Defendant is entitled to judgment as a matter of law.

This form may also be used by an insurer in a trial brief, or in an appellate brief.

For references to related Pleading and Practice chapters, see *§ 120.195[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should refer to facts showingthat the insured assigned the claim to his or her judgment creditor and that the latter subsequently sued the insurer on the assigned claim.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.170* et seq.) and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be a motion by an insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that there is no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts supporting the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[d] Opposing Points and Authorities

The points and authorities in §§ 120.190 and *120.206* may be used in an appropriate case to oppose these points and authorities.

[3] Discussion of Authorities

[a] Insured Waived Claim for Personal Damages by Assigning Rights to Judgment Creditor

Purcell v. Colonial Ins. Co. *(1971) 20 Cal. App. 3d 807, 97 Cal. Rptr. 874* , was an action by an insured against his insurer for damages for mental and physical pain and suffering resulting from defendant's failure tosettle, within policy limits, a claim against plaintiff for bodily injury, property damage, and wrongful death. Judgment in excess of the policy limit had been rendered against plaintiff insured in the third-party action, and plaintiff assigned to the third-party judgment creditors his cause of action against defendant insurer. The third-party judgment creditors then sued defendant on the assignment, and plaintiff in a separate action sued defendant to recover damages for pain and suffering. Defendant's motion for judgment on the pleadings was granted, and plaintiff appealed. Plaintiff contended that he had two causes of action against his insurer, one for the pecuniary loss resulting from the judgment in excess of policy limits and one for pain and suffering and that only the former had been assigned.

The court of appeal rejected this contention and affirmed the judgment. The court said that while the general rule is that causes of action for injuries to person and property are separate, all damages for a single breach of contract must be recovered in one action, that even if defendant's actions were viewed as a tortious breach of the duty owed plaintiff, the same result followed (*20 Cal. App. 3d 807, 813)* . Quoting from *Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 832, 69 Cal. Rptr. 321, 442 P.2d 377* , the court said that compensatory damages do not constitute a plaintiff's cause of action, that his cause of action arises from the wrong inflicted on him, and that for the infliction of that wrong he is allowed an award of damages. An entire claim arising either on a contract or from a wrong cannot be divided and made the subject of several suits (*20 Cal. App. 3d 807, 813)* . The court said that plaintiff could not split the cause of action and explained that, had plaintiff desired to retain his claim for emotional distress, he could have contracted with the third parties to pay to them all or any part of a judgment he might recover from the insurer and that, had he done so, he could have recovered all proper damages without submitting the defendant to a multiplicity of lawsuits (*20 Cal. App. 3d 807, 814)* . The court concluded that plaintiff possessed a single and indivisible cause of action against defendant. Having assigned his cause of action to his judgment creditors in clear and unequivocal language, plaintiff simply waived any claim for personal damages that he might have been able to recover had he, himself, brought the action against the insurer for all damages (*20 Cal. App. 3d 807, 814)* .

[4] Additional Authorities

[a] Insured Waived Claim for Personal Damages by Assigning Rights to Judgment Creditor

In *Murphy v. Allstate Ins. Co. (1976) 17 Cal. 3d 937, 132 Cal. Rptr. 424, 553 P.2d 584* , the Supreme Court summarized *Purcell v. Colonial Ins. Co. (1971) 20 Cal. App. 3d 807, 97 Cal. Rptr. 874* [*see § 120.198[3][a]*] as follows: An insured assigned his cause of action for breach ofthe duty to settle, the assignee suing on the assignment; subsequently, the insured sued for mental distress; the second action was held to violate the rule against splitting a cause of action; the court suggested that the insured should have brought a single action in his own name for all damage, agreeing to pay part of the recovery to the assignee (*17 Cal. 3d 937, 942)* .

In *San Jose v. Superior Court (1974) 12 Cal. 3d 447, 115 Cal. Rptr. 797, 525 P.2d 701* , an original writ proceeding arising out of a purported class action against a municipal airport to recover for diminution in the market value of property allegedly caused by aircraft noise, vapor, dust, and vibration, the theories of liability being nuisance and inverse condemnation, the trial court certified the case as a class action, and defendant sought extraordinary relief based on the contention, among others, that plaintiffs did not adequately represent the members of the class. The Supreme

Court upheld this contention and directed issuance of a writ of mandate ordering the trial court to vacate its order of certification and to dismiss the class action portion of the suit (*12 Cal. 3d 447, 465)* .

The Court pointed out that damages recoverable in a successful nuisance action for injuries to real property include not only diminution in market value but also damages for annoyance, inconvenience, and discomfort, actual injuries to the land, and costs of minimizing future damages. The Court noted that, under California law, a party cannot, as a general rule, split a single cause of action because the first judgment bars recovery in a second suit on the same cause, and that plaintiffs, by seeking damages only for diminution in market value, would effectually be waiving, on behalf of the hundreds of class members, any possible recovery of potentially substantial damages, present or future, and that this they may not do (*12 Cal. 3d 447, 464)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBad Faith & Extracontractual LiabilityGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilityAssignment of ClaimsInsurance LawClaims & ContractsGood Faith & Fair DealingGeneral Overview

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12-120 California Points & Authorities § 120.199

§ 120.199 In Action by Insured Against Insurer for Failure to Settle, Insured May Not Recover Punitive Damages Awarded Against Insured in Underlying Action if Punitive Damages Award Was Based on Insured's Conduct

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURED IS NOT ENTITLED TO RECOVER FROM INSURER THE AMOUNT OF PUNITIVE DAMAGES AWARDED AGAINST INSURED IN THE UNDERLYING ACTION, BECAUSE THE PUNITIVE DAMAGES AWARD WAS BASED ON THE INSURED'S OWNCONDUCT, AND PUBLIC POLICY PREVENTS INDEMNIFICATION OF PUNITIVE DAMAGES.

Insured Cannot Recover from Insurer Punitive Damages Awarded Against Insured. An insured may not recover from the insurer the amount of punitive damages awarded against the insured in the underlying third-party action following the insurer's failure to settle, if the punitive damages were awarded against the insured because of the insured's own conduct (*PPG Indus., Inc. v. Transamerica Ins. (1999) 20 Cal. 4th 310, 315-319, 84 Cal. Rptr. 2d 455, 975 P.2d 652*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted, in a case in which the punitive damages were awarded against the insured because of the insured's own conduct, in support of the contention by an insurer that the insurer is not liable to the insured for punitive damages awarded against the insured in the underlying action, following the insurer's refusal to settle with the third party [*see PPG Indus., Inc. v. Transamerica Ins. (1999) 20 Cal. 4th 310, 315-319, 84 Cal. Rptr. 2d 455, 975 P.2d 652]* .

[b] Argument

Counsel should insert argument linking the points in this form with the facts of counsel's case. In particular, counsel should refer to facts showing that the punitive damages award against the insured was based on the insured's own conduct.

This form should be combined with other forms in this publication as necessary to complete argument with respect to all issues and to place the argument within its proper procedural context.

[3] Discussion of Authorities

[a] In Action by Insured Against Insurer for Failure to Settle, Insured May Not Recover Punitive Damages Awarded Against Insured in Underlying Action if Punitive Damages Award Was Based on Insured's Conduct

PPG Indus., Inc. v. Transamerica Ins. *(1999) 20 Cal. 4th 310, 315-319, 84 Cal. Rptr. 2d 455, 975 P.2d 652* , was an action against an insurer by the successor in interest to the insured, for failure to settle the third-party claim within policy limits although the insured had urged the insurerto do so. Following the insurer's refusal to settle, the injured person brought a lawsuit against the insured in which the jury awarded the plaintiff $5.1 million in compensatory damages and $1 million in punitive damages. The injury to the plaintiff occurred because a windshield distributed and installed by the insured "popped out" during a collision, propelling the plaintiff through the resultant opening and rendering him a paraplegic. The plaintiff showed that the method used by the insured to install the windshield (using silicone instead of industry-recommended urethane) created, with the insured's knowledge, the defective and dangerous condition that caused the plaintiff's injuries. The punitive damages award was based on the insured's conduct in this respect. Following the judgment, the insurer paid the policy limits of $1.5 million plus over $1 million in costs and interest. The excess insurer paid the remainder of compensatory damages, leaving the insured to pay the $1 million in punitive damages. The insured's successor in interest sued the insurer for breach of the covenant of good faith and fair dealing, alleging that the insurer unreasonably refused to settle the underlying lawsuit and seeking compensatory damages representing the $1 million in punitive damages that it was required to pay in the underlying suit. The trial court granted summary judgment for the insurer, relying on the well-established rule prohibiting indemnity coverage for punitive damages awarded against the insured. The court of appeal affirmed the judgment, and the insured sought review.

The California Supreme Court affirmed the judgment of the court of appeal, holding that an insured is prohibited from shifting to the insurance company the obligation to pay punitive damages resulting from the insured's egregious misconduct in the underlying lawsuit. First, the Court stated that public policy prevents liability for intentional wrongdoing from being offset or reduced by the negligence of another. Second, the purpose of punitive damages is to punish the defendant and to deter future misconduct by making an example of the defendant. If the Court were to allow the intentional wrongdoer to shift responsibility for its morally culpable behavior to the insurance company, which surely will pass to the public its higher cost of doing business, it would defeat the public policies of punishing the intentional wrongdoer for its own outrageous conduct and deterring it and others from engaging in that conduct in the future. Third, public policy prohibits indemnification for punitive damages. In this case, the Court noted, punitive damages in the third-party lawsuit were awarded not against the insurance company for its unreasonable failure to settle that lawsuit, but rather against the insured for the insured's own morally reprehensible behavior in installing the windshield on the injured party's vehicle. The Court concluded that an insured may not shift to its insurance company, and ultimately to the public, the payment of punitive damages awarded in the third-party lawsuit against the insured as a result of theinsured's intentional, morally blameworthy behavior against the third party (*20 Cal. 4th 310, 315-319)* .

Legal Topics:

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

Insurance LawBad Faith & Extracontractual LiabilitySettlement ObligationsGeneral OverviewInsurance LawClaims & ContractsPunitive Damages Exclusions

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12-120 California Points & Authorities §§ 120.200-120.204

[Reserved]

§§ 120.200[Reserved]

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12-120 California Points & Authorities § 120.205

§ 120.205 Insurer Did Not Act in Act Good Faith in Rejecting Settlement Offer

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURED BREACHED THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING BY REJECTING THE SETTLEMENT OFFER.

A. Insurer Failed to Act in Good Faith. Every insurance contract contains an implied covenant of good faith and fair dealing that neither party will do anything which will injure the right of the other to receive the benefits of the agreement (*Comunale v. Traders & Gen. Ins. Co. (1958) 50 Cal. 2d 654, 658, 328 P.2d 198* ; *Miller v. Elite Ins. Co. (1980) 100 Cal. App. 3d 739, 756, 161 Cal. Rptr. 322*).

B. Insurer Breached Its Duty By Failing to Settle Claim. The obligation of good faith and fair dealing requires a liability insurer, in an appropriate case, to settle the claim against its insured, although the express terms of the policy do not impose such a duty (*Johansen v. California State Auto. Ass'n Inter-Ins. Bureau (1975) 15 Cal. 3d 9, 14-16, 123 Cal. Rptr. 288, 538 P.2d 744* ; *Comunale v. Traders & Gen. Ins. Co. (1958) 50 Cal. 2d 654, 659, 328 P.2d 198*).

C. Insurer Failed to Take Insured's Interest Into Consideration. In deciding whether to compromise a claim against its insured, the insurer must take into account the interest of the insured and give it at least as much consideration as it does to its own interest (*Comunale v. Traders & Gen. Ins. Co. (1958) 50 Cal. 2d 654, 659, 328 P.2d 198* ; *Miller v. Elite Ins. Co. (1980) 100 Cal. App. 3d 739, 756, 161 Cal. Rptr. 322*).

D. Insurer's Breach Established by Factors. In deciding whether the insurer's refusal to settle constitutes a breach of its duty to exercise good faith, the following factors should be considered: (1) the strength of the injured claimant's case on the issuesof liability and damages; (2) attempts by the insurer to induce the insured to contribute to a settlement; (3) failure of the insurer to properly investigate the circumstances so as to ascertain the evidence against the insured; (4) the

insurer's rejection of the advice of its own attorney or agent; (5) failure of the insurer to inform the insured of a compromise offer; (6) the amount of financial risk to which each party is exposed in the event of a refusal to settle; (7) the fault of the insured in inducing the insurer's rejection of the compromise offer by misleading it as to the facts; and (8) any other factors tending to establish or negate bad faith on the part of the insurer (*Brown v. Guarantee Ins. Co. (1957) 155 Cal. App. 2d 679, 689, 319 P.2d 69* ; *see also Coe v. State Farm Mut. Auto. Ins. Co. (1977) 66 Cal. App. 3d 981, 990, 136 Cal. Rptr. 331*).

E. Insurer's Conduct Fails Objective Test. In determining whether an insurer has given consideration to the interests of the insured, the test is whether a prudent insurer without policy limits would have accepted the settlement offer (***Crisci v. Security Ins. Co.*** *(1967) 66 Cal. 2d 425, 429, 58 Cal. Rptr. 13, 426 P.2d 173*).

F. Insurer Is Liable for Entire Judgment. A liability insurer that refuses to accept a reasonable settlement offer within policy limits of the claim against its insured, in violation of its duty to consider in good faith the interest of the insured in the settlement, is liable for the entire judgment against the insured, even if it exceeds the policy limits (*Johansen v. California State Auto. Ass'n Inter-Ins. Bureau (1975) 15 Cal. 3d 9, 15, 123 Cal. Rptr. 288, 538 P.2d 744* ; *Comunale v. Traders & Gen. Ins. Co. (1958) 50 Cal. 2d 654, 661, 328 P.2d 198* ; *Brown v. Guarantee Ins. Co. (1957) 155 Cal. App. 2d 679, 682, 319 P.2d 69*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose a contention by an insurer that the insurer did not breach the implied covenant of good faith and fair dealing by handling the insured's claim in a reasonable manner. The basis of these points and authorities is that by failing to accept a reasonable settlement offer, the insurer breached the implied covenant.

This form may be used by an insured in various procedural contexts. For example, it may be used by a plaintiff insured in an action against a liability insurer for damages for breach of the implied covenant of good faithbased on the insurer's refusal to settle a claim against its insured within policy limits. In this context, this form would be used to oppose a motion for summary judgment by the insurer. The grounds of the opposition are:

(1) There is in every insurance contract an implied covenant of good faith and fair dealing on the part of the parties,

(2) Pursuant to this implied covenant, an insurer has a duty to act in good faith towards its insured,

(3) The duty of good faith requires the insurer to settle the claim against its insured within policy limits when there is a substantial likelihood of recovery in excess of those limits,

(4) Whether the insurer acted in good faith in rejecting the settlement offer is a material fact [*see Garner v. American Mut. Liab. Ins. Co. (1973) 31 Cal. App. 3d 843, 847-848, 107 Cal. Rptr. 604* (whether or not insurer has acted in good faith in negotiating settlement is question of fact)]; and

(5) There are triable issues with respect to this fact.

This form may also be used in a trial brief, or in an appellate brief.

When appropriate, this form may be used to oppose the points and authorities *set forth in § 120.195* et seq.

For references to related Pleading and Practice chapters, see *§ 120.186[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.186* et seq.) and to place the argument within its proper procedural context.

An appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing an insurer's motion for summary judgment or summary adjudication when the evidentiary facts clearly support the contention. In this context, counsel would modify the form to assert that there remain triable issues of material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts opposing the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(e)-(h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Pleading and Practice Chapters

For legal background related to an insurer's duty of good faith and fair dealing, including related forms of complaint, see California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender).

For a discussion of the rules applicable to summary judgment, a form of notice of motion for summary judgment, and related forms, see Ch. 537, *Summary Judgment* , in that publication.

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Insurer Failed to Act in Good Faith

Comunale v. Traders & Gen. Ins. Co. *(1958) 50 Cal. 2d 654, 328 P.2d 198* , was an action to recover from defendant insurer the amount of a judgment in excess of policy limits previously recovered by plaintiff and his wife in a third-party action against defendant's insured. Plaintiff and his wife had been struck in a marked pedestrian crosswalk by a truck driven by defendant's insured. Plaintiff was seriously injured, and his wife suffered minor injuries. The policy limits were $10,000 for each person injured and $20,000 for each accident. The insured notified defendant of the accident and was told that the policy did not provide coverage because the insured was driving a truck which did not belong to him. Plaintiff and his wife then sued the insured. Defendant refused to defend the action against the insured, and the insured employed competent counsel to represent him. On the second day of trial, the insured informed

defendant that plaintiffs would compromise the case for $4,000, that he did not have enough money to effect the settlement, and that it was highly probable that the jury would return a verdict in excess of policy limits. Under the policy, defendant was obligated to defend any personal injury suit covered by the policy, but it was given the right to make such settlement as it might deem expedient.

The insured demanded that defendant assume defense and settlement of the case, but defendant refused. Trial resulted in a judgment against the insured in favor of plaintiff for $25,000 and in favor of his wife for $1,250. The insured did not pay the judgment, and plaintiff and his wife sued defendant insurer under a provision of the policy permitting the injured party to maintain an action against the insurer after obtaining judgment against the insured [*see Ins. Code § 11580(b)(2)*]. Judgment was rendered in favor of plaintiff for $10,000 and in favor of his wife for $1,250, which sums defendant insurer paid. Plaintiff then obtained an assignment of the insured's rights against defendant insurer and commenced an action to recover the portion of the judgment exceeding the policy limits. The jury returned a verdict for plaintiff, but the trial court entered judgment fordefendant notwithstanding the verdict. In reversing the judgment with directions to the trial court to enter judgment on the verdict, the Supreme Court said that there is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement and that this principle is applicable to insurance policies (*50 Cal. 2d 654, 658)* .

In ***Miller v. Elite Ins. Co.*** *(1980) 100 Cal. App. 3d 739* , in affirming the judgment for plaintiff insured, the court of appeal said that every insurance contract contains an implied covenant of good faith and fair dealing and that good faith and fair dealing means that each party is prevented from interfering with the other's right to benefit from the contract (*100 Cal. App. 3d 739, 756)* .

[b] Insurer Breached Its Duty By Failing to Settle Claim

Johansen v. California State Auto. Ass'n Inter-Ins. Bureau *(1975) 15 Cal. 3d 9, 123 Cal. Rptr. 288, 538 P.2d 744* , was an action to recover the amount of a judgment in excess of policy limits previously recovered by plaintiff against defendant's insured. Plaintiff and her husband had been injured in a car accident caused by the negligence of defendant's insured and sued the insured for damages. The insurer assumed defense of that action but reserved its right to litigate the coverage issue and brought a declaratory relief action against plaintiff and the insured for a determination as to whether the policy afforded coverage. Plaintiff's subsequent offer to settle her claim for $10,000, the full amount of the policy, was rejected by defendant, which stated it would be willing to offer the policy limits only if it were judicially determined that the policy did in fact provide coverage. Defendant admitted the offer was reasonable and conceded that its insured was negligent. Despite defendant's efforts to expedite the declaratory relief action, the personal injury action went to judgment, resulting in an award against the insured for $33,889.30. The trial court in the declaratory relief action ruled in favor of the insurer on the coverage issue, but that determination was reversed on appeal. A final judgment holding that the policy did provide coverage was entered more than four years after the action was commenced. The insurer paid plaintiff the policy limit plus interest.

The insured assigned his rights against the insurer to plaintiff in exchange for her promise to release him from personal liability on the outstanding judgment. Plaintiff, as assignee of the insured's rights, then commenced an action against the insurer to recover the portion of the judgment exceeding the policy limits. The trial court rendered judgment for defendant after finding that the insurer's liability could be predicated only on a showing of bad faith and that the insurer entertained a bona fide belief that coverage did not exist (*15 Cal. 3d 9, 13-14)* . The Supreme Court reversed. The Court said that the implied covenant of good faith and fairdealing imposes a duty on the insurer to settle a claim against its insured within policy limits whenever there is a substantial likelihood of a recovery in excess of those limits (*15 Cal. 3d 9, 14-15)* , and that whenever it is likely that the judgment against the insured will exceed policy limits so that the most reasonable manner of disposing of the claim is a settlement which can be made within those limits, a consideration in good faith of the insured's interests requires the insurer to settle the claim (*15 Cal. 3d 9, 16)* .

The factual background of ***Comunale v. Traders & Gen. Ins. Co.*** *(1958) 50 Cal. 2d 654, 328 P.2d 198* , is discussed

in *§ 120.205[3][a]*. In reversing the judgment for defendant notwithstanding the verdict with directions to the trial court to enter judgment on the verdict for plaintiff, the Supreme Court said that it is common knowledge that a large percentage of the claims covered by insurance are settled without litigation, that this is one of the usual methods by which the insured receives protection, and that under these circumstances, the implied obligation of good faith and fair dealing requires the insurer to settle in an appropriate case although the express terms of the policy do not impose such a duty. The Court added that when there is a great risk of a recovery beyond the policy limits so that the most reasonable manner of disposing of the claim is a settlement which can be made within those limits, a consideration in good faith of the insured's interest requires the insurer to settle the claim (*50 Cal. 2d 654, 659)* .

[c] Insurer Failed to Take Insured's Interest Into Consideration

The factual background of ***Comunale v. Traders & Gen. Ins. Co.*** *(1958) 50 Cal. 2d 654, 328 P.2d 198* , is discussed in *§ 120.205[3][a]*. In reversing the judgment for defendant notwithstanding the verdict with directions to the trial court to enter judgment on the verdict for plaintiff, the Supreme Court said that the insurer, in deciding whether a claim should be compromised, must take into account the interest of the insured and give it at least as much consideration as it does to its own interest (*50 Cal. 2d 654, 659)* .

In ***Miller v. Elite Ins. Co.*** *(1980) 100 Cal. App. 3d 739, 161 Cal. Rptr. 322* , affirming the judgment for plaintiff insured, the court of appeal said that the covenant of good faith and fair dealing is always a prominent issue in the settlement phase of insurance cases because of the possibility of a conflict of interest between the interests of the insurer and the insured. The court observed that when a conflict of interests emerges, the carrier has the obligation of protecting the interests of the insured equally with its own, and that such a conflict arises not only at the litigation stage, butalso at the moment when a third-party claimant offers to settle an excess claim within the policy limits (*100 Cal. App. 3d 739, 756)* .

[d] Insurer's Breach Established by Factors

Brown v. Guarantee Ins. Co. *(1957) 155 Cal. App. 2d 679, 319 P.2d 69* , was an action to recover from defendant insurer the amount of a judgment in excess of the policy limits previously recovered by plaintiff against defendant's insured. Plaintiff was injured by the negligent driving of defendant's insured. The policy limit was $5,000 for bodily injury to any one person. Plaintiff sued the insured who was represented by a law firm hired by defendant to defend the insured. Plaintiff's offer before trial to settle the litigation for $5,000 was rejected by defendant insurer. During trial, defendant insurer made offers of settlement in the amounts of $3,000, $3,500, and $4,000, but rejected offers to settle for the policy limit, maintaining throughout that unless it could save some money on the settlement, it had no reason to settle. The action against the insurer resulted in a judgment for plaintiff in the amount of $15,000. Defendant insurer paid the sum of $5,000, plus $138.50 costs, leaving a balance of $10,000 on the judgment. The insured filed for bankruptcy, and the trustee in bankruptcy assigned all of the insured's interests in any claims against defendant insurer to plaintiff, who then commenced the action to recover the balance of the judgment. Defendant's demurrer to the complaint was sustained without leave to amend, and plaintiff appealed from the subsequent judgment of dismissal. The court of ap peal reversed with directions to allow plaintiff to file an amended complaint (*155 Cal. App. 2d 679, 696)* . The court said that the factors set out in Paragraph D should be considered in determining whether the insurer's refusal to settle constitutes a breach of its covenant of good faith (*155 Cal. App. 2d 679, 689)* .

[e] Insurer's Conduct Fails Objective Test

Crisci v. Security Ins. Co. *(1967) 66 Cal. 2d 425, 58 Cal. Rptr. 13, 426 P.2d 173* , was an action by an insured, a 70-year-old immigrant widow, against her insurer to recover damages proximately resulting from the insurer's refusal to settle a claim against plaintiff insured within policy limits. Plaintiff owned an apartment building which had an outside wooden stairway that was defective. A tenant was seriously injured as a result of the defect and she and her husband sued plaintiff for $400,000. Plaintiff was covered by a general liability policy in the amount of $10,000 issued by

defendant. The policy obligated defendant to defend any suit against the insured and authorized it to make any settlement it deemed expedient. Both the attorney employed by defendant to defend the insured and the insurer's claims manager felt that a jury verdict would be not less than$100,000 against the insured if the jury felt the accident triggered the tenant's psychosis which had developed.

The tenant offered to settle her claim for $10,000. Defendant insurer would pay only $3,000, and later rejected the tenant's settlement demand of $9,000 at a time when plaintiff had offered to pay $2,500 of it. The jury awarded the tenant $100,000 and her husband $1,000. Defendant paid $10,000. A settlement was arranged between the tenants and plaintiff insured whereby the tenants received $22,000, a 40 percent interest in plaintiff's claim to a particular piece of property, and an assignment of plaintiff's cause of action against defendant insurer. Plaintiff, as a result, became indigent and worked as a babysitter. Her grandchildren paid her rent. The change in her financial condition was accompanied by a decline in physical health, hysteria, and suicide attempts. She then brought the present action. The court awarded plaintiff $91,000, plus interest, for the judgment she suffered in the prior third-party action, and $25,000 for mental suffering. Defendant appealed. The Supreme Court affirmed. It said that in determining whether an insurer has given consideration to the interests of the insured, the test is whether a prudent insurer without policy limits would have accepted the settlement offer (*66 Cal. 2d 425, 429)* .

[f] Insurer Is Liable for Entire Judgment

The factual background of ***Johansen v. California State Auto. Ass'n Inter-Ins. Bureau*** *(1975) 15 Cal. 3d 9, 123 Cal. Rptr. 288, 538 P.2d 744* , is discussed in *§ 120.205[3][b]*. The Supreme Court, in reversing the judgment for defendant insurer, said that California authorities establish that an insurer who fails to accept a reasonable settlement offer within policy limits because it believes the policy does not provide coverage assumes the risk that it will be held liable for all damages resulting from such refusal, including damages in excess of applicable policy limits (*15 Cal. 3d 9, 12)* . Quoting from *Comunale v. Traders & Gen. Ins. Co. (1958) 50 Cal. 2d 654, 658, 660, 328 P.2d 198* , the Court said it was not claimed that the settlement offer was unreasonable in view of the extent of the injuries and the probability that the insured would be found liable, that the insurer's only reason for refusing to settle was its claim that the accident was not covered by the policy, that an insurer who denies coverage does so at its own risk, and that if the denial is found to be wrongful, it is liable for the full amount which will compensate the insured for all the detriment caused by the insurer's breach of the express and implied obligations of the contract (*15 Cal. 3d 9, 15)* .

The factual background of ***Comunale v. Traders & Gen. Ins. Co.*** *(1958) 50 Cal. 2d 654, 328 P.2d 198* , is discussed in *§ 120.205[3][a]*. In reversing the judgment for defendant notwithstanding the verdict with directions to enter judgment on the verdict for plaintiff, the Supreme Court said that an insurer who wrongfully declines to defend and who refuses to accept a reasonable settlement within the policy limits in violation of its duty to consider in good faith the interest of the insured in the settlement is liable for the entire judgment against the insured, even if it exceeds the policy limits (*50 Cal. 2d 654, 661)* . The Court earlier in its opinion explained that the decisive factor in fixing the extent of liability is not the refusal to defend; it is the refusal to accept an offer of settlement within policy limits (*50 Cal. 2d 654, 659)* .

The factual background of ***Brown v. Guarantee Ins. Co.*** *(1957) 155 Cal. App. 2d 679, 319 P.2d 69* , is discussed in *§ 120.205[3][d]*. In reversing the judgment for defendant insurer, the court of appeal said that when an insurer engages in compromise negotiations of a claim against the insured, it owes the insured a duty to exercise good faith; breach of this duty renders the insurer liable for damages (*155 Cal. App. 2d 679, 682)* .

NOTE:

In ***Crisci v. Security Ins. Co.*** *(1967) 66 Cal. 2d 425, 58 Cal. Rptr. 13, 426 P.2d 173* , amicus curiae argued that whenever an insurer receives a settlement offer within policy limits and rejects it, the insurer should be liable in every case for the amount of anyfinal judgment, whether or not the judgment is within the policy limits [***Crisci v. Security Ins. Co.*** *(1967) 66 Cal. 2d 425, 430, 58 Cal. Rptr. 13, 426 P.2d*

173] . The Supreme Court favorably discussed the reasons for and effect of such a rule [***Crisci v. Security Ins. Co.*** *(1967) 66 Cal. 2d 425, 430-431, 58 Cal. Rptr. 13, 426 P.2d 173]* , but declined to specifically adopt it on the ground that in the case before it, the evidence was clearly sufficient to support the determination that the insurer breached its duty to consider the interests of the insured in rejecting the proposed settlements [***Crisci v. Security Ins. Co.*** *(1967) 66 Cal. 2d 425, 431-432, 58 Cal. Rptr. 13, 426 P.2d 173]* . In view of the Supreme Court's favorable discussion of the proposed rule, counsel may wish to argue for absolute liability before the trial court, as well as arguing breach of the covenant of good faith, although no California decision has been found adopting or rejecting the proposed rule [*see Johansen v. California State Auto. Ass'n Inter-Ins. Bureau (1975) 15 Cal. 3d 9, 17 n.6, 123 Cal. Rptr. 288, 538 P.2d 744* (proposed rule has been adopted by New Jersey Supreme Court in well-reasoned opinion, but declining to resolve whether it applies in California on ground that in case before it, defendant's liability for excess judgment could be predicated on its rejection of reasonable settlement offer)]. Failure to argue such liability in the trial court may preclude the issue's being raised for the first time on appeal [*see Marsango v. Automobile Club of S. Cal. (1969) 1 Cal. App. 3d 688, 694-695, 82 Cal. Rptr. 92]*

[4] Additional Authorities

[a] Insurer Failed to Act in Good Faith

In *Murphy v. Allstate Ins. Co. (1976) 17 Cal. 3d 937, 132 Cal. Rptr. 424, 553 P.2d 584* , the Supreme Court stated that in every contract there isan implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement and that this principle is applicable to insurance policies.

In ***Archdale v. American Int'l Specialty Lines Ins. Co.*** *(2007) 154 Cal. App. 4th 449, 64 Cal. Rptr. 3d 632* , third parties sued the insureds for personal injuries arising out of a vehicle accident. The defendants' automobile liability insurer provided a defense, which resulted in an excess judgment. In a subsequent action, the third party (under an assignment of rights) brought a breach of contract action against the insurer, alleging a failure to accept multiple reasonable settlement offers within the policy limit. The appellate court reversed summary judgment in favor of the insurer. The court held, among other things, that in every contract, including policies of insurance, there is an implied covenant of good faith and fair dealing that neither party will do anything that will injure the right of the other to receive the benefits of the agreement (*154 Cal. App. 4th 449, 463)* .

In ***Twentieth Century-Fox Film Corp. v. Harbor Ins. Co.*** *(1978) 85 Cal. App. 3d 105, 111, 149 Cal. Rptr. 313* , the court of appeal stated that there is an implied covenant of good faith and fair dealing in every insurance policy that neither party will do anything that will injure the right of the other to receive the benefits of the policy.

[b] Insurer Breached Its Duty By Failing to Settle Claim

In ***Archdale v. American Int'l Specialty Lines Ins. Co.*** *(2007) 154 Cal. App. 4th 449, 64 Cal. Rptr. 3d 632* , third parties sued the insureds for personal injuries arising out of a vehicle accident. The defendants' automobile liability insurer provided a defense, which resulted in an excess judgment. In a subsequent action, the third party (under an assignment of rights) brought a breach of contract action against the insurer, alleging a failure to accept multiple reasonable settlement offers within the policy limit. The appellate court reversed summary judgment in favor of the insurer. The court held, among other things, that the implied obligation of good faith and fair dealing requires the insurer to settle in an appropriate case although the express terms of the policy do not impose the duty (*154 Cal. App. 4th 449, 463)* .

Cain v. State Farm Mut. Auto. Ins. Co. *(1975) 47 Cal. App. 3d 783, 121 Cal. Rptr. 200* , arose out of a single car

collision. Cain, a passenger in the car, was seriously injured and subsequently sued Jew, the owner and operator of the car, which was insured under a liability policy having a $25,000 limit. Prior to trial, Cain's attorney made offers to settle the claim for the policy limit. The insurer rejected the offers. The jury returned a verdict in favor of Cain for $57,883. The insurer paid Cain $25,000, the policy limit. Jew then assigned to Cain any cause of action he might have against the insurer because of its failure to have settled for the policy limit, including the right to sue for the amount of the excess verdict. He reserved to himself, however, any cause of action for physical injuries sustained by him as a result of the insurer's failure to settle. Subsequently, Cain and Jew jointly sued defendant insurer, alleging bad faith breach of contract and seeking compensatory and exemplary damages. The jury returned a verdict for Cain in the amount of $32,883.69 (amount of prior judgment in excess of policy limit) and a verdict in favor of Jew for $25,000 compensatory damages and $115,000 punitive damages. Judgment was entered on these verdicts, and the insurer appealed.

The court of appeal affirmed. It said that under California law, every liability insurance policy carries an implied covenant obligating the insurer to act in good faith in considering settlement offers and that this obligation requires the insurer to give the offer its intelligent and informed consideration (*47 Cal. App. 3d 783, 791)* . Quoting from ***Crisci v. Security Ins. Co.*** *(1967) 66 Cal. 2d 425, 429, 58 Cal. Rptr. 13, 426 P.2d 173* , the court said that when there is great risk of a recovery beyond policy limits so that the most reasonable manner of disposing of the claim is a settlement which can be made within those limits, a consideration in good faith of the insured's interest requires the insurer to settle the claim (*47 Cal. App. 3d 783, 792)* .

[c] Insurer Failed to Take Insured's Interest Into Consideration

The factual background of ***Cain v. State Farm Mut. Auto. Ins. Co.*** *(1975) 47 Cal. App. 3d 783, 121 Cal. Rptr. 200* , is discussed in *§ 120.205[4][b]*. In affirming the judgment for plaintiffs, the court of appeal said that the implied covenant obligating the insurer to act in good faith in considering settlement offers requires that the insurer give equal consideration to the interests of its insured (*47 Cal. App. 3d 783, 791)* . The court said that the issue before it was whether the insurer failed to do this when it refused the settlement offers (*47 Cal. App. 3d 783, 791-792)* . The court reviewed the evidence and concluded that the record supported a finding that defendant insurer had tortiously breached the implied covenant of good faith and fair dealing by a wrongful refusal to settle within the policy limits and by failing to give equal consideration to the interests of its insured (*47 Cal. App. 3d 783, 794)* .

[d] Insurer's Conduct Fails Objective Test

In ***Miller v. Elite Ins. Co.*** *(1980) 100 Cal. App. 3d 739* , affirming the judgment for plaintiff insured, the court of appeal said that the measure for determining whether the insured's interests were properly considered is whether a prudent insurer without policy limits would have accepted the settlement offer. The court noted that in deciding whether to compromise the claim, the insurer must conduct itself as though it alone were liable for the entire amount of the judgment, and that the insurer must give informed consent to any offer of settlement and must advise the insured of the offer and of the insurer's assessment of that offer (*100 Cal. App. 3d 739, 756*).

The factual background of ***Cain v. State Farm Mut. Auto. Ins. Co.*** *(1975) 47 Cal. App. 3d 783, 121 Cal. Rptr. 200* , is discussed in *§ 120.205[4][b]*. In affirming the judgment for plaintiffs, the court of appeal, citing ***Crisci v. Security Ins. Co.*** *(1967) 66 Cal. 2d 425, 429, 58 Cal. Rptr. 13, 426 P.2d 173* , said that the test to be applied in determining whether the insurer gave equal consideration to the interests of its insured is whether a prudent insurer without policy limits would have accepted the settlement offer (*47 Cal. App. 3d 783, 792)* .

[e] Insurer Is Liable for Entire Judgment

The factual background of ***Cain v. State Farm Mut. Auto. Ins. Co.*** *(1975) 47 Cal. App. 3d 783, 121 Cal. Rptr. 200* , is discussed in *§ 120.205[4][b]*. In affirming thejudgment for plaintiffs, the court of appeal said that a breach by the insurer of any of its obligations (to act in good faith in considering settlement offers, to give the offer its intelligent and

informed consideration, to advise the insured of any settlement offers, together with the results of its investigations, and to give equal consideration to the interests of its insured), when coupled with a refusal to settle within the policy limits, renders the insurer liable for the entire amount of a judgment against its insured, including any portion in excess of policy limits (*47 Cal.App. 3d 783, 791)* . The court explained that liability is not imposed for a bad-faith breach of the contract, but for failure to meet the duty to accept reasonable settlements and that liability may exist when the insurer unwarrantedly refuses an offered settlement where the most reasonable manner of disposing of the claim is by accepting the settlement (*47 Cal. App. 3d 783, 792)* . The court further held that the award to the insured of damages for mental distress and punitive damages was proper and supported by the evidence (*47 Cal. App. 3d 783, 792-794)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBad Faith & Extracontractual LiabilitySettlement ObligationsGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilitySettlement ObligationsGood Faith & Fair DealingInsurance LawClaims & ContractsGood Faith & Fair DealingGeneral Overview

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 120 INSURANCE
PART II. FORMS
C. Improper Claims Settlement Practices
2. Refusal to Settle

12-120 California Points & Authorities § 120.206

§ 120.206 Insured Properly Assigned Claim to Judgment Creditor

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF JUDGMENT CREDITOR HAS STANDING TO SUE INSURER FOR INSURER'S BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING IN INSURER'S FAILURE TO ACCEPT A REASONABLE SETTLEMENT, BECAUSE INSURED PROPERLY ASSIGNED HIS/HER INTEREST TO JUDGMENT CREDITOR.

Insured Properly Assigned Claim to Judgment Creditor. An action for damages in excess of the policy limits based on insurer's wrongful failure to settle is assignable (*Johansen v. California State Auto. Ass'n Inter-Ins. Bureau (1975) 15 Cal. 3d 9, 14 n.3, 123 Cal. Rptr. 288, 538 P.2d 744* ; *Comunale v. Traders & Gen. Ins. Co. (1958) 50 Cal. 2d 654, 661, 328 P.2d 198*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose a contention by an insurer that its refusal to settle was consistent with its duty toward its insured under the implied covenant of good faith and fair dealing. The basis of these points and authorities is that insured made a proper assignment of his or her rights against the insurer to the judgment creditor.

This form may be used by a judgment creditor in various procedural contexts, such as to oppose an insurer's motion for summary judgment or in support of a motion for summary judgment. This form may also be used in a trial brief, or in an appellate brief.

When appropriate, this form may be used to oppose the points and authorities *set forth in §§ 120.206* and *120.211*.

For references to related Pleading and Practice chapters, see *§ 120.205[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.205* et seq.) and to place the argument within its proper procedural context.

An appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing an insurer's motion for summary judgment or summary adjudication when the evidentiary facts clearly support the contention. In this context, counsel would modify the form to assert that there remain triable issues of material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts opposing the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(e)-(h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Insured Properly Assigned Claim to Judgment Creditor

The factual background of ***Johansen v. California State Auto. Ass'n Inter-Ins. Bureau*** *(1975) 15 Cal. 3d 9, 123 Cal. Rptr. 288, 538 P.2d 744* ,is discussed in *§ 120.205[3][b]*. In reversing the judgment for defendant insurer, the Supreme Court, quoting from *Comunale v. Traders & Gen. Ins. Co. (1958) 50 Cal. 2d 654, 661, 328 P.2d 198* , said that an action for damages in excess of the policy limits based on an insurer's failure to settle is assignable, whether the action is considered as sounding in tort or in contract (*15 Cal. 3d 9, 14 n.3*).

The factual background of ***Comunale v. Traders & Gen. Ins. Co.*** *(1958) 50 Cal. 2d 654, 328 P.2d 198* , is discussed in *§ 120.205[3][a]*. In reversing the judgment for defendant notwithstanding the verdict with directions to enter judgment on the verdict for plaintiff, the Supreme Court said that an action for damages in excess of the policy limits based on an insurer's wrongful failure to settle is assignable, whether the action is considered as sounding in tort or in contract (*50 Cal. 2d 654, 661)* .

[4] Additional Authorities

[a] Insured Properly Assigned Claim to Judgment Creditor

The factual background of *Cain v. State Farm Mut. Auto. Ins. Co. (1975) 47 Cal. App. 3d 783, 121 Cal. Rptr. 200* , is discussed in *§ 120.205[4][b]*. In affirming the judgment for plaintiffs, the court of appeal noted that the insurer did not challenge the assignability of the insured's cause of action against his insurer to the insured's third-party judgment creditor (*47 Cal. App. 3d 783, 794)* , the implication being that such an assignment is proper.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBad Faith & Extracontractual LiabilityAssignment of ClaimsInsurance LawBad Faith & Extracontractual LiabilitySettlement ObligationsGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilitySettlement ObligationsGood Faith & Fair DealingInsurance LawBad Faith & Extracontractual LiabilitySettlement ObligationsPolicy Limits

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 120 INSURANCE
PART II. FORMS
C. Improper Claims Settlement Practices
2. Refusal to Settle

12-120 California Points & Authorities § 120.207

§ 120.207 Insured's Failure to Pay Excess Judgment Does Not Exonerate Insurer's Wrongful Refusal to Settle

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER IS LIABLE FOR ITS BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING EVEN THOUGH INSURED FAILED TO PAY THE EXCESS JUDGMENT RENDERED AGAINST HIM/HER, BECAUSE PAYMENT OF THE JUDGMENT IN EXCESS OF THE POLICY LIMIT BY THE INSURED IS NOT A PREREQUISITE TO SUIT.

Nonpayment of Excess Judgment by Insured. Payment of the judgment in excess of the policy limit by the insured is not aprerequisite to suit against the insurance company for wrongful refusal to settle (*Brown v. Guarantee Ins. Co. (1957) 155 Cal. App. 2d 679, 689-690, 319 P.2d 69*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose a contention by an insurer that its refusal to settle was consistent with its duty toward its insured under the implied covenant of good faith and fair dealing. The basis of these points and authorities is that payment of the judgment in excess of the policy limit by the insured is not a prerequisite to suit against the insurance company for wrongful refusal to settle.

This form may be used by an insured in various procedural contexts, such as to oppose an insurer's motion for summary judgment or in support of a motion for summary judgment. This form may also be used in a trial brief, or in an appellate brief.

When appropriate, this form may be used to oppose the points and authorities *set forth in § 120.195* et seq.

For references to related Pleading and Practice chapters, see *§ 120.205[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.205* et seq.) and to place the argument within its proper procedural context.

An appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing an insurer's motion for summary judgment or summary adjudication when the evidentiary facts clearly support the contention. In this context, counsel would modify the form to assert that there remain triable issues of material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts opposing the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(e)-(h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Nonpayment of Excess Judgment by Insured

The factual background of ***Brown v. Guarantee Ins. Co.*** *(1957) 155 Cal. App. 2d 679, 319 P.2d 69* , is discussed in *§ 120.205[3][d]*. In reversing judgment for defendant, the court rejected defendant's argument that payment by the insured of the amount of the judgment in excess of the policy limit is a prerequisite to his cause of action for wrongful refusal to settle. The court said that logic and reason supported the contrary view and that the insured's cause of action arises when he or she incurs a binding judgment in excess of the policy limit (*155 Cal. App. 2d 679, 689-690)* . An insurance company may not, the court said, take advantage of the limited financial ability of its insured in order to escape its obligations (*155 Cal. App. 2d 679, 690)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBad Faith & Extracontractual LiabilitySettlement ObligationsGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilitySettlement ObligationsExcess JudgmentsInsurance LawBad Faith & Extracontractual LiabilitySettlement ObligationsGood Faith & Fair Dealing

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 120 INSURANCE
PART II. FORMS
C. Improper Claims Settlement Practices
2. Refusal to Settle

12-120 California Points & Authorities § 120.208

§ 120.208 Insurer's Breach of Covenant Is Not Excused by Insured's Failure to Perform Contractual Obligation

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER IS LIABLE FOR ITS BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING DESPITE ANY ALLEGED FAILURE BY INSURED TO PERFORM ITS CONTRACTUAL OBLIGATION BECAUSE INSURER'S DUTY UNDER THE COVENANT IS UNCONDITIONAL AND INDEPENDENT OF THE PERFORMANCE OF THE INSURED'S CONTRACTUAL OBLIGATIONS.

Insurer Breached Its Unconditional Duty of Good Faith. The insurer's duty of good faith and fair dealing is unconditional and independent of the performance of the insured's contractual obligations (*Gruenberg v. Aetna Ins. Co. (1973) 9 Cal. 3d 566, 578, 108 Cal. Rptr. 480, 510 P.2d 1032*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose a contention by an insurer that its refusal to settle was consistent with its duty toward its insured under the implied covenant of good faith and fair dealing. The basis of these points and authorities is that the insurer's breach of the covenant is not excused by the insured's failure to perform contractual obligation.

This form may be used by an insured in various procedural contexts, such as to oppose an insurer's motion for summary judgment or in support of a motion for summary judgment. This form may also be used in a trial brief, or in an appellate brief.

When appropriate, this form may be used to oppose the points and authorities *set forth in § 120.195* et seq.

For references to related Pleading and Practice chapters, see *§ 120.205[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.205* et seq.) and to place the argument within its proper procedural context.

An appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing an insurer's motion for summary judgment or summary adjudication when the evidentiary facts clearly support the contention. In this context, counsel would modify the form to assert that there remain triable issues of material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts opposing the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(e)-(h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessaryfoundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Insurer Breached Its Unconditional Duty of Good Faith

The factual background of ***Gruenberg v. Aetna Ins. Co.*** *(1973) 9 Cal. 3d 566, 108 Cal. Rptr. 480, 510 P.2d 1032* , is discussed in *§ 120.170[3][a]*. In reversing the judgment of dismissal as to defendant insurers, the Supreme Court noted that all parties appeared to assume that plaintiff's contractual duty to appear and submit to an examination and to produce documents was a dependent condition (whether precedent or subsequent) to defendants' covenant of good faith and fair dealing. In other words, the underlying premise of their arguments was that if plaintiff's failure to appear as demanded constituted a breach of plaintiff's obligation under the policies, then defendants' duty of good faith and fair dealing was excused.

The Court, however, concluded that it need not consider these contentions because it did not think that the controlling issue was the nature of plaintiff's duty, that is, whether his dependent duty was precedent or subsequent; rather, the Court said, the crucial issue was the nature of defendants' duty, that is, whether their duty of good faith and fair dealing was absolute or conditional (*9 Cal. 3d 566, 577)* . The Court said that while it might be argued that defendants would be excused from their contractual duties (e.g., obligation to indemnify) if plaintiff breached his obligations under the policies, it did not think that plaintiff's alleged breach excused defendants from their duty, implied by law, of good faith and fair dealing. In other words, the insurer's duty is unconditional and independent of the performance of plaintiff's

contractual obligations (*9 Cal. 3d 566, 578)* .

The Court explained that the existence of a contractual relationship does not insulate defendant insurers from liability that is ordinarily visited on tortfeasors for interfering with a property interest of the insured in receiving the benefits of the agreement and that, therefore, even though the duty allegedly assumed by defendant insurers arises from an existing contractual relationship, this duty is independent of the performance of plaintiff's contractual obligations (*9 Cal. 3d 566, 578)* . The Court concluded that the duty of good faith and fair dealing on the part of defendant insurance companies is an absolute one. The Court added, however, that it wasn't saying that the parties couldn't define, by the terms of the contract, their respective obligations and duties, but merely that no matter how those duties were stated, the nonperformance by one party of its contractual duties cannot excuse a breach of the duty of good faith and fair dealing by the other party while the contract between them is in effect and not rescinded (*9 Cal. 3d 566, 578)* . It should be noted that the Court, in a footnote, added that even if defendants' duty were construed as a dependent condition (that is, dependent on plaintiff's performance of his obligation under the policies), plaintiff's failure to appear would still not be fatal to his cause of action; the allegations of the complaint demonstrated the plaintiff's failure to appear was induced by defendants' conduct, in breach of their duty of good faith and fair dealing, and that, therefore, plaintiff's obligation to appear could be seen as excused by defendants' alleged breach (*9 Cal. 3d 566, 578 n.9*).

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBad Faith & Extracontractual LiabilityGeneral OverviewInsurance LawClaims & ContractsGeneral OverviewInsurance LawClaims & ContractsGood Faith & Fair DealingGeneral Overview

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
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12-120 California Points & Authorities § 120.209

§ 120.209 Good-Faith Denial of Coverage Is No Defense

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

EVEN IF INSURER BELIEVED IN GOOD FAITH THAT THE POLICY DID NOT COVER THE LIABILITY, INSURER IS LIABLE FOR ITS BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING BECAUSE AN INSURER'S ERRONEOUS GOOD-FAITH BELIEF THAT THE POLICY DOES NOT COVER LIABILITY IS NO DEFENSE.

Good-Faith Belief in Noncoverage as No Defense. A liability insurer's "good faith," though erroneous, belief in noncoverage affords no defense to liability flowing from the insurer's refusal to accept a reasonable settlement offer (*Johansen v. California State Auto. Ass'n Inter-Ins. Bureau (1975) 15 Cal. 3d 9, 16, 123 Cal. Rptr. 288, 538 P.2d 744*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose a contention by an insurer that its refusal to settle was consistent with its duty toward its insured under the implied covenant of good faith and fair dealing. They may be used by an insured in an action against a liability insurer when the insurer admits that the settlement offer made was reasonable, or does not challenge the reasonableness of the offer, but contends that in rejecting the offer it acted in a bona fide belief that the policy did not cover the liability. The basis of these points and authorities is that such belief is not a defense.

This form may be used in various procedural contexts. For example, they may be used in an action:

- Brought by an insured against a liability insurer to recover damages sustained as a result of alleged

bad faith.

- Brought by a third-party judgment creditor suing on the insured's claim to recover the amount of a third-party judgment in excess of policy limits.

- In an action by both the third-party judgment creditor suing as a partial assignee of the insured's claim against the insurer to recover the amount of the judgment in excess of the policy limits, on the one hand; and the insured seeking to recover personal damages, other than the excess judgment, on the other hand; both sustained as a result of the insurer's alleged breach of the covenant of good faith.

This form may be used by an insured in various procedural contexts, such as to oppose an insurer's motion for summary judgment or in support of a motion for summary judgment. This form may also be used in a trial brief, or in an appellate brief.

When appropriate, this form may be used to oppose the points and authorities *set forth in § 120.195* et seq.

For references to related Pleading and Practice chapters, see *§ 120.205[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.205* et seq.) and to place the argument within its proper procedural context.

An appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposingan insurer's motion for summary judgment or summary adjudication when the evidentiary facts clearly support the contention. In this context, counsel would modify the form to assert that there remain triable issues of material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts opposing the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(e)-(h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Good-Faith Belief in Noncoverage as No Defense

The factual background of ***Johansen v. California State Auto. Ass'n Inter-Ins. Bureau*** *(1975) 15 Cal. 3d 9, 123 Cal. Rptr. 288, 538 P.2d 744* , is discussed in *§ 120.205[3][b]*. In reversing the judgment for defendant insurer, the Supreme Court, quoting from *Comunale v. Traders & Gen. Ins. Co. (1958) 50 Cal. 2d 654, 660, 328 P.2d 198* (discussed in *§ 120.205[3][a], [b]*), said that an insurer who denies coverage does so at its own risk. Although its position may not have been entirely groundless, if the denial is found to be wrongful, the insurer is liable for the full amount which will compensate the insured for all the detriment caused by the insurer's breach of the express and implied obligations of the contract (*15 Cal. 3d 9, 15)* . The Court concluded that, accordingly, contrary to defendant's suggestion, an insurer's "good faith," though erroneous, belief in noncoverage affords no defense to liability flowing from the insurer's refusal to accept a reasonable settlement offer (*15 Cal. 3d 9, 16)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBad Faith & Extracontractual LiabilitySettlement ObligationsGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilitySettlement ObligationsReasonable BasisInsurance LawClaims & ContractsGood Faith & Fair DealingGeneral Overview

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
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2. Refusal to Settle

12-120 California Points & Authorities § 120.210

§ 120.210 Insurer Is Not Exonerated by Its Unilateral Delegation of Duty to Make Independent Risk Evaluation

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER IS LIABLE FOR ITS BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING, EVEN THOUGH IT HAD NOT OBTAINED THE CONSENT OF _____ [*name*], BECAUSE INSURER HAS A RESPONSIBILITY TO ITS INSURED TO MAKE AN INDEPENDENT EVALUATION OF THE RISK TO WHICH THE INSURED IS EXPOSED.

Insurer Is Not Exonerated by Its Unilateral Delegation of Duty to Make Independent Risk Evaluation. An insurer may not escape responsibility to its insured to make an independent evaluation of the risk to which the insured is exposed by relying on a unilateral practice established by it of refusing to settle or compromise any claim or suit against its insured without the consent of a third party (*Garner v. American Mut. Liab. Ins. Co. (1973) 31 Cal. App. 3d 843, 848-850, 107 Cal. Rptr. 604*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose a contention by an insurer that its refusal to settle was consistent with its duty toward its insured under the implied covenant of good faith and fair dealing. The basis of these points and authorities is that the insurer is liable for its breach of the implied covenant of good faith and fair dealing, even though it had not obtained the consent of a third party, because the insurer has a responsibility to its insured to make an independent evaluation of the risk to which the insured is exposed.

This form may be used by an insured in various procedural contexts, such as to oppose an insurer's motion for summary judgment or in support of a motion for summary judgment. This form may also be used in a trial brief, or in an appellate

brief.

When appropriate, this form may be used to oppose the points and authorities *set forth in § 120.195* et seq.

For references to related Pleading and Practice chapters, see *§ 120.205[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.205* et seq.) and to place the argument within its proper procedural context.

An appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing an insurer's motion for summary judgment or summary adjudication when the evidentiary facts clearly support the contention. In this context, counsel would modify the form to assert that there remain triable issues of material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts opposing the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(e)-(h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Insurer Is Not Exonerated by Its Unilateral Delegation of Duty to Make Independent Risk Evaluation

The factual background of ***Garner v. American Mut. Liab. Ins. Co.*** *(1973) 31 Cal. App. 3d 843, 107 Cal. Rptr. 604* , is discussed in *§ 120.205[3][3]*. In reversing the judgment for defendant insurer as to liability and directing the trial court to enter judgment for plaintiff after trial on the single issue of the amount of damages to be awarded, the court of appeal said that there is a clear implicit consensus in the cases thatthe duty to consider and weigh all the factors bearing on the advisability of a settlement in the interests of the insured is on the insurance carrier, that this legal duty obviously is exercised normally in conjunction with the judgment of counsel defending the case against the insured, and that it was equally obvious that neither the "insured [sic, insurer?] nor counsel" could base its legal duty to the insured solely on a finding by a medical review committee composed of physicians who are members of some local medical society (*31 Cal. App. 3d 843, 848)* . The court said that defendant owed to plaintiff "its independent evaluation of the risk to which plaintiff was exposed by reason of the malpractice litigation," and its experience and expertise in total claims evaluation as an insurance company, and that it could not ignore the desires or instructions of the insured because, in the final analysis, the exposure and the ultimate risk of loss were the insured's (*31 Cal. App. 3d 843, 849-850)* .

The court concluded that, in this case, resolution of the critical question--to settle or not to settle--had been vested in and delegated exclusively to the medical review committee, and that regardless of the consultations and discussions which were had, the ultimate determination in the case was made neither by the insured nor the insurer, but by an independent committee which, no matter how well-meaning, bore neither the risk nor the hazards of the loss. The court said that this body held only a portion of the total expertise that was needed to make a fully considered judgment based on those multiple factors that must be carefully weighed, measured, and evaluated by professionals whose primary interest is the protection of the insured and that plaintiff, under the terms of the policy, was entitled to this fuller protection (*31 Cal. App. 3d 843, 850)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBad Faith & Extracontractual LiabilityGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilitySettlement ObligationsGeneral OverviewInsurance LawClaims & ContractsGood Faith & Fair DealingGeneral Overview

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12-120 California Points & Authorities § 120.211

§ 120.211 Insured's Assignment of Claim Is Valid Because Stipulated Judgment Was Approved by Court

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF JUDGMENT CREDITOR HAS STANDING TO SUE INSURER FOR ITS BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING BECAUSE THERE WAS A VALID ASSIGNMENT OF THE CLAIM TO PLAINTIFF BASED ON A COURT-APPROVED, GOOD FAITH SETTLEMENT.

A. Insured Properly Assigned Rights in Consideration of Personal Release. An insured may assign its rights against the insurer in consideration for a personal release from liability (*Samson v. Transamerica Ins. Co. (1981) 30 Cal. 3d 220, 240-241, 178 Cal. Rptr. 343, 636 P.2d 32* ; *Zander v. Texaco, Inc. (1968) 259 Cal. App. 2d 793, 802-803, 66 Cal. Rptr. 561*).

B. Assignment Is Valid With Court Approval. A settlement of the underlying claim in which the insured assigns to the plaintiff the insured's claim against the insurer for breach of the implied covenant of good faith and fair dealing, and the plaintiff in return agrees not to personally execute against the insured, is sufficient to support an assignment of the insured's claim when the settlement is reduced to a stipulated judgment and that judgment is approved by the court as a good-faith settlement under *Code of Civil Procedure Section 877.6* (*Roman v. Unigard Ins. Group (1994) 26 Cal. App. 4th 177, 184, 31 Cal. Rptr. 2d 501*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose a contention by an insurer that its refusal to settle was consistent with its duty toward its insured under the implied covenant of good faith and fair dealing. The basis of these points and authorities is that the assignment by the insured judgment debtor to the plaintiff judgment creditor is valid

because the prior settlement was approved by the court in that action as a good-faith settlement under *Code Civ. Proc. § 877.6*.

This form may be used by a judgment creditor in various procedural contexts, such as to oppose an insurer's motion for summary judgment or in support of a motion for summary judgment. This form may also be used in a trial brief, or in an appellate brief.

When appropriate, this form may be used to oppose the points and authorities *set forth in § 120.197*.

For references to related Pleading and Practice chapters, see *§ 120.205[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.205* et seq.) and to place the argument within its proper procedural context.

An appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing an insurer's motion for summary judgment or summary adjudication whenthe evidentiary facts clearly support the contention. In this context, counsel would modify the form to assert that there remain triable issues of material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts opposing the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(e)-(h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Insured Properly Assigned Rights in Consideration of Personal Release

In ***Samson v. Transamerica Ins. Co.*** *(1981) 30 Cal. 3d 220, 240-241, 178 Cal. Rptr. 343, 636 P.2d 32* , the insured was sued after being involved in an auto accident. A question arose as to whether a policy issued on another vehicle owned by the insured provided coverage for the accident. The insurer that issued the policy in question denied coverage and refused to defend. Plaintiffs, the insured, and a second insurer ultimately reached a partial settlement whereby the second insurer contributed its policy limits and plaintiffs agreed not to execute against the insured in return for an assignment of the insured's rights against the nonparticipating insurer. When the action went to trial, the insured presented no defense and did not contest liability or damages. A substantial judgment was entered, the insured assigned

his rights against the nonsettling insurer to plaintiffs in accordance with the earlier agreement, and plaintiffs sued the nonsettling insurer for policy limits and bad faith. Plaintiffs were granted summary judgment, and an appeal followed (*30 Cal. 3d 220, 226-229)* .

After holding that coverage existed, that the insurer breached its duty to defend, and that the insurer therefore was bound by the judgment against its insured, the California Supreme Court concluded that the covenant not to execute in return for assignment of the cause of action was not inherently collusive. The Court rejected the insurer's claim that the parties had intentionally "set up" the insurer for an excess judgment, holding that under the facts, there was no showing that any of the parties had breached any duty or engaged in any improper conduct (*30 Cal. 3d 220, 240-241*). Accordingly, the trial court's order granting summary judgment was affirmed (*30 Cal. 3d 220, 243*).

In ***Zander v. Texaco, Inc.*** *(1968) 259 Cal. App. 2d 793, 802* , the insurer denied coverage in the underlying action and refused to participate in the defense. Thereafter, judgment against two of the defendants was obtained in that action under an arrangement whereby plaintiffs made an oral covenant not to execute against those defendants (which was subsequently reduced to writing) and those defendants did not appear at the trial. The court held that when an insurer has repudiated its obligation to defend its insured, the insured, in the absence of fraud, may settle on the best terms possible, taking a covenant not to execute. The court also held that the giving of such a covenant does not bar the plaintiff's subsequent action directly against the insurer (*259 Cal. App. 2d 793, 802*). Moreover, the facts that the insured permitted plaintiff to take an uncontested judgment and that the plaintiff proved a case unopposed were not sufficient to establish fraud or collusion (*259 Cal. App. 2d 793, 806)* .

[b] Assignment Is Valid With Court Approval

The facts in ***Roman v. Unigard Ins. Group*** *(1994) 26 Cal. App. 4th 177, 184, 31 Cal. Rptr. 2d 501* , are discussed in *§ 120.197[3][a]*. The settlement in the underlying action was approved by the court as a good-faith settlement under *Code Civ. Proc. § 877.6*. The court of appeal held therefore that the proceeding under *Code Civ. Proc. § 877.6* eliminated any concern that the parties engaged in collusive or abusive conduct. Thus, the stipulated judgment and covenant not to execute were sufficient to support the assignment (*26 Cal. App. 4th 177, 184)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBad Faith & Extracontractual LiabilityAssignment of ClaimsInsurance LawBad Faith & Extracontractual LiabilitySettlement ObligationsGood Faith & Fair DealingInsurance LawClaims & ContractsGood Faith & Fair DealingGeneral Overview

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12-120 California Points & Authorities § 120.212

§ 120.212 Insured Did Not Waive Claim for Personal Damages Because Assignor and Assignee Are Joined as Plaintiffs

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURED DID NOT WAIVE HIS/HER CLAIM FOR PERSONAL DAMAGES AGAINST INSURER WHEN HE/SHE ASSIGNED HIS/HER CLAIM TO INSURED'S THIRD-PARTY JUDGMENT CREDITOR, BECAUSE BOTH THE PARTIAL ASSIGNOR AND PARTIAL ASSIGNEE JOIN AS PLAINTIFFS IN SUING THE INSURER ON THE CLAIM.

Insured Did Not Waive Personal Damages Claim Because Assignor and Assignee Are Joined. A partial assignee may sue on the assigned claim by joining, as plaintiff, the partial assignor, and the partial assignor may sue by joining, as plaintiff, the partial assignee; when this is done, the rule against splitting a cause of action does not apply (*Cain v. State Farm Mut. Auto. Ins. Co. (1975) 47 Cal. App. 3d 783, 795-796, 121 Cal. Rptr. 200*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose a contention by an insurer that its refusal to settle was consistent with its duty toward its insured under the implied covenant of good faith and fair dealing. The basis of these points and authorities is that the insured did not waive his or her claim for personal damages by assigning his or her rights to the judgment creditor because both the insured assignor and the judgment debtor assignee are joined as plaintiffs.

This form may be used by an insured in various procedural contexts, such as to oppose an insurer's motion for summary judgment or in support of a motion for summary judgment. This form may also be used in a trial brief, or in an appellate

brief.

When appropriate, this form may be used to oppose the points and authorities *set forth in § 120.198*.

For references to related Pleading and Practice chapters, see *§ 120.205[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.205* et seq.) and to place the argument within its proper procedural context.

An appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing an insurer's motion for summary judgment or summary adjudication when the evidentiary facts clearly support the contention. In this context, counsel would modify the form to assert that there remain triable issues of material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts opposing the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(e)-(h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Insured Did Not Waive Personal Damages Claim Because Assignor and Assignee Are Joined

The factual background of ***Cain v. State Farm Mut. Auto. Ins. Co.*** *(1975) 47 Cal. App. 3d 783, 121 Cal. Rptr. 200* , is discussed in *§ 120.205[3][b]*. Among its various contentions on appeal, all of which were rejected by the court of appeal, defendant insurer, while not challenging the assignability of the cause of action against it, argued that the assignment totally divested Jew, the insured, of any right to recovercompensatory or punitive damages. Defendant relied on *Purcell v. Colonial Ins. Co. (1971) 20 Cal. App. 3d 807, 97 Cal. Rptr. 874* , for the proposition that, by assigning his cause of action, the insured waived any cause of action he might have for emotional distress.

The court of appeal, in affirming the judgment for plaintiffs, explained that at common law a partial assignee had no legal standing to sue, the underlying rationale being that the original creditor could not split his cause of action and sue the debtor in two separate actions and that he could not bring about the same result by assigning part of the claim to another and subjecting the debtor to two suits by different plaintiffs. Enforcement of a partial assignment of a claim was permitted in equity, however, by the process of requiring joinder of all interested parties, that is, the assignor and all

partial assignees. Since legal and equitable actions have been merged under the codes and the equity procedure of joinder has been adopted, there is no longer any procedural obstacle to enforcement of the partial assignment. The plaintiff partial assignee may sue by joining the partial assignor, and the partial assignor may sue on joinder of the partial assignee (*47 Cal. App. 3d 783, 794-795)* .

The court distinguished *Purcell* "in at least two respects." First, the terms of the Jew-Cain assignment expressly reserved to Jew any cause of action which he might have against the insurer for physical injuries sustained by him as a result of its failure to settle within policy limits, whereas in Purcell, the insured had made a blanket assignment of all causes of action against the insurer. Second, and more significantly, Cain and Jew were joined as parties plaintiff in a single suit against the insurer, whereas in *Purcell* separate suits were instituted by the injured party and the insured. The court said that the procedure utilized by plaintiffs Cain and Jew was clearly in accord with the modern rules governing partial assignments and comported with the "primary right" theory advanced by Pomeroy and followed in California. The court concluded that because the partial assignor and the partial assignee were joined as parties plaintiff in the same lawsuit, the judgment was binding on both of them, and the insurer was protected from future litigation arising out of the same facts under the doctrine of res judicata (*47 Cal. App. 3d 783, 796)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilityGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilityAssignment of ClaimsInsurance LawClaims & ContractsGood Faith & Fair DealingGeneral Overview

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C. Improper Claims Settlement Practices
2. Refusal to Settle

12-120 California Points & Authorities §§ 120.213-120.214

[Reserved]

§§ 120.213[Reserved]

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
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3. Damages for Attorneys' Fees

12-120 California Points & Authorities § 120.215

§ 120.215 Attorney's Fees Are Improper in Action by Insurer Against Consecutive or Concurrent Insurers

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER HAS NO STANDING TO RECOVER ATTORNEY'S FEES IN AN ACTION AGAINST A CONSECUTIVE OR CONCURRENT INSURER FOR CONTRIBUTION OF COSTS INCURRED IN DEFENDING THE INSURED.

Attorney's Fees Not Recoverable as Damages by Insurer. An insurer is not entitled to receive its attorney's fees from another insurer in an action to seek contribution of costs incurred in defending a common insured because it has no contractual relationship with the other insurers and therefore no standing to recover its attorney's fees (*CNA Cas. of Cal. v. Seaboard Sur. Co. (1986) 176 Cal. App. 3d 598, 620-621, 222 Cal. Rptr. 276*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a grant of attorney's fees as damages in an action by an insurer against another insurer for contribution of costs incurred in defense of a common insured is improper [*see Code Civ. Proc. §§ 435-437*; *CNA Cas. of Cal. v. Seaboard Sur. Co. (1986) 176 Cal. App. 3d 598, 620-621, 222 Cal. Rptr. 276]* .

This form may be used by an insured in various procedural contexts. For example, it may be used in support of an motion to strike portions of the complaint. It may also be used to oppose a motion for summary judgment or in support of a motion for summary judgment. This form may also be used in a trial brief, or in an appellate brief.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. Therefore, counsel should include facts showing that the action is one for contribution among insurance companies, andthat the attorney's fees sought are those for the instant action, and not for an action alleging breach of a covenant of good faith and fair dealing, or tortious conduct.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues and to place the argument within its proper procedural context.

An appropriate procedural context for this contention, for example, would be a memorandum of points and authorities supporting a motion for summary judgment or summary adjudication when the evidentiary facts clearly support the contention. In this context, counsel would modify the form to assert that there remain no triable issues of material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts supporting the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(e)-(h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Pleading and Practice Chapters

For discussion and forms relating to noticed motions to strike, see California Forms of Pleading and Practice, Ch. 375, *Motions to Strike* (Matthew Bender). For discussion and forms relating to actions against insurers for breach of the covenant of good faith and fair dealing, see California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender).

[d] Related Points and Authorities

For forms of memoranda of points and authorities generally supporting and opposing a motion to strike, see Ch. 160, *Motions to Strike* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Attorney's Fees Not Recoverable as Damages by Insurer

In ***CNA Cas. of Cal. v. Seaboard Sur. Co.*** *(1986) 176 Cal. App. 3d 598, 222 Cal. Rptr. 276* , an insurer brought an action against other insurers for contribution of costs incurred in defending a common insured. The insured obtained comprehensive general liability insurance policies from plaintiff and defendants for various periods of time and for different types of coverage. Insured was sued for violation of anti-trust statutes, and tendered the defense of the complaint to all its insurers, which, with the exception of plaintiff, rejected the tender. After incurring expenses in the defense of the anti-trust action, plaintiff brought an action against the remaining insurers to seek contribution for the costs incurred therein. The trial court found that defendants had a duty to defend the insured, and ordered defendants to reimburse plaintiff for its post-tender costs of defense in the ratio that their separate policy limits bear to the total limit of all the policies. Defendants appealed, and plaintiff cross-appealed, contending, inter alia, that it is entitled to receive

its own attorney's fees in bringing the action for contribution.

The court of appeal affirmed, holding, inter alia, that plaintiff has no contractual relationship with the other insurers and therefore no standing to assert a breach of the covenant of good faith and fair dealing in its own right, or to recover its attorney's fees (*176 Cal. App. 3d 598, 621)* . In addressing defendants' appeal, the court cited *Gray v. Zurich Ins. Co. (1966) 65 Cal. 2d 263, 54 Cal. Rptr. 104, 419 P.2d 168* , and held that the duty to defend is much broader than the duty to indemnify. Although the duty to indemnify is only determined after liability is finally established, the duty to defend must be assessed at the outset of the case (*176 Cal. App. 3d 598, 605)* . The insurer's obligation to defend is not dependent on the facts contained in the complaint alone; and the insurer must furnish a defense when it learns of facts from any source that create the potential of liability under its policy (*176 Cal. App. 3d 598, 605-606)* . Citing *Fresno Econ. Import Used Cars, Inc. v. United States Fid. & Guar. Co. (1977) 76 Cal. App. 3d 272, 142 Cal. Rptr. 681* , the court held that before an insurer may rightfully reject a tender of defense, it must investigate and evaluate the facts expressed or implied in the third-party complaint as well as those that it learns from its insured and any other sources (*176 Cal. App. 3d 598, 610)* .

In addressing plaintiff's cross-appeal requesting attorney's fees, the court rejected plaintiff's argument that it was equitably subrogated to the rights of the insured, and should recover its attorney's fees, as the insured would have had it sued defendants for breach of the covenant of good faith and fair dealing (*176 Cal. App. 3d 598, 620-621)* . Plaintiff's contention wasbased entirely on hypothetical situations because the insured did not assert any claim against defendants for their failure to defend the anti-trust action. The defense costs at issue in the instant action were those incurred by plaintiff on the insured's behalf in the anti-trust action, and the insured suffered no loss in the instant case. There was no finding that any of the insurers breached the covenant of good faith and fair dealing with the insured, nor that their conduct in the matter was tortious, nor was it an issue in the instant case. The holding in *Brandt v. Superior Court (1985) 37 Cal. 3d 813, 818-819* , allowing attorney's fees as damages, is inapplicable to the instant case because tortious conduct by the insurers or bad faith was never alleged, argued, proved, or determined (*176 Cal. App. 3d 598, 621 n.12*).

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsCoinsuranceGeneral OverviewInsurance LawClaims & ContractsCoinsuranceContributionInsurance LawClaims & ContractsCosts & Attorney FeesGeneral Overview

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12-120 California Points & Authorities § 120.216

§ 120.216 Attorney's Fees Recoverable as Damages Only for Work Attributable to Recovery of Amount Due On Policy

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

IN A MIXED CONTRACT AND TORT CASE, PLAINTIFF MAY RECOVER ATTORNEY'S FEES AS DAMAGES ONLY TO THE EXTENT THAT THE ATTORNEY'S FEES ARE ATTRIBUTABLE TO THE RECOVERY OF THE AMOUNT DUE ON THE INSURANCE POLICY.

Attorney's Fees Are Recoverable as Damages Only for Work Attributable to Recovery of Amount Due on Policy. If a party is entitled to recover attorney's fees as damages in an action involving both contract and tort causes of action, the fees recoverable may not exceed the amount attributable to the attorney's efforts to obtain the rejected payment due on the insurance contract, and fees attributable to obtaining any portion of the award that exceeds the amount due under the policy are not recoverable (*Cassim v. Allstate Ins. Co. (2004) 33 Cal. 4th 780, 806-807, 16 Cal. Rptr. 3d 374, 94 P.3d 513*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that in a mixed contract and tort action, attorney's fees recoverable as damages pursuant to *Brandt* [*Brandt v. Superior Court (1985) 37 Cal. 3d 813, 210 Cal. Rptr. 211, 693 P.2d 796* ; *see § 120.220*] are limited to the portion of the fees attributable to obtaining the payment due on the policy, to the exclusion of fees attributable to obtaining damages in excess of that amount.

If appropriate, this form may be used to oppose the points and authorities *set forth in § 120.220*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. Therefore, counsel should include facts and, if necessary, calculations, showing that the opposing party is seeking *Brandt* fees in excess of the proper amount [*see § 120.216[3*] [a] regarding calculations].

The form should be combined with other forms in this publication as necessary to complete argument as to all issues and to place the argument within its proper procedural context, such as in an appellate brief.

[c] Related Pleading and Practice Chapters

For discussion and forms relating to recovery of attorney's fees, see California Forms of Pleading and Practice, Ch. 174, *Costs and Attorney's Fees* , Part II (Matthew Bender). For discussion and forms relating to actions against insurers for breach of the covenant of good faith and fair dealing, see California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender).

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Attorney's Fees Recoverable as Damages Only for Work Attributable to Recovery of Amount Due on Policy

In ***Cassim v. Allstate Ins. Co.*** *(2004) 33 Cal. 4th 780, 806, 16 Cal. Rptr. 3d 374, 94 P.3d 513* , the plaintiffs sued their insurer, seeking recovery of first-party policy benefits due on their homeowner's policy following damage to their home, as well as tort damages for bad faith in the handling of their insurance claim. The jury awarded the plaintiffs a combined $3,594,600 in compensatory damages and $5 million in punitive damages.Before the verdict, the parties stipulated that the trial court sitting as a trier of fact would separately decide the issue of *Brandt* fees--that is, the amount of attorney's fees payable as damages [*see* *Brandt v. Superior Court (1985) 37 Cal. 3d 813, 210 Cal. Rptr. 211, 693 P.2d 796* ; § 120.220]. Without explanation, the trial court awarded the plaintiffs $1,193,533 in *Brandt* fees. The record did not indicate how trial court arrived at its figure, although the amount is approximately one third of the compensatory damages award. The insurer appealed on the ground that the plaintiffs' attorney's closing argument was prejudicial. The court of appeal reversed and remanded for a new trial.

On review, the California Supreme Court concluded that even assuming the plaintiffs' counsel committed misconduct in closing argument, no prejudice resulted. In addition, the Court held that the award of *Brandt* fees was correct, although the trial court was required to recalculate the amount of those fees (*33 Cal. 4th 780, 805-812)* . Because the trial court's decision was not supported by substantial evidence, it abused its discretion in awarding that large an amount of *Brandt* fees (*33 Cal. 4th 780, 794)* . Specifically, the fees recoverable may not exceed the amount attributable to the attorney's efforts to obtain the rejected payment due on the insurance contract. Fees attributable to obtaining any portion of an award that exceeds the amount due under the policy are not recoverable (*33 Cal. 4th 780, 807)* . The Court noted that the plaintiffs had agreed to pay their attorney a 40 percent contingency fee (40 percent of all sums recovered). Nothing in the contingency fee agreement differentiated between recovery on the contract and recovery on the tort, or between compensatory damages and punitive damages. The amount due on their insurance policy, based on the damage to their home, was apparently $40,856. Permitting the plaintiffs in a mixed contract/tort case to recover the majority of their attorney's fees attributable to the entire compensatory damages award (about 83 percent of those fees) is inconsistent with the premise of *Brandt*. In a contingent fee context, the trier of fact must determine the percentage of the legal fees

paid to the attorney that reflects the work attributable to obtaining the contract recovery. No portion of legal fees attributable to the punitive damages award can be recovered as *Brandt* fees. The focus of *Brandt* was solely on ensuring that attorney's fees for contract recovery did not diminish a plaintiff's compensatory damages award, and did not concern diminution of the punitive damages award, which is essentially a windfall for plaintiffs that the law permits for public policy reasons. Moreover, the *Brandt* fees can never exceed the legal fees for the combined tort and contract recovery (*33 Cal. 4th 780, 812)* . To determine the percentage of the legal fees attributable to the contract recovery, the trial court should determine the total number of hours an attorney spent on the case, and then determine how many hours were spent working exclusively on the contract recovery. Hours spent working on issues jointly related to both the tort and contract should be apportioned, with some hours assigned to the contract and some to the tort. The apportioned contract figure should be added to the hours spent on the contract alone, and that sum should be divided by the total number of hours worked, resulting in the appropriate percentage (*33 Cal. 4th 780, 812)* . The Court also noted that the amount of *Brandt* fees, even in a contingency case, could exceed a set percentage of the contract benefit. Moreover, in either an hourly or a contingent fee case, the amount attributable to the attorney's efforts to obtain the contract benefits could conceivably exceed those benefits entirely, although an award of *Brandt* fees in excess of the amount of legal fees for tort and contract recoveries combined would be an abuse of discretion (*33 Cal. 4th 780, 809 n.13*). The Court rejected the insurer's argument that *Brandt* fees in this case should have been limited to 40 percent (pursuant to the contingency fee agreement) of the benefits owing under the contract (*33 Cal. 4th 780, 810)* . On remand, the plaintiffs bear the burden of demonstrating how the fees for legal work attributable to both the contract and the tort recoveries should be apportioned (*33 Cal. 4th 780, 813)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsCosts & Attorney FeesGeneral OverviewInsurance LawClaims & ContractsCosts & Attorney FeesAward Calculations

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12-120 California Points & Authorities §§ 120.217-120.219

[Reserved]

§§ 120.217[Reserved]

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12-120 California Points & Authorities § 120.220

§ 120.220 Attorney's Fees Expended to Recover Policy Benefits Are Proper Element of Damages in Action for Tortious Breach of Insurance Contract

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF MAY RECOVER ATTORNEY'S FEES INCURRED TO COMPEL PAYMENT OF POLICY BENEFITS TORTIOUSLY WITHHELD BY INSURER.

A. Attorney's Fees Are Recoverable as Damages. When an insurer tortiously withholds benefits due under a policy, attorney's fees reasonably incurred to compel payment of the benefits are recoverable as an element of the damages resulting from the tortious conduct, and are not precluded by *Section 1021 of the Code of Civil Procedure* (*Brandt v. Superior Court (1985) 37 Cal. 3d 813, 818-819, 210 Cal. Rptr. 211, 693 P.2d 796* ; *Pacific-S. Mortgage Trust Co. v. Insurance Co. of N. Am. (1985) 166 Cal. App. 3d 703, 717, 212 Cal. Rptr. 754*). Recoverable attorney's fees are those incurred to compel payment of benefits wrongfully withheld by the insurer, such as fees incurred in negotiating a settlement or in bringing a breach of contract action against the insurer. These fees are distinguished from attorney's fees attributable to the bringing of the bad-faith action itself, which are not recoverable [*Brandt v. Superior Court (1985) 37 Cal. 3d 813, 817, 210 Cal. Rptr. 211, 693 P.2d 796]* .

[*Optional*] **B. Insured's Assignment of Bad Faith Cause of Action CarriesWith It Right to *Brandt* Fees.** An insured's assignment of a cause of action against an insurance company for tortious breach of the covenant of good faith and fair dealing by wrongfully denying benefits due under an insurance policy carries with it the right to recover *Brandt* fees that the assignee incurs to recover the policy benefits in the lawsuit against the insurance company (*Essex Ins. Co. v. Five Star Dye House, Inc. (2006) 38 Cal. 4th 1252, 1264, 45 Cal. Rptr. 3d 362, 137 P.3d 192*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose a contention that an award of attorneys fees as damages for an insurer's breach of the covenant of good faith and fair dealing is not proper [*see Code Civ. Proc. §§ 435-437* (motion to strike); *see also Brandt v. Superior Court (1985) 37 Cal. 3d 813, 817, 210 Cal. Rptr. 211, 693 P.2d 796* (attorney's fees recoverable as damages)]. The basis of these points and authorities is that attorney's fees expended to recover policy benefits are a proper element of damages in an action for tortious breach of insurance contract.

Paragraph B should be included when the insured has assigned a bad faith cause of action against the insurer and the insured is entitled to *Brandt* fees.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. Counsel should include facts showing the insurer's initial refusal to pay benefits rightfully due the insured, retention of counsel by the insured, and counsel's efforts to secure payment of the benefits, such as through settlement negotiations or institution of a breach of contract action.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues and to place the argument within its proper procedural context.

An appropriate procedural context for this contention, for example, would be a memorandum of points and authorities opposing a motion for summary judgment or summary adjudication when the evidentiary facts clearly support the contention. In this context, counsel would modify the form to assert that there remain triable issues of material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts opposing the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(e)-(h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(j)].

[c] Related Pleading and Practice Chapters

For discussion and forms relating to noticed motions to strike, see California Forms of Pleading and Practice, Ch. 375, *Motions to Strike* (Matthew Bender). For discussion and forms relating to actions against insurers for breach of the covenant of good faith and fair dealing, see California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender).

[d] Related Points and Authorities

For forms of memoranda of points and authorities generally supporting and opposing a motion to strike, see Ch. 160, *Motions to Strike* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 120.216* may be used to oppose the motion supported by these points and authorities.

[3] Discussion of Authorities

[a] Attorney's Fees Are Recoverable as Damages

In ***Brandt v. Superior Court*** *(1985) 37 Cal. 3d 813, 210 Cal. Rptr. 211, 693 P.2d 796* , plaintiff brought an action for breach of contract, breach of the covenant of good faith and fair dealing, and unfair trade practices against an insurer for its refusal to pay benefits allegedly due under plaintiff's disability insurance policy. In its cause of action for breach of the duty of good faith, plaintiff sought to recover as damages the attorney's fees incurred in connection with the contract cause of action. Defendant insurer successfully moved to strike the portion of the complaint seeking attorney's fees on the ground that *Code Civ. Proc. § 1021* precludes an award of attorney's fees except as authorized by an agreement between the parties or by statute. Plaintiff petitioned for a writ of mandate.

The Supreme Court issued a writ of mandate directing the trial court to vacate its order striking portions of the complaint seeking attorney's fees. Reviewing thelaw of bad-faith tort actions, the Court observed that when an insurer, in discharging its contractual responsibilities, breaches its duty to deal fairly and in good faith by refusing, without proper cause, to compensate the insured for losses covered by the policy, the insurer becomes liable for any damages proximately caused by its breach. If the insurer's tortious conduct compels the insured to retain an attorney to obtain the benefits due under a policy, the insurer is liable in a tort action for the attorney's fees expended, because the fees are an economic loss proximately caused by the tort (*37 Cal. 3d 813, 817)* . In discussing the effect of *Code Civ. Proc. § 1021*, the Court distinguished between recovery of attorney's fees as damages resulting from a tort, and recovery of attorney's fees qua attorney's fees, such as those attributable to the bringing of the bad-faith action itself. It held that *Code Civ. Proc. § 1021* precludes only the latter (*37 Cal. 3d 813, 817-818)* . The Court added that the fees recoverable may not exceed the amount attributable to the attorney's efforts to obtain the rejected payment due on the insurance contract.

Fees attributable to obtaining any portion of the plaintiff's award that exceeds the amount due under the policy are not recoverable (*37 Cal. 3d 813, 819)* . In reaching its decision, the Court adopted the reasoning of *Mustachio v. Ohio Farmers Ins. Co. (1975) 44 Cal. App. 3d 358, 118 Cal. Rptr. 581* , which allowed recovery of attorney's fees incurred by an insured for settlement negotiations after the insurer threatened nonpayment if its first offer of payment was refused, and disapproved *Austero v. Washington Nat'l Ins. Co. (1982) 132 Cal. App. 3d 408* , which had reversed an award of attorney's fees in a bad-faith tort action (*37 Cal. 3d 813, 816-817*).

In ***Pacific-S. Mortgage Trust Co. v. Insurance Co. of N. Am.*** *(1985) 166 Cal. App. 3d 703, 212 Cal. Rptr. 754* , plaintiff brought an action against defendant insurance company seeking damages for defendant's alleged bad-faith refusal to settle a claim made on a commercial blanket bond issued by defendant to plaintiff. The action was brought after defendant refused to indemnify plaintiff for damages suffered by plaintiff as a result of fraudulent misrepresentations made by an employee. Defendant cross complained against the employee. After being tried to two juries, the case resulted in the trial court's decision that plaintiff's loss was covered by the bond and that defendant breached its duty of good faith in failing to investigate or negotiate the claim. The trial court awarded damages and attorney's fees to plaintiff, and defendant appealed. The court of appeal reduced the amount of damages to reflect the improper computation of prejudgment interest, but otherwise affirmed. The court addressed each of the issues raised by defendant on appeal, including the contention that an award for attorney's fees was improper. Citing *Brandt v. Superior Court (1985) 37 Cal. 3d 813, 210 Cal. Rptr. 211, 693 P.2d 796* , the court found that the award of attorney's fees was proper to the extent the fees were attributable to efforts to obtain the payments withheld in bad faith (*166 Cal. App. 3d 703, 717)* .

[b] Insured's Assignment of Bad Faith Cause of Action Carries With It Right to *Brandt* Fees.

In ***Essex Ins. Co. v. Five Star Dye House, Inc.*** *(2006) 38 Cal. 4th 1252, 45 Cal. Rptr. 3d 362, 137 P.3d 192* , the insured, who owned a trucking business that transported commercial machinery, dropped and damaged a commercial dryer during delivery, which resulted in a lawsuit by the customer for damages of lost profits while the machine was under repair. The insured tendered defense of the action to his insurer, which refused to defend. After paying for his own defense, the insured lost the suit, which resulted in a $1.35 million judgment for the plaintiff. The insured then assigned to the plaintiff all his claims and causes of action against his insurer, in exchange for a delay in execution of the judgment until the claims against the insurer for the judgment amount were exhausted. Notwithstanding the assignment, the insured remained liable for the full judgment amount, plus interest. The insurer then filed an action for declaratory relief against the insured and the plaintiff in the underlying action, which cross-complained for breach of contract and bad faith. The insured was dismissed as a defendant based on his previous assignment of all claims. The trial court found the existence of an insurance contract between the insured and his insurer, potential coverage under that policy for the underlying claim against the insured, and bad faith by the insurer in not defending the underlying action. The court awarded the assignee $1.6 million in damages against the insurer, but denied the assignee's request for *Brandt* fees. The Court of Appeal affirmed the trial court's judgment against the insurer, but reversed as to the denial of attorney's fees.

The California Supreme Court granted review to determine whether assignment of a tort action against an insurer for wrongfully withholding policy benefits includes the right to recover *Brandt* fees, and affirmed the judgment of the Court of Appeal. The Court noted that in *Brandt v. Superior Court (1985) 37 Cal.3d 813, 817, 210 Cal. Rptr. 211, 693 P.2d 796* , it held that when an insurer denies coverage in bad faith, the insured can recover attorney fees in an action to recover the policy benefits (*38 Cal. 4th 1252, 1258*). The Court stated that actions for bad faith against an insurer have generally been held to be assignable, including claims for breach of the duty to defend. Although some damages potentially recoverable in a bad faith action, including damages for emotional distress and punitive damages, are not assignable, the cause of action itself remains freely assignable as to all other damages. In this case, the assignee sought to recover as tort damages the monetary value of the policy benefits wrongfully withheld by the insurer (*38 Cal. 4th 1252, 1263*). *Brandt* fees do not possess any of the personal aspects that preclude assignment of other tort damages, such as damages for emotional distress; they are not damages arising from the personal tort aspect of the bad faith cause of action. The Court rejected the insurer's argument that because *Brandt* fees are tort damages, they are recoverable only if incurred by the insured personally, rather than by the assignee. As a general rule, the assignee of a chosein action stands in the shoes of the assignor, taking his or her rights and remedies. The Court therefore concluded that an insured's assignment of a cause of action against an insurance company for tortious breach of the covenant of good faith and fair dealing by wrongfully denying benefits due under an insurance policy carries with it the right to recover *Brandt* fees that the assignee incurs to recover the policy benefits in the lawsuit against the insurance company (*38 Cal. 4th 1252, 1264)* .

[4] Additional Authorities

[a] Attorney's Fees Are Recoverable as Damages.

In *Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co. (1987) 189 Cal. App. 3d 1072, 234 Cal. Rptr. 835* , the jury returned a verdict awarding compensatory and punitive damages to the plaintiff in an action for insurance bad faith and related causes of action. In a subsequent hearing regarding plaintiff's request for attorney's fees on the bad-faith issue, the trial court granted defendant's motion barring plaintiff from introducing evidence on the issue of costs and attorney's fees incurred in the bad faith cause of action, ruling that they were not a recoverable item of damages. Plaintiff appealed, and the court of appeal reversed. The court held that under *Brandt*, when an insurer tortiously withholds benefits, the insured is entitled to recover attorney's fees incurred to compel payment of the policy benefits because the attorney's fees are an economic loss, or damages, proximately caused by the tort (*189 Cal. App. 3d 1072, 1085)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBad Faith & Extracontractual LiabilityGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilityAssignment of ClaimsInsurance LawBad Faith & Extracontractual LiabilityElements of Bad FaithInsurance LawClaims & ContractsCosts & Attorney FeesGeneral OverviewInsurance LawClaims & ContractsCosts & Attorney FeesFailure to Pay Claims

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 120 INSURANCE
PART II. FORMS
C. Improper Claims Settlement Practices
3. Damages for Attorneys' Fees

12-120 California Points & Authorities §§ 120.221-120.229

[Reserved]

§§ 120.221[Reserved]

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C. Improper Claims Settlement Practices
4. Insurer's Misrepresentations

12-120 California Points & Authorities § 120.230

§ 120.230 Insurer Made Wrongful Misrepresentation Regarding Existence of Insured's Right to Obtain Review of Denial of Claim

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER BREACHED THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING BY REPEATEDLY MISLEADING INSURED INTO BELIEVING HE/SHE HAD NO RECOURSE TO REVIEW THE CLAIM DENIAL, ALTHOUGH THE POLICY SPECIFICALLY PROVIDED AN IMPARTIAL REVIEW PROCESS, THEREBY DELIBERATELY INTENDING TO CAUSE INSURED TO FORFEIT HIS/HER RIGHTS OF REVIEW.

Insurer's Wrongful Misrepresenting Regarding Insured's Right to Review of Denial of Claim. An insurer's course of conduct designed to mislead an insured into forfeiting a contractual right to impartial review of a claim denial constitutes breach of the covenant of good faith and fair dealing (*Sarchett v. Blue Shield of Cal. (1987) 43 Cal. 3d 1, 13-15, 233 Cal. Rptr. 76, 729 P.2d 267*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of an insured's contention that the insurer repeatedly misled the insured into believing that the insurer's decision to deny a claim for benefits was final and could not be appealed, when in fact the policy provided for an impartial review process.

This form may be used in various procedural contexts. For example, it may be used in a motion for a directed verdict [*see Code Civ. Proc. § 630* (motion for directed verdict)]. It may also be used in trial or appellate brief.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. Consequently, counsel should discuss evidence showing that either the arbitration clause was inconspicuous, or the insurer had reason to know that the insured was not aware of the review rights under the policy, regardless of the placement of the review clause.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues and to place the argument within its proper procedural context.

An appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing an insurer's motion for summary judgment or summary adjudication when the evidentiary facts clearly support the contention. In this context, counsel would modify the form to assert that there remain triable issues of material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts opposing the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(e)-(h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[3] Discussion of Authorities

[a] Insurer's Wrongful Misrepresenting Regarding Insured's Right to Review of Denial of Claim

In ***Sarchett v. Blue Shield of Cal.*** *(1987) 43 Cal. 3d 1, 233 Cal. Rptr. 76, 729 P.2d 267* , plaintiff obtained insurance offered by his employer under a group policy provided by defendant. Plaintiff was subsequently hospitalized by a member physician of defendant. Defendant paid plaintiff's medical and diagnostic testing bills, but denied his claim for the hospital stay, based on two provisions of the policy: (1) an exclusion for services when hospitalized primarily for diagnostic purposes or medical observation, and (2) an exclusion for services not medically necessary. Plaintiff and others acting on his behalf repeatedly protested the denial of coverage, and received several denial letters from defendant, implying that defendant's decision was final, and failing to mention that any appeal procedures were available, when, in fact, the policy required impartial dispute-resolution mechanisms. The hospital utilization review committee lodged a protest, and defendant wrote a letter to that committee, but notto plaintiff, offering plaintiff a peer review on the condition that he produce further information.

In fact, peer review was an unconditional right under the contract. The matter was submitted to arbitration, and decided in favor of plaintiff. The superior court vacated the award, and set the matter for trial de novo. The trial court directed a verdict for plaintiff on breach of the duty of good faith and fair dealing. The court found that the policy failed to reserve for defendant the right to review the medical necessity of a procedure ordered by the physician and not excluded from coverage by the contract. It also found that defendant violated the covenant of good faith and fair dealing by disagreeing with the judgment of the treating physician solely on the basis of retrospective review of hospital files, when plaintiff was not clearly informed of that procedure in the health plan. It based the directed verdict on the fact that defendant had failed to advise plaintiff of his contractual right to impartial review and arbitration in repeated denial letters to him. The jury awarded plaintiff damages for his hospital costs, compensatory damages, and punitive damages. Defendant appealed.

The Supreme Court reversed, holding that the jury instructions with regard to defendant's failure to pay the hospital bill, and defendant's disagreement with the treating physician solely on the basis of retrospective review, were erroneous, and remanded the case (*43 Cal. 3d 1, 5-16)* . However, the Court held that at retrial, the court should instruct the jury

that defendant breached its duty of good faith and fair dealing by failing to advise plaintiff of his right to peer review and arbitration (*43 Cal. 3d 1, 16)* . Citing *Davis v. Blue Cross of N. Cal. (1979) 25 Cal. 3d 418, 428, 158 Cal. Rptr. 828, 600 P.2d 1060* , the Court noted that the insurer's implied duty of good faith and fair dealing includes a responsibility to inform its insureds of their rights under the policy's arbitration clause. In *Davis*, the policy's arbitration provision was obscurely placed in fine print, whereas in the instant case it was adequately set out with a boldface heading. However, defendant had reason to know that plaintiff was uninformed of his rights, because he repeatedly protested the denial without demanding review by an impartial panel of physicians. Defendant then failed to mention his right to review by anyone other than the single hired consultant who initially denied the claim. That conduct appeared designed to mislead subscribers into forfeiting their contractual right to impartial review and arbitration of disputed claims (*43 Cal. 3d 1, 15)* .

NOTE:

Sarchett concerned a group insurance policy offered by the plaintiff's employer. Although the applicability of the Employee Retirement Income Security Act of 1974 (*29 U.S.C.S. § 1001 et seq.*) to plaintiff's claim does not appear to have been raised, counsel should nevertheless be aware that the United States Supreme Court has held that an action brought under state law asserting the improper processing ofa claim for benefits under an employee benefit plan subject to ERISA is preempted by federal law, unless the state law regulates insurance [*see* *Pilot Life Ins. Co. v. Dedeaux (1987) 481 U.S. 41, 107 S. Ct. 1549, 95 L. Ed. 2d 39, 54* ; *Metropolitan Life Ins. Co. v. Taylor (1987) 481 U.S. 58, 65, 107 S. Ct. 1542, 95 L. Ed. 2d 55, 62]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBad Faith & Extracontractual LiabilityGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilityPayment Delays & DenialsInsurance LawClaims & ContractsGood Faith & Fair DealingGeneral Overview

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4. Insurer's Misrepresentations

12-120 California Points & Authorities §§ 120.231-120.239

[Reserved]

§§ 120.231[Reserved]

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5. Breach of Statutory Duties

12-120 California Points & Authorities § 120.240

§ 120.240 Statute Does Not Confer Any Private Right of Action on Plaintiff in Unfair Claims Settlement Practices Under Ins. Code § 790.03(h)

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF, AS A PRIVATE LITIGANT, HAS NO PRIVATE RIGHT OF ACTION UNDER INSURANCE CODE SECTION 790.03(h).

Plaintiff as Private Litigant May Not Bring Action for Damages Under *Ins. Code § 790.03(h)*. Neither *Insurance Code Section 790.03* nor any other California statute expressly authorizes first-party private litigants to recover damages from insurers for violations of *Insurance Code Section 790.03(h)*. Although the California Supreme Court formerly recognized the existence of such a cause of action (*see Royal Globe Ins. Co. v. Superior Court (1979) 23 Cal. 3d 880, 884, 153 Cal. Rptr. 842, 592 P.2d 329*), that holding was prospectively overruled as to actions filed on or after October 18, 1988. After the latter date, no private litigant may sue an insurance company for damages under *Insurance Code Section 790.03(h)* (*Moradi-Shalal v. Fireman's Fund Ins. Cos. (1988) 46 Cal. 3d 287, 292, 305, 250 Cal. Rptr. 116, 758 P.2d 58*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that plaintiff has no standing to sue the insurer. The basis of these points and authorities is that a private right of action no longer exists under *Ins. Code § 790.03(h)*.

In 1979, the California Supreme Court held that a private right of action for damages existed under *Ins. Code 790.03(h)* against insurers who commit unfair claims settlement practices [*Royal Globe Ins. Co. v. Superior Court (1979) 23 Cal. 3d 880, 884, 153 Cal. Rptr. 842, 592 P.2d 329]* . This statutory right of action was independent of any common

law rights of action arising out of the insurer's covenant of good faith and fair dealing or other duties arising in connection with the handling of insurance claims.

The rights of action could be asserted by insureds and, unlike a common law action for breach of the covenant of good faith and fair dealing, couldalso be asserted directly against the insurer by third persons who were not parties to the insurance contract. The only prerequisite to a third party's action against the insurer was that the third party's lawsuit against the insured must have been "concluded" [*Royal Globe Ins. Co. v. Superior Court (1979) 23 Cal. 3d 880, 884, 153 Cal. Rptr. 842, 592 P.2d 329]* .

In 1988, however, the Court reversed itself and overruled *Royal Globe* prospectively, abolishing the private right of action under *Ins. Code § 790.03(h)* [*see Moradi-Shalal v. Fireman's Fund Ins. Cos. (1988) 46 Cal. 3d 287, 292, 305, 250 Cal. Rptr. 116, 758 P.2d 58]* . Abolition of the private right of action did not extend to cases filed before October 18, 1988, the date on which the *Moradi-Shalal* opinion became final. However, the court held that in all such third party cases, a final judicial determination of the insured's liability must have been obtained before filing the action [*see Moradi-Shalal v. Fireman's Fund Ins. Cos. (1988) 46 Cal. 3d 287, 292, 305, 306, 250 Cal. Rptr. 116, 758 P.2d 58]* .

Although *Moradi-Shalal* involved a third-party claim, subsequent decisions have confirmed that its abolition of a private right of action under *Ins. Code § 790.03(h)* applies to first-party claims as well [*see Tricor Cal., Inc. v. Superior Court (1990) 220 Cal. App. 3d 880, 882, 887, 269 Cal. Rptr. 642* ; *Zephyr Park Ltd. v. Superior Court (1989) 213 Cal. App. 3d 833, 836-838, 262 Cal. Rptr. 106]* .

Thus, with the limited exception noted above, a private right of action no longer exists under *Ins. Code § 790.03(h)* with respect to first parties.

In the wake of *Moradi-Shalal*, the courts have rejected attempts to assert claims under *Bus. & Prof. Code § 17200* and *Bus. & Prof. Code § 17203* (the unfair competition statutes) that could no longer be asserted under *Ins. Code § 790.03(h)*. In *Industrial Indem. Co. v. Superior Court (1989) 209 Cal. App. 3d 1093, 1095-1097, 257 Cal. Rptr. 655* , the court held that the remedies available under *Bus. & Prof. Code § 17203* are limited to injunctive relief and do not include an award of damages. In *Safeco Ins. Co. v. Superior Court (1990) 216 Cal. App. 3d 1491, 1494, 265 Cal. Rptr. 585* , the court summarily rejected a claim under *Bus. & Prof. Code § 17200*, ruling that the latter section could not be used to circumvent Moradi-Shalal. In *Maler v. Superior Court (1990) 220 Cal. App. 3d 1592, 1598, 270 Cal. Rptr. 222* , the court rejected plaintiff's attempt to "bootstrap" a violation of *Ins. Code § 790.03* onto the unfair conduct prohibition in *Ins. Code § 1861.03* (enacted as part of Proposition 103), ruling that the latter section did not supersede the *Moradi-Shalal* prohibition on private causes of action under *Ins. Code § 790.03* [*but see Manufacturers Life Ins. Co. v. Superior Court (1995) 10 Cal. 4th 257, 283-284, 41 Cal. Rptr. 2d 220, 895 P.2d 56* (action by an life insurance brokerage firm against insurers, competitors, and trade associations, in which California Supreme Court ruled that cause of action for unfair competition under *Bus. & Prof. Code § 17200 et seq.* based on conduct made unlawfulunder the Cartwright Act (*Bus. & Prof. Code § 16720 et seq.*) did not compromise Court's holding in *Moradi-Shalal* because it did not constitute an no attempt to use the Unfair Competition Act to enforce a provision of the Unfair Practices Act)].

This form may be used by an insurer in various procedural contexts. For example, it may be used by a defendant insurer to support a demurrer on the ground that no private right of action existed under *Ins. Code § 790.03(h)* on the date the complaint was filed. This form may also be used in a trial brief, or in an appellate brief.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues and to place the argument within its proper procedural context.

An appropriate procedural context for this contention, for example, would be an insurer's memorandum of points and authorities supporting a motion for summary judgment or summary adjudication when the evidentiary facts clearly support the contention. In this context, counsel would modify the form to assert that there remain no triable issues of material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts supporting the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(e)-(h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Pleading and Practice Chapters

For discussion and forms relating to demurrers, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender).

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication indrafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Plaintiff as Private Litigant May Not Bring Action for Damages Under Ins. Code § 790.03(h)

In ***Moradi-Shalal v. Fireman's Fund Ins. Cos.*** *(1988) 46 Cal. 3d 287, 250 Cal. Rptr. 116, 758 P.2d 58* , plaintiff was injured when her car was struck by a vehicle driven by defendant's insured. Initially, the insurer did not respond to plaintiff's claim, but the claim ultimately was settled about five months later for slightly less than plaintiff's original demand. Thereafter plaintiff sued the insurer for unfair claims settlement practices under *Ins. Code § 790.03(h)* and *Royal Globe Ins. Co. v. Superior Court (1979) 23 Cal. 3d 880, 884, 153 Cal. Rptr. 842, 592 P.2d 329* . The trial court sustained the insurer's general demurrer on the ground that the absence of a final judgment against the defendant precluded a *Royal Globe* action. The court of appeal reversed, holding that a settlement coupled with a dismissal with prejudice was a sufficient conclusion of the underlying action for *Royal Globe* purposes.

The Supreme Court reconsidered the underlying validity of the *Royal Globe* decision, concluding that *Royal Globe* was wrongly decided in the first instance and that no private cause of action exists for violation of *Ins. Code § 790.03(h)* (*46 Cal. 3d 287, 304)* . However, the Court declined to apply its decision retroactively to cases seeking relief under *Ins. Code § 790.03(h)* before the date on which the *Moradi-Shalal* opinion became final (*46 Cal. 3d 287, 305)* . With respect to *Royal Globe* claims then currently pending, the court decided that settlement is an insufficient conclusion of the prior action for purposes of *Royal Globe* (*46 Cal. 3d 287, 306, 313)* . Rather, there must be a "conclusive judicial determination" of liability (*46 Cal. 3d 287, 306)* .

In ***Tricor Cal., Inc. v. Superior Court*** *(1990) 220 Cal. App. 3d 880, 882, 886, 887, 269 Cal. Rptr. 642* , and ***Zephyr Park Ltd. v. Superior Court*** *(1989) 213 Cal. App. 3d 833, 836-838, 262 Cal. Rptr. 106* , two courts of appeal concluded that *Moradi-Shalal* applies to first-party as well as third-party actions.

[4] Additional Authorities

[a] Plaintiff as Private Litigant May Not Bring Action for Damages Under Ins. Code § 790.03(h)

In *McMillin Scripps N. P'ship v. Royal Ins. Co. (1993) 19 Cal. App. 4th 1215, 23 Cal. Rptr. 2d 243* , an insured under a first party propertyinsurance policy sought recovery of the costs of investigating whether gasoline storage tanks on the property were leaking. Ultimately, investigation revealed that leakage had occurred prior to the inception of the policy. The insurer failed to investigate whether the claim was covered, and the insured brought an action for breach of the covenant of good faith and other causes of action. The court of appeal affirmed the granting of the insurer's summary judgment, holding that there cannot be bad faith when there is no covered loss during the policy period, absent misrepresentation or conduct on the insurer's part that prevents the insured from protecting its interests (*19 Cal. App. 4th 1215, 1224)* . The court noted that while *Ins. Code § 790.03(h)(3)* imposes a duty to promptly investigate all claims (whether or not they are ultimately determined to be covered), no private right of action exists under that section (*19 Cal. App. 4th 1215, 1221-1222)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBad Faith & Extracontractual LiabilitySettlement ObligationsGeneral OverviewInsurance LawClaims & ContractsGood Faith & Fair DealingGeneral OverviewInsurance LawClaims & ContractsGood Faith & Fair DealingThird Party ClaimantsInsurance LawIndustry RegulationGeneral Overview

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12-120 California Points & Authorities §§ 120.241-120.249

[Reserved]

§§ 120.241[Reserved]

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D. Rescission, Cancellation, and Renewal of Policies
1. Rescission for Material Misrepresentations or Concealment

12-120 California Points & Authorities § 120.250

§ 120.250 Policy Was Rescinded on Ground of Insured's Material Concealment

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER RESCINDED THE INSURANCE CONTRACT PRIOR TO COMMENCEMENT OF THIS ACTION ON THE GROUND OF INSURED'S MATERIAL CONCEALMENT.

A. Insurer's Right to Rescind for Concealment. Concealment, whether intentional or unintentional, entitles the injured party to rescind an insurance contract (*Ins. Code §§ 22, 331*).

B. Misrepresentation Not Required. Misrepresentation and concealment are not synonymous and each constitutes a separate ground for rescinding an insurance contract (*Dinkins v. American Nat'l Ins. Co. (1979) 92 Cal. App. 3d 222, 232, 154 Cal. Rptr. 775*).

C. Insured Engaged in Concealment as Defined. Neglect to communicate that which a party knows, and ought to communicate, is concealment (*Ins. Code § 330*).

D. Insured Failed to Communicate Material Facts. Each party to an insurance contract must communicate to the other, in good faith, all facts within his or her knowledge that are or that he or she believes to be material to the contract and as to which he or she makes no warranty, and which the other has not the means of ascertaining (*Ins. Code § 332*).

[*Optional*] **E. Questions in Insurance Application are Material.** The fact that the insurer has required answers to specific questions in an insurance application is usually sufficient to establish materiality as a matter of law (*Thompson v. Occidental Life Ins. Co. (1973) 9 Cal. 3d 904, 916, 109 Cal. Rptr. 473, 513 P.2d 353* ; *see also*

Williamson & Vollmer Eng'g, Inc. v. Sequoia Ins. Co. (1976) 64 Cal. App. 3d 261, 272, 134 Cal. Rptr. 427).

[*Optional*] **F. Concealment Applies to Modification of Insurance Contract.** The provisions of *Insurance Code Sections 330-361*, relating to concealment and representations, apply to a modification of an insurance contract as well as to its original formation (*Ins. Code § 361*).

G. Rescission Is Proper Prior to Commencement of Action on Contract. Whenever a right to rescind an insurance contract is given to the insurer by any provision of *Insurance Code Sections 100-679.73*, the right may be exercised at any time previous to the commencement of an action on the contract (*Ins. Code § 650*).

[*Optional*] **H. "Action on the Contract," as Used in *Ins. Code § 650*, Defined.** An action on the contract, as that term is used in *Insurance Code Section 650*, means an action on the insurance contract by a party to the contract (*Allstate Ins. Co. v. McCurry (1964) 224 Cal. App. 2d 271, 273-274, 36 Cal. Rptr. 731 , disapproved on other grounds, Barrera v. State Farm Mut. Auto. Ins. Co. (1969) 71 Cal. 2d 659, 679, 79 Cal. Rptr. 106, 456 P.2d 674*).

[*Optional*] **I. Rescission Applies to All Insureds Under Contract.** The rescission exercised by the insurer under *Insurance Code Section 650* applies to all insureds under the contract, including additional insureds, unless the contract provides otherwise (*Ins. Code § 650*).

[*Optional*] **J. Rescission Applies to Assigned Risk Motor Vehicle Policy.** The statutory remedy of rescission applies to assigned risk motor vehicle policies (*Fireman's Fund Am. Ins. Co. v. Escobedo (1978) 80 Cal. App. 3d 610, 619, 145 Cal. Rptr. 785*).

[*Optional*] **K. Insurer May Raise Defense of Rescission After Insured Commences Action.** Although an insurer cannot rescind an insurance policy unilaterally after the insured files suit to enforce the policy, it may raise rescission as a defense (*Atmel Corp. v. St. Paul Fire & Marine Ins. Co. (N.D. Cal. 2006) 416 F. Supp. 2d 802, 805)* .

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of an insurer's contention that the insurance policy was rescinded by the insurer prior to commencement of the action. The basis of these points and authorities is that the insurance contract was rescinded by the insurer because of the concealment of a material fact by the insured.

This form may be used in a variety of procedural contexts. For example, it may be used by an insurer in support of a motion for summary judgment in an action for breach of the insurance contract or to enforce the contract's provisions. Such an action may be brought by any of the following parties:

- By an insured, or the insured's beneficiary under a life policy.
- By a transferee under a life or disability policy.
- By a judgment creditor of the insured under a liability policy.

Paragraph E should be included if the concealment was in the insurance application, and Paragraph F should be included if the concealment related to the modification of the insurance contract.

Paragraph H should be included if the policy involved is a liability policy and the rescission followed the filing of an action by a liability claimant against the insured but before any judgment was entered in that action.

Paragraph I should be included when there is more than one insured covered by the policy, including additional insureds.

Paragraph J should be included if the policy in question is an assigned risk motor vehicle liability policy.

Paragraph K should be included if the insured has already filed an action against the insurer to enforce the policy, and the insurer raises rescission of the policy as a defense.

Numerous statutes cover specific misrepresentations, the effect of concealment and misrepresentation with respect to certain policies, and what statements are to be considered representations rather than warranties. These statutes should be checked if the case involves such a specific misrepresentation or such a policy.

For example, prohibited misrepresentations by an insurer or by an insurer's officer or agent are covered by *Ins. Code §§ 780-784* and unfair practices by *Ins. Code §§ 790-790.10*. *Ins. Code § 2071*, which sets forth the standard form of fire insurance policy for California, requires inclusion of the following provision: "This entire policy shall be void if, whether before or after a loss, the insured has willfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto." *Ins. Code § 6010*, which sets forth the standard form mutual fire insurer's policy, contains an identical requirement.

Special rules relating to concealment and representations peculiar to marine insurance are set forth in *Ins. Code §§ 1900-1905*, and implied warranties peculiar to marine insurance are covered by *Ins. Code §§ 1920-1927*. California law applies to marine insurance contracts when California and federal admiraltylaw are materially the same on the issues presented [*Certain Underwriters at Lloyd's v. Montford (9th Cir. 1995) 52 F.3d 219, 222 n.1* (applying California Insurance Code to claims of rescission of marine insurance contract based on misrepresentations by insured)].

In addition, *Ins. Code § 10244(4)* requires that funeral insurance contracts contain a provision that all statements made by the insured in the application for the policy or its reinstatement will, in the absence of fraud, be deemed representations and not warranties.

Ins. Code § 10113, relating to the contents of life, disability, and life and disability policies, provides in part that "all statements purporting to be made by the insured shall, in the absence of fraud, be representations and not warranties." *Ins. Code § 10207(b)*, requires that group life policies contain a provision that all statements made by the employer or by the individual employees are, in the absence of fraud, representations and not warranties and that such statements will not be used in defense to a claim under the policy unless contained in a written application. *Ins. Code § 10270.6(a)*, relating to group disability master policies, contains a similar provision.

Ins. Code § 10380, relating to disability policies, provides that the falsity of any statement in the application shall not bar the right to recovery under the policy unless the false statement was made with actual intent to deceive or unless it materially affected either the acceptance of the risk or the hazard assumed by the insurer, and *Ins. Code § 10381.5* provides in part that the insured shall not be bound by any statement made in an application for such a policy unless a copy of the application is attached to or endorsed on the policy when issued as a part thereof.

Ins. Code §§ 10113 and *10381.5* preclude an insurer from raising the defense of fraud based on statements that an insured made in an application for insurance, if the application had not been attached to or endorsed on the policy when issued. The insurer may not invoke the defense of misrepresentations in or omissions from the unattached and unendorsed application [*Ins. Code §§ 10113, 10381.5*; *Ticconi v. Blue Shield of California Life & Health Ins. Co. (2008) 160 Cal. App. 4th 528, 540-541, 72 Cal. Rptr. 3d 888*]. The practice of postclaims underwriting is categorically prohibited [*Ins. Code § 10384*; *Ticconi v. Blue Shield of Calif. Life & Health Ins. Co. (2008) 160 Cal. App. 4th 528, 540, 72 Cal. Rptr. 3d 888*].

The statutory remedy of rescission given by the Insurance Code is merely superimposed on the law governing contracts generally and is not in derogation of other remedial rights which are recognized and implemented by other provisions of law. The statutory remedy of rescission is, therefore, not the exclusive remedy of one who has become entitled to avoid an insurance contract by reason of the acts or omissions of the other party to it which are fraudulent in their nature. Rather, the injured party, instead of rescinding, may in an appropriate case, sue for affirmative relief for any injury sustained by the other's wrongful act or omission or set up the fraud by way of affirmative defense to an action brought to enforce the defendant's apparent liability [*Williamson & Vollmer Eng'g, Inc. v. Sequoia Ins. Co. (1976) 64 Cal. App. 3d 261, 274-275, 134 Cal. Rptr. 427* ; *see also Barrera v. State Farm Mut. Auto. Ins. Co. (1969) 71 Cal. 2d 659, 681, 79 Cal. Rptr. 106, 456 P.2d 674* ; *De Campos v. State Comp. Ins. Fund (1954) 122 Cal. App. 2d 519, 529, 265 P.2d 617]* .

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should refer to evidence establishing:

- A material concealment on the part of the insured.
- Rescission by the insurer prior to commencement of the action.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues [*see, e.g., § 120.251*] and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be a motion by an insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that there is no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts supporting the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Pleading and Practice Chapters

For complaints by an insured against an insurer for damages for breach of contract because of the insurer's refusal to pay a third-party judgment against the insured or to defend the insured in a third-party action, see California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender). For a discussion of the rules applicable to summary judgment, a form of notice of motion for summary judgment, and related forms, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[e] Opposing Points and Authorities

The points and *authorities in §§ 120.260, 120.262, 120.267,* and *120.268* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Misrepresentation Not Required

Dinkins v. American Nat'l Ins. Co. *(1979) 92 Cal. App. 3d 222, 154 Cal. Rptr. 775* , was an action by the insured under a family policy naming as insureds plaintiff and five of his 11 children, including his daughter Glinda Ann, to recover payment of the benefit provided for the death of Glinda Ann, who died of gunshot wounds during the contestable period of the policy term. The insurer denied plaintiff's claim for payment on the ground that it was entitled to rescind the policy because of the concealment or misrepresentation of a material fact by plaintiff with respect to the state of Glinda Ann's health at the time that the policy application was completed, and plaintiff sued the insurer to recover the benefit and for other damages. The evidence showed that plaintiff's answers in the insurance application were incorrect insofar as they related to Glinda Ann's past medical history, and there was evidence that defendant would not have covered Glinda Ann by its policy had the true facts been known. Defendant submitted to the trial court a full set of jury instructions covering among other things the defendant's right to withhold payment had a misrepresentation or concealment of a material fact occurred. No instructions on this issue were proposed by plaintiff. The trial court, however, composed its own instructions which it gave to the jury. These instructions placed on defendant the burden of proving a material misrepresentation by plaintiff and substantially omitted any reference to the defense of concealment. The judgment entered on the jury's special verdicts awarded plaintiff the policy benefit, compensatory damages for emotional and mental distress, punitive damages, and attorney's fees.

The court of appeal reversed. It held that the trial court had prejudicially erred in failing to instruct the jury on the defense of concealment. This failure resulted in raising defendant's burden of proof from that of merely establishing that a material fact was omitted from the insurance application to that of establishing an affirmative act of misrepresentation by plaintiff. The court explained that misrepresentation and concealment are not synonymous and that if they were, there would be no reason for the legislature to treat them separately as it has done (*92 Cal. App. 3d 222, 232)* . The court pointed out that in *Ins. Code §§ 330-339,* the legislature deals with concealment as intentional, unintentional, or merely negligent with each type of concealment having a different effect, and that in *Ins. Code §§ 350-361* the legislature deals separately with representations and the effect of their falsity on a party's right to rescind (*92 Cal. App. 3d 222, 232-233)* . The court added that, moreover, California courts have consistently treated misrepresentation and concealment as distinct alternative defenses in the context of insurance coverage (*92 Cal. App. 3d 222, 233)* .

[b] Questions in Insurance Application are Material

Thompson v. Occidental Life Ins. Co. *(1973) 9 Cal. 3d 904, 109 Cal. Rptr. 473, 513 P.2d 353* , was an action by the beneficiary to recover on a life insurance policy. From a judgment awarding plaintiff the full double indemnity coverage, defendant insurer appealed. The insurer had contended that (1) no insurance existed because no policy had been issued at the time of the decedent's accidental death and (2) if it did exist, the contract was rendered void and unenforceable because of the decedent's alleged misrepresentations in his insurance application regarding the state of his health and past medical history. Although holding from the evidence presented at the trial that an insurance contract did exist and that there was no misrepresentation by the decedent, the Supreme Court, in affirming the judgment, noted that material misrepresentation or concealment of material facts are grounds for rescission of the policy, that an actual intent to deceive need not be shown, that materiality is determined solely by the probable and reasonable effect which

truthful answers would have had on the insurer, and the fact that the insurer has demanded answers to specific questions in an application for insurance is in itself usually sufficient to establish materiality as a matter of law (*9 Cal. 3d 904, 916)* .

Williamson & Vollmer Eng'g, Inc. v. Sequoia Ins. Co. *(1976) 64 Cal. App. 3d 261, 134 Cal. Rptr. 427* , was an action by an engineering firm against its insurer for a declaration of the insurer's duty under a liability policy to defend and indemnify plaintiff against a claim asserted by an architect to whom plaintiff had furnished services on a project. The general contractor on the project had sued the owner to recover payments allegedly wrongfully withheld for work performed on the general contract. The owner cross complained against the architect who, in turn, filed a cross complaint against the engineering firm seeking indemnity for any loss the architect might incur on the owner's claim for negligence in the design and supervision of work for which the engineering firm was allegedly responsible. The engineering firm tendered defense of the architect's claim to defendant insurer, which refused to either defend or indemnify. Plaintiff then sued the insurer for declaratory relief. In its application for the insurance, plaintiff has answered "no" to the question whether it was aware of any circumstances which might result in any claim against it. However, prior to that time plaintiff had received from the architect a letter notifying plaintiff of major deficiencies in the air distribution system of the project at least partly caused by the installation of ducts that were smaller than called for on the construction drawings, stating that the reduced duct sizes were shown on the shop drawings submitted by thecontractor and approved by plaintiff, and advising plaintiff that the architect held plaintiff responsible for correcting the condition. The insurer contended that the "no" answer in the application constituted misrepresentation and concealment relieving it from liability to defend or indemnify the insured. Plaintiff appealed from an adverse judgment.

The court of appeal affirmed. The court rejected plaintiff's argument that the word "claim" as used in the insurance application was ambiguous. It set forth a number of definitions for the word (*64 Cal. App. 3d 261, 269)* and concluded that it could not say, as a matter of law, that the letter itself did not constitute a claim within these definitions, much less, that it should not have produced an awareness of circumstances which would result in a claim (*64 Cal. App. 3d 261, 269-270)* . The court also said that it was clear that, as used in the policy, the word "claim" was not limited to a formal lawsuit (*64 Cal. App. 3d 261, 270)* . The court explained that materiality of the claim was evident from the terms of the policy and from the fact that the question was asked in the insurance application and was established by the testimony of plaintiff's insurance broker that if the matter had been known to him he would have included a reference of it in the application, by the testimony of the insurance underwriter that if the true circumstances had been disclosed the policy would have been issued with an endorsement excluding liability for any services under the contract in question, and by the testimony of an experienced mechanical engineer that in his opinion the type of letter in question indicated problems out of which some sort of claim might arise, even if he thought it invalid, that he would have brought the situation to the attention of his insurance broker, and he would have answered the question in the affirmative (*64 Cal. App. 3d 261, 272)* .

[c] "Action on the Contract"

Allstate Ins. Co. v. McCurry *(1964) 224 Cal. App. 2d 271, 36 Cal. Rptr. 731 , disapproved on other grounds, Barrera v. State Farm Mut. Auto. Ins. Co. (1969) 71 Cal. 2d 659, 679, 79 Cal. Rptr. 106, 456 P.2d 674*) was a declaratory relief action by an insurance company against its insured, who defaulted, and others for a determination of plaintiff insurer's liability under an automobile liability policy. In the application for the insurance, the insured had made materially false statements and representations justifying rescission of the policy. The policy had been issued at 9 a.m. on April 19, 1961, and at 6 p.m. the same day the insured was involved in an automobile accident with the nondefaulting defendants. On May 16, 1961, plaintiff informed its insured that the policy had been canceled effective June 5, 1961. On October 30, 1961, the nondefaulting defendants sued the insured for damages for personal injuries and property damage sustained in the accident. The insured tendered defense of that action to plaintiff insurer, which refused it. Three and a half months later, plaintiff insurer sued for declaratory relief.

The nondefaulting defendants demurred to the complaint on the ground that the action was barred because the insurance

policy had not been rescinded prior to the time an action on the contract was filed. The demurrer was overruled. From a subsequent judgment in favor of plaintiff insurer, the nondefaulting defendants appealed, contending the demurrer should have been sustained. The court of appeal affirmed the judgment. It held that the demurrer was properly overruled since the limitation specified in *Ins. Code § 650* did not apply (*224 Cal. App. 2d 271, 273)* .

The court explained that for the right of the insurer to rescind a contract of insurance to be restricted under *Ins. Code § 650* it is necessary that an action on the contract be brought by a party to the contract and that an action by a third party against an insured for injuries received in an accident with the insured's car is not an action on the insurance contract (*224 Cal. App. 2d 271, 273-274)* . The court pointed out that there being no provision in the policy providing that it should inure directly to the benefit of any injured person, no obligation rested on the insurer until judgment was secured against the insured and, until that contingency arose, no right of action against the insurer accrued to the injured person (*224 Cal. App. 2d 271, 275-276)* . Accordingly, the court held that an action against the insured for personal injuries is not an action on the contract under *Ins. Code § 650* and that the trial court properly determined that *Ins. Code § 650* did not prevent plaintiff from canceling the insurance contract (*224 Cal. App. 2d 271, 276)* .

Federal Life Ins. Co. v. Cary *(1937) 20 Cal. App. 2d 257, 67 P.2d 129* , which held that *Ins. Code § 650* was a limitation on the right to rescind and not an extension of it, was an action by an insurance company to rescind four noncancellable health insurance policies issued some 11 years earlier on the ground of fraud and misrepresentation in the insurance applications. The court of appeal rejected the insurer's argument that the general statute of limitations [*Code Civ. Proc. § 338(d)*] and the code sections relating to rescission [*Civ. Code §§ 1689-1693*] did not apply because *Ins. Code § 650* permitted an insurer to rescind at any time previous to the commencement of an action on the contract. The court said that it read these sections together so that the latter should be interpreted as meaning that the insurer may rescind at any time within the statutory period, as long as no action has been commenced on the policy, and that *Ins. Code § 650* is really a limitation on the right to rescind, rather than an extension of it (*20 Cal. App. 2d 257, 261)* .

[d] Rescission Applies to Assigned Risk Motor Vehicle Policy

Fireman's Fund Am. Ins. Co. v. Escobedo *(1978) 80 Cal. App. 3d 610, 145 Cal. Rptr. 785* , was a declaratory relief action by the insurer of a motorist injured in an automobile accident against the motorist, the negligent minor driver of the other car, and the minor driver's insurer for a declaratory judgment that defendant insurer's policy covered the accident. Defendant insurer had issued an assignedrisk policy to the minor motorist, who had been diagnosed as a schizophrenic and who had received psychiatric care. The insurance application asked whether the applicant had any mental or physical disability, and the "no" box was checked. The application did not request information concerning the applicant's history of medical care. Subsequently, defendant insurer hired a retail credit company to make an investigation in the course of which the minor's mother informed the investigator that the minor had been hospitalized for psychiatric care and that he was presently under the care of a psychiatrist.

The investigator omitted this information from her report to defendant insurer. The minor subsequently, while driving a car, was involved in an accident with a car owned and being driven by plaintiff's insured. On receipt of the accident report, defendant insurer requested a special investigation from the retail credit company regarding the minor's mental condition. The new retail credit report stated that the minor was under treatment for schizophrenia when the application for insurance was made and the policy issued and that he had previously been hospitalized for that condition. On receiving this report, defendant insurer rescinded the policy from the date of its inception on the ground of material concealment. Plaintiff insurer paid its insured under the uninsured motorist provisions of its policy and then sued for declaratory relief. The trial court rejected the insureds' proffered jury instruction that the duty on the part of defendant insurer to investigate insurability is a nondelegable affirmative duty and that defendant insurer could not escape liability for any failure to perform the duty by entrusting it to an independent contractor. After jury trial, the court rendered judgment determining that the rescission was effective as against defendant insurer's insured but ineffective as against plaintiff and plaintiff's insured. Both insureds moved for judgment notwithstanding the verdict and, on denial of their motions, both they and defendant insurer appealed.

The court of appeal affirmed the orders denying the motions for judgment notwithstanding the verdict, but reversed the judgment on the ground that the trial court had committed reversible error in refusing the requested jury instruction (*80 Cal. App. 3d 610, 622)* . On appeal, appellant insureds and plaintiff argued that once a risk had been assigned and the designated insurer had ratified the coverage, the only method open to the insurer to relieve itself of an assigned risk which had been accepted was that specified in former 10 Cal. Code Reg. § 2470 and that the statutory remedy of rescission provided in the Insurance Code did not apply to such policies. Defendant insurer, on the other hand, argued that former 10 Cal. Code Reg. § 2470 applied only to cancellation and not to rescission of insurance policies and that rescission was a statutory remedy [*Ins. Code §§ 331, 338, 359*] not affected by the administrative regulations comprising the assigned risk plan (*80 Cal. App. 3d 610, 618)* .

The court of appeal agreed with defendant insurer. It pointed out that there was nothing in the legislation authorizing assigned risks [*Ins. Code § 11620 et seq.*] suggesting that the laws applying to insurance policies in general were not applicable to the assigned risk plan, that the former regulations promulgated by the California Automobile Assigned Risk Plan (CAARP) deal only with cancellation and not with rescission, that cancellation and rescission are not synonymous, that the former is prospective and the latter retroactive, and held that defendant insurer was correct in its contention that the statutory remedy of rescission is applicable to assigned risk policies (*80 Cal. App. 3d 610, 619)* .

[e] Insurer May Raise Defense of Rescission After Insured Commences Action

Atmel Corp. v. St. Paul Fire & Marine Ins. Co. *(N.D. Cal. 2006) 416 F. Supp. 2d 802* , was an action arising from a third-party suit filed against the insured, a manufacturer of computer chips, based on the sale of allegedly defective chips. The insurer, which had issued policies to the insured covering general liability and errors and omissions, refused to defend on the ground that the insured had known about the alleged manufacturing problems before the policy was issued, but had failed to disclose them in the policy applications. After several years of correspondence between the insurer and the insured regarding the insured's duty of full disclosure and the insurer's right to rescind, the insured sued the insurer for damages and declaratory relief. The insurer counterclaimed, alleging rescission, breach of contract, and related claims, and also raised rescission as an affirmative defense. The insurer also tendered rescission of the policy and offered the insured a check for the premiums paid thus far, which the insured rejected and returned. The insured sought partial summary judgment to establish that under *Ins. Code § 650*, the insurer was precluded from unilaterally rescinding the policies after the insured had filed suit, that the policies were therefore still in place, and that the insurer's duty to defend was still an issue in the case. The insurer responded that *Ins. Code § 650* is a procedural statute intended to avoid multiple suits raising rescission, and that it had not lost any of its substantive rights to rescind.

The federal district court held that the insured was correct in that the statute precluded the insurer from unilaterally rescinding the policy after the insured filed suit to enforce the policy. The court also held, however, that an insurer may raise the same issues by asserting rescission as an affirmative defense and counterclaim (*416 F. Supp. 2d 802, 805)* . Moreover, because rescission is retroactive to the time that the representation becomes false, if the insurer is entitled to rescission, then it never owed the insured a duty to defend. Therefore, if the insurer prevails on its affirmative defense, the policies are rendered void *ab initio*. Because a valid rescission voids a policy *ab initio,* and both the insured's attempted enforcement of and the insurer's attempted rescission of the policy would be decided in one action, any preliminary declaration that the policies were in effect or that theinsurer was in breach of its duties would be inappropriate. The court also noted that the practical effect of its ruling was limited: the insurer was precluded from unilaterally rescinding the policy after the insured filed suit; the insured could argue that the insurer acted in bad faith by refusing to defend, that the policies were in effect, and that the insurer was not entitled to rescission; and the insurer could argue that based on the insured's concealment and misrepresentation in its application, the insurer was entitled to rescission, the policies were void *ab initio,* and therefore that the insurer had no duty to defend (*416 F. Supp. 2d 802, 807)* .

[4] Additional Authorities

[a] Insurer's Right to Rescind for Concealment

In *United States Specialty Ins. Co. v. Bridge Capital Corp. (C.D. Cal. 2007) 482 F. Supp. 2d 1164* , the insurer under D&O policies sought rescission and moved for summary judgment. The federal district court granted the motion, holding that the policies were void *ab initio* because the company made material misrepresentations on the insurance application and renewal application regarding the number of previous claims of sexual harassment. Pursuant to *Ins. Code §§ 331* and *334*, a material misrepresentation or concealment in an insurance application, whether intentional or unintentional, entitles the insurer to rescind the insurance policy *ab initio* (*482 F. Supp. 2d 1164, 1166, 1167-1170)* .

In *Nieto v. Blue Shield of Cal. Life & Health Ins. Co. (2010) 181 Cal. App. 4th 60, 103 Cal. Rptr. 3d 906* , *reh'g denied, 2010 Cal. App. LEXIS 275 (2010)* , the insured failed to disclose information about her medical condition and treatment with respect to her back problems, in an application submitted to her health insurance provider. The policy stated that the insurer may terminate the policy for cause based on material information that is false or misrepresented on the application. Several months after issuing the policy, after learning that although the insured had been treated for back problems within the relevant period covered in the application, she had not mentioned it, the insurer rescinded the policy. In the action filed by the insured for breach of contract, bad faith, and related claims, the trial court granted summary judgment in favor of the insurer. The appellate court affirmed, holding that the insurer was entitled to rescind the policy based on the applicant's material misrepresentations and omissions. Among other things, the court stated that pursuant to *Ins. Code § 331*, concealment, whether intentional or unintentional, entitles the injured party to rescind insurance coverage (*181 Cal. App. 4th 60, 75-77)* .

In *TIG Ins. Co. v. Homestore, Inc. (2006) 137 Cal. App. 4th 749, 40 Cal. Rptr. 3d 528* , a D&O liability policy application required the applicant to include a copy of the corporation's latest "form 10-Q," which is a quarterly financial report filed with the Securities and Exchange Commission. After a corporation's former chief financial officer pleaded guilty to filing a false form 10-Q, the insurer obtained rescission of the D&O policy against the corporation and its officers and directors, based on the falsified form attached to the application. The court of appeal affirmed, holding that the policy language allowed rescission regarding insureds in addition to the officer who concealed material facts (*137 Cal. App. 4th 749, 755-756)* .

[b] Insured Failed to Communicate Material Facts

Cohen v. Penn Mut. Life Ins. Co. *(1957) 48 Cal. 2d 720, 312 P.2d 241* , was an action by plaintiff as beneficiary to recover on an insurance policy issued by defendant on the life of her deceased husband. After a verdict in plaintiff's favor, defendant unsuccessfully moved for a judgment notwithstanding the verdict, and judgment was entered on the verdict. Defendant appealed, claiming that its motion should have been granted because of the deceased's misrepresentations and concealment of material facts in stating his medical history in the insurance application. The deceased was a 32-year-old physician who applied for the insurance on September 10, 1949. In his insurance application, he answered "10 years ago" to the question when he last consulted or received treatment for his health from any physician, surgeon, or practitioner; he answered "None" to the requirement that he state the name of every other physician, surgeon, or practitioner who had attended or treated him or with whom he had consulted for any reason or ailment, serious or not serious, within the past five years; he answered "Yes" to the question whether he was in good health; he answered "US. Army induction 1944" to the question whether he had ever had a health or physical examination; he answered "No" to the question whether he had ever had a special heart study or an electrocardiogram; he answered "No" to the question whether he had ever been in a clinic, hospital, sanitorium, or asylum for observation, treatment, or diagnosis; he answered "No" to the question whether there had been any suspicion of, or whether he'd ever had or been treated, for palpitation of heart, shortness of breath, pain in chest, abnormal pulse, any disease of the heart or blood vessels, or a high blood pressure; and he answered "Nothing other than usual childhood diseases" to the question whether he had ever had any illness, disease, operation, or injury other than as already stated. Deceased certified that these answers were full complete, and true and agreed that they should form a part of the insurance contract. Thereafter a doctor selected by defendant examined the deceased and reported his condition as satisfactory.

The policy was issued September 19, 1949, and the insured died of a heart attack on June 1, 1950. The autopsy established the cause of death as "coronary arteriosclerosis, severe," with "old occlusion of left circumflex coronary artery. Subtotal occlusion of left anterior coronary artery. Anterior myocardial scar. Visceral congestion, moderate." The answers given in the insurance application were false.

The testimony of defendant's witnesses at trial established that the policy was issued in reliance of the truth of the representations made in the application and that, had the true facts been known, a different procedure would have been followed by defendant in processing the application, and the policy would not have been issued.

The Supreme Court reversed the judgment for plaintiff and order denying defendant's motion for judgment notwithstanding the verdict with directions to enter judgment for defendant (*48 Cal. 2d 720, 730*). The Court stated that defendant insurer had a right to know all that the deceased insured knew relating to the specific questions asked in the insurance application (*48 Cal. 2d 720, 727*).

[c] Insured Failed to Communicate Material Facts

In *West Coast Life Ins. Co. v. Ward (2005) 132 Cal. App. 4th 181, 33 Cal. Rptr. 3d 319* , the insurer obtained a declaratory judgment that it properly rescinded a life insurance policy covering the life of the defendant's wife after receiving a claim for payment following her death. The insurer based its right to rescission on two inaccurate answers on the application regarding the existence of other life insurance policies. Pursuant to *Ins. Code § 332, "[e]*ach party to a contract of insurance shall communicate to the other, in good faith, all facts within [his or her] knowledge [that] are or [that he or she] believes to be material to the contract." Because the insured's failure to disclose other current insurance policies in her application was material to the insurer's decision to issue the policy, and because the insurer did not waive the right to information of material facts, the insurer was entitled to summary judgment (*132 Cal. App. 4th 181, 186-188, 193)* .

In *Carolina Cas. Ins. Co. v. RDD, Inc. (N.D. Cal. 2010) 685 F. Supp. 2d 1052* , the insurer sought rescission of a policy issued to a restaurant business for employment practices liability insurance. The insurer alleged that rescission was proper based on the insured's failure to disclose prior to issuance of the policy facts concerning one employee's resignation because she had been sexually harassed. The federal district court granted summary judgment for the insurer, holding that a materially false representation at the time of, or before, issuance of a policy may result in rescission of the policy. Materiality is determined by the probable and reasonable effect that truthful answers would have had on the insurer. That the insurer has demanded answers to specific questions in an application for insurance is in itself usually sufficient to establish materiality as a matter of law (*685 F. Supp. 2d 1052, 1057)* .

[d] Questions in Insurance Application are Material

In *United States Specialty Ins. Co. v. Bridge Capital Corp. (C.D. Cal. 2007) 482 F. Supp. 2d 1164* , the insurer under D&O policies sought rescission and moved forsummary judgment. The federal district court granted the motion, holding that the policies were void *ab initio* because the company made material misrepresentations on the insurance application and renewal application regarding the number of previous claims of sexual harassment. Pursuant to *Ins. Code §§ 331* and *334*, a material misrepresentation or concealment in an insurance application, whether intentional or unintentional, entitles the insurer to rescind the insurance policy *ab initio*. That an insurer has demanded answers to specific questions on an application for insurance is usually sufficient to establish the materiality of that information as a matter of law (*482 F. Supp. 2d 1164, 1166, 1167-1170)* .

In *Admiral Ins. Co. v. Debber (E.D. Cal. 2006) 442 F. Supp. 2d 958* , an insurer brought an action against the insured to rescind an employment-liability insurance policy, alleging that in response to questions in its application for the policy (and renewal), the insured gave untruthful negative answers by failing to disclose two prior lawsuits containing claims for sexual harassment and retaliation. The federal district court stated that an insurer's demand for answers to

specific questions in an insurance application usually is sufficient to establish the materiality of those questions as a matter of law. Specifically, an insurance applicant's loss history is a fact material to the insurance risk, supporting rescission (*442 F. Supp. 2d 958, 966-967)* . In addition, the court found that the insurer did not unreasonably delay the action for rescission, precluding the defense of laches (*442 F. Supp. 2d 958, 972)* .

In *Imperial Cas. & Indem. Co. v. Sogomonian (1988) 198 Cal. App. 3d 169, 243 Cal. Rptr. 639* , the insurer under a homeowner's policy sought rescission of the policy after it had made a payment of benefits following a fire that destroyed the insureds' home. The trial court granted summary judgment for the insurer on the ground that in their application the insureds had made material misrepresentations as a matter of law. The court of appeal reversed with directions to enter a summary adjudication of the issue of materiality (and requiring further proceedings regarding damages), holding that the fact that the insurer has demanded answers to specific questions in an application, is in itself usually sufficient to establish materiality as a matter of law (*198 Cal. App. 3d 169, 179)* .

The factual background of *Cohen v. Penn Mut. Life Ins. Co. (1957) 48 Cal. 2d 720, 312 P.2d 241* , is discussed in *§ 120.250[4][a]*. In reversing the judgment and order with directions to enter judgment for defendant insurer, the Supreme Court said that the deceased was bound in good faith to communicate the material facts in the insurance application, and the fact that defendant put the questions in writing and asked for written answers was itself proof that it deemed the answers material (*48 Cal. 2d 720, 727)* .

In *Rutherford v. Prudential Ins. Co. (1965) 234 Cal. App. 2d 719, 44 Cal. Rptr. 697* , the court of appeal noted the general rule that when an applicant for life insurance is asked for material information about his or her medical history and he or she does not give the specific information requested, the insurance company is entitled to void the policy (*234 Cal. App. 2d 719, 724)* .

[d] Rescission Is Proper Prior to Commencement of Action on Contract

In *Old Line Life Ins. Co. v. Superior Court (1991) 229 Cal. App. 3d 1600, 281 Cal. Rptr. 15* , the court of appeal let a writ of mandate issue, ordering the trial court to vacate its order denying the insurer's motion for summary judgment in an action to recover policy benefits brought by the estate of the deceased insured. The court held that insurer's rescission of the life insurance policy was lawful pursuant to *Ins. Code § 331*, because of the insured's misrepresentations of her smoking history on the insurance application (*229 Cal. App. 3d 1600, 1604-1606)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsCancellation & NonrenewalGeneral OverviewInsurance LawClaims & ContractsCancellation & NonrenewalMaterial MisrepresentationInsurance LawClaims & ContractsDisclosure ObligationsGeneral OverviewInsurance LawMotor Vehicle InsuranceCancellation & RenewalGeneral Overview

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 120 INSURANCE
PART II. FORMS
D. Rescission, Cancellation, and Renewal of Policies
1. Rescission for Material Misrepresentations or Concealment

12-120 California Points & Authorities § 120.251

§ 120.251 Policy Was Rescinded on Ground of Material Misrepresentation

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER RESCINDED THE INSURANCE CONTRACT PRIOR TO COMMENCEMENT OF THIS ACTION ON THE GROUND OF INSURED'S MATERIAL CONCEALMENT.

A. Insurer Has Right to Rescind. The injured party is entitled to rescind the insurance contract from the time a representation, whether affirmative or promissory, becomes false in a material point (*Ins. Code § 359*; *O'Riordan v. Federal Kemper Life Assurance (2005) 36 Cal. 4th 281, 287, 30 Cal. Rptr. 3d 507, 114 P.3d 753*). A representation is false when the facts fail to correspond with its assertions or stipulations (*Ins. Code § 358*).

B. Time of Reference. A representation may be made at the time of, or before, issuance of the policy (*Ins. Code § 351*). The completion of the contract of insurance is the time to which a representation must be presumed to refer (*Ins. Code § 356*).

[*Optional*] **C. No Intent to Deceive Required.** When false representations as to material matters have been made, the existence of a fraudulent intent to deceive is not essential (*Cohen v. Penn Mut. Life Ins. Co. (1957) 48 Cal. 2d 720, 725, 312 P.2d 241*).

[*Optional*] **D. Form of Representation.** A representation may be oral or written (*Ins. Code § 350*).

[*Optional*] **E. Severable Endorsement Subject to Rescission.** If issues relating to the validity of an endorsement are severable from the main policy, a party may seek rescission of the endorsement without seeking rescission of main policy (*Merced County Mut. Fire Ins. Co. v. State of California (1991) 233 Cal. App. 3d 765, 775-776, 284 Cal. Rptr. 680*).

[*Optional*] **F. Insurer May Rescind if Applicant for Life Insurance Misrepresented Smoking History to Obtain Nonsmoker Rate.** If an applicant for life insurance misrepresents his or her history as a smoker to obtain a nonsmoker rate, the insurer may rescind the policy [*O'Riordan v. Federal Kemper Life Assurance (2005) 36 Cal. 4th 281, 287, 30 Cal. Rptr. 3d 507, 114 P.3d 753]* .

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of an insurer's contention that the insurance policy was rescinded by the insurer prior to commencement of the action. The basis of these points and authorities is that the insurance contract was rescinded by the insurer because of the insured's material misrepresentation.

This form may be used in a variety of procedural contexts. For example, it may be used by an insurer in support of a motion for summary judgment in an action for breach of the insurance contract or to enforce the contract's provisions. See also *§ 120.250[2][a]*.

Optional Paragraph D should be included if the false representation was oral. Optional Paragraph E should be included if it is argued that an endorsement to the policy, rather than the entire policy, was rescinded. Optional Paragraph F should be included if the applicant misrepresented his or her history as a smoker to obtain a nonsmoker rate.

For references to related Pleading and Practice chapters, see *§ 120.250[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should refer to evidence establishing:

- A material misrepresentation on the part of the insured.
- Rescission by the insurer prior to commencement of the action.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.250*) and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be a motion by an insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that there is no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts supporting the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication indrafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[d] Opposing Points and Authorities

The points and *authorities in §§ 120.260* and *120.268* may be used in an appropriate case to oppose a motion for summary judgment supported by these points and authorities.

[3] Discussion of Authorities

[a] Insurer Has Right to Rescind

The factual and procedural background of ***O'Riordan v. Federal Kemper Life Assurance*** *(2005) 36 Cal. 4th 281, 30 Cal. Rptr. 3d 507, 114 P.3d 753* , is discussed in *§ 120.251[3][d]*. The California Supreme Court ruled that pursuant to *Ins. Code § 359*, a materially false representation at the time of, or before, issuance of a policy may result in rescission of the policy (*36 Cal. 4th 281, 287)* .

[b] No Intent to Deceive Required

The factual background of *Cohen v. Penn Mut. Life Ins. Co. (1957) 48 Cal. 2d 720, 312 P.2d 241* , is discussed in *§ 120.250[4][a]*. The Supreme Court reversed the judgment with directions to enter judgment for defendant insurer. The Court stated that when false representations as to material matters have been made, the existence of a fraudulent intent to deceive is not essential, and noted that at the outset of the case defendant had submitted an instruction stating that the "presence of an intent to deceive is not essential," which, the Court said, is a correct statement of the law (*48 Cal. 2d 720, 725, 729)* .

[c] Severable Endorsement Subject to Rescission

In ***Merced County Mut. Fire Ins. Co. v. State of California*** *(1991) 233 Cal. App. 3d 765, 284 Cal. Rptr. 680* , the insurer issued a policy providing general liability coverage for insured's fruit stand, which was located on property leased from the State. An agent of the State told the insured that he was required to furnish insurance coverage naming the State as an additional insured for liability arising out of the possession of the leased property. The State furnished a certificate of insurance to insured to be executed by the insurance agent on behalf of the insurer. The certificate included a statement that the endorsement assured compliance by the named insured with the terms and provisions of the lease entered into between the insured as lessee and the State as lessor. The insurer amended the policy accordingly, naming the State, its officers, agents, and employees as additional insured under the policy. In fact, however, the lease did not require the lessees to provide the insurance to the State, although it did require them to indemnify the State for any third-party claims arising out of the use of the leased property. While the policy was in effect, a motor vehicle accident involving the property occurred, resulting in litigation that named both insured and the State as defendants.

The insurer undertook defense of both defendants, incurring attorney's fees and expenses. The insurer filed an action against the State to rescind the certificate of insurance because of the agent's misrepresentation; to seek a declaratory judgment that the State was not an additional insured under the policy and was not entitled to coverage for the claims arising out of the vehicle accident; and to seek reimbursement for attorney's fees and expenses. The State demurred on the ground that the complaint failed to allege any facts constituting legal grounds for rescission, arguing that the endorsement did not affect the materiality of the risk. The State also argued that the contract the insurer seeks to rescind is between the insurer and the named insured, and that the State is merely a third-party beneficiary; therefore, the

alleged misrepresentations made by the State to the named insured did not induce the insurer to issue a rider to the insurance policy. The trial court dismissed the action after sustaining the demurrer without leave to amend, and plaintiff appealed.

The court of appeal reversed, holding that the trial court erroneously sustained the demurrer without leave to amend; the facts alleged in the complaint could support a cause of action for rescission, and because any defects in the complaint could be cured by amendment, leave to amend should have been granted (*233 Cal. App. 3d 765, 775)* . The court stated that under *Civ. Code § 1689*, a party to a contract may rescind the contract if its consent was given by mistake or fraud exercised by or with the connivance of the party as to whom it rescinds, or of any other jointly interested party to the contract. *Ins. Code § 359* provides that if a representation is false in a material point, whether affirmative or promissory, the injured party is entitled to rescind the contract from the time the representation becomes false (*233 Cal. App. 3d 765, 771)* . The court noted that in the instant case, the allegations of the complaint adequately establish (1) a misrepresentation or mistake (that the lease between the State and the named insured required the insured to obtain from its insurer an endorsement adding the State as an additional insured); (2) that the insurer relied on the misrepresentation or mistake in issuing the endorsement; and (3) that but for the misrepresentation or mistake, the certificate of insurance would not have been issued. The court rejected the State's argument that the misrepresentation or mistake was not material. The court stated that the risk assumed by the insurer in naming the State as an additional insured did increase and change the nature of riskassumed under the policy, and that whether the State's representations caused the insurer to issue the endorsement was a factual issue that cannot be resolved on demurrer (*233 Cal. App. 3d 765, 773-775*). The court concluded that the insurer had stated (or at least could state) a cause of action for rescission, and that the trial court should therefore have given the insurer the opportunity to amend the complaint to correct any defects (*233 Cal. App. 3d 765, 775*).

The court also stated, for the guidance of the trial court, that an additional insured added by endorsement is a third-party beneficiary of the insurance contract; and that the third-party beneficiaries' rights are derivative. Because the issues relating to the validity of the endorsement are severable from the main policy, the insurer may seek rescission of the endorsement without seeking rescission of the main policy (*233 Cal. App. 3d 765, 775)* . The court quoted *Civ. Code § 1599*: "Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest." The court also relied on *Keene v. Harling (1964) 61 Cal. 2d 318, 320, 38 Cal. Rptr. 513, 392 P.2d 273* , for the rule that whether a contract is entire or separable depends on its language and subject matter, which presents a question of construction to be determined by the court according to the intention of the parties. If the contract is divisible, the first part may stand, although the latter is illegal. Further, the court relied on language from *Simmons v. California Inst. of Tech. (1949) 34 Cal. 2d 264, 275, 209 P.2d 581* , for the proposition that, if a good cause for rescission exists as to one part of a divisible or separable contract, that portion may be rescinded in equity without disturbing the remainder. In the instant case, the court noted, the endorsement was not only executed at a different time than the underlying contract, but it added an additional party to the insurance contract as an insured, thus creating separate and separable rights and obligations from those existing under the underlying contract between the insurer and the named insured (*233 Cal. App. 3d 765, 776)* .

[d] Insurer May Rescind if Applicant for Life Insurance Misrepresented Smoking History to Obtain Nonsmoker Rate

In ***O'Riordan v. Federal Kemper Life Assurance*** *(2005) 36 Cal. 4th 281, 30 Cal. Rptr. 3d 507, 114 P.3d 753* , the insured under a life insurance policy had answered "no" to the question whether she had smoked during the preceding 36 months, consequently obtaining a preferred nonsmoker rate. After the insured's death, the insurer's investigation revealed that she actually had smoked during the 36 months preceding the application. The insurer refused to pay benefits under the policy, and the beneficiary filed an action against the insurer, seeking policy benefits. The insurer sought summary judgment on the ground that it had rescinded the policy, based on the insured's concealment of her smoking history in the application. The trial court granted summary judgment, and the court of appeal affirmed.

The California Supreme Court reversed, holding that triable issues of material fact existed with respect to whether the insured concealed or failed to communicate material information to the insurer regarding her use of cigarettes during the relevant period (*36 Cal. 4th 281, 286-287)* . The Court also held that if an applicant for life insurance misrepresents his or her history as a smoker to obtain a nonsmoker rate, the insurer may rescind the policy (*36 Cal. 4th 281, 287)* . The Court discussed the two pertinent questions in the medical questionnaire inquiring into the insured's cigarette and tobacco use. The first question asked, "Have you smoked cigarettes in the past 36 months?" That inquiry can reasonably be construed as an attempt to determine habitual use, not the smoking of a single cigarette or two during that entire period, as some facts tended to show. If the the insurer had attempted to determine whether an applicant had smoked one or two cigarettes, it could have inquired into the smoking of "any" cigarette during the relevant period. The second question asked: "Have you used tobacco in any other form in the past 36 months?" Because this question directly followed the question pertaining to cigarette use, an applicant could reasonably construe it as inquiring into use of tobacco in any form other than cigarettes. Therefore, an applicant who smoked only a few cigarettes, but did not use tobacco in any other form during the period at issue could correctly answer "no" to this question. Therefore, if (as the beneficiary maintained) the insured smoked only a cigarette or two during the 36 months preceding her application and did not use any other tobacco products, she did not conceal her cigarette use by answering "no" to the two questions at issue. Moreover, even if, as the insurer contended, those two questions required disclosure of even a single cigarette smoked during the period at issue, the insured did not conceal that information from the insurer if she mentioned it to the agent when she applied for the life insurance. The insurer contended, however, that the insured did not tell the agent that she had smoked any cigarettes during the 36 months preceding the application. According to the medical report of the insured's own physician, the physician prescribed a nicotine patch in the year preceding her application, indicating that she smoked more extensively. After viewing more conflicting evidence, the Court concluded that the question of the insured's cigarette use was a disputed material fact and that summary judgment at this stage in the proceedings was therefore improper (*36 Cal. 4th 281, 287-289)* .

[4] Additional Authorities

[a] Insurer Has Right to Rescind

In *Mitchell v. United Nat'l Ins. Co. (2005) 127 Cal. App. 4th 457, 25 Cal. Rptr. 3d 627* , an insured sued its insurer for breach of contract and bad faith after the insurer denied a claim for loss by fire. Concluding that the fire resulted from arson committed by the insured's representative, the insurer had rescinded the policy and offered to return the premium. The trial court granted summary judgment for the insurer based on (1) the alternative grounds of material misrepresentation in the insurance application regarding the description, condition, and use of the property, and (2) the "dishonest act" exclusion. The court of appeal affirmed, holding that *Ins. Code §§ 331* and *359* are part of a larger statutory framework imposing heavy burdens of disclosure on both parties to an insurance contract with respect to material representations and the provision of requested information. An insurer may therefore rescind a fire insurance policy based on the insured's negligent or unintentional misrepresentation of a material fact in the insurance application, notwithstanding the willful misrepresentation clause included in the required standard form pursuant to *Ins. Code §§ 2070* and *2071* (*127 Cal. App. 4th 457, 468, 472-474, 479)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsCancellation & NonrenewalGeneral OverviewInsurance LawClaims & ContractsCancellation & NonrenewalMaterial MisrepresentationInsurance LawLife InsuranceDisclosure ObligationsGeneral Overview

California Points & Authorities

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12-120 California Points & Authorities §§ 120.252-120.259

[Reserved]

§§ 120.252[Reserved]

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12-120 California Points & Authorities § 120.260

§ 120.260 Purported Rescission Was Not Effective Because Concealed or Misrepresented Fact Was Immaterial

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

ANY FACT ALLEGEDLY CONCEALED OR MISREPRESENTED BY THE INSURED WAS IMMATERIAL AND THEREFORE NOT GROUNDS FOR A PURPORTED POLICY RESCISSION UNDER INSURANCE CODE SECTIONS 334 AND 360.

[*EITHER*]

A. Concealment Not Material. To constitute a ground for avoidance of an insurance policy, concealment must be with respect to a material fact (*Holz Rubber Co., Inc. v. American Star Ins. Co. (1975) 14 Cal. 3d 45, 61, 120 Cal. Rptr. 415, 533 P.2d 1055*).

[*OR*]

A. Misrepresentation Not Material. The injured party may rescind an insurance contract for a false representation only when the representation was false in a material point (*see Ins. Code § 359*).

[*CONTINUE*]

B. Determination of Materiality. Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts on the party to whom the communication is due, in forming his or her estimate of the

disadvantages of the proposed contract, or in making inquiries (*Ins. Code § 334* (concealment); *Ins. Code § 360* (false representation)).

C. Materiality From Standpoint of Insurer. Materiality, from the insurer's standpoint, is determined by the probable and reasonable effect that truthful disclosure would have had on the insurer in determining the advantages of the proposed contract, that is, whether the insurer was misled into accepting the risk or fixing the premium (*Holz Rubber Co., Inc. v. American Star Ins. Co (1975) 14 Cal. 3d 45, 61, 120 Cal. Rptr. 415, 533 P.2d 1055*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's contention that the insurance policy was rescinded by the insurer priorto commencement of the action. The basis of these points and authorities is that the purported rescission was not effective because the concealed or misrepresented fact was immaterial.

This form may be used in a variety of procedural contexts. For example, it may be used by an insured to oppose an insurer's motion for summary judgment in an action for breach of the insurance contract or to enforce the contract's provisions. Such an action may be brought by any of the following parties:

- By an insured, or the insured's beneficiary, under a life policy.
- By a transferee under a life or disability policy.
- By a judgment creditor of the insured under a liability policy.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should refer to evidence that establishes that the alleged misrepresentation or concealment related to fact that was not material.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.261* et seq.) and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be to oppose a motion by an insurer for summary judgment, when the evidentiary facts clearly support the contention and disclose that triable issues of material fact remain [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that triable issues of material fact remain [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts opposing the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Pleading and Practice Chapters

For complaints by an insured against an insurer for damages for breach of contract because of the insurer's refusal to

pay a third-party judgment against the insured or to defend the insured in a third-party action, see California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender). For a discussion of the rules applicable to summary judgment, a form of notice of motion for summary judgment, and related forms, see Ch. 537, *Summary Judgment* , in that publication.

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Material Concealment Required

Holz Rubber Co., Inc. v. American Star Ins. Co. *(1975) 14 Cal. 3d 45, 120 Cal. Rptr. 415, 533 P.2d 1055* , was an action by the insureds, a rubber product manufacturing business composed of several corporations with the same individual as president, against two insurance companies under fire policies insuring plaintiffs' stock and against the agent of the insurers. Both policies contained automatic sprinkler warranties, requiring the insureds, in consideration of a reduced rate, to use diligence to maintain the sprinkler system and its water supply. A fire destroyed stock kept in a new building in which no sprinkler system had yet been installed. The insurers denied liability under their policies and cross complained against their agent and the agent's associate for indemnity. The trial court instructed the jury that the sprinkler warranty required plaintiffs to use due diligence in installing a sprinkler system in the new building, but it refused to submit to the jury the affirmative defenses, raised by one of the insurers, of misrepresentation and concealment. The jury returned a verdict for plaintiffs against the insurers, a verdict against the agent and his associate on the cross complaint of one of the insurers, and a verdict for the agent and his associate on the cross complaint of the other insurer.

The Supreme Court affirmed the portion of the judgment in favor of the insureds and that portion of the judgment on the cross complaint of one insurer in favor of the agent and his associate. It reversed that portion of the judgment in favor of the other insurer on its cross complaint against the agent and the agent's associate on the ground that the agent and his associate were entitled to judgment as a matter of law on the basis of the jury's verdict in favor of the insureds (*14 Cal. 3d 45, 65-66)* . With respect to the affirmative defenses of misrepresentation and concealment, the Court said that in order to constitute grounds for avoidance of an insurance policy, misrepresentation or concealment must be with respect to amaterial fact (*14 Cal. 3d 45, 61)* . The Court held that the failure of the insureds to disclose to the insurer, who raised the defenses, that they were storing stock in a newly constructed building prior to installation of the automatic sprinkler system was not material since the insurer, under the terms of its policy, had assumed the risk of covering stock in a newly constructed building pending installation of sprinklers (*14 Cal. 3d 45, 62)* . The Court therefore held that the trial court did not err in refusing to submit the affirmative defenses to the jury (*14 Cal. 3d 45, 60-61)* .

[b] Materiality From Standpoint of Insurer

The factual background of ***Holz Rubber Co., Inc. v. American Star Ins. Co.*** *(1975) 14 Cal. 3d 45, 120 Cal. Rptr. 415, 533 P.2d 1055* , is discussed in *§ 120.260[3][a]*. In affirming the portions of the judgment in favor of the insureds, the Supreme Court, replying to the insurer's argument that the insureds' conduct constituted misrepresentation and concealment and citing *Ins. Code § 334* (concealment) and *Ins. Code § 360* (misrepresentation), said that materiality is determined by the probable and reasonable effect that truthful disclosure would have had on the insurer in determining the advantages of the proposed contract and that, essentially, the Court had to decide whether the insurer was misled

into accepting the risk or fixing the premium of insurance (*14 Cal. 3d 45, 61)* .

[4] Additional Authorities

[a] Material Concealment Required

Rutherford v. Prudential Ins. Co. (1965) 234 Cal. App. 2d 719, 44 Cal. Rptr. 697 , was an action by the deceased's widow against defendant insurer to recover the proceeds of a life insurance policy issued by defendant to the deceased. The policy was solicited by agents of the defendant which had previously issued other life insurance policies in small amounts to the deceased. The insurance application set forth much of the deceased's medical history, but parts of it were omitted. In addition, the answers given were inconsistent among themselves and with answers given in the applications for the prior policies. The application had been filled out by a doctor employed by defendant to examine insurance applicants. Evidence showedthat the doctor would write down what he thought the applicant meant and was not too interested in detail; if an applicant mentioned something not too serious the doctor might ignore it. The deceased signed the application, although he did not read it. The policy was executed on March 12, 1958, and the deceased died of a heart attack on August 17, 1959. The jury returned a verdict for plaintiff. Defendant's motion for judgment notwithstanding the verdict was denied, and defendant appealed.

Although the court of appeal affirmed the judgment on the grounds that defendant was estopped to assert the falsity of the answers in the application as a defense to the action and that defendant by its failure to make further inquiry as to the deceased's medical history had waived any misstatements or concealment in the application, the court, after noting the general rule that when an applicant for life insurance is asked for material information about his medical history and does not give the specific information requested, the insurance company is entitled to void the policy [citing *Ins. Code §§ 331, 10380*], said that the concealment must be of a material fact in order to justify rescission of the policy or to permit the defense of fraud to an action on the policy (*234 Cal. App. 2d 719, 724, 725)* .

[b] Determination of Materiality

The factual background of *Rutherford v. Prudential Ins. Co. (1965) 234 Cal. App. 2d 719, 44 Cal. Rptr. 697* , is discussed in *§ 120.260[4][a]*. In affirming the judgment for plaintiff against the insurer, the court quoted the provisions of *Ins. Code § 334* (*234 Cal. App. 2d 719, 725)* .

[c] Materiality From Standpoint of Insurer

The factual background of *Ransom v. Penn Mut. Life Ins. Co. (1954) 43 Cal. 2d 420, 274 P.2d 633* , is discussed in *§ 120.261[3][a]*. In affirming the judgment for plaintiff against defendant insurer, the Supreme Court, with respect to the insured's "No" answer to the question whether an electrocardiogram had ever been made, said that whether or not an electrocardiogram had ever been made of his heart action was immaterial and that an incorrect answer on an insurance application does not give rise to the defense of fraud where the true facts, if known, would not have made the contract less desirable to the insurer (*43 Cal. 2d 420, 427)* . The Court explained that the electrocardiogram showed that the insured's heart was "essentially normal" and that defendant did not claim that this part of the medical history, if known, would have influenced it to consider the risk less desirable (*43 Cal. 2d 420, 427)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsCancellation & NonrenewalGeneral OverviewInsurance LawClaims & ContractsCancellation & NonrenewalMaterial Misrepresentation

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12-120 California Points & Authorities § 120.261

§ 120.261 Nondisclosure of Temporary Indispositions of Health in Insurance Application Does Not Constitute Concealment

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE INSURED'S NONDISCLOSURE OF MERE TEMPORARY INDISPOSITIONS OF HEALTH DOES NOT CONSTITUTE CONCEALMENT.

Nondisclosure of Temporary Indispositions in Insurance Application. The nondisclosure, in an application for life, accident, or health insurance, of feelings of trivial discomfort, or of temporary indispositions not affecting the general soundness and healthfulness of the system or tending to undermine and weaken the constitution, in answering general questions as to whether the applicant within a specified period has suffered, or has ever suffered any mental disease or infirmity or any bodily disease or illness or received medical or surgical advice or attention, or consulted a physician, does not constitute a fraudulent concealment and will not sustain either an action or defense founded on it (*see Ransom v. Penn Mut. Life Ins. Co. (1954) 43 Cal. 2d 420, 427, 274 P.2d 633* ; *Travelers Ins. Co. v. Byers (1932) 123 Cal. App 473, 478-480, 11 P.2d 444*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's contention that the insurance policy was rescinded by the insurer prior to commencement of the action. The basis of these points and authorities is that the purported rescission was not effective because illnesses omitted form insurance applications were merely temporary indispositions not affecting the overall general health of the insured.

This form may be used in a variety of procedural contexts. For example, it may be used by an insured to oppose an

insurer's motion for summary judgment in an action for breach of the insurance contract or to enforce the contract's provisions. Such an action may be brought by any of the following parties:

- By an insured, or the insured's beneficiary, under a life policy.
- By a transferee under a life or disability policy.
- By a judgment creditor of the insured under a liability policy.

For references to related Pleading and Practice chapters, see *§ 120.260[2][c]*.

This form may be used to oppose the points and authorities *set forth in § 120.250* et seq.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should refer to evidence establishing that information which the insured did not disclosed on the insurance application pertained to feelings of trivial discomfort, or of temporary indispositions not affecting the general soundness and healthfulness of the system or tending to undermine and weaken the constitution.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.260* et seq.) and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be to oppose a motion by an insurer for summary judgment, when the evidentiary facts clearly support the contention and disclose that triable issues of material fact remain [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that triable issues of material fact remain [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts opposing the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Nondisclosure of Temporary Indispositions in Insurance Application

Ransom v. Penn Mut. Life Ins. Co. *(1954) 43 Cal. 2d 420, 274 P.2d 633* , was an action by the insured's widow and named beneficiary under a life insurance policy against the insurer to recover under the policy. The insured, a

28-year-old man, had been solicited by defendant's agent. A doctor selected by defendant examined the insured and found nothing wrong with his physical condition. The insured made a written application for insurance on a form provided by defendant and paid the first premium in full. In the application, the insured had replied "No" to the questions whether he had ever had "high blood pressure," whether he had ever had a "pain" in his chest or any "illness" or "disease" other than as specified in the application, and whether he had an "electrocardiogram" made. He also stated in the application that he had previously been examined by a Dr. Long. In response to inquiries made by defendant, Dr. Long replied that the insured had visited him two years before complaining of a "heavy feeling" in the chest. Dr. Long stated that his examination revealed a "moderately obese patient with no important clinical findings," that laboratory studies included an electrocardiogram which was "essentially normal," that the first blood pressure reading was above normal and that the second reading taken about a week later under less tension was normal as to the systolic pressure and a little above normal as to the diastolic pressure.

Dr. Long advised the insured to lose weight and "reassured" him as to his physical status. After receiving Dr. Long's report, defendant requested that the insured submit to further medical examination, but before this could be arranged the insured was killed in an automobile accident. The autopsy disclosed no evidence of disease and showed that the insured's death resulted from external violence. Several days after the accident, defendant, having received information of the death, tendered to plaintiff the full amount of the first premium payment and informed her that, in view of Dr. Long's report, the insured's application could not be approved. In denying liability under the policy, the insurer claimed first that there was no insurance contract in effect and secondly that the insured's application was fraudulent as a result of the "No" answer mentioned above.

The trial court rendered judgment for plaintiff, and the Supreme Court affirmed. The Court held that an insurance contract came into being immediately on defendant's receipt of the completed application and the first premium payment (*43 Cal. 2d 420, 425)* . With respect to the insured's "No" answer to the question whether he had ever had pain in the chest and the insured's failure to report as an "illness" or "disease" that he had experienced a "heavy feeling" in his chest at the time he consulted Dr. Long, the Court said there was no evidence that the insured ever had a pain in hischest, and that his failure to mention the heavy feeling in his chest did not constitute fraud, since questions concerning illness or disease in insurance applications do not relate to minor indispositions but are to be construed as referring to serious ailments which undermine the general health (*43 Cal. 2d 420, 426-427)* .

Travelers Ins. Co. v. Byers *(1932) 123 Cal. App 473, 11 P.2d 444* , was an action by an insurance company for rescission of two life and accident insurance policies it had issued to defendant's decedent. Defendant was the insured's widow and the named beneficiary under the policies. She cross complained against plaintiff insurer to recover the amounts of the policies, which plaintiff had refused to pay. Plaintiff alleged that it had been induced to issue the policies by reason of decedent's following representations, which plaintiff alleged were fraudulent, in his applications for the insurance:

> (1) Within the previous five years, he had not suffered any mental disease or infirmity or any bodily disease or infirmity and had received no surgical advice or attention;
>
> (2) Within that period he had received medical advice or attention for slight colds, causing him illness for two days, and influenza causing him illness for 10 days (mentioned in second but not in first application); and
>
> (3) He was then in good health.

The policies were issued in 1928. In 1929, the insured was killed as the result of a fall from the fourth floor of a hospital. An autopsy revealed that the insured had a chronic kidney condition. No evidence was introduced showing that the insured had ever received treatment for the kidney condition or that he had been aware of it. There was evidence that the insured had over the two-year period prior to the applications called on a doctor 16 times and that two years before

the applications were made the insured had spent a day in a hospital. But there was no evidence tending to show the purpose of the visits to the doctor or of the hospital stay. The trial court found that the insured's representations were true and entered judgment for defendant on the complaint and for the cross complainant on the cross complaint.

The court of appeal affirmed. It defined the following terms, as used in applications for life, accident, and health insurance: "bodily infirmity" includes only an ailment or disorder of a somewhat established or settled character and not a mere temporary disorder arising from a sudden and unexpected derangement of the system (*123 Cal. App 473, 478)* ; "illness" is a disease or ailment of such a character as to affect the general soundness and healthfulness of the system and not a mere temporary indisposition which does not tend to undermine and weaken the constitution; that is, it relates to matters which have a sensible, appreciable form and appliesordinarily to matters of substantial character and not to a slight and temporary indisposition, speedily forgotten (*123 Cal. App 473, 478)* ; "consult a physician" means a consultation as to some disease or illness with which the applicant was or had been afflicted, not to some feeling of trivial discomfort or temporary indisposition not affecting the general health (*123 Cal. App 473, 479)* "medical advice or attention" means medical advice or attention for some ailment which would affect the general soundness and healthfulness of the system (*123 Cal. App 473, 479-480)* . The court held that the insured's failure to report the colds and influenza in his first application did not constitute a fraudulent concealment since they were mere indispositions not affecting the general soundness and healthfulness of the system or tending to undermine and weaken the constitution and, hence, that neither an action nor a defense founded on it could be sustained (*123 Cal. App 473, 480)* .

With respect to the unreported doctor's visits, the court pointed out that it did not appear what the consultations were for, whether for an illness of the insured or in regard to an illness of some member of his family (*123 Cal. App 473, 477)* , and that, with respect to the hospital stay, for all that appeared from the record, the insured could have been checking up on his general physical condition, merely as a precautionary measure (*123 Cal. App 473, 478)* .

[4] Additional Authorities

[a] Nondisclosure of Temporary Indispositions in Insurance Application

The factual background of *Thompson v. Occidental Life Ins. Co. (1973) 9 Cal. 3d 904, 109 Cal. Rptr. 473, 513 P.2d 353* , is discussed in *§ 120.260[3][c]*. In affirming the judgment for plaintiff beneficiary under a life insurance policy, the Supreme Court, quoting from *Ransom v. Penn Mut. Life Ins. Co. (1954) 43 Cal. 2d 420, 427, 274 P.2d 633* , said that questions in an insurance application concerning illness or disease do not relate to minor indispositions, but are to be construed as referring to serious ailments which undermine the general health (*9 Cal. 3d 904, 916)* .

In *Cohen v. Penn Mut. Life Ins. Co. (1957) 48 Cal. 2d 720* , the Supreme Court reversed the judgment for plaintiff beneficiary under a life insurance policy with directions to enter judgment for defendant insurer on the ground the insured had made fraudulent misrepresentations in his application for insurance which vitiated the policy. However, the court stated that when an applicant for life insurance is asked generally whether he or she has had or been treated for any disease or ailment, the failure to mention minor or temporary indispositions is not material to the risk and will not avoid the policy (*48 Cal. 2d 720, 725)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGeneral OverviewInsurance LawLife InsuranceDisclosure ObligationsGeneral OverviewInsurance LawLife InsuranceDisclosure ObligationsHealth Conditions

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 120 INSURANCE
PART II. FORMS
D. Rescission, Cancellation, and Renewal of Policies
1. Rescission for Material Misrepresentations or Concealment

12-120 California Points & Authorities § 120.262

§ 120.262 No Disclosure Was Required

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURED WAS NOT REQUIRED TO MAKE THE PURPORTED DISCLOSURES, AND THEREFORE NO GROUNDS EXISTED FOR RESCISSION OF THE INSURANCE POLICY.

[*EITHER*]

A. Other Party Knew Facts. Neither party to an insurance contract is bound to communicate, except in answer to the other's inquiries, information of matters which the other knows (*Ins. Code § 333(1)*).

[*AND/OR*]

B. Other Party Should Have Known Facts. Neither party to an insurance contract is bound to communicate, except in answer to the other's inquiries, information of matters which, in the exercise of ordinary care, the other ought to know, and of which the party has no reason to suppose him or her ignorant (*Ins. Code § 333(2)*).

[*AND/OR*]

C. Disclosure Waived. Neither party to an insurance contract is bound to communicate except in answer to the other's inquiries, information of matters of which the other waives communication (*Ins. Code § 333(3)*).

[*AND/OR*]

D. Nondisclosed Matter Tends Only to Prove Existence of Risk Excluded by Warranty. Neither party to an insurance contract is bound to communicate, except in answer to the other's inquiries, information of matters which prove or tend to prove the existence of a risk excluded by a warranty, and which are not otherwise material (*Ins. Code § 333(4)*).

[*AND/OR*]

E. Nondisclosed Matter Relates to Excepted Risk. Neither party to an insurance contract is bound to communicate, except in answer to the other's inquiries, information of matters which relate to a risk excepted from insurance, and which are not otherwise material (*Ins. Code § 333(5)*).

[*AND/OR*]

F. Nondisclosed Matter Relates to Insured's Interest. Information of the nature or amount of the interest of one insured need not be communicated unless in answer to an inquiry, except as prescribed by *Section 381 of the Insurance Code* (requiring that the policy specify, among other things, the interest of the insured in property insured if the insured is not the absolute owner of it), or by the provisions of the insurance contract if such provisions are prescribed by the Insurance Code as part of a standard form (*Ins. Code § 337*).

[*AND/OR*]

G. Opinion. Neither party to an insurance contract is bound to communicate, even on inquiry, information of his or her own judgment on the matters in question (*Ins. Code § 339*).

[*Optional*] **H. Knowledge Presumed**. Each party to an insurance contract is bound to know (1) all the general causes which are open to his or her inquiry equally with that of the other, and which may affect either the political or material perils contemplated, and (2) all general usages of trade (*Ins. Code § 335*; *Newman v. Firemen's Ins. Co. (1944) 67 Cal. App. 2d 386, 394-395, 154 P.2d 451* ; *E.A. Boyd Co. v. United States Fid. & Guar. Co. (1939) 35 Cal. App. 2d 171, 182, 94 P.2d 1046*).

[*Optional*] **I. Waiver of Disclosure by Insurance Contract or by Implication**. The right to information of material facts may be waived by the terms of insurance or by neglect to make inquiries as to such facts, when they are distinctly implied in other facts of which information is communicated (*Ins. Code § 336*; *Reserve Insurance Co. v. Apps (1978) 85 Cal. App. 3d 228, 231-232, 149 Cal. Rptr. 223*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's contention that the insurance policy was rescinded by the insurer prior to commencement of the action. The basis of these points and authorities is that the purported rescission was not effective because the insured was not required to make the purported disclosures, and therefore no grounds existed for rescission of the insurance policy.

This form may be used in a variety of procedural contexts. For example, it may be used by an insured to oppose an insurer's motion for summaryjudgment in an action for breach of the insurance contract or to enforce the contract's provisions. Such an action may be brought by any of the following parties:

- By an insured, or the insured's beneficiary, under a life policy.
- By a transferee under a life or disability policy.
- By a judgment creditor of the insured under a liability policy.

Paragraph H should be used with Paragraph B, if the opposing party was presumed to have had knowledge of the nondisclosed facts.

Paragraph I should be used with Paragraph E, if the waiver was made

(1) In the insurance contract itself or

(2) By the other party's neglecting to make inquiry concerning nondisclosed matter that was implied in other facts of which information was communicated.

For references to related Pleading and Practice chapters, see *§ 120.260[2][c]*.

This form may be used to oppose the points and authorities *set forth in § 120.250* et seq.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should refer to evidence establishing that the insured was not required to make the purported disclosures, and therefore no grounds existed for rescission of the insurance policy.

In the case of an opposition to an insurer's motion for summary judgment, the insured would need to establish that:

- The effectiveness of the purported rescission depends on whether disclosure of the allegedly concealed fact or facts was required,
- Whether disclosure was required is a material fact, and
- There are triable issues with respect to this fact.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.260* et seq.) and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be to oppose a motion by an insurer for summary judgment, when the evidentiary facts clearly support the contention and disclose that triable issues of material fact remain [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that triable issues of material fact remain [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts opposing themotion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other

documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Knowledge Presumed

Evid. Code § 620 provides in part that all presumptions declared by law to be conclusive are conclusive presumptions.

Civ. Code § 1646 provides that a contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made.

Newman v. Firemen's Ins. Co. *(1944) 67 Cal. App. 2d 386, 154 P.2d 451* , was an action by an insured against his insurer to recover under a fire policy covering his house and its contents. Plaintiff had sustained two prior losses at the same premises under prior fire policies issued by defendant and, after the second loss, defendant had marked its files to indicate that it would not accept further insurance from "Jacob Newman for 976 Pine Grove Avenue." There was no evidence that this fact was ever communicated to plaintiff. Plaintiff applied for the present policy under the name Dr. A. J. Newman, and the policy issued covered the property located at 6200 Buena Vista Terrace. Both 976 Pine Grove Avenue and 6200 Buena Vista Terrace described the same premises. Plaintiff's full name was Alfred Jacob Newman, and the evidence indicated that he variously used his full name, or either his first or middle name with his last name, or his first name, middle initial, and last name. He also held various degrees entitling him to use the title "Dr." He applied for the present policy by phone throughan agent who had been recommended to him and who, unknown to him, was an agent for defendant. He introduced himself to the agent as Dr. Newman and gave, as his initials, A.J., when asked for them. From a judgment for defendant, plaintiff appealed.

The court of appeal held that plaintiff was under no duty to give the insurer information disclosing prior losses in the absence of an inquiry on the subject. The court quoted *Ins. Code §§ 330* and *332-335* in whole or in part (*67 Cal. App. 2d 386, 392)* and summarized the holding of *E.A. Boyd Co. v. United States Fid. & Guar. Co. (1939) 35 Cal. App. 2d 171, 94 P.2d 1046* , from which it quoted extensively (*67 Cal. App. 2d 386, 393-394)* . The court said that while the decision in Boyd was placed on the ground of estoppel operating against the insurer, the court in that case also held that what had been said regarding the estoppel of the insurance company, which was created by its knowledge of the uncommunicated facts, did not conflict with the quoted provisions of the Insurance Code, and that, moreover, the facts and circumstances presented in Boyd were such as to have warranted a decision in that case based solely on the authority of the pertinent provisions of the Insurance Code (*67 Cal. App. 2d 386, 394-395)* .

Citing *Ins. Code §§ 332, 333,* and *335,* the court said that (1) in the present case there was no misstatement of facts, merely a failure on plaintiff's part to reveal that he was the same person as Jacob Newman and that 6200 Buena Vista Terrace was the same premises as 976 Pine Grove Avenue; (2) from all that appears in the record, defendant had the

means of ascertaining the uncommunicated facts; (3) under the circumstances presented, the facts were such as could have been ascertained by defendant in the exercise of ordinary care; (4) there was no evidence in the record on which to base an inference that plaintiff supposed defendant to be ignorant of the facts left undisclosed, or from which to infer that plaintiff had any reason to suppose defendant ignorant of such facts; and (5) in the absence of inquiry, plaintiff was not bound to disclose such facts on applying for the fire insurance involved (*67 Cal. App. 2d 386, 395)* .

The court nevertheless affirmed the judgment on the ground that the evidence supported the trial court's findings that plaintiff knowingly and falsely claimed loss of property which had been destroyed in the prior fires, that he grossly overstated the value of each item of property claimed to have been damaged or destroyed, and that plaintiff made these statements knowing that they were false (*67 Cal. App. 2d 386, 399)* .

E.A. Boyd Co. v. United States Fid. & Guar. Co. *(1939) 35 Cal. App. 2d 171, 94 P.2d 1046* , was an action by an employer against its insurer to recover, under a fidelity bond, the amount embezzled by an employee. The employee had been convicted of embezzlement some seven years before while employed by a bank, and defendant insurer had paid a part of the bank's loss.Plaintiff knew of the employee's prior record but, believing that the employee had, based on his employment record during the seven years, been rehabilitated, did not communicate the conviction to defendant. The employee had been added to the schedule of coverage under the present bond as Merwin L. Devin, whereas defendant's records showed the name of M.L. Devin as a former embezzler. Defendant suspected that the two names might be of the same person and several times instructed its agent to check it out, but the agent failed to do so. Defendant did not, however, strike the employee's name from the bonding list until after the loss occurred, at which time it denied liability and served notice of rescission. Judgment for plaintiff was affirmed on the ground defendant was under the circumstances, estopped from claiming that the bond was void (*35 Cal. App. 2d 171, 179-180)* .

The court nevertheless added that the provisions of *Ins. Code §§ 330-339*, relied on by defendant, were not in conflict with what it had said regarding the estoppel of the insurance company which was created by its knowledge of the uncommunicated fact complained of (*35 Cal. App. 2d 171, 182)* . The court quoted the provisions of *Ins. Code §§ 332, 333*, and *335* and said that it followed that since no questions were asked plaintiff regarding the honesty or previous record of the employee, and evidence of his former defalcation was available to defendant in its own records, plaintiff's failure to have voluntarily informed defendant of that fact was not such fraud or concealment as would warrant the cancellation of the bond on that account (*35 Cal. App. 2d 171, 182)* .

[b] Waiver of Disclosure by Insurance Contract or by Implication

Reserve Ins. Co. v. Apps *(1978) 85 Cal. App. 3d 228, 149 Cal. Rptr. 223* , was an action by an insurance company against its insured and his wife for a declaratory judgment that the motor vehicle liability policy issued by plaintiff to defendant husband did not cover defendant wife. The wife was involved in an automobile accident on the day coverage commenced. The policy provided coverage for the insured's spouse if he or she was a resident of the same household; however, two months prior to the accident, defendants, who had been married for many years, entered into a trial separation with the husband living at an apartment and the wife remaining in the family home. From an adverse judgment, plaintiff insurer appealed.

The court of appeal affirmed. The court held immaterial plaintiff's argument that it was not fully informed as to the husband's marital status, since the policy covered a spouse. The court also rejected plaintiff's argument that the application for insurance did not show the wife's prior driving experience, since it did not show the driving experience of the many possible permissive users whom it covered. The court noted that an insurermay required an application to disclose spouses and potential permissive users and their past records, but, if it does not, it assumes whatever risks that may be involved (*85 Cal. App. 3d 228, 231*). The court further held that the trial court was correct in finding, under the evidence presented, that the family home was still a residence of the husband with the wife a resident in that home (*85 Cal. App. 3d 228, 231-232*) and said that if an insurer desires not to cover spouses separated under the conditions shown to exist, it should make that purpose clear in its policy and, lacking any such more explicit definition of

"resident," an insurer must, under well-settled doctrines of interpretation of insurance policies, accept liability under any reasonable interpretation of the words it uses (*85 Cal. App. 3d 228, 232)* .

[4] Additional Authorities

[a] Waiver of Disclosure by Insurance Contract or by Implication

In *Rutherford v. Prudential Ins. Co. (1965) 234 Cal. App. 2d 719* , affirming the judgment for plaintiff against defendant insurer, the court of appeal held that defendant was estopped to assert the falsity of the answers in the application as a defense to the action (*234 Cal. App. 2d 719, 727-733*). Citing *Ins. Code § 336*, the court further held that defendant had waived any misstatements or concealment in the application because defendant failed to request additional information from the insurance doctor or from the insured's doctors after it had been put on notice that the insurance application form was incomplete and inaccurate in material respects (*234 Cal. App. 2d 719, 733-735)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsCancellation & NonrenewalGeneral OverviewInsurance LawClaims & ContractsDisclosure ObligationsGeneral OverviewInsurance LawClaims & ContractsDisclosure ObligationsWarrantiesInsurance LawClaims & ContractsEstoppel & WaiverGeneral Overview

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 120 INSURANCE
PART II. FORMS
D. Rescission, Cancellation, and Renewal of Policies
1. Rescission for Material Misrepresentations or Concealment

12-120 California Points & Authorities § 120.263

§ 120.263 Insured May Rebut Statutory Presumption That Representation Refers to Time Insurance Contract Is Completed

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER'S PURPORTED RESCISSION OF THE INSURANCE CONTRACT WAS NOT EFFECTIVE BECAUSE THE REPRESENTATION DID NOT REFER TO THE TIME THE INSURANCE CONTRACT WAS COMPLETED, BUT TO THE EARLIER TIME OF _____ [*specify, e.g.*, WHEN THE APPLICATION MADE].

Statutory Presumption as Rebuttable. The statutory presumption that a representation refers to the time the insurance contractis completed (*Ins. Code § 356*) is rebuttable (*Metropolitan Life Ins. Co. v. Devore (1967) 66 Cal. 2d 129, 137, 56 Cal. Rptr. 881, 424 P.2d 321*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's contention that the insurance policy was rescinded by the insurer prior to commencement of the action. The basis of these points and authorities is that the insurer's purported rescission of the insurance contract was not effective because the representation did not refer to the time the insurance contract was completed, but rather an earlier time, such as when the application made.

This form may be used in a variety of procedural contexts. For example, it may be used by an insured to oppose an insurer's motion for summary judgment in an action for breach of the insurance contract or to enforce the contract's provisions. Such an action may be brought by any of the following parties:

- By an insured, or the insured's beneficiary, under a life policy.

- By a transferee under a life or disability policy.
- By a judgment creditor of the insured under a liability policy.

For references to related Pleading and Practice chapters, see *§ 120.260[2][c]*.

This form may be used to oppose the points and authorities *set forth in § 120.250* et seq.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should refer to evidence establishing that the representation did not refer to the time the insurance contract was completed, but rather an earlier time, such as when the application made.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.260* et seq.) and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be to oppose a motion by an insurer for summary judgment, when the evidentiary facts clearly support the contention and disclose that triable issues of material fact remain [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that triable issues ofmaterial fact remain [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts opposing the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

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[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Statutory Presumption as Rebuttable

Metropolitan Life Ins. Co. v. Devore *(1967) 66 Cal. 2d 129, 56 Cal. Rptr. 881, 424 P.2d 321* , involved two consolidated actions. The first was by an insurance company to cancel or rescind a 15-year mortgage term life insurance policy issued to Charles Devore, who died after suit was filed and whose widow was substituted in his place, and the second was by the widow against the insurer to recover the insurance benefits. Part A of the application for the insurance had been executed by decedent on September 2, 1959. On September 21, 1959, decedent submitted to a medical examination by a doctor of the insurer's choice. During the examination, the doctor filled in Parts B and C of the application. Part B, which was signed by decedent, contained questions relating to decedent's medical history, and

Part C was the doctor's report on the physical examination given to decedent. Decedent's negative answers to questions in Part B directed towards ascertaining whether decedent had any history of heart trouble, including whether he had ever had an electrocardiogram, were true at the time they were made. The application was sent to the insurer's San Francisco headquarters.

Subsequently, on October 19, 1959, decedent was given an electrocardiogram by his own doctor which disclosed an abnormality. The doctordiagnosed the condition as arteriosclerotic heart disease, but did not tell the decedent. Instead, he suggested that decedent be admitted to a hospital for rest and medication to prevent trouble. Decedent entered the hospital on October 21, 1959, and was discharged on October 26. The insurer approved issuance of a policy on November 12 and issued a policy on an intermediate basis which was delivered to the decedent on November 30. On the same date, decedent paid a full year's premium and signed a document entitled "Application Amendment," which had been prepared by the insurer. The document amended the application in several specified particulars and contained the statement that the application, "as amended, is correct and true, and I hereby ratify and confirm the statements therein made as the date hereof." No questions were asked regarding any change in his medical history since the date of the original application. The decedent died of heart disease on January 10, 1962.

The trial court found that the decedent's answers in his original application were substantially true when made and that the above quoted statement in the application amendment meant that the answers in the original application were true when they were made in September, not that they were still true on November 30. The court rendered judgment for the widow, and the insurer appealed, contending, among other things, that misrepresentation occurred as a matter of law since, under *Ins. Code § 356*, the completion of the contract is the time to which a representation must be presumed to refer. The insurer urged that the contract was not completed until delivery and that, since the representations in the original application were, by the terms of *Ins. Code § 356*, deemed to be made at the time of completion of the contract, the decedent must be held as a matter of law to have answered the questions falsely. The Supreme Court rejected this contention and affirmed the judgment. It held that the presumption specified in *Ins. Code § 356* is rebuttable and that since the trial court had found as a fact that the representations were referable to an earlier time, the date of the application, the conclusion was controlling (*66 Cal. 2d 129, 137)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceInferences & PresumptionsExceptionsStatutory PresumptionsEvidenceInferences & PresumptionsPresumptionsInsurance LawClaims & ContractsCancellation & NonrenewalGeneral OverviewInsurance LawClaims & ContractsContract FormationGeneral Overview

California Points & Authorities

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D. Rescission, Cancellation, and Renewal of Policies
1. Rescission for Material Misrepresentations or Concealment

12-120 California Points & Authorities § 120.264

§ 120.264 Ambiguous Representation Is Construed in Favor of Insured

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER'S RESCISSION OF THE INSURANCE CONTRACT BASED ON INSURED'S ALLEGED MISREPRESENTATION WAS NOT EFFECTIVE BECAUSE, WHEN PROPERLY CONSTRUINGTHE REPRESENTATION MOST FAVORABLY FOR THE INSURED, THE REPRESENTATION WAS TRUE.

A. Construction of Uncertain Terms. Any uncertainty in a contract is to be interpreted against the party who caused the uncertainty to exist (*Civ. Code § 1654*).

B. Ambiguous Representations Drafted by Insurer to be Construed in Favor of Insured. The settled rule that all ambiguities must be interpreted against the insurer applies to representations drafted by the insurer which the insured signs (*Metropolitan Life Ins. Co. v. Devore (1967) 66 Cal. 2d 129, 136, 56 Cal. Rptr. 881, 424 P.2d 321*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's contention that the insurance policy was rescinded by the insurer prior to commencement of the action. The basis of these points and authorities is that the purported rescission was not effective because when construed most favorably for the insured the representation, as it was understood by the insured, was true.

This form may be used in a variety of procedural contexts. For example, it may be used by an insured to oppose an insurer's motion for summary judgment in an action for breach of the insurance contract or to enforce the contract's provisions. Such an action may be brought by any of the following parties:

- By an insured, or the insured's beneficiary, under a life policy.
- By a transferee under a life or disability policy.
- By a judgment creditor of the insured under a liability policy.

For references to related Pleading and Practice chapters, see *§ 120.260[2][c]*.

This form may be used to oppose the points and authorities *set forth in § 120.251*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should refer to the specific representation drafted by the insurer, and point out that when construed against the drafter, the representation of the insured is true.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.260* et seq.) and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be to oppose a motion by an insurer for summary judgment, when the evidentiary facts clearly support the contention and disclose that triable issues of material fact remain [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that triable issues of material fact remain [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts opposing the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Construction of Uncertain Terms

Civ. Code § 1654 provides that in cases of uncertainty not removed by the preceding rules (*Civ. Code §§ 1635-1653*), the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party, except in a contract between a public officer or body, as such, and a private party, in which it is presumed that all uncertainty was caused by the private party.

[b] Ambiguous Representations Drafted by Insurer to be Construed in Favor of Insured

The factual background of ***Metropolitan Life Ins. Co. v. Devore*** *(1967) 66 Cal. 2d 129, 56 Cal. Rptr. 881, 424 P.2d 321* , is discussed in *§ 120.263[3][a]*. The "Application Amendment" was drafted by the insurer and submitted to the insured for signature at the time the policy was delivered (November 30, 1959). By the amendment, the policy classification was changed to "Intermediate" (a substandard policy at a higher premium), the amount of insurance was changed to $20,000, the policy was to bear as the date of issue September 1, 1959, and the answer "No" was to be inserted to a specified question in Part B of the application, relating to the applicant's association with persons suffering from tuberculosis. The amendment further stated: "These amendments and declarations are to be considered as a part of the said application and subject to the agreements, covenants, and statements therein contained. The said application, together with these amendments, is to be considered as the basis of and as a part of the contract of insurance. The said application, as amended, is correct and true, and I hereby ratify and confirm the statements therein made as of the date hereof."

The trial court found that the italicized statement was ambiguous in that it could be construed to mean, as contended by the insurer, that the answers given by decedent in the original application were true as of November 30, the date the amendment was executed, or to mean that the decedent was confirming that the answers in the original application were true when they were made in September. The trial court adopted the latter construction and also found that the decedent reasonably understood the language of the amendment to mean that the insurer was satisfied with and was relying on the September application and, on the basis of that application, was issuing a substandard intermediate policy if the insured authorized the application to be amended so as to apply for the substandard policy at a higher rated premium and to include in it the other amendments specified (*66 Cal. 2d 129, 133)* . The Supreme Court agreed. It held that, in view of the settled rule that all ambiguities must be interpreted against the insurer, the decedent, in signing the amendment, merely represented that he reaffirmed the answers given on his prior application as of the time they were made in September and hence it was unnecessary to decide whether the alleged misrepresentations were material to the risk (*66 Cal. 2d 129, 136)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGeneral OverviewInsurance LawClaims & ContractsCancellation & NonrenewalGeneral OverviewInsurance LawClaims & ContractsDisclosure ObligationsGeneral OverviewInsurance LawClaims & ContractsPolicy InterpretationAmbiguous TermsGeneral Overview

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12-120 California Points & Authorities § 120.265

§ 120.265 Purported Representation Was Mere Hearsay Statement and That Fact Was Made Known to Insurer

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER'S PURPORTED RESCISSION OF THE INSURANCE CONTRACT WAS NOT EFFECTIVE BECAUSE THE INSURED'S ALLEGED MISREPRESENTATION WAS MERE HEARSAY AND THAT WAS MADE KNOWN TO THE INSURER.

Representation on Hearsay. An insured who has no personal knowledge of a fact may nevertheless repeat information which he or she has on the subject and believes to be true, with the explanation that the insured does so on the information of others; or the insured may submit the information in its whole extent to the insurer. In neither case is the insured responsible for its truth, unless it proceeds from the insured's agent whose duty it is to give the information (*Ins. Code § 357*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's contention that the insurance policy was rescinded by the insurer prior to commencement of the action. The basis of these points and authorities is that the insurer's purported rescission of the insurance contract was not effective because the insured's alleged misrepresentation was mere hearsay and that was made known to the insurer.

This form may be used in a variety of procedural contexts. For example, it may be used by an insured to oppose an insurer's motion for summary judgment in an action for breach of the insurance contract or to enforce the contract's provisions. Such an action may be brought by any of the following parties:

- By an insured, or the insured's beneficiary, under a life policy.
- By a transferee under a life or disability policy.
- By a judgment creditor of the insured under a liability policy.

For references to related Pleading and Practice chapters, see *§ 120.260[2][c]*.

This form may be used to oppose the points and authorities *set forth in § 120.251*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.260* et seq.) and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be to oppose a motion by an insurer for summary judgment, when the evidentiary facts clearly support the contention and disclose that triable issues of material fact remain [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that triable issues of material fact remain [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts opposing the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Representation on Hearsay

Under *Ins. Code § 357*, an insured who has no personal knowledge of a fact may nevertheless repeat information which he or she has on the subject and believes to be true, with the explanation that the insured does so on the information of others; or the insured may submit the information in its whole extent to the insurer. In neither case is the insured responsible for its truth, unless it proceeds from the insured's agent whose duty it is to give the information.

Legal Topics:

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

Insurance LawClaims & ContractsGeneral OverviewInsurance LawClaims & ContractsCancellation & NonrenewalGeneral OverviewInsurance LawClaims & ContractsDisclosure ObligationsGeneral Overview

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12-120 California Points & Authorities § 120.266

§ 120.266 Representation Was Altered or Withdrawn

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER'S PURPORTED RESCISSION OF THE INSURANCE CONTRACT WAS NOT EFFECTIVE BECAUSE THE REPRESENTATION RELIED ON WAS _____ [ALTERED or WITHDRAWN] BEFORE THE INSURANCE BECAME EFFECTIVE.

Alteration or Withdrawal of Representation. A representation may be altered or withdrawn before the insurance is effected, but not afterwards (*Ins. Code § 355*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's contention that the insurance policy was rescinded by the insurer prior to commencement of the action. The basis of these points and authorities is that the purported rescission was not effective because the representation relied on was altered or withdrawn before the insurance became effective.

This form may be used in a variety of procedural contexts. For example, it may be used by an insured to oppose an insurer's motion for summary judgment in an action for breach of the insurance contract or to enforce the contract's provisions. Such an action may be brought by any of the following parties:

- By an insured, or the insured's beneficiary, under a life policy.
- By a transferee under a life or disability policy.

- By a judgment creditor of the insured under a liability policy.

For references to related Pleading and Practice chapters, see *§ 120.260[2][c]*.

This form may be used to oppose the points and authorities *set forth in § 120.250* et seq.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should refer to evidence establishing that the representation relied on was altered or withdrawn before the insurance became effective.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.260* et seq.) and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be to oppose a motion by an insurer for summary judgment, whenthe evidentiary facts clearly support the contention and disclose that triable issues of material fact remain [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that triable issues of material fact remain [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts opposing the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Alteration or Withdrawal of Representation

Under *Ins. Code § 355*, a representation may be altered or withdrawn before the insurance is effected, but not afterwards.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsCancellation & NonrenewalGeneral OverviewInsurance LawClaims & ContractsDisclosure ObligationsGeneral Overview

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12-120 California Points & Authorities § 120.267

§ 120.267 Incorrect or Incomplete Answers in Insurance Application Were Due to Insured's Ignorance of Fact or Failure to Appreciate Significance of Information

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER'S PURPORTED RESCISSION OF THE INSURANCE CONTRACT WAS NOT EFFECTIVE BECAUSE THE INSURED _____ [DID NOT HAVE PRESENT KNOWLEDGE OF THEFACTS ALLEGEDLY CONCEALED OR MISREPRESENTED and/or DID NOT APPRECIATE THE SIGNIFICANCE OF THE FACTS OF WHICH THE INSURED WAS AWARE].

Applicant's Ignorance of Facts or Their Significance. The incorrect or incomplete responses of an applicant for insurance caused by the applicant's lack of present knowledge of the facts or failure to appreciate the significance of information related to the applicant do not constitute a ground for rescinding the policy (*Thompson v. Occidental Life Ins. Co. (1973) 9 Cal. 3d 904, 916, 109 Cal. Rptr. 473, 513 P.2d 353*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's contention that the insurance policy was rescinded by the insurer prior to commencement of the action. The basis of these points and authorities is that the purported rescission was not effective because the insured did not have present knowledge of the facts allegedly concealed or misrepresented or did not appreciate the significance of the facts of which the insured was aware.

This form may be used in a variety of procedural contexts. For example, it may be used by an insured to oppose an insurer's motion for summary judgment in an action for breach of the insurance contract or to enforce the contract's provisions. Such an action may be brought by any of the following parties:

- By an insured, or the insured's beneficiary, under a life policy.
- By a transferee under a life or disability policy.
- By a judgment creditor of the insured under a liability policy.

For references to related Pleading and Practice chapters, see *§ 120.260[2][c]*.

This form may be used to oppose the points and authorities *set forth in § 120.250* et seq.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should refer to evidence establishing that the insured did not have present knowledge of the facts allegedly concealed or misrepresented or did not appreciate the significance of the facts of which the insured was aware.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.260* et seq.) and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be to oppose a motion by an insurer for summary judgment, when the evidentiary facts clearly support the contention and disclose that triable issues of material fact remain [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that triable issues of material fact remain [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts opposing the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Applicant's Ignorance of Facts or Their Significance

In ***Thompson v. Occidental Life Ins. Co.*** *(1973) 9 Cal. 3d 904* , affirming the judgment for plaintiff beneficiary under a life insurance policy, the Supreme Court, in reviewing the rules of law applicable in appraising a claim of misrepresentation in procuring insurance, said that if the applicant for insurance had no present knowledge of the facts sought, or failed to appreciate the significance of information related to him, his incorrect or incomplete responses would not constitute grounds for rescission (*9 Cal. 3d 904, 916)* .

[4] Additional Authorities

[a] Applicant's Ignorance of Facts or Their Significance

In *Cohen v. Penn Mut. Life Ins. Co. (1957) 48 Cal. 2d 720, 726, 312 P.2d 241* , the Supreme Court, citing *Travelers Ins. Co. v. Byers (1932) 123 Cal. App 473, 481, 11 P.2d 444* , and *Ransom v. Penn Mut. Life Ins. Co. (1954) 43 Cal. 2d 420, 426, 274 P.2d 633* , noted the rules that failure of an applicant to disclose a physical condition of which he or she is ignorant will not affect the policy and that a lay person might reasonably be excused if, in disclosing information in an insurance application, he or she failed to understand the meaning of certain medical terms and for that reason omitted some fact in his or her medical history (*48 Cal. 2d 720, 726)* .

In *Ransom v. Penn Mut. Life Ins. Co. (1954) 43 Cal. 2d 420* , affirming the judgment for plaintiff against defendant insurer, the Supreme Court, with respect to the insured's "No" answer to the question whether he had ever had high blood pressure, said that there was no evidence that the insured had ever been informed that he had high blood pressure, that the doctor had told him that he had a "mild hypertension," that it did not appear that the insured knew what the term meant, and that, as a layman, he might reasonably have failed to understand that it had any relation to blood pressure (*43 Cal. 2d 420, 426*).

In *Travelers Ins. Co. v. Byers (1932) 123 Cal. App. 473* , affirming the judgment for defendant the (beneficiary under a life insurance policy) on the complaint and for the cross complainant (the beneficiary) on the cross complaint, the court held that a failure to disclose facts of which the applicant was ignorant (kidney condition) will not afford ground for avoiding the policy because of the concealment, that a presumption of intent to deceive is raised only when the statements are made with knowledge of their falsity, and that the burden is on the party asserting the untruthfulness of a statement to show not only that the statement was erroneously made, but that it was willfully so (*123 Cal. App. 473, 481*). The court held that, since no evidence had been presented remotely tending to show that the insured had any knowledge whatsoever of his kidney condition at the time the applications were signed, the trial court's finding that the insured's statements were true was supported by the evidence (*123 Cal. App 473, 481)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsCancellation & NonrenewalGeneral OverviewInsurance LawClaims & ContractsContract FormationApplicationsInsurance LawClaims & ContractsDisclosure ObligationsGeneral Overview

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12-120 California Points & Authorities § 120.268

§ 120.268 Insurer Estopped from Rescinding Policy Because it Failed to Make Reasonable Investigation of Risk Prior to Accident

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE INSURER WAS ESTOPPED FROM RESCINDING THE POLICY UNDER INSURANCE CODE SECTION 650 BECAUSE OF ITS FAILURE TO HAVE UNDERTAKEN AN INVESTIGATION OF THE RISK WITHIN A REASONABLE TIME AFTER THE POLICY WAS ISSUED.

A. Insurer Failed to Take Prompt Action on Application for Insurance. Because of the quasi-public nature of the insurance business and the reasonable expectation of the applicant and the general public, an insurer has an extra-contractual duty to act promptly on applications for insurance (*Amex Life Assurance Co. v. Superior Court (Slome Capital Corp.) (1997) 14 Cal. 4th 1231, 1233, 60 Cal. Rptr. 2d 898, 930 P.2d 1264* ; *Barrera v. State Farm Mut. Auto. Ins. Co. (1969) 71 Cal. 2d 659, 673, 79 Cal. Rptr. 106, 456 P.2d 674*).

B. Insurer Did Not Promptly Investigate Risk. The insurer's duty to act promptly on an insurance application applies directly to the insurer's analogous duty, after the policy is issued, to conduct with due diligence a reasonable investigation of the risk (*Amex Life Assurance Co. v. Superior Court (Slome Capital Corp.) (1997) 14 Cal. 4th 1231, 1233, 60 Cal. Rptr. 2d 898, 930 P.2d 1264* ; *Barrera v. State Farm Mut. Auto. Ins. Co. (1969) 71 Cal. 2d 659, 673, 79 Cal. Rptr. 106, 456 P.2d 674*).

C. Due Diligence Requires Investigation of Risk Within Reasonable Time. An automobile liability insurer must undertake a reasonable investigation of the insured's insurability within a reasonable period of time from the acceptance of the application and the issuance of a policy (*Barrera v. State Farm Mut. Auto. Ins. Co. (1969) 71 Cal. 2d 659, 663, 79 Cal. Rptr. 106, 456 P.2d 674* ; *Fireman's Fund Am. Ins. Co. v. Escobedo (1978) 80 Cal. App. 3d 610, 619, 145 Cal. Rptr. 785*).

D. Effect of Failure to Make Reasonable Investigation of Risk. The failure of an automobile liability insurer to investigate the insured's insurability within a reasonable time after the policy isissued will render the insurer liable on the policy to a person injured as a result of the negligent operation of the car (*Barrera v. State Farm Mut. Auto. Ins. Co. (1969) 71 Cal. 2d 659, 663, 79 Cal. Rptr. 106, 456 P.2d 674* ; *Fireman's Fund Am. Ins. Co. v. Escobedo (1978) 80 Cal. App. 3d 610, 619, 620, 145 Cal. Rptr. 785*).

E. Estoppel to Plead Rescission Where Rights of Third Party Have Intervened. An insurer who fails to undertake a reasonable investigation of the risk may not, in an action against it to recover within policy limits the amount of a judgment previously recovered against its insured, defeat recovery by relying on an untimely attempt to rescind the policy (*Barrera v. State Farm Mut. Auto. Ins. Co. (1969) 71 Cal. 2d 659, 675, 79 Cal. Rptr. 106, 456 P.2d 674*).

F. Reasonableness of Investigation as Question of Fact. Whether an automobile liability insurer has breached its duty to the public to make a reasonable investigation within a reasonable time after issuance of the policy ordinarily constitutes a question for the trier of fact (*Barrera v. State Farm Mut. Auto. Ins. Co. (1969) 71 Cal. 2d 659, 681, 79 Cal. Rptr. 106, 456 P.2d 674* ; *Fireman's Fund Am. Ins. Co. v. Escobedo (1978) 80 Cal. App. 3d 610, 620, 145 Cal. Rptr. 785*).

[*Optional*] **G. Rule Requiring Investigation Applies to Adding Vehicles to Existing Policy.** The rule requiring the insurer to conduct a reasonable investigation of the risk applies to the addition of a car to an existing policy [*United Services Automobile Assn. v. Pegos (2003) 107 Cal. App. 4th 392, 398, 131 Cal. Rptr. 2d 866]* .

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's contention that the insurance policy was rescinded by the insurer prior to commencement of the action. The basis of these points and authorities is that the purported rescission was not effective because the insurer is estopped to deny coverage due to its failure to undertake a reasonable investigation of the insured's insurability within a reasonable time after it issued its policy. Optional Paragraph G is for use if the insurer's failure to investigate involved additional vehicles added to an existing policy.

This form may be used in a variety of procedural contexts. For example, it may be used by an insured to oppose an insurer's motion for summary judgment in an action for breach of the insurance contract or to enforcethe contract's provisions. Such an action may be brought by any of the following parties:

- By an insured, or the insured's beneficiary, under a life policy.
- By a transferee under a life or disability policy.
- By a judgment creditor of the insured under a liability policy.

For references to related Pleading and Practice chapters, see *§ 120.260[2][c]*.

This form may be used to oppose the points and authorities *set forth in § 120.250* et seq.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should refer to evidence establishing that the insurer failed to undertake a reasonable investigation of the insured's

insurability within a reasonable time after it issued its policy.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.260* et seq.) and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be to oppose a motion by an insurer for summary judgment, when the evidentiary facts clearly support the contention and disclose that triable issues of material fact remain [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that triable issues of material fact remain [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts opposing the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Insurer Failed to Take Prompt Action on Application for Insurance

Amex Life Assurance Co. v. Superior Court *(Slome Capital Corp.) (1997) 14 Cal. 4th 1231, 60 Cal. Rptr. 2d 898, 930 P.2d 1264* , was an action against a life insurance company that denied the claim of a company that bought the insured's policy shortly before his death, in which the trial court denied the insurer's motion for summary judgment on causes of action for breach of contract, insurance bad faith, and equitable estoppel. Although the insured, who knew he was HIV positive, had lied on the application and sent an impostor to take the mandatory medical examination, the trial court ruled that California did not recognize the impostor defense to the incontestability clause (*Ins. Code, §§ 10113.5, 10206*) contained in the policy. The insurer filed a petition for a writ of mandate directing the trial court to grant its summary judgment motion; the Court of Appeal granted the petition as to the bad faith cause of action but, finding that the impostor defense, even if it existed, did not apply in the instant case, denied it in all other respects.

The Supreme Court affirmed the judgment of the Court of Appeal, holding that the insurer's challenge to coverage was barred by the policy's incontestability clause (*14 Cal. 4th 1231, 1246)* . Although the insurer asserted that the policy was void ab initio, there was a meeting of the minds on the identity of the person with whom the insurer was dealing. Thus, the facts fell outside the impostor defense and within the policy's incontestability provision (*14 Cal. 4th 1231, 1232)* . When a named insured applies for a policy, and the premiums are paid for over two years, the beneficiaries should be assured they will receive the expected benefits upon the insured's death. The deception could have been discovered at the start had the insurer simply required all applicants to produce photographic identification before conducting the examination and issuing a policy. Given the relatively light burden of such a requirement, and the burden of diligence that *Ins. Code § 10113.5* places on the insurer, application of the incontestability clause was proper.

Although the insurer also asserted the examination was a condition precedent to the contract, such a claim was within the scope of the incontestability clause, which protects the insured against any defense of a breach of a condition precedent where he or she has paid premiums beyond the period of contestability (*14 Cal. 4th 1231, 1232-1233)* .

Note that *Insurance Code sections 10113.5* and *10206* have since been amended to include an imposter defense, although it requires thatphotographic identification be presented during the application process, *and* that an imposter be substituted for the insured during some part of the application process (*see Ins. Code §§ 10113.5(b), 10206(b),* as amended by 1998 legislation). In *Amex Life*, the insured showed no identification of any type during the application process, so that the imposter defense would not have applied.

Barrera v. State Farm Mut. Auto. Ins. Co. *(1969) 71 Cal. 2d 659, 79 Cal. Rptr. 106, 456 P.2d 674* , was an action by the judgment creditor of defendant's insured to compel payment of a judgment that had been obtained for personal injuries sustained by plaintiff in an automobile accident. The insurer cross complained for a declaratory judgment that the policy was not in effect at the time of the accident, claiming it had been rescinded [*see Ins. Code § 650*] because of a material misrepresentation by the insured [*see Ins. Code §§ 359, 360*] in his application. The material misrepresentation consisted of the word "No" having been written in the application in answer to the question, "Has your license to drive or registration been suspended ... in the last five years." The application had been filled out by defendant's agent writing the answers given by the insured to the questions asked. Defendant did not begin its investigation of the insured until more than two months after the accident and almost two years after the policy had been issued.

The investigation consisted of securing a report from the California Department of Motor Vehicles which showed that the insured had one driver's license suspension and two probation orders within the five years preceding April 1958, the month that the application was made and the policy was issued. At the trial, the insured testified that the agent had not called the aforementioned question in the application to his attention and that he showed the agent his driver's license which bore a "Probation" stamp on it. The agent testified that although he did not recall asking the question, he always, as a matter of practice, did so. He also testified that he had not seen the insured's driver's license and could not remember the manner in which he obtained the license number that had been included in the application. The trial court found that defendant had issued the policy in reliance on the misrepresentation, that rescission was therefore justified, and that defendant acted promptly on discovery of the misrepresentation. The court entered judgment for defendant on both the complaint and cross complaint.

The Supreme Court reversed. The Court pointed out that California has developed a line of decisions imposing a duty on all insurers to act promptly on an application for insurance. The Court said that the rationale underlying the extra-contractual imposition of this duty parallels the philosophy underlying the Financial Responsibility Law and related statutory and judicial rules governing automobile liability insurance and that the rule that an insurer must act promptly finds its source in the quasi-publicnature of the insurance business and the reasonable expectation of the applicant and the general public (*71 Cal. 2d 659, 673)* .

[b] Insurer Did Not Promptly Investigate Risk

The facts and procedural background of ***Barrera v. State Farm Mut. Auto. Ins. Co.*** *(1969) 71 Cal. 2d 659, 79 Cal. Rptr. 106, 456 P.2d 674* , are discussed in *§ 120.268[3][a]*. The Supreme Court reversed the judgment for the insurer. The Court said that the following analysis of the insurer's duty to act promptly on an insurance application applies directly to the insurer's analogous duty to conduct with due diligence a reasonable investigation of insurability after issuance of the policy: (1) before one can hold himself or herself out as competent to transact the business of insurance, he or she must have fully complied with the statutes of the state relating to insurance; (2) by the soliciting, making, and receiving of the application, the parties had entered into some kind of a consensual relationship; and (3) under such circumstances, having in view the nature of the risk insured against, the insurer has the duty to act on the application within a reasonable time (*71 Cal. 2d 659, 673)* .

[c] Due Diligence Requires Investigation of Risk Within Reasonable Time

The facts and procedural background of ***Barrera v. State Farm Mut. Auto. Ins. Co.*** *(1969) 71 Cal. 2d 659, 79 Cal. Rptr. 106, 456 P.2d 674* , are discussed in *§ 120.268[3][a]*. The Supreme Court reversed the judgment for the insurer. The parties stipulated in the trial court that on April 29, 1958, the insured had signed the application for automobile insurance prepared by defendant's agent and that on the same date defendant issued a policy with a $10,000 limit for injury to any one person. The insured paid the premiums on the policy in April 1958, October 1958, and April 1959. On November 28, 1959, the insured, while driving a car, struck plaintiff, a pedestrian. On December 4, 1959, plaintiff's attorneys notified defendant of plaintiff's claim. On December 8, 1959, defendant sent a reply letter to plaintiff's attorneys. On April 22, 1960, defendant rescinded the policy and returned all premiums paid. On July 26, 1960, plaintiff sued the insured who forwarded a copy of the summons and complaint to defendant. On August 2, 1960, defendant advised the insured that it would not defend the action. On November 3, 1960, judgment against defendant's insured was entered for plaintiff.

The parties further stipulated that plaintiff neither consented to nor concurred in any rescission or attempted rescission between defendant and its insured and agreed that five months after the original policy had been issued, defendant paid to, or on behalf of, the insured a claim arising out of the comprehensive coverage provisions of the policy. Defendant did not commence an investigation of its insured's insurability until more thantwo months after the accident and almost two years after the policy was issued. In reversing the judgment for defendant insurer, the Supreme Court, although it accepted the trial court's finding of misrepresentation based on conflicting evidence, held that an automobile liability insurer must undertake a reasonable investigation of the insured's insurability within a reasonable period of time from the acceptance of the application and the issuance of the policy (*71 Cal. 2d 659, 663)* .

The court of appeal has held that the duty under Barrera to investigate insurability is limited to automobile liability insurers who deny coverage for reasons arising out of their own negligence. The duty arises from the automobile Financial Responsibility Law, and therefore does not extend to circumstances not governed by that legislation. For example, Barrera does not compel the imposition of a duty on an aircraft insurer to investigate the qualifications of a pilot specifically named in a pilot-clause endorsement of a policy covering the airplane, because the legislation governing aircraft insurance does not embody all of the public policy considerations encompassed by the automobile legislation [*American Continental Ins. Co. v. C & Z Timber Co. (1987) 195 Cal. App. 3d 1271, 1278, 241 Cal. Rptr. 466]* .

The factual background of ***Fireman's Fund Am. Ins. Co. v. Escobedo*** *(1978) 80 Cal. App. 3d 610, 145 Cal. Rptr. 785* is discussed in *§ 120.250[3][d]*. In affirming the orders denying the motions of the insureds for judgment notwithstanding the verdict, but reversing the judgment, the court of appeal, quoting from *Barrera v. State Farm Mut. Auto. Ins. Co. (1969) 71 Cal. 2d 659, 663, 79 Cal. Rptr. 106, 456 P.2d 674* , said that an automobile liability insurer must undertake a reasonable investigation of the insured's insurability within a reasonable period of time from the acceptance of the application and the issuance of the policy (*80 Cal. App. 3d 610, 619)* .

[d] Effect of Failure to Make Reasonable Investigation of Risk

The facts and procedural background of ***Barrera v. State Farm Mut. Auto. Ins. Co.*** *(1969) 71 Cal. 2d 659, 79 Cal. Rptr. 106, 456 P.2d 674* , are discussed in *§ 120.268[3][a]*. The Supreme Court reversed the judgment for the insurer. The Court said that the insurer's duty to undertake a reasonable investigation of the insured's insurability within a reasonable period of time from the acceptance of the application and the issuance of the policy inures to the benefit of third persons injured by the insured, that an injured party who has obtained an unsatisfied judgment against the insured may properly proceed against the insurer, and that the insurer cannot then successfully defend on the ground of its own failure to reasonably investigate the application. The Court said that on retrial plaintiff, on showing that defendant did not reasonably investigatethe insured's insurability within a reasonable time, may recover from defendant, within the policy limits, the amount of the judgment obtained against the insured (*71 Cal. 2d 659, 663)* .

The factual background of ***Fireman's Fund Am. Ins. Co. v. Escobedo*** *(1978) 80 Cal. App. 3d 610, 145 Cal. Rptr. 785* is discussed in *§ 120.250[3][d]*. In affirming the orders denying the motions of the insureds for judgment notwithstanding the verdict, but reversing the judgment, the court of appeal, quoting from *Barrera v. State Farm Mut. Auto. Ins. Co. (1969) 71 Cal. 2d 659, 663, 79 Cal. Rptr. 106, 456 P.2d 674* , said that the duty to undertake a reasonable investigation of the insured's insurability within a reasonable period of time from the acceptance of the application and the issuance of the policy directly inures to the benefit of third persons injured by the insured, that such an injured party, who has obtained an unsatisfied judgment against the insured, may properly proceed against the insurer, and that the insurer cannot then successfully defend on the ground of its own failure reasonably to investigate the application (*80 Cal. App. 3d 610, 619-620)* .

[e] Estoppel to Plead Rescission Where Rights of Third Party Have Intervened

The facts and procedural background of ***Barrera v. State Farm Mut. Auto. Ins. Co.*** *(1969) 71 Cal. 2d 659, 79 Cal. Rptr. 106, 456 P.2d 674* , are discussed in *§ 120.268[3][a]*. The Supreme Court reversed the judgment for the insurer. The Supreme Court explained that the requirement that the carrier act promptly to determine insurability after issuance of an automobile liability insurance policy inures primarily to the benefit of those members of the public who suffer injury from negligent motorists and seek recovery against the responsible tortfeasors (*71 Cal. 2d 659, 674)* , that the duty arises from the public policy that protects the innocent victim of the careless use of automobiles from an inability to sue a financially responsible defendant, and that this duty, which the insurer incurs with the issuance of an automobile liability policy, therefore runs directly to the class of potential victims of the insured (*71 Cal. 2d 659, 674-675)* . Consequently, said the Court, when the insurer breaches that duty, it may not defeat recovery by the injured person, who has recovered a judgment against the insured, by relying on an untimely attempt to rescind (*71 Cal. 2d 659, 675)* . The Court said that the real beneficiary of the insurer's duty cannot lose his or her remedy merely because the party whose relationship with the defendant gave rise to the duty (i.e., the insured) would be barred from recovery (*71 Cal. 2d 659, 677)* .

The Court said that if the insurer does undertake a reasonable investigation of insurability, it retains the statutory right granted in *Ins. Code § 650* to declare the rescission of the policy because of a material misrepresentation of the insured, but that when the insurer fails to conduct such areasonable investigation it cannot assert such a right of rescission against the third-party judgment creditor of its insured; nor can it complain of the denial of the statutory right when its conduct is culpable and directly contributes to the presence on the highway of a financially irresponsible motorist (*71 Cal. 2d 659, 678)* .

The Court further rejected the insurer's argument that the insured's negligence in the operation of the vehicle was a superseding cause insulating the insurer from liability for its own negligence in failing to investigate (*71 Cal. 2d 659, 679)* and explained that, although the insurer that fails to make such an investigation loses its right to rescind as to the injured person, it does not necessarily forfeit all remedies against the insured. For example, the insurer may still prosecute a cause of action against the insured for damages for wrongful misrepresentation, after satisfying the injured person's claim. Furthermore, in an action brought by the insured after he or she has satisfied the judgment against him or her in favor of the injured person, the insurer may defend on the ground of misrepresentations in the application (*71 Cal. 2d 659, 681)* .

[f] Reasonableness of Investigation as Question of Fact

The facts and procedural background of ***Barrera v. State Farm Mut. Auto. Ins. Co.*** *(1969) 71 Cal. 2d 659, 79 Cal. Rptr. 106, 456 P.2d 674* , are discussed in *§ 120.268[3][a]*. The Supreme Court reversed the judgment for the insurer. The Supreme Court said that whether or not an automobile liability insurer has breached its duty to the public to make a reasonable investigation of the insured's insurability within a reasonable time after issuance of the policy ordinarily constitutes a question for the trier of fact (*71 Cal. 2d 659, 681*). The Court added that on remand, the trial court should

determine whether or not the insurer conducted such a reasonable investigation, that if the trial court found that the insurer acted reasonably in light of its duty to undertake a reasonable investigation of insurability, it might allow the insurer once again to assert the invalidity of its contract of insurance with its insured as a defense to plaintiff's action, and that if the trial court concluded that the insurer breached its duty, the defense of the rescission ab initio would no longer be available to the insurer (*71 Cal. 2d 659, 682*).

The Court said that factors to be taken into account by the trial court in assessing the reasonableness of the insurer's course of conduct in failing to investigate the insured's driving record include the cost of obtaining the information from the department of Motor Vehicles, the availability of this information from the department or elsewhere (e.g., the insured claimed that his license suspensions appeared on the back of his driver's license), and the general administrative burden of making such an investigation, and that these factors must be weighed against the importance ofprotecting innocent members of the public against the consequences of automobile owners driving with voidable liability policies (*71 Cal. 2d 659, 682)* .

The factual background of ***Fireman's Fund Am. Ins. Co. v. Escobedo*** *(1978) 80 Cal. App. 3d 610, 145 Cal. Rptr. 785* , is discussed in *§ 120.250[3][d]*. In affirming the orders denying the motions of the insureds for judgment notwithstanding the verdict, but reversing the judgment, the court of appeal, quoting from *Barrera v. State Farm Mut. Auto. Ins. Co. (1969) 71 Cal. 2d 659, 682, 79 Cal. Rptr. 106, 456 P.2d 674* , said that whether or not the automobile liability insurer has breached its duty to the public to make a reasonable investigation with in a reasonable time after the issuance of the policy ordinarily constitutes a question for the trier of fact, and repeated the factors listed in Barrera to be considered in determining the reasonableness of the insurer's actions (*80 Cal. App. 3d 610, 620)* .

[g] Rule Requiring Investigation Applies to Adding Vehicles to Existing Policy

In ***United States Auto. Ass'n v. Pegos*** *(2003) 107 Cal. App. 4th 392, 131 Cal. Rptr. 2d 866* , the insured requested the addition of two vehicles to her existing automobile policy. At the time, one of these vehicles had a commercial license plate. The insurer claimed that the insured answered the question of whether she would carry passengers for profit in the negative, but the insured asserted that she was not asked that question. Although the insured operated both vehicles as taxicabs, the insurer would not have insured either vehicle if it had been aware of the insured's intention to do so. Following accidents involving both added vehicles, the insurer sued the insured and an injured third party for declaratory relief, alleging that the insured's misrepresentations about the intended use of the vehicles constituted grounds for rescission of the insurance policy *ab initio*. The insurer and the third party filed cross-motions for summary judgment. The third party opposed the insurer's motion on the grounds that triable issues of fact remained as to the investigation conducted by the insurer into the insurability of the cars, arguing that the insurer's failure to further investigate the insured's misrepresentations barred the rescission cause of action as a matter of law. The trial court granted the insurer's motion and denied the third party's motion. The third party appealed.

The court of appeal reversed, holding that the rule requiring the insurer to conduct a reasonable investigation of the risk applies to the addition of a vehicle to an existing policy. Unless an insurer has conducted a reasonable investigation as to the insurability of its insured, it may not rescind an automobile insurance policy based on the material misrepresentations of its insured after the insured injures a third party. Under *Barrera*, an automobile liability insurer that wishes to preserve its right to rescind a policy of insurance based on the insured's misrepresentation must undertake a reasonable investigation of the insured's insurability within a reasonable period of time after accepting the application and issuing the policy. This duty directly inures to the benefit of third persons injured by the insured. An injured party who has obtained an unsatisfied judgment against the insured may properly proceed against the insurer, and the insurer cannot then successfully defend on the ground of its own failure reasonably to investigate the application. This obligation to investigate derives principally from the public policy underlying California's Financial Responsibility Law and the quasi-public nature of the insurance business. The insurer's failure reasonably to investigate the insurability of the insured within a reasonable time after issuance of the policy results in the loss of the insurer's right to rescind, as opposed to its right to cancel, the policy. The request to add a new vehicle to an existing policy raises the same concerns

that led the *Barrera* court to impose the duty to investigate in the first place. This type of application for insurance is similar to the addition of a new driver to a policy. Similarly, a new car may have special features that render it uninsurable by a particular insurance company--for example, the engine may be too big or the vehicle may not be "street-legal." Furthermore, as in this case, the vehicle may be used for unacceptable purposes, such as a taxicab or for racing. Requiring a prompt and reasonable investigation furthers the critical public policy goal of California's Financial Responsibility Law of providing monetary compensation to members of the driving public who are injured by their fellow drivers. Whether the insurer conducted a reasonable investigation for this purpose is a question of fact, and therefore summary judgment was improper (*107 Cal. App. 4th 392, 394-401)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsContract FormationApplicationsInsurance LawClaims & ContractsEstoppel & WaiverGeneral OverviewInsurance LawClaims & ContractsEstoppel & WaiverInvestigationsInsurance LawMotor Vehicle InsuranceGeneral Overview

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 120 INSURANCE
PART II. FORMS
D. Rescission, Cancellation, and Renewal of Policies
1. Rescission for Material Misrepresentations or Concealment

12-120 California Points & Authorities § 120.269

§ 120.269 Knowledge of Independent Contractor Hired by Insurer to Conduct Investigation Is Imputed to Insurer

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER'S PURPORTED RESCISSION OF THE INSURANCE CONTRACT WAS NOT EFFECTIVE BECAUSE KNOWLEDGE OF THE INDEPENDENT CONTRACTOR HIRED BY INSURER TO CONDUCT AN INVESTIGATION IS IMPUTED TO INSURER.

Knowledge of Independent Contractor Hired by Insurer to Conduct Investigation as Imputed to Insurer. The duty to investigate insurability inures directly to members of the public and isnondelegable; an insurer that employs an independent contractor as its agent to carry out the investigation is chargeable with the knowledge imparted to its agent in the course of that investigation (*Fireman's Fund Am. Ins. Co. v. Escobedo (1978) 80 Cal. App. 3d 610, 621-622, 145 Cal. Rptr. 785*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's contention that the insurance policy was rescinded by the insurer prior to commencement of the action. The basis of these points and authorities is that the purported rescission was not effective because knowledge of the independent contractor hired by insurer to conduct an investigation isimputed to insurer. Thus, the insurer learned the true facts and subsequently failed to rescind the policy until after the accident, although it had ample opportunity to do so.

This form may be used in a variety of procedural contexts. For example, it may be used by an insured to oppose an insurer's motion for summary judgment in an action for breach of the insurance contract or to enforce the contract's

provisions. Such an action may be brought by any of the following parties:

- By an insured, or the insured's beneficiary, under a life policy.
- By a transferee under a life or disability policy.
- By a judgment creditor of the insured under a liability policy.

For references to related Pleading and Practice chapters, see *§ 120.260[2][c]*.

This form may be used to oppose the points and authorities *set forth in § 120.250* et seq.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should refer to evidence establishing that the insurer learned the true facts through its independent contract, and subsequently failed to rescind the policy until after the accident, although it had ample opportunity to do so.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.260* et seq.) and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be to oppose a motion by an insurer for summary judgment, when the evidentiary facts clearly support the contention and disclose that triable issues of material fact remain [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that triable issues of material fact remain [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts opposing the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Knowledge of Independent Contractor Hired by Insurer to Conduct Investigation Is Imputed to Insurer

The factual background of ***Fireman's Fund Am. Ins. Co. v. Escobedo*** *(1978) 80 Cal. App. 3d 610, 145 Cal. Rptr. 785* , is discussed in *§ 120.250[3][d]*. In affirming the orders denying the motions of the insureds for judgment notwithstanding the verdict, but reversing the judgment, the court of appeal held that the insurer's duty to investigate insurability inures directly to the members of the public and is a nondelegable one and that the trial court committed

reversible error in refusing to so instruct the jury. The court further held that defendant insurer, having employed the retail credit company as its agent to make the investigation, was charged with knowledge of any information imparted to the investigator and that the insurer could not rely solely on the insured's answers in the application when the insurer had conducted an independent investigation which revealed the facts (*80 Cal. App. 3d 610, 621-622)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGeneral OverviewInsurance LawClaims & ContractsCancellation & NonrenewalGeneral Overview

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CHAPTER 120 INSURANCE
PART II. FORMS
D. Rescission, Cancellation, and Renewal of Policies
1. Rescission for Material Misrepresentations or Concealment

12-120 California Points & Authorities §§ 120.270-120.279

[Reserved]

§§ 120.270[Reserved]

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 120 INSURANCE
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1. Rescission for Material Misrepresentations or Concealment

12-120 California Points & Authorities § 120.280

§ 120.280 Policy Was Rescinded on Ground of Breach of Material Express Warranty

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER RESCINDED THE INSURANCE CONTRACT PRIOR TO COMMENCEMENT OF THIS ACTION ON THE GROUND OF INSURED'S BREACH OF A MATERIAL EXPRESS WARRANTY.

A. Right to Rescind. The violation of a material warranty or other material provision of a policy, on the part of either party, entitles the other to rescind (*Ins. Code § 447*).

B. Express Warranty Defined. A statement in a policy of a matter relating to the person or thing insured, or to the risk, as a fact, is an express warranty (*Ins. Code § 441*).

[*Optional*] **C. Breach of Express Warranty by Insured.** The breach of an express warranty that materially affects the risk entitles the insurer to rescind the insurance contract without liability (*Purcell v. Pacific Auto. Ins. Co. (1937) 19 Cal. App. 2d 230, 231-232, 64 P.2d 1114* ; *see McKenzie v. Scottish Union & Nat'l Ins Co. (1896) 112 Cal. 548, 555, 44 P. 922*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of an insurer's contention that the insurance policy was rescinded by the insurer prior to commencement of the action. The basis of these points and authorities is that the policy was rescinded on ground of breach of material express warranty.

This form may be used in a variety of procedural contexts. For example, it may be used by an insurer in support of a

motion for summary judgment in an action for breach of the insurance contract or to enforce the contract's provisions. Such an action may be brought by any of the following parties:

- By an insured, or the insured's beneficiary under a life policy.
- By a transferee under a life or disability policy.
- By a judgment creditor of the insured under a liability policy.

This form may also be combined with points and authorities *set forth in § 120.250*, relating to rescission generally. This form should also be combined with points and authorities in that form when:

- The policy involved is a liability policy and the rescission followed the filing of an action by a liability claimant against the insured, but before any judgment was entered in that action;
- There is more than one insured covered by the policy, including additional insureds; and
- The policy in question is an assigned risk motor vehicle liability policy.

Paragraph E should be included if the warranty breached was a promissory warranty, and Paragraph G should be included if the breach of warranty was by the insured.

Paragraph H should be included if the policy involved is a liability policy and the rescission followed the filing of an action by a liability claimant against the insured but before any judgment was entered in that action.

Paragraph I should be included when there is more than one insured covered by the policy, including additional insureds.

Paragraph J should be included if the policy in question is an assigned risk motor vehicle liability policy.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should refer to evidence establishing:

- A breach of material express warranty by the insured.
- Rescission by the insurer prior to commencement of the action.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.251*) and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be a motion by an insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that there is no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts supporting the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any

accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Pleading and Practice Chapters

For complaints by an insured against an insurer for damages for breach of contract because of the insurer's refusal to pay a third-party judgment against the insured or to defend the insured in a third-party action, see California Forms of Pleading and Practice, Ch. 308, Insurance (Matthew Bender). For a discussion of the rules applicable to summary judgment, a form of notice of motion for summary judgment, and related forms, see Ch. 537, Summary Judgment, in that publication.

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[e] Opposing Points and Authorities

The points and *authorities in § 120.290* et seq. may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Breach of Express Warranty by Insured

In ***McKenzie v. Scottish Union & Nat'l Ins. Co.*** *(1896) 112 Cal. 548* , the Supreme Court reversed the judgment for plaintiff insured, finding that the warranty was an express promissory warranty by the insured and that its breach avoided the policy (*112 Cal. 548, 555*). The Court pointed out that the object of such warranties is usually to bind the insured to the performance of certain acts which, but for the warranty, he or she would not be bound to perform (*112 Cal. 548, 558)* .

McKenzie was distinguished by the court of appeal in *Los Angeles Mut. Ins. Co. v. Cawog (1973) 30 Cal. App. 3d 378, 384, 106 Cal. Rptr. 307* on the ground that the warranty McKenzie was one "directly affecting the risk" and hence material, whereas the one involved in Cawog was immaterial. The McKenzie case was also distinguished by the *Supreme Court in Holz Rubber Co., Inc. v. American Star Ins. Co. (1975) 14 Cal. 3d 45, 59 n.12, 120 Cal. Rptr. 415, 533 P.2d 1055* , on the ground that the warranty in McKenzie was unambiguous, whereas the one involved in Holz was ambiguous.

Purcell v. Pacific Auto. Ins. Co. *(1937) 19 Cal. App. 2d 230, 64 P.2d 1114* , was an action by a judgment creditor of defendant's insured to recover, up to the policy limit, the amount of the judgment previously obtained by plaintiff against the insured in an action arising out of an automobile accident. The public liability policy issued by defendant contained a warranty by its insured that the covered car was to be principally used and garaged in Bakersfield, Kern County, and the premium rate was fixed on the basis of this warranty. The accident occurred eight hours after the effective date of the policy. The evidence established that the car was principally and continuously used and garaged not in Bakersfield, but in Los Angeles, Los Angeles County, both for several months prior to theaccident and several

months thereafter. The parties stipulated that the premium rate for a car principally used and garaged in Los Angeles was higher than the premium rate of such a car used and garaged in Bakersfield. Four months after the accident, defendant rescinded the policy on the ground of breach of warranty. The trial court found that the warranty had been breached from its inception and that the insurer therefore had the right to rescind the policy from the beginning without liability on its part and entered judgment for defendant.

The court of appeal affirmed. The court pointed out that plaintiff did not contend that the warranty was not a material one (*19 Cal. App. 2d 230, 231)* and explained that the warranty was a promise on the part of the insured to use and garage the car principally in Kern County, that it was a promise which had been elevated to the importance of a warranty in reliance on which the premium rate was fixed, and that the evidence supported the trial court's finding that the promise was false when made, that it was made without any intention on the part of the insured to fulfill it, and that it was therefore broken in its inception (*19 Cal. App. 2d 230, 232)* .

In commenting on Purcell, the court of appeal in *Los Angeles Mut. Ins. Co v. Cawog (1973) 30 Cal. App. 3d 378, 384, 106 Cal. Rptr. 307* , pointed out that Purcell had been distinguished by the federal court in *Republic Indem. Co. v. Martin (10th Cir. 1955) 222 F.2d 438* , on the ground that the use of the car, rather than where it was garaged, materially affected the risk in Purcell, whereas in the case before the federal court, there was no restriction on use, and the warranty as to where the car was to be garaged was immaterial.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsCancellation & NonrenewalGeneral OverviewInsurance LawClaims & ContractsDisclosure ObligationsWarranties

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 120 INSURANCE
PART II. FORMS
D. Rescission, Cancellation, and Renewal of Policies
1. Rescission for Material Misrepresentations or Concealment

12-120 California Points & Authorities § 120.281

§ 120.281 Policy Was Rescinded on Ground of Willful Concealment of Matter Relating to Falsity of Warranty

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER RESCINDED THE INSURANCE CONTRACT PRIOR TO COMMENCEMENT OF THIS ACTION BECAUSE OF THE INSURED'S INTENTIONAL AND FRAUDULENT CONCEALMENT OF MATTERS RELATING TO THE FALSITY OF A WARRANTY.

A. Right to Rescind. An intentional and fraudulent omission on the part of one insured to communicate information of matters proving or tending to prove the falsity of a warranty entitles the insurer to rescind (*Ins. Code § 338*).

B. Warranty False at Time Made Voids Policy. The falsity of a statement in an insurance application declared by the policy to be a warranty and by the insured to be absolutely true voids the policy ab initio (*Craig v. United States Fid. & Guar. Co. (1936) 11 Cal. App. 2d 644, 645-646, 54 P.2d 486*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of an insurer's contention that the insurance policy was rescinded by the insurer prior to commencement of the action. The basis of these points and authorities is that the policy was rescinded on ground of the insured's intentional and fraudulent concealment of matters relating to the falsity of a warranty.

This form may be used in a variety of procedural contexts. For example, it may be used by an insurer in support of a motion for summary judgment in an action for breach of the insurance contract or to enforce the contract's provisions. Such an action may be brought by any of the following parties:

- By an insured, or the insured's beneficiary under a life policy.
- By a transferee under a life or disability policy.
- By a judgment creditor of the insured under a liability policy.

This form may also be combined with points and authorities *set forth in § 120.250*, relating to rescission generally. This form should also be combined with points and authorities in that form when:

- The policy involved is a liability policy and the rescission followed the filing of an action by a liability claimant against the insured, but before any judgment was entered in that action;
- There is more than one insured covered by the policy, including additional insureds; and
- The policy in question is an assigned risk motor vehicle liability policy.

For references to related Pleading and Practice chapters, see *§ 120.280[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should refer to evidence establishing:

- The insured's intentional and fraudulent concealment of matters relating to the falsity of a warranty.
- Rescission by the insurer prior to commencement of the action.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.280* et seq.) and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be a motion by an insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that there is no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts supporting the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Warranty False at Time Made Voids Policy

Craig v. United States Fid. & Guar. Co. *(1936) 11 Cal. App. 2d 644, 54 P.2d 486* , was an action by an insured against her insurer to recover under a burglary insurance policy. In answering an item in the insurance application reading, "No burglary, theft, or robbery insurance applied for or carried by assured has been declined or canceled by any company within the last five years except as herein stated," plaintiff's authorized agent had declared "No exceptions." The insurance policy expressly declared that this statement and the answer were to be a part of the insurance policy and a warranty. The statement was in fact false because a policy of burglary insurance held by plaintiff and issued by another insurance company had beencanceled about three months prior to the time defendant's policy was issued. A month after issuance of the present policy, plaintiff's premises were burglarized and defendant, on learning of the false statement, canceled the policy. Plaintiff then sued for recovery under the policy.

Judgment in favor of defendant was affirmed on appeal. The court of appeal said that it is well settled that when a statement in the insurance application is declared by the policy to be a warranty and the insured declares the statement is absolutely true, the falsity of such statement voids the policy ab initio and the question of materiality of the false statement is removed from the consideration of the court. The court reasoned that one of the principal reasons for such warranty is to preclude all controversy as to the materiality or immateriality of the statement (*11 Cal. App. 2d 644, 645-646)* .

It should be noted, however, that unless the policy declares that a violation of specified provisions thereof shall avoid it, the breach of an immaterial provision does not avoid the policy [*Ins. Code § 448*; *see also Ins. Code § 449*; *Los Angeles Mut. Ins. Co. v. Cawog (1973) 30 Cal. App. 3d 378, 382-383, 106 Cal. Rptr. 307* ; § 120.290].

[4] Additional Authorities

[a] Warranty False at Time Made as Voiding Policy

Emery v. Pacific Employers Ins. Co. (1937) 8 Cal. 2d 663, 67 P.2d 1046 , *disapproved on other grounds*, *Barrera v. State Farm Mut. Auto. Ins. Co. (1969) 71 Cal. 2d 659, 679, 79 Cal. Rptr. 106, 456 P.2d 674* , was an action by the judgment creditors of defendant's insured to recover from defendant the amount of the judgment previously recovered by plaintiffs in their action against the insured arising out of an automobile accident. In the insurance application, the insured's agent had written "No" to the question, "Has this risk been canceled or rejected by any Company, if so why." Included in the warranties in the body of the policy as issued was the following: "No company has declined, canceled nor refused to continue automobile insurance, except as follows: No exceptions." The policy provided that the insured, by acceptance of the policy, made the warranties contained in it. The policy was issued on September 12, 1933, and the accident in which plaintiffs were involved took place on September 30, 1933.

On October 4, 1933, defendant mailed the insured a letter declaring the policy void as of its date of issue by reason of the alleged falsity of this representation and warranty, refunded the premium paid, and refused to defend the insured in the action by the plaintiffs. From a judgment for plaintiffs on a directed verdict on the ground defendant had failed to establish that any prior policies had been canceled, defendant appealed, contending that there was evidence from which the jury couldhave found prior cancellations and that the trial court improperly excluded evidence on which it relied to prove prior cancellations based on the insured's bad accident record. The Supreme Court agreed and reversed the judgment. The Court pointed out that plaintiffs' right was to bring an action against the insurer "on the policy and subject to its terms and limitations" an, hence, if the policy were void or voidable as to the insured, plaintiffs could not recover on it (*8 Cal. 2d 663, 665)* . The Court said that a breach of warranty broken in its inception prevents the policy

from attaching to the risk (*8 Cal. 2d 663, 669)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsCancellation & NonrenewalGeneral OverviewInsurance LawClaims & ContractsDisclosure ObligationsWarranties

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1. Rescission for Material Misrepresentations or Concealment

12-120 California Points & Authorities §§ 120.282-120.289

[Reserved]

§§ 120.282[Reserved]

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12-120 California Points & Authorities § 120.290

§ 120.290 Purported Rescission Was Not Effective Because Performance Became Unlawful or Impossible

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER'S PURPORTED RESCISSION OF THE INSURANCE CONTRACT WAS NOT EFFECTIVE BECAUSE PERFORMANCE OF THE WARRANTY BECAME _____ [UNLAWFUL or IMPOSSIBLE].

Performance Became Unlawful or Impossible. When, before the time arrives for the performance of a warranty relating to the future, performance becomes unlawful at the place of the contract, or impossible, the omission to fulfill the warranty does not avoid the policy (*Ins. Code § 446*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's contention that the insurance policy was rescinded by the insurer prior to commencement of the action. The basis of these points and authorities is that the purported rescission was not effective because the insurer's purported rescission of the insurance contract was not effective because the insured's performance of the warranty became unlawful or impossible.

This form may be used in a variety of procedural contexts. For example, it may be used by an insured to oppose an insurer's motion for summary judgment in an action for breach of the insurance contract or to enforce the contract's provisions. Such an action may be brought by any of the following parties:

- By an insured, or the insured's beneficiary, under a life policy.

- By a transferee under a life or disability policy.
- By a judgment creditor of the insured under a liability policy.

This form may be used to oppose the points and authorities *set forth in § 120.280*.

See also *Comments in § 120.250[2][a]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should refer to evidence establishing that performance under the insurance contract was impossible or unlawful.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.290*) and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be to oppose a motion by an insurer for summary judgment, when the evidentiary facts clearly support the contention and disclose that triable issues of material fact remain [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that triable issues of material fact remain [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts opposing the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Pleading and Practice Chapters

For complaints by an insured against an insurer for damages for breach of contract because of the insurer's refusal to pay a third-party judgment against the insured or to defend the insured in a third-party action, see California Forms of Pleading and Practice, Ch. 308, Insurance (Matthew Bender). For a discussion of the rules applicable to summary judgment, a form of notice of motion for summary judgment, and related forms, see Ch. 537, Summary Judgment, in that publication.

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication indrafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Performance Became Unlawful or Impossible

Under ***Ins. Code § 446*** , when, before the time arrives for the performance of a warranty relating to the future,

performance becomes unlawful at the place of the contract, or impossible, the omission to fulfill the warranty does not avoid the policy.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsCancellation & NonrenewalGeneral OverviewInsurance LawClaims & ContractsContract FormationGeneral OverviewInsurance LawClaims & ContractsDisclosure ObligationsWarranties

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12-120 California Points & Authorities § 120.291

§ 120.291 Purported Rescission Was Not Effective Because Breach Was of an Immaterial Policy Provision

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER'S PURPORTED RESCISSION OF THE INSURANCE CONTRACT WAS NOT EFFECTIVE BECAUSE THE EXPRESS WARRANTY ALLEGEDLY BREACHED WAS AN IMMATERIAL POLICY PROVISION.

A. Breach of Immaterial Provision. Unless the policy declares that a violation of specified provisions thereof shall avoid it, the breach of an immaterial provision does not avoid the policy (*Ins. Code § 448*).

B. Applicability to Warranties. The rule set forth in *Section 448 of the Insurance Code* applies regardless of the fact that the provision in the policy may be characterized as a warranty (*Los Angeles Mut. Ins. Co. v. Cawog (1973) 30 Cal. App. 3d 378, 383, 106 Cal. Rptr. 307*).

C. Breach of Coinsurance Warranty as Immaterial. Unless the policy otherwise specifies, the insured's failure to maintain coinsurance as required by an express warranty in the policy is immaterial so long as the insurer is not required to pay under its policy any more than its share of a loss had the coinsurance been maintained (*Los Angeles Mut. Ins. Co. v. Cawog (1973) 30 Cal. App. 3d 378, 386, 106 Cal. Rptr. 307*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's contention that the insurance policy was rescinded by the insurer priorto commencement of the action. The basis of these points and authorities is that the purported rescission was not effective because the express warranty allegedly breached was an immaterial policy provision.

This form may be used in a variety of procedural contexts. For example, it may be used by an insured to oppose an insurer's motion for summary judgment in an action for breach of the insurance contract or to enforce the contract's provisions. Such an action may be brought by any of the following parties:

- By an insured, or the insured's beneficiary, under a life policy.
- By a transferee under a life or disability policy.
- By a judgment creditor of the insured under a liability policy.

For references to related Pleading and Practice chapters, see *§ 120.260[2][c]*.

This form may be used to oppose the points and authorities *set forth in § 120.280*.

See also *Comments in § 120.250[2][a]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should refer to evidence establishing that the express warranty allegedly breached was an immaterial policy provision.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.290* et seq.) and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be to oppose a motion by an insurer for summary judgment, when the evidentiary facts clearly support the contention and disclose that triable issues of material fact remain [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that triable issues of material fact remain [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts opposing the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Applicability to Warranties

Los Angeles Mut. Ins. Co. v. Cawog *(1973) 30 Cal. App. 3d 378, 106 Cal. Rptr. 307* , was an action by an insurance company seeking a declaration of its obligations under a fire policy issued by it and covering a hotel owned by defendant insured. Defendant answered and cross complained for $10,000, the full value of the policy. At the time the policy was issued a similar $10,000 policy issued by another insurer was in effect. Plaintiff's policy contained the following: "It is understood and agreed that this policy being written in the amount of $10,000 is 50% of all contributing insurance. It is thereby warranted that all contributing insurance shall be maintained to the extent that this policy participation will not exceed 50%." The other policy expired and was not renewed. Thereafter, the hotel was damaged by fire, and evidence was offered setting the amount of the loss in excess of $20,000. The trial court rendered judgment exonerating plaintiff from any liability under its policy on the ground that defendant, in failing to renew the other fire policy, breached a warranty of coinsurance.

The court of appeal reversed and remanded the cause for additional findings on the value of the property and the amount of the loss and directed the trial court to enter judgment for defendant in the amount dictated by those findings (*30 Cal. App. 3d 378, 387*). The court stated that the rule in California is that no right to avoid or rescind an existing policy of insurance arises from the violation by the insured of a provision in the policy unless (1) the provision materially affects the risk or (2) the policy specifically sets forth that the breach will avoid the policy. The court held that the rule is the same regardless of the fact that the provision may be characterized as a warranty (*30 Cal. App. 3d 378, 383*).

[b] Breach of Coinsurance Warranty as Immaterial

The factual and procedural background of *Los Angeles Mut. Ins. Co. v. Cawog (1973) 30 Cal. App. 3d 378, 106 Cal. Rptr. 307* , is discussed in *§ 120.291[3][a]*. In reversing the judgment exonerating plaintiff insurer from liability under its policy, the court of appeal, after reviewing California and out-of-state cases involving breaches of warranties, said that it was onlyreasonable to conclude that the purpose of the coinsurance clause was to limit plaintiff's liability to 50 percent of the loss and that so long as that limit was maintained it appeared immaterial whether the other 50 percent was covered by an insurance policy or by the insured as a self-insurer (*30 Cal. App. 3d 378, 386)* . The court added that more importantly, in view of the rule that an insurance policy must be interpreted in the light of the reasonable and normal expectations of the parties as to the extent of coverage (*30 Cal. App. 3d 378, 384)* , the insured could have reasonably understood that it was of no consequence whether the remaining 50 percent came from insurance coverage or from his own resources as a self-insurer (*30 Cal. App. 3d 378, 386)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsCancellation & NonrenewalGeneral OverviewInsurance LawClaims & ContractsCoinsuranceGeneral OverviewInsurance LawClaims & ContractsPolicy InterpretationGeneral Overview

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1. Rescission for Material Misrepresentations or Concealment

12-120 California Points & Authorities § 120.292

§ 120.292 Purported Rescission Was Not Effective Because There Was No Breach When Ambiguous Warranty Is Construed in Favor of Insured

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER'S PURPORTED RESCISSION OF THE INSURANCE CONTRACT WAS NOT EFFECTIVE BECAUSE THE MEANING OF THE WARRANTY WAS UNCERTAIN AND AMBIGUOUS, AND WHEN CONSTRUED IN FAVOR OF THE INSURED, THERE WAS NO BREACH.

Ambiguity in Express Warranty Resolved in Favor of Insured. Any doubt as to the meaning of a policy provision caused by the insurer's use of uncertain or ambiguous language will be resolved against the insurer in favor of the insured, and this rule applies to warranties (*see Holz Rubber Co., Inc. v. American Star Ins. Co. (1975) 14 Cal. 3d 45, 59-60, 120 Cal. Rptr. 415, 533 P.2d 1055*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's contention that the insurance policy was rescinded by the insurer prior to commencement of the action. The basis of these points and authorities is that the purported rescission was not effective because the meaning of the warranty was uncertain and ambiguous, and when construed in favor of the insured, there was no breach.

This form may be used in a variety of procedural contexts. For example, it may be used by an insured to oppose an insurer's motion for summary judgment in an action for breach of the insurance contract or to enforce the contract's provisions. Such an action may be brought by any of the following parties:

- By an insured, or the insured's beneficiary, under a life policy.
- By a transferee under a life or disability policy.
- By a judgment creditor of the insured under a liability policy.

For references to related Pleading and Practice chapters, see *§ 120.260[2][c]*.

This form may be used to oppose the points and authorities *set forth in § 120.280*.

See also *Comments in § 120.250[2][a]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should refer to the specific material provision of the warranty that is ambiguous, identify the ambiguity, and point out that when construed in favor of the insured, the insured did not breach the warranty.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.290* et seq.) and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be to oppose a motion by an insurer for summary judgment, when the evidentiary facts clearly support the contention and disclose that triable issues of material fact remain [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that triable issues of material fact remain [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts opposing the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Ambiguity in Warranty Resolved in Favor of Insured

The factual and procedural background of ***Holz Rubber Co., Inc. v. American Star Ins. Co.*** *(1975) 14 Cal. 3d 45, 120 Cal. Rptr. 415, 533 P.2d 1055* , is discussed in *§ 120.260[3][b]*. The insurance policies in that case contained an identical Automatic Sprinkler Warranty providing that since the policy was being written at a reduced rate based on the protection of the premises by an automatic sprinkler system it was a condition of the policy that, so far as the sprinkler

system and the water supply therefor were under the control of the insured, "due diligence shall be used by the insured to maintain them in complete working order" and that no change was to be made in the system or water supply without the written consent of the insurer or a specified fire rating bureau.

In affirming that portion of the judgment in favor of plaintiff insureds against defendant insurers, the Supreme Court said that an insurer who wishes to condition its contractual liability on the insured's conformance with certain conduct must do so in clear, unambiguous language, that if the insurer uses language which is uncertain, any reasonable doubt will be resolved against it, and that if the doubt relates to the extent or fact of coverage, whether as to the peril insured against, the amount of liability, or the person or persons protected, the language will be understood in its most inclusive sense for the benefit of the insured (*14 Cal. 3d 45, 59-60)* . The Court said that, since a semantically permissible construction of the policy would fairly achieve its manifest object of securing indemnity to the insured for the losses to which the insurance related, it adopted that construction and, accordingly, held that under the facts of the case the warranty required only that the insureds use due diligence in installing a sprinkler system in the new building and did not prohibit use of the new building for storage of insured stock pending installation of the system (*14 Cal. 3d 45, 60)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsCancellation & NonrenewalGeneral OverviewInsurance LawClaims & ContractsPolicy InterpretationAmbiguous TermsConstruction Against Insurers

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 120 INSURANCE
PART II. FORMS
D. Rescission, Cancellation, and Renewal of Policies
1. Rescission for Material Misrepresentations or Concealment

12-120 California Points & Authorities § 120.293

§ 120.293 Purported Rescission Was Not Effective Because Loss Occurred Prior to Breach

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER'S PURPORTED RESCISSION OF THE INSURANCE CONTRACT WAS NOT EFFECTIVE BECAUSE INSURED'S LOSS UNDER THE POLICY OCCURRED BEFORE THE TIME ARRIVED FOR PERFORMANCE OF THE WARRANTY ALLEGEDLY BREACHED.

Loss Occurred Before Warranty Was to Be Performed. When a loss insured against happens before the time arrives for the performance of a warranty relating to the future, the omission to fulfill the warranty does not avoid the policy (*Ins. Code § 446*; *see also Ins. Code § 449*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's contention that the insurance policy was rescinded by the insurer prior to commencement of the action. The basis of these points and authorities is that the purported rescission was not effective because the insured's loss under the policy occurred before the time arrived for performance of the warranty allegedly breached.

This form may be used in a variety of procedural contexts. For example, it may be used by an insured to oppose an insurer's motion for summary judgment in an action for breach of the insurance contract or to enforce the contract's provisions. Such an action may be brought by any of the following parties:

- By an insured, or the insured's beneficiary, under a life policy.

- By a transferee under a life or disability policy.
- By a judgment creditor of the insured under a liability policy.

For references to related Pleading and Practice chapters, see *§ 120.260[2][c]*.

This form may be used to oppose the points and authorities *set forth in § 120.280* et seq.

See also *Comments in § 120.250[2][a]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should refer to evidence establishing that the insured's loss under the policy occurred before the time arrived for performance of the warranty.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.290* et seq.) and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be to oppose a motion by an insurer for summary judgment, when the evidentiary facts clearly support the contention and disclose that triable issues of material fact remain [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that triable issues of material fact remain [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts opposing the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Loss Occurred Before Warranty Was to Be Performed

Ins. Code § 449 also provides that a breach of warranty without fraud merely exonerates an insurer from the time that it occurs, or where the warranty is broken in its inception, prevents the policy from attaching to the risk.

Legal Topics:

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

Insurance LawClaims & ContractsCancellation & NonrenewalGeneral Overview

California Points & Authorities

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1. Rescission for Material Misrepresentations or Concealment

12-120 California Points & Authorities § 120.294

§ 120.294 Purported Rescission Was Not Effective Because Express Warranty Was Not in Writing

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER'S PURPORTED RESCISSION OF THE INSURANCE CONTRACT WAS NOT EFFECTIVE BECAUSE THE EXPRESS WARRANTY ALLEGEDLY BREACHED WAS NOT IN WRITING AS REQUIRED UNDER INSURANCE CODE SECTION 443.

Requirement That Express Warranty Be Contained in Policy or Writing. Every express warranty made at or before the execution of a policy must be contained in the policy itself, or in another instrument signed by the insured and referred to in the policy as making a part of it (*Ins. Code § 443*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's contention that the insurance policy was rescinded by the insurer prior to commencement of the action. The basis of these points and authorities is that the purported rescission was not effective because the express warranty allegedly breached was not in writing as required under *Ins. Code § 443*.

This form may be used in a variety of procedural contexts. For example, it may be used by an insured to oppose an insurer's motion for summary judgment in an action for breach of the insurance contract or to enforce the contract's provisions. Such an action may be brought by any of the following parties:

- By an insured, or the insured's beneficiary, under a life policy.

- By a transferee under a life or disability policy.
- By a judgment creditor of the insured under a liability policy.

For references to related Pleading and Practice chapters, see *§ 120.260[2][c]*.

This form may be used to oppose the points and authorities *set forth in § 120.280*.

See also *Comments in § 120.250[2][a]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should refer to evidence establishing that the express warranty allegedly breached was not in writing as required under *Ins. Code § 443*.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.290* et seq.) and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be to oppose a motion by an insurer for summary judgment, when the evidentiary facts clearly support the contention and disclose that triable issues of material fact remain [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that triable issues of material fact remain [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts opposing the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Requirement That Express Warranty Be Contained in Policy or Writing

Under ***Ins. Code § 443*** , every express warranty made at or before the execution of a policy must be contained in the policy itself, or in anotherinstrument signed by the insured and referred to in the policy as making a part of it.

Legal Topics:

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

Insurance LawClaims & ContractsCancellation & NonrenewalGeneral OverviewInsurance LawClaims & ContractsPolicy InterpretationGeneral Overview

California Points & Authorities

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12-120 California Points & Authorities §§ 120.295-120.299

[Reserved]

§§ 120.295[Reserved]

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D. Rescission, Cancellation, and Renewal of Policies
2. Policy Cancellation Prior to Liability or Loss

12-120 California Points & Authorities § 120.300

§ 120.300 Policy Was Canceled Before Liability Arose or Loss Occurred

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE INSURANCE CONTRACT WAS CANCELED BY THE _____ [MUTUAL AGREEMENT OF THE PARTIES or INSURED or INSURER] PRIOR TO THE DATE THAT THE _____ [LIABILITY AROSE or LOSS OCCURRED].

A. Insurer Terminated Policy by Prescribed Notice. A policy may be terminated by expiration of the term for which it was written without renewal, or by either party on a prescribed statutory notice, or by mutual agreement (*Clauson v. Industrial Indem. Co. (1966) 241 Cal. App. 2d 440, 445, 50 Cal. Rptr. 615*).

[*Optional*] **B. Policy Was Canceled by Its Terms or Mutual Agreement.** Insurance contracts can generally be canceled only pursuant to their terms or by mutual consent; cancellation may be effected by express or implied mutual agreement of the insurer and the insured independently of the existence of conditions authorizing cancellation under the provisions of the policy (*Escobedo v. Estate of Snider (1997) 14 Cal. 4th 1214, 60 Cal. Rptr. 2d 722, 930 P.2d 979* ; *Spott Elec. Co. v. Industrial Indem. Co. (1973) 30 Cal. App. 3d 797, 806, 106 Cal. Rptr. 710*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of an insurer's contention that the insurance policy was canceled by the insurer prior to commencement of the action. The basis of these points and authorities is that the policy was canceled before the event otherwise covered under the policy occurred.

This form may be used in a variety of procedural contexts. For example, it may be used by an insurer in support of a

motion for summary judgment in an action for breach of the insurance contract or to enforce the contract's provisions. Such an action may be brought by any of the following parties:

- By an insured, or the insured's beneficiary under a life policy.
- By a transferee under a life or disability policy.
- By a judgment creditor of the insured under a liability policy.

A notice of cancellation of an automobile insurance policy is effective only if based on one or more of the following reasons, notwithstanding any other provision of law [*Ins. Code § 1861.03(c)(1)*]:

(1) Nonpayment of premium;

(2) Fraud or material misrepresentation affecting the policy or the insured; and

(3) A substantial increase in the hazard insured against.

Grounds for cancellation of automobile liability policies had previously been governed by *Ins. Code § 661*, which was superseded by *Ins. Code § 1861.03(c)(1)* pursuant to adoption by the voters of Proposition 103 in the November 8, 1988, general election [*see Ins. Code § 660* (definitions regarding automobile liability policy), *Ins. Code § 662* and *Ins. Code § 662.1* (notice of cancellation), *Ins. Code § 664* (proof of mailing), *Ins. Code § 665* (notice of assigned risk plan), *Ins. Code § 666* (statement of ground for cancellation), *Ins. Code § 668.5* (policy in effect less than 60 days)].

Regarding cancellation of certain property and liability policies, *Ins. Code § 676* governs grounds for cancellation of insurance policies, regarding risks located or resident in California, that insure the following contingencies [*Ins. Code § 675*]:

(1) Loss of or damage to real property that is used predominantly for residential purposes and consists of not more than four dwelling units.

(2) Loss of or damage to personal property in which natural persons resident in specifically described real property of the kind described in Paragraph (1), above, have an insurable interest, except personal property used in the conduct of a commercial or industrial enterprise.

(3) Legal liability of a natural person or persons for loss of, damage to, or injury to, persons or property, but not including policies primarily insuring risks arising from the conduct of a commercial or industrial enterprise [*see Ins. Code §§ 675.5, 676.2* (commercial insurance policies)].

Ins. Code § 675 does not apply to automobile insurance, workers' compensation insurance (*see Ins. Code § 676.8* (special cancellation requirements governing workers' compensation insurance), or policies exempt under *Ins. Code § 679.6* (regarding certain risks eligible for placement with nonadmitted insurers) [*Ins. Code § 675*].

After a policy specified in *Ins. Code § 675* has been in effect for 60 days or, if the policy is a renewal, effective immediately, no notice of cancellationis effective unless it is based on the occurrence, after the effective date of the policy, of one or more of the following [*Ins. Code § 676*; *see Ins. Code § 677* (notice)]:

- Nonpayment of premium, including nonpayment of any additional premiums, calculated in accordance with the current rating manual of the insurer, justified by a physical change in the insured property or a change in its occupancy or use.

- Conviction of the named insured of a crime having as one of its necessary elements an act increasing any hazard insured against.

- Discovery of fraud or material misrepresentation by either the insured or his or her representative in obtaining the insurance; or the named insured or his or her representative in pursuing a claim under the policy.

- Discovery of grossly negligent acts or omissions by the insured or his or her representative substantially increasing any of the hazards insured against.

- Physical changes in the insured property that result in the property becoming uninsurable.

Regarding cancellation of fire insurance policies, pursuant to the standard form of fire insurance policy set forth in *Ins. Code § 2071*, an insured may cancel the policy at any time on request. On demand and surrender of the policy by the insured, the insurer must refund the excess of paid premium above the customary short rates for the expired time. The insurer may cancel the policy at any time by giving to the insured a 20 days' written notice of cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired time. If not tendered, the excess must be refunded on demand. Notice of the cancellation must state that the excess premium, if not tendered, will be refunded on demand. With respect to policies originated or renewed after December 31, 2003, if the reason for cancellation is nonpayment of premium, the insurer may cancel the policy by giving to the insured a ten-days' written notice of cancellation [*Ins. Code § 2071*].

Additional statutes govern cancellation of county mutual fire insurers (*see Ins. Code § 5093*), county mutual fire reinsurers (*see Ins. Code §§ 9010-9012*), and fraternal fire insurers (*see Ins. Code § 9093*).

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. For example, if a statute governs cancellation of the policy, counsel should set forth the provisions of the statute and show that the requirements were met to effect cancellation. If there was an agreement between the parties to cancel the policy, or the policy was canceled pursuant to policy terms, counsel should set forth facts in support of the agreement or in compliance with policy terms and show that the cancellation was effected before the event that would otherwise have incurred the insurer's liability under the policy.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be a motion by an insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that there is no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts supporting the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Pleading and Practice Chapters

For complaints by an insured against an insurer for damages for breach of contract because of the insurer's refusal to pay a third-party judgment against the insured or to defend the insured in a third-party action, see California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender). For a discussion of the rules applicable to summary judgment, a form of notice of motion for summary judgment, and related forms, see Ch. 537, *Summary Judgment* , in that publication.

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities in *§ 120.330* may be used to oppose these points and authorities.

[3] Discussion of Authorities

[a] Insurer Terminated Policy by Prescribed Notice

Clauson v. Industrial Indem. Co. *(1966) 241 Cal. App. 2d 440, 50 Cal. Rptr. 615* , was an action against an insurer under an oral binder for fire insurance. From a judgment for plaintiff, defendant insurer appealed, contending inter alia that the insurance broker in securing the oral binder had misrepresented facts by stating that the prior policy, which had been issued by another company, was expiring, whereas it had been canceled by mutual agreement of the parties. In rejecting this contention on the ground that the misrepresentation was immaterial, the court of appeal said that there is a distinction in the parlance of the insurance field between expiration of an insurance policy and its cancellation or other termination, that expiration means the policy has reached the end of the term for which it was written, and that a policy may also be terminated by either party on a prescribed statutory notice or by mutual agreement (*241 Cal. App. 2d 440, 445)* .

[b] Policy Was Canceled by Its Terms or Mutual Agreement

In ***Escobedo v. Estate of Snider*** *(1997) 14 Cal. 4th 1214, 60 Cal. Rptr. 2d 722, 930 P.2d 979* , a wrongful death action arising out of an airplane crash, against the pilot's former aviation insurer, the trial court found no coverage because the policy had expired before the accident for nonpayment of premium, and entered judgment for defendant. The Court of Appeal reversed. However, the Supreme Court reversed the judgment of the Court of Appeal. The Supreme Court held that the trial court properly found no coverage because the policy had been canceled before the accident for nonpayment of premium (*14 Cal. 4th 1214, 1222-1223)* .

The Supreme Court observed that a provision of the California Uniform Aircraft Financial Responsibility Act (CUAFRA) (*Pub. Util. Code §§ 24230-24410*), stating that certain aircraft liability policies may not be canceled without 30 days' prior notice to the State Department of Transportation (*Pub. Util. Code § 24361*) is ambiguous and that neither the language of *Pub. Util. Code § 24361* nor the purpose it serves within CUAFRA, is at all plain (*14 Cal. 4th 1214, 1224)* . Accordingly, it should be interpreted in a manner that will result in extending fewer policies' coverage beyond the time of their facial cancellation and will avoid imposing on aviators, insurers, and the department a clerical burden of dubious value under CUAFRA. Thus *Pub. Util. Code, § 24361* applies only to cancellation of insurance

policies that have, before cancellation, been proffered to the department to show financial responsibility after an accident under *Pub. Util. Code § 24243(f)* or *Pub. Util. Code, § 24327(d), (e),* or *(f).*

Plaintiff presented no evidence that the policy issued by defendant to the pilot was ever filed with, or certified to, the department. As the party with the burden of proving coverage, plaintiff also had the burden of showing any fact necessary to such a finding, including that the policy at issue fell within the class of policies subject to *Pub. Util. Code § 24361* but she failed to meet that burden (*14 Cal. 4th 1214, 1222-1226)* .

Spott Elec. Co. v. Industrial Indem. Co. *(1973) 30 Cal. App. 3d 797, 106 Cal. Rptr. 710* , was a declaratory-relief action involving two insurers and several insured parties, concerning the respective obligations of the insurers regarding a March 23, 1966, fire in a third-party's residence and an ensuing lawsuit against the insureds. The insureds were insured under a comprehensive liability policy for the term of March 1, 1965, to March 1, 1966. During that period, the insureds' insurance broker discussed with another insurer the possibility of obtaining a comprehensive policy when the first policy expired. In late February, 1966, the broker sought bids from both insurers. On February 28, 1966, the insureds' current insurer mailed a written binder of insurance (a temporary contract of insurance), effective March 1, 1966, through March 30, 1966.

The binder, in effect, provided insurance according to the terms, conditions, limits, and provisions of the expiring policy, except with regard to cancellation. In relevant part, the binder stated: "A pro rata premium charge will be made for the coverage afforded by this Binder unless policies are issued and accepted by the Insured. The issuance of a Policy shall cancel this Binder." A day or two before March 1, 1966, an agent of the second insurer talked to the insureds' broker by telephone. The agent allegedly knew nothing of the first binder and issued an oral binder to the insureds with the same terms of coverage as their previous policy. He later testified that he understood that the oral binder provided coverage for the insureds effective March 1, 1966, and that a policy for the entire year would subsequently be issued, with the premium price left for later negotiation. The policy was issued on April 14, 1966, with an effective date of March 1, 1966. The insureds paid a premium for the period beginning March 1. The trial court held that the first insurer had no obligation to defend or indemnify the insureds with respect to the third-party claims, and that it was entitled to judgment in its favor both as defendant in the action brought against it by the insureds and as cross-complainant against the second insurer. It therefore held that the second insurer was solely liable for coverage of claims arising from the fire. The insureds and the second insurer appealed.

The court of appeal affirmed, holding that the first insurer's policy had been effectively canceled (*30 Cal. App. 3d 797, 806-808)* . The court noted that under the terms of the first insurer's binder, it could be canceled by the issuance of a policy or written notice to the insured. Insurance contracts can generally be canceled only pursuant to their terms or by mutual consent. Cancellation may beeffected by express or implied mutual agreement of the insurer and the insured independently of the existence of conditions authorizing cancellation under the provisions of the policy. Although there may be a conflict whether substitution has occurred, this conflict is addressed to the trier of fact (*30 Cal. App. 3d 797, 806)* .

The court rejected the second insurer's contention that liability should be apportioned pro rata between the two insurers. Although there is authority supporting the contention that if a rescission of a binder, given retroactive effect, prejudices another insurer by increasing its proportionate share of the total coverage, the liability should be apportioned, the court refused to apply that rule to the instant case. In the case before it, the court noted that the broker intended to protect the insureds and did not intend to purchase or pay for double coverage, permanent or temporary. The second policy was delivered in April 1966, with full knowledge of the possible claims resulting from the fire on March 23. Essentially, the issue is whether an insured must keep coverage it does not want or need merely to afford contribution rights to an insurer that accepted a full premium for full coverage without any expectation of, nor right to expect, contribution from anyone. The court answered in the negative (*30 Cal. App. 3d 797, 807)* . The evidence supported the inference that the broker at no time intended to renew with the first insurer, but procured the first 30-day binder merely to assure continuity in coverage in the event that the second insurer's bid was not competitive. The court noted that this

interpretation of the facts finds support in the broker's action in ordering the first insurer's binder "canceled flat" after the bid of the second insurer was analyzed and found to be satisfactory (*30 Cal. App. 3d 797, 808)* .

[4] Additional Authorities

[a] Insurer Terminated Policy by Prescribed Notice

In *Gorham Co., Inc. v. First Fin. Ins. Co. (2006) 139 Cal. App. 4th 1532, 44 Cal. Rptr. 3d 197* , a subcontractor financed the purchase of a commercial lines policy that named the general contractor of a project for a city as an additional insured. When the insured defaulted, the lender gave the insured the required advance notice of cancellation, and notified the insurer under *Ins. Code § 673(d)* that it was exercising the insured's right to cancel the policy, which had been assigned to the lender as part of the financing agreement. The general contractor received no notice of cancellation. Litigation ensued involving the city, the general contractor, and the subcontractor. The contractor as an additional insured tendered defense to the subcontractor's insurer, among others. In a declaratory relief action brought by the subcontractor's insurer, the general contractor's cross-complaint sought declaratory relief and damages for breach of contract, bad faith, and related causes of action, based on the insurer's failure to defend. The trial court granted the insurer's motion for summary judgment, holding that the insurer properly exercised its right to cancel the policy under *Ins. Code § 673(d)*, which governs cancellation of an insurance policy by a lender for nonpayment of premium, and that it had no duty to notify the additional insured (*139 Cal. App. 4th 1532, 1541-1544)* .

In *In re First Capital Life Ins. Co. (1995) 34 Cal. App. 4th 1283, 40 Cal. Rptr. 2d 816* , the court denied a claim for life insurance benefits by a company that had taken out a policy insuring its president. On November 26, 1991, the policy entered a late period for nonpayment of the required premium. The insurer sent an initial late notice to the company in November, 1991 and a second late notice in December, 1991, stating that the policy would lapse on January 26, 1992, if the premium was not paid. On January 28, 1992, the insurer sent a notice informing the company that the policy had lapsed. However, in July 1992, a late notice on the policy was mistakenly sent to the company, and the company attempted to tender the premium. By this time, the company was aware that its president has been diagnosed with lung cancer. The court held that given the knowledge the insured possessed, it could not reasonably have believed the insurer intended an offer, and at no time did the insured rely on coverage after the lapse; in fact, it had purchased a replacement policy. The court further held that the insurer's mistaken notice to its insured of an offer to reinstate the policy was not a waiver of its right to declare a forfeiture of the policy (*34 Cal. App. 4th 1283, 1291-1292)* .

In *Holland v. Sterling Cas. Ins. Co. (1994) 25 Cal. App. 4th 1059, 1063-1064, 30 Cal. Rptr. 2d 809* , the insurer issued an automobile insurance policy to the insured. Premiums on the policy were financed by a lender. The lender subsequently chose to exercise its statutory right under *Ins. Code § 673* to cancel the policy. The bank claimed it served both the insurer and the insured with notice of its intent to exercise its cancellation rights, but the insured allegedly never received the notice. The insurer did receive notice, and canceled the policy. The insurer did not independently notify the insured of the cancellation. Five days after the cancellation, a person covered under the policy drove the car and injured a pedestrian. The pedestrian sued the insured, and the carrier declined coverage on the ground that the policy had been canceled prior to the accident. The insured then cross-complained against the insurer and the bank for bad faith and breach of contract. The trial court held that the policy had been canceled and granted the insurer judgment on the pleadings, and the insureds appealed. The court of appeal affirmed. The court noted that *Ins. Code § 673* requires that a lender, to exercise its right of cancellation, must mail both the insurer and the insured a five-day precancellation notice, followed by a subsequent confirmation of cancellation within five days following the effective date of cancellation. The burden of sending these notices is on the lender rather than the insurer, and the insurer cannot be held liable for failing to independently notify the insured of the cancellation when the lender failed to do so or the insured failed to receive the lender's notice (*25 Cal. App. 4th 1059, 1063-1064)* .

In *Coe v. Farmers New World Life Ins. Co. (1989) 209 Cal. App. 3d 600, 257 Cal. Rptr. 411* , the widow of the insured under a life-insurance policy brought an action against the insurer, stating a cause of action, inter alia, for breach of

contract. The insured had executed a request to cancel the policy on March 1, 1984; he died on April 8, 1984. The trial court granted the insurer's motion for summary judgment, and the court of appeal affirmed, holding that the policy had been canceled before the insurer's death; it further held that the "grace period" under the policy, which continued the policy in force for 31 days after nonpayment of premiums, had no effect with respect to the cancellation, and that no statutory provision effected a grace period for that purpose (*209 Cal. App. 3d 600, 607)* .

In *Hoffman v. Citadel Gen. Assurance, Ltd. (1987) 194 Cal. App. 3d 1356, 240 Cal. Rptr. 253* , the issue of policy cancellation arose in the context of limitations of actions, in an action by an insured against the insurer in which the trial court granted the defendants' motion for summary judgment. The court of appeal affirmed, holding that the requirementthat a premium lender notify the insurer of cancellation under *Ins. Code § 673* is for the benefit of the insurer, not the insured, and the insured cannot claim ineffective cancellation because the insurer failed to receive notice under that provision (holding therefore that the limitations period, beginning from the time of cancellation, had run before commencement of the action) (*194 Cal. App. 3d 1356, 1362-1363)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGeneral OverviewInsurance LawClaims & ContractsCancellation & NonrenewalGeneral OverviewInsurance LawClaims & ContractsPolicy InterpretationGeneral Overview

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 120 INSURANCE
PART II. FORMS
D. Rescission, Cancellation, and Renewal of Policies
2. Policy Cancellation Prior to Liability or Loss

12-120 California Points & Authorities §§ 120.301-120.309

[Reserved]

§§ 120.301[Reserved]

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12-120 California Points & Authorities § 120.310

§ 120.310 Purported Cancellation Was Not Effective Because Policy Was Not Canceled Before Loss Occurred

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURER'S PURPORTED CANCELLATION OF THE INSURANCE CONTRACT WAS NOT EFFECTIVE BECAUSE THE POLICY WAS NOT CANCELED BEFORE THE LOSS OCCURRED.

Triable Issue Exists Regarding Whether Policy Was Canceled. In an action brought by an insured against the insurer to recover benefits under an insurance policy, summary judgment for the insurer is improper when a triable issue of fact remains regarding whether the policy was effectively canceled according to law and the cancellation provisions of the policy (*Preis v. American Indem. Co. (1990) 220 Cal. App. 3d 752, 758-761, 269 Cal. Rptr. 617*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's contention that the insurance policy was canceled by the insurer prior to commencement of the action. The basis of these points and authorities is that the purported cancellation was not effective because the policy was not canceled before the loss occurred.

This form may be used to oppose the points and authorities *set forth in § 120.300*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. For example, in a case in which an insured isopposing an insurer's motion for summary judgment, counsel should state facts showing that the evidence introduced by defendant is insufficient to establish that defendant complied with procedures required by law

and by the cancellation provisions of the policy.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues and to place the argument within its proper procedural context. In the case of the example given above, counsel would modify the form to assert that triable issues of material fact remain [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts opposing the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

[c] Related Pleading and Practice Chapters

For complaints by an insured against an insurer for damages for breach of contract because of the insurer's refusal to pay a third-party judgment against the insured or to defend the insured in a third-party action, see California Forms of Pleading and Practice, Ch. 308, Insurance (Matthew Bender). For a discussion of the rules applicable to summary judgment, a form of notice of motion for summary judgment, and related forms, see Ch. 537, Summary Judgment, in that publication.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Summary Judgment for Insurer Improper When Triable Issue Exists Regarding Whether Policy Was Canceled

In ***Preis v. American Indem. Co.*** *(1990) 220 Cal. App. 3d 752, 269 Cal. Rptr. 617* , an insured under a policy covering hazard risks to property brought an action against the insurer for damages caused by the insurer's denial of the insured's claim for fire damage benefits under the policy. When plaintiff purchased the apartment building, it was covered by a policy issued by defendant to the former owners of the property. Before the transfer of ownership, plaintiff and his lender contacted the insurance broker that produced the policy, in order to obtain proof of hazard insurance, a requirement for the loan. The broker modified the policy with regard to the name of plaintiff as the insured, and the equitable interest of the lender in the property, and sent the modified policy to plaintiff and his lender, which then loaned plaintiff the money to purchase the property. The property was damaged by fire before the expiration of the policy period established under the original policy issued to the former owners. Defendant denied coverage, asserting that the policy was canceled some four months before the loss.

The policy contained a cancellation provision that stated in relevant part: "This policy may be canceled by the Company by mailing to the named insured at the mailing address shown in the declarations, written notice stating when not less than ten days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice. Notice of cancellation addressed to the named insured and mailed to the mailing address shown in the

Declarations shall be sufficient notice to effect cancellation of this policy." At trial, defendants successfully moved for summary judgment on the grounds that the evidence showed that (1) the policy was canceled in accordance with its provisions before the fire, and (2) the broker had no authority to issue or renew a policy on the property. Plaintiff appealed.

The court of appeal reversed, holding that triable issues of fact existed regarding whether defendant had canceled the policy (and whether defendant negligently caused plaintiff to believe that the broker possessed the authority to modify the policy). The court noted that under the general rule, parties to an insurance policy are free, subject to legislative restriction, to arrange the occasions, method, and means of cancellation by private agreement. In the instant case, the parties agreed the insurer could cancel the policy by mailing written notice to the named insureds at the mailing address shown in the policy declaration. Therefore, under the terms of the policy, defendant was required to mail a notice of cancellation to the namedinsureds, that is, the former property owners, to effectuate the cancellation.

According to *Ins. Code § 38*, the affidavit of the person who mails the notice, stating the facts of the mailing, is prima facie evidence that the notice was mailed. The court noted that defendant did not submit an affidavit from anyone claiming to have mailed a cancellation notice to the named insureds. Instead, defendant presented the following evidence: a copy of a notice canceling the policy; a postal receipt showing that on a particular date some five months before the fire, an envelope was mailed by defendant's agent to the named insureds (the former property owners); and a declaration by the agent's vice-president describing the customary procedure for mailing notices of cancellation (*220 Cal. App. 3d 752, 758*). The court stated that the postal receipt established at most that on that given date, an envelope was mailed to the named insureds at a certain address; however, defendants presented no evidence regarding the contents of the envelope, which could in fact have been empty. Therefore, the postal receipt was not evidence that a notice of cancellation was mailed to the named insureds as required under the terms of the policy (*220 Cal. App. 3d 752, 759*).

The court noted that proof of mailing the cancellation notice would not have been difficult: defendants need only have submitted a declaration from a competent witness describing the following steps: (1) the witness placed a notice of cancellation of the subject policy in an envelope; (2) the envelope was addressed to the named insureds at the declared address; (3) the envelope was affixed with the proper postage; and (4) the envelope was placed in the United States mail at a certain location. However, no such declaration appeared in the record (*220 Cal. App. 3d 752, 759-760)* . Further, defendant's evidence of customary mailing procedures was contradicted by plaintiff's declaration that the named insureds did not receive the notice; and a declaration by the agent's vice-president stated that he mailed the notice to plaintiff, which contradicts defendant's claim that the notice was mailed to the named insureds, that is, the former owners. Consequently, the court held that triable issues of fact existed regarding whether the cancellation notice was mailed and, if it was, whether it was mailed to the named insureds as required by the terms of the policy (*220 Cal. App. 3d 752, 760-761)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsCancellation & NonrenewalGeneral OverviewInsurance LawClaims & ContractsPolicy InterpretationGeneral Overview

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12-120 California Points & Authorities §§ 120.311-120.319

[Reserved]

§§ 120.311[Reserved]

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3. Insured's Defective Attempt to Renew

12-120 California Points & Authorities § 120.320

§ 120.320 Motor Vehicle Policy Expired at End of Policy Term Because of Insured's Defective Attempt to Accept Renewal Offer

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE INSURANCE CONTRACT EXPIRED BY ITS OWN TERMS WITHOUT RENEWAL PRIOR TO THE DATE THAT THE _____ [LIABILITY AROSE or LOSS OCCURRED].

A. Insurance Contract Specifies Policy Term. An insurance contract is required to specify the period during which the insurance is to continue (*Ins. Code § 381(e)*).

B. Policy Expired at End of Term. A motor vehicle policy, as defined in *Insurance Code Section 660(a)-(d)*, expires when coverage is terminated by reason of the policy's having reached the end of the term for which it was issued or the end of the period for which a premium has been paid (*Ins. Code § 660(i)*).

C. There Was No "Renewal" as Defined. "Renewal" or "to renew" means to continue coverage with either the insurer that issued the policy or an affiliated insurer, as defined in *Section 1215 of the Insurance Code*, for an additional period on expiration of the current period of a policy (*Ins. Code § 660(e)*).

[*Optional*] **D. Insurer Offered to Renew Policy or Gave Nonrenewal Notice.** At least 30 days prior to policy expiration, a motor vehicle insurer must deliver or mail to the named insured at the address shown in the policy either a written or verbal offer of renewal of the policy, as defined in *Section 660(a)-(d) of the Insurance Code*, contingent on payment of premium as stated in the offer, or a notice of nonrenewal of the policy (*Ins. Code § 663*; *see also Ins. Code §§ 660(f)* (defining nonpayment of premium), 660(h) (defining nonrenewal).

[*Optional*] **E. Insured Did Not Accept Renewal Offer.** To effect the renewal of an insurance policy, there must be

both an offer by the insurer to renew and an acceptance by the insured (*Fujimoto v. Western Pioneer Ins. Co. (1978) 86 Cal. App. 3d 305, 313, 150 Cal. Rptr. 88*).

[*Optional*] **F. Attempted Acceptance Did Not Comply With Terms of Offer.** The insured's attempted acceptance of the insurer's renewal offer that fails to comply with the terms of the offer constitutes no acceptance and results in the expiration of the policy on its termination date (*Fujimoto v. Western Pioneer Ins. Co. (1978) 86 Cal. App. 3d 305, 313, 150 Cal. Rptr. 88*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of an insurer's contention in an action by an insured under a motor vehicle policy, as defined in *Ins. Code § 660(a)-(d)*, or by the judgment creditor of the insured under a liability policy, against the insurer for damages for breach of the insurance contract (or to enforce the contract provisions), that the insurance contract that is the subject of the lawsuit expired by its own terms prior to the date on which the insured's liability arose or loss occurred.

In addition, if applicable, this form may be used in support of the contention that the insured's attempted renewal of the policy was defective and did not result in its continuation beyond the expiration date.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be a motion by an insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that there is no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts supporting the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Pleading and Practice Chapters

For complaints by an insured against an insurer for damages for breach of contract because of the insurer's refusal to pay a third-party judgment against the insured or to defend the insured in a third-party action, see California Forms of Pleading and Practice, Ch. 308, Insurance (Matthew Bender). For a discussion of the rules applicable to summary judgment, a form of notice of motion for summary judgment, and related forms, see Ch. 537, Summary Judgment, in that publication.

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Policy Expired at End of Term

Ins. Code § 660(i) provides that "expiration," as used in *Ins. Code §§ 660-669.5*, means termination of coverage by reason of the policy having reached the end of the term for which it was issued or the end of the period for which a premium has been paid.

Ins. Code § 660 provides that "policy," as used in *Ins. Code §§ 660-669.5*, means an automobile liability, automobile physical damage, or automobile collision policy, or any combination thereof, delivered or issued for delivery in this state, insuring a single individual or individuals residing in the same household, as named insured, and under which the insured vehicles therein designated are of the following types only [*Ins. Code § 660(a)*]:

(1) A motor vehicle of the private passenger or station wagon type that is not used as a public or livery conveyance for passengers, nor rented to others;

(2) Any other four-wheel motor vehicle with a load capacity of 1,500 pounds or less; provided, however, that *Ins. Code §§ 660-669.5* do not apply to any policy issued under an automobile assigned risk plan, or to any policy insuring more than four automobiles, or to anypolicy covering garage, automobile sales agency, repair shop, service station, or public parking place operation hazards; or

(3) A motorcycle.

The section further defines automobile liability coverage [*Ins. Code § 660(b)*], automobile physical damage coverage [*Ins. Code § 660*], and automobile collision coverage [*Ins. Code § 660(d)*].

[b] There Was No "Renewal" as Defined

Ins. Code § 660(e) further provides that if coverage is continued with an affiliated insurer, it shall be the same or broader coverage as provided by the present insurer, and the insured shall be notified in writing at least 20 days prior to expiration of the current policy period of the all of the following: (1) that the insurer has determined that it will not offer renewal of the policy with the present insurer, (2) that it is offering replacement in an affiliated insurer, and (3) that the insured may obtain in writing the reasons for the change in insurers if he or she requests in writing not later than one month following the expiration of the policy period or term of six months.

Ins. Code § 660(e) also provides that any policy (as defined in *Ins. Code § 660(a)-(d)*, discussed in *§ 120.320[3][a]*) with a policy period or term of six months or less, whether or not made continuous for successive terms on the payment of additional premiums, shall for the purpose of *Ins. Code §§ 660-669.5* be considered as if written for a policy period or term of six months, and that any policy written for a term longer than one year, or any policy with no fixed expiration date, shall for the purpose of *Ins. Code §§ 660-669.5* be considered as if written for successive policy periods or terms of one year.

[c] Insurer Offered to Renew Policy or Gave Nonrenewal Notice

At least 20 days prior to policy expiration, an insurer must deliver or mail to the named insured at the address shown in the policy either a written or verbal offer of renewal of the policy (as defined in *Ins. Code § 660(a)-(d)*, discussed in *§ 120.320[3][a]*), contingent on payment of premium as stated in the offer, or a notice of nonrenewal of the policy. The notice must contain or be accompanied by a statement that on written request by the named insured, made not later than one month following the expiration of the policy period, or delivered to the insurer, the insurer will notify the insured in writing, within 30 days of the insured's request, the reason or reasons for the nonrenewal. In the event that an insurer fails to give the named insured either an offer of renewal or notice of nonrenewal as required, the existing policy, with no change in its terms and conditions, must remain in effect for 20 days from the date that either the offer to renew or the noticeof nonrenewal is delivered or mailed to the named insured. The insurer must provide a notice to that effect to the named insured with the policy or the notice of renewal or nonrenewal.

Notwithstanding the failure of an insurer to comply with *Ins. Code § 663*, the policy terminates on the effective date of any other replacement or succeeding automobile insurance policy procured by the insured, or the insured's agent or broker, with respect to any automobile designated in both policies. The insurer is not required to notify the named insured, or any other insured, of nonrenewal of the policy if the insurer has mailed or delivered a notice of expiration or cancellation, on or before the 20th day preceding expiration of the policy period [*Ins. Code § 663*].

Ins. Code § 660(f) defines "nonpayment of premium" as used in *Ins. Code §§ 660-669.5* as meaning failure of the named insured to discharge when due any of his or her obligations in connection with the payment of premiums on a policy (as defined in *Ins. Code § 660(a)-(d)*, (discussed in *§ 120.320[3][a]*), or any installment of such premium, whether the premium is payable directly to the insurer or its agent or indirectly under any premium finance plan [*see Ins. Code § 673*] or extension of credit.

Ins. Code § 660(h) defines "nonrenewal" as a notice by the insurer to the named insured that the insurer is unwilling to renew a policy.

[d] Insured Did Not Accept Renewal Offer

Fujimoto v. Western Pioneer Ins. Co. *(1978) 86 Cal. App. 3d 305, 150 Cal. Rptr. 88* , was an action against an insurer by its insured for a judgment declaring that an automobile liability insurance policy issued by defendant was in force on June 23, 1976, when plaintiff, an insured under the policy, struck and injured a pedestrian while driving a car covered by the policy. The policy, which covered both plaintiff and her husband, had been issued on June 21, 1972, for a period of six months and, subject to the consent of the insurer, for successive policy periods as provided in Condition 1 of the policy. Condition 1 provided that subject to the consent of the insurer, the policy may be continued in force for successive policy periods by payment of the required continuation premium to the insurer on or before the effective date of each successive policy period and that if such premium was not paid when due, the policy would terminate as of that date and such date would be the end of the policy period.

Following its issuance, the policy was continued for successive six-month periods, the latest being from December 21, 1975, to June 21, 1976. On May 20, 1976, defendant mailed to plaintiff's husband a "Premium Notice" which set forth the policy number, a term of six months, and a due date of June 21, 1976. The body of the notice set forth the coverages of the policy, the premiums due for the respective coverages, a total premium payable of $215, and at the bottom a notice that on receipt of paymentthe insured would receive a continuation certificate of the policy for an additional six months' period, that payment must be received by the insurer before the due date indicated, and that in the event payment was not received by that date, the policy was to become null and void. Plaintiff's husband became ill on May 27, 1976, and was hospitalized until his death on July 3, 1976.

On June 22, 1976, plaintiff mailed a check for $215 to the insurer which received it on June 25 and renewed the policy for six months as of the latter date. The accident, as indicated, occurred on June 23, 1976. The pedestrian sued plaintiff, who then sued defendant insurer for declaratory relief. The trial court determined that the policy was in effect on June

23, 1976, and entered judgment accordingly. In reversing the judgment, the court of appeal pointed out that to effect the renewal of an insurance policy there must be both an offer to renew (by the insurer) and an acceptance of the offer (by the insured) (*86 Cal. App. 3d 305, 313)* .

NOTE:

Fujimoto interpreted notice requirements pursuant to *Ins. Code § 663* as it existed prior to its amendment in 1986.

[e] Attempted Acceptance Did Not Comply With Terms of Offer

The factual background of *Fujimoto v. Western Pioneer Ins. Co. (1978) 86 Cal. App. 3d 305, 313, 150 Cal. Rptr. 88* , is discussed in *§ 120.320[3][d]*. In reversing the judgment for plaintiff insured, the court of appeal held that the premium notice constituted an offer to renew within the meaning of *Ins. Code § 663* [*see § 120.320[3][c]*], that *Ins. Code § 663*, a special statute requiring a motor vehicle insurer to offer renewal of a policy contingent on payment of the premium "as stated in the offer," prevailed over *Ins. Code § 480*, a general statute providing that an insurer is entitled to payment of the premium as soon as the subject matter insured is exposed to the peril insured against, and that because plaintiff failed to pay the premium on the due date as required by the premium notice, no acceptance of the renewal offer resulted and the policy expired on June 21, 1976 (*86 Cal. App. 3d 305, 311-313)* .

NOTE:

The court in Fujimoto declined to rule on the issue of whether the insurer had, by accepting the renewal premium with knowledge of the accident, waived the condition in the premium notice that if the premium was not paid by the date specified in the notice, the policy would terminate as of that date. The court declined to decide this issue because plaintiff did not plead waiver, either in the original complaint or by an amendment to conform to proof.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawMotor Vehicle InsuranceCancellation & RenewalGeneral OverviewInsurance LawMotor Vehicle InsuranceCancellation & RenewalNotice RequirementsGeneral Overview

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12-120 California Points & Authorities §§ 120.321-120.329

[Reserved]

§§ 120.321[Reserved]

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4. Breach of Covenant of Good Faith

12-120 California Points & Authorities § 120.330

§ 120.330 Insurer's Cancellation of Policy Breached Covenant of Good Faith

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT INSURER BREACHED ITS COVENANT OF GOOD FAITH BY CANCELING THE POLICY.

A. Covenant of Good Faith Applies to Insurer's Cancellation of Policy. The cancellation by an insurer of an insurance policy pursuant to its terms is subject to the implied covenant of good faith and fair dealing (*Spindle v. Travelers Ins. Cos. (1977) 66 Cal. App. 3d 951, 958-959, 136 Cal. Rptr. 404*).

B. Improper Exercise of Discretionary Power to Cancel Breaches Covenant. An insurer's failure, in canceling a policy pursuant to a discretionary power conferred on the insurer by the policy, to exercise that discretion in good faith and in accordance with fair dealing constitutes a breach of the covenant of good faith (*see* *Spindle v. Travelers Ins. Cos. (1977) 66 Cal. App. 3d 951, 958, 136 Cal. Rptr. 404*).

C. Bad-Faith Cancellation Subjects Insurer to Liability. An insurer who cancels an insurance policy in accordance with its terms but in breach of its covenant of good faith is liable to the insured for damages resulting from the breach (*Spindle v. Travelers Ins. Cos. (1977) 66 Cal. App. 3d 951, 958-959, 136 Cal. Rptr. 404*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's contention that the insurance policy was cancelled in accordance with the cancellation provisions of the policy. The basis of these points and authorities is that the purported cancellation was not effective because the insurer breached its covenant of good faith in canceling the policy.

This form may be used in a variety of procedural contexts. For example, it may be used by an insured to oppose an insurer's motion for summaryjudgment in an action for breach of the insurance contract or to enforce the contract's provisions [*see also § 120.260[2][a]*].

The right of insurers to cancel insurance policies is limited by the terms of the policy and any other mutual agreement between the parties, in addition to the covenant of good faith and fair dealing implied in every contract. Moreover, certain statutory provisions govern specific types of policies with regard to cancellation requirements.

In an appropriate case, these points and authorities may be submitted in opposition to a motion for summary judgment supported by the points and *authorities in § 120.300*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should refer to evidence establishing that the insurer's conduct constituted a breach of the covenant of good faith and fair dealing [*see Civ. Code § 3294* (grounds for recovery of exemplary damages)].

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.170* et seq.) and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be to oppose a motion by an insurer for summary judgment, when the evidentiary facts clearly support the contention and disclose that triable issues of material fact remain [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that triable issues of material fact remain [*see Code Civ. Proc. § 437c*]. The grounds would be:

(1) There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement,

(2) This covenant applies to cancellation of the policy,

(3) Whether defendant acted in good faith in canceling the policy is a material fact, and

(4) There are triable issues with respect to this fact. Counsel would need to submit a separate statement of undisputed material facts opposing the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Pleading and Practice Chapters

For complaints by an insured against an insurer for damages for breach of contract because of the insurer's refusal to pay a third-party judgment against the insured or to defend the insured in a third-party action, see California Forms of Pleading and Practice, Ch. 308, Insurance (Matthew Bender). For a discussion of the rules applicable to summary judgment, a form of notice of motion for summary judgment, and related forms, see Ch. 537, Summary Judgment, in that publication.

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Covenant of Good Faith Applies to Insurer's Cancellation of Policy

In ***Spindle v. Travelers Ins. Cos.*** *(1977) 66 Cal. App. 3d 951, 136 Cal. Rptr. 404* , the court reversed the judgment dismissing the insured's amended complaint after pointing out that there is an implied covenant of good faith and fair dealing in every insurance contract that neither party will do anything to injure the right of the other to receive the benefits of the agreement, that the principle applies to insurance contracts, and that the principle has been applied to impose liability on the insurer for failure to settle third-party claims or the claims of its own insured, said that it could discern no logical basis for distinguishing between an insurer's conduct in settling a claim made pursuant to the policy and that involved in an insurer's canceling a policy if bad-faith conduct is the basis for the cancellation.

The court explained that the situations are similar in that the ultimate result of the insurer's conduct effectively deprives the insured of the benefit of the bargain, that is, the coverage for the period for which he or she paid a premium, and that no plausible reason exists why cancellation provisions of a contract should be treated differently from other contractual provisions insofar as application of the implied covenant of good faith and fair dealingis concerned. The court concluded that the cancellation provisions of a contract are subject to the covenant of good faith and fair dealing just as are other provisions of a contract (*66 Cal. App. 3d 951, 958)* .

[b] Improper Exercise of Discretionary Power to Cancel Breaches Covenant

The factual and procedural background of *Spindle v. Travelers Ins. Cos. (1977) 66 Cal. App. 3d 951, 136 Cal. Rptr. 404* , is discussed in *§ 120.330[3][a]*. In his amended complaint, plaintiff had alleged that he was a specialist in neurosurgery and an employee and shareholder of a neuro-medical group, as well as a member of the nonprofit medical association to which the master policy had been issued, that during the period of negotiation for the master contract, one of the defendants represented to the association that if its members complied with the conditions precedent and did not have excessive claims filed against them, it would keep the members' malpractice policies in full force and effect, that no malpractice claims were filed against plaintiff under the policy issued to him by defendants, that defendants nevertheless, some 18 months after the policy had been in effect, gave him notice of cancellation effective 30 days from the date of the notice, and that by the cancellation defendant had intended to make an example of plaintiff for the purpose of deterring other insureds under the master contract from resisting defendant's proposed premium increase, which was substantially larger than that permitted by the master contract.

He also alleged that the cancellation was with the intent and purpose to harm and injure plaintiff in the practice of his profession, that defendant was aware that plaintiff would be unable to practice medicine and surgery in hospitals without malpractice insurance, that the canceled insurance was not available at competitive rates from solvent, nonhazardous insurance carriers, and that plaintiff had been forced to secure replacement malpractice insurance from a carrier that had been deemed undercapitalized by the California Insurance Commissioner at a premium 350 percent higher than that paid to defendant. Plaintiff sought recovery of damages for emotional distress, the amount of the increased premium he had to pay to secure other insurance, and punitive damages.

In reversing the judgment of dismissal, the court of appeal said that when a contract confers on one party a discretionary power affecting the rights of the other, a duty is imposed to exercise that discretion in good faith and in accordance with fair dealing, that, in the instant case, the deprivation to the insured of the benefit of his bargain was greater than average due to the lack of competition in the field of malpractice insurance alleged in the amended complaint, and that conspiratorial conduct on the part of insurers to avoid the contractual liability they undertake is not countenanced in California (*66 Cal. App. 3d 951, 958)* .

[c] Bad-Faith Cancellation Subjects Insurer to Liability

The factual and procedural background of *Spindle v. Travelers Ins. Cos. (1977) 66 Cal. App. 3d 951, 136 Cal. Rptr. 404* , is discussed in *§ 120.330[3][a]*. In reversing the judgment of dismissal, the court of appeal said that liability for breach of the covenant of good faith sounds in tort and that an insured may recover for all detriment resulting from the violation, including mental distress (*66 Cal. App. 3d 951, 958)* . The court noted that the evolvement of the doctrine of the implied covenant of good faith and fair dealing is an expression of public policy in California and held that this same doctrine is applicable to subject an insurer to liability to its insured for canceling a malpractice insurance policy in accordance with permissible terms of the cancellation provisions of the policy, if the reasons for the cancellation are such as to make the cancellation a violation of the implied covenant of good faith and fair dealing. The court, therefore, concluded that the complaint stated a cause of action against defendants (*66 Cal. App. 3d 951, 959)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBad Faith & Extracontractual LiabilityGeneral OverviewInsurance LawClaims & ContractsCancellation & NonrenewalGeneral OverviewInsurance LawClaims & ContractsGood Faith & Fair DealingGeneral Overview

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California Points & Authorities

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D. Rescission, Cancellation, and Renewal of Policies
4. Breach of Covenant of Good Faith

12-120 California Points & Authorities §§ 120.331-120.339

[Reserved]

§§ 120.331[Reserved]

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5. Failure of Insurer to Provide Renewal Notice

12-120 California Points & Authorities § 120.340

§ 120.340 Coverage Under Motor Vehicle Policy Continued After Policy Expiration Date Because of Insurer Failed to Give Notice of Renewal or Nonrenewal to Insured

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURED'S POLICY COVERAGE CONTINUED ON EXPIRATION OF THE POLICY TERM BECAUSE INSURER FAILED TO COMPLY WITH STATUTORY REQUIREMENTS OF INSURANCE CODE SECTION 663 IN OFFERING TO RENEW THE POLICY OR GIVING NOTICE OF NONRENEWAL.

Policy Renewed by Insurer's Failure to Give Notice of Nonrenewal. The insurer's failure to give the insured notice of renewal or nonrenewal as required by *Section 663 of the Insurance Code* operates to effect, on the same terms and conditions, an automatic renewal of the policy (*Borders v. Great Falls Yosemite Ins. Co. (1977) 72 Cal. App. 3d 86, 93-94, 140 Cal. Rptr. 33*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose an insurer's contention that the that the policy expired prior to the occurrence giving rise to the loss or liability sued on because of the insured's failure to renew the policy. The basis of these points and authorities is that the purported expiration was not effective because the insurer failed to comply with the requirements stated in *Ins. Code § 663*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should refer to each of the requirements stated under *Ins. Code § 663* with which the insurer failed to comply, referring

to facts establishing the noncompliance.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.170* et seq.) and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be to oppose a motion by an insurer for summary judgment, when the evidentiary facts clearly support the contention and disclose that triable issues of material fact remain [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that triable issues of material fact remain [*see Code Civ. Proc. § 437c*]. The grounds would be:

(1) Defendant insurer failed to give notice of renewal or nonrenewal as required by *Ins. Code § 663*, or the notice given failed to comply with statutory requirements and was therefore defective;

(2) As a consequence the policy was automatically renewed and was in effect at the time the loss occurred or liability arose;

(3) Whether defendant complied with statutory requirements in offering to renew or giving notice of nonrenewal of the policy is a material fact; and

(4) There are triable issues with respect to this fact.

Counsel would need to submit a separate statement of undisputed material facts opposing the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Pleading and Practice Chapters

For complaints by an insured against an insurer for damages for breach of contract because of the insurer's refusal to pay a third-party judgment against the insured or to defend the insured in a third-party action, see California Forms of Pleading and Practice, Ch. 308, Insurance (Matthew Bender). For a discussion of the rules applicable to summary judgment, a form of notice of motion for summary judgment, and related forms, see Ch. 537, Summary Judgment, in that publication.

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Policy Renewed by Insurer's Failure to Give Notice of Nonrenewal

Borders v. Great Falls Yosemite Ins. Co. *(1977) 72 Cal. App. 3d 86, 140 Cal. Rptr. 33* , was an action by an insured for a declaration that a renewed motor vehicle policy provided uninsured motorist coverage. The case involved the construction of former Ins. Code § 663 (repealed and replaced by another code section of the same number in 1974 and amended in 1986) and former Ins. Code § 11580.2(a) [now *Ins. Code § 11580.2(a)(1)*], relating to uninsured motorist coverage. Former Ins. Code § 663 provided in pertinent part that no insurer shall fail to renew a policy unless it shall mail or deliver to the named insured, at the address shown in the policy, at least 20 days' advance notice of its intention not to renew. (The section now provides in pertinent part that an insurer shall offer renewal of a policy [as defined in *Ins. Code § 660*], contingent on payment of premium as stated in the offer, to an insured, unless the insurer mails or delivers to the name insured, at the address shown in the policy, at least 20 days' advance notice of nonrenewal.)

At the time of applying for the policy, plaintiff signed a waiver of uninsured motorist coverage. The expiration date of the policy was June 20, 1973, and hence had a normal expiration date of 12:01 a.m. on that date. The accident occurred approximately nine hours after that time. On May 8, 1973, defendant had given notice of intention not to renew to the legal owner of the car, a finance company, but not to plaintiff insured. Consequently, the policy was renewed by operation of law because of defendant's failure to have complied with former Ins. Code § 663. From a judgment declaring that the policy as renewed did not provide uninsured motorist coverage, plaintiff appealed.

The court of appeal affirmed. It rejected plaintiff's contention that, since the renewal was by operation of law, the effect of plaintiff's waiver of uninsured motorist coverage was not continued. The court, quoting from *State Farm Mut. Auto. Ins. Co. v. Brown (1974) 40 Cal. App. 3d 385, 394, 115 Cal. Rptr. 213* , said that the language of former Ins. Code § 663 imported that an insurer's failure to give such notice operates to effect an automatic renewal of the policy, beyond its renewal-expiration date and irrespective of the insured's nonpayment of the renewal premium (*40 Cal. App. 3d 385, 393)* , and that the renewal was on the same terms and conditions as the original policy (*40 Cal. App. 3d 385, 393-394)* . The court held that renewal requires the assent of the insured, even when it results from the insurer's failure to give notice of nonrenewal, and hence therenewal was one by the named insured within the meaning of former Ins. Code § 11580.2(a) (*40 Cal. App. 3d 385, 393-399)* .

In rejecting plaintiff's contention that the waiver of uninsured motorist coverage was not continued because the renewal was not "by the named insured," as required by *Ins. Code § 11580.2(a)*, but, rather, by operation of law, the court of appeal said that a renewal under *Ins. Code § 660* (definitions, including definition of renewal) and *Ins. Code § 663*, in order to became effective to continue coverage, requires the assent of the insured. The court further stated that this is made more apparent by the present form of these sections; *Ins. Code § 660* now defines renewal as meaning "to continue coverage for an additional policy period upon expiration of the current policy period of the policy," and *Ins. Code § 663*, pursuant to 1974 legislation, provided that failure to send a notice of nonrenewal results in an "offer" of "renewal of a policy, contingent upon payment of premium as stated in the offer." The court concluded that though the 1974 statute clarified the matter, it is apparent that the situation was identical under the prior form, that the renewal made obligatory by virtue of *Ins. Code § 663* has at all times been one requiring the insured's agreement, and that it was, therefore, a renewal "by the named insured" (*72 Cal. App. 3d 86, 96)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawMotor Vehicle InsuranceCancellation & RenewalNotice RequirementsGeneral Overview

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5. Failure of Insurer to Provide Renewal Notice

12-120 California Points & Authorities §§ 120.341-120.349

[Reserved]

§§ 120.341[Reserved]

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E. Actions Between Motor Vehicle Liability Insurers
1. Policy Provides Primary Insurance Coverage

12-120 California Points & Authorities § 120.350

§ 120.350 Insured Engaged in Motor Vehicle-Related Business and Operated Vehicle

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

BY CONCLUSIVE PRESUMPTION, THE INSURANCE AFFORDED BY THE POLICY ISSUED BY _____ [*name of adverse insurer*] PROVIDES THE PRIMARY INSURANCE COVERAGE, BECAUSE THE INSURED OF _____ [*name of adverse insurer*] WAS ENGAGED IN A SPECIFIED MOTOR-VEHICLE RELATED BUSINESS, AND THE VEHICLE INVOLVED IN THE ACCIDENT WAS OPERATED BY THE _____ [INSURED or AGENT/EMPLOYEE OF THE INSURED] OF _____ [*name of adverse insurer*].

A. Public Policy. *Insurance Code Section 11580.9* expresses the total public policy of California respecting the order in which two or more automobile liability insurance policies covering the same loss will apply (*Ins. Code § 11580.8*).

B. Conclusive Presumption Applies to Adverse Insurer. When two or more policies affording valid and collectible automobile liability insurance apply to the same motor vehicle in an occurrence out of which a liability loss arises, and one of the policies affords coverage to a named insured engaged in the business of selling, repairing, servicing, delivering, testing, road-testing, parking, or storing motor vehicles, it is conclusively presumed that if, at the time of loss, the motor vehicle was being operated by the person engaged in any of those businesses, or by his or her employee or agent, the insurance afforded by the policy issued to that person is primary, and the insurance afforded by any other policy is excess (*Ins. Code § 11580.9(a)(1)*; *see Westerholm v. 20th Century Ins. Co. (1976) 58 Cal. App. 3d 628, 634, 130 Cal. Rptr. 164*).

C. Nature of Insured's Business as Determinative Factor. Under *Insurance Code Section 11580.9*, it is the nature of the insured's business, and not the status of the particular vehicleinvolved in the accident giving rise to the liability loss, that determines which insurance policy is primary (*McCall v. Great Am. Ins. Co. (1981) 119 Cal. App. 3d 993, 998,*

174 Cal. Rptr. 399).

[*Optional*] **D. Modification or Amendment of Statutory Presumptions.** The presumptions stated in *Insurance Code Section 11580.9, subdivisions (a)-(d),* inclusive, may not be modified or amended except by written agreement signed by all insurers who have issued one or more policies applicable to the loss described in such subdivisions and all named insureds under such policies (*Ins. Code § 11580.9(f)*).

[2] Comments

[a] Use of Form

These points and authorities may be used in support of the contention that an adverse insurer's policy provides the primary coverage of the loss. The basis of these points and authorities is that the insured of the adverse insurer engaged in a motor vehicle-related business specified in *Ins. Code § 11580.9(a)(1),* and either the insured, or the insured's agent or employee operated the vehicle.

This form may be used in a variety of procedural contexts. For example, it may be used in an action by an insurance company against another insurance company seeking a judicial declaration that the policy issued by the adverse insurer provides the primary coverage of the loss, the plaintiff's policy provides the excess coverage.

Paragraph D may be included in reply to an adverse insurer's contention that the statutory presumptions were modified or amended in some manner other than the manner required by *Ins. Code § 11580.9(f)*.

For points and authorities supporting the contention that the conclusive presumption applies even though the insured and permissive user were both engaged in motor-vehicle related businesses, see *§ 120.351*.

For points and authorities supporting the contention that the conclusive presumption applies to a self-insurer or public entity, see *§ 120.354*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should refer to evidence establishing:

- The insured of the adverse insurer was engaged in one the motor vehicle-related businesses identified in *Ins. Code § 11580.9(a)(1)*.

- At the time of the accident, the vehicle was driven either by the adverse party's insured, or an agent or employee of that insured.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be a motion by an insurer for summary judgment or opposition to such a motion by an adverse insurer, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that there is no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts supporting the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant

[*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Pleading and Practice Chapters

For a form of complaint by an insurance company against another insurance company for a judicial declaration regarding which liability policy provides primary coverage, see California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender). For a discussion of the rules applicable to summary judgment, a form of notice of motion for summary judgment, and related forms, see Ch. 537, *Summary Judgment* , in that publication.

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[e] Opposing Points and Authorities

The points and *authorities in §§ 120.370*, 129.371, and *120.374* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Public Policy

Ins. Code § 11580.8 declares that it is the public policy of California to avoid, so far as possible, conflicts and litigation, with resulting court congestion, between and among injured parties, insureds, and insurers concerning which, among various policies of liability insurance and the various coverages in them, are responsible as primary, excess, or sole coverage, and to what extent, under the circumstances of any given event involving death or injury to persons or property caused by the operation or use of a motor vehicle.

The legislature in *Ins. Code § 11580.8* further declares that *Ins. Code § 11580.9* expresses the total public policy of California respecting the order in which two or more liability insurance policies covering the same loss will apply. This is not to be changed or modified by any provision of the Vehicle Code, except in those express cases in which the requirements of *Veh. Code §§ 16450-16457* apply with regard to a liability insurance policy certified as provided in *Veh. Code § 16431* (relating to proof of financial responsibility).

[b] Conclusive Presumption Applies to Adverse Insurer

In ***Westerholm v. 20th Century Ins. Co.*** *(1976) 58 Cal. App. 3d 628, 130 Cal. Rptr. 164* , the court of appeal explained that under *Ins. Code § 11580.9(a)(1)*, the initial question is whether one of the policies afforded coverage to a named insured engaged in a business outlined in the statute, that if that question is answered in the affirmative and the vehicle was driven by the person engaged in such business (or by his employee or agent) at the time of the accident giving rise to the liability loss, the insurance afforded by his or her policy is primary (*58 Cal. App. 3d 628, 634)* .

[c] Nature of Insured's Business as Determinative Factor

The factual background of ***McCall v. Great Am. Ins. Co.*** *(1981) 119 Cal. App. 3d 993, 174 Cal. Rptr. 399* , is discussed in *§ 120.371[3][a]*. In holding that the policy of the insurer of the car operator provided primary coverage and that the policy of the insurer of the car leasing company was excess, the court of appeal said that by the clear language of *Ins. Code § 11580.9(a)* and *Ins. Code § 11580.9(b)*, indicating that coverage depends on the nature of the business in which the insured engages, it is the nature of the insured's business, not the status of the particular vehicle involved in the accident giving rise to the liability loss, that determines which insurance policy is primary in a multipolicy situation under *Ins. Code § 11580.9* (*119 Cal. App. 3d 993, 998)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsPriority of CoverageInsurance LawMotor Vehicle InsuranceCoverageGeneral OverviewInsurance LawMotor Vehicle InsuranceVehicle OwnershipGeneral Overview

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12-120 California Points & Authorities § 120.351

§ 120.351 Presumption Applies Even Though Insured and Permissive User Both Engaged in Motor-Vehicle Related Businesses

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

BY CONCLUSIVE PRESUMPTION, THE INSURANCE AFFORDED BY THE POLICY ISSUED BY _____ [*name of adverse insurer*] IS THE PRIMARY INSURANCE COVERAGE, EVEN THOUGH BOTH THE VEHICLE OWNER AND THE PERMISSIVE USER ENGAGED IN ONE OF THE SPECIFIED AUTOMOTIVE BUSINESSES, BECAUSE THAT FACT DOES NOT RENDER INAPPLICABLE THE STATUTORY PRESUMPTIONS.

Both Vehicle Owner and Permissive User Engaged in One of Specified Automotive Businesses. The fact that both the owner of the vehicle involved in the accident giving rise to a liability loss and the permissive user of that vehicle were engaged in one of the businesses listed in *Insurance Code Section 11580.9(a)*, does not render inapplicable the presumptions set forth therein (*Zurich-Am. Ins. Co. v. Liberty Mut. Ins. Co. (1978) 85 Cal. App. 3d 481, 487-488, 149 Cal. Rptr. 472*).

[2] Comments

[a] Use of Form

These points and authorities may be used in support of the contention that an adverse insurer's policy provides the primary coverage of the loss. The basis of these points and authorities is that the fact that both the vehicle owner and the permissive user engaged in one of the specified automotive businesses does not render inapplicable the statutory presumptions of *Ins. Code § 11580.9(a)*.

This form may be used in a variety of procedural contexts. For example, it may be used in an action by an insurance

company against another insurance company seeking a judicial declaration that the policy issued by the adverse insurer provides the primary coverage of the loss, the plaintiff's policy provides the excess coverage.

For points and authorities supporting the contention, generally, that the conclusive presumption applies to the policy of an insurer whose insured is engaged in a motor-vehicle related, see *§ 120.350*.

For points and authorities supporting the contention that the conclusive presumption applies to a self-insurer or public entity, see *§ 120.354*.

For references to related Pleading and Practice chapters, see *§ 120.350[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be a motion by an insurer for summary judgment or opposition to such a motion by an adverse insurer, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that there is no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts supporting the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[d] Opposing Points and Authorities

The points and *authorities in §§ 120.370, 120.374* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Both Vehicle Owner and Permissive User Engaged in One of Specified Automotive Businesses

The factual background of ***Zurich-Am. Ins. Co. v. Liberty Mut. Ins. Co.*** *(1978) 85 Cal. App. 3d 481, 149 Cal. Rptr. 472* , is discussed in *§ 120.370[3][a]*. In *Zurich-American Ins. Co.,* the trial court had held that since both plaintiff's

insured and defendant's insured were engaged in businesses described in *Ins. Code § 11580.9(a)*, that subdivision did not apply and that under *Ins. Code § 11580.9(d)* defendant (the insurer of the truck sales company that owned the vehicle) was primarily liable and the policy issued by plaintiff (the insurer of the truck-painting business whose employee was the permissive user of the truck) was excess. In reversing the judgment, the court of appeal held that the trial court had erred in its construction of *Ins. Code § 11580.9(a)* (*85 Cal. App. 3d 481, 487)* . The court said that under this code section, the initial question is whether at least one of the two or more policies affording valid and collectible liability insurance affords coverage to a named insured engaged in the businesses listed. If this question is answered in the affirmative, then the second question is who was the operator of the vehicle at the time of the loss. Primary liability is placed on that party's insurance policy (*85 Cal. App. 3d 481, 488)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceInferences & PresumptionsRebuttal of PresumptionsInsurance LawMotor Vehicle InsuranceVehicle UsePermissive UsersGeneral Overview

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12-120 California Points & Authorities § 120.352

§ 120.352 Insured Was Owner or Lessee of Premises Where Loss Occurred During Loading or Unloading of Vehicle

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

BY CONCLUSIVE PRESUMPTION, THE INSURANCE AFFORDED BY THE POLICY ISSUED BY _____ [*name of adverse insurer*] PROVIDES THE PRIMARY INSURANCE COVERAGE, BECAUSE THE INSURED OF _____ [*name of adverse insurer*] IS THE OWNER/TENANT/LESSEE OF THE PREMISES WHERE THE LOSS OCCURRED, AND THE LOSS AROSE OUT OF THE LOADING AND UNLOADING OF A MOTOR VEHICLE.

Insured Was Owner or Lessee of Premises Where Loss Occurred During Loading or Unloading of Vehicle. When two or more policies are applicable to the same loss arising out of the loading or unloading of a motor vehicle, and one or more of the policies isissued to the owner, tenant, or lessee of the premises on which the loading or unloading occurs, only the insurance afforded by the policy or policies covering the premises on which the loading or unloading occurs shall be primary [and the policy or policies shall cover as an additional insured with respect to the loading or unloading operations all employees of the owner, tenant, or lessee while acting in the course and scope of their employment] (*Ins. Code § 11580.9(c)*).

[2] Comments

[a] Use of Form

These points and authorities may be used in support of the contention that an adverse insurer's policy provides the primary coverage of the loss. The basis of these points and authorities is that by conclusive presumption, the insurance afforded by the policy issued by adverse insurer is the primary insurance coverage because the insured of the adverse insurer is the owner, tenant, or lessee of the premises in which the loss occurred, and the loss arose out of the loading

and unloading of a motor vehicle [*Ins. Code § 11580.9(c)*].

This form may be used in a variety of procedural contexts. For example, it may be used in an action by an insurance company against another insurance company seeking a judicial declaration that the policy issued by the adverse insurer provides the primary coverage of the loss, the plaintiff's policy provides the excess coverage.

For points and authorities supporting the contention that the conclusive presumption applies to a self-insurer or public entity, see *§ 120.354*.

For references to related Pleading and Practice chapters, see *§ 120.350[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should refer to evidence establishing:

- The insured of the adverse insurer is either the owner, tenant, or lessee of the premises in which the loss occurred, and

- The loss arose out of the loading and unloading of a motor vehicle.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be a motion by an insurer for summary judgment or opposition tosuch a motion by an adverse insurer, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that there is no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts supporting the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[d] Opposing Points and Authorities

The points and *authorities in §§ 120.372 -120.374* may be used in an appropriate case to oppose the points and authorities in this form.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawMotor Vehicle InsuranceVehicle UseLoading & Unloading

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 120 INSURANCE
PART II. FORMS
E. Actions Between Motor Vehicle Liability Insurers
1. Policy Provides Primary Insurance Coverage

12-120 California Points & Authorities § 120.353

§ 120.353 Policy Describes or Rates Motor Vehicle as Owned Automobile

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

BY CONCLUSIVE PRESUMPTION, THE INSURANCE AFFORDED BY THE POLICY ISSUED BY _____ [*name of adverse insurer*] PROVIDES THE PRIMARY INSURANCE COVERAGE BECAUSE THE POLICY OF _____ [*name of adverse insurer*] DESCRIBES OR RATES THE MOTOR VEHICLE INVOLVED INTHE INCIDENT GIVING RISE TO THE LOSS AS AN OWNED AUTOMOBILE, AND THE EXCEPTIONS TO THIS RULE IN INSURANCE CODE SECTION 11580.9(a) THROUGH (c) DO NOT APPLY.

A. Motor Vehicle Described in Policy as Owned or Rated Automobile. Except as provided in *Insurance Code Section 11580.9(a)-(c)*, when two or more policies affording valid and collectible motor vehicle insurance apply to the same motor vehicle or vehicles in an occurrence out of which a liability loss arises, it is conclusively presumed that the insurance afforded by the policy in which the motor vehicle is described or rated as an owned automobile will be primary and the insurance afforded by any other policy or policies will be excess (*Ins. Code § 11580.9(d)*; *see Grand Rent A Car Corp. v. 20th Century Ins. Co. (1994) 25 Cal. App. 4th 1242, 31 Cal. Rptr. 2d 88*).

B. *Insurance Code Section 11580.9(a)-(c)* Inapplicable. *Insurance Code Section 11580.9(a)-(c)*, which specifies exceptions to the rule of *Insurance Code Section 11580.9(d)* as stated above, does not apply if (1) neither policy affords coverage to a named insured engaged in the business of selling, repairing, servicing, delivering, road-testing, parking, or storing motor vehicles; (2) neither policy affords coverage to a named insured engaged in the business of renting or leasing, without operators, motor vehicles that either qualify as commercial vehicles or are leased for a term of six months or longer; and (3) the loss did not arise out of the loading or unloading of a motor vehicle that is covered by one or more policies issued to the owner, tenant, or lessee of the premises on which the loading or unloading occurred (*Ins. Code § 11580.9(a)-(c)*; *see Transport Indem. Co. v. Alo (1981) 118 Cal. App. 3d 143, 148-149, 172 Cal. Rptr. 394* ;

Government Employees Ins. Co. v. Carrier Ins. Co. (1975) 45 Cal. App. 3d 223, 226-229, 119 Cal. Rptr. 116).

[*Optional*] **C. Tractor/Trailer Is Treated as One Vehicle.** For purposes of *Ins. Code § 11580.9(d)*, a truck tractor hauling a trailer is treated as a single motor vehicle (*Wilshire Ins. Co., Inc. v. Sentry Select Ins. Co. (2004) 124 Cal. App. 4th 27, 34, 21 Cal. Rptr. 3d 60*).

[2] Comments

[a] Use of Form

These points and authorities may be used in support of the contention that an adverse insurer's policy provides the primary coverage of the loss.The basis of these points and authorities is that the adverse insurer's policy describes or rates the motor vehicle involved in the incident giving rise to the loss as an owned automobile, and the exceptions in *Ins. Code § 11580.9(a)-(c)* do not apply. Optional Paragraph C should be used to assert that a tractor/trailer combination is treated as one vehicle.

The requirement in *Ins. Code § 11580.9(d)* that an automobile be described in the policy as "owned" or "rated" in the owner's policy has created special problems in the context of car rental agencies. When insurance is obtained under a "fleet" policy (a blanket policy covering all the agency's vehicles), or the owner posts a cash deposit or self-insures, the "policy of automobile insurance" (i.e., the policy, certificate of deposit, or certificate of self-insurance) [*see Ins. Code § 11580.9(h)*] often will not describe or rate specific vehicles. Car rental agencies and their insurers have argued that this failure to describe or rate individual vehicles renders *Ins. Code § 11580.9(d)* inapplicable [*see Grand Rent A Car Corp. v. 20th Century Ins. Co. (1994) 25 Cal. App. 4th 1242, 31 Cal. Rptr. 2d 88* ; *Interinsurance Exch. v. Spectrum Inv. Corp. (1989) 209 Cal. App. 3d 1243, 1251, 258 Cal. Rptr. 43* ; *Ohio Cas. Ins. Co. v. Aetna Ins. Co. (1978) 85 Cal. App. 3d 521, 149 Cal. Rptr. 562]* , and in some cases have elected to self-insure specifically to achieve this result, in an attempt to shift primary insurance liability to the driver's insurer [*see Interinsurance Exch. v. Spectrum Inv. Corp. (1989) 209 Cal. App. 3d 1243, 1251, 258 Cal. Rptr. 43* (citing legislative report)].

Although there is authority permitting car rental agencies to shift primary liability to the lessee's insurer under these circumstances [*see Interinsurance Exch. v. Spectrum Inv. Corp. (1989) 209 Cal. App. 3d 1243, 1254-1255, 258 Cal. Rptr. 43]* , the more recent and seemingly better reasoned view is that the car rental agreement and a certificate of self-insurance together constitute a "policy of automobile liability insurance" within the meaning of *Ins. Code § 11580.9(d)*, and that since the car rental agreement does describe the rented car as an owned vehicle, *Ins. Code § 11580.9(d)* applies [*Grand Rent A Car Corp. v. 20th Century Ins. Co. (1994) 25 Cal. App. 4th 1242, 1253, 31 Cal. Rptr. 2d 88]* .

This form may be used in a variety of procedural contexts. For example, it may be used in an action by an insurance company against another insurance company seeking a judicial declaration that the policy issued by the adverse insurer provides the primary coverage of the loss, the plaintiff's policy provides the excess coverage.

These points and authorities may be combined with points and authorities stating the public policy respecting the order in which two or more automobile liability insurance policies covering the same loss will apply under *Ins. Code § 11580.8* [*see § 120.350*, Paragraph A]. They may also be combined with points and authorities defining the meaning of meaningof "policies" as used in *Ins. Code § 11580.9(b)-(d)* [*see § 120.371*, Paragraph C].

For points and authorities supporting the contention that the conclusive presumption applies to a self-insurer or public entity, see *§ 120.354*.

For references to related Pleading and Practice chapters, see *§ 120.350[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should refer to evidence establishing that:

- The adverse insurer's policy describes or rates the motor vehicle involved in the incident giving rise to the loss as an owned automobile, and

- The exceptions in *Ins. Code § 11580.9(a)-(c)* do not apply.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be a motion by an insurer for summary judgment or opposition to such a motion by an adverse insurer, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that there is no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts supporting the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[d] Opposing Points and Authorities

The points and *authorities in § 120.374* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Motor Vehicle Described in Policy as Owned or Rated Automobile

In ***Grand Rent A Car Corp. v. 20th Century Ins. Co.*** *(1994) 25 Cal. App. 4th 1242, 31 Cal. Rptr. 2d 88* , a self-insured car rental agency entered into short-term rental agreements with various individual renters. While operating the rented cars, the renters were involved in traffic collisions with third parties, who made claims against the rental agency as self-insurer. The issue presented was priority of coverage between the agency and the renter's insurers.

Under the terms of the individual rental agreements, the rental agency was required to provide the renter with liability insurance, and the agency allocated a portion of the rental fee to the to that insurance. After examining the history and

background of what was then *Ins. Code § 11580.9(h)* (now *Ins. Code § 11580.9(h)*), which applied *Ins. Code § 11580.9* to self-insurers, the court concluded that the legislative purpose of that section was to ensure that car rental agencies would be primarily liable for injuries arising out of the operation of their vehicles, and eliminate the situation whereby rental agencies could frustrate that purpose by self-insuring in an attempt to escape operation of the statute (*25 Cal. App. 4th 1242, 1250-1251)* .

Turning to the rental agreement, the court concluded that the agreement constituted "insurance" because it contained a provision indemnifying the renter from liability up to a specified limit. The court then determined that the rental agreement, together with the agency's certificate of self-insurance, constituted the "policy of insurance" within the meaning of *Ins. Code § 11580.9(d)* (*25 Cal. App. 4th 1242, 1252)* .

The court then resolved the priority of coverage, noting the requirement that in order for *Ins. Code § 11580.9(d)* to apply, the vehicle in question must be "described" or "rated" in the owner's policy. Although the individual rental cars were not described or rated in the agency's certificate of self-insurance, they were specifically described in the rental agreement itself. This description in the rental agreement, which the court had already held to be part of the "policy of insurance," was sufficient to trigger application of *Ins. Code § 11580(d)*, thereby rendering the agency's insurance primary and the drivers' excess (*25 Cal. App. 4th 1242, 1253-1254)* .

NOTE:

A contrary result had previously been reached in *Interinsurance Exch. v. Spectrum Inv. Corp. (1989) 209 Cal. App. 3d 1243, 1251, 258 Cal. Rptr. 43* , in which the court essentially reached the same conclusion as the court in *Grand Rent A Car* as to the legislative history and purpose of *Ins. Code § 11580.9(h)*, but concluded (in the context of an agency that had posted a cash deposit in lieu of insurance) that *Ins. Code § 11580.9(d)* was inapplicable to cash deposits (and, by implication, to other forms of financial responsibility such as certificates of self-insurance, fleet policies, and authorized bonds) because the cash deposit did not describe or rate the specific vehicle involved in the accident. The court in *Grand Rent A Car* sidestepped this problem by holding that the rental agreement, which did contain a specific description of the car, was part of the "policy of insurance" [*Grand Rent A Car Corp. v. 20th Century Ins. Co. (1994) 25 Cal. App. 4th 1242, 1253, 31 Cal. Rptr. 2d 88* ; *see also* *Ohio Cas. Ins. Co. v. Aetna Ins. Co (1978) 85 Cal. App. 3d 521, 149 Cal. Rptr. 562* (involving "fleet" policy)].

[b] Insurance Code Section 11580.9(a)-(c)Inapplicable

Transport Indem. Co. v. Alo *(1981) 118 Cal. App. 3d 143, 172 Cal. Rptr. 394* , was a declaratory relief action filed by the insurer of a drayage company against a scoutmaster, the Boy Scouts of America, and the Scouts' insurer to determine which insurer's policy covered a liability loss. The drayage company was engaged in the business of renting commercial vehicles without drivers, although the rental operations were not a major part of its business. The company loaned one of its trucks to the scoutmaster (no monetary remuneration was involved) to gather firewood which the scouts planned to sell as a fund-raising activity. As a result of a mechanical difficulty, the scoutmaster lost control of the loaded truck and hit a dwelling house, causing considerable property damage. Plaintiff's policy covered the truck as an owned automobile. The drayage company was licensed by the State Public Utilities Commission and the PUC endorsement attached to the policy increased the basic property damage from $10,000 to $50,000 per occurrence.

This endorsement contained an indemnity clause requiring the insured to reimburse the insurer for amounts paid in excess of the basic $10,000 limit. The Scouts was a named insured under a comprehensive automobile policy, issued by defendant insurer, with limits of $1 million, including property damage, and covered the truck as a nonowned automobile. Both insurers admitted coverage and liability. Plaintiff insurer settled the property damage claims for $20,062.27 and then sued for declaratory relief. The trial court, ruling that *Ins. Code § 11580.9(b)* applied, entered judgment declaring that defendant insurer's policy afforded primary coverage and that plaintiff's policy afforded excess coverage. The trial court attached no significance to the facts that the rental operations were only an occasional part of

the drayage company's business and that there was no rental or monetary remuneration involved in the transaction with the Scouts.

The court of appeal reversed. It pointed out that *Ins. Code § 11580.9(b)* was designed to apply in a business setting in which a commercial vehicle is leased to a profit-making entity and disagreed with the trial court's reasoning that the absence of a commercial situation or rental is insignificant in determining the relevance of *Ins. Code § 11580.9(b)*. The court concluded that the loan transaction that gave rise to the liability loss precluded the applicability of *Ins. Code § 11580.9(b)* (*118 Cal. App. 3d 143, 148-149)* . The court held that the proper rule to apply was the general rule set forth in *Ins. Code § 11580.9(d)*, that this section applies if none of the other subdivisions of *Ins. Code § 11580.9* applies, that under *Ins. Code § 11580.9(d)* the policy that describes or rates the "owned" vehicle is primary and any other insurance excess, and that, accordingly, plaintiff's policy was primary. Since its liability was limited to $10,000 as a result of the PUC endorsement, defendant insurer's policy provided excess coverage for the balance (*118 Cal. App. 3d 143, 149)* .

Government Employees Ins. Co. v. Carrier Ins. Co. *(1975) 45 Cal. App. 3d 223, 119 Cal. Rptr. 116* , was a declaratory relief action between insurers and their insureds to determine which insurer's policy was primary and which was excess with respect to a liability claim. Plaintiff insured had rented a private passenger automobile for a three-day period from its owner, defendant insured, which was in the business of renting passenger-type automobiles on a daily basis. While operating the car, plaintiff insured was involved in an accident with a pedestrian who made claims for injuries and damages against both plaintiff insured and defendant insured. The liability insurance policy issued by plaintiff insurer covered plaintiff insured as the named insured and provided that it was excess on nonowned vehicles. The policy issued by defendant insurer covered defendant insured as a named insured, listed the automobile rented to plaintiff insured as a described, owned automobile, and provided insurance for persons using the vehicle with the permission of defendant insured. The policy also contained an endorsement making it excess if there was any other insurance applicable to the insurable event. The trial court held that the policy of defendant insurer was primary and that the policy of plaintiff insurer was excess.

The court of appeal affirmed. It rejected defendants' argument that the car was a "commercial" vehicle within the meaning of *Ins. Code § 11580.9(b)* and pointed out that the rental involved a short-term and not a long-term lease arrangement as required by that section (*45 Cal. App. 3d 223, 226-229)* . The court quoted the provisions of *Ins. Code § 11580.9(d)* and concluded that since *Ins. Code § 11580.9(b)* did not apply [neither *Ins. Code § 11580.9(a)* nor *Ins. Code § 11580.9(c)* on its face was applicable], defendant insurer's policy covering the lessor of the car was primary, and plaintiff insurer's policy covering the lessee was excess (*45 Cal. App. 3d 223, 229)* .

[c] Tractor/Trailer Is Treated as One Vehicle

In ***Wilshire Ins. Co., Inc. v. Sentry Select Ins. Co.*** *(2004) 124 Cal. App. 4th 27, 21 Cal. Rptr. 3d 60* , an accident involving a tractor/trailer rig resulted in a wrongful death action. Issues arose between insurance carriers regarding whether the insurance carrier for the trailer owed the insurance carrier for the tractor a portion of the defense and indemnity costs in settling the action. The tractor was owned and driven by a company insured by one carrier, and the trailer was owned by a company insured by a second carrier. The lease agreement between the two owners provided that the tractor owner must fully indemnify the trailer owner for damages and bear any liability to a third party. The tractor was scheduled as an owned vehicle on the tractor owner's policy, and the trailer was scheduled as an owned vehicle on the trailer owner's policy. The tractor owner's policy provided liability coverage for damages resulting from the use of owned vehicles specifically described in the policy, as well as liability coverage for any nonowned trailer attached to the tractor. The "other insurance" clause provided that liability was primary if the tractor was hired by another, and a written agreement with the other carrier as lessee required the tractor owner to hold the lessee harmless. If the covered trailer was connected to the covered tractor, liability coverage for the trailer was also primary if coverage for the tractor was primary. The trailer owner's policy provided liability coverage for damages resulting from the use of the trailer, and it contained no provision for liability resulting from the use of the tractor. The "other insurance" clause provided that if the covered trailer was connected to a power unit not covered under the policy, coverage for liability resulting from use

of the trailer was excess. The tractor operator was an "insured" under this policy because the trailer was used with the permission of the owner. Therefore, the trailer owner's policy provided liability coverage for the accident, but the coverage was excess. On cross-motions for summary judgment in an action by the tractor insurer against the trailer insurer seeking contribution for defense and indemnity costs paid on behalf of both insureds, the trial court applied *Ins. Code § 11580.9(d)* and held that despite the language in the two policies, both insureds must share the loss equally as co-primary insurers.

The court of appeal affirmed. At least for purposes of *Ins. Code § 11580.9(d)*, a truck tractor hauling a trailer is treated as a single motor vehicle. Therefore, both policies apply to the "same motor vehicle or vehicles in an occurrence out of which a liability loss shall arise," within the meaning of that statute. The court then identified the equipment "described or rated as an owned automobile" by the respective insurance policies. The court noted that a description or rating, in common sense understanding, means a particularization of the vehicle. Because in one policy the tractor was scheduled as an owned vehicle, and in the other policy the trailer was scheduled as an owned vehicle, and because thetractor/trailer rig is treated as a single vehicle, under *Ins. Code § 11580.9(d)* it is conclusively presumed that each insurance policy is primary. Because each policy had the same limit for bodily injury liability, each insurer had an equal obligation to contribute to the loss (*124 Cal. App. 4th 27, 34-35)* .

[4] Additional Authorities

[a] Motor Vehicle Described in Policy as Owned or Rated Automobile

In *Government Employees Ins. Co. v. Gibraltar Cas. Co. (1986) 184 Cal. App. 3d 163, 229 Cal. Rptr. 57* , a school employee's insurer broughtan action against the school district and its insurer to recover money paid within the limits of the policy in a third-party settlement arising from a vehicle accident within the scope of the insured's employment in which the employee was driving her personal automobile. The trial court granted defendants' motion for summary judgment, and the court of appeal affirmed. The court held that the conclusive presumption of *Ins. Code § 11580.9(d)* applied and therefore plaintiff was the primary and the district was the excess carrier, because the insured's private vehicle was described and rated as an owned vehicle in plaintiff's policy, and not in the district's insurer's policy (*184 Cal. App. 3d 163, 172)* .

In *Lovy v. State Farm Ins. Co. (1981) 117 Cal. App. 3d 834, 173 Cal. Rptr. 307* , the court of appeal stated that *Ins. Code § 11580.9(a)* did not apply to a renter of cars, although that person was also engaged in a business otherwise enumerated in that section, and that since neither subdivision (b) nor (c) of *Ins. Code § 11580.9* applied in the case before it, *Ins. Code § 11580.9(d)* applied (*117 Cal. App. 3d 834, 864-865)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawExcess InsuranceGeneral OverviewInsurance LawMotor Vehicle InsuranceVehicle OwnershipGeneral OverviewInsurance LawMotor Vehicle InsuranceVehicle OwnershipAutomobile Dealers

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E. Actions Between Motor Vehicle Liability Insurers
1. Policy Provides Primary Insurance Coverage

12-120 California Points & Authorities § 120.354

§ 120.354 Statutory Presumptions Apply to Self-Insurers and Public Entities

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE CONCLUSIVE PRESUMPTION UNDER _____ [*identify applicable statute, e.g.,* INSURANCE CODE SECTION 11580.9(d)] APPLIES EVEN THOUGH _____ [*name of insurer*] IS A _____ [SELF INSURER *or* PUBLIC ENTITY].

Statutory Presumptions Apply to Self-Insurers and Public Entities. A certificate of self-insurance issued pursuant to *Vehicle Code Section 16053*, a deposit of cash made pursuant to *Vehicle Code Section 16054.2*, a bond in effect pursuant to *Vehicle Code Section 16054*, or the report filed pursuant to *Vehicle Code Section 16051* (report that motor vehicle involved in accident was owned or leased by or under direction of United States, California, or political subdivision or municipality of California) is considered a policy of automobile liability insurance for the purposes of *Insurance Code Section 11580.9*, relating to statutory presumptions regarding primary and excess coverage (*Ins. Code § 11580.9(h)*).

[2] Comments

[a] Use of Form

These points and authorities may be used in support of the contention that an adverse insurer's policy provides the primary, rather than the excess coverage of the loss. The basis of these points and authorities is that statutory presumptions under *Ins. Code § 11580.9* apply to self-insurers and public entities.

This form may be combined with the points and authorities *set forth in §§ 120.350* et seq. when one of the parties is self-insured or is a public entity.

This form may be used in a variety of procedural contexts. For example, it may be used in an action by an insurance company against another insurance company seeking declaratory relief, declaring that the insurer's policy provides the primary coverage of the loss.

For references to related Pleading and Practice chapters, see *§ 120.350[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be a motion by an insurer for summary judgment or opposition to such a motion by an adverse insurer, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that there is no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts supporting the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Statutory Presumptions Apply to Self-Insurers and Public Entities

Ins. Code § 11580.9(h) also states that it does not establish or provide the basis for any other form of liability for or upon a self-insurer or other person holding, issuing, or establishing any form of security described in that subsection.

The facts and procedural background of ***Grand Rent A Car Corp. v. 20th Century Ins. Co.*** *(1994) 25 Cal. App. 4th 1242, 31 Cal. Rptr. 2d 88* , are discussed in *§ 120.353[3][a]*. The court concluded that car rental agreements together with the rental agency's certificate of self-insurance constitute policies of automobile liability insurance for purposes of *Ins. Code § 11580.9(d)* (*25 Cal. App. 4th 1242, 1252)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceInferences & PresumptionsExceptionsStatutory PresumptionsInsurance LawBusiness

InsuranceSelf-InsuranceGeneral OverviewInsurance LawBusiness InsuranceSelf-InsuranceGovernmental Agencies

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1. Policy Provides Primary Insurance Coverage

12-120 California Points & Authorities §§ 120.355-120.369

[Reserved]

§§ 120.355[Reserved]

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2. Policy Provides Excess Insurance Coverage

12-120 California Points & Authorities § 120.370

§ 120.370 Operator Was Not Insured Engaged in Motor Vehicle-Related Business or Insured's Employee

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE INSURANCE AFFORDED BY THE POLICY ISSUED BY _____ [*name of insurer*] PROVIDES THE EXCESS INSURANCE COVERAGE, AND NOT THE PRIMARY INSURANCE COVERAGE PURSUANT TO THE CONCLUSIVE PRESUMPTION OF INSURANCE CODE SECTION 11580.9(a)(2).

Operator Was Not Insured Engaged in Motor Vehicle-Related Business or Insured's Employee. When two or more policies affording valid and collectible automobile liability insurance apply to the same motor vehicle in an occurrence out of which a liability loss arises and one of the policies affords coverage to a named insured engaged in the business of selling, repairing, servicing, delivering, testing, road testing, parking, or storing motor vehicles, it is conclusively presumed that if, at the time of loss, the motor vehicle was being operated by any person other than the person engaged in any of those businesses and other than his or her employee or agent, the insurance afforded by the policy issued to the person engaged in any of those businesses is excess over all other insurance available to the operator as a named insured or otherwise (*Ins. Code § 11580.9(a)(2)*; *see also Zurich-Am. Ins. Co. v. Liberty Mut. Ins. Co. (1978) 85 Cal. App. 3d 481, 487-490, 149 Cal. Rptr. 472* ; *Westerholm v. 20th Century Ins. Co. (1976) 58 Cal. App. 3d 628, 632-634, 130 Cal. Rptr. 164*).

[2] Comments

[a] Use of Form

These points and authorities may be used to oppose an adverse insurer's contention that an insurance policy provides the primary coverage of the loss. The basis of these points and authorities is that a conclusive presumption exists that insurance coverage issued to an insured engaged in motor vehicle-related business is excess, not primary, where at the time of the loss, the vehicle was being operated by someone not engaged in that vehicle-related business [*Ins. Code §*

11580.9(a)(2)].

This form may be used in a variety of procedural contexts. For example, it may be used in an action by an insurance company against another insurance company seeking a judicial declaration that the policy issued by the adverse insurer provides the primary coverage of the loss, the plaintiff's policy provides the excess coverage.

If the statutory presumptions were modified in writing by all of the insurers and insureds, pursuant to *Ins. Code § 11580.9(f)*, the points and authorities in this form should be combined with those in § 120.374.

This form may be used to oppose the points and authorities *set forth in §§ 120.350, 120.351*.

These points and authorities may be combined with points and *authorities in § 120.350* [*see, e.g.*, Paragraphs A and D, relating to public policy regarding order of liability and the nature of insured's business as determinative factor, respectively].

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should refer to evidence establishing the requirement for a conclusive presumption of excess coverage under *Ins. Code § 11580.9(a)(2)*:

- Insured was engaged in one of the businesses specified in *Ins. Code § 11580.9(a)(1)*, and

- The vehicle involved in the accident giving rise to the liability loss was being operated by a person other than that insured or that insured's employee or agent.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be a motion by an insurer for summary judgment or opposition to such a motion by an adverse insurer, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that there is no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts supporting the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (h), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Pleading and Practice Chapters

For complaints by an insured against an insurer for damages for breach of contract because of the insurer's refusal to pay a third-party judgment against the insured or to defend the insured in a third-party action, see California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender). For a discussion of the rules applicable to summary judgment, a form of notice of motion for summary judgment, and related forms, see Ch. 537, *Summary Judgment* , in that publication.

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Operator Was Not Insured Engaged in Motor Vehicle-Related Business or Insured's Employee

Zurich-Am. Ins. Co. v. Liberty Mut. Ins. Co. *(1978) 85 Cal. App. 3d 481, 149 Cal. Rptr. 472* , was a declaratory relief action between two insurance companies whose policies covered the same motor vehicle involved in a traffic accident. Plaintiff's insured was the owner of a truck-painting business and was a named insured in an automobile and garage liability insurance policy, containing limits of $300,000 for bodily injury per occurrence, issued by plaintiff. Defendant's insured was a truck-sales company and was a named insured in a liability policy, which described a particular truck as an owned vehicle. Defendant's insured had orally hired plaintiff's insured to repair and paint the front fender of the described truck. After the completion of repairs, defendant's insured requested plaintiff's insured to drive the truck to a muffler shop at which place defendant's insured was to take possession. Under customary procedure, plaintiff's insured would have delivered the truck to defendant's insured's place of business.

While en route to the muffler shop, plaintiff's insured struck a bicycle and injured the rider, who subsequently recovered judgment against both plaintiff's insured and defendant's insured in the amount of $100,000, pluscosts. Following trial on the personal injury complaint, plaintiff filed an action for declaratory relief seeking a declaration that defendant's policy provided primary coverage for the accident under *Ins. Code § 11580.9*. Defendant answered the complaint and filed a cross complaint seeking a declaration that plaintiff was primarily liable. The trial court held that under *Ins. Code § 11580.9(d)*, defendant was primarily liable and plaintiff's policy was excess.

The court of appeal reversed. It held that *Ins. Code § 11580.9(a)* applied, that under the clear language of *Ins. Code § 11580.9(a)(1)* and *Ins. Code § 11580.9(a)(2)*, the priority between coinsurers is made on the basis of who was operating the motor vehicle at the time of the accident occasioning the insurable loss and that, as used in that section, the term "operator" must include within its meaning the driver of the vehicle. Thus, when a vehicle involved in an accident was driven by one with the permission of the owner, primary liability attaches to the policy under which the permissive user is afforded coverage as a named insured, and the insurance afforded by any other policy, including that of the owner, is excess (*85 Cal. App. 3d 481, 487)* .

The court explained that the two policies involved afforded valid and collectible liability insurance and that at least one of the policies was issued to a named insured in one of the automotive businesses specified, that he was proceeding in the course and scope of that business and not as an agent for the owner, that the truck-painting company owner was the operator of the truck at the time of the accident, and that he was delivering the truck from his place of business to the owner (*85 Cal. App. 3d 481, 488-489)* . The court concluded that under *Ins. Code § 11580.9(a)*, the liability policy issued to the truck-painting owner was primary, and the policy issued to the truck-sales company was excess (*85 Cal. App. 3d 481, 489)* . The court held that since the policy issued to the truck-sales company was excess, plaintiff must bear the primary responsibility and, under the applicable limits of its policy, the entire loss (*85 Cal. App. 3d 481, 490)* .

Westerholm v. 20th Century Ins. Co. *(1976) 58 Cal. App. 3d 628, 130 Cal. Rptr. 164* , was a personal injury action against the driver of a car involved in an accident and the car's owner, a garage business. At the time of the accident, defendant driver was 18 years old, living with his parents, and insured under a policy issued to his father with personal

injury limits of $15,000. Defendant garage owner held an automobile liability policy, covering the car, issued by another insurance company with personal injury limits of $100,000. The garage owner's insurer defended the action and cross complained, in defendants' names, against the father's insurer for declaratory relief. It claimed that under *Ins. Code § 11580.9(a)(2)*, the policy issued to the father furnished primary coverage and that cross defendant was obligated to furnish a defense to the driver and to pay any judgment entered in plaintiff's favor. This garage owner's insurer settledthe personal injury action for $75,000, a reasonable sum. The cross action was tried by the court without a jury, and judgment was entered ordering that cross defendant pay to the garage owner's insurer the sum of $15,000 as partial reimbursement for the $75,000 paid in settlement of the personal injury action. The trial court determined that *Ins. Code § 11580.9(a)(2)* was controlling and that, under this section, cross defendant's policy furnished primary coverage (*58 Cal. App. 3d 628, 632)* .

The court of appeal affirmed. It said that the findings of the trial court, together with the stipulation of facts, established that the garage owner's insurer had issued an automobile liability policy to the garage owner, who was engaged in the business of repairing cars, that the car was an insured vehicle under that policy and was used in the garage owner's business, that at the time of the accident the car was being driven by the 18-year-old son who was neither an employee nor an agent of the garage owner, and that automobile liability insurance coverage was extended to the driver under the policy issued to this father by cross defendant. Thus, the conclusive presumption set forth in *Ins. Code § 11580.9(a)(2)* applied, with the result that the insurance afforded by the garage owner's policy was excess over the insurance available to the driver under the policy issued by cross defendant (*58 Cal. App. 3d 628, 633-634)* . The court explained that under *Ins. Code § 11580.9*, the initial question is whether one of the policies affords coverage to a named insured engaged in a business as outlined in the statute. If that question is answered in the affirmative, and the vehicle was driven by the person engaged in that business (or by that person's employee or agent) at the time of an accident, the insurance afforded by that person's policy is primary; if the vehicle was driven by any other person, the insurance available to the person under the garage owner's policy is excess. The court concluded that since the car was being driven by a person other than as described in *Ins. Code § 11580.9(a)(1)*, and the policy was issued to a person engaged in one of the businesses specified, the policy was excess (*58 Cal. App. 3d 628, 634)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawExcess InsuranceGeneral OverviewInsurance LawExcess InsuranceApportionment of LiabilityInsurance LawMotor Vehicle InsuranceCoverageGeneral Overview

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 120 INSURANCE
PART II. FORMS
E. Actions Between Motor Vehicle Liability Insurers
2. Policy Provides Excess Insurance Coverage

12-120 California Points & Authorities § 120.371

§ 120.371 Insured Is Lessor of Commercial Vehicles or Long-Term Lessor of Motor Vehicles

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE INSURANCE AFFORDED BY THE POLICY ISSUED BY _____ [*name of insurer*] PROVIDES THE EXCESS INSURANCE COVERAGE, AND NOT THE PRIMARY INSURANCE COVERAGE, PURSUANT TO THE CONCLUSIVE PRESUMPTION OF INSURANCE CODE SECTION 11580.9(b), GOVERNING LESSORS OFCOMMERCIAL VEHICLES OR LONG-TERM LESSOR OF MOTOR VEHICLES.

A. Named Insured Is Engaged in Specified Motor Vehicle Leasing Business. If two or more policies apply to the same loss, and one policy affords coverage to a named insured that in the course of its business rents or leases motor vehicles without operators, it is conclusively presumed that the insurance afforded by that policy to a person other than the named insured or his or her agent or employee is excess over, and not concurrent with, any other valid and collectible insurance applicable to the same loss covering the person as a named insured or as an additional insured under a policy with limits at least equal to the financial responsibility requirements specified in *Veh. Code § 16056*. The presumption applies only if, at the time of the loss, the involved motor vehicle either: (1) qualifies as a "commercial vehicle"; or (2) has been leased for a term of six months or longer. For this purpose, "commercial vehicle" means a type of vehicle subject to registration or identification under the laws of California that is either: (1) used or maintained for the transportation of persons for hire, compensation, or profit; or (2) designed, used, or maintained primarily for the transportation of property (*Ins. Code § 11580.9(b)*; *see also McCall v. Great Am. Ins. Co. (1981) 119 Cal. App. 3d 993, 998-999, 174 Cal. Rptr. 399*).

B. Meaning of "Policies" as Used in *Insurance Code Section 11580.9(b)-(d)*. As used in *Insurance Code Section 11580.9(b)-(d)*, "policies" means automobile liability insurance policies (*Metro U.S. Servs., Inc. v. City of Los Angeles (1979) 96 Cal. App. 3d 678, 682, 158 Cal. Rptr. 207*).

[2] Comments

[a] Use of Form

These points and authorities may be used to oppose an adverse insurer's contention that an insurance policy provides the primary coverage of the loss. The basis of these points and authorities is that the insurance afforded by the policy issued by the insurer opposing the contention provides the excess insurance coverage, and not the primary insurance coverage, pursuant to the conclusive presumption of *Ins. Code § 11580.9(b)* (governing lessors of commercial vehicles or long-term lessor of motor vehicles).

This form may be used in a variety of procedural contexts. For example, it may be used in an action by an insurance company against anotherinsurance company seeking a judicial declaration that the policy issued by the adverse insurer provides the primary coverage of the loss, the plaintiff's policy provides the excess coverage.

If the statutory presumptions were modified in writing by all of the insurers and insureds, pursuant to *Ins. Code § 11580.9(f)*, the points and authorities in this form should be combined with those in § 120.374.

This form may be used to oppose the points and authorities *set forth in § 120.350*.

These points and authorities may be combined with points and *authorities in § 120.350* [*see, e.g.,* Paragraphs A and D, relating to public policy regarding order of liability and the nature of insured's business as determinative factor, respectively].

When the driver of a rented or leased vehicle is involved in an accident, the general rule stated in Ins. Code § 10580.9(d), under which the vehicle owner's insurance is primary and the driver's insurance is excess, ordinarily applies. Thus, when a person rents a car from a car rental agency, and is thereafter involved in an accident, under the general rule the car rental agency's insurance will be primary and any other insurance excess.

Ins. Code § 11580.9(b) states two exceptions for rented or leased vehicles to the general rule noted above. The general presumption that the vehicle owner's insurance is primary and the lessee's insurance is excess is reversed if the motor vehicle in question is leased without an operator and either (1) qualifies as a "commercial vehicle" or (2) has been leased for a term of six months or longer. "Commercial vehicle" means a type of vehicle subject to registration or identification under the laws of California that is either: (1) used or maintained for the transportation of persons for hire, compensation, or profit; or (2) designed, used, or maintained primarily for the transportation of property. In these circumstances, a special exception to the general rule states that any insurance provided by the lessor's policy to any person other than the lessor and the lessor's agents and employees will be excess over any other applicable insurance covering the same person as a named or additional insured, provided that the applicable limits of the other insurance are at least equal to the minimum financial responsibility requirements [*Ins. Code § 11580.9(b)*; *see Veh. Code § 16056* (financial responsibility requirements)]. In the typical fact context, this will mean that when a commercial vehicle or a long-term lease is involved, the lessee's insurance will be primary and the lessor's insurance excess.

The purpose of this exception is to insure that coverage reflects the realities of the transaction in question. If a passenger vehicle is leased or rented for less than six months, the economic benefit and the risk of ownership remains with the lessor and the lessor's policy is primary. If a passenger vehicle is leased for a term exceeding six months, the ownershiprisk shifts to the lessee and the insurance policy issued to the owner/lessor becomes excess [*Transport Indem. Co. v. Alo (1981) 118 Cal. App. 3d 143, 147, 172 Cal. Rptr. 394]* . In the commercial context, since a commercial lessee usually will be making a profit from the use, the lessee's policy should be primary [*Transport Indem. Co. v. Alo (1981) 118 Cal. App. 3d 143, 148, 172 Cal. Rptr. 394]* .

A rental car is not a "commercial vehicle" simply by virtue of the fact that the rental itself is a commercial transaction. Rather, the use to which the lessee puts the vehicle is determinative. If the lessee uses the leased vehicle to transport persons for hire, or if the vehicle is designed, used, or maintained primarily for the transportation of property, the

vehicle qualifies as "commercial" for purposes of this exception [*Government Employees Ins. Co. v. Carrier Ins. Co. (1975) 45 Cal. App. 3d 223, 228, 119 Cal. Rptr. 116]* . In other words, as to leased or rented commercial vehicles, the emphasis is on the business use of the equipment [*Transport Indem. Co. v. Alo (1981) 118 Cal. App. 3d 143, 148, 172 Cal. Rptr. 394]* . Thus, "casual" leasing comes within this exception as long as it can reasonably be stated that the transaction involved was a commercial transaction [*see Mission Ins. Co. v. Hartford Accident & Indem. Co. (1984) 160 Cal. App. 3d 97, 101, 206 Cal. Rptr. 383]* . However, the exception is inapplicable if the vehicle is loaned without consideration rather than being rented or leased, even if the owner is in the business of renting or leasing commercial vehicles [*Transport Indem. Co. v. Alo (1981) 118 Cal. App. 3d 143, 148-149, 172 Cal. Rptr. 394]* .

For references to related Pleading and Practice chapters, see *§ 120.370[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should refer to evidence establishing the requirements set forth in *Ins. Code § 11580.9(b)*.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be a motion by an insurer for summary judgment or opposition to such a motion by an adverse insurer, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that there is no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts supporting the motion. The statement must be supported by cognizable evidence in the form of a request for judicialnotice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Named Insured Is Engaged in Specified Motor Vehicle Leasing Business

McCall v. Great Am. Ins. Co. *(1981) 119 Cal. App. 3d 993, 174 Cal. Rptr. 399* , was a declaratory relief action filed by an insurer and its insured against a car leasing company, a car rental company, and the leasing company's insurer to determine which of the two policies involved provided primary, and which excess, coverage of the liability loss involved. The leasing company was engaged in the business of leasing automobiles for six months or longer. It leased one of its cars to plaintiff insured's company for a period of three years for use by plaintiff insured as an employee of the company. Subsequently, a loan car, owned by the car-rental company, was substituted for the leased car while the

latter was being repaired. Plaintiff insured, while driving the loan car, was involved in the accident giving rise to the liability loss. Both plaintiff insurer's policy and that of defendant insurer covered the loan car. The trial court declared that plaintiff insurer's policy provided primary coverage and that defendant's policy was excess.

The court of appeal affirmed. It explained that the lease under which plaintiff insured received the loan car while the leased car was being repaired was for three years, that the loan vehicle was supplied by the terms of the loan agreement to customers of the leasing company only with the loan agreement providing for the signature of the lessee, and that it was manifest that the loan car was a part of the leasing company's long-term leasing business (*119 Cal. App. 3d 993, 998)* . The court held that Ins.Code § 11580.9(b) applied because that section provides that if one of the two policies affording coverage covers an insured in the business of leasing motor vehicles for six months or longer, that insurance is excess, with primary coverage being presumed under the policy covering the named or additional insured, that plaintiff insurer's policy was therefore primary and defendant insurer's policy was excess (*119 Cal. App. 3d 993, 998-999)* .

[b] Meaning of "Policies" as Used in Insurance Code Section 11580.9(b)-(d)

In ***Metro U.S. Servs., Inc. v. City of Los Angeles*** *(1979) 96 Cal. App. 3d 678, 158 Cal. Rptr. 207* , plaintiff Metro had leased a dump truck to defendant city. While driving the truck, the city's employee had an accident allegedly injuring several persons who then sued plaintiff Metro, the city, and the city's employee for damages. Plaintiff Metro in no way contributed to the cause of the accident. Plaintiff Metro was insured by an insurance company, and defendant city was a self-insurer. The city refused to provide a defense for plaintiff Metro in the third-party action, and plaintiff Metro and its insurer then sued the city for declaratory relief. Plaintiffs appealed from a judgment in favor of the defendant. The court of appeal affirmed on the ground that *Ins. Code § 11580.9*, as it then read, did not apply to self-insurers. In the course of its opinion, the court said that it was obvious that the word "policies" as used in *Ins. Code § 11580.9(b)* means the same as that used in *Ins. Code § 11580.9(a)*, where the complete wording is: "Where two or more policies affording valid and collectible automobile liability insurance apply to the same motor vehicle." The court pointed out that the failure to repeat the entire terminology was carried on throughout subdivisions (a) through (f) and concluded that it was clear that "policies" in subdivision (b) means automobile liability insurance policies (*96 Cal. App. 3d 678, 682)* .

The court's ultimate holding that *Ins. Code § 11580.9* was inapplicable to self-insurers was based on the language of the section as it existed prior to enactment of current *Ins. Code § 11580.9(h)*, which now specifically states that a certificate of self-insurance, among other things, is a "policy of automobile insurance" for purposes of *Ins. Code § 11580.9*. However, the statutory change does not appear to negate the court's conclusion that the word "policies" as used in *Ins. Code § 11580.9(b)* means automobile liability policies. Instead, the current statutory wording simply defines what is included in the latter term.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawExcess InsuranceGeneral OverviewInsurance LawMotor Vehicle InsuranceVehicle OwnershipLeases & Rental Vehicles

California Points & Authorities

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CHAPTER 120 INSURANCE
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2. Policy Provides Excess Insurance Coverage

12-120 California Points & Authorities § 120.372

§ 120.372 Policy Covers Motor Vehicle When Loss Occurred During Loading or Unloading of Vehicle

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE INSURANCE AFFORDED BY THE POLICY ISSUED BY _____ [*name of insurer*] PROVIDES THE EXCESS INSURANCE COVERAGE, AND NOT THE PRIMARY INSURANCE COVERAGE, PURSUANT TO THE CONCLUSIVE PRESUMPTION OF INSURANCE CODE SECTION 11580.9(c), RELATING TO POLICY COVERING MOTOR VEHICLE WHEN LOSS OCCURRED DURING LOADING OR UNLOADING OF VEHICLE.

B. Named Insured Owns or Rents Premises Where Loss Occurred During Loading or Unloading of Vehicle. When two or more policies are applicable to the same loss arising out of the loading or unloading of a motor vehicle, and one or more of the policies is issued to the owner, tenant, or lessee of the premises on which the loading or unloading occurred, it is conclusively presumed that the insurance afforded by the policy covering the motor vehicle is not primary, notwithstanding anything to the contrary in any endorsement required by law to be placed on that policy, but is excess over all other valid and collectible insurance applicable to the same loss with limits up to the financial responsibility requirements specified in *Vehicle Code Section 16056*. In that event, the two or more policies are not to be construed as providing concurrent coverage; rather, only the insurance afforded by the policy or policies covering the premises on which the loading or unloading occurs is primary, and that policy or policies shall cover as an additional insured with respect to the loading or unloading operations all employees of the owner, tenant, or lessee while acting in the course and scope of their employment (*Ins. Code § 11580.9(c)*).

[2] Comments

[a] Use of Form

These points and authorities may be used to oppose an adverse insurer's contention that an insurance policy provides the

primary coverage of the loss. The basis of these points and authorities is that the insurance afforded by the policy issued by the insurer opposing the contention, provides the excess insurance coverage, and not the primary insurancecoverage, pursuant to the conclusive presumption of *Ins. Code § 11580.9(c)* (policy covering motor vehicle when loss occurred during loading or unloading of vehicle).

This form may be used in a variety of procedural contexts. For example, it may be used in an action by an insurance company against another insurance company seeking a judicial declaration that the policy issued by the adverse insurer provides the primary coverage of the loss, the plaintiff's policy provides the excess coverage.

If the statutory presumptions were modified in writing by all of the insurers and insureds, pursuant to *Ins. Code § 11580.9(f)*, the points and authorities in this form should be combined with those in § 120.374.

These points and authorities may be combined with points and *authorities in § 120.350* [*see, e.g.,* Paragraphs A and D, relating to public policy regarding order of liability and the nature of insured's business as determinative factor, respectively].

This form may be used to oppose the points and authorities *set forth in § 120.352*.

For references to related Pleading and Practice chapters, see *§ 120.370[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should refer to evidence establishing the requirements set forth in *Ins. Code § 11580.9(c)*.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be a motion by an insurer for summary judgment or opposition to such a motion by an adverse insurer, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that there is no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statementof undisputed material facts supporting the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Named Insured Owns or Rents Premises Where Loss Occurred During Loading or Unloading of Vehicle

The limits of liability specified in *Veh. Code § 16056* are not less than $15,000 for personal injury to or death of one person in any one accident, $30,000 for personal injury to or death of two or more persons in any one accident, and $5,000 property damage in any one accident [*Veh. Code § 16056(a)*].

[4] Additional Authorities

[a] Named Insured Owns or Rents Premises Where Loss Occurred During Loading or Unloading of Vehicle

In *Charmac, Inc. v. Aetna Cas. & Sur. Co. (1991) 233 Cal. App. 3d 660, 664, 284 Cal. Rptr. 635* , the court concluded that *Ins. Code § 11580.9(c)* applies only with respect to policies covering the same insured for the same loss. Thus, it applies when the driver of a vehicle sues a premises owner for injuries sustained by the driver while the owner's employees were loading or unloading the vehicle on the premises. In this situation, the owner is covered under the premises liability policy, and the owner's employees are also covered under the driver's vehicle liability policy as permissive users while unloading the vehicle. The court held that Ins.Code § 11580.9(c) does not apply when two independent tortfeasors are insured under their own policies and neither is an additional insured under the other's policy, such as when a nonemployee injured while unloading a vehicle sues both the premises owner and the vehicle owner (*233 Cal. App. 3d 660, 667-668)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawExcess InsuranceGeneral OverviewInsurance LawMotor Vehicle InsuranceVehicle UseGeneral OverviewInsurance LawMotor Vehicle InsuranceVehicle UseLoading & Unloading

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12-120 California Points & Authorities § 120.373

§ 120.373 Policies Do Not Cover Same Insured for Same Loss When Loss Occurred During Loading or Unloading of Vehicle

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE INSURANCE AFFORDED BY THE POLICY ISSUED BY _____ [*name of insurer*] PROVIDES THE EXCESS INSURANCE COVERAGE, AND NOT THE PRIMARY INSURANCE COVERAGE, BECAUSE THE LOSS OCCURRED DURING LOADING OR UNLOADING OF VEHICLE, AND THE POLICIES DO NOT COVER THE SAME INSURED FOR SAME LOSS.

Statutory Presumption Inapplicable to Policies Covering Independent Tortfeasors. The presumption under *Insurance Code Section 11580.9(c)* assigns priorities among insurance coverage only when two or more insurance policies cover the same insured for the same loss. It is inapplicable to determine coverage among policies that cover independent tortfeasors insured under their own policies (*Charmac, Inc. v. Aetna Cas. & Sur. Co. (1991) 233 Cal. App. 3d 660, 663-669, 284 Cal. Rptr. 635*).

[2] Comments

[a] Use of Form

These points and authorities may be used to oppose an adverse insurer's contention that an insurance policy provides the primary coverage of the loss. The basis of these points and authorities is that the insurance afforded by the policy issued by the insurer opposing the contention provides the excess insurance coverage, and not the primary insurance coverage, because the loss occurred during loading or unloading of vehicle, and the policies do not cover the same insured for same loss.

This form may be used in a variety of procedural contexts. For example, it may be used in an action by an insurance

company against another insurance company seeking a judicial declaration that the policy issuedby the adverse insurer provides the primary coverage of the loss, the plaintiff's policy provides the excess coverage.

If the statutory presumptions were modified in writing by all of the insurers and insureds, pursuant to *Ins. Code § 11580.9(f)*, the points and authorities in this form should be combined with those in § 120.374.

These points and authorities may be combined with points and *authorities in § 120.350* [*see, e.g.,* Paragraphs A and D, relating to public policy regarding order of liability and the nature of insured's business as determinative factor, respectively].

This form may be used to oppose the points and authorities *set forth in § 120.352*.

For references to related Pleading and Practice chapters, see *§ 120.370[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be a motion by an insurer for summary judgment or opposition to such a motion by an adverse insurer, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that there is no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts supporting the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication indrafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Statutory Presumption Inapplicable to Policies Covering Independent Tortfeasors

In ***Charmac, Inc. v. Aetna Cas. & Sur. Co.*** *(1991) 233 Cal. App. 3d 660, 284 Cal. Rptr. 635* , a worker injured while unloading a truck sued the owner of the truck and owner of the premises (neither of whom were his employer), seeking damages for his injuries. Defendants cross complained against each other for total or partial indemnity. The truck owner also brought a declaratory relief action against the premises insurer, which answered and cross complained for

declaratory relief against the truck owner. The subject of the declaratory relief action was whether the premises insurer had primary liability for the injuries, obligating it to defend and indemnify the premises owner before the vehicle insurer became obliged to pay under an "excess policy." The declaratory relief action was severed from the main action, and the trial court concluded that the premises insurer was the primary carrier, pursuant to *Ins. Code § 11580.9(c)*. Consequently, the premises insurer was held obligated to defend and indemnify the truck owner. The premises insurer appealed.

The court of appeal reversed, holding *Ins. Code § 11580.9(c)* applies only to assess priorities among insurance policies that cover the same insured for the same loss (*233 Cal. App. 3d 660, 664-669)* . The court first discussed the legislative intent of the statute, noting that *Ins. Code § 11580.9(c)* was enacted expressly to avoid the conflicts and court congestion created when multiple policies cover the same loss and numerous involved parties contest which insurer is responsible as the primary carrier and which as an excess carrier. To further that purpose, *Ins. Code § 11580.9* created a series of conclusive presumptions, their applicability being dependent on the factual situations, declaring which insurer would be assigned as the primary carrier and which as the excess carrier (*233 Cal. App. 3d 660, 664)* . *Ins. Code § 11580.9(c)* provides in pertinent part that when two or more policies are applicable to the same loss arising out of the loading or unloading of a motor vehicle, and one or more of the policies is issued to the owner, tenant, or lessee of the premises on which the loading or unloading occurs, the vehicle insurance is conclusively presumed to be excess over all other valid and collectible insurance applicable to the same loss. The premises insurance is primary, and covers as an additional insured with respect to the loading or unloading operations all employees of the owner, tenant, or lessee while acting in the course and scope of theiremployment. The truck owner contended that the statute was intended to apply whenever there are two independent tortfeasors, one protected by a vehicle policy and the other by a premises policy, involved in a loading or an unloading accident. The premises insurer contended that the intent of *Ins. Code § 11580.9(c)* is limited to the assignment of policy priorities only when multiple policies are applicable to a particular insured's liability arising from the accident.

The court stated, based on its review of the language of the statute in light of the apparent purpose of the scheme as a whole, that it has no application when two independent tortfeasors, each having its own insurance and neither being a named or an additional insured under the other's policy, are codefendants in a tort action such as the instant case. The court observed that the apparent general purpose of *Ins. Code § 11580.9* is to assign priorities among policies that insure a single tortfeasor (*233 Cal. App. 3d 660, 665)* . Previous courts examining *Ins. Code § 11580.9(c)* have construed it in a manner consistent with the requirement that the multiple policies all apply to a single tortfeasor. It has been noted that the legislative intent behind *Ins. Code § 11580.9(c)* was to avoid the recurring controversies that arise when the driver of a vehicle is injured on the premises during loading or unloading of the vehicle and the driver sues the premises owner. In those circumstances, two policies are potentially applicable: the premises policy, because the premises owner is a named assured; and the vehicle policy covering the driver's vehicle, because the owner's employees unloading the vehicle would be "permissive users" of the vehicle and hence additional insureds under the vehicle policy. A suit by the driver against the owner invariably raised the issue as to which policy covering the same loss was primary. *Ins. Code § 11580.9(c)* clearly determines the respective responsibilities of the two insurers: the premises policy is primary, and the vehicle policy is excess (*233 Cal. App. 3d 660, 666)* .

The truck owner contended that the only requirement of the application of *Ins. Code § 11580.9(c)* is that two or more policies be "applicable to the same loss," meaning the same injury to the third party. It further contended that the statute does not depend, as a predicate for its applicability, on resolving priorities among coinsurers that are obliged to indemnify the same insured. The court rejected these contentions, finding that a predicate to the statute's application is that multiple policies be "applicable to the same loss" (*233 Cal. App. 3d 660, 667)* . When, as in the instant case, two independent tortfeasors are insured under their own policies and each is not an additional insured under the other's policy, the policies simply are not applicable to the same loss (*233 Cal. App. 3d 660, 667-668)* .

The court noted that the truck owner's argument depends entirely on its interpretation of the term "same loss": the same injury incurred by the third party. However, liability policies generally do not "apply" to losses by third parties; instead,

they "apply" to indemnify an insured for the insured's legal liabilities in relation to the insured's loss. For example, in theinstant case, the "loss" to which the premises policy applies is constituted by "all sums which the insured shall become legally obligated to pay as damages ... caused by an occurrence. ..." The term "insured" is limited to persons or organizations "qualifying as an insured in the "Persons Insured" provision." The vehicle policy presumably has similar application, that is, to indemnify the truck owner for any liability it has to the plaintiff.

Inasmuch as the vehicle policy applies to the truck owner's loss, but the premises policy does not (in that it owes no obligation to indemnify noninsureds under it), the two policies do not apply to the same loss, that is, the loss of the insured. The court's final reason for rejecting the premise insurer's interpretation is that it would make the truck owner an additional insured under the premises policy by operation of law, which would create new coverage, a result unintended by the legislature (*233 Cal. App. 3d 660, 668)* . The court concluded that *Ins. Code § 11580.9(c)* is only applicable when assessing priorities among insurance policies that cover the same insured for the same loss; and because there are not two policies indemnifying the truck owner against the plaintiff's claim, *Ins. Code § 11580.9(c)* has no application in the instant case (*233 Cal. App. 3d 660, 664, 669)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawExcess InsuranceGeneral OverviewInsurance LawMotor Vehicle InsuranceVehicle UseGeneral OverviewInsurance LawMotor Vehicle InsuranceVehicle UseLoading & Unloading

California Points & Authorities

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E. Actions Between Motor Vehicle Liability Insurers
2. Policy Provides Excess Insurance Coverage

12-120 California Points & Authorities § 120.374

§ 120.374 All Insurers and Insureds Modified Statutory Presumption

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE INSURANCE AFFORDED BY THE POLICY ISSUED BY _____ [*name of insurer*] PROVIDES THE EXCESS INSURANCE COVERAGE, AND NOT THE PRIMARY INSURANCE COVERAGE, BECAUSE ALL INSURERS AND INSUREDS MODIFIED STATUTORY PRESUMPTION.

All Insurers and Insureds Modified Statutory Presumption. The presumptions stated in *Insurance Code § 11580.9(a) to (d)*, inclusive, may be modified or amended by written agreement signed by all insurers who have issued a policy or policies applicable to a loss described in those subdivisions and all named insureds under those policies (*Ins. Code § 11580.9(f)*).

[2] Comments

[a] Use of Form

These points and authorities may be used to oppose an adverse insurer's contention that an insurance policy provides the primary coverage of theloss. The basis of these points and authorities is that the statutory presumptions were modified by the written agreement of the insurers and insureds.

This form may be used in a variety of procedural contexts. For example, it may be used in an action by an insurance company against another insurance company seeking a judicial declaration that the policy issued by the adverse insurer provides the primary coverage of the loss, the plaintiff's policy provides the excess coverage.

This form may be used to oppose the points and authorities *set forth in § 120.350* et seq.

For references to related Pleading and Practice chapters, see *§ 120.370[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. In particular, counsel should refer to the written agreement of all the insureds and insurers which modifies the statutory presumptions set forth in *Ins. Code § 11580.9(a)-(d)*.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be a motion by an insurer for summary judgment or opposition to such a motion by an adverse insurer, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that there is no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts supporting the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication indrafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceInferences & PresumptionsExceptionsStatutory PresumptionsInsurance LawExcess InsuranceGeneral Overview

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2. Policy Provides Excess Insurance Coverage

12-120 California Points & Authorities §§ 120.375-120.379

[Reserved]

§§ 120.375[Reserved]

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1. Liability of Insurance Agent or Employee

12-120 California Points & Authorities § 120.380

§ 120.380 Tort Committed Against Insured Is Independent of Insurance Contract

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT, AS INSURER'S _____ [AGENT *or* EMPLOYEE], IS LIABLE TO PLAINTIFF INSURED[, EVEN THOUGH HE/SHE WAS NOT A PARTY TO THE INSURANCE CONTRACT], BECAUSE THE TORT HE/SHE COMMITTED IS INDEPENDENT OF THE INSURANCE CONTRACT.

Insurer's Agent/Employee Is Liable for Tort Not Arising From Insurance Contract. An agent or employee of an insurer is liable to an insured for wrongful and unprivileged acts committed against the insured that are not based on a breach of the insurer's duty of good faith and fair dealing arising under the insurance contract (*Younan v. Equifax Inc. (1980) 111 Cal. App. 3d 498, 510-511, 169 Cal. Rptr. 478*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that an agent or employee of an insurer is liable to the insured. The basis of these points and authorities is that torts committed against the insured are independent of the insurer's duty of good faith and fair dealing [*see Younan v. Equifax Inc. (1980) 111 Cal. App. 3d 498, 510-511, 169 Cal. Rptr. 478]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that an insurer's agent or employee is liable to the insured for independent torts. For example, these points and authorities may be submitted in opposition to a demurrer to a complaint or a defense motion for summary judgment in an action brought by aninsured that states tort causes of action against an insurer's agent or employee. For use in this context, these points and authorities may be combined with points

and authorities pertaining to demurrers or summary judgment motions generally.

In an appropriate case, these points and authorities may be modified to oppose the points and authorities supporting a defense motion for summary judgment *set out in § 120.170*.

These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. For example, counsel should set forth facts showing that the tort alleged does not arise from the insurer's duty to the insured under the implied covenant of good faith and fair dealing arising under the insurance contract, but rather that the defendant's conduct constitutes a tort distinct from the breach of the insurer's duty under the implied covenant.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.381* et seq.) and to place the argument within its proper procedural context.

An appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing a motion for summary judgment or summary adjudication by an insurer, or insurer's agent or employee, when the evidentiary facts clearly support the contention. In this context, counsel would modify the form to assert that there remain triable issues of material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts opposing the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(e)-(h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Pleading and Practice Chapters

For complaints by an insured against an insurer for damages for breach of contract because of the insurer's refusal to pay a third-party judgmentagainst the insured or to defend the insured in a third-party action, see California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender). For a discussion of the rules applicable to summary judgment, a form of notice of motion for summary judgment, and related forms, see Ch. 537, *Summary Judgment* , in that publication.

For discussion and forms regarding civil conspiracy, see Ch. 126, *Conspiracy* , in that publication. For discussion and forms regarding fraud, see Ch. 269, *Fraud and Deceit* , in that publication. For discussion regarding the liability of an agent for wrongful acts, see Ch. 427, *Principal and Agent* , in that publication.

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

For points and authorities regarding civil conspiracy generally, see Ch. 46, *Conspiracy* . For points and authorities regarding fraud generally, see Ch. 105, *Fraud and Deceit* . For points and authorities regarding the liability of an agent to a third party for wrongful acts, see Ch. 182, *Principal and Agent* .

[e] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 120.392* may be used to oppose these points and authorities.

[3] Discussion of Authorities

[a] Insurer's Agent/Employee Is Liable for Tort Not Arising From Insurance Contract

In ***Younan v. Equifax Inc.*** *(1980) 111 Cal. App. 3d 498, 169 Cal. Rptr. 478* , an insured brought an action against his insurer, a company representing the insurer and an employee of that company, and a psychologist who conducted an examination for insurance purposes, alleging that all the defendants acted to deprive him of benefits due under the insurance policy. With respect to the company representing the insurer and its employee, the complaint alleged causes of action in fraud, conspiracy to defraud, and intentional infliction of emotional distress. The insured filed a claim with his insurer to obtain disability benefits after he sustained injuries in an accident. An employee from a company hired by the insureras its representative contacted the insured and referred him to a clinical psychologist, who examined the insured and allegedly filed a false report with the insurer, which denied the insured benefits because of the report, allegedly according to preconceived design. The insured filed suit. The trial court sustained demurrers to the complaint without leave to amend with respect to causes of action against the insurer's representative and its employee for conspiracy to defraud, actual and constructive fraud, and intentional infliction of emotional distress. The insured appealed from the order dismissing those causes of action.

The court of appeal reversed with respect to all causes of action except that for constructive fraud (*111 Cal. App. 3d 498, 517)* . With regard to the cause of action for conspiracy, the court noted that it was predicated on a conspiracy to defraud the insured by setting up a "medical examination" of him in a way predetermined to produce a false report of his physical condition, and furnishing the insurer with a false but plausible excuse to deny his claim for permanent disability benefits. To be actionable conspiracy, the alleged combination must result in the commission of a civil wrong, either by perpetration of an unlawful act or some injurious act by unlawful means, resulting in damage. The court noted that the crucial issue is whether a cause of action for conspiracy will lie (assuming that all the necessary allegations are pleaded) against persons not parties to the contract of insurance.

The insurer's representative and its employee (collectively referred to here as the agents) cited *Gruenberg v. Aetna Ins. Co. (1973) 9 Cal. 3d 566, 108 Cal. Rptr. 480, 510 P.2d 1032* in support of their contention that they could not be held liable for conspiracy, because they were not party to the insurance contract. In Gruenberg, an insured sued the insurers, an insurance adjuster and its employee, and a law firm and its attorney-employee. The court of appeal held that the noninsurer-defendants were not subject to liability for breach of the implied covenant of good faith and fair dealing, because they were not parties to the insurance contract; the Gruenberg court also found that the noninsurer defendants, as agents and employees of the insurers, could not be held liable on a theory of conspiracy. The court in the instant case distinguished Gruenberg on the ground that the sole basis of the complaint was the defendants' alleged breach of the implied covenant of good faith and fair dealing, and not other torts (*111 Cal. App. 3d 498, 509-510)* .

The insured in the instant case based his conspiracy claim not on breach of the implied covenant, but rather on the commission of fraudulent and unprivileged acts (*111 Cal. App. 3d 498, 510-511)* . The duty of every person to abstain from injuring the person or property of another, or infringing on any rights of another person, is independent of contractual duties. The court noted that if a wrongful act underlying the conspiracy agreement is set forth in the complaint, the conspiracy averment is unnecessary to the statement of a cause of action for conspiracy. The plaintiffmay

therefore state a cause of action against several persons by simply alleging that the named defendants committed the acts. With regard to the cause of action for deceit, the agents asserted that the insured failed to establish the elements of a misrepresentation and causation. They argued that the insured's allegation that they advised him that he was to submit to a medical examination at the psychologist's office was not a misrepresentation, because it was true.

However, the insured further alleged that the insurer hired the agents to examine him and to prepare a medical report that would falsely state his condition, and that the agents, the insurer, and the psychologist agreed that the psychologist would prepare a false report in justification of the insurer's denial of his claim. Although mere nondisclosure is not ordinarily actionable unless the defendant is a fiduciary with a duty to disclose, active concealment or suppression of facts by a nonfiduciary is the equivalent of a false representation, that is, actual fraud. The insured pleaded facts showing that the defendants orchestrated a scheme to deprive him of his insurance benefits, and that part of the scheme was to lead him to believe that he was going to receive a physical examination while concealing from him a material fact, that is, that by prearrangement between defendants, the examination was to be dishonest and produce a false report of his condition.

Defendants' active concealment from the insured of this material fact constituted a false representation (*111 Cal. App. 3d 498, 512-513)* . With respect to causation, the court noted the requirement for three distinct elements: (1) actual reliance; (2) damage resulting from the reliance; and (3) justifiable reliance. The insured alleged that the psychologist agreed with the remaining defendants to conduct a sham examination of him to be used as a basis for a false report of his condition; that the psychologist misrepresented to him that he was a medical doctor who would conduct a medical examination for insurance purposes; that the examination was being requested in order to give the insurer sufficient medical information to consider his claim objectively; that in reliance of those representations, he submitted to the examination; and that a false report based on the alleged examination was performed. To show causation, the plaintiff must plead that he believed the representations to be true (or that he was ignorant of their falsity), and that in reliance on the representations, he or she entered into the transaction.

When the defendants represented to the insured that he was to be examined by the psychologist (reputedly a medical doctor), the representation carried with it an implied representation that the examination would be fairly conducted, and that an honest report was to be prepared from it, not that it would be a bogus examination to be used as a basis for a false report to defeat the insured's claim (*111 Cal. App. 3d 498, 513)* . Notwithstanding that there was no direct averment in the complaint thatthe fraudulent representation induced the insured to submit to the examination, the complaint fairly implied that he intended to allege, and did allege though defectively, that he relied on the misrepresentation made by the defendants, and that they were the inducements for him to submit to the bogus examination (*111 Cal. App. 3d 498, 513-514)* . The court concluded that the agents' argument that no sufficient facts were alleged to show that either the examination report or their conduct was a proximate cause of the denial of the insured's claim was without merit, because the complaint pleaded facts showing that the insured was entitled to some relief, sufficient to withstand attack by demurrer (*111 Cal. App. 3d 498, 514)* .

The court also found the complaint sufficient to state a cause of action for intentional infliction of emotional distress (*111 Cal. App. 3d 498, 515-516*). The court affirmed the judgment with respect to the cause of action for constructive fraud, on the ground that the necessary element of a fiduciary duty of disclosure was lacking with respect to the agents, as noninsurers (*111 Cal. App. 3d 498, 516-517)* .

[4] Additional Authorities

[a] Insurer's Agent/Employee Is Liable for Tort Not Arising From Insurance Contract

In *Saunders v. Cariss (1990) 224 Cal. App. 3d 905* , the court of appeal reversed dismissal of an insured's action against his insurance agent that arose from the agent's forging the insured's signature on an agreement reducing the coverage limits on his uninsured motorist policy. Following an accident with an uninsured motorist, the insured hired an attorney

to recover the full benefits of the actual policy limits, and sued the agent to recover his attorney's fees. The court of appeal stated that an agent who performs an unauthorized act is subject to tort liability, and although the complaint erroneously labeled the cause of action as fraud, it did support a cause of action for professional malpractice (*224 Cal. App. 3d 905, 909)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGood Faith & Fair DealingAgents & BrokersTortsIntentional TortsGeneral Overview

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12-120 California Points & Authorities § 120.381

§ 120.381 Liability for Conspiracy to Defraud Insured

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT, AS INSURER'S _____ [AGENT *or* EMPLOYEE], IS LIABLE TO PLAINTIFF INSURED[, EVEN THOUGH HE/SHE WAS NOT A PARTY TO THE INSURANCE CONTRACT], BECAUSEAGENTS AND EMPLOYEES OF AN INSURER ARE SUBJECT TO LIABILITY FOR CONSPIRACY TO DEFRAUD AN INSURED.

Agents and Employees of Insurer Are Subject to Liability for Conspiracy to Defraud Insured. A cause of action for conspiracy will lie against agents and employees of insurers, even though the agents are not parties to the insurance contract, when they join the insurer in a conspiracy to defraud the insured (*Younan v. Equifax Inc. (1980) 111 Cal. App. 3d 498, 511, 169 Cal. Rptr. 478*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that an agent or employee of an insurer is liable to the insured. The basis of these points and authorities is that an agent or employee of an insurer is subject to liability for conspiracy to defraud the insured.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that an insurer's agent or employee is liable to the insured for independent torts. For example, these points and authorities may be submitted in opposition to a demurrer to a complaint or a defense motion for summary judgment in an action brought by an insured that states tort causes of action against an insurer's agent or employee. For use in this context, these points and authorities may be combined with points

and authorities pertaining to demurrers or summary judgment motions generally.

These points and authorities may also be adapted for use in a trial or appellate brief.

For references to related Pleading and Practice chapters, see *§ 120.380[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.380* et seq.) and to place the argument within its proper procedural context.

An appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing a motion for summary judgment or summary adjudication by an insurer, or insurer's agent or employee, when the evidentiary facts clearly support the contention. In this context, counsel would modify the form to assertthat there remain triable issues of material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts opposing the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(e)-(h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

For points and authorities regarding civil conspiracy generally, see Ch. 46, *Conspiracy* . For points and authorities regarding fraud generally, see Ch. 105, *Fraud and Deceit* . For points and authorities regarding the liability of an agent to a third party for wrongful acts, see Ch. 182, *Principal and Agent* .

[3] Discussion of Authorities

[a] Agents and Employees of Insurer Are Subject to Liability for Conspiracy to Defraud Insured

Younan v. Equifax Inc. *(1980) 111 Cal. App. 3d 498, 169 Cal. Rptr. 478* , is discussed in *§ 120.380[3][a]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGood Faith & Fair DealingAgents & BrokersTortsBusiness TortsFraud & MisrepresentationGeneral Overview

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12-120 California Points & Authorities § 120.382

§ 120.382 Liability for Actual Fraud Against Insured

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT, AS INSURER'S _____ [AGENT *or* EMPLOYEE], IS LIABLE TO PLAINTIFF INSURED[, EVEN THOUGH HE/SHE WASNOT A PARTY TO THE INSURANCE CONTRACT], BECAUSE AGENTS AND EMPLOYEES OF AN INSURER ARE SUBJECT TO LIABILITY FOR ACTUAL FRAUD AGAINST AN INSURED.

Agents and Employees of Insurer Are Subject to Liability for Actual Fraud Against Insured. Agents and employees of an insurer are subject to liability for actual fraud against an insured on the basis of a material false representation on which the insured relies, and which the insured believes to be true, that results in the wrongful deprivation of the insured's rights to benefits under the insurance policy (*Younan v. Equifax Inc. (1980) 111 Cal. App. 3d 498, 513, 169 Cal. Rptr. 478*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that an agent or employee of an insurer is liable to the insured. The basis of these points and authorities is that an agent or employee of an insurer is subject to liability for actual fraud against the insured [*see* (*Younan v. Equifax Inc. (1980) 111 Cal. App. 3d 498, 511, 169 Cal. Rptr. 478]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that an insurer's agent or employee is liable to the insured for independent torts. For example, these points and authorities may be submitted in opposition to a demurrer to a

complaint or a defense motion for summary judgment in an action brought by an insured that states tort causes of action against an insurer's agent or employee. For use in this context, these points and authorities may be combined with points and authorities pertaining to demurrers or summary judgment motions generally.

These points and authorities may also be adapted for use in a trial or appellate brief.

For references to related Pleading and Practice chapters, see *§ 120.380[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.380* et seq.) and to place the argument within its proper procedural context.

An appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing a motion for summary judgment or summary adjudication by an insurer, or insurer's agent or employee, when the evidentiary facts clearly support the contention. In this context, counsel would modify the form to assert that there remain triable issues of material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts opposing the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(e)-(h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

For points and authorities regarding civil conspiracy generally, see Ch. 46, *Conspiracy* . For points and authorities regarding fraud generally, see Ch. 105, *Fraud and Deceit* . For points and authorities regarding the liability of an agent to a third party for wrongful acts, see Ch. 182, *Principal and Agent* .

[3] Discussion of Authorities

[a] Agents and Employees of Insurer Are Subject to Liability for Actual Fraud Against Insured

Younan v. Equifax Inc. *(1980) 111 Cal. App. 3d 498, 169 Cal. Rptr. 478* , is discussed in *§ 120.380[3][a]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGood Faith & Fair DealingAgents & BrokersTortsBusiness TortsFraud &

MisrepresentationGeneral Overview

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 120 INSURANCE
PART II. FORMS
F. Tort Actions Against Insurance Agents, Employees, and Brokers
1. Liability of Insurance Agent or Employee

12-120 California Points & Authorities § 120.383

§ 120.383 Agent Breached Duty to Insured to Inform Insured Accurately of Policy Provisions

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT, AS INSURER'S _____ [AGENT *or* EMPLOYEE], IS LIABLE TO PLAINTIFF INSURED[, EVEN THOUGH HE/SHE WAS NOT A PARTY TO THE INSURANCE CONTRACT], BECAUSE HE/SHE BREACHED HIS/HER DUTY TO INSURED TO INFORM INSURED ACCURATELY OF THE PROVISIONS OF THE INSURANCE POLICY.

A. Agent Owes Insured Duty of Due Care. An insurance agent owes the insured a duty of due care under general agency principles (*Eddy v. Sharp (1988) 199 Cal. App. 3d 858, 865, 245 Cal. Rptr. 211*).

B. Agent for Several Insurance Companies Who Selects Insured's Company Is Agent of Insured. If an insurance agent is the agent for several companies and selects the company with which to place the insurance or insures with one of them according to directions, the insurance agent is the agent of the insured (*Eddy v. Sharp (1988) 199 Cal. App. 3d 858, 865, 245 Cal. Rptr. 211*).

C. Agent Who Prepares Insurance Proposal Is Under Duty of Due Care to Inform Insured Accurately of Policy Provisions. An insurance agent who undertakes to prepare an insurance proposal for the insured to review before purchasing an insurance policy owes a duty of care to the insured to inform the insured accurately of the policy's provisions (*Eddy v. Sharp (1988) 199 Cal. App. 3d 858, 866, 245 Cal. Rptr. 211*).

D. Insured Entitled to Reasonably Rely on Agent's Representations Regarding Scope of Coverage. An insured should be able to rely on an agent's representations of coverage without independently verifying the accuracy of those representations by examining the relevant policy provisions, unless the agent's representation is equivocal or some caution or warning is given (*Clement v. Smith (1993) 16 Cal. App. 4th 39, 45, 19 Cal. Rptr. 2d 676*).

E. Agent Prohibited From Misrepresenting Policy Terms. An insurer, or an insurer's officer or agent, or an insurance broker or solicitor shall not cause or permit to be issued, circulated, or usedany misrepresentation of the terms of a policy issued by the insurer or sought to be negotiated by the person making or permitting the misrepresentation (*Ins. Code § 780(a)*; *Eddy v. Sharp (1988) 199 Cal. App. 3d 858, 865, 245 Cal. Rptr. 211*).

F. Misrepresentation to Induce Another to Take Out Policy Prohibited. A person shall not make any misrepresentation to any other person for the purpose of inducing, or tending to induce, that person to take out a policy of insurance (*Ins. Code § 781(a)*; *Eddy v. Sharp (1988) 199 Cal. App. 3d 858, 865, 245 Cal. Rptr. 211*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that an agent or employee of an insurer is liable to the insured. The basis of these points and authorities is that the insured's insurance agent owes the insured a duty to inform him or her accurately of the provisions in the insurance policy [*see Eddy v. Sharp (1988) 199 Cal. App. 3d 858, 245 Cal. Rptr. 211]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that an insurer's agent or employee is liable to the insured for independent torts. For example, these points and authorities may be submitted in opposition to a demurrer to a complaint or a defense motion for summary judgment in an action brought by an insured that states tort causes of action against an insurer's agent or employee. For use in this context, these points and authorities may be combined with points and authorities pertaining to demurrers or summary judgment motions generally.

These points and authorities may also be adapted for use in a trial or appellate brief.

For references to related Pleading and Practice chapters, see *§ 120.380[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. For example, counsel should set forth the representations made by defendant regarding a certain risk that the insured believed was covered under the policy, the contrasting policy provisions or absence of policy provisions, and the resultant loss to plaintiff because that risk was not in fact covered under the policy.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.380* et seq.) and to place the argument within its proper procedural context.

An appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing a motion for summary judgment or summary adjudication by an insurer, or insurer's agent or employee, when the evidentiary facts clearly support the contention. In this context, counsel would modify the form to assert that there remain triable issues of material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts opposing the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(e)-(h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

For points and authorities regarding civil conspiracy generally, see Ch. 46, *Conspiracy* . For points and authorities regarding fraud generally, see Ch. 105, *Fraud and Deceit* . For points and authorities regarding the liability of an agent to a third party for wrongful acts, see Ch. 182, *Principal and Agent* .

[d] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 120.391* may be used to oppose these points and authorities.

[3] Discussion of Authorities

[a] Agent Owes Insured Duty of Due Care

Eddy v. Sharp *(1988) 199 Cal. App. 3d 858, 245 Cal. Rptr. 211* , is discussed in *§ 120.383[3][c]*.

[b] Agent for Several Insurance Companies Who Selects Insured's Company Is Agent of Insured

Eddy v. Sharp *(1988) 199 Cal. App. 3d 858, 245 Cal. Rptr. 211* , is discussed in *§ 120.383[3][c]*.

[c] Agent Who Prepares Insurance Proposal Is Under Duty of Due Care to Inform Insured Accurately of Policy Provisions

In ***Eddy v. Sharp*** *(1988) 199 Cal. App. 3d 858, 245 Cal. Rptr. 211* , the insureds brought an action against their insurance agent, alleging negligence in misrepresenting the terms of a policy, and seeking damages arising from a loss to their property caused by a risk that the agent failed to reveal was excluded under the policy. The insureds owned a building in which they rented units to tenants. In August 1980, the insureds decided to change insurance agents and contacted a new agency to obtain coverage similar to that provided in the existing policy. The new agency sent the insureds an insurance proposal accompanied by a cover letter. The cover letter advised the insureds that the most competitive program for the type of property involved was a particular package offered by particular insurer. The cover letter described the coverage under that policy as "All Risk" except for the "perils on the exclusion list."

The insurance proposal also described the coverage as "All Risk" subject to "All Risk Property Coverage Exclusion list attached for reference." The exclusion list contained eight exclusions. It did not list an exclusion for loss due to water backing up through drains or sewers, and that loss was not reasonably included within any listed exclusion. Nothing in the cover letter, the description of coverage in the proposal, or the exclusion list indicated that the policy had other exclusions not contained in the exclusion list. The proposal contained the following disclaimer: "This proposal is prepared for your convenience only and is not intended to be a complete explanation of policy coverage or terms. Actual policy language will govern the scope and limits of protection afforded." On the basis of the proposal, the insureds determined that the policy satisfied their needs and obtained the policy, which they did not read when received. Two years later, a sewer adjacent to the insureds' property drained into the building, damaging property and causing the

loss of the use of two units as rentals.

The insurer refused to cover the losses because of an exclusion in the policy for loss "caused by, resulting from, contributed to or aggravated by ... water which backs up through sewers or drains." The insureds brought an action against the agency and the agent who sold them the policy, alleging that the agent negligently misrepresented the terms of the policy with no reasonable ground for believing the representations to betrue. They also alleged breach of the contract to insure and sought reformation of the contract. The trial court granted the agents' motion for summary judgment, and the insured appealed.

The court of appeal reversed, holding that there were triable issues of fact with respect to the causes of action for misrepresentation and breach of contract, based on the agents' duty to inform the insured accurately of the provisions of the policy (*199 Cal. App. 3d 858, 866-867)* . The court noted that negligent misrepresentation is a form of deceit defined as the assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true. To be actionable as deceit, the representation must have been made with the intent to induce the recipient to alter his or her position, resulting in injury or risk. That intent can be inferred from defendant's knowledge that the plaintiff would act in reliance on the representation. Responsibility for negligent misrepresentation rests on the existence of a legal duty, imposed by contract, statute, or otherwise, owed by a defendant to the injured person. One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated facts basic to the transaction, if he or she knows that the other is about to enter into it under a mistake regarding those facts, and that the other, because of the relationship between them, the customs of the trade, or other objective circumstances, would reasonably expect a disclosure of those facts. The court noted that few policyholders are actually cognizant of the provisions of their policies, and the insured usually confides implicitly in the agent securing the insurance (*199 Cal. App. 3d 858, 864)* . Consequently, an insurer's duty includes the duty to inform an insured reasonably of the insured's rights and obligations under the insurance policy (*199 Cal. App. 3d 858, 864-865)* .

If an insurance agent is the agent for several companies and selects the company with which to place the insurance or insures with one of them according to directions, the insurance agent is the agent of the insured. When the agency relationship exists there is not only a fiduciary duty, but an obligation to use due care. The individual defendant, as an independent insurance agent, therefore owed a duty of due care to the insureds under agency principles. The insureds asserted that the provisions of Ins. Code *§ 780, Ins. Code* § 781, and *Ins. Code § 790.03* establish the duty of agents and brokers to disclose fully and accurately the provisions of policies they obtain for the insured. *Ins. Code § 780* prohibits an insurer, or an insurer's officer or agent, from misrepresenting policy terms issued by the insurer or sought to be negotiated by the person making or permitting the representation. *Ins. Code § 781* prohibits a misrepresentation for the purpose of inducing another person to take out an insurance policy. *Ins. Code § 790.03* provides that it is unfair competition and an unfair and deceptive act or practice in the business of insurance to misrepresent the terms of an insurance policy (*199 Cal. App. 3d 858, 865)* .

The court agreed with the insureds, finding that those provisions state a statutory duty on the part of agents and brokers to describe accurately the provisions of the policies that they procure for their clients. The trial court had concluded that the agent owed no duty to the insureds, pursuant to *Jones v. Grewe (1987) 189 Cal. App. 3d 950, 234 Cal. Rptr. 717* , which held that the general duty of reasonable care that an insurance agent owes the client does not include the obligation to procure a policy affording the client complete liability protection. However, the Jones court distinguished that case from others that held that an insurer has a duty to inform the insured of his or her rights and obligations under the policy, particularly when the insured's apparent lack of knowledge may result in a loss of benefits or a forfeiture of rights. In the instant case, the agent's duty to the insureds arose because the agent undertook to prepare an insurance proposal for the insureds to review before purchasing a policy of insurance. The agent therefore came under a duty of due care to inform the insureds accurately of the policy provisions. The cover letter described the coverage on the building as "All Risk" except for perils on the exclusion list; the proposal also stated that coverage is "All Risk" subject to the exclusions listed; and the exclusion list did not expressly or impliedly contain the loss in question.

The court declined to state as a matter of law that the disclaimer in the proposal is sufficient to override and nullify the exclusion list, and concluded that there is a triable issue of material fact regarding whether the agent negligently misrepresented the terms of the policy to the insureds (*199 Cal. App. 3d 858, 866)* . With regard to the cause of action for breach of contract, the trial court granted summary judgment because of undisputed evidence that the insureds had requested coverage similar to their previous policy, which excluded losses caused by water backing up through sewers or drains. The court of appeal held that the insureds' request for similar coverage was merely an invitation to the agent to make an offer to provide coverage for their building. By the proposal, the agent offered to obtain "All Risk" coverage subject to specific exclusions, which did not include that for the damage that occurred. When the insureds accepted the offer, a binding contract was formed obligating the agent to obtain the coverage outlined in the proposal. The trial court's granting of the summary judgment motion was therefore in error (*199 Cal. App. 3d 858, 867)* .

[d] Insured Entitled to Reasonably Rely on Agent's Representations Regarding Scope of Coverage

In ***Clement v. Smith*** *(1993) 16 Cal. App. 4th 39, 19 Cal. Rptr. 2d 676* , an insurance agent represented to an insured that there was coverage under the insured's liability policy for possible litigation arising out of the insured's breach of contract. When litigation between the insured and athird party ensued, the insurer denied coverage. The insured then sued the insurance agent for negligent misrepresentation. The trial court found in favor of the insured. The court of appeal affirmed, holding that the insured's reliance was reasonable because an insured should be able to rely on an agent's representations of coverage without independently verifying the accuracy of those representations by examining the relevant policy provisions, unless the representation is equivocal or some caution or warning is given. The court further held that causation was established because the misrepresentations caused the insured to forego procuring additional insurance that would have covered the claims in question.

[e] Agent Prohibited From Misrepresenting Policy Terms

Eddy v. Sharp *(1988) 199 Cal. App. 3d 858, 245 Cal. Rptr. 211* , is discussed in *§ 120.383[3][c]*.

[f] Misrepresentation to Induce Another to Take Out Policy Prohibited

Eddy v. Sharp *(1988) 199 Cal. App. 3d 858, 245 Cal. Rptr. 211* , is discussed in *§ 120.383[3][c]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsTypesInsurance Agent & Insurance CompanyInsurance LawClaims & ContractsGeneral OverviewInsurance LawClaims & ContractsContract FormationGeneral OverviewInsurance LawClaims & ContractsGood Faith & Fair DealingGeneral OverviewInsurance LawClaims & ContractsGood Faith & Fair DealingAgents & Brokers

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 120 INSURANCE
PART II. FORMS
F. Tort Actions Against Insurance Agents, Employees, and Brokers
1. Liability of Insurance Agent or Employee

12-120 California Points & Authorities § 120.384

§ 120.384 Agent Breached Duty to Insured to Explain Policy Limitations When Silence Would Mislead Insured to Believe Certain Coverage Existed

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT, AS INSURER'S _____ [AGENT *or* EMPLOYEE], IS LIABLE TO PLAINTIFF INSURED[, EVEN THOUGH HE/SHE WAS NOT A PARTY TO THE INSURANCE CONTRACT], BECAUSE HE/SHE BREACHED HIS/HER DUTY TO PLAINTIFF BY FAILING TO EXPLAIN LIMITING PROVISIONS OF THE POLICY UNDER CIRCUMSTANCES THAT CAUSED PLAINTIFF TO BELIEVE ERRONEOUSLY THAT PLAINTIFF WAS COVERED FOR THE RISK THAT RESULTED IN AN UNINSURED LOSS.

Agent Breached Duty to Explain Limiting Provisions if Silence Is Misleading Under Circumstances. An insurance agent may be liable for damages arising from the insured's lack of coverage if the agent negligently failed to explain limiting provisions of the policy under circumstances in which the agent's silence misled the insuredinto believing that certain coverage existed (*Westrick v. State Farm Ins. (1982) 137 Cal. App. 3d 685, 691-693, 187 Cal. Rptr. 214*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that an agent or employee of an insurer is liable to the insured. The basis of these points and authorities is that the insured's insurance agent owes him or her a duty to explain limiting provisions of a policy when the agent's silence would mislead the insured under the circumstances [*see* *Westrick v. State Farm Ins. (1982) 137 Cal. App. 3d 685, 691-693, 187 Cal. Rptr. 214]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context

in which counsel wishes to raise the substantive issue that an insurer's agent or employee is liable to the insured for independent torts. For example, these points and authorities may be submitted in opposition to a demurrer to a complaint or a defense motion for summary judgment in an action brought by an insured that states tort causes of action against an insurer's agent or employee. For use in this context, these points and authorities may be combined with points and authorities pertaining to demurrers or summary judgment motions generally.

These points and authorities may also be adapted for use in a trial or appellate brief.

For references to related Pleading and Practice chapters, see *§ 120.380[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. For example, counsel should set forth facts showing that the agent's failure to explain certain limiting policy provisions to the insured resulted in the insured's belief that certain coverage existed, and that a subsequent loss damaged the insured because it arose from the same risk that the insured mistakenly believed was covered under the policy.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.380* et seq.) and to place the argument within its proper procedural context.

An appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposinga motion for summary judgment or summary adjudication by an insurer, or insurer's agent or employee, when the evidentiary facts clearly support the contention. In this context, counsel would modify the form to assert that there remain triable issues of material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts opposing the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(e)-(h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

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For points and authorities regarding civil conspiracy generally, see Ch. 46, *Conspiracy* . For points and authorities regarding fraud generally, see Ch. 105, *Fraud and Deceit* . For points and authorities regarding the liability of an agent to a third party for wrongful acts, see Ch. 182, *Principal and Agent* .

[3] Discussion of Authorities

[a] Agent Breached Duty to Explain Limiting Provisions if Silence Is Misleading Under Circumstances

In ***Westrick v. State Farm Ins.*** *(1982) 137 Cal. App. 3d 685, 187 Cal. Rptr. 214* , an insured brought an action against

his insurance agent for negligence based on the agent's failure to explain a limiting provision in his automobile liability policy, to seek recovery of damages arising from an accident resulting in losses not covered under the policy. The insured planned to cover a new six-wheel vehicle he had purchased under a "30-day automatic coverage" clause in his insurance policy, which provided provisional insurance for new vehicles purchased by existing customers of the insurer. When the insured called to notify his insurance agent thathe had purchased a new vehicle, his agent declined to take down additional information about the vehicle purchased, and failed to inform him of an exclusion in his four six-wheel vehicles. Believing he was covered, insured let his son drive the six-wheel vehicle the following day. The vehicle was in an accident and insured suffered an uninsured loss. The insured and his son brought an action against the insured's agent and the insurer, seeking relief for damages under theories of negligent misrepresentation and negligence. The trial court entered a directed verdict for the defendants, holding that the defendants owed no duty to warn the insured of lack of coverage, as a matter of law. The insured and his son appealed.

The court of appeal reversed, holding that under the circumstances, the agent could be held liable in tort for failing to explain the limiting provisions under the policy (*137 Cal. App. 3d 685, 691-693)* . The court noted that at trial, the insured's regular agent testified that he could not recall any conversation about automatic coverage on a jeep truck. He stated that before the accident, he did not know if automatic coverage applied to commercial vehicles, and would have had to obtain that information from his home office. He also stated that he did not know if the insurer would have been willing to insure the welding truck. He did admit that he had power to bind coverage on a pickup truck used in the agricultural real estate business. He further testified that he and his father worked in the same office and used the same telephone number, but represented different clients. The two agents routinely answered each other's telephone calls in the other's absence and wrote insurance or handled claims for the other's clients. He stated that he thought his father's conversation with the insured took place a day later than the insured asserted it did, and that he did not learn of the call until the day after the accident. The agent's father also testified that the telephone conversation took place the day after the date specified by the insured. He stated that he could have issued a binder on behalf of his son provided the vehicles met the company's underwriting standards, and that he did not discuss the matter further because the insured told him he preferred to speak to his son rather than to him.

An insurance broker who testified as an expert stated that according to the standard of care in the insurance industry, the agent's father had a duty to inquire whether the vehicles were covered under the existing policy and to warn the insured not to drive them until insurance was procured. He said that he would have issued a binder on the pickup truck if the client had presented certain equipment certifications. An underwriter of the insurer testified that his company generally insured six-wheel vehicles, but declined to insure the welding truck when the insured's agent ultimately spoke to him about it. The court of appeal noted that a jury could have found that the agent told the insured that the jeep truck he had intended to buy would be automatically insured under his policy. The court furthernoted that the agent's father understood the purpose of the telephone call from the insured but "ignored the situation," and that the insured was unaware of the policy exclusion regarding six-wheel vehicles, relying on the expertise of his agent's father. Inasmuch as he had not been told anything to the contrary, he reasonably believed that his new trucks, just as the pickup truck, were automatically insured for 30 days. Had he known the welding truck was not covered, he would not have allowed his son to drive it until he had obtained insurance for it.

The court concluded that the evidence, if believed by a jury, would have sustained a finding of the agent's negligence. The agents asserted that the insured never requested insurance, and even if he did, he requested it of his regular agent, not that agent's father, on whom he did not rely as his agent. The court disagreed, holding that the insured's telephone conversation to his agent's father communicated with sufficient clarity his desire to obtain coverage for the two vehicles. When the insured discovered that his agent was absent, he began to describe the vehicles to his agent's father, which indicated the insured's reliance on that agent's knowledge and expertise in his regular agent's absence (*137 Cal. App. 3d 685, 690)* . Moreover, the two agents were each other's agents by mutual agreement, each having the power to respond to requests for insurance by the other's clients. As against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other. (The court declined to say whether the insured's cause of action is defeated as a matter of law

because he could not rely on the expertise of his agent's father, or because the agents had no notice of each other's conduct.) The agents also asserted that an insurance agent cannot be liable for damages arising from a client's lack of coverage unless the agent expressly promised to obtain the insurance but negligently failed to do so. They argued that neither agent ever promised to procure coverage for the welding truck, that the agent's statements concerning automatic coverage related solely to a four-wheel pickup truck, and that the regular agent's father made no promises or representations of any kind.

The court noted, however, that although an insurance agent who promises to procure insurance will indeed be liable for his or her negligent failure to do so, it does not follow that he or she can avoid liability for foreseeable harm caused by his or her silence or inaction merely because of a lack of an express promise to assume responsibility. The court analyzed previous cases that recognized that a disparity of knowledge may impose an affirmative duty of disclosure (*137 Cal. App. 3d 685, 691)* . Those cases have set forth circumstances under which an insurer owes an affirmative duty of disclosure to the insured (*137 Cal. App. 3d 685, 692)* . The insured's request for insurance, his previous questions and long relationship with his insurance agency, and the foreseeability of harm obligated his agent'sfather to respond to the request with further inquiries. The agent's father knew more concerning the scope of the automatic-coverage clause than the insured did. Under the circumstances, the court found it only "just and equitable" to require him to explain the limiting provisions to the insured.

The court found no reason to distinguish between the misfeasance of giving erroneous information and the nonfeasance of giving no information at all. Given a relation involving a duty of care irrespective of a contract, a tort may result as well from acts of omission as of commission in the fulfillment of the duty recognized by law. The insured presented sufficient evidence to warrant a jury determination on the questions of the agents' duty, the foreseeability of harm, and the connection between the agents' conduct and the insured's loss (*137 Cal. App. 3d 685, 692-693)* . The fact that the agent's conduct consisted of inaction instead of a wrongful action is not determinative. The court also rejected the agents' assertion that the insured could not reasonably assume his policy covering four-wheel passenger vehicles also applied to a six-wheel commercial truck. The insured's previous inquiry regarding coverage of the jeep truck, his attempt to furnish the agent with identifying information regarding the purchased vehicles, and the agent's response that the information was not necessary constitute evidence that would support a jury finding in favor of the insured (*137 Cal. App. 3d 685, 693)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsContract FormationGeneral OverviewInsurance LawClaims & ContractsGood Faith & Fair DealingAgents & BrokersTortsBusiness TortsGeneral Overview

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CHAPTER 120 INSURANCE
PART II. FORMS
F. Tort Actions Against Insurance Agents, Employees, and Brokers
1. Liability of Insurance Agent or Employee

12-120 California Points & Authorities § 120.385

§ 120.385 Agent Liable to Insurer for Negligently Inducing Insurer to Provide Coverage

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT, AS INSURER'S _____ [AGENT *or* EMPLOYEE], IS LIABLE TO PLAINTIFF INSURER BECAUSE HE/SHE NEGLIGENTLY INDUCED PLAINTIFF TO PROVIDE INSURANCE COVERAGE.

Agent Liable to Insurer for Loss Resulting From Negligent Inducement to Provide Coverage. If an insurance agent negligently induces an insurer to assume coverage on which it suffers a loss, the agent is liable (*United States Liab. Ins. Co. v. Haidinger-Hayes, Inc. (1970) 1 Cal. 3d 586, 594, 83 Cal. Rptr. 418, 463 P.2d 770*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that an agent or employee of an insurer is liable to the insurer. The basis of these points and authorities is that insurer's agent is liable to the insurer for negligent inducement to provide coverage to an insured, resulting in loss to the insurer [*see United States Liab. Ins. Co. v. Haidinger-Hayes, Inc. (1970) 1 Cal. 3d 586, 594, 83 Cal. Rptr. 418, 463 P.2d 770]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that an insurer's agent is liable to the insurer for losses resulting from the agent's negligent inducement to provide coverage. For example, these points and authorities may be submitted in opposition to a defense motion for summary judgment, in which case they may be combined with points and authorities pertaining to demurrers generally. These points and authorities may also be adapted for use in a trial or appellate brief.

These points and authorities may also be adapted for use in a trial or appellate brief.

For references to related Pleading and Practice chapters, see *§ 120.380[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. For example, counsel should set forth facts showing that the terms of the insurance contract agreed to by the agent were unreasonable according to the standards of the insurance industry, causing the plaintiff to assume an unreasonable risk of coverage under the circumstances and resulting in loss to the plaintiff.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.380* et seq.) and to place the argument within its proper procedural context.

An appropriate procedural context for this contention, for example, would be an insurer's memorandum of points and authorities opposing a motion for summary judgment or summary adjudication by the insurer's agent or employee, when the evidentiary facts clearly support the contention. In this context, counsel would modify the form to assert that there remain triable issues of material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts opposing the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavitsor declarations [*see* Cal. Rules of Court, Rule 342(e)-(h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

For points and authorities regarding civil conspiracy generally, see Ch. 46, *Conspiracy* . For points and authorities regarding fraud generally, see Ch. 105, *Fraud and Deceit* . For points and authorities regarding the liability of an agent to a third party for wrongful acts, see Ch. 182, *Principal and Agent* .

[3] Discussion of Authorities

[a] Agent Liable to Insurer for Loss Resulting From Negligent Inducement to Provide Coverage

In ***United States Liab. Ins. Co. v. Haidinger-Hayes, Inc.*** *(1970) 1 Cal. 3d 586, 83 Cal. Rptr. 418, 463 P.2d 770* , an insurer sued its corporate agent and an officer of that corporation to recover damages arising from losses caused by negligence in contracting with a particular insured. The insurer, an out-of-state corporation, entered into a general agency contract with a licensed corporate insurance agent in California. Under the terms of the agreement, the agent had authority to solicit and underwrite proposals for insurance, to determine the premium rate, and to issue contracts of insurance on the insurer's behalf. The president and principal executive officer of the corporate agent issued a liability policy in October 1961 to a particular company and its subsidiaries. The risk under the policy was "self-rated" and was

not measurable by any published standard or comparable rate. The insurer canceled that policy in 1963 because of excessive-loss history. In 1965 the insurer filed an action against the insured seeking rescission of the insurance contract on the basis of allegations that the insured misrepresented its projected loss ratio; the action resulted in judgment for the insured, and no appeal was taken. The insurersubsequently filed an action against the corporate agent and the agent's president, stating several causes of action. The trial court entered judgment for the insurer against both the corporate and individual defendants, on the cause of action in negligence, based on issuance of the policy at the premium rate established by the defendants. The defendants appealed.

The California Supreme Court affirmed the judgment with respect to the corporate defendant and reversed with respect to the individual defendant (*1 Cal. 3d 586, 599)* . The defendants argued that the evidence did not support the findings of negligence. The trial court found that during the time the agency relationship existed, defendants owed a duty to the insurer to exercise reasonable care in handling the insurer's business and, in the investigation and underwriting of each insurance risk, also to make a reasonable effort to produce a profit for the insurer. Several months before issuing the policy in question, the individual defendant had carried on negotiations with that insured's broker, and had been supplied with current, accurate, and detailed underwriting information concerning the risk of that company dating back several years. The individual defendant reviewed and analyzed the information personally. The trial court received evidence concerning the custom and practice in the insurance industry regarding "self-rated" insurance risks and found that in the exercise of reasonable care, the defendants should have known that the policy would probably result in substantial financial loss to the insurer, because the premium rate, compared to reasonable calculations under industry standards, was excessively low (*1 Cal. 3d 586, 592)* .

The Supreme Court noted that actionable negligence involves a legal duty to use due care, a breach of that duty, and the breach as the proximate or legal cause of the resulting injury. The defendant corporation was a fiduciary to the insurer during the existence of the agency agreement. A professional agent is required to have the particular knowledge and to exercise the particular skill and diligence expected of it. If an insurance agent negligently induces an insurer to assume coverage on which it suffers a loss, the agent is liable. The Court further noted that liability is not incurred by a mere error of judgment in the exercise of discretion unless the error is based on want of care or diligence. With respect to the individual defendant, however, the Court found that as an officer of the corporate agency, he was not responsible to a third person for negligence amounting to mere nonfeasance, regarding a breach of duty owing to the corporation alone (*1 Cal. 3d 586, 594-595)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGeneral OverviewInsurance LawIndustry RegulationInsurance Company OperationsRepresentativesAgentsGeneral Overview

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 120 INSURANCE
PART II. FORMS
F. Tort Actions Against Insurance Agents, Employees, and Brokers
1. Liability of Insurance Agent or Employee

12-120 California Points & Authorities § 120.386

§ 120.386 Agent Liable to Insurer for Extra-Contractual Damages Incurred by Insurer as Result of Agent's Wrongful Conduct Resulting in Insurer's Denial of Underlying Claim

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT, AS INSURER'S _____ [AGENT *or* EMPLOYEE], IS LIABLE TO PLAINTIFF INSURER FOR THE EXTRA-CONTRACTUAL DAMAGES INCURRED BY PLAINTIFF IN THE UNDERLYING ACTION BECAUSE DEFENDANT'S WRONGFUL CONDUCT CAUSED PLAINTIFF TO DENY THE UNDERLYING CLAIM.

A. Agent's Liability for Losses Incurred by Principal. An insurance agent is liable for all losses incurred by its principal, the insurance company, as a result of the agent's conduct, when the agent's acts are the legal cause of the insurer's injury, amount to a breach of the agent's duty to its principal, and no fault is attributable to the insurer (*Fireman's Fund Ins. Co. v. Haslam (1994) 29 Cal. App. 4th 1347, 1355, 35 Cal. Rptr. 2d 135*).

B. Extra-Contractual Damages. Liability of an insurance agent for damages incurred by its principal, the insurance company, as a result of the agent's conduct extends to amounts incurred by the insurer to settle an action arising out of the insurer's denial of an insurance claim, even when the amount of the settlement exceeds the limits of the underlying policy, provided that those damages are solely attributable to the agent's breach of duty to the insurer. Under these circumstances, public policy does not preclude imposition of liability (*Fireman's Fund Ins. Co. v. Haslam (1994) 29 Cal. App. 4th 1347, 1355-1356, 35 Cal. Rptr. 2d 135*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that an agent or employee of an insurer is

liable to the insurer. The basis of these points and authorities is that an insurance agent is liable to an insurer for damages incurred by the insurer as a result of the agent's wrongful conduct with respect to an underlying policy or claim. The agent'sconduct may be negligent, or may consist of misrepresentations or other conduct.

The damages sought by the insurer may exceed the policy limits of the underlying policy in appropriate instances, and may be based on amounts expended by the insurer to settle or otherwise dispose of the underlying claim. Authority permitting the insurer to recover damages in excess of the underlying policy limits in this situation is based on a fact pattern in which the insurer's denial of the underlying claim was found to be wholly the agent's fault. In that case, the absence of any wrongful conduct by the insurer negated the agent's argument that the agent was, in effect, being held liable for the insurer's bad faith [*see Fireman's Fund Ins. Co. v. Haslam (1994) 29 Cal. App. 4th 1347, 1355-1356, 35 Cal. Rptr. 2d 135* (discussed in *§ 120.386[3][a]*)]. However, if an insurer is found to bear some measure of culpability for the conduct that resulted in settlement of the underlying action, it is possible that such a public policy argument might generate a different result [*see Fireman's Fund Ins. Co. v. Haslam (1994) 29 Cal. App. 4th 1347, 1356, 35 Cal. Rptr. 2d 135* , in which the court repeatedly stressed a jury finding that the insurer was not at fault].

These points and authorities may also be adapted for use in a trial or appellate brief.

For references to related Pleading and Practice chapters, see *§ 120.380[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. Specifically, counsel should set forth facts showing that the insurance agent's conduct was negligent or intentional and that this conduct misled the insurer into taking the actions that caused the insurer to incur liability. Counsel should also set forth any facts showing that the agent's actions were the sole reason why the insurer denied the underlying claim or took whatever other actions caused the insurer to incur liability, and that no independent fault is attributable to the insurer.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.380* et seq.) and to place the argument within its proper procedural context.

An appropriate procedural context for this contention, for example, would be an insurer's memorandum of points and authorities opposing a motion for summary judgment or summary adjudication by the insurer's agent or employee, when the evidentiary facts clearly support the contention. In this context, counsel would modify the form to assert that there remain triable issues of material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts opposing the motion. The statement must be supported by cognizableevidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(e)-(h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary*

Judgments .

For points and authorities regarding civil conspiracy generally, see Ch. 46, *Conspiracy* . For points and authorities regarding fraud generally, see Ch. 105, *Fraud and Deceit* . For points and authorities regarding the liability of an agent to a third party for wrongful acts, see Ch. 182, *Principal and Agent* .

[3] Discussion of Authorities

[a] Agent's Liability for Losses Incurred by Principal

In ***Fireman's Fund Ins. Co. v. Haslam*** *(1994) 29 Cal. App. 4th 1347, 35 Cal. Rptr. 2d 135* , a life insurance agent who did not handle property insurance requested that defendant insurance agent, who did handle property insurance, obtain insurance covering an apartment building owned by one of the life insurance agent's clients. Defendant filled out the insurance application, but neglected to describe the apartment building as the insured property and also gave the owner's residence as his mailing address. As a result, the insurer issued a policy listing the residence address rather than the apartment building as the insured property. The property owner thereafter regularly paid premiums in the belief that the apartment building was insured. Months later, a routine loss-control investigation by the insurer disclosed that the property located at the listed address not an apartment building. The insurer thereafter instructed defendant to return the policy for cancellation and to obtain replacement insurance. The property owner signed a cancellation form but did not date the form. The date was later filled in by the agent, who forwarded the cancellation form to the insurer. The insurer canceled the policy butaccepted two more monthly premiums from the property owner. When the property owner received another billing from the insurer, he believed that the insurer had corrected its error and that the apartment building was still insured. As a result, no replacement insurance was ever actually obtained.

Approximately six weeks after the cancellation, a fire destroyed the apartment building. When a claim was made, defendant finally discovered the original address error in the insurance application. Defendant explained the error to the insurer and asked that the insurer reform the policy to conform to the property owner's expectations. Instead, the insurer denied coverage, stating that the policy had been cancelled before the loss was incurred and refunding the two additional monthly premiums the insured had paid.

The property owner sued the insurer and the agent for negligence, bad faith, and related claims, seeking reformation of the contract and rescission of policy cancellation, as well as compensatory and punitive damages. The insurer and agent cross-complained against each other for indemnity. During the course of the action, it was discovered that the agent rather than the owner had filled in the date on the cancellation form, bringing the validity of the cancellation into question. The insurer ultimately settled with the property owner for $1,050,000 (the policy limits were $250,000). The insurer thereafter pursued its cross-complaint against the agent for indemnity, fraud and deceit, negligence, fraud and negligence by a fiduciary, and breach of contract. Ultimately, the jury awarded the insurer the full amount of its previous settlement. The jury found that defendant was negligent when he incorrectly filled out the original application, that the insurer was not negligent, and that the agent's negligence caused the insurer damage in the amount of the policy limits. The jury also found that the agent was liable for negligent misrepresentation for improperly executing the cancellation form and failing to advise the insurer of that fact. The jury found that the latter acts caused the delay in paying the property owner's claim and resulted in the insurer's settlement with the property owner for an additional $800,000. The insurer was also awarded attorneys' fees and prejudgment interest, and the agent appealed.

On appeal, the agent argued that an insurer may not be permitted to obtain indemnity for payments made in settlement of bad faith claims. The court held that under the doctrine of equitable indemnity, a tortfeasor may obtain partial indemnity from another tortfeasor on a comparative fault basis, with the injury borne by each individual tortfeasor in proportion to his or her respective fault. Under the facts, the court was satisfied that the insurer's indemnity cause of action arose out of the agent's own negligence and negligent misrepresentations, and that the agent was not being held liable for the insurer's bad faith (*29 Cal. App. 4th 1347, 1354)* . It further held that an insurer may recover damages

paid in settlement ofa delayed payment of an insured's claim as a result of its agent's negligent acts. Under the facts presented, the agent's actions were the legal cause of the delay, and no fault was attributed to the insurer. The agent had breached duties owed to the insurer as the agent's principal, specifically the duties to exercise due care in filling out the insurance application and to accurately represent the facts of the cancellation to the insurer (*29 Cal. App. 4th 1347, 1354-1355)* . The court rejected the agent's contention that public policy considerations precluded application of the doctrine of equitable indemnity under the facts presented (*29 Cal. App. 4th 1347, 1355-1356)* . Accordingly, the judgment against the agent was affirmed.

[b] Extra-Contractual Damages

The facts and holding in *Fireman's Fund Ins. Co. v. Haslam (1994) 29 Cal. App. 4th 1347, 35 Cal. Rptr. 2d 135* , are discussed in *§ 120.386[3][a]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsDuties & LiabilitiesGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilityPayment Delays & Denials

California Points & Authorities

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CHAPTER 120 INSURANCE
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12-120 California Points & Authorities §§ 120.387-120.389

[Reserved]

§§ 120.387[Reserved]

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
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1. Liability of Insurance Agent or Employee

12-120 California Points & Authorities § 120.390

§ 120.390 Insurer Has No Duty to Advise Insured Regarding Adequacy of Coverage Limits Absent Promise to the Contrary

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT, AS PLAINTIFF'S INSURER, IS NOT LIABLE TO PLAINTIFF FOR LOSSES RESULTING FROM PLAINTIFF'S INADEQUATE COVERAGE UNDER THE INSURANCE POLICY, BECAUSE DEFENDANT IS UNDER NO DUTY TO ADVISE PLAINTIFF OF THE ADEQUACY OF PLAINTIFF'S COVERAGE UNDER THE POLICY AND MADE NO IMPLIED OR EXPRESS ASSERTIONS TO PLAINTIFF TO THE CONTRARY.

A. No Fiduciary Duty to Advise Insured Regarding Adequacy of Coverage. An insurer's fiduciary duties are limited to those arising out of the insurance contract and do not include the duty to advise the insured regarding the adequacy of coverage limits, absent a representation that it will do so (*Shultz Steel Co. v. Hartford Accident & Indem. Co. (1986) 187 Cal. App. 3d 513, 522-523, 231 Cal. Rptr. 715*).

B. No Special Duty to Advise Insured Regarding Adequacy of Coverage. An insurer that makes no recommendations to the insured regarding liability limits owes no special duty extrinsic to theinsurance contract to recommend adequate coverage limits (*Shultz Steel Co. v. Hartford Accident & Indem. Co. (1986) 187 Cal. App. 3d 513, 524-525, 231 Cal. Rptr. 715*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to an insured's contention that the insurer is liable to the insured for losses resulting from inadequate coverage under the insurance policy, when the insurer made no implied or express assertions to the insured that it would provide adequate coverage to meet the insured's needs [*see Shultz Steel*

Co. v. Hartford Accident & Indem. Co. (1986) 187 Cal. App. 3d 513, 522-523, 231 Cal. Rptr. 715] .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that an insurer is not liable to an insured for losses resulting from inadequate coverage under the policy.

These points and authorities may also be adapted for use in a trial or appellate brief.

For references to related Pleading and Practice chapters, see *§ 120.380[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. For example, counsel should set forth facts showing that defendant was merely the plaintiff's insurer and in no way acted as an agent or made representations to the insured regarding adequate policy limits with regard to the risk in question.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.391* et seq.) and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be a motion by an agent for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that there is no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts supporting the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

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[c] Related Points and Authorities

For points and authorities regarding agency generally, see Ch. 182, *Principal and Agent* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] No Fiduciary Duty to Advise Insured Regarding Adequacy of Coverage

In ***Shultz Steel Co. v. Hartford Accident & Indem. Co.*** *(1986) 187 Cal. App. 3d 513, 231 Cal. Rptr. 715* , an insured brought an action against its insurer and insurance agent for negligence and indemnity regarding inadequate liability coverage arising from injuries incurred by a third party on the insured's premises. The insured, a steel manufacturer, purchased a $500,000 liability insurance policy from the insurer through an insurance broker, which, according to

undisputed facts, acted as a duly authorized agent for the insurer. The insured's liability arose from an accident on its premises in which an electrical contracting firm's employee was electrocuted and severely injured. The accident victim brought suit against the insured. While the underlying action was pending, the insured brought an action against the insurer and the broker/agent, for negligence and indemnification for any uninsured loss incurred in the underlying action. (Ultimately the third party was awarded damages in excess of $5 million.) The trial court granted the insurer's motion for summary judgment. The insured appealed.

The court of appeal affirmed, holding that an insurance carrier is not vicariously liable under general agency principles for the alleged negligence of its agent (who is also an independent broker) for the agent's failure torecommend increased liability insurance coverage. It also held that independent of the insurance contract, the insurer is not liable to the insured on a special-duty theory for failure to recommend an increase in liability insurance coverage (*187 Cal. App. 3d 513, 517)* . The court assumed for purposes of the appeal that the agent imprudently advised the insured regarding the amount of liability insurance coverage. Therefore, the main issue on appeal was whether the insurer became vicariously liable to the insured for the carelessness of the agent under the doctrine of respondeat superior.

The court noted the general rule that an agent is one who represents the principal in dealings with third persons, and the principal is liable for the torts of the agent under the doctrine of respondeat superior. However, for this liability to be imposed on an innocent principal, the agent's tort must have been committed during the course and scope of the agent's employment (*187 Cal. App. 3d 513, 518)* . A principal may be liable for the torts of its agent if the principal directed or authorized the agent to perform the tortious act; and the principal may become liable for an action not originally authorized if the principal ratifies the act. The court discussed previous cases in which an insured alleged that the insurer breached a fiduciary duty arising outside the insurance contract (*187 Cal. App. 3d 513, 521)* . The controlling case, *Gibson v. Government Employees Ins. Co. (1984) 162 Cal. App. 3d 441, 208 Cal. Rptr. 511* , held that an insurer's duty to advise the insured could not be based on the covenant of good faith and fair dealing, because the covenant extends only to the limits of the insurance coverage afforded by the insurer to the insured, that is, of insurance entered into between it and its insured. Gibson also held that the duties the insureds sought to impose on the insurer could not be based on the principles of strict fiduciary responsibility, because those duties do not apply to conduct extrinsic to the insurance contract (*187 Cal. App. 3d 513, 522)* .

Applying Gibson to the instant case, the court concluded that the insurer owed no duty to advise the insured regarding the adequacy of its liability coverage limits. There was no evidence that the insurer made representations to either the broker/agent or the insured that the insurer would advise the insured regarding the appropriate liability coverage limits. On the contrary, the evidence showed that the insurer did not make those representations. The court concluded that, as a matter of law, there is no triable issue regarding whether the insurer owed a duty to advise the insured. The court also found that the insurer did not ratify the broker/agent's actions in causing the insured to carry inadequate coverage. Although the insurer was aware of the insured's $500,000 policy, evidence indicated that it had no way of knowing whether the insured had umbrella or excess coverage with another insurer; and no evidence showed that the insurer knew the $500,000 limits were inadequate or that the insured hadnot rejected suggestions to increase its coverage. The final issue was whether independent of the insurance contract, the insurer is liable to the insured, on a special-duty theory, for failure to recommend an increase in liability insurance coverage; or, stated in other terms, whether the insurer owed the insured a direct duty to recommend that it increase its policy limits.

The insured alleged, inter alia, that the insurer was periodically responsible for providing renewal quotations and making requested coverage changes for its general liability policy, that it made safety recommendations after periodic inspections of the insured premises, and that on one occasion, it recommended that the limits be increased on property damages (but not on liability coverage). However, the court noted that no evidence was offered to contradict evidence that the insurer did not make liability limits recommendations (*187 Cal. App. 3d 513, 524)* . There was no indication that the inspections or any other alleged activities had anything to do with liability coverage recommendations; they dealt rather with plant safety matters and factors relevant to the determination of premium quotations.

The court noted that in those situations in which the insurer gave advice regarding other types of insurance coverage, the insurer discussed the matter with the broker/agent, not with the insured, and the advice related to property coverage, not general liability coverage limits recommendations. Therefore, the evidence showed that the insured never received advice from the insurer relating to liability coverage limits recommendations, nor did the insurer make liability limits recommendations to any insured (*187 Cal. App. 3d 513, 525)* . Consequently, there is no triable issue of fact regarding whether the insurer owed a special duty to the insured extrinsic to the insurance contract.

[b] No Special Duty to Advise Insured Regarding Adequacy of Coverage

Shultz Steel Co. v. Hartford Accident & Indem. Co. *(1986) 187 Cal. App. 3d 513, 231 Cal. Rptr. 715* , is discussed in *§ 120.390[3][a]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGood Faith & Fair DealingGeneral OverviewInsurance LawClaims & ContractsGood Faith & Fair DealingAgents & BrokersInsurance LawClaims & ContractsPolicy InterpretationGeneral Overview

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1. Liability of Insurance Agent or Employee

12-120 California Points & Authorities § 120.391

§ 120.391 Insurance Agent Owes No Duty to Insured to Provide Complete Protection Under Insurance Policy

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT, AS PLAINTIFF'S INSURANCE AGENT, HAS NO DUTY TO PLAINTIFF TO PROVIDE COMPLETE PROTECTION FORANY EVENTUAL LOSS INCURRED BY PLAINTIFF, AND MADE NO IMPLIED OR EXPRESS PROMISE TO PLAINTIFF TO ASSUME THAT DUTY.

A. Agent Does Not Have Duty to Provide Complete Protection. The general duty of reasonable care that an insurance agent owes the client does not include the obligation to procure a policy affording the client complete protection (*Jones v. Grewe (1987) 189 Cal. App. 3d 950, 956, 234 Cal. Rptr. 717* .

B. Mere Agency Relationship Does Not Imply Duty to Advise of Additional Coverage. The mere existence of an agency relationship between an insurance agent and an insured imposes no duty on the agent to advise the insured of the advantages of additional coverage (*Jones v. Grewe (1987) 189 Cal. App. 3d 950, 954, 234 Cal. Rptr. 717*).

[*Optional*] **C. Previous Reliance on Agent's Advice Insufficient to Impose Greater Duty**. The mere allegation in a complaint that an insured has purchased insurance from an insurance agent for several years and followed his or her advice on certain insurance matters is insufficient to imply the existence of a greater duty (*Jones v. Grewe (1987) 189 Cal. App. 3d 950, 956, 234 Cal. Rptr. 717*).

[*Optional*] D. Agent's Assurance That Coverage Is Adequate Does Not Imply Broader Agency Relationship. An insured's request for sufficient coverage, and an insurance agent's assurance that a policy provides adequate coverages do not, by themselves, imply an expanded principal-agent relationship (*Jones v. Grewe (1987) 189 Cal. App. 3d 950, 956, 234 Cal. Rptr. 717*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to an insured's contention that the insurance agent has a duty to the insured to provide complete coverage under the insurance policy [*see Jones v. Grewe (1987) 189 Cal. App. 3d 950, 956, 234 Cal. Rptr. 717]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that an insurance agent owes no duty to the insured to provide complete coverage. For example, these points and authorities may be submitted in support of a demurrer to a complaint brought by the insured, in which case they may be combined with points and authorities pertaining to demurrer motions generally. These points and authorities may also be adapted for use in a trial or appellate brief.

These points and authorities may also be adapted for use in a trial or appellate brief.

For references to related Pleading and Practice chapters, see *§ 120.380[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. For example, counsel should set forth facts showing that defendant did not expressly or impliedly represent to plaintiffs that the insurance protection under the policy was adequate.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.390* et seq.) and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be a motion by an agent for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that there is no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts supporting the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (g), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For points and authorities regarding agency generally, see Ch. 182, *Principal and Agent* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Agent Does Not Have Duty to Provide Complete Protection

In ***Jones v. Grewe*** *(1987) 189 Cal. App. 3d 950, 234 Cal. Rptr. 717* , the parents of an injured child brought a negligence action against their landlords, seeking damages arising from a swimming pool accident. The parties entered into a stipulated judgment for an amount far in excess of the applicable limits under the defendant's liability insurance policy, and the plaintiffs agreed not to execute on the judgment, provided the defendants would pay them a portion of the judgment and transfer any legal rights they had against the insurance brokers that had sold them the liability policy. The insureds filed a cross complaint against the brokerage firm and the individual agent (referred to subsequently as the agents) that sold them the policy, alleging breach of fiduciary duty based on their failure to provide liability insurance sufficient to protect their personal assets and satisfy the underlying judgment. The insureds alleged that the agents held themselves out as insurance consultants and experts, had taken care of their insurance needs for 10 years, during which time the insureds relied on their expertise, and had "expressly and impliedly" represented to the insureds that the insurance protection under the policy was adequate. The agents demurred, arguing that they did not have a duty to provide the insureds with liability insurance sufficient to "cover every conceivable eventuality" and that therefore the complaint failed to state a cause of action for negligence. The trial court sustained the demurrer without leave to amend. The insureds appealed.

The court of appeal affirmed, holding that the general duty of reasonable care that an insurance agent owes the client does not include the obligation to procure a policy affording the client complete protection (*189 Cal. App. 3d 950, 956)* . In a case of first impression, the court noted that it needed to determine whether the agents owed the insureds a legal duty of care to provide them with a policy of liability insurance sufficient to protect their personal assets and to satisfy any judgment against them arising out of the insureds' negligent acts (*189 Cal. App. 3d 950, 953)* . Ordinarily, an insurance agent assumes only those duties normally found in any agency relationship. This includes the obligation to use reasonable care, diligence, and judgment in procuring the insurance requested by an insured. The mere existence of that relationship imposes no duty on an agent to advise the insured on specific insurance matters. An agent may point out to the insured the advantages of additional coverage and may ferret out additional facts from the insured applicable to that coverage, but is under no obligation to do so; nor is the insured under an obligation to respond.

The court noted that an agent may assume additional duties by an express agreement or a holding out (*189 Cal. App. 3d 950, 954)* . In thatcase, the agent may be liable to the insured for losses that resulted as a breach of that special duty. The insureds relied in part on *Greenfield v. Insurance Inc. (1971) 19 Cal. App. 3d 803, 97 Cal. Rptr. 164* , which held that an agent is liable in negligence to the insured for failing to obtain coverage requested by the insured after asserting that it has done so. That case is distinguishable, however, because the agents procured the requested coverage (*189 Cal. App. 3d 950, 955)* . The general duty of reasonable care that an insurance agent owes the insured does not include the obligation to procure a policy affording the client complete liability protection. The court analyzed the complaint to determine whether it alleged facts from which a special or greater duty could reasonably be inferred. The complaint did not allege the existence of an express agreement creating a broader agency relationship in which the agents were to advise, suggest, and procure liability insurance in an amount sufficient to protect their personal assets and satisfy any judgment against them arising out of the insureds' negligence.

The mere allegation in a complaint that an insured has purchased insurance from an insurance agent for several years and followed the agent's advice on certain insurance matters is insufficient to imply the existence of a greater duty. Nor can the existence of a broader agency relationship warranting the imposition of a greater duty be reasonably inferred from the complaint's allegation that the agents had assured the insureds of the adequacy of their liability coverage. An insured's request for "sufficient coverage" and an agent's assurance that the policy provided "adequate" coverage do not, in and by themselves, imply an expanded principal-agency relationship. Purchasers of insurance generally seek "sufficient coverage." To imply the existence of a broader agency agreement from that exchange would in effect make the agent a "blanket insurer for his principal." The court further stated that an insurance policy arises out of the insured's desire to be protected in a particular manner against a specific kind of obligation. It is the insured's responsibility to advise the agency of the insurance he or she wants, including the limits of the policy to be issued. Ordinarily, the person

seeking liability insurance knows better than the agent the extent of his or her personal assets, and the premium the insured can afford or is willing to pay.

The complaint did not allege that the agents knew the extent of the insureds' personal assets (*189 Cal. App. 3d 950, 956-957)* . The insureds merely stated that "financial information" of theirs was made available to the agents. The court found that allegation too vague and conclusionary to support the implication of a broader duty. Moreover, the complaint did not allege that liability coverage for the amount of the underlying judgment was available for the insured property and, if so, whether the insureds would have been willing to pay the premium for it. Nor did the complaint allege that the insured had delegated to the agents the burden of determining liability coverage in an amount that would have afforded them completeprotection from any judgment arising out of a third-party negligence action. Absent allegations such as those, the insureds retained the responsibility of deciding how much liability insurance to carry and how much premium to pay. The court concluded that the cross complaint did not allege facts from which it could reasonably infer that the agents were under a duty to procure complete liability protection for the insureds. To hold otherwise would drastically and unilaterally expand the principal-agent relationship (*189 Cal. App. 3d 950, 957)* .

[b] Mere Agency Relationship Does Not Imply Duty to Advise of Additional Coverage

Jones v. Grewe *(1987) 189 Cal. App. 3d 950, 234 Cal. Rptr. 717* , is discussed in *§ 120.391[3][a]*.

[c] Previous Reliance on Agent's Advice Insufficient to Impose Greater Duty

Jones v. Grewe *(1987) 189 Cal. App. 3d 950, 234 Cal. Rptr. 717* , is discussed in *§ 120.391[3][a]*.

[d] Agent's Assurance That Coverage Is Adequate Does Not Imply Broader Agency Relationship

Jones v. Grewe *(1987) 189 Cal. App. 3d 950, 234 Cal. Rptr. 717* , is discussed in *§ 120.391[3][a]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsContract FormationGeneral OverviewInsurance LawClaims & ContractsGood Faith & Fair DealingAgents & Brokers

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F. Tort Actions Against Insurance Agents, Employees, and Brokers
1. Liability of Insurance Agent or Employee

12-120 California Points & Authorities § 120.392

§ 120.392 Insurer's Agent or Employee Is Not Party to Insurance Contract and Therefore Is Not Subject to Liability for Constructive Fraud

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT, AS THE _____ [AGENT *or* EMPLOYEE] OF PLAINTIFF'S INSURER, IS NOT A PARTY TO THE INSURANCE CONTRACT AND THEREFORE IS NOT SUBJECT TO LIABILITY FOR A CAUSE OF ACTION FOR CONSTRUCTIVE FRAUD BROUGHT BY PLAINTIFF.

Agents and Employees of Insurer Not Subject to Liability for Constructive Fraud. An insured cannot state a cause of action for constructive fraud against the agents or employees of an insurer when only the insurer is in a fiduciary relationship with the insured(*Younan v. Equifax Inc. (1980) 111 Cal. App. 3d 498, 517, 169 Cal. Rptr. 478*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that an agent or employee of an insurer is liable to the insured for constructive fraud, on the ground that the agent or employee does not have a fiduciary relationship to the insured [*see* (*Younan v. Equifax Inc. (1980) 111 Cal. App. 3d 498, 517, 169 Cal. Rptr. 478]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that an insurer's agent or employee is not liable to the insured for constructive fraud. For example, these points and authorities may be submitted in support of a demurrer to a complaint brought by an insured with regard to a cause of action for constructive fraud, in which case they may be combined with points and authorities pertaining to demurrers generally. These points and authorities may also be adapted for use in a trial or appellate brief.

These points and authorities may also be adapted for use in a trial or appellate brief.

For references to related Pleading and Practice chapters, see *§ 120.380[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. For example, counsel should set forth facts showing that defendant was not in a fiduciary relationship with plaintiff but was merely an agent or employee representing the insurer, which was the only party that had a fiduciary duty to plaintiff.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.390* et seq.) and to place the argument within its proper procedural context.

One appropriate procedural context for this contention, for example, would be a motion by an insurer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. In this context, counsel would modify the form to assert that there is no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts supporting the motion. The statement must be supportedby cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(d), (h), (h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For points and authorities regarding agency generally, see Ch. 182, *Principal and Agent* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Agents and Employees of Insurer Not Subject to Liability for Constructive Fraud

The facts and procedural background of *Younan v. Equifax Inc. (1980) 111 Cal. App. 3d 498, 169 Cal. Rptr. 478* , are discussed in *§ 120.380[3][a]*. The court held that an agent or employee of an insurer is liable to an insured for wrongful and unprivileged acts committed against the insured that are not based on a breach of the insurer's duty of good faith and fair dealing arising under the insurance contract (*111 Cal. App. 3d 498, 510-511)* . With respect to the insured's cause of action for constructive fraud against the insurance agents, the court affirmed the trial court's sustaining of defendant's demurrer. The court noted that unlike actual fraud, constructive fraud depends on the existence of a fiduciary relationship of some kind, and that relationship must be alleged (*111 Cal. App. 3d 498, 516-517)* .

Although the insured did not contend that a fiduciary relationship existed between him and the insurance agents, he did

contend that the confidential relationship that existed between those defendants and the insurer (which does have a confidential relationship with the insured as his insurer), imposes on the agents a duty to refrain from assisting in the implementation of the scheme to deny him his disability benefits, as wellas the duty to disclose the scheme to him. Active concealment or suppression of facts by a nonfiduciary is the equivalent of a false representation, that is, actual fraud. However, the elements of a representation and falsity are absent from constructive fraud, which consists of the breach of the fiduciary duty of disclosure of relevant matters arising from the relationship. Inasmuch as there was no fiduciary relationship alleged between the insured and anyone other than the insurer, and there were no facts alleged sufficient to show that a confidential relationship existed between the insured and the agents, the demurrer to the cause of action for constructive fraud was properly sustained by the trial court (*111 Cal. App. 3d 498, 517)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsContract FormationGeneral OverviewInsurance LawIndustry RegulationInsurance Company OperationsRepresentativesAgentsGeneral OverviewTortsBusiness TortsFraud & MisrepresentationConstructive FraudGeneral Overview

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12-120 California Points & Authorities §§ 120.393-120.399

[Reserved]

§§ 120.393[Reserved]

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2. Liability of Insurance Broker

12-120 California Points & Authorities § 120.400

§ 120.400 Broker Negligently Obtained Inadequate Coverage

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT, AS PLAINTIFF'S INSURANCE BROKER, IS LIABLE TO PLAINTIFF FOR LOSSES CAUSED BY DEFENDANT'S NEGLIGENT CONDUCT IN OBTAINING INADEQUATE COVERAGE UNDER THE INSURANCE POLICY.

Broker Liable for Negligently Obtaining Inadequate Coverage. An insurance broker who negligently represents an insured with respect to obtaining the correct amount of coverage is subject to liability to the insured for loss suffered by the insured due to the negligence (*Reserve Ins. Co. v. Pisciotta (1982) 30 Cal. 3d 800, 816-817, 180 Cal. Rptr. 628, 640 P.2d 764*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that an insurance broker is liable to the insured, or a third party who had a claim against the insured, for losses resulting from the broker's negligent conduct in obtaining inadequate insurance coverage [*see* *Reserve Ins. Co. v. Pisciotta (1982) 30 Cal. 3d 800, 816-817, 180 Cal. Rptr. 628, 640 P.2d 764* ; *Nowlon v. Koram Ins. Ctr., Inc. (1991) 1 Cal. App. 4th 1437, 1441, 2 Cal. Rptr. 2d 683]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that an insurance agent owes the insured a duty to inform him or her accurately of the policy provisions. For example, these points and authorities may be submitted in opposition to a defense motion for summary judgment, in which case they may be combined with points and authorities pertaining to summary judgment motions generally. These points and authorities may also be adapted for use in a trial or appellate

brief.

These points and authorities may also be adapted for use in a trial or appellate brief.

For references to related California Forms of Pleading and Practice chapters, see *§ 120.380[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. For example, counsel should set forth facts showing the existence of a risk to plaintiff of which the defendant had knowledge, or should have had knowledge, which remained uninsured or inadequately insured because of defendant's negligence, to the plaintiff's detriment.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.401* et seq.) and to place the argument within its proper procedural context.

An appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing a motion for summary judgment or summary adjudication by an insurer, or insurer's agent or employee, when the evidentiary facts clearly support the contention. In this context, counsel would modify the form to assert that there remain triable issues of material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts opposing the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(e)-(h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

For points and authorities regarding civil conspiracy generally, see Ch. 46, *Conspiracy* . For points and authorities regarding fraud generally, see Ch. 105, *Fraud and Deceit* . For points and authorities regarding the liability of an agent to a third party for wrongful acts, see Ch. 182, *Principal and Agent* .

[3] Discussion of Authorities

[a] Broker Liable for Negligently Obtaining Inadequate Coverage

In ***Reserve Ins. Co. v. Pisciotta*** *(1982) 30 Cal. 3d 800, 180 Cal. Rptr. 628, 640 P.2d 764* , an insurer brought a declaratory relief action regarding the application of the "family exclusion" in a marine liability policy; additional issues were litigated concerning potential liabilities of the insured, his broker, and the primary and excess insurers. The insured obtained primary and excess coverage from two different insurers for his boat. The primary policy was in effect until May 11, 1976. The excess policy contained a "maintenance clause," which required the insured to maintain underlying

coverage "not more restrictive" than the coverage under the current primary policy, which provided a single limit of $300,000 per occurrence and contained no family exclusion. The insured and his broker discussed the possibility of obtaining replacement coverage on the expiration of the existing primary policy, but the insured elected to allow the primary policy to lapse because he planned to sell the boat. When he later decided to use the boat, he arranged for the broker to obtain replacement primary coverage.

The broker obtained coverage effective June 26, 1976, on which date the insured's stepson was severely injured when the insured's boat, operated by the insured, collided with another boat. The replacement policy contained a family exclusion and provided "split limit" coverage, instead of the "single limit" coverage provided in the previous policy. The new policy limits were $100,000 per occurrence for injury to one person, and $300,000 per occurrence for injuries to more than one person. The stepson, a minor, filed a complaint through his guardian ad litem for damages against the insured and the driver of the other boat. The primary insurer filed a declaratory relief action seeking a ruling that the family exclusion in the policy applied to the stepson, relieving the insurer of a duty to indemnify the insured regarding liability for the stepson's injuries. The inured filed a cross complaint seeking the following alternative declarations: (1) if the exclusion did not apply and the insurer was consequently required to provide $100,000 of primary coverage, either the excess or primary insurer was responsible for any liability of the insured from $100,000 up to $300,000; or (2) if the exclusion did apply, the broker was responsible for any liability up to $300,000 because of his negligence in procuring a replacement policy containing the family exclusion.

The excess insurer did not dispute that it provided coverage for any liability in excess of $300,000. The trial court found the exclusion to be ambiguous regarding application to the stepson, and therefore interpreted the exclusion in favor of the insured, concluding that the primary insurerwas required to provide coverage up to its policy limit of $100,000. Following a jury trial, both the broker and the insured were found negligent in obtaining an inadequate replacement policy, and the broker was found liable for $150,000 of the resultant gap in coverage, which represented 75 percent of the fault. The jury also found that the broker was not negligent in obtaining a replacement policy containing a family exclusion. The trial court also ruled ("inexplicably") that the excess insurer was liable for indemnification of the insured's portion (25 percent) of responsibility for the coverage gap of $200,000. (The opinion does not state the amount of damages determined in the underlying suit brought by the stepson.) All parties appealed. The California Supreme Court modified the judgment with respect to the amount of the excess insurer's liability. Noting the primary insurer's postjudgment insolvency, and the insured's breach of the maintenance clause, the Court held that the excess insurer's duty to indemnify the insured was limited to the first $100,000 of the insured's liability (*30 Cal. 3d 800, 812-816*). The Court affirmed the judgment with respect to, inter alia, the finding of negligence against the broker (*30 Cal. 3d 800, 816-817)* . The broker challenged the sufficiency of the evidence supporting the finding that he was negligent in procuring a replacement primary policy containing lower limits than those in the previous primary policy.

The Court stated that evidence of the broker's negligence was apparent. He testified that he was a qualified broker with 20 years' experience, that he understood his duty to inform the insured of any coverage problems, and that he failed to review the insured's file before obtaining coverage on the day of the accident. The broker informed the insured of the alternative insurance and of the fact that the new policy would have the "split limit" coverage. However, he did not tell the insured that the new coverage differed from the previous primary coverage, or that the excess policy required him to maintain underlying coverage of $300,000. Although the broker realized that if the insured obtained the new primary policy, a gap in coverage would be possible, he never alerted the insured to that danger. The Court determined that the evidence was sufficient to sustain the verdict. Therefore, because the broker was found to be 75 percent responsible for the $200,000 gap in coverage, he is liable in the amount of $150,000 (*30 Cal. 3d 800, 816-817)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsDuties & LiabilitiesNegligent Acts of AgentsLiability of AgentsInsurance LawClaims & ContractsGeneral OverviewInsurance LawIndustry RegulationInsurance Company

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12-120 California Points & Authorities § 120.401

§ 120.401 Presumption of Negligence for Obtaining Insurance From Out-of-State Carrier

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT, AS PLAINTIFF'S INSURANCE BROKER, IS LIABLE TO PLAINTIFF FOR LOSSES CAUSED BY DEFENDANT'S NEGLIGENT CONDUCT BECAUSE OF THE PRESUMPTION OF NEGLIGENCE IN OBTAINING INSURANCE FROM AN OUT-OF-STATE CARRIER.

Presumption of Negligence for Obtaining Insurance From Out-of-State Carrier. An insurance broker who obtains insurance from an out-of-state carrier, unless the sale is made through a surplus line broker, (*see* Ins. Code *§ 703, Ins. Code § 1761, Ins. Code* § 1776, Pen. Code § 439) may be presumed negligent under *Evidence Code Section 669(a)*, and therefore be held liable for losses caused by the insolvency of the out-of-state carrier (*Nowlon v. Koram Ins. Ctr., Inc. (1991) 1 Cal. App. 4th 1437, 1441, 2 Cal. Rptr. 2d 683*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that an insurance broker is liable to the insured, or a third party who had a claim against the insured, for losses resulting from the broker's negligent conduct in obtaining inadequate insurance coverage based on the presumption of negligence which arises when the broker has procured insurance from an out-of-state insurance carrier [*see Nowlon v. Koram Ins. Ctr., Inc. (1991) 1 Cal. App. 4th 1437, 1441, 2 Cal. Rptr. 2d 683]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the presumption of negligence.

These points and authorities may also be adapted for use in a trial or appellate brief.

For references to related Pleading and Practice chapters, see *§ 120.380[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. For example, counsel should set forth facts showing the existence of a risk to plaintiff of which the defendant had knowledge, or should have had knowledge, which remained uninsured or inadequately insured because of defendant's negligence in obtaining out-of-state coverage, to the plaintiff's detriment.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.400* et seq.) and to place the argument within its proper procedural context.

An appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing a motion for summary judgment or summary adjudication by an insurer, or insurer's agent or employee, when the evidentiary facts clearly support the contention. In this context, counsel would modify the form to assert that there remain triable issues of material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts opposing the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(e)-(h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

For points and authorities regarding agency generally, see Ch. 182, *Principal and Agent* . For points and authorities regarding negligence generally, see Ch. 165, *Negligence* .

[3] Discussion of Authorities

[a] Presumption of Negligence for Obtaining Insurance From Out-of-State Carrier

In ***Nowlon v. Koram Ins. Ctr., Inc.*** *(1991) 1 Cal. App. 4th 1437, 2 Cal. Rptr. 2d 683* , plaintiff was injured at his place of employment. His employer had a general liability insurance policy to insure against liability to third parties for personal injuries arising out of business activities. The insurer, brokered by the defendant, was not authorized to transact business in California and was not a member of the California Insurance Guarantee Association (CIGA). The insurer later became insolvent. Plaintiff then brought an action against defendant insurance broker, alleging that the broker should be presumed negligent based on violations of variousstatutes prohibiting the sale of insurance for an insurer that is not authorized to sell insurance in California, unless such sales are made by a surplus line broker [*see* Ins. Code *§ 703, Ins. Code § 1761, Ins. Code* § 1776, and *Pen. Code § 439*]. Plaintiff alleged that he was damaged by defendant's

negligent brokering of the insurance policy. The trial court sustained a demurrer to plaintiff's first amended complaint without leave to amend (*1 Cal. App. 4th 1437, 1439-1440)* .

The court of appeal reversed with instructions to the trial court to allow plaintiff to amend his complaint to allege that the insurance policy was not obtained by or through a surplus line broker (*1 Cal. App. 4th 1437, 1443, 1447)* . The court assumed that no surplus line broker was involved in the transaction in its discussion regarding the presumption of negligence under *Evid. Code § 669*. It found that plaintiff, as a third-party plaintiff, would have been entitled to make a claim for CIGA benefits had the insolvent insurance company been a member of CIGA (*1 Cal. App. 4th 1437, 1444)* , that the case of an insolvent insurer and a claimant with no recourse to the CIGA fund is precisely one of the types of occurrences that these prohibitive statutes [*see* Ins. Code *§ 703, Ins. Code § 1761, Ins. Code* § 1776; *Pen. Code § 439*] were designed to prevent (*1 Cal. App. 4th 1437, 1445)* , and that the Insurance Code provisions governing contracts of insurance entered into in California generally have a central purpose not only of protecting the insured but also of safeguarding the rights of third parties who may be injured by the acts or omissions of the insured (*1 Cal. App. 4th 1437, 1446-1447)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsDuties & LiabilitiesNegligent Acts of AgentsLiability of AgentsInsurance LawClaims & ContractsGeneral Overview

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12-120 California Points & Authorities § 120.402

§ 120.402 Broker Failed to Obtain Promised Coverage

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT, AS PLAINTIFF'S INSURANCE BROKER, IS LIABLE TO PLAINTIFF FOR LOSSES CAUSED BY DEFENDANT'S FAILURE TO OBTAIN COVERAGE THAT PLAINTIFF REQUESTED AND THAT DEFENDANT ASSURED PLAINTIFF IT HAD OBTAINED.

A. Broker Liable in Negligence for Failing to Obtain Promised Coverage. An insurance broker that advises an insured that it obtained coverage requested by the insured, and fails to do so, is liable to the insured in negligence for injuries proximately caused by its conduct (*Greenfield v. Insurance Inc. (1971) 19 Cal. App. 3d 803, 810-811, 97 Cal. Rptr. 164*).

B. Broker Liable in Fraud Based on Misrepresentation That Requested Coverage Was Obtained. An insurance broker that misrepresents to the insured that it has obtained requested coverage, when in fact it failed to do so, is liable to the insured in fraud if the insured justifiably relied on the misrepresentation to the insured's detriment (*Greenfield v. Insurance Inc. (1971) 19 Cal. App. 3d 803, 811, 97 Cal. Rptr. 164*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that the insured's insurance broker is liable to the insured for losses resulting from the broker's failure to obtain coverage that the insured requested and the broker promised to obtain [*see Greenfield v. Insurance Inc. (1971) 19 Cal. App. 3d 803, 810-811, 97 Cal. Rptr. 164]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context

in which counsel wishes to raise the substantive issue that an insurance broker is liable to the insured for losses resulting from the broker's failure to obtain promised coverage. For example, these points and authorities may be submitted in opposition to a defense motion for summary judgment, in which case they may be combined with points and authorities pertaining to summary judgment motions generally. These points and authorities may also be adapted for use in a trial or appellate brief.

These points and authorities may also be adapted for use in a trial or appellate brief.

For references to related Pleading and Practice chapters, see *§ 120.380[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. For example, counsel should set forth facts showing that plaintiff requested that defendant, as his or her broker, obtain certain coverage, that defendant promised to do so, and that plaintiff suffered a loss resulting from lack of coverage regarding the risk in question.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.400* et seq.) and to place the argument within its proper procedural context.

An appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing a motion for summary judgment or summary adjudication by an insurer,or insurer's agent or employee, when the evidentiary facts clearly support the contention. In this context, counsel would modify the form to assert that there remain triable issues of material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts opposing the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(e)-(h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

For points and authorities regarding agency generally, see Ch. 182, *Principal and Agent* . For points and authorities regarding negligence generally, see Ch. 165, *Negligence* .

[3] Discussion of Authorities

[a] Broker Liable in Negligence for Failing to Obtain Promised Coverage

In ***Greenfield v. Insurance Inc.*** *(1971) 19 Cal. App. 3d 803, 97 Cal. Rptr. 164* , an insured brought an action against his broker, alleging negligence and fraud based on the broker's assertions to him that it had obtained requested coverage

although it had failed to do so. In early 1966, the insured purchased an auto shredder, an expensive piece of equipment, for use in his scrap iron and metal business. A bank financed the purchase of the shredder through a loan that obligated the insured to make large monthly payments. While the shredder was being shipped to him, the insured contacted an officer of his insurance brokerage firm to discuss fire and extended insurance coverage on the shredder. The firm had handled his insurance needs for 10 years, and he relied on its expertise and advice regarding insurance matters.

The insured specifically requested "business interruption coverage" on the shredder, which would cover losses sustained because of its mechanical breakdown. The insured told the brokerage officer of his security obligation to the bank and explained the importance of insuring against a breakdown of the equipment. The insured alleged that the officer telephoned him on April 1, 1966, to inform him that he had obtained the type of coverage requested and that "everything would be covered" except breakdown caused by flood or earthquake. The brokerage officer sent a memo to the insurer requesting the issuance of an "all-risk" business interruption policy, containing an exclusion only for flood and earthquake; a copy of the memo was mailed to the insured. The brokerage officer testified that two days after issuing the memo, he told the insured that he had obtained the requested coverage. The insurer issued a policy that provided fire and extended coverage for loss or damage to the shredder for a three-year period, commencing April 15, 1966. It covered loss because of business interruption, but specifically excluded loss caused by a mechanical breakdown.

Neither the insured nor the broker read the policy when received. In June 1966, the shredder broke down and was out of operation for approximately one month. It broke down again in October and was inoperative for approximately two months. The insured expended in excess of $1,000 to expedite repairs during the breakdowns. In December 1966, the insurer notified the insured that the loss was not covered under the policy. The insured promptly contacted an insurance agent in Washington and obtained a premium quotation for a policy with another insurer, which provided business interruption coverage for loss arising from mechanical breakdown with no exclusions. The insured referred the paperwork to a second officer at his brokerage firm, who completed the process of obtaining the insurance. The insured filed a complaint against the brokerage firm, alleging breach of oral contract, negligence, and fraud, based on the broker's failure to obtain a business interruption policy covering mechanical breakdown. He obtained a judgment in his favor on the causes of action for negligence and fraud, and was awarded damages and prejudgment interest; the broker appealed. The insured subsequently filed a second complaint against the broker, seeking damages for loss of value of his business and stating causes of action in negligence and fraud arising out of the same facts alleged and presumably proved in the first action. The trial court sustained the broker's demurrer to the complaint without leave to amend, and the insured appealed. The cases were consolidated on appeal.

The court of appeal modified the first case with respect to the amount of interest awarded, and affirmed the dismissal of the second action (*19 Cal. App. 3d 803, 814)* . With respect to the first case (which resulted in a judgment for the insured), the court rejected the broker's contention thatthere was no causal relationship between the negligence and fraud and the damages alleged. The court noted that the foundational element of legal cause is cause in fact. It is necessary to show that the conduct contributed in some way to the injury (lack of coverage), so that "but for" the conduct, the injury would not have occurred (*19 Cal. App. 3d 803, 810)* . If the act or omission was a substantial factor in bringing about the result, it will be regarded as a legal cause of the injury. The court noted that the insured requested coverage to insure against a breakdown of the shredder. He relied on the broker's representation that it had obtained coverage when in fact it had not. Within a few days after learning that he was not covered, he obtained the coverage elsewhere. If the broker had not misrepresented the fact of coverage under the first policy, it is reasonable to infer that the insured would have obtained the coverage from the other insurer. Indulging in all reasonable inferences from the evidence, the court concluded that the broker's conduct was a substantial factor in bringing about the harm to the insured.

The court also rejected the broker's assertion that the judgment for fraud was unsupported by evidence showing the insured's reliance on its negligent misrepresentation. The court noted that there is ample evidence to support the implied finding that the insured justifiably relied on the broker's statement that he had obtained the requested coverage. The

insured had relied on the brokerage firm for years in all aspects of his insurance business. It was reasonable that the insured would accept the representations regarding coverage and not read the policy. The broker also asserted that the insured unreasonably incurred his damages by failing to read the policy.

Inasmuch as the broker did not raise contributory negligence as an affirmative defense, the issue was not before the trial court, and could not be raised on appeal. Moreover, there was no evidence on which the trial court could find that the insured could have avoided his damages by reasonable efforts not taken (*19 Cal. App. 3d 803, 811*). (The court proceeded to disallow the award of prejudgment interest and modified the judgment in that respect.) With respect to the second case, the court affirmed the judgment, holding that a party may not split a cause of action, using the same wrong as the basis for separate suits (*19 Cal. App. 3d 803, 814)* .

[b] Broker Liable in Fraud Based on Misrepresentation That Requested Coverage Was Obtained

Greenfield v. Insurance Inc. *(1971) 19 Cal. App. 3d 803, 97 Cal. Rptr. 164* , is discussed in *§ 120.402[3][a]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsDuties & LiabilitiesNegligent Acts of AgentsLiability of AgentsInsurance LawClaims & ContractsGeneral OverviewInsurance LawIndustry RegulationInsurance Company OperationsRepresentativesBrokers

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2. Liability of Insurance Broker

12-120 California Points & Authorities § 120.403

§ 120.403 Insured's Reliance on Broker's Representation of Coverage Justifiable if Supported by History of Similar Reliance

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE INSURED JUSTIFIABLY RELIED ON THE BROKER'S REPRESENTATION OF COVERAGE BASED ON A HISTORY OF SIMILAR RELIANCE.

Insured's Reliance on Broker's Representation of Coverage Justifiable if Supported by History of Similar Reliance. An insured's reliance on a broker's representations regarding coverage, without reading the policy, is justifiable when the insured substantially relied on the broker regarding insurance matters over an extended period of time (*Greenfield v. Insurance Inc. (1971) 19 Cal. App. 3d 803, 811, 97 Cal. Rptr. 164*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that the insured justifiably relied on the broker's representation of coverage [*see Greenfield v. Insurance Inc. (1971) 19 Cal. App. 3d 803, 810-811, 97 Cal. Rptr. 164]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that an insurance broker is liable to the insured for losses resulting from the broker's failure to obtain promised coverage. For example, these points and authorities may be submitted in opposition to a defense motion for summary judgment, in which case they may be combined with points and authorities pertaining to summary judgment motions generally. These points and authorities may also be adapted for use in a trial or appellate brief.

These points and authorities may also be adapted for use in a trial or appellate brief.

For references to related Pleading and Practice chapters, see *§ 120.380[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. For example, counsel should set forth facts showingthe existence of a risk to plaintiff of which the defendant had knowledge, or should have had knowledge, which remained uninsured or inadequately insured because of defendant's negligence in obtaining out-of-state coverage, to the plaintiff's detriment.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues (*see, e.g., § 120.400* et seq.) and to place the argument within its proper procedural context.

An appropriate procedural context for this contention, for example, would be an insured's memorandum of points and authorities opposing a motion for summary judgment or summary adjudication by an insurer, or insurer's agent or employee, when the evidentiary facts clearly support the contention. In this context, counsel would modify the form to assert that there remain triable issues of material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts opposing the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(e)-(h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

For points and authorities regarding agency generally, see Ch. 182, *Principal and Agent* . For points and authorities regarding negligence generally, see Ch. 165, *Negligence* .

[3] Discussion of Authorities

[a] Insured's Reliance on Broker's Representation of Coverage Justifiable if Supported by History of Similar Reliance

Greenfield v. Insurance Inc. *(1971) 19 Cal. App. 3d 803, 97 Cal. Rptr. 164* , is discussed in *§ 120.402[3][a]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBad Faith & Extracontractual LiabilityGeneral OverviewInsurance LawClaims & ContractsGeneral

OverviewInsurance LawIndustry RegulationInsurance Company OperationsRepresentativesBrokers

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12-120 California Points & Authorities § 120.404

§ 120.404 Two-Year Limitations Period Applies to Action Against Broker Based on Broker's Failure to Execute Professional Duties

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S ACTION AGAINST DEFENDANT BROKER IS TIME-BARRED BECAUSE THE APPLICABLE LIMITATIONS PERIOD FOR AN ACTION AGAINST AN INSURANCE BROKER FOR THE BROKER'S FAILURE TO EXECUTE THE BROKER'S PROFESSIONAL DUTIES IS TWO YEARS, AND THE TWO-YEAR LIMITATIONS PERIOD HAS ELAPSED.

Two-Year Limitations Period Applies to Action Against Broker for Failure to Execute Professional Duties. If the gravamen of a suit by an insured against an insurance broker is the broker's failure to execute obligations as an insurance broker, the two-year limitations period for professional negligence under *Code Civ. Proc. § 339* applies (*see Hydro-Mill Co., Inc. v. Hayward, Tilton & Rolapp Ins. Assocs., Inc. (2004) 115 Cal. App. 4th 1145, 1158-1160, 10 Cal. Rptr. 3d 582*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to an insured's contention that an insurance broker is liable to the insured for causes of action stemming from the broker's failure to execute the broker's professional duties, on the ground that the action is time-barred under *Code Civ. Proc. § 339*.

This form may be used by an insurance broker in various procedural contexts, such as in support of a motion for nonsuit on the ground that the action is barred by the statute of limitations. This form may also be used in a trial brief or in an appellate brief.

This form may be used to oppose the points and authorities *set forth in §§ 120.400* and *120.402*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. For example, counsel should show why the causes of action are essentially grounded in the insurance broker's failure toperform professional duties, assert that the two-year limitations period of *Code Civ. Proc. § 339* applies, and then show that this limitations period has elapsed.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues, and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be a memorandum of points and authorities in support of the insurance broker's motion for nonsuit [*see, e.g., Hydro-Mill Co., Inc. v. Hayward, Tilton & Rolapp Ins. Assocs., Inc. (2004) 115 Cal. App. 4th 1145, 1152, 10 Cal. Rptr. 3d 582]* .

[c] Related Pleading and Practice Chapters

For complaints by an insured against agents and brokers, see California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender).

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion of how to combine the forms of this publication, and discussion and general forms for completing a memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities regarding agency generally, see Ch. 182, *Principal and Agent* .

[3] Discussion of Authorities

[a] Two-Year Limitations Period Applies to Action Against Broker for Failure to Execute Professional Duties

In ***Hydro-Mill Co., Inc. v. Hayward, Tilton & Rolapp Ins. Assocs., Inc.*** *(2004) 115 Cal. App. 4th 1145, 10 Cal. Rptr. 3d 582* , a corporation purchased earthquake insurance through its insurance broker, but discovered following the Northridge earthquake that the broker had not obtained the full amount of coverage that the corporation had sought. Specifically, in addition to broad coverage of the location that the corporation owned, the corporation sought limited coverage for premises that it leased. Instead of providing coverage for the leased locations, and omitting coverage for physical damage to the structures as requested, the broker omitted all coverage for the leased locations. After receiving policy benefits in accordance with the policy as written, the corporation brought an action against the broker, stating causes of action for negligence, breach of oral contract, negligent misrepresentation, and breach of fiduciary duty. During the court trial, the broker unsuccessfully moved for nonsuit on the ground thatthe causes of action were time-barred. Following a judgment for the corporation, the insurance broker appealed.

The court of appeal reversed, holding, among other things, that the action was been time-barred pursuant to *Code Civ. Proc. § 339*. The court stated that an agent or broker that fails to procure insurance as requested is liable for any resulting damage. Generally, an insurance agent is liable to a client in tort if the agent's intentional acts or failure to exercise reasonable care with regard to the obtaining or maintenance of insurance results in damage to the client. To determine the statute of limitations applicable to a cause of action, a court must identify the nature of the cause of action--that is, the gravamen of the cause of action. The nature of the right sued on, and not the form of action or the

relief demanded, determines the applicability of the statute of limitations (*115 Cal. App. 4th 1145, 1153)* . The court proceeded to discuss all four causes of action, holding that the gravamen of each of them was the defendant's failure to execute its obligations as an insurance broker and therefore that each cause of action was governed by the two-year limitations period of *Code Civ. Proc. § 339* (*115 Cal. App. 4th 1145, 1154-1160)* . The court then held that the statute of limitations began to run on the date on which the insurer offered to pay the policy amount on the insured's claim (December 9, 1994, or some 11 months following the earthquake), which was also the date on which the insurer clarified that coverage for the leased premises was excluded. The court also held that the trial court erred in holding that the limitations period was tolled until the insurer denied the claim in writing, which denial occurred in its answer to the complaint. The statute of limitations period was not tolled as to the broker while the insurer processed the claim, although the limitations period was tolled as to the insurer during the claim-processing period. Because the corporation did not file suit on or before December 9, 1996, the complaint was untimely filed (*115 Cal. App. 4th 1145, 1162-1164)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsInsurance LawIndustry RegulationInsurance Company OperationsRepresentativesBrokers

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12-120 California Points & Authorities §§ 120.405-120.409

[Reserved]

§§ 120.405[Reserved]

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12-120 California Points & Authorities § 120.410

§ 120.410 Director or Officer of Corporate Insurance Agent Is Not Liable to Insurer for Negligent Inducement to Provide Coverage--Director or Officer Is Not Bound Individually

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT, AS A _____ [DIRECTOR or OFFICER] OF PLAINTIFF'S CORPORATE INSURANCE AGENT, IS NOT INDIVIDUALLY LIABLE TO PLAINTIFF FOR NEGLIGENT INDUCEMENT TO PROVIDE COVERAGE, BECAUSE DEFENDANT DID NOT PURPORT TO BIND HIMSELF/HERSELF INDIVIDUALLY TO THE INSURANCE CONTRACT.

Directors and Officers of Corporate Agent Not Individually Liable. Directors and officers of a corporate insurance agent are not personally liable to the insurer for negligent inducement to provide coverage regarding insurance contracts signed by them for and on behalf of the corporation unless they purport to bind themselves individually (*United States Liab. Ins. Co. v. Haidinger-Hayes, Inc. (1970) 1 Cal. 3d 586, 595, 83 Cal. Rptr. 418, 463 P.2d 770*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that a director or officer of an insurer's corporate agent is liable to the insurer for negligent inducement to provide coverage to an insured [*see United States Liab. Ins. Co. v. Haidinger-Hayes, Inc. (1970) 1 Cal. 3d 586, 595, 83 Cal. Rptr. 418, 463 P.2d 770]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a director or officer of a corporate insurance agent is not liable to the insurer for negligent inducement to provide coverage. For example, these points and authorities may be submitted in support of a motion for summary judgment, in which case they may be combined with points and

authorities pertaining to demurrers generally. These points and authorities may also be adapted for use in a trial or appellate brief.

These points and authorities may also be adapted for use in a trial or appellate brief.

For references to related Pleading and Practice chapters, see *§ 120.380[2][c]*.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of his or her case. For example, counsel should set forth facts showing that defendant did not purport to bind himself or herself individually to the insurance contract.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues and to place the argument within its proper procedural context.

An appropriate procedural context for this contention, for example, would be a director's or officer's memorandum of points and authorities opposing a motion for summary judgment or summary adjudication by an insurer, when the evidentiary facts clearly support the contention. In this context, counsel would modify the form to assert that there remain triable issues of material fact [*see Code Civ. Proc. § 437c*]. Counsel would need to submit a separate statement of undisputed material facts opposing the motion. The statement must be supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations [*see* Cal. Rules of Court, Rule 342(e)-(h)]. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit.

References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see* Cal. Rules of Ct., Rule 313(h)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

For points and authorities regarding agency generally, see Ch. 182, Principal and Agent. For points and authorities regarding negligence generally, see Ch. 165, *Negligence* .

[3] Discussion of Authorities

[a] Directors and Officers of Corporate Agent Not Individually Liable

The facts and procedural background of ***United States Liab. Ins. Co. v. Haidinger-Hayes, Inc.*** *(1970) 1 Cal. 3d 586, 83 Cal. Rptr. 418, 463 P.2d 770* , are discussed in *§ 120.385[3][a]*. The California Supreme Court found that a corporate insurance agent that negligently induces an insurer to assume coverage on which it suffers a loss is liable to the insurer (*1 Cal. 3d 586, 594)* . With respect to the individual defendant, who was the president and principal executive officer of the corporate insurance agent, the Court found no personal liability for negligence and reversed the judgment against him accordingly (*1 Cal. 3d 586, 594-595)* .

The relationship between the individual defendant and the insurer is distinguishable from that between the corporate defendant and the insurer. The trial court imposed liability on the individual defendant for his active participation in the tortious (negligent) act of his principal, which caused pecuniary harm to a third person. The defendant urged on appeal the he was never a fiduciary to the insurer, and owed it no duty of care. The insurer asserted that the defendant was its subagent and that it breached the duty of care arising from the relationship. However, the Court noted that no relationship of subagent was established (*1 Cal. 3d 586, 594)* . As president and principal officer of defendant corporation, the individual defendant was a fiduciary to and an agent of that corporation. He had a duty to the corporation to exercise his corporate powers in good faith and with a view to its interests. Directors and officers are not personally liable on contracts signed by them for and on behalf of the corporation unless they purport to bind themselves individually. His acts were done in the course and scope of his employment, for and on behalf of the corporation, and not as a contracting party.

Directors or officers of a corporation are not responsible to third persons for negligence amounting merely to nonfeasance, regarding a breach of duty owing to the corporation alone; the act must also constitute a breach of duty owed to the third person. The Court noted that liability imposed on agents for active participation in tortious acts of the principal have been mostly restricted to cases involving physical injury, not pecuniary harm, to third persons. Neither the evidence nor the findings support the conclusion that the individual defendant was personally liable to the insurer by reason of his negligent performance of his corporate duties (*1 Cal. 3d 586, 595)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesCauses of ActionGeneral OverviewInsurance LawClaims & ContractsGeneral OverviewInsurance LawIndustry RegulationInsurance Company OperationsGeneral Overview

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12-120 California Points & Authorities §§ 120.411-120.419

[Reserved]

§§ 120.411[Reserved]

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§ 121.syn Synopsis to Chapter 121: INTEREST

§ 121.01 Scope of Chapter

§ 121.02 Governing Law

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§ 121.04 Interest in General

§ 121.05 Prejudgment Interest When Damages Certain

§ 121.06 Prejudgment Interest in Personal Injury Action

§ 121.07 Prejudgment Interest in Unfair Competition Action

§ 121.08 Prejudgment Interest in Court's Discretion

§ 121.09 When Interest Stipulated in Contract

§ 121.10 Compounding of Interest

§ 121.11 When Prejudgment Interest Not Allowed

§ 121.12 Postjudgment Interest

§ 121.13 Cessation of Interest

§ 121.14 Related Pleading and Practice Chapters

§ 121.15 Related Points and Authorities Chapters

§§ 121.16-121.29 [Reserved]

§ 121.30 Supporting Contention That Prejudgment Interest Should Be Awarded--Right to Prejudgment Interest

When Damages Certain [Civ. Code § 3287(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Prejudgment Interest When Damages Certain

[b] Mandatory Prejudgment Interest When Damages Certain in Noncontract Actions

[c] Damages as Certain When Only Dispute Regards Liability

[d] Damages as Certain When Defendant Admits, Stipulates To, or Receives Uncontradicted Evidence of Value

[e] Unliquidated Setoff as Not Precluding Prejudgment Interest

[f] Slight Variance Between Amount Claimed and Amount Awarded as Not Precluding Prejudgment Interest

[g] Prejudgment Interest Permitted Against State or Any of Its Political Subdivisions

[h] Prejudgment Interest in Indemnity Action

[i] Failure to Prevail at Administrative Level Does Not Preclude Prejudgment Interest

[4] Additional Authorities

[a] Prejudgment Interest When Damages Certain

[b] Mandatory Prejudgment Interest When Damages Certain in Noncontract Actions

[c] Damages as Certain When Only Dispute Regards Liability

[d] Damages as Certain When Defendant Admits, Stipulates To, or Receives Uncontradicted Evidence of Value

[e] Slight Variance Between Amount Claimed and Amount Awarded as Not Precluding Prejudgment Interest

[f] Prejudgment Interest Permitted Against State or Any of Its Political Subdivisions

§ 121.31 Supporting Contention That Prejudgment Interest Should Be Awarded--Prejudgment Interest as Proper in Inverse Condemnation Action Even Though Amount of Damages Uncertain

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Certainty of Damages Unnecessary for Prejudgment Interest in Inverse Condemnation Action

[4] Additional Authorities

[a] Certainty of Damages Unnecessary for Prejudgment Interest in Inverse Condemnation Action

§ 121.32 Supporting Contention That Prejudgment Interest Should Be Awarded--Interest in Court's Discretion From Date of Filing of Complaint in Contract Action for Unliquidated Damages [Civ. Code § 3287(b)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Discretionary Prejudgment Interest From Date of Filing of Complaint in Contract Action for Unliquidated Damages

[4] Additional Authorities

[a] Discretionary Prejudgment Interest From Date of Filing of Complaint in Contract Action for Unliquidated Damages

§ 121.33 Supporting Contention That Prejudgment Interest Should Be Awarded--Prejudgment Interest in Discretion of Trier of Fact for Breach of Obligation Not Arising From Contract or for Oppression, Fraud, or Malice [Civ. Code § 3288]

[1] FORM

[2] Comments

[a] Use of Form

[b] Rate of Interest

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Prejudgment Interest in Discretion of Trier of Fact for Breach of Obligation Not Arising From Contract or for Oppression, Fraud, or Malice

[b] General Prayer for Relief as Sufficient to Support Court's Award of Interest

[4] Additional Authorities

[a] Prejudgment Interest in Discretion of Trier of Fact for Breach of Obligation Not Arising From Contract or for Oppression, Fraud, or Malice

§ 121.34 Supporting Contention That Prejudgment Interest Should Be Awarded--Interest Rate Stipulated in Contract Continues Following Breach [Civ. Code § 3289(a)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Interest Rate Stipulated in Contract Continues Following Breach

§ 121.35 Supporting Contention That Prejudgment Interest Should Be Awarded--Interest Rate Not Stipulated in Contract Entered Into After January 1, 1986 [Civ. Code § 3289(b)]

[1] FORM

[2] Comments

[a] Use of Form

§ 121.36 Supporting Contention That Prejudgment Interest Should Be Awarded--Usurious Rate Stipulated in Contract Entered Into After January 1, 1986 [Civ. Code § 3289(b)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] When Rate Stipulated Is Usurious

[4] Additional Authorities

[a] When Rate Stipulated Is Usurious

§ 121.37 Supporting Contention That Prejudgment Interest Should Be Awarded--"Time-Price" Doctrine Makes Usury Law Inapplicable to Finance Charge Stipulated in Contract

[1] FORM

[2] Comments

[a] Use of Form

[b] Award of "Time-Price" Differential, Late Charge, or Finance Charge as Prejudgment Interest

[3] Discussion of Authorities

[a] Time-Price Differential Is Not Interest

[b] Late Charge in Commercial Contract

[c] Charge as Liquidated Damages

[d] Finance Charge in Retail Installment Account

§ 121.38 Supporting Contention That Prejudgment Interest Should Be Awarded--Absence of Prayer for Interest as Not Precluding Prejudgment Interest

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Absence of Prayer for Interest as Not Precluding Prejudgment Interest

§ 121.39 Supporting Contention That Prejudgment Interest Should Be Awarded--Accepting Payment of Principal as Waiving Claim to Interest Only When Parties Dealing at Arm's Length

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Accepting Payment of Principal as Waiving Claim to Interest Only When Parties Dealing at Arm's Length

§ 121.40 Supporting Contention That Prejudgment Interest Should Be Awarded--Accepting Payment of Principal as Not Waiving Claim to Interest Due Under Contract

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Accepting Payment of Principal as Not Waiving Claim to Interest Due and Payable Under Contract

§ 121.41 Supporting Contention That Prejudgment Interest Should Be Awarded--Inclusion of Interest in Judgment as Not Granting Damages in Excess of Loss

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Inclusion of Interest in Judgment as Not Granting Damages in Excess of Loss

[4] Additional Authorities

[a] Inclusion of Interest in Judgment as Not Granting Damages in Excess of Loss

§ 121.42 Supporting Contention That Prejudgment Interest Should Be Awarded--Interest on Judgments as Part of Damages, Not Penalty

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Interest on Judgments as Part of Damages, Not Penalty

[4] Additional Authorities

§ 121.43 Supporting Contention That Prejudgment Interest Should Be Awarded--Prejudgment Interest in Personal Injury Action From Date of Plaintiff's Offer to Compromise Pursuant to Code Civ. Proc. § 998 [Civ. Code § 3291]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Prejudgment Interest in Personal Injury Action From Date of Plaintiff's Offer to Compromise Pursuant to Code Civ. Proc. § 998

[b] Prejudgment Interest in Action for Personal Injuries Resulting From Strict Liability

[c] Mandatory Award of Prejudgment Interest

[d] Prejudgment Interest When Plaintiff Makes Multiple Code Civ. Proc. § 998 Offers

§ 121.44 Supporting Contention That Prejudgment Interest Should Be Awarded--Prejudgment Interest in Unfair Competition Action Allowed When Just Under Circumstances [Bus. & Prof. Code § 16761]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Prejudgment Interest in Unfair Competition Actions

§ 121.45 Supporting Contention That Prejudgment Interest Should Be Awarded--Conditional Tender Not Sufficient to Stop the Running of Interest [Civ. Code §§ 1494, 1504]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Conditional Tender Does Not Stop Running of Prejudgment Interest

§ 121.46 Supporting Contention That Compound Prejudgment Interest Should Be Awarded--Compound Interest Allowable Against Wrongdoing Trustee

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Compound Interest Allowable Against Wrongdoing Trustee

[4] Additional Authorities

[a] Compound Interest Allowable Against Wrongdoing Trustee

§ 121.47 Supporting Contention That Postjudgment Interest Must Be Awarded--Award of Postjudgment Interest Is Mandatory [Cal. Const. art. XV, § 1; Code Civ. Proc. §§ 685.010, 685.020]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Postjudgment Interest Is Mandatory

[b] Accrual of Postjudgment Interest

[c] Accrual of Postjudgment Interest Payable in Installments

[d] Accrual When Judgment Modified on Appeal

[e] Rate of Postjudgment Interest

[f] Postjudgment Interest Allowed on Prejudgment Interest

[g] Waiver by Payment of Principal Not Applicable

[4] Additional Authorities

[a] Accrual of Postjudgment Interest

[b] Postjudgment Interest Allowed on Prejudgment Interest

§ 121.48 Opposing Contention That Interest Should Be Awarded--Tender of Payment as Stopping Accrual of Interest [Civ. Code § 1504]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Tender of Payment as Stopping Accrual of Interest

[4] Additional Authorities

[a] Tender of Payment as Stopping Accrual of Interest

§ 121.49 Opposing Contention That Interest Should Be Awarded--Acceptance of Principal as Waiver of Interest [Civ. Code § 3290]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Acceptance of Principal as Waiver of Interest

§ 121.50 Opposing Contention That Prejudgment Interest Should be Awarded--Prejudgment Interest Not Allowed on General Damages for Personal Injuries Unless Plaintiff Had Made Offer of Settlement Lower Than Judgment [Civ. Code §§ 3288, 3291]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Prejudgment Interest Not Allowed on General Damages for Personal Injuries

[b] Plaintiff Did Not Obtain Judgment Exceeding Amount of Last Code Civ. Proc. § 998 Offer

[4] Additional Authorities

[a] Prejudgment Interest Not Allowed on General Damages for Personal Injuries

§ 121.51 Opposing Contention That Prejudgment Interest Should Be Awarded--Prejudgment Interest Not Allowed on Nonmoney Judgment

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Prejudgment Interest Not Allowed on Nonmoney Judgment

§ 121.52 Opposing Contention That Prejudgment Interest Should Be Awarded--Prejudgment Interest Not Allowed for Period During Which Debtor Prevented From Paying by Law or by Creditor [Civ. Code § 3287(a)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Prejudgment Interest Not Allowed for Period During Which Debtor Prevented From Paying by Law or by Creditor

§ 121.53 Opposing Contention That Prejudgment Interest Should Be Awarded--Prejudgment Interest as Matter of Right Only When Damages Liquidated

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Prejudgment Interest as Matter of Right Only When Damages Liquidated

[b] Damages as Uncertain in Quantum Meruit

[4] Additional Authorities

[a] Prejudgment Interest as Matter of Right Only When Damages Liquidated

[b] Damages as Uncertain in Quantum Meruit

§ 121.54 Opposing Contention That Prejudgment Interest Should Be Awarded--No Prejudgment Interest Under Civ. Code § 3288 in Absence of Request for Specific Jury Instruction

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] No Prejudgment Interest Under Civ. Code § 3288 in Absence of Request for Specific Jury Instruction

§ 121.55 Opposing Contention That Prejudgment Interest Should Be Awarded--Prejudgment Interest Not Allowed In Wrongful Death Action Without Showing of Oppression, Fraud, or Malice [Civ. Code § 3288]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Prejudgment Interest Not Allowed in Wrongful Death Action Without Showing of Oppression, Fraud, or Malice

[b] Willful Misconduct Does Not Justify Award of Prejudgment Interest

§ 121.56 Opposing Contention That Prejudgment Interest Should Be Awarded Under Civ. Code § 3291--Judgment Does Not Include Award for Personal Injury

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Prejudgment Interest Allowed Only on Damages Awarded for Personal Injury

[b] Insurance Bad-Faith Action Is Not One for Personal Injury

[c] Wrongful Termination in Violation of Public Policy is Not Claim for Personal Injury

[d] Plaintiff's Burden of Proof

§ 121.57 Opposing Contention That Compound Interest Should Be Awarded--Interest May Not Be Compounded

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Interest May Not Be Calculated on Accrued Interest

[b] Ambiguous Contract Cannot Be Construed to Provide Compound Interest

[4] Additional Authorities

[a] Interest May Not Be Calculated on Accrued Interest

§ 121.58 Opposing Contention That Postjudgment Interest Should Be Awarded From Date of Original Judgment Reversed on Appeal--Postjudgment Interest Only From Time of New Judgment

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] No Postjudgment Interest on Judgment Reversed on Appeal

[4] Additional Authorities

[a] No Postjudgment Interest on Judgment Reversed on Appeal

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12-121 California Points & Authorities § 121.01

§ 121.01 Scope of Chapter

This chapter contains memoranda for use in supporting [*see §§ 121.30*-121.45] and opposing [*see §§ 121.50*-121.56] the contention that prejudgment interest should be awarded, and supporting [*see § 121.46*] and opposing [*see § 121.57*] the contention that compound prejudgment interest should be awarded. It also contains points supporting the contention that postjudgment interest should be awarded [*see § 121.47*], opposing the contention that any interest should be awarded [*see §§ 121.48*, and *121.49*], and opposing the contention that postjudgment interest should be awarded from the date of entry of an original judgment reversed on appeal [*see § 121.58*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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12-121 California Points & Authorities § 121.02

§ 121.02 Governing Law

Interest is defined in *Civ. Code § 1915*. *Civ. Code § 3302* includes interest in the definition of the detriment caused by the breach of an obligation to pay money only. *Civ. Code §§ 3287-3291* generally set forth circumstances under which a party is entitled to prejudgment interest. Prejudgment interest in an unfair competition action under either *Bus. & Prof. Code § 16750* (action by individual) or *Bus. & Prof. Code § 16760* (action by Attorney General) is governed by *Bus. & Prof. Code § 16761*. The allowable rate of interest is governed by *Cal. Const., art. XV, § 1*, and *Code Civ. Proc. § 685.010*. Postjudgment interest is governed by *Code Civ. Proc. §§ 685.010-685.030*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 121.03 Use of This Chapter

Although the contentions supported and opposed by the memoranda in this chapter may arise in several different procedural contexts during the course of litigation, they are most likely to arise on a motion for a new trial on the ground of inadequate damages [*Code Civ. Proc. § 657(5)*; *see generally* Ch. 64, *Damages: Tort* and Ch. 65, *Damages: Contract*] or a motion to vacate the judgment [*Code Civ. Proc. § 663*; *see generally* Ch. 155, *Motions After Trial*]. They may also be useful in a trial or appellate brief. The memoranda set forth in this chapter may be adapted for use in any procedural context in which the issue of prejudgment, postjudgment, or compound interest arises. For a detailed discussion on how to select and use the forms in the publication to build a draft memorandum and complete the draft, with detailed discussion of all drafting requirements and strategic or stylistic considerations, see Ch. 1, *Writing Legal Memoranda and Briefs* . For a skeletal form of memorandum for use in creating a properly formatted outline in which to compile relevant forms from this publication, see also Ch. 1, *Writing Legal Memoranda and Briefs* .

One of the more significant drafting requirements to keep in mind are page limits: supporting and opposing memoranda must not exceed 15 pages, or 20 pages in summary judgment or summary adjudication proceeding. A reply or closing memorandum may not exceed 10 pages. Exhibits, declarations, attachments, a table of contents, a table of authorities, and the proof of service are excluded from these page limits. Any party must obtain leave of court to file a longer memorandum [*see Cal. Rules of Ct., Rule 3.1113(d), (e)*]. These and other drafting requirements are discussed in further detail in Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureJudgmentsRelief From JudgmentMotions to VacateCivil ProcedureRemediesJudgment InterestPostjudgment InterestCivil ProcedureRemediesJudgment InterestPrejudgment Interest

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12-121 California Points & Authorities § 121.04

§ 121.04 Interest in General

Interest is defined as the compensation allowed by law or fixed by the parties for the use, or forbearance, or detention of money [*Civ. Code § 1915*]. The inclusion of prejudgment interest in a judgment is not the granting of damages in excess of the loss [*Nordahl v. Department of Real Estate (1975) 48 Cal. App. 3d 657, 665-666, 121 Cal. Rptr. 794* ; *see § 121.41*], nor is it an assessment of a penalty [*Harland v. State of California (1979) 99 Cal. App. 3d 839, 847, 160 Cal. Rptr. 613* ; *see § 121.42*].

The inclusion of prejudgment interest in an award is simply a recognition of the fact that one of the elements of direct loss suffered by a party deprived of the use of his or her money or other property is the value of its use, which in the case of money is represented by interest at the legal rate [*Nordahl v. Department of Real Estate (1975) 48 Cal. App. 3d 657, 665-666, 121 Cal. Rptr. 794* ; *see § 121.41*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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12-121 California Points & Authorities § 121.05

§ 121.05 Prejudgment Interest When Damages Certain

If a person is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover such damages is vested in him or her on a particular day, he or she is entitled also to recover interest from that day [*Civ. Code § 3287(a)*]. Damages are considered to be certain when the only real dispute between the parties regards liability [*Sukut-Coulson, Inc. v. Allied Canon Co. (1978) 85 Cal. App. 3d 648, 656, 149 Cal. Rptr. 711* ; *see § 121.30*]. Damages may be certain even if there is a slight variance between the amount claimed and the amount awarded and even if the debtor is entitled to an unliquidated setoff [*Coleman Engineering Co. v. North American Aviation, Inc. (1966) 65 Cal. 2d 396, 408-409, 55 Cal. Rptr. 1, 420 P.2d 713* ; *see § 121.30*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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12-121 California Points & Authorities § 121.06

§ 121.06 Prejudgment Interest in Personal Injury Action

In any action brought to recover damages for personal injury, if the plaintiff makes an offer to compromise pursuant to *Code Civ. Proc. § 998* that the defendant does not accept prior to trial or within 30 days, whichever occurs first, and the plaintiff obtains a more favorable judgment, the judgment must bear interest at the legal rate of 10 percent per annum calculated from the date of theplaintiff's first offer pursuant to *Code Civ. Proc. § 998* that is exceeded by the judgment [*Civ. Code § 3291*; *see § 121.43*]. When there are two successive unaccepted Code Civ. Poc. § 998 offers tendered by a successful plaintiff in personal injury litigation and that plaintiff subsequently recovers a judgment in excess of either offer, the prejudgment interest awarded pursuant to *Civ. Code § 3291* begins from the date of the first offer [*Ray v. Goodman (2006) 142 Cal. App. 4th 83, 87-92, 47 Cal. Rptr. 3d 659]* . *Civ. Code § 3291* does not apply to a public entity or to a public employee for an act or omission within the scope of employment. Nor does it apply in family law matters [*In re Marriage of Green (1989) 213 Cal. App. 3d 14, 24, 261 Cal. Rptr. 294]* and in insurance bad-faith actions [*Gourley v. State Farm Mut. Auto. Ins. Co. (1991) 53 Cal. 3d 121, 126-130, 822 P.2d 374, 3 Cal. Rptr. 666]* . However, it does apply in a defamation action [*O'Hara v. Storer Communications, Inc. (1991) 231 Cal. App. 3d 1101, 1117-1119, 282 Cal. Rptr. 712]* .

Some courts have held that a party may recover prejudgment interest under *Code Civ. Proc. § 998* and *Civ. Code § 3291* when judgment is entered on an award made after judicial arbitration provided that the amount of the judgment exceeds the amount of a prior offer under *Code Civ. Proc. § 998* [*see, e.g.,* *Joyce v. Black (1990) 217 Cal. App. 3d 318, 322-323, 266 Cal. Rptr. 8* ; *Wagy v. Brown (1994) 24 Cal. App. 4th 1, 7-9, 29 Cal. Rptr. 2d 48* (judgment not more favorable when for exact amount of plaintiff's offer)]. However, prejudgment interest accrued under *Civ. Code § 3291* is not part of judgment and plaintiff cannot obtain interest on that prejudgment interest [*Hess v. Ford Motor Co. (2002) 27 Cal. 4th 516, 530-533, 117 Cal. Rptr. 2d 220, 41 P.3d 46]* . One court has used broad language to apply a contrary rule in the context of contractual arbitration [*Woodard v. Southern Cal. Permanente Medical Group (1985) 171 Cal. App. 3d 656, 666, 217 Cal. Rptr. 514]* .

The 10 percent interest rate of *Civ. Code § 3291* is not combined with the 10 percent interest rate of *Code Civ. Proc. § 685.010(a)* (judgment bears 10 percent rate of interest from date judgment rendered) to give a combined interest rate of 20 percent, but instead is applied separately or conjunctively with *Code Civ. Proc. § 685.010(a)* to permit recovery of no more than a 10 percent rate of interest for the covered time period [*Mendez v. Kurten (1985) 170 Cal. App. 3d 481,*

487, 215 Cal. Rptr. 924 (applied separately or conjunctively so as not to offend *Cal. Const., art. XV, § 1*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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12-121 California Points & Authorities § 121.07

§ 121.07 Prejudgment Interest in Unfair Competition Action

In an unfair competition action under either *Bus. & Prof. Code § 16750* (action by individual) or *Bus. & Prof. Code § 16760* (action by Attorney General), prejudgment interest may be allowed if the court finds that such an award is just under the circumstances [*Bus. & Prof. Code §§ 16750(a), 16760(a)(2), 16761*]. The interest is calculated on the actual damages at the rate of 10 percent per annum for the period beginning on the date of service of the complaint and ending on the date of judgment, or for any shorter period therein. In determining whether an award of prejudgment interest is just, the court can consider only the following:

> (1) Whether the person, Attorney General, or opposing party, or the representative of any of these people, made motions or asserted claims or defenses so lacking in merit as to show that the party or representative acted intentionally for delay, or otherwise acted in bad faith [*Bus. & Prof. Code § 16761(a)*];
>
> (2) Whether, in the course of the action involved, the person, Attorney General, or opposing party, or the representative of any of these people, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings [*Bus. & Prof. Code § 16761(b)*]; and
>
> (3) Whether the person, Attorney General, or opposing party, or the representative of any of these people, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof [*Bus. & Prof. Code § 16761(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawTrade Practices & Unfair CompetitionState RegulationGeneral OverviewCivil ProcedureRemediesJudgment InterestPrejudgment Interest

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12-121 California Points & Authorities § 121.08

§ 121.08 Prejudgment Interest in Court's Discretion

In a contract action in which the claim is unliquidated, the creditor may recover prejudgment interest in the court's discretion. The court may fix a date for the accrual of interest no earlier than the date on which the action was filed [*Civ. Code § 3287(b)*; *see § 121.32*].

In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given in the discretion of the trier of fact [*see Civ. Code § 3288*; *Bullis v. Security Pac. Nat. Bank (1978) 21 Cal. 3d 801, 814, 148 Cal. Rptr. 22, 582 P.2d 109* ; *see § 121.33*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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12-121 California Points & Authorities § 121.09

§ 121.09 When Interest Stipulated in Contract

Any legal rate of interest stipulated by a contract entered into before January 1, 1986, remains chargeable after a breach, as before, until the contract is superseded by a verdict or other new obligation [*Civ. Code §§ 3289(a), 3289.5*; *Casey v. Gibbons (1902) 136 Cal. 368, 371, 68 P. 1032* ; *see § 121.34*]. If a contract entered into after January 1, 1986, does not stipulate a legal rate of interest, the obligation shall bear interest at rate of 10 percent per annum after a breach [*Civ. Code § 3289(b)*; *see Mark McDowell Corp. v. LSM 128 (1989) 214 Cal. App. 3d 1427, 1431-1433, 263 Cal. Rptr. 310* (if rate of interest specified in contract is usurious, *Civ. Code § 3289(b)* allows recovery of interest at 10 percent per annum fromdate of breach); *but see Southwest Concrete Production v. Gosh Construction Corp. (1990) 51 Cal. 3d 701, 704, 274 Cal. Rptr. 404, 798 P.2d 1247* (discussed in § 121.34.3, disapproving grounds on which *Mark McDowell Corp.* found interest rate to be usurious)]. For purposes of *Civ. Code § 3289(b)*, the term "contract" does not include a note secured by a deed of trust on real property [*Civ. Code § 3289(b)*].

Legal Topics:

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

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12-121 California Points & Authorities § 121.10

§ 121.10 Compounding of Interest

Although the general rule is that interest may not be computed on accrued interest unless by special statutory provision or by stipulation of the parties, postjudgment interest is calculated on the principal damages plus prejudgment interest, if any, and compound interest may be allowed against a wrongdoing trustee [*Boscus v. Bohlig (1916) 173 Cal. 687, 691, 162 P. 100* ; *Falkner v. Hendy (1889) 80 Cal. 636, 645, 22 P. 401* ; *Estate of Sharp (1971) 18 Cal. App. 3d 565, 585, 95 Cal. Rptr. 816* ; *see §§ 121.46, 121.47,* and 70].

Legal Topics:

For related research and practice materials, see the following legal topics:
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12-121 California Points & Authorities § 121.11

§ 121.11 When Prejudgment Interest Not Allowed

Prejudgment interest is not allowed on a nonmoney judgment or when the debtor is prevented by law, or by the act of the creditor, from paying the debt [*see Civ. Code § 3287(a)*; *Sonoma County Organization of Public Employees v. County of Sonoma (1979) 23 Cal. 3d 296, 321, 152 Cal. Rptr. 903, 591 P.2d 1* ; *Redke v. Silvertrust (1971) 6 Cal. 3d 94, 107, 98 Cal. Rptr. 293, 490 P.2d 805 , cert. denied, 405 U.S. 1041, 92 S. Ct. 1316, 31 L. Ed. 2d 583* ; *see §§ 121.50*-121.52].

Legal Topics:

For related research and practice materials, see the following legal topics:
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12-121 California Points & Authorities § 121.12

§ 121.12 Postjudgment Interest

Every money judgment is entitled to have interest accrue at the legal rate from the date of entry of judgment [*see Cal. Const., art. XV, § 1*; *Code Civ. Proc. § 685.010*; *Stockton Theatres, Inc. v. Palermo (1961) 55 Cal. 2d 439, 442-443, 11 Cal. Rptr. 580, 360 P.2d 76* ; *see also § 121.47*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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12-121 California Points & Authorities § 121.13

§ 121.13 Cessation of Interest

A tender of payment by the debtor stops the running of interest [*Civ. Code § 1504*; *Ferrea v. Tubbs (1899) 125 Cal. 687, 689, 58 P 308* ; *see also § 121.48*]. Although an offer of payment stops the running of interest on an obligation, an offer to pay part of an amount owed will not stop the running of prejudgment interest if it is conditioned on the creditor's dropping a demand for other sums claimed [*see Civ. Code §§ 1494, 1504*; *Klinger v. Realty World Corp. (1987) 196 Cal. App. 3d 1549, 1553-1554, 242 Cal. Rptr. 592]* . Tender and deposit of the amount owing pursuant to *Civ. Code § 1500* will stop the running of interest [*Klinger v. Realty World Corp. (1987) 196 Cal. App. 3d 1549, 1554 n.2, 242 Cal. Rptr. 592]* .

Acceptance of payment of the whole principal, as such, by the creditor waives all claim to interest unless the parties were not dealing at arm's length [*see Civ. Code § 3290*; *Mitchell v. City of Los Angeles (1966) 239 Cal. App. 2d 618, 630, 49 Cal. Rptr. 13* ; *see also §§ 121.39* and *121.49*] *Civ. Code § 3290* is applicable only to interest as damages, not to postjudgment interest. Thus, cashing a check in satisfaction of judgment does not waive one's right to postjudgment interest [*San Francisco Unified School Dist. v. San Francisco Classroom Teachers Assn. (1990) 222 Cal. App. 3d 146, 150, 272 Cal. Rptr. 38]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 121 INTEREST
PART I. INTRODUCTION

12-121 California Points & Authorities § 121.14

§ 121.14 Related Pleading and Practice Chapters

For a discussion of, and forms for use in, proceedings involving usurious rates of interest, see Ch. 568, *Usury* in California Forms of Pleading and Practice. For a discussion of the law regarding interest as an element of damages, see Ch. 177, *Damages* in that publication. For a discussion of, and an alternative form for use in, seeking inclusion of postjudgment interest in a judgment, see Ch. 318, *Judgments* .

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12-121 California Points & Authorities § 121.15

§ 121.15 Related Points and Authorities Chapters

Some aspects of interest on notes and negotiable instruments are addressed in Ch. 166, *Negotiable Instruments*. For a memorandum regarding recovery of interest in an action for claim and delivery, see Ch. 40, *Claim and Delivery* .

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12-121 California Points & Authorities §§ 121.16-121.29

[Reserved]

§§ 121.16[Reserved]

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PART II. FORMS

12-121 California Points & Authorities § 121.30

§ 121.30 Supporting Contention That Prejudgment Interest Should Be Awarded--Right to Prejudgment Interest When Damages Certain [Civ. Code § 3287(a)]

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF IS ENTITLED TO RECOVER INTEREST ON HIS/HER/ITS DAMAGES FROM _____, BECAUSE HIS/HER/ITS RIGHT TO RECOVER DAMAGES WAS VESTED ON THAT DATE AND THE AMOUNT OF DAMAGES WAS CERTAIN, OR CAPABLE OF BEING MADE CERTAIN BY CALCULATION, ON THAT DATE.

A. Prejudgment Interest When Damages Certain. When the right to recover damages certain, or capable of being made certain by calculation, vests on a particular day, the person entitled to collect the damages is also entitled to recover interest from that day (*Civ. Code § 3287(a)*; *Tripp v. Swoap (1976) 17 Cal. 3d 671, 682, 131 Cal. Rptr. 789, 552 P.2d 749* ; *Esgro Central, Inc. v. General Ins. Co. (1971) 20 Cal. App. 3d 1054, 1060-1061, 98 Cal. Rptr. 153*).

[*Optional*] **B. Mandatory Prejudgment Interest When Damages Certain in Noncontract Actions.** When damages are certain or capable of being made certain as of a particular date, prejudgment interest is mandatory under *Section 3287(a) of the Civil Code* even though the action is not based on contract (*Levy-Zentner Co. v. Southern Pac. Transportation Co. (1977) 74 Cal. App. 3d 762, 796-797, 142 Cal. Rptr. 1*).

[*Optional*] **C. Damages as Certain When Only Dispute Regards Liability.** When there is no dispute over the basis for computation of damages, one party's denial of liability does not make the damages unascertainable within the meaning of *Section 3287(a) of the Civil Code* (*Sukut-Coulson, Inc. v. Allied Canon Co. (1978) 85 Cal. App. 3d 648, 656, 149 Cal. Rptr. 711* ; *Esgro Central, Inc. v. General Ins. Co. (1971) 20 Cal. App. 3d 1054, 1060-1061, 98 Cal. Rptr. 153*).

[*Optional*] **D. Damages as Certain When Defendant Admits, Stipulates To, or Receives Uncontradicted Evidence of Value.** When damages are entered into by stipulation or admission, or when answers to interrogatories or valuation

from experts provide the defendant with an amount certain for damages that remains undisputed, prejudgment interest starts to run, when otherwise appropriate, from the time the defendant stipulated to, admitted, or received the undisputed evidence of value (*Levy-Zentner Co. v. Southern Pac. Transportation Co. (1977) 74 Cal. App. 3d 762, 798-801, 142 Cal. Rptr. 1*).

[*Optional*] **E. Unliquidated Setoff as Not Precluding Prejudgment Interest.** When the amount of a claim is certain, but is reduced by reason of an unliquidated setoff, interest properly is allowed on the balance found to be due from the time the amount of the claim itself became certain and was due (*Coleman Engineering Co. v. North American Aviation, Inc. (1966) 65 Cal. 2d 396, 409, 55 Cal. Rptr. 1, 420 P.2d 713* ; *Great Western Drywall, Inc. v. Roel Construction Co., Inc. (2008) 166 Cal. App. 4th 761, 83 Cal. Rptr. 3d 235* ; *Leaf v. Phil Rauch, Inc. (1975) 47 Cal. App. 3d 371, 376, 120 Cal. Rptr. 749*).

[*Optional*] **F. Slight Variance Between Amount Claimed and Amount Awarded as Not Precluding Prejudgment Interest.** A slight difference between the amount of damages claimed and the amount awarded does not mean that the damages were not fixed and determinable, and thus does not preclude an award of prejudgment interest (*Coleman Engineering Co. v. North American Aviation, Inc. (1966) 65 Cal. 2d 396, 408-409, 55 Cal. Rptr. 1, 420 P.2d 713* ; *Esgro Central, Inc. v. General Ins. Co. (1971) 20 Cal. App. 3d 1054, 1062, 98 Cal. Rptr. 153*).

[*Optional*] **G. Prejudgment Interest Permitted Against State or Any of Its Political Subdivisions.** *Section 3287(a) of the Civil Code* permits the recovery of damages and interest from the State of California or any county, city, city and county, municipal corporation, public district, public agency, or any political subdivision of the state (*Civ. Code § 3287(a)*; *Tripp v. Swoap (1976) 17 Cal. 3d 671, 685, 131 Cal. Rptr. 789, 552 P.2d 749* ; *Mass v. Board of Educ. (1964) 61 Cal. 2d 612, 624, 39 Cal. Rptr. 739, 394 P.2d 579*).

[*Optional*] **H. Prejudgment Interest in Indemnity Action.** In an action for implied equitable indemnity, prejudgment interest should be awarded from the date that the successful party made payment in satisfaction of the underlying judgment and not merely from the date of entry of indemnity judgment (*E.L. White, Inc. v. City of Huntington Beach (1982) 138 Cal. App. 3d 366, 377-378, 187 Cal. Rptr. 879*).

[*Optional*] **I. Failure to Prevail at Administrative Level Does Not Preclude Prejudgment Interest.** The interest available under *Civil Code Section 3287(a)* is available to claimants who are unsuccessful in the administrative proceeding but who prevail on appeal in a judicial trial de novo (*Nordquist v. McGraw-Hill Broadcasting Co. (1995) 32 Cal. App. 4th 555, 576, 38 Cal. Rptr. 2d 221*).

[2] Comments

[a] Use of Form

These memoranda may be submitted in support of a party's contention that prejudgment interest should be awarded pursuant to *Civ. Code § 3287(a)* on the ground that the damages were certain, or capable of being made certain by calculation, and the right to recover the damages vested on a particular day. The contention supported by this form is most likely to be raised by plaintiffin a contract action, but may also be raised in conversion, fraud, or other tort actions where the damages were certain and vested prior to trial.

These points may be combined, if appropriate, with points relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of prejudgment interest. The issue is most likely to arise on a motion for a new trial on the ground of inadequate damages [*Code Civ. Proc. § 657(5)*; *see generally* Ch. 64, *Damages: Tort* and Ch. 65, *Damages: Contract*], or a motion to vacate the judgment [*Code Civ. Proc. § 663*; *see generally* Ch. 155, *Motions After Trial* .] The points set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should specifically demonstrate how the facts of the case prove that plaintiff's damages were certain, or capable of being made certain by calculation, and that the right to recover the damages vested on the particular day from which counsel contends interest should be calculated.

[b] Opposing Memoranda

The memoranda set out in *§§ 121.50, 121.52,* and *121.53* may be used in an appropriate case to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Prejudgment Interest When Damages Certain

In ***Tripp v. Swoap*** *(1976) 17 Cal. 3d 671, 131 Cal. Rptr. 789, 552 P.2d 749* , plaintiff commenced an action in administrative mandamus to challenge the determination of the Department of Social Welfare that she was ineligible for benefits under the aid to the needy disabled program (former Welf. & Inst. Code § 13500 et seq.). The trial court issued a writ ordering payment to plaintiff of retroactive benefits along with attorney's fees and prejudgment interest.

Defendant appealed the judgment, contending, among other things, that the award of interest authorized under *Civ. Code § 3287* is limited to contract and tort actions. In affirming the judgment, the Supreme Court held that when a recipient of welfare benefits is adjudged entitled to retroactive payment of benefits pursuant to the statutory obligation of the state, such recipient is entitled to an award of prejudgment interest at the legal rate from the time each payment becomes due (*17 Cal. 3d 671, 685)* . Under *Civ. Code § 3287(a),* a claimant must satisfy three conditions for the recovery of interest in a mandamus action against the state: (1) There must be an underlying monetary obligation; (2) The recovery must be certain or capable of being made certain by calculation; and (3) The right to recovery must vest on a particular day (*17 Cal. 3d 671, 682)* . Since all of these conditions were satisfied in this case, it was appropriate for the trial court to grant prejudgment interest.

In ***Esgro Central, Inc. v. General Ins. Co.*** *(1971) 20 Cal. App. 3d 1054, 98 Cal. Rptr. 153* , plaintiffs were independent concessionaires operating departments in a large department store. The department store was broken into, burned, and looted. In consolidated actions, plaintiffs sued defendant insurance company for refusal to pay on one policy insuring against loss from fire and on another policy insuring against loss from business interruption. The jury found for plaintiffs on both insurance policies. Plaintiffs then moved, pursuant to *Civ. Code § 3287(a),* for an award of prejudgment interest from the date their claims became due and, alternatively, pursuant to *Civ. Code § 3287(b),* for prejudgment interest form the date of filing suit. The motions were denied. Plaintiffs' appeal raised only the issue of the propriety of the trial court's action denying their motions for prejudgment interest (*20 Cal. App. 3d 1054, 1057-1060)* .

The court of appeal reversed the trial court for its denial of prejudgment interest on the sum due under the fire policy. The essential dispute on that cause of action involved the issue of coverage and not computation of the amount of loss. Plaintiffs contended that the loss was caused by fire, while defendant contended that the loss was caused by fire, while defendant contended that the loss was due to looting. Relying on *Coleman Engineering Co. v. North American Aviation, Inc. (1966) 65 Cal. 2d 396, 407-408, 55 Cal. Rptr. 1, 420 P.2d 713* (discussed in *§ 121.30[3][e]*), the court of appeal held that damages are deemed certain or capable of being made certain within *Civ. Code § 3287(a)* when there is essentially no dispute between the parties concerning the basis of computation of damages, if any are recoverable, but there is a dispute centering on the issue of liability giving rise to damages. The obligor's denial of any liability at all does not make the damages uncertain within the meaning of *Civ. Code § 3287* (*20 Cal. App. 3d 1054, 1060-1061)* .

The court of appeal did, however, affirm the trial court's denial of prejudgment interest on the judgment entered on the policy of business interruption insurance. The sole issue in the suit on the business interruption policy was the extent of

plaintiffs' damages for losses admittedly covered. The extent of that loss depended on a judicial determination to be made from conflicting evidence; it was not ascertainable from data furnished by plaintiffs to the defendant. The court noted that *Civ. Code § 3287(a)* does not authorize prejudgment interest as a matter of law when the amount of damage, as opposed to the determination of liability, depends on a judicial determination based on conflicting evidence and is not ascertainable from truthful data supplied by the claimant to his debtor (*20 Cal. App. 3d 1054, 1062-1063)* .

[b] Mandatory Prejudgment Interest When Damages Certain in Noncontract Actions

Levy-Zentner Co. v. Southern Pac. Transportation Co. *(1977) 74 Cal. App. 3d 762, 142 Cal. Rptr. 1* , was a consolidated action brought by plaintiffs whose personal and real property was damaged after defendant's warehouse was destroyed by fire. Defendant appealed the liability aspects of the verdict in favor of plaintiffs, while plaintiffs appealed that portion of the judgment denying them prejudgment interest.

In reversing the portion of the judgment denying prejudgment interest, the court of appeal had to resolve the questions of whether or not prejudgment interest pursuant to *Civ. Code § 3287(a)* is available in tort actions for damages for the loss of real and personal property, and whether the evidence established that the damages of the tenants and owners were certain. In holding that *Civ. Code § 3287(a)* does apply and requires prejudgment interest in tort actions for property damages when the value of the property destroyed can readily be calculated, the court of appeal first examined the language of *Civ. Code § 3287(a)* and noted that it applies without restriction to every person who is entitled to recover damages. The court then went on to discuss several cases allowing the recovery of prejudgment interest in causes of action other than those in contract. Those cases include *Mass v. Board of Educ. (1964) 61 Cal. 2d 612, 39 Cal. Rptr. 739, 394 P.2d 579* (mandamus action); *Tripp v. Swoap (1976) 17 Cal. 3d 671, 131 Cal. Rptr. 789, 552 P.2d 749* (mandamus action where claim based on statutory obligation); *Friedman v. City of Los Angeles (1975) 52 Cal. App. 3d 317, 125 Cal. Rptr. 93* (destruction of real property); and *Holtz v. San Francisco Bay Area Rapid Transit Dist. (1976) 17 Cal. 3d 648, 131 Cal. Rptr. 646, 552 P.2d 430* (inverse condemnation) (*74 Cal. App. 3d 762, 796-797)* .

Counsel should note that despite the overwhelming authority cited in *Levy-Zentner Co. v. Southern Pac. Transportation Co. (1977) 74 Cal. App. 3d 762, 142 Cal. Rptr. 1* , for the proposition that prejudgment interest pursuant to *Civ. Code § 3287(a)* is allowable in certain noncontract actions, at least one court of appeal has nevertheless held that *Civ. Code § 3287(a)* applies only in cases when the recovery is predicated on breach of contract [*Pepitone v. Russo (1976) 64 Cal. App. 3d 685, 690, 134 Cal. Rptr. 709]* .

[c] Damages as Certain When Only Dispute Regards Liability

Sukut-Coulson, Inc. v. Allied Canon Co. *(1978) 85 Cal. App. 3d 648, 149 Cal. Rptr. 711* , originated as three consolidated actions involving plaintiff's claim for money due for labor and materials furnished a subdivider in connection with the construction of a public improvement project (*85 Cal. App. 3d 648, 651)* . Defendant appealed a verdict for plaintiff that included prejudgment interest.

Among defendant's contentions on appeal was that its good-faith dispute regarding liability on its bond rendered the amount due under the construction contract "incapable of ascertainment," thereby precluding prejudgment interest under *Civ. Code § 3287*. In rejecting this contention, the court of appeal, relying on *Esgro Central, Inc. v. General Ins. Co. (1971) 20 Cal. App. 3d 1054, 1060-1061, 98 Cal. Rptr. 153* (discussed in *§ 121.30[3][a]*), held that when there is no dispute over the basis for computation of damages, one party's denial of liability does not make the damages unascertainable within the meaning of *Civ. Code § 3287* (*85 Cal. App. 3d 648, 656)* .

The factual background and holding of ***Esgro Central, Inc. v. General Ins.*** *Co. (1971) 20 Cal. App. 3d 1054, 98 Cal. Rptr. 153* , is discussed in *§ 121.30[3][a]*. In that case, the court of appeal reversed the trial court for its denial of prejudgment interest on the sum due under a fire insurance policy. The essential dispute on that cause of action involved

the issue of coverage and not computation of the amount of loss. Plaintiffs contended that the loss was caused by fire, while defendant contended that the loss was due to looting. Relying on *Coleman Engineering Co. v. North American Aviation, Inc. (1966) 65 Cal. 2d 396, 407-408, 55 Cal. Rptr. 1, 420 P.2d 713* (discussed in *§ 121.30[3][e]*), the court of appeal held that damages are deemed certain or capable of being made certain within the meaning of *Civ. Code § 3287(a)* when there is essentially no dispute between the parties concerning the basis of computation of damages, if any are recoverable, but there is a dispute centering on the issue of liability giving rise to damage. The obligor's denial of any liability at all does not make the damages uncertain within the meaning of *Civ. Code § 3287(a)* (*20 Cal. App. 3d 1054, 1060-1061)* .

[d] Damages as Certain When Defendant Admits, Stipulates To, or Receives Uncontradicted Evidence of Value

The factual background and part of the holding of ***Levy-Zentner Co. v. Southern Pac. Transportation Co.*** *(1977) 74 Cal. App. 3d 762, 142 Cal. Rptr. 1* , are discussed in *§ 121.30[3][b]*. In that case, the court of appeal also had to determine whether the damages were certain or capable of being made certain, because if they were, prejudgment interest must be granted as a matter of right. Each plaintiff's case presented a slightly different situation regarding whether the damages were certain; however, in allowing prejudgment interest for each plaintiff, the court of appeal held prejudgment interest runs from the date the damages are of a nature to be certain or capable of being made certain by calculation and the exact sum due to the plaintiff is made known to the defendant. Thus, if the defendant does not know or cannot readily ascertain damages, it is incumbent on the plaintiff to provide the defendant with some statement and supporting data from which the defendant can make the necessary determination. In this case, where the defendant stipulated to or admitted the amount of damages, the damages were held to be certain from the date of admission or stipulation. Furthermore, the court noted, the unchallenged estimates of an expert areappropriate to render damages certain from the date the defendant receives the estimates (*74 Cal. App. 3d 762, 798-805)* .

[e] Unliquidated Setoff as Not Precluding Prejudgment Interest

In ***Coleman Engineering Co. v. North American Aviation, Inc.*** *(1966) 65 Cal. 2d 396, 55 Cal. Rptr. 1, 420 P.2d 713* , plaintiff contracted to build missile trailers for defendant. The lawsuit arose following the parties' failure to agree on price changes following defendant's change of specifications. The trial court determined that plaintiff should recover $289,000 plus prejudgment interest rather than the $296,000 claimed damages (*65 Cal. 2d 396, 398-403)* .

Defendant contended, among other things, that the damages were not certain because they were offset by an unliquidated amount due to plaintiff's settlement of claims with subcontractors and its salvage of materials. The court of appeal held that this does not preclude the allowance of interest on the balance of the claim. Reductions in damages due to plaintiff's efforts to mitigate damages should not preclude an award of prejudgment interest. If the rule were otherwise, a plaintiff might be encouraged to forgo opportunities to mitigate damages so as not to jeopardize his right to prejudgment interest (*65 Cal. 2d 396, 409)* .

However, the court of appeal did agree with defendant that the trial court erred insofar as it awarded interest from the date of termination on the portion of the damages attributable to settlement expenses, since these expenses were not incurred until after the date of termination. The court stated that interest is not intended to be a windfall. It thus held that interest on this portion of the award should date only from the judgment (*65 Cal. 2d 396, 409)* .

In ***Great Western Drywall, Inc. v. Roel Construction Co., Inc****. (2008) 166 Cal. App. 4th 761, 83 Cal. Rptr. 3d 235* , a subcontractor sued the general contractor on a construction job for breach of contract. The general contractor cross-complained against the subcontractor for breach of contract and negligence. After a bench trial, the court awarded each party damages. The award did not specify whether the general contractor's recovery for property damages was on a contract or tort theory. The award to the subcontractor included change order requests (COR's) that the general contractor admitted were undisputed, and in prejudgment interest on that amount. The general contractor moved for stay

of entry of judgment, arguing the award of prejudgment interest to the subcontractor on the amount of undisputed COR's was improper based on the facts and established case law.

On appeal, the general contractor argued that the subcontractor was not entitled to prejudgment interest because the entire amount of the subcontractor's recovery was an offset since it arose from its deficient performance of the subcontract. The subcontractor countered that the general contractor's tort damages could not be offset against the subcontractor's recovery on liquidated contract damages. The court of appeal first held that prejudgment interest on liquidated damages is an element of compensatory damages [*166 Cal. App. 4th 761, 767*]. The court further held that an award of unliquidated damages to a cross-complainant is a setoff against prejudgment interest awarded a plaintiff for liquidated damages [*166 Cal. App. 4th 761, 768*]. The court concluded that even if the trial court intended to award property damages for negligence as opposed to breach of contract, the general contractor was entitled to a setoff of its entire award. The court held that the general contractor's damages arose entirely from the subcontractor's deficient performance of the contract, and the general contractor's mere inclusion of an alternative count for negligence in its cross-complaint, and any arbitrary reliance by the trial court on one theory over another, should not adversely affect the general contractor's setoff rights [*166 Cal. App. 4th 761, 770*].

Leaf v. Phil Rauch, Inc. *(1975) 47 Cal. App. 3d 371, 120 Cal. Rptr. 749* , was an action brought by the plaintiffs for restitution based on rescission of a motor vehicle conditional sale contract and for damages for breach of warranty. The trial court entered judgment for plaintiffs for the amount paid by them on the contract, plus amounts expended for towing and car rental. Based on conflicting evidence, the court allowed the defendant a setoff for the reasonable value of the plaintiffs' use of the car. The plaintiffs appealed that part of the judgment which denied them prejudgment interest on the sum awarded to them (*47 Cal. App. 3d 371, 373-375)* .

In reversing the judgment insofar as it failed to include prejudgment interest, the court of appeal first reviewed the general principles applicable to awards of prejudgment interest under *Civ. Code § 3287(a)*. The court noted that prejudgment interest is allowable when the amount due plaintiff is fixed by the terms of a contract, or is readily ascertainable by reference to well-established market values. On the other hand, interest is not allowable when the amount of the damages depends on a judicial determination based on conflicting evidence and is not ascertainable from established market prices or values (*47 Cal. App. 3d 371, 375)* . In this case, the court observed, the amount of plaintiffs' damages was certain, while the amount of the setoff was determined on the basis of conflicting evidence. The court of appeal held that when the amount of a claim is certain but is reduced by reason of an unliquidated setoff, interest properly is allowed on the balance found to be due from the time it became due. Since the requirement of *Civ. Code § 3287(a)* regarding certainty of damages was met, plaintiffs were entitled, as a matter of right, to recover prejudgment interest on the sum awarded from the time the amount of the claim itself became certain and due (*47 Cal. App. 3d 371, 376)* .

[f] Slight Variance Between Amount Claimed and Amount Awarded as Not Precluding Prejudgment Interest

The factual background and part of the holding of ***Coleman Engineering Co. v. North American Aviation, Inc.*** *(1966) 65 Cal. 2d 396, 55 Cal. Rptr. 1, 420 P.2d 713* , is discussed in *§ 121.30[3][e]*. In that case, defendant contended, among other things, that the trial court erred in granting prejudgment interest because, under *Civ. Code § 3287*, prejudgment interest may be granted only when the damages are liquidated, and, since plaintiff's original demand exceeded the amount awarded, the damages were not certain, or capable of being made certain. Although the Supreme Court agreed that prejudgment interest may be granted under *Civ. Code § 3287(a)* only when the damages are liquidated, it held that merely a slight difference between the amount of damages claimed and the amount awarded does not preclude an award of damages claimed and the amount awarded does not preclude an award of prejudgment interest, and the erroneous omission of a few matters from the account or erroneous calculation of the costs does not mean that the damages are not capable of being made certain by calculation (*65 Cal. 2d 396, 407-409)* .

The factual background and part of the holding of ***Esgro Central, Inc. v. General Ins. Co.*** *(1971) 20 Cal. App. 3d 1054, 98 Cal. Rptr. 153* , is discussed in *§ 121.30[3][a]*. In that case, the court of appeal also held that the fact that plaintiffs' recovery slightly exceeded their proof of loss and was slightly under the amount claimed in their amended complaints did not detract from the proposition that the damages on the fire policy were fixed and determinable (*20 Cal. App. 3d 1054, 1062)* .

[g] Prejudgment Interest Permitted Against State or Any of Its Political Subdivisions

In 1959, *Civ. Code § 3287(a)* was amended so that it would be applicable to the State of California or any county, city, city and county, municipal corporation, public district, public agency, or any political subdivision of the state.

The factual background and part of the holding of ***Tripp v. Swoap*** *(1976) 17 Cal. 3d 671, 131 Cal. Rptr. 789, 552 P.2d 749* , are discussed in *§ 121.30[3][a]*. In that case, the Supreme Court found that the trial court had misapplied the general rule that interest cannot be recovered against a state or municipality. The Court noted that while it is true that governmental entities traditionally have beenimmune from liability for interest, *Civ. Code § 3287*, as amended in 1959, provides a clear statutory exception to the general rule. Therefore, the Supreme Court held that when a recipient of welfare benefits is adjudged entitled to retroactive payment of benefits pursuant to the statutory obligation of the state, such recipient is entitled to an award of prejudgment interest at the legal rate from the time each payment becomes due (*17 Cal. 3d 671, 683-685)* .

In ***Mass v. Board of Educ.*** *(1964) 61 Cal. 2d 612, 39 Cal. Rptr. 739, 394 P.2d 579* , the trial court upheld the suspension of a teacher by a school board. Following lengthy intermediate appeals and remands, plaintiff brought the present action for mandate. In determining that plaintiff was wrongfully terminated, the Supreme Court ordered payment of salary that the plaintiff would have earned, as well as interest on each such payment from the time it would have been paid. In so holding, the Supreme Court first noted that in 1955, *Civ. Code § 3287* was amended so that it applies to any political subdivision of the State of California. Since plaintiff's suspension could not be sustained, the salary payments became vested as of the dates they accrued. If plaintiff had not been wrongfully suspended, he would have obtained the benefit of the moneys paid as of those dates; he thus lost the natural growth and productivity of the withheld salary in the form of interest. Furthermore, the Supreme Court disapproved a line of authority suggesting that interest could not be recovered in mandamus actions. The Court held that an action in mandamus may support a judgment for interest when it involves recovery on a general underlying monetary obligation (*61 Cal. 2d 612, 624-627)* .

[h] Prejudgment Interest in Indemnity Action

In ***E.L. White, Inc. v. City of Huntington Beach*** *(1982) 138 Cal. App. 3d 366, 187 Cal. Rptr. 879* , plaintiffs obtained an indemnity judgment from defendant based on underlying personal injury and wrongful death judgments for damages in which both plaintiffs and defendant paid half of the judgments. The trial court awarded plaintiffs postjudgment interest from the date that the indemnity judgment was entered. Plaintiffs appealed, contending that they were entitled to prejudgment interest from the date that they made payment in satisfaction of the underlying judgments. Defendant contended that plaintiffs' damages were not certain or ascertainable until the trial court determined whether or not plaintiffs were entitled to full or partial indemnity and entered judgment in the indemnity action.

The court of appeal, in agreeing with plaintiffs, modified that part of the judgment to allow plaintiffs to recover interest from the date that they paid their portion of the underlying judgments. Citing prior California law, the court stated that under *Civ. Code § 3287(a)*, prejudgment interest must be granted as a matter of right if damages are certain or ascertainable, and the interest runs from the date when the damages are certain or ascertainable and when the sum due is made known to the defendant. Accordingly, the court held that plaintiffs' damages were certain when they satisfied the judgments in the underlying suit. Moreover, defendant was aware of the exact amount paid because it paid the other half of the judgment. The possibility of any reduction, or even an actual reduction, in the amount of the indemnity judgment

did not render plaintiffs' damages any less certain (*138 Cal. App. 3d 366, 377-378)* .

[i] Failure to Prevail at Administrative Level Does Not Preclude Prejudgment Interest

In ***Nordquist v. McGraw-Hill Broadcasting Co.*** *(1995) 32 Cal. App. 4th 555, 38 Cal. Rptr. 2d 221* , plaintiff, after resigning from his position as television station sports director/newscast anchor, filed a claim for overtime compensation with the California Labor Commissioner pursuant to *Lab. Code § 98 et seq.* Following an evidentiary hearing, the commissioner ruled that plaintiff was an exempt employee and thus was not entitled to overtime compensation. Plaintiff sought a trial de novo in superior court. The trial court concluded that plaintiff was a nonexempt employee entitled to overtime compensation. The parties stipulated to the amount of overtime compensation plaintiff was entitled to and proceeded to trial on the issue of his entitlement to prejudgment interest. The trial court held that plaintiff was not entitled to interest under *Lab. Code § 98.1(c)* which provides for interest on awards granted by the Labor Commissioner, but was entitled to it under *Civ. Code § 3287*, which provides generally for an award of interest on damages. Defendant appealed the award of prejudgment interest, contending that plaintiff was not entitled to any prejudgment interest because he did not prevail in the administrative proceeding. Defendant argued that because plaintiff was not entitled to interest under the statute that specifically governed the claim, he should not have been entitled to interest under *Civ. Code § 3287*, which provides a general grant of interest.

The court of appeal affirmed, ruling that the trial court properly awarded plaintiff prejudgment interest (*32 Cal. App. 4th 555, 573)* . The parties agreed that plaintiff was not awarded compensation in the administrative proceeding, and therefore was not entitled to interest under *Lab. Code § 98.1(c)*. The only question remaining was whether the court should infer from *Civ. Code § 3287* a legislative intent or determination that interest awardable under *Civ. Code § 3287* was not available to claimants who were unsuccessful in the administrative proceeding but who prevailed on appeal in a judicial trial de novo. Plaintiff relied on a line of cases holding that the Legislature's failure to expressly provide for interest on retroactive government benefit awards did not prevent the recipient from recovering interest under *Civ. Code § 3287(a)*. In each of these cases, the courts found nothing in the statutory scheme governing the particular benefit that suggested a legislative intent to preclude recovery of interest on damages awarded as prejudgment benefits. In this case, the statutory scheme governing employeecompensation claims expressly awarded prejudgment interest to claimants who prevailed in the administrative proceeding. According to the court, the purpose of the Labor Code section was to afford a speedy method by which wage earners could determine their rights in wages, while at the same time affording due process to employers and a procedure for appeal (*32 Cal. App. 4th 555, 574)* . As a corollary to this purpose, the Legislature provided disincentives to discourage meritless and unwarranted appeals. Defendant contended that the Legislature sought to discourage appeals by employees by denying interest even if the appeal had merit. The court rejected this argument because it failed to acknowledge the difference in the rate of interest under the two statutes (*32 Cal. App. 4th 555, 575)* . The court noted specifically that the "adjusted annual rate" of *Lab. Code § 98.1(c)* was substantially more generous that the fixed rate provided by *Civ. Code § 3287(a)*. Because the interest rates varied substantially, the court found that application of the pertinent interest statute in this case both effectuated the legislative purpose of discouraging meritless appeals since the employer who appeals an administrative award to the employee would pay the higher interest rate, and protected the right of the damaged but originally unsuccessful employee to fully recoup his losses from the employer's erroneous denial of wages (*32 Cal. App. 4th 555, 575)* .

[4] Additional Authorities

[a] Prejudgment Interest When Damages Certain

The court of appeal in *Fireman's Fund Ins. Co. v. Allstate Ins. Co. (1991) 234 Cal. App. 3d 1154, 286 Cal. Rptr. 146* , affirmed an award of prejudgment interest under *Civ. Code § 3287(a)* in this declaratory relief action between insurers regarding which was the primary insurer. The amount was certain when the settlement was paid to the injured, so interest was payable from that date. The only dispute related to legal issues regarding the cancellation of a policy and which party was liable as primary insurer (*234 Cal. App. 3d 1154, 1173-1174)* . The court referred to appellant's

confusion of the amount owed by proposal of four "inapt theories of lesser liability," but held that the alternative theories and amounts of liability proposed under each could not confuse the magnitude of its obligation and did not render the award uncertain so as to prohibit the application of *Civ. Code § 3287(a)* (*234 Cal. App. 3d 1154, 1174)* .

The court of appeal in *Aguilar v. Unemployment Ins. Appeals Bd. (1990) 223 Cal. App. 3d 239, 272 Cal. Rptr. 696* , affirmed the issuance of a writ of mandate by the superior court directing payment to petitioners of interest, pursuant to *Civ. Code § 3287(a)*, on unemployment benefits withheld by EDD. The unemployment benefits were originally denied, but that ruling was reversed by an administrative law judge in 1987. The benefits were paid in 1987, but EDD refused to pay interest on the amounts owed. The court of appeal said that the Legislature's failure to provide expressly for interest in a specific situation does not prevent a recipient from receiving interest under *Civ. Code § 3287(a)*, which authorizes the recovery of interest on damages that are certain or capable of being made certain by calculation when the right to recover has vested on a particular day. This right applies in actions based on a general underlying monetary obligation, including the obligation of a governmental entity (*223 Cal. App. 3d 239, 242)* .

[b] Mandatory Prejudgment Interest When Damages Certain in Noncontract Actions

In *Tripp v. Swoap (1976) 17 Cal. 3d 671, 131 Cal. Rptr. 789, 552 P.2d 749* (discussed in *§ 121.30[3][a]*), the Supreme Court held that an award of prejudgment interest was appropriate pursuant to *Civ. Code § 3287(a)* in a mandamus action against the state based on a statutory obligation when the following conditions are met: (1) There must be an underlying monetary obligation; (2) The recovery must be certain or capable of being made certain by calculation; and (3) The right to recovery must vest on a particular day (*17 Cal. 3d 671, 682)* .

In *Mass v. Board of Educ. (1964) 61 Cal. 2d 612, 39 Cal. Rptr. 739, 394 P.2d 579* (discussed in *§ 121.30[3][g]*), a mandate action brought by a suspended teacher seeking reinstatement, back wages, and interest, the Supreme Court held that an award of prejudgment interest was appropriate pursuant to *Civ. Code § 3287*. The Court reasoned that since mandate is the most expeditious and the most frequently used procedure of relief for persons improperly discharged from their positions, such persons should not be subjected to the loss of full restitution by the denial of interest merely because of the selection of this procedure for redress (*61 Cal. 2d 612, 625-627)* .

The court of appeal in *Credit Managers' Assn. v. Brubaker (1991) 233 Cal. App. 3d 1587, 285 Cal. Rptr. 417* , modified a judgment in favor of an assignee for the benefit of creditors that had recovered a preference from the insolvent's chief executive officer to include prejudgment interest under *Civ. Code § 3282(a)* on the amount of the preference recovered from the date of the demand letter. The letter requested the exact amount awarded and set forth the exact amounts owed and the manner of their calculation. That was sufficient certainty for purposes of *Civ. Code § 3282(a)* (*233 Cal. App. 3d 1587, 1595)* .

See also *Fireman's Fund Ins. Co. v. Allstate Ins. Co. (1991) 234 Cal. App. 3d 1154, 286 Cal. Rptr. 146* , discussed in *§ 121.30[4][a]*.

[c] Damages as Certain When Only Dispute Regards Liability

The federal appellate court in *Adams v. Johns-Manville Corp. (9th Cir. 1989) 876 F.2d 702* , a diversity action arising out of asbestos litigation and applyingCalifornia law, upheld the award of prejudgment interest under *Civ. Code § 3287(a)* on damages pursuant to settlement agreements, saying that this was proper because the amount of damages was not in dispute, only the question of liability. In addition, the court said that an order refusing to enforce settlement agreements based on a theory of lack of settlement authority is not a prevention by law from paying the debt and does not fall within this exception. Thus, when the settlement agreements were ultimately affirmed, an award of prejudgment interest on the amounts stipulated by the agreements was proper (*876 F.2d 702, 710)* .

In *Marine Terminals Corp. v. Paceco, Inc. (1983) 145 Cal. App. 3d 991, 193 Cal. Rptr. 687* , an action for breach of

contract and negligence arising from defendant's faulty repair of plaintiff's crane, plaintiff supplied defendant with invoices that reflected the monetary costs incurred by plaintiff because of the faulty repair. Defendant disputed its liability for the charges, but not the amount of the charges. The court of appeal stated that defendant's denial of liability in itself does not make the damages uncertain (*145 Cal. App. 3d 991, 995)* . By submitting the invoices to defendant, plaintiff made its damages known to defendant and rendered them certain (*145 Cal. App. 3d 991, 996)* .

See also *Fireman's Fund Ins. Co. v. Allstate Ins. Co. (1991) 234 Cal. App. 3d 1154, 286 Cal. Rptr. 146* , discussed in *§ 121.30[4][a]*.

[d] Damages as Certain When Defendant Admits, Stipulates To, or Receives Uncontradicted Evidence of Value

In *Caplan v. Schroeder (1961) 56 Cal. 2d 515, 15 Cal. Rptr. 145, 364 P.2d 321* , an action for breach of contract, the Supreme Court held that although the value of the property at issue was not certain and could not be made certain by calculation, prejudgment interest nevertheless should have been allowed from the date the parties stipulated to the property's value (*56 Cal. 2d 515, 521)* .

In *Shell Oil Co. v. National Union Fire Ins. Co. (1996) 44 Cal. App. 4th 1633, 52 Cal. Rptr. 2d 580* , an insurer appealed a plaintiff's judgment for breach of a liability insurance policy on a variety of grounds, including that an award of prejudgment interest under *Civ. Code § 3287(a)* was improper because plaintiff had proposed three different measures of damages to the court, all of which were in dispute. The court of appeal upheld the award, stating that the certainty required by the statute is absent when the amounts due turn on disputed facts, but not when the dispute is confined to the rules governing liability (*44 Cal. App. 4th 1633, 1651)* . Since the plaintiff's alternative theories required only the court's legal determination of which was appropriate, at which point the amount recoverable would be fixed, prejudgment interest was appropriate. The court thus affirmed the judgment.

Marine Terminals Corp. v. Paceco, Inc. (1983) 145 Cal. App. 3d 991, 193 Cal. Rptr. 687 , is discussed in *§ 121.30[4][c]*

[e] Slight Variance Between Amount Claimed and Amount Awarded as Not Precluding Prejudgment Interest

In *Marine Terminals Corp. v. Paceco, Inc. (1983) 145 Cal. App. 3d 991, 193 Cal. Rptr. 687* (discussed in *§ 121.30[4][c]*), the invoices submitted by plaintiff to defendant as proof of the amount of damages actually included some inapplicable charges. Based on this error, defendant argued that plaintiff's damages were not capable of being made certain by calculation because the data supplied was not true and precisely correct. The court of appeal found that the errors in the invoices were minor and could have been easily corrected at the time the demand for payment was made, and that at no time prior to trial had defendant disputed the amount or method of calculating plaintiff's damages (*145 Cal. App. 3d 991, 997-998)* . The erroneous omission of a few matters from the account or erroneous calculation of the costs does not mean that the damages are not capable of being made certain by calculation (*145 Cal. App. 3d 991, 997)* .

Block v. Laboratory Procedures, Inc. (1970) 8 Cal. App. 3d 1042, 87 Cal. Rptr. 778 , was an action for breach of a stock option contract in which the "bid" and "asked" prices were alleged, but the market value was in dispute. In upholding the trial court's disallowance of prejudgment interest, the court of appeal reiterated the principle that when damages can be arrived at only by judicial determination on conflicting evidence, the damages are uncertain and there is no basis for an award of prejudgment interest. In reaching this conclusion, the court stated in dictum that merely a slight difference between the amount of the damages claimed and the amount of the award does not preclude an award of prejudgment in interest (*8 Cal. App. 3d 1042, 1046-1047)* .

[f] Prejudgment Interest Permitted Against State or Any of Its Political Subdivisions

The court of appeal in *Goldfarb v. Civil Service Com. (1990) 225 Cal. App. 3d 633, 275 Cal. Rptr. 284* , reversed an order denying appellant's petition for mandate and held that *Civ. Code § 3287(a)* entitles civil servants to interest on each installment of back salary awards from the date the salary fell due (*225 Cal. App. 3d 633, 636)* .

See discussion of *Aguilar v. Unemployment Ins. Appeals Bd. (1990) 223 Cal. App. 3d 239, 272 Cal. Rptr. 696* , under *§ 121.30[4][a]*. The right to interest applies in actions based on a general underlying monetary obligation, including the obligation of a governmental entity (*223 Cal. App. 3d 239, 242)* . Applied to actions against the state, the only three conditions for recovery of interest are (1) there must be an underlying monetary obligation; (2) the recovery must be certain or capable of being made certain; and (3) the right to recovery must vest on a particular day (*223 Cal. App. 3d 239, 242-243)* . The court rejected the argumentthat welfare benefits and unemployment benefits were designed to serve different functions and thus cases allowing interest on welfare benefits were not controlling. To the contrary, the court said that any distinction in the goals of various governmental programs is entirely unrelated to the right to interest under *Civ. Code § 3287(a)* (*223 Cal. App. 3d 239, 244)* . Similarly, the court rejected the argument that *26 U.S.C. § 3304(a)(4),* which requires that all money withdrawn from the unemployment fund of a state be used solely in payment of unemployment compensation, exclusive of expenses of administration, prohibited payment of interest on unemployment benefits (*223 Cal. App. 3d 239, 244-246)* .

In *Santa Clara County Environmental Health Assn. v. County of Santa Clara (1985) 173 Cal. App. 3d 74, 218 Cal. Rptr. 678* , the trial court granted an environmental association's petition for writ of mandate directing the county to fix salary rates according to certain procedures, and the county appealed. The court of appeal affirmed, holding, inter alia, that the trial court did not err in awarding the association prejudgment interest because *Civ. Code § 3287(a)* is an exception to the general rule that interest cannot be recovered against a state or municipality (*173 Cal. App. 3d 74, 84)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureRemediesJudgment InterestGeneral OverviewCivil ProcedureRemediesJudgment InterestPrejudgment InterestContracts LawRemediesCompensatory DamagesInterestTortsDamagesInterestGeneral OverviewTortsPublic Entity LiabilityGeneral Overview

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 121 INTEREST
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12-121 California Points & Authorities § 121.31

§ 121.31 Supporting Contention That Prejudgment Interest Should Be Awarded--Prejudgment Interest as Proper in Inverse Condemnation Action Even Though Amount of Damages Uncertain

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF IS ENTITLED TO RECOVER INTEREST ON HIS/HER/ITS DAMAGES FROM _____, 19 _____, THE DATE OF THE COMPENSABLE TAKING, IN ORDER TO FULFILL THE CONSTITUTIONAL MANDATE FOR JUST COMPENSATION.

Certainty of Damages Unnecessary for Prejudgment Interest in Inverse Condemnation Action. The right to prejudgment interest in inverse condemnation accrues as of the date the compensable taking or injury occurs without regard to the nature or scope of the compensable event and without regard to the fact that the amount of damages may not be certain, or capable of being made certain, as of that date (*Holtz v. San Francisco Bay Area Rapid Transit Dist. (1976) 17 Cal. 3d 648, 657, 131 Cal. Rptr. 646, 552 P.2d 430*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a party's contention that prejudgment interest should be awarded in an inverse condemnation action from the date that the compensable taking or injury occurred, despite the fact that damages were unliquidated at that time.

These points may be combined, when appropriate, with points relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of prejudgment interest. The issue is most likely to arise on a motion for a new trial on the ground of inadequate damages [*Code Civ. Proc. § 657(5)*; *see generally* Ch. 64, *Damages: Tort* and Ch. 65, *Damages: Contract*] or a motion to vacate the judgment [*Code Civ. Proc. § 663*; *see generally* Chapter 155, *Motions After Trial*]. The points set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the point of law stated.

[3] Discussion of Authorities

[a] Certainty of Damages Unnecessary for Prejudgment Interest in Inverse Condemnation Action

Holtz v. San Francisco Bay Area Rapid Transit Dist. *(1976) 17 Cal. 3d 648, 131 Cal. Rptr. 646, 552 P.2d 430* , was commenced by plaintiff landowners as an action for inverse condemnation against defendant, whose excavations resulted in damage to plaintiffs' property. The defendant appealed the award for plaintiffs, contending, in part, that the trial court erred in awarding prejudgment interest under *Civ. Code § 3287* because the amount of damages was not ascertained until the jury reached its verdict.

In affirming the award of prejudgment interest commencing with the date on which damage caused by the withdrawal of lateral support commenced, the Supreme Court held that the right to prejudgment interest in inverse condemnation actions accrues as of the date the compensable taking or injury occurred, without regard to the nature or scope of the compensable event (*17 Cal. 3d 648, 657-658)* . The Court did recognize the general rule, as stated in *Lineman v. Schmid (1948) 32 Cal. 2d 204, 212, 195 P.2d 408* , that under *Civ. Code § 3287*, prejudgment interest is not allowable when the amount of damages must be determined from conflicting evidence and resolved by verdict, accord, or judgment. The Court held, however, that the general principle must be rejected with regard to inverse condemnation actions in order to fulfill the constitutional mandate for just compensation (*17 Cal. 3d 648, 657)* .

[4] Additional Authorities

[a] Certainty of Damages Unnecessary for Prejudgment Interest in Inverse Condemnation Action

In *Friedman v. City of Los Angeles (1975) 52 Cal. App. 3d 317, 125 Cal. Rptr. 93* , the court held that an award of prejudgment interest was appropriate pursuant to *Civ. Code § 3287(a)* in an action against a city for the wrongful demolition of a building. The uncontradicted testimony of the owner of the building as to the value of the destroyed property satisfied the requirement that the damages were reasonably certain (*52 Cal. App. 3d 317, 322)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment InterestPrejudgment InterestCivil ProcedureEminent Domain ProceedingsGeneral OverviewReal Property LawInverse CondemnationGeneral OverviewReal Property LawInverse CondemnationRemedies

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12-121 California Points & Authorities § 121.32

§ 121.32 Supporting Contention That Prejudgment Interest Should Be Awarded--Interest in Court's Discretion From Date of Filing of Complaint in Contract Action for Unliquidated Damages [Civ. Code § 3287(b)]

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF IS ENTITLED TO HAVE THE COURT EXERCISE ITS DISCRETION TO AWARD PREJUDGMENT INTEREST FROM AS EARLY AS THE DATE THE ACTION WAS FILED, BECAUSE THIS IS A CONTRACT ACTION IN WHICH THE CLAIM IS UNLIQUIDATED.

Discretionary Prejudgment Interest From Date of Filing of Complaint in Contract Action for Unliquidated Damages. Every person who is entitled under any judgment to receive damages based on a cause of action in contract in which the claim was unliquidated may also recover interest from a date prior to the entry of judgment as the court may, in its discretion, fix, but in no event earlier than the date the action was filed (*Civ. Code § 3287(b)*; *A & M Produce Co. v. FMC Corp. (1982) 135 Cal. App. 3d 473, 495-497, 186 Cal. Rptr. 114*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a party's contention that the court should exercise its discretion to award prejudgment interest from as early as the date the action was filed. The argument supported by this form should only be made in a contract action in which the claim is unliquidated [*Civ. Code § 3287(b)*].

This form may be combined, when appropriate, with points relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of prejudgment interest. The issue is most likely to arise on a motion for a new trial on the ground of inadequate damages [*Code Civ. Proc. § 657(5)*; *see generally* Ch. 64, *Damages: Tort* and Ch. 65, *Damages: Contract*] or a motion to vacate the judgment [*Code Civ. Proc. § 663*; *see generally* Ch. 155, *Motions After Trial*]. The points set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should discuss the fact that this is a contract action for unliquidated damages.

[3] Discussion of Authorities

[a] Discretionary Prejudgment Interest From Date of Filing of Complaint in Contract Action for Unliquidated Damages

In 1967, *Civ. Code § 3287* was amended by adding the language now contained in subdivision (b), which provides that every person who is entitled under any judgment to receive damages based on a cause of action in contract in which the claim was unliquidated may also recover interest thereon from a date prior to the entry of judgment as the court may, in its discretion, fix, but in no event earlier than the date the action was filed.

In ***A & M Produce Co. v. FMC Corp.*** *(1982) 135 Cal. App. 3d 473, 186 Cal. Rptr. 114* , plaintiff, a solely owned farming company, had purchased a weight-sizing machine from defendant to help process its tomato crop. Defendant's standard form contract was used, which contained disclaimers of warranties and all consequential damages. The machine failed to work properly, and plaintiff's crop was lost. Plaintiff offered to return the machine for a refund, but defendant refused the offer and demanded full payment of the balance due. Plaintiff filed an action for damages for breach of express and implied warranties. After two trials resulted in a hung jury and an order for new trial, the trial court ruled that the waiver provisions were unconscionable, and the jury returned a general verdict for plaintiff. The court also awarded plaintiff attorney's fees and prejudgment interest. Defendant appealed from the judgment.

The court of appeal affirmed judgment for plaintiff. The court upheld the trial court's determination that the disclaimer of warranties and the exclusion of consequential damages were unconscionable and therefore unenforceable. The court also affirmed the award of consequential damages and attorney's fees for plaintiff. The court then held that the trial court properly exercised its discretion in awarding prejudgment interest. Supporting factors included that over seven years passed between the time plaintiff filed its first complaint and the time judgment was entered. The fact that the hung jury in the first trial or the granting of the new trial motion after the second trial was not defendant's fault was irrelevant. The court stated that the award of seven-percent interest to plaintiff didnot penalize defendant for litigating a bona fide dispute; rather, it was merely a recognition of an additional amount of damage incurred by plaintiff as a result of defendant's breach of warranty. The court also held that the trial court was permitted to take cognizance of the exceedingly higher market interest rates during the seven-year period in exercising its discretion to award prejudgment interest. Finally, the court held that the trial court properly viewed defendant's refusal of plaintiff's offer of settlement as placing the prejudgment interest amount at risk (*135 Cal. App. 3d 473, 495-497)* .

[4] Additional Authorities

[a] Discretionary Prejudgment Interest From Date of Filing of Complaint in Contract Action for Unliquidated Damages

In *Gebert v. Yank (1985) 172 Cal. App. 3d 544, 218 Cal. Rptr. 585* , plaintiff's horse was injured and had to be put to death while in the possession of defendant bloodstock agent. Plaintiff sought damages on both negligence and breach of contract theories. The jury verdict awarded damages under the contract cause of action and stated that no interest was to be awarded. The trial court nonetheless awarded prejudgment interest. Defendant appealed, arguing, among other things, that the award of interest was contrary to the verdict. The court of appeal affirmed, and, as to the interest award, held that the trial court, not the jury, had discretion to award prejudgment interest under *Civ. Code § 3287(b)*, because the judgment was based on an unliquidated claim of contract damages. The court concluded that the trial court did not abuse this discretion (*172 Cal. App. 3d 544, 555-556)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment InterestGeneral OverviewCivil ProcedureRemediesJudgment InterestPrejudgment InterestContracts LawRemediesCompensatory DamagesInterestContracts LawRemediesLiquidated Damages

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12-121 California Points & Authorities § 121.33

§ 121.33 Supporting Contention That Prejudgment Interest Should Be Awarded--Prejudgment Interest in Discretion of Trier of Fact for Breach of Obligation Not Arising From Contract or for Oppression, Fraud, or Malice [Civ. Code § 3288]

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF IS ENTITLED TO HAVE THE TRIER OF FACT EXERCISE ITS DISCRETION IN DECIDING WHETHER PLAINTIFF IS ENTITLED TO PREJUDGMENT INTEREST BECAUSE THIS IS A CASE INVOLVING _____ [BREACH OF AN OBLIGATION NOT ARISING FROM CONTRACT *and/or* OPPRESSION *and/or* FRAUD *and/or* MALICE].

A. Prejudgment Interest in Discretion of Trier of Fact for Breach of Obligation Not Arising From Contract or for Oppression, Fraud, or Malice. In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the trier of fact, even though damages may be unliquidated (*see Civ. Code § 3288*; *Bullis v. Security Pac. Nat. Bank (1978) 21 Cal. 3d 801, 814, 148 Cal. Rptr. 22, 582 P.2d 109* ; *Redke v. Silvertrust (1971) 6 Cal. 3d 94, 106-107, 98 Cal. Rptr. 293, 490 P.2d 805 , cert. denied, 405 U.S. 1041, 92 S. Ct. 1316, 31 L. Ed. 2d 583*).

[*Optional*] **B. General Prayer for Relief as Sufficient to Support Court's Award of Interest.** When the court is the trier of fact, a general prayer for "such other and further relief as the court deems just and proper" is sufficient to support the court's award of prejudgment interest under *Civil Code Section 3288* (*Segura v. McBride (1992) 5 Cal. App. 4th 1028, 1041, 7 Cal. Rptr. 2d 436*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a party's contention that discretionary prejudgment interest should be awarded by the trier of fact pursuant to *Civ. Code § 3288*. The argument supported by this form should be made only in an action

for breach of an obligation not arising from contract, or in a case involving oppression, fraud, or malice [*see Civ. Code § 3288*].

This form may be combined, when appropriate, with points relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of prejudgment interest. The issue is most likely to arise on a motion for a new trial on the ground of inadequate damages [*Code Civ. Proc. § 657(5)*] or a motion to vacate the judgment [*Code Civ. Proc. § 663*; *see* Ch. 155, *Motions After Trial* ; *see also* Ch. 64, *Damages: Tort* and Ch. 65, *Damages: Contract*]. The points set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should point out the facts giving rise to the action and demonstrate that the suit is for breach of an obligation not arising from contract or that it involves oppression, fraud, or malice.

[b] Rate of Interest

The basic rate of prejudgment interest when the action is not based on a contract is the constitutional 7 percent rate [*Cal. Const. art. XV, § 1*; *see Michelson v. Hamada (1994) 29 Cal. App. 4th 1566, 1585-1586, 36 Cal. Rptr. 2d 343* ; *Continental Airlines Inc. v. McDonnell Douglas Corp. (1989) 216 Cal. App. 3d 388, 433-434, 264 Cal. Rptr. 779* ; *see also Civ. Code § 3291* (ten percent interest on judgment calculated from date of any *Code Civ. Proc. § 998* settlement offer that exceeded the judgment)]. Compound interest may be awarded in cases involving a fiduciary relationship [*Michelson v. Hamada (1994) 29 Cal. App. 4th 1566, 1586, 36 Cal. Rptr. 2d 343]* .

[c] Opposing Memoranda

The memoranda set out in *§§ 121.50, 121.51, 121.53* and *121.54* may be used in an appropriate case to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Prejudgment Interest in Discretion of Trier of Fact for Breach of Obligation Not Arising From Contract or for Oppression, Fraud, or Malice

Civ. Code § 3288 provides that in an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury.

The factual background of ***Bullis v. Security Pac. Nat. Bank*** *(1978) 21 Cal. 3d 801, 148 Cal. Rptr. 22, 582 P.2d 109* , is discussed in *§ 121.42[3][a]*. In that case the defendant bank contended on appeal, among other things, that the trial court had abused its discretion when it awarded prejudgment interest, pursuant to *Civ. Code § 3288*, calculated from the date of withdrawal. In affirming the judgment, the Supreme Court held that this negligence action was within the purview of *Civ. Code § 3288* and that the decision to award prejudgment interest may not be overturned unless the trial court abused its discretion.

The Court explained that under *Civ. Code § 3288* the trier of fact, whether it be judge or jury, may award prejudgment interest in an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice. A party does not have to prove both a breach of a noncontractual obligation and oppression, fraud, or malice. Even if plaintiff's damages are not liquidated, prejudgment interest may be awarded. Prejudgment interest is awarded to compensate a party for the loss of the use of his or her property. Since, in this case, the estate was deprived of the use of $250,000 for several years because of defendant's negligence, and since the date of each unauthorized withdrawal was readily ascertainable, it was not an abuse of discretion for the trial judge to award prejudgment interest (*21 Cal. 3d 801, 814-815)* .

In ***Redke v. Silvertrust*** *(1971) 6 Cal. 3d 94, 98 Cal. Rptr. 293, 490 P.2d 805 , cert. denied, 405 U.S. 1041* , the plaintiff brought an action on the theory of constructive fraud to enforce the terms of an oral agreement made for her benefit between her mother and her stepfather whereby the stepfather agreed to bequeath to plaintiff certain property of plaintiff's mother. The trial court awarded plaintiff the fair market value of the subject property together with prejudment interest from the date of the stepfather's death. On appeal, defendants contended that since the value of the property was in dispute, the damages were unliquidated and an award of prejudgment interest was improper.

In rejecting this argument, the Supreme Court pointed out that plaintiff was not proceeding on a breach of contract action but was proceeding on the theory of constructive fraud. Therefore, she was entitled to the benefit of *Civ. Code § 3288*. This section allows the trier of fact to award prejudgment interest whether or not damages are liquidated. Since the stepfather had promised to turn over the mother's property to plaintiff on his death, and since his failure to do so constituted constructive fraud, the trial court had discretion under *Civ. Code § 3288* to award plaintiff interest from the date on which the fraud occurred, even though the amount of damages was unliquidated (*6 Cal. 3d 94, 106)* .

The trial court also awarded plaintiff interest on stock sold by the stepfather before his death, with interest running from the date of sale. Defendants contended the obligation to plaintiff did not arise until the stepfather's death and that his estate should not be liable for interest prior to that time. In rejecting this argument, the Supreme Court held that former Civ. Code § 2237 (*now see Prob. Code §§ 16440(a)* (measure of liability for breach of trust), *16441* (measure of liability for interest) obligates a trustee who has wrongfully disposed of trust property to account for all profits so made, or the value of the use of the property, or to account for its proceeds with interest. Thus, the trial court properly awarded plaintiff interest from the date of sale on the proceeds of the stock sold by the stepfather during his life (*6 Cal. 3d 94, 106-107)* .

[b] General Prayer for Relief as Sufficient to Support Court's Award of Interest

In ***Segura v. McBride*** *(1992) 5 Cal. App. 4th 1028, 7 Cal. Rptr. 2d 436* , the plaintiff sued for damages based on violations of the Home Equity Sales Contract Act [*see Civ. Code § 1695 et seq.*]. The case was tried without a jury, and a judgment was entered in the plaintiff's favor. The judgment included an award of prejudgment interest.

On appeal, the court of appeal, although partially reversing the judgment on other grounds, upheld the trial court's power to award prejudgment interest. The court of appeal determined that *Civ. Code § 3288* governed the issue because the action was for unliquidated damages on an action other than contract. The court then pointed out that when the trial court acts as the trier of fact, it has discretion to award prejudgment interest under Section 3288, citing *Bullis v. Security Pac. Nat. Bank (1978) 21 Cal. 3d 801, 814, 148 Cal. Rptr. 22, 582 P.2d 109* (discussed in *§ 121.33[3][a]*). The court of appeal held that the plaintiff's general prayer for "such other and further relief as the court deems just and proper" was sufficient for the court, on its own, to invoke its power to award such prejudgment interest as it deemed just and equitable (*5 Cal. App. 4th 1028, 1041)* .

[4] Additional Authorities

[a] Prejudgment Interest in Discretion of Trier of Fact for Breach of Obligation Not Arising From Contract or for Oppression, Fraud, or Malice

In *Baker v. Pratt (1986) 176 Cal. App. 3d 370, 222 Cal. Rptr. 253* , plaintiff sole minority shareholder brought a successful shareholder's derivative action alleging that the sole majority shareholder had fraudulently misappropriated corporate funds and property. Following defendant's motion for a new trial, the trial court forced plaintiff to waive prejudgment interest and accept a modified judgment in lieu of having the trial court grant the motion. The court of appeal rejected defendant's rationale that the trial court did not have the power to add interest to the awarded sums because those sums were not capable of having been made certain by calculation before the completion of the various accountings that were the basis for the entry of judgment. Rather, the court noted, under *Civ. Code § 3288* a litigant

proceeding on a theory of fraud arising out of a violation of a fiduciary relationship is entitled to interest at the discretion of the trier of fact, regardless of whether or not the awarded sum is unliquidated. When the trial court found that the defendant had violated former Civ. Code § 2228 (now see *Prob. Code §§ 16002, 16004*) by committing a fraud against the beneficiary of a trust, it laid the basis for its discretion to award prejudgment interest under *Civ. Code § 3288* (*176 Cal. App. 3d 370, 382-383)* .

Zlotoff v. Tucker (1984) 154 Cal. App. 3d 988, 201 Cal. Rptr. 692 , was an action for breach of contract and fraud against the buyer in a contract for the sale of realty. The trial court found for plaintiff and awarded compensatory damages and fees under a liquidated-damages clause, in addition to awarding punitive damages for fraud (*154 Cal. App. 3d 988, 990-994)* . The court also awarded interest from the date that escrow closed on the sale between the parties, based on its finding that defendant had committed fraud in the inducement. Defendant appealed and contended, inter alia, that it was error to award interest from this date because the liquidated-damages clause provided only for interest from the date of the breach, which occurred sometime later. The court of appeal affirmed. In regard to the award of interest, the court noted that the trial court had found defendant liable for both breech of contract and fraud. The court held that the trial court had acted within its discretion in awarding interest, citing *Civ. Code § 3288* (*154 Cal. App. 3d 988, 994)* .

In *Harsany v. Cessna Aircraft Co. (1983) 148 Cal. App. 3d 1139, 196 Cal. Rptr. 374* , an action to recover the value of an aircraft allegedly destroyed by defendants' negligence, the court of appeal held that the loss of the plane was a property loss for which prejudgment interest could be granted in the discretion of the trier of fact (*148 Cal. App. 3d 1139, 1144)* . The court noted that in *Greater Westchester Homeowners Asso. v. City of Los Angeles (1979) 26 Cal. 3d 86, 102-103, 160 Cal. Rptr. 733, 603 P.2d 1329* , cert. denied *(1980) 449 U.S. 820, 101 S. Ct. 77, 66 L. Ed. 2d 22* (discussed in *§ 121.50[3][a]*), the Supreme Court held that prejudgment interest under *Civ. Code § 3288* was not appropriate when the loss is intangible and inherently nonpecuniary. However, the court in *Harsany* held that *Greater Westchester* merely precludes interest on damages awarded for emotional and mental distress and does not preclude an award of interest on a property loss, even when the amount of the loss is disputed (*148 Cal. App. 3d 1139, 1143-1144)* .

In *Gherman v. Colburn (1977) 72 Cal. App. 3d 544, 140 Cal. Rptr. 330* , an action between joint venturers involving alleged breach of fiduciary duties, the court of appeal held that a jury may award interest even on an unliquidated sum against a joint venturer who has violated his or her fiduciary duties (*72 Cal. App. 3d 544, 587)* .

In *Vogelsang v. Wolpert (1964) 227 Cal. App. 2d 102, 38 Cal. Rptr. 440* , a fraud action, defendant contended the trial court erred by awarding plaintiff both prejudgment interest and punitive damages. In affirming the judgment, the court of appeal held that it is well settled that interest may be awarded under *Civ. Code § 3288* in a fraud action in the discretion of the trier of fact. Furthermore, interest and exemplary damages are not mutually exclusive; both may properly be awarded in the same case (*227 Cal. App. 2d 102, 125)* .

In *Nathanson v. Murphy (1957) 147 Cal. App. 2d 462, 305 P.2d 710* , a fraud action, the court of appeal held that the trial judge acted within his discretion by entering a *nunc pro tunc* order modifying his original order, which had granted plaintiff prejudgment interest. The new order allowed interest only from the time of the judgment. In affirming the trial court's *nunc pro tunc* order, the court of appeal held that in a fraud case the trial court possesses discretion whether or not interest shall be allowed from the date of the fraud or only from the date of judgment. When *Civ. Code §§ 3287* and *3288* are read together, the proper rule is that the defrauded party may ask for damages from the date of the fraud, but whether the interest is to be awarded is left to the discretion of the trier of fact and is to be exercised after considering the circumstances of the case (*147 Cal. App. 2d 462, 466-467)* .

Legal Topics:

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

Civil ProcedureRemediesJudgment InterestGeneral OverviewCivil ProcedureRemediesJudgment InterestPrejudgment InterestTortsDamagesInterestPrejudgment InterestTortsDamagesInterestRates

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12-121 California Points & Authorities § 121.34

§ 121.34 Supporting Contention That Prejudgment Interest Should Be Awarded--Interest Rate Stipulated in Contract Continues Following Breach [Civ. Code § 3289(a)]

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF IS ENTITLED TO PREJUDGMENT INTEREST AT _____ PERCENT, THE RATE STIPULATED IN THE CONTRACT, FROM _____ [*date*], THE TIME OF THE BREACH, UNTIL THE CONTRACT IS SUPERSEDED BY A VERDICT OR OTHER NEW OBLIGATION.

A. Interest Rate Stipulated in Contract Continues Following Breach. Anylegal rate of interest stipulated by a contract remains chargeable after a breach of the contract, as before, until the contract is superseded by a verdict or other new obligation (*Civ. Code § 3289(a)*; *Roodenburg v. Pavestone Company, L.P. (2009) 171 Cal. App. 4th 185, 190-192, 89 Cal. Rptr. 3d 558* ; *Casey v. Gibbons (1902) 136 Cal. 368, 371, 68 P. 1032* ; *Roodenburg v. Pavestone Company, L.P. (2009) 171 Cal. App. 4th 185, 191-192, 89 Cal. Rptr. 3d 558* ; *Reid v. Balter (1993) 14 Cal. App. 4th 1186, 1196, 18 Cal. Rptr. 2d 287*).

[*Optional*] **B. Retail Installment Contract.** For purposes of *Civil Code Section 3289*, the rate of the contracted finance charge shall be the legal rate of interest stipulated by a retail installment contract subject to *Civil Code Sections 1801-1812.20* (*Civ. Code § 3289.5*).

[2] Comments

[a] Use of Form

This form may be submitted in support of plaintiff's contention that prejudgment interest should be awarded at the rate stipulated in the contract from the time of the breach until the contract is superseded by a verdict or other new obligation. Optional Paragraph B is for use when the contract involved is a retail installment contract governed by the Unruh Retail Installment Sales Act contained in *Civ. Code § 1801 et seq.* [*see* Civ. Code § 3298.5]. The contention supported by this form may be raised in an action based on breach of a contract that contains a provision specifying the

agreed rate of interest.

This form may be combined, where appropriate, with points relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of prejudgment interest. The issue is most likely to arise on a motion for a new trial on the ground of inadequate damages [*Code Civ. Proc. § 657(5)*; *see* Ch. 64, *Damages: Tort* , Ch. 65, *Damages: Contract*] or a motion to vacate the judgment [*Code Civ. Proc. § 663*; *see* Ch. 155, *Motions After Trial*]. The points set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law stated. Thus, counsel should specifically point out that this is an action for breach of contract, the date of the breach, and the clause in the contract that specifies the agreed rate of interest.

[3] Discussion of Authorities

[a] Interest Rate Stipulated in Contract Continues Following Breach

Roodenburg v. Pavestone Company, L.P. *(2009) 171 Cal. App. 4th 185, 89 Cal. Rptr. 3d 558* , involved an operating agreement whereby the parties formed a limited liability company. The agreement provided that if the plaintiff was terminated from the company or resigned for cause, the defendant would purchase his interest in the company for the value of his capital account at the time. When the parties could not agree on the value of the capital account, the plaintiff sued for breach of contract and was awarded damages. The court awarded the plaintiff prejudgment interest. The defendant appealed, arguing that *Civ. Code § 3287(a)* barred prejudgment interest because the amount owed on the breach of contract claim was uncertain until the jury reached its verdict. The court of appeal disagreed, holding that the operating agreement included a provision for prejudgment interest, and therefore *Civ. Code § 3287(a)* did not apply (*171 Cal. App. 4th 185, 190-192)* .

Casey v. Gibbons *(1902) 136 Cal. 368, 68 P. 1032* , was an action to foreclose a mortgage. The defendant appealed the judgment of foreclosure, contending, among other things, that the trial court erred in allowing interest after maturity of the note. In affirming the judgment of the trial court, the Supreme Court, relying on *Civ. Code § 3289*, held that the rate of interest was stipulated in the contract and remains chargeable after a breach of the contract, as before, until the contract is superseded by a verdict or other new obligation (*136 Cal. 368, 371)* .

In ***Roodenburg v. Pavestone Company, L.P.*** *(2009) 171 Cal. App. 4th 185, 191-192, 89 Cal. Rptr. 3d 558* , the plaintiff and the defendant formed a limited liability company. The company's operating agreement appointed the plaintiff general manager and provided that, if the plaintiff resigned for cause, the company would purchase his interest in the company for the value of his capital account at the time plus a severance payment. The operating agreement provided that any amounts not paid when due would bear interest at the rate of 1.5 percent per month until paid. When the plaintiff resigned and the parties could not agree on the value of the capital account, the plaintiff sued the company for breach of the operating agreement. The jury found for the plaintiff. The court awarded plaintiff prejudgment interest.

On appeal, the defendant argued that the interest award was improper under *Civ. Code § 3287(a)* because the amount owed on plaintiff's breach of contract claim was uncertain until the jury reached its verdict. The court of appeal disagreed, holding that uncertainty in the amount of the judgment was irrelevant when interest was awarded pursuant to a provision of the contract, and not under *Civ. Code § 3287(a)* [*171 Cal. App. 4th 185, 191]* .

Reid v. Balter *(1993) 14 Cal. App. 4th 1186, 18 Cal. Rptr. 2d 287* , was an action to collect the unpaid balance on an installment note. Plaintiffs were successful, but were only awarded interest at the contract rate (12 percent) until March 1, 1988, the date the last installment was due under the terms of the note. The trial court allowed interest thereafter, until the date of judgment, at the rate of 10 percent per annum. The court of appeal reversed to require recalculation of interest at 12 percent interest through the date of judgment (*14 Cal. App. 4th 1186, 1196)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment InterestGeneral OverviewCivil ProcedureRemediesJudgment InterestPrejudgment InterestContracts LawRemediesCompensatory DamagesInterest

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12-121 California Points & Authorities § 121.35

§ 121.35 Supporting Contention That Prejudgment Interest Should Be Awarded--Interest Rate Not Stipulated in Contract Entered Into After January 1, 1986 [Civ. Code § 3289(b)]

[1] FORM

[*This form may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF IS ENTITLED TO PREJUDGMENT INTEREST AT TEN PERCENT PER ANNUM AFTER THE BREACH BECAUSE THE CONTRACT WAS ENTERED INTO AFTER JANUARY 1, 1986, DOES NOT STIPULATE A LEGAL RATE OF INTEREST, AND IS NOT A NOTE SECURED BY A DEED OF TRUST ON REAL PROPERTY.

Interest Rate Not Stipulated in Contract. If a contract entered into after January 1, 1986, does not stipulate a legal rate of interest, the obligation shall bear interest at a rate of 10 percent per annum after a breach (*Civ. Code § 3289(b)*). For the purposes of *Civil Code Section 3289(b)*, the term "contract" shall not include a note secured by a deed of trust of real property (*Civ. Code § 3289(b)*).

[2] Comments

[a] Use of Form

This form may be submitted in support of plaintiff's contention that prejudgment interest should be awarded at the rate of 10 percent per annum after breach of a contract that does not stipulate a legal rate of interest, and is not a note secured by a deed of trust on real property [*see Civ. Code § 3289(b)*].

This form may be combined, when appropriate, with points relating to the specific procedural context in which counsel wishes to raise the issue that plaintiff is entitled to prejudgment interest at ten percent per annum after the breach of a contract that does not does stipulate a legalrate of interest. This form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law

stated. Therefore, counsel should show that the contract was entered into after January 1, 1986, and does not stipulate a legal rate of interest.

Legal Topics:

For related research and practice materials, see the following legal topics:
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12-121 California Points & Authorities § 121.36

§ 121.36 Supporting Contention That Prejudgment Interest Should Be Awarded--Usurious Rate Stipulated in Contract Entered Into After January 1, 1986 [Civ. Code § 3289(b)]

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF IS ENTITLED TO PREJUDGMENT INTEREST AT THE RATE OF 10 PERCENT PER ANNUM AFTER BREACH EVEN THOUGH THE RATE STIPULATED BY THE CONTRACT WAS USURIOUS.

When Rate Stipulated Is Usurious. The 10 percent interest rate of *Section 3289(b) of the Civil Code* is payable after breach when a contract entered into after January 1, 1986, provides a usurious rate of interest (*Mark McDowell Corp. v. LSM 128 (1989) 214 Cal. App. 3d 1427, 1432-1433, 263 Cal. Rptr. 310* (disapproved on another ground in *Southwest Concrete Production v. Gosh Construction Corp. (1990) 51 Cal. 3d 701, 704, 706-709, 274 Cal. Rptr. 404, 798 P.2d 1247*)).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that prejudgment interest should be awarded at the rate of 10 percent per annum after breach of a contract entered into after January 1, 1986, that provided for interest at a usurious rate [*see Civ. Code § 3289(b)* (not applicable to note secured by deed of trust on real property)]. This form should be combined with additional authorities from *§ 121.34* or *121.35* when appropriate.

Note that the Supreme Court disapproved the authority cited in this form on another ground, and the authority should therefore be used with caution [*see* discussion in *§ 121.36[3][a]*].

Counsel should insert argument in this form showing the relationship between the facts of the particular case and the points of law raised.

[3] Discussion of Authorities

[a] When Rate Stipulated Is Usurious

Plaintiff in ***Mark McDowell Corp. v. LSM 128*** *(1989) 214 Cal. App. 3d 1427, 263 Cal. Rptr. 310* , did grading work for defendant pursuant to a contract executed on September 29, 1986, which provided that all sums not paid when due would thereafter bear interest at 1.5 percent per month. The trial court found that defendant owed plaintiff $46,649, and awarded costs, attorney's fees, and interest at the rate of 10 percent per annum from February 3, 1987, the date of breach. Defendant paid the rest of the judgment and appealed the interest award. The court of appeal affirmed.

The court of appeal first concluded that the rate provided by the contract was usurious and therefore void (*214 Cal. App. 3d 1427, 1431)* . The court noted the rule that payment of usurious interest on a note is prohibited before the maturity of the note, but thereafter, the payee is entitled to interest at the legal rate (*214 Cal. App. 3d 1427, 1431-1432)* . Denial of interest before maturity is considered sufficient deterrent, but after maturity, if the obligor withholds payment of the principal sum, it is neither unjust nor contrary to public policy to allow interest at the legal rate on any judgment for the principal sum (*214 Cal. App. 3d 1427, 1432)* . The court concluded that the same rationale should be applied in this situation and that the express language of *Civ. Code § 3289(b)* applied to allow recovery of interest at the rate of 10 percent per annum from the date of breach (*214 Cal. App. 3d 1427, 1432-1433)* .

Note that the Supreme Court disapproved the decision in *Mark McDowell Corp.* to the extent that it held the contract provision for a late charge constituted "interest" at a usurious rate [*see Southwest Concrete Production v. Gosh Construction Corp. (1990) 51 Cal. 3d 701, 704, 706-709, 274 Cal. Rptr. 404, 798 P.2d 1247* (discussed in *§ 121.37[3][b]*)]. Thus, the decision in *Mark McDowell Corp.* should be used with caution as an authority; it is arguably still valid precedent for the proposition that prejudgment interest may be recovered at the legal rate when a contract stipulates a usurious rate, but it should not be cited as authority for the proposition that the particular type of provision involved in the case is usurious.

[4] Additional Authorities

[a] When Rate Stipulated Is Usurious

The rule applicable to notes was applied in *Green v. Future Two (1986) 179 Cal. App. 3d 738, 225 Cal. Rptr. 3* , to a usurious note executed before January 1, 1986. Then, the legal rate was 7 percent per annum; and interest at that rate was held recoverable after maturity (*179 Cal. App. 3d 738, 744)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 121.37 Supporting Contention That Prejudgment Interest Should Be Awarded--"Time-Price" Doctrine Makes Usury Law Inapplicable to Finance Charge Stipulated in Contract

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF IS ENTITLED TO _____ [PREJUDGMENT INTEREST AT THE RATE *or* THE FINANCE CHARGE] OF _____ [*specify percent*] PERCENT PER ANNUM IMPOSED PURSUANT TO THE CONTRACT BECAUSE THE CHARGE IS A TIME-PRICE DIFFERENTIAL AND THUS USURY LAW IS INAPPLICABLE.

A. Time-Price Differential Is Not Interest. A "time-price" differential or a "finance charge" in a bona fide sale of goods or services is not a form of interest within the meaning of the California Constitution, Article XV, provision against usury (*Southwest Concrete Production v. Gosh Construction Corp. (1990) 51 Cal. 3d 701, 704, 709, 274 Cal. Rptr. 404, 798 P.2d 1247* (disapproving contrary holdings in *Crestwood Lumber Co. v, Citizens Sav. & Loan Assn. (1978) 83 Cal. App. 3d 819, 148 Cal. Rptr. 129* , and *Mark McDowell Corp. v. LSM 128 (1989) 214 Cal. App. 3d 1427, 263 Cal. Rptr. 310*); *Fox v. Federated Department Stores, Inc. (1979) 94 Cal. App. 3d 867, 872, 880, 156 Cal. Rptr. 893*).

[*Optional*] **B. Late Charge in Commercial Contract.** A provision in a commercial contract that calls for interest at a specified percent per year on late payments does not violate the usury law. Such a late charge is not subject to the usury law, because it does not constitute payment for the "loan or forbearance of any money" within the meaning of the *California Constitution, Article XV, Section 1*. It is exempt from the usury law under the time-price doctrine and the principle that a debtor by a voluntary act cannot render an otherwise valid contract usurious (*Southwest Concrete Production v. Gosh Construction Corp. (1990) 51 Cal. 3d 701, 274 Cal. Rptr. 404, 798 P.2d 1247* (disapproving contrary holdings in *Crestwood Lumber Co. v. Citizens Sav. & Loan Assn. (1978) 83 Cal. App. 3d 819, 148 Cal. Rptr. 129* , and *Mark McDowell Corp. v. LSM 128 (1989) 214 Cal. App. 3d 1427, 263 Cal. Rptr. 310*); *O'Connor v. Televideo System, Inc. (1990) 218 Cal. App. 3d 709, 718, 267 Cal. Rptr. 237*).

[*Optional*] **C. Charge as Liquidated Damages.** A finance charge of a specified percent per year on late payments constitutes a valid liquidated damage provision unless the party seeking to invalidate it establishes that the provision was unreasonable under the circumstances existing at the time the contract was made (*Civ. Code § 1671*; *O'Connor v. Televideo System, Inc. (1990) 218 Cal. App. 3d 709, 719, 267 Cal. Rptr. 237* ; *Fox v. Federated Department Stores, Inc. (1979) 94 Cal. App. 3d 867, 885, 156 Cal. Rptr. 893*).

[*Optional*] **D. Finance Charge in Retail Installment Account.** A finance charge of a specified percent per year on unpaid balances owed on a retail installment account subject to the Unruh Act (*Section 1801 et seq. of the Civil Code*) is subject to the time-price doctrine, is not a loan or forbearance of money, and is not subject to the usury law (*Fox v. Federated Department Stores, Inc. (1979) 94 Cal. App. 3d 867, 880, 156 Cal. Rptr. 893*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that prejudgment interest should be awarded at a rate provided in a contract [*see Civ. Code § 3289(a)*], despite the fact that the rate apparently exceeds that permitted under the usury law. The ground for the contention is that the payment is not interest but is actually a late charge or "time-price" differential.

Counsel should insert argument in this form showing the relationship between the facts of the particular case and the points of law raised. Specifically, counsel should set forth the contract terminology and the circumstances surrounding its making to provide the factual basis for establishing the transaction as a "bona fide credit sale."

[b] Award of "Time-Price" Differential, Late Charge, or Finance Charge as Prejudgment Interest

The majority in *Southwest Concrete Production v. Gosh Construction Corp. (1990) 51 Cal. 3d 701, 274 Cal. Rptr. 404, 798 P.2d 1247* , in effect affirmed the trial court's award of a sum as prejudgment interest, but held that this sum was not subject to the usury law, because it constituted a time-price differential or finance charge rather than "interest." As pointed out by the minority opinion, the majority declined to address an important issue: whether such a sum may be properly awarded as "prejudgment interest" under *Civ. Code § 3289(a)* when in fact it is not deemed to be "interest" at all [*Southwest Concrete Production v. Gosh Construction Corp. (1990) 51 Cal. 3d 701, 716, 274 Cal. Rptr. 404, 798 P.2d 1247* (opn. of Mosk, J., concurring and dissenting)]. In other cases, the recovery of such sums was apparently upheld as a "finance charge" that was essentially a part of the plaintiff's damages (or liquidated damages), rather than as prejudgment interest [*see O'Connor v. Televideo System, Inc. (1990) 218 Cal. App. 3d 709, 267 Cal. Rptr. 237* (contract apparently called the sum "interest"); *Fox v. Federated Department Stores, Inc. (1979) 94 Cal. App. 3d 867, 880, 156 Cal. Rptr. 893* (contract and statute used the term "finance charge")].

[3] Discussion of Authorities

[a] Time-Price Differential Is Not Interest

Southwest Concrete Production v. Gosh Construction Corp. *(1990) 51 Cal. 3d 701, 274 Cal. Rptr. 404, 798 P.2d 1247* , is discussed in *§ 121.37[3][b]*.

Fox v. Federated Department Stores, Inc. *(1979) 94 Cal. App. 3d 867, 156 Cal. Rptr. 893* , is discussed in *§ 121.37[3][d]*.

[b] Late Charge in Commercial Contract

Southwest Concrete Production v. Gosh Construction Corp. *(1990) 51 Cal. 3d 701, 274 Cal. Rptr. 404, 798 P.2d*

1247 , arose from a dispute regarding the quality of pipe supplied by plaintiff to defendant construction company. Plaintiff sued to recover the unpaid balance. The jury held that the invoices and delivery tickets that accompanied the pipe constituted a contract, which defendant had breached, and that the contract contained a provision for interest of 1.5 percent per month (18 percent per year) on late payments. Plaintiff was awarded prejudgment interest at the rate of 18 percent per year based on the contract. Defendant appealed.

The court of appeal, although reversing and remanding on other grounds, affirmed the award of prejudgment interest at 18 percent, holding that the late charge was not subject to the usury law. The Supreme Court granted review to resolve the conflict among courts of appeal on the issue of whether a provision in a commercial contract that calls for interest at 18 percent per year on late payments violates the usury law, and concluded that it did not (*51 Cal. 3d 701, 704, 709)* . The Court began its discussion by noting that the California usury law is based on *Cal. Const., Art. XV, § 1*, which limits that interest payable for "any loan or forbearance of any money." A loan of money is delivery of a sum of money to another under a contract to return at some future time an equivalent amount. A forbearance of money is the giving of further time for the payment of a debt or an agreement not to enforce a claim at its due date. However, both a loan of money and a forbearance are distinguished from a sale, which is the transfer of property in a thing for a price in money (*51 Cal. 3d 701, 705)* .

In determining whether a transaction constitutes a loan or forbearance, one looks to the substance rather than the form of the transaction: the issue is whether or not the bargain of the parties, in the light of all circumstances, has as its true object the hire of money at an excessive rate of interest (*51 Cal. 3d 701, 705)* . One exception to the usury law that arises in this context is the "time-price" doctrine. The "time-price" doctrine arises when property is sold on credit as an advance over the cash price. In this type of transaction, often called a bona fide credit sale, the seller finances the purchase of property by extending payments over time and charging a higher price for carrying the financing. A bona fide credit sale is not subject to the usury law because it does not involve a loan or forbearance (*51 Cal. 3d 701, 705)* .

Another exception to the usury law is the rule that a debtor by voluntary act, such as voluntary default, cannot render an otherwise valid transaction usurious. If the excessive interest is caused by a contingency under the debtor's control, the transaction will not be deemed usurious (*51 Cal. 3d 701, 706)* .

Although *Crestwood Lumber Co. v. Citizens Sav. & Loan Assn. (1978) 83 Cal. App. 3d 819, 148 Cal. Rptr. 129* , involved substantially similar facts, the Supreme Court noted that the reasoning in *Crestwood Lumber Co.* had been criticized by legal commentators, had been undercut by *Fox v. Federated Department Stores, Inc. (1979) 94 Cal. App. 3d 867, 156 Cal. Rptr. 893* (discussed in *§ 121.37[3][d]*), and failed to consider *Com. Code § 2207* when it concluded that the late charge did not qualify as a liquidated damage provision because the parties had not agreed to it (*51 Cal. 3d 701, 706-708)* . *Com. Code § 2207* provides that additional terms become part of a contract between merchants unless the person receiving them objects to them. Under *Com. Code § 2207*, the clause providing for late charges on overdue invoices becomes part of the contract (*51 Cal. 3d 701, 708)* . Nevertheless, the Court did not reach the question of the validity of these late charges as liquidated damages (*51 Cal. 3d 701, 709)* .

The Supreme Court said that *Crestwood Lumber Co.* erred in holding the transaction to be a cash sale; it was not; it was a credit sale, as was this transaction (*51 Cal. 3d 701, 708)* . A cash sale is one in which the buyer and the seller exchange the goods and payment at the same time; any other method of payment is "on credit." This was a credit sale because payment was to be made within a certain number of days after delivery of the pipe. If payment was not made by that date, then finance charges would accrue. There was no forbearance. A forbearance is giving further time for payment of a debt or an agreement not to insist on payment at the due date. If the invoices truly constituted an agreement to give further time for payment in exchange for an 18 percent surcharge on the principal, then the buyer could conceivably forbear ad infinitum, so long as the finance charge was paid, and the creditor could never recover the principal. The creditor would never be able to sue to collect the money past due because it was receiving consideration for its agreement to forbear (*51 Cal. 3d 701, 708)* .

Plaintiff in ***O'Connor v. Televideo System, Inc.*** *(1990) 218 Cal. App. 3d 709, 267 Cal. Rptr. 237* , was the assignee of a company that performed computer circuit board assembly for defendant. When the work was complete, the company would send defendant invoices that stated the amount due should be paid within 30 days and provided that "All past due accounts are subject to a late charge of 1 1/2% per month or 18% per annum." The company filed a complaint for damages, account stated, goods sold and delivered, and open book account. The complaint alleged that defendant was indebted to plaintiff in the amount of $128,401.92 plus interest at the rate of 1.5 percent per month. The matter was triedwithout a jury, and the court found that defendant owed $43,800 for assembly work, that the parties had agreed to a charge of 1.5 percent per month on the amounts past due, that the interest charge was reasonable, and that plaintiff was entitled to collect it. Defendant filed a request for statement of decision to determine whether the finance charges assessed on the unpaid debt were usurious and barred by California law. The trial court concluded that the finance charge represented a "time-price" differential, agreed to by the parties, that the charge was commercially reasonable, and that it was consistent with the existing practice between the parties. The amended judgment was for $43,800 along with finance charges at 18 percent per annum totaling $21,024. Defendant appealed.

The court of appeal affirmed, holding that the charge was not usurious but instead constituted a valid liquidated damages provision (*218 Cal. App. 3d 709, 713, 719)* . The court defined usury as the exacting, taking, or receiving of a greater rate than is allowed by law, for the use of loan of money. A transaction is usurious if there is a loan at greater than the legal rate of interest or an exaction at more than the legal rate for the forbearance of a debt or sum of money due. A loan of money is a contract by which one delivers a sum of money to another, and the latter agrees to return at a future time a sum equivalent to that which he or she borrowed [*Civ. Code § 1912*]. A forbearance is the giving of further time for the payment of a debt or an agreement not to insist on payment at the due date. Both a loan of money and a forbearance are to be distinguished from a sale, which is the transfer of property in a thing for a price in money. To determine whether a transaction is usurious, one must look to the substance rather than the form of the transaction (*218 Cal. App. 3d 709, 713)* .

One principle that may render the usury laws inapplicable is that a debtor by his or her voluntary act cannot render an otherwise valid transaction usurious. If the excessive interest is caused by a contingency under the lender's control, or not under the borrower's control, the transaction is usurious, but not when the contingency is under the borrower's control (*218 Cal. App. 3d 709, 714)* .

Another exception to the usury law is the "time-price" doctrine. This doctrine applies when property is sold on credit as an advance over the cash price. In these circumstances, the seller finances the purchase of property by extending payments over time. This type of transaction, often called a bona fide credit sale, is not subject to the usury law, because it does not involve a loan or forbearance (*218 Cal. App. 3d 709, 714)* . The court discussed *Fox v. Federated Department Stores, Inc. (1979) 94 Cal. App. 3d 867, 156 Cal. Rptr. 893* (discussed in *§ 121.37[3][d]*), which held that retail revolving charge accounts were bona fide sales of goods to which the time-price doctrine applied, and *Crestwood Lumber Co. v. Citizens Sav. & Loan Assn. (1978) 83 Cal. App. 3d 819, 148 Cal. Rptr. 129* , and *Mark McDowell Corp. v. LSM 128 (1989) 214 Cal. App. 3d 1427, 263 Cal. Rptr. 310* , both of which involved commercial transactions and both of which held an 18 percent per annum charge on past due installments to be usurious (*218 Cal. App. 3d 709, 714-716*). The court declined to follow *Crestwood Lumber Co.* and *Mark McDowell Corp.* for several reasons. First, neither considered the principle that a transaction not usurious at its inception cannot become usurious by virtue of the debtor's voluntary default (*218 Cal. App. 3d 709, 716-717)* . Second, the charge was not usurious, because there was no forbearance. The quoted portion of the contract did not constitute a forbearance because the company did not agree to forgo its right to collect the money immediately; it only stated that a penalty would be imposed if it was made to wait for payment (*218 Cal. App. 3d 709, 717)* . Third, the court did not believe, as had *Crestwood Lumber Co.* and *Mark McDowell Corp.*, that *Fox* was distinguishable because it involved transactions subject to the Unruh Act (*Civ. Code § 1801 et seq.*) (*218 Cal. App. 3d 709, 717-718)* . Finally, the court noted that the purpose of the usury law supported its conclusion that the transaction was not usurious. The usury laws were enacted primarily to protect the indigent, who are helpless to protect themselves in a practical sense. That is not the situation in this case, involving two companies of relatively equal bargaining power, evidently dealing at arm's length, and freely agreeing to an invoice form that is

commonplace in these types of transactions. Thus, the court concluded that the transaction was not usurious, because (1) it was not usurious at its inception but only became so if the debtor did not make timely payment and (2) there was no forbearance as required by *Cal. Const., Art. XV, § 1* (*218 Cal. App. 3d 709, 718)* .

[c] Charge as Liquidated Damages

The facts and procedural background of ***O'Connor v. Televideo System, Inc.*** *(1990) 218 Cal. App. 3d 709, 267 Cal. Rptr. 237* , are discussed in *§ 121.37[3][b]*. Defendant also argued that the finance charge was an invalid liquidated damage provision or penalty within the meaning of *Civ. Code § 1671* and former Com. Code § 2718. *Civ. Code § 1671(b)* states that a provision in a contract liquidating damages for the breach of the contract is valid unless the party seeking to invalidate it establishes that the provision was unreasonable under the circumstances existing at the time the contract was made. Former Com. Code § 2718(1) provided that damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of the proof of loss, and the inconvenience of no feasibility of otherwise obtaining an adequate remedy. Read together, it is clear that defendant must establish that the charge was unreasonable before the court could conclude that it should be invalidated. However, the court said, the defendant wholly failed to establish that the charge was unreasonable under the circumstances existing at the time the contract was made. Moreover, the trial court in its statement of decision expressly found that the charge was reasonable under the circumstances and had been agreed to by both parties to the contract (*218 Cal. App. 3d 709, 718)* . Their agreement is also established by *Com. Code § 2207,* which provides that additional terms become part of the contract between merchants unless the person receiving them objects. Accordingly, the 18 percentcharge constituted a valid liquidated damage provision (*218 Cal. App. 3d 709, 719)* .

The facts and procedural background of ***Fox v. Federated Department Stores,*** *Inc. (1979) 94 Cal. App. 3d 867, 156 Cal. Rptr. 893* , are discussed in *§ 121.37[3][d]*. In the case of oil company accounts that were not revolving, that is, that required the bill to be paid when rendered and imposed finance charges only if the customer failed to pay the bill within 25 days of receipt, plaintiffs also challenged the charges as invalid liquidated damages. The court distinguished *Garrett v. Coast & Southern Federal Savings (1973) 9 Cal. 3d 731, 108 Cal. Rptr. 845, 511 P.2d 1197* , on which plaintiffs relied, noting that the charge in that case was unreasonable because it was 2 percent of the unpaid mortgage principal, most of which was not due, whereas, there was uncontradicted evidence that the oil company's credit card operations incurred substantial losses, that delinquent accounts cost a substantial amount to process, that the 1.5 percent finance charge does not cover the extra expense, and that it would be impracticable, extremely difficult, and expensive to attempt to determine the actual damage the oil company suffered as a result of a customer's default, and that the late charge represents a reasonable endeavor to fix the amount of the oil company's loss (*94 Cal. App. 3d 867, 885)* .

[d] Finance Charge in Retail Installment Account

Fox v. Federated Department Stores, Inc. *(1979) 94 Cal. App. 3d 867, 156 Cal. Rptr. 893* , represented 11 consolidated class actions challenging as usurious the finance charges imposed by defendants on retail installment accounts. Defendants were retail stores and oil companies. The retail store accounts were admittedly subject to the Unruh Act (*Civ. Code § 1801 et seq.*), and the rates charged on those accounts were within the limits set by the Unruh Act. Thus, the challenge to those accounts was made on the ground that the Unruh Act was unconstitutional as violative of the usury provision [*see* Cal. Const., art. XV]. Judgment was for defendants, and plaintiffs appealed.

The court of appeal affirmed, agreeing with the trial court that the usury provision is inapplicable to finance charges on retail installment accounts because those "retail installment sales" are not loans or forbearances within the meaning of the usury provision (*94 Cal. App. 3d 867, 872, 874)* . The oil company accounts also were held to be retail installment sales subject to the Unruh Act and the charges were within the limits allowed by that act (*94 Cal. App. 3d 867, 884)* . The store accounts were called "retail installment accounts" or revolving accounts. The account is established in a single agreement between the store and the customer without a down payment. It permits the customer to make continuing

credit purchases from time to time without having to enter into a new contract on the occasion of each purchase. The agreement provides for minimum monthly installment payments, but the customer has the option of making payments in excess of the minimum monthly amount at any time. The account carries a "finance charge" as defined in *Civ. Code § 1802.10*, which is not precomputed, but is periodically calculated on the monthly balances (*94 Cal. App. 3d 867, 875)* .

The court discussed the origin and history of the "time-price" doctrine, which was first enunciated in England in 1774 and first announced in this country in 1861. California's first usury law was enacted in 1918. In 1927, the *Supreme Court in Verbeck v. Clymer (1927) 202 Cal. 557, 261 P. 1017* , adopted the time-price doctrine, describing it as applicable to a bona fide sale in which the purchase price is named and the terms of sale are fixed and certain deferred payments are provided for. There is no element of loan, nor is the transaction a subterfuge devised to conceal what is in fact a loan (*94 Cal. App. 3d 867, 876)* .

The court then discussed the history and legislative intent of the Unruh Act, which was first adopted in 1959, and traced the terminology used in the original act [*see* former Civ. Code §§ 1802.9, *1802.10* ("time sale price"; "service charge" is synonymous with "time price differential")] (*94 Cal. App. 3d 867, 878-880)* . The court concluded that the revolving charge accounts are validly classified as subject to the time-price doctrine, are not loans or forbearance of money, are not subject to the usury law, and that the act is constitutional (*94 Cal. App. 3d 867, 880)* .

With respect to the oil company accounts, the court held that the fact that the sales were made by independent retailers while the credit cards were issued by the oil companies did not prevent application of the time-price doctrine to the transactions (*94 Cal. App. 3d 867, 882-884)* . In the case of oil company accounts that were not revolving, that is, that required the bill to be paid when rendered, and imposed finance charges only if the customer failed to pay the bill within 25 days of receipt, the court applied the rule that a transaction not usurious at its inception does not become usurious by virtue of a finance charge levied because of the customer's voluntary act in failing to make payment when due (*94 Cal. App. 3d 867, 884)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment InterestGeneral OverviewCivil ProcedureRemediesJudgment InterestPrejudgment InterestContracts LawDefensesUsuryContracts LawRemediesLiquidated Damages

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12-121 California Points & Authorities § 121.38

§ 121.38 Supporting Contention That Prejudgment Interest Should Be Awarded--Absence of Prayer for Interest as Not Precluding Prejudgment Interest

[1] FORM

[*The following may be included, along with additional points, in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF IS ENTITLED TO RECOVER PREJUDGMENT INTEREST DESPITE THE ABSENCE OF A PRAYER FOR INTEREST.

Absence of Prayer for Interest as Not Precluding Prejudgment Interest. If the plaintiff in a contested action is entitled to interest, the court may award interest even though the complaint contains no prayer for interest (*Sanders v. City of Los Angeles (1970) 3 Cal. 3d 252, 263, 90 Cal. Rptr. 169, 475 P.2d 201* ; *see* *Lakin v. Watkins Associated Industries (1993) 6 Cal. 4th 644, 662 n.12, 25 Cal. Rptr. 2d 109, 863 P.2d 179*).

[Plaintiff should include additional points, such as those set forth in *§§ 121.30 -121.34*, *121.39 -121.43*, and *121.46*, which specifically apply to the facts of the case and support plaintiff's right to prejudgment interest].

[2] Comments

[a] Use of Form

This form may be submitted in support of a party's contention that prejudgment interest should be awarded despite the absence of a prayer for interest. This form should ordinarily be combined with additional points, such as the ones set forth in *§§ 121.30 -121.34*, *121.39 -121.43*, and *121.46*, that specifically apply to the facts of the case and support plaintiff's right to prejudgment interest.

This form may be combined, if appropriate, with points relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of prejudgment interest. The issue is most likely to arise on a motion for a new trial on the ground of inadequate damages [*Code Civ. Proc. § 657(5)*; *see generally* Ch. 64, *Damages: Tort* and Ch. 65, *Damages: Contract*] or a motion to vacate the judgment [*Code Civ. Proc. § 663*; *see generally* Ch. 155, *Motions*

After Trial]. The points set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the point of law stated.

[3] Discussion of Authorities

[a] Absence of Prayer for Interest as Not Precluding Prejudgment Interest

Sanders v. City of Los Angeles *(1970) 3 Cal. 3d 252, 90 Cal. Rptr. 169, 475 P.2d 201* , was an action by city employees seeking retroactive salary and wage increases. The superior court ordered that defendants pay certain salary and wage increases retroactively and, despite the absence of a prayer in the complaint for interest, prejudgment interest.

In affirming the order appealed from, the Supreme Court held that an action to recover retroactive pay increases is an action for damages within the meaning of *Civ. Code § 3287* and that in this case the damages were capable of being made certain before judgment. Furthermore, the Court held, in a contested action interest may be awarded if the plaintiff is entitled thereto, even though the complaint contains no prayer for interest (*3 Cal. 3d 252, 262-263)* .

The issues before the California Supreme Court in ***Lakin v. Watkins Associated Industries*** *(1993) 6 Cal. 4th 644, 25 Cal. Rptr. 2d 109, 863 P.2d 179* included a claim for prejudgment interest under *Civ. Code § 3291* (prejudgment interest allowed if plaintiff obtains more favorable judgment than offer to compromise under *Code Civ. Proc. § 998*). The court of appeal, in reaching the merits of the claim, had preliminarily held that *Civ. Code § 3291* does not require a plaintiff to demand prejudgment interest in the complaint (*6 Cal. 4th 644, 650)* . In similarly reaching the merits, the Supreme Court noted that the court of appeals had necessarily decided the procedural issue regarding the necessity of a prayer for prejudgment interest before proceeding on the merits (*6 Cal. 4th 644, 662 n.12*). In that the Supreme Court remanded the case for recomputation of prejudgment interest (*6 Cal. 4th 644, 662*), the case implicitly supports the appellate court holding that no prayer is required.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedureRemediesJudgment InterestGeneral OverviewCivil ProcedureRemediesJudgment InterestPrejudgment Interest

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12-121 California Points & Authorities § 121.39

§ 121.39 Supporting Contention That Prejudgment Interest Should Be Awarded--Accepting Payment of Principal as Waiving Claim to Interest Only When Parties Dealing at Arm's Length

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF IS ENTITLED TO RECOVER PREJUDGMENT INTEREST DESPITE PLAINTIFF'S ACCEPTANCE OF PAYMENT OF PRINCIPAL BECAUSE THE PARTIES WERE NOT DEALING AT ARM'S LENGTH.

Accepting Payment of Principal as Waiving Claim to Interest Only When Parties Dealing at Arm's Length. The principle embodied in *Section 3290 of the Civil Code* that accepting payment of the whole principal, as such, waives all claim to interest is a rule of construction to be applied between parties dealing at arm's length, when their agreement is to be inferred from the fact that principal is tendered and accepted. This rule cannot be invoked when the conditions of payment are such that the creditor has no opportunity to assert his or her claim for interest at the time of payment because of the inequality of bargaining positions of the parties (*Mitchell v. City of Los Angeles (1966) 239 Cal. App. 2d 618, 630, 49 Cal. Rptr. 13* ; *McConnell v. Pacific Mutual Life Ins. Co. (1962) 205 Cal. App. 2d 469, 482-483, 24 Cal. Rptr. 5*).

[2] Comments

[a] Use of Form

This form may be submitted in support of plaintiff's contention that his or her right to prejudgment interest was not waived by acceptance of payment of the principal because the parties were not dealing atarm's length. The contention supported by this memorandum is most likely to be raised by plaintiff in a contract action in which the defendant has paid the principal allegedly owing.

This form may be combined, if appropriate, with points relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of prejudgment interest. The issue is most likely to arise on a motion for a new trial on the ground of inadequate damages [*Code Civ. Proc. § 657(5)*; *see generally* Ch. 64, *Damages: Tort* and Ch.

65, *Damages: Contract*] or a motion to vacate the judgment [*Code Civ. Proc. § 663*; see Ch. 155, *Motions After Trial*]. The points set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should specifically demonstrate that the parties were not dealing at arm's length and that plaintiff lacked the opportunity or bargaining power to assert his or her claim to interest at the time that defendant made the payment of principal.

[b] Opposing Memoranda

The memoranda set out in *§§ 121.48* and *121.49* may be used in an appropriate case to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Accepting Payment of Principal as Waiving Claim to Interest Only When Parties Dealing at Arm's Length

Mitchell v. City of Los Angeles (1966) 239 Cal. App. 2d 618, 49 Cal. Rptr. 13 , was a consolidated action commenced by retired fire and police department pensioners and widows of pensioners against a city and its board of pension commissioners to determine pension rights and benefits affecting them.

Following the initial judgment in a related case, the defendant sent plaintiffs checks accompanied by a notice informing the recipients that they could either accept or reject the checks; however, under *Civ. Code § 3290*, accepting the check meant waiver of any claim to interest (*239 Cal. App. 2d 618, 629)* .

In reversing the judgment solely for the purpose of making a proper computation of the interest, the court of appeal stated that the trial court correctly held that *Civ. Code § 3290* was never intended to authorize a forced election in instances involving parties whose relationships were of the type here presented. For public officials to threaten to withhold the payment of funds which they concede are due and owing to pensioners unless the latter forfeit other sums to which they are entitled, or their claim thereto, is not in accord with the duties and obligations of such officials (*239 Cal. App. 2d 618, 630)* .

McConnell v. Pacific Mutual Life Ins. Co. *(1962) 205 Cal. App. 2d 469, 24 Cal. Rptr. 5* , was an appeal from an order of the superior court instructing the Insurance Commissioner, as liquidator of the insolvent Pacific Mutual Life Insurance Company of California, regarding the payment of interest on claims for damages payable to those holders of noncancellable disability insurance policies who declined to accept reinsurance in the reorganized company (*205 Cal. App. 2d 469, 471)* . Defendant contended that plaintiffs' acceptance of payment clearly designated as a payment of principal in full was a waiver of their right to interest (*205 Cal. App. 2d 469, 482)* .

The court of appeal rejected this contention, stating instead that *Civ. Code § 3290* (providing that accepting payment of the whole principal, as such, waives all claim to interest) is a rule of construction to be applied between parties dealing at arm's length, when their agreement is to be inferred from the fact that principal is tendered and accepted. This rule cannot be invoked, however, when the conditions of payment are such that the creditor has no opportunity to assert his or her claim for interest at the time of payment (*205 Cal. App. 2d 469, 482-483)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment InterestGeneral OverviewCivil ProcedureRemediesJudgment InterestPrejudgment InterestContracts LawContract Conditions & ProvisionsWaiversGeneral Overview

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12-121 California Points & Authorities § 121.40

§ 121.40 Supporting Contention That Prejudgment Interest Should Be Awarded--Accepting Payment of Principal as Not Waiving Claim to Interest Due Under Contract

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF IS ENTITLED TO RECOVER INTEREST DESPITE PLAINTIFF'S ACCEPTANCE OF PAYMENT OF PRINCIPAL BECAUSE SUCH INTEREST IS DUE UNDER THE CONTRACT BETWEEN THE PARTIES.

Accepting Payment of Principal as Not Waiving Claim to Interest Due and Payable Under Contract. The provision set forth in *Section 3290 of the Civil Code* that accepting payment of the whole principal, as such, waives all claim to interest applies only to situations in which interest is claimed as damages for nonpayment or default payment of a debt. It does not apply to situations in which the interest claimed is part of the debt, that is, when the claim is based on a contract, express or implied, to pay interest (*Kawasho Internat. (U.S.A.), Inc. v. Lakewood Pipe Service, Inc. (1984) 152 Cal. App. 3d 785, 794, 201 Cal. Rptr. 640*).

[2] Comments

[a] Use of Form

This form may be submitted in support of plaintiff's contention that his or her right to interest was not waived by acceptance of thepayment of the principal because such interest is not claimed as damages but has accrued under the terms of a contract between the parties. The contention supported by this form is most likely to be raised by plaintiff in a contract action in which the defendant contends that the whole principal owing has been paid.

This form may be combined, when appropriate, with points relating to the specific procedural context in which counsel wishes to raise the issue, as, for example, on a motion for a new trial on the ground of inadequate damages [*Code Civ. Proc. § 657(5)*]. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the point of law

stated. Thus, counsel should specifically demonstrate that the interest is claimed not as damages but as a debt accrued under a contract provision, express or implied, to pay interest, which remains owing notwithstanding payment of the principal obligation.

[b] Opposing Memoranda

The memoranda set out in *§§ 121.48* and *121.49* may be used in an appropriate case to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Accepting Payment of Principal as Not Waiving Claim to Interest Due and Payable Under Contract

Kawasho Internat. (U.S.A.), Inc. v. Lakewood Pipe Service, Inc. *(1984) 152 Cal. App. 3d 785, 201 Cal. Rptr. 640* , was a contract action in which plaintiff sought to recover sums allegedly owed by defendant, who had paid the principal amounts owed under the contract but had not paid the interest accrued under the contract because of defendant's delinquent payments of the principal. Defendant appealed the judgment in plaintiff's favor and argued, inter alia, that plaintiff had waived all claim to interest under *Civ. Code § 3290* by accepting payment of the principal amounts.

The court of appeal affirmed. In rejecting defendant's contention, the court held that *Civ. Code § 3290* applied only to situations in which interest is claimed as damages for nonpayment or default in payment of a debt, and not when the interest is claimed, as here, as part of the debt, on the basis of a contract, express or implied, to pay interest (*152 Cal. App. 3d 785, 794)* . The court reasoned that interest due under a contract obligation to pay interest is a part of the debt, becoming an accretion to the principal. Thus any payment less than the aggregate of the principal and accrued interest is merely a payment on account and does not extinguish the right to interest on the principal (*152 Cal. App. 3d 785, 795)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment InterestGeneral OverviewCivil ProcedureRemediesJudgment InterestPrejudgment InterestContracts LawRemediesCompensatory DamagesInterest

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12-121 California Points & Authorities § 121.41

§ 121.41 Supporting Contention That Prejudgment Interest Should Be Awarded--Inclusion of Interest in Judgment as Not Granting Damages in Excess of Loss

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF IS ENTITLED TO RECOVER PREJUDGMENT INTEREST AS PART OF HIS/HER/ITS COMPENSATORY DAMAGES BECAUSE PREJUDGMENT INTEREST IS MERELY COMPENSATION FOR LOSS OF USE OF MONEY.

Inclusion of Interest in Judgment as Not Granting Damages in Excess of Loss. The inclusion of interest in a verdict is not the granting of damages in excess of the loss incurred; it is simply a recognition that one of the elements of direct loss suffered by a party deprived of the use of his or her money or other property is the value of its use, which in the case of money is interest at the legal rate (*see Civ. Code §§ 1915, 3302*; *Prob. Code §§ 16440, 16441*; *Nordahl v. Department of Real Estate (1975) 48 Cal. App. 3d 657, 665-666, 121 Cal. Rptr. 794*).

[Plaintiff should include additional points, such as those set forth in *§§ 121.30 -121.39*, 9, 10, and 20, which specifically apply to the facts of the case and support plaintiff's right to prejudgment interest].

[2] Comments

[a] Use of Form

This form may be submitted in support of a party's contention that prejudgment interest should be awarded and that the inclusion of interest in the judgment is not the awarding of damages in excess of the loss. This form should ordinarily be combined with additional points, such as the ones set forth in *§§ 121.30 -121.39*, *121.42*, *121.43*, and *121.46*, which specifically apply to the facts of the case and support plaintiff's right to prejudgment interest.

This form may be combined, when appropriate, with points relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of prejudgment interest. The issue is most likely to arise on a motion for a new

trial on the ground of inadequate damages [*Code Civ. Proc. § 657(5)*] or a motion to vacate the judgment [*Code Civ. Proc. § 663*; *see* Ch. 155, *Motions After Trial* ; *see also* Ch. 64, *Damages: Tort* and Ch. 65, *Damages: Contract*]. The points set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship betweenthe facts of the case and the point of law stated. Thus, counsel should include discussion of the loss suffered by plaintiff by being deprived of the use of his or her money.

[3] Discussion of Authorities

[a] Inclusion of Interest in Judgment as Not Granting Damages in Excess of Loss

Civ. Code § 1915 defines interest as the compensation allowed by law or fixed by the parties for the use, or forbearance, or detention of money.

Civ. Code § 3302 provides that the detriment caused by the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation, with interest.

Prob. Code § 16440(a) provides that if the trustee commits a breach of trust, the trustee is chargeable with any of the following that is appropriate under the circumstances: (1) any loss or depreciation in value of the trust estate resulting from the breach of trust, with interest; (2) any profit made by the trustee through the breach of trust, with interest; (3) any profit that would have accrued to the trust estate if the loss of profit is the result of the breach of trust. If the trustee has acted reasonably and in good faith under the circumstances as known to the trustee, the court, in its discretion, may excuse the trustee in whole or in part from liability under *Prob. Code § 16440(a)* if it would be equitable to do so [*Prob. Code § 16440(b)*]. If the trustee is liable for interest pursuant to *Prob. Code § 16440*, the trustee is liable for the greater of either the amount of interest that accrues at the legal rate on judgments, or the amount of interest actually received [*Prob. Code § 16441*].

In ***Nordahl v. Department of Real Estate*** *(1975) 48 Cal. App. 3d 657, 121 Cal. Rptr. 794* , plaintiff received a judgment for $7,500 plus prejudgment interest against a licensed real estate broker who had misappropriated plaintiff's money. After application by plaintiff pursuant to *Bus. & Prof. Code § 10471*, the trial court ordered payment of the judgment out of the Real Estate Education, Research and Recovery Fund. The Department of Real Estate appealed, contending that the trial court erred in ordering the commissioner to pay prejudgment interest.

In affirming the trial court's decision, the court of appeal held that the inclusion of interest in the verdict pursuant to *Civ. Code § 3288* was not the granting of damages in excess of the loss incurred. The court noted that when, by virtue of the fraud or breach of fiduciary duty of defendant, a plaintiff has been deprived of the use of his money or property and is obliged to resort to litigation to recover it, the inclusion of interest in the award is necessary in order to make plaintiff whole. For this reason, it is proper to have such interest run from the time plaintiff parted with the money or property on the basis of defendant's fraud. The reason interest runs from the time the plaintiff pays money to the fraudulent defendant is that if interest were not so paid, plaintiff would not be fully compensated for his or her loss. The Civil Code provisions authorizing interest under these circumstances are simply a recognition that one of the elements of direct loss suffered by a party deprived of the use of his or her money or other property is the value of its use, which in the case of money is interest at the legal rate (*48 Cal. App. 3d 657, 665-666)* .

[4] Additional Authorities

[a] Inclusion of Interest in Judgment as Not Granting Damages in Excess of Loss

See *Bronco Wine Co. v. Frank A. Logoluso Farms (1989) 214 Cal. App. 3d 699, 262 Cal. Rptr. 899* , discussed in *§ 121.42[4]*.

In *Gherman v. Colburn (1977) 72 Cal. App. 3d 544, 140 Cal. Rptr. 330* , plaintiffs obtained a judgment, including prejudgment interest, against defendants who had allegedly converted joint venture assets. On appeal, defendants contended the inclusion of prejudgment interest is precluded by *Civ. Code § 3358*, which prohibits the recovery of a greater amount in damages for the breach of an obligation than would have been gained by the full performance. In rejecting this argument the court of appeal held that *Civ. Code § 3358* was not intended to exclude interest awardable under *Civ. Code § 3288* (*72 Cal. App. 3d 544, 590)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment InterestGeneral OverviewCivil ProcedureRemediesJudgment InterestPrejudgment InterestContracts LawRemediesCompensatory DamagesInterest

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12-121 California Points & Authorities § 121.42

§ 121.42 Supporting Contention That Prejudgment Interest Should Be Awarded--Interest on Judgments as Part of Damages, Not Penalty

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF IS ENTITLED TO RECOVER PREJUDGMENT INTEREST AS AN ASPECT OF COMPENSATORY DAMAGES AND NOT AS A PENALTY.

Interest on Judgments as Part of Damages, Not Penalty. Interest on judgments is awarded to compensate a party for the loss of use of his or her property and not as a penalty (*see Bullis v. Security Pac. Nat. Bank (1978) 21 Cal. 3d 801, 815, 148 Cal. Rptr. 22, 582 P.2d 109* ; *Harland v. State of California (1979) 99 Cal. App. 3d 839, 847, 160 Cal. Rptr. 613*).

[Plaintiff should include additional points, such as those set forth in *§§ 121.30*-121.41, *121.43* and *121.46*, which specifically apply to the facts of the case and support plaintiff's right to prejudgment interest].

[2] Comments

[a] Use of Form

This form may be submitted in support of a party's contention that prejudgment interest should be awarded and that the inclusion of such interest in the judgment is not a penalty. This form should ordinarily be combined with additional points, such as the ones set forth in *§§ 121.30*-121.41, *121.43*, and *121.46*, which specifically apply to the facts of the case and support plaintiff's right to prejudgment interest.

This form may be combined, when appropriate, with points relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of prejudgment interest. The issue is most likely to arise on a motion for a new trial on the ground of inadequate damages [*Code Civ. Proc. § 657(5)*] or a motion to vacate the judgment [*Code Civ. Proc. § 663*; *see* Ch. 155, *Motions After Trial* ; *see also* Ch. 64, *Damages: Tort* and Ch. 65, *Damages: Contract*

]. The points set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should include discussion of the loss suffered by plaintiff by being deprived of the use of his or her money.

[3] Discussion of Authorities

[a] Interest on Judgments as Part of Damages, Not Penalty

Bullis v. Security Pac. Nat. Bank *(1978) 21 Cal. 3d 801, 148 Cal. Rptr. 22, 582 P.2d 109* , which is also discussed in *§ 121.33[3][a]*, was an action commenced by heirs of an estate to collect damages from a bank that negligently allowed money to be misappropriated from the estate. The trial court awarded damages, plus prejudgment interest running from the time of each unauthorized withdrawal.

On appeal the bank contended, among other things, that the trial court abused its discretion when it awarded prejudgment interest, pursuant to *Civ. Code § 3288*, calculated from the date of withdrawal. In affirming the judgment, the Supreme Court held that this negligence action was within the purview of *Civ. Code § 3288* and that the decision to award prejudgment interest may not be overturned unless the trial court abused its discretion.

The Court explained that under *Civ. Code § 3288*, the trier of fact, whether it be the judge or the jury, may award prejudgment interest in an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice. A party does not have to prove both a breach of a noncontractual obligation and oppression, fraud, or malice. Moreover, prejudgment interest may be awarded even if plaintiff's damages are not liquidated. Prejudgment interest is awarded to compensate a party for the loss of the use of his or her property. Since, in this case, the estate was deprived of the use of $250,000 for several years because of defendant's negligence, and since the date of each unauthorized withdrawal was readily ascertainable, it was not an abuse of discretion for the trial judge to award prejudgment interest (*21 Cal. 3d 801, 814-815)* .

In ***Harland v. State of California*** *(1979) 99 Cal. App. 3d 839, 160 Cal. Rptr. 613* , plaintiffs obtained a sizeable award against the state for personal injuries and wrongful death. Following the affirmance of the judgment on appeal, the state paid the judgment but refused to pay interest. The trial court then issued an order, following plaintiff's motion, establishing the amount of accrued interest. The instant decision stemmed from the state's appeal of this order.

In affirming the trial court's award of interest on a judgment against the state, the court of appeal first noted that *Cal. Const., Art. XV, § 1*, applies to a judgment rendered in any court of this state and contains no exceptions for the state or any other class of defendant (*99 Cal. App. 3d 839, 842)* . In response to the state's argument that imposing interest on a judgment against the state would be an inappropriate penalty, the court of appeal held that interest is not awarded as a penalty for nonpayment while a party seeks appellate review of a judgment. Interest is awarded because the party who has retained the money has had its use and benefit while the party who has been entitled to the money has been deprived of the opportunity to use it (*99 Cal. App. 3d 839, 847)* .

[4] Additional Authorities

In *Bronco Wine Co. v. Frank A. Logoluso Farms (1989) 214 Cal. App. 3d 699, 262 Cal. Rptr. 899* , the court of appeal affirmed an award of interest, as provided by the contract in question, on late payments. An administrative award concerning the same defaults in payment for grapes included statutory penalties pursuant to *Food & Agric. Code § 55881*. Defendant contended that penalties and interest could not both be assessed against it because they were duplicative and it would be unfair. The court of appeal disagreed, noting that interest is a form of compensation used to restore plaintiff for moneys that have been unavailable for a business or investment. Its purpose differs from that of a

late fee or penalty. In addition, *Food & Agric. Code § 55437* provided that the penalty was cumulative and in addition to any other right, remedy, or penalty (*214 Cal. App. 3d 699, 714)* . Thus, both interest and statutory late penalties could be awarded incident to the same principal breach (*214 Cal. App. 3d 699, 715)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment InterestGeneral OverviewCivil ProcedureRemediesJudgment InterestPrejudgment InterestContracts LawRemediesCompensatory DamagesInterestTortsDamagesInterestPrejudgment Interest

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12-121 California Points & Authorities § 121.43

§ 121.43 Supporting Contention That Prejudgment Interest Should Be Awarded--Prejudgment Interest in Personal Injury Action From Date of Plaintiff's Offer to Compromise Pursuant to Code Civ. Proc. § 998 [Civ. Code § 3291]

[1] FORM

[*The following may be included in a memorandum or in a trial or appellate brief.*]

PLAINTIFF IS ENTITLED TO PREJUDGMENT INTEREST AT THE RATE OF 10 PERCENT PER ANNUM CALCULATED FROM _____, THE DATE OF PLAINTIFF'S FIRST OFFER TO COMPROMISE PURSUANT TO SECTION 998 OF THE CODE OF CIVIL PROCEDURE THAT IS EXCEEDED BY THE JUDGMENT.

A. Prejudgment Interest in Personal Injury Action From Date of Plaintiff's Offer to Compromise Pursuant to *Code Civ. Proc. § 998*. In any action brought to recover damages for personal injury, if the plaintiff makes an offer to compromise pursuant to *Section 998 of the Code of Civil Procedure* that the defendant does not accept prior to trial or within 30 days, whichever occurs first, and the plaintiff obtains a more favorable judgment, the judgment must bear interest at the legal rate of 10 percent per annum calculated from the date of the plaintiff's first offer pursuant to *Section 998 of the Code of Civil Procedure* that is exceeded by the judgment (*Civ. Code § 3291*).

[*Optional*] **B. Prejudgment Interest in Action for Personal Injuries Resulting From Strict Liability.** An award of prejudgment interest is authorized under *Section 3291 of the Civil Code* when an action for personal injuries is based on strict liability (*see Fortman v. Hemco (1989) 211 Cal. App. 3d 241, 261-262, 259 Cal. Rptr. 311*).

C. Mandatory Award of Prejudgment Interest. An award of prejudgment interest pursuant to *Civil Code Section 3291* is mandatory, and such interest must be awarded if the statutory prerequisites are met (*Morin v. ABA Recovery Service (1987) 195 Cal. App. 3d 200, 205-207, 240 Cal. Rptr. 509*).

[*Optional*] **D. Prejudgment Interest When Plaintiff Makes Multiple *Code Civ. Proc. § 998* Offers.** When a personal injury plaintiff tenders successive unaccepted *Code of Civil Procedure Section 998* offers and subsequently recovers a

judgment in excess of any of the offers, the prejudgment interest awarded pursuant to *Civil Code Section 3291* begins from the date of the first offer (*Ray v. Goodman (2006) 142 Cal. App. 4th 83, 87-92, 47 Cal. Rptr. 3d 659*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a plaintiff's contention that he or she is entitled to prejudgment interest. The argument supported by the memorandum should only be made in a personal injury action in which the plaintiff made an offer to compromise pursuant to *Code Civ. Proc. § 998* that was not accepted by the defendant and which was exceeded by the judgment [*Civ. Code § 3291*]. This argument should not be made when the defendant is a public entity or a public employee being sued for an act or omission within the scope of employment because *Civ. Code § 3291* specifically exempts these defendants.

These points may be combined, where appropriate, with points relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of prejudgment interest. The issue is most likely to arise on a motion for a new trial on the ground of inadequate damages [*Code Civ. Proc. § 657(5)*]; *see generally* Ch. 64, *Damages: Tort* and Ch. 65, *Damages: Contract* or a motion to vacate the judgment [*Code Civ. Proc. § 663*; *see generally* Ch. 155, *Motions After Trial*]. The points in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Opposing Memoranda

The memoranda in *§§ 121.50* and *121.55* may be used in an appropriate case to oppose the contention supported by the memorandum.

[3] Discussion of Authorities

[a] Prejudgment Interest in Personal Injury Action From Date of Plaintiff's Offer to Compromise Pursuant to Code Civ. Proc. § 998

In any action brought to recover damages for personal injury, *Civ. Code § 3291* provides that if the plaintiff makes an offer pursuant to *Code Civ. Proc. § 998* that the defendant does not accept prior to trial or within 30 days, whichever occurs first, and the plaintiff obtains a more favorable judgment, the judgment must bear interest at the legal rate of 10 percent per annum calculated from the date of the plaintiff's first offer pursuant to *Code Civ. Proc. § 998* that is exceeded by the judgment. However, prejudgment interest accrued under *Civ. Code § 3291* is not part of judgment and plaintiff cannot obtain interest on that prejudgment interest [*Hess v. Ford Motor Co. (2002) 27 Cal. 4th 516, 530-533, 117 Cal. Rptr. 2d 220, 41 P.3d 46]* . *Civ. Code § 3291* does not apply to a public entity or to a publicemployee for an act or omission within the scope of employment.

[b] Prejudgment Interest in Action for Personal Injuries Resulting From Strict Liability

Fortman v. Hemco *(1989) 211 Cal. App. 3d 241, 259 Cal. Rptr. 311* , was an action commenced by minor plaintiff against multiple defendants, including a manufacturer of fiberglass molds and cast products, to recover damages based on strict liability for extensive injuries sustained when she was ejected from her parents' Jeep after she inadvertently unlatched a rear-hinged passenger door while the vehicle was in motion. The plaintiff made an offer to the defendant manufacturer to compromise her claim pursuant to *Code Civ. Proc. § 998*, and the manufacturer declined to respond. The trial court thereafter awarded the plaintiff pretrial interest based on her offer to compromise.

On appeal, the manufacturer pointed to the language of *Civ. Code § 3291(a)*, which provides among other things that a plaintiff may resort to that section's provisions in any action brought to recover damages for personal injury sustained by any person resulting from or occasioned by the tort of any other person, whether by negligence or by willful intent of that person, and whether the injury was fatal or otherwise. The manufacturer argued that the reference to a tort "by negligence or by willful intent" excluded any award of prejudgment interest in an action based on strict liability. The court of appeal affirmed the judgment. The court stated that the purpose of the statute is to foster settlements in cases involving personal injury and that it is not a plausible interpretation of legislative intent that the Legislature meant to encourage settlements in personal injury actions based in negligence or intentional tort but not those arising from strict liability (*211 Cal. App. 3d 241, 261-262)* .

[c] Mandatory Award of Prejudgment Interest

In ***Morin v. ABA Recovery Service*** *(1987) 195 Cal. App. 3d 200, 240 Cal. Rptr. 509* , plaintiffs first offered to compromise under *Code Civ. Proc. § 998* for $24,000. After arbitration had resulted in an award of $75,000, defendant rejected paying the award and offered $40,000. Plaintiffs rejected the offer and proceeded to trial. After plaintiffs had rested, defendant offered $82,000, which was also rejected. The jury then returned a general verdict in favor of plaintiffs for a total of $67,500 compensatory and punitive damages. Plaintiffs' request for prejudgment interest under the authority of *Civ. Code § 3291* was denied by the trial court, which construed the statute as discretionary. The appellate court reversed and held that an award of prejudgment interest under the statute was mandatory if its conditions had been met, even if the defendant subsequently offers to settle for an amount in excess of that ultimately awarded in the judgment. The court recognized a certain unfairness in applying the statute to the facts of the case, but found that the statutory language, "shall bear interest," was clear and not susceptible to any other construction (*195 Cal. App. 3d 200, 205-207)* . The court went on to hold, however, that the statute, by its terms, applied only to damages recovered for personal injury. Because plaintiffs had sought recovery for both personal and economic injury, they bore the burden of proof of showing how the jury had allocated the damages awarded among the various injuries. The court stated that special jury findings should be used to determine the allocation, although the case was remanded in order to give the plaintiffs an opportunity to prove the damages allocated to personal injury by other means, if possible (*195 Cal. App. 3d 200, 207-212)* .

[d] Prejudgment Interest When Plaintiff Makes Multiple Code Civ. Proc. § 998 Offers

In ***Ray v. Goodman*** *(2006) 142 Cal. App. 4th 83, 87-92, 47 Cal. Rptr. 3d 659* , plaintiff sued two defendants after a fall on a "dangerous stairway" attached to property defendants owned. Plaintiff initially tendered a *Code Civ. Proc. § 998* offer to each defendant, offering to settle for $400,000 from each defendant. He later served a second *Code Civ. Proc. § 998* offer to settle in the total amount of $400,000. Defendants did not accept either offer. At jury trial, plaintiff was awarded over $900,000 in damages. In post-trial cost proceedings, the trial court ordered that prejudgment interest accrued from the date of the second plaintiff's *Code Civ. Proc. § 998* offer only (*142 Cal. App. 4th 83, 85-86)* .

The court of appeal reversed. Based on the legislative history of *Civ. Code § 3291*, the court held that when a personal injury plaintiff tenders successive unaccepted *Code Civ. Proc. § 998* offers and subsequently recovers a judgment in excess of any of the offers, the prejudgment interest awarded pursuant to *Civ. Code § 3291* begins from the date of the first offer (*142 Cal. App. 4th 83, 87-92)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment InterestGeneral OverviewCivil ProcedureRemediesJudgment InterestPrejudgment InterestTortsDamagesInterestPrejudgment InterestTortsDamagesInterestRates

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12-121 California Points & Authorities § 121.44

§ 121.44 Supporting Contention That Prejudgment Interest Should Be Awarded--Prejudgment Interest in Unfair Competition Action Allowed When Just Under Circumstances [Bus. & Prof. Code § 16761]

[1] FORM

[*The following may be included in a memorandum or in a trial or appellate brief.*]

PLAINTIFF IS ENTITLED TO PREJUDGMENT INTEREST AT THE RATE OF 10 PERCENT PER ANNUM FOR THE PERIOD BEGINNING ON _____ [*date*], THE DATE OF SERVICE OF THE COMPLAINT, AND ENDING ON _____ [*date*], THE DATE OF THE JUDGMENT, BECAUSE SUCH AN AWARD OF INTEREST IS JUST UNDER CIRCUMSTANCES.

A. Prejudgment Interest in Unfair Competition Actions. A person who hasrecovered damages for unfair competition pursuant to either *Section 16750* or *16760 of the Business and Professions Code* may recover prejudgment interest on the actual damages at the rate of 10 percent per annum for the period beginning on the date of the service of the complaint and ending on the date of the judgment, or for any shorter period therein, if the court finds that the award is just under the circumstances, as determined by considering only the criteria enumerated in *Section 16761 of the Business and Professions Code*, as set forth below (*Bus. & Prof. Code §§ 16750(a), 16760(a)(2), 16761*).

[*Optional*] **B. No Intent to Delay or Commit Other Acts of Bad Faith by Plaintiff.** Prejudgment interest is just under the circumstances of this case because neither plaintiff nor any representative of plaintiff made motions or asserted claims or defenses so lacking in merit as to show that plaintiff or plaintiff's representative acted intentionally for delay, or otherwise acted in bad faith (*Bus. & Prof. Code § 16761(a)*).

[*Optional*] **C. No Violation by Plaintiff of Rules Governing Dilatory Behavior or Expeditious Proceedings.** Prejudgment interest is just under the circumstances of this case because neither plaintiff nor any representative of plaintiff violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings (*Bus. & Prof. Code § 16761(b)*).

[*Optional*] **D. No Conduct by Plaintiff Primarily to Delay or Increase Cost of Litigation.** Prejudgment interest is

just under the circumstances of this case because neither plaintiff nor any representative of plaintiff engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof (*Bus. & Prof. Code § 16761(c)*).

[*Optional*] **E. Intent by Defendant to Delay or Commit Other Acts of Bad Faith.** Prejudgment interest is just under the circumstances of this case because _____ [defendant *or* a representative of defendant] made motions or asserted claims or defenses so lacking in merit as to show that _____ [defendant *or* defendant's representative] acted intentionally for delay, or otherwise acted in bad faith (*Bus. & Prof. Code § 16761(a)*).

[*Optional*] **F. Violation by Defendant of Rules Governing Dilatory Behavior or Expeditious Proceedings.** Prejudgment interest is just under the circumstances of this case because _____ [defendant *or* a representative of defendant] violated an applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings (*Bus. & Prof. Code § 16761(b)*).

[*Optional*] **G. Conduct by Defendant Primarily to Delay or Increase Cost of Litigation.** Prejudgment interest is just under the circumstances of this case because _____ [defendant or a representative of defendant] engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof (*Bus. & Prof. Code § 16761(c)*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a party's contention that prejudgment interest should be awarded in an action for unfair competition action under either *Bus. & Prof. Code § 16750* (action by individual) or *Bus. & Prof. Code § 16760* (action by Attorney General) [*see Bus. & Prof. Code § 16761*].

This form may be combined, when appropriate, with points relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of prejudgment interest. The issue is most likely to arise on a motion for a new trial on the ground of inadequate damages [*Code Civ. Proc. § 657(5)*; *see generally* Ch. 64, *Damages: Tort* and Ch. 65, *Damages: Contract*] or a motion to vacate the judgment [*Code Civ. Proc. § 663*; *see generally* Ch. 155, *Motions After Trial*]. The points set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should select the optional paragraphs in this form that are pertinent to the case. It is important to note that the criteria listed in the optional paragraphs are the only criteria that the court may consider in determining whether or not an award of prejudgment interest is just under the circumstances of the case [*see Bus. & Prof. Code § 16761*]. Thus, it may be necessary for counsel to establish at least the criteria mentioned in optional Paragraphs B through D. In addition, counsel should insert argument in this form, showing the relationship between the facts of the case and the optional paragraphs selected. For example, counsel should specify the applicable rule, statute, or court order providing for sanctions for dilatory behavior that the defendant or defendant's representative violated, or the type of conduct that the defendant or defendant's representative engaged in primarily for the purpose of delaying the litigation.

[b] Related Pleading and Practice Forms

For a discussion and forms relating to prejudgment interest in unfair competition actions, see Ch. 565, *Unfair Competition* in California Forms of Pleading and Practice.

[3] Discussion of Authorities

[a] Prejudgment Interest in Unfair Competition Actions

Bus. & Prof. Code § 16750(a) provides that any person who is injured in his or her business or property by reason of

anything forbidden or declared unlawful under the unfair competition laws [*Bus. & Prof. Code §§ 16700-16760*] may sue to recover three times the damages sustained by him or her plus interest on the actual damages pursuant to *Bus. & Prof. Code § 16761*.

Bus. & Prof. Code § 16760(a)(2) provides that in an action by the Attorney General, as parens patriae on behalf of natural person residing in the state, for injury sustained by such persons to their property by reason of any violation of the unfair competition laws [*Bus. & Prof. Code §§ 16700-16760*], the court shall award the state as monetary relief three times the total damage sustained, as described in *Bus. & Prof. Code § 16760(a)(1)*, plus interest pursuant to *Bus. & Prof. Code § 16761*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawTrade Practices & Unfair CompetitionState RegulationGeneral OverviewCivil ProcedureRemediesJudgment InterestGeneral OverviewCivil ProcedureRemediesJudgment InterestPrejudgment Interest

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12-121 California Points & Authorities § 121.45

§ 121.45 Supporting Contention That Prejudgment Interest Should Be Awarded--Conditional Tender Not Sufficient to Stop the Running of Interest [Civ. Code §§ 1494, 1504]

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF IS ENTITLED TO PREJUDGMENT INTEREST AT THE RATE OF _____ PERCENT PER ANNUM FOR THE ENTIRE PERIOD BEGINNING ON _____ [*date*], THE DATE _____ [*specify even triggering accrual of interest*, e.g., ON WHICH THE PRINCIPAL SUM BECAME OWING], BECAUSE DEFENDANT'S TENDER WAS CONDITIONED ON PLAINTIFF'S PERFORMANCE OF ACTS THAT PLAINTIFF WAS NOT OBLIGATED TO PERFORM, AND THUS DID NOT AMOUNT TOTENDER OF THE AMOUNT DEFENDANT OWED TO PLAINTIFF.

Conditional Tender Does Not Stop Running of Prejudgment Interest. In order for an offer of payment to stop the running of interest pursuant to *Section 1504 of the Civil Code*, the offer must be free from any conditions that the creditor is not bound, on his or her part, to perform (*Civ. Code § 1494*; *Klinger v. Realty World Corp. (1987) 196 Cal. App. 3d 1549, 1553-1554, 242 Cal. Rptr. 592*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a party's contention that his or her right to prejudgment interest did not cease when defendant made a conditional offer of payment. The most common type of conditional offer would be an offer to pay part of the amount owing in return for the creditor's release of any claim to the remainder. Note that this form applies even if plaintiff did not prevail at trial on the claim, or part of the claim, he or she was asked to release as part of the conditional offer [*Klinger v. Realty World Corp. (1987) 196 Cal. App. 3d 1549, 1554, 242 Cal. Rptr. 592]* . This contention will most likely by used in a case involving a contract, note, or other sum certain [*see §§ 121.30*-121.32, *121.34*, *121.35*].

This form may be combined with points relating to the specific procedural context in which counsel wishes to invoke the contention. The points may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the particular conditions to the offer of payment, establishing that plaintiff was not bound to perform them.

[b] Opposing Memoranda

The memoranda set out in *§ 121.48* may be used in an appropriate case to oppose the contention supported by this memorandum.

[3] Discussion of Authorities

[a] Conditional Tender Does Not Stop Running of Prejudgment Interest

Civ. Code § 1504 is set forth in *§ 121.48*.

Klinger v. Realty World Corp. *(1987) 196 Cal. App. 3d 1549, 242 Cal. Rptr. 592* , was an action by a franchise marketing broker against a franchisor to collect commissions on the sale of two franchises. One franchise was owned by defendant; the other was owed by a franchisee who, in light of sums found to be missing from client accounts, agreed with defendant to divest himself of that franchise. Defendant and the third party each agreed to pay plaintiff a commission for the sale of their respective franchises. Nevertheless, plaintiff demanded both commissions from defendant. About six months after the sales were negotiated, defendant offered to pay the admittedly owed commission for the franchise it sold, but only if plaintiff accepted that sum as full satisfaction of the amount demanded and released his claim for the other commission. The trial court awarded plaintiff the amount of the commission earned on the sale of defendant's franchise with prejudgment interest from the date of the sale to the date of defendant's offer. Plaintiff appealed.

The court of appeal modified the judgment to provide for interest on the commission from the date of the sale until it was paid. Defendant relied on *Civ. Code § 1504*, but the court noted that *Civ. Code § 1494* prohibits the conditioning of an offer on any conditions that the creditor is not bound to perform. The court cited several cases, including *Mission Ins. Group, Inc. v. Merco Construction Engineers, Inc. (1983) 147 Cal. App. 3d 1059, 1067, 195 Cal. Rptr. 781* , for the proposition that conditional offers are not within the purview of *Civ. Code § 1504* (*196 Cal. App. 3d 1549, 1553)* . The court said there was no legal justification for defendant's refusal to pay the sum it admittedly owed unconditionally. Nor did it matter that defendant ultimately prevailed on the merits of the claim to the second commission. By coercively tying the two sums together, defendant forfeited the right to stop interest on the commission it did owe (*196 Cal. App. 3d 1549, 1554)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment InterestGeneral OverviewCivil ProcedureRemediesJudgment InterestPrejudgment InterestContracts LawPerformanceTender & Delivery

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12-121 California Points & Authorities § 121.46

§ 121.46 Supporting Contention That Compound Prejudgment Interest Should Be Awarded--Compound Interest Allowable Against Wrongdoing Trustee

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF IS ENTITLED TO COMPOUND INTEREST UNDER SECTION 3288 OF THE CIVIL CODE BECAUSE THERE IS A SHOWING OF WRONGDOING ON THE PART OF A TRUSTEE.

Compound Interest Allowable Against Wrongdoing Trustee. Compound interest is allowable under *Section 3288 of the Civil Code*, when there is a showing of wrongdoing on the part of a trustee, whether voluntary or involuntary (*Falkner v. Hendy (1889) 80 Cal. 636, 645, 22 P 401* ; *McNulty v. Copp (1954) 125 Cal. App. 2d 697, 712, 271 P.2d 90*).

[2] Comments

[a] Use of Form

This form may be submitted in support of plaintiff's contention that compound interest should be allowed against a wrongdoing trustee. The contention supported by this form is most likely to be raised in an action based on the oppression, fraud, or malice of a defendant who occupied a position of trust with regard to plaintiff.

This form may be combined, where appropriate, with points relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of prejudgment interest. The issue is most likely to arise on a motion for a new trial on the ground of inadequate damages [*Code Civ. Proc. § 657(5)*; *see generally* Ch. 64, *Damages: Tort* and Ch. 65, *Damages: Contract*] or a motion to vacate the judgment [*Code Civ. Proc. § 663*; *see generally* Ch. 155, *Motions After Trial*]. The points set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should discuss the nature of the trust relationship between plaintiff and defendant, as well as the

oppression, fraud, or malice involved in the defendant's conduct.

[b] Opposing Memoranda

The memoranda set out in *§ 121.57* may be used in an appropriate case to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Compound Interest Allowable Against Wrongdoing Trustee

Falkner v. Hendy *(1889) 80 Cal. 636, 22 P 401* , was an action commenced by plaintiff for an accounting and to recover alleged partnership assets from his partner. The trial court entered judgment for plaintiff including interest compounded monthly to the date of the judgment. Defendant appealed, contending, among other things, that the trial court erred in allowing compound interest.

The Supreme Court found that although defendant was not a partner, he was accountable as a trustee and compound interest at legal rates may be charged against a trustee on moneys fraudulently, wrongfully or oppressively withheld (*80 Cal. 636, 645)* .

McNulty v. Copp *(1954) 125 Cal. App. 2d 697, 271 P.2d 90* , was an appeal from three separate actions involving a dispute between two sisters over division of their father's estate. The trial court found that one of the sisters, Mrs. Ahern, had been guilty of oppression, fraud, and malicious conduct regarding her occupancy, retention, and misappropriation of both real and personal property and the proceeds of insurance. As a result, the other sister, Mrs. Eldridge, was awarded damages plus prejudgment interest compounded annually.

Among the questions presented on appeal was the propriety of the award of compound interest. In affirming the portion of the judgment awarding compound interest, the court of appeal noted that *Civ. Code § 3288* allows either the jury or the judge to award interest in an action in tort in every case of oppression, fraud, or malice. The record amply supported a conclusion that Mrs. Ahern was guilty of fraud. The court of appeal held that it is proper to allow compound interest when there is a showing of wrongdoing on the part of a trustee, whether voluntary or involuntary (*125 Cal. App. 2d 697, 712)* .

[4] Additional Authorities

[a] Compound Interest Allowable Against Wrongdoing Trustee

In *In re Thompson (1894) 101 Cal. 349* , the Supreme Court approved the imposition of compound prejudgment interest against a trustee of an estate who had used money from the estate to invest for his own purposes (*101 Cal. 349, 354-355*).

Long v. Neeland (1931) 118 Cal. App 203, 4 P.2d 815 , was an action against a banker who had promised plaintiff, a personal friend, that he would invest plaintiff's money and obtain greater profit for plaintiff than if plaintiff merely deposited it in the bank. In affirming the allowance of compound interest against defendant, who had invested the money for his own benefit, the court of appeal held that the question whether interest should be compounded rests generally on the circumstances of each particular case. When it appears that the trustee has willfully omitted to invest trust funds and has used them for his or her own benefit or has failed to keep an account so that it is extremely difficult or impracticable to ascertain with any degree of certainty what profit was realized from the trust fund, compound interest should be allowed (*118 Cal. App 203, 206)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment InterestGeneral OverviewCivil ProcedureRemediesJudgment InterestPrejudgment InterestEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral Overview

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CHAPTER 121 INTEREST
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12-121 California Points & Authorities § 121.47

§ 121.47 Supporting Contention That Postjudgment Interest Must Be Awarded--Award of Postjudgment Interest Is Mandatory [Cal. Const. art. XV, § 1; Code Civ. Proc. §§ 685.010, 685.020]

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF IS ENTITLED TO POSTJUDGMENT INTEREST ACCRUING AT THE LEGAL RATE FROM _____ [THE DATE OF ENTRY OF JUDGMENT *or* THE DATE EACH UNPAID INSTALLMENT ON THEJUDGMENT BECAME DUE], UNTIL THE JUDGMENT IS SATISFIED.

A. Postjudgment Interest Is Mandatory. *California Constitution, Article XV, Section 1* does not merely set a ceiling on the postjudgment interest rate, but mandates its award (*San Francisco Unified School Dist. v. San Francisco Classroom Teachers Assn. (1990) 222 Cal. App. 3d 146, 151, 272 Cal. Rptr. 38*).

[*EITHER*]

B. Accrual of Postjudgment Interest. Interest commences to accrue on a money judgment on the date of entry of the judgment (*Code Civ. Proc. § 685.020(a)*; *Bellflower City School Dist. v. Skaggs (1959) 52 Cal. 2d 278, 280, 339 P.2d 848*).

[*OR*]

B. Accrual of Postjudgment Interest Payable in Installments. Unless the judgment otherwise provides, if a money judgment is payable in installments, interest commences to accrue as to each installment on the date the installment becomes due (*Code Civ. Proc. § 685.020(b)*).

[*CONTINUE*]

[*Optional*] **C. Accrual When Judgment Modified on Appeal.** When a judgment is modified on appeal, whether upward or downward, the new sum draws interest from the date of entry of the original judgment or order, not from the date of the new judgment (*Stockton Theatres, Inc. v. Palermo (1961) 55 Cal. 2d 439, 442-443, 11 Cal. Rptr. 580, 360 P.2d 76*).

D. Rate of Postjudgment Interest. Interest accrues at the rate of 10 percent per annum on the principal amount of a money judgment remaining unsatisfied (*Code Civ. Proc. § 685.010(a)*).

[*Optional*] **E. Postjudgment Interest Allowed on Prejudgment Interest.** Postjudgment interest may be awarded on a judgment consisting, in part, of prejudgment interest (*Boscus v. Bohlig (1916) 173 Cal. 687, 691, 162 P. 100* ; *Big Bear Properties, Inc. v. Gherman (1979) 95 Cal. App. 3d 908, 913, 157 Cal. Rptr. 443*).

[*Optional*] **F. Waiver by Payment of Principal Not Applicable.** *Civil Code Section 3290*, which provides that accepting payment of the whole principal, as such, waives all claims of interest, applies to prejudgment interest as damages and has not been extended to apply to interest accrued on an unpaid judgment (*San Francisco Unified School Dist. v. San Francisco Classroom Teachers Assn. (1990) 222 Cal. App. 3d 146, 150, 272 Cal. Rptr. 38*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a party's contention that postjudgment interest should be awarded at the legal rate from the date of entry of the judgment. This contention could arise in any case in which a party receives a money judgment.

This form should be combined with points relating to the specific procedural context in which counsel wishes to raise the issue of postjudgment interest. The issue is most likely to arise on a motion for correction of a clerical mistake in the judgment [*Code Civ. Proc. § 473*; *see generally* Ch. 131, *Judgments*]. The points set forth in this form may also be adapted for use in a trial or appellate brief.

Optional Paragraphs C and F raise points that respond to objections contending that the moving party is not entitled to postjudgment interest. Thus, for tactical reasons, counsel may prefer to use those paragraphs, if applicable, in a supplemental memorandum (such as a reply brief) to respond to objections raised in an opposing memorandum.

Paragraph D sets forth the rate at which postjudgment interest accrues under *Code Civ. Proc. § 685.010*. For judgments entered prior to January 1, 1983, however, interest would accrue at the former rate of seven percent through December 31, 1982, and then at the ten percent rate beginning on January 1, 1983 [*see, e.g.,* *American National Bank v. Peacock (1985) 165 Cal. App. 3d 1206, 1207-1208, 212 Cal. Rptr. 97* ; *see also § 121.47[3][e]*]. Thus, in such cases, this form should be modified to reflect the appropriate rates of interest governing the entire period the judgment remains unsatisfied.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, if counsel is using this form to support a motion to insert interest on a judgment [*see, e.g.,* *San Francisco Unified School Dist. v. San Francisco Classroom Teachers Assn. (1990) 222 Cal. App. 3d 146, 149, 272 Cal. Rptr. 38* , discussed in *§ 121.47[3][a]*], he or she may cite facts from a declaration in support his or her motion, and from documents on file in the action, showing (1) that a money judgment was entered in the action, and the moving party is therefore entitled to an award of interest on the judgment; (2) the date from which the postjudgment interest is owed (that is, the date of the judgment, if postjudgment interest is due under *Code Civ. Proc. § 685.020(a)*, or each date

an unpaid installment was due under *Code Civ. Proc. § 685.020(b)*); (3) any amount paid by the opposing party; and (4) failure of the opposing party to pay the full of amount of such interest, and the amount owed.

[b] Opposing Memoranda

The memoranda set out in *§ 121.58* may be used in an appropriate case to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Postjudgment Interest Is Mandatory

Cal. Const., art. XV, § 1 provides that the rate of interest on a judgment rendered in any court of this state shall be set by the Legislature at not more than 10 percent per annum. In the absence of the setting of such rate by the Legislature, the rate of interest on any judgment rendered in any court of the state shall be 7 percent per annum.

In ***San Francisco Unified School Dist. v. San Francisco Classroom Teachers Assn.*** *(1990) 222 Cal. App. 3d 146, 272 Cal. Rptr. 38*), a labor union representing school teachers filed motions to insert interest on judgments in favor of the teachers, and the trial court granted the motions. The school district appealed from the order.

The court of appeal modified as to the rate of interest, but affirmed the judgment in all other respects. The school district argued that *Cal. Const., art. XV, § 1* does not create an entitlement to postjudgment interest, but merely sets a ceiling on the interest rate. The court stated that this conclusion is directly contrary to that arrived after lengthy analysis in *Harland v. State of California (1979) 99 Cal. App. 3d 839, 842-848, 160 Cal. Rptr. 613* , which held that *Cal. Const., art. XV, § 1* mandates postjudgment interest, that public entities are not excluded from the mandate, and that the interest begins to accrue when the judgment is entered (*222 Cal. App. 3d 146, 151)* .

[b] Accrual of Postjudgment Interest

Bellflower City School Dist. v. Skaggs *(1959) 52 Cal. 2d 278, 339 P.2d 848* , involved a condemnation action commenced to acquire certain lots for the enlargement of an existing school site. Following an interlocutory judgment, plaintiff did not move for a new trial, appeal, or take steps seeking to have the judgment vacated or modified. On motion of the property owners, the court made an order fixing interest on the awards from the date of entry of the interlocutory judgment. The plaintiff appealed.

The Supreme Court affirmed the order. On appeal, the plaintiff contended that no interest should accrue on an interlocutory judgment in condemnation until 30 days after all possibility of direct attack had been exhausted (*52 Cal. 2d 278, 279-280)* . In rejecting the plaintiff's argument, the Court held that an interlocutory judgment in condemnation is a judgment within the meaning of former Cal. Const., art. XX, § 22 [*now see Cal. Const., art. XV, § 1,* and *Code Civ. Proc. § 685.010,* setting the rate of interest on all judgments in California]. The Court concluded that interest should run from the date the interlocutory judgment of condemnation was entered. The court, citing *Glenn v. Rice (1917) 174 Cal. 269, 275-276, 162 P. 1020* , noted that in ordinary civil cases a judgment bears interest from the date of its entry even though it is subject to direct attack (*52 Cal. 2d 278, 280)* .

[c] Accrual of Postjudgment Interest Payable in Installments

Code Civ. Proc. § 685.020(a) provides that except as provided in *Code Civ. Proc. § 685.020(b),* interest commences to accrue on a money judgment on the date of entry of the judgment. *Code Civ. Proc. § 685.020(b)* provides that, unless the judgment otherwise provides, if a money judgment is payable in installments, interest commences to accrue regarding each installment on the date the installment becomes due.

[d] Accrual When Judgment Modified on Appeal

Stockton Theatres, Inc. v. Palermo *(1961) 55 Cal. 2d 439, 11 Cal. Rptr. 580, 360 P.2d 76* , involved orders of the trial court made after judgment, one taxing an item of costs as effective on a certain date, and the other overruling a motion to allow the item of costs with interest as of a different date. Defendants appealed.

The Supreme Court modified and affirmed the order. The sole question presented on the appeal was on what date should interest commence on an award of costs that was the subject of a previous appeal. The Court, citing *Beeler v. American Trust Co. (1946) 28 Cal. 2d 435, 438, 170 P.2d 439* , and *Barnhart v. Edwards (1900) 128 Cal. 572, 575* , stated that when a judgment is modified on appeal, whether upward or downward, the new sum draws interest from the date of entry of the original order, not from the date of the new judgment (*28 Cal. 2d 435, 442*). On the other hand, based on the Court's decision in *Cowdery v. London etc. Bank (1903) 139 Cal. 298, 303,* , when a judgment is reversed on appeal the new award subsequently entered by the trial court can bear interest only from the date of entry of such new judgment (*28 Cal. 2d 435, 442-443*).

[e] Rate of Postjudgment Interest

Code Civ. Proc. § 685.010(a) provides that interest accrues at the rate of 10 percent per annum on the principal amount of a money judgment remaining unsatisfied. The 10 percent interest rate became effective on January 1, 1983 [*see American National Bank v. Peacock (1985) 165 Cal. App. 3d 1206, 1207-1208, 212 Cal. Rptr. 97* (construing Stats. 1982, ch. 150, § 3); *see also* Stats. 1982, ch. 1364, §§ 1, 2, 3, 5 (declaring intent that Section 685.010, as added by Stats. 1982, ch. 150, become effective on January 1, 1983, and remain operative until July 1, 1983, at which time it was repealed; and enacting new Section 685.010, operative July 1, 1983, containing identical subdivision (a)].

Apparently due to an oversight, the statute, as originally adopted, erroneously stated the effective date to be January 1, 1982 [*compare* Stats. 1982, ch. 150, § 6 *with* Stats. 1982, ch. 1364, § 5; *see American National Bank v. Peacock (1985) 165 Cal. App. 3d 1206, 1207-1208, 212 Cal. Rptr. 97]* . Section 685.010 has beenconstrued, however, to become effective on January 1, l983, based on legislative history indicating a lack of intent to make the statute retroactive, and to avoid the unconstitutionality of a retroactive effect [*American National Bank v. Peacock (1985) 165 Cal. App. 3d 1206, 1210-1212, 212 Cal. Rptr. 97* ; *see also Hill v. Pacific Tel. & Tel. Co. (1985) 174 Cal. App. 3d 1076, 1078, 220 Cal. Rptr. 144* (following *American National Bank* and rejecting contrary dicta in *Gutierrez v. State Ranch Services (1983) 150 Cal. App. 3d 83, 88-89, 198 Cal. Rptr. 16*); *Hersch v. Citizens Savings and Loan Assn. (1985) 173 Cal. App. 3d 373, 378, 218 Cal. Rptr. 646* (following *American National Bank*)].

Thus, for example, if a trial court entered judgment against a defendant on September 10, 1979, for a decision rendered on March 14, 1977, interest on the judgment would accrue at the rate of seven percent per annum from March 14, 1977, to the date of judgment. Thereafter, assuming the judgment remained unpaid, the rate would remain the same through December 31, 1982. Beginning on January 1, 1983, the effective date of *Code Civ. Proc. § 685.010*, the interest would accrue at the rate of ten percent per annum, until paid [*see American National Bank v. Peacock (1985) 165 Cal. App. 3d 1206, 1207-1208, 212 Cal. Rptr. 97]* .

[f] Postjudgment Interest Allowed on Prejudgment Interest

Boscus v. Bohlig *(1916) 173 Cal. 687, 162 P. 100* , was an action to foreclose a mechanics' lien. The trial court granted the plaintiff's motion for judgment on the pleadings, and awarded the plaintiff prejudgment interest on the entire amount owing from the date of the completion of the work by plaintiff, even though one-half of the amount was not due until 30 days after completion (*173 Cal. 687, 688-691)* . The defendants appealed.

The Supreme Court affirmed. One of the defendants' contentions on appeal was that the trial court erred in its allowance of interest. The Court agreed that the trial court erred by allowing interest to begin accruing from the date of completion on the one-half of the sum that was not payable until 30 days after completion. The Court held, however, that it was

proper for the prejudgment interest to be added to the principal and that the aggregate amount should thereafter draw interest (*173 Cal. 687, 691)* .

In ***Big Bear Properties, Inc. v. Gherman*** *(1979) 95 Cal. App. 3d 908, 157 Cal. Rptr. 443* , a judgment including prejudgment interest and costs was entered and affirmed on appeal against plaintiffs in a previous action. Plaintiffs subsequently filed an action in interpleader and for declaratory relief, contending, among other things, that the allowance of postjudgment interest on the portion of the judgment representing prejudgment interest constituted an impermissible compounding of interest. Defendants moved for summary judgment and the motion was granted by the trial court. The trial court entered judgment for defendant, declaring that the entire judgment in the prior action, including that portion attributable to prejudgment interest, did and would continue to bear interest at the legal rate until paid. The plaintiffs appealed.

The court of appeal affirmed. Before discussing the merits of the plaintiffs' contentions, the court first noted that even the plaintiffs recognized that all money judgments, by operation of law, bear interest at the legal rate from the date of entry. The court then went on to reject the plaintiffs' contention because, although compound interest generally is not allowable on a judgment, it is established that a judgment bears interest on the whole amount from its date of entry even though the amount is in part made up of interest. As a consequence, compound interest may in effect be recovered on a judgment whereby the aggregate amount of principal and interest is turned into a new principal (*95 Cal. App. 3d 908, 913)* .

[g] Waiver by Payment of Principal Not Applicable

The facts and procedural background of ***San Francisco Unified School Dist. v. San Francisco Classroom Teachers Assn.*** *(1990) 222 Cal. App. 3d 146, 272 Cal. Rptr. 38* , are discussed in *§ 121.47[3][a]*. In San Francisco Unified School Dist., the defendant school district contended that when employees represented by the plaintiff union cashed checks consisting of backpay and benefits owed by the defendant, the teachers waived their right to postjudgment interest under *Civ. Code § 3290*, which provides that accepting payment of the whole principal, as such, waives all claim to interest (*222 Cal. App. 3d 146, 149)* . The court stated, however, that *Civ. Code § 3290* is part of a statutory scheme originally enacted in 1872 regarding "interest as damages." Thus, concluded the court, in context, the statute's plain language makes it applicable to "all claims" to prejudgment interest as damages, and the defendant cited no authority for extending its application to interest accrued on an unpaid judgment (*222 Cal. App. 3d 146, 150)* .

[4] Additional Authorities

[a] Accrual of Postjudgment Interest

The facts and procedural background of *Stockton Theatres, Inc. v. Palermo (1961) 55 Cal. 2d 439, 11 Cal. Rptr. 580, 360 P.2d 76* , is discussed in *§ 121.47[3][d]*. In *Stockton* Theatres, Inc. v. Palermo, the Supreme Court, in setting a firm date for the commencement of interest on the award of costs that was the subject of a previous appeal, reiterated several basic principles for awarding postjudgment interest (*55 Cal. 2d 439, 442-443)* . Citing *Bellflower City School Dist. v. Skaggs (1959) 52 Cal. 2d 278, 280, 339 P.2d 848* , discussed in *§ 121.47[3][b]*, the Court stated that a judgment bears interest from the date of its entry in the trial court even though it is still subject to direct attack (*55 Cal. 2d 439, 442)* .

[b] Postjudgment Interest Allowed on Prejudgment Interest

Estate of Sharp (1971) 18 Cal. App. 3d 565, 95 Cal. Rptr. 816 , stemmed fromthe administration of a very large estate. One of the beneficiaries, a hospital, contended that the trial court erred in the manner in which it dealt with prejudgment interest. The court of appeal rejected the hospital's proposed allocation of interest because it would result in compound interest. Interest may not be computed on accrued interest unless by special statutory provision or by stipulation of the parties, although when a judgment is rendered which awards interest, the full amount of the judgment will bear interest at the statutory rate from the date of entry (*18 Cal. App. 3d 565, 585)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment InterestGeneral OverviewCivil ProcedureRemediesJudgment InterestPostjudgment Interest

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 121 INTEREST
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12-121 California Points & Authorities § 121.48

§ 121.48 Opposing Contention That Interest Should Be Awarded--Tender of Payment as Stopping Accrual of Interest [Civ. Code § 1504]

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF IS NOT ENTITLED TO INTEREST SUBSEQUENT TO _____ [*date*], THE DATE THAT DEFENDANT MADE AN OFFER OF _____ [PAYMENT *or* PERFORMANCE].

Tender of Payment as Stopping Accrual of Interest. An offer of payment or other performance, duly made, although the title to the thing offered is not transferred to the creditor, stops the accrual of interest on the obligation, and has the same effect on all its incidents as a performance thereof (*Civ. Code § 1504*; *Ferrea v. Tubbs (1899) 125 Cal. 687, 689, 58 P 308*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to plaintiff's contention that either prejudgment or postjudgment interest should be awarded. Defendant may make the argument supported by this form whenever he or she has tendered the payment or other performance to which plaintiff is entitled and plaintiff is seeking interest accruing from a date subsequent to the tender. The contention regarding prejudgment interest would most likely arise in an action based on contract; the contention regarding postjudgment interest could arise in any action in which a money judgment has been rendered and the judgment debtor has tendered the amount due [*see, e.g.,* *Sills v. Siller (1963) 218 Cal. App. 2d 735, 744-745, 32 Cal. Rptr. 621* (judgment debtor's tender of amount due under judgment, refused by judgment creditor for fear of jeopardizing appeal, as stopping running of interest)].

This form may be combined, where appropriate, with points relating to the specific procedural context in which the issue of the propriety of prejudgment or postjudgment interest following a tender of payment arises. The prejudgment interest issue is most likely to arise on a motion for a new trial on the ground of inadequate damages [*Code Civ. Proc. §*

657(5); *see generally* Ch. 64, *Damages: Tort* and Ch. 65, *Damages: Contract*] or a motion to vacate the judgment [*Code Civ. Proc. § 663*; *see generally* Ch. 155, *Motions After Trial*]. The postjudgment interest issue may arise, for example, on a motion to compel entry of satisfaction of judgment [*Code Civ. Proc. § 675(a)*; *see generally* Ch. 131, *Judgments*]. The points set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should include a discussion of the date and circumstances surrounding defendant's offer of payment or performance.

[3] Discussion of Authorities

[a] Tender of Payment as Stopping Accrual of Interest

In ***Ferrea v. Tubbs*** *(1899) 125 Cal. 687, 58 P 308* , the plaintiff appealed a money judgment in his favor. Pending the appeal, defendants tendered plaintiff the full amount of the judgment, with all costs, and interest to that date. Plaintiff refused the tender and subsequently lost the appeal. Defendants then sought and obtained an order from the superior court that the judgment be conditionally satisfied on the payment into court of the amount of the original tender. Plaintiff appealed this order, contending that defendants' tender pending the original appeal did not stop the running of interest on the judgment. The Supreme Court rejected this argument and held that plaintiff's refusal of the tender operated as a release of all interest which would otherwise have accrued on the judgment after the date of the tender (*125 Cal. 687, 693)* .

[4] Additional Authorities

[a] Tender of Payment as Stopping Accrual of Interest

Beeler v. American Trust Co. (1944) 24 Cal. 2d 1, 147 P.2d 583 , involved a dispute between a bank and one of its customers regarding whether a document was a deed or a mortgage. The customer offered the full amount due under the purported mortgage, which the bank refused because it contended that the customer was a tenant who was obligated to vacate the premises. The Supreme Court affirmed the finding of the trial court that the document was a mortgage and, since the bank had refused a valid offer of payment, the indebtedness ceased to bear interest as of the date of the tender (*24 Cal. 2d 1, 28-29)* .

Rose v. Hecht (1949) 94 Cal. App. 2d 662, 211 P.2d 347 , involved a dispute between the owner and lessees of a hotel. The lessees' repeated offers to pay themonthly rent were refused by the lessor, who sought reformation of the purported lease and was concerned acceptance of rent would prejudice his rights. In reversing the trial court's award of interest on the rental payments due, the court of appeal held that statutory law clearly supported the lessees' contention that they owed no interest on the rentals because of their offers to pay and their actual tenders of checks for the amounts due (*94 Cal. App. 2d 662, 664-665)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment InterestGeneral OverviewContracts LawPerformanceTender & Delivery

California Points & Authorities

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12-121 California Points & Authorities § 121.49

§ 121.49 Opposing Contention That Interest Should Be Awarded--Acceptance of Principal as Waiver of Interest [Civ. Code § 3290]

[1] FORM

[*The following may be included in a memorandum or in a trial or appellate brief.*]

PLAINTIFF IS NOT ENTITLED TO ANY INTEREST BECAUSE PLAINTIFF ACCEPTED PAYMENT FROM DEFENDANT OF THE ENTIRE PRINCIPAL OWING.

Acceptance of Principal as Waiver of Interest. Accepting payment of the whole principal waives all claim to interest (*Civ. Code § 3290*; *Valentine v. Donohoe-Kelly Banking Co. (1901) 133 Cal. 191, 194, 65 P 381*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to plaintiff's contention that either prejudgment or postjudgment interest should be awarded. Defendant may make this argument whenever plaintiff has already accepted payment of the entire principal plus any accrued interest due and has acknowledged the payment as payment in full.

This form may be combined, when appropriate, with points relating to the specific procedural context in which the issue of the propriety of prejudgment or postjudgment interest arises. The issue is most likely to arise on a motion for a new trial on the ground of inadequate damages. [*Code Civ. Proc. § 657(5)*] or a motion to vacate the judgment [*Code Civ. Proc. § 663*; *see* Ch. 155, *Motions After Trial* ; *see also* Ch. 64, *Damages: Tort* , and Ch. 65, *Damages: Contract*]. The points set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should include a discussion of the circumstances surrounding the payment and acceptance by plaintiff of the entire principal owed by defendant.

This form may be submitted in opposition to the contentions supported by the memoranda set out in *§§ 121.39* and *121.40*.

[3] Discussion of Authorities

[a] Acceptance of Principal as Waiver of Interest

Civ. Code § 3290 provides that accepting payment of the whole principal, as such, waives all claim to interest.

In ***Valentine v. Donohoe-Kelly Banking Co.*** *(1901) 133 Cal. 191, 65 P 381* , the estate of a guarantor of notes paid to defendant bank the unpaid principal of the notes and 23 days' interest to which the bank contended it was entitled. The bank surrendered the notes as paid and canceled. The bank, still having in its possession an account belonging to the estate, subsequently contended that it was entitled to additional interest on the notes it had surrendered. The estate sued and obtained a judgment against the bank for the amount held by the bank which the bank contended it was owed as interest earned on the notes after they were sold to the bank, including interest earned after the testator's death. Defendant bank appealed the judgment and an order denying its motion for a new trial.

In affirming the judgment, the Supreme Court relied on *Civ. Code § 3290* and held that its broad language applies to express contracts. The Court found that the fact that the notes were surrendered by the bank and canceled on payment of what the bank stated to be the balance due for principal and interest is almost a conclusive circumstance, in the absence of fraud or mistake (*133 Cal. 191, 194)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment InterestGeneral OverviewContracts LawPerformanceGeneral OverviewContracts LawRemediesCompensatory DamagesInterest

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12-121 California Points & Authorities § 121.50

§ 121.50 Opposing Contention That Prejudgment Interest Should be Awarded--Prejudgment Interest Not Allowed on General Damages for Personal Injuries Unless Plaintiff Had Made Offer of Settlement Lower Than Judgment [Civ. Code §§ 3288, 3291]

[1] FORM

[*The following may be included in a memorandum or in a trial or appellate brief.*]

PLAINTIFF IS NOT ENTITLED TO PREJUDGMENT INTEREST ON A CLAIM OF GENERAL DAMAGES FOR PAIN AND SUFFERING RESULTING FROM PERSONAL INJURIES UNLESS PLAINTIFF OBTAINS A JUDGMENT EXCEEDING PLAINTIFF'S PREJUDGMENT OFFER TO COMPROMISE PURSUANT TO SECTION 998 OF THE CODE OF CIVIL PROCEDURE.

A. Prejudgment Interest Not Allowed on General Damages for Personal Injuries. Prejudgment interest is not allowed on a claim of general damages for pain and suffering resulting from personal injuries unless plaintiff obtains ajudgment exceeding plaintiff's prejudgment offer pursuant to *Section 998 of the Code of Civil Procedure* (*see Civ. Code § 3291*; *Greater Westchester Homeowners Asso. v. City of Los Angeles (1979) 26 Cal. 3d 86, 102-103, 160 Cal. Rptr. 733, 603 P.2d 1329*).

B. Plaintiff Did Not Obtain Judgment Exceeding Amount of Last *Code Civ. Proc. § 998* Offer. Prejudgment interest is not allowed when the plaintiff does not obtain a judgment exceeding the amount of the plaintiff's last offer under *Code of Civil Procedure Section 998*, even if the amount of the judgment supersedes earlier Section 998 offers (*see Civ. Code § 3291*; *Wilson v. Wal-Mart Stores (1999) 72 Cal. App. 4th 382, 85 Cal. Rptr. 2d 4*).

[2] Comments

CAUTION:

Civ. Code § 3291 provides that, in any action brought to recover damages for personal injury, if the plaintiff makes an offer pursuant to *Code Civ. Proc. § 998* that the defendant does not accept before trial or within 30 days, whichever occurs first, and the plaintiff obtains a more favorable judgment, the judgment will bear interest at the legal rate of 10 percent per annum calculated from the date of the

plaintiff's first offer pursuant to *Code Civ. Proc. § 998* that is exceeded by the judgment. *Civ. Code § 3291* does not apply to a public entity or to a public employee for an act or omission within the scope of employment.

[a] Use of Form

This form may be submitted in opposition to a party's contention, based on *Civ. Code § 3288*, that prejudgment interest should be allowed on an award of general damages for personal injuries.

This form may be combined, when appropriate, with points relating to the specific procedural context in which the issue of the propriety of prejudgment interest arises. The issue is most likely to arise on a motion for a new trial on the ground of inadequate damages [*Code Civ. Proc. § 657(5)*] or a motion to vacate the judgment [*Code Civ. Proc. § 663*; *see* Ch. 155, *Motions After Trial* ; *see also* Ch. 64, *Damages: Tort* , and Ch. 65, *Damages: Contract*]. The points set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law stated.

This form may be submitted in opposition to contentions supported by the memoranda set out in *§ 121.33*.

[3] Discussion of Authorities

[a] Prejudgment Interest Not Allowed on General Damages for Personal Injuries

Greater Westchester Homeowners Asso. v. City of Los Angeles *(1979) 26 Cal. 3d 86, 160 Cal. Rptr. 733, 603 P.2d 1329* , was commenced by homeowners against an airport on a nuisance theory seeking damages for emotional and mental distress. Following a judgment for plaintiffs, the trial court issued a postjudgment order imposing prejudgment interest on the award.

On appeal, defendant contended, among other things, that the trial court improperly awarded prejudgment interest under *Civ. Code § 3288* for the personal injuries and emotional distress sustained by reason of the airport noise. In agreeing with defendant and reversing the judgment insofar as it awarded prejudgment interest on the personal injury claims, the Supreme Court noted that damages for the intangible, noneconomic aspects of mental and emotional injury are inherently nonpecuniary, unliquidated, and not readily subject to precise calculation. The amount of such damages is necessarily left to the subjective discretion of the trier of fact. The Court stated that retroactive interest on such damages adds uncertain conjecture to speculation. Moreover, where, as here, the injury was of a continuing nature, it is particularly difficult to determine when any particular increment of intangible loss arose. Therefore, the Court concluded, prejudgment interest on a claim of general damages for suffering cannot be allowed (*26 Cal. 3d 86, 102-103)* .

In reaching this decision, the Supreme Court distinguished its opinion in *Bullis v. Security Pac. Nat. Bank (1978) 21 Cal. 3d 801, 814-815, 148 Cal. Rptr. 22, 582 P.2d 109* (discussed in *§ 121.33[3][a]*, and in *§ 121.42[3][a]*), which held that *Civ. Code § 3288* permits discretionary prejudgment interest for unliquidated tort claims. In *Bullis*, the prejudgment interest was awarded to compensate a party for the unliquidated loss of his or her property. It represented the accretion of wealth which money or particular property could have produced during a period of loss. This is clearly distinguishable from damages for the intangible, noneconomic aspects of mental and emotional injury (*26 Cal. 3d 86, 102-103)* .

It must be noted, however, that this case was decided prior to the enactment, in 1982, of *Civ. Code § 3291*. *Civ. Code § 3291* modifies the holding in this case by providing that, in any action brought to recover damages for personal injury, if

the plaintiff makes an offer to compromise pursuant to *Code Civ. Proc. § 998* that the defendant does not accept prior to trial or within 30 days, whichever occurs first, and the plaintiff obtains a more favorable judgment, the judgment shall bear interest at the legal rate of 10 percent per annum calculated from the date of the plaintiff's first offer pursuant to *Code Civ. Proc. § 998* that is exceeded by the judgment. *Civ. Code § 3291* does not apply, however, to an action againsta public entity or to a public employee for an act or omission within the scope of employment.

[b] Plaintiff Did Not Obtain Judgment Exceeding Amount of Last Code Civ. Proc. § 998 Offer

In ***Wilson v. Wal-Mart Stores*** *(1999) 72 Cal. App. 4th 382, 85 Cal. Rptr. 2d 4* , plaintiff sued defendant after falling in one of defendant's stores and injuring her back. By special verdict, the jury found defendant to have been negligent and awarded plaintiff $230,000 in economic damages and $120,000 in noneconomic damages for a total of $350,000. However, because the jury also found that plaintiff's own negligence contributed 50 percent to her injuries, judgment was entered in her favor in the amount of $175,000. Before trial, plaintiff served on defendant a *Code Civ. Proc. § 998* offer to compromise for $150,000, with each side to bear its own costs and attorney's fees. Defendant made no response within statutory period, so the offer was deemed rejected. Plaintiff later served a second *Code Civ. Proc. § 998* offer on defendant with the settlement price of $249,000, with each side to bear its own costs and attorney's fees. That offer was also deemed rejected by defendant's failure to accept it within the statutory period. Following the jury verdict, plaintiff filed a memorandum of costs that included prejudgment interest calculated from the date of the first statutory offer to the date of the judgment. Defendant moved to tax costs, and the trial court granted defendant's motion on the ground that plaintiff could not recover prejudgment interest or expert fees because she failed to obtain a judgment more favorable than her second *Code Civ. Proc. § 998* offer, which was the effective offer, because it effectively extinguished her first offer (*72 Cal. App. 4th 382, 387-388*).

The court of appeal affirmed. The court held that the second offer superseded and extinguished the first one, finding that the legislative purpose of *Code Civ. Proc. § 998* is better served by a bright line rule in which the parties know that any judgment will be measured against a single valid statutory offer, *i.e.,* the statutory offer most recently rejected, regardless of offers made earlier in the litigation. (*72 Cal. App. 4th 382, 388-391*).

[4] Additional Authorities

[a] Prejudgment Interest Not Allowed on General Damages for Personal Injuries

The facts and procedural background for *Fox v. Pacific Southwest Airlines (1982) 133 Cal. App. 3d 565, 184 Cal. Rptr. 87* , are set out in *§ 121.55[3][a]*. In*Fox,* the court of appeal relied on the refusal of the Supreme Court in *Greater Westchester Homeowners Asso. v. City of Los Angeles (1979) 26 Cal. 3d 86, 102, 160 Cal. Rptr. 733, 603 P.2d 1329 , cert. denied, 446 U.S. 933 (1980)* (discussed in *§ 121.50[3][a]*) to permit prejudgment interest in personal injury actions in setting out an analogous prohibition on prejudgment interest in wrongful death actions (*133 Cal. App. 3d 565, 572-573)* . The court stated that *Greater Westchester Homeowners Assn.* confirmed that the purpose of prejudgment interest is to compensate a party for lost property. Damages for intangible, noneconomic losses are of a different nature from damages due to loss of property, since the amount of such intangible damages are necessarily left to the subjective discretion of the trier of fact. Retroactive interest on such damages adds uncertain conjecture to speculation (*133 Cal. App. 3d 565, 573)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment InterestGeneral OverviewCivil ProcedureRemediesJudgment InterestPrejudgment InterestTortsDamagesInterestPrejudgment InterestTortsDamagesInterestRatesTortsProcedureSettlementsOffers

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 121 INTEREST
PART II. FORMS

12-121 California Points & Authorities § 121.51

§ 121.51 Opposing Contention That Prejudgment Interest Should Be Awarded--Prejudgment Interest Not Allowed on Nonmoney Judgment

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF IS NOT ENTITLED TO PREJUDGMENT INTEREST BECAUSE HE/SHE/IT _____ [IS SEEKING *or* OBTAINED] A NONMONEY JUDGMENT.

Prejudgment Interest Not Allowed on Nonmoney Judgment. Prejudgment interest may only be awarded on a money judgment, and not on a judgment awarding stock or other personal property (*Redke v. Silvertrust (1971) 6 Cal. 3d 94, 107, 98 Cal. Rptr. 293, 490 P.2d 805 , cert. denied, 405 U.S. 1041, 92 S. Ct. 1316, 31 L. Ed. 2d 583*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to plaintiff's contention that he or she is entitled to prejudgment interest on a nonmoney judgment.

This form may be combined, where appropriate, with points relating to the specific procedural context in which the issue of the propriety of prejudgment interest arises. The issue is most likely to arise on a motion for a new trial on the ground of inadequate damages [*Code Civ. Proc. § 657(5)*; *see generally* Ch. 64, *Damages: Tort* and Ch. 65, *Damages: Contract*] or a motion to vacate the judgment [*Code Civ. Proc. § 663*; *see generally* Ch. 155, *Motions After Trial*]. The points set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form showing the relationship between the facts of the case and the point of law stated. Thus, counsel should include a discussion of the type of relief sought or obtained by plaintiff and point out that this relief is of a nonmoney nature and, therefore, prejudgment interest is not allowed.

This form may be submitted in opposition to contentions supported by the memoranda set out in *§ 121.33*.

[3] Discussion of Authorities

[a] Prejudgment Interest Not Allowed on Nonmoney Judgment

The background and part of the holding of ***Redke v. Silvertrust*** *(1971) 6 Cal. 3d 94, 98 Cal. Rptr. 293, 490 P.2d 805* , *cert. denied, 405 U.S. 1041, 92 S. Ct. 1316, 31 L. Ed. 2d 583* , is discussed in *§ 121.33[3][a]*. In that case, the Supreme Court held that the trial court erred in awarding plaintiff interest from the date of judgment on the fair market value of stock wrongfully retained by the stepfather. The Court held that interest may only be awarded on a money judgment; it may not be awarded on a judgment awarding stock or other personal property (*6 Cal. 3d 94, 107)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureRemediesJudgment InterestGeneral OverviewCivil ProcedureRemediesJudgment InterestPrejudgment Interest

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12-121 California Points & Authorities § 121.52

§ 121.52 Opposing Contention That Prejudgment Interest Should Be Awarded--Prejudgment Interest Not Allowed for Period During Which Debtor Prevented From Paying by Law or by Creditor [Civ. Code § 3287(a)]

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF IS NOT ENTITLED TO PREJUDGMENT INTEREST FROM _____ [*date*], TO _____ [*date*], THE PERIOD DURING WHICH DEFENDANT WAS PREVENTED BY _____ [LAW *or* BY PLAINTIFF'S ACTIONS] FROM PAYING THE ALLEGED DEBT.

Prejudgment Interest Not Allowed for Period During Which Debtor Prevented From Paying by Law or by Creditor. Prejudgment interest may not be awarded for the period during which the debtor was prevented by law, or by the act of the creditor, from paying the debt (*Civ. Code § 3287(a)*; *Sonoma County Organization of Public Employees v. County of Sonoma (1979) 23 Cal. 3d 296, 321, 152 Cal. Rptr. 903, 591 P.2d 1*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to plaintiff's contention that he or she is entitled to prejudgment interest for any period during which the defendant was prevented from paying by law or by the creditor [see *Civ. Code § 3287(a)*].

This form may be combined, where appropriate, with points relating to the specific procedural context in which the issue of the propriety of prejudgment interest arises. The issue is most likely to arise on a motion for a new trial on the ground of inadequate damages [*Code Civ. Proc. § 657(5)*; *see generally* Ch. 64, *Damages: Tort* and Ch. 65, *Damages: Contract*] or a motion to vacate the judgment [*Code Civ. Proc. § 663*; *see generally* Ch. 155, *Motions After Trial*]. The points set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should discuss the law or the actions of the creditor that prevent the debtor from paying the

obligation.

This form may be submitted in opposition to contentions supported by the memoranda set out in *§ 121.30*.

[3] Discussion of Authorities

[a] Prejudgment Interest Not Allowed for Period During Which Debtor Prevented From Paying by Law or by Creditor

Civ. Code § 3287(a) provides, in part, that interest is not recoverable for the period during which the debtor is prevented by law or by the act of the creditor from paying the debt.

Sonoma County Organization of Public Employees v. County of Sonoma *(1979) 23 Cal. 3d 296, 152 Cal. Rptr. 903, 591 P.2d 1* , involved five original proceedings for writs of mandate by labor organizations representing local government employees seeking pay increases contracted for prior to passage of Proposition 13. Subsequent to passage of Proposition 13, the state Legislature enacted *Gov. Code §§ 16280* and *16280.5*, which prevented state surplus funds from going to any locality which provided a cost-of-living increase in 1978-1979 in excess of that granted state employees. The petitioners sought the writs of mandate to compel the local agencies to grant the increases called for in their agreements, along with prejudgment interest, and to prohibit the state from enforcing the condition for payment of state funds set forth in *Gov. Code §§ 16280* and *16280.5*.

In issuing a peremptory writ of mandate directing payment of the salary increases, the Supreme Court denied prejudgment interest because of the provisions of *Civ. Code § 3287(a)*, which prohibit prejudgment interest if the debtor is prevented by law from paying the debt. The Court observed that the practical effect of *Gov. Code §§ 16280* and *16280.5* was to prevent the local governmental entities from paying the increases because such payment would have required them to renounce state surplus funds, resulting in serious financial hardship (*23 Cal. 3d 296, 321)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment InterestGeneral OverviewCivil ProcedureRemediesJudgment InterestPrejudgment InterestContracts LawPerformanceImpossibility of PerformanceGeneral Overview

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12-121 California Points & Authorities § 121.53

§ 121.53 Opposing Contention That Prejudgment Interest Should Be Awarded--Prejudgment Interest as Matter of Right Only When Damages Liquidated

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF IS NOT ENTITLED TO PREJUDGMENT INTEREST AS A MATTER OF RIGHT BECAUSE HIS/HER/ITS DAMAGES ARE UNLIQUIDATED.

A. Prejudgment Interest as Matter of Right Only When Damages Liquidated. Prejudgment interest is recoverable as a matter of right only when the damages are liquidated or, although unliquidated, can be established with reasonable certainty or are calculable by reference to a well-established market value (*see Civ. Code § 3287(a)*; *Coleman Engineering Co. v. North American Aviation, Inc. (1966) 65 Cal. 2d 396, 407, 55 Cal. Rptr. 1, 420 P.2d 713* ; *Esgro Central, Inc. v. General Ins. Co. (1971) 20 Cal. App. 3d 1054, 1062-1063, 98 Cal. Rptr. 153* ; *Distefano v. Hall (1968) 263 Cal. App. 2d 380, 387-389, 69 Cal. Rptr. 691*).

[*Optional*] **B. Damages as Uncertain in Quantum Meruit.** In an action in quantum meruit to recover the reasonable value of services rendered, when the value of the services can only be established by evidence, prejudgment interest under *section 3287(a) of the Civil Code* is not recoverable (*Swinnerton v. Argonaut L. & D. Co. (1896) 112 Cal. 375, 379, 44 P 719* ; *Parker v. Maier Brewing Co. (1960) 180 Cal. App. 2d 630, 634, 4 Cal. Rptr. 825*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a party's contention that prejudgment interest should be awarded as a matter of right. Such an argument would be made when the opposing party contends that thedamages sought or recovered by the party seeking prejudgment interest were unliquidated. Although these points may establish that plaintiff has no absolute right to prejudgment interest, counsel should be aware that plaintiff still might be entitled to have the trier of fact award prejudgment interest in its discretion [*see Civ. Code §§ 3287(b), 3288*; *see also §§ 121.33*

and *121.54*]. Furthermore, prejudgment interest may be awarded in an action for damages for personal injuries if the defendant has failed to accept plaintiff's offer to compromise made pursuant to *Code Civ. Proc. § 998* [*see Civ. Code § 3291*; *see also § 121.43*].

This form may be combined, where appropriate, with points relating to the specific procedural context in which the issue of the propriety of prejudgment interest arises. The issue is most likely to arise on a motion for a new trial on the ground of inadequate damages [*Code Civ. Proc. § 657(5)*; *see generally* Ch. 64, *Damages: Tort* and Ch. 65, *Damages: Contract*] or a motion to vacate the judgment [*Code Civ. Proc. § 663*; *see generally* Ch. 155, *Motions After Trial*]. The points set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion of why plaintiff's damages were not liquidated and cannot be, or could not have been, established with reasonable certainty prior to judgment.

This form may be submitted in opposition to contentions supported by the memoranda set out in *§ 121.30*.

[3] Discussion of Authorities

[a] Prejudgment Interest as Matter of Right Only When Damages Liquidated

Civ. Code § 3287(a) provides, in part, that every person who is entitled to recover damages certain, or capable of being made certain by calculation, and for which the right to recover is vested in him or her on a particular day, is entitled also to recover interest from that day.

The background of ***Coleman Engineering Co. v. North American Aviation, Inc.*** *(1966) 65 Cal. 2d 396, 55 Cal. Rptr. 1, 420 P.2d 713* , is discussed in *§ 121.30[3][e]* and also under *§ 121.30[3][f]*. In that case, the Supreme Court held that prejudgment interest may be allowed as a matter of right only when the damages are liquidated. It should be noted that, as discussed more fully in *§ 121.30*, the Court also held that the existence of an unliquidated setoff or a slight variance between the amount claimed and the amount awarded does not mean that the damages are not liquidated (*65 Cal. 2d 396, 407-409)* .

The background and holding of ***Esgro Central, Inc. v. General Ins. Co.*** *(1971) 20 Cal. App. 3d 1054, 98 Cal. Rptr. 153* , is discussed in *§ 121.30[3][a]*. In that case, the court of appeal held that prejudgment interest as a matter of law is not authorized under *Civ. Code § 3287(a)* when the amount of damage, as opposed to only the determination of liability, depends on a judicial determination based on conflicting evidence and is not ascertainable from truthful data supplied by the claimant to his or her debtor (*20 Cal. App. 3d 1054, 1062-1063)* .

Distefano v. Hall *(1968) 263 Cal. App. 2d 380, 69 Cal. Rptr. 691* , involved an action filed by a contractor against owners on a written contract for the construction of an apartment house. Among the major issues determined at trial were those of the owner's counterclaim for faulty construction as well as an alleged limitation on labor costs. Both parties appealed a judgment in favor of plaintiff. On appeal, plaintiff contended, among other things, that the trial court erred by denying prejudgment interest.

In affirming the trial court, the court of appeal held that the allowance of interest as damages by way of compensation for wrongful detention of money due to plaintiff only occurs when the sum is liquidated or ascertainable within the meaning of *Civ. Code § 3287(a)*. Under this statute, interest cannot be awarded prior to judgment when the amount of damages cannot be ascertained except on conflicting evidence. The rationale for this rule is that when a defendant does not know the amount he or she owed and cannot ascertain it except by accord or judicial process, he or she cannot be in default for not paying it (*263 Cal. App. 2d 380, 388)* .

In this case, the amount due to plaintiff could not be determined until after various questions were resolved at trial. Therefore, the trial court properly concluded that defendants were not able to ascertain the exact amount due and correctly denied prejudgment interest to plaintiff (*263 Cal. App. 2d 380, 389)* .

[b] Damages as Uncertain in Quantum Meruit

In ***Swinnerton v. Argonaut L. & D. Co.*** *(1896) 112 Cal. 375, 44 P 719* , plaintiffs sued defendants in quantum meruit for services rendered in managing defendant's property. Plaintiffs recovered a judgment, including prejudgment interest, from which defendants appealed.

The Supreme Court held that it was error to include prejudgment interest in the award. The Court stated that in an action to recover the reasonable value of services performed by a plaintiff, the amount, character, and value of which can only be established by evidence in court or by an accord between the parties, and which are not susceptible of ascertainment by computation or by reference to market rates, plaintiff is not entitled to interest accruing prior to verdict or judgment (*112 Cal. 375, 379)* .

In ***Parker v. Maier Brewing Co.*** *(1960) 180 Cal. App. 2d 630, 4 Cal. Rptr. 825* , plaintiffs sued defendant to recover for architectural and engineering servicesrendered in connection with the construction of a warehouse addition and alterations to defendant's bottling house. The trial court rendered judgment for plaintiffs for the reasonable value of their services plus prejudgment interest. On appeal, defendant contended, among other things, that the award of prejudgment interest was error.

In agreeing with this contention, the court of appeal held that it is well established that when there is no express contract and the action is in quantum meruit to recover the reasonable value of services rendered, interest is not recoverable prior to judgment. In an action in quantum meruit when there is an express contract but when the value of the services can only be established by evidence and is not susceptible of computation from the face of the contract or by reference to established market values, interest is also not recoverable prior to judgment (*180 Cal. App. 2d 630, 634)* . Furthermore, even when there is an express contract for the performance of services and the action is for a breach, if, because of defendant's prevention of performance, the amount due cannot be computed by the contract terms, thereby rendering the damages uncertain and incapable of being made certain by calculation at the time the cause of action accrues, interest is not recoverable as an element of damage prior to judgment (*180 Cal. App. 2d 630, 634-635)* .

[4] Additional Authorities

[a] Prejudgment Interest as Matter of Right Only When Damages Liquidated

Polster, Inc. v. Swing (1985) 164 Cal. App. 3d 427, 434-436, 210 Cal. Rptr. 567 , was an action by a lessor against lessees for failure to return the leased premises in the same condition as received. Judgment was in plaintiff's favor and included an award of prejudgment interest from the date that defendants returned the premises. On defendants' appeal, the court of appeal struck the award of prejudgment interest, holding the amount due plaintiff as damages was not a sum certain within the meaning of *Civ. Code § 3287(a)* (*164 Cal. App. 3d 427, 436)* . The court first stated the rule that *Civ. Code § 3287(a)* does not authorize prejudgment interest as a matter of law when the amount of damages depends on a judicial determination based on conflicting evidence (*164 Cal. App. 3d 427, 434)* . The court reasoned that, in this case, the defendants did not know and could not readily compute the damages, and the plaintiff did not supply them with an adequate statement and supporting data so that they could ascertain the damages (*164 Cal. App. 3d 427, 435)* . Furthermore, the amount of damages actually determined by the court was significantly less than that demanded by plaintiff, a fact militating against a finding of certainty under *Civ. Code § 3287(a)* (*164 Cal. App. 3d 427, 435-436)* .

Chesapeake Industries, Inc. v. Togova Enterprises, Inc. (1983) 149 Cal. App. 3d 901, 197 Cal. Rptr. 348 , involved an action for an accounting on a business property lease in which the trial court awarded the lessor prejudgment interest

under *Civ. Code § 3287(a)*. The court of appeal reversed the award of interest, finding that the lessee's liability for breach under the lease agreement was not ascertainable on information reasonably available to lessee at time claim was filed. The court held that although inexact knowledge of the amount of indebtedness at the time a claim is filed does not automatically bar an award of prejudgment interest, the circumstances in the instant case did not allow the damages to be made certain by calculation as required by *Civ. Code § 3287(a)* (*149 Cal. App. 3d 901, 907, 914)* .

[b] Damages as Uncertain in Quantum Meruit

In *Samuels v. Singer (1934) 1 Cal. App. 2d 545, 36 P.2d 1098* , an action to recover the value of the use and occupation of real property for the period of defendant's wrongful detention, the court of appeal ruled that the trial court erred in granting prejudgment interest. The case was governed by the general rule that in quantum meruit actions the exact amount to which plaintiff is entitled is uncertain until determined by the trier of fact, and, since the person liable does not know what sum he or she owes, he or she cannot be in default for not paying (*1 Cal. App. 2d 545, 555)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment InterestGeneral OverviewCivil ProcedureRemediesJudgment InterestPrejudgment InterestContracts LawRemediesEquitable ReliefQuantum MeruitContracts LawRemediesLiquidated Damages

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12-121 California Points & Authorities § 121.54

§ 121.54 Opposing Contention That Prejudgment Interest Should Be Awarded--No Prejudgment Interest Under Civ. Code § 3288 in Absence of Request for Specific Jury Instruction

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

IN THE ABSENCE OF A REQUEST FOR A SPECIFIC JURY INSTRUCTION ON DISCRETIONARY INTEREST PURSUANT TO SECTION 3288 OF THE CIVIL CODE, IT IS NOT ERROR FOR THE COURT TO FAIL TO SO INSTRUCT THE JURY AND TO OMIT PREJUDGMENT INTEREST IN ITS AWARD.

No Prejudgment Interest Under *Civ. Code § 3288* in Absence of Request for Specific Jury Instruction. In the absence of a request for a specific jury instruction on discretionary interest pursuant to *Section 3288 of the Civil Code*, it is not error for the court to fail to so instruct the jury and to omit prejudgment interest in its award (*Dixon Mobile Homes, Inc. v. Walters (1975) 48 Cal. App. 3d 964, 974, 122 Cal. Rptr. 202*).

[2] Comments

[a] Use of Form

This form may be submitted in an action for the breach of an obligation not arising from contract and/or a case of oppression, fraud, or malice in opposition to plaintiff's contention that prejudgment interest should have been awarded. This argument would only be made when plaintiff failed to request a specific jury instruction on discretionary interest pursuant to *Civ. Code § 3288* and subsequently contends it was error for the court not to so instruct the jury and award prejudgment interest.

This form may be combined, when appropriate, with points relating to the specific procedural context in which the issue of the propriety of prejudgment interest arises. The issue is most likely to arise on a motion for a new trial on the ground of inadequate damages [*Code Civ. Proc. § 657(5)*] or a motion to vacate the judgment [*Code Civ. Proc. § 663*; *see* Ch. 155, *Motions After Trial* ; *see also* Ch. 65, *Damages*]. The points set forth in this form may also be adapted for use in an appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law stated.

This form may be submitted in opposition to contentions supported by the memoranda set out in *§ 121.33*.

[3] Discussion of Authorities

[a] No Prejudgment Interest Under Civ. Code § 3288 in Absence of Request for Specific Jury Instruction

Dixon Mobile Homes, Inc. v. Walters *(1975) 48 Cal. App. 3d 964, 122 Cal. Rptr. 202* , was an action by the seller of a mobile home for repossession and damages. The buyer cross complained for rescission, restitution, and damages. Both parties appealed from the judgment following a jury trial which awarded the buyer both compensatory and punitive damages.

Defendant buyer contended on appeal that the trial court erred by failing to award prejudgment interest pursuant to *Civ. Code § 3288* (vesting discretion in the jury for prejudgment interest in cases of oppression, fraud, or malice). The court of appeal rejected this contention, holding that in the absence of a specific request from a party, the court is under no duty to instruct on discretionary interest pursuant to *Civ. Code § 3288*. Since the defendant made no such request at trial, it was not error for the court to omit such an instruction and for the subsequent judgment to omit prejudgment interest (*48 Cal. App. 3d 964, 974)* .

It should be noted that in *Bullis v. Security Pac. Nat. Bank (1978) 21 Cal. 3d 801, 815 fn. 18, 148 Cal. Rptr. 22, 582 P.2d 109* , the Supreme Court disapproved a statement in *Dixon* indicating that *Civ. Code § 3288* limits the award of interest to cases of fraud, oppression, or malice. Another court of appeal has, in addition, held that *Dixon* does not support the proposition that a party waives prejudgment interest by failing specifically to request it; it only addresses the court's duty to instruct on the issue [*Segura v. McBride (1992) 5 Cal. App. 4th 1028, 1041, 7 Cal. Rptr. 2d 436]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 121 INTEREST
PART II. FORMS

12-121 California Points & Authorities § 121.55

§ 121.55 Opposing Contention That Prejudgment Interest Should Be Awarded--Prejudgment Interest Not Allowed In Wrongful Death Action Without Showing of Oppression, Fraud, or Malice [Civ. Code § 3288]

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF IS NOT ENTITLED TO PREJUDGMENT INTEREST BECAUSE HE/SHE/IT _____ [IS SEEKING *or* OBTAINED] AN AWARD OF DAMAGES FOR WRONGFUL DEATH AND DEFENDANT'S CONDUCT DID NOT SHOW OPPRESSION, FRAUD, OR MALICE[, AND PLAINTIFF HAS NOT OBTAINED A JUDGMENT EXCEEDING HIS/HER/ITS PREJUDGMENT OFFER TO COMPROMISE PURSUANT TO SECTION 998 OF THE CODE OF CIVIL PROCEDURE].

A. Prejudgment Interest Not Allowed in Wrongful Death Action Without Showing of Oppression, Fraud, or Malice. Absent oppression, fraud, or malice, prejudgment interest should not be awarded in a wrongful death action [*if plaintiff made prejudgment offer to* compromise, add: unless plaintiff obtains a judgment exceeding plaintiff's prejudgment offer pursuant to *Section 998 of the Code of Civil Procedure*] (*see Civ. Code §§ 3288, 3291*; *Fox v. Pacific Southwest Airlines (1982) 133 Cal. App. 3d 565, 573, 184 Cal. Rptr. 87* ; *but see Canavin v. Pacific Southwest Airlines (1983) 148 Cal. App. 3d 512, 525-528, 196 Cal. Rptr. 82*).

[*Optional*] **B. Willful Misconduct Does Not Justify Award of Prejudgment Interest.** Willful misconduct on the part of defendant does not constitute oppression, fraud, or malice so as to justify an award of prejudgment interest in a wrongful death action (*see Southern Pac. Transportation Co. v. State of California (1981) 115 Cal. App. 3d 116, 122, 171 Cal. Rptr. 187*).

[2] Comments

CAUTION:
After the decisions in *Fox v. Pacific Southwest Airlines (1982) 133 Cal. App. 3d 565, 184 Cal. Rptr. 87* , and *Southern Pac. Transportation Co. v. State of California (1981) 115 Cal. App. 3d 116, 171 Cal. Rptr. 187* , the Legislature enacted *Civ. Code § 3291*. Under *Civ. Code § 3291*, prejudgment interest may

be awarded against a defendant in a personal injury action, whether the injury resulted from negligence or by willful intent of the defendant, if the plaintiff makes an offer pursuant to *Code Civ. Proc. § 998* (written offer to compromise on pending action) which the defendant does not accept prior to trial or within 30 days, whichever occurs first, and the plaintiff obtains a more favorable judgment. The judgment bears interest at the legal rate of 10 per cent per annum calculated from the date of the plaintiff's first offer pursuant to *Code Civ. Proc. § 998* which is exceeded by the judgment, and interest accrues until satisfaction of the judgment. *Civ. Code § 3291* does not apply to a public entity or to a public employee for an act or omission within the scope of employment. It thus appears that if the plaintiff has made a settlement offer pursuant to *Civ. Code § 3291*, this form may be used if the plaintiff does not obtain a more favorable judgment. Counsel should also note that *Canavin v. Pacific Southwest Airlines (1983) 148 Cal. App. 3d 512, 525-528, 196 Cal. Rptr. 82* , is in apparent conflict with *Fox* (*see* discussion in *§ 121.55[3][a]*).

[a] Use of Form

This may be submitted in opposition to a party's contention, based on *Civ. Code § 3288*, that prejudgment interest should be allowed on an award of general damages for a wrongful death.

This form may be combined, when appropriate, with points relating to the specific procedural context in which the issue of the propriety of prejudgment interest arises. The issue is most likely to arise on a motion for a new trial on the ground of inadequate damages [*Code Civ. Proc. § 657(5)*] or a motion to vacate the judgment [*Code Civ. Proc. § 663*; *see* Ch. 155, *Motions After Trial* ; *see also* Ch. 64, *Damages: Tort* and Ch. 65, *Damages: Contract*]. The memoranda set out in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, this form may be submitted in opposition to contentions supported by the memorandum set out in *§ 121.33*.

[3] Discussion of Authorities

[a] Prejudgment Interest Not Allowed in Wrongful Death Action Without Showing of Oppression, Fraud, or Malice

Fox v. Pacific Southwest Airlines *(1982) 133 Cal. App. 3d 565, 184 Cal. Rptr. 87* , involved a wrongful death action. Judgment was entered for plaintiffs after trial, but the trial court refused to submit the issue of prejudgment interest to the jury. Defendant appealed and plaintiffs cross appealed.

The court of appeal reversed the judgment on a point unrelated to prejudgment interest. Addressing plaintiffs' point regarding prejudgment interest, the court noted that the case of *Greater Westchester Homeowners Asso. v. City of Los Angeles (1979) 26 Cal. 3d 86, 160 Cal. Rptr. 733, 603 P.2d 1329 , cert. denied 446 U.S. 933 (1980)* (discussed in *§ 121.50[3][a]*), which the parties to the present case had identified as the controlling authority in the area, confirmed that the purpose of prejudgment interest is to compensate a party for lost property. The court stated that wrongful death damages involve neither lost property, nor are they readily ascertainable without a judicial determination based on conflicting evidence. Thus, the court reaffirmed the rule that prejudgment interest should not be awarded in a wrongful death action absent oppression, fraud, or malice (*133 Cal. App. 3d 565, 573)* .

It must be noted, however, that this case was decided prior to the enactment of *Civ. Code § 3291* in 1982. For further discussion of this section, see the CAUTION, *above*.

Additionally, the more recent case of *Canavin v. Pacific Southwest Airlines (1983) 148 Cal. App. 3d 512, 525-528, 196 Cal. Rptr. 82* , decided by another court from the same district, appears to be in partial conflict with *Fox. Canavin* held that in a wrongful death action, prejudgment interest on that portion of the award representing economic loss between the decedent's death and the date of judgment may be allowed when there is no dispute between the parties concerning the basis of computation of recoverable damages (*148 Cal. App. 3d 512, 524)* . It may be possible to distinguish *Canavin* on the ground that prejudgment interest was being awarded on pecuniary, as opposed to nonpecuniary, losses being sought in the same action.

[b] Willful Misconduct Does Not Justify Award of Prejudgment Interest

Southern Pac. Transportation Co. v. State of California *(1981) 115 Cal. App. 3d 116, 171 Cal. Rptr. 187* , was an action for indemnification arising out of a prior a wrongful death action. The wrongful death action was based on a collision between a railroad train and an automobile. In their original action, plaintiffs alleged negligence against both the corporation which owned and operated the train involved in the accident and the State of California. Subsequently, plaintiffs in the wrongful death action filed a separate action against the corporation seeking compensatory damages for the destruction of the automobile involved in the collision and medical expenses, and for punitive damages for the corporation's willful misconduct. The court ordered the actions consolidated, and the cause was eventually tried on an amended complaint containing the allegations of both former complaints. After trial, the jury entered a special verdictwhich assessed total damages and found the state, the corporation, and the decedent each one-third negligent. The jury also found the corporation guilty of willful misconduct, but denied punitive damages. In its judgment, the trial court held the corporation and the state jointly and severally liable for the amount of damages assessed, reduced by one third to account for the decedent's one-third share of contributory negligence. The trial court also held the corporation individually liable for the full amount of the damages assessed, on the theory that the corporation's willful misconduct overrode the decedent's contributory negligence.

Subsequently, the corporation paid the full amount of the assessed damages and sought indemnification from the state, based on the state's share of the fault for the collision. The trial court entered judgment against the state for one third of the assessed damages plus one half of the prejudgment interest which the trial court in the original action had assessed against the corporation. Both sides appealed.

The court of appeal upheld the trial court's decision allowing the corporation indemnification for the state's share of the fault, but overturned the trial court's award of an amount equivalent to one half of the prejudgment interest. The court held that under the present comparative negligence scheme, the concept of willful misconduct had lost its viability for all but intentional injuries that justified punitive damages (*115 Cal. App. 3d 116, 121)* . The court held that prejudgment interest in a tort action, like exemplary damages, is recoverable only in cases involving oppression, fraud, or malice. The court held further that willful misconduct, having been rendered obsolete as a concept by the adoption of comparative negligence, could not justify an award of prejudgment interest. Applying this reasoning to the facts of the present case, the court held that since the trial court had specifically found that the corporation had not intentionally injured the decedent, the award of prejudgment interest in the original action had been incorrect (*115 Cal. App. 3d 116, 122)* .

It must be noted, however, that this case was decided prior to the enactment of *Civ. Code § 3291* in 1982. For further discussion of this section, see the CAUTION, *above.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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12-121 California Points & Authorities § 121.56

§ 121.56 Opposing Contention That Prejudgment Interest Should Be Awarded Under Civ. Code § 3291--Judgment Does Not Include Award for Personal Injury

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF IS NOT ENTITLED TO PREJUDGMENT INTEREST UNDER *CIVIL CODE SECTION 3291* BECAUSE THE DAMAGES AWARDED BY THE _____ [JURY *or* COURT] WERE NOT ON ACCOUNT OF PERSONAL INJURY.

A. Prejudgment Interest Allowed Only on Damages Awarded for Personal Injury. *Section 3291 of the Civil Code,* by its terms, applies only to damages recovered for personal injury, in excess of the amount for which an offer to compromise is made under *Section 998 of the Code of Civil Procedure*; it does not apply to any damages recovered for economic injury (*Morin v. ABA Recovery Service, Inc. (1987) 195 Cal. App. 3d 200, 205-212, 240 Cal. Rptr. 509* ; *see Lakin v. Watkins Associated Industries (1993) 6 Cal. 4th 644, 656-662, 25 Cal. Rptr. 2d 109, 863 P.2d 179*).

B. Insurance Bad-Faith Action Is Not One for Personal Injury. Prejudgment interest under *Civil Code Section 3291* is not available in insurance bad-faith actions because such an action is not brought to recover damages for personal injury (*Gourley v. State Farm Mut. Auto Ins. Co. (1991) 53 Cal. 3d 121, 126-130, 3 Cal. Rptr. 2d 666, 822 P.2d 374*).

C. Wrongful Termination in Violation of Public Policy Is Not Claim for Personal Injury. Prejudgment interest under *Civil Code Section 3291* is not available in an action for wrongful termination in violation of public policy because such an action is not brought to recover damages for personal injury (*Holmes v. General Dynamics Corp. (1993) 17 Cal. App. 4th 1418, 1435-1437, 22 Cal. Rptr. 2d 172*).

D. Plaintiff's Burden of Proof. Plaintiff bears the burden of proving the amount of damages in a judgment that were awarded on account of personal injury and for which prejudgment interest may be allowed under *Civil Code Section 3291* (*Morin v. ABA Recovery Service (1987) 195 Cal. App. 3d 200, 205-212, 240 Cal. Rptr. 509* ; *see Lakin v.*

Watkins Associated Industries (1993) 6 Cal. 4th 644, 656-662, 25 Cal. Rptr. 2d 109, 863 P.2d 179).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a party's contention that prejudgment interest should be allowed under *Civ. Code § 3291* and *Code Civ. Proc. § 998* because plaintiff was awarded more damages by judgment than what would have been received had plaintiff's offer to compromise been accepted. The ground of the opposition is that these statutes allow for prejudgment interest only on damages that are awarded for personal injury. This form may be submitted in opposition to the contentions supported by the memoranda set out in *§ 121.43*. For further discussion of *Civ. Code 3291* and *Code Civ. Proc. § 998, see §§ 121.43* and *121.55*.

[3] Discussion of Authorities

[a] Prejudgment Interest Allowed Only on Damages Awarded for Personal Injury

The background and part of the holding of ***Morin v. ABA Recovery Service, Inc.*** *(1987) 195 Cal. App. 3d 200, 205-212, 240 Cal. Rptr. 509* , is discussed in *§ 121.43[3][c]*. The court of appeal held, in addition, that *Civ. Code § 3291* authorizes an award of prejudgment interest only for damages for personal injury (*195 Cal. App. 3d 200, 208)* .

The holding of *Morin* was essentially adopted by the California Supreme Court in ***Lakin v. Watkins Associated Industries*** *(1993) 6 Cal. 4th 644, 25 Cal. Rptr. 2d 109, 863 P.2d 179* . *Lakin* involved claims for negligence and intentional infliction of emotional distress. Plaintiff suffered personal injury, and sought damages for both emotional distress and damage to her car (*6 Cal. 4th 644, 653*). The Court agreed with the conclusion in *Morin*, that prejudgment interest under *Civ. Code § 3291* is recoverable only on the part of the judgment that represented damages attributable to personal injury (*6 Cal. 4th 644, 658-659)* .

[b] Insurance Bad-Faith Action Is Not One for Personal Injury

In ***Gourley v. State Farm Mut. Auto Ins. Co.*** *(1991) 53 Cal. 3d 121, 3 Cal. Rptr. 2d 666, 822 P.2d 374* , the California Supreme Court held that an action under *Ins. Code § 790.03*, for breach of the implied covenant of good faith and fair dealing in an insurance contract, is not one for "personal injury" to which *Civ. Code § 3291* applies. In this case, an insured was injured in an accident with an uninsured drunk driver and claimed against her own insurer under uninsured motorist coverage. She ultimately made an offer to settle for $60,000, which was rejected by the insurer. An arbitrator awarded her $88,000, which the insurer promptly paid. She then sued the insurer for breach of the implied covenant of good faith and fair dealing and violation of *Ins. Code § 790.03*, alleging entitlement to punitive damages and general damages for pain and suffering due to the insurer's unreasonable refusal to settle the underlying claim. The insured then made an offer under *Code Civ. Proc. § 998* to settle the bad-faith action for $249,099, which the insurer rejected. A jury eventually awarded the insured $15,765 in compensatory damages (undifferentiated between economic loss and general damages) and $1,576,500 punitive damages. The trial court awarded prejudgment interest on the entire amount under *Civ. Code § 3291*.

The insurer appealed the award of prejudgment interest, and the California Supreme Court reversed. The court held that the crux of an insurance bad-faith action is one for interference with property rights and not one for personal injury. As such, it was not within the scope of *Civ. Code § 3291*. The inclusion of a claim for general damages for emotional distress does not change the essential nature of the action. Mental distress is compensable as an aggravation of the financial damages, not as a separate cause of action (*53 Cal. 3d 121, 128-129)* .

[c] Wrongful Termination in Violation of Public Policy is Not Claim for Personal Injury

In ***Holmes v. General Dynamics Corp.*** *(1993) 17 Cal. App. 4th 1418, 22 Cal. Rptr. 2d 172* the plaintiff prevailed on a claim that he had been terminated from his employment in violation of public policy. He was awarded damages for lost wages and benefits and emotional distress, and punitive damages [*see Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 254 Cal. Rptr. 211, 765 P.2d 373* (tort damages permitted only if employment termination violates public policy)]. Plaintiff's claim for prejudgment interest under *Civ. Code § 3291* was denied by the trial court and affirmed on appeal.

Citing the California Supreme Court's holding in *Gourley v. State Farm Mut. Auto. Ins. Co. (1991) 53 Cal. 3d 121, 125-126, 3 Cal. Rptr. 2d 666, 822 P.2d 374* , discussed in *§ 121.56[3][b]*, the court held that an action for wrongful termination essentially seeks to recover on a property right. The nature of a tortious wrongful termination action is not to vindicate the plaintiff's personal interest; rather the essence is to vindicate the public interest (*17 Cal. App. 4th 1418, 1435-1437)* .

[d] Plaintiff's Burden of Proof

The background and part of the holding of ***Morin v. ABA Recovery Service, Inc.*** *(1987) 195 Cal. App. 3d 200, 205-212, 240 Cal. Rptr. 509* , is discussed in *§ 121.43[3][c]*. The court of appeal in that case held that the plaintiff has the burden to prove entitlement to prejudgment interest under *Civ. Code § 3291*. An award of damages under a general jury verdict form is insufficient to allow prejudgment interest if the plaintiff seeks damages for both personal and other injury. The court stated that special jury findings would be the most direct and effective means of establishing the fact and amount of personal injury recovery, although there may be other evidence and factors from which the trial court may make the determination (*195 Cal. App. 3d 200, 208-212)* .

Lakin v. Watkins Associated Industries *(1993) 6 Cal. 4th 644, 25 Cal. Rptr. 2d 109, 863 P.2d 179* is discussed in *§ 121.56[3][a]*. The jury awarded $5,000 for property damages and $15,000 for damages arising from the defendant's providing false identification and insurance information. The plaintiff accepted that she had the initial burden to prove what part of the damages award was for personal injury, but argued that she had met it by showing that a portion of the judgment was for personal injury. She wanted to shift the burden to the defense to then prove what part was *not* for personal injury. The appellate court adopted the view that because she had requested prejudgment interest on the entire award, she failed to establish that the award was for personal injury and was therefore not entitled to prejudgment interest on any of it.

The Supreme Court rejected both views, and essentially endorsed the holdingof *Morin.* The court found no basis in law or public policy to alter the basic rule that a party must prove each fact that is essential to his or her claim [*Evid. Code § 500*]. Thus, it rejected any shift of the burden of proof to the defense. The Court held that the case should be remanded to the trial court to give the plaintiff the opportunity to meet her burden (*6 Cal. 4th 644, 657-661)* .

While the Court noted that it encourages the use of special verdicts or jury findings as the most direct and effective means of establishing the fact and amount of personal injury recovery, special findings are not the sole means to determine the amount of damages awarded for personal injury. Facts and circumstances peculiar to the case, possibly including such considerations as the parties' theories of the case, uncontroverted evidence, or jury instructions, may permit determination of the fact and amount of personal injury recovery (*6 Cal. 4th 644, 662)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment InterestGeneral OverviewCivil ProcedureRemediesJudgment InterestPrejudgment InterestTortsDamagesCompensatory DamagesGeneral OverviewTortsDamagesInterestPrejudgment Interest

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12-121 California Points & Authorities § 121.57

§ 121.57 Opposing Contention That Compound Interest Should Be Awarded--Interest May Not Be Compounded

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF IS NOT ENTITLED TO COMPOUND INTEREST.

A. Interest May Not Be Compounded. Interest may not be computed on accrued interest unless by special statutory provision, or by stipulation of the parties (*Estate of Sharp (1971) 18 Cal. App. 3d 565, 585, 95 Cal. Rptr. 816* ; *State of California v. Day (1946) 76 Cal. App. 2d 536, 554, 173 P.2d 399*).

[*Optional*] **B. Ambiguous Contract Cannot Be Construed to Provide Compound Interest.** As a matter of law an ambiguous contract cannot be construed to provide for compound interest, and extrinsic evidence of the parties' intent is not admissible to show that a loan bears compound interest (*Curry v. Moody (1995) 40 Cal. App. 4th 1547, 1553-1554, 1555-1556, 48 Cal. Rptr. 2d 627*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to plaintiff's contention that he or she should be awarded compound interest.

It should be noted that although prejudgment interest is generally not compounded, postjudgment interest is awarded on the total amount of the judgment, including prejudgment interest [*see § 121.47*]. Counsel should also note that the court has the discretion to allow compound prejudgment interest against a wrongdoing trustee [*see § 121.46*]. Furthermore, if the parties have stipulated to compound interest, or have agreed in the contract which is the subject of the lawsuit that compound interest should be allowed on any damages resulting from either party's breach, the court may allow compound interest [*see § 121.34*].

This form may be combined, when appropriate, with points relating to the specific procedural context in which the issue

of the propriety of compound interest arises. The issue is most likely to arise on a motion for a new trial on the ground of inadequate damages [*Code Civ. Proc. § 657(5)*; *see generally* Ch. 64, *Damages: Tort* and Ch. 65, *Damages: Contract*] or a motion to vacate the judgment [*Code Civ. Proc. § 663*; *see generally* Ch. 155, *Motions After Trial*]. The points set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the point of law stated. Thus, for example, if plaintiff contends he or she is entitled to compound interest because defendant is a wrongdoing trustee, counsel should discuss the nature of plaintiff and defendant's relationship to prove it did not involve a trust situation, or that defendant's conduct did not amount to oppression, fraud, or malice.

The points in this form may be submitted in opposition to contentions supported by the memoranda set out in *§ 121.46*.

[3] Discussion of Authorities

[a] Interest May Not Be Calculated on Accrued Interest

The factual background and holding of ***Estate of Sharp*** *(1971) 18 Cal. App. 3d 565, 95 Cal. Rptr. 816* , are discussed in *§ 121.47[4][b]*. In that case, the court of appeal held that interest may not be computed on accrued interest unless by special statutory provision or by stipulation of the parties, although when a judgment is rendered which awards interest, the full amount of the judgment, including any accrued prejudgment interest, will bear interest at the statutory rate from the date of entry (*18 Cal. App. 3d 565, 585)* .

State of California v. Day *(1946) 76 Cal. App. 2d 536, 173 P.2d 399* , was commenced by the State of California to recover state compensation insurance funds that were allegedly misapplied by defendants. The trial court awarded plaintiff a money judgment to be compounded annually. Defendants appealed, contending, among other things, that the trial court erred in allowing compound interest.

The court of appeal agreed with this contention and directed the trial court to modify its judgment by striking out all amounts representing compound interest and inserting, in lieu thereof, simple interest. The court stated that the general rule is that interest may not be computed on accrued interest unless by special statutoryprovision, or by stipulation of the parties, and in the latter event, the amount may not be fixed in conflict with statutory provisions. The court held that the discretion granted to the court in *Civ. Code § 3288* to award prejudgment interest in cases of oppression, fraud, or malice does not include the right to make an order for interest on interest, because such compound interest would constitute a penalty over and above that expressly allowed in cases of oppression, fraud, or malice (*76 Cal. App. 2d 536, 554-555)* .

[b] Ambiguous Contract Cannot Be Construed to Provide Compound Interest

In ***Curry v. Moody*** *(1995) 40 Cal. App. 4th 1547, 48 Cal. Rptr. 2d 627* , plaintiffs sued for declaratory relief and to quiet title based on a forged reconveyance of a deed of trust on property purchased by defendants. The trial court awarded damages to the plaintiffs equivalent to the principal of the note secured by the trust deed and compound interest and attorneys fees. The defendant's appealed, contending that under the promissory note, the plaintiffs were entitled to only simple interest from the inception of the loan to the foreclosure sale, and compound interest from the date of the foreclosure sale to the trial. The dispute related to the interpretation of language in the note stating, "I promise to pay ...#x2026; interest from [date of inception] at the rate of 13 percent per annum, payable at the time of sale of the house ...#x2026; should interest not be so paid it shall thereafter bear like interest as the principal."

The court of appeal modified the judgment to calculate prejudgment interest using simple interest from the inception of the contract until the date the house was sold, and using compound interest from the date of sale until the date of trial. Although the plaintiffs argued that extrinsic evidence should be admitted to show the party's intend, the court

determined that the evidence was not competent to establish the meaning urged by the plaintiffs. Furthermore, as a matter of law, an ambiguous contract cannot be construed to provide for compound interest (*40 Cal. App. 4th 1547, 1553-1554)* . The court concluded that the provision principal and interest shall be "payable at the time of sale of the house" cannot reasonably be construed to mean principle and interest shall "be payable from the inception of the contract." In any event, the court stated, extrinsic evidence of the parties' intent is not admissible to show that a loan bears compound interest. The reason for this rule is found in *Cal. Const., art. XV, § 1*, which provides in relevant part "interest shall not be compounded, nor shall the interest thereon be construed to bear interest unless an agreement to that effect is clearly expressed in writing and signed by the party to be charged therewith" (*40 Cal. App. 4th 1547, 1555)* . Thus, the court concluded that the very fact the note is ambiguous as to whether compound interest began to accrue from the inception of the loan is enough to defeat that interpretation (*40 Cal. App. 4th 1547, 1556)* .

[4] Additional Authorities

[a] Interest May Not Be Calculated on Accrued Interest

In *Ninety Five Ten v. Crain (1991) 231 Cal. App. 3d 36, 282 Cal. Rptr. 141* , the court of appeal affirmed a judgment in favor of the payee of a promissory note that called for interest-only payments during the time of the delinquencies on which the lawsuit was brought. The judgment awarded plaintiff interest on the principal from the date of breach to the date of judgment. Plaintiff appealed, contending that under *Civ. Code § 3302* (detriment caused by breach of obligation to pay money as amount due by terms of obligation with interest thereon; *see § 121.41*, prejudgment interest should have been awarded on the delinquent interest that comprised the amount of the award). The court of appeal disagreed, citing *Civ. Code §§ 3357, 3358*, and the provision in the Usury Law that specifies that on a loan of money, interest shall not be compounded, nor shall interest thereon be construed to bear interest unless an agreement to that effect is clearly expressed in writing and signed by the party to be charged (*231 Cal. App. 3d 36, 39)* . The court of appeal discussed and disapproved *Daum Development Corp. v. Yuba Plaza, Inc. (1970) 11 Cal. App. 3d 65, 89 Cal. Rptr. 458* , to the extent it may be construed to sanction award of interest on interest in absence of an agreement for that interest (*231 Cal. App. 3d 36, 40-41)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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12-121 California Points & Authorities § 121.58

§ 121.58 Opposing Contention That Postjudgment Interest Should Be Awarded From Date of Original Judgment Reversed on Appeal--Postjudgment Interest Only From Time of New Judgment

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF IS ENTITLED TO POSTJUDGMENT INTEREST ONLY FROM _____ [*date*], THE DATE OF ENTRY OF THE NEW JUDGMENT FOLLOWING REVERSAL OF PLAINTIFF'S FIRST JUDGMENT.

No Postjudgment Interest on Judgment Reversed on Appeal. When a judgment is reversed on appeal, the new award subsequently entered by the trial court can bear postjudgment interest only from the date of entry of the new judgment (*Stockton Theatres, Inc. v. Palermo (1961) 55 Cal. 2d 439, 442-443, 11 Cal. Rptr. 580, 360 P.2d 76*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition toplaintiff's contention that a new award entered subsequent to a reversal of plaintiff's original award should accrue postjudgment interest from the date of entry of the original judgment. Such an award can bear interest only from the date of entry of the subsequent judgment. This argument should not be made when an appellate court has merely modified, rather than reversed, plaintiff's original judgment. When a judgment is modified on appeal, the judgment in its modified form accrues interest from the date of the original entry of judgment, not from the date of modification [*Stockton Theatres, Inc. v. Palermo (1961) 55 Cal. 2d 439, 442, 11 Cal. Rptr. 580, 360 P.2d 76* (citing *Beeler v. American Trust Co. (1946) 28 Cal. 2d 435, 438, 170 P.2d 439*)].

This form may be combined, where appropriate, with points relating to the specific procedural context in which the issue of the propriety of postjudgment interest arises. The issue is most likely to arise on a motion for a new trial on the ground of inadequate damages [*Code Civ. Proc. § 657(5)*; *see generally* Ch. 64, *Damages: Tort* and Ch. 65, *Damages: Contract*] or a motion to vacate the judgment [*Code Civ. Proc. § 663*; *see generally* Ch. 155, *Motions After Trial*]. The points set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the point of law stated.

In an appropriate case, this form may be submitted in opposition to contentions supported by the memoranda set out in *§ 121.47*.

[3] Discussion of Authorities

[a] No Postjudgment Interest on Judgment Reversed on Appeal

The background and holding of ***Stockton Theatres, Inc. v. Palermo*** *(1961) 55 Cal. 2d 439, 442-443, 11 Cal. Rptr. 580, 360 P.2d 76* , is discussed in *§ 121.47[3][a]*. In that case, the Supreme Court held that when a judgment is modified on appeal, whether upward or downward, the new sum draws interest from the date of entry of the original order, not from the date of the new judgment. At pages 442-443, the Court noted that, conversely, when a judgment is reversed on appeal, the new award subsequently entered by the trial court can bear interest only from the date of entry of the new judgment [citing *Cowdery v. London etc. Bank (1903) 139 Cal. 298, 303, 73 P 196]* .

[4] Additional Authorities

[a] No Postjudgment Interest on Judgment Reversed on Appeal

In re Marriage of Milhan (1980) 27 Cal. 3d 765, 166 Cal. Rptr. 533, 613 P.2d 812 , was an appeal by a husband seeking a redetermination of a previous Supreme Court division of his military retirement and insurance rights in light of *Hisquierdo v. Hisquierdo (1979) 439 U.S. 572, 99 S. Ct. 802, 59 L. Ed. 2d 1* . One of the contentions raised by the husband in this second appeal was that the trial court erred in awarding interest from the date on which the Supreme Court's remittitur was filed, rather than the date on which the subsequent judgment was entered.

After reiterating the principle that when a judgment is reversed on appeal, a new award subsequently entered by the trial court can bear interest only from the date of the new judgment, the Court held the remittitur in this case in effect ordered the trial court to enter judgment in the wife's favor. The remittitur fully defined and protected the rights of the parties. The trial court had only to apply equitable principles governing the enforcement of these rights. Accordingly, the filing of the remittitur constituted the entry of judgment for purposes of determining the date from which interest may run (*27 Cal. 3d 765, 779)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment InterestGeneral OverviewCivil ProcedureRemediesJudgment InterestPostjudgment Interest

California Points & Authorities

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§ 122.20 Supporting Contention That Elements Necessary to Recover for Intentional Interference With Economic Relationship Exist--In General

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Elements of Intentional Interference (Inducement to Breach Contract)

[b] Elements of Intentional Interference (Interference With Contractual Relationship)

[c] Elements of Intentional Interference (Interference With Noncontractual Relationship)

[d] Wrongful Conduct Is Unlawful Conduct (Interference With Noncontractual Relationship)

[e] Specific Intent to Interfere Not Required (Interference With Noncontractual Relationship)

[f] Intent May Be Inferred From Conduct Substantially Certain to Interfere With Relationship

[g] Wrongfulness Independent of Interference With Contract Is Not Element of Intentional Interference With Contractual Relationship

[h] Violation of Well-Defined Trade Rules May Constitute Wrongful Conduct

[4] Additional Authorities

[a] Elements of Intentional Interference (Interference With Contractual Relationship)

[b] Elements of Intentional Interference (Interference With Noncontractual Relationship)

§ 122.21 Supporting Contention That Elements Necessary to Recover for Intentional Interference With Economic Relationship Exist--Interference Rendered Performance of Contract More Expensive and Burdensome

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Interference Rendering Contract Performance More Expensive and Burdensome

[4] Additional Authorities

[a] Interference Rendering Contact Performance More Expensive

§ 122.22 Supporting Contention That Elements Necessary to Recover for Intentional Interference With Economic Relationship Exist--Interference With Unenforceable or Voidable Contract

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Interference With Unenforceable Contract

[b] Interference With Voidable Contract

[4] Additional Authorities

[a] Interference With Unenforceable Contract

[b] Interference With Voidable Contract

§ 122.23 Supporting Contention That Elements Necessary to Recover for Intentional Interference With Economic Relationship Exist--Interference With Terminable-at-Will Contract

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Interference With Terminable-at-Will Contract Actionable

[b] Interference With At-Will Contract Actionable as Interference With Prospective Economic Advantage

[c] Employer May Recover For Wrongful Conduct in Inducing At-Will Employee to Terminate Employment Contract

[4] Additional Authorities

[a] Interference With Terminable-at-Will Contact Actionable

§ 122.24 Supporting Contention That Specific Performance of Contract Interfered With Does Not Preclude Recovery for Interference

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Specific Performance Not A Bar to Damages

§ 122.25 Supporting Contention That Claim Supports Award of Punitive Damages [Civ. Code § 3294]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Punitive Damages May Be Awarded for Malicious Intentional Interference

§ 122.26 Supporting Contention That Elements Necessary to Recover for Conspiracy to Interfere With Economic Relationship Exist--In General

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points And Authorities

[3] Discussion of Authorities

[a] Elements of Conspiracy to Interfere

§ 122.27 Supporting Contention That Liability for Intentional Interference With Economic Relationship May Be Imposed on Owner, Officer, or Director of Company

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Owner, Officer, or Director of Company Not Shielded From Liability

[b] Tort Liability May Be Imposed Under Alter Ego Doctrine

[c] Plaintiff's Election

[4] Additional Authorities

[a] Tort Liability May Be Imposed Under Alter Ego Doctrine

§ 122.28 Opposing Contention That Elements Necessary to Recover for Intentional Interference With Economic Relationship Exist--Failure to Show Existing and Valid Contract

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Valid and Existing Contract Required

[b] Void Contract Insufficient

[c] Fraudulently Induced Contract Insufficient

[d] Cancelled Contract Insufficient

[e] Unenforceable Contract Insufficient

§ 122.29 Opposing Contention That Elements Necessary to Recover for Intentional Interference With Economic Relationship Exist--Failure to Show Existing Non-Contractual Economic Relationship

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Economic Relationship With Probability of Future Economic Benefit Required

[4] Additional Authorities

[a] Economic Relationship With Probability of Future Economic Benefits Required

§ 122.30 Opposing Contention That Elements Necessary to Recover for Intentional Interference With Economic Relationship Exist--Failure to Show Knowledge of Economic Relationship

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Defendant's Knowledge of Economic Relationship Required

§ 122.31 Opposing Contention That Elements Necessary to Recover for Intentional Interference With Economic Relationship Exist--Failure to Show Intent to Interfere

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Intent to Disrupt Economic Relationship Required

[b] Attorney's Payment of Third Party Recovery to Client Rather Than Lienor Is Insufficient Interference

[4] Additional Authorities

[a] Intent to Disrupt Economic Relationship Required

§ 122.32 Opposing Contention That Elements Necessary to Recover for Intentional Interference With Economic Relationship Exist--Failure to Show Wrongfulness of Interference With Prospective Economic Relationship

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Interference With Prospective Relations Must Be Wrongful

[b] Violations of Ethical or Industry Standards Do Not Satisfy Wrongfulness Requirement

[4] Additional Authorities

[a] Interference With Prospective Relations Must Be Wrongful

§ 122.33 Opposing Contention That Elements Necessary to Recover for Intentional Interference With Economic Relationship Exist--Failure to Show Disruption of Contractual Relationship

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Cause in Fact of Contractual Interference

[4] Additional Authorities

[a] Cause in Fact of Contractual Interference

§ 122.34 Opposing Contention That Elements Necessary to Recover for Intentional Interference With Economic Relationship Exist--Failure to Show That Interference Proximately Caused Injury

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Defendant's Conduct Was Substantial Factor in Causing Damages

[b] Interference With Prospective Contract or Business Relationship Must Be Moving Cause of Damages

[c] Showing of Resulting Injury Required

[4] Additional Authorities

[a] Interference With Prospective Contract or Business Relationship Must Be Moving Cause of Damages

[b] Showing of Resulting Injury Required

§ 122.35 Opposing Contention That Elements Necessary to Recover for Intentional Interference With Economic Relationship Exist--Defendant Is Party to Contractual Relationship

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] No Cause of Action if Defendant Is Party to Contract

[b] No Liability for Interfering With Subcontracts

[c] Agent Not Stranger to Contract

§ 122.36 Opposing Contention That Elements Necessary to Recover for Intentional Interference With Economic Relationship Exist--Making Competitive Bid on Private Contract Without Proper License Does Not Constitute Actionable Interference

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] No Cause of Action Based on Competitive Bidding by Unlicensed Defendant

§ 122.37 Opposing Contention That Elements Necessary to Recover for Conspiracy to Interfere With Economic Relationship Exist--Failure to Show Commission of Civil Wrong

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Wrongful Act Committed Pursuant to Conspiracy Required

§ 122.38 Opposing Contention That Elements Necessary to Recover for Conspiracy to Interfere With Economic Relationship Exist--Contracting Party May Not Be Held Liable in Tort for Conspiracy to Interfere With Contract

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Contracting Party May Not Be Held Liable in Tort for Conspiracy to Interfere With Contract

§ 122.39 Opposing Contention That Cause of Action for Intentional Interference With Economic Relationship Exists--Public Policy Precludes Recovery--Sporting Contests

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] No Recovery for Interference Related to Sporting Contest

§ 122.40 Opposing Contention That Cause of Action for Intentional Interference With Employment Relationship Exists--Public Policy Precludes Recovery--Employer May Not Sue Competing Employer for Hiring Plaintiff's At-Will Employee

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Employer May Not Sue Competing Employer for Hiring At-Will Employee

§ 122.41 Opposing Contention That Cause of Action for Intentional Interference With Economic Relationship Exists--Public Policy Precludes Recovery--Right to Induce Litigation on Contract of Another

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Right to Induce Litigation on Contract of Another

[4] Additional Authorities

[a] Right to Induce Litigation on Contract of Another

§ 122.42 Supporting Contention That Interference Is Justified or Privileged--Fair Competition

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Fair Competition Is Justified

[b] Noncontractual Interference Enjoys More Extensive Privilege

[4] Additional Authorities

[a] Fair Competition Is Justified

§ 122.43 Supporting Contention That Interference Is Justified or Privileged--Director's, Manager's, and Agent's Privilege

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Managers' Privilege

[b] Attorney for Breaching Party

[c] Predominant Motive Is Sufficient

[d] Privilege is Absolute When Applied to Termination of At-Will Employee

[4] Additional Authorities

[a] Manager's Privilege

[b] Predominant Motive is Sufficient

§ 122.44 Supporting Contention That Interference Is Justified or Privileged--Owner's Privilege

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Owner's Privilege

§ 122.45 Supporting Contention That Interference Is Justified or Privileged--Interference Is Protected by Statute or Constitution--Publication or Broadcast During Legislative, Judicial, or Other Official Proceeding [Civ. Code § 47(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Interference Is Absolutely Privileged Publication or Broadcast

[b] Privilege Extends to Quasi-Judicial Proceedings

[4] Additional Authorities

[a] Interference Is Absolutely Privileged Publication or Broadcast

§ 122.46 Supporting Contention That Interference Is Justified or Privileged--Interference Is Protected by Statute or Constitution--Prevention of Illegal Public Fund Expenditure [U.S. Const. Amends. I, XIV; Cal. Const. art. I, § 10; Code Civ. Proc. § 526a]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Interference Is Privileged as Attempt to Prevent Illegal Public Fund Expenditure

§ 122.47 Supporting Contention That Interference Is Justified or Privileged--Interference Is Protected by Statute or Constitution--Politically Motivated Boycott [U.S. Const. Amend. I]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Interference Is Privileged as Politically Motivated Boycott

§ 122.48 Supporting Contention That Interference Is Justified or Privileged--Interference Is Protected by Statute or Constitution--Right of Free Speech or Press Limits Liability for Allegedly False Statements [U.S. Const. Amend. I; Cal. Const. art. 1, § 2]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] First Amendment Protections Apply to Interference Claim Based on Alleged Injurious Falsehood

[b] Statement Must Be False and Defamatory

[4] Additional Authorities

[a] Statement Must Be False and Defamatory

§ 122.49 Supporting Contention That Interference Is Justified or Privileged--Interference Is Protected by Statute or Constitution--Petitioning Government for Redress of Grievance (Noerr-Pennington Doctrine)

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Conduct Protected by Noerr-Pennington Doctrine

[b] Application of Noerr-Pennington Doctrine to Tort Actions for Interference

[c] Types of Proceedings to Which Doctrine Applies

[d] Litigation Protected by Doctrine Unless Objectively Baseless

§ 122.50 Supporting Contention That Interference Is Justified or Privileged--Bona Fide Claim

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Interference Is Privileged as Attempt to Protect Bona Fide Claim

§ 122.51 Opposing Contention That Interference Is Privileged--Privilege for Fair Competition--Privilege Not Applicable to Competition by Unlawful or Illegitimate Means

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Privilege for Fair Competition Is Inapplicable if Defendant Uses Unlawful or Illegitimate Means

§ 122.52 Opposing Contention That Interference Is Privileged--Privilege Based on Confidential Relationship--Privilege Not Applicable When Purpose of Interference Is Solely to Further Personal Economic Advantage

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Privilege Based on Confidential Relationship Does Not Justify Interference for Purpose of Personal Economic Advantage

§ 122.53 Opposing Contention That Interference Is Privileged--Privilege Based on Financial Interest--Privilege Not Applicable When Interference Is Malicious or When Requisite Interest in Third Party's Business Is Absent

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Pleading and Practice Forms

[3] Discussion of Authorities

[a] Lack of Proprietary or Creditor's Interest

[b] Interference Based on Improper Motive

§ 122.54 Opposing Contention That Interference Is Privileged--Publication or Broadcast During Legislative, Judicial, or Other Official Proceeding [Civ. Code § 47(b)]--Privilege Not Applicable to Publication Unrelated to Judicial Proceeding Contemplated in Good Faith

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Communication Not Protected When Unrelated to Potential Action Contemplated in Good Faith

[4] Additional Authorities

[a] Communication Not Protected When Unrelated to Potential Action Contemplated in Good Faith

§ 122.55 Opposing Contention That Interference Is Privileged--Petitioning Government for Redress of Grievance (Noerr-Pennington Doctrine)--Exception for "Sham" Activity

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] "Sham" Exception to Noerr-Pennington Doctrine

[b] "Sham" Exception Applies to Tort Actions for Interference

[c] Test for "Sham" Litigation

§§ 122.56-122.69 [Reserved]

§ 122.70 Supporting Contention That Cause of Action Exists for Negligent Interference With Economic Relationship--Negligent Contractual Performance

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Criteria for Determining Duty of Care

[b] Negligent Performance of Contract as Basis for Action

[4] Additional Authorities

[a] Negligent Performance of Contract as Basis for Action

§ 122.71 Opposing Contention That Cause of Action Exists for Negligent Interference With Economic Relationship--Injury Is Ordinary Business Risk

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] No Recovery for Injury Resulting From Ordinary Business Risk

§ 122.72 Opposing Contention That Cause of Action Exists for Negligent Interference with Economic Relationship--Defendant Owes No Duty of Care

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] No Recovery If There Is No Duty of Care

[4] Additional Authorities

[a] No Recovery If There Is No Duty of Care

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CHAPTER 122 INTERFERENCE
PART I. INTRODUCTION

12-122 California Points & Authorities § 122.01

§ 122.01 Scope of Chapter

This chapter contains points and authorities relating to actions based on intentional interference with economic relationships, including forms supporting [*see §§ 122.20 -122.27*] and opposing [*see §§ 122.28 -122.41*] the contention that the elements necessary to recover exist, and forms supporting [*see §§ 122.42 -122.50*] and opposing [*see §§ 122.51 -122.55*] the contention that the interference was legally justified or privileged.

This chapter also includes points and authorities relating to actions based on negligent interference with economic relationships, including a from supporting [*see § 122.70*] and opposing [*see §§ 122.71, 122.72*] the contention that a cause of action exists.

Because an interference action may be brought under both a negligence theory and an intentional tort theory, memoranda of points and authorities based on either theory be used in conjunction with those based on the other theory.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsCommercial InterferenceBusiness RelationshipsGeneral OverviewTortsBusiness TortsCommercial InterferenceBusiness RelationshipsDefensesTortsBusiness TortsCommercial InterferenceBusiness RelationshipsElements

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12-122 California Points & Authorities § 122.02

§ 122.02 Governing Statutes

The law governing an action for intentional interference with economic relations has mostly developed through case law. Several landmark cases in this area have established the general rules governing such an action. In *Imperial Ice Co. v. Rossier (1941) 18 Cal. 2d 33, 35, 37-39, 112 P.2d 631* , the Supreme Court first held that interference with a contractual relationship by lawful but unjustified means is actionable. The Court expanded on this theory in *Buckaloo v. Johnson (1975) 14 Cal. 3d 815, 822-823, 827, 122 Cal. Rptr. 745, 537 P.2d 865* , in which the Court held that the tort of intentional interference with prospective economic advantage applies when the defendant interferes with a business or economic relationship not subject to a legally binding agreement, but nonetheless containing a probable future economic benefit to the plaintiff. The Court has subsequently shown some inclination to limit recovery in the area of interference with merely prospective economic advantage. In *Della Penna v. Toyota Motor Sales U.S.A., Inc. (1995) 11 Cal. 4th 376, 378, 392-393, 45 Cal. Rptr. 2d 436, 902 P.2d 740* , the Court held that a plaintiff seeking to recover for alleged interference with prospective economic relations has the burden of pleading and proving that the defendant's interference was wrongful by some measure beyond the fact of the interference itself, and noted that the case before it did not require it to consider other refinements to the precise wrongfulness that must be shown. The Court's listing of potential new requirements--such as whether a plaintiff should be required to prove that the defendant's conduct amounted to an independently tortious act, or was a species of anticompetitive behavior proscribed by positive law, or was motivated by unalloyed malice [*see* Della Penna v. Toyota Motor *Sales U.S.A., Inc. (1995) 11 Cal. 4th 376, 378, 45 Cal. Rptr. 2d 436, 902 P.2d 740]* --may presage issues that the Court will consider in future cases.

An action for negligent interference with economic relations is governed by case law, beginning with *J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 157 Cal. Rptr. 407, 598 P.2d 60* .

Civ. Code § 1714(a) sets forth the general standard of care required of every person. *Evid. Code § 669* creates a rebuttable presumption of negligence for the violation of a statute, ordinance, or regulation under certain conditions.

The measure of damages in a negligence action is governed by *Civ. Code §§ 3333-3333.2*. Contractual limitations on liability for negligence are governed by *Civ. Code § 1668*.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsCommercial InterferenceGeneral OverviewTortsBusiness TortsCommercial InterferenceBusiness RelationshipsGeneral OverviewTortsBusiness TortsCommercial InterferenceBusiness RelationshipsElementsTortsBusiness TortsCommercial InterferenceProspective AdvantageGeneral Overview

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12-122 California Points & Authorities § 122.03

§ 122.03 How to Use Forms in This Chapter

[1] Page Limits on Points and Authorities

One of the more significant drafting requirements to keep in mind are page limits: supporting and opposing memoranda filed in discovery motion proceedings may not exceed 15 pages. A reply or closing memorandum may not exceed 10 pages. Exhibits, declarations, attachments, the table of contents, the table of authorities, and the proof of service are excluded from these page limits. Any party must obtain leave of court to file a longer memorandum [*see Cal. Rules of Ct., Rule 3.1113(d), (e)*]. These and other drafting requirements are discussed in further detail in Ch. 1, *Writing Legal Memoranda and Briefs* .

[2] Using the Forms to Build a Draft Memorandum

The forms in this chapter are in the form of contentions based on substantive points of law, and may be combined with each other, depending on the facts and issues involved. These substantive contentions may also be combined with any appropriate procedural forms, depending on the context in which they are raised. For example, they may be combined with forms in Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* , Ch. 155, *Motions After Trial* , Ch. 160, *Motions to Strike* , or Ch. 221, *Summary Judgments* , if any of these procedures is involved. They may also be adapted for use in a trial or appellate brief, or be used to research office memoranda and jury instructions in interference cases. Whatever procedural context or paper is involved, counsel should add argument to the points and authorities being used, showing the relationship between the facts of the case and the points of law stated.

For a discussion of how to use the forms in this chapter to draft a memorandum of points and authorities or a trial or appellate brief, and for a sample of a complete memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* at the beginning of Volume 1.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureDiscoveryGeneral Overview

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12-122 California Points & Authorities § 122.04

§ 122.04 Terminology Used in This Chapter

"Interference with economic relations" is used by some courts, and is used in this chapter, to describe all types of actionable interference, that is, all wrongful interference with a person's general right to establish and maintain a lawful, contractual business, or other advantageous economic relationship [*see Shamblin v. Berge (1985) 166 Cal. App. 3d 118, 122, 212 Cal. Rptr. 313* (inducement to breach contract, interference with contract, and interference with prospective economic advantage are separate theories on which the tort of interference with economic relations may be based); *Owens v. Palos Verdes Monaco (1983) 142 Cal. App. 3d 855, 872, 191 Cal. Rptr. 381* ("interference with economic relations"); *Zimmerman v. Bank of Am. (1961) 191 Cal. App. 2d 55, 57-58, 12 Cal. Rptr. 319* ("interference with advantageous relationship"); *see also Buxbom v. Smith (1944) 23 Cal. 2d 535, 546, 145 P.2d 305* (recognizing general cause of action for wrongful interference with another's right to establish and conduct lawful business)]. This term describes the essence of the tort, which is the disruption of an advantageous economic relationship [*see Buckaloo v. Johnson (1975) 14 Cal. 3d 815, 822, 827, 122 Cal. Rptr. 745, 537 P.2d 865* ; *Zimmerman v. Bank of Am. (1961) 191 Cal. App. 2d 55, 57-58, 12 Cal. Rptr. 319]* .

Supreme Court decisions have used the term "interference with prospective economic advantage" in the same all-inclusive sense [*see Environmental Planning & Info. Council v. Superior Court (1984) 36 Cal. 3d 188, 193, 203 Cal. Rptr. 127, 680 P.2d 1086* (inducement of breach of contract is merely one type of broader tort of interference with prospective economic advantage); *Buckaloo v. Johnson (1975) 14 Cal. 3d 815, 823, 122 Cal. Rptr. 745, 537 P.2d 865* (same); *see also J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 808, 157 Cal. Rptr. 407, 598 P.2d 60* (negligent interference with prospective economic advantage)], while noting the analytical differences and public-policy distinctions between interference with existing contracts and interference with commercial relations less than contractual in nature [*see Della Penna v. Toyota Motor Sales U.S.A., Inc. (1995) 11 Cal. 4th 376, 392, 45 Cal. Rptr. 2d 436, 902 P.2d 740]* . Because of its use by the Supreme Court, counsel may prefer to use this latter term in memoranda of points and authorities. However, identical or similar terminology is still commonly used in a more limited sense to describe interference with noncontractual economic relations as distinguished from interference with contractual relations [*see, e.g., Shamblin v. Berge (1985) 166 Cal. App. 3d 118, 122, 212 Cal. Rptr. 313* ; *Manor Inv. Co. v. F. W. Woolworth, Co. (1984) 159 Cal. App. 3d 586, 592-594, 206 Cal. Rptr. 37*)]. To avoid possible confusion, therefore, this chapter does not use the term "interference with prospective economic advantage" in either sense, and the term "interference with noncontractual economic relations" is used to distinguish those types of interference that do not

disrupt an existing contract.

Similarly, several other terms are commonly used to describe more specific types of interference (for example, "inducing breach of contract" and "interference with business relations") [*see Manor Inv. Co. v. F. W. Woolworth, Co. (1984) 159 Cal. App. 3d 586, 592-594, 206 Cal. Rptr. 37]* . Counsel may prefer to use these terms in memoranda of points and authorities in accordance with local practice or personal preference.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsCommercial InterferenceGeneral OverviewTortsBusiness TortsCommercial InterferenceBusiness RelationshipsGeneral OverviewTortsBusiness TortsCommercial InterferenceContractsGeneral OverviewTortsBusiness TortsCommercial InterferenceProspective AdvantageGeneral Overview

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12-122 California Points & Authorities § 122.05

§ 122.05 Racketeer Influenced and Corrupt Organizations Act

[1] Civil Actions

In addition to the remedies discussed in this chapter, counsel may also wish to consider whether the facts of the case would give rise to a civil action under the federal Racketeer Influenced and Corrupt Organizations Act (RICO) (*18 U.S.C.S. §§ 1961-1968*). Although the object of RICO is to prevent and punish racketeering activity, its broad definitions may extend to otherwise law-abiding business persons and their respected and legitimate enterprises, that is, to conduct of legitimate business persons who engage in "garden variety" commercial fraud [*see Cianci v. Superior Court (1985) 40 Cal. 3d 903, 909, 221 Cal. Rptr. 575, 710 P.2d 375* ; *Douglas v. Superior Court (1989) 215 Cal. App. 3d 155, 159, 263 Cal. Rptr. 473* (pleading held sufficient)].

RICO authorizes a civil action by any person injured in his or her business or property by reason of a violation of *18 U.S.C.S. § 1962* for treble damages and costs of suit, including a reasonable attorney's fee (*18 U.S.C.S. § 1964(c)*). For a full discussion of RICO and the available civil remedies authorized by it, see Smith & Reed, Civil RICO (Matthew Bender).

[2] Jurisdiction

RICO provides that any person injured in his or her business or property by reason of a violation of *18 U.S.C.S. § 1962* may sue therefor in any appropriate United States District Court. This provision is not exclusive. State courts have concurrent jurisdiction over the civil action for damages authorized by *18 U.S.C.S. § 1964(c)* [*Tafflin v. Levitt (1990) 493 U.S. 455, 456-457, 467, 110 S. Ct. 792, 107 L. Ed. 2d 887* ; *Lou v. Belzberg (9th Cir. 1987) 834 F.2d 730, 736-739* ; *Cianci v. Superior Court (1985) 40 Cal. 3d 903, 907-916, 221 Cal. Rptr. 575, 710 P.2d 375]* . Civil RICO claims are arbitrable when the transaction is covered by an agreement that provides for arbitration of disputes between the parties [*Shearson/Am. Express, Inc. v. McMahon (1987) 482 U.S. 220, 238-242, 107 S. Ct. 2332, 96 L. Ed. 2d 185]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawPrivate ActionsRacketeer Influenced & Corrupt OrganizationsGeneral OverviewAntitrust &

Trade LawPrivate ActionsRacketeer Influenced & Corrupt OrganizationsClaimsGeneral OverviewAntitrust & Trade LawPrivate ActionsRacketeer Influenced & Corrupt OrganizationsCoverage

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12-122 California Points & Authorities § 122.06

§ 122.06 Related Pleadings and Practice Forms

For discussion and forms for use in actions for interference with economic relations, see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender).

For discussion and forms relating to negligence generally, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender). For discussion and forms relating to actions for conspiracy to interfere with economic relations, see California Forms of Pleading and Practice, Ch. 126, *Conspiracy* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsCommercial InterferenceGeneral Overview

California Points & Authorities

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12-122 California Points & Authorities § 122.07

§ 122.07 Related Points and Authorities

For a discussion of how to use the forms in this chapter to draft a memorandum of points and authorities or a trial or appellate brief, and for a sample of a complete memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* . For points and authorities relating to negligence generally, see Ch. 165, *Negligence* .

For additional discussion and forms relating to conspiracy to interfere with economic relations, see Ch. 46, *Conspiracy* .

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12-122 California Points & Authorities §§ 122.08-122.19

[Reserved]

§§ 122.08[Reserved]

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PART II. FORMS
A. Intentional Interference With Economic Relationship

12-122 California Points & Authorities § 122.20

§ 122.20 Supporting Contention That Elements Necessary to Recover for Intentional Interference With Economic Relationship Exist--In General

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS LIABLE FOR HIS/HER INTENTIONAL INTERFERENCE WITH PLAINTIFF'S _____ [CONTRACTUAL *or* NONCONTRACTUAL] ECONOMIC RELATIONSHIP WITH _____ [*name*] BECAUSE PLAINTIFF HAD _____ [A VALID AND EXISTING CONTRACT *or* AN ECONOMIC RELATIONSHIP CONTAINING THE PROBABILITY OF A FUTURE ECONOMIC BENEFIT] WITH _____ [*name*], DEFENDANT KNEW OF THIS _____ [CONTRACT *or* ECONOMIC RELATIONSHIP] AND [COMMITTED INTENTIONAL ACTS DESIGNED TO INDUCE A DISRUPTION OF THE CONTRACT WITH, OR A BREACH OF CONTRACT BY, _____ (*name*) *or* COMMITTED ACTS WRONGFUL BY SOME MEASURE OTHER THAN THE INTERFERENCE ITSELF WITH THE INTENT TO DISRUPT THE PROSPECTIVE RELATIONSHIP] AND HIS/HER ACTS DID _____ [CAUSE ACTUAL DISRUPTION OF THE _____ (CONTRACT *or* ECONOMIC RELATIONSHIP) *or* INDUCE _____ (*name*) TO BREACH THE CONTRACT], RESULTING IN DAMAGES TO PLAINTIFF.

[*EITHER, if action based on inducement to breach a contract*]

A. Elements of Intentional Interference (Inducement to Breach Contract). To plead an actionable wrong for inducement to breach a contract, the plaintiff must allege that (1) he or she had a valid and existing contract with a third party; (2) defendant had knowledge of the contract and intended to induce its breach; (3) the contract was in fact breached by the contracting third party; (4) the breach was caused by defendant's unjustified or wrongful conduct; and (5) plaintiff suffered damages as a result (*Freed v. Manchester Serv., Inc. (1958) 165 Cal. App. 2d 186, 189, 331 P.2d*

689).

[*OR, if action based on interference with a contractual relationship*]

A. Elements of Intentional Interference (Interference With Contractual Relationship). To plead an actionable wrong for interference with a contractual relationship, the plaintiff must allege that (1) he or she had a valid and existing contract with a third party; (2) defendant had knowledge of this contract; (3) defendant committed intentional and unjustified acts designed to interfere with or disrupt the contract; (4) actual interference with or disruption of the relationship occurred; and (5) damages were suffered as a result (*Quelimane Co. v. Stewart Title Guar. Co. (1998) 19 Cal. 4th 26, 55, 77 Cal. Rptr. 2d 709, 960 P.2d 513* ; *Savage v. Pacific Gas & Elec. Co. (1993) 21 Cal. App. 4th 434, 448, 26 Cal. Rptr. 2d 305*).

[*OR, if action based on interference with a noncontractual economic relationship*]

A. Elements of Intentional Interference (Interference With Noncontractual Relationship). To plead an actionable wrong for interference with a noncontractual economic relationship, the plaintiff must allege that (1) he or she had an economic relationship with a third party containing the probability of a future economic benefit to plaintiff; (2) defendant had knowledge of this relationship; (3) defendant committed intentional acts designed to disrupt the relationship, and those acts were wrongful by some measure other than the interference with the plaintiff's interest itself; (4) actual disruption of the relationship occurred; and (5) plaintiff suffered damages as a result (*Della Penna v. Toyota Motor Sales U.S.A., Inc. (1995) 11 Cal. 4th 376, 392-393, 45 Cal. Rptr. 2d 436, 902 P.2d 740* ; *Buckaloo v. Johnson (1975) 14 Cal. 3d 815, 827, 122 Cal. Rptr. 745, 537 P.2d 865* ; *Savage v. Pacific Gas & Elec. Co. (1993) 21 Cal. App. 4th 434, 448, 26 Cal. Rptr. 2d 305*).

[*Optional*] **B. Wrongful Conduct Is Unlawful Conduct (Interference With Noncontractual Relationship).** An act is independently wrongful for purposes of alleging a cause of action for intentional interference with prospective economic advantage if it is unlawful, which means that it must be conduct proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard (*Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal. 4th 1134, 1159, 131 Cal. Rptr. 2d 29, 63 P.3d 937*).

[*Optional*] **C. Specific Intent to Interfere Not Required (Interference With Noncontractual Relationship).** In an action for intentional interference with prospective economic advantage that has not ripened into a contract, a plaintiff is not required to allege that the defendant acted with the specific intent or purpose

of disrupting the plaintiff's prospective economic advantage, and it is sufficient that the plaintiff plead that the defendant knew that the interference was certain or substantially certain to occur as a result of the defendant's action (*Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal. 4th 1134, 1153, 131 Cal. Rptr. 2d 29, 63 P.3d 937*).

[*Optional*] **D. Intent May Be Inferred From Conduct Substantially Certain to Interfere With Relationship.** A party's intent to interfere with a contract or other economic relationship may be established by inference as well as by direct proof and may be inferred from conduct that is substantially certain to interfere with the relationship (*Savage v. Pacific Gas & Elec. Co. (1993) 21 Cal. App. 4th 434, 449, 26 Cal. Rptr. 2d 305*).

[*Optional*] **E. Wrongfulness Independent of Interference With Contract is Not Element of Intentional Interference With Contractual Relationship.** Because intentionally inducing or causing a breach of an existing contract is wrongful in and of itself, plaintiff in an action for intentional interference with an existing contractual

relationship is not required to plead or prove that defendant's conduct is wrongful apart from the interference with the contract itself (*Quelimane Co. v. Stewart Title Guar. Co. (1998) 19 Cal. 4th 26, 55-56, 77 Cal. Rptr. 2d 709, 960 P.2d 513*).

[*Optional*] **F. Violation of Well-Defined Trade Rules May Constitute Wrongful Conduct.** In an action for intentional interference with prospective economic advantage between competitors who are bound by well-defined, established rules or standards of a trade, association, or profession, a violation of those rules or standards may constitute wrongful conduct under the *Korea Supply* standard if the rule or standard allegedly violated provides for, or gives rise to, a sanction or means of enforcement for a violation (*Stevenson Real Estate Servs., Inc. v. CB Richard Ellis Real Estate Servs., Inc. (2006) 138 Cal. App. 4th 1215, 1223, 42 Cal. Rptr. 3d 235*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that plaintiff's cause of action for intentional interference with economic relations generally satisfies the elements essential for recovery. One of the three alternative Paragraphs A should be used depending on whether the action is based on interference (1) inducing a breach of contract, (2) with a contractual relationship, or (3) with a noncontractual relationship. Optional Paragraph B may be included in an action for intentional interference with prospective economic advantage to define the standard for evaluating the wrongfulness of the defendant's conduct.

These contentions may be combined with additional contentions supporting the existence of a particular element [*see §§ 122.21 -122.23*], supporting recovery regardless of plaintiff's ability to obtain specific performance of the contract interfered with [*see § 122.24*], supporting recovery of punitive damages [*see § 122.25*], or supporting the existence of a conspiracy to interfere [*see § 122.26*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the elements of interference with economic relations. This argument may arise in opposing a general demurrer to a complaint, a motion for nonsuit, a defense motion for summary judgment, or other similar procedure. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Counsel should thus set forth facts showing the existence of each element of the tort.

The tort of intentional interference with economic relations may be subdivided into three general theories of liability: inducement to breach a contract, interference with a contractual relationship, and interference with a noncontractual economic relationship. Each of these theories involves different factual elements [*see Quelimane Co. v. Stewart Title Guar. Co. (1998) 19 Cal. 4th 26, 55-56, 77 Cal. Rptr. 2d 709, 960 P.2d 513* ; *Della Penna v. Toyota Motor Sales U.S.A., Inc. (1995) 11 Cal. 4th 376, 392-393, 45 Cal. Rptr. 2d 436, 902 P.2d 740* ; *Shamblin v. Berge (1985) 166 Cal. App. 3d 118, 122-123, 212 Cal. Rptr. 313]* . Counsel should define the elements of the tort according to which theory or theories is most applicable.

[b] Related Pleading and Practice Forms

For discussion and forms relating to interference with economic relations, see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing a demurrer or motion for summary judgment, see respectively Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* , and Ch. 221, *Summary Judgments* .

[d] Opposing Points and Authorities

The points and *authorities in §§ 122.28 -122.35* may be used in an appropriate case to oppose the contentions supported by this memorandum.

[3] Discussion of Authorities

[a] Elements of Intentional Interference (Inducement to Breach Contract)

In ***Freed v. Manchester Serv., Inc.*** *(1958) 165 Cal. App. 2d 186, 331 P.2d 689* , plaintiff, an attorney, had contracted to provide legal services to a washrack operator in exchange for a share of the profits from operation of the washrack. Defendant, the lessor of the washrack, later entered into a new lease with the washrack operator and another person, as copartners, thereby allegedly extinguishing plaintiff's right to receive his share of the profits from the operator's sole operation of the washrack. Plaintiff brought an action for inducement to breach a contract. The trial court entered an order sustaining the general demurrer of one of the defendants and dismissed the action. Plaintiff appealed.

The court of appeal reversed the judgment. The court listed the elements which must be alleged in an action for inducement to breach a contract, stating that plaintiff must allege the existence of a valid contract; that defendant had knowledge of the existence of the contract and intended to induce a breach thereof; that the contract was in fact breached resulting in injury to plaintiff; and that the breach and resulting injury was proximately caused by defendant's unjustified or wrongful conduct (*165 Cal. App. 2d 186, 189)* . The court noted that unless it appears on the face of the complaint that a defendant's conduct was justified, justification is an affirmative defense. In the case at hand, the court found that the complaint did allege that (1) plaintiff had a contract with the washrack operator, (2) defendants knew of this contract, (3) defendants intended to induce its breach, (4) the washrack operator did breach the contract, (5) defendants' wrongful conduct was the proximate cause of the breach, and (6) plaintiff suffered damages (*165 Cal. App. 2d 186, 190)* . The court concluded that the complaint did not affirmatively show the existence of justification, and that plaintiff stated a cause of action (*165 Cal. App. 2d 186, 190-191)* .

NOTE:

The Supreme Court in Quelimane Co. v. Stewart Title Guar. Co. (1998) 19 Cal. 4th 26, 55-56, 77 Cal. Rptr. 2d 709, 960 P.2d 513 [*see §§ 122.20[3*][b] and 122.20[3][g]], held that wrongfulness independent of the act of interfering with the contract itself is not an element of an action for intentional interference with an existing contractual relationship. While the Court did not address the issue, the Court did not distinguish between an action based on an inducement to breach an existing contract and one based more generally on interference with an existing contract. However, the language used by the Court clearly demonstrates it intended that the holding be applied to an action brought under either theory. Thus, in light of that opinion, plaintiff in an action for interference with an existing contract based on inducing a breach of contract does not need to allege that the interference was "wrongful" beyond the fact that the interference was intended to induce the breach.

[b] Elements of Intentional Interference (Interference With Contractual Relationship)

In ***Quelimane Co. v. Stewart Title Guar. Co.*** *(1998) 19 Cal. 4th 26, 77 Cal. Rptr. 2d 709, 960 P.2d 513* , plaintiffs, who were engaged in the holding, ownership, and financing of real property, brought suit against the only companies offering real estate title insurance in their county. Defendants had an established practice of refusing to issue title insurance on properties acquired at tax sales, despite the fact that titles of parcels purchased by tax sale are deeded free and clear by operation of law. This refusal, along with defendants' efforts to convince the public that title insurance was

a necessity, caused a great reduction in the value and marketability of plaintiffs' land bought at tax sales and resulted in the attempted rescission and breach of contracts for sale of plaintiffs' land to third-party purchasers. In the suit, plaintiffs alleged that defendants' refusal to issue title insurance on these properties interfered with plaintiffs' contracts for sale of the property to purchasers, that the defendants conspired to refuse to issue title insurance for property obtained at a tax sale, and that defendants intentionally, willfully, and deliberately interfered with the contractual relations of members of the general public for the sale of land purchased at tax sales. The case was dismissed by stipulation as to two of the three defendants, and the remaining defendant successfully demurred to the causes of action brought against it. The court of appeal affirmed, holding in part that plaintiffs could not state a cause of action for intentional interference with contractual relations because the refusal to issue title insurance on the properties was not wrongful for a reason other than the impact such refusal had on the contracts with the plaintiffs' purchasers.

The Supreme Court reversed the court of appeal. The Court reaffirmed that the elements which a plaintiff must plead to state the cause of action for intentional interference with contractual relations are (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach of disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage (*19 Cal. 4th 26, 55)* . The Court then held that, unlike in a claim for intentional interference with prospective economic advantage, a plaintiff alleging intentional interference with an existing contractual relationship need not allege that the defendant's conduct was wrongful apart from the interference with the contract itself. This is discussed further in § 122.20[3][g]. The Court also noted that the tort of intentional interference with performance of a contract does not require that the actor's primary purpose be disruption of the contract, quoting extensively the language from Restatement (Second) of Torts § 766 (*19 Cal. 4th 26, 55-56)* .

The Court then concluded that the complaint sufficiently alleged a cause of action for intentional interference with existing contractual relations. The complaint alleged a contract between plaintiff and a land purchaser. Knowledge of the contract was implied in an allegation that defendant refused to issue a policy of title insurance unless the purchaser initiated a quiet title action. Disruption of the contractual relationship was alleged in an allegation that the purchaser then failed to complete payment. Damages were alleged in the lost benefits of the transactions and related legal costs. By a conspiracy allegation and similar allegations regarding the tax deeds to purchasers which defendants refused to insure, plaintiffs satisfied those elements of the cause of action. Finally, the complaint alleged that defendants deliberately, willfully, and intentionally interfered with the contractual relations of purchasers of land and sellers who are members of the public owning land purchased through a tax sale, including, but not limited to, the plaintiffs. The Court reserved for trial the issue of plaintiffs' proof that the remaining defendant intended to interfere with land sale contracts when it denied title insurance, as well as the issue of whether the defendant can establish that it had a legitimate business purpose which justified its actions (*19 Cal. 4th 26, 56-57)* .

In ***Savage v. Pacific Gas & Elec. Co.*** *(1993) 21 Cal. App. 4th 434, 26 Cal. Rptr. 2d 305* , plaintiff had sued defendant utility company for libel, slander, and intentional interference with contract and prospective economic advantage based in part on statements made by defendant's officials to plaintiff's employer, a newspaper that reported on the energy industry, which ultimately caused the employer to terminate plaintiff's employment. The statements, which pertained to plaintiff's previous volunteer work for an environmental organization, implied that plaintiff had a conflict of interest that would compromise her objectivity as a reporter and consisted of records of plaintiff's previous appearance in a Public Utilities Commission proceeding on behalf of the organization and an account of a conversation concerning plaintiff allegedly held between one of defendant's officials and a representative of the organization, the truth of which was disputed by plaintiff. The trial court granted summary adjudication for defendant on these causes of action and entered judgment for defendant. Plaintiff appealed, and the court of appeal reversed.

The court of appeal stated that the elements of a cause of action for intentional interference with contractual relations are: (1) a valid contract between the plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage (*21 Cal. App. 4th 434, 448)* . The court noted that a

cause of action under this theory will lie for the intentional interference by a third person with a contractual relationship either by unlawful means or by means otherwise lawful when there is a lack of sufficient justification. Unlawful means include defamation and other tortious conduct (*21 Cal. App. 4th 434, 449)* . The court concluded that there was a triable issue of fact concerning the interference causes of action. The trier of fact could reasonably find that the defendant's executive's conduct was substantially certain to interfere with plaintiff's interests and could infer culpable intent from this fact. The court also held that defendant could not be liable for conveying to plaintiff's employer truthful copies of government documents or an accurate account of its executive's conversation with the environmental organization's representative, but could be held liable on a finding that defendant had defamed plaintiff by conveying a false account of the conversation (*21 Cal. App. 4th 434, 450)* .

[c] Elements of Intentional Interference (Interference With Noncontractual Relationship)

In ***Della Penna v. Toyota Motor Sales U.S.A., Inc.*** *(1995) 11 Cal. 4th 376, 45 Cal. Rptr. 2d 436, 902 P.2d 740* , plaintiff was an automobile wholesaler who alleged that defendant Toyota Motor Sales U.S.A., Inc. (Toyota) had interfered with his prospective economic relationships by requiring purchasers of its Lexus automobiles to agree not to sell the automobiles for use outside the United States (in order to preclude the development of a resale market for Lexuses in Japan). Once Toyota had discovered that plaintiff was purchasing Lexuses and reselling them in Japan, it put his name on an "offenders list" given to dealers along with a warning that sales to those on the list could lead to sanctions on the dealers. Plaintiff's lawsuit went to the jury, which was instructed (over plaintiff's objection) with *BAJI No. 7.82*, modified to provide that the cause of action required proof that defendant "intentionally engaged in wrongful acts or conduct designed to interfere with or disrupt" plaintiff's prospective relationships. The jury returned a divided verdict for Toyota, and plaintiff appealed. The court of appeal reversed on the ground that plaintiff need not establish that the conduct was wrongful; the Supreme Court granted review and reversed the court of appeal.

The Court examined the history of the causes of action for interference with contracts and interference with prospective economic relations, noting the historical emphasis on the "intentionality" requirement, and the existence of the defense of privilege, which could be used to justify conduct based on the defendant's own competitive business interests (*11 Cal. 4th 376, 381-383)* . The Court also discussed the calls for reexamination and reform, including the Restatement and the Second Restatement and the responses of courts to the Restatements (*11 Cal. 4th 376, 383-387)* . In discussing the California treatment of the cause of action, the Court set out the elements of the cause of action from *Buckaloo v. Johnson (1975) 14 Cal. 3d 815, 827, 122 Cal. Rptr. 745, 537 P.2d 865* , as well as its statements that privilege or justification was an affirmative defense, and that a significant privilege or justification is free competition (*11 Cal. 4th 376, 389)* .

The Court went on to discuss the criticisms of the broad scope of the cause of action, especially the potential for liability based on nothing more than competitive business practices that are not otherwise wrongful (*11 Cal. 4th 376, 389-391)* . The Court concluded that the criticisms are valid, and support the conclusion that a distinction needs to be made between interference with an existing contract on the one hand, and a prospective relationship on the other. The interests invaded are not of nearly equal dignity, so economic relationships short of contractual should stand on a different legal footing as far as the potential for tort liability is reckoned (*11 Cal. 4th 376, 392)* . The Court found the notion that inducing the breach of an existing contract is merely a subevent of a "more inclusive" class of acts that interfere with economic relations generally may not be objectionable in theory, but in practice has been mischievous. Instead, the Court stated, courts should give a greater solicitude to those relationships that have ripened into agreements, and recognize that relationships short of that subsist in a zone in which the rewards and risks of competition are dominant (*11 Cal. 4th 376, 392)* . Therefore, the Court held that the trial court's modification of *BAJI No. 7.82* to require proof that the conduct was wrongful in addition to being intentional was not error (*11 Cal. 4th 376, 393)* . To the extent that *Buckaloo v. Johnson (1975) 14 Cal. 3d 815, 827, 122 Cal. Rptr. 745, 537 P.2d 865* and *Seaman's Direct Buying Serv., Inc. v. Standard Oil Co. (1984) 36 Cal. 3d 752, 206 Cal. Rptr. 354, 686 P.2d 1158* , are inconsistent with this requirement, the Court disapproved them (*11 Cal. 4th 376, 393 n.5*).

In ***Buckaloo v. Johnson*** *(1975) 14 Cal. 3d 815, 122 Cal. Rptr. 745, 537 P.2d 865* , one of the defendants, a property owner, erected a sign on her property that read: "For Sale--Contact Your Local Broker." A group of potential buyers approached plaintiff, a real estate broker, and asked about the property. Plaintiff advised the buyers about the merits of the parcel. The buyers promised to return the next day, but never did. Plaintiff sent the seller a note informing her that he was the "procuring cause" of the potential buyers and asking her to refer them to him if they contacted her. Plaintiff learned later that a sale had been made to the buyers without his participation. Plaintiff unsuccessfully requested the seller to pay him a commission. There was no written agreement between plaintiff and the seller or buyer regarding the payment of a commission on the sale of the property. Plaintiff sued the seller and the buyers for intentional interference with prospective economic advantage (that is, intentional interference with a noncontractual relationship) [*see § 122.04*]. The trial court sustained general demurrers by defendant buyers. Plaintiff appealed.

The Supreme Court reversed the demurrers relating to plaintiff's actions for interference. The court stated that in the real estate brokerage context, the elements of interference with a noncontractual relationship are (1) an economic relationship between the broker and vendor or broker and vendee containing the probability of economic benefit to the broker; (2) knowledge by the defendant of the existence of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) damages to the plaintiff proximately caused by the acts of the defendant (*14 Cal. 3d 815, 827)* . Finding that each of these elements was adequately alleged by the plaintiff in the complaint, the Court concluded that plaintiff had stated a cause of action for interference (*14 Cal. 3d 815, 828-830)* .

NOTE:

To the extent that the opinion in *Buckaloo* is inconsistent with the requirement that the plaintiff plead and prove that the defendant's interference was wrongful by some measure beyond the fact of the interference itself, the opinion was disapproved by the *California Supreme Court in Della Penna v. Toyota Motor Sales U.S.A., Inc. (1995) 11 Cal. 4th 376, 393 n.5, 45 Cal. Rptr. 2d 436, 902 P.2d 740* .

The factual and procedural background of ***Savage v. Pacific Gas & Elec. Co.*** *(1993) 21 Cal. App. 4th 434, 26 Cal. Rptr. 2d 305* , is discussed in *§ 122.20[3][b]*. In addition to alleging that defendant's statements caused plaintiff's employer to terminate her employment, plaintiff alleged that defendant's statements to the editor of another newspaper for whom she had worked as a free-lance reporter caused the other newspaper to discontinue accepting her articles for publication.

In concluding that the record in that case presented a triable issue of fact regarding the elements of the tort of interference with prospective economic advantage, the court noted that the elements of that tort differ from that of the tort of intentional interference with contractual relationship only to the extent that the former cause of action presupposes an economic relationship between the plaintiff and a third party with the probability of future economic benefit to the plaintiff (*21 Cal. App. 4th 434, 448)* . The court observed that plaintiff did not have a contractual relationship with the other newspaper and that the newspaper was not obliged to compensate her or to accept her articles. She was merely on a list of reporters privileged to submit articles that would be reviewed for publication. Nevertheless, she did enjoy an economic relationship with the newspaper offering the probability of future economic benefit because she could be expected to be paid for those articles that were accepted for publication (*21 Cal. App. 4th 434, 449)* . Because the court concluded that there was evidence in the record that defendant may have acted unlawfully in intervening with the editor of the newspaper, there was a triable issue as to whether the defendant's interference was justified (*21 Cal. App. 4th 434, 451-456)* .

[d] Wrongful Conduct Is Unlawful Conduct (Interference With Noncontractual Relationship)

In ***Korea Supply Co. v. Lockheed Martin Corp.*** *(2003) 29 Cal. 4th 1134, 131 Cal. Rptr. 2d 29, 63 P.3d 937* , the plaintiff was a business that represented a company that competed for a contract to provide the Republic of Korea with military radar systems. Even though the plaintiff's client's bid was $50 million lower and its equipment allegedly

superior, the contract went to a competing company. After evidence emerged suggesting that the contract was awarded because an agent for the competing company had extended bribes and sexual favors to key Korean officials, the plaintiff brought suit against the company that won the contract and the offending agent, asserting causes of action for conspiracy, intentional interference with prospective economic advantage, and unfair competition. The plaintiff alleged that but for the bribes and sexual favors extended by the agent, conduct that violated the Foreign Corrupt Practices Act, the contract would have been awarded to the plaintiff's client and the client would have paid the plaintiff a commission of over $30 million. Moreover, the plaintiff alleged that the defendants knew of the plaintiff's relationship with its client and that the illegal conduct would cause the plaintiff substantial financial loss. The trial court sustained the defendants' demurrer to all counts. The court of appeal reversed, finding that the plaintiff had sufficiently stated causes of action for intentional interference with prospective economic advantage and statutory unfair competition.

The California Supreme Court granted review to address two specific issues, one of which was whether the plaintiff had adequately pleaded a cause of action for intentional interference with prospective economic advantage even though the plaintiff failed to plead that the defendants had the specific intent to interfere with the plaintiff's business expectancy. In the course of concluding that plaintiff had adequately pleaded this cause of action, the Court clarified that an act is independently wrongful for purposes of alleging a cause of action for intentional interference with prospective economic advantage if it is unlawful, which means that it must be conduct proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard (*29 Cal. 4th 1134, 1159)* . In this case, the Court concluded that the plaintiff had met this requirement by alleging that the defendants' conduct in offering bribes and sexual favors to foreign officials to procure a contract constituted a violation of the Foreign Corrupt Practices Act (*29 Cal. 4th 1134, 1159)* .

[e] Specific Intent to Interfere Not Required (Interference With Noncontractual Relationship)

The factual and procedural background of ***Korea Supply Co. v. Lockheed Martin Corp.*** *(2003) 29 Cal. 4th 1134, 131 Cal. Rptr. 2d 29, 63 P.3d 937* , is described in § 122.20[3][d]. In concluding that the plaintiff had sufficiently pleaded a cause of action for intentional interference with prospective economic advantage, the Court held that a plaintiff in such an action is not required to plead that the defendant acted with the specific intent or purpose of disrupting the plaintiff's prospective economic advantage. It is sufficient that the plaintiff plead that the defendant knew that the interference was certain or substantially certain to occur as a result of the defendant's conduct (*29 Cal. 4th 1134, 1153)* . The Court noted that the use of the word "designed" in the typical formulation of the third element of the tort does not necessarily mean specific intent. Consistent with the intent requirement imposed by *Quelimane Co. v. Stewart Title Guar. Co. (1998) 19 Cal. 4th 26, 77 Cal. Rptr. 2d 709, 960 P.2d 513* , in a cause of action for intentional interference with contract, and the parameters of the interference tort and use of the word "intent" in the Restatement (Second) of Torts § 8A, comment b, the Court held that specific intent was not a required element (*29 Cal. 4th 1134, 1155-1157)* . The Court also noted that the inclusion in the tort of a requirement that the plaintiff prove that the defendant's conduct was wrongful by some measure other than the fact of the interference--which, as the Court clarified, required a showing that the conduct was unlawful by some independent legal standard--makes an additional showing of specific intent to interfere unnecessary. Under the parameters of the tort as articulated by the Court, the impropriety of a defendant's conduct comes from unlawful conduct combined with the defendant's knowledge that the conduct will interfere, or is substantially certain to interfere, with the plaintiff's prospective economic advantage (*29 Cal. 4th 1134, 1159-1162)* .

[f] Intent May Be Inferred From Conduct Substantially Certain to Interfere With Relationship

The factual and procedural background of ***Savage v. Pacific Gas & Elec. Co.*** *(1993) 21 Cal. App. 4th 434, 26 Cal. Rptr. 2d 305* , is discussed in *§ 122.20[3][b]*. In discussing the elements of the torts of intentional interference with contractual relationship and intentional interference with prospective economic advantage, the court of appeal noted that both torts require intentional acts designed to interfere with a contractual or economic relationship. Citing *Seaman's Direct Buying Serv., Inc. v. Standard Oil Co. (1984) 36 Cal. 3d 752, 767* , *206 Cal. Rptr. 354* , *686 P.2d 1158* , the court stated that intent may be established by inference as well as by direct proof. Thus, the jury may infer culpable

intent from conduct substantially certain to interfere with the contract or prospective economic relationship (*21 Cal. App. 4th 434, 449)* . In the case before it, the court concluded that the trier of fact could reasonably find that the defendant's executive's conduct in intervening with the plaintiff's employer and with the other newspaper for which she worked was substantially certain to interfere with plaintiff's interests and could infer culpable intent from this fact (*21 Cal. App. 4th 434, 450)* .

[g] Wrongfulness Independent of Interference With Contract Is Not Element of Intentional Interference With Contractual Relationship

The factual and procedural background of ***Quelimane Co. v. Stewart Title Guar. Co.*** *(1998) 19 Cal. 4th 26, 77 Cal. Rptr. 2d 709, 960 P.2d 513* , is discussed in *§ 122.20[3][b]*. In reaching its decision that plaintiffs had stated a cause of action for intentional interference with an existing contractual relationship sufficient to withstand a demurrer, the Supreme Court held that wrongfulness independent of the act of interfering with the contract itself is not an element of an action for intentional interference with an existing contractual relationship. The Court, citing its earlier opinion in *Della Penna v. Toyota Motor Sales, U.S.A., Inc. (1995) 11 Cal. 4th 376, 45 Cal. Rptr. 2d 436, 902 P.2d 740* [*see § 122.20[3][c]*], reaffirmed that interference with an existing contract receives greater solicitude than interference with prospective economic advantage, and recognized that intentionally inducing or causing a breach of an existing contract is a wrong in and of itself (*19 Cal. 4th 26, 55-56)* .

NOTE:

While it did not address any possible distinction, the *Supreme Court in Quelimane Co. v. Stewart Title Guar. Co. (1998) 19 Cal. 4th 26, 55-56, 77 Cal. Rptr. 2d 709, 960 P.2d 513* , did not distinguish between an action based on an inducement to breach an existing contract and one based more generally on interference with an existing contract. However, the language used by the Court clearly demonstrates it intended that the holding be applied to an action brought under either theory.

[h] Violation of Well-Defined Trade Rules May Constitute Wrongful Conduct

In ***Stevenson Real Estate Servs., Inc. v. CB Richard Ellis Real Estate Servs., Inc.*** *(2006) 138 Cal. App. 4th 1215, 42 Cal. Rptr. 3d 235* , the plaintiff was a real estate broker who was hired to represent a company in its search for new office space to lease. After months of searching, the plaintiff showed the company a particular property and provided the company with substantial information, photographs, and analysis concerning the property. The company told the plaintiff that it was interested in making an offer on a lease, but would have to get prior approval from a second company that was about to acquire it. The plaintiff was initially given approval by a representative of the second company to negotiate on a lease for the property, but subsequently was told that the parent company of the second company had interceded and demanded that the lease negotiations be handled by a different broker. The plaintiff objected and notified the other broker that its conduct was in violation of the Rules of Professional Conduct of the American Industrial Real Estate Association. The company eventually signed a long-term lease for the property, but the plaintiff received no commission, which instead went to the broker provided by the parent company. The plaintiff sued the other broker and its successor in interest for intentional interference with prospective economic advantage. The trial court granted judgment on the pleadings in favor of the defendants and denied leave to amend. The plaintiff appealed.

The court of appeal reversed. The court first rejected the defendants' contention that the second broker was not subject to the Rules of Professional Conduct after noting that the defendants had not requested judicial notice of those Rules necessary to their argument, and as such, the trial court erred in accepting their position (*138 Cal. App. 4th 1215, 1221)* . The court then addressed the defendants' argument that a violation of the Rules of Professional Conduct would not be sufficient to constitute "wrongful conduct" under the standard provided by the Supreme Court *Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal. 4th 1134, 131 Cal. Rptr. 2d 29, 63 P.3d 937* [*see § 122.20[3][d]*]. The court noted that the Supreme Court had specified that the "independently wrongful" element required proscription by some "constitutional, statutory, regulatory, common law, or other determinable legal standard." Because these specified

sources account for virtually all sources of legal restrictions, the phrase "other determinable legal standard" must refer to some other source of limitations on behavior. Therefore, the court held that in an action between competitors who are bound by well-defined, established rules or standards of a trade, association, or profession, a violation of those rules or standards may constitute wrongful conduct under the *Korea Supply* standard, although if a particular rule or standard unduly restricts free competition, that particular rule may not be an appropriate basis for an interference action (*138 Cal. App. 4th 1215, 1223)* . In reaching its decision, the court distinguished the court of appeal opinion in *Gemini Aluminum Corp. v. California Custom Shapes, Inc. (2002) 95 Cal. App. 4th 1249, 116 Cal. Rptr. 2d 358* [*see § 122.32*]. In that case, the industry standards used by the plaintiff to attempt to show wrongful conduct were too vague and not necessarily known to all industry members (*138 Cal. App. 4th 1215, 1222)* .

The court also held that the rule or standard allegedly violated must be independently actionable, which necessarily requires that the rule or standard provide for, or give rise to, a sanction or means of enforcement for a violation. A right to arbitration between aggrieved members of the trade or association would be sufficient to meet this requirement. However, because the plaintiff in this particular case had not alleged that the standards violated were independently actionable, the court remanded to allow the plaintiff the opportunity to amend the complaint to meet this requirement, if possible (*138 Cal. App. 4th 1215, 1223-1224)* .

[4] Additional Authorities

[a] Elements of Intentional Interference (Interference With Contractual Relationship)

In *Shamblin v. Berge (1985) 166 Cal. App. 3d 118, 212 Cal. Rptr. 313* , plaintiff developers had obtained a secured loan from defendant lender in order to construct a townhouse development. When plaintiffs failed to comply with the loan agreement, the lender filed a judicial foreclosure action and concurrently obtained an ex parte order appointing a receiver to take possession of the development. Prior to the receiver's confirmation, plaintiffs obtained deposits on two units. Defendants later approached plaintiffs, stating their desire to act as real estate agents for the development despite the pending foreclosure action. Defendants were given the exclusive right to sell the units, but they sold none. Furthermore, defendants warned the depositors that a purchase of the units on which they had made deposits could be arranged directly from the foreclosing lender at a substantially lower price than that offered by plaintiffs (the lender had been awarded title to the units in settlement of plaintiffs' debt). Each time the depositors visited the development, defendants repeated these warnings and advisements. The depositors soon withdrew the money they had deposited with plaintiffs and agreed to purchase from the lender. Plaintiffs filed a complaint alleging interference with a contractual relationship. The court of appeal affirmed a verdict in favor of plaintiffs. The court noted that to prevail under a theory of "interference with a contractual relationship," a plaintiff must prove (1) he or she had a valid and existing contract with a third party; (2) defendant had knowledge of this contract; (3) defendant committed intentional and unjustified acts designed to interfere with or disrupt the contract; (4) actual interference with or disruption of the relationship; and (5) resulting damages (*166 Cal. App. 3d 118, 123)* . Although the court found that the jury had been erroneously instructed as to the first element of the tort, the court found the instruction did not compel reversal. The court stated that the existence and validity of the contract or contracts at issue had been established at trial, and that it was not reasonably probable that, absent the error, the jury would have returned a verdict in defendants' favor (*166 Cal. App. 3d 118, 123-124)* .

[b] Elements of Intentional Interference (Interference With Noncontractual Relationship)

The court of appeal in *Tri-Growth Ctr. City, Ltd. v. Silldorf, Burdman, Duignan & Eisenberg (1989) 216 Cal. App. 3d 1139, 265 Cal. Rptr. 330* , reversed the trial court's grant of summary judgment. The court held that a cause of action for intentional interference with prospective economic advantage was stated and triable issues of fact existed. Defendant law firm, which had previously represented plaintiff partners in other ventures, used confidential information regarding the plaintiff partnership's negotiations for the purchase of property, allowing the firm to make its own, more favorable offer for the property (*216 Cal. App. 3d 1139, 1153-1154)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsCommercial InterferenceGeneral OverviewTortsBusiness TortsCommercial InterferenceBusiness RelationshipsElementsTortsBusiness TortsCommercial InterferenceContractsElementsTortsBusiness TortsCommercial InterferenceProspective AdvantageElements

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 122 INTERFERENCE
PART II. FORMS
A. Intentional Interference With Economic Relationship

12-122 California Points & Authorities § 122.21

§ 122.21 Supporting Contention That Elements Necessary to Recover for Intentional Interference With Economic Relationship Exist--Interference Rendered Performance of Contract More Expensive and Burdensome

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS LIABLE FOR HIS/HER INTENTIONAL INTERFERENCE WITH PLAINTIFF'S CONTRACT WITH _____ [*name*], BECAUSE DEFENDANT HAS CAUSED PLAINTIFF'S PERFORMANCE UNDER THE CONTRACT TO BECOME MORE EXPENSIVE AND BURDENSOME.

Interference Rendering Contract Performance More Expensive and Burdensome. A defendant is liable for his or her intentional interference with a contract between plaintiff and a third party, either by unlawful means or by means otherwise lawful but unjustified, when that interference renders plaintiff's performance under the contract more expensive and burdensome (*Lipman v. Brisbane Elementary Sch. Dist. (1961) 55 Cal. 2d 224, 232, 11 Cal. Rptr. 97, 359 P.2d 465* ; *Ramona Manor Convalescent Hosp. v. Care Enters. (1986) 177 Cal. App. 3d 1120, 1131, 225 Cal. Rptr. 120*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that, in establishing the fact of injury to plaintiff in an action for intentional interference with a contract, plaintiff is not necessarily limited to showing a breach of the contract by the third party, but may also rely on the fact that his or her own contract performance has been rendered more expensive or burdensome.

This contention may be combined with additional contentions supporting the existence of an interference action [*see § 122.20*] or particular elements [*see §§ 122.22, 122.23*], supporting recovery regardless of plaintiff's ability to obtain

specific performance of the contract interfered with [*see § 122.24*], supporting recovery of punitive damages [*see § 122.25*], or supporting the existence of a conspiracy to interfere [*see § 122.26*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the defendant's interference, for example, in opposition to a demurrer or motion for summary judgment. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should include facts showing that defendant disrupted plaintiff's contractual relationship with a third party by rendering plaintiff's performance more expensive or burdensome.

[b] Related Pleading and Practice Forms

For discussion and forms relating to interference with economic relations, see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing a demurrer or motion for summary judgment, see respectively Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* , and Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Interference Rendering Contract Performance More Expensive and Burdensome

In ***Lipman v. Brisbane Elementary Sch. Dist.*** *(1961) 55 Cal. 2d 224, 11 Cal. Rptr. 97, 359 P.2d 465* , plaintiff school board director alleged that defendant school board trustees maliciously engaged in conduct with intent to discredit plaintiff's reputation and to obtain removal of plaintiff from her position. Defendants had allegedly made statements to various persons, including newspaper reporters and members of the public, to the effect that plaintiff suppressed facts from the board, tampered with minutes of board meetings, received "kickbacks" from district employees, engaged in "shady dealings," and "cleaned up" on business transactions involving the district. Plaintiff filed an action against the trustees alleging interference. The trial court sustained a demurrer to the complaint without leave to amend. Plaintiff appealed.

The Supreme Court reversed, finding that plaintiff properly stated a cause of action for interference (*55 Cal. 2d 224, 234-235)* . The Court noted that an action will lie for the intentional interference by a third person with a contractual relationship either by unlawful means or by means otherwise lawful when there is a lack of sufficient justification. The Court stated that this rule applies when the plaintiff's performance has been rendered more expensive or burdensome (*55 Cal. 2d 224, 232)* . In this case, the Court found that false statements of the sort allegedly made by defendants would be defamatory, and that the statements would make it difficult and burdensome for plaintiff to perform her contractual obligations (*55 Cal. 2d 224, 234)* .

In ***Ramona Manor Convalescent Hosp. v. Care Enters.*** *(1986) 177 Cal. App. 3d 1120* , *225 Cal. Rptr. 120* , defendants were the sublessees of a hospital. Plaintiffs were prospective lessees who had contracted with the hospital owners to take possession after the sublessee's lease had expired. Defendants held over their tenancy beyond the expiration date of their lease, delaying plaintiffs' move into the building. The hospital owners prevailed in an unlawful detainer action against defendants. Then plaintiffs brought an action for damages against defendants alleging intentional interference with contractual relations and intentional interference with prospective economic advantage. The trial court entered judgment for plaintiffs and defendants appealed.

The court of appeal affirmed regarding the interference causes of action. The court stated that in recent years, the tort of inducing breach of contract has expanded to permit liability when the defendant does not literally induce a breach of contract, but makes plaintiff's performance of the contract more expensive or burdensome (*177 Cal. App. 3d 1120, 1131)* . In this case, the court found that the necessary elements of interference were present, and that defendants were properly found liable for both interference with contractual relations and intentional interference with prospective economic advantage (*177 Cal. App. 3d 1120, 1130-1134, 1144)* .

NOTE:

The court of appeal rejected an interference claim based on conduct that allegedly rendered the plaintiff's contractual performance more expensive. In that case, the defendants protested the construction of a nuclear power plant, and in response, the plaintiff dispatched over 100 sheriff's deputies. The plaintiff claimed that the defendants' blockade interfered with its employment relationships with the deputies and other personnel because it required additional services that made the plaintiff's salary payments more expensive. The court of appeal held, without discussion and without mention of either *Lipman* or *Ramona*, that the defendants' conduct was not the kind of "disruption of the relationship" required to state an interference claim [***County of San Luis Obispo v. Abalone Alliance*** *(1986) 178 Cal. App. 3d 848, 861, 223 Cal. Rptr. 846]* .

[4] Additional Authorities

[a] Interference Rendering Contact Performance More Expensive

Pacific Gas & Elec. Co. v. Bear Stearns & Co. (1990) 50 Cal. 3d 1118, 270 Cal. Rptr. 1, 791 P.2d 587 is discussed in *§ 122.41[3][a]*. Although concluding that public policy prevented plaintiff from stating a cause of action for interference with contract or prospective economic advantage, the Supreme Court acknowledged that interference that makes enjoyment of a contract more expensive or burdensome may be actionable (*50 Cal. 3d 1118, 1127, 1129)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsCommercial InterferenceGeneral OverviewTortsBusiness TortsCommercial InterferenceContractsGeneral OverviewTortsBusiness TortsCommercial InterferenceContractsElementsTortsBusiness TortsCommercial InterferenceContractsRemedies

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 122 INTERFERENCE
PART II. FORMS
A. Intentional Interference With Economic Relationship

12-122 California Points & Authorities § 122.22

§ 122.22 Supporting Contention That Elements Necessary to Recover for Intentional Interference With Economic Relationship Exist--Interference With Unenforceable or Voidable Contract

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS LIABLE FOR HIS/HER INTENTIONAL INTERFERENCE WITH PLAINTIFF'S ECONOMIC RELATIONSHIP WITH _____ [*name*], NOTWITHSTANDING THE FACT THAT THE DISRUPTED RELATIONSHIP IS EVIDENCED BY AN UNENFORCEABLE OR VOIDABLE CONTRACT.

A. Interference With Unenforceable Contract. Interference with an economic relationship containing the probability of future benefit to the plaintiff is actionable, and the tort of interference does not require that such relationship involve a legally enforceable contract (*Buckaloo v. Johnson (1975) 14 Cal. 3d 815, 827, 122 Cal. Rptr. 745, 537 P.2d 865*).

[*Optional*] **B. Interference With Voidable Contract.** Contracts which are voidable by reason of the statute of frauds, formal defects, lack of consideration, lack of mutuality, or uncertainty of terms, still afford a basis for a tort action when the defendant interferes with their performance (*Golden v. Anderson (1967) 256 Cal. App. 2d 714, 719, 64 Cal. Rptr. 404* ; *see* *Buckaloo v. Johnson (1975) 14 Cal. 3d 815, 822, 122 Cal. Rptr. 745, 537 P.2d 865*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a plaintiff's contention that the element of plaintiff's economic relationship with a third party is sufficiently established by the existence of a relationship that contains the probability of future economic benefit, even though it lacks an unenforceable contract or is evidenced by a voidable contract.

This contention may be combined with additional contentions supporting the existence of a particular element [*see §§*

122.20, *122.21*, *122.23*], supporting recovery regardless of plaintiff's ability to obtain specific performance of the contract interfered with [*see § 122.24*], supporting recovery of punitive damages [*see § 122.25*], and supporting the existence of a conspiracy to interfere [*see § 122.26*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of unenforceable or voidable contracts, for example, by response to a demurrer or by summary judgment motion. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include facts showing that the economic relationship, although lacking an enforceable contract or evidenced by a voidable contract, nonetheless contained a probability of future economic benefit.

[b] Related Pleading and Practice Forms

For discussion and forms relating to interference with economic relations, see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing a demurrer or motion for summary judgment, see respectively Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* , and Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Interference With Unenforceable Contract

The facts and procedural background of ***Buckaloo v. Johnson*** *(1975) 14 Cal. 3d 815, 122 Cal. Rptr. 745, 537 P.2d 865* , are discussed in *§ 122.20[3][c]*. The Supreme Court reversed the demurrers relating to plaintiff's actions for interference. Relying on *Zimmerman v. Bank of Am. (1961) 191 Cal. App. 2d 55, 57, 12 Cal. Rptr. 319* , the court stated that the tort of intentional interference with prospective economic advantage is not dependent on compliance with the statute of frauds. The tort is based on interference with a relationship between the parties irrespective of the enforceability of the underlying agreement. The tort of interference with an advantageous relationship, or with a contract does not disintegrate because it relates to a contract not written or an advantageous relation not articulated into a contract. The nature of the tort does not vary with the legal strength, or enforceability, of the relation disrupted. The actionable wrong lies in the inducement to break the contract or to sever the relationship, not in the kind of contract or relationship so disrupted, whether it is written or oral, enforceable or not enforceable (*14 Cal. 3d 815, 822)* . The Court noted that, in this case, plaintiff had alleged that the seller intended her sign to constitute an open listing with all area brokers, that the seller intended that brokers induced by the sign to cooperate with buyers would be paid a commission for procuring a buyer on terms the seller would accept, and that plaintiff understood this to constitute an invitation to himself and other area brokers to attempt to find a buyer for the seller's property (*14 Cal. 3d 815, 828)* . According to the court, these allegations, together with others concerning the real estate customs and practices in the community, were sufficient to state the "economic relationship" element of the cause of action, even though the seller and plaintiff had no enforceable contract (*14 Cal. 3d 815, 828-829)* .

[b] Interference With Voidable Contract

In ***Golden v. Anderson*** *(1967) 256 Cal. App. 2d 714, 64 Cal. Rptr. 404* , plaintiff real estate broker agreed orally with the owner/seller of a ranch to attempt to find a buyer. Plaintiff discussed the sale of the ranch with defendant corporation, which expressed interest. Defendant corporation later purchased the lot through one of its employees. This employee misrepresented his identity, causing the seller to think plaintiff had no role in bringing about the sale. As a

result, plaintiff received no commission. Plaintiff brought actions against the defendant corporation and the employees involved in the purchase, alleging that defendants tortiously interfered with a contractual relationship. The trial court granted the individual employees' motion for summary judgment and plaintiff appealed.

The court of appeal affirmed as to six of the defendants because it found that their actions were not intentional (*256 Cal. App. 2d 714, 720)* . As to three other defendants, it reversed. The court acknowledged that the brokerage agreement relied on by defendants was an oral agreement that was subject to the statute of frauds and was therefore voidable. In deciding that an interference action nonetheless would lie against these three defendants, the court noted that contracts which are voidable by reason of the statute of frauds, formal defects, lack of consideration, lack of mutuality, or even uncertainty of terms, could still afford a basis for a tort action when the defendant interferes with their performance (*256 Cal. App. 2d 714, 719)* .

The facts and procedural background of ***Buckaloo v. Johnson*** *(1975) 14 Cal. 3d 815, 122 Cal. Rptr. 745, 537 P.2d 865* , are discussed in *§ 122.20[3][c]*. The Supreme Court indicated that an interference action is not dependent on compliance with the statute of frauds when it is based on an economic relationship between the plaintiff and a third party containing a probability of future economic benefit to the plaintiff (*14 Cal. 3d 815, 822, 827)* .

[4] Additional Authorities

[a] Interference With Unenforceable Contract

In *Rader Co. v. Stone (1986) 178 Cal. App. 3d 10, 223 Cal. Rptr. 806* , plaintiff filed several causes of action against defendants, alleging intentional interference with prospective business advantage (that is, intentional interference with a noncontractual relationship; see discussion in *§ 122.04*). The trial court granted defendants' demurrers, and plaintiff appealed. One of the defendants argued on appeal that plaintiff's cause of action failed due to the lack of a valid written contract. Citing *Buckaloo* [*see § 122.22[3][a]*], the court of appeal held that intentional interference with a noncontractual relationship does not require the existence of a legally binding agreement (*178 Cal. App. 3d 10, 28)* . The court reversed the demurrers, concluding that plaintiff's allegations were sufficient as against a demurrer to state a cause of action for noncontractual interference (*178 Cal. App. 3d 10, 29)* .

In *Zimmerman v. Bank of Am. (1961) 191 Cal. App. 2d 55, 12 Cal. Rptr. 319* , plaintiff alleged that defendants tortiously induced the breach of plaintiff's oral contract. The trial court sustained defendants' demurrer without leave to amend, and rendered judgment for defendants. Plaintiff appealed. Reversing, the court of appeal noted that the agreement in question fell within the statute of frauds. The court then held that the statute of frauds could not be invoked as a defense by defendants because the actionable wrong in an interference case lies in the inducement to break the contract or to sever the relationship, not in the kind of contract or relationship so disrupted (*191 Cal. App. 2d 55, 57)* .

[b] Interference With Voidable Contract

In *Saunders v. Superior Court (1994) 27 Cal. App. 4th 832, 33 Cal. Rptr. 2d 438* , plaintiffs, who were certified shorthand reporters, brought suit against another group of certified shorthand reporters and two insurance companies for unfair business practices and for interference with contract and with prospective economic advantage. The suit arose out of the practice of "direct contracting," under which the defendant group of reporters entered into a contract with the insurance companies for the exclusive right to report depositions taken by the attorneys who represented the insurance companies. The trial court sustained demurrers to all causes of action, but the court of appeal issued a writ of mandate compelling the trial court to overrule the demurrers.

In the cause of action for interference with contract, two of the plaintiff reporters claimed that defendants intentionally interfered with their contract with a law firm that had represented the insurance companies. Defendants contended that

the pleading was insufficient because it failed to allege any definite obligation on the part of the law firm to actually use plaintiffs' services. The appellate court rejected this contention, noting that the complaint alleged that plaintiffs were to perform certain acts and that the law firm agreed, in turn, to utilize plaintiffs' service for the reporting of professional liability claims. The complaint further alleged that the contract was to continue as long as both parties were satisfied with the other's performance. The court held that this language adequately pleaded the law firm's duty to use plaintiffs' reporting services. In any event, the court observed, case law recognizes a tort action for interference with a contract even if the contract is unenforceable (*27 Cal. App. 4th 832, 842-843)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsCommercial InterferenceGeneral OverviewTortsBusiness TortsCommercial InterferenceProspective AdvantageGeneral OverviewTortsBusiness TortsCommercial InterferenceProspective AdvantageDefensesTortsBusiness TortsCommercial InterferenceProspective AdvantageElements

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 122 INTERFERENCE
PART II. FORMS
A. Intentional Interference With Economic Relationship

12-122 California Points & Authorities § 122.23

§ 122.23 Supporting Contention That Elements Necessary to Recover for Intentional Interference With Economic Relationship Exist--Interference With Terminable-at-Will Contract

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS LIABLE FOR HIS/HER INTENTIONAL INTERFERENCE WITH PLAINTIFF'S CONTRACTUAL RELATIONSHIP WITH _____ [*name*], NOTWITHSTANDING THE FACT THAT THE DISRUPTED CONTRACT IS TERMINABLE AT WILL.

A. Interference With Terminable-at-Will Contract Actionable. An action may lie for interference when defendant has unjustifiably interfered with a terminable-at-will contract to which the plaintiff is a party (*Speegle v. Board of Fire Underwriters (1946) 29 Cal. 2d 34, 39-40, 172 P.2d 867* ; *Savage v. Pacific Gas & Elec. Co. (1993) 21 Cal. App. 4th 434, 448, 26 Cal. Rptr. 2d 305* ; *Kozlowsky v. Westminster Nat'l Bank (1970) 6 Cal. App. 3d 593, 598, 86 Cal. Rptr. 52*).

B. Interference With At-Will Contract Actionable as Interference With Prospective Economic Advantage. Interference with an at-will contract is properly viewed as an interference with prospective economic advantage, rather than as interference with an existing contract, because the expectation of an at-will contract is that of a future relationship between the parties to the contract (*Reeves v. Hanlon (2004) 33 Cal. 4th 1140, 1151-1152, 17 Cal. Rptr. 3d 289, 95 P.3d 513*).

[*Optional*] **C. Employer May Recover For Wrongful Conduct in Inducing At-Will Employee to Terminate Employment Contract.** If a competing employer induces the employee of another employer to terminate an at-will employment relationship, the former employer of that employee may pursue an action against the competing employer for interference by pleading and proving the elements of a cause of action for intentional interference with prospective economic advantage (*Reeves v. Hanlon (2004) 33 Cal. 4th 1140, 1154-1155, 17 Cal. Rptr. 3d 289, 95 P.3d 513*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a plaintiff's contention that the plaintiff may recover for interference with an employment contract, even though that employment contract was terminable at the will of the contracting parties.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of terminable-at-will contracts, for example, by response to a demurrer or a summary judgment motion. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion and forms relating to interference with economic relations, see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Interference With Terminable-at-Will Contract Actionable

In ***Speegle v. Board of Fire Underwriters*** *(1946) 29 Cal. 2d 34, 172 P.2d 867* , plaintiff insurance agent had contracted with various insurance companies to sell policies. The companies were members of an insurance board, which along with a local association of fire insurance agents, accused plaintiff of violating his contracts with members of the board by placing insurance with nonboard companies. On plaintiff's refusal to cease the practice, the board and association caused the termination of plaintiff's contracts with board companies. Plaintiff sued the board and association, alleging that defendants interfered with his contractual relations by pressuring insurance companies to terminate their contracts with him. The trial court sustained defendants' demurrers to plaintiff's complaint without leave to amend and entered judgment for defendants. Plaintiff appealed.

The Supreme Court reversed. The Court first analyzed plaintiff's agency employment contracts with the insurance companies. The Court disputed plaintiff's allegation that in the insurance business, agency contracts are customarily regarded as being permanent and revocable only for cause. The Court, citing state and federal case authority, stated that a contract for permanent employment is only a contract for an indefinite period terminable at the will of either party, unless it is based on some consideration other than the services to be rendered. The Court remarked that, since plaintiff did not allege such consideration, it could not conclude that the insurance companies had breached the contracts in terminating them (*29 Cal. 2d 34, 39)* . The Court then addressed the issue of whether an interference action could be based on a terminable-at-will contract. Noting that the majority of cases have held that unjustifiable interference with terminable-at-will contracts may be actionable, the Court concluded that plaintiff's complaint properly stated a cause of action for interference (*29 Cal. 2d 34, 39-40)* .

The factual and procedural background of ***Savage v. Pacific Gas & Elec. Co.*** *(1993) 21 Cal. App. 4th 434, 26 Cal. Rptr. 2d 305* , is discussed in *§ 122.20[3][b]*. In reversing a summary adjudication for the defendant, the court observed that the tort of interference with contractual relations could be based on plaintiff's employment relationship with her

employer, even if that relationship was regarded as a contract at will (a matter on which the court expressed no opinion). As the court observed, reviewing courts have reiterated in case after case that the contractual relationship is at the will of the parties, not at the will of outsiders (*21 Cal. App. 4th 434, 448)* .

In ***Kozlowsky v. Westminster Nat'l Bank*** *(1970) 6 Cal. App. 3d 593, 86 Cal. Rptr. 52* , plaintiff bank president alleged that defendant, a controlling shareholder in the bank, intentionally, maliciously, and without justification caused the bank to discharge him. Plaintiff's complaint alleged intentional interference with contractual relations. The court sustained general demurrers to the complaint and dismissed the action. Plaintiff appealed.

The court of appeal reversed as to the interference action. The court noted that pursuant to federal law, the bank's board could dismiss plaintiff without liability for breach of contract (*6 Cal. App. 3d 593, 596-597)* . Nonetheless, the court stated that the fact that the bank was privileged to discharge plaintiff at any time would not necessarily privilege a third party unjustifiably to induce the termination. Citing *Speegle v. Board of Fire Underwriters (1946) 29 Cal. 2d 34, 39, 172 P.2d 867* , the court noted that the fact that a contract is at the will of the parties does not make it one at the will of others (*6 Cal. App. 3d 593, 598)* . The court concluded that defendant's liability would turn on the question of whether or not defendant, because of his relationship with the bank, was privileged to cause plaintiff's termination (*6 Cal. App. 3d 593, 599-600)* .

[b] Interference With At-Will Contract Actionable as Interference With Prospective Economic Advantage

In ***Reeves v. Hanlon*** *(2004) 33 Cal. 4th 1140, 17 Cal. Rptr. 3d 289, 95 P.3d 513* , the president of a law firm, and the firm itself, brought suit against two former attorneys of the firm for conduct accompanying their departure from the firm. The plaintiffs alleged that when the defendants left the firm suddenly to start their own firm, the defendants also cultivated employee discontent and personally solicited other firm employees to depart the firm as well, destroyed computer files containing client information, left no status reports or lists of pending matters or deadlines, improperly solicited the plaintiffs' clients to their new firm, and misappropriated company trade secrets. After a bench trial, the court found for the plaintiffs on causes of action for interference and misappropriation of trade secrets. The defendants appealed. The court of appeal affirmed in most respects, and the defendants appealed again.

The California Supreme Court affirmed. The defendants argued that they could not be liable for interfering with the employment contracts of the plaintiffs' other employees, because those contracts were terminable at the will of the employer or the employee. The Court recognized that courts have historically allowed parties to sue for intentional interference with an at-will contract, even an at-will employment contract. However, the Court also recognized the state's established public policy providing a former employee the right to engage in competition against a former employer, pointing out that it is not ordinarily a tort to hire the employees of another for use in the hirer's business (*33 Cal. 4th 1140, 1148-1149)* . Citing analysis from the Restatement (Second) of Torts, the Court noted that even if a party to a contract is free to terminate that contract at will, there is still a subsisting contractual relationship and an expectation of a future relationship. Therefore, the Court held that interference with an at-will contract is properly viewed as interference with prospective economic advantage, rather than as interference with an existing contract, because the tort of interference with prospective economic advantage protects future expectancies without requiring the existence of a legally-binding contract (*33 Cal. 4th 1140, 1151-1152)* .

[c] Employer May Recover For Wrongful Conduct in Inducing At-Will Employee to Terminate Employment Contract

The factual and procedural background of ***Reeves v. Hanlon*** *(2004) 33 Cal. 4th 1140, 17 Cal. Rptr. 3d 289, 95 P.3d 513* , is described in § 122.23[3][b]. The Supreme Court held that a plaintiff may recover for interference with an at-will employment relationship, although the plaintiff must plead and prove the elements of a cause of action for interference with prospective economic advantage. In accordance with the elements of that cause of action, the plaintiff must show that the defendant engaged in conduct that is independently wrongful--that is, conduct that is proscribed by some

constitutional, statutory, regulatory, common law, or other determinable legal standard. Therefore, an employer may pursue an action against a competing employer for interfering with the plaintiff's at-will employment relationships, although the plaintiff must show that the competing employer engaged in wrongful conduct that consisted of something more than just hiring away the plaintiff's employees (*33 Cal. 4th 1140, 1152-1154)* . The Court concluded that the evidence of the conduct of the defendants in this particular case was sufficient to support the trial court's finding that the defendants did more than just offer jobs to the plaintiffs' employees, because the defendants purposefully engaged in unlawful acts that crippled the plaintiffs' business operations and caused the plaintiffs' employees to terminate their employment contracts (*33 Cal. 4th 1140, 1154-1155)* .

[4] Additional Authorities

[a] Interference With Terminable-at-Will Contact Actionable

Pacific Gas & Elec. Co. v. Bear Stearns & Co. (1990) 50 Cal. 3d 1118, 270 Cal. Rptr. 1, 791 P.2d 587 is discussed in *§ 122.41[3][a]*. Although concluding that public policy prevented plaintiff from stating a cause of action for interference with contract or prospective economic advantage, the Supreme Court acknowledged that interference with contracts that are terminable at will or in accordance with express provisions is actionable on the theory that, if legal protection from outside interference is afforded to an economic relationship that is wholly prospective, such protection must also be afforded to contractual relationships that are subject to termination (*50 Cal. 3d 1118, 1126-1129)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsCommercial InterferenceGeneral OverviewTortsBusiness TortsCommercial InterferenceEmployment RelationshipsGeneral OverviewTortsBusiness TortsCommercial InterferenceProspective AdvantageGeneral OverviewTortsBusiness TortsCommercial InterferenceProspective AdvantageElements

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12-122 California Points & Authorities § 122.24

§ 122.24 Supporting Contention That Specific Performance of Contract Interfered With Does Not Preclude Recovery for Interference

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

THE FACT THAT PLAINTIFF HAS OBTAINED A DECREE OF SPECIFIC PERFORMANCE IN HIS/HER CONTRACT ACTION AGAINST _____ [*name*] DOES NOT PRECLUDE HIM/HER FROM RECOVERING DAMAGES FOR DEFENDANT'S INTENTIONAL INTERFERENCE WITH THE CONTRACT BETWEEN PLAINTIFF AND _____ [*name*].

Specific Performance Not a Bar to Damages. When a third party has interfered with the performance of a contract, a plaintiff may bring an action for damages against the interferor, regardless of the availability of specific performance against the breaching contractual party (*Owens v. Palos Verdes Monaco (1983) 142 Cal. App. 3d 855, 872, 191 Cal. Rptr. 381* ; *Duff v. Engelberg (1965) 237 Cal. App. 2d 505, 507-509, 47 Cal. Rptr. 114*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of the contention by a plaintiff that he or she may recover damages against a defendant in a action for intentional interference with plaintiff's contract with a third party, notwithstanding the fact that plaintiff has also obtained specific enforcement of the contract interfered with in a contract action against the third party.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion and forms relating to interference with economic relations, see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender). For discussion and forms relating to damages generally, see California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

[c] Related Points and Authorities

For forms of memoranda of points and authorities relating to damages generally, see Ch. 64, *Damages: Tort* .

[3] Discussion of Authorities

[a] Specific Performance Not A Bar to Damages

In ***Owens v. Palos Verdes Monaco*** *(1983) 142 Cal. App. 3d 855, 191 Cal. Rptr. 381* , plaintiff, a real estate developer, contracted with a defendant, a limited partnership, to buy a parcel of land. After defendants refused to perform, plaintiff successfully brought an action for specific performance. Plaintiff had also brought an action against one of the members of the partnership for conspiracy to interfere with the land sale contract, but the trial court dismissed this claim. The trial court concluded that the dismissal of plaintiff's tort claim had been in effect preordained by plaintiff's election of remedies to seek specific performance. Plaintiff appealed from the dismissal of his tort claim.

The court of appeal reversed. In support of its decision, the court cited *Duff v. Engelberg (1965) 237 Cal. App. 2d 505, 507-509, 47 Cal. Rptr. 114* , in which the court of appeal held that a vendee under an executory purchase contract can obtain specific performance of the contract as well as compensatory and exemplary damages against a third party who induced the vendor not to go ahead with the sale. Defendant argued that *Duff* was not applicable because defendant was not an unrelated third person, but a partner in the selling partnership. The court rejected this argument, stating that an action for conspiracy to induce a breach a contract will lie against a party to the agreement, regardless of the fact that the party would not be directly liable for its breach as such (*142 Cal. App. 3d 855, 872)* .

In ***Duff v. Engelberg*** *(1965) 237 Cal. App. 2d 505, 47 Cal. Rptr. 114* , plaintiffs entered into a binding contract for the purchase of a lot from persons who shall be called here contracting defendants. Two other defendants, who shall be called third-party defendants, did not want plaintiffs and their family to live in their neighborhood because plaintiffs were black. The third-party defendants maliciously caused the contracting defendants to refuse to perform the contract. Instead, the contracting defendants conveyed the property to the third party defendants "as trustees." The trial court decreed specific performance with incidental damages against the contracting defendants. The court also gave judgments against the third party defendants for compensatory and punitive damages. The third-party defendants appealed.

The court of appeal affirmed. Defendants argued on appeal that since plaintiffs were made whole by the judgment for specific performance with incidental relief, they could not have additional relief against the third party defendants. They argued that since plaintiffs could not obtain specific performance and have an action at law for damages for breach of contract against the contracting defendant, neither could they sue and recover against the third party defendants inducing the breach of contract after having sought and obtained specific performance (*237 Cal. App. 2d 505, 507)* . The court disagreed with defendants' theory, stating that specific performance, plus incidental relief would not really make plaintiffs whole. According to the court, the suit for specific performance gave plaintiffs the property they were entitled to receive and the incidental expenses and other damages to which they were subjected in their efforts to pursue and recover that property. The court remarked that such relief would not necessarily encompass the total damages suffered since the tort was intentional. Noting that the trial court awarded plaintiffs only incidental damages against the contracting defendants, the appellate court said that plaintiffs were entitled to recover damages for all harm resulting from defendants' acts. The court added that there was no showing that the damage award against the third-party defendants would result in a double recovery of compensatory damages (*237 Cal. App. 2d 505, 508-509)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesSpecific PerformanceTortsBusiness TortsCommercial InterferenceGeneral OverviewTortsBusiness TortsCommercial InterferenceContractsGeneral OverviewTortsBusiness TortsCommercial InterferenceContractsRemedies

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12-122 California Points & Authorities § 122.25

§ 122.25 Supporting Contention That Claim Supports Award of Punitive Damages [Civ. Code § 3294]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be com bined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is liable for plaintiff's injuries caused by defendant's interference.*]

PLAINTIFF IS ENTITLED TO AN AWARD OF PUNITIVE DAMAGES AGAINST DEFENDANT BECAUSE DEFENDANT'S INTENTIONAL INTERFERENCE WITH PLAINTIFF'S ECONOMIC RELATIONSHIP WITH _____ [*name*] WAS MALICIOUS.

Punitive Damages May Be Awarded for Malicious Intentional Interference. Punitive damages are available in an action for intentional interference with economic relations when the plaintiff demonstrates that the acts of the defendant were malicious (*Duff v. Engelberg (1965) 237 Cal. App. 2d 505, 509, 47 Cal. Rptr. 114* ; *Guillory v. Godfrey (1955) 134 Cal. App. 2d 628, 633, 286 P.2d 474*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that punitive damages should be imposed on defendant in an action for intentional interference with economic relations.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of liability for intentional interference with economic relations. For example, they may be combined with points and authorities opposing a motion for a new trial made by a defendant on the ground that the evidence is insufficient to support an award of punitive damages. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, and in any other relevant points and authorities combined with this form to show the relationship between the facts of the case and the points of law stated. Counsel should allege facts demonstrating that that defendant's interference was malicious.

[b] Related Pleading and Practice Forms

For discussion and forms relating to interference with economic relations, see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender). For discussion and forms relating to damages generally, see California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda of points and authorities relating to damages generally, see Ch. 64, *Damages: Tort* . For forms of memoranda of points and authorities relating to motions for a new trial, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] Punitive Damages May Be Awarded for Malicious Intentional Interference

The facts and procedural background of ***Duff v. Engelberg*** *(1965) 237 Cal. App. 2d 505, 47 Cal. Rptr. 114* are discussed in *§ 122.24[3][a]*. The plaintiffs alleged that the third party defendants maliciously caused the contracting defendants to refuse to perform a contract because plaintiffs were black. The court of appeal reviewed the trial court's judgment against the third party defendants for $500 in punitive damages and found such award was proper. Citing *Civ. Code § 3294*, the court noted that the complaint had alleged and the court had found that the acts of the conspirators were malicious (*237 Cal. App. 2d 505, 509)* .

In ***Guillory v. Godfrey*** *(1955) 134 Cal. App. 2d 628, 286 P.2d 474* , plaintiffs alleged that defendants, with intention to destroy plaintiffs' restaurant business, maliciously and wantonly intimidated plaintiffs' customers. Plaintiffs contended that the interference started when plaintiffs hired a black cook; then defendants began making intimidating and offensive remarks to customers about to enter the cafe. Other harassing actions by defendants included a forcible eviction of a customer from the restaurant. Plaintiffs pleaded that as a result of defendants' acts, business dropped off more than 50 percent and that plaintiffs lost money in the business and profits amounting to $1,000. At the trial, a jury awarded plaintiffs compensatory damages in the sum of $2,250 and punitive damages of $2,000. Defendants appealed.

The court of appeal affirmed the judgment. Defendants argued on appeal that no punitive damages should have been awarded against them. The court stated that actual malice was the basis for the punitive damage award, and that such malice was plainly proved in the case. The court added that it was for the jury to determine the proper proportion which the compensatory damages should bear to the punitive award, and that it could not be said on the record that the punitive award was excessive to either defendant (*134 Cal. App. 2d 628, 633)* .

NOTE:
The decisions in *Duff* and *Guillory* were decided before 1987 legislative amendments that modified the statutory definition of "malice" for purposes of *Civ. Code § 3294* and added language requiring that proof of conduct supporting an award of punitive damages must be shown by "clear and convincing evidence" [*Civ. Code § 3294(a), (c)(1)*]. For further discussion of these changes and their effect, see Ch. 64, *Damages: Tort* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsCommercial InterferenceGeneral OverviewTortsBusiness TortsCommercial InterferenceBusiness

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A. Intentional Interference With Economic Relationship

12-122 California Points & Authorities § 122.26

§ 122.26 Supporting Contention That Elements Necessary to Recover for Conspiracy to Interfere With Economic Relationship Exist--In General

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

PLAINTIFF HAS ALLEGED FACTS SUFFICIENT TO STATE A CAUSE OF ACTION FOR CONSPIRACY TO INTERFERE WITH ECONOMIC RELATIONS BETWEEN PLAINTIFF AND _____ [*name*], BECAUSE PLAINTIFF HAS ALLEGED THE FORMATION AND OPERATION OF A CONSPIRACY, WRONGFUL ACTS DONE PURSUANT THERETO, AND DAMAGES ARISING THEREFROM.

Elements of Conspiracy to Interfere. To plead an actionable wrong for conspiracy to interfere with economic relations, the plaintiff must allege (1) the formation and operation of a conspiracy, (2) wrongful acts done pursuant to the conspiracy, and (3) damages arising from the conspiracy (*Olivet v. Frischling (1980) 104 Cal. App. 3d 831, 837, 164 Cal. Rptr. 87* ; *Wise v. Southern Pac. Co. (1963) 223 Cal. App. 2d 50, 64, 35 Cal. Rptr. 652*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a plaintiff alleged all elements necessary to state a cause of action for conspiracy to interfere with economic relations. This contention may be combined with additional contentions supporting the existence of a particular element [*see §§ 122.20 -122.23*], supporting recovery regardless of plaintiff's ability to obtain specific performance of the contract interfered with [*see § 122.24*], or supporting recovery of punitive damages [*see § 122.25*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the elements of conspiracy. This argument may arise in opposing a motion for summary judgment or nonsuit, a demurrer, or other similar procedure. These points and

authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel should allege facts showing the existence of the three elements of the tort.

[b] Related Pleading and Practice Forms

For discussion and forms relating to interference with economic relations, see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender). For discussion and forms relating to conspiracy in general, see California Forms of Pleading and Practice, Ch. 126, *Conspiracy* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing a demurrer or motion for summary judgment, see respectively Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* , and Ch. 221, *Summary Judgments* .

For forms of memoranda of points and authorities relating to civil conspiracy generally, see Ch. 46, *Conspiracy* .

[d] Opposing Points And Authorities

The points and *authorities in §§ 122.37* and *122.38* may be used in an appropriate case to oppose the contention supported by this memorandum.

[3] Discussion of Authorities

[a] Elements of Conspiracy to Interfere

In ***Olivet v. Frischling*** *(1980) 104 Cal. App. 3d 831, 164 Cal. Rptr. 87* , plaintiffs and defendants were members of a general partnership which engaged in the sale and lease-back of medical equipment to a hospital. Defendants were members of the governing board of the hospital, but plaintiffs were not. Defendants formed a competing partnership to sell and lease back equipment to the hospital. Because the defendants were in a position, as board members of the hospital, to control lease-back transactions, they were able to exclude the original partnership from doing business with the hospital. Defendants conducted all of the hospital's lease-back transactions through the new partnership. Plaintiffs filed suit against the defendants, alleging inter alia, civil conspiracy to interfere with a business relationship. Defendants' demurrers were sustained without leave to amend and the trial court ordered a dismissal. Plaintiffs appealed.

The court of appeal reversed. The court stressed that the real gist of a conspiracy action is not the conspiracy itself, but rather the damages suffered thereby. Citing *Wise v. Southern Pac. Co. (1963) 223 Cal. App. 2d 50, 64, 35 Cal. Rptr. 652* , the court noted that to state a conspiracy action a plaintiff must allege (1) the formation and operation of a conspiracy, (2) wrongful acts done pursuant thereto, and (3) damages arising therefrom (*104 Cal. App. 3d 831, 837)* . The court concluded that plaintiffs sufficiently pleaded causes of action against defendants for conspiracy to interfere with plaintiff's economic relationships (*104 Cal. App. 3d 831, 842-843)* .

In ***Wise v. Southern Pac. Co.*** *(1963) 223 Cal. App. 2d 50, 35 Cal. Rptr. 652* , plaintiff brought an action against his employer and others for conspiracy to interfere with his employment contract. Defendants allegedly brought false charges against plaintiff and conspired to deprive plaintiff of a fair hearing on such charges, all for the purpose of securing the discharge of plaintiff from his employment in violation and breach of a collective bargaining agreement. The trial court granted defendants' demurrers and plaintiff appealed.

Reversing, the court of appeal found that a cause of action for conspiracy to interfere with an employment contract would lie against the employer (*223 Cal. App. 2d 50, 72)* . The court noted that the elements of a conspiracy were (1) the formation and operation of the conspiracy, (2) the wrongful act or acts done pursuant thereto, and (3) the damage resulting from such act or acts (*223 Cal. App. 2d 50, 64)* . The court found that plaintiff stated facts sufficient to constitute a cause of action for conspiracy. Plaintiff alleged that defendant employer conspired with codefendants to bring false charges against plaintiff and to deprive plaintiff of a fair hearing on these charges for the purpose of securing his discharge in violation of the union agreement. The court said it was clear that the false charges were wrongful acts which would work an invasion of plaintiff's right to continue in employment according to the provisions of the collective bargaining agreement (*223 Cal. App. 2d 50, 74-75)* .

NOTE:

In *Applied Equip. Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 507-508, 28 Cal. Rptr. 2d 475, 869 P.2d 454* , the California Supreme Court held that a contracting party cannot be held liable in tort for conspiracy to interfere with its own contract. In so holding, the Court disapproved a long line of court of appeal decisions that had held to the contrary, including *Olivet* and *Wise* [*Applied Equip. Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 521 n.10, 28 Cal. Rptr. 2d 475, 869 P.2d 454]* . It appears that *Olivet* and *Wise* are still valid authority, however, for the point stated in this form--that is, the elements of a cause of action for civil conspiracy against a defendant who is not a party to the contract.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsCommercial InterferenceGeneral OverviewTortsBusiness TortsCommercial InterferenceBusiness RelationshipsGeneral OverviewTortsBusiness TortsCommercial InterferenceContractsGeneral OverviewTortsProcedureMultiple DefendantsConcerted ActionCivil ConspiracyGeneral Overview

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12-122 California Points & Authorities § 122.27

§ 122.27 Supporting Contention That Liability for Intentional Interference With Economic Relationship May Be Imposed on Owner, Officer, or Director of Company

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

UNLESS THE INTERFERING CONDUCT IS SHOWN TO BE PRIVILEGED OR JUSTIFIED, AN OWNER, OFFICER, OR DIRECTOR OF A COMPANY MAY BE LIABLE FOR INTERFERING WITH A CONTRACT TO WHICH THE COMPANY WAS A PARTY.

A. Owner, Officer, or Director of Company Not Shielded From Liability. Unless the defendants can show that the conduct was privileged or justified, a claim for interference with an economic relationship founded in contract may be brought against an owner, officer, or director of a company whose contract was the subject of the litigation (*Woods v. Fox Broad. Sub., Inc. (2005) 129 Cal. App. 4th 344, 356, 28 Cal. Rptr. 3d 463*).

[*Optional*] **B. Tort Liability May Be Imposed Under Alter Ego Doctrine.** When a defendant's conduct is not otherwise privileged, the alter ego doctrine cannot be used as a shield to prevent imposition of tort liability for intentional interference with an economic relationship on an owner, director, or manager who caused a corporation to breach its contract (*Shapoff v. Scull (1990) 222 Cal. App. 3d 1457, 1471-1473, 272 Cal. Rptr. 480*).

[*Optional*] **C. Plaintiff's Election.** Although it would be inconsistent to impose liability on an alter ego for both breach of the corporation's contract and for the tort of interference, after a judgment has been rendered on both claims, the plaintiff is entitled to elect whether to proceed on the contract claim or on the tort claim (*see* *Shapoff v. Scull (1990) 222 Cal. App. 3d 1457, 1462, 1473, 272 Cal. Rptr. 480*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that tort liability for intentional interference with economic relationship may be imposed on a shareholder, director, or officer of a corporation. The authority on which the form is based is limited to situations in which the "manager's privilege" [*see §§ 122.43, 122.52, 122.53*] does not apply. It is not clear whether a court would apply the same analysis or reach the same result in a situation in which the conduct was privileged.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the points described--for example, in opposition to a motion for summary judgment or a motion for judgment notwithstanding the verdict. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the particular case and the point of law stated. Thus, counsel should insert facts, or refer to findings, establishing that defendants were not a party to the contract that forms the basis of the complaint, and if necessary, that the alter ego doctrine applies and that the alter ego's conduct was not privileged.

[b] Related Points and Authorities

For memorandum of points and authorities opposing the imposition of liability for interference on a party to the contract, a concept that might, in some situations, be used to oppose the authority in this form, see *§ 122.35*. For memoranda of points and authorities supporting the imposition of liability for interference on owners or managers if the "manager's privilege" does not apply, see *§§ 122.52, 122.53*.

[3] Discussion of Authorities

[a] Owner, Officer, or Director of Company Not Shielded From Liability

In ***Woods v. Fox Broad. Sub., Inc.*** *(2005) 129 Cal. App. 4th 344, 28 Cal. Rptr. 3d 463* , the plaintiffs were former corporate officers of an entertainment company with vested compensatory stock options in the company. Under these stock provisions, if the owner sold the company, the plaintiffs were required to sell their options, but were each guaranteed one percent of the sale price of the company. The company formed a joint venture with other broadcasting entities, and the plaintiffs became officers affiliated with the newly formed company. The new company took over responsibility for the stock option contracts. The owner of the plaintiffs' original company decided to sell, as did the other owning entities of the newly-formed company, triggering the plaintiffs' stock option buyout clause. The sales price, initially set at $5.3 billion, was lowered by $400 million in exchange for the buyer taking over a major league baseball television contract that was losing money. Although the plaintiffs each received over $20 million, which represented their one percent share, the price reduction effectively cost them $4 million each. Alleging causes of action for interference with their stock contract and prospective economic advantage, the plaintiffs sued the other broadcasting entities that owned part of the newly-formed company that had been sold, arguing that the sales price was lowered in part to reduce the amount owed under the plaintiffs' stock buyout provision. The trial court sustained demurrers for these entities on the grounds that they were not strangers to the contract and therefore could not be liable in tort for interfering with the contract. The plaintiffs amended their complaint, replacing the interference claims with breach of contract claims. The trial court again sustained demurrers for the defendants. The plaintiffs then appealed the initial ruling sustaining the demurrers on the interference claims.

The court of appeal reversed. The court noted the established rule that a party to a contract cannot beliable for interfering with that contract, and that in those circumstances, a plaintiff is relegated to a suit for breach of contract. The court also noted that, for many years, courts had allowed interference claims based on the contractual obligations of a business entity to be maintained against officers, owners, and directors of that entity, although these defendants could defend on the basis of certain business privileges (*129 Cal. App. 4th 344, 350-351)* . However, in the course of its

opinion in *Applied Equipment Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503* , the California Supreme Court suggested that "outsiders [with a] legitimate social or economic interest in the contractual relationship" were not "strangers to a contract" and therefore could not be liable for interfering with the contract (*129 Cal. App. 4th 344, 351-353)* . Because of this language, the defendants argued that an ownership interest in a business entity confers immunity from tort liability for interfering with the entity's contracts. The court of appeal noted, however, that the Supreme Court's broad language appeared to be dicta and was not relevant to the Court's holding in that case, which involved liability for conspiracy to interfere. Refusing to read the Supreme Court's holding in the broad fashion favored by the defendants, the court of appeal held that pursuant to established case law predating the *Applied Equipment* decision, unless defendants can show that their conduct was privileged or justified, a claim for interference with an economic relationship founded in contract may be brought against an owner, officer, or director of a company whose contract was the subject of the litigation (*129 Cal. App. 4th 344, 355-356)* . Although the defendants argued that they could prove privilege or business justification, the court and the parties recognized that the issue was not presently before the court on appeal of the demurrers sustained by the trial court (*129 Cal. App. 4th 344, 356)* .

[b] Tort Liability May Be Imposed Under Alter Ego Doctrine

Plaintiff in ***Shapoff v. Scull*** *(1990) 222 Cal. App. 3d 1457, 272 Cal. Rptr. 480* , had a contract with the corporate defendant, an undercapitalized "shell" corporation. The original judgment was against the corporation and its two principals, awarding plaintiff $55,000 for breach of a development agreement with the corporation, $50,000 for intentional interference with contractual relations, and $300,000 in punitive damages. The judgment was based in part on findings that the individual defendants were the alter egos of the corporate defendant and that the breach was caused by one of the alter ego's tortious interference. That individual defendant moved for judgment notwithstanding the verdict, asking the court to limit his liability to the contract claim on the ground that it was inconsistent to impose liability on both the contract claim and the tort claim [*see § 122.35*]. The trial court agreed that it was inconsistent, and gave plaintiff the election to enforce one or the other. Not surprisingly, plaintiff chose to proceed on the tort claim. The trial court amended the judgment to delete its determination that the individual was an alter ego of the corporation. Defendants appealed.

The court of appeal affirmed. The court first discussed the fact that a party to the contract may be liable for conspiring to cause its breach, and characterized defendants' argument as implicitly based on the notion that the trial court's alter ego finding prevents the existence of a third party and thus the occurrence of any interference by a third party (*222 Cal. App. 3d 1457, 1465)* . The court rejected that notion, and compared the manager's privilege and the alter ego doctrine, noting that in the context of the manager's privilege the tort liability of an owner, director, or manager depends on whether he or she was acting to protect the interest of the corporation. In contrast, alter ego liability is not predicated on defendant's intent to advance the interest of a corporation; rather, it may be used only when its use will avoid fraud or injustice. Thus, when a defendant's conduct is not otherwise privileged, the potential existence of alter ego liability will not protect the defendant from tort liability (*222 Cal. App. 3d 1457, 1466)* . The imposition of liability under the alter ego doctrine does not depend on whether the owner or manager was acting in the corporation's interest. The doctrine imposes liability to avoid inequitable results that would otherwise be suffered by the party who dealt with the corporation (*222 Cal. App. 3d 1457, 1469-1471)* . The court noted that defendant had not tendered the manager's privilege to the jury either by argument or requested jury instructions. However, the evidence suggested that the manager's privilege would not have applied because, in causing the corporation to breach the contract, the alter ego was acting to recoup losses on investments unrelated to the corporation or in retaliation for an unrelated project (*222 Cal. App. 3d 1457, 1471-1472)* . In arguing that the alter ego doctrine should be applied to limit the alter ego's liability to the contract claim, defendant was attempting to obtain relief that would be denied to similarly situated defendants under the "manager's privilege" criteria (immunity without regard to motive). The court rejected such an application of the alter ego doctrine (*222 Cal. App. 3d 1457, 1472)* .

The court noted that plaintiff did not appeal the fact that he had been required to elect between the contract claim and the tort claim, so the related issue of whether one person can be held liable both in tort for interference and on the

contract as an alter ego was not addressed (*222 Cal. App. 3d 1457, 1473)* .

NOTE:
In *Applied Equip. Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 507-508, 28 Cal. Rptr. 2d 475, 869 P.2d 454* , the California Supreme Court disapproved the statement in *Shapoff* that a contracting party can be held liable in tort for conspiring to cause the contract to be breached [*Applied Equip. Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 521 n.10, 28 Cal. Rptr. 2d 475, 869 P.2d 454]* . However, the court of appeal has subsequently held that the Supreme Court's disapproval in *Applied Equip.* extended only to the holding in *Shapoff* that a party to a contract can be held liable in tort for conspiring to interfere with his or her own contract, and not to the holding that the alter ego doctrine could not be used to shield a defendant from tort liability [*Webber v. Inland Empire Invs., Inc. (1999) 74 Cal. App. 4th 884, 898-901, 88 Cal. Rptr. 2d 594]* . In many cases, the alter ego may be able to successfully assert a director's, manager's, or agent's privilege [*see § 122.43*] or an owner's privilege [*see § 122.44*].

[c] Plaintiff's Election

Shapoff v. Scull *(1990) 222 Cal. App. 3d 1457, 272 Cal. Rptr. 480* , is discussed in *§ 122.27[3][b]*.

[4] Additional Authorities

[a] Tort Liability May Be Imposed Under Alter Ego Doctrine

In *Webber v. Inland Empire Invs., Inc., (1999) 74 Cal. App. 4th 884, 88 Cal. Rptr. 2d 594* , the plaintiff was the holder of a promissory note executed by a corporation, secured by a deed of trust on a parcel of land. However, that deed of trust was junior to another deed held by a bank that had provided much of the financing in a land purchase deal that involved not only the parcel relevant to the plaintiff, but three other parcels as well. The plaintiff eventually initiated foreclosure proceedings after the corporation failed to make payments on the note. However, the individual who controlled the corporation responded by using other corporations he controlled to purchase the note owned by the bank, and then foreclosing on that note, effectively extinguishing the plaintiff's junior lien. The plaintiff then brought suit against the relevant corporations and the individual who controlled those corporations, asserting a claim for conspiracy to intentionally interfere with a contractual relationship. The court of appeal affirmed a judgment for the plaintiff on that cause of action, despite the defendants' claims that there could be no liability for a conspiracy to interfere with a contract because the corporation that executed the promissory note could not be liable in tort for interfering with its own contract, all of the relevant corporations were the alter egos of the others, and all were actually controlled by the one individual defendant, who took the actions he did to protect his own economic interests in connection with a contract made by his own corporation. In concluding that the defendants could not hide behind the alter ego doctrine to shield themselves from liability, the court of appeal relied on the decision in *Shapoff v. Scull* [*see § 122.27[3]* [b], which it found to be essentially indistinguishable from the case before it (*74 Cal. App. 4th 884, 897-901)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesCauses of ActionGeneral OverviewBusiness & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesCauses of ActionTortious Interference With Business RelationsTortsBusiness TortsCommercial InterferenceBusiness RelationshipsGeneral OverviewTortsBusiness TortsCommercial InterferenceContractsGeneral Overview

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 122 INTERFERENCE
PART II. FORMS
A. Intentional Interference With Economic Relationship

12-122 California Points & Authorities § 122.28

§ 122.28 Opposing Contention That Elements Necessary to Recover for Intentional Interference With Economic Relationship Exist--Failure to Show Existing and Valid Contract

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S COMPLAINT DOES NOT STATE A CAUSE OF ACTION FOR INTENTIONAL INTERFERENCE WITH A CONTRACTUAL RELATIONSHIP BECAUSE IT DOES NOT ALLEGE FACTS SHOWING A VALID AND EXISTING CONTRACT BETWEEN PLAINTIFF AND A THIRD PERSON.

A. Valid and Existing Contract Required. Interference with a contractual relationship, as the basis for a tort cause of action, requires a plaintiff to prove that he or she had a valid and existing contract with a third party (*see Shamblin v. Berge (1985) 166 Cal. App. 3d 118, 123, 212 Cal. Rptr. 313*).

[*Optional*] **B. Void Contract Insufficient.** A plaintiff cannot posit liability for tortious interference with a contractual relationship on a void contract (*A-Mark Coin Co. v. General Mills, Inc. (1983) 148 Cal. App. 3d 312, 322, 195 Cal. Rptr. 859*).

[*Optional*] **C. Fraudulently Induced Contract Insufficient.** A fraudulently procured contract cannot be the subject of the tort of interference with a business or contractual relationship (*Renaissance Realty, Inc. v. Soriano (1981) 120 Cal. App. 3d Supp 13, 18 , 174 Cal. Rptr. 837*).

[*Optional*] **D. Canceled Contract Insufficient.** There is no cause of action for interference with a contractual relationship when at the time of the alleged interference, the alleged contract had been canceled by a third party (*see Dryden v. Tri-Valley Growers (1977) 65 Cal. App. 3d 990, 997, 135 Cal. Rptr. 720*).

[*Optional*] **E. Unenforceable Contract Insufficient.** An unenforceable contract cannot form the basis of a cause of action for intentional interference with contractual relations (*Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Village*

Square Venture Partners (1997) 52 Cal. App. 4th 867, 879, 60 Cal. Rptr. 2d 830).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a plaintiff's contention that defendant tortiously interfered with a contractual relationship to which the plaintiff was a party on the ground that plaintiff failed to allege a valid existing contract with a third person.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the nonexistence of a valid contract, for example, by summary judgment motion. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel could include facts stating that the contract in question involved an illegal subject matter.

In an appropriate case, these points and authorities may be used to oppose the contentions supported by the points and *authorities in § 122.20*.

[b] Related Pleading and Practice Forms

For discussion and forms relating to interference with economic relations, see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing a demurrer or motion for summary judgment, see respectively Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* , and Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Valid and Existing Contract Required

The facts and procedural background of ***Shamblin v. Berge*** *(1985) 166 Cal. App. 3d 118, 212 Cal. Rptr. 313* , are discussed in *§ 122.20[4][a]*. The court of appeal noted that to prevail under a theory of "interference with a contractual relationship," a plaintiff must prove (1) he or she had a valid and existing contract with a third party; (2) defendant had knowledge of this contract; (3) defendant committed intentional and unjustified acts designed to interfere with or disrupt the contract; (4) actual interference with or disruption of the relationship; and (5) resulting damages *166 Cal. App. 3d 118, 123)* . Although the court found that the jury had been erroneously instructed regarding the first element of the tort, the court found the instruction did not compel reversal. The court stated that the existence and validity of the contract or contracts at issue had been established at trial, and it was not reasonably probable that, absent the error, the jury would have returned a verdict in defendants' favor (*166 Cal. App. 3d 118, 123-124)* .

[b] Void Contract Insufficient

In ***A-Mark Coin Co. v. General Mills, Inc.*** *(1983) 148 Cal. App. 3d 312, 195 Cal. Rptr. 859* , plaintiff coin dealer had entered into an agreement with an estate to purchase coins. This agreement had been authorized by a probate court order. Subsequently, defendants offered to bid a higher price for the coins, notwithstanding the existing agreement to

sell the coins to plaintiffs. The probate court vacated and set aside its order authorizing the private sale, declared plaintiff's purchase agreement to be void ab initio, and ordered a public sale, at which defendants could interpose their higher bid. Plaintiff appealed from the probate court's order, and the Supreme Court of Nevada affirmed. At the public sale, plaintiff purchased the coins, but for $1.4 million more than the amount called for under the private sale agreement. At trial, plaintiff alleged intentional interference with a contractual relationship and with an advantageous business relationship. The trial court found for defendant, and plaintiff appealed.

The court of appeal affirmed. Noting that the Nevada probate court declared plaintiff's original contract to be void ab initio, the court held that plaintiff could not posit liability for tortious interference with a contractual relationship on a void contract (*148 Cal. App. 3d 312, 322)* . The court cited authority indicating that a contract subject to court approval, or other governmental confirmation and not yet approved or confirmed, is not sufficient to support a claim of tortious interference with contract (*148 Cal. App. 3d 312, 321-323)* .

[c] Fraudulently Induced Contract Insufficient

In ***Renaissance Realty, Inc. v. Soriano*** *(1981) 120 Cal. App. 3d Supp. 13* , *174 Cal. Rptr. 837* , defendant homebuyers had agreed to purchase a house through plaintiff realtor. The realtor fraudulently concealed from defendants the fact that the price of the house had been increased to include a broker's commission. Pending the closing of the escrow, another realtor convinced defendants to terminate the agreement. This realtor subsequently purchased the house and resold it to the homebuyers at a profit, but for less than what the buyers would have paid under the original agreement with plaintiffs. Plaintiff sued both the second realtor and the homebuyers for interference with a contractual relationship. The trial court awarded plaintiff damages from defendants. Defendants appealed.

The appellate department of the superior court reversed. The court noted the necessity for making a distinction between those contractual or business relationships unenforceable because of the statute of frauds, formal defects, lack of consideration or uncertainty, and those that are invalid because they are illegal or against public policy. The court found that a fraudulently conceived contractual relationship, such as the one involving plaintiff, cannot be the basis of the tort of interference with a contractual relationship (*120 Cal. App. 3d Supp. 13, 18)* .

[d] Cancelled Contract Insufficient

Dryden v. Tri-Valley Growers *(1977) 65 Cal. App. 3d 990, 135 Cal. Rptr. 720* , involved an action for intentional inducement to breach a contract. In *Dryden,* plaintiffs had contracted to purchase certain products from an olive oil manufacturer. The contract was to bind the manufacturer's successors. The manufacturer later repudiated the contract, alleging that plaintiffs were in material breach and had made fraudulent representations, and transferred the ownership of the plant to defendants. Plaintiffs then brought suit against defendants for intentional interference with contractual and/or advantageous economic and business relationships. The trial court sustained a general demurrer by one of the defendants. Plaintiff appealed.

The court of appeal affirmed. The court noted that the performance of the disputed contracts had been abandoned and discontinued by defendant's predecessors in interest many months prior to the transfer of the plant to defendant. Under such circumstances, the court found that the proximate cause necessary to establish an interference action was lacking as a matter of law (*65 Cal. App. 3d 990, 997)* . In any case, the court stated that as a successor party to the contract, defendant was not a "third party" and that consequently an action for intentional interference with contractual relationship could not properly lie against defendant (*65 Cal. App. 3d 990, 998-999)* .

[e] Unenforceable Contract Insufficient

In ***Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Village Square Venture Partners*** *(1997) 52 Cal. App. 4th 867, 60 Cal. Rptr. 2d 830* , plaintiff had negotiated for a retail lease agreement with a shopping center owner. The negotiated

terms of the lease were reduced to a written agreement which was signed by plaintiff but not by the owner. Instead, owner leased the premises to defendant, a retail business in direct competition with plaintiff. Plaintiff then filed an action for interference with contractual relations. The trial court granted summary adjudication in favor of defendant. On appeal, plaintiff contended that it was entitled to maintain an action for intentional interference with a contractual relationship, even though the alleged lease agreement was unenforceable under the statute of frauds.

The court of appeal rejected this argument, and affirmed the judgment. The court stated that the question of whether a third party's interference with a voidable or unenforceable contract could form the basis of a cause of action for intentional interference with contractual relations had been recently addressed in *PMC, Inc. v. Saban Entertainment, Inc. (1996) 45 Cal. App. 4th 579* . In that case, the court held that if a party is not obligated to perform a contract, then a stranger who intentionally interferes with that relationship does not disturb an enforceable contract but only a prospective economic relationship. The court concluded that plaintiff could not maintain a cause of action for intentional interference with a contractual relationship because the alleged lease agreement was unenforceable as a matter of law (*52 Cal. App. 4th 867, 879)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsCommercial InterferenceGeneral OverviewTortsBusiness TortsCommercial InterferenceContractsGeneral OverviewTortsBusiness TortsCommercial InterferenceContractsDefenses

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CHAPTER 122 INTERFERENCE
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A. Intentional Interference With Economic Relationship

12-122 California Points & Authorities § 122.29

§ 122.29 Opposing Contention That Elements Necessary to Recover for Intentional Interference With Economic Relationship Exist--Failure to Show Existing Non-Contractual Economic Relationship

[1] FORM

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief*].

PLAINTIFF'S COMPLAINT DOES NOT STATE A CAUSE OF ACTION FOR INTENTIONAL INTERFERENCE WITH A NON-CONTRACTUAL ECONOMIC RELATIONSHIP BECAUSE IT DOES NOT ALLEGE FACTS SHOWING THE EXISTENCE OF AN ECONOMIC RELATIONSHIP BETWEEN PLAINTIFF AND A THIRD PARTY CONTAINING A PROBABILITY OF FUTURE ECONOMIC BENEFIT TO PLAINTIFF.

Economic Relationship With Probability of Future Economic Benefit Required. A necessary element of the tort of intentional interference with a noncontractual economic relationship is an economic relationship between the plaintiff and some third person containing the probability of future economic benefit to the plaintiff (*Youst v. Longo (1987) 43 Cal. 3d 64, 71, 233 Cal. Rptr. 294, 729 P.2d 728* ; *Blank v. Kirwan (1985) 39 Cal. 3d 311, 330, 216 Cal. Rptr. 718, 703 P.2d 58*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a plaintiff's contention that defendant tortiously interfered with an economic relationship to which the plaintiff was a party on the ground that plaintiff failed to allege an economic relationship with a third party containing a probability of future economic benefit to the plaintiff.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the nonexistence of the requisite economic relationship, for example, by summary judgment motion. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show how plaintiff's complaint fails to allege an economic relationship containing a probability of economic benefit.

In an appropriate case, these points and authorities may be used to oppose the contentions supported by the points and *authorities in § 122.20*.

[b] Related Pleading and Practice Forms

For discussion and forms relating to interference with economic relations, see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing a demurrer or motion for summary judgment, see respectively Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* , and Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Economic Relationship With Probability of Future Economic Benefit Required

In ***Youst v. Longo*** *(1987) 43 Cal. 3d 64, 233 Cal. Rptr. 294, 729 P.2d 728* , plaintiff racehorse owner brought an action for interference with noncontractual economic relations against the driver of a second racehorse. Plaintiff alleged that, during a harness race in which the two horses were competing, the driver drove the second horse into plaintiff's horse and struck it with his whip. Plaintiff's horse finished in fifth place. According to plaintiff, plaintiff's horse would have made a better finish in the race and would have won a larger prize, had the driver not caused the horse to break stride. The trial court sustained defendant's demurrer on the ground that plaintiff failed to state a cause of action. The court of appeal affirmed.

The Supreme Court affirmed, stating that in an action for noncontractual interference, the plaintiff must prove that it is reasonably probable that the lost economic advantage would have been realized but for the defendant's interference (*43 Cal. 3d 64, 71)* . The Court indicated that it would be virtually impossible to determine the probable expectancy of winning a sporting contest (*43 Cal. 3d 64, 75-76)* . Finding that plaintiff failed to allege facts showing interference with a probable economic gain, the Court concluded that no cause of action existed for interference with the horse race (*43 Cal. 3d 64, 77)* .

In ***Blank v. Kirwan*** *(1985) 39 Cal. 3d 311, 216 Cal. Rptr. 718, 703 P.2d 58* , plaintiff applied for a poker club license shortly after the Bell city council legalized such clubs. After the city denied his license, plaintiff claimed that city officials conspired with private individuals to create a monopoly. Plaintiff alleged that city officials received rewards, things of value, and other valuable consideration from the private individuals in exchange for their granting a license to only one club. Plaintiff alleged intentional interference by the private individuals with plaintiff's prospective economic advantage. Defendants' demurrers were sustained without leave to amend and the court granted defendants' motions to dismiss. Plaintiff appealed.

In affirming the trial court's demurrers on plaintiff's interference complaint, the Supreme Court recited the elements of the tort of intentional interference with prospective economic relations (that is, interference with a noncontractual relationship) [*see § 122.04*], stating that the tort requires an economic relationship between the plaintiff and some third person containing the probability of future economic benefit to the plaintiff (*39 Cal. 3d 311, 330)* . The Court noted that the tort of intentional interference with prospective economic advantage has traditionally protected the expectancies

involved in ordinary commercial dealings, not the expectancies, whatever they may be, involved in the governmental licensing process. The Court found that plaintiff could plead no protectible "expectancy," but at most a hope for an economic relationship and a desire for future benefit (*39 Cal. 3d 311, 330-331)* .

[4] Additional Authorities

[a] Economic Relationship With Probability of Future Economic Benefits Required

In *Westside Center Assocsiates v. Safeway Stores 23, Inc. (1996) 42 Cal. App. 4th 507, 49 Cal. Rptr. 2d 793* , a partnership which owned a neighborhood shopping center sued a large supermarket for interference with prospective economic advantage. The supermarket had been the anchor tenant in the shopping center until it closed its store. The supermarket then executed its lease option to renew the lease for an additional five years, but left the anchor position vacant. The partnership contended that by closing its store and keeping the building empty the supermarket was driving down the value of the center so that it could later buy the property at an artificially low price. The partnership claimed that the supermarket thus interfered with the partnership's relationship with the class of all potential buyers for the property. However, the trial court granted an in limine motion by the supermarket to limit the partnership's evidence to matters proving that the supermarket acted with the intent to disrupt an existing relationship with a particular third party as opposed to a prospective relationship with an unknown class of potential buyers. On appeal, this ruling was upheld, with the court of appeal stating that the partnership's "interference with the market" theory is but a variation of a discredited "lost opportunity" theory which fails to provide a factual basis upon which to determine whether the plaintiff was likely to have actually received the expected benefit (*42 Cal. App. 4th 507, 527)* . The court concluded that the partnership's marked theory was insufficient as a matter of law to show an economic relationship with a prospective buyer which was reasonably likely to produce a future beneficial sale (*42 Cal. App. 4th 507, 528)* .

In *Roth v. Rhodes (1994) 25 Cal. App. 4th 530, 30 Cal. Rptr. 2d 706* , plaintiff podiatrist sued a group of physicians who operated a medical office building for damages allegedly caused by their refusal to lease office space to him because of a policy of leasing space only to persons holding M.D. degrees. The plaintiff alleged antitrust violations, as well as intentional interference with prospective business advantage. The court of appeal held that the trial court correctly granted judgment on the pleadings on the interference claim. The court noted that an essential element of the tort of intentional interference with prospective business advantage is the existence of a business relationship with which the tortfeasor interfered. Although the relationship need not be contractual, an existing relationship is required. The court observed that plaintiff's claim was predicated on a claim that tenancy in defendants' building would result in future referrals and patient contacts. The court concluded from the nature of plaintiff's claim that plaintiff could not establish an existing relationship with these speculative "future patients" (*25 Cal. App. 4th 530, 546)* .

The court of appeal in *Amid v. Hawthorne Cmty. Med. Group, Inc. (1989) 212 Cal. App. 3d 1383, 261 Cal. Rptr. 240* , affirmed the judgment entered after sustaining of a demurrer to plaintiff's fourth amended complaint without leave to amend. The complaint included a cause of action for interference with prospective business advantage and was based on defendant's disclosure to an affiliated health insurer of an unfavorable peer review committee evaluation of plaintiff. The court of appeal said that one of the elements that plaintiff failed to sufficiently plead was an economic relationship with a third party. References to plaintiff's medical practice, right of employment with individual patients plaintiff had evaluated and treated and might evaluate and treat in future was inadequate (*212 Cal. App. 3d 1383, 1392)* .

The court of appeal in *Hepe v. Paknad (1988) 199 Cal. App. 3d 412, 244 Cal. Rptr. 823* , affirmed the sustaining of a demurrer to a cause of action for interference with prospective economic advantage. Plaintiff's vehicle was struck by one driven by a person who the defendant, the owner of a bar, "knew or should have known" was an alcoholic, and to whom the defendant had served alcohol shortly before the accident. After the accident, defendant allegedly concealed the driver and removed him from the area so that neither law enforcement officials nor plaintiff could establish that the driver was under the influence of alcohol at the time of the accident. Plaintiff alleged that he was thus prevented from recovering punitive damages and from acquiring a judgment that would not be dischargeable in bankruptcy. Citing

Youst v. Longo (1987) 43 Cal. 3d 64, 75, 77, 233 Cal. Rptr. 294, 729 P.2d 728 , and *Blank v. Kirwan (1985) 39 Cal. 3d 311, 330, 216 Cal. Rptr. 718, 703 P.2d 58* , the court of appeal held that a personal injury judgment was not the type of economic relationship that the tort of interference has traditionally protected and further, that the right to recover punitive damages or a nondischargeable judgment was too speculative to support a cause of action for interference with prospective economic advantage (*199 Cal. App. 3d 412, 420-421)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsCommercial InterferenceGeneral OverviewTortsBusiness TortsCommercial InterferenceBusiness RelationshipsGeneral OverviewTortsBusiness TortsCommercial InterferenceBusiness RelationshipsDefensesTortsBusiness TortsCommercial InterferenceProspective AdvantageGeneral OverviewTortsBusiness TortsCommercial InterferenceProspective AdvantageDefenses

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A. Intentional Interference With Economic Relationship

12-122 California Points & Authorities § 122.30

§ 122.30 Opposing Contention That Elements Necessary to Recover for Intentional Interference With Economic Relationship Exist--Failure to Show Knowledge of Economic Relationship

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION FOR INTENTIONAL INTERFERENCE WITH ECONOMIC RELATIONS BECAUSE IT DOES NOT ALLEGE FACTS SHOWING THAT DEFENDANT HAD KNOWLEDGE OF THE EXISTENCE OF THE ALLEGED RELATIONSHIP.

Defendant's Knowledge of Economic Relationship Required. An essential element to a cause of action for intentional interference with economic relations is that the defendant had knowledge of the existence of the relationship interfered with (*Dryden v. Tri-Valley Growers (1977) 65 Cal. App. 3d 990, 995, 135 Cal. Rptr. 720*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a plaintiff's contention that defendant tortiously interfered with an economic relationship to which the plaintiff was a party. The ground of opposition set forth is that the plaintiff cannot prove defendant was aware of plaintiff's economic relationship with a third party at the time defendant allegedly interfered with it.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the defendant's knowledge, for example, by demurrer or by summary judgment motion. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Thus, counsel should demonstrate how plaintiff's complaint fails to allege defendant's knowledge of plaintiff's

economic relationship with a third party.

In an appropriate case, these points and authorities may be used to oppose the contentions supported by the points and *authorities in §§ 122.20 -122.23*.

[b] Related Pleading and Practice Forms

For discussion and forms relating to interference with economic relations, see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing a demurrer or motion for summary judgment, see respectively Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* , and Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Defendant's Knowledge of Economic Relationship Required

The facts and procedural background of ***Dryden v. Tri-Valley Growers*** *(1977) 65 Cal. App. 3d 990, 135 Cal. Rptr. 720* , are discussed in *§ 122.28[3][d]*. In *Dryden,* defendant executed a purchase contract with the owners of a processing plant, allegedly interfering in plaintiff's economic relations with the owners. The complaint stated that defendant learned of plaintiff's contracts with its predecessor in interest one day after the execution of the purchase contract. The court found the complaint defective, since plaintiffs failed to allege that at the time of purchasing the plant defendant was aware of the existence of previous contracts between plaintiffs and the original owners (*65 Cal. App. 3d 990, 995-996)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsCommercial InterferenceGeneral OverviewTortsBusiness TortsCommercial InterferenceBusiness RelationshipsGeneral OverviewTortsBusiness TortsCommercial InterferenceBusiness RelationshipsDefenses

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CHAPTER 122 INTERFERENCE
PART II. FORMS
A. Intentional Interference With Economic Relationship

12-122 California Points & Authorities § 122.31

§ 122.31 Opposing Contention That Elements Necessary to Recover for Intentional Interference With Economic Relationship Exist--Failure to Show Intent to Interfere

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION FOR INTENTIONAL INTERFERENCE WITH ECONOMIC RELATIONS BECAUSE IT DOES NOT ALLEGE FACTS SHOWING THAT DEFENDANT'S ACTS WERE INTENTIONAL AND DESIGNED TO DISRUPT THE ECONOMIC RELATIONSHIP.

A. Intent to Disrupt Economic Relationship Required. To state a cause of action for intentional interference with economic relations, a plaintiff must show that defendant committed intentional acts designed to disrupt the relationship (*Seaman's Direct Buying Serv., Inc. v. Standard Oil Co. (1984) 36 Cal. 3d 752, 766, 206 Cal. Rptr. 354, 686 P.2d 1158* ; *Khoury v. Maly's of Cal., Inc. (1993) 14 Cal. App. 4th 612, 618, 17 Cal. Rptr. 2d 708*).

[*Optional*] **B. Attorney's Payment of Third Party Recovery to Client Rather Than Lienor Is Insufficient Interference.** An attorney's payment of fees recovered from a third party, to his client rather than to the insurance company lienor, cannot be construed as an act designed to induce breach or disruption of a contractual relationship (*Farmers Ins. Exch. v. Zerin (1997) 53 Cal. App. 4th 445, 458, 61 Cal. Rptr. 2d 707*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a plaintiff's contention that defendant tortiously interfered with a contractual relationship to which the plaintiff was a party. The ground of opposition set forth is that the plaintiff cannot prove that defendant specifically intended to interfere with plaintiff's economic relationship with a third party.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of intent, for example, by demurrer or by summary judgment motion. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. For example, counsel should state facts showing how plaintiff's complaint fails to allege specific intent.

In an appropriate case, these points and authorities may be used to oppose the contentions supported by the points and *authorities in §§ 122.20 -122.23*.

[b] Related Pleading and Practice Forms

For discussion and forms relating to interference with economic relations, see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing a demurrer or a motion for summary judgment, see respectively Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* , and Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Intent to Disrupt Economic Relationship Required

In ***Seaman's Direct Buying Serv., Inc. v. Standard Oil Co.*** *(1984) 36 Cal. 3d 752, 206 Cal. Rptr. 354, 686 P.2d 1158* , plaintiff, a ship supplies corporation, sought to lease from the city of Eureka a large portion of a new marina. The city conditioned approval of the lease on plaintiff's development of a marine fuel dealership on the property, requiring plaintiff to provide written evidence of a binding agreement with an oil supplier. Plaintiff reached an agreement with defendant, an oil supplier, and plaintiff obtained from defendant a letter setting forth the terms of agreement. On presentation of this letter to the city, the city agreed to lease the property to plaintiff. After the lease was signed, the petroleum market changed from a buyer's to a seller's market. Defendant adopted a "no new business" policy. Several months later, the federal government adopted regulations restricting the allocation of petroleum products. The regulations apparently would have barred defendant from supplying petroleum to plaintiff pursuant to the terms of the agreement. Plaintiff obtained a supply order from the federal government, enabling it to carry on business with defendant anyway. Defendant subsequently claimed that no contract existed between it and plaintiff, and that it had no obligation to supply plaintiff with fuel. After defendant successfully appealed from the supply order, plaintiff appealed to have the order reinstated. Plaintiff obtained a court decision providing that an order directing defendant to fulfill its supply obligations would be issued on the filing of a copy of a court decree that a valid contract existed between the parties under state law. Plaintiff asked defendant to stipulate to the existence of a contract, but defendant refused. Plaintiff subsequently discontinued its operations. Plaintiff filed suit against defendant alleging that defendant tortiously interfered with plaintiff's contractual relationship with the city. The jury found for plaintiff, awarding both compensatory and punitive damages. Defendant appealed.

The Supreme Court reversed the judgment against defendant for intentional interference with economic relations. Quoting from *Imperial Ice Co. v. Rossier (1941) 18 Cal. 2d 33, 37, 112 P.2d 631* , the court stated that the act of inducing the breach of contract must be an intentional one. If the actor had no knowledge of the existence of the contract or his or her actions were not intended to induce a breach, he or she cannot be held liable though an actual breach results from his or her lawful and proper acts (*36 Cal. 3d 752, 765)* . Citing Restatement of Torts § 766, the Court noted that it is not enough that the actor intended to perform the acts which caused the result--he or she must have intended to cause the result itself (*36 Cal. 3d 752, 765)* . The Court stated that specific intent to interfere is a necessary

element which must be pleaded and proved in an interference action (*36 Cal. 3d 752, 766)* . Here, the Court found that plaintiff failed to carry its burden of pleading intent, since there was no evidence that defendant acted with the purpose or design of causing plaintiff to breach its contract with the city (*36 Cal. 3d 752, 767)* .

In ***Khoury v. Maly's of Cal.*** *(1993) 14 Cal. App. 4th 612, 17 Cal. Rptr. 2d 708* , the parties entered an oral agreement under which defendant would supply a certain brand of hair care products to plaintiff's beauty salon, for sale to plaintiff's customers, if plaintiff and his employees agreed to attend a training class and to sell the products. Pursuant to the agreement, plaintiff and his employees attended the training, defendant supplied the products, and plaintiff displayed and sold the products. Plaintiff developed a clientele loyal to the products who would accept no substitutes. Thereafter, defendant refused to continue to supply plaintiff with the products, allegedly damaging plaintiff's business. Plaintiff filed a complaint against defendant setting forth, among others, a cause of action for interference with advantageous business relationship. Specifically, plaintiff alleged that defendants, with full knowledge of plaintiff's reliance on the product line sold by defendant, and intending to injure, destroy, and otherwise interfere with plaintiff's business, wrongfully, fraudulently, knowingly, intentionally, and maliciously refused to sell the products to plaintiff, intending to ruin and interfere with his beauty and supply business. Plaintiff also alleged that defendants intended to induce plaintiff's customers to cease doing business with plaintiff. The trial court sustained defendant's demurrer to this cause of action without leave to amend. Plaintiff appealed.

The court of appeal affirmed with respect to plaintiff's cause of action for interference. The court noted that although the complaint generally pleaded the elements of intentional interference with prospective business advantage, the complaint failed to state any factual basis for the assertion that defendant interfered with plaintiff's business relations, having the improper malicious purpose to destroy plaintiff's business. The sole alleged conduct of defendant was the breach of contract to supply the beauty products to plaintiff. The effect on plaintiff's customers (with whom defendant had no relations) and the damage to plaintiff's business were simply consequences of breach of contract. The court noted that if a contract plaintiff could plead in a conclusory way that the defendant maliciously intended to drive the plaintiff out of business, the tort of interference with prospective business advantage would be routinely pleaded in breach of contract cases. Allowing such conclusory pleading would be contrary to the cautious policy of the courts about extending tort remedies to ordinary commercial contracts (*14 Cal. App. 4th 612, 618)* .

[b] Attorney's Payment of Third Party Recovery to Client Rather Than Lienor Is Insufficient Interference

In ***Farmers Ins. Exch. v. Zerin*** *(1997) 53 Cal. App. 4th 445, 61 Cal. Rptr. 2d 707* , an auto insurer sued the attorney representing its insureds in connection with their claims against third party tortfeasors allegedly responsible for their injuries. Two of plaintiff's causes of action stated claims for intentional interference with contract. The complaint alleged that plaintiff had valid contracts with the insureds, that defendant was aware of the contracts, and that defendant interfered with those contracts by paying himself and his clients that portion of the third party recoveries to which plaintiff was entitled. The policy language at issue provided that when an insured had been paid damages by plaintiff under the policy and also recovered from another, the amount recovered from the other must be held by insured in trust for plaintiff and reimbursed to plaintiff to the extent of its payment. Defendant demurred. The trial court sustained the demurrer and dismissed the action.

The court of appeal affirmed, stating that it failed to see how an attorney paying funds to his client rather than to the lienor could be construed as an act designed to induce breach or disruption of a contractual relationship (*53 Cal. App. 4th 445, 458)* . Instead, the court saw this act by the attorney as facilitating compliance with the contract by providing the client with the funds necessary for performance. The court stated that as a general matter, an attorney receiving payment of a judgment or settlement on behalf of his or her client has no obligation to satisfy the client's debts out of that fund. It is only when the creditor has some property interest in the fund or a trust relationship exists that such an obligation might arise. In this case, the court found that plaintiff had no equitable lien on any third party recoveries and no trust relationship existed between plaintiff and defendant. Therefore, plaintiff failed to state claims for intentional interference with contract (*53 Cal. App. 4th 445, 459)* .

[4] Additional Authorities

[a] Intent to Disrupt Economic Relationship Required

The court of appeal in *Fisher v. San Pedro Peninsula Hosp. (1989) 214 Cal. App. 3d 590, 262 Cal. Rptr. 842* , affirmed a judgment for defendants entered after sustaining demurrers without leave to amend with respect to causes of action by spouses for intentional interference with contractual relationships. Both spouses worked for the defendant hospital. The wife, a nurse, alleged sexual harassment by a male physician. The husband, a doctor, complained to the hospital about that physician, and in retaliation, a third physician refused to examine the husband's patients. In affirming the judgment with respect to the wife's cause of action against the harassing physician, the court of appeal agreed with the trial court that allegations that the defendant "embarked on course of intentional conduct designed to disrupt plaintiff's relationship with the hospital" were insufficient in that they pleaded a legal conclusion, not facts. Although the judgment was reversed to allow the wife to amend to allege environmental sexual harassment, that is, to show a hostile work environment, the court concluded that even if such a cause of action were successfully pleaded, there was no logical inference that the harassing physician intended to disrupt the wife's relationship with the hospital by his harassment of other employees. Thus the wife had not and could not state a cause of action for intentional interference with contractual relationship (*214 Cal. App. 3d 590, 619)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsCommercial InterferenceGeneral OverviewTortsBusiness TortsCommercial InterferenceBusiness RelationshipsGeneral OverviewTortsBusiness TortsCommercial InterferenceBusiness RelationshipsDefensesTortsBusiness TortsCommercial InterferenceContractsGeneral OverviewTortsBusiness TortsCommercial InterferenceContractsDefenses

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A. Intentional Interference With Economic Relationship

12-122 California Points & Authorities § 122.32

§ 122.32 Opposing Contention That Elements Necessary to Recover for Intentional Interference With Economic Relationship Exist--Failure to Show Wrongfulness of Interference With Prospective Economic Relationship

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S COMPLAINT DOES NOT STATE A CAUSE OF ACTION FOR INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC RELATIONS BECAUSE IT DOES NOT ALLEGE FACTS SHOWING THAT THE DEFENDANT'S CONDUCT WAS WRONGFUL BY SOME MEASURE BEYOND THE FACT OF THE INTERFERENCE ITSELF.

A. Interference With Prospective Relations Must Be Wrongful. A plaintiff seeking to recover for alleged interference with prospective economic relations has the burden of pleading and proving that the defendant's interference was wrongful by some measure beyond the fact of the interference itself (*Della Penna v. Toyota Motor Sales U.S.A., Inc. (1995) 11 Cal. 4th 376, 392-393, 45 Cal. Rptr. 2d 436, 902 P.2d 740*).

[*Optional*] **B. Violations of Ethical or Industry Standards Do Not Satisfy Wrongfulness Requirement.** Allegations that the defendant's conduct was unethical, or violated vague industry standards, are insufficient to meet the test of wrongfulness in a cause of action for intentional interference with prospective economic advantage (*Gemini Aluminum Corp. v. California Custom Shapes, Inc. (2002) 95 Cal. App. 4th 1249, 1259, 116 Cal. Rptr. 2d 358*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a plaintiff's contention that defendant tortiously interfered with plaintiff's prospective economic relations. The ground of opposition set forth is that the plaintiff has not met the burden of pleading and proving that the defendant's interference was wrongful by some measure beyond the fact of the interference itself.

These points and authorities may be compined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that wrongfulness has not been alleged, for example, by demurrer or by summary judgment motion. These points and authorities may also be adapted for use in a trial or appellate brief.

In an appropriate case, these points and authorities may be used to oppose the contentions supported by the points and *authorities in § 122.20*.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss plaintiff's failure to allege and/or establish that the interference with plaintiff's prospective economic relations was wrongful.

[c] Related Pleading and Practice Forms

For discussion and forms relating to interference with economic relations, see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* . (Matthew Bender).

[d] Related Points and Authorities

For points and authorities supporting and opposing a demurrer or motion for summary judgment, see respectively Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* , and Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Interference With Prospective Relations Must Be Wrongful

The facts and procedural background of ***Della Penna v. Toyota Motor Sales U.S.A., Inc.*** *(1995) 11 Cal. 4th 376, 45 Cal. Rptr. 2d 436, 902 P.2d 740* , are discussed in *§ 122.20[3][c]*. The Court held that a plaintiff seeking to recover for alleged interference with prospective economic relations has the burden of pleading and proving that the defendant's interference was wrongful by some measure beyond the fact of the interference itself (*11 Cal. 4th 376, 392-393)* .

[b] Violations of Ethical or Industry Standards Do Not Satisfy Wrongfulness Requirement

In ***Gemini Aluminum Corp. v. California Custom Shapes, Inc.*** *(2002) 95 Cal. App. 4th 1249, 116 Cal. Rptr. 2d 358* , the plaintiff was a manufacturer of aluminum parts that had subcontracted with the defendant, another aluminum parts manufacturer, for powder coating on certain parts for a workbench project that the plaintiff was working on for a third party. Approximately one or two months after the plaintiff began shipping parts to the third party, the defendant discovered defects in parts that it had powder-coated for the plaintiff, but the plaintiff and the defendant each blamed the other for the defects. After the parties were unable to resolve the dispute, the defendant ceased work on the subcontract, put the plaintiff on a credit hold, and demanded C.O.D. payment for parts that it had finished but not yet delivered. When the plaintiff threatened a lawsuit, however, the defendant delivered the parts on a credit basis. During this time period, the third party who had hired the plaintiff was experiencing severe financial difficulties, precipitating the plaintiff's decision to stop shipping parts to that party. However, the defendant was unaware of these facts and directed one of its salepersons to solicit the work directly from the third party. Over the course of the next three months, the defendant engaged in a series of court actions to recover from the plaintiff for amounts allegedly owed under their contract, and the plaintiff counter-sued for breach of contract and related claims. The plaintiff also sued the third party for the amount allegedly owed in unpaid invoices. Two months later, the third party first ordered aluminum parts directly from the defendant, but after six months, the defendant refused to perform additional work due to the third party's inability to pay the invoices. Three months later, the third party filed for bankruptcy. Three months after that, the

plaintiff sued the defendant for misappropriation of trade secrets, unfair competition, conversion, and intentional interference with prospective economic advantage. The plaintiff alleged that the defendant used die drawings provided by the plaintiff to fabricate the aluminum parts and to solicit business on the parts directly from the third party. The defendant raised the privilege of competition as an affirmative defense. At trial, the plaintiff decided to pursue only the actions for conversion and intentional interference, although it considered the trade secrets claim to be subsumed within the interference claim. The court granted nonsuit on the conversion claim, and the jury returned a defense verdict on the interference action. The court awarded attorney's fees based on certain bad faith conduct by the plaintiff. The plaintiff appealed.

The court of appeal affirmed. Although it was not entirely clear, the court considered the plaintiff's main contention on appeal to be that the trial court improperly required the plaintiff to establish the separate tort of misappropriation of trade secrets to defeat the competition privilege. The plaintiff argued that it was sufficient that it show that the defendant violated industry standards and acted unethically in soliciting the account of a company with which the plaintiff was currently doing business. The court reviewed the standard set forth in *Della Penna v. Toyota Motor Sales U.S.A., Inc. (1995) 11 Cal. 4th 376, 45 Cal. Rptr. 2d 436, 902 P.2d 740* [*see § 122.32[3][a]*], requiring that the plaintiff in an action for intentional interference with prospective economic advantage prove that the interference was independently wrongful by some measure beyond the fact of interference itself (*95 Cal. App. 4th 1249, 1256-1257)* . The court noted that the Supreme Court left this standard undefined, although one concurring opinion in *Della Penna* suggested that tortious or illegal conduct would be required, rather than merely conduct that arguably violated business ethics (*95 Cal. App. 4th 1249, 1258)* . The court then looked at cases pre-dating *Della Penna* that had addressed a wrongfulness standard in assessing a the defendant's alleged intentional interference with prospective economic relations. These cases suggested to the court that showing wrongfulness required a showing that the defendant's conduct was unlawful, illegitimate, or independently actionable. The court then concluded that allegations that the defendant's conduct was unethical, or violated vague industry standards, were insufficient to meet the test of wrongfulness. The court deemed that imposing liability for that type of conduct would create uncertainty and chill, rather than maximize, competition (*95 Cal. App. 4th 1249, 1259)* .

NOTE:

In a subsequent opinion, the court of appeal distinguished the vague industry standards at issue in *Gemini Aluminum* from more defined standards, such as might be contained in well-established, written rules. In *Stevenson Real Estate Servs., Inc. v. CB Richard Ellis Real Estate Servs., Inc. (2006) 138 Cal. App. 4th 1215, 42 Cal. Rptr. 3d 235* [*see § 122.20*], the court of appeal held that in an action for intentional interference with prospective economic advantage between competitors who are bound by well-defined, established rules or standards of a trade, association, or profession, a violation of those rules or standards may constitute wrongful conduct under the *Korea Supply* standard, if the rule or standard allegedly violated provides for, or gives rise to, a sanction or means of enforcement for a violation (*138 Cal. App. 4th 1215, 1223)* .

[4] Additional Authorities

[a] Interference With Prospective Relations Must Be Wrongful

In *Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co. (1996) 47 Cal. App. 4th 464, 54 Cal. Rptr. 2d 888* , plaintiff, a general contractor, had been terminated from a public works construction project by the property owner who complained of deficient workmanship. The surety, which had issued performance, labor, and material bonds on the project, took over the project and complete construction using substitute contractors. Plaintiff sued the surety for interference with prospective economic relations claiming that defendant's termination of bonding frustrated plaintiff's ability to secure bonding from other sureties. The trial court entered judgment for plaintiff. The court of appeal reversed, basing its ruling on *Della Penna v. Toyota Motor Sales, U.S.A., Inc. (1995) 11 Cal. 4th 376, 45 Cal. Rptr. 2d 436, 902 P.2d 740* . In *Della Penna,* the Supreme Court held that a plaintiff seeking to recover for an alleged interference with

prospective economic relations must plead and prove that the defendant not only knowingly interfered with the plaintiff's expectancy, but engaged in conduct that was wrongful by some legal measure other than the fact of the interference itself. Defendant claimed that it did no more than protect its contractual right under its agreements with plaintiff and truthfully report the contractual dispute to interested third parties. Plaintiffs claimed that defendant intentionally interfered with its prospective economic relations by (1) terminating its bonding of plaintiff, (2) putting plaintiff "in claim" and (3) sending false reports to defendant's reinsurers. The court of appeal analyzed the claims in light of the *Della Penna* wrongfulness standard and found nothing actionable in any of them (*47 Cal. App. 4th 464, 479-481)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsCommercial InterferenceGeneral OverviewTortsBusiness TortsCommercial InterferenceProspective AdvantageGeneral OverviewTortsBusiness TortsCommercial InterferenceProspective AdvantageDefensesTortsBusiness TortsCommercial InterferenceProspective AdvantageElements

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A. Intentional Interference With Economic Relationship

12-122 California Points & Authorities § 122.33

§ 122.33 Opposing Contention That Elements Necessary to Recover for Intentional Interference With Economic Relationship Exist--Failure to Show Disruption of Contractual Relationship

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

PLAINTIFF'S COMPLAINT DOES NOT STATE A CAUSE OF ACTION FOR INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONS BECAUSE IT DOES NOT ALLEGE FACTS SHOWING THAT THE DEFENDANT'S ACTS ACTUALLY INTERFERED WITH PLAINTIFF'S CONTRACT WITH _____ [*name*].

Cause in Fact of Contractual Interference. An action for interference with contractual rights will lie only if the defendant's act induced the breach of contract between the plaintiff and third party or if the defendant purposely caused a third person not to perform a contract with the plaintiff (*Short v. Nevada Joint Union High Sch. Dist. (1985) 163 Cal. App. 3d 1087, 1101, 210 Cal. Rptr. 297* ; *Dryden v. Tri-Valley Growers (1977) 65 Cal. App. 3d 990, 995-996, 135 Cal. Rptr. 720*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a plaintiff's contention that defendant tortiously interfered with a contractual relationship to which the plaintiff was a party. The ground of opposition set forth is that the plaintiff has not shown that defendant's conduct actually interfered with plaintiff's contractual relationship with a third party.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of noninterference, for example, by demurrer or by summary judgment motion. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and points of law stated. For example, counsel should discuss how the plaintiff's complaint fails to allege facts showing that defendant disrupted a contract between plaintiff and a third party.

These points and authorities may be used to oppose the contentions supported by the points and *authorities in §§ 122.20 -122.23*.

[b] Related Pleading and Practice Forms

For discussion and forms relating to interference with economic relations, see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing a demurrer or motion for summary judgment, see respectively Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* , and Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Cause in Fact of Contractual Interference

In ***Short v. Nevada Joint Union High Sch. Dist.*** *(1985) 163 Cal. App. 3d 1087, 210 Cal. Rptr. 297* , plaintiff was employed by defendant school district as a security chief. The terms of plaintiff's employment contract allowed for termination under certain circumstances, including "lack of funds." After the school board terminated plaintiff, plaintiff sued, alleging that school administrators tortiously induced the school district to breach its contract with him. The trial court granted defendants' motions for nonsuit on this claim, and plaintiff appealed.

The court of appeal affirmed, finding that plaintiff failed to show that any administrator interfered with the performance of the employment contract. The court noted that defendants' termination actions against plaintiff were fully consistent with the terms of plaintiff's contract and did not run afoul of its terms (*163 Cal. App. 3d 1087, 1101)* . Concluding that none of the defendants induced a breach of plaintiff's contract, the court found that neither the school administrators nor the district were liable for conspiracy to interfere with the contract (*163 Cal. App. 3d 1087, 1102)* .

The facts and procedural background of ***Dryden v. Tri-Valley Growers*** *(1977) 65 Cal. App. 3d 990, 135 Cal. Rptr. 720* , are discussed in *§ 122.28[3][d]*. The plaintiffs sued the purchasers of an olive oil plant, alleging that defendant's purchase would interfere with contractual relations between plaintiffs and the plant's original owners. Plaintiffs' complaint stated that defendant learned of plaintiff's contracts with the original owners the day after the execution of the purchase contract. In rejecting plaintiffs' interference claim, the court noted that an action for interference with contractual rights lies only if defendant's act induced the breach of contract between the plaintiff and the third party or if defendant purposely caused a third person not to perform the contract with another. The court found plaintiffs' cause of action defective, since plaintiffs failed to indicate that defendant induced or otherwise purposely caused the breach of contract (*65 Cal. App. 3d 990, 995-996)* . According to the court, plaintiffs' allegations conclusively demonstrated that the performance of the disputed contracts had been abandoned and discontinued by the original owners of the plant many months prior to the transfer of the plant to defendant. Thus, proximate causation was lacking as a matter of law (*65 Cal. App. 3d 990, 997)* .

[4] Additional Authorities

[a] Cause in Fact of Contractual Interference

In *Davis v. Nadrich (2009) 174 Cal. App. 4th 1, 94 Cal. Rptr. 3d 414* , plaintiff attorney sued another attorney for intentional interference with plaintiff's partnership agreement. Plaintiff alleged that defendant referred clients to plaintiff's law partner individually, rather than to their law firm, causing plaintiff to lose his share of the fees to which he allegedly would have been entitled under the partnership agreement. The trial court granted summary judgment for the referring attorney, and the court of appeal affirmed. The court of appeal concluded that plaintiff had offered no evidence that his partnership agreement precluded either partner from accepting individual referrals. In the absence of such evidence, there was no proof of an actual breach of the partnership contract and thus no cause of action for interfering with that contract premised on defendant's referrals (*174 Cal. App. 4th 1, 10)* .

The facts and procedural background of *Fisher v. San Pedro Peninsula Hosp. (1989) 214 Cal. App. 3d 590, 262 Cal. Rptr. 842* , is discussed in *§ 122.33[3][a]*. In considering the husband's cause of action against the third physician for intentional interference with the husband's relationship with the hospital and his patients, the court of appeal agreed that the husband was unable to state a cause of action. Although the complaint alleged that the husband's relationship with the hospital was actually disrupted because he had to seek other physicians to assist with his patient and the welfare of those patients was actually threatened, there was no allegation that plaintiff lost patients. In addition, having to seek other physicians or threats to patient welfare are not the kind of *economic* interest that the tort of interference is designed to protect (*214 Cal. App. 3d 590, 620)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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12-122 California Points & Authorities § 122.34

§ 122.34 Opposing Contention That Elements Necessary to Recover for Intentional Interference With Economic Relationship Exist--Failure to Show That Interference Proximately Caused Injury

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

PLAINTIFF'S COMPLAINT DOES NOT STATE A CAUSE OF ACTION FOR INTENTIONAL INTERFERENCE WITH ECONOMIC RELATIONS BECAUSE IT FAILS TO ALLEGE FACTS SHOWING THAT DEFENDANT'S INTERFERENCE PROXIMATELY CAUSED DAMAGES TO PLAINTIFF.

[*EITHER, if alleging contractual interference*]

A. Defendant's Conduct Was Substantial Factor in Causing Damages. A plaintiff seeking to hold another liable for intentional interference with an existing contract must prove that defendant's conduct was a substantial factor in causing the harm alleged (*Bank of New York v. Fremont Gen. Corp. (9th Cir. 2008) 523 F.3d 902, 909-910* ; *CACI No. 2201*).

[*OR, if alleging noncontractual interference*]

A. Interference With Prospective Contract or Business Relationship Must Be Moving Cause of Damages. Before recovery can be had for interference with and loss of a future or prospective contract or business relationship, it must appear that such contract or relationship would otherwise have been entered into (*Youst v. Longo (1987) 43 Cal. 3d 64, 77, 233 Cal. Rptr. 294, 729 P.2d 728* ; *Brody v. Montalbano (1978) 87 Cal. App. 3d 725, 738, 151 Cal. Rptr. 206*).

B. Showing of Resulting Injury Required. A plaintiff does not state a cause of action for interference with economic relations when he or she fails to show that defendant's interference caused economic loss on the part of the plaintiff (*see Baldwin v. Marina City Props., Inc. (1978) 79 Cal. App. 3d 393, 407, 145 Cal. Rptr. 406*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a plaintiff's contention that defendant tortiously interfered with a contractual relationship to which the plaintiff was a party. The ground of opposition set forth is that the plaintiff cannot show that defendant's conduct proximately caused plaintiff to suffer economic loss.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of damage, for example, by demurrer or by summary judgment motion. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Thus, counsel should demonstrate that the facts shown by the plaintiff are insufficient to establish that the defendant's interference proximately caused injury to the plaintiff.

In an appropriate case these points and authorities may be used to oppose the contentions supported by the points and *authorities in §§ 122.20 -122.23*.

[b] Related Pleading and Practice Forms

For discussion and forms relating to interference with economic relations, see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing a demurrer or motion for summary judgment, see respectively Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* , and Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Defendant's Conduct Was Substantial Factor in Causing Damages

In ***Bank of New York v. Fremont Gen. Corp.*** *(9th Cir. 2008) 523 F.3d 902* , plaintiff was a New York bank that held funds used to secure the payment of workers' compensation claims by a workers' compensation insurer. New York law required an insurer to maintain accounts to cover the payment of claims, and also required an insurer to enter into a contractual agreement with the custodial bank specifying that the bank could not release principal funds from these accounts without a written request from the insurer accompanied by written approval from the New York Superintendent of Insurance, although interest could be withdrawn without approval from the Superintendent. Despite these requirements, over the course of 12 months, the corporate parent of this insurer had instructed plaintiff bank to transfer funds totaling approximately $14 million from the custodial accounts, which including amounts from the principal, into a non-custodial account at another institution. This was done without the Superintendent's approval, even though at least some of plaintiff's employees knew about the requirements for such transfers. The insurer eventually ran into financial difficulties and was placed into conservatorship in California. Due to these financial difficulties, an accounting was required of plaintiff, at which time it determined that it was partially responsible for mistakenly transferring principal amounts from the custodial accounts. The New York Insurance Department required that this money be replaced, and plaintiff entered into an agreement to pay the missing amount, with interest. The Superintendent then assigned to plaintiff the right to recover from the insurer's corporate parent. Plaintiff sued the corporate parent in federal court, alleging intentional interference with its contract with the insurer and other causes of action. The trial court granted defendant's motion for partial summary judgment on the intentional interference claim after concluding

that the damages were not caused by defendant's conduct. After bench trial on the other claims, judgment was entered for defendant. Plaintiff appealed.

The Ninth Circuit Court of Appeals reversed the partial summary judgment on the interference cause of action. The district court had concluded that the transfer requests submitted by defendant to plaintiff did not actually cause the transfers, which instead were caused by plaintiff's breach of its own independent duty to secure written permission from the Superintendent before the transfers. However, the Court of Appeals held that the district court applied the wrong standard for causation. The Court concluded that the appropriate standard for causation for an intentional tort under California law is the "substantial factor" test, which is broader than but generally produces the same result as the "but for" rule of causation, under which a defendant's conduct is a cause of injury if the injury would not have occurred "but for" that conduct. The Court noted that as long as there is a factual chain of causation, the presence of an independent intervening cause does not defeat a showing that a defendant's conduct was a substantial factor in causing the harm. The Court concluded that irrespective of plaintiff's conduct, defendant's multiple requests for funds transfers from the custodial accounts were a substantial factor in causing the actual transfers, even though plaintiff's failure to get the Superintendent's approval may have also played a role (*523 F.3d 902, 909-910)* .

NOTE:

The courts in *Allen v. Powell (1967) 248 Cal. App. 2d 502, 508, 56 Cal. Rptr. 715* , and *Freed v. Manchester Serv., Inc. (1958) 165 Cal. App. 2d 186, 189 fn. 2, 331 P.2d 689* , have held that it is not necessary to allege that the contract would otherwise have been performed because this allegation is sufficiently implied in the more general allegation of proximately caused damage.

[b] Interference With Prospective Contract or Business Relationship Must Be Moving Cause of Damages

The facts and procedural background of ***Youst v. Longo*** *(1987) 43 Cal. 3d 64, 233 Cal. Rptr. 294, 729 P.2d 728* , are discussed in *§ 122.29[3][a]*. The Supreme Court stated that the plaintiff in a noncontractual interference action must prove that it is reasonably probable that plaintiff's lost economic advantage would have been realized but for defendant's interference (*43 Cal. 3d 64, 71)* . The Court noted that allowing recovery without proof of probable loss would essentially eliminate the tort's element of causation, which links the wrongful act with the damages suffered (*43 Cal. 3d 64, 74)* . The Court indicated that it would be virtually impossible to determine the probable expectancy of winning a sporting contest (*43 Cal. 3d 64, 75-76)* . Finding that plaintiff failed to allege facts showing interference with a probable economic gain, the Court concluded that no cause of action existed for interference with the horse race (*43 Cal. 3d 64, 77)* .

In ***Brody v. Montalbano*** *(1978) 87 Cal. App. 3d 725, 151 Cal. Rptr. 206* , defendant school administrator alleged that several parents of students conspired to interfere with his prospective economic advantage. The parents had written a letter to and filed a formal complaint with the school board, accusing plaintiff of misconduct in handling a student disciplinary matter. As a result of the parents' action, the school board held a hearing. After the hearing, the board concluded that some of the allegations of the parents were well founded, but it did not hold plaintiff to be personally responsible. The administrator later brought an action against the parents which proceeded to trial by jury. At the conclusion of all the evidence, defendants' motions for directed verdict and judgment were granted by the trial court. Plaintiff appealed from the judgment.

The court of appeal affirmed the judgment. The court found that plaintiff failed to sustain his burden of proof to show that, but for defendants' conduct, there was a reasonable probability that an economic advantage would have accrued to him. Plaintiff introduced evidence that he was ranked third on a list of 10 candidates for a position as a secondary opportunity principal, that he was not offered such a position during the period the list remained in force, and that the persons ranked first, second, and eighth were selected as secondary opportunity principals prior to the time defendants sent their letter to the board. Plaintiff admitted that he did not know why he was not appointed. The court held that this was not sufficiently substantial evidence to support a verdict in favor of plaintiff, and that the trial court did not err in

granting a motion for directed verdict (*87 Cal. App. 3d 725, 738)* .

[c] Showing of Resulting Injury Required

In ***Baldwin v. Marina City Props., Inc.*** *(1978) 79 Cal. App. 3d 393, 145 Cal. Rptr. 406* , plaintiffs contracted to sell their limited partnership interests in a real estate development company to a third party. The sales contract provided that plaintiffs would receive cash and promissory notes from the buyer in exchange for the partnership interests. To secure the transaction, plaintiffs retained a security interest in the partnership interests. While this contract was in effect, the general partner of the development company made a call on the limited partners for additional capital contributions. None of the limited partners responded. The general partner then contributed $500,000 to the limited partnership. As a result of the contribution, the general partner's percentage share of capital contributions to the limited partnership increased while that of the limited partners decreased. The buyer defaulted on its payments, and plaintiffs demanded reconveyance of the pledged security interests. Defendant offered to comply with the demand. However, by this time, the security interests had been proportionately reduced due to the general partner's capital contributions. Plaintiffs sued the general partners alleging that the capital contributions impaired their security interests in the limited partnership and were a wrongful interference with prospective contractual or economic advantage. The trial court sustained defendants' general demurrer without leave to amend, and plaintiffs appealed the court's subsequent dismissal.

The court of appeal affirmed as to the interference action, stating that the plaintiffs did not allege facts remotely suggesting that there had been any interference with any prospective business or economic advantage of the plaintiffs. The court found that the security agreement had not been breached and that there was no allegation that the value of the collateral had been impaired. The court stressed that while the proportionate interest or share of the collateral in the limited partnership had been reduced, this was not an allegation that the collateral had a lower value or that its value as a collateral had been impaired (*79 Cal. App. 3d 393, 407)* .

[4] Additional Authorities

[a] Interference With Prospective Contract or Business Relationship Must Be Moving Cause of Damages

In *Wilson v. Loew's Inc. (1956) 142 Cal. App. 2d 183, 298 P.2d 152* , plaintiffs were professionals in the motion picture industry who refused to answer certain questions before the Committee on Un-American Activities of the House of Representatives. Plaintiffs alleged that the defendants, motion picture producers and distributors, circulated a list containing the names of motion picture workers who refused to cooperate with the House Committee, pursuant to an agreement to prevent such persons from gaining further employment in the industry. Plaintiffs' actions for intentional interference with prospective economic relations were rejected by the trial court, which sustained defendants' demurrers. Plaintiffs appealed. The trial court affirmed the judgment against plaintiffs. Reviewing prior case authority, the court stated that before recovery can be had for interference with and loss of a future or prospective contract or business relationship, it must appear that such contract or relationship would otherwise have been entered into (*142 Cal. App. 2d 183, 190)* . In this case, the court found the complaint devoid of any allegation of fact that any contract or relationship would have been entered into between any one of plaintiffs and any one of defendant motion picture producers and distributors or with anyone in the motion picture industry but for the alleged agreement. The court could find no factual showing of denial of employment. The court added that there was no allegation that at the time the agreement was made, or at any time thereafter, any one of plaintiffs was an employee of any one of the defendants or had any reasonable prospect of becoming an employee, or that any of plaintiffs had any prospect of becoming a producer of motion pictures (*142 Cal. App. 2d 183, 194)* . At the oral argument, plaintiffs' counsel conceded that it was not alleged that plaintiffs did apply for work and were denied the right to work. The court concluded that the complaint did not state facts sufficient to constitute a cause of action (*142 Cal. App. 2d 183, 195)* .

[b] Showing of Resulting Injury Required

In *Salma v. Capon (2008) 161 Cal. App. 4th 1275, 74 Cal. Rptr. 3d 873* , cross-plaintiff filed a cross-complaint

alleging causes of action for intentional interference with prospective economic advantage, conversion, and others, against cross-defendant, based on cross-defendant's actions to recover a house that cross-defendant had sold to an intermediary, who then sold to cross-plaintiff. Cross-defendant filed a motion to strike the intentional interference cause of action under the anti-SLAPP statute, *Code Civ. Proc. § 425.16*. In alleging the cause of action for intentional interference, cross-plaintiff claimed that, because he was required to reveal cross-defendant's conduct in trying to recover the house to potential lenders, that conduct disrupted cross-plaintiff's efforts to refinance the house and caused the value of the house to decline. The court of appeal held that the motion to strike the intentional interference claim should have been granted because cross-plaintiff failed to establish a probability of success on the merits as required to withstand the motion to strike. The court noted that cross-plaintiff failed to provide any competent evidence to support his bare allegation that the value of the property was diminished by cross-defendant's conduct. In the absence of such evidence, cross-plaintiff could not show that cross-defendant's conduct caused him actual economic detriment (*161 Cal. App. 4th 1275, 1292)* .

In *Girard v. Delta Towers Joint Venture (1993) 20 Cal. App. 4th 1741, 26 Cal. Rptr. 2d 102* , plaintiff tenant sued its landlord for intentional interference with prospective economic advantage based on the defendant landlord's failure to disclose to plaintiff that plaintiff's subtenant had signed a sublease with another tenant. The subtenant was on the verge of insolvency and needed to find less expensive office space. After defaulting on its sublease with the plaintiff, plaintiff and subtenant entered into a compromise and release involving a cash settlement. The subtenant meanwhile had negotiated a new, less expensive sublease with another tenant of the defendant, with defendant's consent. The court of appeal, reversing a judgment for the plaintiff tenant, held that the plaintiff had failed to establish the requisite loss of economic advantage because plaintiff had failed to show that it would have been better off had defendant landlord disclosed the other sublease. The subtenant's insolvency problem would have been more severe had it not obtained the compromise and release from the sublease with plaintiff, and it was unlikely that the defendant could have obtained more cash for the compromise and release had it known of the other sublease (*20 Cal. App. 4th 1741, 1750)* .

Hepe v. Paknad (1988) 199 Cal. App. 3d 412, 244 Cal. Rptr. 823 , is discussed in *§ 122.29[3][a]*. The court of appeal held that certain damages are too speculative to support a cause of action for interference with prospective economic advantage (*199 Cal. App. 3d 412, 421)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsCommercial InterferenceGeneral OverviewTortsBusiness TortsCommercial InterferenceContractsGeneral OverviewTortsBusiness TortsCommercial InterferenceContractsDefensesTortsBusiness TortsCommercial InterferenceContractsElements

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 122 INTERFERENCE
PART II. FORMS
A. Intentional Interference With Economic Relationship

12-122 California Points & Authorities § 122.35

§ 122.35 Opposing Contention That Elements Necessary to Recover for Intentional Interference With Economic Relationship Exist--Defendant Is Party to Contractual Relationship

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

PLAINTIFF'S CAUSE OF ACTION FOR INTENTIONAL INTERFERENCE WITH _____ [CONTRACT *or* PROSPECTIVE ECONOMIC ADVANTAGE] WILL NOT LIE AGAINST DEFENDANT BECAUSE HE/SHE/IT IS A PARTY TO THE CONTRACT WITH WHICH HE/SHE/IT ALLEGEDLY INTERFERED.

[*EITHER*]

A. No Cause of Action if Defendant Is Party to Contract. A plaintiff does not have a cause of action for intentional interference with prospective economic advantage against a party who had a contract with the plaintiff, if the conduct that is the basis for the suit constitutes a breach of that contract (*JRS Prods., Inc. v. Matsushita Elec. Corp. of Am. (2004) 115 Cal. App. 4th 168, 181-183, 8 Cal. Rptr. 3d 840*).

[*OR*]

A. No Cause of Action if Defendant Is Party to Contract. An action for intentional interference with a contractual relationship will not lie against a defendant who was a party to the contractual relationship which was allegedly interfered with (*Deeter v. Angus (1986) 179 Cal. App. 3d 241, 253, 224 Cal. Rptr. 801* ; *Dryden v. Tri-Valley Growers (1977) 65 Cal. App. 3d 990, 998-999, 135 Cal. Rptr. 720*).

[*Optional*] **B. No Liability for Interfering With Subcontracts.** Neither a party to a contract nor agents of that party

may be liable for interference with related subcontracts that would require the performance of the party to the primary contract (*PM Group, Inc. v. Stewart (2007) 154 Cal. App. 4th 55, 65, 64 Cal. Rptr. 3d 227*).

[*Optional*] **C. Agent Not Stranger to Contract.** An agent for a contracting principal, including a corporate agent or employee, cannot be liable for interfering with the principal's contract with the plaintiff if the alleged interference was committed when the agent was acting within the scope of the agency (*Mintz v. Blue Cross of California (2009) 172 Cal. App. 4th 1594, 1604, 92 Cal. Rptr. 3d 422*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a plaintiff's contention that defendant tortiously interfered with a contract to which the plaintiff was a party. The ground of opposition set forth is that the defendant was also a party to the contract, and consequently a tort action for intentional interference is precluded by the availability of a contract remedy. Alternate paragraphs are included depending on whether the theory of recovery asserted is interference with contract or interference with prospective economic advantage.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should allege facts showing that the defendant was a party to the contract.

In an appropriate case, these points and authorities may be used to oppose the points and *authorities in §§ 122.20 -122.23*.

[b] Related Pleading and Practice Forms

For discussion and forms relating to interference with economic relations, see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing a demurrer or motion for summary judgment, see respectivley Ch. 71, *Demurrers and Motions for Judgment on the Pleadings*, and Ch. 221, *Summary Judgments*.

[3] Discussion of Authorities

[a] No Cause of Action if Defendant Is Party to Contract

In ***Deeter v. Angus*** *(1986) 179 Cal. App. 3d 241, 224 Cal. Rptr. 801* , defendant real estate brokers allegedly breached an oral agreement with plaintiff real estate brokers to pay the plaintiffs a commission. Defendants included two corporations and a husband and wife who were officers at both corporations. Plaintiffs claimed that the wife persuaded her husband not to honor the oral commission agreement. The trial court sustained, without leave to amend, defendants' demurrers to the action for interference with contractual relations. Plaintiffs appealed.

The court of appeal affirmed as to the action for interference with contractual relations. According to the court, plaintiffs' cause of action required plaintiffs to allege that they had a valid and existing contract with a third party. The court noted that the claim for breach of a cooperating broker's agreement averred that the husband acted for both himself and all the other defendants. Accordingly, the wife was a party to the agreement and could not be sued for interference (*179 Cal. App. 3d 241, 253)* .

The facts and procedural background of ***Dryden v. Tri-Valley Growers*** *(1977) 65 Cal. App. 3d 990, 135 Cal. Rptr. 720* , are discussed in *§ 122.28[3][d]*. The plaintiffs sued the purchaser of an olive oil plant, alleging that defendant's purchase would interfere with contractual relations between plaintiffs and the plant's original owners.

The court of appeal found that defendant's demurrer should be upheld because, on the record, defendant was a party to the contracts with the performance of which it allegedly interfered. This circumstance was demonstrated not only by the allegations of the complaint, but also by the agreements incorporated in, and attached to, the complaint. The agreements in dispute explicitly provided that the provisions therein would bind the seller's successors and assigns. The court held that the general rule is that the tort of intentional interference with contractual relations is a remedy created by the common law to compensate one whose contractual relations with others are interfered with by a third person (*65 Cal. App. 3d 990, 998-999)* . According to the court, it would be superfluous to allow a plaintiff who may bring a breach of contract action also to bring an interference action. Also, such a plaintiff would be able to recover tort damages, such as punitive damages and damages for mental suffering, to which the plaintiff would not be entitled under California law in contract action (*65 Cal. App. 3d 990, 999)* .

In ***JRS Prods., Inc. v. Matsushita Elec. Corp. of Am.*** *(2004) 115 Cal. App. 4th 168, 8 Cal. Rptr. 3d 840* , the plaintiff was a dealer of copiers and fax machines that brought suit against an office products manufacturer after the manufacturer terminated a franchise agreement with the plaintiff for allegedly engaging in conduct that the manufacturer thought was taking business directly from the manufacturer. The plaintiff alleged that termination of the agreement was wrongful because the manufacturer did not first give the plaintiff written notice of the conduct that the manufacturer found objectionable. The plaintiff alleged eight causes of action, including an action for breach of contract and interference with prospective economic advantage. The trial court granted summary adjudication in favor of the manufacturer on all causes of action except the action for interference with prospective economic advantage. Recognizing that the contractual claims were the stronger claims and that a party may not generally recover for interference with a contract to which the defendant is a party, the parties agreed that the plaintiff would voluntarily dismiss the remaining interference cause of action without prejudice to facilitate a quicker appeal. However, the court of appeal dismissed the appeal as an appeal from a nonfinal judgment, forcing the plaintiff to go to trial on the interference cause of action. The plaintiff won substantial compensatory and punitive damages, and the defendant appealed. The plaintiff cross-appealed the dismissal of the contract claim.

The court of appeal reversed, finding that both appeals had merit. First, the court agreed with the plaintiff that the trial court erred in dismissing the contract claims, concluding that a franchisee is entitled under the Franchise Relations Act to seek contract damages for wrongful termination of a franchise agreement (*115 Cal. App. 4th 168, 173-178)* . Second, the court agreed that it was an error to allow the plaintiff to recover for intentional interference with prospective economic advantage for conduct that was essentially a breach of contract. The court recognized existing case law that had established that a party to a contract could not recover tort damages for interference with contract from a defendant that was a party to that contract. The same conclusion applied to a cause of action termed an action for interference with prospective economic advantage. If the underlying conduct is essentially conduct that constitutes a breach of contract, a contracting party is limited to recovering for breach of contract. A breach of contract action cannot be transformed into a tort action by arguing that the breach interfered with the plaintiff's business. Therefore, because the plaintiff's essential complaint was that the defendant wrongfully terminated the franchise agreement without good cause, and that conduct, if proven, constituted a breach of the franchise contract, the plaintiff was limited to his contractual remedies, even if the conduct constituting the breach of contract also happened to violate an independent statutory duty (*115 Cal. App. 4th 168, 181-183)* .

[b] No Liability for Interfering With Subcontracts

In *PM Group, Inc. v. Stewart (2007) 154 Cal. App. 4th 55, 64 Cal. Rptr. 3d 227* , plaintiffs were a concert promoter and two subpromoters who sued a singer and his company, manager, agent, and attorney. Plaintiffs sued for intentional interference with contractual relations, among other causes of action, because after negotiations over a proposed concert

tour broke down, defendants failed to return $780,000 that had been deposited toward the tour. A jury found for plaintiffs, awarded return of the deposited funds on theories of money had and received and negligent misrepresentation, and awarded $1.6 million in compensatory damages against the singer's attorney and agent on the theory that they intentionally interfered with subcontracts for individual concert performances. Defendants appealed.

The court of appeal reversed the judgment in favor of plaintiffs on the cause of action for intentional interference with the subcontracts, but otherwise affirmed. As to the interference claim, the court held that neither the singer nor his agents could have interfered with the performance of the subcontracts at issue, which would have required the singer to sing at specific venues as part of the proposed tour. The court noted that the tort of intentional interference with contractual relations can only be committed by parties who are strangers to the contract, and a contracting party is incapable of interfering with the performance of his or her own contract. Because the subcontracts at issue provided for the singer's performance, neither he nor his agents could be held liable for interfering with those subcontracts. Moreover, the court noted that because the jury specifically found that the singer and the promoter had never entered into a binding contract for the tour, none of the relevant subcontracts could have been performed. As such, plaintiffs could not prove the attorney and agent caused the failure of the subcontracts (*154 Cal. App. 4th 55, 65)* .

[c] Agent Not Stranger to Contract

In ***Mintz v. Blue Cross of California*** *(2009) 172 Cal. App. 4th 1594, 92 Cal. Rptr. 3d 422* , plaintiff was denied coverage for an experimental cancer treatment by the third-party administrator for plaintiff's health insurance plan. The administrator advised plaintiff of the right to internal review of that decision, but failed to notify of the right to request an independent external review as required by statute. In addition, the health plan itself stated that a member would be advised of the right to external review when the denial of services triggered such a right. Plaintiff sued the third-party administrator for intentional interference with contract, reckless infliction of emotional distress, and negligence. The trial court sustained defendant's demurrer on all causes of action. Plaintiff appealed.

The court of appeal affirmed as to the interference with contract and infliction of emotional distress causes of action, but reversed on the negligence cause of action. As to the interference with contract cause of action, the court quoted the California Supreme Court in *Applied Equipment Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 513, 28 Cal. Rptr. 2d 475, 869 P.2d 454* , in support of the proposition that only a "stranger to the contract" may be liable for interference with that contract. Moreover, the court recognized as established the principal that corporate agents and employees acting for and on behalf of a corporation cannot be liable for inducing a breach of the corporation's contract. In the case before it, the court concluded that the administrator, which was clearly acting as an agent for the health plan in administering the health insurance contract with plaintiff, could not be liable for interfering with the very contract that it was hired to administer (*172 Cal. App. 4th 1594, 1603-1604)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsCommercial InterferenceGeneral OverviewTortsBusiness TortsCommercial InterferenceContractsGeneral OverviewTortsBusiness TortsCommercial InterferenceProspective AdvantageGeneral OverviewTortsBusiness TortsCommercial InterferenceProspective AdvantageDefensesTortsBusiness TortsCommercial InterferenceProspective AdvantageElements

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CHAPTER 122 INTERFERENCE
PART II. FORMS
A. Intentional Interference With Economic Relationship

12-122 California Points & Authorities § 122.36

§ 122.36 Opposing Contention That Elements Necessary to Recover for Intentional Interference With Economic Relationship Exist--Making Competitive Bid on Private Contract Without Proper License Does Not Constitute Actionable Interference

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S CAUSE OF ACTION FOR INTENTIONAL INTERFERENCE WITH CONTRACT WILL NOT LIE AGAINST DEFENDANT, BECAUSE LACK OF A REQUIRED LICENSE AT THE TIME OF MAKING A COMPETITIVE BID ON A PRIVATE CONTRACT IS NOT ACTIONABLE AS INTERFERENCE.

No Cause of Action Based on Competitive Bidding by Unlicensed Defendant. The fact that a successful competitive bidder was not properly licensed at the time a private entity awarded it a contract does not, standing alone, amount to conduct actionable by an unsuccessful competitive bidder as contractual interference (*Settimo Assocs. v. Environ Sys., Inc. (1993) 14 Cal. App. 4th 842, 846, 17 Cal. Rptr. 2d 757*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a plaintiff's contention that defendant tortiously interfered with a contract to which the plaintiff was a party. The ground of opposition set forth is that the action is merely based on the fact that the defendant was not properly licensed when it successfully bid against plaintiff on a contract.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, these points and authorities may be used to oppose the points and *authorities in § 122.20*.

[3] Discussion of Authorities

[a] No Cause of Action Based on Competitive Bidding by Unlicensed Defendant

In ***Settimo Assocs. v. Environ Sys., Inc.*** *(1993) 14 Cal. App. 4th 842* , plaintiff, the holder of a general B-1 contractor's license, brought an action against defendant, alleging alternative causes of action for intentional or negligent interference with prospective economic advantage. Plaintiff complained that it had twice submitted the lowest bid by any duly licensed contractor for installing a computer support facility, only to lose each contract to defendant, which submitted lower bids. Plaintiff alleged that defendant held only a specialty contractor's license that was not sufficient for some of the work involved, and that this lack of a general contracting license alone satisfied the element of unlawful contract interference so that defendant should reimburse its lost profits. Defendant filed a motion for judgment on the pleadings, which the trial court granted. Plaintiff appealed.

The court of appeal affirmed. It concluded that the fact defendant was not properly licensed at the time it was awarded the contracts did not amount to actionable unlawful interference. The court noted that plaintiff had cited no statutory authority requiring a private entity to accept bids only from duly licensed contractors. It also stated that the Business and Professions Code, which contains statutory licensing regulations, neither creates nor denies any civil remedy to bidders who lose projects to unlicensed competitors. Under *Bus. & Prof. Code §§ 7028(a)* and *7031*, defendant's conduct amounted to a misdemeanor and foreclosed any possibility of its suing to enforce an awarded contract. Nevertheless, the court stated, the regulatory sections of the Business and Professions Code fall within the enforcement jurisdiction of the Contractor's Licensing Board. They create no action for civil damages in a competing bidder (*14 Cal. App. 4th 842, 846)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsCommercial InterferenceGeneral OverviewTortsBusiness TortsCommercial InterferenceContractsGeneral OverviewTortsBusiness TortsCommercial InterferenceContractsDefenses

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CHAPTER 122 INTERFERENCE
PART II. FORMS
A. Intentional Interference With Economic Relationship

12-122 California Points & Authorities § 122.37

§ 122.37 Opposing Contention That Elements Necessary to Recover for Conspiracy to Interfere With Economic Relationship Exist--Failure to Show Commission of Civil Wrong

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S COMPLAINT DOES NOT STATE A CAUSE OF ACTION FOR CONSPIRACY BECAUSE IT FAILS TO ALLEGE FACTS SHOWING THAT A WRONG WAS COMMITTED PURSUANT TO THE CONSPIRACY RESULTING IN DAMAGES.

Wrongful Act Committed Pursuant to Conspiracy Required. To state a cause of action for conspiracy to interfere with economic relations, a plaintiff must show that an underlying civil wrong has been committed resulting in damage (*Manor Inv. Co. v. F. W. Woolworth Co. (1984) 159 Cal. App. 3d 586, 595, 206 Cal. Rptr. 37*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that plaintiff has established a cause of action for conspiracy to interfere with economic relations. The ground of opposition is that plaintiff has not shown the commission, pursuant to the conspiracy, of a wrongful act resulting in damages.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the absence of a civil wrong. This argument may arise in a motion for summary judgment, a demurrer, or other similar procedure. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss how the complaint fails to allege that defendant has committed a civil wrong.

[b] Related Pleading and Practice Forms

For discussion and forms relating to interference with economic relations, see California Forms of Pleading and Practice Ch. 565, *Unfair Competition* (Matthew Bender). For discussion and forms relating to conspiracy in general, see California Forms of Pleading and Practice, Ch. 126, *Conspiracy* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing a demurrer or motion for summary judgment, see respectively Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* , and Ch. 221, *Summary Judgments* . For forms of memoranda of points and authorities relating to a cause of action for civil conspiracy generally, see Ch. 46, *Conspiracy* .

In an appropriate case, these points and authorities may be used to oppose the contentions supported by the points and *authorities in § 122.26*.

[3] Discussion of Authorities

[a] Wrongful Act Committed Pursuant to Conspiracy Required

In ***Manor Inv. Co. v. F. W. Woolworth Co.*** *(1984) 159 Cal. App. 3d 586, 206 Cal. Rptr. 37* , plaintiffs alleged a cause of action against one defendant (hereinafter third-party defendant) for wrongful interference with a contract that plaintiffs had with the remaining defendants (hereinafter party defendants) and another cause of action against all defendants for conspiracy to interfere wrongfully with plaintiffs' contract. The jury found that third-party defendant was not liable for wrongful interference but that all defendants were liable for conspiracy to interfere. Defendants moved for a new trial on the grounds that the verdicts were inconsistent and that the damages awarded were excessive. The trial court granted the new trial only as to the cause of action for conspiracy on the grounds of excessive damages. Plaintiffs appealed and defendants cross appealed.

The court of appeal modified the trial court's orders and resulting judgment so as to require a new trial as to the causes of action for wrongful interference and conspiracy, and otherwise affirmed the orders and judgment (*159 Cal. App. 3d 586, 599)* . The court stated the general rule that liability for conspiracy requires that the facts show something was done which, without conspiracy, would give rise to a cause of action (*159 Cal. App. 3d 586, 595)* . The court noted that the jury vindicated the third party defendant of having interfered with the contractual relations between party defendants and plaintiffs. In the absence of conspiracy, the court stated that party defendants were incapable of interfering with their own contractual relationship with plaintiffs (*159 Cal. App. 3d 586, 595-596)* . The court stated that party defendants' liability could not be derived from third party defendant's liability because the jury specifically found that the third party, standing alone, was not liable for the underlying tort. The court concluded that the jury verdict vindicating the third party on the individual cause of action for interference was inconsistent with the jury verdict finding all defendants liable for conspiracy to interfere with contractual relations (*159 Cal. App. 3d 586, 596)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsCommercial InterferenceGeneral OverviewTortsProcedureMultiple DefendantsConcerted ActionCivil ConspiracyGeneral OverviewTortsProcedureMultiple DefendantsConcerted ActionCivil ConspiracyElements

California Points & Authorities

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A. Intentional Interference With Economic Relationship

12-122 California Points & Authorities § 122.38

§ 122.38 Opposing Contention That Elements Necessary to Recover for Conspiracy to Interfere With Economic Relationship Exist--Contracting Party May Not Be Held Liable in Tort for Conspiracy to Interfere With Contract

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate or appellate brief.*]

DEFENDANT IS NOT LIABLE IN TORT FOR CONSPIRACY TO INTERFERE WITH THE CONTRACT AT ISSUE IN THIS CASE, BECAUSE DEFENDANT IS A PARTY TO THAT CONTRACT.

Contracting Party May Not Be Held Liable in Tort for Conspiracy to Interfere With Contract. A contracting party cannot be held liable in tort for conspiracy to interfere with its own contract (*Applied Equip. Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 507-508, 521, 28 Cal. Rptr. 2d 475, 869 P.2d 454*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that plaintiff has established the elements necessary for a tort cause of action for conspiracy to interfere with an economic relationship consisting of an existing contract. These points and authorities are for use when the plaintiff has attempted to state such a cause of action against a defendant who is a party to the contract.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue stated. In many cases, the defendant's status as a party to the contract will appear on the face of the complaint, in which case this point would be combined with points and authorities supporting a demurrer or motion for judgment on the pleadings. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion and forms pertaining to interference with economic relations, see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender). For discussion and forms pertaining to civil conspiracy generally, see California Forms of Pleading and Practice, Ch. 126, *Conspiracy* (Matthew Bender).

[c] Related Points and Authorities

For points and authorities pertaining to civil conspiracy generally, see Ch. 46, *Conspiracy* . For procedural points and authorities supporting a demurrer or motion for judgment on the pleadings, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Contracting Party May Not Be Held Liable in Tort for Conspiracy to Interfere With Contract

In ***Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*** *(1994) 7 Cal. 4th 503, 28 Cal. Rptr. 2d 475, 869 P.2d 454* , plaintiff entered into a subcontract with defendant Litton to procure and supply spare parts that Litton needed to fulfil a defense contract between Litton and the Kingdom of Saudi Arabia. Plaintiff was to be paid a commission equal to a 26 percent markup on the cost of parts that plaintiff purchased for Litton. As part of its subcontract, plaintiff agreed to buy certain electron tubes that were manufactured exclusively by defendant Varian. Plaintiff then entered into an agreement with Varian to purchase 11 of these parts for resale to Litton. Subsequently, following an internal review by Litton's finance department criticizing the amount of the markup on its agreement with plaintiff, Litton entered into a direct agreement with Varian, under which Varian would sell 6 tubes directly to Litton (without any markup) and 6 tubes to plaintiff for resale to Litton (subject to the 26 percent markup). The renegotitated contract, which substantially reduced plaintiff's commission, was presented to plaintiff as a fait accompli.

Plaintiff sued both defendants for breach of their respective contracts and for tortious interference (including conspiracy to interfere) with those contracts. After trial, the trial court entered a judgment in favor of plaintiff against both defendants for contract damages and for tort damages based on conspiracy to interfere with contract, and against Litton for punitive damages. On appeal, the court of appeal affirmed the judgment as to the contract awards, but reversed as to the tort awards because of inconsistency in the jury verdicts. The court of appeal rejected Varian's argument that Varian could not, as a matter of law, be held liable for conspiracy to interfere with its own contract. The Supreme Court granted review to consider the latter issue.

On review, the Court reversed, holding that a contracting party cannot be held liable in tort for conspiracy to interfere with its own contract (*7 Cal. 4th 503, 507-508, 521)* . The Court observed that civil conspiracy is not a cause of action in itself, but a legal doctrine that imposes liability on persons who, although not committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration (*7 Cal. 4th 503, 510-511)* . By its nature, tort liability from conspiracy presupposes that the co-conspirator is legally capable of committing the tort, i.e., that he or she owes a duty to plaintiff recognized by law and is potentially subject to liability for breach of that duty (*7 Cal. 4th 503, 511)* . The Court noted the underlying tort cause of action for interference with contract does not lie against a party to the contract [*see § 122.35*]. The Court therefore reasoned that because a party to a contract owes no tort duty to refrain from interference with its own contract, a contracting party cannot be bootstrapped into tort liability by allegations of conspiracy (*7 Cal. 4th 503, 514)* . The Court also observed that to permit tort liability on a contracting party for conspiracy to interfere with contract would circumvent limitations on the damages recoverable for breach of contract and obliterate the distinction between tort and contract recovery (*7 Cal. 4th 503, 516-518)* . The Court

specifically disapproved a long line of court of appeal decisions that had permitted tort recovery against contracting parties for conspiracy to interfere with contract (*7 Cal. 4th 503, 521 n.10*).

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsCommercial InterferenceGeneral OverviewTortsBusiness TortsCommercial InterferenceContractsGeneral OverviewTortsProcedureMultiple DefendantsConcerted ActionCivil ConspiracyGeneral OverviewTortsProcedureMultiple DefendantsConcerted ActionCivil ConspiracyDefenses

California Points & Authorities

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12-122 California Points & Authorities § 122.39

§ 122.39 Opposing Contention That Cause of Action for Intentional Interference With Economic Relationship Exists--Public Policy Precludes Recovery--Sporting Contests

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

PLAINTIFF'S COMPLAINT DOES NOT STATE A CAUSE OF ACTION FOR INTERFERENCE BECAUSE SUCH A CAUSE OF ACTION DOES NOT LIE FOR PROSPECTIVE ECONOMIC LOSS WHICH ARISES BETWEEN COMPETITORS DURING A SPORTING CONTEST.

No Recovery for Interference Related to Sporting Contest. A cause of action for interference will not lie to redress a prospective economic loss arising between competitors in a sporting contest (*Youst v. Longo (1987) 43 Cal. 3d 64, 79, 233 Cal. Rptr. 294, 729 P.2d 728*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that plaintiff has established a cause of action for interference with an economic relationship. The ground of opposition is that public policy bars interference actions based on a prospective economic loss that arises between competitors in a sporting contest.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the absence of a cause of action. This argument may arise in a general demurrer or other similar procedure. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show that the plaintiff seeks to recover for a prospective loss which arose between competitors in a sporting contest.

[b] Related Pleading and Practice Forms

For discussion and forms relating to interference with economic relations, see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing a demurrer, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] No Recovery for Interference Related to Sporting Contest

The facts and procedural background of ***Youst v. Longo*** *(1987) 43 Cal. 3d 64, 233 Cal. Rptr. 294, 729 P.2d 728* , are discussed in *§ 122.29[3][a]*. The plaintiff based his interference claim on defendant's alleged contact with plaintiff's racehorse during a race, claiming that the contact caused plaintiff's horse to win a smaller purse than it otherwise would have won.

The Supreme Court rejected plaintiff's claim, as a matter of law and public policy (*43 Cal. 3d 64, 70-71)* . As a matter of law, the Court found that plaintiff's failure to allege facts showing interference with a probable economic gain destroyed plaintiff's cause of action (*43 Cal. 3d 64, 77)* . As a matter of policy, the Court stated that courts are not appropriate forums for adjudicating claimed sporting event violations which allegedly result in prospective economic loss. The Court noted that if the tort of interference were recognized in a sporting competition, virtually no sporting event would take place without a tort claim from some losing competitor seeking to recover his or her supposed economic loss; placing this type of additional pressure on competitors would seriously harm competitive sports (*43 Cal. 3d 64, 78)* . The Court concluded that a cause of action will not lie for prospective economic loss which arises between competitors during a sporting contest (*43 Cal. 3d 64, 79)* . Even conspiracies formed between competitors, or between competitors and noncompetitors would not justify liability for noncontractual interference in the sports context (*43 Cal. 3d 64, 79-80)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsCommercial InterferenceGeneral OverviewTortsBusiness TortsCommercial InterferenceProspective AdvantageGeneral Overview

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12-122 California Points & Authorities § 122.40

§ 122.40 Opposing Contention That Cause of Action for Intentional Interference With Employment Relationship Exists--Public Policy Precludes Recovery--Employer May Not Sue Competing Employer for Hiring Plaintiff's At-Will Employee

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

AN EMPLOYER MAY NOT BRING A CLAIM FOR INTENTIONAL INTERFERENCE WITH AN EMPLOYMENT RELATIONSHIP AGAINST A COMPETING EMPLOYER THAT HIRES AWAY AN EMPLOYEE WHOSE EMPLOYMENT WAS TERMINABLE AT THE WILL OF THE EMPLOYER OR EMPLOYEE.

Employer May Not Sue Competing Employer for Hiring At-Will Employee. An employer may not bring an action for tortious interference with an employment contract against a competing employer that has hired away an employee whose employment was terminable at-will (*GAB Bus. Servs., Inc. v. Lindsey & Newsom Claim Servs., Inc. (2000) 83 Cal. App. 4th 409, 426-427, 99 Cal. Rptr. 2d 665*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted to oppose the contention that an employer may sue a competing employer for intentional interference with an employment relationship based on the defendant's hiring away of the plaintiff's at-will employee.

These points and authorities may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue that the interference action may not be brought against a competing employer. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include facts showing that the employee's employment with the plaintiff was terminable at the will of either the employee or the plaintiff.

[3] Discussion of Authorities

[a] Employer May Not Sue Competing Employer for Hiring At-Will Employee

In ***GAB Bus. Servs., Inc. v. Lindsey & Newsom Claim Servs., Inc.*** *(2000) 83 Cal. App. 4th 409, 99 Cal. Rptr. 2d 665* , the plaintiff was an independent adjusting company that filed suit against a competing adjusting company and the plaintiff's former officer and employee, who had been lured away from the plaintiff by the competing company. The suit was based on the defendants' respective roles in soliciting 17 key employees away from the plaintiff at the time that the plaintiff's former officer switched employment. The plaintiff alleged that in secretly orchestrating the exodus while still an officer with the plaintiff, the former officer owed and breached a fiduciary duty and that the competing employer engaged in unfair competition in assisting with and benefiting from that breach of fiduciary duty. The plaintiff also alleged that these actions constituted intentional interference with the plaintiff's contract with its employees. At trial, the court refused to instruct the jury that the officer owed a fiduciary duty as a matter of law and also refused to instruct on the theory of intentional interference with existing employment relationships. The jury found that the plaintiff's former officer did not owe a fiduciary duty to the plaintiff and otherwise found for the defendants on all causes of action. The plaintiff appealed.

The court of appeal reversed in part. The court first held that the trial court committed reversible error in refusing to instruct the jury that, as a matter of law, the plaintiff's former officer owed a fiduciary duty to the plaintiff while serving as an officer of the company (*83 Cal. App. 4th 409, 416-426)* . As to the claim of tortious interference with existing employment relationships, however, the court of appeal agreed with the trial court. Although courts have allowed tortious interference claims in the specific context of at-will employment relationships, those cases involved claims brought by the employee whose employment had been terminated, and none involved a claim of interference brought by the employer. The court then refused to expand the tort to include such claims, noting that allowing such a claim by an employer would subject employers to liability almost any time they hired away an employee from a competitor. The court also noted the state's strong public policy supporting the mobility of employees, which would be undermined if employers were faced with possible litigation by hiring a competitor's employees. Finally, the court was wary of allowing tort recovery if an employee voluntarily changes employment, noting that any concerns with unfair or unlawful conduct by a competing company can be addressed through an action for unfair competition (*83 Cal. App. 4th 409, 426-427)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsCommercial InterferenceGeneral OverviewTortsBusiness TortsCommercial InterferenceEmployment RelationshipsGeneral OverviewTortsBusiness TortsCommercial InterferenceEmployment RelationshipsDefenses

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12-122 California Points & Authorities § 122.41

§ 122.41 Opposing Contention That Cause of Action for Intentional Interference With Economic Relationship Exists--Public Policy Precludes Recovery--Right to Induce Litigation on Contract of Another

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S COMPLAINT DOES NOT STATE A CAUSE OF ACTION FOR INTERFERENCE, BECAUSE THERE IS NO ALLEGATION THAT THE LITIGATION, WHICH WAS ALLEGEDLY INSTITUTED AT DEFENDANT'S INSTIGATION BY THE OTHER PARTY TO THE CONTRACT, WAS BROUGHT WITHOUT PROBABLE CAUSE _____ [AND/OR] WAS TERMINATED IN PLAINTIFF'S FAVOR.

Right to Induce Litigation on Contract of Another. No cause of action for intentional interference with contract or with prospective economic advantage can be stated on the basis of the defendant's inducing another to undertake litigation relating to the contract unless that litigation was brought without probable cause and was concluded in plaintiff's favor (*Pacific Gas & Elec. Co. v. Bear Stearns & Co. (1990) 50 Cal. 3d 1118, 1137, 270 Cal. Rptr. 1, 791 P.2d 587*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that plaintiff has stated a cause of action for intentional interference with economic relations. The ground for the opposition is that public policy bars an action for interference based on the defendant's inducing a party to a contract to undertake litigation relating to that contract unless that litigation was brought without probable cause and was concluded in plaintiff's favor.

These points and authorities may be combined with points and authorities pertaining to the specific context in which counsel wishes to raise the contention. The argument may arise in a general demurrer or other proceeding. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law stated. Thus, counsel may wish to ask the court to take judicial notice of the status or judgment of the other action.

[b] Related Points and Authorities

The *authorities in §§ 122.42* and *122.45* were relied on as part of the court's reasoning in the case on which this form is based. Thus, counsel may wish to include those authorities if relevant to the particular context.

[3] Discussion of Authorities

[a] Right to Induce Litigation on Contract of Another

Plaintiff in ***Pacific Gas & Elec. Co. v. Bear Stearns & Co.*** *(1990) 50 Cal. 3d 1118, 270 Cal. Rptr. 1, 791 P.2d 587* , had a 50-year contract to purchase hydroelectric power from a county water agency. The contract provided that it would terminate in 2013 or at the end of the year in which the agency completed retirement of its related project bonds, whichever occurred first. As energy prices rose, the agency wished it could terminate the contract and sell the hydroelectric power at more favorable rates but never took any action until persuaded by defendant. Defendant induced the water agency to seek a declaratory judgment that it could terminate its contract with plaintiff early by retiring the bonds. That action resulted in a trial court judgment for the agency, which was reversed on appeal and still pending when the action for damages and injunctive relief based on intentional interference with contract and with prospective economic advantage reached the Supreme Court. The trial court sustained defendant's demurrer to the action based on intentional interference with contract and with prospective economic advantage, and that action was dismissed. The court of appeal reversed, and defendant sought review.

The Supreme Court reversed, stating that to allow either cause of action to be stated when the only interference alleged is that defendant induced the bringing of potentially meritorious litigation would be an unwarranted expansion of the scope of these torts and a pernicious barrier to free access to the courts (*50 Cal. 3d 1118, 1123)* . The Court based its decision on several considerations, including the public policy to allow free access to the courts to provide for peaceful, judicial resolution of differences (*50 Cal. 3d 1118, 1131-1133)* . Other considerations were the constitutional right to petition for redress of grievances (*50 Cal. 3d 1118, 1133-1135)* , and the fact that the interference torts themselves have been criticized as favoring secure enjoyment of contractual and economic relations at the expense of a freely competitive economy, and thus have been limited accordingly in other cases (citing cases discussed in *§ 122.39*) (*50 Cal. 3d 1118, 1136-1137)* . The Court concluded that the appropriate balance between the right to free access to the courts and the interest in being free from the financial and emotional cost of defending litigation is already struck by the tort of malicious prosecution (*50 Cal. 3d 1118, 1131-1133, 1137)* . The Court acknowledged that the right to petition for redress of grievances has previously been applied only to protect the litigants but held that in order to assure free access to the courts and to prevent a flood of oppressive derivative litigation, third parties should be similarly protected (*50 Cal. 3d 1118, 1135-1136)* .

The Court concluded that a plaintiff seeking to state a cause of action for intentional interference with contract or prospective economic advantage because defendant induced another to undertake litigation must allege that the litigation was brought without probable cause and that the litigation was concluded in plaintiff's favor (*50 Cal. 3d 1118, 1137)* .

[4] Additional Authorities

[a] Right to Induce Litigation on Contract of Another

Golden W. Baseball Co. v. City of Anaheim (1994) 25 Cal. App. 4th 11, 31 Cal. Rptr. 2d 378 , arose out of a complex contractual dispute involving a city, a major league baseball team, and a real estate developer as a result of the city's

plans to allow the developer to build an office complex on a portion of the parking lot of a city-owned stadium where the baseball team played its home games. The agreement between the city and the team required the city to provide a minimum number of parking spaces for the team's games. The team contended that it had exclusive right to use the land on which the parking lot was located (thereby precluding any office development without its consent) and that the specified parking spaces had to be ground-level spaces. The city contended that it retained the right to develop the parking lot land as long as it provided the requisite minimum number of spaces and that those spaces could be in a parking garage. When negotiations failed to resolve the dispute, the team sued the city for specific performance of the agreement, the city and the developer for various forms of equitable relief, and the developer for damages for interference with its contract with the city. The trial court entered judgment for the team on its specific performance and equitable relief claims, but entered judgment for the developer on the interference claim.

The court of appeal modified the judgment and affirmed. The court concluded that the city did not cede exclusive control over the entire parking lot, but was obligated to provide the minimum number of parking spaces (with adequate access) and that the parties had intended those parking spaces to be ground-level spaces (*25 Cal. App. 4th 11, 37-42)* . With regard to the interference claim, the court noted that the situation in this case was analogous to that in *Pacific Gas & Elec. Co. v. Bear Stearns & Co. (1990) 50 Cal. 3d 1118, 270 Cal. Rptr. 1, 791 P.2d 587* . The court observed that there was no breach of the contract. At most, the developer's conduct prompted the team to file its lawsuit to determine its rights under the agreement with the city. The court held that the apt question is whether the team's position was indisputably correct. The court noted that, given the contract's ambiguity, the team's position was not indisputably correct. Although the city wrongly concluded that it could place the required parking spaces anywhere on the property, including in parking structures, the city's construction of the contract was arguable because the contract did not expressly require gound-level spaces. Moreover, the team's position, which prompted the litigation, that the city could not build anywhere on the premises was as least as far off the mark. The court concluded that a business relationship with a party to a contract that merely brings to head the contracting parties' good faith dispute about the interpretation of the contract is not tortious (*25 Cal. App. 4th 11, 51)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsCommercial InterferenceGeneral OverviewTortsBusiness TortsCommercial InterferenceContractsGeneral OverviewTortsBusiness TortsCommercial InterferenceProspective AdvantageGeneral Overview

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12-122 California Points & Authorities § 122.42

§ 122.42 Supporting Contention That Interference Is Justified or Privileged--Fair Competition

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT'S INTERFERENCE WITH PLAINTIFF'S ECONOMIC RELATIONSHIP WITH _____ [*name*] WAS JUSTIFIED, AND DEFENDANT IS THEREFORE NOT LIABLE, BECAUSE THE RELATIONSHIP INVOLVED A _____ [PROSPECTIVE CONTRACT *or* CONTRACT TERMINABLE AT WILL] AND CONCERNED A MATTER WITHIN DEFENDANT'S COMPETITION WITH PLAINTIFF, DEFENDANT EMPLOYED ONLY LAWFUL MEANS AND DID NOT CREATE OR CONTINUE AN ILLEGAL RESTRAINT OF COMPETITION, AND DEFENDANT'S PURPOSE WAS AT LEAST IN PART TO ADVANCE HIS/HER INTEREST IN COMPETING WITH PLAINTIFF.

A. Fair Competition Is Justified. One who intentionally causes a third person not to enter into a prospective contractual relation with his or her competitor or not to continue an existing contract terminable at will does not interfere improperly with the competitor's relation if (1) the relation concerns a matter involved in the competition between the actor and his or her competitor, (2) the actor does not employ wrongful means, (3) his or her action does not create or continue an unlawful restraint of trade, and (4) his or her purpose is at least in part to advance his or her interest in competing with the other (*A-Mark Coin Co. v. General Mills, Inc. (1983) 148 Cal. App. 3d 312, 323, 195 Cal. Rptr. 859* ; *Charles C. Chapman Bldg. Co. v. California Mart (1969) 2 Cal. App. 3d 846, 855-856, 82 Cal. Rptr. 830*).

B. Noncontractual Interference Enjoys More Extensive Privilege. The law distinguishes between interference with a contract and interference with relationships without a contract; in the latter situation the law recognizes more extensive privileges to interfere for the sake of competition (*Charles C. Chapman Bldg. Co. v. California Mart (1969) 2 Cal. App. 3d 846, 856, 82 Cal. Rptr. 830* ; *Shida v. Japan Food Corp. (1967) 251 Cal. App. 2d 864, 866, 60 Cal. Rptr. 43*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a contention that defendant's interference with plaintiff's economic relations was justified or privileged as fair competition.

Justification or privilege is an affirmative defense that usually must be raised by way of allegation in the answer. It may be considered as a ground for demurrer only when it is apparent on the face of the complaint [*see Lowell v. Mother's Cake & Cookie Co. (1978) 79 Cal. App. 3d 13, 18-19, 144 Cal. Rptr. 664]* .

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts that show each element of the defense of fair competition.

[b] Related Pleading and Practice Forms

For discussion and forms relating to interference with economic relations, see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Fair Competition Is Justified

The factual and procedural background of ***A-Mark Coin Co. v. General Mills, Inc.*** *(1983) 148 Cal. App. 3d 312, 322, 195 Cal. Rptr. 859* , is discussed in *§ 122.28[3][b]*. The plaintiff alleged at trial that defendants intentionally interfered with a contractual relationship and with an advantageous business relationship to which plaintiff was a party. The trial court found for defendant, and plaintiff appealed.

The court of appeal found that plaintiff could not posit liability for tortious interference with a contractual relationship because the contractual relationship in question was void (*148 Cal. App. 3d 312, 322)* . In addition, the court found that defendants' actions clearly came within the privilege of competition. The court quoted from Restatement (Second) of Torts § 768, which provides that one who intentionally causes a third person not to enter into a prospective contractual relation with another who is his or her competitor or not to continue an existing contract terminable at will does not interfere improperly with the other's relation if (1) the relation concerns a matter involved in the competition between the actor and the other, (2) the actor does not employ wrongful means, (3) his or her action does not create or continue an unlawful restraint of trade, and (4) his or her purpose is at least in part to advance his or her interest in competing with the other (*148 Cal. App. 3d 312, 323)* . The court stated that the policy of the common law has always been in favor of free competition. So long as the plaintiff's contractual relations are merely contemplated or potential, it is considered to be in the public interest that any competitor should be free to divert them to himself or herself by all fair and reasonable means. In short, it is no tort to beat a business rival to prospective customers. Thus, in the absence of prohibition by statute, illegitimate means, or some other unlawful element, a defendant seeking to increase his or her own business may cut rates or prices, allow discounts or rebates, enter into secret negotiations behind the plaintiff's back, refuse to deal with him or her or threaten to discharge employees who do, or even refuse to deal with third parties unless they cease dealing with the plaintiff, all without incurring liability. In this case, the court found that defendants were free to petition lawfully the Nevada probate court seeking a chance to bid on the coin collection. The court found no evidence that defendants' motives were other than to advance their own economic interests in competition with plaintiff (*148 Cal. App. 3d 312, 323-324)* .

In ***Charles C. Chapman Bldg. Co. v. California Mart*** *(1969) 2 Cal. App. 3d 846, 82 Cal. Rptr. 830* , plaintiff was the owner of an office building. Eight of the building's 12 floors were occupied by representatives of children's wear wholesalers and manufacturers. Defendants built a new building to cater to the apparel industry, and solicited away a large number of tenants from plaintiff. Some of these tenants moved before their written leases expired. Plaintiff brought an action for declaratory relief, for damages based on contractual interference, and for an injunction. The trial court granted defendants' motion for judgment. Plaintiffs appealed.

The court of appeal affirmed, stating that unjustified interference with an advantageous business relationship is actionable even though no breach of contract is involved. The justification advanced, the court said, is generally the right to conduct a business in competition with that of another. The court set out the requirements for justification as given in Restatement of Torts § 768: one is privileged purposely to cause a third person not to enter into or continue a business relation with a competitor of the actor if (1) the relation concerns a matter involved in the competition between the actor and the competitor, (2) the actor does not employ improper means, (3) the actor does not intend thereby to create or continue an illegal restraint of competition, and (4) the actor's purpose is at least in part to advance his or her interest in his or her competition with the other. The court noted that the Restatement states the California rule (*2 Cal. App. 3d 846, 855-856)* . The court found that the requirements for justification were met in this case. First, the court indicated that in soliciting tenants of plaintiff's building and entering into leases with them, defendants acted without malice or intent to injure the plaintiff, but solely to further their own economic interests as competitors of the plaintiff. Second, the court noted that defendants did not use improper methods in connection with such solicitation, and that they employed no coercive measures, nor did they make any false statements or representations to any person concerning plaintiff corporation or its building or concerning defendants, the new building, or its tenants. The court concluded that the findings of the trial court established that defendants' acts in soliciting plaintiff's tenants were not unlawful and were done to advance defendants' interests as competitors of plaintiff (*2 Cal. App. 3d 846, 856)* .

[b] Noncontractual Interference Enjoys More Extensive Privilege

The facts and procedural background of ***Charles C. Chapman Bldg. Co. v. California Mart*** *(1969) 2 Cal. App. 3d 846, 82 Cal. Rptr. 830* , are discussed in *§ 122.42[3][a]*. The court of appeal accepted the trial court's finding that defendants' interference with plaintiff's economic relations did not involve a contractual breach. Holding that defendants' interference was privileged under the theory of fair competition, the court of appeal noted that when no breach of contract is shown, the law recognizes a more extensive privilege to interfere with business relations than where a breach appears (*2 Cal. App. 3d 846, 856)* .

In ***Shida v. Japan Food Corp.*** *(1967) 251 Cal. App. 2d 864, 60 Cal. Rptr. 43* , plaintiff alleged that defendant tortiously induced a manufacturer to discontinue business with plaintiff. Over several years, plaintiff had contracted annually with the manufacturer to be the exclusive distributor of manufacturer's food product in the continental United States. Defendant allegedly caused manufacturer not to renew its agreement with plaintiff. Instead, the manufacturer entered into an exclusive distributorship agreement with defendant. The trial court, finding that but for defendant's conduct the manufacturer would have continued its business relationship with plaintiff, entered judgment in favor of plaintiff.

The court of appeal reversed. The critical question, according to the court, was whether the interference was unjustified. The court noted the importance of the distinction between interference with a contract and interference with a noncontractual relationship; in the latter situation the law recognizes more extensive privileges to interfere for the sake of competition (*251 Cal. App. 2d 864, 866)* . Here, defendant caused a failure to renew a contract, not a breach of contract. The court found that this would not be an actionable wrong, stating that there was no finding that defendant used any improper means to persuade the manufacturer, or that any illegal restraint of competition was created, or that defendant had any purpose beyond the obvious objective of advancing its own interest as a competitor (*251 Cal. App. 2d 864, 867)* .

NOTE:

Although concluding that public policy prevented the plaintiff from stating a cause of action for interference with contract or prospective economic advantage, the Supreme Court in has stated that the chief practical distinction between interference with contract and with prospective economic advantage is that a broader range of privilege to interfere is recognized when the relationship or economic advantage interfered with is only prospective [*Pacific Gas & Elec. Co. v. Bear Stearns & Co. (1990) 50 Cal. 3d 1118, 1126, 270 Cal. Rptr. 1, 791 P.2d 587* ; *see § 122.41[3][a]*].

[4] Additional Authorities

[a] Fair Competition Is Justified

In *Los Angeles Land Co. v. Brunswick Corp. (9th Cir. 1993) 6 F.3d 1422* , defendant, a manufacturer of bowling equipment, also owned and operated bowling centers. Plaintiff, a land developer, wished to build a bowling center in a region in which defendant also had planned to build a bowling center. Timberlake Construction Co. (Timberlake), a major builder of bowling centers, had built centers for both plaintiff and defendant in the past. When plaintiff contacted Timberlake about building plaintiff's proposed new bowling center, Timberlake declined to do so, apparently as the result of influence exerted by defendant. Defendant also allegedly interfered with plaintiff's efforts to get financing for its new bowling center, and plaintiff ultimately was forced to abandon the project. Plaintiff land sued defendant for federal antitrust violations and for intentional interference with economic relationships.

The Ninth Circuit reversed a trial court judgment for the plaintiff. Regarding defendant's alleged interference with plaintiff's relationship with Timberlake, the appellate court noted that under California law a firm's interference with another firm's prospective economic relation falls within the privilege of competition if (1) the relation concerns a matter involved in the competition between the two firms; (2) the firm does not employ wrongful means; (3) the firm's action does not create or continue an unlawful restraint of trade; and (4) the firm's purpose is at least in part to advance its interests in competing with the other firm (*6 F.3d 1422, 1431)* . The court observed that plaintiff and defendant were competitors for the services of bowling center builders and that plaintiff had pointed to no evidence in the record that shows that defendant's sole motive in wedging itself between plaintiff and Timberlake (if it did so at all) was other than to advance its own economic interests (*6 F.3d 1422, 1430, 1431)* . Furthermore, there was no evidence to suggest that the conditions for the privilege did not exist, since the court had concluded that there was no antitrust violation and hence no unlawful restraint of trade (*6 F.3d 1422, 1431* & n.9). The court held, therefore, that defendant's conduct with respect to Timberlake was justified (*6 F.3d 1422, 1431)* .

The factual and procedural background of *Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Village Square Venture Partners (1997) 52 Cal. App. 4th 867, 60 Cal. Rptr. 2d 830* , is discussed in *§ 122.28[3][e]*. In an additional claim, plaintiff contended that the trial court erred in ruling that the "fair competition" privilege was a complete defense to plaintiff's action for intentional interference with prospective economic advantage. The court of appeal noted that in order to recover for intentional interference with prospective economic advantage, a plaintiff must plead and prove that the defendant's conduct was independently wrongful and was thus not privileged. Thus, it is not the defendant's burden to prove, as an affirmative defense, that it's conduct was privileged (*52 Cal. App. 4th 867, 881)* . Since plaintiff neither showed, nor even contended, that defendant engaged in conduct which was wrongful beyond the fact of the interference itself, the trial court did not err in granting defendant's motion for summary adjudication.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsCommercial InterferenceGeneral OverviewTortsBusiness TortsCommercial InterferenceBusiness RelationshipsGeneral OverviewTortsBusiness TortsCommercial InterferenceContractsGeneral OverviewTortsBusiness

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California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 122 INTERFERENCE
PART II. FORMS
A. Intentional Interference With Economic Relationship

12-122 California Points & Authorities § 122.43

§ 122.43 Supporting Contention That Interference Is Justified or Privileged--Director's, Manager's, and Agent's Privilege

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT WAS PRIVILEGED TO INTERFERE WITH THE CONTRACT BETWEEN PLAINTIFF AND _____ [*name*] BECAUSE DEFENDANT WAS ACTING IN THE BEST INTERESTS OF _____ [*name*], AS ITS _____ [DIRECTOR *and/or* MANAGER *and/or* AGENT], AND THE INTERFERENCE WAS WITHIN DEFENDANT'S DUTY UNDER THE CONFIDENTIAL RELATIONSHIP.

A. Managers' Privilege. A _____ [director *and/or* manager *and/or* agent] enjoys a qualified privilege to induce his or her _____ [principal *and/or* employer *and/or* the entity he or she manages or by which he or she is employed] to breach a contract that he or she reasonably believes to be harmful to the entity's best interests (*Shoemaker v. Myers (1990) 52 Cal. 3d 1, 24-25, 276 Cal. Rptr. 303, 801 P.2d 1054* ; *Gruenberg v. Aetna Ins. Co. (1973) 9 Cal. 3d 566, 576, 108 Cal. Rptr. 480, 510 P.2d 1032* ; *Wanland v. Los Gatos Lodge, Inc. (1991) 230 Cal. App. 3d 1507, 1522, 281 Cal. Rptr. 890*).

[*Optional*] **B. Attorney for Breaching Party.** An attorney is privileged to induce the breach of his or her client's contract by lawful means, so long as the inducement is intended to protect the interests of the client and the inducement is within the scope of the duty owed by the attorney to the client under the confidential relationship (*Gruenberg v. Aetna Ins. Co. (1973) 9 Cal. 3d 566, 576, 108 Cal. Rptr. 480, 510 P.2d 1032* ; *Schick v. Lerner (1987) 193 Cal. App. 3d 1321, 1329, 238 Cal. Rptr. 902*).

[*Optional*] **C. Predominant Motive Is Sufficient.** A manager need not be acting solely in his or her employer's best interests in order to claim the privilege; all that is required is proof that the principal's interest was one of the factors motivating his or her conduct or advice (*Wanland v. Los Gatos Lodge, Inc. (1991) 230 Cal. App. 3d 1507, 1522, 281*

Cal. Rptr. 890).

[*Optional*] **D. Privilege Is Absolute When Applied to Termination of At-Will Employee.** The manager's privilege is absolute and does not require evidence of the manager's motives when an at-will employee is terminated (*Halvorsen v. Aramark Unif. Servs., Inc. (1998) 65 Cal. App. 4th 1383, 1396, 77 Cal. Rptr. 2d 383*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that defendant's interference with plaintiff's contract with a third party was justified or privileged under the so-called "manager's privilege." Optional Paragraph B is for use when the particular principal-agent relationship involved is the attorney-client relationship. Optional Paragraph C is for use when the defendant may have had other motives, but the principal's best interests were predominant. Optional Paragraph D is for use by a managing agent of an employer to assert that the privilege is absolute when making decisions leading to the termination of an at-will employee.

Justification or privilege is an affirmative defense that usually must be raised by way of answer. It may be considered as a ground for demurrer only when it is apparent on the face of the complaint [*see Lowell v. Mother's Cake & Cookie Co. (1978) 79 Cal. App. 3d 13, 18-19, 144 Cal. Rptr. 664]* .

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should allege facts showing that defendant's interference was by lawful means and was intended to protect the principal's, client's, or employer's interests. The facts should demonstrate that the interference was predominantly motivated by defendant's belief that he or she was acting in accordance with his or her duties under the relationship existing between defendant and the third party.

[b] Related Pleading and Practice Forms

For discussion and forms relating to interference with economic relations, see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender). For discussion and forms for use in actions involving wrongful termination of employees, see California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline* (Matthew Bender).

[c] Related Points and Authorities

For discussion and forms for use in actions involving wrongful termination of employees, see Ch. 100A, *Employer and Employee: Wrongful Termination and Discipline* . For forms of memoranda of points and authorities supporting and opposing a demurrer, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings*.

[3] Discussion of Authorities

[a] Managers' Privilege

Shoemaker v. Myers *(1990) 52 Cal. 3d 1, 276 Cal. Rptr. 303, 801 P.2d 1054* , was an action by an employee of the California Department of Health Services for wrongful termination, and included a cause of action against several of plaintiff's supervisors and other department staff for wrongful interference with a business relationship and inducement of breach of contract. In affirming the sustaining of demurrers to the interference and inducement cause of action, the Supreme Court said that it is well established that corporate agents and employees acting for and on behalf of a corporation cannot be held liable for inducing breach of the corporation's contract (*52 Cal. 3d 1, 24)* . Plaintiff's supervisors were agents of the employer and were vested with the power to act for the employer (rightly or wrongly) in

terminating plaintiff's employment. For purposes of this cause of action, these defendants stood in the place of the employer, because the employer (the other party to the contract) could not act except through its agents. Thus, there is no viable "inducement of breach of contract" or "interference with economic advantage" that is distinguishable from a cause of action for breach of contract (*52 Cal. 3d 1, 25)* .

Gruenberg v. Aetna Ins. Co. *(1973) 9 Cal. 3d 566, 108 Cal. Rptr. 480, 510 P.2d 1032* , was, in part, an action against three insurance companies for failure to pay plaintiff benefits allegedly due under fire insurance policies. Plaintiff also brought suit against a claims adjuster and an attorney employed by the insurers, and their respective firms, alleging a conspiracy to induce a breach of plaintiff's insurance contract. Plaintiff alleged that defendants had conspired to imply falsely that plaintiff had a motive to burn down his business in order to avoid paying the amounts due to plaintiff under the insurance policies. The trial court granted defendants' general demurrers.

The court affirmed the demurrers as to the insurance adjusting firm, its employee, the defendants' law firm, and its employee. The court held that as agents and employees of defendant insurers, these defendants could not be held accountable on a theory of conspiracy. Citing *Wise v. Southern Pac. Co. (1963) 223 Cal. App. 2d 50, 72-73, 35 Cal. Rptr. 652* , the court noted that ordinarily corporate agents and employees acting for and on behalf of the corporation cannot be held liable for inducing a breach of the corporation's contract since being in a confidential relationship to the corporation their action in this respect is privileged (*9 Cal. 3d 566, 576)* . Although *Gruenberg* did not explicitly discuss the elements of civil conspiracy [*see § 122.26*], the opinion makes it clear that the requisite element of wrongful acts committed pursuant to a conspiracy did not exist, because defendants' acts of interference were not wrongful, but lawful and privileged (*9 Cal. 3d 566, 576)* .

Wanland v. Los Gatos Lodge, Inc. *(1991) 230 Cal. App. 3d 1507* , was a wrongful termination suit that included a cause of action for intentional interference with contractual relations. At the time of her dismissal, plaintiff was defendant's catering manager. Plaintiff alleged that the lodge manager was inappropriately influenced to fire plaintiff by a coworker with whom the lodge manager was romantically involved. The coworker did not like plaintiff and wanted the position of catering manager. Evidence established that the lodge manager and the coworker were seen leaving and arriving at work together and that they were rumored to be romantically involved. The trial court excluded evidence that the lodge manager and the coworker travelled to Hawaii together six months after plaintiff was fired. A third candidate, not the coworker, replaced plaintiff as catering manager. The court dismissed the cause of action for intentional interference. On other causes of action, the jury awarded plaintiff $150,000 compensatory damages. The jury was instructed as to when they might award punitive damages, but they did not award any punitive damages. Both parties appealed.

The court of appeal affirmed the dismissal of the cause of action for intentional interference. With respect to that cause of action, plaintiff contended that the evidence of the Hawaiian travel should not have been excluded and that its improper exclusion prejudicially foreclosed her proof of the interference claim. The court recited the elements one must prove to prevail on a cause of action for intentional interference: (1) a valid and existing contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional acts designed to induce breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage (*230 Cal. App. 3d 1507, 1522)* .

Ownership and control of an entity do not by themselves relieve a defendant from tort liability for interfering with the entities contracts. Rather, the tort liability of an owner, director, or manager depends on whether he or she was acting to protect the interests of the entity. Thus, the owner of an entity enjoys a qualified privilege to terminate a contract to which the entity is a party, provided that the owner's predominant purpose in inducing the breach is to further the entity's interests. A manager likewise enjoys a qualified privilege to induce the entity to breach a contract that he or she reasonably believes to be harmful to the entity's best interests. A manager need not be acting solely in his or her employer's best interests in order to claim the privilege; all that is required is proof that the employer's interest was one of the factors motivating his or her conduct or advice (*230 Cal. App. 3d 1507, 1522)* .

With regard to the evidence of the Hawaiian travel, the court said it was properly excluded because it in no way supported an inference that the manager acted under the coworker's influence in removing plaintiff from the position of catering manager. That evidence is thus irrelevant to the claim of intentional interference with plaintiff's employment relationship. That the manager may have been a close friend of the coworker and may have travelled to Hawaii with the coworker some six months after plaintiff's termination simply does not add up to interference with plaintiff's employment contract. Plaintiff's argument might have had greater force if the coworker had replaced plaintiff as catering manager, but that was not the case. The court found no evidence in the record that tended to defeat the qualified privilege held by the lodge managers, and affirmed the trial court's dismissal of the cause of action for intentional interference (*230 Cal. App. 3d 1507, 1523)* .

[b] Attorney for Breaching Party

Gruenberg v. Aetna Ins. Co. *(1973) 9 Cal. 3d 566, 108 Cal. Rptr. 480, 510 P.2d 1032* , is discussed in *§ 122.43[4][a]*.

Schick v. Lerner *(1987) 193 Cal. App. 3d 1321* , was an action by a psychotherapy patient against the therapist's attorney. Plaintiff alleged that the attorney had induced the therapist to breach a contractual relationship with plaintiff by advising the therapist to execute a declaration, to be filed in a family law matter, that contained confidential information about plaintiff. In affirming summary judgment for the attorney, the court of appeal said that absent extraordinary circumstances, an attorney may not be held liable for urging a client to breach a contract with a third party. Public policy dictates that attorney's remain free to counsel their clients without fear of subjecting themselves to liability as a result of the proper discharge of their professional obligations. The confidential attorney-client relationship constitutes justification for an attorney's advice to a client to breach a contract with a third party. Clients also must feel free to seek out an attorney's advice on any issue at any time. Any rule to the contrary would constitute a serious impairment to the attorney-client relationship and would have a resulting deleterious effect on the administration of justice (*193 Cal. App. 3d 1321, 1329)* .

[c] Predominant Motive Is Sufficient

Wanland v. Los Gatos Lodge, Inc. *(1991) 230 Cal. App. 3d 1507* , is discussed in *§ 122.43[4][a]*.

[d] Privilege is Absolute When Applied to Termination of At-Will Employee

In ***Halvorsen v. Aramark Unif. Servs., Inc.*** *(1998) 65 Cal. App. 4th 1383, 77 Cal. Rptr. 2d 383* , plaintiff was a terminated employee who brought an action for breach of the employment contract against the employer and an action against his manager for intentional interference with the employment contract. Suit against the manager was based on his actions in inducing the employee's termination following a dispute about whether a bad business decision made by the employee had been approved by the manager. The trial court granted summary judgment for the employer and granted the manager's demurrer. The plaintiff appealed.

The court of appeal upheld the judgment. As to the action brought against the employer, the court of appeal agreed that the employment had been at-will pursuant to an explicit written agreement and could not be modified by an implied promise to fire only for good cause. In upholding the granting of the manager's demurrer, the court of appeal agreed with the trial court that the manager's alleged actions in inducing the plaintiff's termination were privileged under the manager's privilege. The court of appeal noted that there were three different formulations of the privilege: (1) an absolute privilege that applies regardless of the manager's motives, (2) a qualified privilege that applies as long as the manager was motivated at least in part by a proper motive, and (3) a qualified privilege that applies as long as the manager's predominant motive was proper (*65 Cal. App. 4th 1383, 1391-1393)* . Failing to see a consistent application in the California cases, the court analyzed the privilege in the context of an employer's decision to terminate an at-will

employee and decided that, in that context, the privilege was absolute. In reaching this holding, the court noted the uniquely confidential relationship between an employer and management and the need for open communication, and concluded that there was little justification for allowing judicial inquiry into the motives of either when reaching a decision to discharge an at-will employee (*65 Cal. App. 4th 1383, 1394-1396)* .

[4] Additional Authorities

[a] Manager's Privilege

The court of appeal in *Aalgaard v. Merchants Nat'l Bank, Inc. (1990) 224 Cal. App. 3d 674, 274 Cal. Rptr. 81* , affirmed a judgment in favor of defendants, a bank and its individual directors. Plaintiff's causes of action were for wrongful discharge, age discrimination, conspiracy to interfere with contractual relations, and intentional interference. The wrongful discharge claim and the age discrimination claim were preempted by *12 U.S.C.S. § 24*, which gives the directors of a national bank the right to dismiss officers at their pleasure (*224 Cal. App. 3d 674, 692)* . The interference claims were not preempted (*224 Cal. App. 3d 674, 683)* . Nevertheless, the court did not find it necessary to discuss whether the "manager's privilege" is absolute or qualified, because uncontradicted evidence showed that the defendants acted not in self-interest, but in the bank's interest, in attempting to reduce the bank's costs through elimination of a highly paid employee and replacement with lower-paid workers (*224 Cal. App. 3d 674, 684-686)* .

Becket v. Welton Becket & Assocs. (1974) 39 Cal. App. 3d 815, 114 Cal. Rptr. 531 , was an action by an employee of a corporation against the corporation and its officers for interference with contractual relations. Plaintiff alleged that the president and two directors of the corporation conspired together to effect the discharge of plaintiff in retaliation for plaintiff instituting litigation against the corporation and themselves and to coerce plaintiff into dismissing the action. As a result of this alleged conspiracy, the directors authorized the president to discharge plaintiff. Plaintiff alleged that, in discharging him, the president tortiously interfered with the employment contract between plaintiff and the corporation. The trial court sustained defendants' demurrer without leave to amend, and plaintiff appealed. The court of appeal found that the president would be immune from liability for the tort of inducing a breach of contract because of his relationship with the corporation (*39 Cal. App. 3d 815, 823)* .

The court of appeal in *Mallard v. Boring (1960) 182 Cal. App. 2d 390, 6 Cal. Rptr. 171* , affirmed a judgment entered for defendant after sustaining of a demurrer to plaintiff's first amended complaint and plaintiff's refusal to amend. The complaint in part attempted to state a cause of action against her former employer for damages for wrongful discharge based on plaintiff's alleged arbitrary dismissal. Defendant, the business manager for plaintiff's employer, adopted a rule that tended to control or direct the political activities or affiliation of plaintiff by prohibiting plaintiff from serving as a trial juror [*but see Lab. Code § 230(a)* (employer now prohibited from discharging or in any manner discriminating against employee for taking time off for service as required by law on any trial jury, if employee gives reasonable notice to employer that he or she is required to serve)]. The court noted the general rule that unlawful inducement to breach a contract is actionable and that the rule applies to a contract that is terminable at will. The inducement must be wrongful and unprivileged. One who is in a confidential relationship with a party to a contract is privileged to induce the breach of that contract, and a servant may induce his or her master to breach a contract with a third person (*182 Cal. App. 2d 390, 393)* . Plaintiff did not allege that defendant did not have the authority to discharge her; this being the case, defendant could not induce a breach of contract, and if there was a breach, defendant breached the contract for and on behalf of his employer (*182 Cal. App. 2d 390, 393-394)* .

[b] Predominant Motive is Sufficient

In *Huynh v. Vu (2003) 111 Cal. App. 4th 1183, 4 Cal. Rptr. 3d 595* , the plaintiff was a real estate broker who sued a seller of commercial property and her husband, who was allegedly acting as the seller's agent, to recover the commission lost by the plaintiff from the transaction. The plaintiff, who asserted a cause of action for intentional interference with contract against the seller's husband, alleged that the husband's actions in delaying the closing on the

sale caused the transaction to be closed under a contract with a higher sales price that provided no commission to the plaintiff, rather than under the original sales contract, which would have provided the plaintiff with a substantial commission. At trial, judgment was entered in favor of the plaintiff and against the husband, but the trial court had not allowed the husband to argue the manager's privilege. The court of appeal reversed and remanded, holding that the trial court erred in refusing to instruct on this privilege. After reviewing case law on the manager's privilege in various contexts, the court held that if a manager has some personal financial interest in the transaction, so that it is reasonably possible that the manager acted at least in part out of self-interest, a manager's desire to advance his or her personal interests does not vitiate the privilege as long as the manager's predominant motive is advancing the principal's interests (*111 Cal. App. 4th 1183, 1198-1200)* . The court also rejected the plaintiff's argument that the manager's privilege is limited to cases in which a manager has allegedly induced a principal that is an entity to breach a contract, concluding instead that the privilege may be asserted even if the principal is a natural person (*111 Cal. App. 4th 1183, 1195)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsDuties & LiabilitiesGeneral OverviewBusiness & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesCauses of ActionTortious Interference With Business RelationsTortsBusiness TortsCommercial InterferenceGeneral OverviewTortsBusiness TortsCommercial InterferenceContractsGeneral OverviewTortsBusiness TortsCommercial InterferenceEmployment RelationshipsGeneral Overview

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PART II. FORMS
A. Intentional Interference With Economic Relationship

12-122 California Points & Authorities § 122.44

§ 122.44 Supporting Contention That Interference Is Justified or Privileged--Owner's Privilege

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT WAS JUSTIFIED IN CAUSING _____ [*name*] NOT TO ENTER A PROSPECTIVE CONTRACTUAL RELATION WITH PLAINTIFF BECAUSE DEFENDANT HAD A FINANCIAL INTEREST IN THE BUSINESS OF _____ [*name*] AND DEFENDANT DID NOT EMPLOY WRONGFUL MEANS TO PROTECT THAT INTEREST FROM BEING PREJUDICED BY THE RELATION.

Owner's Privilege. One with a financial interest in the business of another is privileged, so long as he or she does not employ improper means but acts merely to protect his or her financial interest or promote the other's welfare, to induce the other not to enter a business relationship with a third party (*Chicago Title Ins. Co. v. Great W. Fin. Corp. (1968) 69 Cal. 2d 305, 319, 70 Cal. Rptr. 849, 444 P.2d 481*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a defendant's interference with plaintiff's economic relations was justified or privileged because he or she had a financial interest in the business of a third party and because defendant did not employ wrongful means to protect defendant's interest from being prejudiced by the relation.

Justification or privilege is an affirmative defense that usually must be raised by way of allegation in the answer. It may be considered as a ground for demurrer only when it is apparent on the face of the complaint [*see Lowell v. Mother's Cake & Cookie Co. (1978) 79 Cal. App. 3d 13, 18-19, 144 Cal. Rptr. 664]* .

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law

stated. Thus, counsel should allege facts demonstrating defendant's financial interest in the business of the third party, and that defendant did not employ wrongful or illegal means to protect the defendant's interests from being prejudiced by the prospective relation.

[b] Related Points and Authorities

For points and authorities that can be used to support the contention that an owner of real property enjoys a qualified privilege to protect his or her interest in that property, see *§§ 122.42* and *122.50*.

[c] Related Pleading and Practice Forms

For discussion and forms relating to interference with economic relations, see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender).

[3] Discussion of Authorities

[a] Owner's Privilege

Chicago Title Ins. Co. v. Great W. Fin. Corp. *(1968) 69 Cal. 2d 305, 70 Cal. Rptr. 849, 444 P.2d 481* , was an action for interference with prospective business advantage. The complaint contained allegations to the general effect that an escrow company had formed a title company corporation, at the insistence of another title company, to divert business from plaintiffs. The complaint also alleged that a financial holding company had prevailed on two of its corporations to deal only with a title company that purchased all of its title insurance policies from a competitor of the plaintiffs. Plaintiffs appealed from the trial court's order of dismissal entered after it sustained without leave to amend demurrers to plaintiff's fourth amended complaint.

The Supreme Court affirmed, holding that the interference allegations of the complaint were insufficient. The court found that plaintiffs failed to state an action for interference with prospective business advantage, noting that one with a financial interest in the business of another is privileged, so long as he or she does not employ improper means but acts merely to protect his or her financial interest or promote the other's welfare, to induce the other not to enter a business relationship with a third party. Based on the face of the complaint, the court found defendants' conduct was patently justified (*69 Cal. 2d 305, 319)* . The court remarked that owners of a corporate escrow company are authorized by *Ins. Code § 12396* [*now see Ins. Code § 12389*] to incorporate a separate title company which may then receive from the title insurer with which it does business a portion of the posted premium in exchange for its search and abstract services (*69 Cal. 2d 305, 319-320)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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12-122 California Points & Authorities § 122.45

§ 122.45 Supporting Contention That Interference Is Justified or Privileged--Interference Is Protected by Statute or Constitution--Publication or Broadcast During Legislative, Judicial, or Other Official Proceeding [Civ. Code § 47(b)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT'S _____ [PUBLICATION *or* BROADCAST] IS ABSOLUTELY PRIVILEGED UNDER *CIVIL CODE SECTION 47(b)*.

A. Interference Is Absolutely Privileged Publication or Broadcast. A publication or broadcast made by a defendant in any legislative, judicial, or other official proceeding, that interferes with a plaintiff's economic relations with a third party is absolutely privileged by *Civil Code Section 47(b)* (*Rosenthal v. Irell & Manella (1982) 135 Cal. App. 3d 121, 125-128, 185 Cal. Rptr. 92* ; *Asia Inv. Co. v. Borowski (1982) 133 Cal. App. 3d 832, 841-842, 184 Cal. Rptr. 317*).

B. Privilege Extends to Quasi-Judicial Proceedings. The privilege of *Civil Code Section 47(b)* extends to quasi-judicial as well as judicial proceedings (*Ojavan Investors, Inc. v. California Coastal Comm'n (1994) 26 Cal. App. 4th 516, 528, 32 Cal. Rptr. 2d 103*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a contention that defendant's interference with plaintiff's economic relations was justified or privileged because the interference was accomplished by means of a publication or broadcast absolutely protected under *Civ. Code § 47(b)*. Note, however, that the privilege does not apply to any communication made in furtherance of an act of intentional destruction or alteration of physical evidence undertaken for purpose of depriving a party to litigation of the use of that evidence, whether or not the content of the communication is the subject of a subsequent publication or broadcast that is privileged pursuant to *Civ. Code § 47* [

Civ. Code § 47(b)(2)]. The privilege for communications in judicial proceedings is also inapplicable to a communication that knowingly conceals the existence of an insurance policy [*Civ. Code § 47(b)(3)*].

Justification or privilege is an affirmative defense that usually must be raised by way of allegation in the answer. It may be considered as a ground for demurrer only when it is apparent on the face of the complaint [*see Lowell v. Mother's Cake & Cookie Co. (1978) 79 Cal. App. 3d 13, 18-19, 144 Cal. Rptr. 664]* . The immunity from liability offered by *Civ. Code § 47(b)* is also properly raised by demurrer [*see Ojavan Investors, Inc. v. California Coastal Comm'n (1994) 26 Cal. App. 4th 516, 529, 32 Cal. Rptr. 2d 103* ; *Wilton v. Mountain Wood Homeowners Assn., Inc. (1993) 18 Cal. App. 4th 565, 569]* .

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Counsel should thus allege facts establishing the context of the communication, demonstrating that the communication was made in the course of a legislative, judicial, or other official proceeding.

[b] Related Pleading and Practice Forms

For discussion and forms relating to interference with economic relations, see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender). For discussion and forms relating to the application of Civ. Code § 47(b) in defamation actions, see California Forms of Pleading and Practice, Ch. 340, *Libel and Slander* (Matthew Bender).

[c] Related Points and Authorities

For points and authorities relating to the application of *Civ. Code § 47(b)* in defamation actions, see Ch. 142, *Libel and Slander (Defamation)*.

[d] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 122.54* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Interference Is Absolutely Privileged Publication or Broadcast

Rosenthal v. Irell & Manella *(1982) 135 Cal. App. 3d 121, 185 Cal. Rptr. 92* , was an action by an attorney for intentional interference with prospective economic advantage. One of the attorney's former clients had obtained a judgment against him in a prior action for negligence. Pending appeal of this judgment, the former client's attorneys in the negligence action (defendants) entered into discussions with five of the plaintiff's insurance carriers. These discussions culminated in a settlement whereby the judgment against the attorney would be satisfied. Following the settlement, plaintiff's counsel, who had been furnished by the insurers, withdrew from the case. Plaintiff's complaint alleged that his former client's new lawyers induced his insurance carriers to breach their contract with him by settling his financial liability and withdrawing from their representation of him in the appeal without his consent. The trial court sustained defendants' demurrer without leave to amend, and the dismissed the action.

The court of appeal affirmed. The court found that *Civ. Code § 47* would bar plaintiff's action against the lawyer defendants. The privilege created by *Civ. Code § 47*, the court explained, is part of the statutory law dealing with defamation; however, the privilege has evolved through case law application into a rather broad protective device which attaches to various classes of persons and applies to types of publications and in types of actions not traditionally identified with the field of defamation. The court indicated that the privilege has been applied to defeat tort actions based on publications in protected proceedings but grounded on different theories of liability, such as inducing breach

of contracts and interference with prospective economic advantage (*135 Cal. App. 3d 121, 125)* . The court also pointed out that the privilege has been applied to publications which were private communications between parties and which communications were related not only to actual but potential court actions (*135 Cal. App. 3d 121, 126)* . Rejecting plaintiff's suggestion that the privilege applies only to false statements of fact, the court found that the privilege applies to an injurious publication (rather than falsehood) of whatever nature, in a protected proceeding (*135 Cal. App. 3d 121, 127-128)* . Concluding that defendants' publications were privileged under *Civ. Code § 47*, the court found that the privilege defeated plaintiff's action against defendants (*135 Cal. App. 3d 121, 128)* .

In ***Asia Inv. Co. v. Borowski*** *(1982) 133 Cal. App. 3d 832, 184 Cal. Rptr. 317* , plaintiff alleged that defendants' filing of a California Environmental Quality Act action against it with respect to its proposed real estate development interfered with city approval of the development, and constituted intentional interference with prospective business advantage. The trial court granted defendants' motion for summary judgment and denied plaintiff's motion to amend its complaint. Plaintiff appealed.

The court of appeal affirmed the judgment. The court found that defendants' allegedly tortious conduct was privileged under former Civ. Code § 47(2) [*now see Civ. Code § 47(b)*]. Citing *Albertson v. Raboff (1956) 46 Cal. 2d 375, 381, 295 P.2d 405* , the court noted that the filing of a complaint or petition is in itself a publication which is privileged because it is required by law to initiate the judicial proceeding. Such a conclusion is mandated, said the court, by the policy behind *Civ. Code § 47* which is to afford litigants the utmost freedom of access to the courts to secure their rights and defend themselves without fear of being harassed by retaliatory lawsuits (*133 Cal. App. 3d 832, 841)* . The court remarked that although the application of the privilege usually arises in the context of a defamation action, it has been applied to other allegedly tortious conduct such as intentional interference with prospective business advantage (*133 Cal. App. 3d 832, 841-842*). According to the court, the facts stated in plaintiff's proposed amended complaint revealed that the only tortious conduct alleged was the filing of a petition for a writ of mandate; this conduct was privileged pursuant to former Civ. Code § 47(2). The court concluded that no cause of action for intentional interference with prospective advantage could be stated on the facts (*133 Cal. App. 3d 832, 842*).

[b] Privilege Extends to Quasi-Judicial Proceedings

In ***Ojavan Investors, Inc. v. California Coastal Comm'n*** *(1994) 26 Cal. App. 4th 516, 32 Cal. Rptr. 2d 103* , real estate developers filed a complaint against the California Coastal Commission alleging among other things intentional interference with prospective economic advantage stemming from the Commission's issuance of a cease-and-desist order prohibiting the developers from attempting to convey property in violation of a declarations of restrictions which the Commission required to be recorded prior to issuance of development permits. The trial court sustained the Commission's demurrers to plaintiff's complaint on the ground that the cease and desist order was a privileged publication under *Civ. Code § 47* which constituted a defense to the interference cause of action.

The court of appeal affirmed. The court began by stating that *Civ. Code § 47(b)* provides that a privileged publication or broadcast is one made in any judicial proceeding, or in any other official proceeding authorized by law. It then cited *Lebbos v. State Bar (1985) 165 Cal. App. 3d 656, 667, 211 Cal. Rptr. 847* for the proposition that the immunity from liability afforded by a privileged communication applies to actions for defamation as well as to bar other tort actions based on publications in protected proceedings, including a cause of action for interference with prospective economic advantage. Lastly, the court found that this privilege extended to quasi-judicial as well as judicial proceedings, and that the California Coastal Commission's hearings in this case were quasi-judicial (*26 Cal. App. 4th 516, 528)* . Accordingly, the court of appeal affirmed the judgment of the trial court that the interference action was barred by *Civ. Code § 47(b)* (*26 Cal. App. 4th 516, 529)* .

[4] Additional Authorities

[a] Interference Is Absolutely Privileged Publication or Broadcast

In *Caesar Elecs. Inc. v. Andrews (9th Cir. 1990) 905 F.2d 287* , a federal diversity case that did not involve any cause of action for interference, the false information given by a manufacturer to a purchaser in the course of the manufacturer's participation in a government investigation involving violation of export laws was held privileged under *Civ. Code § 47(b)*, and thus rescission or recovery of damages for fraud and breach of fiduciary duty was barred (*905 F.2d 287, 289-290)* .

Pacific Gas & Elec. Co. v. Bear Stearns & Co. (1990) 50 Cal. 3d 1118, 270 Cal. Rptr. 1, 791 P.2d 587 is discussed in *§ 122.41[3][a]*. The Supreme Court's reasoning included consideration of the public policy to allow free access to the courts to provide for peaceful, judicial resolution of differences, as evidenced by the privilege for statements in the course of or related to judicial proceedings (*50 Cal. 3d 1118, 1131-1133)* .

The court of appeal in *Kupiec v. American Int'l Adjustment Co. (1991) 235 Cal. App. 3d 1326, 1 Cal. Rptr. 2d 371* , affirmed a judgment for defendants, an insurer and its adjuster, whose counsel and employees had misrepresented and concealed information from plaintiff regarding the whereabouts of her artwork during her action against the insured. Defendants also had instructed the insured to falsely deny knowledge of the whereabouts of the painting. The court of appeal said the privilege only applies to communications, not to tortious courses of conduct. The purpose of the privilege is to afford litigants freedom of access to the courts and open channels of communication by absolutely protecting them from derivative litigation based on communicative acts during judicial proceedings (*235 Cal. App. 3d 1326, 1331)* . While the communications complained of might be ethically unacceptable, the interference claims were derivative causes of action based on communicative acts done in a judicial proceeding by litigants, to achieve the objects of litigation, and had a logical relation to the action (*235 Cal. App. 3d 1326, 1331-1332)* . All the acts complained of were communicative in nature; there was no allegation of physical destruction of evidence. Defendants merely carried out a plan to delay the prior lawsuit and to avoid liability, and their communicative conduct was therefore within the privilege of *Civ. Code § 47(b)(2)* (*235 Cal. App. 3d 1326, 1333)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewTortsBusiness TortsCommercial InterferenceGeneral OverviewTortsBusiness TortsCommercial InterferenceBusiness RelationshipsDefensesTortsBusiness TortsCommercial InterferenceContractsDefensesTortsBusiness TortsCommercial InterferenceProspective AdvantageDefenses

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CHAPTER 122 INTERFERENCE
PART II. FORMS
A. Intentional Interference With Economic Relationship

12-122 California Points & Authorities § 122.46

§ 122.46 Supporting Contention That Interference Is Justified or Privileged--Interference Is Protected by Statute or Constitution--Prevention of Illegal Public Fund Expenditure [U.S. Const. Amends. I, XIV; Cal. Const. art. I, § 10; Code Civ. Proc. § 526a]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT'S INTERFERENCE WITH PLAINTIFF'S ECONOMIC RELATIONSHIP WITH _____ [*name*] IS JUSTIFIED BECAUSE DEFENDANT'S INTERFERING CONDUCT IS PROTECTED BY PUBLIC POLICY EXPRESSED IN CODE OF CIVIL PROCEDURE SECTION 526a, *CALIFORNIA CONSTITUTION, ARTICLE I, SECTION 10*, AND THE *FIRST* AND *FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION*.

Interference Is Privileged as Attempt to Prevent Illegal Public Fund Expenditure. Interference with contractual relations is justifiable when, pursuant to *Code of Civil Procedure Section 526a, California Constitution, Article I, Section 10*, and to the *First* and *Fourteenth Amendments of the United States Constitution*, a person seeks to prevent an illegal expenditure of public funds (*Bledsoe v. Watson (1973) 30 Cal. App. 3d 105, 108-110, 106 Cal. Rptr. 197*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a contention that defendant's interference with plaintiff's economic relations was justified or privileged because the interference was made in an attempt to prevent an illegal expenditure of public funds.

Justification or privilege is an affirmative defense that usually must be raised by way of allegation in the answer. It may be considered as a ground for demurrer only when it is apparent on the face of the complaint [*see Lowell v. Mother's Cake & Cookie Co. (1978) 79 Cal. App. 3d 13, 18-19, 144 Cal. Rptr. 664]* .

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should allege facts demonstrating that the purpose of defendant's interference was to prevent the illegal expenditure of public funds.

[b] Related Pleading and Practice Forms

For discussion and forms relating to interference with economic relations, see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender). For discussion and forms relating to actions under Code Civ. Proc. § 526a, see California Forms of Pleading and Practice, Ch. 466, *Public Entities and Officers: Taxpayers' Actions* , and Ch. 469, *Public Entities and Officers: Conflicts of Interest* (Matthew Bender).

[3] Discussion of Authorities

[a] Interference Is Privileged as Attempt to Prevent Illegal Public Fund Expenditure

In ***Bledsoe v. Watson*** *(1973) 30 Cal. App. 3d 105, 106 Cal. Rptr. 197* , plaintiff attorney filed an action for interference with contractual relations. Plaintiff alleged that he entered into a written contract for legal services with the City of Seal Beach to investigate irregularities in certain recall petitions and represent the city and individual members of the city council in a mandate proceeding brought by others to compel the city to hold an election to recall members of the city council. The complaint charged that defendant, acting as attorney for the other defendants, by written fraudulent representations of law, maliciously persuaded the city treasurer to repudiate the contract and refuse to disburse city funds to plaintiff. The trial court sustained defendants' general demurrer to the complaint and dismissed the action, and plaintiff appealed.

The court of appeal affirmed the judgment of dismissal. The court noted the general rule that interference with contractual relations is justifiable when a person seeks to protect an interest of greater social value than that attached to the stability of the con tract involved. The court found that Califonia's public policy was made explicit by statute. *Code Civ. Proc. § 526a* provides that an action to obtain a judgment, restraining and preventing any illegal expenditure of funds of a county or city may be maintained against any officer thereof, either by a citizen resident therein, or by a corporation who has paid a tax therein (*30 Cal. App. 3d 105, 108)* . The purpose of this section, according to the court, is to enable a citizen-resident taxpayer to question public expenditures of local governments that might otherwise pass unchallenged. The court found that since defendants were specifically authorized to initiate a lawsuit to prevent an alleged illegal expenditure of funds by the city treasurer, their less drastic act in writing the treasurer to persuade him not to make an illegal expenditure of funds was likewise justified, since the social interest attached to both acts is identical. The court concluded that *Code Civ. Proc. § 526a* provided a complete defense to the action on the face of the complaint (*30 Cal. App. 3d 105, 109)* . The court also found that even if defendants' conduct was not privileged under *Code Civ. Proc. § 526a*, the conduct would be justifiable under the general right of a citizen to protest a public expenditure by petition and instruction. This right is found in both the state and federal constitutions, in *Cal. Const. art. I, § 10*, and *U.S. Const. Amends. I* and *XIV*, respectively. The court noted that the citizen-resident taxpayer who prevents an illegal expenditure of public funds not only safeguards his or her private interest in the amount of taxes he or she pays, but upholds the general public interest in the fiscal integrity of his or her local government. Correspondence with the public officer responsible for the disbursement of the funds under question appeared to court an appropriate means of petition and instruction. In the court's view, protection of the means appropriate to prevent an illegal expenditre of public funds and to achieve fiscal integrity in local government would carry a greater social value than protection from challenge of plaintiff's employment contract with the city and its council members (*30 Cal. App. 3d 105, 109)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewTortsBusiness

TortsCommercial InterferenceGeneral OverviewTortsBusiness TortsCommercial InterferenceBusiness RelationshipsDefensesTortsBusiness TortsCommercial InterferenceContractsDefensesTortsBusiness TortsCommercial InterferenceProspective AdvantageDefenses

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A. Intentional Interference With Economic Relationship

12-122 California Points & Authorities § 122.47

§ 122.47 Supporting Contention That Interference Is Justified or Privileged--Interference Is Protected by Statute or Constitution--Politically Motivated Boycott [U.S. Const. Amend. I]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT'S INTERFERENCE WITH PLAINTIFF'S ECONOMIC RELATIONS WITH _____ [*name*] IS PRIVILEGED BECAUSE IT CONSTITUTES POLITICALLY MOTIVATED CONDUCT THAT IS PROTECTED UNDER THE *FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION*.

Interference Is Privileged as Politically Motivated Boycott. The *First Amendment of the United States Constitution* places outer limits on the category of conduct that may be subject to liability on the basis of tortious interference; a politically motivated secondary boycott, regardless of its objective, is constitutionally protected (*Environmental Planning & Info. Council v. Superior Court (1984) 36 Cal. 3d 188, 195-197, 203 Cal. Rptr. 127, 680 P.2d 1086*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a contention that defendant's interference with plaintiff's economic relations was justified or privileged as a politically motivated boycott.

Justification or privilege is an affirmative defense that usually must be raised by way of allegation in the answer. It may be considered as a ground for demurrer only when it is apparent on the face of the complaint [see *Lowell v. Mother's Cake & Cookie Co. (1978) 79 Cal. App. 3d 13, 18-19, 144 Cal. Rptr. 664]* .

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should allege facts demonstrating that defendant's interference was committed in the context

of an politically motivated economic boycott.

[b] Related Pleading and Practice Forms

For discussion and forms relating to interference with economic relations, see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender).

[3] Discussion of Authorities

[a] Interference Is Privileged as Politically Motivated Boycott

In ***Environmental Planning & Info. Council v. Superior Court*** *(1984) 36 Cal. 3d 188, 203 Cal. Rptr. 127, 680 P.2d 1086* , plaintiff newspaper publisher brought an action against an environmental group and several of the group's officers for intentional interference with economic advantage. Plaintiff alleged in its complaint that defendants published a newsletter criticizing the editorial policies of plaintiff's newspaper, and calling on readers of the newsletter not to patronize businesses that advertised in the newspaper. Defendants moved for summary judgment with supporting affadivits, and when their motion was denied, filed a petition in mandate to compel reversal of the trial court's order of denial.

The Supreme Court determined that, because there was no triable issue of material fact, defendants were entitled to summary judgment as a matter of law *36 Cal. 3d 188, 190)* . The Court noted that the very nature of the activities complained of would invite constitutional analysis. In a case such as this one, the Court stated, constitutional principles impose outer limits on the category of conduct that may be subject to liability on the basis of common law doctrine, and thus serve to shape the doctrine itself (*36 Cal. 3d 188, 195)* . The Court pointed to *NAACP v. Claiborne Hardware Co. (1982) 458 U.S. 886, 914, 102 S. Ct. 3409* , a case involving a boycott by black citizens against white merchants which was intended to pressure white elected officials to accede to the citizens' demands for racial equality and integration. In *Claiborne*, the United States Supreme Court held that the right of the states to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the federal constitution. The Supreme Court in *Claiborne* drew a crucial distinction between solely economic boycott activity and political boycotts. The Court found that the distinction set forth in *Claiborne* was present in this case (*36 Cal. 3d 188, 195-196)* . Plaintiff contended that *Claiborne* was distinguishable because the objective sought by the boycott in that case was the vindication of *Fourteenth Amendment* rights of freedom and equality. Plaintiff said that, in contrast, defendants merely sought to further their private views on environmental matters. The Court disagreed with this distinction, noting that it was precluded by the *First Amendment* from gauging the degree of constitutional protection by the content or subject matter of the speech (*36 Cal. 3d 188, 195-196)* . Plaintiff also sought to distinguish *Claiborne* on the ground that the boycott in the case at hand was directed at changing the editorial policies of a newspaper. Disagreeing, the Court noted that the boycott in *Claiborne* sought to influence political expression and behavior by public citizens and that consequently *Claiborne* was not distinguishable. The Court found that the newspaper was not in a position to claim infringement of its own constitutional rights by defendants' conduct, since no governmental action was implicated, and the degree of economic coercion that existed may have been no greater than that which might have been lawfully exerted by an advertiser who, on his or her own, sought to influence editorial policy by withdrawing or threatening to withdraw its patronage (*36 Cal. 3d 188, 197)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewTortsBusiness TortsCommercial InterferenceGeneral OverviewTortsBusiness TortsCommercial InterferenceBusiness RelationshipsDefenses

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A. Intentional Interference With Economic Relationship

12-122 California Points & Authorities § 122.48

§ 122.48 Supporting Contention That Interference Is Justified or Privileged--Interference Is Protected by Statute or Constitution--Right of Free Speech or Press Limits Liability for Allegedly False Statements [U.S. Const. Amend. I; Cal. Const. art. 1, § 2]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT CANNOT BE HELD LIABLE FOR INTERFERENCE WITH PLAINTIFF'S ECONOMIC RELATIONS BASED ON ALLEGEDLY FALSE STATEMENTS BECAUSE PLAINTIFF HAS NOT SATISFIED THE REQUIREMENTS FOR IMPOSITION OF SUCH LIABILITY IMPOSED BY THE GUARANTEES OF FREE _____ [SPEECH *and/or* PRESS] UNDER THE *FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION*.

A. *First Amendment* Protections Apply to Interference Claim Based on Alleged Injurious Falsehood. *First Amendment* limitations are applicable to claims for intentional or negligent interference with economic relations in which the gravamen is an allegedly injurious falsehood (*Blatty v. New York Times Co. (1986) 42 Cal. 3d 1033, 1045-1048, 232 Cal. Rptr. 542, 728 P.2d 1177* ; *Morningstar, Inc. v. Superior Court (1994) 23 Cal. App. 4th 676, 696, 29 Cal. Rptr. 2d 547*).

[*Optional*] **B. Statement Must Be False and Defamatory.** Because of *First Amendment* concerns, an allegedly false statement cannot be the basis of an action for intentional interference with economic relations unless it is defamatory (*Morningstar, Inc. v. Superior Court (1994) 23 Cal. App. 4th 676, 696, 29 Cal. Rptr. 2d 547*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that defendant is not liable for interference with plaintiff's economic relations when the interference consists of allegedly false statements and plaintiff has not

satisfied the *First Amendment* requirements for imposition of liability for injurious falsehoods. Counsel should add points and authorities pertaining to the specific *First Amendment* requirements that are relevant to the particular case. For examples of such points and authorities, see Ch. 142, *Libel and Slander (Defamation).*

Optional Paragraph B should be used if defendant contends that the allegedly false statements were not defamatory and were therefore constitutionally protected. In that case, counsel may wish to add points and authorities supporting the contention that the statements were not defamatory, such as those contained in Ch. 142, *Libel and Slander (Defamation).*

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should refer to facts demonstrating that defendant's interference was committed in the exercise of free speech or press rights. Counsel should describe the context of the speech. If the plaintiff contends that the interference was defamatory, and thus not within constitutional protection, counsel should also set forth facts demonstrating that the speech was not defamatory.

[b] Related Pleading and Practice Forms

For discussion and forms relating to interference with economic relations, see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender). For discussion and forms relating to defamation, see California Forms of Pleading and Practice, Ch. 340, *Libel and Slander* (Matthew Bender).

[c] Related Points and Authorities

For points and authorities relating to defamation actions and constitutional limitations on such actions, see Ch. 142, *Libel and Slander (Defamation).*

[3] Discussion of Authorities

[a] First Amendment Protections Apply to Interference Claim Based on Alleged Injurious Falsehood

In ***Blatty v. New York Times Co.*** *(1986) 42 Cal. 3d 1033, 232 Cal. Rptr. 542, 728 P.2d 1177* , plaintiff author brought an action against defendant newspaper publisher for intentional and negligent interference with noncontractual economic relations. Plaintiff alleged that defendant failed to include plaintiff's novel on its best-seller list, and that defendant falsely represented that the list was based on actual sales. Plaintiff also alleged that by failing to include the book on its list, defendant falsely represented that the novel did not meet its stated criteria for inclusion. By these alleged misrepresentations, plaintiff alleged that defendant adversely affected the volume of sales of the hardback edition and consequently the value of the paperback and film rights, thereby subjecting plaintiff to injury. Defendant demurred on the ground that plaintiff's complaint was barred by *U.S. Const. Amend. I,* and by *Cal. Const. art. I, § 2*. The trial court sustained the demurrers without leave to amend and dismissed the action. The court of appeal reversed the dismissal as to the intentional interference action, stating that the facts alleged were legally sufficient to support plaintiff's claim, but affirmed as to the dismissal on the negligent interference claim. Plaintiff and defendant appealed.

The Supreme Court reversed as to the intentional interference claim and affirmed as to the negligent interference claim. The Court noted that in order to advance society's interest in free and open discussion on matters of public concern and to avoid undue self-censorship by the press, the *First Amendment* establishes a broad zone of protection within which the press may publish without fear of incurring liability on the basis of injurious falsehood. The California Constitution, added the Court, independently establishes an even broader zone of protection (*42 Cal. 3d 1033, 1041)* . The Court noted that although the constitutional limitations defining the zone of protection for the press were established in defamation actions, they are not peculiar to such actions, but apply to all claims whose gravamen is the alleged injurious falsehood of a statement, including actions for interference (*42 Cal. 3d 1033, 1042, 1045)* . One constitutional limitation, applicable in actions based on injurious falsehood, is that the statement on which the claim is based must

specifically refer to, or be of and concerning the plaintiff in some way (*42 Cal. 3d 1033, 1042)* . Here, the Court found the requirement lacking, since the list did not expressly refer to the author or his novel and the list could not be reasonably understood to refer to the author or his novel by implication (*42 Cal. 3d 1033, 1046)* . The court concluded that plaintiff's interference actions were barred on *First Amendment* grounds (*42 Cal. 3d 1033, 1045, 1048)* .

In ***Morningstar, Inc. v. Superior Court*** *(1994) 23 Cal. App. 4th 676, 29 Cal. Rptr. 2d 547* , defendant had published a commentary in its newsletter in which it criticized plaintiff's newspaper advertisements for its mutual funds. The commentary stated that the advertisements, although not containing any untrue statements, had manipulated financial ratings to make it appear that plaintiff's mutual funds were more successful than they really were, relative to other mutual funds. Plaintiff brought an action against defendant for libel and intentional interference with prospective economic advantage based on the statements in the commentary. Although not challenging the truth of the commentary itself, plaintiff alleged that the title of the commentary ("Lies, Damned Lies, and Fund Advertisements") implied that the plaintiff had lied in its advertisements and that the commentary itself had disparaged the performance of plaintiff's funds and questioned the validity of the rankings relied on in the advertisements. The trial court overruled defendant's demurrer to the complaint, and defendant petitioned for a writ of mandate. The court of appeal initially denied the writ summarily, but the Supreme Court granted review and directed the court of appeal to grant an alternative writ to be heard before the court of appeal. The court of appeal then granted a peremptory writ directing the trial court to sustain the demurrer without leave to amend.

The court of appeal first held that neither the title to the commentary nor the statements in the commentary could be held libelous under constitutional standards. The title was merely "loose, figurative, or hyperbolic" speech (a wordplay on a famous quote by Mark Twain that did not necessarily imply that plaintiff was actually lying) that was protected by the *First Amendment* (*23 Cal. App. 4th 676, 690-691)* . Furthermore, because the commentary itself did not actually accuse plaintiff of making false statements, it could not lend a defamatory meaning to the title (*23 Cal. App. 4th 676, 692)* . Moreover, the disparaging statements made in the commentary itself were not alleged to be false and therefore could not be the basis for a defamation action (*23 Cal. App. 4th 676, 694-695)* .

The court noted that the plaintiff's cause of action for intentional interference for prospective economic advantage was based on the same publication as the libel cause of action (*23 Cal. App. 4th 676, 695)* . Relying on *Blatty*, the court stated that because plaintiff's intentional interference claim has as its gravamen the alleged injurious falsehood of a statement, *First Amendment* doctrines apply. The court observed that it is important to an informed consumer public that those expert in analyzing products, and the advertising claims made in behalf of those products, publish their analyses and opinions. The court held that unless those analyses or opinions are defamatory, the fact that they may be critical of a product or an advertisement and thus harm the producer economically cannot be the basis of a cause of action for intentional infliction of economic injury. Since the court had concluded that plaintiff's libel cause of action failed to satisfy *First Amendment* standards, the demurrer to the intentional interference cause of action should also have been sustained (*23 Cal. App. 4th 676, 696)* .

[b] Statement Must Be False and Defamatory

Morningstar, Inc. v. Superior Court *(1994) 23 Cal. App. 4th 676, 29 Cal. Rptr. 2d 547* , is discussed in *§ 122.48[3][a]*.

[4] Additional Authorities

[a] Statement Must Be False and Defamatory

In *Savage v. Pacific Gas & Elec. Co. (1993) 21 Cal. App. 4th 434, 26 Cal. Rptr. 2d 305* , plaintiff had sued defendant utility company for libel, slander, and intentional interference with contract and prospective economic advantage based in part on statements made by defendant's officials to plaintiff's employer, a newspaper that reported on the energy

industry, which ultimately caused the employer to terminate plaintiff's employment. The statements, which pertained to plaintiff's previous volunteer work for an environmental organization, implied that plaintiff had a conflict of interest that would compromise her objectivity as a reporter and consisted of records of plaintiff's previous appearance in a Public Utilities Commission proceeding on behalf of the organization and an account of a conversation concerning plaintiff allegedly held between one of defendant's officials and a representative of the organization, the truth of which was disputed by plaintiff. In reversing a summary judgment for defendant on the causes of action for intentional interference with economic relations, the court of appeal observed that in connection with such causes of action, the courts have recognized a rule directly analogous to the defense of truth in causes of action for defamation: a person cannot incur liability for interfering with contractual or economic relations by giving truthful information to a third party (*21 Cal. App. 4th 434, 449-450)* . In the case before it, the court concluded that there was a triable issue of fact concerning the interference causes of action. While defendant could not be liable for conveying to plaintiff's employer truthful copies of government documents or an accurate account of its official's conversation with the environmental organization's representative, defendant could be held liable on a finding that it had defamed plaintiff by conveying a false account of that conversation (*21 Cal. App. 4th 434, 450)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechGeneral OverviewTortsBusiness TortsCommercial InterferenceGeneral OverviewTortsBusiness TortsCommercial InterferenceBusiness RelationshipsDefensesTortsIntentional TortsDefamationDefensesGeneral Overview

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 122 INTERFERENCE
PART II. FORMS
A. Intentional Interference With Economic Relationship

12-122 California Points & Authorities § 122.49

§ 122.49 Supporting Contention That Interference Is Justified or Privileged--Interference Is Protected by Statute or Constitution--Petitioning Government for Redress of Grievance (*Noerr-Pennington* Doctrine)

[1] FORM

[*The following may be used in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S ACTION FOR INTERFERENCE WITH ECONOMIC RELATIONS IS BARRED BY THE *NOERR-PENNINGTON* DOCTRINE BECAUSE THE ALLEGED ACTS OF INTERFERENCE CONSIST OF _____ [*specify nature of privileged activity, e.g.,* DEFENDANT'S EFFORTS TO PERSUADE THE LEGISLATURE TO ENACT LEGISLATION THAT DEFENDANT SUPPORTS], AND SUCH CONDUCT IS PROTECTED BY THE *FIRST AMENDMENT* RIGHT TO PETITION THE GOVERNMENT FOR REDRESS OF GRIEVANCES.

A. Conduct Protected by *Noerr-Pennington* Doctrine. The *Noerr-Pennington* doctrine provides that there is no antitrust liability under the Sherman Act for efforts to influence government that are protected by the *First Amendment* right to petition for redress of grievances, even when the motive behind such actions is anticompetitive (*Professional Real Estate Investors v. Columbia Pictures Indus. (1993) 508 U.S. 49, 56-58, 113 S. Ct. 1920, 123 L. Ed. 2d 611* ; *Pacific Gas & Elec. Co. v. Bear Stearns & Co. (1990) 50 Cal. 3d 1118, 1133, 270 Cal. Rptr. 1, 791 P.2d 587* ; *Hi-Top Steel Corp. v. Lehrer (1994) 24 Cal. App. 4th 570, 574, 29 Cal. Rptr. 2d 646*).

B. Application of *Noerr-Pennington* Doctrine to Tort Actions for Interference. Although the *Noerr-Pennington* doctrine originated in the context of federal antitrust litigation, courts have also applied the doctrine to actions for intentional interference with economic relations under California law. Thus, the scope of interference claims is limited by the constitutional right to petition for redress of grievances (*Pacific Gas & Elec. Co. v. Bear Stearns & Co. (1990) 50 Cal. 3d 1118, 1133-1137, 270 Cal. Rptr. 1, 791 P.2d 587* ; *Hi-Top Steel Corp. v. Lehrer (1994) 24 Cal. App. 4th 570, 577-578, 29 Cal. Rptr. 2d 646* ; *see Matossian v. Fahmie (1980) 101 Cal. App. 3d 128, 138-139, 161 Cal. Rptr. 532* ; *Sierra Club v. Butz (N.D. Cal. 1972) 349 F. Supp. 934, 937-938)* .

C. Types of Proceedings to Which Doctrine Applies. The *Noerr-Pennington* doctrine applies to judicial and administrative, as well as legislative, proceedings (*California Transp. v. Trucking Unlimited (1972) 404 U.S. 508, 510-511, 92 S. Ct. 609, 30 L. Ed. 2d 642* ; *see* *Professional Real Estate Investors v. Columbia Pictures Indus. (1993) 508 U.S. 49, 56-58, 113 S. Ct. 1920, 123 L. Ed. 2d 611*).

[*Optional*] **D. Litigation Protected by Doctrine Unless Objectively Baseless.** Litigation will not be deemed a "sham," so as to lose its protection under the *Noerr-Pennington* doctrine, unless the lawsuit is so objectively baseless that no reasonable litigant could realistically expect success on the merits. If an objective litigant could reasonably conclude that the suit is reasonably calculated to elicit a favorable outcome, then the suit is immunized under the *Noerr-Pennington* doctrine, regardless of the defendant's subjective intent in bringing the suit (*Professional Real Estate Investors v. Columbia Pictures Indus. (1993) 508 U.S. 49, 56-58, 60-61, 113 S. Ct. 1920, 123 L. Ed. 2d 611*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of defendant's contention that its alleged interference with plaintiff's economic relationship was protected by the constitutional right to petition the government for redress of grievances and that liability is therefore barred by the *Noerr-Pennington* doctrine.

Optional Paragraph D should be used when the alleged interference consisted of litigation that the defendant contends was a "sham" and therefore not protected by the *Noerr-Pennington* doctrine. For points and authorities supporting application of the "sham" exception, see *§ 122.55*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, to the extent that the alleged acts of interference consist of lobbying activities, participation in administrative proceedings, or the commencement of litigation, counsel should argue that such activities are protected by the right to petition for redress of grievances and therefore cannot be the basis for a tort action for interference. Counsel may also wish to combine these points and authorities with points and authorities pertaining to the specific procedural context in which the issue arises.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities *set forth in § 122.55* may be submitted in opposition to the contention supported by the points and authorities in this form.

[c] Related Pleading and Practice Forms

For discussion and forms relating to interference with economic relations, including the application of the *Noerr-Pennington* doctrine to such actions, see California Forms of Pleading and Practice, *Unfair Competition*, (Matthew Bender).

[3] Discussion of Authorities

[a] Conduct Protected by Noerr-Pennington Doctrine

In ***Professional Real Estate Investors v. Columbia Pictures Indus.*** *(1993) 508 U.S. 49, 113 S. Ct. 1920, 123 L. Ed. 2d 611* , the operators of a resort hotel (PRE) had installed videodisc players in the hotel's guest rooms and assembled a library of over 200 motion pictures on videodisc. PRE rented videodiscs from its library to guests for in-room viewing. PRE had also sought to develop a market for the sale of videodisc rental systems to other hotels. A group of motion picture studios that held the copyrights to the motion pictures recorded on the videodiscs sued PRE for copyright

infringement. PRE counterclaimed against the plaintiffs, alleging antitrust violations under the Sherman Act. The parties filed cross-motions for summary judgment on the copyright claims. The district court granted summary judgment to PRE on the ground that the rental of the videodiscs did not constitute a "public performance" of the copyrighted material, and the Ninth Circuit affirmed. On remand, the plaintiffs sought summary judgment on the antitrust counterclaim, arguing that the copyright infringement action was no sham and therefore was entitled to protection under the *Noerr-Pennington* doctrine. The district court granted summary judgment, and the Ninth Circuit affirmed. PRE petitioned the United States Supreme Court for a writ of certiorari.

On certiorari, the Supreme Court affirmed. The Court observed that those who petition the government for redress are generally immune from antitrust liabililty. The Court noted that it had first recognized in *Eastern R. Presidents Conference v. Noerr Motor Freight, Inc. (1961) 365 U.S. 127, 136-137, 81 S. Ct. 523, 5 L. Ed. 2d 464* , that the Sherman Act does not prohibit persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly, reasoning that the Sherman Act does not punish political activity through which the people freely inform the government of their wishes, nor does it invade the *First Amendment* right to petition (*508 U.S. 49, 56-57)* . The Court further observed that the *Noerr* decision rejected the contention that an attempt to influence the passage and enforcement of laws might lose immunity merely because the lobbyists' sole purpose was to destroy their competitors. As restated in *United Mine Workers v. Pennington (1965) 381 U.S. 657, 657-660, 85 S. Ct. 1585, 14 L. Ed. 2d 626* , the doctrine shields from the Sherman Act a concerted effort to influence public officials, regardless of intent or purpose (*508 U.S. 49, 58)* . The Court also noted that its previous decisions had extended the *Noerr-Pennington* doctrine to citizens' attempts to get redress from administrative agencies and from the courts (*508 U.S. 49, 56-57)* . The Court concluded that the plaintiffs' copyright infringement claim was not a sham and was therefore protected by the *Noerr-Pennington* doctrine from antitrust liability (*508 U.S. 49, 60-66)* .

The factual and procedural background of ***Pacific Gas & Elec. Co. v. Bear Stearns & Co.*** *(1990) 50 Cal. 3d 1118, 270 Cal. Rptr. 1, 791 P.2d 587* , is discussed in *§ 122.41[3][a]*. The California Supreme Court held that a plaintiff seeking to state a cause of action for intentional interference with contract or prospective economic advantage because the defendant induced another to undertake litigation must allege that the litigation was brought without probable cause and was terminated in the plaintiff's favor (*50 Cal. 3d 1118, 1137)* . The Court based its holding in part on the concern that to permit plaintiff to bring such an action without showing lack of probable cause and favorable termination would impair free access to the courts. The Court noted that this concern has led other courts to establish that the scope of interference torts is limited by the constitutional right to petition for redress of grievances. The Court observed that, beginning with *Sierra Club v. Butz (N.D. Cal. 1972) 349 F. Supp. 934* [*see § 122.49[3][b]*], courts have applied the *Noerr-Pennington* doctrine to shield good-faith litigants from tort liability for bringing a lawsuit. The Court explained that the *Noerr-Pennington* doctrine relies on the constitutional right to petition for redress of grievances to establish that there is no antitrust liability for petitioning any branch of government, even if the motive is anticompetitive (*50 Cal. 3d 1118, 1133)* .

Plaintiffs in ***Hi-Top Steel Corp. v. Lehrer*** *(1994) 24 Cal. App. 4th 570, 29 Cal. Rptr. 2d 646* , sued defendants for intentional interference with economic relations and related torts, based on false and groundless statements allegedly made by the defendants to the public and to public officials for the purpose of interfering with plaintiffs' plans to build a metal shredding plant that would compete with defendants' planned facility. The defendants' alleged plan was to delay plaintiffs from entering into the automobile body shredding business and to disrupt plaintiffs' business by saddling them with onerous regulatory and administrative costs and burdens. The trial court granted judgment on the pleadings on the ground that the plaintiffs' claims were barred by the *Noerr-Pennington* doctrine.

On appeal, the court of appeal observed that the *Noerr-Pennington* doctrine provides that there is no antitrust liability under the Sherman Act for efforts to influence the government that are protected by the *First Amendment* right to petition for redress of grievances, even if the motive behind the efforts is anticompetitive (*24 Cal. App. 4th 570, 574)* . After tracing the development of the doctrine in decisions by the United States Supreme Court, the court of appeal

observed that while the doctrine was formulated in the context of antitrust cases, it has been applied or discussed in cases involving other types of civil liability, including liability for interference with contractual relations or prospective economic advantage (*24 Cal. App. 4th 570, 577-578)* . The court noted that the principle of law that bars litigation from injuries received as a consequence of *First Amendment* petitioning activity should be applied regardless of the underlying cause of action asserted by the plaintiffs; to hold otherwise would effectively chill the exercise of defendants' *First Amendment* rights (*24 Cal. App. 4th 570, 578)* . However, the court concluded that plaintiffs had stated a cause of action under the "sham" exception to the *Noerr-Pennington* doctrine and therefore reversed the judgment for defendants (*24 Cal. App. 4th 570, 578-583)* .

[b] Application of Noerr-Pennington Doctrine to Tort Actions for Interference

Pacific Gas & Elec. Co. v. Bear Stearns & Co. *(1990) 50 Cal. 3d 1118, 270 Cal. Rptr. 1, 791 P.2d 587* , is discussed in *§ 122.49[3][a]*.

Hi-Top Steel Corp. v. Lehrer *(1994) 24 Cal. App. 4th 570, 29 Cal. Rptr. 2d 646* , is discussed in *§ 122.49[3][a]*.

In ***Matossian v. Fahmie*** *(1980) 101 Cal. App. 3d 128, 161 Cal. Rptr. 532* , plaintiffs, who held a license to sell alcoholic beverages, sought to transfer their license to a new location. Defendants, who also held alcoholic beverage licenses for competing establishments, unsuccessfully protested the plaintiffs' license transfer to the Department of Alcoholic Beverage Control. After the protests were denied and the transfer was granted, plaintiffs sued defendants for "tortious interference with a business," malicious prosecution, antitrust violations, and other causes of action, alleging that defendants had filed meritless protests for the purpose of destroying competition. After sustaining defendant's demurrer on the tort claims and entering summary judgment on the antitrust claim, the trial court dismissed the action.

The court of appeal affirmed. The court observed that the right of petition to government agencies has a paramount place in our democratic system and is included in both the state and federal constitutions (*101 Cal. App. 3d 128, 135)* . The court noted that the right is not confined to religious or political matters, but also extends to persons who petition the government for resolution of their business and economic interests vis-a-vis their competitors (*101 Cal. App. 3d 128, 136)* . The court further noted that the right of the people to petition government does not depend on motivation or purpose. The defendants' motive, even if malicious, is unimportant if legal ground existed on which to predicate their appeal and protest (*101 Cal. App. 3d 128, 136-137)* . Nor does the right of petition or protest to a governmental agency depend on a successful outcome. The court concluded based on these considerations that when, as here, a statute expressly invites or allows interested persons to protest, or give their view or opinions concerning, proposed or requested governmental administrative action, such persons singly or in combination have a lawful right to do so. In such cases, the law will not permit judicial inquiry into the person' purpose or motivation. Furthermore, such a right may not be defeated, abridged, or "chilled" by the threat or fear of civil action for exercising it (*101 Cal. App. 3d 128, 137)* . The court therefore held that the trial court did not err in sustaining defendants' demurrer to the causes of action for malicious prosecution and tortious interference with a business. With respect to the state antitrust claim, the court regarded *Eastern R. Presidents Conference v. Noerr Motor Freight, Inc. (1961) 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464* , as dispositive and noted that under *Noerr,* joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition (*101 Cal. App. 3d 128, 138-139)* . The court therefore concluded that the trial court properly entered the order granting summary judgment as to the antitrust count (*101 Cal. App. 3d 128, 139)* .

In ***Sierra Club v. Butz*** *(N.D. Cal. 1972) 349 F. Supp. 934* , the plaintiffs, an environmental group and others, sought to enjoin a lumber company from logging in an area under consideration for wilderness area status. The defendant company brought a counterclaim against plaintiffs for intentional interference with "advantageous relationship," alleging that by their complaint and by other actions, the plaintiffs sought to induce the United States government to breach its agreement with the company, under which the company was permitted to log in the proposed wilderness area. Plaintiffs moved to dismiss the counterclaim for failure to state a claim on which relief can be granted, and the district

court granted the motion.

The court noted that the basis of plaintiffs' defense against the counterclaim was the *First Amendment* provision guaranteeing the right of the people to petition the government for redress of grievances, which is a basic freedom in a participatory government, closely related to freedom of speech and press. The court noted that, prior to that time, the United States Supreme Court had never had occasion to decide what effect the right to petition the government had on common-law tort actions that might be brought against those who damage the interests of others in the exercise of that right. However, the court opined that the Supreme Court had outlined applicable principles in its decisions dealing with the relationship between the *First Amendment* and defamation and in its decisions interpreting the Sherman Act as inapplicable to those who conspire to bring about governmental action (*349 F. Supp. 934, 936)* . After discussing the Supreme Court's decision in *Eastern R. Presidents Conference v. Noerr Motor Freight, Inc. (1961) 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464* , the court concluded that when a suit based on interference with advantageous relationship is brought against a party whose "interference" consisted of petitioning a governmental body to alter its previous policy, a privilege is created by the guarantee of the *First Amendment*. The court held that, for the reasons given by the Supreme Court in *Noerr*, all persons, regardless of motive, are guaranteed by the *First Amendment* the right to seek to influence the government or its officials to adopt a new policy and that they cannot be required to compensate another for loss occasioned by a change in policy should they succeed (*349 F. Supp. 934, 938)* . The court further held that the "malice standard" applicable to defamation actions (imposing liability if the speaker knew his or her statements were false or acted with reckless disregard for the truth) is not the proper standard for imposing liability on persons who seek redress of grievance. Instead, the court held, the applicable standard is that set forth in *Noerr*--namely, that liability can be imposed for activities ostensibly consisting of petitioning the government for redress of grievances only if the petitioning is a "sham" and the real purpose is not to obtain governmental action, but to otherwise injure the plaintiff (*349 F. Supp. 934, 938-939)* . Applying these standards to the defendant's counterclaim, the court concluded that it must be dismissed, noting that it alleged nothing more than that the plaintiffs intentionally exercised their right to petition the government (*349 F. Supp. 934, 939)* .

[c] Types of Proceedings to Which Doctrine Applies

In ***California Transp. v. Trucking Unlimited*** *(1972) 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642* , the plaintiffs, who were truck carriers, sued other truck carriers for federal antitrust violations consisting of an alleged conspiracy to monopolize trade in commerce in the transportation of goods. Plaintiffs alleged concerted action by the defendants to institute state and federal administrative and judicial proceedings to resist and defeat applications by the plaintiffs to acquire operating rights or to transfer or register those rights. The district court dismissed the complaint for failure to state a cause of action, but the Ninth Circuit Court of Appeals reversed.

On certiorari, the United States Supreme Court noted that this case was "akin" to *Eastern R. Presidents Conference v. Noerr Motor Freight, Inc. (1961) 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464* , in which a group of trucking companies had sued a group of railroads to restrain them from an alleged conspiracy to monopolize the long-distance freight business (*404 U.S. 508, 509-510)* . The Court noted that in *Noerr* it had held that the no cause of action was alleged insofar as it was predicated on mere attempts to influence the legislative branch for the passage of laws or the executive branch for their enforcement. The Court noted that the holding in *Noerr* was based on the lack of a perceived intent by Congress to apply the Sherman Act to "political activity" or to restrain activity protected by the constitutional right to petition for redress of grievances. The Court held that the same philosophy governs the approach of citizens or groups of citizens to administrative agencies and to the courts. The Court reasoned that the right to petition extends to all departments of the government and that the right of access to the courts is but one aspect of the right of petition (*404 U.S. 508, 510)* . The Court concluded that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors (*404 U.S. 508, 510-511)* . The Court concluded, however, that the complaint in this action involved specific allegations that potentially came within the "sham" exception to the *Noerr*

rule, as adapted to the adjudicatory process. Therefore, the Court affirmed the Court of Appeals decision and remanded the case for trial (*404 U.S. 508, 511-516)* .

Professional Real Estate Investors v. Columbia Pictures Indus. *(1993) 508 U.S. 49, 113 S. Ct. 1920, 123 L. Ed. 2d 611* , is discussed in *§ 122.49[3][a]*.

[d] Litigation Protected by Doctrine Unless Objectively Baseless

The factual and procedural background of ***Professional Real Estate Investors v. Columbia Pictures Indus.*** *(1993) 508 U.S. 49, 113 S. Ct. 1920, 123 L. Ed. 2d 611* , is discussed in *§ 122.49[3][a]*. The Court noted that, under its previous decisions, antitrust immunity under the *Noerr-Pennington* doctrine was withheld from "sham" activities, but that those decisions had not addressed the question of whether litigation may be a sham merely because a subjective expectation of success does not motivate the litigant. The Court answered this question in the negative, holding that an objectively reasonable effort to litigate cannot be a sham, regardless of subjective intent (*508 U.S. 49, 56)* . The Court noted its original formulation of the antitrust petitioning immunity in *Noerr* required that unprotected activity lack objective reasonableness; that is, *Noerr* rejected the contention that an attempt to influence the passage and enforcement of laws might lose immunity merely because the lobbyists' sole purpose was to destroy competitors (*508 U.S. 49, 57)* . The Court interpreted its subsequent decisions as also assuming that the sham exception contains an indispensable objective component (*508 U.S. 49, 57-58)* .

The Court then set forth a two-part definition of "sham" litigation: First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, then the suit is immunized under *Noerr*, and an antitrust claim premised on the sham exception must fail. Only if the challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of the definition, the court must focus on whether the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor through the use of the governmental process (as opposed to the outcome of that process) as an anticompetitive weapon (*508 U.S. 49, 60-61)* . The Court further observed that the existence of probable cause to institute legal proceedings precludes a finding that an antitrust defendant has engaged in sham litigation, since a probable cause determination demonstrates that the antitrust defendant could realistically expect success on the merits of the challenged lawsuit (*508 U.S. 49, 62)* . Applying these tests to the underlying copyright infringement claim, the Court concluded that any reasonable copyright owner in the plaintiff's position could have believed that it had some chance of winning an infringement suit against PRE. Even though its copyright claim did not survive summary judgment, the action was arguably warranted by existing law or at the very least based on an objectively good faith argument for the extension, modification, or reversal of existing law. Accordingly, the Court held that PRE failed to establish the objective prong of the sham exception (*508 U.S. 49, 65)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawExemptions & ImmunitiesNoerr-Pennington DoctrineGeneral OverviewTortsBusiness TortsCommercial InterferenceGeneral OverviewTortsBusiness TortsCommercial InterferenceBusiness RelationshipsDefenses

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CHAPTER 122 INTERFERENCE
PART II. FORMS
A. Intentional Interference With Economic Relationship

12-122 California Points & Authorities § 122.50

§ 122.50 Supporting Contention That Interference Is Justified or Privileged--Bona Fide Claim

[1] FORM

[*The following may be used in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT'S INTERFERENCE WITH PLAINTIFF'S ECONOMIC RELATIONSHIP WITH _____ [*name*] IS PRIVILEGED BECAUSE, AT THE TIME OF THE INTERFERENCE, DEFENDANT BELIEVED THAT HIS/HER LEGALLY PROTECTED INTEREST WOULD HAVE BEEN IMPAIRED OR DESTROYED BY THE PERFORMANCE OF THE CONTRACT.

Interference Is Privileged as Attempt to Protect Bona Fide Claim. Conduct by a defendant that interferes with the performance of a contractual agreement may be privileged when the defendant has acted in good faith to protect his or her own property interest (*Bridges v. Cal-Pac. Leasing Co. (1971) 16 Cal. App. 3d 118, 131-132, 93 Cal. Rptr. 796*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that defendant's interference with plaintiff's economic relations was justified or privileged because defendant acted in good faith to protect his or her own property interest.

Justification or privilege is an affirmative defense that usually must be raised by way of allegation in the answer. It may be considered as a ground for demurrer only when it is apparent on the face of the complaint [*see Lowell v. Mother's Cake & Cookie Co. (1978) 79 Cal. App. 3d 13, 18-19, 144 Cal. Rptr. 664]* .

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel should thus show the nature of defendant's property interest and demonstrate how the interfered-with contractual agreement threatened that interest. In addition, counsel should allege facts showing that

defendant's interference was in good faith.

[b] Related Pleading and Practice Forms

For discussion and forms relating to interference with economic relations, see California Forms of Pleading and Practice, *Unfair Competition* (Matthew Bender).

[3] Discussion of Authorities

[a] Interference Is Privileged as Attempt to Protect Bona Fide Claim

In ***Bridges v. Cal-Pac. Leasing Co.*** *(1971) 16 Cal. App. 3d 118, 93 Cal. Rptr. 796* , defendant landlord allegedly induced its tenants, operators of a restaurant, to breach their contract with cross-complainant, a lessor of restaurant equipment. Several months before these tenants had begun to occupy the restaurant, the landlord had evicted other tenants for defaulting on rental payments. Under the prior tenants' lease, all improvements and fixtures were to belong to the landlord on termination of the lease for breach of any of the covenants contained therein. These prior tenants had made payments to cross-complainant for the rental of restaurant equipment, and had installed the equipment on the restaurant premises. After the new tenants moved in, they also made payments to cross-complainant to continue the rental of this equipment. When the landlord learned of the new tenant's payments, it sent an employee to inform the tenants that the landlord owned the equipment (pursuant to the lease provisions entered into by the preceding tenants), and that no further equipment rental payments should be made.

The trial court found that the advice was given on good faith belief, based on opinion of legal counsel, that the landlord owned the equipment and that the equipment lessor had no right to further payments. Also, the trial court found that the landlord gave this advice for the purpose of protecting its interest in the real property lease and to avoid a default thereon by the tenants. The trial court denied the cross-complainant any recovery on the interference action asserted in its cross complaint against the landlord. The cross-complainant appealed.

The court of appeal affirmed the judgment as it pertained to the cross-complainant. The court found that the landlord made a sufficient showing of justification to justify the trial court's determinations. Citing *Show Management v. Hearst Publishing Co. (1961) 196 Cal. App. 2d 606* , the court noted that if a defendant does not act in a bona fide attempt to protect his or her own interest or the interest of others involved in the situation, he or she forfeits the immunity of the privilege (*16 Cal. App. 3d 118)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewTortsBusiness TortsCommercial InterferenceGeneral OverviewTortsBusiness TortsCommercial InterferenceBusiness RelationshipsGeneral OverviewTortsBusiness TortsCommercial InterferenceBusiness RelationshipsDefenses

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12-122 California Points & Authorities § 122.51

§ 122.51 Opposing Contention That Interference Is Privileged--Privilege for Fair Competition--Privilege Not Applicable to Competition by Unlawful or Illegitimate Means

[1] FORM

[*The following may be used in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT'S ACTS OF INTERFERENCE WITH PLAINTIFF'S ECONOMIC RELATIONS ARE NOT PROTECTED BY THE PRIVILEGE FOR FAIR COMPETITION BECAUSE DEFENDANT USED _____[UNLAWFUL *and/or* ILLEGITIMATE] MEANS TO INTERFERE WITH PLAINTIFF'S ECONOMIC RELATIONS.

Privilege for Fair Competition Is Inapplicable if Defendant Uses Unlawful or Illegitimate Means. The privilege for fair competition is defeated if the defendant engages in unlawful or illegitimate means of competition (*Saunders v. Superior Court (1994) 27 Cal. App. 4th 832, 843, 33 Cal. Rptr. 2d 438*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to defendant's contention that its alleged interference with plaintiff's economic relationship was justified by the privilege for fair competition. The ground of opposition is that the fair competition privilege does not apply when the defendant uses unlawful or illegitimate means of competition.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the specific conduct of the defendant that interfered with plaintiff's economic relations and show how that conduct was unlawful or otherwise illegitimate. Counsel should also cite any specific statutes, case law, or other authority supporting its contention that the defendant's conduct was unlawful.

Counsel may also wish to combine these points and authorities with points and authorities pertaining to the specific

procedural context in which the issue arises.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 122.42*.

[b] Related Pleading and Practice Forms

For discussion and forms relating to interference with economic relations, including the privilege for fair competition, see California Forms of Pleading and Practice, *Unfair Competition* (Matthew Bender).

[3] Discussion of Authorities

[a] Privilege for Fair Competition Is Inapplicable if Defendant Uses Unlawful or Illegitimate Means

In ***Saunders v. Superior Court*** *(1994) 27 Cal. App. 4th 832, 33 Cal. Rptr. 2d 438* , plaintiffs, who were certified shorthand reporters, brought suit against another group of certified shorthand reporters and two insurance companies for unfair business practices and for interference with contract and with prospective economic advantage. The suit arose out of the practice of "direct contracting," under which the defendant group of reporters entered into a contract with the insurance companies for the exclusive right to report depositions taken by the attorneys who represented the insurance companies. The trial court sustained demurrers to all causes of action, but the court of appeal issued a writ of mandate compelling the trial court to overrule the demurrers.

The appellate court first ruled that plaintiffs had stated a cause of action for unfair competition under *Bus. & Prof. Code § 17200* because the court could not say, as a matter of law, that direct contracting, as practiced by the defendants, did not violate professional standards of impartiality, as mandated by *Bus. & Prof. Code § 8025*. Whether the practice did in fact violate those professional standards could not be determined at the demurrer stage, but would require expert testimony at trial (*27 Cal. App. 4th 832, 840)* . Regarding the cause of action for intentional interference with prospective economic advantage, the court found no merit in the defendants' demurrer based on the privilege of competition. The court noted that the mere fact that the defendant reporters are competitors of plaintiffs did not give rise to an absolute privilege on the part of the plaintiffs to interfere with plaintiffs' prospective economic advantage. If it did, the court observed, no cause of action could ever be stated by one competitor against another, but this is clearly not the law. Instead, the court explained, justification based on privilege is an affirmative defense. Furthermore, the competition privilege is defeated if the defendant engages in unlawful or illegitimate means. In this case, the court observed, plaintiffs pled that the reporter defendants were interfering with plaintiffs' economic advantage by unlawful and illegitimate means (*27 Cal. App. 4th 832, 843)* . The court noted that while defendants may be able to show at trial that their interference with plaintiffs' prospective business advantage is justified, this was not a ground for sustaining a demurrer. Whether or not the interference was justified required a balancing of the importance, social and private, of the objective advanced by the interference against the importance of the interest interfered with, considering all the circumstances of the case, and that this could not be determined at the demurrer stage (*27 Cal. App. 4th 832, 844-845)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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CHAPTER 122 INTERFERENCE
PART II. FORMS
A. Intentional Interference With Economic Relationship

12-122 California Points & Authorities § 122.52

§ 122.52 Opposing Contention That Interference Is Privileged--Privilege Based on Confidential Relationship--Privilege Not Applicable When Purpose of Interference Is Solely to Further Personal Economic Advantage

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT WAS NOT PRIVILEGED TO INTERFERE WITH PLAINTIFF'S ECONOMIC RELATIONSHIP WITH _____ [*name of third party*], BECAUSE, NOTWITHSTANDING DEFENDANT'S CONFIDENTIAL RELATIONSHIP WITH _____ [*name of third party*], DEFENDANT'S SOLE PURPOSE IN INTERFERING WITH THE RELATIONSHIP WAS TO ENJOY PERSONAL ECONOMIC BENEFIT.

Privilege Based on Confidential Relationship Does Not Justify Interference for Purpose of Personal Economic Advantage. The privilege of a manager or agent to interfere with an economic relationship between his or her principal and a third party, arising from his or her confidential relationship with the principal, does not apply when the manager or agent acts solely with the purpose of obtaining personal advantage, as opposed to when he or she acts solely to protect the principal's interests in accordance with the confidential relationship (*Olivet v. Frischling (1980) 104 Cal. App. 3d 831, 840-841, 164 Cal. Rptr. 87*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to defendant's contention that he or she was privileged to interfere with plaintiff's economic relationship with a third party, because of his or her confidential relationship with the third party. The ground for opposition is that the privilege based on a confidential relationship does not apply when the defendant does not act in accordance with that relationship, to protect the interest of the third party, but acts solely for the purpose of obtaining personal benefit.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should state facts indicating that defendant acted solely for the purpose of obtaining personal advantage.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 122.43*.

[b] Related Pleading and Pleading and Practice Forms

For discussion and forms for use in actions involving interference in general, see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender). For discussion and forms for use in actions involving employment relationships, see California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes* (Matthew Bender).

[c] Related Points and Authorities

For discussion and forms for use in actions involving employment relationships, see Ch. 100A, *Employer and Employee: Wrongful Termination and Discipline* .

[3] Discussion of Authorities

[a] Privilege Based on Confidential Relationship Does Not Justify Interference for Purpose of Personal Economic Advantage

The facts and procedural background of ***Olivet v. Frischling*** *(1980) 104 Cal. App. 3d 831, 164 Cal. Rptr. 87* , are discussed in *§ 122.26[3][a]*. The court of appeal held that plaintiffs stated a cause of action against defendants for conspiracy to interfere with an economic relationship.

Defendants asserted that even if plaintiffs' cause of action for interference with a business relationship were sufficiently pleaded, it would still be defective because it revealed on its face a complete defense of justification. Defendants based their argument on the fact that the named defendants constituted the hospital's board of directors, and that by virtue of this confidential relationship, the board members were absolutely privileged to induce the hospital to break off its relationship with plaintiffs' company at any time. This argument, the court of appeal found, severely misinterpreted the purpose and scope of the so-called "manager's privilege" (*104 Cal. App. 3d 831, 840)* . The court stated that the privilege to induce an otherwise apparently tortious breach of contract is extended by law to further certain social interests deemed of sufficient importance to merit protection from liability. Thus, a manager or agent may, with impersonal or disinterested motive, properly endeavor to protect the interests of his or her principal by counseling the breach of a contract with a third party which he or she reasonably believes to be harmful to his or her employer's best interests. The court noted that, on the other hand, a person is not justified in inducing a breach of contract simply because he or she is in competition with one of the parties to the contract and seeks to further his or her own economic advantage at the expense of the other. The court concluded that it was reasonably inferable from plaintiffs' allegations that defendants were acting solely for the purpose of obtaining for themselves the advantages formerly enjoyed by plaintiffs' company, and that they were therefore acting as naked competitors rather than in accordance with their confidential relationship. The court found this sufficient to refute defendants' contention that their acts were privileged (*104 Cal. App. 3d 831, 841)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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12-122 California Points & Authorities § 122.53

§ 122.53 Opposing Contention That Interference Is Privileged--Privilege Based on Financial Interest--Privilege Not Applicable When Interference Is Malicious or When Requisite Interest in Third Party's Business Is Absent

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT WAS NOT PRIVILEGED TO INTERFERE WITH PLAINTIFF'S ECONOMIC RELATIONSHIP WITH _____ [*name*] ON THE BASIS OF HIS/HER FINANCIAL INTEREST IN _____ [*name*], BECAUSE _____ [DEFENDANT HAS NOT SUFFICIENTLY ESTABLISHED THE REQUISITE FINANCIAL INTEREST IN _____ [*name*] *or* DEFENDANT'S INTERFERENCE WAS MALICIOUS OR OTHERWISE MOTIVATED BY AN IMPROPER MOTIVE].

[*EITHER, if opposition based on lack of financial interest*]

Lack of Proprietary or Creditor's Interest. The privilege protecting interference with the economic relations of a business in which the interferer has a financial interest does not apply when the defendant lacks a proprietary or creditor's financial interest in the business (*Culcal Stylco, Inc. v. Vornado, Inc. (1972) 26 Cal. App. 3d 879, 882, 103 Cal. Rptr. 419*).

[*AND/OR, if opposition based on improper motive*]

Interference Based on Improper Motive. The privilege protecting interference with the economic relations of a business in which the interferer has a financial interest does not apply when the interference is made maliciously or for an improper purpose (*Culcal Stylco, Inc. v. Vornado, Inc. (1972) 26 Cal. App. 3d 879, 883, 103 Cal. Rptr. 419*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to defendant's contention that he or she was privileged to interfere with plaintiff's economic relationship with a third party, because of his or her financial interest in the third party. The grounds for opposition are that the privilege based on a financial relationship does not apply when the defendant lacks a proprietary or creditor's financial interest in the third party, or interferes without justification or with malice.

Counsel should insert argument in this form, showing the relationship between the facts of case and the points of law stated. For example, counsel should state facts indicating that defendant acted solely out of malice towards the plaintiff.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 122.44*.

[b] Related Pleading and Pleading and Practice Forms

For discussion and forms for use in actions involving interference in general, see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender).

[3] Discussion of Authorities

[a] Lack of Proprietary or Creditor's Interest

In ***Culcal Stylco, Inc. v. Vornado, Inc.*** *(1972) 26 Cal. App. 3d 879, 103 Cal. Rptr. 419* , an action for intentional interference with economic relationship, plaintiffs had entered into a contract with Food Giant under which Food Giant granted each plaintiff a license to operate a retail shoe department in a portion of a Unimart store. Plaintiffs alleged that three corporations affiliated with Food Giant, Unimart, Del Amo, and Vornado, tortiously induced Food Giant to terminate the license agreements. Unimart and Del Amo were alleged to be subsidiaries of either Food Giant or Vornado; Vornado was alleged to be the parent corporation of Food Giant. After sustaining defendants' general demurrer, the trial court dismissed plaintiffs' action. Plaintiffs appealed.

The court of appeal reversed. The court rejected defendants' contention that the interference was justified due to defendants' membership in the same business family as Food Giant. The court quoted from Restatement of Torts § 769 (as proposed for revision in tentative draft No. 14 (1969)), stating that one who has a financial interest in the business of another is privileged purposely to cause him or her not to perform a contract with a third person if the actor does not employ improper means and acts to protect his or her interest from being prejudiced by the contract. The court also quoted from comment (a) of Restatement of Torts § 769, which states that the financial interest in another's business requisite for the privilege is an interest in the nature of an investment. The comment also stated that a part owner of the business such as a partner or stockholder has the requisite interest for the privilege, and that a bondholder or other creditor may also have such interest. The court found that neither Unimart nor Del Amo, as subsidiaries of Food Giant, had the requisite proprietary or creditor's financial interest in Food Giant to render their alleged interference with Food Giant's license agreements with plaintiffs privileged as a matter of law. The court noted that a subsidiary probably possesses an economic interest in the success of its parent, particularly in the parent's operation of the subsidiary as a division, but an interest of this character could not constitute a justification for intentional interference with contractual relations under the Section 769 privilege (*26 Cal. App. 3d 879, 882)* .

[b] Interference Based on Improper Motive

The facts and procedural background of ***Culcal Stylco, Inc. v. Vornado, Inc.*** *(1972) 26 Cal. App. 3d 879, 103 Cal. Rptr. 419* , are discussed in *§ 122.53[3][a]*. The trial court sustained a demurrer to an interference complaint and dismissed the action on the basis that the complaint showed on its face that defendants' interference was privileged due

to their business and corporate relationships with a third party, Food Giant.

The court of appeal found that Vornado, as the parent corporation of Food Giant, would ordinarily come within the privilege based on Restatement of Torts § 769. The court, however, reversed the dismissal as to Vornado. The court cited *Tye v. Finkelstein (1958) 160 F. Supp. 666, 668* , a Massachusetts federal district court case, for the proposition that the privilege expressed in Restatement of Torts § 769 is at most a qualified one, turning on defendant's predominant purpose for interfering. The court found that plaintiffs' allegations that defendants acted "without justification," and "willfully, wantonly, and maliciously," suggested an absence of privilege and warranted reversal of the dismissal as to *Vornado* (*26 Cal. App. 3d 879, 882-883)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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12-122 California Points & Authorities § 122.54

§ 122.54 Opposing Contention That Interference Is Privileged--Publication or Broadcast During Legislative, Judicial, or Other Official Proceeding [Civ. Code § 47(b)]--Privilege Not Applicable to Publication Unrelated to Judicial Proceeding Contemplated in Good Faith

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT'S _____ [PUBLICATION *or* BROADCAST] WAS NOT PRIVILEGED UNDER *CIVIL CODE SECTION 47(b)*, BECAUSE IT WAS NOT RELATED TO A POTENTIAL JUDICIAL ACTION CONTEMPLATED FOR LEGITIMATE PURPOSES.

Communication Not Protected When Unrelated to Potential Action Contemplated in Good Faith. A communication not related to a potential judicial action contemplated for legitimate purposes is not protected by the privilege in *Section 47(b) of the Civil Code* (*Herzog v. "A" Co., Inc. (1982) 138 Cal. App. 3d 656, 188 Cal. Rptr. 155*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to defendant's contention that his or her communication that interfered with plaintiff's economic relation with a third party was absolutely privileged under *Civ. Code § 47(b)*. The ground for opposition is that this statutory privilege does not protect a communication that is unrelated to a potential judicial proceeding contemplated for legitimate purposes.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. For example, counsel should allege facts showing that the communication at issue was not related to a potential judicial proceeding.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 122.45*.

[b] Related Pleading and Practice Forms

For discussion and forms relating to interference with economic relations, see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender). For discussion and forms relating to the application of Civ. Code § 47(b) in defamation actions, see California Forms of Pleading and Practice, Ch. 340, *Libel and Slander* (Matthew Bender).

[c] Related Points and Authorities

For points and authorities relating to the application of *Civ. Code § 47(b)* in defamation actions, see Ch. 142, *Libel and Slander (Defamation)*.

[3] Discussion of Authorities

[a] Communication Not Protected When Unrelated to Potential Action Contemplated in Good Faith

In ***Herzog v. "A" Co., Inc.*** *(1982) 138 Cal. App. 3d 656, 188 Cal. Rptr. 155* , plaintiff claimed his previous employer, defendant, tortiously barred him from employment within his career field. Prior to leaving his job with defendant, plaintiff had signed an agreement prohibiting disclosure of confidential aspects of defendant's business. After plaintiff left defendant's employ, defendant circulated a letter that threatened to sue plaintiff and any of its competitors who employed him. Plaintiff's complaint alleged that the letter was sent for the sole purpose of unlawfully depriving him of an opportunity to work within his area of professional expertise. The trial court found that the complaint stated no cause of action, apparently accepting defendant's argument that the letter was absolutely privileged under former Civ. Code § 47(2) [*now see Civ. Code § 47(b)*]. Plaintiff appealed.

The court of appeal reversed the judgment. First, the court noted that former Civ. Code § 47(2) [*now see Civ. Code § 47(b)*] provides absolute privilege for documents in judicial proceedings. Citing several California cases, the court noted that the privilege has been judicially extended to any communication related to litigation or proposed litigation other than defamation, including intentional interference with economic advantage (*138 Cal. App. 3d 656, 660)* . The court, quoting from *Larmour v. Campanale (1982) 96 Cal. App. 3d 566, 568, 158 Cal. Rptr. 143* , stated that the purpose of the privilege under former Civ. Code § 47 [*now see Civ. Code § 47(b)*] is to afford litigants the utmost freedom of access to the courts, to preserve and defend their rights and to protect attorneys during the course of their representation of their clients (*138 Cal. App. 3d 656, 661)* . The court also noted the rule, set forth in Restatement (Second) of Torts § 586, comment e, that, with respect to the privilege afforded to judicial communications, communications preliminary to a judicial proceeding are privileged only when the communication has some relation to a proceeding that is contemplated in good faith and is under serious consideration. Applying this rule, the court concluded that the communication was not privileged under former Civ. Code § 47(2) because it did not relate to a potential judicial action contemplated for legitimate purposes (*138 Cal. App. 3d 656, 661-662)* . Defendant's letter facially exceeded any legitimate purpose when it threatened plaintiff and his future employers with suit based merely on the fact of employment. Also, the confidentiality agreement to restrain or sue plaintiff was not binding on nonparties (*138 Cal. App. 3d 656, 662)* .

[4] Additional Authorities

[a] Communication Not Protected When Unrelated to Potential Action Contemplated in Good Faith

In *LiMandri v. Judkins (1997) 52 Cal. App. 4th 326, 60 Cal. Rptr. 2d 539* , the factual and procedural background of which is discussed in *§ 122.42[3][a]*, defendant contended that his conduct in securing trust company's lien rights was

privileged under *Civ. Code § 47(b)* because it related to the subsequent interpleader action. Defendant relied on *Rubin v. Green (1993) 4 Cal. 4th 1187, 17 Cal. Rptr. 2d 828* , in which the California Supreme Court reaffirmed the principle that communications with some relation to an anticipated lawsuit are within the litigation privilege. According to the court, *Rubin* was distinguishable in that the communications involved, attorney's communications to prospective plaintiffs, were directly related to the anticipated litigation and therefore absolutely privileged under *Civ. Code § 47(b)*. In contrast, defendant counsel was charged with a course of largely noncommunicative conduct unrelated to any anticipated litigation. That defendant's actions resulted in an interpleader action did not, according to the court, mean they were undertaken in anticipation of such litigation. On that basis, the court held that the allegations of plaintiff's complaint did not establish that the interpleader action was a proceeding contemplated in good faith or under serious consideration by defendant when he interfered with plaintiff's contractual relations (*52 Cal. App. 4th 326, 348)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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12-122 California Points & Authorities § 122.55

§ 122.55 Opposing Contention That Interference Is Privileged--Petitioning Government for Redress of Grievance (*Noerr-Pennington* Doctrine)--Exception for "Sham" Activity

[1] FORM

[*The following may be used in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT'S ACTS OF INTERFERENCE WITH PLAINTIFF'S ECONOMIC RELATIONS ARE NOT IMMUNIZED FROM LIABILITY UNDER THE *NOERR-PENNINGTON* DOCTRINE BECAUSE THOSE ACTIVITIES CONSTITUTED A "SHAM" AND NOT A BONA FIDE EXERCISE OF DEFENDANT'S RIGHT TO PETITION THE GOVERNMENT FOR REDRESS OF GRIEVANCES.

A. "Sham" Exception to *Noerr-Pennington* Doctrine. Efforts to influence government that are merely a "sham" are not protected by the *Noerr-Pennington* doctrine and are subject to antitrust liability (*see California Transp. v. Trucking Unlimited (1972) 404 U.S. 508, 512-513, 92 S. Ct. 609, 30 L. Ed. 2d 642* ; *Hi-Top Steel Corp. v. Lehrer (1994) 24 Cal. App. 4th 570, 575, 29 Cal. Rptr. 2d 646*). The sham exception encompasses situations in which persons use the governmental process, as opposed to the outcome of that process, as an anticompetitive weapon (*Columbia v. Omni Outdoor Adver. (1991) 499 U.S. 365, 380, 111 S. Ct. 1344, 113 L. Ed. 2d 382*).

B. "Sham" Exception Applies to Tort Actions for Interference. The sham exception applies to California tort actions for intentional interference with economic relations (*see Hi-Top Steel Corp. v. Lehrer (1994) 24 Cal. App. 4th 570, 579, 581-583, 29 Cal. Rptr. 2d 646*).

[*Optional*] **C. Test for "Sham" Litigation.** Litigation constitutes a "sham," thereby losing its immunity under the *Noerr-Pennington* doctrine, if (1) the lawsuit is objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits, and (2) the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor through the use of the governmental process (as opposed to the outcome of that process) as an anticompetitive weapon (*Professional Real Estate Investors v. Columbia Pictures Indus. (1993) 508 U.S. 49, 60-61, 113 S. Ct. 1920, 123 L. Ed. 2d 611*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to defendant's contention that its alleged interference with plaintiff's economic relationship was protected by the constitutional right to petition the government for redress of grievances and that liability is therefore barred by the *Noerr-Pennington* doctrine. These points and authorities are based on the "sham" exception to that doctrine.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, to the extent that the alleged acts of interference consist of lobbying activities, participation in administrative proceedings, or the commencement of litigation, counsel should argue that such activities are not protected by the right to petition for redress of grievances because they were an attempt to use the governmental process, as distinguished from the outcome of that process, to interfere with competition and therefore come within the "sham" exception to the *Noerr-Pennington* doctrine. In the case of alleged sham litigation, counsel should also point to any facts and legal authorities establishing that the litigation was "objectively baseless," since the "sham exception" will not apply in the absence of such a showing [*see Professional Real Estate Investors v. Columbia Pictures Indus. (1993) 508 U.S. 49, 56-58, 60-61, 113 S. Ct. 1920, 123 L. Ed. 2d 611* ; *see also § 122.55*, Optional Paragraph C].

Counsel may also wish to combine these points and authorities with points and authorities pertaining to the specific procedural context in which the issue arises.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 122.49*.

[b] Related Pleading and Practice Forms

For discussion and forms relating to interference with economic relations, including the application of the *Noerr-Pennington* doctrine to such actions, see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender).

[3] Discussion of Authorities

[a] "Sham" Exception to Noerr-Pennington Doctrine

The factual and procedural background of ***California Transp. v. Trucking Unlimited*** *(1972) 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642* , is discussed in *§ 122.49[3][c]*. The United States Supreme Court held that the *Noerr-Pennington* doctrine extended to the use by citizens of state and federal agencies and courts to advocate their causes and points of view, but noted that under *Noerr* there may be instances in which the otherwise protected activity is nothing more than a "sham" to attempt to interfere directly with the business relationships of a competitor and application of the Sherman Act would be justified. Examining plaintiffs' complaint, the Court noted that plaintiffs alleged that defendants had used their power, strategy, and resources to harass and deter plaintiffs in their use of administrative and judicial proceedings so as to deny them "free and unlimited access" to those tribunals. The alleged result was that the machinery of the agencies and courts was effectively closed to plaintiffs, thereby making defendants "the regulators of the grants of rights, transfers, and registrations" to plaintiffs and diminishing the value of plaintiffs' businesses (*404 U.S. 508, 511)* .

The Court noted that the plaintiffs alleged not merely that defendants attempted to influence public officials, but that they sought to bar their competitors from meaningful access to adjudicatory tribunals so as to usurp the decisionmaking process by a pattern of instituting proceedings and actions with or without probable cause and regardless of the merits of the cases (*404 U.S. 508, 512)* . The Court noted that a pattern of baseless, repetitive claims may emerge to lead the factfinder to conclude that the administrative and judicial processes have been abused. Once that conclusion is drawn, a

case is established that abuse of those processes produced an illegal result, i.e., effectively barring plaintiffs from access to the agencies and courts. The Court stated that actions of that kind cannot acquire immunity by seeking refuge under the umbrella of "political expression" (*404 U.S. 508, 513)* . The Court concluded that on their face, the allegations of plaintiffs' complaint came within the "sham" exception to the *Noerr* case and therefore remanded the case for trial (*404 U.S. 508, 515-516)* .

The factual and procedural background of ***Hi-Top Steel Corp. v. Lehrer*** *(1994) 24 Cal. App. 4th 570, 29 Cal. Rptr. 2d 646* , is discussed in *§ 122.49[3][a]*. The court of appeal noted that an exception to *Noerr-Pennington* doctrine applies when efforts to influence the government are merely a sham; such efforts are not protected by the doctrine and are subject to antitrust liability (*24 Cal. App. 4th 570, 575)* . The court discussed the United States Supreme Court's analysis of the sham exception, as set forth in *California Transport,*, and noted that in a later case, *Omni Outdoor Advertising,* the Supreme Court had explained that the sham exception encompasses situations in which persons use the governmental process, as opposed to the outcome of that process, as an anticompetitive weapon (*24 Cal. App. 4th 570, 577)* .

The court of appeal observed that in this case, the trial court seemed to accept the *Noerr-Pennington* doctrine, or at least the principles underlying the doctrine, and its application to causes of action for interference with contractual relations and prospective economic advantage, but had expressed concern that California courts had never actually applied the sham exception but only discussed it in dicta (*24 Cal. App. 4th 570, 578)* . The court of appeal acknowledged that the California Supreme Court had, in two previous cases, set forth the sham exception but had not directly applied it. However, the court noted, in neither case did the Supreme Court question the sham exception or suggest that it would not apply or should not be applied in California; the sham exception was simply inapplicable to those cases. The court saw no impediment to applying the sham exception in California and further ruled that it applied to efforts to influence legislation as well as to the adjudicatory process (*24 Cal. App. 4th 570, 579-580)* .

Examining the complaint in this case, the court noted that the allegations showed that defendants made false statements to the public and to public officials regarding plaintiffs' proposed automobile body shredding facility and that they knew their statements about the increased environmental impacts of plaintiffs' proposed facility were groundless, based on their own plans to install a shredder. Defendants also allegedly instituted a baseless appeal of plaintiffs' precise design plan for the facility, prosecuting it without regard to its merits. Defendants allegedly undertook these actions for their own benefit to delay plaintiffs' entrance into the automobile body shredding business and to disrupt their business by saddling them with onerous regulatory and administrative costs and burdens (*24 Cal. App. 4th 570, 582)* . The court held that these allegations showed that defendants undertook petitioning activity solely to delay or prevent plaintiff's entry into the market through use of the governmental process, as opposed to the outcome of that process. Thus, the court held, plaintiffs had stated a cause of action under the sham exception, and the trial court erred in granting defendants judgment on the pleadings (*24 Cal. App. 4th 570, 582-583)* .

In ***Columbia v. Omni Outdoor Adver.*** *(1991) 499 U.S. 365, 380, 111 S. Ct. 1344, 113 L. Ed. 2d 382* , plaintiff billboard operator sued a competing billboard operator and a city under the Sherman Act for allegedly conspiring to enact zoning ordinances and billboard regulations that had the effect of severely restricting the plaintiff's ability to compete in the billboard market in that city. The jury entered a verdict for the plaintiff, but the district court granted defendants' motion for judgment notwithstanding the verdict on the ground that defendants' activities were outside the scope of the antitrust laws. The U.S. Court of Appeals for the Fourth Circuit reversed the judgment and reinstated the jury verdict.

On certiorari, the United States Supreme Court reversed the decision of the Court of Appeals. The Court first held that the city was immune from antitrust liability under the Court's previous decision in *Parker v. Brown (1943) 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315* , because the city's regulation of billboards was authorized by state law (*499 U.S. 365, 370-373)* , and rejected the plaintiff's argument that the city lost its immunity by "conspiring" with private parties to restrict competition (*499 U.S. 365, 374-379)* . Regarding the defendant billboard operator, the Court noted that

Parker did not purport to immunize from antitrust liability the private parties who urge the state to engage in anticompetitive regulation (*499 U.S. 365, 379)* . However, the Court noted that, beginning with the *Noerr* case, the Court has developed a corollary to *Parker:* the federal antitrust laws also do not regulate the conduct of private individuals in seeking anticompetitive action from the government. Furthermore, under *Noerr,* the fact that a private party's motives are selfish is irrelevant: *Noerr* shields from the Sherman Act a concerted effort to influence public officials, regardless of intent or purpose (*499 U.S. 365, 379-380)* . The Court noted, however, that a "sham" exception to the *Noerr* rule has been recognized. The Court stated that the "sham" exception encompasses situations in which persons use the governmental *process*--as opposed to the *outcome* of that process--as an anticompetitve weapon. Citing *California Transport,* the Court stated that a classic example is the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay (*499 U.S. 365, 380)* . Turning the facts of the case before it, the Court concluded that plaintiff had not established facts justifying application of the "sham" exception because the defendant sought to disrupt plaintiff's business not through the lobbying process, but rather through the ultimate product of that process, that is, the enactment of the zoning ordinances (*499 U.S. 365, 381)* . The Court also rejected plaintiff's suggestion that the Court recognize a "conspiracy" exception to the *Noerr* rule, which would apply when government officials conspire with a private party to employ government action as a means of stifling competition (*499 U.S. 365, 382-384)* .

[b] "Sham" Exception Applies to Tort Actions for Interference

Hi-Top Steel Corp. v. Lehrer *(1994) 24 Cal. App. 4th 570, 29 Cal. Rptr. 2d 646* , is discussed in *§ 122.55[3][a]*.

[c] Test for "Sham" Litigation

Professional Real Estate Investors v. Columbia Pictures Indus. *(1993) 508 U.S. 49, 113 S. Ct. 1920, 123 L. Ed. 2d 611* , is discussed in *§§ 122.49[3][a]* and *122.49[3][d]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawExemptions & ImmunitiesNoerr-Pennington DoctrineGeneral OverviewAntitrust & Trade LawExemptions & ImmunitiesNoerr-Pennington DoctrineSham ExceptionTortsBusiness TortsCommercial InterferenceGeneral OverviewTortsBusiness TortsCommercial InterferenceBusiness RelationshipsGeneral OverviewTortsBusiness TortsCommercial InterferenceBusiness RelationshipsDefenses

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 122 INTERFERENCE
PART II. FORMS
A. Intentional Interference With Economic Relationship

12-122 California Points & Authorities §§ 122.56-122.69

[Reserved]

§§ 122.56[Reserved]

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B. Negligent Interference With Economic Relationship

12-122 California Points & Authorities § 122.70

§ 122.70 Supporting Contention That Cause of Action Exists for Negligent Interference With Economic Relationship--Negligent Contractual Performance

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS LIABLE TO PLAINTIFF FOR HIS/HER NEGLIGENT PERFORMANCE OF HIS/HER CONTRACT WITH _____ [*name of third party*] BECAUSE THIS PERFORMANCE CREATED A FORESEEABLE AND UNREASONABLE RISK OF ECONOMIC HARM TO PLAINTIFF AND CAUSED DAMAGE TO PLAINTIFF.

A. Criteria for Determining Duty of Care. The existence of a duty of care in an action for negligent interference with economic relations depends on six criteria: (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct and (6) the policy of preventing future harm (*J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 804, 157 Cal. Rptr. 407, 598 P.2d 60*).

B. Negligent Performance of Contract as Basis for Action. When the negligent performance of a contract creates an unreasonable and foreseeable risk of interference with a third party's economic relations and the negligent performance does in fact proximately cause injury to the third party's economic relations, the negligent party may be liable to the third party in tort (see *J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 804-808, 157 Cal. Rptr. 407, 598 P.2d 60* ; *Chameleon Eng'g Corp. v. Air Dynamics Inc. (1980) 101 Cal. App. 3d 418, 420-423, 161 Cal. Rptr. 463*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in an action for negligent interference with economic relations in support

of the contention that negligent performance of a contract created an unreasonable and foreseeable risk of economic harm to plaintiff, causing economic injury to plaintiff, and entitling plaintiff to recovery in tort against the defendant for the defendant's negligence.

These points and authorities may be combined with a memorandum or points and authorities relating to the specific procedural context in which counsel wishes to raise the substantive issues set forth in this form.

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Thus, counsel should allege facts demonstrating that defendant owed plaintiff a duty of care in light of the criteria set forth in *J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 157 Cal. Rptr. 407, 598 P.2d 60* , and that defendant's breach of that duty proximately caused economic loss to plaintiff.

[3] Discussion of Authorities

[a] Criteria for Determining Duty of Care

In ***J'Aire Corp. v. Gregory*** *(1979) 24 Cal. 3d 799, 157 Cal. Rptr. 407, 598 P.2d 60* , plaintiff operated a restaurant in premises leased from the County of Sonoma. The county entered into a contract with defendant to renovate the restaurant premises. As the contract did not specify a date for completion of the work, plaintiff alleged the work was to have been completed within a reasonable time as defined by custom and usage under *Civ. Code § 1657*. Despite requests that defendant complete the construction promptly, the work was not completed within a reasonable time. Because the restaurant could not operate during part of the construction and was without heat and air conditioning for a longer period, plaintiff suffered loss of business and resulting loss of profits. Plaintiff brought a cause of action based on negligence in completing the work within a reasonable time. Defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action. The trial court sustained the demurrer without leave to amend and the complaint was dismissed. Plaintiff appealed.

The Supreme Court reversed. The Court noted that a plaintiff's interest in prospective economic advantage may be protected against injury occasioned by negligent as well as intentional conduct (*24 Cal. 3d 799, 803)* . The Court pointed to three California cases, including *Biakanja v. Irving (1958) 49 Cal. 2d 647, 320 P.2d 16* , in which it was held that intended beneficiaries of wills could sue to recover legacies lost through the negligent preparation of the will. In each of the cases, the Court had applied six criteria to determine whether or not defendants owed plaintiffs a duty of care. The Court stated that when dealing with a contract in which the parties to the immediate action are not in privity, these criteria should also be applied. The criteria are: (1) the extent to which the transaction was intended to affect the plaintiff; (2) the foreseeability of harm to plaintiff; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury suffered; (5) the moral blame attached to the defendant's conduct and the injury suffered; and (6) the policy of preventing future harm. Applying these criteria to the facts as pleaded, the Court stated that it was evident that a duty was owed by defendant to plaintiff in the present case (*24 Cal. 3d 799, 804)* . The Court noted that it has repeatedly avoided overly rigid common law formulations of duty in favor of allowing compensation for foreseeable injuries caused by a defendant's want of ordinary care (*24 Cal. 3d 799, 805)* . Rather than traditional notions of duty, the Court has focused on foreseeability as the key component necessary to establish liability. Thus, defendant would be liable if his lack of ordinary care caused foreseeable injury to the economic interests of the plaintiff. The Court noted that its holding was consistent with *Civ. Code § 1714(a)*, which holds every person responsible for injuries caused by his or her lack of ordinary care (*24 Cal. 3d 799, 806)* . Addressing the possible dangers of imposing liability for negligent interference, the Court noted that the six duty factors and ordinary principles of tort law would be fully adequate to limit recovery; recovery would be limited to instances where the risk of harm is foreseeable and is closely connected with the defendant's conduct, where damages are not wholly speculative and the injury is not part of the plaintiff's ordinary business risk (*24 Cal. 3d 799, 808)* .

[b] Negligent Performance of Contract as Basis for Action

The facts and procedural background of ***J'Aire Corp. v. Gregory*** *(1979) 24 Cal. 3d 799, 157 Cal. Rptr. 407, 598 P.2d 60* , are discussed in *§ 122.70[3][a]*. The Court stated that when a special relationship exists between the parties, a plaintiff may recover for loss of expected economic advantage through the negligent performance of a contract although the parties were not in contractual privity (*24 Cal. 3d 799, 804)* . The Court then examined the criteria first set out in *Biakanja v. Irving (1958) 49 Cal. 2d 647, 650, 320 P.2d 16* , and in effect concluded that in this case, the alleged facts were sufficient to establish that a special relationship did exist, such that defendant owed a duty of due care to plaintiff in his performance of a contract with a third party, and that defendant's breach of that duty proximately caused ascertainable economic loss to plaintiff (*24 Cal. 3d 799, 804)* . (1) The contract entered into between the defendant and the county was for the renovation of the premises in which plaintiff maintained his business. The contract could not have been performed without impinging on that business, and consequently, the defendant's performance was intended to, and did, directly affect plaintiff. (2) It was clearly foreseeable that any significant delay in completing the construction would adversely affect plaintiff's business beyond the normal disruption associated with such construction. (3) The plaintiff's complaint indicated that plaintiff suffered harm since it was unable to operate its business for one month and suffered additional loss of business while the premises were without heat and air conditioning. (4) Plaintiff alleged that delays occasioned by defendant's conduct were closely connected to and directly caused its injury. (5) Defendant's lack of diligence in the present case was particularly blameworthy since it continued after the probability of damage was drawn directly to defendant's attention. (6) Finally, public policy would support a finding of duty of care because under *Bus. & Prof. Code § 7119* (willful failure or refusal of contractor to prosecute construction project with diligence is ground for disciplining licensed contractor), the legislature has indicated the seriousness with which it views unnecessary delays in the completion of construction (*24 Cal. 3d 799, 804-805)* . The Court found, in light of these factors, that respondent had a duty to complete construction in a manner that would have avoided unnecessary injury to plaintiff's business (*24 Cal. 3d 799, 805)* . Accordingly, the Court concluded that the demurrer to plaintiff's cause of action should not have been sustained by the trial court (*24 Cal. 3d 799, 808)* .

In ***Chameleon Eng'g Corp. v. Air Dynamics Inc.*** *(1980) 101 Cal. App. 3d 418, 161 Cal. Rptr. 463* , plaintiff, a general contractor, brought an action against defendant for negligent interference with economic relations. Plaintiff had entered into a construction contract with the United States Army Corps of Engineers for the construction of military facilities. The contract required the work of construction to be completed within certain time limits and contained liquidated damages provisions to be triggered upon plaintiff's failure to finish the construction on time. Defendant, a supplier to one of plaintiff's subcontractors, failed to supply essential components necessary to the timely completion of the contract. As a result of this failure, plaintiff was delayed in completion of the project. Plaintiff thus incurred excess costs beyond the contract price and liquidated damages. Plaintiff alleged that defendant knew that failure to perform the terms of its purchase order properly would foreseeably affect and impact upon plaintiff's ability to perform the terms of its contract with the Corps of Engineers. Plaintiff also alleged that defendant failed to perform its obligations responsibly, and proximately caused it to sustain monetary damages. The trial court sustained defendant's general demurrer with leave to amend. Plaintiff did not amend its complaint within the time allowed and the court dismissed the action. Plaintiff appealed.

The court of appeal reversed the dismissal. It found that the case was controlled by *J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 157 Cal. Rptr. 407, 598 P.2d 60* . The court applied the *J'Aire* criteria for determining duty. The court found (1) defendant's performance was intended to and did directly affect plaintiff; (2) the harm to plaintiff was clearly foreseeable; (3) plaintiff suffered injury; (4) the close connection between defendant's acts and the damages suffered was patent; (5) the moral blame attached to defendant's conduct was apparently not a factor one way or the other; and (6) imposing liability would promote the prevention of future harm. The court concluded that plaintiff clearly stated a cause of action for negligently caused economic damage (*101 Cal. App. 3d 418, 423)* .

[4] Additional Authorities

[a] Negligent Performance of Contract as Basis for Action

Ales-Peratis Foods Int'l, Inc. v. American Can Co. (1985) 164 Cal. App. 3d 277, 209 Cal. Rptr. 917 was an action for negligent interference with economic relations. Plaintiff had been offered a contract to buy, pack, and sell a quantity of abalone. To fill this contract, plaintiff needed cans lined with "C" enamel, a compound designed to prevent acid corrosion. Plaintiff contracted with defendant can manufacturers to purchase a quantity of such cans. The cans actually delivered lacked the "C" enamel. Plaintiff was left with deficient cans, was unable to can the abalone, and lost the contract for the sale of the abalone. Plaintiff brought suit for negligent interference with economic relations. The trial court granted defendant's summary judgment motion, and plaintiff appealed. Reversing, the court of appeal evaluated the six criteria for duty found in *J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 157 Cal. Rptr. 407, 598 P.2d 60* and found that all of the criteria favored a finding that defendant owed a duty to plaintiff. The court noted that (1) defendant's performance was intended to, and did directly affect plaintiff; (2) the result of defendant's conduct was clearly foreseeable; (3) plaintiff suffered economic harm; (4) there was a close connection between defendant's acts and the damages suffered; (5) defendant's acts were morally blameworthy; and (6) policy considerations warranted the imposition of liability (*164 Cal. App. 3d 277, 289-290)* . The court concluded that plaintiff stated a cause of action for negligent interference (*164 Cal. App. 3d 277, 290)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsCommercial InterferenceGeneral OverviewTortsBusiness TortsCommercial InterferenceProspective AdvantageGeneral OverviewTortsNegligenceActionsGeneral Overview

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12-122 California Points & Authorities § 122.71

§ 122.71 Opposing Contention That Cause of Action Exists for Negligent Interference With Economic Relationship--Injury Is Ordinary Business Risk

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF IS NOT ENTITLED TO RECOVER DAMAGES FOR NEGLIGENT INTERFERENCE WITH HIS/HER NONCONTRACTUAL ECONOMIC RELATIONSHIP WITH _____ [*name*], BECAUSE PLAINTIFF'S INJURY IS NO MORE THAN A PART OF HIS/HER ORDINARY RISK IN DOING BUSINESS.

No Recovery for Injury Resulting From Ordinary Business Risk. Recovery for negligent interference with a noncontractual economic relationship will be denied where the injury is part of plaintiff's ordinary business risk (*Worldvision Enters., Inc. v. American Broad. Cos., Inc. (1983) 142 Cal. App. 3d 589, 597, 191 Cal. Rptr. 148*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a plaintiff may recover for negligent interference with economic relations. The ground for opposition is that the plaintiff's injury was part of his or her ordinary business risk.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show that the plaintiff's injury resulted from an ordinary risk of doing business.

[3] Discussion of Authorities

[a] No Recovery for Injury Resulting From Ordinary Business Risk

Worldvision Enters., Inc. v. American Broad. Cos., Inc. *(1983) 142 Cal. App. 3d 589, 191 Cal. Rptr. 148* , was an action for negligent interference with a noncontractual economic relationship. Plaintiff, a television syndicator, claimed that defendant network disparaged a program to which plaintiff had owned future distribution rights. The program in question was in the network's weekly schedule. The disparagement occurred when the network's president implied in a speech to network affiliates that the program was unsuitable for general family audiences. Plaintiff claimed that after these remarks were made, plaintiff's customers were no longer interested in purchasing the program and that the value of plaintiff's syndication rights was destroyed. The trial court granted defendant's motion for summary judgment and plaintiff appealed.

The court of appeal affirmed. Applying the six criteria for finding a duty of care stated in *J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 157 Cal. Rptr. 407, 598 P.2d 60* , the court rejected plaintiff's contention that defendant owed plaintiff a general duty of due care not to damage plaintiff's prospective economic interests. The court stated that recovery for negligent interference with prospective economic advantage will be denied when the injury is part of the plaintiff's ordinary business risk. The court noted that, in this case, plaintiff must have known or assumed, when it purchased the syndication rights while the series was still being broadcast initially on the network, that the value of the program in syndication could be either enhanced or diminished by defendant's decisions on how to promote the program (*142 Cal. App. 3d 589, 597)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsCommercial InterferenceGeneral OverviewTortsBusiness TortsCommercial InterferenceBusiness RelationshipsDefensesTortsBusiness TortsCommercial InterferenceProspective AdvantageDefensesTortsNegligenceActionsGeneral Overview

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B. Negligent Interference With Economic Relationship

12-122 California Points & Authorities § 122.72

§ 122.72 Opposing Contention That Cause of Action Exists for Negligent Interference with Economic Relationship--Defendant Owes No Duty of Care

[1] FORM

[*The following may be included in a memorandum or points and authorities, or in a trial or appellate brief.*]

PLAINTIFF IS NOT ENTITLED TO RECOVER DAMAGES FOR NEGLIGENT INTERFERENCE WITH HIS/HER ECONOMIC RELATIONSHIP, BECAUSE DEFENDANT OWED PLAINTIFF NO DUTY OF CARE.

No Recovery If There Is No Duty of Care. The tort of negligent interference with economic relationship arises only when the defendant owes the plaintiff a duty of care (*LiMandri v. Judkins (1997) 52 Cal. App. 4th 326, 348, 60 Cal. Rptr. 2d 539*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to the contention that a plaintiff may recover for negligent interference with economic relations. The ground for opposition is that the defendant owed the plaintiff no duty of care.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show that the allegations of the complaint failed to establish that defendant owed plaintiff a duty of care.

[3] Discussion of Authorities

[a] No Recovery If There Is No Duty of Care

In ***LiMandri v. Judkins*** *(1997) 52 Cal. App. 4th 326, 60 Cal. Rptr. 2d 539* , the plaintiff was an attorney representing a client in environmental litigation in both state and federal court. While the state action was pending, the plaintiff was contacted by the defendant, who was counsel for a trust company that had extended a loan to the plaintiff's client. In that conversation, the defendant asked the plaintiff about the status and settlement value of the pending action, but did not tell the plaintiff that the client had granted the trust company a lien against the client's share of any judgment or settlement proceeds obtained in the action. The defendant then filed a notice of lien on behalf of the trust company in the state court action. A judgment was subsequently entered in the state court action in favor of the client. Sometime later, the parties entered into a settlement agreement that settled both state and federal actions. As a result of trust company's lien, the settlement agreement was amended to require the defendant in the environmental litigation to bring an interpleader action in federal district court and deposit the client's share of the settlement funds with the court without prior payment of the client's share of attorney fees. The interpleader action tied up fees owing to the plaintiff for over seven months and caused him to incur extraordinary fees and costs. As a result, the plaintiff filed an action against the defendant for negligent interference with economic relationship. The trial court sustained defendant's general demurrer without leave to amend and denied plaintiff's subsequent motion for reconsideration of that ruling.

The court of appeal affirmed, holding that the trial court properly dismissed plaintiff's negligent interference causes of action on the ground that plaintiff's complaint failed to allege a duty of care owed by defendant to plaintiff. The court began by stating the rule that the tort of negligent interference with economic relationship arises only when a defendant owes a plaintiff a duty of care. It then found that while defendant owed plaintiff a general duty to refrain from committing intentionally tortious conduct, the duty of undivided loyalty defendant owed to his client, trust company, precluded the imposition of a negligence duty of care owed to plaintiff in connection with defendant's representation of trust company in the loan transaction (*52 Cal. App. 4th 326, 348-349)* .

[4] Additional Authorities

[a] No Recovery If There Is No Duty of Care

In *Lange v. TIG Ins. Co. (1998) 68 Cal. App. 4th 1179, 1187-1189, 81 Cal. Rptr. 2d 39* , two independent insurance brokers filed cross-complaints against a liability insurer in its declaratory relief action, alleging promissory estoppel and negligent interference with prospective economic advantage. The brokers' claims were based on the insurer's termination of an agreement between the insurer and an insurance brokerage firm with whom the independent brokers worked in procuring insurance for an association of building contractors. After a jury trial, judgment was entered for the brokers on both causes of action, but the court of appeal reversed. As to the cause of action for negligent interference with prospective economic advantage, the court held that wrongfulness independent of the fact of interference is an element of an action for negligent interference with prospective economic advantage, and cited with seeming approval language from another court opinion suggesting that wrongful conduct is subsumed within a finding that a legal duty of care was owed (*68 Cal. App. 803, 1187-1189)* . The court held that the insurer's exercise of a contractual right to terminate the agreement with the brokerage firm for cause was not wrongful, and thus, the insurer owed no duty to the independent brokers (*68 Cal. App. 4th 1179, 1187-1188)* . The court also rejected the brokers' claims that the insurer's failure to provide longer notice to them before terminating the agreement was wrongful, as well as the argument that the insurer was required to prove that it had cause to terminate the agreement with the brokerage (*68 Cal. App. 4th 1179, 1188)* .

In *Colome v. State Athletic Comm'n (1996) 47 Cal. App. 4th 1444, 55 Cal. Rptr. 2d 300* , a boxer was denied a boxing license by the State Athletic Commission after failing a neurological examination. The boxer's manager sued the doctor and assistant who administered the examination, for interference with prospective economic advantage. A jury found defendants liable, and the defendants appealed. The court of appeal reversed, finding that the six criteria for finding a duty of care stated in *J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 157 Cal. Rptr. 407, 598 P.2d 60* favored a

finding that neither defendant was liable because neither owed the boxer's manager a duty (*47 Cal. App. 4th 1444, 1460)* . The court noted that (1) the neurological examination was not intended to affect the manager; (2) there was little foreseeability of harm to the manager since he was not the issue; (3) the degree of certainty that the manager suffered any injury was in grave doubt since all the damages asserted were highly speculative; (4) the connection between the physician's conduct and any injury suffered by the manager had to be filtered through the actions of the Commission; (5) there was no moral blame ascribed to the physician who determined that the boxer might be at risk; and (6) the policy of preventing future harm was not an issue under the circumstances of this case (*47 Cal. App. 4th 1444, 1460)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsCommercial InterferenceGeneral OverviewTortsNegligenceActionsGeneral OverviewTortsNegligenceDutyGeneral Overview

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§ 123.syn Synopsis to Chapter 123: INTERPLEADER

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§ 123.02 Governing Law

§ 123.03 Page Limits on Memoranda

§ 123.04 Deposit in Court Distinguished

§ 123.05 Sufficiency of Pleading

§ 123.06 Related Pleading and Practice Forms

§§ 123.07-123.19 [Reserved]

§ 123.20 Supporting Defendant's Motion Before Answer for Order Substituting Nonparty Claimant as Defendant and Discharging Defendant From Liability [Code Civ. Proc. § 386(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Nature and Availability of Remedy

[c] Filing of Answer

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Purpose of Statutory Procedure

[4] Additional Authorities

[a] Substitution and Discharge Authorized

§ 123.21 Supporting Motion by Plaintiff in Interpleader for Order Discharging Plaintiff From Liability [Code Civ. Proc. § 386(a)] and, If Appropriate, for Order to Deposit Money or Deliver Property in Question

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Action in Interpleader Authorized

[b] Discharge of Interpleading Party From Liability

[c] Use of Motion Procedure

[d] Deposit in Court

[4] Additional Authorities

[a] Action in Interpleader Authorized

[b] Deposit in Court

§ 123.22 Supporting Motion by Cross Complainant in Interpleader for Order Discharging Cross Complainant From Liability [Code Civ. Proc. § 386(a)] and, If Appropriate, for Order to Deposit Money or Deliver Property Sued For

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

§ 123.23 Supporting Motion for Order for Discharge From Liability to Conflicting Claimants--Conflicting Claims Are Not Identical or Are Independent [Code Civ. Proc. § 386(a)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Effect of Nonidentical or Independent Claims

§ 123.24 Supporting Defendant Stakeholder's Motion for Order Discharging Stakeholder From Liability and Dismissing Stakeholder From Action on Stakeholder's Deposit With Court Clerk of Amount in Dispute [Code Civ. Proc. § 386.5]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

§ 123.25 Supporting Motion of Defendant or Interpleading Party for Order Awarding Costs and Attorney Fees [Code Civ. Proc. § 386.6]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Right to Request Award of Costs and Attorney Fees

[b] Award of Costs and Attorney Fees From Funds Deposited With Court

[c] Award May Be Made From Future Deposits

[4] Additional Authorities

[a] Award of Costs and Attorney Fees From Funds Deposited With Court

§ 123.26 Supporting Application of Plaintiff or Cross Complainant in Interpleader for Preliminary Injunction [Code Civ. Proc. § 527(a)] Enjoining Other Parties to Action From Prosecuting or Instituting Actions Affecting Rights and Obligations of Parties to Action or Cross Action in Interpleader [Code Civ. Proc. § 386(f)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Denial of Application for Preliminary Injunction as Abuse of Discretion

[b] Court May Restrain Collection of Judgment

§ 123.27 Supporting Respondent's Motion for Order Dismissing Appeal--Judgment or Order Discharging Defendant or Interpleading Party From Liability on Deposit of Fund or Delivery of Property as Interlocutory and Nonappealable

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Nonappealability of Judgment of Interpleader

[b] Nonappealability of Order Discharging Defendant

[4] Additional Authorities

[a] Nonappealability of Order Discharging Defendant

§ 123.28 Opposing Motion of Plaintiff or Cross Complainant in Interpleader for Order Discharging Moving Party From Liability [Code Civ. Proc. § 386(a)]--Future Periodic Deposits Into Court Required

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Future Periodic Deposits Into Court Required

§ 123.29 Opposing Motion of Plaintiff or Cross Complainant in Interpleader for Order Discharging Moving Party

From Liability [Code Civ. Proc. § 386(a), (b)]; Claims Do Not Relate to Same Thing, Debt, or Duty

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Required That Claimant Seek the Same Thing, Debt, or Duty

§ 123.30 Opposing Motion of Defendant or Interpleading Party for Order Awarding Costs and Attorney Fees [Code Civ. Proc. § 386.6]--Moving Party Failed to Follow Procedure Specified in Code Civ. Proc. § 386 or 386.5

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Failure to Follow Specified Procedure as Defeating Award

[b] Failure to Deposit Funds With Court as Defeating Award

§ 123.31 Opposing Interpleading Party's Motion for Order Awarding Costs and Attorney Fees [Code Civ. Proc. § 386.6]--Interpleading Party Waived Right to Attorney Fees From Amount Deposited in Court and Sought Recovery From Amount Which Was Not Deposited

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Deposit Was of Undisputed Amount Only as to Which Interpleading Party Waived Right to Attorney Fees

§ 123.32 Opposing Interpleading Party's Motion for Order Awarding Costs and Attorney Fees [Code Civ. Proc. § 386.6]--Award Under Interpleader Statutes as Limited to Expenses Incurred in Pursuit of Stakeholder's Remedy

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Limitation on Award

§ 123.33 Opposing Respondent's Motion for Order Dismissing Appeal--Judgment or Order Discharging Defendant or Interpleading Party From Liability and Awarding Attorney Fees and Costs out of Fund Deposited in Court as Appealable

[1] FORM

[2] Comments

[a] Use of Form

[b] Case Title in Caption

[3] Discussion of Authorities

[a] Appealability of Judgment or Order in Interpleader Awarding Attorney Fees

§ 123.34 Opposing Interpleading Party's Motion for Order Awarding Costs and Attorney Fees [Code Civ. Proc. § 386.6] From Interest Accrued on Interpleaded Funds--No Original Funds Allocated to Interpleading Party

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[3] Discussion of Authorities

[a] Interest Accrued on Interpleaded Funds Must Be Allocated in Same Proportion as Original Funds.

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 123 INTERPLEADER
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12-123 California Points & Authorities § 123.01

§ 123.01 Scope of Chapter

This chapter contains memoranda for use in interpleader proceedings under *Code Civ. Proc. §§ 386(a), (b), (f), 386.5,* and *386.6*. It includes:

- Memoranda supporting [*see §§ 123.20*-123.22] and opposing [*see §§ 123.28, 123.29*] motions for discharge of the defendant or interpleading party under *Code Civ. Proc. § 386(a), (b)*.

- A memorandum supporting a defendant's motion for discharge and dismissal under *Code Civ. Proc. § 386.5* [*see § 123.24*].

- Memoranda supporting [*see § 123.25*] and opposing [*see §§ 123.30*-123.32 and *123.34*] a motion for an award of costs and attorney fees under *Code Civ. Proc. § 386.6*.

- A memorandum supporting an application for a preliminary injunction under *Code Civ. Proc. § 386(f)* [*see § 123.26*].

- Memoranda supporting [*see § 123.27*] and opposing [*see § 123.33*] a motion to dismiss an appeal from an order discharging the defendant or interpleading party from liability.

Also included is a memorandum that may be combined with any of the memoranda set forth in *§§ 123.20*-123.22 if the conflicting claims are not identical or are independent [*see § 123.23*].

Legal Topics:

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

California Points & Authorities

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12-123 California Points & Authorities § 123.02

§ 123.02 Governing Law

Interpleader is governed by *Code Civ. Proc. §§ 386-386.6*, which set forth the circumstances in which an interpleader will lie and procedure for pursuing it.

In addition, a number of specific statutes in the various codes expressly authorize interpleader to determine the rights of conflicting claimants to money or property [*see, e.g., Civ. Code §§ 3175, 3214* (money withheld under stop notices); *Com. Code § 7603* (adverse claims under bill of lading or warehouse receipt to property in possession of bailee or warehouseman)].

Legal Topics:

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

California Points & Authorities

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12-123 California Points & Authorities § 123.03

§ 123.03 Page Limits on Memoranda

Generally, an opening or responding memorandum must not exceed 15 pages, or in the case of a motion for summary judgment or summary adjudication, 20 pages. A reply or closing memorandum may not exceed 10 pages [*see Cal. Rules of Ct., Rule 3.1113(d)*]. Any party desiring to file a longer memorandum must obtain leave of court [*see Cal. Rules of Ct., Rule 3.1113(e)*]. For further discussion of the page limitations under *Cal. Rules of Ct., Rule 3.1113*, and other basic format requirements of memoranda, see *Ch. 1, Writing Legal Memoranda and Briefs, § 1.05*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedureSummary JudgmentSupporting MaterialsMemoranda of Law

California Points & Authorities

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12-123 California Points & Authorities § 123.04

§ 123.04 Deposit in Court Distinguished

The provisional remedy of deposit in court is governed by *Code Civ. Proc. §§ 572-574*, which authorize the court, on motion, to order that property be deposited in court or delivered to a party [*Code Civ. Proc. § 572*]. The sections apparently contemplate a motion by the claimant [*see Code Civ. Proc. § 574* (sanctions for refusal to comply with order)], but otherwise contain no restriction on the actions in which the remedy is available. For a discussion of this remedy and forms for use in pursuing it, see California Forms of Pleading and Practice, Ch. 211, *Deposit in Court* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDeposits in Court

California Points & Authorities

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12-123 California Points & Authorities § 123.05

§ 123.05 Sufficiency of Pleading

The sufficiency of a complaint or cross complaint in interpleader may be challenged by demurrer [*see Code Civ. Proc. §§ 430.10, 430.30(a), 430.70*; *see also Hancock Oil Co. v. Hopkins (1944) 24 Cal. 2d 497, 511-512, 150 P.2d 463* ; *Los Angeles v. Amidor (1903) 140 Cal. 400, 401, 73 P. 1049]* . A pleading under *Code Civ. Proc. § 386(a)* is, however, sufficient if it alleges that the defendants or cross defendants make adverse claims on plaintiff or cross complainant for the same thing and if it alleges facts showing a reasonable probability of double vexation [*see Hancock Oil Co. v. Hopkins (1944) 24 Cal. 2d 497, 510, 150 P.2d 463]* . If the pleading is sufficient, the propriety of the remedy may still be challenged by appropriate denials or affirmative averments in the answer. A failure to attack the propriety of the remedy by demurrer, motion to strike, or answer is, however, a waiver of that objection, and a defendant cannot, on a subsequent appeal from the judgment adjudicating the claims of the adverse claimants after the interpleading party has been discharged, raise the issue of the right to interplead [*Continental Nat. Bank v. Stoltz (1920) 46 Cal. App. 532, 535-536, 189 P. 712]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticePleadingsComplaintsGeneral OverviewCivil ProceduresPartiesInterpleadersGeneral Overview

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12-123 California Points & Authorities § 123.06

§ 123.06 Related Pleading and Practice Forms

For a discussion of, and forms of complaints, answers, cross complaints, and other papers for use in interpleader actions, see California Forms of Pleading and Practice, Ch. 314, *Interpleader* . For forms of complaints in interpleader involving bank deposits, stop notices, surety bonds, and warehousemen, see Ch. 95, *Banks, Deposits, and Checks* , Ch. 361, *Mechanics' Liens* , Ch. 481, *Public Works* , Ch. 538, *Suretyship, Bonds, and Undertakings* and Ch. 213, *Documents of Title* in that publication.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePartiesInterpleadersGeneral Overview

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12-123 California Points & Authorities §§ 123.07-123.19

[Reserved]

§§ 123.07[Reserved]

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12-123 California Points & Authorities § 123.20

§ 123.20 Supporting Defendant's Motion Before Answer for Order Substituting Nonparty Claimant as Defendant and Discharging Defendant From Liability [Code Civ. Proc. § 386(a)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF MOTION FOR
Plaintiff,	)	ORDER FOR SUBSTITUTION OF PARTIES DE-
vs.	)	FENDANT AND DISCHARGE OF DEFENDANT
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

DEFENDANT'S MOTION FOR SUBSTITUTION OF PARTIES DEFENDANT AND DISCHARGE OF DEFENDANT FROM LIABILITY ON DEFENDANT'S _____ [DEPOSITING IN COURT THE AMOUNT CLAIMED ON THE CONTRACT *or* DELIVERING THE PROPERTY OR ITS VALUE TO SUCH PERSON AS THE COURT MAY DIRECT] SHOULD BE GRANTED BECAUSE, AS SHOWN BY THE PAPERS SUBMITTED IN SUPPORT OF THE MOTION, _____ [*name of person sought to be substituted as defendant*] IS NOT A PARTY TO THIS ACTION AND HAS, WITHOUT ANY COLLUSION WITH DEFENDANT, MADE A DEMAND AGAINST DEFENDANT _____ [ON THE CONTRACT *or* FOR THE PROPERTY].

A. Substitution and Discharge Authorized. In an action on a contract or for specific personal property, defendant may, at any time before answer, on a showing, by affidavit or declaration under penalty of perjury, that a person who is not a party to the action, has, without any collusion with defendant, made a demand against defendant on the contract or for the property, apply to the court for an order substituting the person in defendant's place and discharging defendant from liability to either party on defendant's depositing in court the amount claimed on the contract, or delivering the property or its value to such person as the court may direct, and the court may, in its discretion, make the order (*Code Civ. Proc. §§ 386(a), 2015.5*).

B. Purpose of Statutory Procedure. The purpose of *Section 386(a) of the Code of Civil Procedure* is to enable defendant to show that a third party not named in the action claims some right to the subject of the action, either by way of complete ownership or by virtue of a lien against it, and, on so showing, to deposit the money due in court or to deliver the property or its value as the court may direct and have the third party made a defendant in his or her stead, thus placing the real parties in interest in the position of adversaries in the action (see *Youtz v. Farmers' etc. Nat. Bank (1916) 31 Cal. App. 370, 371-372, 160 P. 855*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted by defendant, in an action on a contract or for specific personal property, in support of a motion for an order substituting a nonparty in defendant's place and discharging defendant from liability to either party on defendant's depositing in court the amount claimed on the contract or delivering the property or its value to such person as the court may direct.

The grounds of the motion are: (1) the person sought to be substituted as defendant is not a party to the action and has, without any collusion with defendant, made a demand against defendant on the contract or for the property; and (2) the order of substitution is authorized by *Code Civ. Proc. § 386(a)*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach an affidavit [*Code Civ. Proc. §§ 386(a), 2009*] or declaration [*Code Civ. Proc. § 2015.5*] setting forth evidentiary facts showing that the nonparty has, without any collusion with defendant, made against defendant a demand on the contract or for the property that is adverse to plaintiff's claim, defendant's lack of interest in the money or property, and defendant's offer to deposit the money or deliver the property [*see Code Civ. Proc. § 386(a)*; *DeCoe v. Johnson (1921) 54 Cal. App. 592, 595, 202 P. 362]* .

For additional points and authorities that may be added to the foregoing form if there is no privity between the conflicting claimants, or if an award of costs and attorney fees is sought pursuant to *Code Civ. Proc. § 386.6*, see *§§ 123.23* and *123.25*, respectively.

[b] Nature and Availability of Remedy

Strictly speaking, the proceeding set forth in the foregoing form is not an action of interpleader, but is in the nature of interpleader [*Hellman Commercial T. & S. Bk. v. Alden (1929) 206 Cal. 592, 600, 275 P. 794]* . Moreover, the motion is authorized only if the action is on a contract or for specific personal property, and the remedy is not available if the defendant claims any interest in the money or property sued for. This is implicit in (1) the requirement that defendant deposit in court the amount claimed on the contract or deliver the property or its value to such person as the court may direct, and (2) the fact that the order made is one substituting parties defendant and discharging the original defendant from liability to either party. Obviously, if the defendant claims any interest in the money or property sued for, he or she cannot be discharged from liability to the adverse claimants at this stage of the proceedings. A defendant who claims an interest in a portion of the money or property sued for may, however, proceed by way of cross complaint [*see § 123.22*]. This is the alternative remedy provided by the second part of the first sentence of *Code Civ. Proc. § 386(a)* which permits a defendant who claims some portion of the money or property to file a cross complaint for partial interpleader.

The remedy of substitution of parties defendant is also not available in an interpleader action or cross action under *Code Civ. Proc. § 386(b)*. On the other hand, an action or cross action in interpleader under *Code Civ. Proc. § 386(b)* is authorized even though the interpleading party denies liability in whole or in part to the adverse claimants, and the right to interplead under this latter subdivision is not limited to cases involving conflicting claims to personal property or to the performance of an obligation, as is the case of an interpleader under *Code Civ. Proc. § 386(a)* [*compare Code Civ. Proc. § 386(a) with Code Civ. Proc. § 386(b)*].

[c] Filing of Answer

As indicated in Paragraph A of the foregoing form, the motion is required to be made before an answer is filed. However, if the defendant has filed an answer before serving the notice of motion for substitution, the court may, in its discretion, grant defendant permission to withdraw it [*Israel v. Superior Court (1919) 43 Cal. App. 711, 713-714, 185 P. 682]* , thus enabling defendant to comply with the terms of the statute.

Alternatively, if an answer has been filed, or if the court denies permission to withdraw it, defendant may seek leave to file a cross complaint in interpleader [*see Code Civ. Proc. §§ 386(a), 428.50*; *see also § 123.22*].

The fact that defendant files an answer after he or she has served the notice of motion for an order of substitution and discharge does not affect the jurisdiction of the court to rule on the motion and grant it [*Cassidy v. Norton (1914) 25 Cal. App. 433, 434-435, 143 P. 1057]* .

[d] Related Pleading and Practice Forms

For a discussion and forms of a notice of motion for an order substituting an adverse claimant in place of defendant and for an award of costs and attorney fees incurred in the action, a form of supporting declaration, and a form of order granting the motion, see Ch. 314, *Interpleader* in California Forms of Pleading and Practice.

[3] Discussion of Authorities

[a] Purpose of Statutory Procedure

Youtz v. Farmers' etc. Nat. Bank *(1916) 31 Cal. App. 370, 160 P. 855* , was an action by a married woman against a bank to recover money on deposit in her name. A creditor of plaintiff's husband had previously commenced an action against the husband on two promissory notes, and had served a writ of attachment on the bank claiming that the funds on deposit actually belonged to the husband. The bank, before answering the wife's complaint, moved to have the plaintiff in the attachment action substituted as defendant, and the bank discharged from liability on depositing the amount held, plus interest, into court. In affirming the order granting the motion, the court of appeal stated that the

proceeding taken by the bank was in strict accord with the provisions of *Code Civ. Proc. § 386* [now *Code Civ. Proc. § 386(a)*], that the design of that statute is to enable a party who has been sued on a contract, as to which the party admits full liability as to the amount, to show that a third party not named in the action claims some right to the proceeds of the contract, either by way of complete ownership or the possession of a lien against it, and that, so showing, to deposit the money due in court and have the third party made defendant in his or her stead, thus placing in positions of adversaries the real parties at interest (*31 Cal. App. 370, 371-372)* .

It should be noted that the court in *Youtz* did not discuss the propriety of the appeal, and this fact was noted by the Supreme Court in *Camp v. Oakland Mortgage & Finance Co. (1928) 205 Cal. 380, 383,* , which held that such orders are not appealable [*see § 123.27*].

[4] Additional Authorities

[a] Substitution and Discharge Authorized

Camp v. Oakland Mortgage & Finance Co. (1931) 212 Cal. 433, 298 P. 974 , was an action against a finance company to recover the balance of a loan fund held by it. Several persons having made demand for the fund, the finance company moved, before answer, for an order discharging it from liability on payment into court of the money subject to dispute, and substituting in its place all adverse claimants. The motion was granted. From a subsequent judgment in favor of one of the substituted defendants, plaintiff appealed. The substituted defendant moved to dismiss the appeal on the ground that plaintiff had failed to serve a copy of the transcript or of his opening brief on the original defendant. The Supreme Court rejected this argument on the ground that from the time of the deposit of the money in court and the discharge of the original defendant from the case, the proceeding was one solely between the plaintiff and the substituted defendant (*212 Cal. 433, 435)* . Holding that the order substituting defendants was proper and that the original defendant was not an adverse party on whom service needed to be made, the Court denied the motion to dismiss (*212 Cal. 433, 437)* .

Hellman Commercial T. & S. Bk. v. Alden (1929) 206 Cal. 592, 275 P. 794 , involved a complex fact situation. A man was legally declared an incompetent person; Bank X then issued a $10,000 cashier's check payable to him; he endorsed the check to another party without receiving value for it; the endorsee presented the check to Bank Y; Bank Y credited the endorsee's account and permitted the endorsee to withdraw $5,000; Bank Y sued Bank X, the incompetent person, and the endorsee to recover $5,000. Bank X then moved, pursuant to *Code Civ. Proc. § 386* [*now Code Civ. Proc. § 386(a)*], for an order substituting the guardian of the incompetent's estate in its place and discharging it from further liability. The motion was granted on condition that Bank X deposit in court $10,000 plus interest, which it did, and the order of substitution and discharge was made. The incompetent died and an amended and supplemental complaint was filed in which the defendants named were the administratrix of the decedent's estate and the endorsee of the check. The trial court rendered judgment in favor of plaintiff against the endorsee for $5,000, plus interest and costs, and awarded the money deposited by Bank X to the administratrix of the decedent's estate (*206 Cal. 592, 597)* . The Supreme Court, in affirming the judgment, pointed out that the trial court granted Bank X's motion for an order substituting the incompetent's guardian as defendant and made the necessary order, and that from that point on the proceeding was between the contesting claimants to the fund deposited in court (*206 Cal. 592, 600)* .

Cross v. Eureka Lake etc. Canal Co. (1887) 73 Cal. 302, 14 P. 885 , involved an action by the administrator of the estate of a decedent against a corporation to recover dividends alleged to have been declared on stock claimed to be owned by the estate. The corporation deposited the sum in court and moved to have the adverse claimants to the dividends (the alleged owner of the stock, who claimed merely to have pledged it to decedent as security for an antecedent loan which had since been paid, and the alleged owner's assignee) substituted as parties defendant. The motion was granted, and the action then proceeded between plaintiff and the adverse claimants.

DeCoe v. Johnson (1921) 54 Cal. App. 592, 202 P. 362 , was an action to recover the purchase price of rice allegedly

grown by plaintiff and another person as partners. The other person died, and the crop was harvested by plaintiff, who sold it to defendant. Defendant moved for an order to substitute as defendant the administratrix of the deceased partner's estate. In its supporting affidavit, defendant stated that the administratrix had made a claim on it to one half the proceeds of the sale, that it was at all times willing and able to make payment of the total amount due, that it had offered to make payment to plaintiff and the administratrix in any manner mutually satisfactory to them or to pay half the amount to each of them, but that they had been unable to arrive at a satisfactory agreement under which defendant could make payment to them and so release itself from its obligation to both parties. The affidavit further stated that plaintiff insisted she was entitled to certain expenses incurred in the growing and handling of the rice, and that the administratrix admitted that this was so, but that plaintiff refused to make an accounting to the administratrix until plaintiff had first received payment of the purchase price. Defendant also disclaimed any interest in the amount to be paid by it or in the controversy between plaintiff and the administratrix, stated that there had been no collusion between defendant and the administratix, defendant and the plaintiff, or defendant and anyone else, and offered to deposit the full amount due in court (*54 Cal. App. 592, 595-597)* . After a hearing on the motion, the court ordered that on payment into court by defendant of the amount due, the administratrix would be substituted as defendant in defendant's place. The money was subsequently deposited, and defendant was dismissed from the case. The administratrix filed an answer to the complaint. Plaintiff's motion for judgment on the pleadings was subsequently granted. The order granting the motion was, however, thereafter set aside by the court on motion of the administratrix, and plaintiff appealed. In affirming the order, the court of appeal, in approving the procedure followed, pointed out that the original defendant was entitled to demand that the matter be determined either amicably or by suit between plaintiff and the administratrix before it should be required to pay the debt, which it admitted existed against it (*54 Cal. App. 592, 602)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterpleadersGeneral OverviewCivil ProcedurePartiesSubstitutionsGeneral OverviewCivil ProcedurePartiesSubstitutionsMotions for Substitution

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12-123 California Points & Authorities § 123.21

§ 123.21 Supporting Motion by Plaintiff in Interpleader for Order Discharging Plaintiff From Liability [Code Civ. Proc. § 386(a)] and, If Appropriate, for Order to Deposit Money or Deliver Property in Question

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN SUPPORT OF MOTION FOR ORDER DIS-
vs.	)	CHARGING PLAINTIFF FROM LIABILITY
_____ [*names*],	)	[*Code Civ. Proc. § 386(a)*]
Defendants.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

PLAINTIFF'S MOTION FOR AN ORDER [THAT PLAINTIFF _____ (DEPOSIT WITH THE COURT CLERK THE MONEY IN QUESTION *or* DELIVER THE PROPERTY IN QUESTION AS THE COURT SHALL DIRECT) AND FOR AN ORDER] DISCHARGING PLAINTIFF FROM LIABILITY SHOULD BE GRANTED BECAUSE, AS SHOWN BY THE PAPERS SUBMITTED IN SUPPORT OF THE MOTION, CONFLICTING CLAIMS TO THE _____ [MONEY *or* PROPERTY] _____ [HAVE BEEN *or* MAY BE] MADE BY DEFENDANTS HEREIN. [THE _____ (FULL

AMOUNT IN QUESTION [WITH INTEREST] HAS BEEN DEPOSITED WITH THE CLERK OF THIS COURT *or* PROPERTY HAS BEEN DELIVERED IN ACCORDANCE WITH THE PRIOR ORDER OF THIS COURT)].

A. Action in Interpleader Authorized. A person on whom conflicting claims are or may be made for or relating to personal property, or the performance of an obligation, or any portion thereof, may bring an action against the conflicting claimants to compel them to interplead and litigate their several claims (*Code Civ. Proc. § 386(a)*; *see also Fidelity & Deposit Co. v. Santa Monica Finance Co. (1960) 182 Cal. App. 2d 211, 216-217, 6 Cal. Rptr. 213*).

B. Discharge of Interpleading Party From Liability. The action of interpleader may be maintained, and the interpleading party discharged from liability to all or any of the conflicting claimants (*Code Civ. Proc. § 386(a)*; *see also Weingetz v. Cheverton (1951) 102 Cal. App. 2d 67, 79-80, 226 P.2d 742*).

C. Use of Motion Procedure. Although *Section 386(a) of the Code of Civil Procedure* does not expressly indicate whether or not an interpleading party may serve and file a notice of motion for an order discharging him or her from liability to the defendants, the customary practice appears to be to allow such a motion (*see Code Civ. Proc. § 1003*; *Lincoln Nat. Life Ins. Co. v. Mitchell (1974) 41 Cal. App. 3d 16, 18, 115 Cal. Rptr. 723* ; *Crocker-Anglo Nat. Bk. v. American Tr. Co (1959) 170 Cal. App. 2d 289, 299-300, 338 P.2d 617*).

[*Optional*] **D. Deposit in Court.** Any amount which a plaintiff or cross complainant in interpleader admits to be payable may be deposited by him or her with the clerk of the court at the time the complaint or cross complaint in interpleader is filed without first obtaining an order of the court therefor, and any interest on amounts so deposited and any right to damages for detention of property so delivered, or its value, ceases to accrue after the date of such deposit or delivery (*Code Civ. Proc. § 386(c)*; see also *Code Civ. Proc. § 386.1*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities is for use by a plaintiff in interpleader in support of a motion for an order dis charging him or her from liability to defendants and, if the amount in question was not deposited with the court clerk when the complaint was filed or the case involves disputed personal property and no prior court order has been made directing delivery of it, for an order that plaintiff deposit the money or deliver the property.

The grounds of the motion are: (1) plaintiff claims no interest in the amount which plaintiff owes or the personal property held by plaintiff; (2) conflicting claims to the amount or property have been or may be made by defendants to the action; (3) plaintiff has deposited or will, on order of the court, deposit with the court clerk the full amount in question with accrued interest, if any, or plaintiff has delivered or will, on order of the court, deliver the personal property in accordance with the court's order; and (4) the order of discharge is authorized by *Code Civ. Proc. § 386(a)*.

Paragraph D should be included if the disputed amount is due on a contractual obligation and plaintiff deposited the full amount with accrued interest, if any, with court clerk at the time the complaint was filed.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations setting forth any extrinsic evidence necessary to establish the grounds of the motion.

For additional points and authorities that may be added to the foregoing form if there is no privity between the conflicting claimants, or if an award of costs and attorney fees is sought pursuant to *Code Civ. Proc. § 386.6*, see *§§ 123.23* and *123.25*, respectively.

[b] Opposing Points and Authorities

The points and authorities set out in *§ 123.28* may be used in an appropriate case to oppose a motion by the plaintiff in interpleader for an order discharging him or her from liability that is supported by the foregoing memorandum.

[c] Related Pleading and Practice Forms

For a discussion of the nature of interpleader and the procedure for filing of a complaint or cross complaint in interpleader, a form of interlocutory order discharging plaintiff in interpleader, directing defendants to interplead, and awarding plaintiff costs and attorney fees incurred in the action, a form of stipulation for an order to the same effect, a form of notice of motion for an order discharging the interpleading plaintiff and awarding costs and attorney fees incurred, and a form of order granting the motion, see Ch. 314, *Interpleader* in California Forms of Pleading and Practice.

[3] Discussion of Authorities

[a] Action in Interpleader Authorized

Fidelity & Deposit Co. v. Santa Monica Finance Co. *(1960) 182 Cal. App. 2d 211, 6 Cal. Rptr. 213* , involved the propriety of a preliminary injunction issued to restrain one of the defendants in an action in interpleader from further prosecuting its prior action against the present plaintiff surety and its principal pending determination of the action in interpleader. In modifying the preliminary injunction to allow the prior action to proceed as against the principal, the court of appeal, quoting from 30 Am. Jur., *Interpleader*, § 7, said that it is not necessary in order to justify the filing of a bill of interpleader that suit shall actually have been commenced against the plaintiff, that it is sufficient that claims shall have been made against him, and that he is in danger of being molested by the assertion of conflicting rights (*182 Cal. App. 2d 211, 216-217)* .

[b] Discharge of Interpleading Party From Liability

Weingetz v. Cheverton *(1951) 102 Cal. App. 2d 67, 226 P.2d 742* , was decided not on a motion for discharge from liability, but was an appeal from a judgment rendered against one defendant and in favor of another defendant in plaintiff's action in interpleader. With reference to the discharge of plaintiff, however, the court said it was true that plaintiff in an action of interpleader brings the action when he holds property to which various persons are asserting conflicting claims and in which he has no interest other than that of stakeholder, that if plaintiff makes a proper showing and delivers the property to such person as the court may direct, the court may discharge the plaintiff from liability to all or any of the conflicting claimants and the action may proceed for the determination of the rights of the various claimants to the property which is then in the custody of the court, and that this procedure had been followed in the trial court (*102 Cal. App. 2d 67, 79-80)* .

[c] Use of Motion Procedure

Code Civ. Proc. § 1003 provides in pertinent part that an application for an order is a motion.

The factual and procedural background of ***Lincoln Nat. Life Ins. Co. v. Mitchell*** *(1974) 41 Cal. App. 3d 16, 115 Cal. Rptr. 723* , is discussed in *§ 123.27[3][a]*. In dismissing the appeal from the judgment of interpleader discharging the plaintiff from liability and leaving the defendants to settle their dispute as to the proceeds of matured policies on the ground the judgment was interlocutory and nonappealable, the court of appeal pointed out that the proceeds of the policies had been paid into court, that plaintiff filed a motion for judgment of interpleader asking that it be discharged from any further liability, ordering that its policies be cancelled, and requiring the named defendants to determine the dispute between themselves, that the trial court granted the motion, that a judgment of interpleader was entered, and that the appeal was from this judgment (*41 Cal. App. 3d 16, 18 n.2*).

Crocker-Anglo Nat. Bk. v. American Tr. Co. *(1959) 170 Cal. App. 2d 289, 338 P.2d 617* , was an interpleader action filed by a bank against the executor and the widow of a deceased depositor. The depositor had had both a savings account, from which the wife was authorized to withdraw funds, and a commercial account, on which the wife was authorized to write checks. The balance in these two accounts ($43,005.78) at the time of decedent's death had, at the widow's request, been transferred to her personal account. The executor subsequently demanded from plaintiff payment of the full amounts on deposit at the time decedent died. The bank then withheld the balance in the widow's personal account ($38,082.96), the widow having withdrawn the sum of $4,922.82. Plaintiff prayed that defendants be required to interplead and that, on deposit by plaintiff of the sum of $39,304.99 (amount withheld from widow's account plus interest), plaintiff be discharged from all liability to defendants. The executor filed an answer and a cross complaint against plaintiff and the widow for the sum of $43,005.78 plus interest. Plaintiff filed an answer to the cross complaint and a cross complaint against the widow praying that, in the event plaintiff should be required to pay the executor the amount demanded by the executor, the widow be required to repay plaintiff such sum. Plaintiff filed a notice of motion for an order authorizing plaintiff to deposit the $39,304.99 into court, for an injunction restraining defendants from taking any proceedings or action in relation thereto, and for an interlocutory decree discharging it from all liability to defendants. The trial court denied the motion, apparently on the ground that plaintiff's offer to deposit was conditioned on a complete discharge from liability, whereas the amount it offered to deposit was not the whole amount in dispute. The trial court rendered judgment for the executor against plaintiff for $43,005.78 plus interest and in favor of plaintiff against he widow for the sum of $4,922.82. Plaintiff and the widow appealed.

The court of appeal affirmed. It held that plaintiff's motion had been properly denied because it failed to deposit in court when the complaint was filed the sum it admitted to be due and because its offer to deposit the money, the amount of which was less than that in dispute, was conditioned on its being granted a full discharge from all liability and on the trial court's granting an injunction prohibiting defendants from taking any action or proceeding against plaintiff concerning defendants' claims, and that this the trial court could not do (*170 Cal. App. 2d 289, 300)* .

[d] Deposit in Court

Code Civ. Proc. § 386(c) provides for the deposit of the amount in dispute with the court clerk at the time the complaint or cross complaint is filed, as set forth in Paragraph C of the foregoing form. *Code Civ. Proc. § 386.1* provides that when a deposit has been made pursuant to *Code Civ. Proc. § 386*, the court shall, on the application of any party to the action, order the deposit to be invested in an insured interest-bearing account and that interest on such amount shall be allocated to the parties in the same proportion as the original funds are allocated.

[4] Additional Authorities

[a] Action in Interpleader Authorized

Fidelity Sav. etc. Assn. v. Rodgers (1919) 180 Cal. 683, 182 P. 426 , was an action in interpleader to require the two

defendants to interplead and litigate between themselves their adverse and conflicting claims to a sum of money in plaintiff's possession which plaintiff offered to pay into court for the party found to be entitled to it. The trial court subsequently rendered judgment for one of the defendants, and the other defendant appealed. The Supreme Court reversed on the ground that the trial court erred in concluding that the successful defendant was entitled to the money. The Court rejected, however, appellant's argument that the complaint in interpleader was insufficient because it did not state facts showing that the claims of the successful defendant were well founded. The Court pointed out that the action in interpleader is authorized by *Code Civ. Proc. § 386* [*now Code Civ. Proc. § 386(a)*] and that the code requires nothing more of the plaintiff than, in its complaint in interpleader, to show that the parties to be called in make claims on it for the same thing, that the respective claims are adverse to each other, and that it cannot safely determine for itself which claim is right and lawful (*180 Cal. 683, 684-685)* .

It should be noted that the Court's foregoing statement was later repudiated by the Supreme Court in *Hancock Oil Co. v. Hopkins (1944) 24 Cal. 2d 497, 510, 150 P.2d 463* , to the extent that it requires a complaint in interpleader to allege that plaintiff cannot safely determine for itself which claim is right and lawful.

[b] Deposit in Court

Leroy v. Bella Vista Investment Co. (1963) 222 Cal. App. 2d 369, 35 Cal. Rptr. 128 , involved an appeal from the judgment in each of three cases which were consolidated for trial. The second case was an action in interpleader to determine plaintiff's liability under a promissory note as between the payee of the note and a creditor of the payee who had garnished a portion of the proceeds of the note in a third-party action. On filing the complaint in interpleader, plaintiff deposited the amount in dispute with the clerk of the court. With respect to this action, the court of appeal, citing *Code Civ. Proc. § 386* [*now Code Civ. Proc. § 386(c)*], said that on the filing of the action it was proper for plaintiff to deposit with the clerk of the court the amount in dispute without first obtaining an order of the court therefor, that the deposit stopped the accrual of interest on the amount deposited, and that while the note contained a promise to pay all costs of collection and reasonable attorney's fees incurred by the holder of the note on account of such collection, whether or not suit was filed thereon, the nature of the suit in interpleader precluded the assessment of such special damages as against plaintiff with respect to the amount deposited with the court clerk (*222 Cal. App. 2d 369, 376-377)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureParties InterpleadersGeneral OverviewCivil ProcedureRemediesDeposits in Court

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 123 INTERPLEADER
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12-123 California Points & Authorities § 123.22

§ 123.22 Supporting Motion by Cross Complainant in Interpleader for Order Discharging Cross Complainant From Liability [Code Civ. Proc. § 386(a)] and, If Appropriate, for Order to Deposit Money or Deliver Property Sued For

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ORDER DISCHARGING CROSS COMPLAINANT FROM LIABILITY
_____ [*name*],	)	
Defendant.	)	
_____ [*name*],	)	
Cross Complainant,	)	[*Code Civ. Proc. § 386(a)*]
vs.	)	Date: _____
_____ [*names*],	)	Time: _____
Cross Defendants.	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

CROSS COMPLAINANT'S MOTION FOR AN ORDER [TO _____ (DEPOSIT WITH THE COURT CLERK THE MONEY SUED FOR *or* DELIVER THE PROPERTY SUED FOR AS THE COURT SHALL DIRECT) AND FOR AN ORDER] DISCHARGING CROSS COMPLAINANT FROM LIABILITY SHOULD BE GRANTED BECAUSE, AS SHOWN BY THE PAPERS SUBMITTED IN SUPPORT OF THE MOTION, CROSS

COMPLAINANT HAS NO INTEREST IN THE _____ [MONEY *or* PROPERTY] SUED FOR, AND CONFLICTING CLAIMS TO IT HAVE BEEN MADE BY PLAINTIFF AND CROSS DEFENDANT _____ [*name*]. [THE FULL AMOUNT SUED FOR HAS BEEN DEPOSITED WITH THE CLERK OF THIS COURT].

A. Cross Action in Interpleader Authorized. A defendant against whom an action is pending on a contract or for specific personal property and against whom a demand on the contract or for such property has been made by a person not a party to the action may file a verified cross complaint in interpleader, admitting that he or she has no interest in the amount or property claimed by plaintiff, or in a portion of such amount or such property, and alleging that all or such portion of the amount or property is demanded by parties to such action or cross action (*Code Civ. Proc. § 386(a)*).

B. Discharge of Interpleading Party From Liability. [*See § 123.21, Paragraph B.*]

C. Use of Motion Procedure. [*See § 123.21, Paragraph C.*]

[*Optional*] **D. Motion for Order to Deliver Property.** The cross complainant in interpleader may apply to the court on notice to the parties for an order to deliver the property or portion of it or its value to such person as the court shall direct (*Code Civ. Proc. § 386(a)*).

[*Optional*] **E. Deposit in Court.** [*See § 123.21, Paragraph D.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities is for use by defendant, who has been sued in an action on a contract or for specific personal property and who filed a cross complaint against plaintiff and a third party who had made a claim against defendant on the contract or for the property, in support of a motion for an order discharging defendant/cross complainant from liability to cross defendants and, if the amount sued for was not deposited with the court clerk when the cross complaint was filed, for an order that such amount be so deposited or, if the case involves disputed personal property, for an order that cross complainant deliver the property to such person as the court shall in its order direct.

It should be noted that unlike a motion by defendant to substitute a nonparty in defendant's place and for an order discharging defendant from liability [*see § 123.20*], a cross complaint may be filed with or after the time the answer is filed [*see Code Civ. Proc. §§ 386(a), 428.50*].

The grounds of the motion are: (1) defendant/cross complainant claims no interest in the amount or property sued for; (2) the new party cross defendant has, without any collusion with defendant/cross complainant made a demand against defendant on the contract or for the property; (3) defendant/cross complainant has deposited or will, on order of the

court, deposit with the court clerk the full amount sued for, or defendant/cross complainant will, on order of the court, deliver the personal property to such person as the court shall in its order direct; and (4) the order of discharge is authorized by *Code Civ. Proc. § 386(a)*.

Paragraph D should be included if the action by plaintiff against defendant/cross complainant is one to recover specific personal property as opposed to a sum of money. Paragraph E should be included if the disputed amount is due on a contractual obligation and cross complainant deposited the full amount with accrued interest, if any, with the court clerk at the time the cross complaint was filed.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations setting forth any extrinsic evidence necessary to establish the grounds of the motion.

For additional points and authorities that may be added to this form if there is no privity between the conflicting claimants, or if an award of costs and attorney fees is sought pursuant to *Code Civ. Proc. § 386.6*, see *§§ 123.23* and *123.25*, respectively.

[b] Opposing Points and Authorities

The points and authorities set out in *§ 123.28* may be used in an appropriate case to oppose a motion by the cross complainant in interpleader for an order discharging him or her from liability supported by the foregoing memorandum.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeGeneral OverviewCivil ProceduresPleading & PracticePleadingsCross-ClaimsGeneral OverviewCivil ProceduresPartiesInterpleadersGeneral Overview

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 123 INTERPLEADER
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12-123 California Points & Authorities § 123.23

§ 123.23 Supporting Motion for Order for Discharge From Liability to Conflicting Claimants--Conflicting Claims Are Not Identical or Are Independent [Code Civ. Proc. § 386(a)]

[1] FORM

[The following should be combined with the points and authorities set forth in *§§ 123.20*-123.22 if the claims of the conflicting claimants are adverse and independent.]

THE REMEDY PROVIDED BY SECTION 386(a) OF THE CODE OF CIVIL PROCEDURE IS AVAILABLE ALTHOUGH THE CLAIMS OF THE CONFLICTING CLAIMANTS ARE ADVERSE TO AND INDEPENDENT OF ONE ANOTHER.

Effect of Nonidentical or Independent Claims. The order of substitution of parties may be made and the action of interpleader may be maintained, and the applicant or interpleading party be discharged from liability to all or any of the conflicting claimants, although their titles or claims have not a common origin, or are not identical but are adverse to and independent of one another (*Code Civ. Proc. § 386(a)*; *see also Hancock Oil Co. v. Hopkins (1944) 24 Cal. 2d 497, 502-503, 150 P.2d 463*).

[2] Comments

[a] Use of Form

This point and authority may be combined with the points and authorities set out in *§§ 123.20*-123.22 when not all adverse claimants claim the entire amount in dispute or when there is no privity between the conflicting claimants.

[3] Discussion of Authorities

[a] Effect of Nonidentical or Independent Claims

Hancock Oil Co. v. Hopkins *(1944) 24 Cal. 2d 497, 150 P.2d 463* , was an interpleader action by the lessees of real property to require the lessors and certain other persons to interplead their rights to the landowner's oil royalties which

had accrued and which were to accrue under the terms of the lease. The adverse claimants claimed that the lessors held the property in trust for them and that they were the owners and entitled to the royalties. From a judgment entered following the sustaining of the general and special demurrers of the lessors to the complaint without leave to amend on the ground that a tenant may not, under the provisions of *Code Civ. Proc. § 1962(4)* [repealed; *now see Evid. Code § 624*], dispute the title of his or her landlord at the date of the lease, plaintiffs appealed.

The Supreme Court reversed. The Court pointed out that the common law bill of interpleader had four essential elements: (1) the same thing, debt, or duty had to be claimed by both or all the parties against whom the relief was demanded; (2) all of the adverse titles or claims had to be dependent, or be derived from a common source; (3) the one seeking the relief must not have had or claimed any interest in the subject matter; and (4) the one seeking the relief must have incurred no independent liability to either of the claimants (*24 Cal. 2d 497, 502-503)* . The Court explained that *Code Civ. Proc. § 386* [*now Code Civ. Proc. § 386(a)*] was amended in 1881 to add the provision that interpleader lies although the titles or claims of the conflicting claimants have not a common origin, or are not identical, but are adverse to and independent of one another. The Court held that this amendment, omitting the phrase, "or are not identical," directly abrogated the common law requirement that all the adverse titles or claims had to be dependent or derived from a common source, and that it was therefore clear that privity between the conflicting claimants need not be shown to invoke the remedy of interpleader (*24 Cal. 2d 497, 503)* . The Court further held that the amendment, by use of the phrase, "or are not identical," also abrogated the common law requirement that the same thing, debt, or duty be claimed by both claimants and that the action could be maintained although one claimant claimed the entire fund and another claimant claimed only a portion of that fund (*24 Cal. 2d 497, 503-504)* . The Court, however, cautioned that the amendment does not allow the remedy when each of the claimants asserts the right to a different debt, claim, or duty (*24 Cal. 2d 497, 504)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterpleadersGeneral OverviewCivil ProcedurePartiesSubstitutionsGeneral Overview

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12-123 California Points & Authorities § 123.24

§ 123.24 Supporting Defendant Stakeholder's Motion for Order Discharging Stakeholder From Liability and Dismissing Stakeholder From Action on Stakeholder's Deposit With Court Clerk of Amount in Dispute [Code Civ. Proc. § 386.5]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ORDER DISCHARGING DEFENDANT _____ [*name*] FROM LIABILITY AND DISMISSING HIM/HER/IT FROM CASE [*Code Civ. Proc. § 386.5*]
_____ [*name*] ,	)	
Plaintiff,	)	
vs.	)	
_____ [*names*],	)	
Defendants.	)	
	)	Date: _____
	)	Time: _____
	)	Location: _____
		[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

DEFENDANT _____'S [*name*] MOTION FOR AN ORDER DISCHARGING HIM/HER/IT FROM LIABILITY TO THE PARTIES HEREIN AND DISMISSING HIM/HER/IT FROM THE CASE ON HIS/HER/ITS DEPOSITING THE AMOUNT IN DISPUTE WITH THE CLERK OF THIS COURT SHOULD BE GRANTED BECAUSE, AS SHOWN BY THE PAPERS SUBMITTED IN SUPPORT OF THE MOTION, DEFENDANT _____ [*name*] IS A MERE STAKEHOLDER AND CLAIMS NO INTEREST IN

THE AMOUNT IN DISPUTE OR IN ANY PORTION OF IT AND CONFLICTING CLAIMS TO THE AMOUNT HAVE BEEN MADE ON THIS DEFENDANT BY OTHER PARTIES TO THE ACTION.

Dismissal of Stakeholder. If the only relief sought against one of the defendants is the payment of a stated amount of money alleged to be wrongfully withheld, such defendant may, on affidavit (or declaration under *Section 2015.5 of the Code of Civil Procedure*) that he or she is a mere stakeholder with no interest in the amount or any portion of it and that conflicting demands have been made on him or her for the amount by parties to the action, on notice to such parties, apply to the court for an order discharging him or her from liability and dismissing him or her from the action on his or her depositing with the clerk of the court the amount in dispute, and the court may, in its discretion, make such order (*Code Civ. Proc. § 386.5*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be used in an action against two or more defendants by the defendant against whom the only relief sought is payment of a stated amount of money alleged to be wrongfully withheld in support of a motion for an order discharging the moving defendant from liability to the parties and dismissing him or her from the action on his or her depositing the amount in dispute with the court clerk.

The grounds of the motion are: (1) defendant has no interest in the disputed amount or any portion of it; (2) conflicting demands have been made on him or her for the amount by parties to the action; and (3) the order of discharge and dismissal is authorized by *Code Civ. Proc. § 386.5*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach an affidavit [*Code Civ. Proc. §§ 386.5, 2009*] or declaration [*Code Civ. Proc. § 2015.5*] stating that defendant is a mere stakeholder with no interest in the amount sued for or any portion of it, setting forth evidentiary facts showing that conflicting demands have been made on defendant for the amount by parties to the action, and setting forth defendant's offer to deposit the amount with the court clerk.

For additional points and authorities that may be added to the foregoing form if an award of costs and attorney fees is sought pursuant to *Code Civ. Proc. § 386.6*, see *§ 123.25*.

[b] Related Pleading and Practice Forms

For a form of notice of motion by one of the defendants, in the action to recover money allegedly wrongfully withheld, to be discharged from liability and dismissed from the action on his or her depositing the amount in dispute with the court clerk, a form of supporting declaration, and an order discharging defendant from liability and dismissing him or her from the action, see Ch. 314, *Interpleader* in California Forms of Pleading and Practice.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePartiesInterpleadersGeneral OverviewCivil ProcedureRemediesDeposits in Court

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12-123 California Points & Authorities § 123.25

§ 123.25 Supporting Motion of Defendant or Interpleading Party for Order Awarding Costs and Attorney Fees [Code Civ. Proc. § 386.6]

[1] FORM

[The following should be combined with the points and authorities set forth in *§§ 123.20*-123.22 and *123.24* when the moving defendant or interpleading party seeks an award of costs and attorney fees pursuant to *Code Civ. Proc. § 386.6*].

THE COURT MAY AWARD COSTS AND REASONABLE ATTORNEY FEES TO THE _____ [DEFENDANT *or* INTERPLEADING PARTY] WHO HAS FOLLOWED THE PROCEDURE SET FORTH IN SECTION _____ [386 *or* 386.5] OF THE CODE OF CIVIL PROCEDURE.

A. Right to Request Award of Costs and Attorney Fees. A party who follows the procedure set forth in *Section 386* or *386.5 of the Code of Civil Procedure* may insert in his or her motion, petition, complaint, or cross complaint a request for allowance of his or her costs and reasonable attorney fees incurred in the action (*Code Civ. Proc. § 386.6(a)*; *see also Business Title Corp. v. United States (1978) 21 Cal. 3d 710, 717, 147 Cal. Rptr. 622, 581 P.2d 627*).

[*Optional*] **B. Award of Costs and Attorney Fees From Funds Deposited With Court.** In ordering the discharge of the party, the court may, in its discretion, award such party his or her costs and reasonable attorney fees from the amount in dispute which has been deposited with the court (*Code Civ. Proc. § 386.6(a)*).

[*Optional*] **C. Award May Be Made From Future Deposits** An award of attorney fees pursuant to *Section 386.6 of the Code of Civil Procedure* may, when the initial amount deposited is insufficient, be made from future periodic payments to be deposited with the court by the defendant or interpleading party as they become due (see *Signal Oil & Gas Co. v. Taliaferro (1962) 207 Cal. App. 2d 271, 275-276, 24 Cal. Rptr. 593*).

[*Optional*] **D. Denial of Attorney Fees Because Discharged Party Is Attorney as Not Permitted.** A party may not be denied the attorney fees authorized by *Section 386.6(a) of the Code of Civil Procedure* for the reason that he or she is an attorney, appeared in pro se, and performed his or her own legal services (*Code Civ. Proc. § 386.6(b)*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be used in combination with the points and authorities set out in *§§ 123.20*-123.22 and *123.24* when the defendant or interpleading party seeks, on his or her discharge from liability, an award of costs and attorney fees. If the points and authorities are used in combination with *§§ 123.20*-123.22 and *123.24*, the captions of those forms should include the further description, AND FOR AN AWARD OF COSTS AND ATTORNEY FEES. Also, [*Code Civ. Proc. §§ 386(a)*] in the captions to *§§ 123.20*-123.22 should be changed to [*Code Civ. Proc. §§ 386(a), 386.6*], and [*Code Civ. Proc. § 386.5*] in the caption to *§ 123.24* should be changed to [*Code Civ. Proc. §§ 386.5, 386.6*].

The grounds of the motion are: (1) the moving party has incurred costs and attorney fees in availing himself or herself of the remedy provided in *Code Civ. Proc. § 386(a)* or *386.5*; (2) the moving party has followed the procedure set forth in the applicable section; and (3) the award is authorized by *Code Civ. Proc. § 386.6*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated.

Paragraph B should be included if the amount in dispute has been, or will be, deposited with the court clerk.

Paragraph C should be included if the amount in dispute consists of periodic payments, such as rent, and the initial amount deposited, or to be deposited, is insufficient to cover the costs and reasonable attorney fees sought.

Paragraph D should be included if the stakeholder or interpleading party is an attorney who has appeared in pro se and has performed his or her own legal services.

[b] Opposing Points and Authorities

The points and authorities set out in *§§ 123.30*-123.32 and *123.34* may be used in an appropriate case to oppose a motion for an order awarding costs and attorney fees supported by the foregoing memorandum.

See also *§§ 123.20[2], 123.21[2]*, and *123.24[2]* for Related Pleading and Practice Forms.

[3] Discussion of Authorities

[a] Right to Request Award of Costs and Attorney Fees

Business Title Corp. v. United States *(1978) 21 Cal. 3d 710, 147 Cal. Rptr. 622, 581 P.2d 627* , was an action in interpleader by the escrow holder acting pursuant to appointment under *Bus. & Prof. Code § 24074* to resolve conflicting claims to funds deposited in an escrow account set up for the transfer of a liquor license. Plaintiff requested that it be discharged from liability and dismissed from the action on depositing the interpleaded funds with the court and that it be awarded costs of suit and attorney fees incurred in the action pursuant to the provisions of *Code Civ. Proc. § 386.6* (*21 Cal. 3d 710, 716)* . Subsequently, judgment was entered discharging and dismissing the interpleading party, awarding it out of the interpleaded fund the sum of $1,471 for attorney fees and costs incurred in the action, and awarding the residue of the cash proceeds to one of the interpleaded defendants (*21 Cal. 3d 710, 717)* . The other defendant (the United States) appealed, claiming that its lien should have been given priority and that the trial court erred in awarding the interpleaded fund to the other defendant. The Supreme Court, after an analysis of the facts and law, rejected the argument and affirmed the judgment (*21 Cal. 3d 710, 722)* .

[b] Award of Costs and Attorney Fees From Funds Deposited With Court

In addition to the statement made in Paragraph B of the foregoing form, *Code Civ. Proc. § 386.6(a)* provides that at the

time of final judgment in the action the court may make such further provision for assumption of such costs and attorney fees by one or more of the adverse claimants as may appear proper.

[c] Award May Be Made From Future Deposits

Signal Oil & Gas Co. v. Taliaferro *(1962) 207 Cal. App. 2d 271, 24 Cal. Rptr. 593* , was an action by a lessee of commercial property to compel adverse and conflicting claimants to rent payments to interplead and litigate their claims among themselves. On filing the complaint, plaintiff deposited with the court clerk the sum of $494.22, being the rent then due. The trial court rendered a judgment in plaintiff's favor that defendants interplead their rights to the rental payments and that plaintiff be discharged from any liability on account of nonpayment of rent so long as and to the extent that rent payments were deposited with the court clerk or with a named bank pursuant to the stipulation of the parties. The judgment restrained defendants from commencing any action against plaintiff for rent or because of nonpayment of rent so long as plaintiff complied with the foregoing conditions and ordered that plaintiff was entitled to recover as reasonable attorney fees the sum of $500 which was to be deducted from the sum deposited. On appeal, by one of the defendants, appellant contended that the trial court erred in allowing plaintiff in interpleader $500 attorney fees when the amount deposited in court was only $494.22. The court of appeal held that the claim had no merit. The court noted that the statutory basis for the award [*Code Civ. Proc. § 386.6*] was unchallenged and that in making the award the trial court provided that it "shall be deducted from the sum deposited as provided hereinabove" (*207 Cal. App. 2d 271, 275-276)* . The court said that the judgment clearly contemplated the continuous deposits of rent as it became due, that despite the unfortunate use of the singular in respect to the deduction, "from the sum deposited," the judgment operated prospectively as well as in the present, and that the court was awarding attorney fees with respect to the one month's rent already deposited and the rentals to be deposited in the future. Consequently, the fees allowed did not exceed the fund from which they were to be paid (*207 Cal. App. 2d 271, 276)* .

[4] Additional Authorities

[a] Award of Costs and Attorney Fees From Funds Deposited With Court

Fritschi v. Teed (1963) 213 Cal. App. 2d 718, 29 Cal. Rptr. 114 , involved three cases consolidated on appeal, two of which were interpleader actions by insurance companies to determine the rights of adverse claimants to life insurance proceeds. In the two interpleader actions, the trial court ordered payment of attorney fees and costs to the insurance companies out of the insurance proceeds, and in the subsequent judgment ordered that the sums be included in the costs payable by the losing defendant. The court of appeal held that under *Code Civ. Proc. § 386.6* [*now Code Civ. Proc. § 386.6(a)*], the trial court properly exercised its discretion (*213 Cal. App. 2d 718, 728)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePartiesInterpleadersGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesGeneral Overview

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 123 INTERPLEADER
PART II. FORMS

12-123 California Points & Authorities § 123.26

§ 123.26 Supporting Application of Plaintiff or Cross Complainant in Interpleader for Preliminary Injunction [Code Civ. Proc. § 527(a)] Enjoining Other Parties to Action From Prosecuting or Instituting Actions Affecting Rights and Obligations of Parties to Action or Cross Action in Interpleader [Code Civ. Proc. § 386(f)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*EITHER, if application by plaintiff in interpleader:*]

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF APPLICA-
Plaintiff,	)	TION FOR PRELIMINARY INJUNCTION
vs.	)	[*Code Civ. Proc. §§ 386(f), 527(a)*]
_____ [*names*],	)	Date: _____
Defendants.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

[*OR, if application by cross complainant in interpleader:*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM IN SUPPORT OF APPLICA-

_____ [*name*],	)	TION FOR PRELIMINARY INJUNCTION
Defendant.	)	[*Code Civ. Proc. §§ 386(f), 527(a)*]
_____ [*name*],	)	Date: _____
Cross Complainant,	)	Time: _____
vs.	)	Location: _____
_____ [*names*],	)	[Judge: _____]
Cross Defendants.	)	Date Action Filed: _____
	)	[Trial Date: _____]
	)	
	)	

_____ [PLAINTIFF'S *or* CROSS COMPLAINANT'S] APPLICATION FOR A PRELIMINARY INJUNCTION RESTRAINING ALL PARTIES TO THIS _____ [ACTION *or* CROSS ACTION] FROM INSTITUTING OR FURTHER PROSECUTING ANY OTHER PROCEEDING IN ANY COURT IN CALIFORNIA AFFECTING THE RIGHTS AND OBLIGATIONS AS BETWEEN THE PARTIES TO THE INTERPLEADER UNTIL FURTHER ORDER OF THE COURT SHOULD BE GRANTED BECAUSE, AS SHOWN BY THE PAPERS SUBMITTED IN SUPPORT OF THIS APPLICATION, AN ACTUAL DANGER OF MULTIPLICITY OF ACTIONS EXISTS, THE PENDING INTERPLEADER _____ [ACTION *or* CROSS ACTION] IS ADEQUATE TO PROTECT THE RIGHTS OF ALL THE PARTIES TO THE _____ [FUNDS *or* PROPERTY] IN QUESTION, AND NONE OF THE PARTIES WILL BE DAMAGED BY THE GRANTING OF THE APPLICATION AND THE ISSUANCE OF THE INJUNCTION.

A. Pendente Lite Injunctive Relief Authorized. After a complaint or cross complaint in interpleader has been filed, the court in which it was filed may enter its order restraining all parties to the action from instituting or further prosecuting any other proceeding in any court in California affecting the rights and obligations as between the parties to the interpleader until further order of the court (*Code Civ. Proc. § 386(f)*).

B. When Relief May Be Granted. A preliminary injunction may be granted at any time before judgment on a verified complaint or on affidavits (declarations) showing satisfactorily that sufficient grounds exist for it (*Code Civ. Proc. § 527(a)*).

C. Ground for Relief. An injunction may be granted pendente lite when it is necessary to prevent a multiplicity of judicial proceedings (*Code Civ. Proc. § 526(a)(6)*).

D. Denial of Application for Preliminary Injunction as Abuse of Discretion. It is an abuse of discretion for the trial court to deny a request for a preliminary injunction under *Section 386(f) of the Code of Civil Procedure* when the applicant has made a prima facie showing of the need for injunctive relief and has shown that (1) an actual and not merely a hypothetical danger of multiplicity of suits exists if the injunctive relief is not granted, (2) the interpleader action is adequate to preserve the rights of the parties to the funds or property in question, and (3) no damage would result to the parties if the preliminary injunction is issued (*Department of Education v. Superior Court (1979) 97 Cal. App. 3d 977, 979, 159 Cal. Rptr. 265*).

[*Optional*] **E. Court May Restrain Collection of Judgment.** Jurisdiction to restrain further prosecution of proceedings that affect the rights and obligations of the interpleader includes jurisdiction to restrain collection of a claim that has already been reduced to judgment (*Surety Co. of the Pacific v. Piver (1983) 149 Cal. App. 3d Supp. 29, 32, 197 Cal. Rptr. 531*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted by plaintiff or cross complainant in an action or cross action in interpleader to support an application for a preliminary injunction to restrain defendants or cross defendants from instituting or further prosecuting any other proceeding in any court in California affecting the rights and obligations as between the parties to the interpleader until further order of the court. The application for the preliminary injunction may be either by noticed motion, in which case the memorandum must be served and filed with the notice of motion [*see Cal. Rules of Ct., Rule 3.1113(a)*], or by application for an order to show cause why the preliminary injunction should not be granted and for a temporary restraining order, in which case the memorandum must be served along with the applicant's other papers within five days from the date the temporary restraining order is issued, or two days prior to the hearing, whichever is earlier [*Code Civ. Proc. § 527(d)(2)*].

The grounds of the application are: (1) pendente lite injunctive relief is authorized by *Code Civ. Proc. § 386(f)*; and (2) a denial of the application would constitute an abuse of judicial discretion because (a) an actual danger of multiplicity of actions exists, (b) the pending action or cross action in interpleader is adequate to preserve the rights of the parties to the funds or property in question, and (c) none of the parties will be damaged by the issuance of a preliminary injunction.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. If the application is by noticed motion, counsel should serve and file with the notice of motion and memorandum affidavits [*see Code Civ. Proc. § 2009*] or declarations under penalty of perjury [*Code Civ. Proc. § 2015.5*] setting forth the evidentiary facts necessary to establish the grounds of the motion. If the order to show cause procedure is used, statute requires that the applicant serve on the adverse parties any affidavits (declarations) relied on as establishing the grounds for issuance of a preliminary injunction within the time period prescribed by *Code Civ. Proc. § 527(d)(2)*, as set forth above.

[b] Related Pleading and Practice Forms

For a form of order to show cause and temporary restraining order and form of preliminary injunction enjoining other parties to the action from prosecuting or instituting actions affecting the rights and obligations of the parties in interpleader, see Ch. 314, *Interpleader* in California Forms of Pleading and Practice. For a general discussion and forms of applications for temporary restraining orders and a notice of motion for preliminary injunction and related papers, see Ch. 303, *Injunctions* in that set.

[3] Discussion of Authorities

[a] Denial of Application for Preliminary Injunction as Abuse of Discretion

Department of Education v. Superior Court *(1979) 97 Cal. App. 3d 977, 159 Cal. Rptr. 265* , was an action in

interpleader in which plaintiff deposited the interpleaded funds with the court and sought injunctive relief pursuant to *Code Civ. Proc. § 386(f)*. Plaintiff asserted that one of the defendants had already filed an action against it and that another defendant was threatening to do so. The trial court issued an order to show cause why a preliminary injunction should not be granted. None of the defendants filed opposition to the issuance of a preliminary injunction, although a third defendant appeared and opposed it orally. The trial court denied the motion for a preliminary injunction without giving any reasons for its action, and plaintiff petitioned the court of appeal for a writ of mandate to compel the trial court to grant the request for a preliminary injunction.

In ordering issuance of a peremptory writ of mandate directing the trial court to vacate its order denying the preliminary injunction and to enter an order granting it, the court of appeal said that although the language of *Code Civ. Proc. § 386(f)* is discretionary, the discretion which a trial court enjoys is not unlimited (*97 Cal. App. 3d 977, 979)* . The court pointed out that plaintiff had made more than a prima facie showing of the need for injunctive relief and had shown an actual, not merely a hypothetical, danger of a multiplicity of suits and that the unnecessary filing of multiple suits would inconvenience not only plaintiff but the judicial system as well. The court further noted that defendants had not come forward with any explanation whatever of why the pending interpleader action was inadequate to preserve their rights to the funds in question or how they would be damaged if the preliminary injunction issued. The court held that, under these circumstances, it was an abuse of discretion for the trial court to deny the request for a preliminary injunction (*97 Cal. App. 3d 977, 979)* .

[b] Court May Restrain Collection of Judgment

In ***Surety Co. of the Pacific v. Piver*** *(1983) 149 Cal. App. 3d Supp. 29, 197 Cal. Rptr. 531* , cross defendant obtained a summary judgment against a surety company, based on a statutory contractor's license bond issued by the surety company. A second claimant subsequently brought the present action against the surety company, based on the same bond. The first claimant was aware of the second claimant's claim, as well as of the existence of a third claim, before moving for summary judgment. In the present action, the surety company filed a cross complaint in interpleader. In connection with its cross complaint, the surety company moved for and obtained from the trial court an order an order restraining all parties to the action from instituting or further prosecuting any other proceedings that affected the rights and obligations of the parties to the interpleader. The first claimant appealed the order.

The court of appeal upheld the trial court. The court stated that the trial court clearly had jurisdiction to make the order, and the fact that the fist claimant's claim had been reduced to judgment did not preclude the restraint. The court held that *Code Civ. Proc. § 386(f)*, pursuant to which the order was made, is not limited by its terms to unliquidiated or unadjudicated claims, and that such a statutory limitation should not be implied. The court noted that a restraint against enforcing a judgment may be essential to the protection of the interpleader jurisdiction, and that there may be situations in which the various claimants to particular property or a fund should be permitted to proceed to judgment, being restrained in the interpleader action only as to enforcement of the judgment (*149 Cal. App. 3d Supp. 29, 31*). Thus the court concluded that jurisdiction to restrain further prosecution of proceedings under *Code Civ. Proc. § 386* includes jurisdiction to restrain collection of the judgment (*149 Cal. App. 3d Supp. 29, 32*).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureParties InterpleadersGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary Injunctions

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§ 123.27 Supporting Respondent's Motion for Order Dismissing Appeal--Judgment or Order Discharging Defendant or Interpleading Party From Liability on Deposit of Fund or Delivery of Property as Interlocutory and Nonappealable

[1] FORM

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
_____ APPELLATE DISTRICT
[DIVISION _____]
[*EITHER, if appeal is from order discharging interpleading plaintiff (Code Civ. Proc. § 386(a)):*]

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS APPEAL
Plaintiff and Respondent,	)	
vs.	)	
_____ [*names*],	)	Date: _____
Defendants and Appellants.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

[*OR, if appeal is from order discharging interpleading cross complainant (Code Civ. Proc. § 386(a)):*]

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

vs. _____ [*name*], Defendant. _____ [*name*], Cross Complainant and Respondent, vs. _____ [*names*], Cross Defendants and Appellants.	)))))))))	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS APPEAL Date: _____ Time: _____ Location: _____ [Judge: _____] Date Action Filed: _____ [Trial Date: _____]

[*OR, if appeal is from order substituting parties defendant (Code Civ. Proc. § 386(a)):*]

_____ [*name*], Plaintiff and Appellant, vs. _____ [*name*], Defendant and Respondent.	)))))))))	NO. _____ MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS APPEAL Date: _____ Time: _____ Location: _____ [Judge: _____] Date Action Filed: _____ [Trial Date: _____]

[*OR, if appeal is from order discharging stakeholder (Code Civ. Proc. § 386.5):*]

_____ [*name*], Plaintiff and Appellant, vs. _____ [*name*], Defendant and Respondent, and _____ [*name(s)*], Defendants.	)))))))))	NO._____ MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS APPEAL Date: _____ Time: _____ Location: _____ [Judge: _____] Date Action Filed: _____ [Trial Date: _____]

RESPONDENT'S MOTION FOR AN ORDER DISMISSING THIS APPEAL SHOULD BE GRANTED BECAUSE THE _____ [JUDGMENT *or* ORDER] APPEALED FROM IS INTERLOCUTORY AND NOT APPEALABLE.

[*EITHER*]

Nonappealability of Judgment of Interpleader. A judgment discharging the interpleading party from the case on his or her depositing with the court the fund in controversy, or delivering the property in controversy as the court directs, and leaving the real parties in interest to litigate their respective claims to the deposited fund or property is interlocutory and nonappealable, although it is subject to review on appeal after ultimate resolution of the adverse claims (*Lincoln Nat. Life Ins. Co. v. Mitchell (1974) 41 Cal. App. 3d 16, 20, 115 Cal. Rptr. 723*).

[*OR*]

Nonappealability of Order Discharging Defendant. An order substituting parties defendant and discharging the original defendant from liability pursuant to the first sentence of *Section 386(a) of the Code of Civil Procedure* is not appealable (*Camp v. Oakland Mortgage & Finance Co. (1928) 205 Cal. 380, 381, 270 P. 685*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Respondent _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted in support of a motion by respondent for an order dismissing the appeal from a judgment or order discharging the interpleading party or stakeholder from liability. The first alternative point should be used if the judgment appealed from discharged an interpleading cross complainant or an interpleading plaintiff; the second alternative point should be used if the order appealed from substituted a nonparty for the defendant and discharged the original defendant from liability pursuant to the first sentence of *Code Civ. Proc. § 386(a)*.

No reported case has been found involving an appeal from an order dismissing a stakeholder under *Code Civ. Proc. § 386.5*. If an appeal from such an order should be taken, it might be argued, by analogy to the points set forth in the foregoing form, that the order is nonappealable.

The ground of the motion is that the order or judgment appealed from is interlocutory and nonappealable and that the appeal should therefore be dismissed.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated.

[b] Opposing Points and Authorities

The points and authorities set out in *§ 123.33* may be used in an appropriate case to oppose a motion to dismiss an appeal supported by the foregoing memorandum.

[c] Related Pleading and Practice Forms

For alternative forms of captions, see Ch. 108, *Captions and Introductions* in California Forms of Pleading and Practice. For a discussion and a general form of motion to dismiss an appeal to the appellate division of the superior court in a limited civil case, see Ch. 345A, *Limited Civil Cases* , in that publication. For a discussion and a form of motion to dismiss an appeal pending in a court of appeal, see Ch. 48, *Appeal: Abandonment, Dismissal, and Stipulated Reversal* , in that publication.

[3] Discussion of Authorities

[a] Nonappealability of Judgment of Interpleader

Lincoln Nat. Life Ins. Co. v. Mitchell *(1974) 41 Cal. App. 3d 16, 115 Cal. Rptr. 723* , was an action in interpleader and for declaratory relief by an insurance company against a husband and wife in which it was alleged that there was a conflict between defendants as to entitlement to the proceeds of matured policies purchased by the wife. Shortly before her commitment to a state mental institution as a criminally insane person, the wife purportedly executed a declaration of trust, naming her husband as trustee and remainderman and herself as sole beneficiary; included in the trust res were the policies involved. When the first policy matured, the husband applied to plaintiff for payment as owner of the policy. Plaintiff had, however, received letters from the wife objecting to any payment of the policy proceeds to her husband. The husband appeared and denied that there was any conflict between himself and his wife over the funds. The wife's guardian ad litem answered, representing to the court that the wife denied executing the declaration of trust. Plaintiff moved for a judgment of interpleader, which was granted, and the husband appealed. The court of appeal dismissed the appeal. It held that the judgment of interpleader, discharging plaintiff and leaving defendants to settle the disposition of the insurance proceeds, was interlocutory and nonappealable, subject to review on appeal only after ultimate resolution of the defendants' claims (*41 Cal. App. 3d 16, 20)* .

The court said that the determination of the propriety of interpleader turns on whether the stakeholder is truly a disinterested party whose discharge still leaves parties in litigation with substantial rights to be resolved with respect to the property in question. The court explained that in California the interpleader procedure is viewed as two suits in one, that the first step is a trial or hearing by the court on the issue of plaintiff's right to interplead, and that if the proof is sufficient, or the right is admitted by failure to object or by stipulation, the court makes an interlocutory order which directs the plaintiff stakeholder to deposit the amount or deliver the property and requires the defendant claimants to interplead and litigate their claims among themselves. Citing, among other cases, *Camp v. Oakland Mortgage & Finance Co. (1928) 205 Cal. 380, 381, 270 P. 685* (discussed in *§ 123.27[3][b]*), the court said that such interlocutory orders, concerning the substitution of parties in a suit, have been regarded as nonappealable until such time as a final judgment has been entered disposing of the claims of the remaining litigants (*41 Cal. App. 3d 16, 19)* .

It should be noted that in *Lincoln*, the court of appeal pointed out that plaintiff had been awarded attorney fees by the trial court from the funds on deposit pursuant to *Code Civ. Proc. § 386.6*. In response to plaintiff's request for a further award incurred in defending the appeal, the court said that the trial court could more effectively determine the amount, if any, to be awarded, and directed the trial court to do so. The court of appeal did not, however, consider the effect, in any, that the award of attorney's fees had on the appealability of the judgment discharging plaintiff from liability. The *Lincoln* case was distinguished on this ground by the court of appeal in *Sweeney v. McClaran (1976) 58 Cal. App. 3d*

824, 827-828, 130 Cal. Rptr. 205 (discussed in *§ 123.33[3][a]*).

[b] Nonappealability of Order Discharging Defendant

Camp v. Oakland Mortgage & Finance Co. *(1928) 205 Cal. 380, 270 P. 685* , involved a motion to dismiss plaintiff's appeal from an order of the trial court which granted the original defendant's motion, made before filing an answer, for an order discharging it from liability and dismissing it from the action on payment into court of the sum in dispute and substituting as parties defendant in its place all the adverse claimants to the sum. Both the original defendant and the substituted defendants moved for dismissal of the appeal. In granting the motions and dismissing the appeal, the Supreme Court said that it found meritorious the moving parties' argument that the order substituting parties defendant was not appealable (*Camp v. Oakland Mortgage & Finance Co. (1928) 205 Cal. 380, 381, 270 P. 685*). The Court noted that the orders were not appealable under the provisions of former Code Civ. Proc. § 963(2) or *(3)* [*now Code Civ. Proc. § 904.1(a)(2)-(12)*] or as final judgment under former Code Civ. Proc. § 963(1) [*now Code Civ. Proc. § 904.1(a)(1)*] and, after reviewing out-of-state and earlier California cases, concluded that the order was not appealable but could be reviewed on appeal from the final judgment (*205 Cal. 380, 381-383)* .

[4] Additional Authorities

[a] Nonappealability of Order Discharging Defendant

See also *Neilsen v. Saylors (1956) 146 Cal. App. 2d 139, 140, 303 P.2d 781* , in which the court of appeal stated that an order of substitution of defendants made under *Code Civ. Proc. § 386* [*now Code Civ. Proc. § 386(a)*] on deposit in court has been held not a final judgment and is therefore not appealable.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureParties Interpleaders General OverviewCivil ProcedureRemediesDeposits in CourtCivil ProcedureAppealsAppellate JurisdictionInterlocutory OrdersCivil ProcedureAppealsDismissals of AppealsInvoluntary Dismissals

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 123 INTERPLEADER
PART II. FORMS

12-123 California Points & Authorities § 123.28

§ 123.28 Opposing Motion of Plaintiff or Cross Complainant in Interpleader for Order Discharging Moving Party From Liability [Code Civ. Proc. § 386(a)]--Future Periodic Deposits Into Court Required

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*EITHER, if motion by plaintiff in interpleader:*]

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN OPPOSITION TO MOTION FOR ORDER
vs.	)	DISCHARGING PLAINTIFF FROM LIABILITY
_____ [*names*],	)	Date: _____
Defendants.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

[*OR, if motion by cross complainant in interpleader:*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*],	)	IES IN OPPOSITION TO MOTION FOR ORDER

Defendant.	)	DISCHARGING CROSS COMPLAINANT FROM
_____ [*name*],	)	LIABILITY
Cross Complainant,	)	Date: _____
vs.	)	Time: _____
_____ [*names*],	)	Location: _____
Cross Defendants.	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THE MOTION FOR AN ORDER DISCHARGING _____ [PLAINTIFF *or* CROSS COMPLAINANT] _____ [*name*] FROM LIABILITY TO THE _____ [DEFENDANTS *or* CROSS DEFENDANTS] SHOULD BE DENIED BECAUSE, AS SHOWN BY THE _____ [COMPLAINT *or* CROSS COMPLAINT] ON FILE HEREIN AND BY THE PAPERS SUBMITTED IN OPPOSITION TO THE MOTION, THE CONFLICTING CLAIMS CONSIST NOT ONLY OF MONEY ALREADY DUE UNDER THE CONTRACT IN QUESTION BUT OF MONEY TO BECOME DUE PERIODICALLY IN THE FUTURE BEFORE THE _____ [ACTION *or* CROSS ACTION] IN INTERPLEADER CAN BE CONCLUDED, AND DEPOSIT WITH THE CLERK OF THIS COURT OF FUTURE PAYMENTS AS THEY BECOME DUE IS CONTEMPLATED BY _____ [PLAINTIFF *or* CROSS COMPLAINANT].

Future Periodic Deposits Into Court Required. An interpleading party may not be discharged from all liability when it is contemplated that deposit into court of future payments under the contract as they become due will be made (see *Great-West Life Assur. Co. v. Superior Court (1969) 271 Cal. App. 2d 124, 127-128, 76 Cal. Rptr. 284*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be used by a defendant or cross defendant in interpleader in opposition to a motion by plaintiff or cross complainant for an order discharging him or her from liability to the conflicting claimants when the moving party claims that its liability to the parties is discharged on its deposit in court of the disputed amount of money.

The grounds of opposition are: (1) the interpleading party's obligation arises under a contract requiring periodic payments of a specified sum of money; (2) the adverse claimants claim not only the money now due under the contract but future payments as they become due as well; (3) future sums will periodically become due and payable before the interpleader action is concluded; and (4) the interpleading party contemplates the deposit with the court clerk of these

future periodic payments as they become due and hence cannot be discharged from liability because it has deposited, or will deposit, with the court clerk the amount currently due under the contract.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations setting forth any facts necessary to oppose the motion.

In an appropriate case, this memorandum of points and authorities may be submitted in opposition to a motion for an order discharging the moving party from liability supported by the points and authorities set out in *§§ 123.21* and *123.22*.

[3] Discussion of Authorities

[a] Future Periodic Deposits Into Court Required

Great-West Life Assur. Co. v. Superior Court *(1969) 271 Cal. App. 2d 124, 76 Cal. Rptr. 284* , was a proceeding in mandate to compel the superior court to exercise its jurisdiction to hear and determine an interpleader action which had originally been filed in the municipal court and, after the amount deposited by plaintiff with the court clerk over a period of time exceeded the latter court's jurisdictional maximum (then $5,000), transferred by the latter court to the superior court. The complaint, filed some four years before, alleged that only the sum of $327.97 was owing under the contracts and that additional sums may become due in the future. No supplemental complaint had been filed to show that the amount deposited exceeded the municipal court's jurisdictional maximum. When the case was still pending in the municipal court and before the time the total amount deposited with the court clerk exceeded that court's jurisdiction, plaintiff moved for a judgment discharging it from liability for the amounts deposited, dismissing it from the action, and awarding it costs and attorney fees out of the fund on deposit. The court made an order (1) stating that the case was a proper one for interpleader, (2) discharging plaintiff from further liability as to certain named defendants to the amount of the deposit, (3) ordering that as further sums accrued on the contracts plaintiff deposit them with the court clerk, and (4) providing that plaintiff would receive out of the money on deposit its costs and reasonable attorney fees which would be set by the court at the trial of the matter (*271 Cal. App. 2d 124, 125)* .

In ordering issuance of a writ of mandate to the superior court directing it to make an order that a supplemental complaint alleging the amount of money then involved in the interpleader action be filed and to exercise its jurisdiction to hear and determine the action, the court of appeal noted the rules that an action in interpleader is a two-fold contest, that whether a plaintiff shall be permitted to maintain the action is first determined in the trial court, that if the right is sustained an interlocutory decree is entered requiring the defendants to litigate their claims inter sese, and that following the entry of the interlocutory decree plaintiff ceases to be a party to the litigation (*271 Cal. App. 2d 124, 126-127)* . The court explained that the municipal court order differed from the typical interlocutory judgment in interpleader in that it purported to discharge plaintiff from the claims of three of the defendants but failed to mention the fourth, that the order specifically directed plaintiff to deposit additional moneys with the court clerk as they became due, leaving open the propriety of interpleading further amounts, that the declaration that this was a proper case for interpleader could only have referred to the interpleader of the amount then on deposit, and that the requirement that plaintiff make further deposits was an acknowledgment that plaintiff was remaining an active party litigant (*271 Cal. App. 2d 124, 127-128)* .

The court of appeal further noted that the order deferred determination of the amount of attorney fees to be awarded until the trial of the matter and that *Code Civ. Proc. § 386.6* [*now Code Civ. Proc. § 386.6(a)*] provides that when the interpleading party is discharged and dismissed from the action the court may award him or her costs and attorney fees from the fund on deposit. The court concluded that despite the so-called order of interpleader, the first phase of the two-fold contest remained partially undetermined and, of necessity, plaintiff remained an active participant in the case (*271 Cal. App. 2d 124, 128)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeGeneral OverviewCivil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPartiesInterpleadersGeneral OverviewCivil ProceduresRemediesDeposits in Court

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 123 INTERPLEADER
PART II. FORMS

12-123 California Points & Authorities § 123.29

§ 123.29 Opposing Motion of Plaintiff or Cross Complainant in Interpleader for Order Discharging Moving Party From Liability [Code Civ. Proc. § 386(a), (b)]; Claims Do Not Relate to Same Thing, Debt, or Duty

[1] FORM

[*Caption. See § 123.28.*]

THE MOTION FOR AN ORDER DISCHARGING _____ [PLAINTIFF *or* CROSS COMPLAINANT] _____ [*name*] FROM LIABILITY TO THE _____ [DEFENDANTS *or* CROSS DEFENDANTS] SHOULD BE DENIED BECAUSE, AS SHOWN BY THE _____ [COMPLAINT *or* CROSS COMPLAINT] ON FILE HEREIN AND BY THE PAPERS SUBMITTED IN OPPOSITION TO THE MOTION, THE CONFLICTING CLAIMS DO NOT RELATE TO THE SAME THING, DEBT, OR DUTY.

Required That Claimant Seek the Same Thing, Debt, or Duty. Under *Code Civ. Proc. § 386*, it is still required that the claimants seek the same thing, debt, or duty. If the claims do not relate to the same thing, debt, or duty, then interpleader is improper (*see Hancock Oil Co. v. Hopkins (1944) 24 Cal. 2d 497, 504, 150 P.2d 463* ; *City of Morgan Hill v. Brown (1999) 71 Cal. App. 4th 1114, 1123, 84 Cal. Rptr. 2d 361*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be used by a defendant or cross defendant in interpleader in opposition to a motion by plaintiff or cross complainant for an order discharging him or her from liability to the conflicting claimants when the moving party claims that its liability to the parties is discharged on its deposit in court of the disputed amount of money. The grounds of opposition are that the conflicting claims do not relate to the same thing, debt, or duty, and therefore interpleader is improper.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations setting forth any facts necessary to oppose the motion.

In an appropriate case, these points and authorities may be submitted in opposition to a motion for an order discharging the moving party from liability supported by the points and authorities set out in *§§ 123.21* and *123.22*.

[3] Discussion of Authorities

[a] Required That Claimant Seek the Same Thing, Debt, or Duty

The factual and procedural history of ***Hancock Oil Co. v. Hopkins*** *(1944) 24 Cal. 2d 497, 150 P.2d 463* is discussed in *§ 123.23[3][a]*. Although the court in part held that the 1881 amendment to *Code Civ. Proc. § 386* (*now Code Civ. Proc. § 386(a)*), by use of the phrase, "or are not identical," abrogated the common law requirement that the same thing, debt, or duty be claimed by both claimants and that an action for interpleader could now be maintained when one claimant claimed the entire fund and another claimant claimed only a portion of the fund (*24 Cal. 2d 497, 503-504)* , the court nevertheless noted that the amendment does not allow the remedy where each of the claimants asserts the right to a different debt, claim or duty. If the conflicting claims are mutually exclusive, interpleader cannot be maintained (*24 Cal. 2d 497, 504)* .

In ***City of Morgan Hill v. Brown*** *(1999) 71 Cal. App. 4th 1114, 84 Cal. Rptr. 2d 361* , because of conflicting demands regarding disbursement of attorney fees, plaintiff filed a complaint in interpleader naming as defendants a law firm, the members of the firm, and a former shareholder in the firm. Plaintiff had retained the firm to represent it in two cases. The former shareholder subsequently joined the firm, entering into a shareholder agreement with it that specified compensation and repurchase of share rights. The former shareholder was responsible for the plaintiff's cases. Under the fee agreement with the firm, which had been amended after the former shareholder had joined the firm, plaintiff owed attorney fees in the amount of $563,866.82. Disputes arose between the former shareholder and the firm over allocation of the attorney's fees and other issues. As a result, the firm brought out the shareholder's interest and terminated its professional relationship the shareholder. The former shareholder retained plaintiff as a client.

Plaintiff filed a complaint in interpleader, and the defendants answered and filed cross-complaints against each other. The former shareholder's third amended cross-complaint included claims for breach of contract, wrongful discharge of employment, defamation, and other causes of action. The firms cross-complaint asserted claims arising out of the former shareholder's tenure with the firm. Eventually, the former shareholder and plaintiff filed together a motion for interlocutory order of discharge, attorney fees, and related relief. Neither the firm nor the former shareholder objected to discharging the plaintiff and allowing the fees to be deposited into court, and the court granted the motion. In the interim, the firm had moved for summary judgment/adjudication in the interpleader action, arguing that the firm was entitled to the fees pursuant to the contingent fee agreement between the firm and plaintiff and that any compensation due the former shareholder was governed by agreements between the firm and the former shareholder. The trial court granted the summary judgment motion, and after a motion for reconsideration was denied, an order was issued releasing

the fees to the firm and judgment in the firm's favor was entered. The former shareholder appealed (*71 Cal. App. 4th 1114, 1118-1121)* .

The court of appeal affirmed. The court noted that although settlement had rendered the matter technically moot, the court was retaining jurisdiction to resolve the legal issues presented because they were important and of continuing interest (*71 Cal. App. 4th 1114, 1121 n.5*). The court then discussed rules pertaining to interpleader. Initially, the court noted that when a person may be subject to conflicting claims for money or property, the person may bring an interpleader action to compel the claimants to litigate their claims among themselves, citing *Code Civ. Proc. § 386(b)* (*71 Cal. App. 4th 1114, 1122)* . Once the person admits liability and deposits the money with the court, he or she is discharged from liability and freed from the obligation of participating in the litigation between the litigants (*71 Cal. App. 4th 1114, 1122)* . Under current law, privity between the claimants is no longer required. Further, interpleader may be permitted even though one claimant seeks part of the fund and the other claimant seeks the entire fund amount. Partial interpleader, where the obligor admits some liability but makes a partial claim or asserts a partial interest, is also allowed (*71 Cal. App. 4th 1114, 1122-1123)* . Although *Code Civ. Proc. § 386* has broadened the scope of the interpleader remedy, it is still, however, required that the claimants seek the same thing, debt, or duty. If the claims do not relate to the same thing, debt, or duty, then interpleader is improper (*71 Cal. App. 4th 1114, 1123)* . In this case, the claimants asserted the right to different things, debts or duties owed from different obligors. The debt claimed by the law firm were fees, the obligor being the plaintiff. The debt claimed by the former shareholder was compensation under the firms internal agreements, the obligor being the firm. Given that the former shareholder conceded that the plaintiff party did not owe fees to her, the former shareholder was unable to demonstrate that the claimants asserted the right to the same thing, debt, or duty owed by the plaintiff (*71 Cal. App. 4th 1114, 1123-1124)* . Interpleader speaks of conflicting claims against the same obligor over the same fund; not on the possible eventual right to a judgment that might be satisfied out of that fund (*71 Cal. App. 4th 1114, 1126)* . Although interpleader was improper (*71 Cal. App. 4th 1114, 1123-1126)* , the judge's decision to discharge the plaintiff and to allow the money to be deposited into court was justified and was not erroneous when neither of the claimants claimant objected (*71 Cal. App. 4th 1114, 1127)* .

Because the undisputed facts demonstrated that the firm had a right to the property, the summary judgment was proper. The fact that the parties have other claims against each other is not a persuasive reason for denying summary judgment as to ownership of the fund given the undisputed facts show that only one of the parties is entitled to that ownership. Interpleader confers rights only concerning discharge of the stakeholder and leaves the conflicting claims to the fund for proper later distribution. If it turns out, as here, that a claimant has no viable claim to the fund, then distribution of the fund to the remaining claimant is entirely appropriate (*71 Cal. App. 4th 1114, 1128)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPartiesInterpleadersGeneral Overview

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 123 INTERPLEADER
PART II. FORMS

12-123 California Points & Authorities § 123.30

§ 123.30 Opposing Motion of Defendant or Interpleading Party for Order Awarding Costs and Attorney Fees [Code Civ. Proc. § 386.6]--Moving Party Failed to Follow Procedure Specified in Code Civ. Proc. § 386 or 386.5

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*EITHER, if motion for award by defendant seeking substitution and discharge:*]

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN OPPOSITION TO MOTION FOR AWARD
vs.	)	OF COSTS AND ATTORNEY FEES
_____ [*name*],	)	[*Code Civ. Proc. § 386.6*]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

[*OR, if motion for award by plaintiff in interpleader seeking discharge:*]

	)	
	)	NO._____

_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN OPPOSITION TO MOTION FOR AWARD
vs.	)	OF COSTS AND ATTORNEY FEES
_____ [*names*],	)	[*Code Civ. Proc. § 386.6*]
Defendants.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

[*OR, if motion for award by cross complainant in interpleader seeking discharge:*]

_____ [*name*],	)	
Plaintiff,	)	NO._____
vs.	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*],	)	IES IN OPPOSITION TO MOTION FOR AWARD
Defendant.	)	OF COSTS AND ATTORNEY FEES
_____ [*name*],	)	[*Code Civ. Proc. § 386.6*]
Cross Complainant,	)	Date: _____
vs.	)	Time: _____
_____ [*names*],	)	Location: _____
Cross Defendants.	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

[*OR, if motion for award by defendant stakeholder seeking discharge:*]

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN OPPOSITION TO DEFENDANT
vs.	)	_____'S [*name*] MOTION FOR
_____ [*names*],	)	AWARD OF COSTS AND ATTORNEY FEES
Defendants.	)	[*Code Civ. Proc. § 386.6*]
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____

[Trial Date: _____]

_____

THE MOTION OF _____ [DEFENDANT *or* PLAINTIFF *or* CROSS COMPLAINANT] FOR AN ORDER AWARDING COSTS AND ATTORNEY FEES SHOULD BE DENIED BECAUSE, AS SHOWN BY THE RECORDS AND FILE HEREIN [AND THE PAPERS SUBMITTED IN OPPOSITION TO THE MOTION], THE MOVING PARTY FAILED TO FOLLOW THE PROCEDURE SET FORTH IN SECTION _____ [386 *or* 386.5] OF THE CODE OF CIVIL PROCEDURE.

A. Failure to Follow Specified Procedure as Defeating Award. An award of costs and attorney fees pursuant to *Section 386.6 of the Code of Civil Procedure* is authorized only when the party seeking the award has followed the procedure set forth in *Section 386* or *386.5 of the Code of Civil Procedure*; conversely stated, a party who has not followed that procedure is not entitled to the award (see *Phillips v. Barton (1962) 207 Cal. App. 2d 488, 495-496, 24 Cal. Rptr. 527*).

[*Optional*] **B. Failure to Deposit Funds With Court as Defeating Award.** An award of costs and legal fees under *Section 386.6(a) of the Code of Civil Procedure* may be made only from disputed funds that have been deposited in court. Therefore, a failure to deposit the interpleaded funds in court forecloses an award of costs or fees under Section 386(a) (*Wells Fargo Bank v. Zinnel (2004) 125 Cal. App. 4th 393, 400-403, 22 Cal. Rptr. 3d 750*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be used by a claimant to the amount or personal property in dispute in opposition to a motion by the defendant seeking substitution, the defendant stakeholder, or the plaintiff or cross complainant in interpleader, when the moving party seeks an award of costs and attorney fees as authorized by *Code Civ. Proc. § 386.6*. It may also be used to resist a request for such an award made in a complaint or cross complaint.

The ground of opposition is that, as shown by the records and file in the case and any papers submitted in opposition to the motion, the moving party failed to follow the procedure set forth in *Code Civ. Proc. § 386* or *386.5* and is, therefore, not entitled to the award.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the point of law stated. In addition, counsel should attach affidavits or declarations setting forth any facts necessary to

oppose the motion which do not appear from the court's records and file in the case.

In an appropriate case, the foregoing memorandum of points and authorities may be submitted in opposition to a motion for an order awarding costs and attorney fees supported by the memorandum of points and authorities set out in *§ 123.25*.

[3] Discussion of Authorities

[a] Failure to Follow Specified Procedure as Defeating Award

Phillips v. Barton *(1962) 207 Cal. App. 2d 488, 24 Cal. Rptr. 527* , was an action by buyers against the seller and real estate broker to recover earnest money following failure to consummate an agreement to purchase a restaurant. The agreement was conditioned on approval by the buyers of the underlying lease, and the buyers disapproved the lease. The $5,000 deposited by plaintiffs with the seller had been delivered by the seller to the broker as a stakeholder. The broker cross complained against plaintiffs and the seller to recover his commission on the sale. The trial court rendered judgment on the complaint for plaintiffs against the seller, and against the broker as stakeholder, and rendered judgment on the cross complaint for the broker against the buyers and the seller for $200 as the reasonable value of services rendered and $350 for the defense of the action. The court of appeal affirmed the judgment on the complaint and reversed the judgment on the cross complaint. In his answer to the complaint, the broker had averred that he had no interest in the $5,000 and was a mere stakeholder, but the broker took none of the steps prescribed by *Code Civ. Proc. § 386* or *386.5*; he neither paid the money into court nor sought a discharge from liability as required by the cited sections. The court said that the only right to recover attorney fees in an interpleader is statutory and conditioned by *Code Civ. Proc. § 386.6* on the party's following the procedure set forth in *Code Civ. Proc. § 386* or *386.5* and that, not having done that, the broker had no statutory basis for recovery of an attorney fee (*207 Cal. App. 2d 488, 495-496)* .

[b] Failure to Deposit Funds With Court as Defeating Award

In ***Wells Fargo Bank v. Zinnel*** *(2004) 125 Cal. App. 4th 393, 22 Cal. Rptr. 3d 750* , the plaintiff was a bank that interpled two defendants in order to determine the rights of the parties to the funds in an account. During the litigation, the bank retained the funds in the account and did not deposit them with the court. The trial court granted the bank's motion to release the funds to one of the defendants, discharge the bank's liability, and dismiss the complaint. The court also awarded the bank nearly $43,000 in legal fees from the interpled funds.

The court of appeal reversed the fee award. The court began its analysis with the text of the relevant statute, *Code Civ. Proc. § 386.6(a)*, which provides that in discharging a party in an interpleader action, the court has discretion award the discharged party costs and reasonable attorney's fees "from the amount in dispute which has been deposited with the court." Citing *Phillips v. Barton (1962) 207 Cal. App. 2d 488, 495-496, 24 Cal. Rptr. 527* (discussed immediately above), the court of appeal held that the bank's failure to deposit the interpled funds with the court barred it from recovering fees under Section 386.6 (*125 Cal. App. 4th 393, 400)* .

The court of appeal explained that the statutory prerequisite of a deposit with the court is not pointless. A true stakeholder who promptly surrenders the possession of a disputed fund should not bear the costs and legal fees of responding to competing claims. On the other hand, a stakeholder who enjoys the beneficial use of funds that belong to others should not reap the same advantages, absent a judicial determination that interpleader was proper through an order dismissing the stakeholder and directing the deposit of the held funds into court (from which the court in its discretion can award costs and fees if appropriate) (*125 Cal. App. 4th 393, 401)* .

The bank argued that prerequisite of a deposit with the court in Section 386.6 should not apply in this case because the trial court had denied the bank's motion for an order to deposit the interpled funds. The court of appeal, however, pointed out that the bank did not need a court order to deposit the funds with the court. The interpleader statute

expressly provides that any amount a plaintiff admits to be payable may be deposited with the clerk of the court at the time of filing the complaint in interpleader without a court order (*Code Civ. Proc. § 386(c)*). The court of appeal rejected an argument that the bank's failure in this case to deposit the interpled funds at the time it filed the complaint precluded it from doing so later without a court order. The court of appeal explained that the interpleader statute allows for the voluntary deposit of funds along with the complaint, reflecting the Legislature's assumption that this is when a voluntary deposit would ordinarily occur. But the statute does not otherwise suggest the power to deposit funds is limited to a contemporaneous deposit or expressly provide that thereafter the deposit must be pursuant to a court order. Accordingly, the trial court's refusal to order the deposit if the funds did not excuse the bank's failure to make the necessary deposit (*125 Cal. App. 4th 393, 402-403)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePartiesInterpleadersGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesGeneral Overview

California Points & Authorities

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CHAPTER 123 INTERPLEADER
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12-123 California Points & Authorities § 123.31

§ 123.31 Opposing Interpleading Party's Motion for Order Awarding Costs and Attorney Fees [Code Civ. Proc. § 386.6]--Interpleading Party Waived Right to Attorney Fees From Amount Deposited in Court and Sought Recovery From Amount Which Was Not Deposited

[1] FORM

[*Caption. See § 123.30.*]

THE MOTION OF _____ [PLAINTIFF *or* CROSS COMPLAINANT] FOR AN ORDER AWARDING COSTS AND ATTORNEY FEES SHOULD BE DENIED BECAUSE, AS SHOWN BY THE RECORDS AND FILE HEREIN [AND THE PAPERS SUBMITTED IN OPPOSITION TO THE MOTION], THE MOVING PARTY DEPOSITED INTO COURT ONLY THE AMOUNT WHICH HE/SHE/IT DID NOT DISPUTE WAS OWING, AS TO WHICH HE/SHE/IT WAIVED RECOVERY OF ATTORNEY FEES, AND SEEKS TO RECOVER SUCH FEES FROM THE AMOUNT HE/SHE/IT DID DISPUTE WAS OWING AND WHICH HE/SHE/IT DID NOT DEPOSIT INTO COURT.

Deposit Was of Undisputed Amount Only as to Which Interpleading Party Waived Right to Attorney Fees. An interpleading party who deposits into court only the undisputed portion of the money claimed, and who waives any claim for attorney fees from the amount deposited, is not entitled under *Code Civ. Proc. § 386.6* to an award of attorney fees from the amount in dispute which was not paid into court (*Big Bear Properties, Inc. v. Gherman (1979) 95 Cal. App. 3d 908, 916, 157 Cal. Rptr. 443*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be used by a claimant to the amount in dispute in opposition to a motion by the plaintiff or cross complainant in interpleader for an order awarding costs and attorney fees under *Code Civ. Proc. § 386.6*. The point and authority set out in this form may also be used to resist a request for such an award made in a complaint or cross complaint.

The grounds of opposition are: (1) the interpleading party deposited into court only the amount that the party did not dispute was owing and did not deposit into court the amount he or she disputed was owing; (2) the interpleading party expressly waived recovery of attorney fees from the amount deposited; (3) that party seeks recovery of attorney fees from the disputed amount which was not deposited; and (4) an award of attorney fees is therefore not authorized under *Code Civ. Proc. § 386.6*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the point of law stated. In addition, counsel should attach affidavits or declarations setting forth any facts necessary to oppose the motion which do not appear from the court's records and file in the case.

In an appropriate case, the foregoing memorandum of points and authorities may be submitted in opposition to a motion for an order awarding costs and attorney fees supported by the memorandum of points and authorities set out in *§ 123.25*.

[3] Discussion of Authorities

[a] Deposit Was of Undisputed Amount Only as to Which Interpleading Party Waived Right to Attorney Fees

Big Bear Properties, Inc. v. Gherman *(1979) 95 Cal. App. 3d 908, 157 Cal. Rptr. 443* , was an action in interpleader and for declaratory relief by judgment debtors against the judgment creditors and others claiming an interest in the proceeds of the judgment. Judgment in the prior action awarded plaintiffs (defendants in the present action) $1,256,845 with prejudgment interest [*Civ. Code § 3288*] in the sum of $395,906.18 plus costs of $5,863.38. In the interpleader action, plaintiffs deposited into court $2,021,238.13, which they alleged was the entire amount due on the judgment with simple interest. In their declaratory relief action, plaintiffs alleged that an actual controversy between plaintiffs and defendants regarding the amount payable under the judgment existed, that plaintiffs contended that the judgment bore simple interest and equalled $2,021,028.13 as of the date of complaint in interpleader and for declaratory relief was filed, and that defendants contended that the total amount of the judgment payable on that date included interest on the prejudgment interest and equalled $2,132,489.29. Plaintiffs sought an order directing defendants to interplead and litigate their respective claims against the judgment, an order restraining defendants from instituting proceedings to collect the judgment, a declaration by the court that the total amount payable on the judgment was $2,021,028.13, that by tender of such sum to the court plaintiffs were fully discharged and released from liability on the judgment, and an order awarding them their reasonable attorney fees out of the sum deposited by them with the court. A stipulation and order for release of funds and injunctive relief was executed by the parties, signed by the court, and filed. The stipulation and order provided in part for distribution of the amount deposited, release of plaintiffs from defendants' claims to the extent of the sum deposited, and a waiver of any claim for an award of attorney fees from the undisputed portion of the judgment paid into court by plaintiffs. In accordance with the stipulation and order, the funds were disbursed and a preliminary injunction was issued.

Certain of the defendants, including the judgment creditors, filed an answer to the complaint in which they claimed that the amount owing on the judgment was $2,132,489.29 and that after paying the undisputed portion into court, plaintiffs owed $111,461.16 plus interest on that sum at the legal rate from the date the complaint was filed until paid. Both parties moved for summary judgment, or in the alternative for judgment on the pleadings. Defendants' motion was granted and the injunction was dissolved. The trial court also denied plaintiffs' request for attorney fees. Judgment was entered for the additional sum owing plus interest.

The court of appeal affirmed. With respect to the denial of attorney fees, the court pointed out that *Code Civ. Proc. § 386.6* authorizes such an award from the amount in dispute which has been deposited with the court, that plaintiffs deposited into court only the undisputed portion of the judgment, as to which they expressly waived their claim for attorney fees, and that the reservation of their right to claim attorney fees from the disputed portion of the judgment which was not paid into court, did not make plaintiffs eligible for an award of such fees under *Code Civ. Proc. § 386.6* (*95 Cal. App. 3d 908, 916)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPartiesInterpleadersGeneral OverviewCivil ProceduresRemediesCosts & Attorney FeesGeneral OverviewCivil ProceduresRemediesDeposits in Court

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12-123 California Points & Authorities § 123.32

§ 123.32 Opposing Interpleading Party's Motion for Order Awarding Costs and Attorney Fees [Code Civ. Proc. § 386.6]--Award Under Interpleader Statutes as Limited to Expenses Incurred in Pursuit of Stakeholder's Remedy

[1] FORM

[*Caption. See § 123.30.*]

THE MOTION OF _____ [PLAINTIFF *or* CROSS COMPLAINANT] FOR AN ORDER AWARDING COSTS AND ATTORNEY FEES SHOULD BE DENIED TO THE EXTENT THAT IT SEEKS RECOVERY OF COSTS AND FEES INCURRED IN THE ACTION IN ACTIVITIES UNRELATED TO THE INTERPLEADER REMEDY, BECAUSE SUCH AN AWARD UNDER THE INTERPLEADER STATUTES MUST BE LIMITED TO THOSE COSTS AND FEES INCURRED IN PURSUIT OF THE STAKEHOLDER'S REMEDY.

Limitation on Award. An award of costs and fees under the interpleader statutes must be limited to those incurred only in pursuit of the stakeholder's remedy, whether by complaint or cross complaint, and may not include expenses incurred in unrelated activities (*Sweeney v. McClaran (1976) 58 Cal. App. 3d 824, 830-831, 130 Cal. Rptr. 205*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be used by a claimant to the amount or property in dispute in opposition to a motion by the plaintiff or cross complainant in interpleader, when the moving party seeks an award of costs and attorney fees as authorized by *Code Civ. Proc. § 386.6*. The foregoing point and authority may also be used to resist a request for such an award made in a complaint or cross complaint.

The ground of opposition is that the interpleading party seeks an award of costs and attorney fees incurred in the action apart from his or her pursuit of the remedy of interpleader and that, to this extent, an award under *Code Civ. Proc. § 386.6* is not authorized.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the point of law stated. In addition, counsel should attach affidavits or declarations setting forth the facts necessary to oppose the motion.

In an appropriate case, the foregoing memorandum of points and authorities may be submitted in opposition to a motion for an order awarding costs and attorney fees supported by the points and authorities set out in *§ 123.25*.

[3] Discussion of Authorities

[a] Limitation on Award

Sweeney v. McClaran *(1976) 58 Cal. App. 3d 824, 130 Cal. Rptr. 205* , was an action by the administrator of five labor-management trust funds for operating engineers against a contractor for employee fringe benefit payments which the contractor, as employer, allegedly failed to pay into the trust funds as required by a collective bargaining agreement, and against the contractor's surety to enforce the latter's liability on a $2,500 contractor's license bond issued by it in favor of the State of California, as obligee, and naming the contractor as principal. The surety answered and cross complained for declaratory relief and indemnity and subsequently filed an amended cross complaint adding a cause of action in interpleader against plaintiff, the contractor, and other persons claiming an interest in the proceeds of the bond in a total amount far in excess of the $2,500 penal sum of the bond. The surety, disclaiming any interest in the bond proceeds, then noticed a motion under *Code Civ. Proc. § 386(a)* for an order discharging it from liability and dismissing it from plaintiff's action on its depositing the $2,500 in court. In its motion, the surety also requested an award of costs and reasonable attorney fees out of the $2,500. After the motion had been argued and briefed, the court discharged the surety and allowed it its costs in the sum of $61.30 and attorney fees in the sum of $1,000 which were to be awarded and deducted from the money ($2,500) to be deposited with the clerk of the court. Cross defendants appealed, contesting the award.

The court of appeal reversed on the ground that the trial court had improperly calculated the amount of the award. The appellate court explained that the fees awarded under the interpleader statutes must be limited to those incurred only in pursuit of the stakeholder's remedy, whether by complaint or cross complaint, and that the surety's amended cross complaint alleged four causes of action, only one of which was in interpleader (the others sought declaratory relief and indemnification). The court held that to the extent that fees were awarded for legal work in connection with the other three causes of action, the award was improper (*58 Cal. App. 3d 824, 830)* . The court summarized the facts as follows: The original complaint against the surety was filed on April 10, 1973; the surety filed an answer on June 20, 1973, and on the same day filed a cross complaint seeking declaratory relief and indemnity; on November 15, 1973, it amended the cross complaint to include an action in interpleader; prior to November 15 attorney fees were incurred as shown by a computer printout of costs and fees incurred by the surety to its attorneys dating back to the time when it first undertook to defend the action; the printout was attached to the surety's points and authorities accompanying its motion under *Code Civ. Proc. § 386.6* (*58 Cal. App. 3d 824, 830)* . The court concluded that it was apparent that the trial court allowed fees for the entire legal representation of the surety in the action and reiterated its holding that to the extent that

fees were allowed for legal work on the original defense and cross complaint, the trial court committed error (*58 Cal. App. 3d 824, 830)* . The court said that fees incurred for such activities as negotiations, investigation, dispute over validity of claims (or their amount), cross complaints for affirmative relief, and the like, are not properly allowable under *Code Civ. Proc. § 386.6*, and that the trial court, in its discretion, may allow only such fees as relate solely to the pursuit of the stakeholder remedy, including fees incurred to overcome resistance to the remedy (*58 Cal. App. 3d 824, 830-831)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPartiesInterpleadersGeneral OverviewCivil ProceduresRemediesCosts & Attorney FeesGeneral Overview

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12-123 California Points & Authorities § 123.33

§ 123.33 Opposing Respondent's Motion for Order Dismissing Appeal--Judgment or Order Discharging Defendant or Interpleading Party From Liability and Awarding Attorney Fees and Costs out of Fund Deposited in Court as Appealable

[1] FORM

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
_____ APPELLATE DISTRICT
[DIVISION _____]

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN OPPOSITION TO MOTION
Plaintiff and Respondent,	)	TO DISMISS APPEAL
vs.	)	Date: _____
_____ [*names*],	)	Time: _____
Defendants and Appellants.	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

[*See § 123.27 for alternative captions.*]

RESPONDENT'S MOTION FOR AN ORDER DISMISSING THIS APPEAL SHOULD BE DENIED BECAUSE THE _____ [JUDGMENT *or* ORDER] APPEALED FROM, IN ADDITION TO DISCHARGING RESPONDENT FROM LIABILITY, AWARDED RESPONDENT COSTS AND ATTORNEY FEES FROM THE SUM DEPOSITED WITH THE COURT AND IS THEREFORE APPEALABLE.

Appealability of Judgment or Order in Interpleader Awarding Attorney Fees. A judgment or order discharging an interpleading party or stakeholder from liability on depositing the sum claimed with the court is appealable if it awards the discharged party costs and attorney fees out of the sum so deposited (*Sweeney v. McClaran (1976) 58 Cal. App. 3d 824, 828, 130 Cal. Rptr. 205*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be used by appellant in opposition to a motion by respondent to dismiss the appeal from a judgment or order discharging the interpleading party or stakeholder from liability when respondent contends that the judgment or order is interlocutory and nonappealabe.

The ground of opposition is that the judgment or order, in addition to discharging the interpleading party or stakeholder from liability, awards the interpleading party or stakeholder costs and attorney fees from the sum deposited with the court and for this reason is appealable, and that the motion should therefore be denied.

In an appropriate case, this memorandum of points and authorities may be submitted in opposition to a motion to dismiss an appeal supported by the memorandum of points and authorities set out in *§ 123.27*.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the point of law stated.

[b] Case Title in Caption

The case title in the caption of the form [*see Cal. Rules of Ct., Rule 2.111(4)*] is for use when the action in the trial court was by an interpleading plaintiff pursuant to the third alternative set forth in *Code Civ. Proc. § 386(a)*. For the manner of setting forth the case title when the appeal is from an order or judgment discharging a party from liability pursuant to the other provisions of *Code Civ. Proc. § 386(a)* or *386.6*, see the caption to *§ 123.27*, in which case the phrase IN SUPPORT OF should, of course, be changed to IN OPPOSITION TO.

[3] Discussion of Authorities

[a] Appealability of Judgment or Order in Interpleader Awarding Attorney Fees

The factual background of ***Sweeney v. McClaran*** *(1976) 58 Cal. App. 3d 824, 130 Cal. Rptr. 205* , is discussed in *§ 123.32[3][a]*. The surety, relying on *Lincoln Nat. Life Ins. Co. v. Mitchell (1974) 41 Cal. App. 3d 16, 115 Cal. Rptr. 723* (discussed in *§ 123.27[3][a]*), contended that the order was not appealable. The court of appeal rejected the contention. It noted that this issue had been decided adversely to the surety when the court denied the surety's earlier motion to dismiss the appeal. The court distinguished *Lincoln* on the ground that although the interpleading insurer in

Lincoln was awarded attorney fees from the fund it had deposited with the trial court, the appellate court in that case did not discuss whether the award had any effect on the appealability of the judgment of interpleader, and that, in holding that the judgment was interlocutory, the *Lincoln* court limited its analysis to the effect of a substitution of parties only (*58 Cal. App. 3d 824, 827-828)* . Having thus disposed of *Lincoln*, the court held that the provision for costs and attorney fees rendered the order before it appealable (*58 Cal. App. 3d 824, 828)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePartiesInterpleadersGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionGeneral OverviewCivil ProcedureAppealsDismissals of AppealsInvoluntary Dismissals

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 123 INTERPLEADER
PART II. FORMS

12-123 California Points & Authorities § 123.34

§ 123.34 Opposing Interpleading Party's Motion for Order Awarding Costs and Attorney Fees [Code Civ. Proc. § 386.6] From Interest Accrued on Interpleaded Funds--No Original Funds Allocated to Interpleading Party

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE MOTION OF _____ [PLAINTIFF *or* CROSS COMPLAINANT] FOR AN ORDER AWARDING COSTS AND ATTORNEY FEES FROM INTEREST ACCRUED ON THE INTERPLEADED FUNDS SHOULD BE DENIED BECAUSE INTEREST ACCRUED ON INTERPLEADER ACCOUNTS MUST BE ALLOCATED TO THE PARTIES IN THE SAME PROPORTION AS THE ORIGINAL FUNDS ARE ALLOCATED, AND NONE OF THE ORIGINAL FUNDS HAVE BEEN ALLOCATED TO THE _____ [PLAINTIFF *or* CROSS COMPLAINANT].

Interest Accrued on Interpleaded Funds Must Be Allocated in Same Proportion as Original Funds. Once the court has allocated the interpleaded funds, any interest earned by those funds while on deposit must be allocated to the parties in the same proportion as the original funds are allocated (*Code Civ. Proc. § 386.1*). If none of the original funds has been allocated to the interpleading party, then none of the interest may be allocated to that party (*Canal Ins. Co. v. Tackett (2004) 117 Cal. App. 4th 239, 243-246, 11 Cal. Rptr. 3d 626*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted to oppose an interpleading party's postjudgment motion for costs and attorney fees to be paid out of interest earned by the interpleaded funds. In an appropriate case, this form of points and authorities may be used in response to the points and authorities set forth in *§ 123.25*.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law

stated. Thus, counsel should establish that the court's judgment allocates none of the original funds to the interpleading party.

[c] Related Pleading and Practice Chapters

For related legal background, research guides, and forms pertaining to awards of attorney fees and costs in interpleader actions, see California Forms of Pleading and Practice, Ch. 314, *Interpleader* (Matthew Bender).

[3] Discussion of Authorities

[a] Interest Accrued on Interpleaded Funds Must Be Allocated in Same Proportion as Original Funds.

In ***Canal Ins. Co. v. Tackett*** *(2004) 117 Cal. App. 4th 239, 11 Cal. Rptr. 3d 626* , the plaintiff was an insurance carrier whose insured owned a truck that was involved in an accident that gave rise to claims by multiple persons. The plaintiff filed a complaint in interpleader and deposited its $1 million policy limit with the superior court. The court subsequently ordered the clerk to place the funds in an interest-bearing account (*see Code Civ. Proc. § 386.1*). Eventually, the parties agreed to a settlement, and the court entered judgment on the agreed settlement. Under the terms of the settlement and judgment, the plaintiff was discharged from liability and the interpleaded funds were allocated among 14 claimants. No part of the original funds was allocated to the plaintiff. Some months after entry of judgment, the plaintiff filed a motion for attorney's fees and costs, to be paid from the interest accrued from the time of the last settlement conference. Although the plaintiff had, as part of the settlement, waived fees and costs incurred up to the time of the last settlement conference, it asserted that it had incurred further fees and costs after the settlement conference because of a delay by one of the defendants in signing the settlement agreement. The trial court granted the plaintiff's motion, awarding fees and costs in the amount of unallocated interest then remaining in the interest-bearing account.

The court of appeal reversed, holding that attorney fees cannot be awarded from the interest on interpleader accounts. Under the interpleader scheme, when an interpleading party deposits funds with the court, on the request of any party to the action, the trial court must order that the deposit be invested in an interest-bearing account. Interest on the deposited amount must be allocated to the parties in the same proportion as the original funds are allocated (*Code Civ. Proc. § 386.1*). Another statute in the interpleader scheme provides that an interpleading party may insert in its motion, petition, complaint or cross-complaint a request for allowance of its costs and reasonable attorney fees incurred in the action. In ordering the discharge of the interpleading party, the court has discretion to award the interpleading party's costs and reasonable attorney fees from the amount in dispute that has been deposited with the court (*Code Civ. Proc. § 386.6(a)*). Reading these provisions together, the court of appeal noted that, the interpleader scheme contemplates that a party seeking attorney fees will make its request before it is discharged from liability; the fees can then be awarded from the amount deposited with the court. However, once a discharge has been ordered and the interpleaded funds allocated, interest earned by the interpleaded funds belongs to those who ultimately receive the funds, and not anyone else. At that point, the trial court has no power to award any part of that interest to the interpleading party unless some portion of the original funds has been allocated to the interpleading party (*117 Cal. App. 4th 239, 243-244)* .

In this case, the interpleading party received nothing from the original funds and had waived its claim for pre-settlement attorney fees and costs. Under the circumstances, the court of appeal concluded that the interpleading party had no claim to any of the interest in the account after entry of the judgment discharging the interpleading party (*117 Cal. App. 4th 239, 244-245)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePartiesInterpleadersGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesGeneral Overview

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 124 INTERVENTION

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§ 124.03 Effect of 1977 Amendments to Code Civ. Proc. § 387

[1] In General

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[a] Mandatory Intervention

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§ 124.04 Relation to Compulsory Joinder

§ 124.05 Procedures for Intervening

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§ 124.30 Supporting Motion for Order Granting Leave to File Complaint in Intervention--Permissive Intervention [Code Civ. Proc. § 387(a)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Statutory Authority

[b] Intervention Under Permissive Intervention Is Discretionary

[c] Purpose of Allowing Intervention

§ 124.31 Supporting Motion for Order Granting Leave to File Complaint in Intervention--Mandatory Intervention Based on Right Conferred by Statute [Code Civ. Proc. § 387(b)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Statutory Authority

[b] Intervention Under Lab. Code § 3853

[c] Intervention Under Corp. Code § 1800(c)

[4] Additional Authorities

[a] Intervention Under Lab. Code § 3853

[b] Intervention Under Corp. Code § 1800(c)

§ 124.32 Supporting Motion for Order Granting Leave to File Complaint in Intervention--Mandatory Intervention Based on Interest Relating to Property or Transaction That Is Subject of Action [Code Civ. Proc. § 387(b)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Opposing Points and Authorities

[d] Related Pleading and Practice Forms

[e] Related Points and Authorities

[3] Discussion of Authorities

[a] Statutory Authority

[b] Person May Intervene If Action Impairs of Impedes The Ability to Protect an Interest

§ 124.33 Supporting Motion for Order Granting Leave to File Complaint in Intervention--Permissive or Mandatory Intervention [Code Civ. Proc. § 387(a), (b)]--Intervener's Application Was Timely

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Intervention Within Reasonable Time

[b] Timeliness of Intervention as of Right

[c] Intervention After Judgment

[d] Intervention After Default Judgment

[4] Additional Authorities

[a] Intervention After Default Judgment

§ 124.34 Supporting Motion for Order Granting Leave to File Complaint in Intervention--Permissive Intervention [Code Civ. Proc. § 387(a)]--Scope of the Action Is Not Enlarged

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Scope of the Action

[b] Intervener Seeking Affirmative Relief in Action for Rescission of Contract

[4] Additional Authorities

[a] Scope of the Action

§ 124.35 Supporting Motion for Order Granting Leave to File Complaint in Intervention--Permissive Intervention [Code Civ. Proc. § 387(a)]--Intervener Has Direct Interest in Matter in Litigation

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Intervener Has Direct Interest in Matter in Litigation

[b] Consequential Interest Becoming Direct Interest

[4] Additional Authorities

[a] Intervener Has Direct Interest in Matter in Litigation

§ 124.36 Supporting Motion for Order Granting Leave to File Complaint in Intervention--Permissive Intervention [Code Civ. Proc. § 387(a)]--Intervener Has Direct Interest in Matter in Litigation--Adjoining Property Owner May Intervene in Action to Enjoin Common Trespass

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Actions to Enjoin Trespass to Property

[4] Additional Authorities

§ 124.37 Supporting Motion for Order Granting Leave to File Complaint in Intervention--Permissive Intervention [Code Civ. Proc. § 387(a)]--Intervener Has Direct Interest in Matter in Litigation--Assignee of Party's Interest in Subject Matter of Action

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Assignee of Party in Action

[b] Assignee of Rights Under Contract

[c] Assignee of Special Use Permit

[4] Additional Authorities

[a] Assignee of Party in Action

§ 124.38 Supporting Motion for Order Granting Leave to File Complaint in Intervention--Permissive Intervention

[Code Civ. Proc. § 387(a)]--Intervener Has Direct Interest in Matter in Litigation--Judgment Creditor May Intervene in Action Involving Property Subject to Judgment Lien

[1] FORM

[2] Comments

[a] Use of Form

[b] Judgment Creditor's Lien on Judgment Debtor's Cause of Action or Recovery

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Judgment Creditor May Intervene in Action Involving Property Subject to Judgment Lien

§ 124.39 Supporting Motion for Order Granting Leave to File Complaint in Intervention--Permissive Intervention [Code Civ. Proc. § 387(a)]--Intervener Has Direct Interest in Matter in Litigation--Third-Party Claimant to Property May Intervene in Action to Determine Ownership of Property

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Third-Party Claimant to Property May Intervene in Action to Determine Ownership of Property

§ 124.40 Supporting Motion for Order Granting Leave to File Complaint in Intervention--Permissive Intervention [Code Civ. Proc. § 387(a)]--Intervener Has Direct Interest in Matter in Litigation--Beneficiary of Trust Deed May Intervene in Action by Trustor Against Trustee to Declare Trust Deed Void

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Beneficiary of Trust Deed May Intervene in Action to Set Aside Trust Deed

§ 124.41 Supporting Motion for Order Granting Leave to File Complaint in Intervention--Permissive Intervention [Code Civ. Proc. § 387(a)]--Intervener Has Direct Interest in Matter in Litigation--Limited Partner May Intervene When General Partner Refuses to Defend Unmeritorious or Collusive Action Against Partnership

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Limited Partner May Intervene When General Partner Refuses to Defend Action Against Partnership

[4] Additional Authorities

[a] Limited Partner

§ 124.42 Supporting Motion for Order Granting Leave to File Complaint in Intervention--Permissive Intervention [Code Civ. Proc. § 387(a)]--Intervener Has Direct Interest in Matter in Litigation--Shareholder May Intervene When Officers or Directors of Corporation Refuse to Maintain or Defend Action Involving Corporation

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Shareholder May Intervene When Officers or Directors of Corporation Refuse to Maintain or Defend Action Involving Corporation

§ 124.43 Supporting Motion for Order Granting Leave to File Complaint in Intervention--Permissive Intervention [Code Civ. Proc. § 387(a)]--Intervener Has Direct Interest in Matter in Litigation--Parents of Students in School District Affected by School Reassignment Plan May Intervene in Action to Determine Validity of Plan

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Parents of Students Enrolled in School District Affected by School Reassignment Plan May Intervene in Action to Determine Validity of Plan

§ 124.44 Supporting Motion for Order Granting Leave to File Complaint in Intervention--Permissive Intervention [Code Civ. Proc. § 387(a)]--Intervener Has Direct Interest in Matter in Litigation--Voters Who Participated in Efforts to Approve Ballot Measure May Intervene in Action to Determine Validity of Measure

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Voters Who Participated in Efforts to Approve Ballot Measure May Intervene in Action to Determine Validity of Measure

[4] Additional Authorities

[a] Voters Who Participated in Efforts to Approve Ballot Measure May Intervene in Action to Determine Validity of Measure

§ 124.45 Opposing Motion for Order Granting Leave to File Complaint in Intervention--Permissive or Mandatory Intervention [Code Civ. Proc. § 387(a), (b)]--Application to Intervene Not Timely

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[3] Discussion of Authorities

[a] Application Not Made Within Reasonable Time

[b] Intervention Must Not Retard or Delay Trial of Action

[4] Additional Authorities

[a] Timely Application Required

[b] Application Not Made Within Reasonable Time

[c] Intervention Must Not Retard or Delay Trial of Action

§ 124.46 Opposing Motion for Order Granting Leave to File Complaint in Intervention--Permissive or Mandatory Intervention [Code Civ. Proc. § 387(a), (b)]--Intervener's Interests Adequately Represented by Existing Parties

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[3] Discussion of Authorities

[a] Intervener's Interests Adequately Represented by Existing Parties

[4] Additional Authorities

[a] Intervener's Interest Adequately Represented by Existing Parties

§ 124.47 Opposing Motion for Order Granting Leave to File Complaint in Intervention--Permissive Intervention [Code Civ. Proc. § 387(a)]--Intervention Enlarges Scope of Action

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[3] Discussion of Authorities

[a] Intervention Must Not Enlarge Scope of Action

[b] Intervention Must Not Raise New Issues

[c] Intervention Must Not Enlarge Scope of Remedy Sought by Plaintiff

§ 124.48 Opposing Motion for Order Granting Leave to File Complaint in Intervention--Permissive Intervention [Code Civ. Proc. § 387(a)]--Intervention Would Prejudice Original Parties

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[3] Discussion of Authorities

[a] Intervention Would Unduly Prejudice Rights of Original Parties

[4] Additional Authorities

[a] Intervention Would Unduly Prejudice Rights of Original Parties

§ 124.49 Opposing Motion for Order Granting Leave to File Complaint in Intervention--Permissive Intervention [Code Civ. Proc. § 387(a)]--Intervener Has Only Consequential Rather Than Direct Interest in Matter in Litigation

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[3] Discussion of Authorities

[a] Intervener Has Only Consequential Rather Than Direct Interest in Matter in Litigation

[b] Intervener Does Not Have Interest in Matter in Litigation in Suit as Originally Brought

[c] Precedential Effect of Judgment on Persons Similarly Situated

[d] Unsecured Creditor

[e] Court-Awarded Attorney's Fees

[4] Additional Authorities

[a] Intervener Has Only Consequential Rather Than Direct Interest in Matter in Litigation

[b] Precedential Effect of Judgment on Persons Similarly Situated

[c] Unsecured Creditor

[d] Court-Awarded Attorney's Fees

§ 124.50 Opposing Motion for Order Granting Leave to File Complaint in Intervention--Mandatory Intervention [Code Civ. Proc. § 387(b)]--Intervener Lacks Requisite Interest in Property or Transaction That Is Subject of Action

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Interest in Property or Transaction That Is Subject of Action Required

[b] General Interest in Subject of Litigation as Insufficient

[4] Additional Authorities

[a] Interest in Property or Transaction That is Subject of Action Required

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 124 INTERVENTION
PART I. INTRODUCTION

12-124 California Points & Authorities § 124.01

§ 124.01 Scope of Chapter

This chapter contains memoranda of points and authorities relating to intervention by a nonparty into a pending action under the provisions of *Code Civ. Proc. § 387*. The chapter contains points and authorities in support of a motion for an order granting leave to file a complaint in intervention [*see §§ 124.30 -124.44*] and points and authorities in opposition to intervention [*see §§ 124.45 -124.50*].

Legal Topics:

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

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 124 INTERVENTION
PART I. INTRODUCTION

12-124 California Points & Authorities § 124.02

§ 124.02 Governing Statutes

Permissive intervention is governed by *Code Civ. Proc. § 387(a)*. Mandatory intervention is governed by *Code Civ. Proc. § 387(b)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionGeneral OverviewCivil ProcedurePartiesInterventionPermissive Interventions

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 124 INTERVENTION
PART I. INTRODUCTION

12-124 California Points & Authorities § 124.03

§ 124.03 Effect of 1977 Amendments to Code Civ. Proc. § 387

[1] In General

In 1977, the Legislature amended *Code Civ. Proc. § 387*, governing intervention, by adding a new subdivision (b), thereby creating intervention as a matter of right in certain circumstances. Subdivision (b) contains language almost identical to that of *Fed. R. Civ. P., Rule 24(a)*, which governs mandatory intervention in federal court actions. At the same time, the Legislature retained the provisions of former Code Civ. Proc. § 387, which are now contained in subdivision (a) of that section. The 1977 amendments present two separate, but related, questions of interpretation that have apparently not yet been resolved by the California appellate courts. The first question relates to the applicability in California of cases decided under *Fed. R. Civ. P., Rule 24* and under the statutes of states that have also adopted the federal rule. The second question relates to the applicability of pre-1977 case law under *Code Civ. Proc. § 387*, as amended.

[2] Applicability of Federal Rule

[a] Mandatory Intervention

The wording of *Code Civ. Proc. § 387(b)* is almost identical to that of *Fed. R. Civ. P., Rule 24(a)*, governing mandatory intervention in federal court actions. Under general rules of statutory interpretation, when the Legislature enacts a statute that is framed in language identical to a previously construed federal provision, it is presumed that the Legislature intended that the language used in the state statute be given a like interpretation [*see Kaplan's Fruit & Produce Co. v. Superior Court (1979) 26 Cal. 3d 60, 73, 160 Cal. Rptr. 745, 603 P.2d 1341]* . Nevertheless, counsel should probably exercise caution in relying on federal cases interpreting *Fed. R. Civ. P., Rule 24(a)* to establish a right to intervene under *Code Civ. Proc. § 387(b)*. Under former Code Civ. Proc. § 387, which provided for permissive, rather than mandatory, intervention, the courts held that the intervener must have a direct, and not merely a consequential, interest in the matter in litigation and that the interest must be of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment [*see Jersey Maid Milk Products Co. v. Brock (1939) 13 Cal. 2d 661, 663, 91 P.2d 599* ; *Socialist Workers etc. Committee v. Brown (1975) 53 Cal. App. 3d 879, 891, 125 Cal. Rptr. 915* ; *but see Timberidge Enterprises, Inc. v. City of Santa Rosa (1978) 86 Cal. App. 3d 873, 881, 150 Cal. Rptr. 606* (although quoting *Jersey Maid Milk*, the court noted that it is not

necessary that intervener's interests will inevitably be affected by judgment as long as there is substantial probability that they will be affected)]. Although there are very few reported appellate decisions construing *Code Civ. Proc. § 387(b)*, the few cases that have been reported appear to follow the somewhat conservative approach followed by the courts under the old statute. Thus, for example, one court of appeal has stated that only a direct pecuniary interest can form the basis for mandatory intervention [*Coalition for Fair Rent v. Abdelnour (1980) 107 Cal. App. 3d 97, 115, 165 Cal. Rptr. 685]* .

By contrast, *Fed. R. Civ. P., Rule 24(a)*, has generally been given a more liberal interpretation by the federal courts, both in terms of the type of interest and the degree of impairment of that interest necessary to intervene as a matter of right [*see, e.g., Nuesse v. Camp (D.C. Cir. 1967) 385 F.2d 694, 699-702* ; *Atlantis Development Corporation v. United States (5th Cir. 1967) 379 F.2d 818, 823-827*]. In fact, a number of federal appellate court decisions have stated that the effect of stare decisis may, in some cases, supply the practical impairment of interests that warrants mandatory intervention under the federal rule [*see Foster v. Gueory (DC Cir. 1981) 655 F.2d 1319, 1325* ; *Nuesse v. Camp (D.C. Cir. 1967) 385 F.2d 694, 702* ; *Atlantis Development Corporation v. United States (5th Cir. 1967) 379 F.2d 818, 829*]. Thus, adoption of the federal rule would appear to require repudiation of the stricter standards for intervention that have traditionally been applied by the California courts.

[b] Permissive Intervention

The 1977 amendments retained the provisions of former Code Civ. Proc. § 387 in subdivision (a) of the amended statute, thus retaining a permissive intervention couched in language almost identical to that of the former statute [*see California Physicians' Service v. Superior Court (1980) 102 Cal. App. 3d 91, 96, 162 Cal. Rptr. 266*]. The California courts have held that under the former statute a proposed intervener must have a direct interest in the matter in litigation of such an immediate character that the intervener would gain or lose by the direct legal operation of the judgment [*see* discussion in *§ 124.03[2][a]*]. *Fed. R. Civ. P., Rule 24(b)*, governing permissive intervention in federal court actions, is worded quite differently from *Code Civ. Proc. § 387(a)* and requires only that the proposed intervener's claim or defense have a question of law or fact that is common to the main action [*see Fed. R. Civ. P., Rule 24(b)*]. In light of the substantial difference in the language of the two provisions, federal cases interpreting *Fed. R. Civ. P., Rule 24(b)*, are probably of limited usefulness to counsel attempting to establish the propriety of permissive intervention under *Code Civ. Proc. § 387(a)*.

[3] Applicability of Pre-1977 Cases

[a] Mandatory Intervention

The extent to which cases decided under *Code Civ. Proc. § 387* before its 1977 amendment can be relied on to establish a right to intervene under *Code Civ. Proc. § 387(b)* is unclear. Under the provisions of former Code Civ. Proc. § 387, intervention was not mandatory; even if the proposed intervener could establish the requisite interest in the matter in litigation, the trial court had discretion to deny intervention if the reasons therefor were outweighed by the rights of the original parties to conduct their lawsuit on their own terms [*see Fireman's Fund Ins. Co. v. Gerlach (1976) 56 Cal. App. 3d 299, 302, 303, 128 Cal. Rptr. 396*]. Nevertheless, some cases permitting intervention under the former statute have referred to the third party as having "a right to intervene," and these cases may be of some use to counsel in attempting to establish the propriety of mandatory intervention under the provisions of *Code Civ. Proc. § 387(b)* [*see, e.g., Berghauser v. Golden State Orchards (1929) 208 Cal. 550, 553-554, 282 P. 950* ; *Cohn v. County Board of Supervisors (1955) 135 Cal. App. 2d 180, 184, 286 P.2d 836*].

Whether or not the California appellate courts follow the standard for mandatory intervention applied by the federal courts under *Fed. R. Civ. P., Rule 24(a)*, also has a bearing on the applicability of pre-1977 cases to mandatory intervention under *Code Civ. Proc. § 387(b)*. If the California courts do follow the federal rule, then cases decided prior to 1977 would appear to be useful insofar as they permit intervention, since the standard for mandatory intervention

under the federal rule appears to be more liberal than that applied by the California courts under *Code Civ. Proc. § 387* before the 1977 amendment. On the other hand, pre-1977 cases denying intervention would not necessarily be useful precedent if the federal rule is followed.

Because of the uncertainty concerning the interpretation of *Code Civ. Proc. § 387(b)*, counsel should exercise caution in relying on cases decided under *Code Civ. Proc. § 387* prior to the 1977 amendment. In most cases, it will probably be necessary to carefully analyze the facts of the particular case and compare them with the criteria for mandatory intervention set out in *Code Civ. Proc. § 387(b)* to determine whether the holding in that case is applicable.

[b] Permissive Intervention

Since the Legislature has retained permissive intervention in *Code Civ. Proc. § 387(a)* in language that is nearly identical to that contained in the statute prior to its amendment [*see California Physicians' Service v. Superior Court (1980) 102 Cal. App. 3d 91, 96, 162 Cal. Rptr. 266*], it seems clear that permissive intervention is still permitted in the same situations in which it was formerly permitted. Whether or not permissive intervention is still restricted in the same manner as it formerly was appears to be an open question. Ordinarily, when the Legislature amends a statute without altering portions of the provision that have previously been judicially construed, the Legislature is presumed to have been aware of and to have acquiesced in the previous judicial construction. Thus, reenacted portions of the statute should ordinarily be given the same construction that they received before the amendment [*see Marina Point, Ltd. v. Wolfson (1982) 30 Cal. 3d 721, 734-735, 180 Cal. Rptr. 496, 640 P.2d 115 , cert. denied, 459 U.S. 858*]. However, the application of this rule of statutory construction is somewhat complicated by the addition of *Code Civ. Proc. § 387(b)*, creating mandatory intervention. If the courts, in determining whether a third party has a right to intervene under *Code Civ. Proc. § 387(b)*, follow the liberal standard applied by the federal courts under *Fed. R. Civ. P., Rule 24(a)*, or even the more conservative approach taken by the California courts under *Code Civ. Proc. § 387* prior to its amendment, the effect would be to make permissive intervention under *Code Civ. Proc. § 387(a)* superfluous since a party could then intervene as a matter of right in those circumstances in which he or she could formerly intervene only at the court's discretion. Since the courts generally attempt to construe statutes so as to avoid making any of the provisions surplusage [*see, e.g., J.R. Norton Co. v. Agricultural Labor Relations Bd. (1979) 26 Cal. 3d 1, 36-37, 160 Cal. Rptr. 710, 603 P.2d 1306*], one might expect the courts to apply a more liberal standard than in the past when determining whether intervention should be permitted under *Code Civ. Proc. § 387(a)*. Although the few cases decided under *Code Civ. Proc. § 387(a)* since the 1977 amendment have not directly considered this issue, they do appear to continue to apply the standard as previously applied by California courts, including the requirement of a direct interest [*see Kuperstein v. Superior Court (1988) 204 Cal. App. 3d 598, 600, 251 Cal. Rptr. 385* ; *People ex rel. Rominger v. County of Trinty (1983) 147 Cal. App. 3d 655, 660-661, 195 Cal. Rptr. 186*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionGeneral OverviewCivil ProcedurePartiesInterventionConditional Right to InterveneCivil ProcedurePartiesInterventionRight to Intervene

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 124 INTERVENTION
PART I. INTRODUCTION

12-124 California Points & Authorities § 124.04

§ 124.04 Relation to Compulsory Joinder

California permits a nonparty to become a party to a pending action pursuant to *Code Civ. Proc. § 387* or *389*, or both [*see Muller v. Robinson (1959) 174 Cal. App. 2d 511, 514, 345 P.2d 25* ; *Crofton v. Young (1941) 48 Cal. App. 2d 452, 456, 119 P.2d 1003*]. Whether counsel wishes to proceed under either provision may depend on the desire of the nonparty to enter the case under existing pleadings as required under joinder or to file his or her own complaint in intervention. If the decision is to intervene, the court could well decide that if the party is one who would be required to join in the action under *Code Civ. Proc. § 389(a)(2)(i)*, he or she must be permitted to intervene under *Code Civ. Proc. § 387(b)* unless his or her interests are already being adequately represented. Both statutes employ similar language giving the nonparty meeting its requirements an unconditional right to intervene or join in a pending action. However, intervention under *Code Civ. Proc. § 387(b)* requires timely application, and it is possible that the nonparty could be joined in the action under *Code Civ. Proc. § 389* even though he or she would not be permitted to intervene on the ground that intervention was not timely.

For discussion and forms relating to compulsory joinder of parties, see California Forms of Pleading and Practice, Ch. 395, *Parties* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionGeneral OverviewCivil ProcedurePartiesJoinderCompulsory Joinder

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12-124 California Points & Authorities § 124.05

§ 124.05 Procedures for Intervening

A nonparty may apply to the court for leave to file a complaint in intervention by noticed motion [*see Bowles v. Superior Court (1955) 44 Cal. 2d 574, 588-589, 283 P.2d 704*], or by ex parte application [*see Allen v. California Water & Tel. Co. (1947) 31 Cal. 2d 104, 107, 187 P.2d 393* ; *see also Adoption of Lenn E. (1986) 182 Cal. App. 3d 210, 217, 227 Cal. Rptr. 63*], or by applying for issuance of an order to show cause why leave to intervene should not be granted [*see Thorman v. Dome Producing etc. Co. (1942) 50 Cal. App. 2d 201, 203, 122 P.2d 927*]. A formal motion for intervention is not required; the application for leave to intervene may be made informally and authorized by an ex parte order [*Adoption of Lenn E. (1986) 182 Cal. App. 3d 210, 217, 227 Cal. Rptr. 63*]. The complaint in intervention must be filed on leave to intervene, and it must state facts sufficient, if true, to constitute cause for intervention [*see Hausmann v. Farmers Ins. Exchange (1963) 213 Cal. App. 2d 611, 615, 29 Cal. Rptr. 75*]. If a complaint in intervention is not filed, a trial court is justified in denying a motion to intervene [*see Sutter Health Uninsured Pricing Cases (2009) 171 Cal. App. 4th 495, 513, 89 Cal. Rptr. 3d 615]* .

Whether intervention is permissive or mandatory, a petition to seek leave is required; without permission from the court, a party lacks any standing to the action. Though a party may assert it holds an unconditional right to intervention, that right is not absolute. A court must initially determine if the petition is timely; this exercise of discretion is solely a judicial function, which may not be delegated to a clerk [*see Lohnes v. Astron Computer Products (2001) 94 Cal. App. 4th 1150, 1153, 115 Cal. Rptr. 2d 34*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPartiesInterventionGeneral OverviewCivil ProceduresPartiesInterventionMotions to IntervenеCivil ProceduresPartiesInterventionPermissive InterventionsCivil ProceduresPartiesInterventionRight to Intervene

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12-124 California Points & Authorities § 124.06

§ 124.06 Statute of Limitations

A complaint in intervention, like any other complaint, is subject to an affirmative defense based on an applicable statute of limitations and, if it asserts a new cause of action, the application for leave to intervene must be filed within the pertinent limitations period [*Basin Construction Corp. v. Department of Water & Power (1988) 199 Cal. App. 3d 819, 825, 245 Cal. Rptr. 178*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPartiesInterventionGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime Limitations

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12-124 California Points & Authorities § 124.07

§ 124.07 Procedures for Objecting to Intervention

An existing party may object to a proposed intervener's motion for an order granting leave to file a complaint in intervention or an order to show cause why intervention should not be granted by submitting an affidavit or declaration [*Code Civ. Proc. §§ 2009, 2015.5*] and a memorandum in opposition to the proposed intervention [*see §§ 124.45 -124.50*].

When ex parte leave has been granted to file a complaint in intervention, however, an existing party may respond to the complaint in intervention by answer [*see Code Civ. Proc. §§ 430.10, 430.30(b)*], demurrer [*see Timberidge Enterprises Inc. v. City of Santa Rosa (1978) 86 Cal. App. 3d 873, 880, 150 Cal. Rptr. 606* ; *Code Civ. Proc. §§ 430.10, 430.30(a)*], or motion to strike the complaint in intervention [*see Jersey Maid Milk Products Co. v. Brock (1939) 13 Cal. 2d 661, 662, 91 P.2d 599* ; *Code Civ. Proc. §§ 435-437*]. An existing party may also file a cross complaint against an intervener who has asserted a claim against him or her [*see Code Civ. Proc. §§ 428.10-428.80*], but not if the intervener has intervened as a defendant to resist plaintiff's claims [*see Drinkhouse v. Van Ness (1927) 202 Cal. 359, 372, 260 P. 869*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPleading & PracticePleadingsComplaintsCross-ComplaintsCivil ProceduresPartiesInterventionGeneral Overview

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12-124 California Points & Authorities § 124.08

§ 124.08 Page Limits on Points and Authorities

Generally, a memorandum must not exceed 15 pages in length, or in the case of a motion for summary judgment or summary adjudication, 20 pages in length. A reply or closing memorandum may not exceed 10 pages in length [*see Cal. Rules of Ct., Rule 3.1113(d)*]. The page limit does not include exhibits, declarations, attachments, the table of contents, the table of authorities, or the proof of service [*Cal. Rules of Ct., Rule 3.1113(d)*] Any party desiring to file a longer memorandum must obtain leave of court [*see Cal. Rules of Ct., Rule 3.1113(e)*]. For further discussion of the page limitations under *Cal. Rules of Ct., Rule 3.1113*, and of other basic format requirements of memoranda, see *Ch. 1, Writing Legal Memoranda and Briefs, § 1.05*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureSummary JudgmentSupporting MaterialsMemoranda of Law

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12-124 California Points & Authorities § 124.09

§ 124.09 Related Pleading and Practice Chapters

For discussion and forms relating to intervention and joinder of party, see California Forms of Pleading and Practice, Ch. 395, *Parties* .

For discussion and forms relating to motions to vacate a default judgment pursuant to Code Civ. Proc. § 473, see California Forms of Pleading and Practice, Ch. 489, *Relief From Judgments and Orders* (Matthew Bender).

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12-124 California Points & Authorities § 124.10

§ 124.10 Related Points and Authorities Chapters

For points and authorities pertaining to permissive and compulsory joinder of parties, see Ch. 168, *Parties* .

For points and authorities in support of a motion to intervene and set aside a default judgment, see Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders* .

For points and authorities supporting a judgment creditor's motion to intervene in the judgment debtor's cause of action, see Ch. 131, *Judgments* .

For points and authorities in support of a motion to dismiss a complaint in intervention for failure to prosecute, see Ch. 220, *Subrogation* .

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12-124 California Points & Authorities §§ 124.11-124.29

[Reserved]

§§ 124.11[Reserved]

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12-124 California Points & Authorities § 124.30

§ 124.30 Supporting Motion for Order Granting Leave to File Complaint in Intervention--Permissive Intervention [Code Civ. Proc. § 387(a)]--General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	
_____ [*name*],	)	NO. _____
Defendant;	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*],	)	IES SUPPORTING MOTION FOR ORDER
Intervener.	)	GRANTING LEAVE TO FILE COMPLAINT IN IN-
	)	TERVENTION
	)	

_____

IT IS APPROPRIATE FOR THE COURT TO EXERCISE ITS DISCRETION UNDER CODE OF CIVIL PROCEDURE SECTION 387(a) TO GRANT _____ [*name of intervener*] LEAVE TO FILE A COMPLAINT IN INTERVENTION IN THIS ACTION BECAUSE HE/SHE/IT HAS AN INTEREST _____ [IN THE MATTER IN LITIGATION *or* IN THE SUCCESS OF PLAINTIFF/DEFENDANT IN THIS ACTION *or* AGAINST BOTH PLAINTIFF AND DEFENDANT IN THIS ACTION].

A. Statutory Authority. On timely application, any person who has an interest in the matter in litigation or in the success of either of the parties, or an interest against both, may intervene in the action or proceeding (*Code Civ. Proc. § 387(a)*).

[*Optional*] **B. Intervention Under Permissive Intervention Is Discretionary.** Permissive intervention under *Code of*

Civil Procedure Section 387(a) is discretionary with the trial court (*see People v. Superior Court (Good) (1976) 17 Cal. 3d 732, 736-737, 131 Cal. Rptr. 800, 552 P.2d 760* ; US Ecology, Inc. v. State of California (2001),).

[*Optional*] **C. Purpose of Allowing Intervention.** The purpose of allowing intervention is to protect others potentially affected by a judgment, thus obviating delay and multiplicity of suits (*People v. Superior Court (Good) (1976) 17 Cal. 3d 732, 736, 131 Cal. Rptr. 800, 552 P.2d 760* ; *Montgomery v. Bio-Med Specialties, Inc. (1986) 183 Cal. App. 3d 1292, 1296, 228 Cal. Rptr. 709*).

[*Add further points and authorities, as appropriate, relating to specific reasons why the motion for leave to file a complaint in intervention should be granted (see, e.g., §§ 124.33 -124.44).*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for an order granting leave to file a complaint in intervention in a pending action under *Code Civ. Proc. § 387(a)* (governing permissive intervention). The form sets forth the general point that a person who has an interest in the matter in litigation, or in the success of either party, or against both parties, may intervene.

The appropriate optional paragraphs may be used whenever counsel wishes to urge the trial court to exercise its discretion in granting intervention. For example, Paragraph B may be used to point out to the trial court that intervention under *Code Civ. Proc. § 387(a)* is discretionary and that the trial court should exercise its discretion to grant intervention. Optional Paragraph C may be used as a place to tie in the facts of the case and show that they correspond with the purpose of intervention to protect against delay and a multiplicity of suits.

Counsel should add points and authorities to the form that pertain to specific reasons why intervention is proper [*see, e.g., §§ 124.33 -124.44*]. Counsel may also wish to consider combining the points and authorities set out in this form with the points and authorities *set out in § 124.32*, pertaining to mandatory intervention under *Code Civ. Proc. § 387(b)*, since the facts of a particular case may in some instances support intervention under both *Code Civ. Proc. §§ 387(a)* and *387(b)*.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion of the relevant facts concerning the particular interest of the person seeking intervention and show how this interest justifies intervention.

[b] Related Uses

With appropriate modifications, these points and authorities may be used to support a motion for leave to file a cross

complaint in intervention.

[c] Related Pleading and Practice Forms

For a form of notice of motion for leave to intervene and for a form of complaint in intervention, see California Forms of Pleading and Practice, Ch. 395, *Parties* .

[d] Related Points and Authorities

For memoranda of points and authorities pertaining to compulsory joinder of parties, see Ch. 168, *Parties* .

[e] Opposing Points and Authorities

The points and authorities *set out in §§ 124.45 -124.49* may be used in an appropriate case to oppose a motion for leave to file a complaint in intervention supported by this memorandum.

[3] Discussion of Authorities

[a] Statutory Authority

Code Civ. Proc. § 387(a) provides that on timely application, any person who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both, may intervene in the action or proceeding. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both plaintiff and defendant. An intervention is made by complaint, setting forth the grounds on which the intervention rests, filed by leave of court and served on the parties to the action or proceeding who have not appeared in the same manner as upon the commencement of an original action, and on the attorneys of the parties who have appeared, or on the party if he or she has appeared without an attorney, in the manner provided for service of summons or in the manner provided by *Code Civ. Proc. §§ 1010-1020*. A party served with a complaint in intervention may, within 30 days after service, move, demur, or otherwise plead to the complaint in the same manner as to an original complaint.

Code Civ. Proc. § 387 was amended in 1977, and divided into subdivisions (a) and (b). The provisions of current *Code Civ. Proc. § 387(a)* are virtually identical to those of the former statute, except that the words "upon timely application" at the beginning of the subdivision have been substituted for the words "at any time before trial." The purpose of this change was to liberalize the former timeliness requirement that was often not strictly adhered to by the courts and that was criticized as being unrealistic [*see Sanders v. Pacific Gas & Elec. Co. (1975) 53 Cal. App. 3d 661, 668, 126 Cal. Rptr. 415* (discussed in *§ 124.33[3][a]*].

For a discussion of the possible effect of the 1977 amendment to Code Civ. Proc. § 387 on the applicability of cases decided under that section prior to the 1977 amendment, see *§ 124.03*.

[b] Intervention Under Permissive Intervention Is Discretionary

People v. Superior Court (Good) *(1976) 17 Cal. 3d 732, 131 Cal. Rptr. 800, 552 P.2d 760* , involved a petition for a writ of mandate to compel the trial court in an underlying action to strike interveners' complaint in intervention. In the underlying civil action, the People sought injunctive relief, civil penalties, and restitution to investors, against persons and corporations who had been indicted on criminal charges arising from an alleged investment fraud involving the sale of oil drilling contracts. Subsequently, Good and a purported class of defrauded investors filed a separate action against the same defendants. Plaintiffs in the separate action also filed a complaint in intervention in the People's action, by leave of court, in which they sought restitution, and claimed that the negotiated settlement between the People and

defendants would render defendants incapable of responding in damages or of making restitution to other investors because of the large amount of money to be paid to the county under the terms of the settlement. Subsequently, the trial court entered a stipulated judgment based on the earlier agreement reached between the original parties; however, the judgment also provided that interveners were free to pursue any remedy it sought in its complaint in intervention. The trial court also ordered that any funds received by the district attorney were to be deposited in the trial court and distributed following notice and hearing. The People petitioned the Supreme Court for a writ of mandate to compel the trial court to strike the complaint in intervention. The Court granted an alternative writ pending decision in the matter.

The Supreme Court denied the People's petition for a writ of mandate. The Court, in acknowledging the discretionary nature of *Code Civ. Proc. § 387* [amended; *now see Code Civ. Proc. § 387(a)*], found no abuse in the trial court's granting leave to interveners to file their complaint in intervention. The Court stated that the purpose of the intervention statute was to protect the interests of others who may be affected by any judgment to be rendered in an action obviating delay and multiplicity of actions. Counterbalancing this purpose, the Court noted, was the interest of the original parties in pursuing their litigation unburdened by others. The court pointed out that the interest necessary to intervene must be direct rather than consequential and must be determinable in the action. The court found that both complaints sought restitution to the investors based on the same underlying facts, and involved the same proof of facts. The Court also rejected the People's contention that as general creditors, interveners were only indirectly involved in the People's action, stating that interveners stood to gain directly from the judgment if the People were to obtain all the relief sought. In addition, the Court rejected the People's contention that intervention would unduly extend the proceedings and therefore should not have been permitted. Although a trial court possesses discretion to deny intervention even when interveners have shown a direct interest, the trial court in this action exercised its discretion in favor of intervention and the Court concluded that the trial court did not abuse its discretion. The interveners suffered a risk that their contributions to defendants' venture would be used primarily to pay statutory penalties, thus depriving interveners of the fruit of their investments (*17 Cal. 3d 732, 736-737)* .

Counsel should note that this case was decided before the 1977 amendment to *Code Civ. Proc. § 387*. That amendment, in addition to creating a right to intervene under certain circumstances [*see Code Civ. Proc. § 387(b)*], retained permissive intervention couched in language almost identical to that contained in the pre-1977 version of the statute [*see Code Civ. Proc. § 387(a)*; *California Physicians' Service v. Superior Court (1980) 102 Cal. App. 3d 91, 96, 162 Cal. Rptr. 266* (discussed in *§ 124.46[3][a]*)]. Thus, the statement contained in the above case and in a number of other pre-1977 cases that intervention is subject to the court's discretion appears still to apply to permissive intervention under *Code Civ. Proc. § 387(a)*.

For further discussion of the effect of the 1977 amendment to *Code Civ. Proc. § 387* on the validity of cases decided under that section prior to its amendment, see *§§ 124.03[2][a] -124.03[3][a]*.

US Ecology, Inc. v. State of California (2001), , noted that a third party may intervene in an action if (1) the party has a direct and immediate interest in the action; (2) the intervention will not enlarge the issues in the litigation; and (3) the reasons for the intervention outweigh any opposition by the parties presently in the action [*Code Civ. Proc. § 387(a)*; *Truck Ins. Exchange v. Superior Court (1997) 60 Cal. App. 4th 342, 70 Cal. Rptr. 2d 255*], and that a trial court has broad discretion in determining whether to permit intervention [*see People v. Superior Court (Good) (1976) 17 Cal. 3d 732, 737, 131 Cal. Rptr. 800, 552 P.2d 760* ; *Jade K. v. Viguri (1989) 210 Cal. App. 3d 1459, 1468, 258 Cal. Rptr. 907*].

[c] Purpose of Allowing Intervention

The facts and procedural background of ***People v. Superior Court (Good)*** *(1976) 17 Cal. 3d 732, 131 Cal. Rptr. 800, 552 P.2d 760* , are discussed in *§ 124.30[3][b]*. In holding that the trial court did not abuse its discretion in allowing intervention, the court stated the purpose of intervention as set out in Paragraph C of the form (*17 Cal. 3d 732, 736)* .

Montgomery v. Bio-Med Specialties, Inc. *(1986) 183 Cal. App. 3d 1292, 228 Cal. Rptr. 709* , was an action against a corporation and two of its officers on a promissory note in which two of the principal shareholders intervened to insure a good-faith defense of the corporation. The interveners prevailed in the action and were awarded attorney's fees under the terms of the note and *Civ. Code § 1717*. Plaintiffs appealed, contending that interveners were not entitled to attorney's fees because they were not signatories to the promissory note, and interveners cross appealed, contending the award was insufficient. In affirming the judgment, the appellate court, quoting *Catello v. I.T.T. General Controls (1984) 152 Cal. App. 3d 1009, 1013-1014, 200 Cal. Rptr. 4* , said that the purpose of allowing intervention is to protect others potentially affected by a judgment, thus obviating delay and multiplicity of suits, and that the intervener becomes a party to the action with all of the same procedural rights and remedies as the original parties (*183 Cal. App. 3d 1292, 1296)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeSupporting MemorandaCivil ProceduresPartiesInterventionGeneral OverviewCivil ProceduresPartiesInterventionPermissive Interventions

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12-124 California Points & Authorities § 124.31

§ 124.31 Supporting Motion for Order Granting Leave to File Complaint in Intervention--Mandatory Intervention Based on Right Conferred by Statute [Code Civ. Proc. § 387(b)]--General Form

[1] FORM

[*Caption. See § 124.30.*]

ANY PERSON ON WHOM THE LAW CONFERS AN UNCONDITIONAL RIGHT TO INTERVENE IN A PENDING ACTION MUST BE PERMITTED TO INTERVENE.

A. Statutory Authority. Any person on whom the law confers an unconditional right to intervene shall be permitted to intervene (*Code Civ. Proc. § 387(b)*).

[*Optional*] **B. Intervention Under *Lab. Code § 3853*.** *Section 3853 of the Labor Code*, authorizing an employer or employee to join as party plaintiff in, or to consolidate his or her independently brought action with, an action by the other for injuries sustained by the employee arising out of a work-related incident caused by a third-party tortfeasor confers on the employer or employee an unconditional right to intervene in the other's action pursuant to *Section 387(b) of the Code of Civil Procedure* (*Jordan v. Superior Court (1981) 116 Cal. App. 3d 202, 207, 172 Cal. Rptr. 30*).

[*Optional*] **C. Intervention Under *Corp. Code § 1800(c)*.** *Section 1800(c) of the Corporations Code* gives to any shareholder or creditor an unqualified right to intervene in proceedings for the involuntary winding up or dissolution of the corporation (*see* *Hagan v. Superior Court (1960) 53 Cal. 2d 498, 503, 2 Cal. Rptr. 288, 348 P.2d 896* (decided under former Corp. Code § 4653).

[*Add further points and authorities, as appropriate, pertaining to specific statutory provision relied on as conferring right to intervene.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for an order granting leave to file a complaint in intervention pursuant to *Code Civ. Proc. § 387(b)* (governing mandatory intervention). The form sets forth the general point that a person who has an unconditional statutory right to intervene must be permitted to intervene.

The appropriate optional paragraphs may be used when intervention is sought under *Lab. Code § 3853* [Paragraph B] or under *Corp. Code § 1800(c)* [Paragraph C].

Counsel should add points and authorities to the form, pertaining to specific reasons why intervention is proper. Thus, counsel should cite the statutory provision relied on as conferring a right to intervene, as well as any decisional or other authority supporting the contention that the cited provision confers such a right. For a list of statutory provisions specifically authorizing intervention, see California Forms of Pleading and Practice, Ch. 395, *Parties* (Matthew Bender). If timeliness of the motion is at issue, counsel should combine these points and authorities with those *set out in § 124.33*.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion of the relevant facts concerning the status of the proposed intervener. Counsel should also cite the appropriate statute authorizing intervention and show facts tending to prove that the nonparty comes within the purview of that statute.

[b] Opposing Points and Authorities

The points and authorities *set out in § 124.45* may be used in an appropriate case to oppose a motion for leave to file a complaint in intervention supported by this memorandum.

[c] Related Pleading and Practice Forms

For a form of notice of motion for leave to intervene and for a form of complaint in intervention, see California Forms of Pleading and Practice, Ch. 395, *Parties* (Matthew Bender).

[d] Related Points and Authorities

For points and authorities relating to compulsory joinder of parties, see Ch. 168, *Parties* .

[3] Discussion of Authorities

[a] Statutory Authority

Code Civ. Proc. § 387(b) provides that if any provision of law confers an unconditional right on a person to intervene, the court shall, on timely application, permit that person to intervene.

[b] Intervention Under Lab. Code § 3853

Jordan v. Superior Court *(1981) 116 Cal. App. 3d 202, 172 Cal. Rptr. 30* , arose out of an action in which petitioner employee sought a writ of mandate to compel the trial court to set aside its order sustaining a demurrer to petitioner's complaint in intervention. In the underlying action in the trial court, worker's compensation carrier brought an action against a third-party tortfeasor, Gelson's, for reimbursement of money paid to petitioner by it for injuries sustained while delivering goods for his employer to Gelson's. The compensation carrier brought its action two days before the one-year anniversary of the accident. Three weeks later, one year and 18 days after the accident, petitioner filed a complaint in intervention against Gelson's, seeking general and special damages for his injuries. Gelson's successfully demurred to the complaint on the grounds that the action was barred by the statute of limitations and that petitioner failed to meet the requirements of *Code Civ. Proc. § 387(a)* in that he did not have an interest in the matter in litigation, or in the success of either of the parties, or an interest against both.

The court of appeal granted the writ, holding, among other things, that under the provisions of *Code Civ. Proc. § 387(b)*, any person who has conferred on him or her an unconditional right to intervene shall be permitted to intervene, upon timely application. The court held that *Lab. Code § 3853* gives such an unconditional right. Therefore, said the court, the requirements of *Code Civ. Proc. § 387(a)* were inapplicable (*116 Cal. App. 3d 202, 207)* .

[c] Intervention Under Corp. Code § 1800(c)

Hagan v. Superior Court *(1960) 53 Cal. 2d 498, 2 Cal. Rptr. 288, 348 P.2d 896* , involved a proceeding in prohibition to restrain defendant superior court from entering judgment in proceedings for involuntary dissolution of a corporation and other relief arising out of the trial court's order in the underlying action requiring interveners to post security for costs. In the action in the trial court, four of the five directors of a corporation filed a complaint for involuntary dissolution and winding up of the corporation. The corporation did not respond, and default was entered. Petitioners subsequently learned of the proceedings and were permitted to file complaints in intervention. Petitioners claimed that they were shareholders in the corporation, that defendants in intervention, the plaintiffs, refused to recognize them as such, and that various directors of the corporation had made unauthorized expenditures of corporate funds or wrongful diversion of corporation assets. Plaintiffs filed a motion with the trial court to require petitioners to post security for costs. The trial court granted this motion, and petitioners sought a writ of prohibition.

The Supreme Court granted the writ in prohibition, holding that former Corp. Code § 4653 [*now see Corp. Code § 1800(c)*] gave to any shareholder or creditor an unqualified right to intervene in proceedings for the involuntary winding up or dissolution of a corporation. Consequently, the court could not require that petitioners, as interveners, post security (*53 Cal. 2d 498, 503)* .

[4] Additional Authorities

[a] Intervention Under Lab. Code § 3853

In *Home Insurance Co. v. Southern Cal. Rapid Transit District (1987) 196 Cal. App. 3d 522, 241 Cal. Rptr. 858* , plaintiff in intervention, while driving a vehicle owned by his employer, was injured when hit by a bus owned and operated by defendant public transit district. Both plaintiff in intervention and his employer's insurer filed timely claims against defendant. The insurer thereafter timely filed a complaint for damages against defendant. Pursuant to *Lab. Code § 3853*, plaintiff in intervention intervened in the insurer's action. Defendant moved for summary judgment against plaintiff in intervention on the ground his action was barred by the statute of limitations. The trial court granted the motion and entered judgment. The court of appeal reversed. The court explained that when an employer or its insurer files a timely action against a tortfeasor to recover workers' compensation paid to an injured employee, the employee may intervene to recover damages for personal injury even if the complaint in intervention is not filed within the statute of limitations (*196 Cal. App. 3d 522, 523-524)* . It held that defendant's status as a public entity did not change the

effect of *Lab. Code § 3853*, and distinguished cases that had rejected intervention by employees, noting that in those cases the employees had failed to timely file a claim (*196 Cal. App. 3d 522, 525-527)* .

[b] Intervention Under Corp. Code § 1800(c)

Rosner v. Benedict Heights, Inc. (1963) 219 Cal. App. 2d 1, 32 Cal. Rptr. 764 , involved an action in proceedings for involuntary dissolution of a corporation. A certain shareholder intervened to assert his rights as shareholder so that he would not be prejudiced by the judgment, since he was not a shareholder of record. The court of appeal affirmed the trial court's rejection of plaintiff's contention that intervention was improper because the intervener was not a shareholder of record, holding that as an owner of shares, intervener had an interest in the subject matter of the pending complaint for dissolution of the corporation (*219 Cal. App. 2d 1, 5)* . This case was the underlying action involved in *Hagan v. Superior Court (1960) 53 Cal. 2d 498, 503, 2 Cal. Rptr. 288, 348 P.2d 896* (discussed in *§ 124.31[4][b]*).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePartiesInterventionGeneral OverviewCivil ProcedurePartiesInterventionStatutory Right to Intervene

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 124 INTERVENTION
PART II. FORMS

12-124 California Points & Authorities § 124.32

§ 124.32 Supporting Motion for Order Granting Leave to File Complaint in Intervention--Mandatory Intervention Based on Interest Relating to Property or Transaction That Is Subject of Action [Code Civ. Proc. § 387(b)]--General Form

[1] FORM

[*Caption. See § 124.30.*]

ANY PERSON SEEKING INTERVENTION IN A PENDING ACTION WHO CLAIMS AN INTEREST RELATING TO THE PROPERTY OR TRANSACTION THAT IS THE SUBJECT OF THE ACTION AND WHO IS SO SITUATED THAT THE DISPOSITION OF THE ACTION MAY AS A PRACTICAL MATTER IMPAIR OR IMPEDE THAT PERSON'S ABILITY TO PROTECT THAT INTEREST SHALL BE PERMITTED TO INTERVENE UNLESS THAT PERSON'S INTEREST IS ADEQUATELY REPRESENTED BY EXISTING PARTIES.

A. Statutory Authority. Any person seeking intervention who claims an interest relating to the property or transaction that is the subject of the action and who is so situated that the disposition of the action may as a practical matter impair or impede that person's ability to protect that interest shall be permitted to intervene unless that person's interest is adequately represented by existing parties (*Code Civ. Proc. § 387(b)*).

B. Person May Intervene If Action Impairs of Impedes The Ability to Protect an Interest. A person may intervene in an action when that person has an interest relating to the property or transaction that is the subject of the suit and is so situated that the disposition of the suit could, as a practical matter, impair or impede its ability to protect its subrogation rights within the meaning of *Code of Civil Procedure Section 387(b)* (*Hodge v. Kirkpatrick (2005) 130 Cal. App. 4th 540, 30 Cal. Rptr. 3d 303*).

[*Add further points and authorities, as appropriate, relating to specific reasons why the motion for leave to file a complaint in intervention should be granted (see §§ 124.33 -124.44*)].

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for an order granting leave to file a complaint in intervention pursuant to *Code Civ. Proc. § 387(b)* (governing mandatory intervention). The form sets forth the general point that a person who claims an interest in the property or transaction that is the subject of a pending action, and who is so situated that the disposition of the action may as a practical matter impair or impede that person's ability to protect that interest, must be permitted to intervene in the action unless that person's interest is adequately represented by existing parties.

Counsel should add points and authorities to this form that pertain to specific reasons why intervention is proper. See *§§ 124.35*- 39 for examples of interests that have been held sufficient to justify intervention. Although nearly all of the cases cited in those forms were decided prior to the 1977 amendment to *Code Civ. Proc. § 387*, and therefore arguably apply only to permissive intervention under *Code Civ. Proc. § 387(a)*, many of these cases may nevertheless support mandatory intervention under *Code Civ. Proc. § 387(b)* [*see* discussion in *§§ 124.03[2][a] -124.03[3][a]*]. Counsel may also wish to consider combining the points and authorities set out in this form with the points and authorities *set out in § 124.30*, pertaining to permissive intervention under *Code Civ. Proc. § 387(a)*, since the facts of a particular case may in some instances support intervention under both *Code Civ. Proc. §§ 387(a)* and *387(b)*. If timeliness of the motion is at issue, counsel should combine these points and authorities with those *set out in § 124.33*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing the nature of the intervener's interest and how that interest would be jeopardized if he or she is not permitted to intervene in the action since his or her ability to protect that interest would be impaired or impeded by the disposition of the action.

[b] Related Uses

With appropriate modifications, these points and authorities may be used to support a motion for leave to file a cross complaint in intervention.

[c] Opposing Points and Authorities

The points and authorities *set out in §§ 124.45, 124.46, 124.50* may be used in an appropriate case to oppose a motion for leave to file a complaint in intervention supported by this memorandum.

[d] Related Pleading and Practice Forms

For a form of notice of motion for leave to intervene and for a form of complaint in intervention, see California Forms of Pleading and Practice, Ch. 395, *Parties* (Matthew Bender).

[e] Related Points and Authorities

For memoranda of points and authorities relating to compulsory joinder of a new party, see Ch. 168, *Parties* .

[3] Discussion of Authorities

[a] Statutory Authority

Code Civ. Proc. § 387(b) provides that if a person seeking intervention claims an interest relating to the property or transaction that is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede that person's ability to protect that interest, the court shall, on timely application, permit that person to intervene unless that person's interests is adequately represented by existing parties.

Subsection (b) was added to *Code Civ. Proc. § 387* in 1977 and closely follows the language of *Fed. R. Civ. P., Rule 23(a)* (governing intervention as a matter of right in federal court actions). Courts interpreting the federal provision have generally applied a more liberal standard in determining the interest necessary to intervene as a matter of right than that applied by the California courts under *Code Civ. Proc. § 387* prior to the 1977 amendment [*see* discussion in *§ 124.03[2][a]*]. The California courts have not yet decided whether the federal standard applies under *Code Civ. Proc. § 387(b)*. One possible interpretation is that claimed interests that were sufficient to support permissive intervention under former Code Civ. Proc. § 387 [*now see Code Civ. Proc. § 387(a)*] will be deemed interests sufficient to intervene as a matter of right under *Code Civ. Proc. § 387(b)* [*see Coalition for Fair Rent v. Abdelnour (1980) 107 Cal. App. 3d 97, 115, 165 Cal. Rptr. 685* (discussed in *§ 124.50*[3][b])]. Under such an interpretation, cases decided prior to 1977 may be useful in arguing that a particular claimed interest entitles the proposed intervener to intervene as a matter of right.

For further discussion of the effect of the 1977 amendments to *Code Civ. Proc. § 387* on the use of pre-1977 case law, see *§§ 124.03[2][a] -124.03[3][a]*.

[b] Person May Intervene If Action Impairs of Impedes The Ability to Protect an Interest

In ***Hodge v. Kirkpatrick*** *(2005) 130 Cal. App. 4th 540, 30 Cal. Rptr. 3d 303* , an insurer obtained partial subrogation rights against tortfeasors by paying a portion of the insureds' claims for property damage to their house. The court held that the insurer had a right to intervene under *Code Civ. Proc. § 387(b)*. The insurer, as a partially subrogated insurer, had an interest relating to the property or transaction that was the subject of the construction defect suit and was so situated that the disposition of the construction defect suit could, as a practical matter, impair or impede its ability to protect its subrogation rights within the meaning of § 387(b) (*130 Cal. App. 4th 540, 550)* . Neither a suit against the tortfeasors nor a suit for reimbursement against the insureds was a viable means for the insurer to protect those rights. Intervention served the legislative purpose of preventing multiple litigation. The insurer's interests were not adequately represented by the existing parties to the construction defect lawsuit. The court's decision did not preclude a trial court from finding that an insurer did not have a right to intervene based on a finding it paid a nominal amount on a claim solely as a pretext to intervene in an insured's lawsuit (*130 Cal. App. 4th 540, 557)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeSupporting MemorandaCivil ProceduresPartiesInterventionGeneral OverviewCivil ProceduresPartiesInterventionRight to Intervene

California Points & Authorities

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12-124 California Points & Authorities § 124.33

§ 124.33 Supporting Motion for Order Granting Leave to File Complaint in Intervention--Permissive or Mandatory Intervention [Code Civ. Proc. § 387(a), (b)]--Intervener's Application Was Timely

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities in support of a motion for an order granting leave to file complaint in intervention under either permissive intervention (see § 124.30) or mandatory intervention (see §§ 124.31, 124.32*)].

_____'S [*name*] APPLICATION FOR LEAVE TO INTERVENE IS TIMELY BECAUSE HE/SHE/IT HAS APPLIED FOR LEAVE TO INTERVENE WITHIN A REASONABLE TIME AFTER KNOWLEDGE OF THE SUIT.

[*EITHER if permissive intervention*]

A. Statutory Authority. On timely application, any person who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both, may intervene in the action or proceeding (*Code Civ. Proc. § 387(a)*).

B. Intervention Within Reasonable Time. A nonparty should assert his or her right to intervene within a reasonable time and not be guilty of an unreasonable delay after knowledge of the suit (*Sanders v. Pacific Gas & Elec. Co. (1975) 53 Cal. App. 3d 661, 668, 669, 126 Cal. Rptr. 415*).

[*OR if mandatory intervention*]

A. Statutory Authority. The court shall, on timely application, permit a person to intervene who has an unconditional right to intervene by a provision of law, or who claims an interest relating to the property or transaction that is the subject of the action and who is so situated that the disposition of the action may, as a practical matter, impair or impede

his or her ability to protect that interest (*Code Civ. Proc. § 387(b)*).

[*Optional*] **B. Timeliness of Application to Intervene as of Right.** *Code of Civil Procedure Section 387(b)* and _____ [*specify other statute, e.g., Labor Code Section 3853*], both dealing with intervention as of right, are to be construed with reference to one another. *Code of Civil Procedure Section 387(b)* incorporates the language of statutes conferring an unconditional right to intervene, such as _____ [*specify other statute, e.g., Labor Code Section 3853*]. Thus, "timely application" means the time, if any, stated in the statute granting the unconditional right to intervene. If the statute granting the unconditional right does not contain a time limit or if it repeats the "timely application" language of Section 387(b) or if it provides for intervention pursuant to or under Section 387, the discretionary standard of Section 387 applies (*Mar v. Sakti Internat. Corp. (1992) 9 Cal. App. 4th 1780, 1784, 12 Cal. Rptr. 2d 388*).

[*CONTINUE*]

[*Optional*] **C. Intervention After Judgment.** Intervention is possible, if otherwise appropriate, even after judgment (*Mallick v. Superior Court (1979) 89 Cal. App. 3d 434, 437, 152 Cal. Rptr. 503*).

[*Optional*] **D. Intervention After Default Judgment.** A nonparty who has a direct interest may move to intervene and to set aside a default judgment within six months after its entry, or after six months if the judgment is void on its face (*see Code Civ. Proc. § 473(b), (d)*; *see also Johnson v. Hayes Cal. Builders, Inc. (1963) 60 Cal. 2d 572, 575-578, 35 Cal. Rptr. 618, 387 P.2d 394* ; *Morton Regent Enterprises, Inc. v. Leadtec California, Inc. (1977) 74 Cal. App. 3d 842, 846-847, 141 Cal. Rptr. 706*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for leave to file a complaint in intervention, when the timeliness of the motion is at issue. The points and authorities set out in this form should be combined with general points and authorities *set out in §§ 124.30 -124.32*.

The first alternative Paragraphs A and B should be used if counsel is seeking permissive intervention pursuant to *Code Civ. Proc. § 387(a)*. The second alternative Paragraph A should be used in seeking mandatory intervention under *Code Civ. Proc. § 387(b)*. If the unconditional right to intervene is granted by statute, Optional Paragraph B should be used to set forth the appropriate statute and to establish the standard for timely application.

The optional paragraphs may be used as appropriate. For example, if intervention is sought after a judgment or default judgment, Optional Paragraphs C and D may be used respectively.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion of the relevant facts supporting the contention that the nonparty's motion to intervene is timely.

With appropriate modifications, these points and authorities may be used to support a motion for leave to file a cross complaint in intervention.

[b] Opposing Points and Authorities

The points and authorities *set out in § 124.47* may be used in an appropriate case to oppose a motion for leave to file a

complaint in intervention supported by this memorandum.

[3] Discussion of Authorities

[a] Intervention Within Reasonable Time

Sanders v. Pacific Gas & Elec. Co. *(1975) 53 Cal. App. 3d 661, 126 Cal. Rptr. 415* , arose out of an action by plaintiffs, owners of real property, against defendant utility company to enforce provisions of the Coastal Zone Conservation Act. Plaintiffs alleged that defendant's construction of an overhead electrical utility line obstructed their line of sight to the Pacific Ocean, that defendant failed to obtain a permit from the coastal commission before construction began in violation of the act, and that defendant failed to make an environmental impact report as required by the act. After hearing, a preliminary injunction was issued. At the subsequent trial, some four months later, plaintiffs moved to amend their complaint to ask for civil penalties under the Coastal Act. Although evidence was received on this issue, the court reserved decision. Approximately three weeks later, the Attorney General notified the court that its office did not receive notice of the hearing as required by Code Civ. Proc. § 398.6 in cases involving alleged adverse environmental effects that could affect the public generally. The trial court set aside its briefing schedule and submission order on the issue of damages and granted an ex parte order to the Attorney General to intervene. The state in its complaint in intervention contended that any civil penalties to be assessed should be awarded to the interveners, the coastal commission on whose behalf the attorney general had intervened. The trial court denied plaintiffs' motion to dismiss the complaint in intervention. The trial court's action was apparently based on the ground of untimeliness of the application to intervene. The court entered judgment against defendant, assessing civil penalties of $880 to be divided equally between interveners and plaintiffs. Both the state and plaintiffs appealed the judgment.

The court of appeal affirmed the order denying plaintiffs' motion to dismiss the complaint in intervention and reversed the order awarding civil penalties equally between interveners and plaintiffs. On the issue of timeliness of interveners' application, the court held that even though the motion was made after trial, the application was nonetheless timely. At the time, *Code Civ. Proc. § 387* required that intervention be made before trial; however, the court stated that a trial is not over until after judgment and the court rejected previous appellate decisions with dicta to the effect that the complaint in intervention must be filed before the commencement of the trial, that is, before the case is called for trial on the calendar. Nothing is gained by this strict interpretation, argued the court, since if the party is one necessary for a complete determination of the controversy, the court would be required to order the party joined under *Code Civ. Proc. § 389*. Instead, the court looked to other considerations in determining whether intervention was timely. It is a general rule, stated the court, that a right to intervene should be asserted within a reasonable time and that the intervener must not be guilty of an unreasonable delay after knowledge of the suit has come to him or her. Moreover, since the main purpose of intervention is to obviate delay and avoid multiplicity of actions, intervention should be granted unless it would retard the principal suit, require a reopening of the case for further evidence, delay the trial of the action, or change the position of the original parties. Therefore, concluded the court, intervention was timely in this case since there was ample evidence to show that interveners acted immediately on being informed of plaintiffs' demand for civil penalties, no delay in the trial would be caused by the proposed intervention since judgment was still under submission, and the proposed intervention did not result in any inconvenience or prejudice to he original parties (*53 Cal. App. 3d 661, 667-669)* .

Counsel should note that in 1977, *Code Civ. Proc. § 387* was amended to eliminate the requirement that application for leave to intervene be made before trial. Under the amended version of the statute, the application for leave to intervene under both *Code Civ. Proc. § 387(a)* (permissive intervention) and *Code Civ. Proc. § 387(b)* (mandatory intervention) must be "timely." Although no appellate court decision has considered the issue of what constitutes "timely" intervention since the statute was amended, the standard set forth in the *Sanders* case would appear to be applicable, at least when permissive intervention is sought under *Code Civ. Proc. § 387(a)*. However, in *California Physicians' Service v. Superior Court (1980) 102 Cal. App. 3d 91, 96, 162 Cal. Rptr. 266* (discussed in *§ 124.50[3][a]*), the court of appeal suggested that some of the factors mentioned in the *Sanders* case may not be relevant to a determination of

whether or not an application to intervene under *Code Civ. Proc. § 387(b)* (mandatory intervention) is timely. In *California Physicians' Service*, the court of appeal had to determine whether or not the proposed interveners, who had admitted that their intervention would expand the issues in the case, met the requisites for mandatory intervention. Since the court determined that the interveners did not have the requisite interest in the action, the court did not directly consider the issue of timeliness of the application. The court stated in dictum, however, that the fact that intervention would add to the complexity of the action, create delay, or adversely affect the original parties was of no moment when intervention is sought under *Code Civ. Proc. § 387(b)* (*102 Cal. App. 3d 91, 96)* . On the other hand, another court of appeal, in denying mandatory intervention, cited great delay and the necessity of starting new proceedings in the trial court as factors justifying the denial of mandatory intervention [*see Coalition for Fair Rent v. Abdelnour (1980) 107 Cal. App. 3d 97, 115-116, 165 Cal. Rptr. 685* (distinguishing *Bustop v. Superior Court (1977) 69 Cal. App. 3d 66, 70-73, 137 Cal. Rptr. 793*)] Thus, it is uncertain whether or not delay in the proceedings is a proper consideration when determining the timeliness of a motion for leave to intervene under *Code Civ. Proc. § 387(b)*.

[b] Timeliness of Intervention as of Right

In ***Mar v. Sakti Internat. Corp.*** *(1992) 9 Cal. App. 4th 1780, 12 Cal. Rptr. 2d 388* , plaintiff was injured by masonry falling from an earthquake-damaged building during the course and scope of his employment with Wells Fargo Bank. Wells Fargo's workers' compensation carrier paid plaintiff statutory workers' compensation benefits, and Wells Fargo made up the difference between that amount and plaintiff's full salary during convalescence. Plaintiff filed a complaint for damages against the building's owner and manager and others. In the same month, the carrier filed a complaint in intervention to recover the amount of benefits it had paid to plaintiff. Upon learning that plaintiff's action was to be settled on the eve of trial, Wells Fargo sought to intervene to recover sums it had paid to plaintiff. The trial court denied the motion to intervene (*9 Cal. App. 4th 1780, 1783)* .

The court of appeal reversed the order denying the Wells Fargo's request to intervene, holding that the request was timely. The court stated that the relevant statute granting the right to intervene in a particular situation must be consulted to determine whether it addresses the timeliness issue. If it does not, it should be deemed to refer the issue back to the discretionary standard of *Code Civ. Proc. § 387*. If the statute provides a standard of timeliness, both the right and the statute are to be treated as incorporated in *Code Civ. Proc. § 387(b)* (*9 Cal. App. 4th 1780, 1784)* . In this case *Lab. Code § 3853* grants the employer an unconditional right to intervene in this type of action "at any time before trial on the facts." After the settlement, there still remained for trial the carrier's complaint to recover the amount of benefits paid to plaintiff. Thus, the trial court had no discretion to disregard the express command of *Lab. Code § 3853* and to refuse Wells Fargo leave to intervene (*9 Cal. App. 4th 1780, 1785)* .

[c] Intervention After Judgment

Mallick v. Superior Court *(1979) 89 Cal. App. 3d 434, 152 Cal. Rptr. 503* , arose out of a petition by a class representative for a writ of mandate to compel the superior court to hear petitioner's motion to intervene in a certain action pending before it. Petitioner was the class representative in an action against the Golden Gate Bridge Highway and Transportation District. In an identical suit, Marin County was the class representative. Both class representatives obtained identical judgments, and the district appealed. Petitioner reached a settlement with the district, but conditioned his approval on the county's acceptance of the same settlement. The county refused, insisting that certain other requirements be added. Petitioner then moved the trial court to intervene in county's action, to vacate the county's judgment, and to remove the county as the class representative. The county opposed the motion on the ground that its appeal divested the court of jurisdiction. The trial court agreed and denied the motions on that ground. Petitioner then applied for a writ of mandate. An alternative writ was granted pending determination of the petition.

The court of appeal granted petitioner's application and issued a peremptory writ compelling the superior court to hear and decide petitioner's motions to intervene and substitute class representation. In granting the writ, the court held that under *Code Civ. Proc. § 387* as amended in 1977 [*see* Stats. 1977, ch. 450], intervention is possible, if otherwise

appropriate, even after judgment (*89 Cal. App. 3d 434, 437)* . Under the facts of the case, the court found that intervention after judgment may be appropriate since intervener, as a class member, may have had a protectable interest. Therefore, concluded the court, it was incumbent on the trial court to determine that issue (*89 Cal. App. 3d 434, 437-438)* .

[d] Intervention After Default Judgment

Johnson v. Hayes Cal. Builders, Inc. *(1963) 60 Cal. 2d 572, 35 Cal. Rptr. 618, 387 P.2d 394* , involved an action to recover monies loaned to defendant. Defendant subsequently defaulted, and judgment was entered against it. Seven months later, intervener moved for an order permitting it to intervene on the ground of the invalidity of the default judgment. Intervener alleged that it was a surety on defendant's release of attachment bond. The trial court entered an order permitting intervention and setting aside the default and judgment. Plaintiff appealed.

The Supreme Court, while reversing the judgment of the trial court in setting aside the default judgment, nonetheless held that intervener was a proper party to intervene and that its intervention was timely under *Code Civ. Proc. § 473(d)*, since it asserted the invalidity of the default judgment on its face. However, since intervener could not show that there was anything in the record to rebut the presumption of validity, the Court reversed the judgment (*60 Cal. 2d 572, 575-578)* .

For a form of memorandum of points and authorities in support of motions to intervene and to set aside a default and default judgment on the grounds of mistake, inadvertence, surprise, excusable neglect [*Code Civ. Proc. § 473(b)*], or that the default judgment is void on its face [*Code Civ. Proc. § 473(d)*], see Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders* .

Morton Regent Enterprises, Inc. v. Leadtec California, Inc. *(1977) 74 Cal. App. 3d 842, 141 Cal. Rptr. 706* , arose out of an action by plaintiff clothing distributor against defendant manufacturer for breach of contract and to recover certain property shipped in bulk to defendant for use in the manufacture of men's pants. Plaintiff through claim and delivery proceedings recovered the material that had been provided to defendant. Intervener insurance company provided the surety bond as then required under the claim and delivery statute. Defendant filed a cross complaint for breach of contract and fraud and asked for money for work performed and other damages. At trial, plaintiff failed to appear and the trial court entered judgment against plaintiff on its complaint and for defendant on the cross complaint. Thereafter, intervener surety moved the trial court for leave to intervene and to vacate the judgment. The trial court denied the motion, and intervener appealed from the judgment and from the order denying the motion.

The court of appeal reversed the trial court's order denying leave to intervene and refusing to vacate the judgment. The court stated that although former Code Civ. Proc. § 387 [*now see Code Civ. Proc. § 387(a)*] did not permit intervention after judgment, *Code Civ. Proc. § 473(b)* permitted intervention after judgment when, because of mistake, surprise, inadvertence, or excusable neglect, a default judgment was rendered. In addition, noted the court, an aggrieved person may also intervene after judgment for the purpose of vacating a default judgment that is void (*74 Cal. App. 3d 842, 846-847)* . Consequently, the court held that under the facts of this case it was an abuse of discretion by the trial court to deny intervener surety's motion to intervene and vacate the judgment (*74 Cal. App. 3d 842, 850)* .

[4] Additional Authorities

[a] Intervention After Default Judgment

The facts and procedures of *Linder v. Vogue Investments, Inc. (1966) 239 Cal. App. 2d 338, 48 Cal. Rptr. 633* , are discussed in *§ 124.41[3][a]*. In that case, which involved a motion by a limited partner to intervene and to set aside a default judgment entered against the limited partnership on the ground of the general partner's failure to defend, the court of appeal noted that prior decisions held that a default was the equivalent of a trial within the meaning of *Code*

Civ. Proc. § 387. Once the default judgment was entered, the court further observed, a nonparty could move to set aside the judgment under *Code Civ. Proc. § 473(b)* and *(d)* (*239 Cal. App. 2d 338*).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePartiesInterventionPermissive InterventionsCivil ProcedurePartiesInterventionRight to InterveneCivil ProcedurePartiesInterventionTimelinessCivil ProcedurePretrial JudgmentsDefaultDefault Judgments

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12-124 California Points & Authorities § 124.34

§ 124.34 Supporting Motion for Order Granting Leave to File Complaint in Intervention--Permissive Intervention [Code Civ. Proc. § 387(a)]--Scope of the Action Is Not Enlarged

[1] FORM

[*The following should be combined with a general form of memorandum in support of a motion for an order granting leave to file a complaint in intervention under permissive intervention (see § 124.30).*]

_____'S [*Name of intervener*] INTERVENTION IN THIS ACTION IS PROPER BECAUSE HE/SHE/IT OTHERWISE MEETS THE REQUIREMENTS FOR INTERVENTION AND SUCH INTERVENTION WILL NOT ENLARGE THE SCOPE OR FUNCTION OF THE ACTION.

A. Scope of the Action. Intervention by a party who otherwise meets the statutory requirements for intervention in a pending action is proper when his or her intervention will not enlarge the scope or function of the action (*see Belt Casualty Co. v. Furman (1933) 218 Cal. 359, 361-363, 23 P.2d 293*).

[*Optional*] **B. Intervener Seeking Affirmative Relief in Action for Rescission of Contract.** The scope or function of an action is not necessarily enlarged when, in seeking to oppose or sustain respective contentions of the parties in an action to rescind a contract, the intervener also seeks some form of affirmative relief that could have been obtained in a separate action (*see Belt Casualty Co. v. Furman (1933) 218 Cal. 359, 361-363, 23 P.2d 293* ; *see also Fireman's Fund Ins. Co. v. Gerlach (1976) 56 Cal. App. 3d 299, 305, 128 Cal. Rptr. 396*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for an order granting leave to file a complaint in intervention pursuant to *Code Civ. Proc. § 387(a)* (governing permissive intervention) on the grounds that the proposed intervener has met the statutory requirements for joinder and that his or her complaint in intervention seeks relief that does not enlarge the scope or function of the action. Optional Paragraph B may be used when the complaint in intervention also seeks affirmative relief in an action for rescission of a contract in which the intervener has an interest

[Paragraph B].

Points and authorities set out in this form should be combined with the general form of memorandum of points and authorities *set out in § 124.30*.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion of the relevant facts showing that the proposed intervener has met the statutory requirements for intervention and that his or her complaint in intervention seeks relief that does not enlarge the function or scope of the action.

[i] Related Uses

With appropriate modifications, these points and authorities may be used to support a motion for leave to file a cross complaint in intervention.

[b] Opposing Points and Authorities

The points and authorities *set out in § 124.50* may be used in an appropriate case to oppose a motion for leave to file a complaint in intervention supported by this memorandum.

[3] Discussion of Authorities

[a] Scope of the Action

Belt Casualty Co. v. Furman *(1933) 218 Cal. 359, 23 P.2d 293* , arose out of an action by plaintiff insurer to rescind a policy of automobile insurance issued to defendant. Plaintiff alleged that defendant failed to cooperate with and assist plaintiff in resisting claims brought by persons who were allegedly injured as a result of an automobile accident involving defendant's automobile. By leave of the trial court, these persons filed complaints in intervention based on judgments previously recovered by them against defendant. Interveners sought to avoid the attempted rescission by plaintiff and to recover the amount of their judgments from plaintiff, with interest. The trial court entered judgment against plaintiff on its complaint for rescission. The trial court also entered judgment in favor of interveners for the amounts of the judgments recovered by them in their actions against defendant.

On appeal, the Supreme Court affirmed the judgment. On the issue of intervention, the Court observed that plaintiff did not contend that the interveners did not have a sufficient interest in the action or in the success of the defendant therein to give them the right to intervene (*218 Cal. 359, 361)* . The Court then rejected plaintiff's contention that intervention was improper because it enlarged the scope of the action (*218 Cal. 359, 361-363)* .

Counsel should note that *Belt Casualty* was decided prior to the 1977 amendment to *Code Civ. Proc. § 387*. Since *Code Civ. Proc. § 387(a)* is couched in language virtually identical to that of former Code Civ. Proc. § 387, the rule that intervention should not enlarge the scope of the action is still apparently applicable to permissive intervention. One court of appeal has suggested in dictum, however, that the fact that intervention would add to the complexity of an action is of no consequence when mandatory intervention is sought under *Code Civ. Proc. § 387(b)* [*California Physicians' Service v. Superior Court (1980) 102 Cal. App. 3d 91, 96, 162 Cal. Rptr. 266*].

[b] Intervener Seeking Affirmative Relief in Action for Rescission of Contract

The factual and procedural background of ***Belt Casualty Co. v. Furman*** *(1933) 218 Cal. 359, 23 P.2d 293* , is discussed in *§ 124.34[3][a]*. In that case, plaintiff contended on appeal that interveners should not have been permitted to join in an action in equity to rescind an insurance policy because interveners' complaints set up distinct causes of action that sounded in contract and that sought affirmative relief that could be recovered in actions at law; thus, plaintiff

contended, the scope of the equitable action was enlarged contrary to the meaning and intent of former Code Civ. Proc. § 387 [*now see Code Civ. Proc. § 387(a)*] The Supreme Court rejected plaintiff's contention and held that intervention was proper. The Court noted that if plaintiff's contention was correct, the result would be the denial of the benefit of *Code Civ. Proc. § 387* to those directly interested in the subject matter of the action, but who, although they might be permitted to intervene in the action by virtue of their direct interest, would nevertheless be compelled to file separate suits to recover the affirmative relief to which they immediately would become entitled in the event that the contentions with which they are aligned in the main action are finally sustained (*218 Cal. 359, 361-362)* . The Court noted that in this case the granting of affirmative relief to the interveners was but incidental to the main purpose of *Code Civ. Proc. § 387*, which was to obviate delay and multiplicity of actions by creating an opportunity to those directly interested in the subject matter to join in an action already instituted. The Court further observed that an intervener may be accorded affirmative relief that he or she could properly seek by way of cross complaint had he or she been named one of the original parties of the action. The Court stated that it had not been referred to any theory of law or equity that would deny to the interveners the particular relief sought, nor had plaintiff shown that the issues of the complaints in intervention would not be conveniently tried in the action before it. The Court observed that the right to affirmative relief was not interfered with merely because a separate action might have been maintained (*218 Cal. 359, 362)* .

For discussion of the effect of the 1977 amendments to *Code Civ. Proc. § 387* on the rule set forth in the *Belt Casualty* case and of the applicability of the rule to mandatory intervention, see the discussion in *§ 124.34[3][a]*.

In ***Fireman's Fund Ins. Co. v. Gerlach*** *(1976) 56 Cal. App. 3d 299, 128 Cal. Rptr. 396* , intervener sold vending machines to defendant, who stored them in a building that was covered by a fire insurance policy written by plaintiff. Thereafter, before the machines had been paid for, a fire broke out that destroyed some of the machines and damaged others. Defendant filed a claim for the loss with plaintiff. Plaintiff, alleging that defendant had himself started the fire, brought an action for a judicial declaration that it was not liable for any portion of the loss. Intervener brought a separate action against defendant and recovered a judgment for the unpaid purchase price of the machines. Defendant, however, was judgment proof and there was no reasonable possibility that the judgment would be satisfied, unless defendant was entitled to recover under its policy with plaintiff. Intervener therefore sought to intervene in the action between plaintiff and defendant, seeking a declaration that plaintiff was liable on the policy. The trial court denied leave to intervene, and intervener appealed.

The court of appeal reversed. In holding that the trial court's refusal to permit intervention was an abuse of discretion, the court of appeal noted, inter alia, that the issues of the action would not be enlarged by the proposed intervention (*56 Cal. App. 3d 299, 305)* .

[4] Additional Authorities

[a] Scope of the Action

In *People ex rel. Rominger v. County of Trinity (1983) 147 Cal. App. 3d 655, 195 Cal. Rptr. 186* , the court of appeal held that the Sierra Club had a direct interest in the suit in which it intervened and that the trial court's order prohibiting intervention should be reversed. The suit was brought for declaratory and injunctive relief by the state of California against Trinity County alleging that the county's ordinances controlling the use of certain pesticides were preempted by state law. The court held that allowing intervention would not impermissibly broaden the scope of the litigation. The court stated that the Sierra Club's assertions regarding the adverse effects of pesticides were made for the purpose of establishing its interest in the litigation, not for the purpose of introducing new issues into the litigation. The complaint in intervention raised no new legal or factual issues to be decided by the trial court, and left the validity of the county pesticide ordinances in the face of state pesticide regulations as the only issue (*147 Cal. App. 3d 655, 664-665)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeSupporting MemorandaCivil ProceduresPartiesInterventionGeneral OverviewCivil ProceduresPartiesInterventionPermissive Interventions

California Points & Authorities

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CHAPTER 124 INTERVENTION
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12-124 California Points & Authorities § 124.35

§ 124.35 Supporting Motion for Order Granting Leave to File Complaint in Intervention--Permissive Intervention [Code Civ. Proc. § 387(a)]--Intervener Has Direct Interest in Matter in Litigation

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities in support of a motion for an order granting leave to file complaint in intervention under permissive intervention (see § 124.30).*]

_____ [*Name of intervener*] SHOULD BE PERMITTED TO INTERVENE IN THIS ACTION BECAUSE HE/SHE/IT HAS AN INTEREST IN THE MATTER IN LITIGATION THAT IS DIRECT AND OF SUCH AN IMMEDIATE CHARACTER THAT HE/SHE/IT WILL EITHER GAIN OR LOSE BY THE DIRECT LEGAL OPERATION AND EFFECT OF THE JUDGMENT IN THIS ACTION.

A. Intervener Has Direct Interest in Matter in Litigation. In order to intervene pursuant to *Section 387(a) of the Code of Civil Procedure*, the proposed intervener must have an interest in the matter in litigation that is direct and not consequential; the intervener's interest must be of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment (*Timberidge Enterprises, Inc. v. City of Santa Rosa (1978) 86 Cal. App. 3d 873, 881, 150 Cal. Rptr. 606*).

[*Optional*] **B. Consequential Interest Becoming Direct Interest.** What would otherwise be a consequential interest not justifying intervention may become a direct interest permitting intervention when, because of bad faith of a party to the litigation, the assertion of all parties to the litigation of claims adverse to the party seeking to intervene, collusion, impossibility of asserting a position that should be presented in the litigation, or similar circumstances, strict definition of direct interest is likely to result in injustice (*Fireman's Fund Ins. Co. v. Gerlach (1976) 56 Cal. App. 3d 299, 304, 128 Cal. Rptr. 396*).

[*Add further points and authorities, as appropriate, relating to specific types of interest that satisfy the direct interest requirement of Code Civ. Proc. § 387(a)* (*see §§ 124.36 -124.44*)].

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for an order granting leave to file a complaint in intervention under *Code Civ. Proc. § 387(a)* (governing permissive intervention) on the ground that the proposed intervener has a direct interest in the matter in litigation and will either gain or lose by the direct legal operation and effect of the judgment. By including optional Paragraph B, the points and authorities may be used when an otherwise inconsequential interest becomes a direct interest because of the bad faith of a party to the litigation, collusion, impossibility of asserting a position that should be presented in the litigation, or other similar circumstances.

This form does not provide a complete memorandum, but is designed to be combined with the general form of memorandum of points and authorities *set out in § 124.30*, and with points and authorities relating to a specific type of interest that satisfies the direct interest requirement for intervention under *Code Civ. Proc. § 387(a)* [*see, e.g., §§ 124.36 -124.44*].

Counsel may also wish to combine this form with the general form of memorandum of points and authorities *set out in § 124.32*, supporting mandatory intervention under *Code Civ. Proc. § 387(b)* on the ground that the intervener has an interest in the property or transaction that is the subject of the action and is so situated that the disposition of the action may impair or impede that interest as a practical matter. For a discussion of the possible applicability of the direct interest requirement to mandatory intervention under *Code Civ. Proc. § 387(b)*, see the discussion in *124.03[2][a] -124.03[3][a]*.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion of the relevant facts concerning the nature of the proposed intervener's interest in the matter in litigation and how this interest is sufficiently direct and immediate to justify intervention.

[i] Related Uses

With appropriate modifications, these points and authorities may be used to support a motion for leave to file a cross complaint in intervention.

[b] Opposing Points and Authorities

The points and authorities *set out in § 124.49* may be used in an appropriate case to oppose a motion for leave to file a complaint in intervention supported by this memorandum.

[3] Discussion of Authorities

[a] Intervener Has Direct Interest in Matter in Litigation

Timberidge Enterprises, Inc. v. City of Santa Rosa *(1978) 86 Cal. App. 3d 873, 150 Cal. Rptr. 606* , involved an action by plaintiff land developers to have a school impact fee declared unconstitutional and for recovery of fees already paid under a resolution of defendant city. The resolution was adopted to alleviate temporary overcrowding in the city's schools caused by new subdivisions. On applying for a building permit for the subdivision lots, the applicant was required to pay the school impact fee. The local school district could apparently apply to the city for the impact fee funds to meet expenses caused by the increased school enrollment resulting from added population. The school district and the local agency formation commission were permitted to file complaints in intervention seeking, among other things, dismissal of the action. Plaintiffs demurred to the complaint in intervention, alleging among other things that interveners had no standing in the action since they did not have a direct interest in the matter in litigation. The trial court sustained, without leave to amend, plaintiffs' demurrers and granted its motion to strike the complaint in intervention. Interveners appealed.

The court of appeal reversed the order striking the school district's complaint in intervention, but affirmed the order regarding the local agency formation commission. In finding that the school district was a proper intervener, the court of appeal rejected plaintiffs' argument that since defendant city could reject intervener's application for needed impounded funds, intervener's interest was not direct and that the district would not necessarily gain or lose, depending on the action's outcome. To the contrary, the court held that the district was directly affected and was the ultimate pecuniary beneficiary of the impact fee policy. Defendant city, on the other hand, was only the collector and temporary custodian of the funds. The school district, however, urgently needed the fees in order to avoid a state penalty to the district and to insure that children in the district were provided adequate facilities for their educational needs (*86 Cal. App. 3d 873, 881)* . The intervening school district, said the court, had a statutory duty to provide a proper education for its schools' students and as a public agency, it had a direct interest in meeting its official responsibilities (*86 Cal. App. 3d 873, 882)* .

Counsel should note that the foregoing case was decided under *Code Civ. Proc. § 387* prior to the 1977 amendment of that section. For a discussion of the possible effect of the 1977 amendment on the applicability of cases decided under *Code Civ. Proc. § 387* prior to the 1977 amendment, see *§ 124.03*.

[b] Consequential Interest Becoming Direct Interest

Fireman's Fund Ins. Co. v. Gerlach *(1976) 56 Cal. App. 3d 299, 128 Cal. Rptr. 396* , involved an action for a declaration of nonliability on a fire policy issued to insured defendant. Plaintiff contended that defendant had himself started the fire that broke out in a building which, with its contents, was covered by fire insurance on a policy written by plaintiff. Although served with summons and complaint, defendant did not appear and default was taken. In another action, intervener had obtained judgment against the same defendant and the corporation under which he did business for the unpaid purchase price of vending machines sold to defendant. These machines were stored in the building that had caught fire, and the machines were either destroyed or damaged by the fire. Intervener then petitioned the trial court in the declaratory relief action for leave to intervene since the defendant and the corporation were judgment proof and intervener could not satisfy its judgment unless it was determined that defendant was entitled to recover on plaintiff's policy. By its petition, intervener sought to force plaintiff to prove that defendant was responsible for the fire, and on failure of such proof be able to satisfy its judgment against the policy's benefits. The trial court, however, concluded that intervener had only a consequential interest rather than a direct interest and denied the motion to intervene. Intervener appealed.

In reversing the order denying permission to intervene, the court of appeal rejected plaintiff's claim that intervener had only a consequential interest. The court cited various reasons to support its finding that as a judgment creditor, intervener had a direct interest (*56 Cal. App. 3d 299, 304-305)* . Among the reasons given by the court was defendant's refusal to defend against plaintiff's action, which must reasonably be deemed bad faith in relation to the intervener. Therefore, the court stated, what would otherwise be a consequential interest not justifying intervention may become a direct interest permitting intervention when bad faith of a party to the litigation, the assertion of all parties to the litigation of claims adverse to the party seeking to intervene, collusion, impossibility of asserting a position that should be presented in the litigation, or similar circumstances, render strict definition of direct interest unjust [citing *Continental Vinyl Products Corp. v. Mead Corp. (1972) 27 Cal. App. 3d 543, 551-552, 103 Cal. Rptr. 806* , discussed in *§ 124.49[3][a]*].

For a discussion of other points of law involved in this case, see *§ 124.34[3][b]*.

Counsel should note that although the *Fireman's Fund* case was decided under *Code Civ. Proc. § 387* prior to the 1977 amendments, the provisions of former Code Civ. Proc. § 387 are virtually identical to those of *Code Civ. Proc. § 387(a)* and thus the holding in this case is probably still applicable to permissive intervention under the amended statute. Moreover, the facts of *Fireman's Fund* would probably also support mandatory intervention under *Code Civ. Proc. § 387(b)*. Since the proceeds of the insurance policy represented the intervener's only possible means of satisfying its

judgment against defendant, the intervener had an interest in the subject of the action by plaintiff insurer to rescind that policy, and any disposition of that action in the absence of the intervener might as a practical matter impair its ability to protect its interest. Furthermore, as emphasized by the court, the intervener's interests were not being adequately represented by the existing parties, since defendant had failed to appear and defend the action to rescind the policy.

For a further discussion of the possible effect of the 1977 amendment to *Code Civ. Proc. § 387* on the applicability of cases decided under that section prior to the 1977 amendment, see *§ 124.03*.

[4] Additional Authorities

[a] Intervener Has Direct Interest in Matter in Litigation

In *People v. Superior Court (Good) (1976) 17 Cal. 3d 732, 131 Cal. Rptr. 800, 552 P.2d 760* , the Supreme Court denied a writ of mandate sought by the People to compel the trial court to strike a complaint in intervention. In the underlying action, the People had brought a civil action against defendants, alleging false advertising and unfair competition arising out of an oil exploration venture in which defendants were involved. The People's complaint prayed for injunctive relief, civil penalties, restitution for each investor injured by defendants' misconduct, and costs. Thereafter, real party in interest was granted ex parte leave to file his complaint in intervention on behalf of himself and a class of defrauded investors. The Supreme Court held that the trial court did not abuse its discretion in permitting such intervention (*17 Cal. 3d 732, 737)* . The Court stated that an intervener's interest in the action must be direct rather than consequential, but determined that the test was met in this case. The Court noted that both complaints sought restitution to the investors based on the same underlying facts (*17 Cal. 3d 732, 736)* . Furthermore, the investors had a direct interest in the outcome of the litigation since there was a risk that their contributions to the venture organized by defendants would be used primarily to pay statutory penalties, with the result that the People's action, ostensibly brought to protect consumers, would deprive these very persons of the fruit of their venture (*17 Cal. 3d 732, 737)* .

In *Gray v. Begley (2010) 182 Cal. App. 4th 1509, 106 Cal. Rptr. 3d 729* , plaintiff was injured when a vehicle in which he was a passenger was hit by defendant. Plaintiff sued defendant and defendant's employer to recover compensation for the injuries plaintiff suffered in the accident. Appellant insurer (CNA) provided defendant driver (Begley) a defense subject to a reservation of rights, and the insured subsequently reached a private settlement with a third party claimant without the participation of the insurer. The trial court granted the insurer's motion to intervene in the proceeding. On appeal, respondents asserted the insurer did not have a sufficiently direct and immediate interest in this action to justify its intervention. Respondents' argument was based on the fact that CNA defended Begley under a reservation of rights; that is, CNA reserved the right to contest coverage for Begley. Respondents therefore argued that CNA's interest in the action was not direct and immediate, but is instead contingent on a subsequent determination that CNA's policy afforded coverage for Begley. In rejecting that argument, the court of appeal explained that the key factor in determining whether an insurer is bound by a settlement reached without the insurer's participation is whether the insurer provided the insured with a defense, not whether the insurer denied coverage. It therefore follows that an insurer providing a defense, even though subject to a reservation of rights, may intervene in the action when the insured attempts to settle the case to the potential detriment of the insurer. In contrast to the insurer that refuses to defend, an insurer providing a defense under a reservation of rights has not lost its right to control the litigation, and therefore retains a direct interest in the case.

In *Redevelopment Agency v. Commission on State Mandates (1996) 43 Cal. App. 4th 1188, 51 Cal. Rptr. 2d 100* , a city redevelopment agency sought to overturn a decision of the Commission on State Mandates that the agency was not entitled to reimbursement from state funds for certain housing costs. At the administrative level, The State Department of Finance (DOF) appeared and opposed the agency's request. After an unfavorable decision from the Commission, the agency filed a petition for writ of administrative mandamus naming the Commission as respondent, but naming no real parties in interest. The DOF sought but was denied leave to intervene in the mandamus action. On appeal from this decision, the court of appeal concluded that the trial court erred in denying leave to intervene. After first finding that the

DOF was an indispensable party that should have been named as a real party in interest (*43 Cal. App. 4th 1188, 1197)* , the court went on to hold that the application for intervention also met the standards of *Code Civ. Proc. § 387(a)* and *(b)*. The court found that the DOF had an interest against the success of the city agency, that its ability to protect its interests could be impaired by disposition of the matter in its absence, and that, given the nature of the Commission, it could not be said to adequately represent all of the DOF's interests even though it agreed with DOF on the merits. Thus, the court concluded that the trial had abused its discretion in denying discretionary intervention under Section 387(a) (*43 Cal. App. 4th 1188, 1197-1198)* .

In *People ex rel. Rominger v. County of Trinity (1983) 147 Cal. App. 3d 655, 195 Cal. Rptr. 186* (discussed in *§ 124.34[4][1]*), the court of appeal held that the Sierra Club had a direct interest in the suit in which it intervened by the state against Trinity County alleging that the county's ordinances controlling the use of certain pesticides were preempted by state law. The court of appeal held that when a law exists specifically to protect the public from a hazard to its health and welfare that would allegedly occur without that law, members of the public have a substantial interest in the protection and benefit provided by that law. The court stated that if a party brings an action to invalidate that law, the action has an immediate and direct effect on the public's interest in protecting its health and welfare. The court concluded, on that basis, that the Sierra Club, as representative of its members who reside in and use the resources of the county, had a direct and immediate, rather than consequential and remote, interest in the litigation (*147 Cal. App. 3d 655, 662-663)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePartiesInterventionGeneral OverviewCivil ProcedurePartiesInterventionPermissive Interventions

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12-124 California Points & Authorities § 124.36

§ 124.36 Supporting Motion for Order Granting Leave to File Complaint in Intervention--Permissive Intervention [Code Civ. Proc. § 387(a)]--Intervener Has Direct Interest in Matter in Litigation--Adjoining Property Owner May Intervene in Action to Enjoin Common Trespass

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities in support of a motion for an order granting leave to file a complaint in intervention under permissive intervention (see § 124.30) and with a form of memorandum of points and authorities in support of the contention that the intervener has a direct interest in the matter in litigation (see § 124.35).*]

_____ [*Name of intervener*] SHOULD BE GRANTED LEAVE TO INTERVENE IN THIS ACTION BECAUSE AS AN ADJACENT LANDOWNER HE/SHE IS A PARTY IN INTEREST TO THIS SUIT BROUGHT BY PLAINTIFF SEEKING TO ENJOIN A COMMON TRESPASSER FROM FURTHER TRESPASS AND INJURY TO HIS/HER/ITS PROPERTY IN THAT _____ [*name of intervener*], HAS BEEN INJURED BY THE SAME TRESPASS AND IN THE SAME MANNER AS PLAINTIFF.

Actions to Enjoin Trespass to Property. Neighboring property owners whose property is subject to a trespass in common with plaintiff are proper parties to file complaints in intervention in an action to enjoin future trespass and to recover damages for injury to property (*see A.E. Bell Corp. v. Bell View Oil Synd. (1938) 24 Cal. App. 2d 587, 593-594, 76 P.2d 167*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for an order granting leave to file a complaint in intervention pursuant to *Code Civ. Proc. § 387(a)* (governing permissive intervention), when intervener claims that he or she has a direct interest in the matter in litigation in that he or she owns property adjoining plaintiff's property and therefore may properly intervene in an action to enjoin a trespass common to both properties. This form should be combined with the general form of memorandum of points and authorities *set out in § 124.30* and with the points and

authorities *set out in § 124.35*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion of facts showing that he or she owns property that is adjacent to plaintiff's property and that both properties are subject to a common trespass by defendant.

[i] Related Uses

With appropriate modifications, these points and authorities may be used to support a motion for leave to file a cross complaint in intervention.

[b] Opposing Points and Authorities

The points and authorities *set out in § 124.49* may be used in an appropriate case to oppose a motion for leave to file a complaint in intervention supported by this memorandum.

[3] Discussion of Authorities

[a] Actions to Enjoin Trespass to Property

A.E. Bell Corp. v. Bell View Oil Synd. *(1938) 24 Cal. App. 2d 587, 76 P.2d 167* , involved an action by plaintiff landowner to enjoin a subsurface trespass and to recover the value of oil removed from his property by two "slant drilled" oil wells on defendants' property. Adjoining landowners under whose property the oil wells trespassed filed complaints in intervention, as did the lessee of plaintiff's land. The trial court sustained demurrers to plaintiff's complaint and to the complaints in intervention without leave to amend and entered a judgment of dismissal.

The court of appeal reversed the order of dismissal and remanded the case to the superior court with directions to overrule the demurrers interposed by defendants and to grant leave to plaintiff and interveners to file additional pleadings, if desired. On the issue of intervention, the court held that the adjoining property owner and the lessee of plaintiff's property had clearly and convincingly established a basis to intervene (*24 Cal. App. 2d 587, 593)* . Under *Code Civ. Proc. § 387* [repealed; *now see Code Civ. Proc. § 387(a)*], the intervening parties were proper parties to appear in the action and join either plaintiff or defendants as they should elect (*24 Cal. App. 2d 587, 594)* .

Counsel should note that adjoining landowners are proper interveners in an action involving injuries to several pieces of property only when the injury involves the same trespass or transaction committed at the same time and in the same manner. This situation should be distinguished from actions involving injuries to several pieces of land from similar trespasses or transactions in which intervention has been held improper [see, *e.g.,* *Coleman v. Twin Coast Newspaper, Inc. (1959) 175 Cal. App. 2d 650, 654, 346 P.2d 488* (three separate and distinct plaintiffs involved in action for trespass to three separate and distinct premises); *Foreman v. Boyle (1891) 88 Cal. 290, 293, 26 P 94* (two separate owners of property with different water rights in action for damages for wrongful diversion of upland water)].

Counsel should also note that although the *A.E. Bell* case was decided under *Code Civ. Proc. § 387* prior to the 1977 amendment of that section, the current provisions of *Code Civ. Proc. § 387* are virtually identical to those of former Code Civ. Proc. § 387 and thus the holding in this case is probably still applicable to permissive intervention under the amended statute. It is doubtful, however, whether the facts of this case would support mandatory intervention under *Code Civ. Proc. § 387(b)*. Although the adjacent landowners may be said to have an interest in the property or transaction that is the subject of the action, any adverse decision in that proceeding would not bind them and hence would not preclude them from pursuing their own independent action against defendants, and there appears to be no other practical impairment of interveners' ability to protect its own interests. Moreover, the facts of that case do not suggest that plaintiff would not adequately represent interveners' interests.

For a further discussion of the possible effect of the 1977 amendment to *Code Civ. Proc. § 387* on the applicability of cases decided under that section prior to the 1977 amendment, see *§ 124.03*.

[4] Additional Authorities

In *Malibu v. California Coastal Comm'n (2005) 128 Cal. App. 4th 897, 906, 27 Cal. Rptr. 3d 501* , a landowner's residence was situated on four contiguous beachfront lots, one of which was immediately to the west of the neighbors' house. The owner signed an offer to dedicate (OTD) easements that would have given the public vertical and lateral access to the shoreline. However, he subsequently claimed the OTDs were invalid. The neighbors asserted that they had satisfied the requirements of *Code Civ. Proc. § 387(b)* for mandatory intervention and alternatively that they should be granted permissive intervention under § 387(a). The instant court, mindful that § 387 was to be liberally construed to permit intervention, held that the trial court did not abuse its discretion in denying intervention. The neighbors and the executive had identical interests in preventing members of the public from accessing areas adjacent to their properties. The neighbors could only speculate that the public would trespass and litter on the portion of the beach that the neighbors owned, thereby affecting their quiet enjoyment of their property. The owner had been an able advocate of his and the neighbors' position in attempting to prevent public use of the easements.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeSupporting MemorandaCivil ProceduresPartiesInterventionGeneral OverviewCivil ProceduresPartiesInterventionPermissive InterventionsReal Property LawAdjoining LandownersGeneral Overview

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12-124 California Points & Authorities § 124.37

§ 124.37 Supporting Motion for Order Granting Leave to File Complaint in Intervention--Permissive Intervention [Code Civ. Proc. § 387(a)]--Intervener Has Direct Interest in Matter in Litigation--Assignee of Party's Interest in Subject Matter of Action

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities in support of a motion for an order granting leave to file a complaint in intervention under permissive intervention (see § 124.30) and with a form of memorandum of points and authorities in support of the contention that the intervener has a direct interest in the matter in litigation (see § 124.35).*]

THE COURT SHOULD GRANT _____ [*name of intervener*], LEAVE TO FILE A COMPLAINT IN INTERVENTION BECAUSE AS A[N] [PARTIAL] ASSIGNEE OF _____ [PLAINTIFF *or* DEFENDANT], HE/SHE/IT HAS AN INTEREST IN THE SUBJECT MATTER IN LITIGATION SUFFICIENT TO ALLOW HIM/HER/IT TO INTERVENE IN THE ACTION BEFORE THE COURT TO PROTECT THAT INTEREST.

A. Assignee of Party in Action. An assignee of a party's interest in the subject matter of the litigation may intervene in an action between the assignor and another party to protect that interest (see *Dabney v. Philleo (1951) 38 Cal. 2d 60, 68, 237 P.2d 648*).

[*Optional*] **B. Assignee of Rights Under Contract.** An assignee of rights under a contract may intervene in an action between the assignor and another party affecting those contract rights (see *Marc Bellaire, Inc. v. Fleischman (1960) 185 Cal. App. 2d 591, 595, 8 Cal. Rptr. 650*).

[*Optional*] **C. Assignee of Special Use Permit.** An assignee of a special use permit under a zoning ordinance is a real party in interest and may intervene in an action for declaratory relief seeking to overturn an administrative decision to grant the permit to the assignor (*Cohn v. County Board of Supervisors (1955) 135 Cal. App. 2d 180, 184, 286 P.2d 836*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for an order granting leave to file a complaint in intervention pursuant to *Code Civ. Proc. § 387(a)* (governing permissive intervention), on the ground that the intervener has a direct interest in the matter in litigation in that he or she is an assignee or partial assignee of a party's interest in the subject matter in litigation, and thus may properly intervene in the action. This form should be combined with the general form of memorandum of points and authorities *set out in § 124.30* and with the points and authorities *set out in § 124.35*.

Counsel may also wish to combine this form with the general form of memorandum of points and authorities *set out in § 124.32*, supporting mandatory intervention under *Code Civ. Proc. § 387(b)* on the ground that the intervener has an interest in the property or transaction that is the subject of the action and is so situated that the disposition of the action may impair or impede that interest as a practical matter. For a discussion of the possible applicability of cases decided under *Code Civ. Proc. § 387* prior to the 1977 amendment as authority for mandatory intervention under *Code Civ. Proc. § 387(b)*, see *§§ 124.03[2][a] -124.03[3][a]*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion of interest assigned by an existing party to the action and show how the pending action will affect the interest assigned to the proposed intervener.

[i] Related Uses

With appropriate modifications, these points and authorities may be used to support a motion for leave to file a cross complaint in intervention.

[b] Opposing Points and Authorities

The points and authorities *set out in § 124.49* may be used in an appropriate case to oppose a motion for leave to file a complaint in intervention supported by this memorandum.

[3] Discussion of Authorities

[a] Assignee of Party in Action

Dabney v. Philleo *(1951) 38 Cal. 2d 60, 237 P.2d 648* , involved a combined set of actions by plaintiffs Clifford Dabney and his wife. The main action was against the executor of the estate of Louise Dabney for declaratory and other relief, including claims adverse to the estate on ground of fraud perpetrated against Clifford by his uncle, Joseph Dabney, the predeceased husband of Louise. The other three actions were against persons to whom Clifford assigned fractional shares of all of his interest in all property that he would be entitled to from the estate of Louise. In these three actions, plaintiffs sought, among other things, a declaration that the interests assigned be limited to those of Clifford as heir of Louise and that the interests assigned not include any claims made by Clifford adverse to the estate as a result of the alleged fraud perpetrated against Clifford by his uncle, Joseph. At the time that these assignments were made, plaintiffs had not discovered the alleged fraud that purportedly deprived them of one-half ownership of certain lands procured by Clifford for Joseph for the development of oil production. The trial court permitted assignees, who claimed their assignment included their proportional interest to any claims adverse to the estate, to intervene in the main action, and plaintiffs cross complained against them. The trial court sustained, without leave to amend, demurrers to the various complaints, ordered dismissal of three of the actions, and rendered judgment against plaintiffs in the remaining action. Plaintiffs appealed, contesting, among other things, the trial court's granting assignees leave to intervene in the main action.

The Supreme Court reversed the judgment of the trial court and remanded the case to the lower court with instructions

that plaintiffs be permitted to amend their complaints to overcome the objections raised by the demurrers. In doing so, the Court also upheld the trial court's decision allowing the assignees to intervene in the main action, holding that the assignees had a direct, not a consequential, interest in the matter in litigation since the controversy in the main action pertained to the ownership of certain property, that is, one-half ownership of certain lands procured by Clifford for his Uncle. Since the assignees asserted an interest in the property, they were properly allowed to intervene under *Code Civ. Proc. § 387* (*38 Cal. 2d 60, 68)* .

Counsel should note that although the *Dabney* case was decided under *Code Civ. Proc. § 387* prior to the 1977 amendment of that section, the current provisions of *Code Civ. Proc. § 387(a)* are virtually identical to those of former Code Civ. Proc. § 387 and thus the holding in this case is probably still applicable to permissive intervention under the amended statute. Furthermore, the facts of the *Dabney* case would probably also support mandatory intervention under *Code Civ. Proc. § 387(b)*. Plaintiffs' assignment of their interest in the estate clearly gave the interveners an interest in the subject matter of the action, and a disposition of the action in plaintiffs' favor would probably impair interveners' ability to protect that interest since it would result in a diminution of the estate. Moreover, under these facts, neither defendant nor plaintiff would be expected to adequately represent interveners' interest in the estate.

For a further discussion of the possible effect of the 1977 amendment to *Code Civ. Proc. § 387* on the applicability of cases decided under that section prior to the 1977 amendment, see *§ 124.03*.

[b] Assignee of Rights Under Contract

In ***Marc Bellaire, Inc. v. Fleischman*** *(1960) 185 Cal. App. 2d 591, 8 Cal. Rptr. 650* , plaintiff corporation brought an action for declaration of its rights under an employment contract with defendant. A state labor agency obtained an ex parte order permitting the agency to file a cross complaint in intervention. The agency, a judgment creditor of defendant, had obtained an assignment from defendant of wages owed to defendant under the employment contract with plaintiff. The agency sought intervention to recover the amount of the wages due to defendant. Plaintiff's demurrers to the agency's pleadings were overruled, and the trial court subsequently entered judgment in favor of the agency. Plaintiff appealed, attacking, among other things, the agency's right to intervene.

The court of appeal affirmed. The court rejected plaintiff's contention that intervention was improper, holding that as an assignee of defendant's claim for wages, the state agency had an interest in the contract of employment and in the success of defendant as against the attempt by plaintiff to obtain a declaration that the agreement had effectively been modified. Citing *Dabney v. Philleo (1951) 38 Cal. 2d 60, 68, 237 P.2d 648* (§ 124.37[3][a]), the court concluded that the nature of the agency's interest required intervention (*185 Cal. App. 2d 591, 595)* .

Counsel should note that although the *Fleischman* case was decided under *Code Civ. Proc. § 387* prior to the 1977 amendment of that section, the current provisions of *Code Civ. Proc. § 387(a)* are virtually identical to those of former Code Civ. Proc. § 387 and thus the holding in this case is probably still applicable to permissive intervention under the amended statute. Furthermore, the facts of *Fleischman* would probably support mandatory intervention under *Code Civ. Proc. § 387(b)*, since the assignment clearly gave the intervening agency an interest in the contract rights that were the subject of the litigation and that would be adversely affected by a disposition in the plaintiff's favor. Moreover, the agency's interests would probably not be adequately represented by defendant, since defendant assigned to the agency his rights to all wages due under the employment contract and thus had no further interest in the contract.

For a further discussion of the possible effect of the 1977 amendment to *Code Civ. Proc. § 387* on the applicability of cases decided under that section prior to the 1977 amendment, see *§ 124.03*.

[c] Assignee of Special Use Permit

Cohn v. County Board of Supervisors *(1955) 135 Cal. App. 2d 180, 286 P.2d 836* , involved an action against a

county board of supervisors by a resident of the county for declaratory relief and writ of review to determine the validity of the board's decision to reverse the decision of the regional planning commission denying a special use permit to an industrial developer for the operation of an asphalt plant on certain premises. An alternative writ was issued and the matter was heard and considered in certiorari. After the complaint was filed, the holders of the permit assigned their rights to the permit to the property owner, who subsequently intervened in the action. The trial court entered judgment in favor of defendant and intervener. Plaintiff appealed, contending among other things, that the court erred in permitting the assignee to intervene because she had no justiciable rights in the controversy.

In affirming the judgment of the trial court, the court of appeal held that the assignee was the real party in interest and had a right to intervene. Furthermore, the court said, special use permits under zoning ordinances run with the land and are not personal. The original holders of the permit had the right to assign their interest in the premises, that is, the permit, and as owner of the premises and assignee of the special use permit, intervener was properly allowed to assert her rights and to have those rights determined in the present action (*135 Cal. App. 2d 180, 184)* .

Counsel should note that although the *Cohn* case was decided under *Code Civ. Proc. § 387* prior to the 1977 amendment of that section, the current provisions of *Code Civ. Proc. § 387(a)* are virtually identical to those of former Code Civ. Proc. § 387 and thus the holding in this case is probably still applicable to permissive intervention under the amended statute. Furthermore, the facts of *Cohn* would probably support mandatory intervention under *Code Civ. Proc. § 387(b)*, since the assignment clearly gave the intervening party an interest in the permit rights that were the subject of the litigation and that would be adversely affected by a disposition in the plaintiff's favor. Moreover, the assignee's interests would probably not be adequately represented by defendant, since defendant was merely the issuing agency and thus probably did not have as direct an interest as the assignee in establishing the validity of the permit.

For a further discussion of the possible effect of the 1977 amendment to *Code Civ. Proc. § 387* on the applicability of cases decided under that section prior to the 1977 amendment, see *§ 124.03*.

[4] Additional Authorities

[a] Assignee of Party in Action

In *Loughborough v. McNevin (1887) 74 Cal. 250* , plaintiff brought an action against defendant McNevin and others for recovery of money loaned to defendant after he had refused tender by defendant Drexler, assignee of McNevin, of the amount owed plus interest and refused to return the stock held by plaintiff as security for the loan. An assignee of defendant Drexler intervened, claiming assignment to him by Drexler of the stock held by plaintiff as security, and also of all claims for damages by Drexler for conversion of the stock in question. Judgment was rendered in favor of the intervening assignee, and plaintiff appealed the judgment and denial of his motion for new trial. In affirming the orders of the trial court, the Superme Court held that assignee's complaint in intervention was regular and within the statute permitting intervention and that it had set out the right to redeem the property in question *(74 Cal. 250, 257)* .

Palpar, Inc. v. Thayer (1947) 82 Cal. App. 2d 578, 186 P.2d 748 , involved an action by plaintiff transferee of a tractor against defendants for a partition by sale, accounting, and general relief relating to the ownership of the tractor formerly held by plaintiff's transferor and defendant Thayer. Included as a defendant was a bank that claimed an interest in the property derived from a note and chattel mortgage alleged to have been given by Thayer as security for a loan. Intervener filed a complaint in intervention claiming that defendant Thayer had given intervener a bill of sale of the property and that intervener had paid the note in full and received defendant bank's assignment of the note and chattel mortgage. The court of appeal, although reversing the judgment in favor of defendants, rejected plaintiff's contention that intervention should not have been permitted. The court held that intervener had not only a right, but also a duty to intervene, citing the rule that a claim or lien upon the property that was the subject of the litigation gives a right to intervene (*82 Cal. App. 2d 578, 584)* .

In *Crofton v. Young (1941) 48 Cal. App. 2d 452, 119 P.2d 1003* , plaintiff sued to quiet title to certain property conveyed to him by his father, a judgment debtor of defendant bank. The bank assigned its previous judgment to intervener who obtained an ex parte order making him a party defendant. Subsequently, the trustee in bankruptcy of plaintiff's father's estate moved to be substituted as party defendant in place of intervener who had filed a claim in the bankruptcy proceeding against the estate. Plaintiff's motions to strike the order joining the intervener and his answer and cross complaint were granted by the trial court. On appeal by the trustee in bankruptcy, the court of appeal reversed the orders of the trial court, holding that the assignee was the real party in interest and that the court had the power to make him a defendant under *Code Civ. Proc. § 387* or under *Code Civ. Proc. § 389*, relating to compulsory joinder of a party (*48 Cal. App. 2d 452, 456)* .

Counsel should note that although all of the above cases were decided under *Code Civ. Proc. § 387* prior to the 1977 amendment of that section, the current provisions of *Code Civ. Proc. § 387(a)* are virtually identical to those of former Code Civ. Proc. § 387 and thus the holding in these cases is probably still applicable to permissive intervention under the amended statute.

For a further discussion of the possible effect of the 1977 amendment to *Code Civ. Proc. § 387* on the applicability of cases decided under that section prior to the 1977 amendment, see *§ 124.03*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionMotions to InterveneCivil ProcedurePartiesInterventionPermissive Interventions

California Points & Authorities

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 124 INTERVENTION
PART II. FORMS

12-124 California Points & Authorities § 124.38

§ 124.38 Supporting Motion for Order Granting Leave to File Complaint in Intervention--Permissive Intervention [Code Civ. Proc. § 387(a)]--Intervener Has Direct Interest in Matter in Litigation--Judgment Creditor May Intervene in Action Involving Property Subject to Judgment Lien

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities in support of a motion for an order granting leave to file a complaint in intervention under permissive intervention (see § 124.30) and with a form of memorandum of points and authorities in support of the contention that the intervener has a direct interest in the matter in litigation (see § 124.35).*]

THE COURT SHOULD GRANT _____ [*name of intervener*] LEAVE TO FILE A COMPLAINT IN INTERVENTION BECAUSE HE/SHE/IT HAS OBTAINED A JUDGMENT LIEN ON THE PROPERTY OF _____ [PLAINTIFF *or* DEFENDANT] THAT IS THE SUBJECT OF THE ACTION AND THEREFORE _____ [*name of intervener*] HAS A SUFFICIENT INTEREST IN THE ACTION BEFORE THE COURT TO PERMIT HIM/HER/IT TO INTERVENE.

Judgment Creditor May Intervene in Action Involving Property Subject to Judgment Lien. A judgment creditor who has a lien on property that is the subject of the action before the court has an interest sufficient to permit him or her to intervene in that action (see *Horn v. Volcano Water Co. (1859) 13 Cal. 62, 69-70)* .

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for an order granting leave to file a complaint in intervention pursuant to *Code Civ. Proc. § 387(a)* (governing permissive intervention) on the ground that the intervener had a direct interest in the matter in litigation in that he or she holds a judgment lien on the property that is the subject of the action in which intervention is sought. This form should be combined with the general form of memorandum of points and authorities *set out in § 124.30* and with the points and authorities *set out in § 124.35*.

Counsel may also wish to combine this form with the general form of memorandum of points and authorities *set out in § 124.32*, supporting mandatory intervention under *Code Civ. Proc. § 387(b)* on the ground that the intervener has an interest in the property or transaction that is the subject of the action and is so situated that the disposition of the action may impair or impede that interest as a practical matter. For a discussion of the possible applicability of cases decided under *Code Civ. Proc. § 387* prior to the 1977 amendment as authority for mandatory intervention under *Code Civ. Proc. § 387(b)*, see the discussion in *§§ 124.03[2][a] -124.03[3][a]*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

With appropriate modifications, these points and authorities may be used to support a motion for leave to file a cross complaint in intervention.

[b] Judgment Creditor's Lien on Judgment Debtor's Cause of Action or Recovery

Counsel should note that a judgment creditor who has a money judgment against a judgment debtor who is a party to a pending action or special proceeding may obtain a lien on any cause of action of the judgment debtor for money or property that is the subject of the action or proceeding and on the rights of the judgment debtor to money or property under any judgment subsequently entered in the action or proceeding [*see Code Civ. Proc. § 708.410(a)*] The court in which the action or special proceeding is pending may permit a judgment creditor who has obtained a lien under *Code Civ. Proc. §§ 708.410-708.480* to intervene in the action or proceeding pursuant to *Code Civ. Proc. § 387* [*Code Civ. Proc. § 708.430(a)*] For discussion and forms pertaining to a judgment creditor's right to a lien on the judgment debtor's cause of action, see California Forms of Pleading and Practice, Ch. 318, *Judgments* (Matthew Bender). For points and authorities supporting and opposing a judgment creditor's application for leave to intervene in the judgment debtor's cause of action, see California Forms of Pleading and Practice, Ch. 131, *Judgments* (Matthew Bender).

[c] Opposing Points and Authorities

The points and authorities *set out in § 124.49* may be used in an appropriate case to oppose a motion for leave to file a complaint in intervention supported by this memorandum.

[3] Discussion of Authorities

[a] Judgment Creditor May Intervene in Action Involving Property Subject to Judgment Lien

In ***Horn v. Volcano Water Co.*** *(1859) 13 Cal. 62* , plaintiff brought an action against defendant water company on a note and mortgage executed by the trustees of the company. Included as additional defendants were holders of another note and mortgage executed by the water company. Certain creditors of the company intervened, alleging fraud in the execution of the note and mortgage to plaintiff. One of the creditors was a simple creditor, others were judgment creditors who obtained liens by their judgments on the mortgaged premises. The trial court found in favor of defendants, including interveners. Plaintiffs did not raise any objection to the complaints in intervention at trial.

On appeal by plaintiffs, the Supreme Court reversed the decision. On the subject of intervention, the Court held that the intervener who was a simple creditor was not entitled to intervene since his interest was not secured by any lien on the mortgaged premises. The interest necessary to entitle a person to intervene in an action between other parties, the Court said, must be in the matter in litigation and of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment (*13 Cal. 62, 69)* . To authorize intervention in an action in which property is the matter in litigation, the Court held that the interest must be that created by a claim to the demand, or some part of it, in suit, or a claim to or lien on the property, or some part of it. The Court found that the judgment creditors were proper interveners, having liens by their several judgments on the mortgaged premises, and were therefore necessary parties to a complete adjustment of all interests in the property. Consequently, the Court

stated, the trial court would have been justified in granting them their petition, or ordering them brought in as parties to the action (*13 Cal. 62, 70)* .

Counsel should note that although the *Horn* case was decided under *Code Civ. Proc. § 387* prior to the 1977 amendment of that section, the current provisions of *Code Civ. Proc. § 387(a)* are virtually identical to those of former Code Civ. Proc. § 387 and thus the holding in this case is probably still applicable to permissive intervention under the amended statute. It is unclear whether or not possession of a judgment lien on the property that is the subject of an action would in itself be sufficient to support mandatory intervention under *Code Civ. Proc. § 387(b)*. However, when there are no other assets available to satisfy the judgment, and when the judgment debtor is not prosecuting or defending the action in good faith, it would appear that the judgment creditor could make a viable argument that he or she has an interest in the matter in litigation and is so situated that the disposition of the action would impair his or her ability to protect that interest and that existing parties are not adequately representing that interest, thereby giving the judgment creditor a right to intervene under *Code Civ. Proc. § 387(b)*.

For a further discussion of the possible effect of the 1977 amendment to *Code Civ. Proc. § 387* on the applicability of cases decided under that section prior to the 1977 amendment, see *§ 124.03*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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12-124 California Points & Authorities § 124.39

§ 124.39 Supporting Motion for Order Granting Leave to File Complaint in Intervention--Permissive Intervention [Code Civ. Proc. § 387(a)]--Intervener Has Direct Interest in Matter in Litigation--Third-Party Claimant to Property May Intervene in Action to Determine Ownership of Property

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities in support of a motion for an order granting leave to file a complaint in intervention under permissive intervention (see § 124.30) and with a form of memorandum of points and authorities in support of the contention that the intervener has a direct interest in the matter in litigation (see § 124.35).*]

THE COURT SHOULD GRANT _____ [*name of intervener*] LEAVE TO FILE A COMPLAINT IN INTERVENTION BECAUSE HE/SHE/IT IS THE OWNER OF THE PROPERTY THAT IS THE SUBJECT OF THIS ACTION AND SHOULD BE PERMITTED TO INTERVENE IN ORDER TO PROTECT HIS/HER/ITS INTEREST AGAINST THE CLAIM OF OWNERSHIP BY _____ [PLAINTIFF *or* DEFENDANT].

Third-Party Claimant to Property May Intervene in Action to Determine Ownership of Property. A third party asserting ownership of property may intervene in action to determine the ownership of that property (see *Goes v. Perry (1941) 18 Cal. 2d 373, 375-377, 115 P.2d 441*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for an order granting leave to file a complaint in intervention pursuant to *Code Civ. Proc. § 387(a)* (governing permissive intervention), on the ground that the intervener has a direct interest in the matter in litigation because he or she is a third-party claimant to property, the ownership of which is the subject of the action in which intervention is sought. This form should be combined with the general form of memorandum of points and authorities *set out in § 124.30* and with the points and authorities *set out in § 124.35*.

Counsel may also wish to combine this form with the general form of memorandum of points and authorities *set out in*

§ 124.32, supporting mandatory intervention under *Code Civ. Proc. § 387(b)* on the ground that the intervener has an interest in the property or transaction that is the subject of the action and is so situated that the disposition of the action may impair or impede that interest as a practical matter. For a discussion of the possible applicability of cases decided under *Code Civ. Proc. § 387* prior to the 1977 amendment as authority for mandatory intervention under *Code Civ. Proc. § 387(b)*, see the discussion in *§§ 124.03[2][a] -124.03[3][a]*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion showing that intervener asserts an ownership interest in the property adverse to that asserted by plaintiff and defendant.

[i] Related Uses

With appropriate modifications, these points and authorities may be used to support a motion for leave to file a cross complaint in intervention.

[b] Opposing Points and Authorities

The points and authorities *set out in § 124.49* may be used in an appropriate case to oppose a motion for leave to file a complaint in intervention supported by this memorandum.

[3] Discussion of Authorities

[a] Third-Party Claimant to Property May Intervene in Action to Determine Ownership of Property

Goes v. Perry *(1941) 18 Cal. 2d 373, 115 P.2d 441* , arose out of an action by plaintiff in claim and delivery to recover possession of the property from defendant, who allegedly unlawfully withheld possession of the property from plaintiff. A third party intervened in the action, claiming that money used to purchase the property at a trustee's sale was wrongfully appropriated from a trust fund belonging to her, her coowners, and plaintiff. Intervener sought to impose a trust on the personal property in favor of herself and her associates. Plaintiff based his claim to the possession of the property on his right of ownership arising out of the purchase under a deed of trust of the property at a trustee's sale. Defendant's claim to the possession of the property was apparently based on an agreement with another party that the title and possession of the property were to be transferred to defendant for services rendered. Intervener based her claim to the property on the ground that the purchase price of the property was paid out of funds belonging to intervener and her coowners, and that the property was purchased in the name of plaintiff, who had paid no part of the purchase price. The trial court appointed a receiver of the property on behalf of intervener. Defendant appealed, contending that the court erred in permitting intervention. Defendant claimed that the action was solely to determine the right to possession of personal property, and intervener had not shown, nor claimed, that she was entitled to possession of the property in question, and therefore she did not have sufficient interest in the property entitling her to intervene under *Code Civ. Proc. § 387*.

The Supreme Court, in affirming the trial court's order, rejected defendant's contention. The Court held that while the action was ostensibly for the possession of the property, it was in reality an action to determine ownership of the property, since each party based his right to possession on a claim of ownership. Intervener's purpose in entering the action was to impose a trust on the property in the name of plaintiff. Should defendant be determined the owner of the property in question, intervener's claim would be denied. Consequently, concluded the Court, intervener had the necessary interest in the subject matter in litigation that would entitle her to intervene in the action under *Code Civ. Proc. § 387* (*18 Cal. 2d 373, 376-377)* .

Counsel should note that although the *Goes* case was decided under *Code Civ. Proc. § 387* prior to the 1977 amendment of that section, the current provisions of *Code Civ. Proc. § 387(a)* are virtually identical to those of former Code Civ. Proc. § 387 and thus the holding in this case is probably still applicable to permissive intervention under the amended

statute. Moreover, it also appears that the facts of the *Goes* case would support mandatory intervention under *Code Civ. Proc. § 387(b)*, since intervener clearly claimed an interest in the personal property that was the subject of the action and a disposition of the action awarding possession to plaintiff or defendant would probably impair intervener's ability to protect that interest. Furthermore, intervener's interests were not adequately represented by the existing parties, since both plaintiff and defendant claimed ownership of the property and thus claimed an interest in the property adverse to that asserted by intervener.

For a further discussion of the possible effect of the 1977 amendment to *Code Civ. Proc. § 387* on the applicability of cases decided under that section prior to the 1977 amendments, see *§ 124.03*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionMotions to InterveneCivil ProcedurePartiesInterventionPermissive Interventions

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12-124 California Points & Authorities § 124.40

§ 124.40 Supporting Motion for Order Granting Leave to File Complaint in Intervention--Permissive Intervention [Code Civ. Proc. § 387(a)]--Intervener Has Direct Interest in Matter in Litigation--Beneficiary of Trust Deed May Intervene in Action by Trustor Against Trustee to Declare Trust Deed Void

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities in support of a motion for an order granting leave to file a complaint in intervention under permissive intervention (see § 124.30) and with a form of memorandum of points and authorities in support of the contention that the intervener has a direct interest in the matter in litigation (see § 124.35).*]

THE COURT SHOULD GRANT _____ [*name of intervener*] LEAVE TO FILE A COMPLAINT IN INTERVENTION BECAUSE HE/SHE/IT IS THE BENEFICIARY OF THE TRUST DEED THAT PLAINTIFF TRUSTOR SEEKS TO HAVE SET ASIDE.

Beneficiary of Trust Deed May Intervene in Action to Set Aside Trust Deed. In an action brought by trustors against the trustee of a trust deed to have the trust deed declared void, the beneficiaries are indispensable parties and may properly intervene in the action and in a subsequent action to enjoin a sale of property under the trust deed (see *Straube v. Security First Nat. Bank (1962) 205 Cal. App. 2d 352, 353, 360, 363, 23 Cal. Rptr. 213*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for an order granting leave to file a complaint in intervention pursuant to *Code Civ. Proc. § 387(a)* (governing permissive intervention) on the ground that intervener has a direct interest in the matter in litigation in that he or she is a beneficiary of a trust deed and therefore may properly intervene in an action by the trustor to have the trust deed declared void or to enjoin a sale by the trustee of the property encumbered by the trust deed. This form should be combined with the general form of memorandum of points and authorities *set out in § 124.30* and with the points and authorities *set out in § 124.35*.

Counsel may also wish to combine this form with the general form of memorandum of points and authorities *set out in § 124.32*, supporting mandatory intervention under *Code Civ. Proc. § 387(b)* on the ground that the intervener has an interest in the property or transaction that is the subject of the action and is so situated that the disposition of the action may impair or impede that interest as a practical matter. For a discussion of the possible applicability of cases decided under *Code Civ. Proc. § 387* prior to the 1977 amendment as authority for mandatory intervention under *Code Civ. Proc. § 387(b)*, see the discussion in *§§ 124.03[2][a] -124.03[3][a]*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

With appropriate modifications, these points and authorities may be used to support a motion for leave to file a cross complaint in intervention.

[b] Opposing Points and Authorities

The points and authorities *set out in § 124.48* may be used in an appropriate case to oppose a motion for leave to file a complaint in intervention supported by this memorandum.

[3] Discussion of Authorities

[a] Beneficiary of Trust Deed May Intervene in Action to Set Aside Trust Deed

Straube v. Security First Nat. Bank *(1962) 205 Cal. App. 2d 352, 23 Cal. Rptr. 213* , arose out of an action by plaintiffs claiming ownership of certain real property as trustors under a deed of trust to enjoin defendant trustee bank from carrying out its announced intention to proceed with a sale of the property in question on the ground that a previous action brought by them to quiet title against the bank had resulted in a judgment in their favor, forbidding further claims by defendant bank against the property. A third party filed a complaint in intervention, claiming individually and as executrix of the estate of the previous owner of the property in question that she and the estate were beneficiaries of the deed of trust under which plaintiffs claimed ownership, that promissory notes on the deed of trust were due, that interveners were indispensable parties in the former action in which plaintiffs obtained a decree quieting title in them, that the failure to join the beneficiaries was an attempt to deprive them of their property, and that the previous judgment was void and did not bind the beneficiaries. Plaintiffs moved to strike the complaint in intervention, but the trial court denied the motion. The trial court made findings of fact that closely followed the allegations contained in the complaint in intervention and entered judgment in favor of defendant and intervener. Plaintiffs appealed, contending among other things that the trial court erred in finding that the previous judgment was void, that the trial court improperly allowed intervention in that defendant bank was the only necessary party defendant in the former action, that beneficiaries of the trust deed were not indispensable parties, and that the trust deed and notes that it secured were given without consideration and therefore void.

The court of appeal upheld the judgment of the trial court in denying the injunction and in declaring the previous judgment void, but the court reversed the judgment insofar as it denied plaintiffs the right to a jury trial on the factual issues. Addressing itself to the issue of beneficiaries' right to be parties to an action involving their interests in the property in question, the court held that in an action brought by trustors against the trustee of a deed of trust to declare the trust deed void for want of consideration, the beneficiaries of the trust deed are indispensable parties, and a judgment taken against the trustee alone is void and of no effect. The court discussed at length the basis for its holding and in summary, concluded that when parties to a trust are placed in a position of losing their basic rights in the trust through the bringing of a suit by one of the other parties to the trust agreement, the beneficiaries must be joined as indispensable parties. Under the facts of the case, the rights of the beneficiaries were vitally affected by the first action instituted by plaintiffs and the beneficiaries were therefore indispensable parties to that action. Consequently, observed

the court, the trial court was correct in denying the motion to strike the complaint in intervention since the beneficiaries were indispensable parties to the former action and their rights were still being vitally affected by the continuance in full force and effect of the previous judgment (*205 Cal. App. 2d 352, 360-363)* .

Counsel should note that although the *Straube* case was decided prior to the 1977 amendment of *Code Civ. Proc. § 387*, the current provisions of *Code Civ. Proc. § 387(a)* are virtually identical to those of former Code Civ. Proc. § 387 and thus the holding in this case is probably still applicable to permissive intervention under the amended statute. Furthermore, the facts of *Straube* might also support mandatory intervention under *Code Civ. Proc. § 387(b)*, particularly in view of the court's holding that the beneficiaries were indispensable parties to the action to have the trust deed set aside. For a discussion of the relationship between mandatory intervention and compulsory joinder of parties, see *§ 124.04*. For discussion and forms relating to compulsory joinder of parties, see California Forms of Pleading and Practice, Ch. 395, *Parties* (Matthew Bender). For points and authorities pertaining to compulsory joinder of parties, see Ch. 168, *Parties* in this set.

For a further discussion of the possible effect of the 1977 amendment to *Code Civ. Proc. § 387* on the applicability of cases decided under that section prior to the 1977 amendment, see *§ 124.03*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPartiesInterventionMotions to InterveneCivil ProceduresPartiesInterventionPermissive Interventions

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California Points & Authorities

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CHAPTER 124 INTERVENTION
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12-124 California Points & Authorities § 124.41

§ 124.41 Supporting Motion for Order Granting Leave to File Complaint in Intervention--Permissive Intervention [Code Civ. Proc. § 387(a)]--Intervener Has Direct Interest in Matter in Litigation--Limited Partner May Intervene When General Partner Refuses to Defend Unmeritorious or Collusive Action Against Partnership

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities in support of a motion for an order granting leave to file a complaint in intervention under permissive intervention (see § 124.30) and with a form of memorandum of points and authorities in support of the contention that the intervener has a direct interest in the matter in litigation (see § 124.35).*]

THE COURT SHOULD GRANT _____ [*name of intervener*] LEAVE TO INTERVENE IN THIS ACTION BECAUSE HE/SHE/IT IS A LIMITED PARTNER IN DEFENDANT _____ [*name of partnership*] AND DEFENDANT(S) _____ [*name(s) of general partner(s)*], THE GENERAL PARTNER(S), _____ [HAS *or* HAVE] FAILED AND REFUSED TO EXERCISE GOOD FAITH IN DEFENDING THIS ACTION AGAINST THE PARTNERSHIP.

Limited Partner May Intervene When General Partner Refuses to Defend Action Against Partnership. A limited partner may properly intervene in an action against the partnership on the refusal or failure of the general partner to defend an unmeritorious or collusive action against the partnership (see *Linder v. Vogue Investments, Inc. (1966) 239 Cal. App. 2d 338, 340-342, 48 Cal. Rptr. 633*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for an order granting leave to file a complaint in intervention pursuant to *Code Civ. Proc. § 387(a)* (permissive intervention), on the ground that the intervener, as a limited partner, has a direct interest in the matter in litigation and may properly intervene in an action against partnership when the general partner fails to exercise good faith in defending the action. This form should be combined with the general form of memorandum of points and authorities *set out in § 124.30* and with the points and authorities

set out in § 124.35.

Counsel may also wish to combine this form with the general form of memorandum of points and authorities *set out in § 124.32*, supporting mandatory intervention under *Code Civ. Proc. § 387(b)* on the ground that the intervener has an interest in the property or transaction that is the subject of the action and is so situated that the disposition of the action may impair or impede that interest as a practical matter. For a discussion of the possible applicability of cases decided under *Code Civ. Proc. § 387* prior to the 1977 amendment as authority for mandatory intervention under *Code Civ. Proc. § 387(b)*, see the discussion in *§§ 124.03[2][a] -124.03[3][a]*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion of the relevant facts concerning the status of the intervener as a limited partner and the facts supporting his or her contention that the general partner has failed to defend an action in good faith against the partnership, thereby impairing intervener's interest in the partnership.

[i] Related Uses

With appropriate modifications, these points and authorities may be used to support a motion for leave to file a cross complaint in intervention.

[b] Opposing Points and Authorities

The points and authorities *set out in § 124.49* may be used in an appropriate case to oppose a motion for leave to file a complaint in intervention supported by this memorandum.

[3] Discussion of Authorities

[a] Limited Partner May Intervene When General Partner Refuses to Defend Action Against Partnership

In ***Linder v. Vogue Investments, Inc.*** *(1966) 239 Cal. App. 2d 338, 48 Cal. Rptr. 633* , plaintiff filed an action against defendant Crescent Homes, a limited partnership, for recovery of a debt. The complaint alleged that one Katz was the general partner of defendant partnership and Vogue Investments, Inc. was the limited partner. Summons was served on the general partner, and on his failure to appear and defend the action, a default judgment was entered. Vogue promptly filed a motion to intervene and to vacate the default. In the complaint in intervention, intervener alleged facts that amounted to a charge of fraud and tacit collusion between plaintiff and the general partner. Plaintiff resisted the motion to intervene, claiming that a limited partner was not a proper party in an action against a limited partnership and that intervener did not have a direct interest in the litigation since the partnership did not own any asset against which plaintiff could levy execution. The trial court denied intervener's motion to intervene and also its motion to reconsider. The trial court's reasoning in denying the latter motion was entered in a minute order that stated that limited partners are not bound by the obligations of the partnership and have no power to litigate or defend the partnership obligations, citing certain portions of the Limited Partnership Act, now repealed. Vogue, as intervener, appealed the denial of both motions.

The court of appeal reversed the trial court's order denying intervener's motion to reconsider the motion to intervene and directed the trial court to set aside the default of defendant Crescent Homes and entertain the motion to intervene. In its decision, the court rejected plaintiff's contentions that intervention was prohibited by the Limited Partnership Act. The court found persuasive the many decisions permitting shareholders of a corporation, under conditions similar to the facts in the present case, to intervene on behalf of the corporation. The court held that, as in shareholder cases [*see § 124.44*], a limited partner need not stand idly by and watch a substantial investment disappear because the general partner refuses to defend an unmeritorious or collusive action against the partnership (*239 Cal. App. 2d 338, 340-341)* .

Counsel should note that the court of appeal also based its decision on the right of the limited partner to intervene in this

case on facts indicating that the limited partner may have withdrawn its contribution to the partnership at a time when it was insolvent. If true, the withdrawal was in violation of the Limited Partnership Act and would have subjected the limited partner to a liability to return the contribution at the instigation of a creditor of the partnership. Consequently, intervener had a vital interest in vacating the default judgment and establishing a defense that the alleged debt of the partnership to plaintiff never existed (*239 Cal. App. 2d 338, 342)* .

For a discussion of other points of law involved in this case, see *§ 124.33[4][a]*.

Counsel should also note that although the *Linder* case was decided prior to the 1977 amendment of *Code Civ. Proc. § 387*, the current provisions of *Code Civ. Proc. § 387(a)* are virtually identical to those of former Code Civ. Proc. § 387 and thus the holding in this case is probably still applicable to permissive intervention under the amended statute. Moreover, the facts of *Linder* might also support mandatory intervention under *Code Civ. Proc. § 387(b)* because the limited partner's interest in the partnership would certainly be impaired as a practical matter by the disposition of the action in favor of plaintiff. Although the effect on the limited partner's interest would be somewhat indirect, the failure of the general partner to defend the action in good faith demonstrates a lack of representation of intervener's interests by the existing parties and would probably support an argument that the limited partner has a right to intervene in the proceedings under *Code Civ. Proc. § 387(b).*

[4] Additional Authorities

[a] Limited Partner

Kobernick v. Shaw (1977) 70 Cal. App. 3d 914, 139 Cal. Rptr. 188 , involved an action by plaintiffs to foreclose an equitable lien on real property, naming a limited partnership, a trust company, and various Does as defendants. A limited partner answered for himself as a Doe and filed a cross complaint on behalf of himself and other limited partners, charging plaintiffs and the general partner with conspiracy to defraud the limited partners. The court of appeal reversed the order of the trial court sustaining plaintiffs' demurrer. The court, by analogy to *Code Civ. Proc. § 387*, held that a limited partner may file a cross complaint in proceedings when the general partner fails to defend the action, since a limited partner has a direct interest in the proceedings and is not required to sit idly by and allow his or her interest to disappear (*70 Cal. App. 3d 914, 918-920)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited PartnershipsManagement Duties & LiabilitiesCivil ProcedureParties InterventionMotions to InterveneCivil ProcedureParties InterventionPermissive Interventions

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12-124 California Points & Authorities § 124.42

§ 124.42 Supporting Motion for Order Granting Leave to File Complaint in Intervention--Permissive Intervention [Code Civ. Proc. § 387(a)]--Intervener Has Direct Interest in Matter in Litigation--Shareholder May Intervene When Officers or Directors of Corporation Refuse to Maintain or Defend Action Involving Corporation

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities in support of a motion for an order granting leave to file a complaint in intervention under permissive intervention (see § 124.30) and with a form of memorandum of points and authorities in support of the contention that the intervener has a direct interest in the matter in litigation (see § 124.35).*]

THE COURT SHOULD GRANT _____ [*name of intervener*] LEAVE TO INTERVENE IN THIS ACTION BECAUSE HE/SHE/IT IS A SHAREHOLDER OF _____ [PLAINTIFF *or* DEFENDANT] CORPORATION AND THE CORPORATION, THROUGH ITS OFFICERS AND DIRECTORS, HAS FAILED TO EXERCISE GOOD FAITH IN _____ [MAINTAINING *or* DEFENDING] THIS ACTION.

Shareholder May Intervene When Officers or Directors of Corporation Refuse to Maintain or Defend Action Involving Corporation. A shareholder of a corporation involved in an action may properly intervene on behalf of the corporation when it appears that the corporation, or its officers and directors, will not exercise good faith in maintaining or defending the action (*Eggers v. National Radio Co. (1929) 208 Cal. 308, 313, 281 P 58* ; see *Thorman v. Dome Producing, etc. Co. (1942) 50 Cal. App. 2d 201, 203, 122 P.2d 927*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for an order granting leave to file a complaint in intervention pursuant to *Code Civ. Proc. § 387(a)* (governing permissive intervention) on the grounds that he or she is a shareholder in the corporation involved in the action and that the corporation, through its officers and directors, has failed to exercise good faith in maintaining or defending the action. This form should be combined with the general

form of memorandum of points and authorities *set out in § 124.30* and with the points and authorities *set out in § 124.35*.

Counsel may also wish to combine this form with the general form of memorandum of points and authorities *set out in § 124.32*, supporting mandatory intervention under *Code Civ. Proc. § 387(b)* on the ground that the intervener has an interest in the property or transaction that is the subject of the action and is so situated that the disposition of the action may impair or impede that interest as a practical matter. For a discussion of the possible applicability of cases decided under *Code Civ. Proc. § 387* prior to the 1977 amendment as authority for mandatory intervention under *Code Civ. Proc. § 387(b)*, see the discussion in *§§ 124.03[2][a] -124.03[3][a]*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion of the relevant facts concerning the status of intervener as a shareholder of the corporation in whose behalf he or she seeks to intervene and the facts supporting his or her contention that the corporation, or its officers and directors, have failed to exercise good faith in maintaining or defending an action in which it is involved.

[b] Opposing Points and Authorities

The points and authorities *set out in § 124.49* may be used in an appropriate case to oppose a motion for leave to file a complaint in intervention supported by this memorandum.

[3] Discussion of Authorities

[a] Shareholder May Intervene When Officers or Directors of Corporation Refuse to Maintain or Defend Action Involving Corporation

Eggers v. National Radio Co. *(1929) 208 Cal. 308, 281 P 58* , was an action by plaintiff shareholders against defendant corporation seeking to declare various stock certificate transactions undertaken by defendant void, to secure appointment of a receiver to take possession of all books and records of the corporation, and to declare that certain real property be the property of the holders of the void certificates, the corporation having only the title in trust for the shareholders. Judgment was entered for plaintiffs; however, on defendant's motion, a new trial was granted. Subsequently, the personnel of the board of directors of defendant changed, and on substitution of new attorneys defendant stipulated with plaintiffs that the order granting a new trial be vacated. The trial court then set aside its previous order. Interveners, some 292 persons claiming to hold a majority of the stock of defendant, moved for an order setting aside the order vacating the order for a new trial, reinstating the cause of action for a new trial, and allowing them to intervene. Interveners alleged collusion between plaintiffs and the board of directors of defendant to destroy the defendant corporation and to sell and distribute its assets among certain shareholders without the consent or agreement of the shareholders of defendant. The trial court set aside the order vacating the new trial order but denied the motion to intervene and to reinstate the cause of action for a new trial and entered judgment for plaintiffs. Interveners appealed, defendant having waived the right to do so.

The Supreme Court reversed the judgment and orders of the trial court from which interveners appealed. In doing so, the Court held that the shareholders were entitled to intervene in the action because of the failure of the defendant corporation to defend against the action of plaintiffs, which was designed to destroy the corporation and distribute its assets. Although shareholders of a corporation normally cannot interfere with legal proceedings instituted by or on behalf of the corporation by its board of directors, they may be permitted to do so when the governing directors or trustees refuse to act or are guilty of fraud in the maintenance or defense of an action (*208 Cal. 308, 313)* . Under the facts of the case, the Court concluded that plaintiffs had conspired with the majority of the board of directors of defendant corporation to secure a judgment favorable to plaintiffs. Consequently, the shareholders were entitled to intervene in order to preserve the corporate property and to prevent its loss to the corporation or the impairment of its

value, since whatever would be inimical or injurious to the corporation would be inimical or injurious to the shareholder (*208 Cal. 308, 314)* .

Thorman v. Dome Producing, etc. Co. *(1942) 50 Cal. App. 2d 201, 122 P.2d 927* , involved an action by plaintiff against defendant corporation for recovery of a promissory note payable to plaintiff and executed by plaintiff as president of the corporation, and the secretary of the corporation, who together controlled defendant corporation. A subsequent shareholder, director, and president of the defendant corporation sought to intervene in the action. The shareholder alleged that the note was given without consideration, pursuant to a scheme in violation of the Corporate Securities Act, and was never submitted to the board of directors nor ratified by it. The shareholder further alleged that she purchased her stock without knowledge of the note and without knowledge of the facts that led to its execution. She also alleged that the corporation had valid defenses to the action, that she demanded that the corporation defend the action, and that it refused to do so. Although the trial court overruled plaintiff's demurrers to the application for leave to intervene, it denied the application, apparently on grounds that the complaint in intervention was insufficient. Intervener appealed from the order.

The court of appeal reversed the order, holding that intervener had established facts sufficient to permit her to intervene for the purpose of defending the action. Since the trial court had found the essentials of a case for the intervention in overruling plaintiff's demurrers, it must treat intervener's pleading as sufficient as a complaint in intervention (*50 Cal. App. 2d 201, 203)* .

Counsel should note that although both of the above cases were decided prior to the 1977 amendment of *Code Civ. Proc. § 387*, the current provisions of *Code Civ. Proc. § 387(a)* are virtually identical to those of former Code Civ. Proc. § 387 and thus the holding in these cases are probably still applicable to permissive intervention under the amended statute. Furthermore, the facts of these cases might also support mandatory intervention under *Code Civ. Proc. § 387(b)* since the entry of a judgment against the corporation would as a practical matter impair the shareholder's interest in the corporation, and the bad faith refusal of the officers and directors of the corporation to maintain or defend the action would provide the basis for an argument that the shareholder's interests are not being adequately represented by existing parties, thereby giving the shareholder a right to intervene in the action under *Code Civ. Proc. § 387(b)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsShareholdersShareholder Duties & LiabilitiesGeneral OverviewCivil ProcedurePartiesInterventionMotions to InterveneCivil ProcedurePartiesInterventionPermissive Interventions

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12-124 California Points & Authorities § 124.43

§ 124.43 Supporting Motion for Order Granting Leave to File Complaint in Intervention--Permissive Intervention [Code Civ. Proc. § 387(a)]--Intervener Has Direct Interest in Matter in Litigation--Parents of Students in School District Affected by School Reassignment Plan May Intervene in Action to Determine Validity of Plan

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities in support of a motion for an order granting leave to file a complaint in intervention under permissive intervention (see § 124.30) and with a form of memorandum of points and authorities in support of the contention that the intervener has a direct interest in the matter in litigation (see § 124.35).*]

THE COURT SHOULD GRANT _____ [*name of interveners*] LEAVE TO FILE A COMPLAINT IN INTERVENTION BECAUSE, AS PARENTS OF STUDENTS ENROLLED IN THE SCHOOL DISTRICT, THEY WOULD BE DIRECTLY AFFECTED BY THE PROPOSED SCHOOL REASSIGNMENT PLAN, THE VALIDITY OF WHICH IS THE SUBJECT OF THE ACTION BEFORE THE COURT.

Parents of Students Enrolled in School District Affected by School Reassignment Plan May Intervene in Action to Determine Validity of Plan. Parents of students enrolled in a school district who would be directly affected by a school reassignment plan within the district have a sufficient interest in the matter in litigation to intervene under *Section 387 of the Code of Civil Procedure* in an action to determine validity of the plan (see *Bustop v. Superior Court (1977) 69 Cal. App. 3d 66, 70-73, 137 Cal. Rptr. 793*).

[2] Comments

[a] Use of Form

This points and authorities may be submitted in support of a motion for an order granting leave to file a complaint in intervention pursuant to *Code Civ. Proc. § 387(a)* (governing permissive intervention) on the ground that interveners, as parents of students enrolled in a school district that would be affected by a school reassignment plan, have a direct interest in the matter in litigation and thus may intervene in an action to determine the validity of the plan. This form

should be combined with the general form of memorandum of points and authorities *set out in § 124.30* and with the points and authorities *set out in § 124.35*.

Counsel may also wish to combine this form with the general form of memorandum of points and authorities *set out in § 124.32*, supporting mandatory intervention under *Code Civ. Proc. § 387(b)* on the ground that the intervener has an interest in the property or transaction that is the subject of the action and is so situated that the disposition of the action may impair or impede that interest as a practical matter. For a discussion of the possible applicability of cases decided under *Code Civ. Proc. § 387* prior to the 1977 amendment as authority for mandatory intervention under *Code Civ. Proc. § 387(b)*, see the discussion in *§§ 124.03[2][a] -124.03[3][a]*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing that the proposed interveners are parents of students who would be affected by the school district's reassignment plan.

[b] Opposing Points and Authorities

The points and authorities *set out in § 124.49* may be used in an appropriate case to oppose a motion for leave to file a complaint in intervention supported by this memorandum.

[3] Discussion of Authorities

[a] Parents of Students Enrolled in School District Affected by School Reassignment Plan May Intervene in Action to Determine Validity of Plan

In ***Bustop v. Superior Court*** *(1977) 69 Cal. App. 3d 66, 137 Cal. Rptr. 793* , intervener petitioned the court of appeal for a writ of mandate directing the trial court to grant its petition for leave to intervene pursuant to *Code Civ. Proc. § 387* in an action on remand from the Supreme Court, directing the defendant school district in that action to prepare and implement a reasonably feasible desegregation plan and to submit it to the superior court for approval. The plan submitted included some mandatory reassignment of students to schools other than their so-called "neighborhood schools." Petitioner was a nonprofit corporation with a membership of 65,000 parents who resided in the school district. Its prime objective was the prevention of mandatory reassignment of students to schools other than those which they attended or chose to attend. Petitioner alleged that the Supreme Court, which had declared in its opinion that the district was segregated, did not require mandatory reassignment as a means to desegregate the district. Both plaintiffs and defendant in the underlying action objected to petitioner's intervention, although conceding that it represented a point of view that was entitled to be and should be heard. Plaintiffs argued that petitioners had no direct interest in the outcome of the action as required by *Code Civ. Proc. § 387* since no student had a right to remain assigned to any particular school and that any reassignment as a result of the litigation would only be an indirect consequence of an order designed to protect the interests of the minority students. Defendant contended that petitioner's point of view had already been considered in the political process of formulating the plan and that the only issue before the court was whether the plan would satisfy the court. The trial court denied the petition to intervene on grounds that the court was limited to considering whether or not the plan presented to the court met the constitutional standards in response to the order of the Supreme Court, that defendant school district represented all the residents in the district, and that to permit intervention by this petitioner would open the way for a multitude of others to intervene. Petitioner then sought a writ of mandate to compel the trial court to grant leave to intervene.

The court of appeal reversed the order of the trial court. In doing so, the court found that petitioner satisfied the requirement of *Code Civ. Proc. § 387* that a person must have an interest in the litigation in order to intervene. The court held that reassignment of students to schools distant from their residences would have a direct social, educational, and economic impact on the students reassigned and their parents. The court stated that all students and parents, whatever their race, have an interest in a sound educational system and in the operation of that system in accordance of

the law. That interest is no less significant when it is entangled with the constitutional claims of a racially defined class [citing *Johnson v. San Francisco Unified School District (9th Cir. 1974) 500 F.2d 349, 353]* . The court of appeal also rejected the trial court's reasoning that the school board represented all residents of the district. The court noted that the district had authored the very plan that petitioner claimed impaired their interest and had argued contrary to petitioner's position. Moreover, petitioner's interests were not represented by plaintiffs either, since plaintiffs represented only the interests of specific minority students (*69 Cal. App. 3d 66, 70-71)* .

Counsel should note that although the *Bustop* case was decided under *Code Civ. Proc. § 387* prior to the 1977 amendment of that section, the current provisions of *Code Civ. Proc. § 387(a)* are virtually identical to those of former Code Civ. Proc. § 387 and thus the holding in this case is probably still applicable to permissive intervention under the amended statute. It is unclear whether or not the facts of *Bustop* would support mandatory intervention under *Code Civ. Proc. § 387(b)*. Although the facts of that case indicate that the intervener did have an interest in the litigation that was not adequately represented by the existing parties, there is some question as to whether or not that interest was of the type that is sufficient to permit intervention as a matter of right. In *Coalition for Fair Rent v. Abdelnour (1980) 107 Cal. App. 3d 97, 165 Cal. Rptr. 685* , the court of appeal suggested in dictum that general political or societal interests could only be the basis of permissive intervention within the trial court's broad discretion and that only a direct pecuniary interest forms the basis for mandatory intervention (*107 Cal. App. 3d 97, 115)* . The court in *Coalition for Fair Rent* conceded that *Bustop* cast some shadow on the premise that more than general political interest is necessary for mandatory intervention; however, the court nevertheless distinguished *Bustop* on the ground, inter alia, that the interests of the parents in *Bustop* was more direct than that asserted by the proposed interveners in *Coalition for Fair Rent* (*107 Cal. App. 3d 97, 115-116)* . In light of the current confused state of the case law, counsel should probably exercise caution in relying on cases such as *Bustop* to establish the grounds for intervention as a matter of right.

For a further discussion of the possible effect of the 1977 amendment to *Code Civ. Proc. § 387* on the applicability of cases decided under that section prior to the 1977 amendment, see *§ 124.03*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionMotions to InterveneCivil ProcedurePartiesInterventionPermissive InterventionsEducation LawAdministration & OperationSchool DistrictsAlteration

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12-124 California Points & Authorities § 124.44

§ 124.44 Supporting Motion for Order Granting Leave to File Complaint in Intervention--Permissive Intervention [Code Civ. Proc. § 387(a)]--Intervener Has Direct Interest in Matter in Litigation--Voters Who Participated in Efforts to Approve Ballot Measure May Intervene in Action to Determine Validity of Measure

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities in support of a motion for an order granting leave to file a complaint in intervention under permissive intervention (see § 124.30) and with a form of memorandum of points and authorities in support of the contention that the intervener has a direct interest in the matter in litigation (see § 124.35).*]

THE COURT SHOULD GRANT _____ [*name of intervener*] LEAVE TO FILE A COMPLAINT IN INTERVENTION BECAUSE, AS A VOTER WHO PARTICIPATED IN EFFORTS TO HAVE APPROVED THE BALLOT MEASURE THAT IS THE SUBJECT OF THE ACTION BEFORE THE COURT, HE/SHE HAS AN INTEREST IN THE MATTER IN LITIGATION SUFFICIENT TO ALLOW HIM/HER TO INTERVENE.

Voters Who Participated in Efforts to Approve Ballot Measure May Intervene in Action to Determine Validity of Measure. Voters who participated in efforts to have a ballot measure approved by voters have sufficient interest in the matter in litigation and may properly intervene in an action to determine the validity of the measure (see *Simac Design, Inc. v. Alciati (1979) 92 Cal. App. 3d 146, 152-153, 157, 154 Cal. Rptr. 676*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for an order granting leave to file a complaint in intervention pursuant to *Code Civ. Proc. § 387(a)* (governing permissive intervention), on the ground that the intervener has a direct interest in the matter in litigation and thus may properly intervene in an action to determine the validity of a ballot measure because he or she is a voter who participated in efforts to approve the measure. This form should be combined with the general form of memorandum of points and authorities *set out in § 124.30* and with the points and authorities *set out in § 124.35*.

Counsel may also wish to combine this form with the general form of memorandum of points and authorities *set out in § 124.32*, supporting mandatory intervention under *Code Civ. Proc. § 387(b)* on the ground that the intervener has an interest in the property or transaction that is the subject of the action and is so situated that the disposition of the action may impair or impede that interest as a practical matter. For a discussion of the possible applicability of cases decided under *Code Civ. Proc. § 387* prior to the 1977 amendment as authority for mandatory intervention under *Code Civ. Proc. § 387(b)*, see the discussion in *§§ 124.03[2][a] -124.03[3][a]*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion of the relevant facts concerning the status of the intervening party as a person who actively participated in obtaining voter approval of a ballot measure and who seeks to intervene in an action to determine the validity of that measure.

[i] Related Uses

With appropriate modifications, these points and authorities may be used to support a motion for leave to file a cross complaint in intervention.

[b] Opposing Points and Authorities

The points and authorities *set out in § 124.49* may be used in an appropriate case to oppose a motion for leave to file a complaint in intervention supported by this memorandum.

[3] Discussion of Authorities

[a] Voters Who Participated in Efforts to Approve Ballot Measure May Intervene in Action to Determine Validity of Measure

Simac Design, Inc. v. Alciati *(1979) 92 Cal. App. 3d 146, 154 Cal. Rptr. 676* , involved two mandamus proceedings brought by separate owners of land to compel issuance of building permits and to take action on submitted applications for approval of subdivision maps. The city in which the property involved was located refused to take action in both matters. It cited two reasons for its refusal to take action. First, the city claimed that it was enjoined from taking any action regarding subdivision development pending a hearing in superior court concerning the city's failure to approve an open-space plan as required by statute. Second, the city claimed that it could not take action on the subdivision plans because of the passage of a growth control initiative measure. Plaintiff in the first action filed a petition for a writ of mandate to compel issuance of 11 building permits to plaintiff. After a hearing, the trial court granted the writ. Subsequently, interveners, an association of voters in the city who had drafted and organized voter support for the growth control measure, moved to set aside the judgment. The trial court denied the motion, and interveners appealed from the order denying its motion to set aside the judgment and from the judgment. The city did not appeal. In the second action, separate plaintiffs also filed a writ of mandate to compel the city to act on certain submitted subdivision map applications without regard to the growth control measure passed by the voters. At the hearing on the matter, an attorney representing several associations active in the controlled growth movement happened to be in court awaiting a hearing in connection with the first case. When he realized that the court was conducting a hearing on the second matter, he orally moved, in the presence of both parties, to allow the associations to intervene as defendants and real parties in interest. The trial court granted the oral motion to intervene, but nonetheless granted the writ sought by plaintiffs. Interveners also appealed from this order. As in the first case, the city did not appeal.

In the first action, the court of appeal reversed the judgment of the trial court. The court also held that interveners' motion to vacate the judgment under *Code Civ. Proc. § 663* was proper. The court quoted former Code Civ. Proc. § 387 [*now see Code Civ. Proc. § 387(a)*], stating that before trial, any person who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both, may intervene in the action or proceeding. However,

the court said that a person who is not a party to the action as originally commenced or tried may intervene even after judgment by moving to vacate the judgment under *Code Civ. Proc. § 663* (*92 Cal. App. 3d 146, 152-153)* . In the second action, the court, in modifying the judgment granting the writ, found no error in the trial court's having granted interveners' oral application to intervene in the action. The court held that the attorney's oral presentation of the facts concerning interveners' status as associations of voters in behalf of controlled growth and as a group of residents formed to preserve open space adequately informed the trial court and the other parties of the basis for the motion to intervene (*92 Cal. App. 3d 146, 157)* .

Counsel should note that in discussing the two actions in this case, the court of appeal never directly stated that interveners had the interest necessary to intervene under *Code Civ. Proc. § 387*. In the first action, the court found that interveners were aggrieved parties within the meaning of *Code Civ. Proc. § 902*, whose rights or interests were injuriously affected by the granting of the writ by the trial court and were therefore proper parties to appeal the order denying the motion to vacate the judgment. The court stated that an appellant's interest under *Code Civ. Proc. § 902* must be immediate, pecuniary, and substantial, and not nominal or a remote consequence of the judgment (*92 Cal. App. 3d 146, 153)* . In the second action, the court, in responding to the argument that the trial court erred when it allowed intervention, discussed intervention only in the procedural context of intervention having been permitted pursuant to an oral application. However, implicit in the appellate court's determination that the trial court did not err when it allowed intervention on the basis of an oral motion is a determination that the interveners had adequately set forth the grounds on which intervention rested and that those grounds included the claim that interveners had a sufficient interest to intervene under *Code Civ. Proc. § 387*.

Counsel should note that although the *Simac* case was decided under *Code Civ. Proc. § 387* prior to the 1977 amendment of that section, the current provisions of *Code Civ. Proc. § 387(a)* are virtually identical to those of former Code Civ. Proc. § 387 and thus the holding in this case is probably still applicable to permissive intervention under the amended statute. It is unclear, however, whether or not the facts of *Simac* would support mandatory intervention under *Code Civ. Proc. § 387(b)*. Although the interveners in that case could argue that they had an interest in the subject of the litigation that was not adequately represented by the existing parties, there is some question as to whether or not the type of interest claimed is sufficient to permit intervention as a matter of right. In *Coalition for Fair Rent v. Abdelnour (1980) 107 Cal. App. 3d 97, 165 Cal. Rptr. 685* , the court of appeal suggested in dictum that general political or societal interests could only be the basis of permissive intervention within the trial court's broad discretion and that only a direct pecuniary interest forms the basis for mandatory intervention (*107 Cal. App. 3d 97, 115)* . It is not clear that the interveners in *Simac* had such a direct pecuniary interest in upholding the validity of the ballot measure. In light of the current confused state of the case law, counsel should probably exercise caution in relying on cases such as *Simac* to establish the grounds for intervention as a matter of right.

For a further discussion of the possible effect of the 1977 amendment to *Code Civ. Proc. § 387* on the applicability of cases decided under that section prior to the 1977 amendment, see *§ 124.03*.

[4] Additional Authorities

[a] Voters Who Participated in Efforts to Approve Ballot Measure May Intervene in Action to Determine Validity of Measure

Baroldi v. Denni (1961) 197 Cal. App. 2d 472, 17 Cal. Rptr. 647 , arose out of an action by plaintiffs to enjoin defendant city clerk from filing with the defendant city council certain recall petitions allegedly obtained by fraud and misrepresentation. Permission was granted to allow a city councilman, voter, and signatory to the recall petition to intervene. On appeal by plaintiffs, the court of appeal rejected their claim that intervention was improper. The court concluded that intervener was an elector interested in the success of the very petition whose operation plaintiffs sought to annul. The purpose of intervention is to protect the interest of those who may be affected by the judgment; consequently, the trial court's action was not only proper, but imperative (*197 Cal. App. 2d 472, 478)* .

Counsel should note that although the above case was decided prior to the 1977 amendment of *Code Civ. Proc. § 387*, the current provisions of *Code Civ. Proc. § 387(a)* are virtually identical to those of former Code Civ. Proc. § 387 and thus the holding in this case is probably still applicable to permissive intervention under the amended statute. It is unclear, however, whether or not the facts of this case would support mandatory intervention under *Code Civ. Proc. § 387(b)* [*see § 124.44[3][a]*].

For a further discussion of the possible effect of the 1977 amendment to *Code Civ. Proc. § 387* on the applicability of cases decided under that section prior to the 1977 amendment, see *§ 124.03*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionMotions to InterveneCivil ProcedurePartiesInterventionPermissive InterventionsGovernmentsLocal GovernmentsElectionsGovernmentsState & Territorial GovernmentsElections

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 124 INTERVENTION
PART II. FORMS

12-124 California Points & Authorities § 124.45

§ 124.45 Opposing Motion for Order Granting Leave to File Complaint in Intervention--Permissive or Mandatory Intervention [Code Civ. Proc. § 387(a), (b)]--Application to Intervene Not Timely

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____ _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*],	)	IES IN OPPOSITION TO MOTION FOR ORDER
Intervener.	)	GRANTING LEAVE TO FILE COMPLAINT IN IN-
	)	TERVENTION
	)	[*Code Civ. Proc. § 387*]

_____

_____ [*Name of intervener*] SHOULD NOT BE GRANTED LEAVE TO FILE A COMPLAINT IN INTERVENTION BECAUSE HE/SHE/IT HAS NOT MADE TIMELY APPLICATION TO THE COURT FOR AN ORDER GRANTING LEAVE TO INTERVENE IN THE ACTION BEFORE THE COURT.

A. Timely Application Required. Intervention may be permitted under either permissive or mandatory intervention only on timely application (see *Code Civ. Proc. § 387(a),(b)*).

B. Application Not Made Within Reasonable Time. A right to intervene should be asserted within a reasonable time, and intervener must not be guilty of an unreasonable delay after knowledge of the suit (*Allen v. California Water & Tel. Co. (1947) 31 Cal. 2d 104, 108, 187 P.2d 393*).

[*Optional*] **C. Intervention Must Not Retard or Delay Trial of Action.** Intervention will not be allowed when it would retard the principal suit, require a reopening of the case for further evidence, delay the trial of the action, or change the position of the original parties (*Willett v. Jordan (1934) 1 Cal. 2d 461, 465*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion for an order granting leave to file a complaint in intervention pursuant to *Code Civ. Proc. § 387(a)* or *(b)*, on the ground that the application to intervene was not timely.

In an appropriate case, these points and authorities may be submitted in opposition to a motion for leave to file a complaint in intervention under *Code Civ. Proc. § 387(a)* or *(b)* supported by the points and authorities *set out in §§ 124.30 -124.33*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should indicate when application to the court was made, and argue that, under the circumstances, the application was untimely.

[i] Related Uses

With appropriate modifications, these points and authorities may be used to support a demurrer to the complaint in intervention or a motion to strike the complaint in intervention.

[3] Discussion of Authorities

[a] Application Not Made Within Reasonable Time

Allen v. California Water & Tel. Co. *(1947) 31 Cal. 2d 104, 187 P.2d 393* , arose out of an action by certain property owners for a declaration of rights concerning the extent of their paramount right to water for their respective parcels of land. A municipality, the principal customer of defendant water company, obtained an ex parte order granting leave to intervene in the action after the case had been decided in the trial court, appealed to the Supreme Court, and returned to the trial court for supplemental hearings reserved to the trial court relating to the amount of water defendant could export and various parties' rights to their respective shares of the water in question. The trial court restricted intervener's rights to raise any new issues, limiting it to those issues between the original parties left open by the Supreme Court. Plaintiff moved to strike the complaint in intervention, alleging that intervener had prior knowledge of the suit and its progress. Additionally, the action had received considerable local publicity. The trial court set aside its ex parte order granting leave to intervene and struck the complaint in intervention. Intervener then appealed from the orders denying intervention.

The Supreme Court affirmed the trial court's orders on several grounds, including failure to file a timely complaint in intervention (*31 Cal. 2d 104, 107)* . Intervener had not made application to intervene before trial, as required by statute [relying on former Code Civ. Proc. § 387, amended by Stats. 1977, ch 450]. But aside from the statutory requirement, the Court held, a right to intervene must be asserted within a reasonable time and the intervener must not be guilty of an unreasonable delay after knowledge of the suit. The Court concluded that the intervener municipality had knowledge of the pendency of the suit, the issues involved, and the progress of the action. Moreover, the suit had received much local publicity. Nonetheless, intervener had waited until after the case had been tried, judgment entered, and the case appealed, before intervening upon remand to the trial court (*31 Cal. 2d 104, 108)* .

Counsel should note that the *Allen* case was decided under *Code Civ. Proc. § 387* prior to the 1977 amendments to that section. Prior to 1977, *Code Civ. Proc. § 387* required that an application for leave to intervene be made before trial. In 1977, the statute was amended to delete this requirement. Instead, both *Code Civ. Proc. § 387(a),* governing permissive intervention, and *Code Civ. Proc. § 387(b),* governing mandatory intervention, require that application for leave to intervene be "timely." There appear to be no reported appellate decisions since 1977 that construe the "timely application" requirement. However, because the current provisions of *Code Civ. Proc. § 387(a)* are otherwise virtually identical to those of former Code Civ. Proc. § 387, the rule stated in the *Allen* case is probably still applicable to permissive intervention under the amended statute. It is unclear if the standard set forth in *Allen* would apply to a determination of whether or not an application for leave to intervene as a matter of right under *Code Civ. Proc. § 387(b)* is timely.

For a further discussion of the possible effect of the 1977 amendments to *Code Civ. Proc. § 387* on the applicability of cases decided under that section prior to the 1977 amendment, see *§ 124.03*.

[b] Intervention Must Not Retard or Delay Trial of Action

Willett v. Jordan *(1934) 1 Cal. 2d 461* , involved a proceeding in mandamus against the Secretary of State of California by petitioner, president of the state board of chiropractic examiners, to compel respondent to qualify an initiative measure relating to the practice of chiropractic for a place on the ballot at the next general election. Defendant had refused to place the measure on the ballot after an initial count, as indicated by the certificates of the various county clerks, showed that the petitions were several thousand signatures short of the required number. However, several days later, an amended figure was reported by one of the counties that then placed the total figures over the required number of signatures. Respondent refused to recognize the amended certificates without an order of court directing him to do so, on the ground that the amended certificates were not presented to his office within the time required by the state constitution. Petitioner then brought this suit. A licensed chiropractor filed a petition to intervene, alleging that the error in the count of petition signatures was not inadvertent and that 25 percent of the signatures covered by the amendment to the certificates were not of qualified electors of the county.

The Supreme Court, in granting the peremptory writ, dismissed the petition in intervention. The Court stated that the proposed intervener, by alleging that the total signatures were not legally sufficient to qualify the measure for the ballot on grounds separate from respondent's contentions would force the Court to order a reexamination of the records of the county in which the error in certification of the signatures occurred. This, the Court held, made the application for intervention impermissible, since it is the general rule that an intervention will not be allowed to take place when it would retard the principal suit, require a reopening of the case for further evidence, delay the trial of the action, or change the position of the original parties (*1 Cal. 2d 461, 465)* .

Counsel should note that the *Willet* case was decided under *Code Civ. Proc. § 387* prior to the 1977 amendments to that section. Prior to 1977, *Code Civ. Proc. § 387* required that an application for leave to intervene be made before trial. In 1977, the statute was amended to delete this requirement. In stead, both *Code Civ. Proc. § 387(a),* governing permissive intervention, and *Code Civ. Proc. § 387(b),* governing mandatory intervention, require that application for leave to

intervene be "timely." There appear to be no reported appellate decisions since 1977 that construe the "timely application" requirement. However, because the current provisions of *Code Civ. Proc. § 387(a)* are otherwise virtually identical to those of former Code Civ. Proc. § 387, the rule stated in the *Willet* case--that intervention may be denied if it will cause delay in the trial of the action--is probably still applicable to permissive intervention under the amended statute. However, in *California Physicians' Service v. Superior Court (1980) 102 Cal. App. 3d 91, 162 Cal. Rptr. 266* , the court of appeal suggested that some of the factors mentioned in the *Willet* case may not be relevant to a determination of whether or not an application to intervene under *Code Civ. Proc. § 387(b)* (mandatory intervention) is timely. In *California Physicians' Service*, the court of appeal had to determine whether or not the proposed interveners, who had admitted that their intervention would expand the issues in the case, met the requisites for mandatory intervention. Since the court determined that the interveners did not have the requisite interest in the action, the court did not directly consider the issue of timeliness of the application. The court stated in dictum, however, that the fact that intervention would add to the complexity of the action, create delay, or adversely affect the original parties would be of no moment when mandatory intervention is sought under *Code Civ. Proc. § 387(b)* (*102 Cal. App. 3d 91, 96)* . On the other hand, another court of appeal, in denying mandatory intervention, cited great delay and the necessity of starting new proceedings in the trial court as factors justifying the denial of mandatory intervention [*see Coalition for Fair Rent v. Abdelnour (1980) 107 Cal. App. 3d 97, 115-116* (distinguishing *Bustop v. Superior Court (1977) 69 Cal. App. 3d 66, 137 Cal. Rptr. 793*)] Thus, it is uncertain whether or not delay in the proceedings is a proper consideration when determining the timeliness of a motion for leave to intervene under *Code Civ. Proc. § 387(b)*.

For a further discussion of the possible effect of the 1977 amendments to *Code Civ. Proc. § 387* on the applicability of cases decided under that section prior to the 1977 amendments, see *§ 124.03*.

[4] Additional Authorities

[a] Timely Application Required

In *Andersen v. Barton Memorial Hospital, Inc. (1985) 166 Cal. App. 3d 678* , the court of appeal held that a decedent's heir could not intervene in a wrongful death action alleging medical negligence that had been timely filed by the remaining heirs. The intervenor sought to file her complaint in intervention after the period of limitations of *Code Civ. Proc. § 340.5*. The complaint tendered new claims and issues and, therefore, asserted a new cause of action (*166 Cal. App. 3d 678, 685)* . A complaint in intervention is subject to an affirmative defense based on the applicable statute of limitations and, if it asserts a new cause of action, the application for leave to amend must be filed within the pertinent limitations period (*166 Cal. App. 3d 678, 682)* .

[b] Application Not Made Within Reasonable Time

In *Northern Cal. Psychiatric Society v. City of Berkeley (1986) 178 Cal. App. 3d 90, 223 Cal. Rptr. 609* , psychiatric associations and an individual psychiatrist and taxpayer brought an action against a city for declaratory and injunctive relief concerning a city ordinance banning the use of electroshock treatment on any person within the city. The court of appeal upheld the trial court's refusal to allow intervention by a coalition opposed to electroshock because the coalition had been involved in the lawsuit from the outset (having filed an amicus brief before the summary judgment motion was filed), yet did not attempt to intervene until after plaintiff's motion for summary judgment had been fully argued (*178 Cal. App. 3d 90, 109)* .

[c] Intervention Must Not Retard or Delay Trial of Action

In *Hibernia etc. Society v. Churchill (1900) 128 Cal. 633, 61 P. 278* , defendant administrator sought to vacate a default judgment against her that was obtained by plaintiff on a note and mortgage executed by decedent. Intervener, an heir, obtained an ex parte order to file a complaint in intervention, which sought to dismiss the complaint. On motion of plaintiff, the complaint in intervention was dismissed. The Supreme Court upheld the dismissal, holding, among other things, that default was a trial and a final determination of the matters in issue. Consequently, to allow intervener to

reopen the case was a violation of the general rule that intervention will not be allowed when it would retard the principal suit, require a reopening of the case for further evidence, delay the trial of the action, or change the position of the original parties (*128 Cal. 633, 636)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionMotions to InterveneCivil ProcedurePartiesInterventionPermissive InterventionsCivil ProcedurePartiesInterventionRight to InterveneCivil ProcedurePartiesInterventionTimeliness

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12-124 California Points & Authorities § 124.46

§ 124.46 Opposing Motion for Order Granting Leave to File Complaint in Intervention--Permissive or Mandatory Intervention [Code Civ. Proc. § 387(a), (b)]--Intervener's Interests Adequately Represented by Existing Parties

[1] FORM

[*Caption. See § 124.45.*]

_____ [*Name of intervener*] SHOULD NOT BE GRANTED LEAVE TO FILE A COMPLAINT IN INTERVENTION BECAUSE HIS/HER/ITS INTERESTS ARE ALREADY ADEQUATELY REPRESENTED IN THE ACTION BY _____ [PLAINTIFF *or* DEFENDANT].

Intervener's Interests Adequately Represented by Existing Parties. Denial of intervention is proper when the proposed intervener's interests in the action are already being adequately represented by existing parties (see *Code Civ. Proc. § 387(b)*; *Malibu v. California Coastal Comm'n (2005) 128 Cal. App. 4th 897, 906, 27 Cal. Rptr. 3d 501* ; *Coalition for Fair Rent v. Abdelnour (1980) 107 Cal. App. 3d 97, 115, 165 Cal. Rptr. 685* ; *Hausmann v. Farmers Ins. Exchange (1963) 213 Cal. App. 2d 611, 616-617, 29 Cal. Rptr. 75*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion for an order for leave to file a complaint in intervention on the ground that the proposed intervener's interests are already being adequately represented by an existing party.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion of the relevant facts concerning the interests of the proposed intervener and demonstrate that those interests are already being adequately represented by one of the original parties to the action.

In an appropriate case, these points and authorities may be submitted in opposition to a motion for leave to file a complaint in intervention under *Code Civ. Proc. § 387(a)* or *(b)* supported by the points and authorities *set out in §§ 124.30 -124.32*.

[b] Related Uses

With appropriate modifications, these points and authorities may be used to support a demurrer to the complaint in intervention or a motion to strike the complaint in intervention.

[3] Discussion of Authorities

[a] Intervener's Interests Adequately Represented by Existing Parties

In ***Malibu v. California Coastal Comm'n*** *(2005) 128 Cal. App. 4th 897, 27 Cal. Rptr. 3d 501* , a landowner's residence was situated on four contiguous beachfront lots, one of which was immediately to the west of the neighbors' house. The owner signed an offer to dedicate (OTD) easements that would have given the public vertical and lateral access to the shoreline. However, he subsequently claimed the OTDs were invalid. The neighbors asserted that they had satisfied the requirements of *Code Civ. Proc. § 387(b)* for mandatory intervention and alternatively that they should be granted permissive intervention under § 387(a).

The instant court, mindful that *Code Civ. Proc. § 387* was to be liberally construed to permit intervention, held that the trial court did not abuse its discretion in denying intervention. The neighbors and the executive had identical interests in preventing members of the public from accessing areas adjacent to their properties. The neighbors could only speculate that the public would trespass and litter on the portion of the beach that the neighbors owned, thereby affecting their quiet enjoyment of their property. The owner had been an able advocate of his and the neighbors' position in attempting to prevent public use of the easements (*128 Cal. App. 4th 897, 906)* .

The facts and procedural background of ***Coalition for Fair Rent v. Abdelnour*** *(1980) 107 Cal. App. 3d 97, 165 Cal. Rptr. 685* , are discussed in *§ 124.50[3][b]*.

In *Coalition for Fair Rent*, interveners, an association of apartment owners, and several individual apartment owners sought to intervene on behalf of the defendant city clerk in an action brought by plaintiffs to compel defendant to accept and count a supplemental petition of signatures necessary to qualify a rent control measure for the next general election. Interveners alleged, among other things, that defendant did not adequately represent its interests in the matter.

The court of appeal affirmed the trial court's denial of intervention and, addressing itself to the issue of inadequacy of representation, found no difference between the positions of defendant and interveners. Moreover, the court said, interveners' insinuations that because of budgetary and time constraints the quality of defendants' legal representation was inferior to that commanded by interveners, even if true, were not relevant under *Code Civ. Proc. § 387(b)*. The

question of law was identity of interest, and the question of bias for or against a specific ballot measure in issue would not affect the general question of administration of the initiative procedure (*107 Cal. App. 3d 97, 115)* .

The facts and procedural background of ***Hausmann v. Farmers Ins. Exchange*** *(1963) 213 Cal. App. 2d 611, 29 Cal. Rptr. 75* , are discussed in *§ 124.48[3][a]*. In *Hausmann*, the court stated that intervention would be properly denied in an action when the intervener's interests are already being adequately represented in that action. Since intervener, an insurer, did not claim any collusion between the original parties that would deprive insurer of its share of any judgment recovered, nor did it suggest that its interests would not be competently represented by the insured, the court suggested that on retrial the trial court take this into consideration in determining whether or not intervention should be permitted, if requested (*213 Cal. App. 2d 611, 616, 617)* .

Counsel should note that although the *Hausmann* case was decided under *Code Civ. Proc. § 387* prior to the 1977 amendments to that section, the current provisions of *Code Civ. Proc. § 387(a)* are virtually identical to those of former Code Civ. Proc. § 387 and thus the statement in this case that intervention may be denied if the intervener's interest is adequately represented by the original parties is probably still applicable to permissive intervention under the statute, as amended. With regard to mandatory intervention, *Code Civ. Proc. § 387(b)* expressly provides that there is no right to intervene if the proposed intervener's interest is adequately represented by existing parties.

For a further discussion of the possible effect of the 1977 amendments to *Code Civ. Proc. § 387* on the applicability of cases decided under that section prior to the 1977 amendments, see *§ 124.03*.

[4] Additional Authorities

[a] Intervener's Interest Adequately Represented by Existing Parties

Green v. Community Redevelopment Agency (1979) 96 Cal. App. 3d 491, 158 Cal. Rptr. 126 , arose out of an action by plaintiffs against a city redevelopment agency seeking invalidation of a district redevelopment plan. A special summons required by *Code Civ. Proc. §§ 861.1* and *863* was published, advising "all persons interested" to appear and answer within a certain date. Several months after the last day specified for a third party to join in the action, an intervener filed a notice of motion to intervene as a matter of right. The trial court denied the motion as untimely. The court of appeal affirmed, stating in dictum that even if intervener had sufficient interest under *Code Civ. Proc. § 387(b)*, and even if *Code Civ. Proc. §§ 860-870* did not provide for an exclusive remedy for intervention in matters involving the validity of an action by a public agency, he had not brought himself sufficiently within the provisions of *Code Civ. Proc. § 387(b)*. Intervener, said the court, sought the same relief as plaintiffs, and many of his claims and legal arguments were also the same. Therefore, concluded the court, intervener's interests were adequately represented by existing parties (*96 Cal. App. 3d 491, 501)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionMotions to InterveneCivil ProcedurePartiesInterventionPermissive InterventionsCivil ProcedurePartiesInterventionRight to Intervene

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12-124 California Points & Authorities § 124.47

§ 124.47 Opposing Motion for Order Granting Leave to File Complaint in Intervention--Permissive Intervention [Code Civ. Proc. § 387(a)]--Intervention Enlarges Scope of Action

[1] FORM

[*Caption. See § 124.45.*]

_____ [*Name of intervener*] SHOULD NOT BE GRANTED LEAVE TO FILE HIS/HER/ITS COMPLAINT IN INTERVENTION, BECAUSE IT ENLARGES THE SCOPE OF THE ACTION BY _____ [RAISING NEW ISSUES *and/or* ENLARGING THE SCOPE OF THE REMEDY SOUGHT BY PLAINTIFF].

A. Intervention Must Not Enlarge Scope of Action. Intervention should not be permitted when the complaint in intervention enlarges the scope of the action (see *Lindsay-Strathmore Irr. Dist. v. Wutchumna Water Co. (1931) 111 Cal. App 707, 712, 296 P 942*).

[*Optional*] **B. Intervention Must Not Raise New Issues.** A person seeking to file a complaint in intervention must ordinarily show an interest under the existing pleadings or issues and will not be allowed to intervene on a claim that enlarges the issues and changes the nature of the main proceeding (*Muller v. Robinson (1959) 174 Cal. App. 2d 511, 515, 345 P.2d 25*).

[*Optional*] **C. Intervention Must Not Enlarge Scope of Remedy Sought by Plaintiff.** An intervener may not broaden the scope of the procedure or remedy sought by the original plaintiff (*City of San Diego v. Otay Municipal Water Dist. (1962) 200 Cal. App. 2d 672, 680, 681, 19 Cal. Rptr. 595*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion for an order granting leave to file a complaint in intervention pursuant to *Code Civ. Proc. § 387(a)* (governing permissive intervention) when the opposing party contends that intervention will enlarge the scope of the action. Optional Paragraph B may be included when the opposing party contends that intervention will enlarge the scope of the action by raising new legal or factual issues. Optional Paragraph C may be included when the opposing party contends that intervention will enlarge the scope of the remedy sought by plaintiff.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion of the relevant facts concerning the intervener's complaint in intervention and show that it seeks to enlarge the scope of the action by raising new issues or to broaden the scope of the procedure or remedy available to plaintiff.

In an appropriate case, these points and authorities may be submitted in opposition to a motion for leave to file a complaint in intervention under *Code Civ. Proc. § 387(a)* supported by the points and authorities *set out in §§ 124.30, 124.34*.

[i] Related Uses

With appropriate modifications, these points and authorities may be used to support a demurrer to the complaint in intervention or a motion to strike the complaint in intervention.

[3] Discussion of Authorities

[a] Intervention Must Not Enlarge Scope of Action

In ***Lindsay-Strathmore Irr. Dist. v. Wutchumna Water Co.*** *(1931) 111 Cal. App 707, 296 P 942* , petitioner sought a writ of mandate in superior court to compel the delivery of water proportionate to its share of stock in the respondent water company. Petitioner alleged that it had constructed a side ditch for the purpose of receiving its share of the water flowing from the Wutchumna Ditch and its tributary waterways, but that the water company refused to deliver the water. Certain third-party water users sought, by leave of court, to file a complaint in intervention, claiming that they were owners of land that were riparian to one of the tributary waterways running parallel with the ditch and whose land was situated below the point where the constructed side ditch and the ditch flowed into the main canal. Interveners further claimed that they required the full flow of water of the particular waterway that their lands were riparian to, including additional water provided through seepage from the main canal. Petitioner, interveners alleged, intended to obtain its claimed water out of the Wutchumna Ditch at a point above petitioner's land. If it were permitted to do so, interveners claimed, they would be deprived of their long-standing rights to the full flow of water of the tributary waterway for irrigation purposes. Interveners requested the court to enjoin petitioner from taking any water from the ditch above their lands. The trial court denied the motion to intervene, and interveners appealed.

The court of appeal affirmed the judgment of the trial court, holding that the general rule that interveners are not to be permitted to enlarge the scope of the action was applicable. Interveners, the court found, had no direct interest in the

action by petitioner who sought to enforce its rights as a shareholder in the water company. Nor did they attempt to attach petitioner's right to receive the benefits it sought. Therefore, concluded the court, the proposed complaint in intervention, if allowed to be filed, would have enlarged the scope of the action by adding the general issue of title to the water to the domestic issue of the right of the shareholder in a corporation (*111 Cal. App 707, 712)* .

Counsel should note that although the *Lindsay-Strathmore* case was decided under *Code Civ. Proc. § 387* prior to the 1977 amendments to that section, the current provisions of *Code Civ. Proc. § 387(a)* are virtually identical to those of former Code Civ. Proc. § 387 and thus the rule stated in this case that intervention must not enlarge the scope of the action is probably still applicable to permissive intervention under the statute, as amended. However, in one recent case, the court suggested that although the rule that intervention must not enlarge the scope of the action is still applicable to permissive intervention under *Code Civ. Proc. § 387(a)*, that rule may not apply to mandatory intervention under *Code Civ. Proc. § 387(b)*. In *California Physicians' Service v. Superior Court (1980) 102 Cal. App. 3d 91, 162 Cal. Rptr. 266* , the court of appeal noted that prior to the 1977 amendments, case law applying *Code Civ. Proc. § 387* had developed the principle that intervention was largely in the discretion of the trial court, to be exercised according to the facts of the particular case. The court further noted that reported decisions that deal with the exercise of that discretion further refined the principle to provide that the issues must not be enlarged by the intervention (*102 Cal. App. 3d 91, 95)* . The court observed that the effect of the 1977 amendments to *Code Civ. Proc. § 387* was to retain a permissive intervention couched in language almost identical to that of the former statute and to create a right to intervene under certain circumstances. The court stated that since the intervener in that case admitted that its intervention in the case would expand the issues in litigation and impinge on the right of the original parties to litigate the matter in their own fashion, the intervener would be hard put to argue that the trial court was guilty of an abuse of discretion in denying permissive intervention. Thus, the court stated, the issue was whether or not intervener met the qualifications for mandatory intervention. Since the court concluded that intervener lacked the requisite interest in the litigation, the court held that mandatory intervention was not proper (*102 Cal. App. 3d 91, 96-98)* . The court stated in dictum, however, that if intervener otherwise met the qualifications for mandatory intervention, the fact that the intervention would add to the complexity of the action, create delay, or adversely affect the original parties would be of no moment (*102 Cal. App. 3d 91, 96)* . Thus, it is unclear whether or not the fact that intervention would enlarge the scope of the action is relevant to a determination of whether or not mandatory intervention under *Code Civ. Proc. § 387(b)* is proper.

For a further discussion of the possible effect of the 1977 amendments to *Code Civ. Proc. § 387* on the applicability of cases decided under that section prior to the 1977 amendments, see *§ 124.03*.

[b] Intervention Must Not Raise New Issues

Muller v. Robinson *(1959) 174 Cal. App. 2d 511, 345 P.2d 25* , arose out of an action by plaintiff to quiet title in certain property against several defendants. Intervener, plaintiff's former husband, sought to be joined as a party defendant in the action, to consolidate his action against plaintiff in another action with the present action, and to intervene, claiming that he was the owner of a 1/6 undivided equitable interest in the real property that was the subject of the action, and that such interest was stolen from him by plaintiff and formed the basis of an illegal default judgment against him. Intervener requested in his complaint in intervention a cancellation of the deed procured by plaintiff and annulment of the judgment granting her the deed. The trial court denied all of intervener's motions, and intervener appealed from the denial.

The court of appeal affirmed the trial court's denial of leave to intervene, as well as the other motions. As to intervention, the court held that a person seeking intervention must ordinarily show an interest under the existing pleadings and issues, and will not be allowed to come in on a claim that enlarges the issues and changes the nature of the main proceeding. The court found that under previous proceedings involving plaintiff and intervener, plaintiff's decree quieting title in the property in question remained in full force and effect. Consequently, the court concluded, the trial court was amply justified in denying intervention, since intervener did not have an interest in the matter in litigation of a direct and immediate character. To have permitted intervention under the circumstances would have greatly

enlarged the issues (*174 Cal. App. 2d 511, 515, 516)* .

Counsel should note that although the *Muller* case was decided under *Code Civ. Proc. § 387* prior to the 1977 amendments to that section, the current provisions of *Code Civ. Proc. § 387(a)* are virtually identical to those of former Code Civ. Proc. § 387 and thus the holding in this case is probably still applicable to permissive intervention under the statute, as amended. For a discussion of whether or not the rule that intervention must not enlarge the issues in the action is applicable when mandatory intervention is sought under *Code Civ. Proc. § 387(b)*, see *§ 124.47[3][a]*.

For a further discussion of the possible effect of the 1977 amendments to *Code Civ. Proc. § 387* on the applicability of cases decided under that section prior to the 1977 amendments, see *§ 124.03*.

[c] Intervention Must Not Enlarge Scope of Remedy Sought by Plaintiff

City of San Diego v. Otay Municipal Water Dist. *(1962) 200 Cal. App. 2d 672, 19 Cal. Rptr. 595* , involved an action by plaintiff city for declaratory relief to enjoin defendant water district from operating within the city. Three property owners sought to intervene to declare invalid earlier proceedings taken by defendant in creating an improvement district that included their property. Plaintiff claimed that under the state constitution, a municipality had the right to establish and own water systems, and that under plaintiff's charter, the water district could not operate any water system for the use of the city's residents without plaintiff's consent. The improvement district established by defendants included land subsequently annexed by plaintiff. This land also included the property of interveners. Interveners claimed that the proceedings taken to form the improvement district did not conform to the requirements of the applicable law and that the provisions establishing the district denied them due process of law. The trial court granted the injunction, but made no rulings on the complaint in intervention. The court denied interveners' motion for a new trial. Both defendant and interveners appealed.

The court of appeal, in modifying the judgment concerning the extent of the injunction granted, affirmed the judgment of the trial court denying intervener's motion for a new trial. Addressing itself to the issue of intervention, the court held that proceedings by plaintiff were restrictive in nature, seeking to enjoin defendants from taking certain action, and based on provisions of its charter, and that therefore interveners were not entitled to intervene. The court said that to have allowed intervention would have broadened the scope of the remedy sought by plaintiff, and under the general rule, such intervention is not permitted. The court stated that the action commenced by plaintiff city was limited to a consideration of the effect of the city's charter provision on the authority of the water district to operate a water system within the city and to furnish water to inhabitants of the city. The remedy sought by plaintiff was to enjoin defendant water improvement district from operating within the city and from furnishing water to the city's inhabitants. Interveners' remedy was, in effect, an annulment of the improvement district. Interveners, by their complaint in intervention, attacked the district's validity on grounds that it had failed to comply with the law under which it purportedly was incorporated, and that the law itself was unconstitutional (*200 Cal. App. 2d 672, 680-681)* .

Counsel should note that although the *Otay* case was decided under *Code Civ. Proc. § 387* prior to the 1977 amendments to that section, the current provisions of *Code Civ. Proc. § 387(a)* are virtually identical to those of former Code Civ. Proc. § 387 and thus the holding in this case that intervention must not broaden the scope of the remedy sought by plaintiff is probably still applicable to permissive intervention under the statute, as amended. For a discussion of whether or not the rule applied in this case is applicable when mandatory intervention is sought under *Code Civ. Proc. § 387(b)*, see *§ 124.47[3][a]*.

For a further discussion of the possible effect of the 1977 amendments to *Code Civ. Proc. § 387* on the applicability of cases decided under that section prior to the 1977 amendments, see *§ 124.03*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedureParties InterventionMotions to InterveneCivil ProcedureParties InterventionPermissive Interventions

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 124 INTERVENTION
PART II. FORMS

12-124 California Points & Authorities § 124.48

§ 124.48 Opposing Motion for Order Granting Leave to File Complaint in Intervention--Permissive Intervention [Code Civ. Proc. § 387(a)]--Intervention Would Prejudice Original Parties

[1] FORM

[*Caption. See § 124.45.*]

_____ [*Name of intervener*] SHOULD NOT BE GRANTED LEAVE TO FILE HIS/HER/ITS COMPLAINT IN INTERVENTION, BECAUSE INTERVENTION WOULD UNDULY PREJUDICE THE RIGHTS OF THE ORIGINAL PARTIES.

Intervention Would Unduly Prejudice Rights of Original Parties. Intervention may be denied if the objectives of the statute, namely, the protection of the interests of those who may be affected by the judgment, are outweighed by the rights of the original parties to conduct their lawsuit on their own terms. Thus, intervention may be denied when it will unduly delay or prejudice the rights of the original parties (see *Hausmann v. Farmers Ins. Exchange (1963) 213 Cal. App. 2d 611, 615-616, 29 Cal. Rptr. 75*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion for an order granting leave to file a complaint in intervention pursuant to *Code Civ. Proc. § 387(a)* (governing permissive intervention) when the opposing party contends that intervention would unduly prejudice the rights of existing parties.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should include discussion of the relevant facts showing how intervention would unduly prejudice the rights of the original parties.

In an appropriate case, these points and authorities may be submitted in opposition to a motion for leave to file a complaint in intervention under *Code Civ. Proc. § 387(a)* supported by the points and authorities *set out in § 124.30*.

[i] Related Uses

With appropriate modifications, these points and authorities may be used to support a demurrer to the complaint in intervention or a motion to strike the complaint in intervention.

[3] Discussion of Authorities

[a] Intervention Would Unduly Prejudice Rights of Original Parties

In ***Hausmann v. Farmers Ins. Exchange*** *(1963) 213 Cal. App. 2d 611, 29 Cal. Rptr. 75* , plaintiff filed an action against certain defendants for personal injuries to himself and his family as well as for damages to his automobile. The trial court granted ex parte leave to plaintiff's insurance company to intervene. Intervener justified its proposed intervention on the ground that it was a partial subrogee of plaintiff, since as insurer of plaintiff it had already expended certain sums for repair of the damaged automobile. Plaintiff demurred to the complaint in intervention on the ground that no cause of action was stated, presumably because it did not show that intervener was a partial subrogee at the time plaintiff filed the action. The trial court sustained the demurrer without leave to amend. Intervener appealed from the judgment of dismissal that followed.

The court of appeal reversed the judgment of the trial court on the ground that intervener should have been given the opportunity to amend its complaint in intervention to satisfy the requirement that intervener's interest had to have been in the matter in litigation at the time the suit was filed. Addressing itself to the issue of prejudice to the original parties by the intervention, the court of appeal stated that it was well settled that intervention may be denied if the objectives of the statute governing intervention, namely, the protection of the interests of those who may be affected by the judgment, are outweighed by the rights of the original parties to conduct their lawsuit on their own terms (*213 Cal. App. 2d 611, 615)* . The court observed that intervention would be properly denied when it would unduly delay or prejudice the rights of the original parties (*213 Cal. App. 2d 611, 616)* .

Counsel should note that although the *Hausmann* case was decided under *Code Civ. Proc. § 387* prior to the 1977 amendments to that section, the current provisions of *Code Civ. Proc. § 387(a)* are virtually identical to those of former Code Civ. Proc. § 387 and thus the rule stated in this case that intervention may be denied if it will prejudice the rights of the original parties to the action is probably still applicable to permissive intervention under the statute, as amended. However, in one recent case, the court suggested that although the rule that intervention must not prejudice the rights of the original parties is still applicable to permissive intervention under *Code Civ. Proc. § 387(a)*, that rule may not apply to mandatory intervention under *Code Civ. Proc. § 387(b)*. In *California Physicians' Service v. Superior Court (1980) 102 Cal. App. 3d 91, 162 Cal. Rptr. 266* , the court of appeal noted that prior to the 1977 amendments, case law applying *Code Civ. Proc. § 387* had developed the principle that intervention was largely in the discretion of the trial court, to be exercised according to the facts of the particular case. The court further noted that reported decisions that

deal with the exercise of that discretion further refined the principle to provide that the reasons for intervention must outweigh the rights of the original parties to litigate in their own way (*102 Cal. App. 3d 91, 95)* . The court observed that the effect of the 1977 amendments to *Code Civ. Proc. § 387* was to retain a permissive intervention couched in language almost identical to that of the former statute and to create a right to intervene under certain circumstances. The court stated that since the intervener in that case admitted that its intervention in the case would expand the issues in litigation and impinge on the right of the original parties to litigate the matter in their own fashion, the intervener would be hard put to argue that the trial court was guilty of an abuse of discretion in denying permissive intervention. Thus, the court stated, the issue was whether or not intervener met the qualifications for mandatory intervention. Since the court concluded that intervener lacked the requisite interest in the litigation, the court held that mandatory intervention was not proper (*102 Cal. App. 3d 91, 96-98)* . The court stated in dictum, however, that if intervener otherwise met the qualifications for mandatory intervention, the fact that the intervention would add to the complexity of the action, create delay, or adversely affect the original parties would be of no moment (*102 Cal. App. 3d 91, 96)* . Thus, it is unclear if the fact that intervention would prejudice the rights of the original parties is relevant to a determination of whether or not mandatory intervention under *Code Civ. Proc. § 387(b)* is proper.

For a further discussion of the possible effect of the 1977 amendments to *Code Civ. Proc. § 387* on the applicability of cases decided under that section prior to the 1977 amendments, see *§ 124.03*.

[4] Additional Authorities

[a] Intervention Would Unduly Prejudice Rights of Original Parties

In *Kuperstein v. Superior Court (1988) 204 Cal. App. 3d 598, 251 Cal. Rptr. 385* , petitioner sought a writ of mandate to review a trial court order permitting his insurer to intervene in a products liability action brought against petitioner. The insurer disputed whether its business policy covered the claim against petitioner and, in moving to intervene, sought a declaration of rights and duties under the policy. Holding that the trial court abused its discretion in permitting intervention, the court of appeal set out the three factors to be considered in deciding whether permissive intervention is proper: (1) the intervenor must have a direct interest in the lawsuit, (2) the intervenor must not enlarge the issues raised by the original parties, and (3) the intervenor must not tread on the rights of the original parties to conduct their own lawsuit (*204 Cal. App. 3d 598, 600)* . The court found that none of the factors were satisfied. In its discussion of the rights of the original parties, the court observed that there were questions of fact and law common to the main complaint and the complaint in intervention. However, the court found that the insurer's interest was in having no connection between the product and the place of business covered by the policy, while the interest of the insured, who wanted the insurance to cover any judgment against him, was just the opposite. Whenever an insurer disputes coverage after a claim is made, the court concluded, the insurer and insured do not share an interest in having factual issues resolved the same way. Therefore, the court concluded, intervention is improper because it necessarily injects the possibility the defendants will not be able to conduct the lawsuit on their own terms (*204 Cal. App. 3d 598, 600-601)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPartiesInterventionMotions to InterveneCivil ProceduresPartiesInterventionPermissive Interventions

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Volume 12 Chapters 120-129 INSURANCE---to---INTERVENTION
CHAPTER 124 INTERVENTION
PART II. FORMS

12-124 California Points & Authorities § 124.49

§ 124.49 Opposing Motion for Order Granting Leave to File Complaint in Intervention--Permissive Intervention [Code Civ. Proc. § 387(a)]--Intervener Has Only Consequential Rather Than Direct Interest in Matter in Litigation

[1] FORM

[*Caption. See § 124.45.*]

_____ [*Name of intervener*] SHOULD NOT BE GRANTED LEAVE TO FILE A COMPLAINT IN INTERVENTION, BECAUSE HE/SHE/IT HAS ONLY A CONSEQUENTIAL INTEREST IN THE MATTER IN LITIGATION AND WILL NEITHER GAIN NOR LOSE BY THE DIRECT LEGAL OPERATION AND EFFECT OF THE JUDGMENT TO BE RENDERED IN THE ACTION BEFORE THE COURT.

A. Proposed Intervener Must Have Interest in Matter in Litigation. A person may not intervene under *Section 387(a) of the Code of Civil Procedure* unless he or she has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both (*see Code Civ. Proc. § 387(a)*).

B. Intervener Has Only Consequential Rather Than Direct Interest in Matter in Litigation. A third person having an interest in the outcome of the litigation in a pending action but who would not be directly affected by the legal operation and effect of any judgment in that case does not have a direct interest but a mere consequential interest in the matter in litigation and therefore may not intervene (*see Royal Indem. Co. v. United Enterprises, Inc. (2008) 162 Cal. App. 4th 194, 212, 75 Cal. Rptr. 3d 481* ; *California Assn. of Professional Scientists v. Schwarzenegger (2006) 137 Cal. App. 4th 371, 381* ; *City and County of San Francisco v. California (2005) 128 Cal. App. 4th 1030, 1038-1039, 27 Cal. Rptr. 3d 722* ; *Jersey Maid Milk Products Co. v. Brock (1939) 13 Cal. 2d 661, 664-665, 91 P.2d 599* ; *Mary R v. B & R Corp. (1983) 149 Cal. App. 3d 308, 314-315, 196 Cal. Rptr. 871* ; *Socialist Workers etc. Committee v. Brown (1975) 53 Cal. App. 3d 879, 891, 125 Cal. Rptr. 915*).

[*Optional*] **C. Intervener Does Not Have Interest in Matter in Litigation in Suit as Originally Brought.** The interest that a third party must have in order to intervene in a pending action between other parties must be in the matter

in litigation in the suit as originally brought (*see Jersey Maid Milk Products Co. v. Brock (1939) 13 Cal. 2d 661, 664-665, 91 P.2d 599* ; *People v. Brophy (1942) 49 Cal. App. 2d 15, 34, 120 P.2d 946*).

[*Optional*] **D. Precedential Effect of Judgment on Persons Similarly Situated.** The effect of a judgment concerning judicial interpretation of legislation may serve as a precedent in a subsequent action against persons similarly situated and may give them an interest in the action; however, that interest is not direct but merely consequential (*Jersey Maid Milk Products Co. v. Brock (1939) 13 Cal. 2d 661, 664, 91 P.2d 599*).

[*Optional*] **E. Unsecured Creditor.** A third person seeking to intervene in a pending action under *Section 387 of the Code of Civil Procedure* must have an interest in the matter in litigation, or in the success of either of the parties, that is of a direct and immediate character greater than that possessed by a simple creditor of a party (*see Olson v. Hopkins (1969) 269 Cal. App. 2d 638, 641-642, 75 Cal. Rptr. 33*).

[*Optional*] **F. Court-Awarded Attorney's Fees.** An attorney may not intervene in an action in which the attorney was awarded attorney's fees for services rendered in order to settle a fee dispute, even when in the trial court's discretion the fees are made payable to the attorney, since these fees are granted to the client and not to the attorney, and the awarding of the fees do not give an attorney an interest in the matter in litigation, or in success of either of the parties, or an interest against both that would permit him or her to intervene (*see Meadow v. Superior Court (1963) 59 Cal. 2d 610, 615-616, 30 Cal. Rptr. 824, 381 P.2d 648*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion for an order granting leave to file a complaint in intervention pursuant to *Code Civ. Proc. § 387(a)* (governing permissive intervention) on the ground that the proposed intervener has only a consequential interest in the matter in litigation. Optional Paragraph C may be included when the proposed intervener does not have a direct interest in the action as originally brought. Optional Paragraph D may be included when the interest asserted by the proposed intervener is merely in avoiding an unfavorable legal precedent, optional Paragraph E may be included if the proposed intervener is merely a simple, unsecured creditor of one of the parties, and optional Paragraph F may be included when an attorney seeks to intervene in his or her client's action to settle a fee dispute.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion of the relevant facts concerning the proposed intervener's interest in the action and show that he or she would neither gain nor lose by the direct effect and legal operation of any judgment to be rendered in the action before the court.

In an appropriate case, these points and authorities may be submitted in opposition to a motion for leave to file a

complaint in intervention under *Code Civ. Proc. § 387(a)* supported by the points and authorities *set out in §§ 124.30, 124.35 -124.44*.

[b] Related Uses

With appropriate modifications, these points and authorities may be used to support a demurrer to the complaint in intervention or a motion to strike the complaint in intervention.

[3] Discussion of Authorities

[a] Intervener Has Only Consequential Rather Than Direct Interest in Matter in Litigation

Royal Indem. Co. v. United Enterprises, Inc. *(2008) 162 Cal. App. 4th 194, 75 Cal. Rptr. 3d 481* was an insurance coverage action in which plaintiff insurer sued its insured for declaratory relief that it should not be obligated to provide coverage under a policy from the 1960's, purchased by defendant for its business that was operated on land it formerly owned. Defendant had operated a trap and skeet shooting range on the property, and the property became contaminated. The current owner of the property, Flat Rock Land Co., filed a motion to intervene in the action, alleging it had a direct and immediate interest in the litigation within the meaning of *Code Civ. Proc. § 387(a)* because coverage issues determined in that action would affect its rights to pursue the insurer as a judgment creditor of defendant. Flat Rock had also sued the former owner of the property and other parties in federal and state courts to recover the costs of the environmental clean-up. The trial court denied Flat Rock's motion to intervene, and Flat Rock appealed, arguing it had a legitimate interest in making coverage arguments that might affect its chances to recover damages from defendant United.

The court of appeals affirmed, holding that Flat Rock had not shown it met the criteria for intervention under *Code Civ. Proc. § 387(a)*. The court reviewed the criteria for permissive intervention: (1) the proper procedures have been followed; (2) the nonparty has a direct and immediate interest in the action; (3) the intervention will not enlarge the issues in the litigation; and (4) the reasons for the intervention outweigh any opposition by the parties presently in the action. The court noted that a third party who is not in privity of contract with an insurer would ordinarily lack standing to sue the insurer to resolve coverage questions. The primary exception to this rule is where the third party is a judgment creditor under *Ins. Code § 11580*. Because Flat Rock was not an insured under the policy, it lacked an adequately direct interest to obtain intervention in the coverage action. It was not a judgment creditor, nor was it an assignee of the defendant insured's rights (*162 Cal. App. 4th 194, 212)* .

In ***California Assn. of Professional Scientists v. Schwarzenegger*** *(2006) 137 Cal. App. 4th 371* , the court considered whether the California Public Employment Relations Board had a sufficiently direct interest as to warrant intervention into a proceeding brought by the California Association of Professional Scientists (CAPS) challenging the creation of an alternate retirement program that applies to certain new state employees during their first two years of employment; CAPS challenged the law as it applies to new employees in the bargaining unit that CAPS represents, contending the law impermissibly impairs the pension rights of those employees as secured by the collective bargaining agreement between CAPS and the state. While the case was under submission to the trial court, the Public Employment Relations Board (the Board) sought to intervene, claiming it had exclusive jurisdiction over the matter. The trial court denied the Board's application, and the Board challenges that ruling on appeal.

The appellate court noted that the interest the Board sought to assert was its interest in protecting its own exclusive initial jurisdiction over alleged violations of the Dills Act, which accords collective bargaining rights to state civil service employees; indeed, the only forum to pursue a cause of action for violation of the statutory rights conferred in the Dills Act is before the Board. Here, the Board contended that CAPS's complaint alleges conduct by the state that arguably violated two provisions of the Dills Act. However, the court found that the Board's claim that it had a direct and immediate interest in this case because it has the exclusive initial jurisdiction to act on alleged violations of the

Dills Act misapprehends the gravamen of CAPS's complaint, which was not that the state committed an unfair labor practice in violation of the Dills Act by unilaterally changing employee retirement provisions without notice to CAPS (*137 Cal. App. 4th 371, 381)* . Rather, the gravamen of CAPS's complaint is that the new law, as applied to employees in CAPS's bargaining unit, impermissibly conflicts with the terms of the agreement and therefore violates the state and federal constitutional prohibitions against impairing the obligations of contracts. Because that issue is not within the scope of the Board's exclusive jurisdiction, it has no direct or immediate interest in this action, and thus was properly denied the opportunity to intervene CAPS (*137 Cal. App. 4th 371, 382)* .

In ***City and County of San Francisco v. California*** *(2005) 128 Cal. App. 4th 1030, 27 Cal. Rptr. 3d 722* , two consolidated cases challenged the applicability and constitutionality of laws defining marriage in California as between a man and a woman [*Fam. Code §§ 300, 301, 308.5*]. The Proposition 22 Legal Defense and Education Fund was created to defend the Family Code's definition of marriage, and moved to intervene in those cases. The Fund contended the founder of the fund and the campaign organizers it represents gained a direct interest in litigation challenging section 308.5 and "as a result of investing their personal reputation and considerable time and efforts" toward passage of Proposition 22, since a judgment ruling the statute invalid "would effectively nullify their efforts and harm their reputation." The Fund also asserted that, independent of the interests of its members, it has a sufficient interest to permit intervention because a ruling declaring section 308.5 unconstitutional, or limiting its application, might damage the Fund's reputation and decrease the organization's ability to attract support and contributions. The trial court denied permissive intervention and the Fund appealed.

In affirming the trial court's decision to deny the Fund's intervention, the court noted that the Fund itself played no role in sponsoring Proposition 22 because the Fund was created after passage of that initiative (*128 Cal. App. 4th 1030, 1038)* . Assuming that the Fund could intervene as a representative of members who worked for the initiative, the Fund had not met the requirements of *Cal. Code Civ. Proc. § 387(a)* by alleging a tangible harm absent intervention, as opposed to a political or philosophical interest. The Fund did not claim that a ruling about the constitutionality of denying marriage licenses to same-sex couples would impair or invalidate the existing marriages of its members, or affect the rights of its members to marry persons of their choice in the future. Nor had the fund identified any diminution in legal rights, property rights, or freedoms that an unfavorable judgment might impose on its 15,000 financial contributors or on the Californians who voted for Proposition 22 (*128 Cal. App. 4th 1030, 1039)* .

Each of the following cases was decided under *Code Civ. Proc. § 387* prior to its 1977 amendments. Because the provisions of former Code Civ. Proc. § 387 are virtually identical to the current provisions of *Code Civ. Proc. § 387(a),* cases that permitted intervention under the former statute appear to be still applicable to permissive intervention under the statute, as amended. However, it is not clear whether or not permissive intervention is still restricted in the same manner that it was prior to the 1977 amendments. Thus, counsel should probably exercise some caution in relying on the cases cited in this form. For a discussion of the possible effect of the 1977 amendments to *Code Civ. Proc. § 387* on the applicability of cases decided under that statute prior to the 1977 amendment, see *§ 124.03*.

Jersey Maid Milk Products Co. v. Brock *(1939) 13 Cal. 2d 661, 91 P.2d 599* , arose out of an action to restrain defendant Director of Agriculture from enforcing against plaintiffs certain provisions of the Agricultural Code and the marketing plans for stabilization of the milk industry as formulated by defendant pursuant to the Agricultural Code. Plaintiffs were producers, distributors, and consumers of milk within the area affected by the marketing plan. Appellants, also distributors of milk within the affected area, petitioned the trial court for leave to intervene. Their petition was granted, and they filed a complaint in intervention that both plaintiffs and defendant moved the trial court to strike. The trial court granted those motions, and appellants appealed from that order, contending that, like plaintiffs, they had an interest in the matter in litigation, since they were opposed to the particular chapter of the Agricultural Code that was in issue, as well as to the marketing plan formulated pursuant to that chapter. They also contended that they had an interest in the success of plaintiffs and these interests entitled them to intervene pursuant to *Code Civ. Proc. § 387*.

The Supreme Court affirmed the judgment of the trial court. The Court based its decision on a series of cases that held that the necessary interest of a third person seeking to intervene must be direct and not consequential, and of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment (*13 Cal. 2d 661, 663)* . That interest, stated the Court, must be in the matter in litigation, which in the present case was an action to determine whether defendant should be enjoined from enforcing against plaintiffs, certain provisions of the Agricultural Code. The Court concluded that any judgment rendered would therefore have no direct effect whatever on any person, other than the parties to the action. If the judgment is in favor of plaintiff, defendant would be enjoined in regard to plaintiffs only, but against no other person, including interveners. If judgment is in favor of defendant, then he would be free to enforce the provision in regard to plaintiffs. Appellants would not be affected one way or the other; consequently, they would not gain or lose by the direct operation and legal effect of the judgment, even though they had an interest in the outcome of the litigation. Because their interest was a mere consequential interest in the matter in litigation, they were not entitled to intervene under *Code Civ. Proc. § 387* (*13 Cal. 2d 661, 664-665)* .

Jersey Maid was decided under *Code Civ. Proc. § 387* prior to its 1977 amendments. However, *Mary R v. B & R Corp. (1983) 149 Cal. App. 3d 308, 314-315, 196 Cal. Rptr. 871* (discussed infra), which was decided after the 1977 amendments, cites *Jersey Maid* in making its holding. It therefore appears that *Jersey Maid* is still good law, but counsel should still exercise caution in using pre-1977 cases that hold specific types of interest to be merely consequential.

Mary R v. B & R Corp. *(1983) 149 Cal. App. 3d 308, 196 Cal. Rptr. 871* , arose out of an action against a physician for repeatedly molesting a patient who was 14 years old at the time of the events. The action was dismissed by stipulation, and the trial court had issued an order sealing the court records and directing the parties and their agents or representatives never to discuss the case with anyone. After dismissal of the action, the Division of Medical Quality (hereinafter, Division) received a complaint concerning the conduct of the physician which had been the basis of the action. Plaintiff in the underlying action stated that she would furnish information to the Division if not prohibited by the court. When the trial court refused the Division's request to rescind the sealing and gag order without consent of the physician, the Division moved to intervene in the already dismissed suit, alleging that the court's sealing and gag order prevented it from fulfilling its statutory responsibility to investigate and prosecute violations of the Medical Practices Act. The trial court denied intervention and refused to modify its orders. The Division appealed the denial.

The court of appeal upheld the portion of the trial court's ruling denying intervention. The court stated that a government entity has no more right to intervene in the litigation of others than has any other private party (*149 Cal. App. 3d 308, 314)* . The court cited a series of cases, including *Jersey Maid Milk Products Co. v. Brock (1939) 13 Cal. 2d 661, 663, 91 P.2d 599* (discussed *above*), for the following characterization of the nature of the interest required for intervention. The court stated that a party must have either an interest in the matter in litigation, or in the success of one of the parties to the action, or an interest against both of them. This interest must be direct and not consequential, and it must be an interest which is properly determined in the action in which the intervention is sought. The interest must be in the matter in litigation and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation of the judgment (*149 Cal. App. 3d 308, 314-315)* . Regarding the case before it, the court noted that the Division's interest arose solely from the overbroad effect of the ancillary gag and sealing order of the trial court in the original action. The court held that this interest was merely consequential. Thus, although *Code Civ. Proc. § 387* should be liberally construed in favor of intervention, the trial court had properly denied the Division's request to intervene (*149 Cal. App. 3d 308, 315)* . The court of appeal then struck the trial court's gag and sealing order and remanded the case for further proceedings on that order (*149 Cal. App. 3d 308, 317)* .

Socialist Workers etc. Committee v. Brown *(1975) 53 Cal. App. 3d 879, 125 Cal. Rptr. 915* , involved two actions by plaintiff and others against the California Secretary of State and the local city attorney to enjoin enforcement against plaintiff campaign committee of certain provisions of the Campaign Disclosure Act and the Political Reform Act requiring disclosure of names, addresses, and other information regarding persons and businesses making contributions exceeding a certain amount to a political campaign. Common Cause and its California chairperson obtained an ex parte

order allowing them to intervene in the action. Proposed interveners contended that Common Cause, as an organization working for improvement of political and governmental institutions and processes, had a direct interest in laws relating to the reporting and public disclosure of those who make political contributions for the purpose of influencing elections. On entering the case, interveners filed an answer to the complaint. Plaintiffs moved to vacate the order granting intervention and to strike the answer in intervention, on the ground that interveners lacked the requisite direct interest in the outcome of the litigation. The trial court granted plaintiffs' motion, and interveners appealed from the orders of the trial court.

The court of appeal affirmed the orders of the trial court, holding that interveners failed to show that they possessed the requisite direct interest in the subject matter of plaintiffs' action to enjoin enforcement of the Campaign Disclosure Act against plaintiffs. The court stated that the interest required under *Code Civ. Proc. § 387* must be direct and not consequential and must be of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment that may be rendered. At pages 891-892, the court concluded that in this case any judgment rendered in the action would have no direct effect whatever on any person other than the parties to the action; therefore, intervener's interest was not a direct but a mere consequential interest in the matter in litigation [*citing Jersey Maid Milk Products Co. v. Brock (1939) 13 Cal. 2d 661, 664, 91 P.2d 599* (discussed *above*)].

[b] Intervener Does Not Have Interest in Matter in Litigation in Suit as Originally Brought

Both of the following cases were decided under *Code Civ. Proc. § 387* prior to its 1977 amendments. Because the provisions of former Code Civ. Proc. § 387 are virtually identical to the current provisions of *Code Civ. Proc. § 387(a)*, cases that permitted intervention under the former statute appear to be still applicable to permissive intervention under the statute, as amended. However, it is not completely clear whether or not permissive intervention is still restricted in the same manner that it was prior to the 1977 amendments. Thus, counsel should probably exercise some caution in relying on the cases cited in this form. For a discussion of the possible effect of the 1977 amendments to *Code Civ. Proc. § 387* on the applicability of cases decided under that statute prior to 1977, see *§ 124.03*.

The facts and procedural background of ***Jersey Maid Milk Products Co. v. Brock*** *(1939) 13 Cal. 2d 661, 91 P.2d 599* , are *found in § 124.49[3][a]*.

In *Jersey Maid*, appellants, who were distributors of milk within an area affected by the State Department of Agriculture's enforcement of certain provisions of the Agricultural Code, attempted to intervene in an action brought by other milk distributors in the same affected area to prohibit the Director of Agriculture from enforcing those provisions in regard to them. The Supreme Court, in affirming the trial court's order striking the complaints in intervention, held, among other things, that the interest that entitles a party to intervene in an action between other parties must be in the matter in litigation in the suit as originally brought. In the present action, the Court said, the matter in litigation in the suit as originally brought was whether or not defendant should be enjoined from enforcing the terms of the particular chapter of the Agricultural Code against plaintiffs. Interveners, observed the court, did not claim to be stockholders, or owners of any interest in the property of any of the plaintiffs, and did not have any interest in defendant. Consequently, the Court concluded, appellants had no direct interest in the matter in litigation in the action and therefore had no right to intervene under former Code Civ. Proc. § 387 [*now see Code Civ. Proc. § 387(a)*] (*13 Cal. 2d 661, 664-665)* .

People v. Brophy *(1942) 49 Cal. App. 2d 15, 120 P.2d 946* , arose out of an indictment against defendant by the People for perjury. The basis of the indictment was two affidavits by defendant filed by him in an injunction suit against the telephone company to restrain it from removing telephones and discontinuing service for alleged aiding and abetting of illegal bookmaking on horse races. The telephone company had, in apparent response to a letter from the attorney general of the state, begun to discontinue service to defendant, plaintiff in the injunction action. After defendant filed his injunction action, the City of Los Angeles and the state attorney general filed, by leave of court, complaints in intervention in the injunction action, alleging that they had an interest in the matter in litigation in that they had a duty to enforce the laws and that the granting of the injunction to plaintiff would aid and assist him in violating the laws

against gambling. Defendant, as plaintiff in the injunction action, had filed two affidavits in which he denied any participation in bookmaking activities through the use of the telephone equipment supplied by respondent telephone company. The trial court in the injunction action denied defendant's motion to vacate the orders granting leave to intervene and dissolved the temporary restraining order it had previously issued against the telephone company. Subsequently, the People brought the present criminal action against defendant. On conviction, defendant appealed, claiming that the alleged perjured statements were not material to the injunction suit.

The court of appeal, in agreeing with defendant, reversed the conviction and ordered the trial court to dismiss the indictment (*49 Cal. App. 2d 15, 37)* . There can be no question, the court stated, that defendant's motion in the injunction action to vacate the orders permitting the city and state to intervene should have been granted (*49 Cal. App. 2d 15, 36)* . Neither complaint in intervention stated facts sufficient to constitute a cause of action for intervention, the court held. Former Code Civ. Proc. § 387 [*now see Code Civ. Proc. § 387(a)*] authorized intervention when a person had an interest in the matter in litigation, or in the success of either of the parties, or had an interest against both. When an intervener was admitted into the action, the court said, the complaint in intervention that he or she presented and filed must state facts sufficient, if true, to establish the right or interest that the intervener claims, or else he or she would no longer have standing in court as a litigant if proper objection was made. The interest that entitles a party to intervene, the court stated, must be an interest in the matter in litigation in the suit as originally brought and of such a present, direct, and immediate character that the intervener would either gain or lose by the direct effect of the judgment. The court observed that it was difficult to comprehend or understand what interest the city or state had in the injunction proceeding that was of such a direct or immediate character that either intervener would gain or lose by the immediate operation and effect of a judgment either for or against the telephone company. A judgment restraining the telephone company from discontinuing telephone service, the court noted, would in no way affect the enforcement of the criminal laws regarding bookmaking by either city or state officials. The sole issue in that action, stated the court, was the right of a subscriber for telephone service to compel a public utility to furnish service when the applicant for its services met the necessary requirements. Consequently, the court concluded that interveners' interest in the action was insufficient to permit intervention, their interest being indirect, inconsequential, and entirely remote (*49 Cal. App. 2d 15, 34-35)* .

[c] Precedential Effect of Judgment on Persons Similarly Situated

The factual and procedural background of ***Jersey Maid Milk Products Co. v. Brock*** *(1939) 13 Cal. 2d 661, 91 P.2d 599* , is discussed in *§ 124.49[3][a]*. In *Jersey Maid Milk*, the Supreme Court, in affirming the judgment denying intervention, held that any judgment rendered in the action interpreting the chapter of the Agricultural Code that was the subject matter of the action would have no direct effect whatever on any person other than the parties to the action. If judgment should be in favor of plaintiffs, then defendant would be restrained in enforcing the provisions of that chapter only against plaintiffs, and if judgment was for defendant, he would be free of any restraints to enforce the act against plaintiffs. The judgment, concluded the Court, would in no way be binding on appellants and they would be as free to conduct their business after the rendition of the judgment as before. They therefore would not gain or lose by the direct operation of the judgment. Concededly, the legal judgment that the act in question is a valid legislative enactment might serve as a precedent in any subsequent action instituted against appellants for violation of the act, and to that extent appellants had an interest in the matter in litigation. The Court concluded, however, that that interest would be a mere consequential interest, not a direct interest, since the judgment in this case would have no binding effect on them (*13 Cal. 2d 661, 664)* .

Counsel should note that the above case was decided under *Code Civ. Proc. § 387* prior to its 1977 amendments. Because the provisions of former Code Civ. Proc. § 387 are virtually identical to the current provisions of *Code Civ. Proc. § 387(a)*, cases that permitted intervention under the former statute appear to be still applicable to permissive intervention under the statute, as amended. However, it is not completely clear whether or not permissive intervention is still restricted in the same manner that it was prior to the 1977 amendments. In particular, counsel should note that federal courts applying FRCP, Rule 24(a), which governs mandatory intervention in federal court actions and which was the model for *Code Civ. Proc. § 387(b)*, have held that the effect of stare decisis may in some instances provide a

sufficient interest to permit intervention under that provision [*see, e.g., Foster v. Gueory (D.C. Cir. 1981) 655 F.2d 1319, 1325* ; *Nuesse v. Camp (D.C. Cir. 1967) 385 F.2d 694, 702* ; *Atlantis Development Corporation v. United States (5th Cir. 1967) 379 F.2d 818, 829]* . Thus, counsel should probably exercise some caution in relying on the statement in the *Jersey Maid Milk* case that the possible adverse precedential effect of a judgment does not provide an interest sufficient to permit intervention in a pending action. For a further discussion of the possible effect of the 1977 amendments to *Code Civ. Proc. § 387* on the applicability of cases decided under that statute prior to 1977, see *§ 124.03*.

[d] Unsecured Creditor

In ***Olson v. Hopkins*** *(1969) 269 Cal. App. 2d 638, 75 Cal. Rptr. 33* , plaintiff filed an action against his sister, seeking partition of certain real property. Defendant cross complained alleging that the property was in fact a partnership and that plaintiff had breached an oral agreement of the partnership and had, without authority, diverted and withdrawn partnership funds. Defendant further alleged that she wished to pay plaintiff the value of his interest less damages alleged in the cross complaint. Shortly before pretrial conference, appellants moved the trial court for leave to file a complaint in intervention contending that they were creditors of plaintiff currently engaged in another action for an accounting and that the trial court in that action had enjoined plaintiff from transferring or encumbering his interest in the real property that was the subject of the present action before the court. The motion was opposed on the ground, among others, that appellants, as simple creditors, lacked the requisite interest to intervene. The trial court denied their motion to intervene and also their motion to vacate the judgment it entered on behalf of defendant, decreeing that title to the property was in defendant and that plaintiff's interest was valueless. Appellants appealed on both issues.

The court of appeal affirmed the order of the trial court, holding that it had properly denied appellant's motion to intervene (*269 Cal. App. 2d 638, 644)* . On pages 641 and 642, the court found that appellant's right to intervene was governed by *Code Civ. Proc. § 387*, which has been judicially construed to require a third person seeking to intervene in a pending action to have an interest in the matter in litigation or in the success of either of the parties that was of a direct and immediate character greater than that possessed by a simple creditor of a party. Appellants were, however, only simple creditors whose interest did not become direct by operation of a temporary restraining order on plaintiff not to transfer or encumber his interest in the property. That injunction did not restrain plaintiff in conducting his suit or create any lien on the property, nor did it prevent the trial court from taking any action regarding the property. As simple creditors, appellants may have had an interest in the outcome of the litigation, since their ability to recover on plaintiff's debt would have been enhanced had plaintiff succeeded in his suit. Such interest, concluded the court, did not give them the right to intervene in the action [*citing Horn v. Volcano Water Co. (1859) 13 Cal. 62, 69-70* (discussed in *§ 124.38[3][a]*); *Isaacs v. Jones (1898) 121 Cal. 257, 261-263]* .

Counsel should note that the above case was decided under *Code Civ. Proc. § 387* before its 1977 amendments. Because the provisions of former Code Civ. Proc. § 387 are virtually identical to the current provisions of *Code Civ. Proc. § 387(a)*, cases that permitted intervention under the former statute appear to be still applicable to permissive intervention under the statute, as amended. However, it is not completely clear whether or not permissive intervention is still restricted in the same manner that it was before the 1977 amendments. Thus, counsel should probably exercise some caution in relying on the rule stated in the above case. For a discussion of the possible effect of the 1977 amendments to *Code Civ. Proc. § 387* on the applicability of cases decided under that statute before 1977, see *§ 124.03*.

[e] Court-Awarded Attorney's Fees

Meadow v. Superior Court *(1963) 59 Cal. 2d 610, 30 Cal. Rptr. 824, 381 P.2d 648* , arose out of an action by petitioners to compel respondent superior court to grant petitioner wife's motion for substitution of attorneys in the underlying divorce action and to dismiss that suit. Following petitioner wife's motion for substitution of attorneys and dismissal of the divorce action, the trial court granted ex parte leave to intervener, the wife's attorney, to file a complaint in intervention. Intervener sought recovery of attorney's fees and costs ordered to be paid to it in an earlier hearing and

filed another motion for additional fees and costs. The trial court subsequently denied petitioners' requests to dismiss the divorce action and continued the motion for substitution until after the hearing on the additional fees. The trial court also denied petitioners' motion to strike the complaint in intervention. Petitioners then filed for a writ of prohibition and mandate in the court of appeal. That court denied the petition, and petitioners then sought a hearing on the matter in the Supreme Court. The Supreme Court granted an alternative writ of prohibition restraining the trial court from further proceedings pending determination of the issues.

The Supreme Court granted the writ of mandamus, holding that the trial court erred in permitting intervener to file a complaint in intervention in a divorce action in an attempt to secure payment for fees and costs (*59 Cal. 2d 610, 614)* . The Court held that a wife's attorney in a divorce action has no such interest in the matter in litigation, or in the success of either of the parties, or an interest against both, as would entitle him or her to intervene in that action or proceeding. Furthermore, the Court stated, the attorney's right to these fees was no more direct by virtue of former Civ. Code § 137.5 [*now see Fam. Code § 272(a)*], which provided that attorney's fees may, in the discretion of the court, be made payable in whole or part to the attorney. Those fees, said the court, while payable to the attorney, are granted to the wife, not to her counsel, and the attorney's rights thereto are derived from his or her clients (*59 Cal. 2d 610, 615-616)* .

Counsel should note that the above case was decided under *Code Civ. Proc. § 387* before its 1977 amendments. Because the provisions of former Code Civ. Proc. § 387 are virtually identical to the current provisions of *Code Civ. Proc. § 387(a)*, cases that permitted intervention under the former statute appear to be still applicable to permissive intervention under the statute, as amended. However, it is not completely clear whether or not permissive intervention is still restricted in the same manner that it was before the 1977 amendments. Thus, counsel should probably exercise some caution in relying on the rule stated in the above case. For a discussion of the possible effect of the 1977 amendments to *Code Civ. Proc. § 387* on the applicability of cases decided under that statute before 1977, see *§ 124.03*.

[4] Additional Authorities

[a] Intervener Has Only Consequential Rather Than Direct Interest in Matter in Litigation

In *Hinton v. Beck (2009) 176 Cal. App. 4th 1378, 98 Cal. Rptr. 3d 612* , an insurer denied coverage and refused to defend a personal injury action against its insured. The trial court granted the insurer permissive intervention in the action under *Code Civ. Proc., § 387(a)*, but later granted the injured plaintiff's motion to strike the insurer's complaint in intervention. The appellate court affirmed the judgment, holding that the trial court did not abuse its discretion in granting plaintiff's motion to strike because the insurer denied coverage and refused to defend the action on behalf of its insured. An insurer that denies coverage and refuses to defend its insured does not have a direct interest in the litigation to warrant intervention. The rationale behind this rule is that by its denial, the insurer has lost its right to control the litigation. In the current case, the injured plaintiff settled with the insured by agreeing to forego execution of her default judgment against him in exchange for an assignment of his rights against the insurer. The insurer could not then inject itself into the litigation because it lost its right to control the litigation when it refused to defend or indemnify the insured. Although the injured plaintiff, as a judgment creditor, could proceed directly against the insurer under *Ins. Code § 11580*, the insurer did not have the requisite direct and immediate interest in the litigation, given that it denied coverage and refused to provide a defense. The appellate court explained that not every interest in the outcome of litigation gives to its possessor the right to intervene in a lawsuit. The interest must be direct and not consequential, and it must be an interest which is proper to be determined in the action in which the intervention is sought. A person has a direct interest justifying intervention in litigation where the judgment in the action of itself adds to or detracts from his legal rights without reference to rights and duties not involved in the litigation. A consequential interest, one that is insufficient for intervention, occurs when the action in which intervention is sought does not directly affect it although the results of the action may indirectly benefit or harm its owner.

Each of the following cases was decided under *Code Civ. Proc. § 387* before its 1977 amendments. Because the provisions of former Code Civ. Proc. § 387 are virtually identical to the current provisions of *Code Civ. Proc. § 387(a)*,

cases that permitted intervention under the former statute appear to be still applicable to permissive intervention under the statute, as amended. However, it is not completely clear whether or not permissive intervention is still restricted in the same manner that it was prior to the 1977 amendments. Thus, counsel should probably exercise some caution in relying on the following cases to oppose permissive intervention. For a discussion of the possible effect of the 1977 amendments to *Code Civ. Proc. § 387* on the applicability of cases decided under that statute before 1977, see *§ 124.03*.

The factual and procedural background of *Allen v. California Water & Tel. Co. (1947) 31 Cal. 2d 104, 187 P.2d 393* , is discussed in *§ 124.45[3][a]*. In that case, the Supreme Court, in affirming the order denying intervention, also held that proposed intervener's interest in the supplemental proceedings under reserved jurisdiction did not give it a right to intervene, since it had no direct interest or claim to any of the waters involved in the litigation and therefore did not have the required direct interest that would cause it either to gain or lose by the direct legal operation and effect of the judgment (*31 Cal. 2d 104, 109)* .

Bechtel v. Axelrod (1942) 20 Cal. 2d 390, 125 P.2d 836 , involved an action to obtain a deficiency judgment arising out of defendant's having executed a promissory note to plaintiff as an accommodation-maker. Defendant's wife sought to intervene by seeking a declaration that their community property could not be subjected to payment of the obligation, since it had been incurred by her husband solely as an accommodation-maker and without her knowledge and consent. In affirming the trial court's denial of intervention, the Supreme Court held that intervener did not possess an interest in the action against her husband, because she would neither gain nor lose by the direct legal operation and effect of a money judgment rendered against him. No community property had been seized and defendant could discharge the indebtedness from his separate funds. Consequently, concluded the Court, intervener's interest was remote and contingent and not of the direct and immediate character required by law to support her intervention (*20 Cal. 2d 390, 392-393)* .

In *La Mesa etc. Irr. Dist. v. Halley (1925) 195 Cal. 739, 235 P 999* , petitioner filed for a writ of mandate to compel respondents, president and secretary of petitioner water district, to sign and attest certain bonds in order to acquire an additional water supply and distributing system. Certain taxpayers and landowners within the district requested leave to file a complaint in intervention, alleging, among other things, that the bonds were invalid because they would purportedly cause indebtedness beyond the district's ability to assume, and that the suit was collusive. The Supreme Court, in denying the request to intervene, held that interveners' interests in the action were remote and contingent and not of the direct and immediate character required by law. The ruling of the Court in favor of petitioners would require respondents to do only what the law required them to do, and interveners would neither gain nor lose by the direct operational effect of the judgment, since the judgment would not affect their property interest, nor would the signing of the bonds create any lien on their property. Furthermore, there were other intervening events that would have to occur before their lands could be taxed to pay for the principal and interest on the bonds, or before any lien could be made on their property (*195 Cal. 739, 741-742)* .

Continental Vinyl Products Corp v. Mead Corp (1972) 27 Cal. App. 3d 543, 103 Cal. Rptr. 806 , involved actions by plaintiff for a declaration of rights under an insurance policy. Control of the actions had been taken over by a trustee in bankruptcy. The proposed intervenor moved to intervene, alleging that as owner of 90 percent of the stock of plaintiff corporation his interest in the corporation was significantly injured by the reduction of the value of the corporation's stock resulting from conduct of defendants, that the trustee represented the interests of the creditors rather than his own, and that he was the only one whose rights would be effected by the prosecution of the litigation in such a manner as to recover an amount in excess of that necessary to make plaintiff's creditors whole. The intervenor did not assert improper conduct by the trustee, or that the intervenor's interest was different from that of other shareholders in any way other than amount. The court of appeal held that as a shareholder, the intervenor had a consequential interest but not a direct interest in the outcome of the litigation involving the corporation. The court stated that an interest is consequential when the underlying action does not directly harm or benefit the proposed intervenor. In coming to its conclusion, the court extensively reviewed the applicable law regarding the interest required to intervene in a pending action (*27 Cal. App. 3d 543, 550-551)* .

People v. City of Long Beach (1960) 183 Cal. App. 2d 271, 6 Cal. Rptr. 658 , involved an attempted intervention by an owner of property adjacent to the tidal and submerged lands that were the subject of an action to determine the legal effect of a quitclaim deed from defendant city to the state, and to determine rights to oil and gas in the property. The court of appeal held that the proposed intervener did not have a direct interest in the matters involved in the suit. Intervener's interest was not so direct and immediate as to cause him either to gain or lose by the direct legal operation and effect of the ultimate judgment. Any interest that appellant had in the adjacent lands were at best indirect (*183 Cal. App. 2d 271, 275)* .

In *Faus v. Pacific Elec. Ry. Co. (1955) 134 Cal. App. 2d 352, 285 P.2d 1017* , intervener county appealed from judgments denying its motions for leave to file complaints in intervention in two actions in which plaintiffs sought to quiet title in themselves to separate, abandoned right-of-way strips instead of in either the railway company or the city in which the strips lay. The county contended that it had an interest in the actions because its Board of Supervisors had passed a resolution stating that the acquisition of such rights-of-way was of a general county interest. It also contended that it had an interest in the success of defendant city, because if it prevailed, county funds would not have to be expended for purchase of the strips. The court of appeal rejected county's assertions in affirming the trial court's judgment, holding that a general interest is not the same as a direct interest and that the mere possibility that additional funds might ultimately have to be expended in the event of a judgment adverse to defendant city is a consequential interest of that judgment, not one flowing directly from it (*134 Cal. App. 2d 352, 359-360)* .

Bernheimer v. Bernheimer (1948) 87 Cal. App. 2d 242, 196 P.2d 813 , involved a divorce action brought by the husband against his wife, who raised the affirmative defenses of a previous Missouri divorce and a subsequent remarriage by plaintiff. A charitable beneficiary of a testamentary trust, whose interest was contingent on the death of plaintiff without lawful issue, petitioned to intervene to protect its vested interest in the trust on the ground that if plaintiff prevailed, his son from the remarriage would then become lawful issue and succeed to the trust. The court of appeal affirmed the trial court's denial of intervention, holding that appellant's interest in the testamentary trust was too remote and contingent on many factors other than the legitimacy of plaintiff's son in the state of Missouri; the interest asserted was not that of a present, direct, and immediate character that would cause the appellant either to gain or lose by the direct effect of the judgment (*87 Cal. App. 2d 242, 246-247)* .

Alhambra v. Jacob Bean Realty Co. (1934) 138 Cal. App. 251 , involved condemnation proceedings by plaintiff city to acquire a parcel of defendant's land for purposes of a municipal reservoir. Appellant intervened, alleging that as an adjoining property owner she would sustain damages to her interest in her property by reason of market value depreciation. The court of appeal affirmed the trial court's sustaining of plaintiff's demurrer to the complaint in intervention, holding that the complaint showed no interest by appellant in the land in question, or in the success of either party, or adverse to either. Her claim of potential damage, had the reservoir been built, showed only a consequential interest in the probable use of the property had plaintiff been successful, and no possibility of gain or loss from the direct legal effect of any judgment that might have been rendered (*138 Cal. App 251, 252-253)* .

[b] Precedential Effect of Judgment on Persons Similarly Situated

In *Kenney v. Wolff (1948) 88 Cal. App. 2d 163, 198 P.2d 582* , certain employees of a municipal railway, who had been employees of a private railway company until it was acquired by the city, sought to determine their rights regarding seniority as employees of the city. Certain conductors and motormen, who had also been employees of the private system, attempted to intervene in the action on the ground that any interpretation of the seniority rules would affect them as well. The court of appeal affirmed the trial court order denying intervention, holding that interveners had different job classifications than plaintiffs and therefore had no interest in the adjudication of seniority rights except concerning the effect of any interpretation of those rights on them in some future litigation. This was not a sufficient interest in the subject matter in litigation to entitle them to intervene (*88 Cal. App. 2d 163, 164)* .

Counsel should note that the above case was decided under *Code Civ. Proc. § 387* prior to its 1977 amendments. Because the provisions of former Code Civ. Proc. § 387 are virtually identical to the current provisions of *Code Civ. Proc. § 387(a)*, cases that permitted intervention under the former statute appear to be still applicable to permissive intervention under the statute, as amended. However, it is not completely clear whether or not permissive intervention is still restricted in the same manner that it was prior to the 1977 amendments. In particular, counsel should note that federal courts applying FRCP, Rule 24(a), which governs mandatory intervention in federal court actions and which was the model for *Code Civ. Proc. § 387(b)*, have held that the effect of stare decisis may in some instances provide a sufficient interest to permit intervention under that provision [*see, e.g., Foster v. Gueory (D.C. Cir. 1981) 655 F.2d 1319, 1325* ; *Nuesse v. Camp (D.C. Cir. 1967) 385 F.2d 694, 702* ; *Atlantis Development Corporation v. United States (5th Cir. 1967) 379 F.2d 818, 829]* . Thus, counsel should probably exercise some caution in relying on the statement in the above case that the possible adverse precedential effect of a judgment does not provide an interest sufficient to permit intervention in a pending action. For a further discussion of the possible effect of the 1977 amendments to *Code Civ. Proc. § 387* on the applicability of cases decided under that statute prior to 1977, see *§ 124.03*.

[c] Unsecured Creditor

The factual and procedural background of *Horn v. Volcano Water Co. (1859) 13 Cal. 62* , is discussed in *§ 124.38[3][a]*. In that case, the Supreme Court, while holding that a judgment creditor having a lien on property that was the subject of the action had a sufficient interest in the matter in litigation to justify intervention, stated that a simple creditor of a party owning property does not possess any right to intervene, because he or she does not have sufficient interest in an action involving that property to cause the creditor either to gain or lose by the direct legal operation and effect of the judgment (*13 Cal. 62, 69-70)* .

Counsel should note that the above case was decided under *Code Civ. Proc. § 387* prior to its 1977 amendments. Because the provisions of former Code Civ. Proc. § 387 are virtually identical to the current provisions of *Code Civ. Proc. § 387(a)*, cases that permitted intervention under the former statute appear to be still applicable to permissive intervention under the statute, as amended. However, it is not completely clear whether or not permissive intervention is still restricted in the same manner that it was prior to the 1977 amendments. Thus, counsel should probably exercise some caution in relying on the rule stated in the above case. For a discussion of the possible effect of the 1977 amendments to *Code Civ. Proc. § 387* on the applicability of cases decided under that statute prior to 1977, see *§ 124.03*.

[d] Court-Awarded Attorney's Fees

In Lindelli v. Town of San Anselmo (2006) 139 Cal. App. 4th 1499, 1500-1501, 43 Cal. Rptr. 3d 707, the court held where that a law firm's interest in a fee award in a case involving a local election dispute arose from Code Civ. Proc. § 1021.5, the firm was entitled to fees awarded unless an agreement specified otherwise. As a successful party under § 1021.5, the firm's interest in a fee award would be directly and adversely affected if a final judgment issued prior to a motion for fees. The firm would forever lose the right to collect fees from the opposing party under § 1021.5. Thus, the firm had a sufficiently direct and immediate interest to permit intervention and a motion for an award of fees under § 1021.5.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPartiesInterventionMotions to InterveneCivil ProceduresPartiesInterventionPermissive Interventions

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CHAPTER 124 INTERVENTION
PART II. FORMS

12-124 California Points & Authorities § 124.50

§ 124.50 Opposing Motion for Order Granting Leave to File Complaint in Intervention--Mandatory Intervention [Code Civ. Proc. § 387(b)]--Intervener Lacks Requisite Interest in Property or Transaction That Is Subject of Action

[1] FORM

[*Caption. See § 124.45.*]

_____ [*Name of intervener*] MAY NOT INTERVENE IN THIS ACTION AS A MATTER OF RIGHT UNDER SECTION 387(b) OF THE CODE OF CIVIL PROCEDURE, BECAUSE HE/SHE/IT DOES NOT HAVE AN INTEREST IN THE PROPERTY OR TRANSACTION THAT IS THE SUBJECT OF THE ACTION AND IS NOT SO SITUATED THAT THE DISPOSITION OF THE ACTION MAY AS A PRACTICAL MATTER IMPAIR OR IMPEDE HIS/HER/ITS ABILITY TO PROTECT HIS/HER/ITS INTERESTS.

A. Interest in Property or Transaction That Is Subject of Action Required. A person may not intervene as a matter of right under *Section 387(b) of the Code of Civil Procedure* unless that person claims an interest in the property or transaction that is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede that person's ability to protect that interest (*see Code Civ. Proc. § 387(b)*; *see also California Physicians' Service v. Superior Court (1980) 102 Cal. App. 3d 91, 96-98, 162 Cal. Rptr. 266*).

[*Optional*] **B. General Interest in Subject of Litigation as Insufficient.** Mandatory intervention under *Section 387(b) of the Code of Civil Procedure* is improper when the proposed intervener has only a general interest, no greater than that of any member of the general public, in the subject of the action (*see Coalition for Fair Rent v. Abdelnour (1980) 107 Cal. App. 3d 97, 114-115, 165 Cal. Rptr. 685*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion for an order granting leave to file a complaint in intervention in a pending action pursuant to *Code Civ. Proc. § 387(b)* (governing mandatory intervention). The form sets forth the general point that intervention should be denied when the proposed intervener fails to show that he or she has the requisite interest in the property or transaction that is the subject of the action.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should indicate that the proposed intervener failed to state facts in either the application or complaint in intervention sufficient to show that he or she has the requisite interest in the property or transaction that is the subject of the action or that he is or she is so situated that disposition of action may impair or impede his or her ability to protect that interest as a practical matter.

In an appropriate case, these points and authorities may be submitted in opposition to a motion for leave to file a complaint in intervention under *Code Civ. Proc. § 387(b)* supported by the points and authorities *set out in § 124.32*.

[3] Discussion of Authorities

[a] Interest in Property or Transaction That Is Subject of Action Required

California Physicians' Service v. Superior Court *(1980) 102 Cal. App. 3d 91, 162 Cal. Rptr. 266* , arose out of an action by petitioner, a health insurer, to intervene in a personal injury suit pending in the superior court. In that action, one of petitioner's subscribers sought damages against various defendants arising out of injuries sustained as a result of a surgical operation. Plaintiff in that action had a contract of insurance with petitioner that included a provision for a lien on any recovery by plaintiff from a third party for tort-cause injuries to reimburse petitioner for any such injuries. The parties also had an agreement that plaintiff would make a good-faith effort to recover costs of medical benefits in the suit. Plaintiff repudiated that agreement at the time of the settlement conference and moved for court approval of a settlement with several of the defendants and a declaration that "all medical liens" are null and void. Petitioner promptly filed a motion for leave to intervene. At the hearing on the motion, the trial judge approved the settlement with one of the defendants, found by the trial court to be a health care provider, and ruled that petitioner was not entitled to any of the proceeds. The motion to intervene was then denied. Petitioner then petitioned the court of appeal to vacate the order denying its claim to any of the proceeds of the settlement with the defendant health care provider and denying permission to intervene. An alternative writ of mandate was issued pending the hearing on the matter.

The court of appeal discharged the alternative writ and denied the peremptory writ (*102 Cal. App. 3d 91, 99)* . The court observed that there was a dearth of case law interpreting the mandatory intervention provisions of *Code Civ. Proc. § 387(b)*. The court acknowledged that petitioner had an interest in the outcome of the litigation and in the success of one of the parties. However, the court stated, the critical phrase of *Code Civ. Proc. § 387(b)* is that the proposed intervener must have an interest in the property or transaction that is the subject of the action. The court first stated that plaintiff's cause of action in tort did not qualify as 'property' that was the subject of the action (*102 Cal. App. 3d 91, 96)* . The court then held that although petitioner's claim was based on a contract or 'transaction' with plaintiff, that contract or transaction was not the subject of the action in which petitioner sought to intervene; the transaction being litigated was the alleged tortious conduct of defendants and the injury to plaintiff. The court concluded that petitioner

did not and could not have any interest in plaintiff's tort cause of action (*102 Cal. App. 3d 91, 96-97)* .

Petitioner also claimed that the operation of *Civ. Code § 3333.1* gave it a direct interest in the litigation that justified mandatory intervention. The court noted that *Civ. Code § 3333.1* was enacted to eliminate the so-called double recovery of special damages in medical malpractice actions by allowing the defendant health care provider to introduce, on the issue of damages, evidence of any amount payable to plaintiff by an insurer or other medical benefit provider (*102 Cal. App. 3d 91, 94, fn. 2, 97)* . Under *Civ. Code § 3333.1*, any source of such collateral benefits is not permitted to recover the amount of the benefits from plaintiff nor be subrogated to plaintiff's rights against defendant. The court acknowledged that the impact of the statute raised a number of unanswered questions, both substantive and procedural, such as whether petitioner's separate agreement with plaintiff placed it outside the ambit of *Civ. Code § 3333.1*, whether the statute operates in settlement proceedings or only when the action goes to trial, and whether the statute itself is constitutional (*102 Cal. App. 3d 91, 97-98)* . The court noted, however, that the effect of *Civ. Code § 3333.1* on medical and hospital benefit providers seeking reimbursement depended on certain factual determinations and that the binding effect of those determinations on insurance carriers who would not normally be parties to the question was another yet unanswered question. The court concluded that since petitioner was not a party to the underlying action, it was not bound by the trial court order that purported to foreclose its claim to the proceeds of the settlement with defendants. Petitioner therefore had at all times available the remedy of a separate action against plaintiff to enforce the provisions of its agreement with plaintiff. The court concluded that the mere possibility that *Civ. Code § 3333.1* might be invoked in any litigation did not give a medical benefit provider, such as petitioner, an interest i the matter being litigated within the ambit of the mandatory intervention provisions of *Code Civ. Proc. § 387(b)* (*102 Cal. App. 3d 91, 98)* .

Counsel should note that the court did not consider whether or not permissive intervention under *Code Civ. Proc. § 387(a)* would have been proper in this case, because petitioner had admitted that its intervention in the matter would expand the issues in litigation and impinge on the right of the original parties to litigate the matter in their own fashion. The court then stated in dictum, however, that if petitioner otherwise met the qualifications for mandatory intervention, the fact that such intervention would add to the complexity of the action, create delay, or adversely affect the original parties was of no moment (*102 Cal. App. 3d 91, 96)* .

[b] General Interest in Subject of Litigation as Insufficient

Coalition for Fair Rent v. Abdelnour *(1980) 107 Cal. App. 3d 97, 165 Cal. Rptr. 685* , involved an action by plaintiff association for a writ of mandate compelling defendants, a city and its city clerk, to accept and count the submitted supplemental petition and signatures to determine whether a certain initiative measure establishing local rent control boards qualified for the next general election. An apartment owners' association moved to intervene. The trial court denied the motion, but permitted it to appear as amicus curiae to file briefs and be heard in argument. The trial court then granted the writ of mandate compelling the city to accept and count the supplemental petition signatures. The city appealed from the judgment, and the apartment owners' association appealed independently from the order denying intervention. Plaintiffs then filed another writ of mandate in the court of appeal. All three matters were consolidated.

The court of appeal affirmed the trial court's order denying the motion to intervene. The court noted that although the apartment owners' association had an interest in defeating the proposed initiative measure, its interest in the general question of interpretation of the charter amendment statutes was no greater than that of any member of the general public (*107 Cal. App. 3d 97, 114-115)* . The court observed that in past cases, such a general interest could only be the basis of permissive intervention within the trial court's broad discretion, not intervention as a matter of right. The court stated that only a direct pecuniary interest formed the basis for mandatory intervention. The court also rejected the association's apparent contention that the city did not adequately represent its interests in the action (*107 Cal. App. 3d 97, 115)* .

The court acknowledged that the case of *Bustop v. Superior Court (1977) 69 Cal. App. 3d 66, 70-73, 137 Cal. Rptr.*

793 (discussed in *§ 124.43[3][a]*), had cast some shadow on the premise that more than a general political interest is necessary for mandatory intervention. The court in *Coalition for Fair Rent* nevertheless distinguished *Bustop* on the ground that the parents in *Bustop* had a more direct interest in the question of whether their children would be subject to mandatory school busing than the association in *Coalition for Fair Rent* had in the question of whether a rent control initiative should go on the ballot. The court reasoned that in *Bustop*, success of the school district or the parties representing minority interests would have directly resulted in the busing of the children. By contrast, in *Coalition for Fair Rent*, putting the measure on the ballot would not result in rent control without a significant intervening event, namely, voter approval of the measure (*107 Cal. App. 3d 97, 115)* . The court also distinguished the two cases procedurally, observing that in *Bustop* the decision to permit intervention occurred before or at an early stage of the trial, whereas in *Coalition for Fair Rent* a decision that the association should have been allowed to intervene would have created great delay and necessitated a wholly new proceeding in the trial court. The court concluded that it should not make such a decision absent a showing of significant prejudice (*107 Cal. App. 3d 97, 116)* .

For a discussion of the possible applicability of cases decided under *Code Civ. Proc. § 387* prior to 1977 to a determination of whether mandatory intervention is proper under *Code Civ. Proc. § 387(b)*, see *§ 124.03[3][a]*.

[4] Additional Authorities

[a] Interest in Property or Transaction That is Subject of Action Required

In *Siena Court Homeowners Assn. v. Green Valley Corp. (2008) 164 Cal. App. 4th 1416, 79 Cal. Rptr. 3d 915* , a condominium owners association sought to intervene in a construction defect action between a homeowners association and a developer, on the ground that it had an interest in certain property involved in the dispute, consisting of common facilities that were jointly used and maintained by the two associations. The trial court denied the motion for leave to intervene. The Court of Appeal affirmed the order denying the motion for leave to intervene, holding that the condominium owners association was not entitled to mandatory intervention under *Code Civ. Proc. § 387(b)* because it did not show that the disposition of the action in its absence would impair its ability to protect that interest. Its interest in the repair of the joint common facilities arose from a joint use and maintenance agreement between the associations, which obligated the condominium owners association to fund 48% of the repair and maintenance costs for the joint common facilities, while the obligation of the other association was 52%. The respective obligations were therefore independent of the issues in the construction defect action. Moreover, a judgment in the construction defect action would have no effect on the ability of the condominium owners association to protect its interest. The status of the condominium owners association as a joint obligor on the agreement did not entitle it to joinder as an indispensable party because the underlying action was not brought to enforce that joint liability (*164 Cal. App. 4th 1416, 1423-1430)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePartiesInterventionMotions to InterveneCivil ProcedurePartiesInterventionRight to Intervene

California Points & Authorities

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CHAPTER 130 JUDGES

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§§ 130.08-130.19 [Reserved]

§ 130.20 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Timely Peremptory Motion to Disqualify Not Granted [Code Civ. Proc. § 170.6(a)(3)]--Motion Made at Least Five Days Before Date Set for Trial or Hearing [Code Civ. Proc. § 170.6(a)(2)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Mandate Authorized

[b] Disqualified Judge Without Jurisdiction to Proceed With Case

[c] Motion Filed at Least Five Days Before Date Set for Trial or Hearing

[d] Motion Filed Five Days Before Postponed Date

[e] Case Not Subject to Master Calendar Rule

[4] Additional Authorities

[a] Disqualified Judge Without Jurisdiction to Proceed With Case

[b] Case Not Subject to Master Calendar Rule

§ 130.21 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Timely Peremptory Motion to Disqualify Not Granted [Code Civ. Proc. § 170.6(a)(3)]--Motion Made Before Commencement of Trial Where Judge Not Known at Least 10 Days Before Trial of Cause [Code Civ. Proc. § 170.6(a)(2)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Memoranda

§ 130.22 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Timely Peremptory Motion to Disqualify Not Granted [Code Civ. Proc. § 170.6(3)]--Motion Made Before Commencement of Hearing When Judge Not Known at Least 10 Days Before Hearing [Code Civ. Proc. § 170.6(a)(2)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Motion Made as Expeditiously as Possible After Agreed Matter Becomes Litigated

[4] Additional Authorities

[a] Motion Before Commencement of Hearing

§ 130.23 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Timely Peremptory Motion to Disqualify Not Granted [Code Civ. Proc. § 170.6(a)(3)]--Motion Made to Master Calendar Judge Not Later Than Time Cause Assigned for Trial [Code Civ. Proc. § 170.6(a)(2)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[c] Related Pleading and Practice Forms

§ 130.24 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Timely Peremptory Motion to Disqualify Not Granted [Code Civ. Proc. § 170.6(a)(3)]--Timely Motion Made After Appearance or Notice of All-Purpose Assignment to Judge [Code Civ. Proc. § 170.6(a)(2)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Motion Made After All-Purpose Assignment

[b] Fifteen Days in Direct Calendar Court Subject to Trial Court Delay Reduction Act

[c] Motion Timely Made After General Appearance

[d] Late-Appearing Defendant's Motion Timely Made When Done So Within 10 Days After That Defendant's Appearance.

[4] Additional Authorities

[a] Difference Between Direct Calendar and Master Calendar Courts

[b] Timeliness in Direct Calendar Assignment

§ 130.25 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Timely Peremptory Motion to Disqualify Not Granted [Code Civ. Proc. § 170.6(a)(3)]--Motion Made After Initially Filed Motion Pursuant to Code Civ. Proc. § 170.6 Was Dismissed [Code Civ. Proc. § 170.6(a)(2)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Motion Made After Previous Motion to Disqualify Was Dismissed

§ 130.26 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Timely Peremptory Motion to Disqualify Not Granted [Code Civ. Proc. § 170.6(a)(3)]--Motion Made After Judge Changed After First Appearance

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Timely Motion When Judge Changed After Parties Appeared

§ 130.27 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Timely Peremptory Motion to Disqualify Not Granted [Code Civ. Proc. § 170.6(a)(3)]--Motion Made Before Expiration of 30 Days of Party's First Appearance in One-Judge Court [Code Civ. Proc. § 170.6(a)(2)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Memoranda

§ 130.28 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Timely Peremptory Motion to Disqualify Not Granted [Code Civ. Proc. § 170.6(a)(3)]--Motion Made Prior to Trial and Before Determination of Contested Fact Issue Relating to Merits [Code Civ. Proc. § 170.6(a)(2)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Motion Made After Demurrer Timely

[b] Motion Made After Judgment on Pleadings Timely

[c] Motion Made After Motion To Quash Service Of Summons

[d] Motion Made After Summary Adjudication Motion or Summary Judgment Motion

[e] Motion Made After Court Ruling on Pretrial Motion Pursuant to Civ. Code § 3295(c)

[4] Additional Authorities

[a] Motion Made After Ex Parte Rulings But Before Hearing Set for Determining Issues of Law and Fact

[b] Motion Made Prior to Trial and Before Determination of Contested Fact Issue Relating to Merits

[c] Motion Made After Judgment on Pleadings Timely

§ 130.29 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Timely Peremptory Motion to Disqualify Not Granted [Code Civ. Proc. §

170.6(a)(3)]--Motion Made Within 60 Days of Notice of Assignment of New Trial to Judge Who Conducted Prior Proceeding [Code Civ. Proc. § 170.6(a)(2)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Motion on Retrial Made Within 60 Days of Notice of Assignment

[b] Appellant's Motion on Remand Proper After Reversal of Final Judgment Even if Appellant Made Prior Motion

[c] Motion Proper Even if Reversed Judgment Was Based on Jury Verdict

[d] What Constitutes New Trial

[4] Additional Authorities

[a] What Constitutes New Trial

[b] Bias of Trial Judge After Reversal

§ 130.30 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Timely Peremptory Motion to Disqualify Not Granted [Code Civ. Proc. § 170.6(a)(3)]--Motion Made in Proceeding Separate and Independent From Prior Action in Which Judge Presided

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Subsequent Proceeding Involves Distinct Legal Issues

[4] Additional Authorities

[a] Subsequent Proceeding Involves Distinct Legal Issues

§ 130.31 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge

From Proceeding With Case--Timely Peremptory Motion to Disqualify Not Granted [Code Civ. Proc. § 170.6(a)(3)]--Motion Made in Supplemental Proceeding to Disqualify Judge Who Did Not Preside at Original Proceeding

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Motion to Disqualify Subsequent Judge

§ 130.32 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Timely Peremptory Motion to Disqualify Not Granted [Code Civ. Proc. § 170.6(a)(3)]--Motion Made Within 20 Days After Service of Order Assigning Judge to Coordination Proceeding [Cal. Rules of Ct., Rule 3.516]

[1] FORM

[2] Comments

[a] Use of Form

[b] Peremptory Challenges in Coordination Proceedings

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Extension of Time

[b] Motion Timely Despite Judge's Prior Rulings on Contested Issue

§ 130.33 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Timely Peremptory Motion to Disqualify Not Granted [Code Civ. Proc. § 170.6(a)(3)]--Motion Made by Codefendant Who Is No Longer Party to Action

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Benefit of Timely Peremptory Challenge Inures to Codefendants

§ 130.34 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Challenge by Cross Defendant--Severance of Cross Action and Recusal in Only That Action Is Improper

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Severance of Cross Action and Recusal in Only That Action Is Improper

§ 130.35 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Inquiry Into Party's Good Faith in Making Peremptory Challenge Is Improper

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Inquiry Into Good Faith as Ground for Issuing Writ

§ 130.36 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Parties Entitled to Additional Challenges Due to Adverse Interests

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Exception to the One Peremptory Challenge Per Side Rule Due to Adverse Interests

§ 130.37 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Untimely Peremptory Motion to Disqualify Denied [Code Civ. Proc. § 170.6(a)(3)]--Motion Made Less Than Five Days Before Date Set for Trial or Hearing When Name of Assigned Judge Is Known at Least 10 Days Before Trial or Hearing [Code Civ. Proc. § 170.6(a)(2)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Known Judge Was Assigned

[b] Matter Set for Hearing in Department With Regularly Assigned Judge

[4] Additional Authorities

[a] Matter Set for Hearing in Department With Regularly Assigned Judge

§ 130.38 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Untimely Peremptory Motion to Disqualify Denied [Code Civ. Proc. § 170.6(a)(3)]--Motion Made After Commencement of Trial [Code Civ. Proc. § 170.6(a)(2)]

[1] FORM

[2] Comments

[a] Use of Form

§ 130.39 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Untimely Peremptory Motion to Disqualify Denied [Code Civ. Proc. § 170.6(a)(3)]--Motion Made After Commencement of Hearing Other Than Trial of Cause [Code Civ. Proc. § 170.6(a)(2)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Motion Made After Commencement of Hearing Is Too Late

[4] Additional Authorities

[a] Motion Made After Commencement of Hearing Is Too Late

§ 130.40 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Untimely Peremptory Motion to Disqualify Denied [Code Civ. Proc. § 170.6(a)(3)]--Motion Made After Assignment of Cause for Trial by Master Calendar Judge [Code Civ. Proc. § 170.6(a)(2)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Motion Made After Assignment of Cause for Trial by Master Calendar Judge

§ 130.41 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Untimely Peremptory Motion to Disqualify Denied [Code Civ. Proc. § 170.6(a)(3)]--Motion Made After Contested Matter Submitted [Code Civ. Proc. § 170.6(a)(1), (a)(2)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Motion Made After Contested Matter Submitted

[4] Additional Authorities

[a] Motion Made After Contested Matter Submitted

[b] Judge Cannot Waive Timeliness Requirements

§ 130.42 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Untimely Peremptory Motion to Disqualify Denied [Code Civ. Proc. § 170.6(a)(3)]--Motion Made at Supplemental Proceeding Which Is Continuation of Original Proceeding [Code Civ. Proc. § 170.6(a)(2)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Motion Made at Subsequent Proceeding

[b] Proceeding Involving Substantially, Same Issues

[c] Hearing on Motion to Tax Costs

[d] Hearing on Allowance of Attorney's Fees

[e] Hearing on Motion for New Trial

[4] Additional Authorities

[a] Motion Made at Subsequent Proceeding

[b] Proceeding Involving Substantially Same Issues

§ 130.43 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Untimely Peremptory Motion to Disqualify Denied [Code Civ. Proc. § 170.6(a)(3)]--After Prior Disqualification by Motion of Same Side [Code Civ. Proc. § 170.6(a)(3)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Motion Properly Denied After Prior Disqualification by Motion of Same Side

[b] Motion Properly Denied When Party Seeking Additional Challenge Per Side Fails to Prove Adverse Interests Between Parties

§ 130.44 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Untimely Peremptory Motion to Disqualify Denied [Code Civ. Proc. § 170.6(a)(3)]--Motion Made by Party in Coordination Proceeding [Cal. Rules of Ct., Rules 3.516, 3.544]

[1] FORM

[2] Comments

[a] Use of Form

[b] Add-On Cases in Coordination Proceedings

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[3] Discussion of Authorities

[a] Party in Add-On Case

§ 130.45 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Inquiry Into Party's Good Faith in Making Peremptory Challenge as Proper in Case of Unconstitutional Discrimination

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Inquiry Into Moving Party's Good Faith as Proper in Case of Unconstitutional Discrimination

[b] Burden of Proof

§§ 130.46-130.59 [Reserved]

§ 130.60 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Statement of Disqualification for Cause Improperly Denied [Code Civ. Proc. § 170.3(c)]--Timely Statement of Disqualification [Code Civ. Proc. § 170.3(c)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Disqualified Judge Without Power to Proceed With Case

[b] Timely Statement of Disqualification

[c] Judge Whose Determination Is Reviewed Should Not Hear Further Proceedings

[4] Additional Authorities

[a] Timely Statement of Disqualification

§ 130.61 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Statement of Disqualification for Cause Improperly Denied [Code Civ. Proc. § 170.3(c)]--Financial Interest in Subject Matter of or Party to Proceeding [Code Civ. Proc. § 170.1(a)(3)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Disqualifying Financial Interest

§ 130.62 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Statement of Disqualification for Cause Improperly Denied [Code Civ. Proc. § 170.3(c)]--Personal Knowledge of Disputed Evidentiary Facts Concerning Proceeding [Code Civ. Proc. § 170.1(a)(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Memoranda

§ 130.63 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Statement of Disqualification for Cause Improperly Denied [Code Civ. Proc. § 170.3(c)]--Relationship to Party or Certain Other Persons [Code Civ. Proc. § 170.1(a)(4), (5)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Memoranda

§ 130.64 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Statement of Disqualification for Cause Improperly Denied [Code Civ. Proc. § 170.3(c)]--Permanent or Temporary Physical Impairment [Code Civ. Proc. § 170.1(a)(7)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Memoranda

§ 130.65 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Statement of Disqualification for Cause Improperly Denied [Code Civ. Proc. § 170.3(c)]--Former Legal Representation by Judge [Code Civ. Proc. § 170.1(a)(2)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Memoranda

§ 130.66 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Statement of Disqualification for Cause Improperly Denied [Code Civ. Proc. § 170.3(c)]--Unable to Be Impartial [Code Civ. Proc. § 170.1(a)(6)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[i] New Trial

[ii] Financial Interest Not Covered by Code of Civil Procedure Section 170.1(a)(3)

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Unable to Be Impartial

[b] Judge Disqualified for Pretrial Opinion on Issues to Be Tried

[c] Judge Disqualified for Pretrial Opinion of Party's Lack of Veracity Under Oath

[4] Additional Authorities

[a] Unable to Be Impartial

[b] Judge Disqualified for Pretrial Opinion on Issues to Be Tried

[c] Judge Disqualified for Pretrial Opinion of Party's Lack of Veracity Under Oath

§ 130.67 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Statement of Disqualification for Cause Improperly Denied [Code Civ. Proc. § 170.3(c)]--Prospective Employment as a Dispute Resolution Neutral [Code Civ. Proc. § 170.1(a)(8)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Prospective Employment or Discussion of Employment as Dispute Resolution Neutral

§ 130.68 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Statement of Disqualification for Cause Properly Stricken [Code Civ. Proc. § 170.4(b)]--Statement Alleges No Facts or Insufficient Facts [Code Civ. Proc. § 170.4(b)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Statement Setting Forth No Facts or Insufficient Facts as Properly Stricken

[4] Additional Authorities

[a] Statement Setting Forth No Facts or Insufficient Facts as Properly Stricken

§ 130.69 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Statement of Disqualification for Cause Properly Stricken [Code Civ. Proc. § 170.4(b)]--Statement Not Timely [Code Civ. Proc. § 170.4(b)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Untimely Statement as Properly Stricken

[b] Failure to Present Statement at Earliest Practicable Opportunity Constitutes Waiver

[4] Additional Authorities

[a] Failure to Present Statement at Earliest Practicable Opportunity Constitutes Waiver

§ 130.70 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--Motion to Disqualify Made After Commencement of Trial--Judge Has Discretion to Proceed With Trial [Code Civ. Proc. § 170.4(c)(2)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Ruling on Motions in Limine Constitutes Commencement of Trial

§ 130.71 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Statement of Disqualification for Cause Properly Stricken [Code Civ. Proc. § 170.4(b)]--Statement Alleges Judge Stockholder of Nonparty Corporation Without Otherwise Alleging Judge's Financial Interest in Litigation [Code Civ. Proc. § 170.1(a)(3)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[3] Discussion of Authorities

[a] Judge as Stockholder of Nonparty Corporation Having No Direct Interest

[4] Additional Authorities

[a] Judge as Stockholder of Nonparty Corporation Having No Direct Interest

§ 130.72 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Statement of Disqualification for Cause Properly Stricken [Code Civ. Proc. § 170.4(b)]--Statement Alleges Facts Insufficient to Establish Inability to Be Impartial [Code Civ. Proc. § 170.1(a)(6)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[i] Oppose Proceedings to Set Aside Orders Made by Judge

[ii] Financial Interests Not Covered by Code of Civil Procedure Section 170.1(a)(3)

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[3] Discussion of Authorities

[a] Adverse State of Mind Based on Observation of Witnesses and Evidence

[b] Adverse State of Mind Based on Observation of Witnesses and Evidence in Trial at Which Motion for New Trial Directed

[c] Opinion Expressed in Discharge of Litigation

[d] Error on Question of Law

[e] Objective Standard of Impartiality

[4] Additional Authorities

[a] Adverse State of Mind Based on Observation of Witnesses and Evidence

[b] Opinion Expressed in Discharge of Litigation

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CHAPTER 130 JUDGES
PART I. INTRODUCTION

13-130 California Points & Authorities § 130.01

§ 130.01 Scope of Chapter

This chapter contains memoranda for use in supporting [*see §§ 130.20 -130.36*] and opposing [*see §§ 130.37 -130.45*] a petition for a writ of mandate to prevent a trial judge from proceeding with a case when the judge is alleged to be peremptorily disqualified.

Sections 130.60 et seq. also contain memoranda for use in supporting [*see §§ 130.60 -130.67*] and opposing [*see §§ 130.68 -130.72*] a petition for a writ of mandate to prevent a trial judge from proceeding with a case when the judge is alleged to be disqualified for cause. In the past, a petition for either mandate or prohibition could be used to challenge a judge, but current law requires use of mandate in these matters [*Code Civ. Proc. § 170.3(d)*; *see People v. Hull, (1991) 1 Cal. 4th 266, 269* ; *2 Cal. Rptr. 2d, 526* ; *820 P.2d 1036]* .

This chapter deals primarily with disqualification of judges in civil cases, although peremptory disqualification by the terms of *Code Civ. Proc. § 170.6* applies to criminal actions as well [*Code Civ. Proc. § 170.6(a)(1)*], and disqualification for cause by the terms of *Code Civ. Proc. §§ 170-170.5* applies to "any proceeding," that is, an action, case, cause, motion, or special proceeding [*Code Civ. Proc. §§ 170, 170.5(f)*], which would include a criminal action [*see Pappa v. Superior Court (1960) 54 Cal. 2d 350, 354, 5 Cal. Rptr. 703, 353 P.2d 311* (decided under former Code Civ. Proc. § 170)].

The statutory law underlying sections 130.60 et seq., pertaining to disqualification for cause, was significantly revised in 1984. Sections 130.60 et seq. include cases decided under the prior law to the extent that they appear to be consistent with, or persuasive with respect to, the current law. However, they are no longer controlling authority and should be used with caution. Where a case is cited that was decided under the prior law, it is so indicated in the discussion of authorities.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral Overview

California Points & Authorities

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CHAPTER 130 JUDGES
PART I. INTRODUCTION

13-130 California Points & Authorities § 130.02

§ 130.02 Governing Statutes

Code Civ. Proc. § 170.6 governs the peremptory disqualification of a judge; disqualification of a judge for cause is governed by *Code Civ. Proc. §§ 170-170.5*. Statutes governing a petition for a writ of mandate include *Code Civ. Proc. §§ 1084-1097, 1107, 1108*. *Code Civ. Proc. §§ 170-170.5* also govern the disqualification of a privately compensated temporary judge [*Cal. Rules of Ct., Rule 2.831(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral Overview

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CHAPTER 130 JUDGES
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13-130 California Points & Authorities § 130.03

§ 130.03 Review of Determination Regarding Disqualification

The determination of the question of the disqualification of a judge by peremptory challenge or for cause is a nonappealable order. It may be reviewed only by a writ of mandate brought within 10 days after service of written notice of entry of the decision [*Code Civ. Proc. § 170.3(d)*; *see People v. Hull, (1991) 1 Cal. 4th 266, 276, 2 Cal. Rptr. 2d 526, 820 P.2d 1036]* . Only the parties to the proceeding may seek review [*Code Civ. Proc. § 170.3(d)*]. The disqualified judge cannot seek writ review of a disqualification order [*Curle v. Superior Court (2001) 24 Cal. 4th 1057, 1067, 103 Cal. Rptr. 2d 751]* . For a discussion of the procedure involved in bringing a writ of or mandate and for forms of memoranda for use in mandate proceedings, see Ch. 150, *Mandate and Prohibition* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedureAppealsGeneral Overview

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13-130 California Points & Authorities § 130.04

§ 130.04 Attacking Actions Taken by Disqualified Judge

If grounds for disqualification for cause are first learned of or arise after the judge has made one or more rulings but, before he or she has completed judicial action in a proceeding, the replacement judge may set aside the prior rulings only for good cause [*Code Civ. Proc. § 170.3(b)(4)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral OverviewCivil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsStandards of ReviewGeneral Overview

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CHAPTER 130 JUDGES
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13-130 California Points & Authorities § 130.05

§ 130.05 Vacating Judgment by Disqualified Judge

If grounds for disqualification for cause are first learned of after judgment has been rendered but before it becomes final, it would appear that a motion to vacate the judgment could be made on this basis, by analogy to decisions under prior law [*Tatum v. Southern Pac. Co. (1967) 250 Cal. App. 2d 40, 43, 58 Cal. Rptr. 238* (motion for new trial)]. For discussion of and forms of memoranda for use in bringing motions to vacate judgments, see Ch. 155, *Motions After Trial* , Part II.

Also by analogy to decisions under prior law, if grounds for disqualification are first learned of after judgment has become final, it would appear that a motion or separate action to vacate the judgment could be made on this basis [*see Cadenasso v. Bank of Italy (1932) 214 Cal. 562, 567-570, 6 P.2d 944* (separate action in equity)]. For discussion of and forms of memoranda for use in bringing motions to vacate judgments, see Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to Vacate

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CHAPTER 130 JUDGES
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13-130 California Points & Authorities § 130.06

§ 130.06 Points and Authorities

[1] In Support of Disqualification Challenge

Code Civ. Proc. § 170.3(c)(1) requires a "written verified statement" setting forth facts constituting the ground of disqualification, whereas *Code Civ. Proc. § 170.6* refers to an oral or written "motion" without notice supported by an affidavit or declaration under penalty of perjury or an oral statement under oath to establish prejudice. Although *Cal. Rules of Ct., Rule 3.1113,* requires the service and filing of a memorandum with a "notice of motion," these rules, by their own terms, do not apply to nonnoticed oral motions made in open court or to written motions. Nevertheless, prudent counsel should serve and file such a memorandum if there is an issue as to the timeliness or other procedural aspect of the motion. The pertinent points and authorities set forth in the forms may, with appropriate modifications, be adapted for such use.

[2] In Support of Petition for Writ of Mandate in Superior Court

Neither the Code of Civil Procedure nor the California Rules of Court expressly authorizes or requires that points and authorities be filed in support of a petition for a writ of mandate in the superior court. Nevertheless, language in the governing statutory provisions suggests such a requirement. *Code Civ. Proc. § 1090* refers to the petition for a writ of mandate as a "motion." Moreover, *Code Civ. Proc. § 1088* refers to a petition for a writ of mandate as an "application," and *Code Civ. Proc. § 1003,* which incorporates the provisions relating to civil actions into special proceedings, defines an application for an order as a "motion." As noted above under § 130.06[1], noticed motions must be supported by points and authorities [*see Cal. Rules of Ct., Rule 3.1113(a)*].

The advisability of filing points and authorities to support a petition is buttressed not only by the statutory language but also by practical considerations. For example, respondent has a right to file a memorandum in opposition to the petition [*Code Civ. Proc. § 1107*]; petitioner has no right to respond to such a memorandum. In any case, it is the practice of counsel in many counties throughout California to file points and authorities in support of petitions sought in superior courts. Also, local court rules may require it.

Whenever a writ petition seeks review of a trial court ruling, it must also be accompanied by a record adequate to permit the review, including copies of the order or judgment and copies of all documents and exhibits. The petition must also

be accompanied by a transcript, or if a transcript is unavailable, counsel's declaration explaining why it is not available and summarizing the proceedings, including arguments by counsel and the basis of the trial court's decision, if stated, or counsel's declaration stating the date a transcript was ordered and that is expected to be filed on a certain date (a date prior to any action requested of the reviewing court other than a stay supported by other parts of the record). If a stay is requested, the petition must explain the reasons for the urgency and set forth all relevant time constraints. Failure to meet these requirements may result in a summary denial of the petition, stay request, or both [*Cal. Rules of Ct., Rule 8.486(b)(4)*; *see also Cal. Rules of Ct., Rule 8.486(c)* (format for supporting documents and exhibits)].

[3] In Support of Petition for Writ of Mandate in Appellate Court

Points and authorities in support of a petition for a writ of mandate are expressly required when the petition is filed in an appellate court [*Cal. Rules of Ct., Rule 8.490(a)(5)*].

[4] In Opposition to Petition for Writ of Mandate

Whether the petition is filed in a superior or appellate court, respondent, real party in interest, or both, within ten days after being served with the petition, may file with the court and serve on petitioner a memorandum in opposition to the granting of the writ [*Code Civ. Proc. § 1107*; *Cal. Rules of Ct., Rules 8.486(a), 8.487*; *see Code Civ. Proc. § 1089.5*] and, where the petition is filed in a reviewing court, a statement of any fact not included in the petition which in his, her, or their opinion is material. In an appellate court, no statement in opposition to the petition is required unless requested by the court, and the court, in its discretion, may deny the petition or issue an alternative writ without first requesting the filing of opposition [*Cal. Rules of Ct., Rule 8.487(a)(4)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral Overview

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13-130 California Points & Authorities § 130.07

§ 130.07 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

For a discussion, procedural guide, and forms for use in proceedings to disqualify a judge by peremptory challenge or for cause, see Ch. 317, *Judges* in California Forms of Pleading and Practice (Matthew Bender). For a discussion, procedural guide, and forms for use in mandate proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender).

[2] Related Points and Authorities Chapters

Related memoranda that may be useful in particular cases where the disqualification of a judge is at issue may be found in the following chapters:

- Ch. 71, *Demurrers and Motions for Judgment on the Pleadings*.
- Ch. 110, *Habeas Corpus*.
- Ch. 150, *Mandate and Prohibition*.
- Ch. 155, *Motions After Trial*.

For a discussion of how to use the forms in this chapter to draft a complete memorandum, or a trial or appellate brief, and for an illustration of a completed memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral Overview

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13-130 California Points & Authorities §§ 130.08-130.19

[Reserved]

§§ 130.08[Reserved]

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CHAPTER 130 JUDGES
PART II. FORMS
A. PEREMPTORY DISQUALIFICATIONS

13-130 California Points & Authorities § 130.20

§ 130.20 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Timely Peremptory Motion to Disqualify Not Granted [Code Civ. Proc. § 170.6(a)(3)]--Motion Made at Least Five Days Before Date Set for Trial or Hearing [Code Civ. Proc. § 170.6(a)(2)]

[1] FORM

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA,
_____ APPELLATE DISTRICT
[DIVISION _____]

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	MEMORANDUM IN SUPPORT OF PETITION
THE SUPERIOR COURT OF THE STATE OF	)	FOR WRIT OF MANDATE
CALIFORNIA FOR THE [CITY AND] COUNTY	)	Date: _____
OF _____,	)	Time: _____
and	)	Location: _____
_____ [*name*],	)	[Judge: _____]
THE JUDGE OF SAID COURT,	)	Date Action Filed: _____
Respondents, _____ [*name*(*s*)]	)	[Trial Date: _____]
Real _____ [Party *or* Parties]	)	
in Interest.	)	
_____		

THE COURT SHOULD ISSUE A WRIT OF MANDATE TO PREVENT JUDGE _____ [*name*] FROM PROCEEDING WITH THE CASE BECAUSE THE JUDGE FAILED TO GRANT THE PEREMPTORY MOTION TO DISQUALIFY, WHICH WAS TIMELY MADE OVER FIVE DAYS PRIOR TO THE _____ [TRIAL *or* HEARING] DATE.

A. Mandate Authorized. A writ of mandate may issue from any court to any inferior tribunal to compel the performance of an act that the law specially enjoins as a duty resulting from an office (*Code Civ. Proc. § 1085*). The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law (*Code Civ. Proc. § 1086*). The determination of the question of the peremptory challenge of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal sought within 10 days of notice to the parties of the decision (*Code Civ. Proc. § 170.3(d)*; *People v. Hull (1991) 1 Cal. 4th 266, 276, 2 Cal. Rptr. 2d 526, 820 P.2d 1036*).

B. Disqualified Judge Without Jurisdiction to Proceed With Case. A timely motion to disqualify under *Code of Civil Procedure Section 170.6* deprives the judge of jurisdiction in all further contests in the action (*Brown v. Swickard (1985) 163 Cal. App. 3d 820, 831, 209 Cal. Rptr. 844*).

C. Motion Filed at Least Five Days Before Date Set for Trial or Hearing. A motion and affidavit to disqualify a trial judge under *Code of Civil Procedure Section 170.6* are timely filed if presented at least five days before the last scheduled date for trial if the judge who is assigned to try the cause is known to the party or the party's attorney at least 10 days before that date (*Code Civ. Proc. § 170.6(a)(2)*; *see Eagle Maintenance & Supply Co. v. Superior Court (1961) 196 Cal. App. 2d 692, 694, 695, 16 Cal. Rptr. 745*).

[*Optional*] **D. Motion Filed Five Days Before Postponed Date.** When a hearing date is set, and the hearing is postponed, a motion to disqualify pursuant to *Code of Civil Procedure Section 170.6* filed five days prior to the postponed date is timely (*Zdonek v. Superior Court (1974) 38 Cal. App. 3d 849, 854, 113 Cal. Rptr. 669* (overruled on another ground by same court in *Woodman v. Superior Court (1987) 196 Cal. App. 3d 407, 410, 419, 241 Cal. Rptr. 818*)).

[*Optional*] **E. Case Not Subject to Master Calendar Rule.** Not every case that has been assigned by a master calendar department has been assigned from a "master calendar" as that term is used in *Code of Civil Procedure Section 170.6*. For the master calendar rule to apply, there must be a true master calendar assignment of a ready case to a ready courtroom (*People v. Superior Court (Lavi) (1993) 4 Cal. 4th 1164, 1175-1177*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for a writ of mandate to prevent a judge from proceeding with a case when the judge has not granted a peremptory motion to disqualify that was timely made under the ten-day/five-day rule. This rule requires the motion to be made at least five days before the date set for trial or hearing if the identity of the judge is known at least 10 days prior to the date set for trial or hearing [*see Code Civ. Proc. § 170.6(a)(2)*].

Different time requirements apply in the following situations [*see Code Civ. Proc. § 170.6(a)(2)*], and are addressed in other forms of memoranda:

(1) The judge's identity is learned less than 10 days before the trial date [*see § 130.21*].

(2) The judge's identity is learned less than 10 days before the hearing date [*see § 130.22*].

(3) The motion is directed to trial of the cause where there is a master calendar [*see § 130.23*].

(4) The cause is assigned to a judge for all purposes [*see § 130.24*].

(5) The cause is pending in a court with only one judge [*see § 130.27*].

(6) On remand from appeal for new trial, the cause is assigned to the judge who heard the prior proceeding [*see § 130.29*].

(7) The action is part of a coordination proceeding [*see § 130.32*].

Optional Paragraph E should be used when the opposing party claims the challenge was untimely because it was not made immediately when the assignment was made in a master calendar department, but it was not a "master calendar assignment" for the purposes of *Code Civ. Proc. 170.6*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. In particular, counsel should show that the challenge in this case was timely.

[b] Related Uses

With appropriate modifications, this memorandum may be used to support a petition for a writ of mandate to compel a judge to vacate an order denying petitioner's motion to disqualify that judge and to direct him or her to assign the case to a different judgefor trial [*see Lowry v. Superior Court (1960) 186 Cal. App. 2d 22, 24, 8 Cal. Rptr. 720]* . The memorandum may also be used to support a motion to vacate a default or default judgment entered by a judge who should have disqualified himself or herself after proper motion [*see Estate of Cuneo (1963) 214 Cal. App. 2d 381, 383, 29 Cal. Rptr. 497]* .

[c] Related Pleading and Practice Forms

For forms for use in filing a motion for peremptory disqualification and for a form of a petition for a writ of mandate for use after a judge has refused to reassign a case after a peremptory challenge, see Ch. 317, *Judges* in California Forms of Pleading and Practice (Matthew Bender).

[d] Opposing Memoranda

The points and authorities *set out in §§ 130.37, 130.41 -130.45* may be used in an appropriate case to oppose a petition supported by this form.

[3] Discussion of Authorities

[a] Mandate Authorized

In ***People v. Hull*** *(1991) 1 Cal. 4th 266, 2 Cal. Rptr. 2d 526, 820 P.2d 1036* , after several pretrial conferences and a

continuance, the case was set for trial before a named judge. The assignment was made on a Friday when neither defendant nor her counsel were present. The following Monday defendant filed a peremptory challenge to disqualify the judge. The motion was denied as untimely, and the case proceeded to trial before the judge. Defendant was found guilty and appealed from the judgment of conviction, raising only the issue that denial of the peremptory challenge motion was error. The court of appeal affirmed and defendant petitioned the Supreme Court for review.

The Supreme Court granted review and also affirmed, holding that *Code Civ. Proc. § 170.3(d)* applied to make the determination on the peremptory challenge nonappealable and subject to review only by writ of mandate sought within 10 days after the parties are notified of the decision (*1 Cal. 4th 266, 268, 276)* . The Court reviewed *Woodman v. Superior Court (1987) 196 Cal. App. 3d 407, 241 Cal. Rptr. 818* , which had held that *Code Civ. Proc. § 170.3(d)* does not apply to review of peremptory challenges under *Code Civ. Proc. § 170.6*, but only to review of challenges for cause under *Code Civ. Proc. § 170.1 et seq.*, and *Guedalia v. Superior Court (1989) 211 Cal. App. 3d 1156, 260 Cal. Rptr. 99* , which held that § 170.3(d) was the exclusive means to review any motion to disqualify a judge, including peremptory challenges. The Court followed the *Guedalia* view, and held that denial of the § 170.6 peremptory challenge could not be reviewed on appeal, but only by writ of mandate under Section 170.3(d) (*1 Cal. 4th 266, 270-276)* .

[b] Disqualified Judge Without Jurisdiction to Proceed With Case

In ***Brown v. Swickard*** *(1985) 163 Cal. App. 3d 820, 831, 209 Cal. Rptr. 844* , a change of venue was granted moving the superior court proceedings from Merced County to Lassen County. The plaintiffs filed a peremptory challenge to disqualify the judge on March 23, 1983. On March 28, 1983, the motion was denied as untimely at the hearing on two defendants' motion for summary judgment. The judge also granted the motion for summary judgment, and a judgment dismissing the action as to those defendants was filed on March 29. A motion for summary judgment as to three other defendants, which had been filed on March 2, 1983, was heard by the judge on April 4, 1983. The judge granted the motion and judgment dismissing the action as to those defendants was filed on April 12. The plaintiffs appealed.

The court of appeal declined to apply retroactively the Code Civ. Proc. § 170.6(2) [*now see Code Civ. Proc. § 170.6(a)(2)*] provision regarding one-judge courts to the case, and held that the ten-day/five-day rule of Code Civ. Proc. § 170.6(2) [*now see Code Civ. Proc. § 170.6(a)(2)*] applied (*163 Cal. App. 3d 820, 826-830)* . The court further held that the plaintiff's peremptory challenge was timely under the ten-day/five-day rule (*163 Cal. App. 3d 820, 830)* . The court then noted that a timely motion to disqualify under § 170.6 deprives the judge of jurisdiction in all further contests in the action. Thus, the plaintiffs' motion not only deprived the judge of jurisdiction to rule on the summary judgment motion heard on March 28, but also of jurisdiction to rule on the remaining defendants' motion for summary judgment. Therefore all the summary judgments were void for want of jurisdiction, and the matter was remanded to be heard by a different judge (*163 Cal. App. 3d 820, 826-830)* .

With respect to the actions of the disqualified judge being "void," it has been suggested that "voidable" is a more accurate term because the disqualification may be waived by the parties [*see Guedalia v. Superior Court (1989) 211 Cal. App. 3d 1156, 1161 n.3, 260 Cal. Rptr. 99]* .

[c] Motion Filed at Least Five Days Before Date Set for Trial or Hearing

Eagle Maintenance & Supply Co. v. Superior Court *(1961) 196 Cal. App. 2d 692, 16 Cal. Rptr. 745* , involved a proceeding in which an appellate court issued a peremptory writ of prohibition to prevent a superior court judge from trying a cause of action pending before him. In the superior court, the cause went to trial as a default with judgment entered inplaintiff's favor. Subsequently, defendant moved the court to set aside the default judgment, the motion was granted, and the matter was set for retrial on a certain date. Because of continuances, over 97 days elapsed between that date and the date on which the cause was finally scheduled to be tried. Plaintiff filed a motion to disqualify the trial judge five days before the final scheduled trial date. Defendant contended that since plaintiff knew almost a month prior to the original retrial date that the judge who first tried the case would retry it on that date, plaintiff's motion was not

timely filed. In issuing the writ of prohibition as sought by plaintiff, the appellate court disagreed, stating that *Code Civ. Proc. § 170.6* should be liberally construed, considering that a party might believe a judge to be impartial when a trial date was originally set, but if the trial were set over for several months, changed circumstances might necessitate the later filing of a motion. Also, because of the transfer of judges from one department to another, if a case were continued for a substantial period of time, it would place an undue hardship on a litigant to compel him or her to know before the first scheduled trial setting which judge would finally be assigned to try his or her case. So construing *Code Civ. Proc. § 170.6*, the court held a peremptory motion and affidavit to be timely if presented at least five days before the last scheduled date for trial where a judge who is assigned to or scheduled to try the cause is known to the party or his attorney at least 10 days before such date. In dictum, the court noted that no facts are required to be set forth supporting the charge of prejudice, so that an affidavit is sufficient if there is only a belief as to the existence of prejudice even though it may not in fact exist (*196 Cal. App. 2d 692, 694-695)* .

[d] Motion Filed Five Days Before Postponed Date

In ***Zdonek v. Superior Court*** *(1974) 38 Cal. App. 3d 849, 113 Cal. Rptr. 669* , the judge presiding in the civil master calendar department had consolidated two cases and assigned the consolidated action to another judge for all further proceedings. The assigned judge heard and overruled a demurrer to the complaints, and a motion to test the propriety of the case as a class action was set and then continued. Over five days prior to the date to which the hearing on the latter motion was continued, one of the defendants filed a motion for disqualification. The motion conformed with the requirements of *Code Civ. Proc. § 170.6*, and, if timely, would have been immediately effective to deprive the assigned judge of further jurisdiction in the case. The judge presiding in the master calendar department denied the motion on the ground it was not timely filed.

Defendant then petitioned the court of appeal for a writ of prohibition. The court issued the writ, holding the motion to have been timely filed. The court held that the assignment was not from a master calendar as contemplated by Code Civ. Proc. § 170.6(2) [*now see Code Civ. Proc. § 170.6(a)(2)*] and that therefore, the ten-day/five-day provision of that section applied (*38 Cal. App. 3d 849, 852)* [note that § 170.6(a)(2) was subsequently amended to provide a different rule for cases assigned to a judge for all purposes; *see § 130.24*]. Under the ten-day/five-day rule, if a judge who is scheduled to hear a matter is known at least 10 days before the date set for trial or hearing, the motion to disqualify must be made at least five days before that date. Counsel for real party in interest contended that although the motion to disqualify had been filed more than five days prior to the date to which the court had continued the hearing of the class action motion, the motion to disqualify was untimely because it was not filed five days prior to the date originally set for the hearing on that motion. The appellate court rejected this contention and held that if a hearing date is set, and the hearing is postponed, a motion filed five days prior to the postponed date is timely and, in this regard, petitioner's motion to disqualify was timely filed (*38 Cal. App. 3d 849, 854)* .

The *Zdonek* case was overruled on another ground by the same court in *Woodman v. Superior Court (1987) 196 Cal. App. 3d 407, 410, 419, 241 Cal. Rptr. 818* (discussed in *§ 130.24[3][a]*).

[e] Case Not Subject to Master Calendar Rule

In ***People v. Superior Court (Lavi)*** *(1993) 4 Cal. 4th 1164* , the case was transferred to the criminal master calendar department of the Los Angeles County Superior Court, Central District, after various pretrial motions had been heard. When the parties appeared in the master calendar department to have a trial date assigned, the judge transferred the case for trial setting to a "long cause" department in which Judge Trammell presided. The People did not immediately challenge Judge Trammell, but did so the same afternoon after the conclusion of the hearing. The challenge was rejected as untimely under the master calendar rule. The People petitioned for a writ of mandate, which was ultimately denied by the court of appeal, and the People petitioned the Supreme Court for review.

The Supreme Court reversed, noting that under Code Civ. Proc. § 170.6(2) [*now see Code Civ. Proc. § 170.6(a)(2)*], a

challenge is timely if made before trial commences, unless an exception to that rule, such as the all purpose assignment rule or ten-day/five-day rule, applies (*4 Cal. 4th 1164, 1172)* . The Court stated that the label of a department as a "master calendar" department was persuasive, but not dispositive of whether the master calendar rule applies (*4 Cal. 4th 1164, 1175)* . Looking to the purpose of the rule, the court held that it applies only when a ready case is assigned to a ready courtroom (*4 Cal. 4th 1164, 1177)* . In a footnote, the Court clarified the meaning of "ready" courtroom, pointing out that the courtroom need not be idle, but only available or reasonably expected to become available shortly so that trial may commence. Thus, the mastercalendar rule could apply to an assignment in the morning for a trial expected to commence that afternoon, or to an afternoon assignment for trial to begin in the morning (*4 Cal. 4th 1164, 1177 n.8*). This clearly had not been the case here, because it was contemplated that the trial date would be set in the other department and for a date in the future. The Court then found that the challenge was timely under the all purpose assignment rule (*4 Cal. 4th 1164, 1178-1182)* . Finally, the court held that even if it were not an all purpose assignment, the challenge was timely under the ten-day/five-day rule (*4 Cal. 4th 1164, 1182-1185)* .

[4] Additional Authorities

[a] Disqualified Judge Without Jurisdiction to Proceed With Case

In *McCartney v. Commission on Judicial Qualifications (1974) 12 Cal. 3d 512, 116 Cal. Rptr. 260, 526 P.2d 268* , the Supreme Court issued a writ of review in response to the petition of a municipal court judge that the Court modify or reject the recommendation of the Commission on Judicial Qualifications that he be removed from office. The Court concluded that censure, rather than removal, was the appropriate discipline. Accordingly, the judge was censured for injudicious conduct including the judge's angry criticism of public defenders for filing affidavits of prejudice against him (*12 Cal. 3d 512, 530-531)* . The Court noted that in enacting *Code Civ. Proc. § 170.6*, the Legislature guaranteed to litigants an extraordinary right to disqualify a judge. The right is "automatic" in the sense that a good faith belief in prejudice is alone sufficient, proof of facts showing actual prejudice not being required. Accordingly, the rule has developed that, once an affidavit of prejudice has been filed under *Code Civ. Proc. § 170.6*, the court has no jurisdiction to hold further proceedings in the matter except to inquire into the timeliness of the affidavit or its technical sufficiency under the statute. When the affidavit is timely and properly made, immediate disqualification is mandatory. Hence, the judge was bound to accept proper affidavits without further inquiry. A fortiori, his vehement criticism of public defenders for exercising such statutory power was clearly improper (*12 Cal. 3d 512, 531-532)* . In the light of mitigating factors, however, the Court held that censure was adequate discipline (*12 Cal. 3d 512, 539-540)* .

Andrews v. Joint Clerks etc. Committee (1966) 239 Cal. App. 2d 285, 48 Cal. Rptr. 646 , involved a labor dispute that had been submitted to arbitration by order of a trial court in 1962. In 1964, plaintiffs filed a second action to have certain matters removed from the arbitrator. Defendants demurred to the 1964 complaint. More than five days prior to hearing on the demurrer, one of the plaintiffs filed an affidavit of prejudice and a motion for disqualification of the judge who was to hear the demurrer and who had heard the 1962 case. The judge struck the affidavit of prejudice and sustained the demurrer without leave to amend the complaint. On plaintiff's appeal, the court of appeal stated that a judge against whom a peremptory challenge has been directed is automatically disqualified and without jurisdiction to proceed with a trial or hearing when the *Code Civ. Proc. § 170.6* motion has been timely made and supported by a sufficient affidavit (*239 Cal. App. 2d 285, 293-294)* . However, the court affirmed the judgment of dismissal by concluding that the proceeding in which disqualification was sought was actually a part and continuation of other proceedings pending therein in which the same trial judge had previously heard a matter involving a contested issue of law or fact and that the motion for his disqualification was therefore not timely made, the affidavit of disqualification was properly stricken, and the judge retained jurisdiction to proceed with the case (*239 Cal. App. 2d 285, 298-302)* .

[b] Case Not Subject to Master Calendar Rule

In *Villarruel v. Superior Court (1973) 35 Cal. App. 3d 559, 110 Cal. Rptr. 861* , defendant was arraigned before the presiding superior court judge who ordered the case set for trial before another judge in another department. When he

appeared before the assigned judge, defendant moved to continue the trial, and then filed a declaration under penalty of perjury to disqualify the assigned judge. The assigned judge struck the declaration as not timely, applying the master calendar rule. The appellate court held that the master calendar rule did not apply and that the motion was timely filed under the ten-day/five-day rule of Code Civ. Proc. § 170.6(2) [*now see Code Civ. Proc. § 170.6(a)(2)*], considering the policy reasons underlying the master calendar provision (*35 Cal. App. 3d 559, 562-563)* . The court noted that not every case assigned by a master calendar department has been assigned from a "master calendar," and, in the present case, where the presiding judge of a multi-judge court set defendant's trial date in another department over a month in advance, the case was not on, or assigned from, a master calendar as that term is used in former Cal. Rules of Ct., Rule 223, or *Code Civ. Proc. § 170.6*. When a case is assigned for future trial, the reasons for the special "master calendar" provision do not exist and defendant's motion to disqualify the assigned judge, when filed more than five days prior to the trial date, was timely in accordance with the ten-day/five-day provision. The court issued a peremptory writ of prohibition to prohibit any further proceedings before the assigned judge (*35 Cal. App. 3d 559, 563-564)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral Overview

California Points & Authorities

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 130 JUDGES
PART II. FORMS
A. PEREMPTORY DISQUALIFICATIONS

13-130 California Points & Authorities § 130.21

§ 130.21 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Timely Peremptory Motion to Disqualify Not Granted [Code Civ. Proc. § 170.6(a)(3)]--Motion Made Before Commencement of Trial Where Judge Not Known at Least 10 Days Before Trial of Cause [Code Civ. Proc. § 170.6(a)(2)]

[1] FORM

[*Caption. See § 130.20[1].*]

THE COURT SHOULD ISSUE A WRIT OF MANDATE TO PREVENT JUDGE _____ [*name*] FROM PROCEEDING WITH THE CASE BECAUSE THE JUDGE FAILED TO GRANT THE PEREMPTORY MOTION TO DISQUALIFY, WHICH WAS TIMELY MADE BEFORE COMMENCEMENT OF THE TRIAL BECAUSE THE JUDGE WAS NOT KNOWN UNTIL _____ [*period of less than 10 days prior to trial, e.g.,* FOUR DAYS BEFORE THE TRIAL DATE].

A. Mandate Authorized. [*See § 130.20]1], Paragraph A.*]

B. Disqualified Judge Without Jurisdiction to Proceed With Case. [*See § 130.20]1], Paragraph B.*]

C. Motion Made Before Commencement of Trial. Where the judge or court commissioner or referee assigned or scheduled to try a cause is not known at least 10 days before the date set for trial, a motion under *Code of Civil Procedure Section 170.6* to disqualify made before the drawing of the name of the first juror, or before plaintiff's counsel makes an opening statement in a nonjury case, or before the swearing of the first witness or giving of any evidence in a nonjury case without opening statement by plaintiff's counsel, or before trial of the cause has otherwise commenced is timely (*Code Civ. Proc. § 170.6(a)(2)*).

[*Optional*] **D. Case Not Subject to Master Calendar Rule.** [*See § 130.20]1], Paragraph E.*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for a writ of mandate to prevent a judge from proceeding with a case when the judge has not granted a timely peremptory motion to disqualify made before commencement of a trial in a case in which the judge is not known to petitioner at least 10 days before the trial [*see § 130.20*], the case is not assigned on a master calendar system [*see § 130.23*], and is not assigned to one judge for all purposes [*see § 130.24*; *see also Code Civ. Proc. § 170.6(a)(2)*]. Other specific time limits are listed in § 130.20[2][a]. If none of these exceptions apply, but the challenge is made prior to a hearing other than a trial, see the memorandum *set out in § 130.22*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. In particular, counsel should show that none of the exceptions noted above apply.

[b] Related Pleading and Practice Forms

For forms for use in filing a motion of peremptory disqualification and for a form of a petition for a writ of mandate for use after a judge has refused to reassign a case after a peremptory challenge, see Ch. 317, *Judges* in California Forms of Pleading and Practice (Matthew Bender).

[c] Opposing Memoranda

The points and authorities *set out in §§ 130.38, 130.41 -130.45* may be used in an appropriate case to oppose a petition supported by this form.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral Overview

California Points & Authorities

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 130 JUDGES
PART II. FORMS
A. PEREMPTORY DISQUALIFICATIONS

13-130 California Points & Authorities § 130.22

§ 130.22 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Timely Peremptory Motion to Disqualify Not Granted [Code Civ. Proc. § 170.6(3)]--Motion Made Before Commencement of Hearing When Judge Not Known at Least 10 Days Before Hearing [Code Civ. Proc. § 170.6(a)(2)]

[1] FORM

[*Caption. See § 130.20[1].*]

THE COURT SHOULD ISSUE A WRIT OF MANDATE TO PREVENT JUDGE _____ [*name*] FROM PROCEEDING WITH THECASE BECAUSE THE JUDGE FAILED TO GRANT THE PEREMPTORY MOTION TO DISQUALIFY, WHICH WAS TIMELY MADE BEFORE COMMENCEMENT OF THE HEARING BECAUSE THE JUDGE WAS NOT KNOWN UNTIL _____ [*period of less than 10 days prior to trial, e.g.,* FOUR DAYS BEFORE THE HEARING DATE].

A. Mandate Authorized. [*See § 130.20]1], Paragraph A.*]

B. Disqualified Judge Without Jurisdiction to Proceed With Case. [*See § 130.20]1], Paragraph B.*]

C. Motion Before Commencement of Hearing. When the judge or court commissioner or referee assigned or scheduled to hear a matter other than the trial of a cause is not known at least 10 days before the date set for hearing, a motion under *Code of Civil Procedure Section 170.6* to disqualify made not later than commencement of the hearing is timely (*Code Civ. Proc. § 170.6(a)(2)*).

[*Optional*] **D. Motion Made as Expeditiously as Possible After Agreed Matter Becomes Litigated.** A motion for disqualification of a judge is timely under both the spirit and the letter of *Code of Civil Procedure Section 170.6* if a party moves as expeditiously as it is possible for him or her to do after a theretofore agreed on matter becomes litigated (*Mayr v. Superior Court (1964) 228 Cal. App. 2d 60, 64, 39 Cal. Rptr. 240*).

[*Optional*] **E. Case Not Subject to Master Calendar Rule.** [*See § 130.20]1], Paragraph E.*]

Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for a writ of mandate to prevent a judge from proceeding with a case when the judge has not granted a timely peremptory motion to disqualify made before commencement of a hearing in a case in which the judge is not known to petitioner at least 10 days before the hearing [*see § 130.20*], the case is not assigned on a master calendar system [*see § 130.23*], and is not assigned to one judge for all purposes [*see § 130.24*; *see Code Civ. Proc. § 170.6(a)(2)*]. Other specific time limits are listed in § 130.20[2][a]. If none of these exceptions apply, but the challenge is made prior to a trial as opposed to a hearing, see the memorandum *set out in § 130.21*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. In particular, counsel should show that none of the exceptions noted above apply.

[b] Related Uses

With appropriate modifications, this memorandum may be used to support a petition for a writ of mandate directing a respondent court to vacate a void order entered by a judge when petitioner's motion to disqualify was made at the commencement of a hearing on an order to show cause in a case in which petitioner did not know prior to that date that the judge intended to hear the matter [*see Spector v. Superior Court (1961) 55 Cal. 2d 839, 840, 13 Cal. Rptr. 189, 361 P.2d 909]* .

[c] Related Pleading and Practice Forms

For forms for use in filing a motion of peremptory disqualification and for a form of a petition for a writ of mandate for use after a judge has refused to reassign a case after a peremptory challenge, see Ch. 317, *Judges* in California Forms of Pleading and Practice (Matthew Bender).

[d] Opposing Memoranda

The points and authorities *set out in §§ 130.40 -130.45* may be used in an appropriate case to oppose a petition supported by this form.

[3] Discussion of Authorities

[a] Motion Made as Expeditiously as Possible After Agreed Matter Becomes Litigated

Mayr v. Superior Court *(1964) 228 Cal. App. 2d 60, 39 Cal. Rptr. 240* , involved a proceeding in prohibition before the court of appeal to prevent the respondent judge from hearing a dissolution action. Petitioner alleged that he and his wife had agreed prior to suit that the children would be placed in the husband's custody. Thereafter he filed a document with the court acknowledging receipt of a copy of the complaint and summons, but no answer was filed and his default was taken. At the ex parte hearing in which the wife appeared but the husband did not, evidence was taken that

reopened the issue of child custody. The court ordered an investigation bya probation officer to assist in determining the question. The officer filed his report, and notice was sent to petitioner's attorney advising him of the amount of time he had in which to file for further hearing or opposition, and thereupon, the matter was to be submitted. At that point, petitioner's counsel filed a motion to disqualify the assigned judge accompanied by a supporting affidavit. The court ordered it stricken as untimely, and petitioner applied for prohibition before the court of appeal (*228 Cal. App. 2d 60, 62-63)* .

The appellate court granted the peremptory writ of prohibition. It concluded that the motion was timely, was properly made, and should have been granted and stated that if a party moves as expeditiously as possible after a theretofore agreed upon matter in a lawsuit becomes litigated, the motion is timely under both the spirit and letter of *Code Civ. Proc. § 170.6* (*228 Cal. App. 2d 60, 64)* .

[4] Additional Authorities

[a] Motion Before Commencement of Hearing

In *Retes v. Superior Court (1981) 122 Cal. App. 3d 799, 176 Cal. Rptr. 160* , a matter was assigned to a law and motion department and the judge sitting in that department. On arrival at the hearing, petitioner moved to disqualify the judge and the motion was denied as untimely under the ten-day/five-day rule of *Code Civ. Proc. § 170.6*. The court of appeal vacated the denial order, noting the rule of *Bouchard v. Insona (1980) 105 Cal. App. 3d 768, 164 Cal. Rptr. 505* , that the ten-day/five-day provision does not apply to matters assigned to a law and motion department. The court stated that, despite the naming of the law and motion judge in addition to the department, the facts were within the rule of *Bouchard*. Law and motion judges routinely reassign matters, and thus the initial designation failed to provide enough certainty regarding which judge would actually hear a matter so as to trigger operation of the ten-day/five-day rule (*122 Cal. App. 3d 799, 806)* .

The Second District Court of Appeal has declined to follow *Bouchard* or *Retes* in *Thomas Realty Co. v. Superior Court (1988) 199 Cal. App. 3d 91, 93-96, 244 Cal. Rptr. 733* (discussed in *§ 130.37[3][a]*). However, although the Supreme Court opinion in *People v. Superior Court (Lavi)*, also discussed in *§ 130.37[3][a]*, seems inconsistent with *Bouchard*, the *Lavi* opinion does not expressly disapprove *Bouchard*, and distinguishes *Retes*, from which it may be inferred that *Retes* has more vitality than *Thomas Realty* would accord it.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral Overview

California Points & Authorities

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 130 JUDGES
PART II. FORMS
A. PEREMPTORY DISQUALIFICATIONS

13-130 California Points & Authorities § 130.23

§ 130.23 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Timely Peremptory Motion to Disqualify Not Granted [Code Civ. Proc. § 170.6(a)(3)]--Motion Made to Master Calendar Judge Not Later Than Time Cause Assigned for Trial [Code Civ. Proc. § 170.6(a)(2)]

[1] FORM

[*Caption. See § 130.20[1].*]

THE COURT SHOULD ISSUE A WRIT OF MANDATE TO PREVENT JUDGE _____ [*name*] FROM PROCEEDING WITH THE CASE BECAUSE THE MASTER CALENDAR JUDGE FAILED TO GRANT THE PEREMPTORY MOTION TO DISQUALIFY, WHICH WAS TIMELY MADE WHEN THE CASE WAS ASSIGNED FOR TRIAL BY THE MASTER CALENDAR JUDGE.

A. When Mandate Authorized. [*See § 130.20]1], Paragraph A.*]

B. Disqualified Judge Without Jurisdiction to Proceed With Case. [*See § 130.20]1], Paragraph B.*]

C. Motion Made to Master Calendar Judge. If directed to the trial of a cause where there is a master calendar, a *Code of Civil Procedure Section 170.6* motion to disqualify a judge assigned to try the cause shall be made to the judge supervising the master calendar not later than the time the cause is assigned for trial (*Code Civ. Proc. § 170.6(a)(2)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for a writ of mandate to prevent an assigned judge from proceeding with a case assigned on the master calendar system when the master calendar judge failed to grant a timely peremptory motion todisqualify made not later than the time the cause is assigned for trial [*see Code Civ. Proc. § 170.6(a)(2)*].

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

[b] Opposing Memoranda

The points and authorities *set out in §§ 130.39, 130.41 -130.45* may be used in an appropriate case to oppose a petition supported by this form.

[c] Related Pleading and Practice Forms

For forms for use in filing a motion of peremptory disqualification and for a form of a petition for a writ of mandate for use after a judge has refused to reassign a case after a peremptory challenge, see California Forms of Pleading and Practice, Ch. 317, *Judges* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral Overview

California Points & Authorities

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 130 JUDGES
PART II. FORMS
A. PEREMPTORY DISQUALIFICATIONS

13-130 California Points & Authorities § 130.24

§ 130.24 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Timely Peremptory Motion to Disqualify Not Granted [Code Civ. Proc. § 170.6(a)(3)]--Timely Motion Made After Appearance or Notice of All-Purpose Assignment to Judge [Code Civ. Proc. § 170.6(a)(2)]

[1] FORM

[*Caption. See § 130.20[1].*]

THE COURT SHOULD ISSUE A WRIT OF MANDATE TO PREVENT JUDGE _____ [*name*] FROM PROCEEDING WITH THE CASE BECAUSE THE JUDGE FAILED TO GRANT THE PEREMPTORY MOTION TO DISQUALIFY, WHICH WAS TIMELY MADE WITHIN _____ [10 DAYS AFTER NOTICE OF THE ALL-PURPOSE ASSIGNMENT *or* _____ (10 *or* 15) DAYS AFTER PETITIONER'S APPEARANCE IN THE ACTION].

A. Mandate Authorized. [*See § 130.20]1], Paragraph A.*]

B. Disqualified Judge Without Jurisdiction to Proceed With Case. [*See § 130.20]1], Paragraph B.*]

C. Motion Made After All-Purpose Assignment. A disqualification motion made under *Code of Civil Procedure Section 170.6* and directed to the trial of a cause that has been assigned to a judge for "all purposes" is timely when made to the assigned judge, or to the presiding judge, within 10 days after notice of the all-purpose assignment or, if the moving party has not yet appeared in the action, within 10 days after the appearance (*Code Civ. Proc. § 170.6(a)(2)*). When notice of the all-purpose assignment is served by mail, the 10 day period in which to make the motion is extended under *Code Civ. Proc. § 1013(a)* (*California Business Council v. Superior Court (1997) 52 Cal. App. 4th 1100, 1102, 1106, 62 Cal. Rptr. 2d 7*).

[*Optional*] **D. Fifteen Days in Direct Calendar Court Subject to Trial Court Delay Reduction Act.** In actions subject to the Trial Court Delay Reduction Act (*Gov. Code §§ 68600 et seq.*) brought in direct calendar courts, notwithstanding *Code of Civ. Proc. § 170.6*, peremptory challenges under that section must be exercised within 15 days

of the party's first appearance (*Gov. Code § 68616(i)*).

[*OR*]

[*Optional*] **D. Fifteen Days in Direct Calendar Court Subject to Trial Court Delay Reduction Act.** In actions subject to the Trial Court Delay Reduction Act (*Gov. Code §§ 68600 et seq.*) brought in direct calendar courts, notwithstanding *Code of Civ. Proc. § 170.6*, peremptory challenges under that section must be exercised within 15 days of the party's first appearance (*Gov. Code § 68616(i)*). If a direct calendar assignment is made more than 15 days after a complaint is filed, _____ [the plaintiff's first appearance *or* the first appearance of a defendant who has already responded to the complaint] coincides with the direct calendar assignment so as to allow 15 days from that time within which to exercise the challenge (*Fight for the Rams v. Superior Court (1996) 41 Cal. App. 4th 953, 957-958, 48 Cal. Rptr. 2d 851*).

[*OR*]

[*Optional*] **D. Fifteen Days in Direct Calendar Court Subject to Trial Court Delay Reduction Act.** In actions subject to the Trial Court Delay Reduction Act (*Gov. Code §§ 68600 et seq*) brought in direct calendar courts, notwithstanding *Code of Civ. Proc. § 170.6*, peremptory challenges under that section must be exercised within 15 days of the party's first appearance (*Gov. Code § 68616(i)*). If an individual calendar judge assigned to the case is changed, a party that has already appeared in the action must file its challenge within 15 days of receiving notice of the change (*Cybermedia, Inc. v. Superior Court (1999) 72 Cal. App. 4th 910, 913, 82 Cal. Rptr. 2d 126*).

[*CONTINUE*]

[*Optional*] **E. Motion Timely Made After General Appearance.** In determining whether a peremptory motion to disqualify has been timely made after a party's "appearance," the period is calculated from the party's first general appearance, not from an earlier special appearance (*see La Seigneurie U.S. Holdings, Inc. v. Superior Court (1994) 29 Cal. App. 4th 1500, 1504-1506, 35 Cal. Rptr. 2d 175*).

[*Optional*] **F. Late-Appearing Defendant's Motion Timely Made When Done So Within 10 Days After That Defendant's Appearance.** In a multi-defendant case, a trial court must grant a late named defendant's peremptory challenge to a judge assigned for all purposes notwithstanding that the time within which the other defendants could have challenged the judge has long since expired, [and notwithstanding that the case has been assigned to one judge as complex litigation], when the late appearing defendant exercises his/her/its right to disqualify a judge within 10 days after his/her/its appearance (*School Dist. of Okaloosa County v. Superior Court (1997) 58 Cal. App. 4th 1126, 1129, 1131, 1134-1135, 68 Cal. Rptr. 2d 612* (defendant named as Doe defendant and shortly thereafter served)).

[*Optional*] **G. Case Not Subject to Master Calendar Rule.** [*See § 130.20]1], Paragraph E.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for a writ of mandate to prevent a judge who has been assigned to a case for "all purposes" from proceeding to trial of a case when the assigned judge, or the presiding judge, has denied a peremptory motion to disqualify made within 10 days after notice of the all-purpose assignment or, if the moving party has not yet appeared in the action, within 10 days after the appearance [*see Code Civ. Proc. § 170.6(a)(2)*].

Optional Paragraph D should be used if the action is subject to the Trial Delay Reduction Act and the all-purpose assignment is made in a direct calendar court, in which case the party has 15 days after making an appearance in which to bring the challenge [*see Gov. Code § 68616(i)*]. The appropriate choice that fits the facts should be selected.

Optional Paragraph E should be used if the time period for making the challenge is based on the party first appearing in the action after the assignment was made, and the party had made a special appearance before generally appearing.

Optional Paragraph F should be used by a named defendant who was originally named as a Doe defendant (*see Code Civ. Proc. § 474*) who is thereafter served. The optional language contained within the paragraph can be used when in addition to a case being assigned to one judge for all purposes the action is designated as complex litigation.

Optional Paragraph G should be used when the opposing party claims the challenge was untimely under the "master calendar" rule, but it was not a master calendar assignment within the meaning of *Code Civ. Proc. § 170.6*.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms for use in filing a motion of peremptory disqualification and for a form of a petition for a writ of mandate for use after a judge has refused to reassign a case after a peremptory challenge, see California Forms of Pleading and Practice, Ch. 317, *Judges* (Matthew Bender).

[c] Opposing Memoranda

The points and authorities *set out in §§ 130.41 -130.45* may be used in an appropriate case to oppose a petition supported by this form.

[3] Discussion of Authorities

[a] Motion Made After All-Purpose Assignment

Code Civ. Proc. § 170.6(a)(2) was amended in 1989 to provide that when a disqualification motion is directed to the trial of a cause that has been assigned to a judge for "all purposes," a party must make the motion to the assigned judge, or to the presiding judge, within 10 days after notice of the all-purpose assignment or, if the party has not yet appeared in the action, within 10 days after the appearance [*Code Civ. Proc. § 170.6(a)(2)*]. The amendment abrogates the holding in *Woodman v. Superior Court (1987) 196 Cal. App. 3d 407, 416-419, 241 Cal. Rptr. 818* , that the "master calendar rule" applies when a case is assigned by a master calendar court to a named judge for all purposes and that a motion to disqualify theassigned judge therefore must be made not later than the time the cause is assigned for trial [*see Code Civ. Proc. § 170.6(a)(2)* (master calendar rule)].

In ***California Business Council v. Superior Court*** *(1997) 52 Cal. App. 4th 1100, 62 Cal. Rptr. 2d 7* , an action was assigned to a judge who was challenged pursuant to *Code Civ. Proc. § 170.6*. A new order was issued by the presiding

judge assigning another judge on the case for all purposes, and on the same day the court clerk deposited copies of both the minute order memorializing the assignment and the formal order signed by the presiding judge in the mail addressed to the persons to be served at an address in California. A peremptory challenge to the judge was filed 14 days after the copy of the order was mailed. The superior court ruled the challenge untimely on the ground that the 10-day period within which to file a challenge under Code Civ. Proc. § 170.6(2) [*now see Code Civ. Proc. § 170.6(a)(2)*] was not extended by *Code Civ. Proc. § 1013* and had expired. A writ proceeding followed.

The court of appeal found the disqualification motion to have been timely filed, and issued a peremptory writ directing the superior court to set aside its order and issue a new order granting the motion to disqualify the judge (*52 Cal. App. 4th 1100, 1102-1103)* . The court held that the time within which to file a peremptory challenge to the "all-purpose" assignment of a trial court judge under Code Civ. Proc. § 170.6(2) [*now see Code Civ. Proc. § 170.6(a)(2)*] is extended under *Code Civ. Proc. § 1013(a)* when notice of the assignment is served by mail (*52 Cal. App. 4th 1100, 1102)* . Since the written order assigning the judge for all purposes was served by mail to an address in California, the notice came within the purview of *Code Civ. Proc. § 1013(a)* extending the period within which to challenge the judge by five days. Accordingly, the 10-day period provided by Code Civ. Proc. § 170.6(2) [*now see Code Civ. Proc. § 170.6(a)(2)*] within which to file a peremptory challenge to the assignment was extended to 15 days. Because the challenge was made on the fourteenth day, it was timely (*52 Cal. App. 4th 1100, 1106)* .

[b] Fifteen Days in Direct Calendar Court Subject to Trial Court Delay Reduction Act

In ***Cybermedia, Inc. v. Superior Court*** *(1999) 72 Cal. App. 4th 910, 82 Cal. Rptr. 2d 126* , the action that was filed was originally assigned on June 18, 1998, to one judge for all purposes who was designated the individual calendar judge for department 31. On October 19, 1998, that judge was replaced in department 31 by another judge. Sometime in October, the public information officer of the superior court mailed to the law firm representing the defendants a general notice, including the change in judges, but with no indication of case names or full case numbers. On October 20, 1998, defendants filed demurrers and motions to strike. On Friday, November 13, 1998, the attorney assigned to defendants' case appeared for the hearing on the demurrers and motions to strike and for the first time learned of the new judge now presiding in department 31. The judge allowed counsel to argue the demurrers and motions deferring ruling until such time as the judge received additional briefing on certain specified issues. The following Monday, on November 16, 1998, defendants filed a motion for a peremptory challenge under *Code Civ. Proc. § 170.6* to disqualify the judge. On November 17, 1998, the motion was denied as untimely. Defendants sought review by extraordinary writ (*72 Cal. App. 4th 910, 912-913)* .

The court of appeal issued a writ of mandate directing the superior court to set aside its order denying defendants' *Code Civ. Proc. § 170.6* motion and directing the superior court to issue a new and different order granting the motion (*72 Cal. App. 4th 910, 914-915)* . The court noted that *Gov. Code § 68616(i)* provides that notwithstanding *Code of Civ. Proc. § 170.6*, in direct calendar courts, challenges under that section must be exercised within 15 days of the party's first appearance. Los Angeles Co. Super. Ct. Rules, Rule 7.5(a), provides that a challenge to an (individual calendar judge) under *Code of Civ. Proc. § 170.6* must be made with 15 days of the party's first appearance. Neither *Gov. Code § 68616(i)* nor Los Angeles Co. Super. Ct. Rules, Rule 7.5(a) specifies a time limitation when there is a change in an individual calendar judge assigned to the case after the party's first appearance. However, in a case in which a cause has been assigned to a judge for all purposes, Code of Civ. Proc. § 170.6(2) [*now see Code Civ. Proc. § 170.6(a)(2)*] provides that a party who has already appeared in the action must file the challenge within 10 days after notice of the all purpose assignment. Harmonizing Code of Civ. Proc. § 170.6(2) [*now see Code Civ. Proc. § 170.6(a)(2)*] with *Gov. Code § 68616(i)*, the court determined that where, as in this case, a party has already appeared in the action, it must file its challenge within 15 days of receiving notice of a change in the individual calendar judge assigned to the case (*72 Cal. App. 4th 910, 913)* . The notice mailed by the superior court's public information office was insufficient notice to defendants to trigger the 15 day period. It was not addressed to the attorney assigned to the case and did not reference the case name or full case number. Moreover, the assigned attorney did not learn of the general notice until after the challenge was filed. Because the assigned attorney was not given notice of the new assigned judge and because the

peremptory challenge was filed three days after defendants received actual notice of the assignment, the motion was timely (*72 Cal. App. 4th 910, 914)* .

Furthermore, the court noted that once properly and timely challenged, the judge loses jurisdiction to proceed and all his or her subsequent orders and judgments are void. However, with respect to the hearing on the demurrers and motions to strike, defendants' challenge was untimelybecause it should have been filed before commencement of the hearing. Accordingly, the trial court had jurisdiction to rule on the demurrers and motions to strike before it. Thus, the superior court was ordered on remand to rule on the demurrers and motions to strike before granting defendants *Code Civ. Proc. § 170.6* motion (*72 Cal. App. 4th 910, 914)* .

In ***Fight for the Rams v. Superior Court*** *(1996) 41 Cal. App. 4th 953, 48 Cal. Rptr. 2d 851* , at a hearing several months after the complaint was filed, the originally assigned judge recused himself, transferring the matter to another department. A subsequent minute order and phone call to counsel confirmed a new all-purpose assignment to another judge. A hearing on certain motions was held five days later, and after rulings in favor of defendant, plaintiff filed a peremptory challenge. The challenge was made within 10 days of the superior court's notice of the assignment. However, defendant claimed that because the action was subject to the Trial Court Delay Reduction Act, *Gov. Code § 68616* precluded a peremptory challenge more than 15 days after the action was filed. The trial court agreed, and rejected the peremptory challenge as untimely.

The court of appeal noted that the defendant's interpretation would have the effect of eliminating any plaintiff from making a Section 170.6 peremptory challenge in a case under the Trial Court Delay Reduction Act when the judge is assigned more than 15 days after the action is commenced. Disagreeing with the results of such an interpretation, the court held that when a direct calendar assignment is made more than 15 days after a complaint is filed, the "first appearance" by a plaintiff or defendant who has already responded to the complaint in a direct calendar court coincides with the direct calendar assignment (*41 Cal. App. 4th 953, 958)* . The court issued a peremptory writ of mandate directing the trial court to grant plaintiff's motion for a peremptory challenge.

[c] Motion Timely Made After General Appearance

La Seigneurie U.S. Holdings, Inc. v. Superior Court *(1994) 29 Cal. App. 4th 1500, 35 Cal. Rptr. 2d 175* , involved an action tried under the Trial Court Delay Reduction Act (TCDRA), *Gov. Code § 68600 et seq.* The plaintiff successfully moved to disqualify the first judge assigned to the case for "all purposes." Shortly thereafter, defendant corporation made a special appearance by filing a motion to quash service of process. The following day, a new judge was assigned to the case for "all purposes." On learning of the motion to quash, plaintiff represented that he was in the process of utilizing an alternative method of service. By the time the trial court granted the motion to quash, the plaintiff had perfected service otherwise. Defendant then filed its answer along with a declaration challenging the new judge pursuant to *Code Civ. Proc. § 170.6*. The trial court denied the motion as untimely based on the defendant's earlier special appearance to quash service of process and adhered to this ruling in a subsequent motion for reconsideration (*29 Cal. App. 4th 1500, 1502)* .

The court of appeal issued a peremptory writ of mandate directing the trial court to vacate its prior order and to grant defendant's peremptory challenge (*29 Cal. App. 4th 1500, 1506)* . It noted that, under Code Civ. Proc. § 170.6(2) [*now see Code Civ. Proc. § 170.6(a)(2)*], a party moving for disqualification of a judge assigned to the cause for "all purposes" must file its motion within 10 days after notice of the all purpose assignment, or if the party has not yet appeared in the action, then within 10 days after the appearance. It further observed that *Gov. Code § 68616(i)*, provides that notwithstanding *Code Civ. Proc. § 170.6*, in direct calendar courts, challenges shall be exercised within 15 days of the party's first appearance. The court then found that the term "appearance" has been consistently interpreted to mean "general appearance" in the context of *Code Civ. Proc. § 170.6*. The court also noted that a party filing a motion to quash may move to disqualify the assigned judge from ruling on it, but is not required to do so, and that the time within which the party must move to disqualify the judge will not commence until after the party's first general appearance (

29 Cal. App. 4th 1500, 1503-1506) .

[d] Late-Appearing Defendant's Motion Timely Made When Done So Within 10 Days After That Defendant's Appearance.

School Dist. of Okaloosa County v. Superior Court *(1997) 58 Cal. App. 4th 1126, 68 Cal. Rptr. 2d 612* , involved multiple plaintiffs and multiple defendants. The case was assigned to one judge for all purposes. None of the parties moved to disqualify the judge. The judge later designated the action as complex litigation. When the judge became the Assistant Presiding Judge of the Los Angeles Superior Court, the case was reassigned to another judge for all purposes, and none of the parties moved to disqualify the new judge. While the case was pending before the original judge several of the defendants moved to quash service of summons on the grounds that their contacts with California were insufficient to permit the exercise of in personam jurisdiction. The motions were denied. After the case was transferred to the new judge another defendant moved to quash on the same grounds, and the new judge denied the motion. Meanwhile, before the new judge denied the motion, the defendant currently before the court was named as a Doe defendant and was served in Florida. Defendant thereafter filed its disqualification motion and also filed a motion to quash service of summons. The new judge struck the disqualification motion as untimely finding that the statutory time for the defense side to issue such a challenge had long expired and that the court had prior to the instant filing issued numerous merit rulings. The judge continued the hearing on defendant's motion to quash. The defendant then filed a petition for writof mandate, asking the court of appeal to compel the judge to grant the disqualification motion (*58 Cal. App. 4th 1126, 1129-1130)* .

The court of appeal issued a peremptory writ of mandate directing the trial court to vacate its order denying defendant's disqualification motion and to enter a new order granting the motion and transferring the case to the presiding judge for reassignment to another judge (*58 Cal. App. 4th 1126, 1137)* . The court held that a trial court must grant a late named defendant's peremptory challenge to a judge assigned for all purposes notwithstanding that the time within which the other defendants could have challenged the judge has long since expired, and notwithstanding that the case has been assigned to one judge as complex litigation, when the late appearing defendant exercises its right to disqualify a judge within 10 days after its appearance (*58 Cal. App. 4th 1126, 1129, 1134)* . Under such circumstances, the rules governing coordination cases do not apply to cases designated as complex litigation (*58 Cal. App. 4th 1126, 1135-1136)* . However, if another defendant on the same side has exercised its right to disqualify a judge, a late appearing defendant has no right to challenge the then-current judge because that side has used its one challenge (*58 Cal. App. 4th 1126, 1134-1135)* . In addition, the court found that the motions to quash, on which the judge had already ruled, did not involve the resolution of contested fact issues relating to the merits of the case, which would have barred the Code Civ. Proc. § 170.6(2) [*now see Code Civ. Proc. § 170.6(a)(2)*] motion (*58 Cal. App. 4th 1126, 1133)* .

[4] Additional Authorities

[a] Difference Between Direct Calendar and Master Calendar Courts

In *Zilog, Inc. v. Superior Court (2001) 86 Cal. App. 4th 1309, 104 Cal. Rptr. 2d 173* , the plaintiff in an insurance bad faith action filed a *Code Civ. Proc. § 170.6* challenge of the judge assigned as case management judge for all purposes except trial. The judge denied the challenge as untimely under *Gov. Code § 68616(i)*, which provides that, in a direct calendar court, a Section 170.6 challenge must be exercised within 15 days of the party's appearance in the action. The court of appeal issued the writ of mandate, stating that the court in question (Santa Clara County) had attributes of both a direct calendar and a master calendar court, but because the judge was assigned for all purposes except trial, the time limits governing master calendar courts [*Code Civ. Proc. § 170.6(a)(2)*] applied, and therefore the challenge was timely (*86 Cal. App. 4th 1309, 1320-1321)* .

[b] Timeliness in Direct Calendar Assignment

In *Motion Picture & Television Fund Hospital v. Superior Court (2001) 88 Cal. App. 4th 488, 105 Cal. Rptr. 2d 872* ,

the plaintiff filed a peremptory challenge of a judge 31 days after the court served notice of the assignment of the judge, 30 days after plaintiff had given notice of the assignment to defendant, and 2 days after the initial status conference with the judge. The judge accepted the challenge as timely, and defendant filed a petition for writ of mandate. In argument to the appellate court, plaintiff submitted an unverified statement that the practice of the Los Angeles Superior Court was to reject a peremptory challenge of a judge if it is submitted after notice of assignment is mailed, but before the judge actually begins to hear cases in the new assignment. The court of appeal held that if such a practice existed in the court it was invalid. The court further held that the challenge was untimely per *Gov. Code § 68616(i)*, which requires a party in a direct calendar to exercise a peremptory challenge within 15 days of the party's first appearance in the action. When a direct calendar assignment is made more than 15 days after the first appearance, the 15 days runs from the date when the party receives notice of the assignment (*88 Cal. App. 4th 488, 492-494)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral Overview

California Points & Authorities

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 130 JUDGES
PART II. FORMS
A. PEREMPTORY DISQUALIFICATIONS

13-130 California Points & Authorities § 130.25

§ 130.25 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Timely Peremptory Motion to Disqualify Not Granted [Code Civ. Proc. § 170.6(a)(3)]--Motion Made After Initially Filed Motion Pursuant to Code Civ. Proc. § 170.6 Was Dismissed [Code Civ. Proc. § 170.6(a)(2)]

[1] FORM

[*Caption. See § 130.20[1].*]

THE COURT SHOULD ISSUE A WRIT OF MANDATE TO PREVENT JUDGE _____ [*name*] FROM PROCEEDING WITH THE CASE BECAUSE THE JUDGE FAILED TO GRANT THE PEREMPTORY MOTION TO DISQUALIFY, WHICH WAS TIMELY MADE BECAUSE THE INITIAL MOTION TO DISQUALIFY WAS DISMISSED.

A. Mandate Authorized. [*See § 130.20]1], Paragraph A.*]

B. Disqualified Judge Without Jurisdiction to Proceed With Case. [*See § 130.20]1], Paragraph B.*]

C. Motion Made After Previous Motion to Disqualify Was Dismissed. The *Code of Civil Procedure section 170.6(a)(3)* restriction to a single peremptory challenge in any one action or special proceeding does not preclude a party from filing a later peremptory challenge when the initial motion did not result in reassignment ofthe case. When an initial motion to disqualify under *Code of Civil Procedure section 170.6* has been dismissed and the original judge is later replaced for other reasons, the initial motion was not "duly filed" and does not preclude a second motion to disqualify (*see Truck Ins. Exchange v. Superior Court (1998) 67 Cal. App. 4th 142, 147-148, 78 Cal. Rptr. 2d 721* (initial motion dismissed as untimely)).

[*Optional*] **D. Motion Filed at Least Five Days Before Date Set for Trial or Hearing.** [*See § 130.20]1], Paragraph C.*]

[*Optional*] **E. Motion Filed Five Days Before Postponed Date.** [*See § 130.20]1], Paragraph D.*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for writ of mandate to prevent a judge from proceeding with a case when the judge has not granted a peremptory motion to disqualify that was timely made, but after an initial motion to disqualify was dismissed and the original judge has been removed from the case for reasons other than the peremptory challenge.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. In particular, counsel should show why the initial motion to disqualify was dismissed, and that the original judge was replaced for some reason other than the peremptory challenge.

[b] Related Pleading and Practice Forms

For forms for use in filing a motion of peremptory disqualification and for a form of a petition for a writ of mandate for use after a judge has refused to reassign a case after a peremptory challenge, see California Forms of Pleading and Practice, Ch. 317, *Judges* (Matthew Bender).

[3] Discussion of Authorities

[a] Motion Made After Previous Motion to Disqualify Was Dismissed

In ***Truck Ins. Exchange v. Superior Court*** *(1998) 67 Cal. App. 4th 142, 78 Cal. Rptr. 2d 721* , the plaintiff filed a peremptory challenge, which the judge dismissed as untimely. The judge, who continued to hear motions in the case after the peremptory challenge was dismissed, retired before the trial began, and another judge was assigned to the case. The plaintiff filed a peremptory challenge of the new judge, who found the challenge to be timely filed and in proper form. The challenge was accepted and the case was transferred for reassignment.

The defendant filed a petition for writ of mandamus and/or prohibition, seeking to have the peremptory challenge set aside on the ground that the plaintiff had already made one peremptory challenge. The appellate court denied the petition, holding that the initial peremptory challenge was not "duly filed" because it was dismissed as untimely, and that because the initial challenge did not result in a change of judges, the plaintiff's one peremptory challenge had not been exhausted. "[A]bsent the change of judge, no peremptory challenge was exhausted and the litigants retain the right to exercise one peremptory challenge per proceeding." The fact that the judge was removed from the case was because of his retirement, not because of the peremptory challenge (*67 Cal. App. 4th 142, 148)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral Overview

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 130 JUDGES
PART II. FORMS
A. PEREMPTORY DISQUALIFICATIONS

13-130 California Points & Authorities § 130.26

§ 130.26 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Timely Peremptory Motion to Disqualify Not Granted [Code Civ. Proc. § 170.6(a)(3)]--Motion Made After Judge Changed After First Appearance

[1] FORM

[*Caption. See § 130.20[1].*]

THE COURT SHOULD ISSUE A WRIT OF MANDATE TO PREVENT JUDGE _____ [*name*] FROM PROCEEDING WITH THE CASE BECAUSE THE JUDGE FAILED TO GRANT THE PEREMPTORY MOTION TO DISQUALIFY, WHICH WAS TIMELY MADE BECAUSE THE MOTION WAS FILED AFTER FIRST APPEARANCE BUT WITHIN 15 DAYS OF RECEIVING NOTICE OF CHANGE IN JUDGE.

A. Mandate Authorized. [*See § 130.20]1], Paragraph A.*]

B. Disqualified Judge Without Jurisdiction to Proceed With Case. [*See § 130.20]1], Paragraph B.*]

C. Timely Motion When Judge Changed After Parties Appeared. Where the judge assigned to the case is changed after the parties have already appeared in the action, the party may challenge the new judge under *Code of Civil Procedure section 170.6* as long as the challenge is filed within 15 days of receiving notice of the change in judges (*see Cybermedia, Inc. v. Superior Court (1999) 72 Cal. App. 4th 910, 913, 82 Cal. Rptr. 2d 126*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for writ of mandate to prevent a judge from proceeding with a case when the judge has not granted a peremptory motion to disqualify that was made after the judge assigned to the case is changed after the parties have already appeared in the action.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. In particular, counsel should show when and how he or she received notice of the change in judges, and that the motion was made within 15 days of receiving notice of the change in judges.

[b] Related Pleading and Practice Forms

For forms for use in filing a motion of peremptory disqualification and for a form of a petition for writ of mandate for use after a judge has refused to reassign a case after a peremptory challenge, see California Forms of Pleading and Practice, Ch. 317, *Judges* (Matthew Bender).

[3] Discussion of Authorities

[a] Timely Motion When Judge Changed After Parties Appeared

In ***Cybermedia, Inc. v. Superior Court*** *(1999) 72 Cal. App. 4th 910, 82 Cal. Rptr. 2d 126* , the parties appeared before a judge assigned to the case for all purposes. Thereafter, the court changed the department assignments of several judges, which resulted in the change of judges assigned to the case. A general notice was sent to all law firms, containing the change of departmental assignments of several judges, including the judge assigned to the Cybermedia case. The notice was not directed to the attorney handling the case, and neither the case name nor number was referenced on the notice. The attorney handling the case, who was with a large law firm and never saw the notice, first learned of the change of judges when he appeared for argument on demurrers and motions to strike. Three days after the argument, but before the judge ruled on the demurrers and motions to strike, defendants filed a peremptory challenge under *Code Civ. Proc. § 170.6*. The judge denied the motion as "not timely."

The defendants filed a petition for writ of mandamus, seeking to have the denial of the peremptory challenge set aside. The appellate court granted the petition and issued the peremptory writ. Harmonizing *Gov. Code § 68616* and Code Civ. Proc. § 170.6(2) [*now see Code Civ. Proc. § 170.6(a)(2)*], the court determined that the when a party has appeared in an action, it must file its peremptory challenge within 15 days of receiving notice of a change in the individual calendar judge assigned to the case (*72 Cal. App. 4th 910, 913)* . The court held that the defendants' motion was timely, because the general notice mailed by the court's public information office was not sufficient notice to the defendants to trigger the 15-day time period (*72 Cal. App. 4th 910, 914)* . However, because the challenge was not timely as to the demurrers and motions to strike, the judge had jurisdiction to rule on them and the appellate court, in remanding the case, directed the judge to rule on those motions before granting the section 170.6 motion (*72 Cal. App. 4th 910, 914)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral Overview

California Points & Authorities

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 130 JUDGES
PART II. FORMS
A. PEREMPTORY DISQUALIFICATIONS

13-130 California Points & Authorities § 130.27

§ 130.27 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Timely Peremptory Motion to Disqualify Not Granted [Code Civ. Proc. § 170.6(a)(3)]--Motion Made Before Expiration of 30 Days of Party's First Appearance in One-Judge Court [Code Civ. Proc. § 170.6(a)(2)]

[1] FORM

[*Caption. See § 130.20[1].*]

THE COURT SHOULD ISSUE A WRIT OF MANDATE TO PREVENT JUDGE _____ [*name*] FROM PROCEEDING WITH THE CASE BECAUSE THE JUDGE FAILED TO GRANT THE PEREMPTORY MOTION TO DISQUALIFY, WHICH WAS TIMELY MADE BECAUSE THE ACTION IS PENDING IN A COURT THAT IS AUTHORIZED NOT MORE THAN ONE JUDGE, AND THE MOTION WAS MADE BEFORE THE EXPIRATION OF 30 DAYS FROM THE DATE OF THE MOVING PARTY'S FIRST APPEARANCE IN THE ACTION.

A. Mandate Authorized. [*See § 130.20]1], Paragraph A.*]

B. Disqualified Judge Without Jurisdiction to Proceed With Case. [*See § 130.20]1], Paragraph B.*]

C. Motion Made Before Expiration of 30-Day Period. If the court in which the action is pending is authorized to have no more than one judge and the motion claims that the duly elected or appointed judge of that court is prejudiced, the motion to disqualify is timely if it is made before the expiration of 30 days from the date of the first appearance in the action of the party who is making the motion or whose attorney is making the motion (*Code Civ. Proc. § 170.6(a)(2)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for a writ of mandate to prevent a judge from proceeding with a case if a timely peremptory motion to disqualify has not been granted. In a one-judge court, the motion to disqualify must be made before the expiration of 30 days from the date of the first appearance of the party making the motion [*Code Civ. Proc. § 170.6(a)(2)*; *see People v. Superior Court (Smith) (1987) 190 Cal. App. 3d 427, 429-430, 235 Cal. Rptr. 482* (30-day period is from party's first appearance, not from party's or attorney's first appearance in the alternative)].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. In particular, counsel should discuss facts showing that the motion was timely made and duly supported by an affidavit or declaration under penalty of perjury, or an oral statement under oath, that the judge is prejudiced against the party or his or her attorney so that a fair trial is not possible [*see Code Civ. Proc. § 170.6(a)(2), (a)(3)*].

[b] Related Pleading and Practice Forms

For forms for use in filing a motion of peremptory disqualification and for a form of a petition for a writ of mandate for use after a judge has refused to reassign a case after a peremptory challenge, see California Forms of Pleading and Practice, Ch. 317, *Judges* (Matthew Bender).

[c] Opposing Memoranda

The points and authorities *set out in §§ 130.41 -130.45* may be used in an appropriate case to oppose a petition supported by this form.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral Overview

California Points & Authorities

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 130 JUDGES
PART II. FORMS
A. PEREMPTORY DISQUALIFICATIONS

13-130 California Points & Authorities § 130.28

§ 130.28 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Timely Peremptory Motion to Disqualify Not Granted [Code Civ. Proc. § 170.6(a)(3)]--Motion Made Prior to Trial and Before Determination of Contested Fact Issue Relating to Merits [Code Civ. Proc. § 170.6(a)(2)]

[1] FORM

[*The following should be combined with a general form of memorandum in support of a petition for a writ of mandate prevent a judge from hearing a case (see* §§ 130.20-130.27, 130.29-130.31)]

THE PEREMPTORY MOTION TO DISQUALIFY, WHICH WAS OTHERWISE TIMELY UNDER CODE OF CIVIL PROCEDURE SECTION 170.6(2), SHOULD BE GRANTED EVEN THOUGH THE CHALLENGED JUDGE HAD EARLIER PRESIDED AT OR ACTED IN CONNECTION WITH A PRETRIAL MATTER, BECAUSE THAT MATTER DID NOT INVOLVE A DETERMINATION OF CONTESTED FACT ISSUES RELATING TO THE MERITS.

A. Motion Made Prior to Trial and Before Determination of Contested Fact Issue Relating to Merits. The fact that a judge has presided at or acted in connection with a hearing, proceeding, or motion prior to trial not involving a determination of contested fact issues relating to the merits does not preclude the making of a motion to disqualify that judge under *Code of Civil Procedure Section 170.6* (*Code Civ. Proc. § 170.6(a)(2)*).

[*Optional*] **B. Motion Made After Demurrer Timely.** *Code of Civil Procedure Section 170.6* permits a party to preserve his/her right to disqualify a judge for trials and other fact determinations, even though the judge has earlier heard demurrers and motions without challenge (*Zdonek v. Superior Court (1974) 38 Cal. App. 3d 849, 852, 113 Cal. Rptr. 669* (overruled on another ground by same court in *Woodman v. Superior Court (1987) 196 Cal. App. 3d 407, 410, 419, 241 Cal. Rptr. 818*).

[*Optional*] **C. Motion Made After Judgment on Pleadings Timely.** A motion for judgment on the pleadings does not involve any contested fact issues relating to the merits and a motion to disqualify pursuant to *Code of Civil Procedure Section 170.6* filed thereafter may be timely (*Hospital Council of N. Cal. v. Superior Court (1973) 30 Cal. App. 3d*

331, 337-338, 106 Cal. Rptr. 247).

[*Optional*] **D. Motion Made After Motion To Quash Service Of Summons.** The determination of a motion to quash service of a summons does not involve a determination of contested fact issues related to the merits of the case. Thus, the mere fact that a judge has decided such a motion does not preclude that judge from disqualification pursuant to *Code of Civil Procedure Section 170.6* (*School Dist. of Okaloosa County v. Superior Court (1997) 58 Cal. App. 4th 1126, 1131-1134, 68 Cal. Rptr. 2d 612*).

[*Optional*] **E. Motion Made After Summary Adjudication Motion or Summary Judgment Motion.** The resolution of a summary adjudication or summary judgment motion does not involve the determination of contested fact issues relating to the merits, but rather only legal issues. Thus, the judge remains subject to a later peremptory challenge pursuant to *Code of Civil Procedure Section 170.6* (*Zilog Inc. v. Superior Court (2001) 86 Cal. App. 4th 1309, 1321, 104 Cal. Rptr. 2d 173*) (summary adjudication motion); (*Bambula v. Superior Court (1985) 174 Cal. App. 3d 653, 656-657, 220 Cal. Rptr. 223*) (summary judgment motion).

[*Optional*] **F. Motion Made After Court Ruling on Pretrial Motion Pursuant to *Civ. Code § 3295(c)*** . A ruling under *Civ. Code § 3295(c)* that a plaintiff has demonstrated a substantial probability that he or she will prevail on a claim for punitive damages is not a "determination of contested fact issues relating to the merits" for purposes of asserting a peremptory challenge to a judge pursuant to *Code Civ. Proc. § 170.6(a)(2)* (*Guardado v. Superior Court (2008) 163 Cal. App. 4th 91, 93, 77 Cal. Rptr. 3d 149*).

[2] Comments

[a] Use of Form

This memorandum is for use in support of a party's contention that a motion for peremptory challenge of a judge was timely made even though the judge had presided over or acted in pretrial proceedings in the case. The ground is that those proceedings did not involve determination of contested fact issues relating to the merits [*see Code Civ. Proc. § 170.6(a)(2)*].

This form does not provide a complete memorandum, but is designed to be combined with general points and authorities relating to review of the denial of a timely motion for peremptory disqualification of a judge [*see §§ 130.20 -130.27, 130.29 -130.31*].

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

[b] Opposing Memoranda

The points and authorities *set out in §§ 130.41 -130.45* may be used in an appropriate case to oppose a petition supported by this form.

[3] Discussion of Authorities

[a] Motion Made After Demurrer Timely

The factual background of ***Zdonek v. Superior Court*** *(1974) 38 Cal. App. 3d 849, 113 Cal. Rptr. 669* , is discussed in *§ 130.20[3][d]*. In issuing the writ of prohibition, the appellate court determined that the motion was timely since the challenged judge had not yet conducted any hearings that involved a determination of any contested fact issue relating to the merits. The court noted that the purpose of the 1965 amendment to Code Civ. Proc. § 170.6(2) [*now see Code Civ. Proc. § 170.6(a)(2)*] was to preserve a party's right to disqualify a judge for trials and other fact determinations,

notwithstanding that the judge had earlier heard demurrers and motions without challenge. Therefore, although the judge had conducted a hearing on a demurrer, he had not yet conducted any hearing that involved a determination of any contested fact issue relating to the merits. The court further stated that the fact that the consolidated civil action was assigned to the judge for all proceedings did not prevent an application of the amendment allowing a disqualification motion to be made after a hearing on a demurrer (*38 Cal. App. 3d 849, 852-853)* .

The *Zdonek* case was overruled by the same court in *Woodman v. Superior Court (1987) 196 Cal. App. 3d 407, 410, 419, 241 Cal. Rptr. 818* (discussed in *§ 130.24[3][a]*), to the extent it held that the master calendar rule did not apply when a case was assigned to a judge for all purposes.

Code Civ. Proc. § 170.6(a)(2), as amended in 1989, now provides a specific time for disqualifying a judge assigned to a case for all purposes. Once that time limit has run, the express language of § 170.6(2) would preclude later challenge even if the judge had not, in that time, ruled on any contested fact issues relating to the merits of the case. This appears to abrogate *Zdonek* with respect to judges appointed for all purposes.

[b] Motion Made After Judgment on Pleadings Timely

Hospital Council of N. Cal. v. Superior Court *(1973) 30 Cal. App. 3d 331, 106 Cal. Rptr. 247* , involved an action filed in superior court by taxpayers to recover tax revenues alleged to be due from individuals whose possessory interests in privately owned real property were not assessed. Some time after the action had been assigned a date for trial and hearing, an oral motion permitting intervenors to come into the case was granted, and they participated in the proceedings thereafter. Approximately two months after they entered the case, and on June 5, a date to which all pending matters were continued, the intervenors filed a petition in intervention along with a motion to disqualify the judge hearing the action pursuant to *Code Civ. Proc. § 170.6*. When the judge denied the motion for disqualification, the intervenors petitioned the appellate court for an alternative writ of prohibition to stay the proceedings. The writ was issued and the intervenors further sought a peremptory writ of prohibition and a writ of mandate to compel reassignment of the proceedings to a different judge.

The court first considered the contention of the real parties in interest that the intervenors' motion to disqualify was untimely because it was made after the judge had reviewed and determined a motion for judgment on the pleadings. The court observed, however, that in so determining, the judge did not determine any contested fact issues relating to the merits. Although he had determined various elements of fact in order to ascertain the legal sufficiency of the pleadings, he had not determined the action on its merits. The court stated that a motion for judgment on the pleadings is inthe nature of a general demurrer and the issues raised by it are legal and not factual. Since the judge did not determine any contested fact issues relating to the merits, intervenors' motion to disqualify him was timely in that regard (*30 Cal. App. 3d 331, 337-338)* . But the motion was not timely filed with respect to the ten-day/five-day provision of Code Civ. Proc. § 170.6(2) [*now see Code Civ. Proc. § 170.6(a)(2)*], so the court denied the peremptory writs of mandamus and prohibition and discharged the alternative writ of prohibition (*30 Cal. App. 3d 331, 340)* .

[c] Motion Made After Motion To Quash Service Of Summons

The factual and procedural background of ***School Dist. of Okaloosa County v. Superior Court*** *(1997) 58 Cal. App. 4th 1126, 68 Cal. Rptr. 2d 612* , is discussed in *§ 130.24[3][d]*.

In issuing a peremptory writ of mandate directing the trial court to vacate its order denying defendant's disqualification motion, the court of appeal held that a motion to quash service of summons, on the grounds that defendant's contacts with California were insufficient to permit the exercise of in personam jurisdiction, does not involve a determination of facts related to the merits of the case. However important an issue may be to the outcome of a case, it is not a bar to a disqualification motion unless it requires resolution of contested fact issues relating to the merits of the case (*58 Cal. App. 4th 1126, 1133)* . While a motion to quash service of summons on the ground that the court lacks in personam

jurisdiction may and probably will involve a determination of contested facts concerning the extent of the defendant's contacts with California, the motion does not require a determination of contested facts related to the merits of the case (*58 Cal. App. 4th 1126, 1133-1134)* .

[d] Motion Made After Summary Adjudication Motion or Summary Judgment Motion

In ***Zilog Inc. v. Superior Court*** *(2001) 86 Cal. App. 4th. 1309, 104 Cal. Rptr. 2d 173* , involving an insurance coverage dispute, the insurer refused to defend and indemnify its policyholder in a toxic tort action filed against the policyholder in the federal district court in Idaho. After the Idaho action was settled, the policyholder filed a declaratory relief and insurance bad faith action against the insurer in California. During the course of this litigation, several judges handled the matter. Judge Clark heard and denied the insurer's motion for summary adjudication of its duty to defend. Subsequently, Judge Elfving was assigned as case management judge (*86 Cal. App. 4th 1309, 1312-1313)* .

Judge Elfving presided over the next round of summary adjudication motions, which included the insurer's second motion for summary adjudication of its duty to defend. The policyholder responded to the second motion by filing an ex parte application for an order summarily denying or striking the insurer's motion on the grounds that the motion improperly sought reconsideration of Judge Clark's order denying the prior summary adjudication motion. Judge Elfving heard the ex parte application and determined that it should be filed and heard as a regularly noticed motion. The policyholder then filed a motion captioned "Motion for Order Denying Pacific's Motion for Summary Adjudication or, in the Alternative, Transferring the Motion to the Honorable Donald L. Clark for Hearing." Before this motion could be heard, the policyholder filed a peremptory challenge to Judge Elfving (*86 Cal. App. 4th 1309, 1313)* .

The court of appeal issued a peremptory writ of mandate directing the respondent court to vacate its order denying the policyholder's peremptory challenge pursuant to *Code of Civil Procedure Section 170.6*, and to enter a new and different order accepting the peremptory challenge of Judge Elfving and vacate as void its order denying the policyholder's motion for order denying the insurer's motion for summary adjudication or, alternatively, transferring the motion to Judge Clark (*86 Cal. App. 4th. 1309, 1323)* . After finding the motion to be timely (*86 Cal. App. 4th 1309, 1320-1321)* , the court held that where a judge has previously ruled on a motion for summary adjudication, that judge has determined only legal issues and remains subject to a later peremptory challenge under the plain language of Code Civ. Proc. § 170.6(2) [*now see Code Civ. Proc. § 170.6(a)(2)*] (Judge Elfving had earlier ruled on another summary adjudication motion) (*86 Cal. App. 4th. 1309, 1322)* . The court expressly declined to follow the holding in *California Fed. Sav. & Loan Assn. v. Superior Court (1987) 189 Cal. App. 3d 267, 234 Cal. Rptr. 413* , discussed in *§ 130.41[4][a]*.

In ***Bambula v. Superior Court*** *(1985) 174 Cal. App. 3d 653, 220 Cal. Rptr. 223* , plaintiffs brought an action against defendants for fraud, negligence, breach of broker's duties, breach of warranty, and conspiracy. The cause was assigned to Judge Ryan, who proceeded to rule on a motion for summary judgment and on a motion for reconsideration of the summary judgment ruling. Thereafter, plaintiffs moved for peremptory disqualification of the judge pursuant to *Code Civ. Proc. § 170.6*. The judge denied the motion on the grounds that it was untimely filed, and that he had already heard and determined contested issues of fact. Plaintiffs then sought a writ of mandate to compel the judge to disqualify himself.

The court of appeal issued a peremptory writ of mandate directing the superior court to disqualify the judge and to notify the Chairperson of the Judicial Council of the need to assign another judge to preside over the action. The court explained that in ruling on the summary judgment and reconsideration of summary judgment motions, the judge had not passed on or determined contested issues of fact, but rather had decided whether a triable issue of fact existed. Thus, the judge had not ruled on a contested fact issue prior to filing the peremptory challenge, and was not precluded from the disqualification. The court further held that the 1982 amendment to Code Civ. Proc. § 170.6(2) regarding timeliness of a peremptory challenge motion was not retroactive, and the motion had not been untimely filed under the law as then effective. Because defendants and the respondent court had been given notice and opportunity but had not filed

opposition to the writ petition, the court of appeal issued the peremptory writ in the first instance (*174 Cal. App. 3d 653, 657-658)* .

[e] Motion Made After Court Ruling on Pretrial Motion Pursuant to Civ. Code § 3295(c)

In ***Guardado v. Superior Court*** *(2008) 163 Cal. App. 4th 91, 77 Cal. Rptr. 3d 149* , the claimant sought and obtained an order authorizing her to conduct pretrial punitive damages discovery under *Civ. Code § 3295(c)*. The judge granted her motion, findingthat there was a substantial probability she would prevail on her claim for punitive damages. A peremptory challenge was filed after that ruling. The judge concluded that the peremptory challenge was properly filed because there had been no determination of contested fact issues relating to the merits. On appeal, the court found no error, holding that a substantial probability determination under § 3295(c) was not a determination relating to the merits of the case as contemplated by *Code Civ. Proc. § 170.6*. The peremptory challenge was therefore not precluded.

The court of appeal declined to follow the holding in *Pacific etc. Conference of United Methodist Church v. Superior Court (1978) 82 Cal. App. 3d 72, 80, 147 Cal. Rptr. 44* , on the basis that the Pacific holding is not supported by any authority or analysis. Further, the court found that Pacific is directly contradicted by *Continental Baking Co. v. Katz (1968) 68 Cal.2d 512, 528, 67 Cal. Rptr. 761, 439 P.2d 889* , in which the California Supreme Court held that the granting or denial of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy; it merely determines that the court, balancing the respective equities of the parties, concludes that, pending a trial on the merits, the defendant should or that he should not be restrained from exercising the right claimed by him (*163 Cal. App. 4th 91, 99)* .

[4] Additional Authorities

[a] Motion Made After Ex Parte Rulings But Before Hearing Set for Determining Issues of Law and Fact

In *Grant v. Superior Court (2001) 90 Cal. App. 4th 518, 108 Cal. Rptr. 2d 825* , plaintiff filed a peremptory challenge of a judge after the judge had ruled on two ex parte matters, but before any other hearing was set before that judge. The trial court judge rejected the *Code Civ. Proc. § 170.6* challenge as untimely, on the ground that it was filed after the judge's ruling on the two ex parte matters. The court of appeal held that the prior rulings did not bar a subsequent peremptory challenge, but held that the challenge was untimely on other grounds (i.e. it was premature). The court reasoned that the 10 day/5 day rule of a Section 170.6 challenge is measured from a trial or hearing, "hearing" being defined as a proceeding where the judge is called on to rule on a disputed issue of law or fact. Therefore, the court held, a Section 170.6 challenge may not be filed until a specific hearing has been set before the challenged judge (*90 Cal. App. 4th 518, 526)* . The court noted that its opinion disagreed with other courts of appeal [*see* *Pedus Services, Inc. v. Superior Court (1999) 72 Cal. App. 4th 140, 84 Cal. Rptr. 2d 771* ; *Moreira v. Superior Court (1989) 215 Cal. App. 3d 42, 265 Cal. Rptr. 437]* .

[b] Motion Made Prior to Trial and Before Determination of Contested Fact Issue Relating to Merits

In *Swift v. Superior Court (2009) 172 Cal. App. 4th 878, 91 Cal. Rptr. 3d 504* , a civil action involving a landlord-tenant dispute, plaintiff tenants sought the return of a security deposit under the terms of a residential lease, and defendant landlords alleged that plaintiffs damaged their property. Plaintiffs filed a peremptory challenge pursuant to *Code Civ. Proc., § 170.6*, seeking to disqualify a superior court judge. The judge struck the peremptory challenge on the ground that he had previously made a determination of contested fact issues relating to the merits. In issuing a peremptory writ of mandate directing the superior court to vacate its order striking plaintiffs' peremptory challenge to the judge and to enter a new order accepting the challenge, the Court of Appeal concluded that the judge erred in striking the peremptory challenge because the judge's only factual determinations were made in connection with discovery motions and did not relate to the merits of the case. Plaintiffs' motions for a protective order were distinct from the earlier discovery matters and not reliant upon earlier rulings that determined the merits of the parties' contentions. The mere fact that a judge considering discovery motions and sanctions may draw upon his or her

knowledge regarding the parties' past conduct in the case is insufficient to broaden the category of cases in which a peremptory challenge is considered untimely (*172 Cal. App. 4th 878, 885)* .

In *Woods v. Superior Court (1987) 190 Cal. App. 3d 885, 235 Cal. Rptr. 687* , defendant, while awaiting trial in two criminal cases, filed identical affidavits of prejudice against the judge who was scheduled to try both cases. The judge honored the peremptory challenge in the second case but denied the challenge in the first case, ruling that because the challenge was made subsequent to the evidentiary hearing on defendant's motion to suppress, it was untimely. In rejecting the peremptory challenge, the judge relied on *In re Abdul Y. (1982) 130 Cal. App. 3d 847, 860-861, 182 Cal. Rptr. 146* , which holds that a peremptory challenge is untimely if made after the challenged judge has heard a motion to suppress evidence because a suppression motion involves the determination of contested fact issues relating to the merits. The reviewing court granted defendant's petition for a writ of mandate, directing that the challenge in the first case be granted. The court held that, notwithstanding the rule of *Abdul Y.,* the challenge should have been allowed because granting one challenge while rejecting the other created an appearance of impropriety (*190 Cal. App. 3d 885, 886-887)* .

In *People v. Whitfield (1986) 183 Cal. App. 3d 299, 228 Cal. Rptr. 82* , a trial judge denied a criminal defendant's pro se disqualification motion under *Code Civ. Proc. § 170.6*. The motion was ruled untimely by the judge because there had been a prior hearing on the defendant's motion to have his lawyer disqualified as incompetent because of his failure to make various motions suggested by defendant. On appeal from a judgment of conviction, the court of appeal reversed the judgment, because the judge's failure to disqualify himself in the face of defendant's *Code Civ. Proc. § 170.6* challenge rendered all of his subsequent actions null and void (*183 Cal. App. 3d 299, 306)* . The court observed that on the motion to disqualify defense counsel, there were no factual disputes and the only issue before the trial court was one of law. The court held that even if it could be assumed that the trial court did decide a factual issue, a hearing on the sole question of whether defendant was receiving competent representation had nothing to do with the merits of defendant's case, and therefore would not render defendant's *Code Civ. Proc. § 170.6* disqualification motion untimely (*183 Cal. App. 3d 299, 304-305)* .

[c] Motion Made After Judgment on Pleadings Timely

In *Kohn v. Superior Court (1966) 239 Cal. App. 2d 428, 48 Cal. Rptr. 832* , a trial judge had denied petitioners' motion to set aside a criminal indictment for lack of probable cause made pursuant to *Penal Code § 995* before petitioners moved to disqualify the judge under *Code Civ. Proc. § 170.6*. These motions were denied as untimely, and the petitioners' petitioned for a writ of prohibition to restrain the trial judge from proceeding further in the action. In issuing the writ of prohibition, the court held that a hearing on a motion to set aside an indictment for lack of probable cause does not involve a determination of contested fact issues relating to the merits. In dictum, the court compared the hearing on a motion to set asidean indictment for lack of probable cause with a proceeding for summary judgment in which the obligation of the magistrate is not to pass upon or determine the factual issue itself, but merely to decide if a triable issue of fact does exist. In both proceedings, the lower court applies the external standard of the applicable law to test whether there are facts stated or adduced sufficient to comprise an actionable cause. But the appellate court noted that before a party is precluded from bringing a motion to disqualify a judge, the judge must do more than make a determination that relates to contested fact issues. He or she must have actually resolved or determined conflicting factual contentions relating to the merits prior to trial before the right to disqualify is lost. Therefore, the court of appeal concluded that a motion to disqualify a trial judge made after his or her determination of probable cause under *Penal Code § 995* (and by inference a motion made after a hearing on a motion for summary judgment) is made before a determination of a factual issue relating to the merits of the case ad is timely (*239 Cal. App. 2d 428, 430-431)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil

ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral Overview

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CHAPTER 130 JUDGES
PART II. FORMS
A. PEREMPTORY DISQUALIFICATIONS

13-130 California Points & Authorities § 130.29

§ 130.29 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Timely Peremptory Motion to Disqualify Not Granted [Code Civ. Proc. § 170.6(a)(3)]--Motion Made Within 60 Days of Notice of Assignment of New Trial to Judge Who Conducted Prior Proceeding [Code Civ. Proc. § 170.6(a)(2)]

[1] FORM

[*Caption. See § 130.20[1].*]

THE COURT SHOULD ISSUE A WRIT OF MANDATE TO PREVENT JUDGE _____ [*name*] FROM PROCEEDING WITH THE CASE BECAUSE THE JUDGE FAILED TO GRANT THE PEREMPTORY MOTION TO DISQUALIFY, WHICH WAS TIMELY MADE WITHIN 60 DAYS AFTER PETITIONER RECEIVED NOTICE THAT THE NEW TRIAL ON THE MATTER, WHICH WAS REVERSED ON APPEAL, WAS ASSIGNED TO THE SAME TRIAL JUDGE WHO CONDUCTED THE PRIOR PROCEEDING.

A. Mandate Authorized. [*See § 130.20]1], Paragraph A.*]

B. Disqualified Judge Without Jurisdiction to Proceed With Case. [*See § 130.20]1], Paragraph B.*]

C. Motion on Retrial Made Within 60 Days of Notice of Assignment. A motion under *Code of Civil Procedure Section 170.6* may be made following reversal on appeal of a trial court's decision, or following reversal on appeal of a trial court's final judgment, if the trial judge in the prior proceeding is assigned to conduct a new trial on the matter. The motion must be made within 60 days after the party or the party's attorney has been notified of the assignment (*Code Civ. Proc. § 170.6(a)(2)*). [*Government Code Section 68616* has no application when a judgment has been reversed on appeal and returned to the trial court for retrial. The 60-day provision of *Code of Civil Procedure Section 170.6* controls (*Stubblefield Construction Co. v. Superior Court (2000) 81 Cal. App. 4th 762, 769*)].

[*Optional*] **D. Appellant's Motion on Remand Proper After Reversal of Final Judgment Even if Appellant Made Prior Motion.** The party who filed the appeal that resulted in the reversal of a final judgment of a trial court may make a motion under *Code of Civil Procedure Section 170.6* regardless of whether that party or side has previously done so (

Code Civ. Proc. § 170.6(a)(2); *see Stubblefield Construction Co. v. Superior Court (2000) 81 Cal. App. 4th 762, 765-766*).

[*Optional*] **E. Motion Proper Even if Reversed Judgment Was Based on Jury Verdict.** A party has a right to make the motion regardless of whether the reversed judgment originated from a judge's decision or a jury verdict (*Pandazos v. Superior Court (1997) 60 Cal. App. 4th 324, 326, 70 Cal. Rptr. 2d 669*).

F. What Constitutes New Trial. The term "new trial" for purposes of *Code of Civil Procedure Section 170.6(a)(2)* encompasses a posttrial reversal and remand for trial of a contested issue in which trial court discretion or fact determination is involved (*Paterno v. Superior Court (2004) 123 Cal. App. 4th 548, 558, 20 Cal. Rptr. 3d 282* ; *Hendershot v. Superior Court (1993) 20 Cal. App. 4th 860, 865, 24 Cal. Rptr. 2d 645* ; *C.C. v. Superior Court (2008) 166 Cal. App. 4th 1019, 1022, 83 Cal. Rptr. 3d 225*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a petition for a writ of mandate to prevent a judge from proceeding with a new trial after reversal on appeal. The ground for the motion is that the judge did not grant a timely peremptory motion to disqualify that was made within 60 days after petitioner received notice of the assignment of the new trial to the judge who conducted the prior proceeding [*see Code Civ. Proc. § 170.6(a)(2)*].

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms for use in filing a motion of peremptory disqualification and for a form of a petition for a writ of mandate for use after a judge has refused to reassign a case after a peremptory challenge, see California Forms of Pleading and Practice Ch. 317, *Judges* (Matthew Bender).

[3] Discussion of Authorities

[a] Motion on Retrial Made Within 60 Days of Notice of Assignment

In ***Stubblefield Construction Co. v. Superior Court*** *(2000) 81 Cal. App. 4th 762* , the trial court granted summary judgment for real parties in interest and related defendants (hereafter defendant) and judgment was entered. Plaintiffs appealed. The court of appeal reversed in part and remanded for further proceedings. The court of appeal's opinion was filed on June 28, 1999, and the remittitur was received by the trial court on August 31 of that year. On September 17, the clerk notified the parties that the case had been assigned for all purposes to the judge who had made the ruling that led to the appeal and partial reversal. On October 29, plaintiffs filed a peremptory challenge to the judge under *Code Civ. Proc. § 170.6*. The defendant filed an objection based on untimeliness. The court sustained the objection and refused to disqualify itself. Plaintiffs sought review by a writ petition.

The court of appeal stayed further proceedings pending its resolution of the matter and ultimately issued a peremptory writ of mandate as prayed for (*81 Cal. App. 4th 762, 764, 770)* . In reaching its conclusion, the court rejected defendant's argument that the case was governed by the shorter limitation period in *Gov. Code § 68616(i)* rather than the longer limitation period in Code Civ. Proc. § 170.6(2) [*now see Code Civ. Proc. § 170.6(a)(2)*]. The court held that *Gov. Code § 68616* has no application when a judgment has been reversed on appeal and returned to the trial court for retrial. The 60-day provision of *Code of Civil Procedure § 170.6* controls and plaintiffs motion was timely (*81 Cal. App. 4th 762, 764, 769)* .

[b] Appellant's Motion on Remand Proper After Reversal of Final Judgment Even if Appellant Made Prior Motion

The facts and procedural background of ***Stubblefield Construction Co. v. Superior Court*** *(2000) 81 Cal. App. 4th 762* are set out under § 130.29[3][a]. In issuing a peremptory writ of mandate as prayed for, the court rejected defendant's argument that plaintiffs, having previously filed a challenge under *Code Civ. Proc. § 170.6*, were not entitled to file another. The court noted that although as a rule a party is limited to a single peremptory challenge in a case, the statute clearly permits an additional challenge following reversal of a judgment if the same judge is assigned to hear the case on remand (*81 Cal. App. 4th 762, 764-765)* . However, the defendant argued that because the proceedings were terminated by summary judgment, rather than by judgment after trial, the remand would not result in a new trial but in a first trial. Hence, the argument ran, the exception to the "one challenge" rule did not apply. The court concluded that this contention was meritless. It is true, as argued by the defendant, that the exception does not apply to all proceedings after remand by the court of appeal. *Stegs Investments v. Superior Court (1991) 233 Cal. App. 3d 572, 576* , expressed the view that the disqualification right would not apply if the remand was for a "ministerial" purpose, such as calculating interest. The *Stegs Investment* court explained, however, that a party may disqualify the former judge reassigned to the case if the case involves an actual retrial of one or more issues. In the instant case the court concluded that the proceedings contemplated by the court's remand would be a "new trial" within the meaning of *Code Civ. Proc. § 170.6* and that plaintiffs had the right to disqualify the reassigned judge (*81 Cal. App. 4th 762, 765-766)* .

[c] Motion Proper Even if Reversed Judgment Was Based on Jury Verdict

In ***Pandazos v. Superior Court*** *(1997) 60 Cal. App. 4th 324, 70 Cal. Rptr. 2d 669* , following reversal of a judgment entered after a jury trial in a medical malpractice action, petitioner filed a peremptory challenge to the original trial judge. The judge honored the peremptory challenge and transferred the case to the supervising judge of the respondent court for reassignment, but the respondent court, adopting the real parties' argument that a party could exercise its right to file a peremptory challenge following reversal on appeal only if the first trial was a court trial, rejectedthe peremptory challenge because the appeal was from a jury verdict and reassigned the case to the original judge. A petition for a writ of mandate followed (*60 Cal. App. 4th 324, 326)* .

The court of appeal granted the petition directing the respondent court to (1) vacate its order rejecting the petitioner's peremptory challenge to the original judge as untimely, and (2) enter a new and different order honoring the peremptory challenge (*60 Cal. App. 4th 324, 327)* . The court construed the term "trial court's decision" in Code Civ. Proc. § 170.6(2) [*now see Code Civ. Proc. § 170.6(a)(2)*] to include both a jury trial as well as a court trial noting that in the court's view the 1985 amendment to Code Civ. Proc. § 170.6(2) [*now see Code Civ. Proc. § 170.6(a)(2)*] clearly and unequivocally affords a party the right to file a peremptory challenge to the original trial judge after the reversal of a judgment or order on appeal, regardless of whether the judgment originated from a judge's decision or a jury verdict (*60 Cal. App. 4th 324, 326-327)* .

[d] What Constitutes New Trial

In ***Paterno v. Superior Court*** *(2004) 123 Cal. App. 4th 548, 20 Cal. Rptr. 3d 282* , the court remanded with directions to conduct such further proceedings as were necessary to determine the damages of nonsample plaintiffs. Petitioners

argued that they were entitled to peremptorily challenge the judge on remand because any remand for resolution of any contested factual or legal issue was a "new trial" within the meaning of *Code Civ. Proc. § 170.6(a)(2)*. The court disagreed and held that a new peremptory challenge following a reversal on appeal would only be permitted where the trial court was required to reexamine issues litigated in the prior proceeding. In the case at bar, the remand required no reopening or reconsideration of issues. All liability issues were settled by the appellate decision, and the only task to complete was to determine damages. The trial court's function was not to go back and revisit any factual or legal terrain that had thus far been traversed, but to go forward with a trial on the issue of damages (*123 Cal. App. 4th 548, 560)* . The court disagreed, however, with the trial judge's additional reasoning that the provisions of *Code Civ. Proc. § 170.6(a)(2)* had to yield to the rules for coordination proceedings, specifically former Cal. Rules of Ct. Rule 1515 see now 3.516 (*123 Cal. App. 4th 548, 555)* .

Hendershot v. Superior Court *(1993) 20 Cal. App. 4th 860, 864-865, 24 Cal. Rptr. 2d 645* , involved a breach of contract action against a partnership, a corporation, and an individual. After a trial, judgment was entered against the corporation and the individual and both parties appealed. While the appeal was pending, the individual defendant paid the entire amount of the judgment against him. The court of appeal reversed the judgment as to the individual and affirmed with respect to the corporation. The individual defendant then applied for an order of restitution pursuant to *Code Civ. Proc. § 908*, alleging that he had paid the judgment against him during the pendency of the appeal and was entitled to an order that the plaintiff make restitution. The court of appeal declined to make that determination, noted that there were questions of fact to be resolved by the trial court, including whether amounts paid by the individual defendant were on his own or the corporation's behalf, and remanded the case to the trial court for resolution of the factual issues (*20 Cal. App. 4th 860, 862)* .

The individual defendant then filed a motion for a restitution order in the trial court. When he learned that the case would be reassigned to the same commissioner presiding over the trial, he filed a peremptory challenge under *Code Civ. Proc. § 170.6*. The trial court rejected the challenge as untimely. The individual defendant sought writ relief and a stay of proceedings, pointing out that a claim of error in denial of a peremptory challenge can only be reviewed by writ, citing *People v. Hull (1991) 1 Cal. 4th 266, 276, 2 Cal. Rptr. 2d 526* .

The court of appeal defined the issue as being whether the remand order on the motion for restitution called for a "new trial" within the meaning of Code Civ. Proc. § 170.6(2) [*now see Code Civ. Proc. § 170.6(a)(2)*], in which case the challenge would be timely because the the challenge was made within 60 days from learning of the assignment (*20 Cal. App. 4th 860, 863)* . The court noted the 1985 amendment to Section 170.6 was intended to permit a party to challenge a judge who had been assigned to conduct the "new trial" of the case in which his or her decision was reversed on appeal and that the term "new trial" was intended to cover situations where the case was to be re-tried and not merely remanded with instructions to perform some specific task, for example, to recalculate interest. It stated that if the court's function is merely a ministerial act, then a challenge is not appropriate, but if the court must conduct an actual retrial, the court may be disqualified on a timely challenge under Section 170.6. The court found that the remand order required resolution of the factual issue as to whether the individual defendant paid the judgment for himself alone or on behalf of the corporate defendant (*20 Cal. App. 4th 860, 864)* . Noting that the statute does not define "new trial," the court construed it broadly to encompass a posttrial reversal and remand for trial of a contested issue in which trial court discretion or fact determination is involved. The court directed the respondent court to vacate its order and to enter a new order accepting the peremptory challenge (*20 Cal. App. 4th 860, 864-865)* .

In ***C.C. v. Superior Court*** *(2008) 166 Cal. App. 4th 1019, 83 Cal. Rptr. 3d 225* , a parent was denied reunification services by the appellate court in a juvenile dependency matter and the matter was remanded to the juvenile court to enter an order denying reunification services and to set a permanent plan selection hearing. The parent filed a motion to disqualify the juvenile court judge on remand pursuant to *Code Civ. Proc. § 170.6(a)(2)*. The court appeal found that the remand was not "a 'reexamination' of a factual or legal issue that was in controversy in the prior proceeding" as required by *Code Civ. Proc. § 170.6(a)(2)*. The court's remand to the juvenile court was clearly for the performance of ministerial acts, i.e., entering an order denying reunification services and setting a permanent plan selection hearing

pursuant to *Welf. & Inst. Code § 366.26*. The real parties in interest claimed, "the juvenile court in the present case will undoubtedly revisit the core determinations upon which this Court based its reversal," meaning it will have to consider the strength of the bond between the children and the mother at the permanent plan selection hearing. This claim was true, but the consideration of the parent-child bond at the permanent plan selection hearing is not for purposes of reunification; rather, it is to determine whether to avoid the termination of parental rights and select a different permanent plan. This consideration will take place in a different legal context from the disposition hearing and will involve facts as they then exist. On remand, however, the juvenile court was merely directed to enter an order denying reunification services and to set a permanent plan selection hearing. The implementation of these directions will not constitute a reexamination of an issue of fact or a retrial of the dispositional issues (*166 Cal. App. 4th 1019, 1022)* .

[4] Additional Authorities

[a] What Constitutes New Trial

See *Stubblefield Construction Co. v. Superior Court (2000) 81 Cal. App. 4th 762* , discussed in *§ 130.29[3][b]*.

[b] Bias of Trial Judge After Reversal

In *People v. Superior Court (2001) 91 Cal. App. 4th 391, 109 Cal. Rptr. 2d 897* , the trial court judge twice dismissed the complaint in a criminal action and was twice reversed on appeal. After the second reversal, the People filed a Code Civ. Proc. § 170.6(2) [*now see Code Civ. Proc. § 170.6(a)(2)*] challenge against the judge, which provides that a challenge is timely after a reversal if the trial judge in the prior proceeding is assigned to conduct a new trial on the matter. The trial judge rejected the challenge on the ground that, since the previous action had been dismissed, the current action was not a "new trial" within the meaning of Section 170.6(2). The People filed a petition for writ of mandate and the court of appeal granted the writ. The court reasoned that in order to give effect to the purpose of Section 170.6(2) [*now see Code Civ. Proc. § 170.6(a)(2)*]--to avoid the possible bias of a trial judge who has been reversed--the phrase "new trial" would have to encompass the circumstances in this case (*91 Cal. App. 4th 391, 396-397)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral Overview

California Points & Authorities

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 130 JUDGES
PART II. FORMS
A. PEREMPTORY DISQUALIFICATIONS

13-130 California Points & Authorities § 130.30

§ 130.30 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Timely Peremptory Motion to Disqualify Not Granted [Code Civ. Proc. § 170.6(a)(3)]--Motion Made in Proceeding Separate and Independent From Prior Action in Which Judge Presided

[1] FORM

[*Caption. See § 130.20[1].*]

A WRIT OF MANDATE SHOULD ISSUE TO PREVENT JUDGE _____ [*name*] FROM PROCEEDING WITH THIS CASE BECAUSE HE/SHE FAILED TO GRANT A TIMELY DISQUALIFICATION MOTION THAT WAS MADE IN A SEPARATE AND INDEPENDENT PROCEEDING, AS DISTINGUISHED FROM A CONTINUATION OF A PRIOR ACTION OR PROCEEDING IN WHICH HE/SHE PRESIDED.

A. Mandate Authorized. [*See § 130.20]1], Paragraph A.*]

B. Disqualified Judge Without Jurisdiction to Proceed With Case. [*See § 130.20]1], Paragraph B.*]

[*EITHER*]

C. Motion Made at Least Five Days Before Date Set for Trial or Hearing. [*See § 130.20]1], Paragraph C.*]

[*OR*]

C. Motion Made Before Commencement of Trial. [*See § 130.21]1], Paragraph C.*]

[*OR*]

C. Motion Made to Master Calendar Judge. [*See § 130.23]1], Paragraph C.*]

[*OR*]

C. Motion Made After All-Purpose Assignment. [*See § 130.24]1], Paragraph C.*]

[*OR*]

C. Motion Made Before Expiration of 30-Day Period. [*See § 130.27]1], Paragraph C.*]

[*CONTINUE*]

D. Subsequent Proceeding Involves Distinct Legal Issues. A proceeding is not a continuation of a prior action if it raises distinct legal issues, seeks different relief, includes new parties or results in a realignment of the original parties, and is broader in scope than the original action (*Bravo v. Superior Court (2007) 149 Cal. App. 4th 1489, 1494, 57 Cal. Rptr. 3d 910* ; *City of Hanford v. Superior Court (1989) 208 Cal. App. 3d 580, 592-593, 256 Cal. Rptr. 274*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for a writ of mandate to prevent a judge from proceeding with a case when the judge has denied a peremptory motion to disqualify as untimely because the proceeding in which it was filed is a continuation of an earlier proceeding in which the judge was not challenged. The argument is that the motion is timely because the proceeding in which it was made is separate and independent from the earlier proceeding over which the judge presided.

The foregoing form may also be adapted for use as a supplemental memorandum to be filed in response to the opposing points and authorities contained in § 130.42.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should demonstrate in what ways the legal issues raised by the two proceedings are distinct, even though their subject matter may be the same.

[b] Related Pleading and Practice Forms

For forms for use in filing a motion of peremptory disqualification and for a form of petition for a writ of mandate for use after a judge has refused to reassign a case after a peremptory challenge, see Ch. 317, *Judges* in California Forms of Pleading and Practice (Matthew Bender).

[c] Opposing Memoranda

The points and authorities *set out in §§ 130.41 -130.45* may be used in an appropriate case to oppose a petition supported by this form.

[3] Discussion of Authorities

[a] Subsequent Proceeding Involves Distinct Legal Issues

In ***Bravo v. Superior Court*** *(2007) 149 Cal. App. 4th 1489, 57 Cal. Rptr. 3d 910* , an employee filed a complaint alleging sexual orientation discrimination and describing specific incidents. A demurrer was sustained. Thereafter, the employee filed another complaint alleging that additional harassment and retaliation occurred after the incidents described in the first action. On the ground that the cases were related, the employers obtained a transfer to the judge who heard the first case. Two days later, the employee filed an affidavit of prejudice and made a peremptory challenge to that judge under *Code Civ. Proc. § 170.6*. The trial court found the challenge untimely and ordered it stricken.

The appellate court concluded that the challenge was timely because the second case was not a continuation of the previous action. Although two cases may involve the same parties (*e.g.*, same employee and the same employer), if the second action arises out of later events distinct from those in the previous action, the second action does not constitute a continuation of the previous action and a party's peremptory challenge may be timely (*149 Cal. App. 4th 1489, 1494)* .

In ***City of Hanford v. Superior Court*** *(1989) 208 Cal. App. 3d 580, 256 Cal. Rptr. 274* , several environmental groups brought an action against a power company to enjoin construction of a coal-fueled power plant and against the city that approved plans for the plant. After trial, judgment was entered in the city's favor, and the power company and the environmental groups appealed. While the appeal was pending, the city council reconsidered its approval of the project and enacted a temporary moratorium on emissions from coal-burning industries within city limits. The power company then applied to the trial court for leave to file a cross-complaint against the city challenging the legality of the moratorium. It also filed a separate "mirror" action to enjoin the city from enforcing the moratorium, as well as for declaratory relief and damages. When the trial judge permitted filing of the cross-complaint and temporarily enjoined the city from enforcing the moratorium, the city filed *Code Civ. Proc. § 170.6* motions to disqualify the trial judge from hearing the cross complaint and the new action. The judge ruled that the cross complaint and new action were a continuation of the proceedings initiated by the environmental groups' lawsuit and denied the disqualification motions as untimely. The city challenged the orders by petition for writ of prohibition or mandate.

The court of appeal issued a writ of mandate ordering the trial court to vacate its orders and to accept the disqualification challenge in the power company's new action. After holding that the disqualification motion filed in response to the cross complaint was moot because the cross complaint was improperly filed, the court of appeal held that the disqualification motion in the "mirror" action was timely because the lawsuit was not merely a continuation of the earlier proceeding (*208 Cal. App. 3d 580, 588-589, 593-594)* . The court recognized that, under *McClenny v. Superior Court (1964) 60 Cal. 2d 677, 36 Cal. Rptr. 459, 388 P.2d 691* (discussed in *§ 130.42[3][b]*), a subsequent proceeding is a continuation of an earlier action rather than a separate and independent action if it involves substantially the same issues and matters necessarily relevant and material to the issues involved in the original action (*208 Cal. App. 3d 580, 589)* . However, in the environmental group's original action, the principal issues involved were the adequacy of an environmental impact report and compliance with the city's zoning ordinance, whereas the power company's suit challenged the city's enactment of the moratorium, alleging that it violated state environmental law and the Constitution (*208 Cal. App. 3d 580, 592)* . Although the purpose of the moratorium and of the original lawsuits were the same (to bar construction of the power project) and there clearly was a subject matter connection between the two cases, the legal issues raised by the two actions were quite distinct (*208 Cal. App. 3d 580, 592-593)* . In addition, the court reasoned, the new action sought different relief, included new parties, and resulted in a realignment of the original parties. Moreover, the scope of the new action included more universal issues because the moratorium barred issuance of permits for all coal-burning facilities, not just that of the power company. In summary, the court held, the

paramount questions presented by the two cases were different and the relationship of the issues in the two cases were not as direct as when the second proceeding involves the validity of an order made by the court in the first action or the validity of enforcement proceedings based on the original order. Therefore, the court concluded, the power company's suit was a new action attacking a separate phenomenon and thus not merely a continuation of the earlier proceeding (*208 Cal. App. 3d 580, 593)* .

[4] Additional Authorities

[a] Subsequent Proceeding Involves Distinct Legal Issues

In *NutraGenetics, LLC v. Superior Court (2009) 179 Cal. App. 4th 243, 101 Cal. Rptr. 3d 657* , petitioner, a company in which real party in interest investor had purchased an interest, filed a writ petition challenging the trial court's order accepting the investor's motion to disqualify the trial judge under *Code Civ. Proc. § 170.6*, in the investor's suit alleging breach of contract and other causes of action. In a fraud action against the company's principals, the investor alleged that he had invested in and worked for the company in reliance on misrepresentations and undisclosed facts. The principals' petition to compel arbitration was granted. Thereafter, based on a finding that the two actions were related, the suit against the company was transferred to the judge who was assigned to the suit against its principals. When the investor filed his § 170.6 peremptory challenge, the company asserted that it was untimely because the judge had made a ruling on the arbitration issue. The court held that the suit against the company was not a continuation of the first suit against its principals but was a separate and independent action for purposes of § 170.6. A proceeding was a continuation under § 170.6 if it involved substantially the same issues as the original action and presented matters that were necessarily relevant and material to the issues in the original action. Although the cases were related, they involved different defendants and different causes of action, and the second suit was not brought to enforce or modify orders in the first suit. Thus, the § 170.6 motion was timely.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral Overview

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 130 JUDGES
PART II. FORMS
A. PEREMPTORY DISQUALIFICATIONS

13-130 California Points & Authorities § 130.31

§ 130.31 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Timely Peremptory Motion to Disqualify Not Granted [Code Civ. Proc. § 170.6(a)(3)]--Motion Made in Supplemental Proceeding to Disqualify Judge Who Did Not Preside at Original Proceeding

[1] FORM

[*Caption. See § 130.20[1].*]

A WRIT OF MANDATE SHOULD ISSUE TO PREVENT JUDGE _____ [*name*] FROM PROCEEDING WITH THIS CASE BECAUSE THE JUDGE FAILED TO GRANT THE MOTION TO DISQUALIFY. THE MOTION WAS TIMELY MADE BECAUSE HE/SHE DID NOT PRESIDE AT ANY EARLIER PROCEEDINGS IN THE CASE AND THE MOTION IS OTHERWISE TIMELY UNDER CODE OF CIVIL PROCEDURE SECTION 170.6(a)(2).

A. Mandate Authorized. [*See § 130.20]1], Paragraph A.*]

B. Disqualified Judge Without Jurisdiction to Proceed With Case. [*See § 130.20]1], Paragraph B.*]

[*EITHER*]

C. Motion Made at Least Five Days Before Date Set for Trial or Hearing. [*See § 130.20]1], Paragraph C.*]

[*OR*]

C. Motion Made Before Commencement of Trial. [*See § 130.21]1], Paragraph C.*]

[*OR*]

C. Motion Made to Master Calendar Judge. [*See § 130.23]1], Paragraph C.*]

[*CONTINUE*]

D. Motion to Disqualify Subsequent Judge. When a litigant has not previously exercised a peremptory disqualification under *Code of Civil Procedure Section 170.6*, he or she may peremptorily disqualify a judge assigned to hear a supplemental proceeding, provided that that judge has not previously heard any phase of the matter and the litigant does so before commencement of the hearing of the supplemental proceeding within the time limitations specified in Section 170.6 (*Thompson v. Superior Court (1962) 206 Cal. App. 2d 702, 707, 23 Cal. Rptr. 841*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for a writ of mandate to prevent a judge from proceeding with a case when the judge is a subsequent judge who has not presided at earlier proceedings and who has not granted a timely peremptory motion to disqualify.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms for use in filing a motion of peremptory disqualification and for a form of a petition for a writ of mandate for use after a judge has refused to reassign a case after a peremptory challenge, see Ch. 317, *Judges* in California Forms of Pleading and Practice (Matthew Bender).

[c] Opposing Memoranda

The points and authorities *set out in §§ 130.41 -130.45* may be used in an appropriate case to oppose a petition supported by this form.

[3] Discussion of Authorities

[a] Motion to Disqualify Subsequent Judge

Thompson v. Superior Court *(1962) 206 Cal. App. 2d 702, 23 Cal. Rptr. 841* , involved a proceeding in prohibition before a court of appeal to restrain Judge Pfaff from enforcing his order modifying the child custody provision in an interlocutory divorce decree that had been signed by another judge. The defendant in the divorce action sought modification of the custody award. In the proceedings for modification, Judge Pfaff signed orders to show cause, temporary restraining orders, and various continuances, including one stipulated continuance. When the matter came

onfor hearing, however, it was not transferred and was to be heard before Judge Pfaff. Prior to the hearing, defendant moved to disqualify Judge Pfaff pursuant to *Code Civ. Proc. § 170.6*. The judge denied the motion to disqualify on the ground that it was not timely made, based on the rule set forth in *Jacobs v. Superior Court (1959) 53 Cal. 2d 187, 1 Cal. Rptr. 9, 347 P.2d 9* (discussed in *§ 130.42[3][a]*), that a custody modification hearing is a continuation of the original proceeding and that a motion to disqualify filed prior to a continued proceeding is not timely made. The judge presided at the hearing, vacated all prior orders, and modified the custody award.

In issuing a writ to restrain the judge from modifying the child custody order, the court of appeal recognized that the modification proceedings were, under *Jacobs*, a continuation of the original divorce trial. However, the modifications proceedings in question were not before the judge who tried the case nor before the judge pro tempore who had heard a prior application for modification of child custody (*206 Cal. App. 2d 702, 706)* . The court recognized that the Legislature intended that a litigant who has not previously exercised his or her privilege under *Code Civ. Proc. § 170.6* may do so in a proceeding supplemental to the original action with regard to a judge other than any judge who has previously heard any phase of the matter, provided that the litigant does so within the statutory time limitations before commencement of the hearing in the supplemental proceeding (*206 Cal. App. 2d 702, 707)* . The court observed that, although the challenged judge participated in many preliminary proceedings that took place prior to the divorce trial, every order made by the challenged judge, other than certain continuances, was made pursuant to ex parte application or on stipulation of the parties and none was the result of hearing on a contested issue of law or fact (*206 Cal. App. 2d 702, 707-708, 709)* . Therefore, the court held, the motion to disqualify that the petitioner made in the modification proceeding was timely because the motion was made the first time the petitioner appeared before the judge in a hearing that involved a contested issue (*206 Cal. App. 2d 702, 710)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral Overview

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CHAPTER 130 JUDGES
PART II. FORMS
A. PEREMPTORY DISQUALIFICATIONS

13-130 California Points & Authorities § 130.32

§ 130.32 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Timely Peremptory Motion to Disqualify Not Granted [Code Civ. Proc. § 170.6(a)(3)]--Motion Made Within 20 Days After Service of Order Assigning Judge to Coordination Proceeding [Cal. Rules of Ct., Rule 3.516]

[1] FORM

[*Caption. See § 130.20[1].*]

THE COURT SHOULD ISSUE A WRIT OF MANDATE TO PREVENT JUDGE _____ [*name*] FROM PROCEEDING WITH THE COORDINATED ACTIONS BECAUSE THE JUDGE FAILED TO GRANT THE PEREMPTORY MOTION TO DISQUALIFY, WHICH WAS TIMELY MADE WITHIN 20 DAYS AFTER SERVICE OF THE ORDER OF ASSIGNMENT.

A. Mandate Authorized. [*See § 130.20]1], Paragraph A.*]

B. Disqualified Judge Without Jurisdiction to Proceed With Case. [*See § 130.20]1], Paragraph B.*]

C. Time for Making Motion in Coordination Proceeding. A motion for peremptory disqualification of a judge assigned to a coordination proceeding is timely if it is submitted in writing to the assigned judge within 20 days after service of the order of assignment (*Cal. Rules of Ct., Rule 3.516*).

[*Optional*] **D. Extension of Time.** *Code of Civil Procedure Section 1013* applies to extend the time provided for in *California Rules of Court, Rule 3.516*, for challenging a trial judge assigned to coordinated actions (*Citicorp North America, Inc. v. Superior Court (1989) 213 Cal. App. 3d 563, 565, 261 Cal. Rptr. 668*). Because the order of assignment of the judge was served by _____ [*specify means, e.g.,* mail to an address in California], the 20-day period to file a peremptory challenge was extended by _____ [*specify number of days time is extended by Code Civ. Proc. § 1013 for the type of service used, e.g.,* five] days.

[*Optional*] **E. Motion Timely Despite Judge's Prior Rulings on Contested Issue.** *California Rules of Court, Rule*

3.516, provides 20 days from service of the order assigning the judge to the coordination proceeding in which to file a challenge. The rule provides no exception for coordinated actions that include cases in which contested issues had been previously decided (*Farmers Ins. Exchange v. Superior Court (1992) 10 Cal. App. 4th 1509, 13 Cal. Rptr. 2d 449*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in a coordination proceeding in support of a petition for a writ of mandate to prevent a judge assigned to hear and determine the coordination actions from proceeding after he or she has denied a timely peremptory challenge made within 20 days after service of the order of assignment [*Cal. Rules of Ct., Rule 3.516*].

Optional Paragraph D is for use if the order of assignment was not served personally, but by mail, facsimile transmission, or other alternative method of service, and the peremptory challenge, denied as untimely, actually was timely because the time for making it was extended by *Code Civ. Proc. § 1013*.

Optional Paragraph E is for use if the motion was improperly denied on the ground the assigned judge has made rulings on contested issues in one of the cases included in the coordination proceeding.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Peremptory Challenges in Coordination Proceedings

When civil actions sharing a common question of fact or law and pending in different courts have been ordered coordinated under *Code Civ. Proc. §§ 404.1*, 404.3, the Chairperson of the Judicial Council assigns a judge to hear and determine the actions [*Code Civ. Proc. § 404.3*]. Any motion or affidavit of prejudice regarding an assigned judge must be submitted in writing to the assigned judge within 20 days after service of the order assigning that judge to the coordination proceeding. For purposes of making a *Code Civ. Proc. § 170.6* challenge, all plaintiffs or similar parties in the included or coordinated actions constitute a side and all defendants or similar parties constitute a side [*Cal. Rules of Ct., Rule 3.516*].

[c] Related Pleading and Practice Forms

For a discussion and forms relating to coordinated actions, see Ch. 125, *Consolidation, Severance, and Coordination of Actions* in California Forms of Pleading and Practice (Matthew Bender). For forms for use in filing a motion of peremptory disqualification and for a form of petition for a writ of mandate for use after a judge has denied a timely peremptory challenge, see Ch. 317, *Judges* in that set.

[d] Related Memoranda

For memoranda relating to coordination of actions generally, see Ch. 45, *Consolidation, Severance, and Coordination of Actions* .

[e] Opposing Memoranda

The points and authorities *set out in § 130.44* may be used in an appropriate case to oppose a petition supported by this memorandum.

[3] Discussion of Authorities

[a] Extension of Time

In ***Citicorp North America, Inc. v. Superior Court*** *(1989) 213 Cal. App. 3d 563, 261 Cal. Rptr. 668* , plaintiffs in a coordination proceeding successfully moved to disqualify the assigned trial judge under *Code Civ. Proc. § 170.6*. On April 13, 1989, the Judicial Council Chairperson served the parties by mail with an order assigning a replacement judge. On May 5, 1989, 22 days after the order was served, defendants served their motion for peremptory disqualification. The assigned judge denied their motion as untimely under former Cal. Rules of Ct., Rule 1515, see now 3.516 which requires that the motion be made within 20 days after service of the order of assignment. Defendants petitioned for a writ of mandate.

The court of appeal granted the writ, holding that the motion was timely because *Code Civ. Proc. § 1013* gives a party to a coordination proceeding an additional five days, beyond the 20 days provided for in former Cal. Rules of Ct., Rule 1515, see now 3.516 to assert a challenge to the assigned trial judge when the order of assignment has been served by mail (*213 Cal. App. 3d 563, 565)* . The court reasoned that *Code Civ. Proc. § 1013* by its terms applies whenever a prescribed time period is triggered by the service of a notice, document, or request, and that Rule 1515 specifically links the commencement of the 20-day period to "service" of the assignment notice (*213 Cal. App. 3d 563, 568)* . In addition, the Legislature has not chosen to add the time period set out under former Rule 1515 to the list of exceptions expressly included in *Code Civ. Proc. § 1013*. The Judicial Council had not modified former Rule 1515 in response to decisional law interpreting *Code Civ. Proc. 1013*. The Judicial Council implicitly incorporated *Code Civ. Proc. § 1013* into the coordination rules by adopting former Cal. Rules of Ct., Rule 3.504(a), which makes the provisions of law for civil actions generally applicable to coordination proceedings, unless otherwise provided in the coordination rules. These considerations, the court held, outweigh the settled, general policy requiring prompt challenges to all-purpose judges in civil actions (*213 Cal. App. 3d 563, 569-570)* . Finally, the court emphasized the importance of ensuring that the parties to a coordination proceeding have the full 20 days afforded them by former Rule 1515. Coordination proceedings are unique in that large numbers of parties and counsel are involved. Because any one party can exercise the sole peremptory challenge available to that side, consultations among all similarly situated parties are very important and can be quite time consuming (*213 Cal. App. 3d 563, 568, 571)* .

[b] Motion Timely Despite Judge's Prior Rulings on Contested Issue

In ***Farmers Ins. Exchange v. Superior Court*** *(1992) 10 Cal. App. 4th 1509, 13 Cal. Rptr. 2d 449* , three consolidated actions against the defendants pending in Contra Costa County were coordinated with one pending action pending against the same defendants in Los Angeles County. Prior to coordination, the judge in Contra Costa County ruled against the defendant on contested motions, including one for summary adjudication and a motion for class certification. That judge wasassigned as the coordination trial judge, and defendants filed a *Code Civ. Proc. § 170.6* challenge against him that was timely within the meaning of Cal. Rules of Ct., Rule 1515. The judge denied the challenge, and the defendants petitioned for a writ of mandate.

The court of appeal concluded that Rule 1515 provides no basis for denying a peremptory disqualification motion if it is timely and sufficiently supported. The plaintiffs, as real parties in interest, argued that the challenge was untimely because of the judge's prior rulings on contested motions. The court held, however, that Rule 1515 provided no basis for implying an exception to the time limit it provides, so that the fact that the coordination trial judge had previously ruled against the company on contested matters in some of the coordinated actions did not cut off the right to challenge the

judge (*10 Cal. App. 4th 1509, 1511)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral Overview

California Points & Authorities

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 130 JUDGES
PART II. FORMS
A. PEREMPTORY DISQUALIFICATIONS

13-130 California Points & Authorities § 130.33

§ 130.33 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Timely Peremptory Motion to Disqualify Not Granted [Code Civ. Proc. § 170.6(a)(3)]--Motion Made by Codefendant Who Is No Longer Party to Action

[1] FORM

[*The following should be combined with a general form of memorandum in support of a petition for a writ of mandate prevent a judge from hearing a case (see §§ 130.20 -130.27, 130.29 -130.31*)]

THE PEREMPTORY MOTION TO DISQUALIFY INURES TO PETITIONER'S BENEFIT EVEN THOUGH IT WAS FILED BY A CODEFENDANT WHO IS NO LONGER PARTY TO THE ACTION.

Benefit of Timely Peremptory Challenge Inures to Codefendants. A timely and sufficient peremptory challenge filed pursuant to *Code of Civil Procedure Section 170.6* takes effect instantaneously and irrevocably, and inures to codefendants of the party making the challenge despite later events, such as the dismissal of the party who made the challenge (*Louisiana-Pacific Corp. v. Philo Lumber Co. (1985) 163 Cal. App. 3d 1212, 1218-1221, 210 Cal. Rptr. 368*).

[2] Comments

[a] Use of Form

This memorandum is for use in support of a petition for a writ of mandate to prevent a judge from proceeding with a case when a timely and sufficient challenge was made by a codefendant of the party bringing the petition, even if the codefendant making the challenge is no longer a party.

This form does not provide a complete memorandum, but is designed to be combined with general points and authorities relating to review of the denial of a timely motion for peremptory disqualification of a judge [*see §§ 130.20 -130.27, 130.29 -130.31*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel should, for example, describe the capacity of the moving party in relation to petitioner, and give facts explaining why the moving party is no longer a party to the action.

[3] Discussion of Authorities

[a] Benefit of Timely Peremptory Challenge Inures to Codefendants

In ***Louisiana-Pacific Corp. v. Philo Lumber Co.*** *(1985) 163 Cal. App. 3d 1212, 210 Cal. Rptr. 368* , a timely and sufficient peremptory challenge to the trial judge was filed pursuant to *Code Civ. Proc. § 170.6* by one of three defendants. Before trial, plaintiff dismissed the entire action against the defendant who filed the challenge. The case came on for trial as to the remaining defendants before the challenged judge, who, over objections, proceeded with trial. Judgment was rendered for plaintiff, and defendants appealed.

The court of appeal reversed the judgment, holding that a properly filed peremptory challenge takes effect instantaneously and irrevocably, rendering any subsequent orders by the challenged judge null and void; and later events, such as the dismissal of the party who asserted the challenge, do not cause a rescission of the challenge. The challenge, therefore, inures to the benefit of all defendants (*163 Cal. App. 3d 1212, 1218-1220)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral Overview

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CHAPTER 130 JUDGES
PART II. FORMS
A. PEREMPTORY DISQUALIFICATIONS

13-130 California Points & Authorities § 130.34

§ 130.34 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Challenge by Cross Defendant--Severance of Cross Action and Recusal in Only That Action Is Improper

[1] FORM

[*The following should be combined with a general form of memorandum in support of a petition for a writ of mandate prevent a judge from hearing a case (see §§ 130.20 -130.27*)]

A WRIT OF MANDATE SHOULD ISSUE TO PREVENT JUDGE _____ [*name*] FROM PROCEEDING WITH THIS CASE BECAUSE AFTER A CROSS DEFENDANT MADE A TIMELY AND SUFFICIENT MOTION FOR PEREMPTORY DISQUALIFICATION, JUDGE _____ [*name*] SEVERED THE CROSS ACTION AND RECUSED HIMSELF/HERSELF IN ONLY THE SEVERED CROSS ACTION.

Severance of Cross Action and Recusal in Only That Action Is Improper. When a motion for peremptory disqualification is duly made, with a sufficient supporting affidavit, by a cross defendant, severance of the cross action, with recusal of the challenged judge in only the severed action, is improper. There is no statutory authority for severance of the cross action; rather, *Code of Civil Procedure Section 170.6* requires that the entire case must be assigned to another judge (*Sunkyong Trading (H.K.) Ltd. v. Superior Court (1992) 9 Cal. App. 4th 282, 287-290, 11 Cal. Rptr. 2d 504*).

[2] Comments

[a] Use of Form

This memorandum is for use in support of a petition for a writ of mandate to prevent a judge from proceeding with a case after a timely and sufficiently supported motion asserting a peremptory challenge by a cross defendant, when the challenged judge severed the cross action and recused himself or herself in only the severed cross action.

This form does not provide a complete memorandum, but is designed to be combined with general points and authorities relating to review of the denial of a timely motion for peremptory disqualification of a judge [*see §§ 130.20 -130.27, 130.29 -130.31*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms for use in filing a motion of peremptory disqualification and for a form of a petition for a writ of mandate for use after a judge has refused to assign a case after a peremptory challenge, see Ch. 317, *Judges* , in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Severance of Cross Action and Recusal in Only That Action Is Improper

In ***Sunkyong Trading (H.K.) Ltd. v. Superior Court*** *(1992) 9 Cal. App. 4th 282, 11 Cal. Rptr. 2d 504* , a cross complaint against several existing parties and one new party for indemnity was filed about 15 months after commencement of the action. The cross defendant who was a new party promptly moved, with a sufficient supporting affidavit, for peremptory disqualification of the judge. The judge, noting that he was familiar with the main action (and implying that therefore he should proceed with that action), responded to the motion by severing the cross action and recusing himself in only the severed cross action.

In a proceeding for an extraordinary writ on the petition of cross plaintiffs and some of the cross defendants, the court of appeal concluded that there was no statutory authority for the challenged judge's acts in response to the disqualification motion (*9 Cal. App. 4th 282, 290)* . The fact that severance in this case tended to promote judicial economy was irrelevant (*9 Cal. App. 4th 282, 289)* . While a cross action can be considered as a separate action for some purposes, there is no basis for doing so in applying *Code Civ. Proc. § 170.6* (*9 Cal. App. 4th 282, 288-289)* . A writ of mandate was issued directing that the severance order be vacated and the entire case be assigned to a different judge (*9 Cal. App. 4th 282, 292)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral Overview

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CHAPTER 130 JUDGES
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A. PEREMPTORY DISQUALIFICATIONS

13-130 California Points & Authorities § 130.35

§ 130.35 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Inquiry Into Party's Good Faith in Making Peremptory Challenge Is Improper

[1] FORM

[*The following should be combined with a general form of memorandum in support of a petition for a writ of mandate prevent a judge from hearing a case (see §§ 130.20 -130.27, 130.29 -130.31*)]

A WRIT OF MANDATE SHOULD ISSUE TO PREVENT JUDGE _____ [*name*] FROM PROCEEDING WITH THIS CASE BECAUSE _____ [*specify moving party, e.g.,* PLAINTIFF] MADE A TIMELY DISQUALIFICATION MOTION WITH A SUFFICIENT SUPPORTING _____ [AFFIDAVIT *or* DECLARATION *or* STATEMENT UNDER OATH] AND THE TRIAL COURT IMPROPERLY INQUIRED INTO THE MOVING PARTY'S GOOD FAITH TO DISALLOW THE CHALLENGE.

A. Sufficiency of Supporting Affidavit. A peremptory challenge of a judge is sufficiently supported by an affidavit or declaration under penalty of perjury or statement under oath of a party or a party's attorney stating in substance that he or she cannot, or believes that he or she cannot, have a fair and impartial trial or hearing before the challenged judge (*Code Civ. Proc. § 170.6(a)(1)-(a)(3), (a)(5)*).

B. Inquiry Into Good Faith as Ground for Issuing Writ. When a motion for peremptory disqualification has been duly made with sufficient support, the trial court may not inquire into the moving party's good faith in making the challenge unless the adversary party makes a prima facie showing of invidious discrimination. If the court makes an inquiry when the adversary has failed to make such a showing and sets aside the challenge, the court of appeal may issue an extraordinary writ directing the trial court to vacate the order setting aside the challenge and enter an order disqualifying the challenged judge (*People v. Superior Court (Williams) (1992) 8 Cal. App. 4th 688, 699, 714, 10 Cal. Rptr. 2d 873*).

[2] Comments

[a] Use of Form

This memorandum is for use in a memorandum in support of a petition for a writ of mandate to prevent a judge from proceeding with a case after denial of a timely and sufficiently supported motion asserting a peremptory challenge, when the motion was denied after an inquiry into the moving party's good faith in making the challenge.

This form does not provide a complete memorandum, but is designed to be combined with general points and authorities relating to review of the denial of a timely motion for peremptory disqualification of a judge [*see §§ 130.20 -130.27, 130.29 -130.31*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include highlight parts of the record showing that the adversary failed to make out a prima facie case of invidious discrimination.

[b] Related Pleading and Practice Forms

For forms for use in filing a motion of peremptory disqualification and for a form of a petition for a writ of mandate for use after a judge has refused to assign a case after a peremptory challenge, see Ch. 317, *Judges* , in California Forms of Pleading and Practice (Matthew Bender).

[c] Opposing Memoranda

The points and authorities *set out in § 130.45* may be used in an appropriate case to oppose a petition supported by this memorandum.

[3] Discussion of Authorities

[a] Inquiry Into Good Faith as Ground for Issuing Writ

The facts and procedural background of ***People v. Superior Court (Williams)*** *(1992) 8 Cal. App. 4th 688, 10 Cal. Rptr. 2d 873* , are *set out in § 130.45[3][a]*.

In the proceeding for a writ of mandate, the court of appeal concluded that the peremptory challenge had been timely and in proper form, and that the adversary of the challenge failed to make a prima facie case of invidious discrimination, so that it had not been proper for the court to inquire into the reasons for exercise of the peremptory challenge (*8 Cal. App. 4th 688, 713)* . The court issued a writ directing the trial court to enter an order disqualifying the challenged judge (*8 Cal. App. 4th, 688, 714)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral Overview

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13-130 California Points & Authorities § 130.36

§ 130.36 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Parties Entitled to Additional Challenges Due to Adverse Interests

[1] FORM

[*The following should be combined with a general form of memorandum in support of a petition for a writ of mandate prevent a judge from hearing a case (see §§ 130.20 -130.27, 130.29 -130.31*)].

A WRIT OF MANDATE SHOULD ISSUE TO PREVENT JUDGE _____ [*name*] FROM PROCEEDING WITH THIS CASE BECAUSE _____ [*specify moving party, e.g.,* PLAINTIFF] MADE A TIMELY DISQUALIFICATION MOTION AND WAS ENTITLED TO AN ADDITIONAL MOTION PER SIDE OF THE CASE BECAUSE THE _____ [*specify moving party, e.g.,* PLAINTIFF] AND OTHER PARTIES ON THE SAME SIDE HAD SUFFICIENTLY ADVERSE INTERESTS.

Exception to the One Peremptory Challenge Per Side Rule Due to Adverse Interests. Parties on the same side may be treated as separate parties for purposes of peremptory challenge motions under *Code of Civil Procedure Section 170.6* if they have adverse interests and the party seeking the additional challenge meets the burden of establishing the adverse interests (*The Home Ins. Co. v. Superior Court (2005) 34 Cal. 4th 1025, 1033, 22 Cal. Rptr. 3d 885, 103 P.3d 283*).

[2] Comments

[a] Use of Form

This memorandum is for use in a memorandum in support of a petition for a writ of mandate to prevent a judge from proceeding with a case after denial of a timely and sufficiently supported motion asserting a peremptory challenge, when the motion was denied on the basis of the one challenge per side per case rule.

This form does not provide a complete memorandum, but is designed to be combined with general points and authorities relating to review of the denial of a timely motion for peremptory disqualification of a judge [*see §§ 130.20*

-130.27, 130.29 -130.31].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include highlight parts of the record showing that the party bring in the writ had substantially adverse interests from the other parties on the same side.

[b] Related Pleading and Practice Forms

For forms for use in filing a motion of peremptory disqualification and for a form of a petition for a writ of mandate for use after a judge has refused to assign a case after a peremptory challenge, see Ch. 317, *Judges* , in California Forms of Pleading and Practice (Matthew Bender).

[c] Opposing Memoranda

The points and authorities *set out in § 130.43* may be used in an appropriate case to oppose a petition supported by this memorandum.

[3] Discussion of Authorities

[a] Exception to the One Peremptory Challenge Per Side Rule Due to Adverse Interests

In ***The Home Ins. Co. v. Superior Court*** *(2005) 34 Cal. 4th 1025, 22 Cal. Rptr. 3d 885, 103 P.3d 283* , federal and state authorities had brought environmental damage actions against Montrose Chemical Corporation. In turn, Montrose filed a declaratory relief lawsuit against its primary insurance carriers. During the course of the litigation, one of the carriers exercised a peremptory challenge pursuant to *Code Civ. Proc. § 170.6*, and the case was assigned to a new trial judge. Subsequent, the declaratory relief action reached a settlement, and the primary insurers were dismissed. Montrose then amended its declaratory relief complaint to nameits excess insurance carrier, Home Insurance Company, as a defendant. Home attempted to exercise a peremptory challenge to the trial judge, and, after objection by Montrose, the trial judge ruled that Home was not entitled to a peremptory challenge on the basis that the primary insurer and Home were on the same "side" for purposes of peremptory challenges. Home filed a petition for writ of mandate, and the Court of Appeal reversed, holding that "more often than not" primary and excess carriers have "substantially adverse interests" such that they are on separate sides for purposes of a peremptory challenge.

The Supreme Court reversed, holding that primary and excess carriers do not necessarily have "substantially adverse interests" and therefore a reversal of the trial court's factual determination was not warranted. The Court reviewed the evidentiary standard it had set out in *Pappa v. Superior Court (1960) 54 Cal. 2d 350* : That the party seeking to exercise a second peremptory challenge has the burden of demonstrating that its interests are "substantially adverse" to the co-defendant's (*34 Cal. 4th 1025, 1035)* . The Court rejected the appellate court's reasoning that primary and excess carriers are "more often than not" substantially adverse to each other because they generally attempt to foist liability upon one another, noting that in many cases the same insurer may have issued a primary and excess policy to an insured. The Court also noted that the two types of carriers' positions may often be consistent with one another; i.e., that there is no coverage or that the excess policy does not apply until primary coverage is exhausted. The Court therefore declined to reverse the trial court's determination that the primary and excess insurers were not "substantially adverse" for purposes of peremptory challenges under *Code Civ. Proc. § 170.6* (*34 Cal. 4th 1025, 1036)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral Overview

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CHAPTER 130 JUDGES
PART II. FORMS
A. PEREMPTORY DISQUALIFICATIONS

13-130 California Points & Authorities § 130.37

§ 130.37 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Untimely Peremptory Motion to Disqualify Denied [Code Civ. Proc. § 170.6(a)(3)]--Motion Made Less Than Five Days Before Date Set for Trial or Hearing When Name of Assigned Judge Is Known at Least 10 Days Before Trial or Hearing [Code Civ. Proc. § 170.6(a)(2)]

[1] FORM

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, _____ APPELLATE DISTRICT
[DIVISION _____]

_____ [*name*], Petitioner,	)	
vs.	)	
THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE [CITY AND] COUNTY OF_____,	)	NO. _____
and	)	MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF MANDATE
_____ [*name*], THE JUDGE OF SAID COURT,	)	
Respondents, _____ [*name*(*s*)] Real _____ [Party *or* Parties] in Interest.	)	

_____

THE COURT SHOULD NOT ISSUE A WRIT OF MANDATE TO PREVENT JUDGE _____ [*name*] FROM PROCEEDING WITH THE CASE BECAUSE _____ [*identify party that made*

motion, e.g., PLAINTIFF] MADE THE MOTION TO DISQUALIFY LESS THAN FIVE DAYS BEFORE THE DATE SET FOR _____ [TRIAL *or* HEARING] EVEN THOUGH _____ [*identify party that made motion, e.g.,* PLAINTIFF] KNEW THE NAME OF THE JUDGE ASSIGNED OR SCHEDULED TO _____ [TRY THE CAUSE *or* HEAR THE MATTER] AT LEAST 10 DAYS BEFORE THE _____ [TRIAL *or* HEARING] DATE.

A. Time for Motion to Disqualify. When the judge, other than a judge appointed for all purposes, assigned to or who is scheduledto try the cause or hear the matter is known at least ten days before the date set for trial or hearing, a *Code of Civil Procedure Section 170.6* motion to disqualify that judge must be made at least five days before that date (*Code Civ. Proc. § 170.6(a)(2)*).

[*Optional*] **B. Known Judge Was Assigned.** *Code of Civil Procedure Section 170.6* does not require absolute certainty that a known judge will ultimately preside over the trial. In applying the ten-day/five-day rule, a known judge exists when there is reasonable assurance that the judge will in fact hear the case (*People v. Superior Court (Lavi) (1993) 4 Cal. 4th 1164, 1183-1184*).

[*Optional*] **C. Matter Set for Hearing in Department With Regularly Assigned Judge.** A judge may be a known judge when a case is assigned to a department in which the judge regularly sits, even if the party does not actually know that a specific judge presides over that department because this information is available on further investigation or inquiry (*People v. Superior Court (Lavi) (1993) 4 Cal. 4th 1164, 1183-1184*). When a matter is scheduled for hearing in an identified department and the name of the judge assigned to that department is known at least ten days before the hearing, a *Code of Civil Procedure Section 170.6* motion to disqualify the judge is untimely if it is made less than five days before the hearing date, unless on the hearing date a judge other than the previously assigned judge is presiding (*Thomas Realty Co. v. Superior Court of Los Angeles County (1988) 199 Cal. App. 3d 91, 95*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a petition for a writ of mandate to prevent a judge from proceeding with a case when the judge denied a peremptory motion to disqualify. The ground of the opposition is that the motion was properly denied because it was made less than five days before the date set for trial or hearing and the moving party knew the judge assigned or scheduled to try the cause or to hear the matter at least ten days before that date [*see Code Civ. Proc. § 170.6(a)(2)*]. For memoranda relating to other time limits when the ten-day/five-day rule does not apply, see *§§ 130.38 -130.44*.

In an appropriate case, the foregoing points and authorities may be submitted in opposition to the motion to disqualify supported by the points and authorities *set out in § 130.20*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Known Judge Was Assigned

The facts and procedural background of ***People v. Superior Court (Lavi)*** *(1993) 4 Cal. 4th 1164* , are discussed in *§ 130.20[3][e]*.

After determining that the challenge had been timely under the all purpose assignment rule of *Code Civ. Proc. § 170.6*, the Court went on to state that even if that rule did not apply, the challenge had been timely under the ten-day/five-day rule. In discussing the ten-day/five-day rule, the Court addressed confusion in the lower courts over the degree of certainty with which a judge must be known for § 170.6 to apply. The Court stated that absolute certainty was not required, as it is always possible that a given judge will not hear the case for many reasons, including transfer, illness, death, or recusal. The rule the Court identified is that in applying the ten-day/five-day rule to the judge known to the parties to have been assigned to the case, there be reasonable assurance that the judge will in fact hear the case. In the case before it, the Court noted that the case was assigned to the department in which the challenged judge regularly sat, and nothing in the record indicated that it was unlikely he would ultimately hear the case. Moreover, the Court noted that even if the challenger had not known that the judge presided over that department, further investigation or inquiry would have disclosed that fact. Thus, it was reasonably certain that the judge would hear the case, and the judge's identity was known for purposes of the ten-day/five-day rule. The Court concluded that if this rule applied to the case, the challenge would have been timely (*4 Cal. 4th 1164, 1183-1184)* .

[b] Matter Set for Hearing in Department With Regularly Assigned Judge

People v. Superior Court (Lavi) *(1993) 4 Cal. 4th 1164* , is *discussed under § 130.37[3][a]*.

In ***Thomas Realty Co. v. Superior Court of Los Angeles County*** *(1988) 199 Cal. App. 3d 91* , a petition to confirm an arbitration award was filed on November 17, 1987, in a two-judge branch court. The notice of motion showed that the motion would be heard on December 18, 1987, in a particular department, and court directories, published weekly, showed that Judge Murphy sat in that department. On December 16, the party opposing the motion presented Judge Murphy with an ex parte request for a continuance of the hearing and the request was denied. The next day, the party filed a *Code Civ. Proc. § 170.6* challenge to Judge Murphy. The challenge was denied as untimely and the party appealed.

The Second District Court of Appeal upheld the denial of the motion to disqualify because it was not filed at least five days before the hearing (*199 Cal. App. 3d 91, 97)* . The court expressly disagreed with, and declined to follow, opinions of the *First District in Bouchard v. Insona (1980) 105 Cal. App. 3d 768, 164 Cal. Rptr. 505* , which had held that assignment of a case to a department was insufficient to identify the judge, and *Retes v. Superior Court (1981) 122 Cal. App. 3d 799, 176 Cal. Rptr. 160* (discussed in *§ 130.22[4][a]*), which had held that assignment to a department was insufficient to identify the judge when there was a policy and practice of frequent reassignment (*199 Cal. App. 3d 91, 93-96)* . The court held that the ten-day/five-day rule of *Code Civ. Proc. § 170.6* applies whenever a matter is scheduled for hearing in an identified department and the name of the judge assigned to that department is known at least ten days before the hearing. However, the court stated, if on the hearing date a judge other than the previously assigned judge is presiding, a party may challenge that judge not later than the commencement of the hearing (*199 Cal. App. 3d 91, 95)* .

Although *Thomas Realty* rejected both *Bouchard* and *Retes*, and the Supreme Court opinion in *People v. Superior Court (Lavi)* seems inconsistent with *Bouchard*, the *Lavi* opinion does not expressly disapprove *Bouchard*, and distinguishes *Retes*, from which it may be inferred that *Retes* has more vitality than *Thomas Realty* would accord it.

[4] Additional Authorities

[a] Matter Set for Hearing in Department With Regularly Assigned Judge

In *Lawrence v. Superior Court (1988) 206 Cal. App. 3d 611, 253 Cal. Rptr. 748* , plaintiffs' contract action was assigned for all purposes to a particular judge under the court's local trial delay reduction rules. After the action had been inactive for almost three years, defendants noticed a motion for summary judgment. The notice showed a hearing date of July 8, 1988, in Department 20. At that time, the sitting judge in Department 20 was the same judge who had been assigned the case under the court's delay reduction rules. On July 5, 1988, plaintiffs made an unsuccessful ex parte application to continue the summary judgment motion. Plaintiffs claimed that it was at the hearing on the continuance that they received actual notice that their case had been assigned to the judge for all purposes. On July 7, 1988, plaintiffs filed a peremptory challenge, which was denied as untimely. The Court of Appeal affirmed, following *Thomas Realty Co. v. Superior Court (1988) 199 Cal. App. 3d 91* (*discussed under § 130.37[3][b]*), to hold that plaintiff's challenge was untimely under the ten-day/five-day rule of *Code Civ. Proc. § 170.6* because plaintiff's summary judgment motion was scheduled for hearing in Department 20 and a known judge was assigned to that department. The court held that the knowledge of assignment required under *Thomas Realty* does not mean *actual* knowledge of the party or the party's attorney but only that, on further investigation or inquiry, the identity of the judge assigned to a particular department is ascertainable. The court observed that the fact the judge was also assigned to the case for all purposes under the court's delay reduction rules was immaterial in determining the timeliness of the challenge under *Thomas Realty* (617). The court also concluded that the challenge was untimely under former Los Angeles Co. Super. Ct. Rules, Rule 1104 (*now see* Los Angeles Co. Super. Ct. Rules, Rule 7.5(a)) (*206 Cal. App. 3d 611, 617-618)* .

In *Kaiser Foundation Hospitals v. Superior Court (1987) 190 Cal. App. 3d 721, 235 Cal. Rptr. 630* , a party moved to disqualify the judge at the commencement of a hearing on a petition to vacate an arbitration award. The judge was the regularly assigned judge in the department shown in the noticed motion and the moving party did not claim ignorance of the assignment. The opposing party objected, pointing out that under a local rule the challenging party was able to discover the adverse tentative ruling prior to the hearing. The judge denied the challenge as untimely, heard the petition, and vacated the arbitration award. In denying the moving party's extraordinary writ, the court of appeal found in part that the *Code Civ. Proc. § 170.6* challenge was untimely (*190 Cal. App. 3d 721, 726)* . The court distinguished *Bouchard v. Insona (1980) 105 Cal. App. 3d 768, 164 Cal. Rptr. 505* (discussed in *§ 130.37[3][b],* in relation to *Thomas Realty*), holding that the ten-day/five-day rule may be followed in jurisdictions having a tentative ruling procedure when motions are set in a department that has a regularly assigned judge (*190 Cal. App. 3d 721, 724-725)* . Therefore, the court stated, a party who has received a tentative ruling on a motion cannot disqualify the judge at the time of the hearing unless the regularly assigned judge does not in fact rule on the motion or the regular assignment has been changed without sufficient notification to the parties (*190 Cal. App. 3d 721, 725)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral Overview

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 130 JUDGES
PART II. FORMS
A. PEREMPTORY DISQUALIFICATIONS

13-130 California Points & Authorities § 130.38

§ 130.38 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Untimely Peremptory Motion to Disqualify Denied [Code Civ. Proc. § 170.6(a)(3)]--Motion Made After Commencement of Trial [Code Civ. Proc. § 170.6(a)(2)]

[1] FORM

[*Caption. See § 130.37[1].*]

THE COURT SHOULD NOT ISSUE A WRIT OF MANDATE TO PREVENT JUDGE _____ [*name*] FROM PROCEEDING WITH THE CASE BECAUSE _____ [*identify party that made motion, e.g.,* PLAINTIFF] DID NOT MAKE THE MOTION TO DISQUALIFY HIM/HER UNTIL AFTER TRIAL HAD COMMENCED.

Motion Made After Commencement of Trial. A judge who has been assigned or scheduled to try a cause may, in no case, entertain a motion under *Code of Civil Procedure Section 170.6* to disqualify if the motion was made after the drawing of the name of the first juror, or after plaintiff's counsel makes an opening statement in a nonjury case, or after the swearing of the first witness or giving of any evidence in a nonjury case without opening statement by plaintiff's counsel, or after trial of the cause has otherwise commenced (*Code Civ. Proc. § 170.6(a)(2)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a petition for a writ of mandate to prevent a judge from proceeding with a case. The ground of opposition is that the judge properly denied a peremptory motion to disqualify that was untimely because it was made after trial commenced [*see Code Civ. Proc. § 170.6(a)(2)*]. For memoranda relating to other time limits for making the motion, see *§§ 130.37, 130.39 -130.44*.

In an appropriate case, the foregoing points and authorities may be submitted in opposition to the motion for disqualification supported by the points and authorities *set out in § 130.21*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral Overview

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CHAPTER 130 JUDGES
PART II. FORMS
A. PEREMPTORY DISQUALIFICATIONS

13-130 California Points & Authorities § 130.39

§ 130.39 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Untimely Peremptory Motion to Disqualify Denied [Code Civ. Proc. § 170.6(a)(3)]--Motion Made After Commencement of Hearing Other Than Trial of Cause [Code Civ. Proc. § 170.6(a)(2)]

[1] FORM

[*Caption. See § 130.37[1].*]

THE COURT SHOULD NOT ISSUE A WRIT OF MANDATE TO PREVENT JUDGE _____ [*name*] FROM PROCEEDING WITH THE CASE BECAUSE _____ [*identify party that made motion, e.g.,* PLAINTIFF] DID NOT MAKE THE MOTION TO DISQUALIFY HIM/HER UNTIL AFTER THE HEARING COMMENCED.

Motion Made After Commencement of Hearing Is Too Late. A motion to disqualify pursuant to *Code of Civil Procedure Section 170.6* that is directed to a hearing other than the trial of a cause must be made not later than the commencement of the hearing or it is too late and must be denied (*Michaels v. Superior Court (1960) 184 Cal. App. 2d 820, 824, 826, 7 Cal. Rptr. 858*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a petition for a writ of mandate to prevent a judge fromproceeding with a case. The ground of opposition is that the judge properly denied an untimely peremptory motion to disqualify because it was directed to a hearing other than the trial of a cause and was made after the hearing had commenced [*see Code Civ. Proc. § 170.6(a)(2)*]. For memoranda relating to other time limits for making the motion, see *§§ 130.37, 130.38, 130.40 -130.44*.

In an appropriate case, the foregoing points and authorities may be submitted in opposition to the motion for disqualification supported by the points and authorities *set out in § 130.22*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Motion Made After Commencement of Hearing Is Too Late

The factual background of ***Michaels v. Superior Court*** *(1960) 184 Cal. App. 2d 820, 7 Cal. Rptr. 858* , is discussed in *§ 130.40[3][a]*. In denying the petition for a writ of prohibition, the appellate court noted that immediately after petitioner had made the motion on his claimed special appearance, he had attacked the sufficiency of the order to show cause why he should not be held in contempt on the ground that the court lacked jurisdiction over him. The court held that the questions attempted to be raised on the claimed special appearance and the claimed general appearance were so intermingled as to constitute but one hearing of the cause and that the affidavit of prejudice, filed after the motion on the claimed special appearance was denied, was not filed at the commencement of the hearing and thus came too late (*184 Cal. App. 2d 820, 826)* .

[4] Additional Authorities

[a] Motion Made After Commencement of Hearing Is Too Late

California Fed. Sav. & Loan Assn. v. Superior Court (1987) 189 Cal. App. 3d 267, 234 Cal. Rptr. 413 , involved a class action against a savings and loan association in which plaintiffs contested, among other things, the association's method of computing the interest rate adjustment on variable interest rate loans. The defendant filed a motion for summary adjudication of issues [*Code Civ. Proc. § 437c(f)*], including the issue of interpretation of the promissory note defendant utilized for variable interest rate loans. The trial judge resolved this issue in defendant's favor. Plaintiffs subsequently moved to have the action certified as a class action. When the class certification motion was heard, the judge vacated portions of his prior ruling on defendant's motion for summary adjudication of issues, and set the matter for further argument. On October 27, 1986, the trial judge indicated that he would grant the motion for class certification if plaintiffs would file an amended complaint clarifying issues of concern to the court, among which were those raised by defendant in opposition to plaintiff's motion for class certification. Plaintiffs filed the amended complaint on November 14, 1986, and noticed the matter for further hearing on December 2, 1986. The hearing was continued to December 23. On November 26, defendant filed its peremptory challenge under *Code Civ. Proc. § 170.6*, which the judge denied at the December 23 hearing as untimely. In denying a writ of mandate, the court of appeal pointed out that class certification is all one proceeding, that the proceeding was commenced with the filing of plaintiff's motion, and that it had continued for some nine months, due in no small part to the objections and concerns raised by the defendant, and held that the peremptory challenge was, therefore, untimely insofar as it attempted to disqualify the judge from ruling on any matters relating to certification of the class (*189 Cal. App. 3d 267, 270)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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13-130 California Points & Authorities § 130.40

§ 130.40 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Untimely Peremptory Motion to Disqualify Denied [Code Civ. Proc. § 170.6(a)(3)]--Motion Made After Assignment of Cause for Trial by Master Calendar Judge [Code Civ. Proc. § 170.6(a)(2)]

[1] FORM

[*Caption. See § 130.37[1].*]

THE COURT SHOULD NOT ISSUE A WRIT OF MANDATE TO PREVENT JUDGE _____ [*name*] FROM PROCEEDING WITH THE CASE BECAUSE _____ [*identify party that made motion, e.g.,* PLAINTIFF] DID NOT MAKE THE MOTION TO DISQUALIFY HIM/HER IMMEDIATELY UPON ASSIGNMENT OF THE CAUSE FOR TRIAL BY THE MASTER CALENDAR JUDGE.

Motion Made After Assignment of Cause for Trial by Master Calendar Judge. Where there is a master calendar, a party must make a peremptory motion to disqualify a judge pursuant to *Code of Civil Procedure Section 170.6* to the judge supervising the master calendar not later than the time he/she assigns the cause for trial (Code Civ. Proc. § 170.6(2); *Michaels v. Superior Court (1960) 184 Cal. App. 2d 820, 824, 7 Cal. Rptr. 858*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a petition for a writ of mandate to prevent a judge from proceeding with a case. The ground of opposition is that the judge properly denied an untimely peremptory motion to disqualify made after assignment of the cause for trial by a master calendar judge [*see Code Civ. Proc. § 170.6(a)(2)*]. For memoranda relating to other time limits for making the motion, see *§§ 130.37 -130.39, 130.41 -130.44*.

In an appropriate case, the foregoing points and authorities may be submitted in opposition to the motion for disqualification supported by the points and authorities *set out in § 130.23*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Motion Made After Assignment of Cause for Trial by Master Calendar Judge

In ***Michaels v. Superior Court*** *(1960) 184 Cal. App. 2d 820, 7 Cal. Rptr. 858* , petitioner sought a writ of prohibition to restrain a superior court from proceeding further with its consideration of a contempt charge against petitioner stemming from his refusal to answer questions at a hearing before the county grand jury. Petitioner's counsel appeared before a judge who was supervising the master calendar and the supervising judge assigned the matter to another judge of that court. Petitioner's counsel made no motion to disqualify the assigned judge while appearing before the supervising judge. Once before the assigned judge, petitioner's counsel made a motion relating to petitioner's claimed special appearance which was denied. Immediately thereafter, counsel filed an affidavit of prejudice pursuant to *Code Civ. Proc. § 170.6*. The judge struck the affidavit from the files, stating that it had not been filed in accordance with the provisions of *Code Civ. Proc. § 170.6* and was, therefore, untimely.

After hearing the petition for the writ of prohibition, the court of appeal affirmed the trial court's striking of the affidavit. It found that petitioner had not made and filed the motion of prejudice to the judge supervising the master calendar as is required under Code Civ. Proc. § 170.6(2) [*now see Code Civ. Proc. § 170.6(a)(2)*], but had awaited the outcome of the assigned judge's ruling on the motion on petitioner's claimed special appearance before so filing (*184 Cal. App. 2d 820, 826)* . Because the motion was not timely, the court denied the petition for a writ of prohibition (*184 Cal. App. 2d 820, 829)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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13-130 California Points & Authorities § 130.41

§ 130.41 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Untimely Peremptory Motion to Disqualify Denied [Code Civ. Proc. § 170.6(a)(3)]--Motion Made After Contested Matter Submitted [Code Civ. Proc. § 170.6(a)(1), (a)(2)]

[1] FORM

[*Caption. See § 130.37[1].*]

THE COURT SHOULD NOT ISSUE A WRIT OF MANDATE TO PREVENT JUDGE _____ [*name*] FROM PROCEEDING WITH THE CASE BECAUSE A CONTESTED MATTER IN RELATION TO THE LITIGATION WAS SUBMITTED TO HIM/HER BEFORE _____ [*identify party that made motion, e.g.,* PLAINTIFF] MADE THE MOTION.

Motion Made After Contested Matter Submitted. A motion to disqualify a judge pursuant to *Code of Civil Procedure Section 170.6* is untimely when it is filed after any contested matter in relation to the litigation has been submitted to the judge sought to be disqualified (*Doty v. Doty (1975) 52 Cal. App. 3d 672, 677, 125 Cal. Rptr. 153*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a petition for a writ of mandate to prevent a judge from proceeding with a case. The ground of opposition is that the judge properly denied an untimely peremptory motion to

disqualify made after a contested matter in relation to the litigation had been submitted to the judge sought to be disqualified [*see Code Civ. Proc. § 170.6(a)(2)*]. For memoranda relating to other time limits for making the motion, see *§§ 130.37 -130.40, 130.42 -130.44*.

In an appropriate case, the foregoing points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 130.28*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Motion Made After Contested Matter Submitted

Doty v. Doty *(1975) 52 Cal. App. 3d 672, 125 Cal. Rptr. 153* , involved an action for partition of real property in which the trial court entered an interlocutory order in partition. Ten days after entry of the order, which appointed a referee to sell the property at public sale, defendant filed a request for findings of fact and conclusions of law, but a hearing on objections to proposed findings and conclusions resulted in a minute order in which the court found it had no jurisdiction, in that the matter was by that time on appeal.

The court of appeal reversed with directions to vacate the judgment and to make and enter findings of fact and conclusions of law and judgment. The court held that defendant's request for findings was timely and that the finding contained in the interlocutory judgment did not encompass all issues of fact and did not cover defendant's request for special findings (*52 Cal. App. 3d 672, 678)* . Preliminarily, the court had rejected defendant's contention that the trial judge should have granted a motion for disqualification, holding that the request was not timely. In this case, the trial judge had directed three referees to report to the court whether or not the property in question could be divided in kind in keeping with the several percentage interests of the parties to the action. After the referees had reported that the property could not be so divided and the court had entered the minute order directing sale of the property, defendant filed a motion to disqualify the judge pursuant to *Code Civ. Proc. § 170.6* (*52 Cal. App. 3d 672, 674-676)* . The court held that the motion was properly denied as not timely because it was filed after a contested matter in relation to the litigation had been submitted to the judge sought to be disqualified (*52 Cal. App. 3d 672, 677)* .

[4] Additional Authorities

[a] Motion Made After Contested Matter Submitted

The factual background of *California Fed. Sav. & Loan Assn. v. Superior Court (1987) 189 Cal. App. 3d 267, 234 Cal. Rptr. 413* , is discussed in *§ 130.39[4][a]*. In denying the writ of mandate, the court of appeal held that the peremptory challenge did not deprive the trial judge of jurisdiction over issues other than class certification (*189 Cal. App. 3d 267, 270-271)* . The court distinguished *Bambula v. Superior Court (1985) 174 Cal. App. 3d 653, 220 Cal. Rptr. 223* (discussed in *§ 130.28[3][d]*), and pointed out that a *Code Civ. Proc. § 170.6* challenge may not be filed after the challenged judge has made a determination that bears on the merits of the case (*189 Cal. App. 3d 267, 270, 271)* . The court said that on its motion for summary adjudication of issues, defendant presented to the trial judge a number of issues involving complex questions of law, not the least of which was the issue involving the contractual interpretation of defendant's promissory note, which was one of the issues that would "make or break" the case for defendant (*189 Cal. App. 3d 267, 271)* . The court further stated that just as plaintiffs would have been precluded from filing a peremptory challenge under *Code Civ. Proc. § 170.6* after the trial judge's initial adverse rulings, defendant was precluded from filing a similar challenge after the trial judge's reconsideration of the issue resulted in a ruling adverse to defendant (*189 Cal. App. 3d 267, 271)* .

However, the court in, *Zilog Inc. v. Superior Court (2001) 86 Cal. App. 4th. 1309, 1321, 104 Cal. Rptr. 2d 173* ,

discussed in *§ 130.28[3][d]*, expressly declined to follow *California Fed. Sav.* The court held that where a judge has previously ruled on a motion for summary adjudication, that judge has determined only legal issues and remains subject to a later peremptory challenge under the plain language of Code Civ. Proc. § 170.6(2) [*now see Code Civ. Proc. § 170.6(a)(2)*], which provides that only a prior ruling involving a determination of contested fact issues relating to the merits will preclude a later peremptory challenge (*86 Cal. App. 4th. 1309, 1322)* .

[b] Judge Cannot Waive Timeliness Requirements

In *Briggs v. Superior Court (2001) 87 Cal. App. 4th 312, 104 Cal. Rptr. 2d 445* , the People in a criminal action filed a peremptory challenge of a judge pursuant to *Code Civ. Proc. § 170.6*. The challenge was untimely because the judge had already ruled on defendant's motion to exclude evidence. The trial judge purported to waive the timeliness requirementsof *Code Civ. Proc. § 170.6*, and disqualified himself. Defendant filed petition for writ of mandate with the court of appeal. The court of appeal granted the writ, holding that there was no authority for a trial judge to waive the requirements of Section 170.6, and that there were no apparent grounds for the judge to have disqualified himself (*87 Cal. App. 4th 312, 318)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral Overview

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A. PEREMPTORY DISQUALIFICATIONS

13-130 California Points & Authorities § 130.42

§ 130.42 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Untimely Peremptory Motion to Disqualify Denied [Code Civ. Proc. § 170.6(a)(3)]--Motion Made at Supplemental Proceeding Which Is Continuation of Original Proceeding [Code Civ. Proc. § 170.6(a)(2)]

[1] FORM

[*Caption. See § 130.37[1].*]

THE COURT SHOULD NOT ISSUE A WRIT OF MANDATE TO PREVENT JUDGE _____ [*name*] FROM PROCEEDING WITH THE CASE BECAUSE _____ [*identify party that made motion, e.g.,* PLAINTIFF] MADE THE MOTION TO DISQUALIFY IN A PROCEEDING WHICH IS A CONTINUATION OF EARLIER PROCEEDINGS IN WHICH THE JUDGE PRESIDED.

A. Motion Made at Subsequent Proceeding. A motion to disqualify a judge pursuant to *Code of Civil Procedure Section 170.6* cannot be entertained as to subsequent hearings that are a part or a continuation of the original proceedings (*Jacobs v. Superior Court (1959) 53 Cal. 2d 187, 190, 1 Cal. Rptr. 9, 347 P.2d 9*).

[*Optional*] **B. Proceeding Involving Substantially Same Issues.** A proceeding is a continuation of the original action out of which it arises if it involves substantially the same issues as the original action (*McClenny v. Superior Court (1964) 60 Cal. 2d 677, 684, 36 Cal. Rptr. 459, 388 P.2d 691*).

[*Optional*] **C. Hearing on Motion to Tax Costs.** There can be little doubt that a motion to tax costs is a special proceeding incidental to the original proceedings that dispose of the action (*Oak Grove School Dist. v. City Title Ins. Co. (1963) 217 Cal. App. 2d 678, 699-700, 32 Cal. Rptr. 288* (construing former Code of Civil Procedure Sections 1033 and 1255a; *now see Code of Civil Procedure Section 1268.610(c)*, providing that costs in eminent domain proceedings that are dismissed or result in no taking are taxed by the procedure that applies in civil actions)).

[*Optional*] **D. Hearing on Allowance of Attorney's Fees.** A hearing on the allowance of attorney's fees is so much a part of the whole controversy over child custody that such a hearing is a continuation of the original proceedings (

Haldane v. Haldane (1962) 210 Cal. App. 2d 587, 596, 26 Cal. Rptr. 670).

[*Optional*] **E. Hearing on Motion for New Trial.** A hearing on a motion for a new trial is a part of or continuation of the original proceeding (*Agnew v. Cronin (1961) 197 Cal. App. 2d 535, 540-541, 17 Cal. Rptr. 273*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a petition for a writ of mandate to prevent a judge from proceeding with a case. The ground of opposition is that the judge properly denied an untimely peremptory motion to disqualify made at a supplemental proceeding that is a continuation of the original proceeding.

In an appropriate case, the foregoing points and authorities may be submitted in opposition to a motion to disqualify supported by the points and authorities *set out in §§ 130.28, 130.30*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Motion Made at Subsequent Proceeding

In ***Jacobs v. Superior Court*** *(1959) 53 Cal. 2d 187, 1 Cal. Rptr. 9, 347 P.2d 9* , petitioner filed a motion to modify prior custody orders and a supplemental guardianship petition. Petitioner then filed a motion to disqualify the judge before whom the hearing was set. This judge had previously decided all matters in the proceedings. When the judge deniedthe motion and set matters for hearing before himself, petitioner requested a writ of prohibition to prevent the judge from trying the issues presented in the proceeding involving custody and guardianship. The Supreme Court denied the petition, holding that although *Code Civ. Proc. § 170.6* does not expressly so provide, it follows that, since a motion to disqualify must be made before the trial has commenced, a motion cannot be entertained as to subsequent hearings that are a part or a continuation of the original proceeding. Further, the Court held that in situations involving guardianship and custody orders, subsequent proceedings to obtain changes in custody are continuations of the original proceeding to determine custody. In elaborating, the Court noted that, because the issues presented by the motion to modify and the supplemental petition were basically the same as those which the judge had considered in the prior proceedings, and because the parties were the same, the motion to modify and the supplemental petition were but continuations of the prior proceeding. The Court reasoned that if disqualification were permitted pursuant to *Code Civ. Proc. § 170.6* in such matters, the judge who tried the case, who was in the best position to pass on the questions involved, could be disqualified by a mere general allegation of prejudice. Such a procedure would allow litigants to gamble on obtaining a favorable decision from one judge, and then, if confronted with an adverse judgment, to disqualify him or her without presenting facts showing prejudice, in the hope of securing a different ruling from another judge in supplementary proceedings involving substantially the same issues (*53 Cal. 2d 187, 190-191)* .

[b] Proceeding Involving Substantially, Same Issues

In ***McClenny v. Superior Court*** *(1964) 60 Cal. 2d 677, 36 Cal. Rptr. 459, 388 P.2d 691* , the judge had presided at all of the numerous contested hearings in a dissolution action. Subsequent to the judge's entry of an interlocutory decree and custody award, plaintiff obtained orders to show cause re contempt for defendant's alleged violation of the custody order and a receivership order for the parties' property. Prior to the contempt hearing, defendant moved to disqualify the judge pursuant to *Code Civ. Proc. § 170.6*, but the judge denied the motion on the ground that the contempt proceeding was a continuation of the original dissolution action within the meaning of *Jacobs v. Superior Court (1959) 53 Cal. 2d 187, 190-191, 1 Cal. Rptr. 9, 347 P.2d 9 , discussed under § 130.42[3][a]*. Defendant petitioned for a writ of prohibition.

In the petition proceedings, the Supreme Court stated that the holding in *Jacobs* had been frequently applied, restated, and amplified and that the gravamen of that decision established that a proceeding is a continuation of the original action out of which it arises if it involves substantially the same issues as the original action. In the present case, although the issues to be presented in the contempt proceeding were not identical in every particular to the issues previously submitted, the questions involving the interpretation of the orders allegedly contemned, and the issue of whether defendant violated the judge's orders were matters necessarily relevant and material to the issues involved in the original action. Thus, the Court upheld the judge's denial of the motion to disqualify as untimely filed. The Court also noted that this particular judge was in the best position to pass on the questions involved because he had already presided at all the separate hearings involving contested issues in the case (*60 Cal. 2d 677, 684-685)* .

[c] Hearing on Motion to Tax Costs

In ***Oak Grove School Dist. v. City Title Ins. Co.*** *(1963) 217 Cal. App. 2d 678, 32 Cal. Rptr. 288* , plaintiff moved to disqualify the judge under *Code Civ. Proc. § 170.6* prior to proceedings on a motion to tax costs under former Code Civ. Proc. § 1255a [*now see Code Civ. Proc. §§ 1268.510, 1268.610*] after the plaintiff abandoned an eminent domain proceeding. The judge granted the motion to disqualify, but subsequently struck the order of disqualification. The judge then denied a motion for disqualification for cause, based on prejudice or bias, and ultimately heard and ruled on the motion to tax costs. Plaintiff appealed.

Defendant argued that the judge was not disqualified to hear the action because the motion to tax costs was a supplemental or continued hearing on matters involved in the original eminent domain proceeding and that a motion to disqualify the same judge who heard the original proceeding was not proper or timely because it was made after the trial had commenced. Plaintiff countered that a motion to tax costs under former Code Civ. Proc. § 1255a was an entirely new proceeding involving the enforcement of a legal right, a cause of action that arose upon the entry of the judgment of abandonment. The court of appeal rejected plaintiff's argument and held that a motion to tax costs is a special proceeding incidental to the original proceedings that dispose of the action. The court noted that former § 1255a provided for attorney's fees and costs in an abandoned proceeding to be claimed by the procedure used in civil actions. The court stated that there can be little doubt that a motion to tax costs is a special proceeding incidental to the original proceedings that dispose of the action, and that *Code Civ. Proc. § 1033* so contemplated. Section 1033 at that time provided that motions to tax were to be passed upon by the court in which the judgment was rendered, or by the judge thereof at chambers [former § 1033 was repealed in 1986; former Cal. Rules of Ct., Rule 870, see now 3.1700 which governs the procedure for recovering costs, does not contain comparable language]. The court also noted that it is a matter of common knowledge among lawyers and of judicial notice by the courts that motions to tax costs are usually heard by the judge who presided over the trial in which the judgment of which the costs are an incident was rendered. Moreover, in a proceeding to tax costs, a party moving for a dismissal of the eminent domain proceeding charges itself in the judgment of dismissal with the obligation of the costs and disbursements therein provided. The dismissal carries with it, by virtue of te eminent domain statute, the imposition of an awardin favor of the opponent for those costs and disbursements including attorney's fees. These costs and disbursements arise out of and are necessarily relevant and material to the issues involved in the eminent domain action, and the judge who tries the case is in the best position to pass upon the propriety of these costs and disbursements, particularly the question of the reasonableness of attorney's fees. Therefore, under the rule stated in the *Jacobs v. Superior Court (1959) 53 Cal. 2d 187, 190-191, 1 Cal. Rptr. 9,*

347 P.2d 9 , *discussed under § 130.42[3][a]*, a proper motion to disqualify a judge must be made before trial of an eminent domain action commences, and cannot be entertained when it is made for the first time immediately prior to a hearing on a motion to tax costs and attorney's fees, which is part of or a continuation of the original proceeding (*217 Cal. App. 2d 678, 698-699)* . However, the court went on to reverse the judgment and to direct that the motion to tax costs and attorney's fees be retried before a different judge on the ground that the judge had been properly disqualified for cause by plaintiff's subsequent motion pursuant to former Code Civ. Proc. § 170(5) [*now see Code Civ. Proc. § 170.1(a)(6)*] (*217 Cal. App. 2d 678, 713)* .

[d] Hearing on Allowance of Attorney's Fees

Haldane v. Haldane *(1962) 210 Cal. App. 2d 587, 26 Cal. Rptr. 670* , involved a series of appeals taken by defendant after an interlocutory judgment was entered in a dissolution case. Defendant discharged his attorney, substituted himself in propria persona, and filed motions to set aside the decree and to disqualify the plaintiff's attorney, and several other motions having to do with modification of the child custody provision in the decree. Prior to filing these motions, defendant filed a motion to disqualify the judge, but it was not clear whether it was filed pursuant to *Code Civ. Proc. § 170.6* or former Code Civ. Proc. § 170 [*now Code Civ. Proc. §§ 170-170.5*]. The judge denied the motion to disqualify as untimely filed, and after the hearing on the other motions, he denied them as well and granted attorney's fees to plaintiff's attorneys. Defendant appealed.

The appellate court affirmed the judge's denials of the motions and rejected defendant's argument that the judge was disqualified to conduct certain of the hearings. The hearings were but continuations of the proceedings that had been before the judge previously because the motions heard were mainly a restatement of what defendant had sought previously and had been denied. Although plaintiff's application for attorney's fees and expenses had presented a new issue of a kind not heard before the judge previously, the court held that the allowance of attorney's fees is so much a part of the whole controversy over child custody that it is a continuation of the original proceedings. Therefore, the motion to disqualify was untimely filed, as the trial court had determined. Furthermore, since the affidavit filed by defendant was neither timely under *Code Civ. Proc. § 170.6*, nor factually sufficient under former § 170, the judge was entitled to disregard it (*210 Cal. App. 2d 587, 596-597)* .

[e] Hearing on Motion for New Trial

Agnew v. Cronin *(1961) 197 Cal. App. 2d 535, 17 Cal. Rptr. 273* , involved an appeal by plaintiff from an order granting a new trial to defendant. Defendant had moved for a new trial after entry of a verdict in plaintiff's favor in an action for damages based on fraud and conspiracy. In seeking a reversal, plaintiff argued that the order granting defendant's motion for a new trial was void because prior to the hearing on the motion, plaintiff had filed a motion to disqualify the judge pursuant to *Code Civ. Proc. § 170.6*. The court of appeal rejected plaintiff's argument and affirmed the trial court's holding that plaintiff's motion to disqualify was not timely when filed before a hearing on a motion for a new trial. First, the court noted that *Code Civ. Proc. § 170.6* provides that a judge must not entertain such a motion if it is made after the drawing of the name of the first juror and that in this case, the matter had already been tried and a verdict returned before the motion to disqualify was filed. Further, the court cited *Jacobs v. Superior Court (1959) 53 Cal. 2d 187, 190-191, 1 Cal. Rptr. 9, 347 P.2d 9* , *discussed under § 130.42[3][a]*, as having decided this point adversely to plaintiff's position. The court held that the trial judge was not disqualified to hear the motion for a new trial and that his order granting a new trial was not void (*197 Cal. App. 2d 535, 540-541)* .

[4] Additional Authorities

[a] Motion Made at Subsequent Proceeding

In *Meridith v. Meridith (1968) 264 Cal. App. 2d 504, 70 Cal. Rptr. 631* , the plaintiff, through a new attorney, moved to set aside an interlocutory judgment of dissolution. Before proceeding with the motion to set the decree aside, the new attorney attempted to disqualify the trial judge under *Code Civ. Proc. § 170.6*. The trial judge denied the motion

pointing out that he had heard the prior case and had decided it on its merits and that, at this stage, the filing of an attempted disqualification was not permissible. In affirming the order denying the motion to set aside the interlocutory judgment, the court of appeal reaffirmed the holding in *Jacobs v. Superior Court (1959) 53 Cal. 2d 187, 191, 1 Cal. Rptr. 9, 347 P.2d 9 , discussed under § 130.42[3][a],* and stated that in a continued hearing on matters involved in the original proceeding, an application under *Code Civ. Proc. § 170.6* for disqualification of the same judge who heard the original proceeding is not proper or timely (*264 Cal. App. 2d 504, 508-509)* .

The factual background of *Michaels v. Superior Court (1960) 184 Cal. App. 2d 820, 7 Cal. Rptr. 858* , is discussed in *§ 130.40[3][a]*. At the hearing on the petition for the writ of prohibition, the court of appeal affirmed the trial court's denial of the motion to disqualify as having been filed too late, first, because the motion had not been made to the judge supervising the master calendar, and, second, because instead of filing the disqualifying affidavit at the time of the first hearing on theclaimed special appearance, petitioner waited until an unfavorable decision against him had been entered and then endeavored to disqualify the judge contrary to the holding of *Jacobs v. Superior Court (1959) 53 Cal. 2d 187, 190-191, 1 Cal. Rptr. 9, 347 P.2d 9 , discussed under § 130.42[3][a]* (*184 Cal. App. 2d 820, 824-827)* . Thus, the court denied the petition for a writ of prohibition (*184 Cal. App. 2d. 820, 829)*

Dennis v. Overholtzer (1960) 179 Cal. App. 2d 110, 3 Cal. Rptr. 458 , involved an appeal attacking the validity of two orders made by the trial court on motions of respondents after entry of judgment. The orders were designed to maintain the status quo of property, a tenancy, and payment of rents to the county clerk until final determination of an appeal from the judgment. Appellants contended that both orders were void because the trial judge before whom the motions were made was disqualified under *Code Civ. Proc. § 170.6*. They argued that they had disqualified him by so moving on the date set for the hearing. But the court of appeal rejected appellants' argument and affirmed the validity of the orders holding that, since the orders were merely continuations of orders theretofore made, the rule laid down in the case of *Jacobs v. Superior Court (1959) 53 Cal. 2d 187, 190-191, 1 Cal. Rptr. 9, 347 P.2d 9 , discussed under § 130.42[3][a],* was applicable (*179 Cal. App. 2d 110, 111-112)* .

[b] Proceeding Involving Substantially Same Issues

In *Conservatorship of Durham (1988) 205 Cal. App. 3d 548, 252 Cal. Rptr. 414* , a probate judge heard a conservatorship proceeding and appointed a conservator of the person over the conservatee's opposition. The conservatee then obtained an ex parte domestic violence restraining order in family court barring the conservator from her house, apparently without disclosing the existence of the conservatorship. While a petition for the conservator's removal was pending, the conservator sought an order against the conservator of the estate and the conservatee's attorney for payment of attorneys' fees and sanctions under *Code Civ. Proc. § 128.5*. The conservatee's motion to disqualify the judge who had appointed the conservator from hearing the fees and sanctions motion under *Code Civ. Proc. § 170.6* was denied as untimely. Although reversing the order awarding sanctions, the court upheld denial of the Section 170.6 motion to disqualify. The court analogized a motion for sanctions to one for contempt, citing *McClenny v. Superior Court (1964) 60 Cal. 2d 677, 36 Cal. Rptr. 459, 388 P.2d 691* (*discussed under § 130.42[3][b]*). Both were viewed as exercises of the court's supervisory and enforcement functions and as a continuation of the original issue (*205 Cal. App. 3d 548, 553-554)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral Overview

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 130 JUDGES
PART II. FORMS
A. PEREMPTORY DISQUALIFICATIONS

13-130 California Points & Authorities § 130.43

§ 130.43 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Untimely Peremptory Motion to Disqualify Denied [Code Civ. Proc. § 170.6(a)(3)]--After Prior Disqualification by Motion of Same Side [Code Civ. Proc. § 170.6(a)(3)]

[1] FORM

[*Caption. See § 130.37[1].*]

THE COURT SHOULD NOT ISSUE A WRIT OF MANDATE TO PREVENT JUDGE _____ [*name*] FROM PROCEEDING WITH THE CASE BECAUSE A PRIOR JUDGE HAD BEEN PEREMPTORILY DISQUALIFIED IN THIS _____ [ACTION *or* SPECIAL PROCEEDING] ON THE _____ [*specify party or attorney on same side as party making motion that is subject of the petition, e.g.,* DEFENDANT'S] MOTION.

A. One Motion to Each Side. Only one peremptory motion to disqualify a judge may be made for each side in any one action or special proceeding (*Code Civ. Proc. § 170.6(a)(3)*). The sole exception to this rule allows the party who filed an appeal that resulted in reversal of a final judgment of a trial court to make a motion under *Code of Civil Procedure Section 170.6* regardless of whether that party or side has previously done so (*Code Civ. Proc. § 170.6(a)(2), (a)(3)*). That exception is not relevant to this case.

B. Motion Properly Denied After Prior Disqualification by Motion of Same Side. A motion to disqualify a judge must be denied where a prior judge has been peremptorily disqualified by the motion of a party or an attorney on the same side in any one action or special proceeding (*Pappa v. Superior Court (1960) 54 Cal. 2d 350, 353-354, 5 Cal. Rptr. 703, 353 P.2d 311*).

C. Motion Properly Denied When Party Seeking Additional Challenge Per Side Fails to Prove Adverse Interests Between Parties. A motion to disqualify a judge must be denied when a prior judge has been peremptorily disqualified by the motion of a party or an attorney on the same side in any one action, and a same side party seeking an additional challenge fails to demonstrate sufficiently adverse interest between the parties (*The Home Ins. Co. v. Superior Court (2005) 34 Cal. 4th 1025, 1033, 22 Cal. Rptr. 3d 885, 103 P.3d 283*).

Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Respondent _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a petition for a writ of mandate to prevent a judge from proceeding with a case. The ground of opposition is that the judge properly denied a peremptory motion to disqualify because a prior judge had been peremptorily disqualified by the motion of a party or an attorney on the same side in the same action or special proceeding [*Code Civ. Proc. § 170.6(a)(3)*].

Paragraph A includes language pointing out the exception to the restriction to one motion per party or side [*see Code Civ. Proc. § 170.6(a)(2)* (authorizing motion by party whose appeal resulted in reversal of final judgment whether or not that party made previous motion)] and noting that it is not relevant to the case.

In an appropriate case, these points and authorities may be submitted in opposition to the motion to disqualify supported by the points and authorities *set out in §§ 130.20 -130.34*.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Motion Properly Denied After Prior Disqualification by Motion of Same Side

In ***Pappa v. Superior Court*** *(1960) 54 Cal. 2d 350, 5 Cal. Rptr. 703, 353 P.2d 311* , defendant Pappa and her codefendant Finch were charged with murder and conspiracy. The action was originally set for trial before Judge W who was disqualified by a challenge by the People pursuant to *Code Civ. Proc. § 170.6*. Judge N, who was then assigned to hear the case, was disqualified on a challenge by codefendant Finch under the same section, and the action was assigned to and finally tried before Judge E. The jury was unable to agree, and a mistrial was declared. The action was set for retrial before Judge D. Defendant Pappa, who had not previously attempted to exercise any rights under *Code Civ. Proc. § 170.6*, moved to disqualify Judge D pursuant to that section. When the motion was denied, defendant petitioned the Supreme Court for an alternative writ of prohibition to prevent Judge D from hearing the case and the writ was granted.

At the hearing on the petition for the peremptory writ, the Court first considered the question of whether the codefendants constituted a "side" as the term is used in Code Civ. Proc. § 170.6(3) [*now see Code Civ. Proc. § 170.6(a)(3)*]. If so, defendant Pappa would not be entitled to have Judge D disqualified because her codefendant had previously exercised the one challenge available to a side in any one action. The Court reaffirmed its holding in *Johnson v. Superior Court (1958) 50 Cal. 2d 693, 700, 329 P.2d 5* , that although there are ordinarily only two "sides" to a case, there may be more if codefendants have substantially adverse interests. The Court noted that the reasoning in *Johnson*, a civil case, would be equally applicable to a criminal prosecution. However, the burden was on defendant Pappa to establish that her interests were substantially adverse to those of her codefendant, and she had not met that burden. The Court held that the codefendants were limited to one motion for disqualification which had previously been exercised by Finch before Judge N (*54 Cal. 2d 350, 353-354)* . Because Pappa's motion to disqualify had been

properly denied by Judge D, the Court discharged the alternative writ and denied the peremptory writ (*54 Cal. 2d 350, 356)* .

[b] Motion Properly Denied When Party Seeking Additional Challenge Per Side Fails to Prove Adverse Interests Between Parties

In ***The Home Ins. Co. v. Superior Court*** *(2005) 34 Cal. 4th 1025, 22 Cal. Rptr. 3d 885, 103 P.3d 283* , federal and state authorities had brought environmental damage actions against Montrose Chemical Corporation. In turn, Montrose filed a declaratory relief lawsuit against its primary insurance carriers. During the course of the litigation, one of the carriers exercised a peremptory challenge pursuant to *Code Civ. Proc. § 170.6*, and the case was assigned to a new trial judge. Subsequent, the declaratory relief action reached a settlement, and the primary insurers were dismissed. Montrose then amended its declaratory relief complaint to name its excess insurance carrier, Home Insurance Company, as a defendant. Home attempted to exercise a peremptory challenge to the trial judge, and, after objection by Montrose, the trial judge ruled that Home was not entitled to a peremptory challenge on the basis that the primary insurer and Home were on the same "side" for purposes of peremptory challenges. Home filed a petition for writ of mandate, and the Court of Appeal reversed, holding that "more often than not" primary and excess carriers have "substantially adverse interests" such that they are on separate sides.

The Supreme Court reversed, holding that primary and excess carriers do not necessarily have "substantially adverse interests" and therefore a reversal of the trial court's factual determination was not warranted. The Court reviewed the evidentiary standard it had set out in *Pappa v. Superior Court (1960) 54 Cal. 2d 350* : That the party seeking to exercise a second peremptory challenge has the burden of demonstrating that its interests are "substantially adverse" to the co-defendant's (*34 Cal. 4th 1025, 1035)* . The Court rejected the appellate court's reasoning that primary and excess carriers are "more often than not" substantially adverse to each other because they generally attempt to foist liability upon one another, noting that in many cases the same insurer may have issued a primary and excess policy to an insured. The Court also noted that the two types of carriers' positions may often be consistent with one another; i.e., that there is no coverageor that the excess policy does not apply until primary coverage is exhausted. The Court therefore declined to reverse the trial court's determination that the primary and excess insurers were not "substantially adverse" for purposes of peremptory challenges under *Code Civ. Proc. § 170.6* (*34 Cal. 4th 1025, 1036)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral Overview

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 130 JUDGES
PART II. FORMS
A. PEREMPTORY DISQUALIFICATIONS

13-130 California Points & Authorities § 130.44

§ 130.44 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Untimely Peremptory Motion to Disqualify Denied [Code Civ. Proc. § 170.6(a)(3)]--Motion Made by Party in Coordination Proceeding [Cal. Rules of Ct., Rules 3.516, 3.544]

[1] FORM

[*Caption. See § 130.37[1].*]

THE COURT SHOULD NOT ISSUE A WRIT OF MANDATE TO PREVENT JUDGE _____ [*name*] FROM PROCEEDING WITH THE CASE BECAUSE THE PEREMPTORY MOTION TO DISQUALIFY HIM/HER WAS FILED MORE THAN 20 DAYS AFTER SERVICE OF THE ORDER OF ASSIGNMENT. [A PARTY TO AN ACTION THAT WAS ADDED ON TO A COORDINATION PROCEEDING MORE THAN 20 DAYS AFTER SERVICE OF THE ORDER OF ASSIGNMENT IS NOT AUTHORIZED TO EXERCISE A PEREMPTORY CHALLENGE].

A. Twenty-Day Limitation. A party making a peremptory challenge by motion or affidavit of prejudice regarding an assigned judge must submit it in writing to the assigned judge within 20 days after service of the order assigning the judge to the coordination proceeding (*Cal. Rules of Ct., Rule 3.516*).

[*Optional*] **B. Party in Add-On Case.** A party to an action that has been added on to a coordination proceeding has no right to assert a peremptory challenge to the coordination judge when the party was not in the proceeding within 20 days of the service of the order assigning the coordination judge (*Industrial Indemnity Co. v. Superior Court (1989) 214 Cal. App. 3d 259, 261, 264, 262 Cal. Rptr. 544*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Respondent _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in a coordination proceeding in opposition to a petition for a writ of mandate to prevent the coordination judge from proceeding with the case. The ground of opposition is that the judge properly denied a peremptory challenge as untimely when it was made more than 20 days after service of the order assigning the coordination judge [*Cal. Rules of Ct., Rule 3.516*].

Optional Paragraph B is for use when the challenge was made by a party to an action that was added on to the coordination proceeding more than 20 days after service of the order assigning the coordination judge, in which case the party has no procedure for making a *Code Civ. Proc. § 170.6* challenge [*see Industrial Indemnity Co. v. Superior Court (1989) 214 Cal. App. 3d 259, 261, 264, 262 Cal. Rptr. 544]* .

In an appropriate case, the foregoing points and authorities may be used to oppose a petition supported by the points and authorities *set out in § 130.32*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Add-On Cases in Coordination Proceedings

When a pending civil action shares a common question of fact or law with actions in a coordination proceeding, the assigned coordination judge may add the pending action to the coordination proceeding [*Code Civ. Proc. § 404.4*]. The procedure for a request to coordinate an add-on case is set forth in *Cal. Rules of Ct., Rule 3.544*.

[c] Related Pleading and Practice Forms

For a discussion and forms relating to coordinate actions, see Ch. 125, *Consolidation, Severance, and Coordination of Actions* in California Forms of Pleading and Practice (Matthew Bender).

[d] Related Memoranda

For memoranda relating to coordination of actions generally, see Ch. 45, *Consolidation, Severance, and Coordination of Actions* .

[3] Discussion of Authorities

[a] Party in Add-On Case

In ***Industrial Indemnity Co. v. Superior Court*** *(1989) 214 Cal. App. 3d 259, 262 Cal. Rptr. 544* , a judge was assigned to sit as trial judge in a coordination action involving multiple actions brought by investors who had lost money they had invested with a corporation. Two years later, several plaintiffs, who had already brought their complaints to judgment, filed separate actions against the insurance companies of the judgment debtors, alleging that plaintiffs were nowjudgment creditors of their insureds seeking a declaration that they were entitled to proceed against the insurance companies directly. Plaintiffs then filed a petition with the coordination trial judge to add these actions on to the coordination proceeding. The new defendant insurance companies filed peremptory challenges to the assigned judge. The judge denied the challenges as untimely and the defendants petitioned for extraordinary relief.

The court of appeal affirmed, holding that parties to an add-on petition in a coordination action have no right to challenge the coordination judge (*214 Cal. App. 3d 259, 261)* . The court reasoned that former Cal. Rules of Ct., Rule

1544, see now 3.544 which sets out the procedure to add on cases to an ongoing coordination proceeding after a coordination judge has been assigned, contains no provision for peremptory challenge by a party to an add-on case. The Judicial Council, the court held, has the authority to exclude parties from the right to exercise such a challenge (*214 Cal. App. 3d 259, 263)* . Federal and state constitutional provisions do not prohibit the exclusion of one category of parties from the right to exercise a peremptory challenge as long as the exclusion is reasonable (*214 Cal. App. 3d 259, 263-264)* . The Judicial Council reasonably could have concluded that add-on parties could abuse the peremptory challenge because the rulings of a judge who has participated in the coordination action for years could be well known. In addition, the limitation serves the Legislature's goals in providing for coordination proceedings because a fundamental aspect of coordination is the trial of multiple actions by a single judge (*214 Cal. App. 3d 259, 264)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral Overview

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CHAPTER 130 JUDGES
PART II. FORMS
A. PEREMPTORY DISQUALIFICATIONS

13-130 California Points & Authorities § 130.45

§ 130.45 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Inquiry Into Party's Good Faith in Making Peremptory Challenge as Proper in Case of Unconstitutional Discrimination

[1] FORM

[*Caption. See § 130.37[1].*]

THE COURT SHOULD NOT ISSUE A WRIT OF MANDATE TO PREVENT JUDGE _____ [*name*] FROM PROCEEDING WITH THE CASE BECAUSE THE TRIAL COURT PROPERLY INQUIRED INTO THE MOVING PARTY'S GOOD FAITH AND DULY DETERMINED THAT THE MOVING PARTY SOUGHT TO DISQUALIFY THE JUDGE BASED ON UNCONSTITUTIONALLY DISCRIMINATORY GROUP BIAS.

A. Inquiry Into Moving Party's Good Faith as Proper in Case of Unconstitutional Discrimination. A peremptory challenge may not be used to disqualify a judge on an unconstitutionally discriminatory basis, such as race. Therefore, *Code of Civil Procedure Section 170.6* may not be implemented in such a way as to preclude inquiry into whether the statute has been used for that purpose. The trial court may conduct an inquiry into the moving party's good faith if the inquiry is limited to determining whether the moving party intended to disqualify the judge on an unconstitutionally discriminatory basis (*People v. Superior Court (Williams) (1992) 8 Cal. App. 4th 688, 706-713, 10 Cal. Rptr. 2d 873*).

B. Burden of Proof. A party charging that an adversary has invoked a *Code of Civil Procedure Section 170.6* challenge solely on the ground of group bias bears an initial burden of establishing a prima facie case of invidious discrimination. If a prima facie case is established, the adversary then assumes the burden of demonstrating that the peremptory challenge was not predicated on group bias alone. If the adversary offers a race-neutral basis for the peremptory challenge, the trial court determines whether or not the charging party has established purposeful discrimination (*People v. Superior Court (Williams) (1992) 8 Cal. App. 4th 688, 708, 10 Cal. Rptr. 2d 873*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Respondent _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a petition for a writ of mandate to prevent a judge from proceeding with a case. The ground of opposition is that a peremptory challenge was properly denied after an inquiry into the moving party's good faith in making the challenge, and the trial court determined that the moving party's purpose was unconstitutional discrimination [*see People v. Superior Court (Williams) (1992) 8 Cal. App. 4th 688, 706-713, 10 Cal. Rptr. 2d 873]* .

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should state facts showing that the challenge was exercised to remove a judge who is a member of a cognizable racial group, and that other facts and circumstances raise an inference that the challenge was exercised on account of the judge's race [*see People v. Superior Court (Williams) (1992) 8 Cal. App. 4th 688, 708-709, 10 Cal. Rptr. 2d 873]* .

In an appropriate case, the foregoing points and authorities may be used tooppose a petition supported by the points and authorities *set out in § 130.35*.

[3] Discussion of Authorities

[a] Inquiry Into Moving Party's Good Faith as Proper in Case of Unconstitutional Discrimination

In ***People v. Superior Court (Williams)*** *(1992) 8 Cal. App. 4th 688, 10 Cal. Rptr. 2d 873* , the case was assigned for trial, and later the same day the prosecutor filed a motion for peremptory disqualification of the judge, with a supporting affidavit substantially in the form prescribed by *Code Civ. Proc. § 170.6(a)(5)*. The presiding judge was required by statute, "thereupon and without any further act or proof," to assign the case to another judge [*Code Civ. Proc. § 170.6(a)(3)*]. However, the defendant having asserted that the prosecutor disqualified the judge because of group racial bias, the presiding judge proceeded to inquire into the prosecutor's good faith in making the peremptory challenge. At the direction of the presiding judge, the prosecutor disclosed the reasons for the challenge. Concluding that the stated reasons were not sufficient to overcome a prima facie showing of invidious discrimination, the presiding judge disallowed the challenge.

In a proceeding for a writ of mandate on the prosecutor's behalf, the court of appeal concluded that the inquiry was proper because of the possibility that the challenge was made on an unconstitutionally discriminatory basis (*8 Cal. App. 4th 688, 706-707)* . The court acknowledged the rule of *Solberg v. Superior Court (1977) 19 Cal. 3d 182, 137 Cal. Rptr. 460, 561 P.2d 1148* , that there are abuses, such as "judge shopping" that are to be viewed as a relatively inconsequential price to be paid for the efficient and discreet procedure in *Code Civ. Proc. § 170.6*. The court noted that neither *Solberg* nor any other decision had addressed the vulnerability of a § 170.6 challenge generally to federal constitutional challenge, or specifically to an equal protection claim (*8 Cal. App. 4th 688, 704-706)* . The court held that § 170.6 could not be implemented in such a way as to preclude inquiry into whether the statute has been employed to disqualify a judge because of race (*8 Cal. App. 4th 688, 707)* . Nonetheless, the court of appeal found that the defendant had failed to make a prima facie case of discrimination and issued a writ directing the trial court to set aside the order disqualifying the challenged judge (*8 Cal. App. 4th 688, 712-714)* .

[b] Burden of Proof

The facts and procedural background of ***People v. Superior Court (Williams)*** *(1992) 8 Cal. App. 4th 688, 10 Cal. Rptr. 2d 873* , are *discussed under § 130.45[3][a]*.

After holding that an inquiry may be made to determine whether a *Code of Civ. Proc. § 170.6* challenge has been employed to disqualify a judge in violation of the *Fourteenth Amendment*, the court outlined the procedure that should be followed. The court held that the burden was on the party questioning the peremptory challenge to make a prima facie case of invidious discrimination by showing that the challenged judge is a member of a cognizable racial group and by showing facts and other relevant circumstances that raise an inference that the challenge was exercised on account of the judge's race. The burden then shifts to the party exercising the challenge to show that the challenge was not based on group bias alone. If that party offers a race-neutral basis for the peremptory challenge, the trial court determines whether or not the party questioning the challenge has established purposeful discrimination (*8 Cal. App. 4th 688, 708-709)* . The party questioning the exercise of the challenge in this case failed to meet his burden, and therefore, the court issued a writ directing the trial court to set aside the order disqualifying the challenged judge (*8 Cal. App. 4th 688, 712-714)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral Overview

California Points & Authorities

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 130 JUDGES
PART II. FORMS
A. PEREMPTORY DISQUALIFICATIONS

13-130 California Points & Authorities §§ 130.46-130.59

[Reserved]

§§ 130.46[Reserved]

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 130 JUDGES
PART II. FORMS
B. DISQUALIFICATION FOR CAUSE

13-130 California Points & Authorities § 130.60

§ 130.60 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Statement of Disqualification for Cause Improperly Denied [Code Civ. Proc. § 170.3(c)]--Timely Statement of Disqualification [Code Civ. Proc. § 170.3(c)]

[1] FORM

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, _____ APPELLATE DISTRICT
[DIVISION _____]

_____ [*name*], Petitioner,	)	
vs.	)	
THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE [CITY AND] COUNTY OF_____,	)	
and	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF MANDATE
THE JUDGE OF SAID COURT,	)	
Respondents,	)	
_____ [*name*(*s*)]	)	
Real _____ [Party *or* Parties] in Interest.	)	
	)	

_____

THE COURT SHOULD ISSUE A WRIT OF MANDATE TO PREVENT JUDGE _____ [*name*]

FROM PROCEEDING WITH THE CASE BECAUSE THE TIMELY STATEMENT OF DISQUALIFICATION FOR CAUSE WAS DENIED.

A. Writ of Mandate. A writ of mandate may issue from any court to any inferior tribunal to compel the performance of an act that the law specifically enjoins as a duty from an office, trust, or station (*Code Civ. Proc. § 1085*). The writ must be issued in all cases when there is no plain, speedy, and adequate remedy in the ordinary course of the law on the verified petition of the party beneficially interested (*Code Civ. Proc. § 1086*).

B. Review by Mandate Expressly Authorized. A determination on the question of the disqualification of a judge under *Code of Civil Procedure Sections 170 through 170.5* is not an appealable order and may be reviewed only by writ of mandate from the appropriate court of appeal within ten days of written notice to the parties of entry of the decision and only by the parties to the proceeding (*Code Civ. Proc. § 170.3(d)*).

C. Disqualified Judge Without Power to Proceed With Case. Except as provided under *Code of Civil Procedure Section 170.4*, a disqualified judge has no power to act in any proceeding after his or her disqualification or after the filing of a statement of disqualification until the question of his or her disqualification has been determined (*Code Civ. Proc. § 170.4(d)*).

D. Timely Statement of Disqualification. A statement of disqualification presented by a party at the earliest practicable opportunity after the party's appearance and discovery of the facts constituting the ground of the judge's disqualification under *Code of Civil Procedure Section 170.1* is timely, even though those facts are discovered after the commencement of the hearing of an issue of fact before the judge (*see Keating v. Superior Court (1955) 45 Cal. 2d 440, 446-447, 289 P.2d 209*).

[*Optional*] **E. Judge Whose Determination Is Reviewed Should Not Hear Further Proceedings.** At the request of a party or on its own motion an appellate court will consider whether in the interests of justice it should direct that further proceedings be heard before a trial judge other than the judge whose judgment or order was reviewed by the appellate court (*Code Civ. Proc. § 170.1(c)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of may be submitted in support of a petition for a writ of mandate to prevent a judge from proceeding with a case when petitioner has filed a timely written statementof disqualification for cause and another judge has determined that the challenged judge is not disqualified or the challenged judge has ordered the statement stricken from the record.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

The foregoing points and authorities may also be modified to support a motion to set aside a final judgment alleged to

be voidable because the judge was disqualified to act [*see Urias v. Harris Farms, Inc. (1991) 234 Cal. App. 3d 415, 423-424, 285 Cal. Rptr. 659]* . For forms to use in preparing a motion to vacate a judgment, see Ch. 155, *Motions After Trial* .

[c] Related Pleading and Practice Forms

For forms for use in filing a motion to disqualify a judge for cause, see Ch. 317, *Judges* in California Forms of Pleading and Practice (Matthew Bender). For a discussion of and forms for use in a proceeding to vacate a judgment, see Ch. 371, *Motions After Trial* and Ch. 489, *Relief From Judgments and Orders* in that set.

[d] Related Memoranda

For a discussion of and forms of memoranda for use in a proceeding to vacate a judgment, see Ch. 155, *Motions After Trial* and Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders* .

[e] Opposing Memoranda

In an appropriate case, the points and authorities *set out in § 130.69* may be used to oppose the motion supported by the foregoing points and authorities.

[3] Discussion of Authorities

[a] Disqualified Judge Without Power to Proceed With Case

Except as provided under *Code Civ. Proc. § 170.4*, a disqualified judge has no power to act in any proceeding after his or her disqualification or after the filing of a statement of disqualification until the question of his or her disqualification has been determined [*Code Civ. Proc. § 170.4(d)*]. To the extent that a disqualified judge retains the power to perform specified acts, *Code Civ. Proc. § 170.4(d)* appears to overrule earlier decisions that held that every order entered by a disqualified judge was void [*see, e.g., Briggs v. Superior Court (1932) 215 Cal. 336, 341, 10 P.2d 1003]* . However, those acts by a disqualified judge not enumerated in *Code Civ. Proc. § 170.4* may be considered void as being beyond the judge's authority to act.

A disqualified judge retains the following powers [*Code Civ. Proc. § 170.4(a)*]:

(1) To take any action or issue any order necessary to maintain the jurisdiction of the court pending the assignment of a judge not disqualified;

(2) To request any other judge agreed on by the parties to sit and act in his or her place;

(3) To hear and determine purely default matters;

(4) To issue an order for possession prior to judgment in eminent domain proceedings;

(5) To set proceedings for trial or hearing; and,

(6) To conduct settlement conferences.

Also, while a challenged judge who refuses to recuse himself or herself generally cannot decide the question of his or her own disqualification or the sufficiency of the challenging party's statement of disqualification [*Code Civ. Proc. § 170.3(c)(5)*], he or she may nonetheless order the statement of disqualification stricken in the following situations [*Code Civ. Proc. § 170.4(b), (c)(3)*]:

(1) Is untimely filed;

(2) On its face discloses no legal grounds for disqualification; or

(3) Is a repetition of a prior statement of disqualification filed by the same party that does not allege facts suggesting new grounds for disqualification.

Finally, if a statement of disqualification is filed after the trial or hearing has commenced, as determined under *Code Civ. Proc. § 170.4(c)(1)* or *(2)*, the judge may order the trial or hearing to continue, and his or her orders or rulings made after the filing of the statement will be vacated only if it is subsequently determined that the judge is disqualified [*see Code Civ. Proc. § 170.4(c)(1)*; *see also Code Civ. Proc. § 170.3(b)(4)* (rulings made by disqualified judge before ground of disqualification was first learned of or arose are not to be set aside by replacement judge absent good cause)].

[b] Timely Statement of Disqualification

Keating v. Superior Court *(1955) 45 Cal. 2d 440, 289 P.2d 209* , involved an action brought to recover damages for fraudulent conversion of the assets of a business. The case was tried in superior court without a jury, and after the conclusion of the testimony, the trial judge made statements to the effect that he believed defendant had knowingly sworn falsely during the course of the trial. Judgment was entered against defendant. Plaintiff applied to the same superior court to increase the award of damages andat the hearing defendant sought to reopen the case to introduce certain books of account. The judge stated that it was unnecessary to go into the books since they would not show anything to alter his conclusion, and he reiterated his lack of confidence in defendant's integrity. The award was then increased and findings and judgment were filed. On appeal, the appellate court held that the issue of liability was correctly determined but that the action must be remanded for retrial of the issue of damages. After remand by the appellate court for retrial, plaintiff filed a notice of motion to be made in the department where the original trial judge was presiding for setting the action for further proceedings in that department. At that point, defendant filed a written statement of disqualification of the original trial judge by reason of bias and prejudice. The judge struck the statement from the record as untimely and as insufficient, and defendant petitioned for a writ of prohibition.

The Supreme Court granted a writ of prohibition to prevent the original trial judge from hearing the retrial of the case stating that, insofar as the retrial was concerned, it was clear that the statement of disqualification met the purposes of the statute and was timely because it was presented promptly after petitioner learned that the case was again to be set for trial before the same judge (*45 Cal. 2d 440, 446-447)* .

[c] Judge Whose Determination Is Reviewed Should Not Hear Further Proceedings

An appellate court shall consider, on request of a party or sua sponte, whether the interests of justice require that it direct any further proceedings to be heard by a trial judge other than the judge whose judgment or order was reviewed [*Code Civ. Proc. § 170.1(c)*]. One example in which it seems clear that an appellate court should issue such a direction is when the trial court judge has demonstrated a lack of impartiality in making the determination that is the subject of appellate review. For discussion of cases decided under prior law in which a trial judge was disqualified from retrying a case after reversal on appeal for lack of impartiality during the initial proceeding, see *§ 130.66[3][b], [c]*.

[4] Additional Authorities

[a] Timely Statement of Disqualification

Hollingsworth v. Superior Court (1987) 191 Cal. App. 3d 22, 236 Cal. Rptr. 193 , was an action seeking injunctive and declaratory relief. When petitioning for a temporary restraining order, petitioners prepared, but did not file, a motion to have the presiding juvenile court judge disqualify herself should she assign the case to herself, realizing that

the motion would be superfluous if she assigned the case to another judge. Petitioner requested the clerk to tell the presiding judge that counsel wanted to know, before any rulings were made, whether or not she would hear the matter. The case was trailed to the next day, and petitioner did not file the motion, believing the matter only pending in the presiding judge's department. The next day the judge summoned the counsel into her chambers to discuss the application. At that time petitioner asked the judge to recuse herself. When she declined, petitioner served her with the motion. The judge rejected the motion as untimely. Petitioner sought a writ reversing the order. The court of appeals issued a writ of mandate directing the trial judge to vacate her order denying the motion and striking the disqualification. The court reiterated the "earliest practicable opportunity" language of *Code Civ. Proc. § 170.3(c)(1)*. It examined the record and found sufficient reason for petitioner's belief that the matter was still pending, and that the first indication that the judge would hear the matter on the merits was in her chambers. It noted that the request for recusal was made before the judge announced her tentative decision in chambers, and concluded that it was timely made (*191 Cal. App. 3d 22, 27-28)* .

Schorr v. Superior Court (1980) 105 Cal. App. 3d 568, 164 Cal. Rptr. 478 , arose out of a proceeding to modify child custody and support. In conference with the commissioner, who had been acting as temporary judge pursuant to the parties' stipulation, the husband claimed to have learned of the commissioner's prejudice. He moved for disqualification under both former Code Civ. Proc. § 170(5) [*now see Code Civ. Proc. § 170.1(a)(6)*] and *Code Civ. Proc. § 170.6*, but the commissioner denied the motion as being without basis and as untimely, in that the proceeding had already begun. On the husband's petition, the court of appeal issued a peremptory writ of mandate requiring the trial court to allow the husband to file his verified statement under former § 170(5), and to provide for its hearing by another judge should the statement turn out to be legally sufficient in form and content. The court held that the husband's challenge was timely made, since it was made at the conclusion of the conference at which the husband could have learned the disqualifying facts and therefore was made at the earliest practicable opportunity after discovery of those facts (*105 Cal. App. 3d 568, 571)* .

The facts and procedural background of *Oak Grove School Dist. v. City Title Ins. Co. (1963) 217 Cal. App. 2d 678, 32 Cal. Rptr. 288* , are *set out in § 130.42[3][e]*. In *Oak Grove*, after the judge set aside the order to disqualify himself stating that he had been mistaken concerning his peremptory disqualification under *Code Civ. Proc. § 170.6*, plaintiff immediately filed a written statement to disqualify the judge for bias and prejudice under former Code Civ. Proc. § 170(5) [*now see Code Civ. Proc. § 170.1(a)(6)*]. The statement was based on the judge's remarks made at the time he had granted the peremptory challenge. The trial judge struck the statement to disqualify and after the hearing, made a judgment in defendants' favor. The appellate court held that the written motion todisqualify was timely, even though the facts constituting the ground of disqualification became known to plaintiff on May 1 when the judge made the remarks in question. Because the judge also entered an order disqualifying himself on May 1 and did not set that order aside until May 10, plaintiff had no reason to have moved for disqualification in the interim. When the § 170.6 disqualification was set aside, plaintiff immediately made his motion under former § 170(5). Under the circumstances, the court found that plaintiff had acted at the earliest practicable opportunity. The court reversed the judgment for defendant and directed a retrial of the motion on costs and fees before a different judge (*217 Cal. App. 2d 678, 702-704)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral Overview

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 130 JUDGES
PART II. FORMS
B. DISQUALIFICATION FOR CAUSE

13-130 California Points & Authorities § 130.61

§ 130.61 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Statement of Disqualification for Cause Improperly Denied [Code Civ. Proc. § 170.3(c)]--Financial Interest in Subject Matter of or Party to Proceeding [Code Civ. Proc. § 170.1(a)(3)]

[1] FORM

[*Caption. See § 130.60[1].*]

THE COURT SHOULD ISSUE A WRIT OF MANDATE TO PREVENT JUDGE _____ [*name*] FROM PROCEEDING WITH THE CASE BECAUSE THE STATEMENT TO DISQUALIFY THE JUDGE BASED ON HIS/HER HAVING A FINANCIAL INTEREST IN THIS PROCEEDING OR IN A PARTY TO THIS PROCEEDING WAS IMPROPERLY DENIED.

A. Writ of Mandate. [*See § 130.60[1], Paragraph A.*]

B. Review by Mandate Expressly Authorized. [*See § 130.60[1], Paragraph B.*]

C. Disqualified Judge Without Power to Proceed With Case. [*See § 130.60[1], Paragraph C.*]

D. Timely Statement of Disqualification. [*See § 130.60[1], Paragraph D.*]

[*EITHER*]

E. Disqualifying Financial Interest. A judge is disqualified if the judge, or the judge's spouse or minor child living in the household, has a financial interest in the subject matter in a proceeding or in a party to the proceeding (*Code Civ. Proc. § 170.1(a)(3)(B)(i)*).

[*AND/OR*]

E. Disqualifying Financial Interest as Fiduciary. A judge is disqualified if the judge or the judge's spouse is a fiduciary, including any executor, trustee, guardian, or administrator, who has a financial interest in the subject matter in a proceeding or in a party to the proceeding (*Code Civ. Proc. §§ 170.1(a)(3)(B)(ii), 170.5(g)*).

[*CONTINUE*]

F. Financial Interest Defined. "Financial interest," for the purpose of *Code of Civil Procedure Section 170.1(a)(3)*, means ownership of more than a one percent legal or equitable interest in a party, or a legal or equitable interest in a party of a fair market value in excess of $1,500, or a relationship as director, advisor, or other active participant in the affairs of a party, except as follows:

(1) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in those securities unless the judge participates in the management of the fund;

(2) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(3) The proprietary interest of a policyholder in a mutual insurance company, or a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization if the outcome of the proceeding could substantially affect the value of the interest (*Code Civ. Proc. § 170.5(b)*).

[*Optional*] **G. Judge Whose Determination Is Reviewed Should Not Hear Further Proceedings.** [*See § 130.60]1], Paragraph E.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for a writ of mandate to prevent a judge from proceeding with a case when petitioner has filed a written statement todisqualify the judge on the ground that he or she is financially interested within the meaning of *Code Civ. Proc. §§ 170.1(a)(3)* and *170.5(b)* and *(g)* and another judge has determined that the challenged judge is not disqualified or the challenged judge has ordered the statement stricken from the record.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms for use in filing a motion to disqualify a judge for cause, see Ch. 317, *Judges* in California Forms of Pleading and Practice (Matthew Bender).

[c] Opposing Memoranda

In an appropriate case, the points and authorities *set out in §§ 130.68, 130.71* may be used to oppose the motion supported by the foregoing points and authorities.

[3] Discussion of Authorities

[a] Disqualifying Financial Interest

Because the *Code Civ. Proc. § 170.5(b)* definition of "financial interest" covers only certain types of ownership of or relationship to a party, the exact extent to which a judge may be disqualified under *Code Civ. Proc. § 170.1(a)(3)* for a "financial interest" in the subject matter of the proceeding is not fully clear. It is clear, however, that disqualification for interest under § 170.1(a)(3) is more limited than it was under former Code Civ. Proc. § 170(a)(1), which was construed to cover any certain, definable, pecuniary or proprietary interest or relation that would be directly affected by the judgment in the proceeding [*see Lindsay-Strathmore I. Dist. v. Superior Court (1920) 182 Cal. 315, 330, 187 P. 1056* (action to enjoin removal of subterranean water under real property owned by plaintiff and coincidentally under other real property owned by judge)]. Those pecuniary or proprietary interests that were disqualifying under former § 170(a)(1) but that are apparently not now covered under *Code Civ. Proc. §§ 170.1(a)(3)* and *170.5(b)* arguably continue to be disqualifying under *Code Civ. Proc. § 170.1(a)(6)*, which provides for disqualification if for any reason a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial [*see* discussion in *§ 130.66[2*][b][ii]].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral Overview

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B. DISQUALIFICATION FOR CAUSE

13-130 California Points & Authorities § 130.62

§ 130.62 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Statement of Disqualification for Cause Improperly Denied [Code Civ. Proc. § 170.3(c)]--Personal Knowledge of Disputed Evidentiary Facts Concerning Proceeding [Code Civ. Proc. § 170.1(a)(1)]

[1] FORM

[*Caption. See § 130.60[1].*]

THE COURT SHOULD ISSUE A WRIT OF MANDATE TO PREVENT JUDGE _____ [*name*] FROM PROCEEDING WITH THE CASE BECAUSE THE STATEMENT TO DISQUALIFY HIM/HER BASED ON HIS/HER HAVING PERSONAL KNOWLEDGE OF DISPUTED EVIDENTIARY FACTS CONCERNING THE PROCEEDING WAS IMPROPERLY DENIED.

A. Writ of Mandate. [*See § 130.60]1], Paragraph A.*]

B. Review by Mandate Expressly Authorized. [*See § 130.60]1], Paragraph B.*]

C. Disqualified Judge Without Power to Proceed With Case. [*See § 130.60]1], Paragraph C.*]

D. Timely Statement of Disqualification. [*See § 130.60]1], Paragraph D.*]

E. Personal Knowledge of Disputed Evidentiary Facts Concerning Proceeding. A judge is disqualified if he or she has personal knowledge of disputed evidentiary facts concerning the proceeding (*Code Civ. Proc. § 170.1(a)(1)(A)*). A judge will be deemed to have such personal knowledge if the judge, or his or her spouse, or a person within the third degree of relationship to either of them, as calculated according to the civil law system, or the spouse of such a person, is to the judge's knowledge likely to be a material witness in the proceeding (*Code Civ. Proc. §§ 170.1(a)(1)(B), 170.5(d)*).

[*Optional*] **F. Judge Whose Determination Is Reviewed Should Not Hear Further Proceedings.** [*See § 130.60]1],*

Paragraph E.]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for a writ of mandate to prevent a judge from proceeding with a case when petitioner has filed a written statement to disqualify the judge on the ground that he or she has personal knowledge of disputed evidentiary facts concerning the proceeding within the meaning of *Code Civ. Proc. §§ 170.1(a)(1)* and *170.5(d)* and another judge has determined that the challenged judge is not disqualified or the challenged judge has ordered the statement stricken from the record.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms for use in filing a motion to disqualify a judge for cause, see Ch. 317, *Judges* in California Forms of Pleading and Practice (Matthew Bender).

[c] Opposing Memoranda

In an appropriate case, the points and authorities *set out in § 130.68* may be used to oppose the motion supported by the foregoing points and authorities.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral Overview

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13-130 California Points & Authorities § 130.63

§ 130.63 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Statement of Disqualification for Cause Improperly Denied [Code Civ. Proc. § 170.3(c)]--Relationship to Party or Certain Other Persons [Code Civ. Proc. § 170.1(a)(4), (5)]

[1] FORM

[*Caption. See § 130.60[1].*]

THE COURT SHOULD ISSUE A WRIT OF MANDATE TO PREVENT JUDGE _____ [*name*] FROM PROCEEDING WITH THE CASE BECAUSE THE STATEMENT TO DISQUALIFY HIM/HER BASED ON HIS/HER _____ [BEING *or* BEING RELATED TO] _____ [A PARTY *or* AN OFFICER, DIRECTOR, OR TRUSTEE OF A PARTY *or* A LAWYER IN THE PROCEEDING *or* A PERSON ASSOCIATED IN PRIVATE PRACTICE WITH A LAWYER IN THE PROCEEDING] WAS IMPROPERLY DENIED.

A. Writ of Mandate. [*See § 130.60[1], Paragraph A.*]

B. Review by Mandate Expressly Authorized. [*See § 130.60[1], Paragraph B.*]

C. Disqualified Judge Without Power to Proceed With Case. [*See § 130.60[1], Paragraph C.*]

D. Timely Statement of Disqualification. [*See § 130.60[1], Paragraph D.*]

[*EITHER*]

E. Relationship to Party or Officer, Director, or Trustee of Party. A judge is disqualified if the judge, or the spouse of the judge, or a person within the third degree of relationship to either of them, or the spouse of such a person is a party to the proceeding or an officer, director, or trustee of a party (*Code Civ. Proc. § 170.1(a)(4)*). [The third degree of relationship shall be calculated according to the civil law system (*Code Civ. Proc. § 170.5(d)*)].

[*OR*]

E. Relationship to Attorney in Proceeding. A judge is disqualified if a lawyer or the spouse of a lawyer in the proceeding is the spouse, former spouse, child, sibling, or parent of the judge or the judge's spouse or if such a person is associated in the private practice of law with a lawyer in the proceeding (*Code Civ. Proc. § 170.1(a)(5)*). The term "private practice of law" includes a fee for service, retainer, or salaried representation of private clients or public agencies (*Code Civ. Proc. § 170.5(e)*).

[*Optional*] **F. Judge Whose Determination Is Reviewed Should Not Hear Further Proceedings. [** *See § 130.60[1], Paragraph E.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for a writ of mandate to prevent a judge from proceeding with a case when petitioner has filed a written statement to disqualify the judge on the ground that he or she is related to a party or a lawyer in the proceeding within the meaning of *Code Civ. Proc. §§ 170.1(a)(4)* and *(5)* and *170.5(d)* and *(e)*, and another judge has determined that the challenged judge is not disqualified or the challenged judge has ordered the statement stricken from the record.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms for use in filing a motion to disqualify a judge for cause, see Ch. 317, *Judges* in California Forms of Pleading and Practice (Matthew Bender).

[c] Opposing Memoranda

In an appropriate case, the points and authorities *set out in § 130.68* may be used to oppose the motion supported by the foregoing points and authorities.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral Overview

California Points & Authorities

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 130 JUDGES
PART II. FORMS
B. DISQUALIFICATION FOR CAUSE

13-130 California Points & Authorities § 130.64

§ 130.64 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Statement of Disqualification for Cause Improperly Denied [Code Civ. Proc. § 170.3(c)]--Permanent or Temporary Physical Impairment [Code Civ. Proc. § 170.1(a)(7)]

[1] FORM

[*Caption. See § 130.60[1].*]

THE COURT SHOULD ISSUE A WRIT OF MANDATE TO PREVENT JUDGE _____ [*name*] FROM PROCEEDING WITH THE CASE BECAUSE THE STATEMENT TO DISQUALIFY HIM/HER BASED ON HIS/HER BEING UNABLE TO PROPERLY PERCEIVE THE EVIDENCE OR BEING UNABLE TO PROPERLY CONDUCT THE PROCEEDING BY REASON OF PERMANENT OR TEMPORARY PHYSICAL IMPAIRMENT WAS IMPROPERLY DENIED.

A. Writ of Mandate. [*See § 130.60]1], Paragraph A.*]

B. Review by Mandate Expressly Authorized. [*See § 130.60]1], Paragraph B.*]

C. Disqualified Judge Without Power to Proceed With Case. [*See § 130.60]1], Paragraph C.*]

D. Timely Statement of Disqualification. [*See § 130.60]1], Paragraph D.*]

E. Permanent or Temporary Physical Impairment. A judge is disqualified if he or she, by reason of permanent or temporary physical impairment, is unable to properly perceive the evidence or is unable to properly conduct the proceeding (*Code Civ. Proc. § 170.1(a)(7)*).

[*Optional*] **F. Judge Whose Determination Is Reviewed Should Not Hear Further Proceedings.** [*See § 130.60]1], Paragraph E.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for a writ of mandate to prevent a judge from proceeding with a case when petitioner has filed a written statement to disqualify the judge on the ground that he or she is unable to properly perceive the evidence or conduct the proceeding by reason of permanent or temporary physical impairment within the meaning of *Code Civ. Proc. § 170.1(a)(7)* and another judge has determined that the challenged judge is not disqualified or the challenged judge has ordered the statement stricken from the record.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms for use in filing a motion to disqualify a judge for cause, see Ch. 317, *Judges* in California Forms of Pleading and Practice (Matthew Bender).

[c] Opposing Memoranda

In an appropriate case, the points and authorities *set out in § 130.68* may be used to oppose the motion supported by the foregoing points and authorities.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral Overview

California Points & Authorities

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 130 JUDGES
PART II. FORMS
B. DISQUALIFICATION FOR CAUSE

13-130 California Points & Authorities § 130.65

§ 130.65 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Statement of Disqualification for Cause Improperly Denied [Code Civ. Proc. § 170.3(c)]--Former Legal Representation by Judge [Code Civ. Proc. § 170.1(a)(2)]

[1] FORM

[*Caption. See § 130.60[1].*]

THE COURT SHOULD ISSUE A WRIT OF MANDATE TO PREVENT JUDGE _____ [*name*] FROM PROCEEDING WITH THE CASE BECAUSE THE STATEMENT TO DISQUALIFY HIM/HER BASED ON HIS/HER HAVING FORMERLY _____ [BEEN A LAWYER IN THIS PROCEEDING *or* BEEN A LAWYER FOR A PARTY TO THIS PROCEEDING IN ANOTHER PROCEEDING INVOLVING THE SAME ISSUES *or* GIVEN ADVICE TO A PARTY TO THIS PROCEEDING ON A MATTER INVOLVED IN THIS PROCEEDING] WAS IMPROPERLY DENIED.

A. Writ of Mandate. [*See § 130.60]1], Paragraph A.*]

B. Review by Mandate Expressly Authorized. [*See § 130.60]1], Paragraph B.*]

C. Disqualified Judge Without Power to Proceed With Case. [*See § 130.60]1], Paragraph C.*]

D. Timely Statement of Disqualification. [*See § 130.60]1], Paragraph D.*]

E. Former Legal Representation by Judge. A judge is disqualified if the judge served as a lawyer in the proceeding, or in any other proceeding involving the same issues the judge served as a lawyer for any party in the present proceeding or gave advice to any party in the present proceeding on any matter involved in the proceeding (*Code Civ. Proc. § 170.1(a)(2)(A)*).

[*Optional*] **F. Activities Deemed to Be Service as Lawyer.** A judge will be deemed to have served as a lawyer in the proceeding if within the past two years (a) a party to the proceeding or an officer, director, or trustee of a party was

either a client of the judge when the judge was in the private practice of law or a client of a lawyer with whom the judge was associated in the private practice of law; or (b) a lawyer in the proceeding was associated in the private practice of law with the judge (*Code Civ. Proc. § 170.1(a)(2)(B)*). The term "private practice of law" includes a fee for service, retainer, or salaried representation of private clients or public agencies (*Code Civ. Proc. § 170.5(e)*).

[*Optional*] **G. Previous Service as Lawyer for Public Agency Officer.** A judge who served as a lawyer for or officer of a public agency that is a party to the proceeding will be deemed to have served as a lawyer in the proceeding if he or she personally advised or in any way represented the public agency concerning the factual or legal issues in the proceeding (*Code Civ. Proc. § 170.1(a)(2)(C)*).

[*Optional*] **H. Judge Whose Determination Is Reviewed Should Not Hear Further Proceedings.** [*See § 130.60]1], Paragraph E.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for a writ of mandate to prevent a judge from proceeding with a case when petitioner has filed a written statement to disqualify the judge on the ground that he or she served as former counsel to a party within the meaning of *Code Civ. Proc. §§ 170.1(a)(2)* and *170.5(c)* and *(e)*, and another judge has determined that the challenged judge is not disqualified or the challenged judge has ordered the statement stricken from the record.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms for use in filing a motion to disqualify a judge for cause, see Ch. 317, *Judges* in California Forms of Pleading and Practice (Matthew Bender).

[c] Opposing Memoranda

In an appropriate case, the points and authorities *set out in § 130.68* may be used to oppose the motion supported by the foregoing points and authorities.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral Overview

California Points & Authorities

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 130 JUDGES
PART II. FORMS
B. DISQUALIFICATION FOR CAUSE

13-130 California Points & Authorities § 130.66

§ 130.66 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Statement of Disqualification for Cause Improperly Denied [Code Civ. Proc. § 170.3(c)]--Unable to Be Impartial [Code Civ. Proc. § 170.1(a)(6)]

[1] FORM

[*Caption. See § 130.60[1].*]

THE COURT SHOULD ISSUE A WRIT OF MANDATE TO PREVENT JUDGE _____ [*name*] FROM PROCEEDING WITH THE CASE BECAUSE THE STATEMENT TO DISQUALIFY HIM/HER ON THE GROUND THAT A PERSON AWARE OF THE FACTS MIGHT REASONABLY ENTERTAIN A DOUBT THAT THE JUDGE WOULD BE ABLE TO BE IMPARTIAL WAS IMPROPERLY DENIED.

A. Writ of Mandate. [*See § 130.60]1], Paragraph A.*]

B. Review by Mandate Expressly Authorized. [*See § 130.60]1], Paragraph B.*]

C. Disqualified Judge Without Power to Proceed With Case. [*See § 130.60]1], Paragraph C.*]

D. Timely Statement of Disqualification. [*See § 130.60]1], Paragraph D.*]

E. Unable to Be Impartial. A judge is disqualified if, for any reason, a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial in the proceeding (*Code Civ. Proc. § 170.1(a)(6)(A)(iii)*). This is fundamentally an objective standard. The issue is not limited to actual bias. Rather, if a reasonable man would entertain doubts concerning the judge's impartiality, disqualification is mandated (*Housing Authority of the County of Monterey v. Jones (2005) 130 Cal. App. 4th 1029, 1041-1042 30 Cal. Rptr. 3d 676* ; *United Farm Workers of America v. Superior Court (1985) 170 Cal. App. 3d 97, 104, 216 Cal. Rptr. 4*).

[*Optional*] **F. Bias or Prejudice Towards Lawyer in Proceeding.** Bias or prejudice towards a lawyer in the proceeding may be grounds for disqualification (*Code Civ. Proc. § 170.1(a)(6)(B)*).

[*Optional*] **G. Judge Disqualified for Pretrial Opinion on Issues to Be Tried.** When a judge has expressed his/her opinion on the issue or issues to be tried in the trial before commencement of a trial, he/she is disqualified from acting as judge in that trial (*see Calhoun v. Superior Court (1958) 51 Cal. 2d 257, 260-262, 331 P.2d 648*).

[*Optional*] **H. Judge Disqualified for Pretrial Opinion of Party's Lack of Veracity Under Oath.** When a judge has, before commencement of trial, expressed his/her opinion on a party's lack of veracity under oath, he/she is disqualified from acting as judge in that trial (*see Keating v. Superior Court (1955) 45 Cal. 2d 440, 443-444, 289 P.2d 209*).

[*Optional*] **I. Judge Whose Determination Is Reviewed Should Not Hear Further Proceedings.** [*See § 130.60]1], Paragraph E.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for a writ of mandate to prevent a judge from proceeding with a case when petitioner has filed a written statement to disqualify the judge on the ground that, for any reason, a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial within the meaning of *Code Civ. Proc. § 170.1(a)(6)* and another judge has determined that the challenged judge is not disqualified or the challenged judge has ordered the statement stricken from the record.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

[i] New Trial

With appropriate modifications the foregoing points and authorities may be used to support a motion for new trial because of irregularities in the proceeding preventing a fair trial [*see Estate of Friedman (1918) 178 Cal. 27, 39, 172 P. 140* ; *Develop-Amatic Engineering v. Republic Mortgage Co. (1970) 12 Cal. App. 3d 143, 150, 91 Cal. Rptr. 193* (both decided under former Code Civ. Proc. § 170)].

Although the question of bias or prejudice on the part of a trial judge cannot be raised on a motion for a new trial [*Estate of Friedman (1918) 178 Cal. 27, 39, 172 P. 140* ; *Develop-Amatic Engineering v. Republic Mortgage Co. (1970) 12 Cal. App. 3d 143, 150, 91 Cal. Rptr. 193]* , evidence of the trial judge's conduct during the trial may be shown as evidence of irregularities preventing a fair trial, including an overt act of the judge that prevents the complaining party from having a fair and impartial trial [*Develop-Amatic Engineering v. Republic Mortgage Co. (1970) 12 Cal. App. 3d 143, 150, 91 Cal. Rptr. 193]* . Nevertheless, the determination of whether or not to grant the motion is made with reference to the course of conduct alleged to constitute an irregularity violative of a right to a fair and impartial trial. It is immaterial whether or not the irregularity resulted from bias or prejudice [*Estate of Friedman (1918) 178 Cal. 27, 39, 172 P. 140]* .

[ii] Financial Interest Not Covered by Code of Civil Procedure Section 170.1(a)(3)

With appropriate modifications, the foregoing points and authorities may also be used in arguing that an interest that was previously disqualifying under former Code Civ. Proc. § 170 but that is not now covered as a disqualifying "financial interest" within the meaning of *Code Civ. Proc. §§ 170.1(a)(3)* and *170.5(b)* continues to be disqualifying under *Code Civ. Proc. § 170.1(a)(6)*, because the nature of the interest gives rise to a reasonable doubt that the judge would be able to be impartial [for further discussion, *see § 130.61[3][a]*]. In arguing this proposition, counsel should take care in citing prior case law, which typically held that interests falling under former Code Civ. Proc. § 170 were disqualifying per se, without regard to their effect on the judge's rulings [*see, e.g., Lindsay-Strathmore I. Dist. v. Superior Court (1920) 182 Cal. 315, 330, 187 P. 1056* (action to enjoin removal of subterranean water under real property owned by plaintiff and coincidentally under other real property owned by judge)]. These cases should be cited only to exemplify interests that, even if not "financial" under *Code Civ. Proc. §§ 170.1(a)(3)* and *170.5(b)*, are nonetheless disqualifying because they might affect the judge's ruling and therefore give rise to a reasonable doubt that the judge would not be able to be impartial under *Code Civ. Proc. § 170.1(a)(6).*

[c] Related Pleading and Practice Forms

For forms for use in filing a motion to disqualify a judge for cause, see Ch. 317, *Judges* in California Forms of Pleading and Practice (Matthew Bender). For a discussion of and forms for use in bringing a motion for a new trial, see Ch. 371, *Motions After Trial* in that set.

[d] Related Memoranda

For a discussion of and memoranda to accompany a motion for a new trial, see Ch. 155, *Motions After Trial* .

[e] Opposing Memoranda

In an appropriate case, the points and authorities *set out in §§ 130.68, 130.72* may be used to oppose the motion supported by the foregoing points and authorities.

[3] Discussion of Authorities

[a] Unable to Be Impartial

In addition to the reasonable doubt standard set out in the form, *Code Civ. Proc. § 170.1(a)(6)* also provides that a judge must be disqualified if the judge believes his or her recusal would further the interests of justice or the judge believes there is a substantial doubt about his or her capacity to be impartial.

In ***Housing Authority of the County of Monterey v. Jones*** *(2005) 130 Cal. App. 4th 1029, 1041-1042, 30 Cal. Rptr. 3d 676* , the defendant was a commercial tenant in a facility owned by plaintiff. After informal efforts to end the tenancy failed, plaintiff filed an unlawful detainer action. The matter was classified as a superior court limited jurisdiction case. The parties filed various pretrial motions, including plaintiff's motion for a protective order and defendant's motion for a continuance to conduct discovery, which were heard and decided by Judge Kingsley (*130 Cal. App. 4th 1029, 1033)* . The case continued to trial before a different judge, who ruled in plaintiff's favor. Defendant appealed to the Monterey County Superior Court Appellate Division. Judge Kingsley was one of the judges on the appellate division, and defendant argued that she should not hear the appeal due to her prior involvement in the pretrial motions. The appellate division rejected that argument, holding that a judge is only disqualified of hearing an appeal of a proceeding she "tried or heard" within the meaning of *Code Civ. Proc. § 170.1(b)*. The appellate division then affirmed the unlawful detainer judgment (*130 Cal. App. 4th 1029, 1035)* .

The court of appeals addressed the sole issue of whether Judge Kingsley should have been disqualified from the

appellate panel because of her priorparticipation in the pretrial motions (*130 Cal. App. 4th 1029, 1037)* . The appellate division had been correct that *Code Civ. Proc. § 170.1(b)* did not mandate disqualification because the appellate panel did not review the same "proceeding" that was previously decided by Judge Kingsley. However, disqualification was required under *Code Civ. Proc. § 170.1(a)(6)(C)* because a person aware of the facts, i.e., Judge Kingsley's rulings on the pretrial motions, "might reasonably entertain a doubt that [she] would be able to be impartial." This holding was mandated by the degree to which the pretrial rulings were referenced in the arguments on appeal (*130 Cal. App. 4th 1029, 1041-1042)* .

United Farm Workers of America v. Superior Court *(1985) 170 Cal. App. 3d 97, 216 Cal. Rptr. 4* , is the first case to interpret and apply *Code Civ. Proc. § 170.1(a)(6)(C)*. In this case, defendant farm workers union petitioned to disqualify the trial judge for bias on the basis of his mentioning to union's counsel that he recalled that several years ago his wife had served for several days as a volunteer replacement worker for the grower who was the plaintiff in the action. In denying the writ, the court observed that *Code Civ. Proc. § 170.1(a)(6)(C)*, providing for disqualification if a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial, establishes a fundamentally objective standard that is not limited to the existence of an actual bias. The proper frame of reference for determining whether a basis for disqualification exists under this standard has been described as neither the judge's personal view of his or her own impartiality, nor the litigants' necessarily partisan views, but rather how the "average person on the street" would view the judge's participation in a given case (*170 Cal. App. 3d 97, 104)* .

[b] Judge Disqualified for Pretrial Opinion on Issues to Be Tried

In ***Calhoun v. Superior Court*** *(1958) 51 Cal. 2d 257, 331 P.2d 648* , decided under prior law, the Supreme Court issued a writ of prohibition to restrain a judge from retrying petitioner's case that had been reversed on appeal. The judge had filed an affidavit opposing petitioner's release on bail pending determination of the appeal. In the affidavit, the judge stated that in his opinion the evidence produced in the trial overwhelmingly sustained the charges as contained in the grand jury indictment, that the defendant was guilty as charged, and that any appeal taken would be merely for the purpose of further delaying justice in the proceedings. Petitioner filed a written statement to disqualify the judge for bias and prejudice pursuant to former Code Civ. Proc. § 170(5) [*now see Code Civ. Proc. § 170.1(a)(6)*] alleging these facts. The trial judge struck the statement from the record as being sham and frivolous. In issuing the writ of prohibition, the Court stated that the judge's voluntary expression of his opinion that petitioner was guilty showed that he was biased and prejudiced as to the issue or issues of fact to be tried (*51 Cal. 2d 257, 260-262)* .

[c] Judge Disqualified for Pretrial Opinion of Party's Lack of Veracity Under Oath

The factual background of ***Keating v. Superior Court*** *(1955) 45 Cal. 2d 440, 289 P.2d 209* , is discussed in *§ 130.60[3][b]*. In granting a writ of prohibition to prevent the trial judge from retrying the issue of damages and holding that the judge was biased and prejudiced against petitioner, the Supreme Court noted that a judge is not disqualified from proceeding to try and decide a case or pass on a motion for a new trial because he or she states during the course of the trial that in his or her opinion a party has deliberately given false testimony, provided the opinion of the judge is based on a consideration of the evidence produced. It is the judge's duty when acting as the trier of the facts to pass on the credibility of witnesses, and if he or she believes that a party has testified falsely, and chooses to say so rather than remain silent, he or she is not disqualified from proceeding to render judgment. But the Court held that the rule is different when a judge is about to retry a case after having stated during the course of the prior trial that he or she believes a party has knowingly sworn falsely. Because this was the situation in the case at hand, it was necessary that a complete new trial on the issue of damages be held (*45 Cal. 2d 440, 443-444)* .

[4] Additional Authorities

[a] Unable to Be Impartial

In *Ng v. Superior Court (1997) 52 Cal. App. 4th 1010, 61 Cal. Rptr. 2d 49* , derogatory and apparently unfounded

statements concerning counsel, coupled with evidence presented in support of earlier petitions for extraordinary writs (each of which sought orders from the court of appeal to disqualify the trial judge, after a judge appointed under *Code Civ. Proc. § 170.3(c)(5)* had denied such a motion), and the court's unusual and inappropriate desire to keep the case, led the court of appeal to conclude that the interests of justice required further proceedings to be heard before a trial judge other than the presently assigned judge (*52 Cal. App. 4th 1010, 1024)* . In reaching its conclusion, the court noted that it need not determine whether there is actual bias. *Code Civ. Proc. § 170.1(a)(6)* provides the standard by which to determine the trial judge is to be disqualified, i.e., a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial (*52 Cal. App. 4th 1010, 1024)* .

In *Sincavage v. Superior Court (1996) 42 Cal. App. 4th 224, 49 Cal. Rptr. 2d 615* , a criminal action, the information alleged prior convictions. A review of the transcript of the prior proceeding indicated that the judge for the current proceeding had been the calendar deputy district attorney at the time of the prior proceeding, although a different deputy districtattorney had actually taken the plea. After verifying that her name appeared only as calendar deputy, the court stated that she would not recuse herself. However, she further stated that if she had taken the previous plea she would recuse herself. The defense subsequently moved to disqualify the judge for cause pursuant to *Code Civ. Proc § 170.1*, supporting the motion with a declaration that the judge had in fact conducted the preliminary examination in the prior proceeding. In response to the motion, the judge stated that she had no recollection of the petitioner or the underlying proceeding. The judge appointed to determine the challenge denied the motion to disqualify. The court of appeal disagreed with this result, concluding that the judge was disqualified under *Code Civ. Proc § 170.1(a)(6)(C)*. The court reasoned that two facts lead to the conclusion that a person knowing these facts would have doubt that the judge would be impartial in ruling on matters involving the priors. First, the judge had been active in the prosecution of the priors. Second, the judge herself had stated that if she heard that she had acted as prosecutor in a case charged as a prior she would recuse herself (*42 Cal. App. 4th 224, 230)* . The court thus issued a peremptory writ of mandate directing the court to reassign further proceedings in the matter to another judge.

McKay v. Superior Court (1950) 98 Cal. App. 2d 770, 220 P.2d 945 , decided under prior law, involved a proceeding in prohibition before the court of appeal to restrain a superior court judge from hearing a murder trial. Defendants had been indicted and charged with the murder of a sheriff and deputy sheriff. They moved to disqualify the judge on the ground of bias or prejudice. The judge declined to consent that the action be tried before another judge and filed his answer to the allegations contained in the statement, whereupon the Judicial Council assigned another judge to hear and determine the question of disqualification. The other judge heard the matter and decided that the judge was not disqualified to proceed with the action. Thereafter, defendants applied for a writ of prohibition before the court of appeal. Briefly, the statement of disqualification alleged that the judge was a close friend of the victims, that he had worked closely with them, that they were residents of the same community, and that the judge's father had also been a sheriff who was killed while taking a prisoner into custody. The court of appeal granted the writ of prohibition, noting that it need only appear probable from the statement of disqualification that by reason of bias or prejudice of a judge a fair and impartial trial cannot be had. Further, the court noted that the judge had admitted the facts as disclosed by the transcript, and although he denied bias or prejudice in his affidavit in opposition to disqualification, the denial did not create a conflict in the evidence so that the question of disqualification was a matter of law. Respondent judge further argued that although the facts set forth in petitioners' statement of disqualification might be sufficient to disqualify a judge to conduct a trial when sitting without a jury, the same facts would not disqualify a judge from conducting a jury trial. He reasoned that in a jury trial all the judge does is rule on the evidence and the jury has to decide all question of fact. But the court of appeal rejected the judge's argument noting that former Code Civ. Proc. § 170 (*now see Code Civ. Proc. §§ 170-170.5*) makes no such distinction and that it necessarily follows that the fundamental right of every litigant to a fair and impartial trial applies equally to a court trial as to a trial before a jury. The court therefore held that the judge was disqualified as a matter of law and issued a writ of prohibition (*98 Cal. App. 2d 770, 776-777)* .

[b] Judge Disqualified for Pretrial Opinion on Issues to Be Tried

Oak Grove School Dist. v. City Title Ins. Co. (1963) 217 Cal. App. 2d 678, 32 Cal. Rptr. 288 , decided under prior

law, involved an appeal by plaintiff from a judgment awarding costs and attorney's fees to defendant after plaintiff abandoned an action in eminent domain. On May 1, prior to the hearing on the motion to tax costs, plaintiff had filed a declaration of prejudice seeking to disqualify the judge by peremptory challenge pursuant to *Code Civ. Proc. § 170.6*. When the motion was made, the judge disqualified himself saying: "I don't know that I quite understand the difference between prejudice and bias. If there is any I suppose I must in all frankness tell you that I am a little biased in this case, very much so, because I don't like the way it was handled ... . In my opinion bad management took place that has in all honesty created perhaps a little bias in my mind here, and I think it is quite proper that you have this matter heard before another judge." But subsequently the judge vacated the order disqualifying himself pursuant to *Code Civ. Proc. § 170.6* stating that he had been mistaken in believing that he was disqualified pursuant to that section. He ordered that the court would retain jurisdiction to hear the motion to tax costs. Plaintiff immediately filed a statement of disqualification pursuant to former Code Civ. Proc. § 170(5) (*now see Code Civ. Proc. § 170.1(a)(6)*) alleging the judge's May 1 statements in open court as evidence of his bias and prejudice. The judge struck the statement on the ground that it did not set forth facts on which plaintiff based his charge of prejudice, and plaintiff applied to the court of appeal for a writ of prohibition, which was denied. The judge heard the motion to tax costs and entered judgment for defendants.

Plaintiff appealed from the judgment and on appeal the court considered the question of whether the judge had been disqualified by a timely presented and legally sufficient statement of disqualification. The court stated that although the statement of disqualification appeared to be conclusionary, the statement required by former Code Civ. Proc. § 170(5) (*now see Code Civ. Proc. § 170.3(c)*) is in the nature of a complaint and as such need only allege ultimate facts. The allegation in question consisted of a statement of the ultimate fact that on a certain day the judge stated hewas biased and prejudiced in the case. It further stated that the plaintiff did not believe he could have a fair and impartial trial in the pending motion because of the judge's bias and prejudice. That averment, when coupled with the allegation in the statement of fact, was sufficient to make the bias and prejudice appear probable as to the issues to be tried and to require that another judge decide the issue of disqualification (*217 Cal. App. 2d 678, 704-706)* . The court reversed the judgment and directed a retrial on the motion to tax costs before a different judge (*217 Cal. App. 2d 678, 712)* .

[c] Judge Disqualified for Pretrial Opinion of Party's Lack of Veracity Under Oath

Briggs v. Superior Court (1932) 215 Cal. 336, 10 P.2d 1003 , decided under prior law, involved a petition for writ of prohibition before the Supreme Court to prevent a superior court judge from hearing and trying a contempt proceeding against petitioners. Prior to the hearing on the contempt charge, petitioners filed a written statement of disqualification to disqualify Judge C for bias and prejudice pursuant to former Code Civ. Proc. § 170(5) [*now see Code Civ. Proc. § 170.3(c)*]. When the constructive contempt matter first came before Judge C, the judge took the witness stand and had himself sworn. He then made a statement that in effect charged that petitioners had knowingly made false statements in the statement of disqualification filed prior to the hearing. The petitioners then filed a supplemental statement that set forth the statements Judge C had made when he had himself sworn. The matter of Judge C's disqualification was transferred to Judge W for decision. Judge W ruled that Judge C was not disqualified. In issuing the writ of prohibition, the Supreme Court held that the words used by Judge C and his conduct at the time and under the circumstances showed bias and prejudice against the petitioners, noting that as the trier of the facts, the judge would be called upon to pass on the credibility of the petitioners as the principal witnesses in their own behalf. The Court stated that it was not probable that a judge who had stated under oath that in his opinion the petitioners had deliberately falsified under oath could pass upon their credibility with the impartial judicial mind which should exist in the trier of the facts (*215 Cal. 336, 344-346)* .

Chastain v. Superior Court (1936) 14 Cal. App. 2d 97, 57 P.2d 982 , decided under prior law, involved a proceeding in prohibition before the court of appeal to prevent a respondent judge from retrying a personal injury case on the ground that he was disqualified pursuant to former Code Civ. Proc. § 170(5) [*now see Code Civ. Proc. § 170.1(a)(6)*]. Respondent demurred to the petition, charging that it failed to state facts sufficient to warrant the issuance of a writ. In granting the writ and overruling the demurrer, the court framed the question to be decided as whether a judge is disqualified from trying for a third time a case for damages for negligence in the operation of an automobile when upon

granting new trials therein, he had declared that one of the defendants and some of his witnesses had committed perjury in testifying at the former trials. The judge had further declared that he would not permit any judgment that was based on perjury to stand in his court, that he would continue to hold the same opinion regarding the witnesses' commission of perjury, and that he had twice granted a new trial on the sole ground that he believed the parties were guilty of perjury (*14 Cal. App. 2d 97, 101)* . A disqualification hearing was held before another judge who determined that there was insufficient evidence to merit the judge's disqualification for bias or prejudice (*14 Cal. App. 2d 97, 100)* . But the appellate court issued a writ of prohibition and held that when the trial judge entertains a fixed opinion that a party to an action has deliberately perjured himself or herself and is unworthy of belief, and frankly admits that he or she possesses that frame of mind, the law entitles the litigant to the privilege of a trial before some other judge (*14 Cal. App. 2d 97, 104)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral Overview

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 130 JUDGES
PART II. FORMS
B. DISQUALIFICATION FOR CAUSE

13-130 California Points & Authorities § 130.67

§ 130.67 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Statement of Disqualification for Cause Improperly Denied [Code Civ. Proc. § 170.3(c)]--Prospective Employment as a Dispute Resolution Neutral [Code Civ. Proc. § 170.1(a)(8)]

[1] FORM

[*Caption. See § 130.60[1].*]

THE COURT SHOULD ISSUE A WRIT OF MANDATE TO PREVENT JUDGE _____ [*name*] FROM PROCEEDING WITH THE CASE BECAUSE THE STATEMENT TO DISQUALIFY HIM/HER BASED ON HIS/HER _____ [CURRENT ARRANGEMENT CONCERNING EMPLOYMENT AS A DISPUTE RESOLUTION NEUTRAL *or* PARTICIPATION IN DISCUSSIONS IN THE LAST TWO YEARS CONCERNING EMPLOYMENT AS A DISPUTE RESOLUTION NEUTRAL and THE FACT THAT THE ARRANGEMENT *or* DISCUSSION WAS WITH A PARTY TO THE CASE *or* THE CASE INCLUDES ISSUES RELATING TO THE ENFORCEMENT OF AN AGREEMENT TO SUBMIT A DISPUTE TO ALTERNATIVE DISPUTE RESOLUTION *or* THE APPOINTMENT OR USE OF A DISPUTE RESOLUTION PROFESSIONAL *or* THE JUDGE HAS DIRECTED THE PARTIES TO PARTICIPATE INA DISPUTE RESOLUTION PROCESS IN WHICH THE PROFESSIONAL WILL BE AN INDIVIDUAL *or* ENTITY WITH WHOM THE JUDGE HAS AN EMPLOYMENT ARRANGEMENT *or* HAS PREVIOUSLY BEEN EMPLOYED *or* SERVED *or* IS DISCUSSING *or* HAS DISCUSSED EMPLOYMENT *or* THE JUDGE WILL SELECT A DISPUTE RESOLUTION PROFESSIONAL IN THE MATTER and AMONG THOSE AVAILABLE FOR SELECTION IS AN INDIVIDUAL *or* ENTITY WITH WHOM THE JUDGE HAS AN ARRANGEMENT *or* WITH WHOM THE JUDGE HAS PREVIOUSLY SERVED *or* WITH WHOM THE JUDGE IS DISCUSSING EMPLOYMENT] WAS IMPROPERLY DENIED.

A. Writ of Mandate. [*See § 130.60]1], Paragraph A.*]

B. Review by Mandate Expressly Authorized. [*See § 130.60]1], Paragraph B.*]

C. Disqualified Judge Without Power to Proceed With Case. [*See § 130.60]1], Paragraph C.*]

D. Timely Statement of Disqualification. [*See § 130.60]1], Paragraph D.*]

E. Prospective Employment or Discussions of Employment as Dispute Resolution Neutral. A judge is disqualified for cause if the judge either has a current arrangement concerning employment or other compensated service as a dispute resolution neutral *or* has had discussions concerning such employment or service in the last two years, and any of the following is true: the arrangement or discussions were with a party to the proceeding, *or* the matter before the judge includes issues relating to the enforcement of an agreement to submit a dispute to alternative dispute resolution or the appointment or use of a dispute resolution professional *or* the judge directs the parties to participate in an alternative dispute resolution process in which the dispute resolution neutral will be an individual or entity with whom the judge has the arrangement, has previously been employed or served, or is discussing or has discussed the employment or service, *or* the judge will select a dispute resolution neutral or entity to conduct an alternative dispute resolution process in the matter before the judge, and among those available for selection is an individual or entity with whom the judge has the arrangement, with whom the judge has previously been employed or served, or with whom the judge is discussing or has discussed the employment or service (*Code Civ. Proc. § 170.1(a)(8)(A)*). Grounds for disqualification under *Code Civ. Proc. § 170.1(a)(8)(A)* apply when they both arise and are learned of, not when the judge understands their legal significance (*Rossco Holdings, Inc. v. Bank of America (2007) 149 Cal. App. 4th 1353, 1363, 58 Cal. Rptr. 3d 141*).

[*Optional*] **F. Judge Whose Determination is Reviewed Should Not Hear Further Proceedings.** [*See § 130.60]1], Paragraph E.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for a writ of mandate to prevent a judge from proceeding with a case when petitioner has filed a written statement to disqualify the judge on the ground that he or she has either a current arrangement concerning prospective employment or other compensated service as a dispute resolution neutral with a party to the proceeding *or* the ground that he or she has engaged in discussions with a party to the proceeding in the last two years concerning employment or service as a dispute resolution neutral *or* on the ground that he or she has such a current arrangement or has had such discussions and there is an issue in the case relating to the enforcement of an agreement to submit a dispute to alternative dispute resolution or the appointment or use of a dispute resolution professional *or* on the ground that the judge has directed the parties to participate in an alternative dispute resolution process in which the dispute resolution neutral will be an individual or entity with whom the judge has an arrangement concerning prospective employment, with whom the judge has previously been employed or with whom the judge is discussing or has discussed employment *or* on the ground that the judge will select a dispute resolution neutral or entity to conduct an alternative dispute resolution process in the matter before the judge, and among those available for selection is an individual or entity with whom the judge has the arrangement, has previously been employed or with whom the judge is discussing or has discussed employment.

"Participating in discussions" or "has participated in discussions" means that the judge solicited or otherwise indicated an interest in accepting or negotiating possible employment or service as an alternative dispute resolution neutral or responded to an unsolicited statement regarding, or an offer of, such employment or service by expressing an interest in

that employment or service, making any inquiry regarding the employment or service, or encouraging the person making the statement or offer to provide additional information about that possible employment or service. If a judge's response to an unsolicited statement regarding, a question about, or offer of, prospective employment or other compensated service as a dispute resolution neutral is limited to responding negatively, declining the offer, or declining to discuss such employment or service, that response does not constitute participating in discussions.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms for use in filing a motion to disqualify a judge for cause, see California Forms of Pleading and Practice, Ch. 317, *Judges* (Matthew Bender).

[c] Opposing Memoranda

In an appropriate case, the points and authorities *set out in § 130.68* may be used to oppose the motion supported by the foregoing points and authorities.

[3] Discussion of Authorities

[a] Prospective Employment or Discussion of Employment as Dispute Resolution Neutral

In ***Rossco Holdings, Inc. v. Bank of America*** *(2007) 149 Cal. App. 4th 1353, 58 Cal. Rptr. 3d 141* , the bank filed a motion to compel arbitration, the trial court granted it, and the case proceeded to arbitration. Thereafter, the parties filed cross-petitions to vacate and confirm the award. The trial judge disqualified himself under *Code Civ. Proc., § 170.1(a)(8)* because he had engaged in conversations with dispute resolution providers regarding possible employment. Those conversations occurred prior to the judge's ruling on the motion to compel arbitration. After the matter was transferred to a new judge, the trial court granted the trust's motion to vacate the order compelling arbitration, based on the disqualified judge's lack of authority to issue that order. The trial court also vacated the arbitration award.

The appellate court held that the disqualified judge was properly disqualified under *Code Civ. Proc. § 170.1* and that the order compelling arbitration was void. The good cause exception of *Code Civ. Proc., § 170.3(b)(4)*, did not apply because the disqualified judge knew of the disqualifying facts when he issued the order, even if he was unaware of their legal effect. The order vacating the arbitration award was premature, however, because the award was not necessarily improper (*149 Cal. App. 4th 1353, 1363)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral Overview

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13-130 California Points & Authorities § 130.68

§ 130.68 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Statement of Disqualification for Cause Properly Stricken [Code Civ. Proc. § 170.4(b)]--Statement Alleges No Facts or Insufficient Facts [Code Civ. Proc. § 170.4(b)]

[1] FORM

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA,
_____ APPELLATE DISTRICT
[DIVISION _____]

_____ [*name*], Petitioner,	)	
vs.	)	
THE SUPERIOR COURT OF THE STATE OF	)	
CALIFORNIA FOR THE [CITY AND] COUNTY	)	
OF _____,	)	NO. _____
and	)	MEMORANDUM IN OPPOSITION TO PETITION
_____ [*name*],	)	FOR WRIT OF MANDATE
THE JUDGE OF SAID COURT,	)	
Respondents,	)	
_____ [*name*(*s*)]	)	
Real _____ [Party *or* Parties] in In-	)	
terest.		

_____

THE COURT SHOULD NOT ISSUE A WRIT OF MANDATE TO PREVENT JUDGE _____ [*name*

] FROM PROCEEDING WITH THE CASE BECAUSE HE/SHE PROPERLY STRUCK THE STATEMENT OF DISQUALIFICATION ON THE GROUND THAT ON ITS FACE IT DISCLOSES NO LEGAL GROUNDS FOR THE JUDGE'S ALLEGED DISQUALIFICATION.

A. Statement Required to Set Forth Facts Constituting Ground for Disqualification. A written statement alleging a judge's disqualification for cause and objecting to the hearing or trial before that judge must set forth the facts constituting the grounds for disqualification of the judge (*Code Civ. Proc. § 170.3(c)(1)*).

B. Statement Setting Forth No Facts or Insufficient Facts as Properly Stricken. A challenged judge can strike a statement ofdisqualification from the record when the statement on its face discloses no legal grounds for the judge's alleged disqualification for cause pursuant to *Code of Civil Procedure Section 170.1* (*Code Civ. Proc. § 170.4(b)*; *see Bompensiero v. Superior Court (1955) 44 Cal. 2d 178, 183, 281 P.2d 250*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a petition for a writ of mandate to prevent a judge from proceeding with a case when the judge has stricken from the record a statement of disqualification for cause that on its face discloses no legal grounds for the judge's alleged disqualification [*see Code Civ. Proc. § 170.4(b)*].

In an appropriate case, the foregoing points and authorities may be submitted in opposition to the motion supported by the points and authorities *set out in §§ 130.60 -130.66*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Statement Setting Forth No Facts or Insufficient Facts as Properly Stricken

Bompensiero v. Superior Court *(1955) 44 Cal. 2d 178, 281 P.2d 250* , decided under prior law, involved a proceeding in prohibition before the Supreme Court in which petitioner challenged the jurisdiction of a superior court to try him on an indictment naming him as a public official who accepted bribes. Petitioner contended that the trial judge erred in striking from the record a statement disputing the qualification of the judge to rule on preliminary motions. The court of appeal noted that the ground of asserted disqualification was bias and prejudice against the petitioner and was allegedly demonstrated by two statements made by the judge while presiding over a separate trial of some of the other persons named in the indictment. In that proceeding, petitioner was called as a witness for the prosecution and refused to answer on the ground that his testimony might tend to incriminate him. Several other witnesses were called and claimed the same privilege. During arguments on a motion for a new trial, the trial judge remarked that he had believed the witnesses for the prosecution and expressed the opinion that persons who refused to testify on the grounds they might be incriminated should have their licenses revoked by the Board of Equalization. Petitioner asserted that he held a liquor license and thus was in the category referred to by the judge.

The court of appeal rejected petitioner's argument and denied the writ of prohibition, noting that the judge's remarks, made in a criminal prosecution in which petitioner was only indirectly involved and without indication that he was being singled out, showed so little basis for claiming personal bias or prejudice against petitioner as to justify the conclusion that the charge of disqualification was sham and frivolous. Thus, the trial judge was not in error in striking the statement and affidavit (*44 Cal. 2d 178, 183)* .

[4] Additional Authorities

[a] Statement Setting Forth No Facts or Insufficient Facts as Properly Stricken

In re Marriage of Lemen (1980) 113 Cal. App. 3d 769, 170 Cal. Rptr. 642 , decided under prior law, involved a dispute over deposition questions in a child support modification proceeding. The mother filed a motion to compel answers asked at the deposition of the father's accountant. She also moved to restrain concealment of evidence and requested sanctions against the father, the accountant, and the accountant's attorney. During the hearing on the motions, the accountant and his attorney filed declarations of bias against the judge, pursuant to former Code Civ. Proc. § 170(5) [*now see Code Civ. Proc. § 170.3(c)*]. The judge ordered that the declarations be stricken as untimely filed, because substantive issues in the matter had already been heard and determined. On the appeal by the accountant and his attorney, the court of appeal did not discuss the timeliness of the statements, but instead held that a judge may strike or ignore disqualification statements when they are legally insufficient to establish grounds for disqualification. Relying on *In re Morelli (1970) 11 Cal. App. 3d 819, 91 Cal. Rptr. 72* , discussed *below*, the court expressed the rule that the statement must allege relevant facts showing bias or prejudice. Legal conclusions, nonspecific transcript references, irrelevant facts, and judicial opinions are insufficient (*113 Cal. App. 3d 769, 789)* . Analyzing the statements submitted by the accountant and his attorney, the court held that, as they contained merely references to the judge's legal rulings, and the declarants' objections to those rulings, they were properly stricken (*113 Cal. App. 3d 769, 790-791)* .

In *In re Morelli (1970) 11 Cal. App. 3d 819, 91 Cal. Rptr. 72* , decided under prior law, petitioner sought a writ of habeas corpus before the court of appeal after being sentenced to five days in jail and a $500 fine for disobeying a subpoena to attend a deposition proceeding. Petitioner alleged, among other things, that the judge erred in striking his motion and papers to disqualify the judge. The court of appeal denied the petition for habeas corpus, holding in part that the judge was justified in striking the disqualification papers because such papers may be stricken from the files by the trial judge involved when all the papers contain are: conclusions; references to copious transcripts without citation to specific excerpts; allegations of facts not pertinent or appropriate to the issues to be determined in the hearing; material not legally indicative of bias or prejudice, such as judicial opinions expressed in the discharge of litigation and legal rulings; judicial reactions based on actual observance in participation in legal proceedings; and references to circumstances so inconsequential as to be no indication whatsoever of hostility and nonprobative of any bias and prejudice. The court concluded that the moving papers were inadequate and that the trial judge had the right to strike them. It was not necessary for another judge to pass on the trial court's qualification to sit on the contempt trial (*11 Cal. App. 3d 819, 843-850)* .

The facts and procedural background of *Agnew v. Contractors Safety Ass'n (1963) 216 Cal. App. 2d 154, 30 Cal. Rptr. 690* , are discussed in *§ 130.42[3][e]*. In *Agnew*, decided under prior law, plaintiff's declaration of bias and prejudice stated, in part, that plaintiff believed the judge to be biased and prejudiced against him and incapable of hearing the motion for a new trial impartially and fairly, that during the trial the judge had concealed from plaintiff that he was biased and prejudiced against plaintiff and that he held a fixed opinion as to plaintiff's credibility for truthfulness, that the judge had violated plaintiff's constitutional rights during the trial by refusing to allow plaintiff to enter certain evidence, and that the judge was biased and prejudiced against persons who appeared in propria persona. In affirming the order striking the declaration from the records, the court of appeal noted that a statement of disqualification that contains nothing but conclusions and sets forth no facts constituting a ground of disqualification may be ignored or stricken from the files by the judge (*216 Cal. App. 2d 154, 159)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral Overview

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B. DISQUALIFICATION FOR CAUSE

13-130 California Points & Authorities § 130.69

§ 130.69 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Statement of Disqualification for Cause Properly Stricken [Code Civ. Proc. § 170.4(b)]--Statement Not Timely [Code Civ. Proc. § 170.4(b)]

[1] FORM

[*Caption. See § 130.68[1].*]

THE COURT SHOULD NOT ISSUE A WRIT OF MANDATE TO PREVENT JUDGE _____ [*name*] FROM PROCEEDING WITH THE CASE BECAUSE HE/SHE PROPERLY STRUCK THE STATEMENT OF DISQUALIFICATION ON THE GROUND THAT _____ [*specify party that is seeking disqualification, e.g.,* PLAINTIFF] DID NOT PRESENT THE STATEMENT AT THE EARLIEST PRACTICABLE OPPORTUNITY AFTER DISCOVERY OF THE FACTS CONSTITUTING THE GROUND OF THE JUDGE'S ALLEGED DISQUALIFICATION.

A. Untimely Statement as Properly Stricken. Under *Code of Civil Procedure Section 170.3(c)(1)*, a written statement of disqualification must be presented by a party at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification. A challenged judge may properly order an untimely statement of disqualification stricken (*Code Civ. Proc. § 170.4(b)*; *see Shakin v. Board of Medical Examiners (1967) 254 Cal. App. 2d 102, 115, 62 Cal. Rptr. 274*).

B. Failure to Present Statement at Earliest Practicable Opportunity Constitutes Waiver. A written statement to disqualify a judge for cause must be asserted at the earliest practicable opportunity after a party learns of the ground therefor or it is deemed waived (*Tri Counties Bank v. Superior Court (2008) 167 Cal. App. 4th 1332, 1337-1338, 84 Cal. Rptr. 3d 835* ; *see Develop-Amatic Engineering v. Republic Mortgage Co. (1970) 12 Cal. App. 3d 143, 150, 91 Cal. Rptr. 193*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]

By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a petition for a writ of mandate to prevent a judge from proceeding with a case when the judge has stricken from the record a statement of disqualification for cause that is not presented by a party at the earliest practicable opportunity after discovery of the facts constituting the ground of the judge's alleged disqualification [*see Code Civ. Proc. §§ 170.3(c)(1), 170.4(b)*].

In an appropriate case, the foregoing points and authorities may be submitted in opposition to the motion supported by the points and authorities *set out in § 130.60*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Untimely Statement as Properly Stricken

Shakin v. Board of Medical Examiners *(1967) 254 Cal. App. 2d 102, 62 Cal. Rptr. 274* , decided under prior law, involved an appeal from a superior court judgment that denied petitioner doctor a writ of mandate to compel the Board of Medical Examiners to vacate and annul their order revoking the doctor's medical license. The appellate court affirmed the judgment.

Eleven days prior to the oral argument on the appeal, counsel for the doctor filed a notice of motion to disqualify the appellate judges on the ground of their bias and prejudice. Counsel filed a declaration alleging actions of the court occurring before and during the appeal, and subsequently, on the day calendared for oral argument, he filed a supplemental declaration. Both declarations were ordered stricken. The appellate court held that the declarations were not timely filed because they were not presented at the earliest practicable opportunity. The court noted that the membership of the court at the time of oral argument was identical to the membership of the court at the time the proceedings were first brought. Counsel should have instituted the proper disqualification proceedings several months before and should not have waited until just before the matter was calendared to be heard on oral argument (*254 Cal. App. 2d 102, 115)* .

[b] Failure to Present Statement at Earliest Practicable Opportunity Constitutes Waiver

In ***Tri Counties Bank v. Superior Court*** *(2008) 167 Cal. App. 4th 1332, 84 Cal. Rptr. 3d 835* , real parties in interest filed a class action cross-complaint against the bank. On August 21, 2007, the trial judge issued a tentative ruling granting real parties' motion for class certification. On April 1, 2008, the bank filed its statement of objection, seeking to disqualify the trial judge on the ground the judge had conducted an independent investigation of a factual issue material to the class certification motion, thereby creating the appearance of partiality. The appellate court concluded that the trial court properly struck the untimely disqualification claim because the bank delayed over seven months before asserting the alleged ground for disqualification. The bank knew all the facts on which it relied on August 21, 2007, when the trial court issued its tentative ruling granting the motion for class certification. However, it was not until after the bank lost that motion and appellate review thereof failed, a delay of over seven months, that it finally presented its disqualification motion. The instant court rejected the bank's contention that it was not practicable to pursue disqualification at an earlier time. The purpose of the requirement that alleged grounds for disqualification be asserted at

the earliest practicable opportunity is that "[i]t would seem ... intolerable to permit a party to play fast and loose with the administration of justice by deliberately standing by without making an objection of which he is aware and thereby permitting the proceedings to go to a conclusion which he may acquiesce in, if favorable, and which he may avoid, if not." In other words, "[a] party should not be allowed to gamble on a favorable decision and then raise such an objection in the event he is disappointed in the result." Consequently, if a party is aware of grounds for disqualification of a judge but waits until after a pending motion is decided to present the statement of objection, the statement may be stricken as untimely (*167 Cal. App. 4th 1332, 1337-1338)* .

Develop-Amatic Engineering v. Republic Mortgage Co. *(1970) 12 Cal. App. 3d 143, 91 Cal. Rptr. 193* , decided under prior law, involved a case in which a corporation sought to have a deed absolute in form declared to be a mortgage in fact and to quiet title to the real property involved. When judgment for defendant was entered, the corporation appealed and filed a motion for a new trial and at that point, for the first time, raised the bias and prejudice of the judge pursuant to former Code Civ. Proc. § 170(5) [*now see Code Civ. Proc. § 170.1(a)(6)*]. The corporation alleged that after the parties had made closing arguments, the court had stated, in verbalizing its decision, that it found the property value estimates adduced during trial difficult to believe and that it felt it would take "a lot of money" to make such property marketable. The court further stated that although it accepted a value of $900,000, it felt that was more than the property could or would be sold for. The corporation asserted that these statements indicated that the court had ignored the evidence adduced on the dispositive issue of the disparity between the fair market value of $900,000 and the $450,000 consideration for the conveyance and that, therefore, the court had not considered evidence strongly indicative that a mortgage rather than a sale was intended.

In affirming the judgment and denying the motion for new trial, the court of appeal held that the disqualification of a judge as provided by former Code Civ. Proc. § 170 [*now see Code Civ. Proc. §§ 170-170.5*] must be asserted at the "earliest practicable opportunity" after learning of the grounds therefor, otherwise it is deemed waived. Here, the corporation could have urged such disqualification at the time the court made the comments. In failing to do so, the corporation waived any claimed grounds of disqualification since it could not gamble on a favorable judgment and then move for disqualification upon receiving an adverse judgment (*12 Cal. App. 3d 143, 150)* .

[4] Additional Authorities

[a] Failure to Present Statement at Earliest Practicable Opportunity Constitutes Waiver

In *Lagies v. Copley (1980) 110 Cal. App. 3d 958* , decided under prior law, plaintiff brought an action against defendants for slander and for conspiracy to inflict emotional distress. Defendants demurred to the complaint. At the outset of the hearing on the demurrer, the trial judge informed the parties' attorneys that he was acquainted with plaintiff because plaintiff, a journalist, had interviewed the judge several years previously in connection with an article on traffic tickets. The judge asked if this bothered anyone. Defendants' counsel said that he was not bothered by this; plaintiff's counsel remained silent. The hearing then proceeded, and the trial judge sustained the demurrer. After receiving notice of the adverse ruling on the demurrer, plaintiff's counsel sought rehearing and a recusal by the judge. On appeal, plaintiff contended,among other things, that the judge should have disqualified himself before hearing the demurrer. The court of appeal rejected this contention, holding that plaintiff's motion was both untimely and without merit. The court noted that disqualification of a judge for bias under former Code Civ. Proc. § 170(5) [*now see Code Civ. Proc. § 170.1(a)(6)*] must be asserted at the earliest practicable opportunity after learning of the grounds therefor; otherwise, it is deemed waived. The court observed that in this case, plaintiff could have urged disqualification at the time the court made its comments, but had failed to do so. Accordingly, the court held, he had waived any claimed grounds of disqualification, since he could not gamble on a favorable ruling and then move for disqualification on receiving an adverse order (*110 Cal. App. 3d 958, 966)* . The court also found that plaintiff's contention lacked substance, because nothing in the record showed that the judge had a personal bias or prejudice concerning any party or a personal knowledge involving disputed evidentay facts involved in the proceedings (*110 Cal. App. 3d 958, 966)* . The court, however, reversed the judgment because it found that one of the counts of plaintiff's complaint stated a cause of action

for intentional infliction of emotional distress (*110 Cal. App. 3d 958, 969-974)* .

Lagies was disapproved on other grounds in *Brown v. Kelly Broadcasting Co. (1989) 48 Cal. 3d 711, 738 n.23, 257 Cal. Rptr. 708, 771 P.2d 406* .

Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 69 Cal. Rptr. 321, 442 P.2d 377 , decided under prior law, involved an action against insurers for money had and received, and for breach of contract. The superior court dismissed the action after sustaining demurrers to a second amended complaint without leave to amend after denying a motion to disqualify the judge pursuant to former Code Civ. Proc. § 170(4) [*now see Code Civ. Proc. § 170.1(a)(2)*], which requires disqualification when a judge has been employed as an attorney for a party within two years prior to commencement of the action or proceeding. Plaintiff appealed from the judgment of dismissal and the denial of the motion to disqualify. In reviewing the order, the Supreme Court noted that the judge had heard and ruled on demurrers to the first amended complaint when, prior to the hearing of the demurrers to the second amended complaint, plaintiff moved to disqualify the judge, which motion was denied. The Court did not decide the question regarding disqualification, but held that even if the judge were disqualified, plaintiff had waived the disqualification by failing to urge it at the earliest practicable opportunity after his counsel's discovery of the facts constituting the ground of the disqualification. Where the same judge had heard and ruled upon demurrers to plaintiff's first amended complaint two months before, it should have moved to disqualify him at that time (*68 Cal. 2d 822, 837-838)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral Overview

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13-130 California Points & Authorities § 130.70

§ 130.70 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--Motion to Disqualify Made After Commencement of Trial--Judge Has Discretion to Proceed With Trial [Code Civ. Proc. § 170.4(c)(2)]

[1] FORM

[*Caption. See § 130.37[1].*]

THE COURT SHOULD NOT ISSUE A WRIT OF MANDATE TO PREVENT JUDGE _____ [*name*] FROM PROCEEDING WITH TRIAL OF THE CASE BECAUSE _____ [*identify party that made motion, e.g.*, PLAINTIFF] DID NOT MAKE THE MOTION TO DISQUALIFY HIM/HER UNTIL AFTER TRIAL HAD COMMENCED, SO THAT JUDGE _____ [*name*] HAD DISCRETION TO PROCEED UNDER CODE OF CIVIL PROCEDURE SECTION 170.4(c)(1).

A. Motion Made After Commencement of Trial. If a statement of disqualification is filed after a trial or hearing has commenced by the start of voir dire, by the swearing of the first witness or by the submission of a motion for decision, the judge whose impartiality has been questioned may order the trial or hearing to continue, notwithstanding the statement of disqualification (*Code Civ. Proc. § 170.4(c)(1)*).

[*Optional*] **B. Ruling on Motions in Limine Constitutes Commencement of Trial.** Trial may commence under *Code of Civil Procedure section 170.4(c)(1)* before voir dire starts, and does commence when the parties have submitted motions in limine (*see Eckert v. Superior Court (1999) 69 Cal. App. 4th 262, 266, 81 Cal. Rptr. 2d 467*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a petition for a writ of mandate that seeks to prevent a judge fromproceeding with a case. The ground of opposition is that the judge properly ordered trial to proceed pending determination of the motion to disqualify by another judge, because the motion was made after trial commenced [*see Code of Civ. Proc. § 170.4(c)(1)*].

Optional Paragraph B may be used when counsel contends that the trial was commenced by the submission of motions in limine prior to the start of voir dire.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated, particularly identifying the dates of the event that began trial and the date of the motion to disqualify.

[3] Discussion of Authorities

[a] Ruling on Motions in Limine Constitutes Commencement of Trial

In ***Eckert v. Superior Court*** *(1999) 69 Cal. App. 4th 262, 81 Cal. Rptr. 2d 467* , after the judge had ruled on numerous motions in limine, but before the start of voir dire, plaintiff moved to disqualify the trial judge under *Code Civ. Proc. § 170.1(a)(6)(C)* on the ground that the judge's conduct and rulings demonstrated the clear appearance of bias and prejudice against plaintiff and plaintiff's counsel. Plaintiff also requested a stay of proceedings, pending a ruling on the disqualification motion by a second judge. The trial judge refused to stay the proceedings and proceeded with trial. Plaintiff petitioned for writ of mandate or prohibition.

The appellate court stayed the trial, denied plaintiff's subsequent petition challenging the second judge's decision denying the disqualification motion, and then lifted the stay. Although these events rendered moot the issue of whether the judge had properly proceeded to trial, the appellate court addressed the issue as an important one that was likely to recur (*69 Cal. App. 4th 262, 265)* .

The appellate court denied plaintiff's petition, holding that the trial court was within its discretion to proceed with the action, and that the judge properly proceeded with trial, since trial had "commenced" for purposes of *Code Civ. Proc. § 170.4(c)(1)*. In analyzing when trial commences for purposes of *Code Civ. Proc. § 170.4(c)(1)*, the court read "by the start of voir dire, by the swearing of the first witness or by the submission of a motion for decision," as being in the alternative. The court concluded that the event commencing trial in this case was the submission of motions in limine for the trial court's decision. The court found it abundantly clear that trial process had begun when the trial judge had ruled on numerous motions in limine, announced tentative decisions on others, discussed jury instructions, and determined compliance with pretrial orders (*69 Cal. App. 4th 262, 266)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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13-130 California Points & Authorities § 130.71

§ 130.71 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Statement of Disqualification for Cause Properly Stricken [Code Civ. Proc. § 170.4(b)]--Statement Alleges Judge Stockholder of Nonparty Corporation Without Otherwise Alleging Judge's Financial Interest in Litigation [Code Civ. Proc. § 170.1(a)(3)]

[1] FORM

[*Caption. See § 130.68[1].*]

THE COURT SHOULD NOT ISSUE A WRIT OF MANDATE TO PREVENT JUDGE _____ [*name*] FROM PROCEEDING WITH THE CASE BECAUSE HE/SHE PROPERLY STRUCK THE STATEMENT OF DISQUALIFICATION ON THE GROUND THAT THE STATEMENT MERELY ALLEGES THAT HE/SHE IS A STOCKHOLDER OF A NONPARTY CORPORATION, AND ALLEGES NO DIRECT AND IMMEDIATE INTEREST IN THE OUTCOME OF THE LITIGATION.

A. Statement Required to Set Forth Facts Constituting Ground for Disqualification. [*See § 130.68]1], Paragraph A.*]

B. Statement Setting Forth No Facts or Insufficient Facts as Properly Stricken. [*See § 130.68]1], Paragraph B.*]

C. Financial Interest Defined. "Financial interest," for the purpose of *Code of Civil Procedure Section 170.1(a)(3),* means ownership of more than a one percent legal or equitable interest in a party, or a legal or equitable interest in a party of a fair market value in excess of $1,500, or a relationship as director, advisor, or other active participant in the affairs of a party, except as follows:

(1) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in those securities unless the judge participates in the management of the fund;

(2) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(3) The proprietary interest of a policyholder in a mutual insurance company, or a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest (*Code Civ. Proc. § 170.5(b)*).

D. Judge as Stockholder of Nonparty Corporation Having No Direct Interest. A judge is not disqualified pursuant to *Code of Civil Procedure Section 170.1(a)(3)* when he/she is a stockholder in a corporation that is not and could not be made a party to the action when the judge does not otherwise have a direct and immediate interest in the outcome of the litigation (*see Central Pac. Ry. Co. v. Superior Court (1931) 211 Cal. 706, 719-720, 296 P. 883*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a petition for a writ of mandate to prevent a judge from proceeding with a case when the judge has stricken from the record a statement of disqualification for cause that alleges that a judge is a stockholder of a nonparty corporation and has no direct and immediate interest in the outcome of the litigation.

In an appropriate case, the foregoing points and authorities may be submitted in opposition to the motion supported by the points and authorities *set out in § 130.61*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, the foregoing points and authorities may be used to support a petition for a writ of mandate to compel a judge to hear a pending action when the judge's interest in the litigation is insufficient to merit disqualification [*see Nevada County v. Superior Court (1974) 10 Cal. 3d 663, 664, 111 Cal. Rptr. 568, 517 P.2d 832* (trial court had refused to exercise jurisdiction in an action in which validity of the Governmental Conflict of Interest Act (former Gov. Code § 3600 et seq.) was challenged)].

[3] Discussion of Authorities

[a] Judge as Stockholder of Nonparty Corporation Having No Direct Interest

Central Pac. Ry. Co. v. Superior Court *(1931) 211 Cal. 706, 296 P. 883* , decided under prior law, involved a proceeding before the Supreme Court in which a writ of mandate was issued to compel a judge to proceed with the trial of an action. Defendant had filed a statement of disqualification during the trial of an eminent domain action, and defendant's attorney filed a verified statement alleging the judge's disqualification by reason of his ownership during the pendency of the action of stock of the Transamerica Corporation, which was a holding company owning substantially all the stock in Bank of Italy, the codefendant in the eminent domain action. The Court held that the judge was not disqualified and stated that, had the Transamerica Corporation been made a party to the original action, the situation

would doubtless have been directly covered by the provisions of former Code Civ. Proc. § 170 [*now see Code Civ. Proc. §§ 170.1(a)(3), 170.5(b)*]. But the fact was that whatever the relationship thus alleged to exist between Transamerica Corporation and Bank of Italy might be, the former corporation was not a party to the action, and thus did not come within the purview of the statute. Neither did the Court believe that the situation as thus presented could in any event constitute a disqualification under the well settled rule that the alleged disqualifying interest must appear to be an immediate and direct interest in the outcome of the litigation (*211 Cal. 706, 719-720)* .

[4] Additional Authorities

[a] Judge as Stockholder of Nonparty Corporation Having No Direct Interest

Goodspeed v. Great Western P. Co. (1937) 19 Cal. App. 2d 435, 65 P.2d 1342 , decided under prior law, involved an appeal from a superior court order denying a motion for a change of venue in consolidated cases. The complaints in each case charged fraud committed by the same false representation. Appellants argued that the judge owned stock in two banks that were in the class of those injured by the alleged false representations made by defendant and, as such, had an interest in the outcome of the actions and should be disqualified under former Code Civ. Proc. § 170(2) [*now see Code Civ. Proc. § 170.1(a)(3)*]. In holding that the facts did not establish a disqualifying interest, the court noted that although many cases were consolidated, none was a true class action. Further, neither the judge nor the banks in which he held stock could intervene or directly profit from the judgment in any of the consolidated cases. The court concluded that an interest in the case at bar is not established merely by the fact thatsomeone has a similar and separate cause of action arising in part from the same facts as the case at bar. The court stated that interest means a definite, material, and financial stake in the direct outcome of a particular case. It does not mean an interest in a similar suit against the same or other defendants nor does it mean an interest in a point of law as such, or in an issue of fact as such, or in any general or special phase of the case (*19 Cal. App. 2d 435, 444-445)* . The court affirmed the orders denying the motion for a change of venue (*19 Cal. App. 2d 435, 452)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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13-130 California Points & Authorities § 130.72

§ 130.72 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 170.3(d), 1085, 1086]--To Prevent Judge From Proceeding With Case--Statement of Disqualification for Cause Properly Stricken [Code Civ. Proc. § 170.4(b)]--Statement Alleges Facts Insufficient to Establish Inability to be Impartial [Code Civ. Proc. § 170.1(a)(6)]

[1] FORM

[*Caption. See § 130.68[1].*]

THE COURT SHOULD NOT ISSUE A WRIT OF MANDATE TO PREVENT JUDGE _____ [*name*] FROM PROCEEDING WITH THE CASE BECAUSE HE/SHE PROPERLY STRUCK THE STATEMENT OF DISQUALIFICATION ON THE GROUND THAT THE FACTS IT ALLEGES ARE INSUFFICIENT TO ESTABLISH HIS/HER INABILITY TO BE IMPARTIAL.

A. Statement Required to Set Forth Facts Constituting Ground for Disqualification. [*See § 130.68]1], Paragraph A.*]

B. Statement Setting Forth No Facts or Insufficient Facts as Properly Stricken. [*See § 130.68]1], Paragraph B.*]

[*Optional*] **C. Statutory Exclusions.** A judge will not be considered unable to be impartial or otherwise disqualified for the following grounds:

(1) The judge is or is not a member of a racial, ethnic, religious, sexual, or similar group, and the proceeding involves the rights of such a group;

(2) The judge has in any capacity expressed a view on a legal or factual issue presented in the proceeding, except as provided in *Code of Civil Procedure Section 170.1(a)(2), (b),* or *(c)*;

(3) The judge has as a lawyer or public officer participated in the drafting of laws or in the effort to pass or defeat laws, the meaning, effect, or application of which is in issue in the proceeding unless the judge believes that his or her prior

involvement was so well known as to raise a reasonable doubt in the public mind about his or her capacity to be impartial (*Code Civ. Proc. § 170.2*).

[*Optional*] **D. Adverse State of Mind Based on Observation of Witnesses and Evidence.** When a judge's state of mind is adverse to one of the parties but the adversity is based on actual observance of the witnesses and the evidence given during the trial, it does not amount to that inability to be impartial that disqualifies a judge (*see Code Civ. Proc. § 170.1(a)(6)*; *Kreling v. Superior Court (1944) 25 Cal. 2d 305, 312, 153 P.2d 734*).

[*Optional*] **E. Adverse State of Mind Based on Observation of Witnesses and Evidence in Trial at Which Motion for New Trial Directed.** A judge is not disqualified for inability to be impartial from hearing a motion for a new trial when his/her state of mind appears to be adverse to a litigant but the adversity is based on actual observance of the witnesses and the evidence given during trial (*see Code Civ. Proc. § 170.1(a)(6)*; *Dietrich v. Litton Industries, Inc. (1970) 12 Cal. App. 3d 704, 718-719, 90 Cal. Rptr. 856*).

[*Optional*] **F. Opinion Expressed in Discharge of Litigation.** An opinion expressed by a judge in the discharge of his/her official duty is not evidence of a disqualifying inability to be impartial (*see Code Civ. Proc. § 170.1(a)(6)*; *In re Morelli (1970) 11 Cal. App. 3d 819, 843, 91 Cal. Rptr. 72*).

[*Optional*] **G. Error on Question of Law.** A judge's errors on questions of law, no matter how gross, do not constitute an inability to be impartial or a disqualification to proceed with the trial of the case in which the errors are made (*see Code Civ. Proc. § 170.1(a)(6)*; *Mackie v. Dyer (1957) 154 Cal. App. 2d 395, 400, 316 P.2d 366*).

[*Optional*] **H. Objective Standard of Impartiality.** *Code of Civil Procedure Section 170.1(a)(6)(C)*, which provides that a judge must be disqualified if a reasonable person would entertain doubts concerning the judge's impartiality, establishes an objective standard. This standard indicates that the decision on disqualification should be based, not on the judge's personal view of his own impartiality, nor on the litigant's necessarily partisan views, but on consideration of how the judge's participation looks to the average person on the street. In addition, the facts and circumstances bearing on the judge's possible partiality must be considered as of the time the motion is brought (*Stanford University v. Superior Court (1985) 173 Cal. App. 3d 403, 407-408, 219 Cal. Rptr. 40*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a petition for a writ of mandate to prevent a judge from proceeding with a case when the judge has stricken from the record a statement of disqualification that alleges facts insufficient to establish a disqualifying inability to be impartial within the meaning of *Code Civ. Proc. § 170.1(a)(6)* [*see United Farm Workers of America v. Superior Court (1985) 170 Cal. App. 3d 97, 104, 216 Cal. Rptr. 4* (discussed in *§ 130.66[3*][a])].

In an appropriate case, the foregoing points and authorities may be submitted in opposition to the motion supported by the points and authorities *set out in § 130.66*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

[i] Oppose Proceedings to Set Aside Orders Made by Judge

With appropriate modifications, this memorandum may be used to oppose a motion to vacate and set aside an order allegedly void when the order was entered by a judge allegedly disqualified for inability to be impartial [*see Ensher, Alexander & Barsoom v. Ensher (1964) 225 Cal. App. 2d 318, 322, 37 Cal. Rptr. 327]* , or to support a demurrer to an action in equity to vacate and set aside such a judgment [*see Haldane v. Haldane (1965) 232 Cal. App. 2d 393, 394, 42 Cal. Rptr. 828]* . It should be noted that opposition to a motion to vacate and set aside an order as allegedly void because of disqualification may now be based on a ground other than that exemplified by this memorandum. A disqualified judge retains the power to issue certain orders under *Code Civ. Proc. § 170.4* [*Code Civ. Proc. § 170.4(d)*]. Additionally, if the grounds for disqualification were first learned of or arose after the disqualified judge made one or more rulings in the proceeding but before the final disposition, the replacement judge may vacate such rulings only for good cause [*Code Civ. Proc. § 170.3(b)(4)*].

[ii] Financial Interests Not Covered by Code of Civil Procedure Section 170.1(a)(3)

With appropriate modifications, the foregoing points and authorities may also be used to oppose an argument that an interest that was disqualifying under former Code Civ. Proc. § 170 but that is not now covered as a disqualifying "financial interest" within the meaning of *Code Civ. Proc. §§ 170.1(a)(3)* and *170.5(b)* is nonetheless disqualifying under *Code Civ. Proc. § 170.1(a)(6),* because the nature of the interest gives rise to a reasonable doubt that the judge would be able to be impartial [*see § 130.66[2*][b][ii], and § 130.61[3][a]]. The basis for opposition would be that the statement of disqualification does not sufficiently establish an interest that would have been disqualifying under former Code Civ. Proc. § 170 and therefore does not establish the type of interest that would give rise to reasonable doubts about the judge's ability to be impartial [*see, e.g., Cuyamaca Water Co. v. Superior Court (1924) 193 Cal. 584, 591-592, 226 P. 604* (judges living in city of San Diego, which brought action to quiet title to its use of waters of San Diego River, held to have no direct or immediate disqualifying interest as residents of city); *Central & W. Basin Water etc. Dist. v. Wong (1976) 55 Cal. App. 3d 191, 195, 127 Cal. Rptr. 448* (judge residing in water district, against which action was brought to increase rates of certain users, not disqualified by indirect interest as water district user)].

[c] Related Pleading and Practice Forms

For forms for use in an action to vacate and set aside a void order, see Ch. 371, *Motions After Trial* and Ch. 489, *Relief From Judgments and Orders* in California Forms of Pleading and Practice (Matthew Bender). For forms for use in actions involving demurrers, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

[d] Related Memoranda

For memoranda for use in filing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Adverse State of Mind Based on Observation of Witnesses and Evidence

Kreling v. Superior Court *(1944) 25 Cal. 2d 305, 153 P.2d 734* , decided under prior law, was a proceeding before the Supreme Court for a writ ofprohibition to restrain a superior court judge from hearing further proceedings in a controversy that arose out of a lease of a gasoline station. The controversy involved four cases that had all been set for

trial at the same time before the same court. By agreement of all parties, the cases were to be tried in a certain order suggested by petitioner. All evidence introduced in one case was to be considered in the other cases. Respondent had filed an affirmative defense in each of the four cases that was sustained by Judge M in the first case and was, therefore, decisive of each of the four cases. At that point, petitioner filed a motion to disqualify Judge M from hearing the remaining three cases charging that the language used in his decision in the first case demonstrated his bias and prejudice against petitioner. Judge M filed a counter affidavit in opposition to the motion and the question of disqualification was tried before another judge who denied the motion. Thereupon, the remaining three cases were transferred to Judge M for hearing. Petitioner instituted a proceeding in the court of appeal for a writ of prohibition against Judge M and the court issued a peremptory writ. Thereafter, on respondents' petition, the proceeding was transferred to the Supreme Court.

The Court stated that it is the trial judge's duty to consider and pass on the evidence produced before him or her, and when the evidence is in conflict, to resolve that conflict in favor of the party whose evidence outweighs that of the opposing party. Thus, the Court held that when the state of mind of a judge is adverse to one of the parties, but is based on actual observance of the witnesses and the evidence given during trial, it does not amount to that bias or prejudice against a litigant that would disqualify the judge pursuant to former Code Civ. Proc. § 170(5) [*now see Code Civ. Proc. § 170.1(a)(6)*]. The writ of prohibition was denied (*25 Cal. 2d 305, 312)* .

[b] Adverse State of Mind Based on Observation of Witnesses and Evidence in Trial at Which Motion for New Trial Directed

Dietrich v. Litton Industries, Inc. *(1970) 12 Cal. App. 3d 704, 90 Cal. Rptr. 856* , decided under prior law, involved a libel action after the trial of which five other cases involving the same parties and others arising out of the same general background were to be tried before the same judge and jury. In the original libel action, the jury returned a verdict for plaintiff whereupon the judge granted a mistrial as to the other five cases, stating his opinion that the preponderance of the evidence favored defendants and that it would be useless to go through another phase of the suit knowing he would have to grant a new trial on motion. Counsel for plaintiff moved to disqualify the judge on the ground of bias and prejudice pursuant to former Code Civ. Proc. § 170(5) [*now see Code Civ. Proc. § 170.1(a)(6)*] based on this and other statements of the judge and his rulings before and during trial. At a hearing, however, it was determined that the judge was not disqualified, and subsequently judgment was entered for defendants notwithstanding the verdict and a new trial was ordered in the event that the judgment should be reversed on appeal.

When plaintiff appealed, the court reversed the judgment notwithstanding the verdict and affirmed the order granting new trial. The court rejected plaintiff's contention that the judge was disqualified as a matter of law and held that the judge's expression of an opinion as to the weight of the evidence after the verdict came in and before the motion for a new trial had been made and argued did not establish bias or prejudice. The court noted that in this case circumstances made it necessary for the trial judge to state what he had in mind before the motion for a new trial was heard. Feeling as he did about the verdict, and his duty to set it aside on motion, he could not go ahead with the trials of the consolidated cases before this same jury, nor could he, in fairness, conceal his thoughts and keep the jurors impaneled but idle until it was time to rule on the motion for new trial (*12 Cal. App. 3d 704, 718-719)* .

[c] Opinion Expressed in Discharge of Litigation

The factual background of ***In re Morelli*** *(1970) 11 Cal. App. 3d 819, 91 Cal. Rptr. 72* , decided under prior law, is discussed in *§ 130.68[4][a]*. In that case, in reviewing the contempt proceedings on a petition for habeas corpus, the appellate court held that the judge was justified in striking the disqualification papers from the record because they were inadequate. The disqualification papers alleged that at one point in the proceeding when the trial court endeavored to set a time for a hearing, but petitioner's attorney indicated that another issue would have to be resolved first, the trial court stated that such an approach demonstrated evasiveness and procrastination that the contemner had engaged in previously. The trial court also continued the pending matters and issued another warrant to retain jurisdiction stating

that it was faced with every kind of technicality and the trial court stated that if it could not execute three bench warrants at a university (where the contemnor, an expert witness, taught), what hope was there to reach a felon by a bench warrant. The appellate court stated that these examples were judicial opinions expressed by the judge in the discharge of the litigation and the legal rulings and that such evidence is not legally indicative of bias or prejudice (*11 Cal. App. 3d 819, 843)* .

[d] Error on Question of Law

Mackie v. Dyer *(1957) 154 Cal. App. 2d 395, 316 P.2d 366* , decided under prior law, involved an action for false imprisonment brought against a superior court judge. The appellate court affirmed a judgment dismissing the action entered after a demurrer to the complaint. Plaintiff had beengranted probation in a prior action heard by the judge. When proceedings to revoke probation were commenced, plaintiff filed a statement to disqualify the judge for bias or prejudice pursuant to former Code Civ. Proc. § 170(5) [*now see Code Civ. Proc. § 170.1(a)(6)*]. The judge ignored the statement, heard the revocation proceeding, and revoked plaintiff's probation. Plaintiff contended that the judge lacked jurisdiction to hear the revocation matter after the statement of disqualification was filed and was, therefore, personally responsible in damages for false imprisonment of plaintiff on revocation of his probation. In rejecting plaintiff's argument and sustaining the judgment dismissing the action, the appellate court noted that the only facts set forth as evidence of the judge's bias or prejudice were his rulings in the criminal action on a motion for continuance, on a motion for change of venue, and on objections to the manner of drawing and summoning a jury panel. The court said that a judge's errors on questions of law, no matter how gross, do not constitute bias or prejudice or a disqualification to proceed with the trial of the case in which the errors are made. Erroneous rulings against a litigant, even when numerous and continuous, form no ground for a charge of bias or prejudice, especially when they are subject to review (*154 Cal. App. 2d 395, 400)* .

[e] Objective Standard of Impartiality

In ***Stanford University v. Superior Court*** *(1985) 173 Cal. App. 3d 403, 219 Cal. Rptr. 40* , plaintiff brought three actions against a university and other defendants that challenged certain development projects on the university's campus. In 1984, Judge Thompson ordered the dismissal of two of the actions after he had sustained general demurrers without leave to amend. Plaintiff then filed a declaration under *Code Civ. Proc. § 170.3(c)(1)* to disqualify Judge Thompson and moved to vacate his pretrial orders. Plaintiff alleged that Judge Thompson had been president of the university's Law Society from 1964 to 1972, and therefore a third person might reasonably question his ability to be impartial in any action involving the university. Judge Thompson filed an answer under *Code Civ. Proc. § 170.3(c)(3)*, in which he acknowledged serving as president of a local chapter of the university's Law Society from 1969 to 1971, and in which he also acknowledged serving as a member of the Board of Visitors of the university's Law School from 1969 to 1972. He denied, however, any deeper or subsequent involvement in the university's affairs other than his attendance at alumni gatherings. A second judge, assigned pursuant to *Code Civ. Proc. § 170.3(c)(5), (6)*, determined that Judge Thompson was disqualified under *Code Civ. Proc. § 170.1(a)(6)(C)*. A third judge denied plaintiff's motion to vacate Judge Thompson's prior orders. Defendant university petitioned for a writ of mandate under *Code Civ. Proc. § 170.3(d)* to review Judge Thompson's disqualification, and plaintiff sought review of the order denying her motion to vacate Judge Thompson's orders.

The court of appeal issued a peremptory writ of mandate, directing the trial court to vacate its order of disqualification and to enter a new order declaring that Judge Thompson was not disqualified (*173 Cal. App. 3d 403, 409)* . The court, quoting *United Farm Workers of America v. Superior Court (1985) 170 Cal. App. 3d 97, 216 Cal. Rptr. 4* , discussed in *§ 130.66[3][a]*, stated that the standard established by *Code Civ. Proc. § 170.1(a)(6)(C)*, which provides that a judge must be disqualified if a reasonable person would entertain doubts concerning the judge's impartiality, is an objective one. Under this standard, the decision on disqualification should be based, not on the judge's personal view of his own impartiality, nor on the litigant's necessarily partisan views, but on consideration of how the judge's participation looks to the average person on the street. In addition, the facts and circumstances bearing on the judge's possible partiality

must be considered as of the time the motion is brought (*173 Cal. App. 3d 403, 407-408)* . The court noted that 13 years had elapsed since Judge Thompson's last prominent involvement in two Law School alumni activities before plaintiff brought her motion to disqualify. The court concluded that, as a matter of law, an average person on the street would find that these activities were so remote and so unrelated to the university's land management as to raise no doubts about Judge Thompson's ability to be impartial in the matter (*173 Cal. App. 3d 403, 408)* . Since Judge Thompson was not disqualified, plaintiff's contention that his orders should have been vacated was moot (*173 Cal. App. 3d 403, 409)* .

[4] Additional Authorities

[a] Adverse State of Mind Based on Observation of Witnesses and Evidence

The court of appeal in *Jack Farenbaugh & Son v. Belmont Construction, Inc. (1987) 194 Cal. App. 3d 1023, 240 Cal. Rptr. 78* , affirmed an amended judgment against the defendant corporate contractor and its president and major shareholder. After entry of the original judgment, plaintiff discovered, on examination of the corporate defendant's president and majority shareholder, that defendant corporation had no assets and no bank account. Plaintiff then successfully moved to amend the judgment to include that individual as a judgment debtor. One of appellant's contentions on appeal was that the judge who had also been the trial judge was disqualified to hear the motion to amend the judgment, on which the plaintiff had to prove that the individual to be added as a judgment debtor controlled the initial litigation (*194 Cal. App. 3d 1023, 1029)* . At the hearing on the motion to amend the judgment, the judge noted that plaintiff's attorney's declaration coincided with its own recollection of the trial that the individual defendant testified, counseled with the corporation's attorney, and figured very prominently in the original trial (*194 Cal. App. 3d 1023, 1030-1031)* . The court of appeal said that the trial court's personalobservations and their use in determining the motion were proper. Expressions of opinions by a judge disclosing a state of mind adverse to one party do not amount to prejudice and are not grounds for disqualification under *Code Civ. Proc. § 170.1(a)(6)* if based on actual observation of the witnesses and the evidence given during the trial (*194 Cal. App. 3d 1023, 1031-1032)* [*see also Code Civ. Proc. § 170.2(b)*].

In *Haldane v. Haldane (1965) 232 Cal. App. 2d 393, 42 Cal. Rptr. 828* , decided under prior law, the court of appeal affirmed a superior court judgment dismissing an action in equity to set aside an interlocutory divorce decree on the grounds that the judge was so biased and prejudiced against the then defendant as to deny him a fair trial. The allegations of bias and prejudice included the fact that, at the time the divorce suit came before the judge, he had shuttled the parties back and forth between his chambers and the court room and that unknown to then defendant Haldane, the judge developed a violent prejudice and bias against him which disqualified the judge from deciding the case at all. Further, the complaint alleged that the judge had prejudged the case, and had erroneously granted an interlocutory decree on the weak testimony of an ill and distraught woman. The court sustained the superior court's demurrer to the complaint to set the decree aside holding that the prejudice which the trial judge was alleged to have formed against defendant was one which arose out of the proceeding of the action itself and was, therefore, not sufficient to disqualify the judge from hearing the case then before him (*232 Cal. App. 2d 393, 395-396)* .

[b] Opinion Expressed in Discharge of Litigation

In re Marriage of Lemen (1980) 113 Cal. App. 3d 769, 170 Cal. Rptr. 642 , is discussed in *§ 130.68[4][a]*.

Ensher, Alexander & Barsoom v. Ensher (1964) 225 Cal. App. 2d 318, 37 Cal. Rptr. 327 , decided under prior law, involved an appeal from denial of a motion to vacate and set aside a judgment declaring defendant to be the constructive trustee of certain real property. The appellate court reversed and remitted the case to the trial court. Both parties petitioned for a hearing before the Supreme Court and, while the petition was pending, the governor announced the appointment to state office of the judge who had heard the case in the trial court. Counsel for defendant wrote the judge requesting him to delay his resignation so that he could handle further proceedings in compliance with the remittitur if

the Supreme Court failed to grant a hearing. The judge agreed to delay his resignation and, on the same day the Supreme Court denied the petition for rehearing and remitted the case to the trial court, plaintiff filed a statement of disqualification against the judge because of bias and prejudice. The statement alleged the appointment to state office and the judge's signed affidavit in which he stated that he was willing to accept the personal sacrifice involved in deferring his resignation but that he was concerned that further delays might interfere with his new role as a state officer. The judge ordered the statement of disqualification stricken from the record, entered proposed findings and judgment for defendant, and resigned his office as judge. Plaintiff filed notice of motion for an order to vacate and set aside the judgment alleging that all proceedings were void because the judge was disqualified and was, therefore, without jurisdiction to act. A hearing on the motion to vacate was held before a judge who denied it and a second appeal followed. The appellate court rejected plaintiff's contention that the judge was biased and prejudiced pursuant to former Code Civ. Proc. § 170(5) [*now see Code Civ. Proc. § 170.1(a)(6)*] noting that plaintiff's statement of disqualification failed to allege any facts from which an inference of bias or prejudice by the judge toward plaintiff could be drawn. At most, the statement showed that the judge would be unable to continue with the case if further matters would be lengthy. Nor was there merit to plaintiff's contention that because the judge felt he had to accept his new position as soon as possible, he was disposed toward denying plaintiff's motion without a fair consideration of the merits so that further proceedings would not delay his resignation as judge. The court upheld the denial of the motion to vacate (*225 Cal. App. 2d 318, 322-323)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral Overview

California Points & Authorities

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§ 131.20 Supporting Motion for Entry of Judgment Nunc Pro Tunc or for Correction of Record of Judgment to Show Entry Nunc Pro Tunc

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Inherent Power to Enter Nunc Pro Tunc

[b] Ground for Antedating Entry Nunc Pro Tunc

[c] Entry Nunc Pro Tunc of Order Made but Not Entered

[d] Antedating as Justice Requires

[e] Antedating Entry to Date Prior to Party's Death

[4] Additional Authorities

[a] Inherent Power to Enter Nunc Pro Tunc

[b] Ground for Antedating Entry Nunc Pro Tunc

[c] Antedating as Justice Requires

§ 131.21 Supporting Motion for Entry of Judgment Pursuant to Terms of Stipulated Settlement [Code Civ. Proc. § 664.6]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Entry of Judgment Pursuant to Stipulated Settlement

[b] Power to Enforce Settlement Between Parties Who Are Not Adversaries Under Pleadings

[c] Motion for Entry of Judgment Proper to Confirm Oral Settlement Agreement

[4] Additional Authorities

[a] Entry of Judgment Pursuant to Stipulated Settlement

§ 131.22 Supporting Motion for Entry of Judgment Pursuant to Acceptance of Statutory Settlement Offer [Code Civ. Proc. § 998]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Counteroffer Does Not Preclude Acceptance of Statutory Settlement Offer

[b] Service by Mail Extends Time to Accept Statutory Settlement Offer

§ 131.23 Opposing Motion for Entry of Judgment Nunc Pro Tunc or for Correction of Record of Judgment to Show Entry Nunc Pro Tunc

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Declaring as Done What Was Not Done

[b] Nunc Pro Tunc Correction Unconscionable

[c] Antedating Before Jury Instructed and Verdict Reached

[d] Antedating When Verdict in One Phase Reached

[e] Nunc Pro Tunc May Not Alter Judgment

§ 131.24 Opposing Motion for Entry of Judgment Pursuant to Terms of Settlement [Code Civ. Proc. § 664.6]--Stipulated Settlement Was Oral But Not Entered Before Court, or Was Written But Not Signed by Parties

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Stipulation Must Be Orally Entered Before Court or Written and Signed

[b] Oral Agreement Made at Deposition Insufficient

[c] Oral Agreement Before Non-Adjudicative Mediator Insufficient

[d] Agreement by Attorney Insufficient

[4] Additional Authorities

[a] Stipulation Must Be Orally Entered Before Court of Written and Signed

[b] Agreement by Attorney Insufficient

§ 131.25 Opposing Motion for Entry of Judgment Pursuant to Terms of Settlement [Code Civ. Proc. § 664.6]--No Litigation Pending When Settlement Executed

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Litigation Must Be Pending When Agreement Executed

§ 131.26 Opposing Motion for Entry of Judgment Pursuant to Terms of Settlement [Code Civ. Proc. § 664.6]--Action Was Dismissed and Parties Did Not Properly Request Continuing Jurisdiction

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Parties Must Properly Request Continuing Jurisdiction Before Action Is Dismissed

§ 131.27 Opposing Motion for Entry of Judgment Pursuant to Terms of Settlement [Code Civ. Proc. § 664.6]--Provision of Settlement Agreement Is Invalid

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Court Cannot Enforce Settlement Agreement or Provision of Agreement That Is Invalid

§§ 131.28-131.39 [Reserved]

§ 131.40 Supporting Motion to Correct Clerical Error in Judgment [Code Civ. Proc. § 473(d)]--Court's Power to Correct Clerical Error--Inherent or Statutory [Code Civ. Proc. § 473(d)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Power to Correct Prior to Entry

[b] Power to Modify in Ruling on Motion for New Trial

[c] Inherent Power to Correct

[d] Duty to Correct Error

[e] Correction at Any Time

[f] Correction Following Appeal

[4] Additional Authorities

[a] Inherent Power to Correct

§ 131.41 Supporting Motion to Correct Clerical Error in Judgment [Code Civ. Proc. § 473(d)]--Court's Power to Correct Clerical Error--Power to Determine Character of Error as Clerical

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Forms

[3] Discussion of Authorities

[a] Power to Determine Character of Error

[4] Additional Authorities

[a] Power to Determine Character of Error

§ 131.42 Supporting Motion to Correct Clerical Error in Judgment [Code Civ. Proc. § 473(d)]--Court's Power to Correct Clerical Error--Determining if Error Was Clerical

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Forms

[3] Discussion of Authorities

[a] Distinction Between Clerical and Judicial Error

[b] Competent Evidence of Clerical Error

[c] Judgment Failing to Express Judicial Intent

[d] Inadvertent Omissions

[e] Error as Result of Inadvertence

[f] Misdescription

[g] Clarification

[h] Judge's Signature to Findings Does Not Establish Error as Judicial

[i] Weight Given to Judge's Declaration of Intent

[j] Judgment Failing to Conform to Decision

[k] Trial Court's Finding Based on Conflicting Evidence

[l] Judge's Knowledge and Recollection of Facts

[m] Inadvertent Judgment in Excess of Amount Limited by Law

[4] Additional Authorities

[a] Competent Evidence of Clerical Error

[b] Judgment Failing to Express Judicial Intent

[c] Judgment Failing to Conform to Decision

§ 131.43 Supporting Motion to Correct Clerical Error in Judgment [Code Civ. Proc. § 473(d)]--Court's Power to Correct Clerical Error--Power to Antedate Record of Judgment Nunc Pro Tunc

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Forms

[3] Discussion of Authorities

[a] Grounds for Antedating Nunc Pro Tunc

[b] Order Proper Regardless of Lapse of Time

[4] Additional Authorities

[a] Grounds for Antedating Nunc Pro Tunc

[b] Order Proper Regardless of Lapse of Time

§ 131.44 Opposing Motion to Correct Clerical Error in Judgment [Code Civ. Proc. § 473(d)]--Presumption of Judgment's Correctness and Regularity

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Presumption That Judgment Was One Intended

[b] Burden of Proving Clerical Error

§ 131.45 Opposing Motion to Correct Clerical Error in Judgment [Code Civ. Proc. § 473(d)]--Judgment Not Subject to Correction--Judicial Error

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Correcting Judicial Error

[b] Judicial Error Under Guise of Clerical Error

[c] Judicial Error Defined

[d] Misconstruction of Facts

[e] Misconstruction or Misapplication of Law

[f] Court Misled by Counsel

[g] Enlargement of Original Decision

[4] Additional Authorities

[a] Judicial Error Under Guise of Clerical Error

§ 131.46 Opposing Motion to Correct Clerical Error in Judgment [Code Civ. Proc. § 473(d)]--Judgment Not Subject to Correction Absent Showing of Clerical Error

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Correction Only as Statute Prescribes

[b] Original Judgment Was One Intended

[c] Correction Only to Conform to Truth

[d] Truth Ascertained From Court's Intention

[e] Mere Recital of Clerical Error Not Conclusive

[f] Insufficient Showing of Clerical Error

[4] Additional Authorities

[a] Correction Only as Statute Prescribes

§§ 131.47-131.59 [Reserved]

§ 131.60 Supporting Application for Leave to Intervene in Judgment Debtor's Cause of Action [Code Civ. Proc. § 708.430(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Intervention Should Be Allowed Unless It Will Disrupt Lawsuit or Change Positions of Original Parties

§ 131.61 Opposing Application for Leave to Intervene in Judgment Debtor's Cause of Action [Code Civ. Proc. §

708.430(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Forms

[3] Discussion of Authorities

[a] Intervention Not Required

§§ 131.62-131.79 [Reserved]

Scope

§ 131.80 Supporting Motion to Vacate Judgment [Code Civ. Proc. § 1710.40(b)] Entered Pursuant to Sister State Money Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

§ 131.81 Supporting Motion to Vacate Judgment [Code Civ. Proc. § 1710.40(b)] Entered Pursuant to Sister State Money Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]--Sister State Judgment Not Final and Unconditional

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Final Judgment Requirement

[b] Law Controlling Validity and Finality

§ 131.82 Supporting Motion to Vacate Judgment [Code Civ. Proc. § 1710.40(b)] Entered Pursuant to Sister State Money Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]--Jurisdiction of Sister State Court--Lack of Jurisdiction to Render Judgment

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Sister State Court Having No Jurisdiction

[b] Judgment in Excess of Jurisdiction

[c] Attacking Judgment Exceeding Statutory Limits on Relief

[d] Judgment Not Entitled to Enforcement as Matter of Comity

[4] Additional Authorities

[a] Sister State Court Having No Jurisdiction

[b] Judgment in Excess of Jurisdiction

[c] Attacking Judgment Exceeding Statutory Limits on Relief

§ 131.83 Supporting Motion to Vacate Judgment [Code Civ. Proc. § 1710.40(b)] Pursuant to Sister State Money Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]--Jurisdiction of Sister State Court Subject to Attack for Extrinsic Fraud

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Extrinsic Fraud Re Jurisdiction

[4] Additional Authorities

[a] Grounds for Motion

§ 131.84 Supporting Motion to Vacate Judgment [Code Civ. Proc. § 1710.40(b)] Entered Pursuant to Sister State Money Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]--Judgment Not Enforceable in State Where Rendered to Extent Plaintiff Seeks

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Effect of Sister State Judgment

[b] Liability Not Adjudicated

[4] Additional Authorities

§ 131.85 Supporting Motion to Vacate Judgment [Code Civ. Proc. § 1710.40(b)] Entered Pursuant to Sister State Money Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]--Judgment Paid

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Payment of Judgment

[4] Additional Authorities

[a] Payment of Judgment

§ 131.86 Supporting Motion to Vacate Judgment [Code Civ. Proc. § 1710.40(b)] Entered Pursuant to Sister State Money Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]--Misconduct of Plaintiff

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Misconduct of Plaintiff

§ 131.87 Supporting Motion to Vacate Judgment [Code Civ. Proc. § 1710.40(b)] Entered Pursuant to Sister State Money Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]--Bar of Statute of Limitations

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Limitation Governed by California Law

[b] Period of Limitation on Action

[4] Additional Authorities

[a] Limitation Governed by California Law

§ 131.88 Supporting Motion to Vacate Judgment [Code Civ. Proc. § 1710.40(b)] Entered Pursuant to Sister State Money Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]--Bar of Statute of Limitations--Expiration of Sister State Limitation Period

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Expiration of Sister State Limitation Period

§ 131.89 Supporting Motion to Vacate Judgment [Code Civ. Proc. § 1710.40(b)] Entered Pursuant to Sister State Money Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]--Stay of Enforcement Pending in Sister State

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

§ 131.90 Supporting Motion to Vacate Judgment [Code Civ. Proc. § 1710.40(b)] Entered Pursuant to Sister State Money Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]--Sister State Judgment Was Penal

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Penal Judgment

[b] Definition of Penal Judgment

[c] Definition of "Penalty"

[d] Short Statute of Limitations as Indication of Penalty

[e] Recovery of Triple Interest Paid Above Legal Rate as Penalty

[f] Double or Treble Damages as Penalty

[g] Liability of Directors for Failure to Act as Penalty

[h] Minimum Fine Plus Damages Based on Culpability as Penalty

[4] Additional Authorities

[a] Penal Judgment

[b] Definition of Penal Judgment

§ 131.91 Supporting Motion to Vacate Judgment [Code Civ. Proc. § 1710.40(b)] Entered Pursuant to Sister State Money Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]--Sister State Judgment Conflicts With Earlier California Judgment

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Earlier Conflicting California Judgment

§ 131.92 Supporting Motion for Stay of Enforcement [Code Civ. Proc. § 1710.50] of Judgment Entered Under

Sister State Money Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]--Specific Statutory Grounds

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

§ 131.93 Supporting Motion for Stay of Enforcement [Code Civ. Proc. § 1710.50] of Judgment Entered Under Sister State Money Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]--Interests of Justice Require Stay [Code Civ. Proc. § 1710.50(a)(4)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

§ 131.94 Supporting Motion to Vacate or Stay [Fam. Code § 4853(a)] Foreign Support Order Registered Under Uniform Reciprocal Enforcement of Support Act [Fam. Code § 4800 et seq.]--Statutory Grounds

[1] FORM

[2] Comments

[a] Use of Form

[b] Limitations of Registered Foreign Support Order

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

§ 131.95 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] in Action on Judgment-- General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Finality of Judgment

[b] Actual Controversy

[c] Failure to Comply With Judgment

§ 131.96 Opposing Motion to Vacate Judgment [Code Civ. Proc. § 1710.40(b)] Entered Pursuant to Sister State Money Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]--Full Faith and Credit--Judgment Valid on Face--General Form

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[3] Discussion of Authorities

[a] Judgment Valid and Regular on Its Face

[4] Additional Authorities

[a] Full Faith and Credit Regardless of Public Policy

§ 131.97 Opposing Motion to Vacate Judgment [Code Civ. Proc. § 1710.40(b)] Entered Pursuant to Sister State Money Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]--Full Faith and Credit--Judgment Sufficiently Final for Enforcement in California--Judgment Prospectively Modifiable

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Judgment Prospectively Modifiable

§ 131.98 Opposing Motion to Vacate Judgment [Code Civ. Proc. § 1710.40(b)] Entered Pursuant to Sister State Money Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]--Full Faith and Credit--Judgment Sufficiently Final for Enforcement in California--Judgment Unstayed but Under Appeal

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Judgment Unstayed but Under Appeal

§ 131.99 Opposing Motion to Vacate Judgment [Code Civ. Proc. § 1710.40(b)] Entered Pursuant to Sister State Money Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]--Nonmodifiable Sister State Money Judgment for Arrearages in Support Payments Enforceable in California Under Sister State Money Judgments Act

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[3] Discussion of Authorities

[a] Nonmodifiable Money Judgment for Arrearages in Support Payments Enforceable in California Under Sister State Money Judgments Act

§ 131.100 Opposing Motion to Vacate Judgment [Code Civ. Proc. § 1710.40(b)] Entered Pursuant to Sister State Money Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]--Question of Jurisdiction Litigated in Sister State

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Jurisdictional Issue Litigated in Sister State Court

[b] Decision as to Jurisdiction Res Judicata

[4] Additional Authorities

[a] Jurisdictional Issue Litigated in Sister State Court

[b] Decision as to Jurisdiction Res Judicata

§ 131.101 Opposing Motion to Vacate Judgment [Code Civ. Proc. § 1710.40(b)] Entered Pursuant to Sister State Money Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]--Sister State Court Had Fundamental Jurisdiction--Estoppel of Collateral Attack on Judgment in Excess of Jurisdiction

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[3] Discussion of Authorities

[a] Estoppel of Collateral Attack on Judgment in Excess of Jurisdiction

§ 131.102 Opposing Motion to Vacate Judgment [Code Civ. Proc. § 1710.40(b)] Entered Pursuant to Sister State Money Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]--Question of Fraud Litigated in Sister State

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Question of Fraud Litigated in Sister State

§ 131.103 Opposing Motion to Vacate Judgment [Code Civ. Proc. § 1710.40(b)] Entered Pursuant to Sister State Money Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]--Statute of Limitations No Bar

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Action Not Barred as of Date of Application

[b] Decree for Future Payments as Continuing Judgment

[c] Limitation Applicable to Final Judgment Only

§ 131.104 Opposing Motion to Vacate Judgment [Code Civ. Proc. § 1710.40(b)] Entered Pursuant to Sister State Money Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]--Untimely Motion

[1] FORM

[2] Comments

[a] Use of Form

§ 131.105 Opposing Demurer to Complaint [Code Civ. Proc. § 430.10(e)] in Action on Judgment--Finality, Regularity, and Jurisdiction Sufficiently Pleaded--Judgment Enforceable

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Action on Judgment Permissible if Within Statutory Period

§ 131.106 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] in Action on Judgment--Sufficient Pleading of Nonperformance

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Pleading Nonperformance

[4] Additional Authorities

[a] Pleading Nonperformance

§§ 131.107-131.119 [Reserved]

§ 131.120 Supporting Motion for Order Compelling Acknowledgment of Satisfaction of Judgment Satisfied in Fact or Entering Satisfaction Without Acknowledgment [Code Civ. Proc. § 724.050(d)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Motion Made in Court in Which Judgment Was Rendered

[b] Judgment Satisfied by Payment

[c] Satisfaction of Judgment by Partial Payment in Accord and Satisfaction

[d] Covenant Not to Execute as Grounds for Compelling Satisfaction of Judgment

[e] Satisfaction of Foreign Money-Judgment Established in California

§ 131.121 Supporting Motion for Order Compelling Acknowledgment of Satisfaction of Judgment Satisfied in Fact

or Entering Satisfaction Without Acknowledgment [Code Civ. Proc. § 724.050(d)]--Judgment Satisfied Through Setoff of Cross Demands

[1] FORM

[2] Comments

[a] Use of Form

[b] Satisfaction of Judgment Through Setoff of Cross Demand

[b] Setoff of Claim Not Reduced to Judgment

[3] Discussion of Authorities

[a] Judgment Debtor's Right to Satisfy Judgment by Offsetting Judgment

[b] Right of Equitable Offset Exists Independent of Statute

[c] Setoff as Matter of Right Unless Other Equitable Considerations Preclude It

[d] Insolvency of Judgment Creditor as Justifying Equitable Offset

[e] Judgment Debtor's Right to Choose Which Claims to Offset

[f] Right of Equitable Offset Not Defeated by Assignment of Judgment

[g] Compelling Setoff Against Assignee of Judgment Creditor

[h] Setoff of Individual Claim Against Joint and Several Claim

[i] Priority of Equitable Offset Against Statutory Lien

§ 131.122 Supporting Motion for Order Awarding Damages, Forfeiture of Penalty, and Attorney's Fees for Unjust Refusal to Execute Acknowledgment of Satisfaction of Judgment Satisfied in Fact--Refusal to Respond to Written Demand [Code Civ. Proc. §§ 724.050(e), 724.080]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

§ 131.123 Supporting Motion for Order Awarding Damages and Attorney's Fees for Intentionally Conditioning Delivery of Acknowledgment of Satisfaction on Performance of Act or Payment of Amount by Judgment Debtor in Excess of Amount Required by Judgment [Code Civ. Proc. §§ 724.070, 724.080]

[1] FORM

[2] Comments

[a] Use of Form

§ 131.124 Supporting Motion for Order Vacating Entry of Satisfaction of Judgment

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Motion to Vacate Satisfaction to Be Made in Original Action

[b] Grounds for Vacating Satisfaction

[4] Additional Authorities

[a] Motion to Vacate Satisfaction to Be Made in Original Action

[b] Grounds for Vacating Satisfaction

§ 131.125 Opposing Motion for Order Compelling Acknowledgment of Satisfaction of Judgment or Entering Satisfaction Without Acknowledgment [Code Civ. Proc. §§ 724.050(d), 724.110(b), 724.230]--Inapplicable if Judgment Not Satisfied in Fact

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Judgment Must Be Satisfied in Fact

§ 131.126 Opposing Motion for Order Compelling Acknowledgment of Satisfaction of Judgment or Entering Satisfaction Without Acknowledgment [Code Civ. Proc. §§ 724.050(d), 724.110(b), 724.230]--Judgment Debtor Not Permitted to Satisfy Judgment by Offsetting Claims Not Beneficially Owned by Him or Her

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Judgment Debtor May Not Offset Claims Not Beneficially Owned by Him or Her

[b] Assignee for Collection May Not Set Off Assigned Claim in Satisfying Judgment Against Him or Her

§§ 131.127-131.139 [Reserved]

§ 131.140 Supporting Motion to Recall and Quash Writ of Execution and Vacate Levy--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Recalling and Quashing Writ of Execution

[b] Vacation of Levy

[c] Incidental Relief

§ 131.141 Supporting Motion to Recall and Quash Writ of Execution and Vacate Levy--Judgment Satisfied by Payment

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Writ of Execution Recalled and Quashed on Proof of Payment

§ 131.142 Supporting Motion to Recall and Quash Writ of Execution and Vacate Levy--Judgment Satisfied by Agreement

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Writ of Execution Recalled and Quashed on Proof of Agreement Satisfying Judgment

§ 131.143 Supporting Motion to Recall and Quash Writ of Execution and Vacate Levy--Judgment Debtor Entitled to Credit

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Recalling and Quashing of Writ of Execution When Judgment Creditor Entitled to Credit

[b] Credit When Arrearages Are Followed by Overpayment

[c] Credit When Arrearages Are Preceded by Overpayment

[d] Court Discretion to Credit Judgment Debtor for Child Support Overpayments That Precede Arrearages

§ 131.144 Supporting Motion to Recall and Quash Writ of Execution and Vacate Levy--Judgment Not Enforceable by Execution

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Recalling and Quashing of Writ of Execution When Judgment Not Subject to Execution

[b] Writ of Execution May Not Issue on Decree of Lien on Specific Property

§ 131.145 Supporting Motion to Recall and Quash Writ of Execution and Vacate Levy--Judgment Vacated

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Recalling and Quashing of Writ of Execution When Judgment Vacated

§ 131.146 Supporting Motion to Stay Enforcement--Stay Necessary to Accomplish Ends of Justice [Code Civ. Proc. § 918]

[1] FORM

[2] Comments

[a] Use of Form

[b] Grounds for Stay

[c] Opposing Points and Authorities

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Authority of Trial Court to Issue Stay

[b] Stay Necessary to Accomplish Ends of Justice

[c] Period of Stay

§ 131.147 Supporting Motion to Stay Enforcement--Counter Action Pending Against Judgment Creditor [Code Civ. Proc. § 918.5]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Authority of Trial Court to Stay Enforcement When Action Pending on Disputed Claim

[b] Factors for Consideration

§ 131.148 Supporting Motion to Stay Enforcement--Judgment Debtor Is in Military Service [50 U.S.C. Appen. § 524; Mil. & Vet. Code § 403(c)(2)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Servicemembers Civil Relief Act

[i] In General

[ii] Duration of Stay

[c] State Law Protections

[i] Duration of Stay

§ 131.149 Supporting Motion to Stay Enforcement--Enforcement of Foreign Money Judgment Pending Appeal [former Code Civ. Proc. § 1713.6]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Refusal of Stay Is Abuse of Discretion When Adequate Security Provided

§ 131.150 Supporting Motion by Judgment Debtor to Dismiss Action for Recognition of Foreign Money Judgment--Judgment Is Not Final and Conclusive [former Code Civ. Proc. § 1713.2]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Foreign Judgment Must Be Final, Conclusive, and Enforceable in Foreign Country to Support Claim for Recognition of Judgment in California

[4] Additional Authorities

[a] Foreign Judgment Must Be Final, Conclusive, and Enforceable in Foreign Country to Support Claim for Recognition of Judgment in California

§ 131.151 Supporting Motion by Judgment Debtor to Dismiss Action for Enforcement of Foreign Money Judgment--No Personal Jurisdiction [former Code Civ. Proc. § 1713.3]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Court Must Have Personal Jurisdiction Over Judgment Debtor to Enforce Foreign Judgment Under Foreign Money-Judgments Act

§ 131.151A Supporting Motion by Judgment Debtor to Dismiss Action for Recognition of Foreign Money Judgment--Action Filed After Statute of Limitations Has Run [former Code Civ. Proc. § 1713.3]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Action to Enforce a Foreign-Money Judgment in California Must Be Filed Within the Time Provided by Statute

§ 131.151B Supporting Motion to Stay Enforcement--Enforcement of Foreign-Country Judgment Pending Appeal [Code Civ. Proc. § 1720]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Court's Discretion to Stay Proceedings Pending Appeal

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Refusal of Stay Is Abuse of Discretion When Adequate Security Is Provided

§ 131.151C Supporting Motion by Judgment Debtor to Dismiss Action for Recognition of Foreign-Country Judgment--Judgment Is Not Final and Conclusive [Code Civ. Proc. § 1715(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Recognition of Foreign-Country Judgment

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Foreign-Country Judgment Must Be Final, Conclusive, and Enforceable in Foreign Country to Support Claim for Recognition of Judgment in California

§ 131.151D Supporting Motion by Judgment Debtor to Dismiss Action for Enforcement of Foreign-Country Judgment--No Personal Jurisdiction [Code Civ. Proc. §§ 1716(b)(2), 1719]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Personal Jurisdiction

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Court Must Have Personal Jurisdiction Over Judgment Debtor to Enforce Foreign Judgment Under Foreign Money-Judgments Act

§ 131.151E Supporting Motion by Judgment Debtor to Dismiss Action for Recognition of Foreign-Country Judgment--Action Filed After Statute of Limitations Has Run [Code Civ. Proc. § 1721]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Action to Recognize a Foreign-Money Judgment in California Must Be Filed Within the Time Provided by

Statute

§ 131.152 Opposing Motion to Stay Enforcement--Fully Executed Writ May Not Be Stayed

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Court Without Power to Stay Enforcement on Fully Executed Writ

§ 131.153 Supporting Motion by Judgment Creditor for Determination of Judgment Debtor's Claim of Exemption--Property Claimed Is Not Exempt or Equity Is in Excess of Exemption [Code Civ. Proc. § 703.550]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

§ 131.154 Opposing Motion by Judgment Creditor for Determination of Judgment Debtor's Claim of Exemption--Exemption Statutes Liberally Construed for Judgment Debtor's Welfare

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Exemption Statutes Liberally Construed

[b] Exceptions Narrowly Construed

§ 131.155 Supporting Contention That Execution Sale Should Be Set Aside--Statutory Action--Improper Sale to Judgment Creditor [Code Civ. Proc. § 701.680(c)(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Statutory Action to Set Aside Execution Sale

§ 131.156 Supporting Contention That Execution Sale Should Be Set Aside--Equitable Action--Grossly Inadequate Price When Purchaser Is Guilty of Unfairness or Has Taken Undue Advantage

[1] FORM

[2] Comments

[a] Use of Form

[b] Equitable Action to Set Aside Execution Sale

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Execution Sale Invalidated When Gross Inadequacy of Price and Slight Evidence of Unfairness or Irregularity Are Shown

[b] Unfairness Need Not Amount to Legal Fraud

[c] Inadequacy of Price Is Evidence of Unfairness

[4] Additional Authorities

[a] Unfairness Need Not Amount to Legal Fraud

§ 131.157 Opposing Contention That Execution Sale Should Be Set Aside--Equitable Action--Mere Inadequacy of Price Insufficient

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Mere Inadequacy of Price Alone Insufficient Basis to Set Aside Sale

§ 131.158 Opposing Contention That Execution Sale Should Be Set Aside--Equitable Action--Defendant Is Good-Faith Purchaser

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Good-Faith Purchaser Without Duty Toward Judgment Debtor

[4] Additional Authorities

[a] Good-Faith Purchaser Without Duty Toward Judgment Debtor

§ 131.159 Opposing Petition for Determination of Third Party's Claim of Interest--Petition for Hearing Not Filed Within Statutory Period [Code Civ. Proc. § 720.310(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Court Lacks Jurisdiction When Petition Not Filed Within Statutory Period

§ 131.160 Opposing Petition for Determination of Third Party's Claim of Interest--Third Party's Interest or Lien Is Superior to Judgment Creditor's Lien [Code Civ. Proc. §§ 720.110, 720.220]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Decision on Substantial Evidence Will Not Be Disturbed

[4] Additional Authorities

[a] Decision on Substantial Evidence Will Not Be Disturbed

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13-131 California Points & Authorities § 131.01

§ 131.01 Scope of Chapter

This chapter contains memoranda for use in supporting [*see § 131.20*] and opposing [*see § 131.23*] a motion for entry of a judgment nunc pro tunc or for correction of the record of a judgment to show entry nunc pro tunc.

It also contains memoranda for use in supporting [*see § 131.21*] and opposing [*see § 131.24*] a motion for entry of judgment pursuant to terms of a stipulated settlement, and a memorandum supporting a motion for entry of judgment after acceptance of a statutory settlement offer [*see § 131.22*]. There is also an opposition to entry of judgment based on settlement when the party does not properly request the court's continuing jurisdiction [*see § 131.26*].

This chapter contains memoranda for use in supporting [*see §§ 131.40*-131.43] and opposing [*see §§ 131.44*-131.46] a motion to correct a clerical error in a judgment, either under statute [*Code Civ. Proc. § 473*] or under a court's inherent power to do so.

This chapter contains memoranda supporting [*see § 131.60*] and opposing [*see § 131.61*] an application for leave to intervene in a cause of action asserted by a judgment debtor.

This chapter contains memoranda for use in supporting [*see §§ 131.80*-131.91] and opposing [*see §§ 131.96*-131.104] a motion to vacate a judgment entered under the Sister State Money Judgments Act (or, with appropriate modifications, supporting [*see §§ 131.81*-131.91] or opposing [*see §§ 131.96*-131.103] a motion for summary judgment in an action on a judgment). This chapter also contains memoranda for use in supporting a motion for stay of enforcement of judgment entered under the Sister State Money Judgments Act [*see §§ 131.92, 131.93*]; for use in supporting a motion for vacation or stay of a foreign support order registered under the Uniform Reciprocal Enforcement of Support Act [*see § 131.94*]; and for use in supporting [*see § 131.95*] or opposing [*see §§ 131.105, 131.106*] a demurrer to a complaint in an action on a judgment.

This chapter contains memoranda related to the entering of satisfaction of judgment on the register of actions. It contains memoranda supporting [*see §§ 131.120, 131.121*] and opposing [*see §§ 131.125, 131.126*] a motion to compel a judgment creditor or his or her assignee of record to give an acknowledgment of satisfaction of judgment or to enter satisfaction of judgment without acknowledgment. It also includes memoranda supporting a motion for damages and

attorney's fees for intentionally conditioning the delivery of an acknowledgment of satisfaction on performance of an act or payment of an amount by the judgment debtor in excess of that to which the judgment creditor is entitled under the judgment [*see § 131.123*], as well as a memorandum supporting a motion for damages and attorney's fees for the unjust refusal or failure to deliver an acknowledgment of satisfaction [*see § 131.122*] and a memorandum supporting a motion to vacate an entry of satisfaction of judgment [*see § 131.124*].

This chapter contains memoranda related to proceedings to execute and enforce judgments. It includes memoranda supporting a motion to recall and quash a writ of execution and vacate levy [*see §§ 131.140*-131.145], memoranda supporting [*see* §§ 131.146-131.148] and opposing [*see § 131.152*] a motion to stay enforcement, memoranda supporting [*see § 131.153*] and opposing [*see § 131.154*] a motion by a judgment creditor to determine a judgment debtor's claim of exemption, memoranda supporting [*see §§ 131.155, 131.156*] and opposing [*see §§ 131.157, 131.158*] the contention that an execution sale should be set aside, and memoranda opposing a petition for determination of third party's claim of interest [*see §§ 131.159, 131.160*].

With respect to foreign-country judgments, the chapter includes memoranda supporting a motion to stay enforcement under the Uniform Foreign Money-Judgments Recognition Act [former Code Civ. Proc. § 1713 et seq.], governing actions commenced before January 1, 2008, the effective date of the Uniform Foreign-Country Money Judgments Recognition Act [*see § 131.149*], and supporting motions to dismiss under the predecessor statute [*see §§ 131.150 -131.151A*]. It also includes memoranda supporting a motion to stay enforcement under the Uniform Foreign-Country Money Judgments Recognition Act [*Code Civ. Proc. § 1713 et seq.*; *see § 131.151B*] and supporting motions to dismiss under the current statute [*see §§ 131.151C -131.151E*].

For memoranda supporting and opposing an application for leave to intervene in a judgment debtor's cause of action, see *§ 131.60* et seq. For memoranda supporting a motion for stay of enforcement of a judgment entered under the Sister State Money Judgments Act (*Code Civ. Proc. § 1710.10 et seq.*), see *§ 131.80* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral Overview

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13-131 California Points & Authorities § 131.02

§ 131.02 Governing Statutes

Code Civ. Proc. §§ 577-583.1 contain the general statutory provisions relating to judgments. *Code Civ. Proc. §§ 664-674* set forth statutory provisions relating to the giving and entering of judgments. Satisfaction of judgments is generally governed by *Code Civ. Proc. §§ 724.010-724.260*. *Code Civ. Proc. §§ 708.410-708.480* govern liens on a judgment debtor's cause of action. *Code Civ. Proc. § 1710.10 et seq.* govern actions on sister state judgements. *Code Civ. Proc. § 1713 et seq.* govern actions on foreign money judgments in actions commenced on or after January 1, 2008 (actions commenced before January 1, 2008 involving foreign money judgments are governed by former Code Civ. Proc. § 1713 et seq. (repealed 1/1/08)). *Fam. Code § 4900 et seq.* governs actions under Uniform Interstate Family Support Act.

Code Civ. Proc. § 664 governs the entry of judgment after trial. *Code Civ. Proc. § 664.5* governs notice of entry of judgment in a contested action or special proceeding, except a proceeding for dissolution of marriage, for nullity of marriage, or for legal separation. *Code Civ. Proc. § 664.6* governs the entry of a judgment based on a stipulated settlement.

Code Civ. Proc. §§ 997-998 set forth statutory procedures for the entry of judgments after an offer to compromise. *Code Civ. Proc. § 1139* governs the entry of a judgment in an agreed case. *Code Civ. Proc. § 1134* covers entry of judgments obtained by confession of judgments. *Code Civ. Proc. §§ 1710.25* and *1710.65* set forth provisions relating to the entry of a judgment pursuant to an application under the Sister State Money Judgments Act. *Code Civ. Proc. § 585* governs the entry of default judgments. *Code Civ. Proc. § 676 et seq.* states procedures for entry of a judgment in a foreign currency under the Uniform Foreign-Money Claims Act.

Code Civ. Proc. § 473(d) sets forth the general statutory authority governing motions to correct clerical mistake in a judgment or order to conform the same to the judgment or order directed by the court. *Code Civ. Proc. § 663* governs the correction of judicial errors, a matter not within the scope of this chapter.

The statutory authority for the creation by a judgment creditor of a lien on a cause of action brought by a judgment debtor against a third party and for the intervention of the judgment creditor in the judgment debtor's cause of action is found in *Code Civ. Proc. §§ 708.410-708.480*.

Actions on judgments must be commenced within the 10-year period specified in *Code Civ. Proc. § 337.5*. The pleadings with respect to such actions are governed by *Code Civ. Proc. §§ 456* and *1908.5*. *Code Civ. Proc. § 989* governs an action on domestic judgments seeking to assert a statutory right against a joint debtor. *Ins. Code § 11580* governs an action on a domestic judgment to assert a statutory right against an insurance company. *Evid. Code §§ 1301, 1530-1532* covers the use of judgments as evidence.

The enforcement of judgments after death of the judgment creditor or judgment debtor is governed by *Code Civ. Proc. §§ 686.010, 686.020*, and *Prob. Code §§ 9300-9304, 9391, 10361, 10361.5, 10361.6*.

The requisites for compelling the acknowledgment of satisfaction of a judgment are contained in *Code Civ. Proc. §§ 724.010-724.050*. Provisions for the failure to file an acknowledgment of satisfaction are set forth in *Code Civ. Proc. § 724.050(e)*. Acknowledgment of partial satisfaction of judgment is governed by *Code Civ. Proc. §§ 724.110-724.120*, and acknowledgment of satisfaction of payments under an installment judgment are contained in *Code Civ. Proc. §§ 724.210-724.260*. Damages for a judgment creditor's conditioning delivery of an acknowledgment on performance of any act or payment in excess of the judgment is set forth by *Code Civ. Proc. § 724.070*.

The execution and enforcement of judgments are governed generally by *Code Civ. Proc. § 680.010 et seq.* Various provisions governing the stay of enforcement are set out in *Code Civ. Proc. §§ 918, 918.5*, 1720 and 50 U.S.C. Appen. § 524.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview

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13-131 California Points & Authorities § 131.03

§ 131.03 Page Limits on Points and Authorities

Generally, a memorandum must not exceed 15 pages in length, or, in the case of a motion for summary judgment or summary adjudication, 20 pages. A reply or closing memorandum may not exceed 10 pages [*see Cal. Rules of Ct., Rule 3.1113(d)*]. Any party desiring to file a longer memorandum must obtain leave of court [*see Cal. Rules of Ct., Rule 3.1113(e)*]. For further discussion of the page limitations under *Cal. Rules of Ct., Rule 3.1113*, and of other basic format requirements for memoranda, see *Ch. 1, Writing Legal Memoranda and Briefs § 1.05*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedureJudgmentsGeneral Overview

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13-131 California Points & Authorities § 131.04

§ 131.04 Related Pleadings and Practice Forms

For discussion and forms relating to the process of obtaining and entering judgments, see California Forms of Pleading and Practice, Ch. 318, *Judgments* (Matthew Bender).

For discussion and forms for use in particular cases involving the obtaining and entry of judgments, see the following chapters in California Forms of Pleading and Practice (Matthew Bender):

- Ch. 3, *Abatement of Actions* .
- Ch. 36, *Judicial Arbitration* .
- Ch. 177, *Damages* .
- Ch. 205, *Defaults and Default Judgments* .
- Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .
- Ch. 221, *Dissolution of Marriage and Related Proceedings: Procedure* .
- Ch. 326A, *Jury and Verdicts* .
- Ch. 371, *Motions After Trial* .
- Ch. 520, *Settlement and Release* .
- Ch. 526, *Small Claims* .
- Ch. 529, *Statement of Decision* .

- Ch. 533, *Stipulations* .
- Ch. 534, *Submitted Controversy (Agreed Case)* .

A discussion of the law governing the amendment, correction, and modification of judgments and forms for use in connection with proceedings to correct a clerical error in a judgment are contained California Forms of Pleading and Practice, Ch. 318, *Judgments* , Part II (Matthew Bender).

For discussion and forms for use in particular cases involving the amendment, correction, and modification of judgments, see in that publication the following chapters:

- Ch. 160, *Corporations* ; and
- Ch. 371, *Motions After Trial* .

For discussion and forms relating to the creation of a judgment creditor's lien on and right of intervention in a judgment debtor's cause of action against a third party, see California Forms of Pleading and Practice, Ch. 318, *Judgments* (Matthew Bender). For discussion and forms for use in enforcing judgments generally, see California Forms of Pleading and Practice, Ch. 254, *Executions and Enforcement of Judgments* (Matthew Bender).

For discussion and forms relating to actions on domestic, sister state, and foreign judgments, see California Forms of Pleading and Practice, Ch. 318, *Judgments* , Part VI (Matthew Bender).

For discussion and forms for use in particular cases involving actions on judgments, see the following chapters in that publication:

- Ch. 3, *Abatement of Actions* .
- Ch. 203, *Defaults and Default Judgments* .
- Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .
- Ch. 212, *Dismissal* .
- Ch. 221, *Dissolution of Marriage and Related Proceedings: Procedure* .
- Ch. 258, *Family Law Enforcement: General Enforcement Principles and Remedies* .
- Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances* .
- Ch. 324, *Jurisdiction: Subject Matter Jurisdiction* .
- Ch. 345, *Limitation of Actions* .
- Ch. 371, *Motions After Trial* .

For discussion and forms related to satisfaction of judgment in particular cases, see California Forms of Pleading and Practice, Ch. 6, *Accord and Satisfaction* , Ch. 220, *Dissolution of Marriage and Related Proceedings* , and Ch. 254, *Executions and Enforcement of Judgments* (Matthew Bender).

For additional discussion and forms relating to enforcement proceedings, exemption claims, or stay of enforcement proceedings in particular cases, see the following chapters in California Forms of Pleading and Practice (Matthew Bender):

- Ch. 43, *Appeal: Stay of Proceedings* .
- Ch. 62, *Attachment* .
- Ch. 94, *Bankruptcy* .
- Ch. 258, *Family Law Enforcement: General Enforcement Principles and Remedies* .
- Ch. 276, *Garnishment* .
- Ch. 294, *Homesteads* .
- Ch. 318, *Judgments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview

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13-131 California Points & Authorities § 131.05

§ 131.05 Related Points and Authorities

Related memoranda of points and authorities that may be useful in particular cases involving the entry of a judgment may be found in this publication in the following chapters:

- Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders* .
- Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .
- Ch. 90, *Dismissal* .
- Ch. 121, *Interest* .
- Ch. 150, *Mandate and Prohibition* .
- Ch. 155, *Motions After Trial* .
- Ch. 215, *Statement of Decision* .

For a discussion of how to use the forms in this chapter to draft a memorandum of points or authorities or a trial or appellate brief, and for a sample of a complete memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For a discussion of how to use the forms in this chapter to draft a memorandum of points or authorities or a trial or appellate brief, and for a sample of a complete memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* at the beginning of Volume 1.

Related memoranda of points and authorities which may be useful in particular cases involving actions on judgments may be found in the following chapters in this publication:

- Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders* .

- Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .
- Ch. 90, *Dismissal* .
- Ch. 132, *Jurisdiction: Personal Jurisdiction and Inconvenient Forum* .
- Ch. 133, *Jurisdiction: Subject Matter Jurisdiction* .
- Ch. 143, *Limitation of Actions* .
- Ch. 155, *Motions After Trial* .
- Ch. 158, *Motions to Reconsider and Renewed Motions* .

For related memoranda of points and authorities which may be useful in particular cases involving satisfaction of judgment, see Ch. 6, *Accord and Satisfaction* .

For forms of memoranda of points and authorities relating to prejudgment attachment proceedings and homestead exemptions, see respectively Ch. 23, *Attachment* and Ch. 112, *Homesteads* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview

California Points & Authorities

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 131 JUDGMENTS
PART I. INTRODUCTION

13-131 California Points & Authorities §§ 131.06-131.19

[Reserved]

§§ 131.06[Reserved]

California Points & Authorities

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CHAPTER 131 JUDGMENTS
PART II. FORMS
A. Entry of Judgments

13-131 California Points & Authorities § 131.20

§ 131.20 Supporting Motion for Entry of Judgment Nunc Pro Tunc or for Correction of Record of Judgment to Show Entry Nunc Pro Tunc

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*],	)	IES IN SUPPORT OF MOTION FOR
Defendant.	)	[ENTRY OF JUDGMENT *or* CORRECTION OF
	)	RECORD OF JUDGMENT]
	)	NUNC PRO TUNC

_____

THE COURT HAS INHERENT POWER TO ORDER THE ENTRY OF JUDGMENT IN THIS ACTION NUNC PRO TUNC EITHER TO CORRECT A DEFICIENCY IN THE RECORDING OF ITS PREVIOUS DECISION OR, WHEN AN ORDER HAS ACTUALLY BEEN MADE BUT ITS ENTRY HAS BEEN OMITTED, TO MAKE IT TAKE EFFECT NUNC PRO TUNC AS OF THE DATE WHEN IT WAS ACTUALLY MADE.

A. Inherent Power to Enter Nunc Pro Tunc. The power to enter judgments nunc pro tunc is inherent in the courts [and the court has the same authority to order findings of fact and conclusions of law to be filed nunc pro tunc] (*Norton v. Pomona (1935) 5 Cal. 2d 54, 62, 53 P.2d 952*).

[*EITHER*]

B. Ground for Antedating Entry Nunc Pro Tunc. A judgment may be antedated nunc pro tunc for the correction of a deficiency in the recording of a previous decision to express the court's true intention as of the earlier date (*Young v. Gardner-Denver Co. (1966) 244 Cal. App. 2d 915, 919, 53 Cal. Rptr. 522*).

[*OR*]

B. Entry Nunc Pro Tunc of Order Made but Not Entered. Where an order has actually been made and its entry omitted, it may be entered subsequently, and if justice requires it may be made to take effect nunc pro tunc as of the date when it was actually made (*Hess v. Gross (1943) 56 Cal. App. 2d 529, 532, 133 P.2d 1*).

C. Antedating as Justice Requires. An order for the entry of a judgment nunc pro tunc is allowed as justice may require in view of the circumstances of the particular case (*Norton v. Pomona (1935) 5 Cal. 2d 54, 62, 53 P.2d 952*).

[*Optional*] **D. Antedating Entry to Date Prior to Party's Death.** The fact that *Section 669 of the Code of Civil Procedure* provides for the entry of a judgment after a party's death on a verdict or decision before death does not do away with the rule authorizing the court to direct that its decision, so far as is necessary to protect the rights of the parties, shall be entered nunc pro tunc as of a day anterior to the party's death (*Norton v. Pomona (1935) 5 Cal. 2d 54, 63, 53 P.2d 952*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted in support of a motion for the entry of a judgment nunc pro tunc either where there has been a deficiency in the recording of a previous decision (*see* first alternative Paragraph B) or where an order was actually made but its entry was omitted entirely (*see* second alternative Paragraph B) under the court's inherent power to enter judgments nunc pro tunc as justice requires.

In essence, an order for the entry of a judgment nunc pro tunc is but one type of an order which may be made to correct a clerical error in a judgment. For memoranda of points and authorities relating to the correction of clerical errors other than errors relating to the date of entry, including correction nunc pro tunc, see *§§ 131.40*-131.43.

Where appropriate, counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Inherent Power to Enter Nunc Pro Tunc

In ***Norton v. Pomona*** *(1935) 5 Cal. 2d 54, 53 P.2d 952* , the Supreme Court affirmed the entry of a trial court's judgment nunc pro tunc based on findings filed nunc pro tunc. On June 2, the court made a minute order for judgment for the plaintiff in a personal injury action. Findings were not waived but were not filed at that time. On June 23, the plaintiff died. His executrix later moved the court for an order to file findings and judgment nunc pro tunc as of June 2 and the court so ordered, whereupon judgment was entered on November 6 nunc pro tunc as of June 2. On the issue of the trial court's entry of judgment, the Court stated that the power to enter judgments nunc pro tunc is inherent in the courts. Where the party is not at fault, the determinative consideration is whether or not the action at the party's death was ready for rendition of final judgment. When the state of the record or the minutes show that a suitor was entitled to a particular judgment but that the judgment was not entered when it might have been, such judgment may subsequently be entered to relate back to the time when it should have been entered, providing that the applying party did not occasion the delay. Such an order should be granted or refused as justice may require in view of the circumstances. The Court added that the trial court has the same authority to order findings to be filed nunc pro tunc, since the decision the parties invoke the court to make is the final determination of the rights of the parties and includes every step requisite to final judgment on their rights. These rights, the Court stated, are not to be prejudiced by the court's delay in respect to any of these acts or proceedings, and the court is authorized to direct the making or filing of its findings of fact and conclusions of law, as well as the entry of a judgment thereon, nunc pro tunc as of such date as will preserve them. Moreover, the fact that *Code Civ. Proc. § 669* provides for the rendition of judgment after a party's death does not do away with the rule authorizing the court to direct that its decision, so far as is necessary to protect the rights of the parties, shall be entered nunc pro tunc as of a day anterior to the party's death.

[b] Ground for Antedating Entry Nunc Pro Tunc

In ***Young v. Gardner-Denver Co.*** *(1966) 244 Cal. App. 2d 915, 53 Cal. Rptr. 522* , the court of appeal affirmed a trial court's order denying a motion for entry of judgment nunc pro tunc to correct a clerical error, holding that, although in a proper case a clerical error in a judgment may be corrected nunc pro tunc, such action would have been unconscionable in the case at issue. Within the time allowed, following the conclusion of a trial and the entry of judgment, the trial court granted the defendants a new trial. A month later, the plaintiff moved for entry of judgment nunc pro tunc which would have void the order granting the new trial because by then the trial court would have lost its jurisdiction to rule on the motion. The plaintiff contended that the trial court abused its discretion in denying his motion for correction of judgment nunc pro tunc. The court of appeal stated the general rule that courts have inherent power to enter judgments nunc pro tunc to relate back to the time when they should have been entered but will do so only to avoid injustice. Such a judgment is to be granted or refused as justice may require in view of the circumstances of a particular case. The only grounds for antedating a judgment, the court continued, are the preservation of the legitimate fruits of the litigation which would otherwise be lost to the prevailing party, the correction of a deficiency in the recording of a previous decision to express the court's true intention as of the earlier date and thus conform to the truth, or the correction of a clerical error.

[c] Entry Nunc Pro Tunc of Order Made but Not Entered

In ***Hess v. Gross*** *(1943) 56 Cal. App. 2d 529, 133 P.2d 1* , the court of appeal reversed judgment as to a defendant in an action against sureties on an undertaking staying execution of a prior judgment, holding that the trial court's order in the prior action entering an order nunc pro tunc fixing the amount of the stay bond was entered properly. In the prior action, the plaintiff in this case recovered judgment, from which the defendant there appealed. An undertaking, which was the subject of this action, was then filed. However, in this action it developed that the files of the former action did not contain any order fixing the bond's amount. Thereupon, the judge of the former action filed a nunc pro tunc order fixing the amount of the bond at the amount of the undertaking involved in this case. The main question on appeal was whether or not the judge had the power to make the corrective order. The court of appeal stated that whenever justice requires, if no express statute prohibits it, the courts of this state have always countenanced the entry of nunc pro tunc orders to preserve substantial rights, and such orders are made nunc pro tunc not only to supply deficiencies in the

record of previous orders or judgments but also when no previous judgment or order on the matter has been made, though always to preserve and never to impair the rights of litigants. The court added that all courts have the inherent power to correct their records so that the records shall conform to the facts and speak the truth, and that right is not suspended because the record itself does not show that the entry was incorrect where an order has actually been made and its entry omitted, it may be entered subsequently, and if justice requires, may be made to take effect nunc pro tunc as of the date when it was actually made.

[d] Antedating as Justice Requires

Norton v. Pomona *(1935) 5 Cal. 2d 54, 53 P.2d 952* , is discussed in *§ 131.20[3][a]*.

[e] Antedating Entry to Date Prior to Party's Death

Norton v. Pomona *(1935) 5 Cal. 2d 54, 53 P.2d 952* , is discussed in *§ 131.20[3][a]*.

[4] Additional Authorities

[a] Inherent Power to Enter Nunc Pro Tunc

In *Martin v. Martin (1970) 2 Cal. 3d 752, 87 Cal. Rptr. 526, 470 P.2d 662* , the Supreme Court reversed a trial court's order canceling that part of a divorce court's order for monthly payments from the defendant to the plaintiff. The Court held that a federal bankruptcy court's order discharging the defendant in bankruptcy, which had been corrected nunc pro tunc to exclude the marital payment from discharge, was proper and operated as a final determination on the merits of the question as to whether or not the marital debt survived bankruptcy for the purposes of res judicata in the state courts. After the divorce court issued its interlocutory judgment ordering the payments, the defendant filed for bankruptcy and was discharged. He also challenged the divorce court's order in the state court, moving to cancel the payment order. The plaintiff objected to the defendant's motion in the state court and moved in the bankruptcy court for correction of its general discharge nunc pro tunc to exclude the marital debt from the discharge. The bankruptcy court's order was so amended and on the issue of whether or not the marital debt survived bankruptcy and, thus, whether or not the cancellation was proper, the Supreme Court ruled that all courts have the inherent power to enter orders nunc pro tunc to show that something was done at one time which ought to have been shown then. The Court observed that such an order is an entry now for something previously done so that the record may actually speak the truth. It further observed that the function of a nunc pro tunc order is merely to correct the record of the judgment and not to alter the judgment itself--not to make an order now for then, but to enter now for then an order previously made. The question presented on a motion for a nunc pro tunc order is: what order did the trial judge in fact make at the time?

[b] Ground for Antedating Entry Nunc Pro Tunc

Hess v. Gross (1943) 56 Cal. App. 2d 529, 133 P.2d 1 , is discussed in *§ 131.20[3][c]*.

[c] Antedating as Justice Requires

Hess v. Gross (1943) 56 Cal. App. 2d 529, 133 P.2d 1 , is discussed in *§ 131.20[3][c]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview

California Points & Authorities

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CHAPTER 131 JUDGMENTS
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A. Entry of Judgments

13-131 California Points & Authorities § 131.21

§ 131.21 Supporting Motion for Entry of Judgment Pursuant to Terms of Stipulated Settlement [Code Civ. Proc. § 664.6]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ENTRY OF JUDGMENT PURSUANT TO TERMS OF STIPULATED SETTLEMENT
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	[*Code Civ. Proc. § 664.6*]
	)	Date: _____
		Time: _____
		Location: _____

_____

THE COURT, ON MOTION, MAY ENTER A JUDGMENT PURSUANT TO THE TERMS OF A SETTLEMENT IF PARTIES TO PENDING LITIGATION HAVE STIPULATED, IN WRITING OUTSIDE THE PRESENCE OF THE COURT OR ORALLY BEFORE THE COURT, FOR SETTLEMENT OF ALL OR PART OF THE CASE.

A. Entry of Judgment Pursuant to Stipulated Settlement. If parties to pending litigation stipulate, in writing outside the presence of the court or orally before the court, for settlement of the case or a part of the case, the court, on motion, may enter judgment pursuant to the terms of the settlement (*Code Civ. Proc. § 664.6*; *Corkland v. Boscoe (1984) 156*

Cal. App. 3d 989, 994-995, 203 Cal. Rptr. 356).

[*Optional*] **B. Power to Enforce Settlement Between Parties Who Are Not Adversaries Under Pleadings.** If parties to pending litigation stipulate, in writing or orally before the court, for settlement of the case or a part of the case, the court, on motion, may enter judgment pursuant to the terms of the settlement notwithstanding the fact that the parties to the settlement were not adversaries in the pending action (*Casa de Valley View Owner's Assn. v. Stevenson (1985) 167 Cal. App. 3d 1182, 1190-1191, 213 Cal. Rptr. 790*).

[*Optional*] **C. Motion for Entry of Judgment Proper to Confirm Oral Settlement Agreement.** The use of a "speaking motion" to confirm an oral settlement agreement has legislative endorsement, even when some of the terms of the settlement are subject to reasonable dispute. It is no longer necessary to file a motion for summary judgment (*Richardson v. Richardson (1986) 180 Cal. App. 3d 91, 96, 225 Cal. Rptr. 370* ; *Corkland v. Boscoe (1984) 156 Cal. App. 3d 989, 994, 203 Cal. Rptr. 356* ; *see Code Civ. Proc. § 664.6*).

[*Optional*] **D. Court Retains Jurisdiction to Enforce Settlement.** If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of its terms [*Code Civ. Proc. § 664.6*].
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted in support of a motion for entry of judgment based on a stipulated settlement. The stipulation must have been in writing or made orally before the court [*see Code Civ. Proc. § 664.6*].

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

A form for notice of motion to enter judgment pursuant to a stipulated settlement is found in California Forms of Pleading and Practice, Ch. 318, *Judgments* (Matthew Bender).

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities set out in *§ 131.24* may be used to oppose the contention supported by the foregoing points and authorities.

[3] Discussion of Authorities

[a] Entry of Judgment Pursuant to Stipulated Settlement

In ***Corkland v. Boscoe*** *(1984) 156 Cal. App. 3d 989, 203 Cal. Rptr. 356* , after the parties to litigation had reached a settlement, one of the parties brought a motion to compel enforcement of the agreement. The trial court granted the motion. The court of appeal, in affirming the order of the trial court, held in conformity with the newly enacted *Code Civ. Proc. § 664.6* that if parties to pending litigation stipulate, in writing or orally before the court, for settlement of the case or a part of the case, the court, on motion, may enter judgment pursuant to the terms of the settlement. The court further held that even when there are contentions of disputed fact regarding the settlement, a motion for entry of judgment is proper and the trial court must then determine whether the parties entered into a valid and binding settlement of all or a part of the case (*156 Cal. App. 3d 989, 994-995)* .

[b] Power to Enforce Settlement Between Parties Who Are Not Adversaries Under Pleadings

In ***Casa de Valley View Owner's Assn. v. Stevenson*** *(1985) 167 Cal. App. 3d 1182, 213 Cal. Rptr. 790* , petitioner was allowed to intervene in an action brought by respondent against another party. Although petitioner and respondent had several unresolved legal disputes, at the time of the intervention there were no formal allegations between them in that action and they were denominated co-plaintiffs. In the ensuing settlement negotiations, the parties purportedly settled their differences in writing. Subsequently, however, petitioner sought to avoid the settlement agreement and respondent made a motion under *Code Civ. Proc. § 664.6* to enforce the settlement. The trial court entered judgment pursuant to the terms of the stipulated settlement. On appeal, petitioner argued that the judgment was improper because, contrary to the requirements of *Code Civ. Proc. § 664.6*, there was no "pending litigation" between the parties. The court of appeal rejected this argument, holding that the judgment was proper even though the parties to the disputed settlement were not adversaries under the pleadings. The court based its holding largely on *Code Civ. Proc. § 578*, under which a court is granted the power to determine the rights of all parties to a lawsuit when the interests of justice require it (*167 Cal. App. 3d 1182, 1190-1191)* .

[c] Motion for Entry of Judgment Proper to Confirm Oral Settlement Agreement

In ***Richardson v. Richardson*** *(1986) 180 Cal. App. 3d 91, 225 Cal. Rptr. 370* , plaintiff brought an action against her former husband to compel transfer to her of a portion of the husband's partnership interest that had been awarded to her in their prior dissolution action. She also filed a petition to remove him as trustee of a trust established for her benefit. The liquidated value of husband's partnership interest was deposited in court by the partnership. The two cases were consolidated, and at a mandatory settlement conference held in a judge's chamber without a court reporter, plaintiff's counsel understood that the husband (who was an attorney representing himself) offered to release to wife the money deposited in court in return for the wife's dismissing the consolidated cases. Wife accepted this offer within the 48-hour acceptance period. Thereafter, husband refused to sign a written settlement agreement and maintained that no such agreement had been reached before the settlement judge. Wife then filed a motion to confirm the settlement agreement, pursuant to *Code Civ. Proc. § 664.6*. The same judge who presided at the settlement conference heard the motion, stated that his recollection of the settlement conference was the same as wife's, but deferred his ruling, encouraging the parties to reach a mutually acceptable written settlement agreement. Husband failed to appear for a subsequent hearing, and the judge granted wife's motion to confirm the oral settlement. Husband appealed.

The court of appeal affirmed. The court stated that there was substantial evidence that the parties had reached agreement as to all material terms required for a binding contract, even though it was intended that the agreement be memorialized later by a writing. It also rejected the husband's argument that a motion for summary judgment is required when the material facts of the purported agreement are in dispute, noting that while judicial authorities had questioned the propriety of the use of "speaking motions" to enforce a disputed agreement in the past, the Legislature had endorsed it by enacting *Code Civ. Proc. § 664.6* (*180 Cal. App. 3d 91, 96)* .

The facts and procedural background of *Corkland v. Boscoe (1984) 156 Cal. App. 3d 989, 203 Cal. Rptr. 356* , are discussed in *§ 131.21[3][a]*. The appellate court affirmed an order enforcing a judicially supervised settlement

agreement and noted that under *Code Civ. Proc. § 664.6*, what formerly was a nonstatutory "speaking motion" had now been authorized by statute and was applicable not only to judicially supervised settlement conferences, but also to stipulations of settlement in writing or orally before the court in pending litigation (*156 Cal. App. 3d 989, 994)* .

[4] Additional Authorities

[a] Entry of Judgment Pursuant to Stipulated Settlement

In ***1538 Cahuenga Partners, LLC v. Turmeko Properties, Inc.*** *(2009) 176 Cal. App. 4th 139, 143, 97 Cal. Rptr. 3d 552* , the parties' attorneys stipulated orally before the court to "absolutely, fully, and forever release, relieve, waive, relinquish, and discharge one another individually and collectively ... from any and all ... liens of every kind and nature whatsoever, whether known or unknown, suspected or unsuspected ... " The attorney representing defendant TRE stated in open court that he understood the terms of the agreement and accepted them on behalf of TRE's principal who was not present in the courtroom. In addition, the trial judge stated that he had talked to TRE's principal in chambers, and the principal had stated that he understood the terms and agreed to them. Three months later, TRE obtained a judgment in a related action against one of the parties to the settlement agreement. TRE's principal argued that because he was not present in the courtroom to consent to the settlement on the record, the settlement could not be enforced against TRE.

The court held that *Code Civ. Proc. § 664.6* does not require that the party to be bound consent to the settlement "on the record," only that the party consent to it "orally before the court" (*176 Cal. App. 4th 139, 143)* . The court held that the principal's oral statement to the court in chambers that he understood and agreed to the terms of the settlement satisfied the requirement that the party stipulate to the settlement "orally before the court" (*176 Cal. App. 4th 139, 143)* .

Datatronic Systems Corp. v. Speron, Inc. (1986) 176 Cal. App. 3d 1168, 222 Cal. Rptr. 658 , involved an action based on a contract entered into between the parties. After the deposition of defendant's vice-president, plaintiff offered to settle the action. Defendant accepted the offer, and an oral settlement agreement was recorded by the court reporter present for the deposition. However, the parties never agreed to the settlement in writing. Defendant subsequently filed for judgment pursuant to terms of settlement under *Code Civ. Proc. § 664.6*. The trial court granted judgment, finding that the parties had entered into a settlement within the meaning of *Code Civ. Proc. § 664.6* at the deposition. Plaintiff appealed contending, among other things, that the settlement was not "before the court" within the meaning of *Code Civ. Proc. § 664.6*, and the court of appeal reversed. The court held that oral stipulations for settlement of a case are "before the court" only when they are made on the record at a judicially supervised proceeding (*176 Cal. App. 3d 1168, 1173-1174)* . The court held that the deposition was not a judicially supervised proceeding within the meaning of the statute (*176 Cal. App. 3d 1168, 1174)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedureSettlementsGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview

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13-131 California Points & Authorities § 131.22

§ 131.22 Supporting Motion for Entry of Judgment Pursuant to Acceptance of Statutory Settlement Offer [Code Civ. Proc. § 998]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM IN SUPPORT OF MOTION FOR
_____ [*name*],	)	ENTRY OF JUDGMENT PURSUANT TO AC-
a(n) _____ [*name of state or*	)	CEPTANCE OF STATUTORY SETTLEMENT OF-
foreign country] Corporation,	)	FER
Defendant.	)	[*Code Civ. Proc. § 998*]
	)	Date: _____
		Time: _____
		Location: _____

_____

THE COURT, ON MOTION, MAY ENTER A JUDGMENT PURSUANT TO A PARTY's ACCEPTANCE OF A STATUTORY SETTLEMENT OFFER.

A. Entry of Judgment After Acceptance. If a statutory settlement offer made pursuant to *Section 998 of the Code of Civil Procedure* is accepted, the offer with proof of acceptance shall be filed and the clerk or the judge shall enter judgment accordingly (*Code Civ. Proc. § 998(b)*).

[*Optional*] **B. Counteroffer Does Not Preclude Acceptance of Statutory Settlement Offer.** A settlement offer made pursuant to *Section 998 of the Code of Civil Procedure* is not revoked by a counteroffer and may be accepted until expressly withdrawn by the offeror or deemed withdrawn under the terms of that section (*Poster v. Southern Cal. Rapid Transit Dist. (1990) 52 Cal. 3d 266, 270, 272, 276 Cal. Rptr. 321, 801 P.2d 1072*).

[*Optional*] **C. Service by Mail Extends Time to Accept Statutory Settlement Offer.** When a statutory settlement offer made pursuant to *Section 998 of the Code of Civil Procedure* is served by mail, the provisions of *Section 1013 of the Code of Civil Procedure* apply and extend the 30-day period for acceptance of the offer by 5 days (*Poster v. Southern Cal. Rapid Transit Dist. (1990) 52 Cal. 3d 266, 275, 276 Cal. Rptr. 321, 801 P.2d 1072*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted in support of a motion for entry of judgment based on acceptance of a statutory settlement offer made pursuant to *Code Civ. Proc. § 998*. Optional Paragraph B is for use when the plaintiff contends that the statutory offer was revoked by a counteroffer before acceptance. Optional Paragraph C is for use when the offer was served by mail and was accepted on the 31st to the 35th day after service.

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion and forms relating to statutory settlement offers made under Code Civ. Proc. § 998, see California Forms of Pleading and Practice, Ch. 174, *Costs and Attorney's Fees* and Ch. 520, *Settlement and Release* (Matthew Bender).

[c] Related Points and Authorities

For additional memoranda of points and authorities relating to other aspects of statutory settlement offers made under *Code Civ. Proc. § 998*, see Ch. 60, *Costs* and Ch. 121, *Interest* .

[3] Discussion of Authorities

[a] Counteroffer Does Not Preclude Acceptance of Statutory Settlement Offer

Code Civ. Proc. § 998(b) provides in part that not less than 10 days before commencement of trial, any party may serve an offer in writing on any other party to the action to allow judgment to be taken in accordance with the terms and conditions stated at that time. If the offer is accepted, the offer with proof of acceptance shall be filed and the clerk or

the judge shall enter judgment accordingly. If the offer is not accepted before trial or within 30 days after it is made, whichever occurs first, it shall be deemed withdrawn.

Plaintiff in ***Poster v. Southern Cal. Rapid Transit Dist.*** *(1990) 52 Cal. 3d 266, 276 Cal. Rptr. 321, 801 P.2d 1072* , sustained serious injury after being attacked by other passengers on one of defendant's buses, thrown from the bus, and run over by it. On December 11, 1987, acting pursuant to *Code Civ. Proc. § 998* and *Civ. Code § 3291*, plaintiff served defendants with an offer to compromise. The offer was served by mail with proof of service and provided that if it was accepted and notice of acceptance was given within 30 days or before the commencement of trial, the offer could be filed with proof of acceptance and the clerk of the court would be authorized to enter judgment in accordance with the offer. Defendants received the offer on December 14, 1987, and engaged in further settlement negotiations with plaintiff, making two separate counteroffers on December 16 and on January 8, 1988. Plaintiff refused the first and made no response to the second. On January 12, defendants advised plaintiff's attorney that they would accept the initial offer to compromise in the full amount and sent a letter of acceptance. Plaintiff acknowledged acceptance and agreed that the matter would be removed from the calendar. Notice of acceptance, in the form of a pleading instructing the clerk to enter judgment pursuant to the terms of the offer, was mailed to plaintiff on January 14, 1988. Thereafter, plaintiff's attorney received new information from an expert who advised that the extent and seriousness of plaintiff's injuries might be greater than first thought. Plaintiff's attorney subsequently informed defendants that plaintiff refused to honor the settlement agreement, claiming that the settlement negotiations that occurred after service of the offer to compromise operated as a counteroffer and thus terminated the original offer, revoking defendants' power of acceptance. Defendant noticed a motion to enforce the agreement, which was supported by a declaration from defendants' attorney hat plaintiff had never revoked the offer and continually led defendants to believe that the offer to compromise remained open.

The trial court found that the offer was properly accepted as required by statute and by the offer itself, and ordered judgment in plaintiff's favor in the amount of the offer. Plaintiff appealed. The court of appeal reversed, holding that although Section 998 offers are not automatically revoked by a counteroffer, acceptance in this case was not timely, because *Code Civ. Proc. § 1013(a)*, which generally extends the time to respond by five days when service is by mail, does not apply to Section 998 offers.

The Supreme Court agreed that the counteroffers did not serve to revoke plaintiff's Section 998 offer, but reversed with respect to application of *Code Civ. Proc. § 1013(a)*, and remanded with directions to affirm the trial court's order enforcing the settlement (*52 Cal. 3d 266, 275)* . The Court began by setting forth the pertinent part of *Code Civ. Proc. § 998(b)* and noting that it clearly reflects California's policy of encouraging settlements. Still, the statutory language is silent on a number of issues relevant to the application of the statute, including what constitutes an acceptance, whether the statutory offer may be revoked by the offeror before the expiration of the statutorily designated period, and the effect of counteroffers on the viability of outstanding statutory settlement offers. The Court pointed out that general contract principles have been applied to Section 998 offers to establish (1) that a 998 offer can be revoked by the offeror before the expiration of the statutory period [*T. M. Cobb Co., Inc. v. Superior Court (1984) 36 Cal. 3d 273, 278-280, 204 Cal. Rptr. 143, 682 P.2d 338]* and (2) that a counteroffer that deviates from the terms of an offer generally operates to revoke the offer [*Glende Motor Co. v. Superior Court (1984) 159 Cal. App. 3d 389, 396-398, 205 Cal. Rptr. 682]* . However, the Court reasoned that negotiation during the 30-day period is a normal occurrence and ought not to affect the right of the offeree ultimately to accept the statutory offer in a timely fashion. To adopt the Glende position would affect every personal injury case in which negotiations followed a statutory offer--negotiations that routinely involve counteroffers. Such a rule would have a negative effect on encouraging settlement (*52 Cal. 3d 266, 271)* . The Court concluded that the legislative purpose of *Code Civ. Proc. § 998* is better served by the rule that a Section 998 offer is not revoked by a counteroffer and may be accepted by the offeree during the statutory period unless the offer has been revoked by the offeror, and accordingly disapproved the Glende decision to the extent that it is contrary (*52 Cal. 3d 266, 272)* .

[b] Service by Mail Extends Time to Accept Statutory Settlement Offer

Code Civ. Proc. § 1013(a) provides in part that in the case of service by mail, the service is complete at the time of the deposit, but any prescribed period of notice and any right or duty to do any act or make any response within any prescribed period or on a date certain after the service of the document served by mail is extended five days if the place of address is within California.

The facts and procedural background of *Poster v. Southern Cal. Rapid Transit Dist. (1990) 52 Cal. 3d 266, 276 Cal. Rptr. 321, 801 P.2d 1072* , are discussed in *§ 131.122[3][a]*. The Court noted that the offer was mailed on December 11, 1987, and in computing the time permitted by the statute, and not counting December 11 [*see Code Civ. Proc. § 12*], the offer was open for 20 days in December and was not accepted by defendants until January 12, 1988, the 32nd day (*52 Cal. 3d 266, 272-273)* . The Court reviewed the various types of notices and responses to which *Code Civ. Proc. § 1013* has been held to apply, noting that Section 1013 has become a part of the mental calculations of most litigating attorneys (*52 Cal. 3d 266, 273-274)* . By its terms, *Code Civ. Proc. § 1013* clearly applies to the time period prescribed by *Code Civ. Proc. § 998* for accepting statutory offers of compromise. *Code Civ. Proc. § 1013* applies to the service by mail of a "notice or other paper," which would certainly include a Section 998 settlement offer. By specifically extending for five days "any prescribed period ... to do any act or make any response" to any paper served by mail, Section 1013 clearly applies to the statutory period for accepting a statutory settlement offer. In light of the language of *Code Civ. Proc. § 1013*, the Court concluded that there was no sound reason not to apply the statute to this context.

In determining that Section 1013 did not apply to statutory offers of settlement, the court of appeal had reasoned that its specific exclusion of notices of appeal had been held to encompass other "jurisdictional" deadlines. The Supreme Court found no basis for concluding that the 30-day limit of Section 998 was jurisdictional, and noted that "jurisdictional" is frequently misused in the sense of "mandatory" (*52 Cal. 3d 266, 274)* . There is nothing in *Code Civ. Proc. § 998* to support the conclusion that the 30-day limit was intended to be "jurisdictional" in the fundamental sense. The court of appeal also relied on the general proposition that when there are two conflicting statutes, one a general procedural statute and the other a statute dealing with more specific rights and procedures, the specific statute is regarded as an exception to the general statute. *Code Civ. Proc. § 998*, however, is not part of a specific statutory scheme that conflicts with *Code Civ. Proc. § 1013*. To the contrary, both are contained within miscellaneous provisions of the Code of Civil Procedure and apply generally to all civil cases. The Supreme Court saw no conflict between them that would support excepting Section 998 from the general operation of Section 1013 (*52 Cal. 3d 266, 275)* .

Accordingly, the Court concluded that when a statutory settlement offer pursuant to *Code Civ. Proc. § 998* is served by mail, the provisions of *Code Civ. Proc. § 1013* apply and extend the 30-day period for acceptance of the offer by 5 days (*52 Cal. 3d 266, 275)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedureSettlementsGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview

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CHAPTER 131 JUDGMENTS
PART II. FORMS
A. Entry of Judgments

13-131 California Points & Authorities § 131.23

§ 131.23 Opposing Motion for Entry of Judgment Nunc Pro Tunc or for Correction of Record of Judgment to Show Entry Nunc Pro Tunc

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR _____ [ENTRY OF JUDGMENT *or* CORRECTION OF RECORD OF JUDGMENT TO SHOW ENTRY] NUNC PRO TUNC
_____ [*name*],	)	
Defendant.	)	
	)	
	)	Date: _____
	)	Time: _____
		Location: _____

_____

IT WOULD BE IMPROPER TO ORDER A NUNC PRO TUNC ENTRY BECAUSE THE RESULTING JUDGMENT WOULD _____ [BE UNJUST AND/OR UNCONSCIONABLE *or* STATE THAT SOMETHING NOT DONE WAS DONE].

A. Declaring as Done What Was Not Done. A nunc pro tunc order cannot be made for the purpose of declaring that something was done which was not done (*Los Angeles v. Superior Court (1968) 264 Cal. App. 2d 766, 771, 70 Cal. Rptr. 826*).

B. Nunc Pro Tunc Correction Unconscionable. The trial court may properly refuse to correct a clerical error in a judgment nunc pro tunc when it would be unconscionable to do so (*Young v. Gardner-Denver Co. (1966) 244 Cal. App. 2d 915, 920, 53 Cal. Rptr. 522*).

[*Optional*] **C. Antedating Before Jury Instructed and Verdict Reached.** When a plaintiff has died during a jury trial but before the jury is instructed and a verdict reached, the trial court has no authority to enter judgment nunc pro tunc as of a time before the plaintiff's death (*Williamson v. Plant Insulation Co. (1994) 23 Cal. App. 4th 1406, 1414-1418, 28 Cal. Rptr. 2d 751*).

[*Optional*] **D. Antedating When Verdict in One Phase Reached.** *Code of Civil Procedure § 669* does not give a trial court the authority to enter judgment nunc pro tunc merely because a verdict in one phase of a bifurcated trial has been reached. Rather, a verdict must have been reached on all facts necessary for judgment (*Williamson v. Plant Insulation Co. (1994) 23 Cal. App. 4th 1406, 1414-1415, 28 Cal. Rptr. 2d 751*).

E. Ground for Antedating Judgment Nunc Pro Tunc. [*See § 131.20[1], Paragraph B.*]

F. Antedating as Justice Requires. [*See § 131.20[1], Paragraph C.*]

G. Nunc Pro Tunc May Not Alter Judgment. A court may correct a clerical, as distinguished from a judicial error which appears on the face of a decree by a nunc pro tunc order. However, it cannot change an order that has become final even though made in error, if in fact the order made was that intended to be made [*In re Marriage of Padgett (2009) 172 Cal. App. 4th 830, 851-855, 91 Cal. Rptr. 3d 475]* .
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion for the entry of a judgment nunc pro tunc when there was no actual order or judgment and thus nothing on which an order for such action may act, when, if there was an actual order or judgment, it would be unconscionable or not in the interest of justice to do so, or when the original judgment or order is not deficient.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, this form may be submitted in opposition to the contention supported by the points and authorities set out in *§ 131.21*.

[3] Discussion of Authorities

[a] Declaring as Done What Was Not Done

In ***Los Angeles v. Superior Court*** *(1968) 264 Cal. App. 2d 766, 70 Cal. Rptr. 826* , the court of appeal granted a writ of mandamus to require the trial court to vacate and set aside an order granting plaintiffs' motion for a nunc pro tunc order amending the filing date of a complaint to a date within the time allowed for filing. The plaintiffs argued that since the purpose of a nunc pro tunc order is to preserve the legitimate fruits of the litigation to the prevailing party, the trial court's order, having accomplished that purpose, should be sustained. However, the court of appeal stated that the plaintiffs had misconceived the purpose of a nunc pro tunc order. Such an order, said the court, cannot be made for the purpose of declaring that something was done which was not done. Its only office, the court explained, is to cause the record to show something which was actually done, but which, by misprision or neglect, was not entered in the record at the time. No court can order the clerk to make a record of something which was not done on the date involved.

[b] Nunc Pro Tunc Correction Unconscionable

Young v. Gardner-Denver Co. *(1966) 244 Cal. App. 2d 915, 53 Cal. Rptr. 522* , is discussed in *§ 131.20[3][b]*.

[c] Antedating Before Jury Instructed and Verdict Reached

In ***Williamson v. Plant Insulation Co.*** *(1994) 23 Cal. App. 4th 1406, 28 Cal. Rptr. 2d 751* , the plaintiff filed suit for economic and noneconomic damages alleged to have resulted from lung cancer he allegedly developed from asbestos exposure. The matter proceeded to a jury trial, which was bifurcated into two phases. At the first phase, the jury reached a special verdict that the claim was timely and that exposure to asbestos was a legal cause of the plaintiff's loss, and set the amounts of damages. Trial on the second phase, the issues of liability and comparative fault, then began. Both parties rested, except for the introduction of an anticipated stipulation and a ruling on and admission of exhibits. The court was recessed for a few days; during the interim, the plaintiff died. The matter then continued, without telling the jury of the plaintiff's death, and the jury was instructed and deliberated. After the second phase verdict was reached, the trial court entered judgment nunc pro tunc as of the day before the plaintiff's death.

The court of appeal reversed the award with regard to noneconomic losses, holding that the plaintiff's claim for these had abated with his death, and that the trial court had no authority to enter judgment nunc pro tunc before his death so that the claim could survive. The plaintiff had died during trial; although live testimony had been completed at the time of his death, evidentiary exhibits had not yet been admitted or excluded, jury instructions had not yet been given, and jury argument had not yet been made, let alone final verdict reached. Thus, the trial had not reached the stage at which judgment could be entered, and the trial court could not order entry of judgment nunc pro tunc as of that time. Nor did *Code Civ. Proc. § 669* give the trial court authority to enter judgment nunc pro tunc. Although that statute allows a judge to enter judgment nunc pro tunc "after a verdict upon any issue of fact," it does not allow a judge to do so after a verdict is rendered in the first phase of a bifurcated trial but before the remaining verdict is rendered determining all facts necessary for judgment (*23 Cal. App. 4th 1406, 1414-1418)* .

[d] Antedating When Verdict in One Phase Reached

Williamson v. Plant Insulation Co. *(1994) 23 Cal. App. 4th 1406, 28 Cal. Rptr. 2d 751* , is discussed in *§ 131.23[3][c]*.

[e] Nunc Pro Tunc May Not Alter Judgment

In ***In re Marriage of Padgett*** *(2009) 172 Cal. App. 4th 830, 851-855, 91 Cal. Rptr. 3d 475* , Robert and Beverly Padgett were married in 1972 and divorced in 1988. While married to Beverly, Robert was a participant in a pension plan. The judgment of dissolution did not adjudicate Beverly's interest in Robert's pension plan, but the court expressly retained jurisdiction to do so. Robert married Donna in 1995. Robert continued to work and added to his benefits in the plan. Robert died in 2005, before he had retired and before receiving any plan benefits. The plan provided a survivor's

benefit of half of the monthly pension benefit Robert would have received if he had retired immediately before his death. After Robert's death, Beverly made a claim for the survivor benefits. After litigation between Beverly and Donna, the trial court ruled that Beverly was entitled to survivor benefits under the plan and ordered Beverly's attorney to prepare a nunc pro tunc order as of the date of the marriage dissolution. Donna appealed.

The court of appeal held that a nunc pro tunc order is one entered as of a time prior to the actual entry, so that it is treated as effective at the earlier date. This is an exercise of the court's inherent power in order to do justice to a litigant whose rights are threatened by a delay that is not the litigant's fault. However, the court held, there are limits on a court's power to enter orders nunc pro tunc (*172 Cal. App. 4th 830, 851)* . The court held that by a nunc pro tunc order a court may correct a clerical, rather than a judicial, error which appears on the face of a decree. However, a court may not change an order which has become final even though made in error, if the order made was that intended to be made (*172 Cal. App. 4th 830, 851-852)* . The court noted that decisions allowing nunc pro tunc amendments after the death or retirement of a plan participant did so in circumstances where the original order at a minimum created in the former spouse some interest in the pension plan (*172 Cal. App. 4th 830, 854*). Here, the court held, the court in the original dissolution action did not create any interest for Beverly in the pension plan, and a nunc pro tunc amendment was improper.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsNunc Pro Tunc Relief

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13-131 California Points & Authorities § 131.24

§ 131.24 Opposing Motion for Entry of Judgment Pursuant to Terms of Settlement [Code Civ. Proc. § 664.6]--Stipulated Settlement Was Oral But Not Entered Before Court, or Was Written But Not Signed by Parties

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR ENTRY OF JUDGMENT PURSUANT TO TERMS OF STIPULATED SETTLEMENT
vs.	)	
_____ [*name*],	)	
Defendants.	)	
	)	[*Code Civ. Proc. § 664.6*]
	)	Date: _____
		Time: _____
		Location: _____

_____

THE PURPORTED STIPULATION IS AN INSUFFICIENT BASIS FOR JUDGMENT ON MOTION BECAUSE IT _____ [*if insufficient oral stipulation,* WAS NOT ENTERED BEFORE A COURT (AND/OR) *if insufficient written stipulation,* WAS NOT SIGNED BY THE PARTIES].

A. Stipulation Must Be Orally Entered Before Court or Written and Signed. An agreement sought to be enforced pursuant to *Code of Civil Procedure § 664.6* must be judicially supervised or in writing and signed by the parties (*City of Fresno v. Maroot (1987) 189 Cal. App. 3d 755, 760-762, 234 Cal. Rptr. 353*).

[*Optional*] **B. Oral Agreement Made at Deposition Insufficient.** An out-of-court settlement agreement recorded by a court reporter at a deposition is insufficient to constitute an oral agreement that may be enforced under *Code of Civil Procedure § 664.6*, because the oral agreement must be entered before the court (*City of Fresno v. Maroot (1987) 189 Cal. App. 3d 755, 760-762, 234 Cal. Rptr. 353*).

[*Optional*] **C. Oral Agreement Before Non-Adjudicative Mediator Insufficient.** The requirement that an oral settlement agreement under *Code of Civil Procedure § 664.6* be before the court is not satisfied when the agreement is before a mediator who is not authorized by statute to act in a quasi-judicial capacity (*Murphy v. Padilla (1996) 42 Cal. App. 4th 707, 714, 49 Cal. Rptr. 2d 722*).

[*Optional*] **D. Agreement by Attorney Insufficient.** To be enforceable, a settlement agreement must have been personally agreed to or signed by the litigant; an agreement entered only by the litigant's attorney is insufficient (*Cortez v. Kenneally (1996) 44 Cal. App. 4th 523, 528, 51 Cal. Rptr. 2d 671*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be used in opposition to a motion for the entry of judgment based on a prior stipulation if the purported stipulation was either oral, but not entered before the court, or written, but not signed by the parties. Optional Paragraph B is for use if an oral agreement was recorded by a court reporter at a deposition, but was not also entered before the court [*see City of Fresno v. Maroot (1987) 189 Cal. App. 3d 755, 760-762, 234 Cal. Rptr. 353]* . Optional Paragraph C is for use if an oral agreement was made before a mediator not authorized by statute to act in a quasi-judicial capacity. Optional Paragraph D is for use when the settlement agreement was entered into only by the litigant's attorney, not by the litigant personally.

Counsel should add argument showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should discuss facts describing whether the agreement was oral or written or both, and showing that either the oral agreement was not entered before the court, or the written agreement was not signed by the parties, or both.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities set out in *§ 131.21*.

[3] Discussion of Authorities

[a] Stipulation Must Be Orally Entered Before Court or Written and Signed

In ***City of Fresno v. Maroot*** *(1987) 189 Cal. App. 3d 755, 234 Cal. Rptr. 353* , the parties to an action in eminent domain met at a deposition and underwent settlement negotiations instead of taking the scheduled depositions. Counsel for plaintiffs and defendant recited the agreement to the court reporter, who recorded their statements. An issue

regarding whether the price fixtures were included in the proposed damages amount remained undetermined. The oral agreement was not entered before the court. Subsequently, plaintiff reduced the purported agreement to writing, including a provision regarding the disputed fixtures, and defendants refused to sign it. The trial court granted plaintiff's motion for judgment pursuant to the terms of the purported settlement agreement under *Code Civ. Proc. § 664.6*, based on declarations and the deposition transcript, and defendants appealed.

The court of appeal reversed, holding that unless the agreement is judicially supervised or in writing and signed by the parties, the intent of the parties when they verbalized the settlement is vulnerable to conflicting interpretations and the summary procedures authorized by *Code Civ. Proc. § 664.6* are not available (*189 Cal. App. 3d 755, 762)* . The court noted with approval the holding of *Datatronic Systems Corp. v. Speron, Inc. (1986) 176 Cal. App. 3d 1168, 1174, 222 Cal. Rptr. 658* (discussed in *§ 131.21[4][a]*), stating that an oral stipulation to a settlement agreement recorded by a court reporter following the taking of a deposition is insufficient to satisfy the requirement of *Code Civ. Proc. § 664.6* that the agreement be made "before the court" (*189 Cal. App. 3d 755, 761)* .

[b] Oral Agreement Made at Deposition Insufficient

City of Fresno v. Maroot *(1987) 189 Cal. App. 3d 755, 234 Cal. Rptr. 353* , is discussed in *§ 131.24[3][a]*.

[c] Oral Agreement Before Non-Adjudicative Mediator Insufficient

In ***Murphy v. Padilla*** *(1996) 42 Cal. App. 4th 707, 49 Cal. Rptr. 2d 722* , the underlying suit was based on a disputed easement held by defendant. The trial court referred the matter to arbitration, purportedly pursuant to *Code Civ. Proc. § 638*, but without written consent of the parties. An oral stipulation was apparently reached and memorialized in a handwritten document which was not signed but was intended to be a draft for the attorneys to finalize later. Defendant subsequently informed her attorney that she could not sign the agreement due to unresolved concerns. Plaintiffs moved to enforce the agreement pursuant to *Code Civ. Proc. § 664.6*, and the trial court granted the motion.

Defendant contended on appeal that the agreement was not enforceable because it was an oral agreement which was not made before the court. The court of appeal noted that oral stipulations before a subordinate court officer met the "before the court" requirement of *Code Civ. Proc. § 664.6* if the officer was empowered to act with an adjudicatory function, and did act in that capacity (*42 Cal. App. 4th 707, 712)* . However, since the parties had not signed consents to the arbitration, the court found the status of the mediator unclear, and concluded that he was analogous to a mediator in a voluntary settlement conference. The mediator was thus not empowered with adjudicative authority, and the oral settlement agreement could not be enforced because the "before the court" requirement was not satisfied (*42 Cal. App. 4th 707, 715)* . The court thus reversed the judgment based on the agreement.

[d] Agreement by Attorney Insufficient

In ***Cortez v. Kenneally*** *(1996) 44 Cal. App. 4th 523, 51 Cal. Rptr. 2d 671* , a medical malpractice action, the physician's wife was added as a defendant. A settlement agreement was subsequently negotiated and stated on the record before the court. The physician and his attorney were present, and the attorney represented that he was also representing the physician's wife. Plaintiff subsequently brought a motion to enforce the settlement agreement pursuant to *Code Civ. Proc. § 664.6*. The wife opposed this motion with a declaration stating that she had no role in settlement discussions, was not present at the hearing, and did not authorize either her husband or his attorney to offer anything on her behalf. The trial court ordered enforcement of the judgment, stating that the record was clear that the husband and his attorney were acting on behalf of the wife.

The court of appeal noted that the Supreme Court held in *Levy v. Superior Court (1995) 10 Cal. 4th 578, 41 Cal. Rptr. 2d 878, 896 P.2d 171* , that the word parties in *Code Civ. Proc. § 664.6* means the litigants themselves, and that to be enforceable a settlement agreement must have been personally agreed to or signed by the litigant (*44 Cal. App. 4th*

523, 528) . An agreement entered only by the litigant's attorney is insufficient because the settlement of a lawsuit is not incidental to the management of the lawsuit. Settlement is such a serious step that it requires the client's knowledge and express consent (*44 Cal. App. 4th 523, 529)* . Since she had not been present to personally agree to the settlement and had not signed the agreement, the court reversed the judgment against the wife.

But see ***Robertson v. Chen*** *(1996) 44 Cal. App. 4th 1290, 52 Cal. Rptr. 2d 264* , the facts and procedural background of which are discussed in *§ 131.24[4][a]*, where the court stated that it did not read the involvement by a party requirement of *Levy v. Superior Court (1995) 10 Cal. 4th 578, 41 Cal. Rptr. 2d 878, 896 P.2d 171* , as precluding enforcement of an insurance-funded settlement reached by an authorized insurance defense counsel or adjuster when the carrier has the contractual right to settle (*44 Cal. App. 4th 1290, 1295)* .

[4] Additional Authorities

[a] Stipulation Must Be Orally Entered Before Court of Written and Signed

In *Robertson v. Chen (1996) 44 Cal. App. 4th 1290, 52 Cal. Rptr. 2d 264* , the mandatory settlement conference statement filed by the defense described a defense settlement offer which had been previously rejected by plaintiffs, and stated that the offer would remain open until trial. Plaintiffs later decided to accept the offer, and defendants claimed the offer had been revoked. Plaintiffs moved for enforcement of the offer as a settlement pursuant to *Code Civ. Proc. § 664.6*, and the trial court granted the motion. The court of appeal disagreed, noting that for a written settlement agreement to be enforceable it must be signed by the parties themselves (*44 Cal. App. 4th 1290, 1292)* . In this situation, there was no writing signed by the parties, there was only a mandatory settlement conference statement signed by counsel for one side. The judgment entered on the statement was thus reversed.

[b] Agreement by Attorney Insufficient

In *Murphy v. Padilla (1996) 42 Cal. App. 4th 707, 49 Cal. Rptr. 2d 722* , the facts and procedural background of which is discussed in *§ 131.124[3][c]*, the court rejected a contention that an oral settlement agreement was enforceable because it had been ratified by the attorney of a non-signing party. The court referred to *Levy v. Superior Court (1995) 10 Cal. 4th 578, 41 Cal. Rptr. 2d 878, 896 P.2d 171* , for the rule that direct party-litigant participation is required to enforce settlement agreements (*42 Cal. App. 4th 707, 715)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview

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13-131 California Points & Authorities § 131.25

§ 131.25 Opposing Motion for Entry of Judgment Pursuant to Terms of Settlement [Code Civ. Proc. § 664.6]--No Litigation Pending When Settlement Executed

[1] FORM

[*Caption. See § 131.24[1].*]

TO UTILIZE THE SUMMARY PROCEDURES OF CODE CIV. PROC. § 664.6 IN EXISTING LITIGATION TO ENFORCE A SETTLEMENT AGREEMENT, LITIGATION MUST HAVE BEEN PENDING WHEN THE SETTLEMENT AGREEMENT WAS EXECUTED.

Litigation Must Be Pending When Settlement Agreement Executed. For the summary procedure to enforce a settlement or release agreement pursuant to *Code Civ. Proc. § 664.6* in existing litigation, a settlement or release agreement must have been executed when the litigation was already pending. An agreement executed before litigation is instituted is not enforceable under the summary procedure provided by section 664.6 [*Kirby v. Southern California Edison Co. (2000) 78 Cal. App. 4th 840, 843-846, 93 Cal. Rptr. 2d 223]* .

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be used in opposition to a motion for entry of judgment in existing litigation based on a settlement or release agreement, if the settlement agreement or release was executed before the litigation was instituted [*Kirby v. Southern California Edison Co. (2000) 78 Cal. App. 4th 840, 93 Cal. Rptr. 2d 223]* .

Counsel should add argument showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should specify facts showing when the purported settlement agreement or release was executed and when the instant litigation was instituted.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities in *§ 131.21*.

[3] Discussion of Authorities

[a] Litigation Must Be Pending When Agreement Executed

In ***Kirby v. Southern California Edison Co.*** *(2000) 78 Cal. App. 4th 840, 93 Cal. Rptr. 2d 223* , the mother of a man electrocuted by a downed high-voltage wire during a windstorm filed a wrongful death complaint against a utility company. The company moved pursuant to *Code Civ. Proc. § 664.6* for an order enforcing an alleged settlement agreement with the plaintiff. In opposition to the motion, the plaintiff offered evidence that the utility's representatives came to her house the day after the incident and then returned the next day to present her with a check to assist in the burial of her son, in return for her execution of a release. The plaintiff returned the check to the utility after consulting with an attorney and filed the complaint over 5 months after she executed the release. The trial court granted the utility's motion and dismissed the action.

The court of appeal reversed, finding that the summary procedures of *Code Civ. Proc. § 664.6* were inapplicable in these circumstances. The court found that section 664.6 provides a summary procedure by which a trial court may specifically enforce an agreement settling pending litigation without requiring the filing of a second lawsuit (*78 Cal. App. 4th 840, 843)* . However, at the time the disputed release was executed, there was no litigation pending. The court found that the statutory language referring to settlements by "parties to pending litigation" is clear and ambiguous; "parties" means "litigants," and there are no litigants until there is a case on file to litigate (*78 Cal. App. 4th 840, 844-845)* . The court found further that the legislative history of section 664.6 reinforced the conclusion that the Legislature intended the section to provide a means of enforcing settlement agreements entered into after litigation had been filed (*78 Cal. App. 4th 840, 845)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedureSettlementsGeneral OverviewCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview

California Points & Authorities

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13-131 California Points & Authorities § 131.26

§ 131.26 Opposing Motion for Entry of Judgment Pursuant to Terms of Settlement [Code Civ. Proc. § 664.6]--Action Was Dismissed and Parties Did Not Properly Request Continuing Jurisdiction

[1] FORM

[*Caption. See § 131.24[1].*]

TO UTILIZE THE SUMMARY PROCEDURES OF CODE CIV. PROC. § 664.6 IN EXISTING LITIGATION TO ENFORCE A SETTLEMENT AGREEMENT ONCE THE ACTION IS DISMISSED, THE PARTIES MUST HAVE PROPERLY REQUESTED CONTINUING JURISDICTION.

Parties Did Not Properly Request Continuing Jurisdiction Before the Action Was Dismissed. If requested by the parties to a stipulated settlement, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement [*Code Civ. Proc. § 664.6*]. In order for the court to assert continuing jurisdiction, however, the request must satisfy the same formalities imposed generally on Section 664.6 motions and the settlement agreements the motions seek to enforce. Thus, the request for continuing jurisdiction must be made prior to dismissal, it must be made orally before the court or in a signed writing, and it must be made by the parties themselves, not their attorneys, spouses or other agents. If after the action has been dismissed a party brings a Section 664.6 motion but cannot present to the court a request for continuing jurisdiction that meets all these requirements, enforcement of the agreement must be left to a separate lawsuit (*Wackeen v. Malis (2002) 97 Cal. App. 4th 429, 433, 118 Cal. Rptr. 2d 502*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be used in opposition to a motion for entry of judgment in existing litigation based on a settlement or release agreement, if the action was dismissed and the parties failed to request properly that the court retain jurisdiction before the dismissal [*Wackeen v. Malis (2002) 97 Cal. App. 4th 429, 118*

Cal. Rptr. 2d 502] .

Counsel should add argument showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should specify facts showing when the action was dismissed and facts showing the failure to request continuing jurisdiction properly.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities in *§ 131.21*.

[3] Discussion of Authorities

[a] Parties Must Properly Request Continuing Jurisdiction Before Action Is Dismissed

In ***Wackeen v. Malis*** *(2002) 97 Cal. App. 4th 429, 118 Cal. Rptr. 2d 502* , parties entered into a settlement agreement, and the court approved under *Code of Civ. Proc. § 877.6* good faith settlement motion. Both before and after the settlement agreement was signed, requests for dismissal of various defendants and cross-defendants were filed, which had the effect of dismissing all defendants and cross-defendants and thus the action itself (*97 Cal. App. 4th 429, 434)* . One of the original defendants filed two Section 664.6 motions to enforce clauses of the settlement agreement, alleging that the plaintiff had failed to live up to several of obligations under the agreement. The trial court granted the motions in part (*97 Cal. App. 4th 429, 434-437)* .

The Court of Appeal reversed on the ground that the trial court did not have subject matter jurisdiction over the Section 664.6 motions. The court held that a voluntary dismissal of the entire action divests the court of subject matter jurisdiction, which occurred in this case (*97 Cal. App. 4th 429, 437-439)* . The court then construed the second sentence of Section 664.6, which was added in 1993, to mean that even though a settlement may call for a case to be dismissed or the plaintiff dismisses the action of its own accord, the court may retain jurisdiction to enforce the terms of the settlement until its terms have been performed by the parties if the parties have requested the specific retention of jurisdiction (*97 Cal. App. 4th 429, 439)* . The court then held that the request for retention of jurisdiction must conform to the same three requirements necessary for Section 664.6 enforcement of the settlement itself, i.e., that the request be made during the pendency of the case, that it be made by the parties themselves, and that it either be in a writing signed by the parties or orally before the court (*97 Cal. App. 4th 429, 439-440)* . The court then found that there was no clear express request for retention of jurisdiction necessary to permit the court to retain jurisdiction to enforce under Section 664.6 the provisions of the settlement agreement in this case (*97 Cal. App. 4th 429, 441)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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13-131 California Points & Authorities § 131.27

§ 131.27 Opposing Motion for Entry of Judgment Pursuant to Terms of Settlement [Code Civ. Proc. § 664.6]--Provision of Settlement Agreement Is Invalid

[1] FORM

[*Caption. See § 131.24[1].*]

THE COURT CANNOT ENFORCE A SETTLEMENT AGREEMENT THAT INCLUDES AN INVALID PROVISION.

Court Cannot Enforce a Settlement Agreement With an Invalid Provision. A settlement agreement is a contract subject to all the normal legal and statutory contractual requirements. The courts will not enforce a contract to perform a prohibited act. *Code of Civil Procedure Section 664.6* does not allow a court to endorse or enforce a provision in a settlement agreement or stipulation which is illegal, contrary to public policy, unjust or invalid. The settlement judge's approval of the agreement does not shield it from invalidation (*Timney v. Lin (2003) 106 Cal. App. 4th 1121, 1126-1129, 131 Cal. Rptr. 2d 387*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be used in opposition to a motion for entry of judgment in existing litigation based on a settlement or release agreement, when the settlement agreement in whole or in part is invalid if the action was dismissed and the parties failed to request properly that the court retain jurisdiction before the dismissal (*Timney v. Lin (2003) 106 Cal. App. 4th 1121, 1126-1129, 131 Cal. Rptr. 2d 387*).

Counsel should add argument showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should specify facts showing which provision of the settlement agreement is invalid and why.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities in *§ 131.21*.

[3] Discussion of Authorities

[a] Court Cannot Enforce Settlement Agreement or Provision of Agreement That Is Invalid

In ***Timney v. Lin*** *(2003) 106 Cal. App. 4th 1121, 131 Cal. Rptr. 2d 387* , in the original litigation, buyers sought specific performance of an agreement to buy the home they had been renting from the sellers. The originally contemplated sale could not go through, because a 25 percent interest in the property was held by a person who lived in Taiwan and was unwilling to sell her interest. The buyers and sellers entered into a written settlement agreement providing which provided for the sellers to sell their 75 percent interest to the buyers. The agreement also provided that if the buyers were unable to complete the sale, all funds placed in escrow would be returned to the buyers on the buyers' deposit of a quitclaim deed in escrow within five days of the closing date of September 11, 2001, but if the buyers failed to timely place the quitclaim deed in escrow, their deposit of $20,000, together with their initial deposit of $11,250, would be forfeited to the sellers. This paragraph was not labeled as a liquidated damages provision, although its effect was to provide for a forfeiture of funds deposited into escrow. The buyers did not complete the sale because they were unable to secure financing. The buyers undertook timely steps to cancel the escrow, including cancellation instructions for the title company acting as escrow agent, which was to prepare and deliver a quitclaim deed to the sellers' attorney. Purportedly as a result of the disruption caused by the terrorist attacks of September 11, 2001, the quitclaim deed was not prepared by the escrow agent when the cancellation instructions were forwarded to the sellers, but was provided about three weeks late. The sellers brought a motion to enforce the settlement under *Code Civ. Proc. § 664.6*, including the provision for forfeiture of the deposited funds in escrow for failure to deposit the quitclaim deed in escrow within five days of the closing date. The trial court granted the motion to enforce the settlement, and entered judgment accordingly. (*106 Cal. App. 4th 1121, 1124-1125)* .

The Court of Appeal reversed. The court first held that if the forfeiture provision were included in a real property sales contract, it would be void as an illegal forfeiture (*106 Cal. App. 4th 1121, 1126)* . The court then held that the existence of the provision in a settlement agreement did not require the court to apply a different rule of law. Case law uniformly treats a settlement agreement as a contract subject to all the normal legal and statutory contractual requirements, and the forfeiture of the deposit as a result of the delay in delivering a quitclaim deed, which caused the sellers no cognizable damages, constituted an illegal forfeiture provision and was invalid, even though the provision did not actually mention the term "liquidated damages," because its legal effect was to allow a forfeiture for lateness without regard to any damage caused. Further, the settlement judge's approval did not shield it from invalidation. (*106 Cal. App. 4th 1121, 1127-1129)* .

Legal Topics:

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[Reserved]

§§ 131.28[Reserved]

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B. Amendment, Correction, And Modification Of Judgments

13-131 California Points & Authorities § 131.40

§ 131.40 Supporting Motion to Correct Clerical Error in Judgment [Code Civ. Proc. § 473(d)]--Court's Power to Correct Clerical Error--Inherent or Statutory [Code Civ. Proc. § 473(d)]--General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO CORRECT CLERICAL ERROR IN JUDGMENT UNDER _____ [COURT's INHERENT POWER *or* STATUTE] [*Code Civ. Proc. § 473(d)*]
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	Date: _____
	)	Time: _____
	)	Location: _____

_____

THE TRIAL COURT HAS BOTH THE POWER AND THE DUTY TO CORRECT A CLERICAL ERROR IN ITS JUDGMENT AND SUCH CORRECTION MAY BE MADE AT ANY TIME, WHETHER PRIOR TO OR AFTER THE ENTRY OF THE JUDGMENT.

[*EITHER*]

A. Power to Correct Prior to Entry. The court retains power to amend or change the conclusions of law to point to a different judgment and to enter a judgment different from the first one announced. This power continues until the entry of the judgment, [and a judge other than the one who tried the case may make the change] (*Kelly v. Sparling Water Co. (1959) 52 Cal. 2d 628, 633, 343 P.2d 257*).

[*OR*]

A. Power to Correct After Entry. The court may, on motion of the injured party, correct clerical mistakes in its judgment as entered to conform to the judgment or order directed (*Code Civ. Proc. § 473(d)*).

[*OR*]

A. Power to Modify in Ruling on Motion for New Trial. In a case tried without a jury, when there is a motion for a new trial, the proper procedure under *Section 662 of the Code of Civil Procedure* when the trial court desires to modify the statement of decision and judgment is for the trial court to deny the motion and grant the alternative relief of modification of the statement of decision and judgment (*Medak v. Cox (1970) 12 Cal. App. 3d 70, 74, 90 Cal. Rptr. 452*).

B. Inherent Power to Correct. A court has inherent power to vacate and correct its judgments which, because of clerical error, are improvidently or inadvertently made, as well as the power under *Section 473 of the Code of Civil Procedure* to correct clerical errors (*Bastajian v. Brown (1941) 19 Cal. 2d 209, 214, 120 P.2d 9* ; *Pettigrew v. Grand Rent-A-Car (1984) 154 Cal. App. 3d 204, 209, 201 Cal. Rptr. 125*).

C. Duty to Correct Error. Courts not only have power to correct clerical errors in their judgments but are under the definite and manifest legal duty to do so (*In re Roberts (1962) 200 Cal. App. 2d 95, 98, 19 Cal. Rptr. 147* ; *Meyer v. Porath (1952) 113 Cal. App. 2d 808, 811, 248 P.2d 984*).

[*Optional*] **D. Correction at Any Time.** The courts have power to correct clerical errors in their judgments at any time[, notwithstanding the passage of many years] (*Estate of Goldberg (1938) 10 Cal. 2d 709, 717, 76 P.2d 508*).

E. Correction Following Appeal. The courts have power to correct clerical errors in their judgments either before or after an appeal has been finally determined if the correction does not affect substantial rights of the parties (*LaMar v. Superior Court (1948) 87 Cal. App. 2d 126, 129, 196 P.2d 98*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted by a party to an action in support of his or her motion for correction of the judgment rendered therein when the party contends that the judgment contains a clerical error and the issue is the court's power to make the requested correction. When it is found desirable to add authority concerning the court's power to determine the character of the error as clerical, reference should be made to *§ 131.41*; for points and authorities for use in guiding the court in determining whether the error was clerical, see *§ 131.42*. When the moving party desires to have the record of judgment corrected to speak nunc pro tunc, counsel may incorporate points and authorities set forth in *§ 131.43*. Opposing forms may be found in *§§ 131.44 -131.46*.

Counsel should add argument showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For a notice of motion for an order to correct clerical error in a judgment and to amend the judgment nunc pro tunc, and an order to that effect, see California Forms of Pleading and Practice , Ch. 318, *Judgments* , (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities supporting and opposing a motion to vacate a judgment for mistake, inadvertence, surprise, or excusable neglect, pursuant to *Code Civ. Proc. § 473(b)*, see Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders* .

For memoranda of points and authorities supporting and opposing a motion to vacate a judgment and enter a different judgment under *Code Civ. Proc. §§ 663* and *663a*, see *Ch. 155, Motions After Trial, § 155.320* et seq.

[3] Discussion of Authorities

[a] Power to Correct Prior to Entry

In ***Kelly v. Sparling Water Co.*** *(1959) 52 Cal. 2d 628, 343 P.2d 257* , the Supreme Court ruled that it was proper for a trial court to amend its judgment prior to the entry thereof, but that in this case the amendment was inconsistent with the trial court's findings of fact, requiring reversal and remand for a new trial. The trial court rendered judgment for the plaintiffs in an action for damages and for an injunction to restrain the defendants from diverting water from the plaintiffs' spring, pursuant to its conclusions of law. The defendants moved for a new trial. Because of the hospitalization of the trial judge, another judge heard the motion. That judge denied the motion but modified the conclusions of law and the judgment without changing the findings of fact. As to the modified judgment, the Court noted that it has been repeatedly held that the court retains power to amend or change the conclusions of law to point to a different judgment and enter a judgment different from the first one announced, and that this power continues until the entry of the judgment. It added that such change may be made by a judge other than the one who tried the cause. However, since the modification was contrary to the original judge's findings of fact, the second judge erred, and that error required a reversal.

[b] Power to Modify in Ruling on Motion for New Trial

In ***Medak v. Cox*** *(1970) 12 Cal. App. 3d 70, 90 Cal. Rptr. 452* , the court of appeal dismissed an appeal from a judgment, holding that the judgment had properly been vacated and modified following a motion for a new trial. The case involved an action by an unlicensed architect to foreclose a mechanic's lien for services rendered to the defendants. The defendants filed a cross complaint for money paid under an alleged illegal contract with the plaintiff. The original judgment was entered for the plaintiff and against the defendants on their cross complaint. Following a motion for a new trial, the judgment was modified and a new judgment was entered. Although the trial court made no explicit statement to that effect, it was clear, said the court of appeal, that it was proceeding under the authority granted it by

Code Civ. Proc. § 662, which provides for modification of judgment in ruling on a motion for new trial in a cause tried without a jury. The proper procedure is for the trial court to deny the motion and grant the alternative relief stated under the cited section, i.e., a modification of findings and judgment. Accordingly, held the court, the new judgment superseded the original judgment and the appeal from the superseded judgment was therefore a nullity and was dismissed.

This case construes *Code Civ. Proc. § 662* prior to its amendment in 1981, when references to findings were changed to statement of decision in order to conform with the amendment of *Code Civ. Proc. § 632*, providing for a statement of decision rather than findings of fact and conclusions of law.

[c] Inherent Power to Correct

In ***Bastajian v. Brown*** *(1941) 19 Cal. 2d 209, 120 P.2d 9* , the Supreme Court affirmed a trial court's order setting aside its findings and conclusions and judgment. The action involved a suit to quiet title to real property based on the claim that two trust deeds thereon and a conveyance thereof to the defendants were obtained by fraud and undue influence. After trial a minute order was entered to the effect that the court had ordered judgment for the defendants. A year expired during which time no findings and conclusions were submitted to the court. Findings, conclusions, and a judgment favorable to the plaintiffs were finally prepared by the plaintiff's attorney, signed, and filed. The defendants moved for an order vacating the findings and judgment on the grounds that as a result of clerical error they did not conform to and were not the court's true judgment. The trial court granted the motion and directed the defendants to prepare findings and conclusions and a judgment in accordance with its decision. The Court observed that the defendants' motion invoked a court's inherent power to vacate and correct its judgments, which because of clerical error are improvidently or inadvertently made, as well as the power under *Code Civ. Proc. § 473* to correct clerical errors and to vacate judgments as the result of accident, surprise, and excusable neglect of the parties or their counsel. The Court held that independently of statute, a trial court has power to correct mistakes and to annul orders and judgments inadvertently or improvidently made and concluded that the error was not a judicial error. The judge's declaration and finding in its order vacating the judgment that the findings and judgment did not conform to the true judgment rendered, in that the court intended to pronounce judgment in favor of the defendants, could not be wholly disregarded nor lightly brushed aside.

In ***Pettigrew v. Grand Rent-A-Car*** *(1984) 154 Cal. App. 3d 204, 201 Cal. Rptr. 125* , the underlying action involved an action for damages incurred in an automobile accident. Under *Veh. Code § 17151*, the amount of the award should have been limited to $15,000. Instead, a judgment of $150,000 was entered because of the inadvertence or mistake of the judge and defendant's attorney in failing to note the limitation. The court granted defendant's motion to modify the judgment to $15,000 under *Code Civ. Proc. § 473* (*now see Code Civ. Proc. § 473(b)*), which empowers a court to correct mistakes based on inadvertence, surprise, and excusable neglect.

The court of appeal affirmed, holding that the court had the power to correct a clerical mistake in the judgment, based on *Code Civ. Proc. § 473* (*now see Code Civ. Proc. § 473(d)*) and based on its inherent power to correct clerical mistakes. The court cited *In re Candelario (1970) 3 Cal. 3d 702, 705, 91 Cal. Rptr. 497, 477 P.2d 729* , which held that a court's inherent power to correct clerical errors exists independently of statute and that the correction may be done on the court's own motion or on application of the parties (*154 Cal. App. 3d 204, 209)* . The court held that an error in judgment, made through inadvertence, is a clerical error subject to correction, and distinguished such an error from a judicial error, which is not subject to correction. The court stated that the inadvertent making and entry of a money judgment in excess of the amount limited by law is a clerical error and not a deliberate result of judicial reasoning and determination, because it cannot be presumed that the trial judge deliberately intended to render and enter a judgment that was contrary to law (*154 Cal. App. 3d 204, 210-211)* .

[d] Duty to Correct Error

In ***In re Roberts*** *(1962) 200 Cal. App. 2d 95, 19 Cal. Rptr. 147* , the facts and background of which are discussed in *§ 131.42[3][b],* the court of appeal stated that when the occasion arises, courts not only have the power to amend orders and judgments containing clerical errors but are under the definite and manifest legal duty to do so.

In ***Meyer v. Porath*** *(1952) 113 Cal. App. 2d 808, 248 P.2d 984* , the court of appeal affirmed a trial court's order amending nunc pro tunc its findings of fact, conclusions of law, and judgment. The easement which the trial court intended to declare and describe was a viable roadway. After trial and before the findings and judgment were entered, the prevailing party furnished the court with a description. That description, through the mistake of the surveyor, did not describe the roadway but purported to describe a different roadway. The court of appeal held that orders may be made correcting judgments nunc pro tunc as of their original date without notice and on the court's own motion so as to make them conform to the judicial decision actually made, and this may be done regardless of the lapse of time involved. It further ruled that when the occasion arises, the courts not only have the power to amend such orders and judgments but are under the definite and manifest legal duty to do so, and that this power exists independently of statute.

[e] Correction at Any Time

In ***Estate of Goldberg*** *(1938) 10 Cal. 2d 709, 76 P.2d 508* , the Supreme Court affirmed a trial court's order nunc pro tunc correcting a decree of final distribution of an estate 35 years after entry. In the case at issue, the will provided for distribution of land to one child (Emma) to hold in trust for the testator's son (Fritz) but if Fritz should die without wife or child that the property would vest in "my children Gustave-Fritz-Amelia" and "Emma." The decree provided for the vesting of title to the property on the death of Fritz without wife or child to Gustave, Amelia, and Emma, omitting Fritz. Thirty-five years later, on the death of Fritz without wife or child, the surviving child of the testator (who was the executor and successor-trustee) sought a decree authorizing him to convey the property to himself free of the trust. Following a hearing, the court amended the original decree nunc pro tunc to make it conform to the exact provision of the will. Notwithstanding the general authority of the court to make a correction of the clerical error under *Code Civ. Proc. § 473* (*now see Code Civ. Proc. § 473(d)*), it was contended on appeal that the statute required an application for such relief to be presented within no more than one year after entry. However, the Court noted that especially with reference to clerical errors, notwithstanding the absence of statutory authority to make timely corrections, the courts have recognized the existence of an inherent right or power to correct clerical errors. As to clerical errors, the Court held that when the error is apparent from the record's face, no time limit exists concerning the right to make the correction.

[f] Correction Following Appeal

In ***LaMar v. Superior Court*** *(1948) 87 Cal. App. 2d 126, 196 P.2d 98* , the court of appeal granted a writ of mandamus to compel the trial court to amend an interlocutory judgment of divorce to provide language under which the petitioner could enforce that portion of the judgment which was in his favor. The interlocutory judgment was entered in 1945 and affirmed by the Supreme Court in 1947. In 1948, the petitioner moved for a nunc pro tunc order amending the judgment, which provided that he was awarded a sum of cash as his share of the community property, to declare specifically that the judgment was against the other party. After a hearing, the trial court denied the motion without explanation. The court of appeal ruled that the trial court has inherent power to correct a judgment to make it actually express the decision declared by the court and such power may be exercised after appeal and affirmance of the judgment as well as before an appeal has been finally determined. Thus, the court concluded that the trial court had power, notwithstanding the affirmance of the judgment on appeal, to make all corrections in the judgment necessary to carry it into effect. The court noted that not only did the trial court have power to amend the judgment as requested, but it was its definite and manifest legal duty to do so. In denying the petitioner's motion to amend, the trial court had deprived him of the power to enforce the decision made in his favor.

[4] Additional Authorities

[a] Inherent Power to Correct

In *Commonwealth Land Title Co. v. Kornbluth (1985) 175 Cal. App. 3d 518, 220 Cal. Rptr. 774* , the court of appeal reversed the trial court's order granting respondent title company's application for a writ of execution and allowing it to sell certain dwellings owned by appellant third-party claimants. In reversing the order, the court of appeal held that the omission of the date of entry of judgment on one of five abstracts of title, which were all recorded on the same date the judgment was entered, was not void because the omission was an inadvertent clerical error. The court directed the trial court to correct the abstract of judgment to show the date on which judgment was entered, holding that the trial court has inherent power to correct clerical errors in its records, whether made by the clerk, counsel, or the court itself, so that the records will conform to and speak the truth (*175 Cal. App. 3d 518, 531)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend

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13-131 California Points & Authorities § 131.41

§ 131.41 Supporting Motion to Correct Clerical Error in Judgment [Code Civ. Proc. § 473(d)]--Court's Power to Correct Clerical Error--Power to Determine Character of Error as Clerical

[1] FORM

[*Caption. See § 131.40[1].*]

IN CORRECTING A CLERICAL ERROR IN A JUDGMENT, IT IS PRIMARILY FOR THE TRIAL COURT TO DETERMINE IF A DECISION MISSTATED THE COURT's REAL INTENTION AND IF THE JUDGMENT AS SIGNED WAS AN INADVERTENCE; [THE TRIAL COURT's CONCLUSION AS TO THAT QUESTION WILL NOT BE LIGHTLY SET ASIDE].

A. Power to Correct Clerical Error. [*See § 131.40[1], Paragraphs A-D.*]

B. Power to Determine Character of Error. It is primarily for the trial judge to determine if a decision or order misstated his/her real intention or was an inadvertence, [and the judge's conclusion as to that question will not be lightly set aside] (*Minardi v. Collopy (1957) 49 Cal. 2d 348, 352-353, 316 P.2d 952*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted by a party to an action in support of his or her motion for correction of the judgment rendered therein when that party contends that the court has the power to both correct a clerical error and determine the character of the error claimed. This form may be combined with the points and authorities for use in guiding the court in determining if the error was clerical in nature set forth in *§ 131.42*.

Where appropriate, counsel should add argument showing the relationship between the facts of the case and the points of law stated.

[b] Related Forms

For comments as to related memoranda of points and authorities and forms of pleading and practice, see the Comments to *§ 131.40*.

[3] Discussion of Authorities

[a] Power to Determine Character of Error

In ***Minardi v. Collopy*** *(1957) 49 Cal. 2d 348, 316 P.2d 952* , the Supreme Court affirmed a trial court's order amending a written order to conform to a minute order dismissing the petition of certain third-party claimants in an attachment proceeding. The question on appeal was if the court, in making its order, had acted inadvertently rather than in the exercise of judicial discretion. The minute order, on the plaintiff's motion, dismissed the third-party claimant's petition, but the written order prepared by the plaintiff's attorney added language to the effect that the third-party claimants were not entitled to the property involved in the proceeding at the time it was levied on. Later, on motion of the third-party claimant, the written order was corrected to conform to the minute order and the plaintiff appealed. The Supreme Court ruled that the plaintiff's appeal was not well founded for the reason that there was nothing to indicate that the trial court intended its written order to be different from the minute order or that the minute order did not reflect the true intention of the court. The Court held that it is primarily for the trial judge to determine if a decision misstated his real intention and if the judgment as signed was an inadvertence, and his conclusion as to that question will not be lightly set aside.

[4] Additional Authorities

[a] Power to Determine Character of Error

In *Nathanson v. Murphy (1957) 147 Cal. App. 2d 462, 305 P.2d 710* , the court of appeal affirmed a trial court's order granting a motion to modify its decision and judgment nunc pro tunc. At a hearing on a motion for a new trial in a fraud case after judgment for the plaintiff awarding interest from the date of the fraud, the judge expressed an intent to change the judgment to allow interest only from the date of the judgment but failed to make the change. Since the original order did not correctly state what the judge had expressed as his intent, there was a clerical error and the court of appeal held that the trial court had power to correct it, nunc pro tunc. The court of appeal discussed the decision of the Supreme Court in *Bastajian v. Brown (1941) 19 Cal. 2d 209, 120 P.2d 9* [*see § 131.40[3][c]*], as illustrative of how broad the powers of the trial judge are in correcting clerical errors. In that case, the Supreme Court had held that the trial court's finding, on conflicting evidence and the trial judge's statement that his signed findings did not conform to his true but unexpressed intent, was conclusive.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect &

MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 131 JUDGMENTS
PART II. FORMS
B. Amendment, Correction, And Modification Of Judgments

13-131 California Points & Authorities § 131.42

§ 131.42 Supporting Motion to Correct Clerical Error in Judgment [Code Civ. Proc. § 473(d)]--Court's Power to Correct Clerical Error--Determining if Error Was Clerical

[1] FORM

[*Caption. See § 131.40[1].*]

A CLERICAL ERROR IS ANY MISTAKE OR OMISSION IN THE RECORD THAT IS NOT REASONABLY ATTRIBUTABLE TO DELIBERATE JUDICIAL REASONING AND DETERMINATION AND IS SHOWN BY ANY COMPETENT EVIDENCE.

A. Power to Correct Clerical Error. [*See § 131.40, Paragraphs A, B.*]

B. Power to Determine Character of Error. [*See § 131.41, Paragraph B.*]

C. Distinction Between Clerical and Judicial Error. A clerical error is not necessarily one made by the clerk; it may include an error made by the court. The distinction between a clerical and a judicial error does not depend so much on the person making it as on whether or not it was the deliberate result of judicial reasoning and determination (*Estate of Doane (1964) 62 Cal. 2d 68, 71, 41 Cal. Rptr. 165, 396 P.2d 581* ; *Pettigrew v. Grand Rent-A-Car (1984) 154 Cal. App. 3d 204, 210, 201 Cal. Rptr. 125* ; *Young v. Gardner-Denver Co. (1966) 244 Cal. App. 2d 915, 919, 53 Cal. Rptr. 522*).

D. Competent Evidence of Clerical Error. The clerical nature of an error in the recording of an order is properly shown by any competent evidence, [including the trial judge's statement based on his/her own recollection, the affidavit of a shorthand reporter, or the rough notes entered by the judge on the original docket] (*In re Roberts (1962) 200 Cal. App. 2d 95, 97-98, 19 Cal. Rptr. 147*).

[*Optional*] **E. Judgment Failing to Express Judicial Intent.** Where the judgment as signed does not express the court's

actual judicial intent but is contrary thereto, the signing of such a purported judgment is a clerical error rather than a judicial one (*Zisk v. Roseville (1976) 56 Cal. App. 3d 41, 47, 127 Cal. Rptr. 896*).

[*Optional*] **F. Inadvertent Omissions.** A trial court may properly correct and amend a judgement to include matters inadvertently omitted from the judgment (*Estate of Soboslay (1935) 4 Cal. 2d 177, 179, 47 P.2d 714* ; *Denton v. Denton (1971) 18 Cal. App. 3d 708, 716, 96 Cal. Rptr. 136*).

[*Optional*] **G. Error as Result of Inadvertence.** If an error is the result of an inadvertence but for which a different judgment would have been rendered, the error is clerical and the judgment may be corrected to correspond with what it would have been but for the inadvertence (*McLellan v. McLellan (1972) 23 Cal. App. 3d 343, 100 Cal. Rptr. 258*).

[*Optional*] **H. Misdescription.** When an order or judgment incorrectly records the completed judicial action of a court, the court can correct the clerical error by making an amendment to its judgment or order truly reflecting its action (*Chula v. Superior Court (1962) 57 Cal. 2d 199, 206, 18 Cal. Rptr. 507, 368 P.2d 107*).

[*Optional*] **I. Clarification.** A trial court may properly correct and amend a judgment to clarify it by removing a superfluous word when the removal does not alter the meaning or effect of the original (*Estate of Careaga (1964) 61 Cal. 2d 471, 474, 39 Cal. Rptr. 215, 393 P.2d 415*).

[*Optional*] **J. Judge's Signature to Findings Does Not Establish Error as Judicial.** The fact that the judge signed the findings in question does not necessarily establish that an error in the judgment is a judicial error (*Bastajian v. Brown (1941) 19 Cal. 2d 209, 215, 120 P.2d 9*).

[*Optional*] **K. Weight Given to Judge's Declaration of Intent.** In determining whether an error is clerical or judicial, great weight should be placed on the judge's declaration of his or her intent in signing the order (*Estate of Doane (1964) 62 Cal. 2d 68, 71, 41 Cal. Rptr. 165, 396 P.2d 581* ; *Bowden v. Green (1982) 128 Cal. App. 3d 65, 71, 180 Cal. Rptr. 90*).

[*Optional*] **L. Judgment Failing to Conform to Decision.** A judgment which fails to conform to the decision as a result of the clerk's having entered an order contrary to the court's direction is a judgment entered as a result of a clerical error (*Talman v. Talman (1966) 244 Cal. App. 2d 799, 809-810, 53 Cal. Rptr. 514*).

[*Optional*] **M. Trial Court's Finding Based on Conflicting Evidence.** The trial court's finding on conflicting evidence that a clerical error exists and the nature thereof is conclusive on appeal (*Bastajian v. Brown (1941) 19 Cal. 2d 209, 215, 120 P.2d 9*).

[*Optional*] **N. Judge's Knowledge and Recollection of Facts.** In vacating or correcting a clerical error, the trial judge may consider the facts within his or her personal knowledge and give effect to his or her recollection (*Bastajian v. Brown (1941) 19 Cal. 2d 209, 215, 120 P.2d 9*).

[*Optional*] **O. Inadvertent Judgment in Excess of Amount Limited by Law.** The inadvertent making and entry of a money judgment in excess of the amount limited by law is a clerical error and may be corrected by the court (*Pettigrew v. Grand Rent-A-Car (1984) 154 Cal. App. 3d 204, 210-211, 201 Cal. Rptr. 125*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted by a party to an action in support of his or her motion for correction of a clerical error contained in the judgment rendered therein. This form contains points and authorities supporting the moving party's contention that the claimed error was clerical in nature.

Counsel should add argument showing the relationship between the facts of the case and the points of law stated.

[b] Related Forms

For comments as to related memoranda of points and authorities and forms of pleading and practice, see the Comments to *§ 131.40*.

[3] Discussion of Authorities

[a] Distinction Between Clerical and Judicial Error

Estate of Doane *(1964) 62 Cal. 2d 68, 41 Cal. Rptr. 165, 396 P.2d 581* , is discussed in *§ 131.42[3][i]*.

In ***Pettigrew v. Grand Rent-A-Car*** *(1984) 154 Cal. App. 3d 204, 201 Cal. Rptr. 125* , the facts and background of which are discussed in *§ 131.40[3][c]*, the court of appeal stated that a clerical error by a judge, as distinguished from a judicial error, is one that cannot reasonably be attributed to exercise of judicial consideration or discretion. The term "clerical error" covers all errors, mistakes, or omissions that are not the result of the exercise of the judicial function. In deciding that the trial court had not abused its discretion in modifying a money judgment that was in excess of the amount limited by law, the court of appeal stated that the entry of the excessive amount was not the deliberate result of judicial reasoning and determination and could not reasonably be attributed to the exercise of judicial consideration or discretion (*154 Cal. App. 3d 204, 210-211)* .

In ***Young v. Gardner-Denver Co.*** *(1966) 244 Cal. App. 2d 915, 53 Cal. Rptr. 522* , the facts and background of which are discussed in *§ 131.20[3][b]*, the court of appeal stated that a clerical error is not necessarily one made by the clerk--it may include an error made by the judge or the court. The entry of a judgment generally is deemed a clerical act. The distinction between a clerical error and a judicial error, however, does not depend so much on the person making it as on whether or not it was the deliberate result of judicial reasoning and determination. In the case at issue, the error, consisting of an order for a stay of judgment (instead of a stay of execution), was clerical and was one which in its origin was shared by the court and opposing counsel. Although the clerk, by a minute entry, put down exactly what the parties had said (stay of judgment) and not what they had intended to say (stay of execution), it could not be said that such an error was the result of deliberate judicial reasoning and determination.

[b] Competent Evidence of Clerical Error

In ***In re Roberts*** *(1962) 200 Cal. App. 2d 95, 19 Cal. Rptr. 147* , the court of appeal denied a writ of habeas corpus, holding that the trial court had the right to correct its records nunc pro tunc to show that the petitioners had been advised of their legal rights. The petitioners contended that they were illegally confined since, at their arraignment, they had not been advised of their legal rights. The record showed that the day after the petitioners filed the application for habeas corpus, the trial court made an order correcting the docket entries nunc pro tunc to show that they had been so advised.

An examination of the trial judge's rough notes, on which the original docket entries were based, clearly disclosed that the clerk had erred in those entries by failing to show that petitioners had been advised of their legal rights and that fact was substantiated by the clerk's testimony at the habeas corpus hearing. It was apparent from the judge's notes that a very brief summary of the proceedings had been set forth therein and even those were not correctly reflected in the original entries made by the clerk. That the corrections were to be considered clerical was also borne out by the original notations made on the complaints, which differed from the docket entries. Moreover, the petitioners, who were represented by counsel in the habeas corpus hearings, had full opportunity to present contrary evidence. On the conflict between the petitioners' statements and that of the judge, the judge who heard the matter found in favor of the trial judge's credibility. The court of appeal held that the error in the entries on the court's docket or minutes may be shown by any competent evidence, including the trial judge's statement based on his own recollection or even the affidavit of a shorthand reporter and, based on the record, including the judge's rough notes, concluded that the petition should be denied.

[c] Judgment Failing to Express Judicial Intent

In ***Zisk v. Roseville*** *(1976) 56 Cal. App. 3d 41, 127 Cal. Rptr. 896* , the court of appeal affirmed the trial court's judgment adverse to a plaintiff property owner in a land use case, ruling that the action of the trial judge in vacating his original judgement of dismissal of the property owner's complaint was a valid exercise of the trial court's power to correct clerical errors. In his order vacating the original judgment, the judge described it as being contrary to the prior decision of the court and as being incomplete. The attorney for the defendant city who had drafted the judgment failed to include in it a statement that the demurrer of the individual defendants had been sustained and that judgement was in their favor as well as the city's. The court of appeal stated that this was clearly contrary to the judge's prior ruling on the demurrers, demonstrating beyond doubt that the error was clerical. Where the judgment as signed does not express the court's actual judicial intent, but is contrary thereto, the signing of such a purported judgment is a clerical error rather than a judicial one, the court held.

[d] Inadvertent Omissions

In ***Estate of Soboslay*** *(1935) 4 Cal. 2d 177, 47 P.2d 714* , the Supreme Court affirmed a trial court's judgment decreeing distribution of an estate after overruling objections to the executors' final account. Because the executors had inadvertently failed to deduct certain paid claims in computing their initial final account which was the basis for the original decree of distribution, a motion was filed to vacate the judgment under *Code Civ. Proc. § 473*. However, instead of hearing the motion, and on its own motion, the trial court made an order setting aside the original decree and filed an amended decree. On appeal it was contended that the amendment was not in compliance with statute and was void. However, the Court held that the amendment was not a judicial act. The trial court merely corrected an error of omission in the account and decree of distribution, by reference to the record in the case. The power of the court to correct such clerical errors on its own motion, said the Court, is well recognized.

In ***Denton v. Denton*** *(1971) 18 Cal. App. 3d 708, 96 Cal. Rptr. 136* , the court of appeal affirmed the trial court's postjudgment order amending its record, decree, and judgment. The original decree included a direction that certain community property be sold and that part of the proceeds be paid to the wife's counsel and accountant. The record indicated that the list of such property had been amended during a settlement conference after the court's minute order and before final judgment. Before the amendment, the list had included property sufficient to pay the fees but, afterwards, the property involved was of insufficient value. In its declaration accompanying the postjudgment order, the court stated that it had intended that the husband should pay the fees and that it had been unaware of the insufficiency. The court of appeal noted that a trial court has power to vacate judgments and orders inadvertently made which are not actually the result of the exercise of judgment. In determining if an error is clerical, great weight should be placed on the judge's declaration concerning his intention in signing the order. In the case at issue, said the court of appeal, the trial court's finding that the error was clerical had support in the record aside from the court's declaration in its postjudgment order. Inadvertently, the trial court omitted a sentence to cover the change in the list of property. Because it was clear

that the trial court did not intend that the wife should shoulder the payment of the fees, since it had found that she did not have sufficient funds to do so but that the husband did, the court was bound by the trail court's finding that the error was clerical and, accordingly, concluded that the error was corrected legally.

[e] Error as Result of Inadvertence

In ***McLellan v. McLellan*** *(1972) 23 Cal. App. 3d 343, 100 Cal. Rptr. 258* , the court of appeal affirmed the action of the trial court in modifying its judgment to include an award of costs to the plaintiff, concluding that the omission of costs was the result of inadvertence and, hence, a clerical error which the court had power to correct. After the entry of a supplemental judgment, the plaintiff filed a cost bill. The defendant moved to tax costs, asserting that the plaintiff was not entitled to costs under former Code Civ. Proc. § 1032. The plaintiff then filed a motion for an order modifying the judgment to include an award of costs. After a hearing, the court granted the motion, stating in its order that it was the court's intention to award costs to the plaintiff as the prevailing party and that due to inadvertence, costs were not expressly included in the supplemental judgment. The court of appeal ruled that under *Code Civ. Proc. § 473*, if an error is the result of inadvertence but for which a different judgment would have been rendered, the error is clerical and the judgment may be corrected to correspond with what it would have been but for the inadvertence. It is primarily for the trial court to determine whether the error was an inadvertence, and its conclusion as to this issue will not lightly be set aside, said the court.

[f] Misdescription

In ***Chula v. Superior Court*** *(1962) 57 Cal. 2d 199, 18 Cal. Rptr. 507, 368 P.2d 107* , the Supreme Court affirmed a trial court's judgment of contempt against an attorney, holding, among other matters, that the trial court validly amended its judgment to correct its order to delete the word "defendant" describing the person to be taken into custody and to substitute the attorney's name. The Supreme Court observed that when an order or judgment incorrectly records a court's completed judicial action, the court can correct clerical errors by making an amendment to its order truly reflecting the court's action. The original order showed completed judicial action; however, there was clerical error in that it ordered the "defendant" taken into custody, while in fact the trial court ordered the attorney to be taken into custody. Therefore, the Court concluded, it was proper for the trial court to correct its clerical error.

[g] Clarification

In ***Estate of Careaga*** *(1964) 61 Cal. 2d 471, 474, 39 Cal. Rptr. 215, 393 P.2d 415* , the Supreme Court affirmed the amendment nunc pro tunc of a final decree of distribution. The amendment struck the word "such" from a portion of the original decree which distributed a life estate to each living child of the decedent with remainders to their children or on failure of "such" issue then to others. However, the will was unambiguous and provided that the remainder was to vest in the life tenant's children per stirpes and only in the absence or failure of all issue given life tenant was the remainder of the life estate to be distributed to others. It was clear, the Court ruled, that a court, by means of a nunc pro tunc order, can clarify a decree by removing a superfluous word when its removal does not alter the meaning or legal effect of the original decree. Such a correction is clerical. The Court added that if the removal of the word "such" changed the legal effect of the decree, then the evidence would not support a finding that the word's inclusion was a mere clerical error. However, the Court stated in the case at issue, the two decrees had the same meaning.

[h] Judge's Signature to Findings Does Not Establish Error as Judicial

In ***Bastajian v. Brown*** *(1941) 19 Cal. 2d 209, 120 P.2d 9* , the facts and background of which are discussed in *§ 131.40[3][c]*, the Supreme Court affirmed a trial court's order setting aside and amending a judgment, concluding that the error which the court corrected was not a judicial error. The trial judge's declaration in the vacating order was that the findings and judgment did not conform to and set forth the true judgment rendered. The Supreme Court noted that a minute entry had been made shortly after the trial in which judgment was ordered for defendants. While that entry was not the decision or judgment and was not binding, it was evidence of the court's intention as to the decision, findings of

fact, and conclusions of law that the judge intended ultimately to make. The Court inferred therefrom that the trial judge's intent was the same when he in fact did sign contrary findings and that the signing thereof was a clerical error. Accordingly, the Court ruled that the signing of findings does not necessarily establish that an error in a judgment is a judicial one.

[i] Weight Given to Judge's Declaration of Intent

In ***Estate of Doane*** *(1964) 62 Cal. 2d 68, 41 Cal. Rptr. 165, 396 P.2d 581* , the Supreme Court reversed that part of the trial court's order settling a trustee's final account and distributing an estate based on the trial court's erroneous conclusion that a variance in the decree of preliminary distribution from the terms of the will, although not intended by the court which had declared its general intention to conform to the terms of the will, was judicial error which it could not correct. The Supreme Court ruled that the error in the order for preliminary distribution was a clerical error. Independent of statute, a trial court has power to correct mistakes and to annul orders and judgments inadvertently or improvidently made and which are not actually the result of the exercise of judgment. In reaching its decision, the court applied the following rules. The distinction between clerical error and a judicial error does not depend so much on the person making it as it does on whether or not it was the deliberate result of judicial reasoning and determination. In determining whether an error is clerical or judicial, great weight should be placed on the judge's declaration concerning his intention in signing the order. Applying these rules, it was apparent that the trial judge's statement that he intended his judgment to conform to the terms of the will compelled a determination that the error was clerical and not judicial.

Bowden v. Green *(1982) 128 Cal. App. 3d 65, 180 Cal. Rptr. 90* , was an action for payment on a promissory note securing the sale of a liquor business. Defendants filed a cross complaint against plaintiffs, seeking damages for alleged fraud by plaintiffs during the negotiations surrounding the sale of the business. The judgment included an order that defendants take nothing by way of their cross complaint. Almost one year after entry of final judgment, defendants filed a motion to correct judgment, claiming that the portion of the judgment that defendants take nothing by way of their cross complaint had been entered into the judgment inadvertently. Defendants supported their motion with a declaration by the original trial judge in the action, who had since resigned from the bench, stating that the disputed portion of the judgment had not come to his attention when he signed it, and that he had not meant to include it in the judgment. Plaintiffs countered with evidence that defendants had stipulated to dismissal of the cross complaint. The trial court dismissed the motion.

The court of appeal reversed. Addressing the question of whether or not entry of the disputed portion of the judgment had been clerical error, the court noted that the issue was one of the judge's intent in entering the judgment and that the best evidence of the judge's intent is the judge's own statement, either express or implied from the order of correction. Thus, when the record permits inference of clerical error, the judge's affidavit or declaration will be extremely persuasive on appeal. In the present case, no evidence was presented that the trial judge ever knew of the agreement between counsel to dismiss the cross complaint. Thus, even though the judgment may have reflected the secret agreement of the attorneys, it did not reflect the intent of the judge in entering the judgment. Inasmuch as the judge's declaration that he had not intended to enter the judgment portion was not rebutted, the court had no basis for concluding that the portion of the judgment had been other than a clerical error (*128 Cal. App. 3d 65, 71-72)* .

[j] Judgment Failing to Conform to Decision

In ***Talman v. Talman*** *(1966) 244 Cal. App. 2d 799, 53 Cal. Rptr. 514* , the court of appeal affirmed the trial court's orders concerning payments to be made pursuant to an integrated property settlement, even though the orders varied from the clerk's entry, since the entry was contrary to the court's direction. The trial court had pronounced an order on February 21, but on February 24, pronounced an order vacating and setting aside the first paragraph of its first order and setting the issues involved for further hearing. The latter order was entered two days later and was tantamount to a direction by the judge to the clerk not to enter the first paragraph of the earlier order. The clerk's entry of the disputed paragraph on the minutes of the court was made in disregard of the court's direction. Accordingly, the court of appeal

held that the entry did not correctly portray the record as the trial court had directed it to speak. Since the clerk entered an order contrary to the court's direction, the court of appeal held that the trial court had the power to amend the order to conform to that which it had ordered to be made.

[k] Trial Court's Finding Based on Conflicting Evidence

In ***Bastajian v. Brown*** *(1941) 19 Cal. 2d 209, 120 P.2d 9* , the facts and background of which are discussed in *§ 131.40[3][c]*, and in *§ 131.42[3][h]*, the Supreme Court ruled that the trial court's finding, which was based on conflicting evidence, that a clerical error existed and that nature thereof was conclusive.

[l] Judge's Knowledge and Recollection of Facts

In ***Bastajian v. Brown*** *(1941) 19 Cal. 2d 209, 120 P.2d 9* , the facts and background of which are discussed in *§ 131.40[3][c]*, and in *§ 131.42[3][h]*. the Supreme Court ruled that the facts within the personal knowledge of the judge may be considered, and in vacating or correcting clerical error or mistake, the judge may give effect to his own recollection.

[m] Inadvertent Judgment in Excess of Amount Limited by Law

In *Pettigrew v. Grand Rent-A-Car (1984) 154 Cal. App. 3d 204, 201 Cal. Rptr. 125* , the facts and background of which are discussed in *§ 131.40[3][c]*, and discussed in *§ 131.42[3][c]*, the court of appeal held that the original entry of an award for $150,000, in excess of the legal limit of $15,000, was the result of inadvertence on the part of the court and was not a result of judicial reasoning or discretion. Thus, the court held that it was a clerical error and could be corrected by the court under its statutory and inherent power to correct such errors (*154 Cal. App. 3d 204, 211-212)* .

[4] Additional Authorities

[a] Competent Evidence of Clerical Error

In *In re Marriage of Sheridan (1983) 140 Cal. App. 3d 742, 189 Cal. Rptr. 622* , the interlocutory judgment filed in a dissolution action ordered the former husband to pay spousal support to the former wife for a period of five years but contained no provision reserving the court's jurisdiction over spousal support. At the end of the five-year period, the former wife moved to modify spousal support provisions, and the former husband opposed the motion on the ground that the court's jurisdiction over spousal support had terminated. The trial court issued an order modifying the judgment of dissolution to include a reservation of jurisdiction over spousal support but declined to award the former wife any monetary support under the circumstances shown. The former wife appealed from the order insofar as it failed to award her spousal support, and the former husband cross appealed, contesting the court's modification of the judgment to include an indefinite reservation of jurisdiction over spousal support. The court of appeal affirmed the trial court's order, finding that both the trial court's minutes and a partial transcript of the court proceedings giving rise to the interlocutory judgment unequivocally showed that the omission of a provision reserving the court's jurisdiction over spousal support was a clerical error (*140 Cal. App. 3d 742, 745)* . When a judgment as signed does not express, and is contrary to, the actual judicial intention of the court, the signing of such a purported judgment is a clerical rather than a judicial error (*140 Cal. App. 3d 742, 746)* .

[b] Judgment Failing to Express Judicial Intent

In *Southern Pacific Pipe Lines, Inc. v. State Bd. of Equalization (1993) 14 Cal. App. 4th 42, 17 Cal. Rptr. 2d 345* , the court of appeal modified a judgment for a tax refund to prevent taxpayers from asserting a statute of limitations defense and avoid paying any taxes on the money refunded. The trial court intended to allow the levy of escape assessments on the taxpayers' properties for all tax years in dispute once the refunds were ordered, but failed to adopt a proposed stipulation that tolled the statute of limitations. The court of appeal noted that the judgment should be liberally

construed to further the trial court's manifest intent particularly if an ambiguity is the result of oversight or inadvertence. Accordingly, the court of appeal directed the trial court to enter an amended judgment stating that the taxpayers will not assert any statute of limitations defense to allow for escape assessments for all tax years in dispute (*14 Cal. App. 4th 42, 57)* .

[c] Judgment Failing to Conform to Decision

In *Hennefer v. Butcher (1986) 182 Cal. App. 3d 492, 227 Cal. Rptr. 318* , the court of appeal modified a judgment for specific performance in favor of a purchaser of real property to correct a mathematical error. After noting its power to modify a judgment containing a clerical error, the court of appeal considered appellant's claim that the doctrine of invited error applied. The court said that, because the findings of fact set forth in the statement of decision clearly showed the amount of the purchase price payable and the amount of and reasons for the offsets in favor of the purchaser, the error was merely an error in drafting and therefore of a clerical nature. The court has power to correct such an error whether it is made by the court, the clerk, or counsel (*182 Cal. App. 3d 492, 506-508)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend

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CHAPTER 131 JUDGMENTS
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B. Amendment, Correction, And Modification Of Judgments

13-131 California Points & Authorities § 131.43

§ 131.43 Supporting Motion to Correct Clerical Error in Judgment [Code Civ. Proc. § 473(d)]--Court's Power to Correct Clerical Error--Power to Antedate Record of Judgment Nunc Pro Tunc

[1] FORM

[*Caption. See § 131.40[1].*]

THE TRIAL COURT HAS THE POWER TO ANTEDATE THE RECORDING OF A JUDGMENT NUNC PRO TUNC TO EXPRESS THE COURT's INTENT CONCERNING WHEN THE JUDGMENT SHOULD TAKE EFFECT.

A. Power to Correct Clerical Error. [*See § 131.40[1], Paragraphs A, B.*]

[*Optional*] **B. Power to Determine Character of Error.** [*See § 131.41[1].*]

C. Grounds for Antedating Nunc Pro Tunc. A judgment may be antedated nunc pro tunc either for: (1) the preservation of the legitimate fruits of the litigation which would otherwise be lost to the prevailing party; (2) the correction of a deficiency in the recording of a previous decision to express the court's true intention as of the earlier date; or (3) the correction of a clerical error (*Young v. Gardner-Denver Co. (1966) 244 Cal. App. 2d 915, 919, 53 Cal. Rptr. 522*).

[*Optional*] **D. Order Proper Regardless of Lapse of Time.** An order may be made correcting a judgment nunc pro tunc as of its original date to make it conform to the judicial decision actually made regardless of the lapse of time (*LaMar v. Superior Court (1948) 87 Cal. App. 2d 126, 129-130, 196 P.2d 98*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion to correct a clerical error in a judgment when counsel desires not only to have the record of judgment corrected but also, as is usually the case, to have it corrected nunc pro tunc. As indicated by the optional Paragraph B, it may be combined with a memorandum of points and authorities indicating the power of the court to determine the character of the error and a memorandum of points and authorities for use in determining if the error was clerical, and it should be combined with the general authority for the entry of judgment nunc pro tunc set forth in *§ 131.20*.

The general rationale for the correction of clerical errors is that the record of the judgment should speak the truth while one specific rationale for the entry of a judgment nunc pro tunc is the preservation of the legitimate fruits of the litigation which would otherwise be lost to the prevailing party. Essentially, correction to speak the truth functions to preserve the legitimate fruits of the litigation, and it can be argued that any correction of a clerical error should always be made nunc pro tunc. However, entry nunc pro tunc may be refused when not required by the considerations of justice [*Norton v. Pomona (1935) 5 Cal. 2d 54, 62, 53 P.2d 952]* or if it would be unconscionable to do so [*Young v. Gardner-Denver Co. (1966) 244 Cal. App. 2d 915, 920, 53 Cal. Rptr. 522]* .

Where appropriate, counsel should add argument showing the relationship between the facts of the case and the points of law stated.

[b] Related Forms

For comments as to related memoranda of points and authorities and forms of pleading and practice, see the Comments to *§ 131.40*.

[3] Discussion of Authorities

[a] Grounds for Antedating Nunc Pro Tunc

Young v. Gardner-Denver Co. *(1966) 244 Cal. App. 2d 915, 53 Cal. Rptr. 522* , is discussed in *§ 131.20[3][a]*.

[b] Order Proper Regardless of Lapse of Time

In ***LaMar v. Superior Court*** *(1948) 87 Cal. App. 2d 126, 196 P.2d 98* , the facts and background of which are discussed in *§ 131.40[3][f]*, the court of appeal stated that an order may be made correcting a judgment nunc pro tunc as of its original date without notice and on the court's own motion to make it conform to the judicial decision actually made, and this is true regardless of the lapse of time.

[4] Additional Authorities

[a] Grounds for Antedating Nunc Pro Tunc

Commonwealth Land Title Co. v. Kornbluth (1985) 175 Cal. App. 3d 518, 220 Cal. Rptr. 774 , is discussed in *§ 131.40[4][a]*. In *Commonwealth,* plaintiffs had assigned their respective rights, titles, and interests in a judgment to a

title company, which applied for a writ of execution and for permission to sell certain of the property covered by two of five abstracts. The trial court granted the application and ordered the writ of execution to issue. On appeal by the current owners, the court of appeal reversed the orders, finding the trial court had failed to marshal defendant's assets in the proper manner. The omission of the date of entry of judgment from one of the five abstracts did not void that abstract, because the omission constituted an inadvertent clerical error that could be corrected by the trial court. Furthermore, the court held that when clerical errors in a judgment or order are corrected by a court under its inherent power, the order of correction may, if necessary, be made nunc pro tunc as of the time of the original entry. Additionally, an appellate court may direct a trial court to make an order nunc pro tunc. Accordingly, the court directed the trial court to correct the abstract to show the date on which the judgment was entered (*175 Cal. App. 3d 518, 531)* .

[b] Order Proper Regardless of Lapse of Time

The facts and procedural background of *Commonwealth Land Title Co. v. Kornbluth (1985) 175 Cal. App. 3d 518, 220 Cal. Rptr. 774* , are discussed in *§ 131.43[4][a]*. In *Commonwealth*, the court of appeal held that when clerical errors in a judgment or order are corrected by a court under its inherent power, the order of correction may be made nunc pro tunc as of the time of the original entry. Citing *LaMar v. Superior Court (1948) 87 Cal. App. 2d 126, 129, 196 P.2d 98* , the court also held that the correction may be made regardless of lapse of time (*175 Cal. App. 3d 518, 531)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 131 JUDGMENTS
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B. Amendment, Correction, And Modification Of Judgments

13-131 California Points & Authorities § 131.44

§ 131.44 Opposing Motion to Correct Clerical Error in Judgment [Code Civ. Proc. § 473(d)]--Presumption of Judgment's Correctness and Regularity

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORIT-
vs.	)	IES IN OPPOSITION TO MOTION TO CORRECT
_____ [*name*],	)	ERROR IN JUDGMENT
Defendant.	)	[*Code Civ. Proc. § 473*]
	)	Date: _____
	)	Time: _____
		Location: _____

_____

OFFICIAL DUTY IS PRESUMED TO BE REGULARLY PERFORMED, AND, THEREFORE, THE PARTY SEEKING TO CORRECT AN ERROR IN A JUDGMENT HAS THE BURDEN OF PROVING THAT THE ERROR WAS A CLERICAL ONE.

A. Presumption of Regular Performance of Official Duty. Official duty is presumed to be regularly performed (*Evid. Code § 664*).

B. Rebuttable Presumption. The presumption that official duty is regularly performed is a rebuttable presumption

affecting the burden of proof (*Evid. Code § 660*).

C. Effect of Presumption Affecting Burden of Proof. The effect of a presumption affecting the burden of proof is to impose on the party against whom it operates the burden of proof as to the nonexistence of the presumed facts (*Evid. Code § 606*).

D. Effect of Presumption Affecting Burden of Proof. The effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption (*Evid. Code § 604*).

E. Presumption That Judgment Was One Intended. An order made by the court is presumed to be that intended in the absence of contrary evidence (*Estate of Eckstrom (1960) 54 Cal. 2d 540, 548, 7 Cal. Rptr. 124, 354 P.2d 652*).

F. Burden of Proving Clerical Error. The burden of proving that an error in a judgment is a clerical error is on the party seeking the correction (*Smith v. Smith (1958) 157 Cal. App. 2d 658, 662, 321 P.2d 886*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities is a general form which may be submitted in opposition to a motion to correct an alleged clerical error in a judgment. It sets out statutory and case authority for the point of law that the moving party has the burden of showing that the error is a clerical one.

Where appropriate, counsel should add argument showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Presumption That Judgment Was One Intended

In ***Estate of Eckstrom*** *(1960) 54 Cal. 2d 540, 7 Cal. Rptr. 124, 354 P.2d 652* , the Supreme Court reversed a trial court's order purporting to correct a decree of distribution of a decedent's estate nunc pro tunc, holding that the original decree was the one the court had intended to make and that a trial court cannot change an order, even though made in error, if the order was the one the court intended. The nunc pro tunc order purported to correct the decree by eliminating a provision for deduction of a certain sum for the trustee's distributive share for federal estate tax purposes. The order asserted that the deleted provision was a clerical mistake since it charged the trustee with its share of federal estate taxes with which payment it had previously been credited, and that the decree as entered was not the one the court ought to have pronounced on the facts established. The only matters bearing on the question of the judge's intentions were the

petition for, proceedings on, and the judgment of, final distribution, all of which indicated that the trial judge performed an intentional, if erroneous, act. The decree complied strictly with the prayer of the petition. Both were prepared by the trustee and the decree was approved by the attorneys for the other beneficiaries and the probate commissioner. There was nothing of significance to indicate that the court intended to make a different decree, other than the conclusion that the court ought to have done so. The moving party failed to call as a witness the trial judge, who was available and who could have testified about an intention other than that appearing of record, if he had entertained such an intention. The order made, the Court held, is presumed to be that intended, in the absence of contrary evidence, and the fact of error alone cannot rebut that presumption. Accordingly, the Court concluded that the claimed error was judicial in nature and that the judgment as originally made was that intended.

[b] Burden of Proving Clerical Error

In ***Smith v. Smith*** *(1958) 157 Cal. App. 2d 658, 321 P.2d 886* , the court of appeal affirmed an order denying plaintiff's motion to change a minute order and judgment based thereon by incorporating a property settlement agreement. On reviewing the trial court's analysis of the record and its conclusion that there was no clerical error, the court of appeal concluded that the reasonable interpretation thereof was that the court believed the clerk had fully and correctly recorded the order. Considering the factual aspects of the case, the court of appeal stated that the moving party (the plaintiff in this case) carries the burden of proving that the clerk's minutes contained a clerical error. The applicable presumptions that official duty has been regularly performed and that the court's minutes are correct, while disputable, are in themselves evidence and will support a finding made in accordance with them, even though there is evidence to the contrary. It is elementary that it is the function of the trial court to pass on the credibility of the witnesses and the affidavits but, said the court, it was clear from the trial court's discussion that it did not give full credence to the plaintiff's affidavits.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend

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13-131 California Points & Authorities § 131.45

§ 131.45 Opposing Motion to Correct Clerical Error in Judgment [Code Civ. Proc. § 473(d)]--Judgment Not Subject to Correction--Judicial Error

[1] FORM

[*Caption. See § 131.44[1].*]

THE COURT's POWER TO CORRECT SUMMARILY ERROR IN THE RECORD OF A JUDGMENT PURSUANT TO SECTION 473(d) OF THE CODE OF CIVIL PROCEDURE DOES NOT EXTEND TO JUDICIAL ERROR; IT IS LIMITED TO CLERICAL ERROR.

A. Power to Correct Error in Judgment. [*See § 131.40[1], Paragraph A.*]

B. Correcting Judicial Error. Although a trial court can correct its own inadvertence or clerical error, it can correct judicial error only on a motion for new trial or on a motion under *Section 663 of the Code of Civil Procedure* to vacate the order or judgment and enter a different one (*Greene v. Superior Court (1961) 55 Cal. 2d 403, 405-406, 10 Cal. Rptr. 817, 359 P.2d 249*).

C. Judicial Error Under Guise of Clerical Error. The trial court has no authority, under the guise of amending a clerical error, to correct a judicial error; it is only when the form of the judgment fails to coincide with the substance thereof, as intended at the time the judgment was rendered, that a corrective order can reach it (*Estate of Eckstrom (1960) 54 Cal. 2d 540, 545, 7 Cal. Rptr. 124, 354 P.2d 652*).

D. Judicial Error Defined. A judicial error is any mistake or omission which occurs in the rendition of an order or judgment and is the fault of an exercise of judicial discretion (*Phillips v. Trusheim (1945) 25 Cal. 2d 913, 916, 156 P.2d 25* ; *Young v. Gardner-Denver Co. (1966) 244 Cal. App. 2d 915, 919, 53 Cal. Rptr. 522*).

[*Optional*] **E. Misconstruction of Facts as Judicial Error.** The court's failure to correctly apply the facts is judicial

error (*Estate of Eckstrom (1960) 54 Cal. 2d 540, 545, 7 Cal. Rptr. 124, 354 P.2d 652*).

[*Optional*] **F. Misconception or Misapplication of Law as Judicial Error.** The court's failure to correctly interpret the law is judicial error (*Estate of Eckstrom (1960) 54 Cal. 2d 540, 545, 7 Cal. Rptr. 124, 354 P.2d 652*).

[*Optional*] **G. Court Misled by Counsel.** If the court came to the conclusion resulting in the judgment as a result of having been misled by counsel, the error is judicial (*Lankton v. Superior Court (1936) 5 Cal. 2d 694, 696, 55 P.2d 1170*).

[*Optional*] **H. Enlargement of Original Decision.** An amendment of a judgment which does not amend the already entered judgment to make it conform to the decision which the court actually rendered, but rather, attempts to amend by modifying and enlarging the original judgment is beyond the court's power; the court may not make the judgment express anything not embraced in the court's decision, even though the proposed amendment contains matter which ought to have been so pronounced (*Estate of Eckstrom (1960) 54 Cal. 2d 540, 544, 7 Cal. Rptr. 124, 354 P.2d 652* ; *Bowman v. Bowman (1947) 29 Cal. 2d 808, 813, 178 P.2d 751*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for the correction of an alleged clerical error in a judgment when the opposing party contends that what is really being sought is the correction of a judicial error which may not be done on motion for correction [*Code Civ. Proc. §§ 473(d), 663*]. Thus, this form makes the points that the court's power to correct is limited to clerical error and sets forth points and authorities defining and describing judicial error.

Where appropriate, counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Correcting Judicial Error

In ***Greene v. Superior Court*** *(1961) 55 Cal. 2d 403, 10 Cal. Rptr. 817, 359 P.2d 249* , the Supreme Court issued a writ of prohibition to restrain the superior court from giving effect to its order setting aside the order of the superior court of another county which had reduced monthly alimony payments pendente lite. The Court ruled that the motion to vacate, under which the second superior court had set aside the prior court's order on the ground that the order was beyond the court's authority, was an improper remedy. An order granting temporary alimony is directly appealable as a final judgment and may be directly attacked in the trial court under *Code Civ. Proc. § 473*, the Court stated. However, the Court held that although the trial court can correct its own inadvertence or clerical error or set aside a judgment or order obtained through extrinsic fraud, it can correct judicial error only on a motion for a new trial or on a motion under

Code Civ. Proc. § 663 to vacate the order or judgment and enter a different one.

[b] Judicial Error Under Guise of Clerical Error

In ***Estate of Eckstrom*** *(1960) 54 Cal. 2d 540, 7 Cal. Rptr. 124, 354 P.2d 652* , the facts and background of which are discussed in *§ 131.44[3][c],* the Supreme Court noted that broad language in cited prior cases would impress on all judicial errors the clerical label if the judgment, as entered, were characterized as "not the sentence which the law ought to have pronounced" without regard for the court's intention in rendering the judgment. Carried to its logical conclusion, the Court stated, this theory would give to a motion under *Code Civ. Proc. § 473* the efficacy of a motion for a new trial or an appeal long after the time for such action had expired. Even if not carried to such an extreme, correcting a judgment to what it ought to have been would permit the court in each instance to determine that a particular judicial error, although resulting in an order or judgment the court intended to make, might be presumed to be a clerical misprision in order that the court could do what should have been done on motion for a new trial or on appeal. Neither of these results lie within the purview of either *Code Civ. Proc. § 473* (*now see Code Civ. Proc. § 473(d)*) or any inherent power of the court to correct its own error, the Court stated.

[c] Judicial Error Defined

In ***Phillips v. Trusheim*** *(1945) 25 Cal. 2d 913, 156 P.2d 25* , the Supreme Court reversed an order vacating a judgment and dismissing an action as to one defendant. The Court noted that if the judgment was entered through the trial court's inadvertence or improvidence, the trial court had the power, independent of statute, to correct the mistake by amending or setting aside the judgment, since this presents no question of judicial review on the merits. However, the Court continued, judicial error which occurs in the rendition of orders or judgments, which is the fault of an exercise of judicial discretion, may not be corrected except by statutory procedure.

In ***Young v. Gardner-Denver Co.*** *(1966) 244 Cal. App. 2d 915, 53 Cal. Rptr. 522* , the facts and background of which are discussed in *§ 131.20[3][b],* the court of appeal stated that the distinction between a clerical error and a judicial error does not depend so much on the person making it as on whether or not the error was the deliberate result of judicial reasoning and determination.

[d] Misconstruction of Facts

In ***Estate of Eckstrom*** *(1960) 54 Cal. 2d 540, 7 Cal. Rptr. 124, 354 P.2d 652* , the facts and background of which are discussed in *§ 131.44[3][a],* the Supreme Court stated that clerical errors do not include those made by the court because of its failure to correctly interpret the law or apply the facts. It is only when the form of the judgment fails to coincide with the substance thereof, as intended at the time of the rendition of the judgment, that it can be reached by a corrective nunc pro tunc order, the Court added.

[e] Misconstruction or Misapplication of Law

Estate of Eckstrom *(1960) 54 Cal. 2d 540, 7 Cal. Rptr. 124, 354 P.2d 652* , is discussed in *§ 131.45[3][d].*

[f] Court Misled by Counsel

In ***Lankton v. Superior Court*** *(1936) 5 Cal. 2d 694, 55 P.2d 1170* , the Supreme Court issued a writ of prohibition preventing the trial court from modifying its judgment after the time for appeal therefrom and for a motion for a new trial had elapsed, holding that there was no showing that the judgment had been rendered through clerical error and that, accordingly, the trial court was without authority to modify the judgment under *Code Civ. Proc. § 473* (*now see Code Civ. Proc. § 473(d)*). The trial court had modified its judgment to reduce the amount thereof, having come to the conclusion on the argument of the motion to modify that it was without authority to enter a judgment exceeding the reduced amount. The Supreme Court pointed out that the original judgment was the identical judgment which the trial

court intended to render. There was no mistake in its entry, and it expressed in apt and definite terms the conclusion at which the trial court arrived during the trial. The Court further stated that if the trial court misconstrued the evidence before it, misapplied the law applicable to the facts disclosed by the evidence, or even was misled by counsel, such an error was in no sense a clerical error which could thereafter be corrected by the court on its own motion or in any proceeding except on motion for a new trial.

[g] Enlargement of Original Decision

In ***Estate of Eckstrom*** *(1960) 54 Cal. 2d 540, 7 Cal. Rptr. 124, 354 P.2d 652* , the facts and background of which are discussed in *§ 131.44[3][a]*, the Supreme Court ruled that a trial court cannot change an order which has become final even though made in error, if in fact the order made was that intended to be made. The function of nunc pro tunc order is merely to correct the record of the judgment and not to alter the judgment actually rendered. Citing an earlier case, it noted that a nunc pro tunc order was held without legal force because it did not by its terms amend the already entered judgment to make the latter conform to the decision which the court originally rendered but attempted to amend by new modifications and enlargements the judgment which the court had originally rendered. This, it was noted, the court was not empowered to do since it may not make the judgment express anything not embraced in the court's decision, even though the proposed amendment contains matters which ought to have been so pronounced.

In ***Bowman v. Bowman*** *(1947) 29 Cal. 2d 808, 178 P.2d 751* , the Supreme Court affirmed a judgment and an order restoring to a prior interlocutory judgment the words "for the benefit of plaintiff and said minor child" that had been stricken by an intervening order, pursuant to a motion for correction on the ground that the relief granted was in excess of the prayer, holding that the modification could not be based on the trial court's statutory power to correct clerical errors. The defendant, who had sought the order striking the phrase involved, contended that he was seeking a modification of the judgment to make it correspond to the relief plaintiff requested in her complaint. He conceded, however, that the interlocutory judgment was rendered precisely as the trial judge intended. Since the judgment was so rendered, held the Court, the modification could not be based on the trial court's power, under *Code Civ. Proc. § 473* (*now see Code Civ. Proc. § 473(d)*) or independent of it, to correct clerical errors made by either the clerk or the court.

[4] Additional Authorities

[a] Judicial Error Under Guise of Clerical Error

In *Drinkhouse v. Van Ness (1927) 202 Cal. 359, 260 P. 869* , the Supreme Court declared as null and void an order made by the trial court purporting to amend a prior order granting a new trial to deny a new trial to the defendant and grant it to an intervenor only. The Court noted that if the order entered is not the order made, the records may be corrected to make the entry speak the truth. But, the Court held, the trial court has no authority, under the guise of an amendment, to correct a judicial error or make of record an order that was never made. Yet, said the Court, that was precisely what the trial court had attempted. The later order did not purport to correct the entry of the first order, nor was there anything on its face or in the record from which it could be gathered that such was its purpose.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend

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13-131 California Points & Authorities § 131.46

§ 131.46 Opposing Motion to Correct Clerical Error in Judgment [Code Civ. Proc. § 473(d)]--Judgment Not Subject to Correction Absent Showing of Clerical Error

[1] FORM

[*Caption. See § 131.44[1].*]

ABSENT A SATISFACTORY SHOWING OF CLERICAL ERROR IN THE RECORD OF THE JUDGMENT, THE COURT MAY NOT UNDERTAKE ANY CORRECTION OF THE RECORD.

A. Burden of Proving Clerical Error [*See § 131.44[1], Paragraphs E, F.*]

B. Correction Only as Statute Prescribes. The court may not modify or otherwise amend its judgment except as statute prescribes (*Bowman v. Bowman (1947) 29 Cal. 2d 808, 814, 178 P.2d 751*).

C. Original Judgment Was One Intended. The trial court cannot change a judgment or order which has become final, even though made in error, if, in fact, the order or judgment made was that intended (*Estate of Eckstrom (1960) 54 Cal. 2d 540, 544-545, 7 Cal. Rptr. 124, 354 P.2d 652*).

D. Correction Only to Conform to Truth. A court's inherent and statutory right to cause its acts and proceedings to be correctly set forth in its records, where such records fail to indicate the order or direction in fact made, is exercisable only for the purpose of ascertaining and reflecting the truth (*Estate of Eckstrom (1960) 54 Cal. 2d 540, 547, 7 Cal. Rptr. 124, 354 P.2d 652*).

E. Truth Ascertained From Court's Intention. In correcting clerical errors in a judgment to correctly set forth a court's acts and proceedings, the truth must be ascertained from the trial judge's intention in making the original order (*Estate of Eckstrom (1960) 54 Cal. 2d 540, 547, 7 Cal. Rptr. 124, 354 P.2d 652*).

F. Mere Recital of Clerical Error Not Conclusive. The mere recital that there had been a clerical error is not conclusive of either the fact or the nature of the error (*Estate of Burnett (1938) 11 Cal. 2d 259, 262, 79 P.2d 89* ; *Nacht v. Nacht (1959) 167 Cal. App. 2d 254, 262, 334 P.2d 275*).

G. Insufficient Showing of Clerical Error. A court has no authority to correct a judgment in the absence of anything significant indicating that the court intended to render a different judgment (*Estate of Eckstrom (1960) 54 Cal. 2d 540, 547-548, 7 Cal. Rptr. 124, 354 P.2d 652*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion to correct a claimed clerical error in a judgment when it is contended by the party submitting this form that in the absence of a satisfactory showing of clerical error, the court may not undertake any correction of the record.

Where appropriate, counsel should add argument showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Correction Only as Statute Prescribes

In ***Bowman v. Bowman*** *(1947) 29 Cal. 2d 808, 178 P.2d 751* , the facts and background of which are discussed in *§ 131.45[3][g]*, the Supreme Court ruled that the purported change in the judgment, which was the matter in dispute on appeal, was void. In making the change, the Court noted, the trial court had made an attempt to rectify a supposed error of law on a summary motion procedure not allowed by statute. The Court held that trial courts can modify or amend their judgments only as statute prescribes and *Code Civ. Proc. § 473* does not authorize the summary modification of judgments to correct errors.

[b] Original Judgment Was One Intended

In ***Estate of Eckstrom*** *(1960) 54 Cal. 2d 540, 7 Cal. Rptr. 124, 354 P.2d 652* , the facts and background of which are discussed in *§ 131.44[3][a]*, the Supreme Court reversed a trial court's order purporting to correct a decree of distribution. In so ruling, the Court observed that a court can always correct a clerical, as distinguished from a judicial, error which appears on the face of a decree by a nunc pro tunc order. It cannot, however, change an order which has become final, even though made in error, if in fact the order made was that intended to be made, the Court ruled. The function of a nunc pro tunc order is not to alter the judgment actually rendered but to enter now for then an order previously made. The question presented to the court on a hearing of a motion for such an order is: what order was in fact made at the time by the trial judge? It is only when the form of the judgment fails to coincide with the substance thereof, as intended at the time of the rendition of the judgment, that it can be reached by a corrective order, the Court

added.

[c] Correction Only to Conform to Truth

In ***Estate of Eckstrom*** *(1960) 54 Cal. 2d 540, 7 Cal. Rptr. 124, 354 P.2d 652* , the facts and background of which are discussed in *§ 131.44[3][a],* in reversing a trial court order purporting to correct a decree of distribution, the Supreme Court stated that it could not be denied that there is both an inherent and a statutory duty for a court to cause its acts and proceedings to be correctly set forth in its records where such records fail to indicate the order or direction in fact made. By its very nature, however, the right is exercisable only for the purpose of ascertaining and reflecting the truth and in most instances, the truth must be ascertained from the trial judge's intention in making his original order. Since the only matters bearing on the question of the judge's intentions in the case at issue all indicated that the trial judge performed an intentional, if erroneous, act, and since there was a presumption that the order was that intended, the Court concluded that the judgment as originally made was that intended to have been made.

[d] Truth Ascertained From Court's Intention

Estate of Eckstrom *(1960) 54 Cal. 2d 540, 7 Cal. Rptr. 124, 354 P.2d 652* , on this issue, is discussed in *§ 131.46[3][c].*

[e] Mere Recital of Clerical Error Not Conclusive

In ***Estate of Burnett*** *(1938) 11 Cal. 2d 259, 79 P.2d 89* , the Supreme Court reversed a nunc pro tunc order of the superior court which purported to correct a prior order admitting a will and codicil to probate by admitting another, subsequent will to probate. The second will was merely filed without any petition for probate. The Court held that the superior court's recital in the nunc pro tunc order that a clerical error had crept into its first order is not conclusive of either the fact or the nature of the error. The Court added that although such an order which rests on evidence in which there is a substantial conflict will not be disturbed on appeal, where the facts on which the court acted are undisputed and only one conclusion can be drawn from them, the appellate court is not bound by the order made below.

In ***Nacht v. Nacht*** *(1959) 167 Cal. App. 2d 254, 334 P.2d 275* , the court of appeal reversed a trial court's order amending a prior order denying a final decree of divorce and granting a request for the entry of a final decree of divorce, holding that by granting the second request the trial judge had attempted to correct a judicial ruling rather than a clerical error despite a declaration in the second order that the first one had been signed inadvertently. There was nothing in the record to support the finding of inadvertence except the declaration itself. Twelve days prior to the first order, the court was unequivocally of the opinion that the final decree should not be entered and directed the entry of a finding that the parties had become reconciled, a finding supported by the evidence. The first order was in precise accord with the trial court's directions. On the following day, the trial court changed its mind. The court of appeal stated that if a prior judgment or order is to be set aside, there must be something more in the record to support the new order than the trial court's mere declaration that the prior order had been entered inadvertently. If the record shows clearly that there was no clerical error, the trial court's recital thereof will not be conclusive, the court of appeal ruled.

[f] Insufficient Showing of Clerical Error

In ***Estate of Eckstrom*** *(1960) 54 Cal. 2d 540, 7 Cal. Rptr. 124, 354 P.2d 652* , the facts and background of which are discussed in *§ 131.44[3][a],* the Supreme Court ruled that in exercising the trial court's statutory and inherent right to cause its acts and proceedings to be correctly set forth in its records where such records fail to indicate the order in fact made, the right is exercisable only for the purpose of ascertaining and reflecting the truth, which must be ascertained from the trial judge's intention in making his original order. The only matters bearing on this issue indicated that the trial judge had performed an intentional, if erroneous, act. There was nothing of significance to indicate that the court intended to make a different decree, other than the conclusion that the court ought to have done so. The order made, said the Court, is presumed to be that intended in the absence of contrary evidence, and the fact of error alone cannot rebut

that presumption.

[4] Additional Authorities

[a] Correction Only as Statute Prescribes

The facts and background of *Greene v. Superior Court (1961) 55 Cal. 2d 403, 10 Cal. Rptr. 817, 359 P.2d 249* , are discussed in *§ 131.45[3][a]*.

Legal Topics:

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

§§ 131.47[Reserved]

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 131 JUDGMENTS
PART II. FORMS
C. Judgment Creditor's Lien Asserted On Judgment Debtor's Cause Of Action

13-131 California Points & Authorities § 131.60

§ 131.60 Supporting Application for Leave to Intervene in Judgment Debtor's Cause of Action [Code Civ. Proc. § 708.430(a)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF APPLICATION FOR LEAVE TO INTERVENE IN JUDGMENT DEBTOR's CAUSE OF ACTION [*Code Civ. Proc. § 708.430(a)*]
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	Date: _____
	)	Time: _____
		Location: _____

_____

PURSUANT TO SECTION 708.430(a) OF THE CODE OF CIVIL PROCEDURE, ON THE MOTION OF A JUDGMENT CREDITOR OF ANY PARTY IN AN ACTION, THE COURT MAY PERMIT THE MOVING PARTY TO INTERVENE THEREIN.

A. Intervention May Be Granted. The court in which an action or special proceeding is pending may permit a judgment creditor who has obtained a lien under *Sections 708.410-708.480 of the Code of Civil Procedure* to intervene in the action or proceeding pursuant to *Section 387 of the Code of Civil Procedure* (*Code Civ. Proc. § 708.430(a)*).

B. Intervention Should Be Allowed Unless It Will Disrupt Lawsuit or Change Positions of Original Parties. It is an abuse of discretion for a court to refuse to permit a judgment creditor who has obtained a lien under *Code of Civil Procedure Sections 708.410-708.480* to intervene in the judgment debtor's lawsuit to protect his or her financial interest unless the intervention will disrupt the suit or change the position of the original parties (*In re Marriage of Kerr (1986) 185 Cal. App. 3d 130, 134, 229 Cal. Rptr. 610*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted in support of a judgment creditor's application for leave to intervene in a cause of action asserted by his or her judgment debtor.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show that the judgment creditor has obtained a lien and should be permitted to intervene pursuant to *Code Civ. Proc. § 387*.

[b] Related Pleading and Practice Forms

For a form of notice creating a lien on a judgment debtor's cause of action or proceeding and related forms, see California Forms of Pleading and Practice, Ch. 318, *Judgments* (Matthew Bender). For other forms relating to enforcement of money judgments and judgments for sale of property, see California Forms of Pleading and Practice, Ch. 254, *Executions and Enforcement of Judgments* (Matthew Bender).

[c] Related Points and Authorities

For points and authorities relating to intervention by third parties generally, see Ch. 124, *Intervention* .

[3] Discussion of Authorities

[a] Intervention Should Be Allowed Unless It Will Disrupt Lawsuit or Change Positions of Original Parties

In ***In re Marriage of Kerr*** *(1986) 185 Cal. App. 3d 130, 229 Cal. Rptr. 610* , an attorney obtained a court ordered judgment lien against the assets of a conservatorship. The lien secured attorney's fees for services rendered to the conservatorship on behalf of the conservator, who was the wife of the conservatee. When the conservator terminated the conservatorship and instituted an action for dissolution of her marriage, the attorney noticed a motion to intervene in the action and for an order to impress a lien on specified community assets. The trial court denied the motion.

The court of appeal reversed. The court found that the attorney's noticed motion, to which was attached a certified copy of the order granting him a lien on the conservatorship assets, constituted substantial compliance with *Code Civ. Proc. §*

708.410, which governs the procedure by which a judgment creditor may obtain a lien over the proceeds of a pending action. The court then held that the trial court abused its discretion in refusing to allow the attorney to intervene pursuant to *Code Civ. Proc. § 708.430*. Noting that this provision is remedial in nature and should be liberally construed to give effect to the remedy that it authorizes, the court held that it is an abuse of a trial court's discretion to refuse to permit a judgment creditor to intervene in the judgment debtor's lawsuit to protect his or her financial interest unless the intervention will disrupt the suit or change the position of the original parties, for example, by requiring a reopening of the case for further evidence or delaying the trial of the case or otherwise retarding the action. Although the court held that the attorney was entitled to intervene to protect his financial interests, the court noted that the attorney could also have protected his interests without intervening by applying for an order to satisfy the debt out the proceeds of the pending suit under *Code Civ. Proc. § 708.470* (*185 Cal. App. 3d 130, 134)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionGeneral OverviewCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral Overview

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C. Judgment Creditor's Lien Asserted On Judgment Debtor's Cause Of Action

13-131 California Points & Authorities § 131.61

§ 131.61 Opposing Application for Leave to Intervene in Judgment Debtor's Cause of Action [Code Civ. Proc. § 708.430(a)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN OPPOSITION TO APPLICATION FOR
vs.	)	LEAVE TO INTERVENE IN JUDGMENT DEBT-
_____ [*name*],	)	OR's CAUSE OF ACTION [*Code Civ. Proc. §*
Defendant.	)	*708.430(a)*]
	)	Date: _____
	)	Time: _____
	)	Location: _____
		[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE POWER TO PERMIT A JUDGMENT CREDITOR TO INTERVENE IN A JUDGMENT DEBTOR's CAUSE OF ACTION DURING THE PENDENCY OF THE ACTION IS SOLELY WITHIN THE TRIAL COURT's DISCRETION AND AN APPLICATION FOR LEAVE TO INTERVENE NEED NOT BE GRANTED.

A. Intervention May Be Granted. [*See § 131.60.*]

B. Intervention Not Required. The language of the statute permits, but does not require, intervention (*McClearen v. Superior Court (1955) 45 Cal. 2d 852, 856, 291 P.2d 449* (discussing former Code Civ. Proc. § 688.1).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted by a party to a cause of action asserted by a judgment debtor to oppose an application submitted by the judgment creditor for leave to intervene in the cause of action.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should indicate facts which support the denial of the judgment creditor's request to intervene pursuant to *Code Civ. Proc. § 387*.

[b] Related Forms

For references to related forms, see the Comments to *§ 131.60*, under Related Pleading and Practice Forms and Related Points and Authorities.

[3] Discussion of Authorities

[a] Intervention Not Required

In ***McClearen v. Superior Court*** *(1955) 45 Cal. 2d 852, 291 P.2d 449* , the Supreme Court reviewed action taken by the superior court in connection with a judgment creditor's lien on the judgment debtor's cause of action under former Code Civ. Proc. § 688.1 [*now see Code Civ. Proc. § 708.430(a)]. One issue involved the right to intervene in the judgment debtor's action. The Court ruled that the statute permitted, but did not require, intervention (45 Cal. 2d 852, 856)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPartiesInterventionGeneral OverviewCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral Overview

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13-131 California Points & Authorities §§ 131.62-131.79

[Reserved]

§§ 131.62[Reserved]

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13-131 California Points & Authorities

For a discussion of how to use the forms in this part to draft a memorandum of points or authorities or a trial or appellate brief, and for a sample of a complete memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

California Points & Authorities

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13-131 California Points & Authorities § 131.80

§ 131.80 Supporting Motion to Vacate Judgment [Code Civ. Proc. § 1710.40(b)] Entered Pursuant to Sister State Money Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]--General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORIT-
vs.	)	IES IN SUPPORT OF MOTION TO VACATE
_____ [*name*],	)	JUDGMENT ENTERED PURSUANT TO SISTER
Defendant.	)	STATE MONEY JUDGMENTS ACT
	)	[*Code Civ. Proc. § 1710.40(b)*]
	)	Date: _____
	)	Time: _____
		Location: _____
		[Trial Date: _____]

_____

A JUDGMENT ENTERED BY A CALIFORNIA COURT PURSUANT TO THE SISTER STATE MONEY JUDGMENTS ACT MAY BE VACATED WHERE GROUNDS EXIST WHICH WOULD BE A DEFENSE TO AN ACTION IN THIS STATE ON THE SISTER STATE JUDGMENT.

A. Grounds for Motion. A judgment entered pursuant to the Sister State Money Judgments Act may be vacated on any ground which would be a defense to an action in this state on the sister state judgment (*Code Civ. Proc. §*

1710.40(a)).

B. Authority for Motion. Not later than 30 days after service of notice of entry of judgment pursuant to *Section 1710.30 of the Code of Civil Procedure*, the judgment debtor, on written notice to the judgment creditor, may make a motion to vacate the judgment (*Code Civ. Proc. § 1710.40(b)*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities sets forth the authority and grounds for a motion to vacate a judgment entered pursuant to the Sister State Money Judgments Act [*Code Civ. Proc. §§ 1710.10-1710.65*] and must be submitted in support of such a motion. Points and authorities elaborating the various grounds for such a motion are set forth in succeeding forms [*see §§ 131.81*-131.91] and may be combined with this form when appropriate.

Counsel should add argument showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For an application for entry of judgment on a sister state money judgment and a notice of entry of judgment thereon with appropriate discussion, see California Forms of Pleading and Practice, Ch. 318, *Judgments* (Matthew Bender). For a notice of motion to vacate such a judgment, see California Forms of Pleading and Practice, Ch. 489, *Relief From Judgments and Orders* , (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to Vacate

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13-131 California Points & Authorities § 131.81

§ 131.81 Supporting Motion to Vacate Judgment [Code Civ. Proc. § 1710.40(b)] Entered Pursuant to Sister State Money Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]--Sister State Judgment Not Final and Unconditional

[1] FORM

[*Caption. See § 131.80[1].*]

A JUDGMENT ENTERED BY A CALIFORNIA COURT PURSUANT TO THE SISTER STATE MONEY JUDGMENTS ACT MAY BE VACATED IF THE SISTER STATE JUDGMENT WAS NOT FINAL AND UNCONDITIONAL.

A. Grounds for Motion. [*See § 131.80[1], Paragraph A.*]

B. Final Judgment Requirement. A judgment which is not final is not entitled to full faith and credit under the Full Faith and Credit Clause, Article IV, Section 1 of the United States Constitution (*Barber v. Barber (1944) 323 U.S. 77, 79-80, 65 S. Ct. 137, 89 L. Ed. 82*).

C. Law Controlling Validity and Finality. The law of the state where the judgment was rendered determines the validity and finality of a sister state judgment (*Smith v. Smith (1952) 115 Cal. App. 2d 92, 99, 251 P.2d 720*).

D. Lack of Finality as Defense. A defense to an action in California on a sister state judgment is the defense that the judgment is not final and unconditional where the term "final" means that no further action by the court rendering the judgment is necessary to resolve the matter litigated (*Code Civ. Proc. § 1710.40*, Law Revision Commission Comment).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion to vacate a judgment entered pursuant to the Sister State Money Judgments Act [*Code Civ. Proc. §§ 1710.10-1710.65*] when the moving party contends that the sister state judgment is not sufficiently final under the law of the state of the rendering forum to be entitled to full faith and credit in California.

Counsel should add argument showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

When the plaintiff has brought a common law action on the judgment of a sister state court, as permitted under the Sister State Money Judgments Act [*Code Civ. Proc. § 1710.65*], either because relief other than the payment of money is involved or because the plaintiff seeks interest or for any other reason, the foregoing form may be modified for submission as a memorandum of points and authorities in support of a motion for summary judgment submitted by the defendant judgment debtor [*Code Civ. Proc. § 437c*]. Where so used, the memorandum should be accompanied with appropriate supporting affidavits or declarations [*Code Civ. Proc. § 437c*].

[b] Related Pleading and Practice Forms

For an application for entry of judgment on a sister state money judgment, a notice of entry of judgment thereon, and a notice of motion to vacate such a judgment and associated discussion, see California Forms of Pleading and Practice, Ch. 318, *Judgments* (Matthew Bender).

[3] Discussion of Authorities

[a] Final Judgment Requirement

In ***Barber v. Barber*** *(1944) 323 U.S. 77, 65 S. Ct. 137, 89 L. Ed. 82* , the United States Supreme Court ruled that the judgment of a state court was sufficiently final to be entitled to full faith and credit in another state court. The question for decision was whether the courts of Tennessee, in a suit brought on a North Carolina judgment for arrears of alimony, rightly denied full faith and credit to the judgment, on the ground that it lacked finality in that under North Carolina law it was subject to modification or recall by the court which had entered it. The Court noted the Constitutional command that full faith and credit be given in each state to the judicial proceedings of every other state and the implementing statutory language that judgments shall have such faith and credit given in every court as they have by law or usage in the courts of the state from which they are taken [*28 U.S.C. § 687*]. The Court also noted a prior decision that a decree for future alimony is entitled to full faith and credit as to past due installments, if the right to them is absolute and vested, even though the decree might be modified prospectively by future orders, but that such a decree is not final and not entitled to full faith and credit if the past due installments are subject retroactively to modification or recall by the court after their accrual. For the purpose of the case at issue, the Court assumed that the North Carolina judgment for accrued alimony was not entitled to full faith and credit if, by the law of North Carolina, it was subject to modification. Thus, the question was whether, by the law of North Carolina, the judgment of the courts of that state for arrears of alimony was so wanting in finality as not to be within the command of the Constitution and the implementing statute.

On analysis of the applicable North Carolina law, the Court concluded that the prima facie validity and finality of the judgment sued on had not been overcome and that North Carolina's statutory authority for the modification or recall of an order providing for future allowances of installments of alimony did not extend to a judgment for overdue installments. Thus, it was held that such a judgment was entitled to full faith and credit.

[b] Law Controlling Validity and Finality

In ***Smith v. Smith*** *(1952) 115 Cal. App. 2d 92, 251 P.2d 720* , the court of appeal affirmed judgment for the plaintiff in an action to make a divorce judgment of a sister state a judgment of the California court, holding inter alia that the sister state judgment was valid and final. The plaintiff had sought and obtained a divorce in Kansas. Her Kansas complaint sought a decree of divorce, alimony, attorney's fees, and general relief but, pursuant to the agreement of the parties, the decree provided for property settlement and payment of a lump sum, in installments. The decree did not specifically provide for an award of such property and payment, however, and the plaintiff later sought and obtained a nunc pro tunc order correcting the decree in that particular. She then sought to have the amended Kansas judgment made a judgment of the California courts. The defendant contended that the Kansas judgment was not enforceable because that court was without jurisdiction to adjudicate matters not prayed for in the complaint. However, the court of appeal noted that the defendant had appeared and answered in the Kansas action, that the issue of property settlement was tendered by the parties, that no appeal was taken, and that the judgment had become final.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to Vacate

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13-131 California Points & Authorities § 131.82

§ 131.82 Supporting Motion to Vacate Judgment [Code Civ. Proc. § 1710.40(b)] Entered Pursuant to Sister State Money Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]--Jurisdiction of Sister State Court--Lack of Jurisdiction to Render Judgment

[1] FORM

[*Caption. See § 131.80[1].*]

A JUDGMENT ENTERED BY A CALIFORNIA COURT PURSUANT TO THE SISTER STATE MONEY JUDGMENTS ACT MAY BE VACATED IF THE SISTER STATE COURT WHICH RENDERED THE JUDGMENT INVOLVED HAD NO JURISDICTION TO RENDER THE SAME.

A. Ground for Motion. [*See § 131.80[1], Paragraph A.*]

[*EITHER*]

B. Sister State Court Having No Jurisdiction. The judgment of a sister state court which had no jurisdiction to render the judgment is not entitled to full faith and credit and enforcement in another state (*Arizona v. Yuen (2009) 179 Cal. App. 4th 169, 178-179, 101 Cal. Rptr. 3d 525* ; *Airlines Reporting Corp. v. Renda (2009) 177 Cal. App. 4th 14, 19-22, 99 Cal. Rptr. 3d 66* ; *Donel, Inc. v. Badalian (1978) 87 Cal. App. 3d 327, 332-334, 150 Cal. Rptr. 855* ; *San Pietro v. Collins (1967) 250 Cal. App. 2d 203, 208, 58 Cal. Rptr. 219*).

[*OR*]

B. Judgment in Excess of Jurisdiction. It may always be shown that the judgment of the other state was in excess of jurisdiction and not entitled to full faith and credit and enforcement in another state (*Code Civ. Proc. § 1916*;

Sanpietro v. Collins (1967) 250 Cal. App. 2d 203, 208, 58 Cal. Rptr. 219).

[*Optional*] **C. Attacking Judgment Exceeding Statutory Limits on Relief.** Although the general rule in California accords res judicata effect to a judgment resting on fundamental jurisdiction but exceeding statutory limits on relief, it permits collateral attack when it can be shown that unusual circumstances prevented an earlier and more appropriate attack (*Bierl v. McMahon (1969) 270 Cal. App. 2d 97, 103, 75 Cal. Rptr. 473*).

[*Optional*] **D. Judgment Not Entitled to Enforcement as Matter of Comity.** A sister state judgment which exceeds the statutory limits on the relief which may be granted in the state where it was rendered and which is subject to collateral attack there may not be enforced in California as a matter of comity where the California courts have no more jurisdiction to fashion such a judgment than did the sister state court (*Farley v. Farley (1964) 227 Cal. App. 2d 1, 10, 38 Cal. Rptr. 357*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion to vacate a judgment entered pursuant to the Sister State Money Judgments Act [*Code Civ. Proc. §§ 1710.10-1710.65*] when the ground for the motion is that the sister state court had no jurisdiction to enter the judgment involved or that it acted in excess of its jurisdiction [*Code Civ. Proc. § 1710.40(a)*].

Where appropriate, counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

For comments on the modification of this form for use in connection with a motion for summary judgment [*Code Civ. Proc. § 437c*], see *§ 131.81[2]*.

[b] Related Pleading and Practice Forms

For a reference to related forms to be found in California Forms of Pleading and Practice, see § 131.81[2].

[3] Discussion of Authorities

[a] Sister State Court Having No Jurisdiction

In ***Arizona v. Yuen*** *(2009) 179 Cal. App. 4th 169, 178-179, 101 Cal. Rptr. 3d 525* , the defendant, a California resident, signed articles of incorporation for a friend to form an Arizona corporation. She never owned stock in the corporation or had any involvement in the corporation's activities. About a year later, Arizona initiated an administrative proceeding against her and the corporation. The defendant's friend called the defendant and told her there was a "problem" with the Arizona company and an attorney in Arizona needed to speak with her. The defendant went to an

office in San Francisco and had a "conference call" with an attorney in Arizona, which she later learned was a telephonic deposition. The defendant testified that she did not retain the Arizona attorney and did not pay him. She received no documents from the Arizona attorney or authorized him to appear on her behalf. She never received or sent any correspondence to the Arizona attorney. Other than the conference call, she never spoke with the Arizona attorney. Arizona later applied for entry of judgment on a sister state judgment in California against the defendant. The defendant moved to vacate the judgment on the ground of Arizona's lack of jurisdiction against her. The trial court granted the motion.

On appeal, the court of appeal held that pursuant to *Code of Civ. Proc. § 1710.40,* a sister state judgment entered by the clerk may be vacated on any ground that would be a defense to an action in California on the sister state judgment and that the defendant made the proper showing for relief. The court held that due process requires that notice be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The court held that the defendant was denied the fundamental requirement of due process, i.e., the opportunity to be heard at a meaningful time and in a meaningful manner (*179 Cal. App. 4th 169, 178)* . Because a judgment of a court lacking personal jurisdiction violates due process, the court held, it is null and void everywhere, including the state where it was rendered (*179 Cal. App. 4th 169, 179*).

In ***Airlines Reporting Corp. v. Renda*** *(2009) 177 Cal. App. 4th 14, 19-22, 99 Cal. Rptr. 3d 66* , the plaintiff had filed a previous lawsuits against the defendant in Virginia state and federal courts for fraud regarding proceeds to airline ticket sales. The federal court was previously held not to have had personal jurisdiction against the defendant. However, the plaintiff obtained a default judgment against the defendant in the Virginia state court action without questioning personal jurisdiction. The plaintiff registered the Virginia judgment in California and served notice on the defendant informing him that he had 30 days within which to file a motion to vacate the judgment or the judgment would be final. Shortly thereafter, the plaintiff served the defendant with a demand for production of documents. The defendant filed a notice of appearance and provided a written response to the plaintiff's request for production of documents. Two years later, the defendant moved to vacate entry of the default judgment against him pursuant to *Code Civ. Proc. § 1710.40(a)* and *Code Civ. Proc. § 473*. The trial court found that (1) the 30-day limitations period set forth in *Code Civ. Proc. § 1710.40(b)* was inapplicable; (2) the defendant did not waive personal jurisdiction by making an appearance and responding to postjudgment discovery; and (3) the sister state judgment was void for want of personal jurisdiction.

The court of appeal affirmed. It held that the 30-day limitation in *Code Civ. Proc. § 1710.40(b)* was inapplicable because the Virginia judgment was void on its face because the Virginia court lacked fundamental jurisdiction over the defendant (*177 Cal. App. 4th 14, 19-22)* . The court further agreed that the defendant did not waive personal jurisdiction by making an appearance and responding to postjudgment discovery. The court held that the defendant's appearance in California had no impact on whether the Virginia state court had personal jurisdiction over him in a prior case. In addition, the court held that the Virginia judgment, rendered in the absence of fundamental jurisdiction, was a nullity (*177 Cal. App. 4th 14, 22)* .

In ***Donel, Inc. v. Badalian*** *(1978) 87 Cal. App. 3d 327, 150 Cal. Rptr. 855* , the superior court entered a judgment based on a Hawaii money judgment under the provisions of *Code Civ. Proc. § 1710.25* and subsequently denied defendant's motion to vacate the judgment on the ground that the Hawaii court had not obtained in personam jurisdiction over him. Defendant appealed to the court of appeal which reversed, holding that a foreign judgment is not afforded full faith and credit if rendered by a court that lacked jurisdiction of the subject matter or the parties. In this case, the Hawaii court attempted to obtain personal jurisdiction through service by publication. Essential to in personam jurisdiction to render a money judgment is notice and an opportunity to be heard in conformance with due process of law. Plaintiff was required by Hawaii statute to exercise due diligence to locate defendant before resorting the service by publication. Examination of the recital in the foreign judgment, facts presented to the Hawaii court, and extrinsic evidence established as a matter of law that plaintiff, by limiting its search to telephone directories, did not exercise such due diligence. Thus, plaintiff failed to strictly comply with the statute under which it purported to obtain jurisdiction over the defendant and the motion to vacate the judgment should have been granted.

In ***Sanpietro v. Collins*** *(1967) 250 Cal. App. 2d 203, 58 Cal. Rptr. 219* , the court of appeal affirmed summary judgment for the plaintiffs in an action on a judgment entered in a sister state, despite the defendants' contention that the sister state court did not have personal jurisdiction over them. The complaint attached and incorporated by reference a copy of an Arizona summary judgment awarding a money judgment to the plaintiffs. The defendants answered and defended that the Arizona court had no personal jurisdiction over them. The court of appeal stated the general rule that a judgment of a sister state having no jurisdiction to render the judgment is not entitled to full faith and credit and that the California courts will not recognize a judgment of a sister state if that state did not have jurisdiction. However, it added, if the court of the sister state which rendered the judgment has expressly litigated the question of jurisdiction, that determination is res judicata and is itself protected by the Full Faith and Credit Clause and the question may not be relitigated in California.

[b] Judgment in Excess of Jurisdiction

Sanpietro v. Collins *(1967) 250 Cal. App. 2d 203, 58 Cal. Rptr. 219* , is discussed in *§ 131.82[3][a]*.

[c] Attacking Judgment Exceeding Statutory Limits on Relief

In ***Bierl v. McMahon*** *(1969) 270 Cal. App. 2d 97, 75 Cal. Rptr. 473* , the court of appeal reversed judgment for the plaintiff in an action to establish a child support order from a sister state as a judgment in California. The plaintiff had obtained a Nebraska child support decree which ordered support payments not based on present need but for the purpose of establishing a trust fund for possible future needs. Accordingly, the court of appeal held that the Nebraska court exceeded its subject matter jurisdiction. Although the general rule in California accords res judicata effect to a judgment which rests on fundamental jurisdiction but exceeds statutory limits on relief, it permits collateral attack under unusual circumstances which prevent an earlier and more appropriate attack. Whether one will be estopped from attacking a sister state decree depends on the importance of the irregularity not only to the parties but also to the functioning of the courts and in some instances on other considerations of public policy. Since the defendant here had, in the Nebraska court, personally protested the proposed order and was told by the court to remain silent and since his attorney protested the order, the court of appeal ruled that he was not estopped from collaterally attacking the decree in the California courts.

[d] Judgment Not Entitled to Enforcement as Matter of Comity

Farley v. Farley *(1964) 227 Cal. App. 2d 1, 38 Cal. Rptr. 357* , is discussed in *§ 131.82[4][b]*.

[4] Additional Authorities

[a] Sister State Court Having No Jurisdiction

In *Seabron v. Seabron (1955) 133 Cal. App. 2d 374, 284 P.2d 117* , the facts and background of which are discussed in *§ 131.96[3][a]*, the court of appeal ruled that even though a sister state judgment appears valid and regular on its face and is thus entitled to full faith and credit, it may be ignored if the sister state court lacked jurisdiction, either as to cause or parties, citing *Code Civ. Proc. § 1916* (which provides that any judicial record may be impeached by evidence of a want of jurisdiction in the court). The court of appeal added that lack of jurisdiction may be shown by evidence other than the record of judgment and even by evidence opposed to recitals contained in such record (*133 Cal. App. 2d 374, 375)* .

Hammell v. Britton (1941) 19 Cal. 2d 72, 119 P.2d 333 , is discussed in *§ 131.83[3][a]*.

[b] Judgment in Excess of Jurisdiction

In *Farley v. Farley (1964) 227 Cal. App. 2d 1, 38 Cal. Rptr. 357* , the court of appeal reversed a judgment quieting title in land belonging to the defendant, the plaintiff's former husband, pursuant to a Utah divorce decree, holding that portion of the decree relating to the land was in excess of the Utah court's jurisdiction and subject to collateral attack in California. The Utah decree attempted to make an inter vivos disposition of certain California land owned by the defendant as well as the proceeds therefrom. No Utah cases lent support to such a disposition nor could Utah statutes be stretched to such an extreme, held the court. In the absence of such authority, the court presumed that Utah law was harmonious with that of California and it determined that, in California, such a disposition of the husband's estate exceeds a divorce court's power. The court noted that, although a California general rule accords res judicata effect to a judgment which rests on fundamental jurisdiction, as here, but exceeds statutory limits on relief, collateral attack is permitted under unusual circumstances which prevented an earlier and more appropriate attack. The court observed that the defendant's submission to Utah's jurisdiction was an imposed condition of resistance, not a matter of free choice, and that there was no evidence that he had voluntarily submitted his premarital California land to the Utah court for any disposition at all, let alone the disposition which ensued. Accordingly, the court concluded that the Utah decree, so far as it pertained to the California land, exceeded the jurisdiction of the Utah court, was vulnerable to collateral attack in Utah, and was not entitled to full faith and credit in California. And, since California courts have no more jurisdiction to fashion such a decree than did the Utah court, the court held that the judgment could not be enforced as a matter of comity (*227 Cal. App. 3d 1, 9-10)* .

[c] Attacking Judgment Exceeding Statutory Limits on Relief

Farley v. Farley (1964) 227 Cal. App. 2d 1, 38 Cal. Rptr. 357 , is discussed in *§ 131.82[4][b]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to Vacate

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13-131 California Points & Authorities § 131.83

§ 131.83 Supporting Motion to Vacate Judgment [Code Civ. Proc. § 1710.40(b)] Pursuant to Sister State Money Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]--Jurisdiction of Sister State Court Subject to Attack for Extrinsic Fraud

[1] FORM

[*Caption. See § 131.80[1].*]

A JUDGMENT ENTERED BY A CALIFORNIA COURT PURSUANT TO THE SISTER STATE MONEY JUDGMENTS ACT MAY BE VACATED IF EXTRINSIC FRAUD EXISTS WITH RESPECT TO THE JURISDICTION OF THE SISTER STATE COURT WHICH RENDERED THE JUDGMENT.

A. Grounds for Motion. [*See § 131.80[1], Paragraph A.*]

B. Impeachment of Judgment for Fraud. Any judicial record may be impeached by evidence of fraud in the party offering the record (*Code Civ. Proc. § 1916*).

C. Extrinsic Fraud Re Jurisdiction. In extrinsic fraud existed with respect to the jurisdiction of a sister state to render the judgment at issue, the judgment may be questioned collaterally in California and ignored, notwithstanding the Full Faith and Credit Clause (*Hammell v. Britton (1941) 19 Cal. 2d 72, 81, 119 P.2d 333*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted in support of a motion to vacate a judgment entered pursuant to the Sister State Money Judgments Act [*Code Civ. Proc. §§ 1710.10-1710.65*] when the ground for the motion is that extrinsic fraud existed with respect to the sister state court's jurisdiction. A judgment entered under the act may be vacated on any ground which would be a defense to an action in California on a sister state judgment [*Code Civ. Proc. § 1710.40(a)*] including the defense that the judgment was obtained by extrinsic fraud. For memoranda of points and authorities on the issue of extrinsic fraud see *§ 131.120* et seq.

Where appropriate, counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

For comments on the modification of this form for use in connection with a motion for summary judgment [*Code Civ. Proc. § 437c*], see *§ 131.81[2]*.

[b] Related Pleading and Practice Forms

For a reference to related forms to be found in California Forms of Pleading and Practice, see § 131.81[2].

[3] Discussion of Authorities

[a] Extrinsic Fraud Re Jurisdiction

In ***Hammell v. Britton*** *(1941) 19 Cal. 2d 72, 119 P.2d 333* , the facts and background of which are discussed in *§ 131.83[3][a],* in connection with a contention made by the plaintiff in an equitable action for relief from a judgment that a sister state judgment was rendered without notice to him nor any knowledge thereof, the Supreme Court stated that the plaintiff was legally entitled to contest that judgment on the ground that the sister state court lacked jurisdiction and that the judgment was obtained by fraud. A judgment of a sister state is binding on the courts of California, said the Court, if it is valid, by virtue of the Full Faith and Credit Clause. However, the Court added that the jurisdiction of the court of the sister state in which the judgment is rendered may be questioned collaterally in another state notwithstanding the Full Faith and Credit Clause; and, notwithstanding the jurisdictional recitals in the judgment, if extrinsic fraud exists with respect to the jurisdiction, the judgment may be ignored.

[4] Additional Authorities

[a] Grounds for Motion

The California Law Revision Comment to *Code Civ. Proc. § 1710.40* states that common defenses which may be asserted in support of a motion to vacate a judgment entered under the Sister State Money Judgments Act include the defense that the judgment was obtained by extrinsic fraud.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentFraudCivil ProcedureJudgmentsRelief From JudgmentMotions to Vacate

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13-131 California Points & Authorities § 131.84

§ 131.84 Supporting Motion to Vacate Judgment [Code Civ. Proc. § 1710.40(b)] Entered Pursuant to Sister State Money Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]--Judgment Not Enforceable in State Where Rendered to Extent Plaintiff Seeks

[1] FORM

[*Caption. See § 131.80[1].*]

A JUDGMENT ENTERED BY A CALIFORNIA COURT PURSUANT TO THE SISTER STATE MONEY JUDGMENTS ACT MAY BE VACATED IF THE SISTER STATE JUDGMENT IS NOT ENFORCEABLE IN THE STATE WHERE IT WAS RENDERED TO THE EXTENT PLAINTIFF SEEKS.

A. Grounds for Motion. [*See § 131.80[1], Paragraph A.*]

B. Effect of Sister State Judgment. Under the Full Faith and Credit Clause, Article IV, Section 1, of the United States Constitution, a sister state judgment will not be given any greater effect as an adjudication of the rights and duties of the parties than it had in the state where it was rendered (*Weir v. Corbett (1964) 229 Cal. App. 2d 290, 295, 40 Cal. Rptr. 161*).

[*Optional*] **C. Liability Not Adjudicated.** An action cannot be brought on a sister state judgment to enforce a liability not adjudicated by that judgment (*Gilmer v. Spitalny (1948) 84 Cal. App. 2d 39, 44-45, 189 P.2d 744*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted in support of a motion to vacate a judgment entered pursuant to the Sister State Money Judgments Act when the ground for the motion is that the judgment is not enforceable, to the extent sought by the California plaintiff, in the state where the judgment was rendered. The basis of the point set out in the foregoing memorandum is that, for example, since a sister state judgment will not be given any greater effect as an adjudication of the rights and duties of the parties than it had in the state where it was rendered, a judgment which did not adjudicate the type of liability sought by the California plaintiff will not be enforced in California.

Where appropriate, counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

For comments on the modification of this form for use in connection with a motion for summary judgment [*Code Civ. Proc. § 437c*], see *§ 131.81[2]*.

[b] Related Pleading and Practice Forms

For a reference to related forms to be found in California Forms of Pleading and Practice, see § 131.81[2].

[3] Discussion of Authorities

[a] Effect of Sister State Judgment

In ***Weir v. Corbett*** *(1964) 229 Cal. App. 2d 290, 40 Cal. Rptr. 161* , the court of appeal affirmed summary judgment for the plaintiff in an action to recover money due under a sister state judgment, holding that although a sister state judgment will not be accorded any greater effect as an adjudication of the rights and duties of the parties than it had in the state where rendered, the California statute of limitations governed to permit the action on the judgment despite the fact that the plaintiff's remedies had expired in the state where the judgment was rendered under its statute of limitations. In October 1956, the plaintiff obtained a Washington judgment, no part of which had been paid by October 1961 when the plaintiff commenced action on that judgment in California. In October 1962, judgment was entered in California in favor of the plaintiff for the amount of the original judgment plus interest. The defendant contended on appeal from the California Judgment that under Washington law, after the expiration of six years from the date of the entry of the Washington judgment, the plaintiff's claim expired. The court of appeal noted that the Washington statute did not constitute any bar either to the commencement of the California action or the entry of the California court's judgment since the six-year period had not expired until three days after entry. However, the defendant also contended that the California judgment could not have any effect beyond the six-year deadline. The court stated that the method of enforcement of a foreign judgment is governed by the law of the forum and that while Washington procedure gave the plaintiff only until October 1962 to collect, California has made its remedies available for a longer period. California courts, the court observed, have applied the California statute of limitations to an action on a sister state judgment, whether the local time limit is shorter or longer than that of the sister state.

[b] Liability Not Adjudicated

In ***Gilmer v. Spitalny*** *(1948) 84 Cal. App. 2d 39, 189 P.2d 744* , the court of appeal reversed judgment adjudicating

personal liability on the defendant's part in favor of the plaintiffs in an action on a sister state judgment, holding that the sister state judgment was limited so as to preclude its use for the purpose of establishing a general personal liability on the part of the defendant. The plaintiffs had recovered a judgment in Arizona against the defendants, husband and wife, "as a community debt." The plaintiffs then sued in California, alleging the Arizona judgment as being against the defendants and praying for a judgment against the defendants. The defendants answered and alleged that the judgment was not a personal judgment against the defendant wife and that it was enforceable only as to her interest in the community property of both defendants. Judgment was rendered in the California court against both defendants. The plaintiffs contended on appeal that the Arizona judgment, although unenforceable in Arizona as against the wife personally or as against her separate property, held that both defendants were liable and as much a debt of the wife as of the husband. The court of appeal ruled that it was not correct to say that the Arizona judgment on its face held both defendants equally liable or that it made the debt one owed by the wife as much as the husband. While it was entered against both, it recited on its face a finding that judgment should be entered as a community debt and thus that it was to be enforceable only against the wife's interest in community property and not against her personally. The court observed that the Full Faith and Credit Clause is designed to provide a method of proving the record of a judicial proceeding in one state for the purpose of carrying out the result of that proceeding in other states, that it requires only that the judgment should be given such effect as it had by the law or usage of the state of its origin, and that no more force is t be allowed to a judgment of a sister state than would be accorded to it by the courts of the state which rendered it. Accordingly, the court held that an action to enforce a personal liability cannot be maintained on a sister state judgment unless that judgment adjudicates a personal liability.

[4] Additional Authorities

In *Traci & Marx Co. v. Legal Options, Inc. (2005) 126 Cal. App. 4th 155, 23 Cal. Rptr. 3d 685* , plaintiffs sued defendants in the Court of Common Pleas for Cuyahoga County, Ohio. The prayer for relief requested, among other things, compensatory damages in excess of $25,000 and punitive damages in excess of $25,000. Defendants did not answer. The Ohio court conducted a default hearing, after which it granted plaintiffs judgment in the amount of $25,890 as compensatory damages and $130,000 as punitive damages. Pursuant to the Sister State Money-Judgments Act [*Code Civ. Proc. § 1710.10 et seq.*], a California superior court ordered entry of the Ohio Judgment in the amount of $171,793.50, representing the principal amount of the Ohio Judgment, along with accrued interest. Defendants moved to vacate the Ohio default judgment, seeking to attack the judgment collaterally for, inter alia, unenforceability because the damages awarded exceeded those sought in the complaint. The trial court found that the sums in the Ohio default judgment exceeded those which could have been awarded and granted the motion based on the trial court's conclusion that the Ohio judgment was in excess of the jurisdiction of the Ohio court in which it was rendered (*126 Cal. App. 4th 155, 157-158)* . The Court of Appeal reversed and held that although Ohio law continues to limit the relief to that claimed in the complaint when the judgment is by default, defendants, whose burden it was to establish that the judgment was not enforceable in Ohio, failed to provide any Ohio authority to support their assertion that Ohio law provides that the "in excess of" language in the prayer for relief constituted a ceiling rather than a floor for recoverable damages. Consequently, the trial court erred in vacating the judgment, since there was no basis to conclude that the Ohio court acted in excess of its jurisdiction, or that the judgment was not enforceable in Ohio (*126 Cal. App. 4th 155, 158-160)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to Vacate

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13-131 California Points & Authorities § 131.85

§ 131.85 Supporting Motion to Vacate Judgment [Code Civ. Proc. § 1710.40(b)] Entered Pursuant to Sister State Money Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]--Judgment Paid

[1] FORM

[*Caption. See § 131.80[1].*]

AN ACTION CANNOT BE BROUGHT ON A SISTER STATE JUDGMENT WHICH HAS BEEN PAID.

Payment of Judgment. An action cannot be brought on a sister state judgment which has been paid (*Rall v. Lovell (1951) 105 Cal. App. 2d 507, 510, 233 P.2d 681*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted in support of a motion to vacate a judgment entered pursuant to the Sister State Money Judgments Act when the ground for the motion is that the judgment has been paid.

Where appropriate, counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

For comments on the modification of this form for use in connection with a motion for summary judgment [*Code Civ. Proc. § 437c*], see *§ 131.81[2]*.

[b] Related Pleading and Practice Forms

For a reference to related forms to be found in California Forms of Pleading and Practice, see § 131.81[2].

[3] Discussion of Authorities

[a] Payment of Judgment

In ***Rall v. Lovell*** *(1951) 105 Cal. App. 2d 507, 233 P.2d 681* , the court of appeal reversed summary judgment for the plaintiff in an action on a sister state judgment, holding that the pleadings presented a triable issue. The plaintiff had filed a complaint alleging that she was the defendant's former wife and that pursuant to a Montana decree the defendant was obligated to pay certain child support. The defendant filed an answer alleging that he had made certain payments and that a petition was then pending in the Montana court requesting it to construe its judgment and to adjudge his liability as of that time and requesting that no further proceedings be had until the Montana court acted. The court of appeal held that the trial court had abused its discretion in granting summary judgment. Triable issues were presented by the answer as to the amount, if any, due under the judgment and the law of Montana. The law of the state where the judgment was rendered and by which its effect is to be determined must be established as a fact, and the validity and effect of the Montana judgment is governed by the laws of that state, the court ruled. The extent of the defendant's liability is determined by the terms of the Montana decree and it will be enforced only for the amount for which it is enforceable in the state in which it was rendered. Moreover, the court stated that a payment of that judgment discharges the obligation thereof (citing Rest Conflict of Laws §§ 436, 441). The first issue to be determined in regard to a judgment of another state, after jurisdictional inquiries have been satisfactorily answered, is that of its effect in the state whence it was taken. The effect which it has there is precisely the effect which must be accorded to it in every other state. It must not be given any greater effect than it has in the state where it was rendered, said the court.

[4] Additional Authorities

[a] Payment of Judgment

In *Harris v. EMI Television Programs, Inc. (1980) 102 Cal. App. 3d 214, 162 Cal. Rptr. 357* , defendant had damaged plaintiff's automobile, while on location in Tennessee. When settlement negotiations appeared to reach a standstill, defendant sent plaintiff a check (marked as "settlement") for a portion of the amount demanded, and plaintiff eventually cashed the check. Thereupon, plaintiff sued in Tennessee, and obtained a default judgment.

Plaintiff then sought an entry of the Tennessee judgment in California, and received an ex parte entry of the judgment for the total amount claimed minus the amount of the settlement check previously received. Defendant made a motion to vacate this judgment pursuant to *Code Civ. Proc. § 1710.40*, which the trial court denied.

The court of appeal reversed, noting that under Tennessee law, the acceptance of defendant's settlement check constituted an accord and satisfaction (*102 Cal. App. 3d 214, 218, 219)* . Therefore, since satisfaction of a sister state judgment is a defense to an action on a judgment in California, the trial court erred in refusing to grant defendant's motion to vacate the California judgment (*102 Cal. App. 3d 214, 219)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to Vacate

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13-131 California Points & Authorities § 131.86

§ 131.86 Supporting Motion to Vacate Judgment [Code Civ. Proc. § 1710.40(b)] Entered Pursuant to Sister State Money Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]--Misconduct of Plaintiff

[1] FORM

[*Caption. See § 131.80[1].*]

A JUDGMENT ENTERED BY A CALIFORNIA COURT PURSUANT TO THE SISTER STATE MONEY JUDGMENTS ACT MAY BE VACATED IF PLAINTIFF OBTAINED THE JUDGMENT AS A DIRECT RESULT OF HIS/HER MISCONDUCT.

A. Grounds for Motion. [*See § 131.80[1], Paragraph A.*]

B. Misconduct of Plaintiff. Recovery under a sister state money judgment may be denied where it appears that such judgment was obtained as a direct result of the misconduct of the plaintiff therein (*Code Civ. Proc. § 1710.40*, Law Revision Commission Comment; see *Kubon v. Kubon (1958) 51 Cal. 2d 229, 231-232, 331 P.2d 636*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

CAUTION:

Kubon v. Kubon (1958) 51 Cal. 2d 229, 231-232, 331 P.2d 636 , cited in the foregoing form, has been noted as setting forth what is termed the "contemptuous litigant" doctrine [*see* Note, "CONFLICT OF LAWS: Suit by a Contemptuous Litigant in a Foreign Money Judgment," *11 Hastings LJ 68*; Note, "Conflict of Laws: Full Faith and Credit: Denial of Privileges to Contemptuous Litigant Seeking Enforcement of Sister State Judgment," *7 UCLA L Rev 124*; *see also Code Civ. Proc. § 1710.40*, Law Revision Commission Comment]. However, the decision does not actually discuss the doctrine, nor does it appear to be cited as authority for such a rule by any other court since the decision was rendered. Therefore, the plaintiff's misconduct which would be necessary to deny a motion to vacate a judgment may be limited to situations similar to the facts in *Kubon* in which the judgment holder has acted in contempt of a California court judgment bearing directly on his or her own case. On the other hand, the term could conceivably apply to any judgment holder who, in the words used in the case cited, does not come into the California court with "clean hands" [*see Kubon v. Kubon (1958) 51 Cal. 2d 229, 231, 331 P.2d 636]* .

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted in support of a motion to vacate a judgment entered pursuant to the Sister State Money Judgments Act [*Code Civ. Proc. §§ 1710.10-1710.65*] where it appears that the sister state judgment was obtained as a direct result of the misconduct of the judgment holder [*but see* Caution, *above*].

Where appropriate, counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

For comments on the modification of this form for use in connection with a motion for summary judgment [*Code Civ. Proc. § 437c*], see *§ 131.81[2]*.

[b] Related Pleading and Practice Forms

For a reference to related forms to be found in California Forms of Pleading and Practice, see § 131.81[2].

[3] Discussion of Authorities

[a] Misconduct of Plaintiff

In ***Kubon v. Kubon*** *(1958) 51 Cal. 2d 229, 331 P.2d 636* , the Supreme Court affirmed judgment for the defendant in an action to recover on a Nevada money judgment based on orders pursuant to a divorce judgment requiring the defendant to pay child support. During a period when the defendant, a California resident, had legal custody of the children involved, pursuant to a Nevada custody order he filed a petition in a California court seeking to be appointed guardian of the children. The California court issued a temporary restraining order restraining the plaintiff from removing the children from the defendant's home or custody. Shortly after issuance of that order, the plaintiff kidnapped the children, took them to Nevada, and concealed them in an abandoned mine. The Nevada custody order was then modified to take away the defendant's right to custody. The defendant thereafter failed to make support payments, whereupon the plaintiff obtained the Nevada money judgment. The defendant set up the affirmative defense that it would be against public policy to enforce the judgment in California because the plaintiff had not come into court with clean hands and was in contempt of the California court whose aid she was seeking. After trial, the judge in the California court found that the allegations of the defense were true and denied plaintiff recovery on the Nevada judgment. The Supreme Court ruled that since the findings of fact showed that the restraining order had been served on the plaintiff, the court had not erred in denying the plaintiff's motion to strike the defendant's affirmative defense and holding for the defendant.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to Vacate

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13-131 California Points & Authorities § 131.87

§ 131.87 Supporting Motion to Vacate Judgment [Code Civ. Proc. § 1710.40(b)] Entered Pursuant to Sister State Money Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]--Bar of Statute of Limitations

[1] FORM

[*Caption. See § 131.80[1].*]

A JUDGMENT ENTERED BY A CALIFORNIA COURT PURSUANT TO THE SISTER STATE MONEY JUDGMENTS ACT MAY BE VACATED IF THE CAUSE OF ACTION ON THE JUDGMENT IS BARRED BY THE PASSAGE OF MORE THAN 10 YEARS FROM THE TIME THE CAUSE OF ACTION AROSE.

A. Grounds for Motion. [*See § 131.80[1], Paragraph A.*]

B. Limitation Governed by California Law. The barring of a claim by the statute of limitations is a procedural matter governed by the law of the forum, regardless of where the cause of action arose (*Biewend v. Biewend (1941) 17 Cal. 2d 108, 114, 109 P.2d 701*).

C. Limitation of Action on Sister State Judgment. An action brought on a judgment of a sister state is subject to the limitations prescribed by the law of the state where the action is brought (*Biewend v. Biewend (1941) 17 Cal. 2d 108, 114-115, 109 P.2d 701*).

D. Period of Limitation on Action. The period prescribed for the commencement of an action on a judgment or decree of any court of the United States or of any state within the United States is 10 years (*Code Civ. Proc. § 337.5(3)*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted in support of a motion to vacate a judgment entered pursuant to the Sister State Money Judgments Act [*Code Civ. Proc. §§ 1710.10-1710.65*] where it appears that an action on such a judgment would be barred under the California statute of limitations [*Code Civ. Proc. § 337.5(3)*] because 10 years has passed since the time the cause of action arose.

Where appropriate, counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

For comments on the modification of this form for use in connection with a motion for summary judgment [*Code Civ. Proc. § 437c*], see *§ 131.81[2]*.

[b] Related Pleading and Practice Forms

For a reference to related forms to be found in California Forms of Pleading and Practice, see § 131.81[2].

[3] Discussion of Authorities

[a] Limitation Governed by California Law

In ***Biewend v. Biewend*** *(1941) 17 Cal. 2d 108, 109 P.2d 701* , the Supreme Court affirmed a trial court's judgment ordering that defendant make payments pursuant to a sister state divorce decree in favor of the plaintiff, holding that the claim was not barred by the California statute of limitations. The plaintiff had secured a divorce decree in Missouri in 1918 which ordered the defendant to pay weekly support. In 1938, the plaintiff sued on the decree in a California court and recovered a judgment ordering payment of those installments which had accrued within the California limitation period prior to the beginning of the action. The Court ruled that it is a principle of conflict of laws recognized in California that the barring of a claim by the statute of limitations is a procedural matter governed by the law of the forum, regardless of where the cause of action arose. It is a corollary, said the Court, that an action brought on a judgment of a sister state is subject to the limitations prescribed by the law of the state where the action is brought. The Court observed that former Code Civ. Proc. § 336 [*now see Code Civ. Proc. § 337.5(3)*] provided that an action on a judgment or decree of any state must be brought within five years and that a decree for future payments is a continuing judgment.

[b] Period of Limitation on Action

Biewend v. Biewend *(1941) 17 Cal. 2d 108, 109 P.2d 701* , is discussed in *§ 131.87[3][a]*.

[4] Additional Authorities

[a] Limitation Governed by California Law

Weir v. Corbett *(1964) 229 Cal. App. 2d 290, 40 Cal. Rptr. 161* , is discussed in *§ 131.84[3][a]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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13-131 California Points & Authorities § 131.88

§ 131.88 Supporting Motion to Vacate Judgment [Code Civ. Proc. § 1710.40(b)] Entered Pursuant to Sister State Money Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]--Bar of Statute of Limitations--Expiration of Sister State Limitation Period

[1] FORM

[*Caption. See § 131.80[1].*]

WHERE THE SISTER STATE PERIOD OF LIMITATION OPERATES TO EXTINGUISH THE OBLIGATION ESTABLISHED BY A JUDGMENT RENDERED IN A COURT OF THAT STATE AND THAT PERIOD HAS EXPIRED, THE SISTER STATE JUDGMENT CANNOT SUPPORT ANY ACTION THEREON IN CALIFORNIA.

A. Action Barred in California. When a cause of action has arisen in another state and by the laws thereof an action thereon cannot be maintained by reason of the lapse of time, an action thereon shall not be maintained in this state except in favor of one who has been a citizen of this state and who has held the cause of action since it accrued (*Code Civ. Proc. § 361*).

B. Expiration of Sister State Limitation Period. Where the sister state period of limitation operates to extinguish the obligation established by a judgment rendered in a court of that state and that period has expired, that judgment cannot support any action in California (*Parhm v. Parhm (1969) 2 Cal. App. 3d 311, 314, 82 Cal. Rptr. 570*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted in support of a motion to vacate a judgment entered pursuant to the Sister State Money Judgments Act where it appears that a sister state statute of limitations has operated to extinguish the obligation established by the judgment so that the sister state judgment could not support any action in California.

Where appropriate, counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Expiration of Sister State Limitation Period

In ***Parhm v. Parhm*** *(1969) 2 Cal. App. 3d 311, 82 Cal. Rptr. 570* , the court of appeal affirmed a trial court's judgment refusing to order the payment of certain child support payments on the ground that any action to collect those installments pursuant to a Washington judgment was barred by Washington law and, therefore, any action thereon was barred in California. The court of appeal noted that the applicable Washington statute entirely extinguished not only the local remedy under the judgment but also the obligation itself. That extinguishment by lapse of time was the legal equivalent of satisfaction of the judgment by payment. If the judgment sued on is dormant in the state where rendered, in the sense that it is absolutely dead and incapable of being enforced or revised, it cannot support any action in another state, the court held. The court distinguished *Weir v. Corbett (1964) 229 Cal. App. 2d 290, 40 Cal. Rptr. 161* [*see § 131.84*], since in that case a California judgment had been entered in an action on a Washington judgment prior to the date on which an action in Washington would have been barred.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to VacateGovernmentsLegislationStatutes of LimitationsGeneral Overview

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13-131 California Points & Authorities § 131.89

§ 131.89 Supporting Motion to Vacate Judgment [Code Civ. Proc. § 1710.40(b)] Entered Pursuant to Sister State Money Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]--Stay of Enforcement Pending in Sister State

[1] FORM

[*Caption. See § 131.80[1].*]

A JUDGMENT ENTERED BY A CALIFORNIA COURT PURSUANT TO THE SISTER STATE MONEY JUDGMENTS ACT MAY BE VACATED IF A STAY OF ENFORCEMENT OF THE SISTER STATE JUDGMENT IS CURRENTLY IN EFFECT IN THE SISTER STATE.

A. Grounds for Motion. [*See § 131.80[1], Paragraph A.*]

B. Stay of Enforcement Pending in Sister State. No judgment based on a sister state judgment may be entered pursuant to the Sister State Money Judgments Act where a stay of enforcement of the sister state judgment is currently in effect in the sister state (*Code Civ. Proc. § 1710.55(a)*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted in support of a motion to vacate a judgment entered pursuant to the Sister State Money Judgments Act in violation of the statutory rule that no judgment based on a sister state money judgment may be entered under the act where a stay of enforcement of the sister state judgment is currently in effect in the sister state [*Code Civ. Proc. § 1710.55(a)*]. The theory of this form is that a judgment entered under the act may be vacated on any ground which would be a defense to an action in California on the sister state judgment [*Code Civ. Proc. § 1710.40*] and that the existence of a stay in the rendering forum is such a defense.

Where appropriate, counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the point of law stated.

For comments on the modification of this form for use in connection with a motion for summary judgment [*Code Civ. Proc. § 437c*], see the Comments on *§ 131.81*.

[b] Related Pleading and Practice Forms

For a reference to related forms to be found in California Forms of Pleading and Practice, see § 131.81[2].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to Vacate

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13-131 California Points & Authorities § 131.90

§ 131.90 Supporting Motion to Vacate Judgment [Code Civ. Proc. § 1710.40(b)] Entered Pursuant to Sister State Money Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]--Sister State Judgment Was Penal

[1] FORM

[*Caption. See § 131.80[1].*]

A JUDGMENT ENTERED BY A CALIFORNIA COURT PURSUANT TO THE SISTER STATE MONEY JUDGMENTS ACT MAY BE VACATED IF THE JUDGMENT RENDERED BY THE SISTER STATE COURT WAS A PENAL JUDGMENT.

A. Grounds for Motion. [*See § 131.80[1], Paragraph A.*]

B. Penal Judgment. Penal judgments of sister states are not enforceable in California (*Farmers & Merchants Trust Co. v. Madeira (1968) 261 Cal. App. 2d 503, 508, 68 Cal. Rptr. 184*).

C. Definition of Penal Judgment. The question of whether or not a judgment is penal depends on whether its purpose is to punish an offense against the public justice of the state or to afford a private remedy to a person injured by a wrongful act (*Farmers & Merchants Trust Co. v. Madeira (1968) 261 Cal. App. 2d 503, 508, 68 Cal. Rptr. 184*).

[*Optional*] **D. Definition of "Penalty."** A "penalty" includes any law compelling a defendant to pay a plaintiff more than is necessary to compensate him/her for a legal damage done him/her by the former (*Miller v. Municipal Court (1943) 22 Cal. 2d 818, 837, 142 P.2d 297*).

[*Optional*] **E. Short Statute of Limitations as Indication of Penalty.** Ordinarily, a short statute of limitations indicates that the amount of recovery authorized is a penalty (*Miller v. Municipal Court (1943) 22 Cal. 2d 818, 837, 142 P.2d 297*).

[*Optional*] **F. Recovery of Triple Interest Paid Above Legal Rate as Penalty.** A statute of another state providing for the recovery of triple the amount of interest paid by the plaintiff above the rate of interest permitted in that state in penal is nature (*Miller v. Municipal Court (1943) 22 Cal. 2d 818, 837, 142 P.2d 297*).

[*Optional*] **G. Double or Treble Damages as Penalty.** A statute allowing double or treble damages is penal in nature (*Miller v. Municipal Court (1943) 22 Cal. 2d 818, 837, 142 P.2d 297*).

[*Optional*] **H. Liability of Directors for Failure to Act as Penalty.** A statute making the directors of a corporation liable for all debts of the corporation on the failure to file a required report is penal in character (*Miller v. Municipal Court (1943) 22 Cal. 2d 818, 837, 142 P.2d 297*).

[*Optional*] **I. Minimum Fine Plus Damages Based on Culpability as Penalty.** A statute which provides for a minimum fine and which increases the damages, not in proportion to the loss suffered by the plaintiff, but by the degree of the culpability of the defendant is penal in nature (*Miller v. Municipal Court (1943) 22 Cal. 2d 818, 837, 142 P.2d 297*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted in support of a motion to vacate a judgment entered pursuant to the Sister State Money Judgments Act where the sister judgment was penal in nature.

Where appropriate, counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

For comments on the modification of this form for use in connection with a motion for summary judgment [*Code Civ. Proc. § 437c*], see *§ 131.81[2]*.

[b] Related Pleading and Practice Forms

For a reference to related forms to be found in California Forms of Pleading and Practice, see § 131.81[2].

[3] Discussion of Authorities

[a] Penal Judgment

In ***Farmers & Merchants Trust Co. v. Madeira*** *(1968) 261 Cal. App. 2d 503, 68 Cal. Rptr. 184* , the court of appeal reversed judgment for the defendant in an action to enforce a Pennsylvania child support order. The crucial question on appeal was whether the Pennsylvania order was in reality a civil judgment awarding child support or a penal judgment

to punish the defendant for desertion and nonsupport. The court of appeal noted that if it were the latter, it would not be enforceable in California under either the Full Faith and Credit Clause or as a matter of comity since it is the prevailing rule that no action can be maintained in one state to recover money extracted as punishment for a civil wrong committed under the laws of another state (citing Rest, Conflict of Laws, § 611). The court further noted that the question of whether or not a statute of one state, which in some aspects may be called penal, is a penal law so that it cannot be enforced in the courts of another state, depends on whether its purpose is to punish an offense against the public justice of the state or to afford a private remedy to a person injured by the wrongful act. Although the action which resulted in the support order was brought in the name of the state under the Pennsylvania Penal Code, the court of appeal concluded that the order was primarily civil in nature, irrespective of the label. Moreover, the applicable penal code provision did not purport to punish for an offense against public justice or extract payment for a civil wrong--rather, its purpose was to protect wives and children by providing a speedy remedy to insure their support.

[b] Definition of Penal Judgment

Farmers & Merchants Trust Co. v. Madeira *(1968) 261 Cal. App. 2d 503, 68 Cal. Rptr. 184* , is discussed in *§ 131.90[3][a]*.

[c] Definition of "Penalty"

In ***Miller v. Municipal Court*** *(1943) 22 Cal. 2d 818, 142 P.2d 297* , the Supreme Court granted a writ of mandamus to compel a small claims court to hear and determine a consumer action authorized under federal law, holding that a state court otherwise competent to exercise jurisdiction over the subject matter must assume jurisdiction of an action created by federal law, regardless of whether or not that law is considered penal. The Court stated the general rule that no action may be maintained to recover a penalty, the right to which is given by the law of another state, and noted that the test generally underlying most of the cases on the subject is that a "penalty" includes any law compelling a defendant to pay a plaintiff more than is necessary to compensate him for legal damage done him by the defendant. Ordinarily, said the Court, a short statute of limitations indicates that the amount of recovery authorized is a penalty. The Court also noted the following as examples of penal statutes: a New Hampshire statute providing for the recovery of three times the amount of interest paid above the legal rate in that state (held to be penal when action for such sum was brought in Vermont); a claim arising under a Pennsylvania statute awarding treble damages for rate discrimination, in an action in New York; a statute allowing double damages for injuries to livestock; a New York statute making directors liable for all debts of their corporation on the failure to file a required report; and a Massachusetts statute providing for a "fine" of a minimum amount and for increased damages, not in proportion to the loss suffered by the plaintiff, but according to the culpability of the defendant. The Court also noted that state courts generally have refused to assume jurisdiction to enforce acts of Congress which they have considered as "penal." However, said the Court, considering the intent of the framers of the Constitution including the provisions of the Supremacy Clause, as well as the acts of early Congress, it seems clear that a state court which is otherwise competent to exercise jurisdiction over the subject matter, the parties, and the amount in controversy must assume jurisdiction of an action created by federal law enacted pursuant to a legitimate federal function, regardless of whether or not that action is considered as penal.

[d] Short Statute of Limitations as Indication of Penalty

Miller v. Municipal Court *(1943) 22 Cal. 2d 818, 142 P.2d 297* , is discussed in *§ 131.90[3][c]*.

[e] Recovery of Triple Interest Paid Above Legal Rate as Penalty

Miller v. Municipal Court *(1943) 22 Cal. 2d 818, 142 P.2d 297* , is discussed in *§ 131.90[3][c]*.

[f] Double or Treble Damages as Penalty

Miller v. Municipal Court *(1943) 22 Cal. 2d 818, 142 P.2d 297* , is discussed in *§ 131.90[3][c]*.

[g] Liability of Directors for Failure to Act as Penalty

Miller v. Municipal Court *(1943) 22 Cal. 2d 818, 142 P.2d 297* , is discussed in *§ 131.90[3][c]*.

[h] Minimum Fine Plus Damages Based on Culpability as Penalty

Miller v. Municipal Court *(1943) 22 Cal. 2d 818, 142 P.2d 297* , is discussed in *§ 131.90[3][c]*.

[4] Additional Authorities

[a] Penal Judgment

In *Huntington v. Attrill (1892) 146 U.S. 657, 13 S. Ct. 224, 36 L. Ed. 1123* , the United States Supreme Court reversed a Maryland court's decision denying full faith and credit to a New York judgment, holding that the statue on which the New York judgment was based was not penal in nature, that, therefore, the New York judgment was not a penal judgment, and that, accordingly, it was entitled to full faith and credit in Maryland. The suit in the Maryland court sought to charge stock belonging to the defendant with the payment of a judgment recovery by the plaintiff against the defendant in New York under a statute making the defendant, as an officer of a corporation, liable for the debts of that corporation. The Court stated that whether or not a statute of one state is penal so that it cannot be enforced in the courts of another state depends on the question whether its purpose is to punish an offense against the public justice of the state or to afford a private remedy to one injured by a wrongful act. The test, said the Court, is not by what name the statute is called by the legislature or the courts in which it was passed, but whether it appears to the court called on to enforce it to be a punishment of an offense against the public or a grant of a civil right to a private person. The statute, said the Court, was in no sense a criminal law; it gave a civil remedy at the private suit of a creditor and such remedy was measured by the amount of his debt and was, as to him, clearly remedial. To maintain such a suit, the Court observed, is not to administer a punishment imposed on an offender against the state but simply to enforce a private right. Thus, the Court concluded that the faith and credit and force and effect which the judgment based on the statute had in New York was conclusive evidence of a direct civil liability and was a debt of record, on which an action would lie as in any other civil judgment. And, the Maryland court, in deciding the case against the plaintiff, on the ground that the judgment was not one that it was bound to enforce, denied to the judgment the full faith, credit and effect to which it was entitled under the Constitution and the laws of the United States.

[b] Definition of Penal Judgment

Huntington v. Attrill (1892) 146 U.S. 657, 13 S. Ct. 224, 36 L. Ed. 1123 , is discussed in *§ 131.90[4][a]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to Vacate

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13-131 California Points & Authorities § 131.91

§ 131.91 Supporting Motion to Vacate Judgment [Code Civ. Proc. § 1710.40(b)] Entered Pursuant to Sister State Money Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]--Sister State Judgment Conflicts With Earlier California Judgment

[1] FORM

[*Caption. See § 131.80[1].*]

A PLAINTIFF IS NOT ENTITLED TO ENFORCE A SISTER STATE JUDGMENT IN A CALIFORNIA COURT IF THAT JUDGMENT CONFLICTS WITH AN EARLIER CALIFORNIA JUDGMENT.

A. Grounds for Motion. [*See § 131.80[1], Paragraph A.*]

B. Earlier Conflicting California Judgment. When courts of different jurisdictions have reached different results on the same issue and the first of the conflicting decisions was rendered by a court of the state in which the current action is pending, that decision takes precedence over the court of a sister state (*Stuart v. Lilves (1989) 210 Cal. App. 3d 1215, 1221, 258 Cal. Rptr. 780*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of a motion to vacate a judgment entered pursuant to the Sister State Money Judgments Act when it appears that the sister state judgment conflicts with an earlier California judgment.

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

For comments on the modification of the foregoing form for use in connection with a motion for summary judgment [*Code Civ. Proc. § 437c*], see *§ 131.81[2]*.

[b] Related Pleading and Practice Forms

For a reference to related forms to be found in California Forms of Pleading and Practice, see § 131.81[2].

[3] Discussion of Authorities

[a] Earlier Conflicting California Judgment

In ***Stuart v. Lilves*** *(1989) 210 Cal. App. 3d 1215, 258 Cal. Rptr. 780* , the plaintiff filed an application in a California court for entry of a Colorado judgment pursuant to the Sister State Money Judgments Act, and the defendant moved to vacate the Colorado judgment, arguing that the Colorado court failed to give full faith and credit to an earlier California judgment. The trial court concluded that it was bound by the full faith and credit clause to honor the judgment of the Colorado court and denied the motion.

The court of appeal reversed and held that since the full faith and credit clause does not require the California courts to ignore a California judgment, the order denying the defendant's motion to vacate the Colorado judgment was erroneous. The court stated that although it is the general rule that when courts of different jurisdictions have reached different results on the same issue the later judgment controls, it is also the rule that when one of the conflicting decisions was entered by a court of the state in which the current action is pending, that decision takes precedence over the court of a sister state. Quoting *Hammell v. Britton (1941) 19 Cal. 2d 72, 84, 119 P.2d 333* , the court stated that if full faith and credit is to be given, it should have been given to the California judgment by the Colorado court when it entertained the plaintiff's action (*210 Cal. App. 3d 1215, 1220-1221)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to Vacate

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13-131 California Points & Authorities § 131.92

§ 131.92 Supporting Motion for Stay of Enforcement [Code Civ. Proc. § 1710.50] of Judgment Entered Under Sister State Money Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]--Specific Statutory Grounds

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR STAY OF ENFORCEMENT OF SISTER STATE MONEY JUDGMENT
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	[*Code Civ. Proc. § 1710.50*]
	)	Date: _____
	)	Time: _____
		Location: _____
		[Trial Date: _____]

_____

ON MOTION, THE COURT MAY GRANT A STAY OF ENFORCEMENT OF A JUDGMENT ENTERED PURSUANT TO THE SISTER STATE MONEY JUDGMENTS ACT WHERE _____ [AN APPEAL FROM THE SISTER STATE JUDGMENT IS PENDING OR MAY BE TAKEN WHERE RENDERED *or* A STAY OF ENFORCEMENT OF THE SISTER STATE JUDGMENT HAS BEEN GRANTED IN THE SISTER STATE *or* THE JUDGMENT DEBTOR HAS MADE A MOTION TO VACATE].

A. Authority for Stay. The court may grant a stay of enforcement of a judgment entered pursuant to the Sister State Money Judgments Act, under *Section 1710.50 of the Code of Civil Procedure* on its own motion, on ex parte motion, or on noticed motion (*Code Civ. Proc. § 1710.50(b)*).

[*EITHER*]

B. Appeal in Sister State as Ground. The court shall grant a stay of enforcement where an appeal from the sister state judgment is pending or may be taken in the state which originally rendered the judgment and enforcement will be stayed until the proceedings on appeal have been concluded or time for appeal has expired (*Code Civ. Proc. § 1710.50(a)(1).*

[*OR*]

B. Stay of Enforcement in Sister State as Ground. The court shall grant a stay of enforcement where a stay of enforcement of the sister state judgment has been granted in the sister state and enforcement will be stayed until the sister state stay of enforcement expires or is vacated (*Code Civ. Proc. § 1710.50(a)(2)*).

[*OR*]

B. Pending Motion to Vacate. The court shall grant a stay of enforcement where the judgment debtor has made motion to vacate pursuant to *Section 1710.40 of the Code of Civil Procedure* and enforcement will be stayed until the motion to vacate is determined (*Code Civ. Proc. § 1710.50(a)(3)*).

[*Optional*] **C. Stay of Enforcement Pending in Sister State.** [*See § 131.89[1], Paragraph B.*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted in support of a judgment debtor's motion for stay of enforcement of a judgment entered under the Sister State Money Judgments Act where one of the specific statutory grounds therefor (as set out in Paragraph B) [*Code Civ. Proc. § 1710.50(a)(1)-(3)*] exists. For a memorandum of points and authorities applicable to the general statutory ground for stay of enforcement, that the interests of justice require a stay [*Code Civ. Proc. § 1710.50(a)(4)*], see *§ 131.93*.

Where appropriate, counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For a notice of motion to stay enforcement of a judgment entered pursuant to the Sister State Money Judgments Act, with related discussion, see California Forms of Pleading and Practice, Ch. 318, *Judgments* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral Overview

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13-131 California Points & Authorities § 131.93

§ 131.93 Supporting Motion for Stay of Enforcement [Code Civ. Proc. § 1710.50] of Judgment Entered Under Sister State Money Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]--Interests of Justice Require Stay [Code Civ. Proc. § 1710.50(a)(4)]

[1] FORM

[*Caption. See § 131.92[1].*]

ON MOTION, THE COURT MAY GRANT A STAY OF ENFORCEMENT OF A JUDGMENT ENTERED PURSUANT TO THE SISTER STATE MONEY JUDGMENTS ACT WHERE THE INTERESTS OF JUSTICE REQUIRE SUCH ACTION.

A. Authority for Stay. [*See § 131.92[1], Paragraph A.*]

B. Interests of Justice. The court shall grant a stay of enforcement where the interests of justice require a stay of enforcement (*Code Civ. Proc. § 1710.50(a)(4)*).

[*Optional*] **C. Judgment Improperly Entered.** No judgment based on a sister state judgment may be entered pursuant to the Sister State Money Judgments Act when _____ [an action based on the sister state judgment is currently pending in any court in this state (*Code Civ. Proc. § 1710.55(b)*) *or* a judgment based on the sister state judgment has previously been entered in any proceeding in this state] (*Code Civ. Proc. § 1710.55(c)*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted in support of a judgment debtor's motion for stay of enforcement of a judgment entered pursuant to the Sister State Money Judgments Act where the judgment debtor contends that the judgment was unlawfully entered [*see Code Civ. Proc. § 1710.55(b), (c)*] and, accordingly, that the interests of justice require a stay of enforcement.

Where appropriate, counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For a notice of motion to stay enforcement of a judgment entered pursuant to the Sister State Money Judgments Act, with related discussion, see California Forms of Pleading and Practice, Ch. 318, *Judgments* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral Overview

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13-131 California Points & Authorities § 131.94

§ 131.94 Supporting Motion to Vacate or Stay [Fam. Code § 4853(a)] Foreign Support Order Registered Under Uniform Reciprocal Enforcement of Support Act [Fam. Code § 4800 et seq.]--Statutory Grounds

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Defendant.	)	IES IN SUPPORT OF MOTION TO
	)	_____ [VACATE *or* STAY] FOR-
	)	EIGN SUPPORT ORDER REGISTERED UNDER UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT

_____

A FOREIGN SUPPORT ORDER THAT HAS BEEN REGISTERED IN CALIFORNIA MUST, WITH LIMITED EXCEPTIONS, BE TREATED IN THE SAME MANNER AS A SUPPORT ORDER ISSUED BY A CALIFORNIA COURT, AND SUCH AN ORDER IS THEREFORE SUBJECT TO THE SAME PROCEDURES, DEFENSES, AND PROCEEDINGS FOR _____ [VACATING *or* STAYING] AS A SUPPORT ORDER OF THIS STATE.

A. Treatment of Registered Order. On registration, with certain limited exceptions specified by statute, a registered foreign support order must be treated in the same manner as a support order issued by a court of this state (*Fam. Code §*

4853(a)).

B. Procedures Applicable to Registered Order. A registered foreign support order has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a support order of this state (*Fam Code § 4853(a)*).

[*Optional*] **C. Stay of Enforcement.** At the hearing on the motion to vacate registration of the support order, if the obligor shows and the court finds _____ [that an appeal from the court is pending *or* that a stay of execution has been granted *or* grounds on which enforcement of a support order of this state may be stayed], the court must stay enforcement of the order until _____ [the appeal is concluded *or* the time for appeal has expired *or* the order is vacated], on proof of security for payment of the support ordered (*Fam. Code § 4853(c)*).

[*Optional*] **D. Petition to Vacate Registration.** The obligor has 20 days after the mailing or other service of notice of the registration of a foreign support order in which to file a noticed motion requesting the court to vacate the registration or to give other relief (*Fam. Code § 4853(b)*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be used in support of a motion to vacate or stay a foreign support order that has been registered in California under the Uniform Reciprocal Enforcement of Support Act. Generally, a foreign support order which has been registered in California has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a support order of this state [*Fam. Code § 4853(a)*]. Specified limitations to this general rule are discussed in *§ 131.94[2][b]*.

[b] Limitations of Registered Foreign Support Order

Although a registered foreign support order is generally treated in the same manner as a California support order, there are limitations [*see Fam. Code § 4853(a)*]. Joinder or coordination of actions or cross complaints are not permitted, and the claims or defenses are to be limited strictly to the identity of the obligor, the validity of the underlying foreign support order, or the accuracy of the obligee's statement of the amount of support remaining unpaid unless the amount has been previously established by a judgment or order. If the obligor does not file the motion within 20 days after the mailing or other service of notice of the registration of a foreign order of support or assignment of wages, the registered foreign support order or foreign order for the assignment of wages and all other documents filed pursuant to *Fam. Code § 4852(a),* are confirmed [*Fam. Code § 4853(a)*].

In addition, registration of an out-of-state order for the sole purpose of interstate wage withholding does not confer jurisdiction on the court for any purpose other than income withholding [*Fam. Code § 4853(d)*].

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[c] Related Pleading and Practice Forms

For forms and discussion of procedures applicable under the Uniform Reciprocal Enforcement of Support Act, see California Forms of Pleading and Practice, Ch. 258, *Family Law Enforcement: General Enforcement Principles and Remedies* . For discussion and forms pertaining to child and spousal support generally, see California Forms of Pleading and Practice, Ch. 224, *Dissolution of Marriage: Child Support* , and Ch. 225, *Dissolution of Marriage: Spousal Support* .

[d] Related Points and Authorities

For memoranda of points and authorities generally applicable to a motion to vacate a judgment, see Ch. 155, *Motions After Trial* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral Overview

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D. Actions On Judgments

13-131 California Points & Authorities § 131.95

§ 131.95 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] in Action on Judgment-- General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN SUPPORT OF DEMURRER TO COM-
vs.	)	PLAINT IN ACTION ON JUDGMENT
_____ [*name*],	)	[*Code Civ. Proc. § 430.10(e)*]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

A COMPLAINT ON A JUDGMENT WHICH FAILS TO INDICATE THE _____ [FINALITY OF THAT JUDGMENT *or* EXISTENCE OF AN ACTUAL CONTROVERSY *or* FAILURE OF THE DEFENDANT TO COMPLY THEREWITH] FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION.

A. Objection by Demurrer. The party against whom a complaint has been filed may object, by demurrer as provided

in *Section 430.30 of the Code of Civil Procedure*, to the complaint on the ground that it does not state facts sufficient to constitute a cause of action (*Code Civ. Proc. § 430.10(e)*). When any ground for objection to a complaint appears on the face thereof [or from any matter of which the court is required to or may take judicial notice], the objection on that ground may be taken by a demurrer to the complaint (*Code Civ. Proc. § 430.30(a)*).

[*EITHER*]

B. Finality of Judgment. An action on a judgment may not be commenced until the judgment has become final, either on expiration of the period within which an appeal may be taken or, if an appeal is taken, on the issuance of the remittitur on affirmance (*Hoover v. Galbraith (1972) 7 Cal. 3d 519, 525-526, 102 Cal. Rptr. 733, 498 P.2d 981*).

[*OR*]

B. Actual Controversy. To invoke the jurisdiction of a court, it is essential that there exists a genuine and existing controversy calling for the present adjudication of presents rights (*Young v. Young (1950) 100 Cal. App. 2d 85, 86, 223 P.2d 25*).

[*OR*]

B. Failure to Comply With Judgment. An action to enforce a sister state judgment is not permitted in the absence of an allegation that the defendant has not complied with the terms of such judgment (*Young v. Young (1950) 100 Cal. App. 2d 85, 86, 223 P.2d 25*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted by the defendant in an action on a judgment when the complaint does not allege or indicate that the judgment has become final [*see Code Civ. Proc. § 456*], or that there is an amount due and owing and unpaid from the defendant to the plaintiff under the judgment or other facts indicating the existence of an actual controversy, or that the defendant has not complied with the terms of the judgment sued on.

Where appropriate, counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms of complaint on domestic and sister state money judgments, with related comment, see California Forms of Pleading and Practice, Ch. 131, *Judgments* (Matthew Bender).

[3] Discussion of Authorities

[a] Finality of Judgment

In ***Hoover v. Galbraith*** *(1972) 7 Cal. 3d 519, 102 Cal. Rptr. 733, 498 P.2d 981* , the Supreme Court affirmed a judgment of the superior court for the plaintiff in an action on a prior judgment, holding that the action was not barred under the statute of limitations since the original judgment did not become final until its affirmance on appeal, the statute did not commence to run until that time, the action could not have been commenced until the original judgment had become final, and that it was timely filed. During the pendency of the plaintiff's action on a creditor's claim against a corporation, the corporate defendant was dissolved without provision for payment of the debt. The plaintiff won a judgment but it was not affirmed until about five years after the dissolution. Within three weeks after the judgment was affirmed, he sued the former directors of the corporation and obtained judgment against them. On appeal, the defendants contended that the action was barred by the applicable three-year statute of limitations [*Code Civ. Proc. § 359*]. However, the Supreme Court held that an action on a judgment, as distinguished from execution on a judgment, may not be commenced until the judgment has become final, either on expiration of the period within which an appeal may be taken or, if an appeal is taken, on the issuance of the remittitur when the judgment has been affirmed. Thus, said the Court, while the defendant's liability was created in 1964, the plaintiff could take no action against them until his judgment was affirmed on appeal in 1969, the intervening time was excluded from the limitation period of *Code Civ. Proc. § 359*, and the present action, commenced within three weeks after affirmance, was not barred.

[b] Actual Controversy

In ***Young v. Young*** *(1950) 100 Cal. App. 2d 85, 223 P.2d 25* , the court of appeal affirmed a judgment for the defendant on the sustaining of his general demurrer to the complaint. The plaintiff alleged that a Washington divorce decree had been entered in her favor and that the decree incorporated a property settlement agreement. Her complaint sought a decree that the Washington decree be established in California, that the decree ratify and incorporate the property settlement agreement, award costs, and grant further relief deemed just and proper. The issue was whether the complaint stated a cause of action in the absence of any allegation that the defendant had failed or refused to comply with the terms of the property settlement agreement or the Washington decree. The court noted the rule that to invoke the jurisdiction of a court of justice, it is essential that there be involved a genuine and existing controversy, calling for present adjudication and involving present rights. Since the allegations of the complaint failed to allege any facts from which it could be concluded that there was any controversy between the parties or that the judgment plaintiff sought would be of any practical or productive result to her, the court concluded that the trial court had property sustained the demurrer without leave to amend.

[c] Failure to Comply With Judgment

Young v. Young *(1950) 100 Cal. App. 2d 85, 223 P.2d 25* , is discussed in *§ 131.95[3][b]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresJudgmentsGeneral OverviewCivil ProceduresJudgmentsEntry of JudgmentsGeneral OverviewCivil ProceduresJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral Overview

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California Points & Authorities

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 131 JUDGMENTS
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13-131 California Points & Authorities § 131.96

§ 131.96 Opposing Motion to Vacate Judgment [Code Civ. Proc. § 1710.40(b)] Entered Pursuant to Sister State Money Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]--Full Faith and Credit--Judgment Valid on Face--General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORIT-
vs.	)	IES IN OPPOSITION TO MOTION TO VACATE
_____ [*name*],	)	JUDGMENT ENTERED PURSUANT TO SISTER
Defendant.	)	STATE MONEY JUDGMENTS ACT
	)	[*Code Civ. Proc. § 1710.40(b)*]
	)	Date: _____
	)	Time: _____
		Location: _____
		Judge: _____

_____

THE JUDGMENT OF A COURT OF A SISTER STATE WHICH IS VALID AND REGULAR ON ITS FACE MUST BE GIVEN THE SAME EFFECT IN THIS STATE AS IN THE STATE WHERE IT WAS MADE UNDER THE FULL FAITH AND CREDIT CLAUSE, ARTICLE IV, SECTION 1, OF THE UNITED STATES CONSTITUTION.

A. Full Faith and Credit. Full faith and credit shall be given in each state to the judicial proceedings of every other state (US *Const, Art IV, § 1*).

B. Law or Usage in State Where Rendered. Judgments shall have such faith and credit given them in every court as they have by law or usage in the courts of the state from which they are taken (*28 U.S.C. § 687*).

C. Effect of Judicial Record. The effect of a judicial record of a sister state is the same in California as in the state where it was made (*see Code Civ. Proc. § 1913(a)*).

D. Judgment Valid and Regular on Its Face. The judgment of a court of a sister state which is valid and regular on its face is to be given full faith and credit in California (*Seabron v. Seabron (1955) 133 Cal. App. 2d 374, 375, 284 P.2d 117*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted by the judgment creditor in opposition to a motion to vacate entry of judgment pursuant to the Sister State Money Judgments Act, when the judgment creditor contends that the sister state judgment is valid and regular on its face, is therefore entitled to full faith and credit in California courts, and must be given the same effect here as it would be given in the state where it was rendered. Of course, it should be borne in mind that there are exceptions to the general rule stated in this form. Thus, for example, an apparently valid and regular sister state judgment will not be accorded full faith and credit if the sister state court did not have jurisdiction of the cause or the parties [*Seabron v. Seabron (1955) 133 Cal. App. 2d 374, 284 P.2d 117]* , if the sister state judgment is not final [*see § 131.81*], or if other defenses exist [*see §§ 131.82*-131.91].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

When the plaintiff has brought a common law action on the judgment of a sister state court as permitted under the Sister State Money Judgments Acts [*Code Civ. Proc. §§ 1710.10-1710.65*], because either relief other than the payment of money is involved or the plaintiff seeks interest or for any other reason, the foregoing form may be modified for submission as a memorandum of points and authorities in opposition to a motion for summary judgment [*Code Civ. Proc. § 437c*]. Where so used, the memorandum should be accompanied with appropriate supporting affidavits or declarations [*Code Civ. Proc. § 437c*].

[3] Discussion of Authorities

[a] Judgment Valid and Regular on Its Face

In ***Seabron v. Seabron*** *(1955) 133 Cal. App. 2d 374, 284 P.2d 117* , the court of appeal reversed an order dismissing

an order to show cause why a defendant should not pay the plaintiff, his former wife, alimony and support. The order to show cause was filed concurrently with the filing of the plaintiff's complaint for separate maintenance. On the hearing of the order, it was stated by counsel that the plaintiff had left her husband in Alabama, that the defendant had obtained a divorce from her there, and he had never been a California resident. Counsel further stated the plaintiff had induced the defendant to come to California by representing that he could have partial custody of their child but that when the defendant arrived in California to arrange for this, he was served with process in this case. The plaintiff contended on appeal that she had a right to attack the validity of the Alabama decree, which did not award plaintiff alimony, or support on the ground that the Alabama court had no jurisdiction to grant it. The court of appeal stated that it is a familiar principle that a judgment of a court of sister state, if valid and regular on its face, must be accorded full faith and credit in this state, but further stated that if such court was without jurisdiction of either cause or parties, the judgment may be ignored, and that lack of jurisdiction may be shown by evidence other than the record of the judgment. Accordingly, said the court, it followed that the order dismissing the order to show cause must be reversed.

[4] Additional Authorities

[a] Full Faith and Credit Regardless of Public Policy

In *Worthley v. Worthley (1955) 44 Cal. 2d 465, 283 P.2d 19* , the Supreme Court ruled that since the plaintiff did not question the validity of the divorce granted by the Nevada court, that decree, being regular on its face, must be accorded full faith and credit in this state (*44 Cal. 2d 465, 467-468)* .

In *Silbrico Corp. v. Raanan (1985) 170 Cal. App. 3d 202, 216 Cal. Rptr. 201* , plaintiff moved to have a California judgment entered based on a judgment plaintiff had obtained in a Wisconsin state court. Defendant opposed the motion on the grounds that California's rules pertaining to confession judgments had not been followed, and that the Wisconsin judgment was an unenforceable penalty under California law. The trial court rejected defendant's arguments and entered a California judgment based on the new Wisconsin judgment, and defendant appealed. The court of appeal affirmed, holding that the trial court properly gave full faith and credit to the Wisconsin judgment by entering the California judgment. The court relied on *World Wide Imports, Inc. v. Bartel (1983) 145 Cal. App. 3d 1006, 1010-1011, 193 Cal. Rptr. 830* (discussed *above*), and held that the sole inquiry on a full faith and credit issue is whether the forum court had fundamental jurisdiction in the case. If jurisdiction was proper, then a California court must give full faith and credit to a sister state judgment, even though the strong public policy of the state of California would have precluded recovery in a California court on the original claim (*170 Cal. App. 3d 202, 207-208)* .

In *World Wide Imports, Inc. v. Bartel (1983) 145 Cal. App. 3d 1006, 193 Cal. Rptr. 830* , plaintiff obtained a California judgment entered based on a judgment obtained in a Washington state court. Defendants moved to vacate the California judgment on the grounds that the Washington judgment was unenforceable because it had been rendered in violation of the right to a jury trial. The superior court denied the motion to vacate, and defendants appealed. The court of appeal affirmed, holding that the Washington judgment was entitled to full faith and credit in a California court because the Washington court had jurisdiction over the parties and the subject matter, and reasonable notice and opportunity to defend had been given to defendants. As the sister state court had jurisdiction, the California court was required to give full faith and credit to a sister state judgment, even if a strong public policy of the state of California would have precluded recovery in a California court on the original claim. Thus, the issue of whether California's public policy regarding the right to a jury trial would have precluded recovery in a California court was irrelevant, and the Washington judgment was entitled to full faith and credit by the superior court (*145 Cal. App. 3d 1006, 1010-1012)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil

ProcedureJudgmentsRelief From JudgmentMotions to Vacate

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CHAPTER 131 JUDGMENTS
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13-131 California Points & Authorities § 131.97

§ 131.97 Opposing Motion to Vacate Judgment [Code Civ. Proc. § 1710.40(b)] Entered Pursuant to Sister State Money Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]--Full Faith and Credit--Judgment Sufficiently Final for Enforcement in California--Judgment Prospectively Modifiable

[1] FORM

[*Caption. See § 131.96[1].*]

A SISTER STATE JUDGMENT, ALTHOUGH PROSPECTIVELY MODIFIABLE, IS SUFFICIENTLY FINAL TO BE ACCORDED FULL FAITH AND CREDIT IN CALIFORNIA COURTS.

A. Judgment Valid and Regular on Its Face. [*See § 131.96[1], Paragraph D.*]

B. Judgment Prospectively Modifiable. A judgment or decree for [installment payments *or* future alimony] is entitled to full faith and credit as to past due installments if the right to them is absolute and vested, even though the judgment or decree may be modified prospectively by future orders (*Barber v. Barber (1944) 323 U.S. 77, 79-80, 65 S. Ct. 137, 89 L. Ed. 82*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted by a judgment creditor in opposing the judgment debtor's motion to vacate judgment entered pursuant to the Sister States Money Judgments Act when the judgment creditor contends that the sister state judgment is sufficiently final in nature to be entitled to full faith and credit, even though it is prospectively modifiable.

Where appropriate, counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

For comments on the modification of this form for use in connection with a motion for summary judgment [*Code Civ. Proc. § 437c*], see *§ 131.96[2]*.

[3] Discussion of Authorities

[a] Judgment Prospectively Modifiable

Barber v. Barber *(1944) 323 U.S. 77, 65 S. Ct. 137, 89 L. Ed. 82* , is discussed in *§ 131.81[3][a]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to Vacate

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§ 131.98 Opposing Motion to Vacate Judgment [Code Civ. Proc. § 1710.40(b)] Entered Pursuant to Sister State Money Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]--Full Faith and Credit--Judgment Sufficiently Final for Enforcement in California--Judgment Unstayed but Under Appeal

[1] FORM

[*Caption. See § 131.96[1].*]

A SISTER STATE JUDGMENT, WHICH IS UNSTAYED BUT UNDER APPEAL IS SUFFICIENTLY FINAL TO BE ACCORDED FULL FAITH AND CREDIT IN CALIFORNIA COURTS.

A. Judgment Valid and Regular on its Face. [*See § 131.96[1], Paragraph D.*]

B. Judgment Unstayed but Under Appeal. A sister state judgment which is unstayed but under appeal in that state is final for full faith and credit purposes (*Little v. Stevens (1972) 23 Cal. App. 3d 112, 113-114, 99 Cal. Rptr. 885*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted by a judgment creditor in opposing the judgment debtor's motion to vacate judgment entered pursuant to the Sister State Money Judgments Act when the judgment creditor contends that the sister state judgment is sufficiently final in nature to be entitled to full faith and credit, even though the judgment is unstayed but under appeal in the state where it was rendered. It should be noted that if the judgment is under appeal, the judgment debtor may move for a stay of enforcement of a judgment entered under the Sister State Money Judgments Act [*Code Civ. Proc. § 1710.50*; *see § 131.92*].

Where appropriate, counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

For comments on the modification of this form for use in connection with a motion for summary judgment [*Code Civ. Proc. § 437c*], *see § 131.96[2]*.

[3] Discussion of Authorities

[a] Judgment Unstayed but Under Appeal

In ***Little v. Stevens*** *(1972) 23 Cal. App. 3d 112, 99 Cal. Rptr. 885* , the court of appeal affirmed summary judgment for the plaintiff in an action to enforce an Oklahoma money judgment that was unstayed but under appeal in that state. The sole issue, said the court, was whether such a judgment is the type of judgment to which full faith and credit had to be given. The court noted that *Code Civ. Proc. § 1913* provides that the effect of a judicial record of a sister state is the same in California as in the state where it was made. Under Oklahoma statutes no proceeding to reverse a judgment would have the effect of staying execution thereof unless the appropriate stay bond were filed. The court noted that no such bond had been filed and that, consequently, the Oklahoma judgment was subject to enforcement in Oklahoma. Accordingly, the court concluded, an action to enforce that judgment in California was proper under *Code Civ. Proc. § 1913*. The court further noted that its holding accorded with the great weight of apparently numerically limited authority on the point and with Rest, Conflict of Laws, 2d, § 107, 112 and Rest, Judgments, § 41.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to Vacate

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13-131 California Points & Authorities § 131.99

§ 131.99 Opposing Motion to Vacate Judgment [Code Civ. Proc. § 1710.40(b)] Entered Pursuant to Sister State Money Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]--Nonmodifiable Sister State Money Judgment for Arrearages in Support Payments Enforceable in California Under Sister State Money Judgments Act

[1] FORM

[*Caption. See § 131.96[1].*]

A NONMODIFIABLE SISTER STATE MONEY JUDGMENT REPRESENTING ARREARAGES IN SUPPORT PAYMENTS MAY BE ENFORCED IN CALIFORNIA PURSUANT TO THE SISTER STATE MONEY JUDGMENTS ACT.

A. Judgment Valid and Regular on Its Face. [*See § 131.96[1], Paragraph D.*]

B. Nonmodifiable Money Judgment for Arrearages in Support Payments Enforceable in California Under Sister State Money Judgment Act. Although a support order, as defined in *Family Code Section 155*, may not be enforced by means of the procedures set forth in the Sister State Money Judgments Act (*see Code Civ. Proc. § 1710.10(c)*), a nonmodifiable money judgment representing aggregate arrearages in support payments due under a divorce decree is enforceable in California under the Sister State Money Judgments Act (*see Liebow v. Superior Court (1981) 120 Cal. App. 3d 573, 579-581, 175 Cal. Rptr. 26* ; *contra Morris v. Cohen (1983) 149 Cal. App. 3d 507, 513-514, 196 Cal. Rptr. 834*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted by a judgment creditor in opposition to a judgment debtor's motion to vacate a judgment entered pursuant to the Sister State Money Judgments Act. The ground of opposition is that the judgment is a nonmodifiable money judgment for aggregate arrearages in support payments which is enforceable in California under the act. Counsel should note that two courts of appeal have reached different results on this point, and the decisions do not seem distinguishable on their facts [*compare Morris v. Cohen (1983) 149 Cal. App. 3d 507, 513-514, 196 Cal. Rptr. 834 with Liebow v. Superior Court (1981) 120 Cal. App. 3d 573, 579-581, 175 Cal. Rptr. 26]* . Thus, until the matter is clarified by the Legislature or the Supreme Court, counsel should emphasize the policy considerations supporting his or her position in arguing that the court should adopt that position.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

For comments on modification of this form for use in connection with a motion for summary judgment [*Code Civ. Proc. § 437c*], see *§ 131.96[2]*.

[3] Discussion of Authorities

[a] Nonmodifiable Money Judgment for Arrearages in Support Payments Enforceable in California Under Sister State Money Judgments Act

In ***Liebow v. Superior Court*** *(1981) 120 Cal. App. 3d 573, 175 Cal. Rptr. 26* , an Ohio resident successfully moved in an Ohio court for an order reducing her ex-husband's aggregate arrearages in support payments due under an Ohio divorce decree to a money judgment. The ex-husband, who had previously relocated in California, then filed an action in California to modify the alimony provision of the Ohio divorce decree. The ex-wife appeared specially, moving to quash service of summons due to lack of personal jurisdiction. Her motion was granted, and the ex-husband did not appeal. The ex-wife later registered her judgment in California, pursuant to the Sister State Money Judgments Act [*Code Civ. Proc. §§ 1710.10-1710.65*]. In response, the ex-husband made another motion to modify the support order, and also filed a petition to stay execution of the money judgment. The ex-wife again made a motion to quash, and also moved to strike the motion for modification. The trial court granted her motion to quash, but also granted her ex-husband's application for a protective order, on the ground that the judgment was a support order as defined in former Code Civ. Proc. § 1653(k) (*now see Fam. Code § 155*) and was therefore unenforceable in California by means of the procedures set forth in the Sister State Money Judgments Act [*see Code Civ. Proc. § 1710.10(c)*]. The ex-wife's motion for reconsideration was denied. She then sought a writ of mandate in the court of appeal to compel the trial court to vacate the protective order.

The court of appeal issued the writ. It held that because the money judgment was nonmodifiable, it was an enforceable sister state judgment under *Code Civ. Proc. §§ 1710.10-1710.65* (*120 Cal. App. 3d 573, 580-581)* . In determining that the judgment was not an unenforceable support order, as defined in former Code Civ. Proc. § 1653(k) (*now see Fam. Code § 155*), the court noted that to give meaning to former Code Civ. Proc. § 1653(k) (*now see Fam. Code § 155*), it must be interpreted as including only orders that are subject to modification (*120 Cal. App. 3d 573, 580)* . To interpret the section as including nonmodifiable support orders would defeat both the ex-wife's efforts to obtain an enforceable

judgment and the full faith and credit clause of the California Constitution (*120 Cal. App. 3d 573, 580-581)* .

However, *Liebow v. Superior Court (1981) 120 Cal. App. 3d 573, 175 Cal. Rptr. 26* , was criticized for its analysis of *Code Civ. Proc. § 1653(k)* in *Neuman v. Barbera (1985) 164 Cal. App. 3d 437, 441-443, 210 Cal. Rptr. 556* . In *Neuman*, the court held that out-of-state judgments for child support arrearages must be registered under RURESA to be enforceable. It reversed the denial of a motion to vacate a Pennsylvania support judgment registered under the Sister State Money Judgments Act (SSMJA). The court reasoned that SSMJA specifically excepts enforcement of support orders as defined in *Code Civ. Proc. § 1653(k)* [*see Code Civ. Proc. § 1710.10(c)*]. The court noted that in enacting RURESA the Legislature intended that all foreign support orders be enforced under RURESA, despite language indicating that its remedies are cumulative. The court cited *Morris v. Cohen (1983) 149 Cal. App. 3d 507, 196 Cal. Rptr. 834* , which also criticized *Liebow*. Therefore, the continuing validity of *Liebow* may be in question.

In ***Morris v. Cohen*** *(1983) 149 Cal. App. 3d 507, 196 Cal. Rptr. 834* , plaintiff had reduced arrearages due from defendant under a 1959 divorce order to a money judgment in 1976. Plaintiff then had the judgment entered as a money judgment in California under *Code Civ. Proc. § 1710.10*. The trial court denied defendant's motion to vacate the judgment, but did reduce the amount of the judgment. Defendant appealed, arguing that the trial court should have considered his affirmative defenses to the judgment.

The court of appeal reversed, holding that the judgment for support arrearages was a support order under former Code Civ. Proc. § 1653(k) (*now see Fam. Code § 155*) and was therefore not enforceable as a sister-state money judgment under *Code Civ. Proc. § 1710.10* (*149 Cal. App. 3d 507, 513-514)* . The court was not persuaded by the analysis of *Liebow v. Superior Court (1981) 120 Cal. App. 3d 573, 579-581, 175 Cal. Rptr. 26* (discussed *above*), and held instead that all final judgments imposing a duty of support are within the definition of support order in former Code Civ. Proc. § 1653(k) (*now see Fam. Code § 155*), and are therefore enforceable only through the procedures of former Fam. Code § 4800 et seq. [*now see Fam. Code § 4900 et seq.* (Uniform Interstate Family Support Act)]. The court did not address the Full Faith and Credit Clause argument relied on by the court in *Liebow*.

This conflict between the holdings in *Morris* and *Liebow* appears to be based on a difference of opinion over whether or not a judgment for a liquidated sum overdue under the terms of a support order or judgment of divorce or dissolution imposes a duty of support. The court in *Morris* held that it does [*Morris v. Cohen (1983) 149 Cal. App. 3d 507, 514, 196 Cal. Rptr. 834]* , while the court in *Liebow* treated such a judgment as not different in kind from any other money judgment [*see Liebow v. Superior Court (1981) 120 Cal. App. 3d 573, 579-581, 175 Cal. Rptr. 26]* . A duty of support as defined in RURESA includes the duty to pay arrearages of support past due and unpaid [former Code Civ. Proc. § 1653(b); *now see Fam.Code § 4802(b)*]. However, this duty arises under the original support order, and does not require a separate judgment to be enforceable under the RURESA procedures [former Code Civ. Proc. § 1653(k); *now see Fam. Code § 155*].

If a separate judgment is obtained for a liquidated sum, and the judgment becomes final, under the procedure endorsed in *Morris* the judgment may be attacked using California law, such as the California statute of limitations [*Morris v. Cohen (1983) 149 Cal. App. 3d 507, 515-516, 196 Cal. Rptr. 834* ; *see also Code Civ. Proc. § 1699(a)*]. This procedure would appear to violate the Full Faith and Credit Clause of the federal constitution [U.S. Const., art. IV, § 1; *see Liebow v. Superior Court (1981) 120 Cal. App. 3d 573, 580-581, 175 Cal. Rptr. 26]* . Until the Supreme Court or the Legislature clarifies the effect of a sister-state judgment on a support arrearage and the enforcement thereof, counsel should attempt to persuade the court that the policy behind his or her position is the stronger of the two positions.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to Vacate

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13-131 California Points & Authorities § 131.100

§ 131.100 Opposing Motion to Vacate Judgment [Code Civ. Proc. § 1710.40(b)] Entered Pursuant to Sister State Money Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]--Question of Jurisdiction Litigated in Sister State

[1] FORM

[*Caption. See § 131.96[1].*]

A DEFENDANT IN AN ACTION ON A SISTER STATE JUDGMENT MAY NOT CLAIM LACK OF FUNDAMENTAL JURISDICTION ON THE PART OF THE SISTER STATE COURT IF THE JURISDICTIONAL ISSUE WAS FULLY AND FAIRLY LITIGATED THERE.

A. Jurisdictional Issue Litigated in Sister State Court. A defendant may not claim lack of fundamental jurisdiction on the part of the sister state court if the jurisdictional issue has been fully and fairly litigated there (*Farley v. Farley (1964) 227 Cal. App. 2d 1, 8, 38 Cal. Rptr. 357*).

B. Decisions as to Jurisdiction Res Judicata. If the court of the sister state which rendered the judgment involved has expressly litigated the question of jurisdiction, that determination is res judicata and is itself protected by the Full Faith and Credit Clause (*Sanpietro v. Collins (1967) 250 Cal. App. 2d 203, 208, 58 Cal. Rptr. 219*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted by the judgment creditor, who has obtained entry of judgment pursuant to the Sister State Money Judgments Act, in opposition to the judgment debtor's motion to vacate such entry of judgment on the ground that the sister state lacked fundamental jurisdiction or acted in excess of its jurisdiction. For a memorandum of points and authorities in support of a motion to vacate on these grounds, see *§ 131.82*.

Where appropriate, counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

For comments on the modification of this form for use in connection with a motion for summary judgment [*Code Civ. Proc. § 437c*], see *§ 131.96[2]*.

[3] Discussion of Authorities

[a] Jurisdictional Issue Litigated in Sister State Court

In ***Farley v. Farley*** *(1964) 227 Cal. App. 2d 1, 38 Cal. Rptr. 357* , the facts and background of which are discussed in *§ 131.82[4][b]*, the court of appeal stated that under the full faith and credit decisions of the United States Supreme Court, a defendant may not claim lack of fundamental jurisdiction on the part of the sister state court if the jurisdictional issue has been fully and fairly litigated there.

[b] Decision as to Jurisdiction Res Judicata

Sanpietro v. Collins *(1967) 250 Cal. App. 2d 203, 58 Cal. Rptr. 219* , is discussed in *§ 131.82[3][a]*.

[4] Additional Authorities

[a] Jurisdictional Issue Litigated in Sister State Court

Sanpietro v. Collins (1967) 250 Cal. App. 2d 203, 58 Cal. Rptr. 219 , is discussed in *§ 131.82[3][a]*.

[b] Decision as to Jurisdiction Res Judicata

Farley v. Farley (1964) 227 Cal. App. 2d 1, 38 Cal. Rptr. 357 , is discussed in *§ 131.82[4][b]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to Vacate

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13-131 California Points & Authorities § 131.101

§ 131.101 Opposing Motion to Vacate Judgment [Code Civ. Proc. § 1710.40(b)] Entered Pursuant to Sister State Money Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]--Sister State Court Had Fundamental Jurisdiction--Estoppel of Collateral Attack on Judgment in Excess of Jurisdiction

[1] FORM

[*Caption. See § 131.96[1].*]

A DEFENDANT IN AN ACTION ON A SISTER STATE JUDGMENT WHICH RESTS ON FUNDAMENTAL JURISDICTION IS ESTOPPED FROM COLLATERAL ATTACK ON SUCH A JUDGMENT ON THE GROUND THAT IT EXCEEDS STATUTORY LIMITS ON THE RELIEF GRANTED.

Estoppel of Collateral Attack on Judgment in Excess of Jurisdiction. The general rule in California accords res judicata effect to a judgment which rests on fundamental jurisdiction but exceeds statutory limits on relief, and generally one is estopped from collateral attack on such a judgment (*Bierl v. McMahon (1969) 270 Cal. App. 2d 97, 103, 75 Cal. Rptr. 473* ; *Farley v. Farley (1964) 227 Cal. App. 2d 1, 8, 38 Cal. Rptr. 357*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted by the judgment creditor, who has obtained entry of judgment pursuant to the Sister State Money Judgments Act, in opposition to the judgment debtor's motion to vacate such entry of judgment on the ground that the sister state court acted in excess of its jurisdiction. For a memorandum of points and authorities in support of a motion to vacate on this ground, see *§ 131.82*.

[i] Related Uses

For comments on the modification of this form for use in connection with a motion for summary judgment [*Code Civ. Proc. § 437c*], see *§ 131.96[2]*.

Where appropriate, counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Estoppel of Collateral Attack on Judgment in Excess of Jurisdiction

Bierl v. McMahon *(1969) 270 Cal. App. 2d 97, 75 Cal. Rptr. 473* , is discussed in *§ 131.82[3][c]*.

In ***Farley v. Farley*** *(1964) 227 Cal. App. 2d 1, 38 Cal. Rptr. 357* , the facts and background of which are discussed in *§ 131.82[4][b]*, the court of appeal noted the rule of jurisdictional finality when the issue has been fully and fairly litigated in the sister state court and added that the rule should apply with even more vigor when the subject of attack is not the original court's lack of fundamental jurisdiction but a grant of relief exceeding its defined judicial power, citing the general California rule according res judicata effect to a judgment which rests on fundamental jurisdiction but exceeds statutory limits on relief and permits collateral attack only under unusual circumstances which prevent an earlier and more appropriate attack.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to Vacate

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13-131 California Points & Authorities § 131.102

§ 131.102 Opposing Motion to Vacate Judgment [Code Civ. Proc. § 1710.40(b)] Entered Pursuant to Sister State Money Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]--Question of Fraud Litigated in Sister State

[1] FORM

[*Caption. See § 131.96[1].*]

A DEFENDANT IN AN ACTION ON A SISTER STATE JUDGMENT MAY NOT CLAIM THAT FRAUD AFFECTED THE SISTER STATE JUDGMENT IF THE ISSUE OF FRAUD WAS EXPRESSLY LITIGATED IN THAT COURT.

Question of Fraud Litigated in Sister State. If the court of the state which rendered the judgment has expressly litigated the issue of fraud affecting the judgment, that determination becomes res judicata and the judgment is protected by the Full Faith and Credit Clause (*Sanpietro v. Collins (1967) 250 Cal. App. 2d 203, 208, 58 Cal. Rptr. 219*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted by a judgment creditor in opposition to a motion to vacate a judgment entered pursuant to the Sister State Money Judgments Act when the judgment debtor contends that the judgment involved was obtained by fraud but the judgment creditor can show that the matter of fraud was litigated in the sister state. For a memorandum of points and authorities in support of a motion to vacate a judgment entered under the act on the ground that the jurisdiction of the sister state court is subject to attack for extrinsic fraud, see *§ 131.83*.

Where appropriate, counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

For comments on the modification of this form for use in connection with a motion for summary judgment [*Code Civ. Proc. § 437c*], see *§ 131.96[2]*.

[3] Discussion of Authorities

[a] Question of Fraud Litigated in Sister State

Sanpietro v. Collins *(1967) 250 Cal. App. 2d 203, 58 Cal. Rptr. 219* , is discussed in *§ 131.82[3][a]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to Vacate

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13-131 California Points & Authorities § 131.103

§ 131.103 Opposing Motion to Vacate Judgment [Code Civ. Proc. § 1710.40(b)] Entered Pursuant to Sister State Money Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]--Statute of Limitations No Bar

[1] FORM

[*Caption. See § 131.96[1].*]

A SISTER STATE JUDGMENT WHICH IS NOT BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS AS OF THE DATE OF THE APPLICATION FOR ENTRY THEREOF PURSUANT TO THE SISTER STATE MONEY JUDGMENTS ACT IS ENTITLED TO ENFORCEMENT IN CALIFORNIA.

A. Limitation Governed by California Law. [*See § 131.87[1], Paragraph B*].

B. Action Not Barred as of Date of Application. The requirement of *Section 1710.15 of the Code of Civil Procedure* that the application for entry of judgment under the Sister State Money Judgments Act must state that an action in California on the sister state judgment is not barred by the applicable statute of limitations necessarily speaks as of the date of the application (*Epps v. Russell (1976) 62 Cal. App. 3d 201, 204, 133 Cal. Rptr. 30*).

[*Optional*] **C. Decree for Future Payments as Continuing Judgment.** A decree for future payments is a continuing judgment (*Biewend v. Biewend (1941) 17 Cal. 2d 108, 115, 109 P.2d 701*).

[*Optional*] **D. Limitation Applies to Final Judgment Only.** The statute of limitations does not run on an action on a prior judgment until that judgment becomes final (*Hoover v. Galbraith (1972) 7 Cal. 3d 519, 525-526, 102 Cal. Rptr. 733, 498 P.2d 981*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted by the judgment creditor in opposition to a motion to vacate entry of judgment pursuant to the Sister State Money Judgments Act when the judgment debtor contends that the statute of limitations bars the action [*see § 131.87, 131.88*] and the judgment creditor contends that the statute of limitations is not a bar to the action. The judgment creditor's contention would be that as of the date of the application for entry of the judgment the California action is not barred (1) by the applicable statute of limitations, (2) since a decree for future payments is a continuing judgment, or (3) since the judgment did not become final until a point in time within the limitation period.

Where appropriate, counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

For comments on the modification of this form for use in connection with a motion for summary judgment [*Code Civ. Proc. § 437c*], see *§ 131.96[2]*.

[3] Discussion of Authorities

[a] Action Not Barred as of Date of Application

In ***Epps v. Russell*** *(1976) 62 Cal. App. 3d 201, 133 Cal. Rptr. 30* , the court of appeal reversed an order vacating a judgment entered in favor of the plaintiff pursuant to the Sister State Money Judgments Act, holding that the general rules concerning the filing of civil actions applied and that the California statute of limitations had not expired as of the time the plaintiff's application for entry of the sister state judgment was filed. On May 4, 1965, the plaintiff obtained a Texas judgment against the defendant. On April 29, 1975, he filed an application for entry of a judgment based on that judgment. On May 9, 1975, judgment was entered pursuant to the application. Defendant then moved to vacate on the ground that the 10-year statute of limitations applied to, and barred, the plaintiff's proceeding. The motion was granted, and on appeal from the order entered on the motion, the court of appeal held that the filing of the application is the equivalent of the filing of a complaint in an action on a judgment and that, under long settled principles, such a filing stops the running of a statute of limitations. The court noted that *Code Civ. Proc. § 1710.15* provides that the application for entry of judgment must include a statement that an action in this state on the sister state judgment is not barred by the applicable statute of limitations. That requirement, the court held, necessarily speaks as of the date of the application, not as to some indefinite future date. The court added that in the absence of any express statute of limitations in the Sister State Money Judgments Act, it could see no reason why the general rules concerning the filing of civil actions did not apply.

[b] Decree for Future Payments as Continuing Judgment

Biewend v. Biewend *(1941) 17 Cal. 2d 108, 109 P.2d 701* , is discussed in *§ 131.87[3][a]*.

[c] Limitation Applicable to Final Judgment Only

Hoover v. Galbraith *(1972) 7 Cal. 3d 519, 102 Cal. Rptr. 733, 498 P.2d 981* , is discussed in *§ 131.95[3][a]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to VacateGovernmentsLegislationStatutes of LimitationsGeneral Overview

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13-131 California Points & Authorities § 131.104

§ 131.104 Opposing Motion to Vacate Judgment [Code Civ. Proc. § 1710.40(b)] Entered Pursuant to Sister State Money Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]--Untimely Motion

[1] FORM

[*Caption. See § 131.96[1].*]

A MOTION TO VACATE A JUDGMENT ENTERED PURSUANT TO THE SISTER STATE MONEY JUDGMENTS ACT MUST BE MADE NOT LATER THAN 30 DAYS AFTER SERVICE OF NOTICE OF ENTRY OF JUDGMENT AND PROPER PROOF THEREOF.

Time for Motion to Vacate. The judgment debtor must make his/her motion to vacate a judgment entered pursuant to the Sister State Money Judgments Act not later than 30 days after service of notice of entry of judgment pursuant to *Section 1710.30 of the Code of Civil Procedure* and proper proof thereof (*Code Civ. Proc. § 1710.40(b)*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted by the judgment creditor on opposition to the judgment debtor's motion to vacate the entry of a sister state money judgment pursuant to the Sister State Money Judgments Act when the motion was filed more than 30 days after proper service of notice on him or her of the entry of the judgment.

Where appropriate, counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to Vacate

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13-131 California Points & Authorities § 131.105

§ 131.105 Opposing Demurer to Complaint [Code Civ. Proc. § 430.10(e)] in Action on Judgment--Finality, Regularity, and Jurisdiction Sufficiently Pleaded--Judgment Enforceable

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Defendant.	)	IES IN OPPOSITION TO DEMURRER TO COM-
	)	PLAINT IN ACTION ON JUDGMENT
	)	

_____

IN AN ACTION ON A _____ [DOMESTIC *or* SISTER STATE] JUDGMENT, IN PLEADING THE JUDGMENT IT IS NOT NECESSARY TO STATE THE FACTS CONCERNING JURISDICTION BUT ONLY THAT THE JUDGMENT WAS DULY GIVEN AND HAS BECOME FINAL [AND WHEN SO PLEADED, A SISTER STATE JUDGMENT IS ENTITLED TO ENFORCEMENT IN THIS STATE].

A. Pleading of Judgments. In pleading a judgment or other judicial determination, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made and to have become final (*Code Civ. Proc. § 456*).

[*Optional*] **B. Action on Judgment Permissible if Within Statutory Period.** An action on a judgment against either a

private defendant or a local public entity may be brought within 10 years after the judgment became final, excluding any period tolled while the judgment debtor was out of state (*see Code Civ. Proc. §§ 337.5, 351, 683.050*; *Barkley v. City of Blue Lake (1993) 18 Cal. App. 4th 1745, 1750-1751, 23 Cal. Rptr. 2d 315* ; *Green v. Zissis (1992) 5 Cal. App. 4th 1219, 1222, 7 Cal. Rptr. 2d 406* ; *Pratali v. Gates (1992) 4 Cal. App. 4th 632, 636-637, 5 Cal. Rptr. 2d 733*).

[*Optional*] **C. Law Controlling Validity and Finality.** [*See § 131.81[1], Paragraph C.*]

[*Optional*] **D. Judgment Prospectively Modifiable.** [*See § 131.97[1], Paragraph B.*]

[*Optional*] **E. Judgment Unstayed but Under Appeal.** [*See § 131.98[1], Paragraph B.*]

[*Optional*] **F. Judgment Valid and Regular on Its Face.** [*See § 131.96[1], Paragraph D.*]

[*Optional*] **G. Modifiable Judgment Enforceable as Matter of Comity.** [*See § 131.99[1], Paragraph D.*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted by a plaintiff suing on a domestic or sister state judgment in opposition to a demurrer the grounds of which are that the complaint does not sufficiently allege or indicate the finality of the judgment sued on or the regularity thereof or that the that the pleadings (incorporating the judgment sued on) indicate that the judgment sued on is prospectively modifiable or is subject to appeal under the law of the rendering jurisdiction. Thus, this form is designed to show that in pleading a domestic or sister state judgment it is only necessary to allege that it was duly given and that it has become final and as to sister state judgments that: the law controlling the validity and finality of the judgment is that of the rendering jurisdiction; if the judgment is prospectively modifiable or is under appeal but unstayed it is entitled to enforcement in California; and such a judgment is entitled to enforcement in California either under the Full Faith and Credit Clause or, even though it is modifiable, as a matter of comity.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Action on Judgment Permissible if Within Statutory Period

In ***Barkley v. City of Blue Lake*** *(1993) 18 Cal. App. 4th 1745, 23 Cal. Rptr. 2d 315* , a judgment creditor attempted to enforce execution of a judgment against a city by a mandamus action. However, the judgment creditor failed to timely prosecute that action, and it was dismissed for not being brought to trial before the 10-year period under *Gov. Code § 970.1* elapsed. Thus, the judgment creditor filed a new action, on the judgment. The city demurred, and the trial court sustained the demurrer.

The court of appeal affirmed the dismissal of the execution action but reversed the sustaining of the demurrer on the action on the judgment, holding that the judgment creditor could bring an action on the judgment against a local public entity. An action on the judgment is a separate, independent action on the judgment. The right to bring an action on the judgment has been established for a private defendant, if brought within 10 years after the judgment became final, pursuant to *Code Civ. Proc. § 683.020*. The enforcement of money judgments against a local public entity is not governed by the same statutes (*Gov. Code § 970 et seq.*) as those actions against a private defendant (*Code Civ. Proc. § 680.010 et seq.*). Nevertheless, the Law Revision Commission comments to *Code Civ. Proc. § 680.010 et seq.* indicate that the Legislature intended to preserve the right to bring an action on a money judgment even against a local public entity. Thus, the judgment creditor in this case could bring an action on the judgment against the city. Since it was filed within 10 years after the judgment became final, the trial court erred in dismissing it as untimely (*18 Cal. App. 4th 1745, 1748-1751)* .

In ***Pratali v. Gates*** *(1992) 4 Cal. App. 4th 632, 5 Cal. Rptr. 2d 733* , a judgment creditor obtained a judgment against a private defendant. Afterward, the judgment creditor attempted to demand payment from the judgment debtor, who had moved out of state, and filed an application to renew the judgment, which was denied as untimely. The judgment creditor then filed a separate action on the judgment. The trial court entered judgment for the judgment creditor.

The court of appeal affirmed, holding that the judgment creditor had properly brought a separate, independent action on the judgment, that was distinguishable from the application to renew the prior judgment. The separate action on the judgment was authorized by *Code Civ. Proc. § 683.050*, and was timely commenced under *Code Civ. Proc. § 337.5*. Although more than 10 years had elapsed between the time the original judgment became final and the time the judgment creditor filed the action on the judgment, the 10-year limitations period was tolled during the time that the judgment debtor was out of state, pursuant to *Code Civ. Proc. § 351* (*4 Cal. App. 4th 632, 636-638)* .

In ***Green v. Zissis*** *(1992) 5 Cal. App. 4th 1219, 7 Cal. Rptr. 2d 406* , the judgment creditor obtained a judgment against a private defendant, who then left the state. Later, the judgment creditor obtained a renewal of the judgment; however, that was vacated because it had not been timely filed. The judgment creditor then filed an independent action on the judgment. The trial court found that the judgment had become unenforceable because the judgment creditor had failed to timely renew it, and found for the judgment debtor.

The court of appeal reversed, holding that the judgment creditor was entitled to judgment on the action on the judgment, because the action was an independent action properly brought. An action on the judgment may be commenced after the period for obtaining an execution of the judgment has expired and there is no other means of enforcing the judgment except by action. The judgment creditor properly brought the action on the judgment, within the Code Civ. § 337.5 10-year limitations period. Since the judgment debtor had left the state, that limitations period was tolled pursuant to *Code Civ. Proc. § 351*, and the action was timely. Thus, the judgment creditor was entitled to judgment (*5 Cal. App. 4th 1219, 1222-1223)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresJudgmentsGeneral OverviewCivil ProceduresJudgmentsEntry of JudgmentsGeneral OverviewCivil ProceduresJudgmentsRelief From JudgmentGeneral Overview

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13-131 California Points & Authorities § 131.106

§ 131.106 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] in Action on Judgment--Sufficient Pleading of Nonperformance

[1] FORM

[*Caption. See § 131.105[1].*]

IN AN ACTION ON A JUDGMENT, A COMPLAINT IS SUFFICIENT IF IT ALLEGES THAT THE OBLIGATION IMPOSED BY THE JUDGMENT HAS NOT BEEN PERFORMED.

Pleading Nonperformance. In an action on a judgment, a complaint is sufficient if it alleges that the obligation imposed by the judgment has not been performed (*Bronzan v. Drobaz (1892) 93 Cal. 647, 650, 29 P. 254*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a demurrer to a complaint in an action on a judgment when the ground of the demurrer is that the complaint fails to allege sufficient facts to show that the

obligation imposed by the judgment has not been performed.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Pleading Nonperformance

In ***Bronzan v. Drobaz*** *(1892) 93 Cal. 647, 29 P. 254* , the Supreme Court affirmed a trial court's judgment for the plaintiff in an action on a prior judgment following the overruling of a general demurrer. The complaint stated that the judgment sued on was duly given and made and that no part of it had been paid. The defendant contended that the complaint did not state facts sufficient to constitute a cause of action. However, the Court held that the complaint was sufficient (*93 Cal. 647, 650)* .

[4] Additional Authorities

[a] Pleading Nonperformance

In *Young v. Young (1950) 100 Cal. App. 2d 85, 223 P.2d 25* , the facts and background of which are discussed in *§ 131.95[3][b]*, the court of appeal held that the trial court had properly sustained a general demurrer because the complaint failed to allege any facts from which it could be concluded that there was any controversy or that the defendant had failed or refused to comply with the terms of the prior decree (*100 Cal. App. 2d 85, 86)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresJudgmentsGeneral OverviewCivil ProceduresJudgmentsRelief From JudgmentGeneral Overview

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[Reserved]

§§ 131.107[Reserved]

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E. Satisfaction Of Judgment

13-131 California Points & Authorities § 131.120

§ 131.120 Supporting Motion for Order Compelling Acknowledgment of Satisfaction of Judgment Satisfied in Fact or Entering Satisfaction Without Acknowledgment [Code Civ. Proc. § 724.050(d)]--General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ORDER COMPELLING ACKNOWLEDGMENT OF SATISFACTION OF JUDGMENT SATISFIED IN FACT OR ENTERING SATISFACTION WITHOUT ACKNOWLEDGMENT [*Code Civ. Proc. § 724.050(d)*]
_____ [*name*],	)	
Defendant.	)	
	)	
	)	

_____

THE COURT IN WHICH A JUDGMENT IS RENDERED MAY, ON MOTION, COMPEL A JUDGMENT CREDITOR OR HIS/HER ASSIGNEE TO GIVE AN ACKNOWLEDGMENT OF SATISFACTION OF A JUDGMENT SATISFIED IN FACT, OR ORDER THE ENTRY OF SATISFACTION TO BE MADE WITHOUT ACKNOWLEDGMENT.

A. Motion Made in Court in Which Judgment Was Rendered. When a judgment is satisfied in fact, the judgment debtor may compel satisfaction of the judgment by motion in the original action in which the judgment was rendered (*LaFleur v. M.A. Burns Lbr. Co. (1922) 188 Cal. 321, 328, 205 P. 102* ; *Chambreau v. Coughlan (1968) 263 Cal. App.*

2d 712, 717, 69 Cal. Rptr. 783).

B. Statutory Authority of Court to Compel Acknowledgment of Satisfaction or Order Entry of Satisfaction Without Acknowledgment. When a money judgment is satisfied, except as pursuant to a writ of execution, the judgment debtor, the owner of property subject to a judgment lien created under the judgment, or a person having a security interest in or a lien on personal property subject to the lien may apply to the court on noticed motion for an order requiring the judgment creditor or his or her assignee of record to comply with a demand for acknowledgment of satisfaction. The court may either order the judgment creditor to comply with the demand or order the court clerk to enter satisfaction of the judgment (*Code Civ. Proc. §§ 680.240, 724.050(a), (d)*).

[*Optional*] **C. Judgment Satisfied by Payment.** Payment by the judgment debtor satisfies and extinguishes the judgment (*Salveter v. Salveter (1936) 11 Cal. App. 2d 335, 337, 53 P.2d 381*).

[*Optional*] **D. Satisfaction of Judgment by Partial Payment in Accord and Satisfaction.** A judgment may be discharged and satisfied by partial payment in accord and satisfaction (*Schwartz v. California Claim Service (1942) 52 Cal. App. 2d 47, 52-53, 125 P.2d 883*).

[*Optional*] **E. Covenant Not to Execute as Grounds for Compelling Satisfaction of Judgment.** When there is a single judgment debtor, a covenant not to execute against him or her has the effect of an outright release, and the judgment may be considered satisfied in fact for purposes of a motion under *Section 724.050(d) of the Code of Civil Procedure* (former Code Civ. Proc. § 675(a)) to compel satisfaction of judgment (*Yanchor v. Kagan (1971) 22 Cal. App. 3d 544, 552, 99 Cal. Rptr. 367*).

[*Optional*] **F. Satisfaction of Foreign Money-Judgment Established in California.** When a foreign judgment for money, subsequently established in California under the _____ [*for actions commenced after January 1, 2008*: Uniform Foreign-Country Money Judgments Recognition Act (*Code Civ. Proc. § 1713 et seq.*) *or, for actions commenced prior to January 1, 2008*: Uniform Foreign Money Judgments Recognition Act (former Code Civ. Proc. § 1713 et seq.)], is satisfied in the foreign jurisdiction in the currency of that country, defendant is entitled to entry of a satisfaction of the California judgment, notwithstanding the fact that the value of the foreign currency, because of fluctuation in value, is less than that of the American dollars into which the foreign judgment had been converted in the California judgment (*Pecaflor Construction Co. v. Landes (1988) 198 Cal. App. 3d 342, 345-350, 243 Cal. Rptr. 605*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted by a judgment debtor, the owner of real or personal property subject to a judgment lien, or a person having a security interest in or a lien on personalty subject to the judgment lien in support of a motion to compel the judgment creditor or his or her assignee of record [see *Code Civ. Proc. § 680.240*], to give a

written acknowledgment of satisfaction of a judgment, or to order the entry of satisfaction without acknowledgment. Optional Paragraph D should be inserted when the judgment is satisfied by partial payment in accord and satisfaction. For a form of memorandum of points and authorities for use when the judgment is satisfied by offsetting cross demands for money, see *§ 131.121*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should show that the judgment was satisfied in full by payment of a cashier's check, and that the judgment creditor was served with a demand for acknowledgment but to date has not complied with the demand. In addition, counsel should attach declarations to the notice of motion and memorandum which show that the judgment has been satisfied in fact.

[b] Related Pleading and Practice Forms

For a notice of motion to compel satisfaction of judgment, a declaration in support of such a motion, and an order granting the motion, see California Forms of Pleading and Practice, Ch. 318, *Judgments* (Matthew Bender).

[3] Discussion of Authorities

[a] Motion Made in Court in Which Judgment Was Rendered

In ***LaFleur v. M.A. Burns Lbr. Co.*** *(1922) 188 Cal. 321, 205 P. 102* , plaintiff brought an action against defendant to recover damages for personal injuries plaintiff sustained while employed by defendant. The trial court rendered a judgment for plaintiff which was affirmed on appeal. When the appeal was taken, an insurance company became surety for defendant and gave an appeal bond. Plaintiff assigned his interest in the judgment to his attorney for consideration, and defendant's insurance company subsequently paid the attorney the amount of the judgment. Defendant then successfully moved the court to order entry of satisfaction of the judgment. The insurance company appealed the order on the ground that by right of subrogation it stood in the shoes of the plaintiff and his assignee and thus had the right to keep the judgment unsatisfied of record. Defendant contended, inter alia, that the proceeding to compel satisfaction of the judgment was a special proceeding separate from the main action; the purported assignment of the judgment from plaintiff's assignee to the insurance company was made before the special proceeding commenced; and the insurance company was therefore not permitted to maintain an appeal in the plaintiff's name. The Supreme Court held that the motion to compel entry of satisfaction was merely a part of the original action and not a special proceeding, and that the insurance company, as an assignee of plaintiff, was entitled to maintain an appeal of the order in the plaintiff's name.

In ***Chambreau v. Coughlan*** *(1968) 263 Cal. App. 2d 712, 69 Cal. Rptr. 783* , appellant and respondents entered into a stipulated judgment for $8,025, execution on which was to be stayed as long as respondents made an initial payment of $500 and monthly installments of $200 thereafter until a total of $5,656.19 was paid, at which time appellant was to give respondents a full satisfaction of judgment. Respondents thereafter paid appellant this sum in 27 monthly installments. One of the installments, however, was not paid on time because of a bank error which resulted in the payment check being returned by the bank. After respondents made their last installment payment, they successfully filed a motion to compel satisfaction of the judgment. Appellant appealed the order on the grounds, in part, that the late payment constituted a default which made the entire amount of the judgment due, and that any motion to seek relief from the default was barred by respondents' failure to file it within six months after the default as required by *Code Civ. Proc. § 473* (*now see Code Civ. Proc. § 473(b)*). The court of appeal stated that when the judgment was satisfied in fact, the respondents had a right to compel satisfaction of judgment by motion in the original action. Because this latter motion could not be filed until the last installment had been paid, respondents were not required to seek relief from their default since the motion to compel satisfaction, filed within two months after the last installment was paid, was timely.

[b] Judgment Satisfied by Payment

In ***Salveter v. Salveter*** *(1936) 11 Cal. App. 2d 335, 53 P.2d 381* , plaintiff sought to set aside a writ of execution which

had been issued on the basis of an affidavit which falsely stated that plaintiff had failed to pay defendant a sum which he had been ordered to pay by a previous court order. The trial court entered judgment against plaintiff after sustaining defendant's demurrer to the complaint on the grounds that the order issuing the writ of execution constituted a final judgment on the merits against the plaintiff and that it was therefore "res judicata" that plaintiff owed defendant this sum. In reversing the trial court, the court of appeal rejected this contention and stated that a writ of execution must be based on a valid and subsisting judgment which has not been satisfied, and that payment of the judgment satisfies and extinguishes the judgment. Since the demurrer admitted that the defendant had in fact been paid in full, there was no valid and unsatisfied judgment on which the writ of execution could be based.

[c] Satisfaction of Judgment by Partial Payment in Accord and Satisfaction

Schwartz v. California Claim Service *(1942) 52 Cal. App. 2d 47, 125 P.2d 883* , was an action for damages and equitable relief in which plaintiff alleged that (1) he had offered defendant a part payment in full satisfaction of a judgment previously rendered against plaintiff, which defendant had accepted in writing; (2) plaintiff had made this part payment to defendant; and (3) defendant had thereafter caused a writ of execution to be issued and levied against plaintiff's bank account. Plaintiff sought damages and equitable relief. The trial court rendered a judgment on the pleadings for defendant. The court of appeal reversed, considering and rejecting defendant's argument, on the basis of the former common-law rule that an agreement to satisfy a judgment for less than its total amount is without consideration. The court held that a judgment constitutes an obligation within the meaning of *Civ. Code § 1524* that can be extinguished by part performance if expressly accepted by the creditor in writing.

[d] Covenant Not to Execute as Grounds for Compelling Satisfaction of Judgment

In ***Yanchor v. Kagan*** *(1971) 22 Cal. App. 3d 544, 99 Cal. Rptr. 367* , plaintiff induced defendant into testifying on plaintiff's behalf and into not putting on a defense by both orally assuring him that he would seek a judgment only against the codefendant and not against defendant and executing a document promising not to execute on any judgment obtained against defendant. Thereafter, plaintiff obtained judgment against defendant and attempted to enforce it. Defendant successfully moved the trial court for an order entering satisfaction of the judgment, and plaintiff appealed. The court of appeal affirmed, holding first that the agreement not to execute was binding on plaintiff. The court did note that former Code Civ. Proc. § 675(a) [*now see Code Civ. Proc. § 724.050(d)*], which authorizes the court to compel a judgment creditor to give acknowledgment of satisfaction or order the entry of satisfaction to be made without acknowledgment, applies only if it clearly appears that the judgment has been satisfied in fact, but it held that a binding covenant not to execute is the equivalent of an outright release which satisfies the judgment, and that the defendant was therefore entitled to an order entering satisfaction of the judgment.

[e] Satisfaction of Foreign Money-Judgment Established in California

In ***Pecaflor Construction Co. v. Landes*** *(1988) 198 Cal. App. 3d 342, 243 Cal. Rptr. 605* , plaintiffs had obtained a judgment for damages for breach of contract against defendant in Canada in Canadian dollars. Subsequently, they had the Canadian judgment established in California under the Uniform Foreign Money Judgments Recognition Act (former Code Civ. Proc. § 1713 et seq.) [*now see* Uniform Foreign-Country Money Judgments Recognition Act (*Code Civ. Proc. § 1713 et seq.*), applicable to actions commenced after January 1, 2008] which judgment was rendered in American dollars at the exchange rate in effect at the time the Canadian judgment was entered. In the time between entry of the Canadian judgment and entry of the California judgment, the Canadian dollar had fallen in value as against the American dollar. Defendant paid the Canadian judgment in Canada in Canadian dollars and received orders of satisfaction of judgment. He then moved the California court for an order to compel acknowledgment of full satisfaction of the California judgment based on satisfaction of the Canadian judgment. Plaintiffs opposed the motion on the ground that the fall in value of the Canadian dollar in relation to the American dollar resulted in a deficiency of some $18,000. The motion was granted, and plaintiffs appealed.

The court of appeal affirmed, holding that the superior court correctly deemed the California enforcing judgment satisfied in full by satisfaction of the underlying Canadian judgment in Canadian dollars, and that the trial court's order compelling acknowledgment of satisfaction of judgment was not in error (*198 Cal. App. 3d 342, 350-351)* . The court further held that a California court, when enforcing a foreign judgment rendered in foreign currency, must ordinarily convert the foreign currency to American dollars using the exchange rate that was in effect at the time of the foreign judgment (*198 Cal. App. 3d 342, 345, 350)* , although this rule does not prevent the parties from showing that they had an agreement that one side alone would bear the risk of postjudgment currency fluctuations (*198 Cal. App. 3d 342, 350)* . The court explained that just as the domestic forum, sitting as a trial court, must ignore currency fluctuations predating the time when the defendant had an obligation arising under domestic law, a domestic court, in an enforcement action, should ignore currency fluctuations that predate the enforcing judgment, and that no obligation arises in California until the foreign judgment is established here (*198 Cal. App. 3d 342, 347)* . Allowing the court to consider prejudgment fluctuations would encourage the foreign judgment-creditor to enforce the judgment in California whenever the American dollar had risen against the foreign currency and would promote forum shopping (*198 Cal. App. 3d 342, 347-348)* . The court said that it would also make the judgment debtor an insurer, effectively allowing the plaintiff to speculate without risk of loss, that if the American dollar rose, the creditor would be put in the hindsight position of having invested the judgment in dollars, that if the dollar fell, the creditor would try to enforce the judgment in the foreign forum, and that California policy does not call for such a result. The court explained that California generally does not protect domestic plaintiffs against such factors as inflation or the cost of borrowing money, especially in contract actions, and that to the extent recognition has been given to these factors, the issue has arisen in the context of tort causes in which the purposes and calculation of damages differ from those in contract actions (*198 Ca. App. 3d 342, 348)* . The court observed that our courts have no reason to put a foreign plaintiff in a better position than a California plaintiff, and that, similarly, they have no reason to place a foreign judgment-creditor in a better position than he would have enjoyed in the foreign forum. The court said it had been directed to no authority indicating that Canadian courts make allowances for postjudgment declines in the Canadian dollar as against foreign currency and added that the Canadian court apparently considered the judgment satisfied by defendant's payment without regard for the relative strength of the American dollar (*198 Cal. App. 3d 342, 348)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentDischarge, Release & Satisfaction

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 131 JUDGMENTS
PART II. FORMS
E. Satisfaction Of Judgment

13-131 California Points & Authorities § 131.121

§ 131.121 Supporting Motion for Order Compelling Acknowledgment of Satisfaction of Judgment Satisfied in Fact or Entering Satisfaction Without Acknowledgment [Code Civ. Proc. § 724.050(d)]--Judgment Satisfied Through Setoff of Cross Demands

[1] FORM

[*Caption. See § 131.120[1].*]

THE COURT IN WHICH A JUDGMENT IS RENDERED MAY, ON MOTION, COMPEL A JUDGMENT CREDITOR OR HIS/HER ASSIGNEE TO GIVE AN ACKNOWLEDGMENT OF SATISFACTION OF A JUDGMENT SATISFIED IN FACT, OR ORDER THE ENTRY OF SATISFACTION TO BE MADE WITHOUT AN ACKNOWLEDGMENT. IN SATISFYING THE JUDGMENT, THE DEBTOR MAY OFFSET ANY JUDGMENT BENEFICIALLY OWNED BY HIM/HER AGAINST THE CREDITOR.

A. Motion to Be Made in Original Action in Court in Which Judgment Was Rendered. [*See § 131.120[1], Paragraph A.*]

B. Statutory Authority of Court to Compel Acknowledgment of Satisfaction or Order Entry of Satisfaction Without Acknowledgment. [*See § 131.120[1], Paragraph B.*]

C. Judgment Debtor's Right to Satisfy Judgment by Offsetting Judgment. A judgment debtor who by assignment or otherwise becomes the beneficial owner of judgment against his or her judgment creditor may go into the court in which the judgment against him or her was rendered and have his or her judgment offset against the first judgment (*Erlich v. Superior Court (1965) 63 Cal. 2d 551, 555, 47 Cal. Rptr. 473, 407 P.2d 649* ; *Harrison v. Adams (1942) 20 Cal. 2d 646, 649, 128 P.2d 9*).

D. Right of Equitable Offset Exists Independent of Statute. The right of a judgment debtor to satisfy, in whole or in part, a judgment held against him or her out of a judgment which he or she owns against the judgment creditor exists

independent of statute and is based upon the inherent power of the court to do justice to the parties before it (*Salaman v. Bolt (1977) 74 Cal. App. 3d 907, 918, 141 Cal. Rptr. 841*).

E. Setoff as Matter of Right Unless Other Equitable Considerations Preclude It. Setoff of cross demands is a matter of right, unless the judgment creditor establishes the existence of facts supporting some equitable principle which precludes it (*Salaman v. Bolt (1977) 74 Cal. App. 3d 907, 919, 141 Cal. Rptr. 841* ; *Margott v. Gem Properties, Inc. (1973) 34 Cal. App. 3d 849, 854, 855, 111 Cal. Rptr. 1*).

[*Optional*] **F. Insolvency of Judgment Creditor as Justifying Equitable Offset.** The insolvency of the judgment creditor is an equitable ground justifying an offset of mutual cross demands (*Erlich v. Superior Court (1965) 63 Cal. 2d 551, 555, 556-557, 47 Cal. Rptr. 473, 407 P.2d 649*).

[*Optional*] **G. Judgment Debtor's Right to Choose Which Claims to Offset.** The judgment debtor, not the judgment creditor, has the right to choose which of several claims possessed by the judgment debtor against the judgment creditor should be offset (*Margott v. Gem Properties, Inc. (1973) 34 Cal. App. 3d 849, 855, 111 Cal. Rptr. 1*).

[*Optional*] **H. Cross Demand Barred by Statute of Limitations if Separately Asserted May Be Used as Setoff If Pleaded as Defense.** A judgment debtor may set off against a judgment a claim for money which he or she owns against the judgment creditor if he or she pleads such claim as a defense to the action, notwithstanding that an independent action on that claim would be barred by the statute of limitations at the time of the filing of the answer, provided that the judgment debtor's claim and the claim which is the subject of the judgment coexisted at any point in time when neither claim was barred by the statute of limitations (see *Code Civ. Proc. § 431.70*).

[*Optional*] **J. Right of Equitable Offset Not Defeated by Assignment of Judgment.** A judgment debtor's right to offset judgments or claims he or she owns against the judgment creditor is not defeated by a subsequent assignment of the judgment by the judgment creditor as to claims or judgments owned by the judgment debtor at the time of, or before, notice of the assignment (see *Code Civ. Proc. §§ 368, 431.70*; *Harrison v. Adams (1942) 20 Cal. 2d 646, 649, 128 P.2d 9*).

[*Optional*] **K. Compelling Setoff Against Assignee of Judgment Creditor.** Setoff of a cross demand existing against the judgment creditor may be compelled against an assignee of the judgment although the assignee takes without notice of the cross demand and for value (*Machado v. Borges (1915) 170 Cal. 501, 502-503, 150 P. 351*).

[*Optional*] **L. Setoff of Individual Against Joint and Several Claim.** An individual claim may be set off against a joint and several claim (*Whittier v. Visscher (1922) 189 Cal. 450, 456, 209 P. 23*).

[*Optional*] **M. Priority of Equitable Offset Against Statutory Lien.** The existence of a prior lien on a judgment does not give the lien priority over a judgment debtor's right to offset a judgment subsequently obtained against the judgment creditor. As between a statutory lien and the right of equitable offset, the offset is given an equitable preference absent the existence of some facts establishing an equitable principle precluding it (*Salaman v. Bolt (1977) 74 Cal. App. 3d 907, 918, 919, 141 Cal. Rptr. 841*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted by a judgment debtor in support of a motion to compel the judgment creditor or his or her assignee or attorney to give a written acknowledgment of satisfaction of a judgment satisfied in fact, or to order the entry of satisfaction to be made without an acknowledgment. This form should be used where the judgment debtor alleges that the judgment against him or her has been satisfied by an offsetting judgment which the judgment debtor owns against the judgment creditor. When the judgment has been satisfied by some means other than by offsetting cross demands, counsel should use § 131.120.

Where appropriate, counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Satisfaction of Judgment Through Setoff of Cross Demand

The courts have held that a judgment debtor who by assignment or otherwise becomes the beneficial owner of a claim against his or her judgment creditor may have a court in equity offset the amount of that claim against the judgment [*Erlich v. Superior Court (1965) 63 Cal. 2d 551, 555, 47 Cal. Rptr. 473, 407 P.2d 649]* . The offsetting claim need not have been reduced to judgment [*Erlich v. Superior Court (1965) 63 Cal. 2d 551, 555, 47 Cal. Rptr. 473, 407 P.2d 649* ; *Harrison v. Adams (1942) 20 Cal. 2d 646, 649, 128 P.2d 9]* , nor must the claim be liquidated [*Hauger v. Gates (1954) 42 Cal. 2d 752, 755, 269 P.2d 609]* . The setoff may be presented by a motion in the court in which the judgment was rendered [*see Harrison v. Adams (1942) 20 Cal. 2d 646, 649, 128 P.2d 9]* or by an independent equitable action [*Norman v. Berney (1965) 235 Cal. App. 2d 424, 434, 45 Cal. Rptr. 467]* .

[b] Setoff of Claim Not Reduced to Judgment

It is unlikely that a judgment debtor can set off a claim against the judgment by a motion in the court in which the judgment was rendered when the claim itself has never been reduced to judgment, and the foregoing form is limited to supporting a motion to compel satisfaction only where the claim has been reduced to judgment. There are at least two reasons for this. One is that the statutory basis for the setoff rule was changed when former Code Civ. Proc. § 440 was repealed and replaced by *Code Civ. Proc. § 431.70*. Former Code Civ. Proc. § 440 provided that when cross demands exist between persons under such circumstances that if one had brought an action against the other, a counterclaim could have been set up, the two demands are deemed compensated so far as they equal each other. *Code Civ. Proc. § 431.70* now provides in pertinent part that where cross demands for money existed between persons at any time when neither demand was barred by the statute of limitations, and an action is thereafter commenced by one such person, the other person may assert in his or her answer the defense of payment in that the two demands are compensated so far as they equal each other, notwithstanding that an independent action asserting his or her claim would at the time of filing his or her answer be barred by the statute of limitations.

The comment of the California Law Revision Commission to this section states that although *Code Civ. Proc. § 431.70* continues the substantive effect of former Code Civ. Proc. § 440, it is expressly limited to cross demands for money, and specifies the procedure for pleading the defense provided by that section. Thus, in any case, if the claim was not reduced to judgment and was never included in the defendant's answer, it is unlikely that at the time the judgment is sought to be enforced, the defendant could offset his or her claim at least when it was barred by the statute of limitations at the time plaintiff commenced his or her action.

In addition to any argument based on the legislative changes in the law governing setoffs, there appear to be no cases in which a motion to compel the entry of satisfaction of judgment was the means by which the judgment debtor

adjudicated his or her claim against the judgment creditor and had it set off against the judgment. Instead, the judgment debtor's remedy is to enjoin the enforcement of the judgment by demonstrating that enforcement would otherwise be unjust [*see* *Erlich v. Superior Court (1965) 63 Cal. 2d 551, 555-556, 47 Cal. Rptr. 473, 407 P.2d 649* (specifying factors based on probability and amount of recovery and insolvency of judgment creditor for exercise of trial court's discretion to stay enforcement of execution)]. While the courts have made clear that at the time the judgment debtor by assignment, or otherwise, has become the beneficial owner of the claim, the claim need not be reduced to judgment or even have been liquidated [*Coonan v. Loewenthal (1905) 147 Cal. 218, 222-225, 81 P. 527]* , no court in the absence of some specific provision has permitted the judgment debtor to offset a claim which has not been reduced to judgment.

For example, in *Jones v. Mortimer (1946) 28 Cal. 2d 627, 630-632, 170 P.2d 893* , the former Building and Loan Association Commissioner, now Savings and Loan Commissioner, set off the amount due on certain tax assessments plaintiff owed as a shareholder in a corporation against an unrelated judgment that plaintiff had recovered for services rendered to the corporation. Plaintiff, in a separate action to enforce the judgment for services rendered, argued that the commissioner had no power to set off the tax assessment and that to permit a setoff would deprive him of his right to attack the validity of the assessment. In response, the Supreme Court held that under the former Building and Loan Association Act, now Savings and Loan Association Act, collection by action was not the only means for the commissioner to enforce the assessment. Instead, he could take the additional step of collecting the assessment, in this case by setoff. The Court also stated that the lack of opportunity to contest the validity of the assessment was not an issue, since it presumed that by answer to plaintiff's complaint, the commissioner had set up the assessment and the claim of offset. (Neither the complaint nor the answer were before the Court.)

Not at issue in the case was whether the commissioner as a judgment debtor could have set off the assessment on motion, since the action was a separate action to enforce plaintiff's judgment. It is arguable, however, that the commissioner could have moved to set off the assessment, but it would be presumably because the commissioner had the power to enforce collection of the assessment by a means other than a civil action.

[3] Discussion of Authorities

[a] Judgment Debtor's Right to Satisfy Judgment by Offsetting Judgment

In ***Erlich v. Superior Court*** *(1965) 63 Cal. 2d 551, 47 Cal. Rptr. 473, 407 P.2d 649* , plaintiff recovered a judgment against defendant in a trade libel action for $30,000 general damages and $5,000 punitive damages. On appeal, the judgment was reversed for insufficient evidence on the issue of damages, and the cause was remanded for a new trial on this issue. Defendant, who was insolvent at the time, was awarded a judgment of $1,800 for costs of appeal. Plaintiff's motion to quash the writ of execution issued on this judgment was denied, and he applied to the Supreme Court for a writ of prohibition restraining the lower court from issuing a writ of execution on the judgment. In issuing the writ, the Court stated the general rule that a judgment debtor who, by assignment or otherwise, becomes owner of a claim against his judgment creditor in equity may have his claim set off against the judgment, and the fact that the claim has not itself been reduced to judgment is no obstacle to its use as a setoff. The Court noted that the insolvency of the party against whom the relief is sought affords sufficient ground for invoking this equitable principle. The Court then stated that the judgment debtor should not be required to pay the judgment prior to determining the validity of his own claim where the creditor is insolvent, since to do so would in all likelihood deprive the judgment debtor of both his right of setoff and recovery of his own judgment. Noting the trial court's power to stay execution of a judgment on the ground that there is an action pending on a disputed claim by the judgment debtor against the judgment creditor, the Court set out guidelines for the trial in determining whether execution should be enjoined.

In ***Harrison v. Adams*** *(1942) 20 Cal. 2d 646, 128 P.2d 9* , Adams obtained a judgment against Harrison for $11,000 which was affirmed on appeal. Adams, who was insolvent, assigned his interest in the judgment to his wife for consideration. Thereafter, a third party assigned to Harrison, solely for purposes of collection, a promissory note for $3,800 owed by Adams to the third party. Harrison subsequently commenced this action to set off the amount due on

the note against the judgment, depositing the amount due under the judgment with the county clerk. The trial court rendered judgment for Harrison against Adams for the amount of the note, but refused to offset this amount against the judgment against Harrison and ordered the county clerk to pay the full amount deposited to Adams's wife. Harrison appealed the latter part of the judgment, and the Supreme Court affirmed.

The Court first stated the general rule that a judgment debtor who has, by assignment or otherwise, become the owner of a judgment or claim against his judgment creditor may go into the court in which the judgment against him was rendered and have his judgment offset against the first judgment. The Court also noted that such a setoff may be compelled even against an assignee of the judgment who took without notice and for value, and that the debtor may set off against the judgment claims acquired after assignment of the judgment, but prior to notice to the debtor of the assignment.

The Court stated, however, that the judgment debtor as assignee must be the beneficial owner of a claim or judgment in order to use it as a setoff against a judgment against him. An assignee for collection, held the Court, is merely an agent for the assignor and not the beneficial owner of the claim. The Court therefore ruled that Harrison was not entitled to offset the amount due on the note assigned to him against the judgment against him, and that Adams's wife, who was a bona fide assignee of the judgment for value, was entitled to the entire amount deposited with the county clerk.

[b] Right of Equitable Offset Exists Independent of Statute

In ***Salaman v. Bolt*** *(1977) 74 Cal. App. 3d 907, 141 Cal. Rptr. 841* , plaintiffs commenced an unlawful detainer action against defendant, which resulted in a judgment for defendant on equitable grounds. The trial court awarded defendant attorney's fees and costs. Defendant thereafter confessed judgment to his attorney Field for an amount covering attorney's fees for services rendered in defending the unlawful detainer action. Field then moved to impress a lien on defendant's cause of action against plaintiffs for attorney's fees. The trial court denied this motion, but the order was reversed on appeal. Thereafter, in an unrelated action, plaintiffs recovered a judgment by default against defendant, and moved to offset their judgment against defendant's judgment for attorney's fees. Field opposed this motion arguing that his lien had priority over the offset claimed by plaintiffs. The trial court endorsed Field's lien on defendant's judgment and denied the offset. Plaintiffs appealed, and the court of appeal reversed.

The court first ruled that Field had a valid lien against defendant's judgment against the plaintiffs. The court stated, however, that a judgment debtor's right to satisfy a judgment held against him out of a judgment or claim which he acquires against the judgment creditor exists independent of statute and rests on the inherent power of the court to do justice to the parties before it, and that this offset is a matter of right in the absence of facts establishing an equitable principle which precludes it. Since Field's lien was only on defendant's right to recover from plaintiffs, and since this right was subject to plaintiffs' right to offset judgments or claims owned by them against defendant, the court ruled that it was error for the lower court to give priority to Field's lien and to deny the plaintiffs' right of offset.

[c] Setoff as Matter of Right Unless Other Equitable Considerations Preclude It

In ***Margott v. Gem Properties, Inc.*** *(1973) 34 Cal. App. 3d 849, 111 Cal. Rptr. 1* , plaintiff recovered a judgment against defendants setting aside a sale under a deed of trust for fraud and awarding incidental, compensatory, and punitive damages. On appeal, defendants contended, inter alia, that the trial court erred both in refusing to offset against this judgment amounts owed by plaintiff on an unrelated judgment against plaintiff acquired by defendants by assignment, and in offsetting against the judgment the unpaid balance owed to defendants by plaintiff on the note secured by the deed of trust. The court of appeal agreed, stating that offset is a matter of right unless the judgment creditor establishes the existence of facts supporting some equitable principle which precludes it. The court held that since equitable offset is a right of the judgment debtor, the judgment debtor, and not the judgment creditor, has the right to choose which of several claims he or she possesses against the judgment creditor to offset against the judgment. The court ruled that defendants therefore had the right to elect to offset their unsecured judgment against the judgment

against them and to preserve their secured claim against the judgment creditor, and that the trial court could not disturb this election absent some equitable ground precluding the election. Since the trial court had ruled on the matter without hearing argument on defendants' motion to offset their own judgment against plaintiff's judgment, the court remanded the case for a retrial on the question of the defendants' right to offset.

Salaman v. Bolt *(1977) 74 Cal. App. 3d 907, 141 Cal. Rptr. 841* , is discussed in *§ 131.121[3][b]*.

[d] Insolvency of Judgment Creditor as Justifying Equitable Offset

Erlich v. Superior Court *(1965) 63 Cal. 2d 551, 47 Cal. Rptr. 473, 407 P.2d 649* , is discussed in *§ 131.121[3][a]*.

[e] Judgment Debtor's Right to Choose Which Claims to Offset

Margott v. Gem Properties, Inc. *(1973) 34 Cal. App. 3d 849, 111 Cal. Rptr. 1* , is discussed in *§ 131.121[3][c]*.

[f] Right of Equitable Offset Not Defeated by Assignment of Judgment

Code Civ. Proc. § 368 provides that "[in] the case of the assignment of a thing in action, the action by the assignee is without prejudice to any set off, or other defense existing at the time of, or before, notice of the assignment..." *Code Civ. Proc. § 431.70* provides that a defendant has the right to plead the defense of payment in that the cross demands of plaintiff and defendant are compensated so far as they equal each other, and that the defendant cannot be deprived of this right by assignment or death of the plaintiff. It thus appears that an assignee of the judgment takes subject to any right of offset of the judgment debtor existing at the time of, or before, notice of the assignment is given to the judgment debtor.

In ***Harrison v. Adams*** *(1942) 20 Cal. 2d 646, 128 P.2d 9* , discussed in *§ 131.121[3][a]* *Code Civ. Proc. § 368* was noted, evidently to show that judgment debtor had a right to equitable offset if he had become the beneficial owner of the claim prior to the assignee's notice of assignment. However, this was dictum since the primary thrust of the Court's opinion was that the judgment debtor had acquired his judgment for purposes of collection only. Therefore, he was not the beneficial owner of the claim but instead was a trustee for the assignor who had retained the equitable interest in the thing assigned. To attempt to use the assigned judgment as an offset violated the elementary rule of trusts that forbids the trustee from using trust property for his private or individual purposes.

[g] Compelling Setoff Against Assignee of Judgment Creditor

In ***Machado v. Borges*** *(1915) 170 Cal. 501, 150 P. 351* , defendant for consideration executed and delivered to plaintiff his promissory notes, and thereafter failed to make any payments on the notes. Defendant obtained a judgment against plaintiff in an unrelated action and assigned the judgment to a third party who took it for value and without notice of the claim of plaintiff against defendant. Plaintiff then brought an equitable action to offset the amount due on the promissory notes against the judgment recovered by defendant against plaintiff. The trial court rendered a judgment for plaintiff. In affirming the judgment, the Supreme Court held that setoff of a cross demand existing at the time of assignment of a judgment may be compelled against the assignee even where the assignee acquired the judgment for value and without notice of the existence of the cross demand.

[h] Setoff of Individual Claim Against Joint and Several Claim

In ***Whittier v. Visscher*** *(1922) 189 Cal. 450, 209 P. 23* , plaintiff brought an action to recover on a promissory note executed by the defendants Mr. and Mrs. Visscher to defendant Dixon who subsequently indorsed the note to plaintiff. The note had been given in consideration for the transfer of certain shares of a corporation to the Visschers by defendant Dixon, who was a principal shareholder of the corporation. At the time of the transfer, the corporation and Dixon were liable to Mrs. Visscher on another promissory note. The Visschers counterclaimed for the money due to Mrs. Visscher

under this other note. In reversing the trial court and ruling that the Visschers had stated a valid counterclaim, the Supreme Court held, inter alia, that because payment by either of two joint and several obligors would extinguish the plaintiff's right of action, either defendant may set off a valid claim against the obligee under the note with the same result. The Court therefore rejected as untenable plaintiff's objection to the Visschers' counterclaim on the grounds that it ran as a setoff in favor of only one of the defendants.

[i] Priority of Equitable Offset Against Statutory Lien

Salaman v. Bolt *(1977) 74 Cal. App. 3d 907, 141 Cal. Rptr. 841* , is discussed in *§ 131.121[3][b]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentDischarge, Release & Satisfaction

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CHAPTER 131 JUDGMENTS
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E. Satisfaction Of Judgment

13-131 California Points & Authorities § 131.122

§ 131.122 Supporting Motion for Order Awarding Damages, Forfeiture of Penalty, and Attorney's Fees for Unjust Refusal to Execute Acknowledgment of Satisfaction of Judgment Satisfied in Fact--Refusal to Respond to Written Demand [Code Civ. Proc. §§ 724.050(e), 724.080]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ORDER AWARDING DAMAGES, FORFEITURE OF PENALTY, AND ATTORNEY'S FEES FOR UNJUST REFUSAL TO EXECUTE ACKNOWLEDGMENT OF SATISFACTION [*Code Civ. Proc. §§ 724.050(e), 724.080*]
_____ [*name*],	)	
Defendant.	)	
	)	
	)	

_____

ON MOTION IN AN ACTION IN WHICH A JUDGMENT WAS RENDERED, THE JUDGMENT DEBTOR MAY RECOVER ALL DAMAGES HE/SHE SUSTAINED, INCLUDING THE RECOVERY OF ATTORNEY's FEES AND THE FORFEITURE OF THE SUM OF $100, BY REASON OF THE REFUSAL OF THE JUDGMENT CREDITOR OR ASSIGNEE WITHOUT JUST CAUSE TO GIVE AN ACKNOWLEDGMENT OF SATISFACTION OF JUDGMENT WITHIN 15 DAYS AFTER RECEIPT OF A WRITTEN DEMAND THEREFOR MADE AFTER THE JUDGMENT HAS IN FACT BEEN PAID IN FULL.

A. Statutory Liability of Judgment Creditor. Any judgment creditor or assignee who fails without just cause to comply with the demand for acknowledgment of satisfaction of judgment within 15 days after receipt of the demand, is liable to the person making the demand for all damages resulting from the failure to comply plus the sum of $100 (*see Code Civ. Proc. §§ 724.050(e), 724.240(a)*; *see also Code Civ. Proc. § 680.240* (judgment creditor defined)).

B. Award of Attorney's Fees. In any action maintained pursuant to Sections 724.010-724.100 or 724.210-724.260 of the Code of Civil Procedure, the court must award reasonable attorney's fees to the prevailing party (*Code Civ. Proc. §§ 724.080, 724.260*).

C. Damages Recoverable by Motion in Original Action. A judgment debtor may recover damages as provided in *Section 724.050(e)* or *724.240(a) of the Code of Civil Procedure* by moving for an award of such damages in the original action in which the judgment was rendered (*see Code Civ. Proc. §§ 724.050(d), (e), 724.230, 724.240(a)*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted by a judgment debtor, an owner of property subject to a judgment lien created under the judgment, or, if personal property is involved, a person having a security interest in or a lien on personal property subject to the lien in support of a motion for an order awarding damages, forfeiture of penalty, and attorney's fees on the ground that the judgment creditor or his or her assignee of record [*see Code Civ. Proc. § 680.240*] refused without just cause either (1) to execute, acknowledge, or deliver an acknowledgment of satisfaction or (2) to file the acknowledgment with the court within 15 days after receipt of a written demand therefor made after the judgment had in fact been paid in full. When appropriate, the foregoing form may be combined with a memorandum of points and authorities in support of a motion for an order compelling acknowledgment of satisfaction or ordering entry of satisfaction to be made without acknowledgment [*see § 131.120, § 131.121*].

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should summarize the facts that show that a demand for acknowledgment was served on the judgment creditor who failed to comply with the demand. Counsel should also attach declarations to the notice of motion and memorandum of points and authorities showing that the judgment has in fact been satisfied, the subsequent written demand of the judgment debtor or property owner, and the judgment creditor's refusal without just cause to give an acknowledgment of satisfaction within 15 days after receiving the demand.

[b] Related Pleading and Practice Forms

For a form of acknowledgment of satisfaction of judgment, and for a form of written demand for an acknowledgment of satisfaction, see California Forms of Pleading and Practice, Ch. 318, *Judgments* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentDischarge, Release & SatisfactionCivil ProcedureRemediesCosts & Attorney FeesGeneral Overview

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13-131 California Points & Authorities § 131.123

§ 131.123 Supporting Motion for Order Awarding Damages and Attorney's Fees for Intentionally Conditioning Delivery of Acknowledgment of Satisfaction on Performance of Act or Payment of Amount by Judgment Debtor in Excess of Amount Required by Judgment [Code Civ. Proc. §§ 724.070, 724.080]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ORDER AWARDING DAMAGES AND ATTORNEY'S FEES FOR INTENTIONALLY CONDITIONING DELIVERY OF ACKNOWLEDGMENT OF SATISFACTION ON PERFORMANCE OF ACT OR PAYMENT OF AMOUNT IN EXCESS OF AMOUNT REQUIRED BY JUDGMENT [*Code Civ. Proc. §§ 724.070, 724.080*]
_____ [*name*],	)	
Defendant.	)	
	)	
	)	

A JUDGMENT CREDITOR OR ASSIGNEE WHO INTENTIONALLY CONDITIONS THE DELIVERY OF AN ACKNOWLEDGMENT OF SATISFACTION OF JUDGMENT ON THE PERFORMANCE OF AN ACT OR THE PAYMENT OF AN AMOUNT BY THE JUDGMENT DEBTOR IN EXCESS OF THE AMOUNT TO WHICH THE JUDGMENT CREDITOR OR ASSIGNEE IS ENTITLED PURSUANT TO THE JUDGMENT IS LIABLE TO THE JUDGMENT DEBTOR FOR ALL DAMAGES SUSTAINED BY REASON OF SUCH ACTION, PLUS

REASONABLE ATTORNEY'S FEES, AND IN NO CASE SHALL THE AMOUNT OF DAMAGES RECOVERED BE LESS THAN $250.

A. Liability of Judgment Creditor. A judgment creditor or assignee who intentionally conditions delivery of an acknowledgment of satisfaction of judgment on the performance of an act or the payment of an amount by the judgment debtor, in excess of that to which the judgment creditor or assignee is entitled, pursuant to the judgment, is liable to the judgment debtor for all damages sustained by reason of such action, and in no case shall the amount of damages recovered be less than $250 (*Code Civ. Proc. §§ 680.240, 724.070(a)*).

B. Award of Attorney's Fees. [*See § 131.122[1], Paragraph B.*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

CAUTION:

A noticed motion procedure to establish a judgment creditor's liability for intentionally conditioning satisfaction of the judgment on payment in excess of that to which the judgment creditor is entitled has neither been established nor apparently used in any of the reported cases decided under the provisions of former Code Civ. Proc. § 675(d), the predecessor to *Code Civ. Proc. § 724.070(a)*. Unlike *Code Civ. Proc. § 724.050(e)* (providing for liability when judgment creditor fails without just cause to comply with demand for acknowledgment of satisfaction), *Code Civ. Proc. § 724.070(a)* does not expressly provide that the liability imposed by that section may be determined by motion in the action in which the judgment was rendered. However, in *George S. Nolte Consulting Civil Eng'rs, Inc. v. Magliocco (1979) 93 Cal. App. 3d 190, 193-195, 155 Cal. Rptr. 348* , the trial court granted a judgment debtor's motion, made in the original action in which the judgment was rendered, for an order under former Code Civ. Proc. § 675(c), *(g)* entering satisfaction of the judgment, and awarding damages and attorney's fees for refusal to give acknowledgment of satisfaction without just cause. The court of appeal affirmed the order without discussing the propriety of the use of the motion to establish liability, even though former Code Civ. Proc. § 675(c), like former Code Civ. Proc. § 675(d), did not specify the procedure for establishing a judgment creditor's liability. It may be permissible then to use a similar motion procedure to establish liability under *Code Civ. Proc. § 724.070(a)*, which is derived from former Code Civ. Proc. § 675(d).

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted in support of a motion for an order awarding damages and attorney's fees under *Code Civ. Proc. §§ 724.070(a), 724.080*. The ground for the motion is the intentional conditioning of the delivery of an acknowledgment of satisfaction by the judgment creditor or assignee on performance of an act or payment of an amount by the judgment debtor in excess of that to which the judgment creditor or assignee of record [*see Code Civ. Proc. § 680.240*] is entitled pursuant to the judgment. Note that provisions of *Code Civ. Proc. § 724.070(a)* do not apply if the judgment creditor or assignee has agreed to deliver an acknowledgment of satisfaction of judgment to the judgment debtor prior to full satisfaction of judgment in consideration for the judgment debtor

having agreed either to furnish security or to execute a promissory note, or both, the principal amount of which does not exceed the amount to which the judgment creditor or assignee is entitled pursuant to the judgment [*Code Civ. Proc. § 724.070(a)*]. This form may be combined with a memorandum of points and authorities in support of a motion for an order compelling acknowledgment of satisfaction or entering satisfaction without acknowledgment in appropriate cases.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts showing that the delivery of the acknowledgment of satisfaction was conditioned on the performance of an act or the payment of a sum in excess of the amount required to satisfy the judgment in full.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentDischarge, Release & SatisfactionCivil ProcedureRemediesCosts & Attorney FeesGeneral Overview

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13-131 California Points & Authorities § 131.124

§ 131.124 Supporting Motion for Order Vacating Entry of Satisfaction of Judgment

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Defendant.	)	IES IN SUPPORT OF MOTION FOR ORDER VA-
	)	CATING ENTRY OF SATISFACTION OF JUDG-
	)	MENT

_____

A PARTY OF RECORD MAY, BY MOTION IN THE ORIGINAL ACTION IN WHICH THE JUDGMENT WAS RENDERED, HAVE AN ENTRY OF SATISFACTION OF JUDGMENT VACATED ON GROUNDS OF MISTAKE, FRAUD, OR UNDUE INFLUENCE.

A. Motion to Vacate Satisfaction to Be Made in Original Action. A party of record may have a satisfaction of judgment entered by mistake or in fraud of his or her rights set aside by motion in the original action in which the judgment was rendered (*Wherry v. Rambo (1950) 97 Cal. App. 2d 569, 571, 218 P.2d 142*).

B. Grounds for Vacating Satisfaction. Fraud, undue influence, and mistake are the generally recognized grounds for vacating a satisfaction of judgment (*Remillard Brick Co. v. Dandini (1950) 98 Cal. App. 2d 617, 622, 220 P.2d 927*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted in support of a motion for an order vacating an entry of satisfaction of judgment on grounds of mistake, fraud, or undue influence. The motion may be made by the judgment creditor in the original action in which the judgment was rendered. For points and authorities for use in establishing mistake, fraud, or undue influence in analogous situations, see Ch. 50, *Contracts* and Ch. 105, *Fraud and Deceit* .

Where appropriate, counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For a form of notice of motion to vacate a satisfaction of judgment, see California Forms of Pleading and Practice, Ch. 318, *Judgments* (Matthew Bender).

[3] Discussion of Authorities

[a] Motion to Vacate Satisfaction to Be Made in Original Action

In *Wherry v. Rambo (1950) 97 Cal. App. 2d 569, 218 P.2d 142* , plaintiff's former attorney filed an acknowledgment of satisfaction of judgment with the court stating that the judgment had been paid, acknowledging full satisfaction, and authorizing the clerk of the court to enter satisfaction of record in the action, whereupon the clerk made an entry of satisfaction of the judgment. Thereafter, plaintiff, appearing in propria persona, filed a notice of motion to vacate the entry, alleging that the attorney was no longer representing plaintiff in the matter, that plaintiff had not received any money or consideration for the satisfaction and had not consented to any settlement of the judgment, and that he believed that the satisfaction had been entered to defraud him of his rights under the judgment. The trial court denied the motion. The court of appeal, in affirming, noted that a party to the record may have a satisfaction of judgment entered in fraud of his rights set aside on motion in the action in which the judgment is rendered. The court held, however, that where the plaintiff had not filed a revocation of the attorney's authority to accept money on behalf of his client prior to the filing of the acknowledgment of satisfaction, and where there was no showing that plaintiff's former attorney had accepted or received less than the full amount of the judgment, the trial court properly denied the plaintiff's motion.

[b] Grounds for Vacating Satisfaction

In *Remillard Brick Co. v. Dandini (1950) 98 Cal. App. 2d 617, 220 P.2d 927* , plaintiff Remillard Brick Co., a shareholder of Remillard-Dandini Co., had filed a derivative suit on behalf of Remillard-Dandini against its president and manager, A.O. Dandini, alleging fraud and misappropriation of funds. Judgment was entered in favor of Remillard-Dandini Co. against defendant Dandini. Thereafter, plaintiff instituted an action to enforce collection of the judgment. Before that action went to trial, the board of directors of Remillard-Dandini passed a resolution offsetting credits on the books of the company in Dandini's favor against the judgment, and this was later filed and entered as a satisfaction of the judgment. Plaintiff moved to vacate satisfaction of the judgment, and the motion was denied. The court of appeal noted that a satisfaction of judgment which has been filed and entered may be set aside by appropriate proceedings and for proper cause, and that the generally recognized grounds for vacating a satisfaction of judgment are fraud, undue influence, and mistake. The court held, however, that Dandini's right to offset these amounts had already been established in the fraud action, and that there was no evidence of fraud or any other grounds for vacating the entry of satisfaction. The court therefore affirmed the order denying the motion.

[4] Additional Authorities

[a] Motion to Vacate Satisfaction to Be Made in Original Action

In *Kinnison v. Guaranty Liquidating Corp. (1941) 18 Cal. 2d 256, 115 P.2d 450* , defendant had obtained a judgment against a third party. In satisfying the judgment in part, defendant levied a writ of execution on certain funds held by a bank in the name of the third party judgment debtor. Plaintiff then brought this action to recover this amount from defendant, alleging that it had a prior right to these funds. The trial court entered a judgment for plaintiff and attempted to restore defendant to its position prior to the levy of execution by canceling the partial satisfaction of judgment entered on receipt of the funds recovered from the bank and reinstating the judgment in its former amount. The Supreme Court affirmed the judgment for plaintiff but reversed the portion of the judgment reinstating defendant's judgment against the third party. The court stated the general rule that a satisfaction of judgment which has been erroneously entered may be vacated either on motion in the original action in which the judgment was rendered, or by means of an independent action in equity between the parties. The court held, however, that such an order could not properly be made in this case because the third party judgment debtor was not a party to this action.

[b] Grounds for Vacating Satisfaction

In *Haggin v. Clark (1882) 61 Cal. 1* , one of two judgment creditors authorized entry of satisfaction of judgment without the consent of the other judgment creditor and without having received the full amount of the judgment. The Supreme Court held that the trial court had properly granted the second judgment creditor's motion to vacate the satisfaction of judgment except to the extent that the judgment had been paid.

In *Argue v. Wilson (1935) 3 Cal. App. 2d 645, 40 P.2d 297* , respondents recovered a judgment on a cross complaint against appellant. Appellant's insurance carrier issued a draft to respondents for the amount of the judgment, payable on presentation to insurance company's office. On issuance of the draft, respondents gave a satisfaction of the judgment. Two days later, however, a receiver took over the insurance carrier's assets and the draft was dishonored. Respondents then successfully moved the trial court for an order vacating the entry of satisfaction. The court of appeal noted that respondents had accepted the draft on the assumption that it would be redeemable in cash when presented to the insurance company and that there was no showing that respondents had intended or agreed to substitute the insurance company as judgment debtor in lieu of appellant. The court then held that the motion to vacate satisfaction was properly granted.

In *Clark v. Johnston (1920) 49 Cal. App 315, 193 P. 864* , Rauer had assigned several claims to his bookkeeper, Clark, the nominal plaintiff, solely for purposes of collection. Actions were brought in Clark's name, and judgments were rendered for plaintiff totaling over $3,500. Clark subsequently executed a written acknowledgment of satisfaction, which was filed with the clerk, and satisfaction of judgment was entered by the clerk. In return for the satisfaction, one

of the judgment debtors, Davis, gave Clark $50 in cash and a $1,950 promissory note which was, in the words of the court of appeal, "of problematical value." Rauer then moved the court for an order vacating this satisfaction, alleging that he was the real party in interest, and that Clark had no authority to settle or compromise the actions or to satisfy the judgments therein, and that Davis had notice of this, and that the satisfaction entered was "without right and without consideration." The trial court granted the motion, and the court of appeal affirmed. In denying Davis's petition to have the cause heard in the Supreme Court, the Supreme Court issued an opinion stating that as it understood the opinion of the court of appeal, the order setting aside the satisfaction was upheld and justified because the evidence showed that the satisfaction was given pursuant to an arrangement between the nominal plaintiff and the judgment debtor which was in actual fraud of the real party in interest in the judgment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentDischarge, Release & Satisfaction

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13-131 California Points & Authorities § 131.125

§ 131.125 Opposing Motion for Order Compelling Acknowledgment of Satisfaction of Judgment or Entering Satisfaction Without Acknowledgment [Code Civ. Proc. §§ 724.050(d), 724.110(b), 724.230]--Inapplicable if Judgment Not Satisfied in Fact

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM IN OPPOSITION TO MOTION
_____ [*name*],	)	FOR ORDER COMPELLING ACKNOWLEDG-
Defendant.	)	MENT OF SATISFACTION OF JUDGMENT OR
	)	ENTERING SATISFACTION WITHOUT AC-
	)	KNOWLEDGMENT
		[*Code Civ. Proc. § 724.050(d)*]

_____

THE PROVISIONS OF SECTION 724.050(d) OF THE CODE OF CIVIL PROCEDURE, AUTHORIZING THE COURT TO COMPEL ACKNOWLEDGMENT OF SATISFACTION OR ENTER SATISFACTION WITHOUT ACKNOWLEDGMENT, ARE INAPPLICABLE WHEN IT APPEARS THAT THE JUDGMENT HAS NOT BEEN SATISFIED IN FACT.

Judgment Must Be Satisfied in Fact. Unless it clearly appears that the judgment was satisfied in fact, the provisions of *Sections 724.050(d)*, *724.110(b)*, and *724.230 of the Code of Civil Procedure*, authorizing the court to compel acknowledgment of satisfaction or order the entry of satisfaction to be made without acknowledgment, are not

applicable (*Lucky United Properties Investment, Inc. v. Lee (2010) 185 Cal. App. 4th 125, 147-151, 110 Cal. Rptr. 3d 159* ; *Yanchor v. Kagan (1971) 22 Cal. App. 3d 544, 550, 99 Cal. Rptr. 367* (discussing former Code Civ. Proc. § 675(a)).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted by a judgment creditor in opposition to a motion for an order compelling the judgment creditor to give an acknowledgment of satisfaction of judgment or to enter satisfaction without acknowledgment. The ground for opposition is that the judgment has not been satisfied in fact as required by *Code Civ. Proc. § 724.050(d)*. This memorandum may be submitted in opposition to the form set out in *§ 131.120* in appropriate cases.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts showing that although the judgment debtor has demanded execution of an acknowledgment of satisfaction, the judgment entered in the action remains unsatisfied in a specified amount.

[3] Discussion of Authorities

[a] Judgment Must Be Satisfied in Fact

Lucky United Properties Investment, Inc. v. Lee *(2010) 185 Cal. App. 4th 125, 147-151, 110 Cal. Rptr. 3d 159* , involved a malicious prosecution suit. The defendant responded to the suit by filing a special motion to strike under *Code Civ. Proc. § 425.16*, and the court granted the motion. The plaintiff appealed, but ultimately abandoned the appeal. The court of appeal held that the defendant could recover costs and attorney's fees incurred on appeal. Previous costs and fees awards arising from other stages of the case were outstanding. The trial court granted the defendant's motion for costs and attorney's fees in the amount of $33,830. The next day, the plaintiff sent a check to the defendant for $33,830, with a note stating that accepting the check constituted full and complete satisfaction of the award. The defendant contested that the check constituted full and complete satisfaction of the award insofar as the money should first be applied to the interest on the previous outstanding fees awards. The defendant deposited the check.

The plaintiff filed a motion for full satisfaction of the judgment pursuant to *Code Civ. Proc. § 724.050(d)*, identifying the $33,830 costs and fees order as the judgment. The trial court granted the plaintiff's motion for an order compelling the defendant to acknowledge satisfaction of the costs and fees order on the ground there was an accord and satisfaction of the order under *Com. Code § 3311*.

On appeal, the court held that an accord and satisfaction had not occurred. To establish an accord and satisfaction, under *Com. Code § 3311(a)*, a debtor must prove that: (1) the debtor in good faith tendered an instrument to the claimant as

full satisfaction of the claim, (2) the amount of the claim was unliquidated or subject to a bona fide dispute, and (3) the claimant obtained payment of the instrument. Under *Com. Code § 3311(b)*, if the debtor proves that he or she accompanied the tender with a conspicuous statement that the amount was tendered as full satisfaction of the claim, and if the claimant does not prove that he or she tendered repayment of the amount within 90 days, the debt is discharged. The court held that no substantial evidence supported the conclusion that the plaintiff tendered the $33,830 in order to resolve a bona fide dispute over the amount owing under the order. The court held that there was no direct evidence that the parties disputed the amount owed under the order when the plaintiff tendered the check, or even that they discussed the issue until after the plaintiff tendered the money [*185 Cal. App. 4th 125, 149-151]* . Accordingly, the court reversed the *Code Civ. Proc. § 724.050(d)* order.

Yanchor v. Kagan *(1971) 22 Cal. App. 3d 544, 99 Cal. Rptr. 367* , is discussed in *§ 131.120[3][d]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentDischarge, Release & Satisfaction

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13-131 California Points & Authorities § 131.126

§ 131.126 Opposing Motion for Order Compelling Acknowledgment of Satisfaction of Judgment or Entering Satisfaction Without Acknowledgment [Code Civ. Proc. §§ 724.050(d), 724.110(b), 724.230]--Judgment Debtor Not Permitted to Satisfy Judgment by Offsetting Claims Not Beneficially Owned by Him or Her

[1] FORM

[*Caption. See § 131.125[1].*]

THE COURT MAY NOT COMPEL ACKNOWLEDGMENT OF SATISFACTION OF JUDGMENT OR ORDER ENTRY OF SATISFACTION WITHOUT ACKNOWLEDGMENT PURSUANT TO SECTION 724.050(d) OF THE CODE OF CIVIL PROCEDURE UNLESS IT CLEARLY APPEARS THAT THE JUDGMENT HAS BEEN SATISFIED IN FACT. IN SATISFYING THE JUDGMENT, THE JUDGMENT DEBTOR MAY NOT OFFSET AGAINST THE JUDGMENT CLAIMS AGAINST THE JUDGMENT CREDITOR WHICH ARE NOT BENEFICIALLY OWNED BY THE JUDGMENT DEBTOR.

A. Judgment Must Be Satisfied in Fact. [*See § 131.125.*]

B. Judgment Debtor May Not Offset Claims Not Beneficially Owned by Him or Her. In satisfying the judgment against him or her, a judgment debtor may set off only those claims against the judgment creditor which are beneficially owned by the judgment debtor (*Harrison v. Adams (1942) 20 Cal. 2d 646, 649-650, 128 P.2d 9*).

[*Optional*] **C. Assignee for Collection May Not Set Off Assigned Claim in Satisfying Judgment Against Him or Her.** A judgment debtor to whom a claim for collection was assigned is not the beneficial owner of the claim and may not satisfy a judgment against him or her by offsetting the claim (*Harrison v. Adams (1942) 20 Cal. 2d 646, 650, 128 P.2d 9*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted by a judgment creditor in opposition to a motion by the judgment debtor for an order compelling the judgment creditor to give an acknowledgment of satisfaction of judgment or ordering the entry of satisfaction to be made without an acknowledgment, where the judgment debtor alleges that the judgment has been satisfied in fact through offsetting cross demands held by him or her against the judgment creditor. The ground for opposition is that the judgment debtor may not satisfy the judgment by offsetting claims or judgments which he or she does not beneficially own. This memorandum may be submitted in opposition to the memorandum set out in *§ 131.121* in appropriate cases.

Where appropriate, counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Judgment Debtor May Not Offset Claims Not Beneficially Owned by Him or Her

Harrison v. Adams *(1942) 20 Cal. 2d 646, 128 P.2d 9* , is discussed in *§ 131.121[3][e]*.

[b] Assignee for Collection May Not Set Off Assigned Claim in Satisfying Judgment Against Him or Her

Harrison v. Adams *(1942) 20 Cal. 2d 646, 128 P.2d 9* , is discussed in *§ 131.121[3][e]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentDischarge, Release & Satisfaction

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13-131 California Points & Authorities §§ 131.127-131.139

[Reserved]

§§ 131.127[Reserved]

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F. Execution And Enforcement Of Judgments

13-131 California Points & Authorities § 131.140

§ 131.140 Supporting Motion to Recall and Quash Writ of Execution and Vacate Levy--General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*]	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*],	)	IES IN SUPPORT OF MOTION TO RECALL AND
Defendant.	)	QUASH EXECUTION AND VACATE LEVY
	)	Date: _____
	)	Time: _____
		Location: _____

_____

THE JUDGMENT DEBTOR's MOTION TO RECALL AND QUASH THE WRIT OF EXECUTION ISSUED TO ENFORCE THE _____ [ORDER *or* JUDGMENT] SHOULD BE GRANTED BECAUSE _____ [THE ISSUANCE OF THE WRIT WAS IMPROPERLY AND/OR INADVERTENTLY MADE *or* AUTHORITY FOR ISSUANCE OF THE WRIT HAS BEEN REVOKED].

A. Recalling and Quashing Writ of Execution. A writ of execution may be recalled and quashed when the issuance was improperly or inadvertently made, or the authority for the issuance has been revoked (*Creditors Adjustment Co. v. Newman (1921) 185 Cal. 509, 511, 197 P. 334* ; *Meyer v. Meyer (1952) 115 Cal. App. 2d 48, 49, 251 P.2d 335*).

[*Optional*] **B. Vacation of Levy.** As the result of quashing a writ of execution all rights and proceedings based thereon

fall with it (*Moreno v. Mihelis (1962) 207 Cal. App. 2d 449, 451, 24 Cal. Rptr. 582* ; *Wellborn v. Wellborn (1942) 55 Cal. App. 2d 516, 525, 131 P.2d 48*).

[*Optional*] **C. Incidental Relief.** The court, on ordering that a writ of execution be quashed, may at the same time order any appropriate relief incidental thereto (*McMann v. Superior Court (1887) 74 Cal. 106, 108, 15 P. 448*).

[*Add additional points and authorities supporting the specific ground on which the motion is based* (*see §§ 131.141*-131.145)].

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion to recall and quash a writ of execution and vacate the levy on that writ when the writ was improperly or inadvertently issued. The form is a general one that sets out the authority of the court to quash and recall a writ of execution. Additional points and authorities should be added as appropriate in support of specific grounds for granting the motion [*see, e.g., §§ 131.141*-131.145].

Optional Paragraph B may be used when a levy has been placed on property. Optional Paragraph C may be used when other relief is sought incidental to quashing of the writ of execution [*see, e.g., McMann v. Superior Court (1887) 74 Cal. 106, 108, 15 P. 448* (motion seeking to quash the writ also requested an order directing the levying officer to return money seized under the writ)].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, if the moving party contends that a prior order quashing a writ of execution is res judicata against the issuance of the writ on which the current motion is based, counsel should refer to facts indicating that the creditor's rights to enforce the judgment was clearly before the court on its merits in the earlier proceeding and that those rights were concluded [*see Creditors Adjustment Co. v. Newman (1921) 185 Cal. 509, 197 P. 334* , discussed in *§ 131.140[3][a]*].

[b] Related Pleading and Practice Forms

For a form of notice of motion to recall and quash a writ of execution and vacate the levy, see *California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments, § 254.40 et seq.* (Matthew Bender).

[3] Discussion of Authorities

[a] Recalling and Quashing Writ of Execution

In ***Creditors Adjustment Co. v. Newman*** *(1921) 185 Cal. 509, 197 P. 334* , the plaintiff, as assignee of a claim against

defendant, obtained a judgment by default. Five years later (the period for enforcement of judgments under former Code Civ. Proc. § 681 [*now see Code Civ. Proc. § 683.020*, providing for a ten-year period for enforcement]), the judgment remained unsatisfied and the plaintiff brought an action on the original judgment and defendant again defaulted. A renewal of judgment was obtained for the original amount with accrued interest and costs. Nothing was collected on this judgment and after the lapse of over five years from the date of entry of the last judgment, plaintiff obtained an ex parte order for the issuance of an execution pursuant to the provisions of former Code of Civ. Proc. § 685 [*now see Code Civ. Proc. §§ 683.110-683.220*]. Execution was issued and levied on property of the defendant. Shortly thereafter the defendant, on notice and affidavits, obtained an order setting aside the former order, execution, and levy. No appeal was taken by plaintiff from this order. Plaintiff then made a second application for issuance of another execution, which order was granted, execution issued and levied on property of defendant. Defendant again applied for an order vacating the order for execution, recalling the second writ and denying further relief under the judgment. The application was granted, and the plaintiff appealed.

The Supreme Court affirmed. The Court agreed with defendant's contention that the order vacating the first writ of execution became final and res judicata in denial of plaintiff's right to enforce its judgment. The Court stated that the right of the court to recall the execution cannot be doubted if the issuance was improperly or inadvertently made or if authority for the execution is revoked. With regard to the order vacating the first writ, the Court stated that the question of plaintiff's right to an execution was clearly before the trial court on its merits, the court had jurisdiction to act, and the judgment having become final, without appeal or other direct attack, is conclusive, whether the matter was rightly or wrongly decided, as to all matters presented or which should have been presented on the hearing. Hence, the Supreme Court held that the first ruling was conclusive of the issues presented and necessarily involved therein, and the superior court had correctly vacated the second order for a writ of execution (*185 Cal. 509, 514)* .

In ***Meyer v. Meyer*** *(1952) 115 Cal. App. 2d 48, 251 P.2d 335* , the defendant's former wife obtained an execution against defendant directing the sheriff to collect $2,400 in child support arrearages, which the former wife charged defendant had failed to pay under an interlocutory decree of divorce and order for the support of the former couple's two minor children. Defendant moved to recall the execution, to vacate the order for its issuance and to quash the writ on the grounds that the amounts allegedly due on the judgment had been paid and satisfied. The superior court granted the defendant's motion and the former wife appealed.

The court of appeal affirmed the judgment. The court reviewed the affidavits submitted, and noted that the evidence was in conflict. The court stated that when the trial court's decision on such a motion is based on conflicting evidence, the appellate court will not interfere. The affidavits of the defendant declared that he made payments totalling $3,025 to the children, while affidavits of the plaintiff declared that any sums paid by the defendant were outright gifts to the children and not contributions toward their support. The court held that the trial court's action based on the former husband's proof of payment was proper. Citing *Creditors Adjustment Co. v. Newman (1921) 185 Cal. 509, 197 P. 334* , discussed *above*, the court stated that a writ of execution may be recalled and quashed when the issuance was improperly or inadvertently made (*115 Cal. App. 2d 48, 49)* .

[b] Vacation of Levy

In ***Moreno v. Mihelis*** *(1962) 207 Cal. App. 2d 449, 24 Cal. Rptr. 582* , the defendant moved for an order to quash the writ of execution issued in the case. The motion was supported by an affidavit establishing that he had paid the judgment rendered in the action in full as to principal, interest, and court costs; that the sheriff had levied on monies due, owing, and unpaid from a third party; and that the third party would pay the amount to the defendant if the sheriff would release the levy, but the sheriff refused to make any release. The motion was opposed by the plaintiff with the special request that the court makes its order only on condition that the defendant execute a withdrawal of his appeal from the judgment in the cased. The trial court granted the order, but conditioned the order on defendant's withdrawal of the appeal. The defendant appealed.

The court of appeal reversed, stating that the order should have been granted by the trial court without condition. The sole legitimate function of the execution was to secure the payment of the judgment, and when the judgment was fully satisfied, there was no reason to continue any additional levy in effect. As a result of quashing a writ of execution, all rights and proceedings based thereon fall with it. The court stated that the trial court was in error if it thought that the mere fact of the payment of a judgment in full by the appellant would necessitate the dismissal of an appeal as moot. If a defendant is compelled to make payment of a judgment under threat of execution or other coercion he or she does not lose his or her right to appeal (*207 Cal. App. 2d 449, 451-452)* .

Wellborn v. Wellborn *(1942) 55 Cal. App. 2d 516, 131 P.2d 48* , involved an action by a wife to annul a marriage on the ground the defendant husband had another wife living. The plaintiff sought to quiet plaintiff's title to certain real and personal property that she claimed as her separate property. Defendant cross complained, claiming that the property had been paid for with his earnings, and asked that his ownership of the property be decreed. The trial court granted the annulment and rendered judgment concerning the property. Defendant moved for and was granted an order for the issuance of a writ of execution. The execution issued. The sheriff levied on the property and sold it to defendant and later delivered a deed to the property. Plaintiff moved to quash the execution and vacate the levy and sale. The motion was denied without prejudice. Plaintiff again moved to quash the execution and vacate the levy and sale. The second motion was also denied and the plaintiff appealed.

The court of appeal reversed. The court stated that the most important question on the appeal was whether the judgment was one on which execution will issue; or put another way, whether execution will issue on a judgment granting a lien on real property, but when no personal judgment is given, no order for payment of money made, and no provision made in the judgment for enforcement of the lien. The court concluded that if no personal liability is imposed by the judgment declaring the lien, and the judgment makes no express provision for enforcement of the lien, execution will not issue and the judgment creditor can only enforce the lien by an independent action to foreclose. Therefore, since the court had no power to order execution, its action could be attacked any time without regard to limitation. The order for issuance of the writ of execution being void, all the proceedings by the sheriff were likewise void, and plaintiff was entitled to disregard them and to attack them at any time. The court held that as there was no provision for a personal judgment or for enforcement of the lien, execution did not lie, and the motion to quash writ of execution and to vacate the execution levy and sale should have been granted (*55 Cal. App. 2d 516, 524-525)* .

[c] Incidental Relief

In ***McMann v. Superior Court*** *(1887) 74 Cal. 106, 15 P. 448* , the sheriff applied for a writ of review, seeking to have the Supreme Court vacate an order which required the sheriff to refund certain moneys collected on an execution. The judgment debtor claimed the judgment was void for the reason that the judgment on which it was issued ceased to be operative because it had been entered more than the statutory period for execution of judgments.

The Supreme Court denied the writ. The court stated that since the statute commenced to run from the entry made in the docket, there was no authority for issuing the execution, and the trial court therefore did not err in recalling it. The court also held that the power of the court to order the sheriff to refund the money can not be doubted. The sheriff was acting as an officer of the court and under color of its process. Thus acting, he demanded and received moneys illegally. The money was paid to him in his official capacity as an officer of the court as a consequence of the improperly issued process. The court must have the power to control the conduct of its officers when acting under color of its authority of its authority or of its process (*74 Cal. 106, 108)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral Overview

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13-131 California Points & Authorities § 131.141

§ 131.141 Supporting Motion to Recall and Quash Writ of Execution and Vacate Levy--Judgment Satisfied by Payment

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities in support of a motion to recall and quash writ of execution and vacate levy (see § 131.140).*]

THE JUDGMENT DEBTOR's MOTION TO RECALL AND QUASH THE WRIT OF EXECUTION ISSUED TO ENFORCE THE _____ [ORDER *or* JUDGMENT] SHOULD BE GRANTED BECAUSE ALL AMOUNTS ALLEGEDLY DUE ON THE JUDGMENT HAVE BEEN PAID AND SATISFIED.

Writ of Execution Recalled and Quashed on Proof of Payment. A court may grant a motion for recall of execution and for annulment of the order for its issuance solely on proof that the judgment debtor has paid and satisfied the amounts due on the judgment (*Meyer v. Meyer (1952) 115 Cal. App. 2d 48, 49, 251 P.2d 335*).

[*If appropriate, add additional points and authorities supporting other specifics ground for granting the motion (see §§ 131.142*-131.145)].

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted in support of a motion to recall and quash a writ of execution and vacate levy when the judgment debtor has paid the amount due under the judgment. The foregoing form should be combined with general points and authorities supporting a motion to recall and quash a writ of execution [*see § 131.140*], and may be combined, when appropriate, with additional points and authorities supporting other specific grounds for granting the motion [*see §§ 131.142*-131.145].

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the

points of law stated. Thus, counsel should include discussion showing how the facts provided in the supporting declarations demonstrate that the terms of the judgment have been satisfied [*see, e.g., Meyer v. Meyer (1952) 115 Cal. App. 2d 48, 49, 251 P.2d 335]* .

[3] Discussion of Authorities

[a] Writ of Execution Recalled and Quashed on Proof of Payment

The facts and procedural background of ***Meyer v. Meyer*** *(1952) 115 Cal. App. 2d 48, 251 P.2d 335* , are discussed in *§ 131.140[3][a]*. In *Meyer*, the court of appeal held that the trial court's order granting defendant's motion for recall of execution and for annulment of the order for its issuance was proper on proof of payment by the judgment debtor (*115 Cal. App. 2d 48, 49)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of Execution

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13-131 California Points & Authorities § 131.142

§ 131.142 Supporting Motion to Recall and Quash Writ of Execution and Vacate Levy--Judgment Satisfied by Agreement

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities in support of a motion to recall and quash writ of execution and vacate levy (see § 131.140).*]

THE JUDGMENT DEBTOR's MOTION TO RECALL AND QUASH THE WRIT OF EXECUTION ISSUED TO ENFORCE THE _____ [ORDER *or* JUDGMENT] SHOULD BE GRANTED BECAUSE THE JUDGMENT HAS BEEN FULLY SATISFIED BY AGREEMENT BETWEEN THE PARTIES.

Writ of Execution Recalled and Quashed on Proof of Agreement Satisfying Judgment. A court of equity may quash the execution and cancel a judgment on persuasive proof of an agreement that satisfied the judgment (*Colby v. Colby (1954) 127 Cal. App. 2d 602, 605, 274 P.2d 417*).

[*If appropriate, add additional points and authorities supporting other specifics ground for granting the motion (see §§ 131.141,* 131.143- 175)].

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted in support of a motion to recall and quash a writ of execution and vacate levy when the judgment creditor and the judgment debtor have entered into an agreement that satisfies the judgment. The foregoing form should be combined with general points and authorities supporting a motion to recall and quash a writ of execution [*see § 131.140*], and may be combined, when appropriate, with additional points and authorities supporting other specific grounds for granting the motion [*see §§ 131.141,* 131.143- 175].

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the

points of law stated. Thus, counsel should include discussion showing that the parties have entered into an agreement to substitute a different performance from that required under the judgment and that the judgment debtor has fully performed the terms of the agreement.

[3] Discussion of Authorities

[a] Writ of Execution Recalled and Quashed on Proof of Agreement Satisfying Judgment

In ***Colby v. Colby*** *(1954) 127 Cal. App. 2d 602, 274 P.2d 417* , the former husband moved for an order quashing a writ of execution issued after an interlocutory decree of divorce awarding the former wife spousal and child support. The motion was based on the former husband's contention that the parties entered into an agreement, at the former wife's request, that the husband pay a lump sum in exchange for the wife's release of the former husband from any further obligation to make the support payments. The trial court granted the motion and the former wife appealed.

The court of appeal affirmed. After reviewing the evidence submitted on the motion, the court concluded that the former husband presented adequate proof that he had settled the judgment by paying the former wife the sum she demanded for a complete discharge of his obligation. The court stated that even though monthly payments ordered by the interlocutory judgment may have accrued within the period for execution of a judgment, a court of equity may quash the execution and cancel the judgment on persuasive proof of an agreement that satisfied the judgment. The court also noted that, although nonpayment of installments accruing within the period for execution of a judgment may entitle the judgment creditor to the issuance of an execution to enforce his or her judgment, this fact does not alter the court's equitable jurisdiction to grant relief against a judgment which has actually been totally satisfied (*127 Cal. App. 2d 602, 605)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of Execution

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13-131 California Points & Authorities § 131.143

§ 131.143 Supporting Motion to Recall and Quash Writ of Execution and Vacate Levy--Judgment Debtor Entitled to Credit

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities in support of a motion to recall and quash writ of execution and vacate levy (see § 131.140).*]

THE JUDGMENT DEBTOR's MOTION TO RECALL AND QUASH THE WRIT OF EXECUTION ISSUED TO ENFORCE THE _____ [ORDER *or* JUDGMENT] SHOULD BE GRANTED BECAUSE _____ [*specify moving party, e.g.,* THE JUDGMENT DEBTOR] IS ENTITLED TO CREDIT FOR AMOUNTS THAT HE/SHE PAID.

A. Recalling and Quashing of Writ of Execution When Judgment Creditor Entitled to Credit. In order to ascertain the proper amount unpaid under the judgment, it is necessary to resolve whether credit for arrearages may be made (*In re Marriage of Peet (1978) 84 Cal. App. 3d 974, 978-979, 149 Cal. Rptr. 108*).

[*EITHER*]

B. Credit When Arrearages Are Followed by Overpayment. When arrearages are followed by overpayments, the excess amounts are applied against the arrearages (*see In re Marriage of Peet (1978) 84 Cal. App. 3d 974, 979, 149 Cal. Rptr. 108*).

[*OR*]

B. Credit When Arrearages Are Preceded by Overpayment. A credit for earlier overpayments on later arrearages is recognized in this state (*see In re Marriage of Peet (1978) 84 Cal. App. 3d 974, 979, 149 Cal. Rptr. 108*).

[*Optional*] **C. Court Discretion to Credit Judgment Debtor for Child Support Overpayments That Precede Arrearages.** Whether the paying spouse is entitled to credit on arrearages for earlier overpayments of child support made to the receiving spouse when there is no evidence of fraud, agreement by the parties, or communication of the purpose of the overpayments to the receiving spouse is a matter for the sound discretion of the trial court to be determined from the facts and circumstances of each case (*In re Marriage of Peet (1978) 84 Cal. App. 3d 974, 976, 149 Cal. Rptr. 108*).

[*If appropriate, add additional points and authorities supporting other specific grounds for granting the motion* (*see §§ 131.141, 131.142, 131.144, 131.145*)].

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted in support of a motion to recall and quash a writ of execution and vacate levy when the judgment debtor has made overpayments that were not taken into account in the writ of execution. The foregoing form should be combined with general points and authorities supporting a motion to recall and quash a writ of execution [*see § 131.140*], and may be combined, when appropriate, with additional points and authorities supporting other specific grounds for granting the motion [*see §§ 131.141, 131.142, 131.144, 131.145*].

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated. That is, counsel should state facts showing that the judgment debtor made overpayments against the amounts due under the judgment. If the judgment was for the payment of child support, and the overpayments were in advance of arrearages, the judgment debtor should, in addition, refer to facts which serve as equitable factors sufficient to support the court's action in giving credit for overpayments [*see In re Marriage of Peet (1978) 84 Cal. App. 3d 974, 976, 149 Cal. Rptr. 108* , discussed in *§ 131.143[3][a]*].

[3] Discussion of Authorities

[a] Recalling and Quashing of Writ of Execution When Judgment Creditor Entitled to Credit

In ***In re Marriage of Peet*** *(1978) 84 Cal. App. 3d 974, 149 Cal. Rptr. 108* , the wife obtained a writ of execution to enforce payment of unpaid child support on a judgment terminating marriage and ordering support of minor children. The husband moved to quash the writ. The trial court found that the husband was entitled to credit for the amount he claimed he had overpaid and reduced the recoverable arrearages.

The court of appeal affirmed. The court determined that the question pertained to the equitable power of the court to quash a writ of execution in whole or in part. The wife contended that the overpayments should be viewed as gifts. The court determined, however, that the husband had the better part of the argument, and cited the husband's contention that in order to ascertain the proper amount unpaid under the judgment, it is necessary to resolve whether credit for arrearages may be made. In cases involving overpayments before arrearages, when there is a showing of fraud, an agreement between the parties or communication of the purpose of the overpayment to the receiving spouse that the money is an advance on future payments, there is no reason to deny the credit to the paying spouse. However, sometimes, as in this case, there is no fraud, agreement or communication of purpose, and in such cases whether the paying spouse should receive credit for overpayments is a matter for the sound discretion of the trial court to be determined from the facts and circumstances peculiar to each case. The concept of applying a credit for earlier payments to later arrearages is found daily in the trial courts (*84 Cal. App. 3d 974, 979)* .

[b] Credit When Arrearages Are Followed by Overpayment

The facts and procedural background of ***In re Marriage of Peet*** *(1978) 84 Cal. App. 3d 974, 149 Cal. Rptr. 108* , are discussed in *§ 131.140[3][a]*. The court in this case noted that it has long been recognized in this state that when arrearages are followed by overpayments, the excess amounts are applied against arrearages. They are not treated as gifts (*84 Cal. App. 3d 974, 979)* .

[c] Credit When Arrearages Are Preceded by Overpayment

The facts and procedural background of ***In re Marriage of Peet*** *(1978) 84 Cal. App. 3d 974, 149 Cal. Rptr. 108* , are discussed in *§ 131.143[3][a]*. The court in this case noted that the concept of applying a credit for earlier payments to later arrearages is found daily in the trial courts (*84 Cal. App. 3d 974, 979)* .

[d] Court Discretion to Credit Judgment Debtor for Child Support Overpayments That Precede Arrearages

The facts and procedural background of ***In re Marriage of Peet*** *(1978) 84 Cal. App. 3d 974, 149 Cal. Rptr. 108* , are discussed in *§ 131.143[3][a]*. In *Peet*, the court held that whether the paying spouse is entitled to credit on arrearages for earlier overpayments of child support made to the receiving spouse when there is no evidence of fraud, agreement by the parties, or communication of the purpose of the overpayments to the receiving spouse is a matter for the sound discretion of the trial court to be determined from the facts and circumstances of each case [*In re Marriage of Peet (1978) 84 Cal. App. 3d 974, 976, 149 Cal. Rptr. 108]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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13-131 California Points & Authorities § 131.144

§ 131.144 Supporting Motion to Recall and Quash Writ of Execution and Vacate Levy--Judgment Not Enforceable by Execution

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities in support of a motion to recall and quash writ of execution and vacate levy (see § 131.140).*]

JUDGMENT DEBTOR's MOTION TO RECALL AND QUASH THE WRIT OF EXECUTION ISSUED TO ENFORCE THE _____ [ORDER *or* JUDGMENT] SHOULD BE GRANTED BECAUSE THE _____ [JUDGMENT *or* ORDER] IS NOT SUBJECT TO EXECUTION.

A. Recalling and Quashing of Writ of Execution When Judgment Not Subject to Execution. A writ of execution may be recalled and quashed if the judgment is not one on which execution may issue (*Montgomery v. Meyerstein (1924) 195 Cal. 37, 47, 231 P. 730* ; *Wellborn v. Wellborn (1942) 55 Cal. App. 2d 516, 525, 131 P.2d 48*).

[*Optional*] **B. Writ of Execution May Not Issue on Decree of Lien on Specific Property.** When a judgment decrees a lien on specific property, without ordering its sale, the lien may not be enforced by a writ of execution (*Montgomery v. Meyerstein (1924) 195 Cal. 37, 46, 231 P. 730* ; *Wellborn v. Wellborn (1942) 55 Cal. App. 2d 516, 525, 131 P.2d 48*).

[*If appropriate, add additional points and authorities supporting other specific grounds for granting the motion* (*see §§ 131.141*-131.143, *131.144*, 141.145)].

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted in support of a motion to recall and quash a writ of execution and vacate levy when the particular judgment is not subject to enforcement by writ of execution. The

foregoing form should be combined with general points and authorities supporting a motion to recall and quash a writ of execution [*see § 131.140*], and may be combined, when appropriate, with additional points and authorities supporting other specific grounds for granting the motion [*see §§ 131.141*-131.143, 175].

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated. That is, counsel should refer to the judgment and demonstrate that, whatever other relief it may provide, it is not one on which an execution may lie.

[3] Discussion of Authorities

[a] Recalling and Quashing of Writ of Execution When Judgment Not Subject to Execution

In ***Montgomery v. Meyerstein*** *(1924) 195 Cal. 37, 231 P. 730* , the plaintiff entered into a contract to purchase certain real property with the seller. After taking possession of the property under the contract and making certain monthly payments on the purchase price, the plaintiff discovered that the seller made certain false and fraudulent representations to her as to the original cost of the house on the premises, and as a consequence, brought an action for rescission of the contract and for recovery of the moneys she paid. Defendant was a mortgage holder on the property. The cause went to trial and resulted in a judgment in favor of the plaintiff and against the seller, but in favor of the defendant for his costs. The judgment, however, did not declare any lien on the property. Plaintiff thereafter moved the court for a judgment on the findings for a certain amount and for declaration of a lien against the property for the amount. The motion was denied and the plaintiff appealed.

The Supreme Court upheld the judgment in the plaintiff's favor, and reversed and remanded the cause with direction to the trial court to enter judgment in favor of the plaintiff and against the seller and declaring a lien on the properties in question, subject to the defendant's lien. The trial court entered judgment and the plaintiff applied for and was issued a writ of execution directing the sheriff to make levy of the execution for the sums of money due on the judgment and to satisfy the sums out of the specific real property involved in the action. The defendant moved the court to recall and quash the writ of execution and the motion was denied. The defendant appealed.

The Supreme Court reversed. The Court stated that the primary question presented by the record related to the right of the plaintiff in the action to have an execution issued for the enforcement of the judgment which she held against the specific property described therein. The plaintiff had not asked for and she did not receive by the reformed judgment of the trial court any decree directing the foreclosure of the lien or directing or authorizing the issuance of any writ of execution or order of sale having that effect. The Court was unable to find any provision in the Code of Civil Procedure regulating the issuance of writs of execution having for its effect the foreclosure of a lien on specific real property to the absence of any provision in the decree establishing the lien which ordains its foreclosure. The Court also stated that no authorities were cited to the Court which support the view that an execution can issue for the sale of specific property encumbered by a vendee's lien without a direction in the judgment establishing such lien which decrees its foreclosure and sale (*195 Cal. 37, 43)* .

The Court stated that a decree or order for the sale of certain specific property made by a court of equity differs materially from a common law judgment. The Court reviewed the practice under the chancery system and in California prior to adoption of the Code of Civil Procedure and concluded that, absent any provision in the court's decree directing a sale of the premises on which the decree has imposed a lien, an ordinary writ of execution issuable to enforce a common law judgment cannot be used as a substitute for an absent order of sale (*195 Cal. 37, 46)* . For this reason, the Court held that the trial court was in error refusing to recall and quash the writ of execution improperly issued (*195 Cal. 37, 49)* .

The facts and procedural background of *Wellborn v. Wellborn (1942) 55 Cal. App. 2d 516, 131 P.2d 48* , are discussed in *§ 131.140[3][b]*. The court of appeal in *Wellborn* stated that the most important question in that appeal was whether

the judgment was one on which execution will issue. The court, citing *Montgomery v. Meyerstein (1924) 195 Cal. 37, 231 P. 730* , concluded that if no personal liability is imposed by the judgment declaring lien on real property, and the judgment makes no express provision for enforcement of the lien, execution will not issue and the judgment creditor can only enforce the lien by an independent action to foreclose (*55 Cal. App. 2d 516, 524)* .

[b] Writ of Execution May Not Issue on Decree of Lien on Specific Property

The facts and procedural background of *Montgomery v. Meyerstein (1924) 195 Cal. 37, 231 P. 730* , are discussed in *§ 131.144[3][a]*. The court in *Montgomery* held that, in the absence of any provision in the decree of the court directing a sale of the premises on which the decree has imposed a lien, an ordinary writ of execution issuable to enforce a common law judgment cannot be used as a substitute for an absent order of sale (*195 Cal. 37, 46)* .

The facts and procedural background of *Wellborn v. Wellborn (1942) 55 Cal. App. 2d 516, 131 P.2d 48* , are discussed in *§ 131.140[3][b]*, and in *§ 131.144[3][a]*. The court in *Wellborn* cited the facts in *Montgomery v. Meyerstein (1924) 195 Cal. 37, 231 P. 730* , and noted that in the *Montgomery* decision there had been a personal judgment. In the present case, a much stronger situation justified the recall and quashing of a writ of execution, in that there was no personal judgment (*55 Cal. App. 2d 516, 521)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of Execution

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13-131 California Points & Authorities § 131.145

§ 131.145 Supporting Motion to Recall and Quash Writ of Execution and Vacate Levy--Judgment Vacated

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities in support of a motion to recall and quash writ of execution and vacate levy (see § 131.140).*]

THE JUDGMENT DEBTOR's MOTION TO RECALL AND QUASH THE WRIT OF EXECUTION ISSUED TO ENFORCE THE _____ [ORDER *or* JUDGMENT] SHOULD BE GRANTED BECAUSE THE JUDGMENT FROM WHICH THE WRIT HAS ISSUED HAS BEEN VACATED.

Recalling and Quashing of Writ of Execution When Judgment Vacated. After a judgment has been vacated, a trial court may recall and quash a writ of execution issued thereon (*Stegge v. Wilkerson (1961) 189 Cal. App. 2d 1, 5, 10 Cal. Rptr. 867*).

[*If appropriate, add additional points and authorities supporting other specifics ground for granting the motion* (*see §§ 131.141*-131.144)].

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted in support of a motion to recall and quash a writ of execution and vacate levy when the judgment from which the writ was issued has been vacated. The foregoing form should be combined with general points and authorities supporting a motion to recall and quash a writ of execution [*see § 131.140*], and may be combined, when appropriate, with additional points and authorities supporting other specific grounds for granting the motion [*see §§ 131.141*-131.144].

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated. That is, counsel should refer to the order vacating the particular judgment from which the writ of

execution was issued.

[3] Discussion of Authorities

[a] Recalling and Quashing of Writ of Execution When Judgment Vacated

In ***Stegge v. Wilkerson*** *(1961) 189 Cal. App. 2d 1, 10 Cal. Rptr. 867* , defendant was a partner of a partnership against whom the plaintiff brought an action for dissolution and an accounting. Defendant did not answer or demur and a default judgment was entered against him. A levy of execution was made and defendant sought and received an order staying enforcement of the judgment. Defendant thereafter filed motions to set aside the default and to quash and withdraw the writ of execution. The trial court granted the motions and plaintiff appealed.

The court of appeal affirmed. The court held that the trial court did not err in recalling and quashing the writ of execution. It quoted from *Levy v. Drew (1935) 4 Cal. 2d 456, 459, 50 P.2d 435* , in which the Supreme Court stated that it is well settled in California that when a judgment is reversed on appeal the appellant is entitled to restitution of all things taken from him or her under the judgment. After reversal the respondent stands in the position of a trustee of appellant of the property obtained under the judgment and the same rule should apply when a judgment has been vacated by a trial court. A judgment, when vacated, cannot be effective for any purpose (*189 Cal. App. 2d 1, 5)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of Execution

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13-131 California Points & Authorities § 131.146

§ 131.146 Supporting Motion to Stay Enforcement--Stay Necessary to Accomplish Ends of Justice [Code Civ. Proc. § 918]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*],	)	IES IN SUPPORT OF MOTION TO STAY EN-
Defendant.	)	FORCEMENT
	)	Date: _____
	)	Time: _____
		Location: _____

_____

THE JUDGMENT DEBTOR's MOTION TO STAY ENFORCEMENT SHOULD BE GRANTED BECAUSE A STAY IS NECESSARY TO ACCOMPLISH THE ENDS OF JUSTICE.

A. Authority of Trial Court to Issue Stay. The trial court may stay the enforcement of any judgment or order (*Code Civ. Proc. § 918(a)*).

B. Stay Necessary to Accomplish Ends of Justice. The trial court has the power to stay enforcement on its judgment whenever it is necessary to accomplish the ends of justice, and the exercise of its discretion will not be controlled by mandate except in case of palpable abuse (*see Milstein v. Superior Court (1945) 72 Cal. App. 2d 123, 124, 164 P.2d*

26).

C. Period of Stay. When the enforcement of the judgment or order would be stayed on appeal only by the giving of an undertaking, a trial court may, without consent of the adverse party, stay the enforcement thereof under *Section 918 of the Code of Civil Procedure* for period which extends for not more than 10 days beyond the last date on which a notice of appeal could be filed (*Code Civ. Proc. § 918(b)*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of a motion in the trial court to stay temporarily enforcement of a judgment or order.

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated. That is, counsel should refer to facts that support the conclusion that the court should grant the stay of enforcement because the stay is necessary to accomplish the ends of justice.

[b] Grounds for Stay

Code Civ. Proc. § 918 does not enumerate grounds on which the trial court may grant a stay. It has been recognized, however, that the power of the court to stay enforcement derives from its general authority to control its own proceedings [*see Vickich v. Superior Court (1930) 105 Cal. App. 587, 589, 288 P. 127]* . Put another way, the court has power to stay temporarily executions on its judgments whenever it is necessary to accomplish the ends of justice [*see Milstein v. Superior Court (1945) 72 Cal. App. 2d 123, 124, 164 P.2d 26* (noting interests of justice as consideration pertinent to determination of stay, but holding court was without authority to stay enforcement longer than period allowed by statute; discussed in *§ 131.146[3][b]*); *see also Code Civ. Proc. § 1710.50(a)(4)* (grant of stay of enforcement under sister state money judgments statutes when interest of justice requires)]. For example, it may be argued that in certain cases it would promote the interests of justice to grant a defendant a stay of enforcement to allow him or her time to review the proceedings to determine whether there are grounds for a new trial or for other post-judgment motion, or for an appeal [*see Code Civ. Proc. § 1710.50(a)(3)* (grant of stay of enforcement of sister state money judgment when judgment debtor has made motion to vacate)].

If a writ of execution has been issued at the time the application for stay is made, it would appear that the grounds that support a motion to recall and quash execution may also support a motion to stay enforcement. This is because the trial court's authority in either proceeding derives from its inherent control over its processes. If the issuance of the writ was somehow inappropriate, continued enforcement under such circumstances would also be unfair [*see Adams v. Bell (1933) 219 Cal. 503, 505, 27 P.2d 757* ; *§ 131.140 -131.145*]. The court may not, however, order a stay on levies already made under the writ of execution, since such property while in the hands of the levying officer is property of the judgment creditor and not of the judgment debtor [*Del Riccio v. Superior Court (1952) 115 Cal. App. 2d 29, 31, 251*

P.2d 678 ; *see also § 131.152*]. For relief in this latter situation, a judgment debtor would require an order recalling and quashing a writ of execution [*see § 131.140 -131.145*].

[c] Opposing Points and Authorities

The points and authorities set out in *§ 131.152* may be used in an appropriate case to oppose a motion supported by the foregoing memorandum.

[d] Related Pleading and Practice Forms

For a form of notice of motion and order staying enforcement of judgment or order under Code Civ. Proc. § 918, see California Forms of Pleading and Practice, Ch. 254, *Executions and Enforcement of Judgments* (Matthew Bender).

[3] Discussion of Authorities

[a] Authority of Trial Court to Issue Stay

Under *Code Civ. Proc. § 918(a)*, the trial court may stay the enforcement of any judgment or order. The trial court is authorized to stay the enforcement of a judgment or order whether or not an appeal will be taken from the judgment or order and whether or not a notice of appeal has been filed [*Code Civ. Proc. § 918(c)*]. In this respect, *Code Civ. Proc. § 918* supersedes former Code Civ. Proc. § 681a, which included similar provisions but also included limitations that were inconsistent with the later enacted provisions of *Code Civ. Proc. § 918*.

[b] Stay Necessary to Accomplish Ends of Justice

In ***Milstein v. Superior Court*** *(1945) 72 Cal. App. 2d 123, 124, 164 P.2d 26* , a judgment creditor sought a writ of mandate to compel the superior court to vacate an order staying enforcement. The judgment creditor had procured the writ of execution under the then existing renewal of judgments statute by notice of motion [former Code Civ. Proc. § 685; *now see Code Civ. Proc. §§ 683.110-683.220*]. The motion was granted and the execution was issued. Thereafter, the judgment debtor served on the judgment creditor's attorney notice of motion to set aside the order granting enforcement of the judgment and an order staying enforcement. The judgment creditor moved to dissolve the order staying enforcement, and on denial of this motion petitioned for a writ of mandate.

The court of appeal ordered that a peremptory writ of mandate be issued. The court stated that the ex parte order staying the execution constituted an unauthorized attempt to nullify the court's order granting enforcement, which was a valid order, made after notice and hearing. Since no appeal was taken from that order and no stay bond had been filed, the court was powerless to stay the enforcement of the execution issued pursuant thereto for a period longer than that prescribed under the statute governing the stay of enforcement by the trial court [*see* former Code Civ. Proc. § 681a; *now see Code Civ. Proc. § 918*] (*72 Cal. App. 2d 123, 125)* .

For purposes of evaluating the grounds on which a motion to stay enforcement may be brought, however, it should be noted that the judgment debtor argued that the trial court had power to stay temporarily executions on its judgments whenever necessary to accomplish the ends of justice, and that the exercise of its discretion will not be controlled by mandate except in case of palpable abuse. The court of appeal acknowledged the pertinence of these points, but stated that the proper time for the contentions would have been before the trial court granted the order permitting enforcement of the judgment (*72 Cal. App. 2d 123, 124-125)* .

[c] Period of Stay

If the enforcement of the judgment or order would be stayed on appeal only by the giving of an undertaking (which is the case with the perfecting of an appeal of a judgment or order for money under *Code Civ. Proc. § 917.1(a)*), a trial

court does not have power, without the consent of the adverse party, to stay the enforcement thereof under *Code Civ. Proc. § 918* for a period which extends for more than 10 days beyond the last date on which a notice of appeal could be filed [*Code Civ. Proc. § 918(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral Overview

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13-131 California Points & Authorities § 131.147

§ 131.147 Supporting Motion to Stay Enforcement--Counter Action Pending Against Judgment Creditor [Code Civ. Proc. § 918.5]

[1] FORM

[*Caption. See § 131.146[1].*]

THE JUDGMENT DEBTOR's MOTION TO STAY ENFORCEMENT SHOULD BE GRANTED BECAUSE HE/SHE HAS ANOTHER ACTION PENDING ON A DISPUTED CLAIM AGAINST THE JUDGMENT CREDITOR, AND _____ [*set forth applicable grounds under Code Civ. Proc. § 918.5, e.g.,* THERE IS A STRONG LIKELIHOOD THAT THE JUDGMENT DEBTOR WILL PREVAIL AND RECEIVE JUDGMENT FOR AN AMOUNT AT LEAST EQUAL TO THAT WHICH JUDGMENT CREDITOR SEEKS TO ENFORCE AND THAT THE JUDGMENT CREDITOR WILL NOT HAVE THE FINANCIAL ABILITY TO SATISFY THE JUDGMENT].

A. Authority of Trial Court to Stay Enforcement When Action Pending on Disputed Claim. The trial court may, in its discretion, stay the enforcement of a judgment or order if the judgment debtor has another action pending on a disputed claim against the judgment debtor (*Code Civ. Proc. § 918.5(a)*; *Erlich v. Superior Court (1965) 63 Cal. 2d 551, 555, 47 Cal. Rptr. 473, 407 P.2d 649* ; *Airfloor Co. of California, Inc. v. Regents of University of California (1979) 97 Cal. App. 3d 739, 742-743, 158 Cal. Rptr. 856*).

B. Factors for Consideration. In exercising its discretion under *Section 918.5 of the Code of Civil Procedure*, the court must consider all of the following: (1) the likelihood of the judgment debtor prevailing in the other action; (2) the amount of the judgment of the judgment creditor as compared to the amount of the probable recovery of the judgment debtor in the action on the disputed claim; and (3) the financial ability of the judgment creditor to satisfy the judgment if a judgment is rendered against the judgment creditor in the action on the disputed claim (*Code Civ. Proc. § 918.5*; *Erlich v. Superior Court (1965) 63 Cal. 2d 551, 555, 47 Cal. Rptr. 473, 407 P.2d 649* ; *Airfloor Co. of California, Inc. v. Regents of University of California (1979) 97 Cal. App. 3d 739, 741, 158 Cal. Rptr. 856*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of a motion in the trial court to stay enforcement on the ground that the judgment debtor has another action pending on a disputed claim against the judgment debtor, pursuant to *Code Civ. Proc. § 918.5*.

According to the Law Revision Commission Comments, *Code Civ. Proc. § 918.5* codifies a judicially developed rule [*see, e.g., Erlich v. Superior Court (1965) 63 Cal. 2d 551, 555-556, 47 Cal. Rptr. 473, 407 P.2d 649]* , the rationale for which is based on equitable principles that not to stay enforcement of the judgment unfairly deprives the judgment debtor not only of the right to offset but also, with an impecunious creditor, of any right to recover at all.

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated. That is, counsel should refer to facts that weigh in favor of the court granting the stay based on the principles stated in *Code Civ. Proc. § 918.5*.

For a form of memoranda of points and authorities supporting a motion for order compelling acknowledgment of satisfaction of judgment when the judgment has been satisfied through setoff of cross demands, see *§ 131.120* et seq.

See also *§ 131.146[2]*.

[b] Opposing Points and Authorities

The points and authorities set out in *§ 131.152* may be used in an appropriate case to oppose a motion supported by the foregoing memorandum.

[3] Discussion of Authorities

[a] Authority of Trial Court to Stay Enforcement When Action Pending on Disputed Claim

In ***Erlich v. Superior Court*** *(1965) 63 Cal. 2d 551, 47 Cal. Rptr. 473, 407 P.2d 649* , the plaintiff recovered a judgment against the defendant in a trade libel action. Subsequently on appeal, the judgment was reversed on the ground of insufficiency of evidence in support of the damages as awarded, and the cause was remanded for retrial on that sole issue. After the remittitur was filed, however, the defendant obtained a judgment for costs on appeal. The plaintiff twice made motions to forestall enforcement of the cost judgment until final determination on retrial, and offered to post a stay bond in an amount to be set by the court. The trial court denied both motions, and stated that it had no discretion in the circumstances. The plaintiff petitioned the court of appeal for a writ of prohibition to restrain the superior court from issuing its writ of execution on the judgment for costs, to compel the superior court to quash any writ of execution that had been previously issued, to reset the trade libel action for trial at the earliest convenient date, and to vacate certain

orders.

The Supreme Court granted the peremptory writ of mandate directing the trial court to set the trade libel action for retrial, and to consider the plaintiff's right to have collection of cost judgment enjoined pending determination of litigation. The Court compared the situation when a claim against which a setoff is sought is a judgment to the situation in which cross demands exist between persons under circumstances such that, if one had brought an action against the other, a counterclaim could have been set up and the two demands could be deemed compensated so far as they equal each other. According to the Court, the two situations are akin. Further, the Court concluded that there appears to be no reason to treat a judgment for costs on appeal differently from other judgments and that the insolvency of the party against whom the relief is sought affords sufficient ground for invoking the equitable principle (*63 Cal. 2d 551, 555)* . Thus, the trial court had discretion to grant a stay of enforcement of the costs judgment (*63 Cal. 2d 551, 556)* .

In ***Airfloor Co. of California, Inc. v. Regents of University of California*** *(1979) 97 Cal. App. 3d 739, 158 Cal. Rptr. 856* , the judgment debtor moved the trial court to stay enforcement on the ground that another action was pending between the parties and the judgment was concerned with the inequity it may suffer if it were unable to offset the judgment against any judgment it might obtain in the other action. The trial court denied the motion and the judgment debtor appealed.

The court of appeal reversed, and instructed the trial court to grant the motion to stay enforcement. The court cited the rule in *Erlich v. Superior Court (1965) 63 Cal. 2d 551, 555, 47 Cal. Rptr. 473, 407 P.2d 649* , that a court has the power to stay enforcement of a judgment when the judgment debtor has another action pending on a disputed claim against the judgment creditor. The rationale for the rule is based on equitable principles for to hold otherwise unfairly deprives the judgment debtor of not only his or her right of set-off, but with an impecunious creditor, the right to receive any recovery whatsoever (*97 Cal. App. 3d 739, 741)* .

[b] Factors for Consideration

The facts and procedural background of ***Erlich v. Superior Court*** *(1965) 63 Cal. 2d 551, 47 Cal. Rptr. 473, 407 P.2d 649* , are discussed in *§ 131.147[3][a]*. In *Erlich*, the Supreme Court stated that in determining whether to enjoin collection of the judgment pending decision of a validly disputed claim, the court should consider the likelihood that the judgment debtor will recover on his or her claim, the probability and comparative amount of recovery, and the ability of the judgment creditor to respond should a judgment be rendered against him or her in the action on the disputed claim. The fact that the judgment creditor may have an immediate need for the funds due to him or her on the judgment is not a basis for denial of relief when the foregoing considerations otherwise compel relief. In the case before it, the Court determined that the judgment debtor failed to establish the amount that he would likely recover and, accordingly, the Court could not say that as a matter of law the judgment debtor was entitled to have collection of the judgment enjoined. The Court held, however, that the judgment debtor was entitled to a writ of mandate compelling the trial court to determine the matter (*63 Cal. 2d 551, 556)* .

The facts and procedural background of ***Airfloor Co. of California, Inc. v. Regents of University of California*** *(1979) 97 Cal. App. 3d 739, 158 Cal. Rptr. 856* , are discussed in *§ 131.147[3][a]*. In *Airfloor*, the court cited the factors set forth in *Erlich v. Superior Court (1965) 63 Cal. 2d 551, 555, 47 Cal. Rptr. 473, 407 P.2d 649* (discussed in *§ 131.147[3][a]*). The court stated that on a hearing on a motion to stay enforcement, a court cannot decide the other pending action on its merits. The best that can be done is a reasonable effort to evaluate the respective arguments of the parties in light of the evidence presented at the hearing. On the limited uncontroverted evidence presented to the court, the court of appeal concluded that the judgment debtor's action had substantial merit. It noted that denial of the motion to stay enforcement would result in an outright loss to the judgment debtor of $100,000, but granting of the motion would have no present economic impact on the judgment creditor (*97 Cal. App. 3d 739, 743)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral Overview

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13-131 California Points & Authorities § 131.148

§ 131.148 Supporting Motion to Stay Enforcement--Judgment Debtor Is in Military Service [50 U.S.C. Appen. § 524; Mil. & Vet. Code § 403(c)(2)]

[1] FORM

[*Caption. See § 131.146[1].*]

THE JUDGMENT DEBTOR's MOTION TO STAY ENFORCEMENT SHOULD BE GRANTED BECAUSE HE/SHE IS IN MILITARY SERVICE AND HIS/HER ABILITY TO COMPLY WITH THE JUDGMENT/ORDER IS MATERIALLY AFFECTED BY REASON OF THE MILITARY SERVICE.

Stay of Enforcement. In any action or proceeding commenced in any court against a person in military service, before or during the period of such service, or within 90 days thereafter, the court may on its own motion, or on application by the servicemember, the court must stay the execution of any judgment or order, unless in the opinion of the court, the ability of the defendant to comply with the judgment or order entered or sought is not materially affected by reason of the person's military service (50 U.S.C. Appen. § 524; *Mil. & Vet. Code § 403(c)(2)*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion to stay enforcement of a judgment or order in an action or proceeding commenced against a person in the military service with respect to the obligations, transactions, and proceedings that are within the scope of the Servicemembers Civil Relief Act (50 U.S.C. Appen. § 501 et seq.). Alternatively, these points and authorities may be submitted in support of a motion to stay execution of a judgment or order entered against a military service member before or during a protected period of military service as provided by state law [*Mil. & Vet. Code § 403(c)(2)*].

The form may be modified for use in applying for an order vacating or staying an attachment or garnishment of property, money, or debts in the hands of another, whether before or after judgment [*see* 50 U.S.C. Appen. § 524(a)(2); *Mil. & Vet. Code § 403(c)(1)*].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. That is, counsel should refer to facts that support the conclusion that the court should grant the stay of enforcement because the defendant's ability to comply with the judgment or order entered or sought is materially affected by reason of his or her military service.

[b] Servicemembers Civil Relief Act

[i] In General

The Servicemembers Civil Relief Act (50 U.S.C. Appen. § 501 et seq.) generally provides for the suspension of enforcement of civil liabilities, in certain cases, of persons in the military service of the United States. Congress has stated that the relief is to provide for, strengthen, and expedite the national defense through protection extended by this Act to servicemembers of the United States to enable them to devote their entire energy to the defense needs of the nation, and to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service [50 U.S.C. Appen. § 502].

The term "servicemember" means a member of the uniformed services, as "uniformed services" is defined in *10 U.S.C. § 101(a)(5)* [*50 U.S.C. App. § 511(1)*] *10 U.S.C. § 101(a)(5)* defines "uniformed services" as including the armed forces, the commissioned corps of the National Oceanic and Atmospheric Administration, and the commissioned corps of the Public Health Service. The term "court" means a court or an administrative agency of the United States or of any state, including a political subdivision of a state, whether or not a court or administrative agency of record [50 U.S.C. Appen. § 511(5)]. The term "judgment" means any judgment, decree, order, or ruling, whether final or temporary [50 U.S.C. Appen. § 511(9)].

Protection under the act extends to certain transactions involving property [*see* 50 U.S.C. Appen. § 531 et seq.], insurance [*see* 50 U.S.C. Appen. § 541 et seq.], and taxes and public lands [*see* 50 U.S.C. Appen. § 561 et seq.].

[ii] Duration of Stay

Any stay of any action, proceeding, attachment, or execution, ordered by any court under the provisions of the act may be ordered for the period of military service and 90 days thereafter or any part of that period. The court may set the terms and amounts for the installment payments as the court considers reasonable [50 U.S.C. Appen. § 525(a)]. When the person in military service is a codefendant with others, the plaintiff may nevertheless by leave of court proceed against the others [50 U.S.C. Appen. § 525(b)]. These provisions do not apply to a stay or proceedings when the servicemember has notice [*see* 50 U.S.C. Appen. § 522] or to an application by a servicemember for anticipatory relief [*50 U.S.C. § 525(c)*; for anticipatory relief, *see* 50 U.S.C. Appen. § 591].

[c] State Law Protections

Effective June 21, 2002, Stats. 2002, ch. 60 provides for the suspension of enforcement of civil liabilities in certain cases of persons in military service in order to provide for, strengthen, and expedite the national or state defense under the emergent conditions threatening the peace and security of the United States and California, and to enable the United States and California to fulfill the requirements of the national or state defense more successfully by enabling persons in military service to devote their entire energy to the defense needs of the nation and the state [Stats. 2002, ch. 60 § 1].

A "service member" is defined for these purposes as either of the following [*Mil. & Vet. Code § 400(a)*]:

- Officers and enlisted members of the National Guard called or ordered into active state service by the Governor pursuant to *Mil. & Vet. Code §§ 143* or *146* or into active federal service by the President pursuant to Title 10 or 32 of the United States Code.

- Reservists of the United States Military Reserve who have been called to full-time active duty.

"Military service" means full-time active state or federal service as defined in *Mil. & Vet. Code § 400(a)(1)* or full-time active of a reservist as defined in *Mil. & Vet. Code § 400(a)(2)*, for a period in excess of seven days in any 14-day period. Days of service for a service member called to active service or duty since September 11, 2001, to engage in homeland defense against terrorism are credited toward the seven-day period [*Mil. & Vet. Code § 400(b)*].

A certificate signed by an appropriately authorized officer of the military department, branch, or unit in which a service member is serving is prima facie evidence as to any of the following facts as stated in the certificate [*Mil. & Vet. Code § 409.8(a)*]:

- That a person named has not been, or is, or has been in the military service.

- The time when and the place where the person entered military service.

- The person's residence at that time, and the rank, branch, and unit of the service the person entered.

- The dates within which the person was in the military service.

- The monthly pay received by the person at the date of issuing the certificate.

- The time when and the place where the person died in or was discharged from the service.

The authorized officer must furnish the certificate on application. Any certificate purporting to be signed by an officer purporting on the face of the certificate to have been authorized to sign it, is prima facie evidence of its contents and of the authority of the signer to issue it [*Mil. & Vet. Code § 409.8(b)*].

[i] Duration of Stay

Duration of the stay under stay law is identical to that under the federal Servicemembers Civil Relief Act, i.e., a stay of execution may be ordered for the period of military service and three months thereafter, or any part of that period, and subject to those terms as may be just, including terms with respect to payment in installments of those amounts at those times the court may fix. When the person in military service is a codefendant with others, the plaintiff may nevertheless, by leave of court, proceed against the others [*Mil. & Vet. Code § 403(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral Overview

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13-131 California Points & Authorities § 131.149

§ 131.149 Supporting Motion to Stay Enforcement--Enforcement of Foreign Money Judgment Pending Appeal [former Code Civ. Proc. § 1713.6]

[1] FORM

CAUTION: This form is based on the Uniform Foreign Money-Judgments Recognition Act [former Code Civ. Proc. § 1713 et seq.]. Although that Act was repealed in 2007 [Stats. 2007 Ch. 212 § 1], it continues to apply to all actions commenced before January 1, 2008, in which the issue of recognition of a foreign-country judgment is raised [*Code Civ. Proc. § 1724*; *see § 131.149[2][a]*].

[*Caption. See § 131.146[1].*]

THE JUDGMENT DEBTOR's MOTION TO STAY ENFORCEMENT OF THE JUDGMENT RENDERED IN _____ [*specify source of foreign judgment*] SHOULD BE GRANTED BECAUSE _____ [AN APPEAL IS PENDING *or* THE JUDGMENT DEBTOR IS ENTITLED AND INTENDS TO APPEAL] FROM THE JUDGMENT.

A. Stay When Defendant Has or Intends to Appeal Foreign Money Judgment. If the defendant satisfies the court either that an appeal is pending or that he or she is entitled and intends to appeal from the foreign judgment, the court may stay the proceedings until the appeal has been determined or until the expiration of a period of time sufficient to enable the defendant to prosecute the appeal (former Code Civ. Proc. § 1713.6, applicable to actions commenced prior to January 1, 2008 (*Code Civ. Proc. § 1724*)).

[*Optional*] **B. Refusal of Stay Is Abuse of Discretion When Adequate Security Provided.** When the judgment debtor will provide adequate security for the payment of the judgment, and no prejudice to the creditors appears, it is an abuse of discretion for the superior court to refuse a stay request under *Section 1713.6 of the Code of Civil Procedure* (*Stevens v. Superior Court (1972) 28 Cal. App. 3d 1, 4, 104 Cal. Rptr. 369*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion by a judgment debtor under a foreign money judgment to stay proceedings under the Uniform Foreign Money-Judgments Recognition Act (former Code Civ. Proc. § 1713 et seq.).

CAUTION: This form is based on the Uniform Foreign Money-Judgments Recognition Act (former Code Civ. Proc. § 1713 et seq.). Although that Act was repealed in 2007 [Stats. 2007 Ch. 212 § 1], it continues to apply to all actions commenced before January 1, 2008, in which the issue of recognition of a foreign-country judgment is raised [*Code Civ. Proc. § 1724*].

The successor statute, the Uniform Foreign-Country Money Judgments Recognition Act [*Code Civ. Proc. § 1713 et seq.*] applies to all actions commenced on or after January 1, 2008, in which the issue of recognition of a foreign-country judgment is raised [*Code Civ. Proc. § 1724(a)*].

For a form for a supporting motion to stay enforcement of a foreign-country judgment pending appeal under Uniform Foreign-Country Money Judgments Recognition Act, *Code Civ. Proc. § 1720*, applicable to all actions commenced on or after January 1, 2008, see *§ 131.151B.*

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated. If the judgment debtor contends, for example, that an appeal is pending, counsel should refer to facts evidencing that the appeal has been filed and is pending before the reviewing court of the foreign state.

[b] Related Pleading and Practice Forms

For discussion of the Uniform Foreign-Country Money Judgments Recognition Act and its predecessor statute, Uniform Foreign Money-Judgments Recognition Act generally, see California Forms of Pleading and Practice, Ch. 318, *Judgments* (Matthew Bender).

[3] Discussion of Authorities

[a] Refusal of Stay Is Abuse of Discretion When Adequate Security Provided

In ***Stevens v. Superior Court*** *(1972) 28 Cal. App. 3d 1, 104 Cal. Rptr. 369* , the defendant moved in superior court for stay of enforcement of a money judgment pending a decision by the Supreme Court of Oklahoma. The motion was brought under former Code Civ. Proc. § 1713.6 [*now see Code. Civ. Proc. § 1720* (applicable to actions commenced on or after January 1, 2008)] prior to the adoption of the Sister State Money-Judgments Act (*Code Civ. Proc. § 1710.10 et seq.*) [*now see Code Civ. Proc. § 1710.50* (stays of enforcement proceedings on sister state judgments); *see also § 131.92*]. The trial court denied the motion and the defendant petitioned the court of appeal for a writ of mandate.

The court of appeal issued the writ of mandate, commanding the superior court to set aside its order denying the defendant's motion to stay execution. The court stated that *Code Civ. Proc. § 1713.6* must be construed as authorizing a

postjudgment stay of execution. The court stated that the policy of California, as reflected in *Code Civ. Proc. § 917.1* (stay of enforcement of money judgment pending appeal), is to permit a judgment debtor to stay enforcement of the judgment pending appellate review if he or she provides an undertaking to secure payment in the event of affirmance. This policy, by analogy, should govern postjudgment stays requested under *Code Civ. Proc. § 1713.6*. Thus, the court held that when the judgment debtor will provide adequate security for the payment of the judgment, and no prejudice to the creditors appears, it is an abuse of discretion for the superior court to refuse a stay (*28 Cal. App. 3d 1, 4)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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13-131 California Points & Authorities § 131.150

§ 131.150 Supporting Motion by Judgment Debtor to Dismiss Action for Recognition of Foreign Money Judgment--Judgment Is Not Final and Conclusive [former Code Civ. Proc. § 1713.2]

[1] FORM

CAUTION: This form is based on the Uniform Foreign Money-Judgments Recognition Act [former Code Civ. Proc. § 1713 et seq.]. Although that Act was repealed in 2007 [Stats. 2007 Ch. 212 § 1], it continues to apply to all actions commenced before January 1, 2008, in which the issue of recognition of a foreign-country judgment is raised [*Code Civ. Proc. § 1724*; *see § 131.150[2][a]*].

[*Caption. See § 131.146[1].*]

THE JUDGMENT DEBTOR'S MOTION TO DISMISS THE ACTION FOR RECOGNITION OF THE JUDGMENT RENDERED IN _____ [*specify source of foreign judgment*] SHOULD BE GRANTED BECAUSE THE JUDGMENT IS NOT FINAL AND CONCLUSIVE.

Foreign Judgment Must Be Final and Conclusive and Enforceable in Foreign Country to Support Claim for Recognition of Judgment in California. Under California law, recognition is afforded to any foreign judgment that is final and conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal (former Code of Civil Procedure Section 1713.2, applicable to actions commenced prior to January 1, 2008 (*Code of Civil Procedure § 1724*)). A judgment that is not final and conclusive where rendered is not entitled to recognition in California (*Manco Contracting Company v. Bezdikian (2008) 45 Cal. 4th 192, 198-204, 85 Cal. Rptr. 3d 233, 195 P.3d 604*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion by a judgment debtor under a foreign money judgment to dismiss proceedings under the Uniform Foreign Money-Judgments Recognition Act (*Code Civ. Proc. § 1713 et seq.*) because the judgment the judgment creditor seeks to have recognized and enforced is not final and/or conclusive in the country in which it was rendered.

> **CAUTION:** This form is based on the Uniform Foreign Money-Judgments Recognition Act (former Code Civ. Proc. § 1713 et seq.). Although that Act was repealed in 2007 [Stats. 2007 Ch. 212 § 1], it continues to apply to all actions commenced before January 1, 2008, in which the issue of recognition of a foreign-country judgment is raised [*Code Civ. Proc. § 1724*].
>
> The successor statute, the Uniform Foreign-Country Money Judgments Recognition Act [*Code Civ. Proc. § 1713 et seq.*] applies to all actions commenced on or after January 1, 2008, in which the issue of recognition of a foreign-country judgment is raised [*Code Civ. Proc. § 1724(a)*].
>
> For a form for a supporting motion by a judgment debtor to dismiss an action for recognition of a foreign-country judgment on the ground that the judgment is not final and conclusive under the Uniform Foreign-Country Money Judgments Recognition Act, *Code Civ. Proc. § 1715(a)*, applicable to all actions commenced on or after January 1, 2008, see *§ 131.151C*. For additional forms of memoranda supporting motions to dismiss under the Uniform Foreign-Country Money Judgments Recognition Act [*Code Civ. Proc. § 1713 et seq.*], see *§§ 131.151D, 131.151E*.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. If the judgment debtor contends that the foreign judgment is not final and/or conclusive in the country in which it was rendered, counsel should refer to facts and law evidencing that fact.

[b] Related Pleading and Practice Forms

For discussion of the Uniform Foreign-Country Money Judgments Recognition Act and its predecessor statute, former Uniform Foreign Money-Judgments Recognition Act generally, see California Forms of Pleading and Practice, Ch. 318, *Judgments* (Matthew Bender).

[3] Discussion of Authorities

[a] Foreign Judgment Must Be Final, Conclusive, and Enforceable in Foreign Country to Support Claim for Recognition of Judgment in California

In California, recognition is afforded to any foreign judgment that is final and conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal [former Code Civ. Proc. § 1713.2, applicable to all actions commenced before January 1, 2008; *now see Code Civ. Proc. § 1715(a)(2)*, applicable applies to all actions commenced on or after January 1, 2008 which provides that a judgment must be "final, conclusive, and enforceable" under the law of the foreign country where rendered].

In ***Manco Contracting Company v. Bezdikian*** *(2008) 45 Cal. 4th 192, 198-204, 85 Cal. Rptr. 3d 233, 195 P.3d 604* , the plaintiff obtained a multimillion-dollar judgment in 1997 against the defendant in the Grand Civil Court of Doha, in

the nation of Qatar. The defendant appealed from the judgment, then moved to California. In 2000, a Qatari appellate court issued a new judgment reducing the award and granting the plaintiff reasonable court expenses and attorney's fees. In 2004, the plaintiff filed a complaint in Los Angeles County Superior Court seeking to enforce its Qatari judgment. The defendant sought summary judgment, arguing that the cause of action accrued in 1997 and was therefore barred by a four-year statute of limitations. Arguing that its cause of action did not accrue until 2000, when the Qatari appellate court issued its amended judgment, the plaintiff submitted an expert declaration stating that, under Qatari law, a judgment is not final before conclusion of an appeal unless the parties previously agreed to treat the judgment as final, the judgment is nonappealable, or the time for appeal has expired. The trial court interpreted former Code Civ. Proc § 1713.2 to provide that California recognizes a foreign judgment that has been appealed, or is subject to appeal, regardless of whether the foreign country recognizes it as final. Accordingly, the court held that the plaintiff's cause of action for recognition accrued in 1997, when the Qatari trial court entered judgment against the defendant. The court of appeal reversed, holding that under former Code Civ. Proc. § 1713.2 a foreign judgment was not subject to recognition unless and until it was final, conclusive, and enforceable under the law where the judgment was rendered (*45 Cal. 4th 192, 198)* .

The California Supreme Court agreed with the court of appeal. It held that California courts must recognize a foreign judgment, regardless of whether it has been appealed or is subject to appeal, as long as the judgment is final, conclusive, and enforceable in the country where it was rendered. The Court held that the language in the second clause of former Code Civ. Proc. § 1713.2 requiring recognition "even though an appeal therefrom is pending or [the judgment] is subject to appeal" was not an exception to the requirements of finality, conclusiveness, and enforceability in the nation of origin, but was meant to amplify the directive that finality, conclusiveness, and enforceability are to be assessed based on the law of the foreign jurisdiction where judgment was rendered (*45 Cal. 4th 192, 201)* . The Court further noted that the newly enacted UFCMJRA, applicable to actions commenced after January 1, 2008, eliminated the second clause of former Code Civ. Proc. § 1713.2 (*see Code Civ. Proc. § 1715(a)*) (*45 Cal. 4th 192, 204)* .

[4] Additional Authorities

[a] Foreign Judgment Must Be Final, Conclusive, and Enforceable in Foreign Country to Support Claim for Recognition of Judgment in California

In *Societe Civile Succession Richard Guino v. Redstar Corp. (2007) 153 Cal. App. 4th 697, 63 Cal. Rptr. 3d 224* , plaintiffs brought an action in California to enforce a French judgment against defendants. The trial court enforced a portion of the French judgment, but denied enforcement of a portion of the judgment to be paid "as a reserve" as being a provisional remedy not enforceable under California's former Uniform Foreign Money-Judgments Recognition Act (former Code Civ. Proc. § 1713 et seq.) (*153 Cal. App. 4th 697, 699)* . The Court of Appeal held that under former Code Civ. Proc. § 1713.2 [*now see Code Civ. Proc. § 1715(a)(2)*, applicable to actions commenced on or after January 1, 2008 (*Code Civ. Proc. § 1724*)], the court in the French judgment awarded a sum of money that was a final judgment, and that judgment was immediately enforceable (*153 Cal. App. 4th 697, 702-706)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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13-131 California Points & Authorities § 131.151

§ 131.151 Supporting Motion by Judgment Debtor to Dismiss Action for Enforcement of Foreign Money Judgment--No Personal Jurisdiction [former Code Civ. Proc. § 1713.3]

[1] FORM

CAUTION: This form is based on the Uniform Foreign Money-Judgments Recognition Act [former Code Civ. Proc. § 1713 et seq.]. Although that Act was repealed in 2007 [Stats. 2007 Ch. 212 § 1], it continues to apply to all actions commenced before January 1, 2008, in which the issue of recognition of a foreign-country judgment is raised [*Code Civ. Proc. § 1724*; *see § 131.151[2][a]*].

[*Caption. See § 131.146[1].*]

THE JUDGMENT DEBTOR'S MOTION TO DISMISS THE ACTION FOR ENFORCEMENT OF THE JUDGMENT RENDERED IN _____ [*specify source of foreign judgment*] SHOULD BE GRANTED BECAUSE THE COURT DOES NOT HAVE PERSONAL JURISDICTION OVER THE JUDGMENT DEBTOR.

Court Must Have Personal Jurisdiction Over Judgment Debtor to Enforce Foreign Money Judgment Under Foreign Money-Judgments Act. Foreign money judgments are enforced in California by bringing an action in California to obtain a domestic judgment (*see* former Code Civ. Proc. § 1713.3, applicable to actions commenced prior to January 1, 2008 (*Code Civ. Proc. § 1724*)). The party seeking enforcement must comply with the procedures applicable to civil actions, including service of a summons to establish personal jurisdiction. A judgment obtained without proper service of the summons and complaint is void for lack of personal jurisdiction (*Renoir v. Redstar Corp. (2004) 123 Cal. App. 4th 1145, 1149-1154, 20 Cal. Rptr. 3d 603*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion by a judgment debtor under a foreign money judgment to dismiss proceedings to enforce a foreign judgment under the Uniform Foreign Money-Judgments Recognition Act (former Code Civ. Proc. § 1713 et seq.) because the trial court does not have personal jurisdiction over the judgment debtor.

> **CAUTION:** This form is based on the Uniform Foreign Money-Judgments Recognition Act (former Code Civ. Proc. § 1713 et seq.). Although that Act was repealed in 2007 [Stats. 2007 Ch. 212 § 1], it continues to apply to all actions commenced before January 1, 2008, in which the issue of recognition of a foreign-country judgment is raised [*Code Civ. Proc. § 1724*].
>
> The successor statute, the Uniform Foreign-Country Money Judgments Recognition Act [*Code Civ. Proc. § 1713 et seq.*] applies to all actions commenced on or after January 1, 2008, in which the issue of recognition of a foreign-country judgment is raised [*Code Civ. Proc. § 1724(a)*].
>
> For a form for a supporting motion by a judgment debtor to dismiss an action for recognition of a foreign-country judgment for lack of personal jurisdiction under the Uniform Foreign-Country Money Judgments Recognition Act, *Code Civ. Proc. § 1719*, applicable to all actions commenced on or after January 1, 2008, see *§ 131.151D*. For additional forms of memoranda supporting motions to dismiss under the Uniform Foreign-Country Money Judgments Recognition Act [*Code Civ. Proc. § 1713 et seq.*), see *§§ 131.151C, 131.151E*.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Counsel should refer to facts and law evidencing the fact that the trial court lacks jurisdiction over the judgment debtor.

[b] Related Pleading and Practice Forms

For discussion of the Uniform Foreign-Country Money Judgments Recognition Act [*Code Civ. Proc. § 1713 et seq.*, applicable to actions commenced on or after January 1, 2008, in which the issue of recognition of a foreign-country judgment is raised (*Code Civ. Proc. § 1724*)], generally, see California Forms of Pleading and Practice, Ch. 318, *Judgments* (Matthew Bender).

[3] Discussion of Authorities

[a] Court Must Have Personal Jurisdiction Over Judgment Debtor to Enforce Foreign Judgment Under Foreign Money-Judgments Act

Under the former Foreign Money-Judgments Recognition Act, enforcement of a foreign judgment is different than recognition [*see* former Code Civ. Proc. § 1713.3 (applicable to actions commenced prior to January 1, 2008); *now see Code. Civ. Proc. §§ 1716-1718* (applicable to actions commenced on or after January 1, 2008); for a form for dismissal of an action for recognition, *see § 131.150*].

In ***Renoir v. Redstar Corp.*** *(2004) 123 Cal. App. 4th 1145, 20 Cal. Rptr. 3d 603* , plaintiffs obtained a French judgment for both monetary and nonmonetary relief. Plaintiffs then filed a petition to enter a California judgment on the

French judgment and a notice of motion and motion in support of the petition, and filed accompanying declarations. Plaintiffs filed a proof of service specifying documents that were served on defendants in foreign countries. None of those documents included a summons. Plaintiffs then filed and served via mail a "Reply Memorandum of Points and Authorities" stating that as no opposition had been filed by the defendants, the petition should be deemed admitted. Defendants did not appear at the hearing. The trial court signed and entered a California judgment in favor of plaintiffs, awarding plaintiffs the same monetary and nonmonetary relief provided for in the French judgment. More than three years later, defendants appeared specially to file a motion to set aside the California judgment, contending that the judgment was void on the ground that the court did not have personal jurisdiction over them because of the failure of plaintiffs to serve a summons, other defects in service, and defendants' lack of minimum contacts with California. The trial court denied the motion to set aside the California judgment, finding that defendants participated in the French action and the foreign judgment was rendered in accordance with American principals of jurisdictional due process (*see* former Code Civ. Proc. § 1713.5). The court also found that defendants had notice of the California action (*123 Cal. App. 4th 1145, 1148-1149)* .

The Court of Appeal reversed. The Court held that a foreign judgment may not be enforced pursuant to the provisions of the Sister-State and Foreign Money-Judgments Act (*123 Cal. App. 4th 1145, 1151* ; *see* former Code Civ. Proc. § 1710.10 et seq.). Foreign money judgments are enforced by bringing an action in California to obtain a domestic judgment (*123 Cal. App. 4th 1145, 1151)* . To enforce a foreign judgment recognized under the Foreign Money-Judgments Act, the party seeking enforcement must comply with the procedures applicable to civil actions, including service of a summons to establish personal jurisdiction (*123 Cal. App. 4th 1145, 1152)* . The enforcement proceeding under the Act was not a special proceeding in which process was something other than a summons, and plaintiffs' label of "Petition" on their pleading was of no significance. Further, defendants' knowledge of the action did not satisfy the requirement of adequate service of a summons and complaint. By not serving a summons, plaintiffs failed to take the required steps to obtain personal jurisdiction over defendants to enforce the French judgment in California. Defendants' brief references to issues related to whether the trial court correctly enforced the French judgment did not constitute a general appearance by defendants (*123 Cal. App. 4th 1145, 1152-1153)* . The Court also parenthetically noted that nonmonetary portions of the foreign judgment were not covered by the former Foreign Money-Judgments Act. The Act provides for enforcement of any judgment of a foreign state granting or denying recovery of a sum of money (*123 Cal. App. 4th 1145, 1152* ; *see* former Code Civ. Proc. § 1713.1(2)).

Legal Topics:

For related research and practice materials, see the following legal topics:
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13-131 California Points & Authorities § 131.151A

§ 131.151A Supporting Motion by Judgment Debtor to Dismiss Action for Recognition of Foreign Money Judgment--Action Filed After Statute of Limitations Has Run [former Code Civ. Proc. § 1713.3]

[1] FORM

CAUTION: This form is based on the Uniform Foreign Money-Judgments Recognition Act [former Code Civ. Proc. § 1713 et seq.]. Although that Act was repealed in 2007 [Stats. 2007 Ch. 212 § 1], it continues to apply to all actions commenced before January 1, 2008, in which the issue of recognition of a foreign-country judgment is raised [*Code Civ. Proc. § 1724*; *see § 131.151A[2][a]*].

[*Caption. See § 131.146[1].*]

THE JUDGMENT DEBTOR'S MOTION TO DISMISS THE ACTION FOR RECOGNITION [AND ENFORCEMENT] OF THE JUDGMENT RENDERED IN _____ [*specify source of foreign judgment*] SHOULD BE GRANTED BECAUSE THE ACTION WAS FILED AFTER THE STATUTE OF LIMITATIONS HAD RUN.

Action to Enforce a Foreign Money Judgment in California Must Be Filed Within the Time Provided by Statute. An action seeking recognition and enforcement of a foreign money judgment under the Uniform Foreign Money-Judgments Recognition Act (former Code Civ. Proc. § 1713 et seq., applicable to actions commenced prior to January 1, 2008 (*Code Civ. Proc. § 1724*) is subject to the 10-year statute of limitations applicable to actions on sister state judgments provided in *Code Civ. Proc. § 337.5(3)* (*Manco Contracting Company v. Bezdikian (2008) 45 Cal. 4th 192, 204-210, 85 Cal. Rptr. 3d 233, 195 P.3d 604*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion by a judgment debtor under a foreign money judgment to dismiss proceedings to enforce a judgment under the Uniform Foreign Money-Judgments Recognition Act [former

Code Civ. Proc. § 1713 et seq.] because the statute of limitations has run. The Uniform Foreign Money-Judgments Recognition Act (former Code Civ. Proc. § 1713 et seq.) continues to apply to all actions commenced before January 1, 2008, in which the issue of recognition of a foreign-country judgment is raised (*Code Civ. Proc. § 1724*).

For a form for a supporting motion by a judgment debtor to dismiss an action for recognition of foreign-country judgment filed after the statute of limitations has run under the Uniform Foreign-Country Money Judgments Recognition Act, *Code Civ. Proc. § 1719*, applicable to all actions commenced on or after January 1, 2008, see *§ 131.151E*. For additional forms of memoranda supporting motions to dismiss under the Uniform Foreign-Country Money Judgments Recognition Act [*Code Civ. Proc. § 1713 et seq.*], see *§§ 131.151C, 131.151D*.

> **CAUTION:** This form is based on the Uniform Foreign Money-Judgments Recognition Act (former Code Civ. Proc. § 1713 et seq.). Although that Act was repealed in 2007 [Stats. 2007 Ch. 212 § 1], it continues to apply to all actions commenced before January 1, 2008, in which the issue of recognition of a foreign-country judgment is raised [*Code Civ. Proc. § 1724*].
>
> The successor statute, the Uniform Foreign-Country Money Judgments Recognition Act [*Code Civ. Proc. § 1713 et seq.*] applies to all actions commenced on or after January 1, 2008, in which the issue of recognition of a foreign-country judgment is raised [*Code Civ. Proc. § 1724(a)*]. Note that an action under the post-2007 Uniform Foreign-Country Money Judgments Recognition Act to recognize a foreign-country judgment must be commenced within the earlier of the time during which the foreign-country judgment is effective in the foreign country or 10 years from the date that the foreign-country judgment became effective in the foreign country [*Code Civ. Proc. § 1721*].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Counsel should refer to facts and law evidencing the fact that the statute of limitations has run.

[b] Related Pleading and Practice Forms

For discussion of the Uniform Foreign-Country Money Judgments Recognition Act and its predecessor statute, former Uniform Foreign Money-Judgments Recognition Act generally, see California Forms of Pleading and Practice, Ch. 318, *Judgments* (Matthew Bender).

[3] Discussion of Authorities

[a] Action to Enforce a Foreign-Money Judgment in California Must Be Filed Within the Time Provided by Statute

The facts of ***Manco Contracting Company v. Bezdikian*** *(2008) 45 Cal. 4th 192, 204-210, 85 Cal. Rptr. 3d 233, 195 P.3d 604* are discussed in detail in *§ 131.150[3][a]*. In that case, the defendant argued that the four-year statute of limitations of *Code Civ. Proc. § 343* furnished the limitations period for actions to recognize foreign judgments. The California Supreme Court disagreed. It held that based on the directive of former *Code Civ. Proc. § 1713.3* that foreign judgments be enforced in the same manner as sister state judgments, the 10-year statute of limitations applicable to actions on sister state judgments set forth in *Code Civ. Proc. § 337.5* also applied to actions on foreign judgments (*45 Cal. 4th 192, 207-208)* .

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13-131 California Points & Authorities § 131.151B

§ 131.151B Supporting Motion to Stay Enforcement--Enforcement of Foreign-Country Judgment Pending Appeal [Code Civ. Proc. § 1720]

[1] FORM

[*Caption. See § 131.146[1]* .]

THE JUDGMENT DEBTOR'S MOTION TO STAY ENFORCEMENT OF THE JUDGMENT RENDERED IN _____ [*specify source of foreign judgment*] SHOULD BE GRANTED BECAUSE _____ [AN APPEAL IS PENDING *or* THE JUDGMENT DEBTOR IS ENTITLED AND INTENDS TO APPEAL] FROM THE JUDGMENT.

A. Stay When Defendant Has or Intends to Appeal Foreign-Country Judgment. If the defendant satisfies the court either that an appeal is pending or that defendant is entitled and intends to appeal from the foreign judgment, the court may stay the proceedings until the appeal is concluded, or the time for appeal expires, or the defendant has had sufficient time to prosecute the appeal and has failed to do so (*Code Civ. Proc. § 1720*)).

[*Optional*] **B. Refusal of Stay Is Abuse of Discretion When Adequate Security Provided.** When the judgment debtor will provide adequate security for the payment of the judgment and there is not apparent prejudice to the creditors, it is an abuse of discretion for the superior court to refuse a stay request under former Code of Civil Procedure Section 1713.6 (*now Code of Civil Procedure Section 1720*, amended without substantive change, effective January 1, 2008) (*Stevens v. Superior Court (1972) 28 Cal. App. 3d 1, 4, 104 Cal. Rptr. 369* , decided under prior law).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion by a judgment debtor under a foreign-country judgment to stay proceedings under the Uniform Foreign-Country Money Judgments Recognition Act, *Code Civ. Proc. § 1713 et seq.* [*see Code Civ. Proc. § 1720*; § 131.151B[2][c]].

The Uniform Foreign-Country Money Judgments Recognition Act [*Code Civ. Proc. § 1713 et seq.*] applies to all actions commenced on or after January 1, 2008, and replaces the Uniform Foreign Money-Judgments Recognition Act [former Code Civ. Proc. § 1713 et seq.), which continues to govern actions commenced before the new Act's January 1, 2008, effective date [*Code Civ. Proc. § 1724*]. For a form for a supporting motion to stay enforcement of a foreign judgment pending appeal under the Uniform Foreign Money-Judgments Recognition Act [former Code Civ. Proc. § 1713 et seq.], see *§ 131.149*.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. If the judgment debtor contends, for example, that an appeal is pending, counsel should refer to facts evidencing that the appeal has been filed and is pending before the reviewing court of the foreign state.

[c] Court's Discretion to Stay Proceedings Pending Appeal

If a party establishes that an appeal from a foreign-country judgment is pending or will be taken in the foreign country, the court may stay any proceedings with regard to the foreign-country judgment until the appeal is concluded, the time for appeal expires, or the appellant has had sufficient time to prosecute the appeal and has failed to do so [*Code Civ. Proc. § 1720*].

[d] Related Pleading and Practice Forms

For further discussion of the Uniform Foreign-Country Money Judgments Recognition Act and its predecessor statute, the Uniform Foreign Money-Judgments Recognition Act, see California Forms of Pleading and Practice, Ch. 318, *Judgments* (Matthew Bender).

[3] Discussion of Authorities

[a] Refusal of Stay Is Abuse of Discretion When Adequate Security Is Provided

Although the Uniform Foreign Money-Judgments Recognition Act [former Code Civ. Proc. § 1713 et seq.] was repealed and replaced, effective January 1, 2008 [Stats. 2007 Ch. 212 § 1], by the Uniform Foreign-Country Money Judgments Recognition Act [*Code Civ. Proc. § 1713 et seq.*], the new Act retained many provisions of the previous act without substantive change. Accordingly, cases decided under the prior act generally remain instructive and may be cited as valid precedent unless counsel's research indicates otherwise.

Stevens v. Superior Court *(1972) 28 Cal. App. 3d 1, 104 Cal. Rptr. 369* , holding that it is an abuse of discretion for the superior court to refuse a stay when the judgment debtor will provide adequate security for the payment of the judgment, and there is no prejudice to the creditors, is discussed in *§ 131.149[3][a]*.

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13-131 California Points & Authorities § 131.151C

§ 131.151C Supporting Motion by Judgment Debtor to Dismiss Action for Recognition of Foreign-Country Judgment--Judgment Is Not Final and Conclusive [Code Civ. Proc. § 1715(a)]

[1] FORM

[*Caption. See § 131.146[1]* .]

THE JUDGMENT DEBTOR'S MOTION TO DISMISS THE ACTION FOR RECOGNITION OF THE JUDGMENT RENDERED IN _____ [*specify source of foreign judgment*] SHOULD BE GRANTED BECAUSE THE JUDGMENT IS NOT FINAL AND CONCLUSIVE.

A. Foreign-Country Judgment Must Be Final, Conclusive, and Enforceable in Foreign Country to Support Claim for Recognition of Judgment in California. Under California law, recognition is afforded to any foreign-country judgment that is final and conclusive and enforceable where rendered (*Code Civ. Proc. § 1715(a)*). A judgment that is not final and conclusive where rendered is not entitled to recognition in California (*Korea Water Resources Co. v. Lee (2004) 115 Cal. App. 4th 389, 8 Cal. Rptr. 3d 853* , decided under prior law).

B. Burden of Proof Is on Claimant. A party seeking recognition of a foreign-country judgment has the burden of establishing that the foreign-country judgment is entitled to recognition under the Uniform Foreign-Country Money Judgments Recognition Act [*Code Civ. Proc. § 1713 et seq.*] (*Code Civ. Proc. § 1715(c)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion by a judgment debtor under a foreign-country judgment to dismiss proceedings under the Uniform Foreign-Country Money Judgments Recognition Act [*Code Civ. Proc. § 1713 et seq.*] on the ground that the judgment the creditor seeks to have recognized and enforced is not final and/or conclusive in the country in which it was rendered [*see Code Civ. Proc. § 1715(a)*; § 131.151C[2][c]].

The Uniform Foreign-Country Money Judgments Recognition Act [*Code Civ. Proc. § 1713 et seq.*] applies to all actions commenced on or after January 1, 2008 and replaces the Uniform Foreign Money-Judgments Recognition Act [former Code Civ. Proc. § 1713 et seq.], which continues to govern actions commenced before the new Act's January 1, 2008, effective date [*Code Civ. Proc. § 1724*]. For a form for a supporting motion by a judgment debtor to dismiss an action for recognition of a foreign money judgment on the ground that the judgment is not final and conclusive under the Uniform Foreign Money-Judgments Recognition Act [former Code Civ. Proc. § 1713 et seq.], see *§ 131.150*.

[b] Argument

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. If the judgment debtor contends that the foreign-country judgment is not final and/or conclusive in the country in which it was rendered, counsel should refer to facts and law evidencing that fact.

[c] Recognition of Foreign-Country Judgment

To support a claim for recognition of a foreign-country judgment in California, that judgment must grant or deny recovery of a sum of money and be final, conclusive, and enforceable under the law of the foreign country where rendered [*Code Civ. Proc. § 1715(a)*; *see Code Civ. Proc. § 1715(b)* (foreign-country judgments to which Uniform Foreign-Country Money Judgments Recognition Act do not apply, even if judgment grants or denies recovery of sum of money)].

Additionally, a court may not recognize a foreign court judgment if any of the following applies [*Code Civ. Procedure § 1716(b)*]:

- The judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law.
- The foreign court did not have personal jurisdiction over the defendant.
- The foreign court did not have jurisdiction over the subject matter.

A party seeking recognition of a foreign-country judgment has the burden of establishing that the foreign-country judgment is entitled to recognition under the Act [*Code Civ. Proc. § 1715(c)*; *see Code Civ. Proc. § 1716(d)* (when burden shifts to party resisting recognition)]. If recognition of a foreign-country judgment is sought as an original matter, the issue of recognition must be raised by filing an action seeking recognition of the foreign-country judgment [*Code Civ. Proc. § 1718(a)*]. If recognition of a foreign-country judgment is sought in a pending action, the issue of recognition may be raised by counterclaim, cross-claim, or affirmative defense [*Code Civ. Proc. § 1718(b)*].

[d] Related Pleading and Practice Forms

For further discussion of the Uniform Foreign-Country Money Judgments Recognition Act and its predecessor statute, the Uniform Foreign Money-Judgments Recognition Act, see California Forms of Pleading and Practice, Ch. 318, *Judgments* (Matthew Bender).

[3] Discussion of Authorities

[a] Foreign-Country Judgment Must Be Final, Conclusive, and Enforceable in Foreign Country to Support Claim for Recognition of Judgment in California

Although the Uniform Foreign Money-Judgments Recognition Act [former Code Civ. Proc. § 1713 et seq.] was repealed and replaced, effective January 1, 2008 [Stats. 2007 Ch. 212 § 1], by the Uniform Foreign-Country Money Judgments Recognition Act (*Code Civ. Proc. § 1713 et seq.*), the new Act retained many provisions of the previous act without substantive change. Accordingly, cases decided under the prior act generally remain instructive and may be cited as valid precedent, unless counsel's research indicates otherwise.

The facts and procedural background of ***Korea Water Resources Co. v. Lee*** *(2004) 115 Cal. App. 4th 389, 8 Cal. Rptr. 3d 853* , are discussed in *§ 131.150[3][a]*. In that case, the court of appeal held that because the Korean district court judgment was not "conclusive" in Korea within the meaning of former Code Civ. Proc. § 1713.2 (*now Code Civ. Proc. § 1715(a)(2)*), the judgment was not entitled to recognition in California (*115 Cal. App. 4th 389, 398-403)* . The court agreed with the California superior court's conclusion that once the Korea Supreme Court rejected the tort theory that formed the legal basis for the judgment and remanded the matter for a new trial, the judgment was not sufficiently conclusive to warrant California recognition (*115 Cal. App. 4th 389, 400-403)* . The court found that the posture of the case presented much more than a mere potential for change on appeal; rather, the continued viability of the judgment was already compromised as a result of the Korean appellate process because the Korea Supreme Court rejected the tort theory of recovery utilized by the high court and remanded the case to the high court for retrial. In addition to the loss of certainty as to whether there was a legal foundation for the judgment, the factual foundation was also subject to change given the structure of the Korea system which provides for trial de novo at the appellate level (*115 Cal. App. 4th 389, 402)* . Further, the court was not persuaded that the Korea judgment was conclusive merely because it remained to some extent provisionally enforceable because the Korea high court significantly reduced the amount of the provisional execution order, indicating the amount of the judgment was in flux and not based on a calculated damages award (*115 Cal. App. 4th 389, 402)* . The court concluded that the superior court could have exercised its authority under former Code Civ. Proc. § 1713.6 (*now Code Civ. Proc. § 1720*) and continued the stay of the California action pending resolution of the appellate process in Korea only if the circumstances of the case satisfied former Code Civ. Proc. § 1713.2's (*now Code Civ. Proc. § 1715(a)*'s] threshold requirement that the foreign judgment be final and conclusive and enforceable in *Korea (115 Cal. App. 4th 389, 403)* . However, the Korea Supreme Court's decision, which rejected the theory of liability underlying the judgment, defeated such a finding (*115 Cal. App. 4th 389, 403)* .

For discussion of additional cases decided under prior law, refer to § 131.150[4].

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13-131 California Points & Authorities § 131.151D

§ 131.151D Supporting Motion by Judgment Debtor to Dismiss Action for Enforcement of Foreign-Country Judgment--No Personal Jurisdiction [Code Civ. Proc. §§ 1716(b)(2), 1719]

[1] FORM

[*Caption. See § 131.146[1]* .]

THE JUDGMENT DEBTOR'S MOTION TO DISMISS THE ACTION FOR ENFORCEMENT OF THE JUDGMENT RENDERED IN _____ [*specify source of foreign judgment*] SHOULD BE GRANTED BECAUSE THE COURT MAY NOT RECOGNIZE, OR SUBSEQUENTLY ENFORCE, A FOREIGN-COUNTRY JUDGMENT IF THE FOREIGN COURT DID NOT HAVE PERSONAL JURISDICTION OVER THE JUDGMENT DEBTOR.

A. Foreign-Country Judgment Is Unrecognizable and Therefore Unenforceable Under Uniform Foreign-Country Money Judgments Recognition Act (*Code Civ. Proc. § 1713 et seq.*) if Foreign Court Lacked Personal Jurisdiction Over Judgment Debtor. Foreign-country judgments are enforceable in California only if the trial court, in a proceeding brought under *Code of Civil Procedure Section 1718*, finds the foreign-country judgment is entitled to recognition under the Uniform Foreign-Country Money Judgments Recognition Act (*see Code Civ. Proc. § 1719*). A California court may not recognize a foreign-country judgment if the foreign court did not have personal jurisdiction over the judgment debtor (*Code Civ. Proc. § 1716(b)(2)*).

[*Optional*:] **B. Court Must Have Personal Jurisdiction Over Judgment Debtor to Enforce Foreign Judgment Under Force in Money-Judgments Act.** A judgment obtained without proper service of the summons and complaint is void for lack of personal jurisdiction (*Renoir v. Redstar Corp. (2004) 123 Cal. App. 4th 1145, 1149-1154, 20 Cal. Rptr. 3d 603* , decided under prior law).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion by a judgment debtor under a foreign-country judgment to dismiss proceedings to enforce a foreign judgment under the Uniform Foreign-Country Money Judgments Recognition Act [*Code Civ. Proc. § 1713 et seq.*], on grounds that the California court may not recognize a foreign-court judgment if the foreign court did not have personal jurisdiction over the judgment debtor [*see Code Civ. Proc. § 1716(b)(2)*]. If the California court finds that the foreign-country judgment is not entitled to recognition, that judgment is not enforceable [*see Code Civ. Proc. § 1719(b)*].

If the judgment debtor seeks dismissal on the basis of lack of subject matter jurisdiction [*see Code Civ. Proc. § 1716(b)(3)*], or on any of the discretionary bases listed in *Code Civ. Proc. § 1716(c)*, this form may be adapted accordingly.

The enforcement of a foreign judgment is not the same as recognition of the judgment [*see Code. Civ. Proc. §§ 1716-1718* (recognition); *Code Civ. Proc. § 1719* (enforcement)]. A judgment must be recognized before it can be enforced [*see Code Civ. Proc. § 1719*]. For a form resisting recognition of a foreign-country judgment, on the grounds that the judgment is not final and conclusive, *see § 131.151C*.

The Uniform Foreign-Country Money Judgments Recognition Act [*Code Civ. Proc. § 1713 et seq.*] applies to all actions commenced on or after January 1, 2008, and replaces the Uniform Foreign Money-Judgments Recognition Act [former Code Civ. Proc. § 1713 et seq.), which continues to govern actions commenced before the new Act's January 1, 2008, effective date [*Code Civ. Proc. § 1724*]. For a form for a supporting motion by a judgment debtor to dismiss an action for recognition of a foreign money judgment based on lack of personal jurisdiction under the Uniform Foreign Money-Judgments Recognition Act [former Code Civ. Proc. § 1713 et seq.], see *§ 131.151*.

[b] Argument

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Counsel should refer to facts and law evidencing the fact that the foreign court lacked personal jurisdiction over the judgment debtor. For further discussion of the bases for resisting personal jurisdiction, see Ch. 132, *Jurisdiction : Personal Jurisdiction and Inconvenient Forum*.

[c] Personal Jurisdiction

Under the Uniform Foreign-Country Money Judgments Recognition Act [*Code Civ. Proc. § 1713 et seq.*], a California court may not recognize a foreign-country judgment if the foreign court did not have personal jurisdiction over the defendant [*Code Civ. Proc. § 1716(b)(2)*].

Personal jurisdiction is governed generally by the *due process clauses of the Fifth* and *Fourteenth Amendments to the United States Constitution*, *Cal. Const. art. I, § 7*, *Code Civ. Proc. §§ 410.10-418.11*, and by case law. In addition, *Code Civ. Proc. § 1717* specifically provides that a foreign-country judgment may not be refused recognition for lack of personal jurisdiction if any of the following applies:

- The defendant was served with process personally in the foreign country [*Code Civ. Proc. § 1717(a)(1)*].

- The defendant voluntarily appeared in the proceeding, other than for the purpose of protecting property seized or threatened with seizure in the proceeding or of contesting the jurisdiction of the court over the defendant [*Code Civ. Proc. § 1717(a)(2)*].

- The defendant, before the commencement of the proceeding, had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved [*Code Civ. Proc. § 1717(a)(3)*].

- The defendant was domiciled in the foreign country when the proceeding was instituted or was a corporation or other form of business organization that had its principal place of business in, or was organized under the laws of, the foreign country [*Code Civ. Proc. § 1717(a)(4)*].

- The defendant had a business office in the foreign country and the proceeding in the foreign court involved a cause of action or claim for relief arising out of business done by the defendant through that office in the foreign country [*Code Civ. Proc. § 1717(a)(5)*].

- The defendant operated a motor vehicle or airplane in the foreign country and the proceeding involved a cause of action or claim for relief arising out of that operation [*Code Civ. Proc. § 1717(a)(6)*].

This list of bases for personal jurisdiction is not exclusive. California courts may recognize bases of personal jurisdiction other than those listed in the statute as sufficient to support a foreign-country judgment [*Code Civ. Proc. § 1717(b)*].

[d] Related Pleading and Practice Forms

For further discussion of the Uniform Foreign-Country Money Judgments Recognition Act and its predecessor statute, the Uniform Foreign Money-Judgments Recognition Act, see California Forms of Pleading and Practice, Ch. 318, *Judgments* (Matthew Bender). For discussion of personal jurisdiction generally, see California Forms of Pleading and Practice, Ch. 323, *Jurisdiction : Personal Jurisdiction, Inconvenient Forum, and Appearances* (Matthew Bender).

[3] Discussion of Authorities

[a] Court Must Have Personal Jurisdiction Over Judgment Debtor to Enforce Foreign Judgment Under Foreign Money-Judgments Act

Although the Uniform Foreign Money-Judgments Recognition Act [former Code Civ. Proc. § 1713 et seq.] was repealed and replaced, effective January 1, 2008 [Stats. 2007 Ch. 212 § 1], by the Uniform Foreign-Country Money Judgments Recognition Act [*Code Civ. Proc. § 1713 et seq.*], the new Act retained many provisions of the previous act without substantive change. Accordingly, cases decided under the prior act generally remain instructive and may be cited as valid precedent, unless counsel's research indicates otherwise.

The facts and procedural background of ***Renoir v. Redstar Corp.*** *(2004) 123 Cal. App. 4th 1145, 20 Cal. Rptr. 3d 603* , are discussed in *§ 131.151[3][a]*. In that case, the court held that a foreign judgment may not be enforced pursuant to the provisions of the Sister-State and Foreign Money-Judgments Act *(123 Cal. App. 4th 1145, 1151* ; *see* former Code Civ. Proc. § 1710.10 et seq.). Foreign money judgments are enforced by bringing an action in California to obtain a domestic judgment (*123 Cal. App. 4th 1145, 1151)* . To enforce a foreign judgment recognized under the former Foreign Money-Judgments Act, the party seeking enforcement must comply with the procedures applicable to civil actions, including service of a summons to establish personal jurisdiction (*123 Cal. App. 4th 1145, 1152*). The enforcement proceeding under the Act was not a special proceeding in which process was something other than a summons, and plaintiffs' label of "Petition" on their pleading was of no significance. Further, defendants' knowledge of the action did not satisfy the requirement of adequate service of a summons and complaint. By not serving a summons,

plaintiffs failed to take the required steps to obtain personal jurisdiction over defendants to enforce the French judgment in California. Defendants' brief references to issues related to whether the trial court correctly enforced the French judgment did not constitute a general appearance by defendants (*123 Cal. App. 4th 1145, 1152-1153)* . The court noted, parenthetically, that nonmonetary portions of the foreign judgment were not covered by the former Foreign Money-Judgments Act. The Act provided for enforcement of any judgment of a foreign state granting or denying recovery of a sum of money (*123 Cal. App. 4th 1145, 1152* ; *see* former Code Civ. Proc. § 1713.1(2) (*now Code Civ. Proc. § 1715(a)(1)*)).

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13-131 California Points & Authorities § 131.151E

§ 131.151E Supporting Motion by Judgment Debtor to Dismiss Action for Recognition of Foreign-Country Judgment--Action Filed After Statute of Limitations Has Run [Code Civ. Proc. § 1721]

[1] FORM

[*Caption. See § 131.146[1]* .]

THE JUDGMENT DEBTOR'S MOTION TO DISMISS THE ACTION FOR RECOGNITION OF THE JUDGMENT RENDERED IN _____ [*specify source of foreign judgment*] SHOULD BE GRANTED BECAUSE THE ACTION WAS FILED AFTER THE STATUTE OF LIMITATIONS HAD RUN.

Action to Recognize a Foreign-Country Judgment in California Must Be Filed Within the Time Provided by Statute. An action seeking recognition of a foreign-country judgment under the Uniform Foreign-Country Money Judgments Recognition Act (*Code Civ. Proc. § 1713 et seq.*) must be commenced within the earlier of the time during which the foreign-country judgment is effective in the foreign country or 10 years from the date that the foreign-country became effective in the foreign country (*Code Civ. Proc. § 1721*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion by a judgment debtor under a foreign-country judgment to dismiss proceedings to recognize the foreign judgment under the Uniform Foreign-Country Money Judgments Recognition Act [*Code Civ. Proc. § 1713 et seq.*] because the statute of limitations has run. The Uniform Foreign-Country Money Judgments Recognition Act applies to all actions commenced on or after January 1, 2008, in which the issue of recognition of a foreign-country judgment is raised [*Code Civ. Proc. § 1724(a)*]. The Uniform Foreign Money-Judgments Recognition Act [former Code Civ. Proc. § 1713 et seq.] continues to apply to all actions commenced before January 1, 2008, in which the issue of recognition of a foreign-country judgment is raised [*Code Civ. Proc. § 1724(b)*].

For a form supporting a motion by a judgment debtor under a foreign money judgment to dismiss proceedings to recognize and enforce the foreign judgment under the Uniform Foreign Money-Judgments Recognition Act [former Code Civ. Proc. § 1713 et seq.] because the statute of limitations has run, see *§ 131.151A*.

[b] Argument

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Counsel should refer to facts and law evidencing the fact that the statute of limitations has run.

[c] Related Pleading and Practice Forms

For further discussion of the Uniform Foreign-Country Money Judgments Recognition Act and its predecessor statute, Uniform Foreign Money-Judgments Recognition Act, see California Forms of Pleading and Practice, Ch. 318, *Judgments* (Matthew Bender). For discussion of limitations of actions generally, see California Forms of Pleading and Practice, Ch. 345, *limitations of Actions* (Matthew Bender).

[d] Related Pleading and Practice Forms

For further discussion of the Uniform Foreign-Country Money Judgments Recognition Act and its predecessor statute, the Uniform Foreign Money-Judgments Recognition Act, see California Forms of Pleading and Practice, Ch. 318, *Judgments* (Matthew Bender). For discussion of personal jurisdiction generally, see California Forms of Pleading and Practice, Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances* (Matthew Bender).

[3] Discussion of Authorities

[a] Action to Recognize a Foreign-Money Judgment in California Must Be Filed Within the Time Provided by Statute

An action seeking recognition of a foreign-country judgment under the Uniform Foreign-Country Money Judgments Recognition Act [*Code Civ. Proc. § 1713 et seq.*] must be commenced within the earlier of the time during which the foreign-country judgment is effective in the foreign country or 10 years from the date that the foreign-country became effective in the foreign country [*Code Civ. Proc. § 1721*]. A foreign-country judgment that is not recognized is not enforceable [*see Code Civ. Proc. § 1719*].

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13-131 California Points & Authorities § 131.152

§ 131.152 Opposing Motion to Stay Enforcement--Fully Executed Writ May Not Be Stayed

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM IN OPPOSITION TO MOTION
_____ [*name*],	)	TO STAY ENFORCEMENT
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____

_____

THE JUDGMENT DEBTOR'S MOTION TO STAY ENFORCEMENT SHOULD BE DENIED BECAUSE THE WRIT HAS BEEN FULLY EXECUTED.

Court Without Power to Stay Enforcement on Fully Executed Writ. When a writ of execution has been regularly issued and executed, money collected, while in the hands of the levying officer, is property of the judgment creditors and not the judgment debtor. When the execution is no longer outstanding, the court is without power to take control of the judgment debtor's money by ordering the levying officer not to pay it over as the officer is legally bound to do (*Del Riccio v. Superior Court (1952) 115 Cal. App. 2d 29, 31, 251 P.2d 678*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion to stay enforcement, when the judgment debtor is seeking a stay of enforcement on property already levied on by the levying officer. The form may be used to oppose the memoranda provided in *§§ 131.146* and *131.147*.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Counsel should refer to facts that demonstrate that the writ of execution was regularly issued and fully executed.

[3] Discussion of Authorities

[a] Court Without Power to Stay Enforcement on Fully Executed Writ

Del Riccio v. Superior Court *(1952) 115 Cal. App. 2d 29, 251 P.2d 678* , involved a proceeding in mandamus to require the superior court to annul orders relating to a stay of enforcement. The petitioners were judgment creditors who recovered a judgment against the judgment debtor, and a writ of execution was issued on a bank in which the defendant had a deposit. The bank made its return and paid the sum to the sheriff. While the sheriff still had the money in his possession, on application of the judgment debtor, the court ordered the sheriff not to pay any moneys to the judgment creditors in the action. No motion was made to recall the execution or quash the levy, nor was a claim made regarding any irregularity in the proceeding. The judgment debtors petitioned the court for a writ of mandate relating to the trial court's stay of enforcement.

The court of appeal granted the writ of mandate commanding the trial court to vacate its orders insofar as they purported to command the sheriff not to pay over to the judgment creditors the money on hand, less sheriff's fees and costs. The issue before the court was whether in the absence of statutory authority, a command to the sheriff not to pay over money levied on was within the inherent powers of the court. Under former Code Civ. Proc. § 691 [*now see Code Civ. Proc. §§ 701.810-701.830*], it is the duty of the officer who collects money on execution to pay over to the judgment creditor or the judgment creditor's attorney so much thereof as will satisfy the judgment. When a sale is required, the officer has the same duty to pay the amount of the judgment from the proceeds from the sale.

The court stated that when the writ has been regularly issued and executed, money collected while in the hands of the officer, is property of the judgment creditors and not the debtor. Nothing can be done with it other than to turn it over to the creditor. The possession of the officer solely for the use and benefit of the creditor is possession by the latter. As between the parties, the money should be deemed to have been delivered to the creditor immediately on its receipt by the officer and the creditor's right to receive it is not affected by any delay that may occur. Correspondingly, when the debtor's money is taken on a valid execution, it ceases to be the debtor's and he or she immediately becomes entitled to partial or full satisfaction of the judgment. The rights of the parties cannot be interfered with except through procedure authorized by statute. The court concluded that although there can be no doubt as to the power of the court to control further proceedings while the execution is outstanding, the court was without power to take control of the money of the judgment creditors by ordering the sheriff not to pay it over as the officer was legally bound to do (*115 Cal. App. 2d 29, 31)* .

Note that the rule in *Del Riccio v. Superior Court (1952) 115 Cal. App. 2d 29, 31, 251 P.2d 678* , discussed *above*, would not apply in proceedings for enforcement of a sister state money judgment under *Code Civ. Proc. § 1710.50*, in view of the specific provision in the statute allowing the court to order the levying officer to retain possession of the property capable of physical possession and to maintain the levy on other property, if property of the judgment debtor has been levied on under a writ of execution, [*see Code Civ. Proc. § 1710.50(c)(3)*]. In addition, it appears that the rule would probably not be available in proceedings that are within the scope of the Servicemembers Civil Relief Act [50 U.S.C. Appen. § 501 et seq.; *see also § 131.148*], since under that act a court may vacate or stay any attachment or garnishment of property, money, or debts in the hands of another [*see* 50 U.S.C. Appen. § 524(a)(2)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral Overview

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13-131 California Points & Authorities § 131.153

§ 131.153 Supporting Motion by Judgment Creditor for Determination of Judgment Debtor's Claim of Exemption--Property Claimed Is Not Exempt or Equity Is in Excess of Exemption [Code Civ. Proc. § 703.550]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*],	)	IES IN SUPPORT OF MOTION FOR DETERMIN-
Defendant.	)	ATION OF CLAIM OF EXEMPTION
	)	Date: _____
	)	Time: _____
		Location: _____

_____

THE JUDGMENT CREDITOR's MOTION FOR DETERMINATION OF CLAIM OF EXEMPTION SHOULD BE GRANTED BECAUSE _____ [THE PROPERTY ALLEGED IS NOT EXEMPT UNDER SECTIONS 703.010 THROUGH 704.995 OF THE CODE OF CIVIL PROCEDURE *or* THE EQUITY IN THE PROPERTY CLAIM TO BE EXEMPT IS IN EXCESS OF THE AMOUNT PROVIDED IN THE APPLICABLE EXEMPTION].

A. Property Is Not Exempt or Equity Is in Excess of Exemption. The allegation that _____ [the property is not exempt under the provision of *Sections 703.010 through 704.995 of the Code of Civil Procedure or* the equity in the property claimed to be exempt is in excess of the amount provided in the applicable exemption] in the

judgment creditor's notice of opposition controverts the claim of exemption. If the court is satisfied that sufficient facts are shown by the claim and the notice of opposition, the court may make its determination thereon (*Code Civ. Proc. §§ 703.560, 703.580(c)*).

B. Burden of Proof on Claimant. At a hearing under *Section 703.580 of the Code of Civil Procedure*, the exemption claimant has the burden of proof (*Code Civ. Proc. § 703.580(b)*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted in support of a judgment creditor's motion for an order determining the judgment debtor's claim of exemption, under *Code Civ. Proc. § 703.550*. In addition to the notice of motion, a notice of opposition to the claim of exemption must be filed, using the mandatory Judicial Council form. The notice of opposition must be executed under oath and include both the pertinent allegation provided in *Code Civ. Proc. § 703.560(a)*, and a statement of the facts necessary to support the allegation [*Code Civ. Proc. § 703.560(b)*].

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated. Thus, if the motion is based on the allegation that the equity in the property claimed to be exempt is in excess of the amount provided in the applicable exemption, counsel should cite the applicable exemption and refer to facts disclosing the true value of the subject property.

[b] Opposing Points and Authorities

The points and authorities set out in *§ 131.154* may be used in an appropriate case to oppose a motion supported by the foregoing memorandum.

[c] Related Pleading and Practice Forms

For discussion of exemptions and exemption procedure generally, and a form of notice of motion and order relating to a motion for order determining claim of exemption pursuant to Code Civ. Proc. § 703.550, see California Forms of Pleading and Practice, Ch. 254, *Executions and Enforcement of Judgments* (Matthew Bender).

[d] Related Points and Authorities

For points and authorities opposing a defendant's claim of exemption submitted in opposition to an application for a right to attach order, see Ch. 112, *Homesteads* .

Legal Topics:

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

Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptions

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13-131 California Points & Authorities § 131.154

§ 131.154 Opposing Motion by Judgment Creditor for Determination of Judgment Debtor's Claim of Exemption--Exemption Statutes Liberally Construed for Judgment Debtor's Welfare

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*],	)	IES IN OPPOSITION TO MOTION FOR DETERM-
Defendant.	)	INATION OF CLAIM OF EXEMPTION
	)	Date: _____
	)	Time: _____
		Location: _____

_____

THE JUDGMENT CREDITOR's MOTION FOR ORDER DETERMINING CLAIM OF EXEMPTION SHOULD BE DENIED BECAUSE _____ [*specify applicable exemption statute, e.g.,* SECTION 690.18(a) OF THE CODE OF CIVIL PROCEDURE], WHEN LIBERALLY CONSTRUED IN FAVOR THE JUDGMENT DEBTOR _____ [PROVIDES FOR THE EXEMPTION AS CLAIMED *or* DOES NOT WITHHOLD THE EXEMPTION CLAIMED].

A. Exemption Statutes Liberally Construed. The principal objective of the exemption statutes is to provide for the support and welfare of the debtor and his or her family and to enable the judgment debtor to follow his or her vocation. Such statutes are liberally construed to carry out these purposes and, as far as practicable, for the debtor's benefit (

Holmes v. Marshall (1905) 145 Cal. 777, 779, 79 P. 534 ; *Roosevelt v. Roosevelt (1981) 117 Cal. App. 3d 397, 402, 172 Cal. Rptr. 641*).

[*Optional*] **B. Exceptions Narrowly Construed.** Conversely to the rule of liberal construction of the grant of an exemption, provisions which limit or take away the exemption are strictly construed, whether in provisos and exceptions or amending statutes (*Roosevelt v. Roosevelt (1981) 117 Cal. App. 3d 397, 402-403, 172 Cal. Rptr. 641*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in opposition to a judgment creditor's motion for an order determining the judgment debtor's claim of exemption, under *Code Civ. Proc. § 703.550*. The ground for opposition set forth is that when the statute granting the applicable exemption is read liberally, or the statute providing an exception to an exemption is strictly construed, the property of the judgment debtor is exempt from execution on the judgment.

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, the foregoing points and authorities may be submitted in opposition to a motion supported by the points and authorities set out in *§ 131.153*.

[b] Related Pleading and Practice Forms

For discussion and forms relating to exemptions generally, see California Forms of Pleading and Practice, Ch. 254, *Executions and Enforcement of Judgments* (Matthew Bender).

[c] Related Points and Authorities

For points and authorities supporting a defendant's claim of exemption submitted in opposition to an application for a right to attach order, see Ch. 112, *Homesteads* .

[3] Discussion of Authorities

[a] Exemption Statutes Liberally Construed

Holmes v. Marshall *(1905) 145 Cal. 777, 79 P. 534* , involved an action on a promissory note. After the action was commenced, a writ of attachment was issued and a sum of money on deposit at a bank was levied on. The judgment debtor moved to set aside the levy of the writ and dissolve it as to the money. The trial court granted the motion and the judgment creditor appealed.

The Supreme Court affirmed the order. The court stated that the principal question was whether or not the money was subject to the debts of the judgment debtor, or was exempt from execution. The money in question was deposited from the proceeds of three life insurance policies, two of which were payable to the judgment debtor, and one which was payable to the estate of judgment debtor's husband. After the estate was probated, all the proceeds of the policies were deposited into the account. The main contention of the judgment creditor was that the exemption under former Code Civ. Proc. § 690 applying to benefits growing out of life insurance [*now see Code Civ. Proc. § 704.100*], extended only against the debtors of the person whose life was insured and who paid the premiums and that the death did not continue after death in favor of the beneficiary. In resolving the question, the Court stated that the statutes exempting property from execution are enacted on the ground of public policy for the benevolent purpose of saving debtors and their families from want by reason of misfortune or improvidence and that the general rule is to construe such statutes liberally, so as to carry out the intention of the Legislature, and the humane purpose, designed by the lawmakers. The Court applied the foregoing principal to construe the words "exempt from execution" to mean exempt from any execution, since the Legislature did not mention any particular class of executions and the Court was not at liberty to judicially insert such a class (*145 Cal. 777, 778-779)* .

Note that under the current statute providing exemptions relating to life insurance, benefits from matured life insurance policies (including endowment and annuity policies) are exempt to the extent reasonably necessary for the support of the judgment debtor and the spouse and dependents of the judgment debtor [*Code Civ. Proc. § 704.100*].

In ***Roosevelt v. Roosevelt*** *(1981) 117 Cal. App. 3d 397, 172 Cal. Rptr. 641* , the plaintiff brought an action for breach of contract and accounting on the parties' separation agreement, based on the defendant's cessation of monthly support payments. The plaintiff obtained a money judgment, with the damages represented as accumulated arrearages of the support payments. Plaintiff thereafter obtained a writ of execution on the judgment and levied on the United States Civil Service Commission which administers and pays the defendant a monthly pension based on his employment with the United States government. The defendant asserted that his pension was exempt from execution under former Code Civ. Proc. § 609.18(a), governing public retirement benefits [*now see Code Civ. Proc. § 704.110*]. In response, the plaintiff noticed a motion for determination of defendant's claim of exemption. The trial court found that the plaintiff's judgment on the agreement was for court-ordered spousal support payments, as the term was used under former Code Civ. Proc. § 609.18(a) [*now see Code Civ. Proc. § 704.110(c)*], and denied the defendant's claim of exemption. The defendant appealed.

The court of appeal reversed and remanded the cause with directions to enter an order upholding the defendant's claim to exemption. The court stated that the principal objective of the exemption statutes is to provide for the support and welfare of the debtor and his or her family and to enable the debtor to follow his or her vocation. Such statutes are liberally construed to carry out these purposes and, as far as practicable, for the debtor's benefit (*117 Cal. App. 3d 397, 402)* .

[b] Exceptions Narrowly Construed

The facts and procedural background of *Roosevelt v. Roosevelt (1981) 117 Cal. App. 3d 397, 172 Cal. Rptr. 641* , are discussed in *§ 131.154[3][a]*. In *Roosevelt*, the court considered whether the federal government retirement benefit payments of the judgment debtor were exempt. The court stated that the corollary proposition to that requiring liberal construction of exemption statutes for the benefit of the debtor is that exceptions to the exemption statute must be strictly construed. The court cited the statement in *Los Angeles Finance Co. v. Flores (1952) 110 Cal. App. 2d Supp. 850, 854, 243 P.2d 139* , that conversely to the rule of liberal construction of the grant of an exemption, provisions which limit or take away the exemption are strictly construed, whether in provisos and exceptions or in amending statutes. Since the judgment in the action did not provide for or enforce, in the language of the exemption statute, "court-ordered ... spousal support payments," but was rendered in an action on a property settlement agreement, the court held that the judgment debtor was entitled to exemption (*117 Cal. App. 3d 397, 407)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptions

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13-131 California Points & Authorities § 131.155

§ 131.155 Supporting Contention That Execution Sale Should Be Set Aside--Statutory Action--Improper Sale to Judgment Creditor [Code Civ. Proc. § 701.680(c)(1)]

[1] FORM

[*The following may be included in a memorandum or points and authorities, or in a trial or appellate brief.*]

THE EXECUTION SALE TO THE JUDGMENT CREDITOR SHOULD BE SET ASIDE BECAUSE THE SALE WAS IMPROPER.

Improper Sale to Judgment Creditor May Be Set Aside. If the sale was improper because of irregularities in the proceedings, because the property sold was not subject to execution, or for any other reason, the judgment debtor, or the judgment debtor's successor in interest, may commence an action to set aside the sale if the purchaser at the sale is the judgment creditor (*Code Civ. Proc. § 701.680(c)(1)*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of a judgment debtor's contention that the execution sale of his or her property to the judgment creditor should be set aside because the sale was improper, either because of irregularities in the proceedings, because the property sold was not subject to execution, or for any other reason.

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated. For example, if the execution sale was made on property that was exempt from execution, it should be established that the purchaser was the judgment creditor and that the property was exempt under the execution of judgment statutes [*see, e.g., Code Civ. Proc. §§ 704.010-704.210* (property exempt from execution)].

[b] Statutory Action to Set Aside Execution Sale

Prior to the Legislature's adoption of the Enforcement of Judgments Law (*Code Civ. Proc. § 680.010 et seq.*) in 1982, a judgment debtor or his or her successor in interest had the right to redeem his or her property within 12 months after an execution sale by paying the purchaser the purchase price plus interest, taxes, and other costs [*see* former Code Civ. Proc. § 701]. If there was some irregularity or unfairness in the execution sale proceedings, the judgment debtor was permitted to seek relief to set aside the execution sale either by bringing a motion under statute [*see* former Code Civ. Proc. § 708], or an independent action in equity [*see Sullivan v. Wellborn (1948) 32 Cal. 2d 214, 217, 195 P.2d 787* ; *Smith v. Kessler (1974) 43 Cal. App. 3d 26, 31, 117 Cal. Rptr. 470* ; *see § 131.156*].

Under the new statutes, the judgment debtor's right of redemption after an execution sale has been abolished, although the judgment debtor retains a grace period of 120 days between the notice of levy and the notice of sale, during which he or she may save his or her property or sell it for a higher price [*see Code Civ. Proc. § 701.545*]. In addition, the judgment debtor or the judgment debtor's successor in interest may commence an action within 90 days after the date of the execution sale to set aside the sale if the purchaser at the sale is the judgment creditor. The action may be commenced if the sale was improper because of irregularities in proceedings, because the property sold was not subject to execution, or for any other reason [*Code Civ. Proc. § 701.680(c)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of Execution

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13-131 California Points & Authorities § 131.156

§ 131.156 Supporting Contention That Execution Sale Should Be Set Aside--Equitable Action--Grossly Inadequate Price When Purchaser Is Guilty of Unfairness or Has Taken Undue Advantage

[1] FORM

[*The following may be included in a memorandum or points and authorities, or in a trial or appellate brief.*]

THE EXECUTION SALE SHOULD BE SET ASIDE BECAUSE THE PRICE OBTAINED WAS GREATLY DISPROPORTIONATE TO THE ACTUAL VALUE AND THE PURCHASER _____ [IS GUILTY OF UNFAIRNESS *or* HAS TAKEN UNDUE ADVANTAGE].

A. Execution Sale Invalidated When Gross Inadequacy of Price and Slight Evidence of Unfairness or Irregularity Are Shown. If the price obtained is greatly disproportionate to the actual value, very slight evidence of unfairness or irregularity will suffice to authorize the granting of relief (*Odell v. Cox (1907) 151 Cal. 70, 74, 90 P. 194* ; *Darden v. Reese (1948) 88 Cal. App. 2d 904, 908, 200 P.2d 81*).

[*Optional*] **B. Unfairness Need Not Amount to Legal Fraud.** Acts of oppression and unfairness which will justify vacating an execution sale need not amount to legal fraud. "Unfairness," as it relates to conduct in connection with execution sales, embraces all types of dishonesty, deception, and oppression that operate to the prejudice of the judgment debtor or others interested in the sale (*Darden v. Reese (1948) 88 Cal. App. 2d 904, 909-910, 200 P.2d 81*).

[*Optional*] **C. Inadequacy of Price Is Evidence of Unfairness.** It is universally recognized that inadequacy of price is a circumstance of greater or less weight, to be considered in connection with other circumstances impeaching the fairness of the transaction as a cause of vacating it. Inadequacy of price may be so gross as in itself to furnish satisfactory evidence of fraud or misconduct on the part of the officer or purchaser, and justify the vacating of the sale (*Odell v. Cox (1907) 151 Cal. 70, 74, 90 P. 194*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of a judgment debtor's contention that the execution sale of his or her property should be set aside because the price received at the sale was grossly inadequate and the purchaser is guilty of unfairness or has taken undue advantage. An action in equity to set aside an execution judgment may be made as an alternative to the statutory action provided for under *Code Civ. Proc. 701.680(c)(1)* [*see § 131.155*].

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should refer to facts which establish that the price that the property was sold at the execution sale was grossly inadequate to the actual value of the property, and to facts indicating unfairness or undue advantage [*see, e.g., Odell v. Cox (1907) 151 Cal. 70, 74-75, 90 P. 194* , discussed in *§ 131.156[3][a]*].

[b] Equitable Action to Set Aside Execution Sale

According to the Law Revision Commission, which recommended changes to the former statutory governing enforcement of judgments later that were adopted by the Legislature in 1982, the elimination of the statutory right of redemption from execution sales would not affect the equitable right of a judgment debtor to redeem from a sale at a grossly inadequate price when the purchaser is guilty of unfairness or has taken undue advantage [*see* 16 Cal. L. Revision Comm'n Reports, pp. 1119-1120; Witkin, California Procedure, vol. 8, *Enforcement of Judgment* § 158; *but see* Schwartz & Ahart, Cal. Prac. Guide: Enforcing Judgments & Debts (TRG 1990), Paragraph 6:723 (suggesting that *Code Civ. Proc. § 701.680(c)* may be preemptive, providing the exclusive grounds for relief from execution sale)].

[c] Opposing Points and Authorities

The points and authorities set out in *§§ 131.157* and *131.158* may be used in an appropriate case to oppose the contention that an execution sale should be set aside.

[3] Discussion of Authorities

[a] Execution Sale Invalidated When Gross Inadequacy of Price and Slight Evidence of Unfairness or Irregularity Are Shown

In ***Odell v. Cox*** *(1907) 151 Cal. 70, 90 P. 194* , the plaintiff was an owner of corporate stock that had been levied on and sold at an execution sale under a writ of execution obtained on a judgment against him. He brought an action against the judgment creditor in the earlier suit seeking to vacate the sale. The trial court granted judgment in favor of the plaintiff. The defendant moved for new trial and the motion was denied. The defendant then appealed the order denying the motion, and the judgment. The defendant's argued that there could be no question of fraud in the case, in view of a finding against an allegation in the complaint of intentional concealment by defendant of the proceedings for the sale of execution for purpose of obtaining the property for a mere nominal sum.

The Supreme Court affirmed. The Court concluded that findings of fact, taken in connection with admitted allegations of the complaint, showed unfairness and undue advantage constituting constructive fraud. The court acknowledged the rule that mere inadequacy of price is not a sufficient ground for refusing to confirm or vacating an execution sale. But it is universally recognized that inadequacy of price is a circumstance of greater or less weight, to be considered in connection with other circumstances impeaching the fairness of the transaction as a cause of vacating it, and that where the inadequacy is palpable and great, very slight additional evidence of unfairness or irregularity is sufficient to authorize the granting of the relief sought. In fact, the Court observed, according to very respectable authority, inadequacy of price may be so gross as in itself to furnish satisfactory evidence of fraud or misconduct on the part of the officer or purchaser, and justify the vacating of the sale (*151 Cal. 70, 74)* . In the case before it, the Court noted that the price for which the stock was sold was grossly inadequate. The amount bid was $26.50, when the property had a cash value of $2,000 on the market (*151 Cal. 70, 73)* . There was an absolute lack of knowledge on the part of the owner of the property of any levy or proposed sale. The manner of the levy, while authorized by law, was such that the

owner of the property could learn of the levy in time only from such information as might be given by the officers of the respective corporations, or the notices of sale, or casually by some one who did know the fact. No one saw fit to enlighten the owner. In addition, the judgment creditor took advantage of the absence of the owner of the property by attempting to take the property at what he knew to be for mere nominal consideration (*151 Cal. 70, 75)* .

The Court also cited *Schroeder v. Young (1895) 161 U.S. 334, 16 S. Ct. 512, 40 L. Ed. 721* , for the following circumstances that may constitute irregularity of proceedings: when several lots have been sold in such manner that their full value could not be realized; when bidders have been kept away; when any undue advantage has been taken to the prejudice of the owner of the property; when the owner has been lulled into a false security; or when the sale has been conducted collusively or in any other manner for the benefit of the purchaser (*151 Cal. 70, 75)* .

Darden v. Reese *(1948) 88 Cal. App. 2d 904, 200 P.2d 81* , involved an action to set aside an execution sale of corporate stock. The court found that the market value of the stock was approximately $35,000 and that the defendant purchaser bid $1,150 knowing that the sum was grossly inadequate, the defendant purchaser was not a bona fide purchaser of the stock, and the defendant judgment creditor was guilty of fraudulent conduct and great unfairness toward the plaintiff. The trial court's judgment vacated the sale and the defendant appealed.

The court of appeal affirmed. The defendants conceded that inadequacy of price alone does not invalidate an execution sale. When, however, the price obtained is greatly disproportionate to the actual value, very slight evidence of unfairness or irregularity will suffice to authorize the granting of relief. The court considered whether under the facts established at the trial, the case was one for relief under the above rule. The court cited the fact that the defendant judgment creditor intentionally withheld information of the levy of execution from the plaintiff and gave instructions and directions to the defendant purchaser with respect to bidding at the sale in support of the finding of fraudulent conduct and great unfairness (*88 Cal. App. 2d 904, 908)* .

[b] Unfairness Need Not Amount to Legal Fraud

The facts and procedural background of ***Darden v. Reese*** *(1948) 88 Cal. App. 2d 904, 200 P.2d 81* , are discussed in *§ 131.156[3][a]*. In *Darden*, the court of appeal affirmed the trial court's judgment setting aside and execution sale of corporate stock that had been levied on. The court of appeal stated that acts of oppression and unfairness which will justify vacating an execution sale need not amount to legal fraud. "Unfairness," as it relates to conduct in connection with execution sales, embraces all types of dishonesty, deception, and oppression that operate to the prejudice of the judgment debtor or others interested in the sale. The court continued to state that there can be no fixed standards by which the fairness of conduct or the extent of the claimed deception can be measured. Each case must be judged according to its particular facts. Hence, unfairness sufficient to invalidate the sale was found in the conduct of the secretary of the corporation who held the judgment sought to be collected as trustee for the corporation, who was under a duty to act in the highest good faith toward the corporation in all matters affecting its interests, and who for his own benefit and advantage, withheld from the plaintiff information that his stock had been subjected to the levy of an execution, and also withheld such information from the other officers of the corporation (*88 Cal. App. 2d 904, 909-910)* .

[c] Inadequacy of Price Is Evidence of Unfairness

The facts and procedural background of ***Odell v. Cox*** *(1907) 151 Cal. 70, 90 P. 194* , are discussed in *§ 131.156[3][a]*. In *Odell*, in affirming the trial court judgment vacating the execution sale, the Supreme Court stated that it is universally recognized that inadequacy of price is a circumstance of greater or less weight, to be considered in connection with other circumstances impeaching the fairness of the transaction as a cause of vacating the execution sale, and that when the inadequacy is palpable and great, very slight additional evidence of unfairness or irregularity is sufficient to authorize the granting of the relief sought. The Court further observed that inadequacy of price may be so gross as in itself to furnish satisfactory evidence of fraud or misconduct on the part of the officer or purchaser, and justify the

vacating of the sale (*151 Cal. 70, 74)* .

[4] Additional Authorities

[a] Unfairness Need Not Amount to Legal Fraud

Smith v. Kessler (1974) 43 Cal. App. 3d 26, 117 Cal. Rptr. 470 , involved an action to recover a parcel of real property which the defendant had acquired through an execution sale. It was stipulated at trial that the property was worth between $20,000 and $24,000, and the defendant had acquired the property on his bid of $999.55. The trial court granted judgment in favor of the plaintiff and defendant appealed.

The court of appeal modified the judgment, and as modified, affirmed. The court cited *Odell v. Cox (1907) 151 Cal. 70, 73, 90 P. 194* (discussed in *§ 131.156[3][a]*) and stated that when, in addition to gross inadequacy of price, the purchaser has been guilty of any unfairness or has taken any undue advantage resulting in such gross inadequacy and consequent injury to the owner of the property, he or she will be deemed guilty of fraud warranting the interposition of a court of equity in favor of the owner who is himself or herself without fault. The court concluded that the evidence fully supported the decision to grant equitable relief because defendant acquired valuable property for a fraction of its value, bid on the property under a name that would not readily be connected to him and quietly waited for the expiration of the statutory period of redemption allowing the plaintiff to collect the rents, pay the taxes, and build up her equity on a trust deed during that period. The plaintiff was in total ignorance of what was happening, which the defendant must have surely realized. The court stated that the defendant was not chargeable for his intent, but for what he did, that is, to take unfair advantage of an absent and unwary owner (*43 Cal. App. 3d 26, 32)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral Overview

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13-131 California Points & Authorities § 131.157

§ 131.157 Opposing Contention That Execution Sale Should Be Set Aside--Equitable Action--Mere Inadequacy of Price Insufficient

[1] FORM

[*The following may be included in a memorandum or points and authorities, or in a trial or appellate brief.*]

THE EXECUTION SALE SHOULD NOT BE SET ASIDE BECAUSE THE MERE INADEQUACY OF PRICE IS INSUFFICIENT GROUND FOR SETTING ASIDE AN EXECUTION SALE.

Mere Inadequacy of Price Alone Insufficient Basis to Set Aside Sale. It is well settled in this state that mere inadequacy of price, however gross, is not itself a sufficient ground for setting aside a sale legally made. There must, in addition, be proof of some element of fraud, unfairness, or oppression before a court will be justified in depriving the purchaser of his or her legal advantage (*Rauer v. Hertweck (1917) 175 Cal. 278, 280-281, 165 P. 946*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in opposition to a judgment debtor's contention that the execution sale of his or her property should be set aside, through an action in equity, if the sole contention on the part of the judgment debtor is that the price received at the judgment sale is inadequate. In an appropriate case, the foregoing points and authorities may be submitted in opposition to the contention support by the points and authorities set out in *§ 131.156*.

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated. It should be established that, notwithstanding the judgment debtor's allegation that the price obtained at the sale was inadequate, there is an absence of any other evidence indicating unfairness in the sale [*see, e.g., Rauer v. Hertweck (1917) 175 Cal. 278, 281, 165 P. 946]* .

See also *§ 131.156[2]*.

[3] Discussion of Authorities

[a] Mere Inadequacy of Price Alone Insufficient Basis to Set Aside Sale

Rauer v. Hertweck *(1917) 175 Cal. 278, 165 P. 946* involved an action to set aside an execution sale of real estate. The trial court granted the defendant purchaser's motion for a nonsuit, and entered judgment in their favor. The plaintiff judgment debtor appealed the judgment.

The Supreme Court affirmed the judgment. The Court stated that on a motion for a nonsuit, the evidence, and every inference that may fairly be drawn from it, must be viewed in the light most favorable to the plaintiff's claim. There was testimony that the land was worth $2,000 to $3,000, and the sum bid at the execution sale was only $46. The Court cited the rule, however, that it is well settled in this state that mere inadequacy of price, however gross, is not itself a sufficient ground for setting aside a sale legally made. There must, in addition, be proof of some element of fraud, unfairness, or oppression before a court will be justified in depriving the purchaser of his or her legal advantage. The only proof given by the plaintiff on the question of unfairness was that he had no knowledge of the judgment or of the proceedings on execution. Facts furnished, however, provided evidence that the plaintiff's attorney had actual knowledge of the entry of the judgment, which is, in the law, the knowledge of the client. There were also letters from the defendant's attorneys to the plaintiff's attorney requesting payment up to two months prior to the execution. Further, the notice of sale was published and posted in strict conformity with the requirements of statute. The Court concluded from the foregoing that it was unable to find any showing of fraud, unfairness, or oppression (*175 Cal. 278, 281-282)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral Overview

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13-131 California Points & Authorities § 131.158

§ 131.158 Opposing Contention That Execution Sale Should Be Set Aside--Equitable Action--Defendant Is Good-Faith Purchaser

[1] FORM

[*The following may be included in a memorandum or points and authorities, or in a trial or appellate brief.*]

THE EXECUTION SALE SHOULD NOT BE SET ASIDE BECAUSE THE DEFENDANT IS A STRANGER TO THE PROCEEDINGS WHO HAS PURCHASED IN GOOD FAITH.

Good-Faith Purchaser Without Duty Toward Judgment Debtor. A purchaser at an execution sale who is a stranger to the proceedings and buys in good faith is charged with no duty toward the judgment debtor (*Bock v. Losekamp (1919) 179 Cal. 674, 677, 179 P. 516*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in opposition to a judgment debtor's contention that the execution sale of his or her property should be set aside, through an action in equity, if the purchaser is a stranger to the proceedings who purchased the property in good faith. In an appropriate case, the foregoing points and authorities may be submitted in opposition to the contention support by the points and authorities set out in *§ 131.156*.

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated. That is, counsel should refer to facts indicating that the purchaser submitted his or her bid in good faith and was otherwise a stranger to the enforcement proceedings.

See also *§ 131.156[2]*.

[3] Discussion of Authorities

[a] Good-Faith Purchaser Without Duty Toward Judgment Debtor

Bock v. Losekamp *(1919) 179 Cal. 674, 179 P. 516* , involved an action to set aside an execution sale and deed of the plaintiff judgment debtor's real estate. The basis for the action was a judgment was entered against the judgment debtor for costs in superior court, on which an execution issued. The sheriff levied on the judgment debtor's property and after due notice offered it to sale. The defendant in the action was not a party to the earlier suit against the plaintiff and was the only bidder at the sale. The trial court found that the property was sold for $35.60, which was the amount of the judgment and costs, was encumbered for $220, and was worth $2,000 and concluded that the sale price was grossly inadequate. The trial court also found that the judgment creditor knew where the plaintiff resided and did not notify him of the sale, and both the judgment creditor and the sheriff knew that the plaintiff did not see the published notice of the sale. However, it was not claimed or found that there was any irregularity in the proceedings connected with the sale, or that the defendant had any knowledge of the circumstances which caused the plaintiff's ignorance concerning the judgment, execution, and sale. The trial court's judgment was in favor of the plaintiff and the defendant appealed.

The Supreme Court reversed the judgment. The plaintiff relied on the decision in *Odell v. Cox (1907) 151 Cal. 70, 74, 90 P. 194* (discussed in *§ 131.156[3][a]*), in which the Court held that a judgment debtor is entitled to have an execution sale set aside if the price obtained is greatly disproportionate to the actual value, and there is very slight evidence of unfairness or irregularity. The Court distinguished *Odell*, however, on the ground that the present case involved an innocent purchaser. The Court stated that a purchaser at an execution sale who is a stranger to the proceedings and buys in good faith is charged with no duty toward the judgment debtor. The purchaser must at his or her peril examine the judgment and execution in order to determine whether the levying officer is duty authorized to make the sale, but the purchaser need not inquire further into the proceedings of the levying officer and judgment creditor to ascertain if they have been in all respects fair toward the judgment debtor. The purchaser may rely on the levying officer's authority to sell and the purchaser's own good faith as to that matter (*179 Cal. 674, 677)* .

[4] Additional Authorities

[a] Good-Faith Purchaser Without Duty Toward Judgment Debtor

The facts and procedural background of *Rauer v. Hertweck (1917) 175 Cal. 278, 165 P. 946* , are discussed in *§ 131.157[3][a]*. In *Rauer*, the Court concluded that it was unable to find anything showing fraud, unfairness and oppression and held that the trial court properly granted the defendant's motion for a nonsuit (*175 Cal. 278, 282)* . It is noted in *Bock v. Losekamp (1919) 179 Cal. 674, 676, 179 P. 516* , discussed in *§ 131.158[3][a]* that *Rauer* involved an execution sale of property for a grossly inadequate price, on a judgment and execution for which the debtor had no actual personal knowledge, and of which no actual knowledge was given to the debtor, and the purchaser was a stranger to the judgment.

In *Sargent v. Shumaker (1924) 193 Cal. 122, 223 P. 464* , the defendant appealed from a judgment in favor of the plaintiff in an action to quiet title and to set aside a trustee's sale under a power of sale in a trust deed. The Court cited the general rule that when the inadequacy of price is palpable and great, slight irregularities in conjunction therewith will authorize a court to set aside the sale. The Court was of the opinion, however, that in order to have this effect, the irregularities must have conduced to the inadequacy of the price, or in some other way have contributed to the injury of the plaintiff. The court stated that if the inadequacy can be connected with or shown to result from any mistake, accident, surprise, misconduct, fraud, or irregularity, the sale will generally be vacated, unless the complainant was himself in fault, or the rights of innocent third parties have become dependent on the sale (*193 Cal. 122, 132)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil

ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral Overview

California Points & Authorities

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 131 JUDGMENTS
PART II. FORMS
F. Execution And Enforcement Of Judgments

13-131 California Points & Authorities § 131.159

§ 131.159 Opposing Petition for Determination of Third Party's Claim of Interest--Petition for Hearing Not Filed Within Statutory Period [Code Civ. Proc. § 720.310(a)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*],	)	IES IN OPPOSITION TO PETITION FOR HEAR-
Defendant.	)	ING TO DETERMINE VALIDITY OF THIRD
	)	PARTY CLAIM
	)	Date: _____
		Time: _____
		Location: _____

_____

THE COURT SHOULD DISMISS THE PETITION BECAUSE THE COURT LACKS JURISDICTION TO HEAR THE PROCEEDING ON THE GROUND THAT NO PETITION WAS FILED WITHIN THE STATUTORY PERIOD.

A. Petition Must Be Filed Within Statutory Period. Not later than 15 days _____ [after the third-party claim is filed with the levying officer pursuant to Section _____ (720.120 *or* 720.220) of the Code of Civil Procedure *or* after filing an undertaking pursuant to *Section 720.610 of the Code of Civil Procedure*], either the creditor or the third person may petition the court for a hearing to determine the validity of the third-party

claim and the proper disposition of the property that is the subject of the claim (*Code Civ. Proc. § 720.310(a)*).

B. Court Lacks Jurisdiction When Petition Not Filed Within Statutory Period. When the statutory period has run from the filing on the third-party claim and no petition for hearing has been filed, the trial court in which the suit was brought loses jurisdiction to hear the summary proceeding (*Commercial Credit Plan, Inc. v. Gomez (1968) 276 Cal. App. 2d Supp. 831, 834, 80 Cal. Rptr. 534*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in opposition to a petition for hearing to determine a third-party claim and disposition of property under *Code Civ. Proc. § 720.310*.

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated. That, counsel should refer to facts indicating that no petition for hearing was filed within the period required under *Code Civ. Proc. § 720.310*.

Note that the failure to demand a hearing within the period required under *Code Civ. Proc. § 720.310(a)* does not foreclose an independent action [*see Commercial Credit Plan, Inc. v. Gomez (1968) 276 Cal. App. 2d Supp. 831, 834, 80 Cal. Rptr. 534* (discussed in *§ 131.159[3][a]*)].

[b] Related Pleading and Practice Forms

For a discussion and forms relating to proceedings on a third-party claim, see California Forms of Pleading and Practice, Ch. 254, *Executions and Enforcement of Judgments* (Matthew Bender).

[3] Discussion of Authorities

[a] Court Lacks Jurisdiction When Petition Not Filed Within Statutory Period

In ***Commercial Credit Plan, Inc. v. Gomez*** *(1968) 276 Cal. App. 2d Supp. 831, 80 Cal. Rptr. 534* , the plaintiff, who allegedly held legal title to an automobile as security for a loan, brought an action against defendants, who were sureties on an undertaking given to the sheriff to enable the sheriff to hold and sell the automobile after its seizure under attachment against the debtors, who were the registered owners. The defendants demurred on the ground that the filing of a third-party claim, together with the failure to file a petition for a hearing to determine the claim foreclosed an independent action against the sureties. The trial court rendered judgment of dismissal after the demurrer was sustained without leave to amend. The plaintiff appealed from the judgment.

The appellate department of the superior court reversed with directions to overrule the demurrer. The court stated that the law is clear that when 15 days have run from the filing of the third-party claim and no petition for hearing has been

filed under former Code Civ. Proc. § 689b(10) [*now see Code Civ. Proc. § 720.310(a)*], the trial court in which the suit was brought loses jurisdiction to hear the summary proceeding. However, no case was cited to the court holding that the parties are foreclosed from bringing an independent action and the election to file a third-party claim does not require a party to proceed by way of the summary proceedings under the statute. The court said that to hold otherwise might well destroy property rights without an adjudication on the merits (*276 Cal. App. 2d Supp. 831, 834*).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral Overview

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 131 JUDGMENTS
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13-131 California Points & Authorities § 131.160

§ 131.160 Opposing Petition for Determination of Third Party's Claim of Interest--Third Party's Interest or Lien Is Superior to Judgment Creditor's Lien [Code Civ. Proc. §§ 720.110, 720.220]

[1] FORM

[*Caption. See § 131.159[1].*]

THE COURT SHOULD DETERMINE THE THIRD-PARTY CLAIM OF _____ [*name*] IN FAVOR OF THE CLAIMANT BECAUSE THE CLAIMANT's _____ [INTEREST *or* LIEN] IS SUPERIOR TO THE CREDITOR's LIEN ON THE PROPERTY.

A. Third Party's Interest Is Superior to Creditor's Lien. A third person claiming ownership or the right of possession of property may make a third-party claim if the _____ [interest *or* security interest *or* lien] claimed is superior to the creditor's lien on the property, when _____ [*set forth circumstances of levy, as provided in Code Civ. Proc. §§ 720.110, 720.210, e.g.,* personal property has been levied on under a writ of execution] (*Code Civ. Proc. § 720.110 or 720.210*).

B. Trial Court's Judgment. At the conclusion of the hearing, the court is required to give judgment determining the validity of the third-party claim and may order the disposition of the property or its proceeds in accordance with the respective interests of the parties [*Code Civ. Proc. § 720.390*].

C. Decision on Substantial Evidence Will Not Be Disturbed. No findings of fact are required in third-party claim proceedings. If there is substantial evidence to support implied trial court findings in favor of a claimant in third-party claim proceedings, these findings are conclusive on an appellate court (*Code Civ. Proc. § 720.400*; *Chico Tractor, Inc. v. Coyle (1963) 215 Cal. App. 2d 483, 486-487, 30 Cal. Rptr. 196*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in opposition to a judgment creditor's petition to the trial court to determine the validity of the third-party claim and the proper disposition of the property that is the subject of the claim. Either the judgment creditor or the third person is entitled to petition the court for determination [*Code Civ. Proc. § 720.310*]. If the third person is petitioning the court the determination, the foregoing form may be modified for use in support of the petition.

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should refer to facts that support the claimant's contention that he or she has an interest or lien that is superior to the creditor's lien on the property.

[3] Discussion of Authorities

[a] Decision on Substantial Evidence Will Not Be Disturbed

In ***Chico Tractor, Inc. v. Coyle*** *(1963) 215 Cal. App. 2d 483, 30 Cal. Rptr. 196* , after obtaining a default judgment, the judgment creditor levied execution on a forklift. A third-party claim was filed asserting title to the equipment. The trial court, after hearing evidence, found that the claimants were the owners of the forklift and ordered its release to them. The judgment creditor appealed, contending, among other things, that a sale of the forklift by the claimants to the judgment debtor was absolute rather than conditional.

The court of appeal affirmed. The court stated that the parties' intent, a factual question, determined whether the original sale was absolute or conditional. Since findings are not required in third-party claim proceedings, the appellate court must assume that the trial court made all findings essential to support the judgment. If there is substantial evidence to support implied trial court findings in third-party claim proceedings, these findings are conclusive on the appellate court. The trial court adjudged that the third parties were owners of the forklift at the time of the execution levy. Implicit but essential foundations for its decision were findings that the transaction between them and the judgment debtor was a conditional sale and that no later conduct of the sellers caused loss of their reserved rights. The court concluded that the settled statement between the parties revealed no absence of substantial evidence to support the trial court's findings (*215 Cal. App. 2d 483, 486-487)* .

Note that *Chico* was decided prior to the adoption of the Execution of Judgments Law in 1982, and was based on proceedings existing under the former statutes. It is arguable, however, that the rule of law set forth in the case remains persuasive authority in proceedings under the new statute.

[4] Additional Authorities

[a] Decision on Substantial Evidence Will Not Be Disturbed

Bruhnke v. Bowlus-Teller Mfg. Co. (1937) 21 Cal. App. 2d 317, 69 P.2d 208 , involved a proceeding under former Code Civ. Proc. § 689 [*now see Code Civ. Proc. § 720.010 et seq.*] to determine the rights of the judgment creditor as

against a third-party claimant, in three bank accounts. The sole issue of fact in the trial was regarding the ownership of the accounts. The trial court entered judgment in favor of the third-party claimant and the judgment creditor appealed. The court of appeal affirmed. The court stated that plaintiff did not contend that there was no substantial evidence to sustain the trial court's finding. No legal questions were presented for the reviewing court's determination, but only questions of fact with which the court must not concern itself (*21 Cal. App. 2d 317, 318)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureRemediesJudgment LiensGeneral Overview

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 131A JUDICIAL ARBITRATION

13-131A California Points & Authorities 131A.syn

§ 131A.syn Synopsis to Chapter 131A: JUDICIAL ARBITRATION

§ 131A.01 Scope of Chapter

§ 131A.02 Governing Law

[1] In General

[2] Private Arbitration and Judicial Arbitration Compared

[3] When Judicial Arbitration Is Required or Available

[a] Judicial Arbitration Required

[b] Judicial Arbitration Available

[4] Actions Exempt From Judicial Arbitration

[5] When Exemption Is Determined

[6] Suspension of Time Required to Bring Action to Trial

[7] Qualification and Selection of Arbitrator

[8] Powers of Arbitrators and Conduct of Hearing

[9] The Award

[10] Trial de Novo

[a] Right to Trial de Novo

[b] Costs Imposed If Result at Trial Is Less Favorable Than Award

[11] Trial Court Delay Reduction Act

§ 131A.03 How to Use the Forms in This Chapter

[1] Page Limits on Points and Authorities

[2] Using the Forms to Build a Draft Memorandum

§ 131A.04 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

[2] Related Points and Authorities

§§ 131A.05-131A.09 [Reserved]

§ 131A.10 Case Should Not Have Been Referred to Judicial Arbitration

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Action Is Not Subject to Judicial Arbitration Because Amount in Controversy Exceeds $50,000

[b] Action Is Not Subject to Judicial Arbitration Because Party Over Seventy Years of Age Is Entitled to Preference in Trial Setting

§ 131A.11 Attorney Did Not Have Authority to Stipulate to Judicial Arbitration

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Attorney Had No Authority to Stipulate to Judicial Arbitration

§ 131A.12 Party May Withdraw Election for Judicial Arbitration

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Trial Court May Allow Party to Withdraw Case From Arbitration

§§ 131A.13-131A.99 [Reserved]

§ 131A.100 Supporting Motion to Vacate [Judgment Based on] Judicial Arbitration Award

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Statutory Basis for Vacating Award

[b] Arbitrator Failed to Disclose Ground for Disqualification

§ 131A.101 Supporting Motion to Vacate [Judgment Based on] Judicial Arbitration Award on Grounds of Mistake, Inadvertence, Surprise or [Excusable] Neglect

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Grounds for Relief

[b] Award Filed Without Proper Notice Constitutes Surprise

[c] Attorney's Neglect Requires Court to Vacate Judgment

§§ 131A.102-131A.119 [Reserved]

§ 131A.120 Arbitrator's Duty to Disclose Personal and Professional Relationships and Facts that Some Might Believe Constitute Bias

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

§§ 131A.121-131A.149 [Reserved]

§ 131A.150 Opposing Motion to Vacate [Judgment Based on] Judicial Arbitration Award on Grounds of Mistake, Inadvertence, Surprise or [Excusable] Neglect

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Case Does Not Invoke Mandatory Provision of Code of Civil Procedure Section 473(b)

[b] Attorney's Press of Business Does Not Constitute Excusable Neglect

[c] Attorney's Failure to Determine When Award Was Filed Does Not Constitute Excusable Neglect

§§ 131A.151-131A.199 [Reserved]

§ 131A.200 Supporting Motion to Vacate Voluntary Dismissal and Enter Judgment on Judicial Arbitration Award

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Effect of Party's Dismissal of Action After Requesting Trial de Novo

[b] As Prevailing Party Under Arbitration Award, [Plaintiff or Defendant] Is Entitled to Attorney's Fees

§§ 131A.201-131A.299 [Reserved]

§ 131A.300 Attorney's Fees Included as Costs After Less Favorable Result on Trial de Novo

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Attorney's Fees Award Is Mandatory Even if Statute Authorizing Them Is Discretionary

§ 131A.301 Costs and Fees May Be Awarded to Party Who Also Requested Trial de Novo

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] When Two Parties Request Trial de Novo

[b] When Attempt to Request Partial Trial de Novo Fails

§ 131A.302 Labor Code Section 3856 Entitles Plaintiff to Reasonable Litigation Expense Even After Less Favorable Result on Trial de Novo

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Workers' Compensation Statute to Be Given Effect

§§ 131A.303-131A.349 [Reserved]

§ 131A.350 Employee Obtained More Favorable Result on Trial de Novo

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Employee Obtained More Favorable Result on Trial de Novo

California Points & Authorities

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 131A JUDICIAL ARBITRATION
PART I. INTRODUCTION

13-131A California Points & Authorities § 131A.01

§ 131A.01 Scope of Chapter

This chapter contains forms of points and authorities addressing the following aspects of judicial ("court-annexed") arbitration:

- Exemption of actions from judicial arbitration (*see § 131A.10* et seq.).
- Grounds for setting aside a judgment based on a judicial arbitration award (*see § 131A.100* et seq.).
- Consequences of voluntary dismissal of the action by the party who requested trial de novo after an arbitration award was made (*see § 131A.200* et seq.).
- Penalties imposed on a party who obtains a result on trial de novo that is less favorable than the arbitration award (*see § 131A.300* et seq.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMandatory ADR

California Points & Authorities

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 131A JUDICIAL ARBITRATION
PART I. INTRODUCTION

13-131A California Points & Authorities § 131A.02

§ 131A.02 Governing Law

[1] In General

Code Civ. Proc. §§ 1141.10-1141.31, Cal. Rules of Ct., Rules 3.810 et seq., and local rules of court govern judicial (non-binding) arbitration.

Code Civ. Proc. § 128.5, relating to sanctions for frivolous or delaying tactics in actions commenced prior to January 1, 1995, is by its terms applicable to judicial arbitration. *Code Civ. Proc. § 128.7*, relating to sanctions for frivolous or delaying tactics in actions commenced on or after January 1, 1995, does not expressly apply to judicial arbitration. *Code Civ. Proc. § 128.6*, which will reinstate the provisions of *Code Civ. Proc. § 128.5*, and will thus apply to judicial arbitration, would have become operative January 1, 2003, but the Legislature extended the repeal date of *Code Civ. Proc. § 128.7* until January 1, 2006 [*see Code Civ. Proc. §§ 128.6(f), 128.7(j)*; Stats 2002, ch. 491].

Code Civ. Proc. § 575.2 authorizes a trial court to impose sanctions for noncompliance with local rules. The trial court may strike out all or any part of the pleadings of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party, or impose other penalties of a lesser nature otherwise provided by law, and may order that party or his or her counsel to pay the moving party the reasonable expenses in making that motion, including reasonable attorney's fees. One such local rule is Sacramento Co. Super. Ct. Rules, Rule 12.04A which provides that for willful failure to meaningfully participate in arbitration proceedings, the court, on noticed motion, may impose sanctions including arbitrator's fees, attorney's fees, and costs. Taken together, these have been held to allow imposition of sanctions against an attorney who failed to meaningfully participate in judicial arbitration [*see Rietveld v. Rosebud Storage Partners, L.P. (2004) 121 Cal. App. 4th 250, 255257, 16 Cal. Rptr. 3d 791* (sanction was equal to fees and costs incurred by the other party in arbitration and in making the motion for sanctions, but party was allowed trial de novo)].

[2] Private Arbitration and Judicial Arbitration Compared

Code Civ. Proc. § 1280 et seq., the general arbitration statutes, govern private arbitration conducted pursuant to an agreement between the parties. *Code Civ. Proc. § 1141.10 et seq.*, the Judicial Arbitration Act, governs "court-annexed" arbitration. The two statutory schemes are mutually exclusive and independent of each other [*Code Civ. Proc. §*

1141.30; *Porreco v. Red Top RV Center (1989) 216 Cal. App. 3d 113, 118-119, 264 Cal. Rptr. 609]* .

The primary difference is that private arbitration is binding [*see Code Civ. Proc. § 1285 et seq.* (limited grounds for vacating award or opposing its confirmation)], whereas judicial arbitration offers the opportunity for a de novo trial after arbitration has been completed [*Code Civ. Proc. § 1141.20*], although the parties may waive this right [*Blanton v. Womancare, Inc. (1985) 38 Cal. 3d 396, 401-402, 212 Cal. Rptr. 151, 696 P.2d 645* ; *Porreco v. Red Top RV Center (1989) 216 Cal. App. 3d 113, 119-120, 264 Cal. Rptr. 609]* . Other differences include the following [*Porreco v. Red Top RV Center (1989) 216 Cal. App. 3d 113, 119-120, 264 Cal. Rptr. 609]* :

- Parties to private arbitration bear the cost of arbitration; judicial arbitration is at public expense, except that parties who stipulate to judicial arbitration of an action not otherwise subject to judicial arbitration pay the arbitrator's compensation in equal shares [*Code Civ. Proc. § 1141.28(b)*].

- Private arbitration allows discovery only in personal injury cases unless the parties' agreement provides otherwise; parties to judicial arbitration have full discovery rights [*compare Cal. Rules of Ct., Rule 3.822 with Code Civ. Proc. § 1283.1*]; and

- Private arbitration generally dispenses with the rules of evidence; judicial arbitration follows those rules with certain modifications [*compare Code Civ. Proc. § 1282.2(d) with Cal. Rules of Ct., Rule 3.823(b)*].

- A private arbitration award will not support a cause of action for malicious prosecution [*Sagonowsky v. More (1998) 64 Cal. App. 4th 122, 125, 134, 75 Cal. Rptr. 2d 118]* , but a judicial arbitration award will [see *Nicholson v. Fazeli (2003) 113 Cal. App. 4th 1091, 1094, 1100, 1102-1103, 6 Cal. Rptr. 3d 881* (malicious prosecution action stated after judicial arbitration of character of marital property pursuant to *Fam. Code § 2554*)].

[3] When Judicial Arbitration Is Required or Available

[a] Judicial Arbitration Required

Code Civ. Proc. §§ 1141.11, 1141.27 and *Cal. Rules of Ct., Rule 3.811(a)* require judicial arbitration of the following actions, including those in which a public agency or public entity is a party:

- In superior courts with 18 or more judges all nonexempt unlimited civil cases, in which the amount in controversy does not exceed $50,000 for each plaintiff [*see Code Civ. Proc. § 85* (defining "limited civil case")]. In a county in which the superior court has fewer than 18 judges this requirement applies only if local rule so provides.

- All nonexempt limited civil cases [*see Code Civ. Proc. § 85*] required by local rule to be submitted to arbitration, except small claims court actions, actions for unlawful detainer [*see Code Civ. Proc. § 1161*], or actions brought under *Civ. Code § 1781*, relating to deceptive practices under the Consumer Legal Remedies Act (*Civ. Code § 1770 et seq.*). If a court provides for judicial arbitration in this manner, cases arbitrated must include actions against a single defendant (as defined in *Code Civ. Proc. § 1141.11(d)*) arising out of a motor vehicle collision.

[b] Judicial Arbitration Available

Code Civ. Proc. § 1141.12 and *Cal. Rules of Ct., Rule 3.811(a)* allow judicial arbitration of the following actions:

- Any action in any court on the parties' stipulation, regardless of the amount in controversy. For a form of stipulation, see California Forms of Pleading and Practice, Ch. 36, *Judicial Arbitration* (Matthew Bender).

- Any action in any court in which all plaintiffs file an election for judicial arbitration agreeing that the award will not exceed $50,000. For a form of election, see California Forms of Pleading and Practice, Ch. 36, *Judicial Arbitration* (Matthew Bender).

[4] Actions Exempt From Judicial Arbitration

Code Civ. Proc. § 1141.13 and *Cal. Rules of Ct., Rule 3.811(b)* exempt the following types of actions from judicial arbitration:

- Actions including a prayer for equitable relief that is not frivolous or insubstantial.

- Class actions.

- Small claims actions or appeals therefrom as trials de novo.

- Unlawful detainer proceedings.

- Family law proceedings, except as provided in *Fam. Code § 2554* (character, valuation, and division of property).

- Cases not amenable to arbitration because arbitration would not reduce the probable time and expense necessary to resolve the litigation.

- Categories of cases not considered amenable by local rule as not amenable to arbitration on the grounds set forth, *above*.

- Cases involving multiple causes of action or a cross complaint if the court determines any cause or the cross complaint exceeds $50,000.

[5] When Exemption Is Determined

Code Civ. Proc. § 1141.16(a) require the determination whether an action be submitted to judicial arbitration to be made at a case management conference, or by review of the written submissions of the parties, after all parties have appeared or defaulted. At that conference the court determines the amount in controversy and whether any prayer for equitable relief is frivolous or insubstantial. The determination regarding equitable relief is nonappealable.

[6] Suspension of Time Required to Bring Action to Trial

Except as provided in *Code Civ. Proc. § 1141.17(b)*, submission of an action to judicial arbitration does not suspend the running of the time periods specified in *Code Civ. Proc. § 583.110 et seq.* for bringing the matter to trial [*Code Civ. Proc. § 1141.17(a)*].

If an action is or remains submitted to judicial arbitration more than four years and six months after it was filed, the time beginning four years and six months after the action was filed and ending on the date on with a request for trial de novo is filed, shall not be included in computing the five-year period under *Code Civ. Proc. § 583.310* [*Code Civ. Proc. § 1141.17(b)*].

For forms of points and authorities applying this tolling period in the context of dismissal of an action for delay in prosecution, see Ch. 90, *Dismissal* .

[7] Qualification and Selection of Arbitrator

Code Civ. Proc. § 1141.18 and *Cal. Rules of Ct., Rules 3.813 to 3.816* govern qualification and selection of arbitrators. The parties may stipulate to a particular arbitrator [*Cal. Rules of Ct., Rule 3.815(a)*]. For a form of stipulation for judicial arbitration that includes a stipulated designation of an arbitrator and the arbitrator's consent thereto, see California Forms of Pleading and Practice, Ch. 36, *Judicial Arbitration* (Matthew Bender).

A party may disqualify an arbitrator on the grounds and by the procedures specified in *Code Civ. Proc. § 170.1* or *Code Civ. Proc. § 170.6*, applicable tojudges [*Code Civ. Proc. § 1141.18(d)*] and as provided by *Cal. Rules of Ct., Rule 3.816*. For forms for use to reject or disqualify an arbitrator, see California Forms of Pleading and Practice, Ch. 36, *Judicial Arbitration* (Matthew Bender).

[8] Powers of Arbitrators and Conduct of Hearing

Code Civ. Proc. § 1141.19 and *Cal. Rules of Ct., Rules 3.817-3.824* govern powers of the arbitrator, discovery, and the conduct of the arbitration hearing.

Cal. Rules of Ct., Rule 3.818(a), (b) provide for continuance on the parties' stipulation with the arbitrator's consent or for good cause shown on a party's motion. For a form of motion for continuance, see California Forms of Pleading and Practice, Ch. 36, *Judicial Arbitration* (Matthew Bender).

[9] The Award

Judicial arbitration awards are governed by *Code Civ. Proc. §§ 1141.20, 1141.22, 1141.23, 1141.26* and *Cal. Rules of Ct., Rule 3.825*.

The award may be in excess of $50,000 [*Code Civ. Proc. § 1141.26*].

The arbitrator must file the award, with proof of service on each party to the arbitration, with the clerk of the court within 10 days after the conclusion of the arbitration hearing [*Code Civ. Proc. § 1141.23*; *Cal. Rules of Ct., Rule 3.825(b)* (extension allowed by court)]. The award has the same force and effect as a judgment in any civil action or proceeding. Thus, the prevailing party is entitled to his or her costs pursuant to *Code Civ. Proc. § 1032(b)* [*Code Civ. Proc. § 1141.23*; *Cal. Rules of Ct., Rule Rules 3.825(a)(1), 3.827(c)*]. If the arbitrator fails to award costs, the prevailing party may be able file a memorandum of costs to have the court make the award [*see Guevara v. Brand (1992) 8 Cal. App. 4th 995, 997-998, 10 Cal. Rptr. 2d 780* ; *but see Wagy v. Brown (1994) 24 Cal. App. 4th 1, 7-9, 29 Cal. Rptr. 2d 48* (arbitration award that does not award costs constitutes order by arbitrator that each side bear its own costs)]. For memoranda for use when the arbitrator failed to make a cost award, see *Ch. 60, Costs, §§ 60.15, 60.104*.

If no request for trial de novo is filed within 30 days after the award was filed with the court, the award becomes final and is entered as a judgment [*Code Civ. Proc. §§ 1141.20, 1141.23*]. The award is not subject to appeal and it may not be attacked or set aside except as provided in *Code Civ. Proc. §§ 473* or *1286.2* or Judicial Council rule [*Code Civ. Proc. § 1141.23*; *Cal. Rules of Ct., Rules 3.827(c), 3.828(a), (d)*].

For a form of points and authorities supporting a motion to vacate the award on the grounds set forth in *Code Civ. Proc. § 1286.2* and *Cal. Rules of Ct., Rule 3.828(a)*, see *§ 131A.100*. For forms of points and authorities supporting and opposing a motion to vacate the award on the grounds set forth in *Code Civ. Proc. § 473* (mistake, inadvertence,

excusable neglect), see *§§ 131A.101* and *131A.150*, respectively.

[10] Trial de Novo

[a] Right to Trial de Novo

Trial de novo is governed by *Code Civ. Proc. §§ 1141.20, 1141.21* and *Cal. Rules of Ct., Rule 3.826*.

A party may file a request for trial de novo within 30 days of the filing of the award, in which event the case must proceed as provided under an applicable case management order. If no pending order provides for the prosecution of the case after arbitration, the court must promptly schedule a case management conference [*Code Civ. Proc. § 1141.20*; *Cal. Rules of Ct., Rule 3.826(a), (b)*; *see Karamzai v. Digitcom (1996) 51 Cal. App. 4th 547, 551, 59 Cal. Rptr. 2d 139* (court has no authority to shorten 30-day period for requesting trial de novo)]. Although cases have held that a party's timely request for trial de novo cannot be denied, even as a sanction for that party's failure to participate in the arbitration [*Lyons v. Wickhorst (1986) 42 Cal. 3d 911, 919, 231 Cal. Rptr. 738, 727 P.2d 1019* ; *Salowitz Organization, Inc. v. Traditional Industries, Inc. (1990) 219 Cal. App. 3d 797, 804-806, 268 Cal. Rptr. 493* (only sanction that may be imposed against party who did not participate in the arbitration proceeding is that provided in *Code Civ. Proc. § 128.5*, which is not applicable to actions commenced on or after January 1, 1995); *see* [1], *above*], neither of those cases considered *Code Civ. Proc. § 575.2*, enacted in 1982 [*see* Stats 1892, ch. 1406], and discussed at [1], *above*, which would seem to authorize this sanction.

At the subsequent trial, no mention may be made of the arbitration award or proceedings or any evidence adduced at the arbitration hearing. Any such reference constitutes an irregularity in the proceedings for purposes of *Code Civ. Proc. § 657* (new trial) [*Code Civ. Proc. § 1141.25*; *Cal. Rules of Ct., Rule 3.826(c)*].

Once a timely request for trial de novo has been filed, it cannot be unilaterally withdrawn [*Marracino v. Brandstetter (1993) 14 Cal. App. 4th 543, 546-548, 17 Cal. Rptr. 2d 700]* . For a form of points and authorities that may be used in response to an attempt to circumvent this rule by voluntary dismissal of the action by the party who requested trial de novo, see *§ 131A.200[1]*.

[b] Costs Imposed If Result at Trial Is Less Favorable Than Award

Code Civ. Proc. §§ 1141.21, 1141.26 and *Cal. Rules of Ct., Rule 3.826(d)* govern imposition of costs against a party who is less successful in the subsequent trial than in the judicial arbitration. If the judgment on trial de novo is not more favorable in terms of the amount of damages or the type of relief granted for theparty electing trial de novo, that party must be ordered to pay a number of fees and expenses unless the court find that such payment would constitute substantial economic hardship [*Code Civ. Proc. § 1141.21*; *see Cal. Rules of Ct., Rule 3.826(d)*; *see § 131A.300[1]*, Paragraph A].

If two or more parties elect trial de novo, each is subject to being held liable for costs under *Code Civ. Proc. § 1141.21* if he or she is less successful in the trial de novo [*Boyd v. Oscar Fisher Co. (1989) 210 Cal. App. 3d 368, 382, 258 Cal. Rptr. 473]* .

[11] Trial Court Delay Reduction Act

All California trial courts are required to implement delay reduction programs [*Gov. Code §§ 68605.5, 68620*].

Gov. Code § 68616(g) provides that a case may not be referred to arbitration prior to 210 days after the filing of the complaint, exclusive of the stipulated period provided for in *Gov. Code § 68616(d)*, which permits the parties, within 30 days of service of responsive pleadings, to stipulate to continuance of 30 days or less.

Local rules enacted to implement the Trial Court Delay Reduction Act may, in many situations, affect the procedure for judicial arbitration. For example, Los Angeles and Alameda County local rules provide procedure and time limits relating to mandatory arbitration [*see* Los Angeles Co. Super. Ct. Rules, Rule 12.0 et seq.; Alameda Co. Coordinated Local Ct. Rules, Rule 4.4(2)(F), (S)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMandatory ADR

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13-131A California Points & Authorities § 131A.03

§ 131A.03 How to Use the Forms in This Chapter

[1] Page Limits on Points and Authorities

One of the more significant drafting requirements to keep in mind are page limits: supporting and opposing memoranda of points and authorities must not exceed 15 pages, or 20 pages in a summary judgment proceeding. A reply or closing memorandum may not exceed 10 pages in length [*see Cal. Rules of Ct., Rule 3.1113(d)*]. Exhibits, declarations, attachments, and tables of content are not counted. Any party must obtain leave of court to file a longer memorandum [*see* Cal. Rules of Ct., Rule 3.1113(d), *(e)*]. These and other drafting requirements are discussed in further detail in *Ch. 1, Writing Legal Memoranda and Briefs, § 1.05*.

[2] Using the Forms to Build a Draft Memorandum

The forms included in this chapter are designed to be combined with other points and authorities to form a complete memorandum. For detailed discussion on how to select and use the forms in the publication to build a draft memorandum and complete the draft, with detailed discussion of all drafting requirements and strategic or stylistic considerations, see *Ch. 1, Writing Legal Memoranda and Briefs, §§ 1.03*-1.06. For a skeletal form of memorandum for use in creating a properly formatted outline in which to compile relevant forms from this publication, see *Ch. 1, Writing Legal Memoranda and Briefs, § 1.10*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMandatory ADR

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13-131A California Points & Authorities § 131A.04

§ 131A.04 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

For detailed legal background discussion, research guides, procedural checklists, and practice forms of motions and other papers relating to judicial arbitration, see California Forms of Pleading and Practice, Ch. 36, *Judicial Arbitration* (Matthew Bender).

For detailed legal background discussion, research guides, procedural checklists, and practice forms of motions and other papers relating costs to which a prevailing party in judicial arbitration is entitled, see California Forms of Pleading and Practice, Ch. 174, *Costs and Attorney's Fees* (Matthew Bender).

For detailed legal background discussion, research guides, procedural checklists, and practice forms of motions and other papers relating to sanctions under Code Civ. Proc. §§ 128.5 and 128.7, see California Forms of Pleading and Practice, Ch. 510, *Sanctions* (Matthew Bender).

[2] Related Points and Authorities

For memoranda for use when the arbitrator failed to include the prevailing party's costs in the award, see Ch. 60, *Costs* .

For discussion and forms of memoranda relating to dismissal of an action submitted to judicial arbitration for delay in prosecution, see Ch. 90, *Dismissal* .

For memoranda of points and authorities supporting and opposing motions for sanctions for frivolous or delaying tactics under *Code Civ. Proc. § 128.5*, Ch. 207, *Sanctions*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMandatory ADR

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13-131A California Points & Authorities §§ 131A.05-131A.09

[Reserved]

§§ 131A.05[Reserved]

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PART II. FORMS
PART A. Determining Whether Judicial Arbitration Is Required or Authorized

13-131A California Points & Authorities § 131A.10

§ 131A.10 Case Should Not Have Been Referred to Judicial Arbitration

[1] FORM

THIS CASE SHOULD BE EXEMPTED FROM JUDICIAL ARBITRATION [AS BEING NOT AMENABLE THERETO], BECAUSE _____ [*specify reason, e.g.,* ARBITRATION WILL NOT REDUCE THE PROBABLE TIME AND EXPENSE NECESSARY TO RESOLVE THE LITIGATION IN THAT _____ (*indicate factual basis of contention*)].

[*Optional*] **A. Case Is Not Amenable to Arbitration Because of Time and Expense Involved.** A case otherwise subject to judicial arbitration is exempt therefrom if it is found by the court not to be amenable to arbitration on the ground that arbitration would not reduce the probable time and expense necessary to resolve the litigation (*Cal. Rules of Ct., Rule 3.811(b)(6)*).

[*Optional*] **B. Case Is Not Subject to Judicial Arbitration Because Amount in Controversy Exceeds $50,000.** A case [involving multiple causes of action or a cross-complaint] is not subject to judicial arbitration if, in the opinion of the court, the amount in controversy for each plaintiff [as to any given cause of action of cross-complaint] exceeds $50,000. In determining the amount in controversy, the judge shall not consider questions of liability or comparative negligence or other defenses. The determination shall be based on the total amount of damages. In determining the amount in controversy, the judge cannot rely on the pleadings. If the damages arguably exceed $50,000, the matter should not be referred to judicial arbitration unless plaintiff fails, on request, to make an offer of proof regarding damages or the judge has some factual basis for his or her opinion that the damages alleged are inflated (*Code Civ. Proc. §§ 1141.11(a), (b), 1141.16(a)*; [*Cal. Rules of Ct., Rule 3.811(b)(8)*]; *Sharples v. Chole (1994) 29 Cal. App. 4th 1213, 1219-1220, 35 Cal. Rptr. 2d 208*).

[*Optional*] **C. Action Is Not Subject to Judicial Arbitration Because Party Over Seventy Years of Age Is Entitled to Preference in Trial Setting.** *Code of Civil Procedure Section 36(a),* which seeks to ensure that older litigants have their day in court, is mandatory, absolute, and controlling; and in any conflict between them, the judicial arbitration statutes must yield. Thus, an action involving a party who is over the age of 70 years, who files a motion for preference

under *Code of Civil Procedure Section 36(a)*, and who is qualified for that preference, may not be ordered submitted to judicial arbitration (*Code Civ. Proc. § 36(a)*; *Vinokur v. Superior Court (1988) 198 Cal. App. 3d 500, 503, 243 Cal. Rptr. 683*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a motion to vacate or reconsider an order referring an action to judicial arbitration. Neither *Code Civ. Proc. §§ 1141.10-1141.31* nor *Cal. Rules of Ct., Rules 3.810 et seq.* provide for a motion to determine whether an action should be submitted to judicial arbitration. That determination and any resulting referral are made at the initial case management conference required by *Rules 3.722(a), 3.727(6). 3.728(1), (2)* or based on review of written submissions by the parties [*see Code Civ. Proc. § 1141.16(a)*; *Cal. Rules of Ct., Rule 3.812(d)* (determination to be made at first case management conference after all parties have appeared or defaulted)]. The case management order controls subsequent proceedings until it is modified by subsequent order [*Cal. Rules of Ct., Rule 3.730*]. This form of points and authorities is not designed to provide a complete memorandum, but should be combined with a form, such as in Ch. 180, *Pretrial Proceedings*, § 181.10, which sets forth the general authority for amending an order [*see Code Civ. Proc. §§ 473(a), 576*]. Counsel may wish to modify the form to conform to any applicable local rule and to include any applicable local rule as authority for his or her particular motion.

Counsel should use any of the optional paragraphs (and optional clauses shown within brackets in those paragraphs) that are applicable to the particular case. Optional Paragraph C is appropriate for use only if a petition for preference has already been made or is being made simultaneously with the motion to exempt the matter from judicial arbitration and the declaration in support of the preference establishes the party's entitlement to the preference [*see Code Civ. Proc. § 36(a)*]. Additional grounds for exempting a matter from judicial arbitration are set forth at *§ 131A.02[4]*.

Cal. Rules of Ct., Rule 3.812(c) provides that after all plaintiffs have elected judicial arbitration, a cross complainant may make a motion, within 15 days of notice of that election, for determination that the amount in controversy is over $50,000. Optional Paragraph B, including the bracketed references to cross-complaints, may be used to support such a motion. For a form of motion by a cross complainant for determination of the amount in controversy, see California Forms of Pleading and Practice, Ch. 36, *Judicial Arbitration* (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, if the moving party seeks to demonstrate that time and expense render the matter not amenable to judicial arbitration, the motion would be accompanied by a declaration stating in what respects the action willtake such an amount of time and expense that arbitration would not be appropriate.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], or otherwise by affidavits or declarations [*see Sharples v. Chole (1994) 29 Cal. App. 4th 1213, 1219-1220, 35 Cal. Rptr. 2d 208* (in determining amount in controversy, court must consider factual showing outside the pleadings)]. Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant or declarant necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For detailed legal background discussion, research guides, procedural checklists, and practice forms of motions relating to judicial arbitration, including a form of cross complainant's motion under *Cal. Rules of Ct., Rule 3.812(c)* for determination of the amount in controversy, see California Forms of Pleading and Practice, Ch. 36, *Judicial Arbitration* (Matthew Bender).

[d] Related Points and Authorities

For memoranda of points and authorities addressing the right of a party over the age of 70 years to trial preference, which counsel may need to combine with this form, see Ch. 180, *Pretrial Proceedings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Action Is Not Subject to Judicial Arbitration Because Amount in Controversy Exceeds $50,000

Code Civ. Proc. § 1141.16(a) provides that the determination of the amount in controversy shall be based on the total amount of damages and prohibits the judge from considering questions of liability, comparative negligence, and other defenses.

Cal. Rules of Ct., Rule 3.811(b) indicates that the court is to determine whether the amount in controversy as to any given cause of action or cross complaint will exceed $50,000 and thus be exempt from arbitration.

NOTE:

Sharples v. Chole (1994) 29 Cal. App. 4th 1213, 35 Cal. Rptr. 2d 208 , cited in paragraph B of the form and discussed *below*, may be somewhat limited since revision of *Code Civ. Proc. § 1141.16(a)* by Stats 2003, ch. 449 § 12, to provide that the amount in controversy may be determined at a case management conference or based on "review of the written submissions of the parties, as provided in rules adopted by the Judicial Council." presumably the case management conference statements submitted pursuant to *Cal. Rule of Ct., Rule 3.811(b)*; [*see* Judicial Council Form CM-110: Case Management Conference Statement].

Sharples v. Chole *(1994) 29 Cal. App. 4th 1213, 35 Cal. Rptr. 2d 208* , was a medical malpractice action in which plaintiff alleged damages for physical and emotional harm, medical expenses, loss of work, and general damages in amounts not yet ascertained. Plaintiff's at issue memorandum indicated that the matter was exempt from judicial arbitration because damages were in excess of $50,000. Defendant's response form indicated that the matter was suitable for judicial arbitration. At an unreported arbitration conference, the matter was ordered to judicial arbitration with no limit on the amount of the award. Arbitration resulted in an award for defendant. Trial de novo resulted in a defense verdict; and defendant filed a cost bill. Plaintiff moved to strike costs contending that most of them were due to plaintiff's failure to obtain a judgment more favorable than the arbitration award as provided in *Code Civ. Proc. § 1141.21*, and that section 1141.21 was not applicable because the matter was exempt from judicial arbitration. The trial court denied the motion to strike. Plaintiff appealed.

The court of appeal reversed insofar as the judgment awarded costs under *Code Civ. Proc. § 1141.21*, and affirmed in other respects, finding that the trial court either failed to exercise its discretion or abused its discretion in determining that the matter should be assigned to judicial arbitration (*29 Cal. App. 4th 1213, 1220)* . The court noted that the words "in the opinion of the court" in *Code Civ. Proc. § 1141.11* require the court to exercise discretion in determining the amount in controversy (*29 Cal. App. 4th 1213, 1218)* . That discretion is to be exercised at a conference, which implies

there is need for interaction between the parties and the court and for consideration of matters outside the pleadings. If the amount in controversy is disputed, the parties should offer representations in the nature of an offer of proof of damages. The trial court can form an opinion based on those representations (*29 Cal. App. 4th 1213, 1219)* . Thus, under *Code Civ. Proc. §§ 1141.11* and *1141.16*, the trial court must have some basis in fact for its opinion that the damages, considered in isolation, are significantly inflated and can be discounted to below $50,000. Here the record suggested no facts on whichthe trial court could have predicated such an opinion. Nor was there reason to believe plaintiff would have failed to make an offer of proof on inquiry by the court (*29 Cal. App. 4th 1213, 1220)* . Because the matter should not have been assigned to judicial arbitration, plaintiff should not have been required to pay the additional costs provided for in *Code Civ. Proc. § 1141.21* (*29 Cal. App. 4th 1213, 1221)* .

[b] Action Is Not Subject to Judicial Arbitration Because Party Over Seventy Years of Age Is Entitled to Preference in Trial Setting

Code Civ. Proc. § 36(a) provides that a party to a civil action who is over the age of 70 years may petition the court for a preference, which the court shall grant if the court finds both (1) that the party has a substantial interest in the action, and (2) that the party's health is such that a preference is necessary to prevent prejudicing the party's interest in the litigation.

Vinokur v. Superior Court *(1988) 198 Cal. App. 3d 500, 243 Cal. Rptr. 683* , was a personal injury action. The 75-year-old plaintiff moved for trial setting preference pursuant to *Code Civ. Proc. § 36(a)*. The court acknowledged the conflict between *Code Civ. Proc. § 36* and *Code Civ. Proc. § 1141.11*, determined that the arbitration statute prevailed, denied the motion for preference, and ordered the matter submitted to judicial arbitration. Plaintiff sought a writ of mandate compelling respondent court to grant the motion for trial preference.

The court of appeal issued the writ, finding that *Code Civ. Proc. § 36* was unquestionably the controlling authority (*198 Cal. App. 3d 500, 503)* . The court of appeal characterized the purpose of *Code Civ. Proc. § 36* as safeguarding a substantive right of a clearly defined class of litigants and the purpose of the judicial arbitration statutes as easing the burden on the courts by efficient resolution of minor civil disputes (*198 Cal. App. 3d 500, 502)* . Under these circumstances, the court said, *Code Civ. Proc. § 36*, which is mandatory and absolute, was unquestionably the controlling authority, and the competing interest of the arbitration statute had to yield in order to ensure that older litigants have their day in court. Efficient as judicial arbitration is, a party who seeks trial de novo after arbitration will have a trial date far beyond the 120 days from the date the case was ordered to arbitration. Moreover, the court could find no reason to accord trial preference to parties over 70 years of age when the amount in controversy exceeds $50,000 while denying that right when less money is at stake. The court concluded, citing *Code Civ. Proc. § 1141.11(a)*, that the filing of a motion for preference by a qualified litigant created a situation in which the use of arbitration was not possible, and that plaintiff was entitled to a trial date within 120 days of the date on which the motion for preference should have been granted (*198 Cal. App. 3d 500, 503)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMandatory ADR

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PART II. FORMS
PART A. Determining Whether Judicial Arbitration Is Required or Authorized

13-131A California Points & Authorities § 131A.11

§ 131A.11 Attorney Did Not Have Authority to Stipulate to Judicial Arbitration

[1] FORM

THE STIPULATION [AND ORDER] FOR JUDICIAL ARBITRATION OF THIS MATTER SHOULD BE SET ASIDE BECAUSE MOVING PARTY NEVER AUTHORIZED HIS/HER/ITS COUNSEL TO AGREE TO [BINDING] JUDICIAL ARBITRATION [OR TO WAIVE HIS/HER/ITS RIGHT TO TRIAL DE NOVO].

A. Attorney Had No Authority to Stipulate to Judicial Arbitration. An attorney retained to engage in litigation has no apparent authority to bind his or her client to an agreement to arbitrate [or to waive the right to trial de novo]. Thus, in the absence of the client's express authority to agree to [binding] judicial arbitration or the client's ratification of such an agreement, neither of which is involved here, the stipulation for judicial arbitration [and the waiver of the right to trial de novo] [and any resulting award], must be set aside (*Blanton v. Womancare, Inc. (1985) 38 Cal. 3d 396, 407, 212 Cal. Rptr. 151, 696 P.2d 645* ; *Sanker v. Brown (1985) 167 Cal. App. 3d 1144, 1146, 213 Cal. Rptr. 768*).

[2] Comments

[a] Use of Form

This form of points and authorities may be used in support of a motion to set aside a stipulation (and order) for judicial arbitration when the attorney who entered into the stipulation did not have the moving party's express authority to do so. Both cases cited in the form involved stipulations to binding judicial arbitration (i.e., the parties waived the right to trial de novo), but the language of the opinions is broader and refers to the lack of authority to stipulate to arbitration. For that reason, the language in the form relating to waiving trial de novo and to binding arbitration is optional.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the motion should be supported by declarations from both the moving party and the attorney who entered into the stipulation indicating that the moving party never agreed to stipulate to judicial arbitration and explaining how the

misunderstanding occurred or otherwise explain how the stipulation was made without the party's consent. The declarations should also explain when the party first learned of the stipulation and that steps to set the stipulation aside were taken as soon as possible after the client learned of the stipulation.

It is advisable for counsel to submit cognizable evidence in support of factualstatements, by request for judicial notice [*see Evid. Code § 450 et seq.*], or otherwise by affidavits or declarations. Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant or declarant necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For detailed legal background discussion, research guides, procedural checklists, and practice forms of motions, and a form of stipulation for judicial arbitration that includes signatures of all parties, see California Forms of Pleading and Practice, Ch. 36, *Judicial Arbitration* (Matthew Bender).

For detailed legal background discussion, research guides, procedural checklists, and practice forms of motions relating to stipulations, see California Forms of Pleading and Practice, Ch. 533, *Stipulations* (Matthew Bender).

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Attorney Had No Authority to Stipulate to Judicial Arbitration

Blanton v. Womancare, Inc. *(1985) 38 Cal. 3d 396, 212 Cal. Rptr. 151, 696 P.2d 645* , arose from a medical malpractice action. Although plaintiff did not want to arbitrate, she agreed with her attorney that she would arbitrate as long as her right to trial de novo was preserved. Her attorney, however, entered into a stipulation that the matter be submitted to binding arbitration. The court approved that stipulation, and ordered the matter to proceed to judicial arbitration. The order declared that the arbitration and award would be binding. Nearly three months later, when plaintiff learned of the stipulation, she fired her attorney, and hired another attorney who moved to set aside the stipulation. The trial court denied the motion, apparently in the belief that the stipulation involved a procedural matter within the scope of an attorney's unilateral discretion. Arbitration resulted in an award for the defense. Plaintiff's attorney filed a request for trial de novo, but in accordance with the stipulation and order, it was not accepted, and the award was entered as a judgment. Plaintiff appealed.

The Supreme Court reversed, and remanded to the trial court with orders to set aside the stipulation and the subsequent award and to order a trial de novo (*38 Cal. 3d 396, 399)* . Because the attorney acted not only without plaintiff's express authority, but contrary to her express instructions, plaintiff was bound by the agreement only if the attorney had either implied actual authority or apparent authority to enter into the agreement on her behalf (*38 Cal. 3d 396, 403)* . An attorney's authority, implied in law, includes the authority to enter into stipulations and agreements in all procedural and tactical matters, but stops short of authority to impair the client's substantial rights or the cause of action (*38 Cal. 3d 396, 404)* . Because defense counsel was unaware of plaintiff's objection to binding arbitration, the question in this case was one of apparent authority (*38 Cal. 3d 396, 405)* . Even in situations involving apparent authority, when an

attorney makes an agreement that compromises his or her client's substantial rights, the opposing party must ascertain whether the attorney has authority to make that agreement (*38 Cal. 3d 396, 406)* . The agreement to submit to binding arbitration did not constitute a tactical matter in pending litigation, but a diversion of the dispute from the judicial to the arbitral arena and a contract such as might be entered into in the absence of any litigation at all. Just as an attorney cannot enter into a contract on behalf of his or her client without express authority, an attorney does not have apparent authority to bind his or her client to an agreement for arbitration merely by virtue of his or her employment as attorney (*38 Cal. 3d 396, 407)* . A client who engages an attorney to litigate in a judicial forum has a right to be consulted, and his or her consent obtained, before the dispute is shifted to another forum (*38 Cal. 3d 396, 407-408)* . The Court also found there was no ratification (*38 Cal. 3d 396, 408)* .

Sanker v. Brown *(1985) 167 Cal. App. 3d 1144, 213 Cal. Rptr. 768* , was an action between joint tenants. Plaintiff sought partition of the property. Defendant cross-complained for a declaration of resulting trust. The parties, through their respective counsel, filed a stipulation for judicial arbitration, in which each party waived the right to trial de novo. The stipulation form only had signature lines for the attorneys, none for the parties. Arbitration resulted in an award for plaintiff directing defendant to sell the property and split the proceeds. Defendant filed a request for trial de novo, which was rejected on the ground of the stipulation. Defendant then moved to set aside the award on the ground that he had never agreed to waive the right to trial de novo and the attorney's stipulation waiving his right to trial de novo was the result of mistake or inadvertence. The motion was denied. Defendant appealed.

The court of appeal reversed with directions to the trial court to allow defendant to file a request for trial de novo within 30 days from the date the court of appeal'sopinion became final (*167 Cal. App. 3d 1144, 1147)* . Defendant's former attorney's declaration in support of the motion stated the attorney never intended the arbitration to be final; that the stipulation was prepared by plaintiff's counsel; that he did not notice that the stipulation submitted the matter to binding arbitration; and that this was a mistake on his part that was purely inadvertent. Defendant's declaration in support of the motion also stated that the arbitration was not to be binding. While this case was pending on appeal, the Supreme Court issued its opinion in *Blanton v. Womancare, Inc. (1985) 38 Cal. 3d 396, 212 Cal. Rptr. 151, 696 P.2d 645* (discussed *above*). The court of appeal cited *Blanton* for the proposition that an attorney, merely by virtue of his employment as such has no apparent authority to bind his client to an agreement for arbitration, and found that *Blanton* required reversal of this case. In both cases the client did not agree to binding arbitration and repudiated the stipulation on learning of it (*167 Cal. App. 3d 1144, 1146)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMandatory ADRLegal EthicsGeneral Overview

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 131A JUDICIAL ARBITRATION
PART II. FORMS
PART A. Determining Whether Judicial Arbitration Is Required or Authorized

13-131A California Points & Authorities § 131A.12

§ 131A.12 Party May Withdraw Election for Judicial Arbitration

[1] FORM

PLAINTIFF SHOULD BE ALLOWED TO WITHDRAW HIS/HER/ITS ELECTION FOR JUDICIAL ARBITRATION OF THIS MATTER BECAUSE GOOD CAUSE EXISTS THEREFOR IN THAT _____ [*explain reason for withdrawing election, e.g.*, PLAINTIFF HAS DISCOVERED A NEW CAUSE OF ACTION, WHICH WILL RENDER PREVIOUS ESTIMATES OF PLAINTIFF'S DAMAGES INADEQUATE AND CAUSE DAMAGES TO EXCEED THE $50,000 AGREED TO IN THE ELECTION].

A. Trial Court May Allow Party to Withdraw Case From Arbitration. The trial court has discretion to allow a party who has elected judicial arbitration [pursuant to *Code of Civil Procedure Section 1141.12(b)*] to withdraw the matter from arbitration on showing a good reason for withdrawal[, for example, if facts indicate a new cause of action] (*Invicta Plastics, U.S.A., Ltd. v. Superior Court (1981) 120 Cal. App. 3d 190, 192-194, 174 Cal. Rptr. 476*).

[2] Comments

[a] Use of Form

This form of points and authorities may be used in support of a motion to withdraw an election for judicial arbitration, and to withdraw the matter from the list of case assigned to arbitration when the plaintiff can show good cause for withdrawing the election [*see Code Civ. Proc. § 1141.16(c)* (earliest time arbitration hearing may be held); *Cal. Rules of Ct., Rule 3.812(b)* (election must be filed no later than time initial case management statement is filed, unless court orders otherwise)]. As a practical matter, it may be necessary to make another motion at the same time, such as a motion for leave to file an amended complaint [*see* Ch. 16, *Amended and Supplemental Pleadings*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, argument should focus on the reason for withdrawing the election and should explain why that reason was not known at the time

the election was made.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], or otherwise by affidavits or declarations. Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant or declarant necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For detailed legal background discussion, research guides, procedural checklists, and practice forms of motions, and a form of election for judicial arbitration, see California Forms of Pleading and Practice, Ch. 36, *Judicial Arbitration* (Matthew Bender).

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Trial Court May Allow Party to Withdraw Case From Arbitration

Invicta Plastics, U.S.A., Ltd. v. Superior Court *(1981) 120 Cal. App. 3d 190, 174 Cal. Rptr. 476* , was an action by plaintiff/real party against his former employer for wrongful discharge. Plaintiff filed an election for judicial arbitration pursuant to former Code Civ. Proc. § 1141.12(b)(ii) [*see now Code Civ. Proc. § 1141.12(b)*] and former Cal. Rules of Ct., Rule 1600(b) [*see now Cal. Rules ofCt., Rule 3.811(a)(5)*] agreeing that the award would not exceed the then-applicable $15,000 limit. Later, plaintiff obtained new counsel and moved for leave to file a second amended complaint and to withdraw the case from judicial arbitration. Both motions were granted. Defendant petitioned for writ of mandate to compel the superior court to vacate its orders.

The court of appeal denied the writ. While the court agreed that there was no basis for a party to unilaterally withdraw a case from judicial arbitration, this withdrawal was not unilateral. It was done with the court's permission after exercise of its discretion (*120 Cal. App. 3d 190, 192)* . The absence of an express statute or rule did not necessarily foreclose the trial court from allowing change when good reason was shown. No specific statute or court rule provides how and when a case may be withdrawn from judicial arbitration. However, Former Cal. Rules of Ct., Rule 1600.5(f) [*see now Cal. Rules of Ct., Rule 3.811(b)(6)*], exempts from judicial arbitration any action the court finds is not amenable to arbitration. This implies an authority and discretion in the trial court to determine an action is exempt. A corollary thereof is authority to remove a cause from the arbitration list or calendar once the finding is made that it would not be amenable to arbitration. This case involved allegations of an honest belief in facts indicating a recently recognized cause of action (*120 Cal. App. 3d 190, 193)* . Because an amendment of the pleadings to conform to proof would have been allowed even after receipt of all evidence at trial, it was proper to allow amendment in this case and the court found no reason why the amendment should not provide the basis for the request to remove the case from arbitration (*120 Cal. App. 3d 190, 193-194)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMandatory ADR

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PART II. FORMS
PART A. Determining Whether Judicial Arbitration Is Required or Authorized

13-131A California Points & Authorities §§ 131A.13-131A.99

[Reserved]

§§ 131A.13[Reserved]

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 131A JUDICIAL ARBITRATION
PART II. FORMS
PART B. Setting Aside Judgment Based on Judicial Arbitration Award

13-131A California Points & Authorities § 131A.100

§ 131A.100 Supporting Motion to Vacate [Judgment Based on] Judicial Arbitration Award

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO VACATE [JUDGMENT BASED ON] JUDICIAL ARBITRATION AWARD
Plaintiff,	)	
vs.	)	
_____ [*name*],	)	
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD VACATE THE _____ [JUDGMENT *or* AWARD] BECAUSE _____ [*specify ground for vacating award, e.g.*, THE ARBITRATOR WAS SUBJECT TO A DISQUALIFICATION OF WHICH HE/SHE WAS AWARE BEFORE THE HEARING AND WHICH HE/SHE FAILED TO DISCLOSE)].

A. Statutory Basis for Vacating Award. A party against whom a judicial arbitration award or resulting judgment is entered may move to vacate the award or judgment, as soon as is practicable after learning of the existence of the grounds on which the motion is based, and within six months after entry of the judgment, as provided in *Code of Civil*

Procedure Section 473 or *1286.2* or *California Rules of Court, Rule 3.826(d)* (*Code Civ. Proc. § 1141.22-1141.23*; *Cal. Rules of Ct., Rule 3.828(a)* (*Code Civ. Proc. §§ 1141.21-1141.23*; *Cal. Rules of Ct., Rule 3.828(a)*).

[*EITHER*]

B. Award Procured by Undue Means. The court shall vacate the _____ [judgment *or* award] if it determines that the award was procuredby corruption, fraud, or other undue means (*Code Civ. Proc. § 1286.2(a)(1)*; *Cal. Rules of Ct., Rule 3.828(a)*).

[*AND/OR*]

C. Corruption of Arbitrator(s). The court shall vacate the _____ [judgment *or* award] if it determines that there was corruption in any of the arbitrators (*Code Civ. Proc. § 1286.2(a)(2)*); *Cal. Rules of Ct., Rule 3.828(a)*).

[*AND/OR*]

D. Misconduct of Neutral Arbitrator. The court shall vacate the _____ [judgment *or* award] if it determines that the rights of the moving party were substantially prejudiced by misconduct of a neutral arbitrator (*Code Civ. Proc. § 1286.2(a)(3)*; *Cal. Rules of Ct., Rule 3.828(a)*).

[*AND/OR*]

E. Arbitrator Failed to Disclose Ground for Disqualification. The court shall vacate the _____ [judgment *or* award] if it determines that the arbitrator was subject to a disqualification not disclosed before the hearing and of which the arbitrator was then aware (*Cal. Rules of Ct., Rule 3.828(a)*; *see Cal Rules of Ct., Rule 3.816(b)* (arbitrator's duty to disclose ground for disqualification)).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*party's status and name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a motion to vacate a judicial arbitration award, or the resulting judgment, on one or more of the grounds specified in *Code Civ. Proc. § 1286.2(a)(1)-(3)* or *Cal. Rules of Ct., Rule 3.828(a)* [*see Code Civ. Proc. §§ 1141.21-1141.23*; *Cal. Rules of Ct., Rule 3.828(a)*, discussed at [3][a], *below*].

Depending on what it was the arbitrator failed to disclose, it may be appropriate to combine this form with the authority in *§ 131A.120*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, if the moving party seeks to vacate the award on the ground that the arbitrator was subject to a disqualification, the motion would be accompanied by a declaration stating the basis for the disqualification, that the arbitrator knew of the disqualification at the time of his or her appointment and failed to disclose it, and when and how the moving party first learned of the ground for disqualification.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], or otherwise by affidavits or declarations [*see Cal. Rules of Ct., Rule 3.828(b)* (motion to vacate judicial arbitration award to be granted only on clear and convincing evidence that grounds alleged are true)]. Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant or declarant necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For detailed legal background discussion, research guides, procedural checklists, and practice forms of motions, and a form of motion to vacate a judgment entered pursuant to a judicial arbitration award, see California Forms of Pleading and Practice, Ch. 36, *Judicial Arbitration* (Matthew Bender).

[d] Related Points and Authorities

For a form of points and authorities supporting a motion to vacate a judgment pursuant to *Code Civ. Proc. § 473* for mistake, inadvertence, surprise, or neglect, see *§ 131A.101*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For forms of points and authorities supporting and opposing a motions to vacate contractual arbitration awards on the grounds set forth in *Code Civ. Proc. § 1286.2*, see Ch. 20C, *Arbitration: Confirming, Correcting, or Vacating the Award* .

[3] Discussion of Authorities

[a] Statutory Basis for Vacating Award

Code Civ. Proc. § 1141.22 provides that Judicial Council rules must specify the grounds on which the arbitrator, or the court, or both, may correct, modify, or vacate an award.

Code Civ. Proc. § 1141.23 refers to setting aside an award [*see § 131A.02[9]*] and provides that an award "is not subject to appeal and it may not be attacked or set aside except as provided by [*Code Civ. Proc. Section 473, 1286.2*], or Judicial Council rule."

Cal. Rules of Ct., Rule 3.828 refers to a judgment, and provides that a motion to vacate the judgment may be made within six months after its entry, but also provides that the motion may be granted only on clear and convincing evidence that the grounds alleged are true and that the motion was made as soon as practicable after the moving party learned of the existence of those grounds. Notice of the motion is to be given to the adverse parties and to the arbitrator.

Cal Rules of Ct., Rule 3.828(a) limits the grounds for vacating a judgment to those set forth in *Code Civ. Proc. § 473* or in subdivisions (a)(1), (a)(2), and (a)(3) of *Code Civ. Proc. § 1286.2* and adds the ground that the arbitrator was subject to a disqualification not disclosed before the hearing and of which he or she was then aware, which is similar to the ground in *Code Civ. Proc. § 1286.2(a)(6)(A)*, added by Stats. 2001, ch. 362 [*see also Cal. Rules of Ct., Rule 3.827(c)* (judgment not to be attacked or set aside except as provided in *Rule 3.828*)].

[b] Arbitrator Failed to Disclose Ground for Disqualification

Any party can request disqualification of the arbitrator selected for his or her case on the grounds and by the procedures specified in *Code Civ. Proc. § 170.1* or *170.6* [*Code Civ. Proc. § 1141.18(d)*]. The arbitrator must determine whether any cause exists for disqualification on any of the grounds set forth in *Code Civ. Proc. § 170.1* governing the disqualification of judges. If any member of the arbitrator's law firm would be disqualified under *Code Civ. Proc. § 170.1(a)(2)*, the arbitrator is disqualified. Unless the ground for disqualification is disclosed to the parties in writing and is expressly waived by all parties in writing, the arbitrator must promptly notify the administrator of any known ground for disqualification, and another arbitrator must be selected as provided in *Cal. Rules of Ct., Rule 3.815* [*Cal Rules of Ct. Rule 3.816(a)*; *see Code Civ. Proc. § 170.1(a)(2)* (judge served as lawyer in the proceeding, or in any other proceeding involving same issues, he or she served as lawyer for any party in present proceeding or gave advice to any party in present proceeding on any matter involved in action or proceeding)].

In addition to any other disclosure required by law, no later than five days prior to the deadline for parties to file a motion for disqualification of the arbitrator under *Code Civ. Proc. § 170.6*, or, if the arbitrator is not aware of his or her appointment or of a matter subject to disclosure at that time, as soon as practicable thereafter, an arbitrator must disclose the following to the parties [*Cal. Rules of Ct., Rule 3.816(b)*]:

- Any matter subject to disclosure under subdivisions (D)(2)(f) and (D)(2)(g) of canon 6 of the Code of Judicial Ethics; and

- Any significant personal or professional relationship the arbitrator has or has had with a party, attorney, or law firm in the instant case, including the number and nature of any other proceedings in the past 24 months in which the arbitrator has been privately compensated by a party, attorney, law firm, or insurance company in the instant case for any services, including service as an attorney, expert witness, or consultant or as a judge, referee, arbitrator, mediator, settlement facilitator, or other alternative dispute resolution neutral.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral Overview

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CHAPTER 131A JUDICIAL ARBITRATION
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13-131A California Points & Authorities § 131A.101

§ 131A.101 Supporting Motion to Vacate [Judgment Based on] Judicial Arbitration Award on Grounds of Mistake, Inadvertence, Surprise or [Excusable] Neglect

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	NO. _____
Plaintiff,	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR RELIEF FROM [JUDGMENT PURSUANT TO] ARBITRATION AWARD ENTERED THROUGH MISTAKE, INADVERTENCE, SURPRISE, OR [EXCUSABLE] NEGLECT
vs.	
_____ [*name*],	
Defendant.	[LIMITED CIVIL CASE]
	Date: _____
	Time: _____
	Dept: _____
	[Judge: _____]
	Date Action Filed: _____
	[Trial Date: _____]

_____

THE COURT SHOULD GRANT _____ [PLAINTIFF'S *or* DEFENDANT'S] MOTION FOR RELIEF BECAUSE THE _____ [AWARD *or* JUDGMENT] WAS TAKEN AGAINST _____ [PLAINTIFF *or* DEFENDANT] THROUGH _____ [PLAINTIFF'S *or* DEFENDANT'S] [ATTORNEY'S] _____ [*insert ground(s) for relief pursuant to Code Civ. Proc. §*

473, e.g., MISTAKE].

A. Statutory Basis for Vacating Award. [*See § 131A.100[1], Paragraph A.*]

B. Grounds for Relief. Relief from an award or judgment entered pursuant thereto may be granted if it was taken against the moving party through his or her mistake, inadvertence, surprise, or excusable neglect. [Whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, the court shall vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise or neglect] (*Code Civ. Proc. § 473(b)*).

[*Optional*] **C. Award Filed Without Proper Notice Constitutes Surprise.** The entry of an arbitration award as a judgment less than 20 days after notice of the award was given to a party constitutes surprise and the award may be vacated under *Code of Civil Procedure Section 473* (*Oats v. Oats (1983) 148 Cal. App. 3d 416, 421, 196 Cal. Rptr. 20*).

[*Optional*] **D. Attorney's Neglect Requires Court to Vacate Judgment.** When a _____ [party *or* plaintiff] loses the opportunity to participate in the arbitration through the neglect of counsel, and the resulting [defense] award becomes final also due to attorney misfeasance, the mandatory provision of subsection *Code of Civil Procedure Section 473(b)* is applicable; and even if the attorney's neglect was not excusable, the judgment must be vacated (*Yeap v. Leake (1997) 60 Cal. App. 4th 591, 594, 601, 70 Cal. Rptr. 2d 680*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for_____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a motion to vacate a judicial arbitration award, or the resulting judgment, on one or more of the grounds specified in *Code Civ. Proc. § 473* [*see Code Civ. Proc. § 1141.23*; *Cal. Rules of Ct., Rule 3.828(a)* [*see also* discussion of *Cal Rules of Ct, Rule 3.828(a)* in § 131A.100[3][a]]. The optional bracketed text in Paragraph B is what is referred to in Paragraph D as the mandatory provision of *Code Civ. Proc. § 473(b)*. Optional Paragraphs C and D are for use if they coincide with the facts in counsel's particular situation.

Unlike a judgment on an arbitrator's award that is made nonappealable by *Code Civ. Proc. § 1141.23*, an order denying a motion to vacate and set aside the judgment is appealable under *Code Civ. Proc. § 904.1(a)(2)* [*Cabrera v. Plager (1987) 195 Cal. App. 3d 606, 609-610, 241 Cal. Rptr. 731* (citing former Code Civ. Proc. § 904.1(b))].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, to bring the action within the mandatory provisions of *Code Civ. Proc. § 473(b)* the declarations in support of the motion and any

documents of which the court is asked to take judicial notice should establish that the moving party never had the opportunity to arbitrate his or her case on the merits and that loss of that opportunity was caused solely by counsel's mistake, inadvertence, surprise, or neglect.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], or otherwise by affidavits or declarations [*see Cal. Rules of Ct., Rule 3.828(a)* (motion to vacate judicial arbitration award to be granted only on clear and convincing evidence that grounds alleged are true)]. Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant or declarant necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For detailed legal background discussion, research guides, procedural checklists, and practice forms of motions relating to judgments entered pursuant to judicial arbitration awards, see California Forms of Pleading and Practice, Ch. 36, *Judicial Arbitration* (Matthew Bender).

For detailed legal background discussion, research guides, procedural checklists, and practice forms of motions relating to relief based on mistake, inadvertence, surprise, or excusable neglect, see California Forms of Pleading and Practice, Ch. 489, *Relief From Judgments and Orders* (Matthew Bender).

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For forms of points and authorities supporting and opposing motions for relief based on mistake, inadvertence, surprise, or excusable neglect, see Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders* .

[e] Opposing Points and Authorities

For a form of points and authorities that may be used in an appropriate case to oppose this form, see *§ 131A.150*.

[3] Discussion of Authorities

[a] Grounds for Relief

Code Civ. Proc. § 473 provides, in part, that the court may, on any terms as may be just, relieve a party or his or her legal representative from a judgment, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Notwithstanding any other requirement of *Code Civ. Proc. § 473*, relief is mandatory if it is based on an attorney's mistake, inadvertence, surprise, or neglect and the application is timely, and is supported by the attorney's affidavit, unless the court determines that the attorney's mistake, inadvertence, surprise, or neglect was not in fact the cause of the default or dismissal [*Code Civ. Proc. § 473(b)*]. The mandatory provision was added by 1988 amendments, and amended again in 1992 to add "or dismissal" to *Code Civ. Proc. § 473(b)(2)* to give parity to plaintiffs whose attorneys' mistake, inadvertence, surprise, or neglect caused them to lose the opportunity to pursue their case [*see Yeap v. Leake (1997) 60 Cal. App. 4th 591, 600, 70 Cal. Rptr. 2d 680* (discussed at [3][c], *below*

)].

Application for relief pursuant to *Code Civ. Proc. § 473(b)* must be made within a reasonable time, in no case exceeding six months, after the judgment, order, or proceeding was taken, except in certain proceedings to determine the right to ownership or possession of real or personal property [*Code Civ. Proc. § 473(b)*].

The phrase on "any terms as may be just" has been construed to allow the court to require payment of costs or attorney's fees to the adverse party to compensate that party for any losses or expenses suffered by the *Code Civ. Proc. § 473* motion [*Hearst v. Ferrante (1987) 189 Cal. App. 3d 201, 204, 234 Cal. Rptr. 385* ; *see also Code Civ. Proc. § 473(c)(1)(C)* (authorizing any other relief as is proper)]. In addition, courts granting relief from default or dismissal under *Code Civ. Proc. § 473* are expressly authorized to impose a penalty of up to $1,000 on an offending attorney or defaulting party, and to direct that an offending attorney pay up to $1,000 to the State Bar Client Security Fund [*Code Civ. Proc. § 473(c)(1)(A), (B)*].

When relief from default is based on a sworn declaration of fault by the defaulting party's attorney, the court is required to order that attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties [*Code Civ. Proc. § 473(b)*]. However, when the court grants relief from default based on the affidavit of the defaulting party's attorney attesting to the attorney'smistake, inadvertence, surprise, or neglect, the relief is not to be conditioned on the attorney's payment of compensatory legal fees or costs or monetary penalties imposed by the court or on compliance with other sanctions ordered by the court [*Code Civ. Proc. § 473(c)(2)*].

[b] Award Filed Without Proper Notice Constitutes Surprise

In ***Oats v. Oats*** *(1983) 148 Cal. App. 3d 416, 196 Cal. Rptr. 20* , an arbitration award was executed and filed in favor of plaintiff; but no proof of service was attached to the award and the parties did not receive notice of the award until nearly a month later when the clerk mailed notice to the parties. Defendant filed a request for a trial de novo within 20 days of the notice from the clerk but after a judgment had been entered on the award. Defendant's motion to set aside the entry of judgment was denied. Defendant appealed, contending that the arbitration award filed with the court without proof of service or actual notice to the parties was not an effective filing under former Cal. Rules of Ct., Rules 1615(b) and 1616(a) [*see now Cal. Rules of Ct., Rules 3.825(b)(1)* and *3.826(a)*].

The court of appeal reversed, holding that an arbitration award cannot be effective without notice thereof to the parties affected by the award (*148 Cal. App. 3d 416, 421)* . The court relied on former Cal. Rules of Ct., Rule 1615(b) [*see now Cal. Rules of Ct., Rule 3.825(b)(1)*], which requires the arbitrator to file an award with the clerk along with proof of service on each party to the arbitration, to hold that service of the award is a prerequisite to the court's jurisdiction to act further regarding the award (*148 Cal. App. 3d 416, 420-421)* . The court held that the award was not effective until proper service was made. Thus, the act of the court in entering judgment less than 20 days after the award's effective filing date was held to constitute surprise, and to require that the award be vacated pursuant to *Code Civ. Proc. § 473* (*148 Cal. App. 3d 416, 421)* .

[c] Attorney's Neglect Requires Court to Vacate Judgment

Yeap v. Leake *(1997) 60 Cal. App. 4th 591, 70 Cal. Rptr. 2d 680* , arose out of a medical malpractice action. The associate in the office of plaintiff's counsel who attended the status conference gave his notes to his secretary to calendar the arbitration date, April 12, 1995. The secretary was new and did not calendar the arbitration date. When no one appeared for plaintiff, the arbitrator entered an award that plaintiff take $0. That award was dated and filed April 12. Plaintiff's counsel received his copy of the award on April 18, spoke to opposing counsel and the arbitrator, and asked his secretary to calendar the deadline for filing a request for trial de novo. That secretary mistakenly filed the deadline as 30 days from receipt of notice of the award. The award was entered as a judgment on May 15, 1995. Request for trial de novo was filed on May 16, 1995. In a letter dated May 22, the clerk of the court rejected the request for trial de novo

as untimely. Both plaintiff's counsel and his secretary denied receiving that letter. Plaintiff made a motion to set aside the award and a motion to vacate the judgment. Both were denied. Plaintiff appealed.

The court of appeal reversed, concluding that when a plaintiff loses the opportunity to participate in judicial arbitration through the neglect of counsel, and the resulting defense award becomes final also due to attorney misfeasance, the mandatory provision of *Code Civ. Proc. § 473(b)* applies and the judgment must be vacated (*60 Cal. App. 4th 591, 594)* . The court of appeal began by noting that if the case were within the discretionary provision of *Code Civ. Proc. § 473(b)*, the trial court's ruling would have to be upheld because there was no clear abuse of discretion. Both motions were denied in the belief that the attorney's neglect in failing to file a timely request for trial de novo, after having caused his client to miss the arbitration, was not excusable (*60 Cal. App. 4th 591, 598-599)* . Since the words "of dismissal" were added to *Code Civ. Proc. § 473(b)(2)* in 1992, ostensibly to give plaintiffs parity with defendants, the court must determine whether a particular dismissal is governed by the mandatory provision. The mandatory provision should be applied when dismissal occurs under circumstances similar to default. Here, plaintiff never had the opportunity to litigate the merits of her claim. The effect of the award was the same as a dismissal for failure to appear on the first day of trial. The judgment in this matter was analogous to a default because it came about as the result of appellant's failure to appear and litigate at the arbitration hearing. Thus, the mandatory provision was applicable (*60 Cal. App. 4th 591, 600-601)* . To obtain relief under the mandatory provision, counsel need not show that his or her mistake, inadvertence, surprise, or neglect was excusable. The only question is whether the dismissal was in fact caused by attorney neglect (*60 Cal. App. 4th 591, 601)* . Here, it was undisputed that but for the mistakes of appellant's counsel, the case would have proceeded to arbitration on the merits. On remand, the court was instructed to determine the amount of compensatory legal fees and costs to be paid by plaintiff's counsel (*60 Cal. App. 4th 591, 602)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral Overview

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13-131A California Points & Authorities §§ 131A.102-131A.119

[Reserved]

§§ 131A.102[Reserved]

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13-131A California Points & Authorities § 131A.120

§ 131A.120 Arbitrator's Duty to Disclose Personal and Professional Relationships and Facts that Some Might Believe Constitute Bias

[1] FORM

THE ARBITRATOR WAS REQUIRED TO MAKE THE DISCLOSURES SPECIFIED BY RULE 3.816

A. The Arbitrator Is Required to Disclose Personal and Professional Relationships and Facts that Some Might Believe Indicate Bias. In addition to any other disclosure required by law, [no later than five days prior to the deadline for parties to file a motion for disqualification of the arbitrator under *Code of CivilProcedure section 170.6* or, if the arbitrator is not aware of his or her appointment or of a matter subject to disclosure at that time, as soon as practicable thereafter, an arbitrator must disclose to the parties:

- Any matter subject to disclosure under subdivisions (D)(2)(f) and (D)(2)(g) of canon 6 of the Code of Judicial Ethics; and

- Any significant personal or professional relationship the arbitrator has or has had with a party, attorney, or law firm in the instant case, including the number and nature of any other proceedings in the past 24 months in which the arbitrator has been privately compensated by a party, attorney, law firm, or insurance company in the instant case for any services, including service as an attorney, expert witness, or consultant or as a judge, referee, arbitrator, mediator, settlement facilitator, or other alternative dispute resolution neutral. (*Cal. Rules of Ct., Rule 3.816(b)*).

[*Optional*] **B. Information Others Might Consider Relevant.** The arbitrator must disclose in writing or on the record information required by law, or information the arbitrator believes the parties or their lawyers might consider relevant to the question of disqualification, even if he or she believes that there is no actual basis for disqualification (Cal. Rules of Ct., Appendix, Code of Judicial Ethics, Canon (D)(2)(f)).

[*Optional*] **C. Memberships in Organizations That Discriminate.** The arbitrator must disclose in writing or on the

record membership in any organization that practices invidious discrimination on the basis of race, sex, religion, national origin, or sexual orientation, except for membership in a religious or an official military organization of the United States and membership in a nonprofit youth organization so long as membership does not violate canon 4A [conduct of extrajudicial activities] (Cal. Rules of Ct., Appendix, Code of Judicial Ethics, Canon (D)(2)(g)).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a petition to vacate a judicial arbitration award when the arbitrator failed to make the disclosures required by *Cal Rules of Ct., Rule 3.816(b)*. The authority in this form may be appropriate for use with the second optional Paragraph H in the form in *§ 131A.100*.

This form does not provide a complete memorandum but is designed to be combined with a general form of memorandum of points and authorities in support of vacating the award [*see § 131A.100*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should show the particular relationship or membership that was not disclosed and how that establishes bias.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* (motion to compel arbitration improperly denied when plaintiff/respondent filed unverified complaint and presented no evidence, by declaration or otherwise, of grounds claimed for revocation of arbitration agreement); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 184-186, 35 Cal. Rptr. 2d 747]* .

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureAlternative Dispute ResolutionValidity of ADR Methods

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13-131A California Points & Authorities §§ 131A.121-131A.149

[Reserved]

§§ 131A.121[Reserved]

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13-131A California Points & Authorities § 131A.150

§ 131A.150 Opposing Motion to Vacate [Judgment Based on] Judicial Arbitration Award on Grounds of Mistake, Inadvertence, Surprise or [Excusable] Neglect

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN OPPOSITION TO MOTION FOR RELIEF
vs.	)	FROM [JUDGMENT PURSUANT TO] ARBITRA-
_____ [*name*],	)	TION AWARD ENTERED THROUGH MISTAKE,
Defendant.	)	INADVERTENCE, SURPRISE, OR [EXCUSABLE]
	)	NEGLECT
	)	Date: _____
	)	Time: _____
		Dept: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

THE COURT SHOULD NOT GRANT _____ [PLAINTIFF'S *or* DEFENDANT'S] MOTION FOR RELIEF BECAUSE THE _____ [PLAINTIFF'S *or* DEFENDANT'S] [ATTORNEY'S] CONDUCT DOES NOT CONSTITUTE _____ [*insert ground(s) on which relief is sought pursuant to Code Civ. Proc. § 473, e.g.,* EXCUSABLE NEGLECT].

A. Statutory Basis for Vacating Award. [*See § 131A.100[1], Paragraph A.*]

B. Grounds for Relief. [*See § 131A.101[1], Paragraph B*].

[*Optional*] **C. Case Does Not Invoke Mandatory Provision of *Code of Civil Procedure Section 473(b)*.** When a _____ [party *or* defendant not only answers the complaint, but] participates in discovery and in a judicial arbitration hearing, any judgment entered on the award is not a default or default judgment within the meaning of *Code of Civil Procedure Section 473(b)*; and any motion to vacate that judgment will fall within the discretionary rather than the mandatory provision of Section 473(b) (*Ayala v. Southwest Leasing and Rental, Inc. (1992) 7 Cal. App. 4th 40, 44, 8 Cal. Rptr. 2d 637*).

[*Optional*] **D. Attorney's Press of Business Does Not Constitute Excusable Neglect.** The fact that an attorney who failed to file a timely request for trial de novo took over a large number of cases [at one time] is not in and of itself excusable neglect. Under those circumstances, the attorney must take immediate precautions to avoid missing any one of the many procedural time limitations intrinsic to civil litigation. The failure to do so does not amount to excusable neglect (*Ayala v. Southwest Leasing and Rental, Inc. (1992) 7 Cal. App. 4th 40, 45, 8 Cal. Rptr. 2d 637*).

[*Optional*] **E. Attorney's Failure to Determine When Award Was Filed Does Not Constitute Excusable Neglect.** The conduct of an attorney who knew that an award should have been filed, but did not receive notice thereof, and who failed to ascertain the fact and date of the filing of the award [and thus also failed to file a timely request for trial de novo] constitutes inexcusable neglect and does not require the resulting judgment to be set aside pursuant to *Code of Civil Procedure Section 473(b)* (*Alvarado v. City of Port Hueneme (1982) 133 Cal. App. 3d 695, 707, 184 Cal. Rptr. 154*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for

_____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to a motion seeking to have a judicial arbitration award, or resulting judgment, vacated on one or more of the grounds specified in *Code Civ. Proc. § 473* [*see Code Civ. Proc. § 1141.23*; *Cal. Rules of Ct., Rule 3.825(d)*; *see also* discussion of *Cal. Rules of Ct., Rule 3.828(d)* [*see also* discussion of *Cal Rules of Ct, Rule 3.828(a)* at *§ 131A.100[3][a]*].

Optional Paragraph C is for use to establish that the case falls within the discretionary provision of *Code Civ. Proc. § 473(b)*.

Optional Paragraphs D and E address particular instances of attorney neglect that are not excusable.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the

points and authorities set out in *§ 131A.101*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the declarations opposing the motion and any court documents of which the opposing party asks the court to take judicial notice should establish that the moving party had his or her "day in court" by participation in the preparation of the case and in the arbitration hearing. Argument should also emphasize all deficiencies in the moving party's explanation for the mistake, inadvertence, surprise, or neglect urged as the basis for vacating the judgment.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], or otherwise by affidavits or declarations [*see Cal. Rules of Ct., Rule 3.828(b)* (motion to vacate judicial arbitration award to be granted only on clear and convincing evidence that grounds alleged are true)]. Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant or declarant necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For detailed legal background discussion, research guides, procedural checklists, and practice forms of motions relating to judgments entered pursuant to judicial arbitration awards, see California Forms of Pleading and Practice, Ch. 36, *Judicial Arbitration* (Matthew Bender).

For detailed legal background discussion, research guides, procedural checklists, and practice forms of motions relating to relief based on mistake, inadvertence, surprise, or excusable neglect, see California Forms of Pleading and Practice, Ch. 489, *Relief From Judgments and Orders* (Matthew Bender).

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For forms of points and authorities supporting and opposing motions for relief based on mistake, inadvertence, surprise, or excusable neglect, see Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders* .

[3] Discussion of Authorities

[a] Case Does Not Invoke Mandatory Provision of Code of Civil Procedure Section 473(b)

Ayala v. Southwest Leasing and Rental, Inc. *(1992) 7 Cal. App. 4th 40, 8 Cal. Rptr. 2d 637* , is discussed at [b], *below*.

[b] Attorney's Press of Business Does Not Constitute Excusable Neglect

Ayala v. Southwest Leasing and Rental, Inc. *(1992) 7 Cal. App. 4th 40, 8 Cal. Rptr. 2d 637* , was a personal injury action which resulted in a judicial arbitration award in favor of plaintiffs. The award was filed on July 20, 1990; and on

August 21, 1990, the award was entered as a judgment. Ten days after that, defendants filed an untimely request for trial de novo. The request was denied. Defendants moved to vacate the judgment pursuant to *Code Civ. Proc. § 473*. The motion was supported by the declaration of defendants' attorney stating that on August 2, 1990, his office took over 250 to 300 of defendant Southwest's cases from another law firm and that he was not aware of the August 20 deadline for filing a request for trial de novo until it had passed. The motion was denied. Defendants appealed, contending that they had satisfied the requirements of the mandatory provision of *Code Civ. Proc. § 473* and that they had established excusable neglect.

The court of appeal affirmed. The court of appeal first determined that the case fell within the discretionary rather than the mandatory provisions of *Code Civ. Proc. § 473* because it did not involve a default judgment. Defendants not only answered the complaint, but participated in discovery and in an arbitration hearing (*7 Cal. App. 4th 40, 44)* . The declarations in support of the motion did not explain why Southwest's former counsel did not request trial de novo before transferring the file to the second attorney; nor was there any explanation of the circumstances under which the second attorney became aware that the deadline had been missed. The fact that Southwest's attorney took over a large number of cases is not in and of itself excusable neglect. Under those circumstances, it is necessary for an attorney to take immediate precautions to avoid missing any one of the many procedural time limitations intrinsic to civil litigation. The failure to do so does not amount to excusable neglect (*7 Cal. App. 4th 40, 45)* .

[c] Attorney's Failure to Determine When Award Was Filed Does Not Constitute Excusable Neglect

Alvarado v. City of Port Hueneme *(1982) 133 Cal. App. 3d 695, 184 Cal. Rptr. 154* , resulted in a judicial arbitration award for defendant, after the arbitrator granted nonsuit at the conclusion of plaintiffs' case on January 22, 1981. Theaward was signed the next day and served on the parties. It was filed with the court on January 26. Plaintiffs' attorney knew that a nonsuit had been granted by the arbitrator but did not receive notice of the award. Seven days prior to the expiration of the then-applicable 20-day period within which to request trial de novo, the attorney sent a law clerk to the county clerk's office to check on the filing of the award. The award was not inserted in the case file but was held at the processing desk for the expiration of the 20-day period. The award was also noted on an arbitration index. The law clerk checked only the individual case file, and because it did not contain the award, assumed that the award had not yet been filed. Judgment on the award was entered on February 17. Plaintiffs filed an untimely request a trial de novo on February 26. Plaintiffs then moved for relief from the judgment pursuant to *Code Civ. Proc. § 473*. The trial court denied the motion both because *Code Civ. Proc. § 473* was not then mentioned in *Code Civ. Proc. § 1141.23* or former Cal Rules of Ct., Rule 1615(d) [*see now Cal. Rules of Ct., Rule 3.828(a)*], and the court believed it had no authority to grant relief on that basis and because plaintiffs' attorney's conduct amounted to inexcusable neglect. Plaintiffs appealed.

The court of appeal affirmed, first holding that the trial court did have authority to grant relief pursuant to *Code Civ. Proc. § 473* (*133 Cal. App. 3d 695, 705*). The court stated that because it had long been the law that a paper is filed when delivered and received by the clerk, not when placed in the file, it was not an abuse of discretion to hold the attorney's neglect inexcusable when the problem of law was simple and the solution readily ascertainable (*133 Cal. App. 3d 695, 707)* .

Both *Code Civ. Proc. § 1141.23* and former Cal Rules of Ct., Rule 1615(d) [*see now Cal. Rules of Ct., Rule 3.828(a)*] were amended in 1982 to specifically mention *Code Civ. Proc. § 473* as a ground for vacating a judgment based on a judicial arbitration award [*see* Stats. 1982, ch. 621].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From

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13-131A California Points & Authorities §§ 131A.151-131A.199

[Reserved]

§§ 131A.151[Reserved]

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PART C. Voluntary Dismissal of Action After Request for Trial de Novo

13-131A California Points & Authorities § 131A.200

§ 131A.200 Supporting Motion to Vacate Voluntary Dismissal and Enter Judgment on Judicial Arbitration Award

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN SUPPORT OF MOTION TO VACATE VOL-
vs.	)	UNTARY DISMISSAL AND ENTER JUDGMENT
_____ [*name*],	)	IN ACCORDANCE WITH JUDICIAL ARBITRA-
Defendant.	)	TION AWARD
	)	Date: _____
	)	Time: _____
	)	Dept: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

THE COURT SHOULD SET ASIDE _____ [PLAINTIFF'S *or* DEFENDANT'S] REQUEST FOR DISMISSAL AND ORDER JUDGMENT ENTERED IN ACCORDANCE WITH THE JUDICIAL ARBITRATION AWARD, FILED ON _____ [*date*], WHICH, BUT FOR THE REQUEST FOR TRIAL DE NOVO THAT WAS REPUDIATED BY THE DISMISSAL, WOULD HAVE BECOME THE FINAL JUDGMENT IN THIS MATTER ON _____ [*date*].

A. Effect of Party's Dismissal of Action After Requesting Trial de Novo. A party's voluntary dismissal of an action following his or her request for trial de novo amounts to a repudiation of the request for trial de novo. That restores the parties to their previous legal positions and reinstates the arbitration award, which may then be entered as the judgment in the matter. [Or, on a proper showing of prejudice by the party that did not file for trial de novo, the court may vacate the dismissal and require the parties to proceed to trial de novo] (*Kelley v. Bredelis (1996) 45 Cal. App. 4th 1819, 1826, 1834, 53 Cal. Rptr. 2d 536* ; *Calderon v. Kane(1995) 36 Cal. App. 4th 1663, 1667-1668, 43 Cal. Rptr. 2d 480* ; *Herbert Hawkins Realtors, Inc. v. Milheiser (1983) 140 Cal. App. 3d 334, 340, 189 Cal. Rptr. 450*).

[*Optional*] **B. As Prevailing Party Under Arbitration Award, _____ [Plaintiff *or*** Defendant] Is Entitled to Attorney's Fees. Pursuant to the contract between the parties, _____ [plaintiff *or* defendant] is entitled to his/her/its reasonable attorney's fees. Once the dismissal is vacated, *Civil Code Section 1717(b)(2)* will no longer be applicable and _____ [plaintiff *or* defendant] will be entitled to attorney's fees as prevailing party under the arbitration award (*Kelley v. Bredelis (1996) 45 Cal. App. 4th 1819, 1832, 53 Cal. Rptr. 2d 536*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a motion by a party in whose favor a judicial arbitration award was filed, to vacate a voluntary dismissal filed by the adverse party after the adverse party requested trial de novo, and to have the arbitration award entered as a judgment [*see Code Civ. Proc. §§ 1141.20(a), 1141.23*; *Cal. Rules of Ct., Rule 3.827(a)*].

If the party in whose favor the award was rendered believes he or she can obtain an even more favorable result on trial de novo, presumably he or she is free to respond by requesting trial de novo instead of entry of judgment [*see Calderon v. Kane (1995) 36 Cal. App. 4th 1663, 1668, 43 Cal. Rptr. 2d 480* (discussed at [3][a], *below*)]. Paragraph A includes optional bracketed text that may included to support such a request.

Optional Paragraph B is for use if the moving party is entitled to attorney's fees under a contract between the parties to establish that this situation does not involve a voluntary dismissal within the meaning *Civ. Code § 1717(b)(2)* so as to preclude enforcement of the attorney's fee award. If the arbitration award did not fix the amount of attorney's fees, or if the moving party requests additional attorney's fees to have the dismissal set aside, counsel should notice a motion to fix the amount of fees to be heard at the same time as the motion supported by this memorandum [*see* California Forms of Pleading and Practice, Ch. 174, *Costs and Attorney's Fees* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the declarations supporting the motion and the court documents of which the moving party asks the court to take judicial notice should include the judicial arbitration award and the request for dismissal and should establish the dates on which those documents were filed.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], or otherwise by affidavits or declarations. Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant or declarant necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For detailed legal background discussion, research guides, procedural checklists, and practice forms of motions relating to judicial arbitration, see California Forms of Pleading and Practice, Ch. 36, *Judicial Arbitration* (Matthew Bender).

For detailed legal background discussion, research guides, procedural checklists, and practice forms of motions relating to cost and attorney's fees, see California Forms of Pleading and Practice, Ch. 174, *Costs and Attorney's Fees* (Matthew Bender).

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For forms of points and authorities relating to attorney's fees, see Ch. 25, *Attorney's Fees* .

[3] Discussion of Authorities

[a] Effect of Party's Dismissal of Action After Requesting Trial de Novo

Kelley v. Bredelis *(1996) 45 Cal. App. 4th 1819, 53 Cal. Rptr. 2d 536* , was anaction for breach of contract and specific performance of a lease with an alleged option to purchase. The agreement provided that the prevailing party in any litigation would be entitled to reasonable attorney's fees. Judicial arbitration resulted in a defense award based on a finding that the agreement had been modified to allow the lessor, on return of 10 percent of the rents paid, to elect not to sell. The award included attorney's fees and costs. Plaintiffs filed a request for trial de novo, but before the trial date, filed a request for dismissal of the action with prejudice. Defendant filed a costs memorandum, a motion for attorney's fees, and a motion for an order vacating the request for trial de novo and entering judgment on the arbitration award. The motions were all granted, with attorney's fees set at $21,500. Plaintiffs appealed.

The court of appeal affirmed. Following *Herbert Hawkins Realtors, Inc. v. Milheiser (1983) 140 Cal. App. 3d 334, 189 Cal. Rptr. 450* , the court of appeal held that plaintiffs did not have an absolute right to dismiss their action after arbitration and that plaintiffs' voluntary dismissal of their action following their request for trial de novo amounted to a repudiation of their previous election for trial de novo and reinstated the arbitration award, on which judgment was then correctly entered. That result reconciles the competing interests of the dismissal statutes and the judicial arbitration statutes and avoids "mischief and absurdity" (*45 Cal. App. 4th 1819, 1825-1826)* . It made no difference that the dismissal was with prejudice, as opposed to without prejudice. Arbitration was viewed as a trial on the merits. The only way to stop the award from becoming a final judgment was to settle the case or have a trial de novo. A party who does neither has had his or her day in court (*45 Cal. App. 4th 1819, 1827)* . After addressing the dissent and the issue of attorney's fees, discussed at [b], *below*, the court of appeal reiterated that the trial court was clearly correct in vacating the dismissal, reinstating the award, and entering judgment against the plaintiffs pursuant to that award (*45 Cal. App.*

4th 1819, 1834) .

Calderon v. Kane *(1995) 36 Cal. App. 4th 1663, 43 Cal. Rptr. 2d 480* , was a defamation action that resulted in a judicial arbitration award in defendants' favor based on a finding that the communication was privileged. Plaintiffs requested trial de novo, but before the matter came to trial filed a request for voluntary dismissal without prejudice. Defendants filed a motion to vacate the dismissal and to enter judgment on the arbitration award with attorney's fees and costs. The trial court granted the motions and ordered judgment to be entered in accordance with the award. Plaintiffs appealed.

The court of appeal affirmed, approving *Herbert Hawkins Realtors, Inc. v. Milheiser (1983) 140 Cal. App. 3d 334, 340, 189 Cal. Rptr. 450* , and agreeing that when a losing party withdraws a previous request for trial de novo, not only is the request for trial de novo repudiated, but the repudiating party is restored to the legal position that that party was in prior to electing trial de novo, thus triggering the finalization of the award (*36 Cal. App. 4th 1663, 1667)* .

The court also considered *Marracino v. Brandstetter (1993) 14 Cal. App. 4th 543, 17 Cal. Rptr. 2d 700* , which held that absent a local rule providing otherwise, a party cannot withdraw a request for trial de novo after the 30-day period for filing the request has run, but found *Marracino* unpersuasive because it could force the parties to a trial de novo that neither of them wanted (*36 Cal. App. 4th 1663, 1667-1668)* . Instead, the court said, when a party dismisses a request for trial de novo after the 30-day period has run, the court retains jurisdiction to vacate the dismissal in order to reinstate the arbitration award, or, on a proper showing of prejudice by the nonfiling party, to vacate the dismissal and require the parties to proceed to a trial de novo. Because the withdrawal of a request for trial de novo undoubtedly affects the rights of the adverse party, the preferable procedure is to seek withdrawal by noticed motion. That would give the adverse party the opportunity to indicate whether he or she wanted a trial de novo. Under that procedure, the parties to the arbitration, not the court, would make the ultimate decision whether the matter is brought to trial (*36 Cal. App. 4th 1663, 1668)* .

Herbert Hawkins Realtors, Inc. v. Milheiser *(1983) 140 Cal. App. 3d 334, 189 Cal. Rptr. 450* , was an action by realtors for breach of contract. Defendants asserted several defenses and claimed attorney's fees. Plaintiffs failed to appear at the arbitration hearing, and an award was entered against them. Defendants were awarded their costs and attorney's fees. Plaintiffs filed a timely request for trial de novo, but before the matter was tried, filed a request for dismissal without prejudice. Defendants requested judgment to be entered based on the award and that they have their costs. The request was denied on the ground the dismissal was without prejudice. Defendants then moved for an order of dismissal with prejudice and for costs, claiming plaintiffs had violated a local rule prohibiting withdrawal of a request for trial de novo except with written approval of all parties. The trial court denied the motion. Defendants appealed.

The court of appeal reversed with directions to the trial court to vacate the dismissal without prejudice, to treat the dismissal as a repudiation of the request for trial de novo, and to enter the award as a judgment pursuant to *Code Civ. Proc. § 1141.23* (*140 Cal. App. 3d 334, 341)* . The court of appeal said that permitting plaintiffs to dismiss the action without prejudice would defeat the express legislative purpose of the judicial arbitration statutes. Such a construction of the interrelationship between the dismissal statute [*Code Civ. Proc. § 581(1)*] and the judicial arbitration statutes would produce absurd consequences and promote mischief (*140 Cal. App. 3d 334, 339)* . No party has the right to avoid a judicial arbitration award at their whim. The party requesting trial de novo may either proceed with trial de novo or allow the award to be entered as a judgment. When parties withdraw requests for trial de novo or voluntarily dismiss their complaints,they repudiate their previous election for trial de novo. This restores the repudiating party to their legal position before electing trial de novo and triggers finalization of the award under *Code Civ. Proc. § 1141.23*. *Code Civ. Proc. § 581(1)* was not applicable because a specific provision relating to a particular subject will govern in respect to that subject as against a general provision. This position is consistent with the rule that one cannot voluntarily dismiss an action after a demurrer has been sustained with leave to amend (*140 Cal. App. 3d 334, 340)* .

[b] As Prevailing Party Under Arbitration Award, _____ [Plaintiff *or* Defendant] Is Entitled to Attorney's Fees

The facts and procedural background of ***Kelley v. Bredelis*** *(1996) 45 Cal. App. 4th 1819, 53 Cal. Rptr. 2d 536* , are discussed at [a], *above.* Plaintiffs also contested the award of attorney's fees to defendant, relying on *Civ. Code § 1717(b)(2),* which provides that when an action has been voluntarily dismissed, there is no prevailing party for purposes of that section. The court of appeal held that there was no dismissal here. The dismissal that was filed was set aside by the court. The effect of that dismissal was to notify the court that plaintiffs were repudiating their request for trial de novo. That restored the parties to their previous legal positions as they existed before the filing of the request for trial de novo, and triggered the finalization of the award under *Code Civ. Proc. § 1141.20*. Once the dismissal and the request for trial de novo were vacated, *Civ. Code § 1717(b)(2)* was no longer applicable because there was no voluntary dismissal. There was a valid judgment on the arbitration award, which included the award of attorney's fees; and the trial court properly set the amount of those fees to the party who clearly prevailed in the arbitration (*45 Cal. App. 4th 1819, 1832)* . In addition, the court said, attorney's fees could properly have been awarded to defendant as costs under *Code Civ. Proc. § 1032(a)(4)*and *(b)* and *Code Civ. Proc. § 1033.5(a)(10)(A)* (*45 Cal. App. 4th 1819, 1833)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMandatory ADR

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PART C. Voluntary Dismissal of Action After Request for Trial de Novo

13-131A California Points & Authorities §§ 131A.201-131A.299

[Reserved]

§§ 131A.201[Reserved]

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13-131A California Points & Authorities § 131A.300

§ 131A.300 Attorney's Fees Included as Costs After Less Favorable Result on Trial de Novo

[1] FORM

_____ [PLAINTIFF *or* DEFENDANT] IS ENTITLED TO HIS/HER/ITS REASONABLE ATTORNEY'S FEES INCURRED FROM THE TIME _____ [PLAINTIFF *or* DEFENDANT] REQUESTED THE TRIAL DE NOVO, AT WHICH HE/SHE/IT OBTAINED A VERDICT LESS FAVORABLE THAN WHAT HE/SHE/IT WAS GRANTED BY THE ARBITRATION AWARD.

A. Penalty Provision. If the judgment upon the trial de novo is not more favorable in either the amount of damages awarded or the type of relief granted for the party electing the trial de novo than the arbitration award, the court shall order that party to pay the following nonrefundable costs and fees, unless the court finds in writing and upon motion that the imposition of those costs and fees would create such a substantial economic hardship as not to be in the interest of justice (*Code Civ. Proc. § 1141.21(a)(1)*):

> (A) To the court, the compensation actually paid to the arbitrator, less any amount paid pursuant to paragraph (D).
>
> (B) To the other party or parties, all costs specified in Section 1033.5 [of the Code of Civil Procedure], and the party electing trial de novo shall not recover his or her costs.
>
> (C) To the other party or parties, the reasonable costs of the services of expert witnesses, who are not regular employees of any party, actually incurred or reasonably necessary in the preparation of the trial of the case.
>
> (D) To the other party or parties, the compensation paid by the other party or parties to the arbitrator pursuant to subdivision (b) of Section 1141.28 [of the Code of Civil Procedure].

Those costs and fees, other than the compensation of the arbitrator, shall include only those incurred from the time of

the election of the trial de novo (*Code Civ. Proc. § 1141.21(a)(2)*).

B. Attorney Fees as Costs. Attorney fees are allowable as costs under Section 1032 [of the Code of Civil Procedure] when authorized by (A) contract, (B) statute, or (C) law (*Code Civ. Proc. § 1033.5(a)(10)*).

[*Optional*] **C. Attorney's Fees Award Is Mandatory Even if StatuteAuthorizing Them Is Discretionary.** *Section 1141.21 of the Code of Civil Procedure* is mandatory, not permissive. Thus, an award of attorney's fees that is discretionary under some other statute is made mandatory by Section 1141.21 when incorporated therein to be applied against a party who failed to obtain a more favorable result at trial de novo than under the judicial arbitration award (*Bhullar v. Tayyab (1996) 46 Cal. App. 4th 582, 587-588, 591, 54 Cal. Rptr. 2d 17*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a motion to fix the amount of attorney's fees includable as costs after a trial de novo in which the party against whom such costs are sought to be imposed failed to obtain a result more favorable than he or she received under the judicial arbitration award [*see Code Civ. Proc. § 1141.21*; *Cal. Rules of Ct., Rule 3.826(d)*].

Paragraph A sets forth *Code Civ. Proc. § 1141.21(a)*.

Paragraph B sets forth the portion of *Code Civ. Proc. § 1033.5* making attorney fees includable as costs. Counsel should incorporate as additional authority any other statute or law authorizing attorney fees in the particular situation.

Optional Paragraph C is for use to argue that even though the statute made applicable by *Code Civ. Proc. § 1033.5(a)(10)(B)* is by its terms discretionary, as against a party who obtained a less favorable result on trial de novo, it becomes mandatory. The other statute involved in the authority cited in Optional Paragraph C was *Code Civ. Proc. § 1021.1* (repealed by its own terms on January 1, 2001), but the principle should remain valid when applied to any other statute.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should establish the particular basis for attorney's fees, whether a contract between the parties, case law, or a particular statute, and show how the particular case is within the terms of that contract, case, or statute.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], or otherwise by affidavits or declarations. Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant or declarant necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For detailed legal background discussion, research guides, procedural checklists, and practice forms of motions relating to judicial arbitration, see California Forms of Pleading and Practice, Ch. 36, *Judicial Arbitration* (Matthew Bender).

For detailed legal background discussion, research guides, procedural checklists, and practice forms of motions relating to cost and attorney's fees, see California Forms of Pleading and Practice, Ch. 174, *Costs and Attorney's Fees* (Matthew Bender).

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For forms of points and authorities relating to attorney's fees, see Ch. 25, *Attorney's Fees* .

For forms of points and authorities relating to costs, see Ch. 60, *Costs* .

[3] Discussion of Authorities

[a] Attorney's Fees Award Is Mandatory Even if Statute Authorizing Them Is Discretionary

Bhullar v. Tayyab *(1996) 46 Cal. App. 4th 582, 54 Cal. Rptr. 2d 17* , was an action by the seller of liquor store against the buyer for breach of contract. The buyer cross-complained for damages for fraud and misrepresentation. Buyer made an offer under *Code Civ. Proc. § 998* to settle the matter for $25,000. Seller did not accept the offer. Judicial arbitration resulted in an award that neither party take anything and that each bear its own costs and attorney's fees. Seller requested trial de novo, which resulted in a judgment for buyer of approximately $39,000 plus costs of suit. Buyer moved to fix the amount of attorney's fees includable as costs. The court denied the motion on the ground that seller's rejection of the Section 998 offer was reasonable. Buyer appealed.

The court of appeal reversed and remanded for determination of the amount of attorney's fees (*46 Cal. App. 4th 582, 591)* . Under *Code Civ. Proc. § 1021.1(b)* (repealed by its terms on January 1, 2001), if a party to an action in Riverside County or San Bernardino County refused a *Code Civ. Proc. § 998* settlementoffer, and failed to obtain a more favorable judgment at trial, the court has discretion to award attorney's fees. Costs specified in *Code Civ. Proc. § 1033.5(a)(10)* include attorney's fees when authorized by (A) contract, (B) statute, or (C) law. Seller contended that the discretion authorized by any statute incorporated by *Code Civ. Proc. § 1033.5(a)(10)(B)* was retained under *Code Civ. Proc. § 1141.21*. The court of appeal disagreed (*46 Cal. App. 4th 582, 587)* . First, the court noted that the language of *Code Civ. Proc. § 1141.21* was mandatory, not permissive, with the only exception being when the court finds in writing and on motion that imposing the costs would create such a substantial hardship as not to be in the interest of justice (*46 Cal. App. 4th 582, 588)* . Second, the legislative purpose of *Code Civ. Proc. § 1141.21* is to discourage trials de novo (*46 Cal. App. 4th 582, 589)* , and to encourage acceptance of arbitration awards. If the imposition of attorney's fees after a less favorable result on trial de novo remained as discretionary as after refusal to accept a settlement offer, the significant disincentives to refusing an arbitration award would be written out of the statute. Construing *Code Civ. Proc. § 1141.21* to grant the trial court discretion whether or not to award attorney's fees would impair the purpose of that statute, while interpreting that statute as mandatory furthers the legislative intent to encourage acceptance of arbitration awards (*46 Cal. App. 4th 582, 590)* . Attorney's fees that were discretionary after failure to accept the settlement offer were made mandatory by *Code Civ. Proc. § 1141.21* after failure to accept the arbitration award (*46 Cal. App. 4th 582, 591)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureAppealsStandards of ReviewDe Novo

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13-131A California Points & Authorities § 131A.301

§ 131A.301 Costs and Fees May Be Awarded to Party Who Also Requested Trial de Novo

[1] FORM

EVEN THOUGH _____ [PLAINTIFF *or* DEFENDANT] REQUESTED TRIAL DE NOVO, HE/SHE/IT IS ENTITLED TO HIS/HER/ITS COSTS [AND REASONABLE ATTORNEY'S FEES] INCURRED FROM THE TIME _____ [*other (less-successful) party:* PLAINTIFF *or* DEFENDANT] REQUESTED TRIAL DE NOVO.

A. Penalty Provision. [*See § 131A.300[1], Paragraph A*].

B. When Two Parties Request Trial de Novo. When two or more parties elect trial de novo, each is subject to liability for costs [under *Section 1141.21 of the Code of Civil Procedure*] if less successful at trial de novo (*Muega v. Menocal (1996) 50 Cal. App. 4th 868, 877, 57 Cal. Rptr. 2d 697* ; *Boyd v. Oscar Fisher Co. (1989) 210 Cal. App. 3d 368, 382, 258 Cal. Rptr. 473*).

[*Optional*] **C. When Attempt to Request Partial Trial de Novo Fails.** One who obtains a less favorable result on trial de novo than under a judicial arbitration award is liable for costs [under *Section 1141.21 of the Code of Civil Procedure*] to a party he or she attempted to exclude from the trial de novo when the attempt to request a partial trial de novo failed because the issues, claims, causes of action, or cross-claim emanated from a single integrated set of facts (*Muega v. Menocal (1996) 50 Cal. App. 4th 868, 876-877, 57 Cal. Rptr. 2d 697*).

[2] Comments

[a] Use of Form

This form of points and authorities is for use by a party who requested trial de novo and seeks to recover costs, and if appropriate, attorney's fees against another party who also requested trial de novo when the other party failed to obtain a result more favorable than he or she received under the judicial arbitration award [*see Code Civ. Proc. § 1141.21*; *Cal. Rules of Ct., Rule 3.826(d)*]. The authority may be used to anticipate or respond to the claim by the party against whom

such costs are sought to be imposed that he or she is somehow exempt from liability for costs because both parties requested trial de novo. For example, this form may be used in support of a motion to fix the amount of attorney's fees, and/or in opposition to a motion tax costs.

Optional Paragraph C is for use if the party resisting the imposition of costs and fees attempted to request only a partial trial de novo as to issues, causes or action, complaints, or cross complaints that did not involve the party seeking to recover costs.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should explain how the party against whom costs are sought to be imposed was less successful on trial de novo.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], or otherwise by affidavits or declarations. Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant or declarant necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For detailed legal background discussion, research guides, procedural checklists, and practice forms of motions relating to judicial arbitration, see California Forms of Pleading and Practice, Ch. 36, *Judicial Arbitration* (Matthew Bender).

For detailed legal background discussion, research guides, procedural checklists, and practice forms of motions relating to cost and attorney's fees, see California Forms of Pleading and Practice, Ch. 174, *Costs and Attorney's Fees* (Matthew Bender).

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For forms of points and authorities relating to attorney's fees, see Ch. 25, *Attorney's Fees* .

For forms of points and authorities relating to costs, see Ch. 60, *Costs* .

[3] Discussion of Authorities

[a] When Two Parties Request Trial de Novo

Muega v. Menocal *(1996) 50 Cal. App. 4th 868, 57 Cal. Rptr. 2d 697* , arose out of an automobile accident involving two cars. The driver and the passengers in the forward car sued the driver of the following vehicle, who cross complained against the driver of the forward car for indemnity. After discovery, the passengers filed a supplemental complaint against the driver of the forward car. Judicial arbitration resulted in awards of $9,000 for the driver of the forward car, and $9,000 and $18,000 for the two passengers, all against the driver of the following car. The arbitrator specifically found for the driver of the forward car on the cross complaint and awarded her costs. The two passengers

requested trial de novo only on the supplemental complaint against the driver of the forward car. The driver of the following car requested trial de novo on all issues. Before the trial, the drivers settled their claims against each other. Trial de novo proceeded on all issues, but nonsuit was entered in favor of the driver of the forward car when the passengers failed to amend their opening statement. The verdicts for the passengers were less than the arbitration award. The forward driver filed a motion for sanctions [*Code Civ. Proc. § 128.5*] against the passengers on the ground that their claims against her were frivolous and totally without merit. That motion resulted in sanctions equal to the amount of attorney's fees expended by the forward driver after the two drivers settled their claims against each other and in preparation for the trial. Both drivers filed costs memoranda. The passengers moved to tax costs. Costs were awarded to both drivers and the passengers appealed.

The court of appeal affirmed. The court first considered and rejected the passengers' claim that they could not be charged with the forward driver's costs because the arbitrator never expressly ruled on their supplemental complaint against that driver, saying that there was no reason why the arbitrator's failure to expressly rule on the supplemental complaint affected that driver's right to costs (*50 Cal. App. 4th 868, 875)* .

As to the costs awarded to the following driver, the passengers contended that they could not be charged with those costs because they had not requested trial de novo with respect to the following driver. The court acknowledged that appellants attempted to request a partial trial de novo with respect only to the forward driver, but found that the attempt failed because their claims against both drivers emanated from a single integrated set of facts. The court cited *Trump v. Superior Court (1981) 118 Cal. App. 3d 411, 415, 173 Cal. Rptr. 403* , and former Cal. Rules of Ct., Rule 1616(c) [*see now Cal. Rules of Ct., Rule 3.826(c)*] for the proposition that a valid and timely request for trial de novo vacates the arbitration award in its entirety and puts the case at large as though no arbitration proceedings had occurred (*50 Cal. App. 4th 868, 876)* . Thus, the passengers were fairly treated as "the party electing trial de novo" within the meaning of *Code Civ. Proc. § 1141.21*. Nor did it matter that the following driver also requested trial de novo. The court cited *Boyd v. Oscar Fisher Co. (1989) 210 Cal. App. 3d 368, 382, 258 Cal. Rptr. 473* , for the proposition that when two or more parties elect trial de novo, each is subject to the discouraging prospect of liability for costs if less successful at trial de novo (*50 Cal. App. 4th 868, 877)* .

Plaintiff/equipment dealer in ***Boyd v. Oscar Fisher Co.*** *(1989) 210 Cal. App. 3d 368, 258 Cal. Rptr. 473* , sued the manufacturer for wrongful termination of an exclusive franchise. Manufacturer cross-complained for unpaid invoices, which contained an attorney's fee provision. The parties stipulated to judicial arbitration and waived the [then] $25,000 limitation on the award. The arbitrator awarded plaintiff approximately $57,000 plus costs and defendant approximately $32,000 plus interest thereon and attorney's fees. Both parties requested trial de novo, though defendant/manufacturer's request purported to be limited to the complaint only. The jury entered a net verdict of approximately $22,000 for manufacturer, which then moved for attorney's fees, cost, and prejudgment interest. All those motions were granted and defendant was awarded $38,730 in attorney's fees, prejudgment interest amounting to approximately $8,700, and costs of approximately $17,900. Plaintiff appealed from the order making those awards.

Except for reducing the amount of one expert's services, the court of appeal affirmed (*210 Cal. App. 3d 368, 383)* . Dealer contended that his election of trial de novo did not trigger the provisions of *Code Civ. Proc. § 1141.21* because manufacturer had already elected trial de novo. The court agreed that manufacturer's election called for trial de novo of all competing cross-claims, not merely "on the complaint only" as it purported to do, but it did not follow that the dealer'ssubsequent election had no effect. Nothing in the judicial arbitration statutes precludes more than one party per arbitration from electing trial de novo. If two or more parties do so, each is subject to the discouraging prospect of liability for costs if unsuccessful (*210 Cal. App. 3d 368, 382)* .

[b] When Attempt to Request Partial Trial de Novo Fails

Muega v. Menocal *(1996) 50 Cal. App. 4th 868, 57 Cal. Rptr. 2d 697* , is discussed under [a], *above*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureAppealsStandards of ReviewDe Novo Review

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13-131A California Points & Authorities § 131A.302

§ 131A.302 Labor Code Section 3856 Entitles Plaintiff to Reasonable Litigation Expense Even After Less Favorable Result on Trial de Novo

[1] FORM

EVEN THOUGH PLAINTIFF OBTAINED A LESS FAVORABLE RESULT ON TRIAL DE NOVO, HE/SHE IS ENTITLED TO HAVE THE JUDGMENT APPLIED FIRST TO HIS/HER REASONABLE ATTORNEY'S FEES AND LITIGATION EXPENSES IN ACCORDANCE WITH SECTION 3856 OF THE LABOR CODE.

A. Workers' Compensation Statute to Be Given Effect. An employee who obtains a less favorable result against a third party on trial de novo following judicial arbitration, and therefore cannot recover his or her costs under *Section 1141.21(a)(1)(B) of the Code of Civil Procedure*, may still have the judgment allocated in accordance with *Section 3856 of the Labor Code*, including use of the judgment to pay his or her reasonable litigation expenses and reasonable attorney's fees (*Phelps v. Stostad (1997) 16 Cal. 4th 23, 34, 65 Cal. Rptr. 2d 360, 939 P.2d 760* (disapproving dictum to the contrary in *Crampton v. Takegoshi (1993) 17 Cal. App. 4th 308, 319, 21 Cal. Rptr. 2d 284*)).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted by an injured employee who has collected workers' compensation benefits and also recovered damages against a third party for the same injury to have the judgment allocated to pay his or her reasonable litigation expenses, including attorney's fees, even though he or she obtained a less favorable result on trial de novo. The legal argument is that *Lab. Code § 3856* is to be given effect notwithstanding *Code Civ. Proc. § 1141.21*. For example, this form may be used by the employee to support of a motion by the employee to fix the amount of reasonable attorney's fees or to support a motion to tax costs.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument

should establish that the case is one which is governed by *Lab. Code § 3856*, i.e., that the injured employee prosecuted his or her own claims and those of the employer against the third party. Argument also should establish that at the time of the election for trial de novo, the employee had a reasonable expectation of obtaining a more favorable result than the arbitration award.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], or otherwise by affidavits or declarations. Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant or declarant necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For detailed legal background discussion, research guides, procedural checklists, and practice forms of motions relating to judicial arbitration, see California Forms of Pleading and Practice, Ch. 36, *Judicial Arbitration* (Matthew Bender).

For detailed legal background discussion, research guides, procedural checklists, and practice forms of motions relating to cost and attorney's fees, see California Forms of Pleading and Practice, Ch. 174, *Costs and Attorney's Fees* (Matthew Bender).

For detailed legal background discussion, research guides, procedural checklists, and practice forms of motions relating to workers' compensation, see California Forms of Pleading and Practice, Ch. 577, *Workers' Compensation* (Matthew Bender).

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For forms of points and authorities relating to attorney's fees, see Ch. 25, *Attorney's Fees* .

For forms of points and authorities relating to costs, see Ch. 60, *Costs* .

[3] Discussion of Authorities

[a] Workers' Compensation Statute to Be Given Effect

Lab. Code § 3856 governs allocation between the employer and the injured employee of a judgment obtained against a negligent third party. Any such judgment is to be used first to pay reasonable litigation expenses incurred in preparation or prosecution of that action, together with a reasonable attorney's fee. Next, the judgment is to be used to reimburse the employer for the amount of compensation paid to the employee. Any remaining portion of the judgment goes to the injured employee. Under *Lab. Code § 3856(b)*, if the employee alone prosecutes the action, the reasonable attorney's fees to which the judgment is applied are calculated based on services rendered by the employee's attorney in effecting recovery both for the benefit of the employee and the employer.

Phelps v. Stostad *(1997) 16 Cal. 4th 23, 65 Cal. Rptr. 2d 360, 939 P.2d 760* , was a personal injury action by a plaintiff who had been injured when a vehicle driven by defendant crashed into the building where plaintiff worked. The

employer intervened to recover workers' compensation benefits paid to plaintiff. Judicial arbitration resulted in an award of $45,000 for plaintiff/employee and an award for the employer of its entire workers' compensation expenditure. Plaintiff elected trial de novo. Before the trial, employer settled with defendant, accepting $20,000 in return for its assignment to defendant of its right to reimbursement of workers' compensation paid to plaintiff, which amounted to $28,000. At trial, plaintiff was awarded only $14,600: $5,000 for medical expenses; $2,100 for lost earnings; and $7,600 for general damages. Defendant filed a memorandum of costs in the amount of $6,933.02 and a motion to determine set-off against judgment, although defendant agreed that the right to reimbursement applied only to the $7,100 of economic damages. Plaintiff claimed that under *Lab. Code § 3856(b)*, his reasonable litigation costs and attorney's fees (which he alleged amounted to more than $18,000) should be paid from the judgment before it was applied to reimbursement of the workers' compensation benefits. The trial court, following dicta in *Crampton v. Takegoshi (1993) 17 Cal. App. 4th 308, 319, 21 Cal. Rptr. 2d 284* , applied the entire $7,100 of general damages to reimbursement and awarded defendant her costs, leaving plaintiff a balance of $566.98. Plaintiff appealed. The court of appeal affirmed.

The Supreme Court accepted review and reversed, holding that even when a party who has elected trial de novo following judicial arbitration is precluded by former Code Civ. Proc. § 1141.21(a)(ii) [*see now Code Civ. Proc. § 1141.21(a)(1)(B)*] from recovering his or her costs, the proceeds of the judgment obtained by that party are subject to allocation pursuant to *Lab. Code § 3856*, including use of the judgment for payment of reasonable litigation expenses and attorney's fees, and disapproving dictum to the contrary in *Crampton* (*16 Cal. 4th 23, 34)* . The Court noted that former Code Civ. Proc. § 1141.21(a)(ii) [*see now Code Civ. Proc. § 1141.21(a)(1)(B)*] and *Lab. Code § 3856* address totally unrelated subjects (*16 Cal. 4th 23, 28)* ; and there is no conflict between them (*16 Cal. 4th 23, 32)* . The purpose of *Code Civ. Proc. § 1141.21* is to encourage parties to accept reasonable arbitration awards and to discourage trials de novo. *Lab. Code § 3856* is part of the workers' compensation system (*16 Cal. 4th 23, 29)* . The rule giving priority to the claim for litigation expenses and attorney's fees was created for cases like the present one in which the amount of the judgment is insufficient to pay reasonable litigation expenses and attorney's fees and also to fully reimburse the employer. Interpreting former Code Civ. Proc. § 1141.21(a)(ii) [*see now Code Civ. Proc. § 1141.21(a)(1)(B)*] to preclude payment of litigation expenses and attorney's fees from the judgment would nullify that priority and produce an unexpected windfall for the employer (*16 Cal. 4th 23, 30-31)* .

By allowing an injured employee to apply any judgment obtained from a third party tortfeasor first to pay his or her reasonable litigation expenses and attorney's fees, *Lab. Code § 3856* does not allow the employee to "recover his or her costs" in contravention of former Code Civ. Proc. § 1141.21(a)(ii) [*see now Code Civ. Proc. § 1141.21(a)(1)(B)*] (*16 Cal. 4th 23, 32)* . The employee would "recover his or her costs" within the meaning of former Code Civ. Proc. § 1141.21(a)(ii) [*see now Code Civ. Proc. § 1141.21(a)(1)(B)*] if the court were to order the third party tortfeasor to pay that party's costs *in addition* to paying the amount of damages awarded by the judgment (*16 Cal. 4th 23, 32-33)* . A party does not "recover" costs for purposes of former Code Civ. Proc. § 1141.21(a)(ii) [*see now Code Civ. Proc. § 1141.21(a)(1)(B)*] simply because a portion of the judgment that party has been awarded is used to pay litigation expenses or attorney's fees. It would be unreasonable to interpret the phrase "shall not recover his or her costs" in former Code Civ. Proc. § 1141.21(a)(ii) [*see now Code Civ. Proc. § 1141.21(a)(1)(B)*]to preclude a party from using part of a judgment to pay costs incurred during the litigation. Application of former Code Civ. Proc. § 1141.21(a)(ii) [*see now Code Civ. Proc. § 1141.21(a)(1)(B)*]is consistent with the apparent purpose and design of *Code Civ. Proc. § 1141.21(a)(ii)* and does not deprive the third party tortfeasor of the benefits contemplated by former Code Civ. Proc. § 1141.21(a)(ii) [*see now Code Civ. Proc. § 1141.21(a)(1)(B)*]. The third party is relieved of its obligation as the "losing party" to pay the costs of the party who elected trial de novo. Moreover, in determining what litigation expenses and attorney's fees are reasonable within the meaning of *Lab. Code § 3856*, the court may consider (and the trial court here should do so on remand) whether it was reasonable to request a trial de novo. If, at the time the employee elected the trial de novo, there was no reasonable prospect of a recovery significantly greater than the arbitration award, the court could exclude expenses incurred for the trial de novo from thosepayable under *Lab. Code § 3856* (*16 Cal. 4th 23, 33, 33 n.7, 34)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureAppealsStandards of ReviewDe Novo Review

California Points & Authorities

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 131A JUDICIAL ARBITRATION
PART II. FORMS
PART D. Penalties for Less Favorable Result on Trial de Novo

13-131A California Points & Authorities §§ 131A.303-131A.349

[Reserved]

§§ 131A.303[Reserved]

California Points & Authorities

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 131A JUDICIAL ARBITRATION
PART II. FORMS
PART D. Penalties for Less Favorable Result on Trial de Novo

13-131A California Points & Authorities § 131A.350

§ 131A.350 Employee Obtained More Favorable Result on Trial de Novo

[1] FORM

PLAINTIFF OBTAINED A MORE FAVORABLE RESULT ON TRIAL DE NOVO, BECAUSE THE TOTAL AMOUNT OF THE JUDGMENT WAS LARGER THAN THE TOTAL AMOUNT OF THE ARBITRATION AWARD. THUS, PLAINTIFF IS NOT LIABLE FOR COSTS AND FEES UNDER SECTION 1141.21 OF THE CODE OF CIVIL PROCEDURE.

A. Employee Obtained More Favorable Result on Trial de Novo. In determining whether *Section 1141.21 of the Code of Civil Procedure*, is applicable to a trial de novo, in which all [or some] of the amount of the judgment will reimburse an injured employee's employer for workers' compensation benefits paid to the employee on account of the injuries inflicted by the third party, what is to be measured is the total award obtained in the judicial arbitration proceeding as against the total judgment in the third party proceeding, not the amount that the employee actually will receive after deduction of the employer's lien in those proceedings (*Crampton v. Takegoshi (1993) 17 Cal. App. 4th 308, 320-321, 21 Cal. Rptr. 2d 284*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted by an injured employee to establish that under the appropriate method of comparison between a judgment on trial de novo, part of which will be applied to reimburse the employer for workers' compensation benefits it paid to the employee, and the arbitration award, the employee did obtain a more favorable result, and thus *Code Civ. Proc. § 1141.21* does not apply. This situation is most likely to arise when the employee only prosecutes an action against the third party. For example, this form may be used by the employee to support motion to tax costs in response to the third party's filing of a memorandum of costs.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, the argument should establish that the case is one involving a judgment, a portion of which will be applied to reimburse the employer for benefits paid to the employee [*see, e.g., Lab. Code § 3856* (discussed at *§ 131A.302[3]* [a]), and should show that the total verdict on trial de novo exceeds the amount of the arbitration award.

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], or otherwise by affidavits or declarations. Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), *2015.5*]. Their purpose is to supply the facts within the personal knowledge of the affiant or declarant necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Chapters

For detailed legal background discussion, research guides, procedural checklists, and practice forms of motions relating to judicial arbitration, see California Forms of Pleading and Practice, Ch. 36, *Judicial Arbitration* (Matthew Bender).

For detailed legal background discussion, research guides, procedural checklists, and practice forms of motions relating to cost and attorney's fees, see California Forms of Pleading and Practice, Ch. 174, *Costs and Attorney's Fees* (Matthew Bender).

For detailed legal background discussion, research guides, procedural checklists, and practice forms of motions relating to workers' compensation, see California Forms of Pleading and Practice, Ch. 577, *Workers' Compensation* (Matthew Bender).

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms in this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For forms of points and authorities relating to attorney's fees, see Ch. 25, Attorney's Fees.

For forms of points and authorities relating to costs, see Ch. 60, Costs.

[3] Discussion of Authorities

[a] Employee Obtained More Favorable Result on Trial de Novo

Plaintiff in ***Crampton v. Takegoshi*** *(1993) 17 Cal. App. 4th 308, 21 Cal. Rptr.2d 284* , was injured when a truck he was driving in the course of his employment was struck by defendant. Plaintiff's employer paid him $72,000 in workers' compensation benefits. Employer filed a complaint in intervention in the suit by plaintiff against defendant. The parties stipulated to judicial arbitration. The arbitrator found that not all of plaintiff's injuries were attributable to the accident and that plaintiff could have returned to work sooner than he did. The arbitrator awarded the employer $16,819.72 in reimbursement and the employee $27,678, for a total award of $44,497.72. Employee requested trial de novo. Employer settled with defendant for $25,000, assigned its lien to defendant, and dismissed its complaint in intervention. At the trial de novo, the jury was instructed that plaintiff would not recover anything unless the verdict was more than $75,000. The verdict was only $58,862. Plaintiff filed a memorandum of costs seeking $28,749.03 in costs and attorney's fees under *Lab. Code § 3856(b)*. Defendant filed a memorandum of costs seeking approximately $6,000 under *Code Civ.*

Proc. § 1141.21(a). Each party moved to tax the other's costs. The trial court granted defendant's costs and denied plaintiff's costs and attorney's fees, finding that plaintiff's recovery on trial de novo was zero and that *Code Civ. Proc. § 1141.21* precluded an award under *Lab. Code § 3856*. Plaintiff appealed.

The court of appeal reversed, finding that the comparison should have been between the total award ($44,497.72) and the total verdict ($58,862). Thus, plaintiff did obtain a more favorable result on trial de novo; and *Code Civ. Proc. § 1141.21* was not applicable (*17 Cal. App. 4th 308, 320-321)* . The court of appeal said *Lab. Code § 3856* incorporates the equitable principle of apportionment between an active litigant and a passive beneficiary. If a party who expends attorney's fees winning a lawsuit which creates a fund from which others derive benefits, those passive beneficiaries may be required to share litigation costs (*17 Cal. App. 4th 308, 317)* . Here, plaintiff did not obtain any net recovery, but a benefit was conferred on the passive beneficiary (*17 Cal. App. 4th 308, 318)* . Employer's assignment of its rights to defendant did not change that result (*17 Cal. App. 4th 308, 319)* . The allocation of the arbitration award between employer and employee did not change the fact that the arbitrator found plaintiff had suffered damages of approximately $44,500. What was to be measured for the purpose of *Code Civ. Proc. § 1141.21* was the total award obtained in the judicial arbitration proceeding as against the total judgment in the third party proceeding, not the amount that plaintiff actually received after deduction of the employer's lien in those proceedings (*17 Cal. App. 4th 308, 320)* . That compared the amount of damages awarded between the litigants in their capacity as parties, not their setoff rights obtained from other lienholders. Because the verdict rendered at trial as between plaintiff and defendant was larger than the arbitrator's award, *Code Civ. Proc. § 1141.21* did not apply. Plaintiff was entitled to his costs and to reasonable attorney's fees as fixed by the court under *Lab. Code § 3856* (*17 Cal. App. 4th 308, 321)* .

Note that the statement of dicta in *Crampton* that when a litigant obtains a less favorable judgment in terms of damages than was awarded in the judicial arbitration proceedings, *Code Civ. Proc. § 1141.21* precludes an award of litigation expenses and attorney's fees otherwise due under *Lab. Code § 3856(b)* (*17 Cal. App. 4th 308, 319)* has been disapproved in *Phelps v. Stostad (1997) 16 Cal. 4th 23, 34, 65 Cal. Rptr. 2d 360, 939 P.2d 760* , discussed at *§ 131A.302[3][a]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureAppealsStandards of ReviewDe Novo Review

California Points & Authorities

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 132 JURISDICTION: PERSONAL JURISDICTION AND INCONVENIENT FORUM

13-132 California Points & Authorities 132.syn

§ 132.syn Synopsis to Chapter 132: JURISDICTION: PERSONAL JURISDICTION AND INCONVENIENT FORUM

§ 132.01 Scope of Chapter

§ 132.02 Governing Law

§ 132.03 Terminology Used in This Part

§ 132.04 Jurisdiction to Render Judgment in Personam, in Rem, or Quasi in Rem

[1] In General

[2] Requirement of Notice and Opportunity to Be Heard

§ 132.05 Procedure for Acquiring Jurisdiction Over Person or Thing

[1] Actions in Personam

[2] Actions in Rem

[3] Quasi in Rem Actions

§ 132.06 Procedure for Challenging Personal Jurisdiction

[1] Motion to Quash Service of Summons

[2] Opposition to Motion to Quash

[3] Review

§ 132.07 Invalidity of Judgment Rendered Without In Personam Jurisdiction

§ 132.08 Lack of Jurisdiction

§ 132.09 Excess of Jurisdiction

§ 132.10 Jurisdiction to Determine Jurisdiction

§ 132.11 Doctrine of Inconvenient Forum

§ 132.12 Effect of Party Being a California Resident

§ 132.13 Related Pleading and Practice Chapters

§ 132.14 Related Points and Authorities Chapters

§ 132.15 Page Limits on Memoranda

§§ 132.16-133.19 [Reserved]

§ 132.20 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground of Immunity--Defendant Has Diplomatic Immunity [22 U.S.C. § 254d]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[3] Discussion of Authorities

[a] Diplomatic Immunity to Suit

§ 132.21 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground of Immunity--Defendant Is California Legislator Immune to Civil Process [Cal. Const., art. IV, § 14]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Members of United States Congress

[3] Discussion of Authorities

[a] Immunity of California Legislator

§ 132.22 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground of Immunity--Defendant Is Present in California in Response to Subpoena or Order to Attend and Testify in Criminal Case

[Penal Code §§ 1334.4, 1334.5] or on or after Waiver of Extradition [Penal Code § 1555]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

§ 132.23 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground of Immunity--Defendant Is Indian Tribal Casino

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Immunity of Indian Tribal Casino

§§ 132.24-132.29 [Reserved]

§ 132.30 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground of Immunity--Parties and Witnesses in Civil Actions Are Not Immune to Service of Summons While in California

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[3] Discussion of Authorities

[a] Abrogation of Nonresident Witness Immunity

[b] Abrogation of Nonresident Party Immunity

§ 132.31 [Reserved]

§ 132.32 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground of Immunity--Tribal Immunity Has Been Waived

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[3] Discussion of Authorities

[a] Tribal Immunity From Suit Is Waived When a Party Undertakes to Avail Himself or Herself of the Services of a State Court.

§§ 132.33-132.39 [Reserved]

§ 132.40 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground of Defective Service or Summons--Service Did Not Conform With Statutory Requirements--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Extension of Time to Plead

[d] Substituted and Constructive Service Distinguished

[e] Related Pleading and Practice Forms

[f] Related Points and Authorities

[g] Opposing Memoranda

[3] Discussion of Authorities

[a] Compliance with Statutory Provisions Governing Service of Process Is Required

[b] Strict Compliance Necessary for Substituted or Constructive Service

[c] Requirement That Substituted Service Be Reasonably Calculated to Give Actual Notice

[d] Defendant Sued in Representative Capacity, Served by Publication, and Papers Mailed Are Directed to Defendant in Individual Capacity

[e] Service of Summons by Party Is Void

[f] General Appearance After Default Judgment Does Not Validate Defective Service

[4] Additional Authorities

[a] Compliance with Statutory Provisions Governing Service of Process Is Required

[b] Strict Compliance Necessary for Substituted or Constructive Service

§ 132.41 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground of Defective Service or Summons--Service Did Not Conform With Statutory Requirements--Service on Corporation [Code Civ. Proc. § 416.10]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Service on Corporation's Purported General Manager

[b] Substituted Service on Foreign Corporation

§ 132.42 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground of Defective Service or Summons--Service Did Not Conform With Statutory Requirements--Service on Minor [Code Civ. Proc. § 416.60]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Service of Summons on Minor

§ 132.43 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground of Defective Service or Summons--Service Did Not Conform With Statutory Requirements--Service on Nonresident Motorist [Veh. Code §§ 17454-17456]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Substituted Service on Nonresident Motorist or Deceased Nonresident Motorist's Personal Representative

[4] Additional Authorities

[a] Substituted Service on Nonresident Motorist or Deceased Nonresident Motorist's Personal Representative.

§ 132.44 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground of Defective Service or Summons--Service Did Not Conform With Statutory Requirements--Substituted Service on Individual Defendant or Service by Publication Ineffective When Reasonable Diligence Requirement Has Not Been Satisfied [Code Civ. Proc. §§ 415.20(b), 415.50(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Reasonable Diligence Required for Substituted Service

[b] Reasonable Diligence Required for Service by Publication

[c] Effect of Failure to Exercise Reasonable Diligence

[d] Ignoring Obvious Avenues to Find Party Constitutes Failure to Exercise Reasonable Diligence

§ 132.45 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground of Defective Service or Summons--Service Did Not Conform With Statutory Requirement--Service of Summons Was Incomplete

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Service Outside California

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Postal Service Return Receipt Is Insufficient

[b] Service by Mail on Nonresident

§ 132.46 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground of Defective Service or Summons--Summons Was Substantially Defective

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Required Contents of Summons

[d] Related Pleading and Practice Forms

[e] Related Points and Authorities

[f] Opposing Memoranda

[3] Discussion of Authorities

[a] Service of Substantially Defective Summons

[b] Lack of Statutory Notice in Summons Served on Individual on Behalf of Corporation or Unincorporated Association

[c] Motion to Quash Is Appropriate to Test Whether Complaint for Unlawful Detainer States Cause for Relief Supporting Reduced Time for Response to Summons

[4] Additional Authorities

[a] Service of Substantially Defective Summons

§§ 132.47-132.59 [Reserved]

§ 132.60 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground of Defective Service or Summons--Service Conformed With Statutory Requirements--Person Served on Behalf of Corporation Had

Ostensible Authority or Was General Manager of Corporation [Code Civ. Proc. § 416.10; Corp. Code § 2110]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[3] Discussion of Authorities

[a] Service of Process Act to Be Liberally Construed

[b] Factual Determination

[c] Service on Corporate Agent With Ostensible Authority to Accept Service Is Sufficient

[d] Service on General Manager

[e] When Individual May Be Regarded as General Manager of Foreign Corporation

[f] Activities of Agent of Foreign Corporation

[g] Proof of Service

§ 132.61 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground of Defective Service or Summons--Service Conformed With Statutory Requirements--Service on Person in Charge of Defendant's Office [Code Civ. Proc. § 415.20(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Person to Be Served

[c] When Service Is Deemed Complete

[3] Discussion of Authorities

[a] Service Effective Although Defendant Rendered Physical Service Impossible

§ 132.62 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground of Defective Service or Summons--Service Conformed With Statutory Requirements--Service at Defendant's Home, Business, or Mailing Address [Code Civ. Proc. § 415.20(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Person to Be Served

[3] Discussion of Authorities

[a] Constitutional Validity of Substituted Service

[b] Reasonable Diligence Requirement Satisfied

§ 132.63 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground of Defective Service or Summons--Service Conformed With Statutory Requirements--Service on Defendant's Agent [Code Civ. Proc. § 416.90]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Specific Authorization Unnecessary

§ 132.64 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground of Defective Service or Summons--Service Conformed With Statutory Requirements--Service Pursuant to Direction of Court [Code Civ. Proc. § 413.30]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Service in Dissolution Proceeding

§ 132.65 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground of Defective Service or Summons--Summons Substantially Complied With Statutory Requirements [Code Civ. Proc. § 412.30]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Substantial Compliance With Statutory Provisions

§§ 132.66-132.69 [Reserved]

§ 132.70 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground That Court Lacks Personal Jurisdiction--Nonresident Defendant Lacks Minimal Contacts With California--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Federal Actions

[d] Related Pleading and Practice Forms

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Requirement of Personal Jurisdiction Over Defendant

[b] Due Process of Law Required

[c] Due Process Requires Reasonable Notice and Minimum Contacts to Support Exercise of Personal Jurisdiction

[d] Minimum Contacts Requirement

[e] Minimum Contacts Requirement Applies to Actions in Personam, in Rem, and Quasi in Rem

[f] Minimum Contacts Requirement Applies to Both Individual and Corporate Defendants

[g] Effect of Minimum Contacts Requirement

[h] Minimum Contacts Lacking When Defendant Has No Contacts With State

[4] Additional Authorities

[a] Requirement of Personal Jurisdiction Over Defendant

[b] Due Process Requires Reasonable Notice and Minimum Contacts to Support Exercise of Personal Jurisdiction

[c] Minimum Contacts Requirement

[d] Minimum Contacts Requirement Applies to Both Individual and Corporate Defendants

[e] Minimum Contacts Lacking When Defendant Has No Contacts With State

§ 132.71 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground That Court Lacks Personal Jurisdiction--Nonresident Defendant Lacks Minimal Contacts With California--Exercise of General Jurisdiction Is Improper When Nonresident Defendant Has Ceased Doing Business in State

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] General Jurisdiction Terminates When Nonresident Ceases to Do Business in State

§ 132.72 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground That Court Lacks Personal Jurisdiction--Nonresident Defendant Lacks Minimal Contacts With California--Minimal Burden on Defendant in Defending Action Is Irrelevant

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Fact That Burden of Defending Is Minimal Is Irrelevant When Minimum Contacts Requirement Is Not Satisfied

§ 132.73 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground That Court Lacks Personal Jurisdiction--Nonresident Defendant Lacks Minimal Contacts With California--Unilateral Activity of Third Person Is Irrelevant

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Unilateral Activity of Third Parties

[4] Additional Authorities

[a] Unilateral Activity of Third Parties

§ 132.74 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground That Court Lacks Personal Jurisdiction--Nonresident Defendant Lacks Minimal Contacts With California--Insufficient Foreseeability That Defendant Would Be Haled Into California Court in Action Based on Alleged Defective Product

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] "Foreseeability" Element of Due Process Analysis in Action Based on Defective Product

[4] Additional Authorities

[a] "Foreseeability" Element of Due Process Analysis in Action Based on Defective Product

§ 132.75 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground That Court Lacks Personal Jurisdiction--Nonresident Defendant Lacks Minimal Contacts With California--Plaintiff Has Burden to Establish That Minimum Contacts Exist

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Burden of Showing Proper Basis for Personal Jurisdiction

[4] Additional Authorities

[a] Burden of Showing Proper Basis for Personal Jurisdiction

§ 132.76 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground That Court Lacks Personal Jurisdiction--Nonresident Defendant Lacks Minimal Contacts With California--Exercise of Limited Jurisdiction Is Improper--General Requirements of Purposeful Availment by Defendant and Relationship Among Defendant, Forum, and Cause of Action

[1] FORM

[2] Comments

[a] Use of Form

[b] General and Limited Jurisdiction

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Quality and Nature of Defendant's Activity

[b] Assessment of Relationship Among Defendant, Forum, and Litigation

[c] Test for Limited Jurisdiction; Purposeful Availment

[d] Effect of Purposeful Availment Requirement

[4] Additional Authorities

[a] Assessment of Relationship Among Defendant, Forum, and Litigation

[b] Test for Limited Jurisdiction; Purposeful Availment

§ 132.77 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground That Court Lacks Personal Jurisdiction--Nonresident Defendant Lacks Minimal Contacts With California--Exercise of Limited Jurisdiction Is Improper--Exercise of Jurisdiction Must Be Reasonable and Fair

[1] FORM

[2] Comments

[a] Use of Form

[b] Evaluation of Factors

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Reasonableness and Fairness Requirement

[b] Relevant Factors

[c] Balancing of Conveniences for Exercise of Limited Jurisdiction

[d] When Defendant Is Foreign National

[4] Additional Authorities

[a] Reasonableness and Fairness Requirement

[b] Relevant Factors

[c] Balancing of Conveniences for Exercise of Limited Jurisdiction

[d] When Defendant Is Foreign National

§ 132.78 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground That Court Lacks Personal Jurisdiction--Nonresident Defendant Lacks Minimal Contacts With California--Exercise of Limited Jurisdiction Is Improper--Defendant Corporation's Sole Contacts With California Are Insubstantial and Unrelated to Controversy

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Defendant Corporation's Contacts Too Insubstantial

§ 132.79 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground That Court Lacks Personal Jurisdiction--Nonresident Defendant Lacks Minimal Contacts With California--Exercise of Limited Jurisdiction Is Improper--Designation of Agent for Service of Process [Corp. Code § 2105] Insufficient by Itself

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Designation of Agent for Service of Process Insufficient by Itself

§ 132.80 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground That Court Lacks Personal Jurisdiction--Nonresident Defendant Lacks Minimal Contacts With California--Exercise of Limited Jurisdiction Is Improper--Presence of Defendant's Property Unrelated to Action Is Insufficient by Itself

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Assertion of Jurisdiction Based Solely on Presence of Property Unrelated to Action

§ 132.81 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground That Court

Lacks Personal Jurisdiction--Nonresident Defendant Lacks Minimal Contacts With California--Exercise of Limited Jurisdiction Is Improper--Defendant Is Merely Out-of-State Customer

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Out-of-State Customers

[4] Additional Authorities

[a] Out-of-State Customers

§ 132.82 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground That Court Lacks Personal Jurisdiction--Nonresident Defendant Lacks Minimal Contacts With California--Exercise of Limited Jurisdiction Is Improper--Individual Defendant Is Merely Officer or Director and Stockholder of Defendant Foreign Corporation

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Officer or Director and Stockholder of Foreign Corporation

[4] Additional Authorities

[a] Officer or Director and Stockholder of Foreign Corporation

§ 132.83 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground That Court Lacks Personal Jurisdiction--Nonresident Defendant Lacks Minimal Contacts With California--Exercise of Limited Jurisdiction Is Improper--Advertising in California

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Advertising in California

[4] Additional Authorities

§ 132.84 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground That Court Lacks Personal Jurisdiction--Nonresident Defendant Lacks Minimal Contacts With California--Exercise of Limited Jurisdiction Is Improper--Foreign Corporation Is Parent of California Subsidiary

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Foreign Corporation Is Parent of California Subsidiary

[4] Additional Authorities

§ 132.85 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground That Court Lacks Personal Jurisdiction--Nonresident Defendant Lacks Minimal Contacts With California--Exercise of Limited Jurisdiction Is Improper--Contract With Out-of-State Party

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Contracting With Out-of-State Party

[4] Additional Authorities

[a] Contracting With Out-of-State Party

§ 132.86 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground That Court Lacks Personal Jurisdiction--Nonresident Defendant Lacks Minimal Contacts With California--Exercise of Limited Jurisdiction Is Improper--Mere Placement of Product in Stream of Commerce

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Placing Product Into Stream of Commerce

§ 132.87 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground That Court Lacks Personal Jurisdiction--Nonresident Defendant Lacks Minimal Contacts With California--Exercise of Limited Jurisdiction Is Improper--Activities of Independent Nonexclusive Sales Representative

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Activities of Independent Nonexclusive Sales Representatives

§ 132.88 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground That Court Lacks Personal Jurisdiction--Nonresident Defendant Lacks Minimal Contacts With California--Exercise of Limited Jurisdiction Is Improper--Defendant's Out-of-State Act Did Not Cause Sufficient Effect in California

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Defendant Did Not Intend to Cause Effect in California and Effect in California Was Not Reasonably Foreseeable

[b] Assertion of Jurisdiction Based on Defendant's Out-of-State Act Would Be Unreasonable

[4] Additional Authorities

[a] Defendant Did Not Intend to Cause Effect in California and Effect in California Was Not Reasonably Foreseeable

[b] Assertion of Jurisdiction Based on Defendant's Out-of-State Act Would Be Unreasonable

§ 132.89 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground That Court Lacks Personal Jurisdiction--Nonresident Defendant Lacks Minimal Contacts With California--Exercise of Limited Jurisdiction Is Improper--Passive Web Site on Internet

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Creating Passive Website, by Itself, Insufficient to Confer Specific Jurisdiction

[4] Additional Authorities

§ 132.90 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground That Court Lacks Personal Jurisdiction--Nonresident Defendant Lacks Minimal Contacts With California--Exercise of Limited Jurisdiction Is Improper--Long Distance Follow-up Care by Nonresident Health Care Provider Who Treated California Resident Out of State

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Provision of Follow-up Care by Out-of-State Health Care Provider

§§ 132.91-132.99 [Reserved]

§ 132.100 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground That Court Lacks Personal Jurisdiction--Sufficient Basis for Jurisdiction Exists--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Bases for Jurisdiction

[i] Judicial Council Comments to Code Civ. Proc. § 410.10

[ii] Jurisdiction Over Plaintiff

[iii] Jurisdiction Over Party Who Intrudes Voluntarily Into Lawsuit

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Scope of Court's Personal Jurisdiction

[b] Minimum Contacts Requirement

[c] "Contacts" Means "Basis of Jurisdiction"

[d] Bases of Jurisdiction Over Individual Defendant

[e] General and Limited Personal Jurisdiction

[f] When Court May Exercise General Personal Jurisdiction Over Defendant

[g] When Court May Exercise Limited Personal Jurisdiction Over Defendant

[h] Defendant's Economic Activity in Forum

[i] Defendant's Purposeful Direction of Act Having Effect in Forum

[j] Defendant's Purposeful Interjection into Forum

[k] Effect of Contractual Choice of Law Provision

[l] Effect of Defendant's Purposeful Availment of Privilege of Conducting Activities in Forum

[m] Contacts Resulting From Defendant's Own Actions

[n] Requisite Minimum Contacts Can Be Electronic

[o] Defendant's Burden of Proof After Plaintiff Has Established Basis for Jurisdiction

[p] Plaintiff's Lack of Contacts Irrelevant

[4] Additional Authorities

[a] Scope of Court's Personal Jurisdiction

[b] Minimum Contacts Requirement

[c] When Court May Exercise General Personal Jurisdiction Over Defendant

[d] When Court May Exercise Limited Personal Jurisdiction Over Defendant

[e] Defendant's Economic Activity in Forum

[f] Defendant's Purposeful Direction of Act Having Effect in Forum

[g] Defendant's Burden of Proof After Plaintiff Has Established Basis for Jurisdiction

§ 132.101 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground That Court Lacks Personal Jurisdiction--Sufficient Basis for Jurisdiction Exists--Defendant Was Present in California When Served

[1] FORM

[2] Comments

[a] Use of Form

[b] Presence as Basis of Jurisdiction

[3] Discussion of Authorities

[a] Defendant's Presence in California Is Basis of Personal Jurisdiction

[b] Type of Action in Which Presence Is Basis for Jurisdiction

§ 132.102 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground That Court Lacks Personal Jurisdiction--Sufficient Basis for Jurisdiction Exists--Individual Defendant Is Citizen or Resident of or Has Domicile in California

[1] FORM

[2] Comments

[a] Use of Form

[b] Individual Defendant

[i] Domicile

[ii] Residence

[iii] Citizenship

[3] Discussion of Authorities

[a] Domicile

[b] Domicile in California When Cause of Action Arose

§ 132.103 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground That Court Lacks Personal Jurisdiction--Sufficient Basis for Jurisdiction Exists--Defendant Domestic Corporation or Other Entity Was Incorporated or Formed in California

[1] FORM

[2] Comments

[a] Use of Form

[b] Domestic Corporations

[c] Partnership or Other Unincorporated Association

§ 132.104 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground That Court Lacks Personal Jurisdiction--Sufficient Basis for Jurisdiction Exists--Defendant Foreign Corporation or Other Entity Was Served Through Agent Designated to Receive Service of Process

[1] FORM

[2] Comments

[a] Use of Form

[b] Other Minimum Contacts May Be Required

[c] Designation of Agent and Service of Process

[3] Discussion of Authorities

[a] Service on Nonqualified Foreign Corporation

§ 132.105 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground That Court Lacks Personal Jurisdiction--Sufficient Basis for Jurisdiction Exists--Defendant Has Consented to Jurisdiction

[1] FORM

[2] Comments

[a] Use of Form

[b] Effect of Consent

[c] Sufficiency of Consent

[3] Discussion of Authorities

[a] Consent to Jurisdiction by Competent Individual

[b] Consent to Jurisdiction by Foreign Corporation

[c] Consent by Foreign Corporation Transacting Unauthorized Intrastate Business

[4] Additional Authorities

[a] Consent to Jurisdiction by Competent Individual

§ 132.106 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground That Court Lacks Personal Jurisdiction--Sufficient Basis for Jurisdiction Exists--Defendant Has Made General Appearance in Action

[1] FORM

[2] Comments

[a] Use of Form

[b] Effect of General Appearance

[c] Special and General Appearances Distinguished

[d] Continuation of Jurisdiction

[3] Discussion of Authorities

[a] General Appearance Is Equivalent to Valid Service

[b] General Appearance Made By Recognizing Court's Authority to Proceed

[c] General Appearance Made By Actions Undertaken by the Defendant While a Motion to Quash or Writ of Mandate Was Pending Which Recognized the Trial Court's Jurisdiction

[4] Additional Authorities

[a] General Appearance Is Equivalent to Valid Service

§ 132.107 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground That Court Lacks Personal Jurisdiction--Sufficient Basis for Jurisdiction Exists--Cause of Action Arose From Defendant's Act in California

[1] FORM

[2] Comments

[a] Use of Form

[b] State's Interest in Torts

[c] Nontort Action

[3] Discussion of Authorities

[a] Tort Action Against Nonresident Individual

[b] Nontort Action Against Nonresident Individual

[c] Tort Action Against Foreign Corporation

[d] Tort Action Arose From Contract Executed in California

[e] Tortious Act of Corporate Officer or Director

[f] Tortious Act of Counsel for Foreign Corporation

[4] Additional Authorities

[a] Tort Action Against Nonresident Individual

[b] Tort Action Arose From Contract Executed in California

[c] Tortious Act of Corporate Officer or Director

§ 132.108 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground That Court Lacks Personal Jurisdiction--Sufficient Basis for Jurisdiction Exists--Defendant's Out-of-State Act Caused Effect in California and Exercise of Jurisdiction Is Otherwise Reasonable

[1] FORM

[2] Comments

[a] Use of Form

[b] Reasonableness of Jurisdiction

[3] Discussion of Authorities

[a] Effect Caused in California by Individual

[b] Effect Caused in California by Foreign Corporation

[c] Purpose of Rule

[d] Types of Effects Caused in California by Acts Done Elsewhere

[e] Act Done With Intention of Causing Effect in California

[f] Act Done With Reasonable Foreseeability That It Would Cause Effect in California

[g] Act Done Without Intent to Cause Effect and Without Reasonable Foreseeability That It Would Cause Effect in California

[4] Additional Authorities

[a] Effect Caused in California by Individual

[b] Effect Caused in California by Foreign Corporation

[c] Act Done With Intention of Causing Effect in California

[d] Act Done With Reasonable Foreseeability That It Would Cause Effect in California

§ 132.109 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground That Court Lacks Personal Jurisdiction--Sufficient Basis for Jurisdiction Exists--Cause of Action Is Related to Thing Located in California That Is Owned, Used, or Possessed by Defendant

[1] FORM

[2] Comments

[a] Use of Form

[b] Immovable Things

[c] Chattels

[3] Discussion of Authorities

[a] Individual's Ownership, Use, or Possession of Thing Located in California

§ 132.110 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground That Court Lacks Personal Jurisdiction--Sufficient Basis for Jurisdiction Exists--Defendant's Business Activity in California--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Doing Business

[3] Discussion of Authorities

[a] Defendant Foreign Corporation Conducts Continuous and Substantial Business in California and Exercise of Jurisdiction is Reasonable

[4] Additional Authorities

[a] Cause of Action Against Foreign Defendants Arose From Business Done in California

§ 132.111 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground That Court Lacks Personal Jurisdiction--Sufficient Basis for Jurisdiction Exists--Defendant's Business Activity in California--Contract Made and To Be Performed in California

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Contract Made and to Be Performed in California

[b] Recovery of Attorney Fees for Service Performed in California

[4] Additional Authorities

[a] Contract Made and to Be Performed in California

§ 132.112 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground That Court Lacks Personal Jurisdiction--Sufficient Basis for Jurisdiction Exists--Defendant's Business Activity in California--Life Insurance Contract

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Life Insurance Contract

§ 132.113 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground That Court Lacks Personal Jurisdiction--Sufficient Basis for Jurisdiction Exists--Defendant's Business Activity in California--Defective Product Sold in State

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Defective Product Sold in State

[4] Additional Authorities

[a] Defective Product Sold in State

§ 132.114 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground That Court Lacks Personal Jurisdiction--Sufficient Basis for Jurisdiction Exists--Defendant's Business Activity in California--Foreign Parent Corporation or Nonresident Stockholder and Director Is Alter Ego of Corporation Subject to Court's Jurisdiction

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Corporate Defendant Is Alter Ego of Foreign Parent Corporation

[b] Alter Ego Test Applies to Determine Issue of Control

[c] Corporate Defendant Is Alter Ego of Nonresident Stockholders

§ 132.115 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground That Court Lacks Personal Jurisdiction--Sufficient Basis for Jurisdiction Exists--Defendant's Business Activity in California--Officer, Director, or Stockholder of Foreign Corporation Is Doing Business in Individual Capacity

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Defendant Is Doing Business in California in Capacity as Individual as Well as in Representative Capacity

§ 132.116 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground That Court Lacks Personal Jurisdiction--Sufficient Basis for Jurisdiction Exists--Defendant's Business Activity in California--Out-of-State Law Firm Practiced Law in California

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Out-of-state Law Firm Was Doing Business in California

§§ 132.117-132.119 [Reserved]

§ 132.120 Supporting Ex Parte Application for Order for Publication of Summons [Code Civ. Proc. § 415.50]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Defendant Cannot With Reasonable Diligence Be Served in Another Manner

[b] A Cause of Action Exists Against Defendant/Defendant Is Necessary or Proper Party to Action

[4] Additional Authorities

[a] Defendant Cannot With Reasonable Diligence Be Served in Another Manner

§§ 132.121-132.129 [Reserved]

§ 132.130 Supporting Motion to Stay or Dismiss Action or Proceeding for Inconvenient Forum [Code Civ. Proc. §§ 410.30(a), 418.10(a)(2)]--Factors Weigh in Favor of Stay or Dismissal

[1] FORM

[2] Comments

[a] Use of Form

[b] Weight of Factors

[c] Additional Factors in Action Against California Manufacturer by Foreign Plaintiff

[d] Relationship of Personal Jurisdiction and Inconvenient Forum on Jurisdiction

[e] Related Uses

[f] Related Pleading and Practice Forms

[g] Opposing Memoranda

[3] Discussion of Authorities

[a] Considerations of Court

[b] Factors to Be Considered And Balancing of Factors

[c] Specific Factors Enumerated

[d] Relative Financial Condition of Parties

[e] Neutral Factors

[f] Other Factors

[4] Additional Authorities

[a] Factors to Be Considered

[b] Specific Factors Enumerated

§§ 132.131-132.139 [Reserved]

§ 132.140 Opposing Motion to Stay or Dismiss Action or Proceeding for Inconvenient Forum [Code Civ. Proc. §§ 410.30(a), 418.10(a)(2)]--No Suitable Alternative Forum or Factors Weigh Against Stay or Dismissal

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Suitable Alternative Forum Is Not Available

[b] When Weighing of Private and Public Interest Factors Is Proper; Burden of Proof

[c] Effect of Plaintiff's Choice of Forum

[4] Additional Authorities

[a] Suitable Alternative Forum Is Not Available

[b] Specific Factors Enumerated

[c] Effect of Plaintiff's Choice of Forum

§ 132.141 Opposing Motion to Stay or Dismiss Action or Proceeding for Inconvenient Forum [Code Civ. Proc. §§ 410.30(a), 418.10(a)(2)]--Law of Alternative Forum Less Favorable to Plaintiff Than Law of California

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Law of Alternative Forum Provides Remedy Less Favorable to Plaintiff Than That of Forum

§§ 132.142-132.149 [Reserved]

§ 132.150 Supporting or Opposing Motion to Stay or Dismiss Action or Proceeding for Inconvenient Forum [Code Civ. Proc. §§ 410.30(a), 418.10(a)(2)]--Application of Factors to Be Considered

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Balanced Analysis of Factors Is Required

[4] Additional Authorities

§ 132.151 Supporting or Opposing Motion to Stay or Dismiss Action or Proceeding for Inconvenient Forum [Code Civ. Proc. §§ 410.30(a), 418.10(a)(2)]--Ruling on Motion Is in Court's Discretion

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Discretion of Court

[b] Discretion Not Arbitrary

[4] Additional Authorities

[a] Discretion of Court

§ 132.152 Supporting or Opposing Motion to Stay or Dismiss Action or Proceeding for Inconvenient Forum [Code Civ. Proc. §§ 410.30(a), 418.10(a)(2)]--Stay Versus Dismissal

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Dismissal Is Exceptional Remedy

[b] Dismissal Required

[4] Additional Authorities

[a] Dismissal Is Exceptional Remedy

§ 132.153 Supporting or Opposing Motion to Stay or Dismiss Action or Proceeding for Inconvenient Forum [Code Civ. Proc. §§ 410.30(a), 418.10(a)(2)]--Doctrine Is Drastic Remedy to Be Used Cautiously

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authority

[a] Doctrine Is Drastic Remedy

§ 132.154 Supporting or Opposing Motion to Stay or Dismiss Action or Proceeding for Inconvenient Forum [Code Civ. Proc. §§ 410.30(a), 418.10(a)(2)]--Evidentiary Showing Concerning Alternative Forum

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Evidentiary Showing Concerning Alternative Forum Required

California Points & Authorities

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 132 JURISDICTION: PERSONAL JURISDICTION AND INCONVENIENT FORUM
PART I. INTRODUCTION

13-132 California Points & Authorities § 132.01

§ 132.01 Scope of Chapter

This chapter discusses jurisdiction over the person of a party to a lawsuit. Forms in Part II include the following:

- Subpart A includes forms of memoranda of points and authorities supporting [§§ 132.20-132.22] and opposing [§ 132.30] a motion to quash service of summons or to dismiss the action on the ground that the defendant is either immune to suit or immune to service of process.

- Subpart B includes forms of memoranda supporting [§§ 132.40-132.43] and opposing [§§ 132.60-132.65] a motion to quash service of summons on the ground that service or the summons was substantially defective.

- Subpart C includes forms of memoranda supporting [§§ 132.70-132.90] and opposing [§§ 132.100-132.116] a motion to quash service of summons for lack of jurisdiction on the ground that there is not a sufficient basis for the court to exercise personal jurisdiction over a particular defendant, as well as a form of memorandum for use in supporting an ex parte application for an order for publication of summons [§ 132.120].

- Subpart D contains forms of memoranda of points and authorities supporting [§§ 132.130, 132.150-132.154] and opposing [§§ 132.140, 132.150-132.154] a motion for an order staying or dismissing the action on the ground of inconvenient forum.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionJurisdictional SourcesGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral Overview

California Points & Authorities

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 132 JURISDICTION: PERSONAL JURISDICTION AND INCONVENIENT FORUM
PART I. INTRODUCTION

13-132 California Points & Authorities § 132.02

§ 132.02 Governing Law

Personal jurisdiction is governed generally by the *due process clauses of the Fifth* and *Fourteenth Amendments to the United States Constitution, Cal. Const. art. I, § 7, Code Civ. Proc. §§ 410.10-418.11,* and by case law.

The guarantee of "due process of law" is set forth in the *Fifth* and *Fourteenth Amendments to the U.S. Constitution* and of *Cal. Const., art. I, § 7(a).*

Code Civ. Proc. § 410.10 sets forth the basis on which California courts may exercise jurisdiction. The Judicial Council Comment to this section, cited extensively in this part and entitled "Bases of Judicial Jurisdiction," is set out in West's Annot. Code Civ. Proc. (1973 ed.), following § 410.10. *Code Civ. Proc. § 410.50* provides generally that, unless otherwise provided by statute, a court has jurisdiction over a party from the time summons is served under *Code Civ. Proc. § 413.10 et seq.* or that party makes a general appearance, and such jurisdiction continues throughout subsequent proceedings in the action.

Code Civ. Proc. § 410.40 allows an action to be maintained in California against a foreign corporation pursuant to a choice-of-California-law provision in any contract, agreement, or undertaking that relates to a transaction involving $1,000,000, or more and that contains a provision by which the foreign corporation agrees to submit to the jurisdiction of the California courts. *Code Civ. Proc. §§ 410.60* and *410.70* set out additional provisions concerning a court's jurisdiction over trustees and stockholders of a defunct corporation and persons liable on a contract, respectively.

Code Civ. Proc. §§ 412.10-412.30 govern the content and issuance of summons. *Code Civ. Proc. §§ 413.10-417.40* govern the persons, including corporations, on whom a summons may be served and the manner of service of summons.

Jurisdiction over and service of process on corporations is also governed by *Corp. Code §§ 1502-1505, 1700-1702, 2104-2105, 2107, 2110-2111, 2114, 2117, 2203.*

Code Civ. Proc. §§ 418.10 and *1005(a)(4), (b)* govern motions to quash service of summons for lack of personal jurisdiction. *Code Civ. Proc. § 1167.4* also applies to such motions when made in a proceeding for unlawful detainer, forcible entry, or forcible detainer. *Code Civ. Proc. §§ 418.10(d)* and *418.11* specify certain acts by a defendant that do

not constitute a general appearance.

Immunity to civil process is governed by diverse federal and state statutes. The more important of these are set out in forms in Subpart A, § 132.20 et seq.

Motions to stay or dismiss an action for inconvenient forum are governed by *Code Civ. Proc. §§ 410.30, 418.10,* and *1005(a)(13), (b)*. A special provision governs these motions when made in a special proceeding for unlawful detainer, forcible entry, or forcible detainer (*Code Civ. Proc. § 1167.4*).

Review of any superior court order granting or denying a motion to change the place of trial is governed by *Code Civ. Proc. § 400* and by case law. Review of the denial by any California trial court of a motion to quash service of summons for lack of jurisdiction over the defendant or to stay or dismiss an action for inconvenient forum is governed by *Code Civ. Proc. § 418.10(c).*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionJurisdictional SourcesGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral Overview

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PART I. INTRODUCTION

13-132 California Points & Authorities § 132.03

§ 132.03 Terminology Used in This Part

As used in this part, the terms "in personam jurisdiction" and "personal jurisdiction" are synonymous. The words "limited" and "specific," when referring to jurisdiction, are also used synonymously [*see, e.g., Sinatra v. National Enquirer, Inc. (9th Cir. 1988) 854 F.2d 1191, 1195* ; *Hirsch v. Blue Cross, Blue Shield of Kansas City (9th Cir. 1986) 800 F.2d 1474, 1477]* .

The more common spelling "domicile" is used in this part in lieu of the spelling "domicil," except when quoting another source.

The term "domestic corporation" is used to mean a corporation organized and existing under the laws of California. The term "foreign corporation" is used to mean either a corporation organized under the laws of a sister state or foreign country. The terms "out-of-state corporation" and "nonresident corporation" are used occasionally in this part to mean a foreign corporation organized and existing under the laws of a sister state. The term "nonresident defendant" may, depending on context, mean either a natural person whose residence or domicile is other than California or a foreign corporation or other foreign entity.

The terms "forum non conveniens" and "inconvenient forum" are synonymous, as are the terms "forum conveniens" and "convenient forum."

Legal Topics:

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13-132 California Points & Authorities § 132.04

§ 132.04 Jurisdiction to Render Judgment in Personam, in Rem, or Quasi in Rem

[1] In General

In order to render a valid judgment, a court must not only have proper subject-matter jurisdiction, that is, jurisdiction to grant the type of relief sought (*see generally* Chapter 133); it must also have jurisdiction of the person or thing bound by the judgment, such that the judgment can be properly executed against that person or thing. Thus, civil actions and proceedings are classified as "in personam," "in rem," or "quasi in rem," depending on the nature of the judgment sought, that is, whether the judgment imposes an obligation on a particular person, a particular thing, or a particular person's rights in a particular thing, respectively [*see Shaffer v. Heitner (1977) 433 U.S. 186, 199, 97 S. Ct. 2569, 53 L. Ed. 2d 683]* .

With regard to jurisdiction of persons or things, a California court may exercise its jurisdiction on any basis not inconsistent with the Constitution of California or of the United States [*see Code Civ. Proc. § 410.10*]. *Code Civ. Proc. § 410.10* is thus a "long-arm" statute [*see, e.g., Asahi Metal Industry Co. v. Superior Court (1987) 480 U.S. 102, 106, 107 S. Ct. 1026, 94 L. Ed. 2d 92]* , providing state courts with the broadest possible exercise of jurisdiction, limited only by constitutional considerations of due process as defined by the U.S. Supreme Court [*see Pacific Atlantic Trading Co. v. M/V Main Exp. (9th Cir. 1985) 758 F.2d 1325, 1327* ; *Sibley v. Superior Court (1976) 16 Cal. 3d 442, 445, 128 Cal. Rptr. 34, 546 P.2d 322]* . For further discussion regarding the effect on jurisdiction of procedural due process considerations, see *§ 132.04[2]*. For further discussion of the means of acquiring jurisdiction in personam, in rem, or quasi in rem, see *respectively, §§ 132.05[1], 132.05[2],* and *132.05[3]*.

[2] Requirement of Notice and Opportunity to Be Heard

The exercise of jurisdiction over a party or party's property is limited by the *due process clauses of the Fifth* and *Fourteenth Amendments to the U.S. Constitution*. Notice and opportunity to be heard are essential ingredients of due process, and this is true whether the action is in personam, in rem, or quasi in rem [*see Hanson v. Denckla (1958) 357 U.S. 235, 245, 78 S. Ct. 1228, 2 L. Ed. 2d 1283* ; *In re Raner (1963) 59 Cal. 2d 635, 642-643, 30 Cal. Rptr. 814, 381 P.2d 638* ; *see also discussion under § 132.04[1]*]. Hence, under the *Fourteenth Amendment to the U.S. Constitution*, a state may not exercise judicial jurisdiction over a person, although the person is subject to its judicial jurisdiction, unless a reasonable method is employed to give the person notice of the action and unless the person is afforded a reasonable

opportunity to be heard [*see* Restatement (Second), Conflict of Laws, § 25]. Notice of a civil action or proceeding is normally given by the service of a summons with a copy of the complaint or other pleading [*see Code Civ. Proc. §§ 413.10-417.40*].

The methods of giving notice may vary between actions in personam on the one hand and actions in rem or quasi in rem on the other. For further discussion, see *respectively §§ 132.05[1], 132.05[2]*, and *132.05[3]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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13-132 California Points & Authorities § 132.05

§ 132.05 Procedure for Acquiring Jurisdiction Over Person or Thing

[1] Actions in Personam

If the court's jurisdiction is based on its authority over the defendant's person, the action and judgment are denominated in personam and the court can impose a personal obligation on the defendant in favor of the plaintiff [*Shaffer v. Heitner (1977) 433 U.S. 186, 199, 97 S. Ct. 2569, 53 L. Ed. 2d 683]* . In other words, an action that seeks to impose a personal liability or obligation on the defendant in favor of another is an action in personam, and a judgment in personam is one that imposes a personal liability or obligation on one person in favor of another [*Hanson v. Denckla (1958) 357 U.S. 235, 246 n.12, 78 S. Ct. 1228, 2 L. Ed. 2d 1283]* .

Common examples of in personam judgments are those that impose a contract or tort liability on the defendant in favor of the plaintiff by awarding the plaintiff a sum of money. Other examples include an action to enforce a duty of support or some other personal obligation growing out of the parent-child relationship [*Hartford v. Superior Court (1956) 47 Cal. 2d 447, 454, 304 P.2d 1* ; *see also Kulko v. California Superior Court (1978) 436 U.S. 84, 91, 98 S. Ct. 1690, 56 L. Ed. 2d 132* ; *Titus v. Superior Court (1972) 23 Cal. App. 3d 792, 798-799, 100 Cal. Rptr. 477.]* .

To impose personal liability, the court must have jurisdiction over the person of the defendant [*see Pennoyer v. Neff (1878) 95 U.S. 714, 732-733, 24 L. Ed. 565* (leading case); *see also Kulko v. California Superior Court (1978) 436 U.S. 84, 91, 98 S. Ct. 1690, 56 L. Ed. 2d 132* ; *Hartford v. Superior Court (1956) 47 Cal. 2d 447, 454, 304 P.2d 1* ; *Titus v. Superior Court (1972) 23 Cal. App. 3d 792, 799, 100 Cal. Rptr. 477* ; *Code Civ. Proc. § 1917*].

If a California court has a proper basis for exercising personal jurisdiction over a defendant, the court acquires such jurisdiction by the service on that defendant of a summons [*see Code Civ. Proc. § 410.50(a)*], or by defendant's general appearance in the action [*see Code Civ. Proc. § 410.50(a)*; *Neihaus v. Superior Court (1977) 69 Cal. App. 3d 340, 345, 137 Cal. Rptr. 905]* .

The method of service of summons necessary to acquire personal jurisdiction is generally personal service on the defendant, substituted service (delivery of summons to third person for defendant), or service by mail. The statutes specifying the type of notice required in a given action, as well as the service statutes, must be consulted and complied

with. In the case of substituted service, the form of service must be reasonably calculated to give an interested party actual notice of the proceedings and an opportunity to be heard in order that the traditional notions of fair play and substantial justice implicit in due process are satisfied [*Zirbes v. Stratton (1986) 187 Cal. App. 3d 1407, 1416, 232 Cal. Rptr. 653]* .

Conversely, a defendant may challenge the court's exercise of personal jurisdiction by a motion to quash service of summons under *Code Civ. Proc. § 418.10*; *see also discussion under § 132.06*.

Jurisdiction of the court over the parties and the subject matter of an action continues throughout subsequent proceedings in an action, and *Code Civ. Proc. § 415.50* continues the law governing the acquisition of judicial jurisdiction by a California court [*Code Civ. Proc. § 415.50(a)*] and the continuation of such jurisdiction throughout all subsequent proceedings which arise out of the original cause of action [*Code Civ. Proc. § 415.50(b)* ; *Goldman v. Simpson (2008) 160 Cal. App. 4th 255, 263, 72 Cal. Rptr. 3d 729*] (continuing jurisdiction to effectuate the statutory renewal of a money judgment, and the renewal is not subject to attack on the ground that the debtor has insufficient personal contacts with California to establish personal jurisdiction when the renewal is entered; once acquired, jurisdiction is not defeated by subsequent events which might have prevented jurisdiction had they occurred before personal service of the action was made).

There is nothing unreasonable about subjecting a defendant to the jurisdiction of California courts in an independent action to renew a prior judgment; and the passage of time between an original California litigation and a revival action, during which defendant has no additional contacts with California, does not defeat personal jurisdiction as concerns the enforcement because this discourages judgment debtors from evading legal obligations imposed by a judgment of this state's courts by simply packing up their assets and leaving the jurisdiction [*The Cadle Co. II v. Fiscus (2008) 163 Cal. App. 4th 1232, 1240, 78 Cal. Rptr. 3d 238*].

[2] Actions in Rem

An action or proceeding in rem is one which seeks to affect the rights of all persons in certain property within the state and jurisdiction of the court [*Title etc. Restoration Co. v. Kerrigan (1906) 150 Cal. 289, 306-307, 88 P. 356* ; *In re Estate of Davis (1902) 136 Cal. 590, 596, 69 P. 412]* . Such proceedings exist only when authorized by statute, and the "res" which is to be affected thereby, is the defendant, and must be brought before the court either by seizure or by publication of notice [*Lee v. Silva (1925) 197 Cal. 364, 371, 240 P. 1015* ; *Page v. W. W. Chase Co. (1904) 145 Cal. 578, 583, 79 P. 278]* . The basis of in rem jurisdiction is the presence of the subject property or the status involved within the territorial jurisdiction of the forum state [*see Hanson v. Denckla (1958) 357 U.S. 235, 246, 78 S. Ct. 1228, 2 L. Ed. 2d 1283]* .

Examples of actions in rem are probate proceedings, the res being the estate of the decedent which is to be administered and distributed with regard to the rights of creditors, devisees, and all the world [*Abels v. Frey (1932) 126 Cal. App. 48, 53-54, 14 P.2d 594* ; *see also Estate of Neilson (1962) 57 Cal. 2d 733, 748, 22 Cal. Rptr. 1, 371 P.2d 745* (proceeding to determine heirship); *Estate of Neubauer (1958) 49 Cal. 2d 740, 745, 321 P.2d 741* (probate of will); *Estate of Plaut (1945) 27 Cal. 2d 424, 428, 164 P.2d 765* (will contest); *Lilienkamp v. Superior Court (1939) 14 Cal. 2d 293, 298, 93 P.2d 1008* (distribution of estate, partial distribution)]. Jurisdiction is established when the appropriate petition has been filed and the notice required by statute given [*Estate of Wise (1949) 34 Cal. 2d 376, 382, 210 P.2d 497* ; *Lilienkamp v. Superior Court (1939) 14 Cal. 2d 293, 298, 93 P.2d 1008]* .

Other examples are actions or proceedings that determine the status of parties in family law proceedings [*see, e.g., In re Marriage of Hanley (1988) 199 Cal. App. 3d 1109, 1119, 245 Cal. Rptr. 441* (marriage status); *Titus v. Superior Court (1972) 23 Cal. App. 3d 792, 798, 100 Cal. Rptr. 477* (custody of children present in California)]. The res that is the subject of adjudication in these cases is an intangible, and jurisdiction is exercised not by taking custody of a tangible article, but by serving process (in person or by publication) on the other spouse [*Mungia v. Superior Court*

(1964) 225 Cal. App. 2d 280, 284, 37 Cal. Rptr. 285] . However, if the object of the action or proceeding is to fasten a relationship on the defendant, rather than to sever a relationship, the action is in personam rather than in rem, and personal jurisdiction over the defendant is required [*see Hartford v. Superior Court (1956) 47 Cal. 2d 447, 453-457, 304 P.2d 1* (action to declare defendant plaintiff's father)].

In actions in rem, personal jurisdiction over the person whose rights are affected is ordinarily not required, but the court must have jurisdiction over the res, that is, the thing which is the subject of the action [*see* People v. $6,500 U.S. Currency (1989) 215 Cal. App. 3d 1542, 1546, 264 Cal. Rptr. 294; *In re Marriage of Hanley (1988) 199 Cal. App. 3d 1109, 1119, 245 Cal. Rptr. 441* ; and *Code Civ. Proc. § 1917*].

Because in rem jurisdiction is based on the court's power over property within its territory, the effect of a judgment in rem is limited to the property that supports jurisdiction and does not impose a personal liability on the property owner, since he or she is not before the court [*Shaffer v. Heitner (1977) 433 U.S. 186, 199, 97 S. Ct. 2569, 53 L. Ed. 2d 683]* . A judgment in rem, thus, is one that affects the interests of all persons in designated property [*Shaffer v. Heitner (1977) 433 U.S. 186, 199 n.17, 97 S. Ct. 2569, 53 L. Ed. 2d 683* ; *Hanson v. Denckla (1958) 357 U.S. 235, 246 n.12, 78 S. Ct. 1228, 2 L. Ed. 2d 1283* ; *Title etc. Restoration Co. v. Kerrigan (1906) 150 Cal. 289, 306-308, 88 P. 356]* .

With respect to in rem actions, in which service is frequently made by publication or posting, the following discussion is pertinent: "The statute ... involved [in *Title etc. Restoration Co. v. Kerrigan (1906) 150 Cal. 289, 317-318, 88 P. 356]* authorized an in rem proceeding to establish and quiet title to property whenever public records were destroyed, and it provided, among other things, for personal service upon adverse claimants when the plaintiff knew or had been informed of them. The court said that the evident purpose was to secure, so far as possible, actual notice of the proceeding to all known claimants, and that where a statute is careful to provide for actual notice to the known claimants, it should not be construed as intended to permit a plaintiff to willfully or negligently close his eyes to the means of knowledge and thus secure a decree by publication and posting alone as against persons whose identity he might have learned by the use of due effort. On the basis of this reasoning the court held that the statute, properly construed, imposed upon the plaintiff the duty of inquiry as to the names and residences of all persons who might claim an adverse interest in the property and that it required the plaintiff to designate and serve all persons whom, with reasonable diligence, he could ascertain to be claimants" [*Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 556-557, 305 P.2d 20* ; *see also Cavin Memorial Corp. v. Requa (1970) 5 Cal. App. 3d 345, 357, 85 Cal. Rptr. 107* (judgment in quiet title action is void on its face when service was by publication and the affidavit for the order for publication is devoid of any facts showing that due diligence was exercised to make personal service on the defendants)].

[3] Quasi in Rem Actions

Quasi in rem jurisdiction is, like jurisdiction in rem (*discussed under § 132.05[2]*), based on the court's power over property within its territory, and the judgment likewise is limited in its effect to the property that supports jurisdiction and does not impose a personal liability on the property owner, since he or she is not before the court [*Shaffer v. Heitner (1977) 433 U.S. 186, 199, 97 S. Ct. 2569, 53 L. Ed. 2d 683]* . A judgment quasi in rem affects the interests of *particular* persons in designated property [*Shaffer v. Heitner (1977) 433 U.S. 186, 199 n.17, 97 S. Ct. 2569, 53 L. Ed. 2d 683* ; *Title etc. Restoration Co. v. Kerrigan (1906) 150 Cal. 289, 308, 88 P. 356]* . As in the case of an in rem action, the court must have jurisdiction over the res, that is the thing (property) which is the subject of the action [*see Code Civ. Proc. § 1917*].

There are two types of quasi in rem actions or proceedings. In the first type the plaintiff is seeking to secure a preexisting claim in the subject property and to extinguish or establish the nonexistence of similar interests of particular persons [*Shaffer v. Heitner (1977) 433 U.S. 186, 199 n.17, 97 S. Ct. 2569, 53 L. Ed. 2d 683* ; *Hanson v. Denckla (1958) 357 U.S. 235, 246 n.12, 78 S. Ct. 1228, 2 L. Ed. 2d 1283]* . Examples are actions to foreclose a street assessment lien [*Lee v. Silva (1925) 197 Cal. 364, 369, 240 P. 1015]* and actions to quiet title to land [*see Park v. Powers (1935) 2 Cal. 2d 590, 598, 42 P.2d 75]* .

In the second type of quasi in rem action, the plaintiff seeks to apply what he or she concedes to be the property of the defendant to the satisfaction of a claim the plaintiff has against the defendant [*Shaffer v. Heitner (1977) 433 U.S. 186, 199 n.17, 97 S. Ct. 2569, 53 L. Ed. 2d 683* ; *Hanson v. Denckla (1958) 357 U.S. 235, 246 n.12, 78 S. Ct. 1228, 2 L. Ed. 2d 1283]* .

Before the second type of quasi in rem jurisdiction may be obtained, it is essential that some property of the defendant be actually subjected to the court's control before judgment by a procedure such as attachment, garnishment (a form of attachment), or receivership [*Fount Wip, Inc. v. Golstein (1973) 33 Cal. App. 3d 184, 189, 108 Cal. Rptr. 732* . For examples of this type of jurisdiction, see *Goodwine v. Superior Court (1965) 63 Cal. 2d 481, 484, 47 Cal. Rptr. 201, 407 P.2d 1* (attachment); *Nichols v. Superior Court (1934) 1 Cal. 2d 589, 599, 36 P.2d 380* (receivership)]. In addition, the defendant's interest in the property must be a present interest [*Fount Wip, Inc. v. Golstein (1973) 33 Cal. App. 3d 184, 189, 108 Cal. Rptr. 732]* , and the property must be of a kind subject to one of the provisional remedies mentioned above.

For example, contingent obligations may be so ephemeral as not to be subject to attachment, and their purported attachment cannot confer quasi in rem jurisdiction. Thus, an insurer's obligation under a motor vehicle policy to indemnify and defend its insured is so contingent and uncertain that it is not subject to garnishment and attachment and cannot be the basis of quasi in rem jurisdiction in an action arising out of an automobile accident involving the insured vehicle [*see* *Javorek v. Superior Court (1976) 17 Cal. 3d 629, 632-647, 131 Cal. Rptr. 768, 552 P.2d 728* ; *see also Neihaus v. Superior Court (1977) 69 Cal. App. 3d 340, 344-345, 137 Cal. Rptr. 905]* .

If the court would not have jurisdiction of the defendant properly served with summons on the underlying cause of action because of the defendant's insufficient minimum contacts with the state to satisfy the *due process clause of the Fourteenth Amendment to the U.S. Constitution*[*see, e.g.,* *International Shoe Co. v. Washington (1945) 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95]* , the court cannot obtain quasi in rem jurisdiction by attaching or garnishing defendant's property in the forum state or putting a receiver in charge of it. That is, for a court to obtain quasi in rem jurisdiction over a defendant's property in the state, the defendant must have or have had certain minimum contacts with the state such that maintenance of the underlying action in the state would not offend traditional notions of fair play and substantial justice [*see* *Shaffer v. Heitner (1977) 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683* (holding unconstitutional Delaware's sequestration statute (Delaware Code, Title 10, § 366 (1975)) authorizing court to compel the appearance of a nonresident defendant by the seizure of defendant's property within the state and sold under court order to pay plaintiff's demand)].

Because process can be served on a defendant or respondent anywhere in the world under California's long-arm statute [*see Code Civ. Proc. §§ 410.10, 413.10, 415.10-415.50*], it would appear that the use of this second type of quasi in rem jurisdiction, in view of *Shaffer v. Heitner (1977) 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683* , would be limited to cases where a nonresident defendant, having the required minimum contacts with California, has property in California subject to attachment, garnishment, or receivership in the action, but his or her present whereabouts are unknown or he or she is a California domiciliary or resident who has concealed him or herself to avoid the service of process.

If the plaintiff can, in such case, subject the defendant's real or personal California property to the court's control by the provisional remedy of attachment, garnishment, or receivership, the action can proceed to judgment and the claim can be satisfied to the extent possible out of the property seized [*see* *Shaffer v. Heitner (1977) 433 U.S. 186, 199, 97 S. Ct. 2569, 53 L. Ed. 2d 683* ; *Goodwine v. Superior Court (1965) 63 Cal. 2d 481, 483, 47 Cal. Rptr. 201, 407 P.2d 1]* .

Legal Topics:

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13-132 California Points & Authorities § 132.06

§ 132.06 Procedure for Challenging Personal Jurisdiction

[1] Motion to Quash Service of Summons

On or before the last day of the time to plead or within such further time as the court for good cause allows, a defendant may serve and file a notice of motion to quash service of summons on the ground the court lacks jurisdiction over him or her [*Code Civ. Proc. § 418.10(a)*]. Note that a defendant may move alternatively or simultaneously for a stay or dismissal on the ground of inconvenient forum [*Code Civ. Proc. § 418.10(a)*; for further discussion and forms of memoranda relating to inconvenient forum, *see § 132.11*, and Part II, D, § 132.30 et seq.]. If appropriate, the defendant may also alternatively or simultaneously move to dismiss for delay in prosecution [*Code Civ. Proc. § 418.10(a)(3)*; for discussion and forms relating to motions to dismiss for delay in prosecution, *see* Ch. 90, *Dismissal*].

Code Civ. Proc. § 418.10(e) provides that a defendant or cross-defendant may make a motion under *Code Civ. Proc. § 418.10* and simultaneously answer, demur, or move to strike the complaint or cross-complaint. Notwithstanding *Code Civ. Proc. § 1014*, no act by a party who makes a motion under *Code Civ. Proc. § 418.10*, including filing an answer, demurrer, or motion to strike constitutes an appearance, unless the court denies the motion made under this section. If the court denies the motion made under *Code Civ. Proc. § 418.10*, the defendant or cross-defendant is not deemed to have generally appeared until entry of the order denying the motion [*Code Civ. Proc. § 418.10(e)(1)*]. If the motion made under *Code Civ. Proc. § 418.10* is denied and the defendant or cross-defendant petitions for a writ of mandate pursuant to *Code Civ. Proc. § 418.10(c)*, the defendant or cross-defendant is not deemed to have generally appeared until the proceedings on the writ petition have finally concluded [*Code Civ. Proc. § 418.10(e)(2)*]. Failure to make a motion under *Code Civ. Proc. § 418.10* at the time of filing a demurrer or motion to strike constitutes a waiver of the issues of lack of personal jurisdiction, inadequacy of process, inadequacy of service of process, inconvenient forum, and delay in prosecution [*Code Civ. Proc. § 418.10(e)(3)*].

A notice of motion to quash service of summons should be supported by affidavits, or declarations under penalty of perjury, setting forth the facts necessary to support the motion [*see Code Civ. Proc. 1005(b), 2009*; *Cal. Rules of Ct., Rules 3.1300, 3.1306*], and a memorandum setting out the applicable law [*see Cal. Rules of Ct., Rule 3.1113*].

A defendant may move to quash service of summons on several grounds. First, the defendant may object on the ground

that, by operation of a state or federal statute or constitutional provision, he or she is immune to civil process [*see forms in § 132.20* et seq.]. Second, the defendant may object because of substantial noncompliance with the applicable service statutes [*see forms in § 132.40* et seq.]. Finally, a defendant may object on the ground that is not a sufficient basis for the court to exercise personal jurisdiction under *Code Civ. Proc. § 410.10* [*see forms in § 132.70* et seq.].

For a form of notice of motion to quash service of summons, as well as a discussion of the contents of the motion, the procedure to be followed, and the effect of the motion on the defendant's time to plead, see California Forms of Pleading and Practice, Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances* (Matthew Bender).

[2] Opposition to Motion to Quash

On a motion to quash service of summons for lack of jurisdiction, the burden of proof is on the plaintiff to establish the facts of jurisdiction by a preponderance of the evidence [*see § 132.84*]. The plaintiff must show both that there is a proper *basis* for the court's exercise of personal jurisdiction and that the court properly *acquired* that jurisdiction by strict compliance with the statutory service requirements [*Ziller Electronics Lab GMBH v. Superior Court (1988) 206 Cal. App. 3d 1222, 1229, 254 Cal. Rptr. 410* ; *see also § 132.06[1]*].

The plaintiff normally seeks to carry this burden by the service and filing of counteraffidavits or counterdeclarations, setting forth the probative facts of jurisdiction [*see Code Civ. Proc. §§ 1005(b), 2009, 2015.5*; *Cal. Rules of Ct., Rules 3.1300, 3.1306*]. A verified complaint may be treated as a counteraffidavit or counterdeclaration [*Arnesen v. Raymond Lee Organization, Inc. (1973) 31 Cal. App. 3d 991, 995, 107 Cal. Rptr. 744* ; *see Crea v. Busby (1996) 48 Cal. App. 4th 509, 514, 55 Cal. Rptr. 2d 513]* , provided it alleges the essential probative facts establishing jurisdiction [*see Thomas J. Palmer, Inc. v. Turkiye Is Bankasi A.S. (1980) 105 Cal. App. 3d 135, 148-149, 164 Cal. Rptr. 181]* .

A memorandum should be submitted with the counterdeclarations setting forth the law applicable to the facts of the case supporting the denial of the motion.

[3] Review

If the motion to quash service of summons is denied, the defendant may petition an appropriate reviewing court for a writ of mandate to compel the trial court to enter its order quashing service [*Code Civ. Proc. § 418.10(c)*]. A defendant who chooses to litigate the merits of a lawsuit after its motion to quash has been denied has no right to raise the jurisdictional question on appeal; by contesting the merits, the defendant makes a general appearance and submits itself to the jurisdiction of the court, and thereby waives any right it may have had to insist that jurisdiction of its person was not obtained [*State Farm General Ins. Co. v. JT's Frames, Inc. (2010) 181 Cal. App. 4th 429, 437, 104 Cal. Rptr. 3d 573]* . For further discussion of writ review and the procedure to be followed, see California Forms of Pleading and Practice, Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances* (Matthew Bender).

If the motion to quash service of summons is granted, the plaintiff may appeal from the order [*Code Civ. Proc. §§ 904.1(a)(3), 904.2(d)*].

Legal Topics:

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13-132 California Points & Authorities § 132.07

§ 132.07 Invalidity of Judgment Rendered Without In Personam Jurisdiction

A court that lacks jurisdiction over the person of the defendant has no power to enter a personal judgment against the defendant [*First National Bank v. Eastman (1904) 144 Cal. 487, 490, 77 P. 1043* ; *see also, e.g.,* *Rothschild v. Erda (1968) 258 Cal. App. 2d 750, 753, 66 Cal. Rptr. 209* ; *Sharove v. Middleman (1956) 146 Cal. App. 2d 199, 202, 303 P.2d 900* ; *King v. Superior Court (1950) 99 Cal. App. 2d 91, 92, 221 P.2d 120]* . Under the *Fourteenth Amendment to the U.S. Constitution*, any judgment purporting to bind the person of a defendant over whom the court has not acquired in personam jurisdiction is void within the state as well as without [*Hanson v. Denckla (1958) 357 U.S. 235, 250, 78 S. Ct. 1228, 2 L. Ed. 2d 1283]* .

Moreover, the *due process clause of the Fourteenth Amendment to the U.S. Constitution* limits the power of a state to render a valid personal judgment against a nonresident defendant, and a judgment rendered in violation of due process is void in the rendering state and is not entitled to full faith and credit elsewhere [*World-Wide Volkswagen Corp. v. Woodson (1980) 444 U.S. 286, 291, 100 S. Ct. 559* ; *see also* *Comfort v. Comfort (1941) 17 Cal. 2d 736, 741, 112 P.2d 259* ; *Glaston v. Glaston (1945) 69 Cal. App. 2d 787, 791, 160 P.2d 45]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentVoid Judgments

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13-132 California Points & Authorities § 132.08

§ 132.08 Lack of Jurisdiction

Lack of jurisdiction in its strict sense means an entire absence of power to hear or determine a case, an absence of authority over either the subject matter, the parties, or both [*see Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 287-288, 109 P.2d 942* ; *Schwenke v. J & P Scott, Inc. (1988) 205 Cal. App. 3d 71, 76, 252 Cal. Rptr. 91]* . It may also refer to lack of in rem jurisdiction, or jurisdiction over a specific thing that is the subject of the action [*see Code Civ. Proc. § 1917*].

The judgment of a court lacking jurisdiction over the parties, or a specific thing that is the subject of the judgment is void [*see Kulko v. California Superior Court (1978) 436 U.S. 84, 91, 98 S. Ct. 1690, 56 L. Ed. 2d 132, 141* ; *Hanson v. Denckla (1958) 357 U.S. 235, 250, 78 S. Ct. 1228, 2 L. Ed. 2d 1283* ; *County of Ventura v. Tillett (1982) 133 Cal. App. 3d 105, 110, 183 Cal. Rptr. 741 , cert. denied, 460 U.S. 1051, 103 S. Ct. 1497, 75 L. Ed. 2d 929 (1983)* (disapproved on another point in *County of Los Angeles v. Soto (1984) 35 Cal. 3d 483, 492 n.4, 198 Cal. Rptr. 779, 674 P.2d 750*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionJurisdictional SourcesGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss

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13-132 California Points & Authorities § 132.09

§ 132.09 Excess of Jurisdiction

In some instances a court may have proper jurisdiction over the parties, and a specific thing when it is the subject of the action, but it may nonetheless be limited in the exercise of that jurisdiction. It may, for example, have jurisdiction or power to act only in a particular manner, to grant only certain kinds of relief, or to act only on the occurrence of certain procedural prerequisites [*Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 288, 109 P.2d 942* ; *see also Crittenden v. Superior Court (1964) 61 Cal. 2d 565, 567, 39 Cal. Rptr. 380, 393 P.2d 692* ; *Schwenke v. J & P Scott, Inc. (1988) 205 Cal. App. 3d 71, 76, 252 Cal. Rptr. 91]* . Strictly speaking, a court having fundamental jurisdiction, but acting beyond the limits of its authority, is acting in excess of its jurisdiction; although the phrase "lack of jurisdiction" is sometimes used to refer to such acts, they should be distinguished from acts undertaken with a lack of fundamental jurisdiction [*see Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 290, 109 P.2d 942* ; *Jones v. World Life Research Institute (1976) 60 Cal. App. 3d 836, 846, 131 Cal. Rptr. 674* ; *see also* discussion in *§ 132.08*].

Judicial acts in excess of jurisdiction may be challenged by petition for writ of prohibition or review [*see Crittenden v. Superior Court (1964) 61 Cal. 2d 565, 567, 39 Cal. Rptr. 380, 393 P.2d 692* (writ of prohibition granted); *Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal. 2d 450, 454-455, 20 Cal. Rptr. 321, 369 P.2d 937* (writ of certiorari); *see also Code Civ. Proc. § 1094.5(a), (b)* (petition for writ of administrative mandate to review certain quasi-judicial acts of administrative agencies)]. These acts generally include any acts that exceed the power of a court as defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of stare decisis [*see Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 287-288, 109 P.2d 942]* . Moreover, the judgment of a court that exceeds its jurisdiction by granting relief that it has no power to grant is void [*County of Ventura v. Tillett (1982) 133 Cal. App. 3d 105, 110, 183 Cal. Rptr. 741 , cert. denied, 460 U.S. 1051 (1983)* (disapproved on another point in *County of Los Angeles v. Soto (1984) 35 Cal. 3d 483, 492 n.4, 198 Cal. Rptr. 779, 674 P.2d 750*); *but see People v. Malveaux (1997) 50 Cal. App. 4th 1425, 1434, 59 Cal. Rptr. 2d 371* (judgment void rather than voidable only if trial court lacked subject matter jurisdiction; since juvenile court's judgment was in excess of jurisdiction, judgment was only voidable and not void; consequently, court lost jurisdiction over own judgment after notice of appeal filed; trial court loses jurisdiction to vacate its own judgment once party files notice of appeal, thus shifting jurisdiction over cause to court of appeal, except that trial court is allowed to vacate void but not voidable judgment; trial court may also enter orders that only determine ancillary or collateral matters); *see also Shisler v. Sanfer Sports Cars, Inc. (2008) 167 Cal. App. 4th 1, 8, 83 Cal. Rptr. 3d 771* (while it is true that once a motion to quash

is granted, the court may not review the merits of the underlying action, at least as far as they pertain to the defendant that prevailed on the motion to quash for lack of personal jurisdiction, it does not necessarily follow that the lack of power to rule on the merits of the lawsuit deprives the trial court of jurisdiction to rule upon a collateral motion for attorney fees; a defendant does not forfeit a collateral right to attorney fees by choosing to assert the right to challenge the court's in personam jurisdiction)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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13-132 California Points & Authorities § 132.10

§ 132.10 Jurisdiction to Determine Jurisdiction

Although a court may not act in a matter over which it has no jurisdiction, it has the initial power, or jurisdiction, to determine whether or not it has jurisdiction to act [*Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 302-303, 109 P.2d 942* ; *Ziller Electronics Lab GMBH v. Superior Court (1988) 206 Cal. App. 3d 1222, 1228, 254 Cal. Rptr. 410]* . Thus, a court has inherent power to inquire into its jurisdiction of a matter on its own motion, regardless of whether the issue is raised by the litigants [*Walker v. Superior Court (1991) 53 Cal. 3d 257, 267, 279 Cal. Rptr. 576, 807 P.2d 418* ; *Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 302, 109 P.2d 942* ; *In re Corienna G. (1989) 213 Cal. App. 3d 73, 77, 261 Cal. Rptr. 462]* . The power of inquiry rests partially on the theory that until the court determines that it has jurisdiction and does some act in consequence, there can be no injury to the party who denies its jurisdiction. The exercise of jurisdiction to determine jurisdiction is a preliminary step, not a final one, and no interference in the tribunal's inquiry is permitted. However, once a court decides that it has jurisdiction, then any subsequent act is always subject to inquiry by a higher court [*Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 302-303, 109 P.2d 942]* . That is, once the determination is made, the question is no longer one of jurisdiction to determine jurisdiction, but, rather, one of jurisdiction to act, and if the court acts, its action is subject to review by a higher court [*Harden v. Superior Court (1955) 44 Cal. 2d 630, 634, 284 P.2d 9* ; *Housing Authority v. Superior Court (1950) 35 Cal. 2d 550, 557, 219 P.2d 457]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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13-132 California Points & Authorities § 132.11

§ 132.11 Doctrine of Inconvenient Forum

Forum non conveniens, or inconvenient forum as it is referred to by statute [*see Code Civ. Proc. § 418.10(a)(2)*], is "an equitable doctrine invoking the discretionary power of a court to decline to exercise the jurisdiction it has over a transitory cause of action when it believes that the action may be more appropriately and justly tried elsewhere" [*Stangvik v. Shiley Inc. (1991) 54 Cal. 3d 744, 751, 1 Cal. Rptr. 2d 556, 819 P.2d 14* ; *see also* Price v. Atchison, T. & S.F. Ry. Co. (1954) *42 Cal. 2d, 577, 580 , 268 P.2d 457]* .

The principle is distinct from questions of jurisdiction and venue in that it permits a court to stay or dismiss an action even when jurisdiction and venue are technically proper [*see Outboard Marine Corp. v. Superior Court (1976) 59 Cal. App. 3d 434, 437, 130 Cal. Rptr. 642* ; *Great Northern Ry. Co. v. Superior Court (1970) 12 Cal. App. 3d 105, 108-109, 90 Cal. Rptr. 461 , cert. denied sub nom. Curtin v. Superior Court of California, 401 U.S. 1013, 91 S. Ct. 1254, 28 L. Ed. 2d 550 (1971)]* .

In *Sinochem Int'l Co. Ltd v. Malaysia Int'l Shipping Corp. (2007) ___ U.S. ___, 127 S. Ct. 1184, 167 L. Ed. 2d 15* , the U.S. Supreme Court considered whether a district court can dismiss a case under the forum non conveniens doctrine before it determines definitively that it has both subject matter and personal jurisdiction. The Court held that a district court has discretion to respond at once to a defendant's forum non conveniens plea, and need not take up first any other threshold objection. In particular, a court need not resolve whether it has authority to adjudicate the cause (subject matter jurisdiction) or personal jurisdiction over the defendant if it determines that, in any event, a foreign tribunal is the more suitable arbiter of the merits of the case.

For discussion and forms relating to proceedings to stay or dismiss an action on the ground of inconvenient forum, see California Forms of Pleading and Practice, Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
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ActionsGeneral OverviewCivil ProcedureVenueForum Non Conveniens

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13-132 California Points & Authorities § 132.12

§ 132.12 Effect of Party Being a California Resident

Under case law prior to 1986, the trial court had no discretion to dismiss an action for inconvenient forum when the plaintiff was a resident of California, except in extraordinary cases [*see, e.g.,* *Archibald v. Cinerama Hotels (1976) 15 Cal. 3d 853, 858-859, 126 Cal. Rptr. 811, 544 P.2d 947* (court noted, however, that rule was inapplicable when the California resident was but a nominal plaintiff suing on behalf of a foreign beneficiary or creditor); *Thomson v. Continental Ins. Co. (1967) 66 Cal. 2d 738, 742, 59 Cal. Rptr. 101, 427 P.2d 765* ; *Corrigan v. Bjork Shiley Corp. (1986) 182 Cal. App. 3d 166, 176, 227 Cal. Rptr. 247* , *appeal dismissed, 479 U.S. 1049 (1987)* (disapproved on other grounds in *Stangvik v. Shiley Inc. (1991) 54 Cal. 3d 744, 761, 764, 1 Cal. Rptr. 2d 556, 819 P.2d 14*)].

In 1986, the Legislature amended *Code Civ. Proc. § 410.30* to provide that the domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action. The purpose of the amendment was to overcome the holding of *Archibald* and other cases that a trial court was powerless to dismiss an action on the ground of forum non conveniens if the plaintiff was a California resident [*see* *Stangvik v. Shiley Inc. (1991) 54 Cal. 3d 744, 756, 1 Cal. Rptr. 2d 556, 819 P.2d 14]* . Specifically, under the amended statute, the courts were required to assign less weight to the factor of the plaintiff's California residence, and instead consider the justice, fairness, and convenience of California as a forum, without giving any special emphasis to the fact that a party to the action was a California resident [*Delfosse v. C.A.C.I., Inc.-Federal (1990) 218 Cal. App. 3d 683, 688 n.4, 267 Cal. Rptr. 224* ; *Credit Lyonnais Bank Nederland, N.V. v. Manatt, Phelps, Rothenberg & Tunney (1988) 202 Cal. App. 3d 1424, 1432, 1434, 249 Cal. Rptr. 559* ; *see also* *Northrop Corp. v. American Motorists Ins. Co. (1990) 220 Cal. App. 3d 1553, 1560-1562, 270 Cal. Rptr. 233]* . The 1986 version of *Code Civ. Proc. § 410.30* (*see* Stats. 1986, ch. 968) was, however, by its own terms, repealed effective January 1, 1992, at which time the pre-1986 version of the statute became reoperative. The reoperative version does not contain the provision that the domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action. It would therefore appear that the rule of *Archibald*, prohibiting the dismissal of an action if the plaintiff is a California resident, is reinstated. In contrast to dismissal of an action, however, it has been held that in applying the doctrine of forum non conveniens, a California court has the power to stay an action even though the sole plaintiff is a California resident [*Hansen v. Owens-Corning Fiberglas Corp. (1996) 51 Cal. App. 4th 753, 761, 59 Cal. Rptr. 2d 229* ; *see* *Berg v. MTC Electronics Technologies Co. (1998) 61 Cal. App. 4th 349, 362, 71 Cal. Rptr. 2d 523]* . A stay of an action filed by a California resident, however, is rare [*Berg v. MTC Electronics Technologies Co. (1998) 61 Cal. App. 4th 349, 362, 71 Cal. Rptr. 2d 523*

(case, however, one in which stay justified)].

In addition, the presumption that the forum was convenient to a defendant who was a resident of California was not affected by the 1986 amendment of *Code Civ. Proc. § 410.30* and remained in effect. This presumption, however, is not conclusive, and a resident defendant may overcome the presumption by evidence that the alternate jurisdiction is a more convenient place for trial of the action, even if the defendant is a corporation which has its principal place of business in California and the tort was allegedly committed in this state [*Stangvik v. Shiley Inc. (1991) 54 Cal. 3d 744, 756, 760-761, 1 Cal. Rptr. 2d 556, 819 P.2d 14* (rejecting contrary analysis in *Corrigan v. Bjork Shiley Corp. (1986) 182 Cal. App. 3d 166, 181-182, 227 Cal. Rptr. 247* ; *Hemmelgarn v. Boeing Co. (1980) 106 Cal. App. 3d 576, 580, 165 Cal. Rptr. 190* ; and *Brown v. Clorox Co. (1976) 56 Cal. App. 3d 306, 313-314, 128 Cal. Rptr. 385*); *see also Northrop Corp. v. American Motorists Ins. Co. (1990) 220 Cal. App. 3d 1553, 1562, 270 Cal. Rptr. 233]* .

A refusal by California courts to exercise jurisdiction cannot be justified by the mere fact that a claim arising from California contacts is prosecuted by a nonresident. While the foreign status of an assignee might in some cases reduce the state's interest in adjudicating a dispute, that is at most a subsidiary consideration which cannot by itself justify a denial of access to California's courts [*Epic Communications, Inc. v. Richwave Technolgy, Inc. (2009) 179 Cal. App. 4th 314, 317-318, 101 Cal. Rptr. 3d 572*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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13-132 California Points & Authorities § 132.13

§ 132.13 Related Pleading and Practice Chapters

For discussion and forms relating to proceedings to challenge a court's personal jurisdiction by motions to quash service of summons, see California Forms of Pleading and Practice, Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances* (Matthew Bender).

For discussion and forms relating to proceedings to stay or dismiss an action on the ground of inconvenient forum, see California Forms of Pleading and Practice, Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
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13-132 California Points & Authorities § 132.14

§ 132.14 Related Points and Authorities Chapters

For additional memoranda of points and authorities relating to personal jurisdiction or related issues, see the following chapters in this publication:

- Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders;*
- Ch. 150, *Mandate and Prohibition*;
- Ch. 195, *Public Administrative Law*, Part I; and
- Ch. 205, *Review (Certiorari), Writ of.*

For additional memoranda on issues related to inconvenient forum, see the following chapters in this publication:

- Ch. 10, *Abatement and Survival of Actions*, § 10.30 et seq.
- Ch. 238, *Venue*.

For further discussion of how to use the forms in this chapter in drafting a complete memorandum or trial or appellate brief, see Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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13-132 California Points & Authorities § 132.15

§ 132.15 Page Limits on Memoranda

Generally, a supporting or opposing memorandum must not exceed 15 pages, or, in the case of a motion for summary judgment or summary adjudication, 20 pages. A reply or closing memorandum may not exceed 10 pages [*see Cal. Rules of Ct., Rule 3.1113(d)*]. The page limit does not include exhibits, declarations, attachments, the table of contents, the table of authorities, or the proof of service [*Cal. Rules of Ct., Rule 3.1113(d)*]. Any party desiring to file a longer memorandum must obtain leave of court [*see Cal. Rules of Ct., Rule 3.1113(e)*]. For further discussion of the page limitations under *Cal. Rules of Ct., Rule 3.1113*, and of other basic format requirements of memoranda, see *Ch. 1, Writing Legal Memoranda and Briefs, § 1.05*.

Legal Topics:

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

§§ 132.16[Reserved]

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PART II. FORMS
A. Immunity to Suit

13-132 California Points & Authorities § 132.20

§ 132.20 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground of Immunity--Defendant Has Diplomatic Immunity [22 U.S.C. § 254d]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO QUASH SERVICE OF SUMMONS AND TO DISMISS _____ [ACTION *or* PROCEEDING]
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	[*Code Civ. Proc. § 418.10(a)(1)*; *22 U.S.C. § 254d*]
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE MOTION TO QUASH SERVICE OF SUMMONS AND DISMISS THIS _____ (ACTION *or* PROCEEDING) SHOULD BE GRANTED BECAUSE DEFENDANT IS IMMUNE TO SUIT UNDER THE PROVISIONS OF _____ [*either* THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS *or* SECTION _____ (254b *or* 254c) OF TITLE 22 OF THE UNITED STATES CODE *or specify other law extending diplomatic immunity*].

A. Diplomatic Immunity to Suit. Any action or proceeding brought against an individual who is entitled to immunity with respect to such action or proceeding under the Vienna Convention on Diplomatic Relations, or under Section 254b or 254c of Title 22 of the United States Code, or under any other laws extending diplomatic privileges and immunities, shall be dismissed. Such immunity may be established on motion or suggestion by or on behalf of the individual, or as otherwise permitted by law or applicable rules of procedure (*22 U.S.C. § 254d*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The memorandum of points and authorities in [1], *above*, may be submitted in support of a defendant's motion to quash service of summons and to dismiss the action or proceeding. The ground of the motion is that the court lacks jurisdiction over the defendant because he or she has diplomatic immunity [*see 22 U.S.C. § 254d*; *see also* Restatement (Second), Foreign Relations Law of the United States, §§ 73, 74, 81].

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, these points and authorities may also be used in support of a petition for a writ of prohibition to restrain the trial court from proceeding with the action or proceeding and a writ of mandate to compel it to quash service of summons and to dismiss the action after it has denied a motion to do so.

[3] Discussion of Authorities

[a] Diplomatic Immunity to Suit

22 U.S.C. § 254b, referred to in *22 U.S.C. § 254d*, provides that with respect to a nonparty to the Vienna Convention, the mission, the members of the mission, their families, and diplomatic couriers shall enjoy the privileges and immunities specified in the Vienna Convention.

22 U.S.C. § 254c, also referred to in *22 U.S.C. § 254d*, provides that the President may, on the basis of reciprocity and under such terms and conditions as he may determine, specify privileges and immunities for the mission, the members of the mission, their families, and the diplomatic couriers which result in more favorable treatment or less favorable treatment than is provided under the Vienna Convention. By Executive Order, the President delegated the functions respecting privileges and immunities for diplomatic missions and personnel to the Secretary of State [Executive Order No. 12101 (Nov. 17, 1978), 43 Fed. Reg. 54195 , as amended by Executive Order No. 12608 (Sept. 9, 1987) 52 Fed. Reg. 34617].

As used in the Diplomatic Relations Act (Pub. L. No. 95-393, Sept. 30, 1978, 92 Stat. 808, as amended, which includes *22 U.S.C. §§ 254a-254e*):

(1) The term "members of a mission" means (a) the head of a mission and those members of a mission who are members of the diplomatic staff or who, pursuant to law, are granted equivalent privileges and immunities, (b) members of the administrative and technical staff of a mission, and (c) members of the service staff of a mission, as such terms are defined in Article 1 of the Vienna Convention [*22 U.S.C. § 254a(1)*].

(2) The term "family" means (a) the members of the family of a member of a mission described in *22 U.S.C. § 254a(1)*, Paragraph (A), who form part of his or her household if they are not nationals of the United States, and (b) the members of the family of a member of a mission as described in *22 U.S.C. § 254a(1)*, Paragraph (B), who form part of his or her household if they are not nationals or permanent residents of the United States, within the meaning of Article 37 of the Vienna Convention [*22 U.S.C. § 254a(2)*].

(3) The term "mission" includes missions within the meaning of the Vienna Convention and any missions representing foreign governments, individually or collectively, which are extended the same privileges and immunities, pursuant to law, as are enjoyed by missions under the Vienna Convention [*22 U.S.C. § 254a(3)*].

(4) The term "Vienna Convention" means the Vienna Convention on diplomatic Relations of April 18, 1961 (T.I.A.S. numbered 7502; 23 U.S.T. 3227) entered into force with respect to the United States on December 13, 1972 [*22 U.S.C. § 254a(4)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureFederal & State InterrelationshipsSovereign ImmunityGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss

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A. Immunity to Suit

13-132 California Points & Authorities § 132.21

§ 132.21 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground of Immunity--Defendant Is California Legislator Immune to Civil Process [Cal. Const., art. IV, § 14]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO QUASH SERVICE OF SUMMONS
vs.	)	[*Code Civ. Proc. § 418.10(a)(1)*; *Cal. Const., art., IV, § 14*]
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THE MOTION TO QUASH SERVICE OF SUMMONS SHOULD BE GRANTED BECAUSE DEFENDANT IS A MEMBER OF THE CALIFORNIA LEGISLATURE AND IS PRESENTLY NOT SUBJECT TO SERVICE OF PROCESS PURSUANT TO *SECTION 14 OF ARTICLE IV OF THE CALIFORNIA CONSTITUTION*.

A. Immunity of California Legislator. A member of the California Legislature is not subject to civil process during a session of the Legislature or for five days before and after a session (*Cal. Const., art., IV, § 14*; *see Harmer v. Superior*

Court (1969) 275 Cal. App. 2d 345, 348, 79 Cal. Rptr. 855).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The memorandum of points and authorities in [1], *above*, may be submitted in support of a defendant's motion to quash service of summons. The ground of the motion is that the court lacks jurisdiction over the defendant because defendant is a California legislator, the summons was served during a legislative session or within five days before or after a legislative session, and the defendant was immune to, or exempt from, civil process during that period.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, the foregoing points and authorities may also be used in support of a petition for a writ of prohibition to restrain the trial court from proceeding with the action or proceeding and a writ of mandate to compel it to quash service of summons after it has denied a motion to do so [*see Harmer v. Superior Court (1969) 275 Cal. App. 2d 345, 347-348, 79 Cal. Rptr. 855]* .

[c] Members of United States Congress

Unlike California legislators, members of the United States Congress are not immune to civil process during Congressional sessions or at any other time [*see Long v. Ansell (1934) 293 U.S. 76, 81-83, 55 S. Ct. 21, 79 L. Ed. 208* ; *cf.* U.S. *Const., art. I, § 6, cl. 1* (immunity to arrest for specified crimes)].

[3] Discussion of Authorities

[a] Immunity of California Legislator

Harmer v. Superior Court *(1969) 275 Cal. App. 2d 345, 79 Cal. Rptr. 855* , was a proceeding in prohibition by three California state senators and a California state assemblyman, all members of the State Advisory Commission on Indian Affairs, to restrain the superior court from proceeding against them in a civil class action, on behalf of American Indians residing in California, involving an asserted violation of the laws requiring open meetings of state agencies and seeking an injunction against alleged secret meetings. Three of the legislators were served with a summons and complaint, and the fourth with a subpoena. The Legislature was in session at the time of service (and at the time the appellate decision was rendered). Their motions in the trial court to quash service of summons and discovery proceedings based on their constitutional immunity were denied.

In ordering the writ issued, the court of appeal said that *Cal. Const., art. IV, § 14*, creates an exemption from civil process without qualification as to the kind or subject matter of the lawsuit, and that similar exemptions have been construed to cover civil actions of all kinds, including those involving the legislator's personal affairs. The court said that, while conveying incidental personal advantage, the immunity is designed to benefit the public by protecting

legislators against compelled distraction and interference during a legislative session, and that the California immunity applies to civil process generally, not just to civil actions involving legislative functions, and cannot be squeezed by interpretation to a restricted class of lawsuits (*275 Cal. App. 345, 348)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureFederal & State InterrelationshipsSovereign ImmunityGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 132 JURISDICTION: PERSONAL JURISDICTION AND INCONVENIENT FORUM
PART II. FORMS
A. Immunity to Suit

13-132 California Points & Authorities § 132.22

§ 132.22 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground of Immunity--Defendant Is Present in California in Response to Subpoena or Order to Attend and Testify in Criminal Case [Penal Code §§ 1334.4, 1334.5] or on or after Waiver of Extradition [Penal Code § 1555]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN SUPPORT OF MOTION TO QUASH SER-
vs.	)	VICE OF SUMMONS
_____ [*name*],	)	[*Code Civ. Proc. § 418.10(a)(1)*; Penal Code §
Defendant.	)	_____ [1334.4 *or* 1334.5 *or* 1555]
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE MOTION TO QUASH SERVICE OF SUMMONS SHOULD BE GRANTED BECAUSE AT THE TIME THE SUMMONS WAS SERVED DEFENDANT WAS IMMUNE TO SERVICE OF PROCESS.

[*EITHER*]

A. Nonresident Witness in California Pursuant to Subpoena to Testify in Criminal Case. A person coming into California in obedience to a subpoena directing him or her to attend and testify in this state pursuant to the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Cases (*Penal Code §§ 1334-1334.6*) is not subject to arrest or service of process, civil or criminal, in connection with matters which arose before his or her entrance into California under the subpoena (*Penal Code § 1334.4*).

[*OR*]

A. Nonresident Witness Passing Through California in Response to Subpoena to Testify in Criminal Case in Another State. A person passing through California while going to another state in obedience to a subpoena or order to attend and testify in that state pursuant to the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Cases (*Penal Code §§ 1334-1334.6*), or while returning from that state, is not subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his or her entrance into California under the subpoena or order (*Penal Code § 1334.5*).

[*OR*]

A. Person in California on or after Waiver of Extradition. A person brought into California on, or after waiver of, extradition based on a criminal charge is not subject to service of process in civil actions arising out of the same facts as the criminal proceedings for which he or she is returned, until he or she has been convicted in the criminal proceeding, or, if acquitted, until he or she has had reasonable opportunity to return to the state from which he or she was extradited (*Penal Code § 1555*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The form in [1], *above*, may be submitted in support of a defendant's motion to quash service of summons. The ground of the motion is that defendant is immune to civil process, and that the court therefore lacks jurisdiction over him or her, because defendant was served while in or passing through California pursuant to a subpoena or order to testify in a criminal case pursuant to the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Cases (*Penal Code §§ 1334-1334.6*) [*Penal Code §§ 1334.4*, *1334.5*], or on or after waiver of extradition and either has not yet been convicted in the criminal proceeding or was acquitted and was served before having a reasonable opportunity to return to the originating state [*Penal Code § 1555*]. In this latter situation, the immunity terminates on conviction of the criminal offense [*Penal Code § 1555*; *see People v. Wilson (1963) 213 Cal. App. 2d 290, 292-293, 28 Cal. Rptr. 675]* .

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, these points and authorities may also be used in support of a petition for a writ of prohibition to restrain the trial court from proceeding with the action or proceeding and a writ of mandate to compel it to quash service of summons after it has denied a motion to do so.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureFederal & State InterrelationshipsSovereign ImmunityGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 132 JURISDICTION: PERSONAL JURISDICTION AND INCONVENIENT FORUM
PART II. FORMS
A. Immunity to Suit

13-132 California Points & Authorities § 132.23

§ 132.23 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground of Immunity--Defendant Is Indian Tribal Casino

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN SUPPORT OF MOTION TO QUASH SER-
vs.	)	VICE OF SUMMONS
_____ [*name*],	)	[*Code Civ. Proc § 418.10(a)(1)*]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE MOTION TO QUASH SERVICE OF SUMMONS SHOULD BE GRANTED BECAUSE DEFENDANT IS AN INDIAN TRIBAL CASINO IMMUNE FROM SUIT.

A. Immunity of Indian Tribal Casino. An aboriginal American tribe is a sovereign nation and is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity (*Warburton/Buttner v. Superior Court (2002) 103 Cal. App. 4th 1170, 1182, 127 Cal. Rptr. 2d 706* ; *Great Western Casinos, Inc. v. Morongo Band of Mission Indians (1999) 74 Cal. App. 4th 1407, 1419-1420, 88 Cal. Rptr. 2d 828* ; *Smith v. Hoplandband of Pomo*

Indians (2002) 95 Cal. App. 4th 1, 6-10,115 Cal. Rptr. 2d 455). Tribal immunity applies to commercial as well as governmental activities (*Redding Rancheria v. Superior Court (2001) 88 Cal. App. 4th 384, 388, 105 Cal. Rptr. 2d 773*). A tribal entity is treated as the tribe for immunity purposes (*Redding Rancheria v. Superior Court (2001) 88 Cal. App. 4th 384, 388, 105 Cal. Rptr. 2d 773* ; *Trudgeon v. Fantasy Springs Casino (1999) 71 Cal. App. 4th 632, 637-645, 84 Cal. Rptr. 2d 65*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The form in [1], *above*, may be submitted in support of a defendant's motion to quash service of summons under *Code Civ. Proc. § 418.10(a)(1)*, on the ground that the court lacks jurisdiction over the defendant because the defendant is an Indian tribal casino.

Counsel should insert argument in the showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Immunity of Indian Tribal Casino

In ***Warburton/Buttner v. Superior Court*** *(2002) 103 Cal. App. 4th 1170, 127 Cal. Rptr. 2d 706* , the court held that sovereign immunity is not a discretionary doctrine that may be applied as a remedy depending on the equities of a given situation; rather, it presents a pure jurisdictional question (*103 Cal. App. 4th 1170, 1182)* . In determining whether sovereign immunity extends to a tort case against a separate business entity organized by an Indian tribe, as opposed to immunity from a tort claim against the tribe itself, the court applies a three-part test setting forth the relevant criteria to address the immunity issue, including these considerations: (1) whether the business entity is organized for a purpose that is governmental in nature, rather than commercial; (2) whether the tribe and the business entity are closely linked in governing structure and other characteristics; and (3) whether federal policies intended to promote Indian tribal autonomy are furthered by the extension of immunity to the business entity (*103 Cal. App. 4th 1170, 1182-1183* , citing *Trudgeon v. Fantasy Springs Casino (1999) 71 Cal. App. 4th 632, 84 Cal. Rptr. 2d 65*).

In ***Great Western Casinos, Inc. v. Morongo Band of Mission Indians*** *(1999) 74 Cal. App. 4th 1407, 88 Cal. Rptr. 2d 828* , the defendant Indian tribe terminated a casino management contract without cause. The management company sued the tribe. The tribe moved to quash service of summons and the trial court granted the motion. In affirming, the court of appeal held that the tribe had sovereign immunity from the contract suit and did not waive that immunity (*74 Cal. App. 4th 1407, 1419-1420)* .

In ***Smith v. Hoplandband of Pomo Indians*** *(2002) 95 Cal. App. 4th 1, 115 Cal. Rptr. 2d 455* , the defendant Indian tribe argued that it had not waived its sovereign immunity by entering into a contract containing an arbitration clause, and agreeing to the application of California law, because a Tribal ordinance provided that its sovereign immunity could only be waived by an ordinance or resolution of the Tribal Council explicitly waiving immunity. In rejecting this contention, the court relied on *C & L Enterprises v. Potawatomi Indian Tribe (2001) 532 U.S. 411, 121 S. Ct. 1589, 149 L. Ed. 2d 623* , in which the U.S. Supreme Court resolved the split of authority that had emerged in the state and

federal courts on the question whether, by agreeing to an arbitration clause, and to enforcement of an arbitral award, in any court having jurisdiction thereof, a tribe has waived its sovereign immunity from suit. The Court concluded that agreement to such contract language constitutes an explicit waiver of tribal sovereign immunity. Finding that the contract in *Smith* was indistinguishable from the contract in *C & L Enterprises*, the California court concluded that the only reasonable interpretation of its terms is that it clearly and explicitly waives tribal sovereign immunity (*95 Cal. App. 4th 1, 6-10)* .

In ***Redding Rancheria v. Superior Court*** *(2001) 88 Cal. App. 4th 384, 105 Cal. Rptr. 2d 773* , a bartender sued an Indian tribal casino for injuries she received while working at an off-reservation hotel hosting a party for the casino. The casino moved to quash service of summons and the trial court denied the motion. In ordering the trial court to grant the motion, the court of appeal held that the casino, as a tribal entity, was immune from suit (*88 Cal. App. 4th 384, 388-389)* .

In ***Trudgeon v. Fantasy Springs Casino*** *(1999) 71 Cal. App. 4th 632, 637-645, 84 Cal. Rptr. 2d 65* , a man injured in a fight at an Indian casino sued the casino corporation for negligence. The trial court granted the casino corporation's motion to dismiss on the ground that it was immune from state tort laws. The court of appeal affirmed, holding that the casino corporation should be granted immunity from state court rulings because the corporation was formed for the benefit of the tribal members, was closely related to the tribe, and federal policies furthered immunity (*71 Cal. App. 4th 632, 637-645)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureFederal & State InterrelationshipsSovereign ImmunityGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss

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PART II. FORMS
A. Immunity to Suit

13-132 California Points & Authorities §§ 132.24-132.29

[Reserved]

§§ 132.24[Reserved]

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CHAPTER 132 JURISDICTION: PERSONAL JURISDICTION AND INCONVENIENT FORUM
PART II. FORMS
A. Immunity to Suit

13-132 California Points & Authorities § 132.30

§ 132.30 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground of Immunity--Parties and Witnesses in Civil Actions Are Not Immune to Service of Summons While in California

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*], Plaintiff,	)	IES IN OPPOSITION TO MOTION TO QUASH
vs.	)	SERVICE OF SUMMONS
_____ [*name*], Defendant.	)	[*Code Civ. Proc. § 418.10(a)(1)*]
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE MOTION TO QUASH SERVICE OF SUMMONS SHOULD BE DENIED BECAUSE THE RULE UNDER WHICH NONRESIDENT _____ [PARTIES TO *or* WITNESSES IN] CIVIL ACTIONS WERE DEEMED TO BE IMMUNE TO SERVICE WHILE IN CALIFORNIA TO TESTIFY HAS BEEN ABOLISHED.

[*EITHER*]

A. Abrogation of Nonresident Witness Immunity. The court-made rule, under which nonresident witnesses were deemed to be immune to civil process while in California to testify, has been abrogated and is no longer the law of California *Severn v. Adidas Sportschuhfabriken (1973) 33 Cal. App. 3d 754, 762, 109 Cal. Rptr. 328*).

[*OR*]

A. Abrogation of Nonresident Party Immunity. The court-made rule, under which nonresident parties were deemed to be immune to civil process while in California in connection with the conduct of an action, has been abrogated and is no longer the law of California *Silverman v. Superior Court (1988) 203 Cal. App. 3d 145, 149, 249 Cal. Rptr. 724*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The form in [1], *above*, may be submitted in opposition to a defendant's motion to quash service of summons. The ground of opposition is that the court-made rule that nonresident witnesses or parties, while in California in attendance in connection with the conduct of a civil lawsuit, are immune to service of process in any other civil action has been abolished.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, the foregoing points and authorities may also be used in opposition to a petition for a writ of prohibition and writ of mandate seeking to restrain the trial court from proceeding with the action or proceeding and to quash service of summons after it has denied a motion to do so.

[3] Discussion of Authorities

[a] Abrogation of Nonresident Witness Immunity

Severn v. Adidas Sportschuhfabriken *(1973) 33 Cal. App. 3d 754, 109 Cal. Rptr. 328* , was an action against three European corporations and an individual who was a resident of France and one of the persons described by *Code Civ. Proc. § 416.10* as authorized to receive service of summons on behalf of the defendant corporations. One of the defendant corporations had commenced an action in the United States District Court in Florida. While attending that state for the sole purpose of giving his deposition in the federal court litigation, the individual defendant was personally served with summons in the California action on behalf of himself and the defendant corporations. It was conceded that defendants had sufficient minimum contacts with California so that maintenance of the suit did not offend traditional notions of fair play and substantial justice [*see §§ 132.70, 132.100*]. The defendants moved to quash service of summons based on the so-called immunity rule. Under this rule, witnesses in attendance on a court outside the territorial jurisdiction of their residence were immune from service of civil process while attending court and for a reasonable time before and after in going to, and returning from, court. The motion was granted, and plaintiff appealed.

In reversing the order quashing service of summons, the court of appeal traced the history of the immunity rule (*33 Cal. App. 3d 754, 756-762)* . The court pointed out that in 1969 California's jurisdiction and service of process statutes were updated and liberalized and that the Legislature enacted *Code Civ. Proc. §§ 410.10, 413.10,* and *415.10* which, when jurisdiction over the subject matter exists, collectively authorize personal service of summons on a defendant in this state, outside this state but within the United States, and outside the United States, and that service outside California may be made in the manner permitted by California law (*33 Cal. App. 3d 754, 762)* . The court held that, by virtue of these statutes, the reason for the immunity rule no longer exists in California, for nonresident witnesses and others may no longer remain in the state or country of their residence secure from the reach of this state's process, and that, because the individual defendant and the corporations could have been served at their places of residence or business in Europe, the rule had no legitimate application to them (*33 Cal. App. 3d 754, 762)* . The court further held that even if the immunity rule followed by the federal courts or the State of Florida should differ from that adopted by California, the public policy and law of California would determine the validity of the service of process on the individual defendant, and that because the individual defendant and the corporations were subject to service of California's process in Europe, neither the federal courts nor Florida would have any legitimate interest in applying the immunity rule (*33 Cal. App. 3d 754, 763)* .

[b] Abrogation of Nonresident Party Immunity

Silverman v. Superior Court *(1988) 203 Cal. App. 3d 145, 249 Cal. Rptr. 724* , was a mandate proceeding arising out of an action by a creditor of a corporation against a nonresident shareholder. The complaint was entitled "Complaint for Money Due on Judgment and Alter Ego" and sought to recover from the nonresident the principal sum awarded in a prior action against the corporation. The defendant was served with summons while he was in California pursuant to a court directive that he be physically present at a mandatory settlement conference in a different action. The defendant's motion to quash service of summons was denied, and he sought a writ of mandate or prohibition to compel the trial court to grant the motion.

In denying the writ the court of appeal said that it was once the general rule that parties and witnesses coming from outside the state to participate in the hearing of litigation in a court of the state are ordinarily exempt from the service of process in another action for a reasonable time in coming, attending court, and leaving the jurisdiction (*203 Cal. App. 3d 145, 149)* . Citing *Severn v. Adidas Sportschuhfabriken (1973) 33 Cal. App. 3d 754, 109 Cal. Rptr. 328* (*discussed under § 132.30[3][a], above*), the court explained that with respect to nonresident witnesses, the immunity rule is no longer the law of California. The court found the reasoning of the *Severn* court persuasive and held that inasmuch as the immunity from service rule no longer applies to nonresident witnesses, the immunity rule is likewise no longer the law in California with respect to nonresident parties (*203 Cal. App. 3d 145, 149)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureFederal & State InterrelationshipsSovereign ImmunityGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss

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PART II. FORMS
A. Immunity to Suit

13-132 California Points & Authorities § 132.31

[Reserved]

§ 132.31[Reserved]

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CHAPTER 132 JURISDICTION: PERSONAL JURISDICTION AND INCONVENIENT FORUM
PART II. FORMS
A. Immunity to Suit

13-132 California Points & Authorities § 132.32

§ 132.32 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground of Immunity--Tribal Immunity Has Been Waived

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN SUPPORT OF MOTION TO QUASH SER-
vs.	)	VICE OF SUMMONS
_____ [*name*],	)	[*Code Civ. Proc. § 418.10(a)(1)*]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE MOTION TO QUASH SERVICE OF SUMMONS SHOULD BE DENIED BECAUSE TRIBAL IMMUNITY HAS BEEN WAIVED.

A. Tribal Immunity From Suit Is Waived When a Party Undertakes to Avail Himself or Herself of the Services of a State Court. When a person with tribal immunity undertakes to avail himself or herself of the services of a state family law court, tribal immunity is waived (In *Re Marriage of Maria and Randy Jacobsen (2004) 121 Cal. App. 4th 1187, 1192, 18 Cal. Rptr. 3d 162*).

Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The form in [1], *above*, may be submitted in opposition to a defendant's motion to quash service of summons. The ground of opposition is that a party that purposely avails itself of the services of a state court waives its tribal immunity from suit.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, the foregoing points and authorities may also be used in opposition to a petition for a writ of prohibition and writ of mandate seeking to restrain the trial court from proceeding with the action or proceeding and to quash service of summons after it has denied a motion to do so.

[3] Discussion of Authorities

[a] Tribal Immunity From Suit Is Waived When a Party Undertakes to Avail Himself or Herself of the Services of a State Court.

In **In** ***Re Marriage of Maria and Randy Jacobsen*** *(2004) 121 Cal. App. 4th 1187, 18 Cal. Rptr. 3d 162* , the wife, Maria, an enrolled member of the Santa Ynez Band of Mission Indians (the Tribe), filed a petition to dissolve her eleven-year marriage to her husband, Randy, in State court. Federal law directs state courts to give full force and effect to American Indian tribal law and custom in civil matters. Chumash tribal custom and tradition provides that funds distributed by the tribe to its members should not be used to pay spousal support to nonmembers. Randy filed a motion seeking, among other things, an award of temporary spousal support pursuant to *Fam. Code § 3600*. Maria responded, in part, that it is the custom and tradition of the Tribe that per capita distributions not be provided to non-tribal members for spousal support. The court ordered the temporary spousal support, and Maria appealed.

The reviewing court upheld the temporary support order. The family law court had jurisdiction to order Maria to pay temporary spousal support to Randy because Maria initiated the dissolution proceedings, appeared, and participated therein. "[W]hen a Native American ... undertakes to avail himself or herself of the services of a state court in a domestic relations matter, ... the state court has jurisdiction to act and to grant whatever relief is contemplated by the action initiated by the Native American" (*121 Cal. App. 4th 1187, 1192)* . The court further reasoned the tribal custom and tradition set forth was inconsistent with California law and public policy regarding temporary spousal support. Also of importance is that the family law court did not order the Tribe to satisfy Maria's obligation of temporary spousal support. Facially, the support orders also are independent of and unrelated to any particular source of funds that may be used to satisfy them. Once Maria deposited her Tribal distribution in a bank account or a securities account, for example, "the money involved lost its identity as immune Indian property" (*121 Cal. App. 4th 1187, 1193)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureFederal & State InterrelationshipsSovereign ImmunityGeneral OverviewGovernmentsNative AmericansGeneral OverviewGovernmentsNative AmericansAuthority & Jurisdiction

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[Reserved]

§§ 132.33[Reserved]

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PART II. FORMS
B. Defective Service of Summons

13-132 California Points & Authorities § 132.40

§ 132.40 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground of Defective Service or Summons--Service Did Not Conform With Statutory Requirements--General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN SUPPORT OF MOTION TO QUASH SER-
vs.	)	VICE OF SUMMONS
_____ [*name*],	)	[*Code Civ. Proc. § 418.10(a)(1)*]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE MOTION TO QUASH SERVICE OF SUMMONS SHOULD BE GRANTED BECAUSE THE SERVICE OF PROCESS ON DEFENDANT FAILED TO COMPLY WITH STATUTORY REQUIREMENTS.

A. Motion to Quash Service of Summons. On or before the last day of his or her time to plead, or within such further time as the court may for good cause allow, a defendant may serve and file a notice of motion to quash service of summons on the ground the court lacks jurisdiction over him or her (*Code Civ. Proc. § 418.10(a)(1)*).

B. Compliance With Statutory Provisions Governing Service of Process Is Required. Service of summons in conformance with the mode prescribed by statute is deemed jurisdictional, and, absent such service, no jurisdiction is acquired by the court in the particular action (*Renoir v. Redstar Corp. (2004) 123 Cal. App. 4th 1145, 1150, 20 Cal. Rptr. 3d 603* ; *Schering Corp. v. Superior Court*

(1975) 52 Cal. App. 3d 737, 741, 125 Cal. Rptr. 337 ; *Sternbeck v. Buck (1957) 148 Cal. App. 2d 829, 832, 307 P.2d 970*).

[*Optional*] **C. Strict Compliance Necessary for Substituted or Constructive Service.** A court has no authority to render judgment on the basis of substituted or constructive service of the summons when statutory requirements have not been strictly complied with (*Summers v. McClanahan (2006) 140 Cal. App. 4th 403, 412, 44 Cal. Rptr. 3d 338* (improper service on personal manager); *Zirbes v. Stratton (1986) 187 Cal. App. 3d 1407, 1416, 232 Cal. Rptr. 653* (substituted service); *Eagle Electric Mfg. Co. v. Keener (1966) 247 Cal. App. 2d 246, 251, 55 Cal. Rptr. 444* (same); *Bank of America v. Carr (1956) 138 Cal. App. 2d 727, 737, 292 P.2d 587* (constructive service)).

[*Optional*] **D. Requirement That Substituted Service Be Reasonably Calculated to Give Actual Notice.** To be constitutionally sound the form of substituted service must be reasonably calculated to give an interested party actual notice of the proceedings and an opportunity to be heard, in order that the traditional notions of fair play and substantial justice implicit in due process are satisfied (*Zirbes v. Stratton (1986) 187 Cal. App. 3d 1407, 1416, 232 Cal. Rptr. 653*).

[*Optional*] **E. Defendant Sued in Representative Capacity, Served by Publication, and Papers Mailed Are Directed to Defendant in Individual Capacity.** When a complaint and summons designate a party in a representative capacity, the court acquires no jurisdiction over the person of that defendant when service is by publication and the papers mailed to that defendant pursuant to statute are directed to the person in his or her individual capacity (*Bank of America v. Carr (1956) 138 Cal. App. 2d 727, 736-737, 292 P.2d 587*).

[*Optional*] **F. Service of Summons by Party Is Void.** Personal service of process by a party to an action or proceeding is void, and the court does not thereby acquire personal jurisdiction over the defendant (*see Code Civ. Proc. § 414.10*; *Caldwell v. Coppola (1990) 219 Cal. App. 3d 859, 863, 865, 268 Cal. Rptr. 453*).

[*Optional*] **G. General Appearance After Default Judgment Does Not Validate Defective Service.** The general appearance after entry of a default judgment by a defendant who was defectively served with summons does not make the defective service retroactively valid (*In re Marriage of Smith (1982) 135 Cal. App. 3d 543, 545, 547-552, 185 Cal. Rptr. 411*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The form in [1], *above*, may be submitted in support of a defendant's motion to quash service of summons on the ground of lack of jurisdiction over him or her for the reason that the service of the summons was defective. The memorandum sets forth general points of law regarding the necessity of compliance with statutory service requirements.

Optional Paragraph C sets out a rule of "strict compliance" with respect to substituted or constructive service (*see also discussion under § 132.40[2][d]*). For relaxation of this "strict compliance" requirement, see *Pasadena Medi-Center Associates v. Superior Court (1973) 9 Cal. 3d 773, 778, 108 Cal. Rptr. 828, 511 P.2d 1180* , discussed in *§ 132.60[3][a]*.

Optional Paragraph D sets out the general requirement that substituted service must be reasonably designed to provide actual notice.

Optional Paragraph E should be used when a person is being sued in a representative capacity but has been served as an individual rather than in his or her representative capacity. Optional Paragraph F should be used when a party to the action has attempted to effect service himself or herself. Optional Paragraph G should be included if the default of the defectively served defendant was entered and the defendant thereafter made a general appearance in the case. For points and authorities relating to a general appearance as a basis of in personam jurisdiction, see *§ 132.106*.

For additional points and authorities involving particular types of service or service on particular types of defendants, see *§§ 132.141 -132.45*. For a memorandum of points and authorities based on defects in the summons, as opposed to the service of the summons, see *§ 132.46*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show specifically how the service of the summons failed to comply with the statutory requirements or was otherwise improper.

[b] Related Uses

With appropriate modifications, the foregoing points and authorities may be used to support a motion by a third party cross defendant to quash a defective service of summons on a cross complaint [*see Code Civ. Proc. § 428.60(1)*], or a motion by a nonresident served outside California [*see Code Civ. Proc. § 415.40*] to quash a defective service of summons when the defendant has sufficient minimum contacts with California to support the assumption by a California court of general jurisdiction over him or her. With appropriate modifications, they may also be used in support of a petition for a writ of mandate to compel the trial court to quash service of summons after it has denied a motion to do so [*see Code Civ. Proc. § 418.10(c)*].

[c] Extension of Time to Plead

The service and filing of the notice of motion extends the defendant's time to plead until 15 days after service on him or her of a written notice of entry of an order denying his or her motion, except that for good cause shown the court may extend the defendant's time to plead for an additional period not exceeding 20 days [*Code Civ. Proc. § 418.10(b)*].

[d] Substituted and Constructive Service Distinguished

Strictly speaking, the term "substituted service" means service on the defendant by delivery of the summons to some other person for the defendant, in which case the presumption is that the person will deliver the summons to the defendant. Like personal service or mail service, it is a form of actual service. "Constructive service," on the other hand, consists of service by publication or posting, in which case there is no presumption that the defendant will actually receive notice of the lawsuit.

The courts, however, sometimes use the two terms interchangeably, or they use the term "constructive service" to include any kind of service other than personal service, for example, service by mail.

[e] Related Pleading and Practice Forms

For forms of notices of motion to quash service of summons, and related papers, see California Forms of Pleading and Practice, Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances* (Matthew Bender).

[f] Related Points and Authorities

For a memorandum of points and authorities supporting a motion to quash service of summons for failure to comply with the fictitious name statute (*Code Civ. Proc. § 474*), see Ch. 104, *Fictitiously Named Defendants (DOES)* in this publication.

[g] Opposing Memoranda

For memoranda of points and authorities that may in an appropriate case be submitted in opposition to the foregoing memorandum, see *§ 132.60* et seq.

[3] Discussion of Authorities

[a] Compliance with Statutory Provisions Governing Service of Process Is Required

In ***Renior v. Redstar Corporation*** *(2004) 123 Cal. App. 4th 1145, 20 Cal. Rptr. 3d 603* , plaintiffs sought to enforce a French judgment in California. The trial court entered judgment in favor of plaintiffs under the Foreign Money-Judgments Act (*Code Civ. Proc. §§ 1713-1713.8*). Defendants appeared specially and moved under *Code Civ. Proc. § 473(d)* to set aside the California judgment as void. Specifically, defendants argued that the trial court lacked personal jurisdiction over them because plaintiffs failed to issue and to serve a summons.

The appellate court held that the Foreign Money-Judgments Act does not exempt compliance with the procedures applicable to civil actions, including service of a summons (*123 Cal. App. 4th 1145, 1150)* . The Act as enacted by the Legislature provided that "the foreign judgment is enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit." There is nothing in the Foreign Money-Judgments Act that suggests the service of a proper summons is not required. Thus, the Foreign Money-Judgments Act does not exempt compliance with the procedures applicable to civil actions, including service of a summons (*123 Cal. App. 4th 1145, 1152)* .

Schering Corp. v. Superior Court *(1975) 52 Cal. App. 3d 737, 125 Cal. Rptr. 337* , was a mandate proceeding arising out of an action against a foreign corporation doing business in California. Because the provisions of *Code Civ. Proc. § 412.30* (*discussed under § 132.46[3][b]*), defendant moved to quash service of summons and to dismiss the action for failure to serve summons within three years as required by *Code Civ. Proc. § 581a* [repealed; *now see Code Civ. Proc. §§ 583.210, 583.250*]. The trial court denied the motion, and defendant petitioned for a writ of mandate to compel the trial court to vacate its order of denial and to grant the motions.

In granting the writ, the court of appeal, with respect to the motion to quash, said that although a proper basis for personal jurisdiction exists and notice is given in a manner which satisfies the constitutional requirements of due process, service of summons is not effective and the court does not acquire jurisdiction of the party unless the statutory requirements for service of summons are met (*52 Cal. App. 3d 737, 741)* .

In ***Sternbeck v. Buck*** *(1957) 148 Cal. App. 2d 829, 307 P.2d 970* , the court of appeal reversed a judgment for defendant in an action in equity to vacate a default judgment entered in another action in which the plaintiff (as defendant) had not been personally served with summons. The court said that service of summons in conformance with the mode prescribed by statute is deemed jurisdictional and that, absent such service, no jurisdiction is acquired by the court in the particular action (*148 Cal. App. 2d 829, 832)* . The court held that the service of the summons did not conform to the requirements of the then existing statutes governing the service of summons (*148 Cal. App. 2d 829, 832-835)* .

[b] Strict Compliance Necessary for Substituted or Constructive Service

In ***Summers v. McClanahan*** *(2006) 140 Cal. App. 4th 403, 44 Cal. Rptr. 3d 338* , the summons and complaint were served by leaving copies with an agent of actress Rue McClanahan, who was the individual's personal manager, at the agent's office. The agent, who was not authorized by the individual to accept service of process on her behalf, forwarded the documents to counsel. Because the documents found their way to the named defendant by admitted receipt of counsel, the trial court concluded that service was effective under *Code Civ. Proc. § 416.90*, which provides summons may be served on a person not otherwise specified in Article 4 regarding service of summons. The appellate court reversed the decision.

The reviewing court considered the question whether service can be upheld on the theory a close connection between the defendant, actress Rue McClanahan, and a third party, her manager Barbara Lawrence, made it highly probable that McClanahan would receive actual notice of the service of process on Lawrence on McClanahan's behalf (*140 Cal. App. 4th 403, 415)* . In addition to finding no evidence of a close relationship between McClanahan and Lawrence, the court noted that an actual notice rule would create a standardless free-for-all in which defendants would bring motions to quash service claiming they never received actual notice and, in many cases, plaintiffs would be unable to prove otherwise (*140 Cal. App. 4th 403, 415)* . In addition, such a rule would put a premium on defendants developing creative ways of evading service thereby thwarting the fundamental principle disputes should be resolved in courts, on the merits. Thus, the court found that the trial court did not acquire personal jurisdiction over McClanahan through substituted service on Lawrence (*140 Cal. App. 4th 403, 416)* .

In ***Zirbes v. Stratton*** *(1986) 187 Cal. App. 3d 1407, 232 Cal. Rptr. 653* , a husband and wife who were separated, and between whom a marital dissolution proceeding commenced by the wife had been filed, the divorce granted subsequently becoming final, were sued for breach of a restaurant equipment lease by the lessor. The attorney representing the husband in the marital dissolution proceeding filed an answer to the lessor's complaint on behalf of both the husband and the wife. On appeal from the judgment in favor of the lessor, the court regarded the husband as the sole defendant and affirmed the judgment against him. Approximately five years after the action was filed, the husband filed a voluntary bankruptcy petition. About four months later, the wife learned that the lessor had named her as a judgment debtor and intended to levy on her assets. She filed a motion pursuant to *Code Civ. Proc. § 473* and the court's equitable power for relief from the judgment on the ground that her former husband's lawyer had represented her without her knowledge and consent. The trial court set aside the judgment as to her, and the lessor appealed. In affirming the order, the court of appeal said that in order to obtain in personam jurisdiction through any form of constructive service there must be strict compliance with the requisite statutory procedures (*81 Cal. App. 367, 371)* .

Eagle Electric Mfg. Co. v. Keener *(1966) 247 Cal. App. 2d 246, 55 Cal. Rptr. 444* , was an action by a corporation to set aside a default and default judgment entered against it in a personal injury action in which the corporation was served under former Corp. Code § 6501 [*now see Corp. Code § 2111*] by substituted service on the Secretary of State pursuant to a court order which was void because it was based on a declaration which, on its face, was insufficient to give the court jurisdiction. The invalidity of the service appeared from the face of the record, that is, from the judgment roll. Plaintiff's motion for summary judgment was granted, and defendants appealed.

In affirming the summary judgment, the court of appeal, after pointing out that a judgment, which is void on the face of the judgment roll, can be attacked at any time and that the court has the right and power any time to vacate a void entry of default and a void default judgment, said that when jurisdiction is obtained by a prescribed form of constructive notice, the statutory conditions on which service depends must be strictly construed and there must be strict compliance with the mode prescribed in the statute; that conformance with the statute is deemed jurisdictional and the absence of conformance deprives the court in the particular action of the power to render a judgment (*247 Cal. App. 2d 246, 250-251)* .

Bank of America v. Carr *(1956) 138 Cal. App. 2d 727, 292 P.2d 587* , was an interpleader action filed by the bank to

determine the ownership of two bank accounts in which a former wife, her two minor sons, and her former husband as trustee for the minors were named as defendants. The former wife and the younger son were personally served with a copy of the summons and complaint. The former husband, individually and not as trustee, was served by publication and copies of the required papers were mailed to him at an out-of-state address. Subsequently, publication of the summons on the second minor was made, and copies of the required papers were mailed to him at the same address as the former husband. The former wife filed an answer and a cross complaint, which was not served and was subsequently dismissed with prejudice. The court made an order for interpleader which recited the appearance of the bank and the former wife, and the failure to appear of the two minors and former husband as trustee. Two days later, a judgment and order of distribution of funds was filed which awarded the accounts to the former wife. Five days later, the former husband, individually and not as trustee, filed notice of special appearance and motion to quash service of summons, which was denied. The former husband and the two sons appealed, arguing, among other grounds, that there had been no sufficient service of summons on the complaint to give the court jurisdiction to render judgment against the former husband as he was served individually only, or against the younger son because he was under the age of 14 and no copy of the summons had been delivered to a parent or guardian, as required by former Code Civ. Proc. § 411(3) [*now see Code Civ. Proc. § 416.60* (applying to all minors)]. In reversing the judgment and various orders, the court of appeal said that when jurisdiction is sought to be obtained by a prescribed form of constructive service, the statutory conditions on which the service depends must be strictly observed, and that, unless the statute has been complied with, there is no power to render a judgment (*138 Cal. App. 2d 727, 737)* .

[c] Requirement That Substituted Service Be Reasonably Calculated to Give Actual Notice

The facts and procedural background of ***Zirbes v. Stratton*** *(1986) 187 Cal. App. 3d 1407, 232 Cal. Rptr. 653* , are *discussed under § 132.40[3][b]*. The lessor contended among other things that the wife had been properly served with process because substituted service pursuant to *Code Civ. Proc. § 415.20(b)* had been made to her mother's address in Los Angeles and to the restaurant. The wife claimed she had not been personally served and did not receive the summons or complaint because she neither resided at her mother's residence nor received mail there, and that she was living with her two children at her legal address in Pacific Palisades, where she had filed her petition for dissolution of marriage more than six months before the lessor's action was filed.

In affirming the order setting aside the judgment as to the former wife, the court of appeal pointed out that substituted service by abode service is a secondary method of service on natural persons, and that *Code Civ. Proc. § 415.20(b)* allows a process server to leave the summons and complaint at the "dwelling house" or "usual place of abode" of the person being served. The court said that, to be constitutionally sound the form of substituted service must be reasonably calculated to give an interested party actual notice of the proceedings and an opportunity to be heard in order that the traditional notions of fair play and substantial justice implicit in due process are satisfied, and concluded that service of process at a parent's residence was not reasonably calculated to give the former wife notice (*187 Cal. App. 3d 1407, 1416)* . The court similarly found no merit in the contention that service of process was effective by leaving the summons and complaint with the estranged husband at his restaurant, where the former wife had not worked for several years before the lessor sued, and concluded that her community interest in the restaurant was not a strong enough connection to render the service effective (*187 Cal. App. 3d 1407, 1417)* .

[d] Defendant Sued in Representative Capacity, Served by Publication, and Papers Mailed Are Directed to Defendant in Individual Capacity

The facts and procedural background of ***Bank of America v. Carr*** *(1956) 138 Cal. App. 2d 727, 292 P.2d 587* , are *discussed under § 132.40[3][b]*. In reversing the order denying the former husband's motion to quash, the court of appeal said that the general rule is that if the complaint and summons designate the defendant in a representative capacity, he or she should be so served (*138 Cal. App. 2d 727, 736-737)* . The court explained that, when service is by publication, former Code Civ. Proc. § 413 [*now see Code Civ. Proc. § 415.50(b)*] required that copies of the summons and complaint be "deposited in the post office, directed to the person to be served," and said that unless it appears that it

was so directed, the record will fail to show a compliance with the order for publication and the proof of service will be incomplete (*138 Cal. App. 2d 727, 737)* . The court of appeal pointed out that the person to be served was the former husband in his capacity as trustee and the copies were not directed to him has such, and it concluded that, although the objection was very formal, the appellate court was constrained to hold that there had been no compliance with the statutory requirements of constructive service and that the court did not obtain jurisdiction over the person of the former husband as defendant (*138 Cal. App. 2d 727, 737)* .

[e] Service of Summons by Party Is Void

Code Civ. Proc. § 414.10 provides that a summons may be served by any person who is at least 18 years of age and not a party to the action.

Caldwell v. Coppola *(1990) 219 Cal. App. 3d 859, 268 Cal. Rptr. 453* , involved a domestic violence injunctive order, issued on ex parte application, restraining defendant from harassing the complainant, with whom the defendant had been living, and her sister, with whom she lived after separating from the defendant. The ex parte application for the order to show cause, supporting declaration, and temporary restraining order were personally served on the defendant by the sister.

Inasmuch as the sister was a party protected by the order, the court of appeal held the order was void for lack of personal jurisdiction due to improper service, and reversed. The court held that proper service is a requirement for a court's exercise of personal jurisdiction and that an order entered without personal jurisdiction over the defendant is void (*219 Cal. App. 3d 859, 863)* . After setting forth the history of *Code Civ. Proc. § 414.10* (*219 Cal. App. 3d 859, 864)* , the court explained that the long-standing prohibition on personal service by the opposing party arises from the adversarial interest present in legal actions and the concern for discouraging fraudulent service (*219 Cal. App. 3d 859, 864)* . The court said: (1) the common law rule was that an interested party could not serve a summons, the policy behind the rule being that an interested party should not be put in a position whereby he or she might gain an advantage over his or her antagonist; (2) although attorneys are competent to serve process, the prohibition on service by the opposing party is strictly enforced; (3) when a party has served notice on the opposing party, the court lacks personal jurisdiction over the defendant; and (4) personal service by a party renders any judgment or order arising from the proceeding void, despite the defendant's actual notice (*219 Cal. App. 3d 859, 865)* .

[f] General Appearance After Default Judgment Does Not Validate Defective Service

In re Marriage of Smith *(1982) 135 Cal. App. 3d 543, 185 Cal. Rptr. 411* , arose out of a proceeding for dissolution of marriage filed by the wife. Contrary to *Code Civ. Proc. § 414.10*, the wife herself handed the summons and petition to the husband. The husband's default was entered and the court granted the wife an interlocutory decree and later a final decree of dissolution, which included an order that the husband make child support payments to the wife. Five months after the entry of judgment, the wife filed a motion to increase child support payments and obtained an order directing the husband to show cause why he should not be held in contempt for failure to obey the child support orders previously made. The husband filed a motion to quash service of summons and to set aside the default and interlocutory and final judgments. His attorney appeared in court on the date set for the wife's motions and requested a continuance in order to prepare defenses to both motions. The court granted the continuance, after which the husband's attorney took the wife's deposition and served notice of taking the deposition of the custodian of the wife's employment records. The trial court granted the husband's motion to quash service and to set aside the judgments, from which order the wife appealed, contending that by entering the general appearance the husband retroactively made valid the defective service of summons.

The court of appeal rejected this argument and affirmed the trial court order. The court said that California's Jurisdiction and Service of Process Act [*Code Civ. Proc. § 410.10 et seq.*] preempted the subjects of jurisdiction and service of process and clearly rejected the rule handed down in *Security Loan & Trust Co. v. Boston & South Riverside Fruit Co.*

(1899) 126 Cal. 418, 58 P. 941 , and repeated in subsequent cases, that a defendant's general appearance after entry of a default judgment against him or her based on a void service of summons retroactively makes that void service valid (*135 Cal. App. 3d 543, 547-552)* .

[4] Additional Authorities

[a] Compliance with Statutory Provisions Governing Service of Process Is Required

In *Taylor-Rush v. Multitech Corp. (1990) 217 Cal. App. 3d 103, 265 Cal. Rptr. 672* , one of the nonresident defendants lived in Apartment 15A at a specified address; the summons and complaint were mailed to him at Apartment 4-D at that address. The return receipt was signed by two persons, neither of whom was the nonresident defendant, and there was no evidence as to who they were. In his declaration in support of his motion to quash, the nonresident defendant declared that he had never been served with the summons and complaint or the amended complaint. The plaintiff argued that he had obviously received both the complaint and its amendment since he referred in his declaration to matters alleged in the first amended complaint.

The court of appeal, in affirming an order quashing service of summons, said that a defendant is under no duty to respond to a defectively served summons, that the notice requirement is not satisfied by actual knowledge of the action without service conforming to the statutory requirements, which are to be strictly construed, and held that due to the defective service on him, no jurisdiction was acquired over him (*217 Cal. App. 3d 103, 111)* .

In *Chaplin v. Superior Court (1927) 81 Cal. App. 367, 253 P. 954* , the court of appeal issued a writ of prohibition to restrain the trial court from taking further proceedings under orders awarding alimony, child support, and counsel fees in a pending divorce action. Plaintiff urged that defendant had waived service of summons by making a general appearance in the action, but the appellate court rejected the contention that the defendant had made a general appearance. It stated that, inasmuch as none of the statutory requirements for obtaining jurisdiction of the defendant has been complied with in either form or substance, the ordinary rule appeared to be that an order made by the court of the nature of those in question would be unauthorized and void (*81 Cal. App. 367, 371)* .

[b] Strict Compliance Necessary for Substituted or Constructive Service

In *Tandy Corp. v. Superior Court (1981) 117 Cal. App. 3d 911, 173 Cal. Rptr. 81* , the court of appeal ordered issuance of a writ of mandate to the superior court directing it to vacate its order denying the motions of the petitioner (the defendant corporation in the underlying wrongful death action) to quash service of summons for lack of jurisdiction and to dismiss the action for failure to serve the summons within the period prescribed in former Code Civ. Proc. § 581a(a) [*now see Code Civ. Proc. §§ 583.210, 583.250*], and to grant the motions. The real parties in interest had attempted to serve the defendant pursuant to (1) *Code Civ. Proc. § 415.30* (mail and acknowledgment of receipt); and (2) *Code Civ. Proc. § 415.40* (first-class mail outside California). The court held that service under *Code Civ. Proc. § 415.30* was not completed because no executed acknowledgment of receipt was returned [*see § 132.42*], and that service under *Code Civ. Proc. § 415.40* [*see § 132.60*] was not completed because no person outside California was involved (*117 Cal. App. 3d 911, 913)* . The court said that, in order to obtain in personam jurisdiction by a form of constructive service, there must be strict compliance with the requisite statutory procedures, and pointed out that the real parties in interest (plaintiffs in the underlying action) had not complied with any applicable manner of service prescribed by any California statute (*117 Cal. App. 3d 911, 913)* .

Note that the court further said that "service [was not] sufficient under [*Code Civ. Proc. Section 415.20*]" (substituted service on person to be served on behalf of entity by leaving summons and complaint with person apparently in charge of office of person to be served and thereafter sending copies to same address by mail) (*117 Cal. App. 3d 911, 913)* . However, it is not clear from the opinion whether the court is saying that service under that section was attempted but not completed or that neither of the attempted services under *Code Civ. Proc. §§ 415.30* and *415.40* was sufficient to

constitute service under *Code Civ. Proc. § 415.20(a)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss

California Points & Authorities

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 132 JURISDICTION: PERSONAL JURISDICTION AND INCONVENIENT FORUM
PART II. FORMS
B. Defective Service of Summons

13-132 California Points & Authorities § 132.41

§ 132.41 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground of Defective Service or Summons--Service Did Not Conform With Statutory Requirements--Service on Corporation [Code Civ. Proc. § 416.10]

[1] FORM

[*Caption. See § 132.40.*]

THE MOTION TO QUASH SERVICE OF SUMMONS SHOULD BE GRANTED BECAUSE THE SERVICE OF PROCESS ON DEFENDANT CORPORATION FAILED TO COMPLY WITH STATUTORY REQUIREMENTS.

A. Motion to Quash. [*See § 132.40*, Paragraph A.]

B. Compliance With Statutory Provisions Governing Service of Process Is Required. [*See § 132.40*, Paragraph B].

[*EITHER*]

C. Service on Corporation's Purported General Manager. The term "general manager," as used in *Section 416.10(b) of the Code of Civil Procedure*, and *Section 2110 of the Corporations Code*, indicates one who has general direction and control of the business of the corporation; one who has the management of only a particular branch of the business and who is not permitted to do everything that the corporation could do in transaction of its business is not a "general manager" of the corporation (*General Motors Corp. v. Superior Court (1971) 15 Cal. App. 3d 81, 86, 93 Cal. Rptr. 148* ; *Bakersfield Hacienda, Inc. v. Superior Court (1962) 199 Cal. App. 2d 798, 804, 18 Cal. Rptr. 812*).

[*OR*]

C. Substituted Service on Foreign Corporation. Substituted service on a foreign corporation may be made only in the manner and form authorized by statute, and a failure to conform with the statute deprives the court of power to

render a judgment (*Eagle Electric Mfg. Co. v. Keener (1966) 247 Cal. App. 2d 246, 251, 55 Cal. Rptr. 444*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The memorandum of points and authorities in [1], *above*, may be submitted in support of a corporate defendant's motion to quash service of summons on the ground of lack of jurisdiction over it for the reason that the service of the summons was defective.

For general points and authorities regarding defective service, see *§ 132.40*. For additional points and authorities regarding particular types of service or service on other particular types of defendants, see *§§ 132.42 -132.45*. For a memorandum of points and authorities based on defects in the summons, as opposed to the service of the summons, see *§ 132.46*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated.

See also *§ 132.40[2]* for comments on a general form.

[b] Related Uses

With appropriate modifications, the foregoing points and authorities may be used to support a motion by a third-party cross defendant to quash service of summons on a cross complaint [*see Code Civ. Proc. § 428.60(1)*]. With appropriate modifications, they may also be used in support of a petition for a writ of mandate to compel the trial court to quash service of summons after it has denied a motion to do so [*see Code Civ. Proc. § 418.10(c)*].

[c] Related Pleading and Practice Forms

For forms of notices of motion to quash service of summons, and related papers, see California Forms of Pleading and Practice, Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances* .

[d] Opposing Memoranda

For memoranda of points and authorities that may in an appropriate case be submitted in opposition to the foregoing memorandum, see *§ 132.60*.

[3] Discussion of Authorities

[a] Service on Corporation's Purported General Manager

In ***General Motors Corp. v. Superior Court*** *(1971) 15 Cal. App. 3d 81, 93 Cal. Rptr. 148* , petitioner sought a writ of mandate to quash service of summons purportedly made on it by service on a customer relations manager of one of its divisions. The employee served was not a designated or authorized agent to accept service, and service was made on

him on behalf of a dealership, which was an entity completely separate and independent of petitioner. In opposing issuance of the writ, plaintiffs apparently contended that the employee was a general manager within the meaning of *Code Civ. Proc. § 416.10(b)* and former Corp. Code § 6500 [*now see Corp. Code § 2110*] and, in addition, that it had been orally represented to them that the employee was authorized to receive service on behalf of petitioner.

In granting a peremptory writ directing the trial court to vacate its order denying the motion to quash and to quash service of summons, the court of appeal held that service on petitioner had not been made in the prescribed statutory manner, and that, therefore, the trial court did not acquire jurisdiction over the petitioner. The court noted that the various sections providing for service on responsible corporate officers is to protect the foreign corporation against default, and that petitioner had, in fact, properly designated an agent, whose identity was easily ascertainable, for service of process. The court also noted that the plaintiffs offered no evidence of the employee's character and rank within the corporation or of his duties and responsibilities in order to demonstrate that his employment came within the meaning of the term "general manager." After stating the definition of "general manager" as one who has general direction and control of the business of the corporation, and noting that this definition excludes one who has the management of only a particular branch of the business and who is not permitted to do everything that the corporation could do in transaction of its business, the court held that the plaintiffs had not sustained their burden of proof that the employee was authorized to receive service of process on behalf of the petitioner (*15 Cal. App. 3d 81, 86)* .

Bakersfield Hacienda, Inc. v. Superior Court *(1962) 199 Cal. App. 2d 798, 18 Cal. Rptr. 812* , was a proceeding to show cause based on a petition filed by a domestic corporation for a writ of prohibition which alleged that jurisdiction was never obtained over the petitioner in an action against it for breach of contract and foreclosure of a trust deed. Based on affidavits submitted by the plaintiffs in the action, the trial court had made an order for substituted service, and after completion of such service, entered a default judgment for plaintiff. Petitioner's motion to set aside the default and default judgment was denied. In granting a peremptory writ, the court of appeal pointed out that the trial court had not complied with the provisions of former Corp. Code § 3302 [*now see Corp. Code § 1702*] for substituted service on domestic corporations in that the affidavits submitted by the plaintiff for an order for such service contained nothing which showed an attempt to serve any of the persons enumerated in former Code Civ. Proc. § 411(1) [*now see Code Civ. Proc. § 416.10(b)*]. Specifically, service had been made on a woman as general manager of a motel owned by petitioner. In holding that no showing had been made that service was attempted on a person authorized to receive service, the court pointed out that the woman was not the general manager of the corporation, by virtue of being the general manager of the motel, and stated the rule that a "general manager" within the meaning of the statute is one who has general direction and control of the business of the corporation, and that this definition excludes one who has the management of only a particular branch of the business and who is not permitted to do everything that the corporation could do in transaction of its business (*199 Cal. App. 2d 798, 804)* .

[b] Substituted Service on Foreign Corporation

The facts and procedural background of ***Eagle Electric Mfg. Co. v. Keener*** *(1966) 247 Cal. App. 2d 246, 55 Cal. Rptr. 444* , are discussed in *§ 132.40[3][b]*. In affirming the summary judgment for plaintiff vacating a default and default judgment, the court of appeal said that it is elementary that substituted service on a foreign corporation may be made only in the manner authorized by statute (*247 Cal. App. 2d 246, 251)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss

California Points & Authorities

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13-132 California Points & Authorities § 132.42

§ 132.42 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground of Defective Service or Summons--Service Did Not Conform With Statutory Requirements--Service on Minor [Code Civ. Proc. § 416.60]

[1] FORM

[*Caption. See § 132.40.*]

THE MOTION TO QUASH SERVICE OF SUMMONS SHOULD BE GRANTED BECAUSE THE SERVICE OF PROCESS ON DEFENDANT MINOR FAILED TO COMPLY WITH STATUTORY REQUIREMENTS.

A. Motion to Quash. [*See § 132.40*, Paragraph A].

B. Compliance With Statutory Provisions Governing Service of Process Is Required. [*See § 132.40*, Paragraph B].

C. Service of Summons on Minor. A court does not acquire jurisdiction of a minor if a copy of the summons and complaint are not delivered to the minor's parent, guardian, conservator, or similar fiduciary, or, if no such person can be found with reasonable diligence, to a person having the care or control of the minor or with whom the minor resides or by whom he or she is employed and to the minor if he or she is at least 12 years of age (*see Code Civ. Proc. § 416.60*; *see also Bank of America v. Carr (1956) 138 Cal. App. 2d 727, 737-738, 292 P.2d 587*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The memorandum of points and authorities in [1], *above*, may be submitted in support of a minor defendant's motion to quash service of summons on the ground of lack of jurisdiction over it for the reason that the service of the summons was defective.

For general points and authorities regarding defective service, see *§ 132.40*. For additional points and authorities regarding particular types of service or service on other particular types of defendants, see *§§ 132.41*, *132.43 -132.45*. For a memorandum of points and authorities based on defects in the summons, as opposed to the service of the summons, see *§ 132.46*.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

See also *§ 132.40[2]* for comments on a general form.

[b] Related Uses

With appropriate modifications, these points and authorities may be used to support a motion by a third-party cross defendant to quash service of summons on a cross complaint [*see Code Civ. Proc. § 428.60(1)*]. With appropriate modifications, they may also be used in support of a petition for a writ of mandate to compel the trial court to quash service of summons after it has denied a motion to do so [*see Code Civ. Proc. § 418.10(c)*].

[c] Related Pleading and Practice Forms

For forms of notices of motion to quash service of summons, and related papers, see California Forms of Pleading and Practice, Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances* (Matthew Bender).

[3] Discussion of Authorities

[a] Service of Summons on Minor

Code Civ. Proc. § 416.60 provides that a summons may be served on a minor by delivering a copy of the summons and of the complaint to the minor's parent, guardian, conservator, or similar fiduciary, or, if no such person can be found with reasonable diligence, to any person having the care or control of the minor or with whom the minor resides or by whom the minor is employed, and to the minor if he or she is at least 12 years of age. Note that a minor is any person under 18 years of age [*Fam. Code § 6500*].

The facts and procedural background of ***Bank of America v. Carr*** *(1956) 138 Cal. App. 2d 727, 292 P.2d 587* , are discussed in *§ 132.40[3][b]*. In reversing the order denying the younger son's motion to quash, the court of appeal pointed out that it was undisputed that at the time of service on him he was a minor under the age of 14 years, residing in the state, and that former Code Civ. Proc. § 411(3) [*now see Code Civ. Proc. § 416.60*] required delivery of a copy of the summons to the minor personally (now only if the minor is at least 12 years of age) and also to his father, mother, or guardian, if one is within the state (now parent, guardian, conservator, or similar fiduciary, or if no such person can be found with reasonable diligence, to any person having the care or control of the minor or with whom the minor resides or by whom the minor is employed), and that this personal service is jurisdictional. The court said that no service on the mother, who was within the state, appears, and there was no contention that she was served as such; that she was served as a defendant is not sufficient (*138 Cal. App. 2d 727, 737)* . The court said that a statute requiring process against an infant to be served on his or her father, mother, or guardian is not complied with by service on a parent in his or her capacity as a defendant only; where the parent is also a party defendant, he or she must be specially served for the infant in order to bring the latter before the court (*138 Cal. App. 2d 727, 737)* . The court concluded that because there was

no service as required by the statute, the court did not obtain jurisdiction over the minor's person (*138 Cal. App. 2d 727, 737-738)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss

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13-132 California Points & Authorities § 132.43

§ 132.43 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground of Defective Service or Summons--Service Did Not Conform With Statutory Requirements--Service on Nonresident Motorist [Veh. Code §§ 17454-17456]

[1] FORM

[*Caption. See § 132.40.*]

THE MOTION TO QUASH SERVICE OF SUMMONS SHOULD BE GRANTED BECAUSE THE SERVICE OF PROCESS ON DEFENDANT NONRESIDENT MOTORIST FAILED TO COMPLY WITH STATUTORY REQUIREMENTS.

A. Motion to Quash. [*See § 132.40*, Paragraph A].

B. Compliance with Statutory Provisions Governing Service of Process Is Required. [*See § 132.40*, Paragraph B].

C. Substituted Service on Nonresident Motorist or Deceased Nonresident Motorist's Personal Representative. A court does not acquire jurisdiction of a nonresident motorist, or a deceased nonresident motorist's personal representative, by service of summons that fails to comply strictly with the statutory requirements of *Sections 17454-17456 of the Vehicle Code*, prescribing the method of service (*Ben-Yehoshua v. Superior Court (1963) 214 Cal. App. 2d 719, 722, 29 Cal. Rptr. 775* (nonresident motorist); *Kaplan v. Superior Court (1961) 191 Cal. App. 2d 492, 494, 12 Cal. Rptr. 781* (deceased nonresident motorist's personal representative)).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The form in [1], *above*, may be submitted in support of a nonresident motorist defendant's motion to quash service of summons on the ground of lack of jurisdiction over it for the reason that the service of the summons was defective.

For general points and authorities regarding defective service, see *§ 132.40*. For additional points and authorities regarding particular types of service or service on other particular types of defendants, see *§§ 132.41, 132.42, 132.44, 132.45*. For a memorandum of points and authorities based on defects in the summons, as opposed to the service of the summons, see *§ 132.46*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated.

See also *§ 132.40[2]* for comments on a general form.

[b] Related Uses

With appropriate modifications, the foregoing points and authorities may be used to support a motion by a third-party cross defendant to quash service of summons on a cross complaint [*see Code Civ. Proc. § 428.60(1)*]. With appropriate modifications, they may also be used in support of a petition for a writ of mandate to compel the trial court to quash service of summons after it has denied a motion to do so [*see Code Civ. Proc. § 418.10(c)*].

[c] Related Pleading and Practice Forms

For forms of notices of motion to quash service of summons, and related papers, see California Forms of Pleading and Practice, Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances* .

[3] Discussion of Authorities

[a] Substituted Service on Nonresident Motorist or Deceased Nonresident Motorist's Personal Representative

Ben-Yehoshua v. Superior Court *(1963) 214 Cal. App. 2d 719, 29 Cal. Rptr. 775* , was a mandate proceeding by a nonresident motorist to compel the superior court to vacate an order denying his motion to quash service of summons in an underlying personal injury action and to require the court to grant the motion. In the personal injury action, a return of service filed by the sheriff's office certified that a copy of the summons and complaint had been served on the defendant by their delivery to the secretary of the Director of the Department of Motor Vehicles pursuant to *Veh. Code § 17454*. The petitioner was never personally served with a copy of the summons and complaint. In granting the writ, the court of appeal said that while the certificate asserted compliance with *Veh. Code § 17454*, it did not appear that there was compliance with *Veh. Code §§ 17455* and *17456*, that sufficient compliance with these sections might be had by means of personal service on a nonresident defendant and proof of service of the nature set forth in *Veh. Code § 17456*, even though the defendant is not within the territorial limits of the United States at the time of such service, but that, in the absence of such compliance, the superior court was without power to render a valid judgment in personam against the nonresident motorist (*214 Cal. App. 2d 719, 722)* .

Kaplan v. Superior Court *(1961) 191 Cal. App. 2d 492, 12 Cal. Rptr. 781* , was a mandate proceeding by the foreign executrix of a deceased nonresident motorist to compel the superior court to vacate an order denying her motion to quash the service of summons on her as a foreign executrix in the underlying personal injury action and to enter an order granting the motion. The summons and complaint had been personally served on her while she was in California.

Under *Veh. Code § 17452*, service on the deceased nonresident motorist's personal representative must be made in the same manner and on the same notice as is provided for the nonresident motorist, that is, in compliance with *Veh. Code §§ 17454-17456*.

In granting the writ, the court of appeal said that, under *Veh. Code §§ 17450-17456*, a foreign executor is subject to the process of this state in an action brought to recover damages for the negligent operation by his or her decedent of an automobile on the highways of this state, but that, in order to obtain jurisdiction over a foreign executor, it is necessary that the statutory conditions on which service depends be strictly observed, and that these statutes had not been complied with (*191 Cal. App. 2d 492, 494-495)* . In answer to the real party in interest's contention that the statutes were satisfied by personal service within California, the court said that the petitioner, as an individual and as executrix, is, in the theory of the law, two persons; her powers and authority as executrix exist only in the State of New York; when she left that state she did not do so in her capacity as executrix, but only as an individual, and personal service on her in this state would not accomplish service on her as executrix; such service could only be accomplished in the manner provided by the statute (*191 Cal. App. 2d 492, 495)* .

[4] Additional Authorities

[a] Substituted Service on Nonresident Motorist or Deceased Nonresident Motorist's Personal Representative.

In *Weisfeld v. Superior Court (1952) 110 Cal. App. 2d 148, 242 P.2d 29* , the court of appeal issued a writ of prohibition to restrain the trial court from taking further proceedings in a personal injury action against a nonresident motorist on the ground that plaintiff failed to comply with the statutory requirements as to service. The court stated that former Veh. Code § 404 [*now see Veh. Code § 17450 et seq.*] prescribed the form of constructive (that is, substituted) service; that when jurisdiction is sought to be obtained by a prescribed form of constructive service, the statutory conditions on which the service depends must be strictly observed, and that unless the statute has been complied with, there is no authority to render a judgment (*110 Cal. App. 2d 148, 151)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss

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13-132 California Points & Authorities § 132.44

§ 132.44 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground of Defective Service or Summons--Service Did Not Conform With Statutory Requirements--Substituted Service on Individual Defendant or Service by Publication Ineffective When Reasonable Diligence Requirement Has Not Been Satisfied [Code Civ. Proc. §§ 415.20(b), 415.50(a)]

[1] FORM

[*Caption. See § 132.40.*]

THE MOTION TO QUASH SERVICE OF SUMMONS SHOULD BE GRANTED BECAUSE SUBSTITUTED SERVICE ON AN INDIVIDUAL DEFENDANT [OR SERVICE BY PUBLICATION] IS NOT AUTHORIZED, AND IS, THEREFORE INEFFECTIVE TO SECURE JURISDICTION, WHEN THERE IS NO SHOWING THAT REASONABLE DILIGENCE WAS EXERCISED IN ATTEMPTING TO MAKE PERSONAL SERVICE.

A. Motion to Quash. [*See § 132.40,* Paragraph A].

B. Compliance With Statutory Provisions Governing Service of Process Is Required. [*See § 132.40,* Paragraph B].

[*EITHER, if substituted service*]

C. Reasonable Diligence Required for Substituted Service. Substituted service on an individual defendant is authorized only when the defendant cannot with reasonable diligence by personally served (*see Code Civ. Proc. §§ 415.20(b), 415.50(e)*; *Burchett v. City of Newport Beach (1995) 33 Cal. App. 4th 1472, 1477-1478, 40 Cal. Rptr. 2d 1* ; *Evartt v. Superior Court (1979) 89 Cal. App. 3d 795, 799, 152 Cal. Rptr. 836*).

[*OR, if service by publication*]

C. Reasonable Diligence Required for Service by Publication. Service by publication is authorized only when the

party to be served cannot with reasonable diligence be served in another manner (*see Code Civ. Proc. § 415.50(a)*; *Kott v. Superior Court (1996) 45 Cal. App. 4th 1126, 1135, 53 Cal. Rptr. 2d 215*).

D. Effect of Failure to Exercise Reasonable Diligence. Failure to exercise reasonable diligence to effect personal service renders substitute abode service ineffective and void (*Evartt v. Superior Court (1979) 89 Cal. App. 3d 795, 802, 152 Cal. Rptr. 836*).

[*Optional*] **E. Ignoring Obvious Avenues to Find Party Constitutes Failure to Exercise Reasonable Diligence.** A plaintiff who ignores obvious avenues for obtaining the information fails to exercise reasonable diligence as a matter of law (*Kott v. Superior Court (1996) 45 Cal. App. 4th 1126, 1139, 53 Cal. Rptr. 2d 215*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The form in [1], *above*, may be submitted in support of a defendant's motion to quash service of summons on the ground of lack of personal jurisdiction. The ground of the motion is that the substituted service was ineffective and void because there was no showing that plaintiff had exercised reasonable diligence in attempting to serve the defendant personally before effecting substituted service under *Code Civ. Proc. § 415.20(b)*.

Optional Paragraph E may be used when there were obvious means to determine the location of the person to be served, but the plaintiff failed to pursue them.

For general points and authorities regarding defective service, see *§ 132.40*. For additional points and authorities regarding particular types of service or service on other particular types of defendants, see *§§ 132.41 -132.43, 132.45*. For a memorandum of points and authorities based on defects in the summons, as opposed to the service of the summons, see *§ 132.46*.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

See also *§ 132.40[2]* for comments on a general form.

[b] Related Uses

With appropriate modifications, these points and authorities may be used to support a motion by a third-party cross defendant to quash service of summons on a cross complaint [*see Code Civ. Proc. § 428.60(1)*]. With appropriate modifications, they may also be used in support of a petition for a writ of mandate to compel the trial court to quash service of summons after it has denied a motion to do so [*see Code Civ. Proc. § 418.10(c)*].

[c] Related Pleading and Practice Forms

For forms of notices of motion to quash service of summons, and related papers, see California Forms of Pleading and Practice, Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances* (Matthew Bender).

[d] Opposing Memoranda

For memoranda of points and authorities that may in an appropriate case be submitted in opposition to this memorandum, see *§§ 132.60, 132.62*.

[3] Discussion of Authorities

[a] Reasonable Diligence Required for Substituted Service

Code Civ. Proc. § 415.20(b) , in pertinent part, provides that if a copy of the summons and complaint cannot with reasonable diligence be personally delivered to the person to be served, then service may be made by leaving a copy of the summons and complaint at such person's dwelling house, usual place of abode, usual place of business, or usual mailing address (other than a United States Postal Service post office box) in the presence of a competent member of the household or a person apparently in charge of the office, place of business, or usual mailing address, at least 18 years of age, who must be informed of the contents, and by thereafter mailing a copy of the summons and complaint by first-class mail postage prepaid to the person to be served at the same address, and that service is deemed complete on the 10th day after mailing.

Code Civ. Proc. § 415.50(e) provides that as a condition of establishing that the party to be served cannot with reasonable diligence be served in another manner specified in this article, the court may not require that a search be conducted of public databases where access by a registered process server to residential addresses is prohibited by law or by published policy of the agency providing the database, including, but not limited to, voter registration rolls and records of the Department of Motor Vehicles.

In ***Burchett v. City of Newport Beach*** *(1995) 40 Cal. Rptr. 2d 1* , which involved a land use dispute, plaintiffs brought action against the city and several individual city officials. Plaintiff did not serve the defendants within the time required by local rule, but the court granted extensions and ordered plaintiffs to serve defendants by a certain date. Within that deadline, most of the individual defendants were served by leaving the summons with an assistant to the city clerk and mailing a copy to the named defendants. Defense counsel notified plaintiffs' counsel orally and in writing that service was improper, but no further attempt to serve the defendants personally was made prior to the deadline. These defendants specially appeared, moving to quash service. The court granted the motion to quash and dismissed the case. As to the defendants who had been properly served, the court sustained a demurrer without leave to amend, and dismissed as to them as well. Plaintiffs appealed.

The court of appeal affirmed. The issue as to the specially appearing defendants was whether the plaintiffs had exercised reasonable diligence in attempting to personally serve them prior to resorting to service under *Code Civ. Proc. § 415.20(b)*. The court found that the plaintiffs had exercised no diligence whatsoever. Plaintiffs had not attempted service within the time required by the fast track rules, had not attended an August evaluation conference, and although they attended a September conference, they still had not perfected service. Granted an extension, plaintiffs made no attempt at personal service but left the papers with a deputy clerk and sent copies through the mail. Informed by opposing counsel that the service was ineffective, plaintiffs declined to act even though there was time left before the deadline (*33 Cal. App. 4th 1472, 1477)* . In affirming the judgment of dismissal, the court also rejected the plaintiff's contention that it was the marshal's office that failed to properly serve the defendants. The court found that although plaintiffs's instructions to the marshal had indicated that personal service was desired, the instructions did not require it (*33 Cal. App. 4th 1472, 1478)* .

Evartt v. Superior Court *(1979) 89 Cal. App. 3d 795, 152 Cal. Rptr. 836* , was a proceeding in mandate arising out of an action for personal injuries resulting from an alleged assault and battery in which no effort to serve the summons and complaint was made until three days before the expiration of the three-year period for mandatory dismissal under former Code Civ. Proc. § 581a [*now see Code Civ. Proc. §§ 583.210, 583.250*]. The alleged assault and battery

occurred at 1733 Grimes Avenue; defendant lived at 1809 Grimes Avenue, where he had resided for the prior 14 years. The complaint was filed on August 25, 1975. The marshal's Certificate for Substituted Service on Individual and Declaration Re Diligence showed the following: (1) on August 23, 1978, at 3 p.m., a process server went to defendant's residence at 1809 Grimes Avenue but was unable to make service because the defendant, according to his housesitter, was on vacation; (2) on August 24, 1978, at 9:35 a.m., the process server again went to 1809 Grimes Avenue, but the defendant was not present so summons and complaint was not served (the housesitter told the process server that defendant's son lived in a trailer on the side of the property); (3) on August 24, 1978, at 7:15 p.m., the process service again went to 1809 Grimes Avenue, but service was not effectuated because no one was home; (4) on August 25, 1978 at 10:45 a.m., the process server attempted to effectuate substituted service by personally serving defendant's son at 17331/2 Grimes Avenue and mailing a copy to defendant at that address; and (5) on August 25, 1978, at 7:56 p.m., plaintiff's attorney went to 1809 Grimes Avenue and left a copy of the summons and complaint with the housesitter, "a competent member of the household," and mailed a copy to the defendant at that address. With brief exceptions defendant had been available for service at his residence during the entire period of time he had lived there. On August 20, 1978, he went to Texas and Oklahoma for family reunions and returned September 7, 1978, and discovered the complaint which had been mailed by the plaintiff's attorney. Defendant's motion to quash service of summons was denied, and defendant petitioned the court of appeal for a writ of mandate.

In granting the writ directing the trial court to grant the motions to quash service of process and to dismiss the action, the court explained that before substituted service by abode service on an individual is authorized in California under the Jurisdiction and Service of Process Act (*Code Civ. Proc. §§ 410.10-418.11*), *Code Civ. Proc. § 415.20(b)* requires that reasonable diligence be exercised to effect personal service, and that it thus makes abode service a secondary method of service on natural persons. The court pointed out that this requirement is not contained in the Act as adopted by practically all of the other states nor in the federal rules of civil procedure after which the Act is modeled, and said that the fact the requirement was placed in the statute by the California Legislature shows a conscious, deliberate election by that body that personal service be effected whenever it can be accomplished through the exercise of reasonable diligence, and that the Legislature thus showed a knowing preference for personal service as the means which would more certainly assure actual notice to the defendant (*89 Cal. App. 3d 795, 799)* .

[b] Reasonable Diligence Required for Service by Publication

In ***Kott v. Superior Court*** *(1996) 45 Cal. App. 4th 1126, 53 Cal. Rptr. 2d 215* , an action for breach of contract and fraud, plaintiff attempted substituted service on defendant at what plaintiff believed to be defendant's place of employment. At a hearing quashing that service, at which defendant's attorney produced evidence that defendant was not an employee at the location identified by plaintiff, defendant's attorney stated that defendant was a citizen of Canada. Plaintiff subsequently filed an application for an order for publication of summons, stating in the application that the residence and business addresses of defendant were unknown. The trial court granted this request, and defendant's attorney again filed a motion to quash, arguing that plaintiff had failed to exercise reasonable diligence to locate defendant. The trial court denied the motion to quash.

The court of appeal granted a writ of mandate directing the trial court to vacate the order denying the motion to quash and to enter a new order granting the motion. The court reviewed the requirements for service by publication, stating that summons may be served by publication under *Code Civ. Proc. § 415.50(a)* if the party to be served cannot with reasonable diligence be served in another manner. The same requirement that the defendant's address be unknown despite the exercise of reasonable diligence must be met to excuse compliance with the Hague Convention when service is on a foreign national abroad (*45 Cal. App. 4th 1126, 1135-1136)* . The court found diligence lacking as a matter of law in this case, as *discussed under § 132.44[3]*[[d].

[c] Effect of Failure to Exercise Reasonable Diligence

The facts and procedural background of ***Evartt v. Superior Court*** *(1979) 89 Cal. App. 3d 795, 152 Cal. Rptr. 836* , are

discussed under § 132.44[3][a]. In granting the writ, the court distinguished *Pasadena Medi-Center Associates v. Superior Court (1973) 9 Cal. 3d 773, 778, 108 Cal. Rptr. 828, 511 P.2d 1180* (discussed in *§ 132.60[3][a]*) and said the burden is on the plaintiff to show reasonable diligence to effect personal service, that each case must turn on its own facts, and that no single formula or mode of search can be said to constitute due diligence in every case (*89 Cal. App. 3d 795, 801)* . The court said the plaintiff clearly failed to carry her burden, having not presented one scintilla of information or explanation for her failure to attempt personal service for 2 years and 363 days, during all of which time except for very short periods defendant was available for service at his residence close by (*89 Cal. App. 3d 795, 801-802)* . The court concluded that the substituted abode service was ineffective and void because the plaintiff had failed to comply with the mandatory prerequisite to such service by exercising reasonable diligence to effect personal service (*89 Cal. App. 3d 795, 802)* .

Note that the decision in *Evartt* was decided by the Court of Appeal of the Fifth Appellate District. The case was criticized and distinguished by the Court of Appeal of the Fourth Appellate District, Division Three, in *Espindola v. Nunez (1988) 199 Cal. App. 3d 1389, 1392-1393, 245 Cal. Rptr. 596* (discussed in *§ 132.60[3][a]*, and in § 132.62[3][b]).

[d] Ignoring Obvious Avenues to Find Party Constitutes Failure to Exercise Reasonable Diligence

The facts and procedural background of ***Kott v. Superior Court*** *(1996) 45 Cal. App. 4th 1126, 53 Cal. Rptr. 2d 215* , are *discussed under § 132.44[3][b]*. The court noted that although plaintiff made various investigative efforts trying to locate defendant in California, it made no effort to locate an address for him in Canada despite defendant's counsel disclosure in court that the defendant was a resident and citizen of Canada. Furthermore, plaintiff did not ask defendant's attorney for defendant's address (the court noting that had this request been made and denied the case might be in an entirely different position), and did not seek the address from co-defendants who had already been served and with respect to whom plaintiff could have used interrogatories to request the address. The court concluded that plaintiff failed to demonstrate that it exercised reasonable diligence in attempting to learn defendant's address, stating that a plaintiff who ignores obvious avenues for obtaining the information fails to exercise reasonable diligence as a matter of law (*45 Cal. App. 4th 1126, 1138-1139)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticeService of ProcessGeneral Overview

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13-132 California Points & Authorities § 132.45

§ 132.45 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground of Defective Service or Summons--Service Did Not Conform With Statutory Requirement--Service of Summons Was Incomplete

[1] FORM

[*Caption. See § 132.40.*]

THE MOTION TO QUASH SERVICE OF SUMMONS SHOULD BE GRANTED BECAUSE THE SERVICE BY MAIL WAS NOT COMPLETED.

A. Motion to Quash. [*See § 132.40*, Paragraph A].

B. Compliance With Statutory Provisions Governing Service of Process Is Required. [*See § 132.40*, Paragraph B].

[*EITHER*]

C. Service by Mail and Acknowledgment of Receipt. Although a summons may be served by mail as provided in *Section 415.30 of the Code of Civil Procedure*, service is not complete under that statute until a written acknowledgment of receipt is executed and returned to the sender (*Code Civ. Proc. § 415.30(c)*).

D. Requirement That Acknowledgment of Receipt Be Included in Proof of Service. When service is made by mail pursuant to *Section 415.30 of the Code of Civil Procedure*, proof of service shall include the acknowledgment of receipt of summons in the form provided by that section or other written acknowledgment satisfactory to the court (*Code Civ. Proc. § 417.10(a)*).

[*Optional*] **E. Postal Service Return Receipt Is Insufficient.** The postal service return receipt does not suffice as a substitute for an executed acknowledgment of receipt of summons (*Tandy Corp. v. Superior Court (1981) 117 Cal. App. 3d 911, 913, 173 Cal. Rptr. 81*).

[*OR*]

C. Service Outside California by First-Class Mail. A summons may be served on a person outside California by sending a copy of the summons and of the complaint to the person to be served by first-class mail, postage prepaid, requiring a return receipt (*Code Civ. Proc. § 415.40*).

D. Proof of Service. Proof that a summons was served on a person by mail pursuant to *Section 415.40 of the Code of Civil Procedure* (service outside California) shall include evidence satisfactory to the court establishing actual delivery to the person to be served by a signed return receipt or other evidence (*Code Civ. Proc. § 417.20(a)*).

E. Service by Mail on Nonresident. When service by mail pursuant to *Section 415.40 of the Code of Civil Procedure* is attempted on a nonresident, service is not complete when the return receipt is returned unsigned and marked "Unclaimed," and, in the absence of any other evidence of delivery, must be quashed on motion of the unserved defendant (*Stamps v. Superior Court (1971) 14 Cal. App. 3d 108, 110, 92 Cal. Rptr. 151*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The form in [1], *above*, may be submitted in support of a defendant's motion to quash service of summons on the ground of lack of jurisdiction over him or her for the reason that the attempted service of the summons by mail and acknowledgment (*Code Civ. Proc. § 415.30*) or outside California by first-class mail (*Code Civ. Proc. § 415.40*) was incomplete because no executed acknowledgment of receipt, in the case of service under *Code Civ. Proc. § 415.30*, or signed return receipt, in the case of service under *Code Civ. Proc. § 415.40*, was returned, and there was no other evidence that the summons and complaint had been received by or delivered to the defendant.

For general points and authorities regarding defective service, see *§ 132.40*. For additional points and authorities regarding particular types of service or service on other particular types of defendants, see *§§ 132.41 -132.44*. For a memorandum of points and authorities based on defects in the summons, as opposed to the service of the summons, see *§ 132.46*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated.

See also *§ 132.40[2]* for comments on a general form.

[b] Related Uses

With appropriate modifications, the foregoing points and authorities may be used to support a motion by a third-party cross defendant to quash service of summons on a cross complaint [*see Code Civ. Proc. § 428.60(1)*]. With appropriate modifications, they may also be used in support of a petition for a writ of mandate to compel the trial court to quash service of summons after it has denied a motion to do so [*see Code Civ. Proc. § 418.10(c)*].

[c] Service Outside California

As stated in the second alternative Paragraph B of the foregoing form, a summons may be served on a person outside California by sending a copy of the summons and of the complaint to the person to be served by first-class mail, postage prepaid, requiring a return receipt [*Code Civ. Proc. § 415.40*]. *Code Civ. Proc. § 415.40* further provides that service outside California in compliance with that statute is deemed complete on the 10th day after mailing, and, in addition, authorizes service in any other manner provided by *Code Civ. Proc. §§ 415.10-415.50*.

As stated in second alternative Paragraph C of the foregoing form, proof that a summons was served on a person by mail pursuant to Code Civ. Proc. § 415.40 shall include evidence satisfactory to the court establishing actual delivery to the person to be served by a signed return receipt or other evidence [*Code Civ. Proc. § 417.20(a)*]. While a return receipt signed by the defendant would obviously be sufficient, a return receipt signed by someone authorized by the nonresident to sign for his or her mail is also sufficient, provided the plaintiff provide separate evidence establishing the authority of the person who signed the return receipt on defendant's behalf. In addition, other evidence of actual receipt may also validate the otherwise defective service, such as, when a defendant's attorney acknowledges the defendant's receipt of the summons [*Taylor-Rush v. Multitech Corp. (1990) 217 Cal. App. 3d 103, 110-111, 265 Cal. Rptr. 672* (adding, however, that no such evidence had been presented in the case before it)].

[d] Related Pleading and Practice Forms

For forms of notices of motion to quash service of summons, and related papers, see California Forms of Pleading and Practice, Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances* .

[3] Discussion of Authorities

[a] Postal Service Return Receipt Is Insufficient

Tandy Corp. v. Superior Court *(1981) 117 Cal. App. 3d 911, 173 Cal. Rptr. 81* , was a mandate proceeding by which the petitioner (the defendant corporation in an underlying wrongful death action), sought to compel the superior court to grant its motions to quash service of summons for lack of jurisdiction over it and to dismiss the action for failure to serve and return summons within three years as required by former Code Civ. Proc. § 581a(a) [*now see Code Civ. Proc. §§ 583.210, 583.250*]. The real parties in interest (the plaintiffs in the underlying action) had attempted service in several ways, among them, by mail and acknowledgment of receipt pursuant to *Code Civ. Proc. § 415.30*.

In granting the writ, the court of appeal pointed out that real parties had attempted service under *Code Civ. Proc. § 415.30* by mailing copies of the summons and the first amended complaint, and the appropriate notice and acknowledgment of receipt of summons (*Code Civ. Proc. § 415.30(a)*), to the petitioner's agent for service in California by certified mail, return receipt requested, but that the acknowledgment was not executed and returned by the agent, and, hence, service was not completed (*117 Cal. App. 3d 911, 913)* . The court said that the postal service return receipt did not suffice as a substitute for an executed acknowledgment of receipt of summons (*117 Cal. App. 3d 911, 913)* .

[b] Service by Mail on Nonresident

Stamps v. Superior Court *(1971) 14 Cal. App. 3d 108, 92 Cal. Rptr. 151* , was a proceeding in mandate arising out of a proceeding to establish an Arkansas divorce decree in which service of process on the ex-husband, an Arizona resident, was attempted by airmail, as then provided by *Code Civ. Proc. § 415.40* (the statute was amended in 1982 to change "airmail" to "first-class mail, postage prepaid"). The return receipt was returned bearing the notice "unclaimed." The trial court deemed that the service was adequate to comply with law and denied the ex-husband's motion to quash. The ex-husband petitioned the court of appeal for a writ of mandate to compel the trial court to vacate its order denying, and to enter an order granting, the motion to quash. In granting the writ, the appellate court explained that *Code Civ.*

Proc. § 415.40 (as it then read) provides in part that "summons" [sic, service] may be made on a person outside California "by sending a copy of the summons and of the complaint to the person to be served by any form of airmail," and that, under *Code Civ. Proc. § 417.20(a)*, the proof of service "shall include evidence satisfactory to the court establishing actual delivery to the person to be served, by a signed receipt or other evidence" (*14 Cal. App. 3d 108, 110)* . The court pointed out that there was no signed receipt or other evidence of delivery, and, citing several cases, held that in order to obtain in personam jurisdiction through any form of constructive service there must be strict compliance with the requisite statutory procedures (*14 Cal. App. 3d 108, 110)* . The court said that this had not been accomplished (*14 Cal. App. 3d 108, 110)* , and concluded that the service, therefore, had to be quashed (*14 Cal. App. 3d 108, 111)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProceduresPleading & PracticeService of ProcessGeneral Overview

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13-132 California Points & Authorities § 132.46

§ 132.46 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground of Defective Service or Summons--Summons Was Substantially Defective

[1] FORM

[*Caption. See § 132.40.*]

THE MOTION TO QUASH SERVICE OF SUMMONS SHOULD BE GRANTED BECAUSE THE SUMMONS SERVED DID NOT COMPLY WITH THE REQUIREMENTS OF SECTION 412.20 OF THE CODE OF CIVIL PROCEDURE AND WAS THEREFORE SUBSTANTIALLY DEFECTIVE, IN THAT _____ [*specify defect, e.g.,* IT SPECIFIED A RESPONSE TIME OF _____ DAYS, WHICH IS LESS THAN THAT PROVIDED BY LAW].

A. Motion to Quash. [*see § 132.40,* Paragraph A].

B. Compliance With Statutory Provisions Governing Service of Process Is Required. [*see § 132.40,* Paragraph B.]

C. Service of Substantially Defective Summons. The service of a substantially defective summons does not confer jurisdiction over the party served (*Greene v. Municipal Court (1975) 51 Cal. App. 3d 446, 451, 124 Cal. Rptr. 139*).

[*Optional*] **D. Lack of Statutory Notice in Summons Served on Individual on Behalf of Corporation or Unincorporated Association.** When, in an action against _____ [*either* a corporation *or* an unincorporated association (including a partnership)], the summons is served on a person who is not a party to the action and the summons fails to contain the notice required by *Section 412.30 of the Code of Civil Procedure* that the person served is served on behalf of the _____ [corporation *or* unincorporated association *or* partnership], the service of the summons is ineffective, gives the court no jurisdiction over the defendant, and must be quashed (*Tresway Aero, Inc. v. Superior Court (1971) 5 Cal. 3d 431, 435, 96 Cal. Rptr. 571, 487 P.2d 1211* ; *Schering Corp. v. Superior Court (1975) 52 Cal. App. 3d 737, 741, 125 Cal. Rptr. 337* ; *National Union Fire Ins. Co. v. Superior Court (1966) 247 Cal. App. 2d 326, 328-329, 55 Cal. Rptr. 574*).

[*Optional*] **E. Motion to Quash Is Appropriate to Test Whether Complaint for Unlawful Detainer States Cause for Relief Supporting Reduced Time for Response to Summons.** A motion to quash service of summons is a proper method for determining whether the court has acquired personal jurisdiction over the defendant through service of the five-day unlawful detainer summons (*Delta Imports, Inc. v. Municipal Court (1983) 146 Cal. App. 3d 1033, 1035, 194 Cal. Rptr. 685*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The form in [1], *above*, may be submitted in support of a defendant's motion to quash service of summons on the ground of lack of jurisdiction over him or her for the reason that the summons served was substantially defective in failing to comply with the provisions of *Code Civ. Proc. § 412.20* or *412.30*.

For additional points and authorities regarding defective service, as distinguished from a defective summons, see *§§ 132.40 -132.45*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated.

See also*§ 132.40[2]* for comments on a general form.

[b] Related Uses

With appropriate modifications, the foregoing points and authorities may be used to support a petition for a writ of mandate to compel the trial court to quash service of summons after it has denied a motion to do so [*see Code Civ. Proc. § 418.10(c)*].

[c] Required Contents of Summons

The required contents of the summons in a civil action are set forth in *Code Civ. Proc. §§ 412.20, 412.30*, and *474*.

[d] Related Pleading and Practice Forms

For forms of notices of motion to quash service of summons, and related papers, see California Forms of Pleading and Practice, Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances* .

[e] Related Points and Authorities

For a memorandum of points and authorities supporting a motion to quash service of summons for failure to comply with the fictitious name statute (*Code Civ. Proc. § 474*), see Ch. 104, *Fictitiously Named Defendants (DOES)* in this publication.

[f] Opposing Memoranda

For a memorandum of points and authorities that may in an appropriate case be submitted in opposition to the foregoing memorandum, see *§ 132.65*.

[3] Discussion of Authorities

[a] Service of Substantially Defective Summons

Greene v. Municipal Court *(1975) 51 Cal. App. 3d 446, 124 Cal. Rptr. 139* , was a proceeding in certiorari to review the judgment of the appellate department of the superior court affirming a municipal court judgment in unlawful detainer. One of the three issues involved was the validity of a five-day unlawful detainer summons issued on a complaint which alleged a cause of action not in unlawful detainer.

After holding that the complaint did not state a cause for relief in unlawful detainer or a cause of action within the subject matter jurisdiction of the municipal court (*51 Cal. App. 3d 446, 450)* , the court of appeal said that service of a substantially defective summons does not confer jurisdiction over a party, and that the summons was fatally defective; that a summons must, under *Code Civ. Proc. § 412.20*, contain a direction that the defendant file a responsive pleading within 30 days unless some specific statute modifies the time for response (*51 Cal. App. 3d 446, 451)* . The court said that plaintiff purported to utilize *Code Civ. Proc. § 1167*, applicable to proceedings in unlawful detainer, to secure a summons calling for a response within five days, but that the *Code Civ. Proc. § 1167* summons was inappropriate because the complaint, if it stated a cause of action at all, stated it on a theory other than unlawful detainer (*51 Cal. App. 3d 446, 451-452)* . Hence, the court held that, since the summons was substantially defective in illegally purporting to shorten defendants' time to plead, the court did not acquire jurisdiction over the parties served with it, and reversed the municipal court judgment (*51 Cal. App. 3d 446, 452)* .

[b] Lack of Statutory Notice in Summons Served on Individual on Behalf of Corporation or Unincorporated Association

Code Civ. Proc. § 412.30 provides that in an action against a corporation or unincorporated association (including a partnership), the copy of the summons that is served shall contain a notice stating in substance: "To the person served: You are hereby served in the within action (or special proceeding) on behalf of (here state the name of the corporation or the unincorporated association) as a person upon whom a copy of the summons and of the complaint may be delivered to effect service on said party under the provisions of (here state appropriate provisions of Chapter 4 (commencing with *Section 413.10) of the Code of Civil Procedure."* If service is also made on such person as an individual, the notice shall also indicate that service is being made on such person as an individual as well as on behalf of the corporation or the unincorporated association. *Code Civ. Proc. § 412.30* further provides that if such notice does not appear on the copy of the summons served, no default may be taken against such corporation or unincorporated association or against such person individually, as the case may be.

Tresway Aero, Inc. v. Superior Court *(1971) 5 Cal. 3d 431, 96 Cal. Rptr. 571, 487 P.2d 1211* , was a mandate proceeding arising out of a wrongful death action in which the summons served on an individual on behalf of the corporate defendant did not contain the notice required by former Code Civ. Proc. § 410 [*now see Code Civ. Proc. § 412.30*], providing in relevant part that when the service is against a corporation there shall appear on the copy of the summons that is served a notice stating in substance: "To the person served: You are hereby served in the within action (or proceeding) on behalf of (here state the name of the corporation ...) as a person upon whom the summons and a copy of the complaint must be served to effect service against said party. ..." The defendant corporation's motion to quash the service and to dismiss the action for failure to serve summons within three years of the filing of the complaint as required by former Code Civ. Proc. § 581a [*now see Code Civ. Proc. §§ 583.210, 583.250*] was denied, and defendant petitioned for a writ of mandate.

The Supreme Court granted the writ as to the motion to quash and denied it as to the motion to dismiss on the ground defendant was estopped to rely on the statute. The Court pointed out that former Code Civ. Proc. § 411 [*now see Code Civ. Proc. § 416.10*] provided that, in a suit against a domestic corporation, summons could be served on a person designated for service of process or authorized to receive service of process, and that the person to whom the summons had been delivered was such a person. The Court said, however, that the copy of the summons delivered did not contain the notice required by former Code Civ. Proc. § 410 [*now see Code Civ. Proc. § 412.30*]. Citing *National Union Fire Ins. Co. v. Superior Court (1966) 247 Cal. App. 2d 326, 329, 55 Cal. Rptr. 574* (discussed *below*), the Court held that the provisions of the statute are mandatory, and that service of a summons which does not comply with those provisions is ineffective (*5 Cal. 3d 431, 435)* .

The facts and procedural background of ***Schering Corp. v. Superior Court*** *(1975) 52 Cal. App. 3d 737, 125 Cal. Rptr. 337* , are discussed in *§ 132.40[3][a]*. In granting the writ of mandate, the court of appeal quoted the applicable provisions of *Code Civ. Proc. § 412.30*, and said that the requirements of the section are mandatory so that service on a corporation of a purported summons that fails to comply substantially with the section is ineffective, and that failure of the summons to state that the person to whom the summons and complaint are delivered is served on behalf of the corporation is not cured by the oral statement of the process server to the person of the fact omitted from the summons (*52 Cal. App. 3d 737, 741)* .

National Union Fire Ins. Co. v. Superior Court *(1966) 247 Cal. App. 2d 326, 55 Cal. Rptr. 574* , was a mandate proceeding to compel the superior court to quash service of summons in the underlying action and to dismiss the action for failure to serve summons within three years after the action was filed as required by former Code Civ. Proc. § 581a [*now see Code Civ. Proc. §§ 583.210, 583.250*]. Service had been made by delivering a copy of the summons and a copy of the complaint to one of National Union's vice presidents who was told at the time of service that he was being served in such capacity, and the return of service was so worded. The real party in interest did not claim that the service was effective on the vice president as an individual, and said that the vice president was not and was never intended to be a party to the action.

In granting the petition, the court of appeal pointed out that the copy of the summons served did not contain the notice required by former Code Civ. Proc. § 410 [*now see Code Civ. Proc. § 412.30*], nor did the proof of service recite that such notice had appeared on the copy served (*247 Cal. App. 2d 326, 328)* . The court held that the provisions of former Code Civ. Proc. § 410 were mandatory and, hence, the purported service of summons was ineffective; it did not give the court jurisdiction over the defendant and had to be quashed; and because the purported service and return of service were made on the last permissible day of the three-year period, dismissal of the action was required for failure to serve the summons within three years after the action was commenced (*247 Cal. App. 2d 326, 329)* .

[c] Motion to Quash Is Appropriate to Test Whether Complaint for Unlawful Detainer States Cause for Relief Supporting Reduced Time for Response to Summons

Delta Imports, Inc. v. Municipal Court *(1983) 146 Cal. App. 3d 1033, 194 Cal. Rptr. 685* , was an appeal from a superior court judgment denying a petition for writ of mandate sought to compel the municipal court to grant the defendant's motion to quash service of summons in an unlawful detainer proceeding pending in the municipal court on the ground that the complaint failed to state a cause for relief for unlawful detainer and, therefore, could not support the issuance of a summons with a five-day response time. The trial court had denied the motion on the ground that defendant's remedy was a demurrer to the complaint and not a motion to quash.

In reversing the judgment and remanding the cause to the superior court with directions to issue a peremptory writ of mandate directing the municipal court to quash service of summons, the court of appeal said that a motion to quash service is the proper method for determining whether the court has acquired personal jurisdiction over a defendant through service of the five-day unlawful detainer summons (*see Code Civ. Proc. § 1167*) (*146 Cal. App. 3d 1033, 1035)* . The court said that if the complaint fails to state a cause of action for unlawful detainer, then use of the five-day

summons is improper and the defendant is entitled to an order quashing service as a matter of law. If the municipal court erroneously refuses to quash service, the defendant is entitled to a writ of mandate from the superior court (*146 Cal. App. 3d 1033, 1035)* . The court explained that a motion to quash service is the only method by which the defendant can test whether the complaint states a cause of action for unlawful detainer and, thereby, supports a five-day summons, that a general demurrer only tests whether the complaint states a cause of action for *something* even if it is on a theory other than unlawful detainer, and, further, that if defendant appeared in the action by filing a demurrer, it mooted the very point it was seeking to raise (*146 Cal. App. 3d 1033, 1036)* .

Note that the court's rationale with respect to this last statement, in effect, was that because a demurrer constitutes a general appearance under *Code Civ. Proc. § 1014*, its mere filing would have constituted a waiver of the defect in the summons and subjected the defendant to the personal jurisdiction of the court [*see Code Civ. Proc. § 410.50(a)*]. For points and authorities relating to a general appearance as a basis of in personam jurisdiction, see *§ 132.106*.

[4] Additional Authorities

[a] Service of Substantially Defective Summons

County of Riverside v. Superior Court (1997) 54 Cal. App. 4th 443, 62 Cal. Rptr. 2d 747 , involved an action brought under *Code Civ. Proc. § 863* to invalidate a redevelopment plan, sometimes called a reverse validation action. Under *Code Civ. Proc. § 863*, the form and manner of service of the summons in such an action is prescribed by *Code Civ. Proc. § 861.1*. Under *Code Civ. Proc. § 861.1*, the summons must contain a notice to all persons interested in the matter to appear and answer the complaint not later than the date specified in the summons, which date must be 10 or more days after completion of publication of the summons, and except as otherwise specified in that section the summons must be in the form prescribed in *Code Civ. Proc. § 412.20*. Plaintiffs did not employ a modified summons as provided for in *Code Civ. Proc. § 861.1*, but instead caused to be published a copy of the usual summons informing the readers that they had 30 days to respond "after this summons is served on you," and personally served the county with a general civil service form informing the county that it had 30 days within which to respond. The county moved to quash service of the summons under *Code Civ. Proc. § 418.10*, one ground being that the published summons was fatally defective in that it did not specify a date for answering and appearing. The trial court found that it was not significant that the publication did not specify a date, and held that the service was valid. The county, by a petition for a writ of mandate, sought review of the trial court's order refusing to quash service of process on it and dismissal of the action.

The court of appeal issued a peremptory writ of mandate directing the respondent court to vacate its order denying petitioners' motion to quash service and dismiss the action, and to enter a new order granting the motion (*54 Cal. App. 4th 443, 451-452)* . *Code Civ. Proc. § 861.1* provides that the summons in a (reverse) validation action must require response by the date "specified" in the summons. The word "specified" means the giving of a concrete date (*54 Cal. App. 4th 443, 449)* . It is often stated that the rules governing service of process are to be liberally construed and that substantial compliance with the statutory mandates is sufficient to confer jurisdiction. However, the traditional rule is that the requirements of service of summons by publication must be strictly complied with, although the cases are not consistent in their description of the appropriate standard in this context. The court, however, need not attempt to make a definitive resolution in this case. In the unique circumstances presented, plaintiffs failed to comply even substantially with the statute (*54 Cal. App. 4th 443, 450)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticeService of ProcessGeneral Overview

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13-132 California Points & Authorities §§ 132.47-132.59

[Reserved]

§§ 132.47[Reserved]

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13-132 California Points & Authorities § 132.60

§ 132.60 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground of Defective Service or Summons--Service Conformed With Statutory Requirements--Person Served on Behalf of Corporation Had Ostensible Authority or Was General Manager of Corporation [Code Civ. Proc. § 416.10; Corp. Code § 2110]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO QUASH SERVICE OF SUMMONS
vs.	)	
_____ [*name*],	)	Date: _____
	)	Time: _____
Defendant.	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

DEFENDANT CORPORATION'S MOTION TO QUASH SERVICE OF SUMMONS SHOULD BE DENIED BECAUSE THE SUMMONS AND COMPLAINT WERE DELIVERED TO _____[*name*], WHO _____ [WAS (AND IS) A GENERAL MANAGER OF DEFENDANT CORPORATION (IN THIS STATE) *or* HAD OSTENSIBLE AUTHORITY, REASONABLY RELIED ON BY PLAINTIFF, TO RECEIVE SERVICE OF SUMMONS ON BEHALF OF DEFENDANT CORPORATION].

[*EITHER, if defendant is domestic corporation*]

A. Service of Process on Domestic Corporation. Summons may be served on a corporation by delivering a copy of the summons and of the complaint to the president, chief executive officer, or other head of the corporation, a vice president, a secretary or assistant secretary, a treasurer or assistant treasurer, a controller or chief executive officer, a general manager, or a person authorized by the corporation to receive service of process (*Code Civ. Proc. § 416.10(b)*).

[*OR, if defendant is foreign corporation*]

A. Service of Process on Foreign Corporation. Summons may be served on a foreign corporation by delivering, by hand, a copy of the summons and of the complaint to any officer of the corporation or its general manager in California (*Code Civ. Proc. § 416.10(d)*; *Corp. Code § 2110(a)*).

[*CONTINUE*]

B. When Personal Jurisdiction Attaches. Except as otherwise provided by statute, the court in which an action is pending has jurisdiction over a party from the time summons is served on the party as provided in *Sections 413.10-417.40 of the Code of Civil Procedure* (*Code Civ. Proc. § 410.50(a)*).

C. Service of Process Act to Be Liberally Construed. The provisions of the Jurisdiction and Service of Process Act (*Code Civ. Proc. § 410.10 et seq.*) are to be liberally construed to effectuate service and uphold the jurisdiction of the court if actual notice has been received by the defendant (*Pasadena Medi-Center Associates v. Superior Court (1973) 9 Cal. 3d 773, 778, 108 Cal. Rptr. 828, 511 P.2d 1180* ; *Espindola v. Nunez (1988) 199 Cal. App. 3d 1389, 1391, 245 Cal. Rptr. 596*).

D. Factual Determination. Whether a person served with summons may properly be regarded as within the concept of the statute designating the persons to whom service of process on a corporation may be delivered depends on the particular facts of the case (*Cosper v. Smith & Wesson Arms Co. (1959) 53 Cal. 2d 77, 83, 346 P.2d 409*).

[*EITHER, if person served has ostensible authority*]

E. Service on Corporate Agent With Ostensible Authority to Accept Service Is Sufficient. Defendant corporation's erroneous designation in its _____ [*specify, e.g.*, application for a stock permit] of _____ [*name*] as its _____ [*specify officer, e.g.*, Secretary-Treasurer] clothed him/her with ostensible authority to accept service of process; because service on a corporate agent with ostensible authority to accept service suffices for the court to acquire jurisdiction over the corporation, the defendant corporation has been properly served (*Pasadena Medi-Center Associates v. Superior Court (1973) 9 Cal. 3d 773, 777, 108 Cal. Rptr. 828, 511 P.2d 1180*).

[*OR, if person served is general manager*]

E. Service on General Manager. Service on a corporation is valid when process is delivered to a person as "general manager"of the corporation when the person is of sufficient character and rank as to make it reasonably certain that the defendant will be apprised of the service made (*Cosper v. Smith & Wesson Arms Co. (1959) 53 Cal. 2d 77, 83, 346 P.2d 409*).

[*CONTINUE*]

[*Optional*] **F. When Individual May Be Regarded as General Manager of Foreign Corporation.** An arrangement between a particular person and a foreign corporation is a sufficient basis on which to treat that person as the corporation's general manager in California, when the person performs services for the corporation and provides it with the opportunity for regular contact with its customers and a channel for a continuous flow of business into the state in such a manner that the corporation is enjoying substantially the same business advantages it would have enjoyed were it to conduct its business through its own officers or paid agents in the state (*Cosper v. Smith & Wesson Arms Co. (1959) 53 Cal. 2d 77, 83-84, 346 P.2d 409*).

[*Optional*] **G. Activities of Agent of Foreign Corporation.** The performance of important services for a foreign corporation by its agent, consisting of the establishment and maintenance of a satisfactory importing, distributing, and sales organization, is a sufficient basis on which to treat that agent as the corporation's general manager regardless of how closely these activities may be supervised by the corporation (*Carl. F. W. Borgward, G.M.B.H. v. Superior Court (1958) 51 Cal. 2d 72, 78, 330 P.2d 789*).

[*Optional*] **H. Surrender of Right to Transact Intrastate Business.** The fact that a foreign corporation ceases to transact business without filing a certificate of surrender as provided for in *Section 2112 of the Corporations Code* does not revoke the appointment of any agent for the service of process (*Corp. Code § 2112*).

[*Optional*] **I. Proof of Service.** An affidavit of service of process that names the person served as the managing agent for the defendant corporation is prima facie proof that the person named as managing agent is such agent (*Eclipse Fuel etc. Co. v. Superior Court (1957) 148 Cal. App. 2d 736, 743-744, 307 P.2d 739*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The form in [1], *above*, may be submitted in opposition to a motion to quash service of summons made on the ground that the service of the summons was defective. The ground of opposition is that, applying the rule of liberal construction, service was made in compliance with either *Code Civ. Proc. § 416.10(b)*, in the case of a domestic corporation, or *Code Civ. Proc. § 416.10(d)* and *Corp. Code § 2110*, in the case of a foreign corporation, because the person served either had ostensible authority to receive process on behalf of the corporation, or was a general manager of the corporation.

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, the foregoing memorandum of points and authorities may be submitted in opposition to the points and authorities *set out in § 132.41*.

[b] Related Uses

With appropriate modifications, the foregoing points and authorities may be used to oppose a motion by a third-party cross defendant to quash service of summons on him or her on a cross complaint [*see Code Civ. Proc. § 428.60(1)*]; or in opposition to a petition for writ of mandate to compel the trial court to quash service of summons after the trial court has denied defendant's motion to do so [*see Code Civ. Proc. § 418.10(c)*]; or in opposition to any proceeding attacking a judgment on the ground that it was rendered by a court that lacked personal jurisdiction over the defendant.

[3] Discussion of Authorities

[a] Service of Process Act to Be Liberally Construed

Pasadena Medi-Center Associates v. Superior Court *(1973) 9 Cal. 3d 773, 108 Cal. Rptr. 828, 511 P.2d 1180* , was a proceeding in certiorari and mandate to compel the superior court to grant motions to quash service of summons and vacate a default judgment and levy of execution against defendants, a corporation and a partnership in which the corporation was general partner, in an action against them on two promissory notes. The day after the complaint was filed, plaintiff attached real property owned by the corporation and subsequently attempted to serve process. Discovering that the corporation maintained no general office for the transaction of business and had not filed the list of officers and agents authorized to accept service required by former Corp. Code § 3301 [*now see Corp. Code § 1502*], plaintiff's counsel arranged to examine the corporation's file with the Commissioner of Corporations and there observed a 1968 application for a permit to issue stock filed by defendant corporation, which listed among its corporate officers, an Albert A. Binney, Sr. as its secretary-treasurer and director. Unknown to plaintiff's counsel, the application was erroneous and Albert A. Binney, Sr., was not, and had never been, its secretary-treasurer (this office was held by Albert A. Binney, Jr.). Plaintiff's counsel knew that the person listed in the permit application as the corporate president had died, and therefore directed his process server to serve the man who had been listed as vice president. When the process server could not locate this man, counsel asked him to serve Albert Binney, Sr. at the address listed in the stock permit application, and service was made and a return of service filed. On receiving the summons and complaint, Binney, Sr. said nothing to the process server, but notified Binney, Jr. of the suit. Binney, Jr. notified the other corporate directors and all agreed that since defendants owed plaintiff the sum claimed and since they lacked the funds to finance a defense they would not contest the action. Plaintiff subsequently had the defendants' default entered and obtained a default judgment. Although notified of these events, defendants took no action. Meanwhile, the defendant corporation had sold the property attached by plaintiff, the only remaining corporate asset, to one Robbins. Because Robbins required title insurance against plaintiff's lien, a Boyd Jefferies, who was a limited partner of the defendant partnership and a former director of defendant corporation, gave the title company a personal indemnity for the amount of plaintiff's attachment. When plaintiff obtained judgment and levied on the property, the title company demanded that Jefferies make good the indemnity. Jefferies' attorneys, however, discovered the error in the service of summons. Although this error might have served to vacate the judgment and levy of execution, defendants still faced the encumbrance of the prejudgment attachment, but that was also subject to attack under *Randone v. Appellate Dep't of Superior Court (1971) 5 Cal. 3d 536, 96 Cal. Rptr. 709, 488 P.2d 13* . The vacating of the judgment and liens, then, would have cleared the title; Jefferies would have been freed of the indemnity; and plaintiff would have had only a cause of action against a judgment-proof corporation. It was under these circumstances that Jefferies moved, in defendants' names, to quash service of summons and to vacate the default judgment and levy of execution. The motion was denied, and the writ proceedings were initiated to compel the trial court to grant the motion and vacate the default.

In denying the writs, the Supreme Court pointed out that recognizing the serious need to update California's jurisdiction and service of process statutes, the California Judicial Council and State Bar, following a joint study, recommended a comprehensive revision of the California statutes, and that the suggested changes, including Corp. Code § 416.10, governing service on corporations, were enacted in 1969. The Court said that although some decisions under pre-1969 statutes required strict and exact compliance with the statutory requirements, the provisions of the new law, according to its authors, are to be liberally construed. Quoting Li, Attorney's Guide to California Jurisdiction and Process (CEB 1970), pp. 57-58, the Court said that, as reported in the November 25, 1968 Report of the Judicial Council's Special

Committee on Jurisdiction, pp. 14-15, the provisions of the act should be liberally construed to effectuate service and uphold the jurisdiction of the court if actual notice has been received by the defendant, and in the last analysis the question of service should be resolved by considering each situation from a practical standpoint. The liberal construction rule, it is anticipated, will eliminate unnecessary, time-consuming, and costly disputes over legal technicalities, without prejudicing the right of defendants to proper notice of court proceedings (*9 Cal. 3d 773, 778)* .

Espindola v. Nunez *(1988) 199 Cal. App. 3d 1389, 245 Cal. Rptr. 596* , was an action for damages based on negligence, breach of contract, fraud, and conspiracy. The complaint was filed on January 26, 1983, and an amended complaint on January 10, 1986, at which time plaintiff's lawyer hired an investigator to locate the defendants, as his own attempts to find them since late 1985 had been unsuccessful. On January 17, the process server went to an address provided by the investigator, but the defendants had moved eight months earlier. The process server then made three unsuccessful attempts to serve them at their current address. On the fourth attempt, the server found the defendant wife at home and served her with a summons and complaint individually, and left another set for her husband. The husband moved to quash service on the grounds plaintiffs had failed to show reasonable diligence in their efforts to serve him personally before resorting to substituted service. The motion was granted, and plaintiffs appealed.

In reversing the order, the court of appeal pointed out that *Code Civ. Proc. § 415.20(b)* was enacted in 1969 as part of the legislative package to update California law on jurisdiction and service of process, that before the 1969 legislation, substituted service on an individual defendant was not authorized in California, and that, consequently, very little case law defined "reasonable diligence." The court found guidance, however, in *Pasadena Medi-Center Associates v. Superior Court (1973) 9 Cal. 3d 773, 108 Cal. Rptr. 828, 511 P.2d 1180* (discussed *above*), and quoted the statements from the decision in *Pasadena*, that the provisions of the 1969 act should be liberally construed to effectuate service and uphold the jurisdiction of the court if actual notice has been received by the defendant, and in the last analysis the question of service should be resolved by considering each situation from a practical standpoint (*199 Cal. App. 3d 1389, 1391)* .

[b] Factual Determination

In ***Cosper v. Smith & Wesson Arms Co.*** *(1959) 53 Cal. 2d 77, 346 P.2d 409* , the plaintiff appealed from the trial court's order quashing service of summons on a defendant foreign corporation on the grounds it was not doing business in California and service on its sales manager and manufacturer's representative did not constitute service on the corporation by hand delivery of process to its "general manager," as that term was used in former Corp. Code § 6500 [*now see Corp. Code § 2110*]. In reversing the order, the California Supreme Court said that in any given case, whether the person served may properly be regarded as within the statute's designation of the persons to be served depends on the particular facts involved (*53 Cal. 2d 77, 83)* .

[c] Service on Corporate Agent With Ostensible Authority to Accept Service Is Sufficient

The facts and procedural background of ***Pasadena Medi-Center Associates v. Superior Court*** *(1973) 9 Cal. 3d 773, 108 Cal. Rptr. 828, 511 P.2d 1180* , are *discussed under § 132.60[3][a]*. In denying the writs, the Supreme Court said that, by representing that Binney, Sr. was its secretary-treasurer, defendant corporation conferred on him ostensible authority to accept service on the corporation's behalf, and, consequently, service on Binney, Sr. sufficed to establish personal jurisdiction over defendant corporation (*9 Cal. 3d 773, 775)* . The Court explained that defendant corporation's designation in its application for a stock permit of Binney, Sr. as its secretary-treasurer, clothed him with ostensible authority to accept service of process and, because service on a corporate agent with ostensible authority to accept service suffices to acquire jurisdiction over the corporation, the defendant corporation had been properly served and could present no viable reason for setting aside the default judgment entered against it (*9 Cal. 3d 773, 777)* . Bearing in mind the caveat of the authors of *Code Civ. Proc. § 416.10* that it be liberally construed, the Court pointed out that the section designates a secretary or treasurer, or a combined secretary-treasurer, as a proper person to receive service of process and held that the statement in the application for a stock permit that Binney, Sr. was its

secretary-treasurer was a public assertion of that fact and estopped defendants from denying his authority to accept service (*9 Cal. 3d 773, 778-779)* . The Court held that service on an agent possessing only ostensible authority sufficed to impose personal jurisdiction over the principal (*9 Cal. 3d 773, 781-783)* .

[d] Service on General Manager

In ***Cosper v. Smith & Wesson Arms Co.*** *(1959) 53 Cal. 2d 77, 346 P.2d 409* , the plaintiff appealed from the trial court's order quashing service of summons on a defendant foreign corporation on the grounds it was not doing business in California and service on its sales manager and manufacturer's representative did not constitute service on the corporation by hand delivery of process to its "general manager," as that term was used in former Corp. Code § 6500 [*now see Corp. Code § 2110*]. The Supreme Court reversed on the grounds that (1) the corporation was doing business in California, and that (2) the manufacturer's representative was its general manager in California. With respect to the second ground, the Court said that every object of the service is obtained when the agent served is of sufficient character and rank to make it reasonably certain that the defendant will be apprised of the service made (*53 Cal. 2d 77, 83)* .

[e] When Individual May Be Regarded as General Manager of Foreign Corporation

The procedural background of ***Cosper v. Smith & Wesson Arms Co.*** *(1959) 53 Cal. 2d 77, 346 P.2d 409* , is *discussed under § 132.60[3][d]*. In reversing the order quashing service of process, the Supreme Court pointed out that the manufacturer's representative (1) actively engaged in promoting defendant's sales and earned commissions through such sales; (2) had ample regular contact with the defendant and was of sufficient character and rank to make it reasonably certain that the defendant would be apprised of the service of process; (3) performed services for the defendant and provided it with the opportunity for regular contact with its customers and a channel for a continuous flow of business into the state through his selling and advertising activities; and (4) gave defendant substantially the business advantages it would have enjoyed had it conducted its business through its own offices or paid agents in the state (*53 Cal. 2d 77, 83-84)* . The Court concluded that such arrangement was sufficient to constitute the manufacturer's representative the foreign corporate defendant's general manager in this state for purposes of service of process on the defendant (*53 Cal. 2d 77, 84)* .

[f] Activities of Agent of Foreign Corporation

In ***Carl F. W. Borgward, G.M.B.H. v. Superior Court*** *(1958) 51 Cal. 2d 72, 330 P.2d 789* , the petitioner, a German corporation, sought a writ of mandate to compel the trial court to quash service of summons on it in an action against it and its exclusive importer for damages for breach of contract and conspiracy, following the trial court's denial of the motion. Process had been served on petitioner's agent, who was alleged to be the petitioner's general manager in this state under former Corp. Code § 6500 [*now see* Corp. code § 2110], and who negotiated and arranged for the distribution of petitioner's products in California by independent contractors.

In denying a peremptory writ of mandate, the Supreme Court said that important services performed by the agent for petitioner in California, namely, the establishment and maintenance of a satisfactory importing, distributing, and sales organization, were petitioner's activities through its agent and sufficient to constitute the agent petitioner's general manager, regardless of how closely these activities may have been supervised from Germany (*51 Cal. 2d 72, 78)* .

[g] Proof of Service

In ***Eclipse Fuel etc. Co. v. Superior Court*** *(1957) 148 Cal. App. 2d 736, 307 P.2d 739* , five suits brought by different individuals for personal injuries each joined the petitioner as a defendant. Petitioner's motion to quash service of summons was denied, and petitioner sought a writ of prohibition to restrain the trial court from proceeding with the cases.

In denying the peremptory writ, the court of appeal held that petitioner had been validly served with process. The court

noted that the affidavit of service of summons and complaint in one action showed service on petitioner by service on its exclusive manufacturer's agent, a corporation, through delivery to the corporation's agent, and, in the other four cases, that the affidavits showed service on the corporation by delivery to the same person as manager and manufacturer's agent. Although the court found additional elements of proof showing service was proper, it said that such affidavits of service of process were prima facie proof that the person named therein as managing agent for a defendant corporation was such agent (*148 Cal. App. 2d 736, 743-744)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticeService of ProcessGeneral Overview

California Points & Authorities

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 132 JURISDICTION: PERSONAL JURISDICTION AND INCONVENIENT FORUM
PART II. FORMS
B. Defective Service of Summons

13-132 California Points & Authorities § 132.61

§ 132.61 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground of Defective Service or Summons--Service Conformed With Statutory Requirements--Service on Person in Charge of Defendant's Office [Code Civ. Proc. § 415.20(a)]

[1] FORM

[*Caption. See § 132.60.*]

THE MOTION TO QUASH SERVICE OF SUMMONS SHOULD BE DENIED BECAUSE THE SUMMONS AND COMPLAINT WERE PROPERLY SERVED ON THE DEFENDANT IN THE MANNER PRESCRIBED BY SECTION 415.20(a) OF THE CODE OF CIVIL PROCEDURE.

A. When Personal Jurisdiction Attaches. [*See § 132.60*, Paragraph B].

B. Service of Process Act to Be Liberally Construed. [*See § 132.60*, Paragraph C].

[*EITHER*]

C. Service of Summons Effected When Summons and Complaint Left With Person in Charge of Office of Person to Be Served Followed By Subsequent Mailing. In lieu of personal delivery of a copy of the summons and a copy of the complaint to the person to be served as specified in Code of Civil Procedure Section _____ [416.10, relating to service on an existing corporation *or* 416.20, relating to service on a dissolved corporation *or* 416.30, relating to service on a joint stock company *or* 416.40, relating to service on an unincorporated association, including a partnership *or* 416.50, relating to service on a public entity], a summons may be served by leaving a copy of the summons and complaint during usual office hours in his or her office or, if no physical address is known, at his/her usual mailing address, other than a U.S Postal Service post office box, with the person who is apparently in charge thereof, and by thereafter mailing a copy of the summons and complaint by first-class mail, postage prepaid to the person to be served at the place where a copy of the summons and complaint were left. When service is effected by leaving a copy of the summons and complaint at a mailing address, it shall be left with a person at

least 18 years of age, who shall be informed of the contents thereof (*Code Civ. Proc. § 415.20(a)*).

[*OR*]

C. Service of Summons Effected When Defendant Is A Business Organization, Form Unknown, and Summons and Complaint Left With Person in Charge of Office Followed By Subsequent Mailing. In lieu of personal delivery of a copy of the summons and complaint to be served as specified in *Code of Civil Procedure Sections 416.20-416.50*, when the business organization is in a form unknown, and the business is not a corporation with a registered agent for service of process listed with the Secretary of State, summons may be served by leaving a copy of the summons and complaint during usual business hours with the person who is apparently in charge of the office of the business organization, and by thereafter mailing a copy of the summons and complaint by first-class mail, postage prepaid, to the person to be served at the place where the summons and complaint was left (*Code Civ. Proc. § 415.95*).

[*Optional*] **D. Service Effective Although Defendant Rendered Physical Service Impossible.** A defendant will not be permitted to defeat service by rendering physical service impossible (*Khourie, Crew & Jaeger v. Sabek, Inc. (1990) 220 Cal. App. 3d 1009, 1013, 269 Cal. Rptr. 687*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The memorandum in [1], *above*, may be submitted in opposition to a motion to quash service of summons made on the ground that the service of the summons was defective. The ground of opposition is that service was made in compliance with the provisions of *Code Civ. Proc. § 415.20(a)*.

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, the foregoing memorandum may be submitted in opposition to the memorandum *set out in § 132.40*.

See also *§ 132.60[2][b]* for related uses.

[b] Person to Be Served

Code Civ. Proc. § 415.20(a) refers to "the person to be served as specified in Section 416.10, 416.20, 416.30, 416.40, or 416.50" of the Code of Civil Procedure.

The persons thus referred to are as follows:

- When the defendant is a corporation:
    - An agent for service of process designated as provided in *Corp. Code § 202, 1502*,

2105, or *2107* [*Code Civ. Proc. § 416.10(a)*];

- The president, chief executive officer, or other head of the corporation, or a vice president, secretary or assistant secretary, treasurer or assistant treasurer, a controller or chief financial officer, general manager, or person authorized by the corporation to receive service of process [*Code Civ. Proc. § 416.10(b)*];

- If the corporation is a bank, to a cashier or assistant cashier or to a person specified in *Code Civ. Proc. § 416.10(a)* or *(b)* [*Code Civ. Proc. § 416.10(c)*]; or

- As provided in *Corp. Code § 1701* or *1702* (both relating to service on domestic corporation), or *Corp. Code § 2110* or *2111* (both relating to service on foreign corporation) [*Code Civ. Proc. § 416.10(d)*].

- When the defendant is a corporation that has forfeited its charter or right to do business, or has dissolved:

  - A trustee of the corporation and its stockholders or members [*Code Civ. Proc. § 416.20(a)*]; or

  - As provided in *Corp. Code § 2011* (dissolved corporation) or 2114 (foreign corporation which has withdrawn from business in California) [*Code Civ. Proc. § 416.20(b)*].

- When the defendant is a joint stock company or association: as provided in *Code Civ. Proc. § 416.10* or *416.20* [*Code Civ. Proc. § 416.30*].

- When the defendant is a general or limited partnership: the person designated as agent for service of process as provided in *Corp. Code § 24003* or a general partner or the general manager of the partnership [*Code Civ. Proc. § 416.40(a)*].

- When the defendant is any other form of unincorporated association:

  - The person designated as agent for service of process as provided in *Corp. Code § 24003*, or the president or other head of the association, or a vice president, secretary or assistant secretary, treasurer or assistant treasurer, general manager, or person authorized by the association to receive service of process [*Code Civ. Proc. § 416.40(b)*]; or

  - As provided in *Corp. Code § 15700* (relating to service on secretary of state [repealed by Stats. 1983, ch. 1223, § 11, operative July 1, 1984; *now see Corp. Code § 15800*]) or in *Corp. Code § 24007* (relating to service, on court order, to member of association) [*Code Civ. Proc. § 416.40(c)*].

- When the defendant is a public entity: the clerk, secretary, president, presiding officer, or other head of the entity's governing body [*Code Civ. Proc. § 416.50(a)*]. (The term "public entity," as used in *Code Civ. Proc. § 416.50* is defined in *Code Civ. Proc. § 416.50(b)*.)

For points and authorities supporting the contention that service on an entity's designated agent is a proper basis for the exercise of in personam jurisdiction, see *§ 132.104*.

If the defendant is a business organization, form unknown, and the defendant is not a corporation with a registered agent for service of process listed with the Secretary of State, summons may be served by leaving a copy of the summons and complaint during usual business hours with the person who is apparently in charge of the office of the business organization, followed by mailed service of the summons and complaint to the person to be served at the place where the summons and complaint was left [*Code Civ. Proc. § 415.95*].

[c] When Service Is Deemed Complete

Code Civ. Proc. § 415.20(a) provides that service in the manner prescribed in the section is deemed complete on the tenth day after the mailing. *Code Civ. Proc. § 415.95(b)* provides that when service is made on a business organization, form unknown, service in the manner prescribed in the section is deemed complete on the tenth day after mailing.

[3] Discussion of Authorities

[a] Service Effective Although Defendant Rendered Physical Service Impossible

In ***Khourie, Crew & Jaeger v. Sabek, Inc.*** *(1990) 220 Cal. App. 3d 1009, 269 Cal. Rptr. 687* , a process server went to the defendant corporation's place of business during usual business hours in order to serve its agent with a summons and complaint. The door was locked. A woman responded when the process server rang the bell. She refused to tell her name and refused to unlock the door. The process server explained his purpose and she stated that she was not accepting the papers. The process server then told her that he was leaving the summons and complaints outside the locked door and she watched as he did so. The process server also mailed a copy of the summons and complaint to defendant at its place of business. Subsequently, plaintiff's attorney wrote defendant pointing out that the summons and complaint had been served and gave notice that it would take defendant's default if a responsive pleading were not filed by a specified date, which was later extended on request of the defendant. No pleading was filed and defendant's default was entered. Defendant's motion to set aside the default was denied, and defendant appealed.

The court of appeal affirmed. The court said that the evident purpose of *Code Civ. Proc. § 415.20* is to permit service to be completed on a good-faith attempt at physical service on a responsible person, plus actual notification of the action by mailing the summons and complaint to the appropriate party (*220 Cal. App. 3d 1009, 1013)* . The court said it is established that a defendant will not be permitted to defeat service by rendering physical service impossible (*220 Cal. App. 3d 1009, 1013)* , that the process server provided actual notice of the documents to the person apparently in charge of the defendant's office, and, prevented by that person from leaving them inside the office, left them on the other side of the office door. No more was required to effect service other than to mail to the defendant a copy of the summons and complaint, which the server did (*220 Cal. App. 3d 1009, 1012, 1014)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProceduresPleading & PracticeService of ProcessGeneral Overview

California Points & Authorities

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 132 JURISDICTION: PERSONAL JURISDICTION AND INCONVENIENT FORUM
PART II. FORMS
B. Defective Service of Summons

13-132 California Points & Authorities § 132.62

§ 132.62 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground of Defective Service or Summons--Service Conformed With Statutory Requirements--Service at Defendant's Home, Business, or Mailing Address [Code Civ. Proc. § 415.20(b)]

[1] FORM

[*Caption. See § 132.60.*]

THE MOTION TO QUASH SERVICE OF SUMMONS SHOULD BE DENIED BECAUSE A COPY OF THE SUMMONS AND OF THE COMPLAINT WERE PROPERLY SERVED ON THE DEFENDANT IN THE MANNER PRESCRIBED BY SECTION 415.20(b) OF THE CODE OF CIVIL PROCEDURE.

A. When Personal Jurisdiction Attaches. [*see § 132.60*, Paragraph B].

B. Service of Process Act to Be Liberally Construed. [*see § 132.60*, Paragraph C].

C. Summons Left at Defendant's Home or Place of Business or Mailing Address. When a copy of the summons and a copy of the complaint cannot with reasonable diligence be personally delivered to the person to be served as specified in Code of Civil Procedure Section _____ [416.60, relating to service on a minor defendant *or* 416.70, relating to service on an adult defendant for whom a guardian, conservator, or similar fiduciary has been appointed *or* 416.80, relating to service on a candidate for public office and the action relates to the candidacy or the election laws *or* 416.90, relating to service on a defendant who is person not otherwise specified in *Code of Civil Procedure Sections 416.10-416.80*], the summons may be served by leaving a copy of the summons and complaint at the person's dwelling house, usual place of abode, usual place of business, or usual mailing address other than a United States Postal Service post office box, in the presence of a competent member of the household or a person apparently in charge of his or her office, place of business, or usual mailing address other than a United States Postal Service post office box, at least 18 years of age, who shall be informed of the contents thereof, and by thereafter mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served at the place where a copy of the summons and complaint were left (*Code Civ. Proc. § 415.20(b)*).

D. Constitutional Validity of Substituted Service. Substituted service under the provisions of *Section 415.20(b) of the Code of Civil Procedure* satisfies the constitutional requirements of service reasonably calculated to give an interested party actual notice of the proceedings and an opportunity to be heard (*Korea Exchange Bank v. Yang (1988) 200 Cal. App. 3d 1471, 1474, 246 Cal. Rptr. 619*).

[*Optional*] **E. Reasonable Diligence Requirement Satisfied.** When the actions of the process server in making substituted service were calculated to, and did, result in actual notice to the defendant, the requirement of reasonable diligence under *Section 415.20(b) of the Code of Civil Procedure* has been met (*Espindola v. Nunez (1988) 199 Cal. App. 3d 1389, 1393, 245 Cal. Rptr. 596*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The points and authorities in [1], *above*, may be submitted in opposition to a motion to quash service of summons made on the ground that the substituted service on the defendant was ineffective and void. The ground of opposition is that service was made in accordance with the provisions of *Code Civ. Proc. § 415.20(b)*. Optional Paragraph E should be included when the defendant claims that plaintiff did not exercise reasonable diligence in attempting to make personal service.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, this memorandum of points and authorities may be submitted in opposition to the points and authorities *set out in § 132.44*.

See also *§ 132.60[2][b]* for related uses.

[b] Person to Be Served

Code Civ. Proc. § 415.20(b) refers to "[t]he person to be served as specified in Section 416.60, 416.70, 416.80, or 416.90" of the Code of Civil Procedure.

The persons thus referred to are as follows:

- When the defendant is a minor, the minor's parent, guardian, conservator, or similar fiduciary, or, if no such person can be found with reasonable diligence, any person having the care or control of the minor or with whom the minor resides or by whom the minor is employed, and the minor if he or she is at least 12 years of age [*Code Civ. Proc. § 416.60*].

- When the defendant is an adult ward or conservatee, the defendant's guardian, conservator, or similar fiduciary, and to the defendant (but, for good cause shown, the court in which the action is pending may dispense with delivery to the defendant) [*Code Civ. Proc. § 416.70*].

- When the defendant is a candidate for public office, the action arises out of such candidacy or the election laws, personal service cannot be effected with due diligence, and a court order is obtained, the Secretary of State or the county clerk appointed as the candidate's attorney for service of process, or any person employed in such person's office in the capacity of assistant or deputy [*Code Civ. Proc. § 416.80*; *see Elec. Code § 12*].

- When the defendant is a person not otherwise specified in *Code Civ. Proc. §§ 416.10-416.80*, the defendant or a person authorized by the defendant to receive service of process [*Code Civ. Proc. § 416.90*; *see §§ 132.63*].

[3] Discussion of Authorities

[a] Constitutional Validity of Substituted Service

Korea Exchange Bank v. Yang *(1988) 200 Cal. App. 3d 1471, 246 Cal. Rptr. 619* , was an action for damages and judicial foreclosure against a husband and wife. The wife had guaranteed her husband's business debt to the plaintiff, a portion of which was also secured by a deed of trust encumbering their residence. They failed to repay the money lent, and plaintiff filed suit. The husband was personally served with a copy of the summons and complaint. The wife was served by substituted service pursuant to *Code Civ. Proc. § 415.20(b)*. Plaintiff obtained a default judgment against the husband and the wife, and the judgment assessed money damages against both the wife and husband with regard to the unsecured portion of their debt, and directed that the residence be sold in satisfaction of the secured debt. The property was sold for less than the full amount owed, and the plaintiff moved for a deficiency judgment. The court granted the motion as to the husband and denied it as to the wife because she had been served by substituted service. Plaintiff appealed.

In reversing the denial of plaintiff's motion as to the wife, the court of appeal, citing Restatement (Second), Judgments, § 2, Comment a, said that substituted service pursuant to *Code Civ. Proc. § 415.20(b)* by leaving a copy of the summons and of the complaint at the person's usual place of abode in the presence of a competent member of the household at least 18 years of age, who shall be informed of the contents thereof, and by thereafter mailing a copy of the summons and of the complaint, satisfies the constitutional requirements of service reasonably calculated to give an interested party actual notice of the proceedings and an opportunity to be heard (*200 Cal. App. 3d 1471, 1474)* .

[b] Reasonable Diligence Requirement Satisfied

The facts and procedural background of ***Espindola v. Nunez*** *(1988) 199 Cal. App. 3d 1389, 245 Cal. Rptr. 596* , are discussed in *§ 132.60[3][a]*. In reversing the order quashing service of summons, the court said that it was influenced by the Supreme Court's admonition in *Pasadena Medi-Center Associates v. Superior Court (1973) 9 Cal. 3d 773, 778, 108 Cal. Rptr. 828, 511 P.2d 1180* (discussed in *§ 132.60[3][a]*), to construe the process statutes liberally to effectuate service and uphold the jurisdiction of the court if actual notice has been received by the defendant (*199 Cal. App. 3d 1389, 1393)* . The court held that since the actions of the process server were calculated to, and did, result in actual notice to the defendant, the requirement of reasonable diligence under *Code Civ. Proc. § 415.20(b)* had been met (*199 Cal. App. 3d 1389, 1393)* .

Note that the court criticized and distinguished *Evartt v. Superior Court (1979) 89 Cal. App. 3d 795, 152 Cal. Rptr. 836* , which is discussed in *§§ 132.44[3][a]* and *132.44[3][c]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to

DismissCivil ProceduresPleading & PracticeService of ProcessGeneral Overview

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B. Defective Service of Summons

13-132 California Points & Authorities § 132.63

§ 132.63 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground of Defective Service or Summons--Service Conformed With Statutory Requirements--Service on Defendant's Agent [Code Civ. Proc. § 416.90]

[1] FORM

[*Caption. See § 132.60.]*

THE MOTION TO QUASH SERVICE OF SUMMONS SHOULD BE DENIED BECAUSE A COPY OF THE SUMMONS AND OF THE COMPLAINT WERE DELIVERED TO A PERSON AUTHORIZED TO RECEIVE SERVICE OF PROCESS BY THE DEFENDANT.

A. When Personal Jurisdiction Attaches. [*see § 132.60*, Paragraph B].

B. Service of Process Act to Be Liberally Construed. [*see § 132.60*, Paragraph B].

C. Delivery to Person Authorized to Receive Service. A summons may be served on a person not otherwise specified in *Sections 416.10 through 416.80 of the Code of Civil Procedure* by delivering a copy of the summons and of the complaint to such person or to a person authorized by him or her to receive service of process (*Code Civ. Proc. § 416.90*).

[*Optional*] **D. Specific Authorization Unnecessary.** The person to whom a copy of the summons and a copy of the complaint are delivered pursuant to *Section 416.90 of the Code of Civil Procedure* need not have been specifically authorized to receive service of process if the relationship between that person and the person whose authority he or she has is close and enduring enough to make it highly probable that the person on whose behalf service was thus made will receive actual notice of the lawsuit (*Warner Bros. Records, Inc. v. Golden West Music Sales (1974) 36 Cal. App. 3d 1012, 1017-1018, 112 Cal. Rptr. 71*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The form in [1], *above*, may be submitted in opposition to a motion to quash service of summons made on the ground that the substituted service on the defendant was ineffective and void. The ground of opposition is that the defendant is not a person or entity otherwise specified in *Code Civ. Proc. §§ 416.10-416.80*, and hence service under *Code Civ. Proc. § 416.90* by delivery of a copy of the summons and of the complaint to a person authorized by the defendant to receive service on his or her behalf was authorized and is valid.

Service of summons pursuant to *Code Civ. Proc. § 416.90* on a person or entity covered in *Code Civ. Proc. §§ 416.10-416.80* would be improper and properly quashed [*see Warner Bros. Records, Inc. v. Golden West Music Sales (1974) 36 Cal. App. 3d 1012, 1016-1018, 112 Cal. Rptr. 71* (*discussed under § 132.63[3*][a]). The persons referred to in *Code Civ. Proc. §§ 416.10-416.50* are listed in § 132.61[2][b]. The persons specified in *Code Civ. Proc. §§ 416.60-416.80* are listed in § 132.62[2][b]].

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, the foregoing memorandum of points and authorities may be submitted in opposition to the points and authorities *set out in § 132.40*.

See also *§ 132.60[2][b]* for related uses.

[3] Discussion of Authorities

[a] Specific Authorization Unnecessary

Warner Bros. Records, Inc. v. Golden West Music Sales *(1974) 36 Cal. App. 3d 1012, 112 Cal. Rptr. 71* , was a class action by recording companies for damages, an accounting, and injunctive relief, arising out of the alleged "pirating" of musical and other performances recorded by the plaintiffs. Named as defendants were three individuals, individually and as copartners in a law partnership, 20 other persons, both in their individual capacities and "doing business as" various named entities, seven separate business entities, and 500 "Does." Service of process on the named defendants, other than the law partners, was made by handing copies of the summons and the complaint to one of the law partners as agent for each of the defendants pursuant to *Code Civ. Proc. § 416.90*. Several defendants moved to quash service on the ground the law partner was not authorized to receive service in their behalf. The trial court granted the motions, stating that, under *Code Civ. Proc. § 416.90*, to be an agent for the service of process, the law partner's authorization had to be real and actual and could not be inferred or implied.

The court of appeal affirmed the orders with respect to the business entities on the ground they were not subject to service under *Code Civ. Proc. § 416.90* because they were business entities "otherwise specified" in *Code Civ. Proc. §§ 416.10-416.80* (*36 Cal. App. 3d 1012, 1016)* . With respect to the individual defendants, however, the court of appeal, after quoting the Judicial Council's official approved comment to *Code Civ. Proc. § 416.90*, said that the Judicial Council further observed that a specific appointment is not required, but the principal-agent relationship must be close and enduring enough to make it highly probable that the defendant will receive actual notice (*36 Cal. App. 3d 1012, 1017)* . The court said that this statement by the authors of *Code Civ. Proc. § 416.90* is in accord with their expressed

intention that the recently enacted statutes governing service of process should be liberally construed to effectuate service and uphold the jurisdiction of the court if actual notice has been received by the defendant, and in the last analysis the question of service should be resolved by considering each situation from a practical standpoint (citing *Pasadena Medi-Center Associates v. Superior Court (1973) 9 Cal. 3d 773, 778, 108 Cal. Rptr. 828, 511 P.2d 1180* , discussed in *§ 132.60[3][a]*) (*36 Cal. App. 3d 1012, 1017)* . The court said that an attorney, as well as any other person, could be actually or ostensibly authorized to receive service of process on behalf of the principal, and that characterizing the attorney as an independent contractor and not as an employee or agent was, in effect, irrelevant to the determination of the validity of substituted service under *Code Civ. Proc. § 416.90*; that the essential factor as whether te law partner's relationship with the individual defendants may have been sufficiently close and enduring to make it reasonably certain that they would be apprised of the service (*36 Cal. App. 3d 1012, 1018)* . Th court said that the trial court's stated reason for granting the motions was in error and reversed the orders as to the individual defendants with directions to the trial court to determine the nature of the relationship between the defendants and the attorney to determine whether the attorney was their ostensible agent to receive service of process or not (*36 Cal. App. 3d 1012, 1018-1019)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticeService of ProcessGeneral Overview

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13-132 California Points & Authorities § 132.64

§ 132.64 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground of Defective Service or Summons--Service Conformed With Statutory Requirements--Service Pursuant to Direction of Court [Code Civ. Proc. § 413.30]

[1] FORM

[*Caption. See § 132.60.*]

THE MOTION TO QUASH SERVICE OF SUMMONS SHOULD BE DENIED BECAUSE SERVICE WAS MADE IN THE MANNER DIRECTED BY THE ORDER OF THIS COURT.

A. When Personal Jurisdiction Attaches. [*see § 132.60*, Paragraph B].

B. Service of Process Act to Be Liberally Construed. [*see § 132.60*, Paragraph C].

C. Service in Manner Directed by Court. When no provision is made by law for the service of summons, the court in which the action is pending may direct that summons be served in a manner which is reasonably calculated to give actual notice to the party to be served (*Code Civ. Proc. § 413.30*).

[*Optional*] **D. Service in Dissolution Proceeding.** When the respondent spouse in a dissolution proceeding cannot be found and the petitioning spouse is indigent and cannot afford the cost of service by publication, the court may order that summons be served on the respondent spouse by mail at his or her last known address and posted notice (*Cohen v. Board of Supervisors (1971) 20 Cal. App. 3d 236, 239, 97 Cal. Rptr. 550*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The form in [1], *above*, may be submitted in opposition to a motion to quash service of summons made on the ground that the substituted service on the defendant was ineffective and void. The ground of opposition is that the service was made in the manner ordered by the court and the order was proper.

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, the foregoing memorandum of points and authorities may be submitted in opposition to the points and authorities *set out in § 132.40*.

See also *§ 132.60[2][b]* for related uses.

[3] Discussion of Authorities

[a] Service in Dissolution Proceeding

Cohen v. Board of Supervisors *(1971) 20 Cal. App. 3d 236, 97 Cal. Rptr. 550* , was a combined proceeding in mandate and an action for declaratory relief to compel the respondent board of supervisors to pay for the publication of summons in dissolution of marriage and declaration of nullity proceedings where the petitioners were indigent and unable to pay the cost of service by publication and their spouses could not be found. The trial court sustained a demurrer to both causes of action and denied the writ of mandate.

The court of appeal affirmed. Nevertheless, the court pointed out that in *Boddie v. Connecticut (1971) 401 U.S. 371, 382, 91 S. Ct. 780, 28 L. Ed. 2d 113* , the United States Supreme Court held that due process of law prohibits a state from denying, solely because of inability to pay court fees and costs for service of process, access to its courts to indigents who, in good faith, seek judicial dissolution of their marriages, and that the Supreme Court had said in that case that "reliable alternatives exist to service of process by a state-paid sheriff if the State is unwilling to assume the cost of official service. This is perforce true of service by publication which is the method of notice least calculated to bring to a potential defendant's attention the pendency of judicial proceedings. ... We think in this case service at defendant's last known address by mail and posted notice is equally effective as publication in a newspaper" (*20 Cal. App. 3d 236, 238)* . The court of appeal explained that *Code Civ. Proc. § 415.50* provides for service by publication if upon affidavit it appears to the satisfaction of the court in which the action is pending that the party to be served cannot with reasonable diligence be served in other specified manner, and that a cause of action exists against the party or he is a necessary or proper party to the action. But this is not the only pertinent statute. Section 413.30 of the ... [Code of Civil Procedure] directs that where no provision is made in "this chapter or other law" for service of summons, the court in which the action is pending may direct that summons be served in a manner which is reasonably calculated to give actual notice to the party to be served. Obviously, such a "manner" is at hand, for the Supreme Court has described it in *Boddie* ... as service at a defendant's last known address and posting. The other prerequisite mentioned in section 413.30 [of the Code of Civil Procedure] is also present, in that there really is no other provision made by law for service, because although publication is theoretically possible, practically there is no way of efficient publication save by the doubtful expedient of ordering public officials to make expenditures which no statute authorizes them to make. This would be a measure justifiable, if at all, only if it were the sole available means of carrying into execution the service of summons which plaintiffs, as indigent litigants, rightfully demand as an incident of due process (*20 Cal. App. 3d 236, 239)* .

The court added that since neither the superior court nor any of its officers had been made a party defendant it could not

direct positive action by the court, but it affirmed the judgment on the ground plaintiffs had an adequate remedy by the alternative method of service of summons under *Code Civ. Proc. § 413.30*, a remedy which they had not yet sought in the superior court (*20 Cal. App. 3d 236, 239)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticeService of ProcessGeneral Overview

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13-132 California Points & Authorities § 132.65

§ 132.65 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground of Defective Service or Summons--Summons Substantially Complied With Statutory Requirements [Code Civ. Proc. § 412.30]

[1] FORM

[*Caption. See § 132.60.*]

THE MOTION TO QUASH SERVICE OF SUMMONS SHOULD BE DENIED BECAUSE THE SUMMONS IS IN SUBSTANTIAL COMPLIANCE WITH STATUTORY NOTICE REQUIREMENTS.

A. When Personal Jurisdiction Attaches. [*see § 132.60*, Paragraph B].

B. Service of Process Act to Be Liberally Construed. [*see § 132.60*, Paragraph C].

C. Substantial Compliance With Statutory Provisions. In order to support jurisdiction, a summons need only substantially comply with the provisions of *Section 412.30 of the Code of Civil Procedure* governing service of summons on a corporate defendant (*Cory v. Crocker National Bank (1981) 123 Cal. App. 3d 665, 670-671, 177 Cal. Rptr. 150*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The memorandum of points and authorities in [1], *above*, may be submitted in opposition to a motion to quash service of summons made on the ground that the summons is defective. The ground of opposition is that the summons substantially complies with the requirements of *Code Civ. Proc. § 412.30* (contents of summons for corporation or unincorporated association).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, the foregoing memorandum of points and authorities may be submitted in opposition to the points and authorities *set out in § 132.46*.

See also *§ 132.60[2][b]* for related uses.

[3] Discussion of Authorities

[a] Substantial Compliance With Statutory Provisions

In ***Cory v. Crocker National Bank*** *(1981) 123 Cal. App. 3d 665, 177 Cal. Rptr. 150* , an action against a corporate defendant for accounting, escheat, and report and delivery of unclaimed property, defendant filed a motion to quash service on the ground that the summons, which was served on the defendant's operations manager, failed to show the name of the defendant and to indicate that the person receiving service did so on behalf of the corporation. The trial court granted the motion, but the court of appeal reversed. The court discussed the rule that provisions of the law governing service of summons on corporations are to be liberally construed to effectuate service and uphold jurisdiction so long as actual notice has been received by a defendant. The court noted that no other defendants were named in the action and that the officer accepting service had stamped the summons to indicate that he was accepting on behalf of the corporation. In light of these facts, the summons could be found to have substantially complied with the statute and to have given actual notice of the action to defendant. Such substantial compliance was sufficient to uphold jurisdiction (*123 Cal. App. 3d 665, 670-671)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticeService of ProcessGeneral Overview

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13-132 California Points & Authorities §§ 132.66-132.69

[Reserved]

§§ 132.66[Reserved]

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C. Bases of Jurisdiction

13-132 California Points & Authorities § 132.70

§ 132.70 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground That Court Lacks Personal Jurisdiction--Nonresident Defendant Lacks Minimal Contacts With California--General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN SUPPORT OF MOTION TO QUASH SER-
vs.	)	VICE OF SUMMONS
_____ [*name*],	)	[*Code Civ. Proc. § 418.10(a)(1)*]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE MOTION TO QUASH SERVICE OF SUMMONS FOR LACK OF JURISDICTION SHOULD BE GRANTED BECAUSE DEFENDANT IS A _____ [NONRESIDENT OF CALIFORNIA *or* FOREIGN _____ (CORPORATION *or* ASSOCIATION *or* PARTNERSHIP)], WAS SERVED WITH SUMMONS OUTSIDE CALIFORNIA, AND LACKS SUFFICIENT CONTACTS, TIES, OR RELATIONS WITH CALIFORNIA THAT ARE REQUIRED BY DUE PROCESS OF LAW TO SUPPORT THIS COURT'S EXERCISE OF PERSONAL JURISDICTION OVER _____ [IT *or* HIM *or* HER].

A. Motion to Quash Service of Summons. On or before the last day of his or her time to plead, or within such further time as the court may for good cause allow, a defendant may serve and file a notice of motion to quash service of summons on the ground the court lacks jurisdiction over him or her (*Code Civ. Proc. § 418.10(a)(1)*).

B. Requirement of Personal Jurisdiction Over Defendant. A state court must have personal jurisdiction over a defendant in order to impose on him or her a personal liability or obligation in favor of the plaintiff (*Kulko v. California Superior Court (1978) 436 U.S. 84, 91, 98 S. Ct. 1690, 56 L. Ed. 2d 132* ; *Titus v. Superior Court (1972) 23 Cal. App. 3d 792, 799, 100 Cal. Rptr. 477* ; *see also World-Wide Volkswagen Corp. v. Woodson (1980) 444 U.S. 286, 291, 100 S. Ct. 559, 62 L. Ed. 2d 490*).

C. Due Process of Law Required. This state may not deprive any person of life, liberty, or property without due process of law (*United States Constitution, Amendment XIV*; *California Constitution, Article I, § 7*). A court of this state may exercise personal jurisdiction over a defendant only on a basis that is consistent with this requirement (*see Code Civ. Proc. § 410.10*).

D. Due Process Requires Reasonable Notice and Minimum Contacts to Support Exercise of Personal Jurisdiction. The existence of personal jurisdiction depends on the presence of reasonable notice to the defendant that an action has been brought, and a sufficient connection between the defendant and the forum state as to make it fair to require defense of the action in the forum (*Kulko v. California Superior Court (1978) 436 U.S. 84, 91, 98 S. Ct. 1690, 56 L. Ed. 2d 132*). The concept of a sufficient connection with the forum state is synonymous with the principle of minimal contacts (*see Titus v. Superior Court (1972) 23 Cal. App. 3d 792, 800, 100 Cal. Rptr. 477*).

E. Minimum Contacts Requirement. Due process requires that, in order to subject a defendant who is not present within the territory of the forum to a judgment in personam, the defendant have certain minimum contacts with the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice (*International Shoe Co. v. Washington (1945) 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95*).

[*Optional*] **F. Minimum Contacts Requirement Applies to Actions in Personam, in Rem, and Quasi in Rem.** The minimum contacts requirement applies whether the action or proceeding is in personam, in rem, or quasi in rem (*Shaffer v. Heitner (1977) 433 U.S. 186, 199 n.17, 207, 97 S. Ct. 2569, 53 L. Ed. 2d 683*).

[*Optional*] **G. Minimum Contacts Requirement Applies to Both Individual and Corporate Defendants.** The minimum contacts requirement applies to individuals as well as to corporations and associations (*see Titus v. Superior Court (1972) 23 Cal. App. 3d 792, 800, 100 Cal. Rptr. 477* ; *Arnesen v. Raymond Lee Organization, Inc. (1973) 31 Cal. App. 3d 991, 996, 107 Cal. Rptr. 744* ; *see also World-Wide Volkswagen Corp. v. Woodson (1980) 444 U.S. 286, 294, 100 S. Ct. 559, 62 L. Ed. 2d 490* ; *International Shoe Co. v. Washington (1945) 326 U.S. 310, 319, 66 S. Ct. 154, 90 L. Ed. 95*).

H. Effect of Minimum Contacts Requirement. The concept of minimum contacts performs two related, but distinguishable, functions: (1) it protects the defendant against the burdens of litigating in a distant or inconvenient forum; and (2) it acts to ensure that the states, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in the federal system (*World-Wide Volkswagen Corp. v. Woodson (1980) 444 U.S. 286, 291-292, 100 S. Ct. 559, 62 L. Ed. 2d 490*).

[*Optional*] **I. Minimum Contacts Lacking When Defendant Has No Contacts With State.** A state may not make binding a judgment against an individual or corporate defendant with which the state has no contacts, ties, or relations (*World-Wide Volkswagen Corp. v. Woodson (1980) 444 U.S. 286, 294, 100 S. Ct. 559, 62 L. Ed. 2d 490* ; *Shaffer v. Heitner (1977) 433 U.S. 186, 216, 97 S. Ct. 2569, 53 L. Ed. 2d 683* ; *International Shoe Co. v. Washington (1945) 326 U.S. 310, 319, 66 S. Ct. 154, 90 L. Ed. 95*).

[*In an appropriate case, add additional points and authorities set out in §§ 132.72 -132.88, supporting the argument that the exercise of jurisdiction would be improper under the particular facts of the case.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The form in [1], *above*, is for use in support of a motion to quash service of summons under *Code Civ. Proc. § 418.10(a)(1)*, on the ground that the court has no proper basis for exercising personal jurisdiction over the defendant, because the defendant is a nonresident individual or legal entity who lacks the minimal contacts with California that are necessary under constitutional due process limitations to support the court's exercise of such jurisdiction. The memorandum sets forth general points of law regarding the requirement, imposed by constitutional due process considerations, that a defendant have certain minimum contacts with the forum state before the court may exercise personal jurisdiction over the defendant.

Optional Paragraph F may be used when appropriate to show that the minimum contacts requirement applies in actions in rem or quasi in rem as well as in actions in personam [*see also* discussion in *§§ 132.04, 132.05[1]*].

Optional Paragraph G may be used when appropriate to show that the minimum contacts requirement applies to individual defendants as well as to defendants that are corporations or associations.

Optional Paragraph I should be used when the defendant has no contacts whatever with California.

For additional points and authorities supporting a motion to quash for lack of an adequate basis of jurisdiction in particular situations, see *§§ 132.72 -132.88*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, the foregoing points and authorities may be used in support of a motion by a third-party cross defendant to quash service of the summons on a cross complaint [*see Code Civ. Proc. § 428.60(1)*] for lack of in personam jurisdiction, or in support of a petition for a writ of mandate to compel the trial court to grant a motion to quash after it has declined to do so (*Code Civ. Proc. § 418.10(c)*). They may also be adapted for use in a trial or appellate brief.

[c] Federal Actions

Under the *due process clause of the Fifth Amendment to the U.S. Constitution*, the same rules apply to federal actions. For example, in federal suits arising under a federal court's admiralty jurisdiction, the *due process clause of the Fifth Amendment* determines whether the court has personal jurisdiction over the defendant. In addition, the state's long-arm statute (*Code Civ. Proc. § 410.10*; *see also Code Civ. Proc. §§ 413.10, 415.10*) must be applied to determine the

defendant's amenability to suit in the forum [*Pacific Atlantic Trading Co. v. M/V Main Exp. (9th Cir. 1985) 758 F.2d 1325, 1327]* .

[d] Related Pleading and Practice Forms

For forms of notices of motion to quash service of summons, and related papers, see California Forms of Pleading and Practice, Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances* .

[e] Opposing Memoranda

For memoranda of points and authorities that may, in an appropriate case, be submitted in opposition to the foregoing memorandum, see *§ 132.100* et seq.

[3] Discussion of Authorities

[a] Requirement of Personal Jurisdiction Over Defendant

In ***Kulko v. California Superior Court*** *(1978) 436 U.S. 84, 98 S. Ct. 1690, 56 L. Ed. 2d 132* , a man and woman, both domiciliaries of New York, were married in 1959 during the man's three-day stopover in California en route from a military base in Texas to a tour of duty in Korea. The wife immediately returned to New York after the marriage, as did the husband after his tour of duty. The parties continued to reside in New York, where they had two children, until March 1972, when they separated, and the wife moved to San Francisco, California. After the separation, the parties entered into a separation agreement, executed in New York, under which the children were to remain with their father during the school year, but would spend specified vacation periods with the mother, to whom the father agreed to pay child support for the periods they were in her custody. Immediately thereafter, the wife obtained a divorce in Haiti, and the separation agreement was incorporated in the divorce decree. A year later, the parties' daughter told her father that she wanted to remain with her mother in California following her next vacation. The father bought her a one-way plane ticket, and she moved. Two years later the parties' son took up residence with his mother in California after the mother, without the father's knowledge, sent the son a plane ticket at his request. The mother then commenced a proceeding in California against the father seeking to establish the Haitian divorce decree as a California judgment, and to modify the judgment so as to award her full custody of the children, and to increase the father's child support obligations. The father moved to quash service of the summons on the ground he was not a California resident and lacked sufficient contacts with California to warrant the state's assertion of personal jurisdiction over him. The trial court denied the motion, and the court of appeal affirmed. The California Supreme Court upheld the trial court, holding that the exercise of personal jurisdiction over the nonresident father was reasonable because he had purposefully availed himself of the benefits and protections of California's laws [*see § 132.76*] by sending his daughter to California to live with her mother.

In holding that the motion to quash was erroneously denied and reversing the judgment of the California Supreme Court, the Supreme Court of the United States said that the *due process clause of the Fourteenth Amendment to the U.S. Constitution*operates as a limitation on the jurisdiction of state courts to enter judgments affecting rights or interests of nonresident defendants, and that it has long been the rule that a valid judgment imposing a personal obligation or duty in favor of the plaintiff may be entered only by a court having jurisdiction over the person of the defendant (*436 U.S. 84, 91)* .

Titus v. Superior Court *(1972) 23 Cal. App. 3d 792, 100 Cal. Rptr. 477* , was a mandate proceeding arising out of a proceeding to establish as a California judgment a Massachusetts divorce judgment. The divorce judgment required the father to pay child support and provided (1) for joint custody of the parties' three children, and (2) that the children were not be taken from Massachusetts without permission of the court or the written consent of the other parent. The mother subsequently moved to California where she remarried. The father signed a written agreement, prepared by him, allowing the children to visit their mother in California during the summer of 1971, providing for the sharing of the

costs of the children's round-trip air fare from Boston to San Francisco, providing for the children's support by the mother while in her custody, and specifically providing that the children were to return to Massachusetts no later than the end of August 1971. He mailed the agreement to the mother in California where she signed it. On August 17, 1971, the mother commenced the proceeding to establish the Massachusetts divorce judgment as a California judgment and to have the judgment modified to award the custody of the children to the mother, to require the father to pay for their support, and for attorney's fees incurred in the prosecution of the proceeding. At the time the proceeding was filed, the mother secured issuance of an order directing the husband to appear and show cause on August 31, 1971, why the court should not grant the relief sought. A copy of the complaint, summons, and order to show cause were served on the husband by certified airmail special delivery in New Bedford, Massachusetts. The husband then filed a motion to quash service of the order to show cause on the ground the California court did not have jurisdiction over him. The motion was denied. The husband appeared specially on the order to show cause to object to the jurisdiction of the court. The court nevertheless received evidence from the wife and made an order awarding custody to the wife pending trial of the proceeding, ordering the husband to pay $75 per month child support for each child, and reserving other matters in the order to show cause for trial. The husband petitioned the court of appeal for a writ of mandate directing the trial court to quash service of the order to show cause.

In granting the writ insofar as the order to show cause purported to give the trial court personal jurisdiction over the husband for purposes of child support, and annulling the child support order because there was no basis for in personam jurisdiction over the father, the court of appeal said in order to exercise jurisdiction over the subject matter [of an action in personam], the court must secure personal jurisdiction over the defendant, and, citing Restatement (Second), Conflicts of Law, p. 103, said that a state must have personal jurisdiction over a defendant in order to impose on him or her through its courts a personal liability or obligation in favor of the plaintiff (*23 Cal. App. 3d 792, 799)* .

The facts and procedural background of ***World-Wide Volkswagen Corp. v. Woodson*** *(1980) 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490* , are *discussed under § 132.70[3][g]*. In reversing the judgment of the Oklahoma Supreme Court ruling that two New York corporations were subject to the state's in personam jurisdiction in the underlying products liability action, the United States Supreme Court said that due process requires that the defendant be given adequate notice of the suit and be subject to the personal jurisdiction of the court (*444 U.S. 286, 291)* .

[b] Due Process of Law Required

Code Civ. Proc. § 410.10, California's long-arm statute, provides that "[a] court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." For the purpose of exercising personal jurisdiction, the constitutional provision chiefly applicable is the *due process clause of the Fourteenth Amendment*: a state may not deprive any person of life, liberty, or property without due process of law [*U.S. Const., amend. XIV*; *see also Cal. Const., art. I, § 7*].

[c] Due Process Requires Reasonable Notice and Minimum Contacts to Support Exercise of Personal Jurisdiction

The facts and procedural background of ***Kulko v. California Superior Court*** *(1978) 436 U.S. 84, 98 S. Ct. 1690, 56 L. Ed. 2d 132* , are *discussed under § 132.70[3][a]*. In holding that the denial of the motion to quash was error and reversing the judgment of the California Supreme Court, the Supreme Court of the United States said that the existence of personal jurisdiction depends on the presence of reasonable notice to the defendant that an action has been brought, and a sufficient connection between the defendant and the forum state as to make it fair to require defense of the action in the forum (*436 U.S. 84, 91)* .

The facts and procedural background of ***Titus v. Superior Court*** *(1972) 23 Cal. App. 3d 792, 100 Cal. Rptr. 477* , are *discussed under § 132.32[3][a]*. In granting the petition for writ of mandate insofar as the order to show cause purported to give the trial court personal jurisdiction over the husband for purposes of child support, and annulling the

child support order because there was no basis for in personam jurisdiction over the father, the court of appeal said that the concept of relationship with the forum state is synonymous and a reflection of the principle of minimal contacts, and that the terms "relationship to the state" and "minimal contracts" [*sic*] are synonymous (*23 Cal. App. 3d 792, 800)* .

[d] Minimum Contacts Requirement

In ***International Shoe Co. v. Washington*** *(1945) 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95* , a Delaware corporation appeared specially before the State of Washington's unemployment agency and moved to set aside an order and notice of assessment of delinquent contributions which that office found the corporation was required to pay on the basis of the activities of the corporation's salesmen, who resided in, and were actively engaged in promoting the sales of the corporation's products in, Washington. The motion was made on the ground, among others, that the corporation's activities in Washington were insufficient to manifest its "presence" there and that, in the absence of such presence, state courts were without jurisdiction; consequently, it was a denial of due process for Washington to subject the corporation to suit. The motion was denied by an appeal tribunal, and the commissioner of the unemployment agency was found to be entitled to collect the delinquent contributions.

The Washington state courts affirmed, and, in a landmark decision, the United States Supreme Court also affirmed. Although the Court found that the corporation was amenable to suit in Washington, since it had sufficient contacts or ties with Washington to permit the state to enforce the assessed obligations, the Court held that due process requires that, in order to subject a defendant to a judgment in personam, where the defendant is not present within the territory of the forum, the defendant must have certain minimum contacts with the state such that maintenance of the suit does not offend traditional notions of fair play and substantial justice (*326 U.S. 310, 316)* .

[e] Minimum Contacts Requirement Applies to Actions in Personam, in Rem, and Quasi in Rem

Shaffer v. Heitner *(1977) 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683* , was a shareholder's derivative suit filed in a Delaware court by a nonresident of Delaware naming as defendants a corporation (incorporated in Delaware but having its principal place of business in Arizona), its subsidiary, and 28 present or former corporate officers or directors, all of whom were nonresidents of Delaware, alleging that the individual defendants had violated their duties to the corporation by causing it and its subsidiary to engage in actions (which occurred in Oregon) that resulted in corporate liability for substantial damages in a private antitrust suit and a large fine in a criminal contempt action. The plaintiff simultaneously filed a motion for sequestration of the Delaware property of the individual defendants (stock, options, warrants, and various corporate rights), and a sequestration order was issued pursuant to which the shares and options belonging to 21 defendants were seized and "stop transfer" orders were placed on the corporate books. The individual defendants made a special appearance to quash service of process and to vacate the sequestration order. Other than the presence of the shares of stock in Delaware, the individual defendants had no contacts with that state, and thus the jurisdiction of the court was quasi in rem, the shares of stock being held by the Delaware court in order to satisfy plaintiff's claim against the defendants. The trial court denied the motion to vacate and the Delaware Supreme Court affirmed.

On appeal to the United States Supreme Court, defendants argued in part that the Delaware sequestration statute as applied against them violated the *due process clause of the Fourteenth Amendment* because it permitted Delaware to exercise jurisdiction despite the absence of sufficient contacts among the defendants, the litigation, and Delaware [*see § 132.76*].

The Supreme Court agreed and reversed the judgment of the Delaware Supreme Court. In overruling prior cases which were decided on the rationales of *Pennoyer v. Neff (1878) 95 U.S. 714, 24 L. Ed. 565* , and *Harris v. Balk (1905) 198 U.S. 215, 25 S. Ct. 625, 49 L. Ed 1023* , the Court stated that all assertions of state court jurisdiction (that is, in personam, in rem, or quasi in rem) must be evaluated according to the standards set forth in *International Shoe Co. v. Washington (1945) 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95* (*discussed under § 132.70[3][d]*), and its progeny (*433*

U.S. 186, 212) . Thus, the Court held that Delaware could not proceed with the action based on a theory that it had jurisdiction to determine plaintiff's claim in defendants' property, that is, based on jurisdiction quasi in rem. The Court reasoned that the phrase "judicial jurisdiction over a thing" is a customary, elliptical way of referring to jurisdiction over the interests of persons in a thing (*433 U.S. 186, 207)* . This recognition led to the conclusion that in order to justify an exercise of jurisdiction in rem or quasi in rem, the basis for jurisdiction must be sufficient to justify exercising jurisdiction over the interests of persons in a thing (*433 U.S. 186, 199 n.17, 207)* . The standard for determining whether an exercise of jurisdiction over the interests of persons is consistent with the due process clause is the minimum contacts standard elucidated in *International Shoe* (*433 U.S. 186, 207)* . The Court thus held that the presence of defendant's property within the state would not support the state court's exercise of jurisdiction when such property was completely unrelated to the plaintiff's cause of action and when there were otherwise insufficient ties among the defendant, the state, and the litigation to support the state's exercise of jurisdiction (*433 U.S. 186, 209, 213)* .

[f] Minimum Contacts Requirement Applies to Both Individual and Corporate Defendants

The facts and procedural background of ***Titus v. Superior Court*** *(1972) 23 Cal. App. 3d 792, 100 Cal. Rptr. 477* , are discussed under [a], *above*. In granting the petition for writ of mandate insofar as the order to show cause purported to give the trial court personal jurisdiction over the husband for purposes of child support, and annulling the child support order because there was no basis for in personam jurisdiction over the father, the court of appeal said that it is well established that in order for a relationship between a nonresident defendant and the forum state to exist which gives a state judicial jurisdiction over an individual, that individual must have had minimal contacts with the state (*23 Cal. App. 3d 792 800)* .

In ***Arnesen v. Raymond Lee Organization, Inc.*** *(1973) 31 Cal. App. 3d 991, 107 Cal. Rptr. 744* , the court of appeal, in affirming an order quashing service of summons on nonresident individual defendants on the ground they lacked sufficient contacts with California to justify the exercise of in personam jurisdiction over them, said that jurisdiction based on minimum contacts is exercisable over both individuals and corporations (*31 Cal. App. 3d 991, 996)* .

The facts and procedural background of ***World-Wide Volkswagen Corp. v. Woodson*** *(1980) 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490* , are *discussed under § 132.70[3][g]*. In reversing the judgment of the Oklahoma Supreme Court ruling that two New York corporations were subject to in the state's in personam jurisdiction in the underlying products liability action, the Supreme Court said that the due process clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations (*444 U.S. 286, 294)* .

The facts and procedural background of ***International Shoe Co. v. Washington*** *(1945) 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95* , are *discussed under § 132.70[3][d]*. In the course of announcing the minimum contacts requirement, the Court said that the due process clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations (*326 U.S. 310, 319)* .

[g] Effect of Minimum Contacts Requirement

In ***World-Wide Volkswagen Corp. v. Woodson*** *(1980) 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490* , a husband and wife, both New York residents, had purchased a foreign car from a New York retailer. A year later while the family was driving to its new home in Arizona the car was struck from behind by another car while they were passing through Oklahoma. The foreign car caught fire, and the wife and the couple's two children were severely burned. The family brought a products liability suit in Oklahoma, claiming their injuries resulted from the defective design and placement of the car's gas tank and fuel system. They joined as defendants the car manufacturer (a foreign corporation), its importer, the importer's regional distributor (a New York corporation), and the latter's retail dealer (also a New York corporation). The New York corporations entered special appearances, claiming the exercise of jurisdiction over them

would offend the limitations imposed on the state's jurisdiction by the *due process clause of the Fourteenth Amendment*. Although there had been no showing in the trial court that the defendants had any contact with Oklahoma other than the presence in Oklahoma of the car that was sold to the plaintiffs, the Oklahoma court rejected the contention. The Supreme Court of Oklahoma denied a writ of prohibition, holding that personal jurisdiction over the defendants was authorized by the state's "long-arm" statute. The New York corporations petitioned the United States Supreme Court for a writ of certiorari.

The Court granted the petition and reversed the judgment of the Supreme Court of Oklahoma. The Court said that a state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist minimum contacts between the defendant and the forum state, and that the concept of minimum contacts performs two related, but distinguishable, functions: (1) it protects the defendant against the burdens of litigating in a distant or inconvenient forum; and (2) it acts to ensure that the states, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system (*444 U.S. 286, 291-292)* .

[h] Minimum Contacts Lacking When Defendant Has No Contacts With State

The facts and procedural background of ***World-Wide Volkswagen Corp. v. Woodson*** *(1980) 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490* , are *discussed under § 132.70[3][g]*. In reversing the judgment of the Oklahoma Supreme Court on the ground the defendants had no contacts, ties, or relations with the State of Oklahoma (*444 U.S. 286, 299)* , the United States Supreme Court said that the due process clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations (*444 U.S. 286, 294)* . The Court found in the record before it a total absence of those affiliating circumstances that are a prerequisite to any exercise of state court jurisdiction. The Court pointed out that petitioners carried on no activity whatsoever in Oklahoma; they closed no sales and performed no services there; they availed themselves of none of the privileges and benefits of Oklahoma law; they solicited no business there either through salespersons or through advertising reasonably calculated to reach the state, and that the record did not show that the petitioners regularly sold cars at wholesale or retail to Oklahoma customers or residents or that they indirectly, through others, served or sought to serve the Oklahoma market. The Court said that, in short, the plaintiffs sought to base jurisdiction on one, isolated occurrence and whatever inferences can be drawn from it: the fortuitous circumstance that a single Audi automobile, sold in New York to New York residents, happened to suffer an accident while passing through Oklahoma (*444 U.S. 286, 295)* .

The facts and procedural background of ***Shaffer v. Heitner*** *(1977) 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683* , are *discussed under § 132.70[3][e]*. In reversing the judgment, the Supreme Court, quoting *International Shoe Co. v. Washington (1945) 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95* , said that the due process clause does not contemplate that a state may make binding a judgment against an individual or corporate defendant with which the state has no contacts, ties, or relations (*433 U.S. 186*).

The facts and procedural background of ***International Shoe Co. v. Washington*** *(1945) 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95* , are *discussed under § 132.70[3][d]*. In affirming state court jurisdiction, the Court stated further that the due process clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations (*326 U.S. 310, 319)* .

[4] Additional Authorities

[a] Requirement of Personal Jurisdiction Over Defendant

In *Kaiser Aetna v. Deal (1978) 86 Cal. App. 3d 896, 150 Cal. Rptr. 615* , the court of appeal, in affirming an order quashing the service of summons on nonresident defendants in an action arising out of allegedly fraudulent land transactions, the court of appeal said that the *due process clause of the Fourteenth Amendment* operates as a limitation

on the jurisdiction of state courts to enter judgments affecting rights or interests of nonresident defendants, and that it has long been the rule that a valid judgment imposing a personal obligation or duty in favor of the plaintiff may be entered only by a court having jurisdiction over the person of the defendant (*86 Cal. App. 3d 896, 899)* .

[b] Due Process Requires Reasonable Notice and Minimum Contacts to Support Exercise of Personal Jurisdiction

In *Kaiser Aetna v. Deal (1978) 86 Cal. App. 3d 896, 150 Cal. Rptr. 615* , the court of appeal, in affirming an order quashing the service of summons on nonresident defendants in an action arising out of allegedly fraudulent land transactions, the court of appeal said that the existence of personal jurisdiction depends on the existence of reasonable notice to the defendant that an action has been brought, and a sufficient connection between the defendant and the forum state as to make it fair to require defense of an action in the forum (*86 Cal. App. 3d 896, 899)* .

[c] Minimum Contacts Requirement

The facts and procedural background of *Asahi Metal Industry Co. v. Superior Court (1987) 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92* , are discussed in *§ 132.77[3][d]*. In reversing the California Supreme Court, which had upheld the jurisdiction of the California superior court over a Japanese company in a cross action for indemnity filed in a products liability case, the United States Supreme Court said that the *due process clause of the Fourteenth Amendment* limits the power of a state court to exert personal jurisdiction over a nonresident defendant, and that the constitutional touchstone of the determination whether an exercise of personal jurisdiction comports with due process remains whether the defendant purposefully established minimum contacts in the forum state (*480 U.S. 102, 108-109)* . The Court held that under the facts of the case the exertion of personal jurisdiction over the Japanese company by the California Superior Court exceeded the limits of due process, and that the strictures of the due process clause forbid a state court from exercising personal jurisdiction over the Japanese company under circumstances that would offend traditional notions of fair play and substantial justice (*480 U.S. 102, 113)* .

The facts and procedural background of *Helicopteros Nacionales de Colombia v. Hall (1984) 466 U.S. 408, 104 S. Ct. 1868, 80 L. Ed. 2d 404* , are discussed in *§ 132.76[3][b]*. In holding that the defendant's contacts with Texas were insufficient to satisfy the requirements of due process and reversing the judgment of the Supreme Court of Texas (*466 U.S. 408, 418-419)* , the Supreme Court of the United States said that the *due process clause of the Fourteenth Amendment* operates to limit the power of a state to assert in personam jurisdiction over a nonresident defendant and that due process requirements are satisfied when in personam jurisdiction is asserted over a nonresident corporate defendant that has certain minimum contacts with the forum such that maintenance of the suit does not offend traditional notions of fair play and substantial justice (*466 U.S. 408, 413-414)* .

The facts and procedural background of *Kulko v. California Superior Court (1978) 436 U.S. 84, 98 S. Ct. 1690, 56 L. Ed. 2d 132* , are *discussed under § 132.70[3][a]*. In holding that the denial of the motion to quash was error and reversing the judgment of the California Supreme Court, the Supreme Court of the United States said that the constitutional standard for determining whether a state may enter a binding judgment against a nonresident defendant is that set forth in *International Shoe Co. v. Washington (1945) 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95* ; that a defendant have certain minimum contacts with the forum state such that maintenance of the suit does not offend traditional notions of fair play and substantial justice (*436 U.S. 84, 92)* .

In *Pavlovich v. Superior Court (2002) 29 Cal. 4th 262, 127 Cal. Rptr. 2d 329* , the California Supreme Court considered for the first time the scope of personal jurisdiction based solely on Internet use, and concluded that a California court improperly exercised personal jurisdiction over a defendant based on a posting on an Internet website. This case involved a defendant whose sole contact with California was the posting of source code on his Internet website, accessible to any person with Internet access; the source code allowed users to decrypt data contained on DVDs and enable the placement of the decrypted data onto computer hard drives or other storage media. The defendant

owned no property, had no telephone listing, and conducted no business in California. The website merely posted information and had no interactive features. Because of the defendant's apparent lack of minimum contacts with California, the court reduced the matter to the consideration of one question: whether the defendant's knowledge that his tortious conduct may harm certain industries centered in California (the motion picture, computer, and consumer electronics industries) is sufficient to establish express aiming at California. Although the record lacked any indication that the defendant knew that California residents would be detrimentally affected by his actions, plaintiffs suggested that jurisdiction exists solely because the defendant's tortious conduct had a foreseeable effect in California. The court rejected this argument, finding that mere foreseeability is not enough for jurisdiction: "Because finding jurisdiction in this case would effectively subject all intentional tortfeasors whose conduct may harm industries in California to jurisdiction in California, we decline to do so" (*29 Cal. 4th 262, 278)* . The court further held that *Nam Tai Electronics, Inc. v. Titzer (2001) 93 Cal. App. 4th 1301, 113 Cal. Rptr. 2d 769* , discussed *below*, is disapproved to the extent it is contrary to the holding in *Pavlovich* (*29 Cal. 4th 262, 278)* .

In *Carretti v. Italpast (2002) 101 Cal. App. 4th 1236, 125 Cal. Rptr. 2d 126* , a pasta machine distributor with an office in California argued that the manufacturer, which sold products to him in Italy, had the requisite minimum contacts to support jurisdiction in California. In rejecting this argument, the court noted that the manufacturer did not promote the sale of its goods in California at all; it simply sold goods to a buyer who showed up on its doorstep in Italy, willing to pay the price. The minimal resales of the product in California by the distributor, standing alone, do not amount to the substantial continuous and systematic contacts with the forum state necessary for the exercise of general jurisdiction over a foreign corporation doing business in its home country (*101 Cal. App. 4th 1236, 1253-1254)* .

In *Nam Tai Electronics, Inc. v. Titzer (2001) 93 Cal. App. 4th 1301, 113 Cal. Rptr. 2d 769* , the court considered whether specific jurisdiction should be extended over a non-resident defendant who posted allegedly defamatory messages on Yahoo!, a California-based Internet message board. In order to avail himself of the opportunity to post on a Yahoo! message board, the defendant was required to register a nickname or alias known as a Yahoo! ID, and agree to Yahoo!'s terms of service; among other things, those terms include a promise not to post any content that is unlawful, defamatory, libelous, or otherwise objectionable, and that the relationship between the person registering and Yahoo! shall be governed by the laws of the State of California, and that both agree to submit to the personal and exclusive jurisdiction of the California courts. The plaintiff in this matter was not Yahoo!, however, it was the party about whom the allegedly defamatory messages were about.

Plaintiff initially contended that defendant made himself subject to jurisdiction in California by posting several messages on Yahoo!'s California-maintained web site. In rejecting this argument, the court stated that the issue is not whether the company that makes the web sites available is incorporated or based in California. Instead, the determinative question is whether the web sites themselves are of particular significance to California or Californians such that the user has reason to know the posting of a message will have a significant impact in this state (*93 Cal. App. 4th 1301, 1312)* .

Plaintiff further argued that the defendant's voluntary agreement to Yahoo!'s terms of service subject him to jurisdiction in this state. In rejecting this argument, the court pointed out that the language on which plaintiff seeks to rely appears on its face to govern litigation between registered users and Yahoo!--not registered users and third parties. Thus, that agreement, by itself, cannot justify subjecting defendant to California jurisdiction for purposes of the instant lawsuit (*93 Cal. App. 4th 1301, 1313)* .

The facts and procedural background of *Jewish Defense Organization, Inc. v. Superior Court (1999) 72 Cal. App. 4th 1045, 85 Cal. Rptr. 2d 611* , are discussed in *§ 132.89[3][a]*. In issuing a peremptory writ of mandate directing the trial court to vacate its order and to enter a new and different order granting the motion to quash service of summons, the court of appeal noted that a state's assertion of personal jurisdiction over a nonresident defendant who has not been served with process within the state comports with the requirements of the due process of the federal constitution if the defendant has such minimum contacts with the state that the assertion of jurisdiction does not violate traditional notions

of fair play and substantial justices (*72 Cal. App. 4th 1045, 1054)* .

In *Crea v. Busby (1996) 48 Cal. App. 4th 509, 55 Cal. Rptr. 2d 513* , defendant was an Oregon resident and an attorney licensed to practice law both in Oregon and California, although defendant had not practiced in California since 1981. Originally plaintiff was a Massachusetts resident and one of three shareholders of an Oregon corporation located in Oregon. In 1990, the president of the Oregon corporation retained defendant to investigate possible claims that the corporation might have for breach of a licensing agreement. After investigating and concluding that the corporation had a meritorious claim, defendant drafted a proposed complaint. However, defendant was informed that plaintiff did not want to participate in the litigation because of financial concerns. Consequently, the complaint was filed only in the name of the corporate president in federal district court in Oregon. The case was eventually settled. Plaintiff, now residing in California, instituted the instant action alleging that defendant conspired to exclude plaintiff from the Oregon litigation and thus breached defendant's fiduciary duties. The trial court granted defendant's motion to dismiss for lack of personal jurisdiction. In affirming and holding that California does not have personal jurisdiction over an individual whose only contact with the state is maintaining a California law license, the court of appeal stated the rule that a defendant must establish minimum contacts with the state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice (*48 Cal. App. 4th 509, 514)* .

In *Sammons Enterprises, Inc. v. Superior Court (1988) 205 Cal. App. 3d 1427, 253 Cal. Rptr. 261* , the court of appeal, in directing issuance of a peremptory writ of mandate ordering the trial court to vacate its decision denying the motion to quash service of summons on the foreign parent corporation of a California subsidiary corporation and to enter an order granting the motion, said that, under the due process clause of the federal constitution, the basic prerequisite for personal jurisdiction is that the defendant have such minimum contacts with the forum state that maintenance of the suit would not offend traditional notions of fair play and substantial justice (*205 Cal. App. 3d 1427, 1432)* .

Great-West Life Assurance Co. v. Guarantee Co. of North America (1988) 205 Cal. App. 3d 199, 252 Cal. Rptr. 363 , was an action by a Canadian life insurance corporation against another Canadian corporation for breach of contract, the implied covenant of good faith and fair dealing, and statutory duties in connection with a bond issued by the defendant insuring plaintiff for losses occurring at its offices in Canada. The defendant's motion to quash service of summons for lack of jurisdiction was granted, and plaintiff appealed. In affirming the judgment, the court of appeal said that a court may exercise personal jurisdiction over a nonresident defendant so long as the defendant has certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice (*205 Cal. App. 3d 199, 205)* .

The facts and procedural background of *J. M. Sahlein Music Co. v. Nippon Gakki Co., Ltd. (1987) 197 Cal. App. 3d 539, 243 Cal. Rptr. 4* , are discussed in *§ 132.73[4][a]*. In affirming the order quashing service of summons on a Japanese company, the court of appeal said that under the due process clause of the federal constitution, the basic prerequisite for personal jurisdiction is that the defendant have such "minimum contacts" with the forum state that maintenance of the suit does not offend "traditional notions of fair play and substantial justice" (*197 Cal. App. 3d 539, 542)* .

In *E.I.C., Inc. v. Bank of Virginia (1980) 108 Cal. App. 3d 148, 166 Cal. Rptr. 317* , the cross complainant (E.I.C.), a California corporation, in an action against it by a New York corporation to enforce a deficiency judgment obtained in Kentucky, appealed from two superior court orders quashing service of process on two cross defendants, in part, on the basis that there were insufficient contacts with California to permit the trial court to exercise a limited personal jurisdiction over the two nonresidents. Personal jurisdiction was asserted over one cross defendant, a Virginia bank, based, in part, on the bank's issuance of a letter of credit in favor of E.I.C. to secure a Virginia corporation's (PN's) performance of certain terms and conditions under a contract by the terms of which cross complainant purchased certain Kentucky property from PN. E.I.C. executed a promissory note in favor of PN secured by a mortgage on property. The contacts alleged to be sufficient to assert personal jurisdiction over the individual cross defendant (Carlton) was his

guarantee of a promissory note, executed in favor of a New York bank and secured by a second mortgage on the Kentucky property. The cross complaint alleged a conspiracy among cross defendants to defraud E.I.C. by overstating the value of the Kentucky property, by concealing the assignment of the mortgage, which secured the purchase of the property, to the Virginia bank, and by including terms not agreed to by E.I.C. in the deed conveying the property. In affirming the orders quashing service on the grounds that, with respect to the bank, no connection existed between the delivery of the letter of credit in California and E.I.C.'s causes of action (*108 Cal. App. 3d 148, 153-154)* , and that, with respect to Carlton, his personal guarantee had no relationship to any event taking place in California and was irrelevant to the cross action (*108 Cal. App. 3d 148, 155)* , the court of appeal said that the due process clause, which protects a nonresident against inconvenient litigation in a distant forum, requires that a nonresident have at least minimum contacts with the forum state (*108 Cal. App. 3d 148, 152)* .

In *Kaiser Aetna v. Deal (1978) 86 Cal. App. 3d 896, 150 Cal. Rptr. 615* , the court of appeal, in affirming an order quashing the service of summons on nonresident defendants in an action arising out of allegedly fraudulent land transactions, the court of appeal said that the *due process clause of the Fourteenth Amendment* operates as a limitation on the jurisdiction of state courts to enter judgments affecting rights or interests of nonresident defendants, and that in order for a state to exercise personal jurisdiction over a defendant, the defendant must have certain minimum contacts with the forum state such that the maintenance of the suit there does not offend traditional notions of fair play and substantial justice (*86 Cal. App. 3d 896, 899-900)* .

The facts and procedural background of *Titus v. Superior Court (1972) 23 Cal. App. 3d 792, 100 Cal. Rptr. 477* , are *discussed under § 132.70[3][a]*. In granting the petition for writ of mandate insofar as the order to show cause purported to give the trial court personal jurisdiction over the husband for purposes of child support, and annulling the child support order because there was no basis for in personam jurisdiction over the nonresident father, the court of appeal said that due process requires only that, in order to subject a defendant to a judgment in personam if he or she be not present within the territory of the forum, he or she have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice (*23 Cal. App. 3d 792, 800)* .

[d] Minimum Contacts Requirement Applies to Both Individual and Corporate Defendants

An additional case involving nonresident individual defendants lacking sufficient contacts or having no contacts with the forum state is *Shaffer v. Heitner (1977) 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683 , discussed under § 132.70[3][e]*.

[e] Minimum Contacts Lacking When Defendant Has No Contacts With State

The facts and procedural background of *Burger King Corp. v. Rudzewicz (1985) 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528* , are discussed in *§ 132.76[3][c]*. Although the United States Supreme Court held that the Florida federal court had jurisdiction over the nonresident franchisees, it said that the due process clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he or she has established no meaningful contacts, ties, or relations (*471 U.S. 462, 471-472)* .

In *Thomson v. Anderson (2004) 113 Cal. App. 4th 258, 6 Cal. Rptr. 3d 262* , a franchisee contended that franchisors, who were directors of a Texas corporation, made false representations and that they failed to refund his investment as promised. The franchisors moved to quash service of summons on the ground that they were not subject to personal jurisdiction in California. The franchisors presented evidence that they had never lived in California and had never conducted business in California on behalf of the corporation. The court granted the motion, holding that *Cal. Corp. Code § 31420*, a service of process statute, did not create an independent basis for personal jurisdiction for claims arising under the California Franchise Investment Law (*113 Cal. App. 4th 258, 270)* . Notwithstanding § 31420, there must be grounds for exercising personal jurisdiction, pursuant to *Cal. Code Civ. Proc. § 410.10*, over a nonresident defendant that are consistent with the U.S. Constitution. Ownership of vacation property in California and occasional

travel to the state on vacation or on business unrelated to the corporation did not give rise to personal jurisdiction (*113 Cal. App. 4th 258, 270-271)* .

In *Muckle v. Superior Court (2002) 102 Cal. App. 4th 218, 125 Cal. Rptr. 2d 303* , Andrew Muckle was a resident of California from January 1998 through December 1998. While living in California and married to Cassandra Muckle, he purchased property in Georgia, which he took title to in his name alone. Since December 1998, Andrew was a resident of Georgia. In January 2001, Cassandra served dissolution papers on Andrew in Georgia by substituted service. Andrew made a special appearance to contest jurisdiction, moving to quash service of summons for lack of personal jurisdiction. Among other things, Andrew argued he had insufficient minimum contacts with California for the trial court to establish personal jurisdiction over him. Although acknowledging that California has a manifest interest in providing effective means of redress for its residents, the court declined to find that such interest coupled with the mere fact of past residency, during which a party while married purchased out of state property, is sufficient contacts of such nature and quality to entertain even "special" personal jurisdiction over Andrew consistent with traditional notions of fair play and substantial justice (*102 Cal. App. 4th 218, 225-231)* .

In *Benefit Assn. Internat., Inc. v. Superior Court (1996) 46 Cal. App. 4th 827, 54 Cal. Rptr. 2d 165* , an action for breach of contract and fraud, the primary issue concerned what minimum contacts are needed for in personam jurisdiction over an insurer who sells medical benefits policies to foreigners traveling in California. The plaintiff was a citizen of Venezuela and the defendant insurance company was located in Mississippi. The litigation was connected to California because the plaintiff suffered a stroke and was hospitalized in California and incurred bills the defendant refused to pay. The court of appeal concluded that the trial court erred in taking jurisdiction over the insurance company. There was nothing in the record that suggested that the defendant advertised or otherwise marketed its policy in settings that targeted California travelers. The only connection with California was that the plaintiff said that when he purchased the policy the agent told him that the policy would cover any medical costs he might incur while in California. However, plaintiff presented no evidence that defendant had ever before insured a person traveling to California, paid a California medical bill, or otherwise participated in commerce in California (*46 Cal. App. 4th 827, 833-834)* . The court thus issued a peremptory writ of mandate directing the trial court to vacate its order denying defendant's motion to quash and to enter a new order granting the motion.

In *In re Marriage of Martin (1989) 207 Cal. App. 3d 1426, 255 Cal. Rptr. 720* , the court of appeal affirmed the trial court's order quashing service of summons on a nonresident insurer and dismissing a joinder proceeding brought against it following a dissolution of marriage proceeding. The judgment granting dissolution required the husband to provide dental insurance for the two minor children of the marriage and to keep in force hospital, medical, and dental insurance coverage for the minor children through the husband's employment, so long as it was available to the husband. The husband was a resident of Michigan, and, through his employer, he and his dependents were entitled to certain dental insurance coverage under a program administered by the insurer, which was a nonprofit Michigan corporation with its principal place of business in Michigan, was not licensed to do business in any other state, and, pursuant to its enabling act, was not required to pay non-Michigan dentists for services performed for its subscribers and their dependents. The children, California residents, had dental work done in California and the mother caused a claim to be filed with the insurer, which sent the reimbursement check to the father in accordance with the terms of the policy, but the father did not reimburse the mother, and the mother sought recovery from the insurer. The court explained that for a California court to secure jurisdiction over the insurer, the insurer had to have certain minimum contacts with California (*207 Cal. App. 3d 1426, 1435-1437)* , and in the case before it, the insurer had none; it had never advertised nor solicited business in California; it had never filed any action in a California court or otherwise sought the assistance of the courts of this state (*207 Cal. App. 3d 1426, 1430)* ; there was no showing that an insurance policy was delivered to the mother in California; that subscribers were solicited by the insurer in California; that premiums were received by the insurer from California; that the insurer engage in "economic activity" in California; or that it purposefully conducted activities invoking the benefits and protections of California law or did anything which would have provided notice it would be "haled" into court in California (*207 Cal. App. 3d 1426, 1437)* .

The facts and procedural background of *E.I.C., Inc. v. Bank of Virginia (1980) 108 Cal. App. 3d 148, 166 Cal. Rptr. 317* , are *discussed under § 132.70[4][c]*. In affirming the orders quashing service of summons on the cross defendants, the court of appeal said that although the limits imposed by the due process clause on a state's exercise of jurisdiction have been substantially relaxed as a result of the increasing nationalization of commerce, state lines are not irrelevant for jurisdictional purposes, and a state may not make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations (*108 Cal. App. 3d 148, 152)* .

See also *Hanson v. Denckla (1958) 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283* , discussed in *§ 132.73[3][a]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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13-132 California Points & Authorities § 132.71

§ 132.71 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground That Court Lacks Personal Jurisdiction--Nonresident Defendant Lacks Minimal Contacts With California--Exercise of General Jurisdiction Is Improper When Nonresident Defendant Has Ceased Doing Business in State

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum supporting a motion to quash service of summons on the ground that the court lacks a sufficient basis for exercising personal jurisdiction (see, e.g., § 132.70), or with a memorandum submitted in reply to a plaintiff's opposition to a motion to quash service*]

THE MOTION TO QUASH SERVICE OF SUMMONS FOR LACK OF JURISDICTION SHOULD BE GRANTED BECAUSE THE NONRESIDENT DEFENDANT LACKS SUFFICIENT CONTACTS WITH CALIFORNIA TO SUPPORT THE EXERCISE BY CALIFORNIA OF GENERAL JURISDICTION IN THAT THE NONRESIDENT DEFENDANT CEASED DOING BUSINESS IN CALIFORNIA BEFORE SERVICE OF PROCES.

A. General Jurisdiction Terminates When Nonresident Ceases to Do Business in State. General jurisdiction in the case of a nonresident corporation is viewed analogously to the presence of a natural person. A nonresident corporation which is doing business of a sufficiently substantial and continuous nature is treated as if it had a physical presence in the forum, placing it within the jurisdiction of the state as to causes of action independent from that business. When the corporation ceases to do business in the state, however, there is no longer any general jurisdiction, that is, jurisdiction as to causes of action independent of that business (*Serafini v. Superior Court (1998) 68 Cal. App. 4th 70, 79-80, 80 Cal. Rptr. 2d 159*). The same rule presumably applies to nonresident individuals (*see Serafini v. Superior Court (1998) 68 Cal. App. 4th 70, 79-80, 80 Cal. Rptr. 2d 159* ; *see also Code Civ. Proc. § 410.10,* Judicial Counsel Comment, Bases of Judicial Jurisdiction Over Individuals, (7) Doing Business in State; Restatement (Second) of Conflict of Laws, § 35 (1971)).

[2] Comments

[a] Use of Form

The form in [1], *above*, is for use in support of a motion to quash service of summons under *Code Civ. Proc. § 418.10(a)(1)*, on the ground that the court has no proper basis for exercising general jurisdiction over the nonresident defendant, because the nonresident defendant ceased doing business in the forum before service of process.

This form does not provide a complete memorandum, but is designed to be combined with a general form of memorandum supporting a motion to quash service of summons [*see, e.g., § 132.70*], or with a memorandum of points and authorities submitted in reply to the plaintiff's papers opposing the motion to quash. It may also be included in a petition for a writ of mandate to compel the trial court to grant the motion to quash after it has declined to do so [*see Code Civ. Proc. § 418.10(c)*], or it may be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

For additional points and authorities supporting a motion to quash for lack of an adequate basis of jurisdiction in particular situations, see *§§ 132.72 -132.88*.

See also *§ 132.70[2]* for comments on a general form.

[3] Discussion of Authorities

[a] General Jurisdiction Terminates When Nonresident Ceases to Do Business in State

Serafini v. Superior Court *(1998) 68 Cal. App. 4th 70, 80 Cal. Rptr. 2d 159* , involved an action against plaintiff's former employer, its parent corporation, and others for wrongful termination and related causes of action. It included two counts naming defendant Serafini, an officer and director of the parent corporation, one based on intentional infliction of emotional distress and one based on violation of civil rights and discrimination. Defendant made a special appearance to move for an order quashing service of summons on defendant on the ground the court lacked jurisdiction. Defendant's supporting declaration stated that: (1) he was a resident of Pennsylvania, (2) he had resigned as an officer and director of the out-of-state parent corporation before service of the complaint, (3) during his tenure he maintained his residence, office and domicile in Pennsylvania, (4) he visited the parent corporation's California office only once, for two hours while on a family vacation, (5) his only activity on that occasion was meeting the employees, including, for 10 minutes, plaintiff, (6) other than that meeting, his communications with plaintiff were monthly telephone calls usually initiated by plaintiff concerning routine personnel issues, (7) he had no knowledge concerning when or if plaintiff's employment was terminated, (8) he was not part of any decision regarding plaintiff's termination from employment, and did not discuss plaintiff's employment status with two other individual defendants or make or participate in any decisions about plaintiff's compensation or treatment, and (9) he denied all the complaint's allegations concerning mistreatment of or discrimination against plaintiff insofar as directed to himself. Plaintiff filed a declaration opposing the motion. When the matter came on for hearing the trial court continued it and in the interim authorized plaintiff to take defendant's deposition in Pennsylvania. The deposition was taken in Florida, but defendant took the position that the questioning was limited to facts having a direct bearing on jurisdiction as to the counts of the complaint in which defendant was named as a defendant, and defendant's counsel instructed defendant not to answer the questions that went beyond this. Plaintiff took the position that there was no limitation on the scope of the deposition. Ultimately, when the matter came up for hearing, the trial court denied defendant's motion to quash and defendant sought writ review (*68 Cal. App. 4th 70, 74-77)* .

The court of appeal granted a preemptory writ of mandate directing the superior court to vacate its ruling denying the motion and to determine whether to continue the motion until resolution of the discovery dispute or grant the motion, applying the legal rules and guidelines set forth in the opinion (*68 Cal. App. 4th 70, 82)* . After first discussing the burden of proof on a motion to quash service of a summons (*68 Cal. App. 4th 70, 77)* , the court discussed the rules concerning general jurisdiction. General jurisdiction turns on the substantiality of the party's contacts with the forum

state. Personal jurisdiction may be either general or specific. A nonresident defendant may be subject to the general jurisdiction of the forum if his or her contacts in the forum are substantial, continuous and systematic. In such a case it is not necessary that the specific cause of action alleged be connected with the defendant's business relationship to the forum. Such a defendant's contacts with the forum are so wide-ranging that they take the place of physical presence in the forum as a basis for jurisdiction (*68 Cal. App. 4th 70, 78)* . General jurisdiction in the case of a nonresident corporation is viewed analogously to the presence of a natural person (*68 Cal. App. 4th 70, 79)* . Thus, a nonresident corporation that is doing business of a sufficiently substantial and continuous nature is treated as if it had a physical presence in the forum, placing it within the jurisdiction of the state as to causes of action independent from that business. When the corporation ceases to do business in the state, however, there is no longer any general jurisdiction, *i.e.*, jurisdiction as to causes of action independent of that business (*68 Cal. App. 4th 70, 80)* . Even assuming that defendant Serafini's contacts with California in "doing business" as an agent of the corporation could be ascribed to him as a person (which the court did not decide), when defendant ceased that activity, he absented himself and terminated any general jurisdiction of California over him (*68 Cal. App. 4th 70, 79-80)* . This relegated plaintiff to a claim of specific jurisdiction over defendant Serafini, the resolution of which turned on whether plaintiff tendered evidence that showed that defendant caused a tort to be committed against plaintiff in California for which defendant would be personally liable. The court concluded that under the facts there was no basis for the exercise of specific jurisdiction against Serafini (*68 Cal. App. 4th 70, 80-82)* .

Note that under both *Code Civ. Proc. § 410.10*, Judicial Council Comment, Bases of Judicial Jurisdiction Over Individuals, (7) Doing Business in State and the Restatement (Second) of Conflict of Laws, § 35 (1971), a state has power to exercise judicial jurisdiction over an individual who has done business in the state, but has ceased to do business there at the time when the action is brought (rather than before service of process as specified in Serafini, *above*), with respect to causes of action arising from business done in the state.

Legal Topics:

For related research and practice materials, see the following legal topics:
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13-132 California Points & Authorities § 132.72

§ 132.72 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground That Court Lacks Personal Jurisdiction--Nonresident Defendant Lacks Minimal Contacts With California--Minimal Burden on Defendant in Defending Action Is Irrelevant

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum supporting a motion to quash service of summons on the ground that the court lacks a sufficient basis for exercising personal jurisdiction (see, e.g., § 132.70), or with a memorandum submitted in reply to a plaintiff's opposition to a motion to quash service.*]

THE MOTION TO QUASH SERVICE OF SUMMONS FOR LACK OF JURISDICTION SHOULD BE GRANTED BECAUSE THE FACT THAT THE BURDEN TO THE DEFENDANT OF DEFENDING IN THE FORUM MAY BE MINIMAL IS IRRELEVANT TO THE ISSUE OF JURISDICTION WHEN THE NONRESIDENT DEFENDANT LACKS SUFFICIENT CONTACTS WITH CALIFORNIA TO SUPPORT THE EXERCISE BY CALIFORNIA OF IN PERSONAM JURISDICTION.

A. Fact That Burden of Defending Is Minimal Is Irrelevant When Minimum Contacts Requirement Is Not Satisfied. However minimal the burden of defending in a foreign tribunal, a defendant may not be called on to do so unless he or she has had the minimal contacts with the state that are a prerequisite to the state's exercise of power over him or her (*In re Marriage of Martin (1989) 207 Cal. App. 3d 1426, 1438, 255 Cal. Rptr. 720* ; *see also World-Wide Volkswagen Corp. v. Woodson (1980) 444 U.S. 286, 294, 100 S. Ct. 559, 62 L. Ed. 2d 490*).

[2] Comments

[a] Use of Form

The form in [1], *above*, is for use in support of a motion to quash service of summons under *Code Civ. Proc. § 418.10(a)(1)*, on the ground that the court has no proper basis for exercising personal jurisdiction over the defendant, because the defendant is a nonresident individual or legal entity who lacks the minimal contacts with California that are necessary under constitutional due process limitations to support the court's exercise of such jurisdiction. The point of

law stated is that, when minimal contacts are lacking, it is irrelevant that the defendant's burden of defending the action in a California court would be minimal.

This form does not provide a complete memorandum, but is designed to be combined with a general form of memorandum supporting a motion to quash service of summons [*see, e.g., § 132.70*], or with a memorandum of points and authorities submitted in reply to the plaintiff's papers opposing the motion to quash. It may also be included in a petition for a writ of mandate to compel the trial court to grant the motion to quash after it has declined to do so [*see Code Civ. Proc. § 418.10(c)*], or it may be adapted for use in a trial or appellate brief.

For additional points and authorities supporting a motion to quash for lack of an adequate basis of jurisdiction in particular situations, see *§§ 132.73 -132.88*.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

See also *§ 132.70[2]* for comments on a general form.

[3] Discussion of Authorities

[a] Fact That Burden of Defending Is Minimal Is Irrelevant When Minimum Contacts Requirement Is Not Satisfied

The facts and procedural background of ***In re Marriage of Martin*** *(1989) 207 Cal. App. 3d 1426, 255 Cal. Rptr. 720* , are discussed in *§ 132.70[4][e]*. In affirming the order quashing service of summons and dismissing the joinder proceeding, the court of appeal, in reply to the mother's argument that the burden on the insurer of defending in California was minimal, said however minimal the burden of defending in a foreign tribunal, a defendant may not be called on to do so unless he or she has had the minimal contacts with the state that are a prerequisite to the state's exercise of power over him or her (*207 Cal. App. 3d 1426, 1438)* .

The facts and procedural background of ***World-Wide Volkswagen Corp. v. Woodson*** *(1980) 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490* , are discussed in *§ 132.70[3][g]*. In reversing the judgment of the Oklahoma Supreme Court on the ground the defendants had no contacts, ties, or relations with the State of Oklahoma, and hence the Oklahoma courts had no jurisdiction over them (*444 U.S. 286, 299)* , the United States Supreme Court said that the due process clause, acting as an instrument of interstate federalism, may sometimes act to divest the state of its power to render a valid judgment, despite the facts that the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another state, that the forum state has a strong interest in applying its law to the controversy, and that the forum state is the most convenient location for litigation (*444 U.S. 286, 294)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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13-132 California Points & Authorities § 132.73

§ 132.73 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground That Court Lacks Personal Jurisdiction--Nonresident Defendant Lacks Minimal Contacts With California--Unilateral Activity of Third Person Is Irrelevant

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum supporting a motion to quash service of summons on the ground that the court lacks a sufficient basis for exercising personal jurisdiction (see, e.g., § 132.70), or with a memorandum submitted in reply to a plaintiff's opposition to a motion to quash service.*]

THE MOTION TO QUASH SERVICE OF SUMMONS FOR LACK OF JURISDICTION SHOULD BE GRANTED BECAUSE THE UNILATERAL ACTIVITY OF THIRD PARTIES CLAIMING SOME RELATIONSHIP TO THE DEFENDANT DOES NOT SUPPORT THE IMPOSITION OF IN PERSONAM JURISDICTION OVER THE NONRESIDENT DEFENDANT.

Unilateral Activity of Third Parties. The mere unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact by the defendant with the forum state (*World-Wide Volkswagen Corp. v. Woodson (1980) 444 U.S. 286, 298, 100 S. Ct. 559, 62 L. Ed. 2d 490* ; *Hanson v. Denckla (1958) 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283*).

[2] Comments

[a] Use of Form

The form in [1], *above*, is for use in support of a motion to quash service of summons under *Code Civ. Proc. § 418.10(a)(1)*, on the ground that the court has no proper basis for exercising personal jurisdiction over the defendant, because the defendant is a nonresident individual or legal entity who lacks the minimal contacts with California that are necessary under constitutional due process limitations to support the court's exercise of such jurisdiction. The point of law stated is that the unilateral activity of third parties cannot serve as the basis for in personam jurisdiction over a nonresident defendant.

This form does not provide a complete memorandum, but is designed to be combined with a general form of memorandum supporting a motion to quash service of summons [*see, e.g., § 132.70*], or with a memorandum of points and authorities submitted in reply to the plaintiff's papers opposing the motion to quash. It may also be included in a petition for a writ of mandate to compel the trial court to grant the motion to quash after it has declined to do so [*see Code Civ. Proc. § 418.10(c)*], or it may be adapted for use in a trial or appellate brief.

For additional points and authorities supporting a motion to quash for lack of an adequate basis of jurisdiction in particular situations, see *§§ 132.72, 132.74 -132.88*.

Counsel should insert argument in the form showing the relationship between the facts of the case and the point of law stated.

See also *§ 132.70[2]* for comments on a general form.

[3] Discussion of Authorities

[a] Unilateral Activity of Third Parties

The facts and procedural background of ***World-Wide Volkswagen Corp. v. Woodson*** *(1980) 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490* , are discussed in *§ 132.70[3][g]*. In reversing the judgment of the Oklahoma Supreme Court ruling that the two New York corporations were subject to the state's in personam jurisdiction in the underlying products liability action, the United States Supreme Court said that although it was foreseeable to the defendant that purchasers of automobiles sold by the defendant in New York may take them to Oklahoma, the mere unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state (*444 U.S. 286, 298)* .

Hanson v. Denckla *(1958) 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283* , arose out of a controversy concerning the right to a portion of the corpus of a trust established in Delaware by a settlor who was at the time domiciled in Pennsylvania and, a few years later, became domiciled in Florida, where she executed her will and a power of appointment of the trust assets, and subsequently died. One group of claimants contended that the property passed under the residuary clause of the settlor's will, which was admitted to probate in Florida. Other claimants contended that the property passed pursuant to the settlor's exercise of the inter vivos power of appointment created in the deed of trust. The defendant trustee had no office in Florida and transacted no business there, and none of the trust assets had ever been held or administered in Florida. The trustee solicited no business in Florida in person or by mail. The Florida court ruled that the trust was invalid as a testamentary trust and that the trust assets passed under the will, but that it lacked jurisdiction over nonresidents, including the trustee, who were constructively served but did not appear. The Supreme Court of Florida reversed that part of the judgment ruling that the court lacked jurisdiction over the nonresident defendants. In a separate action in Delaware brought by the executrix, the court ruled that both the trust and power of appointment were valid, that the trust assets passed under their terms, and that the Florida judgment was not entitled to full faith and credit because the Florida court had acquired no jurisdiction either over the Delaware trustee, who under Florida law was an indispensable party, or over the trust res.

In affirming the judgment of the Delaware Supreme Court and reversing the judgment of the Florida Supreme Court, the United States Supreme Court held there was no basis for jurisdiction over the trustee in Florida because it had no contacts with that state. With respect to the execution in Florida of the powers of appointment under which the beneficiaries and appointees claimed, the Court said that this did not give Florida a substantial connection with the contract on which the suit was based because it is the validity of the trust agreement, not the appointment, that was in issue (*357 U.S. 235, 253)* . For the purpose of applying its rule that the validity of the trust is determined by the law of the state of its creation, Florida ruled that the appointment amounted to a republication of the original trust instrument in

Florida. The Supreme Court said that, although for choice-of-law purposes, such a ruling might be justified, it was an insubstantial connection with the trust agreement for purposes of determining the question of personal jurisdiction over a nonresident defendant, and added that the unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state (*357 U.S. 235, 253)* .

[4] Additional Authorities

[a] Unilateral Activity of Third Parties

The facts and procedural background of *Burger King Corp. v. Rudzewicz (1985) 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528* , are discussed in *§ 132.76[3][b]*. In holding that the Florida federal court had jurisdiction over the nonresident franchisees, the United States Supreme Court, quoting *Hanson v. Denckla (1958) 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283* (*discussed under § 132.73[3][a]*), said that the unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state (*471 U.S. 462, 474)* .

The facts and procedural background of *Kulko v. California Superior Court (1978) 436 U.S. 84, 98 S. Ct. 1690, 56 L. Ed. 2d 132* , are discussed in *§ 132.70[3][a]*. In holding that the denial of the motion to quash was error and reversing the judgment of the California Supreme Court, the Supreme Court of the United States said the unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state (*436 U.S. 84, 93-94)* .

The facts and procedural background of *Jewish Defense Organization, Inc. v. Superior Court (1999) 72 Cal. App. 4th 1045, 85 Cal. Rptr. 2d 611* , are discussed in *§ 132.89[3][a]*. In issuing a peremptory writ of mandate directing the trial court to vacate its order and to enter a new and different order granting the motion to quash service of summons, the court of appeal noted that the unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and procedures of its laws (*72 Cal. App. 4th 1045, 1056)* .

In *Mansour v. Superior Court (1995) 38 Cal. App. 4th 1750, 46 Cal. Rptr. 2d 191* , plaintiff, the president and principal stockholder of a California corporation, sued various defendants for defamation, alleging that they had conspired to oust the director of a Delaware corporation and that pursuant to the conspiracy they prepared a report indicating that the individual they were targeting had engaged in unethical and illegal business conduct with the plaintiff. Two of the defendants, an Ohio resident and attorney, and the Ohio law firm to which he belonged, moved to quash service of summons for lack of personal jurisdiction. The Ohio defendants claimed that California lacked personal jurisdiction over them because they did not publish or cause the publication of any statements about plaintiff in California. The plaintiff contended that these defendants can be sued in California because they belonged to a conspiracy and the forum-related acts of the coconspirators are imputable to them. The superior court denied the motion to quash service. The court of appeal reversed, rejecting the claim that jurisdiction could be exercised by attributing forum-related activities of other coconspirators to the defendants for two reasons. First, the court concluded that the plaintiff failed to provide evidence supporting use of a conspiracy theory. Second, the court held that even if evidence of a conspiracy had been presented the plaintiff could not prevail because California does not recognize conspiracy as a basis for acquiring personal jurisdiction over a party (*38 Cal. App. 4th 1750, 1760)* . The court thus issued a writ of mandate directing the superior court to vacate its order denying the motion to quash, and to enter a new order granting the motion and dismissing the action as to the Ohio defendants.

Great-West Life Assurance Co. v. Guarantee Co. of North America (1988) 205 Cal. App. 3d 199, 252 Cal. Rptr. 363 , was an action by a Canadian life-insurance corporation against another Canadian corporation for breach of contract, the

implied covenant of good faith and fair dealing, and statutory duties in connection with a bond issued by the defendant insuring plaintiff for losses occurring at its offices in Canada. The defendant's motion to quash service of summons for lack of jurisdiction was granted, and plaintiff appealed. In affirming the judgment, the court of appeal said that unilateral activity on the part of the plaintiff cannot satisfy the requirement of contact with the forum state (*205 Cal. App. 3d 199, 205)* .

In *J.M. Sahlein Music Co. v. Nippon Gakki Co., Ltd. (1987) 197 Cal. App. 3d 539, 243 Cal. Rptr. 4* , plaintiff sued a California corporation and its Japanese parent. The Japanese corporation manufactured acoustical guitars, which were imported by the California corporation. The California corporation, which was the United States importer and master distributor of the guitars, terminated plaintiff's distributorship. Plaintiff sued for damages for wrongful termination of the distributorship and for conspiracy by both defendants to interfere with the advantageous relationships between plaintiff and its customers. Service of summons was effected on the Japanese corporation by mail in Japan. The trial court granted the Japanese corporation's motion to quash service of summons, and plaintiff appealed, asserting among other things that the Japanese corporation had forum-related contacts related to the claim consisting of electronic correspondence between it and the California corporation preceding the latter's decision to terminate existing distributorships. In finding that the forum and claim-related contacts of the Japanese corporation with California identified by the plaintiff were insufficient to warrant personal jurisdiction over that defendant, and affirming the judgment, the court of appeal, in answer to the plaintiff's contention, pointed out that all but two of those communications were sent by the California corporation to the Japanese corporation and said that the unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum state to justify an assertion of jurisdiction (*197 Cal. App. 3d 539, 544-545)* .

Circus Circus Hotels, Inc. v. Superior Court (1981) 120 Cal. App. 3d 546, 174 Cal. Rptr. 885 , was a proceeding in mandate arising out of an action by California residents against a Nevada hotel corporation for negligence proximately resulting in the theft or mysterious disappearance of plaintiffs' personal property from a Las Vegas, Nevada hotel. The defendant's only contacts with California were substantial and regular advertising in a California newspaper and the maintenance of an "800" telephone number which readers of the advertising could use without cost to themselves to call the hotel and make reservations. The defendant's motion to quash service of summons for lack of in personam jurisdiction was denied, and the defendant petitioned for a writ of mandate or prohibition. In issuing the writ of mandate directing the trial court to quash service of summons, the court of appeal said that it is only the defendant's activities within the forum state which are significant in deciding the question of jurisdiction and not the activities of the plaintiffs (*120 Cal. App. 3d 546, 562)* . In *Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 461, 464, 475, 58 Cal. Rptr. 2d 899, 926 P.2d 1085* , the California Supreme Court rejected the "proximate cause" test used by *Circus Circus Hotels, Inc.* as being inconsistent with the rationale underlying specific jurisdiction in the context of ongoing franchise relationships and disapproved the reasoning *Circus Circus Hotels, Inc.* to the extent it is inconsistent with the *Vons Companies, Inc.* opinion. For discussion of *Vons Companies, Inc.*, see *§ 132.100[3][g]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsMinimum ContactsCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss

California Points & Authorities

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13-132 California Points & Authorities § 132.74

§ 132.74 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground That Court Lacks Personal Jurisdiction--Nonresident Defendant Lacks Minimal Contacts With California--Insufficient Foreseeability That Defendant Would Be Haled Into California Court in Action Based on Alleged Defective Product

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum supporting a motion to quash service of summons on the ground that the court lacks a sufficient basis for exercising personal jurisdiction (see, e.g., § 132.70), or with a memorandum submitted in reply to a plaintiff's opposition to a motion to quash service.*]

THE MOTION TO QUASH SERVICE OF SUMMONS FOR LACK OF JURISDICTION SHOULD BE GRANTED BECAUSE THE "FORESEEABILITY" CRITICAL TO THE DUE PROCESS ANALYSIS IN THIS ACTION BASED ON AN ALLEGED DEFECT IN A PRODUCT _____ [SOLD *or* DISTRIBUTED *or* MANUFACTURED] BY DEFENDANT IS WHETHER DEFENDANT'S CONDUCT AND CONNECTION WITH THE FORUM STATE ARE SUCH THAT HE/SHE/IT SHOULD REASONABLY ANTICIPATE BEING HALED INTO A COURT OF THIS STATE.

"Foreseeability" Element of Due Process Analysis in Action Based on Defective Product. The foreseeability that is critical to due process analysis in an action for damages based on an alleged defect in a product is not the mere likelihood that a nonresident defendant's product will find its way into the forum state, but, rather, whether the defendant's conduct and connection with the forum state are such that he or she should reasonably anticipate being haled into court there (*World-Wide Volkswagen Corp. v. Woodson (1980) 444 U.S. 286, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490* ; *Felix v. Bomoro Kommanditgesellschaft (1987) 196 Cal. App. 3d 106, 113, 241 Cal. Rptr. 670*).

[2] Comments

[a] Use of Form

The form in [1], *above*, is for use in support of a motion to quash service of summons under *Code Civ. Proc. §*

418.10(a)(1), on the ground that the court has no proper basis for exercising personal jurisdiction over the defendant, because the defendant is a nonresident individual or legal entity who lacks the minimal contacts with California that are necessary under constitutional due process limitations to support the court's exercise of such jurisdiction. The point of law stated is that, in an action based for damages against a nonresident defendant based on an alleged defect in a product, the only "foreseeability" relevant to a due process analysis of the court's exercise of personal jurisdiction over the defendant is whether the defendant, because of its activities or conduct with respect to the forum state, should have reasonably foreseen that it was subject to suit in the forum state as a result of those activities.

This form does not provide a complete memorandum, but is designed to be combined with a general form of memorandum supporting a motion to quash service of summons [*see, e.g., § 132.70*], or with a memorandum of points and authorities submitted in reply to the plaintiff's papers opposing the motion to quash. It may also be included in a petition for a writ of mandate to compel the trial court to grant the motion to quash after it has declined to do so [*see Code Civ. Proc. § 418.10(c)*], or it may be adapted for use in a trial or appellate brief.

For additional points and authorities supporting a motion to quash for lack of an adequate basis of jurisdiction in particular situations, see *§§ 132.72, 132.73, 132.75 -132.90*.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

See also *§ 132.70[2]* for comments on a general form.

[b] Related Points and Authorities

For discussion and forms relating to products liability actions generally, see Ch. 190, *Products Liability* .

[3] Discussion of Authorities

[a] "Foreseeability" Element of Due Process Analysis in Action Based on Defective Product

The facts and procedural background of ***World-Wide Volkswagen Corp. v. Woodson*** *(1980) 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490* , are discussed in *§ 132.70[3][g]*. In reversing the judgment of the Oklahoma Supreme Court ruling that the two New York corporations were subject to the state's in personam jurisdiction in the underlying products liability action, the United States Supreme Court, in rejecting the contention that jurisdiction was proper because a car is mobile and it was foreseeable to the New York corporations that the car would cause injury in Oklahoma, the Supreme Court said that if foreseeability were the criterion, a local California tire retailer could be forced to defend in Pennsylvania when a blowout occurs there, or a Wisconsin seller of a defective automobile jack could be haled before a distant court for damage caused in New Jersey, or a Florida soft-drink concessionaire could be summoned to Alaska to account for injuries happening there, and that every seller of chattels would in effect appoint the chattel his or her agent for service of process, and his or her amenability to suit would travel with the chattel (*444 U.S. 286, 296)* . The Court added that this was not to say that foreseeability is wholly irrelevant. The Court said the foreseeability that is critical to due process analysis, however, is not the mere likelihood that a product will find its way into the forum state. Rather, it is that the defendant's conduct in connection with the forum state are such that he or she should reasonably anticipate being haled into court there (*444 U.S. 286, 297)* . The Court explained that the due process clause, by ensuring the orderly administration of the laws, gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit (*444 U.S. 286, 297)* .

The facts and procedural background of ***Felix v. Bomoro Kommanditgesellschaft*** *(1987) 196 Cal. App. 3d 106, 241 Cal. Rptr. 670* , are discussed in *§ 132.75[4][a]*. In affirming the judgment of dismissal after the defendant's motion to

quash service of summons was granted, the court of appeal, quoting *World-Wide Volkswagen Corp. v. Woodson (1980) 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490* (discussed *above*), said that the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum state. Rather, it is that the defendant's conduct and connection with the forum state are such that he or she should reasonably anticipate being haled into court there (*196 Cal. App. 3d 106, 113)* .

[4] Additional Authorities

[a] "Foreseeability" Element of Due Process Analysis in Action Based on Defective Product

Great-West Life Assurance Co. v. Guarantee Co. of North America (1988) 205 Cal. App. 3d 199, 252 Cal. Rptr. 363 , was an action by a Canadian life insurance corporation against another Canadian corporation for breach of contract, the implied covenant of good faith and fair dealing, and statutory duties in connection with a bond issued by the defendant insuring plaintiff for losses occurring at its offices in Canada. The defendant's motion to quash service of summons for lack of jurisdiction was granted, and plaintiff appealed. In affirming the judgment, the court of appeal said that the foreseeability that is critical to due process analysis is that the defendant's conduct and connection with the forum state are such that he or she should reasonably anticipate being haled into court there (*205 Cal. App. 3d 199, 205)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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13-132 California Points & Authorities § 132.75

§ 132.75 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground That Court Lacks Personal Jurisdiction--Nonresident Defendant Lacks Minimal Contacts With California--Plaintiff Has Burden to Establish That Minimum Contacts Exist

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum supporting a motion to quash service of summons on the ground that the court lacks a sufficient basis for exercising personal jurisdiction (see, e.g., § 132.70), or with a memorandum submitted in reply to a plaintiff's opposition to a motion to quash service.*]

THE MOTION TO QUASH SERVICE OF SUMMONS FOR LACK OF JURISDICTION SHOULD BE GRANTED WHEN PLAINTIFF DOES NOT MEET HIS/HER/ITS BURDEN OF SHOWING THAT THERE IS A PROPER BASIS FOR THE COURT TO EXERCISE PERSONAL JURISDICTION OVER THE DEFENDANT.

Burden of Showing Proper Basis for Personal Jurisdiction. When a defendant properly moves to quash service of summons for lack of jurisdiction, the burden of proof is on the plaintiff to establish the facts of jurisdiction by a preponderance of the evidence (*Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 449, 58 Cal. Rptr. 2d 899, 926 P.2d 1085* ; *Carretti v. Italpast (2002) 101 Cal. App. 4th 1236, 1245-1246, 125 Cal. Rptr. 2d 126* ; *Magnecomp Corp. v. Athene Co. (1989) 209 Cal. App. 3d 526, 533, 257 Cal. Rptr. 278* ; *Ziller Electronics Lab GmbH v. Superior Court (1988) 206 Cal. App. 3d 1222, 1232-1233, 254 Cal. Rptr. 410*).

[2] Comments

[a] Use of Form

The form of points and authorities in [1], *above*, is for use in support of a motion to quash service of summons under *Code Civ. Proc. § 418.10(a)(1)*, on the ground that the court has no proper basis for exercising personal jurisdiction over the defendant, because the defendant is a nonresident individual or legal entity who lacks the minimal contacts with California that are necessary under constitutional due process limitations to support the court's exercise of such jurisdiction. The point of law stated is that, on a motion to quash by the defendant, the plaintiff must demonstrate by a

preponderance of evidence that a proper basis for personal jurisdiction exists.

This form does not provide a complete memorandum, but is designed to be combined with a general form of memorandum supporting a motion to quash service of summons [*see, e.g., § 132.70*], or with a memorandum of points and authorities submitted in reply to the plaintiff's papers opposing the motion to quash. It may also be included in a petition for a writ of mandate to compel the trial court to grant the motion to quash after it has declined to do so [*see Code Civ. Proc. § 418.10(c)*], or it may be adapted for use in a trial or appellate brief.

For additional points and authorities supporting a motion to quash for lack of an adequate basis of jurisdiction in particular situations, see *§§ 132.72 -132.74, 132.76 -132.90*.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

See also *§ 132.70[2]* for comments on a general form.

[3] Discussion of Authorities

[a] Burden of Showing Proper Basis for Personal Jurisdiction

The facts and procedural background of ***Vons Companies, Inc. v. Seabest Foods, Inc.*** *(1996) 14 Cal. 4th 434, 58 Cal. Rptr. 2d 899, 926 P.2d 1085* , are discussed in *§ 132.107[3][g]*. The trial court granted defendants' motion to quash for lack of personal jurisdiction, and the court of appeal affirmed. In reversing the court of appeal, the Supreme Court stated that when a defendant moves to quash service of process on jurisdictional grounds, the plaintiff has the initial burden of demonstrating facts justifying the exercise of jurisdiction (*14 Cal. 4th 434, 449)* .

In ***Carretti v. Italpast*** *(2002) 101 Cal. App. 4th 1236, 125 Cal. Rptr. 2d 126* , a pasta machine distributor with an office in California argued that the manufacturer, which sold products to him in Italy, had the requisite minimum contacts to support jurisdiction in California. In rejecting this argument, the court noted that the manufacturer did not promote the sale of its goods in California at all; it simply sold goods to a buyer who showed up on its doorstep in Italy, willing to pay the price. The minimal resales of the product in California by the distributor, standing alone, do not amount to the substantial continuous and systematic contacts with the forum state necessary for the exercise of general jurisdiction over a foreign corporation doing business in its home country (*101 Cal. App. 4th 1236, 1245-1246)* .

Magnecomp Corp. v. Athene Co. *(1989) 209 Cal. App. 3d 526, 257 Cal. Rptr. 278* , was an action by a California corporation against a Japanese corporation and its alleged agent (a former employee of the plaintiff) for alleged misappropriation of trade secrets. The trial court granted the defendant corporation's motion to quash service of summons, and plaintiff appealed.

In reversing the order, on the ground that the minimum contacts test sufficient to support limited jurisdiction (*see* discussion in *§ 132.76[2][b]*) had been satisfied, the appellate court relied on the following rules: (1) when jurisdiction is challenged by a nonresident defendant, the burden of proof is on the plaintiff to demonstrate that minimum contacts exist between defendant and the forum state to justify imposition of personal jurisdiction, and plaintiff has the right to conduct discovery with regard to the issue of jurisdiction to develop the facts necessary to sustain this burden; and (2) the plaintiff does not have to prove the truth of the allegations constituting the causes of action in order to justify the exercise of jurisdiction over the nonresident parties, but he or she must present facts demonstrating that the conduct of defendants related to the pleaded causes is such as to constitute constitutionally cognizable minimum contacts. Thus, in reviewing the trial court order pertaining to a motion to quash, the court is guided by the following principles: (1) when a defendant properly moves to quash out-of-state service of process for lack of jurisdiction, the burden of proof is on the plaintiff to establish the facts of jurisdiction by a preponderance of the evidence; (2) evidence of those facts or their

absence may be in the form of declarations; and (3) when there is a conflict in the declarations, resolution of the conflict by the trial court will not be disturbed on appeal if the determination of that court is supported by substantial evidence (*209 Cal. App. 3d 526, 533)* . The appellate court added that substantial evidence is not synonymous with any evidence, but rather is evidence of ponderable legal significance, that is, evidence which is reasonable in nature, credible, and of solid value (*209 Cal. App. 3d 526, 533)* . The appellate court may not consider evidence not properly before the trial court (*209 Cal. App. 3d 526, 533-534)* .

Ziller Electronics Lab GmbH v. Superior Court *(1988) 206 Cal. App. 3d 1222, 254 Cal. Rptr. 410*), was a mandate proceeding to compel the trial court to quash a second service of process on defendant, a West Germany corporation, in an action for breach of contract after it had denied the motion on the ground the issue had been determined adversely to the defendant on its prior successful motion to quash the first service. The defendant had originally been served in Germany by mail and moved to quash service on the ground (1) defendant lacked sufficient minimum contacts with California; and (2) service was ineffective because it did not comply with the Hague Convention on Service of Process Abroad. The trial court found in its tentative ruling that minimum contacts existed, but granted the motion for ineffective service of process. The defendant was served again in Germany in accordance with the Hague Convention, and moved to quash service on the ground of lack of minimum contacts. A different judge than the one who had determined the first motion heard the second and denied it on the ground minimum contacts had been determined to exist by the judge on the prior motion.

In granting the writ with directions to the trial court to vacate its order denying the second motion to quash and to reconsider and determine the issue of minimum contacts on the merits, the court of appeal said that personal jurisdiction over a nonresident defendant depends on the existence of essentially two criteria: (1) a basis for jurisdiction must exist due to defendant's minimum contacts with the forum state; and (2) given that basis for jurisdiction, jurisdiction must be acquired by service of process in strict compliance with the requirements of our service statutes (*Code Civ. Proc. §§ 412.10-417.40*). The court said that, on a challenge by a specially appearing nonresident defendant pursuant to *Code Civ. Proc. § 418.10*, plaintiff must establish that both criteria are met (*206 Cal. App. 3d 1222, 1229)* .

[4] Additional Authorities

[a] Burden of Showing Proper Basis for Personal Jurisdiction

The facts and procedural background of *Jewish Defense Organization, Inc. v. Superior Court (1999) 72 Cal. App. 4th 1045, 85 Cal. Rptr. 2d 611* , are discussed in *§ 132.89[3][a]*. In issuing a peremptory writ of mandate directing the trial court to vacate its order and to enter a new and different order granting the motion to quash service of summons, the court of appeal noted that when a nonresident defendant challenges personal jurisdiction the burden shifts to the plaintiff to demonstrate by a preponderance of the evidence that all the necessary jurisdictional criteria are met. This burden must be met by competent evidence in affidavits and authenticated documentary evidence. An unverified complaint cannot be considered as an affidavit supplying necessary facts. Declarations are insufficient to support the assertions for which they are offered if they consist primarily of vague assertions of ultimate facts rather then specific evidentiary facts permitting a court to form an independent conclusion on the issue (*72 Cal. App. 4th 1045, 1054-1055)* .

The facts and procedural background of *Serafini v. Superior Court (1998) 68 Cal. App. 4th 70, 80 Cal. Rptr. 2d 159* , are discussed in *§ 132.71[3][a]*. The court, in reversing the denial of defendant's motion to quash, stated that when a defendant moves to quash service of process on jurisdictional grounds, the plaintiff has the initial burden of demonstrating facts justifying the exercise of jurisdiction (*68 Cal. App. 4th 70, 77)* .

In *Floveyor Internat., Ltd. v. Superior Court (1997) 59 Cal. App. 4th 789, 69 Cal. Rptr. 2d 457* , the issue before the court of appeal was who had the burden of proof on the issues of the validity of the service of process and the sufficiency of minimum contacts with the State of California to support jurisdiction over a cross-defendant who was a

British corporation. The trial court imposed the burden of proof on the cross-defendant to show some defect in the service of process and that California did not have jurisdiction and denied the cross-defendant's motion to quash. The court of appeal, in granting the cross-defendant's petition for a writ of mandate, held that the plaintiff bears the burden of proof on the validity of service and the court's jurisdiction over the defendant (*59 Cal. App. 4th 789, 793)* . Until the plaintiff makes at least a prima facie showing of the validity of service and sufficient contacts with the State of California, the defendant may stand mute (*59 Cal. App. 4th 789, 794)* . Although the cross-complainant made a prima facie showing that service of the summons and cross-complaint in England was in accordance with the Hague Convention and thus was valid (*59 Cal. App. 4th 789, 794-796)* , the record before the court was devoid of any evidence that the cross-defendant had any contacts with the state of California. Thus, the court was compelled to find that the trial court abused its discretion in denying the cross-defendant's motion to quash (*59 Cal. App. 4th 789, 797)* .

In *Wolfe v. City of Alexandria (1990) 217 Cal. App. 3d 541, 265 Cal. Rptr. 881* , plaintiffs, a brother and an elderly sister, who was unable to care for herself adequately, sued a city in a sister state and public and private community services organizations operating in that city and certain of their employees, none of whom resided, did business, or was present in California, for injuries allegedly sustained as a result of defendants having caused the sister to be transported from Virginia to San Francisco and there "dumped" on her brother who was unable to care for her. Defendants' motions to quash service of summons for lack of jurisdiction over them were granted, and plaintiffs appealed.

In affirming, the court of appeal, said that it was well settled that the plaintiff bears the burden of proof to establish the facts of jurisdiction, and that the trial court, in ruling on the motion, considers evidence relevant to that issue which may be set forth in declarations, treating a verified complaint as a declaration; the court concluded that plaintiffs had failed to carry their burden of establishing otherwise (*217 Cal. App. 3d 541, 546-547)* . The court further held that the mere causing of an effect in California, without more, is not, in and of itself, sufficient to sustain jurisdiction (*217 Cal. App. 3d 541, 548)* [*see § 132.88*].

In *Taylor-Rush v. Multitech Corp. (1990) 217 Cal. App. 3d 103, 265 Cal. Rptr. 672* , the court of appeal, in affirming an order quashing service of summons on a nonresident defendant, said that the plaintiff has the burden of demonstrating by a preponderance of the evidence that all jurisdictional criteria are met (*217 Cal. App. 3d 103, 110)* . With respect to other nonresident defendants who had been properly served, the court of appeal said that when jurisdiction is challenged by a nonresident defendant, the burden of proof is on the plaintiff to demonstrate that sufficient minimum contacts exist between the defendant and the forum state to justify imposition of personal jurisdiction (*217 Cal. App. 3d 103, 112)* .

Felix v. Bomoro Kommanditgesellschaft (1987) 196 Cal. App. 3d 106, 241 Cal. Rptr. 670 , was a products liability action brought by a California resident (who died during the pendency of the appeal and whose personal representative was substituted in as plaintiff) against a German corporation, and others, including a foreign car manufacturer and its American importer, for injuries sustained by the resident when, while riding as a passenger, he was thrown from an automobile during a collision allegedly due to a design defect in a door latch assembly, which had been designed and manufactured by the German corporation and used by the foreign car manufacturer in its vehicles. The German corporation appeared specially and moved to quash service of summons on the ground that it lacked the requisite minimum contacts with California to justify California's assertion of personal jurisdiction over it. The trial court granted the motion, and plaintiff appealed.

In affirming the judgment of dismissal, the court of appeal said it has long been settled that when a defendant properly moves to quash out-of-state service of process for lack of jurisdiction, the burden of proof is on the plaintiff to establish the facts of jurisdiction by a preponderance of the evidence (*196 Cal. App. 3d 106, 110)* .

Sklar v. Princess Properties International, Ltd. (1987) 194 Cal. App. 3d 1202, 240 Cal. Rptr. 102 , was an action by a California resident against a Bermuda hotel owner, which had been served with summons in Bermuda, for injuries sustained on defendant's hotel premises in Bermuda. Defendant's motion to quash service of summons for lack of

jurisdiction was granted, and plaintiff appealed. In affirming, the court of appeal said that where a defendant properly moves to quash out-of-state service for lack of jurisdiction, the burden is on the plaintiff to establish the facts of jurisdiction by a preponderance of the evidence, and that on review of an order granting a motion to quash, the facts must be viewed most favorably to the defendant (*194 Cal. App. 3d 1202, 1208-1209)* . In *Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 461, 464, 475, 58 Cal. Rptr. 2d 899, 926 P.2d 1085* , the California Supreme Court rejected the "proximate cause" test used by *Sklar* as being inconsistent with the rationale underlying specific jurisdiction in the context of ongoing franchise relationships and disapproved the reasoning *Sklar* to the extent it is inconsistent with the *Vons Companies, Inc.* opinion. For discussion of *Vons Companies, Inc.*, see *§ 132.100[3][g]*.

Kroopf v. Guffey (1986) 183 Cal. App. 3d 1351, 228 Cal. Rptr. 807 , was an action by a California resident against a Connecticut resident, who formerly lived in California with plaintiff, for declaratory relief and for damages for breach of contract, fraud, and infliction of emotional distress. The trial court granted defendant's motion to quash service of summons for lack of jurisdiction, and plaintiff appealed. In reversing the order, the court of appeal stated the rules set forth in *Arnesen v. Raymond Lee Organization, Inc. (1973) 31 Cal. App. 3d 991, 994-995, 107 Cal. Rptr. 744* (discussed *below*) (*183 Cal. App. 3d 1351, 1356)* .

In *Mihlon v. Superior Court (1985) 169 Cal. App. 3d 703, 215 Cal. Rptr. 442* , in holding that the burden of proof was sustained and denying the peremptory writ of mandate sought to compel the trial court to quash service of summons after it had denied motions to do so, the court of appeal said that (1) when jurisdiction is challenged by a nonresident defendant, the burden of proof is on the plaintiff to demonstrate that minimum contacts exist between defendant and the forum state to justify imposition of personal jurisdiction, and the plaintiff has the right to conduct discovery with regard to the issue of jurisdiction to develop the facts necessary to sustain this burden; (2) an unverified complaint has no evidentiary value in the determination of personal jurisdiction, but it has limited cognizable significance as a material fact, in that it defines the cause of action, the nature of which has some bearing on the decision whether it is fair and reasonable to require the nonresident parties to appear and defend in this state; but the pleader has no burden of proving the truth of the allegations constituting the causes of action in order to justify the exercise of jurisdiction over nonresident parties; the plaintiff need only present facts demonstrating that the conduct of defendants related to the pleaded causes is such as to constitute constitutionally cognizable minimum contacts; (3) the explicit and implicit resolution by the trial court of any conflict between the declarations of the parties may not be reevaluated on appellate review, and the appellate court is not permitted to consider evidence that was not before the trial court (*169 Cal. App. 3d 703, 710)* .

University Financing Consultants, Inc. v. Barouche (1983) 148 Cal. App. 3d 1165, 196 Cal. Rptr. 484 , was a breach of contract action by a California mortgage brokerage association against Hawaiian condominium developers who were never physically present in California and had obtained the plaintiff's brokerage services via contracts made with a Hawaiian mortgage broker. The trial court granted the defendant's motion to quash service of summons for lack of jurisdiction, and plaintiff appealed. In reversing the order, the court of appeal said that when a defendant moves to quash out-of-state service for lack of jurisdiction, the burden is on the plaintiff to establish the facts of jurisdiction by a preponderance of the evidence (*148 Cal. App. 3d 1165, 1168)* .

In *Thomas J. Palmer, Inc. v. Turkiye Is Bankasi A.S. (1980) 105 Cal. App. 3d 135, 164 Cal. Rptr. 181* , in affirming the trial court's order quashing out-of-state service of summons on a Turkish national bank, the court of appeal, citing *Arnesen v. Raymond Lee Organization, Inc. (1973) 31 Cal. App. 3d 991, 995, 107 Cal. Rptr. 744* (discussed *below*), said that where a defendant properly moves to quash out-of-state service for lack of jurisdiction, the burden of proof is on the plaintiff to establish the facts of jurisdiction by a preponderance of the evidence (*105 Cal. App. 3d 135, 146)* .

In *Kaiser Aetna v. Deal (1978) 86 Cal. App. 3d 896, 150 Cal. Rptr. 615* , in affirming an order quashing service of summons and dismissing the action as to nonresident defendants, the court of appeal said that the defendants properly moved to quash out-of-state service of process for lack of personal jurisdiction, and that the burden of proof therefore was on the plaintiffs to establish the fact of jurisdiction by a preponderance of the evidence (*86 Cal. App. 3d 896, 904)*

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Sheard v. Superior Court (1974) 40 Cal. App. 3d 207, 114 Cal. Rptr. 743 , was a mandate proceeding to compel the trial court to quash service of summons on nonresidents who were directors and the sole stockholders of an out-of-state corporation that was doing interstate business with California residents. In issuing the writ, the court of appeal said that, although jurisdiction over the corporation will support jurisdiction over the stockholders when a corporation is the alter ego of the stockholders so as to justify disregard of the corporate entity, (*40 Cal. App. 3d 207, 210)* , the plaintiff had failed to allege facts sufficient to justify application of the alter ego doctrine and had failed to prove facts requisite to an effective service on the individuals (*40 Cal. App. 3d 207, 211-212)* . The court said that when a defendant properly moves to quash service of summons the burden is on the plaintiff to prove facts requisite to the effective service (*40 Cal. App. 3d 207, 211)* .

In *Arnesen v. Raymond Lee Organization, Inc. (1973) 31 Cal. App. 3d 991, 107 Cal. Rptr. 744* , the court of appeal, in affirming an order quashing service of summons on nonresident individual defendants served outside California, said that the propriety of the order would be tested by the following four principles: (1) when a defendant properly moves to quash out-of-state service of process for lack of jurisdiction, the burden is on the plaintiff to establish the facts of jurisdiction by a preponderance of the evidence; (2) evidence of those facts or their absence may be in the form of declarations with the verified complaint being treated as a declaration for that purpose; (3) when there is a conflict in the declarations, resolution of the conflict by the trial court will not be disturbed on appeal if the determination of that court is supported by substantial evidence; and (4) the appellate court is not permitted on appeal to consider evidence not before the trial court (*31 Cal. App. 3d 991, 995)* .

In *General Motors Corp. v. Superior Court (1971) 15 Cal. App. 3d 81, 93 Cal. Rptr. 148* , in granting a writ of mandate directing the trial court to vacate its order denying the foreign corporation's motion to quash service of summons and to grant the motion on the ground plaintiff had failed to establish on the motion to quash that the person served with process was the general manager of the corporation [*see § 132.60*], the court of appeal said that when the validity of service of process on a foreign corporation is challenged by a motion to quash, the burden is on the plaintiff to prove the validity of the service, which burden extends to establishing the fact of compliance with California's statutory provisions for acquiring jurisdiction (*15 Cal. App. 3d 81, 85-86)* .

In *Wilson v. Eddy (1969) 2 Cal. App. 3d 613, 82 Cal. Rptr. 826* (decided before enactment of *Code Civ. Proc. § 410.10*), affirming an order quashing service of summons on an attorney for nonresidents and holding that there was insufficient evidence that the attorney had been appointed an agent of the nonresidents to receive service of process, the court said that when a defendant properly moves to quash service of summons, the burden is on the plaintiff to prove facts requisite to the effective service (*2 Cal. App. 3d 613, 616-617)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsMinimum ContactsCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss

California Points & Authorities

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 132 JURISDICTION: PERSONAL JURISDICTION AND INCONVENIENT FORUM
PART II. FORMS
C. Bases of Jurisdiction

13-132 California Points & Authorities § 132.76

§ 132.76 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground That Court Lacks Personal Jurisdiction--Nonresident Defendant Lacks Minimal Contacts With California--Exercise of Limited Jurisdiction Is Improper--General Requirements of Purposeful Availment by Defendant and Relationship Among Defendant, Forum, and Cause of Action

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum supporting a motion to quash service of summons on the ground that the court lacks a sufficient basis for exercising personal jurisdiction (see, e.g., § 132.70), or with a memorandum submitted in reply to a plaintiff's opposition to a motion to quash service.*]

THE MOTION TO QUASH SERVICE OF SUMMONS FOR LACK OF JURISDICTION SHOULD BE GRANTED IF THERE IS NOT A SUFFICIENT RELATIONSHIP AMONG THE DEFENDANT, THE FORUM, AND THE LITIGATION TO SUPPORT THIS COURT'S EXERCISE OF LIMITED PERSONAL JURISDICTION OVER THE DEFENDANT.

A. Quality and Nature of Defendant's Activity. Whether a state court's exercise of jurisdiction over a nonresident defendant satisfies due process depends on the quality and nature of the defendant's activity in relation to the fair and orderly administration of the law which it was the purpose of the due process clause to insure (*International Shoe Co. v. Washington (1945) 326 U.S. 310, 319, 66 S. Ct. 154, 90 L. Ed. 95*).

B. Assessment of Relationship Among Defendant, Forum, and Litigation. When a controversy is related to or arises out of a nonresident defendant's contacts with the forum, a relationship among the defendant, the forum, and the litigation is the essential foundation of in personam jurisdiction (*Helicopteros Nacionales de Colombia v. Hall (1984) 466 U.S. 408, 414, 104 S. Ct. 1868, 80 L. Ed. 2d 404* ; *Great-West Life Assurance Co. v. Guarantee Co. of North America (1988) 205 Cal. App. 3d 199, 204-205, 252 Cal. Rptr. 363* ; *J. M. Sahlein Music Co. v. Nippon Gakki Co. Ltd. (1987) 197 Cal. App. 3d 539, 542, 243 Cal. Rptr. 4*).

C. Test for Limited Jurisdiction; Purposeful Availment. The requirements for the exercise of limited personal

jurisdiction are as follows: (1) the nonresident defendant must perform some act or consummate some transaction with the forum or perform some act constituting a purposeful availment of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the cause of action must arise out of or result from the defendant's forum-related activities; and (3) the exercise of jurisdiction must be reasonable (*Burger King Corp. v. Rudzewicz (1985) 471 U.S. 462, 471-478, 105 S. Ct. 2174, 85 L. Ed. 2d 528* ; *Hunt v. Erie Ins. Group (9th Cir. 1984) 728 F.2d 1244, 1247* ; *see also World-Wide Volkswagen Corp. v. Woodson (1980) 444 U.S. 286, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490* ; *Kulko v. California Superior Court (1978) 436 U.S. 84, 94, 98 S. Ct. 1690, 56 L. Ed. 2d 132* ; *Hanson v. Denckla (1958) 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283*).

D. Effect of Purposeful Availment Requirement. The "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or a third person (*Burger King Corp. v. Rudzewicz (1985) 471 U.S. 462, 475, 105 S. Ct. 2174, 85 L. Ed. 2d 528*).

[*In an appropriate case, add additional points and authorities set out in §§ 132.77 -132.88, supporting the argument that the exercise of limited jurisdiction would be improper under the particular facts of the case.*]

[2] Comments

[a] Use of Form

The form of points and authorities in [1], *above*, is for use in support of a motion to quash service of summons under *Code Civ. Proc. § 418.10(a)(1)*, on the ground that the court has no proper basis for exercising personal jurisdiction over the defendant, because the defendant is a nonresident individual or legal entity who lacks the minimal contacts with California that are necessary under constitutional due process limitations to support the court's exercise of such jurisdiction. The point of law stated is that, in order for the court to exercise limited personal jurisdiction [*see discussion under § 132.76[2][b]*], there must be a sufficient relationship among the defendant, the forum, and the litigation.

This form does not provide a complete memorandum, but is designed to be combined with a general form of memorandum supporting a motion to quash service of summons [*see, e.g., § 132.70*], or with a memorandum of points and authorities submitted in reply to the plaintiff's papers opposing the motion to quash. It may also be included in a petition for a writ of mandate to compel the trial court to grant the motion to quash after it has declined to do so [*see Code Civ. Proc. § 418.10(c)*], or it may be adapted for use in a trial or appellate brief.

This form should be augmented, when appropriate, by the additional points and authorities *set out in § 132.77 -132.90*, which support the argument that the exercise of limited jurisdiction would be improper under the particular facts of the case.

For additional points and authorities supporting a motion to quash for lack of an adequate basis of jurisdiction in particular situations, see *§§ 132.72 -132.75*.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

See also *§ 132.70[2]* for comments on a general form.

[b] General and Limited Jurisdiction

It is said that personal jurisdiction over a nonresident defendant may be either "general" or "limited," depending on the nature of the minimum contacts with California [*see Hirsch v. Blue Cross, Blue Shield of Kansas City (9th Cir. 1986)*

800 F.2d 1474, 1477 ; *Cornelison v. Chaney (1976) 16 Cal. 3d 143, 147-148, 127 Cal. Rptr. 352, 545 P.2d 264]* . General jurisdiction arises when the defendant's contacts are so extensive that it is not unreasonable to exercise jurisdiction even when the cause of action is not specifically related to those contacts [*Cornelison v. Chaney (1976) 16 Cal. 3d 143, 147, 127 Cal. Rptr. 352, 545 P.2d 264]* . Limited, or specific, jurisdiction arises when the defendant's contacts are not so extensive as to justify the exercise of general jurisdiction, but they nonetheless constitute a purposeful availment of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws, when the cause of action arise out of or results from these activities, and when the exercise of jurisdiction is otherwise reasonable [*see* *Burger King Corp. v. Rudzewicz (1985) 471 U.S. 462, 472, 105 S. Ct. 2174, 85 L. Ed. 2d 528* ; *Hunt v. Erie Ins. Group (9th Cir. 1984) 728 F.2d 1244, 1247* ; *Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 446, 58 Cal. Rptr. 2d 899, 926 P.2d 1085* (nonresident defendant may be subject to specific jurisdiction if defendant has purposefully availed himself or herself of forum benefits, and controversy is related to or arises out of a defendant's contact with forum); *Cornelison v. Chaney (1976) 16 Cal. 3d 143, 149, 127 Cal. Rptr. 352, 545 P.2d 264]* . For further discussion, see particularly the discussion of *Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 58 Cal. Rptr. 2d 899, 926 P.2d 1085* and *Cornelison v. Chaney (1976) 16 Cal. 3d 143, 127 Cal. Rptr. 352, 545 P.2d 264* in § 132.100[3][g].

[c] Opposing Memoranda

For memoranda of points and authorities that may, in an appropriate case, be submitted in opposition to the foregoing memorandum, see *§§ 132.100, 132.104, 132.107 -132.115*.

[3] Discussion of Authorities

[a] Quality and Nature of Defendant's Activity

The facts and procedural background of ***International Shoe Co. v. Washington*** *(1945) 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95* , are discussed in *§ 132.70[3][d]*. In affirming the judgment of the Washington Supreme Court, holding the corporation amenable to suit in Washington in the state's suit to collect unemployment insurance taxes, the Supreme Court, after noting various criteria to be considered in determining whether a nonresident defendant is amenable to suit, said that it was evident that the criteria by which it marked the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less. Rather, whether due process has been satisfied must depend on the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure (*326 U.S. 310, 319)* . The Court concluded that because the activities carried on in behalf of the corporation in Washington were neither irregular nor casual, but, rather, systematic and continuous throughout the years involved and resulted in a large volume of interstate business in the course of which the corporation received the benefits and protection of the laws of the state, including the right to resort to the courts for the enforcement of its rights, and because the obligation sued on arose out of those very activities, the Washington courts had personal jurisdiction over it (*326 U.S. 310, 320-321)* .

[b] Assessment of Relationship Among Defendant, Forum, and Litigation

In ***Helicopteros Nacionales de Colombia v. Hall*** *(1984) 466 U.S. 408, 104 S. Ct. 1868, 80 L. Ed. 2d 404* , a Colombian corporation, whose principal place of business was in Bogota, Colombia, and which had no place of business in Texas and had never been licensed to do business in that state, was engaged in the business of providing helicopter transportation for oil and construction companies in South America. It had contracted to provide helicopter transportation to a consortium, which was the alter ego of a joint venture headquartered in Houston, Texas. One of its helicopters crashed in Peru and among those who lost their lives were four U.S. citizens employed by the consortium who were working on a pipeline in Peru for a Peruvian state-owned oil company. The decedents' survivors and representatives, none of whom was domiciled in Texas, sued the Colombian corporation and others in Texas. The

corporation's only contacts with Texas were as follows: (1) it sent its chief executive officer to Houston for contract negotiations; (2) it accepted into its New York bank account checks drawn by the consortium on a Texas bank; and (3) it purchased helicopters, spare parts and accessories, and training services from a Texas manufacturer and sent its personnel and prospective pilots to that manufacturer's facilities for training and to ferry the aircraft to South America. Although the Texas Court of Civil Appeals reversed the trial court's denial of the corporation's motion to dismiss for lack of jurisdiction, the Supreme Court of Texas reversed the Court of Civil Appeals.

The Supreme Court of the United States in effect agreed with the Texas Court of Civil Appeals and held that the corporation's contacts with Texas were insufficient to satisfy the requirement of the *due process clause of the Fourteenth Amendment*and reversed the judgment of the Supreme Court of Texas. The Court said that when a controversy is related to or arises out of a defendant's contacts with the forum, a relationship among the defendant, the forum, and the litigation is the essential foundation of in personam jurisdiction (*466 U.S. 408, 414)* .

Great-West Life Assurance Co. v. Guarantee Co. of North America *(1988) 205 Cal. App. 3d 199, 252 Cal. Rptr. 363* , was an action by a Canadian life-insurance corporation against another Canadian corporation for breach of contract, the implied covenant of good faith and fair dealing, and statutory duties in connection with a bond issued by the defendant insuring plaintiff for losses occurring at its offices in Canada. The defendant's motion to quash service of summons for lack of jurisdiction was granted, and plaintiff appealed.

In affirming the judgment, the court of appeal said that, in determining whether a particular exercise of limited personal jurisdiction is consistent with due process, the inquiry must focus on the relationship among the defendant, the forum, and the litigation (*205 Cal. App. 3d 199, 204-205)* .

The facts and procedural background of ***J. M. Sahlein Music Co. v. Nippon Gakki Co. Ltd.*** *(1987) 197 Cal. App. 3d 539, 243 Cal. Rptr. 4* , are discussed in *§ 132.73[4][a]*. In affirming the order quashing service of summons on a Japanese company, the court of appeal said that if a defendant has sufficiently extensive "contacts" with the forum state, it may be subject to suit there on all claims wherever they arise, but in other cases the jurisdictional sufficiency of the defendant's contacts depends on an assessment of the relationship among the defendant, the forum, and the litigation (*197 Cal. App. 3d 539, 542)* .

[c] Test for Limited Jurisdiction; Purposeful Availment

In ***Burger King Corp. v. Rudzewicz*** *(1985) 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528* , a Florida corporation, which had its principal offices in Miami and which conducted most of its restaurant business through a franchise operation, sued two of its Michigan franchisees in the United States District Court for the Southern District of Florida for breach of contract and for continued withholding of the premises and conducting business under the name Burger King after Burger King had terminated the contract for failure of the franchisees to make required payments. The contract provided that the franchise relationship was established in Miami and governed by Florida law.

The District Court denied the defendants' motion to dismiss for lack of in personam jurisdiction, ruling that pursuant to Florida's long-arm statute, a nonresident franchisee was subject to in personam jurisdiction in Florida in actions arising out of the franchise agreement. Florida's long-arm statute extended jurisdiction to any person, whether or not a citizen or resident of Florida, who, among other things, breached a contract in Florida by failing to perform acts required by the contract to be performed in Florida, so long as the cause of action arose from the alleged contractual breach. The defendants then filed an answer and a counterclaim seeking damages for alleged violations by Burger King of Michigan's Franchise Investment Law. The court found that the counterclaims were not proved and entered judgment for Burger King. One of the nonresident franchisees appealed to the United States Court of Appeals for the Eleventh Circuit, which reversed, holding that the District Court could not properly exercise personal jurisdiction pursuant to Florida's long-arm statute, because the circumstances of the franchise and the negotiations that led to it left the defendant bereft of reasonable notice and financially unprepared for the prospect of franchise litigation in Florida, and,

accordingly, that the exercise of jurisdiction under these circumstances would offend the fundamental fairness which is the touchstone of due process.

On certiorari, the United States Supreme Court reversed the Court of Appeals. The Court stated that, when a forum seeks to assert specific (that is, limited) jurisdiction over a nonresident defendant, due process requires that the defendant must have purposefully directed activities at residents of the forum, and the litigation must result from alleged injuries that arise out of or relate to those activities (*471 U.S. 462, 471-473)* . The constitutional touchstone remains whether the defendants purposefully established minimum contacts in the forum state; it is essential that there be some act by which the defendant purposefully avails himself, herself, or itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws (*471 U.S. 462, 474-475)* . Finally, once these minimum contacts are shown, they must be examined with other factors to determine whether the exercise of jurisdiction is reasonable, such that it would comport with fair play and substantial justice (*471 U.S. 462, 476-478)* . It held that the exercise of in personam jurisdiction over the nonresident franchisees by the Florida court did not violate the *due process clause of the Fourteenth Amendment* because the franchisee had established a substantial and continuing relationship with the plaintiff's headquarters in Florida and received fair notice from the contract documents and the course of dealing that he might be subject to suit in that state (*471 U.S. 462, 478, 487)* .

The facts and procedural background of ***Hunt v. Erie Ins. Group*** *(9th Cir. 1984) 728 F.2d 1244* , are discussed in *§ 132.100[3][f]*. In affirming the judgment of the federal district court dismissing the action for lack of personal jurisdiction, the United States Court of Appeals said the requirements for the exercise of limited personal jurisdiction are as follows: (1) the nonresident defendant must perform some act or consummate some transaction with the forum or perform some act constituting a purposeful availment of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the cause of action must arise out of or result from the defendant's forum-related activities; and (3) the exercise of jurisdiction must be reasonable (*728 F.2d 1244, 1247)* .

The facts and procedural background of ***World-Wide Volkswagen Corp. v. Woodson*** *(1980) 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490* , are discussed in *§ 132.70[3][g]*. In reversing the judgment of the Oklahoma Supreme Court on the ground the defendants had no contacts, ties, or relations with the State of Oklahoma (*444 U.S. 286, 299)* , the United States Supreme Court said that the due process clause, by ensuring the orderly administration of the laws, gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit (*444 U.S. 286, 297)* . The Court explained that when a corporation purposefully avails itself of the privilege of conducting activities within the forum state, it has clear notice that it is subject to suit there. Hence if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other states, it is not unreasonable to subject it to suit in one of those states if its allegedly defective merchandise has there been the source of injury to its owner or to others (*444 U.S. 286, 297)* .

The facts and procedural background of ***Kulko v. California Superior Court*** *(1978) 436 U.S. 84, 98 S. Ct. 1690, 56 L. Ed. 2d 132* , are discussed in *§ 132.70[3][a]*. In reversing the judgment of the California Supreme Court upholding state court jurisdiction over a nonresident defendant, and quoting *Hanson v. Denckla (1958) 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283* , the United States Supreme Court said that it is essential in each case that there be some act by which the defendant purposefully avails himself or herself of the privilege of conducting activities with the forum state (*436 U.S. 84, 93-94)* . The Court further held that the action did not arise out of any act performed or transaction consummated by the defendant in California (*436 U.S. 84, 96-97)* .

[d] Effect of Purposeful Availment Requirement

The facts and procedural background of ***Burger King Corp. v. Rudzewicz*** *(1985) 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528* are *discussed under § 132.76[3][c]*. In holding that the Florida federal court had jurisdiction over the

nonresident franchisees, the United States Supreme Court said that the "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or a third person (*471 U.S. 462, 475)* .

[4] Additional Authorities

[a] Assessment of Relationship Among Defendant, Forum, and Litigation

The procedural background of *Calder v. Jones (1984) 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804* , *aff'g Jones v. Calder (1982) 138 Cal. App. 3d 128, 187 Cal. Rptr. 825* , is discussed in *§ 132.100[3][p]*. In holding that the nonresident defendants were subject to the jurisdiction of the California courts in a libel action, the United States Supreme Court said that in judging minimum contacts, a court properly focuses on the relationship among the defendant, the forum, and the litigation (*465 U.S. 783, 788)* .

The facts and procedural background of *Keeton v. Hustler Magazine, Inc. (1984) 465 U.S. 770, 104 S. Ct. 1473, 79 L. Ed. 2d 790* , are discussed in *§ 132.100[3][p]*. In holding that the United States District Court in New Hampshire had personal jurisdiction over the defendant corporation and reversing the judgment of the United States Court of Appeals for the First Circuit, the United States Supreme Court said that in judging minimum contacts, a court properly focuses on the relationship among the defendant, the forum, and the litigation (*465 U.S. 770, 775)* .

The facts and procedural background of *Secrest Machine Corp. v. Superior Court (1983) 33 Cal. 3d 664, 190 Cal. Rptr. 175, 660 P.2d 399* , are discussed in *§ 132.100[3][h]*. Although it denied the petition for writ of mandate seeking to have the service of summons on a foreign corporation quashed, the Supreme Court said that in determining whether a particular exercise of state-court jurisdiction is consistent with due process, the inquiry must focus on the relationship among the defendant, the forum, and the litigation (*33 Cal. 3d 664, 668)* .

In *Daar & Newman v. VRL Int'l (2005) 129 Cal. App. 4th 482, 28 Cal. Rptr. 3d 566* , appellant law firm previously represented respondent in a personal injury action. Because respondent had insufficient contacts with California for it to assert jurisdiction over it, appellant successfully moved to quash service of process and obtained respondent's dismissal from the action. Appellant also successfully defended the trial court's ruling on appeal to this court. Contending that it was not paid in full for the services it rendered on behalf of respondent in the prior action, appellant filed an action for recovery of fees. Respondent filed a motion to quash contending it had no sufficient contacts with this state upon which jurisdiction may be based. The trial court granted the motion to quash and dismissed respondent from the action. The court of appeal reversed, finding that the operative facts and law relating to the attorney fee action were different from the prior action. The plaintiff in the prior action attempted to assert jurisdiction over respondent for injuries which occurred in connection with a personal watercraft accident in Nassau, the Bahamas. Here, appellant asserts jurisdiction to recover fees directly related to appellant's retention and representation of respondent in California. Because the claim arises directly from services rendered by appellant for respondent in California, limited jurisdiction existed for resolution of the claim.

In *Nam Tai Electronics, Inc. v. Titzer (2001) 93 Cal. App. 4th 1301, 113 Cal. Rptr. 2d 769* , the court considered whether specific jurisdiction should be extended over a non-resident defendant who posted allegedly defamatory messages on Yahoo!, a California-based Internet message board. In order to avail himself of the opportunity to post on a Yahoo! message board, the defendant was required to register a nickname or alias known as a Yahoo! ID, and agree to Yahoo!'s terms of service; among other things, those terms include a promise not to post any content that is unlawful, defamatory, libelous, or otherwise objectionable, and that the relationship between the person registering and Yahoo! shall be governed by the laws of the State of California, and that both agree to submit to the personal and exclusive jurisdiction of the California courts. The plaintiff in this matter was not Yahoo!, however, it was the party about whom the allegedly defamatory messages were about.

Plaintiff initially contended that defendant made himself subject to jurisdiction in California by posting several messages on Yahoo!'s California-maintained web site. In rejecting this argument, the court stated that the issue is not whether the company that makes the web sites available is incorporated or based in California. Instead, the determinative question is whether the web sites themselves are of particular significance to California or Californians such that the user has reason to know the posting of a message will have a significant impact in this state (*93 Cal. App. 4th 1301, 1312)* .

Plaintiff further argued that the defendant's voluntary agreement to Yahoo!'s terms of service subject him to jurisdiction in this state. In rejecting this argument, the court pointed out that the language on which plaintiff seeks to rely appears on its face to govern litigation between registered users and Yahoo!--not registered users and third parties. Thus, that agreement, by itself, cannot justify subjecting defendant to California jurisdiction for purposes of the instant lawsuit (*93 Cal. App. 4th 1301, 1313)* .

In *Wolfe v. City of Alexandria (1990) 217 Cal. App. 3d 541, 265 Cal. Rptr. 881* , plaintiffs, an elderly sister, who was unable to care for herself adequately, and brother, sued a city in a sister state and public and private community services organizations operating in the city and certain of their employees, none of whom resided, did business, or was present in California, for injuries allegedly sustained as a result of defendants having caused the sister to be transported from Virginia to San Francisco and there "dumped" on her brother who was unable to care for her. Defendants' motions to quash service of summons for lack of jurisdiction were granted, and plaintiffs appealed. In affirming the orders on the ground there was no basis for exercising jurisdiction over the defendants, the court of appeal, after pointing out that *Code Civ. Proc. § 410.10* manifests an intent to exercise the broadest possible jurisdiction, limited only by constitutional considerations, said that these considerations include the following: a defendant not literally present in the forum state may not be required to defend itself in that state's tribunals unless the quality and nature of the defendant's activity in relation to the particular cause of action makes it fair to do so (*217 Cal. App. 3d 541, 545)* . The court pointed out that while the effect of physical and psychological trauma claimed by plaintiffs occurred in California, the acts or omissions that allegedly led to that effect were nothing more than providing the sister with temporary housing, obtaining an airplane ticket for her, and driving her to the airport without ensuring the truth of her claims that her brother had agreed to take care of her, and that even if these acts and omissions were wrongful, and even if they were done fraudulently, they simply were not such as would permit a California court to exercise jurisdiction over nonresident defendants (*217 Cal. App. 3d 541, 548-549)* .

The facts and procedural background of *Felix v. Bomoro Kommanditgesellschaft (1987) 196 Cal. App. 3d 106, 241 Cal. Rptr. 670* , are discussed in *§ 132.75[4][a]*. In affirming the judgment of dismissal after the defendant's motion to quash service of summons was granted, the court of appeal said that in determining whether a particular exercise of jurisdiction is consistent with due process, the inquiry must focus on the relationship among the defendant, the forum, and the litigation (*196 Cal. App. 3d 106, 111)* .

[b] Test for Limited Jurisdiction; Purposeful Availment

The facts and procedural background of *Asahi Metal Industry Co. v. Superior Court (1987) 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92* , are discussed in *§ 132.77[3][d]*. In reversing the California Supreme Court, which had upheld the jurisdiction of the California Superior court over a Japanese company, the United States Supreme Court said the minimum contacts by which jurisdiction over a nonresident defendant is sought to be established must have a basis in some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws (*480 U.S. 102, 109)* .

In *Elkman v. National States Ins. Co. (2009) 173 Cal. App. 4th 1305, 93 Cal. Rptr. 3d 768* , an insurer issued a long term care insurance policy to the insured, which was delivered to her Florida residence. The insured subsequently relocated to California. The court found no basis to justify the imposition of either general or specific jurisdiction over the insurer in California. The insurer did not subject itself to either general or specific jurisdiction in the state merely by

accepting premium payments from California and by processing and paying claims submitted by its California insureds for services rendered in California. The insurer did not solicit any business in California, nor could it do so, because it was not licensed or authorized to do business in the state. It was the unilateral decision of the insured and other insureds to relocate to California that caused the insurer to accept payments from California and to process and pay claims for services rendered in California. Those circumstances did not support a finding the insurer purposefully availed itself of forum benefits so as to make it subject to specific jurisdiction in California (*173 Cal. App. 4th 1305, 1318)* .

In *Roman v. Liberty University, Inc. (2008) 162 Cal. App. 4th 670, 75 Cal. Rptr. 3d 828* , the only contact a Virginia university had with California was the university's recruiting coordinator visit to plaintiff in California to recruit him to play football for the university, and the execution of a scholarship agreement by plaintiff in California. The court found that the university had not purposely availed itself of the benefits of doing business in California such that it could expect to be subject to the jurisdiction of California courts. The nexus between the university's activities in California and the injury plaintiff suffered in Virginia was so attenuated as to be virtually nonexistent (*162 Cal. App. 4th 670, 680)* .

In *Healthmarkets, Inc. v. Superior Court (2009) 171 Cal. App. 4th 1160, 90 Cal. Rptr. 3d 527* , plaintiff sued a nonresident holding company, alleging that he was the victim of a fraudulent health insurance sales scheme perpetrated by the holding company. The holding company was incorporated in Delaware, with its principal place of business in Texas. It had no contacts with California. The trial court denied the holding company's motion to quash service of summons based on lack of personal jurisdiction. The trial court concluded that the contacts with the state by the holding company's subsidiary should be attributed to the holding company for purposes of specific personal jurisdiction. The Court of Appeal issued a peremptory writ of mandate directing the trial court to vacate its order denying the holding company's motion to quash service of summons and rule on plaintiff's request for a continuance to conduct discovery. The court concluded that plaintiff failed to establish purposeful availment and therefore failed to establish a basis for personal jurisdiction over the holding company. The holding company's mere ownership of the subsidiary did not constitute purposeful availment. Plaintiff did not show that the holding company purposefully directed its activities at California, either directly or through its subsidiary or any other person or entity. Absent evidence that the holding company purposefully directed the activities of the subsidiary toward the state, there was no basis for personal jurisdiction over the holding company. Because plaintiff failed to establish purposeful availment, the trial court erred in denying the holding company's motion to quash (*171 Cal. App. 4th 1160, 1168-1174)* .

In *Aquila, Inc. v. Superior Court (2007) 148 Cal. App. 4th 556, 55 Cal. Rptr. 3d 803* , a group of independent plaintiffs sued a publicly regulated utility, alleging the utility participated in manipulating the price of natural gas in California by falsely reporting natural gas trades to price indices and engaging in wash trades. The utility, which was headquartered in Missouri, moved to quash service of summons, challenging the trial court's exercise of jurisdiction over it for lack of sufficient ties to California. The utility asserted that all the alleged minimum contacts claimed by plaintiffs were actually carried out by its independent subsidiary companies. The trial court denied the motion, finding a sufficient basis for specific jurisdiction under the theory the utility had purposefully availed itself of opportunities in California. The Court of Appeal issued a peremptory writ of mandate requiring the trial court to vacate its order denying the utility's motion to quash service of summons and to enter a new order granting the motion. The court concluded that the exercise of specific jurisdiction over the utility was improper because plaintiffs did not bear their burden of demonstrating the existence of sufficient minimum contacts between the utility and the state. A weather derivative contract that obligated the utility and its subsidiary to pay money to a utilities district if rainfall levels were low and impeded hydroelectrical generators from operating properly did not adequately show that the utility purposefully availed itself of the benefits of forum contacts with the state so as to justify specific jurisdiction over the utility. The utility's purchase of an insurance policy for itself and its subsidiaries for several real properties, one of which was in California, did not demonstrate its own purposeful availment of forum benefits. The court also concluded that the record did not support the application of the representative services doctrine. The utility's purchase of the property insurance policy did not establish the pervasive control required for the representative services doctrine to apply. A guarantee the utility provided for its subsidiary's financial obligations under the weather derivative contract did not destroy the

separateness of the parent and subsidiary so as to justify application of the representative services doctrine. Therefore, the utility's motion to quash service of summons should have been granted.

In *Archdiocese of Milwaukee v. Superior Court (2003) 112 Cal. App. 4th 423, 5 Cal. Rptr. 3d 154* , plaintiff alleged and declared under oath that when he was a boy, a Roman Catholic priest molested him; the priest was working at a parish in Orange County when the alleged molestation occurred. The plaintiff sued the Milwaukee Archdiocese, the Roman Catholic Bishop of Orange (the Orange Diocese), and the priest. Among other things, plaintiff alleged the Milwaukee Archdiocese engaged in a cover-up of the priest's prior misconduct, which included a conviction in Wisconsin for sexual perversion against a boy, and arranged for the priest to move to California in 1973. The evidence showed the Milwaukee Archdiocese sought to rid itself of the priest by sending him into California knowing he was a pedophile and had been convicted in Wisconsin of sexual perversion against a boy. The court held that plaintiff met his burden of proving, for purposes of establishing specific personal jurisdiction, the Milwaukee Archdiocese engaged in intentional conduct expressly aimed at California and knew its conduct would cause harm in this state. Thus, under the "effects" test for determining purposeful availment in personal jurisdiction analysis, a defendant might be subject to jurisdiction in the forum state if the defendant engaged in intentional conduct expressly aimed at or targeting the forum state, and the defendant knew the intentional conduct would cause harm in the future (*112 Cal. App. 4th 423, 438-442)* .

Tri-West Ins. Services, Inc. v. Seguros Monterrey Aetna, S.A. (2000) 78 Cal. App. 4th 672, 93 Cal. Rptr. 2d 78 , involved a Mexican insurance company (SMA) that issued a policy to plaintiff, a manufacturer maintaining factories in Mexico, of transit insurance to cover goods being transported to and from Mexico. The plaintiff had made premium payments through brokers. When plaintiff made a claim based on a loss in Mexico, SMA informed plaintiff that it had never received any premium payments and that the policy had long been cancelled. Plaintiff sued its insurance broker for negligence, breach of contract, breach of fiduciary duty, and fraud, and the broker filed a cross complaint against SMA equitable indemnity, fraud, conversion, and other causes of action. The trial court found that SMA did not have the requisite minimum contacts with California for the assertion of jurisdiction and quashed service of process dismissing the action with prejudice.

In affirming, the court of appeal stated that a nonresident defendant may be subject to the specific jurisdiction of the forum if the defendant has purposefully availed himself or herself of forum benefits and the controversy is related to or arises out of the defendant's contacts with the forum. Specific jurisdiction arises when a nonresident defendant has purposefully directed his or her activities at forum residents, or has purposefully derived benefits from forum activities, or has purposefully availed himself or herself of privilege of conducting activities within the forum, or has deliberately engaged in significant activities with a state or has created continuing obligations between himself or herself and residents of the forum. In such cases it is presumptively not unreasonable to require the defendant to submit to the burdens of litigation in the forum (*78 Cal. App. 4th 672, 677)* . The issuance of the transit policy was not a sufficient contact for the exercise of jurisdiction (*78 Cal. App. 4th 672, 677-678)* . There was no evidence that SMA insured other California business entities, or insured anyone for losses in California, except plaintiff, or was otherwise engaged in commerce in California (*78 Cal. App. 4th 672, 680)* . Moreover, SMA issued a property policy, which included no liability insurance. SMA did not volunteer to litigate in California, but merely to pay claims to its insured for property loss (*78 Cal. App. 4th 672, 679)* .

Stone v. State of Texas (1999) 76 Cal. App. 4th 1043, 90 Cal. Rptr. 2d 657 , involved an action brought by plaintiff against Texas and the University of Texas Health Center at Tyler (together Health Center) for breach of contract, breach of implied covenant of good faith and fair dealing, and violation of *Lab. Code § 970*. Plaintiff, a doctor with a practice in San Diego, was solicited by a search firm located in Texas for employment by the Health Center. Over two years after plaintiff started working for the Health Center, he resigned because a college expense benefit for his children, which was an important factor in his taking the position, was substantially reduced. Plaintiff, however, continued to reside and practice in Texas. The trial court granted Health Center's motion for an order quashing service of the summons and plaintiff appealed (*76 Cal. App. 4th 1043, 1046-1047)* .

In affirming, the court of appeal noted that a nonresident defendant may be subject to specific jurisdiction of the forum, if the defendant has purposefully availed himself or herself of the forum benefits, and the controversy is related to or arises out of a defendant's contacts with the forum (*76 Cal. App. 4th 1043, 1047-1048)* . The court concluded that plaintiff failed to meet the purposeful availment prong of the minimum contacts test (*76 Cal. App. 4th 1043, 1048)* . "Purposeful availment" requires that the defendant have performed some types of affirmative conduct that allows or promotes the transaction of business within the forum state. A contract with an out-of-state party does not automatically establish purposeful availment in the other party's home forum. Rather, a court must evaluate the contract terms and the surrounding circumstances to determine whether the defendant purposefully established minimum contacts with the forum. Relevant factors include prior negotiations, contemplated future consequences, the parties course of dealings, and contract's choice of law provision (*76 Cal. App. 4th 1043, 1048)* . The court further noted that with respect to interstate contractual obligations, parties who reach out beyond one state and create continuing relationships and obligations with citizens of another state are subject to sanctions in the other state for consequences of their activities. Due process requires a substantial connection between the contract at issue and the forum state (*76 Cal. App. 4th 1043, 1048-1049)* .

The facts and procedural background of *Jewish Defense Organization, Inc. v. Superior Court (1999) 72 Cal. App. 4th 1045, 85 Cal. Rptr. 2d 611* , are discussed in *§ 132.89[3][a]*. In issuing a peremptory writ of mandate directing the trial court to vacate its order and to enter a new and different order granting the motion to quash service of summons, the court of appeal noted that specific jurisdiction is determined under a three-part test: (1) the nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he or she purposefully avails himself or herself of privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one that arises out of or results from the defendant's forum related activities; and (3) the exercise of jurisdiction must be reasonable (*72 Cal. App. 4th 1045, 1054)* .

Goehring v. Superior Court (1998) 62 Cal. App. 4th 894, 73 Cal. Rptr. 2d 105 , involved plaintiffs who purchased telephone units as investments from a California corporation. After the California corporation filed bankruptcy, plaintiffs filed a class action alleging the investment scheme was fraudulent and violated several California statutes. Plaintiffs named numerous defendants, including two Texas residents who were general partners of a Texas partnership that sold the pay telephone units to the California corporation. The two general partners moved to dismiss for lack of jurisdiction. The trial court denied the motion relying on four sets of documents relating to the sale, *i.e.*, (1) a written sales agreement, (2) the related promissory notes and collection and escrow agreement, (3) a security agreement, and (4) a California UCC-1 financing statement. Defendants petitioned the court of appeal for a writ of mandate challenging the trial court's order (*62 Cal. App. 4th 894, 899-903)* .

The court of appeal granted the writ ordering the trial court to vacate its denial of the dismissal motion, but also directed that the trial court be provided the opportunity to exercise its discretion to determine whether jurisdictional discovery that plaintiffs requested pertaining to the defendants, would be appropriate in the case (*62 Cal. App. 4th 894, 899, 911)* . In reaching its conclusion, the court noted that when general jurisdiction over a defendant cannot be established, a court may assume specific jurisdiction over a defendant in a particular case if the plaintiff shows that (1) the defendant has purposefully availed himself or herself of the forum benefits, (2) the controversy is related to or arises out of the defendant's contacts with the forum, and (3) the assertion of jurisdiction would comport with fair play and substantial justice (*62 Cal. App. 4th 894, 904)* . A contract with an out-of-state party does not automatically establish purposeful availment in the other party's home forum. Rather, the court must evaluate the contract terms and surrounding circumstances to determine whether the defendant purposefully established minimum contacts within the forum. "Purposeful availment" requires that the defendant have performed some type of affirmative conduct that allows or promotes the transaction of business within the forum state (*62 Cal. App. 4th 894, 907)* . The defendants did not purposefully avail themselves of California benefits by executing the sales, security, and escrow agreements so as to give rise to sufficient minimum contacts with the forum to confer jurisdiction over them when the (1) contract negotiations occurred in Texas, (2) sales, security agreements and promissory notes were governed by Texas law, (3)

transaction documents were prepared by a Texas law firm, (4) transactions closed in Texas, (5) documents were executed in Texas and payments necessary to close the transaction were provided to a bank in Texas, and (6) sales and security agreements concerned only Texas-based pay telephones that were required to remain in Texas. Thus, all future consequences were in Texas (*62 Cal. App. 4th 894, 907)* . Similarly, the filing of a single California UCC-1 financial statement in California Secretary of State's office, signed by a partner, considered alone or in connection with the sales and security agreements, did not demonstrate purposeful availment. The filing of financing statements is not akin to soliciting business in the forum, introducing products into the forum, or signing and performing a contract in the forum (*62 Cal. App. 4th 894, 907-908)* . Moreover, jurisdiction could not be based on out-of-state conduct causing an effect in California, *i.e.*, injury to the plaintiffs. The mere causing of an effect is not necessarily sufficient to afford a constitutional basis for jurisdiction. Jurisdiction may be invoked only if the actor committed an out-of-state act intending to cause effects in California or reasonably expecting that effects in California would result (*62 Cal. App. 4th 894, 908* -909).

Pennsylvania Life & Health Ins. Guaranty Assn. v. Superior Court (1994) 22 Cal. App. 4th 477, 27 Cal. Rptr. 2d 507 , was an action brought by a widow against a Pennsylvania insurance guaranty association, in which she sought to recover as beneficiary of her husband's life insurance policy issued by a Pennsylvania insurance company that later became insolvent. The trial court denied the guaranty association's motion to quash service of summons for lack of personal jurisdiction and the guaranty association sought a petition for writ of mandate.

The court of appeal issued a writ of mandate, directing the trial court to vacate its order. It held that the guaranty association's contacts to California were insufficient to establish jurisdiction when its only contacts were sending two letters to the deceased insured in California as part of its effort to wind up the affairs of the insolvent Pennsylvania insurance company and thus the association did not direct its activities toward a specific California resident or "purposefully avail" itself of the benefits and protections of California. The court further stated that the guaranty association did not impliedly consent to be sued in California since it stood in the shoes of the insolvent Pennsylvania insurer only for some limited purposes, the extent of its liability was limited to statutorily defined claims, and it was not in the business of insurance for profit (*22 Cal. App. 4th 477, 483)* .

The facts and procedural background of *Felix v. Bomoro Kommanditgesellschaft (1987) 196 Cal. App. 3d 106, 241 Cal. Rptr. 670* , are discussed in *§ 132.75[4][a]*. In affirming the judgment of dismissal after the defendant's motion to quash service of summons was granted, the court of appeal said that in instances where jurisdiction is based on the defendant's occasional activities within the forum state, the United States Supreme Court has made it clear that there must be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws (*196 Cal. App. 3d 106, 112)* .

See also *Buckeye Boiler Co. v. Superior Court (1969) 71 Cal. 2d 893, 898, 80 Cal. Rptr. 113, 458 P.2d 57* , discussed in *§ 132.77[3][c]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsMinimum Contacts

California Points & Authorities

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 132 JURISDICTION: PERSONAL JURISDICTION AND INCONVENIENT FORUM
PART II. FORMS
C. Bases of Jurisdiction

13-132 California Points & Authorities § 132.77

§ 132.77 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground That Court Lacks Personal Jurisdiction--Nonresident Defendant Lacks Minimal Contacts With California--Exercise of Limited Jurisdiction Is Improper--Exercise of Jurisdiction Must Be Reasonable and Fair

[1] FORM

[*The following should be combined with general points and authorities concerning the exercise of limited jurisdiction over a nonresident defendant (see § 132.76).*]

DEFENDANT'S CONTACTS WITH THE FORUM STATE ARE NOT SUCH THAT IT IS REASONABLE AND FAIR FOR THE COURT TO EXERCISE LIMITED PERSONAL JURISDICTION OVER THE DEFENDANT.

A. Reasonableness and Fairness Requirement. The protection against inconvenient litigation is described in terms of "reasonableness" and "fairness"; the nonresident defendant's contacts with the forum state must be such that maintenance of the suit does not offend traditional notions of fair play and substantial justice; thus, the relationship between the defendant and the forum must be such that it is reasonable to require the defendant to defend the particular suit which is brought there (*World-Wide Volkswagen Corp. v. Woodson (1980) 444 U.S. 286, 292, 100 S. Ct. 559, 62 L. Ed. 2d 490* ; *see also Cornelison v. Chaney (1976) 16 Cal. 3d 143, 147, 127 Cal. Rptr. 352, 545 P.2d 264*).

B. Relevant Factors. Implicit in the emphasis on reasonableness is the understanding that the burden on the nonresident defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including: (1) the forum state's interest in adjudicating the dispute; (2) the plaintiff's interest in obtaining convenient and effective relief, at least when that interest is not adequately protected by the plaintiff's power to choose the forum; (3) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (4) the shared interest of the several states in furthering fundamental substantive social policies (*World-Wide Volkswagen Corp. v. Woodson (1980) 444 U.S. 286, 292, 100 S. Ct. 559, 62 L. Ed. 2d 490* ; *see also Asahi Metal Industry Co. v. Superior Court (1987) 480 U.S. 102, 113, 107 S. Ct. 1026, 94 L. Ed. 2d 92* ; *Sinatra v. National Enquirer, Inc. (9th Cir. 1988) 854 F.2d 1191, 1198-1199)* .

C. Balancing of Conveniences for Exercise of Limited Jurisdiction. Once it is established that the defendant has engaged in activity of the requisite quality and nature in the forum state and that the cause of action is sufficiently connected with this activity, the propriety of an assumption of jurisdiction depends on a balancing of the inconvenience to the defendant in having to defend itself in the forum state against both the interest of the plaintiff in suing locally and the interrelated interest of the state in assuming jurisdiction (*Buckeye Boiler Co. v. Superior Court (1969) 71 Cal. 2d 893, 899, 80 Cal. Rptr. 113, 458 P.2d 57* ; *see also* *Cornelison v. Chaney (1976) 16 Cal. 3d 143, 150-151, 127 Cal. Rptr. 352, 545 P.2d 264* ; *Magnecomp Corp. v. Athene Co. (1989) 209 Cal. App. 3d 526, 539, 257 Cal. Rptr. 278* ; *Belmont Industries, Inc. v. Superior Court (1973) 31 Cal. App. 3d 281, 286, 107 Cal. Rptr. 237*).

[*Optional*] **D. When Defendant Is Foreign National.** In every case, the substantive interests of other nations, as well as the federal interest in its foreign relations policies, are best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum state; great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field (*Asahi Metal Industry Co. v. Superior Court (1987) 480 U.S. 102, 115, 107 S. Ct. 1026, 94 L. Ed. 2d 92* ; *J. M. Sahlein Music Co. v. Nippon Gakki Co., Ltd. (1987) 197 Cal. App. 3d 539, 546, 243 Cal. Rptr. 4*).

[2] Comments

[a] Use of Form

The form in [1], *above*, is for use in support of a motion to quash service of summons under *Code Civ. Proc. § 418.10(a)(1)*, on the ground that the court has no proper basis for exercising personal jurisdiction over the defendant, because the defendant is a nonresident individual or legal entity who lacks the minimal contacts with California that are necessary under constitutional due process limitations to support the court's exercise of such jurisdiction. The point of law stated is that the exercise of limited personal jurisdiction over a nonresident defendant must be reasonable and fair in light of the circumstances of the case.

This form does not provide a complete memorandum, but is designed to be combined with general points and authorities relating to the proper exercise of limited jurisdiction [*see § 132.76*], and, when appropriate, with points and authorities relating to the exercise of limited jurisdiction in specific fact situations [*see §§ 132.78 -132.88*].

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Evaluation of Factors

Consideration of the factors set forth in Paragraphs B and C of the foregoing form overlap to some extent with the factors considered on a motion to stay or dismiss an action or proceeding for inconvenient forum [*see § 132.130* et seq.].

[c] Opposing Memoranda

For memoranda of points and authorities that may, in an appropriate case, be submitted in opposition to the foregoing memorandum, see *§§ 132.100, 132.104, 132.107 -132.115*.

[3] Discussion of Authorities

[a] Reasonableness and Fairness Requirement

The facts and procedural background of ***World-Wide Volkswagen Corp. v. Woodson*** *(1980) 444 U.S. 286, 100 S. Ct.*

559, 62 L. Ed. 2d 490 , are discussed in *§ 132.70[3][g]*. In holding that the Oklahoma courts did not have in personam jurisdiction over the New York corporations and reversing the judgment of the Oklahoma Supreme Court, the United States Supreme Court said that the protection against inconvenient litigation is typically described in terms of "reasonableness" or "fairness," that the defendant's contacts with the forum state must be such that maintenance of the suit does not offend traditional notions of fair play and substantial justice, and that the relationship between the defendant and the forum must be such that it is "reasonable" to require the corporation to defend the particular suit which is brought there (*444 U.S. 286, 292)* .

The facts and procedural background of ***Cornelison v. Chaney*** *(1976) 16 Cal. 3d 143, 127 Cal. Rptr. 352, 545 P.2d 264* , are discussed in *§ 132.100[3][g]*. Although the California Supreme Court reversed the judgment of dismissal following the granting of a motion to quash out-of-state service of summons by mail on the ground that the court could exercise limited jurisdiction over the nonresident defendant, the Court said that, in a significant line of cases beginning with *International Shoe Co. v. Washington (1945) 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95* (discussed in *§ 132.70[3][d]*), the United States Supreme Court has defined the parameters of the powers of states to compel nonresidents to defend suits brought against them in the state's courts, and that the general rule is that the forum state may not exercise jurisdiction over a nonresident unless his or her relationship to the state is such as to make the exercise of such jurisdiction reasonable (*16 Cal. 3d 143, 147)* .

[b] Relevant Factors

The facts and procedural background of ***World-Wide Volkswagen Corp. v. Woodson*** *(1980) 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490* , are discussed in *§ 132.70[3][d]*. Holding that the Oklahoma courts did not have in personam jurisdiction over the New York corporations and reversing the judgment of the Oklahoma Supreme Court, the United States Supreme Court said that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, at least when that interest is not adequately protected by the plaintiff's power to choose the forum, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies (*444 U.S. 286, 292)* . The Court further pointed out that the reasonableness of asserting jurisdiction over the defendant must be assessed in the context of our federal system of government and that the due process clause ensures not only fairness, but also the orderly administration of the laws (*444 U.S. 286, 293-294)* .

The facts and procedural background of ***Asahi Metal Industry Co. v. Superior Court*** *(1987) 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92* , are *discussed under § 132.77[3][d]*. In reversing the California Supreme Court, which had upheld the jurisdiction of the California superior court over a Japanese company, the United States Supreme Court, citing *World-Wide Volkswagen Corp. v. Woodson (1980) 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490* (discussed *above*), said that it had previously explained that the determination of the reasonableness of the exercise of jurisdiction in each case will depend on an evaluation of several factors, that the court must consider the burden on the defendant, the interests of the forum state, and the plaintiff's interest in obtaining relief, and it must also weigh in its determination the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies (*480 U.S. 102, 113)* .

The procedural background of ***Sinatra v. National Enquirer, Inc.*** *(9th Cir. 1988) 854 F.2d 1191* , is discussed in *§ 132.100[4][d]*. In affirming the judgment for plaintiff, the United States Court of Appeals said that reasonableness is considered as a separate factor in determining the existence of limited personal jurisdiction, that once it has been shown that the defendant purposefully availed himself or herself of the forum's benefits, the burden shifts to the defendant to overcome the presumption that the exercise of jurisdiction is reasonable, and that in determining reasonableness the court would examine the following seven factors: (1) the extent of defendant's purposeful interjection (which is analogous to the purposeful direction analysis [*see § 132.100*]); (2) the burden on the defendant in defending in the forum in light of the corresponding burden on the plaintiff in litigating in the foreign jurisdiction; (3) the extent of any

conflict with the sovereignty of the defendant's state; (4) the forum state's interest in adjudicating the suit; (5) the most efficient judicial resolution of the dispute; (6) the convenience and effectiveness of relief for the plaintiff; and (7) the existence of an alternative forum (*854 F.2d 1191, 1198-1199)* . The court said that the application of these seven factors is not mechanical, but rather, in determining whether the exercise of personal jurisdiction is reasonable, the court must balance them (*854 F.2d 1191, 1199)* . The court then separately analyzed the seven factors and concluded that, after balancing the relative significance of each factor, the district court's exercise of jurisdiction over the Swiss clinic was reasonable (*854 F.2d 1191, 1199-1201)* .

See also ***Cornelison v. Chaney*** *(1976) 16 Cal. 3d 143, 127 Cal. Rptr. 352, 545 P.2d 264 , discussed under § 132.77[3][c].*

[c] Balancing of Conveniences for Exercise of Limited Jurisdiction

Buckeye Boiler Co. v. Superior Court *(1969) 71 Cal. 2d 893, 80 Cal. Rptr. 113, 458 P.2d 57* , was a mandate proceeding arising out of an action by a California worker for damages for personal injuries sustained when a pressure tank, which was manufactured some seven years earlier by the defendant, an Ohio corporation, but not sold by it to plaintiff's employer, was being used in connection with a system for the spraying of liquid under air pressure. The defendant manufactured pressure vessels having numerous and varied uses; sales were solicited outside Ohio in interstate commerce both directly and through independent manufacturers' representatives who sold the defendant's products on a commission basis in a number of states, but not California. The defendant's only contact with California was its sales of pressure tanks (of a kind not involved in the action) to an Ohio corporation which maintained a manufacturing plant in California, and the shipment of tanks directly to the California plant. Defendant's motion to quash service of summons was denied and the defendant petitioned for a writ of mandate to compel the trial court to grant its motion.

In denying the peremptory writ, the California Supreme Court first pointed out that former Code Civ. Proc. § 411(2) [*now see Code Civ. Proc. § 410.10*] authorized service of process on foreign corporations doing business in California, and that this section exerted the full power of the state, consistent with the due process clause, to subject foreign corporations to the jurisdiction of California courts (*71 Cal. 2d 893, 898)* . The Court said that (1) a defendant not literally present in the forum state may not be required to defend itself in that state's tribunals unless the quality and nature of the defendant's activity in relation to the particular cause of action makes it fair to do so; (2) such a defendant's activity must consist of an act performed or transaction consummated in the forum state or some other act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws; and (3) furthermore, unless the defendant's forum-related activity reaches such extensive or wide-ranging proportions as to make the defendant sufficiently present in the forum state to support jurisdiction over it concerning causes of action which are unrelated to that activity, the particular cause of action must arise out of or be connected with the defendant's forum-related activity (*71 Cal. 2d 893, 898-899)* . The Court said that once it is established that the defendant has engaged in activity of the requisite quality and nature in the forum state and that the cause of action is sufficiently connected with this activity, the propriety of an assumption of jurisdiction depends on a balancing of the inconvenience to the defendant in having to defend itself in the forum state against both the interest of the plaintiff in suing locally and the interrelated interest of the state in assuming jurisdiction. In other words, once the threshold of sufficient activity by the defendant has been passed, the question of the propriety of subjecting the defendant to the jurisdiction of the forum involves both a consideration of fairness to the plaintiff and a determination of whether, from a standpoint of the logical and orderly distribution of interstate litigation, the forum state is a "forum conveniens" (*71 Cal. 2d 893, 899)* .

The facts and procedural background of ***Cornelison v. Chaney*** *(1976) 16 Cal. 3d 143, 127 Cal. Rptr. 352, 545 P.2d 264* , are discussed in *§ 132.100[3][g].* Although the California Supreme Court reversed the dismissal of the action following the granting of the nonresident's motion to quash service of summons, the Court said that it next considered whether it would be fair and reasonable to subject defendant to the jurisdiction of California in light of the

inconvenience to him in defending an action in this state, when balanced against the interests of plaintiff in suing locally and of the state in assuming jurisdiction (*16 Cal. 3d 143, 150)* . In reply to plaintiff's assertion that the Court was precluded from considering the balance of these conveniences because defendant did not move to dismiss the action on the ground of inconvenient forum, the Court said that in situations where justification for the exercise of jurisdiction is not obvious, the convenience of the parties is a factor to be considered in determining whether it would be fair to exercise jurisdiction over a defendant who resides in another state (*16 Cal. 3d 143, 150-151)* . The Court said that the following are some of the considerations involved in this balance: (1) the relative availability of evidence and the burden of defense and prosecution in one place rather than another; (2) the interest of a state in providing a forum for its residents or regulating the business involved; (3) the ease of access to an alternative forum; (4) the avoidance of a multiplicity of suits and conflicting adjudications; and (5) the extent to which the cause of action arose out of defendant's local activities (*16 Cal. 3d 143, 151)* . After weighing the relevant considerations, the Court concluded that it would not offend due process to subject the defendant to the jurisdiction of the California courts (*16 Cal. 3d 143, 151-152)* .

The procedural background of ***Magnecomp Corp. v. Athene Co.*** *(1989) 209 Cal. App. 3d 526, 257 Cal. Rptr. 278* , is discussed in *§ 132.75[3][a]*. In reversing the order quashing service of summons on the Japanese corporation in an action for alleged misappropriation of trade secrets, the court of appeal, quoting *Buckeye Boiler Co. v. Superior Court (1969) 71 Cal. 2d 893, 899, 80 Cal. Rptr. 113, 458 P.2d 57* (discussed *above*), said once it is established that the defendant has engaged in activity of the requisite quality and nature in the forum state and that the cause of action is sufficiently connected with this activity, the propriety of an assumption of jurisdiction depends on a balancing of the inconvenience to the defendant in having to defend itself in the forum state against both the interest of the plaintiff in suing locally and the interrelated interest of the state in assuming jurisdiction. The court said that the considerations pertaining to the convenient forum include, inter alia, the interest of the state in providing a forum to its residents; the choice of law; the relative availability of evidence; the ease of access to an alternative forum; the avoidance of the multiplicity of suits and conflicting adjudications; and inconvenience to the defendant to defend himself or herself in the local forum. The court concluded that each of these factors militated toward California as the appropriate forum (*209 Cal. App. 3d 526, 539)* .

Belmont Industries, Inc. v. Superior Court *(1973) 31 Cal. App. 3d 281, 107 Cal. Rptr. 237* , was a proceeding in mandate seeking to compel the trial court to enter its order quashing service of summons on the defendant for lack of jurisdiction in an action by a California corporation against a foreign corporation to recover on a contract for services rendered. The defendant's only contact with California was the negotiation through interstate communications of the contract, executed by a purchase order in Pennsylvania. In granting the writ, the court of appeal said that in deciding whether jurisdiction reasonably may be assumed it had to analyze the nature and quality of the foreign corporation's activities in relation to California, and that this required a consideration of the following criteria: (1) the state's interest in providing a forum for its resident and in regulating the business involved; (2) the relative availability of evidence and the burden of defense and prosecution in one place rather than another; (3) the ease of access to an alternative forum; (4) the avoidance of multiplicity of suits and conflicting adjudications; and (5) the extent to which the cause of action arose out of defendant's activities in California (*31 Cal. App. 3d 281, 286)* . The court concluded that the evaluation of these considerations weighed against the assumption of jurisdiction by the California court. The court added that another compelling reason against the assumption of jurisdiction by California under the circumstances of the case was the adverse effect it would have on interstate commerce, that to hold that a foreign buyer had subjected itself to the judicial jurisdiction of California by the simple act of purchasing services from a California resident would hinder interstate business contrary to the best economic interest of California (*31 Cal. App. 3d 281, 289)* .

[d] When Defendant Is Foreign National

Asahi Metal Industry Co. v. Superior Court *(1987) 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92* , was a proceeding in certiorari brought by a Japanese manufacturer of tire valve assemblies which it sold to various tire manufacturers, including a Taiwanese company. The sales took place in Taiwan. The Taiwanese company incorporated

the assemblies into its finished tires which it sold throughout the world, including California in which about 20 percent of its U.S. sales were made. The proceeding arose out of a products liability action against the Taiwanese company for personal injuries and wrongful death sustained in California when one of the company's tires installed on a motorcycle suddenly lost air and exploded, causing the driver to lose control and the motorcycle to crash into a tractor, resulting in serious injuries to the motorcycle driver and the death of his passenger-wife. The complaint alleged that the tire, tube, and sealant were defective. The Taiwanese company filed a cross complaint for indemnity against the Japanese company. The main damages suit was eventually settled and dismissed, but the California superior court denied the Japanese company's motion to quash service of the summons issued against it.

The California court of appeal ordered that the service be quashed, but the California Supreme Court reversed. Although the Court observed that the Japanese company had no offices, property, or agents in California, solicited no business in California, made no direct sales in California, and did not design or control the system of distribution that carried its valve assemblies into California, it nonetheless held that the Japanese company's intentional act of placing its assemblies into the stream of commerce by delivering them in Taiwan to the Taiwanese company, coupled with its awareness that some of them would eventually reach California, were sufficient to support state court jurisdiction under the due process clause.

On certiorari, the United States Supreme Court pointed out that *World-Wide Volkswagen Corp. v. Woodson (1980) 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490* (discussed in *§ 132.77[3][a]*) admonished courts to take into consideration the interests of the several states, in addition to the forum state, in the efficient judicial resolution of a dispute and the advancement of substantive policies and added that this advice called for the Court to consider in the case before it the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction by the California court (*480 U.S. 102, 115)* . The Court said that the procedural and substantive interests of other nations in a state court's assertion of jurisdiction over an alien defendant will differ from case to case, but that, in every case, those interests, as well as the federal interest in its foreign relations policies, will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum state (*480 U.S. 102, 115)* . The Court cautioned that great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field (*480 U.S. 102, 115)* , and concluded that, considering the international context, the heavy burden on the alien defendant, and the slight interests of the plaintiff and the forum state, the exercise of personal jurisdiction over the Japanese company would be unreasonable and unfair (*480 U.S. 102, 116)* . Because it found that the facts of the case did not establish minimum contacts such that the exercise of jurisdiction would be consistent with fair play and substantial justice, the Supreme Court reversed the judgment of the California Supreme Court and remanded the case for further proceedings not inconsistent with its opinion (*480 U.S. 102, 116)* .

The facts and procedural background of ***J.M. Sahlein Music Co. v. Nippon Gakki Co., Ltd.*** *(1987) 197 Cal. App. 3d 539, 243 Cal. Rptr. 4* , are discussed in *§ 132.73[4][a]*. In affirming the order quashing service of summons on a Japanese corporation, the court of appeal, quoting *Asahi Metal Industry Co. v. Superior Court (1987) 480 U.S. 102, 115, 107 S. Ct. 1026, 94 L. Ed. 2d 92* , said that, in every case, the interests of other nations as well as the federal interest in its foreign relations policies, will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and of an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum state, and that great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field (*197 Cal. App. 3d 539, 546)* .

[4] Additional Authorities

[a] Reasonableness and Fairness Requirement

The facts and procedural background of *Kulko v. California Superior Court (1978) 436 U.S. 84, 98 S. Ct. 1690, 56 L. Ed. 2d 132* , are discussed in *§ 132.70[3][a]*. In holding that the denial of the motion to quash was error and reversing

the judgment of the California Supreme Court, the Supreme Court of the United States said that while the interests of the forum state and of the plaintiff in proceeding with the cause in the plaintiff's forum of choice are to be considered, an essential criterion in all cases is whether the quality and nature of the defendant's activity is such that it is reasonable and fair to require him or her to conduct his or defense in that state (*436 U.S. 84, 92)* .

In *Muckle v. Superior Court (2002) 102 Cal. App. 4th 218, 125 Cal. Rptr. 2d 303* , Andrew Muckle was a resident of California from January 1998 through December 1998. While living in California and married to Cassandra Muckle, he purchased property in Georgia, which he took title to in his name alone. Since December 1998, Andrew was a resident of Georgia. In January 2001, Cassandra served dissolution papers on Andrew in Georgia by substituted service. Andrew made a special appearance to contest jurisdiction, moving to quash service of summons for lack of personal jurisdiction. Among other things, Andrew argued he had insufficient minimum contacts with California for the trial court to establish personal jurisdiction over him. Although acknowledging that California has a manifest interest in providing effective means of redress for its residents, the court declined to find that such interest coupled with the mere fact of past residency, during which a party while married purchased out of state property, is sufficient contacts of such nature and quality to entertain even "special" personal jurisdiction over Andrew consistent with traditional notions of fair play and substantial justice (*102 Cal. App. 4th 218, 225-231)* .

In *Yu v. Signet Bank/Virginia (1999) 69 Cal. App. 4th 1377, 1385, 82 Cal. Rptr. 2d 304* , plaintiffs filed an action individually and on behalf of others similarly situated against defendants challenging their debt collection practices with respect to credit cards they issued to California residents. Defendants had a program for dealing with out-of-state-debtors who defaulted on their credit cards and during the proposed class period had obtained many judgments in Virginia courts against California residents. Prior to the action, defendants had obtained a default judgment in Virginia against plaintiffs and garnished the salary of one of the plaintiffs (*69 Cal. App. 4th 1377, 1381-1384)* . In reversing summary judgment in favor of the defendants on plaintiffs' abuse of process and unlawful business practice claims, and affirming the judgment as to the other causes of action (*69 Cal. App. 4th 1377, 1381, 1398)* , the court of appeal addressed the issue of the jurisdiction of the Virginia state court concerning the default judgment. The court noted that a judgment of a court lacking personal jurisdiction is a violation of due process, and is null and void everywhere, including the state in which it is rendered (*69 Cal. App. 4th 1377, 1385)* . After rejecting defendants' argument that any inquiry into the Virginia court's jurisdiction would be improper (*69 Cal. App. 4th 1377, 1385-1386)* , the court concluded that the Virginia judgments against defendants' distant out-of-state cardholders were in excess of jurisdiction (*69 Cal. App. 4th 1377, 1388)* . The court noted that as a matter of due process, personal jurisdiction over a defendant who is outside the forum requires that he or she have certain minimum contacts with it such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. It must appear that the defendant purposefully directed his or her activities at residents of the forum such that he or she should reasonably anticipate being haled into court there. With respect to interstate contracts, parties who reach out beyond one state and create continuing relationships and obligations with citizens of another state are subject to the latter state's jurisdiction. However, a contract with an out-of-state party does not alone automatically confer jurisdiction on the other party's home forum. Fortuitous, or attenuated contacts with the forum are insufficient, and jurisdictional rules may not be employed in such a way as to make litigation so gravely difficult and inconvenient that a party unfairly is at severe disadvantage in comparison to his or her opponent. Jurisdiction may not be grounded on a contract whose application would render litigation so gravely difficult and inconvenient that a party will for all practical purposes be deprived of his or her day in court. Jurisdictional rules may not be employed against small consumers to cripple their defense. Insofar as appeared from the record, the plaintiffs were merely unsophisticated California consumers who, pursuant to a credit card solicitation, signed up for the card, used the card and made payments on the card. In so doing, they neither deliberately affiliated themselves with Virginia in any meaningful sense, nor would they have foreseen the need to go there to defend themselves in any dispute arising from the credit agreement. They had no relationship with Virginia other than their card and it was fundamentally unfair to expect them to travel thousand of miles to litigate matters concerning their account (*69 Cal. App. 4th 1377, 1386-1388)* .

In *Wolfe v. City of Alexandria (1990) 217 Cal. App. 3d 541, 265 Cal. Rptr. 881* , the court of appeal affirmed orders

quashing service of summons on the defendants, a city in a sister state and public and private community services organizations operating in that state and certain of their employees, none of whom resided, did business, or was present in California, in an action by an elderly sister, who was unable to adequately care for herself, and brother for injuries allegedly sustained as a result of defendants having caused the sister to be transported from Virginia to San Francisco and there "dumped" on her brother who was unable to care for her. The court quoted the statements from *Buckeye Boiler Co. v. Superior Court (1969) 71 Cal. 2d 893, 898-899, 80 Cal. Rptr. 113, 458 P.2d 57* , set out under § 132.77[3][c], but concluded that because plaintiffs had not passed the threshold test (sufficient activity by the defendants with respect to the forum state), it need not and would not consider the issues of convenience of forum (*217 Cal. App. 3d 541, 545)* .

In *Mihlon v. Superior Court (1985) 169 Cal. App. 3d 703, 215 Cal. Rptr. 442* , although the court of appeal denied a peremptory writ of mandate sought to compel the trial court to quash service of summons on foreign defendants, the court, quoting *Cornelison v. Chaney (1976) 16 Cal. 3d 143, 147-148, 127 Cal. Rptr. 352, 545 P.2d 264* , *discussed under § 132.77[3][a]*, said that the general rule is that the forum state may not exercise jurisdiction over a nonresident unless his or her relationship with the state is such as to make the exercise of such jurisdiction reasonable (*169 Cal. App. 3d 703, 710)* .

In *E.I.C., Inc. v. Bank of Virginia (1980) 108 Cal. App. 3d 148, 166 Cal. Rptr. 317* , the court of appeal, in affirming orders quashing service of summons on cross defendants, a Virginia bank and a resident of Virginia, in an action by a New York corporation against a California corporation to enforce a deficiency judgment obtained in Kentucky, the court of appeal said that the general rule is that a forum court may not assume personal jurisdiction over a nonresident defendant unless his or her relationship with the state is such as to make the exercise of jurisdiction reasonable in the context of our federal system (*108 Cal. App. 3d 148, 152-153)* .

In *Kaiser Aetna v. Deal (1978) 86 Cal. App. 3d 896, 150 Cal. Rptr. 615* , the court of appeal, in affirming an order quashing the service of summons on nonresident defendants in an action arising out of allegedly fraudulent land transactions, the court of appeal said that, generally, a state may not exercise jurisdiction over a nonresident unless the relationship of the nonresident to the state is such as to make the exercise of jurisdiction reasonable (*86 Cal. App. 3d 896, 899-900)* .

In *Boaz v. Boyle & Co. (1995) 40 Cal. App. 4th 700, 46 Cal. Rptr. 2d 888* , grandchildren of mothers who had ingested a certain drug while pregnant sought to sue the manufacturers of the drug for injuries that the grandchildren received when they were born. The original drug ingestion occurred in New York, and actions were originally pursued in New York, but New York State declined to recognize the preconception tort relied on by plaintiffs. The plaintiffs then sought relief in California. One of the defendants, a New York corporation, raised the issue of jurisdiction by a motion to quash the return of service. The trial court granted the motion.

The court of appeal affirmed. The defendant had never been licensed to do business in California, and has never had salespersons or offices in California. The defendant had conducted advertising on a national scale, but the court concluded that this did not justify the assertion of general jurisdiction over a nonresident defendant (*40 Cal. App. 4th 700, 717)* . The court reasoned that a common factor in cases applying the doctrine of minimum contacts to support personal jurisdiction which was lacking in this case was that the nonresident defendant's acts must have caused the forum-related injury (*40 Cal. App. 4th 700, 718)* . Plaintiffs argued that modern litigation requires a relaxed approach to the limits of state jurisdiction, and that the key factors should be the concentration of expertise and experience in a handful of attorneys, an accumulated library of discovery and legal materials, and the availability of experts. However, the court held that even though improvements in transportation and communication have made it less burdensome for a party to defend itself in a state in which it engages in economic activity, the restrictions on the personal jurisdiction of state courts are important to the territorial limitations on the power of the states (*40 Cal. App. 4th 700, 720)* .

[b] Relevant Factors

The facts and procedural background of *Burger King Corp. v. Rudzewicz (1985) 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528* , are discussed in *§ 132.76[3][c]*. The United States Supreme Court stated that, once it has been decided that a defendant purposefully established minimum contacts within the forum state, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice (*471 U.S. 462, 476)* . The Court said that, thus, courts in appropriate cases may evaluate the burden on the defendant, the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies, and that these considerations sometimes serve to establish the reasonableness of jurisdiction on a lesser showing of minimum contacts than would otherwise be required (*471 U.S. 462, 476-477)* . The Court added that where a defendant who purposefully has directed his or her activities at forum residents seeks to defeat jurisdiction, he or she must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable (*471 U.S. 462, 477)* .

In *Fisher Governor Co. v. Superior Court (1959) 53 Cal. 2d 222, 1 Cal. Rptr. 1, 347 P.2d 1* , after holding that the activities of independent nonexclusive sales representatives of a foreign corporation in California were insufficient to give the California courts general jurisdiction over actions for wrongful death and personal injuries occurring in Idaho, the California Supreme Court said that it had to look beyond defendant's sales activities in this state to determine whether jurisdiction could constitutionally be assumed (*53 Cal. 2d 222, 225)* . The Court listed the following as factors to be considered: (1) the interest of the state in providing a forum for its residents or in regulating the business involved; (2) the relative availability of evidence and the burden of defense and prosecution in one place rather than another; (3) the ease of access to an alternative forum; (4) the avoidance of multiplicity of suits and conflicting adjudications; and (5) the extent to which the cause of action arose out of defendant's local activities (*53 Cal. 2d 222, 225-226)* . The Court concluded that none of these considerations supported the assumption of jurisdiction and granted the peremptory writ of mandate directing the trial court to quash service of summons (*53 Cal. 2d 222, 226)* .

The facts and procedural background of *Jewish Defense Organization, Inc. v. Superior Court (1999) 72 Cal. App. 4th 1045, 85 Cal. Rptr. 2d 611* , are discussed in *§ 132.89[3][a]*. In issuing a peremptory writ of mandate directing the trial court to vacate its order and to enter a new and different order granting the motion to quash service of summons, the court of appeal noted that if the nonresident defendant does not have substantial and systematic contacts in the forum sufficient to establish general jurisdiction, he or she may still be subject to the specific jurisdiction of the forum if the defendant has purposefully availed himself or herself of forum benefits and the controversy is related to or arises out of a defendant's contacts with the forum. In analyzing the exercise of specific jurisdiction, once it has been decided that a defendant purposefully established minimum contacts within the forum state, these contacts may be considered in light of other factors to determine if assertion of personal jurisdiction comports with fair play and substantial justice. Courts may evaluate the burden on the defendant of appearing in the forum, the forum state's interest in adjudicating the claim, the plaintiff's interest in convenient and effective relief within the forum, judicial economy, and the shared interest of the several states in furthering fundamental substantive social policies (*72 Cal. App. 4th 1045, 1054)* .

In *Great-West Life Assurance Co. v. Guarantee Co. of North America (1988) 205 Cal. App. 3d 199, 252 Cal. Rptr. 363* , in affirming an order quashing service of summons for lack of jurisdiction and dismissing the action by a Canadian insurance company against a Canadian bond company for breach of contract, the covenant of good faith and fair dealing, and statutory duties on the ground the defendant did not possess sufficient minimum contacts with California for an assertion of jurisdiction, the court of appeal said that even if it were to conclude that the defendant did possess such minimum contacts, several other considerations would come into play (*205 Cal. App. 3d 199, 209)* . Quoting *Burger King Corp. v. Rudzewicz (1985) 471 U.S. 462, 476-477, 105 S. Ct. 2174, 85 L. Ed. 2d 528* (discussed *above*), the court said once it has been decided that a defendant purposefully established minimum contacts with the forum state, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice, and that, if it is established that a defendant purposefully has directed his or her activities at forum residents, the burden shifts to him or her to present a compelling case that the

presence of some other considerations would render jurisdiction unreasonable (*205 Cal. App. 3d 199, 209)* . The court said that the determination of the reasonableness of jurisdiction in each case depends on an evaluation of several factors, and, quoting *Asahi Metal Industry Co. v. Superior Court (1987) 480 U.S. 102, 113, 107 S. Ct. 1026, 94 L. Ed. 2d 92* (*discussed under § 132.77[3][d]*), said that a court must consider the burden on the defendant, the interests of the forum state, and the plaintiff's interest in obtaining relief, and that it must also weigh in its determination the interstate judicial system's interest in obtaining the most efficient resolution of controversies and the shared interest of the several states in furthering fundamental substantive social policies (*205 Cal. App. 3d 199, 209)* . Applying these factors, the court said that the burden imposed on the defendant were it required to defend a contractual claim in the California courts clearly would be substantial, that California has little interest in adjudicating a contractual dispute between two Canadian insurance companies, neither of which is a resident of California, where the underlying claims of the California residents already had been disposed of and would not be affected by the litigation, and that it was doubtful that our choice of law rules would dictate that California law be applied (*205 Cal. App. 3d 199, 209)* .

[c] Balancing of Conveniences for Exercise of Limited Jurisdiction

County of Humboldt v. Harris (1988) 206 Cal. App. 3d 857, 254 Cal. Rptr. 49 , was an action against a nonresident defendant to establish paternity and secure child support. The court of appeal said that the requirement of minimum contacts is met by the performing of an act in the state provided (1) the cause of action alleged arises from the act performed and (2) in light of the circumstances the exercise of jurisdiction is reasonable (*206 Cal. App. 3d 857, 860)* . The court said that, in determining reasonableness, a number of factors are to be considered: the nature and quality of the act, the extent of the relationship of the state to the defendant and the plaintiff, and the degree of inconvenience to the defendant if forced to defend in the state (*206 Cal. App. 3d 857, 860)* .

[d] When Defendant Is Foreign National

Core-Vent Corp. v. Nobel Industries AB (9th Cir. 1993) 11 F.3d 1482 , involved an action brought by a California corporation against three Swedish doctors and a Swedish corporation for antitrust violations and libel based on articles published in international medical journals. The trial court granted defendants' motion to dismiss for lack of personal jurisdiction and the California corporation appealed.

The court of appeal affirmed. The court stated that the burden to the Swedish doctors to defend themselves in this country was particularly great since they had no ongoing connection to or relationship with the United States. It also noted that the defendants' purposeful interjection into California by virtue of the published articles was attenuated and that only one individual defendant had visited the United States five times in four years. The court concluded that jurisdiction over the defendants would not comport with the notions of fair play and substantial justice (*11 F.3d 1482, 1490)* .

Doe v. Roman Catholic Archbishop of Cashel & Emly (2009) 177 Cal. App. 4th 209, 99 Cal. Rptr. 3d 158 , which involved allegations of child molestation by a priest, defendant was an archdiocese located in Ireland. Substantial evidence showed that defendant did no more than accept tuition money and related expenses from a California diocese for the priest's seminary training, much the same as any other school that is a passive recipient of a student's tuition from a nonprofit scholarship fund. There was also substantial evidence to support findings that the priest was not an agent or employee of defendant, that defendant did not know the priest had a propensity to molest children, and that it did not assign or send him to the California diocese. The priest's alleged acts of molestation were very much attenuated from defendant's extremely limited contacts with California. Accordingly, the California court did not have specific personal jurisdiction over defendant.

Legal Topics:

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

Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsMinimum Contacts

California Points & Authorities

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CHAPTER 132 JURISDICTION: PERSONAL JURISDICTION AND INCONVENIENT FORUM
PART II. FORMS
C. Bases of Jurisdiction

13-132 California Points & Authorities § 132.78

§ 132.78 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground That Court Lacks Personal Jurisdiction--Nonresident Defendant Lacks Minimal Contacts With California--Exercise of Limited Jurisdiction Is Improper--Defendant Corporation's Sole Contacts With California Are Insubstantial and Unrelated to Controversy

[1] FORM

[*The following should be combined with general memoranda concerning the exercise of limited jurisdiction over a nonresident defendant (see § 132.76).*]

DEFENDANT'S ONLY CONTACTS WITH CALIFORNIA ARE TOO INCIDENTAL AND UNRELATED TO THE LITIGATION TO SUPPORT THIS COURT'S EXERCISE OF LIMITED PERSONAL JURISDICTION.

Defendant Corporation's Contacts Too Insubstantial. The exercise of limited personal jurisdiction over a nonresident defendant corporation when it has only marginal contact with the forum state that is unrelated to the litigation (*see Szabo v. Medical Information Bureau (1981) 127 Cal. App. 3d 51, 53-57, 179 Cal. Rptr. 368*).

[2] Comments

[a] Use of Form

This form is for use in support of a motion to quash service of summons under *Code Civ. Proc. § 418.10(a)(1)*, on the ground that the court has no proper basis for exercising personal jurisdiction over the defendant, because the defendant is a nonresident individual or legal entity who lacks the minimal contacts with California that are necessary under constitutional due process limitations to support the court's exercise of such jurisdiction. The point of law stated is that the court's exercise of limited jurisdiction is improper when the defendant's contacts with California are too incidental or insubstantial.

This form does not provide a complete memorandum, but is designed to be combined with general points relating to the proper exercise of limited jurisdiction [*see § 132.76*], and, when appropriate, with points relating to the exercise of

limited jurisdiction in other specific fact situations [*see §§ 132.77, 132.79 -132.88*].

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Opposing Memoranda

For memoranda that may, in an appropriate case, be submitted in opposition to the foregoing memorandum, see *§§ 132.100, 132.104, 132.108 -132.115*.

[3] Discussion of Authorities

[a] Defendant Corporation's Contacts Too Insubstantial

In ***Szabo v. Medical Information Bureau*** *(1981) 127 Cal. App. 3d 51, 179 Cal. Rptr. 368* , the court of appeal affirmed an order quashing service of summons on a nonresident corporation for lack of personal jurisdiction. The corporation was composed of several hundred life insurance companies and had a principal office located in Boston. The court noted that the cause of action alleged did not arise from activities of the corporation within California and that the corporation had no offices, property, bank accounts, employees, or directors located in California. The only contact that the corporation had with California was that some of its member life insurance companies were located in the state and that a consultant spent 100 hours per year in the state. The court concluded that these were insufficient contacts to support jurisdiction (*127 Cal. App. 3d 51, 53-57)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsMinimum ContactsCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss

California Points & Authorities

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CHAPTER 132 JURISDICTION: PERSONAL JURISDICTION AND INCONVENIENT FORUM
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13-132 California Points & Authorities § 132.79

§ 132.79 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground That Court Lacks Personal Jurisdiction--Nonresident Defendant Lacks Minimal Contacts With California--Exercise of Limited Jurisdiction Is Improper--Designation of Agent for Service of Process [Corp. Code § 2105] Insufficient by Itself

[1] FORM

[*The following should be combined with memoranda concerning the exercise of limited jurisdiction over a nonresident defendant (see § 132.76).*]

THE FACT THAT THE NONRESIDENT DEFENDANT HAS DESIGNATED AN AGENT FOR SERVICE OF PROCESS UNDER SECTION 2105 OF THE CORPORATIONS CODE IS NOT, WITHOUT MORE, SUFFICIENT TO JUSTIFY THIS COURT'S EXERCISE OF LIMITED PERSONAL JURISDICTION.

A. Designation of Agent for Service of Process Insufficient by Itself. A nonresident defendant's designation of an agent for service of process under *Section 2105 of the Corporations Code* is not sufficient, by itself, to justify exercising personal jurisdiction over the defendant (*Gray Line Tours v. Reynolds Electrical & Engineering Co. (1987) 193 Cal. App. 3d 190, 193-195, 238 Cal. Rptr. 419*).

[2] Comments

[a] Use of Form

The form in [1], *above*, is for use in support of a motion to quash service of summons under *Code Civ. Proc. § 418.10(a)(1)*, on the ground that the court has no proper basis for exercising personal jurisdiction over the defendant, because the defendant is a nonresident individual or legal entity who lacks the minimal contacts with California that are necessary under constitutional due process limitations to support the court's exercise of such jurisdiction. The point of law stated is that the court's exercise of limited jurisdiction is improper when it is dependent solely on the defendant's designation of an agent for service of process under *Corp. Code § 2105*.

This form does not provide a complete memorandum, but is designed to be combined with general points and authorities relating to the proper exercise of limited jurisdiction [*see § 132.76*], and, when appropriate, with points and authorities relating to the exercise of limited jurisdiction in other specific fact situations [*see §§ 132.77, 132.78, 132.80 -132.88*].

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Opposing Memoranda

In an appropriate case, the points and authorities *set out in § 132.104* may be used to oppose the points and authorities set out in the foregoing form.

[3] Discussion of Authorities

[a] Designation of Agent for Service of Process Insufficient by Itself

In ***Gray Line Tours v. Reynolds Electrical & Engineering Co.*** *(1987) 193 Cal. App. 3d 190, 238 Cal. Rptr. 419* , plaintiff appealed from the trial court's order quashing service of summons on defendant, a Texas corporation, whose principal place of business was in Nevada.

The court of appeal affirmed the order. Noting that defendant's contacts with California were limited and that the facts giving rise to plaintiff's cause of action arose exclusively in Nevada and were completely unrelated to defendant's forum-related contacts, the court found that there was no justification for exercising even limited jurisdiction over defendant corporation (*193 Cal. App. 3d 190, 193)* . The court rejected plaintiff's contention that defendant's designation of an agent for service of process under *Corp. Code § 2105* was sufficient to permit an exercise of jurisdiction (*193 Cal. App. 3d 190, 193-195)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsMinimum ContactsCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss

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13-132 California Points & Authorities § 132.80

§ 132.80 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground That Court Lacks Personal Jurisdiction--Nonresident Defendant Lacks Minimal Contacts With California--Exercise of Limited Jurisdiction Is Improper--Presence of Defendant's Property Unrelated to Action Is Insufficient by Itself

[1] FORM

[*The following should be combined with general points and authorities concerning the exercise of limited jurisdiction over a nonresident defendant (see § 132.76).*]

THE FACT THAT THE NONRESIDENT DEFENDANT HAS PROPERTY IN THIS STATE IS, BY ITSELF, INSUFFICIENT TO JUSTIFY THIS COURT'S EXERCISE OF JURISDICTION WHEN THE PROPERTY IS UNRELATED TO THE LITIGATION.

A. Assertion of Jurisdiction Based Solely on Presence of Property Unrelated to Action. The mere presence in the forum state of the property of a nonresident does not, in the absence of the existence of other ties among the nonresident defendant, the state, and the litigation, support the assertion of in personam jurisdiction over the nonresident in an action unrelated to the property (*Shaffer v. Heitner (1977) 433 U.S. 186, 213, 97 S. Ct. 2569, 53 L. Ed. 2d 683*).

[2] Comments

[a] Use of Form

The memorandum of points and authorities in [1], *above*, is for use in support of a motion to quash service of summons under Code Civ. Proc. § 418.10(a)(1), on the ground that the court has no proper basis for exercising personal jurisdiction over the defendant, because the defendant is a nonresident individual or legal entity who lacks the minimal contacts with California that are necessary under constitutional due process limitations to support the court's exercise of such jurisdiction. The point of law stated is that the court's exercise of limited jurisdiction is improper when it is based solely on the presence in the forum of property owned by the defendant but unrelated to the litigation.

This form does not provide a complete memorandum, but is designed to be combined with general points and authorities relating to the proper exercise of limited jurisdiction [*see § 132.76*], and, when appropriate, with points and authorities relating to the exercise of limited jurisdiction in other specific fact situations [*see §§ 132.77 -132.79, 132.81 -132.88*].

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Opposing Memoranda

In an appropriate case, the points and authorities *set out in § 132.109* may be used to oppose the points and authorities set out in the foregoing form.

[3] Discussion of Authorities

[a] Assertion of Jurisdiction Based Solely on Presence of Property Unrelated to Action

The facts and procedural background of ***Shaffer v. Heitner*** *(1977) 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683* , are discussed in *§ 132.70[3][e]*. In holding that the individual defendants did not have sufficient contacts with Delaware to support in personam jurisdiction, the Supreme Court pointed out that the Delaware courts based their assertion of jurisdiction solely on the statutory presence in Delaware of the individual defendants' property (stock, options, and warrants), but that that property was not the subject matter of the litigation, and the underlying action did not relate to that property. Hence the Court concluded that if jurisdiction existed at all it had to have some other foundation (*433 U.S. 186, 213)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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13-132 California Points & Authorities § 132.81

§ 132.81 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground That Court Lacks Personal Jurisdiction--Nonresident Defendant Lacks Minimal Contacts With California--Exercise of Limited Jurisdiction Is Improper--Defendant Is Merely Out-of-State Customer

[1] FORM

[*The following should be combined with general points and authorities concerning the exercise of limited jurisdiction over a nonresident defendant (see § 132.76).*]

DEFENDANT IS MERELY AN OUT-OF-STATE CUSTOMER OF PLAINTIFF, AND THIS FACT, WITHOUT MORE, IS INSUFFICIENT TO JUSTIFY THIS COURT'S EXERCISE OF LIMITED PERSONAL JURISDICTION.

Out-of-State Customers. A California business that seeks out customers in other states only through out-of-state agents or through interstate mail and telephone is not entitled to force such an out-of-state customer to come to California to defend a contract action when the customer is not "present" in California for general purposes (*Interdyne Co. v. SYS Computer Corp. (1973) 31 Cal. App. 3d 508, 511-512, 107 Cal. Rptr. 499*).

[2] Comments

[a] Use of Form

The memorandum of points and authorities in [1], *above*, is for use in support of a motion to quash service of summons under *Code Civ. Proc. § 418.10(a)(1)*, on the ground that the court has no proper basis for exercising personal jurisdiction over the defendant, because the defendant is a nonresident individual or legal entity who lacks the minimal contacts with California that are necessary under constitutional due process limitations to support the court's exercise of such jurisdiction. The point of law stated is that the court's exercise of limited jurisdiction is improper when it is based solely on the fact that the defendant is an out-of-state customer of the plaintiff.

This form does not provide a complete memorandum, but is designed to be combined with general points and authorities relating to the proper exercise of limited jurisdiction [*see § 132.76*], and, when appropriate, with points and

authorities relating to the exercise of limited jurisdiction in other specific fact situations [*see §§ 132.77 -132.80, 132.82 -132.88*].

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Opposing Memoranda

For memoranda of points and authorities that may, in an appropriate case, be submitted in opposition to the foregoing memorandum, see *§§ 132.100, 132.104, 132.108, 132.110 -132.115*.

[3] Discussion of Authorities

[a] Out-of-State Customers

Interdyne Co. v. SYS Computer Corp. *(1973) 31 Cal. App. 3d 508, 107 Cal. Rptr. 499* , was an action by a California corporation against an out-of-state corporation based on a contract for the purchase by the out-of-state corporation of computer parts manufactured by the California corporation.

In affirming the trial court's order quashing service of summons on the out-of-state corporation, the appellate court said that a California business that seeks out purchasers in other states who are not "present" in California for general purposes, and deals with them only by out-of-state agents or by interstate mail and telephone, is not entitled to force the customer to come to California to defend an action on the contract, and that *Code Civ. Proc. § 410.10* (long-arm statute) is not long enough to reach buyers who have only such minimal contact with California (*31 Cal. App. 3d 508, 511-512)* [compare *Interdyne Co.* with *Hall v. LaRonde (1997) 56 Cal. App. 4th 1342, 1346-1347, 66 Cal. Rptr. 2d 399* , discussed in *§ 132.100[3][n]*].

[4] Additional Authorities

[a] Out-of-State Customers

Hunt v. Superior Court (2000) 81 Cal. App. 4th 901, 97 Cal. Rptr. 2d 215 , involved an action for breach of an equipment financing lease agreement and guaranty. The only California connection to the transaction was that plaintiff, who had financed the transaction, had an office in California and processed and managed the financing lease at that office. The equipment was never delivered. Plaintiff's telephone call to the defendant lessee in Maryland to demand payment was that defendant's first contact with plaintiff. The defendant lessee told plaintiff that defendant would not pay for equipment never received. The court of appeal issued a writ of mandate overturning the trial court's denial of defendants' motion to quash service of summons for lack of personal jurisdiction. In so doing, the court noted that when an out-of-state resident's only contact with California is a single purchase from a California vendor of goods for delivery out of state, there are insufficient minimum contacts to establish personal jurisdiction even though the California vendor supplies financing to the buyer (*81 Cal. App. 4th 901, 906)* .

Spirits, Inc. v. Superior Court (1980) 104 Cal. App. 3d 918, 164 Cal. Rptr. 101 , arose out of an action for personal injury against an Arizona liquor store, which did no business in California, but which was located near the California border. Plaintiff had been injured in Arizona when a bottle sold by defendant exploded in her hand. The trial court denied defendant's motion to quash service of summons, and the court of appeal issued a writ of mandate, ordering the trial court to vacate its order denying defendant's motion. The court held that where an injury occurs outside the state, then a nonresident defendant's activities within the state must have been substantial and closely linked to the injury in order for California courts to have personal jurisdiction over the nonresident defendant (*104 Cal. App. 3d 918, 924-926)* . Therefore, there was no jurisdiction over defendant in that its activity in California (taking advantage of trade with California residents) did not constitute sufficient California business activity to overcome the fact that the injury

occurred outside the state (*104 Cal. App. 3d 918, 924)* .

In *Cornell University Medical College v. Superior Court (1974) 38 Cal. App. 3d 311, 113 Cal. Rptr. 291* , a mandate proceeding to compel the trial court to quash service of summons on a foreign educational corporation named as a cross defendant by an insurance carrier in an action to recover for damage in transit sustained by a piece of equipment purchased by the foreign corporation from a California manufacturer, where all negotiations for the purchase had been conducted by mail, the appellate court, in granting the writ, stated that it could find no authority for permitting a California court to take jurisdiction of a foreign corporation on the basis of the facts of the case (*38 Cal. App. 3d 311, 316-318)* .

Belmont Industries, Inc. v. Superior Court (1973) 31 Cal. App. 3d 281, 107 Cal. Rptr. 237 , was a proceeding in mandate seeking to compel the trial court to enter its order quashing service of summons on the defendant, a Pennsylvania corporation, for lack of jurisdiction in an action by a California drafting corporation to recover on a contract for services rendered. The defendant's only contact with California was the negotiation of the contract through interstate communications and the contract was executed by a purchase order in Pennsylvania. In granting the writ, the court of appeal said that although the contract sued on undoubtedly contemplated that the drafting firm would perform its obligations in California, that was not required by the contract, and that such performance would not give a California court jurisdiction of the Pennsylvania corporation, since it would be the Pennsylvania corporation's activity in California that must provide the basis, if any, for jurisdiction. The court found no purposeful activity by the Pennsylvania corporation in California from which it could be inferred that the Pennsylvania corporation intended to do business in California (*31 Cal. App. 3d 281, 286-288)* .

In *Tiffany Records, Inc. v. M. B. Krupp Distributors, Inc. (1969) 276 Cal. App. 2d 610, 81 Cal. Rptr. 320* , the court of appeal affirmed an order granting a motion to quash service of summons on nonresident purchasers of phonograph records from a California manufacturer in an action to recover the price. The court stated that the purchasers' activities were out of the state and, at most, consisted of the out-of-state placement or receipt of telephone calls and the mailing of orders; moreover, although this activity was frequent in some cases, it was nevertheless outside the state and did not constitute the quality and nature of activity that would make it fair to require any of them to defend a lawsuit in California (*276 Cal. App. 2d 610, 619)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsMinimum Contacts

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13-132 California Points & Authorities § 132.82

§ 132.82 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground That Court Lacks Personal Jurisdiction--Nonresident Defendant Lacks Minimal Contacts With California--Exercise of Limited Jurisdiction Is Improper--Individual Defendant Is Merely Officer or Director and Stockholder of Defendant Foreign Corporation

[1] FORM

[*The following should be combined with general points and authorities concerning the exercise of limited jurisdiction over a nonresident defendant (see § 132.76).*]

DEFENDANT _____[*name*] IS MERELY A STOCKHOLDER AND _____ [OFFICER *or* DIRECTOR] OF DEFENDANT FOREIGN CORPORATION, AND THIS FACT ALONE IS NOT SUFFICIENT TO JUSTIFY THIS COURT'S EXERCISE OF LIMITED PERSONAL JURISDICTION OVER DEFENDANT _____ [*name*] IN AN ACTION AGAINST DEFENDANT FOREIGN CORPORATION.

Officer or Director and Stockholder of Foreign Corporation. The mere fact that a nonresident is an officer or director and stockholder of an out-of-state corporation transacting interstate business with California residents does not make the nonresident subject to the in personam jurisdiction of a California court in an action against the corporation (*see Lundgren v. Superior Court (1980) 111 Cal. App. 3d 477, 486-487, 168 Cal. Rptr. 717* ; *Sheard v. Superior Court (1974) 40 Cal. App. 3d 207, 211-212, 114 Cal. Rptr. 743*).

[2] Comments

[a] Use of Form

The memorandum of points and authorities in [1], *above*, is for use in support of a motion to quash service of summons under *Code Civ. Proc. § 418.10(a)(1)*, on the ground that the court has no proper basis for exercising personal jurisdiction over the defendant, because the defendant is a nonresident individual or legal entity who lacks the minimal contacts with California that are necessary under constitutional due process limitations to support the court's exercise of

such jurisdiction. The point of law stated is that the court's exercise of limited jurisdiction is improper when it is based solely on the fact that an individual defendant is an officer or director and stockholder of a foreign corporation against which the action is being prosecuted.

This form does not provide a complete memorandum, but is designed to be combined with general points and authorities relating to the proper exercise of limited jurisdiction [*see § 132.76*], and, when appropriate, with points and authorities relating to the exercise of limited jurisdiction in other specific fact situations [*see §§ 132.77 -132.81, 132.83 -132.88*].

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Opposing Memoranda

In an appropriate case, the points and authorities *set out in §§ 132.100, 132.107, 132.110, 132.114* and *132.115* may be used to oppose the points and authorities set out in the foregoing form.

[3] Discussion of Authorities

[a] Officer or Director and Stockholder of Foreign Corporation

In ***Lundgren v. Superior Court*** *(1980) 111 Cal. App. 3d 477, 168 Cal. Rptr. 717* , an Oregon accounting corporation and its officer-shareholder were served with a California cross complaint. The California action arose from a stock transfer transaction. The plaintiff was a broker in the transaction and sued all the parties to it to recover fees for brokerage services. The defendants cross complained against several parties, including the Oregon accounting firm, and its sole shareholder, for furnishing false information to the cross complainants to induce them to complete the transaction. After being served by mail in Oregon, these cross defendants moved to quash service of summons. The trial court denied the motion, and they petitioned for a writ of mandate to compel the trial court to grant the motion.

In denying the writ with respect to the corporation on the ground that the corporation had sufficient contacts with California to be subject to its jurisdiction because of a different officer's activities in California which had been essential to the subject transaction (*111 Cal. App. 3d 477, 484)* and granting the writ with respect to the officer-shareholder because he had no contact with California, other than as an officer and shareholder of the corporation, did not personally participate in the subject transaction in any way, and Oregon law would not have imputed to him any legal responsibility for the conduct of another corporate officer in these circumstances, the court of appeal held that in these circumstances there was no basis on which California court could assert jurisdiction over him (*111 Cal. App. 3d 477, 486-487)* .

Sheard v. Superior Court *(1974) 40 Cal. App. 3d 207, 114 Cal. Rptr. 743* , was a mandate proceeding to compel the trial court to quash service of summons on nonresidents who were directors and owners, in varying specified proportions of all the issued and outstanding stock of the named defendant, an out-of-state corporation that was doing business in interstate commerce with California residents. In issuing the writ, the court of appeal said that, although jurisdiction over the corporation will support jurisdiction over the stockholders when a corporation is the alter ego of the stockholders so as to justify disregard of the corporate entity, (*40 Cal. App. 3d 207, 210)* , the plaintiff had failed to allege facts sufficient to justify application of the alter ego doctrine and had failed to prove facts requisite to an effective service on the individuals (*40 Cal. App. 3d 207, 211-212)* .

[4] Additional Authorities

[a] Officer or Director and Stockholder of Foreign Corporation

In *Arnesen v. Raymond Lee Organization, Inc. (1973) 31 Cal. App. 3d 991, 107 Cal. Rptr. 744* , in affirming the order quashing service of summons on three nonresident individual defendants who were officers of the defendant foreign corporation and were served outside California, the court of appeal rejected plaintiff's contentions that jurisdiction by the California court existed because (1) the separate identity of the corporation should be disregarded thereby rendering the individual defendants subject to personal jurisdiction in California (no factual basis for this contention was established) and (2) jurisdiction should be taken to prevent a failure of justice if the individual defendants were not required to appear (a contention contrary to the basic principle that jurisdiction is a constitutional concept dependent on a rule of law rather some vague concept of equity) (*31 Cal. App. 3d 991, 998)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsMinimum Contacts

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13-132 California Points & Authorities § 132.83

§ 132.83 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground That Court Lacks Personal Jurisdiction--Nonresident Defendant Lacks Minimal Contacts With California--Exercise of Limited Jurisdiction Is Improper--Advertising in California

[1] FORM

[*The following should be combined with general points and authorities concerning the exercise of limited jurisdiction over a nonresident defendant (see § 132.76).*]

THE FACT THAT DEFENDANT ENGAGED INDEPENDENT CONTRACTORS TO ADVERTISE IN CALIFORNIA IS NOT, BY ITSELF, SUFFICIENT TO JUSTIFY THIS COURT'S EXERCISE OF LIMITED PERSONAL JURISDICTION.

Advertising in California. Sales and sales promotion by nonexclusive agents or independent contractors in the forum state do not constitute "doing business" so as to extend jurisdiction to a foreign corporation which retained the services of nonexclusive agents or independent contractors for these purposes in the forum state; hence, merely advertising in the forum state, together with maintaining an "800" telephone number there, confers no general in personam jurisdiction on the forum state to try the culpability of the advertiser's allegedly tortious conduct occurring elsewhere (*Circus Circus Hotels, Inc. v. Superior Court (1981) 120 Cal. App. 3d 546, 567, 174 Cal. Rptr. 885* , disapproved to the extent it is inconsistent with the opinion in *Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 440, 461, 464, 58 Cal. Rptr. 2d 899, 926 P.2d 1085*).

[2] Comments

[a] Use of Form

The form in [1], *above*, is for use in support of a motion to quash service of summons under *Code Civ. Proc. § 418.10(a)(1)*, on the ground that the court has no proper basis for exercising personal jurisdiction over the defendant, because the defendant is a nonresident individual or legal entity who lacks the minimal contacts with California that are necessary under constitutional due process limitations to support the court's exercise of such jurisdiction. The point of

law stated is that the court's exercise of limited jurisdiction is improper when it is based solely on the fact that defendant engaged independent contractors to conduct an advertising campaign in California.

This form does not provide a complete memorandum, but is designed to be combined with general points and authorities relating to the proper exercise of limited jurisdiction [*see § 132.76*], and, when appropriate, with points and authorities relating to the exercise of limited jurisdiction in other specific fact situations [*see §§ 132.77 -132.82, 132.84 -132.90*].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Opposing Memoranda

In an appropriate case, the points and authorities *set out in §§ 132.100, 132.110*, and *132.111* may be used to oppose the points and authorities set out in this form.

[3] Discussion of Authorities

[a] Advertising in California

The procedural background of ***Circus Circus Hotels, Inc. v. Superior Court*** *(1981) 120 Cal. App. 3d 546, 174 Cal. Rptr. 885* , are discussed in *§ 132.73[4][a]*. In granting a writ of mandate directing the trial court to quash service of summons on the foreign corporation, the court of appeal said that in California sales and sales promotion by nonexclusive agents or independent contractors in the forum state have not been characterized as "doing business" so as to extend jurisdiction to a foreign corporation which retained the services of the nonexclusive agents or independent contractors for these purposes in the forum state, and that it logically follows, therefore, that merely advertising in the forum state, together with maintaining an "800" telephone number there, confers no general in personam jurisdiction on the forum state to try the culpability of the advertiser's allegedly tortious conduct occurring elsewhere (*120 Cal. App. 3d 546, 567)* . In summary, the court said that sales and travel promotion activities within California, either through agents or by advertising, including use of an "800" telephone number, do not, without more, operate to confer in personam jurisdiction over a nonresident defendant instituting such activities, where the plaintiff seeks to recover from such defendant for a grievance occurring in the course of recreational activities wholly outside the forum state, even though the plaintiff's sojourn outside the forum state was in response to such promotional activities (*120 Cal. App. 3d 546, 572)* . In *Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 461, 464, 475, 58 Cal. Rptr. 2d 899, 926 P.2d 1085* the California Supreme Court rejected the "proximate cause" test used by *Circus Circus Hotels, Inc.* as being inconsistent with the rationale underlying specific jurisdiction in the context of ongoing franchise relationships and disapproved the reasoning *Circus Circus Hotels, Inc.* to the extent it is inconsistent with the *Vons Companies, Inc.* opinion. For discussion of *Vons Companies, Inc.*, see *§ 132.100[3][g]*.

[4] Additional Authorities

In *Snowney v. Harrah's Entertainment, Inc. (2005) 35 Cal. 4th 1054, 29 Cal. Rptr. 3d 33, 112 P.3d 28* , the California Supreme Court held that the assertion of specific jurisdiction was fair where a hotel advertised heavily in California, obtained a significant percentage of its business from California residents, and maintained an Internet Web site and toll-free phone number where visitors or callers could obtain room quotes and make reservations. The hotel purposefully availed itself of the privilege of doing business in California. The guest's causes of action were premised on alleged omissions during the hotel's consummation of transactions with California residents and in its California advertisements. Because the harm alleged by the guest related directly to the content of the hotel's promotional activities in California, an inherent relationship between the guest's claims and the hotel's contacts with California existed. By purposefully and successfully soliciting the business of California residents, the hotels could reasonably anticipate being subject to litigation in California in the event their solicitations caused an injury to a California resident (*35 Cal. 4th*

1054, 1064-1065) .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsMinimum Contacts

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13-132 California Points & Authorities § 132.84

§ 132.84 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground That Court Lacks Personal Jurisdiction--Nonresident Defendant Lacks Minimal Contacts With California--Exercise of Limited Jurisdiction Is Improper--Foreign Corporation Is Parent of California Subsidiary

[1] FORM

[*The following should be combined with general points and authorities concerning the exercise of limited jurisdiction over a nonresident defendant (see § 132.76).*]

THE FACT THAT DEFENDANT FOREIGN CORPORATION IS THE OWNER OF A CALIFORNIA CORPORATION IS NOT, BY ITSELF, SUFFICIENT TO JUSTIFY THIS COURT'S EXERCISE OF LIMITED PERSONAL JURISDICTION.

Foreign Corporation Is Parent of California Subsidiary. Mere ownership by a foreign corporation of a California incorporated

subsidiary does not warrant the exercise of jurisdiction over the foreign corporation (*J. M. Sahlein Music Co. v. Nippon Gakki Co., Ltd. (1987) 197 Cal. App. 3d 539, 543, 243 Cal. Rptr. 4*).

[2] Comments

[a] Use of Form

The form in [1], *above*, is for use in support of a motion to quash service of summons under *Code Civ. Proc. § 418.10(a)(1)*, on the ground that the court has no proper basis for exercising personal jurisdiction over the defendant, because the defendant is a nonresident individual or legal entity who lacks the minimal contacts with California that are necessary under constitutional due process limitations to support the court's exercise of such jurisdiction. The point of law stated is that the court's exercise of limited jurisdiction is improper when it is based solely on the fact that defendant foreign corporation is the owner of a California corporation.

This form does not provide a complete memorandum, but is designed to be combined with general points and authorities relating to the proper exercise of limited jurisdiction [*see § 132.76*], and, when appropriate, with points and authorities relating to the exercise of limited jurisdiction in other specific fact situations [*see §§ 132.77 -132.83, 132.85 -132.88*].

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Opposing Memoranda

In an appropriate case, the points and authorities *set out in §§ 132.100, 132.110, 132.114,* and *132.115* may be used to oppose the points and authorities set out in the foregoing form.

[3] Discussion of Authorities

[a] Foreign Corporation Is Parent of California Subsidiary

The facts and procedural background of ***J. M. Sahlein Music Co. v. Nippon Gakki Co., Ltd.*** *(1987) 197 Cal. App. 3d 539, 243 Cal. Rptr. 4* , are discussed in *§ 132.73[4][a]*. In affirming the order quashing service of summons on the defendant Japanese Corporation, the court of appeal said that ownership of a California incorporated subsidiary does not warrant the exercise of jurisdiction over the foreign corporation unless the foreign parent manipulates the subsidiary to the detriment of creditors or the subsidiary is the alter ego of the parent (*197 Cal. App. 3d 539, 543)* . The court pointed out that no such showing was attempted and plaintiff appeared to concede that the parent-subsidiary relationship was not sufficient to subject the Japanese parent corporation to the jurisdiction of the California court (*197 Cal. App. 3d 539, 543)* .

[4] Additional Authorities

In *Aquila, Inc. v. Superior Court (2007) 148 Cal. App. 4th 556, 55 Cal. Rptr. 3d 803* , a group of independent plaintiffs sued a publicly regulated utility, alleging the utility participated in manipulating the price of natural gas in California by falsely reporting natural gas trades to price indices and engaging in wash trades. The utility, which was headquartered in Missouri, moved to quash service of summons, challenging the trial court's exercise of jurisdiction over it for lack of sufficient ties to California. The utility asserted that all the alleged minimum contacts claimed by plaintiffs were actually carried out by its independent subsidiary companies. The trial court denied the motion, finding a sufficient basis for specific jurisdiction under the theory the utility had purposefully availed itself of opportunities in California. The Court of Appeal issued a peremptory writ of mandate requiring the trial court to vacate its order denying the utility's motion to quash service of summons and to enter a new order granting the motion. The court concluded that the exercise of specific jurisdiction over the utility was improper because plaintiffs did not bear their burden of demonstrating the existence of sufficient minimum contacts between the utility and the state. A weather derivative contract that obligated the utility and its subsidiary to pay money to a utilities district if rainfall levels were low and impeded hydroelectrical generators from operating properly did not adequately show that the utility purposefully availed itself of the benefits of forum contacts with the state so as to justify specific jurisdiction over the utility. The utility's purchase of an insurance policy for itself and its subsidiaries for several real properties, one of which was in California, did not demonstrate its own purposeful availment of forum benefits. The court also concluded that the record did not support the application of the representative services doctrine. The utility's purchase of the property insurance policy did not establish the pervasive control required for the representative services doctrine to apply. A guarantee the utility provided for its subsidiary's financial obligations under the weather derivative contract did not destroy the separateness of the parent and subsidiary so as to justify application of the representative services doctrine. Therefore, the utility's motion to quash service of summons should have been granted.

In *DVI, Inc. v. Superior Court (2002) 104 Cal. App. 4th 1080, 128 Cal. Rptr. 2d 683* , citing with approval *Sonora*

Diamond Corp. v. Superior Court (2000) 83 Cal. App. 4th 523, 99 Cal. Rptr. 2d 824 , the court held that a parent company's ownership or control of a subsidiary corporation does not, without more, subject the parent corporation to the jurisdiction of the state where the subsidiary does business. A parent holding company may be subject to general jurisdiction only under limited circumstances. Those circumstances permitting the exercise of general jurisdiction include an alter ego relationship or the parent's exercise of such a degree of control of the subsidiary as to reflect the parent's purposeful disregard of the subsidiary's independent corporate existence (*104 Cal. App. 4th 1080, 1087)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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13-132 California Points & Authorities § 132.85

§ 132.85 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground That Court Lacks Personal Jurisdiction--Nonresident Defendant Lacks Minimal Contacts With California--Exercise of Limited Jurisdiction Is Improper--Contract With Out-of-State Party

[1] FORM

[*The following should be combined with general points and authorities concerning the exercise of limited jurisdiction over a nonresident defendant (see § 132.76).*]

THE FACT THAT PLAINTIFF ENTERED INTO A CONTRACT WITH DEFENDANT IS NOT, BY ITSELF, SUFFICIENT TO JUSTIFY THIS COURT'S EXERCISE OF LIMITED PERSONAL JURISDICTION.

Contracting With Out-of-State Party. An individual's contract with an out-of-state party cannot alone automatically establish sufficient minimum contacts in the individual's home forum for the purpose of assertion of in personam jurisdiction (*Burger King Corp. v. Rudzewicz (1985) 471 U.S. 462, 478-479, 105 S. Ct. 2174, 85 L. Ed. 2d 528*).

[2] Comments

[a] Use of Form

The form in [1], *above*, is for use in support of a motion to quash service of summons under *Code Civ. Proc. § 418.10(a)(1)*, on the ground that the court has no proper basis for exercising personal jurisdiction over the defendant, because the defendant is a nonresident individual or legal entity who lacks the minimal contacts with California that are necessary under constitutional due process limitations to support the court's exercise of such jurisdiction. The point of law stated is that the court's exercise of limited jurisdiction is improper when it is based solely on the fact that plaintiff entered into a contract with the nonresident defendant.

This form does not provide a complete memorandum, but is designed to be combined with general points and authorities relating to the proper exercise of limited jurisdiction [*see § 132.76*], and, when appropriate, with points and authorities relating to the exercise of limited jurisdiction in other specific fact situations [*see §§ 132.77 -132.84, 132.86*

-*132.88*].

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Opposing Memoranda

In an appropriate case, the points and authorities *set out in §§ 132.100, 132.110, 132.111*, and *132.112* may be used to oppose the points and authorities set out in the foregoing form.

[3] Discussion of Authorities

[a] Contracting With Out-of-State Party

The facts and procedural background of ***Burger King Corp. v. Rudzewicz*** *(1985) 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528* , are discussed in *§ 132.76[3][c]*. In holding that the Florida federal court had jurisdiction over the nonresident franchisees, the United States Supreme Court said that an plaintiff's contract with an out-of-state party cannot alone automatically establish sufficient minimum contacts in the plaintiff's home forum for the purpose of assertion of in personam jurisdiction, that the Court had long ago rejected the notion that personal jurisdiction might turn on mechanical tests, and that, in determining whether the defendant has purposely established minimum contacts with the forum, prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing, must be evaluated (*471 U.S. 462, 478-479)* .

[4] Additional Authorities

[a] Contracting With Out-of-State Party

See *Hunt v. Superior Court (2000) 81 Cal. App. 4th 901, 97 Cal. Rptr. 2d 215* , discussed in *§ 132.81[4][a]*.

The facts and procedural background of *Goehring v. Superior Court (1998) 62 Cal. App. 4th 894, 73 Cal. Rptr. 2d 105* , are discussed in *§ 132.76[4][b]*. In granting a writ of mandate directing the trial court to vacate its order denying petitioners' motion to dismiss for lack of personal jurisdiction, the court noted that a contract with an out-of-state party does not automatically establish purposeful availment in the other party's home forum. Rather, the court must evaluate the contract terms and surrounding circumstances to determine whether the defendant purposefully established minimum contacts within the forum. Purposeful availment requires that the defendant have performed some type of affirmative conduct that allows or promotes the transaction of business within the forum state (*62 Cal. App. 4th 894, 907)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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13-132 California Points & Authorities § 132.86

§ 132.86 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground That Court Lacks Personal Jurisdiction--Nonresident Defendant Lacks Minimal Contacts With California--Exercise of Limited Jurisdiction Is Improper--Mere Placement of Product in Stream of Commerce

[1] FORM

[*The following should be combined with general points and authorities concerning the exercise of limited jurisdiction over a nonresident defendant (see § 132.76).*]

THE FACT THAT DEFENDANT PLACED THE ALLEGED DEFECTIVE PRODUCT INTO THE STREAM OF COMMERCE IS NOT, BY ITSELF, SUFFICIENT TO JUSTIFY THIS COURT'S EXERCISE OF LIMITED PERSONAL JURISDICTION.

A. Mere Placement of Product in Stream of Commerce. The mere placement of a product in the stream of commerce is insufficient of itself to support jurisdiction over a nonresident defendant (*Asahi Metal Industry Co. v. Superior Court (1987) 480 U.S. 102, 112, 107 S. Ct. 1026, 94 L. Ed. 2d 92* ; *Carretti v. Italpast (2002) 101 Cal. App. 4th 1236, 1245-1246, 125 Cal. Rptr. 2d 126*).

[2] Comments

[a] Use of Form

The form in [1], *above*, is for use in support of a motion to quash service of summons under *Code Civ. Proc. § 418.10(a)(1)*, on the ground that the court has no proper basis for exercising personal jurisdiction over the defendant, because the defendant is a nonresident individual or legal entity who lacks the minimal contacts with California that are necessary under constitutional due process limitations to support the court's exercise of such jurisdiction. The point of law stated is that the court's exercise of limited jurisdiction is improper when it is based solely on the fact that defendant placed the alleged defective product in the stream of commerce.

This form does not provide a complete memorandum, but is designed to be combined with general points and

authorities relating to the proper exercise of limited jurisdiction [*see § 132.76*], and, when appropriate, with points and authorities relating to the exercise of limited jurisdiction in other specific fact situations [*see §§ 132.77 -132.85, 132.87, 132.88*].

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Opposing Memoranda

In an appropriate case, the points and authorities *set out in §§ 132.100, 132.108, 132.110, 132.113* may be used to oppose the points and authorities set out in the foregoing form.

[3] Discussion of Authorities

[a] Placing Product Into Stream of Commerce

The facts and procedural background of ***Asahi Metal Industry Co. v. Superior Court*** *(1987) 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92* , are discussed in *§ 132.77[3][d]*. In reversing the California Supreme Court, which had upheld the jurisdiction of the California Superior court over a Japanese company, the United States Supreme Court said that the placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum state. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum state, for example, designing the product for the market in the forum state, advertising in the forum state, establishing channels for providing regular advice to customers in the forum state, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum state. But a defendant's awareness that the stream of commerce may or will sweep the product into the foreign state does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum state (*480 U.S. 102, 112)* . The Court said that assuming, arguendo, that the Japanese company's awareness that some of the valves sold to the Taiwanese company would be incorporated into tire tubes sold in California had been established, this did not demonstrate any action by the Japanese company to purposefully avail itself of the California market; it does not do business in California, it has no office, agents, employees, or property in California, it does not advertise or otherwise solicit business in California, it did not create, control, or employ the distribution system that brought its valves into California, and there was no evidence that it designed its product in anticipation of sales in California (*480 U.S. 102, 112-113)* . The Court held that, on the basis of these facts, the exertion of personal jurisdiction over the Japanese company by the superior court of California exceeded the limits of due process (*480 U.S. 102, 113)* .

In ***Carretti v. Italpast*** *(2002) 101 Cal. App. 4th 1236, 125 Cal. Rptr. 2d 126* , a pasta machine distributor with an office in California argued that the manufacturer, which sold products to him in Italy, had the requisite minimum contacts to support jurisdiction in California. In rejecting this argument, the court noted that the manufacturer did not promote the sale of its goods in California at all; it simply sold goods to a buyer who showed up on its doorstep in Italy, willing to pay the price. The minimal resales of the product in California by the distributor, standing alone, do not amount to the substantial continuous and systematic contacts with the forum state necessary for the exercise of general jurisdiction over a foreign corporation doing business in its home country. Further, the court held that random sales in Italy to a distributor who happens to have an office in California but may resell its products anywhere are not tantamount to an effort to serve the market in this state (*101 Cal. App. 4th 1236, 1245-1246)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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13-132 California Points & Authorities § 132.87

§ 132.87 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground That Court Lacks Personal Jurisdiction--Nonresident Defendant Lacks Minimal Contacts With California--Exercise of Limited Jurisdiction Is Improper--Activities of Independent Nonexclusive Sales Representative

[1] FORM

[*The following should be combined with general points and authorities concerning the exercise of limited jurisdiction over a nonresident defendant (see § 132.76).*]

THE ACTIVITIES OF AN INDEPENDENT NONEXCLUSIVE SALES REPRESENTATIVE ENGAGED BY DEFENDANT ARE NOT ALONE SUFFICIENT TO JUSTIFY THIS COURT'S EXERCISE OF LIMITED PERSONAL JURISDICTION.

Activities of Independent Nonexclusive Sales Representatives. The use by a foreign corporation of independent nonexclusive sales representatives does not by itself constitute a sufficient contact with the forum to justify the assertion of personal jurisdiction in a cause of action unrelated to these activities (*see Fisher Governor Co. v. Superior Court (1959) 53 Cal. 2d 222, 225, 1 Cal. Rptr. 1, 347 P.2d 1*).

[2] Comments

[a] Use of Form

The memorandum of points and authorities in [1], *above*, is for use in support of a motion to quash service of summons under *Code Civ. Proc. § 418.10(a)(1)*, on the ground that the court has no proper basis for exercising personal jurisdiction over the defendant, because the defendant is a nonresident individual or legal entity who lacks the minimal contacts with California that are necessary under constitutional due process limitations to support the court's exercise of such jurisdiction. The point of law stated is that the court's exercise of limited jurisdiction is improper when it is based solely on the activities of independent nonexclusive sales representatives engaged by the defendant.

This form does not provide a complete memorandum, but is designed to be combined with general points and

authorities relating to the proper exercise of limited jurisdiction [*see § 132.76*], and, when appropriate, with points and authorities relating to the exercise of limited jurisdiction in other specific fact situations [*see §§ 132.77 -132.86, 132.88*].

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Opposing Memoranda

In an appropriate case, the points and authorities *set out in §§ 132.100, 132.110*, and *132.111* may be used to oppose the points and authorities set out in the foregoing form.

[3] Discussion of Authorities

[a] Activities of Independent Nonexclusive Sales Representatives

In ***Fisher Governor Co. v. Superior Court*** *(1959) 53 Cal. 2d 222, 1 Cal. Rptr. 1, 347 P.2d 1* , petitioner, an Iowa corporation, sought a writ of mandate to compel the trial court to quash service of summons following the corporation's special appearance in three actions for damages for wrongful death and personal injuries occurring in Idaho when a gas meter and pressure reducing station exploded, allegedly owing to defective equipment manufactured by petitioner. Petitioner had no officers, plants, employees, or property in California. Its only contacts with California consisted of independent nonexclusive agents who received commissions on sales of petitioner's products.

In holding that the petitioner was not doing business in the state within the meaning of former Code Civ. Proc. § 411(2) [*now see Code Civ. Proc. § 410.10*], and granting the writ, the Supreme Court stated that, although a foreign corporation may have sufficient contacts with a state to justify an assumption of jurisdiction over it to enforce causes of action having no relation to its activities in that state, more contacts are required for the assumption of such extensive jurisdiction than sales and sales promotion within the state by independent nonexclusive sales representatives. To hold otherwise would subject any corporation that promotes the sales of its goods on a nationwide basis to suit anywhere in the United States without regard to other considerations bearing on the fair and orderly administration of the laws which it was the purpose of the due process clause to insure (*53 Cal. 2d 222, 225)* .

Legal Topics:

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13-132 California Points & Authorities § 132.88

§ 132.88 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground That Court Lacks Personal Jurisdiction--Nonresident Defendant Lacks Minimal Contacts With California--Exercise of Limited Jurisdiction Is Improper--Defendant's Out-of-State Act Did Not Cause Sufficient Effect in California

[1] FORM

[*The following should be combined with general points and authorities concerning the exercise of limited jurisdiction over a nonresident defendant (see § 132.76)].*

DEFENDANT'S ALLEGED CONDUCT OCCURRED OUTSIDE THIS FORUM AND THE ALLEGED EFFECT CAUSED IN THIS FORUM IS INSUFFICIENT BY ITSELF TO JUSTIFY THIS COURT'S EXERCISE OF LIMITED PERSONAL JURISDICTION.

[*EITHER*]

Defendant Did Not Intend to Cause Effect in California and Effect in California Was Not Reasonably Foreseeable. When the defendant's act was not performed with the intention of causing effects in the state and when the defendant had no reason to suppose that his or her acts outside the state would result in effects within the state, the state will not generally have jurisdiction over the defendant unless both the plaintiff and the defendant have an extensive relationship to the state (*Titus v. Superior Court (1972) 23 Cal. App. 3d 792, 802, 100 Cal. Rptr. 477*).

[*OR*]

Assertion of Jurisdiction Based on Defendant's Out-of-State Act Would Be Unreasonable. An out-of-state act that merely causes an effect in California is not in and of itself sufficient if the nature and effect of defendant's relationship to California makes the exercise of jurisdiction unreasonable (*Farris v. Capt. J. B. Fronapfel Co. (1986) 182 Cal. App. 3d 982, 989, 227 Cal. Rptr. 619*).

[2] Comments

[a] Use of Form

The memorandum of points and authorities in [1], *above*, is for use in support of a motion to quash service of summons under *Code Civ. Proc. § 418.10(a)(1)*, on the ground that the court has no proper basis for exercising personal jurisdiction over the defendant, because the defendant is a nonresident individual or legal entity who lacks the minimal contacts with California that are necessary under constitutional due process limitations to support the court's exercise of such jurisdiction. The point of law stated is that the court's exercise of limited jurisdiction is improper when it is based solely on an alleged act that occurred out-of-state and the nature of the effect caused in California was neither intended nor reasonably foreseeable, or that the assertion of jurisdiction based on the out-of-state act would not be reasonable and fair under the circumstances.

This form does not provide a complete memorandum, but is designed to be combined with general points and authorities relating to the proper exercise of limited jurisdiction [*see § 132.76*], and, when appropriate, with points and authorities relating to the exercise of limited jurisdiction in other specific fact situations [*see §§ 132.77 -132.87*].

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Opposing Memoranda

In an appropriate case, the points and authorities *set out in §§ 132.100* and *132.108* may be used to oppose the points and authorities set out in the foregoing form.

[3] Discussion of Authorities

[a] Defendant Did Not Intend to Cause Effect in California and Effect in California Was Not Reasonably Foreseeable

The facts and procedural background of ***Titus v. Superior Court*** *(1972) 23 Cal. App. 3d 792, 100 Cal. Rptr. 477* , are discussed in *§ 132.70[3][a]*. In granting the petition for writ of mandate insofar as the order to show cause purported to give the trial court personal jurisdiction over the husband for purposes of child support, and annulling the child support order because there was no basis for in personam jurisdiction over the father, the court of appeal said that in the situation when the act was not performed with the intention of causing effects in the state and when the defendant had no reason to suppose that his or her acts outside the state would result in effects within the state, the state will not generally have jurisdiction over the defendant unless both the plaintiff and the defendant have an extensive relationship to the state (*23 Cal. App. 3d 792, 802)* .

[b] Assertion of Jurisdiction Based on Defendant's Out-of-State Act Would Be Unreasonable

In ***Farris v. Capt. J. B. Fronapfel Co.*** *(1986) 182 Cal. App. 3d 982, 227 Cal. Rptr. 619* , plaintiff, a California resident, purchased a yacht in Florida. One of the brokers in the sale arranged for the defendant, a Florida resident, to survey the vessel and issue a written report stating its value and condition. The report stated that the vessel was in good condition and worth approximately $250,000, and plaintiff, relying on the report, purchased the boat. Although the broker paid defendant for the report, defendant knew that the report was for the benefit of the plaintiff and that the vessel would be taken to California. After plaintiff purchased the yacht and it was transported to California, he learned that the survey was false and that the vessel had major structural damage. Plaintiff then brought an action for deceit against the defendant, among others, in California. The trial court granted defendant's motion to quash service of summons on the ground the court lacked personal jurisdiction, and the court of appeal affirmed.

The court of appeal initially noted that while an act that intentionally causes an effect in California may be grounds for personal jurisdiction, merely causing an effect in California is not in and of itself sufficient if the nature and effect of defendant's relationship to California makes the exercise of jurisdiction unreasonable (*182 Cal. App. 3d 982, 989)* . The court then held that the fact that plaintiff foreseeably lost money on a transaction as a result of defendant's tortious act was not sufficient to confer personal jurisdiction on the theory that the defendant's act produced an effect in California (*182 Cal. App. 3d 982, 990)* .

[4] Additional Authorities

[a] Defendant Did Not Intend to Cause Effect in California and Effect in California Was Not Reasonably Foreseeable

Edmunds v. Superior Court (1994) 24 Cal. App. 4th 221, 29 Cal. Rptr. 2d 281 , was an action by a California limited partnership against a Hawaii attorney not admitted to practice law in California for professional negligence arising out of legal representation defendant provided to the partnership in Hawaii litigation. The trial court denied defendant's motion to quash service of summons and complaint on the ground of lack of personal jurisdiction. Defendant then petitioned for a writ of mandate.

The court of appeal issued the writ of mandate, directing the trial court to vacate its order and to grant defendant's motion. The court noted that defendant's representation of the partnership was confined to the litigation in the Hawaii action which extended after settlement only as to limited assistance in the sale of real property in Hawaii. The defendant did not author or cause to be sent documents constituting the alleged breach of fiduciary duty and defendant's comments on them were de minimis in the context of the entire transaction. The court concluded that there was no substantial evidence of defendant's tortious conduct in California or any nexus between the causes of action alleged and defendant's activities causing effect in California (*24 Cal. App. 4th 221, 232-236)* .

[b] Assertion of Jurisdiction Based on Defendant's Out-of-State Act Would Be Unreasonable

See *Prince v. Urban (1996) 49 Cal. App. 4th 1056, 57 Cal. Rptr. 2d 181 , discussed under § 132.70[4][c].*

In *Beckman v. Thompson (1992) 4 Cal. App. 4th 481, 6 Cal. Rptr. 2d 60* , plaintiff sued a Tennessee resident for breach of a contract to be performed in Tennessee and a Delaware corporation for inducing its codefendant to repudiate the contract. The trial court granted the corporation's motion to quash service of summons for lack of personal jurisdiction (*4 Cal. App. 4th 481, 484)* . The court of appeal affirmed, holding that the only effect in California of the corporation's alleged inducement of breach of contract is that a California resident was deprived of the benefit of a contract to be performed in Tennessee. The nature of the effects and the corporation's otherwise minimal or nonexistent contacts with California make the exercise of jurisdiction unreasonable (*4 Cal. App. 4th 481, 486)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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13-132 California Points & Authorities § 132.89

§ 132.89 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground That Court Lacks Personal Jurisdiction--Nonresident Defendant Lacks Minimal Contacts With California--Exercise of Limited Jurisdiction Is Improper--Passive Web Site on Internet

[1] FORM

[*The following should be combined with general points and authorities concerning the exercise of limited jurisdiction over a nonresident defendant (see § 132.76).*]

DEFENDANT'S CREATING ON THE INTERNET A PASSIVE WEB SITE IN THE STATE OF _____ [*specify location outside of California, e.g.,* New York], WITHOUT MORE, IS INSUFFICIENT TO JUSTIFY THIS COURT'S EXERCISE OF SPECIFIC JURISDICTION.

Creating Passive Website, by Itself, Insufficient to Confer Specific Jurisdiction. Under the rules for ascertaining the existence of specific jurisdiction, the defendant's conduct of contracting, via an out of state computer, with Internet service providers who happen to be located in California, so as to permit them to operate a passive Web site from their residence out of state, without more, is an insufficient basis for the exercise of specific jurisdiction. Such conduct of contracting, via computer, with Internet service providers, which may be California corporations, or which may maintain officers or databases in California, is insufficient to constitute "purposeful availment" and does not satisfy the first prong of the three-prong test for specific jurisdiction (*Jewish Defense Organization, Inc. v. Superior Court (1999) 72 Cal. App. 4th 1045, 1057-1062, 85 Cal. Rptr. 2d 611*).

[2] Comments

[a] Use of Form

The form in [1], *above*, is for use in support of a motion to quash service of summons under *Code Civ. Proc. § 418.10(a)(1)*, on the ground that the court has no proper basis for exercising personal jurisdiction over the defendant, because the defendant is a nonresident individual or legal entity who lacks the minimal contacts with California that are necessary under constitutional due process limitations to support the court's exercise of such jurisdiction. The point of

law stated is that the court's exercise of specific jurisdiction is improper when it is based solely on a defendant having contracted via an out of state computer with an internet provider so as to permit them to operate a passive Web site from their residence out of state. This form uses the term "specific jurisdiction" because that is the term used in the cited case. Cases have frequently also used the term "limited jurisdiction" to refer to this type of jurisdiction. For further discussion, *see generally* California Forms of Pleading and Practice, Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances* .

This form does not provide a complete memorandum, but is designed to be combined with general points and authorities relating to the proper exercise of limited (*i.e.*, specific) jurisdiction [*see § 132.76*], and, when appropriate, with points and authorities relating to the exercise of limited (*i.e.*, specific) jurisdiction in other specific fact situations [*see §§ 132.77 -132.87*].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Opposing Memoranda

In an appropriate case, the points and authorities *set out in §§ 132.100* and *132.108* may be used to oppose the points and authorities set out in this form.

[3] Discussion of Authorities

[a] Creating Passive Website, by Itself, Insufficient to Confer Specific Jurisdiction

In ***Jewish Defense Organization, Inc. v. Superior Court*** *(1999) 72 Cal. App. 4th 1045, 85 Cal. Rptr. 2d 611* , plaintiff in October, 1997, brought an action for defamation and related causes of action against the Jewish Defense Organization, Inc. (hereafter JDO) and its individual founder based on defendants having posted a World Wide Web page containing some alleged defamatory statements. The individual defendant had lived in California from 1982 to 1984 while attending college. In the early 1980's he was associated with the Los Angeles chapter of the Jewish Defense League, but after having been kicked out, or having voluntarily left the organization in 1981, he formed his own group known as the JDO. After he left Los Angeles in 1984, there was no longer any presence of the JDO in Los Angeles. When the defendants left California, JDO no longer maintained any California telephone number or post office box. There is currently no California chapter of the JDO. The individual defendant has been a resident of New York City since about 1985 and earns his living as an accountant. He conducted no commercial activities in California and owns no property in California. Between 1984 and 1989 he would come to California from time to time to make public speeches. He incorporated the JDO in New York in 1989. The JDO maintains a World Wide Web site for the dissemination of information to anyone in the world where the Internet is available. The Web site is passive in that the JDO does not seek to attract readers or others to the site and does not capture or receive any information from those who hit the Web site. The Web site merely provides information for those who seek access to it. Prior to this suit, plaintiff had filed in California a similar defamation suit against other defendants arising out of an allegedly defamatory Web page. During the discovery stage of that lawsuit, after the instant lawsuit was filed, the individual defendant sent some documents by mail to an individual in California that were passed on to one of the defendants for use in the defense of that lawsuit. Also, after the instant suit was filed, defamatory information about plaintiff similar to that on the JDO Web sites allegedly appeared on several mirror Web pages served by providers located in California. The mirror Web sites, however, are maintained by someone who the individual defendant asserted was not an employee, officer or agent of the JDO and was not authorized to speak on JDO's behalf. Defendants moved to quash service of summons for lack of jurisdiction over them, or in the alternative, to stay or dismiss the action on the grounds of forum non conveniens. The trial court denied the motions and the defendants filed a timely petition for writ of mandate (*72 Cal. App. 4th 1045, 1049-1053)* .

The court of appeal issued a peremptory writ of mandate directing the trial court to vacate its order and to enter a new and different order granting the motion to quash service of summons (*72 Cal. App. 4th 1045, 1049-1053)* . In reaching this conclusion, the court discussed the rules that apply concerning a state court's assertion of personal jurisdiction over a nonresident defendant. With regard to general jurisdiction, the court noted that a nonresident may be subject to the general jurisdiction of the forum if his or her contacts in the forum state are substantial, continuous and systematic and that in such a case the specific cause of action alleged need not be connected with the defendant's business relationship to the forum (*72 Cal. App. 4th 1045, 1054)* . The defendants only contacts with California after 1989 consisted of (1) the use of the mail to mail some documents to an individual in California in connection with another libel lawsuit by the plaintiff against different defendants, and (2) contracting with one or more Internet service providers who happen to be located in California, so as to permit them to operate a passive Web site from their residence in New York. The plaintiff did not contend that this conduct alone is sufficient to provide a basis for the assertion of general jurisdiction over the defendants in California and the court concluded that such conduct was an insufficient basis for the assertion of general jurisdiction (*72 Cal. App. 4th 1045, 1057)* .

With regard to specific jurisdiction, the court noted that specific jurisdiction is determined under a three-part test: (1) the nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he or she purposefully avails himself or herself of privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one that arises out of or results from the defendant's forum related activities; and (3) the exercise of jurisdiction must be reasonable (*72 Cal. App. 4th 1045, 1054)* . In tort cases, the "purposeful availment" requirement can be satisfied by the "effects test" set out in *Calder v. Jones (1984) 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804* . The court first addressed the issue of specific jurisdiction in the context of the case law that has developed in defamation cases. Under *Calder*, personal jurisdiction can be based on (1) intentional actions, (2) expressly aimed at the forum state (3) causing harm, the brunt of which is suffered, and which defendant knows is likely to be suffered, in the forum state (*72 Cal. App. 4th 1045, 1057)* . The court concluded there was insufficient evidence showing defendants' minimum contacts with California under the analysis set out in cases dealing with defamation by nonresidents. Plaintiff failed to provide sufficient evidence to establish that it was foreseeable that a risk of injury by defamation would arise in California. Plaintiff did not even establish that his residence or principal place of business was in California, so that the "purposeful availment" prong of the special jurisdiction issue was not satisfied on that ground (*72 Cal. App. 4th 1045, 1057, 1057 n.3*). In reaching its conclusion, the court distinguished *Panavision Intern, L.P. v. Toeppen (9th Cir. 1998) 141 F.3d 1316, 1322* , which involved registering plaintiff's trademarks as defendant's domain names and posting a WEB site on the Internet for the purpose of extorting money, in which the "purposeful availment" requirement for specific jurisdiction was satisfied under the "effects test" (*72 Cal. App. 4th 1045, 1057)* .

The court next analyzed specific jurisdiction in the context of cases dealing with use of the internet. Quoting from *Zippo Mfg. Co. v. Zippo Dot Com (W.D. Pa. 1997) 952 F. Supp. 1119, 1123-1124)* , the court noted three level of internet use for the purpose of determining jurisdiction. Exercising personal jurisdiction is proper when a defendant has entered into contracts with nonresidents that involves knowing and repeated transmission of computer files on the Internet, but is improper when a passive Web site is involved that does little more than makes information available to those interested in it. When an interactive Web site is involved that permits exchange of information between user and host computer, the exercise of jurisdiction is determined by examining the level of interactivity and commercial use of the exchange of information that occurs on the Web site (*72 Cal. App. 4th 1045, 1060)* . In the instant case defendants' conduct in registering plaintiff's name as a domain name and posting passive Web sites on the Internet is not sufficient to subject defendants to jurisdiction in California. Creating a site, like placing a product into the stream of commerce, may be felt nationwide, or even worldwide, but, without more, it is not an act purposefully directed toward the forum state (*72 Cal. App. 4th 1045, 1060)* . The court, quoting from *Pres-Kap v. System One, Direct Access (Fla. Dist. Ct. App. 1994) 636 So. 2d 1351, 1353* , noted that in every state across the nation customers of on-line information networks have contractual relationships with out-of-state supplier companies. To permit users of such on-line services to be haled into court in a state in which the suppliers billing office and database happens to be located, even if such users are solicited, engaged, and serviced entirely instate by the supplier's local representatives would be wildly beyond

the reasonable expectations of such computer-information users and accordingly that result would offend traditional notions of fair play and substantial (*72 Cal. App. 4th 1045, 1061)* . In the instant case defendants were consumers of Internet service providers who happen to maintain offices and databases in California. Such providers were engaged by the JDO from its computer in New York. As in *Pres-Kap*, the court concluded that defendants' conduct of contracting, via computer, with Internet service providers, which may be California corporations or which may maintain offices or databases in California, was insufficient to constitute "purposeful availment" and did not satisfy the first prong of the three-part test for specific jurisdiction (*72 Cal. App. 4th 1045, 1061-1062)* .

[4] Additional Authorities

In *Pavlovich v. Superior Court (2002) 29 Cal. 4th 262, 127 Cal. Rptr. 2d 329* , the California Supreme Court considered for the first time the scope of personal jurisdiction based solely on Internet use, and concluded that a California court improperly exercised personal jurisdiction over a defendant based on a posting on an Internet website. This case involved a defendant whose sole contact with California was the posting of source code on his Internet website, accessible to any person with Internet access; the source code allowed users to decrypt data contained on DVDs and enable the placement of the decrypted data onto computer hard drives or other storage media. The defendant owned no property, had no telephone listing, and conducted no business in California. The website merely posted information and had no interactive features. Because of the defendant's apparent lack of minimum contacts with California, the court reduced the matter to the consideration of one question: whether the defendant's knowledge that his tortious conduct may harm certain industries centered in California (the motion picture, computer, and consumer electronics industries) is sufficient to establish express aiming at California. Although the record lacked any indication that the defendant knew that California residents would be detrimentally affected by his actions, plaintiffs suggested that jurisdiction exists solely because the defendant's tortious conduct had a foreseeable effect in California. The court rejected this argument, finding that mere foreseeability is not enough for jurisdiction: "Because finding jurisdiction in this case would effectively subject all intentional tortfeasors whose conduct may harm industries in California to jurisdiction in California, we decline to do so" (*29 Cal. 4th 262, 278)* . The court further held that *Nam Tai Electronics, Inc. v. Titzer (2001) 93 Cal. App. 4th 1301, 113 Cal. Rptr. 2d 769* , discussed *below*, is disapproved to the extent it is contrary to the holding in *Pavlovich* (*29 Cal. 4th 262, 278)* .

In *Shisler v. Sanfer Sports Cars, Inc. (2006) 146 Cal. App. 4th 1254, 53 Cal. Rptr. 3d 335* , the trial court granted a seller's motion to quash service of summons in a dispute concerning the purchase of a used car. The seller was located in Florida and maintained a web site in Florida. The buyer, a California resident, wrote to and telephoned the seller to inquire about a vehicle advertised on the web site. The buyer purchased the vehicle but was dissatisfied with its condition when it arrived in California and, after efforts to negotiate failed, brought suit against the seller. The seller moved to quash service of the summons on the grounds that the seller lacked minimum contacts with California. The seller presented evidence that it had never owned or leased property in California, had never directly advertised in the state, had never intentionally targeted any California resident as a prospective customer, and had sold only 10 vehicles to California residents out of a total of more than 40,000 vehicles sold. The Court of Appeal affirmed, concluding that there was no evidence of continuous and systematic contact with California and that the seller's maintenance of the web site alone was insufficient to establish personal jurisdiction. Purposeful availment was not shown because the web site did not target California residents and because there was no ongoing business relationship between the parties.

In *Nam Tai Electronics, Inc. v. Titzer (2001) 93 Cal. App. 4th 1301, 113 Cal. Rptr. 2d 769* , the court considered whether specific jurisdiction should be extended over a non-resident defendant who posted allegedly defamatory messages on Yahoo!, a California-based Internet message board. In order to avail himself of the opportunity to post on a Yahoo! message board, the defendant was required to register a nickname or alias known as a Yahoo! ID, and agree to Yahoo!'s terms of service; among other things, those terms include a promise not to post any content that is unlawful, defamatory, libelous, or otherwise objectionable, and that the relationship between the person registering and Yahoo! shall be governed by the laws of the State of California, and that both agree to submit to the personal and exclusive jurisdiction of the California courts. The plaintiff in this matter was not Yahoo!, however, it was the party about whom

the allegedly defamatory messages were about.

Plaintiff initially contended that defendant made himself subject to jurisdiction in California by posting several messages on Yahoo!'s California-maintained web site. In rejecting this argument, the court stated that the issue is not whether the company that makes the web sites available is incorporated or based in California. Instead, the determinative question is whether the web sites themselves are of particular significance to California or Californians such that the user has reason to know the posting of a message will have a significant impact in this state (*93 Cal. App. 4th 1301, 1312)* .

Plaintiff further argued that the defendant's voluntary agreement to Yahoo!'s terms of service subject him to jurisdiction in this state. In rejecting this argument, the court pointed out that the language on which plaintiff seeks to rely appears on its face to govern litigation between registered users and Yahoo!--not registered users and third parties. Thus, that agreement, by itself, cannot justify subjecting defendant to California jurisdiction for purposes of the instant lawsuit (*93 Cal. App. 4th 1301, 1313)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsMinimum Contacts

California Points & Authorities

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 132 JURISDICTION: PERSONAL JURISDICTION AND INCONVENIENT FORUM
PART II. FORMS
C. Bases of Jurisdiction

13-132 California Points & Authorities § 132.90

§ 132.90 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] on Ground That Court Lacks Personal Jurisdiction--Nonresident Defendant Lacks Minimal Contacts With California--Exercise of Limited Jurisdiction Is Improper--Long Distance Follow-up Care by Nonresident Health Care Provider Who Treated California Resident Out of State

[1] FORM

[*The following should be combined with general points and authorities concerning the exercise of limited jurisdiction over a nonresident defendant (see § 132.76).*]

DEFENDANT'S PROVIDING OF FOLLOW-UP CARE TO PLAINTIFF BY _____ [*e.g.*, MAIL AND TELEPHONE] AFTER PLAINTIFF SOUGHT OUT MEDICAL TREATMENT FROM DEFENDANT IN _____ [*specify location outside California, e.g.*, ILLINOIS], IS INSUFFICIENT TO JUSTIFY THIS COURT'S EXERCISE OF LIMITED PERSONAL JURISDICTION.

Provision of Follow-up Care by Out-of-State Health Care Provider. An out-of-state physician's follow-up care of a patient by telephone, even when the home state patient pays for it, is not a sufficient basis for personal jurisdiction (*Prince v. Urban (1996) 49 Cal. App. 4th 1056, 57 Cal. Rptr. 2d 181*). Three factors that indicate no jurisdiction include the following (*Prince v. Urban (1996) 49 Cal. App. 4th 1063-1064, 49 Cal. App. 4th 1056, 1064, 57 Cal. Rptr. 2d 181*):

1. The doctor-patient relationship was not the result of any systematic or continuing effort to provide services to be "felt" in California.

2. The services rendered were not grounded in any relationship with California.

3. The interest of California as a state in insuring the availability of medical care for its citizens dominates over its interest in protecting its citizens from injury by out-of-state doctors, to ensure that Californians will be able to secure adequate medical services wherever they may go.

These elements weigh against jurisdiction in this case. As to the first element,

_____ [*tie in facts showing that health care provider did not market itself in California or otherwise seek out California patients*].

As to the second element, _____ [*tie in facts showing that health care provider's relationship with the California plaintiff was initiated by plaintiff who went to the health care provider's out-of-state locale for treatment*].

As to the third element, _____ [*describe circumstances under which California plaintiff sought out defendant's services and nature of the follow-up care that was provided*].

[2] Comments

[a] Use of Form

The form in [1], *above*, is for use in support of a motion to quash service of summons under *Code Civ. Proc. § 418.10(a)(1)*, on the ground that the court has no proper basis for exercising personal jurisdiction over the defendant, because the defendant is a nonresident individual or legal entity who lacks the minimal contacts with California that are necessary under constitutional due process limitations to support the court's exercise of such jurisdiction. The point of law stated is that the court's exercise of limited jurisdiction is improper when it is based solely on a health care provider having provided follow-up care to a California resident after having treated the California resident outside of California. Use of the form would not be appropriate if the health care provider marketed its services to California residents or engaged in a basically mail-order relationship [*see Prince v. Urban (1996) 49 Cal. App. 4th 1056, 1060-1064, 57 Cal. Rptr. 2d 181]* .

This form does not provide a complete memorandum, but is designed to be combined with general points and authorities relating to the proper exercise of limited jurisdiction [*see § 132.76*], and, when appropriate, with points and authorities relating to the exercise of limited jurisdiction in other specific fact situations [*see §§ 132.77 -132.88*].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Opposing Memoranda

In an appropriate case, the points and authorities *set out in §§ 132.100* and *132.108* may be used to oppose the points and authorities set out in this form.

[3] Discussion of Authorities

[a] Provision of Follow-up Care by Out-of-State Health Care Provider

In ***Prince v. Urban*** *(1996) 49 Cal. App. 4th 1056, 57 Cal. Rptr. 2d 181* , a California doctor referred plaintiff, a California migraine sufferer, to an Illinois headache specialist. The plaintiff went to Illinois for treatment and was seen by the headache specialist and an associate. Plaintiff returned to California after the headaches subsided with a 30-day supply of various prescription medications. After the plaintiff's return to California the plaintiff had numerous telephone conferences with the Illinois headache specialist for which the plaintiff was billed. When the plaintiff's medication ran out, the Illinois doctors arranged to have additional medication mailed to the plaintiff and on other occasions called prescriptions directly to California pharmacies near the plaintiff's home. Because of the medication prescribed by the Illinois doctors, the plaintiff became confused and disoriented resulting in plaintiff becoming dysfunctional. After hospitalization at a California detoxification facility, plaintiff filed a medical malpractice action. The trial court quashed

service of the summons based on lack of personal jurisdiction over the Illinois physicians.

The court of appeal affirmed. The court noted that in the typical scenario when a patient travels out of state to a doctor and there receives allegedly negligent treatment, courts consistently hold the patient's home state cannot exercise personal jurisdiction over the physician even though the effects of the doctor's negligence are felt in the patient's home state (*49 Cal. App. 4th 1056, 1058)* . The more difficult cases are those where some aspect of the relationship crosses state lines. Just because there must be communications across state lines between doctor and patient, however, does not mean the prerequisite minimum contacts necessary for personal jurisdiction are present. The court held that follow-up consultation ancillary to examination and treatment made by the out-of-state doctor, telephone calls about the patient's status, or arrangements for a patient to continue with medication that the doctor prescribed do not meet the minimum contacts necessary to satisfy due process (*49 Cal. App. 4th 1056, 1061)* . Thus, an out-of-state physician's follow-up care of patient by telephone, even when the home state patient pays for it, is not a sufficient basis for personal jurisdiction (*49 Cal. App. 4th 1056, 1067)* . The court looked to three factors listed in the form, *above*, in determining the reasonableness of exercising personal jurisdiction. One factor the court especially pointed to was that the interest of California in insuring the availability of medical care for its citizens dominates over the state's interest in protecting its citizens from injury by out-of-state doctors. The court found this factor particularly important where California citizens must travel out of state to find specialized medical treatment (*49 Cal. App. 4th 1056, 1064, 1066-1067)* . The court, however, distinguished cases in which minimum contacts were found sufficient for the exercise of personal jurisdiction because an interstate marketing scheme was involved, or the doctor's services were fundamentally interstate in nature from the inception of relationship (*49 Cal. App. 4th 1056, 1060-1061)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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13-132 California Points & Authorities §§ 132.91-132.99

[Reserved]

§§ 132.91[Reserved]

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13-132 California Points & Authorities § 132.100

§ 132.100 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground That Court Lacks Personal Jurisdiction--Sufficient Basis for Jurisdiction Exists--General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN OPPOSITION TO MOTION TO QUASH
vs.	)	SERVICE OF SUMMONS
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE MOTION TO QUASH SERVICE OF SUMMONS SHOULD BE DENIED BECAUSE THE COURT HAS A SUFFICIENT BASIS TO EXERCISE PERSONAL JURISDICTION OVER THE DEFENDANT IN THAT _____ [*specify basis of jurisdiction*].

A. Scope of Court's Personal Jurisdiction. A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States (*Code Civ. Proc. § 410.10*; *see Felix v. Bomoro Kommanditgesellschaft (1987) 196 Cal. App. 3d 106, 111, 241 Cal. Rptr. 670* ; *Quattrone v. Superior Court (1975) 44 Cal. App. 3d 296, 302, 118 Cal. Rptr. 548*).

B. Minimum Contacts Requirement. A court may exercise personal jurisdiction over a nonresident defendant consistently with the *Due Process Clause of the Fourteenth Amendment* so long as the defendant has certain minimum contacts with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice (*International Shoe Co. v. Washington (1945) 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95*).

C. "Contacts" Means "Basis of Jurisdiction." The term "contacts" in *International Shoe Co. v. Washington (1945) 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95* is synonymous with the term "basis of jurisdiction" (*In re Marriage of Smith (1982) 135 Cal. App. 3d 543, 553, 185 Cal. Rptr. 411*).

[*EITHER*]

D. Bases of Jurisdiction Over Individual Defendant. The following are recognized bases for exercising personal jurisdiction over an individual defendant: (1) presence; (2) domicil; (3) residence; (4) nationality or citizenship; (5) consent; (6) appearance in the action; (7) doing business in the state; (8) an act done in the state; (9) causing an effect in the state by an act done elsewhere; (10) ownership, use, or possession of a thing in the state; and (11) other relationships to the state that make the exercise of judicial jurisdiction reasonable (Judicial Council Comments to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Individuals; *see also* *Quattrone v. Superior Court (1975) 44 Cal. App. 3d 296, 302-303, 118 Cal. Rptr. 548* ; *Titus v. Superior Court (1972) 23 Cal. App. 3d 792, 799, 100 Cal. Rptr. 477*).

[*OR*]

D. Basis of Jurisdiction Over Domestic Corporation. The basis of judicial jurisdiction over a domestic corporation, that is, a corporation formed under the laws of California, is its incorporation in the state (Judicial Council Comments to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Corporations).

[*OR*]

D. Bases of Jurisdiction Over Foreign Corporation. The bases of judicial jurisdiction over a foreign corporation, that is, a corporation formed under the laws of another state or of foreign country, are: (1) consent; (2) appointment of agent for service of process; (3) appearance; (4) doing business in the state; (5) doing an act in the state; (6) causing effects in the state by an act done elsewhere; (7) ownership, use, or possession of a thing in the state; and (8) other relationships to the state that make the exercise of judicial jurisdiction reasonable (Judicial Council Comments to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Corporations).

[*OR*]

D. Bases of Jurisdiction Over Partnerships and Other Unincorporated Associations. In California a partnership or other unincorporated association is subject to suit in the firm or common name (*see Code Civ. Proc. § 369.5*), and thus the court may exercise judicial jurisdiction over the partnership or association if under the circumstances it could exercise judicial jurisdiction over a corporation on a similar basis of jurisdiction (Judicial Council Comments to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Partnerships or Other Unincorporated Associations).

[*CONTINUE*]

E. General and Limited Personal Jurisdiction. In personam jurisdiction is of two types, general and limited also referred to as specific (*Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 445, 58 Cal. Rptr. 2d 899, 926 P.2d 1085* ; *Great-West Life Assurance Co. v. Guarantee Co. of North America (1988) 205 Cal. App. 3d 199, 204, 252 Cal. Rptr. 363*).

[*EITHER, if court has sufficient basis for exercising general jurisdiction over defendant*]

F. When Court May Exercise General Personal Jurisdiction Over Defendant. General jurisdiction arises when a nonresident defendant's activities in the forum are so extensive that due process does not require a connection between the cause of action pleaded and the nature of the defendant's activities in the state (*Hunt v. Erie Ins. Group (9th Cir. 1984) 728 F.2d 1244, 1246)* . Thus, a court may exercise general jurisdiction over a nonresident defendant when the defendant's activities within the state are extensive or wide-ranging, or substantial, continuous, and systematic, and there is no requirement that the cause of action alleged be connected with defendant's forum-related activities (*Perkins v. Benguet Consol. Min. Co. (1952) 342 U.S. 437, 446, 72 S. Ct. 413, 96 L. Ed. 485, 63 Ohio Law Abs. 146* ; *Cornelison v. Chaney (1976) 16 Cal. 3d 143, 147, 127 Cal. Rptr. 352, 545 P.2d 264* ; *Henderson v. Superior Court (1978) 77 Cal. App. 3d 583, 590, 142 Cal. Rptr. 478*).

[*OR, if court has sufficient basis for exercising limited jurisdiction over defendant*]

F. When Court May Exercise Limited Personal Jurisdiction Over Defendant. Specific jurisdiction arises when a nonresident defendant's activities within the forum state are not so pervasive as to justify the exercise of general jurisdiction, but defendant has nevertheless purposefully availed himself or herself of the forum benefits, when the controversy arises out of or is related to, *i.e.*, bears a substantial connection or nexus to, the defendant's forum contacts, and when the exercise of personal jurisdiction comports with fair play and substantial justice (*Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 446-447, 452-454, 58 Cal. Rptr. 2d 899, 926 P.2d 1085*); *Cornelison v. Chaney (1976) 16 Cal. 3d 143, 148, 127 Cal. Rptr. 352, 545 P.2d 264* ; *Cassiar Mining Corp. v. Superior Court (1998) 66 Cal. App. 4th 550, 555-558, 78 Cal. Rptr. 2d 167*). Thus, a claim need not arise directly from the defendant's forum contacts to warrant the exercise of limited jurisdiction as long as there is substantial connection or nexus between the defendant's forum contacts and the litigation. The defendant's forum activities need not be directed to the plaintiff to give rise to limited jurisdiction. The nexus required to establish limited jurisdiction is between the defendant, the forum, and the litigation, not between the plaintiff and defendant (*Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 452-458, 58 Cal. Rptr. 2d 899, 926 P.2d 1085* ; *Cassiar Mining Corp. v. Superior Court (1998) 66 Cal. App. 4th 550, 555-558, 78 Cal. Rptr. 2d 167*). In determining whether the exercise of personal jurisdiction comports with fair play and substantial justice, the court may evaluate defendant's burden in appearing in the forum, the forum state's interest in adjudicating the claim, the plaintiff's interest in convenience and effective relief within the forum, judicial economy, and the shared interest of several states in furthering fundamental substantive social policies (*Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 447-448, 58 Cal. Rptr. 2d 899, 926 P.2d 1085*).

[*CONTINUE*]

[*Optional*] **G. Defendant's Economic Activity in Forum.** With regard to corporate manufacturers of allegedly defective products, California has equated engaging in economic activity within this state as a matter of commercial actuality with the requirement of purposeful activity within the state (*Snowney v. Harrah's Entertainment, Inc. (2005) 35 Cal. 4th 1054, 1064-1065, 29 Cal. Rptr. 3d 33, 112 P.3d 28* ; *Secrest Machine Corp. v. Superior Court (1983) 33 Cal. 3d 664, 669, 190 Cal. Rptr. 175, 660 P.2d 399* ; *Buckeye Boiler Co. v. Superior Court (1969) 71 Cal. 2d 893, 902, 80 Cal. Rptr. 113, 458 P.2d 57*).

[*Optional*] **H. Defendant's Purposeful Direction of Act Having Effect in Forum.** The purposeful availment requirement has been modified to allow the exercise of jurisdiction over a defendant whose only contact with the forum is the purposeful direction of a foreign act having an effect in the forum state (*see Asahi Metal Industry Co. v. Superior Court (1987) 480 U.S. 102, 109, 112, 107 S. Ct. 1026, 94 L. Ed. 2d 92* ; *Burger King Corp. v. Rudzewicz (1985) 471 U.S. 462, 477-478, 105 S. Ct. 2174, 85 L. Ed. 2d 528* ; *Calder v. Jones (1984) 465 U.S. 783, 789, 104 S. Ct. 1482, 79 L. Ed. 2d 804* ; *Sinatra v. National Enquirer, Inc. (9th Cir. 1988) 854 F.2d 1191, 1195)* .

[*Optional*] **I. Defendant's Purposeful Interjection Into Forum.** In determining the reasonableness of the assumption of jurisdiction over a nonresident defendant, the court examines the extent of the defendant's purposeful interjection into the forum, which is analogous to the purposeful direction analysis (*Sinatra v. National Enquirer, Inc. (9th Cir. 1988) 854 F.2d 1191, 1198, 1199*).

[*Optional*] **J. Effect of Contractual Choice of Law Provision.** A choice of law provision should not be ignored in considering whether a defendant has purposefully invoked the benefits and protections of a state's laws for jurisdictional purposes; although such a provision standing alone would be insufficient to confer jurisdiction, it may, when considered with other factors, reinforce the defendant's deliberate affiliation with the forum state and the reasonable foreseeability of possible litigation there, and a nonresident might purposefully avail himself or herself of the forum state's laws by entering into contracts expressly providing that those laws could govern disputes under the contract (*Burger King Corp. v. Rudzewicz (1985) 471 U.S. 462, 482, 105 S. Ct. 2174, 85 L. Ed. 2d 528*).

[*Optional*] **K. Effect of Defendant's Purposeful Availment of Privilege of Conducting Activities in Forum.** When a nonresident defendant purposefully avails itself of the privilege of conducting activities within the forum state, it has clear notice that it is subject to suit there and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to its customers, or, if the risks are too great, severing its connection with the state (*World-Wide Volkswagen Corp. v. Woodson (1980) 444 U.S. 286, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490* ; *St. Joe Paper Co. v. Superior Court (1981) 120 Cal. App. 3d 991, 999, 175 Cal. Rptr. 94*).

[*Optional*] **L. Contacts Resulting From Defendant's Own Actions.** Jurisdiction is proper when the defendant's contacts with the forum state result from actions of the defendant that create a substantial connection with the forum state (*Asahi Metal Industry Co. v. Superior Court (1987) 480 U.S. 102, 109, 107 S. Ct. 1026, 94 L. Ed. 2d 92* ; *Burger King Corp. v. Rudzewicz (1985) 471 U.S. 462, 475, 105 S. Ct. 2174, 85 L. Ed. 2d 528*).

[*Optional*] **M. Requisite Minimum Contacts Can Be Electronic.** Use of electronic mail and the telephone by a party in another state may establish sufficient minimum contacts with California to support personal jurisdiction (*Snowney v. Harrah's Entertainment, Inc. (2005) 35 Cal. 4th 1054, 1064-1065, 29 Cal. Rptr. 3d 33, 112 P.3d 28* ; *Hall v. LaRonde (1997) 56 Cal. App. 4th 1342, 1344, 66 Cal. Rptr. 2d 399*).

[*Optional*] **N. Defendant's Burden of Proof After Plaintiff Has Established Basis for Jurisdiction.** Once plaintiff establishes the existence of defendant's minimum contacts with the forum state, a rebuttable presumption arises that the exercise of jurisdiction is reasonable, and the defendant therefore bears the burden of ultimately proving that the exercise of jurisdiction is unreasonable [*Burger King Corp. v. Rudzewicz (1985) 471 U.S. 462, 477, 105 S. Ct. 2174, 85 L. Ed. 2d 528* ; *Sinatra v. National Enquirer, Inc. (9th Cir. 1988) 854 F.2d 1191, 1195* ; *Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 449, 475, 58 Cal. Rptr. 2d 899, 926 P.2d 1085]* .

[*Optional*] **O. Plaintiff's Lack of Contacts Irrelevant.** So long as minimum contacts exist between a nonresident defendant and the forum state, the fact that the plaintiff lacks contacts with the forum state does not defeat otherwise proper jurisdiction (*Calder v. Jones (1984) 465 U.S. 783, 788, 104 S. Ct. 1482, 79 L. Ed. 2d 804* ; *Keeton v. Hustler Magazine, Inc. (1984) 465 U.S. 770, 779-781, 104 S. Ct. 1473, 79 L. Ed. 2d 790*).

[*In an appropriate case, add additional points and authorities set out in §§ 132.101 -132.115, supporting the argument*

that the exercise of jurisdiction would be proper under the particular facts of the case.]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

The form of points and authorities in [1], *above*, is for use in opposing a motion to quash service of summons under *Code Civ. Proc. § 418.10(a)(1)*, on the ground that the court has no proper basis for exercising personal jurisdiction over the defendant. Because a motion to quash services of summons will in most cases involve a nonresident defendant, the memorandum sets out general points of law regarding the requirement, imposed by constitutional due process considerations, that a nonresident defendant have certain minimum contacts with the forum state before the court may exercise personal jurisdiction over the defendant [*see* Paragraphs A, B, C, E].

Alternative Paragraphs D set out the bases for a court to exercise personal jurisdiction over an individual defendant, a domestic corporate defendant, a foreign corporate defendant, and a defendant that is a partnership or unincorporated association, respectively. Alternative Paragraphs F set out the requirements that must be satisfied for the court to exercise either general or limited jurisdiction over a defendant. For discussion regarding the distinction between general and limited jurisdiction, see *§ 132.76[2][b]*.

Optional Paragraphs G through M set out various points of law supporting the argument that a defendant's particular type of forum-related activity constitutes sufficient minimum contacts to support the court's exercise of limited personal jurisdiction. Optional Paragraph N states the point of law regarding the plaintiff's burden of proof once the defendant has established the existence of sufficient minimum contacts, while Optional Paragraph O relates to the fact that plaintiff's contacts with the forum state, as distinguished from the defendant's, are irrelevant.

The form should be augmented, when appropriate, with additional points and authorities *set out in §§ 132.101 -132.115*, which support the argument that the court has a sufficient basis to exercise general or limited personal jurisdiction in particular situations.

In an appropriate case, the points and authorities set out in this form may be used to oppose a motion supported by the points and authorities *set out in §§ 132.70 -132.90*.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, the foregoing points and authorities may be used to oppose a motion by a third-party cross defendant to quash service of the summons on a cross complaint [*see Code Civ. Proc. § 428.60(1)*] for lack of in personam jurisdiction, or to oppose a petition for a writ of mandate to compel the trial court to grant a motion to quash after it has declined to do so (*Code Civ. Proc. § 418.10(c)*). They may also be adapted for use in a trial or appellate brief.

[c] Bases for Jurisdiction

[i] Judicial Council Comments to Code Civ. Proc. § 410.10

Code Civ. Proc. § 410.10 is California's "long-arm" statute [*see, e.g., Asahi Metal Industry Co. v. Superior Court (1987) 480 U.S. 102, 106, 107 S. Ct. 1026, 94 L. Ed. 2d 92]* , providing state courts with the broadest possible exercise of jurisdiction, limited only by constitutional considerations of due process as defined by the U.S. Supreme Court [*see Pacific Atlantic Trading Co. v. M/V Main Exp. (9th Cir. 1985) 758 F.2d 1325, 1327* ; *Sibley v. Superior Court (1976) 16 Cal. 3d 442, 445, 128 Cal. Rptr. 34, 546 P.2d 322]* . The Judicial Council Comment to *Code Civ. Proc. § 410.10*, entitled generally "Bases of Judicial Jurisdiction," outlines the various bases of jurisdiction that are consistent with due process limitations, and this comment is therefore cited extensively in the foregoing form [*see* Alternative Paragraphs D] as well as in succeeding comments to this form, and in succeeding forms in this subpart [*see, e.g., §§ 132.101 -132.110*]. The text of the Judicial Council Comment to *Code Civ. Proc. § 410.10* is set out in West's Annot. Code Civ. Proc. (1973 ed.), following § 410.10 [*see also* Li, Attorney's Guide to California Jurisdiction and Process, Part I, *Jurisdiction and Service of Process* (Cal. C.E.B. 1970); Restatement (Second), Conflict of Laws, §§ 27-52].

The Judicial Council has pointed out that, in addition to the specifically enumerated bases of jurisdiction, other bases of jurisdiction may be developed in the future that satisfy the basic requirement of reasonableness, and those bases are also included under *Code Civ. Proc. § 410.10* [*see* Judicial Council Comments to *Code Civ. Proc. § 410.10*, under Bases of Judicial Jurisdiction over Individuals].

Moreover, the Judicial Council Comments to *Code Civ. Proc. § 410.10* refer to nonenumerated "other relationships" to the state that make the exercise of personal jurisdiction over an individual nonresident defendant or a foreign corporate defendant reasonable under the circumstance [*see* first and third Alternative Paragraphs D]. With respect to individuals, these situations include those in which the defendant is an executor, administrator, guardian, receiver, conservator, trustee, or other legal representative who is appointed or qualified pursuant to the laws of this state, or has consented to the exercise of such jurisdiction, or has engaged in conduct specifically enumerated as a basis for jurisdiction [*see* Judicial Council Comment to *Code Civ. Proc. § 410.10*, under Bases of Judicial Jurisdiction Over Individuals]. With respect to foreign corporations, these situations include corporations ceasing to do business in the state or surviving after merger in the state [*see* Judicial Council Comment to *Code Civ. Proc. § 410.10*, under Bases of Judicial Jurisdiction over Corporations].

[ii] Jurisdiction Over Plaintiff

A state has power to exercise judicial jurisdiction over an individual who brings an action as plaintiff [*see* Judicial Council Comment to *Code Civ. Proc. § 410.10*, under Bases of Judicial Jurisdiction Over Individuals], as well as a plaintiff who is a corporation [*see* Judicial Council Comment to *Code Civ. Proc. § 410.10*, under Bases of Judicial Jurisdiction Over Corporations].

[iii] Jurisdiction Over Party Who Intrudes Voluntarily Into Lawsuit

In addition to the bases of jurisdiction discussed under Bases for Jurisdiction-Judicial Council Comments to Code Civ. Proc. §§ 410.10 and *132.100[3][c][ii], above* , a party not named in a lawsuit who voluntarily intrudes into it thereby submits itself to the in personam jurisdiction of the court and is bound by any adjudication made in the case [*California Concrete Co. v. Beverly Hills Savings & Loan Assn. (1989) 215 Cal. App. 3d 260, 267-268, 261 Cal. Rptr. 484]* .

[d] Related Pleading and Practice Forms

For forms of notices of motion to quash service of summons, and related papers, see California Forms of Pleading and Practice, Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances* .

[3] Discussion of Authorities

[a] Scope of Court's Personal Jurisdiction

The facts and procedural background of ***Felix v. Bomoro Kommanditgesellschaft*** *(1987) 196 Cal. App. 3d 106, 241 Cal. Rptr. 670* , are discussed in *§ 132.75[4][a]*. Although the court of appeal affirmed the judgment of dismissal after the defendant's motion to quash service of summons was granted, the court, after quoting the provisions of *Code Civ. Proc. § 410.10*, said the statute manifests an intent to exercise the broadest possible jurisdiction, limited only by constitutional considerations (*196 Cal. App. 3d 106, 111)* .

The facts and procedural background of ***Quattrone v. Superior Court*** *(1975) 44 Cal. App. 3d 296, 118 Cal. Rptr. 548* are more fully discussed in *§ 132.108[3][a]*. In that case the trial court denied a Pennsylvania resident's motion to quash service of summons made on him by mail in an action by a California corporation alleging a conspiracy among the nonresident defendant and others to defraud plaintiff by submitting to it falsified financial records relating to the operations of its foreign based subsidiary. The nonresident petitioned the court of appeal for a writ of mandate to compel the trial court to grant the motion. In denying the petition, the court of appeal, after quoting the provisions of *Code Civ. Proc. § 410.10*, said that by imposing no limitation except those imposed by constitutional considerations, this section authorizes the broadest possible exercise of judicial jurisdiction (*44 Cal. App. 3d 296, 302)* .

[b] Minimum Contacts Requirement

The facts and procedural background of ***International Shoe Co. v. Washington*** *(1945) 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95* , are discussed in *§ 132.70[3][d]*. In upholding the jurisdiction of the Washington courts, the Supreme Court of the United States said that due process requires only that in order to subject a defendant to a judgment in personam, if he or she be not present within the territory or forum, he or she must have certain minimum contacts with it such that maintenance of the suit does not offend traditional notions of fair play and substantial justice (*326 U.S. 310, 316)* .

[c] "Contacts" Means "Basis of Jurisdiction"

The facts and procedural background of ***In re Marriage of Smith*** *(1982) 135 Cal. App. 3d 543, 185 Cal. Rptr. 411* , are discussed in *§ 132.40[3][f]*. On appeal from the order quashing the service of summons on the husband because of defective service and setting aside the interlocutory and final judgments of dissolution, the wife contended that under *Code Civ. Proc. § 410.10* the court had, notwithstanding the defective service of summons, acquired jurisdiction over the respondent as a result of his alleged general appearance in the proceeding that, she argued, constituted a consent to jurisdiction or a waiver of any objection to jurisdiction.

In rejecting this contention and affirming the order, the appellate court explained that the word "basis" has several uses, and that, although one common use refers to relationships between things or individuals, this is not the use that lawyers, judges, teachers, and legislators have made of "basis" in reference to the jurisdiction of courts. In this context "basis" refers to the relationship between a court and persons, entities, or things a court may seek to bring before it (*135 Cal. App. 3d 543, 552-553)* . Thus, if a "basis of jurisdiction" exists between a court and a defendant, the court may bring that defendant within its authority and thereafter make orders binding on the defendant.

The term "contacts" is used in ***International Shoe Co. v. Washington*** *(1945) 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95* (discussed in *§ 132.70[3][d]*) synonymously with "basis of jurisdiction" (*135 Cal. App. 3d 543, 553)* . The court said that due process requirements of notice and opportunity to be heard should be carefully distinguished from due process requirements of basis of jurisdiction. If there is no constitutionally adequate basis of jurisdiction for a court to grant a plaintiff the specific judgment he or she seeks against the defendant, it will make no difference that the defendant has been given notice and opportunity to be heard (*135 Cal. App. 3d 543, 553)* .

[d] Bases of Jurisdiction Over Individual Defendant

For discussion of the Judicial Council Comments to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction over Individuals, see the Comments under Bases for Jurisdiction-Judicial Council Comments to *Code Civ. Proc. § 410.10*.

The procedural background of ***Quattrone v. Superior Court*** *(1975) 44 Cal. App. 3d 296, 118 Cal. Rptr. 548* , is *discussed under § 132.100[3][a]*. In denying the petition for writ of mandate, the court of appeal said that in its 1969 Annual Report to the Governor and the Legislature, the Judicial Council of California commented at length on the effect of *Code Civ. Proc. § 410.10*, and said that all the recognized bases of judicial jurisdiction are included and that, in the case of natural persons, such bases currently include: (1) presence; (2) domicile; (3) residence; (4) nationality or citizenship; (5) consent; (6) appearance in the action; (7) doing business in the state; (8) an act done in the state; (9) causing an effect in the state by an act done elsewhere; (10) ownership, use, or possession of a thing in the state; and (11) other relationships to the state that make the exercise of judicial jurisdiction reasonable (*44 Cal. App. 3d 296, 302, 303)* .

The facts and procedural background of ***Titus v. Superior Court*** *(1972) 23 Cal. App. 3d 792, 100 Cal. Rptr. 477* , are discussed in *§ 132.70[3][a]*. Although the court granted the writ insofar as the order to show cause purported to give the trial court personal jurisdiction over the husband for purposes of child support and annulling the child support order because there was no basis for in personam jurisdiction over the father, the court of appeal said that the bases of judicial jurisdiction are those listed in Restatement (Second), Conflict of Laws, § 27, as follows: (a) presence; (b) domicile; (c) residence; (d) nationality or citizenship; (e) consent; (f) appearance in an action; (g) doing business in the state; (h) an act done in the state; (i) causing an effect in the state by an act done elsewhere; (j) ownership, use, or possession of a thing in the state; and (k) other relationships to the state that make the exercise of jurisdiction reasonable (*23 Cal. App. 3d 792, 799)* .

[e] General and Limited Personal Jurisdiction

The facts and procedural background of ***Vons Companies, Inc. v. Seabest Foods, Inc.*** *(1996) 14 Cal. 4th 434, 58 Cal. Rptr. 2d 899, 926 P.2d 1085* , are *discussed under § 132.100[3][g]*. The court noted in its opinion that personal jurisdiction may be either general or specific (*14 Cal. 4th 434, 445)* .

Great-West Life Assurance Co. v. Guarantee Co. of North America *(1988) 205 Cal. App. 3d 199, 252 Cal. Rptr. 363* was an action by a Canadian insurance company against a Canadian bond company for breach of contract, breach of the implied covenant of good faith and fair dealing, and breach of statutory duties. The court of appeal affirmed the order quashing service of summons for lack of jurisdiction and dismissing the action on the ground that the defendant did not possess sufficient minimum contacts with California for an assertion of jurisdiction, stating that in personam jurisdiction is of two types, general and limited (*205 Cal. App. 3d 199, 204)* .

[f] When Court May Exercise General Personal Jurisdiction Over Defendant

In ***Hunt v. Erie Ins. Group*** *(9th Cir. 1984) 728 F.2d 1244* , plaintiff, while on a summer break from college was en route to visit her mother in California when, while passing through Colorado, the car in which she was riding rear-ended a truck, as a result of which plaintiff was rendered a quadriplegic. While she was hospitalized in Colorado, a dispute broke out between the plaintiff and the defendant, which insured the car driver under a no-fault policy, with respect to the amount of coverage afforded plaintiff by the policy. Plaintiff was unable to afford the only rehabilitative treatment available in Colorado, and her mother arranged to have her transferred to a rehabilitation center in California. Unable to resolve the dispute with the insurance company, plaintiff sued the insurer in a California state court. The insurer had the case transferred to the federal court, where its motion to dismiss for lack of personal jurisdiction was granted, and plaintiff appealed.

Although it affirmed the dismissal on the ground that no basis for jurisdiction existed, the U.S. Court of Appeals said that general jurisdiction arises when a nonresident defendant's activities in the forum are so substantial and continuous

that due process does not require a connection between the cause of action pleaded and the nature of the defendant's activities in the state (*728 F.2d 1244, 1246)*

In ***Perkins v. Benguet Consol. Min. Co.*** *(1952) 342 U.S. 437, 72 S. Ct. 413, 96 L. Ed. 485, 63 Ohio Law Abs. 146* , the Supreme Court of Ohio affirmed the judgments of the lower courts quashing service of summons on a Philippine corporation in two transitory actions against it, neither of which arose in Ohio nor was connected with the corporation's Ohio activities, by a nonresident stockholder seeking to recover (1) dividends claimed to be due, and (2) damages for the corporation's failure to issue stock certificates to her. The Court ruled that the exercise of in personam jurisdiction over the corporation would violate due process. In holding that the exercise of jurisdiction would not offend the due process clause of the *Fourteenth Amendment to the U.S. Constitution*, and vacating the judgment of the Ohio Supreme Court, the United States Supreme Court pointed out that the corporation's mining properties were in the Philippine Islands, that the mining operations were completely halted during the Japanese occupation of the Islands during World War II, and that, during that interim, the president, who was also the general manager and principal stockholder of the company, returned to his home in Ohio, and there maintained an office in which he conducted company matters and in which he kept the company's office files. The Court also pointed out that in this office he (1) carried on correspondence relating to company business and to its employees; (2) drew and distributed salary checks to himself as president and to two company secretaries who worked with him; (3) used local banks for carrying company funds and as transfer agents of company stock; (4) held directors' meetings in his home; (5) from his home supervised policies dealing with the rehabilitation of the corporation's properties in the Philippines and dispatched funds to cover purchases of machinery for the rehabilitation; and that he, thus, carried on in Ohio a continuous and systematic supervision of the necessarily limited wartime activities of the company and there discharged his duties as president and general manager, both during the occupation and immediately thereafter (*342 U.S. 437, 447-448, 63 Ohio Law Abs. 146)* .

Under these circumstances, the Court found no requirement of federal due process that either prohibited Ohio from opening its courts to the causes of action or compelled it to do so (*342 U.S. 437, 446, 448, 63 Ohio Law Abs. 146)* , and vacated the judgment of the Ohio court. Quoting *International Shoe Co. v. Washington (1945) 326 U.S. 310, 318, 66 S. Ct. 154, 90 L. Ed. 95* (discussed in *§ 132.70[3][d]*), the Court nevertheless pointed out that there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities (*342 U.S. 437, 446, 63 Ohio Law Abs. 146)* .

The facts and procedural background of ***Cornelison v. Chaney*** *(1976) 16 Cal. 3d 143, 127 Cal. Rptr. 352, 545 P.2d 264* , are *discussed under § 132.100[3][g]*. In reversing the judgment of dismissal following the granting of a motion to quash out-of-state service of summons by mail on the ground that the court could exercise limited jurisdiction over the nonresident defendant, the California Supreme Court said that if a nonresident defendant's activities can be described as extensive or wide-ranging, or substantial, continuous, and systematic, there is a constitutionally sufficient relationship to warrant jurisdiction for all causes of action asserted against the nonresident, and, in such circumstances, it is not necessary that the specific cause of action alleged be connected with the defendant's business relationship to the forum (*16 Cal. 3d 143, 147)* .

In ***Henderson v. Superior Court*** *(1978) 77 Cal. App. 3d 583, 142 Cal. Rptr. 478* , although holding that the California court had neither general nor limited jurisdiction over the nonresident defendant on a claim relating to an agreement made, activities performed, obligations incurred, and services rendered as companion and homemaker during an extramarital and nonmarital relationship that took place in Florida, the court of appeal said that general jurisdiction over a nonresident defendant exists when his or her activities within California are extensive, wide-ranging, substantial, continuous, and systematic (*77 Cal. App. 3d 583, 590)* .

[g] When Court May Exercise Limited Personal Jurisdiction Over Defendant

In ***Vons Companies, Inc. v. Seabest Foods, Inc.*** *(1996) 14 Cal. 4th 434, 58 Cal. Rptr. 2d 899, 926 P.2d 1085* ,

customers of franchise restaurants in several states, including Washington, suffered from exposure to E. coli bacteria traced to hamburgers sold at the restaurants. Eighty-five franchisees from California and other states, whose customers were not injured, brought suit San Diego superior court against the franchisor, a Delaware corporation with its principal place of business in San Diego, and other defendants stating causes of action for negligence, breach of implied warranty, breach of contract and other claims, and seeking damages for loss of business caused by the adverse publicity that followed the E. coli outbreak. One of the defendants (Vons), a meat supplier, cross-complained against several of the defendants, including owners of franchises in Washington State at which E. coli contamination had injured or killed customers, alleging, among other things, that the injuries caused by the E. coli contamination would have been avoided had the franchisor and its franchisees cooked the hamburgers at the proper temperature. Vons asserted causes of action against the Washington franchisees for negligence and intentional interference with economic advantage, and comparative and equitable indemnity. Vons sought damages for its own loss of business, indemnification for any liability that might be imposed on it for injury to franchisee customers in other actions and for liability that might be imposed on it for claims of franchisees in the current action. The Washington cross defendants appeared specially and moved to quash service of process based on lack of personal jurisdiction. The trial court granted the motion, and the court of appeal affirmed.

The Supreme Court reversed. The Court held that the franchisees had sufficient contacts with California through their relationship with their California franchisor, and that the tort claims alleged against the franchisees in a cross-complaint filed in a California action stemming from food poisoning incidents were sufficiently related to the franchisees' contacts in California, to justify California's exercise of jurisdiction of the franchisees (*14 Cal. 4th 434, 440)* . The Court noted that if a nonresident defendant does not have substantial and systematic contacts in the forum sufficient to establish general jurisdiction, the nonresident defendant may be subject to specific jurisdiction of the forum if the defendant has purposefully availed himself or herself of the forum benefits and the controversy is related to or arises out of the defendant's contacts with the forum. The United States Supreme Court has described the forum contacts necessary to establish specific jurisdiction as involving variously a nonresident who has purposely directed his or her activities at forum residents, purposefully derived benefit from forum activities, or purposefully availed himself or herself of privilege of conducting activities in forum state, thus invoking the benefits and protections of its laws. The United States Supreme Court has also referred to the requisite forum contacts as involving a nonresident defendant who deliberately has engaged in significant activities within a state, or created continuing obligations between himself or herself and residents of the forum, concluding that in such cases the defendant manifestly has availed himself or herself of the privilege of conducting business in the forum, and because his or her activities are shielded by the benefits and protections' of the forum's laws it is not unreasonable to require him or her to also submit to burdens of litigation in that forum. It is fair to subject defendants to specific jurisdiction because their forum activities should put them on notice that they will be subject to litigation in that forum (*14 Cal. 4th 434, 446)* . Once it is decided defendant purposefully established minimum contacts in the forum state, these contacts may be considered in light of other factors to determine if assertion of personal jurisdiction would comport with fair play and substantial justice (*14 Cal. 4th 434, 447)* . Courts may evaluate the burden on the defendant in appearing in the forum, the forum state's interest in adjudicating the claim, the plaintiff's interest in convenience and effective relief within the forum, judicial economy, and shared interest of several states in furthering fundamental substantive social policies (*14 Cal. 4th 434, 448)* . Quoting from *Cornelison v. Chaney (1976) 16 Cal. 3d 143, 148, 127 Cal. Rptr. 352, 545 P.2d 264* , the court noted that as the relationship of the defendant with the state seeking to exercise jurisdiction over the defendant grows more tenuous, the scope of jurisdiction also retracts, and fairness is assured by limiting the circumstances under which the plaintiff can compel the defendant to appear and defend (*14 Cal. 4th 434, 448, 452)* .

The Court further noted that a claim need not arise directly from the defendant's forum contacts in order to be sufficiently related to the contact to warrant the exercise of specific jurisdiction. Rather, as long as the claim bears a substantial connection to the nonresident's forum contacts, the exercise of specific jurisdiction is appropriate (*14 Cal. 4th 434, 452)* . The United States Supreme Court has not provided precise criteria regarding the necessary relationship between the plaintiff's cause of action and the defendant's contacts in the forum. Rather, the Court has stated the applicable standard in broader terms requiring only that plaintiff's cause of action be related to or arise out of the

defendant's contacts with the forum (*14 Cal. 4th 434, 453)* . Thus, a state may exercise specific jurisdiction if there is a substantial connection or nexus between forum contacts and the litigation (*14 Cal. 4th 434, 454)* . The defendant's forum activities need not be directed to the plaintiff to give rise to specific jurisdiction (*14 Cal. 4th 434, 454, 457)* . Accordingly, a nonresident defendant may be subject to California specific jurisdiction if the defendant purposefully has availed itself of forum benefits through an ongoing franchise agreement and there is a substantial nexus or connection between the defendant's forum activities and the plaintiff's claim even though the plaintiff is not a party to the franchise contract (*14 Cal. 4th 434, 456-457)* . The nexus required to establish specific jurisdiction is between the defendant, the forum, and the litigation, not between the plaintiff and defendant. In deciding whether a defendant has minimum contacts or purposefully has availed itself of forum benefits, the relevant contacts are said to be with the forum, because it is the defendant's choice to take advantage of opportunities that exist in the forum that subjects it to jurisdiction (*14 Cal. 4th 434, 458)* .

In reaching its conclusion that there were sufficient forum contacts to justify California's exercise of jurisdiction over the franchisees, the Court in the context of ongoing franchise relationships rejected the "proximate cause" test applied in *Sklar v. Princess Properties International, Ltd. (1987) 194 Cal. App. 3d 1202, 1208, 240 Cal. Rptr. 102* and *Circus Circus Hotels, Inc. v. Superior Court (1981) 120 Cal. App. 3d 546, 569, 174 Cal. Rptr. 885* , as too narrow and disapproved the reasoning of those cases to the extent they are inconsistent with the opinion (*14 Cal. 4th 434, 461-464, 475)* . The proximate cause test applied by those cases is inconsistent with rationale underlying specific jurisdiction in context of ongoing franchise relationship (*14 Cal. 4th 434, 464)* . Similarly, in the context of ongoing franchise relationships, the Court rejected the "but for" test applied in *State of Oregon v. Superior Court (1994) 24 Cal. App. 4th 1550, 29 Cal. Rptr. 2d 909* and *Dialysis at Sea, Inc. v. Superior Court (1989) 216 Cal. App. 3d 788, 265 Cal. Rptr. 71* , as too broad and amorphous and did not follow those cases (*14 Cal. 4th 434, 465-467, 474)* . The Court was not persuaded that it is productive to focus on whether inquiry would have occurred "but for" the forum contacts, at least when an ongoing franchise relationship is the forum contact (*14 Cal. 4th 434, 467)* . Additionally, in the context of ongoing franchise relationships, the Court rejected the "substantive relevance" test (*14 Cal. 4th 434, 469-475)* . In rejecting these tests, the Court noted that the United States Supreme Court has rejected the use of "talismanic jurisdictional formulas," and has stated that the facts of each case must always be weighed in determining whether personal jurisdiction would comport with fair play and substantial justice (*14 Cal. 4th 434, 460, 463)* .

Cornelison v. Chaney *(1976) 16 Cal. 3d 143, 127 Cal. Rptr. 352, 545 P.2d 264* , was a wrongful death action, arising out of a vehicular accident that occurred in Nevada near the California border. The action was brought by a California resident against a resident and domiciliary of Nebraska, who for seven years preceding the accident had been engaged in the business of hauling goods by truck in interstate commerce, made about 20 trips a year to California in the operation of his business, and, at the time of the accident, was hauling goods to a manufacturer in California, where he intended to obtain cargo for a return shipment to an undesignated destination. He was licensed to haul freight in California, as well as several other states, and acted as an independent contractor for several brokerage companies engaged in shipping, one of which was in California. His average cargo in any single trip to California had a value of about $20,000. The trial court granted the defendant's motion to quash the out-of-state mail service of summons on him, and dismissed the action for lack of jurisdiction over the defendant. Plaintiff appealed.

In reversing the judgment on the ground that sufficient minimal contacts existed to support limited jurisdiction, the California Supreme Court said that "[i]f the defendant's activities in the forum are not so pervasive as to justify the exercise of general jurisdiction over him, then jurisdiction depends on the quality and nature of his activity in the forum in relation to the particular cause of action. In such a situation, the cause of action must arise out of an act done or transaction consummated in the forum, or the defendant must perform some other act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws. Thus, as the relationship of the defendant with the state seeking to exercise jurisdiction over him grows more tenuous, the scope of jurisdiction also retracts, and fairness is assured by limiting the circumstances under which the plaintiff can compel him to appear and defend. The crucial inquiry concerns the character of defendant's activity in the forum, whether the cause of action arises out of or has a substantial connection with that activity, and upon the balancing of the

convenience of the parties and the interest of the state in assuming jurisdiction" (*16 Cal. 3d 143, 147-148)* .

The language quoted above from the decision in *Cornelison* has been widely quoted in other California courts in deciding whether the exercise of limited jurisdiction is warranted in a particular case [*see, e.g.,* *Magnecomp Corp. v. Athene Co. (1989) 209 Cal. App. 3d 526, 534, 257 Cal. Rptr. 278* ; *Mihlon v. Superior Court (1985) 169 Cal. App. 3d 703, 711, 215 Cal. Rptr. 442* (both cases *discussed under § 132.100[4]* [d])]. Although extensively quoted, one portion of this language is somewhat misleading, particularly if read out of context of the remaining language. This is the Court's statement that "the cause of action must arise out of an act done or transaction consummated in the forum, or the defendant must perform some other act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws." This statement should not be read to suggest that limited jurisdiction may be based *either* on some act or transaction that occurs in the forum *or* on an act that constitutes purposeful availment. To justify the exercise of limited jurisdiction, there must always some act of purposeful availment by the defendant sufficient to invoke the benefit and protection of the laws of the forum state *and* the cause of action must be sufficiently related to that activity, whether or not it is based on an act or transaction that occurred in the forum state [*see* *Burger King Corp. v. Rudzewicz (1985) 471 U.S. 462, 474-475, 105 S. Ct. 2174, 85 L. Ed. 2d 528* ; *Sinatra v. National Enquirer, Inc. (9th Cir. 1988) 854 F.2d 1191, 1195* (*discussed under § 132.100[4]* [d])]. This statement should, therefore, be read to suggest that the essential requirement f purposeful availment can be satisfied by the fact that the defendant's act giving rise to the cause of action occurred in he forum state, or it can be satisfied by "some other act" sufficient to constitute purposeful availment, to which the cause of action is related.

Cassiar Mining Corp. v. Superior Court *(1998) 66 Cal. App. 4th 550, 78 Cal. Rptr. 2d 167* , involved a Canadian company that for some 40 years admittedly sold thousands of tons of raw asbestos to California manufacturers who incorporated the asbestos into finished products. The company had been incorporated in Canada in 1951, but ceased its operation in 1992, when it went bankrupt and subsequently dissolved. Suit was brought by 10 California workers who allegedly sustained asbestos-related lung injuries as a result of inhaling asbestos during the course of their employment. They claimed they were injured when they inhaled asbestos supplied by the defendant company to various manufacturers. None of the plaintiffs, however, worked in plants where the defendant company shipped asbestos. The plaintiffs claimed that defendant failed to adequately warn of the health risks. Defendant appeared specially and moved to quash service of summons. While conceding it sold asbestos fiber to certain discrete locations in California between 1953 and 1991, defendant declared that no sales of asbestos were made at any time to any jobsite where any plaintiff alleged occupational exposure to asbestos. Plaintiffs counterdeclarations did not establish any casual link between their injuries and defendant's California sales. The trial court denied defendant's motion to quash and defendant filed a petition for writ of mandate (*66 Cal. App. 4th 550, 552-554, 557)* .

The court of appeal denied the petition. The court applied *Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 58 Cal. Rptr. 2d 899, 926 P.2d 1085* , to find sufficient contacts to justify the exercise of specific jurisdiction. The instant litigation results from injuries related to defendant's forum activities of selling asbestos to certain companies located in California and it is manifestly fair to require that defendant account in California for the consequences of its activities within the state (*66 Cal. App. 4th 550, 553)* . Even if defendant had severed any California connections long before the time of suit, it still may be subject to the state's specific jurisdiction if it has (1) purposefully derived benefits from California activities, and (2) the subject lawsuit is related to or arises out of California contacts (*66 Cal. App. 4th 550, 555)* . Merely knowing the product will enter California, however, does not comply with the constitutional minimum contacts requirements. Instead the foreign defendant must have some control over the ultimate destination. Defendant sold thousands of tons of raw asbestos fiber directly to California locations. Far from fortuitous or random connections, the record shows defendant purposefully directed raw asbestos to these sites in California (*66 Cal. App. 4th 550, 555)* . It is equally foreseeable that asbestos fiber which was directed by defendant to California would be used in California and could give rise to tort litigation in California. Defendant knowingly availed itself of the benefits accruing from its activities in California. Thus, the court concluded that defendant intended to serve the California market, thereby becoming subject to its specific jurisdiction for lawsuits having a substantial connection with its forum activities. As long as the claim bears a substantial connection to the nonresident's forum contacts, the exercise of

specific jurisdiction is appropriate (*66 Cal. App. 4th 550, 556)* .

With regard to defendant's attack on plaintiffs' showing of a substantial connection between the California asbestos sales and plaintiffs' injuries, the court rejected defendant's argument that you can only have specific jurisdiction if the cause of action arises out of those contacts with the state. *Vons*, the leading California authority, expressly rejected similar efforts to impose such strict requirements in specific jurisdiction cases. In its place the Supreme Court chose a relaxed, flexible standard, rather than one requiring that the plaintiff's claims arise out of the forum contact in any narrow sense. According to the Supreme Court, the nexus required to establish specific jurisdiction is between the defendant, the forum, and the litigation, not between the plaintiff and defendant. The relevant contacts are said to be with the forum, because it is the defendant's choice to take advantage of opportunities that exist in the forum that subjects it to jurisdiction (*66 Cal. App. 4th 550, 557)* . Additionally, the Supreme Court rejected a mechanical proximate cause test for evaluating the connection between a nonresident defendant's forum activities and a plaintiff's cause of action. The relevant standard was painted in relative broad terms and formulated in the disjunctive; the cause of action either must arise out of or be related to the defendant's forum activity in order to warrant the exercise of specific jurisdiction. Instead of a bright-line rule, the Supreme Court chose the amorphous goal of fairness. There is a sliding scale or continuum between the defendant's contacts and the plaintiff's claim so that the greater the intensity of forum activity, the lesser the relationship required between the contact and the claim (*66 Cal. App. 4th 550, 557-558)* . The connection between plaintiffs' complaint and defendant's forum-based activities met the *Vons* relatedness test. Plaintiffs who were exposed to asbestos fibers in California are suing defendant only because it purposefully sold asbestos fiber in the state. Defendant's obligation, if any, to plaintiffs are connected to its California-based activities. The goal of fairness to defendants is met by extending the burdens of California jurisdiction over a defendant who purposefully availed itself of the benefits of selling asbestos fibers within the state. Since plaintiffs were harmed while engaged in activities integral to the relationship defendant sought to establish, the nexus between the contacts and the cause of action is sufficiently strong to survive the due process inquiry at least at the relatedness stage (*66 Cal. App. 4th 550, 557-558)* .

[h] Defendant's Economic Activity in Forum

In ***Snowney v. Harrah's Entertainment, Inc.*** *(2005) 35 Cal. 4th 1054, 29 Cal. Rptr. 3d 33, 112 P.3d 28* , plaintiff hotel guest, a California resident, filed a class action against defendant Nevada hotels for failing to provide notice of an energy surcharge imposed on hotel guests. The trial court granted the hotels' motion to quash the summons for lack of personal jurisdiction. The appellate court reversed and the action was appealed to the Supreme Court.

The California Supreme Court reviewed the federal cases addressing internet web sites and their impact on personal jurisdiction, but has not adopted a particular approach whether a web site available in California by itself is "doing business" in the state (*35 Cal. 4th 1054, 1064)* . However, the Court did find that a Nevada hotel chain web site, by any standard, established purposeful availment by touting the proximity of their hotels to California, providing driving directions from California to their hotels, specifically targeting residents of California, many of their patrons come from California and that some of these patrons undoubtedly made reservations using their Web site. As such, the hotel purposefully derived a benefit from their internet activities in California (*35 Cal. 4th 1054, 1064-1065)* .

The California Supreme Court further held that the assertion of specific jurisdiction was fair where a hotel advertised heavily in California, obtained a significant percentage of its business from California residents, and maintained an interactive Internet Web site for conducting business and toll-free phone number where visitors or callers could obtain room quotes and make reservations. The hotel purposefully availed itself of the privilege of doing business in California. The guest's causes of action were premised on alleged omissions during the hotel's consummation of transactions with California residents and in its California advertisements. Because the harm alleged by the guest related directly to the content of the hotel's promotional activities in California, an inherent relationship between the guest's claims and the hotel's contacts with California existed. By purposefully and successfully soliciting the business of California residents, the hotels could reasonably anticipate being subject to litigation in California in the event their solicitations caused an injury to a California resident.

Secrest Machine Corp. v. Superior Court *(1983) 33 Cal. 3d 664, 190 Cal. Rptr. 175, 660 P.2d 399* , arose out of a products liability action by a worker to recover damages for injuries sustained as a result of using a leveling machine manufactured outside California by the defendant, a Delaware corporation, and sold by it to plaintiff's employer, which took delivery in Virginia. Prior to traveling east to purchase the machine, one of the employer's employees had viewed two or three leveling machines manufactured by the defendant in operation at another company in Alameda, California. The employer's acceptance of the machine was conditional on its satisfactory performance at the employer's California plant, and the defendant sent an employee to California who spent two days assisting the employer in installing the machine. In addition, the employer consulted the defendant about proper maintenance of the machine and occasionally ordered spare parts from the defendant. When considering adapting the machine to accommodate a "slitter" (a device which trims metal sheets to a specified width) manufactured by another company, the employer asked for and received from the defendant drawings of possible adaptations. The defendant twice sent the employer circulars advertising special sale prices of certain of its products, and on six occasions in 1981 the defendant placed advertisements in a national trade publication which was distributed in California. However, the defendant did not regularly maintain any offices, or have any agents, representatives, employees, or property in California and had never applied for authorization to do business in California. The defendant's motion to quash service of summons for lack of jurisdiction was denied, and defendant petitioned for a writ of mandate.

In denying the writ, the California Supreme Court concluded that the trial court could properly exercise jurisdiction over the defendant for the limited purpose of the lawsuit (*33 Cal. 3d 664, 667)* . Citing *Buckeye Boiler Co. v. Superior Court (1969) 71 Cal. 2d 893, 902, 80 Cal. Rptr. 113, 458 P.2d 57* (discussed *below*), the Court said that with regard to corporate manufacturers of allegedly defective products the Court had equated engaging in economic activity within this state as a matter of commercial actuality with the requirement stated in *Hanson v. Denckla (1958) 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283*) regarding purposeful activity within the state. The Court added that in *Buckeye Boiler* it explained that whenever the purchase or use of its product within the state generates gross income for the manufacturer and is not so fortuitous or unforeseeable as to negative the existence of an intent on the manufacturer's part to bring about this result the manufacturer has engaged in economic activity within the state as a matter of commercial actuality (*33 Cal. 3d 664, 669)* .

The facts and procedural background of ***Buckeye Boiler Co. v. Superior Court*** *(1969) 71 Cal. 2d 893, 80 Cal. Rptr. 113, 458 P.2d 57* , are discussed in *§ 132.77[3][c]*. In denying the peremptory writ of mandate, the California Supreme Court said that an enterprise obtains the benefits and protection of our laws if, as a matter of commercial actuality, it has engaged in economic activity within this state. The requirement that the defendant engage in purposeful activity within the forum state is designed to demonstrate that the defendant has invoked such benefits and protection and is therefore amenable to jurisdiction in at least some cases. Thus, the California Supreme Court had equated engaging in economic activity within this state as a matter of commercial actuality with the requirement in *Hanson v. Denckla (1958) 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283* , regarding purposeful activity within the state (*71 Cal. 2d 893, 901-902)* . The Court explained that a manufacturer engages in economic activity within a state as a matter of commercial actuality whenever the purchase or use of its product within the state generates gross income for the manufacturer and is not so fortuitous or unforeseeable as to negative the existence of an intent on the manufacturer's part to bring about this result (*71 Cal. 2d 893, 902)* .

[i] Defendant's Purposeful Direction of Act Having Effect in Forum

The facts and procedural background of ***Asahi Metal Industry Co. v. Superior Court*** *(1987) 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92* , are discussed in *§ 132.77[3][d]*. In reversing the California Supreme Court, which had upheld the jurisdiction of the California superior court over a Japanese company, the United States Supreme Court pointed out that in *World-Wide Volkswagen Corp. v. Woodson (1980) 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490* (discussed in *§ 132.70[3][g]*), the Court had said that the forum state does not exceed its powers under the due process clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the

expectation that they will be purchased by consumers in the forum state, and that, applying this statement, two lines of cases had developed: (1) those courts holding that placing a product into the stream of commerce was sufficient to support jurisdiction over a nonresident even though the defendant did nothing else purposefully to avail itself of the market of the forum state; and (2) those cases holding that the action of the nonresident must be more purposefully directed at the forum state than the mere act of placing a product in the stream of commerce. The reasoning of the California Supreme Court illustrated the former interpretation (*480 U.S. 102, 110)* . The United States Supreme Court rejected the former line of cases and found the second line of cases to be consonant with the requirements of due process. The Court said that the "substantial connection" between the defendant and the forum state necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum state (*480 U.S. 102, 112)* . The Court added, however, that the placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum state (*480 U.S. 102, 112)* .

The facts and procedural background of ***Burger King Corp. v. Rudzewicz*** *(1985) 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528* , are discussed in *§ 132.76[3][c]*. In holding that the Florida federal court had jurisdiction over the nonresident franchisees, the United States Supreme Court said that, by requiring that individuals have fair warning that a particular activity may subject them to the jurisdiction of a foreign sovereign, the due process clause gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit (*471 U.S. 462, 472)* . Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, the fair warning requirement is satisfied if the defendant has purposefully directed his or her activities at residents of the forum, and the litigation results from alleged injuries that arise out of or relate to those activities (*471 U.S. 462, 472)* . By way of example, the Court said that thus, the forum state does not exceed its powers under the due process clause if it asserts personal jurisdiction over a corporation that delivers products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state and those products subsequently injure forum consumers. Similarly, a publisher who distributes magazines in a distant state may fairly be held accountable in that forum for damages resulting there from an alleged defamatory story. With respect to contractual relations, parties who reach out beyond one state and create continuing relationships and obligations with citizens of another state are subject to regulation and sanctions in the other state for the consequences of their activities (*471 U.S. 462, 473)* .

The Court explained that the reason a forum may legitimately exercise personal jurisdiction over a nonresident who purposefully directs his or her activities toward forum residents is that the state generally has a manifest interest in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors (*471 U.S. 462, 473)* . Moreover, when individuals purposefully derive benefit from their interstate activities, it may well be unfair to allow them to escape having to account in other states for consequences that arise proximately from such activities; the due process clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed (*471 U.S. 462, 473-474)* . The Court added that jurisdiction may not be avoided merely because the defendant did not physically enter the forum state (*471 U.S. 462, 476)* .

The procedural background of ***Calder v. Jones*** *(1984) 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804* , *aff'g Jones v. Calder (1982) 138 Cal. App. 3d 128, 187 Cal. Rptr. 825* , is *discussed under § 132.100[3][p]*. In holding that the nonresident defendants were subject to the jurisdiction of the California courts in a libel action, the United States Supreme Court said that the intentional, and allegedly tortious actions of the individual defendants were aimed at California (*465 U.S. 783, 789)* .

The facts and procedural background of ***Sinatra v. National Enquirer, Inc.*** *(9th Cir. 1988) 854 F.2d 1191* , are *discussed under § 132.100[3][g]*. In affirming the judgment for plaintiff, the United States Court of Appeals said that it had interpreted the holdings of *Calder v. Jones (1984) 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804* (discussed *above*) and *Burger King Corp. v. Rudzewicz (1985) 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528* (discussed *above*) as modifying the purposeful availment rubric to allow the exercise of jurisdiction over a defendant whose only contact with the forum was the purposeful direction of a foreign act having effect in the forum state (*854 F.2d 1191, 1195)* .

[j] Defendant's Purposeful Interjection into Forum

The facts and procedural background of ***Sinatra v. National Enquirer, Inc.*** *(9th Cir. 1988) 854 F.2d 1191* , are *discussed under § 132.100[4][d]*. In affirming the judgment for plaintiff the United States Court of Appeals, in listing the factors to be considered in determining whether it is reasonable for the court to assert jurisdiction over a nonresident defendant, said that the court should examine seven factors (set out in case discussions in *§ 132.77[3][b]*), including the extent of defendant's purposeful interjection, which is analogous to the purposeful direction analysis (*854 F.2d 1191, 1198-1199)* . The Court added, however, that the Ninth Circuit cases give the purposeful interjectment factor no weight once it is shown that the defendant purposefully directed its activities to the forum state, and that the case before it was such a case (*854 F.2d 1191, 1199)* .

[k] Effect of Contractual Choice of Law Provision

The facts and procedural background of ***Burger King Corp. v. Rudzewicz*** *(1985) 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528* , are discussed in *§ 132.76[3][c]*. In holding that the Florida federal court had jurisdiction over the nonresident franchisees, the United States Supreme Court, after pointing out that the Florida Court of Appeals reasoned that choice of law provisions were irrelevant to the question of personal jurisdiction, said a choice of law provision should not be ignored in considering whether a defendant has purposefully invoked the benefits and protections of a state's laws for jurisdictional purposes, that, although such a provision standing alone would be insufficient to confer jurisdiction, it may, when considered with other factors, reinforce the defendant's deliberate affiliation with the forum state and the reasonable foreseeability of possible litigation there, and that a nonresident might purposefully avail himself or herself of the forum state's laws by entering into contracts expressly providing that those laws could govern disputes under the contract (*471 U.S. 462, 482)* .

[l] Effect of Defendant's Purposeful Availment of Privilege of Conducting Activities in Forum

The facts and procedural background of ***World-Wide Volkswagen Corp. v. Woodson*** *(1980) 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490* , are discussed in *§ 132.70[3][g]*. Although it reversed the judgment of the Oklahoma Supreme Court on the ground the defendants had no contacts, ties, or relations with the State of Oklahoma (*444 U.S. 286, 299)* , the United States Supreme Court said that when a corporation purposefully avails itself of the privilege of conducting activities within the forum state, it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to its customers, or, if the risks are too great, severing its connection with the state (*444 U.S. 286, 297)* .

St. Joe Paper Co. v. Superior Court *(1981) 120 Cal. App. 3d 991, 175 Cal. Rptr. 94* , was a mandate proceeding by two nonresident defendant corporations seeking review of the superior court's denial of their motions to quash service of summons for lack of jurisdiction in a class action under the Cartwright Act (*Bus. & Prof. Code § 16720 et seq.*) The action was brought by a California corporation against 34 foreign corporate defendants, alleging a national conspiracy to fix the prices of corrugated containers purchased by plaintiff from out-of-state wholesalers or distributors and delivered in California. The only contacts one of the paper companies (Consolidated Packaging Co., a Michigan corporation) had with California were: (1) its sale of corrugated containers to a California resident, other than plaintiff, for $29,412.90 pursuant to an unsolicited telephone order; (2) its sale in Michigan of corrugated materials to the United States Government General Services Administration that shipped some of the materials into California; and (3) its sale of corrugated cartons to another California corporation. The other nonresident defendant corporation (St. Joe Paper Co., a Florida corporation), three or four times a year, sent two of its salesmen to California to call on national companies that do business in other states in addition to California. The calls did not result in any sales in California, as all of the resulting orders were for corrugated containers to be purchased from St. Joe's plant where they were produced and used locally. One of the direct purchasers, however, shipped corrugated containers from a St. Joe plant in Memphis, Tennessee to California. This purchaser was headquartered in Philadelphia, Pennsylvania; its orders for containers originated in Philadelphia, and all of its payments to St. Joe were made from there. It took title to the goods at the plant

and directed destination and shipment by common carrier; these shipments could go to any of 16 state, including California. St. Joe regularly sold boxes to this purchaser with the knowledge that they would be used in California. Plaintiff alleged that over an 11-year period each of the paper companies was engaged in an out-of-state price-fixing conspiracy to injure California consumers, in violation of the Cartwright Act, and reaped unusually high profits as a result of its unlawful activity. The paper companies contended that the plaintiff had not met its burden of proving jurisdiction [*see § 132.75*], and that the defendant's allegations of nationwide conspiracy and their activities in California were not sufficient minimum contacts to provide a basis for in personam jurisdiction under California's long-arm statute, *Code Civ. Proc. § 410.10*.

Rejecting this contention and denying the writs on the ground that a basis for jurisdiction existed, the court of appeal, quoting *World-Wide Volkswagen Corp. v. Woodson (1980) 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490* (discussed *above*), said that when a corporation purposefully avails itself of the privilege of conducting activities within the forum state, it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the state (*120 Cal. App. 3d 991, 999)* .

[m] Contacts Resulting From Defendant's Own Actions

The facts and procedural background of ***Asahi Metal Industry Co. v. Superior Court*** *(1987) 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92* , are discussed in *§ 132.77[3][d]*. Although it reversed the California Supreme Court, which had upheld the jurisdiction of the California superior court over a Japanese company, the United States Supreme Court said that when the contacts that create a substantial connection with the forum state proximately result from the defendant's own actions, jurisdiction is proper (*480 U.S. 102, 109)* .

The facts and procedural background of ***Burger King Corp. v. Rudzewicz*** *(1985) 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528* , are discussed in *§ 132.76[3][c]*. In holding that the Florida federal court had jurisdiction over the nonresident franchisees, the United States Supreme Court said that jurisdiction is proper when the contacts with the forum state result from the actions of the defendant itself that create a substantial connection with the forum state (*471 U.S. 462, 475)* .

[n] Requisite Minimum Contacts Can Be Electronic

In ***Snowney v. Harrah's Entertainment, Inc.*** *(2005) 35 Cal. 4th 1054, 29 Cal. Rptr. 3d 33, 112 P.3d 28* , plaintiff hotel guest, a California resident, filed a class action against defendant Nevada hotels for failing to provide notice of an energy surcharge imposed on hotel guests. The trial court granted the hotels' motion to quash the summons for lack of personal jurisdiction. The appellate court reversed and the action was appealed to the Supreme Court.

The California Supreme Court held that the assertion of specific jurisdiction was fair where a hotel advertised heavily in California, obtained a significant percentage of its business from California residents, and maintained an interactive Internet Web site for conducting business and toll-free phone number where visitors or callers could obtain room quotes and make reservations. The hotel purposefully availed itself of the privilege of doing business in California. The guest's causes of action were premised on alleged omissions during the hotel's consummation of transactions with California residents and in its California advertisements. Because the harm alleged by the guest related directly to the content of the hotel's promotional activities in California, an inherent relationship between the guest's claims and the hotel's contacts with California existed. By purposefully and successfully soliciting the business of California residents, the hotels could reasonably anticipate being subject to litigation in California in the event their solicitations caused an injury to a California resident (*35 Cal. 4th 1054, 1064-1066)* .

In ***Hall v. LaRonde*** *(1997) 56 Cal. App. 4th 1342, 66 Cal. Rptr. 2d 399* , plaintiff's complaint alleged plaintiff and defendant had entered into a contract whereby defendant was authorized to sell licenses for use of a computer software

application to the general public and defendant would pay plaintiff $1 for every license sold. Plaintiff's principal place of business was in California; defendant's was in New York. Plaintiff received payments for sales through September of 1995, but although defendant continued to market the application, plaintiff received no further payments. Defendant moved to quash service of the summons on the grounds that the California courts had no jurisdiction, claiming that sufficient minimum contacts with California were lacking (*56 Cal. App. 4th 1342, 1344)* . Plaintiff submitted an affidavit in opposition to the motion which stated that plaintiff originally contacted defendant by electronic mail concerning a software module plaintiff had written. Defendant responded with the idea of integrating plaintiff's module into defendant's software package. Defendant suggested various modifications. Plaintiff made the modifications and the module was incorporated into defendant's retail product. After plaintiff finished the module, plaintiff continued to assist defendant in upgrading its application to new and existing software. Plaintiff performed all the work on the module in California. All negotiations were conducted by electronic mail and telephone. Plaintiff had no other business or personal connections with New York. Defendant did not contradict the statement made by the plaintiff. The court granted defendant's motion to quash and ordered the case dismissed (*56 Cal. App. 4th 1342, 1345)* .

The court of appeal reversed. The court noted that specific (*i.e.,* limited) jurisdiction may be asserted when a defendant has purposefully availed himself or herself of forum benefits and the controversy is related to or arises out of the defendant's contacts with the forum. Sufficient minimum contacts for specific jurisdiction exist when a nonresident deliberately has engaged in significant activities within a state, or has created continuing obligations between himself or herself and residents of the forum. The court distinguished *Interdyne Co. v. SYS Computer Corp. (1973) 31 Cal. App. 3d 508, 511-512, 107 Cal. Rptr. 499* (which is *discussed under § 132.81[3]*[a]). Unlike in *Interdyne*, the court did not believe that the physical presence of a representative of the defendant in California should be determinative on the question of the sufficiency of the minimum contacts requirement. Much has happened in the role that electronic communications plays in business transactions since *Interdyne* was decided more than 20 years ago. The speed and ease of electronic communications have increased the number of transactions that are consummated without either party leaving the office. There is no reason why the requisite minimum contacts cannot be electronic (*56 Cal. App. 4th 1342, 1347)* . Accordingly, use of electronic mail and the telephone by a party in another state may establish sufficient minimum contacts with California to support personal jurisdiction (*56 Cal. App. 4th 1342, 1344)* . In the instant case, the evidence established sufficient minimum contacts for specific jurisdiction. It is uncontroverted that plaintiff reached out to New York in search of business and defendant reached back to California. The record showed that defendant's contacts with California consisted of more than simply purchasing a software module from the plaintiff. Rather, defendant worked with plaintiff to integrate the module into defendant's software package. Even after the initial adaption was finished, defendant continued to work with plaintiff to modify the module for new and existing software. In addition, the contract contemplated that defendant would make continuing royalty payments to plaintiff. Thus, defendant created a continuing obligation between himself and a resident of California. Defendant contacts with California were more than random, fortuitous, or attenuated. Defendant purposefully derived a benefit from interstate activities. It is fair to require that defendant account in California for the consequences that arise from such activities (*56 Cal. App. 4th 1342, 1347)* .

[o] Defendant's Burden of Proof After Plaintiff Has Established Basis for Jurisdiction

The facts and procedural background of ***Burger King Corp. v. Rudzewicz*** *(1985) 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528* , are discussed in *§ 132.76[3][c]*. In holding that the Florida federal court had jurisdiction over the nonresident franchisees, the United States Supreme Court said that when a defendant who purposefully has directed his or her activities at forum residents seeks to defeat jurisdiction, he or she must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable (*471 U.S. 462, 477)* .

The facts and procedural background of ***Sinatra v. National Enquirer, Inc.*** *(9th Cir. 1988) 854 F.2d 1191* , are *discussed under § 132.100[4][d]*. In affirming the judgment for plaintiff the United States Court of Appeals said that once minimum contacts is shown, a rebuttable presumption arises that the exercise of jurisdiction is reasonable, and the defendant bears the burden of ultimately proving that the exercise of jurisdiction is unreasonable (*854 F.2d 1191,*

1195) .

The facts and procedural background of ***Vons Companies, Inc. v. Seabest Foods, Inc.*** *(1996) 14 Cal. 4th 434, 58 Cal. Rptr. 2d 899, 926 P.2d 1085* , are *discussed under § 132.100[3][g]*. The trial court granted defendants' motion to quash for lack of personal jurisdiction, and the court of appeal affirmed. In reversing the court of appeal, the Supreme Court stated that once facts showing minimum contacts with the forum state are established, it becomes the defendant's burden to demonstrate that the exercise of jurisdiction would be unreasonable (*14 Cal. 4th 434, 449)* .

[p] Plaintiff's Lack of Contacts Irrelevant

Calder v. Jones *(1984) 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804* , *aff'g Jones v. Calder (1982) 138 Cal. App. 3d 128, 187 Cal. Rptr. 825* , arose out of an action by a famous entertainer, who worked and lived in California, for libel, invasion of privacy, and intentional infliction of emotional distress. The action was against a newspaper reporter and editor, who were residents of Florida, for an article written and edited by them and published by their employer, a national magazine in Florida with a large circulation in California. The trial court granted the defendants' motion to quash service of summons on the ground that *First Amendment* concerns weighed against an assertion of jurisdiction otherwise proper under due process. The California court of appeal reversed, rejecting the contention that *First Amendment* considerations enter into the jurisdictional analysis.

In affirming the judgment of the court of appeal, the United States Supreme Court said that the plaintiff's lack of contacts [with the forum state] will not defeat otherwise proper jurisdiction, although they may be so manifold as to permit jurisdiction when it would not exist in their absence (*465 U.S. 783, 788)* .

Keeton v. Hustler Magazine, Inc. *(1984) 465 U.S. 770, 104 S. Ct. 1473, 79 L. Ed. 2d 790* , was a libel action brought in the United States District Court for the District of New Hampshire by a New York resident against, among others, an Ohio corporation that published a nationally circulated magazine. The plaintiff's only connection with New Hampshire was the circulation there of copies of a magazine she had assisted in producing, and which bore her name in several places, crediting her with editorial and other work. Defendant corporation's only contacts with New Hampshire was its monthly sales there of some 10,000 to 15,000 copies of its magazine. The plaintiff claimed to have been libeled in five separate issues of the magazine published between September 1975 and May 1976. The action was filed only after plaintiff's similar action in Ohio had been dismissed on the ground that it was barred by the Ohio statute of limitations.

The district court dismissed the action, believing that the *due process clause of the Fourteenth Amendment* forbade the application of New Hampshire's long-arm statute in order to acquire jurisdiction over the defendant corporation. The United States Court of Appeals for the First Circuit affirmed, holding that plaintiff's lack of contacts with New Hampshire rendered the state's interest in redressing the tort of libel to plaintiff too attenuated for an assertion of personal jurisdiction over the defendant corporation, and concluding that, because plaintiff could recover damages caused in all states by the libel even though the action was barred by the statute of limitations in all states other than New Hampshire, it would be unfair to assert jurisdiction over the corporation.

The United States Supreme Court reversed on the ground that the defendant's regular circulation of magazines in New Hampshire was sufficient to support an assertion of jurisdiction in a libel action based on the contents of the magazine (*465 U.S. 770, 773-774)* and the fact that the statute of limitations on libel had run in all other states presented a choice of law question and not a jurisdictional issue (*465 U.S. 770, 778-779)* . The Court said that the three concerns advanced by the court of appeals, whether considered singly or together, were not sufficiently weighty to merit a different result, that the "single publication rule," New Hampshire's unusually long statute of limitations, and plaintiff's lack of contacts with the forum do not defeat jurisdiction otherwise deemed proper under both New Hampshire law and the due process clause (*465 U.S. 770, 775)* . With respect to plaintiff's limited contacts with New Hampshire, the Court said it had not yet required a plaintiff to have minimum contacts with the forum state before permitting that state to assert personal jurisdiction over a nonresident defendant, and that, on the contrary, it has upheld the assertion of

jurisdiction where such contacts were entirely lacking (*465 U.S. 770, 779)* .

[4] Additional Authorities

[a] Scope of Court's Personal Jurisdiction

In *Threlkeld v. Tucker (9th Cir. 1974) 496 F.2d 1101* , affirming a judgment for the plaintiff in an action (invoking diversity jurisdiction in the United States District Court) to enforce a California judgment against a Connecticut resident, the United States Court of Appeals held that the federal court could exercise the same jurisdiction over a defendant as could be exercised by the state courts in the state where the federal court is located. It quoted *Code Civ. Proc. § 410.10* and stated that the jurisdiction of the California courts is coextensive under that statute with the outer limits of due process under the state and federal Constitutions as those limits have been defined by the United States Supreme Court. The court added that the boundaries of personal jurisdiction under *Code Civ. Proc. § 410.10* appear to have been held by the California courts as defined by the minimum contacts test of *International Shoe Co. v. Washington (1945) 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95* (*discussed under § 132.100[3][b]*) (*496 F.2d 1101, 1103 n.2*).

In *The Cadle Co. II v. Fiscus (2008) 163 Cal. App. 4th 1232, 1240, 78 Cal. Rptr. 3d 238* , the court of appeal held that there is nothing unreasonable about subjecting a defendant to the jurisdiction of California courts in an independent action to renew a 1992 judgment. Defendant had entered into a contract in California (a promissory note) that was to be performed in California (i.e., payment of the debt), which he breached when he failed to repay the debt. An action on the note was filed in California and defendant submitted himself to the jurisdiction of the California court when he appeared in the action. A money judgment was entered against defendant in California, and he has failed to pay his obligations. The passage of time between the original California litigation and the revival action, during which defendant has had no additional contacts with California, does not defeat personal jurisdiction as concerns the enforcement of the 1992 judgment. Such a conclusion could encourage judgment debtors to evade legal obligations imposed by a judgment of this state's courts by simply packing up their assets and leaving the jurisdiction (*163 Cal. App. 4th 1232, 1240)* .

In *Taylor-Rush v. Multitech Corp. (1990) 217 Cal. App. 3d 103, 265 Cal. Rptr. 672* , the court of appeal, in setting forth the rules applicable to the exercise of personal jurisdiction over a nonresident, said that under Code *Civ. Proc. § 410.10* California courts may exercise jurisdiction over nonresidents on any basis not inconsistent with the Constitution of this state or of the United States, and that the statute manifests an intent to exercise the broadest possible jurisdiction, limited only by constitutional considerations (*217 Cal. App. 3d 103, 112)* .

[b] Minimum Contacts Requirement

The procedural background of *Calder v. Jones (1984) 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804* , *aff'g Jones v. Calder (1982) 138 Cal. App. 3d 128, 187 Cal. Rptr. 825* , is *discussed under § 132.100[3][p]*. In holding that the nonresident defendants were subject to the jurisdiction of the California courts in a libel action, the United States Supreme Court said that the *due process clause of the Fourteenth Amendment* permits personal jurisdiction over a defendant in any state with which the defendant has certain minimum contacts such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice (*465 U.S. 783, 788)* .

In *State of Oregon v. Superior Court (1994) 24 Cal. App. 4th 1550, 29 Cal. Rptr. 2d 909* , the court of appeal denied a writ of mandate by which defendants State of Oregon and two state universities sought to compel the trial court to quash service of summons in a wrongful death action arising out of allegedly negligent medical care of a California resident who died from a stroke while on the basketball team of one of the Oregon state universities. The court first noted the fair play and substantial justice rule of *International Shoe* (*24 Cal. App. 4th 1550, 1556)* . The court then held that the university's recruitment of the deceased in California and re-recruitment in California after his first stroke with

assurances of proper medical care, which lead the deceased to accept the medical treatment and advice from the defendants that formed the basis of the wrongful death action, established the nexus necessary to establish minimum contacts with California (*24 Cal. App. 4th 1550, 1558-1559)* . In *Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 465 n.8, 475, 58 Cal. Rptr. 2d 899, 926 P.2d 1085* , in the context of ongoing franchise relationships, the court rejected the "but for" test of *State of Oregon* as too broad and amorphous and, stating that the Court was not persuaded that the "but for" test provides an appropriate general standard, disapproved *State of Oregon* to the extent it is inconsistent with the *Von's Companies, Inc.* opinion. For discussion of *Vons Companies, Inc.*, see *§ 132.100[3][g]*.

In *Taylor-Rush v. Multitech Corp. (1990) 217 Cal. App. 3d 103, 265 Cal. Rptr. 672* , the court of appeal, in setting forth the rules applicable to the exercise of personal jurisdiction over a nonresident, said that a state may constitutionally exercise personal jurisdiction over a nonresident as long as he or she has minimum contacts with that forum such that maintenance of the suit does not offend traditional notions of fair play and substantial justice (*217 Cal. App. 3d 103, 112)* .

In *Shoei Kako Co. v. Superior Court (1973) 33 Cal. App. 3d 808, 109 Cal. Rptr. 402* , the court of appeal denied a writ of mandate by which a Japanese corporation sought to compel the trial court to quash service of summons in a personal injury action. The court said that Code Civ. Proc. § 410.10 provides that a court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States; that the basic underlying rule is found in *International Shoe Co. v. Washington (1945) 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95* (*discussed under § 132.100[3][b]*), wherein the court referred to sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to permit the state to enforce the obligations that the nonresident has incurred there (*33 Cal. App. 3d 808, 811)* .

The facts and procedural background of *Felix v. Bomoro Kommanditgesellschaft (1987) 196 Cal. App. 3d 106, 241 Cal. Rptr. 670* , are discussed in *§ 132.75[4][a]*. Although the court of appeal affirmed the judgment of dismissal after the defendant's motion to quash service of summons was granted, the court said that as a general constitutional principle, a court may exercise personal jurisdiction over a nonresident defendant as long as the defendant has such minimum contacts with the forum that the maintenance of the suit does not offend traditional notions of fair play and substantial justice (*196 Cal. App. 3d 106, 111)* .

[c] When Court May Exercise General Personal Jurisdiction Over Defendant

In *Hirsch v. Blue Cross, Blue Shield of Kansas City (9th Cir. 1986) 800 F.2d 1474* , in reversing a judgment of dismissal granted for lack of jurisdiction on the ground the trial court had limited jurisdiction over the defendant, the United States Court of Appeals said that if the nonresident defendant's activities in the state are continuous and systematic, or substantial, the court may assert general jurisdiction over a cause of action, even if it is unrelated to the defendant's forum activities (*800 F.2d 1474, 1477)* .

The facts and procedural background of *Secrest Machine Corp. v. Superior Court (1983) 33 Cal. 3d 664, 190 Cal. Rptr. 175, 660 P.2d 399* , are *discussed under § 132.100[3][h]*. Although it denied the petition for writ of mandate seeking to have quashed the service of summons on a foreign corporation on the ground that sufficient contacts existed to support limited jurisdiction, the Supreme Court said that where a corporation's activities have been extensive or wide ranging, or substantial, continuous, and systematic, they may justify jurisdiction for all causes of action asserted against the corporation (*33 Cal. 3d 664, 669)* .

The facts and procedural background of *Magnecomp Corp. v. Athene Co. (1989) 209 Cal. App. 3d 526, 257 Cal. Rptr. 278* , are discussed in *§ 132.75[3][a]*. In reversing the order quashing service of summons on a Japanese corporation in an action for alleged misappropriation of trade secrets, the court of appeal, holding that the trial court had limited jurisdiction, said that if a nonresident defendant's activities in the forum state may be described as extensive or wide-ranging, or substantial, continuous, and systematic, there is a constitutionally sufficient relationship to warrant

jurisdiction for all causes of action asserted against him or her (*209 Cal. App. 3d 526, 534)* .

The facts and procedural background of *In re Marriage of Martin (1989) 207 Cal. App. 3d 1426, 255 Cal. Rptr. 720* , are discussed in *§ 132.70[4][e]*. Although it affirmed the order quashing service of summons and dismissing the joinder proceeding, the court of appeal said that if a defendant has sufficient extensive "contacts" with the forum state, it may be subject to suit there on all claims wherever they arise (*207 Cal. App. 3d 1426, 1434)* .

The facts and procedural background of *Felix v. Bomoro Kommanditgesellschaft (1987) 196 Cal. App. 3d 106, 241 Cal. Rptr. 670* , are discussed in *§ 132.75[4][a]*. Although the court of appeal affirmed the judgment of dismissal after the defendant's motion to quash service of summons was granted, the court said that if a nonresident corporation's activities are sufficiently wide-ranging, systematic and continuous, it may be subject to jurisdiction within the state on all causes of action asserted against it, and that, in such circumstances, the specific cause of action need not be related to the defendant's business activities within the state (*196 Cal. App. 3d 106, 111-112)* .

In *Koninklijke L.M. v. Superior Court (1951) 107 Cal. App. 2d 495, 237 P.2d 297* , the court of appeal denied a writ of prohibition seeking to restrain the trial court from taking any further proceedings in wrongful death actions against a Netherlands corporation following the denial of its motion to quash service of summons. The defendant operated an intercontinental commercial airline, and the death actions arose from the crash of a plane on taking off from a London, England airfield. The corporation had never qualified to do business in California, but it had purchased from California manufacturers airplanes in excess of $1 million a year, the contracts for which were executed in The Netherlands, and accepted delivery of the airplanes in California. It maintained a technical office in Los Angeles where 24 persons were employed to administer its contracts for the purchase of airplanes and airplane parts; the corporation also maintained a bank account in California, and owned four automobiles in this state. The office was listed in the building directory, and rent was paid locally on a month to month basis. Defendant also maintained in Los Angeles a ticket office, employing three or four persons whose duties were to sell tickets on defendant's intercontinental flights. In denying the writ, the court of appeal held that the corporation's activities in this state were sufficient to render it amenable to suit and said that when a corporation is here, not occasionally or casually, but with a fair measure of permanence and continuity, then, whether its business is interstate or local, it is within the jurisdiction of the California courts (*107 Cal. App. 2d 495, 500)* .

[d] When Court May Exercise Limited Personal Jurisdiction Over Defendant

Sinatra v. National Enquirer, Inc. (9th Cir. 1988) 854 F.2d 1191 , was an action in a United States District Court in California for misappropriation of name, likeness, and photograph, brought by a nationally famous entertainer against a Swiss clinic and a national tabloid resulting from false statements made by the clinic's employees, as part of the clinic's continuing effort to solicit California clients, and published in the national tabloid, which was widely circulated in California. The case was originally filed in a California superior court and removed to the federal district court on the ground of diversity. The Swiss clinic's special appearance to challenge the district court's in personam jurisdiction over it was unsuccessful. Judgment was for the plaintiff, and the Swiss clinic appealed, renewing its jurisdictional challenge.

In affirming the judgment on the ground that the district court had limited in personam jurisdiction over the defendant, the United States Court of Appeals, after pointing out that the clinic did not have substantial or continuous and systematic contacts with California to support the exercise of general jurisdiction (*854 F.2d 1191, 1194)* , said that the issue was whether the district court properly asserted "limited" or "specific" jurisdiction for a cause of action arising out of the clinic's forum-related activities (*854 F.2d 1191, 1195)* . The court said that, in evaluating whether a court may exercise specific jurisdiction, it applied a three-part test: (1) the nonresident defendant must do some act or consummate come transaction with the forum or perform some act by which he or she purposefully avails himself or herself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one that arises out of or results from the defendant's forum-related activities; and (3) exercise of jurisdiction must be reasonable (*854 F.2d 1191, 1195)* .

The facts and procedural background of *Hunt v. Erie Ins. Group (9th Cir. 1984) 728 F.2d 1244, 1246* are *discussed under § 132.100[3][f]*. In affirming dismissal on the ground that no basis for jurisdiction existed, the U.S. Court of Appeals nevertheless said that the requirements for the exercise of limited personal jurisdiction are as follows: (1) the nonresident defendant must do some act or consummate some transaction within the forum or perform some act constituting a purposeful availment of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the cause of action must arise out of or result from the defendant's forum-related activities; and (3) the exercise of jurisdiction must be reasonable (*728 F.2d 1244, 1247)* .

The facts and procedural background of *Dialysis at Sea, Inc. v. Superior Court (1989) 216 Cal. App. 3d 788, 265 Cal. Rptr. 71* , are more fully discussed in *§ 132.107[3][d]*. In denying the petition for writ of mandate, the court of appeal, quoting *Walter v. Superior Court (1986) 178 Cal. App. 3d 677, 680, 224 Cal. Rptr. 41* , said that when the nonresident's activities are less extensive (than those required to support general jurisdiction), the cause of action must arise out of or be connected with the defendant's forum-related activity (*216 Cal. App. 3d 788, 792)* . In *Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 465 n.8, 475, 58 Cal. Rptr. 2d 899, 926 P.2d 1085* , in the context of ongoing franchise relationships, the Court rejected the "but for" test of used by the court in *Dialysis at Sea* as too broad and amorphous and, stating that the Court was not persuaded that the "but for" test provides an appropriate general standard, disapproved *Dialysis at Sea* to the extent it is inconsistent with the *Von's Companies, Inc.* opinion. For discussion of *Vons Companies, Inc.*, see *§ 132.100[3][g]*.

The facts and procedural background of *Magnecomp Corp. v. Athene Co. (1989) 209 Cal. App. 3d 526, 257 Cal. Rptr. 278* , are discussed in *§ 132.75[3][a]*. In reversing the order quashing service of summons on a Japanese corporation in an action for alleged misappropriation of trade secrets on the ground the defendant's contacts with California were sufficient to permit the exercise of limited jurisdiction over it, the court of appeal, quoting *Mihlon v. Superior Court (1985) 169 Cal. App. 3d 703, 711, 215 Cal. Rptr. 442* (discussed *below*), said that if the defendant's activities in the forum are not so pervasive as to justify the exercise of general jurisdiction, then jurisdiction depends on the quality and nature of the defendant's activity in the forum in relation to the particular cause of action. In such a situation, the cause of action must arise out of an act done or transaction consummated in the forum, or the defendant must perform some other act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws. Thus, as the relationship of the defendant with the state seeking to exercise jurisdiction over him grows more tenuous, the scope of jurisdiction also retracts, and fairness is assured by limiting the circumstances under which the plaintiff can compel him to appear and defend. The crucial inquiry concerns the character of defendant's activity in the forum, whether the cause of action arises out of or has a substantial connection with that activity, and upon the balancing of the convenience of the parties and the interest of the state in assuming jurisdiction (*209 Cal. App. 3d 526, 534)* .

In *Mihlon v. Superior Court (1985) 169 Cal. App. 3d 703, 215 Cal. Rptr. 442* , the court of appeal, in denying a peremptory writ of mandate sought to compel the trial court to quash service of summons on foreign defendants. The court of appeal quoted the statement from *Cornelison v. Chaney (1976) 16 Cal. 3d 143, 147-148, 127 Cal. Rptr. 352, 545 P.2d 264* (discussed in *§ 132.100[3][g]*), that, if the defendant's activities in the forum are not so pervasive as to justify the exercise of general jurisdiction over him or her, then jurisdiction depends on the quality and nature of the defendant's activity in the forum in relation to the particular cause of action. In such a situation, the cause of action must arise out of an act done or transaction consummated in the forum, or the defendant must perform some other act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws. Thus, as the relationship of the defendant with the state seeking to exercise jurisdiction over him grows more tenuous, the scope of jurisdiction also retracts, and fairness is assured by limiting the circumstances under which the plaintiff can compel him to appear and defend. The crucial inquiry concerns the character of defendant's activity in the forum, whether the cause of action arises out of or has a substantial connection with that activity, and upon the balancing of the convenience of the parties and the interest of the state in assuming jurisdiction (*169 Cal. App. 3d 703, 710-711)* .

[e] Defendant's Economic Activity in Forum

In *Luberski, Inc. v. Oleificio F.LLI Amato S.R.L. (2009) 171 Cal. App. 4th 409, 89 Cal. Rptr. 3d 774* , a purchaser of olive oil sued the seller, an Italian company, for breach of a contract for the sale of 12,000 cases of olive oil. As an Italian olive oil company with limited sales to California customers, defendant Amato averred its contacts with California were insufficient to justify the exercise of personal jurisdiction as a matter of constitutional due process. In support of Amato's motion to quash the summons and complaint, its president attested to the following facts: Amato is a corporation formed under the laws of Italy and located in Partanna, Italy; Amato is in the business of producing olive oil and related products which it sells on a wholesale and retail basis in Italy and to a lesser extent internationally; Amato has sold "some" olive oil to California customers over the years, mainly to two buyers (not including Luberski); Amato provides no services in California; Amato's California sales consist of accepting purchase orders, preparing an invoice, and shipping the products to the closest harbor (either Long Beach or Oakland); Amato has no employees, assets, bank accounts, or offices in California; Amato is a "small company" for which defense of a California action would impose a material burden; Amato "shipped the requested oil over eighteen months ago"; and this order was the first for Luberski, which was introduced to Amato by an existing California buyer. Luberski countered by submitting a declaration which verified the facts alleged in the complaint. The trial court granted defendant's motion to quash service of summons for lack of personal jurisdiction. The Court of Appeal reversed the order quashing service of summons. The court found that, under the long-arm statute (*Code Civ. Proc. § 410.10*), the California court had specific jurisdiction because the subject of the dispute was the seller's alleged nondelivery of $406,000 worth of olive oil to the purchaser in California. The seller purposefully availed itself of the California forum. The negotiations were conducted and completed in Italy and California via long-distance communications with the implicit understanding that the goods were only useful to the buyer if they were delivered to California, and the seller maintained responsibility for the goods until they arrived in California. Thus, the seller had the expectation that the goods it was placing in interstate commerce would be utilized in California. Furthermore, the size of the contemplated transaction--more than $ 400,000 for the first shipment and another similarly sized shipment contemplated--was substantial by almost any definition pertaining to a contract for the sale of goods. With those same facts in mind, it was only fair to provide the buyer with the opportunity to prove its allegations in the forum where it alleged the goods were not delivered (and where the seller claimed they were delivered) (*171 Cal. App. 4th 409, 413-420)* .

Neadeau v. Foster (1982) 129 Cal. App. 3d 234, 180 Cal. Rptr. 806 , involved the breach of a contract signed in California in which a nonresident defendant appealed from a default judgment in favor of plaintiff. Defendant contended in part that the trial court abused its discretion in denying his motion to quash service of process for lack of in personam jurisdiction. The court of appeal found that even though he had no business office, agents, or sales personnel in California, defendant did extensive business in California and engaged in economic activity within the state that would justify the exercise of jurisdiction (*129 Cal. App. 3d 234, 239-240)* .

The facts and procedural background of *St. Joe Paper Co. v. Superior Court (1981) 120 Cal. App. 3d 991, 175 Cal. Rptr. 94* , are *discussed under § 132.100[3][l]*. In denying the writs of mandate sought to compel the trial court to quash service of summons on nonresident defendant corporations, the court of appeal said that the deliveries made by the corporations met the alternate test of economic activity in this state. In evaluating their activities, it focused on the economic reality rather than any mechanical checklist (*120 Cal. App. 3d 991, 999)* . The court, citing *Buckeye Boiler Co. v. Superior Court (1969) 71 Cal. 2d 893, 901, 80 Cal. Rptr. 113, 458 P.2d 57* (*discussed under § 132.100[3][h]*), said that an enterprise obtains the benefits and protection of our laws if as a matter of commercial actuality it has engaged in economic activity within this state. A manufacturer engages in economic activity within this state as a matter of commercial actuality whenever the purchase or use of its product within the state generates gross income for the manufacturer and is not so fortuitous or unforeseeable as to negative the existence of an intent on the manufacturer's part to bring about this result (*120 Cal. App. 3d 991, 999-1000)* . That the manufacturer deals with the residents of the state indirectly, rather than directly, or requires orders to be accepted at the home office, is not determinative. Thus, an analysis of the nonresident manufacturer's activities must focus on the actual economic benefit derived from such activities. Where the manufacturer sells its products in circumstances such that it knows or should reasonably anticipate

that its products will ultimately be resold in a particular state, it should be held to have purposefully availed itself of the market for its products in that state (*120 Cal. App. 3d 991, 1000)* . The court said that when the cause of action arises out of the forum-related economic activity, the forum state will entertain jurisdiction over the nonresident defendant (*120 Cal. App. 3d 991, 1000)* . The court added that an isolated act of economic activity, such as the making and performance of a contract in the forum state, may be sufficient to accord the forum state jurisdiction over the defendant when the cause of action is related to that isolated act of economic activity (*120 Cal. App. 3d 991, 1000)* .

Martin v. Detroit Lions, Inc. (1973) 32 Cal. App. 3d 472, 108 Cal. Rptr. 23 , was an action against the Michigan corporate owner of a professional football team by a player to recover under his contract salary for a season when he did not play due to injuries received in Detroit, Michigan in the performance of his duties. The defendant did not maintain an agent, officer, or other person in California on whom service of summons could be made, and service was therefore made on defendant by serving the summons and a copy of the complaint on the California Secretary of State. The defendant's motion to quash service of process was granted, and plaintiff appealed. Though defendant, in support of its motion to quash, alleged that it owned no property in California and did not and had never transacted any business in California, it was undisputed that (1) plaintiff had been scouted and recruited in California and his contract had been signed in California; (2) the team played regularly in California with the corporation receiving a portion of the gate receipts; (3) the team had played in the state during the season in question; and (4) during that season defendant had employed a professional scout who maintained a residence in the state and scouted and recruited football players in California for the defendant. In reversing the order, the court of appeal said that, while it has been said that minimum contact requires more than a mere "foot-fall on the state's soil," where the cause of action arises out of economic activity within the state, the contacts need not consist of repeated or continuous business transactions, that an isolated transaction, such as the breach of a contract made and to be performed in the state, may be sufficient (*32 Cal. App. 3d 472, 475)* .

Note that the court further rejected the defendant's argument that its motion should be treated as a motion to dismiss for inconvenient forum on the ground that it had made a vague reference to that doctrine when citing the jurisdictional factors (*32 Cal. App. 3d 472, 476-477)* . The court pointed out that the trial court's order was based solely on lack of jurisdiction and that the doctrine of forum non convenience, as such, was not presented. The Court said that the doctrine of forum non conveniens is an extremely limited one and cannot be applied by a court to dismiss an action over which it otherwise has jurisdiction unless all pertinent factors are weighed and considered (*32 Cal. App. 3d 472, 477)* [*see also* Part II, D, § 132.130 et seq.].

[f] Defendant's Purposeful Direction of Act Having Effect in Forum

In *Archdiocese of Milwaukee v. Superior Court (2003) 112 Cal. App. 4th 423, 5 Cal. Rptr. 3d 154* , plaintiff alleged and declared under oath that when he was a boy, a Roman Catholic priest molested him; the priest was working at a parish in Orange County when the alleged molestation occurred. The plaintiff sued the Milwaukee Archdiocese, the Roman Catholic Bishop of Orange (the Orange Diocese), and the priest. Among other things, plaintiff alleged the Milwaukee Archdiocese engaged in a cover-up of the priest's prior misconduct, which included a conviction in Wisconsin for sexual perversion against a boy, and arranged for the priest to move to California in 1973. The evidence showed the Milwaukee Archdiocese sought to rid itself of the priest by sending him into California knowing he was a pedophile and had been convicted in Wisconsin of sexual perversion against a boy. The court held that plaintiff met his burden of proving, for purposes of establishing specific personal jurisdiction, the Milwaukee Archdiocese engaged in intentional conduct expressly aimed at California and knew its conduct would cause harm in this state. Thus, under the "effects" test for determining purposeful availment in personal jurisdiction analysis, a defendant might be subject to jurisdiction in the forum state if the defendant engaged in intentional conduct expressly aimed at or targeting the forum state, and the defendant knew the intentional conduct would cause harm in the future (*112 Cal. App. 4th 423, 438-442)* .

In *Taylor-Rush v. Multitech Corp. (1990) 217 Cal. App. 3d 103, 265 Cal. Rptr. 672* , the court of appeal, in setting

forth the rules applicable to the exercise of personal jurisdiction over a nonresident, said that the substantial connection between the defendant and the forum state necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum state (*217 Cal. App. 3d 103, 112)* .

[g] Defendant's Burden of Proof After Plaintiff Has Established Basis for Jurisdiction

The facts and procedural history of *Cassiar Mining Corp. v. Superior Court (1998) 66 Cal. App. 4th 550, 78 Cal. Rptr. 2d 167* , are *discussed under § 132.100[3][g]*. The court of appeal in denying a defendant's petition for writ of mandate noted that when, as in the case before it, the plaintiffs have established sufficient minimum contacts to pass constitutional muster, the burden shifts to the defendant to make a compelling case as to why jurisdiction is unreasonable (*66 Cal. App. 4th 550, 559)* .

The facts and procedural background of *Dialysis at Sea, Inc. v. Superior Court (1989) 216 Cal. App. 3d 788, 265 Cal. Rptr. 71* , are discussed in *§ 132.107[3][d]*. In denying the petition for writ of mandate, the court of appeal said that when a defendant properly files a motion to quash service of summons due to lack of personal jurisdiction the initial burden is on the plaintiff to establish the prima facie facts entitling the court to assume jurisdiction. Once a plaintiff has established that a defendant has purposefully directed his or her activity at forum residents, the burden then shifts to the defendant to supply facts demonstrating that the assumption of jurisdiction would be unreasonable (*216 Cal. App. 3d 788, 793)* [for a form of points and authorities the defendant might use on the issue of reasonableness, see *§ 132.77*]. In *Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 465 n.8, 475, 58 Cal. Rptr. 2d 899, 926 P.2d 1085* , in the context of ongoing franchise relationships, the Court rejected the "but for" test of *Dialysis at Sea* as too broad and amorphous and, stating that the Court was not persuaded that the "but for" test provides an appropriate general standard, disapproved *Dialysis at Sea* to the extent it is inconsistent with the *Von's Companies, Inc.* opinion. For discussion of *Vons Companies, Inc.*, see *§ 132.100[3][g]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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California Points & Authorities

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PART II. FORMS
C. Bases of Jurisdiction

13-132 California Points & Authorities § 132.101

§ 132.101 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground That Court Lacks Personal Jurisdiction--Sufficient Basis for Jurisdiction Exists--Defendant Was Present in California When Served

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum opposing a motion to quash service of summons on the ground that the court lacks a sufficient basis for exercising personal jurisdiction (see, e.g., § 132.100).*]

SERVICE OF SUMMONS ON THE NONRESIDENT DEFENDANT WHILE IN CALIFORNIA IS A PROPER BASIS FOR THE EXERCISE OF PERSONAL JURISDICTION OVER HIM/HER.

A. Defendant's Presence In California Is Basis of Personal Jurisdiction. A state has power to exercise judicial jurisdiction over an individual who is physically present within its territory, whether permanently or temporarily, if at that time he or she is properly served with process (Judicial Council Comment to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Individuals; *see Burnham v. Superior Court of Cal. (1990) 495 U.S. 604, 610-611, 110 S. Ct. 2105, 109 L. Ed. 2d 631* ; *Silverman v. Superior Court (1988) 203 Cal. App. 3d 145, 150, 249 Cal. Rptr. 724*).

B. Type of Action in Which Presence Is Basis for Jurisdiction. Defendant's presence in California when served with summons gives the state a basis for the exercise of jurisdiction over the individual in any action that may be there brought against him or her (Judicial Council Comment to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Individuals; *see Burnham v. Superior Court of Cal. (1990) 495 U.S. 604, 610-611, 110 S. Ct. 2105, 109 L. Ed. 2d 631*).

[2] Comments

[a] Use of Form

The form in [1], *above*, is for use in opposing a motion to quash service of summons under *Code Civ. Proc. §*

418.10(a)(1), on the ground that the court has no proper basis for exercising personal jurisdiction over the defendant. The ground for opposition is that the defendant was present in California when he or she was served with the summons, and that this in itself is a sufficient basis for the court to exercise its jurisdiction over defendant.

This form does not provide a complete memorandum, but is designed to be combined with a general form of memorandum opposing a motion to quash service of summons [*see, e.g., § 132.100*]. It may also be included in a memorandum of points and authorities opposing a petition for a writ of mandate to compel the trial court to grant the motion to quash after it has declined to do so [*see Code Civ. Proc. § 418.10(c)*], or it may be adapted for use in a trial or appellate brief.

For additional points and authorities opposing a motion to quash on other grounds, see *§§ 132.102 -132.115*.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

See also *§ 132.100[2]* for comments to a general form.

[b] Presence as Basis of Jurisdiction

The California Judicial Council has pointed out that physical presence is the most common and least frequently challenged basis of jurisdiction, but that such presence must usually be voluntary, that the court may decline to exercise its jurisdiction if force or fraud was used to effect such presence, and that various persons are immune to service of process or suit [Judicial Council Comment to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Individuals]. For memoranda of points and authorities relating to persons immune to suit or process, see *§ 132.20* et seq.

The American Law Institute has pointed out that physical presence in the state was the traditional basis of judicial jurisdiction at common law, that it is immaterial that the individual is only temporarily in the state, that the individual's presence in the state even for an instant gives the state judicial jurisdiction over him or her, and that if at that time exercise of this jurisdiction is initiated by proper service of process, and, if the individual is afforded a reasonable opportunity to be heard, a valid judgment may be entered against the individual even though he or she leaves the state immediately after the service of process [Restatement (Second), Conflict of Laws, § 28, Comment a].

The Institute has acknowledged that the rule may result at times in a defendant's being compelled to stand suit in a state to which he or she has no relationship other than the fact that he or she was served with process while passing through that state's territory, and that it can also be contended that the rule is inconsistent with the basic principle of reasonableness which underlies the field of judicial jurisdiction, but that the rule's potentialities for hardship are mitigated by the fact that the court may refuse to exercise its jurisdiction when a defendant's presence was obtained by fraud or unlawful force over the defendant or the defendant's property, when the defendant is immune to suit (see Subpart A, § 132.20 et seq.), and when the forum is a seriously inconvenient forum (see Subpart D, § 132.130 et seq.) [Restatement (Second), Conflict of Laws, § 28, Comment a].

[3] Discussion of Authorities

[a] Defendant's Presence in California Is Basis of Personal Jurisdiction

In ***Burnham v. Superior Court of Cal.*** *(1990) 495 U.S. 604, 110 S. Ct. 2105, 109 L. Ed. 2d 631* , the parties were married in West Virginia in 1976, moved to New Jersey in 1977, where their two children were born, and separated in July 1987, agreeing that the wife, who intended to move to California, would take custody of the children and that she would file for divorce there on the ground of irreconcilable differences. Instead, the husband in 1987 filed for divorce in a New Jersey state court on the ground of desertion, did not obtain issuance of a summons, and did not attempt to serve

his wife with process. In January 1988, the wife filed for dissolution of marriage in California. Later that month the husband visited southern California on business, after which he visited with his children in the San Francisco Bay area. He took the older child to San Francisco for the weekend and on their return, he was served with summons in the wife's dissolution of marriage proceeding. Later that year, he appeared specially and moved to quash service of summons on the ground of insufficient contacts with California. The superior court denied the motion, and the California court of appeal denied the husband's petition for a writ of mandate on the ground the defendant's presence in California at the time of service was a sufficient basis for in personam jurisdiction over him. The United States Supreme Court granted certiorari.

In unanimously affirming the judgment, the United States Supreme Court nevertheless was divided on the proper basis for the affirmance. One opinion, subscribed by four justices, stated that the *Due Process Clause of the Fourteenth Amendment* does not deny a state court's jurisdiction over a nonresident who is personally served with process while temporarily in the state, in a suit unrelated to his activities in the state (*495 U.S. 604* , 610). After tracing the historical precedent for the rule, the opinion stated that jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of traditional notions of fair play and substantial justice, that that standard was developed by analogy to physical presence, and that it would be perverse to say that the standard could now be turned against that touchstone of jurisdiction (*495 U.S. 604, 619)* . The opinion distinguished *Shaffer v. Heitner (1977) 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683* , which was a shareholder's derivative suit against a corporation's directors and involved quasi in rem jurisdiction by a Delaware state court over the nonresident defendants by the sequestration of their stock in the company, the situs of which was Delaware under Delaware law. The opinion acknowledged that in *Shaffer* the Court had said that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe Co. v. Washington (1945) 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95* and its progeny. However, this statement stands for nothing more than the proposition that, when the minimum contact that is a substitute for physical presence consists of property ownership, it must, like other minimum contacts, be related to the litigation (*495 U.S. 604, 620* ; plurality opinion of Scalia, J.).

Another opinion, also subscribed by four justices, agreed that the *Due Process Clause of the Fourteenth Amendment* generally permits a state court to exercise jurisdiction over a defendant if he or she is served with process while voluntarily present in the forum state (*495 U.S. 604, 628-629)* . However, all rules of jurisdiction, even ancient ones, must, in keeping with the critical insight of *Shaffer v. Heitner (1977) 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683* , satisfy contemporary notions of due process, and factors other than mere presence should be considered in determining whether the exercise of jurisdiction comported with traditional notions of fair play and substantial justice (*495 U.S. 604, 628-632)* . This opinion stated the belief that the Court should therefore undertake an independent inquiry into the fairness of the prevailing in-state service, or transient jurisdiction, rule, and concluded that the exercise of jurisdiction over the nonresident defendant in this case met the requirements of the fairness standard (*495 U.S. 604, 636-639* ; plurality opinion by Brennan, J.).

The ninth justice concurred in the judgment, finding both views to be persuasive (*495 U.S. 604, 640)* .

The facts and procedural background of ***Silverman v. Superior Court*** *(1988) 203 Cal. App. 3d 145, 249 Cal. Rptr. 724* , are discussed in *§ 132.30[3][b]*. In denying a writ of mandate sought to compel the trial court to grant a nonresident defendant's motion to quash service of summons, the court of appeal pointed out that it was undisputed that defendant was served in California and that his presence in California when service of process was effected meets the jurisdictional requirement that there be a proper basis for jurisdiction under *Code Civ. Proc. § 410.10* (*203 Cal. App. 3d 145, 150)* .

[b] Type of Action in Which Presence Is Basis for Jurisdiction

See discussion of ***Burnham v. Superior Court of Cal.*** *(1990) 495 U.S. 604, 110 S. Ct. 2105, 109 L. Ed. 2d 631* , under

§ 132.101[3][a].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral Overview

California Points & Authorities

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13-132 California Points & Authorities § 132.102

§ 132.102 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground That Court Lacks Personal Jurisdiction--Sufficient Basis for Jurisdiction Exists--Individual Defendant Is Citizen or Resident of or Has Domicile in California

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum opposing a motion to quash service of summons on the ground that the court lacks a sufficient basis for exercising personal jurisdiction (see, e.g., § 132.100).*]

THE _____ [DOMICILE *and/or* RESIDENCE *and/or* CITIZENSHIP] OF THE DEFENDANT IN CALIFORNIA IS A PROPER BASIS FOR THE EXERCISE OF PERSONAL JURISDICTION OVER HIM/HER.

[*EITHER, if jurisdiction is based on domicile*]

A. Domicile. A state has power to exercise judicial jurisdiction over an individual who is domiciled in, but may be absent from the state. A person's domicile is usually the place where the person has his or her home and, at least for the same purpose, no person has more than one domicile at a time (Judicial Council Comment to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Individuals; *see also Milliken v. Meyer (1940) 311 U.S. 457, 462-463, 61 S. Ct. 339, 85 L. Ed. 278* ; *Allen v. Superior Court (1953) 41 Cal. 2d 306, 310-311, 259 P.2d 905*).

[*Optional*] **B. Domicile in California When Cause of Action Arose.** Domicile at the time the cause of action arose, in addition to allegations that the action is based on the defendant's activities within the forum state, afford the state a constitutional basis for jurisdiction (*Kroopf v. Guffey (1986) 183 Cal. App. 3d 1351, 1358, 228 Cal. Rptr. 807*).

[*AND/OR, if jurisdiction is based on residence*]

A. Residence. A state has power to exercise judicial jurisdiction over an individual who is a resident of the state unless the individual's relationship to the state is so attenuated as to make the exercise of such jurisdiction unreasonable (Judicial Council Comment to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Individuals).

[*AND/OR, if jurisdiction is based on citizenship*]

A. Citizenship. A state has power to exercise judicial jurisdiction over an individual who is a citizen of the state unless the nature of the individual's relationship to the state makes the exercise of such jurisdiction unreasonable (Judicial Council Comment to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Individuals).

B. Citizenship Defined. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside (*United States Constitution, Amendment XIV*).

[2] Comments

[a] Use of Form

The form in [1], *above*, is for use in opposing a motion to quash service of summons under *Code Civ. Proc. § 418.10(a)(1)*, on the ground that the court has no proper basis for exercising personal jurisdiction over the defendant. The ground for opposition is that the defendant is an individual who is a citizen or resident of, or has a domicile in, California, and that this is a sufficient basis for the court to exercise its jurisdiction over defendant.

This form does not provide a complete memorandum, but is designed to be combined with a general form of memorandum opposing a motion to quash service of summons [*see, e.g., § 132.100*]. It may also be included in a memorandum of points and authorities opposing a petition for a writ of mandate to compel the trial court to grant the motion to quash after it has declined to do so [*see Code Civ. Proc. § 418.10(c)*], or it may be adapted for use in a trial or appellate brief.

For additional points and authorities opposing a motion to quash on other grounds, see *§§ 132.101, 132.103 -132.115*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated.

See also *§ 132.100[2]* for comments to a general form.

[b] Individual Defendant

[i] Domicile

A person's domicile is his or her home. It is the place where the person dwells and which is the center of the person's domestic, social, and civil life. It assures the existence of a place in which a person is continuously amenable to suit. The person may be served with process personally, or by a method of substituted service, either within or outside California as provided by *Code Civ. Proc. § 413.10*. Every person has a domicile at all times, even though the person may have left such home for the purpose of establishing a home elsewhere [Judicial Council Comment to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Individuals].

[ii] Residence

A person's residence is the place where he or she has an abode or where he or she has settled down to live for a period of time, but not necessarily with the intention of making a home there so as to create a domicile. Service of process may

be effected on a resident within or outside California as provided in *Code Civ. Proc. § 413.10*[Judicial Council Comment to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Individuals)].

Establishment of a residence does not require the existence of an attitude of mind similar to that required for the acquisition of a domicile. On the other hand, it is necessary that the individual have a sufficiently close relationship to the state to make reasonable the exercise by the state of judicial jurisdiction over him or her. Among the factors to be considered are (1) the amount of time the individual spends in the state; (2) the nature of his or her place of abode in the state; (3) his or her objective attitude of mind toward the state, as for example, whether he or she regards it with affection and as a place to which he or she likes to go whenever possible; and (4) the things he or she does in the state. For a state to have judicial jurisdiction over an individual on the basis of residence, it is necessary, at least, that the person spend a considerable portion of his or her time there. The nature of his or her place of abode, if any, in the state is important. The person is more likely to have the required relationship to a state where he or she has a fixed dwelling place than in one where he or she lives only in hotels or boarding houses. The person is also more likely to have the required relationship to the state if the state is one to which he or she goes of his or her own free choice and not on account of economic or other necessity. What the individual does in the state is significant. The greater his or her activity in the state, the closer is his or her relationship to the state and therefore the better the reason for holding that the state has judicial jurisdiction over him or her [Restatement (Second), Conflict of Laws, § 30, Comment a; *see also* Judicial Council Comments to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Individuals].

Federal statutes rarely use the word domicile but use residence instead. This is also true in California. Hence, it has been pointed out that the word "residence" (and its variants) is ambiguous and that each time it is used in a legal phrase its meaning must be determined; that it is frequently used in a sense equivalent to domicile, and on occasion to mean something more than domicile, namely, a domicile at which a person actually dwells; that, on the other hand, it may mean something less than domicile, namely, a place where the individual has an abode or where the person has settled down to live for a period of time, but not necessarily with such an intention of making a home there as to create a domicile; and finally that the phrase "legal residence" is sometimes used as the equivalent of domicile [Restatement (Second), Conflict of Laws, § 11, Comment k].

[iii] Citizenship

Because all persons born or naturalized in the United States and subject to its jurisdiction are citizens of the United States and the state in which they reside, a person may, in appropriate instances, be subject to the judicial jurisdiction of the state on the ground both of domicile and citizenship. The factors to be considered in determining whether judicial jurisdiction based on citizenship exists are generally the same as in the case of jurisdiction based on residence (*discussed under § 132.102[2][b][ii]*) [Judicial Council Comment to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Individuals].

[3] Discussion of Authorities

[a] Domicile

In ***Milliken v. Meyer*** *(1940) 311 U.S. 457, 61 S. Ct. 339, 85 L. Ed. 278* , the Colorado Supreme Court held null and void a judgment of the Wyoming court against the claim of the plaintiff in the Wyoming action that the Wyoming judgment was entitled to full faith and credit under the federal constitution. In the Wyoming action, the Wyoming domiciliary had been personally served with summons in Colorado pursuant to Wyoming law, but had thereafter failed to appear in the Wyoming action.

In reversing the judgment, the Supreme Court of the United States said that domicile in the state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service, and that substituted service in such cases has been quite uniformly upheld where the

absent defendant was served at his or her usual place of abode in the state, as well as where he or she was personally served without the state, so long as the form of substituted service employed is reasonably calculated to give the defendant actual notice of the proceedings and an opportunity to be heard, and if it is, the traditional notions of fair play and substantial justice implicit in due process are satisfied (*311 U.S. 457, 462-463)* .

Allen v. Superior Court *(1953) 41 Cal. 2d 306, 259 P.2d 905* , was a prohibition proceeding arising out of an automobile accident case in which the defendant sought to restrain the trial court from taking any further proceedings against him and to compel it to quash the order for publication of the summons on the ground it was in excess of the court's power, and to quash the service of summons and complaint. The accident occurred in California where the defendant was a resident (domiciliary) but from which he moved approximately five years later to Oregon. Service was made by publication and by personally delivering a copy of the summons and complaint to the defendant in Oregon. Thus, the defendant was a resident (domiciliary) of California at the time of the accident and when the complaint was filed.

In the course of denying the writ, the Supreme Court, quoted the statements, among others, from *Milliken v. Meyer (1940) 311 U.S. 457, 462-463, 61 S. Ct. 339, 85 L. Ed. 278* , set forth *above* (*41 Cal. 2d 306, 310-311)* .

[b] Domicile in California When Cause of Action Arose

Kroopf v. Guffey *(1986) 183 Cal. App. 3d 1351, 228 Cal. Rptr. 807* , was an action by a California resident against a Connecticut resident, who formerly lived in California with plaintiff, for declaratory relief and for damages for breach of contract, fraud, and infliction of emotional distress. The trial court granted defendant's motion to quash service of summons for lack of jurisdiction, and plaintiff appealed.

In reversing the order, the court of appeal said that domicile at the time the cause of action arose, in addition to allegations that the action is based on the defendant's activities within the forum state, afford the state a constitutional basis for personal jurisdiction, and that, thus, a state may exercise jurisdiction over a defendant domciled in the state at the time the cause of action arose, but who left the forum before commencement of the action or service of process (*183 Cal. App. 3d 1351, 1358)* .

See also *Allen v. Superior Court (1953) 41 Cal. 2d 306, 310-311, 259 P.2d 905* , *discussed under § 132.102[3][b][i]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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13-132 California Points & Authorities § 132.103

§ 132.103 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground That Court Lacks Personal Jurisdiction--Sufficient Basis for Jurisdiction Exists--Defendant Domestic Corporation or Other Entity Was Incorporated or Formed in California

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum opposing a motion to quash service of summons on the ground that the court lacks a sufficient basis for exercising personal jurisdiction (see, e.g., § 132.100).*]

THE _____[INCORPORATION *or* FORMATION] OF THE DEFENDANT IN CALIFORNIA IS A PROPER BASIS FOR THE EXERCISE OF PERSONAL JURISDICTION OVER IT.

A. Domestic Corporation. A state has plenary power to exercise judicial jurisdiction over a domestic corporation. That is, a state has power to exercise judicial jurisdiction over a corporation incorporated in the state even though it does no business there. Incorporation in the state gives the state a basis for exercising juridical jurisdiction over the corporation in any action that may there be brought against it (Judicial Council Comment to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Corporations).

B. Domestic Corporation Defined. A "domestic corporation" is a corporation formed under the laws of California (*Corp. Code § 167*).

[*ADD, if defendant is unincorporated association or partnership*]

C. Partnership or Other Unincorporated Association. A state in which a partnership or other unincorporated association is subject to suit in the firm or common name has power to exercise judicial jurisdiction over the partnership or association if under the circumstances it could exercise judicial jurisdiction over a corporation on a similar basis of jurisdiction (Judicial Council Comment to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction over Partnerships or

Other Unincorporated Associations).

D. Authority to Sue Partnership or Other Unincorporated Association in Common Name. Any partnership or other unincorporated association, whether organized for profit or not, may sue and be sued in the name which it has assumed or by which it is known (*Code Civ. Proc. § 369.5(a)*).

[2] Comments

[a] Use of Form

The form in [1], *above*, is for use in opposing a motion to quash service of summons under *Code Civ. Proc. § 418.10(a)(1)*, on the ground that the court has no proper basis for exercising personal jurisdiction over the defendant. The ground for opposition is that the defendant is a domestic corporation, partnership, or unincorporated association, and that this is a sufficient basis for the court to exercise its jurisdiction over defendant.

This form does not provide a complete memorandum, but is designed to be combined with a general form of memorandum opposing a motion to quash service of summons [*see, e.g., § 132.100*]. It may also be included in a memorandum of points and authorities opposing a petition for a writ of mandate to compel the trial court to grant the motion to quash after it has declined to do so [*see Code Civ. Proc. § 418.10(c)*], or it may be adapted for use in a trial or appellate brief.

For additional points and authorities opposing a motion to quash on other grounds, see *§§ 132.101, 132.102, 132.104 -132.115*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated.

See also *§ 132.100[2]* for comments on a general form.

[b] Domestic Corporations

Judicial Council Comment (1) to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Corporations provides as follows: a state has power to exercise judicial jurisdiction over a corporation incorporated in the state even though it does no business there, and incorporation in the state gives the state a basis for exercising juridical jurisdiction over the corporation in any action that may there be brought against it. It further provides that service of process is effected on an officer, employee, designated agent, or public official, either within or outside California, as provided by *Code Civ. Proc. § 416.10* or *416.20*, but that, like an individual and a foreign corporation, a domestic corporation may waive the requirement of notice by its consent or by making a general appearance [*see Code Civ. Proc. § 410.50(a)*; *see also §§ 132.105, 132.106*].

Restatement (Second), Conflict of Laws, § 41, Comment, provides as follows: (a) A corporation's incorporation in a state provides a fair and reasonable basis on which to base amenability to suit there. This basis of jurisdiction assures the existence of a place at which a corporation is continuously amenable to suit; and (b) incorporation in the state gives the state a basis for the exercise of personal jurisdiction over the corporation in any action that may there be brought against it.

[c] Partnership or Other Unincorporated Association

As pointed out in Paragraph C, the Judicial Council Comment to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Partnerships or Other Unincorporated Associations, provides that a state in which a partnership or other unincorporated association is subject to suit in the firm or common name (which includes California [*see Code*

Civ. Proc. § 369.5(a)]) has power to exercise jurisdiction over the partnership or association if under similar circumstances it could exercise judicial jurisdiction over a corporation on a similar basis of jurisdiction. The Comment further states that for purposes of suit, California treats partnerships or associations as corporations and that the type of actions that may be brought against a partnership or association is the same as against a corporation, and adds that by permitting a partnership or association to sue and be sued in its firm or common name, that a state creates an entity status for the partnership or association.

Thus, because California courts may exercise judicial jurisdiction over a domestic corporation, even one that does no business in the state, they may also exercise judicial jurisdiction on the same basis over a partnership or other unincorporated association formed under the laws of California.

The American Law Institute has taken a somewhat different position. Restatement (Second), Conflict of Laws, § 40(1), provides that a state in which a partnership or unincorporated association is subject to suit in the firm or common name has power to exercise judicial jurisdiction over the partnership or association if under the circumstances it could exercise judicial jurisdiction over an individual on one or more of the bases set forth in Restatement (Second), Conflict of Laws, §§ 32-l39 [*see §§ 132.104 -132.110*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 132.104 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground That Court Lacks Personal Jurisdiction--Sufficient Basis for Jurisdiction Exists--Defendant Foreign Corporation or Other Entity Was Served Through Agent Designated to Receive Service of Process

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum opposing a motion to quash service of summons on the ground that the court lacks a sufficient basis for exercising personal jurisdiction (see, e.g., § 132.100).*]

DELIVERY OF A COPY OF THE SUMMONS AND COMPLAINT TO THE AGENT DESIGNATED BY DEFENDANT FOR RECEIPT OF SERVICE OF PROCESS IS A PROPER BASIS FOR THE EXERCISE OF PERSONAL JURISDICTION OVER THE DEFENDANT.

A. Service on Agent Designated by Defendant Foreign Corporation. A state has power to exercise judicial jurisdiction over a foreign corporation that has authorized an agent or a public official to accept service of process in actions brought against the corporation in the state as to all causes of action to which the authority of the agent or official to accept service extends (Judicial Council Comment to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Corporations).

[*Optional*] **B. Service on Nonqualified Foreign Corporation.** Any foreign corporation that transacts intrastate business and that does not hold a valid certificate of qualification from the Secretary of State pursuant to *Section 2105 of the Corporations Code* is, by transacting such unauthorized intrastate business, deemed to consent to the jurisdiction of the courts of California in any civil action arising in California in which the corporation is named a party defendant and is deemed to have designated the Secretary of State as the agent on whom process directed to the corporation may be served within California (*Corp. Code § 2203(a)*; *Cannon v. American Hydrocarbon Corp. (1970) 4 Cal. App. 3d 639, 84 Cal. Rptr. 575*). A foreign corporation is considered to be transacting intrastate business if it enters into repeated and successive transactions of its business in California, other than interstate or foreign commerce (*Corp. Code § 191(a)*; *see Neogard Corp. v. Malott & Peterson-Grundy (1980) 106 Cal. App. 3d 213, 226-227, 164 Cal. Rptr. 813*

).

[*Optional*] **C. Foreign Corporation Defined.** Except in certain situations involving corporations or associations chartered under the laws of the United States, "foreign corporation" means any corporation other than a domestic corporation (*Corp. Code § 171*).

[*ADD, if defendant is partnership or other unincorporated association*]

D. Partnership or Other Unincorporated Association. [*See § 132.103,* Paragraph C].

E. Authority to Sue Partnership or Other Unincorporated Association in Common Name. [*See § 132.103,* Paragraph D].

[2] Comments

[a] Use of Form

The form in [1], *above*, is for use in opposing a motion to quash service of summons under *Code Civ. Proc. § 418.10(a)(1),* on the ground that the court has no proper basis for exercising personal jurisdiction over the defendant. The ground for opposition is that the defendant is a foreign corporation or a partnership or unincorporated association that was served in the action through an agent designated to receive service of process, and that this is a sufficient basis for the court to exercise its jurisdiction over defendant. Although the Judicial Council Comment *Code Civ. Proc. § 410.10,* Bases of Judicial Jurisdiction Over Corporations, cited in Paragraph A is limited to foreign corporations, the same rule would apply in the case of a domestic corporations or partnership or unincorporated association [*see Code Civ. Proc. §§ 415.50(a), 416.10(a), 416.30, 416.40(a)*].

This form does not provide a complete memorandum, but is designed to be combined with a general form of memorandum opposing a motion to quash service of summons [*see, e.g., § 132.100*]. It may also be included in a memorandum of points and authorities opposing a petition for a writ of mandate to compel the trial court to grant the motion to quash after it has declined to do so [*see Code Civ. Proc. § 418.10(c)*], or it may be adapted for use in a trial or appellate brief.

For additional points and authorities opposing a motion to quash on other grounds, see *§§ 132.101 -132.103, 132.105 -132.115*.

In an appropriate case, the points and authorities set out in the foregoing form may be used to oppose a motion supported by the points and authorities *set out in § 132.79*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated.

See also *§ 132.100[2]* for comments on a general form.

[b] Other Minimum Contacts May Be Required

At least one court has held that the designation of an agent for service of process of under *Corp. Code § 2105* was an insufficient minimum contact, by itself, to justify the trial court's exercise of personal jurisdiction over a foreign corporation in a cause of action that arose out of state and had no relationship to the defendant's activities in California [*see Gray Line Tours v. Reynolds Electrical & Engineering Co. (1987) 193 Cal. App. 3d 190, 238 Cal. Rptr. 419*

(discussed in *§ 132.79[3][a*])].

[c] Designation of Agent and Service of Process

Neither a domestic nor a foreign corporation can successfully secrete itself to avoid the jurisdiction of the court; the Corporations Code provides for an effective mode of obtaining personal service on the corporation whose officers and agents cannot be found after due diligence by providing for service on the Secretary of State [*Coates Capitol Corp. v. Superior Court (1967) 251 Cal. App. 2d 125, 128-129, 59 Cal. Rptr. 231]* .

For the designation by a domestic corporation of an agent for service of process and for when service of process may be made on a domestic corporation by delivery to the corporation's appointed agent, see *Code Civ. Proc. § 416.10(a)*; *Corp. Code §§ 202(c), 1502(b), 1504, 1505, 1701*. For when service may be made by delivery of the process to the secretary of state, see *Corp. Code § 1702*.

For the designation by a foreign corporation of an agent for service of process and for when service of process may be made on a foreign corporation by delivery to the corporation's designated agent, see *Code Civ. Proc. § 416.10(a)*; and *Corp. Code §§ 2102, 2105(a)(4), (5), 2107(b), (d), 2110, 2117(b), 2203*.

For when service may be made by delivery of the process to the Secretary of State, see *Corp. Code §§ 2105(a)(5), 2111, 2114*.

For the designation of an agent for service of process on a partnership, other than a foreign limited partnership, see *Corp. Code §§ 15800* and *24003*. For when service may be made by delivery of process to the Secretary of State, see *Corp. Code § 15800*.

For the designation of an agent for service of process and for when service of process may be made on an unincorporated association by delivery to the association's appointed agent, see *Code Civ. Proc. § 416.40(a), (b)*; and *Corp. Code §§ 24003, 24005*. For when service may be made by delivery of process to a member of the association, see *Corp. Code § 24007*.

For further discussion of service of process on corporations and associations, and on public officials on behalf of corporations or associations, see California Forms of Pleading and Practice, Ch. 518, *Service of Summons and Papers* .

[3] Discussion of Authorities

[a] Service on Nonqualified Foreign Corporation

Cannon v. American Hydrocarbon Corp. *(1970) 4 Cal. App. 3d 639, 84 Cal. Rptr. 575* , involved the interpretation of former Corp. Code § 6408 [*now see Corp. Code § 2203(a)*]. Defendant foreign corporation sought to have default judgments against it set aside, in part, on the ground that service on it pursuant to former Corp. Code § 6408, by service on the Secretary of State, could be made only by first obtaining a court order. The trial court disagreed, and the court of appeal affirmed (*4 Cal. App. 3d 639, 647-649)* .

Defendant had transacted business in California, which business gave rise to plaintiff's cause of action, but it had not qualified under former Corp. Code § 6403 [*now see Corp. Code § 2105*] to conduct such business. Plaintiff, therefore, served defendant in accordance with the provisions of former Corp. Code § 6408 [*now see Corp. Code § 2203(a)*] by personal delivery of the process to a deputy Secretary of State in Sacramento. In doing so, plaintiff obtained no order permitting such service from the superior court. Defendant maintained that plaintiff was required to do so, because under former Code Civ. Proc. § 411 [*now see Code Civ. Proc. § 416.10*], service of process could only be made in the manner provided in former Corp. Code §§ 6500-6504, which provided, in pertinent part, that substituted service on the

Secretary of State could be made only by first obtaining a court order. The court of appeal held that former Corp. Code § 6408 did not require substituted service on the Secretary of State to be preceded by first obtaining a court order (*4 Cal. App. 3d 639, 647-649)* .

Although under the present statutory scheme, this conflict is no longer explicit, it should be noted that the present statutory provisions for service on corporations contained in *Code Civ. Proc. § 416.10* do not make reference to the right to serve a corporation which is transacting unauthorized intrastate business by serving process on the Secretary of State; nor do those provisions provide the manner in which such service may be made. It would appear, thus, that reference may still be made to the *Cannon* decision for authority for the manner in which service may be made on a corporation transacting unauthorized intrastate business. ***Neogard Corp. v. Malott & Peterson-Grundy*** *(1980) 106 Cal. App. 3d 213, 164 Cal. Rptr. 813* is discussed in *§ 132.105[3][c]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral Overview

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13-132 California Points & Authorities § 132.105

§ 132.105 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground That Court Lacks Personal Jurisdiction--Sufficient Basis for Jurisdiction Exists--Defendant Has Consented to Jurisdiction

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum opposing a motion to quash service of summons on the ground that the court lacks a sufficient basis for exercising personal jurisdiction (see, e.g., § 132.100).*]

THE CONSENT OF THE DEFENDANT TO THIS COURT'S JURISDICTION IS A PROPER BASIS FOR THE EXERCISE OF PERSONAL JURISDICTION OVER HIM/HER/IT.

[*EITHER, if defendant is an individual*]

A. Consent to Jurisdiction by Competent Individual. A state has power to exercise judicial jurisdiction over a competent individual who has consented to the exercise of such jurisdiction (Judicial Council Comment to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Individuals; *see also National Equipment Rental v. Szukhent (1964) 375 U.S. 311, 316-317, 84 S. Ct. 411, 11 L. Ed. 2d 354*).

[*OR, if defendant is a foreign corporation*]

A. Consent to Jurisdiction by Foreign Corporation. A state has power to exercise judicial jurisdiction over a foreign corporation which has consented to the exercise of such jurisdiction (Judicial Council Comment to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Corporations; *see Atkins, Kroll & Co. v. Broadway Lbr. Co. (1963) 222 Cal. App. 2d 646, 650, 653, 656, 35 Cal. Rptr. 385*).

[*Optional*] **B. Consent by Foreign Corporation Transacting Unauthorized Intrastate Business.** Any foreign

corporation that transacts intrastate business and that does not hold a valid certificate of qualification from the Secretary of State pursuant to *Section 2105 of the Corporations Code* is, by transacting such unauthorized intrastate business, deemed to consent to the jurisdiction of the courts of California in any civil action arising in California in which the corporation is named a party defendant and is deemed to have designated the Secretary of State as the agent on whom process directed to the corporation may be served within California (*Corp. Code § 2203(a)*). A foreign corporation is considered to be transacting intrastate business if it enters into repeated and successive transactions of its business in California, other than interstate or foreign commerce (*Corp. Code § 191(a)*; *see Neogard Corp. v. Malott & Peterson-Grundy (1980) 106 Cal. App. 3d 213, 226-227, 164 Cal. Rptr. 813*).

[*Optional*] **C. Transaction of Intrastate Business.** [*See § 132.100*, Paragraph D].

[*Optional*] **D. Foreign Corporation Defined.** [*See § 132.104*, Paragraph B].

[*ADD, if defendant is a foreign partnership or other unincorporated association*]

E. Partnership or Other Unincorporated Association. [*See § 132.103*, Paragraph C].

F. Authority to Sue Partnership or Other Unincorporated Association in Common Name. [*See § 132.103*, Paragraph D].

[2] Comments

[a] Use of Form

The form in [1], *above*, is for use in opposing a motion to quash service of summons under *Code Civ. Proc. § 418.10(a)(1)*, on the ground that the court has no proper basis for exercising personal jurisdiction over the defendant. The ground for opposition is that the defendant has effectively consented to the jurisdiction of the court, and that this is a sufficient basis for the court to exercise its jurisdiction over defendant. For an example of a California statute providing for jurisdiction over a foreign corporation or nonresident person based on consent to jurisdiction as expressed in specified contracts, see *Code Civ. Proc. § 410.40*.

This form does not provide a complete memorandum, but is designed to be combined with a general form of memorandum opposing a motion to quash service of summons [*see, e.g., § 132.100*]. It may also be included in a memorandum of points and authorities opposing a petition for a writ of mandate to compel the trial court to grant the motion to quash after it has declined to do so [*see Code Civ. Proc. § 418.10(c)*], or it may be adapted for use in a trial or appellate brief.

For additional points and authorities opposing a motion to quash on other grounds, see *§§ 132.101 -132.104*, *132.106 -132.115*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated.

See also *§ 132.100[2]* for comments on a general form.

[b] Effect of Consent

Although the consent of a party is effective to give a state jurisdiction over his or her person, it cannot enlarge the competency of the court to include a type of case which a court has not been authorized to hear by the state or a case

involving either a greater or lesser amount in controversy [Judicial Council Comment to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Individuals]. That is, while a party can consent to jurisdiction over his or her person, the party cannot, by agreement or otherwise, enlarge the subject matter jurisdiction of the court.

[c] Sufficiency of Consent

Actual consent to the exercise of jurisdiction is required, but such consent may be expressed by words or by conduct, and must be given by a person who is under no legal disability. Consent may be given with respect to a particular action either before the action is brought or afterwards, or it may be given generally with respect to actions which may thereafter be brought. Consent may be given by a contractual provision either waiving service of process or authorizing extraterritorial service of process; by a power of attorney to confess judgment, unless such confessions are illegal in the state; by a contractual provision for arbitration by a state arbitration board; by an acknowledgment of "due service"; or by the designation of an agent to receive process [Judicial Council Comment to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Individuals].

For a form relating to designation of an agent to receive process, see *§ 132.104*. For discussion of confessions of judgment in California, see Ch. 318, *Judgments* , Pt. I, in California Forms of Pleading and Practice. For discussion of the statutes governing the appointment of a California state official, such as the Secretary of State, to receive service of summons on certain nonresidents as a result of some activity by them in California, see California Forms of Pleading and Practice, Ch. 518, *Service of Summons and Papers* .

[3] Discussion of Authorities

[a] Consent to Jurisdiction by Competent Individual

National Equipment Rental v. Szukhent *(1964) 375 U.S. 311, 84 S. Ct. 411, 11 L. Ed. 2d 354* , was an action in a New York federal district court by the corporate lessor of farm equipment, with its principal place of business in New York City, against the lessees, a father and son farming in Michigan, for alleged default in payments due under the lease. The lease provided that the lessees designated a named individual (with whom the lessees were not acquainted) as their agent for the purpose of accepting any process in the State of New York. The purpose of this provision was to assure that any litigation under the lease would be conducted in New York. Two copies of the summons and complaint were delivered to the designated agent who the same day sent the summons and complaint to the lessees in Michigan by certified mail, with a letter stating that the documents had been served on her as their agent in accordance with the lease agreement. The federal court quashed service of the summons and complaint and the United States Court of Appeals affirmed.

In reversing the judgment, the United States Supreme Court, in upholding, under federal rules, the validity of the service on the agent, said that it was settled that parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether (*375 U.S. 311, 316-317)* .

[b] Consent to Jurisdiction by Foreign Corporation

In ***Atkins, Kroll & Co. v. Broadway Lbr. Co.*** *(1963) 222 Cal. App. 2d 646, 35 Cal. Rptr. 385* , in reversing an order of the superior court quashing service of process and dismissing a proceeding to confirm an arbitration award, the California court of appeal held that by contractually agreeing that all matters relating to the performance of the contract were to be governed by California laws and agreeing to submit to arbitration under the laws of California any dispute arising under the contract, the foreign corporation agreed to submit to the jurisdiction of the courts of this state, and that this included not only the enforcement of arbitration agreements and the conduct of arbitration proceedings, but the enforcement of the award resulting from such arbitration in the manner provided by California law (*222 Cal. App. 2d 646, 650, 653, 656)* .

[c] Consent by Foreign Corporation Transacting Unauthorized Intrastate Business

Plaintiff ***Neogard Corp. v. Malott & Peterson-Grundy*** *(1980) 106 Cal. App. 3d 213, 164 Cal. Rptr. 813* , had transacted business in California for nine years. Nevertheless, it had not obtained a certificate of qualification under *Corp. Code § 2105* and, on this basis, the trial court dismissed its breach of contract action against a local firm.

The court of appeal upheld the dismissal, finding that plaintiff's activities enumerated above constituted intrastate business, when taken together, despite the fact that plaintiff maintained no payrolled office in California (*106 Cal. App. 3d 213, 226)* . Plaintiff established relations with and paid commissions to manufacturer's representatives residing in California. It sent sales representatives intrastate to induce construction contracts between California project designers and California waterproofing subcontractors. It assisted the waterproofing subcontractors in obtaining those contracts. It entered into contracts with subcontractors and utilized this fact to induce contracts between interstate parties. It supervised the physical in-state application of its waterproofing system. It signed contracts in-state to guarantee those projects and provided in-state supervision when defects appears. This, the court said, amounted to more than entry into California merely to contribute to or to conclude a unitary interstate transaction (*106 Cal. App. 3d 213, 226)* . Plaintiff also contended that the cause of action related to purely interstate contracts involving defendant's obligation to pay for product received and thus, could not be dismissed under *Corp. Code § 2203(c)* or the commerce clause. The court of appeal disagreed, concluding that the fact that the contract sued on is part and parcel of a course of business they deemed "intrastate" for purposes of *Corp. Code § 2105* renders that contract action one on intrastate business for purposes of *Corp. Code § 2203(c)* (*106 Cal. App. 3d 213, 227)* .

[4] Additional Authorities

[a] Consent to Jurisdiction by Competent Individual

In *Szynalski v. Superior Court (2009) 172 Cal. App. 4th 1, 90 Cal. Rptr. 3d 683* , the trial court denied a motion brought by a nonresident who had signed a settlement agreement in a California class action to quash service of a summons and complaint in a suit brought by the settlement administrator for payment of its fees. The nonresident agreed to pay the administrator's fees and agreed that the trial court would retain jurisdiction over the settlement agreement, including disputes relating to the administrator. The settlement agreement described the nonresident's participation as a special appearance and stated that he did not submit to the trial court's jurisdiction. The trial court, in approving the settlement, expressly retained jurisdiction over all matters relating to its administration. The Court of Appeal denied the nonresident's petition for writ of mandate. The court held that the trial court had personal jurisdiction over the nonresident in accordance with *Code Civ. Proc., § 410.10*, because he consented to that court's jurisdiction and had the required minimum contacts with California. Although his mere presence in California to negotiate and sign the settlement agreement might not have been sufficient to confer personal jurisdiction over him, he also obtained the trial court's approval of the settlement while understanding that the trial court would retain jurisdiction, accepted the benefits of the administrator's services, and agreed to pay the administrator's fees. His attempt by reservation to restrict the trial court's jurisdiction over him was ineffective (*172 Cal. App. 4th 1, 7-12)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral Overview

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13-132 California Points & Authorities § 132.106

§ 132.106 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground That Court Lacks Personal Jurisdiction--Sufficient Basis for Jurisdiction Exists--Defendant Has Made General Appearance in Action

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum opposing a motion to quash service of summons on the ground that the court lacks a sufficient basis for exercising personal jurisdiction (see, e.g., § 132.100).*]

THE GENERAL APPEARANCE OF THE DEFENDANT IN THIS CASE IS A PROPER BASIS FOR THE EXERCISE OF PERSONAL JURISDICTION OVER HIM/HER/IT.

A. General Appearance Is Equivalent to Valid Service. Except as otherwise provided by statute, the court in which an action is pending has jurisdiction over a party from the time the summons is served on him, her, or it as provided by *Code of Civil Procedure Section 413.10 et seq.*; a general appearance by a party is equivalent to personal service of summons on that party (*Code Civ. Proc. § 410.50(a)*; *Hamilton v. Asbestos Corp. (2000) 22 Cal. 4th 1127, 1147-1149, 95 Cal. Rptr. 2d 701, 998 P.2d 403* ; *Harrington v. Superior Court (1924) 194 Cal. 185, 189, 228 P. 15* ; *Neihaus v. Superior Court (1977) 69 Cal. App. 3d 340, 345, 137 Cal. Rptr. 905*).

[*EITHER, if defendant is an individual*]

B. General Appearance by Individual. A state has power to exercise judicial jurisdiction over an individual who enters an appearance as a defendant in the action (Judicial Council Comment to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Individuals).

[*OR, if defendant is foreign a corporation*]

B. General Appearance by Foreign Corporation. A state has power to exercise judicial jurisdiction over a foreign corporation which enters an appearance as defendant in an action in the state (Judicial Council Comment to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Corporations).

[*Optional*] **C. Foreign Corporation Defined.** [*See § 132.104*, Paragraph B.]

[*ADD, if defendant is a foreign partnership or other unincorporated association*]

D. Partnership or Other Unincorporated Association. [*See § 132.103*, Paragraph C].

E. Authority to Sue Partnership or Other Unincorporated Association in Common Name. [*See § 132.103*, Paragraph D].

F. General Appearance Made By Recognizing Court's Authority to Proceed. The statutory list contained in *Code of Civil Procedure Section 1014* of what constitutes an appearance is not exclusive. A general appearance occurs when the defendant takes part in the action or in some manner recognizes the authority of the court to proceed (*Hamilton v. Asbestos Corp. (2000) 22 Cal. 4th 1127, 1147-1149, 95 Cal. Rptr. 2d 701, 998 P.2d 403* ; Dial 800 v. *Fesbinder (2004) 118 Cal. App. 4th 32, 52, 12 Cal. Rptr. 3d 711*).

G. General Appearance Made By Actions Undertaken by the Defendant While a Motion to Quash or Writ of Mandate Was Pending Which Recognized the Trial Court's Jurisdiction. *Code Civ. Proc. § 418.10(e)(1)* provides that a defendant or cross-defendant may make a motion to quash and simultaneously answer, demur, or move to strike the complaint or cross-complaint, and these acts do no constitute an appearance unless the court denies the motion, and the party is not deemed to have generally appeared until entry of the order denying the motion. If the order is denied and the defendant or cross-defendant petitions for a writ of mandate pursuant to *Code Civ. Proc. § 418.10(c)*, the defendant or cross-defendant is not deemed to have generally appeared until the proceedings on the writ petition have finally concluded (*Code Civ. Proc. § 418.10(e)(2)*). However, subdivision (e) does not change the essential rule that "[a] defendant submits to the court's jurisdiction by making a general appearance in an action" by "participat[ing] in the action in a manner which recognizes the court's jurisdiction." (*State Farm General Ins. Co. v. JT's Frames, Inc. (2010) 181 Cal. App. 4th 429, 441, 104 Cal. Rptr. 3d 573*). It merely delays the effect of such actions until the motion to quash is denied or, if the defendant seeks writ review, until proceedings on the writ have concluded. Once the motion is denied or writ proceedings have concluded, the actions undertaken by the defendant while the motion or writ was pending which recognized the trial court's jurisdiction will be "deemed" to constitute a general appearance, and no further objection to jurisdiction will be permitted. If the defendant or cross-defendant have freely chosen to become involved in the merits of the action and participated fully in resolving the merits of the litigation while the writ was pending such as conducting discovery or moving for summary judgment, that party has submitted itself to the jurisdiction of the court and waived any further right to contest personal jurisdiction (*State Farm General Ins. Co. v. JT's Frames, Inc. (2010) 181 Cal. App. 4th 429, 441-444, 104 Cal. Rptr. 3d 573*).

[2] Comments

[a] Use of Form

The memorandum of points and authorities in [1], *above*, is for use in opposing a motion to quash service of summons under *Code Civ. Proc. § 418.10(a)(1)*, on the ground that the court has no proper basis for exercising personal jurisdiction over the defendant. The ground for opposition is that the defendant has made a general appearance in the action or proceeding, and that this is a sufficient basis for the court to exercise its jurisdiction over defendant.

This form does not provide a complete memorandum, but is designed to be combined with a general form of memorandum opposing a motion to quash service of summons [*see, e.g., § 132.100*]. It may also be included in a memorandum of points and authorities opposing a petition for a writ of mandate to compel the trial court to grant the motion to quash after it has declined to do so [*see Code Civ. Proc. § 418.10(c)*], or it may be adapted for use in a trial or appellate brief.

For additional points and authorities opposing a motion to quash on other grounds, see *§§ 132.101 -132.105, 132.107 -132.115*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated.

See also *§ 132.100[2]* for comments on a general form.

[b] Effect of General Appearance

A party, even one who has no minimum contacts with this state, may consent to a court's exercise of personal jurisdiction over him or her in a particular case [*see § 132.105*]. A general appearance is a form of consent by conduct. Thus, when a party takes part in an action or proceeding, for example, by pleading or participating in the trial, the party has made a general appearance in the action and has consented, or submitted, to the court's jurisdiction over his or her person [*Estate of Heil (1989) 259 Cal. Rptr. 28* (State of Nevada, which had been designated in holographic will by testator, who died in California, as the trustee of a charitable trust for the preservation of wild horses in Nevada, held subject to jurisdiction of probate court in California in proceedings to revoke probate of will and to remove Nevada as trustee when Nevada made a general appearance, thereby consenting to jurisdiction, by answering petition to revoke probate of will and by actively participating in discovery and settlement of proceeding)].

By the same token, a general appearance in effect supersedes the service of any defective summons or defective service, or no service of summons at all, although the defendant must be given a reasonable opportunity to be heard and proper notice of any proceeding following the general appearance [Judicial Council Comment to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Individuals]. Note, however, that a general appearance after a default judgment does not operate to waive prior defects in services [*see In re Marriage of Smith (1982) 135 Cal. App. 3d 543, 545, 547-552, 185 Cal. Rptr. 411* , discussed in *§ 132.40[3][f]*].

Although the Judicial Council Comment to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Corporations, is limited to foreign corporations, the same rule would apply in the case of a domestic corporation or association [*see Code Civ. Proc. § 415.50(a)*].

[c] Special and General Appearances Distinguished

Although the Judicial Council's official comment, in its statement of the rule, uses the word "appearance" without qualification, its further comments indicate that it means a general appearance. With respect to the Restatement rule, the American Law Institute explained that states do not usually choose to exercise judicial jurisdiction on the basis of an appearance which is not general [Restatement (Second), Conflict of Laws, § 33, Comment c]. Thus, an appearance does not give a state the power to exercise judicial jurisdiction over an individual unless that appearance is a general appearance, that is, one in which the individual takes part in the action or proceeding by pleading or participating in the trial [*Titus v. Superior Court (1972) 23 Cal. App. 3d 792, 800, 100 Cal. Rptr. 477]* .

A "special" appearance is one in which a defendant or cross defendant appears only to challenge the in personam jurisdiction of the court over his or her person [*Titus v. Superior Court (1972) 23 Cal. App. 3d 792, 801, 100 Cal. Rptr. 477]* . All other appearances are either "general," which constitutes a submission to the in personam jurisdiction of

the court, or "not general," that is, they do not constitute a submission to the in personam jurisdiction of the court. Various acts are declared by statute or case law not to be general appearances [*see, e.g., Code Civ. Proc. § 418.10(d)* (no *Code Civ. Proc. § 418.10* motion to quash service, to stay or dismiss for inconvenient forum, or to dismiss for delay in prosecution, and no *Code Civ. Proc. § 473* or *473.5* motion, when joined with a § 418.10 motion, and no application or stipulation to extend time to plead is to be deemed a general appearance by defendant); Code Civ. Proc. § 481.11 (appearance at hearing at which ex parte relief is sought, or appearance at hearing for which ex parte application for provisional remedy is made is not a general appearance); *Josephson v. Superior Court (1963) 219 Cal. App. 2d 354, 358, 362, 33 Cal. Rptr. 196* (motion to reconsider denial of motion to quash service of summons on cross complaint does not constitute a general appearance if it is limited to same grounds as original motion)].

*Code Civ. Proc. § 418.10(e)*provides that a defendant or cross-defendant may make a motion under *Code Civ. Proc. § 418.10* and simultaneously answer, demur, or move to strike the complaint or cross-complaint. Notwithstanding *Code Civ. Proc. § 1014*, no act by a party who makes a motion under *Code Civ. Proc. § 418.10*, including filing an answer, demurrer, or motion to strike constitutes an appearance, unless the court denies the motion made under this section. If the court denies the motion made under *Code Civ. Proc. § 418.10*, the defendant or cross-defendant is not deemed to have generally appeared until entry of the order denying the motion [*Code Civ. Proc. § 418.10(e)(1)*]. If the motion made under *Code Civ. Proc. § 418.10* is denied and the defendant or cross-defendant petitions for a writ of mandate pursuant to *Code Civ. Proc. § 418.10(c)*, the defendant or cross-defendant is not deemed to have generally appeared until the proceedings on the writ petition have finally concluded [*Code Civ. Proc. § 418.10(e)(2)*]. Failure to make a motion under *Code Civ. Proc. § 418.10* at the time of filing a demurrer or motion to strike constitutes a waiver of the issues of lack of personal jurisdiction, inadequacy of process, inadequacy of service of process, inconvenient forum, and delay in prosecution [*Code Civ. Proc. § 418.10(e)(3)*].

The word "appearance," standing alone, usually means a general and not a special appearance [*O'Keefe v. Miller (1965) 231 Cal. App. 2d 920, 927, 42 Cal. Rptr. 343]* . Thus, the word "appearance" in *Code Civ. Proc. § 1014* means a general and not a special appearance. That statute provides that a defendant appears in an action when he answers, demurs, files a notice of motion to strike, files a notice of motion to transfer pursuant to *Code Civ. Proc. § 396b*, moves for reclassification pursuant to *Code Civ. Proc. § 403.040*, gives the plaintiff written notice of appearance, or when an attorney gives written notice of appearance for the defendant. However, this list is not exclusive. In *Hamilton v. Asbestos Corp. (2000) 22 Cal. 4th 1127, 1147, 95 Cal. Rptr. 2d 701, 998 P.2d 403* , the California Supreme Court noted that the term "general appearance" may apply to various acts which, under all of the circumstances, are deemed to confer jurisdiction of the person. What is determinative is whether defendant participates in the particular action which in some manner recognizes the court's authority to proceed [*see also O'Keefe v. Miller (1965) 231 Cal. App. 2d 920, 921, 42 Cal. Rptr. 343* (general appearance is not necessarily formal, technical step or act; term applied to various acts which under established principles of procedure are deemed to confer jurisdiction of person)]. Similarly, in *Davenport v. Superior Court (1920) 183 Cal. 506, 511, 191 P. 911* , the Supreme Court, although holding that the act in that case did not constitute an appearance, stated: "An act of a defendant by which he intentionally submits himself to the jurisdiction of the court in that action for the purpose of obtaining any ruling or order of the court going to the merits of the case, ... which may reasonably be construed to imply that the court has, in that action, acquired jurisdiction of the person of the defendant, will be equivalent to an appearance, although not strictly in accordance with the terms of [*Code Civ. Proc. section 1014*]" [*see also Creed v. Schultz (1983) 148 Cal. App. 3d 733, 739-740, 196 Cal. Rptr. 252* ; *Palmer v. Superior Court (1961) 192 Cal. App. 2d 302, 306-307, 13 Cal. Rptr. 301* ; *Brown v. Douglas Aircraft Co. (1958) 166 Cal. App. 2d 232, 238, 333 P.2d 59* (an unusual and anomalous case since it was plaintiff who unsuccessfully attempted to show that the corporate defendant's appearance in the action was special and not general); *Braden Copper Co. v. Industrial Acci. Com. (1956) 147 Cal. App. 2d 205, 210, 305 P.2d 222]* .

For further discussion of special appearances, general appearances, and acts not constituting a general appearance, see Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances* , in California Forms of Pleading and Practice, (Matthew Bender).

[d] Continuation of Jurisdiction

Once acquired, jurisdiction of the court over the parties continues throughout subsequent proceedings in the action [*Code Civ. Proc. § 410.50(b)*].

[3] Discussion of Authorities

[a] General Appearance Is Equivalent to Valid Service

Hamilton v. Asbestos Corp. *(2000) 22 Cal. 4th 1127, 95 Cal. Rptr. 2d 701, 998 P.2d 403* , involved two actions brought by plaintiff's decedent (plaintiff). Plaintiff initially brought an action to recover compensatory and punitive damages for asbestosis. Before trial began, plaintiff was diagnosed with a malignant peritoneal mesothelioma, a fatal cancer primarily triggered by exposure to asbestos, and within a month thereafter, plaintiff filed a second action seeking to recover compensatory and punitive damages for mesothelioma. The actions were consolidated. After trial, judgment was entered in the plaintiff's favor. Defendant appealed. The court of appeal reversed the judgment in its entirety. As to the first action, the court held that the trial court lacked personal jurisdiction over defendant because defendant had not been served in that action. The court found that defendant had not made a general appearance in that action sufficient to constitute the equivalent of personal service. The California Supreme Court granted review (*22 Cal. 4th 1127, 1132-1137)* .

The Supreme Court reversed the judgment of the court of appeal with directions to resolve certain remaining issues in that court (*22 Cal. 4th 1127, 1150)* . After holding that both actions were timely under *Code Civ. Proc. § 340.2* (*22 Cal. 4th 1127, 1137-1147),* the court held that the trial court did not lack jurisdiction over defendant in plaintiff's first action. Citing *Code Civ. Proc. § 410.50(a),* the court noted that a general appearance by a party is equivalent to personal service of summons on that party. The court then noted that the statutory list of acts constituting an appearance specified in *Code Civ. Proc. § 1014* is not exclusive. Rather, the term may apply to various acts which, under all of the circumstances, are deemed to confer jurisdiction of the person. What is determinative is whether defendant participates in the particular action which in some manner recognizes the authority of the court to proceed (*22 Cal. 4th 1127, 1147)* . The trial court had ordered plaintiff's two actions consolidated for all purposes and defendant fully participated without objection in the consolidated action. Defendant thereby made a general appearance (*22 Cal. 4th 1127, 1147-1149)* .

Harrington v. Superior Court *(1924) 194 Cal. 185, 228 P. 15* , was a proceeding in prohibition to restrain the superior court from proceeding further in a condemnation proceeding in which the defendant filed a general appearance and thereafter a demurrer to the complaint, which was overruled, and plaintiff was given immediate possession of the property. Subsequently, the defendant moved to vacate and set aside all proceedings on the ground no summons had been served and, hence, the court had no jurisdiction over the defendant's person or the subject matter.

In denying the writ, the Supreme Court said that process is waived by a general appearance in person or by attorney, entered in the action, or by some act equivalent thereto, such as the filing of a pleading in the case or by otherwise recognizing the authority of the court to proceed with the action. The Court explained that a defendant has a right to demand that process be issued against him or her in the manner provided by law, but if process is not so issued and he or she appears generally without making objection, such appearance, being the purpose of the process, confers jurisdiction of the person and the court is empowered to act in the premises (*194 Cal. 185, 189)* .

Neihaus v. Superior Court *(1977) 69 Cal. App. 3d 340, 137 Cal. Rptr. 905* , was a personal injury action arising out of an automobile accident in Nevada against, among others, a Nevada resident, who was served with summons in Nevada and who moved to quash service of summons on the ground of lack of personal jurisdiction. The motion was granted. Plaintiff then had the court issue a writ of attachment which was levied on the Nevada resident's right under a liability insurance policy to have the insurer defend and indemnify him on the claim. The trial court denied the Nevada resident's motion to quash the levy of the writ. Defendant's counsel then filed an answer containing affirmative defenses

and stating that the defendant was not thereby subjecting his person to the jurisdiction of the court. Later, the California Supreme Court ruled that an insurer's obligation to defend was not subject to attachment as the basis of quasi in rem jurisdiction, and the defendant again moved to quash, and again the motion was denied. The defendant then petitioned the court of appeal for an order restraining the trial court from proceeding with the case on the ground the superior court had neither personal nor quasi in rem jurisdiction over him.

In denying the writ, the court of appeal said that ordinarily no in personam jurisdiction is conferred by service on a defendant in another state when there is neither presence, domicile, nor any act of the defendant within California, but that if the defendant appears by formally answering a complaint, such an appearance is a general appearance and confers jurisdiction on the court when none existed before (*69 Cal. App. 3d 340, 345)* . The court said that the defendant's argument that the disclaimer clause contained in his filed answer had the effect of somehow transforming the answer into a special appearance for the limited purpose of challenging jurisdiction was without merit, and that it has been long established by decisions of the courts of this state that where a defendant makes a general appearance by the filing of an answer, demurrer, or certain motions, he submits himself or herself to the jurisdiction of the court irrespective of an attempt in the pleading to disclaim such submission or limit the appearance (*69 Cal. App. 3d 340, 345)* .

[b] General Appearance Made By Recognizing Court's Authority to Proceed

The facts of ***Hamilton v. Asbestos Corp.*** *(2000) 22 Cal. 4th 1127, 95 Cal. Rptr. 2d 701, 998 P.2d 403* are discussed in [a], *above.*

In determining whether a general or special appearance has been made, the appellate court held that the issue is fact-specific, and in the case at bar two paramount facts supported a general appearance: the trial court ordered the plaintiff's two actions to be consolidated for all purposes, and the defendant fully participated without objection in the consolidated action. The defendant thereby made a general appearance (*22 Cal. 4th 1127, 1147)* .

In **Dial 800 v.** ***Fesbinder*** *(2004) 118 Cal. App. 4th 32, 12 Cal. Rptr. 3d 711* , the plaintiff corporations challenged a decision of the trial court which dismissed the corporations' interpleader action filed pursuant to *Code Civ. Proc. § 386.* The corporations filed this interpleader complaint and alleged that it held and was required to distribute a particular sum to the correct party. That amount was deposited with the clerk of court. The trial court dismissed the corporations' interpleader action sua sponte based on a private agreement by the company, its owner, and individuals to arbitrate, in Israel, their dispute over the ownership of the shares in the corporations. The trial court found that the arbitration clause deprived the trial court of jurisdiction to resolve the issues raised in the interpleader action.

On appeal, the court reversed. Because the corporations alleged that multiple claims were made against them concerning certain funds, and the funds were tendered to the trial court, the trial court had the power under *Code Civ. Proc. § 386* to adjudicate the issues raised by the interpleader action. Because the matter had been submitted to private arbitration by the company, its owner, and individuals, but not the corporations, the trial court did not lose subject matter jurisdiction, pursuant to *Code Civ. Proc. § 1281.4.* A general appearance occurs when the defendant takes part in the action or in some manner recognizes the authority of the court to proceed. If the defendant confines its participation in the action to objecting to lack of jurisdiction over the person, there is no general appearance. However, a party who seeks relief on any basis other than a motion to quash for lack of personal jurisdiction will be deemed to have made a general appearance and waived all objections to defects in service, process, or personal jurisdiction. A general appearance occurs where a party, either directly or through counsel, participates in an action in some manner which recognizes the authority of the court to proceed. It does not require any formal or technical act. Thus, if a defendant seeks any affirmative relief on the merits, the application may be deemed a general appearance. California courts have found that parties have generally appeared under varying circumstances in which the defendants sought affirmative relief. A court is thus required to analyze the defendant's papers to determine if any affirmative relief could be granted on the merits, which is a general appearance. This is distinguished from a mere request for a dismissal based on a

statutory provision, which is not a general appearance (*118 Cal. App. 4th 32, 52-54)* .

[c] General Appearance Made By Actions Undertaken by the Defendant While a Motion to Quash or Writ of Mandate Was Pending Which Recognized the Trial Court's Jurisdiction

In ***State Farm General Ins. Co. v. JT's Frames, Inc.*** *(2010) 181 Cal. App. 4th 429, 104 Cal. Rptr. 3d 573* , appellant JT's Frames, Inc. (JT's), obtained, in a prior Illinois lawsuit, a settlement on behalf of itself and a class of similarly situated entities based on defendant's transmission of over 74,000 unsolicited faxes to class members. In the underlying lawsuit, respondent State Farm General Insurance Company (State Farm) sought a declaration that JT's claims were not covered as "advertising injury" or "property damage" under policies State Farm allegedly issued to the Illinois defendant. JT's moved to quash service of State Farm's complaint on the ground JT's was not subject to personal jurisdiction in California. The trial court denied the motion to quash, and JT's sought a writ in the court of appeal. While the writ petition was pending, the parties moved forward with the litigation, and the trial court granted summary judgment in favor of State Farm shortly before the writ was summarily denied. JT's appealed both the judgment entered and the order denying its motion to quash.

In concluding that the order denying the motion to quash is not appealable where, as here, the party contesting jurisdiction entered a general appearance and litigated the merits, the court of appeal explained that *Code of Civ. Proc. § 418.10(e)* prevents the inadvertent waiver of objections to jurisdiction by delaying recognition of the party's general participation in the litigation until after the jurisdictional issue is finally resolved. However, Section 418.10(e) does not change the essential rule that a defendant submits to the court's jurisdiction by making a general appearance in an action by participating in the action in a manner which recognizes the court's jurisdiction. It merely delays the effect of such actions until the motion to quash is denied or, if the defendant seeks writ review, until proceedings on the writ have concluded. JT's, having participated fully in resolving the merits of the litigation while the writ was pending, submitted itself to the jurisdiction of the court and waived any further right to contest personal jurisdiction [*181 Cal. App. 4th 429, 441-444]* .

[4] Additional Authorities

[a] General Appearance Is Equivalent to Valid Service

In *People v. Ciancio (2003) 109 Cal. App. 4th 175, 192, 134 Cal. Rptr. 2d 531* , appellant Department of Mental Health (DMH) claimed that the trial court lacked personal jurisdiction over it in a commitment proceeding conducted pursuant to the Sexually Violent Predators Act (SVPA) [*Welf. & Inst. Code § 6600 et seq.*]. Although DMH had filed documents in the proceeding, responding to an order to show cause (OSC), it claimed that it had made a special appearance and had not waived jurisdiction.

The appellate court initially explained that an SVPA commitment proceeding is a special proceeding of a civil nature, because it is neither an action at law nor a suit in equity, but instead is a civil commitment proceeding commenced by petition independently of a pending action. Accordingly, unless otherwise indicated on the face of the statute, rules of civil procedure will operate (*109 Cal. App. 4th 175, 192)* .

The court further noted that a general appearance occurs where a party, either directly or through counsel, participates in an action in some manner which recognizes the authority of the court to proceed. It does not require any formal or technical act. The statutory list of acts constituting an appearance, such as filing an answer, demurrer or motion to strike, is not exclusive; rather, the term may apply to various acts which, under all of the circumstances, are deemed to confer jurisdiction of the person. If a defendant raises any issue other than jurisdiction or asks for any relief which can only be granted upon the hypothesis that the court has jurisdiction of his person, his appearance is general. A party's statement that its appearance is special is not necessarily conclusive. Thus, opposing a motion on other than jurisdictional grounds has been held to constitute a general appearance. Because DMH filed a response to the OSC in

which it argued the merits of the motions, challenged the relief sought by the alleged sexually violent predators, and expressly requested that the motions be denied on their merits, the court concluded that it had made a general appearance in the matter, whether or not it was a the real party in interest or otherwise a party to the proceedings (*109 Cal. App. 4th 175, 192-193)* .

In *Mansour v. Superior Court (1995) 38 Cal. App. 4th 1750, 46 Cal. Rptr. 2d 191* , plaintiff, the president and principal stockholder of a California corporation, sued various defendants for defamation, alleging that they had conspired to oust the director of a Delaware corporation and that pursuant to the conspiracy they prepared a report indicating that the individual they were targeting had engaged in unethical and illegal business conduct with the plaintiff. Defendants from Arizona and Arkansas moved to quash service of summons for lack of personal jurisdiction. The plaintiff contended that these defendants could not challenge California's jurisdiction because their attorneys entered general appearances for them by assisting in the preparation of a joint case management statement and appearing at an evaluation hearing. The superior court denied the motion.

The court of appeal affirmed. The court noted that a general appearance occurs where a party, either directly or through counsel, participates in an action in some manner which recognizes the authority of the court to proceed. A general appearance does not require any formal or technical act. The court then discussed the case management evaluation procedure, in which both parties' attorneys had participated, and described this process as being premised on the trial court having jurisdiction over the parties participating in it (*38 Cal. App. 4th 1750, 1757)* . The court concluded that these defendants had waived their right to challenge the superior court's denial of their motions to quash service by making general appearances in the action.

The facts and procedural background of *Titus v. Superior Court (1972) 23 Cal. App. 3d 792, 100 Cal. Rptr. 477* , are discussed in *§ 132.70[3][a]*. Although the court of appeal granted the writ the mandate insofar as the order to show cause purported to give the trial court personal jurisdiction over the husband for purposes of child support, and annulled the child support order because there was no basis for in personam jurisdiction over the father, the court of appeal said that where a person makes a general appearance that appearance operates as a consent to jurisdiction over his or her person (*23 Cal. App. 3d 792, 800-801)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral Overview

California Points & Authorities

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 132 JURISDICTION: PERSONAL JURISDICTION AND INCONVENIENT FORUM
PART II. FORMS
C. Bases of Jurisdiction

13-132 California Points & Authorities § 132.107

§ 132.107 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground That Court Lacks Personal Jurisdiction--Sufficient Basis for Jurisdiction Exists--Cause of Action Arose From Defendant's Act in California

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum opposing a motion to quash service of summons on the ground that the court lacks a sufficient basis for exercising personal jurisdiction (see, e.g., § 132.100).*]

THE FACT THAT DEFENDANT PERFORMED AN ACT IN THIS STATE IS A PROPER BASIS FOR THE EXERCISE OF PERSONAL JURISDICTION OVER HIM/HER/IT WHEN THE CAUSE OF ACTION AROSE OUT OF THAT ACT.

[*EITHER, if individual defendant performed act giving rise to cause of action in tort*]

A. Tort Action Against Nonresident Individual. A state has power to exercise judicial jurisdiction over an individual who has performed, or has caused to be performed, an act in the state with respect to any cause of action in tort arising from the act (Judicial Council Comment to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Individuals; *see Rosenblatt v. American Cyanamid Co. (1965) 86 S. Ct. 1, 15 L. Ed. 2d 39* (in chambers opinion of Goldberg, J.)).

[*OR, if individual defendant performed act giving rise to cause of action other than in tort*]

A. Nontort Action Against Nonresident Individual. A state has power to exercise judicial jurisdiction over an individual who has performed, or has caused to be performed, an act in the state with respect to any cause of action not in tort arising from the act unless the nature of the act and of the individual's relationship to the state and to other states make the exercise of such jurisdiction unreasonable (Judicial Council Comment to *Code Civ. Proc. § 410.10*, Bases of

Judicial Jurisdiction Over Individuals; *see County of Humboldt v. Harris (1988) 206 Cal. App. 3d 857, 860, 254 Cal. Rptr. 49* ; *Floyd J. Harkness Co. v. Amezcua (1976) 60 Cal. App. 3d 687, 691, 131 Cal. Rptr. 667*).

[*OR, if defendant corporation performed act giving rise to cause of action in tort*]

A. Tort Action Against Foreign Corporation. A state has power to exercise judicial jurisdiction over a foreign corporation which has performed, or has caused to be performed, an act in the state with respect to any cause of action in tort arising from the act (Judicial Council Comment to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Corporations; *see Keeton v. Hustler Magazine, Inc. (1984) 465 U.S. 770, 776-777, 104 S. Ct. 1473, 79 L. Ed. 2d 790* ; *Magnecomp Corp. v. Athene Co. (1989) 209 Cal. App. 3d 526, 535-536, 257 Cal. Rptr. 278*).

[*OR, if defendant corporation performed act giving rise to cause of action other than in tort*]

A. Nontort Action Against Foreign Corporation. A state has power to exercise judicial jurisdiction over a foreign corporation which has performed, or has caused to be performed, an act in the state with respect to any cause of action not in tort arising from the act unless the nature of the act and of the corporation's relationship to the state makes the exercise of such jurisdiction unreasonable (Judicial Council Comment to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Corporations).

[*CONTINUE*]

[*Optional*] **B. Foreign Corporation Defined.** [*See § 132.104*, Paragraph B].

[*ADD, if defendant is a foreign partnership or other unincorporated association*]

C. Partnership or Other Unincorporated Association. [*See § 132.103*, Paragraph C].

D. Authority to Sue Partnership or Other Unincorporated Association in Common Name. [*See § 132.103*, Paragraph D].

[*CONTINUE*]

[*Optional*] **E. Tort Action Arose From Contract Executed in California.** When a contract to be performed outside California is executed in California between a California resident and a nonresident defendant, and the contractual contact is the "but for" causative factor of a subsequent tort occurring outside California, the contact satisfies the due process requirement with respect to the exercise of personal jurisdiction by the California courts over the nonresident defendant in an action against it by the California resident based on the tort (*Dialysis at Sea, Inc. v. Superior Court (1989) 216 Cal. App. 3d 788, 795, 265 Cal. Rptr. 71* (disapproved to the extent it is inconsistent with the opinion in *Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 440, 465 n.8, 58 Cal. Rptr. 2d 899, 926 P.2d 1085*)).

[*Optional*] **F. Tortious Act of Corporate Officer or Director.** Although corporate officers and directors cannot ordinarily be held personally liable for the acts or obligations of their corporations, they may become liable if they directly or actively participate in wrongful or tortious conduct (*Taylor-Rush v. Multitech Corp. (1990) 217 Cal. App. 3d 103, 113, 265 Cal. Rptr. 672*).

[*Optional*] **G. Tortious Act of Counsel for Foreign Corporation.** Corporate counsel for a foreign corporation is subject to the personal jurisdiction of the California courts in an action arising out of the corporation's intentionally tortious act in California when corporate counsel participated in the tort, and the wrongful nature of the corporation's acts is alleged (*Mihlon v. Superior Court (1985) 169 Cal. App. 3d 703, 716, 215 Cal. Rptr. 442*).

[2] Comments

CAUTION:

Paragraph E of this form, Tort Action Arose From Contract Executed in California, is based on *Dialysis at Sea, Inc. v. Superior Court (1989) 216 Cal. App. 3d 788, 265 Cal. Rptr. 71* . In *Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 58 Cal. Rptr. 2d 899, 926 P.2d 1085* , the California Supreme Court rejected the "but for" test of *Dialysis at Sea* as too broad and amorphous and, stating that the Court was not persuaded that the "but for" test provides an appropriate general standard, disapproved *Dialysis at Sea* to the extent it is inconsistent with the *Von's Companies, Inc.* opinion. The *Dialysis at Sea* case may still be useful outside the context of ongoing franchise relationships, which was the situation before the Court in the *Von's Companies, Inc.* case. However, the *Von's Companies, Inc.* opinion cautioned that mechanical tests are inconsistent with a court's basic task of determining whether the exercise of personal jurisdiction would comport with fair play and substantial justice [*Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 465 n.8, 475, 58 Cal. Rptr. 2d 899, 926 P.2d 1085* ; *see also* *Cassiar Mining Corp. v. Superior Court (1998) 66 Cal. App. 4th 550, 557, 78 Cal. Rptr. 2d 167* (following *Vons Companies, Inc.*, in an action brought by workers who allegedly sustained asbestos related lung injuries as a result of inhaling asbestos, and noting that Supreme Court rejected mechanical proximate cause test for evaluating connection between nonresident defendant's forum activities and plaintiff's cause of action)]. Therefore, extreme caution should be exercised in engaging in "but for" analysis of the issue. Both *Von's Companies, Inc.* and *Cassiar Mining Corp.* are discussed in *§ 132.100[3]*g].

[a] Use of Form

The form in [1], *above*, is for use in opposing a motion to quash service of summons under *Code Civ. Proc. § 418.10(a)(1)*, on the ground that the court has no proper basis for exercising personal jurisdiction over the defendant. The ground for opposition is that the defendant performed an act in California giving rise to a cause of action in tort, and that this is sufficient to justify the court's exercise of limited personal jurisdiction over the defendant. An alternative ground for opposition is that the defendant performed an act in California giving rise to a cause of action other than in tort that, combined with other factors, is sufficient to justify the court's exercise of limited personal jurisdiction over the defendant. For discussion concerning limited jurisdiction, see *§ 132.76[2][b]*.

This form does not provide a complete memorandum, but is designed to be combined with a general form of memorandum opposing a motion to quash service of summons [*see, e.g., § 132.100*]. It may also be included in a memorandum of points and authorities opposing a petition for a writ of mandate to compel the trial court to grant the motion to quash after it has declined to do so [*see Code Civ. Proc. § 418.10(c)*], or it may be adapted for use in a trial or appellate brief.

For additional points and authorities opposing a motion to quash on other grounds, see *§§ 132.102 -132.106, 132.108 -132.115*.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

See *§ 132.100[2]* for comments on a general form.

[b] State's Interest in Torts

A state has a special interest in exercising judicial jurisdiction over those who commit torts within its territory because torts involve wrongful conduct which a state seeks to deter, and against which it attempts to afford protection, by providing that a tortfeasor shall be liable for damages which are the proximate result of the tort. Furthermore, witnesses in a tort action will usually reside in the state where the complained of act took place. Hence, it is reasonable that a state should exercise judicial jurisdiction over an individual who has done, or has caused to be done, in the state what is claimed to be a tortious act [Judicial Council Comment to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Individuals].

The rule has its most obvious application to torts which involve acts or omissions that are dangerous to life or to tangible things, such as shooting a gun or driving an automobile within the state. But it is not essential that the act or omission should actually constitute a tort or dangerous act, or that the injury be to persons or tangible things; it is enough that the complaint states a cause of action in tort based on such act or omission, and the action may be based on injury to intangible interests, as, for example, one's reputation. Nor is it essential that the injury occur within California. The cause of action may be based on damage or injury outside the state caused by an act or omission within the state if there is a sufficient relationship existing between the individual and the state [Judicial Council Comment to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Individuals].

[c] Nontort Action

A state will usually have judicial jurisdiction over an individual who does, or causes to be done, in the state an act, even though it is not tortious, as to causes of action arising from the act, for the reason, among others, that a heavy burden may be imposed on a local inhabitant if he or she is compelled to litigate outside the state a claim based on an act performed within the state [Restatement (Second), Conflict of Laws, § 36, Comment e on Subsection (2)]. Whether it is reasonable for a state to exercise judicial jurisdiction over an individual on the basis of an act or omission not claimed to be tortious depends on the facts of the case. The principal factors are: (1) the nature and quality of the act or omission; (2) the extent of the relationship of the state to the defendant and to the plaintiff; and (3) the degree of inconvenience which would result to the defendant by being forced to stand suit in the state on the particular cause of action [Judicial Council Comment to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Individuals; *see also County of Humboldt v. Harris (1988) 206 Cal. App. 3d 857, 860, 254 Cal. Rptr. 49* ; see *§ 132.107[3][b]*].

It is also settled that the state's jurisdiction is likely to be upheld when it is based on a particular statute or regulation or when the isolated act has injurious consequences in the state. As stated in the Restatement (Second), Conflict of Laws, § 36, Comment e on Subsection (2), it is reasonable that a state should exercise judicial jurisdiction over the defendant as to causes of action arising from an act performed, or caused to be performed, by him or her in the state which the state subjects to special regulation or when the act performed by him or her has substantial consequences there even though the act is an isolated act not constituting the doing of business in the state [*County of Humboldt v. Harris (1988) 206 Cal. App. 3d 857, 860-861, 254 Cal. Rptr. 49]* .

Conversely, although minimal contacts with this state essential to the exercise of jurisdiction over a nonresident defendant may be grounded in doing an act in this state, this state does not have jurisdiction if the maintenance of the suit offends traditional notions of fair play and substantial justice and the nature of the act performed in this state and the nature of the individual's relationship to the state make the exercise of such jurisdiction unreasonable [*Floyd J. Harkness Co. v. Amezcua (1976) 60 Cal. App. 3d 687, 691, 131 Cal. Rptr. 667]* .

[3] Discussion of Authorities

[a] Tort Action Against Nonresident Individual

In ***Rosenblatt v. American Cyanamid Co.*** *(1965) 86 S. Ct. 1, 15 L. Ed. 2d 39* , a United States citizen was sued in a New York state court for injunctive relief and damages in connection with an alleged conspiracy to convert trade secrets, and he was served in Rome, Italy, under New York's long arm statute, which provided for in personam jurisdiction on the basis of the commission of a tortious act in the state. The plaintiff alleged that pursuant to a conspiracy to purchase biological cultures and confidential documents which had been stolen from plaintiff by one of its employees at its New York plant, and which were to be used by an Italian company in the production of antibiotics in competition with those of plaintiff, the defendant had flown to New York where he had inspected and purchased the stolen material and had paid part of the purchase price, and then returned with the material to Italy. Defendant's motion to dismiss the complaint for lack of personal jurisdiction over him was denied in the trial court, affirmed in the appellate department, and unanimously affirmed by the New York Court of Appeals. Pending appeal to the United States Supreme Court, the defendant applied for a stay of judgment.

In denying the stay on the ground that defendant's constitutional argument (that New York's long arm statute, as applied to him under the circumstances of the case, was unconstitutional under the *Fourteenth Amendment*) was insubstantial and that plenary review by the Court was unlikely, Justice Goldberg, in a chambers opinion, said that the logic of the Court's decisions in *International Shoe Co. v. Washington (1945) 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95* , and *McGee v. International Life Ins. Co. (1957) 355 U.S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 223* , supports the validity of state long arm statutes such as the one involved which bases in personam jurisdiction on commission of a tortious act in the forum state, that since those decisions a large number of states have enacted similar statutes, and that, in cases under the statutes in state and federal courts, jurisdiction on the basis of a single tort has been uniformly upheld. Justice Goldberg said that the situation is exactly that of the nonresident motorist statutes, which were long ago upheld, except that the highways are not directly involved, and that it is now clear, if it was ever in doubt, that the nonresident motorist cases were not really based on consent but on the interest of the forum state and the fairness of trial there to the defendant [*15 L. Ed. 2d 39, 43]* .

[b] Nontort Action Against Nonresident Individual

County of Humboldt v. Harris *(1988) 206 Cal. App. 3d 857, 254 Cal. Rptr. 49* , was an action against a Nevada resident by a county on behalf of a minor child to establish paternity, set child support, and recover funds expended for the support of the child pursuant to aid to families with dependent children. The defendant moved to quash service of summons for lack of jurisdiction. The child was conceived in October 1984. The defendant admitted the sexual intercourse but claimed to have had virtually no contact with California since 1982. The trial court granted the motion, and the county appealed, contending that personal jurisdiction over the nonresident defendant was specifically authorized by former Civ. Code § 7007 [*now see Fam. Code § 7620*], providing in part that a person who has sexual intercourse in California thereby submits to the jurisdiction of California courts as to an action brought under the Uniform Parentage Act, former Civ. Code § 7000 et seq. [*now see Fam. Code § 7600 et seq.*] with respect to a child who may have been conceived by that act of intercourse.

The court of appeal agreed, and reversed the order. The court said that the requirement of minimum contacts is satisfied not only by doing business or owning property in the forum state, but also by doing an act provided (1) the cause of action alleged arises from the act performed in the state; and (2) in light of the circumstances the exercise of the jurisdiction is reasonable (*206 Cal. App. 3d 857, 860)* .

Floyd J. Harkness Co. v. Amezcua *(1976) 60 Cal. App. 3d 687, 131 Cal. Rptr. 667* , was an action by a California corporation based on promissory notes given by citizen of Mexico in connection with contracts to grow vegetables in Mexico for consignment to plaintiff. The trial court granted defendant's motion to quash service of summons for lack of jurisdiction and the plaintiff appealed. Although it affirmed the order on the ground the defendant's contacts with California were too tenuous to support jurisdiction, the court of appeal nevertheless said that minimal contacts with this state essential to the exercise of jurisdiction over a nonresident may be grounded in doing an act in this state (*60 Cal.*

App. 3d 687, 691) .

[c] Tort Action Against Foreign Corporation

The facts and procedural background of ***Keeton v. Hustler Magazine, Inc.*** *(1984) 465 U.S. 770, 104 S. Ct. 1473, 79 L. Ed. 2d 790* , are discussed in *§ 132.100[3][p]*. In holding that the United States District Court in New Hampshire had personal jurisdiction over the defendant corporation and reversing the judgment of the United States Court of Appeals for the First Circuit, the United States Supreme Court held: (1) a state has an especial interest in exercising judicial jurisdiction over those who commit torts within its territory, that this is because torts involve wrongful conduct which a state seeks to deter, and against which it attempts to afford protection, by providing that a tortfeasor shall be liable for damages which are the proximate result of his or her tort (quoting New Hampshire case which was quoting Restatement (Second), Conflict of Laws, § 36, Comment c.); (2) this interest extends to libel actions brought by nonresidents; (3) false statements of fact harm both the subject of the falsehood and the readers of the statement; (4) New Hampshire may rightly employ its libel laws to discourage the deception of its own citizens; (5) there is no constitutional value in false statements of fact; (6) New Hampshire may also extend its concern to the injury that in-state libel causes within New Hampshire to a nonresident (*465 U.S. 770, 776)* ; and (7) the tort of libel is generally held to occur wherever the offending material is circulated (citing Restatement (Second), Torts, § 577A, Comment a. (1977)) (*465 U.S. 770, 777)* .

The facts and procedural background of ***Magnecomp Corp. v. Athene Co.*** *(1989) 209 Cal. App. 3d 526, 257 Cal. Rptr. 278* , are discussed in *§ 132.75[3][a]*. In reversing the order quashing service of summons on a Japanese corporation in an action for alleged misappropriation of trade secrets on the ground the defendant's contacts with California were sufficient to permit the exercise of limited jurisdiction over it, the court of appeal, citing authorities, said that (1) the allegations of misappropriation of Magnecomp's gimbal assemblies within California alone satisfy the minimum contacts requirement; (2) a state has a special interest in exercising jurisdiction over those who commit tortious acts within its territory and it is, therefore, reasonable that a state should exercise jurisdiction over those who commit or cause to be committed in the state what is claimed to be a tortious act; (3) California may properly exercise jurisdiction over an individual whose tortious conduct it seeks to deter; (4) under California's long arm statute and federal due process, a tortious act, standing alone, is sufficient to find personal jurisdiction if that act is aimed at a resident of the state or has effects in the state; (5) a state has power to exercise judicial jurisdiction over an individual who has performed, or has caused to be performed, an act in the state with respect to any cause of action in tort arising from the act; and (6) a court may exercise personal jurisdiction over a person, who acts directly or by agent, as to a cause of action or claim for relief arising from the person's causing tortious injury by an act or omission in this state (*209 Cal. App. 3d 526, 535-536)* .

[d] Tort Action Arose From Contract Executed in California

Dialysis at Sea, Inc. v. Superior Court *(1989) 216 Cal. App. 3d 788, 265 Cal. Rptr. 71* , arose out of an action for medical malpractice against, among others, a foreign corporation (DAS), which provided medical service to travelers. Plaintiff alleged that she and her husband went on a cruise arranged by DAS during which hemodialysis was provided to her husband under the supervision of a qualified physician, and that defendants negligently rendered that medical treatment resulting in permanent injury to her husband, which was in turn a factor contributing to his death. DAS moved to quash service of summons for lack of jurisdiction on the ground it was a Massachusetts corporation with its sole office in Boston, that it never had any offices in California, had never sought to qualify to do business in California or been authorized to do business in California, had never appointed an agent in California for service of process, had never owned property, appointed agents, had telephone listings or bank accounts in California, and had never paid any taxes to the State of California, that its only communications with individuals in California had been by telephone or through correspondence, and that every activity or occurrence alleged in the complaint transpired on a foreign commercial vessel which had traveled in and around the Mediterranean Sea, and which had not at any time relevant to the action any connection or contact with the State of California. Plaintiff did not dispute that DAS's contacts with

California were insufficient to subject it to general jurisdiction, but that the contacts subjected DAS to limited jurisdiction with respect to the action sued on. The motion was denied, and DAS petitioned for a writ of mandate.

In denying the writ the court of appeal pointed out that in her verified complaint, plaintiff alleged that the contract leading to the cruise on which medical services would be provided was negotiated and entered into in Whittier, California, and that DAS argued the allegation was factually incorrect, relying on the statement in the declaration in support of its motion to quash that the only communication with individuals in California had been by telephone and through correspondence. The court said that the absence of physical travel to California does not, however, negate the possibility that the contract was entered into in this state for purposes of assuming jurisdiction, and that accordingly, consistent with the rules for reviewing factual determinations by the trial court, it assumed that the contract was entered into in this state. DAS also admitted that it had conducted several limited mailings, approximately twice a year, of its brochures to kidney centers in California (*216 Cal. App. 3d 788, 793-794)* .

Distinguishing Circus Circus Hotels, Inc. v. Superior Court (1981) 120 Cal. App. 3d 546, 174 Cal. Rptr. 885 (discussed in *§ 132.73[4][a]*) and *Sklar v. Princess Properties International, Ltd. (1987) 194 Cal. App. 3d 1202, 240 Cal. Rptr. 102* (discussed in *§ 132.75[4][a]*), and declining to follow the broad language of those cases, the court, quoting *Prejean v. Sonatrach, Inc. (5th Cir. 1981) 652 F.2d 1260, 1270 n.21* , said that, logically, there is no reason why a tort cannot grow out of a contractual contact. In a case like this, the contractual contact is a "but for" causative factor for the tort since it brought the parties within tortious striking distance of each other, and that while the relationship between a tort suit and contractual contact is certainly more tenuous than when a tort suit arises from a tort contact, that only goes to whether the contact is by itself sufficient for due process, not whether the suit arises from the contact (*216 Cal. App. 3d 788, 795)* . The court concluded under this reasoning that plaintiff's causes of action were sufficiently related to the contract consummated in California to satisfy the "arising out of" prong of the standard (that is, the cause of action must arise out of an act performed or transaction consummated in the forum, or defendant must perform some other act by which he or she purposefully avails himself or herself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws) (*216 Cal. App. 3d 788, 795)* .

The court said that the plaintiff's causes of action were grounded on the allegedly negligent medical treatment rendered to her deceased husband while they were passengers on a cruise arranged by DAS, that under the contract entered into in California, DAS agreed to provide medical care and treatment for the decedent during the cruise, and that absent that contract DAS would not have been in striking distance of the decedent. In other words, "but for" the contract plaintiff and decedent would not have been on the cruise and the decedent would not have been subjected to DAS's allegedly negligent medical treatment (*216 Cal. App. 3d 788, 795)* . The court further held that the exercise of jurisdiction under the circumstances would be reasonable (*216 Cal. App. 3d 788, 796)* .

In ***Vons Companies, Inc. v. Seabest Foods, Inc.*** *(1996) 14 Cal. 4th 434, 58 Cal. Rptr. 2d 899, 926 P.2d 1085* , the California Supreme Court rejected the "but for" test of *Dialysis at Sea* as too broad and amorphous and, stating that the Court was not persuaded that the "but for" test provides an appropriate general standard, disapproved *Dialysis at Sea* to the extent it is inconsistent with the *Von's Companies, Inc.* opinion. The *Dialysis at Sea* case may still be useful outside the context of ongoing franchise relationships, which was the situation before the Court in the *Von's Companies, Inc.* case. However, the *Von's Companies, Inc.* opinion cautioned that mechanical tests are inconsistent with a court's basic task of determining whether the exercise of personal jurisdiction would comport with fair play and substantial justice [*Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 465 n.8, 475, 58 Cal. Rptr. 2d 899, 926 P.2d 1085]* . Therefore, extreme caution should be exercised in engaging in "but for" analysis of the issue.

Moreover, *Von's Companies, Inc.* rejected the "proximate cause" test applied by *Sklar v. Princess Properties International, Ltd. (1987) 194 Cal. App. 3d 1202, 240 Cal. Rptr. 102* and *Circus Circus Hotels, Inc. v. Superior Court (1981) 120 Cal. App. 3d 546, 174 Cal. Rptr. 885* because it is inconsistent with the rationale underlying specific jurisdiction in the context of an ongoing franchise relationship and disapproved both *Circus Circus Hotels, Inc.* and *Sklar* to the extent they are inconsistent with the opinion in *Vons Companies, Inc.* [*Vons Companies, Inc. v. Seabest*

Foods, Inc. (1996) 14 Cal. 4th 434, 461, 464, 475, 58 Cal. Rptr. 2d 899, 926 P.2d 1085] . For discussion of *Von's Companies, Inc.*, see *§ 132.100[3][g]*.

[e] Tortious Act of Corporate Officer or Director

Taylor-Rush v. Multitech Corp. *(1990) 217 Cal. App. 3d 103, 265 Cal. Rptr. 672* , was an action by the former owner of a California corporation against six nonresident corporate officers and directors and a nonresident corporation for breach of contract, fraud, breach of a written employment contract, breach of an agreement to convey stock, conspiracy to defraud, conspiracy to induce a breach of contract, and fraudulent transfer of securities. Although plaintiff's complaint alleged that at all times the individual defendants were acting within the course and scope of their agency and employment by the out-of-state corporation, she sought jurisdiction over each based on their individual tortious conduct toward her. The individual defendants' motion to quash service of summons on the ground that their activities within and other contacts with California were in performance of their duties as corporate officers or directors was granted, and plaintiff appealed.

The court of appeal reversed as to two of the defendants, one of whom had committed tortious acts toward the plaintiff in California (fraudulent misrepresentations and nondisclosure) and the other of whom had committed tortious acts (fraudulent misrepresentations and nondisclosure) in New York which was purposefully directed at plaintiff in California and had a tortious effect here, and that, with respect to both, sufficient minimum contacts had been established for personal jurisdiction (*217 Cal. App. 3d 103, 114)* . The court said personal jurisdiction may be exercised over a defendant who has caused an effect in the forum state by an act or omission occurring elsewhere (*217 Cal. App. 3d 103, 112)* , and that, although corporate officers and directors cannot ordinarily be held personally liable for the acts or obligations of their corporation, they may become liable if they directly authorize or actively participate in wrongful or tortious conduct. The court further pointed out that plaintiff further contended that defendants were individually liable under *Corp. Code §§ 25401*, *25504*, and *25504.1* for the fraudulent acquisition of securities in California, and that the intentional misrepresentations and nondisclosure by the defendants induced her to sell her stock in her California corporation as part of the buy-sell agreement between her and the foreign corporation (*217 Cal. App. 3d 103, 113)* .

[f] Tortious Act of Counsel for Foreign Corporation

The facts and procedural background of ***Mihlon v. Superior Court*** *(1985) 169 Cal. App. 3d 703, 215 Cal. Rptr. 442* , are discussed in *§ 132.115[3][a]*. Although the corporate counsel, in her affidavit in support of her motion to quash service of summons, in effect denied any meaningful contact with California and averred that her California contacts made in connection with the prior action against the corporation was in her role as corporate officer and counsel and the work incidental thereto, she conceded that she participated in the settlement negotiations in the prior lawsuit on behalf of her corporate client, by acts and correspondence from outside California, which she intended (or reasonably should have known) would effect a settlement of that action, without knowledge of or authorization of the corporation's California attorney of record and without payment of the attorney's fee her client had agreed to pay.

In denying the peremptory writ of mandate as to both defendants, the court of appeal, with respect to corporate counsel, said that for jurisdictional purposes the acts of corporate officers and directors, in their official capacities, are acts exclusively of the corporation and are thus not material for purposes of establishing minimum contacts as to individuals, and that implicit in this principle is the consideration that corporations are separate legal entities that cannot speak or act without their designated officers and directors. Accordingly, acts performed by individuals in such official capacities may not reasonably be attributed to them as individual acts creating personal jurisdiction (*169 Cal. App. 3d 703, 713)* . The court further explained that California case law concerning personal jurisdiction over employees of foreign corporations does not expressly state the rule that employees are to be treated differently than officers and directors, but it is clear that employees have not received the same "official capacity" immunity that officers and directors receive. The implicit basis for different treatment is that employees are not necessary in order for the corporation to act; they

merely perform services for the corporation (*169 Cal. App. 3d 703, 713)* . After discussing several cases (*169 Cal. App. 3d 703, 713-715)* , the court concluded that corporate counsel is not entitled to the same "official capacity" shield from personal jurisdiction as are corporate officers and directors, that counsel merely provides legal counsel and services and does not speak for or act as the corporation in the same manner that officers and directors do, and that corporate counsel should be treated for purposes of personal jurisdiction in the same manner as employees or independent contractors for the corporation rather than as officers of directors (*169 Cal. App. 3d 703, 715-716)* . The court said that an intentionally tortious act of the corporation would confer personal jurisdiction over participating corporate counsel when knowledge of the wrongful nature of the corporation's acts is alleged (*169 Cal. App. 3d 703, 716)* .

[4] Additional Authorities

[a] Tort Action Against Nonresident Individual

In *Threlkeld v. Tucker (9th Cir. 1974) 496 F.2d 1101* , where the defendant was a Connecticut resident and had brought more than 30 lawsuits in California courts in the period of six years, the court of appeals stated in dictum that because the defendant's deliberate and repeated use of the California courts amounted to his purposefully availing himself of the privilege of conducting activities within the state, the defendant became subject to future long-arm jurisdiction in the California courts in an action (in this case, malicious prosecution) arising out of such conduct (*496 F.2d 1101, 1103)* .

See also *Taylor-Rush v. Multitech Corp. (1990) 217 Cal. App. 3d 103, 114, 265 Cal. Rptr. 672* , discussed in *§ 132.107[3][e]*.

[b] Tort Action Arose From Contract Executed in California

The facts and procedural background of *State of Oregon v. Superior Court (1994) 24 Cal. App. 4th 1550, 29 Cal. Rptr. 2d 909* , are *discussed under § 132.100[4][b]*. In denying defendants' petition for a writ of mandate seeking to compel the trial court to quash service of the summons and complaint, the court stated that the defendants' recruitment activities directed at the deceased were contractual contacts which brought the deceased within tortious striking distance of defendant medical practitioners (*24 Cal. App. 4th 1550, 1557-1561)* [*but see Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 465-468, 475, 58 Cal. Rptr. 2d 899, 926 P.2d 1085]* , in the context of ongoing franchise relationships, the Court rejected the "but for" test of *State of Oregon* as too broad and amorphous and, stating that the Court was not persuaded that the "but for" test provides an appropriate general standard, disapproved *State of Oregon* to the extent it is inconsistent with the *Von's Companies, Inc.* opinion.

[c] Tortious Act of Corporate Officer or Director

Seagate Technology v. A.J. Kogyo Co. (1990) 219 Cal. App. 3d 696, 268 Cal. Rptr. 586 , was an action against, among others, a Japanese corporation and a Japanese citizen, who was the president of both the Japanese corporation and a California corporation and who had caused the Japanese corporation to issue a guaranty of the California corporation's business transactions with plaintiff, brought by a California manufacturer to recover the loss it sustained when the California corporation declared bankruptcy. The trial court granted the president's motion to quash service of summons, and plaintiff appealed. In reversing the order, the court explained that for purposes of liability, the acts of the corporation may or may not be the acts of the individual, that it is well settled that corporate directors cannot be held vicariously liable for the corporation's torts in which they do not participate, that their liability, if any, stems from their own tortious conduct, not from their status as directors or officers of the enterprise, that an officer or director will not be liable for torts in which he or she does not personally participate, of which he or she has no knowledge, or to which he or she has not consented, and that while the corporation itself may be liable for such acts, the individual officer or director will be immune unless he or she authorizes, directs, or in some meaningful sense actively participates in the wrongful conduct (*219 Cal. App. 3d 696, 701)* . The court said that directors are jointly liable with the corporation and may be joined as defendants if they personally directed or participated in the tortious conduct (*219 Cal. App. 3d 696,*

701-702) . The court explained that the rule has its roots in the law of agency, that directors are said to be agents of their corporate principal, and that the true rule is that the agent is liable for his or her own acts, regardless of whether the principal is liable or amenable to judicial action (*219 Cal. App. 3d 696, 702)* . The court concluded that some acts taken by a corporate officer are not only the acts of the corporation, but the acts of the individual, and that where an act of this type creates contact with the forum state, that contact may be the contact of the individual as well as the contact of the corporation and, therefore, should be considered in determining if the forum state has personal jurisdiction over the individual (*219 Cal. App. 3d 696, 702)* . The court said the basis for the exercise of jurisdiction over the individual was his causing an effect in the forum state, that is, his causing plaintiff to extend credit to the California corporation because of the guaranty he issued as president of both corporations (*219 Cal. App. 3d 696, 702, 704-705)* . The court pointed out that a proper basis of judicial jurisdiction is the doing of an act elsewhere with the intention of causing effects in the state, and that it follows that if a corporate officer may be held personally responsible for causing the corporation to act, that act may be imputed to the officer for purposes of establishing personal jurisdiction over him or her (*219 Cal. App. 3d 696, 703)* .

Note that the court pointed out, however, that the reversal did not end the matter, that on remand jurisdiction might be defeated by a finding that the individual did not personally cause the Japanese corporation to issue the guaranty, the letter (of guaranty) as written by the individual (as opposed to the translation) was not in fact a guarantee to make good the debts at issue, or by a finding that there was no misrepresentation by him, that the letter was written with the intention of performing, although the promise stated was later breached (*219 Cal. App. 3d 696, 706)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral Overview

California Points & Authorities

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 132 JURISDICTION: PERSONAL JURISDICTION AND INCONVENIENT FORUM
PART II. FORMS
C. Bases of Jurisdiction

13-132 California Points & Authorities § 132.108

§ 132.108 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground That Court Lacks Personal Jurisdiction--Sufficient Basis for Jurisdiction Exists--Defendant's Out-of-State Act Caused Effect in California and Exercise of Jurisdiction Is Otherwise Reasonable

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum opposing a motion to quash service of summons on the ground that the court lacks a sufficient basis for exercising personal jurisdiction (see, e.g., § 132.100).*]

DEFENDANT'S CAUSING AN EFFECT IN THIS STATE BY AN ACT DONE ELSEWHERE IS A PROPER BASIS FOR THE EXERCISE OF PERSONAL JURISDICTION OVER HIM/HER/IT WHEN THE CAUSE OF ACTION ARISES OUT OF THE EFFECT AND THE EXERCISE OF JURISDICTION IS NOT OTHERWISE UNREASONABLE IN THAT _____ [*specify, e.g.,* DEFENDANT INTENDED TO CAUSE THE EFFECT].

[*EITHER, if defendant is an individual*]

A. Effect Caused in California by Individual. A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act performed elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable (Judicial Council Comment to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Individuals; *see Calder v. Jones (1984) 465 U.S. 783, 788-790, 104 S. Ct. 1482, 79 L. Ed. 2d 804* , *aff'g Jones v. Calder (1982) 138 Cal. App. 3d 128, 187 Cal. Rptr. 825* ; *Sibley v. Superior Court (1976) 16 Cal. 3d 442, 446, 128 Cal. Rptr. 34, 546 P.2d 322* ; *Quattrone v. Superior Court (1975) 44 Cal. App. 3d 296, 306, 118 Cal. Rptr. 548*).

[*OR, if defendant is a foreign corporation*]

A. Effect Caused in California by Foreign Corporation. A state has power to exercise judicial jurisdiction over a foreign corporation which causes effects in the state by an act performed elsewhere with respect to any cause of action arising from these effects unless the nature of these effects and of the corporation's relationship to the state makes the exercise of such jurisdiction unreasonable (Judicial Council Comment to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Corporations; *see Secrest Machine Corp. v. Superior Court (1983) 33 Cal. 3d 664, 669, 190 Cal. Rptr. 175, 660 P.2d 399* ; *United California Bank v. First Bank of Oak Park (1979) 98 Cal. App. 3d 439, 443, 159 Cal. Rptr. 607*). The rule relating to foreign corporations is the same as in the case of a natural person (Judicial Council Comment to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Corporations).

[*CONTINUE*]

B. Purpose of Rule. The intent of the rule, by which a court may exercise personal jurisdiction in actions based on effects caused in California by acts occurring elsewhere, is to reach wrongful activity outside the state causing injury within the state (*Kulko v. California Superior Court (1978) 436 U.S. 84, 96, 98 S. Ct. 1690, 56 L. Ed. 2d 132*).

C. Types of Effects Caused in California by Acts Done Elsewhere. There are three possible situations in which an act performed elsewhere may cause an effect in this state: (1) the act was performed with the intention of causing effects in the state; (2) the act, although not performed with the intention of causing effects in the state, could reasonably have been expected to do so; and (3) the act was not performed with the intention of causing effects in the state and could not reasonably have been expected to do so (Judicial Council Comment to *Code Civ. Proc. § 410.10*, *Bases of Judicial Jurisdiction Over Individuals; Quattrone v. Superior Court (1975) 44 Cal. App. 3d 296, 304, 118 Cal. Rptr. 548*).

[*EITHER*]

D. Act Done With Intention of Causing Effect in California. In the case of an act performed outside a state with the intention of causing effects in the state, the state may exercise the same judicial jurisdiction over the defendant as to any cause of action arising from the effects as it could have exercised had these effects resulted from an act performed within its territory (Judicial Council Comment to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Individuals; *see Snowney v. Harrah's Entertainment, Inc. (2005) 35 Cal. 4th 1054, 1064-1065, 29 Cal. Rptr. 3d 33, 112 P.3d 28* ; *Pavlovich v. Superior Court (2002) 29 Cal. 4th 262, 278, 127 Cal. Rptr. 2d 329* ; *United California Bank v. First Bank of Oak Park (1979) 98 Cal. App. 3d 439, 443, 159 Cal. Rptr. 607* ; *Quattrone v. Superior Court (1975) 44 Cal. App. 3d 296, 304, 118 Cal. Rptr. 548*). It is reasonable to exercise jurisdiction on the basis of the defendant intentionally causing effects in the state by an omission or act done elsewhere whenever (a) the effects are of a nature that the state treats as exceptional and subjects to special regulation or (b) the defendant has, in connection with causing such effects in the forum state, invoked the benefits and protections of its laws (*Jamshid-Negad v. Kessler (1993) 15 Cal. App. 4th 1704, 1708, 19 Cal. Rptr. 2d 621*).

[*OR*]

D. Act Done With Reasonable Foreseeability That It Would Cause Effect in California. Whether the forum state may exercise personal jurisdiction over the defendant for the effects of an act not performed with the intention of causing effects in California, but which could reasonably have been expected to do so, depends on a variety of factors, including the extent of the relationship of the state to the defendant and to the plaintiff, the nature and quality of the effects resulting from the act, and the degree of inconvenience which would result to the defendant from being forced to stand suit in the state on the particular cause of action (*Pavlovich v. Superior Court (2002) 29 Cal. 4th 262, 278, 127 Cal. Rptr. 2d 329* ; *Kaiser Aetna v. Deal (1978) 86 Cal. App. 3d 896, 902-903, 150 Cal. Rptr. 615* ; Judicial Council

Comment to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Individuals; *see also St. Joe Paper Co. v. Superior Court (1981) 120 Cal. App. 3d 991, 997, 175 Cal. Rptr. 94*).

[*OR*]

D. Act Done Without Intent to Cause Effect and Without Reasonable Foreseeability That It Would Cause Effect in California. Although the state may not constitutionally exercise jurisdiction over a nonresident defendant whose act outside California caused effects in California when the defendant did not intend to cause effects in California and could not reasonably have been expected to do so, the defendant is subject to jurisdiction in California for the effect of the act when both the plaintiff and the defendant have an extensive relationship with the state (*see* Judicial Council Comment to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Individuals; *see Pavlovich v. Superior Court (2002) 29 Cal. 4th 262, 278, 127 Cal. Rptr. 2d 329* ; *Kaiser Aetna v. Deal (1978) 86 Cal. App. 3d 896, 904, 150 Cal. Rptr. 615* ; *Titus v. Superior Court (1972) 23 Cal. App. 3d 792, 802, 100 Cal. Rptr. 477*).

[*CONTINUE*]

[*Optional*] **E. Foreign Corporation Defined.** [*See § 132.104*, Paragraph B].

[*ADD, if defendant is a foreign partnership or other unincorporated association*].

F. Partnership or Other Unincorporated Association. [*See § 132.103*, Paragraph C].

G. Authority to Sue Partnership or Other Unincorporated Association in Common Name. [*See § 132.103*, Paragraph D].

[2] Comments

[a] Use of Form

The form in [1], *above*, is for use in opposing a motion to quash service of summons under *Code Civ. Proc. § 418.10(a)(1)*, on the ground that the court has no proper basis for exercising personal jurisdiction over the defendant. The ground for opposition is that the defendant did some act outside California that caused an effect in California giving rise to the cause of action, and the court's exercise of limited personal jurisdiction over the defendant is reasonable under the circumstances, such as when the defendant intended to cause the effect or reasonably could have foreseen that the effect would result. For discussion regarding limited personal jurisdiction, see *§ 132.76[2][b]*.

This form does not provide a complete memorandum, but is designed to be combined with a general form of memorandum opposing a motion to quash service of summons [*see, e.g., § 132.100*]. It may also be included in a memorandum of points and authorities opposing a petition for a writ of mandate to compel the trial court to grant the motion to quash after it has declined to do so [*see Code Civ. Proc. § 418.10(c)*], or it may be adapted for use in a trial or appellate brief.

For additional points and authorities opposing a motion to quash on other grounds, see *§§ 132.102 -132.107, 132.109 -132.115*.

In an appropriate case, the points and authorities set out in the foregoing form may be used to oppose a motion supported by the points and authorities *set out in § 132.88*.

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

See also *§ 132.100[2]* for comments on a general form.

[b] Reasonableness of Jurisdiction

Although the minimal contacts with this state essential to the exercise of jurisdiction over a nonresident defendant may be grounded in causing an effect in this state by an act or omission which occurs elsewhere, this state does not have jurisdiction if the maintenance of the suit offends traditional notions of fair play and substantial justice and the nature of the effect of the act performed elsewhere and the nature of the individual's relationship to the state make the exercise of such jurisdiction unreasonable [*Sibley v. Superior Court (1976) 16 Cal. 3d 442, 445-446, 128 Cal. Rptr. 34, 546 P.2d 322* ; *Floyd J. Harkness Co. v. Amezcua (1976) 60 Cal. App. 3d 687, 691, 131 Cal. Rptr. 667* ; *see also Farris v. Capt. J. B. Fronapfel Co. (1986) 182 Cal. App. 3d 982, 988-989, 227 Cal. Rptr. 619* (discussed in *§ 132.88[3]* [b]; *see also § 132.86*].

[3] Discussion of Authorities

[a] Effect Caused in California by Individual

The facts and procedural background of ***Calder v. Jones*** *(1984) 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804* , *aff'g Jones v. Calder (1982) 138 Cal. App. 3d 128, 187 Cal. Rptr. 825* , are discussed in *§ 132.100[3][p]*. In holding that California had personal jurisdiction over the nonresident defendants in the action for libel on the ground that defendants' intentional conduct in Florida was calculated to cause injury to plaintiff in California (*465 U.S. 783, 791)* , the Court explained that the allegedly libelous story concerned the California activities of a California resident, that it impugned the professionalism of an entertainer whose television career was centered in California, that the article was drawn from California sources, that the brunt of the harm, in terms both of plaintiff's emotional distress and the injury to her professional reputation, was suffered in California, and that, in sum, California was the focal point both of the story and of the harm suffered. The Court held that jurisdiction over the defendants was therefore proper in California based on the "effects" in California of their Florida conduct (*465 U.S. 783, 788-789)* . Rejecting the defendants' argument that they were not responsible for the circulation of the article in California, the Court said that their intentional, and allegedly tortious, actions were expressly aimed at California, that one defendant wrote and the other edited an article that they knew would have a potentially devastating impact on plaintiff, and that that injury would be felt in California where plaintiff lived and worked and in which the magazine had its largest circulation (*465 U.S. 783, 789-790)* . The Court said that under the circumstances, the defendants had to "reasonably anticipate being haled into court" in California to answer for the truth of the statements made in their article (*465 U.S. 783, 790)* and that they were primary participants in alleged wrongdoing intentionally directed at a California resident (*465 U.S. 783, 790)* .

Sibley v. Superior Court *(1976) 16 Cal. 3d 442, 128 Cal. Rptr. 34, 546 P.2d 322* , was a proceeding in mandate to compel the trial court to quash service of summons on a nonresident guarantor after the trial court had denied the nonresident's motion to do so. The underlying action was by a California limited partnership against the nonresident and others, alleging breach of a California limited partnership agreement and breach of a guaranty of the performance of the general partner, a Georgia corporation. The guarantor was the nonresident defendant, who was a resident of Florida.

The Supreme Court pointed out that one of the recognized bases for jurisdiction in California arises when the defendant has caused an "effect" in the state by an act or omission which occurs elsewhere (*16 Cal. 3d 442, 445)* . The Court said that this ground for assertion of jurisdiction is discussed by the Judicial Council in its comment to *Code Civ. Proc. § 410.10* as follows: a state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an omission or act performed elsewhere with respect to causes of action arising from these effects, unless the nature of

the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable, and that when jurisdiction over an individual is based solely on such act or omission, only a claim for relief arising from such act or omission may be asserted against the individual (*16 Cal. 3d 442, 446)* . The Court, however, found that the exercise of jurisdiction on the facts before it would be unreasonable (*16 Cal. 3d 442, 448)* and granted the writ of mandate.

Quattrone v. Superior Court *(1975) 44 Cal. App. 3d 296, 118 Cal. Rptr. 548* , was a mandate proceeding which arose out of an action for damages and other relief by a California corporation with its principal office in Los Angeles against a Pennsylvania resident, three other defendants, and numerous Does for defrauding the plaintiff by submitting to it falsified financial records relating to the operations of plaintiff's Pennsylvania-based subsidiary. The subsidiary had been acquired by plaintiff under an acquisition agreement and reorganization plan. The acquisition agreement provided for exchange of the subsidiary's shares for shares of plaintiff issued for that purpose under either of two options at the election of the subsidiary's shareholders. One option, under which 12.1 shares of the subsidiary were exchanged for one share of plaintiff, included participation in a reserve stock "A" performance program under which additional shares of plaintiff's stock would be issued by plaintiff, based on the profit performance of the subsidiary during a two-year period following closing. Fraudulent financial records of the subsidiary's operations allegedly supplied to plaintiff by the conspirators caused it to issue 18,607 shares of its common stock in 1969 which were not properly issuable in view of the true profit of the subsidiary. Other injury allegedly incurred by plaintiff as a result of the conspiracy and continued submission of false financial information through 1972 included that resulting from the contribution of additional capital based on the assumed earning capacity and the loss of a beneficial contract to sell the subsidiary when the true facts were discovered, bringing the total damages alleged to $11 million. The Pennsylvania resident moved to quash service of summons supported by a declaration averring in effect that he had no contacts at all with California. Plaintiff submitted opposing declarations averring that the nonresident as the controller of te subsidiary, by his own uncontadicted admission, had prepared the false financial reports and had benefitted from the fraud by receiving more of plaintiff's shares in exchange for his shares of the subsidiary than that to which he was entitled. The trial court denied the motion, and the nonresident petitioned the court of appeal for a writ of mandate.

In denying the writ, the court of appeal, after listing the bases of judicial jurisdiction over individuals (*set out in § 132.100*), said that the only basis that applied to the nonresident was causing an effect in the state by an act or omission elsewhere (*44 Cal. App. 3d 296, 303)* . The court pointed out that the Judicial Council's comment concerning this basis stated that a state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an omission or act performed elsewhere with respect to causes of action arising from these effects, unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable, and that when jurisdiction over an individual is based solely on such act or omission, only a claim for relief arising from the act or omission may be asserted against the individual (*44 Cal. App. 3d 296, 303)* . The court held that jurisdiction was proper based on the nonresident's performing an act outside California with the intention of causing an effect in California, the effect being the issuance of securities by plaintiff in violation of former Corp. Code § 26104, a regulation designed in part to protect shareholders of California corporations (*44 Cal. App. 3d 296, 304-308)* .

[b] Effect Caused in California by Foreign Corporation

Secrest Machine Corp. v. Superior CourtSecrest Machine Corp. v. Superior Court *(1983) 33 Cal. 3d 664, 190 Cal. Rptr. 175* , was a mandate proceeding arising out of a products liability action by a California resident against a foreign corporation for injuries sustained as a result of using a machine manufactured by the defendant and sold to plaintiff's employer. Defendant's motion to quash service of summons was denied, and defendant petitioned for a writ of mandate.

In denying the writ on the ground the defendant had sufficient minimum contacts with California to support the trial court's assertion of jurisdiction over it in the case, the Supreme Court said that California has recognized that a state may exercise jurisdiction over one who causes effects in the state by an act or omission performed elsewhere with respect to causes of action arising from the effects, and that this was so unless the nature of the effects and of the individual's relationship to the state made the exercise of jurisdiction unreasonable (*33 Cal. 3d 664, 669)* .

Note that the Court in *Secrest* stated the rule set out in the first Alternative Paragraph A was applicable to individual defendants, but the Court applied the rule to a foreign corporation; the case would therefore support the rule set forth in the second Alternative Paragraph A, which is identical in all respects except that it refers to a foreign corporation rather than an individual.

United California Bank v. First Bank of Oak Park *(1979) 98 Cal. App. 3d 439, 159 Cal. Rptr. 607* , was a declaratory relief action against an Illinois bank by a California bank that had participated in a loan secured by a certificate of deposit issued by an Illinois bank after the borrower filed for bankruptcy and defendant cancelled the certificate of deposit. The Illinois bank had issued the certificate of deposit knowing that the depositor, who was heavily indebted to it, intended to use the certificate in California to secure a loan and that the security would be worthless because it would be subject to the Illinois bank's right of offset against the depositor's indebtedness to it. The certificate was so used as security for a substantial loan made to the depositor by the California bank. Thereafter, the Illinois bank exercised its right of offset by canceling the certificate of deposit. The depositor defaulted on the California loan and subsequently filed for bankruptcy.

In reversing the order quashing service of summons, the court of appeal, quoting the Judicial Council Comment to *Code Civ. Proc. § 410.10*, said that a state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an omission or act performed elsewhere, with respect to causes of action arising from those effects, unless the nature of the effects and of the individual's relationship to the state make the exercise of jurisdiction unreasonable (*98 Cal. App. 3d 439, 443)* .

[c] Purpose of Rule

The facts and procedural background of ***Kulko v. California Superior Court*** *(1978) 436 U.S. 84, 98 S. Ct. 1690, 56 L. Ed. 2d 132* , are discussed in *§ 132.70[3][a]*. Although the United States Supreme Court held that the denial of the motion to quash was error and reversed the judgment of the California Supreme Court, it said that the effects test, set forth in Restatement (Second), Conflicts of Law, § 37 (1971), which provides that a state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act performed elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable, although not binding on the Supreme Court, was intended to reach wrongful activity outside of the state causing injury within the state, such as shooting a bullet from one state into another state, or commercial activity affecting state residents (*436 U.S. 84, 96)* . The Court added, however, that even in such situations the Restatement recognizes that there might be circumstances that would render unreasonable the assertion of jurisdiction over the nonresident defendant, and held that such was so in the case before it (*436 U.S. 84, 96)* .

[d] Types of Effects Caused in California by Acts Done Elsewhere

The facts and procedural background of ***Quattrone v. Superior Court*** *(1975) 44 Cal. App. 3d 296, 118 Cal. Rptr. 548* , are *discussed under § 132.108[3][a], above*. In denying the writ of mandate, the court of appeal, quoting Restatement (Second), Conflict of Laws, § 37, Comment a, said that there are three possible situations: (1) the act was performed with the intention of causing effects in this state; (2) the act, although not performed with the intention of causing effects in this state, could reasonably have been expected to do so; and (3) the act was not performed with the intention of causing effects in the state and could not reasonably have been expected to do so (*44 Cal. App. 3d 296, 304)* .

[e] Act Done With Intention of Causing Effect in California

In ***Snowney v. Harrah's Entertainment, Inc.*** *(2005) 35 Cal. 4th 1054, 29 Cal. Rptr. 3d 33, 112 P.3d 28* , plaintiff hotel guest, a California resident, filed a class action against defendant Nevada hotels for failing to provide notice of an

energy surcharge imposed on hotel guests. The trial court granted the hotels' motion to quash the summons for lack of personal jurisdiction. The appellate court reversed and the action was appealed to the Supreme Court.

The California Supreme Court reviewed the federal cases addressing internet web sites and their impact on personal jurisdiction, but has not adopted a particular approach whether a web site available in California by itself is "doing business" in the state (*35 Cal. 4th 1054, 1064)* . However, the Court did find that a Nevada hotel chain web site, by any standard, established purposeful availment by touting the proximity of their hotels to California, providing driving directions from California to their hotels, specifically targeting residents of California, many of their patrons come from California and that some of these patrons undoubtedly made reservations using their Web site. As such, the hotel purposefully derived a benefit from their internet activities in California (*35 Cal. 4th 1054, 1064-1065)* .

The California Supreme Court further held that the assertion of specific jurisdiction was fair where a hotel advertised heavily in California, obtained a significant percentage of its business from California residents, and maintained an Internet website and toll-free phone number where visitors or callers could obtain room quotes and make reservations. The hotel purposefully availed itself of the privilege of doing business in California. The guest's causes of action were premised on alleged omissions during the hotel's consummation of transactions with California residents and in its California advertisements. Because the harm alleged by the guest related directly to the content of the hotel's promotional activities in California, an inherent relationship between the guest's claims and the hotel's contacts with California existed. By purposefully and successfully soliciting the business of California residents, the hotels could reasonably anticipate being subject to litigation in California in the event their solicitations caused an injury to a California resident.

In ***Pavlovich v. Superior Court*** *(2002) 29 Cal. 4th 262, 127 Cal. Rptr. 2d 329* , the California Supreme Court considered for the first time the scope of personal jurisdiction based solely on Internet use, and concluded that a California court improperly exercised personal jurisdiction over a defendant based on a posting on an Internet website. This case involved a defendant whose sole contact with California was the posting of source code on his Internet website, accessible to any person with Internet access; the source code allowed users to decrypt data contained on DVDs and enable the placement of the decrypted data onto computer hard drives or other storage media. The defendant owned no property, had no telephone listing, and conducted no business in California. The website merely posted information and had no interactive features. Because of the defendant's apparent lack of minimum contacts with California, the court reduced the matter to the consideration of one question: whether the defendant's knowledge that his tortious conduct may harm certain industries centered in California (the motion picture, computer, and consumer electronics industries) is sufficient to establish express aiming at California. Although the record lacked any indication that the defendant knew that California residents would be detrimentally affected by his actions, plaintiffs suggested that jurisdiction exists solely because the defendant's tortious conduct had a foreseeable effect in California. The court rejected this argument, finding that mere foreseeability is not enough for jurisdiction: "Because finding jurisdiction in this case would effectively subject all intentional tortfeasors whose conduct may harm industries in California to jurisdiction in California, we decline to do so" (*29 Cal. 4th 262, 278)* . However, the court specifically emphasized the narrowness of its holding and stated: "A defendant's knowledge that his tortious conduct may harm industries centered in California is undoubtedly relevant to any determination of personal jurisdiction and may support a finding of jurisdiction. We merely hold that this knowledge alone is insufficient to establish express aiming at the forum state as required by the effects test" (*29 Cal. 4th 262, 278)* .

The facts and procedural background of ***United California Bank v. First Bank of Oak Park*** *(1979) 98 Cal. App. 3d 439, 159 Cal. Rptr. 607* , are *discussed under § 132.100[3][b]*. In reversing the order quashing service of summons, the court of appeal agreed with plaintiff's argument that consistent with the effects test of jurisdiction, the exercise of jurisdiction over the Illinois bank was proper because the bank did an intentional act knowing that it would cause effects in California, the nature of which California deems to be exceptional and subject to special regulation, and the Illinois bank anticipated an economic benefit from its act which caused the effect in this state (*98 Cal. App. 3d 439, 443)* . Holding that *Quattrone v. Superior Court (1975) 44 Cal. App. 3d 296, 118 Cal. Rptr. 548* (discussed *below*), was

controlling, the court concluded that it was reasonable to exercise jurisdiction on the basis of the defendant's having intentionally caused effects in the state by an omission or act performed elsewhere, the effects being of a nature that the state treats as exceptional and subject to special regulation (*98 Cal. App. 3d 439, 443)* . The court pointed out that California deems chartered banks exceptional and subject to special regulation (*98 Cal. App. 3d 439, 444)* .

The facts and procedural background of ***Quattrone v. Superior Court*** *(1975) 44 Cal. App. 3d 296, 118 Cal. Rptr. 548* , are *discussed under § 132.108[3][a]*. In denying the writ of mandate, the court of appeal, quoting Restatement (Second), Conflict of Laws, § 37, Comment a, said that if the act was performed with the intention of causing effects in the state, the state may exercise the same judicial jurisdiction over the actor, or over the one who caused the act to be performed, as to causes of action arising from these effects as it could have exercised if these effects had resulted from an act performed within its territory, so that one who intentionally shoots a bullet into a state is as subject to the judicial jurisdiction of the state as to causes of action arising from the effects of the shot as if he or she had actually fired the bullet in this state, and that, similarly, an insurance company which solicits through the mails the purchase of an insurance policy and thereafter mails the insured premium notices and the like is as subject to the judicial jurisdiction of the state as to causes of action arising from the policy as if it had sent an agent into the state to solicit the policy and to present the premium notices to the insured (*44 Cal. App. 3d 296, 304)* .

In ***Jamshid-Negad v. Kessler*** *(1993) 15 Cal. App. 4th 1704, 19 Cal. Rptr. 2d 621* , plaintiffs brought suit against the out-of-state parents of a University of California student who attempted to break into plaintiff's apartment while intoxicated. The action against the parents was based on negligent supervision and imputed negligence liability under *Civ. Code § 1714.1*. The trial court granted the parents' motion to quash service of summons for lack of personal jurisdiction.

The court of appeal remanded the matter with directions to vacate the order granting the motion to quash. The asserted basis of jurisdiction was limited to the parents having caused an effect in the state by an act or omission which occurred elsewhere (*15 Cal. App. 4th 1704, 1708)* . Recognizing that intentionally causing an effect justifies jurisdiction unless the nature and effects of the individual's relationship to the state make the exercise of such jurisdiction unreasonable, the court addressed the test for reasonableness when a defendant has intentionally caused an effect in the state by an act or omission elsewhere. The court, quoting *Quattrone, above*, concluded that the exercise of jurisdiction in this situation is reasonable whenever (a) the effects are of a nature that the state treats as exceptional and subjects to special regulation or (b) the defendant has, in connection with causing such effects in the forum state, invoked the benefits and protections of its laws (*15 Cal. App. 4th 1704, 1708)* . The court identified the out-of-state acts in this case as being the parents acquiescing in the minor's decision to attend the University of California and providing him with full financial support. The only effect intentionally caused in California was the minor's unsupervised presence in the state (*15 Cal. App. 4th 1704, 1708-1709)* . The court held that this was a sufficient basis for jurisdiction because negligent failure to supervise a minor is the subject of special regulations, most particularly the liability imposed by *Civ. Code § 1714.1*, and because the parents had invoked the benefits and protections of California law by taking advantage of the California's public higher education (*15 Cal. App. 4th 1704, 1709)* . Having found sufficient contacts with California, the court also held that the plaintiff's interest in obtaining relief and the state's interest in adjudicating the dispute outweighed the inconvenience to the parents in having to litigate in California (*15 Cal. App. 4th 1704, 1710)* .

[f] Act Done With Reasonable Foreseeability That It Would Cause Effect in California

In ***Pavlovich v. Superior Court*** *(2002) 29 Cal. 4th 262, 127 Cal. Rptr. 2d 329* , the California Supreme Court considered for the first time the scope of personal jurisdiction based solely on Internet use, and concluded that a California court improperly exercised personal jurisdiction over a defendant based on a posting on an Internet website. This case involved a defendant whose sole contact with California was the posting of source code on his Internet website, accessible to any person with Internet access; the source code allowed users to decrypt data contained on DVDs and enable the placement of the decrypted data onto computer hard drives or other storage media. The defendant owned no property, had no telephone listing, and conducted no business in California. The website merely posted

information and had no interactive features. Because of the defendant's apparent lack of minimum contacts with California, the court reduced the matter to the consideration of one question: whether the defendant's knowledge that his tortious conduct may harm certain industries centered in California (the motion picture, computer, and consumer electronics industries) is sufficient to establish express aiming at California. Although the record lacked any indication that the defendant knew that California residents would be detrimentally affected by his actions, plaintiffs suggested that jurisdiction exists solely because the defendant's tortious conduct had a foreseeable effect in California. The court rejected this argument, finding that mere foreseeability is not enough for jurisdiction: "Because finding jurisdiction in this case would effectively subject all intentional tortfeasors whose conduct may harm industries in California to jurisdiction in California, we decline to do so" (*29 Cal. 4th 262, 278)* . However, the court specifically emphasized the narrowness of its holding and stated: "A defendant's knowledge that his tortious conduct may harm industries centered in California is undoubtedly relevant to any determination of personal jurisdiction and may support a finding of jurisdiction. We merely hold that this knowledge alone is insufficient to establish express aiming at the forum state as required by the effects test" (*29 Cal. 4th 262, 278)* .

Kaiser Aetna v. Deal *(1978) 86 Cal. App. 3d 896, 150 Cal. Rptr. 615* , was an action arising out of allegedly fraudulent land transactions. Although it affirmed the order quashing service of summons, the court of appeal said if a nonresident defendant commits an act or omission outside the forum state that could reasonably be expected to cause effects within the forum state, whether the forum state may exercise personal jurisdiction over the defendant depends on several factors. The mere causing of an "effect" in the forum is not sufficient without more to afford a constitutional basis for jurisdiction (*86 Cal. App. 3d 896, 902)* . The court cited the Judicial Council comment as follows: the act may not have been performed with the intention of causing effects in the state, but could reasonably have been expected to do so. Whether the state may exercise judicial jurisdiction in such a situation depends on a variety of factors, including the extent of the relationship of the state to the defendant and to the plaintiff, the nature and quality of the effects resulting from the act, and the degree of inconvenience which would result to the defendant from being forced to stand suit in the state on a particular cause of action. The greater the defendant's relationship to the state, the greater the likelihood that the state may exercise judicial jurisdiction over him or her as to causes of action arising from the effects of the act in the state. So if the defendant does business in the state, or solicits business extensively in the state, or if a substantial quantity of goods manufactured by him or her are sold in the state, there is a greater likelihood that the state may exercise judicial jurisdiction over him or her as to causes of action arising from the effects in the state of an act performed by him or her outside the state than if the defendant did not have this relationship to the state. This is so even though the defendant's relationship to the state is not related in any way to he act or to such of its effects in the state as are involved in the suit. The plaintiff's relationship to the state is also material. The greater the extent of this relationship, the greater is the interest of the state in the plaintiff and consequently the more appropriate it will be that the state should be in the position to try the case in its courts. On the other hand, if the plaintiff has little or no relationship to the state, the defendant's relationship to the state must be correspondingly greater to give the state a sufficient interest to justify trial of the case in its courts. Another factor of significance is the nature and quality of the effects which occur in the state. The state may exercise judicial jurisdiction over the defendant if the effects which could have been anticipated and which actually occurred are of a sort highly dangerous to persons or to things (*86 Cal. App. 3d 896, 902-903)* .

The facts and procedural background of ***St. Joe Paper Co. v. Superior Court*** *(1981) 120 Cal. App. 3d 991, 175 Cal. Rptr. 94* , are discussed in *§ 132.100[3][l]*. In denying the writs of mandate sought by the nonresident defendant corporations to compel the trial court to quash service of summons on them, the court of appeal said that the minimum contacts of a defendant with a state need not arise from actual physical activity of the defendant in the forum state, that activities taking place in other states which entail foreseeable effects in a forum state may be sufficient to satisfy the minimum contacts requirement (*120 Cal. App. 3d 991, 997)* .

[g] Act Done Without Intent to Cause Effect and Without Reasonable Foreseeability That It Would Cause Effect in California

In ***Pavlovich v. Superior Court*** *(2002) 29 Cal. 4th 262, 127 Cal. Rptr. 2d 329* , the California Supreme Court considered for the first time the scope of personal jurisdiction based solely on Internet use, and concluded that a California court improperly exercised personal jurisdiction over a defendant based on a posting on an Internet website. This case involved a defendant whose sole contact with California was the posting of source code on his Internet website, accessible to any person with Internet access; the source code allowed users to decrypt data contained on DVDs and enable the placement of the decrypted data onto computer hard drives or other storage media. The defendant owned no property, had no telephone listing, and conducted no business in California. The website merely posted information and had no interactive features. Because of the defendant's apparent lack of minimum contacts with California, the court reduced the matter to the consideration of one question: whether the defendant's knowledge that his tortious conduct may harm certain industries centered in California (the motion picture, computer, and consumer electronics industries) is sufficient to establish express aiming at California. Although the record lacked any indication that the defendant knew that California residents would be detrimentally affected by his actions, plaintiffs suggested that jurisdiction exists solely because the defendant's tortious conduct had a foreseeable effect in California. The court rejected this argument, finding that mere foreseeability is not enough for jurisdiction: "Because finding jurisdiction in this case would effectively subject all intentional tortfeasors whose conduct may harm industries in California to jurisdiction in California, we decline to do so" (*29 Cal. 4th 262, 278)* . However, the court specifically emphasized the narrowness of its holding and stated: "A defendant's knowledge that his tortious conduct may harm industries centered in California is undoubtedly relevant to any determination of personal jurisdiction and may support a finding of jurisdiction. We merely hold that this knowledge alone is insufficient to establish express aiming at the forum state as required by the effects test" (*29 Cal. 4th 262, 278)* .

The facts and procedural background of ***Kaiser Aetna v. Deal*** *(1978) 86 Cal. App. 3d 896, 150 Cal. Rptr. 615* , are *discussed under § 132.108[3][d]*. Although it affirmed the order quashing service of summons, the court of appeal said if a defendant commits an act outside the state, and the act was not performed with the intention of causing effects in the state and could not reasonably have been expected to cause any effects in the state, the state may not constitutionally exercise jurisdiction over the defendant, unless the defendant is found to have an extensive relationship with the state (*86 Cal. App. 3d 896, 904)* .

The facts and procedural background of ***Titus v. Superior Court*** *(1972) 100 Cal. Rptr. 477* , are discussed in *§ 132.70[3][a]*. In granting the petition for writ of mandate insofar as the order to show cause purported to give the trial court personal jurisdiction over the husband for purposes of child support, and annulling the child support order because there was no basis for in personam jurisdiction over the father, the court of appeal, citing Restatement (Second), Conflicts of Law, § 37, Comment a, said that finally, in the situation where the act was not performed with the intention of causing effects in the state and where the defendant had no reason to suppose that his or her acts outside the state would result in effects within the state, the state will not generally have jurisdiction over the defendant unless both the plaintiff and the defendant have an extensive relationship to the state (*23 Cal. App. 778, 802)* .

[4] Additional Authorities

[a] Effect Caused in California by Individual

Brown v. Watson (1989) 207 Cal. App. 3d 1306, 255 Cal. Rptr. 507 , was a legal malpractice action against a group of California attorneys, who had been employed by California plaintiffs to represent them in personal injury and wrongful death actions arising out of an automobile accident in Texas, and a group of Texas attorneys, with whom the California attorneys had associated themselves, based on the alleged negligence of the Texas attorneys in failing to timely serve and file the summons and complaint within the period provided by Texas law. In reversing the trial court's order quashing service of summons on the Texas attorneys, the court of appeal pointed out that (1) the requisite minimum contacts of a defendant with the forum state need not arise from his or her physical activity in that state; (2) a person need not be physically present within the forum state in order to transact business there, and that contact with the forum state by telephone or mail may furnish the necessary minimum contacts essential for the exercise of jurisdiction under

the transaction-of-business standards (*207 Cal. App. 3d 1306, 1313)* ; (3) one of the recognized bases for jurisdiction in California arises when the defendant has caused an effect in the state by an act or omission that occurs elsewhere (*207 Cal. App. 3d 1306, 1314)* ; and (4) the complaint alleged that the Texas attorneys' negligence in failing timely to serve the summons and complaint, which omission occurred in Texas, resulted in dismissal of plaintiffs' Texas action, thereby causing damage to plaintiffs in California (*207 Cal. App. 3d 1306, 1315)* . The court pointed out that the Texas attorneys were retained by plaintiffs in California, through their California attorneys, to file and prosecute an action in Texas, that material and information necessary for prosecution of the action were in California and were furnished to the Texas attorneys by the California attorneys, that the Texas attorneys telephoned and corresponded with plaintiffs and the California attorneys regarding the Texas lawsuit, that their fee was to be paid through a fee-splitting arrangement with the California attorneys, and that the Texas attorneys consequently had substantial contacts with California (*207 Cal. App. 3d 1306, 1314-1315)* . Having concluded that the Texas attorneys had the required minimum contacts with California, the court further held that a balancing of the relative interests of the parties in California favored the exercise of jurisdiction over the Texas attorneys (*207 Cal. App. 3d 1306, 1315-1316)* .

In *Rollins Burdick Hunter of So. Cal., Inc. v. Alexander & Alexander Services, Inc. (1988) 206 Cal. App. 3d 1, 253 Cal. Rptr. 338* , the court of appeal, although it affirmed the order quashing service of summons on a nonresident defendant on the ground that whatever he did, it was done after the alleged breach complained of, said that a state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an omission or act performed elsewhere with respect to causes of action arising from these effects, unless the nature of the effects and of the individual's relationship to the state make the exercise of jurisdiction unreasonable (*206 Cal. App. 3d 1, 8-9)* .

The facts and procedural background of *Titus v. Superior Court (1972) 23 Cal. App. 3d 792, 100 Cal. Rptr. 477* , are discussed in *§ 132.70[3][a]*. Although the California Supreme Court granted the petition for writ of mandate insofar as the order to show cause purported to give the trial court personal jurisdiction over the husband for purposes of child support, and annulled the child support order because there was no basis for in personam jurisdiction over the father, the court of appeal, citing Restatement (Second), Conflicts of Law, § 37, Caveat, said that the basis of jurisdiction set forth in the first alternative Paragraph A does not arise if the exercise of jurisdiction is not fair to the nonresident defendant and is unreasonable from the standpoint of the international and interstate systems (*23 Cal. App. 3d 792, 802-803)* . The court apprehended that it would be unfair and unreasonable to hold that a nonresident parent has submitted him or herself to the jurisdiction of another state merely by the act of sending his or her children to that state temporarily for the purpose of visiting with the other parent, and that a contrary rule would thwart the strong policy of the law to encourage the visitation of children with their parents (*23 Cal. App. 3d 792, 803)* .

See also *Taylor-Rush v. Multitech Corp. (1990) 217 Cal. App. 3d 103, 112, 114, 265 Cal. Rptr. 672* , discussed in *§ 132.107[3][e]*.

[b] Effect Caused in California by Foreign Corporation

The facts and procedural background of *Felix v. Bomoro Kommanditgesellschaft (1987) 196 Cal. App. 3d 106, 241 Cal. Rptr. 670* , are discussed in *§ 132.75[4][a]*. Although the court of appeal affirmed the judgment of dismissal after the defendant's motion to quash service of summons was granted, the court of appeal said that California recognizes that a state may exercise jurisdiction over one who causes effects in the state by an act or omission performed elsewhere with respect to causes of action arising from the effects, and that this is so unless the nature of the effects and of the individual's relationship to the state make the exercise of jurisdiction unreasonable (*196 Cal. App. 3d 106, 112)* .

Note that the court in *Felix*, citing *Secrest Machine Corp. v. Superior Court (1983) 33 Cal. 3d 664, 669, 190 Cal. Rptr. 175, 660 P.2d 399* (*discussed under § 132.108[3][b]*), and *Sibley v. Superior Court (1976) 16 Cal. 3d 442, 446, 128 Cal. Rptr. 34, 546 P.2d 322* (*discussed under § 132.108[3][a]*), stated the rule set out in the first Alternative Paragraph A, relating to individual defendants, but then applied this rule to a foreign corporation. The case would therefore support the rule set out in the second Alternative paragraph A, which is identical in all respects except that it

refers to a foreign corporation rather than an individual.

Kaiser Aetna v. Deal (1978) 86 Cal. App. 3d 896, 150 Cal. Rptr. 615 , was an action arising out of allegedly fraudulent land transactions. Although the court of appeal affirmed the order quashing service of summons on out-of-state defendants on the ground the allegedly tortious acts committed in California by the resident co-conspirators could not be imputed to the nonresident defendants for purposes of establishing personal jurisdiction, the court said that every state has a natural interest in effects occurring within its territory, even if the act causing those effects was committed elsewhere, and, quoting both Restatement (Second), Conflict of Laws, § 37, Comment a, and Judicial Council Comment to *Code Civ. Proc. § 410.10*, Bases of Jurisdiction Over Individuals, said that there are three possible situations; (1) the act was performed with the intention of causing effects in the state; (2) the act, although not performed with the intention of causing effects in the state, could reasonably have been expected to do so; and (3) the act was not performed with the intention of causing effects in the state and could not reasonably have been expected to do so (*86 Cal. App. 3d 896, 902)* .

[c] Act Done With Intention of Causing Effect in California

In *Heilig v. Superior Court (1983) 149 Cal. App. 3d 978, 197 Cal. Rptr. 371* , jurisdiction over nonresident defendants in a defamation action was upheld. Defendants had signed letters that they knew were to be mailed and received in California for the express purpose of defaming and defeating a political candidate. The court of appeal held that defendants' intentional out-of-state activities clearly resulted in tortious conduct in California, and that, under the circumstances, it was fair and reasonable to subject them to the jurisdiction of the California courts (*149 Cal. App. 3d 978, 984-985)* .

The facts and procedural background of ***Kaiser Aetna v. Deal*** *(1978) 86 Cal. App. 3d 896, 150 Cal. Rptr. 615* , are *discussed under § 132.108[d]*. Although it affirmed the order quashing service of summons, the court of appeal said that if a defendant commits an act or omission outside the forum with the intent to cause a tortious effect within the state, the state may exercise jurisdiction over the defendant as to any cause of action arising from the effects. The intent to cause tortious injury within the state when the tort actually occurs is generally a sufficient basis, without more, for the exercise of in personam jurisdiction. Quoting Restatement (Second), Conflict of Laws, § 37, Comment a, the court added that the act may have been performed with the intention of causing effects in the state. If so, the state may exercise the same judicial jurisdiction over the actor, or over the one who caused the act to be performed, as to causes of action arising from these effects as it could have exercised if these effects had resulted from an act performed within its territory (*86 Cal. App. 3d 896, 902)* .

The facts and procedural background of *Titus v. Superior Court (1972) 23 Cal. App. 3d 792, 100 Cal. Rptr. 477* , are discussed in *§ 132.70[3][a]*. In holding that the nonresident father did not send his children to California with the intent of causing effects in California which would give rise to a cause of action for custody and support of the children, but that his intent was clearly and undisputably for the purpose of having them visit their mother during the summer with the understanding that they would return to the father at the end of summer, and granting the petition for writ of mandate insofar as the order to show cause purported to give the trial court personal jurisdiction over the husband for purposes of child support, and annulling the child support order because there was no basis for in personam jurisdiction over the father, the court of appeal, citing Restatement (Second), Conflicts of Law, § 37, Comment a, said that in situations where the act is performed with the intention of causing effects in the state, the state in which these effects are caused will have judicial jurisdiction over the actor or the one who caused the act to be performed as to causes of action arising from these effects (*23 Cal. App. 3d 792, 802)* .

[d] Act Done With Reasonable Foreseeability That It Would Cause Effect in California

The facts and procedural background of *Titus v. Superior Court (1972) 23 Cal. App. 3d 792, 100 Cal. Rptr. 477* , are discussed in *§ 132.70[3][a]*. In holding that, even if it could be said that although the father did not intend to cause

effects in California by sending his children to California but could reasonably be expected to do so, the relationship between the father and California was not close enough to give California jurisdiction, and granting the petition for writ of mandate insofar as the order to show cause purported to give the trial court personal jurisdiction over the husband for purposes of child support, and annulling the child support order because there was no basis for in personam jurisdiction over the father, the court of appeal, citing Restatement (Second), Conflicts of Law, § 37, Comment a, said that when the act is not performed with the intention of causing effects in the state but could reasonably have been expected to do so, the state's power to exercise judicial "discretion" [sic, jurisdiction] depends on a variety of factors, including the extent of the relationship of the state to the defendant and to the plaintiff, the nature and quality of the effects resulting from the act, and the degree of inconvenience which would result to the defendant from being forced to stand suit in the state on the particular cause of action, and that in this situation an important indicia is the defendant's closeness to the state, that the more closely the defendant is related to the state, the more convenient it will probably be for him or her to stand suit in the state (*23 Cal. App. 3d 792, 802)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral Overview

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13-132 California Points & Authorities § 132.109

§ 132.109 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground That Court Lacks Personal Jurisdiction--Sufficient Basis for Jurisdiction Exists--Cause of Action Is Related to Thing Located in California That Is Owned, Used, or Possessed by Defendant

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum opposing a motion to quash service of summons on the ground that the court lacks a sufficient basis for exercising personal jurisdiction (see, e.g., § 132.100).*]

DEFENDANT OWNS, USES, OR POSSESSES A THING LOCATED IN THIS STATE, AND THIS IS A PROPER BASIS FOR THE EXERCISE OF PERSONAL JURISDICTION OVER THE DEFENDANT IN AN ACTION ARISING OUT OF THAT OWNERSHIP, USE, OR POSSESSION.

[*EITHER, if defendant is an individual*]

A. Individual's Ownership, Use, or Possession of Thing Located in California. A state has power to exercise judicial jurisdiction over an individual who has owned, used, or possessed (1) an immovable thing in the state with respect to any cause of action arising from the thing while it was owned, used, or possessed by the individual, or (2) a chattel in the state with respect to any cause of action arising from the chattel while it was in the state and was so owned, used, or possessed unless the nature of the chattel and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable (Judicial Council Comment to *Code Civ. Proc. § 410.10*, under Bases of Judicial Jurisdiction Over Individuals; *see Indiana Insurance Co. v. Pettigrew (1981) 115 Cal. App. 3d 862, 864-868, 171 Cal. Rptr. 770*).

[*OR, if defendant is a foreign corporation*]

A. Foreign Corporation's Ownership, Use, or Possession of Thing Located in California. A state has power to exercise judicial jurisdiction over a foreign corporation which has owned, used, or possessed (1) an immovable thing in the state with respect to any cause of action arising from the thing while it was owned, used, or possessed by the corporation, or (2) a chattel in the state with respect to any cause of action arising from the chattel while it was in the state and was so owned, used, or possessed by the corporation or arising from the chattel while it was in the state and was so owned, used, or possessed unless the nature of the chattel and of the corporation's relationship to the state make the exercise of such jurisdiction unreasonable (Judicial Council Comment to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Corporations).

[*CONTINUE*]

[*Optional*] **B. Foreign Corporation Defined.** [*see § 132.104*, Paragraph B].

[*ADD, if defendant is a foreign partnership or other unincorporated association*]

C. Partnership or Other Unincorporated Association. [*see § 132.103*, Paragraph C].

D. Authority to Sue Partnership or Other Unincorporated Association in Common Name. [*see § 132.103*, Paragraph D].

[2] Comments

[a] Use of Form

The form in [1], *above*, is for use in opposing a motion to quash service of summons under *Code Civ. Proc. § 418.10(a)(1)*, on the ground that the court has no proper basis for exercising personal jurisdiction over the defendant. The ground for opposition is that the defendant owns, uses, or possesses and thing that is located in California and is related to the cause of action, and that under these circumstances the court is justified in exercising limited personal jurisdiction over the defendant. This rule applies equally to nonresident individuals and to foreign corporations [Judicial Council Comment to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Corporations]. For discussion concerning limited jurisdiction, see *§ 132.76[2][b]*.

This form does not provide a complete memorandum, but is designed to be combined with a general form of memorandum opposing a motion to quash service of summons [*see, e.g., § 132.100*]. It may also be included in a memorandum of points and authorities opposing a petition for a writ of mandate to compel the trial court to grant the motion to quash after it has declined to do so [*see Code Civ. Proc. § 418.10(c)*], or it may be adapted for use in a trial or appellate brief.

For additional points and authorities opposing a motion to quash on other grounds, see *§§ 132.102 -132.108, 132.110 -132.115*.

In an appropriate case, the points and authorities set out in the foregoing form may be used to oppose a motion supported by the points and authorities *set out in § 132.80*.

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

See also *§ 132.100[2]* for comments on a general form.

[b] Immovable Things

Immovable things include land and things that are so attached to the land as to be legally regarded a part of it [Judicial Council Comment to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Individuals].

[c] Chattels

A chattel, which is a tangible movable thing, may be moved from state to state, and, for this reason, the rules of judicial jurisdiction relating to the ownership, use, or possession of chattels are somewhat different from those involving immovable things [Judicial Council Comment to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Individuals]. A state may usually exercise judicial jurisdiction over an individual as to causes of action arising from his or her use or possession of a chattel in the state. By such use or possession, the individual creates a relationship to the state that will usually provide a reasonable basis for the exercise of jurisdiction by the state. Judicial jurisdiction may be exercised over an individual as to causes of action arising from his or use or possession of a chattel in the state that is dangerous to life or to tangible things. By using or possessing the chattel in the state, the individual endangers the interests of other persons in the state and can fairly be required to stand suit in the state for any injury that may result. The chattel need not be peculiarly dangerous, as is a bomb or other explosive. It need only be of a sort from which liability in tort for personal injury is not unlikely to arise, as is true, for example, of most kinds of mechanized equipment. When the chattel is not of a kind dangerous to life or property, the state must have a closer relationship to either the defendant or the plaintiff than would otherwise be necessary to permit it to exercise judicial jurisdiction over the defendant as to causes of action arising from his or her use of the chattel [Judicial Council Comment to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Individuals].

The mere ownership of a chattel in the state, as distinguished from its use or possession, creates more difficult problems. A state may not exercise judicial jurisdiction over an individual by reason of his or her mere ownership of a chattel in the state unless he or she may be deemed responsible for the presence of the chattel in the state. So a state may not exercise jurisdiction over the owner of a stolen chattel which is brought into the state without the knowledge or consent of the owner until at least such time as the owner has learned of the presence of the chattel in the state and has had a reasonable opportunity to reclaim it. Whether judicial jurisdiction may be exercised over the owner in other situations may depend on whether he or she has directed or consented that the chattel should be taken into the state or at least had reason to foresee that it would be taken there. Likewise, it is more probable that the state may exercise judicial jurisdiction over the owner if he or she has other relationships to the state apart from his or her ownership of the chattel, or if the chattel is of a sort dangerous to life or to tangible property, or if the plaintiff is closely related to the state [Judicial Council Comment to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Individuals].

[3] Discussion of Authorities

[a] Individual's Ownership, Use, or Possession of Thing Located in California

In ***Indiana Insurance Co. v. Pettigrew*** *(1981) 115 Cal. App. 3d 862, 171 Cal. Rptr. 770* , the defendant's minor son was involved in a multiple car collision in Indiana while driving a car owned by defendant. After settling the claims of its insureds involved in the accident, the insurance company, under the subrogation provisions of the insurance agreement, instituted in Indiana an action against the defendant's minor son for negligence and against the defendant by reason of the fact that the son was a minor under the age of 18 years at the time of the accident and the father was responsible for the operation of the car by the son. At all relevant times both the defendant and his son were California residents. Both the father and son were served in California by certified mail, but defaulted in the Indiana action. The insurer secured a default judgment and attempted to enforce it in California under the Sister State Money Judgments Act [*Code Civ. Proc. § 1710.10 et seq.*]. The defendant claimed the Indiana judgment was void for lack of personal jurisdiction over him. The trial court denied recognition of the Indiana judgment and quashed a previously issued writ of execution against the property of the judgment debtor (the defendant), and the insurance company appealed.

In reversing the order denying entry of the Indiana judgment and quashing the previously issued writ of execution, the court of appeal first pointed out that Indiana has a nonresident motorist statute which provides for jurisdiction only over the nonresident operator or his or her duly authorized agent, whereas California has provided for extension of jurisdiction over the owner who merely extends permission to another driver to operate his or her vehicle in this state (*115 Cal. App. 3d 862, 865)* . The court held that although the language of the Indiana statute contained some limitations, jurisdiction was properly extended by the nonresident statute over defendant, as more than his mere ownership or permission to operate was involved; he was the signatory on his minor son's license, as required by *Veh. Code § 17707*, and this statute by creating a vicarious liability sufficed to create a limited type of "agency" to satisfy the extension of jurisdiction over defendant pursuant to the Indiana nonresident motorist law (*115 Cal. App. 3d 862, 865-866)* . The court further held the minimum contacts test was satisfied; the collision occurred in Indiana; defendant permitted a car owned by him to be driven in Indiana by his uninsured son and agreed to a statutory vicarious liability for damage caused by the minor while operating a motor vehicle; in engaging in these activities, defendant vicariously participated in the operation of his automobile by his son in Indiana; and jurisdiction was properly asserted under the general Indiana long-arm statute (*115 Cal. App. 3d 862, 867)* . The court said that although the defendant argued that giving his son permission to drive his car was an act which occurred in California and not in Indiana, and should be limited to acts occurring in California, a fair interpretation of the Indiana statute required its extension to this case; the collision occurred in Indiana; defendant owned the car and agreed to be responsible for the acts of his minor son (*Veh. Code § 17707*), and permitted it to be taken to Indiana by his so. These acts suffice as an act causing personal injury and property damage within Indiana (*115 Cal. App. 3d 862, 868)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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13-132 California Points & Authorities § 132.110

§ 132.110 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground That Court Lacks Personal Jurisdiction--Sufficient Basis for Jurisdiction Exists--Defendant's Business Activity in California--General Form

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum opposing a motion to quash service of summons on the ground that the court lacks a sufficient basis for exercising personal jurisdiction (see, e.g., § 132.100).*]

DOING BUSINESS IN CALIFORNIA IS A PROPER BASIS FOR THE EXERCISE OF PERSONAL JURISDICTION OVER THE DEFENDANT.

[*EITHER, if defendant is an individual and cause of action is related to business activity in California*]

A. Cause of Action Against Natural Person Arose From Business Done in California. A state has power to exercise judicial jurisdiction over an individual who does business in the state with respect to causes of action arising out of that business (Judicial Council Comment to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Individuals).

[*OR, if defendant is an individual and cause of action is related to former business activity in California*]

A. Cause of Action Against Natural Person Arose From Former Business Done in California. A state has power to exercise judicial jurisdiction over an individual who has done business in the state, but has ceased to do business there at the time when the action is brought, with respect to causes of action arising from the business done in the state (Judicial Council Comment to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Individuals).

[*OR, if defendant is an individual doing continuous and substantial business in state*]

A. Defendant Natural Person Conducts Continuous and Substantial Business in California and Exercise of Jurisdiction Is Reasonable. A state has power to exercise judicial jurisdiction over an individual who does business in the state, with respect to causes of action that do not arise from the business done in the state, if this business is so continuous and substantial as to make exercise of such jurisdiction reasonable (Judicial Council Comment to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Individuals).

[*OR, if defendant is a foreign corporation and cause of action is related to business activity in California*]

A. Cause of Action Against Foreign Corporation Arose From Business Done in California. A state has power to exercise judicial jurisdiction over a foreign corporation which does business in the state with respect to causes of action arising from the business done in this state (Judicial Council Comment to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Corporations).

[*OR, if defendant is a foreign corporation and cause of action is related to former business activity in California*]

A. Cause of Action Against Foreign Corporation Arose From Former Business Done in California. A state has power to exercise judicial jurisdiction over a foreign corporation which has done business in the state, but has ceased to do business there at the time the action is commenced, with respect to causes of action arising out of that business (Judicial Council Comment to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Corporations).

[*OR, if defendant is a foreign corporation doing continuous and substantial business in California*]

A. Defendant Foreign Corporation Conducts Continuous and Substantial Business in California and Exercise of Jurisdiction Is Reasonable. A state has power to exercise judicial jurisdiction over a foreign corporation that does business in the state, with respect to causes of action that do not arise from the business done in the state, if this business is so continuous and substantial as to make it reasonable for the state to exercise such jurisdiction (*Hesse v. Best Western Internat., Inc. (1995) 32 Cal. App. 4th 404, 408-410, 38 Cal. Rptr. 2d 74* ; Judicial Council Comment to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Corporations).

[*Optional*] **B. Foreign Corporation Defined.** [*See § 132.104*, Paragraph B].

[*ADD, if defendant is a foreign partnership or other unincorporated association*]

C. Partnership or Other Unincorporated Association. [*see § 132.103*, Paragraph C].

D. Authority to Sue Partnership or Other Unincorporated Association in Common Name. [*See § 132.103*, Paragraph D].

[*In an appropriate case, add additional points and authorities set out in §§ 132.111 -132.115, supporting the argument that the defendant conducted business activities in California sufficient to support the court's exercise of personal jurisdiction over the defendant in particular fact situations.*]

[2] Comments

[a] Use of Form

The form in [1], *above*, is for use in opposing a motion to quash service of summons under *Code Civ. Proc. § 418.10(a)(1)*, on the ground that the court has no proper basis for exercising personal jurisdiction over the defendant. The ground for opposition is that the defendant is or has conducted business activity in California, and either the cause of action is related to this activity, such that the court is justified in exercising limited personal jurisdiction over the defendant, or the activity is so extensive that the court is justified in exercising general personal jurisdiction over any cause of action. For discussion concerning general and limited jurisdiction, see *§ 132.76[2][b]*.

This form does not provide a complete memorandum, but is designed to be combined with a general form of memorandum opposing a motion to quash service of summons [*see, e.g., § 132.100*]. It may also be included in a memorandum of points and authorities opposing a petition for a writ of mandate to compel the trial court to grant the motion to quash after it has declined to do so [*see Code Civ. Proc. § 418.10(c)*], or it may be adapted for use in a trial or appellate brief.

For additional points and authorities opposing a motion to quash on other grounds, see *§§ 132.102 -132.109*. For points and authorities that may be combined with the foregoing form in specific facts situations, see *§§ 132.111 -132.115*.

In an appropriate case, the points and authorities set out in the foregoing form may be used to oppose a motion supported by the points and authorities *set out in §§ 132.70, 132.74, 132.76 -132.78*, and *132.83 -132.90*.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

See also *§ 132.100[2]* for comments on a general form.

[b] Doing Business

Doing business is doing a series of similar acts for the purpose of thereby realizing pecuniary profit, or otherwise accomplishing an object, or doing a single act for such purpose with the intention of thereby initiating a series of such acts [Judicial Council Comment to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Individuals, and Judicial Council Comment to *Code Civ. Proc. § 410.10*, Bases of Judicial Jurisdiction Over Corporations].

[3] Discussion of Authorities

[a] Defendant Foreign Corporation Conducts Continuous and Substantial Business in California and Exercise of Jurisdiction is Reasonable

Hesse v. Best Western Internat., Inc. *(1995) 32 Cal. App. 4th 404, 38 Cal. Rptr. 2d 74* , involved an action for personal injuries sustained by a guest in a hotel in Mexico brought against a membership organization to which the hotel belonged. The court of appeal reversed the trial court's order of dismissal following its order granting defendant's motion to quash service of summons for lack of personal jurisdiction. The court found that the evidence established that defendant had continuous and purposeful transactions with California for purposes of general jurisdiction because defendant was authorized to do business in California with a designated agent for service of process, maintained a business office in California from which it solicited guests for affiliate members and advertised collectively for affiliate members in California (*32 Cal. App. 4th 404, 408-410)* .

[4] Additional Authorities

[a] Cause of Action Against Foreign Defendants Arose From Business Done in California

Epic Communications, Inc. v. Richwave Technolgy, Inc. (2009) 179 Cal. App. 4th 314, 101 Cal. Rptr. 3d 572 was an action by a Taiwanese corporation and its California subsidiary seeking damages for an alleged misappropriation of intellectual property originally transferred by their predecessor in interest, a California corporation, to a corporation in Taiwan. The transfer took place pursuant to a joint development agreement negotiated in substantial part by a Taiwanese engineer then employed by the transferee corporation. The three defendants are the transferee corporation, the engineer who negotiated the development agreement, and a second Taiwanese corporation formed by her as a "spin-off" of the transferee. The trial court granted a motion by the engineer and the "spin-off" corporation to quash service of process, reasoning that even if those defendants had sufficient contact with California to otherwise be subject to the jurisdiction of its courts, the Taiwanese residence of the principal plaintiff corporation made it unreasonable to exercise jurisdiction in California. In rejecting that conclusion, the court of appeal explained that a refusal by California courts to exercise jurisdiction cannot be justified by the mere fact that a claim arising from California contacts is prosecuted by a nonresident. While the foreign status of an assignee might in some cases reduce the state's interest in adjudicating a dispute, that is at most a subsidiary consideration which cannot by itself justify a denial of access to our courts. The principal inquiry remains whether subjecting the defendants to local jurisdiction comports with fair play and substantial justice. The residence of the current owner of the claim has little if any bearing on that inquiry. Here the two Taiwan defendants engaged in conduct in California, and caused effects in California, that made it readily foreseeable that they would be haled into court here in the event of a dispute of the present type. The defendants dealt directly with a California corporation at the time of the contacts giving rise to jurisdiction; their dealings involved services to be performed entirely in California, in the sense that the work was done here, the workers resided here, and the compensation would be received here; and none of the defendants had any reason to anticipate that a dispute under the agreement would be adjudicated anywhere but in California. Further, defendants have no reason to anticipate that the plaintiff in any such controversy would be anybody other than the California enterprise with which they dealt. The later transfer of that entity's rights to a Taiwan corporation could have no bearing on the foreseeability, at the time of the conduct giving rise to the suit, of their being haled into court. So far as they knew, it was entirely predictable that if the agreement were not performed, or a dispute arose over the disposition of its fruits, they would be haled into court--or at least into arbitration--in California. That the plaintiff who eventually sued them was itself a Taiwan corporation was, from their perspective, a pure fortuity. That fact does not furnish a compelling basis for holding California jurisdiction unreasonable.

Legal Topics:

For related research and practice materials, see the following legal topics:
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13-132 California Points & Authorities § 132.111

§ 132.111 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground That Court Lacks Personal Jurisdiction--Sufficient Basis for Jurisdiction Exists--Defendant's Business Activity in California--Contract Made and To Be Performed in California

[1] FORM

[*The following should be combined with general points and authorities concerning the defendant's business activity in California as a basis for the court's exercise of personal jurisdiction over defendant (see § 132.110).*]

IN AN ACTION FOR BREACH OF CONTRACT AGAINST THE DEFENDANT, THE FACT THAT THE CONTRACT WAS MADE AND TO BE PERFORMED IN CALIFORNIA IS A SUFFICIENT BASIS FOR THIS COURT TO EXERCISE ITS PERSONAL JURISDICTION OVER THE DEFENDANT.

A. Contract Made and to Be Performed in California. It is well settled that personal jurisdiction attaches when a cause of action arises out of the breach of a contract made and to be performed in this state (*Kroopf v. Guffey (1986) 183 Cal. App. 3d 1351, 1358, 228 Cal. Rptr. 807* ; *University Financing Consultants, Inc. v. Barouche (1983) 148 Cal. App. 3d 1165, 1170, 196 Cal. Rptr. 484*).

[Optional] **B. Recovery of Attorney Fees for Service Performed in California.** A contract for the performance of attorney services in California by an out of state defendant supports personal jurisdiction over a party for the recovery of attorney's fees, even if the defendant previously succeeding in quashing service of summons for insufficient contacts with California *California (Daar & Newman v. VRL International (2005) 129 Cal. App. 4th 482, 28 Cal. Rptr. 3d 566*).

[2] Comments

[a] Use of Form

The form of points and authorities in [1], *above*, is for use in opposing a motion to quash service of summons under *Code Civ. Proc. § 418.10(a)(1)*, on the ground that the court has no proper basis for exercising personal jurisdiction

over the defendant. The ground for opposition is that, in an action for breach of contract, the fact that the contract was made and was to be performed in California is a sufficient basis for the court to exercise its personal jurisdiction over the defendant.

This form does not provide a complete memorandum, but is designed to be combined with general points and authorities relating to the defendant's business activity in California as a basis for exercising personal jurisdiction [*see § 132.110*].

In an appropriate case, the points and authorities set out in this form may be used to oppose a motion supported by the points and authorities *set out in §§ 132.81, 132.83, 132.85,* and *132.87.*

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Contract Made and to Be Performed in California

The facts and procedural background of ***Kroopf v. Guffey*** *(1986) 183 Cal. App. 3d 1351, 228 Cal. Rptr. 807* , are discussed in *§ 132.102[3]*b]. In reversing the order granting the motion to quash service of summons, the court of appeal said it is well settled that personal jurisdiction attaches when a cause of action arises out of the breach of a contract made and to be performed in this state (*183 Cal. App. 3d 1351, 1358)* .

University Financing Consultants, Inc. v. Barouche *(1983) 148 Cal. App. 3d 1165, 196 Cal. Rptr. 484* , was a breach of contract action by a California mortgage brokerage association against Hawaiian condominium developers whose single connection with California was the engagement of brokerage services from plaintiff. Defendants were never physically present in California and had obtained the plaintiff's brokerage services via contracts made with a Hawaiian mortgage broker. The trial court granted the defendant's motion to quash service of summons for lack of jurisdiction, and plaintiff appealed. In reversing the order, the court of appeal said that jurisdiction over a nonresident defendant can be maintained on the basis of a single contract with the forum state (*148 Cal. App. 3d 1165, 1170)* .

[b] Recovery of Attorney Fees for Service Performed in California

In ***Daar & Newman v. VRL Int'l*** *(2005) 129 Cal. App. 4th 482, 28 Cal. Rptr. 3d 566* , appellant law firm previously represented respondent in a personal injury action. Because respondent had insufficient contacts with California for it to assert jurisdiction over it, appellant successfully moved to quash service of process and obtained respondent's dismissal from the action. Appellant also successfully defended the trial court's ruling on appeal to this court. Contending that it was not paid in full for the services it rendered on behalf of respondent in the prior action, appellant filed an action for recovery of fees. Respondent filed a motion to quash contending it had no sufficient contacts with this state upon which jurisdiction may be based. The trial court granted the motion to quash and dismissed respondent from the action. The court of appeal reversed, finding that the operative facts and law relating to the attorney fee action were different from the prior action. The plaintiff in the prior action attempted to assert jurisdiction over respondent for injuries which occurred in connection with a personal watercraft accident in Nassau, the Bahamas. Here, appellant asserts jurisdiction to recover fees directly related to appellant's retention and representation of respondent in California. Because the claim arises directly from services rendered by appellant for respondent in California, limited jurisdiction existed for resolution of the claim.

[4] Additional Authorities

[a] Contract Made and to Be Performed in California

Neadeau v. Foster (1982) 129 Cal. App. 3d 234, 180 Cal. Rptr. 806 , involved the breach of a contract signed in California in which a nonresident defendant appealed from a default judgment in favor of plaintiff. Defendant contended in part that the trial court abused its discretion in denying his motion to quash service of process for lack of in personam jurisdiction. The court of appeal found that even though he had no business office, agents, or sales personnel in California, defendant did extensive business in California. The court said that even if the defendant's activities in the forum were not so pervasive as to justify the exercise of general jurisdiction, the breach of contract action was directly related to defendant's business activities within the state. Quoting *Martin v. Detroit Lions, Inc. (1973) 32 Cal. App. 3d 472, 108 Cal. Rptr. 23* (discussed in *§ 132.100[4][e]*), the court stated that when the cause of action arises out of economic activity within the state, the contacts need not consist of repeated or continuous business transactions; an isolated transaction, such as the breach of a contract made and to be performed in the state may be sufficient (*129 Cal. App. 3d 234, 240)* .

Legal Topics:

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13-132 California Points & Authorities § 132.112

§ 132.112 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground That Court Lacks Personal Jurisdiction--Sufficient Basis for Jurisdiction Exists--Defendant's Business Activity in California--Life Insurance Contract

[1] FORM

[*The following should be combined with general points and authorities concerning the defendant's business activity in California as a basis for the court's exercise of personal jurisdiction over defendant (see § 132.110).*]

IN AN ACTION FOR BREACH OF A LIFE INSURANCE CONTRACT THIS COURT MAY EXERCISE PERSONAL JURISDICTION OVER DEFENDANT INSURER WHEN THE CONTRACT HAD SUBSTANTIAL CONNECTIONS WITH THIS STATE.

Life Insurance Contract. A state court has authority to render a judgment in personam against a nonresident in an action based on a contract which has substantial connection with the state; and such substantial connection exists in the case of an action based on a life insurance contract if the contract was delivered in the state, the premiums were mailed from the state, and the insured was a resident of the state when the contractual obligation sought to be enforced became due (*McGee v. International Life Ins. Co. (1957) 355 U.S. 220, 223, 78 S. Ct. 199, 2 L. Ed. 2d 223*).

[2] Comments

[a] Use of Form

The form in [1], *above*, is for use in opposing a motion to quash service of summons under *Code Civ. Proc. § 418.10(a)(1)*, on the ground that the court has no proper basis for exercising personal jurisdiction over the defendant. The ground for opposition is that, in an action for breach of a life insurance contract by the insurer, the court may exercise personal jurisdiction over the defendant insurer when the contact had substantial connections with the state.

This form does not provide a complete memorandum, but is designed to be combined with general points and authorities relating to the defendant's business activity in California as a basis for exercising personal jurisdiction [*see §*

132.110].

In an appropriate case, the points and authorities set out in the foregoing form may be used to oppose a motion supported by the points and authorities *set out in §§ 132.85* and *132.87*.

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Life Insurance Contract

McGee v. International Life Ins. Co. *(1957) 355 U.S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 223* , involved a judgment by a California court against a Texas insurance company. In holding the judgment valid and entitled to full faith and credit in the courts of Texas, the U.S. Supreme Court stated: "Turning to this case we think it apparent that the Due Process Clause did not preclude the California court from entering a judgment binding on respondent. It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that state. The contract was delivered in California, the premiums were mailed from there and the insured was a resident of that State when he died" (*355 U.S. 220, 223)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral Overview

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13-132 California Points & Authorities § 132.113

§ 132.113 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground That Court Lacks Personal Jurisdiction--Sufficient Basis for Jurisdiction Exists--Defendant's Business Activity in California--Defective Product Sold in State

[1] FORM

[*The following should be combined with general points and authorities concerning the defendant's business activity in California as a basis for the court's exercise of personal jurisdiction over defendant (see § 132.110).*]

IN AN ACTION FOR INJURIES RESULTING FROM A DEFECTIVE PRODUCT, THIS COURT MAY EXERCISE PERSONAL JURISDICTION OVER DEFENDANT MANUFACTURER WHEN THE SALE OF THE DEFECTIVE PRODUCT WAS NOT AN ISOLATED EVENT BUT AROSE FROM DEFENDANT'S EFFORT TO SERVE THE MARKET FOR ITS PRODUCT IN THIS STATE.

Defective Product Sold in State. A court of this state has authority to render a judgment in personam against a nonresident in an action arising out of injuries caused by the use in the state of a defective product manufactured by the nonresident and sold in this state if the sale was not simply an isolated occurrence, but arose from the efforts of the manufacturer to serve, directly or indirectly, the market for its product in this state (*Secrest Machine Corp. v. Superior Court (1983) 33 Cal. 3d 664, 670, 190 Cal. Rptr. 175, 660 P.2d 399* ; *see also Buckeye Boiler Co. v. Superior Court (1969) 71 Cal. 2d 893, 902-903, 80 Cal. Rptr. 113, 458 P.2d 57*).

[2] Comments

[a] Use of Form

The form in [1], *above*, is for use in opposing a motion to quash service of summons under *Code Civ. Proc. § 418.10(a)(1)*, on the ground that the court has no proper basis for exercising personal jurisdiction over the defendant. The ground for opposition is that, in an action for damages based on an alleged defective product, the court may exercise personal jurisdiction on the nonresident manufacturer when the sale of the product in the state was not an isolated event but arose as a part of the defendant's effort to service the market for its products in the state.

This form does not provide a complete memorandum, but is designed to be combined with general points and authorities relating to the defendant's business activity in California as a basis for exercising personal jurisdiction [*see § 132.110*]. Note also that this type of action, based on the sale or introduction in this state of a defective product manufactured, distributed, or sold by a foreign corporation or nonresident individual, is one of the more common situations in which a court of this state is called on to determine whether it may properly exercise personal jurisdiction over the foreign corporation or nonresident individual. Thus, additional points and authorities relating to this type of action may also be *found in § 132.100*, the general form of memorandum opposing a motion to quash service of summons for lack of jurisdiction.

In an appropriate case, the points and authorities set out in the foregoing form may be used to oppose a motion supported by the points and authorities *set out in §§ 132.74* and *132.86*.

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Defective Product Sold in State

The facts and procedural background of ***Secrest Machine Corp. v. Superior Court*** *(1983) 33 Cal. 3d 664, 190 Cal. Rptr. 175, 660 P.2d 399* , are discussed in *§ 132.100[3][e]*. In denying the writ of mandate, the California Supreme Court, quoting *World-Wide Volkswagen Corp. v. Woodson (1980) 444 U.S. 286, 297-298, 100 S. Ct. 559, 62 L. Ed. 2d 490* (discussed in *§ 132.70[3][g]*), said that if the sale of a product of a manufacturer or distributor is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other states, it is not unreasonable to subject it to suit in one of those states if its allegedly defective merchandise has there been the source of injury to its owner or to others (*33 Cal. 3d 664, 670)* . The Court pointed out that the defendant (Secrest) had engaged in a number of acts in connection with the sale of the leveling machine to the plaintiff's employer (F&S), that some of these acts, such as the initial negotiations, took place outside California, that others, such as sending an employee to assist F&S with installation of the machine, involved the physical presence of a Secrest employee in California, and that still others involved communication by mail and phone between Secrest's Virginia office and F&S's California office, and the sending of drawings on spare parts for the machine to F&S (*33 Cal. 3d 664, 670-671)* . The Court said that all of these acts were designed to consummate a business arrangement in which Secrest would profit financially by selling its product in California, and that, although F&S initially approached Secrest, the sale was a deliberate act by Secrest which generated substantial gross income and constituted economic activity within California as a matter of commercial actuality. From the nature of the machine and the business of F&S it was evident that Secrest knew the product would, and intended that it should, enter California and here be used by F&S, and that the real party's cause of action arose directly from the intended effect (*33 Cal. 3d 664, 671)* .

The facts and procedural background of ***Buckeye Boiler Co. v. Superior Court*** *(1969) 71 Cal. 2d 893, 80 Cal. Rptr. 113, 458 P.2d 57* , are discussed in *§ 132.77[3][c]*. In denying the peremptory writ of mandate, the California Supreme Court first pointed out that former Code Civ. Proc. § 411(2) [*now see Code Civ. Proc. § 410.10*] authorized service of process on foreign corporations doing business in California, and that this section exerted the full power of the state, consistent with the due process clause, to subject foreign corporations to the jurisdiction of California courts (*71 Cal. 2d 893, 898)* . The Court said that a manufacturer whose products pass through the hands of one or more middlemen before reaching their ultimate users cannot disclaim responsibility for the total distribution pattern of the products. If the manufacturer sells its products in circumstances that it knows or should reasonably anticipate that they will ultimately be resold in a particular state, it should be held to have purposefully availed itself of the market for its products in that state (*71 Cal. 2d 893, 902)* .

[4] Additional Authorities

[a] Defective Product Sold in State

Rowe v. Dorrough (1984) 150 Cal. App. 3d 901, 198 Cal. Rptr. 131 , involved an appeal from the trial court's order quashing service on a foreign corporation whose products had allegedly caused personal injury to plaintiffs as a result of a defect. Defendant was a Japanese corporation that sold its products to a California corporation, which in turn resold the products in California and other states. Defendant had no contacts with California other than sale of its products here. The court of appeal reversed the trial court's order to quash. In reaching its conclusion that defendant had sufficient minimum contacts with the state to establish personal jurisdiction, the court extensively reviewed prior case law regarding jurisdiction. The court cited *Buckeye Boiler Co. v. Superior Court (1969) 71 Cal. 2d 893, 80 Cal. Rptr. 113, 458 P.2d 57* (*discussed under § 132.113[3][a]*), for the rules that a state's jurisdiction over a manufacturer does not depend on whether the manufacturer deals directly with residents of the state or through a middleperson, and that there is personal jurisdiction when the manufacturer sells its products in circumstances such that it knows or should reasonably anticipate that they will ultimately be resold in the state (*150 Cal. App. 3d 901, 907)* . The court acknowledged that the United States Supreme Court had set out a limit to the extension of jurisdiction in *World-Wide Volkswagen Corp. v. Woodson (1980) 444 U.S. 286, 100 S. Ct. 559* (discussed in *§ 132.70[3][g]*). However, the court cited language from *World-Wide* stating that if the sale of a product of a manufacture is not simply an isolated occurrence, but arises from the efforts of the manufacturer to directly or indirectly serve the market for its product in other states, jurisdiction may be exercised (*150 Cal. App. 3d 901, 907-908)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral Overview

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13-132 California Points & Authorities § 132.114

§ 132.114 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground That Court Lacks Personal Jurisdiction--Sufficient Basis for Jurisdiction Exists--Defendant's Business Activity in California--Foreign Parent Corporation or Nonresident Stockholder and Director Is Alter Ego of Corporation Subject to Court's Jurisdiction

[1] FORM

[*The following should be combined with general points and authorities concerning the defendant's business activity in California as a basis for the court's exercise of personal jurisdiction over defendant (see § 132.110).*]

WHEN A CORPORATE DEFENDANT SUBJECT TO THE JURISDICTION OF THIS COURT IS IN EFFECT A MERE ALTER EGO OF _____ [A FOREIGN PARENT CORPORATION *or* NONRESIDENT STOCKHOLDER(S)], THE COURT MAY PROPERLY EXERCISE ITS PERSONAL JURISDICTION OVER THE _____ [FOREIGN CORPORATION *or* STOCKHOLDER(S)] AS WELL.

[*EITHER*]

A. Corporate Defendant Is Alter Ego of Foreign Parent Corporation. Jurisdiction over a foreign parent corporation for the defalcations of its wholly owned California subsidiary is proper when the subsidiary is the alter ego of the foreign parent or when the foreign parent manipulates the affairs of the subsidiary to the detriment of the subsidiary's creditors (*Empire Steel Corp. v. Superior Court (1961) 56 Cal. 2d 823, 831, 17 Cal. Rptr. 150, 366 P.2d 502* ; *Rollins Burdick Hunter of So. Cal., Inc. v. Alexander & Alexander Services, Inc. (1988) 206 Cal. App. 3d 1, 9, 253 Cal. Rptr. 338* ; *see also Sheard v. Superior Court (1974) 40 Cal. App. 3d 207, 210, 114 Cal. Rptr. 743*).

B. Alter Ego Test Applies to Determine Issue of Control. The basic test in determining whether the foreign parent dominates and controls the domestic subsidiary is whether one corporation is the alter ego of the other (*Rollins Burdick Hunter of So. Cal., Inc. v. Alexander & Alexander Services, Inc. (1988) 206 Cal. App. 3d 1, 9, 253 Cal. Rptr. 338*).

[*OR*]

Corporate Defendant Is Alter Ego of Nonresident Stockholders. When a corporation is the alter ego of nonresident stockholders so as to justify disregard of the corporate entity, jurisdiction over the corporation will support jurisdiction over the stockholders (*Sheard v. Superior Court (1974) 40 Cal. App. 3d 207, 210, 114 Cal. Rptr. 743*).

[2] Comments

[a] Use of Form

The form in [1], *above*, is for use in opposing a motion to quash service of summons under *Code Civ. Proc. § 418.10(a)(1)*, on the ground that the court has no proper basis for exercising personal jurisdiction over the defendant. The ground for opposition is that, in an action in which the court has proper personal jurisdiction over a corporate defendant, it may also exercise personal jurisdiction over that corporation's foreign parent corporation or nonresident stockholders when the corporation is merely the alter ego of the foreign parent or the stockholders.

This form does not provide a complete memorandum, but is designed to be combined with general points and authorities relating to the defendant's business activity in California as a basis for exercising personal jurisdiction [*see § 132.110*].

In an appropriate case, the points and authorities set out in the foregoing form may be used to oppose a motion supported by the points and authorities *set out in §§ 132.82* and *132.84*.

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Corporate Defendant Is Alter Ego of Foreign Parent Corporation

Empire Steel Corp. v. Superior Court *(1961) 56 Cal. 2d 823, 17 Cal. Rptr. 150, 366 P.2d 502* , was a proceeding in prohibition arising out of an action by a California corporation, Associated Metals and Minerals Corporation (Associated), against the defendant, Empire Steel Corporation of Texas, Inc. (Empire), for damages for alleged breach of contract by Empire's wholly owned California subsidiary, Gachman Steel Corporation of California (Gachman), which was in bankruptcy. Associated alleged that Gachman operated in California as Empire's alter ego and that Empire's conduct with respect to Gachman was fraudulent as to those firms doing business with Gachman. Empire's motion to quash service of process for lack of minimum contacts with California was denied, and Empire petitioned for a writ of prohibition to prevent the trial court from continuing with the action.

In denying the peremptory writ, the California Supreme Court held that Empire's contacts with California (*56 Cal. 2d 823, 831-833)* were sufficient to constitute the doing of business in this state within the meaning of former Code Civ. Proc. § 411(2) [*now see Code Civ. Proc. § 410.10*] (*56 Cal. 2d 823, 833, 835)* , and that even though all of Empire's relevant activities were technically carried out in Texas, their alleged consequences within California would be sufficient to sustain jurisdiction over Empire in connection with plaintiff's action (*56 Cal. 2d 823, 832)* . The Court nevertheless said that jurisdiction over a foreign parent association has been sustained when the local subsidiary was found to be the alter ego of the sales department of a foreign corporation and when the foreign parent manipulated the affairs of the subsidiary to the detriment of creditors of the subsidiary, and pointed out that Associated had alleged that Empire manipulated the affairs of Gachman to the detriment of third parties dealing with the subsidiary (*56 Cal. 2d 823, 831)* . The Court also pointed out that Empire had engaged in activities creating substantial contacts with

California in relation to the claim asserted, that there appeared to have been ample evidence in the record before the trial court from which the inference could have been drawn that Empire knowingly caused its California subsidiary to make the contracts in suit while Gachman was in fact insolvent but had the appearance of financial responsibility, and that Empire's activities in keeping Gachman in business beyond a period safe for persons dealing with Gachman was manifestly related to plaintiff's cause of action for breach of contract, since in all probability plaintiff would not have contracted to sell steel to an obviously insolvent or defunct Gachman corporation (*56 Cal. 2d 823, 832)* .

Rollins Burdick Hunter of So. Cal., Inc. v. Alexander & Alexander Services, Inc. *(1988) 206 Cal. App. 3d 1, 253 Cal. Rptr. 338* , arose out of an action by a California corporation against, among others, another California corporation, its foreign parent corporation, its foreign grandparent corporation, and the chairman of the grandparent corporation's board of directors, among others, for damages for breach of an agreement authorized by statute, interference with contractual relations, unfair competition, breach of fiduciary duty, and fraudulent conversion. The crux of the complaint was as follows: (1) defendant foreign corporation (the grandparent corporation) was the sole shareholder of another defendant foreign corporation (the parent corporation) which in turn was the sole shareholder of the California corporation: (2) an individual defendant (the seller) had sold his insurance business, including its goodwill, to plaintiffs and executed a covenant not to compete; (3) following execution of the purchase and sale contract and the seller's covenant not to compete, the seller became plaintiffs' president and a member of its board of directors; (4) subsequently, unknown to plaintiffs, the defendant grandparent, parent, and California corporations agreed to aid the seller in breaching his covenant not to compete with plaintiffs; and (5) pursuant to the agreement, the seller terminated his employment with plaintiffs, became an employee of the defendant California corporation, and diverted from plaintiffs for the benefit of the defendants certain insurance contracts which he had sold to plaintiffs. The motion of the grandparent corporation and its board chairman to quash service of summons for lack of personal jurisdiction was granted, and plaintiffs appealed.

The court of appeal affirmed the order as to the board chairman, but reversed the order as to the grandparent corporation. The court said that judicial jurisdiction over a subsidiary corporation will give the state judicial jurisdiction over the parent corporation if the parent so controls and dominates the subsidiary as in effect to disregard the latter's independent and corporate existence (*206 Cal. App. 3d 1, 9)* .

Sheard v. Superior Court *(1974) 40 Cal. App. 3d 207, 114 Cal. Rptr. 743* , was a mandate proceeding to compel the trial court to quash service of summons on nonresidents who were directors and the sole stockholders of an out-of-state corporation that was doing interstate business with California residents. Although the court granted the writ on the ground the plaintiff had failed to prove facts requisite to an effective service on the individuals (*40 Cal. App. 3d 207, 211-212)* , the court of appeal said that it has been held in this state that if a subsidiary corporation acts as an agent of the parent corporation or is so controlled by the parent as to justify disregard of the separate entity, jurisdiction over the subsidiary will support jurisdiction over the parent (*40 Cal. App. 3d 207, 210)* .

[b] Alter Ego Test Applies to Determine Issue of Control

The procedural background of ***Rollins Burdick Hunter of So. Cal., Inc. v. Alexander & Alexander Services, Inc.*** *(1988) 206 Cal. App. 3d 1, 253 Cal. Rptr. 338* , is *discussed under § 132.114[3][a]*. In reversing the order quashing service on the grandparent corporation, the court said that ownership of all the stock of the subsidiary and the existence of common directors does not in itself provide the requisite domination and control over the subsidiary by the parent for purposes of jurisdiction, that the basic test is whether one corporation is the alter ego of the other. In other words, what is required is something more than that amount of control of one corporation over another which mere common ownership and directorship would indicate (*206 Cal. App. 3d 1, 9)* . In opposition to the motion to quash, plaintiffs had submitted evidence showing: (1) the grandparent approved the California corporation's major budgets, including hiring and compensation, real estate purchases or leases, and purchases and sales of insurance businesses, provided the California corporation with guidelines by which to invest nonfiduciary funds, selected the California corporation's public accountants and controlled all routine and spot audits of the California corporation, determined the compensation

of all executives of the California corporation, and treated the employees of the California corporation as its own; (2) the California corporation's employees were paid from outside California under a system set up by the grandparent; (3) the California corporation's board of directors was made up entirely of employees of the grandparent or parent corporation, received no compensation, and never held a meeting; (4) the chairman of the grandparent's board of directors came to California at least once a year where he met with the California corporation's employees, and, to further the California corporation's business, met with senior executives of major corporations which either laced at least some of their insurance business with the California corporation or did not do business with the California corporation in order to solicit insurance business for the California corporation (*206 Cal. App. 3d 1, 11)* . The court said that the grandparent was a separate corporate entity only in name and form, that every facet of the California corporation's business, from broad policy decisions to routine matters of day-to-day operation, appeared to have been dictated by the grandparent, and that, under these circumstances, a valid basis existed for California's exercise of personal jurisdiction over the grandparent corporation (*206 Cal. App. 3d 1, 11)* .

[c] Corporate Defendant Is Alter Ego of Nonresident Stockholders

Sheard v. Superior Court *(1974) 40 Cal. App. 3d 207, 114 Cal. Rptr. 743* , was a mandate proceeding to compel the trial court to quash service of summons on nonresidents who were directors and the sole stockholders of an out-of-state corporation that was doing interstate business with California residents. The court of appeal granted the writ on the ground the plaintiff had failed to prove facts requisite to an effective service on the individuals (*40 Cal. App. 3d 207, 211-212)* . It stated that, in this state, jurisdiction over a subsidiary corporation will support jurisdiction over the parent when the subsidiary corporation acts as an agent of the parent corporation or is so controlled by the parent as to justify disregard of the subsidiary's separate entity. The court concluded that it was persuaded that, when a corporation is the alter ego of the stockholders so as to justify disregard of the corporate entity, jurisdiction over the corporation will support jurisdiction over the stockholders (*40 Cal. App. 3d 207, 210)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral OverviewCivil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral Overview

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13-132 California Points & Authorities § 132.115

§ 132.115 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground That Court Lacks Personal Jurisdiction--Sufficient Basis for Jurisdiction Exists--Defendant's Business Activity in California--Officer, Director, or Stockholder of Foreign Corporation Is Doing Business in Individual Capacity

[1] FORM

[*The following should be combined with general points and authorities concerning the defendant's business activity in California as a basis for the court's exercise of personal jurisdiction over defendant (see § 132.110).*]

THIS COURT MAY PROPERLY EXERCISE ITS PERSONAL JURISDICTION OVER _____ [*name*] ON THE BASIS OF HIS/HER CONTACTS WITH THIS STATE IN HIS/HER CAPACITY AS AN INDIVIDUAL, NOTWITHSTANDING THE FACT THAT HE/SHE IS ALSO _____ [AN OFFICER *and/or* DIRECTOR *and/or* STOCKHOLDER] OF [DEFENDANT] _____ [*name of corporation*].

Defendant Is Doing Business in California in Capacity as Individual as Well as in Representative Capacity. An officer of a foreign corporation is subject to the jurisdiction of the California courts when he or she engaged in business in California in his or her individual capacity, as well as on behalf of the corporation, or benefited individually from the protection of the laws of California, and the cause of action arises out of his or her conduct (*Mihlon v. Superior Court (1985) 169 Cal. App. 3d 703, 711, 215 Cal. Rptr. 442*).

[2] Comments

[a] Use of Form

The form in [1], *above*, is for use in opposing a motion to quash service of summons under *Code Civ. Proc. § 418.10(a)(1)*, on the ground that the court has no proper basis for exercising personal jurisdiction over the defendant. The ground for opposition is that the defendant, while acting in a representative capacity for a foreign corporation, also acted in an individual capacity sufficient to justify the court's exercise of limited personal jurisdiction over him or her.

This form does not provide a complete memorandum, but is designed to be combined with general points and authorities relating to the defendant's business activity in California as a basis for exercising personal jurisdiction [*see § 132.110*].

In an appropriate case, the points and authorities set out in the foregoing form may be used to oppose a motion supported by the points and authorities *set out in § 132.82*.

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Defendant Is Doing Business in California in Capacity as Individual as Well as in Representative Capacity

Mihlon v. Superior Court *(1985) 169 Cal. App. 3d 703, 215 Cal. Rptr. 442* , was a proceeding in mandate arising out of an action by a California attorney against the president of a foreign corporation and the corporation's attorney for conspiracy to induce the foreign corporation to dismiss plaintiff as corporate counsel in a prior California action against the corporation. Plaintiff had been retained to represent the corporation in the California action, which had been settled without advising plaintiff, who was the attorney of record, and without paying him his contingency fee, which he claimed amounted to $700,000. The plaintiff further alleged that the corporation, which was in bankruptcy in Maryland, was the defendant's under-capitalized alter ego. The defendants moved for an order quashing service of summons on the ground that all their alleged wrongful conduct relative to the underlying action was in their official capacities as either officers or corporate counsel of the foreign corporation and such conduct could not be the basis for imposition of jurisdiction over them individually. In his affidavit in support of the motion, the corporate president averred that he was a resident of Maryland, owned no California property, had no personal business here, and had never entered an appearance in any judicial proceeding in California in his individual capacity as either a plaintiff or defendant, that he was a 51-percent shareholder, president, and a director of the corporation, and that the corporation was formed in 1980 with $10,000 initial capital contribution. However, he acknowledged that at an unspecified time he came to California and engaged in negotiations with prospective producers concerning the sale of a movie script owned by the corporation, the resulting contract for which was executed in Maryland, that plaintiff sent him letters soliciting legal representation of the corporation in the California action, that he executed the enclosed retainer agreements (one of which was in his individual capacity and two on behalf of the corporation as president), and that he returned them to plaintiff by mail. In his counterdeclaration, plaintiff stated he was approached in California to represent the president and the corporation in a contract dispute with CBS, Inc., in California, and that he was the only attorney of record for the president and corporation in the prior California action. The corporate president's motion to quash was denied.

In denying the peremptory writ of mandate, the court of appeal said that the evidence showed that the president acted in his capacity as president and director of the corporation and that he acted in his capacity as an individual with the intent to do business and litigate in California state courts and to benefit generally from the protection of the laws of California, and that the act of the president in retaining plaintiff to represent him as an individual in California concerning the same contractual dispute as that of the corporation with CBS, Inc., in furtherance of his interests as an individual, constituted sufficient purposeful availment of the protection of California law and California activity related to plaintiff's underlying causes of action to render limited jurisdiction over the president reasonable (*169 Cal. App. 3d 703, 711)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem

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13-132 California Points & Authorities § 132.116

§ 132.116 Opposing Motion to Quash Service of Summons [Code Civ. Proc. § 418.10] on Ground That Court Lacks Personal Jurisdiction--Sufficient Basis for Jurisdiction Exists--Defendant's Business Activity in California--Out-of-State Law Firm Practiced Law in California

[1] FORM

THIS COURT MAY PROPERLY EXERCISE ITS PERSONAL JURISDICTION OVER DEFENDANT LAW FIRM ON THE BASIS THAT IT PRACTICED LAW IN CALIFORNIA BY ITS EMPLOYMENT OF AN ATTORNEY LICENSED TO PRACTICE IN CALIFORNIA WHO PROVIDED LEGAL SERVICES UNDER CALIFORNIA LAW TO CALIFORNIA RESIDENTS.

A. Defendant Is Doing Business in California. California may properly exercise personal jurisdiction over an out-of-state law firm which practiced law in California when it employed an attorney licensed to practice law only in California who performed legal services governed by California law for California residents seeking recourse before California courts (*Simons v. Steverson (2001) 88 Cal. App. 4th 693, 697, 106 Cal. Rptr. 2d 193*).

[2] Comments

[a] Use of Form

The memorandum of points and authorities in [1], *above*, may be submitted in opposition to a defendant's motion to quash service of summons under *Code Civ. Proc. § 418.10*, on the ground that the court lacks personal jurisdiction over the defendant, an out-of-state law firm.

This form does not provide a complete memorandum, but is designed to be combined with general points and authorities relating to the defendant's business activity in California as a basis for exercising personal jurisdiction [*see § 132.110*]. Counsel should insert argument in the showing the relationship between the facts of the case and the points of law stated.

For discussion of the recovery of attorney's fees by an attorney hired to perform services in California against an

out-of-state defendant, even if the defendant previously succeeding in quashing service of summons for insufficient contacts with California, see *§ 132.111*.

[3] Discussion of Authorities

[a] Out-of-state Law Firm Was Doing Business in California

In ***Simons v. Steverson*** *(2001) 88 Cal. App. 4th 693, 106 Cal. Rptr. 2d 193* , the defendant New York law firm was sued by California residents for, among other things, malpractice. The plaintiffs had retained an attorney, licensed to practice only in California, who was an associate for the firm in New York. The attorney provided legal services under California law to the plaintiffs. The firm moved to quash service of summons and the court granted the motion. The court of appeal reversed, holding that the firm's practice of law in California was sufficient to justify the exercise of personal jurisdiction over it. The court concluded the undisputed jurisdictional facts established ample contacts to warrant specific jurisdiction over the firm (*88 Cal. App. 4th 693, 712)* . The court pointed out that the attorney's physical presence in California, or his absence, was not determinative because the practice of law in California can occur although the attorney is not physically present in California by the attorney's advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means (*88 Cal. App. 4th 693, 713)* . The court stated that the crucial fact was that the firm in employing the attorney, licensed to practice law only in California, and not in New York, to represent California residents, concerning contracts to be governed by California law and involving other California residents, clearly sought to obtain benefits and exercise privileges which are peculiarly specific to California (*88 Cal. App. 4th 693, 713-714)* . The court also concluded that the firm failed to proffer any compelling circumstances which would render the exercise of personal jurisdiction over it unreasonable (*88 Cal. App. 4th 693, 714)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral Overview

California Points & Authorities

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13-132 California Points & Authorities §§ 132.117-132.119

[Reserved]

§§ 132.117[Reserved]

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13-132 California Points & Authorities § 132.120

§ 132.120 Supporting Ex Parte Application for Order for Publication of Summons [Code Civ. Proc. § 415.50]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*]	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF EX PARTE APPLICATION FOR ORDER FOR PUBLICATION OF SUMMONS
vs. _____ [*name*],	)	
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD AUTHORIZE SERVICE OF THE SUMMONS ON DEFENDANT BY PUBLICATION PURSUANT TO SECTION 415.50 OF THE CODE OF CIVIL PROCEDURE BECAUSE THE DEFENDANT CANNOT WITH REASONABLE DILIGENCE BE SERVED IN ANOTHER MANNER.

A. Defendant Cannot With Reasonable Diligence Be Served in Another Manner. The court may allow plaintiff to serve a summons by publication on defendant when plaintiff has exercised reasonable diligence and has been unable to locate defendant (*Code Civ. Proc § 415.50(a), (e)*). Plaintiff has exercised reasonable diligence when, in good faith, a thorough, systematic investigation and inquiry to determine the defendant's whereabouts has been conducted and plaintiff has been unable to locate defendant (*see Vorburg v. Vorburg (1941) 18 Cal. 2d 794, 797, 117 P.2d 875*).

[*EITHER*]

B. A Cause of Action Exists Against Defendant. The court may authorize service by publication if it appears to the court's satisfaction that a cause of action exists against the defendant (Code Civ. Proc § 415.50(a)(1); *see Harris v. Cavasso (1977) 68 Cal. App. 3d 723, 725-726, 137 Cal. Rptr. 410*).

[*OR*]

C. Defendant Is Necessary or Proper Party to Action. The court may authorize service by publication if it appears to the court's satisfaction that defendant is a necessary or proper party to the action (*Code Civ. Proc § 415.50(a)(1)*; *see Harris v. Cavasso (1977) 68 Cal. App. 3d 723, 725, 137 Cal. Rptr. 410* .

[*OR*]

D. Defendant _____ [Has *or* Claims] Interest in Property in California. The court may authorize service by publication if it appears to the court's satisfaction that defendant _____ [has *or* claims] an interest in property in California (*Code Civ. Proc § 415.50(a)(2)*).

[*OR*]

E. Relief Demanded in Action Consists Wholly or Partially in Excluding Defendant From Any Interest in Property in California. The court may authorize service by publication if it appears to the court's satisfaction that the relief demanded consists wholly or partially in excluding defendant from any interest in property in California (*Code Civ. Proc § 415.50(a)(2)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

The form of points and authorities in [1], *above*, may be submitted in support of an ex parte application for order for publication of summons pursuant to *Code Civ. Proc. § 415.50*. Counsel must show that the plaintiff has exercised reasonable diligence in an attempt to serve the defendant in another manner and that either (1) a cause of action exists against the defendant; (2) defendant is a necessary or proper party to the action; (3) defendant has or claims an interest in property in California; or (4) the relief demanded in the action consists wholly or partially in excluding the defendant from any interest in the property in California [*Code Civ. Proc. § 415.50(a)*].

These points and authorities may be combined, if appropriate, with forms of points and authorities relating to the specific cause of action alleged against the defendant [*see* particular chapters throughout this publication, such as Ch.

50, *Contracts* and Ch. 165, *Negligence*] or to the joinder of necessary parties [*see* Ch. 168, *Parties*].

As an ex parte application, the application for order for publication of summons will not be directly opposed. If the court grants the application, however, the propriety of service by publication may be challenged by a later motion to quash or to set aside a default judgment. For points and authorities relating to statutory relief from void judgments or orders, see Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders* , Pt. II. For points and authorities relating to supporting or opposing motions to quash service of summons, see Subpart B of this chapter, *above*.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should outline the search made for the defendant and identify the defendant's connection with the case, citing to the supporting affidavit or declaration.

[b] Related Pleading and Practice Forms

For forms of ex parte applications for order for publication of summons, and related papers, see California Forms of Pleading and Practice, Ch. 518, *Service of Summons and Papers* (Matthew Bender).

[3] Discussion of Authorities

[a] Defendant Cannot With Reasonable Diligence Be Served in Another Manner

Code Civ. Proc. § 415.50(a) provides that a summons may be served by publication if upon affidavit it appears to the satisfaction of the court in which the action is pending that the party to be served cannot with reasonable diligence be served in another manner and that (1) a cause of action exists against the party upon whom service is to be made or he or she is a necessary or proper party to the action; or (2) the party to be served has or claims an interest in real or personal property in California that is subject to the jurisdiction of the court or the relief demanded in the action consists wholly or in part in excluding the party from any interest in the property.

Code Civ. Proc. § 415.50(e) provides that as a condition of establishing that the party to be served cannot with reasonable diligence be served in another manner specified in this article, the court may not require that a search be conducted of public databases where access by a registered process server to residential addresses is prohibited by law or by published policy of the agency providing the database, including, but not limited to, voter registration rolls and records of the Department of Motor Vehicles.

In ***Vorburg v. Vorburg*** *(1941) 18 Cal. 2d 794, 117 P.2d 875* , plaintiff obtained an order for publication of summons in a divorce action. After defendant failed to answer, a final decree of divorce was entered in favor of plaintiff. Fourteen years later, plaintiff moved to set aside the final decree of divorce on the ground that due diligence was not exercised to locate the defendant. The trial court denied the motion.

The Supreme Court affirmed the trial court's order denying plaintiff's motion, holding that the plaintiff presented sufficient facts to the trial court to demonstrate that due diligence was exercised pursuant to former Code Civ. Proc. §§ 412, 413 [*now see Code Civ. Proc. § 415.50(a)*]. The question of whether due diligence was exercised is a factual one for the trial court and, if the facts set forth in the affidavit have a legal tendency to show that plaintiff exercised diligence in seeking to locate the defendant, the trial court's ruling will be regarded as having the same effect as the court's decision upon any other matter of fact. Despite the plaintiff's failure to affirmatively disclose that a search had been made of telephone directories in the affidavit for publication of summons, the Supreme Court held that the trial court properly ruled that the plaintiff exercised due diligence to attempt to locate the defendant (*18 Cal. 2d 794, 796-797)* .

[b] A Cause of Action Exists Against Defendant/Defendant Is Necessary or Proper Party to Action

In ***Harris v. Cavasso*** *(1977) 68 Cal. App. 3d 723, 137 Cal. Rptr. 410* , plaintiff obtained an order for publication of summons in an action for breach of contract. A default judgment was entered against defendant and defendant moved to set aside the judgment based on the insufficiency of plaintiff's affidavit for service by publication. The trial court denied the motion.

The court of appeal reversed, holding that for service by publication pursuant to *Code Civ. Proc. § 415.50* there must be an affidavit containing a statement of some fact or facts tending to show the existence of a cause of action. Plaintiff's affidavit was devoid of any facts from which the court could conclude that a cause of action existed against the defendant, and therefore, the court properly denied the motion to set aside the judgment (*68 Cal. App. 3d 723, 726)* .

[4] Additional Authorities

[a] Defendant Cannot With Reasonable Diligence Be Served in Another Manner

Transamerica Title Ins. Co. v. Hendrix (1995) 34 Cal. App. 4th 740, 40 Cal. Rptr. 2d 614 , on an appeal from a default judgment, the court of appeal held that service by publication under *Code Civ. Proc. § 415.50* was defective when the plaintiff had been aware that the defendant was receiving mail at a post office box. A post office box is a sufficient address for *Code Civ. Proc. § 415.30* service by mail, so that plaintiff's failure to attempt such service invalidated plaintiff's application for service by publication (*34 Cal. App. 4th 740, 746)* . The court therefore reversed, and directed the trial court to vacate the default and default judgment and to permit the defendant to file an answer.

In *Donel, Inc. v. Badalian (1978) 87 Cal. App. 3d 327, 150 Cal. Rptr. 855* , the court of appeal discussed the comparable reasonable diligence requirements for service by publication under both *Code Civ. Proc. § 415.50* and Hawaii Rev. Stat. § 634-23. The court held that plaintiff failed to exercise reasonable diligence required by the Hawaii statute in attempting to locate defendant because plaintiff's diligence consisted of the single act of searching telephone directories. The court noted that other avenues must be searched as well, including city directories and tax rolls. The court also noted that plaintiff most significantly failed to inquire of the attorney who had answered previous correspondence in defendant's behalf, an inquiry which patently appeared to hold the most promise for locating defendant (*87 Cal. App. 3d 327, 332-334)* .

In *Slusher v. Durrer (1977) 69 Cal. App. 3d 747, 138 Cal. Rptr. 265* , the court of appeal discussed, in dictum, the requirement under *Code Civ. Proc. § 415.50(a)* that the plaintiff must exercise reasonable diligence in an attempt to locate the defendant to be served by publication. The court noted that the Judicial Council Comment to Section 415.50 that discusses the requirement of reasonable diligence indicates that a "thorough, systematic investigation and inquiry" be conducted in good faith (*69 Cal. App. 3d 747, 756)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral Overview

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13-132 California Points & Authorities §§ 132.121-132.129

[Reserved]

§§ 132.121[Reserved]

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13-132 California Points & Authorities § 132.130

§ 132.130 Supporting Motion to Stay or Dismiss Action or Proceeding for Inconvenient Forum [Code Civ. Proc. §§ 410.30(a), 418.10(a)(2)]--Factors Weigh in Favor of Stay or Dismissal

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO STAY OR DISMISS _____ [ACTION *or* PROCEEDING] FOR INCONVENIENT FORUM [Code Civ. Proc. § _____ (410.30(a) *or* 418.10(a)(2))]
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE MOTION TO STAY OR DISMISS THIS _____ [ACTION *or* PROCEEDING] ON THE GROUND THAT CALIFORNIA IS AN INCONVENIENT FORUM FOR TRIAL SHOULD BE GRANTED BECAUSE A CONSIDERATION OF THE PRIMARY FACTORS INVOLVED IN THIS CASE DEMAND THAT THE CASE BE TRIED IN _____ [*specify alternative forum*].

[*EITHER, if defendant has not made a general appearance*]

A. Motion to Stay or Dismiss for Inconvenient Forum. On or before the last day of his or her time to plead or within any further time that the court may for good cause allow, a defendant may serve and file a notice of motion to stay or dismiss the action on the ground of inconvenient forum (*Code Civ. Proc. § 418.10(a)(2)*).

[*OR, if defendant has made a general appearance*]

A. Motion to Stay or Dismiss for Inconvenient Forum. When a court on motion of a party finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just (*Code Civ. Proc. § 410.30(a)*).

[*CONTINUE*]

B. Considerations of Court. In making its determination to stay or dismiss an action, the court may take into account any consideration which legitimately bears on the relative suitability or convenience of the alternative forums (*Corrigan v. Bjork Shiley Corp. (1986) 182 Cal. App. 3d 166, 173, 227 Cal. Rptr. 247* (*disapproved on other grounds in Stangvik v. Shiley Inc. (1991) 54 Cal. 3d 744, 761, 764, 1 Cal. Rptr. 2d 556, 819 P.2d 14*)).

C. Factors to Be Considered And Balancing of Factors. The factors, which have been characterized as involving either the private interests of the parties or the public's interest in the litigation, are numerous. Basically, the court looks to the relative convenience and fairness to the parties and witnesses in favoring one forum over another, which forum will best serve the interests of judicial efficiency, which forum is most able to obtain jurisdiction over the parties and compel witnesses to testify, and the relative interest of each state in adjudicating the issue (*Corrigan v. Bjork Shiley Corp. (1986) 182 Cal. App. 3d 166, 173-174, 227 Cal. Rptr. 247* (*disapproved on other grounds in Stangvik v. Shiley Inc. (1991) 54 Cal. 3d 744, 761, 764, 1 Cal. Rptr. 2d 556, 819 P.2d 14*)). The doctrine of forum non conveniens requires a balancing of the factors considered rather than placing undue influence on a single factor (*Morris v. AGFA Corp. (2006) 144 Cal. App. 4th 1452, 1465, 51 Cal. Rptr. 3d 301*).

D. Specific Factors Enumerated. Specific factors that have been recognized by courts as proper considerations in determining whether to stay or dismiss an action or proceeding for inconvenient forum include the following: (1) the amenability of the defendant to personal jurisdiction in the alternative forum; (2) the relative convenience to the parties and witnesses of trial in the alternative forum; (3) the choice of law (that is, the differences between conflict of law rules applicable in California and those applicable in the alternative forum); (4) the defendant's principal place of business, and the inconvenience to the defendant to defend himself or herself in the local forum; (5) the extent to which the situation, transaction, or events out of which the action arose exists, occurred in, or had a substantial relationship to this state (or, conversely, the absence of a substantial relationship to this state of the situation, transaction, or events out of which the action arose); (6) whether any party would be substantially disadvantaged by having to try the action either in California or in the forum suggested by the moving party; (7) the relative enforceability of judgments rendered in California and in the alternative forum; (8) whether witnesses would be inconvenienced if the action were prosecuted in either this state or in the forum in which the moving party asserts it ought to be tried; (9) the relative expense to the parties of proceeding in California or in the alternative forum; (10) whether a view of the premises by the trier of fact will or might be necessary or helpful in deciding the case; (11) whether prosecution of the action in California will or may place a burden on the state judicial resources which is unfair, inequitable, or disproportionate to the relationship of the parties or cause of action to California; (12) whether the parties participating in the action have a relationship to this state which imposes on them an obligation to participate in judicial proceedings in the courts of this state; (13) the interest of California in providing a forum for some or all of the parties to the action; (14) the interest, if any, of this

state in regulating the situation or conduct involved; (15) the avoidance of a multiplicity of suits and inconsistent adjudications; (16) the relative availability and access to sources of evidence, which would include relative ease of access to sources of proof; (17) the availability of compulsory process to secure the attendance of witnesses in California as contrasted with such availability in the alternative forum; (18) the relative advantages and obstacles to a fair trial in California and in the alternative forum; (19) the California public interest in the case; (20) whether administrative difficulties and other inconveniences from crowded calendars and congested courts are more probable in California as opposed to the alternative forum; (21) whether imposition of jury duty is imposed on a community having no relation to the litigation; (22) the injustice to and burden on local courts and taxpayers; (23) the difficulties and inconvenience to the moving party, to the court, and to the jurors hearing the case, attending presentation of evidence by deposition; (24) the availability of the suggested alternative forum; and (25) the other practical considerations that make trial of a case convenient, expeditious, and inexpensive (*see Corrigan v. Bjork Shiley Corp. (1986) 182 Cal. App. 3d 166, 174 n.2, 227 Cal. Rptr. 247* (*disapproved on other grounds in Stangvik v. Shiley Inc. (1991) 54 Cal. 3d 744, 761, 764, 1 Cal. Rptr. 2d 556, 819 P.2d 14*); *Roulier v. Cannondale (2002) 101 Cal. App. 4th 1180* ; *Appalachian Ins. Company v. Superior Court (1984) 162 Cal. App. 3d 427, 435-436 n.2, 208 Cal. Rptr. 627* ; *Hemmelgarn v. Boeing Co. (1980) 106 Cal. App. 3d 576, 584-585, 165 Cal. Rptr. 190* (*disapproved on another ground in Stangvik v. Shiley Inc. (1991) 54 Cal. 3d 744, 761, 1 Cal. Rptr. 2d 556, 819 P.2d 14*); *Jagger v. Superior Court (1979) 96 Cal. App. 3d 579, 585-586, 158 Cal. Rptr. 163* ; *Henderson v. Superior Court (1978) 77 Cal. App. 3d 583, 595-597, 142 Cal. Rptr. 478* ; *Great Northern Ry. Co. v. Superior Court (1970) 12 Cal. App. 3d 105, 112-115, 90 Cal. Rptr. 461*).

[*Optional*] **E. Relative Financial Condition of Parties.** In addition, the relative financial condition of the parties is a factor which every court must necessarily take into account to some degree in determining the convenience or inconvenience of the forum (*Allison v. Superior Court (1979) 99 Cal. App. 3d 993, 1001, 160 Cal. Rptr. 309*).

[*Optional*] **F. Neutral Factors.** Factors, pro and con, in any given case may be neutral in that they cancel each other out (*see Corrigan v. Bjork Shiley Corp. (1986) 182 Cal. App. 3d 166, 174-175, 227 Cal. Rptr. 247* (*disapproved on other grounds in Stangvik v. Shiley Inc. (1991) 54 Cal. 3d 744, 761, 764, 1 Cal. Rptr. 2d 556, 819 P.2d 14*)).

[*Optional*] **G. Other Factors.** While some courts have delineated specific facts to consider in ruling on a motion to stay or dismiss an action for forum non conveniens, courts are not limited to these factors. In ruling on a forum non conveniens motion, courts examine all of the circumstances, balance the private and public interests, and look to the relative convenience and fairness of the parties, the witnesses, and the courts (*Delfosse v. C.A.C.I., Inc.-Federal (1990) 218 Cal. App. 3d 683, 687-688, 267 Cal. Rptr. 224*).

[*In an appropriate case, add additional points and authorities set out in §§ 132.150 -132.154.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The form in [1], *above*, is for use by a resident or nonresident defendant in support of a motion stay or dismiss the action or proceeding on the ground that California is an inconvenient forum and that the case should be tried in another forum.

The first alternative Paragraph A should be used if the motion is made by a defendant who has not made a general appearance in the action; if the defendant has made a general appearance, the provisions of *Code Civ. Proc. § 418.10* do not apply and the motion must be made under *Code Civ. Proc. § 410.30(a)*, as set out in the second alternative Paragraph A [*see Code Civ. Proc. § 410.30(b)*]. Note that, if the defendant has not made a general appearance, the motion under *Code Civ. Proc. § 418.10* may be combined with a motion to quash service of summons for lack of jurisdiction [*see Code Civ. Proc. § 418.10(a)* and §§ 132.20-132.22, 132.40, 132.70].

The additional memoranda *set out in §§ 132.150 -132.154* should be combined, when appropriate, with the points and authorities set out in this form.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. For example, counsel should enumerate the particular facts that, in light of the enumerated specific factors, weigh in favor of a stay or dismissal of the case.

[b] Weight of Factors

The factors listed in Paragraph D do not bear equal weight. For example, one factor that is given considerable weight is the plaintiff's status as resident of California. For further discussion of this factor, see *§ 132.12* [*see also § 132.150*].

[c] Additional Factors in Action Against California Manufacturer by Foreign Plaintiff

In an action against a California manufacturer by a foreign plaintiff for an injury sustained outside the country, two other factors to be considered are (1) the competitive disadvantage to California business that would result if California manufacturers were called on to defend lawsuits involving extraterritorial injuries; and (2) the interests and policy concerns in the litigation of the country of residence of the foreign plaintiff [*Stangvik v. Shiley Inc. (1991) 54 Cal. 3d 744, 760, 1 Cal. Rptr. 2d 556, 819 P.2d 14]* .

[d] Relationship of Personal Jurisdiction and Inconvenient Forum on Jurisdiction

In ruling that California is an inconvenient forum, a trial court necessarily implies that California has jurisdiction over the defendant. A motion to dismiss on the ground of forum non conveniens is inconsistent with and necessarily phrased in the alternative to a motion to quash service for lack of jurisdiction. This is because a court, in dismissing a suit on the grounds of forum non conveniens, relinquishes jurisdiction it already has over the action, whereas a court, in quashing service, determines that it never had jurisdiction over the parties and the cause. Once jurisdiction is established, the court, in its discretion, can stay or dismiss an action if it finds that in the interest of substantial justice the case should be heard in another forum [*Credit Lyonnais Bank Nederland, N.V. v. Manatt, Phelps, Rothenberg & Tunney (1988) 202 Cal. App. 3d 1424, 1430-1431 n.8, 249 Cal. Rptr. 559]* .

The U.S. Supreme Court holds that a district court has discretion to respond at once to a defendant's forum non conveniens plea, and need not take up first any other threshold objection. In particular, a court need not resolve whether it has authority to adjudicate the cause (subject matter jurisdiction) or personal jurisdiction over the defendant if it determines that, in any event, a foreign tribunal is the more suitable arbiter of the merits of the case [*Sinochem Int'l Co. Ltd v. Malaysia Int'l Shipping Corp. (2007) ___ U.S. ___, 127 S. Ct. 1184, 167 L. Ed. 2d 15]* .

Although a motion to stay or dismiss an action for inconvenient forum concedes in personam jurisdiction, many of the factors that are a proper consideration on a motion to stay or dismiss for inconvenient forum [*see § 132.130*] overlap the factors considered by the court in determining whether it has limited jurisdiction over a nonresident defendant [*see § 132.70*].

[e] Related Uses

This memorandum may be adapted for use in support of a petition for writ of mandate to compel the trial court to stay or dismiss the action or proceeding after it has declined to do so. They may also be used in a trial or appellate brief.

[f] Related Pleading and Practice Forms

For a form of notice of motion to stay or dismiss an action for inconvenient forum, and related papers, see California Forms of Pleading and Practice, Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances* .

[g] Opposing Memoranda

For a memorandum of points and authorities that may, in an appropriate case, be used in opposition to the foregoing memorandum, see *§ 132.140*.

[3] Discussion of Authorities

[a] Considerations of Court

Corrigan v. Bjork Shiley Corp. (1986) 182 Cal. App. 3d 166, 227 Cal. Rptr. 247 , appeal dismissed, 479 U.S. 1049 (1987) , was a wrongful death action brought by Australian residents for the death of their decedent, a citizen and resident of Australia, against a California corporation that had manufactured a heart valve prosthesis that allegedly fragmented after implantation in plaintiffs' decedent by Australian doctors in an Australian hospital. Several of the components of the valve allegedly fragmented and separated from the valve entering the decedent's circulatory system. A resulting blockage allegedly caused cardiac arrest from which she could not be resuscitated. The complaint alleged products liability negligence, strict liability, and breach of express and implied warranties. The defendant answered the complaint without alleging third-party negligence, and subsequently moved to dismiss the action on the grounds California was an inconvenient forum and Australia was the proper alternative forum. The trial court denied the motion to dismiss, but, finding that the prejudice to defendant was greater if the action remained in California than that to plaintiffs if it were brought in Australia, stayed the action pursuant to *Code Civ. Proc. § 430.10(a)* so that it might be brought in Australia. Plaintiffs appealed.

In reversing the order, the court of appeal, after pointing out that one of the appropriate forums in which an action against a corporate defendant may be brought is the state of its incorporation or principal place of business (*182 Cal. App. 3d 166, 173, n.1*), said that, in making its determination to stay or dismiss, the trial court may take into account any consideration which legitimately bears on the relative suitability or convenience of the alternative forums (*182 Cal. App. 3d 166, 173)* .

Note that *Corrigan* was disapproved on other grounds in *Stangvik v. Shiley Inc. (1991) 54 Cal. 3d 744, 761, 764, 1 Cal. Rptr. 2d 556, 819 P.2d 14* .

[b] Factors to Be Considered And Balancing of Factors

The facts and procedural background of ***Corrigan v. Bjork Shiley Corp.*** *(1986) 182 Cal. App. 3d 166, 227 Cal. Rptr. 247 , appeal dismissed, 479 U.S. 1049 (1987)* , are *discussed under § 132.130[3][a]*. In reversing the order staying the action, the court of appeal said that the remaining factors, aside from the plaintiff's choice of the forum and the lack of a suitable alternative forum [*see § 132.140*], have been characterized as involving either the private interests of the parties or the public's interest in the litigation, and are numerous. Basically, the court looks to the relative convenience and fairness to the parties and witnesses in favoring one forum over another, which forum will best serve the interests of judicial efficiency, which forum is most able to obtain jurisdiction over the parties and compel witnesses to testify, and the relative interest of each state in adjudicating the issue (*182 Cal. App. 3d 166, 173-174)* .

Note that *Corrigan* was disapproved on other grounds in *Stangvik v. Shiley Inc. (1991) 54 Cal. 3d 744, 761, 764, 1*

Cal. Rptr. 2d 556, 819 P.2d 14 .

In ***Morris v. AGFA Corp.*** *(2006) 144 Cal. App. 4th 1452, 51 Cal. Rptr. 3d 301* , the trial court granted manufacturer's motion to stay a California survival and wrongful death action brought against them by Texas residents, a decedent's widow and two children, under the doctrine of forum non conveniens. The decedent was alleged to have suffered some injury from exposure to chemicals in California (the forum selected by plaintiffs) and subsequently experienced exposure to chemicals for almost two decades in Texas (the forum preferred by defendants). Most of the defendant's employment, and all of his medical treatment, occurred in Texas.

The Court of Appeal affirmed the order, holding that Texas was a suitable alternative forum and that the trial court did not abuse its discretion in finding that California was a seriously inconvenient forum for the trial of the action. The vast majority of the defendant's coworkers had been identified in the lawsuit were Texas residents who worked with the defendant in Texas from 1983 to 2001. Furthermore, all of the decedent's medical care was administered in Texas and the approximately 100 medical provider witnesses were located in Texas. By contrast, only the decedent's employers from 1976 to 1982 were in California, and they were out of business. Thus, the private interest factors of ease of access to prove the cause of obtaining witnesses weighed heavily in favor of Texas as a forum. All defendants agreed to consent to jurisdiction in Texas and stated that they would not assert the statute of limitations as a defense in Texas. Therefore, there was no bar to proceeding in Texas. California had little interest in that litigation given the decedent's lengthy work history in Texas, and the relative insignificance played by California corporations among the defendants. Thus, the trial court did not abuse its discretion in finding that the public interest factors weighed in favor of litigating the matter in Texas (*144 Cal. App. 4th 1452, 1466*).

In so ruling, the court explained that a trial court must be flexible in its weighing of the *Stangvik* factors. Private and public interest factors must be applied flexibly without giving undue emphasis to any one element. The doctrine of forum non conveniens cannot be based on the identification of a single factor rather than the balancing of several factors. An undue emphasis on a single factor is especially threatening to a balanced analysis because some of the matter to be weighed will by their nature point to a grant or denial of the motion. For example, the jurisdiction's interest in deterring future wrongful conduct of the defendants will usually favor retention of the action if the defendant is a resident of the forum, whereas the court's congestion factor will weigh in favor of trial in the alternate jurisdiction. The court must consider the public policy consideration, such as California's interest in deciding actions against resident corporations whose conduct in the state causes injury to persons in other jurisdictions (*144 Cal. App. 4th 1452, 1468)* .

[c] Specific Factors Enumerated

The facts and procedural background of ***Corrigan v. Bjork Shiley Corp.*** *(1986) 182 Cal. App. 3d 166, 227 Cal. Rptr. 247* , *appeal dismissed, 479 U.S. 1049 (1987)* , are *discussed under § 132.130[3][a]*. In reversing the order staying the action, the court of appeal, quoting *Hemmelgarn v. Boeing Co. (1980) 106 Cal. App. 3d 576, 584-585, 165 Cal. Rptr. 190* (discussed *below*), said that the numerous factors to be considered include the following: (1) the amenability of the parties to personal jurisdiction in this state and in the alternative forum; (2) the relative convenience to the parties and trial witnesses of the competing forums; (3) the differences in the conflict of law rules applicable in the competing forums; (4) the selection of a convenient, reasonable, and fair place of trial; (5) defendant's principal place of business; (6) the extent to which the cause of action arose out of events related to this state; (7) the extent to which any party will be substantially disadvantaged by a trial in either forum; (8) the relative enforceability of judgments rendered in this state or the alternative forum; (9) the relative inconvenience to witnesses and relative expense to parties of proceeding in this state or the alternative forum; (10) the significance and necessity of a view by the trier of fact of physical evidence not conveniently movable from the alternative forum; (11) the extent to which prosecution of the action in this state would place a burden on this state's judicial resources equitably disproportionate to the relationship of the parties or cause of action to this state; (12) the extent to which the relationship of the moving party to this state obligates him or her to participate in judicial proceedings here; (13) this state's interest in providing a forum for some or all of the parties; (14) this state's public interest in the litigation; (15) the avoidance of multiplicity of actions and inconsistent

adjudications; (16) the relative ease of access to sources of proof; (17) the availability of compulsory process for attendance of witnesses; (18) the relative advantages and obstacles to a fair trial; (19) the burden on jurors, local court, and taxpayers of a jurisdiction having a minimal relation to the subject of the litigation; (20) the difficulties and inconveniences to defendant, the court, and jurors incident to the presentation of evidence by deposition; and (21) the availability of the suggested forum (*182 Cal. App. 3d 166, 174, n.2*). The court added that a court may not consider, however, the probability, if such exists, that a California jury may be more generous in its award than the proper forum (*182 Cal. App. 3d 166, 174, n.2*).

Note that *Corrigan* was disapproved on other grounds in *Stangvik v. Shiley Inc. (1991) 54 Cal. 3d 744, 761, 764, 1 Cal. Rptr. 2d 556, 819 P.2d 14* . For further discussion regarding factors (1) (the amenability of the parties to personal jurisdiction in this state and in the alternative forum) and (21) (the availability of the suggested forum), see *Stangvik v. Shiley Inc. (1991) 54 Cal. 3d 744, 752, 1 Cal. Rptr. 2d 556, 819 P.2d 14* , discussed in *§ 132.140[3][a]*. For further discussion regarding factor (3) (the differences in the conflict of law rules applicable in the competing forums), see *Stangvik v. Shiley Inc. (1991) 54 Cal. 3d 744, 753-754, n.5, 763-764, 1 Cal. Rptr. 2d 556, 819 P.2d 14* , discussed in *§ 132.141[3][a]*.

Appalachian Ins. Company v. Superior Court *(1984) 162 Cal. App. 3d 427, 208 Cal. Rptr. 627* , was a mandate proceeding arising out of an action by an insured, a New York corporation which had its principal place of business in Connecticut and did business in California, against its Rhode Island insurer, respecting a New York claim. The insurance contract between the parties contained a "service of suit" clause by which the defendant agreed to submit to the jurisdiction of any court of competent jurisdiction which the plaintiff requested. The defendant's motion to dismiss on the ground of forum non conveniens was denied, and it petitioned the court of appeal for a writ of mandate.

The court of appeal, in considering when the doctrine of forum non conveniens applies and quoting *Gulf Oil Corp. v. Gilbert (1947) 330 U.S. 501, 507, 67 S. Ct. 839, 91 L. Ed. 1055* , said that an interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious, and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. The court will weigh the relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, vex, harass, or oppress the defendant by inflicting on him or her expense or trouble not necessary to plaintiff's own right to pursue his or her remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed. Factors of public interest also have a place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed on the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself (*162 Cal. App. 3d 427, 433-434)* .

After pointing out that the doctrine of forum non conveniens is codified in California in *Code Civ. Proc. § 410.30(a)*, the court of appeal said that the applicable criteria for ruling on a motion to dismiss or stay on the ground of forum non conveniens are set forth in *Great Northern Ry. Co. v. Superior Court (1970) 12 Cal. App. 3d 105, 112-115, 90 Cal. Rptr. 461* (discussed *below*), which listed 25 legitimate factors to be considered in determining the applicability of the doctrine, as follows: (1) the amenability of the defendant to personal jurisdiction in the alternative forum; (2) the relative convenience to the parties and witnesses of trial in the alternative forum; (3) the differences in conflict of law rules applicable in this state and in the alternative forum; (4) the defendant's principal place of business; (5) whether the situation, transaction, or events out of which the action arose exists, occurred in, or had a substantial relationship with

this state; (6) whether any party would be substantially disadvantaged in having to try the action (a) in this state or (b) in the forum in which the moving party asserts it ought to be tried; (7) whether any judgment entered in the action would be enforceable by process issued or other enforcement proceedings undertaken in this state; (8) whether witnesses would be inconvenienced if the action were prosecuted (a) in this state or (b) in the forum in which the moving party asserts it ought to be prosecuted; (9) the relative expense to the parties of maintaining the action (a) in this state and (b) in the state in which the moving party asserts the action ought to be tried; (10) whether a view of the premises by the trier of fact will or might be necessary or helpful in deciding the case; (11) whether prosecution of the action will or may place a burden on the courts of this state which is unfair, inequitable or disproportionate in view of the relationship of the parties or of the cause of action to this state; (12) whether the parties participating in the action have a relationship to this state which imposes on them an obligation to participate in judicial proceedings in the courts of this state; (13) the interest, if any, of this state in providing a forum for some or all of the parties to the action; (14) the interest, if any, of this state in regulating the situation or conduct involved; (15) the avoidance of multiplicity of actions and inconsistent adjudications; (16) the relative ease of access to sources of proof; (17) the availability of compulsory process for attendance of witnesses; (18) the relative advantages and obstacles to a fair trial; (19) the public interest in the case; (20) whether administrative difficulties and other inconveniences from crowded calendars and congested courts are more probable in the jurisdiction chosen by the plaintiff; (21) whether imposition of jury duty is imposed on a community having no relation to the litigation; (22) the injustice to, and burden on, local courts and taxpayers; (23) the difficulties and inconvenience to defendant, to the court, and to jurors hearing the case, attending presentation of testimony by depositions; (24) availability of the forum claimed to be more appropriate; and (25) the other practical considerations that make trial of a case convenient, expeditious and inexpensive (*162 Cal. App. 3d 427, 434, 435-436, n.2*). The court pointed out that, applying the above criteria to the case, 22 of the 25 criteria favored dismissal of the action (*162 Cal. App. 3d 427, 436)* , and held that the service of suit clause in the contract did not prevent application of the doctrine (*162 Cal. App. 3d 427, 437-439)* , and granted the writ.

Note that, with respect to the service of suit clause, the court stressed the critical distinction between this case and cases which have enforced contractual clauses which achieve certainty and predictability by providing for a specific forum (*162 Cal. App. 3d 427, 439)* . For further discussion regarding factors (1) (the amenability of the defendant to personal jurisdiction in the alternative forum) and (24) (availability of the forum claimed to be more appropriate), see *Stangvik v. Shiley Inc. (1991) 54 Cal. 3d 744, 752, 1 Cal. Rptr. 2d 556, 819 P.2d 14* , discussed in *§ 132.140[3][a]*. For further discussion regarding factor (3) (the differences in conflict of law rules applicable in this state and in the alternative forum) see *Stangvik v. Shiley Inc. (1991) 54 Cal. 3d 744, 753-754, n.5, 763-764, 1 Cal. Rptr. 2d 556, 819 P.2d 14* , discussed in *§ 132.141[3][a]*.

Hemmelgarn v. Boeing Co. *(1980) 106 Cal. App. 3d 576, 165 Cal. Rptr. 190* , arose out of the crash of a Pacific Western Airlines (PWA) Boeing 737 aircraft in British Columbia, Canada, in which 43 people were killed. Numerous wrongful death actions were filed in Canada and in both federal and state courts in California. The present case concerned three such actions filed in the San Diego County Superior Court against Rohr Industries, Inc. (Rohr), a manufacturer of component parts and a California resident, the Boeing Company (Boeing), a Washington corporation and manufacturer of the aircraft, and PWA, which, however, was never served. All other defendants who were potentially liable for damages were residents of Canada. The liability of Rohr and Boeing was predicated on negligence and defective design, instruction, and warning regarding the thrust reverser and associated systems of the aircraft. Their motions to dismiss for forum non conveniens were granted on condition that they submit to the jurisdiction of the British Columbia courts, and plaintiffs appealed.

The court of appeal held that the plaintiffs choice of forum had to be subordinated to the cumulative weight of other important considerations bearing on the trial court's exercise of discretion, which factors included, but were not limited to, the furtherance of California's interest in assuring to one of its residents (Rohr), in a single proceeding in Canada in which all defendants were before the court, the complete apportionment of damages among those responsible for the accident (*106 Cal. App. 3d 576, 581)* , and affirmed the judgment. In reaching this conclusion, the court said that the primary factors which must be weighed by the trial court in ruling on the motion are firmly established and have been

articulated in a number of decisions applying the doctrine (*106 Cal. App. 3d 576, 584)* . The court then listed the factors (*106 Cal. App. 3d 576, 584-585)* which are set forth in *Corrigan v. Bjork Shiley Corp. (1986) 182 Cal. App. 3d 166, 227 Cal. Rptr. 247* (discussed *above*).

Note that *Hemmelgarn* was disapproved on another ground in *Stangvik v. Shiley Inc. (1991) 54 Cal. 3d 744, 761, 1 Cal. Rptr. 2d 556, 819 P.2d 14* .

Jagger v. Superior Court *(1979) 96 Cal. App. 3d 579, 158 Cal. Rptr. 163* , was a mandate proceeding arising out of a legal separation and marriage dissolution proceeding brought by the wife. The husband was an internationally known rock singer and musician, was English by birth, and was traveling on a British passport. The wife was also a British subject and had also filed a divorce proceeding in England. The English court had ruled that both parties were subject to the English forum. The parties had executed a premarital agreement in France where they were married and where they subsequently lived together until shortly before the birth of their only child when they returned to England. The husband owned a home in England, maintained an unused apartment in France, rented an apartment in New York City, and owned property in the West Indies, on which he had commenced construction of a large house. His visits to California were infrequent and in connection with furthering his career. He owned no property in California and had recorded no albums or made any films in California since 1971. His motion to quash service of summons for lack of jurisdiction and to dismiss the action for inconvenient forum were denied, but the court granted a stay to permit the English court to proceed with due diligence.

In granting a writ of mandate directing the superior court to vacate its order denying the motion to quash, granting a stay, and denying the motion to dismiss, and to enter an order denying the motion to quash and granting a stay of the proceedings on the ground of forum non conveniens, the court of appeal listed the primary factors which must be weighed by the court ruling on a forum non conveniens motion, which factors are substantially identical to those set forth in *Corrigan v. Bjork Shiley Corp. (1986) 182 Cal. App. 3d 166, 227 Cal. Rptr. 247* (discussed *above*) (*96 Cal. App. 3d 579, 585-586)* .

In ***Henderson v. Superior Court*** *(1978) 77 Cal. App. 3d 583, 142 Cal. Rptr. 478* , the court of appeal granted a writ of mandate directing the trial court to vacate its orders denying a motion to quash service of summons and to dismiss for inconvenient forum and to grant both motions in an action by a woman to enforce a nonmarital claim against the defendant, a nonresident defendant served in Florida, which related in its entirety to an agreement made, activities performed, obligations incurred, and services rendered as companion and homemaker during an extramarital and nonmarital relationship that took place in Florida. After holding that the nature and quality of the defendant's activity in California (his horses handled by plaintiff, a horse trainer, had raced at several meets in California) subjected him to neither the general nor limited jurisdiction of the California courts (*77 Cal. App. 3d 583, 594)* , the court held that even if jurisdiction did exist, plaintiff's attempt to litigate her claim in this state would falter on the ground of inconvenient forum (*77 Cal. App. 3d 583, 594)* , and that dismissal of the action was the appropriate remedy (*77 Cal. App. 3d 583, 598)* . In reaching this conclusion, the court adopted, and set forth, the itemization of factors used to determine convenience of forum in *Great Northern Ry. Co. v. Superior Court (1970) 12 Cal. App. 3d 105, 113-115* (discussed *below*), and concluded that almost all of them affirmatively favored a Florida forum (*77 Cal. App. 3d 583, 595-597)* . The factors listed by the court are those set forth in *Appalachian Ins. Company v. Superior Court (1984) 162 Cal. App. 3d 427, 435-436 n.2, 208 Cal. Rptr. 627* (discussed *above*).

Great Northern Ry. Co. v. Superior Court *(1970) 12 Cal. App. 3d 105, 90 Cal. Rptr. 461 , cert. denied sub nom. Curtin v. Superior Court of California, 401 U.S. 1013, 91 S. Ct. 1254, 28 L. Ed. 2d 550 (1971)* , was a mandate proceeding arising out of a wrongful death action under the Federal Employers Liability Act brought by the widow and heir of a brakeman killed in Washington in the performance of his duties with defendant railroad. Both the widow and her husband had been residents of Washington, and the widow still resided there. The widow employed a California law firm to sue the railroad, and that firm secured the appointment of its employee as California administratrix of the brakeman's estate. The railroad's principal place of business was in Minnesota. It had general offices in Washington, and

operated 1,310 miles of trackage there. In California it had about 63 miles of single track over which it carried freight only, and it maintained "off-line" offices in California for solicitation of business. The trial court denied the railroad's motion to dismiss the action for inconvenient forum.

In granting a writ of mandate directing the trial court to dismiss the action, the court of appeal listed 25 factors, which are set forth in *Appalachian Ins. Company v. Superior Court (1984) 162 Cal. App. 3d 427, 435-436 n.2, 208 Cal. Rptr. 627* (discussed *above*) (*12 Cal. App. 3d 105, 112-115)* .

[d] Relative Financial Condition of Parties

Allison v. Superior Court *(1979) 99 Cal. App. 3d 993, 160 Cal. Rptr. 309* , was a mandate proceeding arising out of proceedings concerning the custody of children. The marriage of the parties, both California residents, had been dissolved in 1974 and the wife was awarded custody of the children with visitation rights to the father. On stipulation of the parties, custody was later awarded to the father, with right of visitation in the mother. The father, with the children, then moved to Texas. The children visited the mother in 1977 in California, but a second visit scheduled for later the same year was cancelled by the father. In 1978 the mother secured issuance of an order to show cause re contempt, alleging that the father had denied her rights of visitation, and a hearing on the show-cause order was scheduled. The father then filed a proceeding re the parent-child relationship in Texas, a hearing which was scheduled four days before the hearing on the mother's order to show cause. On the basis of the father's testimony, the Texas court entered an order purporting to terminate the mother's visitation rights. The mother then petitioned the California court to modify custody. The father's motion to dismiss this proceeding under the Uniform Child Custody Jurisdiction Act was denied, and he petitioned for a writ of mandate.

The court of appeal ruled that the Texas court had not complied with the act, but added that even though the Texas court didn't exercise jurisdiction in compliance with the act, perhaps not even in compliance with due process, Texas still retained the potential for a valid exercise of jurisdiction, but the question remained whether California should defer the exercise of its jurisdiction to a Texas court (*99 Cal. App. 3d 993, 1000)* . In holding that California was a convenient forum and denying the writ, the court considered four factors to be determinative, among which was the financial burden on the parties (*99 Cal. App. 3d 993, 1000-1001)* . The court said that the father was better able, financially, to present his case in California than it was for the mother to present hers in Texas. The father, a successful physician in California, presumably continued to enjoy the income of a successful physician in Texas, whereas the mother was poor. The court said that even though the relative financial condition of the parties is not a factor specifically enumerated in the Uniform Child Custody Jurisdiction Act, it was one which every court must necessarily take into account to some degree in determining convenience or inconvenience of forum under *Code Civ. Proc. § 410.30* (*99 Cal. App. 3d 993, 1001)* .

[e] Neutral Factors

The facts and procedural background of ***Corrigan v. Bjork Shiley Corp.*** *(1986) 182 Cal. App. 3d 166, 227 Cal. Rptr. 247* , *appeal dismissed 479 U.S. 1049 (1987)* , are discussed under *§ 132.130[3][a]*. In reversing the order staying the action, the court of appeal first disposed of the factors which were basically neutral. The court said: (1) the Australian plaintiffs were willing to come to California in the prosecution of their action and to submit to this state's jurisdiction, whereas the defendant stipulated to submit to jurisdiction and pay any judgment that might be rendered in Australia, and, hence, this factor was neutral in its weighing process; (2) the California action was commenced well within California's statute of limitations; the applicable statute of limitations in Australia is six years (expiring some two years later) and that alternative forum was available-another basically neutral factor; and (3) as to the relative convenience to parties and witnesses of trial in Australia, both sides were willing to shoulder the burden of trial in the forum which was less convenient from the perspective of their respective residences, and neither forum was more convenient from the standpoint of all the witnesses; therefore, this factor was essentially neutral; and (4) each party was also willing to assume the expense of trial in the less convenient forum, so this factor was also neutral (*182 Cal. App. 3d 166,*

174-175) . The court said that further, the relative ease of access of the parties to sources of proof would be about equally enhanced were trial to commence in their respective preferred forums; any judgment rendered in either forum would be enforceable; the difficulty to the moving party, court, and jurors created by the necessity of employing deposition testimony was not oppressive; and finally, the case does not turn on a view by the trier of fact of physical evidence which cannot be moved from the site of the accident (*182 Cal. App. 3d 166)* .

Note that *Corrigan* was disapproved on another ground in *Stangvik v. Shiley Inc. (1991) 54 Cal. 3d 744, 764, 1 Cal. Rptr. 2d 556, 819 P.2d 14* .

[f] Other Factors

Delfosse v. C.A.C.I., Inc.-Federal *(1990) 218 Cal. App. 3d 683, 267 Cal. Rptr. 224* , was an appeal from an order dismissing, on the ground of inconvenient forum, an action for wrongful discharge arising out of an employment contract made in California but allegedly breached in Virginia, where the plaintiff employee had been transferred and where he had worked for over 10 years. The court of appeal stated that, while some courts have delineated specific facts to consider in ruling on a motion to stay or dismiss an action for forum non conveniens, courts are not limited to these factors. In ruling on a forum non conveniens motion, courts examine all of the circumstances, balance the private and public interests, and look to the relative convenience and fairness of the parties, the witnesses, and the courts (*218 Cal. App. 3d 683, 687-688)* . Neither the California nor the Virginia statute of limitations had run when the California action was filed, but the Virginia statute did run before the trial court dismissed the action.

After noting that the employer's counsel had never directly responded to the trial court's inquiry as to whether a waiver would be acceptable and should be given an opportunity to do so (*218 Cal. App. 3d 683, 691)* , the court reversed the dismissal with detailed directions, including the direction that if the trial court, after reconsideration, granted the motion, the order be conditioned on the defendant's written agreement filed with the court that defendant would accept service in Virginia and would waive the Virginia statute of limitations (*218 Cal. App. 3d 683, 690-692)* .

The court further held that the California action was not barred under California's borrowing statute (*Code Civ. Proc. § 361*), providing that a cause of action arising in another state or country that, by the laws of that other jurisdiction, is barred by lapse of time is also barred in California (*218 Cal. App. 3d 683, 691)* .

[4] Additional Authorities

[a] Factors to Be Considered

Intershop Communications v. Superior Court (2002) 104 Cal. App. 4th 191, 127 Cal. Rptr. 2d 847 involved the enforcement of a forum selection clause. In commanding the trial court to enforce the forum selection clause, the court explained that, under a traditional forum non conveniens analysis, the trial court makes its determination on a motion to stay the action after balancing various factors related to the parties' private interests as well as the interests of the public in retaining the action for trial in California. The defendant, as the moving party, has the burden of proof. In contrast, in cases with a contractual forum selection clause, the burden of proof is on the plaintiff, the party resisting the motion. The various factors involved in the traditional forum non conveniens analysis do not control. Instead, the forum selection clause is presumed valid and will be enforced unless the plaintiff shows that enforcement of the clause would be unreasonable under the circumstances of the case (*104 Cal. App. 4th 191, 198-200)* .

The facts and procedural background of *Chong v. Superior Court (1997) 58 Cal. App. 4th 1032, 68 Cal. Rptr. 2d 427* , are discussed in *§ 132.140[4][a]*. The court in *Chong* stated that if (an alternate) forum is suitable, the court where the motion is pending must then balance the private interests of the litigants and the interests of the public in retaining the action in California. The private interest factors are those that make trial and enforceability of the ensuing judgment expeditious and relatively inexpensive, such as ease of access to sources of proof, cost of obtaining attendance of

witnesses, and availability of compulsory process for attendance of unwilling witnesses. The public interest factors include avoidance of overburdening local courts with congested calendars, protecting the interests of potential jurors so that they are not called on to decide cases in which the local community has little concern, and weighing the competing interests of California and the alternate jurisdiction in litigation. No single factor is predominant. Instead, all factors should be weighed together (*58 Cal. App. 4th 1032, 1037)* . The court concluded that the private interests of the litigants and the interests of the public overwhelming favored a Hong Kong forum. The evidence related to the case was located in Hong Kong. If any witnesses were required to testify, they too would be located in Hong Kong. California courts do not have jurisdiction over nonparty witnesses located in Hong Kong. Moreover, the public interests also weighed in favor of Hong Kong. Plaintiff was a Hong Kong Corporation, and defendants were Hong Kong citizens, although at least one resided in California. The letters of guarantee were negotiated and signed in Hong Kong, and the case would be decided under Hong Kong law. California's only interest in the litigation is that goods were shipped to California. However, the goods were shipped to a business that is not a party to the litigation. Jurors should not be required to decide a case based on Hong Kong law with which they have little or no concern, and California courts should not be burdened with litigation that may have been previously adjudicated in Hong Kong. Finally, Hong Kong's interest in applying its law and ensuring that its financial institutions are compensated for breach of contract claims far outweighs California's interest in providing a forum for companies that finance a shipment of goods into California (*58 Cal. App. 4th 1032, 1039)* .

In *Boaz v. Boyle & Co. (1995) 40 Cal. App. 4th 700, 46 Cal. Rptr. 2d 888* , grandchildren of mothers who had ingested a certain drug while pregnant sought to sue the manufacturers of the drug for injuries that the grandchildren received when they were born. All but one of the grandchildren was a resident of New York or New Jersey, the original drug ingestion occurred in New York, but all of the defendants did business in California. Actions were originally pursued in New York, but New York State declined to recognize the preconception tort relied on by plaintiffs. The plaintiffs then sought relief in California. The trial court dismissed the actions of the nonresident plaintiffs under the doctrine of forum non conveniens. The court of appeal concluded that the trial court acted within the proper scope of its discretion, and discussed three of the factors guiding judicial discretion in forum non conveniens cases. First, the plaintiff's choice is to be accorded substantial weight. However, the court stated that this factor derives most of its meaning from cases in which the plaintiff is a resident of the forum state. Second, the desire of the forum state to deter the tortious activity is significant. However, the court noted that this factor was of minor application in this matter. Third, the choice of law problems are to be considered. The court reasoned that the circumstances of this situation, including the site of the tortious acts and their manifestation, and the lack of a California connection to these events, suggests that a California court would look to the substantive law of New York (*40 Cal. App. 4th 700, 713)* . Concluding that there was no reason for California to handle the litigation, the court affirmed the dismissal of the nonresidents actions.

[b] Specific Factors Enumerated

In *Net2Phone, Inc. v. Superior Court (2003) 109 Cal. App. 4th 583, 135 Cal. Rptr. 2d 149* , a forum selection clause was enforced against a plaintiff who was not a party to the contract in question, based on a finding that the plaintiff was closely related to the contractual relationship. The plaintiff challenging the forum selection clause has the burden of showing, in response to a defendant's motion to stay or dismiss, that enforcement of the clause would be unreasonable under the circumstances. Where an entity that is not itself a party to a contract sues in a representative capacity challenging certain contractual terms, it purports to assert the rights of those who are parties to the contract, and is thus "closely related" to the contractual relationship (*109 Cal. App. 4th 583, 588-589)* .

Chong v. Superior Court (1997) 58 Cal. App. 4th 1032, 68 Cal. Rptr. 2d 427 , is *discussed under § 132.130[4][a]*.

In *Rinauro v. Honda Motor Co. (1995) 31 Cal. App. 4th 506, 37 Cal. Rptr. 2d 181* , the court of appeal upheld the trial court's order granting defendants' motion to dismiss based on forum non conveniens in a products liability action arising from an automobile accident brought by residents of Nevada against a foreign vehicle manufacturer and its wholly owned subsidiaries, which were California corporations. The court stated that the trial court correctly applied the factors

enumerated by the *California Supreme Court in Stangvik v. Shiley, Inc. (1991) 54 Cal. 3d 744, 1 Cal. Rptr. 2d 556, 819 P.2d 14* , in determining whether the action should be dismissed on grounds of forum non conveniens (*31 Cal. App. 4th 506, 509)* .

It found that substantial evidence supported the trial court's implied finding that Nevada was a "suitable" alternate forum since the action could be filed in Nevada under its statute of limitations, the plaintiffs resided in Nevada, the accident occurred there, and many if not most of the witnesses resided there (*31 Cal. App. 4th 506, 509)* . The court then considered the private interests of the litigants, such as the ease of access to sources of proof, the cost of obtaining attendance of witnesses and the availability of compulsory process for attendance of unwilling witnesses, and the interests of the public in retaining the action for trial in California, such as avoidance of overburdening local courts with congested calendars, protecting the interests of potential jurors so that they are not called upon to decide cases in which the local community has little concern, and weighing the competing interests of California and the alternate jurisdiction in the litigation (*31 Cal. App. 4th 506, 510)* .

The court of appeal concluded by finding the following factors supported the trial court's order: (1) plaintiffs were residents of Nevada; (2) the vehicle was purchased in Nevada from a Nevada resident; (3) the accident occurred in Nevada; (4) many witnesses resided in Nevada who declared extreme inconvenience by a California trial; (5) other witnesses resided in Idaho who also declared extreme inconvenience by a California trial; (6) the California corporations did not manufacture or design the vehicle; and (7) the lawsuit would burden the California courts (*31 Cal. App. 4th 506, 510)* .

Legal Topics:

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California Points & Authorities

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CHAPTER 132 JURISDICTION: PERSONAL JURISDICTION AND INCONVENIENT FORUM
PART II. FORMS
D. Inconvenient Forum

13-132 California Points & Authorities §§ 132.131-132.139

[Reserved]

§§ 132.131[Reserved]

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California Points & Authorities

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13-132 California Points & Authorities § 132.140

§ 132.140 Opposing Motion to Stay or Dismiss Action or Proceeding for Inconvenient Forum [Code Civ. Proc. §§ 410.30(a), 418.10(a)(2)]--No Suitable Alternative Forum or Factors Weigh Against Stay or Dismissal

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO STAY OR DISMISS _____ [ACTION *or* PROCEEDING] FOR INCONVENIENT FORUM
vs.	)	
_____ [*name*],	)	
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE MOTION TO STAY OR DISMISS THIS _____ [ACTION *or* PROCEEDING] ON THE GROUND THAT CALIFORNIA IS AN INCONVENIENT FORUM FOR TRIAL SHOULD BE DENIED BECAUSE _____ [THE PROPOSED ALTERNATIVE FORUM IS NOT SUITABLE *and/or* A CONSIDERATION OF THE PRIMARY FACTORS INVOLVED IN THIS WEIGH IN FAVOR OF THIS COURT RETAINING THE CASE].

A. Motion to Stay or Dismiss for Inconvenient Forum. A court shall stay or dismiss the action in whole or in part on

any conditions that may be just only when it finds that it would be in the interest of substantial justice that the action should be heard in a forum outside this state (*see Code Civ. Proc. § 410.30(a)*).

[*EITHER*]

B. Suitable Alternative Forum Is Not Available. The action will not be dismissed unless a suitable alternative forum is available to the plaintiff. Whether the alternative forum is suitable is a threshold inquiry that does not depend on the factors relevant to the convenience of the parties and the interests of the public, but on whether an action may be commenced in the alternative jurisdiction and a valid judgment obtained there against the defendant (*Stangvik v. Shiley Inc. (1991) 54 Cal. 3d 744, 752, 752 n.3, 1 Cal. Rptr. 2d 556, 819 P.2d 14* ; *American Cemwood Corp. v. American Home Assurance Co. (2001) 87 Cal. App. 4th 431, 104 Cal. Rptr. 2d 670*). Because of this factor, the suit will be entertained, no matter how inappropriate the forum may be, if the defendant cannot be subjected to jurisdiction in other states. The same is true if the plaintiff's cause of action would elsewhere be barred by the statute of limitations, unless the court is willing to accept the defendant's stipulation that he or she will not raise this defense in the second state (*Stangvik v. Shiley Inc. (1991) 54 Cal. 3d 744, 752, 1 Cal. Rptr. 2d 556, 819 P.2d 14*).

C. When Weighing of Private and Public Interest Factors Is Proper; Burden of Proof. It is only when the alternate forum is a suitable place for trial that the private interests of the litigants and the interests of the public in retaining the action for trial in California are considered, and the defendant, as the moving party, bears the burden of proof (*Stangvik v. Shiley Inc. (1991) 54 Cal. 3d 744, 752, 1 Cal. Rptr. 2d 556, 819 P.2d 14* ; *Morris v. AGFA Corp. (2006) 144 Cal. App. 4th 1452, 1466, 51 Cal. Rptr. 3d 301* ; *Roulier v. Cannondale (2002) 101 Cal. App. 4th 1180, 1187-1193, 124 Cal. Rptr. 2d 877*).

[*AND/OR*]

D. Considerations of Court. [*See § 132.130*, Paragraph B].

E. Factors to Be Considered. [*See § 132.130*, Paragraph C].

F. Specific Factors Enumerated. [*See § 132.130*, Paragraph D].

[*Optional*] **G. Effect of Plaintiff's Choice of Forum.** When the plaintiff is a California resident, his or her choice of forum in California should not be disturbed unless the balance is strongly in favor of the defendant (*see Stangvik v. Shiley Inc. (1991) 54 Cal. 3d 744, 754-755, 1 Cal. Rptr. 2d 556, 819 P.2d 14*).

[*Optional*] **H. Relative Financial Condition of Parties.** [*see § 132.130*, Paragraph E].

[*Optional*] **I. Neutral Factors.** [*See § 132.130*, Paragraph F].

[*Optional*] **J. Other Factors.** [*See § 132.130*, Paragraph G].

[*In an appropriate case, add additional points and authorities set out in §§ 132.150 -132.154.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The form in [1], *above*, is for use by a plaintiff in opposing a motion stay or dismiss the action or proceeding on the ground that California is an inconvenient forum and that the case should be tried in another forum.

The additional points and authorities *set out in §§ 132.150 -132.153* should be combined, when appropriate, with the points and authorities set out in the foregoing form.

In an appropriate case, the points and authorities set out in the foregoing form may be used to oppose a motion supported by the points and authorities *set out in § 132.130*.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, the plaintiff should set forth in his or her counter declaration the facts establishing those factors *set forth in § 132.130* that favor the court's retention of jurisdiction [*see, e.g., Corrigan v. Bjork Shiley Corp. Co. (1986) 182 Cal. App. 3d 166, 173-174, 174 n.2, 176, 227 Cal. Rptr. 247 , appeal dismissed 479 U.S. 1049 (1987)* (*disapproved on other grounds in Stangvik v. Shiley Inc. (1991) 54 Cal. 3d 744, 761, 764, 1 Cal. Rptr. 2d 556, 819 P.2d 14*)]. In the memorandum, counsel should enumerate those particular factors that weigh against the stay or dismissal of the case.

See also *§ 132.130[2]* for comments on factors weighing in favor of stay or dismissal.

[3] Discussion of Authorities

[a] Suitable Alternative Forum Is Not Available

In ***Stangvik v. Shiley Inc.*** *(1991) 54 Cal. 3d 744, 751, 1 Cal. Rptr. 2d 556, 819 P.2d 14* , plaintiffs, members of two families, one residing in Norway and the other in Sweden, were the wives and children of two men who received heart valve implants in the countries of their residence. The valves were designed and manufactured in California by defendant. The valves allegedly failed and the two men died. Plaintiffs sued defendant and its Delaware parent in California alleging that the heart valves were defective. They sought damages based on theories of negligence, strict liability, breach of warranty, fraud, and loss of consortium. Defendants' motion to dismiss or stay the actions on the ground of forum non conveniens was granted, subject to seven conditions to which defendants agreed. The court retained jurisdiction to make such further orders as might become appropriate. Plaintiffs appealed. The court of appeal affirmed.

Although the Supreme Court affirmed the judgment of the court of appeal on the ground, among others, that the courts of Norway and Sweden presented suitable forums for trial of the actions, the Court said that in determining whether to grant a motion based on forum non conveniens, a court must first determine whether the alternate forum is a "suitable" place for trial (*54 Cal. 3d 744, 751)* . Rejecting *Holmes v. Syntex Laboratories, Inc. (1984) 156 Cal. App. 3d 372, 202 Cal. Rptr. 773* , which the Court said appears to consider the "suitability" of the alternative forum not as a threshold inquiry, but as part of the discretionary determination of the balance of conveniences, the Court said that the Judicial Council Comment to *Code Civ. Proc. § 410.30* makes it clear that the question of a suitable alternative forum depends not on the factors relevant to the convenience of the parties and the interests of the public, but on whether an action may be commenced in the alternative jurisdiction and a valid judgment obtained there against the defendant (*54 Cal. 3d 744, 752 n.3*). Quoting the Judicial Council Comment, the Court said the action will not be dismissed unless a suitable alternative forum is available to the plaintiff, and that, because of this factor, the suit will be entertained, no matter how inappropriate the forum may be, if the defendant cannot be subjected to jurisdiction in other states. The same will be true if the plaintiff's cause of action would elsewhere be barred by the statute of limitations, unless the court is willing to

accept the defendant's stipulation that he or she will not raise this defense in the second state (*54 Cal. 3d 744, 752)* . The Court said that the defendants stipulated that they would submit to jurisdiction in Sweden or Norway, respectively, as well as to the tolling of the statute of limitations during the pendency of the actions in California, and that, thus, the courts of Sweden and Norway presented suitable forums for trial of the actions (*54 Cal. 3d 744, 752)* .

American Cemwood Corp. v. American Home Assurance Co. *(2001) 87 Cal. App. 4th 431, 104 Cal. Rptr. 2d 670* , involved an insurance dispute relating to defective roofing tiles. The manufacturer and related companies (the insured) filed suit in California against five insurers to obtain a declaration of the insurers' obligations with respect to claims against the manufacturer, and as to some defendants, damages for breach of the duties to defend and indemnify and of the implied covenant of good faith. Two of the insurers brought an action in British Columbia against the insured for declaratory relief as to their indemnity and defense obligations. The other insurers involved in the California action were not joined in the British Columbia action. In the California action, the insurers who brought the action in British Columbia moved to dismiss or to stay the California action in favor of the British Columbia action under a theory of forum non conveniens. The trial court stayed the action, and plaintiffs appealed.

The court of appeal reversed. The court first noted that the availability of a suitable alternative forum is critical because the doctrine presupposes at least two forums in which the defendant is amenable to process and provides the criteria for choosing between them (*87 Cal. App. 4th 431, 435)* . The court then rejected the defendant's contention that the granting or denial of a forum non conveniens motion is entirely discretionary. Rather, the court must first make a nondiscretionary determination whether the alternative forum is a suitable place for trial. Only if the court finds the alternative forum suitable does the court proceed to the discretionary balancing of the litigant's private interests and the interests of the public in retaining the action in California (*87 Cal. App. 4th 431, 436)* . The court then proceeded to find that British Columbia was not a suitable alternative forum because the moving defendants did not establish that all of the defendants in the California action were subject to the jurisdiction of British Columbia (*87 Cal. App. 4th 431, 437-440)* .

[b] When Weighing of Private and Public Interest Factors Is Proper; Burden of Proof

The procedural background of ***Stangvik v. Shiley Inc.*** *(1991) 54 Cal. 3d 744, 1 Cal. Rptr. 2d 556, 819 P.2d 14* , is *discussed under § 132.140[3][a]*. In affirming the judgment of the court of appeal affirming the trial court's order that conditionally granted the inconvenient forum motion and stayed the action, the Supreme Court said that if the alternate forum is a suitable place for trial, the next step is to consider the private interests of the litigants and the interests of the public in retaining the action for trial in California. The private interest factors are those that make trial and the enforceability of the ensuing judgment expeditious and relatively inexpensive, such as the ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the availability of compulsory process for attendance of unwilling witnesses. The public interest factors include avoidance of overburdening local courts with congested calendars, protecting the interests of potential jurors so that they are not called on to decide cases in which the local community has little concern, and weighing the competing interests of California and the alternate jurisdiction in the litigation (*54 Cal. 3d 744, 751 , citing Piper Aircraft Co. v. Reyno (1981) 454 U.S. 235, 259-261, 102 S. Ct. 252, 70 L. Ed. 2d 419* and *Gulf Oil Corp. v. Gilbert (1947) 330 U.S. 501, 507-509, 67 S. Ct. 839, 91 L. Ed. 1055*). The Court added that, on a motion for forum non conveniens, defendant, as the moving party, bears the burden of proof (*54 Cal. 3d 744, 751)* .

The procedural background of ***Morris v. AGFA Corp.*** *(2006) 144 Cal. App. 4th 1452, 51 Cal. Rptr. 3d 301* is discussed in *§ 132.130[3][b]*. In its ruling, the court explained that a trial court must be flexible in its weighing of the *Stangvik* factors. Private and public interest factors must be applied flexibly, without giving undue emphasis to any one element. The doctrine of forum non conveniens may not be base on identification of a single factor rather than the balancing of several factors. An undue emphasis on a single factor is especially threatening to a balanced analysis because some of the matters to be weighed will by their nature point to a grant or denial of the motion. For example, the jurisdiction's interest in deterring future wrongful conduct of the defendant will usually favor retention of the action if

the defendant is a resident of the forum, whereas the congestion factor will usually weigh in favor of trial in the alternate jurisdiction. The court must consider the public policy considerations, such as California's interest in deciding actions against resident corporation whose conduce in the state causes injury to persons in other jurisdictions.

In ***Roulier v. Cannondale*** *(2002) 101 Cal. App. 4th 1180, 124 Cal. Rptr. 2d 877* , plaintiff was a resident of Switzerland. While visiting California, he purchased a Cannondale bicycle from Two Wheels One Planet, a retail bicycle shop located in Artesia. After returning to Switzerland, Roulier was seriously injured while riding the bicycle. He subsequently filed a complaint in Los Angeles Superior Court, alleging causes of action for strict product liability, negligent product liability, and breach of warranty, against Two Wheels One Planet and Cannondale, a Delaware-incorporated business that designs and manufactures bicycles; Cannondale's principle place of business is in Connecticut. Defendants filed a motion to stay or dismiss the action on the grounds of forum non conveniens, and the trial court found that Switzerland would be a suitable forum and dismissed the suit.

While the appellate court also found that Switzerland was a suitable alternative forum because an action could be commenced and a valid judgment obtained there against the defendant, the court reversed the trial court and found a strong interest in maintaining the action in California. The fact that an alternative jurisdiction's law was less favorable to a litigant than the law of the forum could not be accorded any weight in deciding a motion for forum non conveniens provided that some remedy was afforded. Once a suitable alternative forum is found, the next step is to consider the private interests of the litigants and the interests of the public in retaining the action for trial in California. The private interest factors are those that make trial and the enforceability of the ensuing judgment expeditious and relatively inexpensive, such as the ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the availability of compulsory process for attendance of unwilling witnesses. The public interest factors include avoidance of overburdening local courts with congested calendars, protecting the interests of potential jurors so that they are not called upon to decide cases in which the local community has little concern, and weighing the competing interests of California and the alternate jurisdiction in the litigation. These factors are to be applied flexibly, without giving undue emphasis to any one element. There were relevant witnesses and documents available in both Switzerland and California. The consumer provided defendants his medical records, made himself available for medical examination in California, and has stipulated to video depositions of any medical witnesses in Switzerland. Little or no impact on court congestion would be expected to result from a trial in California. Switzerland had little interest in the case, whereas California had a strong interest in preventing the production and sale of defective products in the state (*101 Cal. App. 4th 1180, 1187-1193)* .

[c] Effect of Plaintiff's Choice of Forum

The procedural background of ***Stangvik v. Shiley Inc.*** *(1991) 54 Cal. 3d 744, 1 Cal. Rptr. 2d 556, 819 P.2d 14* is *discussed under § 132.140[3][a]*. In affirming the judgment of the court of appeal affirming the trial court's order that conditionally granted the inconvenient forum motion and stayed the action, the Supreme Court said many cases hold that a plaintiff's choice of a forum should rarely be disturbed unless the balance is strongly in favor of the defendant, but that the reasons advanced for this frequently reiterated rule apply only to residents of the forum state, namely: (1) if the plaintiff is a resident of the jurisdiction in which the suit is filed, the plaintiff's choice of forum is presumed to be convenient (*citing* *Piper Aircraft Co. v. Reyno (1981) 454 U.S. 235, 255-256, 102 S. Ct. 252, 70 L. Ed. 2d 419* ; *Thomson v. Continental Ins. Co. (1967) 66 Cal. 2d 738, 744-745, 59 Cal. Rptr. 101, 427 P.2d 765*); and (2) a state has a strong interest in assuring its own residents an adequate forum for the redress of grievances (citing *Archibald v. Cinerama Hotels (1976) 15 Cal. 3d 853, 859, 126 Cal. Rptr. 811, 544 P.2d 947*) (*54 Cal. 3d 744, 754-755)* . The Court said it is difficult to justify giving preferential status to a plaintiff's choice of forum if the plaintiff is not a resident. Since the preference is based on factors which apply only to residents, it would appear that the underlying justification for the preference does not apply to nonresidents. The Court acknowledged, however, that the defendants did not make this argument, and that this view is admittedly contrary to *Piper Aircraft Co. v. Reyno (1981) 454 U.S. 235, 255, 102 S. Ct. 252, 70 L. Ed. 2d 419* , which states that there is ordinarily a strong presumption in favor of the plaintiff's choice of forum (*54 Cal. 3d 744, 755 n.7*).

Note, however, with respect to plaintiffs who are citizens of foreign countries, the Court said that the *Supreme Court of the United States, in Piper Aircraft Co. v. Reyno (1981) 454 U.S. 235, 255, 259-261, 102 S. Ct. 252, 70 L. Ed. 2d 419* , held that where the plaintiff resides in a foreign country the plaintiff's choice of forum is much less reasonable and is not entitled to the same preference as a resident of the state where the action is filed. The Court held that, under the rule laid down in *Piper,* the fact that plaintiffs in the cases before it chose to file their complaint in California was not a substantial factor in favor of retaining jurisdiction here (*54 Cal. 3d 744, 755 n.7*). The Court expressly disapproved the ruling in *Holmes v. Syntex Laboratories, Inc. (1984) 156 Cal. App. 3d 372, 202 Cal. Rptr. 773* , that substantial deference is accorded even a foreign plaintiff's choice of forum (*54 Cal. 3d 744, 755 n.7*).

[4] Additional Authorities

[a] Suitable Alternative Forum Is Not Available

In *Chong v. Superior Court (1997) 58 Cal. App. 4th 1032, 68 Cal. Rptr. 2d 427* , plaintiff was a registered deposit taking institution authorized to do business under Hong Kong law and conducted its business in Hong Kong. Plaintiff extended credit to another Hong Kong business. The credit was for goods shipped to that business's California company. Defendants signed letters of guarantee personally guaranteeing credit for debt incurred by that business. The letters of guarantee were negotiated and executed in Hong Kong, but defendants claimed they were deceived into signing the guarantees. Plaintiff obtained judgments in Hong Kong against the Hong Kong business and one of the defendants on the guarantee. Plaintiff also filed in California against the defendants. Defendants petitioned for dismissal or a stay based on forum non conveniens grounds. Defendants agreed to stipulate to jurisdiction in Hong Kong as well as to the tolling of any statute of limitations during the pendency of the suit in California. Defendants were Hong Kong citizens although one of them had a primary residence in California. The trial court denied defendants' motion to stay or dismiss the action. The court was concerned that the transfer of Hong Kong from British to Chinese control would destroy plaintiff's opportunity to receive a fair trial. The court also found that the public and private interests did not weigh in favor of granting the motion. Defendants petitioned for a writ of mandate (*58 Cal. App. 4th 1032, 1035-1036)* .

The court of appeal issued the writ of mandate directing the trial court to stay the proceedings during the pendency of the proceedings in Hong Kong. The court stated that in determining whether to grant a motion based on forum non conveniens, a court must make a threshold determination whether the alternate forum is a suitable place for trial. A forum is suitable if there is jurisdiction and no statute of limitations bar to hearing the case on the merits. A forum is suitable where an action can be brought, although not necessarily won. In rare circumstances, however, a forum may not be suitable even when the defendant is amenable to process and there is no procedural bar to hearing the issues on the merits. This exception has been applied in cases where the proposed alternative forum is in a foreign country that lacks an independent judiciary (*58 Cal. App. 4th 1032, 1036-1037)* . The issue before the court was whether Hong Kong courts presented a rare circumstance where a forum is not suitable even when the jurisdictional and procedural requirements are satisfied. The defendants argued that because it is well known that Chinese courts do not provide due process, the court should infer Hong Kong courts would not provide due process after Hong Kong came under Chinese control. Defendants, however, provided no evidence to support this inference. Moreover, there was evidence that Hong Kong courts would remain independent following the Chinese takeover. China promised by international treaty that the Hong Kong judiciary would remain independent. This is distinguishable from those cases that found Iran, Ecuador, and Chile did not constitute suitable forums because there was evidence that the judiciary would not provide due process. No such evidence was presented in this case. Because there was evidence that Hong Kong will continue to provide due process, Hong Kong remained a suitable alternate forum (*58 Cal. App. 4th 1032, 1037)* .

[b] Specific Factors Enumerated

The facts and procedural background of *Chong v. Superior Court (1997) 58 Cal. App. 4th 1032, 68 Cal. Rptr. 2d 427* ,

are *discussed under § 132.140[4][a]*. Although the court of appeal in *Chong* issued a writ of mandate directing the trial court to stay the proceedings during the pendency of the proceedings in Hong Kong, the court stated that if an alternate forum is suitable, the court where the motion is pending must then balance the private interests of the litigants and the interests of the public in retaining the action in California. The private interest factors are those that make trial and enforceability of the ensuing judgment expeditious and relatively inexpensive such as ease of access to sources of proof, cost of obtaining attendance of witnesses, and availability of compulsory process for attendance of unwilling witnesses. The public interest factors include avoidance of overburdening local courts with congested calendars, protecting the interests of potential jurors so that they are not called on to decide cases in which the local community has little concern, and weighing the competing interests of California and the alternate jurisdiction in litigation. No single factor is predominant. Instead, all factors should be weighed together (*58 Cal. App. 4th 1032, 1037)* .

The court of appeal in *Ford Motor Co. v. Insurance Co. of North America (1995) 35 Cal. App. 4th 604, 41 Cal. Rptr. 2d 342* , held the trial court abused its discretion in granting a motion to dismiss on grounds of inconvenient forum in an action brought by an automobile company against numerous insurance companies to establish rights to insurance coverage for liabilities arising from environmental contamination of its various plant sites in different states, including California. The court stated that in exercising its discretion, the trial court must rely on evidence and not merely bald assertions that California is an inconvenient forum (*35 Cal. App. 4th 604, 610)* . The court cited numerous factors in determining that California was a suitable forum, including that the insurance policies at issue contained "service of suit" clauses, California bore a substantial interest in regulating the conduct at issue since environmental cleanup issues were at stake as well as the fact that some of the key witnesses resided in California, the California courts had a superior ability to decide the case expeditiously given the trial court delay reduction procedures, the absence of any disproportionate burden on the state's courts, the absence of unfairness in imposing jury duty on a community unrelated to the action, the lack of any possibility of needless multiplicitous actions and inconsistent adjudication, and the defendants' failure to establish party and witness inconvenience (*35 Cal. App. 4th 604, 611-618)* .

[c] Effect of Plaintiff's Choice of Forum

The facts and procedural background of *Chong v. Superior Court (1997) 58 Cal. App. 4th 1032, 68 Cal. Rptr. 2d 427* , are *discussed under § 132.140[4][a]*. Although the court of appeal in *Chong* issued a writ of mandate directing the trial court to stay the proceedings during the pendency of the proceedings in Hong Kong, the court stated that when a plaintiff is a resident of the forum state, plaintiff's choice of forum in that state is afforded substantial weight. A nonresident plaintiff's choice of forum is entitled to less deference (*58 Cal. App. 4th 1032, 1038)* .

The facts and procedural background of *Ford Motor Co. v. Insurance Co. of North America (1995) 35 Cal. App. 4th 604, 41 Cal. Rptr. 2d 342* , are *discussed under § 132.140[4][b]*. In holding that the trial court abused its discretion by dismissing the case based on forum non conveniens, the court stated that the plaintiff's choice of forum is entitled to great weight even though the plaintiff is a nonresident, citing, among other cases, *Gulf Oil Corp. v. Gilbert (1947) 330 U.S. 501, 508-509, 67 S. Ct. 839, 91 L. Ed. 1055* (*35 Cal. App. 4th 604, 610-611)* . The court acknowledged dicta in *Stangvik v. Shiley, Inc. (1991) 54 Cal. 3d 744, 1 Cal. Rptr. 2d 556, 819 P.2d 14* , that questioned affording great deference to a nonresident plaintiff's choice of forum, but noted that the *Stangvik* court declined to state a different rule because to do so would be inconsistent with United States Supreme Court cases. The only pertinent holding in *Stangvik* on this issue is that a foreign, noncitizen plaintiff's choice of forum is entitled to less deference. Thus, the defendants bore the burden of producing sufficient evidence to overcome the strong presumption of appropriateness attending plaintiff's choice of forum, and unless that burden was met, the trial court abused its discretion in granting the motion (*35 Cal. App. 4th 604, 610-611)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem

ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil ProcedureVenueForum Non ConveniensCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss

California Points & Authorities

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CHAPTER 132 JURISDICTION: PERSONAL JURISDICTION AND INCONVENIENT FORUM
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13-132 California Points & Authorities § 132.141

§ 132.141 Opposing Motion to Stay or Dismiss Action or Proceeding for Inconvenient Forum [Code Civ. Proc. §§ 410.30(a), 418.10(a)(2)]--Law of Alternative Forum Less Favorable to Plaintiff Than Law of California

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum opposing a motion to stay or dismiss an action on the ground of inconvenient forum (see, e.g., §§ 132.140).*]

THE COURT SHOULD DENY THE MOTION TO _____ [STAY *or* DISMISS] THE ACTION FOR INCONVENIENT FORUM BECAUSE THE LAW OF _____ [*specify alternative jurisdiction*] DOES SUPPLY A REMEDY AND THE FACT THAT THE LAW OF _____ [*specify alternative jurisdiction*] IS LESS FAVORABLE TO _____ [*specify moving party*] THAN IS THE LAW OF CALIFORNIA IS NOT TO BE ACCORDED ANY WEIGHT IN DECIDING THE MOTION.

Law of Alternative Forum Provides Remedy Less Favorable to Plaintiff Than That of Forum. The fact that an alternative jurisdiction's law is less favorable to a litigant than the law of the forum should not be accorded any weight in deciding a motion for forum non conveniens provided, however, that some remedy is afforded (*Stangvik v. Shiley Inc. (1991) 54 Cal. 3d 744, 754 n.5, 1 Cal. Rptr. 2d 556, 819 P.2d 14*).

[2] Comments

[a] Use of Form

The form in [1], *above*, states the rule that the alternative jurisdiction's less favorable law to plaintiff is not a factor to be considered unless the alternative jurisdiction affords no remedy at all. The form does not provide a complete memorandum, but is designed to be combined with a general form of memorandum opposing a motion to stay or dismiss an action for inconvenient forum.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Law of Alternative Forum Provides Remedy Less Favorable to Plaintiff Than That of Forum

The procedural background of ***Stangvik v. Shiley Inc.*** *(1991) 54 Cal. 3d 744, 1 Cal. Rptr. 2d 556, 819 P.2d 14* is discussed in *§ 132.140[3][a]*. In affirming the judgment of the court of appeal affirming the trial court's order that conditionally granted the inconvenient forum motion and stayed the action, the Supreme Court discussed *Piper Aircraft Co. v. Reyno (1981) 454 U.S. 235, 252, 254, 102 S. Ct. 252, 70 L. Ed. 2d 419* , which, at p. 248, n.13, noted that the law of California relating to forum non conveniens is virtually identical to federal law (*54 Cal. 3d 744, 754, n.6*). The Court said that the high court discussed in some detail the significance to be accorded to the fact that the law of the forum state is more favorable to the plaintiff than that of the alternate jurisdiction, and that, in this connection, it observed the laws of the United States in product liability actions favor plaintiffs in several respects: the law of strict liability, which exists in almost all 50 states but only a handful of foreign countries; the existence of jury trials in such actions, resulting in sometimes generous awards; contingent attorney fee arrangements; and more liberal rules of discovery. The Court said the high court held that if substantial weight is given to the circumstance that the law in the forum state is more favorable to the plaintiff than the one in the alternate jurisdiction, the American courts, which are already extremely attractive to foreign plaintiffs, would become even more attractive, that the flow of litigation into the United States would increase and further congest already crowded courts, and that, thus, the possibility of an unfavorable change in the law is a relevant consideration only if the remedy in the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all (*54 Cal. 3d 744, 753)* .

The Court said it is not entirely clear from the language of *Piper* whether an unfavorable change of law should be given no consideration whatsoever in the forum non conveniens balance or only slight consideration (*54 Cal. 3d 744, 753-754 n.5*). The Court said that, in its view, the fact that an alternative jurisdiction's law is less favorable to a litigant than the law of the forum should not be accorded any weight in deciding a motion for forum non conveniens, provided, however, that some remedy is afforded. One basis underlying the doctrine, as *Piper* and other cases hold, is to avoid burdening the trial court by requiring it to interpret the law of foreign jurisdictions, which compels it to conduct complex exercises in comparative law. To impose such a burden on the trial court for the purpose of facilitating its consideration of a factor of only slight significance in the forum non conveniens balance would be unwarranted (*54 Cal. 3d 744, 754 n.5*). The Court disapproved *Holmes v. Syntex Laboratories, Inc. (1984) 156 Cal. App. 3d 372, 202 Cal. Rptr. 773* , to the extent it held that California attaches far greater significance to the possibility of an unfavorable change in applicable law in the alternative forum than the federal courts and that a factor of fundamental importance in favor of denial of the motion for forum non conveniens was that the plaintiffs would be substantially disadvantaged if the case were tried in Britain because that country did not afford recovery on the basis of strict liability (*54 Cal. 3d 744, 763-764)* . The Court said that, as *Piper Aircraft Co. v. Reyno (1981) 454 U.S. 235, 102 S. Ct. 252, 70 L. Ed. 2d 419* , points out, if substantial weight is given to the fact that the law in the forum state is more favorable to a plaintiff than in the foreign jurisdiction, the balance will ordinarily favor denial of the motion, and substantial weight should be given to this factor only if the alternative forum provides no remedy at all (*54 Cal. 3d 744, 764)* .

Note that it would appear that if the alternative forum provided no remedy at all, it would not be a suitable forum for trial of the action, and the argument opposing the motion to stay or dismiss would be based on that ground. That is, absence of a suitable alternative forum is not a factor to be weighed against other factors in determining whether or not to stay or dismiss the action, but is a threshold question to be answered; if the answer is in the negative, the motion should be denied and the court never reaches the stage of balancing factors [*see* *Stangvik v. Shiley Inc. (1991) 54 Cal. 3d 744, 752, 1 Cal. Rptr. 2d 556, 819 P.2d 14* , and discussion in *§ 132.140[3][a]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem

ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil ProcedureVenueForum Non ConveniensCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss

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13-132 California Points & Authorities §§ 132.142-132.149

[Reserved]

§§ 132.142[Reserved]

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13-132 California Points & Authorities § 132.150

§ 132.150 Supporting or Opposing Motion to Stay or Dismiss Action or Proceeding for Inconvenient Forum [Code Civ. Proc. §§ 410.30(a), 418.10(a)(2)]--Application of Factors to Be Considered

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum supporting or opposing a motion to stay or dismiss an action on the ground of inconvenient forum (see, e.g., §§ 132.130, 132.140).*]

A BALANCED ANALYSIS OF THE FACTORS IS REQUIRED.

Balanced Analysis of Factors to Be Considered Is Required. The private and public interest factors must be applied flexibly, without giving undue emphasis to any one element. An undue emphasis on a single factor is especially threatening to a balanced analysis because some of the matters to be weighed will by their nature point to a grant or denial of the motion (*Stangvik v. Shiley Inc. (1991) 54 Cal. 3d 744, 753, n.4, 1 Cal. Rptr. 2d 556, 819 P.2d 14* ; *Morris v. AGFA Corp. (2006) 144 Cal. App. 4th 1452, 1466, 51 Cal. Rptr. 3d 301* ; *Roulier v. Cannondale (2002) 101 Cal. App. 4th 1180, 1187-1193, 124 Cal. Rptr. 2d 877*).

[2] Comments

[a] Use of Form

The points and authorities in [1], *above*, state the rule that, in a motion to stay or dismiss an action for inconvenient forum, a balanced analysis of the factors to be considered is required.

This form does not provide a complete memorandum, but is designed to be combined with a general form of memorandum supporting or opposing a motion to stay or dismiss an action for inconvenient forum [*see, e.g., §§ 132.130, 132.140*]. For other related uses, see *§ 132.130[2]*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Balanced Analysis of Factors Is Required

The procedural background of ***Stangvik v. Shiley Inc.*** *(1991) 54 Cal. 3d 744, 1 Cal. Rptr. 2d 556, 819 P.2d 14* , is discussed in *§ 132.140[3][a]*. In affirming the judgment of the court of appeal affirming the trial court's order that conditionally granted the inconvenient forum motion and stayed the action, the Supreme Court, discussing *Piper Aircraft Co. v. Reyno (1981) 454 U.S. 235, 249-250, 252, 102 S. Ct. 252, 70 L. Ed. 2d 419* , said that the high court, in its analysis of the doctrine of forum non conveniens, reiterated long-standing principles, first clearly enunciated by it in *Gulf Oil Corp. v. Gilbert (1947) 330 U.S. 501, 501, 67 S. Ct. 839, 91 L. Ed. 1055*), and later applied in California in *Price v. Atchison, T. & S. F. R. Co. (1954) 42 Cal. 2d 577, 268 P.2d 457* , and warned that the private and public interest factors must be applied flexibly, without giving undue emphasis to any one element. A court should not decide that there are circumstances in which the doctrine will apply or never apply. Otherwise, the flexibility of the doctrine would be threatened, and its application would be based on identification of a single factor rather than the balancing of several (*54 Cal. 3d 744, 753)* . The Court noted that an undue emphasis on a single factor is especially threatening to a balanced analysis because some of the matters to be weighed will by their nature point to a grant or denial of the motion. For example, the jurisdiction's interest in deterring future wrongful conduct of the defendant will usually favor retention of the action if the defendant is a resident of the forum, whereas the court congestion factor will usually weigh in favor of trial in the alternate jurisdiction (*54 Cal. 3d 744, 753 n.3*).

The procedural background of ***Morris v. AGFA Corp.*** *(2006) 144 Cal. App. 4th 1452, 51 Cal. Rptr. 3d 301* is discussed in *§ 132.130[3][b]*. In its ruling, the court explained that a trial court must be flexible in its weighing of the *Stangvik* factors. Private and public interest factors must be applied flexibly, without giving undue emphasis to any one element. The doctrine of forum non conveniens may not be base on identification of a single factor rather than the balancing of several factors. An undue emphasis on a single factor is especially threatening to a balanced analysis because some of the matters to be weighed will by their nature point to a grant or denial of the motion. For example, the jurisdiction's interest in deterring future wrongful conduct of the defendant will usually favor retention of the action if the defendant is a resident of the forum, whereas the congestion factor will usually weigh in favor of trial in the alternate jurisdiction. The court must consider the public policy considerations, such as California's interest in deciding actions against resident corporation whose conduce in the state causes injury to persons in other jurisdictions.

The facts and procedural background of ***Roulier v. Cannondale*** *(2002) 101 Cal. App. 4th 1180, 124 Cal. Rptr. 2d 877* are discussed in *§ 132.140(3)(b)*. The court relied on *Stangvik v. Shiley Inc. (1991) 54 Cal. 3d 744, 1 Cal. Rptr. 2d 556* in considering the private interests of the litigants and the interests of the public in retaining the action for trial in California. The private interest factors are those that make trial and the enforceability of the ensuing judgment expeditious and relatively inexpensive, such as the ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the availability of compulsory process for attendance of unwilling witnesses. The public interest factors include avoidance of overburdening local courts with congested calendars, protecting the interests of potential jurors so that they are not called upon to decide cases in which the local community has little concern, and weighing the competing interests of California and the alternate jurisdiction in the litigation. These factors are to be applied flexibly, without giving undue emphasis to any one element (*101 Cal. App. 4th 1180, 1187-1188)* . The court found that Switzerland had little interest in the case, whereas California had a strong interest in preventing the production and sale of defective products in the state.

[4] Additional Authorities

In *Roman v. Liberty University, Inc. (2008) 162 Cal. App. 4th 670, 75 Cal. Rptr. 3d 828* , plaintiff challenged the trial court's granting of a motion based on forum non conveniens, arguing that no suitable alternative forum is available because Virginia applies contributory, rather than comparative, negligence principles, and plaintiff's own negligence or assumption of the risk would completely bar his recovery under Virginia law. As a general rule, comparative law

questions are irrelevant to a forum non conveniens analysis, except when the alternate forum provides no remedy at all. Accordingly, the court of appeal affirmed, holding that plaintiff has identified no bar to filing a negligence action in Virginia. If he proves his case, and proves that he was not contributorily negligent, he will be entitled to recover damages under Virginia law; a forum is suitable where an action can be brought, although not necessarily won (*162 Cal. App. 4th 670, 683*).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil ProcedureVenueForum Non ConveniensCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss

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13-132 California Points & Authorities § 132.151

§ 132.151 Supporting or Opposing Motion to Stay or Dismiss Action or Proceeding for Inconvenient Forum [Code Civ. Proc. §§ 410.30(a), 418.10(a)(2)]--Ruling on Motion Is in Court's Discretion

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum supporting or opposing a motion to stay or dismiss an action on the ground of inconvenient forum (see, e.g., §§ 132.130, 132.140).*]

OTHER THAN THE NONDISCRETIONARY THRESHOLD DETERMINATION THAT THE ALTERNATIVE FORUM IS A SUITABLE PLACE FOR TRIAL, THE APPLICATION OF THE DOCTRINE OF FORUM NON CONVENIENS IN A GIVEN CASE IS WITHIN THE DISCRETION OF THE TRIAL COURT.

A. Discretion of Court. The threshold determination of whether the proposed alternative forum is a suitable place for trial is a nondiscretionary determination (*Stangvik v. Shiley Inc. (1991) 54 Cal. 3d 744, 752 n.3, 1 Cal. Rptr. 2d 556, 819 P.2d 14* ; *Morris v. AGFA Corp. (2006) 144 Cal. App. 4th 1452, 1466, 51 Cal. Rptr. 3d 301* ; *American Cemwood Corp. v. American Home Assurance Co. (2001) 87 Cal. App. 4th 431, 436, 104 Cal. Rptr. 2d 670*). If the court finds the alternative forum suitable, the court proceeds to a discretionary exercise of balancing the private interests of the litigants and the interests of the public in retaining the action in California. In this respect, the granting or denial of the motion is within the trial court's discretion and substantial deference is accorded its determination in this regard (*Stangvik v. Shiley Inc. (1991) 54 Cal. 3d 744, 751, 752 n.3, 1 Cal. Rptr. 2d 556, 819 P.2d 14* ; *American Cemwood Corp. v. American Home Assurance Co. (2001) 87 Cal. App. 4th 431, 436, 104 Cal. Rptr. 2d 670* ; *Roulier v. Cannondale (2002) 101 Cal. App. 4th 1180, 1188, 124 Cal. Rptr. 2d 877*).

B. Discretion Not Arbitrary. The trial court's discretion may not, however, be arbitrary, but must be exercised in conformity with the spirit of the law and in a manner to subserve and not impede the ends of substantial justice (*Credit Lyonnais Bank Nederland, N.V. v. Manatt, Phelps, Rothenberg & Tunney (1988) 202 Cal. App. 3d 1424, 1436, 249 Cal. Rptr. 559* ; *Corrigan v. Bjork Shiley Corp. (1986) 182 Cal. App. 3d 166, 173, 227 Cal. Rptr. 247*).

[2] Comments

[a] Use of Form

The form in [1], *above*, states the rule that, in a motion to stay or dismiss an action for inconvenient forum, the court has discretion in ruling on the motion.

This form does not provide a complete memorandum, but is designed to be combined with a general form of memorandum supporting or opposing a motion to stay or dismiss an action for inconvenient forum [*see, e.g., §§ 132.130, 132.140*], or adapted for use in a trial or appellate brief. For other related uses, see *§ 132.130[2]*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Discretion of Court

The procedural background of ***Stangvik v. Shiley Inc.*** *(1991) 54 Cal. 3d 744, 1 Cal. Rptr. 2d 556, 819 P.2d 14* , is discussed in *§ 132.140[3][a]*. In affirming the judgment of the court of appeal affirming the trial court's order that conditionally granted the inconvenient forum motion and stayed the action, the Supreme Court, citing *Piper Aircraft Co. v. Reyno (1981) 454 U.S. 235, 257, 102 S. Ct. 252, 70 L. Ed. 2d 419* , and *Credit Lyonnais Bank Nederland, N.V., above*, said that the granting or denying of a forum non conveniens motion is within the trial court's discretion, and substantial deference is accorded its determination in this regard (*54 Cal. 3d 744, 751)* .

The court also noted that the question of the suitability of the alternative forum was a threshold inquiry, and not part of the discretionary balancing of conveniences (*54 Cal. 3d 744, 752 n.3*).

The procedural background of ***Morris v. AGFA Corp.*** *(2006) 144 Cal. App. 4th 1452, 51 Cal. Rptr. 3d 301* is discussed in *§ 132.130[3][b]*. In its ruling, the court explained that a trial court must be flexible in its weighing of the *Stangvik* factors. Private and public interest factors must be applied flexibly, without giving undue emphasis to any one element. The doctrine of forum non conveniens may not be base on identification of a single factor rather than the balancing of several factors. An undue emphasis on a single factor is especially threatening to a balanced analysis because some of the matters to be weighed will by their nature point to a grant or denial of the motion. For example, the jurisdiction's interest in deterring future wrongful conduct of the defendant will usually favor retention of the action if the defendant is a resident of the forum, whereas the congestion factor will usually weigh in favor of trial in the alternate jurisdiction. The court must consider the public policy considerations, such as California's interest in deciding actions against resident corporation whose conduce in the state causes injury to persons in other jurisdictions.

The facts and procedural background of ***American Cemwood Corp. v. American Home Assurance Co.*** *(2001) 87 Cal. App. 4th 431, 104 Cal. Rptr. 2d 670* , are discussed in *§ 132.140[3][a]*.

In reversing the order staying the action, the court of appeal noted that the threshold question of whether the alternative forum is a suitable place for trial is a threshold determination and is not a discretionary determination. In assessing suitability there is no balancing of interests and no discretion to be exercised. Only after the alternative forum is determined to be suitable does the court proceed to the discretionary balance of public and private interests (*87 Cal. App. 4th 431, 436)* .

The facts and procedural background of ***Roulier v. Cannondale*** *(2002) 101 Cal. App. 4th 1180, 124 Cal. Rptr. 2d 877* are discussed in *§ 132.140*[3][b]. The *Roulier* court reiterated the rule that the rule on forum non conveniens is an equitable doctrine invoking the discretionary power of a court to decline to exercise the jurisdiction it has over a transitory cause of action when it believes that the action may be more appropriately and justly tried elsewhere, and the

trial court's balancing of these factors is entitled to substantial deference (*101 Cal. App. 4th 1180, 1188)* .

[b] Discretion Not Arbitrary

In ***Credit Lyonnais Bank Nederland, N.V. v. Manatt, Phelps, Rothenberg & Tunney*** *(1988) 202 Cal. App. 3d 1424, 249 Cal. Rptr. 559* , a Netherlands bank sued an English lawyer and his law firm and a California law firm for legal malpractice, based on a loan transaction involving security interests in California in which the California law firm represented the bank on behalf of the English law firm, and the California law firm cross complained against the English lawyer for indemnification. The trial court granted the motion of the English lawyer and his law firm to dismiss the action as to them on the ground of forum non conveniens, and the court of appeal affirmed. In affirming the order dismissing the action as to two defendants, the court of appeal said that the act of staying or dismissing an action on the ground of forum non conveniens is an act of discretion which may not be arbitrary; it must be exercised in conformity with the spirit of the law and in a manner to subserve and not impede the ends of substantial justice, and that when the court has abused its discretion, the stay or dismissal must be lifted (*202 Cal. App. 3d 1424, 1436)* .

The facts and procedural background of ***Corrigan v. Bjork Shiley Corp.*** *(1986) 182 Cal. App. 3d 166, 227 Cal. Rptr. 247* , *appeal dismissed 479 U.S. 1049 (1987)* , are discussed in *§ 132.130[3][a]*. In reversing the order staying the action, the court of appeal said that the act of staying an action is an action of discretion which may not be arbitrary; it must be exercised within the spirit of the law and in a manner to subserve and not impede the ends of substantial justice, and that where the court has abused its discretion, the stay must be lifted (*182 Cal. App. 3d 166, 173)* .

Note that *Corrigan* was disapproved on other grounds in *Stangvik v. Shiley Inc. (1991) 54 Cal. 3d 744, 761, 764, 1 Cal. Rptr. 2d 556, 819 P.2d 14* .

[4] Additional Authorities

[a] Discretion of Court

The facts and procedural background of *Campbell v. Parker-Hannifin Corp. (1999) 69 Cal. App. 4th 1534, 82 Cal. Rptr. 2d 202* , are discussed in *§ 132.154[3][a]*. In finding that the trial court had not abused its discretion by staying the action against two defendants based on the doctrine of forum non conveniens, the court of appeal, citing *Stangvik v. Shiley Inc. (1991) 54 Cal. 3d 744, 751, 1 Cal. Rptr. 2d 556, 819 P.2d 14* , noted that on a motion for forum non conveniens, the granting or denial of such a motion is within the trial court's discretion, and substantial deference is accorded its determination in this regard (*69 Cal. App. 4th 1534, 1538, 1541)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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13-132 California Points & Authorities § 132.152

§ 132.152 Supporting or Opposing Motion to Stay or Dismiss Action or Proceeding for Inconvenient Forum [Code Civ. Proc. §§ 410.30(a), 418.10(a)(2)]--Stay Versus Dismissal

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum supporting or opposing a motion to stay or dismiss an action on the ground of inconvenient forum (see, e.g., §§ 132.130, 132.140).*]

THE _____ [ACTION *or* PROCEEDING] SHOULD [NOT] BE DISMISSED FOR THE REASON THAT _____ [*specify*].

A. Stay Versus Dismissal. Once the court determines that in the interest of substantial justice a forum other than California would be more convenient, the court may either dismiss or stay the action (*Code Civ. Proc. § 410.30(a)*).

B. Dismissal Is Exceptional Remedy. Ordinarily, dismissal is an exceptional remedy and a stay is the usual one, so that if obstacles to litigation develop in the convenient forum, the parties may resume litigation in California (*Jagger v. Superior Court (1979) 96 Cal. App. 3d 579, 589, 158 Cal. Rptr. 163* ; *Henderson v. Superior Court (1978) 77 Cal. App. 3d 583, 597-598, 142 Cal. Rptr. 478*).

[*Optional*] **C. Dismissal Required.** When the balance of factors to be considered does weigh heavily in a defendant's favor for dismissal, it becomes the trial court's duty to apply the doctrine and dismiss the action or proceeding (*Outboard Marine Corp. v. Superior Court (1976) 59 Cal. App. 3d 434, 439, 130 Cal. Rptr. 642*).

[*Optional*] **D. Conditions on Dismissal or Stay.** The court may dismiss or stay the action in whole or in part on any conditions that may be just (*Code Civ. Proc. § 410.30(a)*).

[2] Comments

[a] Use of Form

The form in [1], *above*, sets out various factors for the court's consideration, in ruling on a motion to stay or dismiss an action for inconvenient forum, in determining whether a stay or dismissal is the more appropriate remedy.

This form does not provide a complete memorandum, but is designed to be combined with a general form of memorandum supporting or opposing a motion to stay or dismiss an action for inconvenient forum [*see, e.g., §§ 132.130, 132.140*]. For other related uses, see *§ 132.130[2]*.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Dismissal Is Exceptional Remedy

The facts and procedural background of ***Jagger v. Superior Court*** *(1979) 96 Cal. App. 3d 579, 158 Cal. Rptr. 163* , are discussed in *§ 132.130[3][c]*. In granting a writ of mandate directing the trial court to stay the proceedings on the ground of forum non conveniens, the court of appeal said that ordinarily, dismissal is an exceptional remedy and a stay is the usual one, so that if obstacles to litigation develop in the convenient forum the parties may resume litigation in California (*96 Cal. App. 3d 579, 589)* .

The procedural background of ***Henderson v. Superior Court*** *(1978) 77 Cal. App. 3d 583, 142 Cal. Rptr. 478* , is discussed in *§ 132.130[3][c]*, Specific Factors Enumerated. In granting the writ directing the trial court to grant the motion to quash service of summons for lack of jurisdiction and to dismiss the action for inconvenient forum, the court of appeal said ordinarily, dismissal is the exceptional remedy and stay the usual remedy, so that if obstacles develop to litigation in the convenient forum the litigant may resume litigation in the California forum (*77 Cal. App. 3d 583, 597-598)* .

[b] Dismissal Required

Outboard Marine Corp. v. Superior Court *(1976) 59 Cal. App. 3d 434, 130 Cal. Rptr. 642* , was a mandate proceeding arising out of an action against a Delaware corporation, which did business in all 50 states and had a resident agent for service of process in California, and an individual named as a nominal defendant because of his California residence, for the wrongful death of one of the Delaware corporation's California division's dealers who had been killed in Wyoming while operating a trackster manufactured by the corporation in Nebraska or Wisconsin. The decedent's widow and heirs were residents of Wyoming. Defendants' motions for dismissal for forum non conveniens were denied, and they petitioned for a writ of mandate.

In granting the writ, the court of appeal said that when the balance of factors weighs heavily in a defendant's favor, it becomes the trial court's duty to apply the doctrine and dismiss the case; after weighing the relevant factors, the court concluded that the trial court's failure to apply the doctrine was an abuse of discretion (*59 Cal. App. 3d 434, 439, 442)* .

[4] Additional Authorities

[a] Dismissal Is Exceptional Remedy

In *Century Indemnity Co. v. Bank of America (1997) 58 Cal. App. 4th 408, 68 Cal. Rptr. 2d 132* , plaintiffs appealed from an order staying on the basis of forum non conveniens their declaratory relief action brought against defendant bank. The defendant had brought an earlier action in Hawaii state court naming the plaintiffs and others as defendants in that action. In affirming the trial court's order, the court of appeal stated that because dismissal of action results in California's loss of jurisdiction over the matter, it has long been the rule that an action brought by a California resident may not be dismissed on grounds of forum non conveniens except in extraordinary circumstances. The trial court,

however, has considerably wider discretion to grant stays because under a stay California retains jurisdiction. Even an action brought by a California resident is subject to a stay. In deciding whether to issue a stay, a trial court should consider the importance of discouraging multiple litigation designed solely to harass an adverse party, and of avoiding unseemly conflicts with the courts of other jurisdictions as well as whether the rights of the parties can best be determined by the court of the other jurisdiction because of the nature of the subject matter, the availability of witnesses, or the stage to which the proceedings in the other court have already advanced. A trial court can take into account any consideration that bears on the relative suitability or convenience of the two forums (*58 Cal. App. 4th 408, 411-412)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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13-132 California Points & Authorities § 132.153

§ 132.153 Supporting or Opposing Motion to Stay or Dismiss Action or Proceeding for Inconvenient Forum [Code Civ. Proc. §§ 410.30(a), 418.10(a)(2)]--Doctrine Is Drastic Remedy to Be Used Cautiously

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum supporting or opposing a motion to stay or dismiss an action on the ground of inconvenient forum (see, e.g., §§ 132.130, 132.140).*]

THE INCONVENIENT FORUM DOCTRINE IS A DRASTIC REMEDY TO BE USED CAUTIOUSLY.

Doctrine Is Drastic Remedy. The doctrine of inconvenient forum is regarded as a drastic remedy and must be exercised with caution and restraint (*Credit Lyonnais Bank Nederland, N.V. v. Manatt, Phelps, Rothenberg & Tunney (1988) 202 Cal. App. 3d 1424, 1436, 249 Cal. Rptr. 559* ; *Corrigan v. Bjork Shiley Corp. (1986) 182 Cal. App. 3d 166, 173, 227 Cal. Rptr. 247* (disapproved on other grounds in *Stangvik v. Shiley Inc. (1991) 54 Cal. 3d 744, 761, 764, 1 Cal. Rptr. 2d 556, 819 P.2d 14*)).

[2] Comments

[a] Use of Form

The points and authorities in [1], *above*, state the rule that the doctrine of inconvenient forum is a drastic remedy that should be used cautiously.

This form does not provide a complete memorandum, but is designed to be combined with a general form of memorandum supporting or opposing a motion to stay or dismiss an action for inconvenient forum [*see, e.g., §§ 132.130*, 132. 140]. For other related uses, see *§ 132.130[2]*.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authority

[a] Doctrine Is Drastic Remedy

The facts and procedural background of ***Credit Lyonnais Bank Nederland, N.V. v. Manatt, Phelps, Rothenberg & Tunney*** *(1988) 202 Cal. App. 3d 1424, 249 Cal. Rptr. 559* , are discussed in *§ 132.151[3][a]*. In affirming the judgment of dismissal on the ground of forum non conveniens, the court of appeal nevertheless pointed out that forum non conveniens is a drastic remedy to be exercised with caution and restraint (*202 Cal. App. 3d 1424, 1436)* .

The facts and procedural background of ***Corrigan v. Bjork Shiley Corp. Co.*** *(1986) 182 Cal. App. 3d 166, 227 Cal. Rptr. 247 , appeal dismissed, 479 U.S. 1049 (1987)* , are discussed in *§ 132.130[3][a]*. In reversing the order staying the proceedings on the ground of forum non conveniens, the court of appeal said that the doctrine of inconvenient forum is regarded as a drastic remedy and must be exercised with caution and restraint (*182 Cal. App. 3d 166, 173)* .

Note that *Corrigan* was disapproved on other grounds in *Stangvik v. Shiley Inc. (1991) 54 Cal. 3d 744, 761, 764, 1 Cal. Rptr. 2d 556, 819 P.2d 14* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil ProcedureVenueForum Non ConveniensCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 132 JURISDICTION: PERSONAL JURISDICTION AND INCONVENIENT FORUM
PART II. FORMS
D. Inconvenient Forum

13-132 California Points & Authorities § 132.154

§ 132.154 Supporting or Opposing Motion to Stay or Dismiss Action or Proceeding for Inconvenient Forum [Code Civ. Proc. §§ 410.30(a), 418.10(a)(2)]--Evidentiary Showing Concerning Alternative Forum

[1] FORM

[*The following may be combined, when appropriate, with a general form of memorandum supporting or opposing a motion to stay or dismiss an action on the ground of inconvenient forum (see, e.g., §§ 132.130, 132.140).*]

AN EVIDENTIARY SHOWING THAT TRIAL MAY BE HAD IN THE ALTERNATIVE FORUM AND SOME FORM OF RELIEF MAY BE GRANTED IS REQUIRED.

Evidentiary Showing Concerning Alternative Forum Required. The principal evidentiary showing required by *Stangvik v. Shiley Inc. (1991) 54 Cal. 3d 744, 1 Cal. Rptr. 2d 556, 819 P.2d 14* , is that trial may be had in the alternative forum and that some form of relief may be granted. Examination of the private and public interests at stake involve more general considerations (*Campbell v. Parker-Hannifin Corp. (1999) 69 Cal. App. 4th 1534, 1542, 82 Cal. Rptr. 2d 202*).

[2] Comments

[a] Use of Form

The form of points and authorities in [1], *above*, states the required evidentiary showing concerning availability of the alternative forum. This form does not provide a complete memorandum, but is designed to be combined with a general form of memorandum supporting or opposing a motion to stay or dismiss an action for inconvenient forum [*see, e.g., §§ 132.130, 132.140*], or adapted for use in a trial or appellate brief. For other related uses, see *§ 132.130[2]*.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. In particular, counsel arguing in favor of the motion should identify the specific alternative forum and show that some form of relief would be available in that forum. Opposing counsel will want to show that the allegedly available alternative forum in fact is not available or that no relief would be available in that forum [*see also § 132.141*].

In either case, therefore, counsel may need to arrange for judicial notice to be taken of the law of the other forum [*see Evid. Code §§ 452, 453*; *Cal. Rules of Ct., Rules 3.1113(k), 3.1306(c)*; for discussion and forms for invoking judicial notice, *see* California Forms of Pleading and Practice, Ch. 321, *Judicial Notice*].

[3] Discussion of Authorities

[a] Evidentiary Showing Concerning Alternative Forum Required

In ***Campbell v. Parker-Hannifin Corp.*** *(1999) 69 Cal. App. 4th 1534, 82 Cal. Rptr. 2d 202* , plaintiff and other heirs of victims of a fatal airline crash in Australia appealed from the trial court's ruling granting summary judgment in favor of one of the defendant's and staying the action as to two other defendants on the grounds of forum non conveniens. Plaintiffs contended that the trial court abused its discretion in granting the forum non conveniens motion, and erred in granting summary judgment. The court of appeal affirmed the summary judgment and also found there was no abuse of discretion in the trial court's ruling staying the action as to the two remaining defendants based on the doctrine of forum non conveniens (*69 Cal. App. 4th 1534, 1537-1540)* . One argument raised by the plaintiffs was that the defendants failed to present any evidence to support their assertion that California was inconvenient. The court rejected this argument noting that the argument ignored much of the analytical framework set forth in *Stangvik v. Shiley Inc. (1991) 54 Cal. 3d 744, 1 Cal. Rptr. 2d 556, 819 P.2d 14* . *Stangvik* did not require an extensive evidentiary showing. The principal evidentiary *Stangvik* requires is that trial may be had in the alternative forum and that some form of relief may be granted. Defendants met that burden. Examination of the private and public interests at stake involve more general considerations. There is no requirement that the trial court make any express ruling on a motion to stay/dismiss (*69 Cal. App. 4th 1534, 1542)* . The court also rejected plaintiffs' argument that the defendants failed to show that California was an inconvenient forum. Defendants asserted in their briefs and during argument before the trial court that since the accident occurred in Australia, California would be an inconvenient forum. They indicated they would contest causation and would want to call Australian witnesses regarding the maintenance and operation of the plane in Australia and the training and proficiency of the pilot. Defendant further indicated they would want to call as witnesses persons mentioned in the coroner's report who heard or observed the crash. Thus, plaintiffs were incorrect in asserting defendants made no showing that California would be an inconvenient forum (*69 Cal. App. 4th 1534, 1543)* . Moreover, the court noted that it reiterated the *Stangvik* court's observation that the scales are not usually tipped on the basis of this factor in any event (*69 Cal. App. 4th 1534, 1543)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil ProcedureVenueForum Non ConveniensCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss

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13-133 California Points & Authorities 133.syn

§ 133.syn Synopsis to Chapter 133: JURISDICTION: SUBJECT MATTER JURISDICTION

§ 133.01 Scope of Chapter

§ 133.02 Governing Law

§ 133.03 Lack of Jurisdiction

§ 133.04 Excess of Jurisdiction

§ 133.05 Jurisdiction to Determine Jurisdiction

§ 133.06 Page Limits on Points and Authorities

§ 133.07 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

[2] Related Points and Authorities Chapters

§§ 133.08-133.19 [Reserved]

§ 133.20 Supporting Motion to Dismiss Action, Proceeding, or Case for Lack of Jurisdiction--No California Court Has Jurisdiction of Action for Damages to, or Concerning Title of, Real Property Situated in Another State

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Local Action Arising in Another State

[b] Action to Determine Title to Real Property in Another State

§ 133.21 Supporting Motion to Dismiss Action, Proceeding, or Case for Lack of Jurisdiction--No California Court Has Jurisdiction of Declaratory Relief Action by Debtor Against Creditor on Matured Claim

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Action for Declaratory Relief by Debtor on Fully Matured Claim

[b] Absence of California Court Having Subject Matter Jurisdiction

§ 133.22 Supporting Motion to Dismiss Action, Proceeding, or Case for Lack of Jurisdiction--Parties to an Arbitration Agreement Cannot Expand the Jurisdiction of the Court to Review Arbitration Awards Beyond that Provided by Statute

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

§§ 133.23-133.29 [Reserved]

§ 133.30 Supporting Petition for Writ of Prohibition [Code Civ. Proc. §§ 1102, 1103]--To Restrain Court From Proceeding With Action of Which Another Court of Concurrent Jurisdiction First Acquired Jurisdiction Over the Parties

[1] FORM

[2] Comments

[a] Use of Form

[b] Precedential Jurisdiction

[c] Effect of Final Judgment in Second Action

[d] Related Uses

[e] Related Pleading and Practice Forms

[f] Related Points and Authorities

[g] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Priority of Jurisdiction

[b] Test of Priority

[c] Restraint by Prohibition

[4] Additional Authorities

[a] Priority of Jurisdiction

[b] Test of Priority

§ 133.31 Supporting Motion to Stay Action--Abatement of Action Required Under Rule of Exclusive Concurrent Jurisdiction

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[3] Discussion of Authorities

[a] Rule of Exclusive Concurrent Jurisdiction

[b] Abatement Required When Conditions for Its Issuance Exist

[c] Absolute Identity of Parties, Causes of Action, or Remedies Sought Is Not Required

§§ 133.32-133.39 [Reserved]

§ 133.40 Opposing Petition for Writ of Prohibition to Restrain Court From Proceeding With Action [Code Civ. Proc. §§ 1102, 1103]--Court First Acquiring Jurisdiction Over Parties Has Declined to Assume Jurisdiction

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Court in Which Summons Was Served First Has Yielded Its Jurisdiction to Second Court

§§ 133.41-133.49 [Reserved]

§ 133.50 Supporting Motion to Dismiss Action for Lack of Jurisdiction--Jurisdiction Is Vested Exclusively in Federal Courts

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] When Issue of Preemption Arises

[d] Conflict Between Federal and State Statutes

[e] Related Pleading and Practice Forms

[f] Related Points and Authorities

[3] Discussion of Authorities

[a] Death on the High Seas Act

[b] Federal Patent Law

§ 133.51 Supporting Motion to Quash Service of Summons and to Dismiss Action for Lack of Jurisdiction--Jurisdiction of Disputes Involving Ownership or Right to Possession of Indian Land Held in Trust by United States or Interest Therein Is Vested Exclusively in Federal Courts [28 U.S.C. § 1360(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[3] Discussion of Authorities

[a] Limitation on State Court Jurisdiction

[b] Action Is Completely Preempted by Federal Law and Dismissal Is Required

[c] Hybrid Motion to Quash/Dismiss Is Proper

[d] Indian Defendants Acting Within Their Authority Are Immune From Liability

[4] Additional Authorities

[a] Limitation on State Court Jurisdiction

§ 133.52 Supporting Motion to Vacate Defendant's Default Entered on Remand of Case From Federal Court [28 U.S.C. § 1446]--Entry of Default [Code Civ. Proc. § 585] Was Void [Code Civ. Proc. § 473, Fifth Paragraph] Because Responsive Pleading Was Timely Filed

[1] FORM

[2] Comments

[a] Use of Form

[b] Removal and Remand

[c] Related Uses

[d] Related Pleading and Practice Forms

[e] Related Points and Authorities

[3] Discussion of Authorities

[a] Removal of Action Suspends State Court's Jurisdiction

[b] Effect of Removal and Remand on Time to Plead

[c] Responsive Pleading Filed in Federal Court

[4] Additional Authorities

[a] Removal of Action Suspends State Court's Jurisdiction

§§ 133.53-133.59 [Reserved]

§ 133.60 Opposing Motion to Dismiss Action for Lack of Jurisdiction--State Courts Have Concurrent Jurisdiction With Federal Courts of Federal Cause of Action

[1] FORM

[2] Comments

[a] Use of Form

[b] Removal of Action

[3] Discussion of Authorities

[a] Presumption of Concurrent Jurisdiction

[b] Effect of Grant of Jurisdiction to Federal Court

[4] Additional Authorities

[a] Presumption of Concurrent Jurisdiction

§§ 133.61-133.69 [Reserved]

§ 133.70 Supporting Motion to Reclassify Action From a Limited Civil Case to an Unlimited Civil Case [Code Civ. Proc. § 403.040]--Complaint or Cross-Complaint Seeks Relief in Excess of $25,000 [Code Civ. Proc. § 85]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] The Walker Test Continues to Govern the Determination of the Jurisdictional Amount in Controversy for Reclassification of a Case

[b] Each Party Must Be Afforded the Opportunity to Respond and Offer Reasons Why Reclassification Is or Is Not Appropriate

§ 133.71 Supporting Motion to Reclassify Action From a Limited Civil Case to an Unlimited Civil Case [Code Civ. Proc. § 403.040]--Complaint or Cross-Complaint Seeks Relief of a Type Not Granted in Limited Civil Cases [Code Civ. Proc. § 85(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] The Walker Test Continues to Govern the Determination of the Jurisdictional Amount in Controversy for Reclassification of a Case

[b] Each Party Must Be Afforded the Opportunity to Respond and Offer Reasons Why Reclassification Is or Is Not Appropriate

§§ 130.72-130.89 [Reserved]

§ 133.90 Opposing Motion to Reclassify Action From a Limited Civil Case to an Unlimited Civil Case [Code Civ. Proc. § 403.040]--Complaint or Cross-Complaint Does Not Seek Relief in Excess of $25,000 [Code Civ. Proc. § 85]; Good Cause Required for Not Seeking Reclassification After Time to Amend Pleading or Respond to Complaint, Cross-Complaint, or Other Initial Pleading [Code Civ. Proc. § 403.040(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] The Walker Test Continues to Govern the Determination of the Jurisdictional Amount in Controversy for Reclassification of a Case

[b] Each Party Must Be Afforded the Opportunity to Respond and Offer Reasons Why Reclassification Is or Is Not Appropriate

§§ 130.91-130.109 [Reserved]

§ 133.110 Supporting Motion to Reclassify Action From an Unlimited Civil Case to a Limited Civil Case [Code Civ. Proc. § 403.040]--Complaint or Cross-Complaint Does Not Seek Relief in Excess of $25,000 [Code Civ. Proc. § 85]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] The Walker Test Continues to Govern the Determination of the Jurisdictional Amount in Controversy for Reclassification of a Case

[b] Each Party Must Be Afforded the Opportunity to Respond and Offer Reasons Why Reclassification Is or Is Not Appropriate

§ 133.111 Supporting Motion to Reclassify Action From an Unlimited Civil Case to a Limited Civil Case [Code Civ. Proc. § 403.040]--Recovery of Amount in Excess of $25,000 Has Been Remitted [Code Civ. Proc. § 403.040(f)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

§§ 130.112-130.129 [Reserved]

§ 133.130 Opposing Motion to Reclassify Action From an Unlimited Civil Case to a Limited Civil Case [Code Civ. Proc. § 403.040]--Complaint or Cross-Complaint Seeks Relief in Excess of $25,000 [Code Civ. Proc. § 85]; Good Cause Required for Not Seeking Reclassification After Time to Amend Pleading or Respond to Complaint, Cross-Complaint, or Other Initial Pleading [Code Civ. Proc. § 403.040(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] The Walker Test Continues to Govern the Determination of the Jurisdictional Amount in Controversy for Reclassification of a Case

[b] Each Party Must Be Afforded the Opportunity to Respond and Offer Reasons Why Reclassification Is or Is Not

Appropriate

§ 133.131 Opposing Motion to Reclassify Action From an Unlimited Civil Case to a Limited Civil Case [Code Civ. Proc. § 403.040]--Complaint or Cross-Complaint Seeks Relief of a Type Not Granted in Limited Civil Cases [Code Civ. Proc. § 85(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] The Walker Test Continues to Govern the Determination of the Jurisdictional Amount in Controversy for Reclassification of a Case

[b] Each Party Must Be Afforded the Opportunity to Respond and Offer Reasons Why Reclassification Is or Is Not Appropriate

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13-133 California Points & Authorities § 133.01

§ 133.01 Scope of Chapter

This chapter discusses and includes points and authorities relating to the subject matter jurisdiction of California courts.

Subpart A includes points and authorities for use in supporting a motion to dismiss an action for lack of subject matter jurisdiction when there is no California state court having jurisdiction [*§§ 133.20, 133.21*].

Subpart B includes points and authorities for use in supporting [*§ 133.30*] and opposing [*§ 133.40*] a petition for writ of prohibition to restrain a court from proceeding with a case on the ground that another court of concurrent jurisdiction has already acquired jurisdiction, and points and authorities supporting [*§ 133.31*] a motion to stay an action on the ground that another court has exclusive concurrent jurisdiction.

Subpart C includes points and authorities for use in supporting [*§ 133.50*] and opposing [*§ 133.60*] a motion to dismiss an action on the ground the federal courts have exclusive jurisdiction of the subject matter, as well as points and authorities for use in supporting a motion to vacate a default judgment entered after remand from the federal court on the ground the entry of default was unauthorized and is void [*§ 133.52*].

Subpart D includes points and authorities for use in supporting or opposing reclassification of limited civil case to an unlimited civil case [*§§ 133.70*-133.90], or supporting or opposing reclassification from an unlimited civil case to a limited civil case [*§§ 133.110*-133.131].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral Overview

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13-133 California Points & Authorities § 133.02

§ 133.02 Governing Law

Subject matter jurisdiction is conferred by *Cal. Const., art. VI, §§ 10* and *11*, and by *Code Civ. Proc. §§ 85-86.1* (limited civil cases), and *Code Civ. Proc. § 116.220* (small-claims division). Parties cannot confer subject matter jurisdiction upon the court by consent, waiver, or estoppel [*Housing Group v. United Nat'l Ins. Co. (2001) 90 Cal. App. 4th 1106, 1113, 109 Cal. Rptr. 2d 497]* .

The transfer of an action or proceeding from a court lacking subject matter jurisdiction to one having such jurisdiction is governed by *Code Civ. Proc. §§ 396* and *399*.

Reclassification of a case filed in superior court as either a limited civil case or unlimited civil case is governed by *Code Civ. Proc. §§ 403.010-403.090*.

Review of any superior court order granting or denying a motion to change the place of trial is governed by *Code Civ. Proc. § 400*, whereas review of a superior court order granting or denying a motion to reclassify an action or proceeding under *Code Civ. Proc. § 403.040* is governed by *Code Civ. Proc. § 403.080*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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13-133 California Points & Authorities § 133.03

§ 133.03 Lack of Jurisdiction

Lack of jurisdiction in its strict sense means an entire absence of power to hear or determine a case, an absence of authority over the subject matter [*see Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 287-288, 109 P.2d 942* ; *Schwenke v. J & P Scott, Inc. (1988) 205 Cal. App. 3d 71, 76, 252 Cal. Rptr. 91]* .

The judgment of a court lacking jurisdiction over the subject matter is void [*see Kulko v. California Superior Court (1978) 436 U.S. 84, 91, 98 S. Ct. 1690, 56 L. Ed. 2d 132, 141* ; *Hanson v. Denckla (1958) 357 U.S. 235, 250, 78 S. Ct. 1228, 2 L. Ed. 2d 1283* ; *County of Ventura v. Tillett (1982) 133 Cal. App. 3d 105, 110, 183 Cal. Rptr. 741* , *cert. denied, 460 U.S. 1051 (1983*) (disapproved on another point in *County of Los Angeles v. Soto (1984) 35 Cal. 3d 483, 492 n.4, 198 Cal. Rptr. 779, 674 P.2d 750*)].

Parties cannot confer subject matter jurisdiction upon the court by consent, waiver, or estoppel [*Housing Group v. United Nat'l Ins. Co. (2001) 90 Cal. App. 4th 1106, 1113, 109 Cal. Rptr. 2d 497]* , nor can they expand a court's jurisdiction by contract to include a review of an arbitration award on the merits [*Crowell v. Downey Community Hospital Foundation (2002) 95 Cal. App. 4th 730, 739, 115 Cal. Rptr. 2d 810]* .

A court's lack of subject matter jurisdiction is never waived and can be raised for the first time on appeal [*Miranda v. 21st Century Insurance Co. (2004) 117 Cal. App. 4th 913, 920, 12 Cal. Rptr. 3d 159* ; *Parrott v. Mooring Townhomes Assn. (2003) 112 Cal. App. 4th 873, 876, 6 Cal. Rptr. 3d 116]* .

A judgment void on its face--because rendered when the court lacked subject matter jurisdiction or exceeded its jurisdiction in granting relief--is subject to collateral attack at any time [*Sindler v. Brennan (2003) 105 Cal. App. 4th 1350, 1353, 129 Cal. Rptr. 2d 888]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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13-133 California Points & Authorities § 133.04

§ 133.04 Excess of Jurisdiction

In some instances a court may have proper jurisdiction over the subject matter but it may nonetheless be limited in the exercise of that jurisdiction. It may, for example, have jurisdiction or power to act only in a particular manner, to grant only certain kinds of relief, or to act only on the occurrence of certain procedural prerequisites [*Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 288, 109 P.2d 942* ; *see also Crittenden v. Superior Court (1964) 61 Cal. 2d 565, 567, 39 Cal. Rptr. 380, 393 P.2d 692* ; *Schwenke v. J & P Scott, Inc. (1988) 205 Cal. App. 3d 71, 76, 252 Cal. Rptr. 91]* . Strictly speaking, a court having fundamental jurisdiction, but acting beyond the limits of its authority, is acting in excess of its jurisdiction; although the phrase "lack of jurisdiction" is sometimes used to refer to such acts, they should be distinguished from acts undertaken with a lack of fundamental jurisdiction [*see Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 290, 109 P.2d 942* ; *Jones v. World Life Research Institute (1976) 60 Cal. App. 3d 836, 846, 131 Cal. Rptr. 674* ; *see also discussion under § 133.03*].

Judicial acts in excess of jurisdiction may be challenged by petition for writ of prohibition or review [*see Crittenden v. Superior Court (1964) 61 Cal. 2d 565, 567, 39 Cal. Rptr. 380, 393 P.2d 692* (writ of prohibition granted); *Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal. 2d 450, 454-455, 20 Cal. Rptr. 321, 369 P.2d 937* (writ of certiorari); *see also Code Civ. Proc. § 1094.5(a), (b)* (petition for writ of administrative mandate to review certain quasi-judicial acts of administrative agencies)]. These acts generally include any acts that exceed the power of a court as defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of stare decisis [*see Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 287-288, 109 P.2d 942]* . Moreover, the judgment of a court that exceeds its jurisdiction by granting relief that it has no power to grant is void [*County of Ventura v. Tillett (1982) 133 Cal. App. 3d 105, 110, 183 Cal. Rptr. 741 , cert. denied, 460 U.S. 1051 (1983*) (disapproved on another point in *County of Los Angeles v. Soto (1984) 35 Cal. 3d 483, 492 n.4, 198 Cal. Rptr. 779, 674 P.2d 750*); *but see People v. Malveaux (1997) 50 Cal. App. 4th 1425, 1434, 59 Cal. Rptr. 2d 371* (judgment void rather than voidable only if trial court lacked subject matter jurisdiction; since juvenile court's judgment was in excess of jurisdiction, judgment was only voidable and not void; consequently, court lost jurisdiction over own judgment after notice of appeal filed; trial court loses jurisdiction to vacate its own judgment once party files notice of appeal, thus shifting jurisdiction over cause to court of appeal, except that trial court is allowed to vacate void but not voidable judgment; trial court may also enter orders that only determine ancillary or collateral matters)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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13-133 California Points & Authorities § 133.05

§ 133.05 Jurisdiction to Determine Jurisdiction

Although a court may not act in a matter over which it has no jurisdiction, it has the initial power, or jurisdiction, to determine whether or not it has jurisdiction to act [*Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 302-303, 109 P.2d 942* ; *Ziller Electronics Lab GMBH v. Superior Court (1988) 206 Cal. App. 3d 1222, 1228, 254 Cal. Rptr. 410]* . Thus, a court has inherent power to inquire into its jurisdiction of a matter on its own motion, regardless of whether the issue is raised by the litigants [*Walker v. Superior Court (1991) 53 Cal. 3d 257, 267, 279 Cal. Rptr. 576, 807 P.2d 418* ; *Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 302, 109 P.2d 942* ; *In re Corienna G. (1989) 213 Cal. App. 3d 73, 77, 261 Cal. Rptr. 462]* . The power of inquiry rests partially on the theory that until the court determines that it has jurisdiction and does some act in consequence, there can be no injury to the party who denies its jurisdiction. The exercise of jurisdiction to determine jurisdiction is a preliminary step, not a final one, and no interference in the tribunal's inquiry is permitted. However, once a court decides that it has jurisdiction, then any subsequent act is always subject to inquiry by a higher court [*Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 302-303, 109 P.2d 942]* . That is, once the determination is made, the question is no longer one of jurisdiction to determine jurisdiction, but, rather, one of jurisdiction to act, and if the court acts, its action is subject to review by a higher court [*Harden v. Superior Court (1955) 44 Cal. 2d 630, 634, 284 P.2d 9* ; *Housing Authority v. Superior Court (1950) 35 Cal. 2d 550, 557, 219 P.2d 457* ; *see also* discussion in *§ 133.30[2][b]*].

Where the evidence is not in dispute, a determination of subject matter jurisdiction is a legal question subject to de novo review [Dial 800 v. *Fesbinder (2004) 118 Cal. App. 4th 32, 42, 12 Cal. Rptr. 3d 711* ; *Warburton/Buttner v. Superior Court (2002) 103 Cal. App. 4th 1170, 1180, 127 Cal. Rptr. 2d 706]* .

Legal Topics:

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13-133 California Points & Authorities § 133.06

§ 133.06 Page Limits on Points and Authorities

Generally, a supporting or opposing memorandum must not exceed 15 pages, or, in the case of a motion for summary judgment or summary adjudication, 20 pages. A reply or closing memorandum may not exceed 10 pages [*see Cal. Rules of Ct., Rule 3.1113(d)*]. The page limit does not include exhibits, declarations, attachments, the table of contents, the table of authorities, or the proof of service [*Cal. Rules of Ct., Rule 3.1113(d)*]. Any party desiring to file a longer memorandum must obtain leave of court [*see Cal. Rules of Ct., Rule 3.1113(e)*]. For further discussion of the page limitations under *Cal. Rules of Ct., Rule 3.1113*, and of other basic format requirements of memoranda, see *Ch. 1, Writing Legal Memoranda and Briefs, § 1.05*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProceduresPleading & PracticeGeneral OverviewCivil ProceduresPleading & PracticeMotion PracticeContent & Form

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 133 JURISDICTION: SUBJECT MATTER JURISDICTION
PART I. INTRODUCTION

13-133 California Points & Authorities § 133.07

§ 133.07 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

For discussion and forms relating to proceedings to challenge a court's subject matter jurisdiction by motion to transfer an action, see California Forms of Pleading and Practice, Ch. 324, *Jurisdiction: Subject Matter Jurisdiction* (Matthew Bender). For discussion, a procedural guide, and a form of demurrer on the ground the court lacks subject matter jurisdiction or on the ground that another action is pending between the same parties on the same cause, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , in that publication.

Additional discussion and forms relating to jurisdiction may be found in the following chapters in California Forms of Pleading and Practice (Matthew Bender):

- Ch. 3, *Abatement of Actions*, §§ 3.50 et seq. and 3.90 et seq.
- Ch. 265, *Federal Courts: Jurisdiction and Removal*.
- Ch. 358, *Mandate and Prohibition*.
- Ch. 474B, *Standards in Reviewing Agency Decisions*, and Ch. 474C, *Procedures in Reviewing Agency Decisions*.
- Ch. 489, *Relief From Judgments and Orders*.
- Ch. 492, *Review (Certiorari), Writ of*.

[2] Related Points and Authorities Chapters

For additional memoranda of points and authorities relating to jurisdictional or related issues, see the following chapters:

- Ch. 10, *Abatement and Survival of Actions*.
- Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders*.
- Ch. 71, *Demurrers and Motions for Judgment on the Pleadings*.
- Ch. 150, *Mandate and Prohibition*.
- Ch. 195, *Public Administrative Law*.
- Ch. 205, *Review (Certiorari), Writ of*.
- Ch. 238, *Venue*.

For further discussion of how to use forms in this chapter in drafting a complete memorandum of points and authorities or trial or appellate brief, see Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProceduresPleading & PracticeGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss

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13-133 California Points & Authorities §§ 133.08-133.19

[Reserved]

§§ 133.08[Reserved]

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CHAPTER 133 JURISDICTION: SUBJECT MATTER JURISDICTION
PART II. FORMS
A. Dismissal of Action for Lack of Jurisdiction

13-133 California Points & Authorities § 133.20

§ 133.20 Supporting Motion to Dismiss Action, Proceeding, or Case for Lack of Jurisdiction--No California Court Has Jurisdiction of Action for Damages to, or Concerning Title of, Real Property Situated in Another State

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*],	)	IES IN SUPPORT OF MOTION TO DISMISS AC-
Plaintiff, vs.	)	TION FOR LACK OF JURISDICTION
_____ [*name*],	)	[Limited Civil Case]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE MOTION TO DISMISS THIS ACTION SHOULD BE GRANTED BECAUSE THIS COURT LACKS JURISDICTION OF AN ACTION _____ [FOR DAMAGES TO *or* RELATING TO THE TITLE OF] REAL PROPERTY SITUATED IN ANOTHER STATE, AND THERE IS NO OTHER COURT IN CALIFORNIA HAVING SUCH JURISDICTION.

[*EITHER*]

A. Local Action Arising in Another State. No California court has jurisdiction to entertain a local action arising in another state (*Ophir Silver Min. Co. v. Superior Court (1905) 147 Cal. 467, 473-476, 82 P. 70*).

[*OR*]

A. Action to Determine Title to Real Property in Another State. No California court has jurisdiction of an action to determine title to real property situated in another state (*see Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 288, 109 P.2d 942* ; *Taylor v. Taylor (1923) 192 Cal. 71, 76, 218 P. 756* ; *River Farms, Inc. v. Superior Court (1967) 252 Cal. App. 2d 604, 609, 60 Cal. Rptr. 665*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*party's status and name*]

[2] Comments

[a] Use of Form

The form in [1], *above*, may be submitted in support of a motion to dismiss an action on the ground the court lacks jurisdiction of the subject of the action for damages to, or relating to title of, real property situated in another state, and there is no court in California having such jurisdiction.

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, the foregoing points and authorities may be used to support a demurrer to the complaint on the ground the court lacks jurisdiction of the subject of the cause of action alleged [*see Code Civ. Proc. § 430.10(a)*], or to support of a petition for writ of prohibition to restrain the trial court from continuing with the action after it has improperly denied a motion to dismiss or overruled a demurrer on jurisdictional grounds. They may also be adapted for use in a trial or appellate brief.

[c] Related Pleading and Practice Forms

For a form of notice of motion for an order dismissing an action for lack of subject matter jurisdiction when there is no court in California having such jurisdiction, and for related forms, see, California Forms of Pleading and Practice, Ch. 324, *Jurisdiction: Subject Matter Jurisdiction* (Matthew Bender). For a form of demurrer to the complaint or cross complaint on the ground that the court lacks jurisdiction of the subject of the action, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , in California Forms of Pleading and Practice (Matthew Bender). For a form of petition for writ of prohibition and related forms, see Ch. 358, *Mandate and Prohibition* in that publication.

[d] Related Points and Authorities

For memoranda of points and authorities generally supporting and opposing demurrers to a complaint on the ground of lack of subject matter jurisdiction, see *Ch. 71, Demurrers and Motions for Judgment on the Pleadings, § 71.20* et seq., in this publication. For memoranda of points and authorities generally supporting and opposing a petition for writ of prohibition, see Ch. 150, *Mandate and Prohibition* in this publication.

[3] Discussion of Authorities

[a] Local Action Arising in Another State

Ophir Silver Min. Co. v. Superior Court *(1905) 147 Cal. 467, 82 P. 70* , was a proceeding in prohibition arising out of an action in which both the plaintiff mining company and the defendants, a mining company and a bank, were California corporations having their offices and principal places of business in San Francisco and which involved mining property owned by the plaintiff and situated in Nevada. Plaintiff sought damages for defendants' alleged trespass on its mining property and removing ore from it, for both a preliminary and a permanent injunction to restrain their continuing to do so, and for an accounting. Plaintiff alleged that defendants had sold the ore and converted the proceeds to their own use, that Ophir Silver Mining Co. had brought about $95,000 of the proceeds into California and deposited it with defendant bank. Defendants' demurrers to the complaint on the ground of lack of jurisdiction were overruled, and defendant Ophir Silver Mining Co. petitioned the Supreme Court for a writ of prohibition to restrain the trial court from continuing with the case. Ophir claimed that the action was for trespass quare clausum fregit, and therefore local, and that jurisdiction was exclusively in the Nevada courts where the mine was situated; plaintiff contended that the action was to recover the value of personal property for a trespass de bonis asportatis, or trover (conversion), and that it was therefore transitory and the California court had jurisdiction.

The Supreme Court granted the writ, holding that by seeking damages for injury to the real property and for injunctive relief to prevent continuing trespasses, the action was local and that the superior court was without jurisdiction (*147 Cal. 467, 473-476)* . The Court explained that there was no doubt that the owner of land, if he or she chose to waive all claim for damages to the freehold, could maintain a personal action for the value of the timber or ores removed from the land by a naked trespasser, and the mere fact that in such action he or she may be compelled to allege, and, if denied, to prove, ownership of the land from which the timber was cut or the ore extracted does not make the action local. There is little doubt that when the whole or any part of the damages claimed is for injury to the freehold, the action is local and not transitory (*147 Cal. 467, 473)* . Because land can be injured only where it is situated, damages for such injuries can only be recovered where it is situated, but since timber or ores, when severed from the land by the act of a trespasser, remain the personal property of the owner and are capable of being converted by any person anywhere, an action to recover only the value of the ore or timber after severance is transitory and may be maintained wherever the trespasser can be served with summons (*147 Cal. 467, 473-474)* . The Court said that with respect to territorial jurisdiction there can be no difference between a suit in equity to restrain future trespasses on real property and an action at law for past trespasses on it. If one is local the other is necessarily local and for the reason that forms the basis of the distinction between local and transitory actions, that is, that the injury to be redressed in one case, or prevented in the other, can only take place where the land or mine is situated (*147 Cal. 467, 476)* .

[b] Action to Determine Title to Real Property in Another State

The procedural background of ***Abelleira v. District Court of Appeal*** *(1941) 17 Cal. 2d 280, 109 P.2d 942* , is discussed in *§ 133.70[3][a]*. In issuing the writ of prohibition to restrain the court of appeal from taking any steps toward enforcing its writ of mandate and temporary restraining order against the California Employment Commission (now Unemployment Insurance Appeals Board), the Supreme Court, in giving examples of lack of jurisdiction in its most fundamental or strict sense, said that a state court has no jurisdiction to determine title to land located outside its territorial borders, for the subject matter is entirely beyond its authority or power (*17 Cal. 2d 280, 288)* .

Taylor v. Taylor *(1923) 192 Cal. 71, 218 P. 756* , was an action by a former wife against a former husband brought approximately four years after they had been divorced by a Nevada judgment to enforce an interest in real property situated in California. Judgment was for the defendant, and plaintiff appealed, claiming that the real property had not been divided by the Nevada court, which had no jurisdiction to affect its title, and that the parties therefore became tenants in common of it.

The Supreme Court agreed, and reversed the judgment. The Court said that it is unquestionably the law that the courts of one state cannot make a decree that will operate to change or directly affect the title to real property beyond the territorial limits of its jurisdiction (*192 Cal. 71, 76)* . The reason for the rule is that jurisdiction to affect the title to real estate by a judgment in rem, or directly against the thing itself, exists only in the court of the state in which the land is situated, and that no principle is more fundamental or thoroughly settled than that the local sovereignty, by itself or its judicial agencies, can alone adjudicate on and determine the status of lands and immovable property within its borders, including their title and its incidents and the mode in which they may be charged or conveyed, that neither the laws of another sovereignty, nor the judicial proceedings, decrees, and judgments of its courts can in the least degree affect such lands and immovable property (*192 Cal. 71, 76)* .

Note that the Court also pointed out that by means of its power over the person of the parties before it, a court of equity could in proper cases compel the parties to act in relation to the property not within the jurisdiction, but that its decrees do not operate directly on the property or affect title (*192 Cal. 71, 76)* . Thus, a court with personal jurisdiction over the parties can compel them to execute a conveyance in the form required by the law of the situs [*see, e.g., Phelps v. Kozakar (1983) 146 Cal. App. 3d 1078, 1084, 194 Cal. Rptr. 872* ; *see also In re Marriage of Fink (1979) 25 Cal. 3d 877, 883-887, 884 n.5, 160 Cal. Rptr. 516, 603 P.2d 881* (distribution of out-of-state property in marriage dissolution proceeding)].

River Farms, Inc. v. Superior Court *(1967) 252 Cal. App. 2d 604, 60 Cal. Rptr. 665* , arose out of an action against an Arizona corporation to quiet title to land alleged to be situated in California. Defendant's demurrer to the original complaint was sustained and an amended complaint filed. Between the time the original complaint was filed and the amended complaint was filed, the land became a part of the state of Arizona pursuant to an Interstate Compact between California and Arizona, consented to by Congress and approved by the President of the United States, by the provisions of which California divested itself of sovereignty over the land and reserved no territorial jurisdiction in the California courts. Defendant's motion to strike the complaint and amended complaint on the ground, among others, of lack of jurisdiction, was denied, and defendant petitioned the court of appeal for a writ of prohibition.

In granting the writ, the court held that the court's jurisdiction over the property terminated when California divested itself of sovereignty over the property (*252 Cal. App. 2d 604, 609)* . The court said that trial of an action that involves determination of title to real property in another state is beyond the jurisdiction of the superior court of this state, and prohibition will lie to prevent the trial (*252 Cal. App. 2d 604, 609)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss

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PART II. FORMS
A. Dismissal of Action for Lack of Jurisdiction

13-133 California Points & Authorities § 133.21

§ 133.21 Supporting Motion to Dismiss Action, Proceeding, or Case for Lack of Jurisdiction--No California Court Has Jurisdiction of Declaratory Relief Action by Debtor Against Creditor on Matured Claim

[1] FORM

[*Caption. See § 133.20[1].*]

THE MOTION TO DISMISS THIS ACTION SHOULD BE GRANTED BECAUSE NEITHER THIS COURT NOR ANY OTHER COURT HAS JURISDICTION TO ENTERTAIN A DECLARATORY RELIEF ACTION BY A DEBTOR AGAINST A CREDITOR ON A MATURED CLAIM.

A. Dismissal Required. [*See § 133.20, Paragraph A*].

B. Action for Declaratory Relief by Debtor on Fully Matured Claim. The rule that a superior court does not have jurisdiction to entertain a declaratory relief action by a creditor when the issue relates solely to a fully matured claim for money in an amount within the jurisdiction of the municipal court, when nothing remains to be done but the payment of money, and when no declaration of future rights and obligations is sought, or necessary, or proper, applies also to actions by debtors (*Watson v. Sansone (1971) 19 Cal. App. 3d 1, 4, 96 Cal. Rptr. 387*).

C. Absence of California Court Having Subject Matter Jurisdiction. No California court has jurisdiction to entertain a declaratory relief action by a debtor on a matured claim, and any such action must, therefore, be dismissed (*Watson v. Sansone (1971) 19 Cal. App. 3d 1, 4, 96 Cal. Rptr. 387*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*party's status and name*]

[2] Comments

[a] Use of Form

The memorandum in [1], *above*, may be submitted in support of a motion to dismiss a declaratory relief action by a debtor against a creditor on a matured claim.

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, the foregoing points and authorities may be used to support a demurrer to the complaint on the ground the court lacks jurisdiction of the subject of the cause of action alleged [*see Code Civ. Proc. § 430.10(a)*], or to support a petition for writ of prohibition to restrain the trial court from continuing with the action after it has improperly denied a motion to dismiss or overruled a demurrer on jurisdictional grounds. They may also be adapted for use in a trial or appellate brief.

[c] Related Pleading and Practice Forms

For a form of notice of motion for an order dismissing an action for lack of subject matter jurisdiction when there is no court in California having such jurisdiction, and for related forms, see California Forms of Pleading and Practice, Ch. 324, *Jurisdiction: Subject Matter Jurisdiction* (Matthew Bender). For a form of demurrer to the complaint or cross complaint on the ground that the court lacks jurisdiction of the subject of the action, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , in California Forms of Pleading and Practice (Matthew Bender). For a form of petition for writ of prohibition and related forms, see Ch. 358, *Mandate and Prohibition* in that publication. For discussion and forms for use in declaratory relief actions, see Ch. 182, *Declaratory Relief* in that publication.

[d] Related Points and Authorities

For memoranda of points and authorities generally supporting and opposing demurrers to a complaint on the ground of lack of subject matter jurisdiction, see Ch. 71, *Demurrers and Motions for Judgment* on the Pleadings, *§ 71.20* et seq., in this publication. For memoranda of points and authorities generally supporting and opposing a petition for writ of prohibition, see Ch. 150, *Mandate and Prohibition* in this publication. For memoranda of points and authorities generally supporting and opposing demurrers and motions for judgment on the pleadings in declaratory relief actions, see Ch. 67, *Declaratory Relief* in this publication.

[3] Discussion of Authorities

[a] Action for Declaratory Relief by Debtor on Fully Matured Claim

Watson v. Sansone *(1971) 19 Cal. App. 3d 1, 96 Cal. Rptr. 387* , was an action for declaratory relief by an attorney against a physician who had examined a personal injury client of the plaintiff. Plaintiff attorney wrote the doctor requesting a written report concerning the medical status and prognosis of his client. The defendant doctor sent him a registered package, together with his bill for $514. Considering the bill excessive, plaintiff returned the package unopened and sent the defendant a letter of protest. Defendant's attorney wrote plaintiff threatening to sue him if he did not pay the bill. Plaintiff sought a declaration of the rights of the parties. Defendant's demurrer to the complaint was

sustained with leave to amend, and on plaintiff's failure to amend, the complaint was dismissed. On plaintiff's motion, the dismissal was set aside. The doctor appealed from the order setting the dismissal aside, and plaintiff appealed from the dismissal.

In affirming the dismissal and reversing the order setting the dismissal aside, the court of appeal said it was settled law that the superior court does not have jurisdiction to entertain a declaratory relief action when the issue relates solely to a fully matured claim for money in an amount within the jurisdiction of the municipal court, when nothing remains to be done but the payment of money, and when no declaration of future rights and obligations is sought, or necessary, or proper (*19 Cal. App. 3d 1, 4)* . The court said that while the rule had been applied in situations in which the purported creditor requested a declaratory judgment, the rule was no different when the debtor did so (*19 Cal. App. 3d 1, 4)* .

[b] Absence of California Court Having Subject Matter Jurisdiction

The facts and procedural background of ***Watson v. Sansone*** *(1971) 19 Cal. App. 3d 1, 96 Cal. Rptr. 387* , are discussed under *§ 133.21[3][a]*. In reversing the order setting aside the judgment of dismissal and affirming the judgment of dismissal of a declaratory relief action by a debtor on a matured claim, the court of appeal said that the superior court never had jurisdiction over the inadequate declaratory relief action, and that having no jurisdiction, the court's only power was to dismiss the action (*19 Cal. App. 3d 1, 4)* . The court said that had the action been brought by the creditor, it could have ordered the action transferred to an inferior court having jurisdiction over the claim, but that plaintiff had not stated a cause of action entertainable by any court of this state (*19 Cal. App. 3d 1, 4-5)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss

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PART II. FORMS
A. Dismissal of Action for Lack of Jurisdiction

13-133 California Points & Authorities § 133.22

§ 133.22 Supporting Motion to Dismiss Action, Proceeding, or Case for Lack of Jurisdiction--Parties to an Arbitration Agreement Cannot Expand the Jurisdiction of the Court to Review Arbitration Awards Beyond that Provided by Statute

[1] FORM

[*Caption. See § 133.20.*]

THE MOTION TO DISMISS THIS ACTION SHOULD BE GRANTED BECAUSE PARTIES CANNOT EXPAND THE JURISDICTION OF THE COURT TO REVIEW ARBITRATION AWARDS BEYOND THAT PROVIDED BY STATUTE.

A. Dismissal Required. [*See § 133.20*, Paragraph A].

B. Actions for Declaratory Relief That Arbitration Award Is Supported by Law and Substantial Evidence. Grounds for vacating and correcting arbitration awards are set forth in *Code Civ. Proc. §§ 1286.2* and *1286.6*. None of the specified grounds for vacating or correcting an award suggest that a court can review the merits of an award for errors of law or lack of adequate supporting evidence. Because the Legislature clearly set forth the trial court's jurisdiction to review arbitration awards, parties cannot expand that jurisdiction by contract to include a review on the merits [*Crowell v. Downey Community Hospital Foundation (2002) 95 Cal. App. 4th 730, 739, 115 Cal. Rptr. 2d 810]* .

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*party's status and name*]

[2] Comments

[a] Use of Form

The memorandum of points and authorities in [1], *above*, may be submitted in support of a motion to dismiss a declaratory relief action that an arbitration award is supported by law and substantial evidence.

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For a form of notice of motion for an order dismissing an action for lack of subject matter jurisdiction when there is no court in California having such jurisdiction, and for related forms, see California Forms of Pleading and PracticeCh. 324, *Jurisdiction: Subject Matter Jurisdiction* (Matthew Bender). For a form of demurrer to the complaint or cross complaint on the ground that the court lacks jurisdiction of the subject of the action, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , in California Forms of Pleading and Practice. For a form of petition for writ of prohibition and related forms, see Ch. 358, *Mandate and Prohibition* in that publication. For discussion and forms for use in declaratory relief actions, see Ch. 182, *Declaratory Relief* in that publication.

[c] Related Points and Authorities

For memoranda of points and authorities generally supporting and opposing demurrers to a complaint on the ground of lack of subject matter jurisdiction, see *Ch. 71, Demurrers and Motions for Judgment on the Pleadings, § 71.20* et seq., in this publication. For memoranda of points and authorities generally supporting and opposing a petition for writ of prohibition, see Ch. 150, *Mandate and Prohibition* in this publication. For memoranda of points and authorities generally supporting and opposing demurrers and motions for judgment on the pleadings in declaratory relief actions, see Ch. 67, *Declaratory Relief* in this publication.

[3] Discussion of Authorities

Crowell v. Downey Community Hospital Foundation *(2002) 95 Cal. App. 4th 730, 115 Cal. Rptr. 2d 810* was an action for declaratory relief seeking a judicial determination that an arbitration agreement was "valid and enforceable" and that the parties were "obligated, forthwith, to arbitrate in accordance with their agreement." The arbitration agreement in question included a provision stating that the decision of the arbitrator was to be final and binding except that upon the petition of any party to the arbitration, a court shall have the authority to review the transcript of the arbitration proceedings and the arbitrator's award and shall have the authority to vacate the arbitrator's award, in whole or in part, on the basis that the award is not supported by substantial evidence or is based upon an error of law. The plaintiff contended that binding arbitration is essentially a matter of contract between the parties, and that while *Code Civ. Proc. §§ 1286.2* and *1286.6* specify grounds on which a court may vacate or correct an arbitration award, these are merely default provisions which control when the parties do not agree otherwise. The defendant contended that the arbitration agreement is void and unenforceable as a matter of law because jurisdiction to review arbitration awards is conferred by the California Arbitration Act which provides the exclusive grounds on which courts are authorized to vacate or correct an award, and the parties cannot broaden review by agreement.

In affirming the dismissal of the complaint, the court of appeal held that none of the specified grounds for vacating or correcting an award suggest that a court can review the merits of an award for errors of law or lack of adequate supporting evidence. Because the Legislature clearly set forth the trial court's jurisdiction to review arbitration awards, parties cannot expand that jurisdiction by contract to include a review on the merits. (*95 Cal. App. 4th 730, 739)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProceduresPleading & PracticeGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral Overview

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13-133 California Points & Authorities §§ 133.23-133.29

[Reserved]

§§ 133.23[Reserved]

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PART II. FORMS
B. Concurrent Jurisdiction Between California Courts

13-133 California Points & Authorities § 133.30

§ 133.30 Supporting Petition for Writ of Prohibition [Code Civ. Proc. §§ 1102, 1103]--To Restrain Court From Proceeding With Action of Which Another Court of Concurrent Jurisdiction First Acquired Jurisdiction Over the Parties

[1] FORM

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*],	)	NO. _____
Petitioner,	)	MEMORANDUM OF POINTS AND AUTHORIT-
vs.	)	IES IN SUPPORT OF PETITION FOR WRIT OF
_____ [*name*],	)	PROHIBITION
Respondent.	)	Date: _____
_____ [*name*],	)	Time: _____
Real Party in Interest.	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE PETITION FOR A WRIT OF PROHIBITION TO RESTRAIN THE _____ COURT OF _____ FROM EXERCISING JURISDICTION OVER THIS ACTION SHOULD BE GRANTED BECAUSE JURISDICTION OVER THE THIS ACTION WAS FIRST ACQUIRED BY THE _____ COURT OF _____ ON THE PRIOR AND PROPER SERVICE OF SUMMONS.

A. Acquisition of Jurisdiction Over Party. The court in which an action is pending has jurisdiction over a party from the time the summons is served on him or her (*Code Civ. Proc. § 410.50(a)*).

B. Priority of Jurisdiction. When two or more courts or tribunals in California have concurrent jurisdiction, the tribunal first assuming it, as a general rule, retains it to the exclusion of all other tribunals in which the action might have been initiated [*Advanced Bionics Corp. v. Medtronic, Inc. (2002) 29 Cal. 4th 697, 707, 128 Cal. Rptr. 2d 172* (first filed rule was never meant to apply where the two courts involved are not courts of the same sovereignty); *Mission Imports, Inc. v. Superior Court (1982) 31 Cal. 3d 921, 926 n.3, 184 Cal. Rptr. 296, 647 P.2d 1075* ; *In re Marriage of Hanley (1988) 199 Cal. App. 3d 1109, 1115, 245 Cal. Rptr. 441* , *disapproved on other grounds by Leadford v. Leadford (1992) 6 Cal. App. 4th 571, 575 n.5, 8 Cal. Rptr. 2d 9* ; *Mungia v. Superior Court (1964) 225 Cal. App. 2d 280, 283, 37 Cal. Rptr. 285* . (Similarly, when a proceeding has been assigned to one department of a superior court, it is beyond the jurisdictional authority of another department of the same court) *People v. Madrigal (1995) 37 Cal. App. 4th 791, 43 Cal. Rptr. 2d 498]* .

C. Test of Priority. Ordinarily, service of the summons and complaint is the test of priority of jurisdiction when there are actions pending in two courts dealing with the same subject matter (*In re Marriage of Hanley (1988) 199 Cal. App. 3d 1109, 1116, 245 Cal. Rptr. 441* ; *Mungia v. Superior Court (1964) 225 Cal. App. 2d 280, 283, 37 Cal. Rptr. 285*).

D. Restraint by Prohibition. Should another tribunal attempt to assume jurisdiction after one tribunal has already done so, it may be restrained from proceeding with the case by a writ of prohibition issued, on proper application, from a higher court (*Taylor v. Superior Court (1956) 47 Cal. 2d 148, 149, 301 P.2d 866* ; *Mungia v. Superior Court (1964) 225 Cal. App. 2d 280, 283, 37 Cal. Rptr. 285*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*party's status and name*]

[2] Comments

[a] Use of Form

The form in [1], *above*, may be submitted in support of a petition for a writ of prohibition to restrain a court from proceeding to hear a case when another court of concurrent jurisdiction has already acquired jurisdiction over it.

The bracketed optional phrase at the end of Paragraph B may be used when the competing courts are actually different departments of a multi-department court.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Precedential Jurisdiction

There are two types of jurisdiction concerning subject matter between a court and an administrative agency: (1) exclusive subject matter jurisdiction; and (2) precedential jurisdiction, or the jurisdiction to determine subject matter jurisdiction [*Yavitch v. Workers' Comp. Appeals Bd. (1983) 142 Cal. App. 3d 64, 69-70, 190 Cal. Rptr. 793]* . Unlike

subject matter jurisdiction, precedential jurisdiction may be waived and a litigant may be estopped to assert lack of jurisdiction [*see Yavitch v. Workers' Comp. Appeals Bd. (1983) 142 Cal. App. 3d 64, 69-70, 190 Cal. Rptr. 793* ; *Sea World Corp. v. Superior Court (1973) 34 Cal. App. 3d 494, 501-503, 110 Cal. Rptr. 232* ; *San Martin v. Superior Court (1959) 169 Cal. App. 2d 14, 17-18, 336 P.2d 618]* .

For example, the Workers' Compensation Appeals Board and the superior court have concurrent precedential jurisdiction to determine the threshold question of subject matter jurisdiction, namely, whether a cause of action comes within the workers' compensation laws and thus within the exclusive jurisdiction of the appeals board [*Yavitch v. Workers' Comp. Appeals Bd. (1983) 142 Cal. App. 3d 64, 69-70, 190 Cal. Rptr. 793]* . In such case, the tribunal first assuming jurisdiction retains it to the exclusion of the other; once that decision has been made, jurisdiction becomes exclusive, and the final determination in regard to jurisdiction is res judicata before the other tribunal between the same parties and those privy to them. Moreover, a party may obtain an order preventing the second tribunal from acting pending determination by the first tribunal of the jurisdictional question. But the court need not on its own motion await the first tribunal's action [*Busick v. Workmen's Comp. Appeals Bd. (1972) 7 Cal. 3d 967, 976, 104 Cal. Rptr. 42, 500 P.2d 1386* ; *see also Yavitch v. Workers' Comp. Appeals Bd. (1983) 142 Cal. App. 3d 64, 70, 190 Cal. Rptr. 793* ; *Taylor v. Superior Court (1956) 47 Cal. 2d 148, 149, 301 P.2d 866* (discussed under *§ 133.30[3]*[c])].

[c] Effect of Final Judgment in Second Action

When an action is prosecuted to final judgment, priority of jurisdiction between courts or a court and administrative tribunal loses its significance; it is not the final judgment of the court or tribunal first assuming jurisdiction that matters, but rather the first final judgment, although it may be rendered by the court or tribunal subsequently assuming jurisdiction, that renders the issue res judicata on the other [*see Busick v. Workmen's Comp. Appeals Bd. (1972) 7 Cal. 3d 967, 977, 104 Cal. Rptr. 42, 500 P.2d 1386* ; *Browne v. Superior Court (1940) 16 Cal. 2d 593, 597, 107 P.2d 1* ; *Magliulo v. Superior Court (1975) 47 Cal. App. 3d 760, 780-781, 121 Cal. Rptr. 621* ; *see also In re Marriage of Hanley (1988) 199 Cal. App. 3d 1109, 1117-1118, 245 Cal. Rptr. 441* (discussed under *§ 133.30[3]*[a])].

[d] Related Uses

With appropriate modifications, these points and authorities may be used to support a demurrer to the complaint on the ground of another action pending between the same parties on the same cause [*see Code Civ. Proc. § 430.10(c)*], or a motion for separate trial of the affirmative defense of another action pending [*see Code Civ. Proc. § 597*], or a motion to stay or dismiss the action because of another action pending.

[e] Related Pleading and Practice Forms

For a form of demurrer to the complaint on the ground of another action pending, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , in California Forms of Pleading and Practice (Matthew Bender). For a form of petition for a writ of prohibition to restrain proceedings in the second action in California and a notice of motion for a separate trial of the special defense of another action pending, see *Ch. 3, Abatement of Actions, § 3.50* et seq. § 3.110 et seq., respectively, in that publication. For discussion, research guide, and form of petition for writ of prohibition, and related forms, see Ch. 358, *Mandate and Prohibition* , in that publication.

[f] Related Points and Authorities

For a memorandum of points and authorities in support of a motion to stay an action on the ground of another action pending in a federal court or court of a sister state, see Ch. 10, *Abatement and Survival of Actions* , in this publication. For memoranda of points and authorities generally supporting and opposing demurrers to a complaint on the ground of another action pending, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* , in this publication. For memoranda of points and authorities supporting and opposing a petition for a writ of prohibition generally, see Ch. 150, *Mandate and Prohibition* , in this publication.

[g] Opposing Points and Authorities

For a memorandum of points and authorities that may, in an appropriate case, be filed in opposition to this memorandum, see *§ 133.40*.

[3] Discussion of Authorities

[a] Priority of Jurisdiction

In ***Advanced Bionics Corp. v. Medtronic, Inc.*** *(2002) 29 Cal. 4th 697, 128 Cal. Rptr. 2d 172* , a Delaware company, headquartered in California, hired an employee who had signed a non-compete agreement that included a choice of state law provision with his former employer. The employee and his new employer sued petitioner in a California trial court for declaratory relief alleging that the Minnesota company's covenant not to compete and choice-of-law provisions violated California's law and public policy and were void. Subsequently, the California corporation and the employee applied for a temporary restraining order (TRO) enjoining the Minnesota company from filing an action in Minnesota. When the Minnesota company brought suit in Minnesota, the California trial court issued a TRO as to the Minnesota action. On review, the appellate court affirmed the stay. The Supreme Court of California reviewed the matter and found the trial court exceeded its jurisdiction in issuing the TRO. A California court could not enjoin a party subject to parallel jurisdiction in another state from commencing litigation over a noncompetition agreement in another state.

The California Supreme Court clarified that the first filed rule in California means that when two courts of the same sovereignty have concurrent jurisdiction, the first to assume jurisdiction over a particular subject matter of a particular controversy takes it exclusively, and the second court should not thereafter assert control over that subject matter. The first filed rule was never meant to apply where the two courts involved are not courts of the same sovereignty. Restraining a party from pursuing an action in a court of foreign jurisdiction involves delicate questions of comity and therefore requires that such action be taken only with care and great restraint (citing *Compagnie des Bauxites de Guinea v. Ins. Co. of N. Am. (3rd Cir. 1981) 651 F.2d 877*) (*29 Cal. 4th 697, 707)* .

Mission Imports, Inc. v. Superior Court *(1982) 31 Cal. 3d 921, 184 Cal. Rptr. 296, 647 P.2d 1075* , was a proceeding in mandate [*see Code Civ. Proc. § 400*], arising out of an action between an importer of alcoholic beverages, whose principal place of business was in San Bernardino County, and its corporate distributor, whose principal place of business was in Los Angeles County. The importer sued the distributor and its attorney for declaratory and injunctive relief in the San Francisco Superior Court. The attorney moved for change of venue to Los Angeles County; the same day, the importer amended its complaint, and dropped the attorney as a party defendant, but added an unfair competition claim and a claim for damages against the distributor, and subsequently formally dismissed with prejudice its claims against the attorney. Meanwhile, the distributor had filed suit against the importer in the Los Angeles Superior Court, which, because of the attorney's change of venue motion in the San Francisco action, concluded that it need not abate the Los Angeles action immediately, and it set a hearing on the distributor's request for a preliminary injunction against the importer. The distributor then filed a motion in the San Francisco court for change of venue. The Los Angeles court heard the motion for a preliminary injunction on the date scheduled and granted it. The San Francisco court denied the distributor's motion for change of venue, and the distributor petitioned for a writ of mandate.

In holding that venue was properly laid in San Francisco under *Code Civ. Proc. § 395.5* (*31 Cal. 3d 921, 927-931)* , the Supreme Court denied the writ, in the course of which it said that when two courts have concurrent jurisdiction over the same parties and subject matter, the tribunal which first acquires jurisdiction of the parties is entitled to retain it exclusively, and that ordinarily, the other court must abate its proceedings on demand. The Court explained that the timely filing of a motion to change venue on the ground that the action has been brought in the wrong court [former Code Civ. Proc. § 397(1); *now see Code Civ. Proc. § 397(a)*] suspends a court's jurisdiction to take any action in the case other than hearing and deciding the venue motion and that it was apparently for this reason that the Los Angeles court determined that it need not abate its proceedings immediately (*31 Cal. 3d 921, 926 n.3*).

In ***In re Marriage of Hanley*** *(1988) 199 Cal. App. 3d 1109, 245 Cal. Rptr. 441* , the husband filed a petition for dissolution of marriage in the Sonoma County Superior Court; thereafter, his wife filed a petition for dissolution in the state of Washington and the summons in her action was served first. The husband participated in this latter action, but after obtaining an interlocutory judgment in his California action on the wife's default, in which the family residence in Sonoma County was awarded to him and he was ordered to pay $100 per month per child for each of the parties' two children, his attorney notified the Washington court that no further appearance would be made on the husband's behalf. The Washington court shortly thereafter entered a judgment of dissolution awarding the wife $500 attorney's fees, $10,000 to equalize the property division at six percent interest, and child support of $150 per month per child. The husband for a number of years made the support payments as provided in his interlocutory judgment, although the total amount paid was $11,625 less than that awarded in the Washington judgment. Eventually, in attempting to sell the residence, he filed a motion to compel satisfaction of the California support judgment, which was denied. The former wife then moved in the Sonoma County Superior Court for determination of which of the divorce decrees was controlling and to establish the amount of arrearages. After trial, the court ruled that the Washington decree was controlling (*199 Cal. App. 3d 1109, 1114)* .

The court of appeal affirmed. Citing *Mungia v. Superior Court (1964) 225 Cal. App. 2d 280, 283, 37 Cal. Rptr. 285* (discussed *below*), and *Mission Imports, Inc. v. Superior Court (1982) 31 Cal. 3d 921, 926 n.3, 184 Cal. Rptr. 296, 647 P.2d 1075* (discussed *above*), the court said that when two courts have concurrent jurisdiction over the same parties and subject matter, the tribunal which first acquires jurisdiction of the parties is entitled to retain it exclusively, and, ordinarily, the other court must abate its proceedings on demand (*199 Cal. App. 3d 1109, 1115-1116)* . The court found that the general rule in Washington is the same, that is, when the jurisdiction of two courts is invoked concerning the same subject of controversy, the court first obtaining jurisdiction has power to determine the controversy to the exclusion of the other court (*199 Cal. App. 3d 1109, 1116)* , and that, notwithstanding a peculiar twist in the Washington statute that made it difficult to determine when jurisdiction was acquired by the superior court, the Washington court first obtained jurisdiction and the right to proceed with the action to the exclusion of the California court (*199 Cal. App. 3d 1109, 1116)* .

Note that the court further held that the Washington judgment also prevailed under the rule that when in two actions inconsistent judgments are rendered, the later judgment prevails. The court said (1) a judgment rendered in a state of the United States will not be recognized and enforced in sister states if an inconsistent, but valid, judgment is subsequently rendered in another action between the parties and if the earlier judgment is superseded by the later judgment under the local law of the state where the latter judgment was rendered; (2) when in two actions inconsistent final judgments are rendered, it is the later, not the earlier, judgment that is accorded conclusive effect in a third action under the rules of res judicata; and (3) this is the case even when the court that rendered the later judgment denied full faith and credit to the first judgment or made other errors of fact or law (*199 Cal. App. 3d 1109, 1117-1118)* .

Mungia v. Superior Court *(1964) 225 Cal. App. 2d 280, 37 Cal. Rptr. 285* , was a proceeding in prohibition, arising out of two actions. One was by a wife against her husband for separate maintenance, which was filed in the Los Angeles County Superior Court on October 18, 1963, on which date an order to show cause in re pendente lite relief was issued, and in which the summons and complaint were served on October 31, 1963. The other was by the husband for divorce, filed in the Kern County Superior Court on October 24, 1963, and in which the summons and complaint were served the same day. The husband's demurrer on the ground of another action pending was overruled, and he petitioned for a writ of prohibition to stop further proceedings in the Los Angeles action. In ordering the writ issued, the court, after pointing out that the demurrer on the ground of another action pending was not applicable, taking the provision in former Code Civ. Proc. § 430(3) [*now see Code Civ. Proc. § 430.10(c)*] literally, said that when two tribunals of this state have concurrent jurisdiction over the same parties and subject matter, the tribunal that first acquires jurisdiction of the parties is entitled to retain it exclusively, and the other must respect the priority of the first and must desist from further proceedings so long as the matter is pending before the first (*225 Cal. App. 2d 280, 283)* .

In ***People v. Madrigal*** *(1995) 37 Cal. App. 4th 791, 43 Cal. Rptr. 2d 498* , a criminal defendant who was already on probation from another matter pleaded guilty in a new matter pursuant to a plea agreement under which he would be on probation in both cases, through revoking the original probation and reinstating it with no additional time. At the sentencing hearing, the file for the probation violation from the original probation was not before the judge. The judge explained his intention to reinstate the probation on the same terms and conditions, and the defendant waived his right to be present when the judge would find him in violation of the probation then reinstate it on the same terms. Subsequently, the prosecution filed a motion with a different judge to revoke the original probation based on the new conviction. The defendant sought to have his plea agreement enforced, and further maintained that the probation violation had already been handled so that the new judge was estopped from proceeding further. Nevertheless, the new judge found defendant in violation of the original probation and sentenced him to state prison.

The court of appeal reversed. The court recognized that the jurisdiction of a multi-judge, multi-department superior court is vested in the court as a whole and if one department exercises authority in a matter which might properly be heard in another such action it does not amount to a defect of jurisdiction. However, while one department is exercising jurisdiction in a matter, the other departments are as distinct from that department as other superior courts (*37 Cal. App. 4th 791, 795-796)* . In this situation, although the original sentencing judge could not find the file for the probation violation, he obtained defendant's permission to revoke the probation and reinstate it under the same terms in defendant's absence. While the case file did not indicate that the judge actually revoked and reinstated the probation as agreed, he retained jurisdiction to do so. The new judge could thus not order the probation violation be heard by him (*37 Cal. App. 4th 791, 797)* . The order revoking the defendant's probation and sentencing him to prison was vacated, and the superior court was directed to enter a new order revoking the probation and reinstating it on the same terms.

[b] Test of Priority

The facts and procedural background of ***In re Marriage of Hanley*** *(1988) 199 Cal. App. 3d 1109, 245 Cal. Rptr. 441* , are discussed under *§ 133.30[3][a]*. In affirming the judgment determining that the Washington decree was controlling, the court of appeal, citing *Mungia v. Superior Court (1964) 225 Cal. App. 2d 280, 283, 37 Cal. Rptr. 285* (discussed *below*), said that in applying the foregoing rule regarding priority of jurisdiction, it is the tribunal in which process is served first which has priority, regardless of which action was filed first (*199 Cal. App. 3d 1109, 1116)* .

The facts and procedural background of ***Mungia v. Superior Court*** *(1964) 225 Cal. App. 2d 280, 37 Cal. Rptr. 285* , are discussed under *§ 133.03[3][a]*. In ordering issuance of a writ of prohibition, the court said that in applying the rule regarding priority of jurisdiction, it is the tribunal in which process is served first which has priority, regardless of which action was filed first (*225 Cal. App. 2d 280, 283)* .

[c] Restraint by Prohibition

Taylor v. Superior Court *(1956) 47 Cal. 2d 148, 301 P.2d 866* , was a proceeding in prohibition to halt proceedings in the Superior Court of Los Angeles County for damages for injuries sustained by a worker who had previously invoked the jurisdiction of the Industrial Accident Commission (the predecessor to the Workers' Compensation Appeals Board) to adjudicate his claim regarding the same injuries. Determination of the question of which tribunal had jurisdiction depended on whether the worker was injured in an employment relationship with his employer.

In granting the writ to restrain the court from proceeding until the commission had determined whether it or the court had jurisdiction to proceed, the Supreme Court said that when two tribunals in this state have concurrent jurisdiction to determine jurisdiction, the question of which shall have exclusive jurisdiction shall be determined by the tribunal whose jurisdiction was first invoked, and proceedings in the tribunal whose jurisdiction was subsequently sought will, if not voluntarily stayed, be halted by prohibition until final determination of the jurisdictional question by the tribunal where jurisdiction was first laid (*47 Cal. 2d 148, 149)* .

The facts and procedural background of ***Mungia v. Superior Court*** *(1964) 225 Cal. App. 2d 280, 37 Cal. Rptr. 285* , are discussed under *§ 133.30[3][a]*. In ordering issuance of a writ of prohibition, the court said that if the court not having priority of jurisdiction refuses to abate its proceedings on demand, the remedy is by writ of prohibition (*225 Cal. App. 2d 280, 283)* .

[4] Additional Authorities

[a] Priority of Jurisdiction

California Union Ins. Co. v. Trinity River Land Co. (1980) 105 Cal. App. 3d 104, 163 Cal. Rptr. 802 , was a declaratory relief action against a corporation and its sole shareholder filed in the Superior Court of Trinity County by insurers seeking a declaration of nonliability or limited liability for defendants' insured building, which was destroyed by fire, on the ground the individual defendant was responsible for the fire. Personal service was made on the shareholder individually and on behalf of the corporation. Subsequently, defendants filed a complaint in the Superior Court of Shasta County claiming (1) a loss of $430,000 under the policy issued by defendants through their Redding agent, (2) a wrongful refusal to pay the claim, (3) negligence by the agent in failing to provide $50,000 worth of insurance, and (4) misrepresentation, unfair claim practices, and defamation by the insurers. The agent was named a defendant in the Shasta County suit, as were the plaintiffs in the Trinity County suit. A day later, the defendants filed a demurrer and motion to change venue in the Trinity County action. The court sustained the demurrer without leave to amend on the grounds the complaint failed to state a cause of action and another action was pending, and plaintiffs appealed from the subsequent judgment.

Holding that sustaining the demurrer on the ground of another action pending was error (and that even if correct, the action should have been abated, not dismissed), the court of appeal, in reversing the judgment with directions to overrule the demurrer, pointed out that the parties were not identical in both actions, and that the controlling rule was that the pendency of another action growing out of the same transaction (here, the insurance contracts and the fire) is a ground for abatement of the second action but never for abatement of the first (*105 Cal. App. 3d 104, 108-109)* . The court said that the rule of exclusive concurrent jurisdiction provides that when two superior courts have concurrent jurisdiction over the subject matter and all parties involved in litigation, the first to assume jurisdiction has exclusive and continuing jurisdiction over the subject matter and all parties involved until such time as all necessarily related matters have been resolved (*105 Cal. App. 3d 104, 109)* .

In *Halpin v. Superior Court (1971) 14 Cal. App. 3d 530, 545, 92 Cal. Rptr. 329* , the court of appeal said that when two courts have concurrent jurisdiction over the subject matter and parties involved in the litigation, the first court to assume jurisdiction has exclusive and continuing jurisdiction over the subject matter and all parties involved in the litigation until such time as all matters necessarily related to the litigation have been resolved, and held that when a tort action was still pending in Shasta County, one of the defendants could not bring a second action in Sacramento County for specific enforcement of a settlement agreement of the tort action allegedly made with him by the plaintiff in the Shasta County tort action (*14 Cal. App. 3d 530, 545)* .

[b] Test of Priority

The facts and procedural background of *California Union Ins. Co. v. Trinity River Land Co. (1980) 105 Cal. App. 3d 104, 163 Cal. Rptr. 802* , are discussed under *§ 133.30[4][a]*. In reversing the judgment, the court said that priority of jurisdiction resides in the tribunal where process is first served, and that in the case before it the proof of service attached to plaintiffs' complaint shows it was filed before the defendants' filing suit in Shasta County (*105 Cal. App. 3d 104, 109)* .

Legal Topics:

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

Civil ProcedureGeneral OverviewCivil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsConcurrent Jurisdiction

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 133 JURISDICTION: SUBJECT MATTER JURISDICTION
PART II. FORMS
B. Concurrent Jurisdiction Between California Courts

13-133 California Points & Authorities § 133.31

§ 133.31 Supporting Motion to Stay Action--Abatement of Action Required Under Rule of Exclusive Concurrent Jurisdiction

[1] FORM

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff, vs.	)	IES IN SUPPORT OF MOTION TO STAY ACTION
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THE MOTION TO STAY THIS ACTION PENDING CONCLUSION OF ANOTHER PRIOR PENDING ACTION SHOULD BE GRANTED BECAUSE BOTH ACTIONS ARISE OUT OF THE SAME TRANSACTION, ALL PARTIES NECESSARY TO A DETERMINATION OF THE OTHER ACTION _____ [ARE *or* MAY BE MADE] PARTIES TO THAT ACTION, AND THAT COURT HAS JURISDICTION TO LITIGATE ALL THE ISSUES AND GRANT ALL THE RELIEF TO WHICH ANY OF THE PARTIES MIGHT BE ENTITLED UNDER THE PLEADINGS. HENCE, UNDER THE RULE OF EXCLUSIVE CONCURRENT JURISDICTION, THE FIRST COURT TO ASSUME JURISDICTION HAS EXCLUSIVE AND CONTINUING JURISDICTION UNTIL SUCH TIME AS ALL NECESSARILY RELATED MATTERS HAVE BEEN RESOLVED.

A. Rule of Exclusive Concurrent Jurisdiction. Under the rule of exclusive concurrent jurisdiction, when two superior courts have concurrent jurisdiction over the subject matter and all parties involved in litigation, the first to assume jurisdiction has exclusive and continuing jurisdiction over the subject matter and all parties involved until such time as all necessarily related matters have been resolved (*Plant Insulation Co. v. Fibreboard Corp. (1990) 224 Cal. App. 3d 781, 786-787, 792, 274 Cal. Rptr. 147*).

B. Abatement Required When Conditions for Its Issuance Exist. Under the rule of exclusive concurrent jurisdiction, an order of abatement issues as a matter of right, not as a matter of discretion, when the conditions for its issuance exist (*Plant Insulation Co. v. Fibreboard Corp. (1990) 224 Cal. App. 3d 781, 787, 274 Cal. Rptr. 147*).

C. Absolute Identity of Parties, Causes of Action, or Remedies Sought Is Not Required. The rule of exclusive concurrent jurisdiction, unlike the statutory plea of abatement on the ground of another action pending, does not require absolute identity of parties, causes of action, or remedies sought in the initial and subsequent actions; all that is required is that the court exercising original jurisdiction have the power to bring before it all necessary parties and the power to litigate all the issues and grant all the relief to which any of the parties might be entitled under the pleadings, and that both actions arise from the same transaction (*Plant Insulation Co. v. Fibreboard Corp. (1990) 224 Cal. App. 3d 781, 788, 274 Cal. Rptr. 147*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*party's status and name*]

[2] Comments

[a] Use of Form

The form in [1], *above*, may be submitted in support of a motion to stay the pending action on the ground that another California state court has already assumed jurisdiction over the subject matter and all parties involved in the litigation and that the other court has exclusive and continuing jurisdiction over the subject matter and parties until all necessarily related matters have been resolved.

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, the foregoing points and authorities may be used to support a petition for writ of prohibition and mandate to restrain the trial court from proceeding with the second action and to require it to grant a stay after it has denied a motion to do so.

[3] Discussion of Authorities

[a] Rule of Exclusive Concurrent Jurisdiction

Plant Insulation Co. v. Fibreboard Corp. *(1990) 224 Cal. App. 3d 781, 274 Cal. Rptr. 147* , was an action in the Marin County Superior Court by an industrial insulation contractor, which installed and distributed defendant's insulation products. The action was for breach of contract, express contractual indemnity, and declaratory and injunctive relief, to prevent defendant from pursuing good-faith settlements with claimants in multiple pending asbestos suits, in which plaintiff and defendant were codefendants, that would preclude plaintiff's right to indemnity from defendant. Since 1948, plaintiff had been the exclusive distributor in certain areas of California and Nevada of asbestos products manufactured by defendant. Since the 1970's, asbestos claimants had sued plaintiff and defendant in approximately 4,000 suits alleging bodily injury and death from asbestos exposure. Defendant obtained good-faith determinations [*Code Civ. Proc. §§ 877-877.6*] of its settlements with asbestos plaintiffs in several actions, thus barring cross complaints for indemnity filed against it therein by plaintiff. At the time, over 1,000 of plaintiff's cross complaints against defendant were pending in asbestos suits in various Bay Area counties. However, to avoid a demurrer on the ground of another action pending [*Code Civ. Proc. § 430.10(c)*], plaintiff dismissed without prejudice all of its indemnity cross complaints against defendant in the pending asbestos suits, after which defendant filed in those suits cross complaints against plaintiff for indemnity and declaratory relief. Defendant moved for (1) abatement or dismissal of plaintiff's complaint on the ground of other actions pending in California courts that have exclusive prior jurisdiction, and (2) a stay of the complaint with respect to asbestos cases in other states and federal courts. At the hearing on the motion, the trial court dismissed the complaint without prejudice with respect to the asbestos suits pending in other California courts on the basis of its determination that the doctrine of exclusive concurrent jurisdiction applied because the subject matter arose out of the same transaction, there were no issues presented that could not be determined in the pending asbestos suits, and all parties were already before the court in those suits. The court stayed the action with respect to asbestos suits pending in other states and federal courts. With respect to asbestos suits pending in Marin County, the action was dismissed without prejudice and plaintiff was granted leave to file it as a cross complaint in those suits. Plaintiff appealed, contending inter alia that exclusive concurrent jurisdiction did not exist, because it and defendant were not adverse parties in the pending asbestos claims, but codefendants, and that application of both the plea in abatement on the ground of another action pending [*Code Civ. Proc. § 430.10(c)*] and the rule of exclusive concurrent jurisdiction requires a prior pending action between adverse parties.

The court of appeal disagreed. In reversing the order of dismissal with directions to grant a stay instead, the court said that under the rule of exclusive concurrent jurisdiction, when two superior courts have concurrent jurisdiction over the subject matter and all parties involved in litigation, the first to assume jurisdiction has exclusive and continuing jurisdiction over the subject matter and all parties involved until such time as all necessarily related matters have been resolved (*224 Cal. App. 3d 781, 786-787, 792)* . The court explained that the rule is based on the public policies of avoiding conflicts that might arise between courts if they were free to make contradictory decisions or awards relating to the same controversy, and preventing vexatious litigation and multiplicity of suits, and that the rule was established and is enforced not so much to protect the rights of parties as to protect the rights of courts of coordinate jurisdiction to avoid conflict of jurisdiction, confusion, and delay in the administration of justice (*224 Cal. App. 3d 781, 787)* .

[b] Abatement Required When Conditions for Its Issuance Exist

The facts and procedural background of ***Plant Insulation Co. v. Fibreboard Corp.*** *(1990) 224 Cal. App. 3d 781, 274 Cal. Rptr. 147* , are discussed under *§ 133.31[3][a]*. In reversing the dismissal with directions to grant a stay instead, the court of appeal, acknowledging that abatement is not appropriate when the first action cannot afford the relief sought in the second, said the rule of exclusive concurrent jurisdiction may constitute a ground for abatement of the subsequent action, and an order of abatement issues as a matter of right, not as a matter of discretion, when the conditions for its issuance exist (*224 Cal. App. 3d 781, 787)* .

[c] Absolute Identity of Parties, Causes of Action, or Remedies Sought Is Not Required

The facts and procedural background of ***Plant Insulation Co. v. Fibreboard Corp.*** *(1990) 224 Cal. App. 3d 781, 274 Cal. Rptr. 147* , are discussed under *§ 133.31[3][a]*. In reversing the dismissal with directions to grant a stay instead,

the court of appeal said that a plea in abatement pursuant to *Code Civ. Proc. § 430.10(c)* may be made by demurrer or answer when there is another action pending between the same parties on the same cause. The court pointed out that in determining whether the causes of action are the same for purposes of pleas in abatement, the rule is that such a plea may be maintained only when a judgment in the first action would be a complete bar to the second action. Further, when a demurrer is sustained on the ground of another action pending, the proper order is not a dismissal, but abatement of further proceedings pending termination of the first action (*224 Cal. App. 3d 781, 787-788)* .

The court explained that the rule of exclusive concurrent jurisdiction, although similar in effect to the statutory plea in abatement, may apply when the requisite grounds for a statutory plea of abatement due to another action pending do not exist. Unlike the statutory plea of abatement, the rule of exclusive concurrent jurisdiction does not require absolute identity of parties, causes of action, or remedies sought in the initial and subsequent actions. After acknowledging that abatement is not appropriate when the first action cannot afford the relief sought in the second (*224 Cal. App. 3d 781, 787)* , the court of appeal said that, if the court exercising original jurisdiction has the power to bring before it all the necessary parties, then the fact that the parties in the second action are not identical does not preclude application of the rule, and, moreover, the remedies sought in the separate actions need not be precisely the same so long as the court exercising original jurisdiction has the power to litigate all the issues and grant all the relief to which any of the parties might be entitled under the pleadings (*224 Cal. App. 3d 781, 788)* . Plaintiff, citing *Stearns v. Los Angeles City School Dist. (1966) 244 Cal. App. 2d 696, 714, 53 Cal. Rptr. 482* (which held that the true test for applying the rule of exclusive concurrent jurisdiction is whether or not the determination of the first suit would be res judicata in the second suit), argued that the pending asbestos suits, which were personal injury actions, did not involve the same subject matter as the instant action, which involved contract principles, and that therefore the rule of exclusive concurrent jurisdiction did not apply because a judgment in the asbestos suits would not bar the instant action. The court said that no case since *Stearns* has required a res judicata test for application of the rule of exclusive concurrent jurisdiction. The court agreed with subsequent cases holding that the res judicata test is not required, and adopted the more expansive subject matter test applied in the recent cases and by the trial court, which considers whether the first and second actions arise from the same transaction (*224 Cal. App. 3d 781, 789)* . The court concluded that the relative liability of the parties to the asbestos claimants arose out of the same transaction, and the subject matter was the same for purposes of applying the rule of exclusive concurrent jurisdiction (*224 Cal. App. 3d 781, 789)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsConcurrent Jurisdiction

California Points & Authorities

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 133 JURISDICTION: SUBJECT MATTER JURISDICTION
PART II. FORMS
B. Concurrent Jurisdiction Between California Courts

13-133 California Points & Authorities §§ 133.32-133.39

[Reserved]

§§ 133.32[Reserved]

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California Points & Authorities

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13-133 California Points & Authorities § 133.40

§ 133.40 Opposing Petition for Writ of Prohibition to Restrain Court From Proceeding With Action [Code Civ. Proc. §§ 1102, 1103]--Court First Acquiring Jurisdiction Over Parties Has Declined to Assume Jurisdiction

[1] FORM

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Petitioner, vs.	)	IES IN OPPOSITION TO PETITION FOR WRIT OF
_____ [*name*],	)	PROHIBITION
Respondent.	)	[*Code Civ. Proc. §§ 1102, 1103*]
_____ [*name*],	)	Date: _____
Real Party in Interest.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE PETITION FOR A WRIT OF PROHIBITION TO RESTRAIN THE _____ COURT OF _____ FROM EXERCISING JURISDICTION OVER THIS ACTION SHOULD BE DENIED BECAUSE, ALTHOUGH JURISDICTION OF THE PARTIES BY SERVICE OF SUMMONS WAS FIRST ACQUIRED BY THE _____ COURT OF _____, THAT COURT HAS YIELDED ITS JURISDICTION TO THIS COURT AND STAYED ITS PROCEEDINGS IN THE CASE THEREIN PENDING.

Court in Which Summons Was Served First Has Yielded Its Jurisdiction to Second Court. The court in which the

summons was subsequently served may exercise jurisdiction over the case when the court in which the summons was served first, in deference to the second court, has stayed the action therein pending, and no injustice to the parties will result from trying the action in the second court (*De Brincat v. Mogan (1934) 1 Cal. App. 2d 7, 10-11, 36 P.2d 245*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*party's status and name*]

[2] Comments

[a] Use of Form

The memorandum of points and authorities in [1], *above*, may be submitted in opposition to a petition for a writ of prohibition to restrain a court from proceeding to hear a case, or a petition for writ of mandate to compel a trial court to stay the proceeding, when another court of concurrent jurisdiction has acquired jurisdiction over the case by virtue of the prior service of summons, but has declined to exercise its jurisdiction, and no injustice to the parties will result by trying the action in the second court.

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Court in Which Summons Was Served First Has Yielded Its Jurisdiction to Second Court

De Brincat v. Mogan *(1934) 1 Cal. App. 2d 7, 36 P.2d 245* , was a proceeding in mandate arising out of actions by two residents of the City and County of San Francisco against each other for damages resulting from an automobile collision between them in San Mateo County. The first case was filed by one party in the San Francisco Superior Court and the second by the other party in the San Mateo Superior Court. In the San Mateo action, summons was served on the day the action was filed. Summons in the San Francisco case was not served until four days later. Defendant's motion to stay the San Francisco action, on the ground the San Mateo court had exclusive jurisdiction because summons was served first in that action, was denied. The subsequent motion by the defendant in the San Mateo action to stay that action was granted. The San Francisco defendant then petitioned the court of appeal for a writ of mandate to compel the San Francisco court to stay the action.

The court of appeal pointed out that the concurrent jurisdiction of the two courts in the first instance was conceded (*1 Cal. App. 2d 7, 9)* . The court said that by the terms of former Code Civ. Proc. § 416 [*now see Code Civ. Proc. § 410.50(a)*], a court is deemed to have acquired jurisdiction of the parties from the time the summons and a copy of the complaint are served; that both courts had jurisdiction by virtue of the service of process; and that priority of jurisdiction is determined by the date the process is served (*1 Cal. App. 2d 7, 10)* . The court said that it does not follow, however, from this that the writ of mandate should issue, and that the writ is ordinarily one of discretion and does not issue as a matter of absolute right when not necessary to prevent an injustice to the parties (*1 Cal. App. 2d 7, 10)* . The court said that (1) both parties resided in San Francisco; (2) only four days elapsed between the service of process in both cases; (3) no proceedings detrimental to the petitioner have been taken in either case; (4) the entire

controversy may be determined in the San Francisco court without prejudice to either side; (5) though the San Mateo court had full power to assume jurisdiction over the whole controversy, it did not, under the circumstances, abuse its discretion in refusing to do so; and (6) until full jurisdiction was assumed by the San Mateo court, the San Francisco court had jurisdiction to proceed with the trial (*1 Cal. App. 2d 7, 10-11)* .

Note that the court of appeal, on the basis of the foregoing decision, denied a writ of mandate sought to compel the San Mateo Court to vacate its order staying proceedings in the action pending before it [*see De Brincat v. Swart (1934) 1 Cal. App. 2d 756, 36 P.2d 247]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral Overview

California Points & Authorities

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13-133 California Points & Authorities §§ 133.41-133.49

[Reserved]

§§ 133.41[Reserved]

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PART II. FORMS
C. Federal-State Jurisdiction

13-133 California Points & Authorities § 133.50

§ 133.50 Supporting Motion to Dismiss Action for Lack of Jurisdiction--Jurisdiction Is Vested Exclusively in Federal Courts

[1] FORM

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff, vs.	)	IES IN SUPPORT OF MOTION TO DISMISS AC-
_____ [*name*],	)	TION FOR LACK OF JURISDICTION
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE MOTION OF DEFENDANT FOR AN ORDER TO DISMISS THIS ACTION FOR LACK OF JURISDICTION SHOULD BE GRANTED BECAUSE EXCLUSIVE JURISDICTION OF THE ACTION IS IN THE _____ [SUPREME COURT OF THE UNITED STATES *or* UNITED STATES DISTRICT COURTS].

[*EITHER*]

Controversies Between States. The Supreme Court of the United States has original and exclusive jurisdiction of all controversies between two or more states (*28 U.S.C. § 1251(a)*).

[*OR*]

Maritime Cases. The United States District Courts have original jurisdiction, exclusive of the courts of the states of (1) any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled; and (2) any prize brought into the United States and all proceedings for the condemnation of property taken as prize (*28 U.S.C. § 1333*).

[*OR*]

A. Death on the High Seas Act. Exclusive jurisdiction of actions under the federal Death on the High Seas Act (*46 U.S.C. §§ 761-767*) is in the federal courts (*46 U.S.C. § 761*; *Cairl v. Boeing Co. (1974) 39 Cal. App. 3d 137, 139, 113 Cal. Rptr. 925* ; *Gordon v. Reynolds (1960) 187 Cal. App. 2d 472, 477-478, 10 Cal. Rptr. 73*). [Aircraft accidents are included within the meaning of the Death on the High Seas Act (*Cairl v. Boeing Co. (1974) 39 Cal. App. 3d 137, 139, 113 Cal. Rptr. 925*)].

OR

B. Federal Patent Law. Cases seeking to regulate the conduct of attorneys appearing before the U.S. Patent and Trademark Office, and requires resolution of substantial issues of patent law, is subject to the exclusive jurisdiction of the federal courts (*Lockwood v. Sheppard, Mullin, Richter & Hampton (2009) 173 Cal. App. 4th 675, 687, 93 Cal. Rptr. 3d 220*). If elements of a state cause of action require resolution of substantial issues of patent law, such as the elements of causation and damages in a patent prosecution malpractice action, the suit is within the exclusive jurisdiction of the federal courts (*Landmark Screens, LLC v. Morgan, Lewis & Bockius, LLP (2009) 183 Cal. App. 4th 238, 251, 107 Cal. Rptr. 3d 373*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*party's status and name*]

[2] Comments

[a] Use of Form

The memorandum of points and authorities in [1], *above*, may be submitted in support of a motion to dismiss a state court action on the ground the federal courts have exclusive jurisdiction of the action. The points and authorities set

forth are illustrative only and not exhaustive of federal statutes vesting exclusive jurisdiction in the federal courts [*see* discussion under *§ 133.50[3][c]*].

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, the foregoing points and authorities may be used to support a demurrer to the complaint on the ground the court lacks jurisdiction of the subject of the action alleged [*see Code Civ. Proc. § 430.10(a)*], or a motion for separate trial of the affirmative defense that the court lacks jurisdiction of the subject matter [*see Code Civ. Proc. § 597*]. With appropriate modifications, they may also be used in support of a petition for writ of prohibition [*Code Civ. Proc. §§ 1102, 1103*] to restrain the trial court from proceeding with the case and a writ of mandate [*Code Civ. Proc. §§ 1085, 1086*] to compel the trial court to dismiss it. They may also be adapted for use in an appellate brief.

[c] When Issue of Preemption Arises

In the field of preemption of state law, questions of subject matter jurisdiction arise in those categories of cases over which the federal courts have exclusive jurisdiction, such as bankruptcy, patent and copyright law, penalties and forfeitures under the law of the United States, and some types of cases within the area of admiralty and maritime law [*Hughes v. Blue Cross of Northern California (1989) 215 Cal. App. 3d 832, 849, 263 Cal. Rptr. 850]* . As in the field of admiralty and maritime law, federal preemption under the Employees' Retirement Income Security Act of 1974 (ERISA) sometimes affects subject matter jurisdiction and sometimes it does not (*see 29 U.S.C. § 1132(a)(1)(B), (e)(1)*) [*Hughes v. Blue Cross of Northern California (1989) 215 Cal. App. 3d 832, 849, 263 Cal. Rptr. 850]* . Under the Federal Tort Claims Act (*28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401, 2411, 2412, 2671*-2680), federal district courts have exclusive jurisdiction over claims against the United States for torts committed by its employees within the scope of their employment, when the United States would be liable under applicable law if it were a private person [*28 U.S.C. § 1346(b)*].

State courts are not authorized to determine whether a person's claim for relief under a federal law, in a federal court, and within that court's exclusive jurisdiction, is an appropriate one. The fact that Congress' grant to the federal courts of exclusive jurisdiction over bankruptcy petitions precludes collateral attacks on such petitions in state courts is supported by the fact that remedies are available in the federal courts to creditors who believe that a filing is frivolous [*Choy v. Redland Insurance Company (2002) 103 Cal. App. 4th 789, 798, 127 Cal. Rptr. 2d 94]* .

In addition, the National Labor Relations Board has exclusive jurisdiction over causes of action in a collective bargaining context [*see 29 U.S.C. § 151 et seq.*; *Machinists Automotive Trades Dist. Lodge v. Peterbilt Motors Co. (1990) 220 Cal. App. 3d 1402, 1407-1412, 269 Cal. Rptr. 911]* .

[d] Conflict Between Federal and State Statutes

Even when Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent it actually conflicts with federal law. Such a conflict arises when compliance with both federal and state regulations is a physical impossibility, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress [*Aalgaard v. Merchants Nat. Bank, Inc. (1990) 224 Cal. App. 3d 674, 686, 274 Cal. Rptr. 81* (quoting *Fidelity Federal Sav. & Loan Ass'n v. de la Cuesta (1982) 458 U.S. 141*)]. The controlling principle then is that any state legislation that frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause of the U.S. Constitution (U.S. Const., art. VI, cl. 2) [*Aalgaard v. Merchants Nat. Bank, Inc. (1990) 224 Cal. App. 3d 674, 688, 274 Cal. Rptr. 81* (quoting *Perez v. Campbell (1971) 402 U.S. 637*)]. For example, an action by the former cashier of a chartered national bank with fewer than 20 employees against the bank and its officers

for age discrimination under former Gov. Code § 12941(a) (providing that employer may not discharge or dismiss any individual over age of 40 on ground of age, except in cases where law compels or provides for such action; section repealed as of January 1, 2003) and for violation of employment covenants under California law is preempted by § 24 of the National Bank Act [*12 U.S.C. § 24*], providing in part that, under the act, a national banking association shall have power to elect or appoint directors, and by its board of directors to appoint a president, vice-president, cashier, and other officers, define their duties, dismiss such officers or any of them at pleasure, and appoint others to fill their places [*Aalgaard v. Merchants Nat. Bank, Inc. (1990) 224 Cal. App. 3d 674, 677, 686-695, 274 Cal. Rptr. 81* (affirming summary judgment for defendant)].

[e] Related Pleading and Practice Forms

For a discussion and forms for use in securing the dismissal of a federal action for lack of subject matter jurisdiction and for removing certain actions within the original jurisdiction of the federal district courts from a California state court to a federal court, see California Forms of Pleading and Practice, Ch. 265, *Federal Courts: Jurisdiction and Removal* (Matthew Bender). For a form of demurrer to the complaint or cross complaint on the ground that the court lacks jurisdiction of the subject of the action, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , in that publication.

[f] Related Points and Authorities

For memoranda of points and authorities generally supporting and opposing demurrers to a complaint on the ground of lack of subject matter jurisdiction, see *Ch. 71, Demurrers and Motions for Judgment on the Pleadings, § 71.20* et seq., in this publication.

[3] Discussion of Authorities

[a] Death on the High Seas Act

46 U.S.C. § 761 provides that whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any state, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the United States District Courts, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation that would have been liable if death had not ensued.

Cairl v. Boeing Co. *(1974) 39 Cal. App. 3d 137, 113 Cal. Rptr. 925* , was an action in the Los Angeles County Superior Court for wrongful death resulting from decedent's fall from a B-52 aircraft alleged to have been negligently and defectively designed and manufactured, and warranted by the defendant, and alleged to have occurred at a point 60 miles northwest of Thule Air Base Greenland, a point located on the high seas beyond a marine league from the shore of any state, or the District of Columbia, or the Territories or dependencies of the United States. Defendant's demurrer to the complaint for lack of subject matter jurisdiction [*see Code Civ. Proc. § 430.10(a)*] was sustained, and the action was dismissed. Plaintiffs appealed. The court of appeal said that cases interpreting *46 U.S.C. § 761* uniformly have held that state courts are not granted jurisdiction over deaths occurring on the high seas as defined, and, since the suit must be brought in admiralty, United States courts have exclusive jurisdiction, and that the place of accident, that is, locale, determines the exercise of admiralty jurisdiction. Quoting *Wilson v. Transocean Airlines (N.D. Cal. 1954) 121 F. Supp. 85, 92* , the court said that in applying the locality test for admiralty jurisdiction, the tort is deemed to occur not where the wrongful act or omission has its inception, but where the impact of the act or omission produces such injury as to give rise to a cause of action (*39 Cal. App. 3d 137, 139)* . The court said that *Gordon v. Reynolds (1960) 187 Cal. App. 2d 472, 10 Cal. Rptr. 73* (discussed *below*), specifically held that state courts have no jurisdiction over the subject matter of an action brought under the federal Death on the High Seas Act and that federal courts have exclusive jurisdiction, and that the case has been cited approvingly a number of times (*39 Cal. App. 3d 137, 139)* . The court also

said that airplane accidents are included within the meaning of the Death on the High Seas Act (*39 Cal. App. 3d 137, 139)* .

Gordon v. Reynolds *(1960) 187 Cal. App. 2d 472, 10 Cal. Rptr. 73* , was an action for, among other things, the wrongful death of a passenger aboard an aircraft, owned by the defendant, that was ditched in the Pacific Ocean approximately seven miles southwest of Cape San Martin Light in Monterey County, resulting in the drowning deaths of the pilot, his wife, and plaintiff's husband. Plaintiff was the sole survivor of the crash. The defense of lack of subject matter jurisdiction was tried first and resulted in a judgment that the court had no jurisdiction of the wrongful death action.

The court of appeal affirmed. The court said that the federal Death on the High Seas Act [*46 U.S.C. §§ 761-768*] created, in the exercise of the plenary powers of Congress, a new substantive cause of action for death on the high seas, and that jurisdiction of the federal court over the federal cause of action is exclusive (*187 Cal. App. 2d 472, 478)* . Quoting *Wilson v. Transocean Airlines (N.D. Cal. 1954) 121 F. Supp. 85, 92* , the court further pointed out that the tort is deemed to occur not where the wrongful act or omission has its inception, but where the impact of the act or omission produces such injury as to give rise to a cause of action (*187 Cal. App. 2d 472, 479)* .

[b] Federal Patent Law

In ***Lockwood v. Sheppard, Mullin, Richter & Hampton*** *(2009) 173 Cal. App. 4th 675, 93 Cal. Rptr. 3d 220*), plaintiff inventor sued defendant law firm after the firm requested reexamination of two of the inventor's patents. Subsequently, the inventor filed an amended complaint. The trial court granted the firm's special motions to strike the inventor's original and amended complaints pursuant to *Code Civ. Proc. § 425.16*, and entered judgment in favor of the firm. On appeal, the court concluded that the inventor's complaints arose under federal patent laws and therefore were subject to the exclusive jurisdiction of the federal courts under *28 U.S.C. § 1338*. Although the United States Patent and Trademark Office (USPTO) found that the prior art failed to disclose, teach, or suggest the invention described by the inventor's patents, this determination was not particularly instructive as to whether the requests for reexamination would have been granted absent the firm's alleged misrepresentations. Thus, the USPTO's decision confirming the inventor's patents did not obviate the substantial questions of federal patent law involved in determining whether the prior art would be considered important in deciding the patentability of the inventor's patent claims (*173 Cal. App. 4th 675, 687)* .

In ***Landmark Screens, LLC v. Morgan, Lewis & Bockius, LLP*** *(2009) 183 Cal. App. 4th 238, 107 Cal. Rptr. 3d 373* , plaintiff client sued defendants, an attorney and his law firm, for legal malpractice in a patent prosecution. The client alleged that defendants engaged in a deceptive course of action by actively concealing from it the negligent filing of a divisional application. The trial court sustained defendants' demurrer for lack of subject matter jurisdiction. On appeal, the court concluded that this action should have been adjudicated in federal court because of the substantial patent questions presented in the elements of causation and damages. The showing required of the client went beyond the question of whether defendants' alleged concealment and deception amounted to malpractice. To recover from defendants, the client needed to prove that but for their failure to disclose (or intentional concealment of) the attorney's negligence in filing the application, it would not have lost valuable and pioneering patent rights. The client's success would have derived from demonstrating that defendants' concealment closed the door on its opportunity to pursue patent rights for its invention. The nature and extent of these rights presented a substantial issue of federal patent law that was properly adjudicated in federal court (183 Cal. App. 4th 238, 251). Although the client argued that affirmance of the judgment would leave it without a remedy, at the time it filed this action there was sufficient authority suggesting that federal court was the proper forum for resolution of the issues raised. The client was not deprived of its ability to file a timely action in federal court (*183 Cal. App. 4th 238, 252*).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss

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13-133 California Points & Authorities § 133.51

§ 133.51 Supporting Motion to Quash Service of Summons and to Dismiss Action for Lack of Jurisdiction--Jurisdiction of Disputes Involving Ownership or Right to Possession of Indian Land Held in Trust by United States or Interest Therein Is Vested Exclusively in Federal Courts [28 U.S.C. § 1360(b)]

[1] FORM

[*Caption. See § 133.50.*]

THE MOTION TO [QUASH SERVICE OF SUMMONS AND] DISMISS THIS ACTION SHOULD BE GRANTED BECAUSE THIS COURT DOES NOT HAVE JURISDICTION OVER [THE DEFENDANTS OR] THE SUBJECT OF THE ACTION FOR THE REASON THAT THIS CASE INVOLVES A DISPUTE CONCERNING THE _____ [OWNERSHIP *or* RIGHT TO POSSESSION *or specify other interest in the property*] OF INDIAN LAND, JURISDICTION OF WHICH IS IN THE FEDERAL COURTS.

A. Limitation on State Court Jurisdiction. Although *28 U.S.C. § 1360(a)* gives California jurisdiction over civil disputes that involve Indians and arise in Indian country, that jurisdiction is limited by *28 U.S.C. § 1360(b)*, which provides in part that the general grant of civil jurisdiction does not confer jurisdiction on the state to adjudicate the ownership or right to possession of Indian property that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States or any interest in it (*28 U.S.C. § 1360*; *see Boisclair v. Superior Court (1990) 51 Cal. 3d 1140, 1146, 276 Cal. Rptr. 62, 801 P.2d 305*)

B. Action Is Completely Preempted by Federal Law and Dismissal Is Required. An action involving the ownership or right to possession of Indian trust property or any interest in it is completely preempted under federal law and the state court action must be dismissed *Boisclair v. Superior Court (1990) 51 Cal. 3d 1140, 1156, 276 Cal. Rptr. 62, 801 P.2d 305*

[*Optional*] **C. Hybrid Motion to Quash/Dismiss Is Proper.** Although a motion to quash service of summons is normally directed at defects in personal, as opposed to subject matter jurisdiction, the hybrid motion to quash/dismiss is a proper means of challenging the court's authority without making a general appearance. This is consistent with the general rule that subject matter jurisdiction can be challenged at any time during the course of an action (*Boisclair v.*

Superior Court (1990) 51 Cal. 3d 1140, 1144 n.1, 276 Cal. Rptr. 62, 801 P.2d 305).

[*Optional*] **D. Indian Defendants Acting Within Their Authority Are Immune From Liability.** The rule that if actions of an officer do not conflict with the terms of his or her valid statutory authority, they are the actions of the sovereign, whether or not they are tortious under general law, applies to Indian tribal officers (*Boisclair v. Superior Court (1990) 51 Cal. 3d 1140, 1144 n.1, 276 Cal. Rptr. 62, 801 P.2d 305*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*party's status and name*]

[2] Comments

[a] Use of Form

The form in [1], *above*, may be used by the defense in an action against an Indian tribe, band, or community, and/or tribal officers when the action involves the ownership or right to possession of Indian land held in trust by the United States. The memorandum may be submitted in support of a motion to dismiss the action for lack of subject matter jurisdiction, or a hybrid motion to quash service of summons [*see Code Civ. Proc. § 418.10(a)(1)*] for lack of personal jurisdiction on the ground the tribal officers are immune to suit and to dismiss the action for lack of jurisdiction, on the ground the dispute involves a federal claim, jurisdiction of which is exclusively in the federal courts [*see 28 U.S.C. § 1360(b)*; *Boisclair v. Superior Court (1990) 51 Cal. 3d 1140, 1146, 1156, 276 Cal. Rptr. 62, 801 P.2d 305* (both discussed under *§ 133.51[3]*[a])]. Optional Paragraphs C and D should be included when the points and authorities are submitted in support of a hybrid motion by individual tribal officers named as defendants who claim that they are immune to suit under the doctrine of sovereign immunity. Paragraph D may also be used by itself in a separate memorandum of points and authorities in support of a motion by Indian tribal officers to quash service of summons in an action against them for an act which is tortious under general law but to which the doctrine of sovereign immunity applies.

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, Paragraphs A and B of the foregoing points and authorities may be used in support of a demurrer to the complaint on the ground the court lacks jurisdiction of the subject of the action alleged [*see Code Civ. Proc. § 430.10(a)*], or a motion for separate trial of the affirmative defense that the court lacks jurisdiction of the subject matter [*see Code Civ. Proc. § 597*]. With appropriate modifications, all or any of the paragraphs may be used in support of a petition for writ of prohibition [*Code Civ. Proc. §§ 1102, 1103*] to restrain the trial court from proceeding with the case and a writ of mandate [*Code Civ. Proc. §§ 1085, 1086*] to compel the trial court to (quash service of summons and) dismiss the case. They may also be adapted for use in an appellate brief.

[3] Discussion of Authorities

[a] Limitation on State Court Jurisdiction

28 U.S.C. § 1360(a) provides:

> Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indians country as they have elsewhere within the State: [specifying states, including California, and Indian country affected, which in California is all Indian country within the state].
>
> (b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize the regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or any other regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.
>
> (c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

Boisclair v. Superior Court *(1990) 51 Cal. 3d 1140, 276 Cal. Rptr. 62, 801 P.2d 305* , was a mandate proceeding arising out of an action by a granite company for declaratory and injunctive relief against both Indian defendants (tribal officers) and non-Indian defendants (who were not parties to the writ proceeding) with respect to the use of a road which crossed four parcels of land. Parcel 1 was leased by its Indian owner's family to the granite company in 1981 for the purpose of mining granite; parcel 3 was non-Indian land; parcels 2 and 4 were held in trust by the United States for the Pala Band of Mission Indians, a recognized Indian tribe organized under the Indian Reorganization Act (*25 U.S.C. § 476*). The dispute began when the non-Indian defendants welded shut a gate that extended across the road on their property, thereby denying the company its sole means of egress. The Indian defendants were charged with having conspired with the non-Indian defendants to shut the gate. The company claimed the defendants were committing trespass and/or nuisance by interfering with their use of the road, which they contended was either a public road open to all or a road over which parcel 1 had easement rights. The Indian tribe claimed the road was part of Indian trust land and that it was free to deny the company access over it. The Indian defendants appeared specially and moved to quash service of summons on the ground they enjoyed sovereign immunity from liability and to dismiss the action on the ground the trial court lacked jurisdiction of the subject matter. The motion was denied, and the Indians petitioned for a writ of mandate or prohibition. The court of appeal denied the petition. In partly affirming and partly reversing the judgment of the court of appeal, the Supreme Court said that the proper construction of *28 U.S.C. § 1360* was the center of the jurisdictional issue and of the case. The Court explained that, after granting California jurisdiction in *28 U.S.C. § 136(a)* over civil disputes involving Indians and arising in Indian country was the limitation in *28 U.S.C. § 1360(b)* that the general grant of civil jurisdiction does not confer jurisdiction on the state to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of Indian property or any interest in it (*51 Cal. 3d 1140, 1146-1147)* .

After discussing the historical relationship between the federal government, state government, and Indian tribes, related federal statutes, and the legislative history and intent of *28 U.S.C. § 1360* (*51 Cal. 3d 1140, 1147-1151)* , the Court held that the limitation precludes states from asserting jurisdiction over disputes concerning Indian land, including disputes in which one party claims the disputed property is non-Indian, and that if one possible outcome of the litigation

is the determination that the disputed property is in fact Indian trust land, then a state court is barred from assuming jurisdiction over the case (*51 Cal. 3d 1140, 1152-1153)* . The Court said that it makes no difference whether a plaintiff claims that the land is owned by himself, by the state, or is under state jurisdiction by virtue of federal government action, that as long as the Indian party to the litigation claims that the property is Indian trust or allotted land, the dispute may be characterized as one concerning ownership and possession of Indian land, and is therefor barred from state court jurisdiction (*51 Cal. 3d 1140, 1154)* .

[b] Action Is Completely Preempted by Federal Law and Dismissal Is Required

The facts and procedural background of ***Boisclair v. Superior Court*** *(1990) 51 Cal. 3d 1140, 276 Cal. Rptr. 62, 801 P.2d 305* , are discussed under *§ 133.51[3][a]*. The Supreme Court said that, although, as a general rule, subject matter jurisdiction is determined from the face of a well-pleaded complaint, when a complaint is in an area completely preempted by federal law, the well-pleaded complaint rule is supplemented, with regard to federal-question jurisdiction, by the "complete preemption doctrine." Under this doctrine, once an area of state law has been completely preempted, any claim purportedly based on that preempted state law is considered, from its inception, a federal claim, and therefore arises under federal law. Indian property law is an area in which the complete preemption doctrine applies (*51 Cal. 3d 1140, 1156)* . The Court said that it is incumbent on the state court, whenever a party claims that the state court has no subject matter jurisdiction under *28 U.S.C. § 1360(b)*, as in the case of areas of law completely preempted, to look beyond the face of the complaint in order to determine from the totality of the pleadings whether the case before it is a dispute over the ownership or right to possession of Indian land or any interest in it. If it appears from the pleading that the case may be so characterized, and that one possible outcome of the case may be a finding that the property in dispute is Indian trust land, the court must dismiss the case for want of subject matter jurisdiction (*51 Cal. 3d 1140, 1156)* . Applying the standard, the Court found it evident from the pleadings that at least a part of the dispute was about the ownership or right of possession of Indian land, as well as a dispute about interests in the land, that the facts alleged in the complaint and in the motion to dismiss, *i.e.*, that the road runs through what both sides concede to be Indian land and there is a factual dispute about whether the road is public, make it clear that the dispute concerns Indian property rights. The Court held that that part of the complaint asking for an adjudication of rights to purportedly Indian land cannot be adjudicated by a court of this state (*51 Cal. 3d 1140, 1156)* . The Court held that the trial court should have granted the Indian defendants' motion to dismiss all claims of the company's rights in that portion of the road that runs through parcels 2 and 4, which are Indian trust territory (*51 Cal. 3d 1140, 1158)* , and reversed that part of the Court of Appeal judgment denying relief with directions to partially grant the petition for writ of mandate (*51 Cal. 3d 1140, 1159)* .

[c] Hybrid Motion to Quash/Dismiss Is Proper

The facts and procedural background of ***Boisclair v. Superior Court*** *(1990) 51 Cal. 3d 1140, 276 Cal. Rptr. 62, 801 P.2d 305* , are discussed under *§ 133.51[3][a]*. In partly affirming and partly reversing the judgment of the court of appeal, the Supreme Court made the statement set out in Paragraph C of the foregoing form (*51 Cal. 3d 1140, 1144 n.1*).

[d] Indian Defendants Acting Within Their Authority Are Immune From Liability

The facts and procedural background of ***Boisclair v. Superior Court*** *(1990) 51 Cal. 3d 1140, 276 Cal. Rptr. 62, 801 P.2d 305* , are discussed under *§ 133.51[3][a]*. The company alleged that the Indian defendants acted in concert with the non-Indian defendants to obstruct the portion of the road running through the non-Indian owners' parcel. The Court said that the question whether the Indian defendants acted tortiously on concededly non-Indian land does not require a determination of Indian property rights, and that, therefore, the damage claim against the Indian defendants for actions taken outside the reservation was not barred by *28 U.S.C. § 1360(b)*, but that whether it was barred by the sovereign immunity of the Indian defendants as officers of a recognized Indian tribe, as they contended, was a separate question, and that, although Indian tribes enjoy broad sovereign immunity from lawsuits, the immunity of Indian tribal officers is

more limited (*51 Cal. 3d 1140, 1157)* .

Although it concluded that determination of the sovereign immunity issue required a greater elaboration of the facts that underlay the company's allegations in further proceedings at the trial court (*51 Cal. 3d 1140, 1158)* , the Supreme Court nevertheless discussed the applicable principles. It said that: (1) in general, the agent of a sovereign may be held liable when he or she acts in excess of his or her authority or under an authority not validly conferred; (2) the commission of a tortious act is not per se exempt from immunity; (3) if the actions of an officer do not conflict with the terms of his or her valid statutory authority, then they are actions of the sovereign, whether or not they are tortious under general law; (4) this general principle of sovereign immunity has been applied to Indian sovereign immunity (*51 Cal. 3d 1140, 1157)* ; (5) the authority of a tribal government to act beyond the confines of its own territory is severely circumscribed; (6) exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation; and (7) the sovereign power of Indian tribes to act on land that is neither tribal land nor within the confines of the reservation is minimal (*51 Cal. 3d 1140, 1157-1158)* .

The Court added that Indian tribes may exercise sovereign power over non-Indians who enter their land, that they may exercise control of their boundaries and exclude those seeking access, but that this power to exclude does not extend to actions taken beyond the confines of the reservation (*51 Cal. 3d 1140, 1158)* . The Court, however, was unable to determine from the record whether the alleged tortious or conspiratorial acts by the Indian defendant's were beyond the scope of tribal self-government. The Court said that, if their acts were nothing more than those appropriate for excluding the company from tribal territory and were taken within tribal boundaries, the Indian defendants acted within the scope of their sovereign immunity, but that if they committed or conspired to commit tortious acts the primary situs of which was outside Indian territorial boundaries, they acted beyond their sovereign authority and are not protected by sovereign immunity (*51 Cal. 3d 1140, 1158)* .

[4] Additional Authorities

[a] Limitation on State Court Jurisdiction

Friends of East Willits Valley v. County of Mendocino (2002) 101 Cal. App. 4th 191 involved a challenge to the Mendocino County Board of Supervisors' decision to grant a Native American tribe's request for cancellation of certain agricultural use restrictions on land the tribe sought to develop. Among other things, the tribe argued that even if the restrictions were to remain in place, they would be unenforceable in the future because *28 U.S.C. § 1360* precludes jurisdiction over the tribe. In rejecting this argument, the court acknowledged that the tribe enjoys sovereign immunity from suit in state court. However, Congressional authorization and tribal consent are separate and independent bases for jurisdiction. If a tribe elects to waive sovereign immunity and submit itself to state court jurisdiction, nothing in the language of *28 U.S.C. § 1360* stands as a bar to assumption of that jurisdiction (*101 Cal. App. 4th 191, 202)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProceduresPleading & PracticeGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss

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13-133 California Points & Authorities § 133.52

§ 133.52 Supporting Motion to Vacate Defendant's Default Entered on Remand of Case From Federal Court [28 U.S.C. § 1446]--Entry of Default [Code Civ. Proc. § 585] Was Void [Code Civ. Proc. § 473, Fifth Paragraph] Because Responsive Pleading Was Timely Filed

[1] FORM

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO VACATE DEFAULT
vs.	)	
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

DEFENDANT'S MOTION TO VACATE THE DEFAULT ENTERED BY THE COURT CLERK ON REMAND OF THIS CASE FROM THE FEDERAL COURT SHOULD BE GRANTED BECAUSE THE JURISDICTION OF THIS COURT WAS SUSPENDED DURING THE PERIOD OF REMOVAL, AND THE DEFAULT IS VOID BECAUSE _____ [IT WAS ENTERED BEFORE THE EXPIRATION OF DEFENDANT'S TIME TO FILE A RESPONSIVE PLEADING, EXCLUDING THE TIME THE CASE WAS IN THE FEDERAL COURT *or* DEFENDANT HAD TIMELY FILED A RESPONSIVE PLEADING IN THE FEDERAL COURT].

A. Motion to Set Aside. The court may, on the motion of either party after notice to the other party, set aside any void judgment or order (*Code Civ. Proc. § 473(d)*).

B. Time to File Responsive Pleading. A defendant has 30 days after the summons is served on him or her in which to file a responsive pleading to the complaint, and no default can properly be entered before expiration of that period (*see Code Civ. Proc. §§ 412.20(a)(3), (4), 585*).

C. Statutory Effect of Removal of Case to Federal Court. Promptly after the filing of a petition for removal of a civil action and bond, the defendant must give written notice thereof to all adverse parties and file a copy of the petition with the clerk of the state court, which effects the removal, and the state court shall proceed no further unless and until the case is remanded (*28 U.S.C. § 1446(d)*).

D. Removal of Action Suspends State Court's Jurisdiction. Once a case is removed from a state to a federal court, the jurisdiction of the state court to proceed with the case is suspended until the case is remanded to it by the federal court (*Laguna Village, Inc. v. Laborers' Internat. Union of North America (1983) 35 Cal. 3d 174, 180, 197 Cal. Rptr. 99, 672 P.2d 882* ; *Dauenhauer v. Superior Court (1957) 149 Cal. App. 2d 22, 25, 307 P.2d 724*).

[*EITHER*]

E. Effect of Removal and Remand on Time to Plead. On remand from the federal court, the state court resumes jurisdiction of the case, but the period during which the case was removed is not counted and the parties are entitled to any period in which an act is required to be taken to the extent that the period had not expired when the case was removed (*Dauenhauer v. Superior Court (1957) 149 Cal. App. 2d 22, 26, 307 P.2d 724*).

[*OR*]

E. Responsive Pleading Filed in Federal Court. The filing of a motion to dismiss by the defendant in the federal court to which a case has been removed, which is sufficiently similar to a demurrer in state court to constitute a responsive pleading, prevents the entry of defendant's default after the case is remanded to the state court (*Laguna Village, Inc. v. Laborers' Internat. Union of North America (1983) 35 Cal. 3d 174, 176, 179-182, 197 Cal. Rptr. 99, 672 P.2d 882*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*party's status and name*]

[2] Comments

[a] Use of Form

The form in [1], *above*, may be used in support of a motion to vacate the defendant's default entered by the clerk after

remand of the case by the federal court to the state court. The ground of the motion is that the entry of default is void, either because a responsive pleading or its equivalent was timely filed in the federal court or because the default was entered before the time in which a responsive pleading had to be filed in the state court.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Removal and Remand

Federal removal jurisdiction is derivative; only cases properly within the jurisdiction of the state court are subject to removal [*Hughes v. Blue Cross of Northern California (1989) 215 Cal. App. 3d 832, 850, 263 Cal. Rptr. 850]* .

Unless it is reversed on appeal by an appropriate federal court, the order of remand is conclusive regarding the question of jurisdiction and not subject to review by a California appellate court [*see Delpit v. U.S. Shipping Board E. F. Corp. (1931) 115 Cal. App. 85, 86, 300 P. 990]* .

[c] Related Uses

With appropriate modifications, these points and authorities may also be used in support of a petition for writ of mandate to compel the trial court to vacate the entry of default when the remedy by appeal is inadequate [*see Code Civ. Proc. §§ 1085, 1086*] or a petition for writ of prohibition [*Code Civ. Proc. §§ 1102, 1103*] should the state court attempt to exercise jurisdiction over the case while it is in the federal court. They may also be adapted for use in an appellate brief.

[d] Related Pleading and Practice Forms

For a discussion and forms for use in securing removal of an action within the original jurisdiction of the federal district courts from a California state court to a federal court, see Ch. 265, *Federal Courts: Jurisdiction and Removal* , in California Forms of Pleading and Practice (Matthew Bender). For forms of a notices of motion to set aside void judgments, see California Forms of Pleading and Practice, Ch. 489, *Relief From Judgments and Orders* .

[e] Related Points and Authorities

For additional memoranda of points and authorities to set aside defaults and default judgments, including the unauthorized entry of default or judgment by a court clerk, see Ch. 70, *Defaults, Default Judgments and Relief From Judgments and Orders* .

[3] Discussion of Authorities

[a] Removal of Action Suspends State Court's Jurisdiction

Laguna Village, Inc. v. Laborers' Internat. Union of North America *(1983) 35 Cal. 3d 174, 197 Cal. Rptr. 99, 672 P.2d 882* , arose out of an action by a land developer against a labor union for damages for trespass. The union had the case removed to the federal court, which thereafter remanded it to the state court. Plaintiff then had defendant's default entered after defendant failed to file an answer within the extended period granted by plaintiff to do so.

In holding that the trial court erred in denying relief from default, the Court, citing *Dauenhauer v. Superior Court (1957) 149 Cal. App. 2d 22, 307 P.2d 724* (discussed *below*), said that under modern practice the state court's jurisdiction is suspended from the moment of removal until the case is remanded to it by the federal court (*35 Cal. 3d 174, 180)* .

Dauenhauer v. Superior Court *(1957) 149 Cal. App. 2d 22, 307 P.2d 724* , was a mandate proceeding, arising out of an action for damages for breach of a farm machine lease, in which defendants filed an answer and a cross complaint. Plaintiff's demurrers were sustained with leave to amend, amended pleadings were filed, and the court extended plaintiff's time to plead to them. During the period of plaintiff's extended leave to plead, a party who had been joined in the action by the cross complaint filed in a federal court a petition for removal. The federal court remanded the cause to the state court and, within the unexpired time of the extended time to plead, not counting the interim of federal control, plaintiff demurred specially and generally to the amended answer and cross complaint and moved to strike both. When he filed these papers he was unaware that the day following remand, his default had been entered. When the matter came on for hearing, the cross complainant objected on the ground plaintiff's default had been entered. The objection was sustained, although the court, after hearing argument on the merits, overruled the general demurrers on the ground that the objection of failure to state a cause of action could be raised at any time [*see Code Civ. Proc. § 430.80*], and denied the motions to strike the entire pleadings; it denied the motions to strike portions of the pleadings and the special demurrers on the ground they were not timely, and plaintiff had no standing because his default had been entered.

In issuing a writ of mandate directing the trial court to rule on the merits of the special demurrers and special motions to strike, the court of appeal held that a case is removed from the jurisdiction of the state court on the filing of the petition for removal and that the jurisdiction of the state court is suspended until the case is remanded to it by the federal court, at which time the state court resumes jurisdiction (*149 Cal. App. 2d 22, 25)* .

[b] Effect of Removal and Remand on Time to Plead

The facts and procedural background of ***Dauenhauer v. Superior Court*** *(1957) 149 Cal. App. 2d 22, 307 P.2d 724* , are discussed under *§ 133.52[3][a]*. In directing issuance of a writ of mandate, the court held that when the cause was remanded to the superior court by the federal court, the state of suspension theretofore existing terminated, and plaintiff had the unexpired time within which to file his demurrers and motions to strike; that since all this appeared on the court's record, the clerk was without authority to enter the default; that his attempt to do so was a nullity; and that since the act of entering default was void, the demurrers and motions to strike were properly filed by the clerk and it was the duty of the court to hear them and decide them on the merits (*149 Cal. App. 2d 22, 26)* .

[c] Responsive Pleading Filed in Federal Court

The facts and procedural background of ***Laguna Village, Inc. v. Laborers' Internat. Union of North America*** *(1983) 35 Cal. 3d 174, 197 Cal. Rptr. 99, 672 P.2d 882* , are discussed under *§ 133.52[3][a]*. While the case was in the federal court, the defendant filed a motion to dismiss pursuant to *Fed. R. Civ. P., Rule 12(b)(1), (6)* (providing that every defense to a claim for relief in any pleading shall be asserted in the responsive pleading thereto if one is required, except that certain defenses may at the option of the pleader be made by motion, including lack of jurisdiction over the subject matter and failure to state a claim on which relief can be granted). Plaintiff filed a brief in opposition to the motion and moved to remand the case to the state court. The federal court granted the motion and, in light of the remand, declined to consider the motion to dismiss. In reversing the order denying relief from default under former Code Civ. Proc. § 473, fourth paragraph [*now see Code Civ. Proc. § 473(d)*], the court held that the motion to dismiss in federal court was sufficiently similar to a demurrer to constitute a responsive pleading for the purpose of avoiding entry of default (*35 Cal. 3d 174, 176, 179, 182)* .

[4] Additional Authorities

[a] Removal of Action Suspends State Court's Jurisdiction

In *People v. Bogart (1970) 7 Cal. App. 3d 257, 86 Cal. Rptr. 737* , a criminal prosecution on multiple felony counts, in which a removal petition had been filed and denied by the federal court and the case remanded to the state court, the appellate court, holding that an appeal from an order of remand did not deprive the state court of jurisdiction to proceed with the case, and citing, among other cases, *Dauenhauer v. Superior Court (1957) 149 Cal. App. 2d 22, 24-26, 307*

P.2d 724 (discussed under *§ 133.52[3][a]*), said that it is clear that a removal petition deprives the state court of jurisdiction as soon as it is filed and served on the state court, but that jurisdiction returns to the state court when a remand order is filed and served on the state court, unless that order is stayed (*7 Cal. App. 3d 257, 264)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral Overview

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13-133 California Points & Authorities §§ 133.53-133.59

[Reserved]

§§ 133.53[Reserved]

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13-133 California Points & Authorities § 133.60

§ 133.60 Opposing Motion to Dismiss Action for Lack of Jurisdiction--State Courts Have Concurrent Jurisdiction With Federal Courts of Federal Cause of Action

[1] FORM

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*], Plaintiff,	)	IES IN OPPOSITION TO MOTION TO DISMISS
vs.	)	ACTION FOR LACK OF JURISDICTION
_____ [*name*], Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE MOTION OF DEFENDANT FOR AN ORDER DISMISSING THIS ACTION FOR LACK OF JURISDICTION SHOULD BE DENIED BECAUSE THE FEDERAL COURTS AND THE STATE COURTS HAVE CONCURRENT JURISDICTION OVER THE ACTION.

[*EITHER*]

Applicable Federal Statute Creating Right of Action Provides for Concurrent Jurisdiction. This right of action is

authorized by _____ [*specify federal statute, e.g., 28 U.S.C. § 1352* (action on bond executed under law of United States)], which expressly provides that jurisdiction between the United States District Courts and state courts is concurrent.

[*OR*]

A. Presumption of Concurrent Jurisdiction. State courts have inherent authority, and are thus presumptively competent to adjudicate claims arising under the laws of the United States. To give federal courts exclusive jurisdiction over a federal cause of action, Congress must, in an exercise of its powers under the Supremacy Clause, affirmatively divest state courts of their presumptively concurrent jurisdiction (*Yellow Freight Sys., Inc. v. Donnelly (1990) 494 U.S. 820* ; *Garofalo v. Princess Cruises, Inc. (2000) 85 Cal. App. 4th 1060, 1080, 102 Cal. Rptr. 2d 754*). This presumption can be overcome only by explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state court jurisdiction and federal interests (*Tafflin v. Levitt (1990) 493 U.S. 455, 460, 110 S. Ct. 792, 107 L. Ed. 2d 887* ; *Gulf Offshore Co. v. Mobil Oil Corp. (1981) 453 U.S. 473, 101 S. Ct. 2870, 69 L. Ed. 2d 784*).

[*Optional*] **B. Effect of Grant of Jurisdiction to Federal Courts.** The mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause of action (*Gulf Offshore Co. v. Mobil Oil Corp. (1981) 453 U.S. 473, 479, 101 S. Ct. 2870, 69 L. Ed. 2d 784*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*party's status and name*]

[2] Comments

[a] Use of Form

The memorandum of points and authorities in [1], *above*, may be submitted in opposition to a motion to dismiss a state court action on the ground the federal courts have exclusive jurisdiction of the subject matter. The basis of opposition is that (1) the federal statute creating the right (which may or may not be the statute relied on by the party seeking dismissal) either expressly provides for concurrent jurisdiction between the federal and state courts or is silent on the question; (2) there is no disabling incompatibility between federal and state court jurisdiction; and (3) therefore, the presumption of concurrent jurisdiction prevails. The points and authorities set forth are illustrative only and not exhaustive of federal statutes providing either for concurrent jurisdiction or which are silent on the question. For example, state courts enjoy concurrent jurisdiction over causes of action brought under the federal civil rights statute providing that all persons within the jurisdiction of the United States shall have the same legal rights as enjoyed by white citizens (*42 U.S.C. § 1981(a)*) [*DeHorney v. Bank of America Nat. Trust and Sav. (9th Cir. 1989) 879 F.2d 459, 463]* . Paragraph B should be included if the applicable federal statute expressly provides that federal courts have jurisdiction to enforce the right granted.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law

stated.

[b] Removal of Action

Notwithstanding the rule of concurrent jurisdiction, a defendant may in certain cases of concurrent jurisdiction between state and federal courts have an action removed from the state to the federal courts under *28 U.S.C. §§ 1441-1452*. For the cases that may be removed and those that may not and a discussion of the procedure for removal, see Ch. 265, *Federal Courts: Jurisdiction and Removal* , in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Presumption of Concurrent Jurisdiction

After the plaintiff in ***Yellow Freight System, Inc. v. Donnelly*** *(1990) 494 U.S. 820, 110 S. Ct. 1566, 108 L. Ed. 2d 834* , received a "Notice of Right to Sue" from the Equal Employment Rights Opportunity Commission, she filed suit within the 90-day limitation period in Illinois state court, alleging discrimination in hiring based on plaintiff's sex in violation of the Illinois Human Rights Act. In response to a motion to dismiss, the plaintiff moved to amend her complaint to allege violation of title VII of the Civil Rights Act of 1964. The motion was made after the 90-day period had expired. The defendant removed the case to federal court and moved to dismiss on the ground that the action was not timely because the state court did not have jurisdiction over the Title VII claim. The trial court denied the motion. The plaintiff prevailed after a trial on the merits, the court of appeals affirmed, and the defendant petitioned for certiorari.

The United States Supreme Court granted certiorari to resolve a split in the courts of appeal, some of which had held that federal courts have exclusive jurisdiction of Title VII claims. The Court first noted that under the system of dual sovereignty the Court has consistently held that state courts have inherent authority, and are presumptively competent, to adjudicate claims arising under the laws of the United States. The Court continued, stating that to give federal courts exclusive jurisdiction over a federal cause of action, Congress must, in an exercise of its powers under the Supremacy Clause, affirmatively divest state courts of their presumptively concurrent jurisdiction (*494 U.S. 820, 823)* . Looking to the statute, the Court found that although it affirmatively conferred jurisdiction on the federal courts, it did not expressly confine jurisdiction to the federal courts or oust state courts of their presumptive jurisdiction. The Court noted that this omission was strong, and arguably sufficient, evidence that Congress did not intend federal courts to have exclusive jurisdiction. Reviewing the legislative history of Title VII, the Court found it silent on whether jurisdiction was to be exclusive in federal courts, and noted that at any rate that history would not be an adequate substitute for a legislative decision to overcome the presumption of concurrent jurisdiction (*494 U.S. 820, 824-825)* . Nor could the Court find any incompatibility between the Title VII procedures and state court jurisdiction (*494 U.S. 820, 825-826)* . Finally, the Court, without disagreeing that most legislators, judges, and administrators who had been involved in the enactment, amendment, enforcement, and interpretation of Title VII expected that Title VII matters would be heard exclusively in federal court, concluded that that anticipation did not overcome the presumption of concurrent jurisdiction (*494 U.S. 820, 826)* .

In ***Garofalo v. Princess Cruises, Inc.*** *(2000) 85 Cal. App. 4th 1060, 102 Cal. Rptr. 2d 754* , Ms. Garofalo was entitled to lifetime medical care under a worker's compensation award. Later, she was allegedly injured in a shipboard fire while on a cruise, and among other litigation, the employer sought to recover the costs of medical care provided to her as a result of that event under the employer's subrogation rights under the California worker's compensation law. The trial court granted the defendant's motion for summary judgment on the ground that the Death on the High Seas Act (DOSHA) preempted the action and that the court lacked subject matter jurisdiction. The employer appealed from the judgment dismissing the action.

The court of appeal affirmed in part and reversed in part. First, the court held that DOHSA preempted the employer's state law claim in subrogation to recover the costs of medical care (*85 Cal. App. 4th 1060, 1072-1079)* . The court then

held that California courts have concurrent jurisdiction with the federal courts over DOHSA (46 Appen. U.S.C. § 761 et seq.) claims. Disagreeing with the contrary result in *Chromy v. Lawrance (1991) 233 Cal. App. 3d 1521, 285 Cal. Rptr. 400* , and relying on *Offshore Logistics, Inc. v. Tallentire (1986) 477 U.S. 207, 212, 106 S. Ct. 2485, 91 L. Ed. 2d 174* , the court found it clear that state courts have concurrent jurisdiction over DOHSA claims (*85 Cal. App. 4th 1060, 1079-1085)* . In its analysis, the court quoted *Yellow Freight System* for on the inherent authority of state courts to adjudicate claims arising under the laws of the United States (*85 Cal. App. 4th 1060, 1080)* .

Tafflin v. Levitt (1990) 493 U.S. 455, 460, 110 S. Ct. 792, 107 L. Ed. 2d 887 involved an action raising a number of causes of action under Maryland law and also under the federal Securities Exchange Act of 1934 and the Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C. § 1961 et seq.* (RICO). The trial court dismissed action, finding that plaintiffs failed to state a cause of action under the Securities Exchange Act and that because the state courts had concurrent jurisdiction over the RICO claims, federal abstention was appropriate for the other causes of action because they had been raised in pending litigation in state court. The court of appeals affirmed.

The United States Supreme Court granted certiorari to resolve a conflict among the federal appellate courts and state supreme courts on the issue of concurrent jurisdiction over civil RICO claims. The Court affirmed, finding concurrent jurisdiction. In doing so, the court applied the presumption in favor of concurrent jurisdiction (*493 U.S. 455, 458-459)* . Evaluating RICO, the court found that the grant of jurisdiction to federal courts was permissive, not mandatory (as the defendants conceded) (*493 U.S. 455, 460-461)* , that the legislative history did not even show that Congress considered the issue of exclusive jurisdiction (*493 U.S. 455, 461-463)* , and that state court jurisdiction over civil RICO claims was not imcompatible with federal interests (*493 U.S. 455, 464-467)* .

The concurring opinion of Justice Scalia, joined by Justice Kennedy, criticizes as dicta the implication that meeting any one of the three tests for excluding state court jurisdiction would suffice to establish exclusive jurisdiction in federal court. The concurring opinion particularly questioned whether "unmistakable implication from legislative history" could ever defeat concurrent jurisdiction and also questioned whether the inconsistency ground could ever be sufficient.

In ***Gulf Offshore Co. v. Mobil Oil Corp.*** *(1981) 453 U.S. 473, 101 S. Ct. 2870, 69 L. Ed. 2d 784* , Mobil had contracted with Gulf for the latter to perform operations on oil drilling platforms offshore of Louisiana, and as part of the agreement, Gulf promised to indemnify Mobil for all claims resulting directly or indirectly from the work. While the work was in progress, a hurricane required that workers be evacuated from the oil platforms. One of Gulf's employees was taken aboard a boat chartered by Mobil and, subsequently, sustained injury while assisting crewmen evacuating other workers from the platforms. He sued Mobil and the boatowner in a Texas state court for negligence; Mobil cross complained against Gulf for indemnification. Gulf answered, raising the objection that Mobil's cause of action arose under the Outer Continental Shelf Lands Act [*43 U.S.C. § 1331 et seq.*], which, it was argued, vested exclusive subject matter jurisdiction in the federal district courts. The Texas court rejected the argument. The jury awarded the worker $900,000 and found the claim was subject to the indemnification contract. Hence, judgment was entered in favor of the worker against Gulf for $900,000. The judgment was affirmed by the Texas Court of Civil Appeals.

The U.S. Supreme Court granted Gulf's petition for a writ of certiorari to, among other things, resolve a conflict over whether federal courts have exclusive subject matter jurisdiction over suits arising under the act. In holding that they do not, the Supreme Court said that in considering the propriety of state court jurisdiction over any particular federal claim, the Court begins with the presumption that state courts enjoy concurrent jurisdiction (*453 U.S. 473, 478)* . The Court added that Congress may confine jurisdiction to the federal courts either explicitly or implicitly, and that the presumption of concurrent jurisdiction can, therefore, be rebutted by explicit statutory directive, by an unmistakable implication from legislative history, or by a clear incompatibility between state court jurisdiction and federal interests (*453 U.S. 473, 478)* .

[b] Effect of Grant of Jurisdiction to Federal Court

The facts and procedural background of ***Gulf Offshore Co. v. Mobil Oil Corp.*** *(1981) 453 U.S. 473, 101 S. Ct. 2870, 69 L. Ed. 2d 784* , are discussed under *§ 133.60[3][b]*. In holding that federal courts do not have exclusive subject matter jurisdiction over suits arising under the Outer Continental Shelf Lands Act [*43 U.S.C. § 1331 et seq.*], the Court noted that Congress did grant United States district courts original jurisdiction of cases and controversies arising out of or in connection with any operations conducted on the outer Continental Shelf [*see 43 U.S.C. § 1349(b)*], but that it was black-letter law that the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause of action (*453 U.S. 473, 479)* .

The Court pointed out that all law applicable to the Outer Continental Shelf is federal law, but that to fill the substantial gaps in the coverage of federal law, the act borrows the applicable and not inconsistent laws of the adjacent states as surrogate federal law [*see 43 U.S.C. § 1333(a)(2)*]; and that, thus, a personal injury action involving events occurring on the shelf is governed by federal law, the content of which is borrowed from the law of the adjacent state, here Louisiana (*453 U.S. 473, 480-481*). The Court said that the operation of the act would not be frustrated by state court jurisdiction over personal injury actions (*453 U.S. 473, 483)* . The Court pointed out that the factors generally recommending exclusive federal court jurisdiction over an area of federal law include the desirability of uniform interpretation, the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts to peculiarly federal claims, but that these factors cannot support exclusive federal jurisdiction over claims whose governing rules are borrowed from state law, because there is no need for uniform interpretation of laws that vary from state to state (*453 U.S. 473, 483 484*). The Court explained that allowing personal injury and contract actions in state courts will advance interests identified by Congress in enacting the act, that a recurring consideration in the deliberations leading to enactment was the special relationship between the men working on the platforms and the adjacent shore to which they commute to visit their families. Allowing state court jurisdiction over these cases will allow these workers, and their lawyers, to pursue individual claims in familiar, convenient, and possibly less expensive for a (*453 U.S. 473, 484)* . The Court concluded, in summary, that nothing in the language, structure, legislative history, or underlying policies of the act suggests that Congress intended federal courts to exercise exclusive jurisdiction over personal injury actions arising under the act and that the Texas courts had jurisdiction over the case (*453 U.S. 473, 484)* .

[4] Additional Authorities

[a] Presumption of Concurrent Jurisdiction

Kingston Constructors, Inc. v. Washington Metropolitan Area Transit Authority (1997) 14 Cal. 4th 939, 59 Cal. Rptr. 2d 866, 928 P.2d 581 , involved the issue of whether the courts of the State of California have jurisdiction over actions brought by or against the Washington Metropolitan Area Transit Authority (transit authority). The transit authority was established by a compact initiated and consummated by Congress for federal purposes entered into between the District of Columbia, Maryland and Virginia. The compact provided that original jurisdiction vested with the United States district courts, concurrent with the courts of Maryland and Virginia concerning actions brought by or against the transit authority. A California corporation and the transit authority had been sued in a California superior court. The transit authority did not enter an appearance, and a default was entered. The corporate defendant settled, and as part of the settlement the plaintiff assigned its claims against the transit authority to the settling defendant. Thereafter, the superior court rendered judgment on default in favor of the settling defendant, as assignee, against the transit authority. On the transit authority's motion, however, the superior court concluded that under the compact it did not have jurisdiction of the action, and issued an order vacating the judgment as void. An appeal followed.

The court of appeal affirmed the superior court's order, and the California Supreme Court affirmed the judgment of the court of appeal. The Supreme Court held that the compact grants original jurisdiction to the United States district courts, and concurrently grants original jurisdiction to the courts of Maryland and Virginia (*14 Cal. 4th 939, 945-946)* . Moreover, the compact impliedly denies jurisdiction of transit authority actions to the courts of states other than Maryland and Virginia--more precisely, it impliedly denies them original jurisdiction. It explicitly includes Maryland and Virginia courts, and thereby implicitly excludes the remaining states, including California. Thus, California courts

do not have jurisdiction over transit authority actions (*14 Cal. 4th 939, 946-947)* . In reaching its conclusion, however, the Supreme Court recognized the rule that the presumption of concurrent jurisdiction between federal courts and state courts arises when the jurisdictional provision in question is silent as to the jurisdiction of state courts. That, however, was not the case before the court (*14 Cal. 4th 939, 948)* .

S.P. Growers Asso. v. Rodriguez (1976) 17 Cal. 3d 719, 131 Cal. Rptr. 761, 552 P.2d 721 , was an unlawful detainer proceeding by a corporate agricultural employer against several of its nonunion workers. Earlier, the workers had walked off their jobs in a dispute over implementation of a previous agreement with plaintiff, and three weeks later had filed suit against plaintiff in federal district court charging violation of the former Farm Labor Contractor Registration Act (former 7 U.S.C. § 2041 et seq. [*now see* 29 U.S.C. § 1801 et seq.]), which, among other things, authorized a private civil remedy for violation of the act (former 7 U.S.C. § 2050a [*now see 29 U.S.C. § 1854*]) and prohibited discrimination against a worker in retaliation for filing suit under the act (former 7 U.S.C. § 2050b [*now see 29 U.S.C. § 1855*]). Immediately, plaintiff served the workers with notices of eviction from company-owned housing and, when they failed to leave, sued for unlawful detainer. The trial court granted plaintiff's motion to exclude evidence regarding defendant's affirmative defenses of retaliatory eviction (1) for the strike and (2) for filing the federal action, and entered judgment against the workers.

The Supreme Court reversed, holding that evidence of the affirmative defense of retaliatory eviction for striking was properly excluded, but that evidence of retaliatory eviction for filing the federal action should have been admitted. The Court said that allowing the defense to be raised in an unlawful detainer proceeding was necessary to prevent emasculation of the federal act (*17 Cal. 3d 719, 725)* . The Court acknowledged the well-established rule that a state court has concurrent jurisdiction to enforce a right created by federal law unless the law excludes concurrent jurisdiction or is incompatible with such jurisdiction (*17 Cal. 3d 719, 726)* , and pointed out that the federal act neither expressly nor impliedly excludes a state court from enforcing its provisions, and that there was nothing inherent in the nature of the act, such as a comprehensive federal administrative scheme, which militates against concurrent jurisdiction (*17 Cal. 3d 719, 726)* . The Court nevertheless added that, more relevantly, no state court in the proceeding was being called on to interpret or enforce federal law, that the defendants were merely asking that state law be construed so as not to thwart the express purposes of the remedial federal legislation, and that the Supremacy Clause of the U.S. Constitution [U.S. Const., art. VI, cl. 2] commanded no less (*17 Cal. 3d 719, 726)* .

Robbins v. Foothill Nissan (1994) 22 Cal. App. 4th 1769, 28 Cal. Rptr. 2d 190 , involved an action brought by purchasers of an automobile who alleged that they were overcharged. The action, against the automobile dealer and the financing bank, asserted causes of action for fraud, conspiracy, violations of the Rees-Levering Motor Vehicle Sales and Finance Act, *Civil Code § 2981 et seq.*, the Federal Truth in Lending Act, *15 U.S.C. § 1601* et seq., and the Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C. § 1961 et seq.* After the action was filed, the bank became insolvent and the Federal Deposit Insurance Corporation was appointed as its receiver under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, *12 U.S.C. § 1811 et seq.* Pursuant to this act, the plaintiffs were required to submit their claim to the FDIC, but the claim was not processed within the required time period. The FDIC moved to dismiss the action on the grounds that the state court lacked subject matter jurisdiction because the federal judiciary was vested with exclusive jurisdiction. The trial court granted the motion.

The court of appeal reversed. It held that the trial court continued to have jurisdiction over the claim after the claims period expired since the act allowed the claimant to continue any action filed before the appointment of the receiver. The court further held that the legislative history of the act did not indicate an intent by Congress to deprive state courts of jurisdiction over actions filed before receivership by the FDIC (*22 Cal. App. 4th 1769, 1780-1786)* .

Teamsters Agricultural Workers Union v. International Brotherhood of Teamsters (1983) 140 Cal. App. 3d 547, 189 Cal. Rptr. 627 , was an action brought by a local union of agricultural workers under the Labor-Management Reporting and Disclosure Act of 1959 [*29 U.S.C. §§ 401-531*] to enjoin continuation of a trusteeship imposed by the international union, which cross complained against individuals who had been elected officers of the local for conversion and an

accounting of funds collected by them. The trial court found for the international union and other defendants on the complaint and for the international union and against the individuals on the cross complaint. In affirming the judgment, the court of appeal noted the well-established rule that a state court has concurrent jurisdiction to enforce a right created by federal law unless the law excludes concurrent jurisdiction or is incompatible with it, and held that federal-state jurisdiction is concurrent with respect to suits brought under the act because the jurisdictional provision [*29 U.S.C. § 464(a)*] neither expressly nor impliedly precluded state court jurisdiction, and there appeared no reason why state courts are any less competent than federal courts to resolve trustee disputes (*140 Cal. App. 3d 547, 550, n.2*).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProceduresPleading & PracticeGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss

California Points & Authorities

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 133 JURISDICTION: SUBJECT MATTER JURISDICTION
PART II. FORMS
C. Federal-State Jurisdiction

13-133 California Points & Authorities §§ 133.61-133.69

[Reserved]

§§ 133.61[Reserved]

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 133 JURISDICTION: SUBJECT MATTER JURISDICTION
PART II. FORMS
D. Classification and Reclassification of a Superior Court Case
1. Reclassification From Limited to Unlimited Civil Case

13-133 California Points & Authorities § 133.70

§ 133.70 Supporting Motion to Reclassify Action From a Limited Civil Case to an Unlimited Civil Case [Code Civ. Proc. § 403.040]--Complaint or Cross-Complaint Seeks Relief in Excess of $25,000 [Code Civ. Proc. § 85]

[1] FORM

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*],	)	IES IN SUPPORT OF MOTION FOR RECLASSI-
Defendant.	)	FICATION OF CASE FROM LIMITED CIVIL
[_____ (*name*),]	)	CASE TO UNLIMITED CIVIL CASE
[Cross Complainant,]	)	Date: _____
[vs.]	)	Time: _____
[_____ (*name*),] [Cross Defend-	)	Location: _____
ant.]	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD GRANT THE MOTION FOR RECLASSIFICATION OF THIS _____ [ACTION *or* PROCEEDING *or* CASE] FROM A LIMITED CIVIL CASE TO AN UNLIMITED CIVIL CASE BECAUSE THE _____ [COMPLAINT *or* CROSS COMPLAINT] SEEKS RELIEF IN EXCESS OF $25,000.

A. The Amount in Controversy of an Unlimited Civil Cases Exceeds $25,000. To be treated as a limited civil case,

the amount in controversy in an action or special proceeding cannot exceed $25,000 (*Code Civ. Proc. § 85(a)*). "Amount in controversy" means the amount of the demand, or the recovery sought, or the value of the property, or the amount of the lien, that is in controversy in the action, exclusive of attorney's fees, interest, and costs (*Code Civ. Proc. § 85(a)*).

[*EITHER*]

B. Jurisdictional Classification. Limited civil cases include cases at law in which the demand, exclusive of interest, or the value of property in controversy amounts to $25,000 or less (*Code Civ. Proc. § 86(a)(1)*). Cases at law with demands in excess of $25,000 are unlimited civil cases (*see Code Civ. Proc. § 88*).

[*OR, if action is for dissolution of partnership with assets exceeding $25,000*]

B. Jurisdictional Classification. Limited civil cases include actions for dissolution of a partnership where the total assets do not exceed $25,000 (*Code Civ. Proc. § 86(a)(2)*). Where the total assets exceed $25,000, these actions are unlimited civil cases (*see Code Civ. Proc. § 88*).

[*OR, in case of interpleader when amount demanded or value of property exceeds $25,000*]

B. Jurisdictional Classification. Limited civil cases include actions of interpleader, and the _____ [amount of money *or* the value of the property] involved does not exceed $25,000 (*Code Civ. Proc. § 86(a)(2)*). Where the _____ [amount of money *or* the value of the property] exceeds $25,000, these actions are an unlimited civil cases (*see Code Civ. Proc. § 88*).

[*OR, in case of action demanding or seeking recovery of property valued in excess of $25,000 and for cancellation or rescission of contract under which amount was paid or property was delivered*]

B. Jurisdictional Classification. Limited civil cases include actions to _____ [cancel *or* rescind] a contract in an action to recover _____ [money *or* property of a value] not in excess of $25,000 _____ [paid *or* delivered] _____ [under *or* in consideration of] the contract (*Code Civ. Proc. § 86(a)(3)*). Where the _____ [money *or* property of a value] exceeds $25,000, these actions are unlimited civil cases (*see Code Civ. Proc. § 88*).

[*OR, if action is for unlawful detainer, forcible entry, or forcible detainer and amount claimed is in excess of $25,000*]

B. Jurisdictional Classification. Limited civil cases include actions in _____ [forcible entry *or* forcible detainer *or* unlawful detainer] in which the whole amount of damages claimed does not exceed $25,000 (*Code Civ. Proc. § 86(a)(4)*). Where the amount of damages exceeds $25,000, these actions are unlimited civil cases (*see Code Civ. Proc. § 88*).

[*OR, if action to enforce and foreclose a lien on personal property exceeding $25,000*]

B. Jurisdictional Classification. Limited civil cases include actions to enforce and foreclose a lien on personal property that do not exceed $25,000 (*Code Civ. Proc. § 86(a)(5)*). Where the lien exceeds $25,000, these actions are

unlimited civil cases (*see Code Civ. Proc. § 88*).

[*OR, if action to enforce and foreclose a mechanic's lien exceeding $25,000*]

B. Jurisdictional Classification. Limited civil cases include actions to enforce and foreclose, or is a petition to release, a mechanic's lien (*Civ. Code § 3109 et seq.*) not exceeding $25,000 (*see Code Civ. Proc. § 86(a)(6)*). Where the amount of the mechanics lien exceeds $25,000, these actions are unlimited civil cases (*see Code Civ. Proc. § 88*).

[*OR, if action is one to enforce and foreclose an assessment lien exceeding $25,000 on a common-interest development*]

B. Jurisdictional Classification. Limited civil cases include actions to enforce and foreclose an assessment lien not exceeding $25,000 on a common-interest development as defined in *Civil Code Section 1351* (*Code Civ. Proc. § 86(a)(6)*). Where the assessment lien exceeds $25,000, these actions are unlimited civil cases (*see Code Civ. Proc. § 88*).

[*OR, if action is one for declaratory relief*]

B. Jurisdictional Classification. Limited civil cases include actions for declaratory relief when brought pursuant to _____ [a cross-complaint as to a right of indemnity with respect to the relief demanded in the complaint or a cross-complaint in an action or proceeding that is otherwise a limited civil case *or* conduct a trial after a nonbinding fee arbitration between an attorney and client pursuant to *Business and Professions Code § 6200 et seq.* where the amount in controversy does not exceed $25,000] (*Code Civ. Proc. § 86(a)(7)*). Where the amount in controversy exceeds $25,000, these actions are unlimited civil cases (*see Code Civ. Proc. § 88*).

[*OR, if action is one by a judgment creditor to recover interest in personal property or enforce the liability of a debtor of a judgment debtor and the property claimed or debt denied exceeds $25,000*]

B. Jurisdictional Classification. Limited civil cases include an action that is one by a judgment creditor under *Code of Civil Procedure Sections 708.210-708.290* to _____ [recover an interest in personal property *or* enforce the liability of a debtor of a judgment debtor] and the _____ [interest claimed adversely is of a value not exceeding $25,000 *or* debt denied not exceeding $25,000] (*Code Civ. Proc. § 86(a)(9)*). Where the _____ [interest claimed adversely *or* debt denied] exceeds $25,000, these actions are unlimited civil cases (*see Code Civ. Proc. § 88*).

[*OR, if action in equity to try title to personal property in excess of $25,000*]

B. Jurisdictional Classification. Limited civil cases include an action in equity to try title to personal property, and the amount involved does not exceed $25,000 (*Code Civ. Proc. § 86(b)(1)*). Where the amount involved exceeds $25,000, these actions are unlimited civil cases (*see Code Civ. Proc. § 88*).

[*CONTINUE*]

[*EITHER, if plaintiff, cross-complainant, or petitioner filing motion within time to amend initial pleading*]

C. Reclassification Is Mandatory If Case Incorrectly Classified and Motion Filed Before Time to Amend Initial Pleading. A plaintiff, cross-complainant or petitioner may file a motion for reclassification within the time allowed for that party to amend the initial pleading; and the court must grant a motion to reclassify and enter an order for reclassification regardless of any fault or lack of fault if the case has been classified in an incorrect jurisdictional classification (*Code of Civ. Proc. § 403.040(a)*).

[*OR, if defendant or cross-defendant filing motion within time to respond to initial pleading*]

C. Reclassification Is Mandatory If Case Incorrectly Classified and Motion Filed Before Time to Amend Initial Pleading. A defendant or cross-defendant may file a motion for reclassification within the time allowed for that party to respond to the initial pleading; and the court must grant a motion to reclassify and enter an order for reclassification regardless of any fault or lack of fault if the case has been classified in an incorrect jurisdictional classification (*Code of Civ. Proc. § 403.040(a)*).

[*OR, if party files a motion after time for party to amend party's initial pleading or to respond to a complaint, cross-complaint, or other initial pleading*]

C. Reclassification Is Mandatory Even If Motion Is Filed After Time Allowed to Amend Initial Pleading or Respond to Complaint, Cross-Complaint, or Other Initial Pleading If the Case Is Incorrectly Classified and Good Cause Exists for Not Seeking Reclassification Earlier. If a party files a motion for reclassification after that time for that party to amend that party's initial pleading or to respond to a complaint, cross-complaint, or other initial pleading, the court must grant the motion and enter an order for reclassification if both the case is incorrectly classified and good cause exists for the moving party not to have sought reclassification earlier (*Code of Civ. Proc. § 403.040(b)*).

D. The *Walker* Test Continues to Govern the Determination of the Jurisdictional Amount in Controversy for Reclassification of a Case. Although the reclassification statutes have made numerous changes, the jurisdictional amount in controversy has not changed and continues to provide a basis for reclassification (*Code Civ. Proc. §§ 85(a), 86(a)(1), 403.010 et seq.*), the statutory changes have not altered substantive and procedural law governing how a trial court values a case to determine the jurisdictional amount in controversy, and the *Walker* test (*Walker v. Superior Court (1991) 53 Cal. 3d 257, 262, 279 Cal. Rptr. 576, 807 P.2d 418*) continues to govern the determination of the jurisdictional amount in controversy for reclassification as a limited civil case, i.e., that the matter will "necessarily" result in a verdict below the jurisdictional amount (*Stern v. Superior Court (2003) 105 Cal. App. 4th 223, 229-231, 129 Cal. Rptr. 2d 275*).

[*Optional*] **E. Each Party Must Be Afforded the Opportunity to Respond and Offer Reasons Why Reclassification Is or Is Not Appropriate.** While a trial court has authority to conduct a pretrial hearing to obtain information about whether the amount of the judgment will require reclassification, whether a party makes a motion or the court raises the jurisdictional issue on its own motion, the court must provide sufficient opportunity to respond and offer reasons why reclassification should or should not be ordered, and even if no hearing is held, before ordering reclassification the court must afford the parties an opportunity to contest reclassification (*Stern v. Superior Court (2003) 105 Cal. App. 4th 223, 230-231, 129 Cal. Rptr. 2d 275*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*party's status and name*]

[2] Comments

[a] Use of Form

The form in [1], *above*, may be submitted in support of a motion to reclassify an action from a limited civil case to an unlimited civil case when the complaint or cross complaint seeks relief beyond the monetary jurisdiction of a limited civil case [*see Code Civ. Proc. §§ 85, 86*].

Paragraph A sets out the general proposition that the amount in controversy of a limited civil case cannot exceed $25,000, whereas Paragraph B sets out the various types of monetary limits to the limited civil case under different types of actions [*Code Civ. Proc. §§ 85, 86*].

The first alternative Paragraph C should be used by a plaintiff, cross-complainant, or petitioner who files the motion within the time allowed for that party to amend the initial pleading. The second alternative Paragraph C should be used by a defendant or cross-defendant who files the motion within the time allowed to respond to the initial pleading. The third alternative Paragraph C should be used by a party that files the motion after the time for that party to amend that party's initial pleading or to respond to a complaint, cross-complaint, or other initial pleading.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. In particular, counsel should describe the type of action at issue and the facts supporting the type of action, the amounts demanded, and the filing dates of the initial and responsive pleadings. Additionally, if the movant files the motion after the time for that party to amend that party's initial pleading or to respond to a complaint, cross-complaint, or other initial pleading, facts should be argued in support of showing why good cause exists for not seeking reclassification earlier.

[c] Related Pleading and Practice Forms

For forms of notice of motion and an order relative to reclassifying a case, see *California Forms of Pleading and Practice, Ch. 324, Jurisdiction: Subject Matter Jurisdiction, §§ 324.120*-324.124 (Matthew Bender).

[3] Discussion of Authorities

[a] The *Walker* Test Continues to Govern the Determination of the Jurisdictional Amount in Controversy for Reclassification of a Case

In ***Stern v. Superior Court*** *(2003) 105 Cal. App. 4th 223, 129 Cal. Rptr. 2d 275* , the appellate court reviewed the effect of the statutory unification of municipal courts and superior courts into only superior courts and the application of prior case for interpreting jurisdictional classification, where the jurisdictional amount for "transfer" of a case between courts under the prior statutory scheme and "classification" of a case under the present scheme remains the same, i.e., $25,000. In *Stern*, the plaintiff asserted a violation of the accounting licensing statutes and that one of the accountants was not properly licensed at the time he performed services for the clients. At the initial status conference, the trial court observed that the action had not been certified a class action. Plaintiffs' attorney conceded it was not certified. Without giving the plaintiffs notice or an opportunity to present evidence, the trial court found that the matter was not a class

action and ordered the matter reclassified as a limited civil case because plaintiffs had not shown they could recover more than the $25,000 jurisdictional limit. Plaintiffs filed an appeal (*105 Cal. App. 4th 223, 228-229)* .

The appellate court found that formerly a case whose amount in controversy did not meet the jurisdictional minimum was subject to a transfer of jurisdiction from the superior court to the municipal court, but now there are no municipal courts and a "transfer" of jurisdiction from one court to another no longer takes place. The superior court has original jurisdiction in a limited civil case [*Code Civ. Proc. § 85.1*]. The statutory scheme now authorizes "reclassification" of a case that is erroneously classified [*Code Civ. Proc. § 403.040(a)*]. Notwithstanding the changes in court organization, procedure, and nomenclature reflected in *Code Civ. Proc. §§ 85(a), 86(a)(1), 403.010-403.090,* the amount in controversy continues to provide a ground for reclassifying an action. A "limited civil case" includes, inter alia, a case at law "in which the demand, exclusive of interest, or the value of the property in controversy amounts to twenty-five thousand dollars ($25,000) or less" [*Code Civ. Proc. § 86(a)(1)*]. "A civil action or proceeding other than a limited civil case may be referred to as an unlimited civil case" [*Code Civ. Proc. § 88*]. The statutory changes have not altered substantive and procedural law governing how a trial court values a case to determine the jurisdictional amount in controversy when ruling on a motion for reclassification (*105 Cal. App. 4th 223, 228-230)* .

Although the reclassification statutes have made numerous changes, the jurisdictional amount in controversy has not changed and continues to provide a basis for reclassification. Thus the test in ***Walker v. Superior Court*** *(1991) 53 Cal. 3d 257, 262, 279 Cal. Rptr. 576, 807 P.2d 418* continues to govern the determination of the jurisdictional amount in controversy for reclassification as a limited civil case, i.e., that the matter will "necessarily" result in a verdict below the jurisdictional amount (*105 Cal. App. 4th 223, 231)* . The trial court reviews the record to determine whether the result is obtainable. Simply stated, the trial court looks to the possibility of a jurisdictionally appropriate verdict, not to its probability. The prayer or "demand" for relief in the complaint is relevant to valuation of the amount in controversy. Other evidence can take the form of arbitration awards, or the amount of a settlement recommendation resulting from court-ordered settlement negotiations. The lack of notice to the parties that the court would order reclassification prevented the parties from providing evidence of the value of the verdict other than the Stern complaint itself. The second amended complaint sought restitution of fees that plaintiffs paid defendants, and the class action causes of action seek restitution of accountancy fees paid by an unknown number of class members. Without further evidence as to the value of the case, the allegations of the complaint preclude a finding that the verdict will "necessarily" fall short of the $25,001 jurisdictional requirement. Therefore, the reclassification order was an abuse of discretion (*105 Cal. App. 4th 223, 233)* .

[b] Each Party Must Be Afforded the Opportunity to Respond and Offer Reasons Why Reclassification Is or Is Not Appropriate

The facts and procedural background of ***Stern v. Superior Court*** *(2003) 105 Cal. App. 4th 223, 129 Cal. Rptr. 2d 275* are discussed under *§ 133.70(3)(a)*. The *Stern* court holds that ***Walker v. Superior Court*** *(1991) 53 Cal. 3d 257, 262, 279 Cal. Rptr. 576, 807 P.2d 418* continues to govern the procedural and substantive requirements for a reclassification order, and that (*105 Cal. App. 4th 223, 229-230)* :

- A party moving for reclassification should make a noticed motion.

- A court contemplating ordering reclassification on its own motion must also provide notice to the parties.

- Whether a party makes a motion or the court raises the jurisdictional issue on its own motion, the court must provide sufficient opportunity to respond and offer reasons why [reclassification] should or should not be ordered.

- Even if no hearing is held, before ordering reclassification the court must afford the parties an

opportunity to contest reclassification.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral Overview

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Volume 13 Chapters 130-139 JUDGES---to---JURISDICTION
CHAPTER 133 JURISDICTION: SUBJECT MATTER JURISDICTION
PART II. FORMS
D. Classification and Reclassification of a Superior Court Case
1. Reclassification From Limited to Unlimited Civil Case

13-133 California Points & Authorities § 133.71

§ 133.71 Supporting Motion to Reclassify Action From a Limited Civil Case to an Unlimited Civil Case [Code Civ. Proc. § 403.040]--Complaint or Cross-Complaint Seeks Relief of a Type Not Granted in Limited Civil Cases [Code Civ. Proc. § 85(b)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*],	)	IES IN SUPPORT OF MOTION FOR RECLASSI-
Defendant.	)	FICATION OF CASE FROM LIMITED CIVIL
[_____ (*name*),]	)	CASE TO UNLIMITED CIVIL CASE
[Cross Complainant,]	)	Date: _____
[vs.]	)	Time: _____
[_____ (*name*),]	)	Location: _____
[Cross Defendant.]	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THE COURT SHOULD GRANT THE MOTION FOR RECLASSIFICATION OF THIS _____ [ACTION *or* PROCEEDING *or* CASE] FROM A LIMITED CIVIL CASE TO AN UNLIMITED CIVIL CASE BECAUSE THE _____ [COMPLAINT *or* CROSS COMPLAINT] SEEKS RELIEF OF A TYPE NOT GRANTED IN LIMITED CIVIL CASES.

A. Unlimited Civil Cases May Involve Amounts in Controversy Not Exceeding $25,000 If the Relief Sought Is a Type Not Granted in Limited Civil Cases. To be treated as a limited civil case, the action or special proceeding must satisfy all three of the following conditions: (1) the amount in controversy does not exceed $25,000, (2) the relief sought is a type that may be granted in a limited civil case, and (3) the relief sought, whether in a complaint or cross-complaint, is exclusively of a type described in one or more statutes that classify an action or special proceeding as a limited civil case (*Code Civ. Proc. § 85*).

[*Optional*] **B. Permanent Injunctive Relief.** The court in a limited civil case may not grant a permanent injunction, except as otherwise authorized by statute [*Code Civ. Proc. § 580(b)(2)*].

[*Optional*] **C. Determining Title to Real Property.** The court in a limited civil case may not grant as relief a determination of the title to real property [*Code Civ. Proc. § 580(b)(3)*].

[*Optional*] **D. Declaratory Relief.** The court may not grant declaratory relief in a limited civil case, except as authorized by *Code of Civil Procedure Section 86* (*Code Civ. Proc. § 580(b)(4)*; *see Code Civ. Proc. § 86(a)(7)*).

E. The *Walker* Test Continues to Govern the Determination of the Jurisdictional Amount in Controversy for Reclassification of a Case. Although the reclassification statutes have made numerous changes, the jurisdictional amount in controversy has not changed and continues to provide a basis for reclassification (*Code Civ. Proc. §§ 85(a), 86(a)(1), 403.010 et seq.*), the statutory changes have not altered substantive and procedural law governing how a trial court values a case to determine the jurisdictional amount in controversy, and the *Walker* test (*Walker v. Superior Court (1991) 53 Cal. 3d 257, 262, 279 Cal. Rptr. 576, 807 P.2d 418*) continues to govern the determination of the jurisdictional amount in controversy for reclassification as a limited civil case, i.e., that the matter will "necessarily" result in a verdict below the jurisdictional amount (*Stern v. Superior Court (2003) 105 Cal. App. 4th 223, 229-231, 129 Cal. Rptr. 2d 275*).

[*Optional*] **F. Each Party Must Be Afforded the Opportunity to Respond and Offer Reasons Why Reclassification Is or Is Not Appropriate.** While a trial court has authority to conduct a pretrial hearing to obtain information about whether the amount of the judgment will require reclassification, whether a party makes a motion or the court raises the jurisdictional issue on its own motion, the court must provide sufficient opportunity to respond and offer reasons why reclassification should or should not be ordered, and even if no hearing is held, before ordering reclassification the court must afford the parties an opportunity to contest reclassification (*Stern v. Superior Court (2003) 105 Cal. App. 4th 223, 230-231, 129 Cal. Rptr. 2d 275*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*party's status and name*]

[2] Comments

[a] Use of Form

The form in [1], *above*, may be submitted in support of a motion to reclassify an action from a limited civil case to an

unlimited civil case when the complaint or cross complaint seeks relief of the type not available in a limited civil case [*see Code Civ. Proc. §§ 85, 86*].

Paragraph A sets out the statutory requirements of limited civil case [*Code Civ. Proc. § 85*].

Alternative Paragraphs B through E provide the statutory list of types of relief that are not available in a limited civil action that are not dependent on the amount in controversy [*Code Civ. Proc. § 580*].

If the amount in controversy also exceeds $25,000, this memorandum of points and authority may be combined with the *form in § 133.70*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. In particular, counsel should describe the type of action at issue and the facts supporting the type of action, and the type of relief plead.

[c] Related Pleading and Practice Forms

For forms of notice of motion and an order relative to reclassifying a case, see *California Forms of Pleading and Practice, Ch. 324, Jurisdiction: Subject Matter Jurisdiction, §§ 324.120*-324.124 (Matthew Bender).

[3] Discussion of Authorities

[a] The *Walker* Test Continues to Govern the Determination of the Jurisdictional Amount in Controversy for Reclassification of a Case

The facts and procedural background of ***Stern v. Superior Court*** *(2003) 105 Cal. App. 4th 223, 129 Cal. Rptr. 2d 275* are discussed under *§ 133.70(3)(a)*. Although the reclassification statutes have made numerous changes, the jurisdictional amount in controversy has not changed and continues to provide a basis for reclassification. Thus the test in ***Walker v. Superior Court*** *(1991) 53 Cal. 3d 257, 262, 279 Cal. Rptr. 576, 807 P.2d 418* continues to govern the determination of the jurisdictional amount in controversy for reclassification as a limited civil case, i.e., that the matter will "necessarily" result in a verdict below the jurisdictional amount (*105 Cal. App. 4th 223, 231)* . The trial court reviews the record to determine whether the result is obtainable. Simply stated, the trial court looks to the possibility of a jurisdictionally appropriate verdict, not to its probability. The prayer or "demand" for relief in the complaint is relevant to valuation of the amount in controversy. Other evidence can take the form of arbitration awards, or the amount of a settlement recommendation resulting from court-ordered settlement negotiations. The lack of notice to the parties that the court would order reclassification prevented the parties from providing evidence of the value of the verdict other than the Stern complaint itself. The second amended complaint sought restitution of fees that plaintiffs paid defendants, and the class action causes of action seek restitution of accountancy fees paid by an unknown number of class members. Without further evidence as to the value of the case, the allegations of the complaint preclude a finding that the verdict will "necessarily" fall short of the $25,001 jurisdictional requirement. Therefore, the reclassification order was an abuse of discretion (*105 Cal. App. 4th 223, 233)* .

[b] Each Party Must Be Afforded the Opportunity to Respond and Offer Reasons Why Reclassification Is or Is Not Appropriate

The facts and procedural background of ***Stern v. Superior Court*** *(2003) 105 Cal. App. 4th 223, 129 Cal. Rptr. 2d 275* are discussed under *§ 133.70(3)(a)*. The *Stern* court holds that ***Walker v. Superior Court*** *(1991) 53 Cal. 3d 257, 262, 279 Cal. Rptr. 576, 807 P.2d 418* continues to govern the procedural and substantive requirements for a reclassification order, and that (*105 Cal. App. 4th 223, 229-230)* :

- A party moving for reclassification should make a noticed motion.

- A court contemplating ordering reclassification on its own motion must also provide notice to the parties.

- Whether a party makes a motion or the court raises the jurisdictional issue on its own motion, the court must provide sufficient opportunity to respond and offer reasons why [reclassification] should or should not be ordered.

- Even if no hearing is held, before ordering reclassification the court must afford the parties an opportunity to contest reclassification.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral Overview

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13-133 California Points & Authorities §§ 130.72-130.89

[Reserved]

§§ 130.72[Reserved]

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1. Reclassification From Limited to Unlimited Civil Case

13-133 California Points & Authorities § 133.90

§ 133.90 Opposing Motion to Reclassify Action From a Limited Civil Case to an Unlimited Civil Case [Code Civ. Proc. § 403.040]--Complaint or Cross-Complaint Does Not Seek Relief in Excess of $25,000 [Code Civ. Proc. § 85]; Good Cause Required for Not Seeking Reclassification After Time to Amend Pleading or Respond to Complaint, Cross-Complaint, or Other Initial Pleading [Code Civ. Proc. § 403.040(b)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*],	)	IES IN OPPOSITION TO MOTION FOR RECLAS-
Defendant.	)	SIFICATION OF CASE FROM LIMITED CIVIL
[_____ (*name*),]	)	CASE TO UNLIMITED CIVIL CASE
[Cross Complainant,]	)	Date: _____
[vs.]	)	Time: _____
[_____ (*name*),] [Cross Defend-	)	Location: _____
ant.]	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD DENY THE MOTION FOR RECLASSIFICATION OF THIS _____ [ACTION *or* PROCEEDING *or* CASE] FROM A LIMITED CIVIL CASE TO AN UNLIMITED CIVIL CASE BECAUSE THE _____ [COMPLAINT *or* CROSS COMPLAINT] DOES NOT SEEK RELIEF IN EXCESS OF $25,000.

A. The Amount in Controversy of a Limited Civil Cases Cannot Exceed $25,000. To be treated as a limited civil case, the amount in controversy in an action or special proceeding cannot exceed $25,000 (*Code Civ. Proc. § 85(a)*). "Amount in controversy" means the amount of the demand, or the recovery sought, or the value of the property, or the amount of the lien, that is in controversy in the action, exclusive of attorney's fees, interest, and costs (*Code Civ. Proc. § 85(a)*).

[*EITHER*]

B. Jurisdictional Classification. Limited civil cases include cases at law in which the demand, exclusive of interest, or the value of property in controversy amounts to $25,000 or less (*Code Civ. Proc. § 86(a)(1)*). Cases at law with demands in excess of $25,000 are unlimited civil cases (*see Code Civ. Proc. § 88*).

[*OR, if action is for dissolution of partnership with assets exceeding $25,000*]

B. Jurisdictional Classification. Limited civil cases include actions for dissolution of a partnership where the total assets do not exceed $25,000 (*Code Civ. Proc. § 86(a)(2)*). Where the total assets exceed $25,000, these actions are unlimited civil cases (*see Code Civ. Proc. § 88*).

[*OR, in case of interpleader when amount demanded or value of property exceeds $25,000*]

B. Jurisdictional Classification. Limited civil cases include actions of interpleader, and the _____ [amount of money *or* the value of the property] involved does not exceed $25,000 (*Code Civ. Proc. § 86(a)(2)*). Where the _____ [amount of money *or* the value of the property] exceeds $25,000, these actions are an unlimited civil cases (*see Code Civ. Proc. § 88*).

[*OR, in case of action demanding or seeking recovery of property valued in excess of $25,000 and for cancellation or rescission of contract under which amount was paid or property was delivered*]

B. Jurisdictional Classification. Limited civil cases include actions to _____ [cancel *or* rescind] a contract in an action to recover _____ [money *or* property of a value] not in excess of $25,000 _____ [paid *or* delivered] _____ [under *or* in consideration of] the contract (*Code Civ. Proc. § 86(a)(3)*). Where the _____ [money *or* property of a value] exceeds $25,000, these actions are unlimited civil cases (*see Code Civ. Proc. § 88*).

[*OR, if action is for unlawful detainer, forcible entry, or forcible detainer and amount claimed is in excess of $25,000*]

B. Jurisdictional Classification. Limited civil cases include actions in _____ [forcible entry *or* forcible detainer *or* unlawful detainer] in which the whole amount of damages claimed does not exceed $25,000 (*Code Civ. Proc. § 86(a)(4)*). Where the amount of damages exceeds $25,000, these actions are unlimited civil cases (*see Code Civ. Proc. § 88*).

[*OR, if action to enforce and foreclose a lien on personal property exceeding $25,000*]

B. Jurisdictional Classification. Limited civil cases include actions to enforce and foreclose a lien on personal property that do not exceed $25,000 (*Code Civ. Proc. § 86(a)(5)*). Where the lien exceeds $25,000, these actions are unlimited civil cases (*see Code Civ. Proc. § 88*).

[*OR, if action to enforce and foreclose a mechanic's lien exceeding $25,000*]

B. Jurisdictional Classification. Limited civil cases include actions to enforce and foreclose, or is a petition to release, a mechanic's lien (*Civ. Code § 3109 et seq.*) not exceeding $25,000 (*see Code Civ. Proc. § 86(a)(6)*). Where the amount of the mechanics lien exceeds $25,000, these actions are unlimited civil cases (*see Code Civ. Proc. § 88*).

[*OR, if action is one to enforce and foreclose an assessment lien exceeding $25,000 on a common-interest development*]

B. Jurisdictional Classification. Limited civil cases include actions to enforce and foreclose an assessment lien not exceeding $25,000 on a common-interest development as defined in *Civil Code Section 1351* (*Code Civ. Proc. § 86(a)(6)*). Where the assessment lien exceeds $25,000, these actions are unlimited civil cases (*see Code Civ. Proc. § 88*).

[*OR, if action is one for declaratory relief*]

B. Jurisdictional Classification. Limited civil cases include actions for declaratory relief when brought pursuant to _____ [a cross-complaint as to a right of indemnity with respect to the relief demanded in the complaint or a cross-complaint in an action or proceeding that is otherwise a limited civil case *or* conduct a trial after a nonbinding fee arbitration between an attorney and client pursuant to *Business and Professions Code § 6200 et seq.* where the amount in controversy does not exceed $25,000] (*Code Civ. Proc. § 86(a)(7)*). Where the amount in controversy exceeds $25,000, these actions are unlimited civil cases (*see Code Civ. Proc. § 88*).

[*OR, if action is one by a judgment creditor to recover interest in personal property or enforce the liability of a debtor of a judgment debtor and the property claimed or debt denied exceeds $25,000*]

B. Jurisdictional Classification. Limited civil cases include an action that is one by a judgment creditor under *Code of Civil Procedure Sections 708.210-708.290* to _____ [recover an interest in personal property *or* enforce the liability of a debtor of a judgment debtor] and the _____ [interest claimed adversely is of a value not exceeding $25,000 *or* debt denied not exceeding $25,000] (*Code Civ. Proc. § 86(a)(9)*). Where the _____ [interest claimed adversely *or* debt denied] exceeds $25,000, these actions are unlimited civil cases (*see Code Civ. Proc. § 88*).

[*OR, if action in equity to try title to personal property in excess of $25,000*]

B. Jurisdictional Classification. Limited civil cases include an action in equity to try title to personal property, and the amount involved does not exceed $25,000 (*Code Civ. Proc. § 86(b)(1)*). Where the amount involved exceeds $25,000, these actions are unlimited civil cases (*see Code Civ. Proc. § 88*).

[*CONTINUE*]

[*EITHER, if plaintiff, cross-complainant, or petitioner filing motion within time to amend initial pleading*]

C. Reclassification Is Not Mandatory If Case Is Correctly Classified Even If Motion Filed Before Time to Amend Initial Pleading. A plaintiff, cross-complainant or petitioner may file a motion for reclassification within the time allowed for that party to amend the initial pleading; however, the court may deny the motion if the case has the correct jurisdictional classification (*see Code of Civ. Proc. § 403.040(a)*).

[*OR, if defendant or cross-defendant filing motion within time to respond to initial pleading*]

C. Reclassification Is Not Mandatory If Case Is Correctly Classified Even If Motion Filed Before Time to Amend Initial Pleading. A defendant or cross-defendant may file a motion for reclassification within the time allowed for that party to respond to the initial pleading; however, the court may deny the motion if the case has the correct jurisdictional classification (*see Code of Civ. Proc. § 403.040(a)*).

[*OR, if party files a motion after time for party to amend party's initial pleading or to respond to a complaint, cross-complaint, or other initial pleading*]

D. Reclassification Requires Showing of Good Cause for Not Seeking Reclassification Earlier If Motion Made After Time Allowed to Amend Initial Pleading or Respond to Complaint, Cross-Complaint, or Other Initial Pleading. If a party files a motion for reclassification after that time for that party to amend that party's initial pleading or to respond to a complaint, cross-complaint, or other initial pleading, the court may deny the motion even if the case is incorrectly classified if the moving party fails to show good cause for not seeking reclassification earlier (*Code of Civ. Proc. § 403.040(b)*).

E. The *Walker* Test Continues to Govern the Determination of the Jurisdictional Amount in Controversy for Reclassification of a Case. Although the reclassification statutes have made numerous changes, the jurisdictional amount in controversy has not changed and continues to provide a basis for reclassification (*Code Civ. Proc. §§ 85(a), 86(a)(1), 403.010 et seq.*), the statutory changes have not altered substantive and procedural law governing how a trial court values a case to determine the jurisdictional amount in controversy, and the *Walker* test (*Walker v. Superior Court (1991) 53 Cal. 3d 257, 262, 279 Cal. Rptr. 576, 807 P.2d 418*) continues to govern the determination of the jurisdictional amount in controversy for reclassification as a limited civil case, i.e., that the matter will "necessarily" result in a verdict below the jurisdictional amount (*Stern v. Superior Court (2003) 105 Cal. App. 4th 223, 229-231, 129 Cal. Rptr. 2d 275*).

[*Optional*] **F. Each Party Must Be Afforded the Opportunity to Respond and Offer Reasons Why Reclassification Is or Is Not Appropriate.** While a trial court has authority to conduct a pretrial hearing to obtain information about whether the amount of the judgment will require reclassification, whether a party makes a motion or the court raises the jurisdictional issue on its own motion, the court must provide sufficient opportunity to respond and offer reasons why reclassification should or should not be ordered, and even if no hearing is held, before ordering reclassification the court must afford the parties an opportunity to contest reclassification (*Stern v. Superior Court (2003) 105 Cal. App. 4th 223, 230-231, 129 Cal. Rptr. 2d 275*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*party's status and name*]

[2] Comments

[a] Use of Form

The form in [1], *above*, may be submitted in opposition to a motion to reclassify an action from a limited civil case to an unlimited civil case when the complaint or cross complaint does not seek relief beyond the monetary jurisdiction of a limited civil case [*see Code Civ. Proc. §§ 85, 86*].

Paragraph A sets out the general proposition that the amount in controversy of a limited civil case cannot exceed $25,000, whereas Paragraph B sets out the various types of monetary limits to the limited civil case under different types of actions [*Code Civ. Proc. §§ 85, 86*].

The first alternative Paragraph C should be used by a plaintiff, cross-complainant, or petitioner who files the motion within the time allowed for that party to amend the initial pleading. The second alternative Paragraph C should be used by a defendant or cross-defendant who files the motion within the time allowed to respond to the initial pleading. The third alternative Paragraph C should be used when the movant files the motion after the time for that party to amend that party's initial pleading or to respond to a complaint, cross-complaint, or other initial pleading.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. In particular, counsel should describe the type of action at issue and the facts supporting the type of action, the amounts demanded, and the filing dates of the initial and responsive pleadings. Additionally, counsel should add argument to support the assertion that good cause does not exist to show why the movant did not seek reclassification earlier.

[c] Related Pleading and Practice Forms

For forms of notice of motion and an order relative to reclassifying a case, see *California Forms of Pleading and Practice, Ch. 324, Jurisdiction: Subject Matter Jurisdiction, §§ 324.120*-324.124 (Matthew Bender).

[3] Discussion of Authorities

[a] The *Walker* Test Continues to Govern the Determination of the Jurisdictional Amount in Controversy for Reclassification of a Case

The facts and procedural background of ***Stern v. Superior Court*** *(2003) 105 Cal. App. 4th 223, 129 Cal. Rptr. 2d 275* are discussed under *§ 133.70(3)(a)*. Although the reclassification statutes have made numerous changes, the jurisdictional amount in controversy has not changed and continues to provide a basis for reclassification. Thus the test in ***Walker v. Superior Court*** *(1991) 53 Cal. 3d 257, 262, 279 Cal. Rptr. 576, 807 P.2d 418* continues to govern the determination of the jurisdictional amount in controversy for reclassification as a limited civil case, i.e., that the matter will "necessarily" result in a verdict below the jurisdictional amount (*105 Cal. App. 4th 223, 231)* . The trial court reviews the record to determine whether the result is obtainable. Simply stated, the trial court looks to the possibility of a jurisdictionally appropriate verdict, not to its probability. The prayer or "demand" for relief in the complaint is relevant to valuation of the amount in controversy. Other evidence can take the form of arbitration awards, or the

amount of a settlement recommendation resulting from court-ordered settlement negotiations. The lack of notice to the parties that the court would order reclassification prevented the parties from providing evidence of the value of the verdict other than the Stern complaint itself. The second amended complaint sought restitution of fees that plaintiffs paid defendants, and the class action causes of action seek restitution of accountancy fees paid by an unknown number of class members. Without further evidence as to the value of the case, the allegations of the complaint preclude a finding that the verdict will "necessarily" fall short of the $25,001 jurisdictional requirement. Therefore, the reclassification order was an abuse of discretion (*105 Cal. App. 4th 223, 233)* .

[b] Each Party Must Be Afforded the Opportunity to Respond and Offer Reasons Why Reclassification Is or Is Not Appropriate

The facts and procedural background of ***Stern v. Superior Court*** *(2003) 105 Cal. App. 4th 223, 129 Cal. Rptr. 2d 275* are discussed under *§ 133.70(3)(a)*. The *Stern* court holds that ***Walker v. Superior Court*** *(1991) 53 Cal. 3d 257, 262, 279 Cal. Rptr. 576, 807 P.2d 418* continues to govern the procedural and substantive requirements for a reclassification order, and that (*105 Cal. App. 4th 223, 229-230)* :

- A party moving for reclassification should make a noticed motion.

- A court contemplating ordering reclassification on its own motion must also provide notice to the parties.

- Whether a party makes a motion or the court raises the jurisdictional issue on its own motion, the court must provide sufficient opportunity to respond and offer reasons why [reclassification] should or should not be ordered.

- Even if no hearing is held, before ordering reclassification the court must afford the parties an opportunity to contest reclassification.

Legal Topics:

For related research and practice materials, see the following legal topics:
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13-133 California Points & Authorities §§ 130.91-130.109

[Reserved]

§§ 130.91[Reserved]

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13-133 California Points & Authorities § 133.110

§ 133.110 Supporting Motion to Reclassify Action From an Unlimited Civil Case to a Limited Civil Case [Code Civ. Proc. § 403.040]--Complaint or Cross-Complaint Does Not Seek Relief in Excess of $25,000 [Code Civ. Proc. § 85]

[1] FORM

SUPERIOR COURT OF CALIFORNIA
COUNTY OF_____

_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR RECLASSIFICATION OF CASE FROM UNLIMITED CIVIL CASE TO LIMITED CIVIL CASE
_____ [*name*], Defendant.	)	Date: _____
[_____ (*name*),] [Cross Complainant,]	)	Time: _____
[vs.]	)	Location: _____
[_____ (*name*),] [Cross Defendant.]	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THE COURT SHOULD GRANT THE MOTION FOR RECLASSIFICATION OF THIS _____ [ACTION *or* PROCEEDING *or* CASE] FROM AN UNLIMITED CIVIL CASE TO A LIMITED CIVIL CASE BECAUSE THE _____ [COMPLAINT *or* CROSS COMPLAINT] DOES NOT SEEK RELIEF IN EXCESS OF $25,000.

A. The Amount in Controversy of a Limited Civil Cases Cannot Exceed $25,000. To be treated as a limited civil case, the amount in controversy in an action or special proceeding cannot exceed $25,000 (*Code Civ. Proc. § 85(a)*). "Amount in controversy" means the amount of the demand, or the recovery sought, or the value of the property, or the amount of the lien, that is in controversy in the action, exclusive of attorney's fees, interest, and costs (*Code Civ. Proc. § 85(a)*).

[*EITHER*]

B. Jurisdictional Classification. Limited civil cases include cases at law in which the demand, exclusive of interest, or the value of property in controversy amounts to $25,000 or less (*Code Civ. Proc. § 86(a)(1)*). Cases at law with demands in excess of $25,000 are unlimited civil cases (*see Code Civ. Proc. § 88*).

[*OR, if action is for dissolution of partnership with assets exceeding $25,000*]

B. Jurisdictional Classification. Limited civil cases include actions for dissolution of a partnership where the total assets do not exceed $25,000 (*Code Civ. Proc. § 86(a)(2)*). Where the total assets exceed $25,000, these actions are unlimited civil cases (*see Code Civ. Proc. § 88*).

[*OR, in case of interpleader when amount demanded or value of property exceeds $25,000*]

B. Jurisdictional Classification. Limited civil cases include actions of interpleader, and the _____ [amount of money *or* the value of the property] involved does not exceed $25,000 (*Code Civ. Proc. § 86(a)(2)*). Where the _____ [amount of money *or* the value of the property] exceeds $25,000, these actions are an unlimited civil cases (*see Code Civ. Proc. § 88*).

[*OR, in case of action demanding or seeking recovery of property valued in excess of $25,000 and for cancellation or rescission of contract under which amount was paid or property was delivered*]

B. Jurisdictional Classification. Limited civil cases include actions to _____ [cancel *or* rescind] a contract in an action to recover _____ [money *or* property of a value] not in excess of $25,000 _____ [paid *or* delivered] _____ [under *or* in consideration of] the contract (*Code Civ. Proc. § 86(a)(3)*). Where the _____ [money *or* property of a value] exceeds $25,000, these actions are unlimited civil cases (*see Code Civ. Proc. § 88*).

[*OR, if action is for unlawful detainer, forcible entry, or forcible detainer and amount claimed is in excess of $25,000*]

B. Jurisdictional Classification. Limited civil cases include actions in _____ [forcible entry *or* forcible detainer *or* unlawful detainer] in which the whole amount of damages claimed does not exceed $25,000 (*Code Civ. Proc. § 86(a)(4)*). Where the amount of damages exceeds $25,000, these actions are unlimited civil cases (*see Code Civ. Proc. § 88*).

[*OR, if action to enforce and foreclose a lien on personal property exceeding $25,000*]

B. Jurisdictional Classification. Limited civil cases include actions to enforce and foreclose a lien on personal

property that do not exceed $25,000 (*Code Civ. Proc. § 86(a)(5)*). Where the lien exceeds $25,000, these actions are unlimited civil cases (*see Code Civ. Proc. § 88*).

[*OR, if action to enforce and foreclose a mechanic's lien exceeding $25,000*]

B. Jurisdictional Classification. Limited civil cases include actions to enforce and foreclose, or is a petition to release, a mechanic's lien (*Civ. Code § 3109 et seq.*) not exceeding $25,000 (*see Code Civ. Proc. § 86(a)(6)*). Where the amount of the mechanics lien exceeds $25,000, these actions are unlimited civil cases (*see Code Civ. Proc. § 88*).

[*OR, if action is one to enforce and foreclose an assessment lien exceeding $25,000 on a common-interest development*]

B. Jurisdictional Classification. Limited civil cases include actions to enforce and foreclose an assessment lien not exceeding $25,000 on a common-interest development as defined in *Civil Code Section 1351* (*Code Civ. Proc. § 86(a)(6)*). Where the assessment lien exceeds $25,000, these actions are unlimited civil cases (*see Code Civ. Proc. § 88*).

[*OR, if action is one for declaratory relief*]

B. Jurisdictional Classification. Limited civil cases include actions for declaratory relief when brought pursuant to _____ [a cross-complaint as to a right of indemnity with respect to the relief demanded in the complaint or a cross-complaint in an action or proceeding that is otherwise a limited civil case *or* conduct a trial after a nonbinding fee arbitration between an attorney and client pursuant to *Business and Professions Code § 6200 et seq.* where the amount in controversy does not exceed $25,000] (*Code Civ. Proc. § 86(a)(7)*). Where the amount in controversy exceeds $25,000, these actions are unlimited civil cases (*see Code Civ. Proc. § 88*).

[*OR, if action is one by a judgment creditor to recover interest in personal property or enforce the liability of a debtor of a judgment debtor and the property claimed or debt denied exceeds $25,000*]

B. Jurisdictional Classification. Limited civil cases include an action that is one by a judgment creditor under Code of Civil Procedure Sections 708.210-708.290 to _____ [recover an interest in personal property *or* enforce the liability of a debtor of a judgment debtor] and the _____ [interest claimed adversely is of a value not exceeding $25,000 *or* debt denied not exceeding $25,000] (*Code Civ. Proc. § 86(a)(9)*). Where the _____ [interest claimed adversely *or* debt denied] exceeds $25,000, these actions are unlimited civil cases (*see Code Civ. Proc. § 88*).

[*OR, if action in equity to try title to personal property in excess of $25,000*]

B. Jurisdictional Classification. Limited civil cases include an action in equity to try title to personal property, and the amount involved does not exceed $25,000 (*Code Civ. Proc. § 86(b)(1)*). Where the amount involved exceeds $25,000, these actions are unlimited civil cases (*see Code Civ. Proc. § 88*).

[*CONTINUE*]

[*EITHER, if plaintiff, cross-complainant, or petitioner filing motion within time to amend initial pleading*]

C. Reclassification Is Mandatory If Case Incorrectly Classified and Motion Filed Before Time to Amend Initial Pleading. A plaintiff, cross-complainant or petitioner may file a motion for reclassification within the time allowed for that party to amend the initial pleading; and the court must grant a motion to reclassify and enter an order for reclassification regardless of any fault or lack of fault if the case has been classified in an incorrect jurisdictional classification (*Code of Civ. Proc. § 403.040(a)*).

[*OR, if defendant or cross-defendant filing motion within time to respond to initial pleading*]

C. Reclassification Is Mandatory If Case Incorrectly Classified and Motion Filed Before Time to Amend Initial Pleading. A defendant or cross-defendant may file a motion for reclassification within the time allowed for that party to respond to the initial pleading; and the court must grant a motion to reclassify and enter an order for reclassification regardless of any fault or lack of fault if the case has been classified in an incorrect jurisdictional classification (*Code of Civ. Proc. § 403.040(a)*).

[*OR, if party files a motion after time for party to amend party's initial pleading or to respond to a complaint, cross-complaint, or other initial pleading*]

C. Reclassification Is Mandatory Even If Motion Is Filed After Time Allowed to Amend Initial Pleading or Respond to Complaint, Cross-Complaint, or Other Initial Pleading If the Case Is Incorrectly Classified and Good Cause Exists for Not Seeking Reclassification Earlier. If a party files a motion for reclassification after that time for that party to amend that party's initial pleading or to respond to a complaint, cross-complaint, or other initial pleading, the court must grant the motion and enter an order for reclassification if both the case is incorrectly classified and good cause exists for the moving party not to have sought reclassification earlier (*Code of Civ. Proc. § 403.040(b)*).

D. The *Walker* Test Continues to Govern the Determination of the Jurisdictional Amount in Controversy for Reclassification of a Case. Although the reclassification statutes have made numerous changes, the jurisdictional amount in controversy has not changed and continues to provide a basis for reclassification (*Code Civ. Proc. §§ 85(a), 86(a)(1), 403.010 et seq.*), the statutory changes have not altered substantive and procedural law governing how a trial court values a case to determine the jurisdictional amount in controversy, and the *Walker* test (*Walker v. Superior Court (1991) 53 Cal. 3d 257, 262, 279 Cal. Rptr. 576, 807 P.2d 418*) continues to govern the determination of the jurisdictional amount in controversy for reclassification as a limited civil case, i.e., that the matter will "necessarily" result in a verdict below the jurisdictional amount (*Stern v. Superior Court (2003) 105 Cal. App. 4th 223, 229-231, 129 Cal. Rptr. 2d 275*).

[*Optional*] **E. Each Party Must Be Afforded the Opportunity to Respond and Offer Reasons Why Reclassification Is or Is Not Appropriate.** While a trial court has authority to conduct a pretrial hearing to obtain information about whether the amount of the judgment will require reclassification, whether a party makes a motion or the court raises the jurisdictional issue on its own motion, the court must provide sufficient opportunity to respond and offer reasons why reclassification should or should not be ordered, and even if no hearing is held, before ordering reclassification the court must afford the parties an opportunity to contest reclassification (*Stern v. Superior Court (2003) 105 Cal. App. 4th 223, 230-231, 129 Cal. Rptr. 2d 275*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*party's status and name*]

[2] Comments

[a] Use of Form

The form in [1], *above*, may be submitted in support of a motion to reclassify an action from an unlimited civil case to a limited civil case when the complaint or cross complaint does not seek relief beyond the monetary jurisdiction of a limited civil case [*see Code Civ. Proc. §§ 85, 86*].

Paragraph A sets out the general proposition that the amount in controversy of a limited civil case cannot exceed $25,000, whereas Paragraph B sets out the various types of monetary limits to the limited civil case under different types of actions [*Code Civ. Proc. §§ 85, 86*].

The first alternative Paragraph C should be used by a plaintiff, cross-complainant, or petitioner who files the motion within the time allowed for that party to amend the initial pleading. The second alternative Paragraph C should be used by a defendant or cross-defendant who files the motion within the time allowed to respond to the initial pleading. The third alternative Paragraph C should be used when the movant files the motion after the time for that party to amend that party's initial pleading or to respond to a complaint, cross-complaint, or other initial pleading.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. In particular, counsel should describe the type of action at issue and the facts supporting the type of action, the amounts demanded, and the filing dates of the initial and responsive pleadings. Additionally, counsel should add argument to support the assertion that good cause does not exist to show why the movant did not seek reclassification earlier.

[c] Related Pleading and Practice Forms

For forms of notice of motion and an order relative to reclassifying a case, see *California Forms of Pleading and Practice, Ch. 324, Jurisdiction: Subject Matter Jurisdiction, §§ 324.120*-324.124 (Matthew Bender).

[3] Discussion of Authorities

[a] The *Walker* Test Continues to Govern the Determination of the Jurisdictional Amount in Controversy for Reclassification of a Case

The facts and procedural background of ***Stern v. Superior Court*** *(2003) 105 Cal. App. 4th 223, 129 Cal. Rptr. 2d 275* are discussed under *§ 133.70(3)(a)*. Although the reclassification statutes have made numerous changes, the jurisdictional amount in controversy has not changed and continues to provide a basis for reclassification. Thus the test in ***Walker v. Superior Court*** *(1991) 53 Cal. 3d 257, 262, 279 Cal. Rptr. 576, 807 P.2d 418* continues to govern the determination of the jurisdictional amount in controversy for reclassification as a limited civil case, i.e., that the matter will "necessarily" result in a verdict below the jurisdictional amount (*105 Cal. App. 4th 223, 231)* . The trial court reviews the record to determine whether the result is obtainable. Simply stated, the trial court looks to the possibility of a jurisdictionally appropriate verdict, not to its probability. The prayer or "demand" for relief in the complaint is relevant to valuation of the amount in controversy. Other evidence can take the form of arbitration awards, or the

amount of a settlement recommendation resulting from court-ordered settlement negotiations. The lack of notice to the parties that the court would order reclassification prevented the parties from providing evidence of the value of the verdict other than the Stern complaint itself. The second amended complaint sought restitution of fees that plaintiffs paid defendants, and the class action causes of action seek restitution of accountancy fees paid by an unknown number of class members. Without further evidence as to the value of the case, the allegations of the complaint preclude a finding that the verdict will "necessarily" fall short of the $25,001 jurisdictional requirement. Therefore, the reclassification order was an abuse of discretion (*105 Cal. App. 4th 223, 233)* .

[b] Each Party Must Be Afforded the Opportunity to Respond and Offer Reasons Why Reclassification Is or Is Not Appropriate

The facts and procedural background of ***Stern v. Superior Court*** *(2003) 105 Cal. App. 4th 223, 129 Cal. Rptr. 2d 275* are discussed under *§ 133.70(3)(a)*. The *Stern* court holds that ***Walker v. Superior Court*** *(1991) 53 Cal. 3d 257, 262, 279 Cal. Rptr. 576, 807 P.2d 418* continues to govern the procedural and substantive requirements for a reclassification order, and that (*105 Cal. App. 4th 223, 229-230)* :

- A party moving for reclassification should make a noticed motion.

- A court contemplating ordering reclassification on its own motion must also provide notice to the parties.

- Whether a party makes a motion or the court raises the jurisdictional issue on its own motion, the court must provide sufficient opportunity to respond and offer reasons why [reclassification] should or should not be ordered.

- Even if no hearing is held, before ordering reclassification the court must afford the parties an opportunity to contest reclassification.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral Overview

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13-133 California Points & Authorities § 133.111

§ 133.111 Supporting Motion to Reclassify Action From an Unlimited Civil Case to a Limited Civil Case [Code Civ. Proc. § 403.040]--Recovery of Amount in Excess of $25,000 Has Been Remitted [Code Civ. Proc. § 403.040(f)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA
COUNTY OF_____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*],	)	IES IN SUPPORT OF MOTION FOR RECLASSI-
Defendant.	)	FICATION FROM UNLIMITED CIVIL CASE TO
[_____ (*name*),]	)	LIMITED CIVIL CASE
[Cross Complainant,]	)	Date: _____
[vs.]	)	Time: _____
[_____ (*name*),]	)	Location: _____
[Cross Defendant.]	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THE COURT SHOULD GRANT THE MOTION TO RECLASSIFY THIS _____ [ACTION *or* PROCEEDING *or* CASE] TO A LIMITED CIVIL CASE BECAUSE _____ [PLAINTIFF *or* CROSS COMPLAINANT] HAS IN HIS/HER _____ [COMPLAINT *or* CROSS COMPLAINT] EXPRESSLY REMITTED AND WAIVED ANY PART OF THE DEMAND IN EXCESS OF THE JURISDICTION OF A LIMITED CIVIL CASE.

Remission of Excess. In any case in where the misclassification is due solely to an excess in the amount of the demand, the excess may be remitted and the action may continue as a limited civil case (*Code Civ. Proc. § 403.030(f)*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*party's status and name*]

[2] Comments

[a] Use of Form

The form in [1], *above*, may be submitted in support of a motion to reclassify an action from an unlimited civil case to a limited civil case when the money or damages originally sought is in excess of the monetary jurisdiction of a limited civil case and the party has in his or her complaint or cross complaint voluntarily remitted or waived any amount in excess of the jurisdiction of a limited civil case [*see Code Civ. Proc. § 403.040(f)*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. In particular, counsel should describe the type of action at issue and the facts supporting the type of action, the amounts demanded, the filing dates of the initial and responsive pleadings, and the date and description of the amounts remitted or waived.

[c] Related Pleading and Practice Forms

For forms of notice of motion and an order relative to reclassifying a case, see *California Forms of Pleading and Practice, Ch. 324, Jurisdiction: Subject Matter Jurisdiction, §§ 324.120*-324.124 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral Overview

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13-133 California Points & Authorities §§ 130.112-130.129

[Reserved]

§§ 130.112[Reserved]

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2. Reclassifying From Unlimited to Limited Civil Case

13-133 California Points & Authorities § 133.130

§ 133.130 Opposing Motion to Reclassify Action From an Unlimited Civil Case to a Limited Civil Case [Code Civ. Proc. § 403.040]--Complaint or Cross-Complaint Seeks Relief in Excess of $25,000 [Code Civ. Proc. § 85]; Good Cause Required for Not Seeking Reclassification After Time to Amend Pleading or Respond to Complaint, Cross-Complaint, or Other Initial Pleading [Code Civ. Proc. § 403.040(b)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA
COUNTY OF_____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*],	)	IES IN OPPOSITION TO MOTION FOR RECLAS-
Defendant.	)	SIFICATION OF CASE FROM UNLIMITED CIVIL
[_____ (*name*),]	)	CASE TO LIMITED CIVIL CASE
[Cross Complainant,]	)	Date: _____
[vs.]	)	Time: _____
[_____ (*name*),]	)	Location: _____
[Cross Defendant.]	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THE COURT SHOULD DENY THE MOTION FOR RECLASSIFICATION OF THIS _____ [ACTION *or* PROCEEDING *or* CASE] FROM AN UNLIMITED CIVIL CASE TO A LIMITED CIVIL CASE BECAUSE THE _____ [COMPLAINT *or* CROSS COMPLAINT] SEEKS RELIEF IN EXCESS OF $25,000.

A. The Amount in Controversy of a Limited Civil Cases Cannot Exceed $25,000. To be treated as a limited civil case, the amount in controversy in an action or special proceeding cannot exceed $25,000 (*Code Civ. Proc. § 85(a)*). "Amount in controversy" means the amount of the demand, or the recovery sought, or the value of the property, or the amount of the lien, that is in controversy in the action, exclusive of attorney's fees, interest, and costs (*Code Civ. Proc. § 85(a)*).

[*EITHER*]

B. Jurisdictional Classification. Limited civil cases include cases at law in which the demand, exclusive of interest, or the value of property in controversy amounts to $25,000 or less (*Code Civ. Proc. § 86(a)(1)*). Cases at law with demands in excess of $25,000 are unlimited civil cases (*see Code Civ. Proc. § 88*).

[*OR, if action is for dissolution of partnership with assets exceeding $25,000*]

B. Jurisdictional Classification. Limited civil cases include actions for dissolution of a partnership where the total assets do not exceed $25,000 (*Code Civ. Proc. § 86(a)(2)*). Where the total assets exceed $25,000, these actions are unlimited civil cases (*see Code Civ. Proc. § 88*).

[*OR, in case of interpleader when amount demanded or value of property exceeds $25,000*]

B. Jurisdictional Classification. Limited civil cases include actions of interpleader, and the _____ [amount of money *or* the value of the property] involved does not exceed $25,000 (*Code Civ. Proc. § 86(a)(2)*). Where the _____ [amount of money *or* the value of the property] exceeds $25,000, these actions are an unlimited civil cases (*see Code Civ. Proc. § 88*).

[*OR, in case of action demanding or seeking recovery of property valued in excess of $25,000 and for cancellation or rescission of contract under which amount was paid or property was delivered*]

B. Jurisdictional Classification. Limited civil cases include actions to _____ [cancel *or* rescind] a contract in an action to recover _____ [amount of money *or* property of a value] not in excess of $25,000 _____ [paid *or* delivered] _____ [under *or* in consideration of] the contract (*Code Civ. Proc. § 86(a)(3)*). Where the _____ [amount of money *or* property of a value] exceeds $25,000, these actions are unlimited civil cases (*see Code Civ. Proc. § 88*).

[*OR, if action is for unlawful detainer, forcible entry, or forcible detainer and amount claimed is in excess of $25,000*]

B. Jurisdictional Classification. Limited civil cases include actions in _____ [forcible entry *or* forcible detainer *or* unlawful detainer] in which the whole amount of damages claimed does not exceed $25,000 (*Code Civ. Proc. § 86(a)(4)*). Where the amount of damages exceeds $25,000, these actions are unlimited civil cases (*see Code Civ. Proc. § 88*).

[*OR, if action to enforce and foreclose a lien on personal property exceeding $25,000*]

B. Jurisdictional Classification. Limited civil cases include actions to enforce and foreclose a lien on personal property that do not exceed $25,000 (*Code Civ. Proc. § 86(a)(5)*). Where the lien exceeds $25,000, these actions are unlimited civil cases (*see Code Civ. Proc. § 88*).

[*OR, if action to enforce and foreclose a mechanic's lien exceeding $25,000*]

B. Jurisdictional Classification. Limited civil cases include actions to enforce and foreclose, or is a petition to release, a mechanic's lien (*Civ. Code § 3109 et seq.*) not exceeding $25,000 (*see Code Civ. Proc. § 86(a)(6)*). Where the amount of the mechanics lien exceeds $25,000, these actions are unlimited civil cases (*see Code Civ. Proc. § 88*).

[*OR, if action is one to enforce and foreclose an assessment lien exceeding $25,000 on a common-interest development*]

B. Jurisdictional Classification. Limited civil cases include actions to enforce and foreclose an assessment lien not exceeding $25,000 on a common-interest development as defined in *Civil Code Section 1351* (*Code Civ. Proc. § 86(a)(6)*). Where the assessment lien exceeds $25,000, these actions are unlimited civil cases (*see Code Civ. Proc. § 88*).

[*OR, if action is one for declaratory relief*]

B. Jurisdictional Classification. Limited civil cases include actions for declaratory relief when brought pursuant to _____ [a cross-complaint as to a right of indemnity with respect to the relief demanded in the complaint or a cross-complaint in an action or proceeding that is otherwise a limited civil case *or* conduct a trial after a nonbinding fee arbitration between an attorney and client pursuant to *Business and Professions Code § 6200 et seq.* where the amount in controversy does not exceed $25,000] (*Code Civ. Proc. § 86(a)(7)*). Where the amount in controversy exceeds $25,000, these actions are unlimited civil cases (*see Code Civ. Proc. § 88*).

[*OR, if action is one by a judgment creditor to recover interest in personal property or enforce the liability of a debtor of a judgment debtor and the property claimed or debt denied exceeds $25,000*]

B. Jurisdictional Classification. Limited civil cases include an action that is one by a judgment creditor under *Code of Civil Procedure Sections 708.210-708.290* to _____ [recover an interest in personal property *or* enforce the liability of a debtor of a judgment debtor] and the _____ [interest claimed adversely is of a value not exceeding $25,000 *or* debt denied not exceeding $25,000] (*Code Civ. Proc. § 86(a)(9)*). Where the _____ [interest claimed adversely *or* debt denied] exceeds $25,000, these actions are unlimited civil cases (*see Code Civ. Proc. § 88*).

[*OR, if action in equity to try title to personal property in excess of $25,000*]

B. Jurisdictional Classification. Limited civil cases include an action in equity to try title to personal property, and the amount involved does not exceed $25,000 (*Code Civ. Proc. § 86(b)(1)*). Where the amount involved exceeds $25,000, these actions are unlimited civil cases (*see Code Civ. Proc. § 88*).

[*CONTINUE*]

[*EITHER, if plaintiff, cross-complainant, or petitioner filing motion within time to amend initial pleading*]

C. Reclassification Is Not Mandatory If Case Is Correctly Classified Even If Motion Filed Before Time to Amend Initial Pleading. A plaintiff, cross-complainant or petitioner may file a motion for reclassification within the time allowed for that party to amend the initial pleading; however, the court may deny the motion if the case has the correct jurisdictional classification (*see Code of Civ. Proc. § 403.040(a)*).

[*OR, if defendant or cross-defendant filing motion within time to respond to initial pleading*]

C. Reclassification Is Not Mandatory If Case Is Correctly Classified Even If Motion Filed Before Time to Amend Initial Pleading. A defendant or cross-defendant may file a motion for reclassification within the time allowed for that party to respond to the initial pleading; however, the court may deny the motion if the case has the correct jurisdictional classification (*see Code of Civ. Proc. § 403.040(a)*).

[*OR, if party files a motion after time for party to amend party's initial pleading or to respond to a complaint, cross-complaint, or other initial pleading*]

C. Reclassification Requires Showing of Good Cause for Not Seeking Reclassification Earlier If Motion Made After Time Allowed to Amend Initial Pleading or Respond to Complaint, Cross-Complaint, or Other Initial Pleading. If a party files a motion for reclassification after that time for that party to amend that party's initial pleading or to respond to a complaint, cross-complaint, or other initial pleading, the court may deny the motion even if the case is incorrectly classified if the moving party fails to show good cause for not seeking reclassification earlier (*Code of Civ. Proc. § 403.040(b)*).

D. The *Walker* Test Continues to Govern the Determination of the Jurisdictional Amount in Controversy for Reclassification of a Case. Although the reclassification statutes have made numerous changes, the jurisdictional amount in controversy has not changed and continues to provide a basis for reclassification (*Code Civ. Proc. §§ 85(a), 86(a)(1), 403.010 et seq.*), the statutory changes have not altered substantive and procedural law governing how a trial court values a case to determine the jurisdictional amount in controversy, and the *Walker* test (*Walker v. Superior Court (1991) 53 Cal. 3d 257, 262, 279 Cal. Rptr. 576, 807 P.2d 418*) continues to govern the determination of the jurisdictional amount in controversy for reclassification as a limited civil case, i.e., that the matter will "necessarily" result in a verdict below the jurisdictional amount (*Stern v. Superior Court (2003) 105 Cal. App. 4th 223, 229-231, 129 Cal. Rptr. 2d 275*).

[*Optional*] **E. Each Party Must Be Afforded the Opportunity to Respond and Offer Reasons Why Reclassification Is or Is Not Appropriate.** While a trial court has authority to conduct a pretrial hearing to obtain information about whether the amount of the judgment will require reclassification, whether a party makes a motion or the court raises the jurisdictional issue on its own motion, the court must provide sufficient opportunity to respond and offer reasons why reclassification should or should not be ordered, and even if no hearing is held, before ordering reclassification the court must afford the parties an opportunity to contest reclassification (*Stern v. Superior Court (2003) 105 Cal. App. 4th 223, 230-231, 129 Cal. Rptr. 2d 275*).
Dated: _____.

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*party's status and name*]

[2] Comments

[a] Use of Form

The form in [1], *above*, may be submitted in opposition to a motion to reclassify an action from an unlimited civil case to a limited civil case when the complaint or cross complaint seeks relief beyond the monetary jurisdiction of a limited civil case [*see Code Civ. Proc. §§ 85, 86*].

Paragraph A sets out the general proposition that the amount in controversy of a limited civil case cannot exceed $25,000, whereas Paragraph B sets out the various types of monetary limits to the limited civil case under different types of actions [*Code Civ. Proc. §§ 85, 86*].

The first alternative Paragraph C should be used by a plaintiff, cross-complainant, or petitioner who files the motion within the time allowed for that party to amend the initial pleading. The second alternative Paragraph C should be used by a defendant or cross-defendant who files the motion within the time allowed to respond to the initial pleading. The third alternative Paragraph C should be used when the movant files the motion after the time for that party to amend that party's initial pleading or to respond to a complaint, cross-complaint, or other initial pleading.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. In particular, counsel should describe the type of action at issue and the facts supporting the type of action, the amounts demanded, and the filing dates of the initial and responsive pleadings. Additionally, counsel should add argument to support the assertion that good cause does not exist to show why the movant did not seek reclassification earlier.

[c] Related Pleading and Practice Forms

For forms of notice of motion and an order relative to reclassifying a case, see *California Forms of Pleading and Practice, Ch. 324, Jurisdiction: Subject Matter Jurisdiction, §§ 324.120*-324.124 (Matthew Bender).

[3] Discussion of Authorities

[a] The *Walker* Test Continues to Govern the Determination of the Jurisdictional Amount in Controversy for Reclassification of a Case

The facts and procedural background of ***Stern v. Superior Court*** *(2003) 105 Cal. App. 4th 223, 129 Cal. Rptr. 2d 275* are discussed under *§ 133.70(3)(a)*. Although the reclassification statutes have made numerous changes, the jurisdictional amount in controversy has not changed and continues to provide a basis for reclassification. Thus the test in ***Walker v. Superior Court*** *(1991) 53 Cal. 3d 257, 262, 279 Cal. Rptr. 576, 807 P.2d 418* continues to govern the determination of the jurisdictional amount in controversy for reclassification as a limited civil case, i.e., that the matter will "necessarily" result in a verdict below the jurisdictional amount (*105 Cal. App. 4th 223, 231)* . The trial court reviews the record to determine whether the result is obtainable. Simply stated, the trial court looks to the possibility of a jurisdictionally appropriate verdict, not to its probability. The prayer or "demand" for relief in the complaint is relevant to valuation of the amount in controversy. Other evidence can take the form of arbitration awards, or the

amount of a settlement recommendation resulting from court-ordered settlement negotiations. The lack of notice to the parties that the court would order reclassification prevented the parties from providing evidence of the value of the verdict other than the Stern complaint itself. The second amended complaint sought restitution of fees that plaintiffs paid defendants, and the class action causes of action seek restitution of accountancy fees paid by an unknown number of class members. Without further evidence as to the value of the case, the allegations of the complaint preclude a finding that the verdict will "necessarily" fall short of the $25,001 jurisdictional requirement. Therefore, the reclassification order was an abuse of discretion (*105 Cal. App. 4th 223, 233)* .

[b] Each Party Must Be Afforded the Opportunity to Respond and Offer Reasons Why Reclassification Is or Is Not Appropriate

The facts and procedural background of ***Stern v. Superior Court*** *(2003) 105 Cal. App. 4th 223, 129 Cal. Rptr. 2d 275* are discussed under *§ 133.70(3)(a)*. The *Stern* court holds that ***Walker v. Superior Court*** *(1991) 53 Cal. 3d 257, 262, 279 Cal. Rptr. 576, 807 P.2d 418* continues to govern the procedural and substantive requirements for a reclassification order, and that (*105 Cal. App. 4th 223, 229-230)* :

- A party moving for reclassification should make a noticed motion.

- A court contemplating ordering reclassification on its own motion must also provide notice to the parties.

- Whether a party makes a motion or the court raises the jurisdictional issue on its own motion, the court must provide sufficient opportunity to respond and offer reasons why [reclassification] should or should not be ordered.

- Even if no hearing is held, before ordering reclassification the court must afford the parties an opportunity to contest reclassification.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral Overview

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13-133 California Points & Authorities § 133.131

§ 133.131 Opposing Motion to Reclassify Action From an Unlimited Civil Case to a Limited Civil Case [Code Civ. Proc. § 403.040]--Complaint or Cross-Complaint Seeks Relief of a Type Not Granted in Limited Civil Cases [Code Civ. Proc. § 85(b)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA
COUNTY OF_____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*],	)	IES IN OPPOSITION TO MOTION FOR RECLAS-
Defendant.	)	SIFICATION OF CASE FROM UNLIMITED CIVIL
[_____ (*name*),]	)	CASE TO LIMITED CIVIL CASE
[Cross Complainant,]	)	Date: _____
[vs.]	)	Time: _____
[_____ (*name*),]	)	Location: _____
[Cross Defendant.]	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THE COURT SHOULD DENY THE MOTION FOR RECLASSIFICATION OF THIS _____ [ACTION *or* PROCEEDING *or* CASE] FROM AN UNLIMITED CIVIL CASE TO A LIMITED CIVIL CASE BECAUSE THE _____ [COMPLAINT *or* CROSS COMPLAINT] SEEKS RELIEF OF A TYPE NOT GRANTED IN LIMITED CIVIL CASES.

A. Unlimited Civil Cases May Involve Amounts in Controversy Not Exceeding $25,000 If the Relief Sought Is a Type Not Granted in Limited Civil Cases. To be treated as a limited civil case, the action or special proceeding must satisfy all three of the following conditions: (1) the amount in controversy does not exceed $25,000, (2) the relief sought is a type that may be granted in a limited civil case, and (3) the relief sought, whether in a complaint or cross-complaint, is exclusively of a type described in one or more statutes that classify an action or special proceeding as a limited civil case (*Code Civ. Proc. § 85*).

[*Optional*] **B. Permanent Injunctive Relief.** The court in a limited civil case may not grant a permanent injunction, except as otherwise authorized by statute [*Code Civ. Proc. § 580(b)(2)*].

[*Optional*] **C. Determining Title to Real Property.** The court in a limited civil case may not grant as relief a determination of the title to real property [*Code Civ. Proc. § 580(b)(3)*].

[*Optional*] **D. Declaratory Relief.** The court may not grant declaratory relief in a limited civil case, except as authorized by *Code of Civil Procedure Section 86* (*Code Civ. Proc. § 580(b)(4)*; *see Code Civ. Proc. § 86(a)(7)*).

E. The *Walker* Test Continues to Govern the Determination of the Jurisdictional Amount in Controversy for Reclassification of a Case. Although the reclassification statutes have made numerous changes, the jurisdictional amount in controversy has not changed and continues to provide a basis for reclassification (*Code Civ. Proc. §§ 85(a), 86(a)(1), 403.010 et seq.*), the statutory changes have not altered substantive and procedural law governing how a trial court values a case to determine the jurisdictional amount in controversy, and the *Walker* test (*Walker v. Superior Court (1991) 53 Cal. 3d 257, 262, 279 Cal. Rptr. 576, 807 P.2d 418*) continues to govern the determination of the jurisdictional amount in controversy for reclassification as a limited civil case, i.e., that the matter will "necessarily" result in a verdict below the jurisdictional amount (*Stern v. Superior Court (2003) 105 Cal. App. 4th 223, 229-231, 129 Cal. Rptr. 2d 275*).

[*Optional*] **F. Each Party Must Be Afforded the Opportunity to Respond and Offer Reasons Why Reclassification Is or Is Not Appropriate.** While a trial court has authority to conduct a pretrial hearing to obtain information about whether the amount of the judgment will require reclassification, whether a party makes a motion or the court raises the jurisdictional issue on its own motion, the court must provide sufficient opportunity to respond and offer reasons why reclassification should or should not be ordered, and even if no hearing is held, before ordering reclassification the court must afford the parties an opportunity to contest reclassification (*Stern v. Superior Court (2003) 105 Cal. App. 4th 223, 230-231, 129 Cal. Rptr. 2d 275*).
Dated: _____.

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*party's status and name*]

[2] Comments

[a] Use of Form

The form in [1], *above*, may be submitted in opposition to a motion to reclassify an action from a limited civil case to an unlimited civil case when the complaint or cross complaint seeks relief of the type not available in a limited civil case [*see Code Civ. Proc. §§ 85, 86*].

Paragraph A sets out the statutory requirements of limited civil case [*Code Civ. Proc. § 85*].

Alternative Paragraphs B through E provide the statutory list of types of relief that are not available in a limited civil action that are not dependent on the amount in controversy [*Code Civ. Proc. § 580*].

If the amount in controversy also exceeds $25,000, this points and authority may be combined with the form in *§ 133.130*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. In particular, counsel should describe the type of action at issue and the facts supporting the type of action, and the type of relief plead.

[c] Related Pleading and Practice Forms

For forms of notice of motion and an order relative to reclassifying a case, see *California Forms of Pleading and Practice, Ch. 324, Jurisdiction: Subject Matter Jurisdiction, §§ 324.120*-324.124 (Matthew Bender).

[3] Discussion of Authorities

[a] The *Walker* Test Continues to Govern the Determination of the Jurisdictional Amount in Controversy for Reclassification of a Case

The facts and procedural background of ***Stern v. Superior Court*** *(2003) 105 Cal. App. 4th 223, 129 Cal. Rptr. 2d 275* are discussed under *§ 133.70(3)(a)*. Although the reclassification statutes have made numerous changes, the jurisdictional amount in controversy has not changed and continues to provide a basis for reclassification. Thus the test in ***Walker v. Superior Court*** *(1991) 53 Cal. 3d 257, 262, 279 Cal. Rptr. 576, 807 P.2d 418* continues to govern the determination of the jurisdictional amount in controversy for reclassification as a limited civil case, i.e., that the matter will "necessarily" result in a verdict below the jurisdictional amount (*105 Cal. App. 4th 223, 231)* . The trial court reviews the record to determine whether the result is obtainable. Simply stated, the trial court looks to the possibility of a jurisdictionally appropriate verdict, not to its probability. The prayer or "demand" for relief in the complaint is relevant to valuation of the amount in controversy. Other evidence can take the form of arbitration awards, or the amount of a settlement recommendation resulting from court-ordered settlement negotiations. The lack of notice to the parties that the court would order reclassification prevented the parties from providing evidence of the value of the verdict other than the Stern complaint itself. The second amended complaint sought restitution of fees that plaintiffs paid defendants, and the class action causes of action seek restitution of accountancy fees paid by an unknown number of class members. Without further evidence as to the value of the case, the allegations of the complaint preclude a finding that the verdict will "necessarily" fall short of the $25,001 jurisdictional requirement. Therefore, the reclassification order was an abuse of discretion (*105 Cal. App. 4th 223, 233)* .

[b] Each Party Must Be Afforded the Opportunity to Respond and Offer Reasons Why Reclassification Is or Is Not Appropriate

The facts and procedural background of ***Stern v. Superior Court*** *(2003) 105 Cal. App. 4th 223, 129 Cal. Rptr. 2d 275* are discussed under *§ 133.70(3)(a)*. The *Stern* court holds that ***Walker v. Superior Court*** *(1991) 53 Cal. 3d 257, 262, 279 Cal. Rptr. 576, 807 P.2d 418* continues to govern the procedural and substantive requirements for a reclassification order, and that (*105 Cal. App. 4th 223, 229-230)* :

- A party moving for reclassification should make a noticed motion.

- A court contemplating ordering reclassification on its own motion must also provide notice to the parties.

- Whether a party makes a motion or the court raises the jurisdictional issue on its own motion, the court must provide sufficient opportunity to respond and offer reasons why [reclassification] should or should not be ordered.

- Even if no hearing is held, before ordering reclassification the court must afford the parties an opportunity to contest reclassification.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral Overview

California Points & Authorities

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 141 LANDLORD AND TENANT

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§ 141.syn Synopsis to Chapter 141: LANDLORD AND TENANT

§ 141.01 Scope of Chapter

§ 141.02 Governing Statutes

§ 141.03 Page Limits on Points and Authorities

§ 141.04 Related Pleading and Practice Forms

§§ 141.05- 141.19 [Reserved]

§ 141.20 Supporting Contention That Landlord Is Entitled to Damages From Tenant Who Breached Lease and Abandoned Premises--Unpaid Rent Earned Before Termination, and Rental Value of Premises Minus Avoidable Amount of Loss After Termination Is Proper Amount of Damages

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Termination of Lease

[b] Damages for Period Prior to Termination

[c] Damages for Period From Termination to Time of Award

[d] Damages for Period After Termination Up to Expiration of Lease Term

[e] Other Damages

[4] Additional Authorities

[a] Termination of Lease

[b] Other Damages

§ 141.21 Supporting Contention That Landlord Is Entitled to Damages From Tenant Who Breached Lease and Abandoned Premises--Landlord's Efforts to Mitigate Damages Were Sufficient

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Tenant Has Burden of Proving That Landlord's Mitigation Efforts Were Insufficient

[b] Reasonable Mitigation Efforts

[c] Landlord Not Required to Negotiate Another Lease With Defaulting Tenant

[d] Landlord Entitled to Recover Mitigation Costs

[e] Landlord Entitled to Recover Additional Losses Caused by Mitigation Efforts

[f] Landlord May Sell Property to Mitigate Losses

§ 141.22 Supporting Contention That Landlord Is Entitled to Damages From Tenant Who Breached Lease and Abandoned Premises--Rent Due Under Lease Is Proper Amount of Recoverable Damages Because Provision in Lease Permitted Landlord to Continue Lease in Effect After Breach and Abandonment

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Lease Must Provide That Landlord May Maintain Lease in Effect

[b] Lease Must Provide That Tenant May Sublet or Assign Lease

[c] Lease Permits Tenant to Sublet, Assign, or Both

[d] Lease Permits Tenant to Sublet, Assign, or Both, Subject to Reasonable Standards or Conditions

[e] Lease Permits Tenant to Sublet, Assign, or Both, Subject to Consent Not to Be Unreasonably Withheld

[4] Additional Authorities

[a] Lease Permits Tenant to Sublet, Assign, or Both, Subject to Consent Not to Be Unreasonably Withheld

§ 141.23 Supporting Contention That Landlord Is Entitled to Damages From Tenant Who Breached Lease and Abandoned Premises--Liquidated Damages Provision in Lease Is Valid and Enforceable

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Liquidated Damages Provision in Lease for Residential Dwelling Is Valid if Actual Damages Are Impracticable or Extremely Difficult to Determine

[b] Liquidated Damages Provision Is Valid Unless Provision Was Unreasonable When Contract Was Made

§ 141.24 Supporting Contention That Landlord Is Entitled to Damages From Tenant Who Breached Lease and Abandoned Premises--Any Breach by Landlord Was Independent of Tenant's Covenant to Pay Rent

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Covenants Are Presumed to Be Mutually Independent

[b] Breach of Independent Covenant Does Not Justify Refusal to Pay Rent

[c] Landlord's Covenant to Repair Normally Is Independent

[d] In Order to Treat Covenant to Repair as Dependent With Covenant to Pay Rent, Tenant Must Meet the Statutory Standards of Civil Code Section 1942

[4] Additional Authorities

[a] In Order to Treat Covenant to Repair as Dependent With Covenant to Pay Rent, Tenant Must Meet the Statutory Standards of Civil Code Section 1942

§ 141.25 Supporting Contention That Landlord Is Entitled to Damages From Tenant Who Breached Lease and Abandoned Premises--Tenant Was Not Constructively Evicted, So Is Liable for Rent for Entire Term of Lease

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Failure to Establish Constructive Eviction Precludes Finding That Tenant Was Relieved of Obligation to Pay Rent

[b] Constructive Eviction Does Not Exist if Tenant Fails to Vacate Within a Reasonable Time

[c] No Constructive Eviction Because No Breach of Implied Warranty of Habitability

[d] No Constructive Eviction Because No Breach of Implied Covenant of Quiet Enjoyment

[e] No Constructive Eviction Because Commercial Lease Limited Tenant to Seeking Only Damages or Injunctive Relief for Landlord's Breach of Covenant of Quiet Enjoyment

[f] Trespass Alone Not Necessarily Constructive Eviction

[4] Additional Authorities

[a] Constructive Eviction Does Not Exist if Tenant Fails to Vacate Within a Reasonable Time

§ 141.26 Opposing Contention That Landlord Is Entitled to Damages From Tenant Who Breached Lease and Abandoned Premises--Action Barred by Statute of Limitations [Code Civ. Proc. §§ 337.2, 339.5]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Four-Year Statute of Limitations for Written Leases

[b] Two-Year Statute of Limitations for Oral Leases

[c] Accrual of Landlord's Cause of Action

§ 141.27 Opposing Contention That Landlord Is Entitled to Damages From Tenant Who Breached Lease and Abandoned Premises--Landlord Has Failed to Make Sufficient Efforts to Mitigate Damages

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Landlord Required to Do Everything Reasonably Possible to Minimize Loss

[b] Landlord Must Act Reasonably, With Due Diligence, and in Good Faith

[c] Reduction of Landlord's Recovery

§ 141.28 Opposing Contention That Landlord Is Entitled to Damages From Tenant Who Breached Lease and Abandoned Premises--Liquidated Damages Provision Is Not Enforceable Because Unreasonable at Time Contract Was Entered Into

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Unreasonable Liquidated Damages Provision Is Invalid

§ 141.29 Opposing Contention That Landlord Is Entitled to Damages From Tenant Who Breached Lease and Abandoned Premises--Liquidated Provision in Residential Lease Is Invalid Because Nature of Case Did Not Make Actual Damages Impractical or Extremely Difficult to Fix

[1] FORM

[2] Comments

[a] Use of Form

§ 141.30 Opposing Contention That Landlord Is Entitled to Damages From Tenant Who Breached Lease and Abandoned Premises--Landlord's Breach of Covenant of Quiet Enjoyment Constituted Constructive Eviction of Tenant, Relieving Tenant of Obligation to Pay Rent

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Covenant of Quiet Enjoyment Implied in Every Lease

[b] Implied Covenant of Quiet Enjoyment Is Mutual and Dependent With Tenant's Covenant to Pay Rent

[c] Implied Covenant of Quiet Enjoyment Not Limited to Physical Possession

[d] Constructive Eviction by Landlord

[e] Premises Must Be Vacated Within a Reasonable Time

[f] Tenant Not Liable for Rent After Constructive Eviction

[g] Premises Were Vacated Within Reasonable Time

[h] Landlord's Harassment Can Constitute Constructive Eviction

[i] Unsanitary Conditions on Premises Retained by Landlord

[4] Additional Authorities

[a] Constructive Eviction by Landlord

[b] Premises Must Be Vacated Within a Reasonable Time

[c] Acts of Harassment by Landlord

§ 141.31 Opposing Contention That Landlord Is Entitled to Damages From Tenant Who Breached Lease and Abandoned Premises--Landlord's Breach of Implied Covenant of Habitability Relieved Residential Tenant of Obligation to Pay Rent

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Implied Warranty of Habitability

[b] Duty to Pay Rent as Mutually Dependent

[c] Constructive Eviction

[d] Utilizing Statutory Repair Remedies Not a Prerequisite

[e] Tenant Liable for Reasonable Rental Value Only

[f] Separate Action by Tenant for Damages Is Permissible

[g] Warranty May Not Be Waived by Tenant

[4] Additional Authorities

[a] Tenant Liable for Reasonable Rental Value Only

§ 141.32 Opposing Contention That Landlord Is Entitled to Damages From Tenant Who Breached Lease and Abandoned Premises--Substantial Destruction of Leased Premises Without Fault of Tenant Ends Tenant's Obligation to Pay Rent

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Tenant's Covenant to Repair as Not Requiring Rebuilding

[b] Nondefaulting Tenant Entitled to Return of Deposit

§ 141.33 Supporting Contention That Lease Should Be Rescinded or Cancelled--Tenant's Material Breach of Mutual and Dependent Covenant Entitles Landlord to Rescission

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Breach of Essential Covenant Entitles Lessor to Rescission or Cancellation

§ 141.34 Supporting Contention That Lease Should Be Rescinded or Cancelled--Landlord's Material Breach of Mutual and Dependent Covenant Entitles Tenant to Rescission

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Breach of Essential Covenant

[4] Additional Authorities

[a] Breach of Essential Covenant

§ 141.35 Opposing Contention That Lease Should Be Rescinded or Cancelled--Any Breach by Tenant Is Not Sufficiently Material to Justify Rescission

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Trivial Breach Does Not Entitle Party to Rescind

§ 141.36 Supporting Contention That Commercial Lessor Has Breached Covenant Not to Lease to Competing Business

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Covenant May Be Express or Implied From Language of Lease

[b] Covenant Not to Compete Not an Unreasonable Restraint of Trade

[c] Covenant Enforceable Against Landlord's Successor in Interest and Successor's Tenant With Notice

[d] Covenant Enforceable Against Activities of Landlord, Successor, or Tenant on Adjacent Property

[e] Tenant Entitled to Injunctive Relief

[f] Tenant Entitled to Recover Damages

[g] Tenant Entitled to Terminate or Rescind Lease

§ 141.37 Opposing Contention That Commercial Lessor Has Breached Covenant Not to Lease to Competing Business--No Covenant Reasonably Inferable From Language of Lease

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Covenant Must Be Reasonably Inferable From Language of Lease

[b] An Ambiguous Covenant Should Be Narrowly Construed as Against Successor of Landlord's Adjacent Property

§ 141.38 Supporting Contention That Rent Control Ordinance Is Unconstitutional--Ordinance Violates Judicial Powers Clause

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Violation of Judicial Powers Clause of State Constitution

[b] Standing to Sue Without Exhausting Administrative Remedies

§ 141.39 Supporting Contention That Rent Control Ordinance Is Unconstitutional--Ordinance That Precludes Fair Return on Landlord's Investment Violates Takings Clause

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Violation of Takings Clause of State Constitution

[4] Additional Authorities

[a] Violation of Takings Clause of State Constitution

§ 141.40 Opposing Contention That Rent Control Ordinance Is Unconstitutional--Administrative Authority Does Not Violate Judicial Powers Clause

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Rent Control Law's Administrative Authority to Determine Whether Landlord Has Charged Excessive Rent Does Not Violate Judicial Powers Clause of State Constitution

§ 141.41 Opposing Contention That Rent Control Ordinance Is Unconstitutional--Ordinance Permitting Consideration of Tenant's Hardship in Setting Rent Levels Is Facially Valid Under Due Process, Equal Protection, and Takings Clauses

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Rent Control Law Permitting Consideration of Tenant Hardship Is Facially Valid Under Constitutional Due Process, Equal Protection, and Takings Clauses

§ 141.42 Opposing Contention That Rent Control Ordinance Is Unconstitutional--Ordinance's Exercise of Police Powers Validly Serves Legitimate Governmental Purpose

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Rent Control Law's Exercise of Police Powers Is Valid in That it Serves Legitimate Governmental Purpose

[b] Rent Control Law's Procedures for Determining Maximum Rents Constitute Valid Exercise of Police Powers

[4] Additional Authorities

[a] Rent Control Law's Procedures for Determining Maximum Rentals Constitute Valid Exercise of Police Powers

§ 141.43 Opposing Contention That Rent Control Ordinance Is Unconstitutional--Ordinance Does Not Conflict With Landlords' Rights to Summary Eviction Procedures

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Rent Control Law Preserves Landlord's Rights to Summary Eviction Procedures

§ 141.44 Opposing Contention That Rent Control Ordinance Is Unconstitutional--Ordinance Basing Rents on Return on Investment Does Not Violate Takings Clause

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Fair Return Standard Constitutional

[4] Additional Authorities

[a] Fair Return Standard Constitutional

§ 141.45 Opposing Contention That Rent Control Ordinance Is Unconstitutional--Ordinance Serves Legitimate Governmental Purpose in Preventing Unreasonable and Excessive Rent Increases

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Rent Control Law's Exercise of Police Powers Is Valid in That it Serves Legitimate Governmental Purpose

[b] Ordinance Serves Legitimate Governmental Purpose in Preventing Unreasonable and Excessive Rent Increases

[4] Additional Authorities

[a] Ordinance Serves Legitimate Governmental Purpose in Preventing Unreasonable and Excessive Rent Increases

§ 141.46 Supporting Contention That Tenant Is Entitled Under Rent Control Ordinance to Refund of Excess Rent [Civ. Code § 1947.11]--Plaintiff Was Tenant With Landlord's Knowledge and Consent--Vacancy Decontrol Provision Inapplicable

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Formal Rental Agreement Not Necessary to Establish Tenancy

[b] Landlord's Knowledge Can Infer Consent to Create Tenancy

[c] Residence at Premises Was Sufficiently Lengthy to Infer Landlord's Consent to Tenancy

§ 141.47 Supporting Contention That Court Should Award Tenant Treble Amount of Excess Rent Paid--Landlord's Violation Was Willful or Intentional

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Court Is Authorized to Award Treble Amount of Excess Rent Paid by Tenant if Landlord's Actions Are Willful or Intentional

§ 141.48 Opposing Contention That Tenant Is Entitled Under Rent Control Ordinance to Refund of Excess Rent [Civ. Code § 1947.11]--Landlord Did Not Consent to Plaintiff's Tenancy--Vacancy Decontrol Provision Applicable

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Landlord's Lack of Knowledge Precludes Finding of Consent to Landlord/Tenant Relationship

[b] Actions of Subterfuge by Alleged Tenant Are Probative of Lack of Knowledge and Consent

§ 141.49 Opposing Contention That Tenant Is Entitled Under Rent Control Ordinance to Refund of Excess Rent [Civ. Code § 1947.11]--Action That Grants Mandatory Penalty to Prevailing Plaintiff Is Barred by One-Year Statute of Limitations [Code Civ. Proc. § 340(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Action Seeking Mandatory Penalty or Forfeiture as Part of Tenant's Remedies Governed by One-Year Statute of Limitations

§ 141.50 Opposing Contention That Tenant Is Entitled to Damages or Penalties--Landlord Was in Substantial Compliance With Ordinance

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Good-Faith Attempt to Comply, and Cure of Defect, Constitutes Substantial Performance

[b] Landlord in Substantial Compliance May Only Be Assessed Tenant's Registration or Filing Fees, and Excess Rent Paid.

§ 141.51 Opposing Contention That Court Should Award Tenant Treble Damages--Only Amount of Out-of-Pocket Damages May Be Trebled

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] "Actual Damages" That May Be Trebled Are Limited to Out-of-Pocket Damages

[b] "Actual Damages" Do Not Include Damages for Mental Suffering

§ 141.52 Opposing Contention That Tenant's Action Under Rent Control Ordinance for Refund of Excess Rent [Civ. Code § 1947.11] Is Barred by One-Year Statute of Limitations [Code Civ. Proc. § 340(a)]--Three-Year Limitations Period Applies [Code Civ. Proc. § 338(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Action Seeking Discretionary Penalty or Forfeiture as Part of Tenant's Remedies Governed by Three-Year Statute of Limitations

§ 141.53 Supporting Contention That Tenant Is Entitled to Damages for Wrongful Eviction--Fraudulent Intent to Occupy [Civ. Code § 1947.10]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Landlord's Failure to Maintain Residence at Premises for Six Continuous Months Permits Finding of Fraud

[b] Finding of Fraud Permits Award to Tenant of Treble Damages and Relocation to Vacated Unit

[c] Finding of Fraud Permits Award to Tenant, Who Elects Not to Move Back to Vacated Unit, of Treble Amount of One Month's Rent and Treble Relocation Costs

§ 141.54 Supporting Contention That Landlord Who Failed to Return Security Deposit and to Provide a Written

Accounting of Deductions to Tenant in a Timely Manner [Civ. Code § 1950.5(g)] Is Entitled to Recover Unpaid Rent and Costs of Cleaning and Repair

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Landlord Who in Good Faith Failed to Return Security Deposit and to Provide a Written Accounting of Deductions in a Timely Manner May Recover Unpaid Rent and Costs of Repairs and Cleaning as Damages in Judicial Proceeding

[b] Amount of Unpaid Rent, Cost of Repairs, or Cost of Cleaning to Be Recovered From Former Tenant Must Be Reasonable

§ 141.55 Opposing Contention That Landlord Who Failed to Return Security Deposit and to Provide a Written Accounting of Deductions to Tenant in a Timely Manner [Civ. Code § 1950.5(g)] Is Entitled to Recover Unpaid Rent and Costs of Cleaning and Repair as Damages

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Landlord Must Show That His or Her Failure to Return Security Deposit and to Provide a Written Accounting of Deductions to Former Tenant in a Timely Manner Was in Good Faith

[b] Landlord Is Not Entitled to Recover Unpaid Rent and Costs of Repairs or Cleaning When Landlord Has Not Shown That the Amounts Are Reasonable

California Points & Authorities

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CHAPTER 141 LANDLORD AND TENANT
PART I. INTRODUCTION

14-141 California Points & Authorities § 141.01

§ 141.01 Scope of Chapter

This chapter contains memoranda of points and authorities for use in supporting [*see §§ 141.20*-141.25] and opposing [*see §§ 141.26*-141.32] a landlord's contentions concerning the proper measure of damages recoverable from a tenant who has breached a lease and abandoned the leased premises; supporting [*see §§ 141.33, 141.34*] and opposing [*see § 141.35*] the contention that a lease should be rescinded; and supporting [*see § 141.36*] and opposing [*see § 141.37*] a contention that a commercial landlord has breached a covenant not to lease to a competitor of his or her tenant.

The chapter also includes forms of memoranda supporting [*see §§ 141.38, 141.39*] and opposing [*see §§ 141.40*-141.45] contentions that rent control ordinances are unconstitutional, supporting [*see §§ 141.46, 141.47*] and opposing [*see §§ 141.48*-141.52] contentions that a tenant is entitled to relief under typical rent control provisions, supporting the contention that a tenant is entitled to relief for wrongful eviction based on a landlord's fraudulent conduct [*see § 141.53*], supporting the contention that a landlord who in good faith failed to return a security deposit and to provide the tenant a written accounting of deductions in a timely manner may recover amounts for unpaid rent, repairs, and cleaning as damages in a judicial proceeding [*see § 141.54*], and opposing the contention that a landlord who failed to return a security deposit and to provide a written accounting of deductions from the deposit in a timely manner is entitled to recover unpaid rent and costs of repairs and cleaning as damages [*see § 141.55*].

For memoranda of points and authorities for use in unlawful detainer actions, see Ch. 236, *Unlawful Detainer* . For points and authorities relating to a landlord's liability for injuries resulting from defects in the premises, see Ch. 178, *Premises Liability* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsBreachGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview

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14-141 California Points & Authorities § 141.02

§ 141.02 Governing Statutes

The relationship of landlords and tenants generally is governed by *Civ. Code §§ 1940-1954.1*. Hiring in general is governed by *Civ. Code §§ 1925-1936.5*, rights of owners and tenants in the land is governed by *Civ. Code §§ 818-827*, and termination of estates is governed by *Civ. Code §§ 789-793*. Rent control is covered in *Civ. Code §§ 1954.25-1954.31* (commercial rent control) and *Civ. Code §§ 1954.50-1954.535* (residential rent control).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantRent RegulationGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview

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14-141 California Points & Authorities § 141.03

§ 141.03 Page Limits on Points and Authorities

Generally, a supporting memorandum must not exceed 15 pages in length, or in the case of a motion for summary judgment or summary adjudication, 20 pages in length. A reply or closing memorandum may not exceed 10 pages in length [*see Cal. Rules of Ct., Rule 3.1113(d)*]. Any party desiring to file a longer memorandum must obtain leave of court [*see Cal. Rules of Ct., Rule 3.1113(e)*]. For further discussion of the page limitations under *Cal. Rules of Ct., Rule 3.1113*, and of other basic format requirements of supporting memoranda, see *Ch. 1, Writing Legal Memoranda and Briefs § 1.01[4]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedureSummary JudgmentGeneral OverviewReal Property LawLandlord & TenantGeneral Overview

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14-141 California Points & Authorities § 141.04

§ 141.04 Related Pleading and Practice Forms

For a discussion and forms of complaints, allegations, affirmative defenses, claims for damages, and demurrers involving landlords and tenants, see California Forms of Pleading and Practice, Chs. 330-335, *Landlord and Tenant* (Matthew Bender).

For discussions and forms for use in particular cases involving landlords and tenants, see the following chapters in that publication:

- Ch. 103, *Brokers*.
- Ch. 117, *Civil Rights: Housing Discrimination*.
- Ch. 122, *Community Property*.
- Ch. 126, *Conspiracy*.
- Ch. 140, *Contracts*.
- Ch. 150, *Conversion*.
- Ch. 247, *Eminent Domain and Inverse Condemnation*.
- Ch. 267, *Fires*.
- Ch. 277, *Gas and Electricity*.
- Chs. 280-290H, *Guardianship and Conservatorship*.
- Ch. 300, *Indemnity and Contribution*.

- Ch. 315, *Irrigation*.
- Ch. 316, *Joint Tenancy and Tenancy in Common*.
- Ch. 340, *Libel and Slander*.
- Ch. 357, *Malicious Prosecution and Abuse of Process*.
- Ch. 363, *Mining*.
- Ch. 393, *Oil and Gas*.
- Ch. 441, *Probate: Disposition Without Administration*.
- Ch. 536, *Subrogation*.
- Ch. 540, *Taxes and Assessments*.
- Ch. 547, *Theaters, Shows, and Amusement Places.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedurePleading & PracticeGeneral OverviewReal Property LawLandlord & TenantGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview

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14-141 California Points & Authorities §§ 141.05- 141.19

[Reserved]

§§ 141.05[Reserved]

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14-141 California Points & Authorities § 141.20

§ 141.20 Supporting Contention That Landlord Is Entitled to Damages From Tenant Who Breached Lease and Abandoned Premises--Unpaid Rent Earned Before Termination, and Rental Value of Premises Minus Avoidable Amount of Loss After Termination Is Proper Amount of Damages

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT TENANT'S BREACH OF THE LEASE AND ABANDONMENT OF THE PREMISES ENTITLES PLAINTIFF LANDLORD TO RECOVER AS DAMAGES THE PRESENT WORTH OF UNPAID RENT TO THE TIME OF TERMINATION OF THE LEASE, AND RENTAL VALUE DAMAGES AFTER THE TERMINATION OF THE LEASE, PURSUANT TO *CIVIL CODE SECTION 1951.2*.

A. Termination of Lease. A lease is terminated if the tenant breaches the lease and abandons the property before the end of the lease term, or if the tenant's right to possession is terminated by the lessor because of a breach of the lease (*Civ. Code § 1951.2(a)*).

B. Damages for Period Prior to Termination. On termination of a lease, a landlord is entitled to recover from the tenant the worth at the time of the award of the unpaid rent that had been earned at the time of termination (*Civ. Code § 1951.2(a)(1), (b)*).

C. Damages for Period From Termination to Time of Award. On termination of a lease, a landlord is entitled to recover from the tenant the worth at the time of the award of the amount by which the unpaid rent that would have been earned after termination until the time of the award, exceeds the amount of that rental loss that the tenant proves could have been reasonably avoided (*Civ. Code § 1951.2(a)(2), (b)*; *California Safety Center, Inc. v. Jax Car Sales (1985) 164 Cal. App. 3d 992, 996-997, 211 Cal. Rptr. 39*).

D. Damages for Period From Time of Award to Expiration of Lease Term. On termination of a lease, a landlord is entitled to recover from the tenant the worth at the time of the award of the amount by which the unpaid rent for the balance of the term after the time of the award, exceeds the amount of such rental loss that the tenant proves could have

been reasonably avoided, but only if the lease so provides or if the landlord shows that he acted reasonably and in a good faith effort to mitigate his damages (*Civ. Code § 1951.2(a)(3), (b), (c)*; *Willis v. Soda Shoppes of California, Inc. (1982) 134 Cal. App. 3d 899, 903-905, 184 Cal. Rptr. 761*).

E. Other Damages. On termination of a lease, a landlord is entitled to recover from the tenant any other amount necessary to compensate the landlord for all the detriment proximately caused by the tenant's failure to perform the obligations under the lease, or which in the ordinary course of things would be likely to result from the tenant's failure to perform (*Civ. Code § 1951.2(a)(4)*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention by a landlord that he is entitled to damages both prior and subsequent to the termination of a lease.

Counsel should insert argument in the above form, showing the relationship between the facts of the case and the points of law stated. For example, counsel may insert facts showing when a termination of the lease occurred, and the amounts owing to the landlord both before and after the lease's termination.

NOTE:
Civ. Code § 1951.2 does not apply to leases executed before July 1, 1971.

[b] Related Pleading and Practice Forms

For forms of complaint for damages based on a tenant's breach of a lease and abandonment of the premises, see California Forms of Pleading and Practice, Ch. 332, *Landlord and Tenant: The Tenancy* , and Ch. 334, *Landlord and Tenant: Claims for Damages* (Matthew Bender).

[3] Discussion of Authorities

[a] Termination of Lease

Civ. Code § 1951.2(a) provides that, except as otherwise provided in *Civ. Code § 1951.4*, if a tenant breaches a lease and abandons the property before the end of the lease term, or if a tenant's right to possession is terminated by the lessor because of a breach of the lease, the lease is terminated, and the landlord is entitled to recovery of damages as set forth in *Civ. Code § 1951.2(a)(1)-(4), (b)*, and *(c)*.

[b] Damages for Period Prior to Termination

Civ. Code § 1951.2(a)(1) entitles a landlord to recover from a tenant who has breached the lease and is no longer in possession of the premises the worth, at the time of the award, of the unpaid rent that had been earned up to the time the lease was terminated. *Civ. Code § 1951.2(b)* provides that the "worth at the time of award" is computed by allowing interest at a lawful rate as provided in the lease, or at the legal rate if none is specified, from the time it becomes due until the award.

[c] Damages for Period From Termination to Time of Award

Civ. Code § 1951.2(a)(2) entitles a landlord to recover from a tenant who has breached the lease and is no longer in possession of the premises the worth, at the time of the award, of the amount by which the unpaid rent that would have been earned after termination until the time of the award, exceeds the amount of that rental loss that the tenant proves could have been reasonably avoided. *Civ. Code § 1951.2(b)* provides that the "worth at the time of award" is computed by allowing interest at a lawful rate as provided in the lease, or at the legal rate if none is specified, from the time it becomes due until the award.

In ***California Safety Center, Inc. v. Jax Car Sales*** *(1985) 164 Cal. App. 3d 992, 211 Cal. Rptr. 39* , the landlord prevailed in an unlawful detainer action, and then brought an action to recover damages covering the remainder of the term up until the time the premises were relet. The trial court originally awarded damages that included rent from the time of the unlawful detainer action until the time the premises were relet, but granted the lessee's motion for judgment notwithstanding the verdict and awarded as damages only the amounts incurred in reletting the premises, based on its interpretation of the phrase "at the time of the award" in *Civ. Code § 1951.2* to mean the time of the award in the unlawful detainer action. The landlord appealed, and the court of appeal reversed.

The court of appeal held that the statutory language was intended to refer to the date of the award in the action for damages, not the time that the landlord prevailed in an unlawful detainer action. The court based its interpretation both on the language of the statute, which it found would be meaningless if it permitted damages only from the time a lease is terminated by an unlawful detainer judgment, to the time of the unlawful detainer award, as well as the legislative purpose described in *Sanders Construction Co. v. San Joaquin First Fed. Sav. & Loan Assn. (1982) 136 Cal. App. 3d 387, 398-399, 186 Cal. Rptr. 218* , as the abrogation of the common-law rule that the lessee's obligation to pay rent depends on the continued existence of the term (*164 Cal. App. 3d 992, 996-999)* . The court concluded that, in enacting *Civ. Code § 1951.2*, the Legislature intended that alandlord's right to recover damages for loss of the benefits of the lease should be independent of the right to bring an unlawful detainer action to recover possession, as expressly provided in *Code Civ. Proc. § 1174.5* (*164 Cal. App. 3d 992, 997)* .

[d] Damages for Period After Termination Up to Expiration of Lease Term

Civ. Code § 1951.2(a)(3) entitles a landlord to recover the worth, at the time of the award, of the amount by which the unpaid rent for the balance of the term after the time of the award exceeds the amount of the rental loss that the tenant proves could have been reasonably avoided. However, *Civ. Code § 1951.2(c)(1)* and *(2)* state that a landlord may recover for this period of time only if the lease specifically provides for such a recovery, or if the landlord shows that he or she acted reasonably and in a good faith effort to mitigate damages. Instead of entitlement to interest at a lawful interest rate provided in the lease, or at the legal rate, *Civ. Code § 1951.2(b)* provides that "the worth at the time of award" for a recovery under *Civ. Code § 1951.2(a)(3)* is computed by discounting the amount at the discount rate of the Federal Reserve Bank of San Francisco at the time of the award plus 1 percent. The Law Revision Commission Comment to *Civ. Code § 1951.2* states that the discounted rate is to reflect prepayment.

Willis v. Soda Shoppes of California, Inc. *(1982) 134 Cal. App. 3d 899, 184 Cal. Rptr. 761* , was an action by landlords to recover accrued rent and consequential damages after the tenant's abandonment of commercial premises. After the abandonment, the landlords relet the property with an increase in rent. The trial court held that the lessors were entitled to recover damages from the lessee, but were required to offset the increased rental received and promised

under the new lease against the amounts owing by the original tenant for the balance of the lease term. The lessor appealed.

The court of appeal affirmed, holding that the offset was proper under *Civ. Code § 1951.2(a)* (*134 Cal. App. 3d 899, 904-905)* . However, the court stated that if the excess rent received exceeds the landlord's damages, the tenant cannot profit from his own wrong and recover the amount of the excess from the landlord; in reality, the "offset" is merely the manner of computing the detriment suffered by the plaintiff, and if the lessor has received an amount greater than the amount that would have been due under the lease, the lessor has not been damaged and cannot recover any amount from the lessee (*134 Cal. App. 3d 899, 905)* .

For points and authorities concerning "the amount of such rental loss that the (tenant) proves could be reasonably avoided" [*Civil Code § 1951.2(a)(3), (c)(2)*], and concerning whether the landlord "acted reasonably and in a good-faith effort to mitigate his damages" [*Civil Code § 1951.2(a)(3), (c)(1)*], see *§ 141.21*.

[e] Other Damages

Civ. Code § 1951.2(a)(4) provides that, on termination of a lease, a landlord is entitled to recover from the tenant any other amount necessary to compensate the landlord for all the detriment proximately caused by the tenant's failure to perform its obligations under the lease, or which in the ordinary course of things would be likely to result therefrom.

[4] Additional Authorities

[a] Termination of Lease

Adler v. Elphick (1986) 184 Cal. App. 3d 642, 649, 229 Cal. Rptr. 254 , involved a property owner's action for unlawful detainer against a tenant who refused to vacate her apartment after the building was sold and the owner served an eviction notice. After the trial court ruled that the tenant's attempt to raise an affirmative defense could not prevent the eviction under the circumstances, the tenant objected to the trial court's jury instruction that did not limit the damages for withholding possession of the property to the rent established by the applicable rent control ordinance. The court of appeal held that the instruction was proper, because losses sustained after termination of the tenancy are considered to be damages (in the amount of the reasonable value of the use of the premises) rather than rent; therefore, the rent limits are not applicable to those damages (*184 Cal. App. 3d 642, 649-650)* .

[b] Other Damages

In *Worthington v. Kaiser Foundation Health Plan, Inc. (1970) 8 Cal. App. 3d 435, 87 Cal. Rptr. 272* , the lease required the tenant to return the premises to their pre-lease condition at the end of the lease term. When the tenant vacated the premises, the landlord was required to spend three months to restore the premises. The court of appeal affirmed the trial court's award of damages in the amount of the rental value during those three months, in addition to the expenses of the restoration itself (*8 Cal. App. 3d 435, 442)* .

In *Lu v. Grewal (2005) 130 Cal. App. 4th 841, 30 Cal. Rptr. 3d 623* , after defendant tenants abandoned a gas station leased from the plaintiff, the plaintiff operated the business and turned a profit. The plaintiff attempted to lease or sell the property, but was unsuccessful. Plaintiff sued the tenants for unpaid rent and other damages as a result of their breach of the lease. The trial court entered judgment for the defendants, finding that plaintiff suffered no damages because she and her husband occupied the premises, managed to run the business at a profit, and mitigated damages well above the amount of damages owed by the defendants. The court of appeal reversed, holding that the proper measure of mitigation credit was the fair market rental value of the property (*130 Cal. App. 4th 841, 849-850)* . It reasoned that, just as a landlord, after the enactment of *Civ. Code 1951.2*, has no obligation to re-lease the property for the benefit of the tenant to recover lost rent, that landlord has no obligation to run the business on the property for the tenant's benefit (*130 Cal. App. 4th 841, 850)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawGeneral OverviewReal Property LawLandlord & TenantGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsBreachGeneral OverviewReal Property LawLandlord & TenantLease AgreementsDamagesGeneral Overview

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14-141 California Points & Authorities § 141.21

§ 141.21 Supporting Contention That Landlord Is Entitled to Damages From Tenant Who Breached Lease and Abandoned Premises--Landlord's Efforts to Mitigate Damages Were Sufficient

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE LANDLORD'S EFFORTS TO MITIGATE THE DAMAGES RESULTING FROM THE TENANT'S BREACH WERE PROPER AND SUFFICIENT TO SUPPORT THE LANDLORD'S RECOVERY OF DAMAGES

A. Tenant Has Burden of Proving That Landlord's Mitigation Efforts Were Insufficient. The burden of proof is on a tenant to show that the landlord has failed to make sufficient efforts to mitigate rental loss damages, by showing that landlord's alleged rental losses could have been reasonably avoided (*Civ. Code § 1951.2(a)(2), (a)(3), (c)(1)*; *Sebastian International, Inc. v. Peck (1987) 195 Cal. App. 3d 803, 810-811, 240 Cal. Rptr. 911*).

B. Reasonable Mitigation Efforts. A landlord injured by a tenant's breach of contract is required to do everything reasonably possible to minimize his or her loss, in reduction of the damages to which the tenant has become liable. It is sufficient if the landlord acts reasonably, and with due diligence, in good faith (*Brandon & Tibbs v. George Kevorkian Accountancy Corp. (1990) 226 Cal. App. 3d 442, 460, 277 Cal. Rptr. 40* ; *Green v. Smith (1968) 261 Cal. App. 2d 392, 396-397, 67 Cal. Rptr. 796* ; Legislative Committee Comment, *Civ. Code § 1951.2*).

[*Optional*] **C. Alternative Means of Mitigating Damages Acceptable.** The fact that reasonable measures other than those taken by a landlord would have further reduced or avoided landlord's damage, is not, in and of itself, proof of the fact that the measures taken, though unsuccessful, were unreasonable. If a choice of two reasonable courses of action present themselves, the tenant whose wrong forced the choice cannot complain that one measure rather than the other is chosen (*Green v. Smith (1968) 261 Cal. App. 2d 392, 396-397, 67 Cal. Rptr. 796* ; Legislative Committee Comment, *Civ. Code § 1951.2*).

[*Optional*] **D. Landlord's Efforts to Mitigate Damages Do Not Waive Rights to Recover Statutory Damages.** Efforts by a landlord to mitigate damages caused by a tenant's breach of lease do not waive a landlord's right to recover

damages under *Civil Code Section 1951.2* (*Civ. Code § 1951.2(d)*).

[*Optional*] **E. Landlord Not Required to Negotiate Another Lease With Defaulting Tenant.** A landlord's obligation to make sufficient efforts to mitigate damages does not require a landlord to mitigate damages by negotiating another lease, at a lesser rental, with a defaulting tenant (*Zanker Development Co. v. Cogito Systems Corp. (1989) 215 Cal. App. 3d 1377, 1382, 264 Cal. Rptr. 76*).

[*Optional*] **F. Landlord Entitled to Recover Mitigation Costs.** A party's expenses incurred in mitigation efforts may be recovered as damages (*Brandon & Tibbs v. George Kevorkian Accountancy Corp. (1990) 226 Cal. App. 3d 442, 461, 277 Cal. Rptr. 40*).

[*Optional*] **G. Landlord Entitled to Recover Additional Losses Caused by Mitigation Efforts.** An injured party may recover additional losses resulting from the party's reasonable efforts to mitigate damages (*W.C. Cook & Co. v. White Truck etc. Co. (1932) 124 Cal. App. 721, 727, 13 P.2d 549*).

[*Optional*] **H. Landlord May Sell Property to Mitigate Losses.** A landlord may sell the property following the tenant's abandonment to avoid further loss of rental revenue, and may recover rental loss accruing after the date of sale as well as the costs of selling the property (*Millikan v. American Spectrum Real Estate Services California, Inc. (2004) 117 Cal. App. 4th 1094, 1100, 12 Cal. Rptr. 3d 459*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that a landlord has made efforts to mitigate damages incurred due to a breach by the landlord's tenant that are sufficient to support an award of damages. Optional paragraphs C through H may be used as appropriate to respond to contentions by the tenant regarding the landlord's entitlement to a specific aspect of mitigation damages.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, counsel may discuss the nature of and the results from various efforts by the landlord tomitigate his or her damages, and should argue that the tenant has not proven that any of the landlord's losses could have been reasonably avoided.

[b] Related Pleading and Practice Forms

For related forms, see California Forms of Pleading and Practice, Ch. 334, *Landlord and Tenant: Claims for Damages* (Matthew Bender).

[3] Discussion of Authorities

[a] Tenant Has Burden of Proving That Landlord's Mitigation Efforts Were Insufficient

Sebastian International, Inc. v. Peck *(1987) 195 Cal. App. 3d 803, 240 Cal. Rptr. 911* , was an action in which a sublessor sued the personal guarantor of the defaulting subtenant for the damages caused by the subtenant's default. The evidence showed that the sublessor had attempted to sublease the premises again for the remainder of the lease term, but that the master landlord refused to consent to another sublease. The trial court granted the sublessor's motion for summary judgment over the defendant's objection that the sublessor had a duty to mitigate the damages, and the court of appeal affirmed.

The court stated that the defendant misconceived both the duty to mitigate, and the burden of proof relating to that duty. The court pointed out that *Civ. Code § 1951.2* specifically places the burden of proving that damages are reasonably avoidable on the tenant, and the amount of those reasonably avoidable damages, before the tenant is entitled to have those amounts deducted from the damages award (*195 Cal. App. 3d 803, 810)* . Because the defendant (who stood in the shoes of the tenant as a result of the guaranty agreement) did not submit any evidence that the sublessor's attempts to mitigate damages were unreasonable under the circumstances, the grant of the summary judgment was proper (*195 Cal. App. 3d 803, 811)* .

[b] Reasonable Mitigation Efforts

Brandon & Tibbs v. George Kevorkian Accountancy Corp. *(1990) 226 Cal. App. 3d 442, 277 Cal. Rptr. 40* , was a breach of contract action brought by a purchaser of an accountancy practice against the seller. After the defendant refused to permit plaintiff to enter the premises, plaintiff opened another accountancy office in the same building as defendant's, and sought to recover as damages the losses incurred by that office as well as lost profits. The trial court awarded plaintiff these damages, and defendant appealed.

The court of appeal affirmed the judgment, holding that the lost profits as established by the plaintiff were properly awarded, that the expenses plaintiff incurred in opening the new practice after defendant's breach were also recoverable, and rejected the defendant's contention that the plaintiff's efforts to mitigate its lost profits damages were unreasonable. The defendant had argued that plaintiff should have purchased an existing practice to mitigate its damages instead of opening its own practice, which was likely to lose money for a certain amount of time at the beginning of the practice. The court held that the trial court may well have considered the difficulty involved in negotiating the sale involved in the case before it in finding plaintiff's conduct reasonable, and that the conclusion that the plaintiff made sufficient reasonable efforts in mitigation was supported by the evidence (*226 Cal. App. 3d 442, 460-461)* .

In ***Green v. Smith*** *(1968) 261 Cal. App. 2d 392, 396-397, 67 Cal. Rptr. 796* , an owner of ornamental nursery trees sought damages for crop loss caused by the defendant's destruction of an irrigation ditch. Although the plaintiff had taken steps to mitigate his damages, the trial court determined that the plaintiff could have avoided all crop losses, at a cost of not more than $600.00, by pursuing any one of five mitigation alternatives suggested by defendant.

The appellate court reversed the lower court ruling and held that, as a matter of law, the plaintiff met his duty of acting reasonably to mitigate his damages at the time the loss was threatened. The court found it irrelevant that in hindsight, the plaintiff could have taken alternative measures suggested by the defendant to further reduce the damages incurred. The court declared that if a choice of two reasonable courses of action presents itself, the party whose wrong forced the choice cannot complain that one rather than the other course is chosen. In addition, the injured party is not required to take measures that are impractical, or that would involve expenditures disproportionate to the loss sought to be avoided, or that may be beyond the party's financial means (*261 Cal. App. 2d 392, 396-398)* .

[c] Landlord Not Required to Negotiate Another Lease With Defaulting Tenant

In ***Zanker Development Co. v. Cogito Systems Corp.*** *(1985) 215 Cal. App. 3d 1377, 264 Cal. Rptr. 76* , a landlord

brought a legal action against its tenant and tenant's guarantors for damages caused by defendant's breach of a lease. After the landlord had obtained an unlawful detainer judgment against the tenant and the tenant had vacated the premises, the tenant offered to reoccupy the premises under a new rental agreement "on other terms and conditions." The trial court granted the landlord's motion in limine excluding evidence of this offer, and awarded damages without considering the tenant's offer as evidence of mitigation of damages.

The appellate court affirmed the lower court ruling that evidence of offers by tenant to stay on all or part of the leased premises under different terms and conditions was irrelevant and inadmissible on the issue of mitigation. Relying on ***Green v. Smith*** *(1968) 261 Cal. App. 2d 392, 396-397, 67 Cal. Rptr. 796* , theappellate court explained that the tenant and guarantors failed to offer any evidence that landlord's efforts to lease property to a new tenant were unreasonable, and that in light of the plaintiff's sufficient efforts to mitigate the damages there was no requirement that the landlord accept the evicted tenant's offer to relet the property on terms and condition different than those provided for by the original lease (*215 Cal. App. 3d 1377, 1381-1382)* .

[d] Landlord Entitled to Recover Mitigation Costs

The facts and procedural background of ***Brandon & Tibbs v. George Kevorkian Accountancy Corp.*** *(1990) 226 Cal. App. 3d 442, 277 Cal. Rptr. 40* , are discussed in *§ 141.21[3][b]*. In that case, the court ruled that reasonable expenses incurred in a good faith attempt to mitigate damages are recoverable even if the effort to mitigate fails (*226 Cal. App. 3d 442, 461)* .

[e] Landlord Entitled to Recover Additional Losses Caused by Mitigation Efforts

In ***W.C. Cook & Co. v. White Truck and Transfer Co.*** *(1932) 124 Cal. App. 721, 13 P.2d 549* , plaintiff's shipment of dried figs and fig paste were damaged by rain during shipment by defendant. Plaintiff spent some $447 reconditioning a damaged portion of the shipment, and the trial court included this amount in the damages award. Defendant appealed, arguing that those expenses were an improper element of damages.

The court of appeal affirmed the judgment. The court held that, if in forestalling injury, the party against whom the breach is committed incurs expenses that he or she would not otherwise have incurred, and thereby succeeds in preventing a still greater loss, such expense, if made in good faith, becomes an item of damages that the injured party is entitled to recover (*124 Cal. App. 721, 727)* .

[f] Landlord May Sell Property to Mitigate Losses

In ***Millikan v. American Spectrum Real Estate Services California, Inc.*** *(2004) 117 Cal. App. 4th 1094, 12 Cal. Rptr. 3d 459* , the landlord was unable to re-lease commercial property following abandonment of the property by the tenant. The landlord sold the property, thereby incurring a prepayment penalty on the loan, a sales commission, and miscellaneous closing costs.

The court of appeal held that the trial court properly awarded selling expenses of $141,491 to the landlord as consequential damages in its breach of contract action against the tenant (*117 Cal. App. 4th 1094, 1105-1106)* . The court held that following abandonment, the landlord's sale of the property does not constitute breach of the duty to mitigate provided the trier of fact finds a sale to be a reasonable means to avoid further loss of rental revenue. Accordingly, the landlord retains the right to claim rental loss accruing after the date of sale, except to the extent the breaching tenant can prove the rental loss was avoidable, together with consequential damages including the landlord's selling expenses (*117 Cal. App. 4th 1094, 1104)* . The court held that the trial court had sufficient evidence from which it could find that sale of the building was a reasonably foreseeable consequence of the tenant's breach. The tenant was in the business of leasing, selling, and managing real estate, and it had leased the entire building. From this fact, and from the tenant's special training and experience in leasing, selling, and managing real estate, the trial court could reasonably

infer that the tenant had reason to know that the landlord would not be able to bear the burden of a vacant building indefinitely, and that at some point it was reasonably probable the landlord would elect to sell the building to stem further losses (*117 Cal. App. 4th 1094, 1105)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsBreachGeneral OverviewReal Property LawLandlord & TenantLease AgreementsDamagesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsDamagesMitigation

California Points & Authorities

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 141 LANDLORD AND TENANT
PART II. FORMS

14-141 California Points & Authorities § 141.22

§ 141.22 Supporting Contention That Landlord Is Entitled to Damages From Tenant Who Breached Lease and Abandoned Premises--Rent Due Under Lease Is Proper Amount of Recoverable Damages Because Provision in Lease Permitted Landlord to Continue Lease in Effect After Breach and Abandonment

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PURSUANT TO *CIVIL CODE SECTION 1951.4*, PLAINTIFF LANDLORD WAS ENTITLED TO MAINTAIN THE LEASE IN EFFECT AFTER THE TENANT BREACHED THE LEASE AND ABANDONED THE PREMISES, AND TO RECOVER RENTAL DAMAGES AS THE RENT BECOMES DUE UNDER THE LEASE.

A. Lease Must Provide That Landlord May Maintain Lease in Effect. If the lease so provides, and also permits the tenant to sublet the premises or to assign the lease subject only to reasonable limitations, the landlord may elect not to terminate the tenant's right to possession after the tenant has breached the lease and abandoned the premises, but to maintain the lease in effect and to recover rental damages as they become due under the lease (*Civ. Code § 1951.4(a), (b)*).

[*EITHER*]

B. Lease Permits Tenant to Sublet, Assign, or Both. The landlord may elect the remedy of *Civil Code Section 1951.4* to maintain the lease in effect, because the lease _____ [permits *or* does not prohibit or otherwise restrict the right of] the tenant to sublet the property, assign the lease, or both (*Civ. Code § 1951.4(b)(1)*).

[*OR*]

B. Lease Permits Tenant to Sublet, Assign, or Both, Subject to ReasonableStandards or Conditions. The landlord may elect the remedy of *Civil Code Section 1951.4* to maintain the lease in effect, because the lease permits the tenant

to sublet the premises, assign the lease, or both, subject to express standards or conditions, and those standards are reasonable (*Civ. Code § 1951.4(b)(2)*).

[*OR*]

B. Lease Permits Tenant to Sublet, Assign, or Both, Subject to Consent Not to Be Unreasonably Withheld. The landlord may elect the remedy of *Civil Code Section 1951.4* to maintain the lease in effect, because the lease permits the tenant to sublet the premises, assign the lease, or both, subject to the landlord's consent, which cannot be unreasonably withheld (*Civ. Code § 1951.4(b)(3)*; *Kendall v. Ernest Pantana, Inc. (1985) 40 Cal. 3d 488, 498, 220 Cal. Rptr. 818, 709 P.2d 837*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention by a landlord that he or she is entitled to damages under a lease, after a tenant has breached the lease and abandoned the premises. The memorandum argues that the landlord was entitled to treat the lease as continuing, and therefore is entitled to recover rent as it becomes due, pursuant to *Civ. Code § 1951.4*.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing that the lease entitles the landlord to proceed pursuant to *Civ. Code § 1951.4*, including providing that the tenant may sublet the premises or assign the lease as required by the statute.

[b] Related Pleading and Practice Forms

For related forms, see California Forms of Pleading and Practice, Ch. 334, *Landlord and Tenant: Claims for Damages* (Matthew Bender).

[3] Discussion of Authorities

[a] Lease Must Provide That Landlord May Maintain Lease in Effect

Civ. Code § 1951.4(a) provides that if a lease provides for this remedy, a landlord may elect, after a breach and abandonment by a tenant, to continue the lease in effect and to collect rental amounts as they become due under the lease. The primary effect of *Civ. Code § 1951.4* is to require the tenant, rather than the landlord, to bear the burden of mitigating damages by subletting or assigning the lease [*see* Cal. L. Revision Comm'n Comment to *Civ. Code § 1951.4*].

The remedy of *Civ. Code § 1951.4* is not available if the landlord evicts the tenant, thereby terminating the lease; in such a case, the landlord may only proceed under *Civ. Code § 1951.2* [Cal. L. Revision Comm'n Comment to *Civ. Code § 1951.4*].

[b] Lease Must Provide That Tenant May Sublet or Assign Lease

The remedy under ***Civ. Code § 1951.4*** may only be used if a lease permits a tenant to sublet the premises or to assign the lease in accordance with *Civ. Code § 1951.4(b)(1), (b)(2),* or *(b)(3).*

[c] Lease Permits Tenant to Sublet, Assign, or Both

Civ. Code § 1951.4(b)(1) provides that a landlord may elect the remedy of *Civ. Code § 1951.4* to maintain a lease in effect, if the lease permits, or does not prohibit or otherwise restrict the right of a tenant to sublet the property, assign the lease, or both.

[d] Lease Permits Tenant to Sublet, Assign, or Both, Subject to Reasonable Standards or Conditions

Civ. Code § 1951.4(b)(2) provides that a landlord may elect the remedy of *Civ. Code § 1951.4* to maintain a lease in effect, if the lease permits the tenant to sublet the premises, assign the lease, or both, subject to express standards or conditions, provided that they are reasonable as of the time the lease was executed, and provided that the landlord does not require compliance with any standard or condition that has become unreasonable at the time that the tenant seeks to sublet or assign. For purposes of this statute, an express standard or condition is presumed to be reasonable for burden of proof purposes.

[e] Lease Permits Tenant to Sublet, Assign, or Both, Subject to Consent Not to Be Unreasonably Withheld

Civ. Code § 1951.4(b)(3) provides that a landlord may elect the remedy of *Civ. Code § 1951.4* to maintain a lease in effect, if the lease permits a tenant to sublet the premises, assign the lease, or both, subject to a landlord's consent not to be unreasonably withheld, or if the lease includes a standard implied in law that consent should not be unreasonably withheld.

Kendall v. Ernest Pantana, Inc. *(1985) 40 Cal. 3d 488, 220 Cal. Rptr. 818, 709 P.2d 837* , was an action by a commercial tenant for declaratory and injunctiverelief and damages against a landlord who refused to consent to an assignment of the lease desired by the tenant. The lease merely provided that any sublease or assignment must have the landlord's consent. The trial court sustained the landlord's demurrer without leave to amend and dismissed the complaint. The tenant appealed, and the California Supreme Court reversed.

The Court held that a landlord's refusal to consent to a sublease or assignment must have a commercially reasonable basis (*40 Cal. 3d 488, 498)* . The Court based this holding on the traditional legal hostility to restraint on alienation (*40 Cal. 3d 488, 498-500)* , and on the rule that every contract, including leases, includes an implied covenant of good faith and fair dealing (*40 Cal. 3d 488, 500)* . The Court gave the following examples of factors relevant to the determination whether a landlord's refusal to consent was reasonable: the financial responsibility of proposed assignees or subtenants, the suitability and legality of the prospective use for the particular property, the nature of the occupancy, and any need for alteration of the premises. The Court also stated that a refusal to consent based on personal taste or sensibilities were not commercially reasonable factors (*40 Cal. 3d 488, 501)* .

[4] Additional Authorities

[a] Lease Permits Tenant to Sublet, Assign, or Both, Subject to Consent Not to Be Unreasonably Withheld

In *Carma Developers (Cal.), Inc. v. Marathon Development California, Inc. (1992) 2 Cal. 4th 342, 6 Cal. Rptr. 2d*

467, 826 P.2d 710 , the California Supreme Court considered a commercial lease provision that granted to the landlord the absolute right to terminate the lease on the tenant's request to sublet the premises. It was undisputed that the landlord exercised its right of termination in order to realize the appreciated market value. The Court held that the provision was enforceable, and was not subject to a reasonableness test (*2 Cal. 4th 342, 351)* . The Court based this conclusion in part on its conclusion that the policy against restraints on alienation is less applicable to leasehold interests than it is to fee interests, and that the termination clause before it was in any event a reasonable provision that precluded a tenant from profiting from increased rental values (*2 Cal. 4th 342, 361-362)* . The Court also noted that the termination provision did not affect the lease provision permitting the remedies provided by *Civ. Code § 1951.4*, because on termination of the lease the tenant is no longer under any obligations under the lease (*2 Cal. 4th 342, 365-366)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsBreachGeneral OverviewReal Property LawLandlord & TenantLease AgreementsDamagesGeneral Overview

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CHAPTER 141 LANDLORD AND TENANT
PART II. FORMS

14-141 California Points & Authorities § 141.23

§ 141.23 Supporting Contention That Landlord Is Entitled to Damages From Tenant Who Breached Lease and Abandoned Premises--Liquidated Damages Provision in Lease Is Valid and Enforceable

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE LIQUIDATED DAMAGES PROVISION IN THE LEASE IS VALID AND ENFORCEABLE, BECAUSE DAMAGES WOULD HAVE BEEN IMPRACTICABLE OR EXTREMELY DIFFICULT TO FIX, AND THE PROVISION WAS REASONABLE AT THE TIME THE LEASE WAS ENTERED INTO.

A. Liquidated Damages Clauses in Leases Governed by Contract Law. *Civil Code Section 1671*, covering liquidated damages provisions in contracts generally, governs liquidated damages provisions in real property leases (*Civ. Code § 1951.5*).

[*EITHER*]

B. Liquidated Damages Provision in Lease for Residential Dwelling Is Valid if Actual Damages Are Impracticable or Extremely Difficult to Determine. A provision in a lease liquidating damages for breach is valid in favor of landlord seeking enforcement of the provision, when the parties have agreed in the lease on an amount that will be presumed to be the amount of damage sustained by a breach because, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage (*Civ. Code § 1671(c)(2), (d)*).

[*OR*]

B. Liquidated Damages Provision Is Valid Unless Provision Was Unreasonable When Contract Was Made. A provision liquidating the damages for breach of a contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made (*Civ.*

Code § 1671(b)).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that a provision for liquidated damages is enforceable under *Civ. Code § 1671*. The first alternate Paragraph B is for use if the lease is of real property for use as a dwelling by the party or by those dependent on the party for support; the second alternate Paragraph B is for use in cases involving other types of leases, in which only the reasonableness of the provision is considered.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, counsel for a landlord seeking to recover liquidated damages based on a provision in a lease of real property for use as a dwelling by the party or by those dependent on the party for support should discuss facts showing that actual damages would be impracticable or extremely difficult to fix.

[b] Related Pleading and Practice Forms

For related forms, see California Forms of Pleading and Practice, Ch. 334, *Landlord and Tenant: Claims for Damages* (Matthew Bender).

[3] Discussion of Authorities

[a] Liquidated Damages Provision in Lease for Residential Dwelling Is Valid if Actual Damages Are Impracticable or Extremely Difficult to Determine

Civ. Code § 1671(d) provides that, in a case involving a party to a lease of real property for use as a dwelling by the party or by those dependent on the party for support, a provision in a contract liquidating damages for the breach of the contract is void except that the parties to such a contract may agree in the contract to an amount that shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage [*see also Civ. Code § 1671(c)(2)* (excepting residential lease contracts from more general rule of interpretation set forth in *Civ. Code § 1671(b)*)].

[b] Liquidated Damages Provision Is Valid Unless Provision Was Unreasonable When Contract Was Made

Civ. Code § 1671(b) provides that, except as provided in *Civ. Code § 1671(c)* (discussed in *§ 141.23[3][a]*), a provision in a contract liquidating the damages for the breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsBreachGeneral OverviewReal Property LawLandlord & TenantLease AgreementsDamagesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsDamagesLiquidated Damages

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14-141 California Points & Authorities § 141.24

§ 141.24 Supporting Contention That Landlord Is Entitled to Damages From Tenant Who Breached Lease and Abandoned Premises--Any Breach by Landlord Was Independent of Tenant's Covenant to Pay Rent

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE ALLEGED BREACH BY LANDLORD OF AN INDEPENDENT COVENANT DOES NOT JUSTIFY THE TENANT'S BREACH OF THE COVENANT TO PAY RENT, BECAUSE ANY BREACH BY THE LANDLORD WAS INDEPENDENT OF THE TENANT'S COVENANT TO PAY RENT.

A. Covenants Are Presumed to Be Mutually Independent. Covenants in leases are mutually independent unless a lease or statute expressly or impliedly makes them conditional (*Goldsmith v. Tub-O-Wash (1962) 199 Cal. App. 2d 132, 138, 18 Cal. Rptr. 446*).

B. Breach of Independent Covenant Does Not Justify Refusal to Pay Rent. The breach of an independent covenant on the part of a landlord does not justify a tenant's refusal to perform the covenant to pay rent (*Exchange Securities Co. v. Rossini (1919) 44 Cal. App. 583, 586, 186 P. 828*).

[*Optional*] **C. Landlord's Covenant to Repair Normally Is Independent.** A covenant to repair on the part of a landlord and a covenant to pay rent on the part of a tenant are normally independent covenants, so that a breach of the former does not normally justify the refusal on the part of the tenant to perform the latter (*Hosang v. Minor (1962) 205 Cal. App. 2d 269, 272, 22 Cal. Rptr. 794*).

[*Optional*] **D. In Order to Treat Covenant to Repair as Dependent With Covenant to Pay Rent, Tenant Must Meet the Statutory Standards of *Civil Code Section 1942*.** A tenant may invoke *Civil Code Section 1942* to vacate the premises and to discontinue paying rent or, in the alternative, to apply rental payments to repair the dilapidations, only if the repairs that the tenant requested the landlord to make rendered the premises untenantable (*Civ. Code §§ 1941, 1941.1, 1941.2, 1942*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a landlord's action for rent, if the tenant asserts that the landlord's breach of a covenant excused his or her payment of rent.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts tending to show that the covenants are independent, based on the lease's provisions and circumstances. If the tenant has asserted that the landlord has breached the covenant to maintain residential premises in a tenantable condition, counsel should discuss facts tending to show that any breach by the landlord did not render the premises untenantable.

[3] Discussion of Authorities

[a] Covenants Are Presumed to Be Mutually Independent

In ***Goldsmith v. Tub-O-Wash*** *(1962) 199 Cal. App. 2d 132, 18 Cal. Rptr. 446* , the landlord had leased to the tenants the entire ground floor of a building. Tenants wished to convert the premises to a self-service launderette and began remodeling. Subsequently, a building inspector found that certain work would have to be performed before a license for the operation of the business could be granted. Landlord had covenanted to make requisite repairs to the roof and exterior walls, and this was related to the corrections required by the building inspector. Landlord had indicated her willingness to perform the necessary repairs. However, defendants refused to continue their work of alteration and repair unless the landlord first performed all of the work called for in the agreement. Landlord agreed to do the work, provided that the tenants performed first, but the tenants instead abandoned the project entirely. The landlord sued for money due under the lease, for damages for breach of contract, and for declaratory relief. The tenant defendants answered denying liability and any breach of the lease, and cross complained for damages resulting from the landlord's alleged breach. The trial court denied the tenants' motion for a judgment on the pleadings, and after a trial without a jury, the court entered judgment for the landlord.

The court of appeal affirmed the judgment of the trial court in favor of the landlord. The court held that covenants in a lease are mutually independent unless the lease expressly or impliedly makes them conditional. There was nothing in the lease to indicate that the parties intended to make the landlord's covenant to repair the roof and exterior walls a condition precedent for the performance of the tenants' obligation to pay rent. Thus, the tenants were liable for breach of the agreement (*199 Cal. App. 2d 132, 137-138)* .

[b] Breach of Independent Covenant Does Not Justify Refusal to Pay Rent

Exchange Securities Co. v. Rossini *(1919) 44 Cal. App. 583, 186 P. 828* , was an action by a landlord to recover rent due under a lease, with interest, less the amount for which the premises had been relet after the tenant vacated the

premises. The lease contained a covenant requiring the landlord to give the tenants an option to purchase the leased property if the landlord received an offer for the purchase of the property and wished to sell. The tenants vacated the premises five months after the lessor sold the property without offering to tenants the option to buy as specified in the lease. The trial court found that landlord was entitled to nothing and entered judgment in favor of the tenants.

The court of appeal reversed the judgment, holding that the covenant to give an option to purchase was independent of the tenant's covenant to pay rent. The court held that the landlord's breach of its covenant to give the tenant an option to purchase is the basis for the tenant's action for breach of the covenant, but would justify the tenant's termination of the lease only if the lease so provided. Because the lease did not make payment of rent dependent on the landlord's performance of its covenants, and did not provide that the tenant could terminate the lease on such a breach by the landlord, the court concluded that the breach of the covenant did not warrant the tenants' terminating the lease and refusing to pay the rent (*44 Cal. App. 583, 585-586)* .

[c] Landlord's Covenant to Repair Normally Is Independent

In ***Hosang v. Minor*** *(1962) 205 Cal. App. 2d 269, 22 Cal. Rptr. 794* , the plaintiff landlords brought an action for rent allegedly due under a lease and for damages for injury to the leased property. The landlords had covenanted to repair water pumping equipment if emergency repair became necessary. They failed to replace or repair the pumping equipment when it was destroyed by a fire, and thereafter the tenant paid no rent. The trial court entered judgment for the defendant.

The court of appeal reversed the judgment, holding that a covenant to repair on the part of the lessor and a covenant to pay rent on the part of the lessee are usually considered as independent covenants, and that unless the covenant to repair is expressly or impliedly made a condition precedent to the covenant to pay rent, a breach of the former does not justify the refusal on the part of the tenant to perform the latter. The court determined that the covenant to repair did not run to the entire consideration of the lease and no justification existed for implying that the defendant's agreement to pay rent was dependent on repair or replacement of damaged equipment (*205 Cal. App. 2d 269, 272-273)* .

[d] In Order to Treat Covenant to Repair as Dependent With Covenant to Pay Rent, Tenant Must Meet the Statutory Standards of Civil Code Section 1942

Civil Code § 1942 permits a tenant the option of vacating the premises, and not paying any further rent if a landlord has received reasonable written or oral notice of dilapidations rendering the premises untenantable and if the landlord is obligated and fails to repair the condition. Under this statute, a tenant also possesses the option of spending up to one month's rent to repair the condition, and deducting the expenses of repair from the rent when due. However, the self-help remedy applies only if the dilapidations involved render the premises untenantable [*Civ. Code § 1942(a)*].

On and after July 1, 1988, the remedies available under *Civ. Code § 1942* are also available against a landlord who violates statutory provisions that require landlords of buildings intended for human habitation to install and maintain operable deadbolts and other locking devices [*see Civ. Code § 1941.3(c)*].

A landlord may successfully oppose a residential tenant's right to vacate the premises or deduct costs of repair from his or her rent pursuant to *Civ. Code § 1942* if the tenant is in substantial violation of any of the affirmative obligations listed in *Civ. Code § 1941.2(a)(1)-(5)*, and the tenant's violation contributes substantially to the existence of the dilapidations or interferes substantially with the landlord's obligation to effect necessary repairs in order to make the premises tenantable for their intended purpose [*Civ. Code § 1941.2(a)*; *see Civ. Code §§ 1941, 1941.1*].

Civ. Code § 1941.1 sets forth characteristics for deeming untenantable a premises intended for occupation of human beings pursuant to *Civ. Code § 1941*.

[4] Additional Authorities

[a] In Order to Treat Covenant to Repair as Dependent With Covenant to Pay Rent, Tenant Must Meet the Statutory Standards of Civil Code Section 1942

In *Green v. Superior Court (1974) 10 Cal. 3d 616, 111 Cal. Rptr. 704, 517 P.2d 1168* , the Supreme Court declared that the "repair and deduct" statutory remedy was intended to encompass relatively minor dilapidations, and that a tenant is not required to use the remedy as a prerequisite to asserting a landlord's breach of the implied warranty of habitability (*10 Cal. 3d 616, 631-632)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsBreachGeneral OverviewReal Property LawLandlord & TenantLease AgreementsDamagesGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview

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14-141 California Points & Authorities § 141.25

§ 141.25 Supporting Contention That Landlord Is Entitled to Damages From Tenant Who Breached Lease and Abandoned Premises--Tenant Was Not Constructively Evicted, So Is Liable for Rent for Entire Term of Lease

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE FACTS ALLEGED BY TENANT DO NOT CONSTITUTE A CONSTRUCTIVE EVICTION, AND THEREFORE DO NOT RELIEVE THE TENANT FROM LIABILITY FOR THE PAYMENT OF RENT FOR THE BALANCE OF THE LEASE TERM ON THAT BASIS.

A. Failure to Establish Constructive Eviction Precludes Finding That Tenant Was Relieved of Obligation to Pay Rent. A tenant's obligation to pay rent is not relieved during the period of time that no constructive eviction has been established (*see Clark v. Spiegel (1971) 22 Cal. App. 3d 74, 79-80, 99 Cal. Rptr. 86*).

[*Optional*] **B. Constructive Eviction Does Not Exist if Tenant Fails to Vacate Within a Reasonable Time.** There can be no constructive eviction if the tenant fails to vacate the premises within a reasonable time after the inception of the alleged interference with the tenant's beneficial enjoyment of the premises (*Clark v. Spiegel (1971) 22 Cal. App. 3d 74, 79-80, 99 Cal. Rptr. 86*).

[*Optional*] **C. No Constructive Eviction Because No Breach of Implied Warranty of Habitability.** If residential premises are habitable, a tenant cannot avoid liability for rental damages, based on an alleged constructive eviction caused by breach of the implied warranty of habitability (*cf. Green v. Superior Court (1974) 10 Cal. 3d 616, 635, 111 Cal. Rptr. 704, 517 P.2d 1168*).

[*Optional*] **D. No Constructive Eviction Because No Breach of Implied Covenant of Quiet Enjoyment.** If a tenant is not deprived of possession or beneficial enjoyment of the premises for the purposes contemplated by the tenancy, the tenant cannot avoid liability for rental damages based on an alleged constructive eviction caused by a breach of the implied covenant of quiet enjoyment (*Civ. Code § 1927*; *cf. Groh v. Kover's Bull Pen, Inc. (1963) 221 Cal. App. 2d 611, 614, 34 Cal. Rptr. 637*).

[*Optional*] **E. No Constructive Eviction Because Commercial Lease Limited Tenant to Seeking Only Damages or Injunctive Relief for Landlord's Breach of Covenant of Quiet Enjoyment.** If a commercial lease limits a tenant's remedies to damages or injunctive relief in the event of a breach of the covenant of quiet possession, the tenant is precluded from vacating the premises and asserting a constructive eviction defense (*Lee v. Placer Title Co. (1994) 28 Cal. App. 4th 503, 514, 33 Cal. Rptr. 2d 572*).

[*Optional*] **F. Trespass Alone Not Necessarily Constructive Eviction.** Acts of a landlord, or his or her agent, that are no more serious than a trespass, do not constitute a sufficient basis for a constructive eviction (*North Pac. S.S. Co. v. Terminal Inv. Co. (1919) 43 Cal. App. 182, 189, 185 P. 205*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention by a landlord that there was no constructive eviction precluding landlord's right to rental damages.

Counsel should insert argument in the above form, showing the relationship between the facts of the case and the points of law stated. For example, counsel may insert facts showing that there there was no breach of the implied covenant of quiet enjoyment, or of the implied warranty of habitability, or that tenant did not vacate the premises within a reasonable period of time after the inception of the conditions complained about, or that landlord's acts only amounted to a trespass.

[3] Discussion of Authorities

[a] Failure to Establish Constructive Eviction Precludes Finding That Tenant Was Relieved of Obligation to Pay Rent

In ***Clark v. Spiegel*** *(1971) 22 Cal. App. 3d 74, 99 Cal. Rptr. 86* , plaintiffs brought an action for damages for constructive eviction from the premises on which they had operated a laundromat. The claim of constructive eviction was based partly on the failure of the defendants to maintain the lighting in a parking area in conformance with lease provisions; approximately 40 percent of the laundromat's business came at night, and the lack of lighting led to a loss of customers. The other basis for the claim was the closing of certain doors in the shopping mall in which the laundromat was located. The defendants had emphasized access through those doors as an inducement to plaintiffs while negotiating the lease. The trial court found for plaintiff, and awarded $65,000 in damages; defendant appealed.

The court of appeal affirmed in part, reversed in part, and remanded for a new trial on the issue of damages. The court held that the trial court erred in instructing that interference with the doors could amount to a constructive eviction in this case. The plaintiffs remained on the premises almost four years after the first closing of the doors, and for

approximately three years after the mall doors had been permanently locked. The court stated that there is a clear obligation incumbent on a tenant alleging an interference with the implied covenant of quiet enjoyment, to vacate the premises within a reasonable time. Because the plaintiff continued to possess the premises, the court held that no constructive eviction was shown for that period, precluding a finding that no rent was due during that period (*22 Cal. App. 3d 74, 79-80)* .

[b] Constructive Eviction Does Not Exist if Tenant Fails to Vacate Within a Reasonable Time

The facts and procedural background of ***Clark v. Spiegel*** *(1971) 22 Cal. App. 3d 74, 99 Cal. Rptr. 86* , are discussed in *§ 141.25[3][a]*. The court of appeal held that there is an obligation incumbent on a lessee alleging breach of the covenant of quiet enjoyment to vacate the premises within a reasonable time (*22 Cal. App. 3d 74, 79)* . The court also held that there can be no constructive eviction of the tenant if the lessee continues in possession of the premises, and that the trial court's calculation of damages was erroneous because it was based on the premise that the plaintiff was constructively evicted beginning at the time the alleged breach occurred, rather than at the time the tenant vacated the premises (*22 Cal. App. 3d 74, 80)* .

[c] No Constructive Eviction Because No Breach of Implied Warranty of Habitability

Green v. Superior Court *(1974) 10 Cal. 3d 616, 111 Cal. Rptr. 704, 517 P.2d 1168* , was an unlawful detainer action commenced by a landlord in small claims court, seeking possession of the leased premises and back rent. The tenant admitted nonpayment of rent but defended the action on the ground that the landlord had failed to maintain the leased premises in a habitable condition. The small claims court awarded possession of the premises to the landlord and entered a money judgment for $225 against the tenant.

The tenant then appealed to the San Francisco Superior Court where a de novo trial was held in accordance with former Code Civ. Proc. § 117j (*now see Code Civ. Proc. § 116.770*). Although the tenant submitted a copy of an inspection report of the Department of Public Works disclosing some 80 housing code violations in the building in question, and although he and his roommate detailed a long list of serious defects in the leased premises that the landlord had failed to repair after notice, the superior court agreed with the landlord's contention that the repair and deduct provisions of *Civ. Code §§ 1941* and *1942* constituted thetenant's exclusive remedy. Again, the landlord was awarded $225 and possession of the premises. The tenant sought a writ, and the petition was eventually granted by the California Supreme Court.

In considering the general legal issues presented, the Supreme Court held that a warranty of habitability is implied by law in residential leases in California. Under this implied warranty, a residential landlord covenants that premises leased as living quarters will be maintained in a habitable state for the duration of the lease. It does not require that a landlord ensure that the leased premises are in perfect, aesthetically pleasing condition, but it does mean that "bare living requirements" must be maintained. In most cases substantial compliance with the applicable building and housing code standards that materially affect health and safety will suffice to meet the landlord's obligations under the implied warranty of habitability.

The Court stated that the tenant's duty to pay rent is mutually dependent on the landlord's fulfillment of the implied warranty of habitability. The old common-law treatment of the lease as a property conveyance, and the independent covenants rule that stems from this treatment have outlived their usefulness, at least in the case of a residential lease where the habitability of the dwelling unit has become the very essence of the lease. If the tenant can prove the landlord's breach of the warranty of habitability, he may demonstrate that his nonpayment of rent was justified and that no rent is in fact due and owing to the landlord (*10 Cal. 3d 616, 635)* .

[d] No Constructive Eviction Because No Breach of Implied Covenant of Quiet Enjoyment

Groh v. Kover's Bull Pen, Inc. *(1963) 221 Cal. App. 2d 611, 34 Cal. Rptr. 637* , involved a lease of premises used as

a cocktail lounge. The roof of the premises leaked to an extent that caused the tenant to lose customers, and the lessor did not repair the roof despite promises to do so. The tenant notified the lessor that it would terminate the lease if the condition was not remedied, and did so, suing to recover the security deposit held by the lessor. The trial court entered judgment for the tenant, and the lessor appealed.

The court of appeal affirmed, holding that a constructive eviction occurs when the acts or omissions to act of a landlord, or any disturbance or interference with the tenant's possession by the landlord, renders the premises, or a substantial portion of the premises, unfit for the purposes for which they were leased, or has the effect of depriving the tenant for a substantial period of time of the beneficial enjoyment or use of the premises (*221 Cal. App. 2d 611, 614)* . The court found that the leaky condition of the roof in the case before it could have constituted a constructive eviction, requiring affirmance of the trial court's factual determination (*221 Cal. App. 2d 611, 614)* . The court also rejected the landlord's contention that its covenant to repair the roof was independent of the tenant's covenant to pay rent, because the covenant to repair went to the very root of the consideration for the lease (*221 Cal. App. 2d 611, 614)* .

[e] No Constructive Eviction Because Commercial Lease Limited Tenant to Seeking Only Damages or Injunctive Relief for Landlord's Breach of Covenant of Quiet Enjoyment

In ***Lee v. Placer Title Co.*** *(1994) 28 Cal. App. 4th 503, 33 Cal. Rptr. 2d 572* , a commercial tenant stopped paying rent and vacated the premises, claiming fumes from an adjoining business made its office unusable. The landlord filed a complaint for rent owing on the remainder of the lease. The tenant asserted a constructive eviction defense based on the landlord's breach of the covenant of quiet possession. The court of appeal upheld the trial court's ruling that the tenant was precluded from vacating the premises and asserting a constructive eviction defense since, under the terms of the lease, the tenant was limited to seeking only damages or injunctive relief for any landlord breach of the covenant of quiet enjoyment (*28 Cal. App. 4th 503, 514)* . The statutory prohibition against waiving the covenant (*Civ. Code § 1953(a)*) applies to dwellings and hence has no application to tenants in a commercial setting (*28 Cal. App. 4th 503, 513)* .

[f] Trespass Alone Not Necessarily Constructive Eviction

North Pac. S.S. Co. v. Terminal Inv. Co. *(1919) 43 Cal. App. 182, 185 P. 205* , was an action brought by a tenant to have a lease declared rescinded. The tenant alleged that the tenant of the adjoining premises began hanging a sign obstructing a passageway that had advertising value for plaintiff. The landlord had no knowledge of the sign until the tenant first complained about the matter. The landlord at first declined to take any action, but 10 days after he learned of the sign he caused the adjoining tenants to remove the sign from the passageway. Plaintiff was informed of this but had already delivered its notice of rescission. Judgment was entered for the landlord.

The court of appeal affirmed the judgment and stated that if the interference with the tenant's possession was no more serious than the findings indicate, the act of defendant's other tenant could amount to no more than a mere trespass, and did not constitute a breach of the covenant of quiet enjoyment (*43 Cal. App. 182, 189)* .

[4] Additional Authorities

[a] Constructive Eviction Does Not Exist if Tenant Fails to Vacate Within a Reasonable Time

In *Petroleum Collections, Inc. v. Swords (1975) 48 Cal. App. 3d 841, 122 Cal. Rptr. 114* , a case in a commercial context, the court explained the expansion of thetraditional covenant of quiet enjoyment, to protect a commercial tenant's beneficial enjoyment of the premises for the purposes contemplated by the tenancy. This led the court to find that the removal of a special sign, which had been present when the premises were leased, was removed, constituted a constructive eviction. Thus, when it was required by the city to be removed or rectified, and the landlord failed to comply with the city's required measures to retain the sign, this was deemed to constitute a constructive eviction. The court found that the mere removal of the sign that was present when the lease commenced, was mutually dependent

with the covenant to pay rent, even though the sign was not addressed per se in the lease. Even though the parties negotiated for approximately eleven months before the tenant vacated the premises claiming a constructive eviction, the court found that this was not an unreasonable amount of time for the tenant to have vacated the premises, although the constructive eviction did not relieve the tenant of the obligation to pay rent until it vacated the premises (*48 Cal. App. 3d 841, 848)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsBreachGeneral OverviewReal Property LawLandlord & TenantLease AgreementsDamagesGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsConstructive Eviction

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14-141 California Points & Authorities § 141.26

§ 141.26 Opposing Contention That Landlord Is Entitled to Damages From Tenant Who Breached Lease and Abandoned Premises--Action Barred by Statute of Limitations [Code Civ. Proc. §§ 337.2, 339.5]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF LANDLORD'S CLAIM FOR RENTAL DAMAGES IS BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS, _____ [CODE OF CIVIL PROCEDURE SECTION 337.2 *or* CODE OF CIVIL PROCEDURE SECTION 339.5], IN THAT IT WAS FILED OVER _____ [FOUR YEARS *or* TWO YEARS] AFTER THE CAUSE OF ACTION ACCRUED.

[*EITHER*]

A. Four-Year Statute of Limitations for Written Leases. An action for rental damages under *Civil Code Section 1951.2* based on a written lease must be commenced within four years after the cause of action has accrued (*Code Civ. Proc. § 337.2*).

B. Accrual of Landlord's Cause of Action. A landlord's cause of action accrues, and the period of limitation begins to run, after the breach of the lease and abandonment of the property, or after the termination of the right of the tenant to possession of the property, whichever is the earlier time (*Code Civ. Proc. § 337.2*).

[*OR*]

A. Two-Year Statute of Limitations for Oral Leases. An action for rental damages under *Civil Code Section 1951.2*, based on a lease that is not in writing, must be commenced within two years after the cause of action has accrued (*Code Civ. Proc. § 339.5*).

B. Accrual of Landlord's Cause of Action. A landlord's cause of action accrues, and the period of limitation begins to run, after the breach of the lease and abandonment of the property, or after the termination of the right of the tenant to possession of the property, whichever is the earlier time [*Code Civ. Proc. § 339.5*].

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention by a tenant that a landlord's complaint for rental damages is barred by the applicable statute of limitations.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing when the applicable cause of action accrued, and when the statute of limitations period expired.

[b] Related Pleading and Practice Forms

For related forms, see California Forms of Pleading and Practice, Ch. 334, *Landlord and Tenant: Claims for Damages* (Matthew Bender).

[3] Discussion of Authorities

[a] Four-Year Statute of Limitations for Written Leases

Code Civ. Proc. § 337.2 provides that the applicable statute of limitations for an action by a landlord for rental and related damages, pursuant to *Civ. Code § 1951.2*, based on a written lease is four years.

[b] Two-Year Statute of Limitations for Oral Leases

Code Civ. Proc. § 339.5 provides that the applicable statute of limitations foran action by a landlord for rental and related damages, pursuant to *Civ. Code § 1951.2*, based on an oral lease is two years.

[c] Accrual of Landlord's Cause of Action

Under both *Code Civ. Proc. § 337.2* (written leases) and *§ 339.5* (oral leases), accrual of a landlord's cause of action for statute of limitations purposes, occurs at the time of "breach of the lease or abandonment of the property" by a tenant, or "the termination of the right of the [tenant] to possession of the property, whichever is the earlier time." The time of accrual of the landlord's cause of action pursuant to a written lease is the same, whether the landlord proceeds under *Civ. Code § 1951.2*, thereby terminating the lease, or the landlord has availed himself of the right to continue the lease in effect, pursuant to *Civ. Code § 1951.4*. Even though a tenant has breached a lease and abandoned the property,

thereby triggering the running of the statute of limitations pursuant to *Code Civ. Proc. § 337.2*, *Civ. Code § 1951.4* permits a landlord instead to continue the lease in effect and to collect the rent as it becomes due under the lease, rather than to recover damages based primarily on the loss of future rent as set forth in *Civ. Code § 1951.2*. For discussion of the provisions of *Civ. Code § 1951.4*, see *§ 141.22[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewReal Property LawLandlord & TenantGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsBreachGeneral Overview

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14-141 California Points & Authorities § 141.27

§ 141.27 Opposing Contention That Landlord Is Entitled to Damages From Tenant Who Breached Lease and Abandoned Premises--Landlord Has Failed to Make Sufficient Efforts to Mitigate Damages

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

LANDLORD HAS FAILED TO MAKE SUFFICIENT EFFORTS TO MITIGATE DAMAGES, IN THAT LANDLORD'S ALLEGED RENTAL LOSSES COULD HAVE BEEN REASONABLY AVOIDED.

A. Landlord Required to Do Everything Reasonably Possible to Minimize Loss. A landlord injured by a tenant's breach of contract is required to do everything reasonably possible to minimize his or her loss, in reduction of the damages to which a tenant has become liable (*Green v. Smith (1968) 261 Cal. App. 2d 392, 396-397, 67 Cal. Rptr. 796*).

B. Landlord Must Act Reasonably, With Due Diligence, and in Good Faith. In seeking to minimize his or her loss, a landlord must act reasonably, with due diligence, and in good faith (*Green v. Smith (1968) 261 Cal. App. 2d 392, 396-397, 67 Cal. Rptr. 796*).

C. Reduction of Landlord's Recovery. A plaintiff landlord injured by a tenant's breach cannot be compensated for damages that the landlord could have avoided by reasonable efforts and without undue expense (*Brandon & Tibbs v. George Kevorkian Accountancy Corp. (1990) 226 Cal. App. 3d 442, 460-461, 277 Cal. Rptr. 40* ; *Green v. Smith (1968) 261 Cal. App. 2d 392, 396-397, 67 Cal. Rptr. 796*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to a contention that a landlord is entitled to recover damages based on the tenant's breach of a rental agreement, based on the landlord's failure to make sufficient efforts to mitigate damages incurred due to the tenant's breach.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts tending to show that the landlord has failed to act reasonably, with due diligence, or in good faith, or that some or all of landlord's alleged damages could have been reasonably avoided.

[b] Related Pleading and Practice Forms

For related forms, see California Forms of Pleading and Practice, Ch. 334, *Landlord and Tenant: Claims for Damages* (Matthew Bender).

[3] Discussion of Authorities

[a] Landlord Required to Do Everything Reasonably Possible to Minimize Loss

In ***Green v. Smith*** *(1968) 261 Cal. App. 2d 392, 67 Cal. Rptr. 796* , an owner of ornamental nursery trees sought damages for crop loss sustained by reason of the defendant's destruction of an irrigation ditch. Although the plaintiff had taken steps to mitigate his damages, the trial court determined that the plaintiff could have avoided all crop losses at a cost of not more than $600.00, by pursuing any one of five mitigation alternatives suggested by defendant.

The appellate court reversed the lower court ruling and held that, as a matter oflaw, the plaintiff met his duty of acting reasonably to mitigate his damages at the time the loss was threatened. The court held that it was irrelevant that, in hindsight, the plaintiff could have taken alternative measures suggested by the defendant to further reduce the damages that the plaintiff incurred. The court declared that if a choice of two reasonable courses of action presents itself, the party whose wrong forced the choice cannot complain that one rather than the other is chosen. In addition, the injured party is not required to take measures that are impractical, or that would involve expenditures are disproportionate to the loss sought to be avoided, or that may be beyond the financial means of the party (*261 Cal. App. 2d 392, 396-397)* .

[b] Landlord Must Act Reasonably, With Due Diligence, and in Good Faith

The facts and procedural background of ***Green v. Smith*** *(1968) 261 Cal. App. 2d 392, 67 Cal. Rptr. 796* , are discussed in *§ 141.27[3][a]*. In discussing the obligation to mitigate damages, the court stated that it was more accurate to say that the wrongdoer is not required to compensate the injured party for damages that are avoidable by reasonable effort on the latter's part (*261 Cal. App. 2d 392, 396)* . The court also stated that, although the standard of reasonableness is not as high as is required in other areas of the law, the party is required to act reasonably and with due diligence, in good faith (*261 Cal. App. 2d 392, 397)* .

[c] Reduction of Landlord's Recovery

The facts and procedural background of ***Brandon & Tibbs v. George Kevorkian Accountancy Corp.*** *(1990) 226 Cal. App. 3d 442, 277 Cal. Rptr. 40* , are discussed in *§ 141.21[3][b]*. The court of appeal reversed the judgment in part, in

order to permit the trial court to determine the proper amount for the reduction of plaintiff's damages, based on the profit that the plaintiff made during the last two years of the five-year period that would have been covered by the agreement between the parties that was the subject of the breach of contract action (*226 Cal. App. 3d 442, 460-461)* .

The facts and procedural background of ***Green v. Smith*** *(1968) 261 Cal. App. 2d 392, 67 Cal. Rptr. 796* , are discussed in *§ 141.27[3][a]*. Because the court concluded that the evidence did not support the trial court's findings that the plaintiff had not acted reasonably to mitigate damages, the court reversed the judgment (*261 Cal. App. 2d 392, 398-399)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsBreachGeneral OverviewReal Property LawLandlord & TenantLease AgreementsDamagesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsDamagesMitigation

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14-141 California Points & Authorities § 141.28

§ 141.28 Opposing Contention That Landlord Is Entitled to Damages From Tenant Who Breached Lease and Abandoned Premises--Liquidated Damages Provision Is Not Enforceable Because Unreasonable at Time Contract Was Entered Into

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE LIQUIDATED DAMAGES PROVISION IN THE LEASE IS INVALID BECAUSE THE PROVISION WAS UNREASONABLE UNDER THE CIRCUMSTANCES EXISTING AT THE TIME THE LEASE WAS ENTERED INTO.

A. Liquidated Damages Clauses in Leases Governed by Contract Law. *Civil Code Section 1671*, covering liquidated damages provisions in contracts generally, governs liquidated damages provisions in real property leases (*Civ. Code § 1951.5*).

B. Unreasonable Liquidated Damages Provision Is Invalid. A liquidated damages provision in a lease not described in *Civil Code Section 1671(c)(2)* is invalid if the party challenging the provision establishes that the provision was unreasonable under the circumstances existing at the time the lease was entered into (*Civ. Code § 1671(b)*; *see Ridgley v. Topa Thrift & Loan Assn. (1998) 17 Cal. 4th 970, 977, 73 Cal. Rptr. 2d 378, 953 P.2d 484* ; *Harbor Island Holdings, LLC v. Kim (2003) 107 Cal. App. 4th 790, 796, 132 Cal. Rptr. 2d 406*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that a provision for liquidated damages is void or inapplicable under *Civ. Code § 1671(b)*.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that the liquidated damages provision was unreasonable under thecircumstances existing at the time of entry into the lease.

[b] Related Pleading and Practice Forms

For related forms, see California Forms of Pleading and Practice, Ch. 334, *Landlord and Tenant: Claims for Damages* (Matthew Bender).

[3] Discussion of Authorities

[a] Unreasonable Liquidated Damages Provision Is Invalid

Civ. Code § 1671(b) provides that a provision in a contract liquidating the damages for the breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made, thereby placing the burden of proof on the party challenging the provision's invalidity.

Civ. Code § 1671(b) appears applicable to commercial leases, because the two exceptions to this subsection only cover contracts for the retail purchase or rental of personal property or services, primarily for personal, family, or household purposes (*Civ. Code § 1671(c)(1)*), and leases of real property for use as a dwelling (*Civ. Code § 1671(c)(2)*). However, it is unclear how a real property lease for premises encompassing both commercial and residential dwelling purposes would be treated under the statute.

Moreover, as against a landlord of residential premises, it appears that *Civ. Code § 1671(b)* would normally be applicable, whereas as against a tenant of residential premises, the standard set forth in *Civ. Code § 1671(c)* and *(d)* would normally apply (Legislative Committee Comment, *Civ. Code § 1671*). For a memorandum of points and authorities for use if the standard set forth in *Civ. Code § 1671(d)* applies, see *§ 141.29*.

In ***Ridgley v. Topa Thrift & Loan Assn.*** *(1998) 17 Cal. 4th 970, 977, 73 Cal. Rptr. 2d 378, 953 P.2d 484* , the California Supreme Court held that a liquidated damages clause will generally be considered unreasonable, and hence unenforceable under § *Civ. Code § 1671(b)*, if it bears no reasonable relationship to the range of actual damages that the parties could have anticipated would flow from a breach. The amount set as liquidated damages must represent the result of a reasonable endeavor by the parties to estimate a fair average compensation for any loss that may be sustained. In the absence of such relationship, a contractual clause purporting to predetermine damages must be construed as a penalty (*17 Cal. 4th 970, 977)* .

Ridgley involved a prepayment penalty on a loan, but its rationale was applied in the context of a commercial lease in ***Harbor Island Holdings, LLC v. Kim*** *(2003) 107 Cal. App. 4th 790, 132 Cal. Rptr. 2d 406* . In *Harbor Island*, the court held that a provision in a commercial lease extension increasing the rent but providing that half of the increased rent would be conditionally "deferred" and ultimately forgiven if the tenants complied with all of their obligations under the lease was unenforceable as a penalty. The deferred rent had no reasonable relationship to the amount of actual damages

caused by the tenants' breach of their obligation to maintain the premises (*107 Cal. App. 4th 790, 796-797)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsBreachGeneral OverviewReal Property LawLandlord & TenantLease AgreementsDamagesGeneral Overview

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14-141 California Points & Authorities § 141.29

§ 141.29 Opposing Contention That Landlord Is Entitled to Damages From Tenant Who Breached Lease and Abandoned Premises--Liquidated Provision in Residential Lease Is Invalid Because Nature of Case Did Not Make Actual Damages Impractical or Extremely Difficult to Fix

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE LIQUIDATED DAMAGES PROVISION INCLUDED IN THE RESIDENTIAL LEASE INVOLVED IN THIS CASE IS NOT ENFORCEABLE BECAUSE THE DAMAGES THAT WOULD BE SUSTAINED BY A BREACH WERE NOT, BASED ON THE NATURE OF THE CASE, IMPRACTICAL OR EXTREMELY DIFFICULT TO FIX.

A. Liquidated Damages Clauses in Leases Governed by Contract Law. [*See § 141.28, Paragraph A.*]

B. Liquidated Damages Clause Invalid, Except When Actual Damages Are Impracticable or Extremely Difficult to Determine. A provision in a residential lease liquidating damages for breach is void, except if the parties agree in the lease on an amount that will be presumed to be the amount of damage sustained by a breach because, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage (*Civ. Code § 1671(c)(2), (d)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a provision for liquidated damages is void or inapplicable under *Civ. Code § 1671(d)*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that the party from whom the liquidated damages are sought is a party to a lease of real property for use as a dwelling by the party or by those dependent on the party for their support [*Civ. Code § 1671(c)(2)*], and facts tending to show that the nature of the case did not make it impracticable orextremely difficult to fix the actual damage that would result from a breach of the lease.

See also *§ 141.28[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsBreachGeneral OverviewReal Property LawLandlord & TenantLease AgreementsDamagesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsDamagesLiquidated Damages

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14-141 California Points & Authorities § 141.30

§ 141.30 Opposing Contention That Landlord Is Entitled to Damages From Tenant Who Breached Lease and Abandoned Premises--Landlord's Breach of Covenant of Quiet Enjoyment Constituted Constructive Eviction of Tenant, Relieving Tenant of Obligation to Pay Rent

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE LANDLORD'S BREACH OF THE IMPLIED COVENANT OF QUIET ENJOYMENT CONSTITUTES A CONSTRUCTIVE EVICTION OF THE TENANT, WHICH RELIEVED THE TENANT FROM LIABILITY FOR FURTHER PAYMENT OF RENT.

A. Covenant of Quiet Enjoyment Implied in Every Lease. There is an implied covenant of quiet enjoyment in every lease, requiring that the tenant shall not be disturbed in his or her possession by the landlord (*Civ. Code § 1927*; *Pierce v. Nash (1954) 126 Cal. App. 2d 606, 612, 272 P.2d 938*).

B. Implied Covenant of Quiet Enjoyment Is Mutual and Dependent With Tenant's Covenant to Pay Rent. The implied covenant of quiet enjoyment is mutual and dependent with the tenant's obligation to pay further rent, and a landlord's breach of that covenant constitutes a constructive eviction once the premises are vacated (*Green v. Superior Court (1974) 10 Cal. 3d 616, 625 n.10, 111 Cal. Rptr. 704, 517 P.2d 1168*).

C. Implied Covenant of Quiet Enjoyment Not Limited to Physical Possession. The implied covenant of quiet enjoyment has been expanded from the traditional right of physical possession of the premises, to a guarantee of the tenant's beneficial enjoyment of the premises for the purposes contemplated by the tenancy (*Petroleum Collections Inc. v. Swords (1975) 48 Cal. App. 3d 841, 847-848, 122 Cal. Rptr. 114*).

D. Constructive Eviction by Landlord. A constructive eviction occurs when the landlord by act or omission renders the premises unfit for the purposes for which they were leased, or deprives the tenant for a substantial period of time of the beneficial enjoyment of the premises (*Groh v. Kover's Bull Pen, Inc. (1963) 221 Cal. App. 2d 611, 614, 34 Cal. Rptr. 637*).

E. Tenant Not Liable for Rent After Constructive Eviction. The tenant is not liable to pay rent for the portion of the lease term after the tenant vacates the premises as a result of a constructive eviction (*Kulawitz v. Pacific etc. Paper Co. (1944) 25 Cal. 2d 664, 670, 155 P.2d 24*).

[*Optional*] **F. Premises Were Vacated Within Reasonable Time.** In order to constitute a constructive eviction, the tenant must vacate the premises within a reasonable time after the inception of the interference with the tenant's beneficial enjoyment of the premises (*Petroleum Collections Inc. v. Swords (1975) 48 Cal. App. 3d 841, 847-848, 122 Cal. Rptr. 114*).

[*Optional*] **G. Tenant's Statutory Right to Vacate.** If within a reasonable time after written or oral notice to the landlord or his or her agent of dilapidations rendering the premises untenantable, which the landlord is obligated to repair, and the landlord neglects to do so, the tenant may vacate the premises; in which case the tenant is discharged from further payment of rent (*Civ. Code §§ 1942(a), (d), 1941.2*).

[*Optional*] **H. Landlord's Harassment Can Constitute Constructive Eviction.** Actions by a landlord designed to deprive a tenant of the beneficial enjoyment of the premises and causing abandonment amount to a constructive eviction (*Aaker v. Smith (1948) 87 Cal. App. 2d 36, 45-46, 196 P.2d 150*).

[*Optional*] **I. Unsanitary Conditions on Premises Retained by Landlord.** If the landlord leases part of a building and permits unsanitary conditions amounting to a nuisance to exist in the portion of the building remaining under his or her control, which operate to deprive the tenant of his or her beneficial enjoyment, the tenant may treat this as a constructive eviction (*Johnson v. Snyder (1950) 99 Cal. App. 2d 86, 88, 221 P.2d 164*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a contention by a landlord that a tenant owes rent for the period after the tenant has vacated the premises. The opposition is based on the tenant's contention that he or she was constructively evicted from the premises, and therefore had no obligation to pay rent after vacating the premises.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts supporting the particular claim of constructive eviction. For example, counsel may discuss how the condition of the premises constituted a breach of the covenant of quiet enjoyment and a constructive eviction, and that the tenant vacated the premises within a reasonable time after the inception of the alleged breach.

[3] Discussion of Authorities

[a] Covenant of Quiet Enjoyment Implied in Every Lease

In ***Pierce v. Nash*** *(1954) 126 Cal. App. 2d 606, 272 P.2d 938* , plaintiff was the assignee of the original lessee of a premises used as a pool hall. Plaintiff's complaint alleged that the defendant lessors had erected, over plaintiff's objection, supporting posts throughout the premises that had the effect of making the premises unsuitable for use as a pool hall. The evidence showed that the city had ordered that the defendants improve the support of the second floor of the structure, although an alternative plan (that would have strengthened the existing support, without adding additional beams) was also approved by the city but not implemented by defendants. The complaint alleged that plaintiff thereafter vacated the premises, and plaintiff sought damages on the ground that he was constructively evicted from the premises. The trial court originally found for plaintiff, finding that a constructive eviction occurred and awarding damages, but then granted defendants' motion for a new trial; plaintiff appealed.

The court of appeal reversed. The court stated that a lease includes, even in the absence of an expressed covenant for quiet enjoyment in the lease, an implied covenant binding on the landlords during the continuation of the term. Whether expressed or implied, this covenant means that a tenant shall not be wrongfully evicted or disturbed in his possession by the landlord (*126 Cal. App. 2d 606, 612)* . The court rejected the defendants' contention that damages based on a constructive eviction must be based on a showing that the landlord acted in bad faith, holding that the only requirement is that the landlord's conduct must be intentional, which the conduct in installing the posts was (*126 Cal. App. 2d 606, 612-613)* . The acts of the lessor in interfering with plaintiff's use and enjoyment of the premises by the installation of the wooden posts were substantial enough to constitute an invasion of the tenant's rights under the lease, and therefore constituted a constructive eviction (*126 Cal. App. 2d 606, 619)* .

[b] Implied Covenant of Quiet Enjoyment Is Mutual and Dependent With Tenant's Covenant to Pay Rent

The facts and procedural background of ***Green v. Superior Court*** *(1974) 10 Cal. 3d 616, 625, n.10, 631-637, 111 Cal. Rptr. 704, 517 P.2d 1168* , are discussed in *§ 141.25[3][d]*. The court noted that a landlord's actions in refusing to repair conditions that make the premises untenantable may be in breach of an implied covenant of quiet enjoyment, in that they may interfere with the right of the tenant to use and enjoy the premises for the purposes contemplated by the tenancy, but noted that to avail oneself of a breach of the covenant of quiet enjoyment a tenant must vacate the premises (*10 Cal. 3d 616, 625 n.10*).

[c] Implied Covenant of Quiet Enjoyment Not Limited to Physical Possession

Petroleum Collections Inc. v. Swords *(1975) 48 Cal. App. 3d 841, 122 Cal. Rptr. 114* , involved a commercial lease of a gas station along a highway. When the parties entered into the lease, the premises included a large illuminated sign, which was easily visible from the highway. However, the sign had been erected without a required permit and was determined to pose a fire danger, so the lessor had it removed and replaced with a nonilluminated sign that was not easily visible form the highway. The lessee insisted that the lessor furnish a sign comparable to the one that had originally been on the premises, and refused to pay rent when the lessor refused to do so. Plaintiff (a collection agent to whom the lessor assigned the cause of action) brought an action to recover the unpaid rent; the trial court entered a defense verdict on the ground that the refusal to replace the sign constituted a breach of the covenant of quiet enjoyment, which was mutually dependent with the lessee's obligation to pay rent. The plaintiff appealed, and the court of appeal reversed.

The court noted the expansion of the traditional covenant of quiet enjoyment, from its original purpose of protecting the tenant's physical possession of the premises against interference by the lessor, to the current view of the covenant as protection of a tenant's beneficial enjoyment of the premises for the purposes contemplated by the tenancy (*48 Cal. App. 3d 841, 846)* . The court held that the lessor's removal of the sign, which interfered with the purpose of the

lease--to attract motorists from the nearby highway, without which the business could not be successful--could constitute a breach of the covenant, and therefore be a constructive eviction (*48 Cal. App. 3d 841, 846)* . However, because a constructive eviction requires that the tenant vacate the premises, which the tenant here did not do for 11 months after the sign was removed, the court reversed and remanded for a determination whether the tenant vacated within a reasonable time, with instructions that the damages be calculated from the time the tenant vacated the premises (*48 Cal. App. 3d 841, 847-848)* .

[d] Constructive Eviction by Landlord

The facts and procedural background of ***Groh v. Kover's Bull Pen, Inc.*** *(1963) 221 Cal. App. 2d 611, 34 Cal. Rptr. 637* , are discussed in *§ 141.25[3][d]*. The court of appeal affirmed the judgment in favor of the tenant, holding that the tenant was constructively evicted from the premises leased as a cocktail lounge,due to the lessors' failure to repair a leaking roof. The court held that a constructive eviction occurs when the acts or omission to act of a landlord, or any disturbance or interference with the tenant's possession by the landlord, renders the premises or a substantial portion thereof unfit for the purposes for which they were leased, or has the effect of depriving the tenant for a substantial period of time of the beneficial enjoyment or use of the premises. The leaky condition of the roof met this requirement (*221 Cal. App. 2d 611, 614)* .

[e] Premises Must Be Vacated Within a Reasonable Time

The facts and procedural background of ***Petroleum Collections Inc. v. Swords*** *(1975) 48 Cal. App. 3d 841, 847-848, 122 Cal. Rptr. 114* , are discussed in *§ 141.30[3][c]*. In this case, the parties negotiated for approximately 11 months before the tenant vacated the premises based on an alleged constructive eviction; the court noted that the trial court had not made an express finding whether this was reasonable under the circumstances, and noted that in any event the obligation to pay rent is not extinguished until the tenant vacates the premises (*48 Cal. App. 3d 841, 848)* .

[f] Tenant Not Liable for Rent After Constructive Eviction

Kulawitz v. Pacific Woodenware & Paper Co. *(1944) 25 Cal. 2d 664, 155 P.2d 24* , was an action by a tenant to rescind a lease, and the landlord's cross complaint seeking recovery of unpaid rent. The landlord appealed from a judgment in its favor on the cross complaint which limited the recovery for unpaid rent to the period before the tenant vacated the premises. The lease contained a covenant not to lease any other space in the same building for the purposes of conducting a furniture store. The lessor let adjoining space for a business involving the sale of linoleum and kindred products. The Supreme Court affirmed the judgment, and concurred that there had been a constructive eviction; the Court held that, if the tenant elects to treat a landlord's interference with the substantial enjoyment of the premises as a constructive eviction and surrenders possession, the tenant is not liable to pay rent for the portion of the term following the eviction (*25 Cal. 2d 664, 670)* .

[g] Premises Were Vacated Within Reasonable Time

The facts and procedural background of ***Petroleum Collections Inc. v. Swords*** *(1975) 48 Cal. App. 3d 841, 847-848, 122 Cal. Rptr. 114* , are discussed in *§ 141.30[3][c]*. The court remanded the case for determination whether the 11 months between the lessor's conduct that breached the covenant of quiet enjoyment, and the lessee's surrender of the premises, was reasonable under the circumstances (*48 Cal. App. 3d 841, 848)* .

[h] Landlord's Harassment Can Constitute Constructive Eviction

Aaker v. Smith *(1948) 87 Cal. App. 2d 36, 196 P.2d 150* , was an action for damages for breach of an oral lease. The trial court entered judgment in favor of the plaintiff in the amount of $4,500. Plaintiff was the tenant of restaurant premises and facilities located in the landlords' cocktail lounge. After four years of occupancy, the landlords embarked on a campaign to force tenant to abandon her restaurant business. They removed locks, took furniture and food,

removed the sign advertising the restaurant, informed inquiring customers that the tenant was no longer in business, and shut off the gas. The court of appeal affirmed, modifying the amount of damages. The court stated that the trial court was justified in finding a constructive eviction. Any interference by the landlord by which the tenant is deprived of the beneficial enjoyment of the premises amounts to a constructive eviction if the tenant so elects and surrenders possession (*87 Cal. App. 2d 36, 45-46)* .

[i] Unsanitary Conditions on Premises Retained by Landlord

In ***Johnson v. Snyder*** *(1950) 99 Cal. App. 2d 86, 221 P.2d 164* , plaintiff sued for damages for constructive eviction. Plaintiff rented a stall in defendant's building and conducted a restaurant. When the other tenants of the building quit the building it was allowed to become dirty and unsanitary, and as a result, the city health inspector ordered plaintiff to close his restaurant business, which plaintiff did. The court of appeal affirmed the trial court's judgment for plaintiff, holding that where the landlord leases part of a building and permits unsanitary conditions amounting to a nuisance to exist in the portion of the building remaining under his control which operate to deprive the tenant of his beneficial enjoyment, the tenant may treat this as a constructive eviction (*99 Cal. App. 2d 86, 88-89)* .

[4] Additional Authorities

[a] Constructive Eviction by Landlord

Sierad v. Lilly (1962) 204 Cal. App. 2d 770, 22 Cal. Rptr. 580 , was an action for damages for constructive eviction from leased premises. Plaintiffs had leased the premises for use as a liquor store; parking space was available at the time of the lease but not specifically provided for in the lease. The defendant lessor sold the balance of his property without reserving parking space rights, leading to plaintiffs' loss of customers. The lessor also violated a lease provision requiring him to furnish extra storage space. The court of appeal affirmed the judgment for plaintiffs and held that there had been a constructive eviction. There need not be actual dispossession of the tenant from the leased premises; any disturbance of a tenant's possession by a landlord or by someone acting under the landlord's authority, whereby the premises are rendered unfit for occupancy for the purpose for which they are demised or the tenant is deprived of the beneficial enjoyment of the premises, amounts to a constructive eviction (*204 Cal. App. 2d 770, 774-775)* .

[b] Premises Must Be Vacated Within a Reasonable Time

The facts and procedural background of *Clark v. Spiegel (1971) 22 Cal. App. 3d 74, 99 Cal. Rptr. 86* , are discussed in *§ 141.25[3][a]*. The court held that the trial court erred in instructing that interference with the doors could amount to a constructive eviction in this case, because of the four-year delay in vacating the premises after this interference. The court held that this delay did not meet the legal requirement that the tenant vacate the premises within a reasonable time, and therefore, no constructive eviction was established. There is a clear obligation incumbent on a lessee alleging an interference with the implied covenant of quiet enjoyment to vacate the premises within a reasonable time (*22 Cal. App. 3d 74, 79-80)* .

[c] Acts of Harassment by Landlord

In *Sanders v. Allen (1948) 83 Cal. App. 2d 362, 188 P.2d 760* , a complaint for eviction by harassment alleged intentional breaking and blocking of windows, rapping on the apartment door without reason, frequent ringing of plaintiff's telephone, and an assault on plaintiff's husband. The trial court sustained a demurrer to the complaint but the court of appeal reversed. The court stated that the cause of action was one for damages for constructive eviction. There was alleged a series of acts that were designed to and allegedly did operate to deprive the tenants of the beneficial enjoyment of the premises, causing them to abandon the premises (*83 Cal. App. 2d 362, 366)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsBreachGeneral OverviewReal Property LawLandlord & TenantLease AgreementsDamagesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 141 LANDLORD AND TENANT
PART II. FORMS

14-141 California Points & Authorities § 141.31

§ 141.31 Opposing Contention That Landlord Is Entitled to Damages From Tenant Who Breached Lease and Abandoned Premises--Landlord's Breach of Implied Covenant of Habitability Relieved Residential Tenant of Obligation to Pay Rent

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

LANDLORD'S BREACH OF THE IMPLIED WARRANTY OF HABITABILITY RELIEVED THE TENANT OF THE DUTY TO PAY RENT UNDER THE RENTAL AGREEMENT, AND CONSTITUTED A CONSTRUCTIVE EVICTION FROM THE TIME THE TENANT VACATED THE PREMISES.

A. Implied Warranty of Habitability. A warranty of habitability is implied by law in residential leases in California (*Green v. Superior Court (1974) 10 Cal. 3d 616, 631, 111 Cal. Rptr. 704, 517 P.2d 1168*).

B. Duty to Pay Rent Is Mutually Dependent. The tenant's duty to pay rent is mutually dependent on the landlord's fulfillment of the implied warranty of habitability (*Green v. Superior Court (1974) 10 Cal. 3d 616, 635, 111 Cal. Rptr. 704, 517 P.2d 1168*).

C. Constructive Eviction. A breach by landlord of the implied warranty of habitability may be the basis of a constructive eviction, once tenant has vacated the premises (*Green v. Superior Court (1974) 10 Cal. 3d 616, 629, 111 Cal. Rptr. 704, 517 P.2d 1168*).

[*Optional*] **D. Using Statutory Repair Remedies Not a Prerequisite.** A tenant possesses the option but is not required to use the statutory repair remedies set forth in *Civil Code Section 1942*, and it is not a prerequisite to using remedies of constructive eviction or seeking damages based on a breach of the implied warranty of habitability (*Green v. Superior Court (1974) 10 Cal. 3d 616, 629-631, 111 Cal. Rptr. 704, 517 P.2d 1168*).

[*Optional*] **E. Tenant Liable for Reasonable Rental Value Only.** If the landlord has breached the implied warranty of habitability, the tenant remains liable only for the reasonable rental value of the premises during the time the

premises were in violation of the warranty (*Hinson v. Delis (1972) 26 Cal. App. 3d 62, 70, 102 Cal. Rptr. 661*).

[*Optional*] **F. Separate Action by Tenant for Damages Is Permissible.** Notwithstanding a tenant's defense of constructive eviction in an action for rent, the tenant may sue the landlord for damages in a separate action, or by cross complaint in a non-unlawful detainer action (*Stoiber v. Honeychuck (1980) 101 Cal. App. 3d 903, 931-932, 162 Cal. Rptr. 194*).

[*Optional*] **G. Warranty May Not Be Waived.** No circumstances, including the retention of possession of the premises by a tenant after he or she has knowledge of the conditions that are the subject of complaint, may constitute a waiver by tenant of the warranty (*Knight v. Hallsthammar (1981) 29 Cal. 3d 46, 51-53, 171 Cal. Rptr. 707, 623 P.2d 268*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to a contention that the landlord is entitled to recover damages from a tenant, based onthe tenant's breach of a lease or rental agreement and abandonment of the premises. The ground of opposition is that the landlord has breached the implied warranty of habitability applicable to residential leases, that the breach constituted a constructive eviction terminating the tenant's obligation to pay rent as of the time the tenant vacated the premises, and that the tenant was liable only for the reasonable rental value of the premises during the time he or she was in possession. Optional paragraphs may be used to add additional grounds of opposition, if the landlord asserts that full rental damages are due up to the time the tenant surrendered possession of the premises, or if the landlord argues that the tenant is not entitled to seek damages from the landlord by cross complaint in a non-unlawful detainer action.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, counsel for the tenant in an action to recover rent may discuss facts showing the breach of the implied warranty, the date the tenant vacated the premises, and the reasonable rental value of the premises before the tenant vacated the premises.

[b] Related Pleading and Practice Forms

For a form of affirmative defense to an action for recovery of rent based on the landlord's breach of the implied warranty of habitability and the tenant's payment of the reasonable rental value of the premises, see California Forms of Pleading and Practice, Ch. 334, *Landlord and Tenant: Claims for Damages* (Matthew Bender).

[3] Discussion of Authorities

[a] Implied Warranty of Habitability

The facts and procedural background of ***Green v. Superior Court*** *(1974) 10 Cal. 3d 616, 111 Cal. Rptr. 704, 517 P.2d 1168* , are discussed in *§ 141.25[3][c]*. The Court held that a warranty of habitability is implied by law in residential leases in California. Under this implied warranty, a residential landlord covenants that premises he or she leases for living quarters will be maintained in a habitable state for the duration of the lease. It does not require that a landlord ensure that the leased premises are in a perfect, aesthetically pleasing condition, but it does mean that "bare living requirements" must be maintained. In most cases substantial compliance with the applicable building and housing code standards that materially affect health and safety will suffice to meet the landlord's obligations under the implied warranty of habitability (*10 Cal. 3d 616, 637)* .

[b] Duty to Pay Rent as Mutually Dependent

The facts and procedural background of ***Green v. Superior Court*** *(1974) 10 Cal. 3d 616, 111 Cal. Rptr. 704, 517 P.2d 1168* , are discussed in *§ 141.25[3][c]*. The Court stated that the tenant's duty to pay rent is mutually dependent on the landlord's fulfillment of his or her implied warranty of habitability. The old common-law treatment of the lease as a property conveyance, and the independent covenants rule that stems from this treatment, have outlived their usefulness, at least in the case of a residential lease in which the habitability of the dwelling unit has become the very essence of the lease. If the tenant can prove the landlord's breach of the warranty of habitability, he or she may demonstrate that the nonpayment of rent was justified and that no rent is in fact due and owing to the landlord (*10 Cal. 3d 616, 635)* .

[c] Constructive Eviction

The facts and procedural background of ***Green v. Superior Court*** *(1974) 10 Cal. 3d 616, 111 Cal. Rptr. 704, 517 P.2d 1168* , are discussed in *§ 141.25[3][c]*. The Court noted that alternative theories, such as the breach of the warranty of quiet enjoyment, require the tenant to vacate the premises (and argue that a constructive eviction has occurred) in order to establish the defense (*10 Cal. 3d 616, 625 n.10*). Because the Court found that the landlord's breach of the implied warranty of habitability can be raised without having vacated the premises (*10 Cal. 3d 616, 635)* , it can be inferred that a tenant who did vacate the premises should be entitled to claim a constructive eviction as well.

[d] Utilizing Statutory Repair Remedies Not a Prerequisite

The facts and procedural background of ***Green v. Superior Court*** *(1974) 10 Cal. 3d 616, 111 Cal. Rptr. 704, 517 P.2d 1168* , are discussed in *§ 141.25[3][c]*. The Court examined the legislative history of the repair and deduct remedy of *Civ. Code § 1942,* and concluded that it had never been intended to displace the application of the common-law rules regarding constructive eviction (*10 Cal. 3d 616, 629-630)* .

[e] Tenant Liable for Reasonable Rental Value Only

In ***Hinson v. Delis*** *(1972) 26 Cal. App. 3d 62, 102 Cal. Rptr. 661* , a tenant's apartment had a hole in the bathroom floor that caused several falls; the toilet leaked requiring tenant to continually mop the bathroom floor; the glass in the front door did not fit properly allowing a constant draft to enter the apartment; and the linoleum in the kitchen failed to provide a continuous water-repellent surface. The tenant informed the landlord's manager of the defective toilet and front door but nothing was done. Following a fall in the bathroom by her 10-year-old son, the tenant informed the manager that she would pay her rent only after the landlord made proper repairs. The tenant then filed an action in superior court seeking a declaratory judgment that the tenant was obliged to pay her full rent only after the landlord complied with his duty to substantially obey the housing codes, and requesting that the landlord be enjoined from filing any eviction action based on nonpayment of rent during the pendency of the action. Although finding that theaction was a proper case for declaratory relief, the trial court held that the lessee had no legal or equitable right to unilaterally withhold rent, and gave judgment for the landlord.

The court of appeal reversed and remanded for further proceedings. The court found an implied warranty of habitability

in the lease agreement. In the event of breach, the tenant is not absolved from all liability for rent, but remains liable for the reasonable rental value of the premises, as determined for such time as the premises were in violation of the housing codes. In considering the materiality of an alleged breach, both the seriousness of the claimed defect and the length of time for which it persists are relevant factors. Minor housing code violations standing alone, which do not affect habitability, will not entitle the tenant to reduction in rent. Also, the violation must be relevant and affect the tenant's apartment or the common areas that he or she uses (*26 Cal. App. 3d 62, 70-71)* .

[f] Separate Action by Tenant for Damages Is Permissible

In ***Stoiber v. Honeychuck*** *(1980) 101 Cal. App. 3d 903, 162 Cal. Rptr. 194* , the court held that a landlord could be sued by a present or former tenant for damages based on the reduction of rental value of premises that results from a breach of the implied warranty of habitability, and that the landlord also could be sued in tort for compensatory and punitive damages (*101 Cal. App. 3d 903, 918-919)* .

[g] Warranty May Not Be Waived by Tenant

Knight v. Hallsthammar *(1981) 29 Cal. 3d 46, 171 Cal. Rptr. 707, 623 P.2d 268* , was a case in which tenants of a 30-unit apartment building, who were named as defendants in unlawful detainer actions, raised as a defense in those actions the landlord's alleged breach of the implied warranty of habitability. The landlord prevailed at trial after the court instructed the jury that a tenant may not defend an unlawful detainer action on the basis of a landlord's breach of the implied warranty of habitability, unless the defective condition was unknown to the tenant at the time of occupying the premises.

On appeal, the Supreme Court ruled that, as a matter of public policy, a landlord's breach of the implied warranty of habitability may not be waived by a tenant's taking possession of or continuing to live in the premises despite knowledge of the defective conditions. Likewise, the Court relieved tenants of any duty to ascertain conditions of a dwelling at the time of taking possession of the premises. In so ruling, the Court held that whether a tenant was aware of specific defects is not determinative of the duty of the landlord to maintain premises that are habitable. The Court further ruled that the implied warranty could not be waived by a tenant's failure to allow a landlord reasonable time to repair the defective conditions. The Court stated that any permissible waiver by a tenant would undermine the holding in *Green v. Superior Court (1974) 10 Cal. 3d 616, 111 Cal. Rptr. 704, 517 P.2d 1168* , which held that the warranty could not be waived by a lease provision because it would allow landlords to circumvent the warranty through their superior bargaining power. The Court also refused to relieve the landlord of responsibility for conditions which first existed under a former owner of the property (*29 Cal. 3d 46, 53-57)* .

[4] Additional Authorities

[a] Tenant Liable for Reasonable Rental Value Only

Quevedo v. Braga (1977) 72 Cal. App. 3d Supp 1, 140 Cal. Rptr. 143 , was a case in which the court defined the damages for breach of the implied warranty of habitability as limited to an amount reflecting the difference between the rent paid during the portion of the tenancy when the unfit condition was present, and the rent that would have been reasonable, taking into account the extent to which the rental value of the property was reduced as a result of the defective condition (*72 Cal. App. 3d Supp 1, 8*).

In *Cazares v. Ortiz (1980) 109 Cal. App. 3d Supp. 23, 168 Cal. Rptr. 108* , the court ruled that to determine damages in that case, the agreed rent should be reduced by the percentage reduction of habitability owing to the ascertained defects, and then by multiplying the difference by the number of months during which the condition persisted (*109 Cal. App. 3d Supp. 23, 29, 33*).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsBreachGeneral OverviewReal Property LawLandlord & TenantLease AgreementsDamagesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 141 LANDLORD AND TENANT
PART II. FORMS

14-141 California Points & Authorities § 141.32

§ 141.32 Opposing Contention That Landlord Is Entitled to Damages From Tenant Who Breached Lease and Abandoned Premises--Substantial Destruction of Leased Premises Without Fault of Tenant Ends Tenant's Obligation to Pay Rent

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

TENANT HAS NO OBLIGATION TO CONTINUE TO PAY RENT, OR TO REBUILD, AFTER TOTAL OR SUBSTANTIAL DESTRUCTION OF PREMISES WITHOUT FAULT OF TENANT.

A. Termination of Lease by Destruction. A lease automatically terminates in the event the leased premises are destroyed, and the tenant is relieved of the obligation to pay rent (*Civ. Code § 1933(4)*).

B. Termination for Destruction of Greater Part of Premises. A tenant may terminate a lease before the end of the term agreed on if the greater part of the leased premises, or that part that was (and that the landlord had reason to believe at the time of the lease was) the material inducement to the tenant to enter into the contract, perishes from any cause other than the want of ordinary care of the tenant (*Civ. Code § 1932(2)*).

[*Optional*] **C. Tenant's Covenant to Repair as Not Requiring Rebuilding.** A general covenant by a tenant to repair or surrender the premises in good condition does not oblige the tenant to rebuild structures that have been completely destroyed (*Dicker v. West (1958) 164 Cal. App. 2d 55, 60-61, 330 P.2d 106*).

[*Optional*] **D. Nondefaulting Tenant Entitled to Return of Deposit.** A nondefaulting tenant is entitled to the return of a security deposit, as long as deposit was not consideration for entering into lease, and was not an advance payment of rental for commercial premises (*Civ. Code §§ 1950.5, 1950.7*; *Warming v. Shapiro (1953) 118 Cal. App. 2d 72, 75-76, 257 P.2d 74* ; *C.M. Staub Shoe Co. v. Byrne (1915) 169 Cal. 122, 130, 145 P. 1032*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that a tenant's rent or other obligations are ended if the leased premises were completely or mostly destroyed.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts tending to show the extent to which the premises were destroyed, and the provisions of the lease affecting the rights and duties of the parties.

[b] Related Pleading and Practice Forms

For a form of affirmative defense to an action for recovery of rent based on destruction of the leased premises, see California Forms of Pleading and Practice, Ch. 334, *Landlord and Tenant: Claims for Damages* (Matthew Bender).

[3] Discussion of Authorities

[a] Tenant's Covenant to Repair as Not Requiring Rebuilding

Dicker v. West *(1958) 164 Cal. App. 2d 55, 330 P.2d 106* , was an action by a lessee to recover the balance of a deposit of $10,000 prepaid rent following destruction of the demised premises. The lessor by cross complaint sought to recover rent from and after the destruction of the premises to the end of the term provided in the lease and damages for breach of a covenant to deliver possession of the leased premises in the same condition as when they were received. Judgment in the amount of $3,971.26 was entered in favor of the lessees.

The court of appeal affirmed, holding that the deposit was security for the payment of rent, not advance rent. Therefore, the landlord was obligated to refund any unused portion thereof when no further rent could accrue due to the destruction of the premises. The court further held that the covenant to keep the premises in good condition and repair did not make the lessees the insurers of the leased property and the covenant did not include a covenant to pay for a structure wholly destroyed by fire without the fault of the lessee (*164 Cal. App. 2d 55, 60-61)* .

[b] Nondefaulting Tenant Entitled to Return of Deposit

In ***Warming v. Shapiro*** *(1953) 118 Cal. App. 2d 72, 257 P.2d 74* , plaintiff, as assignee of a tenant under a lease, brought an action against the landlord to recover money paid by the tenant to the landlord at the time the lease was executed. Judgment was entered for the defendant landlord. The lease contained a condition prohibiting assignment by the tenant without the consent of the landlord. The tenant assigned without consent and the landlord brought an unlawful detainer action against the assignee, as a result of which the lease was terminated and the assignee was forced to quit the premises. The tenant assigned to the plaintiff all his rights in the money paid at the time of execution remaining in the hands of the landlord. The lease contained a recital that the payment was made as part consideration for the execution of the lease and as prepayment of part of the rent for the last year of the lease. The court of appeal affirmed the judgment for defendant. The payment was made as advance payment of rent and as a bonus or consideration for the execution of the lease, and as such it could be retained by the landlord if the lease was terminated (

118 Cal. App. 2d 72, 75-76) .

C.M. Staub Shoe Co. v. Byrne *(1915) 169 Cal. 122, 145 P. 1032* , was an action to recover the value of a lease of premises damaged by fire and to recover the proportion of monthly rent representing that part of the month elapsing after the fire. The trial court entered judgment for the defendant lessor. Plaintiff leased the premises on January 1, and on February 16 the premises occupied by the plaintiff were damaged and injured by fire. A clause in the lease stated that if the building or premises were destroyed by fire, or partially destroyed so as to render the premises demised wholly unfit for occupancy, or so badly injured that they could not be repaired within 60 days after the injury, then the lease would cease. The clause also provided that the lessee would be required to pay rent within the term only to the time of such surrender. The Supreme Court affirmed, holding that the lease had terminated under the provision dealing with partial destruction rendering the premises wholly unfit for occupancy. It further held that a tenantwho has taken possession of leased premises and paid his rent, or a part of it, in advance as required by the terms of the lease cannot recover the rent so paid in case of the destruction of the premises in the absence of a covenant in the lease. The lessee was not entitled to repayment of a proportion of the February rent since the covenant in the lease was not a covenant to repay any installment of rent which had become due and been paid. It merely declared that the tenant would not be liable for any further rent after surrendering the premises (*169 Cal. 122, 130-131)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsBreachGeneral OverviewReal Property LawLandlord & TenantLease AgreementsDamagesGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsFrustration of Purpose

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
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PART II. FORMS

14-141 California Points & Authorities § 141.33

§ 141.33 Supporting Contention That Lease Should Be Rescinded or Cancelled--Tenant's Material Breach of Mutual and Dependent Covenant Entitles Landlord to Rescission

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE ACTIONS OF TENANT CONSTITUTE A MATERIAL BREACH OF THE LEASE, FOR WHICH MONEY DAMAGES WOULD BE AN INADEQUATE REMEDY, ENTITLING LANDLORD TO CANCEL OR RESCIND THE LEASE.

Breach of Essential Covenant Entitles Lessor to Rescission or Cancellation. Breach of performance by a tenant of an express covenant essential to the lease and tenancy, for which damages would be an inadequate remedy, can be the basis for cancellation or rescission of the lease (*see Poundstone v. Gofoor (1930) 104 Cal. App. 212, 216, 285 P. 403*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a contention by a landlord that tenant is in

material breach of an essential covenant in a lease, and that rescission or cancellation of the lease is the proper remedy because money damages would be an inadequate remedy.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts tending to show the essential nature of the lease provision, how the breach is material, and why an award of damages would be an inadequate remedy.

[3] Discussion of Authorities

[a] Breach of Essential Covenant Entitles Lessor to Rescission or Cancellation

In ***Poundstone v. Gofoor*** *(1930) 104 Cal. App. 212, 216, 285 P. 403* , a lease required the tenant to prepare land for planting of rice, and to plant the rice, with the work to start by a specified date. The lease also provided that the lessor could terminate the lease if the lessee defaulted in the performance required under the lease. The lessor brought an action to rescind the lease and evict the tenant when the tenant had not begun the work by the specified date, and the trial court entered judgment in favor of the lessor.

The court of appeal affirmed, holding that the tenant's failure to perform the covenant requiring preparation of the land and sowing of rice seed was deemed to be a material breach, for which damages would not be an adequate remedy, entitling landlord to terminate the lease (*104 Cal. App. 212, 216)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsBreachGeneral OverviewReal Property LawLandlord & TenantLease AgreementsBreachMaterial BreachReal Property LawLandlord & TenantLease AgreementsDamagesGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview

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14-141 California Points & Authorities § 141.34

§ 141.34 Supporting Contention That Lease Should Be Rescinded or Cancelled--Landlord's Material Breach of Mutual and Dependent Covenant Entitles Tenant to Rescission

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE ACTIONS OF LANDLORD CONSTITUTE A MATERIAL BREACH OF THE LEASE, AND TENANT IS THEREFORE ENTITLED TO CANCEL OR RESCIND THE LEASE.

Breach of Essential Covenant. Breach of performance of an express covenant essential to the beneficial enjoyment of the property by the tenant may be basis for cancellation or rescission of the lease (*Kulawitz v. Pacific etc. Paper Co. (1944) 25 Cal. 2d 664, 669-670, 155 P.2d 24*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a contention by a tenant that landlord is in material breach of an essential covenant in a lease, and that the landlord's breach entitles the tenant to rescission or

cancellation of the lease.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts tending to show that the breached lease provision was essential, and that the breach was material.

[3] Discussion of Authorities

[a] Breach of Essential Covenant

In ***Kulawitz v. Pacific etc. Paper Co.*** *(1944) 25 Cal. 2d 664, 670, 155 P.2d 24* , the plaintiff leased store premises from a landlord for the purpose of conducting a furniture business. The lease provided that the landlord would not rent out or permit occupancy of any other space or storeroom in the same building for purposes of conducting a furniture store, a covenant which the landlord violated. The tenant tendered back the premises, and declared a constructive eviction and rescission of the lease. The court of appeal determined that performance of the restrictive covenant was essential to the beneficial enjoyment of the premises by the lessee for the purposes intended, that the covenant was dependent with the tenant's covenant to pay rent, that the breach amounted to a constructive eviction once tenant vacated the premises, and that the tenant was entitled to rescind the lease (*25 Cal. 2d 664, 669-670*).

[4] Additional Authorities

[a] Breach of Essential Covenant

In *Medico-Dental Bldg. Co. v. Horton & Converse (1942) 21 Cal. 2d 411, 132 P.2d 457* , the plaintiff landlord brought a suit for rent alleged to be due under a lease, for the amount of an electricity charge against defendant during the last month of its occupancy, and for money expended for renovation following the defendant's removal. The trial court found that plaintiff's breach of a restrictive covenant in the lease not to rent to competing businesses prevented the maintenance of the action, except to recover the expenditure for electricity. Judgment was entered accordingly. The lease provided that the premises would be used by lessee as a drug store and for no other business. The lessor agreed not to lease or sublease any part of the building to any other person or firm for the purpose of maintaining a drug store or selling drugs or ampuls. Several years later, while this lease was still in effect, the plaintiff leased a floor of the building to a physician with the stipulation that he not maintain a drug store or compound or dispense drugs except in connection with the regular course of treatment of his own patients. The physician maintained a drug room where drugs were sold until he opened a drug store on his floor which was registered as a pharmacy and where drugs were sold and prescriptions were compounded and filled. When defendant learned of these facts it notified plaintiff in writing, expressly demanding that plaintiff take immediate steps to stop the objectionable operation and charging that such practice constituted a breach of its lease. Plaintiff later informed defendant that no arrangements could be made with the physician and plaintiff could not do anything with him. Defendant, through its president, replied that it was going to vacate the premises in order to avoid a waiver of its exclusive right to maintain a drug store in the building and the next day defendant closed its store.

The Supreme Court affirmed the judgment and held that those covenants that run to the entire consideration of a contract are mutual and dependent. Covenants and stipulations on the part of the lessor and lessee are construed to be dependent on each other or independent of each other, according to the intention of the parties and the good sense of the case. Here, the restrictive covenant in defendant's lease was undoubtedly of such a nature as to be mutual and dependent. The exclusive right to conduct a drug store in the building was vital to the defendant's successful operation of its business. Thus, the breach of the restrictive covenant relieved defendant of any duty to perform on his part the provisions of the contract, and he was not obliged to pay rent after surrendering possession of the premises.

In *Fong v. Rossi (1948) 87 Cal. App. 2d 20, 195 P.2d 854* , the court found that rescission of a lease by the tenant was justified, where the lease stated that the principal income from the premises would be obtained by the sale of liquor

under the license possessed by landlord. The landlord failed and refused to transfer the licenses unless the tenant agreed to buy a large stock of liquor from the landlord. The court implied from the lease's provisions that the landlord was obligated to transfer the licenses, even though the lease did not expressly state that they should be transferred (*87 Cal. App. 2d 20, 22-23)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsBreachGeneral OverviewReal Property LawLandlord & TenantLease AgreementsBreachMaterial BreachReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsRemediesGeneral Overview

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14-141 California Points & Authorities § 141.35

§ 141.35 Opposing Contention That Lease Should Be Rescinded or Cancelled--Any Breach by Tenant Is Not Sufficiently Material to Justify Rescission

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE ACTIONS OF TENANT DO NOT CONSTITUTE A MATERIAL BREACH OF THE LEASE THAT WOULD ENTITLE LANDLORD TO CANCEL OR RESCIND THE LEASE.

Trivial Breach Does Not Entitle Party to Rescind. An alleged breach by a tenant of a covenant in the lease must be material in order for a forfeiture to occur (*Beckett v. City of Paris Dry Goods Co. (1939) 14 Cal. 2d 633, 638, 96 P.2d 122*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a contention that a tenant is not in material breach of an essential covenant in a lease, making rescission inappropriate.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts explaining the relevant lease provision, and how the alleged breach is not material.

[3] Discussion of Authorities

[a] Trivial Breach Does Not Entitle Party to Rescind

In ***Beckett v. City of Paris Dry Goods Co.*** *(1939) 14 Cal. 2d 633, 96 P.2d 122* , an agreement between an owner of a commercial premises and an optometrist permitted the optometrist to conduct an optical department in the store, and required all money taken in by the optometrist to be deposited with the cashier of the store at the end of each business day. After three years, the store notified the optometrist that it was cancelling the agreement (which it characterized as a license) immediately, based on the failure to comply with the deposit requirement. The optometrist sued, and recovered damages for unlawful eviction, and the store appealed.

The Supreme Court affirmed, holding that the agreement in question was a lease of space, not a personal license agreement. Because the breach of the covenant involved was not sufficient to justify a forfeiture of the lease, the award of damages was held proper (*14 Cal. 2d 633, 638)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsBreachGeneral OverviewReal Property LawLandlord & TenantLease AgreementsBreachMaterial BreachReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview

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14-141 California Points & Authorities § 141.36

§ 141.36 Supporting Contention That Commercial Lessor Has Breached Covenant Not to Lease to Competing Business

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

LANDLORD HAS VIOLATED THE COVENANT NOT TO COMPETE CONTAINED IN TENANT'S LEASE, ENTITLING TENANT TO RELIEF.

A. Covenant May Be Express or Implied From Language of Lease. A covenant not to compete may be express, or reasonably implied, if the lease's language indicates that the parties intended such a restriction (*Keating v. Preston (1940) 42 Cal. App. 2d 110, 122, 108 P.2d 479*).

B. Covenant Not to Compete Not an Unreasonable Restraint of Trade. A covenant not to compete normally is valid and enforceable, and does not constitute an unreasonable restraint of trade (*Martikian v. Hong (1985) 164 Cal. App. 3d 1130, 1133, 211 Cal. Rptr. 66*).

C. Covenant Enforceable Against Landlord's Successor in Interest and Successor's Tenant With Notice. A tenant may enforce a covenant not to compete, against any successor of landlord, including another tenant of landlord or his or her successor, if the successor or tenant had actual or constructive notice of the covenant (*Civil Code § 1469*; *Carter v. Adler (1955) 138 Cal. App. 2d 63, 69-70, 291 P.2d 111* ; *Flagg v. Andrew Williams Stores, Inc. (1954) 127 Cal. App. 2d 165, 170, 273 P.2d 294*).

D. Covenant Enforceable Against Activities of Landlord, Successor, or Tenant on Adjacent Property. An express covenant not to compete may carry with it an implied covenant that landlord will not lease, use, or convey landlord's adjacent property for a competing business (*Civil Code §§ 1469, 1470*; *Edmond's of Fresno v. MacDonald Group, Ltd. (1985) 171 Cal. App. 3d 598, 605, 217 Cal. Rptr. 375* ; *Carter v. Adler (1955) 138 Cal. App. 2d 63, 69-70, 291 P.2d 111*).

[*EITHER*]

E. Tenant Entitled to Injunctive Relief. A tenant is entitled to elect remedy of injunctive relief to enforce a covenant not to compete, against a landlord and landlord's successors, assignees, or other tenants (*Edmond's of Fresno v. MacDonald Group, Ltd. (1985) 171 Cal. App. 3d 598, 605, 217 Cal. Rptr. 375*).

[*OR*]

E. Tenant Entitled to Recover Damages. A tenant entitled to enforce a covenant not to compete may elect recovery of damages amounting to lost profits (*Hildebrand v. Stonecrest Corp. (1959) 174 Cal. App. 2d 158, 165-166, 344 P.2d 378*).

[*OR*]

E. Tenant Entitled to Terminate or Rescind Lease. A tenant is entitled to treat a covenant not to compete as a dependent covenant with the covenant to pay rent, and to terminate or rescind the lease (*Kulawitz v. Pacific etc. Paper Co. (1944) 25 Cal. 2d 664, 670, 155 P.2d 24*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a contention that a tenant is entitled to relief based on the landlord's breach of a covenant not to compete.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing both the existence of a covenant not to compete and the landlord's breach of the covenant, as well as the factors supporting the relief plaintiff seeks as a result of the breach. Counsel should also be aware that an aggrieved tenant may be entitled to alternative remedies of damages, injunctive relief, and rescission, to the extent that they are not inconsistent.

[b] Related Pleading and Practice Forms

For related forms, see California Forms of Pleading and Practice, Ch. 332, *Landlord and Tenant: The Tenancy* (Matthew Bender).

[3] Discussion of Authorities

[a] Covenant May Be Express or Implied From Language of Lease

The case of ***Keating v. Preston*** *(1940) 42 Cal. App. 2d 110, 108 P.2d 479* , involved a leasing of space in a small hotel for purposes of operating a restaurant business, and also of serving liquor in any part of the hotel. The language of the lease entitled the tenant to "(a)ll the space ...#x2026; necessary to do the restaurant business," together with the right to "serve ...#x2026; liquors not only on the leased premises but also in any part of the hotel." In a dispute with the tenant, purportedly because the tenant sometimes accepted money from customers to bet on horse races, the landlord closed and barred the door between the restaurant and hotel, and threatened to lease to other tenants another portion of the hotel to be operated as a hotel or cocktail room in competition with the tenant's business. Landlord then filed suit to rescind and gain forfeiture of the lease on the grounds of breach of a covenant not to use the property for a purpose other than that of maintaining a restaurant, and on grounds of an alleged violation of the Penal Code, in accepting wagers on horse races. At approximately the same time, the tenant filed suit to enjoin the landlord from leasing any portion of the hotel property to others for purposes of opening a restaurant in competition with the tenant's restaurant. The trial court held that the landlord was not entitled to a rescission or forfeiture of the lease, and that the tenant was entitled to exclusively operate his restaurant.

In upholding the ruling of the trial court, the court of appeal determined that a rescission by the landlord, based on the horse race wagers, was not permitted under the language of the lease. The court further concluded that, based on the language of the lease, it could reasonably be implied that it was the intention of the parties that the tenant was to have the exclusive right to operate a restaurant in the hotel building (*42 Cal. App. 2d 110, 122)* .

[b] Covenant Not to Compete Not an Unreasonable Restraint of Trade

In ***Martikian v. Hong*** *(1985) 164 Cal. App. 3d 1130, 211 Cal. Rptr. 66* , landlord and tenant entered into a lease for tenant to operate a business in a small shopping center entitled Glendale House of Liquor and Deli. Another tenant already was operating a restaurant entitled Edna's Coffee Shop. Prior to signing a lease with the landlord, as part of the lease, the two tenants entered into an agreement that the Liquor and Deli would sell no middle eastern grocery items, and that the Coffee Shop would sell no beer or wine. After entering into the lease, the owner of the Liquor and Deli began to sell middle eastern products, and steadfastly refused to discontinue selling such items, even though the trial court granted and refused to dissolve a preliminary injunction against the owner of the Liquor and Deli, held the owner in contempt of court, and even though an arbitration of the matter resulted in a decision against the Liquor and Deli as well. The owner of the Liquor and Deli argued that the covenant not to compete constituted an unreasonable restraint of trade.

The court of appeal affirmed, and refused to hold that the covenant not to compete in the sale of middle eastern products constituted an illegal restraint of trade. The court of appeal's ruling was made on the grounds that there were no circumstances rendering the covenant "particularly pernicious," there was not an unduly or unreasonable interference with trade and commerce, the noncompetitive effect was trivial, the covenant was not illegal per se as a horizontal restraint, the public welfare was not involved, the covenant did not affect the public's right toacquire the products at competitive prices, and that the covenant was not even directed at price (*164 Cal. App. 3d 1130, 1133-1134)* .

[c] Covenant Enforceable Against Landlord's Successor in Interest and Successor's Tenant With Notice

In ***Carter v. Adler*** *(1955) 138 Cal. App. 2d 63, 291 P.2d 111* , after entering into a covenant not to compete with a tenant of a shopping center, the landlord of a shopping center began to conduct a supermarket on an adjacent property. The trial court held that the language of the lease between the landlord and tenant containing a restrictive covenant against competition, applied to an adjacent property owned by the landlord, and applied to his successor.

The court of appeal affirmed, observing that the lease containing the covenant also gave the landlord a right to terminate the lease if tenant fell below a gross sales quota, and that a supermarket on the adjacent property would expectedly

reduce the tenant's sales in derogation of the tenant's ability to meet the minimum sales level required by the lease and ability to enjoyment of the leased premises (*138 Cal. App. 2d 63, 69-73)* .

In ***Flagg v. Andrew Williams Stores, Inc.*** *(1954) 127 Cal. App. 2d 165, 273 P.2d 294* , the owner of a shopping center leased a portion of that property to plaintiff; the lease included a provision that the lessor agreed not to operate a soda fountain on the lessor's remaining property. Lessor then sold the property and assigned its rights as lessor to a third party, and the third party installed facilities for a restaurant on the property. Plaintiff sued, seeking to enjoin defendants from operating a restaurant on the premises and seeking a declaration of their rights under the lease. The trial court entered judgment for plaintiff, and defendants appealed.

The court of appeal affirmed, holding that the covenant not to compete was enforceable not only against the original lessor, but also against successors in interest to the original lessor, whether to the entire parcel or any part of that parcel (*127 Cal. App. 2d 165, 170)* .

[d] Covenant Enforceable Against Activities of Landlord, Successor, or Tenant on Adjacent Property

Edmond's of Fresno v. MacDonald Group, Ltd. *(1985) 171 Cal. App. 3d 598, 217 Cal. Rptr. 375* , was a case in which there was a covenant in a lease between a tenant's retail jewelry business and a landlord shopping mall, not to lease to any more than one other retail jeweler. The landlord expanded the mall to an adjacent property that it owned, and added another retail jeweler as a tenant. The trial court granted a permanent injunction against the addition of the new retail jeweler. The court of appeal affirmed, holding that although the covenant did not specifically mention expansion of the mall on the landlord's adjacent property, it was implied by the lease, and was a proper basis for a permanent injunction (*171 Cal. App. 3d 598, 605)* .

The facts and procedural background of ***Carter v. Adler*** *(1955) 138 Cal. App. 2d 63, 291 P.2d 111* , are discussed in *§ 141.36[3][c]*. The court held that a lessor's conduct that would derogate a covenant not to compete is breached if the lessor's conduct takes place on adjacent property owned by the lessor, even if the lease does not expressly so provide, as long as the intent of the provision indicates that such conduct was intended to be covered (*138 Cal. App. 2d 63, 69-71)* .

[e] Tenant Entitled to Injunctive Relief

The facts and procedural background of ***Edmond's of Fresno v. MacDonald Group, Ltd.*** *(1985) 171 Cal. App. 3d 598, 217 Cal. Rptr. 375* , are discussed in *§ 141.36[3][d]*. After affirming the trial court's finding that the lessor breached the covenant, it also affirmed the trial court's grant of a permanent injunction (*171 Cal. App. 3d 598, 605)* .

[f] Tenant Entitled to Recover Damages

Hildebrand v. Stonecrest Corp. *(1959) 174 Cal. App. 2d 158, 344 P.2d 378* , was a case in which a tenant pharmacy prevailed against its landlord and a competing supermarket, based on its allegation that the landlord breached a covenant not to compete with the drug store or the sale of drugs, medicines, or cosmetics. The court of appeal affirmed, holding that the plaintiff was entitled to a recovery measured by the loss of profits resulting from the breach (*174 Cal. App. 2d 158, 165-166)* . Concerning the amount of damages awarded, the court explained that the findings of damages may not be rejected merely because there is evidence which might authorize a different result, and that one whose wrongful conduct has rendered difficult the ascertainment of damages cannot escape liability because the damages could not be measured with exactness (*174 Cal. App. 2d 158, 167)* .

[g] Tenant Entitled to Terminate or Rescind Lease

In ***Kulawitz v. Pacific etc. Paper Co.*** *(1944) 25 Cal. 2d 664, 670, 155 P.2d 24* , the plaintiff leased store premises from a landlord for the purpose of conducting a furniture business. The lease provided that the landlord would not rent out or

permit occupancy of any other space or storeroom in the same building for purposes of conducting a furniture store, a covenant that the landlord violated. The tenant tendered back the premises, and declared a constructive eviction and rescission of the lease.

The court of appeal determined that performance of the restrictive covenant was essential to the beneficial enjoyment of the premises by the lessee for the purposes intended, that the covenant was dependent with the tenant's covenant topay rent, that the breach amounted to a constructive eviction once tenant vacated the premises, and that the tenant was entitled to rescind the lease (*25 Cal. 2d 664, 669-670)* . The court further explained that a landlord may not regard a covenant not to compete and a covenant to pay rent as being dependent, unless the lease provides otherwise, and therefore, if a tenant defaults in the payment of rent, a landlord is not then permitted to breach the covenant not to compete, unless the lease is terminated (*25 Cal. 2d 664, 670)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawLandlord & TenantLease AgreementsBreachGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsDamagesGeneral Overview

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14-141 California Points & Authorities § 141.37

§ 141.37 Opposing Contention That Commercial Lessor Has Breached Covenant Not to Lease to Competing Business--No Covenant Reasonably Inferable From Language of Lease

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

LANDLORD['S SUCCESSOR IN INTEREST] HAS NOT VIOLATED ANY COVENANT NOT TO COMPETE CONTAINED IN LANDLORD'S LEASE WITH TENANT, BECAUSE SUCH A COVENANT IS NOT REASONABLY INFERABLE FROM THE LANGUAGE OF THE LEASE.

A. Covenant Must Be Reasonably Inferable From Language of Lease. For a tenant to obtain relief based on an implied covenant not to compete, the covenant must be reasonably implied directly from the language of the lease, rather than from alleged facts surrounding its execution (*Stockton Dry Goods v. Girsh (1951) 36 Cal. 2d 677, 681, 227 P.2d 1*).

[*Optional*] **B. An Ambiguous Covenant Should Be Narrowly Construed as Against Successor of Landlord's Adjacent Property.** In the event of ambiguity, any covenant not to compete should be narrowly construed so as not to extend to successor purchasers from a landlord of adjacent property, and not unnecessarily restrict the right of alienation of property (*see* *Carr v. King (1914) 24 Cal. App. 713, 721-722, 142 P. 131*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to a contention that a landlord or landlord's successor in interest has breached a covenant not to lease to a competing business. The basis for the opposition is that a covenant not to compete is not reasonably inferable from the language of the lease.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the provisions of the lease on which the alleged covenant is based, and discuss how no implied covenant not to compete should be reasonably implied from any of those provisions.

[3] Discussion of Authorities

[a] Covenant Must Be Reasonably Inferable From Language of Lease

In ***Stockton Dry Goods v. Girsh*** *(1951) 36 Cal. 2d 677, 227 P.2d 1* , a tenant of a small portion of a department store who used that portion of the store for selling shoes, sought declaratory relief when the landlord asserted a right to set up one or more competing shoe departments in the store. The lease between the parties provided that the rental was a certain percentage of sales. The trial court ruled in the landlord's favor, and the appellate court affirmed, on the grounds that there was no language in the lease from which the tenant could infer any intention of a covenant not to compete. Accordingly, evidence offered by the tenant, of an alleged oral understanding of such a covenant between the parties before signing the lease, was held inadmissible (*36 Cal. 2d 677, 681)* .

[b] An Ambiguous Covenant Should Be Narrowly Construed as Against Successor of Landlord's Adjacent Property

In ***Carr v. King*** *(1914) 24 Cal. App. 713, 142 P. 131* , plaintiff had leased two acres from the owner of a 1,000-acre plot along a river. Plaintiff operated a resort hotel on the land, and the lease provided that the lessor would not "demise or let" any other part of its property for use in a similar manner. The lessor subsequently sold two parcels of lands to persons who then established resort hotels on the land, and plaintiff sued, alleging breach of the lease covenant. The trial court granted the lessor's motion for nonsuit, and plaintiff appealed.

The court of appeal affirmed, holding that the clause at issue did not restrict the lessor's right to sell part of his property for any use, but only restricted the lessor's right to enter into lease agreements that would be in competition with plaintiff. The court held that the clause at issue did not clearly restrict the lessor's rights regarding the sale of fee interests in the property, and did not create a burden running with the land, so the court interpreted the clause narrowly (*24 Cal. App. 713, 719-721)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawLandlord & TenantLease AgreementsBreachGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsDamagesGeneral Overview

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 141 LANDLORD AND TENANT
PART II. FORMS

14-141 California Points & Authorities § 141.38

§ 141.38 Supporting Contention That Rent Control Ordinance Is Unconstitutional--Ordinance Violates Judicial Powers Clause

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE RENT CONTROL ORDINANCE AT ISSUE UNCONSTITUTIONALLY GRANTS JUDICIAL POWERS TO AN ADMINISTRATIVE BODY BY PERMITTING REMEDIES WITHOUT MEANINGFUL REVIEW BY COURTS.

A. Violation of Judicial Powers Clause of State Constitution. A rent control law that allows either a tenant or a rent control board to withhold rent, bar unlawful detainer actions based on rent withholding, award treble damages, or order that damages offset future rent payments, without court review or approval or any judicial involvement, violates the judicial powers clause of the Constitution of the State of California (*Cal. Const., art. VI, § 1*; *McHugh v. Santa Monica Rent Control Board (1989) 49 Cal. 3d 348, 376-377, 261 Cal. Rptr. 318, 777 P.2d 91* ; *Floystrup v. City of Berkeley Rent Stabilization Board (1990) 219 Cal. App. 3d 1309, 1314-1316, 268 Cal. Rptr. 898*).

[*Optional*] **B. Standing to Sue Without Exhausting Administrative Remedies.** A party has standing to challenge an ordinance or statute allegedly invalid on its face, without first exhausting the party's administrative remedies (*Floystrup v. City of Berkeley Rent Stabilization Board (1990) 219 Cal. App. 3d 1309, 1316-1317, 268 Cal. Rptr. 898*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that a rent control ordinance is constitutionally invalid, on the ground that the ordinance grants powers to an administrative body, or to a tenant, that are not subject to judicial review and therefore violates the judicial powers clause of the California Constitution [*Cal. Const., art. VI, § 1*].

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the specific provisions of the challenged ordinance, and the way in which the ordinance permits the administrative body to act without sufficient judicial review.

[b] Related Pleading and Practice Forms

For related forms, see California Forms of Pleading and Practice, Ch. 335, *Landlord and Tenant: Rent Control* (Matthew Bender).

[3] Discussion of Authorities

[a] Violation of Judicial Powers Clause of State Constitution

In ***McHugh v. Santa Monica Rent Control Board*** *(1989) 49 Cal. 3d 348, 261 Cal. Rptr. 318, 777 P.2d 91* , in response to an administrative complaint filed by two tenants asserting that their landlord had charged excessive rents, the board ruled that the tenants had been overcharged, and awarded restitution of excess rent and treble damages, and authorized one tenant to withhold future rents as credit against damages. On writ of mandate to the superior court, the court ruled in favor of the landlord, on the ground that the applicable rent control law was invalid insofar as it required the board to usurp judicial powers reserved to the courts under *Cal. Const., art. VI, § 1*.

The Supreme Court reversed the superior court's ruling in part, holding that the law was not unconstitutional on its face, but held that the specific order of the board denied the landlord an opportunity for judicial review in violation of art. VI, § 1. In so ruling, the Court determined that the local ordinance enabled the board to validly exercise, with proper safeguards, the quasi-judicial power of determining whether a landlord has charged excessive rent over the rent level permitted under the ordinance. The Court held that an administrative board may constitutionally hold hearings, determine facts, apply the law to the facts, and order relief, including certain types of monetary relief, as long as reasonably necessary to effectuate the board's primary, legitimate legislative purposes, and as long as the courts maintained the power of judicial review of such administrative determinations (*49 Cal. 3d 348, 372)* .

However, the Court invalidated as an unconstitutional violation of the judicial powers clause of the state constitution, the board's authority to award treble damages for excessive rent charged, and to order that amounts awarded could be offset against future rent. In rendering its ruling, the court observed that the rent control law in issue produced a self-enforcing remedy prior to any effective judicial review of the decision, and that the law presented a significant risk of producing arbitrary outcomes (*49 Cal. 3d 348, 378-379)* .

In ***Floystrup v. City of Berkeley Rent Stabilization Board*** *(1990) 219 Cal. App. 3d 1309, 268 Cal. Rptr. 898* , a landlord failed to register his apartment unitswith the Berkeley Rent Stabilization Board. The applicable ordinance provided that a failure to register allowed the Board to authorize tenants to withhold rents. Pursuant to the tenants' petition to the Board for permission to withhold rents, the Board ordered tenants to place their rents in escrow with the Board, and that if the landlord failed to register within 60 days, one-half of the escrowed rent would be distributed to the

tenants and forfeited by the landlord.

The court of appeal held that this ordinance was unconstitutional in that it violated the judicial powers clause of the California Constitution [*Cal. Const., art. VI, § 1*], by allowing tenants or a rent control board to withhold rents, by barring any unlawful detainer action, and by authorizing the forfeiture of withheld rents, without any court review, approval, or any judicial involvement (*219 Cal. App. 3d 1309, 1314-1316)* .

[b] Standing to Sue Without Exhausting Administrative Remedies

The facts and procedural background of ***Floystrup v. City of Berkeley Rent Stabilization Board*** *(1990) 219 Cal. App. 3d 1309, 268 Cal. Rptr. 898* , are discussed in *§ 141.38[3][a]*. The court relied on *Ebel v. City of Garden Grove (1981) 120 Cal. App. 3d 399, 409, 176 Cal. Rptr. 312* , for the proposition that, if an ordinance or statute allegedly is unconstitutional on its face, a party has judicial standing to challenge its validity, without first exhausting the party's administrative remedies (*219 Cal. App. 3d 1309, 1316-1317)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantRent RegulationGeneral OverviewReal Property LawLandlord & TenantRent RegulationRent Control StatutesReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview

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14-141 California Points & Authorities § 141.39

§ 141.39 Supporting Contention That Rent Control Ordinance Is Unconstitutional--Ordinance That Precludes Fair Return on Landlord's Investment Violates Takings Clause

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE RENT CONTROL ORDINANCE BEFORE THE COURT IS UNCONSTITUTIONAL, BECAUSE ITS PROVISIONS PRECLUDE LANDLORDS FROM OBTAINING RENT INCREASES NECESSARY TO ASSURE A FAIR RETURN ON INVESTMENT AND THEREFORE VIOLATES THE *TAKINGS CLAUSE*.

A. Violation of *Takings Clause* of State Constitution. A rent control law that does not provide for an efficient administrative procedure allowing a landlord to receive sufficient rent increases to assure a fair, reasonable, and timely return on the landlord's investment, so as to avoid confiscatory results, violates the *takings clause of the Constitution* of the State of California (*Fisher v. City of Berkeley (1984) 37 Cal. 3d 644, 679, 209 Cal. Rptr. 682, 693 P.2d 261* ; *Birkenfeld v. City of Berkeley (1976) 17 Cal. 3d 129, 164-168, 130 Cal. Rptr. 465, 550 P.2d 1001*).

[*Optional*] **B. Standing to Sue Without Exhausting Administrative Remedies.** [*See § 141.38, Paragraph B.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that a rent control ordinance is constitutionally invalid, on the ground that the ordinance does not provide for an efficient administrative procedure allowing landlords to receive sufficient rent increases to assure a fair and reasonable return on landlords' investments, and therefore violates the *takings clause of the constitution*.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the specific provisions of the challenged ordinance, and the way in which the ordinance permits the administrative body to deny landlords a fair and reasonable return on investment.

[b] Related Pleading and Practice Forms

For related forms, see California Forms of Pleading and Practice, Ch. 335, *Landlord and Tenant: Rent Control* (Matthew Bender).

[3] Discussion of Authorities

[a] Violation of Takings Clause of State Constitution

In ***Fisher v. City of Berkeley*** *(1984) 37 Cal. 3d 644, 209 Cal. Rptr. 682, 693 P.2d 261* , the Supreme Court reviewed a city rent control ordinance, which provided that a landlord was to receive a fair return on his or her investment, but did not base permissible rents on the value of the rental property. In rendering its ruling, the Court determined that the "fair return" standard permitted the Berkeley rent control board sufficient flexibility to avoid confiscatory results. The Court explained that it presumed that the board would exercise its powers in accordance with constitutional requirements, and that if the board acts unfairly, the fault lies with the board and not with the law creating the board. The Court further expressed that the rent control law would have been invalid on its face if it hadfailed to provide for an efficient administrative procedure allowing a landlord to receive sufficient rent increases to assure a fair, reasonable, and timely return on the landlord's investment, or if it had failed to permit those administering it to avoid confiscatory results in its application to the complaining parties. However, the Court cautioned that a police power regulation constitutes a confiscatory "taking," in violation of constitutional requirements, only if a landlord has been deprived of substantially all reasonable use of the property, even if there is a significant diminution in value of the property as a result of the amount of rent approved by the board (*37 Cal. 3d 644, 687-691)* .

Birkenfeld v. City of Berkeley *(1976) 17 Cal. 3d 129, 130 Cal. Rptr. 465, 550 P.2d 1001* , arose as a class action brought by landlords seeking to declare invalid a charter amendment adopted by initiative process in the city of Berkeley. The trial court declared the amendment void and enjoined the city from enforcing it, on the primary ground that the evidence showed that the city was not faced with a serious public emergency to warrant the imposition of rent controls under the city's police power [*Cal. Const., art. XI, § 7*]. The trial court also ruled that the law's requirement for a landlord to obtain a "certificate of eviction" from the city before an unlawful detainer action could be filed against a tenant, was invalid in that it conflicted with state law's summary eviction procedures pursuant to which landlords were entitled to act.

The Supreme Court reversed the lower court in part and affirmed in part. The Court ruled that the law violated constitutional limits on the exercise of police power, by withholding from the rent control board, powers by which it could adjust maximum rents without unreasonable delays. The rent control law required the board to follow an adjusted procedure for determining permissible rent increases which would make delays inevitable. The Court determined that the law's "inexcusably cumbersome rent adjustment procedures" were not reasonably related to the rent control law's stated purpose of preventing excessive rents, and deprive landlords of due process of law (*17 Cal. 3d 129, 164-168)* . However, the Court held that the existence of an emergency is not necessary for a rent control law to be enacted and

enforced through the state's police powers, just as other forms of economic regulation are constitutional when reasonably related to the furtherance of a legitimate governmental purpose (*17 Cal. 3d 129, 158-164)* .

[4] Additional Authorities

[a] Violation of Takings Clause of State Constitution

In *Apartment Assn. of Greater L.A. v. Santa Monica Rent Control Bd. (1994) 24 Cal. App. 4th 1730, 30 Cal. Rptr. 2d 228* , the court of appeal ruled that the trial court correctly stayed enforcement of a rent control provision that prohibited any landlord who purchased rental property after the effective date of the rent control ordinance from seeking an adjustment in base rents. The court reasoned that the ordinance was too broad because it did not allow *any* post-rent control purchaser to petition for a base rent increase on any ground. Accordingly, the regulation could have unconstitutional results in particular cases, and the trial court was correct in staying its enforcement. Rent control regulations can have a confiscatory effect if no rent adjustment mechanism is provided, and a regulation may be invalid on its face when its terms will not permit those who administer it to avoid confiscatory results in its application to the complaining parties (*24 Cal. App. 4th 1730, 1738-1739)* .

Kavanau v. Santa Monica Rent Control Bd. (1993) 19 Cal. App. 4th 730, 23 Cal. Rptr. 2d 724 , involved a local rent control ordinance that limited rent increases to a maximum of 12 percent in any given year except under "extraordinary circumstances." Although the court ruled that the ordinance was not unconstitutional on its face, it held the ordinance unconstitutional on due process grounds, as applied to the landlord in that case, based on the municipality's interpretation of "extraordinary circumstances." Under that interpretation, the loss of the landlord's fair and reasonable return of his rental property was not viewed to be "extraordinary" so as to justify an exception to the 12 percent cap rule; the only qualifying circumstances referred to by the municipality on oral argument were the landlord's insolvency or a threatened act or an act of God (*19 Cal. App. 4th 730, 735-736)* .

In *Kavanau v. Santa Monica Rent Control Bd. (1997) 16 Cal. 4th 761, 66 Cal. Rptr. 2d 672, 941 P.2d 851* , the same landlord in the *Kavanau* Court of Appeal case discussed above, argued that the rent regulation which deprived him of due process by depriving him of a fair return also constituted an unconstitutional taking. The California Supreme Court rejected the argument, holding that a remedy for the due process violation, if available and adequate, obviates a finding of a taking (*16 Cal. 4th 761, 782)* . According to the Court, the landlord's remedy for the due process violation was his continuing right to an adjustment of future rents under the rent control ordinance (*16 Cal. 4th 761, 783, 786)* .

In *Galland v. City of Clovis (2001) 24 Cal. 4th 1003, 103 Cal. Rptr. 2d 711, 16 P.3d 130* , the California Supreme Court addressed the question left open in *Kavanau*, above: whether a future rent adjustment also forecloses a suit for damages for violation of a right to constitutional due process under *42 U.S.C. § 1983* (*24 Cal. 4th 1003, 1008)* . The Court concluded that it does. It held that to recover § 1983 damages for allegedly confiscatory rent regulation, landlords must show that a confiscatory rent ceiling or other rent regulation was imposed and that relief via a writ of mandate and a *Kavanau* adjustment is inadequate (*24 Cal. 4th 1003, 1025)* .

In *Carson Harbor Village, Ltd. v. City of Carson (9th Cir. 2004) 353 F.3d 824* , the Ninth Circuit held that a mobilehome park's rent control takings claim was not ripe for litigation in federal court because the park failed to pursue a "Kavanauadjustment" of prospective rents that would compensate for past losses and failed to show that the "Kavanau adjustment" was an inadequate remedy (*353 F.3d 824, 830)* .

Similarly, in *Hacienda Valley Mobile Estates v. City of Morgan Hill (9th Cir. 2003) 353 F.3d 651* , the Ninth Circuit held that although a mobilehome park owner's allegation that the city rent control ordinance allowed tenants to capture a "premium" on the sales price of mobilehomes alleged as-applied regulatory takings claim, that claim was not ripe because the owner failed to show that a "Kavanau adjustment" was an inadequate remedy (*353 F.3d 651, 661)* .

In *Ventura Mobilehome Communities Owners Ass'n v. City of San Buenaventura (9th Cir. 2004) 371 F.3d 1046* , the Ninth Circuit, following *Carson Harbor Village* and *Hacienda Valley*, rejected a takings challenge to a mobilehome park ordinance that alleged the ordinance prevented owners of mobilehome parks from charging rents at market rates and conferred a premium on renters by artificially inflating the value of mobilehomes at the expense of park owners was not ripe for review in federal court, on the ground the plaintiff failed to show that it had exhausted available state remedies or that California's compensation procedures were futile or inadequate, so as to create an exemption from the exhaustion requirement (*371 F.3d 1046, 1052-1054)* .

In *Levald, Inc. v. City of Palm Desert (9th Cir. 1993) 998 F.2d 680* , the United States Court of Appeals held that the district court properly dismissed a substantive due process claim challenging a city's mobilehome park rent control and vacancy control ordinance as taking without just compensation (*998 F.2d. 680, 690)* . However, the district court abused its discretion in failing to explain its reasons for denying leave to amend a complaint (when no reasons were apparent from record) (*998 F.2d 680, 692)* . Furthermore, the property owner's facial taking challenge to the local ordinance was ripe for judicial review even though the property owner did not first seek remedies in state court. It would have been futile to seek state court relief at the time the alleged taking occurred because California did not at that time recognize actions for inverse condemnation based on regulatory takings (*998 F.2d 680, 686)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantRent RegulationGeneral OverviewReal Property LawLandlord & TenantRent RegulationRent Control StatutesReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview

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14-141 California Points & Authorities § 141.40

§ 141.40 Opposing Contention That Rent Control Ordinance Is Unconstitutional--Administrative Authority Does Not Violate Judicial Powers Clause

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE RENT CONTROL ORDINANCE AT ISSUE DOES NOT UNCONSTITUTIONALLY GRANT JUDICIAL POWERS TO AN ADMINISTRATIVE BODY BECAUSE THE AUTHORITY GRANTED IS REASONABLY NECESSARY TO THE ORDINANCE'S LEGITIMATE PURPOSES, AND THE COURTS RETAIN POWER TO REVIEW THE BODY'S DECISIONS THROUGH JUDICIAL REVIEW.

Rent Control Law's Administrative Authority to Determine Whether Landlord Has Charged Excessive Rent Does Not Violate Judicial Powers Clause of State Constitution. It is permissible for a rent control board to be given the authority to determine claims against a landlord for charging excess rents, as long as this authority is reasonably necessary to serve the board's primary, legitimate, legislative purposes, and that the power to make binding judgments remains in the courts, through judicial review (*Cal. Const., art. VI, § 1*; *McHugh v. Santa Monica Rent Control Bd. (1989) 49 Cal. 3d 348, 372, 261 Cal. Rptr. 318, 777 P.2d 91*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be used to oppose a contention that a rent control ordinance is unconstitutional, when the basis of the claim of unconstitutionality is an alleged violation of the judicial powers clause. In an appropriate case, the points and authorities in this form may be used to oppose the contention supported by *§ 141.38*.

Counsel should insert argument in the above form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the provisions of the ordinance that permit meaningful judicial review of the determinations of the administrative body given authority under the ordinance.

[3] Discussion of Authorities

[a] Rent Control Law's Administrative Authority to Determine Whether Landlord Has Charged Excessive Rent Does Not Violate Judicial Powers Clause of State Constitution

The facts and procedural background of ***McHugh v. Santa Monica Rent Control Bd.*** *(1989) 49 Cal. 3d 348, 261 Cal. Rptr. 318, 777 P.2d 91* , are discussedin *§ 141.38[3][a]*. The Court held that the ordinance before it was not facially invalid, as the local ordinance enabled the board to validly exercise, with proper safeguards, the quasi-judicial power of determining whether a landlord has charged excessive rent over the rent level permitted under the ordinance. The Court held that an administrative board may constitutionally hold hearings, determine facts, apply the law to the facts, and order relief, including certain types of monetary relief, as long as reasonably necessary to effectuate the board's primary, legitimate legislative purposes, and as long as the courts maintained the power of judicial review of such administrative determinations (*49 Cal. 3d 348, 372)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantRent RegulationGeneral OverviewReal Property LawLandlord & TenantRent RegulationRent Control StatutesReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview

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14-141 California Points & Authorities § 141.41

§ 141.41 Opposing Contention That Rent Control Ordinance Is Unconstitutional--Ordinance Permitting Consideration of Tenant's Hardship in Setting Rent Levels Is Facially Valid Under Due Process, Equal Protection, and Takings Clauses

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE RENT CONTROL ORDINANCE PROVISION PERMITTING CONSIDERATION OF TENANT HARDSHIP IN SETTING RENT LEVELS DOES NOT ON ITS FACE VIOLATE THE DUE PROCESS, EQUAL PROTECTION, OR *TAKINGS CLAUSES.*

Rent Control Law Permitting Consideration of Tenant Hardship Is Facially Valid Under Constitutional Due Process, Equal Protection, and *Takings Clauses*. A local rent control ordinance that allows a hearing officer to consider a tenant's hardship, among other factors, in fixing reasonable rent, is valid on its face, under the constitutional due process and *equal protection clauses*, and does not constitute an illegal confiscatory taking (*Pennell v. City of San Jose (1986) 42 Cal. 3d 365, 374, 228 Cal. Rptr. 726, 721 P.2d 1111 , aff'd, 485 U.S. 1, 108 S. Ct. 849, 99 L. Ed. 2d 1*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be used to oppose a contention that a rent control ordinance is unconstitutional, when the basis of the claim of unconstitutionality is a provision of the ordinance that permits an administrative body to consider a tenant's hardship in fixing reasonable rents.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the provisions of the ordinance that permit consideration of a tenant's hardship, in the context of other considerations that assure that the rents set do not deprive landlords of a fair and reasonable return on investment.

[3] Discussion of Authorities

[a] Rent Control Law Permitting Consideration of Tenant Hardship Is Facially Valid Under Constitutional Due Process, Equal Protection, and Takings Clauses

In ***Pennell v. City of San Jose*** *(1986) 42 Cal. 3d 365, 228 Cal. Rptr. 726, 721 P.2d 1111 , aff'd, 485 U.S. 1, 108 S. Ct. 849, 99 L. Ed. 2d 1* , a group of landlords brought an action challenging the constitutionality of the city of San Jose's rent control ordinance, which provided that if a landlord raised the annual rent of a tenant by over eight percent, the tenant could object to the portion of the raise exceeding the eight-percent level, on the basis of hardship to the tenant. The ordinance required a hearing to determine whether the landlord's proposed increase was "reasonable under the circumstances," and the hearing officer was directed by the ordinance to consider specified factors, including the fairness of the return on the landlord's investment, and the hardship to the tenant. The superior court held that this provision was unconstitutional on its face under the due process and *equal protection clauses*. The court of appeal affirmed. The State Supreme Court reversed this portion of the case, holding that the tenant hardship provision was not unconstitutional on its face.

The United States Supreme Court affirmed and held that the tenant hardship provision of the ordinance was constitutionally valid on its face, in that it afforded constitutional due process of law and equal protection of the laws, and did not constitute a confiscatory law in violation of the *takings clause*. The Court determined that the ordinance carefully considered the circumstances of both the landlord and tenant in connection with approvals of rent increases, that the ordinance set forth a scheme "rationally related to a legitimate state interest," and that the ordinance was neither arbitrary nor discriminatory. However, the Court stated that it was premature to determine whether the *application* of the ordinance violated the *takings clause* prohibiting the taking of property without justcompensation, because an application of the ordinance was not before the court. The court observed that there was no evidence that any hearing officer had relied on the tenant hardship clause to reduce a rent below the figure that would have been set on the basis of the other factors for determining rent increases set forth in the ordinance (*485 U.S. 1, 9-11)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantRent RegulationGeneral OverviewReal Property LawLandlord & TenantRent RegulationRent Control StatutesReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview

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14-141 California Points & Authorities § 141.42

§ 141.42 Opposing Contention That Rent Control Ordinance Is Unconstitutional--Ordinance's Exercise of Police Powers Validly Serves Legitimate Governmental Purpose

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE RENT CONTROL ORDINANCE BEFORE THE COURT IS CONSTITUTIONAL AS A VALID EXERCISE OF POLICE POWERS SERVING LEGITIMATE GOVERNMENTAL PURPOSE TO SET MAXIMUM PERMISSIBLE RENTS.

A. Rent Control Law's Exercise of Police Powers Is Valid in That it Serves Legitimate Governmental Purpose. The applicable rent control law's procedures constitute a valid exercise of the state's police powers, in that they are reasonably related to the furtherance of a legitimate governmental purpose (*Cal. Const., art. XI, § 7*; *Birkenfeld v. City of Berkeley (1976) 17 Cal. 3d 129, 158-164, 130 Cal. Rptr. 465, 550 P.2d 1001* ; *Santa Monica Beach, Ltd. v. Superior Court (1999) 19 Cal. 4th 952, 971, 81 Cal. Rptr. 2d 93, 968 P.2d 993*).

B. Rent Control Law's Procedures for Determining Maximum Rents Constitute Valid Exercise of Police Powers. The applicable rent control law's procedures constitute a valid exercise of the state's police powers, in that they enable adjustments of maximum rents that do not result in unreasonable delays inhibiting a landlord's legal rights (*Cal. Const., art. XI, § 7*; *Carson Mobilehome Park Owners' Ass'n v. City of Carson (1983) 35 Cal. 3d 184, 193, 197 Cal. Rptr. 284, 672 P.2d 1297* ; *cf. Birkenfeld v. City of Berkeley (1976) 17 Cal. 3d 129, 164-168, 130 Cal. Rptr. 465, 550 P.2d 1001*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be used to oppose a contention that a rent control ordinance is unconstitutional, when the basis of the claim of unconstitutionality is that the ordinance does not serve a valid governmental purpose.

Counsel should insert argument in the above form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the provisions of the ordinance that relate to the valid governmental purpose of stabilizing a rental market, even in the absence of any emergency.

[3] Discussion of Authorities

[a] Rent Control Law's Exercise of Police Powers Is Valid in That it Serves Legitimate Governmental Purpose

Birkenfeld v. City of Berkeley *(1976) 17 Cal. 3d 129, 130 Cal. Rptr. 465, 550 P.2d 1001* , arose as a class action brought by landlords seeking to declare invalid a charter amendment adopted by initiative process in the City of Berkeley. The trial court declared the amendment void and enjoined the city from enforcing it, on the primary ground that the evidence showed that the city was not faced with a serious public emergency to warrant the imposition of rent controls under the city's police power [*Cal. Const., art. XI, § 7*]. The trial court also ruled that the law's requirement for a landlord to obtain a "certificate of eviction" from the city before an unlawful detainer action could be filed against a tenant, was invalid in that it conflicted with state law's summary eviction procedures pursuant to which landlords were entitled to act.

The Supreme Court reversed the lower court in part and affirmed in part. The Court reversed and held that the existence of an emergency is not necessary for a rent control law to be enacted and enforced through the state's police powers, just as other forms of economic regulation are constitutional when reasonably related to the furtherance of a legitimate governmental purpose (*17 Cal. 3d 129, 158-164)* . The Court further determined that the facts at trial did not support precluding the city from legislating on the subject of rent control, and held that state law does not exempt placing maximum limits on residential rents (*17 Cal. 3d 129, 164-168)* . The Court upheld as well a provision in the rent control law prohibiting a tenant who is in good standing at the expiration of his or her tenancy from being evicted, unless the premises are withdrawn from the rental housing market, or unless a landlord's offer of a renewal lease has been refused. The Court determined that this was a reasonable means of enforcing rent ceilings, by preventing landlords from evicting tenants who are unwilling to pay, or who oppose paying, increased rentals.

The Court affirmed the lower court's holding that the law violated constitutional limits on the exercise of police power, by withholding from the rent control board powers by which it could adjust maximum rents without unreasonable delays. The rent control law required the board to follow an adjusted procedure for determining permissible rent increases that would make delays inevitable. The Court determined that the law's "inexcusably cumbersome rent adjustment procedures" were not reasonably related to the rent control law's stated purpose of preventing excessive rents, and deprive landlords of due process of law (*17 Cal. 3d 129, 164-168)* . The Court also affirmed the lower court's rejection of the law's "certificate of eviction" requirement, because it supplanted the summary procedures provided by state statute, pursuant to which landlords were entitled to exercise their eviction rights (*17 Cal. 3d 129, 151-153)* .

In ***Santa Monica Beach, Ltd. v. Superior Court*** *(1999) 19 Cal. 4th 952, 81 Cal. Rptr. 2d 93, 968 P.2d 993* , plaintiff

landlord filed a combined complaint for inverse condemnation and petition for writ of administrative mandate, contending that application of defendant city's rent control ordinance to its property constituted a taking because it did not "substantially advance" the ordinance's stated goals of providing affordable housing for the poor, the elderly, and young families. Specifically, plaintiff contended that the rent control law did not meet the "substantial advancement" test articulated by the United States Supreme Court in *Nollan v. California Coastal Com. (1987) 483 U.S. 825, 836-837* (regulation of property effects a taking if it does not substantially advance legitimate state interests) and *Dolan v. City of Tigard (1994) 512 U.S. 374, 391 114 S. Ct. 2309, 129 L. Ed. 2d 304* . The trial court sustained defendants' demurrer to plaintiff's inverse condemnation claim. The court of appeal reversed, holding that the heightened standard of scrutiny applied and that if plaintiff's allegations were true, the ordinance did not substantially advance a legitimate governmental purpose. The California Supreme Court granted review, and reversed the court of appeal judgment.

The Supreme Court concluded that the heightened intermediate scrutiny standard articulated by the United States Supreme Court in *Nollan* and *Dolan* is inapplicable to takings claims based on the general application of rent control laws to an individual landlord. It stated that the standard of review for generally applicable rent control legislation must be at least as deferential as for generally applicable zoning legislation and other legislative land use controls, which means that a party challenging rent control on takings grounds must show that it is an "arbitrary regulation of property rights" (*19 Cal. 4th 952, 967)* . The Supreme Court concluded that even if the more stringent "substantial interest" test of *Nollan* and *Dolan* were applicable, the landlord in *Santa Monica Beach, Ltd.* failed to establish a taking claim. Even though the landlord alleged that the ordinance failed to advance its stated goals of providing affordable housing for the poor, the elderly, and young families, the landlord did not allege that the rent control ordinance failed to advance the purpose of preventing unreasonable and excessive rent increases, and therefore did not adequately allege that the ordinance failed to advance some legitimate state purpose (*19 Cal. 4th 952, 971)* . The Court reasoned that the prevention of "excessive and unreasonable rent increases" caused by the growing shortage of and increasing demand for housing in the city was a legitimate government interest whether or not that goal was precisely identified in the text of the ordinance and whether the primary beneficiaries of such protection were tenants with low or merely moderate income (*19 Cal. 4th 952, 970)* .

[b] Rent Control Law's Procedures for Determining Maximum Rents Constitute Valid Exercise of Police Powers

In ***Carson Mobilehome Park Owners' Ass'n v. City of Carson*** *(1983) 35 Cal. 3d 184, 197 Cal. Rptr. 284, 672 P.2d 1297* , an association of mobilehome park owners brought an action challenging the City of Carson's rent control ordinance on various grounds, including whether the ordinance required excessive delays in obtaining decisions on applications for rent increases and is confiscatory under the constitutional *takings clause*. Under the ordinance, a review board was required to hold a hearing within 90 days of a landlord's application for a rent increase, and was required to render a decision within 15 days after the hearing. If no decision ensued within 105 days from the landlord's filing of his application, the rent increase was to take effect. The trial court ruled that the rent increase procedures were unconstitutional on its face. The Supreme Court reversed and held that the law's rent increase procedures were constitutional and met the standards set in *Birkenfeld v. City of Berkeley (1976) 17 Cal. 3d 129, 164-168, 130 Cal. Rptr. 465, 550 P.2d 1001* for validity of such a rent control law, even though in that case, the rent increase procedures in issue were held to be unconstitutional. The Court held that the ordinance in question was not beyond the scope of the police powers that may be used for legitimate governmental objectives (*35 Cal. 3d 184, 192)* .

The facts and procedural background of ***Birkenfeld v. City of Berkeley*** *(1976) 17 Cal. 3d 129, 130 Cal. Rptr. 465, 550 P.2d 1001* , are discussed in *§ 141.42[3][a]*.

[4] Additional Authorities

[a] Rent Control Law's Procedures for Determining Maximum Rentals Constitute Valid Exercise of Police Powers

In *Oceanside Mobilehome Park Owners Association v. City of Oceanside (1984) 157 Cal. App. 3d 887, 204 Cal. Rptr. 239* , the court upheld a rent control law procedure pursuant to which a landlord was required to give a 60-day notice of rent increase to a tenant, and then to apply to the rent control board for approval of the discretionary rent increase. A hearing on the proposed increase was required to be held within 30 days of the landlord's application for the increase, and thedecision by the rent control board was required to be rendered within 14 days after the hearing. The court held reasonable and valid a delay of 110 days from the date of the notice to the tenant to the effective date of the rent increase (*157 Cal. App. 3d 887, 901)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantRent RegulationGeneral OverviewReal Property LawLandlord & TenantRent RegulationRent Control StatutesReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview

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CHAPTER 141 LANDLORD AND TENANT
PART II. FORMS

14-141 California Points & Authorities § 141.43

§ 141.43 Opposing Contention That Rent Control Ordinance Is Unconstitutional--Ordinance Does Not Conflict With Landlords' Rights to Summary Eviction Procedures

[1] FORM

THE RENT CONTROL ORDINANCE BEFORE THE COURT DOES NOT IMPERMISSIBLY INTERFERE WITH LANDLORDS' RIGHTS TO SUMMARY EVICTION PROCEDURES GRANTED BY STATE LAW.

Rent Control Law Preserves Landlord's Rights to Summary Eviction Procedures. The applicable rent control law's procedures are valid, in that they do not conflict with a landlord's summary procedures for evictions provided by California statutes (*Cal. Const., art. XI, § 7*; *cf. Birkenfeld v. City of Berkeley (1976) 17 Cal. 3d 129, 151-153, 130 Cal. Rptr. 465, 550 P.2d 1001*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to a contention that a rent control ordinance is unconstitutional if the asserted ground of unconstitutionality is that the ordinance is in conflict with the summary eviction procedures established by statute.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the factors showing that the provisions of the ordinance do not conflict with the statutory summary eviction procedures.

[b] Related Pleading and Practice Forms

For related forms, see California Forms of Pleading and Practice, Ch. 335, *Landlord and Tenant: Rent Control* (Matthew Bender).

[3] Discussion of Authorities

[a] Rent Control Law Preserves Landlord's Rights to Summary Eviction Procedures

The facts and procedural background of ***Birkenfeld v. City of Berkeley*** *(1976) 17 Cal. 3d 129, 151-153, 130 Cal. Rptr. 465, 550 P.2d 1001* , are discussed in *§ 141.39[3][a]*. Although the Court found the ordinance involved unconstitutional on other grounds, it noted that the ordinance reviewed permitted as grounds for eviction most, if not all, of the historically available grounds for eviction, and held that the statutory procedures for recovery of possession and unpaid rent do not preclude a defense based on provisions of a municipal rent control ordinance (*17 Cal. 3d 129, 148-149)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantRent RegulationGeneral OverviewReal Property LawLandlord & TenantRent RegulationRent Control StatutesReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview

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14-141 California Points & Authorities § 141.44

§ 141.44 Opposing Contention That Rent Control Ordinance Is Unconstitutional--Ordinance Basing Rents on Return on Investment Does Not Violate Takings Clause

[1] FORM

THE RENT CONTROL ORDINANCE BEFORE THE COURT IS NOT AN UNCONSTITUTIONAL VIOLATION OF THE *TAKINGS CLAUSE* MERELY BECAUSE IT PERMITS RENT LEVELS TO BE BASED ON RETURN ON INITIAL INVESTMENT RATHER THAN ON CURRENT MARKET VALUE OF RENTAL PROPERTY.

Fair Return Standard Constitutional. A rent control law that provides that a landlord is entitled to receive rental which constitutes a fair return on landlord's investment is constitutional on its face, and does not produce confiscatory results in violation of takings provision of constitution (*Fisher v. City of Berkeley (1984) 37 Cal. 3d 644, 679, 687-691, 209 Cal. Rptr. 682, 693 P.2d 261*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to a contention that a rent control ordinance is an unconstitutional violation of the*takings clause*, when that contention is based on a provision of the ordinance permitting

rent levels to be set by reference to the landlord's investment in the rental property rather than to the current market value of the rental property.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the provisions of the ordinance that ensure that rents will permit landlords to receive a reasonable and fair rate of return on their investment in the rental property.

[b] Related Pleading and Practice Forms

For related forms, see California Forms of Pleading and Practice, Ch. 335, *Landlord and Tenant: Rent Control* (Matthew Bender).

[3] Discussion of Authorities

[a] Fair Return Standard Constitutional

In ***Fisher v. City of Berkeley*** *(1984) 37 Cal. 3d 644, 679, 209 Cal. Rptr. 682, 693 P.2d 261* , the Supreme Court reviewed a city rent control ordinance that provided that a landlord was to receive a fair return on his investment, rather than permissible rents being determined by the value of the landlord's property. In holding the ordinance constitutional, the Court determined that the "fair return" standard permitted the Berkeley rent control board sufficient flexibility to avoid confiscatory results. The Court explained that it was to be presumed that the board would exercise its powers in accordance with constitutional requirements, and that if the board acts unfairly, the fault lies with the board and not with the law creating the board. The Court further explained that a police power regulation constitutes a confiscatory "taking" in violation of constitutional requirements, only if a landlord has been deprived of substantially all reasonable use of the property, even if there is a significant diminution in value of the property as a result of the amount of rent approved by the board. The Court did express that the rent control law would have been invalid on its face if it had failed to provide for an efficient administrative procedure allowing a landlord to receive sufficient rent increases to assure a fair, reasonable, and timely return on the landlord's investment, or if it had failed to permit those administering it to avoid confiscatory results in its application to the complaining parties.

[4] Additional Authorities

[a] Fair Return Standard Constitutional

In *Apartment Assn. of Greater L.A. v. Santa Monica Rent Control Bd. (1994) 24 Cal. App. 4th 1730, 30 Cal. Rptr. 2d 228* , the Court of Appeal ruled that the trial correctly stayed enforcement of a rent control provision that prohibited any landlord who purchased rental property after the effective date of the rent control ordinance from seeking an adjustment in base rents. The Court of Appeal reasoned that the ordinance was too broad because it did not allow *any* post-rent control purchaser to petition for a base rent increase on any ground. Accordingly, the regulation could have unconstitutional results in particular cases, and the trial court was correct in staying its enforcement. Rent control regulations can have a confiscatory effect if no rent adjustment mechanism is provided, and a regulation may be invalid on its face when its terms will not permit those who administer it to avoid confiscatory results in its application to the complaining parties (*24 Cal. App. 4th 1730, 1738-1739)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantRent RegulationGeneral OverviewReal Property LawLandlord & TenantRent RegulationRent Control StatutesReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview

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14-141 California Points & Authorities § 141.45

§ 141.45 Opposing Contention That Rent Control Ordinance Is Unconstitutional--Ordinance Serves Legitimate Governmental Purpose in Preventing Unreasonable and Excessive Rent Increases

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

THE RENT CONTROL ORDINANCE BEFORE THE COURT IS NOT UNCONSTITUTIONAL BECAUSE IT SERVES THE LEGITIMATE GOVERNMENTAL PURPOSE OF PREVENTING UNREASONABLE AND EXCESSIVE RENT INCREASES.

A. Rent Control Law's Exercise of Police Powers Is Valid in That it Serves Legitimate Governmental Purpose. The applicable rent control law's procedures constitute a valid exercise of the state's police powers, in that they are reasonably related to the furtherance of a legitimate governmental purpose (*Cal. Const., art. XI, § 7*; *Birkenfeld v. City of Berkeley (1976) 17 Cal. 3d 129, 158-164, 130 Cal. Rptr. 465, 550 P.2d 1001*).

B. Preventing Unreasonable and Excessive Rent Increases Is a Legitimate Governmental Purpose. The rent control ordinance at issue serves to prevent unreasonable and excessive rent increases, which is a legitimate governmental purpose whether or not that goal is precisely identified in the rent control law and whether the primary beneficiaries of such protection are tenants with low or merely moderate income (*Santa Monica Beach, Ltd. v. Superior Court (1999) 19 Cal. 4th 952, 970, 81 Cal. Rptr. 2d 93, 968 P.2d 993*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be used to oppose a contention that a rent control ordinance is unconstitutional, when the basis of the claim of unconstitutionality is that the ordinance does not serve the governmental purposes specifically identified in the text of the ordinance.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the provisions of the ordinance that relate to the valid governmental purpose of stabilizing a rental market.

[3] Discussion of Authorities

[a] Rent Control Law's Exercise of Police Powers Is Valid in That it Serves Legitimate Governmental Purpose

The facts and procedural background of ***Birkenfeld v. City of Berkeley*** *(1976) 17 Cal. 3d 129, 130 Cal. Rptr. 465, 550 P.2d 1001* are discussed in *§ 141.42[1]*A.

[b] Ordinance Serves Legitimate Governmental Purpose in Preventing Unreasonable and Excessive Rent Increases

In ***Santa Monica Beach, Ltd. v. Superior Court*** *(1999) 19 Cal. 4th 952, 81 Cal. Rptr. 2d 93, 968 P.2d 993* , plaintiff landlord brought an action contending that application of the city's rent control ordinance to plaintiff's property constituted a taking because the ordinance did not "substantially advance" its stated goals of providing affordable housing for the poor, the elderly, and young families. The trial court sustained defendants' demurrers to plaintiff's inverse condemnation claim. The court of appeal reversed, holding that if the allegations were true, the ordinance did not substantially advance a legitimate governmental purpose. The California Supreme Court reversed the court of appeal judgment. The Supreme Court acknowledged that plaintiff's claim resembled a facial challenge in a number of respects, because it sought to invalidate the rent control law, not merely its application against one landlord. Nevertheless, the Court rejected a statute of limitations defense and addressed the merits of the action. The Court held that the standard of review for generally applicable rent control legislation must be at least as deferential as for generally applicable zoning legislation and other legislative land use controls. Thus, a party challenging rent control on takings grounds must show that it is an "arbitrary regulation of property rights" (*19 Cal. 4th 952, 967)* . The Court then held that the landlord failed to establish a taking claim because, even though the landlord alleged that the ordinance failed to advance its stated goals of providing affordable housing for the poor, the elderly, and young families, the landlord did not allege that the rent control ordinance failed to advance the purpose of preventing unreasonable and excessive rent increases, and therefore did not adequately allege that the ordinance failed to advance some legitimate state purpose (*19 Cal. 4th 952, 971)* .

The Court stated that there is no constitutional requirement that the inquiry into whether the legislation substantially serves legitimate goals must be limited to stated goals, much less to only some of the stated goals. The Court concluded that the prevention of "excessive and unreasonable rent increases" caused by the "growing shortage of and increasing demand for housing" was a legitimate government interest whether or not that goal was precisely identified in the text of the rent control ordinance and whether the primary beneficiaries of such protection were tenants with low or merely moderate income (*19 Cal. 4th 952, 970)* . The Court stated that "the notion that a court may invalidate legislation that it finds, after a trial, to have failed to live up to expectations, is indeed novel. In our constitutional system, it is generally assumed that only the legislative body that enacted the statute may exercise a power of repeal if that statute fails to meet

legislative expectations" (*19 Cal. 4th 952, 963-964)* .

[4] Additional Authorities

[a] Ordinance Serves Legitimate Governmental Purpose in Preventing Unreasonable and Excessive Rent Increases

In *Montclair Parkowners Assn. v. City of Montclair (1999) 76 Cal. App. 4th 784, 90 Cal. Rptr. 2d 598* , the court of appeal rejected a facial takings challenge to an ordinance amending the existing mobilehome rent control ordinance to include vacancy control provisions. The court held that the city could have reasonably concluded that limiting park owners' ability to raise the rent on the sale or transfer of mobilehomes would accomplish the ordinance's stated goal of protecting current mobilehome owners' equity in their homes and protecting prospective mobilehome owners from excessive rents, by making mobilehomes more attractive sale items and making mobilehome ownership more feasible for prospective buyers. Thus, the ordinance on its face was not an arbitrary regulation of the park owners' property rights (*76 Cal. App. 4th 784, 795)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantRent RegulationGeneral OverviewReal Property LawLandlord & TenantRent RegulationRent Control StatutesReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview

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14-141 California Points & Authorities § 141.46

§ 141.46 Supporting Contention That Tenant Is Entitled Under Rent Control Ordinance to Refund of Excess Rent [Civ. Code § 1947.11]--Plaintiff Was Tenant With Landlord's Knowledge and Consent--Vacancy Decontrol Provision Inapplicable

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF WAS A TENANT WITH THE KNOWLEDGE AND [IMPLIED] CONSENT OF THE LANDLORD, AND IS THEREFORE ENTITLED TO PROTECTION UNDER THE APPLICABLE RENT CONTROL LAW, DESPITE PRIOR TENANT'S DEPARTURE FROM THE PREMISES.

A. Formal Rental Agreement Not Necessary to Establish Tenancy. A landlord/tenant relationship may be created by the landlord's consent and acceptance of rent, without entry into a formal rental agreement (*Getz v. City of West Hollywood (1991) 233 Cal. App. 3d 625, 629-630, 284 Cal. Rptr. 631*).

B. Landlord's Knowledge Can Infer Consent to Create Tenancy. A landlord/tenant relationship may be deemed created and consented to if a landlord had knowledge of plaintiff's residence at the premises due to the landlord's acceptance of rent payments from plaintiff (*Getz v. City of West Hollywood (1991) 233 Cal. App. 3d 625, 630-631, 284 Cal. Rptr. 631* ; *Parkmerced Co. v. San Francisco Rent Stabilization and Arbitration Bd. (1989) 215 Cal. App. 3d 490, 494, 263 Cal. Rptr. 617*).

[*Optional*] **C. Residence at Premises Was Sufficiently Lengthy to Infer Landlord's Consent to Tenancy.** A plaintiff's residence at the premises for a considerable length of time supports the contention that a tenancy was created due to the landlord's knowledge and apparent consent (*Parkmerced Co. v. San Francisco Rent Stabilization and Arbitration Bd. (1989) 215 Cal. App. 3d 490, 494, 263 Cal. Rptr. 617* .

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

The form of points and authorities may be submitted in support of a contention that a plaintiff seeking a refund for excess rent paid, is entitled to protection as a tenant under an applicable rent control law [*Civ. Code § 1947.11*]. The refund would be based on an argument that plaintiff had entered into a landlord/tenant relationship with the landlord, even though the formal agreement was with another who subsequently vacated the premises, and that therefore the landlord was not entitled to raise rents based on a vacancy decontrol provision. Counsel should base the argument on the language of the particular rent control law at issue.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel for the tenant should discuss facts showing that the landlord had knowledge that plaintiff resided at the premises and did not object to that residence. Evidence that the residence was relatively lengthy can be used in conjunction with Optional Paragraph C in support of the contention.

[b] Related Pleading and Practice Forms

For related forms, see California Forms of Pleading and Practice, Ch. 335, *Landlord and Tenant: Rent Control* (Matthew Bender).

[3] Discussion of Authorities

[a] Formal Rental Agreement Not Necessary to Establish Tenancy

In ***Getz v. City of West Hollywood*** *(1991) 233 Cal. App. 3d 625, 284 Cal. Rptr. 631* , the plaintiff had lived with the prior tenant at the premises for six months, during which time the landlord knew of the plaintiff's presence, and had accepted rent checks from him. When the prior tenant vacated the premises, the landlord executed a new rental agreement with the plaintiff, which called for an increased amount of rent. When the plaintiff learned of the applicable rent control ordinance, he petitioned for a refund of excess amounts paid, and for a reduction in the permissible rent level for the remainder of the agreement period. The rent board granted the petition, and the landlord sought review of the order.

The court of appeal affirmed the order, holding that substantial evidence supported the factual finding that a landlord/tenant relationship was created by consent and acceptance of rent, even in the absence of a formal rental agreement. The court held that, because plaintiff had become a tenant before the other tenant vacated, no vacancy had occurred that would permit an increase in rent under the terms of the vacancy decontrol ordinance (*233 Cal. App. 3d 625, 629-630)* .

[b] Landlord's Knowledge Can Infer Consent to Create Tenancy

The facts and procedural background of ***Getz v. City of West Hollywood*** *(1991) 233 Cal. App. 3d 625, 284 Cal. Rptr. 631* , are discussed in *§ 141.46[3][a]*. The court noted that the rent board had made factual findings that the landlord had known that plaintiff was living in the unit, and had accepted rent payments from him, and that those findings

supported the conclusion that there was no "vacancy" when the original tenant terminated his tenancy. Because no vacancy occurred, the maximum rent was limited to a percentage increase of the rent charged the previous tenant, and the plaintiff was entitled to recover the payments made in excess of that maximum (*233 Cal. App. 3d 625, 630)* .

In ***Parkmerced Co. v. San Francisco Rent Stabilization and Arbitration Bd.*** *(1989) 215 Cal. App. 3d 490, 263 Cal. Rptr. 617* , a woman was an occupant of anapartment for over four years along with her brother, who had entered into several successive written leases. The plaintiff's name had been included on her brother's application for a lease renewal, and she had paid rent by personal check bearing her name throughout the four-year period. When her brother terminated his agreement and plaintiff attempted to execute a lease in her own name, the landlord informed plaintiff that the rent would be $127 per month higher than would have been permitted by the applicable rent control ordinance under a continuous tenancy. Plaintiff executed a lease in the higher amount, and petitioned the rent board for relief. The board found that plaintiff was a tenant under the ordinance, making the vacancy decontrol provision inapplicable, and ordered a rent reduction. The landlord appealed to the full rent board, which affirmed the order, and then sought a writ of mandate from the superior court. The court granted the writ, and plaintiff appealed.

The court of appeal reversed, holding that the ordinance protected those who legally occupied a rental unit, whatever the basis of that person's obligation to pay rent. The court found that the evidence supported the board's finding that plaintiff was a cotenant with her brother. In support of its ruling, the court cited the facts that she was listed as an occupant under her brother's successive lease applications, which were incorporated into her brother's leases, and that she paid rent with her personalized checks over the four-year period (*215 Cal. App. 3d 490, 494)* .

[c] Residence at Premises Was Sufficiently Lengthy to Infer Landlord's Consent to Tenancy

The facts and procedural background of ***Getz v. City of West Hollywood*** *(1991) 233 Cal. App. 3d 625, 284 Cal. Rptr. 631* , are discussed in *§ 141.46[3][a]*. The court held that the landlord's acceptance of rent checks over a six-month period supported the rent board's factual finding that a tenancy existed, although it noted that a contrary finding might also be justified under the facts of the case (*233 Cal. App. 3d 625, 630)* .

The facts and procedural background of ***Parkmerced Co. v. San Francisco Rent Stabilization and Arbitration Bd.*** *(1989) 215 Cal. App. 3d 490, 263 Cal. Rptr. 617* , are discussed in *§ 141.46[3][b]*. The court noted that the length of time over which the landlord accepted plaintiff 's rent checks--four years--supported the factual finding that the landlord consented to plaintiff 's tenancy (*215 Cal. App. 3d 490, 494)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantRent RegulationGeneral OverviewReal Property LawLandlord & TenantRent RegulationRent Control StatutesReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview

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14-141 California Points & Authorities § 141.47

§ 141.47 Supporting Contention That Court Should Award Tenant Treble Amount of Excess Rent Paid--Landlord's Violation Was Willful or Intentional

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF IS ENTITLED TO A JUDGMENT TREBLING THE AMOUNT OF EXCESS RENT THAT THE TENANT PAID TO LANDLORD, BECAUSE THE LANDLORD'S VIOLATION WAS WILLFUL OR INTENTIONAL.

Court Is Authorized to Award Treble Amount of Excess Rent Paid by Tenant if Landlord's Actions Are Willful or Intentional. If a landlord refuses to refund to a tenant rent paid by a tenant in excess of the certified rent ceiling, and the court determines that the landlord willfully or intentionally charged the tenant rent in excess of a certified, lawful rent control ceiling, the court may award treble damages (*Civ. Code § 1947.11*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that a plaintiff seeking a refund for excess rent paid, is entitled to treble damages under *Civ. Code § 1947.11*. Counsel is advised to tie the argument to language of the particular rent control law(s) in issue.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts tending to show that the landlord acted willfully and intentionally in charging and refusing to return excess rent.

Counsel should note that the statute provides that a finding that the violation was willful or intentional requires the court to award a judgment for the amount of excess rent charged, and permits the court to award treble that amount [*Civ. Code § 1947.11*]. Thus, it would appear that a court could require additional evidence of egregious conduct by the

landlord to support an award of treble damages, so counsel should be prepared to argue that the court should exercise its discretion to award the additional amount, instead of arguing that the showing of intentional violation alone requires the additional award.

For coverage of the statute of limitations in an action on a liability created by statute, see *§ 141.52*.

[b] Related Pleading and Practice Forms

For related forms, see California Forms of Pleading and Practice, Ch. 335,*Landlord and Tenant: Rent Control* (Matthew Bender).

[3] Discussion of Authorities

[a] Court Is Authorized to Award Treble Amount of Excess Rent Paid by Tenant if Landlord's Actions Are Willful or Intentional

Civ. Code § 1947.11(a) authorizes a court to award treble damages for a landlord's willful or intentional behavior in charging and failing to return rents in excess of a certified rent level established under *Civ. Code § 1947.8*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsBreachGeneral OverviewReal Property LawLandlord & TenantLease AgreementsDamagesGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview

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14-141 California Points & Authorities § 141.48

§ 141.48 Opposing Contention That Tenant Is Entitled Under Rent Control Ordinance to Refund of Excess Rent [Civ. Code § 1947.11]--Landlord Did Not Consent to Plaintiff's Tenancy--Vacancy Decontrol Provision Applicable

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF IS NOT ENTITLED TO PROTECTION UNDER THE APPLICABLE RENT CONTROL LAW, BECAUSE LANDLORD DID NOT CONSENT TO PLAINTIFF'S TENANCY, SO TERMINATION OF FORMER TENANT'S RENTAL AGREEMENT MADE THE PREMISES VACANT FOR PURPOSES OF RENT CONTROL LAW.

A. Landlord's Lack of Knowledge Precludes Finding of Consent to Landlord/Tenant Relationship. A landlord/tenant relationship may be deemed created and consented to only if the landlord had knowledge of plaintiff's residence at the premises when rent was accepted (*cf. Getz v. City of West Hollywood (1991) 233 Cal. App. 3d 625, 629-630, 284 Cal. Rptr. 631* ; *Parkmerced Co. v. San Francisco Rent Stabilization and Arbitration Bd. (1989) 215 Cal. App. 3d 490, 494, 263 Cal. Rptr. 617*).

[*Optional*] **B. Actions of Subterfuge by Alleged Tenant Are Probative of Lack of Knowledge and Consent.** Evidence that a purported cotenant paid rent under a successful subterfuge that a departed tenant continued to reside at the premises and pay rent support the conclusion that the landlord lacked knowledge and consent to a tenancy with the party or parties engaging in the subterfuge (*Miller & Desatnik Management Co. v. Bullock (1990) 221 Cal. App. 3d Supp. 13, 19-20, 270 Cal. Rptr. 600*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that a plaintiff bringing a legal action for damages for excess rent charged is not considered a tenant under the applicable rent control law. The contention is

most likely to arise in the context of a rent control law that permits the landlord to raise rent levels to a greater extent when a rental becomes vacant, to counter an argument that the premises were never vacated because the tenant under the new agreement was in fact a tenant during the previous agreement. Counsel is advised to tie argument to language of the particular rent control law in issue.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts tending to show that the landlord had no knowledge that the plaintiff was a tenant during the course of the previous rental agreement, and did not consent to plaintiff being a tenant of the premises during that tenancy.

[b] Related Pleading and Practice Forms

For related forms, see California Forms of Pleading and Practice, Ch. 335, *Landlord and Tenant: Rent Control* (Matthew Bender).

[3] Discussion of Authorities

[a] Landlord's Lack of Knowledge Precludes Finding of Consent to Landlord/Tenant Relationship

The facts and procedural background of ***Getz v. City of West Hollywood*** *(1991) 233 Cal. App. 3d 625, 284 Cal. Rptr. 631* , are discussed in *§ 141.46[3][a]*. The court of appeal based its holding that the rent board's decision was based on substantial evidence on the landlord's apparent knowledge that plaintiff was a cotenant with the tenant who had signed the rental agreement, based on the landlord's acceptance of rent payments from plaintiff for six months. The court did state that, under the facts presented, a finding that no tenancy existed was also possible, and would be entitled to similar deference (*233 Cal. App. 3d 625, 630)* .

The facts and procedural background of ***Parkmerced Co. v. San Francisco Rent Stabilization and Arbitration Bd.*** *(1989) 215 Cal. App. 3d 490, 263 Cal. Rptr. 617* , are discussed in *§ 141.46[3][b]*. The court based its conclusion that the plaintiff (the sister of the previous tenant) was a cotenant during the previous tenancy on the evidence that she was listed as an occupant under her brother's successive lease applications, which were incorporated into her brother's leases, and that she paid rent with her personalized checks over the four-year period (*215 Cal. App. 3d 490, 494)* .

[b] Actions of Subterfuge by Alleged Tenant Are Probative of Lack of Knowledge and Consent

In ***Miller & Desatnik Management Co. v. Bullock*** *(1990) 221 Cal. App. 3d Supp. 13, 270 Cal. Rptr. 600* , the tenant under a written month-to-month rentalagreement died, and for four years thereafter the tenant's mother stayed on the premises, paying the monthly rent with a money order naming the deceased daughter as payor. The landlord brought an unlawful detainer action after it learned of the tenant's death and plaintiff did not vacate after service of a 30-day notice to vacate; the trial court entered judgment in the mother's favor, on the ground that she was a tenant and the eviction was not for a cause that the rent control ordinance provided was proper. The landlord appealed, and the appellate department reversed.

The appellate department held that the daughter's rental agreement terminated as of the 30th day following her last payment before her death, pursuant to *Civ. Code § 1934*, that the mother was not entitled to the use and occupancy of the premises, that the mother's continued occupancy thereafter was a trespass, and that the mother was not a tenant under the applicable rent control law. The court relied on the facts that the landlord never had knowledge of the daughter's death until shortly before the landlord served the mother with a notice to vacate, as a result of the mother's subterfuge that the daughter was still alive, residing at the premises and paying the rent, and that the landlord therefore had never consented to the mother being a tenant. The court distinguished the case of *Parkmerced Co. v. San Francisco Rent Stabilization and Arbitration Bd. (1989) 215 Cal. App. 3d 490, 263 Cal. Rptr. 617* , on the basis that in that case, the sister was listed as an occupant in her brother's four separate yearly applications for lease, the sister paid

rent to the landlord openly for four years, and that as a result, the landlord had knowledge of her tenancy at the premises, and the landlord's consent could be inferred from the failure to object (*221 Cal. App. 3d Supp. 13, 20*).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantRent RegulationGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsRemediesGeneral Overview

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14-141 California Points & Authorities § 141.49

§ 141.49 Opposing Contention That Tenant Is Entitled Under Rent Control Ordinance to Refund of Excess Rent [Civ. Code § 1947.11]--Action That Grants Mandatory Penalty to Prevailing Plaintiff Is Barred by One-Year Statute of Limitations [Code Civ. Proc. § 340(a)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

TENANT'S ACTION FOR REFUND OF RENT PAID IN EXCESS OF MAXIMUM SET BY RENT CONTROL ORDINANCE INCLUDES ACTION FOR PENALTY AND IS THEREFORE BARRED BY THE ONE-YEAR STATUTE OF LIMITATIONS.

Action Seeking Mandatory Penalty or Forfeiture as Part of Tenant's Remedies Governed by One-Year Statute of Limitations. The entire action by a tenant for a refund of excessive rent paid in violation of a rent control law, if prevailing tenant is entitled to a mandatory recovery of penalty damages such as treble damages, as part of the tenant's remedies in addition to actual losses incurred, is governed by the one-year statute of limitations of *Code of Civil Procedure Section 340(a)* (*Menefee v. Ostawari (1991) 228 Cal. App. 3d 239, 243-245, 278 Cal. Rptr. 805*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that a tenant's legal action for damages was filed after the expiration of the period of limitation applicable to an action seeking a mandatory penalty [*Code Civ. Proc. § 340(a)* (one year)].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that the tenant is seeking a mandatory recovery of a penalty or forfeiture of money under the particular rent control law in issue, as well as facts showing that the tenant's cause of action accrued more than one year before the action before the court was filed. For general discussion of accrual of causes of actions and potential applicability of authorities on delayed discovery of causes of action, see Ch. 143,

Limitation of Actions .

[b] Related Pleading and Practice Forms

For related forms, see California Forms of Pleading and Practice, Ch. 335, *Landlord and Tenant: Rent Control* (Matthew Bender).

[3] Discussion of Authorities

[a] Action Seeking Mandatory Penalty or Forfeiture as Part of Tenant's Remedies Governed by One-Year Statute of Limitations

Code Civ. Proc. § 340(a) provides that an action on a statute for a penalty or forfeiture is governed by a one-year statute of limitations, unless the statute imposing it prescribes a different limitation.

In ***Menefee v. Ostawari*** *(1991) 228 Cal. App. 3d 239, 278 Cal. Rptr. 805* , plaintiff sought damages for wrongful termination of a tenancy, based on a rent control ordinance that provided for three times the amount of damages to a prevailing plaintiff. Defendant moved for summary judgment on the ground that the action was barred by the statute of limitations, because the action was filed more than one year after the landlord served the 30-day notice to vacate the premises. The trial court granted the motion, and the plaintiff appealed.

The court of appeal affirmed, holding that the action was barred by former CodeCiv. Proc. § 340(1) (*now see Code Civ. Proc. § 340(a)*). The court held that, because the ordinance did not permit any lesser award, the penalty was mandatory, and therefore governed by former § 340(1) (*now see* § 340(a)). The court also held that the entire action was based on the ordinance (as a 30-day notice to vacate is otherwise permitted by state law, and no other independent wrong was alleged in the complaint), so the entire action was barred (*228 Cal. App. 3d 239, 243-245)* .

Note that *Menefee* (discussed *above*) was distinguished by the Superior Court Appellate Department in *Mitchell v. Leslie (1995) 39 Cal. App. 4th Supp. 7, 46 Cal. Rptr. 2d 419* (discussed in *§ 141.52[3][a]*), in which the tenants brought an action to recover excess rent under the Santa Monica rent control ordinance. The trial court ruled that the claim was subject to the three-year statute of limitations in *Code Civ. Proc. § 338(a)* applicable to "an action upon a liability created by statute, other than a penalty or forfeiture." The Appellate Department affirmed. It held that the three-year period was applicable because restitution of excess rent is not a penalty, and because, unlike in *Menefee,* the award of treble damages was not mandatory on a finding that the landlord violated the ordinance, but rather lay within the trial court's discretion (*39 Cal. App. 4th Supp. 7, 11-12*).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsStatutes of LimitationsReal Property LawLandlord & TenantRent RegulationGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview

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14-141 California Points & Authorities § 141.50

§ 141.50 Opposing Contention That Tenant Is Entitled to Damages or Penalties--Landlord Was in Substantial Compliance With Ordinance

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

LANDLORD IS EXEMPT FROM PENALTIES OR OTHER SANCTIONS UNDER THE APPLICABLE RENT CONTROL LAW, BECAUSE LANDLORD IS IN SUBSTANTIAL COMPLIANCE WITH ITS REQUIREMENTS.

A. Good-Faith Attempt to Comply, and Cure of Defect, Constitutes Substantial Performance. If by a preponderance of the evidence, a landlord has made a good faith attempt to comply with a rent control law sufficient to reasonably carry out its intent and purpose, but is not in full compliance, and has, after receiving a notice of deficiency from a local agency, cured the defect in a timely manner, as reasonably determined by the local agency, that landlord is deemed to be in substantial compliance (*Civ. Code § 1947.7(b)*).

B. Landlord in Substantial Compliance May Only Be Assessed Tenant's Registration or Filing Fees, and Excess Rent Paid. A landlord who is in substantial compliance with a rent control law may not be assessed a penalty or other sanction for noncompliance, and may only be assessed for restitution of excess rent to the tenant, and payment of the tenant's registration or filing fees (*Civ. Code § 1947.7(b)*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to a contention by a tenant that he or she is entitled to damages, beyond excess rent paid and registration or filing fees, from a landlord who is in substantial compliance with the provisions of the rent control ordinance.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing the landlord's good faith attempt to comply with the applicable

rent control law, and the actions taken by the landlord to cure the defects after notice that he or she was not in full compliance with the law.

[b] Related Pleading and Practice Forms

For related forms, see California Forms of Pleading and Practice, Ch. 335, *Landlord and Tenant: Rent Control* (Matthew Bender).

[3] Discussion of Authorities

[a] Good-Faith Attempt to Comply, and Cure of Defect, Constitutes Substantial Performance

Civ. Code § 1947.7(b) provides that a landlord who is in substantial compliance with a rent control law must not be assessed any penalty or other sanction for noncompliance. A landlord who has made a good faith attempt to comply with a rent control law sufficient to reasonably carry out its intent and purpose, but who is not in full compliance, and who has, after receiving a notice of deficiency from a local agency, cured the defect in a timely manner, as reasonably determined by the local agency, is deemed to be in substantial compliance.

[b] Landlord in Substantial Compliance May Only Be Assessed Tenant's Registration or Filing Fees, and Excess Rent Paid.

Civ. Code § 1947.7(b) provides that a landlord who is in substantial compliance with a rent control law may not be assessed a penalty or other sanction for noncompliance, and that restitution to the tenant, or recovery of the tenant's registration or filing fees, are the exclusive remedies that may be imposed against a landlord who is in "substantial compliance" with a rent control ordinance.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsDamagesGeneral OverviewReal Property LawLandlord & TenantRent RegulationGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview

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14-141 California Points & Authorities § 141.51

§ 141.51 Opposing Contention That Court Should Award Tenant Treble Damages--Only Amount of Out-of-Pocket Damages May Be Trebled

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

ONLY TENANT'S ACTUAL, OUT-OF-POCKET DAMAGES MAY BE TREBLED PURSUANT TO THE APPLICABLE RENT CONTROL LAW.

A. "Actual Damages" That May Be Trebled Are Limited to Out-of-Pocket Damages. An entitlement by a tenant under an applicable rent control law to recover treble the amount of "actual damages" suffered, is limited to treble the amount of tenant's out-of-pocket damages (*Balmoral Hotel Tenants Assn. v. Lee (1990) 226 Cal. App. 3d 686, 690-692, 276 Cal. Rptr. 640*).

B. "Actual Damages" Do Not Include Damages for Mental Suffering. A tenant's entitlement under an applicable rent control law to recover treble the amount of "actual damages" suffered, does not permit a trebling of damages for mental suffering (*Balmoral Hotel Tenants Assn. v. Lee (1990) 226 Cal. App. 3d 686, 690-692, 276 Cal. Rptr. 640*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to a contention by a tenant that the tenant is entitled, under a local rent control law, to trebling of all actual damages proven by the tenant in connection with an action under the rent control ordinance. Counsel is advised to tie argument to language and provisions of the particular rent control law in issue.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that specific items of damages alleged or proven by the tenant are not out-of-pocket damages, and are therefore not to be trebled.

[b] Related Pleading and Practice Forms

For related forms, see California Forms of Pleading and Practice, Ch. 335, *Landlord and Tenant: Rent Control* (Matthew Bender).

[3] Discussion of Authorities

[a] "Actual Damages" That May Be Trebled Are Limited to Out-of-Pocket Damages

Balmoral Hotel Tenants Assn. v. Lee *(1990) 226 Cal. App. 3d 686, 276 Cal. Rptr. 640* , was a case in which a group of tenants brought a legal action for wrongful eviction and damages, due to disruptive renovations engaged in by the landlord. The trial court awarded treble damages to the tenants, including trebling of damages for mental suffering, which the trial court determined was encompassed within the term "actual damages," entitled to trebling pursuant to Section 37.9 of the San Francisco Administrative Code.

The appellate court reversed and held that the term "actual damages" only encompassed out-of-pocket damages, and not damages for mental suffering. The court stated that a narrow interpretation of "actual damages" as referring only to out-of-pocket expenses, is most consistent with the legislative purposes underlying the treble damages provision of the rent control law, and that trebling of mental distress damages could lead to awards subject to constitutional attack (*226 Cal. App. 3d 686, 696-697)* .

The court disagreed with the result in *Beeman v. Burling (1990) 216 Cal. App. 3d 1586, 265 Cal. Rptr. 719* , which had been decided by another division of the same appellate court regarding the same treble damages provision. The court in *Beeman* expressed the view that damages for mental suffering in that case could be trebled. The *Balmoral* court stated that the court in *Beeman* did not have occasion to address the question of whether the San Francisco Administrative Code provision at issue authorized recovery of damages for mental suffering, because that case involved defendant's default, and the court was "dismissing a plainly meritless procedural objection" without full consideration of the issues involved (*226 Cal. App. 3d 686, 697)* .

Counsel should note that, a few months after the *Balmoral* decision, the San Francisco rent control ordinance in question was amended, and now specifically includes mental and emotional injury within the definition of "actual damages."

[b] "Actual Damages" Do Not Include Damages for Mental Suffering

The facts and procedural background of ***Balmoral Hotel Tenants Assn. v. Lee*** *(1990) 226 Cal. App. 3d 686, 276 Cal. Rptr. 640* , are discussed in *§ 141.51[3][a]*. The court explained that a treble damage award for mental suffering damages could lead to an unconstitutional confiscatory result in abrogation of the constitutional "takings" provision (*226 Cal. App. 3d 686, 697)* . The court also rejected the tenants' contention that the trebling of mental suffering damages was necessary to provide sufficient economic incentive for tenants to bring wrongful eviction lawsuits, given the limited amount of out-of-pocket damages normally at issue; the court explained that a claim for mental suffering damages could provide such incentive even without trebling (*226 Cal. App. 3d 686, 690-692)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsBreachGeneral OverviewReal Property LawLandlord & TenantLease AgreementsDamagesGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview

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14-141 California Points & Authorities § 141.52

§ 141.52 Opposing Contention That Tenant's Action Under Rent Control Ordinance for Refund of Excess Rent [Civ. Code § 1947.11] Is Barred by One-Year Statute of Limitations [Code Civ. Proc. § 340(a)]--Three-Year Limitations Period Applies [Code Civ. Proc. § 338(a)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

THE TRIAL COURT HAS DISCRETION TO AWARD A PENALTY IN TENANT'S ACTION FOR REFUND OF RENT PAID IN EXCESS OF MAXIMUM SET BY RENT CONTROL ORDINANCE AND THEREFORE THE ACTION IS GOVERNED BY THE THREE-YEAR STATUTE OF LIMITATIONS.

Action Seeking Discretionary Penalty or Forfeiture as Part of Tenant's Remedies Governed by Three-Year Statute of Limitations. An action by a tenant for a refund of excessive rent paid in violation of a rent control law is governed by the three-year statute of limitations set forth in *Code Civ. Proc. § 338(a)* if the prevailing tenant may be awarded penalty damages such as treble damages in addition to actual losses incurred, at the discretion of the trial court (*Mitchell v. Leslie (1995) 39 Cal. App. 4th Supp. 7, 11-12, 46 Cal. Rptr. 2d 419*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to the contention that a tenant's legal action for damages was filed after the expiration of the period of limitation applicable to an action seeking a mandatory penalty [*Code Civ. Proc. § 340(a)* (one year); *see § 141.49*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that the tenant is seeking a discretionary award of a penalty or forfeiture of money under the particular rent control law in issue, as well as facts showing that the tenant's cause of action accrued less than three years before the action before the court was filed. For general discussion of accrual of causes of actions and potential applicability of authorities on delayed discovery of causes of action, see Ch. 147,

Limitation of Actions .

[b] Related Pleading and Practice Forms

For related forms, see California Forms of Pleading and Practice, Ch. 334, *Landlord and Tenant: Claims for Damages* , and Ch. 335, *Landlord and Tenant: Rent Control* (Matthew Bender).

[3] Discussion of Authorities

[a] Action Seeking Discretionary Penalty or Forfeiture as Part of Tenant's Remedies Governed by Three-Year Statute of Limitations

Code Civ. Proc. § 340(a) provides that an action on a statute for a penalty or forfeiture is governed by a one-year statute of limitations, unless the statute imposing it prescribes a different limitation. *Code Civ. Proc. § 338(a)* provides that an action on a liability created by statute, other than a penalty or forfeiture, is governed by a three-year statute of limitations.

In ***Mitchell v. Leslie*** *(1995) 39 Cal. App. 4th Supp. 7, 46 Cal. Rptr. 2d 419* , the plaintiffs brought an action to recover excess rent under the Santa Monica rent control ordinance. The lower court ruled that the claim was subject to the three-year statute of limitations in *Code Civ. Proc. § 338(a)*. The defendants appealed on the ground the action was barred by the one-year statute of limitations in former Code Civ. Proc. § 340(1) (*now see Code Civ. Proc. § 340(a)*). The Superior Court Appellate Department affirmed. It held that the three-year period was applicable because restitution of excess rent is not a penalty, and because the award of treble damages was not mandatory on a finding that the landlord violated the ordinance, but rather lay within the discretion of the trial court (*39 Cal. App. 4th Supp. 7, 11-12*).

The Appellate Department distinguished *Menefee v. Ostawari (1991) 228 Cal. App. 3d 239, 278 Cal. Rptr. 805* (discussed in *§ 141.49[3][a]*), in which the plaintiff sought damages for wrongful termination of a tenancy, based on a rent control ordinance that provided for three times the amount of damages to a prevailing plaintiff. The defendant in *Menefee* moved for summary judgment on the ground the action was barred by the statute of limitations because it was filed more than one year after the landlord served the 30-day notice to vacate the premises. The trial court granted the motion, and the plaintiff appealed. The court of appeal affirmed, holding that the action was barred by former Code Civ. Proc. § 340(1) (*now see Code Civ. Proc. § 340(a)*). The *Menefee* court held that because the ordinance did not permit any lesser award, the penalty was mandatory, and therefore governed by § 340(1) (*now see Code Civ. Proc. § 340(a)*). The court also found that the entire action was based on the ordinance (as a 30-day notice to vacate is otherwise permitted by state law, and no other independent wrong was alleged in the complaint), and therefore the entire action was barred (*39 Cal. App. 4th Supp. 7*).

The Appellate Department in *Mitchell* distinguished *Menefee* on the ground the award of treble damages in *Mitchell* was discretionary rather than mandatory (*39 Cal. App. 4th Supp. 7, 12*).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsStatutes of LimitationsReal Property LawLandlord & TenantRent RegulationGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsRemediesGeneral Overview

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14-141 California Points & Authorities § 141.53

§ 141.53 Supporting Contention That Tenant Is Entitled to Damages for Wrongful Eviction--Fraudulent Intent to Occupy [Civ. Code § 1947.10]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF WAS WRONGFULLY EVICTED FROM THE PREMISES, BECAUSE LANDLORD['S RELATIVE(S)] FOR WHOM PLAINTIFF VACATED PREMISES DID NOT RESIDE THEREIN FOR SIX MONTHS.

A. Landlord's Failure to Maintain Residence at Premises for Six Continuous Months Permits Finding of Fraud. The failure by a landlord['s immediate relative(s)] to maintain residence for at least six continuous months at premises that plaintiff was required to vacate on the ground that landlord['s immediate relative(s)] would occupy the premises, permits a finding of fraud (*Civ. Code § 1947.10*).

[*EITHER*]

B. Finding of Fraud Permits Award to Tenant of Treble Damages and Relocation to Vacated Unit. If the court determines that the eviction of plaintiff was based on fraud, it may award plaintiff treble the cost of relocating back to tenant's previous unit, and to treble the amount of any increase in rent that the tenant has paid, in addition to attorneys' fees, court costs, and any other remedies (*Civ. Code § 1947.10*).

[*OR*]

B. Finding of Fraud Permits Award to Tenant, Who Elects Not to Move Back to Vacated Unit, of Treble Amount of One Month's Rent and Treble Relocation Costs. If the court determines that the eviction of plaintiff was based on fraud, and the tenant elects not to relocate to his/her previous premises, the court may order the landlord to pay treble the amount of one month's rent paid by the tenant for the unit that the tenant vacated, and treble the amount of any

costs incurred in relocating to a different unit, plus attorneys' fees and court costs (*Civ. Code § 1947.10*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention by a tenant that the tenant was fraudulently induced by a landlord to vacate rented premises. The contention is based on the fact that the landlord (or his or her immediate relative(s)), who the landlord represented would replace the tenant in the premises, did not in fact maintain residence in the premises for six consecutive months; a court may determine that the eviction of plaintiff was based on fraud, and if the court does so determine, it may award the remedies set forth in the statute [*Civ. Code § 1947.10*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that the landlord or his or her immediate relative(s) failed to reside at the premises for six continuous months after the tenant vacated, that the landlord had a fraudulent intent at the time plaintiff was evicted, and facts supporting the damages sought.

[b] Related Pleading and Practice Forms

For related forms, see California Forms of Pleading and Practice, Ch. 335, *Landlord and Tenant: Rent Control* (Matthew Bender).

[3] Discussion of Authorities

[a] Landlord's Failure to Maintain Residence at Premises for Six Continuous Months Permits Finding of Fraud

Civ. Code § 1947.10 provides that after July 1, 1990, in a city, county, or city and county that administers a system of controls on the price at which residential rental units may be offered for rent or lease, and that requires the registration of rents, any landlord who evicts a tenant based on the landlord's or landlord's immediate relative(s)' intention to occupy the tenant's unit, must occupy, or his or her immediate relative(s) must occupy, the unit for at least six continuous months, and failure to do so enables the court to find a fraudulent intention by the landlord or his or her immediate relative(s) to occupy the unit.

[b] Finding of Fraud Permits Award to Tenant of Treble Damages and Relocation to Vacated Unit

If fraud is determined by a court in accordance with *Civ. Code § 1947.10*, and the tenant elects to relocate back to his or her previous premises, the statute authorizes the court in its discretion, to order the landlord to pay to the tenant treble the cost of relocating back to the tenant's previous unit, and treble the amount of any increase in rent that the tenant has paid, in addition to other remedies. The prevailing party must be awarded attorneys' fees and court costs (*Civ. Code § 1947.10*).

[c] Finding of Fraud Permits Award to Tenant, Who Elects Not to Move Back to Vacated Unit, of Treble Amount of One Month's Rent and Treble Relocation Costs

If fraud is determined by a court in accordance with *Civ. Code § 1947.10*, andthe tenant elects not to relocate back to his or her previous premises, the statute authorizes the court in its discretion, to order the landlord to pay treble the amount of one month's rent paid by the tenant for the premises that the tenant vacated, and treble the amount of any costs incurred in relocating to a different unit, in addition to other remedies. The prevailing party must be awarded attorneys' fees and court costs (*Civ. Code § 1947.10*).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsBreachGeneral OverviewReal Property LawLandlord & TenantLease AgreementsDamagesGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsRemediesGeneral Overview

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 141 LANDLORD AND TENANT
PART II. FORMS

14-141 California Points & Authorities § 141.54

§ 141.54 Supporting Contention That Landlord Who Failed to Return Security Deposit and to Provide a Written Accounting of Deductions to Tenant in a Timely Manner [Civ. Code § 1950.5(g)] Is Entitled to Recover Unpaid Rent and Costs of Cleaning and Repair

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

LANDLORD IS ENTITLED TO RECOVER UNPAID RENT, COSTS OF REPAIR, AND/OR COSTS OF CLEANING, BECAUSE LANDLORD'S FAILURE TO RETURN TENANT'S SECURITY DEPOSIT AND TO PROVIDE A WRITTEN ACCOUNTING OF DEDUCTIONS FROM THE DEPOSIT IN A TIMELY MANNER WAS IN GOOD FAITH AND THEREFORE DOES NOT PRECLUDE LANDLORD FROM RECOVERING SUCH AMOUNTS AS DAMAGES IN A JUDICIAL PROCEEDING.

A. Landlord Who in Good Faith Failed to Return Security Deposit and to Provide a Written Accounting of Deductions in a Timely Manner May Recover Unpaid Rent and Costs of Repairs and Cleaning as Damages in Judicial Proceeding. A landlord who fails to return a vacating tenant's security deposit and to provide a written accounting of deductions from the deposit within three weeks after the tenant vacated the premises as required by *Civ. Code § 1950.5(g)* must return the security deposit to the tenant but is not barred from recovering damages for unpaid rent, repair, and cleaning in a judicial proceeding if the landlord retained the security deposit in good faith (*Granberry v. Islay Investments (1995) 9 Cal. 4th 738, 749-750, 38 Cal. Rptr. 2d 650, 889 P.2d 970*).

B. Amount of Unpaid Rent, Cost of Repairs, or Cost of Cleaning to Be Recovered From Former Tenant Must Be Reasonable. A landlord who in good faith failed to return a vacating tenant's security deposit and to provide a written accounting of deductions from the deposit within three weeks after the tenant vacated the premises as required by *Civ. Code § 1950.5(g)* may recover damages for unpaid rent, repair, and cleaning in a judicial proceeding if the amounts to be recovered are reasonable (*Granberry v. Islay Investments (1995) 9 Cal. 4th 738, 749-750, 38 Cal. Rptr. 2d 650, 889 P.2d 970*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention by a landlord that he or she is entitled to recover compensation for unpaid rent, repairs, and cleaning from a tenant who has vacated the premises, despite the landlord's failure to return the security deposit and to provide the tenant with a written accounting of any portion of the deposit to be retained as compensation for unpaid rent, repairs, and cleaning within three weeks after the termination [*Civ. Code § 1950.5(g)*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing that the landlord's failure to return the security deposit was in good faith, and facts showing that the amounts sought as damages are reasonable.

[b] Related Pleading and Practice Forms

For related forms, see California Forms of Pleading and Practice, Ch. 334, *Landlord and Tenant: Claims for Damages* (Matthew Bender).

[3] Discussion of Authorities

[a] Landlord Who in Good Faith Failed to Return Security Deposit and to Provide a Written Accounting of Deductions in a Timely Manner May Recover Unpaid Rent and Costs of Repairs and Cleaning as Damages in Judicial Proceeding

In ***Granberry v. Islay Investments*** *(1995) 9 Cal. 4th 738, 748, 38 Cal. Rptr. 2d 650, 889 P.2d 970* , the defendants owned or operated between 1,200 and 1,500 residential rental units. It was the defendants' practice to charge tenants an increased rental fee for the first 31 days of tenancy, but to charge a reduced fee for all subsequent months. The defendants never returned the increased fee in whole or in part but simply retained it as part of the rental payment for the first month.

Former tenants of the defendants filed a class action seeking a refund of the amount by which the rent they had paid for the first 31 days of their tenancy exceeded the amount they paid in each of the following months. The trial court held that the plaintiffs were not entitled to a refund because the increased rent paid during the first month was in fact rent and not a security deposit within the meaning of *Civ. Code § 1950.5(b)*. The court of appeal reversed, holding that the character of the payment was a triable issue of fact [*Granberry v. Islay Investments (1984) 161 Cal. App. 3d 382, 388-391, 207 Cal. Rptr. 652]* . On remand, the court granted the defendants leave to amend their answer to allege they were entitled to set off amounts owed to them for unpaid rent, repair, andcleaning if a jury were to find the increased rental payment was a refundable security deposit.

The trial court granted the plaintiffs summary judgment on the issue of whether the defendants were entitled to a setoff in view of the fact that they had failed to comply with former Civ. Code § 1950.5(f) (*now see Civ. Code § 1950.5(g)*), which requires that within three weeks after the tenant has vacated the premises, the landlord must furnish the tenant with a copy of an itemized statement indicating the basis for, and the amount of, any security received and the disposition of the security, and return any remaining portion of the security to the tenant. A jury found that the excess rental payments were security deposits, but that defendants had not retained them in bad faith. On appeal, the court of appeal held, in part, that the trial court erred in ruling that defendants were not entitled to a setoff.

The California Supreme Court affirmed the ruling. It held that when a landlord, within the specified time period, fails to provide the tenant with a written accounting of the portion of the security deposit the landlord intends to retain, the right to retain all or part of the security deposit has not been perfected, and the landlord must return the entire deposit to the tenant (*9 Cal. 4th 738, 745)* . The failure to comply with former Civ. Code § 1950.5(f) (*now see Civ. Code § 1950.5(g)*

) does not completely bar the landlord from recovering damages for unpaid rent, repair, and cleaning. A landlord who retains the security deposit in good faith may recover such damages in a subsequent judicial proceeding if the landlord proves by a preponderance of the evidence that he or she has suffered such damages and that the amount claimed is reasonable (*9 Cal. 4th 738, 749-750)* . The Court held that since the jury had found that the defendants had acted in good faith, the defendants could raise claims for unpaid rent, repair, and cleaning through the equitable defense of setoff (*9 Cal. 4th 738, 749-750)* .

[b] Amount of Unpaid Rent, Cost of Repairs, or Cost of Cleaning to Be Recovered From Former Tenant Must Be Reasonable

The facts and procedural background of ***Granberry v. Islay Investments*** *(1995) 9 Cal. 4th 738, 38 Cal. Rptr. 2d 650, 889 P.2d 970* , are discussed in *§ 141.54[3][a]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsDamagesGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsRemediesGeneral Overview

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PART II. FORMS

14-141 California Points & Authorities § 141.55

§ 141.55 Opposing Contention That Landlord Who Failed to Return Security Deposit and to Provide a Written Accounting of Deductions to Tenant in a Timely Manner [Civ. Code § 1950.5(g)] Is Entitled to Recover Unpaid Rent and Costs of Cleaning and Repair as Damages

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

LANDLORD IS NOT ENTITLED TO RECOVER UNPAID RENT AND/OR COSTS OF REPAIR AND/OR CLEANING BECAUSE LANDLORD HAS NOT MET HIS/HER BURDEN OF SHOWING THAT HIS/HER FAILURE TO RETURN TENANT'S SECURITY DEPOSIT AND TO PROVIDE A WRITTEN ACCOUNTING OF DEDUCTIONS FROM THE DEPOSIT WITHIN THREE WEEKS OF THE DATE TENANT VACATED THE PREMISES WAS IN GOOD FAITH.

A. Landlord Must Show That His or Her Failure to Return Security Deposit and to Provide a Written Accounting of Deductions to Former Tenant in a Timely Manner Was in Good Faith. A landlord who fails to return a vacating tenant's security deposit and to provide a written accounting of deductions from the deposit within three weeks after the tenant vacated the premises as required by *Civ. Code § 1950.5(g)* is barred from recovering damages for unpaid rent, repair, and cleaning in a judicial proceeding when the landlord cannot prove that its actions were in good faith (*Civ. Code § 1950.5*(*l*); *Granberry v. Islay Investments (1995) 9 Cal. 4th 738, 749-750, 38 Cal. Rptr. 2d 650, 889 P.2d 970*).

[*Optional*] **B. Landlord Is Not Entitled to Recover Unpaid Rent and Costs Repairs or Cleaning When Landlord Has Not Shown That the Amounts Are Reasonable.** A landlord who fails to return a tenant's security deposit and provide a written accounting in a timely manner (*Civ. Code 1950.5(g)*) may not recover unpaid rent or costs of repair and cleaning as damages in a judicial proceeding when the landlord cannot show that the amounts sought are reasonable (*Civ. Code § 1950.5*(*l*); *Granberry v. Islay Investments (1995) 9 Cal. 4th 738, 747, 38 Cal. Rptr. 2d 650, 889 P.2d 970*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention by a former tenant that his or her former landlord is not entitled to recover damages for unpaid rent or the costs of repairs or cleaning, when the landlord failed to return the security deposit and to provide the tenant with a writtenaccounting of any deductions within three weeks after the tenant vacated the premises [*Civ. Code § 1950.5(g)*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing that the landlord's failure to return the security deposit was in bad faith and that the amounts sought are unreasonable.

[b] Related Pleading and Practice Forms

For related forms, see California Forms of Pleading and Practice, Ch. 334, *Landlord and Tenant: Claims for Damages* (Matthew Bender).

[3] Discussion of Authorities

[a] Landlord Must Show That His or Her Failure to Return Security Deposit and to Provide a Written Accounting of Deductions to Former Tenant in a Timely Manner Was in Good Faith

The facts and holding in ***Granberry v. Islay Investments*** *(1995) 9 Cal. 4th 738, 748, 38 Cal. Rptr. 2d 650, 889 P.2d 970* , are discussed in *§ 141.54. Granberry* held that when a landlord, within the specified time period, fails to provide the tenant with a written accounting of the portion of the security deposit the landlord intends to retain, the right to retain all or part of the security deposit has not been perfected, and the landlord must return the entire deposit to the tenant (*9 Cal. 4th 738, 745)* . However, the failure to comply with former Civ. Code § 1950.5(f) (*now see Civ. Code § 1950.5(g)*) does not completely bar the landlord from recovering damages for unpaid rent, repair, and cleaning. A landlord who retained the security deposit in good faith may recover such damages in a subsequent judicial proceeding. However, the landlord bears the burden of proving by a preponderance of the evidence that he or she has suffered such damages and that the amount claimed is reasonable (*9 Cal. 4th 738, 749-750)* .

[b] Landlord Is Not Entitled to Recover Unpaid Rent and Costs of Repairs or Cleaning When Landlord Has Not Shown That the Amounts Are Reasonable

The facts and holding in ***Granberry v. Islay Investments*** *(1995) 9 Cal. 4th 738, 748, 38 Cal. Rptr. 2d 650, 889 P.2d 970* , are discussed in *§ 141.55[3][a]*, and *§ 141.54.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsBreachGeneral OverviewReal Property LawLandlord & TenantLease AgreementsDamagesGeneral Overview

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§ 142.syn Synopsis to Chapter 142: LIBEL AND SLANDER (DEFAMATION)

§ 142.01 Scope of Chapter

§ 142.02 Governing Statutes

§ 142.03 Page Limits on Memoranda

§ 142.04 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

[2] Related Points and Authorities Chapters

[3] Related California Torts Chapters

§§ 142.05-142.19 [Reserved]

§ 142.20 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Failure to Allege Special Damages if Language Not Defamatory on Its Face [Civ. Code §§ 45a, 46(5)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Form

[3] Discussion of Authorities

[a] Libel on Its Face

[b] Slander Per Se

[c] Special Damages

[d] Actual Damages

[4] Additional Authorities

[a] Slander Per Se

[b] Special Damages

§ 142.21 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Allegedly Defamatory Statement Does Not Imply Provably False Factual Assertion

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Statement That Does Not Assert Fact Is Afforded Protection

[b] Totality of Circumstances Test

[c] No Liability for Truthful, But One-Sided, News Story

[4] Additional Authorities

[a] Statement That Does Not Assert Fact Is Afforded Protection

[b] Totality of Circumstances Test

§ 142.22 Supporting Demurrer to Complaint for Libel [Code Civ. Proc. § 430.10(e)]--Statement Not Published to Third Person

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Libelous Statement Not Actionable Absent Publication

[b] Party That Publishes Statements Cannot Assert Libel Action

[c] Material Not "Published" When Sent to Fax Number Supplied by Plaintiff

[d] Forced Republication by Defamed Person Requires Actual Republication

§ 142.23 Opposing Preliminary Injunction--Prior Restraint

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Prior Restraints Not Permitted to Stop Defamatory Statements

§ 142.24 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Failure of Public Official Suing for Defamation to Allege Malice

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Actual Malice Required if Plaintiff Is Public Official

[b] Actual Malice Standard Applies to Governmental Defendants

[c] Definition of Public Official

[4] Additional Authorities

[a] Actual Malice Required if Plaintiff Is Public Official

[b] Definition of Public Official

§ 142.25 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Failure of Public Figure Suing for Defamation to Allege Malice

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Actual Malice Required if Plaintiff Is Public Figure

[b] Actual Malice Standard Applies to Governmental Defendants

[c] Definition of Public Figure for All Purposes

[d] Definition of Public Figure for Limited Purpose

[e] Determination of Public-Figure Status Made by Court

[4] Additional Authorities

[a] Actual Malice Required if Plaintiff Is Public Figure

[b] Definition of Public Figure for All Purposes

[c] Definition of Public Figure for Limited Purpose

§ 142.26 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Failure of Plaintiff Suing Distributor to Allege Malice

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[3] Discussion of Authorities

[a] Malice Required to Recover for Distribution of Defamatory Publication of Another

§ 142.27 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Failure of Public Official or Public Figure to Allege Falsity

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Plaintiff Who Is Public Official or Figure Must Show Falsity

[4] Additional Authorities

[a] Plaintiff Who Is Public Official or Figure Must Show Falsity

§ 142.28 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Failure of Plaintiff Suing Religious Organization or Minister to Allege Malice

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[3] Discussion of Authorities

[a] Malice Required if Remarks Were Exercise of Religion

[b] Ministerial Exception Prohibits Inquiry Into Truth or Falsity of Religious Doctrine

§ 142.29 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Failure to Establish Reckless Disregard for Truth

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Reckless Disregard for Truth Required if Plaintiff Is Public Figure

[b] Clear and Convincing Evidence Required

[4] Additional Authorities

[a] Reckless Disregard for Truth Required if Plaintiff Is Public Figure

§ 142.30 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Failure of Private Individual to Allege Negligence--Allegedly Defamatory Statement Relates to Matter of Public Concern

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Negligence Required if Allegedly Defamatory Statement Relates to Matter of Public Concern

§ 142.31 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Failure of Private Individual to Allege Actual Malice by Media Defendant if Plaintiff Seeks Compensation Only for Damages for Other Than Actual Injury and if Allegedly Defamatory Statement Related to Matter of Public Concern

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Recovery Limited to Actual Damages if Actual Malice Not Shown

§ 142.32 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Failure of Private Figure Plaintiff to Allege Falsity if Suing for Allegedly Defamatory Statement Related to Matter of Public Concern

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Private Plaintiff Suing Media Defendant Must Show Falsity

[b] Private Plaintiff Suing Nonmedia Defendant on Matter of Public Interest Must Show Falsity

§ 142.33 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Failure of Plaintiff Suing Publisher or Broadcaster to Allege Notice and Demand for Retraction [Civ. Code § 48a(1)] if Special Damages Are Not Sought

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

§ 142.34 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Failure of Plaintiff Suing Publisher or Broadcaster to Notify Defendant With Sufficient Specificity What Statements Were Allegedly Defamatory if Special Damages Are Not Sought [Civ. Code § 48a(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Form

[3] Discussion of Authorities

[a] Specificity Required in Demand for Retraction

[4] Additional Authorities

[a] Specificity Required in Demand for Retraction

§ 142.35 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Failure of Plaintiff Suing Publisher or Broadcaster to Notify Defendant of Allegedly Defamatory Statements Within Statutory Period if

Special Damages Are Not Sought [Civ. Code § 48a(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

§ 142.36 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Failure of Plaintiff Suing Publisher or Broadcaster to Serve Demand on Owner Rather Than Originator of Allegedly Defamatory Statements if Special Damages Are Not Sought [Civ. Code § 48a(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Service of Demand on Owner

§ 142.37 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10]--Failure of Private Party Suing Newspaper Publisher or Broadcaster to Serve Proper Demand for Retraction or Allege Special Damages [Civ. Code § 48a]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Statutory Period for Service Retraction Demand

[b] Conditional Demand Does Not Comply With Statute

[c] Retraction Demand Only Effective as to Identified Plaintiffs

§ 142.38 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Nonliability of Radio or Television Broadcaster Who Has Exercised Due Care to Prevent Defamatory Statement [Civ. Code § 48.5(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Due Care as Defense

§ 142.39 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Statements Substantially True--Private Figure Plaintiff Suing for Publishing Matter Not of Public Concern

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Truth as Defense

[b] Substantial Truth Sufficient; Objective Truth as Standard

[4] Additional Authorities

[a] Substantial Truth Sufficient

§ 142.40 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Falsity Not Established--Private Figure Plaintiff Suing for Publishing Matter of Public Concern

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] Plaintiff Must Show Falsity of Statement if Suing for Publishing Matter of Public Concern

§ 142.41 Supporting Motion for Summary Judgment Code Civ. Proc. § 437c[]--By Defendant--Adding Emphasis to Truthful Statement Not Defamatory

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Adding Emphasis to Truthful Statement Not Defamatory

§ 142.42 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Presence of Qualified Privilege Disclosed on Face of Complaint

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Form

[3] Discussion of Authorities

[a] Qualified Privilege as Ground for Demurrer

[4] Additional Authorities

[a] Qualified Privilege as Ground for Demurrer

§ 142.43 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Presence of Absolute Privilege Disclosed on Face of Complaint

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Form

[3] Discussion of Authorities

[a] Absolute Privilege as Ground for Demurrer

[4] Additional Authorities

[a] Absolute Privilege as Ground for Demurrer

§ 142.44 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Complaint in Action for Defamation Arising Out of Criminal Prosecution for Child Abuse Fails to Allege Complaint Is Not Barred by Civ. Code § 48.7(a) [Civ. Code § 48.7(c)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Judicial Notice

[c] Attorney's Fees and Costs

[d] Tolling of Statute of Limitations

[e] Pendency of Criminal Action

§ 142.45 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Privileges of Civil Code Section 47 Apply to Conduct in Mexico [Civ. Code § 47]

[1] FORM

[2] Comments

[a] Use of Form

[3] Related Pleading and Practice Forms

[4] Discussion of Authorities

[a] Privileges Apply to Conduct Occurring in Mexico

§ 142.46 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Absolute Privilege for Executive Officer [Civ. Code § 47(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Absolute Privilege for Executive Officer

[4] Additional Authorities

[a] Absolute Privilege for Executive Officer

§ 142.47 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Absolute Privilege for Statement Made in Legislative Proceeding [Civ. Code § 47(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Absolute Privilege for Legislative Proceeding

[4] Additional Authorities

[a] Absolute Privilege for Legislative Proceeding

§ 142.48 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Absolute Privilege for Publication Made in Judicial Proceeding [Civ. Code § 47(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Absolute Privilege for Judicial Proceeding

[b] Privilege Applicable to Proposed Judicial Proceeding

[c] Absolute Privilege for Attorney's Communications Related to Proceeding

[d] Absolute Privilege for Insurer That Defends Party

[e] Privilege Applicable to Nonparties as Well as Parties

[f] Privilege Applicable to Quasi-Judicial Proceedings

[g] Privilege Extends to Category of Communications Permitted by Law

[4] Additional Authorities

[a] Absolute Privilege for Judicial Proceeding

[b] Privilege Applicable to Proposed Judicial Proceeding

[c] Absolute Privilege for Attorney's Communications Related to Proceeding

[d] Privilege Applicable to Nonparties as Well as Parties

§ 142.49 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Participant in Arbitration Immune From Liability for Statements Made in Contractual Arbitration Proceeding [Civ. Code § 47(b)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Privilege Applies to Contractual Arbitration

[b] Privilege Applies to Deposition Testimony

§ 142.50 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Absolute Privilege for Publication Made in Official Proceeding Authorized by Law or Initiation or Course of Proceeding Authorized by Law and Reviewable by Mandate [Civ. Code § 47(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Privilege for Proceedings of Governmental Agencies

[b] Privilege for Proceedings Authorized by Law and Reviewable by Mandate

[c] Privilege Is Absolute

[d] Determining Quasi-Judicial Function

[e] Proceedings of Board of Medical Quality Assurance

[f] Communications Prompting Official Action

[g] Pleading Tort Theory Other Than Libel or Slander

[h] Absolute Privilege Applies to Employer Response to Request for Information From Law Enforcement Agency Conducting Employment Background Investigation

[i] Statements Made to Police Reporting Potential Criminal Conduct Absolutely Privileged

[j] No Particular Action by Official Body Required for Complaint to Be Protected

[4] Additional Authorities

[a] Summary Judgment

[b] Privilege for Proceedings of Government Agencies

[c] Privilege for Proceedings Authorized by Law and Reviewable by Mandate

[d] Privilege Is Absolute

[e] Determining Quasi-Judicial Function

[f] Communications Prompting Official Action

[g] Pleading Tort Theory Other Than Libel or Slander

[h] Statements Made to Police Reporting Potential Criminal Conduct Absolutely Privileged

§ 142.51 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Absolute Privilege for Publication Which Was Fair and True Report in or Communication to Public Journal [Civ. Code § 47(d)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Absolute Privilege for Public Journal

[b] Privilege Not Lost if Proceeding Is Confidential

[c] Proceeding Which is Closed to Public Is Still Public Official Proceeding

[4] Additional Authorities

[a] Absolute Privilege for Public Journal

§ 142.52 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Absolute Privilege for Publication Which Was Fair and True Report of Public Meeting [Civ. Code § 47(e)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Absolute Privilege for Report of Public Meeting

§ 142.53 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Qualified Privilege for Publication [Civ. Code § 47(c)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Qualified Privilege

[b] Communication by Employer

[c] Plaintiff Has Burden of Establishing Malice

[d] Privilege for Employer Not Defeated by Mere Negligence

[4] Additional Authorities

[a] Qualified Privilege

[b] Plaintiff Has Burden of Establishing Malice

§ 142.54 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Consent of Plaintiff to Defamatory Publication

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Consent

§ 142.55 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Person Authorized to Make Report of Child Abuse [Penal Code § 11166] Immune From Liability for Report Not Made With Knowledge of Falsity or Reckless Disregard for Truth or Falsity [Penal Code § 11172(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Persons to Whom Immunity Applies

[3] Discussion of Authorities

[a] Qualified Immunity for Report of Child Abuse

§ 142.55A Supporting Contention That Liability for Making False Report of Child Abuse Does Not Apply to Alleged Victim of Abuse [Penal Code § 11172(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] No Cause of Action Under Penal Code Section 11172(a) Against Alleged Victim of Child Abuse

§ 142.56 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Bar of Statute of Limitations [Code Civ. Proc. § 340(c)] Affirmatively Appearing on Face of Pleading

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Publication Activates Statute of Limitations

[b] Date of Actual Distribution to Public

[c] Rule of Discovery Inapplicable to Public Defamation

[d] Discovery Rule Inapplicable Even When Publication Is Not Widely Disseminated to Public

[e] Discovery Rule Inapplicable Once Secret Defamation Is Revealed in Subsequent Public Publication

[f] Statute Tolling Limitation Period Regarding Criminal Child Abuse Is Inapplicable to Newsperson

[g] Single Publication Rule Applies to Internet Publication

[4] Additional Authorities

[a] Date of Actual Distribution to Public

[b] Rule of Discovery Inapplicable to Public Defamation

§ 142.57 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Publication Did Not Convey Defamatory Meaning

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] No Defamatory Meaning Conveyed

[4] Additional Authorities

[a] No Defamatory Meaning Conveyed

§ 142.58 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Failure of Plaintiff Suing Public Employee to File Claim With Public Entity

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Form

[3] Discussion of Authorities

[a] Necessity of Filing Claim

[4] Additional Authorities

[a] Necessity of Filing Claim

§ 142.59 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Public Employee Immune for Statement Made Within Scope of Authority [Gov. Code § 820.2]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Public Employee Immunity

§ 142.60 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Public Entity Immune for Discretionary Statement of Public Employee

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Public Entity Immunity

§ 142.60A Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Federal Communications Decency Act of 1996 Provides Absolute Immunity for Republication of Defamatory Material on Internet

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Act Provides Absolute Immunity for Republishing Defamatory Material on Internet

[b] "User" Defined

[c] Employer is "Provider" When Providing Internet Access to Employees

[4] Additional Authorities

[a] Act Provides Absolute Immunity for Republishing Defamatory Material on Internet

§ 142.61 Supporting Motion for Summary Adjudication [Code Civ. Proc. § 437c(f)]--By Defendant--Republication Was Neither Authorized Nor Intended

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] No Liability for Unauthorized and Unintended Republication

[b] Voluntary Disclosure by Plaintiff

§ 142.62 Supporting Motion for Summary Adjudication [Code Civ. Proc. 437c(f)] of Claim for Exemplary Damages [Civ. Code § 3294]--By Defendant--Retraction Was Sufficient [Civ. Code § 48a(3)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Summary Adjudication of Claim for Exemplary Damages Based on Insufficiency of Retraction Is Proper if No Reasonable Juror Could Find Retraction Insufficient

§ 142.63 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10]--Special Damages Not Essential Allegation if Language Defamatory on Its Face

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Libel on Its Face

[b] Language Charging Crime

[c] Language Adversely Affecting Occupation

[d] Language Charging Violation of Confidence

[4] Additional Authorities

[a] Language Charging Crime

[b] Language Adversely Affecting Occupation

§ 142.64 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10]--Actual Damages Not Essential Allegation if Language Slanderous Per Se

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Slander Per Se

[b] Language Charging Crime

[c] Language Imputing Disease

[d] Language Injuring Business

[e] Language Imputing Lack of Chastity

[4] Additional Authorities

[a] Language Charging Crime

[b] Language Injuring Business

§ 142.65 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Public Figure Plaintiff--Inaccurate or Fabricated Quotations May Be Basis of Cause of Action and Show Actual Malice

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Deliberate Alteration That Materially Changes Meaning Constitutes Actual Malice

§ 142.66 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Plaintiff--Plaintiff Is Not Public Official--Actual Malice Need Not Be Alleged

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Public Official

[b] Actual Malice

[c] Licensee Is Not Public Official

[d] School Teacher Is Not Public Official

[e] Deputy Public Defender Is Not Public Official

§ 142.67 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Plaintiff--Plaintiff Is Not Public Figure--Actual Malice Need Not Be Alleged

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Public Figure Defined

[b] Private Individual Involved in Public Matter

[c] Person Who Engaged in Criminal Conduct

[d] Plaintiff Not Seeking to Influence Resolution of Issues

[4] Additional Authorities

[a] Public Figure Defined

§ 142.68 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Public Figure or Public Official Plaintiff--Plaintiff Has Shown Actual Malice by Clear and Convincing Evidence

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Clear and Convincing Evidence of Actual Malice Defeats Summary Judgment Motion

[b] Failure to Investigate Amounting to Avoidance of Truth Supports Finding of Actual Malice

[c] Political Candidate Not Protected if Statement Uttered With Actual Malice

[4] Additional Authorities

[a] Failure to Investigate Amounting to Avoidance of Truth Supports Finding of Actual Malice

§ 142.69 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10]--No Compliance With Retraction Statute [Civ. Code § 48a] Necessary if Defamatory Matter Not Published in Newspaper or on Radio or Television Broadcast

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Compliance With Retraction Statute Not Necessary

§ 142.70 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10]--No Compliance With Retraction Statute [Civ. Code § 48a] Necessary if Slander Complete Prior to Publication in Newspaper

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Republication of Slander

§ 142.71 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10]--No Compliance With Retraction Statute [Civ. Code § 48a] Necessary if Slander Committed by Unauthorized Intruder on Radio or Television Broadcast

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Intruder Not Protected by Retraction Statute

§ 142.72 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10]--No Compliance With Retraction Statute [Civ. Code § 48a(1)] Necessary if Defendant Is Magazine Rather Than Newspaper

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Magazine Not Covered by Retraction Statute

§ 142.73 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10]--No Compliance With Retraction Statute [Civ. Code § 48a] Necessary if Defamation Committed by Nonparticipant in Process of News Dissemination

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Nonparticipant Not Covered by Retraction Statute

[4] Additional Authorities

[a] Nonparticipant Not Covered by Retraction Statute

§ 142.74 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10]--Plaintiff's Notice and Demand for Correction Identifying Defendant's Defamatory Statements Were Sufficiently Specific to Comply With Retraction Statute [Civ. Code § 48a]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Sufficiency of Demand for Correction

§ 142.75 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10]--Plaintiff Meets Requirement that Notice and Demand for Correction [Civ. Code § 48a(1)] Be Served on Publisher of Newspaper

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Requirement of Service of Notice and Demand on Publisher Not Intended as Technical Barrier to Recovery

[b] Plaintiff Meets Requirement of Service of Notice and Demand on Publisher by Service on Publisher's Designee

[c] Plaintiff Meets Requirement of Service of Notice and Demand on Publisher by Service on Employee Other than Publisher or Publisher's Designee if Publisher Timely Acquires Actual Knowledge of Notice and Demand

[d] Notice and Demand Not Required To Be Sent by Registered Mail

§ 142.76 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--Statutory Defense of Due Care [Civ. Code § 48.5] as Not Applicable if Allegedly Defamatory Statements Made by Owner or Employee of Broadcasting Station

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Due Care Defense Not Applicable to Owner or Employee

§ 142.77 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--Absolute Privilege [Civ. Code § 47(b)] Not Available to Defendant--Defamatory Statements Not Related to and Did Not Achieve Object of Proceeding

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Privilege Does Not Apply if Communication Is Not Related to or Does Not Achieve Object of Proceeding

[b] Publication Has Both a Litigation and Nonlitigation Purpose

[4] Additional Authorities

[a] Privilege Does Not Apply if Communication Is Not Related to or Does Not Achieve Object of Proceeding

§ 142.78 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--Absolute Privilege [Civ. Code § 47(b)] Not Available to Defendant--Statements to Media Concerning Litigation Not Privileged if They Are Neither Reports of Proceeding Nor Have Some Logical Relation to Proceeding

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Communications to Media That Are Not Within Litigation Privilege

[4] Additional Authorities

[a] Communications to Media That Are Not Within Litigation Privilege

§ 142.79 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--Absolute Privilege [Civ. Code § 47(b)] Not Available to Defendant--False Report of Child Abuse [Penal Code § 11172]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] False Report of Child Abuse Not Within Litigation Privilege

§ 142.80 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10]--Qualified Privilege for Publication [Civ. Code § 47(c)] Defeated by Existence of Malice

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Qualified Privilege Defeated by Malice

[4] Additional Authorities

[a] Qualified Privilege Defeated by Malice

§ 142.81 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--Plaintiff Sought Reiteration of Defamatory Statement From Defendant but Did Not Consent to Publication

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Reiteration Not Consent

§ 142.82 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--Public Employee Not Immune for Statement Made Outside Scope of Authority

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Statements Not Shielded by Rule of Immunity for Public Employee

§ 142.83 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--Qualified Immunity for Report of Child Abuse [Penal Code § 11172(a)] Not Available to Defendant

[1] FORM

[2] Comments

[a] Use of Form

[b] Persons to Whom Immunity Applies

[3] Discussion of Authorities

[a] Qualified Immunity Defeated by Malice

[b] No Qualified Immunity if Defendant Did Not Follow Statutory Reporting Procedure

§ 142.84 Opposing Motion for Summary Adjudication [Code Civ. Proc. § 437c(f)]--Republication Was Reasonably Foreseeable

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

[3] Discussion of Authorities

[a] Reasonably Foreseeable Republication

[b] Plaintiff's Republication

[4] Additional Authorities

[a] Reasonably Foreseeable Republication

§ 142.85 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10]--Statement Asserts Fact That is Susceptible to Being Proved False

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Liability for Statements Implying Provably False Assertion

[b] Allocations of Questions of Law and Fact

[4] Additional Authorities

[a] Liability for Statements Implying Provably False Assertion

§ 142.86 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10]--No Constitutional Privilege for Opinion

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] No Constitutional Privilege for Opinion

[b] No Broader Protection Afforded Under California Constitution

[4] Additional Authorities

[a] No Broader Protection Afforded Under California Constitution

§ 142.87 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--Media Defendant Has No Public-Interest Privilege Under Civ. Code § 47(c) in Action by Private-Figure Plaintiff

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] No Public-Interest Privilege for Media in Civil Code Section 47(c) in Defamation Action Brought by Private Individual

§ 142.88 Opposing Motion for Summary Adjudication [Code Civ. Proc. 437c(f)] of Claim for Exemplary Damages [Civ. Code § 3294]--By Plaintiff--Conspicuousness of Retraction Is Jury Question [Civ. Code § 48a]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Conspicuousness of Retraction Is Question of Fact for Jury

§ 142.89 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10]--No Constitutional Neutral Reportage Privilege For Publishing Defamatory Material About Private Figure

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] No State or Federal Constitutional Privilege For Republication of Libel Concerning Private Figure

§ 142.90 Supporting Injunctive Relief--Injunction Against Repeating Defamatory Statements Permitted

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Injunction Prohibiting Repetition of Defamatory Statements Permitted

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CHAPTER 142 LIBEL AND SLANDER (DEFAMATION)
PART I. INTRODUCTION

14-142 California Points & Authorities § 142.01

§ 142.01 Scope of Chapter

This chapter contains memoranda for use by a defendant in supporting demurrers and motions for summary judgment or summary adjudication with regard to complaints filed in defamation actions [§§ 142.20-142.62]. Also included are forms for use by a plaintiff in opposition to some of those demurrers and motions [§§ 142.63-142.89].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral OverviewTortsIntentional TortsDefamationProcedureTortsIntentional TortsDefamationRemediesGeneral Overview

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14-142 California Points & Authorities § 142.02

§ 142.02 Governing Statutes

Causes of action for defamation and defenses to such actions are governed by *Civ. Code § 43 et seq.* Pleadings in defamation actions are governed by *Code Civ. Proc. §§ 460-461*.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationElementsGeneral OverviewTortsIntentional TortsDefamationElementsLibelTortsIntentional TortsDefamationElementsSlander

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14-142 California Points & Authorities § 142.03

§ 142.03 Page Limits on Memoranda

Generally, a supporting or opposing memorandum must not exceed 15 pages in length, or, in the case of a motion for summary judgment or summary adjudication, 20 pages in length. A reply or closing memorandum may not exceed 10 pages in length [*see Cal. Rules of Ct., Rule 3.1113(d)*]. Any party desiring to file a longer memorandum must obtain leave of court [*see Cal. Rules of Ct., Rule 3.1113(e)*]. For further discussion of the page limitations under *Cal. Rules of Ct., Rule 3.1113*, and of other basic format requirements of memoranda, see *Ch. 1, Writing Legal Memoranda and Briefs, § 1.05*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedureSummary JudgmentGeneral OverviewTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationElementsGeneral Overview

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14-142 California Points & Authorities § 142.04

§ 142.04 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

For a discussion of complaints and defenses involving libel and slander actions, see California Forms of Pleading and Practice, Ch. 340, *Libel and Slander* (Matthew Bender). For discussion and forms for use in actions involving torts that protect interests that are similar to the interest in good reputation protected by defamation actions, see the following chapters:

- Ch. 357, *Malicious Prosecution and Abuse of Process*.
- Ch. 362, *Mental Suffering and Emotional Distress*.
- Ch. 429, *Privacy*.

[2] Related Points and Authorities Chapters

Related memoranda that may be useful in particular libel or slander cases may be found in the following chapters:

- Ch. 71, *Demurrers and Motions for Judgment on the Pleadings*.
- Ch. 81, *Discovery: Privileges and Other Discovery Limitations*.
- Ch. 104, *Fictitiously Named Defendants (DOES)*.
- Ch. 160, *Motions to Strike*.

For a discussion and sample forms showing how to use the forms in this chapter to draft a complete memorandum or brief, and for further discussion of law and motion procedure and strategy, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Related California Torts Chapters

For full discussion of the law relating to actions for defamation, see Levy, Golden, and Sacks, California Torts, Ch. 45, *Defamation* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral Overview

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14-142 California Points & Authorities §§ 142.05-142.19

[Reserved]

§§ 142.05[Reserved]

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PART II. FORMS

14-142 California Points & Authorities § 142.20

§ 142.20 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Failure to Allege Special Damages if Language Not Defamatory on Its Face [Civ. Code §§ 45a, 46(5)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF DEMURRER
Plaintiff,	)	TO COMPLAINT
vs.	)	Date: _____
_____ [*name(s)*],	)	Time: _____
Defendant(s).	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT FAILS TO ALLEGE SPECIAL DAMAGES AND THE LANGUAGE COMPLAINED OF IS NOT DEFAMATORY ON ITS FACE.

A. Objection by Demurrer. The party against whom a complaint has been filed may object, by demurrer as provided in *Code of Civil Procedure Section 430.30*, to the complaint on the ground that it does not state facts sufficient to constitute a cause of action (*Code Civ. Proc. § 430.10(e)*). If any ground for objection to a complaint appears on the face of the complaint, or from any matter of which the court is required to or may take judicial notice, the objection on that ground may be taken by a demurrer to the complaint (*Code Civ. Proc. § 430.30(a)*).

[*EITHER*]

B. Libel on Its Face. To be libelous on its face, the defamatory nature of the language must appear without the necessity of explanatory matter such as an inducement, an innuendo, or any other extrinsic fact (*Civ. Code § 45a*; *MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 548-549, 343 P.2d 36*).

[*OR*]

B. Slander Per Se. In order for language to be slanderous per se, it must charge the plaintiff either with a crime (*Civ. Code § 46(1)*), with having an infectious disease (*Civ. Code § 46(2)*), with a fact that injures the plaintiff in his or her business (*Civ. Code § 46(3)*), or with being impotent or unchaste (*Civ. Code § 46(4)*).

[*EITHER*]

C. Special Damages. A publication that is not libelous on its face must have proximately caused special damages before it is actionable (*Civ. Code § 45a*); an allegation of special damages is an essential element of such a cause of action (*Gomes v. Fried (1982) 136 Cal. App. 3d 924, 929, 186 Cal. Rptr. 605*).

[*OR*]

C. Actual Damages. A publication that is not slanderous per se must have caused actual damages before it is actionable (*see Civ. Code § 46(5)*); an allegation of special damages is required to withstand a demurrer (*Gautier v. General Tel. Co. (1965) 234 Cal. App. 2d 302, 309, 44 Cal. Rptr. 404*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a general demurrer to a complaint if the demurrer asserts that the complaint fails to state facts sufficient to constitute a cause of action in that it appears on the face of the complaint, or from any matter of which the court is required to or may take judicial notice, that the language complained of is neither libelous on its face nor slanderous per se and the plaintiff has failed to plead any special damages.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Form

For a form of demurrer to a complaint based on the plaintiff's failure to allege special damages if the language is not defamatory on its face, see Ch. 340, *Libel and Slander* in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Libel on Its Face

MacLeod v. Tribune Publ'g Co. *(1959) 52 Cal. 2d 536, 343 P.2d 36* , reversed a judgment for the defendant after a general and special demurrer had been sustained. The plaintiff had sued for a defamatory article that accused him of being affiliated with communism, but the defendant argued that the article was susceptible of an innocent meaning and therefore not libelous on its face. The Court reaffirmed the test for a publication asserted to the libelous on its face that is contained in *Civ. Code § 45a*, and it repudiated the possible innocent interpretation rule that had developed in earlier cases (*52 Cal. 2d 536, 548-549)* .

[b] Slander Per Se

Slanderous language must fall into one of the four statutory categories before it is deemed slanderous per se [*Civ. Code § 46(1)-(4)*].

[c] Special Damages

In ***Gomes v. Fried*** *(1982) 136 Cal. App. 3d 924, 186 Cal. Rptr. 605* , a police officer sued a newspaper for libel based on an article and photograph published in the paper. After judgment was awarded to the plaintiff, the trial court conditionally granted a new trial on the issue of damages unless the plaintiff agreed to a reduction in damages. The plaintiff agreed to the reduction and appealed from that order. The defendants appealed from the judgment and from an order denying their motion for judgment notwithstanding the verdict.

In deciding the issue of whether or not the plaintiff had proven special damages, the court of appeal stated that if defamatory language is not libelous on its face, no cause of action arises unless the plaintiff proves special damages (*136 Cal. App. 3d 924, 929)* . The court concluded that the plaintiff was not entitled to special damages, because he had not proven any. For this and other reasons the case was reversed and the trial court was directed to enter judgment for the defendants (*136 Cal. App. 3d 924, 941)* .

[d] Actual Damages

A false and unprivileged publication that, by its natural consequences, causes actual damage is actionable [*Civ. Code § 46(5)*]. In ***Gautier v. General Tel. Co.*** *(1965) 234 Cal. App. 2d 302, 44 Cal. Rptr. 404* , the court sustained a demurrer to a complaint containing a number of counts, one of which was for slander. The court held that charging the plaintiffs with failure to pay their debts was not defamatory per se. Therefore, because the plaintiffs had failed to allege special damages, the pleading was fatally defective (*234 Cal. App. 2d 302, 309)* .

[4] Additional Authorities

[a] Slander Per Se

In *The Nethercutt Collection v. Regalia (2009) 172 Cal. App. 4th 361, 90 Cal. Rptr. 3d 882* , plaintiff, a former long-time employee of defendant automobile restoration and museum company, sued the company's president for slander based on statements made shortly after plaintiff's employment was terminated. Prior to his termination, plaintiff was negotiating for a raise in salary and also demanded a $230,000 finder's fee for a recent company donation valued at $2.3 million. Defendant president denied the finder's fee and terminated plaintiff's employment. Shortly after, in

discussing the reasons for plaintiff's termination with other company employees, the president stated that plaintiff had demanded a finder's fee to which he was not entitled and that other employees would not work for plaintiff and were threatening to quit if he was retained. After forming his own company, plaintiff sued for slander based on those remarks, arguing that they were slander per se under *Civ. Code § 46(3)* because they damaged him in his business, profession, or trade. The cause was submitted to the jury on a theory of slander per se. The jury found that plaintiff suffered no actual damages, but awarded $750,000 on the slander per se theory. The court of appeal reversed. The court held that the statements that plaintiff had demanded a finder's fee to which he was not entitled and that other employees would not work for plaintiff if he remained, were not slander per se as those statements did not necessarily reflect negatively on plaintiff. The court noted that a person can make a claim for money that is rejected without having that claim reflect negatively on the person. Similarly, the court also noted that there are many reasons why employees may not want to work for another person, and that fact in and of itself does not reflect negatively on the person. Thus, it was an error to grant judgment for plaintiff on a theory of slander per se. The court then ordered the trial court to enter judgment for defendants, because the jury explicitly found that plaintiff suffered no actual damages, which would be required in order to recover on a theory of slander per quod (*172 Cal. App. 4th 361, 369-370)* .

[b] Special Damages

Smith v. L.A. Bookbinders Union No. 63 *(1955) 133 Cal. App. 2d 486, 284 P.2d 194 , overruled on other grounds, MacLeod v. Tribune Pub. Co. (1959) 52 Cal. 2d 536, 551, 343 P.2d 36* , involved the issue of whether the plaintiff could amend his original complaint to state a cause of action. The court of appeal held that it was error to deny the plaintiff an opportunity to amend his original complaint, because the allegation of special damages is only one element of a cause of action for libel. However, the court affirmed the principle of *Civ. Code § 45a* that special damage is an essential element of an action for a publication that was not libelous on its face (*133 Cal. App. 2d 486, 494-495)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationElementsLibelTortsIntentional TortsDefamationElementsSlander

California Points & Authorities

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 142 LIBEL AND SLANDER (DEFAMATION)
PART II. FORMS

14-142 California Points & Authorities § 142.21

§ 142.21 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Allegedly Defamatory Statement Does Not Imply Provably False Factual Assertion

[1] FORM

[*Caption. See § 142.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT, TAKEN IN THE CONTEXT OF THE TOTALITY OF THE CIRCUMSTANCES, THE ALLEGEDLY DEFAMATORY STATEMENT DOES NOT IMPLY A PROVABLY FALSE ASSERTION.

A. Statement That Does Not Assert Fact Is Afforded Protection. Statements that cannot be reasonably interpreted as stating actual facts are entitled to protection under *U.S. Const. amend. I* (*Moyer v. Amador Valley Joint Union High Sch. Dist. (1990) 225 Cal. App. 3d 720, 724, 275 Cal. Rptr. 494*).

B. Totality of Circumstances Test. Whether a reasonable fact finder could conclude that the published statements imply a provably false factual assertion is determined by the "totality of circumstances" test, which is a review of the meaning of the language in context and its susceptibility of being proved true or false (*Moyer v. Amador Valley Joint Union High Sch. Dist. (1990) 225 Cal. App. 3d 720, 724-725, 275 Cal. Rptr. 494*).

[*Optional*] **C. No Liability for Truthful, But One-Sided, News Story.** A media defendant is not liable for publishing a factual account that provides only one perspective on a story, but fails to include additional facts that might give the reader or listener a different impression of the events discussed (*Paterno v. Superior Court (2008) 163 Cal. App. 4th 1342, 1352* , 78 Ca. Rptr. 3d 244).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a general demurrer to a complaint if the demurrer asserts that the complaint fails to state facts sufficient to constitute a cause of action in that the allegedly defamatory statement does not imply a provably false factual assertion [*see Milkovich v. Lorain Journal Co. (1990) 497 U.S. 1, 19-20, 110 S. Ct. 2695, 111 L. Ed. 2d 1* (discussed in *§ 142.86[3*][a]); *see also Moyer v. Amador Valley Joint Union High Sch. Dist. (1990) 225 Cal. App. 3d 720, 724, 275 Cal. Rptr. 494]* .

This form may be adapted for use in other procedural contexts, for example, in support of a motion for judgment on the pleadings, and may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should set forth the statement alleged to be defamatory and should show that, on examination of the meaning of the language in context, the statement is incapable of being proved true or false.

In an appropriate case, the points *in § 142.85* may be used to oppose these points.

[3] Discussion of Authorities

[a] Statement That Does Not Assert Fact Is Afforded Protection

In ***Moyer v. Amador Valley Joint Union High Sch. Dist.*** *(1990) 225 Cal. App. 3d 720, 275 Cal. Rptr. 494* , a high school teacher filed an action for defamation and infliction of emotional distress against the school district, the school principal, and certain students in connection with a publication in the school newspaper criticizing his professional competence and describing an incident that had allegedly occurred in his classroom. The newspaper article reported that a smoke bomb had gone off in the plaintiff's classroom. The headline stated that the students in the classroom had terrorized the plaintiff; and the article quoted the student responsible as stating that the plaintiff annoyed him and was the worst teacher in the school. The trial court sustained general demurrers to the complaint, and the plaintiff appealed.

The court of appeal affirmed (*225 Cal. App. 3d 720, 727)* . The court noted that prior to the filing of the appellate briefs, the courts perceived a fundamental distinction between statements of fact and statements of opinion, which were held to be protected by *U.S. Const. amend. I* and therefore not actionable. However, while the appeal was pending, the United States Supreme Court filed its opinion in *Milkovich v. Lorain Journal Co. (1990) 497 U.S. 1, 110 S. Ct. 2695, 111 L. Ed. 2d 1* (discussed in *§ 142.86[3][a]*), in which the Court reexamined the law of defamation as limited by the *First Amendment* and rejected "the creation of an artificial dichotomy between opinion and fact" (*225 Cal. App. 3d 720, 723)* . Although the Court held in *Milkovich* that there is no separate *First Amendment* privilege for statements of opinion, it recognized that existing constitutional doctrine still protects free expression of ideas. That is, statements that cannot be reasonably interpreted as stating actual facts are still entitled to constitutional protection.

In this case, the plaintiff essentially asserted that the publication contained three factual statements: (1) the headline that the students terrorized him; (2) that he was a "babbler"; and (3) that he was the worst teacher in the school. The court stated that the narrow issue before it is whether these statements can reasonably be understood to state actual facts about the plaintiff. In determining that issue, the court considered the nature and meaning of the language used, including the verifiability of the statements, and the context in which the statements appeared, and concluded that the statements are not actionable (*225 Cal. App. 3d 720, 725)* . With respect to the first statement, the court agreed with the plaintiff that

by its nature, a headline over a news story arguably implies a factual assertion. However, it held, even if the descriptive term "terrorize" is an exaggeration of the actual event, it nonetheless falls within the protectable category of "rhetorical hyperbole": a word used in a loose, figurative sense. Moreover, the article read in full context accurately reported that one student had supplied another student with a smoke bomb that was set off during the plaintiff's class (*225 Cal. App. 3d 720, 726)* . The court held that the second statement does not fall within the legal framework of actionable speech because a commonly accepted definition of "babbler" is one who utters meaningless or unintelligible sounds, or who talks foolishly or incessantly (*225 Cal. App. 3d 720, 725-726)* . Obviously, the court held, the readers would have understood that the word was not used literally but as a form of exaggerated expression conveying the speaker's disapproval of the plaintiff's teaching or speaking style. The statement could not reasonably have been understood to be stating actual facts about the plaintiff (*225 Cal. App. 3d 720, 726)* . The court also held that the third statement contains no factual assertion capable of being proved true or false. Clearly, the court concluded, the statement is an expression of subjective judgment the speaker; the full text of the sentence confirms that the statement was simply an expression of anger or disgust on the speaker's part. Inasmuch as the statement contains no verifiable facts, it is clearly protected under the *First Amendment* (*225 Cal. App. 3d 720, 725)* . The court concluded that because the statements are not actionable, and that no fact finder could reasonably interpret the statements as stating actual facts about the plaintiff, the demurrers were properly sustained (*225 Cal. App. 3d 720, 726)* .

[b] Totality of Circumstances Test

The factual and procedural background of ***Moyer v. Amador Valley Joint Union High Sch. Dist.*** *(1990) 225 Cal. App. 3d 720, 275 Cal. Rptr. 494* , is discussed in *§ 142.21[3][a]*. The court of appeal noted that, before *Milkovich*, California courts had employed a "totality of circumstances" test to differentiate between fact and opinion. Under this test, courts first examine the language of the statement: the words are defamatory if they are understood in a defamatory sense. They then consider the context in which the statement was made, that is, the nature and full content of the communication, and the knowledge and understanding of the audience to whom the publication was directed. The crucial determination whether the statement was fact or opinion was held to be a question of law for the court. The court of appeal stated that *Milkovich* did not substantially change these principles; it underscored that in cases raising *First Amendment* issues, a reviewing court must make an independent examination of the whole record to ensure that there is no infringement of free expression (*225 Cal. App. 3d 720, 724)* . The dispositive question for the court is whether a reasonable fact finder could conclude that the published statements imply a provably false factual assertion, which is determined by applying the "totality of circumstances" test: a review of the meaning of the language in context and its susceptibility of being proved true or false (*225 Cal. App. 3d 720, 724-725)* .

[c] No Liability for Truthful, But One-Sided, News Story

In ***Paterno v. Superior Court*** *(2008) 163 Cal. App. 4th 1342* , 78 Ca. Rptr. 3d 244, plaintiff, the corporate owner of a daily city newspaper, brought suit against the author of a magazine article that provided an account of recent events at the newspaper that had culminated in the dismissal or resignation of more than half of the newsroom staff. After the article suggested that the staff had been working in a "climate of fear and paranoia" and the newspaper's principal was responsible for much of the "turmoil" because of her efforts to "silence" criticism, plaintiff sued defendant for libel and trade disparagement for allegedly falsely implying that the principal's personal agenda improperly influenced the newspaper's reporting. Defendant filed a motion to strike the complaint under *Code Civ. Proc. § 425.16*, the anti-SLAPP statute. Plaintiff claimed that it could establish a probability of success on the merits sufficient to defeat the motion, but requested discovery to establish defendant's knowledge about the events and her state of mind when she wrote the report. The trial court ruled that only three statements in the article were potentially actionable, and granted discovery to allow plaintiff to uncover evidence as to whether defendant made those three statements with actual malice. Defendant filed a petition for writ of mandate, arguing that two of the three statements were true and the third was non-actionable opinion.

The court of appeal granted the petition and ordered the trial court to deny the discovery motion. The court first held

that plaintiff could not establish good cause for conducting discovery on the issue of actual malice unless plaintiff first demonstrated that the statements actually contained provably false factual assertions (*163 Cal. App. 4th 1342, 1349)* . Addressing the three statements, the court noted that the gist of the complaint was that, while defendant's statements may have been truthful, defendant had not provided plaintiff's side of the story, the inclusion of which might have given readers a different impression of the events. For example, the article stated that a story on the sentencing of one of the newspaper editors for drunk driving had been "killed" by management, which was admitted to be true by the principal. She argued, however, that the article created an impression that the story was killed to protect a favored employee, which she claimed was false. In another statement, defendant had recounted that a workplace restraining order had been sought by the newspaper to protect one employee from another employee, and the case dropped only after the employee against whom the order was sought had incurred $7,000 in legal fees. While this was true, plaintiff argued that the story created a false impression because it failed to include the fact that the case was dropped because it became moot when the employee who would have been protected left the newspaper's employ. The court of appeal held that defendant had no obligation to provide plaintiff's version of these events, and because the published statements were true, defendant was to be afforded a reasonable degree of flexibility in how to present the story (*163 Cal. App. 4th 1342, 1352-1355)* . As to the final statement, in which defendant wrote that the newspaper had "slashed" benefits and overtime pay, the court noted first that the statement was attributed in the article to former employees of the newspaper, and plaintiff admitted that the employees' 401(k) plan had been eliminated. While plaintiff noted that the article failed to include the fact that new merit-based salary increases had been added, the court concluded the statement published in the article was non-actionable opinion about the effect of the loss of certain benefits (*163 Cal. App. 4th 1342, 1355-1357)* .

[4] Additional Authorities

[a] Statement That Does Not Assert Fact Is Afforded Protection

In *Nygard, Inc. v. Uusi-Kerttula (2008) 159 Cal. App. 4th 1027, 72 Cal. Rptr. 3d 210* , plaintiff brought suit for defamation and a variety of other tort and contract claims against a former employee based on a published interview in which defendant stated such things as working for the company was "horrible," that he felt used and worked like a slave without a break, and that he endured around-the-clock pestering. The trial court struck the complaint under *Code Civ. Proc. § 425.16*, the anti-SLAPP statute, and the court of appeal affirmed. The court first held that *Code Civ. Proc. § 425.16* applied to the action because the magazine was a public forum and the matter was one of public interest to the magazine's readership (*159 Cal. App. 4th 1027, 1036-1044)* . The court then held that defendant's use of colorful language to describe what he perceived as unpleasant working conditions with plaintiff, including that the work experience was "horrible" and that plaintiff "slaved" for plaintiff, was non-actionable opinion, because no reasonable reader could conclude that the statements were literal statements of truth. The court noted, for example, that no reasonable reader could understand defendant's comments to mean that he was actually struck with horror while working for plaintiff or that he was actually enslaved (*159 Cal. App. 4th 1027, 1052-1053)* . As to one statement made by defendant suggesting that employees were not allowed to see a doctor when injured, defendant had gone on to describe his own personal experience after an injury when he was discouraged from seeing a doctor prior to finishing his assignment. Because he had provided the factual details behind his statement, and these details were not shown to be false, the broad conclusion defendant had given based on his personal experience was not actionable (*159 Cal. App. 4th 1027, 1053-1054)* .

In *McGarry v. University of San Diego (2007) 154 Cal. App. 4th 97, 64 Cal. Rptr. 3d 467* , plaintiff was a former university head football coach who brought a defamation action against the university and university officials after his employment was terminated. The defamation action was based in part on a statement made by a university official during a meeting with parents of the football players suggesting that plaintiff may have been terminated because of unspecified "immoral" conduct. The trial court granted defendants' motion to strike the defamation action under the anti-SLAPP statute, *Code Civ. Proc. § 425.16*. The court of appeal affirmed, holding in part that the statement made at the parent conference was a statement of opinion that was not actionable. The court first noted that the university official did not *expressly* state that plaintiff had been fired because of immoral behavior. Assuming, however, that the

statement could reasonably be interpreted as suggesting that plaintiff was fired for unspecified immoral behavior, the court concluded that the statement was incapable of being interpreted as implying a provably false assertion of fact, as behavior that might qualify as immoral to one person might be perfectly acceptable to another (*154 Cal. App. 4th 97, 116-117)* .

In *Seelig v. Infinity Broad. Corp. (2002) 97 Cal. App. 4th 798, 119 Cal. Rptr. 2d 108* , the plaintiff was a participant on a nationally broadcast television show in which she and 49 other women competed to win the opportunity to marry an anonymous millionaire. The plaintiff did not win the contest, and in fact only appeared on the actual broadcast for less than one minute, although she was identified by name, city of residence, and occupation. On the morning before the broadcast, the hosts of a comedic talk show on a radio station in the plaintiff's city, after unsuccessfully trying to get the plaintiff to appear on the radio program to talk about her participation in the contest, made disparaging comments about the plaintiff for failing to appear on the radio show. Although the plaintiff was not specifically identified by name on the radio, the radio program participants referred to her several times as a "local loser," a "chicken butt," and a "skank." The plaintiff sued for defamation and related causes of action. The defendants filed a motion to strike the complaint under *Code Civ. Proc. § 425.16*, the anti-SLAPP statute, but the trial court denied the motion. The court of appeal reversed, however, finding that the anti-SLAPP statute applied and that the plaintiff had not shown a probability of prevailing on the merits of the action. The court held that the comments, made on the air about a matter of public interest in a context that was clearly meant to be humorous, constituted either the speaker's subjective judgment or rhetorical hyperbole. Because the comments did not state provable facts about the plaintiff, they were not actionable as defamation (*97 Cal. App. 4th 798, 810-812)* .

In *Rosenaur v. Scherer (2001) 88 Cal. App. 4th 260, 105 Cal. Rptr. 2d 674* , the plaintiff was a property owner who sought through a local public initiative to obtain the zoning changes needed to permit commercial development on his property. During the public battle over the initiative, an argument took place at a shopping mall between the plaintiff and a political opponent of the initiative. During that argument, the opponent allegedly called the plaintiff a "thief" and a "liar." After the initiative was defeated, the plaintiff brought suit against his former opponents for the public assertions made at the shopping mall. The trial court granted the defendants' anti-SLAPP motion to strike the complaint brought under *Code Civ. Proc. § 425.16*, and the plaintiff appealed. The court of appeal held that the statements made at the mall, in the context of the heated public initiative measure, were constitutionally protected hyperbole and not provably false assertions of fact (*88 Cal. App. 4th 260, 275-276)* .

In *Savage v. Pacific Gas & Elec. Co. (1993) 21 Cal. App. 4th 434, 26 Cal. Rptr. 2d 305* , the plaintiff was a reporter for an energy newsletter, and had been involved with an anti-nuclear group. The defendant, who worked for a power company, told the editor of the newsletter that he believed the plaintiff had a conflict of interest, and the editor fired the plaintiff on the ground of conflict of interest. The plaintiff sued the defendant for slander and other causes of action; the trial court granted the defendant's motion for summary judgment and dismissed the cause of action, and the plaintiff appealed. The court of appeal affirmed, holding that the statement of opinion that the plaintiff had a conflict of interest could not be defamatory under *Civ. Code § 45* or *46*, because it could not be proved to be true or false and did not imply any objective fact that could be so proved (*21 Cal. App. 4th 434, 445)* .

[b] Totality of Circumstances Test

In *Franklin v. Dynamic Details, Inc. (2004) 116 Cal. App. 4th 375, 10 Cal. Rptr. 3d 429* , the plaintiff was the owner of a business that provided sales representation for vendors of electronics products and equipment. The plaintiff brought suit for libel, trade libel, and other causes of action against a company that provides design and manufacturing services to the electronics manufacturing industry and one of the company's corporate directors. The plaintiff alleged that the corporate director defamed the plaintiff and his company in e-mails sent to the plaintiff's clients, which suggested that the plaintiff was dishonest. The trial court granted summary judgment for the defendants, and the court of appeal affirmed. Applying a totality of the circumstances test, the court of appeal held that the e-mails were not actionable as libel or trade libel because they expressed the director's opinions and fully disclosed the provably true facts on which

those opinions were based. The e-mails suggested that the plaintiff stole copyrighted material, plagiarized data, breached a nondisclosure agreement, compromised the defendant's company, and was generally dishonorable. However, the e-mails also directed the recipient to the plaintiff's Internet web site and specifically described the relevant links to follow at that site and what those links disclosed that the director considered to be dishonest. The court noted that under established case law, a publisher is not liable for defamation if the publisher gives an opinion and fully discloses all of the facts on which that opinion is based, without implying the existence of any other facts, so long as those underlying disclosed facts are provably true. Because there was no dispute that the director's description of the materials on the plaintiff's web site was accurate, the facts underlying the opinion that the director expressed in the e-mails were fully disclosed and provably true, and neither the director nor his company could be liable for the director's opinion of the plaintiff's dishonesty, which was based on those disclosed facts (*116 Cal. App. 4th 375, 384-390)* .

In *Ferlauto v. Hamsher (1999) 74 Cal. App. 4th 1394, 88 Cal. Rptr. 2d 843* , the plaintiff was an attorney who filed suit alleging that he was defamed in a book written by the defendant. The book generally concerned the defendant's production of a movie and a lawsuit against her stemming from those events in which the plaintiff was the attorney for the other party, and it described in very colorful, unflattering, and sometimes vulgar terms the defendant's opinion of the persons involved in, and the merits of, this earlier lawsuit. However, although the defendant's account suggested that the underlying lawsuit was "frivolous" and "unethical," much of the unflattering language was directed at the actual plaintiff in the earlier underlying suit and the name of the opposing attorney, the name of the plaintiff alleging defamation, was never given in the book. The trial court sustained the defendant's demurrer without leave to amend, and the court of appeals affirmed. In applying the "totality of circumstances" test, the court noted that editorial context is a powerful element in construing as opinion what might otherwise be considered fact (*74 Cal. App. 4th 1394, 1401)* . The court then concluded that the "spicy prose" used in the book to describe the defendant's opponents in the earlier litigation and to provide the defendant's opinion of the merits of that litigation, taken in context, was opinion and could not support an action for defamation by the plaintiff (*74 Cal. App. 4th 1394, 1405)* . Because in the book the defendant had been describing the surrounding events using fiery and opinionated rhetoric, it was to be expected that the defendant would describe the emotionally charged litigation in the same fiery and highly opinionated way (*74 Cal. App. 4th 1394, 1403)* .

In *Campanelli v. Regents of Univ. of Cal. (1996) 44 Cal. App. 4th 572, 51 Cal. Rptr. 2d 891* , a terminated college basketball coach filed a defamation action against the college for which he had worked based on two allegedly defamatory remarks. The first statement was from a newspaper interview given by the vice-chancellor concerning the plaintiff's termination as head coach. The article stated that the father of one of the players felt that the former coach was putting so much pressure on his son that he was making him physically ill. The second statement was by the college athletic director who, in explaining the reasons for firing the plaintiff, stated that the players were "beaten down and in trouble psychologically." The trial court sustained the defendant's demurrer, and the plaintiff appealed. The court of appeal affirmed (*44 Cal. App. 4th 572, 575)* . The court applied a totality of the circumstances test and found that the statement regarding the player's father could not be characterized as a statement of fact. First, the vice-chancellor made it clear that the statement did not express his own sentiment, but that of a parent. Second, the statement was couched in terms of a feeling, which connotes a subjective judgment. Lastly, the court considered the statement in light of the context of the statement, the charged atmosphere surrounding the coach's firing and the highly publicized facts set forth in the article (*44 Cal. App. 4th 572, 578-579)* . Similarly, the court held that the statement regarding the "psychological damage" suffered by players at the hands of the plaintiff was nonactionable opinion. The court took into account the fact that for the purposes of this action, the plaintiff was a public figure and that because the subject was highly publicized, the matter was one of public concern (*44 Cal. App. 4th 572, 581)* .

In *Jensen v. Hewlett-Packard Co. (1993) 14 Cal. App. 4th 958, 18 Cal. Rptr. 2d 83* , an employee brought a defamation action against his employer based on a manager's unfavorable evaluation of the employee's performance. The evaluation stated that, while the employee's work was adequate in certain respects, he had been the subject of some third-party complaints, was not carrying his weight, had a negative attitude in dealing with others, evidenced a lack of direction in his project activities, and was unwilling to take responsibility for the projects he oversaw (*14 Cal. App. 4th*

958, 966-967) . The court of appeal held that communications must be examined by the court in light of the context in which it was published; that is, the communication's meaning must be considered in reference to relevant factors, such as the occasion of the utterance, the persons addressed, the purpose to be served, and "all of the circumstances attending the publication." Based on this standard, the court held that the comments in question were statements of opinion, not false statements of fact. In noting the context of these statements, the court held that there was nothing in the attendant circumstances tending to show that the evaluation constituted anything but business-as-usual. The court also held that the word "evaluation" denotes opinion, not fact. Thus, even if the comments in the evaluation were objectively unjustified or made in bad faith, they could not provide a legitimate basis for the employee's libel claim because they were statements of opinion, not false statements of fact (*14 Cal. App. 4th 958, 970-971)* .

In reaching its decision, the court expressed a strong judicial disfavor for libel suits based on communications in employment performance reviews, particularly if, as in this particular case, the tort claim appears to be an attempt to circumvent *Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 700, 254 Cal. Rptr. 211, 765 P.2d 373* , which held that tort remedies are not available for breach of the implied covenant of good faith and fair dealing in an employment contract to employees who allege they have been discharged in violation of the covenant. The court stated that in light of the multitude of laws designed to protect the employee from oppressive employment practices, evaluations serve the important business purpose of documenting the employer's hiring, promotion, discipline, and firing practices. Moreover, evaluations serve as a vehicle for informing the employee of what management expects, how the employee measures up, and what he or she needs to do to obtain wage increases, promotions, or other recognition. Thus, the primary recipient and beneficiary of the communication is the employee, while the tangential beneficiaries are ordinarily all part of a management group with a common interest, such as the efficient running of the business (*14 Cal. App. 4th 958, 964)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationElementsLibelTortsIntentional TortsDefamationElementsSlander

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 142 LIBEL AND SLANDER (DEFAMATION)
PART II. FORMS

14-142 California Points & Authorities § 142.22

§ 142.22 Supporting Demurrer to Complaint for Libel [Code Civ. Proc. § 430.10(e)]--Statement Not Published to Third Person

[1] FORM

[*Caption. See § 142.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION FOR LIBEL BECAUSE IT FAILS TO ALLEGE THAT THE STATEMENT THAT IS THE BASIS FOR THE ACTION WAS PUBLISHED TO A THIRD PERSON.

A. Libelous Statement Not Actionable Absent Publication. A libelous statement is not actionable until it has been published to a third person (*Live Oak Publ'g Co. v. Cohagan (1991) 234 Cal. App. 3d 1277, 1284, 286 Cal. Rptr. 198*).

[*Optional*] **B. Party That Publishes Statements Cannot Assert Libel Action.** A party that publishes the defamatory statements cannot state a cause of action in libel against the person who made the statements (*Live Oak Publ'g Co. v. Cohagan (1991) 234 Cal. App. 3d 1277, 1287, 286 Cal. Rptr. 198*).

[*Optional*] **C. Material Not "Published" When Sent to Fax Number Supplied by Plaintiff.** A defendant does not necessarily "publish" defamatory material by faxing a letter to a number supplied by the plaintiff, even if that fax is read by a third party (*Martinelli v. International House USA (2008) 161 Cal. App. 4th 1332, 1337-1338, 75 Cal. Rptr. 3d 186*).

[*Optional*] **D. Forced Republication by Defamed Person Requires Actual Republication.** Imposing liability on the original publisher for forced republication by the defamed person to another person requires an actual republication of the defamatory comments, and a mere foreseeability that the defamed person might have to repeat the defamatory comments at some point in the future is an insufficient basis for imposing liability (*Dible v. Haight Ashbury Free Clinics, Inc. (2009) 170 Cal. App. 4th 843, 855, 88 Cal. Rptr. 3d 464*).
Dated: _____

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a general demurrer to a complaint if the demurrer asserts that the complaint fails to state facts sufficient to constitute a cause of action for libel because it fails to allege publication to a third person [*see Live Oak Publ'g Co. v. Cohagan (1991) 234 Cal. App. 3d 1277, 1284, 286 Cal. Rptr. 198]* .

This memorandum may be adapted for use in other procedural contexts (for example, in support of a motion for judgment on the pleadings), and may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should show that either there was no publication of the statements to third persons, or that the only publication was made by the plaintiff. If appropriate under the facts, counsel should also argue that any publication made by the plaintiff did not constitute a publication under any exception--for example, that of a coerced publication [*see § 142.22[3][a]*].

[3] Discussion of Authorities

[a] Libelous Statement Not Actionable Absent Publication

In ***Live Oak Publ'g Co. v. Cohagan*** *(1991) 234 Cal. App. 3d 1277, 286 Cal. Rptr. 198* , a newspaper sued an individual for libel and slander. The action arose from an article in the plaintiff's newspaper concerning a political candidate. The defendant, a supporter of that candidate, wrote a letter to the newspaper accusing it of intentionally garbling the article, presumably to influence the outcome of the election. She included a check to cover the cost of printing her letter as a full-page advertisement. The newspaper kept her money and printed the letter as an advertisement. Then the newspaper and several of its employees sued her for libel. The newspaper also sued for slander, based on statements the defendant made to employees of the newspaper. The court sustained the defendant's demurrer without leave to amend regarding the libel cause of action, on the ground that the newspaper itself published the libel. The newspaper, which was given leave to amend the slander cause of action, filed a first-amended complaint, realleging both causes of action. The defendant again demurred and the court overruled the demurrer. The plaintiff declined to pursue the libel cause of action, and appealed from that dismissal. The defendant was granted summary judgment on the slander cause of action, on the ground that the plaintiff was a public figure and there was no evidence of actual malice.

The court of appeal affirmed dismissal of the libel cause of action (*234 Cal. App. 3d 1277, 1287)* . The court noted that an entity other than a natural person may be libeled, and that this particular case was not the first in which a newspaper and its agents have brought suit for defamation. The court also noted that an advertisement may be held libelous (*234 Cal. App. 3d 1277, 1283)* . The court stated, however, that a libelous statement is not actionable until it has been published to a third person. A plaintiff cannot manufacture a defamation cause of action by publishing the statements to third persons; the publication must be done by the defendant (*234 Cal. App. 3d 1277, 1284)* . The court noted an exception to the rule: if it was foreseeable that a defendant's act would result in publication to a third person, the plaintiff may maintain a libel action. This rule applies if the act of disclosure arises from necessity, and that necessity need not be a physical necessity (as in the case of a letter to a blind person, read aloud by a sighted person) but may be superinduced by a fear that is akin to duress. The court further stated that the coercion aspect of this exception applies if the originator of the defamatory statement has reason to believe that the person defamed will be under a strong compulsion to disclose the contents of the defamatory statement to a third person after he or she has read it or been

informed of its contents (*234 Cal. App. 3d 1277, 1284)* . The rationale for imposing liability in this situation is the strong causal link between the actions of the originator and the damage caused by the republication. This causal link is no less strong if the foreseeable republication is made by the person defamed while under a strong compulsion to republish the defamatory statement, and those circumstances are known to the originator of the defamatory statement.

The court noted that this exception has been limited to a narrow class of cases, and usually applies if a plaintiff is compelled to republish the statements in order to disprove them. To determine if the "coercion" exception applies, the test is whether one could reasonably anticipate the communication based on necessity. The plaintiff made no claim that it was required by law to publish the advertisement, so the issue was whether, as a practical matter, it could not reasonably have refused to publish the article because it was under a sufficiently strong compulsion to do so (*234 Cal. App. 3d 1277, 1285)* . The court noted that the only fact from the original complaint relating to compulsion is that the defendant "demanded" that the letter be published. The court stated that this was insufficient as a matter of law; the remaining issue is whether the complaint could have been amended to state facts establishing the requisite compulsion (*234 Cal. App. 3d 1277, 1286)* . The complaint asserted that the plaintiff acted reasonably in publishing the letter, but it does not establish that it was compelled to do so (*234 Cal. App. 3d 1277, 1286-1287)* . The court noted that the complaint does not depict a situation in which the statement would go unrebutted if the plaintiff refused to publish the defamatory statement, because the plaintiff could print an article contesting the accuracy of the defendant's assertions made from another forum. The court concluded that the plaintiff is not brought within the coerced republication rule. Inasmuch as it published the defamatory statements itself, it cannot state a cause of action against the defendant for libel. It is self-axiomatic that a person cannot sue himself or herself. Consequently, the trial court properly sustained the demurrer (*234 Cal. App. 3d 1277, 1287)* . The court also upheld summary judgment on the slander cause of action, because the plaintiffs failed to produce evidence showing actual malice, required because of their status as public figures (*234 Cal. App. 3d 1277, 1287-1293)* .

[b] Party That Publishes Statements Cannot Assert Libel Action

Live Oak Publ'g Co. v. Cohagan *(1991) 234 Cal. App. 3d 1277, 286 Cal. Rptr. 198* , is discussed in *§ 142.22[3][a]*.

[c] Material Not "Published" When Sent to Fax Number Supplied by Plaintiff

In ***Martinelli v. International House USA*** *(2008) 161 Cal. App. 4th 1332, 75 Cal. Rptr. 3d 186* , plaintiff was an attorney whose family also operated an insurance agency. Plaintiff's niece came to the United States from Italy on a student visa and enrolled in an English language program run by defendant. She lived with plaintiff while attending classes. In July 2005, defendant sent a report to the United States Immigration and Customs Enforcement Agency notifying them that plaintiff's niece had accepted employment in violation of the terms of her visa and that they were reporting plaintiff to the State Bar because she asked defendant to ignore INS regulations. Defendant faxed a copy of this letter to plaintiff's daughter at plaintiff's family's insurance agency, as defendant had been led to believe that this was a proper way of contacting plaintiff. In October 2005, plaintiff wrote to defendant on her law office letterhead to discuss her niece's immigration status and her status at the school. Defendant responded with a letter addressed to plaintiff and faxed to the number that had been printed on the law office letterhead, and this letter repeated the allegedly defamatory statement that plaintiff had earlier asked defendant to ignore INS regulations. The letter was received and read by plaintiff's daughter, who was working in the law office. Plaintiff sued defendant for defamation. The trial court granted defendant's motion for summary adjudication of the defamation cause of action. Plaintiff appealed.

The court of appeal affirmed. The court concluded that the faxes did not constitute publications to a third person under the circumstances of the case, defeating the defamation cause of action. The court of appeal held that the October fax sent to the law office did not constitute publication to a third person because the attorney invited correspondence to her to be sent to that fax number by printing it on the letterhead she used to write to defendant and thus she had the burden to protect her own confidentiality (*161 Cal. App. 4th 1332, 1337-1338)* . As to the earlier letter faxed to the insurance agency, defendant knew from prior contacts that plaintiff was deeply involved with her niece's immigration status and

plaintiff's niece had provided the fax number of the insurance agency as a means of communicating with plaintiff about such issues. Although that fax had been sent to the attention of plaintiff's daughter, defendant had been told by plaintiff's niece that plaintiff's daughter was responsible for the day-to-day operations of the agency and plaintiff would not be in the office that day. Under those circumstances, the court concluded that defendant could reasonably believe that sending a fax to plaintiff's daughter at the insurance agency was equivalent to sending the fax to plaintiff, and as such the fax did not constitute publication to a third person for purposes of establishing liability for defamation (*161 Cal. App. 4th 1332, 1338)* .

[d] Forced Republication by Defamed Person Requires Actual Republication

In ***Dible v. Haight Ashbury Free Clinics, Inc.*** *(2009) 170 Cal. App. 4th 843, 88 Cal. Rptr. 3d 464* , plaintiff was a social worker who formerly provided psychiatric services for a free clinic. After the clinic terminated her employment, plaintiff sought unemployment benefits. When the relevant state agency investigated the unemployment claim, clinic representatives told the agency that the reason for plaintiff's dismissal was that plaintiff's negligence when providing counseling services at a local jail had led to the suicide of a jail inmate. Plaintiff sued the former employer for defamation, but the trial court struck the complaint under *Code Civ. Proc. § 425.16*, the anti-SLAPP statute. Plaintiff appealed.

The court of appeal affirmed. After concluding that the defamation complaint was covered by the anti-SLAPP statute, the court held that plaintiff had not demonstrated a probability of success on the merits of her claim. The court held in part that plaintiff had failed to show an actionable publication to a third party. As to the defendant's statements made to the state agency, plaintiff suffered no damages because she was found eligible for unemployment benefits by the agency (*170 Cal. App. 4th 843, 853)* . Plaintiff also argued, however, that the possibility that she would have to repeat her employer's stated reasons for discharging her to other prospective employers should constitute a republication sufficient to support her defamation claim. Recognizing court precedent for imposing liability on the original publisher of defamatory comments for a forced republication by the defamed person to another person, the court of appeal refused to extend that rule to include situations in which no actual forced republication by the plaintiff had yet taken place. The court concluded that the mere foreseeability that the defamed person might have to repeat the defamatory comments at some point in the future was an insufficient basis for imposing liability. The court noted that the rule proposed by plaintiff would require courts to engage in considerable speculation as to future conduct and future damages (*170 Cal. App. 4th 843, 855)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral OverviewTortsIntentional TortsDefamationElementsLibel

California Points & Authorities

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 142 LIBEL AND SLANDER (DEFAMATION)
PART II. FORMS

14-142 California Points & Authorities § 142.23

§ 142.23 Opposing Preliminary Injunction--Prior Restraint

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF'S PETITION FOR A PRELIMINARY INJUNCTION MUST BE DENIED BECAUSE IT WOULD CONSTITUTE AN UNCONSTITUTIONAL PRIOR RESTRAINT ON *FIRST AMENDMENT* RIGHTS.

Prior Restraints Not Permitted to Stop Defamatory Statements. Prior restraints are disfavored and are not permitted to stop defamatory statements (*Evans v. Evans (2008) 162 Cal. App. 4th 1157, 1168-1169, 76 Cal. Rptr. 3d 859* ; *Gilbert v. National Enquirer, Inc. (1996) 43 Cal. App. 4th 1135, 1144, 51 Cal. Rptr. 2d 91*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a defendant's contention in opposition to an injunction to prevent publication of an alleged defamatory statement that prior restraints are disfavored and are not permitted to stop defamatory statements.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the scope of the injunction being sought, and should argue that it would constitute a prior restraint on the *First Amendment* right of free speech.

[3] Discussion of Authorities

[a] Prior Restraints Not Permitted to Stop Defamatory Statements

In ***Evans v. Evans*** *(2008) 162 Cal. App. 4th 1157, 76 Cal. Rptr. 3d 859* , plaintiff was a deputy sheriff who brought suit against his ex-wife based on allegations that she had made false accusations about him to the internal affairs division of the sheriff's department and placed defamatory information about him on the Internet. Arguing that the statements made by his ex-wife were affecting his career, reputation, and emotional well-being, plaintiff sought a preliminary injunction to prevent her from causing further damage. The trial court granted the preliminary injunction enjoining defendant from publishing false and defamatory statements about plaintiff on the Internet, and enjoining defendant from contacting the sheriff's department regarding plaintiff, with an exception for 9-1-1 calls to report criminal conduct. Defendant appealed.

The court of appeal reversed and remanded. The court of appeal noted that the use of a preliminary injunction to prevent the publication of allegedly-defamatory statements was a classic example of an unconstitutional prior restraint on free speech. Recognizing that an injunction might be appropriate for specific statements that have already been judged to be defamatory in a trial on the merits, as held by the California Supreme Court in *Balboa Island Village Inn, Inc. v. Lemen (2007) 40 Cal. 4th 1141, 1155-1156, 57 Cal. Rptr. 3d 320, 156 P.3d 339* , discussed in *§ 142.90[3][a]*, the court of appeal held that the present injunction was unconstitutional because the statements at issue in the case had not yet been determined to be defamatory at trial. The court also concluded that the preliminary injunction was unconstitutionally vague and overbroad because it enjoined "false and defamatory" statements but did not indicate precisely what statements would violate the order (*162 Cal. App. 4th 1157, 1167-1169)* . The court also concluded that the order prohibiting defendant from communicating with plaintiff's employer, except in emergencies, was also overbroad in that the order would prohibit defendant from communicating information to the sheriff's department that may be relevant to law enforcement concerns, such as public safety issues or defendant's subjective feelings of personal safety. As defendant had a fundamental right to present concerns to public agencies, particularly law enforcement agencies, the court concluded that the minimal evidence presented by plaintiff was not enough to defeat this right at this stage of the proceeding (*162 Cal. App. 4th 1157, 1171-1173)* .

In ***Gilbert v. National Enquirer, Inc.*** *(1996) 43 Cal. App. 4th 1135, 51 Cal. Rptr. 2d 91* , the plaintiff, a well-known actor, sought a preliminary injunction against her ex-husband and a newspaper to prevent them from disclosing allegedly defamatory statements regarding her sexual relationships and substance abuse. The paper had already published an interview with the husband that became the basis of a defamation action by the plaintiff. The plaintiff then sought the injunction to prevent future revelations. The trial court issued the injunction, stating that the plaintiff's right of privacy outweighed the ex-husband's right of free speech.

The court of appeal held that the preliminary injunction was an unconstitutional prior restraint on the ex-husband's and the newspaper's *First Amendment* rights. The court stated that prior restraints are disfavored and presumptively invalid, and are not permitted to stop the publication of a defamatory statement (*43 Cal. App. 4th 1135, 1144)* . The court recognized that not all prior restraints are invalid, with exceptions for extraordinary circumstances such as the prevention of disclosure of military secrets or in some cases the protection of private rights (*43 Cal. App. 4th 1135, 1145)* . However, the court found that the injunction was too broad in applying to information obtained at any time in the course of the ex-husband's relationship to the plaintiff. Furthermore, the court reasoned that heightened public interest in the personal activities of a well-known actor is a factor to be weighed in balancing the competing interests (*43 Cal. App. 4th 1135, 1145-1146)* . Concluding that the plaintiff's right to privacy did not outweigh the ex-husband's right to express his uncensored opinion about her use of drugs and alcohol and her sexual relationships, so that the preliminary injunction was an invalid prior restraint, the court reversed the order issuing the preliminary injunction.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral OverviewTortsIntentional TortsDefamationRemediesEquitable Remedies

California Points & Authorities

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 142 LIBEL AND SLANDER (DEFAMATION)
PART II. FORMS

14-142 California Points & Authorities § 142.24

§ 142.24 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Failure of Public Official Suing for Defamation to Allege Malice

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF MOTION FOR
Plaintiff,	)	SUMMARY JUDGMENT
vs.	)	[*Code Civ. Proc. § 437c*]
_____ [*name(s)*],	)	Date: _____
Defendant(s).	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

SUMMARY JUDGMENT FOR DEFENDANT IS PROPER BECAUSE PLAINTIFF, A PUBLIC OFFICIAL, HAS FAILED TO ALLEGE MALICE.

A. Summary Judgment. A defendant may move for summary judgment in any action or proceeding if it is contended that the action has no merit. Such motion must be granted if all of the papers submitted show that there is no triable issue as to any material fact and that the defendant is entitled to a judgment as a matter of law (*Code Civ. Proc. § 437c(a), (c)*).

B. Actual Malice Required if Plaintiff Is Public Official. The *first amendment* requires that a public official who is suing for allegedly defamatory remarks concerning his or her conduct in public office must allege that the defendant published or broadcast the remarks with knowledge of their falsity or with reckless disregard for their truth (*New York Times Co. v. Sullivan (1964) 376 U.S. 254, 279-280, 84 S. Ct. 710, 11 L. Ed. 2d 686* ; *Weingarten v. Block (1980) 102 Cal. App. 3d 129, 144, 162 Cal. Rptr. 701* ; *Sierra Breeze v. Superior Court (1978) 86 Cal. App. 3d 102, 107, 149 Cal. Rptr. 914*).

[*Optional*] **C. Actual Malice Standard Applies to Governmental Defendants.** The constitutional requirement that a plaintiff show actual malice to prevail in a defamation action, applies to actions brought against governmental defendants (*Nadel v. Regents of Univ. of Cal. (1994) 28 Cal. App. 4th 1251, 1267, 34 Cal. Rptr. 2d 188*).

D. Definition of Public Official. The definition "public official" encompasses at a minimum all government employees who have or who appear to have substantial responsibility or control over the conduct of governmental affairs (*Rosenblatt v. Baer (1966) 383 U.S. 75, 85, 86 S. Ct. 669, 15 L. Ed. 2d 597* ; *Weingarten v. Block (1980) 102 Cal. App. 3d 129, 144, 162 Cal. Rptr. 701*).
Dated: _____

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for summary judgment if the motion asserts that the defendant is entitled to a judgment as a matter of law, because the plaintiff is a public official and has failed to allege that the defendant either published or broadcast the allegedly defamatory statements with falsity or reckless disregard for their truth. Optional Paragraph C is for use if the defendant is a public entity, or a public employee sued for conduct committed while he or she was acting in the scope of his or her employment, to counter an actual or anticipated assertion that the actual malice requirement does not apply to governmental defendants.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law raised. Thus, counsel should discuss facts tending to show that the plaintiff is a "public official" within the definition set forth in the case law. In addition, counsel should attach affidavits or declarations that support the motion, including a separate statement of material facts that the moving party contends are undisputed [*Code Civ. Proc. § 437c(b)*].

California courts recognize both a potential chilling effect on the exercise of *First Amendment* rights from protracted litigation, and a public interest in resolving defamation cases promptly [*Reader's Digest Assn. v. Superior Court (1984) 37 Cal. 3d 244, 252, 208 Cal. Rptr. 137, 690 P.2d 610* ; *Okun v. Superior Court (1981) 29 Cal. 3d 442, 460, 175 Cal. Rptr. 157, 629 P.2d 1369]* . That does not mean, however, that a court should grant summary judgment if there is a triable issue of fact concerning actual malice. Instead, a court may give effect to its concern of a potential chilling effect by finding no triable issues unless it appears that actual malice may be proved at trial by clear and convincing evidence [*Reader's Digest Assn. v. Superior Court (1984) 37 Cal. 3d 244, 252, 208 Cal. Rptr. 137, 690 P.2d 610]* . To this extent, summary judgment is a "favored" remedy in defamation cases involving the issue of actual malice under the standard of *New York Times Co. v. Sullivan (1964) 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686* [*Reader's Digest Assn. v. Superior Court (1984) 37 Cal. 3d 244, 252, 208 Cal. Rptr. 137, 690 P.2d 610* ; *Good Government Group, Inc. v. Superior Court of Los Angeles County (1978) 22 Cal. 3d 672, 685, 150 Cal. Rptr. 258, 586 P.2d 572]* .

[b] Related Uses

With appropriate modifications, these points may be used to support a demurrer to a complaint based on a public official's failure to allege malice.

[c] Related Pleading and Practice Forms

For discussion and forms pertaining to the requirement that public official plaintiffs plead and prove actual malice, see California Forms of Pleading and Practice, Ch. 340, *Libel and Slander* (Matthew Bender).

[3] Discussion of Authorities

[a] Actual Malice Required if Plaintiff Is Public Official

New York Times Co. v. Sullivan *(1964) 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686* , was the landmark case in which the United States Supreme Court reversed a judgment against four individuals and the corporation that publishes the New York Times newspaper. To foster a national commitment to robust debate on public issues, the Court announced a constitutional privilege available to all defendants sued by public officials for defamation. The Court held that the constitutional guarantees require a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his or her official conduct unless he or she proves that the statement was made with "actual malice"--that is, with knowledge that it was false or with reckless disregard of whether it was true or not (*376 U.S. 254, 279-280)* .

In ***Weingarten v. Block*** *(1980) 102 Cal. App. 3d 129, 162 Cal. Rptr. 701* , an action against a newspaper for libel for the publication of two news stories and an editorial, the court of appeal affirmed a judgment of nonsuit rendered at the close of the plaintiff's evidence before a jury. Prior to the plaintiff's presentation of evidence, the trial court had made a determination that the plaintiff was both a public official and a public figure.

One of the plaintiff's contentions on appeal was that the trial court had erred by making a determination of the public official/public figure question prior to the commencement of the jury trial. The court of appeal upheld the procedure that was followed, noting that order of proof is generally properly left to the trial court's discretion (*102 Cal. App. 3d 129, 135)* , and that the trial court correctly found public official status arising from the plaintiff's long-term position as city attorney, and as attorney for the Redevelopment Agency (*102 Cal. App. 3d 129, 139)* . Because of this status, the plaintiff was required to show both that the publication was false, and that it was circulated with reckless disregard for its truth or falsity (*102 Cal. App. 3d 129, 144)* . In this regard, the court stated that recklessness could not be established by (1) the newspaper reporter's failure to obtain the plaintiff's version of the events, (2) inaccuracies in reporting judicial proceedings, (3) failure to provide an objective picture, or (4) a showing that the reporting was speculative or even sloppy (*102 Cal. App. 3d 129, 147)* .

Sierra Breeze v. Superior Court *(1978) 86 Cal. App. 3d 102, 149 Cal. Rptr. 914* , was an action by a county supervisor against a newspaper that had in a front-page article accused him of having voted "to squander property tax funds" for an airport. The article explained the newspaper's reasons for stating that the vote was a squandering of public money. The supervisor admitted he voted funds for the airport but denied that by doing so he "squandered" public money. After holding that the statement was not libelous, because a false statement of fact as opposed to the statement of opinion was required to constitute libel, the court pointed out that to recover, the plaintiff "must show not only that the use of the word 'squander' was false and that it was a false statement of fact rather than opinion, but that it was published with malice. Malice, in this context, means that it was published with knowledge of its falsehood or with reckless disregard for whether it was false or not. [The plaintiff] does not allege that the article was printed with malice so defined" (*86 Cal. App. 3d 102, 107)* . The court issued a peremptory writ of mandate directing the superior court to grant the newspaper's motion for summary judgment.

[b] Actual Malice Standard Applies to Governmental Defendants

In ***Nadel v. Regents of Univ. of Cal.*** *(1994) 28 Cal. App. 4th 1251, 34 Cal. Rptr. 2d 188* , the plaintiffs had been opposed to a development project undertaken by the defendant. Employees of the defendant characterized the plaintiffs as violent, and the plaintiffs sued both the defendant, and the employees who made the statements, for damages arising from the alleged defamation. The defendants all moved for summary judgment, on the ground that the plaintiffs had not alleged that the defendants had acted with constitutionally-required actual malice; the trial court granted the motion and entered judgment for the defendant, and the plaintiffs appealed.

The court of appeal discussed at length the plaintiffs' contention that the constitutional requirement of actual malice does not apply to governmental defendants. Although the court acknowledged the merit in the plaintiffs' argument that the *First Amendment* was intended to protect citizens from government, not to protect the government from citizens, the court concluded that *any* potential defamation liability is a check on governmental abuse of its power to defame, and the requirement of actual malice in the constitutional sense promotes the unfettered exchange of ideas by permitting the government to participate (*28 Cal. App. 4th 1251, 1266-1267)* . The court held that, as long as a matter of public interest is involved, a governmental defendant may be held liable for defamation only if there is actual knowledge of falsity, or reckless disregard of the truth (*28 Cal. App. 4th 1251, 1267)* . The court found this result especially appropriate to protect governmental employees, who should not lose their *First Amendment* protections by virtue of government employment (*28 Cal. App. 4th 1251, 1267)* .

NOTE:

Although the court broadly stated that its holding applied to actions by public officials and public figures, the case before it involved plaintiffs found to be limited purpose public figures (*28 Cal. App. 4th 1251, 1270)* . The application of the standard to public officials is therefore technically dictum, although it seems likely that a court that accepts the holding of *Nadel* would also apply that holding to public officials.

[c] Definition of Public Official

The question of who qualifies as a public official within the meaning of the New York Times privilege has not been answered definitively. In ***Rosenblatt v. Baer*** *(1966) 383 U.S. 75, 86 S. Ct. 669, 15 L. Ed. 2d 597* , the Court did hold, however, that the category applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs (*383 U.S. 75, 85)* .

The facts and procedural background of ***Weingarten v. Block*** *(1980) 102 Cal. App. 3d 129, 162 Cal. Rptr. 701* , are discussed in *§ 142.24[3][a]*. The court of appeal held that the plaintiff was a public official within the meaning of *New York Times* and *Rosenblatt.* As city attorney and attorney for the Redevelopment Agency, he had substantial control over the conduct of governmental affairs of Seaside. After his discharge and recall, the public had an independent interest in anything that might touch on his fitness for that office and his continued services to the Redevelopment Agency (*102 Cal. App. 3d 129, 144)* .

[4] Additional Authorities

[a] Actual Malice Required if Plaintiff Is Public Official

McCoy v. Hearst Corp. (1986) 42 Cal. 3d 835, 231 Cal. Rptr. 518, 727 P.2d 711 , was a libel action brought by two police officers and a prosecutor against a newspaper and two reporters. The newspaper had published a prisoner's affidavit alleging official misconduct by the plaintiffs in connection with another prisoner's conviction. After publication, the affiant admitted the falsity of the affidavit. The trial court entered judgment against the plaintiffs, and the court of appeal affirmed. The Supreme Court reversed. The Court noted that it had a duty to examine the facts

independently, to determine whether or not, under the *New York Times* test, the defendants knowingly published a falsehood or published a falsehood with reckless disregard for the truth (*42 Cal. 3d 835, 841, 845)* . The Court concluded that at the time the allegedly libelous material was published, the defendants did not possess a subjective awareness of probable falsity (*42 Cal. 3d 835, 868)* .

Good Government Group, Inc. v. Superior Court of Los Angeles County (1978) 22 Cal. 3d 672, 150 Cal. Rptr. 258, 586 P.2d 572 , was a proceeding in mandate seeking to compel the trial court to grant the defendant's motion for summary judgment in a libel action brought against it by the plaintiff, who was a city councilman at the time the allegedly libelous publication was made. At the time of the publication, which was made in the course of a successful recall proceeding against the plaintiff, the city was embroiled in "political turmoil and strife that was likely to ulcerate the most tranquil dispositions." In response to the defendant's contentions that the allegedly libelous statement was one of opinion and not of fact and that even if it were read as one of fact, the plaintiff failed in opposition to the motion for summary judgment to show actual malice, the Court began its analysis with the decision in *New York Times Co. v. Sullivan (1964) 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686* , which established the principles applicable to an action for libel brought by a public official. The Court then examined the holding of *New York Times* and pointed out that that case concluded that a public official may not recover damages for a defamatory falsehood relating to his or her official conduct, unless the official proves that the statement was made with actual malice. The term "actual malice" was defined as the defendant's knowledge that the statement was false or the defendant's reckless disregard of whether it was false. The Court noted that in light of this holding, the two major issues that it must decide were whether the statements complained of constituted false statements of fact, and whether a sufficient showing of malice was made to justify the conclusion that the issue must be decided by a jury. The Court concluded that the allegedly defamatory statement was ambiguous--that is, it could be read either as a statement of fact, in which event it would be libelous, or as a statement of opinion, in which event it would not be libelous, and that the issue was one that must be left to the jury's determination (*22 Cal. 3d 672, 680)* . The peremptory writ was, therefore, denied.

Miller v. Nestande (1987) 192 Cal. App. 3d 191, 237 Cal. Rptr. 359 , was an action by an incumbent candidate for public office against his opponent and several former prisoners of war (POW) for defamation arising out of the opponent's dissemination of a pamphlet to registered voters accusing the incumbent of cooperating with the enemy while a POW during the Vietnam war. The trial court granted summary judgment in favor of the defendants, finding that the record failed to show any triable issues of fact in regard to whether the defendants made the publication with actual malice. The court of appeal affirmed, holding that the plaintiff's status as an incumbent candidate for public office required him to prove that the pamphlet was published with actual malice, even though the pamphlet was not published by a member of the media and was unrelated to his conduct while in office (*192 Cal. App. 3d 191, 200-201)* . It further held that the incumbent could not prove actual malice in light of numerous published descriptions of his conduct while a POW, his censure by the Navy, and the defendants' own information and observations during the war (*192 Cal. App. 3d 191, 201-202)* .

[b] Definition of Public Official

In *Ghafur v. Bernstein (2005) 131 Cal. App. 4th 1230, 32 Cal. Rptr. 3d 626* , the plaintiff was the superintendent of a charter school district who brought a libel suit against an anti-defamation league and two of its principals. The plaintiff alleged that a letter sent to the Superintendent of Public Instruction, and later published on the league's Internet web site, was actionable because it urged an investigation into alleged ties between the plaintiff and a terrorist organization. The trial court granted a motion to strike the complaint under *Code Civ. Proc. § 425.16*, the anti-SLAPP statute, and the court of appeal affirmed. The court of appeal held that the plaintiff was a public official and therefore was required to prove malice in order to prevail on her libel action, which she was unable to do. The court noted that public school superintendents and school board members are public officials for the purpose of defamation actions, given the importance to the community of public school system governance. The court then held that the superintendent of a charter school district was also a public official, because charter schools receive public funding and are considered part of the state's public school system, regardless of whether a charter school superintendent was technically a government

employee (*131 Cal. App. 4th 1230, 1238-1240)* .

McCunn v. California Teachers Ass'n (1970) 3 Cal. App. 3d 956, 83 Cal. Rptr. 846 , affirmed the granting of summary judgment for the defendants. The plaintiff was a former superintendent of a junior college district who had been discharged after an investigative panel had rendered a report concerning his qualifications. In addition to holding that the report was conditionally privileged and that there was no demonstration of malice under *Civ. Code § 48a(4)(d)*, the court also implicitly determined that the plaintiff was a public official and could not prove malice according to the New York Times standard of reckless disregard for the truth or falsity of the report (*3 Cal. App. 3d 956, 962-963)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral Overview

California Points & Authorities

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 142 LIBEL AND SLANDER (DEFAMATION)
PART II. FORMS

14-142 California Points & Authorities § 142.25

§ 142.25
Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Failure of Public Figure Suing for Defamation to Allege Malice

[1] FORM

[*Caption. See § 142.24.*]

SUMMARY JUDGMENT FOR DEFENDANT IS PROPER BECAUSE PLAINTIFF, A PUBLIC FIGURE, HAS FAILED TO ALLEGE MALICE.

A. Summary Judgment. [*See § 142.24, Paragraph A.*]

B. Actual Malice Required if Plaintiff Is Public Figure. The *First Amendment to the United States Constitution* requires that a public figure who is suing for allegedly defamatory remarks must allege that the defendant published or broadcast the remarks with knowledge of their falsity or with reckless disregard for their truth (*Curtis Publ'g Co. v. Butts (1967) 388 U.S. 130, 164, 87 S. Ct. 1975, 18 L. Ed. 2d 1094* ; *Reader's Digest Assn. v. Superior Court (1984) 37 Cal. 3d 244, 256, 208 Cal. Rptr. 137, 690 P.2d 610*).

[*Optional*] **C. Actual Malice Standard Applies to Governmental Defendants.** The constitutional requirement that a plaintiff show actual malice to prevail in a defamation action, applies to actions brought against governmental defendants (*Nadel v. Regents of Univ. of Cal. (1994) 28 Cal. App. 4th 1251, 1267, 34 Cal. Rptr. 2d 188*).

D. Definition of Public Figure for All Purposes. An individual who achieves pervasive fame or notoriety becomes a public figure for all purposes and in all contexts (*Gertz v. Welch (1974) 418 U.S. 323, 352, 94 S. Ct. 2997, 41 L. Ed. 2d 789*).

E. Definition of Public Figure for Limited Purpose. An individual who voluntarily injects himself or herself or is drawn into a particular public controversy becomes a public figure for a limited range of issues (*Gertz v. Welch (1974) 418 U.S. 323, 352, 94 S. Ct. 2997, 41 L. Ed. 2d 789* ; *Mosesian v. McClatchy Newspapers (1991) 233 Cal. App. 3d 1685, 1689, 285 Cal. Rptr. 430*).

F. Determination of Public-Figure Status Made by Court. The question whether a plaintiff is a public figure is determined by the court, not the jury, as a mixed question of law and fact (*Stolz v. KSFM 102 FM (1994) 30 Cal. App. 4th 195, 203-204, 35 Cal. Rptr. 2d 740*).
Dated: _____

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion for summary judgment if the motion asserts that the defendant is entitled to a judgment as a matter of law, on the ground that the plaintiff is a public figure and has failed to allege that the defendant either published or broadcast the allegedly defamatory statements with falsity or reckless disregard for their truth. Optional Paragraph C is for use if the defendant is a public entity, or a public employee sued for conduct committed while he or she was acting in the scope of his or her employment, to counter an actual or anticipated assertion that the actual malice requirement does not apply to governmental defendants.

This form may be adapted for use in a demurrer to a complaint, or in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of his case and the points of law raised. In addition, counsel should attach affidavits or declarations that support the motion and a separate statement of undisputed facts [*Code Civ. Proc. § 437c(b)*].

[b] Related Pleading and Practice Forms

For discussion and forms pertaining to the requirement that public figure plaintiffs plead and prove actual malice, see California Forms of Pleading and Practice, Ch. 340, *Libel and Slander* (Matthew Bender).

[3] Discussion of Authorities

[a] Actual Malice Required if Plaintiff Is Public Figure

In ***Curtis Publ'g Co. v. Butts*** *(1967) 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094* , the athletic director of a university was accused in the defendant's publication of conspiring to fix a football game involving his university. Its companion case involved an erroneous Associated Press account of a former military general's participation in a university campus riot. Because the plaintiff in *Curtis* was paid by a private alumni association, and the plaintiff in the companion case had resigned from the military, neither could be classified as a public official under *New York Times Co. v. Sullivan (1964) 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686* (discussed in *§ 142.24[3][a]*). A majority of the United States Supreme Court agreed with Chief Justice Warren's conclusion that the *New York Times* test should apply to criticism of public figures as well as public officials, extending the constitutional privilege announced in *New York Times* to protect defamatory criticism of nonpublic persons who are nevertheless intimately involved in the resolution of important public questions, or who by reason of their fame shape events in areas of concern to society at large (*388 U.S. 130, 164* ; opinion of Warren, C.J., concurring in result).

In ***Reader's Digest Assn. v. Superior Court*** *(1984) 37 Cal. 3d 244, 208 Cal. Rptr. 137, 690 P.2d 610* , an organization and its founder brought an action for libel (and related causes of action) against a magazine publisher and other

defendants based on an article about a Pulitzer Prize-winning expose concerning the plaintiffs' operations that had been published in a small newspaper. The plaintiffs established a program for drug rehabilitation in 1958. In the 1970's, a newspaper in a small community published a series of articles critical of the plaintiffs and refuting their asserted success in drug treatment. At that point, the plaintiffs had already been the subject of nationwide publicity, including magazine articles and a full-length movie, all of which depicted the plaintiffs favorably; but after the articles were published, the plaintiffs' reputations suffered. The newspaper received the Pulitzer Prize for the articles. Approximately two years later, the magazine published an article concerning the newspaper's Pulitzer Prize. The magazine article was based on the underlying newspaper accounts, and a subsequent book on the same topic written by the same authors, as well as interviews with the authors and a sociology professor. It recounted the history of the organization from its inception as a program for drug rehabilitation, its transformation into an "alternative life-style community," and its claim of church status. It also charged that the organization carried out a policy of intimidating and assaulting its detractors, including an account of the criminal conviction in one episode of the founder and two other members (for conspiracy to commit murder). The plaintiffs filed suit, naming as defendants the magazine publisher, the author of the magazine article, the authors of the newspaper article, and the sociologist quoted in the magazine article. The magazine publisher and author moved for summary judgment, claiming that the plaintiffs were public figures under the rule of *New York Times Co. v. Sullivan (1964) 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686* (discussed in *§ 142.25[3][a]*), and consequently that the defendants can be liable only for statements made with actual malice, that is, with knowledge that it was false or with reckless disregard of whether it was false or not. The defendants asserted that there was no triable issue of fact as to actual malice, entitling them to summary judgment. The trial court denied the motion, and the defendants sought review by writ of mandate.

The California Supreme Court held that the trial court erred in denying the motion for summary judgment, and therefore that the writ of mandate should issue (*37 Cal. 3d 244, 250)* . The plaintiffs first contested their status as public figures, a question of law crucial to the proper resolution of their libel claim. In *New York Times*, the United States Supreme Court fundamentally altered judicial treatment of defamation actions by placing a significant constitutional limitation on the ability of a public official to recover damages for a defamatory falsehood (*37 Cal. 3d 244, 252)* . Emphasizing the importance of free expression and a free press under the *First Amendment*, the Supreme Court determined that public officials may not prevail in an action for libel relating to their official conduct absent proof that the statement was made with actual malice (*37 Cal. 3d 244, 252-253)* . In *Gertz v. Welch (1974) 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789* [*see § 142.25[3][c]*], the Court provided a twofold rationale for extending the *New York Times* rule to public figures. First, it recognized that public figures are generally less vulnerable to injury from defamation because of their ability to resort to effective self-help. Those persons ordinarily enjoy considerably greater access than private individuals to the media and other channels of communication. This access in turn enables them to counter criticism and to expose the fallacies of defamatory statements (citing *Gertz v. Welch (1974) 418 U.S. 323, 344, 94 S. Ct. 2997, 41 L. Ed. 2d 789*). Second, and more significantly, public figures are less deserving of protection than private persons because public figures, like public officials, have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them.

Gertz therefore defined two classes of public figures. The first is the "all purpose" public figure who has achieved such pervasive fame or notoriety that he or she becomes a public figure for all purposes and in all contexts. The second category is that of the "limited purpose" or "vortex" public figure, an individual who voluntarily injects himself or herself, or is drawn into a particular public controversy and consequently becomes a public figure for a limited range of issues (citing *Gertz v. Welch (1974) 418 U.S. 323, 351, 94 S. Ct. 2997, 41 L. Ed. 2d 789*) (*37 Cal. 3d 244, 253)* . Unlike the "all purpose" figure, the "limited purpose" public figure loses certain protection for his or her reputation only to the extent that the allegedly defamatory communication relates to his or her role in a public controversy (*37 Cal. 3d 244, 253-254)* . At this point, the Court noted that the plaintiff organization should at the very least be classified as a "limited purpose" public figure for the purposes of this general controversy, and that the individual plaintiff is a public figure to the extent that his conduct in directing the activities of the organization is at issue. The Court observed that the cases decided since *New York Times* and *Gertz* make it clear that a person or group should not be considered a public figure solely because that person or group is a criminal defendant, has sought relief through the courts, or merely

happens to be involved in a controversy that is newsworthy. Rather, a public figure plaintiff must have undertaken some voluntary act through which he or she seeks to influence the resolution of the public issues involved. As such, the mere involvement of a person in a matter that the media deems to be of interest to the public does not, in and of itself, require that the person become a public figure for the purpose of a subsequent libel action (*37 Cal. 3d 244, 254)* . In sum, courts called on to make a determination of public figure status should look for evidence of affirmative actions by which purported public figures have thrust themselves into the forefront of particular public controversies (*37 Cal. 3d 244, 254-255)* . This determination is often a close question that can only be resolved by considering the totality of the circumstances that comprise each individual controversy.

In the case before it, the Court found that both plaintiffs were public figures based on their myriad attempts to thrust their case and the organization in general into the public eye, rather than on their own statements regarding their public visibility and reputation (e.g., their self-pronounced claims to be "internationally renowned" and "world famous"). The Court noted the facts tending to show the plaintiffs' intent to make its case in the public arena, and stated that although any person or organization has the right to engage in publicity efforts and to attempt to influence public and media opinion regarding their cause, significant, voluntary efforts to inject oneself into the public arena require that the entity be classified as a public figure in any related defamation actions. In this particular case, the plaintiffs sponsored massive publicity and self-promotion efforts over a period of many years, and apparently increased these efforts with regard to the present controversy. As such, they enjoyed remarkable access to the media through which to counter any criticisms they deemed to be unwarranted, and voluntarily exposed themselves to increased risk of injury from unfavorable commentary about them. Thus, the Court concluded, they have clearly met the standards for public figure status for purposes of the defamation action.

The Court then stated that the *New York Times* decision superimposed a constitutional standard on the common law of libel. A person who is a public figure cannot recover for defamation unless he or she proves, by clear and convincing evidence, that the libelous statement was made with actual malice, that is, with knowledge that it was false or with reckless disregard of whether it was false or not (*37 Cal. 3d 244, 256)* . Subsequently, the United States Supreme Court clarified that reckless conduct is not measured by whether a reasonably prudent person would have published, or would have investigated before publishing. Rather, there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts concerning the truth of the publication. Publishing with those doubts shows reckless disregard for truth or falsity and demonstrates actual malice (citing *St. Amant v. Thompson (1968) 390 U.S. 727, 731, 88 S. Ct. 1323, 20 L. Ed. 2d 262*) (*37 Cal. 3d 244, 256-257)* . This definition establishes a subjective test, under which the defendant's actual belief concerning the truthfulness of the publication is the crucial issue (*37 Cal. 3d 244, 257)* . The Court noted that although such circumstantial evidence as a failure to investigate, anger and hostility toward the plaintiff, and reliance on unreliable sources are factors that may indicate a publisher's serious doubts, it is relevant only to the extent that it reflects on the subjective attitude of the publisher. The failure to conduct a thorough and objective investigation, standing alone, does not prove actual malice, and does not necessarily raise a triable issue of fact on that controversy. Similarly, mere proof of ill will on the part of the publisher may also be insufficient (*37 Cal. 3d 244, 258)* .

The Court stated that there is no direct evidence that the magazine author or other magazine personnel believed the questioned passages in the article were false, or even entertained serious doubts respecting their truth. The magazine relied primarily on the writings and conversations of the sociology professor, who taught at a leading university and had authored a number of studies on the organization, and on the newspaper writers, who had received the Pulitzer Prize for their reports and editorials on the organization. Although the plaintiffs questioned the objectivity of these sources, and the extent of their knowledge, they did not question that the magazine considered them to be persons of unsullied reputation (*37 Cal. 3d 244, 258-259)* . In that context, the magazine's failure to contact the organization or to conduct an objective investigation is relatively inconsequential. A publisher does not have to investigate personally, but may rely on the investigation and conclusions of reputable sources. If the publication comes from a known reliable source, and there is nothing in the circumstances to suggest inaccuracy, there is no duty to investigate. Moreover, there is no duty to write an objective account, because a publisher is not required to provide an objective picture. A publisher who

has no serious doubts concerning its truth can present but one side of the story. Therefore, the magazine could properly tell the story of how the newspaper writers won the Pulitzer Prize, and in that story reflect the writers' views on the organization, without also presenting the opposing viewpoint. The Court observed that fair and objective reporting may be a worthy ideal, but there is also room, within the protection of the *First Amendment*, for writing that seeks to expose wrongdoing and arouse righteous anger, which is typically less than objective in its presentation (*37 Cal. 3d 244, 259)* .

The Court rejected the plaintiffs' argument that the magazine's prior knowledge of its libel suit against the sociology professor and newspaper writers should have required it independently to corroborate the statements from these sources; plaintiff organization's notoriety for filing lawsuits as a censorship device belied a publisher's conclusion that the truthfulness of published material was doubtful. In addition, the Court categorized a letter written by the magazine author previous to his publication of the article, describing the organization as "very, very nasty indeed, and litigious as hell," as "a reasonable reaction" to what he learned while researching the article, rather than as evidence of bias (*37 Cal. 3d 244, 260)* . The plaintiffs also relied on the argument that the magazine article factually departs from the statements and information furnished by their sources. The Court noted that this contention squarely raises the question of the extent to which the *New York Times* standard of actual malice permits the exercise of literary license. It stated that the language of *New York Times* clearly implies that all publications must necessarily be permitted some degree of flexibility in their choice of the proper words and phrases to describe the subject at issue.

The United States Supreme Court has also recognized the need for a certain degree of literary license when properly applying the *New York Times* standard to the facts of each case (*37 Cal. 3d 244, 261)* . The language to which the plaintiffs took exception, concerning the plaintiffs' unproved claims of success in drug rehabilitation, for example, fell within an acceptable range of literary license when compared to the exact language used by the defendant's sources and when judged by the general apparent accuracy of the statements made (*37 Cal. 3d 244, 263-264)* . In addition, the Court affirmed that the related causes of action (intentional infliction of emotional distress, and invasion of privacy, i.e., false light and intrusion), based on the same facts as the defamation claim, were also properly subject to summary judgment for the defendants, in that the plaintiffs failed to show a triable issue of fact as to actual malice (*37 Cal. 3d 244, 265)* . The Court concluded that none of the alleged defamatory statements goes beyond what a responsible staff writer might draft on the basis of the information provided by sources; the sources were persons of good and distinguished reputation; and nothing in the record suggested that anyone employed by the magazine had any serious doubt as to the reliability of the sources or the truth of the challenged statements. Inasmuch as the record revealed no clear and convincing evidence of actual malice, and thus failed to raise a triable issue of fact, summary judgment should have been entered for the defendants. The Court therefore issued a peremptory writ of mandate, directing the trial court to vacate its order denying the plaintiffs' motion for summary judgment, to enter its order granting the motion (*37 Cal. 3d 244, 266)* .

[b] Actual Malice Standard Applies to Governmental Defendants

The facts and procedural background of ***Nadel v. Regents of Univ. of Cal.*** *(1994) 28 Cal. App. 4th 1251, 34 Cal. Rptr. 2d 188* , are discussed in *§ 142.24[3][b]*. The court of appeal concluded that *any* potential defamation liability is a check on governmental abuse of its power to defame, and the requirement of actual malice in the constitutional sense promotes the unfettered exchange of ideas by permitting the government to participate (*28 Cal. App. 4th 1251, 1266-1267)* . The court held that, as long as a matter of public interest is involved, a governmental defendant may be held liable for defamation only if there is actual knowledge of falsity, or reckless disregard of the truth (*28 Cal. App. 4th 1251, 1267)* . The court found this result especially appropriate to protect governmental employees, who should not lose their *First Amendment* protections by virtue of government employment (*28 Cal. App. 4th 1251, 1267)* .

[c] Definition of Public Figure for All Purposes

In ***Gertz v. Welch*** *(1974) 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789* , a prominent attorney brought a libel action

against a magazine that published an article about him concerning a civil action he brought against a police officer on behalf of the family of a shooting victim. The magazine, a John Birch Society monthly publication, published an article accusing the plaintiff of participating in a communist conspiracy to discredit law enforcement, and claimed that the civil suit against the police officer was part of the conspiracy. In his capacity as counsel in the civil suit, the plaintiff attended the coroner's inquest into the victim's death, and initiated actions for damages, but neither discussed the police officer with the press nor played any part in the criminal proceeding. The plaintiff brought a diversity action for libel, and the defendant invoked the privilege of *New York Times Co. v. Sullivan (1964) 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686* (discussed in *§ 142.24[3][a]*). The district court denied the defendant's motion for summary judgment, in which the defendant asserted that the plaintiff was a public official or public figure, that the article concerned an issue of public interest and concern, and therefore that the defendant was entitled to a constitutional privilege under *New York Times* because the plaintiff was unable to show malice. Following a jury verdict, the district court concluded that the *New York Times* standard should govern the case even though the plaintiff was not a public official or public figure, on the basis that the privilege protected discussion of any public issue without regard to the status of person defamed. The federal court of appeals affirmed, and the plaintiff petitioned for a writ of certiorari.

The United States Supreme Court reversed and remanded the case for further proceedings in accordance with its opinion (*418 U.S. 323, 352)* . The Court stated that the principal issue is whether a newspaper or broadcaster that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitutional privilege against liability for the injury inflicted by those statements (*418 U.S. 323, 332)* . The Court noted that three years after *New York Times*, the Supreme Court extended the constitutional privilege enunciated in that case to defamatory criticism of public figures, in *Curtis Publ'g Co. v. Butts (1967) 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094* [*see § 142.25[3][a]*] (*418 U.S. 323, 334)* . *Curtis* extended the *New York Times* rule to protect defamatory criticism of nonpublic persons who are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large (*418 U.S. 323, 336-337)* . Thereafter, in *Rosenbloom v. Metromedia (1971) 403 U.S. 29, 91 S. Ct. 1811, 29 L. Ed. 2d 296* , a plurality opinion extended the *First Amendment* privilege requiring proof of malice to speech on all matters of public concern. Under *Rosenbloom*, the of question whether malice was required depended on whether the utterance concerned an issue of public or general concern (*418 U.S. 323, 337)* . The Court noted that the *First Amendment* requires the protection of some falsehood in order to protect speech that matters, and proceeded to discuss the applicable body of prior case law to the facts of this particular case (*418 U.S. 323* , 341-345). The Court stated that public figures are similar to public officials, vis-a-vis private persons. Hypothetically, it may be possible for someone to become a public figure through no purposeful action of is or her own, but the instances of truly involuntary public figures must be exceedingly rare. For the most part, those who attain this status have assumed roles of special prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment (*418 U.S. 323, 345)* . The Court further stated that even if the foregoing generalities do not obtain in every instance, the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual, who has not accepted public office or assumed an influential role in ordering society (citing *Curtis Publ'g Co. v. Butts (1967) 388 U.S. 130, 164, 87 S. Ct. 1975, 18 L. Ed. 2d 1094*).

A private individual therefore has relinquished no interest in the protection of his or her own good name, and consequently has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood. Thus, private individuals are not only more vulnerable to injury than public officials and public figures, they are also more deserving of recovery (*418 U.S. 323, 345)* . The Court stated that the extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge this legitimate state interest to an unacceptable degree, holding rather that so long as states do not impose liability without fault, they may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual (*418 U.S. 323, 346-347)* . This rule allows states to impose liability on a publisher or broadcaster of defamatory falsehood on a less demanding

showing than that required by *New York Times* (*418 U.S. 323, 348)* .

Notwithstanding the Court's refusal to extend the *New York Times* privilege to defamation of private individuals, the defendant contended that the judgment should be affirmed on the ground that the plaintiff is either a public official or a public figure. The Court rejected outright the defendant's contention that the plaintiff was a public official, holding that his brief service on a public housing committee several years prior to the present incident was an insufficient basis for that classification. Otherwise, the Court stated, all lawyers would be swept under the *New York Times* rule as officers of the court, which would distort the plain meaning of the "public official" category beyond all recognition. The Court then assessed the plaintiff's status as a public figure, stating that in some instances an individual may achieve such pervasive fame or notoriety that he or she becomes a public figure for all purposes and in all contexts. More commonly, however, an individual voluntarily injects himself or herself, or is drawn into a particular public controversy and consequently becomes a public figure for a limited range of issues. In either case, those persons assume special prominence in the resolution of public questions. The Court noted that the plaintiff had long been active in community and professional affairs, having served as an officer of local civil groups and of various professional organizations, and having published several books and articles on legal subjects. Although the plaintiff was consequently well known in some circles, he had achieved no general fame or notoriety in the community. None of the prospective jurors called at the trial had ever heard of him. The Court refused to "lightly assume" that a citizen's participation in community and professional affairs renders that person a public figure for all purposes, noting that "[i]t is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." The Court therefore concluded that the *New York Times* standard did not apply to this particular case, and that the trial court erred in entering judgment for the defendant. Because the jury was allowed to impose liability without fault and was permitted to presume damages without proof of injury, the Court ordered a new trial on remand (*418 U.S. 323, 352)* .

[d] Definition of Public Figure for Limited Purpose

The factual and procedural background of ***Gertz v. Welch*** *(1974) 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789* , is discussed in *§ 142.25[3][c]*. In discussing whether the plaintiff was a public figure with regard to the controversy involved in the defamation action, the Court held that he was not, in that he played a minimal role at the coroner's inquest, and his participation related solely to his representation of a private client. He took no part in the criminal prosecution of the criminal defendant. Moreover, he never discussed either the criminal or civil litigation with the press. He plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome. The Court was persuaded that the trial court did not err in refusing to characterize petitioner as a public figure for the purpose of the instant litigation.

In ***Mosesian v. McClatchy Newspapers*** *(1991) 233 Cal. App. 3d 1685, 285 Cal. Rptr. 430* , a prominent local lawyer and businessman who obtained a horse racing license regarding a racing meet in his community brought a defamation action against a local newspaper based on several published articles regarding his personal qualifications to hold the license. The plaintiff was president and legal representative, as well as a director and shareholder, of the parent corporation of a company that sought a contract to conduct horse racing. He competed with a local politician for a lease of the racing facilities, a prerequisite to obtaining a license to operate a newly created spring racing meet in the area. The plaintiff, the high bidder, was initially selected to receive the contract, subject to licensing. Public controversy arose over charges that the plaintiff was unqualified for the contract because his organization was unincorporated; consequently, his conditional approval was retracted, and his rival selected. The plaintiff publicly denounced the decision and accused the parties to the contract of collusion. He subsequently filed a lawsuit against the board of directors of the racing facility, the rival racing association that received the contract, the state agency involved, and state and county officials, seeking a temporary restraining order to prevent the award of the contract as decided. The suit alleged conspiracy to break the plaintiff's contract award. The parties argued their positions at public hearings, and the bidding process was eventually reopened. The plaintiff was again awarded the lease subject to licensing. The defendant published articles (not the subject of the instant suit) concerning the plaintiff's license application and his plans

regarding the race meet. More public meetings were held regarding the license application, other competitors appeared, and the plaintiff's organization was eventually awarded a license to conduct the meet. Further public controversies arose over permitted incidental use of the facilities for the duration of the racing event. The defendant provided daily coverage of the racing.

After the race event ended, the plaintiff announced his intention to renew its license for the following year. For approximately five months, the defendant published no articles about the license renewal or related racing topics. However, that fall, defendant began publishing a series of articles about the plaintiff and his personal qualifications to be involved in horse racing. The articles concerned investigations into possible mishandling of racing funds and the plaintiff's background, and other evidence of the plaintiff's involvement with illegal gambling and other criminal activities. After the first article appeared, the plaintiff responded in a press conference, about which defendant published an article the following day. The plaintiff filed the instant defamation action. The trial court granted defendant's motion for summary judgment on the ground that the plaintiff was a public official, and actual malice could not be shown. The plaintiff's appeal resulted in a published opinion reversing the trial court and holding that the plaintiff was not a public official as a matter of law [*see Mosesian v. McClatchy Newspapers (1988) 205 Cal. App. 3d 597, 252 Cal. Rptr. 586* (discussed in *§ 142.66[3*][a])]. The court in that case (*Mosesian I*) did not, however, resolve the question whether the plaintiff was a public figure, which also requires proof of actual malice as a predicate for damages. That issue was addressed on remand. *Mosesian I* also held that no reasonable jury could find actual malice; therefore, if it were to be determined in further proceedings that the plaintiff was a public figure, he would be unable to recover damages for defamation, and defendants would be entitled to judgment.

On remand, the trial court ruled that there were triable issues of fact on the question whether the plaintiff was a public figure for all purposes, but concluded as a matter of law that the plaintiff was a public figure for the limited purpose of the public controversy over his qualifications to be licensed for horse racing. The trial court therefore granted defendant's motion for summary judgment, and dismissed the libel action based on the plaintiff's inability to prove actual malice. The plaintiff appealed.

The court of appeal affirmed (*233 Cal. App. 3d 1685, 1689)* . The court stated that the United States Supreme Court has defined two categories of public figures for *First Amendment* analysis. The first is the "all purpose" public figure who has achieved such pervasive fame or notoriety that he or she becomes a public figure for all purposes and in all contexts. The second is the "limited purpose" or "vortex" public figure, an individual who voluntarily injects himself or herself or is drawn into a particular public controversy and consequently becomes a public figure for a limited range of issues (*233 Cal. App. 3d 1685, 1689)* . The court noted that of the 31 published articles that are the subject of the action, many were prominently displayed and presumably read by many people in the community affected by the horse racing meet. Further, they were also presumably the basis of numerous radio and television news commentaries throughout that general geographical region (*233 Cal. App. 3d 1685, 1689-1690)* . The court proceeded to outline the events as they unfolded, from the point at which the spring horse racing meet was authorized pursuant to state law in 1976 until the institution of the defamation action some four years later (*233 Cal. App. 3d 1685, 1690-1693)* . The Court noted that speech on matters of public concern is at the heart of the *First Amendment* (*233 Cal. App. 3d 1685, 1693)* . Freedom of expression on public questions and debate on public issues should be uninhibited, robust, and wide-open, even though it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials (*233 Cal. App. 3d 1685, 1693-1694)* . For this reason, to recover damages for a defamatory falsehood relating to official conduct, a public official must prove the statement was made with knowledge that it was false or with reckless disregard of whether it was true or false. By contrast, speech on purely private matters is of less *First Amendment* concern, and a plaintiff is not required to prove actual malice if the libelous statement relates to a private matter. Moreover, plaintiffs who are private individuals need not prove actual malice even if speech involves a matter of public concern. Unlike public officials or public figures, private individuals have not voluntarily exposed themselves to an increased risk of injury from defamatory statements and generally lack effective opportunities for rebutting those statements.

The court stated that three types of defamation plaintiffs have been identified who must prove actual malice if defamatory speech relates to a matter of public concern: the public official, the general-purpose public figure, and the limited-purpose public figure. Whether a plaintiff is a public official or public figure is in the first instance a question of law for the trial court to decide (*233 Cal. App. 3d 1685, 1694)* . The court discussed the U.S. Supreme Court's creation of the public figure concept in *Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 345, 94 S. Ct. 2997, 41 L. Ed. 2d 789* [*see § 142.25[3][c]*] , which held that persons classed as public figures are in a similar position to those classed as public officials. Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his or her own, but the instances of truly involuntary public figures must be exceedingly rare. The Supreme Court further stated that it is preferable to reduce the public figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation (*233 Cal. App. 3d 1685, 1697)* . The court discussed several cases in which the plaintiff was found to be a public figure for a limited purpose (*233 Cal. App. 3d 1685, 1697-1700)* .

The court noted that in this particular case, from the summer of 1979 to the beginning of the spring racing meet in May 1980, there was a substantial and almost continuous public debate and controversy over, first, who would receive the license for the 1980 spring meet and, second, what policies would be followed in conducting the meet. The first issue as to who would receive the license impacted the public's consciousness dramatically when it was learned the initial contest would be between, on the one side, the plaintiff, a prominent local lawyer and businessman, and on the other side a prominent local elected official. This fact alone, the court noted, whetted the public's appetite for controversy and created a wide interest in the outcome, apart from the question regarding which party should receive the license based on merit (*233 Cal. App. 3d 1685, 1700)* . The court, after describing the events that occurred from that point until the time the allegedly defamatory articles were published, observed that the plaintiff's personal qualifications to be licensed were subject to public scrutiny and comment. The court noted that horse racing and gambling are controversial subjects and deserving of serious public concern, and that the California regulatory scheme for licensing and control of horse racing is detailed and replete with rules designed to protect the public from criminal elements who might be attracted to the horse races (*233 Cal. App. 3d 1685, 1701-1702)* . The plaintiff argued that even assuming he attained public figure status for the 1980 spring meet, his public status ended after the meet was held and before the publication of the defamatory article. The court rejected the plaintiff's contention that because there was no press comment about his horse racing activities for some five months after the 1980 meet, at the time that defendant published the fall 1980 article, the plaintiff was merely a private businessman and lawyer. The court explained that the plaintiff's personal qualifications, background, and honesty as a license applicant, as well as his organization and his associates, remained subject to public scrutiny by virtue of his intention to renew his license the following year (*233 Cal. App. 3d 1685, 1702)* . The fact that the plaintiff had not formally applied for the 1981 license when the article appeared is of no consequence, because the plaintiff's announcement to seek renewal reinjected the issue of his personality into the continuing public controversy over the operation of spring horse racing in that community (*233 Cal. App. 3d 1685, 1702-1703)* .

The court concluded that the issue of the plaintiff's qualifications to be licensed was before the public, and under the *First Amendment* defendant was entitled to publish the information it had received regarding his qualifications. Public figure status, the court stated, does not end spontaneously when the publicity ends. Rather, the public figure status continues as long as the specific issue for which the public status was achieved continues. Under the totality of the unique circumstances of the case, by publicly announcing his intention to apply for a license for the 1981 spring horse racing meet, the plaintiff placed his qualifications to be licensed in the public eye and foreclosed his return to private figure at least until the 1981 licensing procedures were completed (*233 Cal. App. 3d 1685, 1703)* .

[e] Determination of Public-Figure Status Made by Court

In ***Stolz v. KSFM 102 FM*** *(1994) 30 Cal. App. 4th 195, 35 Cal. Rptr. 2d 740* , the plaintiffs were a radio station and the owner-operator of the station, who sued another radio station for defamation, based on a discussion over the latter station concerning assertedly improper conduct by defendants. The trial court ruled that the plaintiffs were public figures, and therefore had the burden of proving that defendant had acted with knowledge of the falsity of the

statements, or with reckless disregard of the truth of the statements. The jury returned a general verdict in favor of defendant, and the plaintiff appealed from the judgment entered pursuant to that verdict.

The court of appeal affirmed, holding that the trial court properly found that the plaintiffs were public figures, required by the *First Amendment* to establish actual malice in order to recover for defamation (*30 Cal. App. 4th 195, 205-207)* . The court rejected the plaintiffs' argument that the trial court had improperly made the public-figure determination based on argument, rather than evidence. The court held that, because the determination is to be made by the court, rather than by the jury, appellate review is based on the entire record (*30 Cal. App. 4th 195, 204)* . In the case before it, the evidence supported the public-figure finding made by the trial court (*30 Cal. App. 4th 195, 205-207)* .

[4] Additional Authorities

[a] Actual Malice Required if Plaintiff Is Public Figure

In *Annette F. v. Sharon S. (2004) 119 Cal. App. 4th 1146, 15 Cal. Rptr. 3d 100* , the plaintiff sued her former lesbian partner for libel based on a letter sent by the defendant to the directors of a gay and lesbian organization and to a gay and lesbian newspaper. In the letter, the defendant referred to the plaintiff as a "convicted perpetrator of domestic abuse," and also accused the plaintiff of making repeated false accusations of child abuse and neglect against the defendant. The very public comments made by the defendant were part of a longer dispute between the parties over the plaintiff's right to adopt the children conceived through artificial insemination by the defendant while the two parties were in a committed relationship. Their dispute over the right to adopt had received extensive public attention, as had the relationship between the two parties in general, because they had purposefully drawn public media attention to themselves to promote gay rights. The trial court denied the defendant's motion to strike the libel complaint under *Code Civ. Proc. § 425.16*, the so-called anti-SLAPP statute, but the court of appeal reversed. The court of appeal held that the statements made by the defendant were protected by the anti-SLAPP statute (*119 Cal. App. 4th 1146, 1160-1162)* , and that the plaintiff had failed to establish a probability of prevailing on her claim as required to defeat the motion to strike. The court held that the plaintiff was a limited purpose public figure for purposes of the dispute between the parties (*119 Cal. App. 4th 1146, 1163-1166)* , which meant that the plaintiff was required to show actual malice on the part of the defendant in order to prevail on her libel claim. The plaintiff failed to do so. The defendant, who was not a lawyer, thought the phrase "convicted perpetrator of domestic abuse," was accurate. The defendant meant to refer to a family court's finding that the plaintiff had committed domestic violence against her, and not necessarily to a criminal conviction. The court noted that the use of the term "convicted" to refer to a noncriminal adjudication was fairly common, and that the use of the phrase in the context used by the defendant did not prove actual malice (*119 Cal. App. 4th 1146, 1168-1170)* . As to the defendant's statement that the plaintiff's accusations of child abuse and neglect against the defendant were false, the court noted that the charges had been investigated by the children's attorney and found to be unsubstantiated. Because the plaintiff failed to introduce any competent evidence to show that the accusations of child abuse were true, the court held that the plaintiff failed to show a probability of success in proving libel based on that statement made by the defendant (*119 Cal. App. 4th 1146, 1170-1171)* .

In *Rosenaur v. Scherer (2001) 88 Cal. App. 4th 260, 105 Cal. Rptr. 2d 674* , the plaintiff was a property owner who sought through a local public initiative to obtain the zoning changes needed to permit commercial development on his property. During the public battle over the initiative, his political opponents distributed a campaign flyer alleging that the property was partly owned by out-of-town speculators. Although that fact was no longer true, the information for the assertion had come from the most recent documents filed in the county assessor's office by the plaintiff's partnership. After the initiative was defeated, the plaintiff brought suit against his former opponents for the false assertion in the flyer. The trial court granted the defendants' anti-SLAPP motion to strike the complaint brought under *Code Civ. Proc. § 425.16*, and the plaintiff appealed. The plaintiff conceded that he was a public figure for purposes of the suit and that he had to show that the defendants acted with actual malice in order to prevail. However, the court of appeal concluded that the plaintiff could not meet that burden because the defendants had not acted with reckless disregard for the truth of their statements. The court held that the defendants had a right to rely on the information provided in the public

documents if they had no reason to doubt the accuracy of the information. The court also rejected the plaintiff's argument that the defendants had an obligation to verify the information first by contacting the plaintiff or one of the alleged out-of-town partners (*88 Cal. App. 4th 260, 275-276)* .

In *Beilenson v. Superior Court (1996) 44 Cal. App. 4th 944, 52 Cal. Rptr. 2d 357* , the plaintiff, a defeated candidate for political office, sued his political opponent for libel based on a campaign mailer that stated that the plaintiff "ripped off" California taxpayers because he maintained a private law practice on the side while he was on the public payroll. The defendant brought a SLAPP motion to dismiss the action. The trial court denied the motion, finding that the plaintiff met his burden of proof that there was a "possibility" that he would prevail. The defendant sought relief by way of extraordinary writ. The parties subsequently settled the dispute, but the court of appeal issued a decision because of the importance of the issues. The court initially found that the accusations in the mailer were statements of opinion entitled to the protection of the *First Amendment*. Furthermore, the court stated that even if the statements were deemed to be untruthful and not statements of opinion, the plaintiff was required to establish that the defendant was aware of the probable falsity. However, the record lacked evidence that the defendant acted with malice (*44 Cal. App. 4th 944, 952)* .

The facts and procedural background of *Live Oak Publ'g Co. v. Cohagan (1991) 234 Cal. App. 3d 1277, 286 Cal. Rptr. 198* , are discussed in *§ 142.22[3][a]*. In *Live Oak,* the court of appeal held that a newspaper could not state a libel cause of action against a person whose letter it had published itself, because publication to a third person is an element of that tort (*234 Cal. App. 3d 1277, 1283-1287)* . With respect to the slander cause of action brought by the newspaper, the court affirmed summary judgment for the defendant, based on the plaintiff's failure to introduce evidence of actual malice in opposition to the defendant's motion (*234 Cal. App. 3d 1277, 1287-1293)* .

The facts and procedural background of *Weingarten v. Block (1980) 102 Cal. App. 3d 129, 162 Cal. Rptr. 701* , are discussed in *§ 142.24[3][a]*. The court of appeal determined that the plaintiff was a public figure, in addition to being a public official, and that the plaintiff (as he conceded) was therefore required to show the defendant's reckless disregard for truth or falsity (*102 Cal. App. 3d 129, 144)* .

[b] Definition of Public Figure for All Purposes

In *Belli v. Curtis Publ'g Co. (1972) 25 Cal. App. 3d 384, 102 Cal. Rptr. 122* , the court of appeal affirmed the granting of summary judgment for the defendant in an action that arose out of two articles concerning attorney Melvin Belli's participation in Jack Ruby's trial for the murder of Lee Harvey Oswald. In his answer to the defendants' interrogatories, the plaintiff acknowledged that he was a public figure, and that the Jack Ruby trial was a matter of public interest (although the court did not specify whether the scope of the plaintiff's status as a public figure was for all purposes or for a limited purpose) (*25 Cal. App. 3d 384, 388)* . The court held that the plaintiff could not show with the evidence that the two disputed magazine articles were published with malice. The plaintiff contended that the defendant had knowledge of false statements in one of the articles and that the second was published in reckless disregard of whether it was true or false, but the court of appeal reviewed the evidence and concluded that the plaintiff's contentions were without merit and that the summary judgment was proper (*25 Cal. App. 3d 384, 392-401)* .

[c] Definition of Public Figure for Limited Purpose

In *Gilbert v. Sykes (2007) 147 Cal. App. 4th 13, 53 Cal. Rptr. 3d 752* , a plastic surgery patient filed a medical malpractice action against her plastic surgeon. The plastic surgeon filed a cross-complaint against the patient for defamation and related torts based on statements the patient had published on her Internet web site publicizing her dissatisfaction with the results of her surgery. The patient filed a motion to strike the cross-complaint under *Code Civ. Proc. § 425.16*, the anti-SLAPP statute. The trial court denied the motion to strike after concluding that the surgeon had demonstrated a probability of success on the merits. The court of appeal reversed. For purposes of the surgeon's defamation claims, the court of appeal held that the surgeon was a limited-purpose public figure, and as such he was

required to show that the patient's statements were made with actual malice in order to prevail. The court first held that the relative merits of plastic surgery was a subject that had garnered national attention and was the focus of widespread public interest. In reaching the conclusion that the surgeon was a limited-purpose public figure in this public debate, the court relied on evidence that the plastic surgeon had placed himself into the public debate by appearing on local television shows, writing numerous articles in medical journals and beauty magazines advocating the procedures, testifying as an expert witness on the subject, and advertising his services in the local media (*147 Cal. App. 4th 13, 25)* . The court also rejected the surgeon's argument that he was not a limited-purpose public figure because there was no preexisting public debate over the controversy surrounding this particular patient's treatment at the hands of the surgeon. The court stressed that it was not necessary that the surgeon's private conduct generate a public controversy before he could be deemed a public figure. If there is a public debate on a topic that concerns a substantial number of people, such as the merits of plastic surgery in general, and the surgeon placed himself into that debate, then his particular words and actions relating to that debate become fair game (*147 Cal. App. 4th 13, 25)* . Finally, the court held that the surgeon had failed to demonstrate that he could prevail on a defamation claim based on any words or pictures the patient had published on the web site (*147 Cal. App. 4th 13, 27-34)* .

The factual and procedural background of *Annette F. v. Sharon S. (2004) 119 Cal. App. 4th 1146, 15 Cal. Rptr. 3d 100* , is described in § 142.25[4][a]. In the course of reaching its decision, the court of appeal held that the plaintiff was a limited purpose public figure because she purposefully drew public and media attention to her relationship with the defendant to promote gay marriage and second-parent adoptions. While living together, the plaintiff and the defendant had solicited public attention and media coverage of their commitment ceremony, had set up a web site to publicize their ceremony and provide information to others about gay marriage and second-parent adoptions, and had published a book on gays in the workplace. They had willingly participated in a national television show on gay marriage, which received extensive coverage in the national press. The plaintiff's involvement in the very public litigation between her and the defendant over the plaintiff's right to adopt furthered her public recognition as an advocate for gay and lesbian rights, and specifically as an advocate for second-parent adoptions. In fact, the plaintiff had taken advantage of her national recognition to set up a nonprofit organization to solicit donations to fund her litigation seeking to establish her right to adopt. Therefore, the plaintiff's status as a limited purpose public figure extended to the subject matter of the legal dispute between the plaintiff and her former partner over the adoption rights to their children. Because the alleged domestic violence perpetrated by the plaintiff against the defendant was at the heart of the adoption dispute and related proceedings, the plaintiff was required to show that the defendant's statements were made with actual malice (*119 Cal. App. 4th 1146, 1164-1166)* .

Reader's Digest Assn. v. Superior Court (1984) 37 Cal. 3d 244, 208 Cal. Rptr. 137, 690 P.2d 610 , is discussed in *§ 142.25[3][a]*.

Lewis v. Ueberroth (1983) 147 Cal. App. 3d 442, 195 Cal. Rptr. 150 , was an action for libel brought by two leaders of a community group opposing development of an area in the San Fernando Valley as a site for the Olympics, against the president of the Los Angeles Olympic Organizing Committee. The defendant had made statements critical of the leadership of the groups opposing the Olympics in an interview published in a local magazine. The court of appeal affirmed the trial court's dismissal of the action, holding that the statements made were well within the bounds of protected public debate and could not be the basis for a libel action (*147 Cal. App. 3d 442, 446)* . In discussing the plaintiffs' status, the court stated that although they did not concede the point that they were public figures for purposes of the controversy, their self-proclaimed status as "active and vocal community leaders" appeared to resolve that issue (*147 Cal. App. 3d 442, 446 n.2*).

The facts and procedural background of *Weingarten v. Block (1980) 102 Cal. App. 3d 129, 162 Cal. Rptr. 701* , are discussed in *§ 142.24[3][a]*. In *Weingarten*, the court of appeal found that the plaintiff thrust himself to the forefront of the public controversy that arose from his termination, and that he was actively involved in influencing its resolution by his involvement in the recall and his continuing representation of the Redevelopment Agency as its chief local counsel. Consequently, the plaintiff was a public figure for the purpose of the litigation under the rule established in *Gertz v.*

Welch (1974) 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (discussed in *§ 142.89[3][a]*) (*102 Cal. App. 3d 129, 142)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral Overview

California Points & Authorities

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 142 LIBEL AND SLANDER (DEFAMATION)
PART II. FORMS

14-142 California Points & Authorities § 142.26

§ 142.26 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Failure of Plaintiff Suing Distributor to Allege Malice

[1] FORM

[*Caption. See § 142.24.*]

SUMMARY JUDGMENT FOR DEFENDANT AS DISTRIBUTOR OF A DEFAMATORY PUBLICATION IS PROPER BECAUSE PLAINTIFF HAS FAILED TO ALLEGE MALICE.

A. Summary Judgment. [*See § 142.24, Paragraph A.*]

B. Malice Required to Recover for Distribution of Defamatory Publication of Another. The activity of selling or distributing books or other publications is protected by the *First Amendment*. A plaintiff must therefore show malice to hold a distributor liable for disseminating defamatory material published by another. At the very least, a plaintiff must show that the distributor knew of the defamatory content of the material or knew facts giving rise to a duty to investigate (*Osmond v. EWAP Inc. (1984) 153 Cal. App. 3d 842, 852-854, 200 Cal. Rptr. 674*). Summary judgment is proper if the plaintiff fails to raise a triable issue of fact on the question of malice (*Osmond v. EWAP Inc. (1984) 153 Cal. App. 3d 842, 854-857, 200 Cal. Rptr. 674*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted by a defendant in support of a motion for summary judgment in a defamation action if the motion is based on the contention that the defendant is entitled to judgment as a matter of law because the plaintiff has failed to raise a triable issue on the question whether the defendant, as the distributor of a defamatory publication of another, had the requisite malice, in the sense that he or she knew or should have known that the publication was defamatory.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach opposing affidavits or declarations and a separate statement of undisputed facts [*see Code Civ. Proc. § 437c(b)*], which include facts showing that the defendant had no actual or constructive knowledge that the publication was defamatory.

[b] Related Uses

With appropriate modifications, these points may be used to support a general demurrer to the complaint, or to support a motion for judgment on the pleadings, if it appears on the face of the complaint that the plaintiff has failed to allege facts showing that the defendant acted with malice.

[c] Related Pleading and Practice Forms

For a general form of notice of motion for summary judgment based on an affirmative defense to a defamation action, see Ch. 340, *Libel and Slander* in California Forms of Pleading and Practice (Matthew Bender).

[d] Related Memoranda

For memoranda relating to summary judgment generally, see Ch. 221, *Summary Judgments* in this set.

[3] Discussion of Authorities

[a] Malice Required to Recover for Distribution of Defamatory Publication of Another

In ***Osmond v. EWAP Inc.*** *(1984) 153 Cal. App. 3d 842, 200 Cal. Rptr. 674* , the plaintiff, a former child actor who played the character "Eddie Haskell" in a popular television series, sued an operator of adult book stores for displaying and selling copies of a pornographic film with labels stating that the male star of the film was "John Holmes, who played 'Little Eddie Haskell on the Leave it to Beaver' show." The defendant moved for summary judgment on the ground that there was no triable issue of fact on the issue of malice. The trial court granted the motion, and the plaintiff appealed the ensuing judgment.

The court of appeal affirmed, holding that the plaintiff had failed to raise a triable issue on the question of malice (*153 Cal. App. 3d 842, 855-857)* . The court stated that one who merely disseminates the defamatory publication of another is not liable absent knowledge either of the defamatory nature of the publication or of other extraneous facts that should have put him or her on guard (*153 Cal. App. 3d 842, 852)* . The court observed that the defendant's activity of selling or distributing books or other publications was protected by the *First Amendment*, regardless of the fact that "adult" publications were involved. The court concluded that this constitutional protection required proof of malice before holding the defendant or any other distributor liable in a civil action for disseminating libelous material published by a third party (*153 Cal. App. 3d 842, 853-854)* . The court stated that to establish the requisite malice or scienter, the plaintiff must, at the very least, show that the defendant knew of the libelous matter, or that the defendant should have known of it because of knowledge of other facts that imposed a duty to investigate (*153 Cal. App. 3d 842, 854)* . The court held that summary judgment was proper, because the supporting evidence sufficiently established lack of malice by showing that the defendant had no knowledge of the libel nor of other facts giving rise to a duty to investigate, while

the plaintiff's opposing evidence failed to raise a triable issue on this question (*153 Cal. App. 3d 842, 855-857)* . The court also noted that its affirmance on this ground was independent of the issue whether the plaintiff was a public figure because of his status as a former child actor (*153 Cal. App. 3d 842, 857 n.4*).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral Overview

California Points & Authorities

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 142 LIBEL AND SLANDER (DEFAMATION)
PART II. FORMS

14-142 California Points & Authorities § 142.27

§ 142.27 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Failure of Public Official or Public Figure to Allege Falsity

[1] FORM

[*Caption. See § 142.24.*]

SUMMARY JUDGMENT FOR DEFENDANT IS PROPER BECAUSE PLAINTIFF, A PUBLIC _____ [OFFICIAL *or* FIGURE], HAS FAILED TO ALLEGE THE FALSITY OF THE DEFAMATORY STATEMENT(S).

A. Summary Judgment. [*See § 142.24, Paragraph A.*]

B. Definition of Public _____ [Official *or* Figure]. [*See § 142.24, Paragraph D, if public official, or § 142.25, Paragraph D or E, if public figure.*]

C. Plaintiff Who Is Public Official or Figure Must Show Falsity. A plaintiff who is a public official or figure is constitutionally required to bear the burden of showing the falsity of the allegedly defamatory statement at issue before recovering damages in a suit for defamation (*Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 776, 106 S. Ct. 1558, 89 L. Ed. 2d 783*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of motion for summary judgment if the motion asserts that the defendant is entitled to a judgment as a matter of law because the plaintiff is a public official or figure and has failed to allege that the allegedly defamatory statement was false.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law raised. In addition, counsel should attach affidavits or declarations that support the motion and a separate statement of undisputed facts [*Code Civ. Proc. § 437c(b)*]. If appropriate, counsel may also combine these points with those in § 142.24 or § 142.25.

[b] Related Uses

With appropriate modifications, these points may be used to support a demurrer to a complaint based on the failure of a plaintiff who is a public official or figure to allege the falsity of the defamatory statement.

[c] Related Pleading and Practice Forms

For related discussion and forms concerning public officials or figures, see California Forms of Pleading and Practice, Ch. 340, *Libel and Slander* (Matthew Bender).

[3] Discussion of Authorities

[a] Plaintiff Who Is Public Official or Figure Must Show Falsity

The facts and procedural background of ***Philadelphia Newspapers, Inc. v. Hepps*** *(1986) 475 U.S. 767, 106 S. Ct. 1558, 89 L. Ed. 2d 783* , are discussed in *§ 142.32[3][a]*. In reversing the decision of the Pennsylvania Supreme Court in *Philadelphia Newspapers,* the United States Supreme Court embarked on a thorough discussion of recent defamation case law, including a discussion of *Gertz v. Welch (1974) 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789* (discussed in *§ 142.25[3][c]*), and of *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. (1985) 472 U.S. 749, 105 S. Ct. 2939, 86 L. Ed. 2d 593* , the facts and procedural backgrounds of which are discussed in § 142.303[3][a]. In its discussion, the United States Supreme Court clarified many questions that have arisen since the latter two cases were decided. The most important of its clarifications is the Court's announcement that under *New York Times Co. v. Sullivan (1964) 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686* , a public figure plaintiff must show the falsity of the statements at issue to prevail on a suit for defamation (citing *Garrison v. Louisiana (1964) 379 U.S. 64, 74, 85 S. Ct. 209, 13 L. Ed. 2d 125*). The Court then extended this rule of law to hold that the *First Amendment* requires a private figure plaintiff, suing a newspaper or other media defendant for publishing an article of public concern, to bear the burden of showing falsity before recovering damages (*475 U.S. 767, 775)* .

[4] Additional Authorities

[a] Plaintiff Who Is Public Official or Figure Must Show Falsity

In *Aisenson v. American Broad. Co. (1990) 220 Cal. App. 3d 146, 269 Cal. Rptr. 379* , a superior court judge brought an action against a television station that broadcast the results of an opinion poll it conducted among members of the criminal law bar, concerning performance ratings of criminal law judges. The complaint alleged defamation based on the plaintiff's receiving the worst overall rating of all the judges evaluated. The court of appeal affirmed summary judgment for the defendant, holding that a public official may not recover damages for a published statement touching on fitness for office without proof that the defendant made a false statement of fact and that the defendant either knew

the statement was false or recklessly disregarded whether it was false or not. There was no evidence in this case that the defendant either broadcast false statements of fact, or tampered with the results of the poll (*220 Cal. App. 3d 146, 154-156)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral Overview

California Points & Authorities

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 142 LIBEL AND SLANDER (DEFAMATION)
PART II. FORMS

14-142 California Points & Authorities § 142.28

§ 142.28 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Failure of Plaintiff Suing Religious Organization or Minister to Allege Malice

[1] FORM

[*Caption. See § 142.24.*]

SUMMARY JUDGEMENT FOR DEFENDANT AS _____ [A RELIGIOUS ORGANIZATION *and/or* A MINISTER OF A RELI GIOUS ORGANIZATION] IS PROPER BECAUSE PLAINTIFF HAS FAILED TO ALLEGE CONSTITUTIONAL MALICE.

A. Summary Judgment. [*See § 142.24, Paragraph A.*]

B. Malice Required if Remarks Were Exercise of Religion. In an action for defamation in which the alleged defamatory remarks occurred during the exercise of religion, as might occur during the course of a religious doctrinal explanation by a duly authorized minister, the plaintiff must show, by clear and convincing evidence, that the defamation was made with constitutional malice, that is, with knowledge that it was false or with reckless disregard of whether it was false or not (*McNair v. Worldwide Church of God (1987) 197 Cal. App. 3d 363, 377, 242 Cal. Rptr. 823*).

[*Optional*] **C. Ministerial Exception Prohibits Inquiry Into Truth or Falsity of Religious Doctrine.** Statements made by church leaders when terminating the employment of another church leader may be protected by a so-called "ministerial exception" if evaluating the truth or falsity of those statements would necessarily require an inquiry into the doctrinal beliefs of the church (*Gunn v. Mariners Church, Inc. (2008) 167 Cal. App. 4th 206, 216, 84 Cal. Rptr. 3d 1*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion for summary judgment if the motion asserts that the defendant is entitled to a judgment as a matter of law because the plaintiff has failed to raise a triable issue on the question whether the defendant, making the alleged defamatory remarks during the exercise of religion, had the requisite constitutional malice.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law raised. In addition, counsel should attach affidavits or declarations that support the motion and should attach a separate statement of undisputed facts [*Code Civ. Proc. § 437c(b)*].

[b] Related Uses

With appropriate modifications, this form may be used to support a general demurrer to the complaint, or to support a motion for judgment on the pleadings, if it appears on the face of the complaint that the plaintiff has failed to allege facts showing that the defendant acted with constitutional malice.

[c] Related Pleading and Practice Forms

For a general form of notice of motion for summary judgment based on an affirmative defense to a defamation action, see California Forms of Pleading and Practice, Ch. 340, *Libel and Slander* (Matthew Bender).

[d] Related Memoranda

For memoranda relating to summary judgment generally, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Malice Required if Remarks Were Exercise of Religion

In ***McNair v. Worldwide Church of God*** *(1987) 197 Cal. App. 3d 363, 242 Cal. Rptr. 823* , the plaintiff, a member of a church, was married to a minister of that church. The church had very strict views on the permanence of marriage, and divorce was very difficult to obtain. Some years after the marriage, a division occurred within the church, and the plaintiff allied herself with the dissidents while the plaintiff's husband remained with the church. When the plaintiff failed to disassociate herself from the dissidents, her marriage deteriorated. In the meantime the church modified its position and made divorce somewhat more acceptable. After the plaintiff and her husband were divorced, the husband remarried and continued his ministry. At the next annual church conference, the church's controversial change in position on divorce and remarriage was discussed. Because the plaintiff's former husband was a very prominent member of the ministry, his divorce and remarriage were specifically addressed. Both during that conference and in a later written report, the plaintiff's behavior as a wife and member of the church were discussed and criticized in intimate detail. After learning of the remarks, the plaintiff sued the church, her former husband, and another minister on several causes of action, among them libel and slander. After a jury trial, the trial court entered judgment in favor of the plaintiff. The defendants appealed.

The court of appeal reversed. The court said that the clause in the *First Amendment* that describes the free exercise of religion guarantees the freedom to believe and the freedom to act. However, religious conduct may be regulated for the protection of society if a paramount interest is threatened with grave abuse. The court concluded that the protection of a person's good name is a sufficiently important state interest that the burden of tort damages may be imposed on a church and its evangelist minister's actions under certain limitations (*197 Cal. App. 3d 363, 374)* . In articulating these limitations, the court drew many analogies from cases in which the reputational interests of a plaintiff were balanced against the free speech and free press protections of the *First Amendment* (*197 Cal. App. 3d 363, 375-377)* . The court concluded that in this particular case the accommodation of the competing societal interests--the protection of personal reputations on the one hand, and the free exercise of religion on the other--requires that in order for a plaintiff to recover damages for defamatory remarks made during the course of a doctrinal explanation by a duly authorized minister, the plaintiff must show, by clear and convincing evidence, that the defamation was made with constitutional malice, that is, with knowledge that it was false or with reckless disregard of whether it was false or not (*197 Cal. App. 3d 363, 377)* . The court concluded that the plaintiff had not presented evidence sufficient to show actual malice (*197 Cal. App. 3d 363, 378)* .

[b] Ministerial Exception Prohibits Inquiry Into Truth or Falsity of Religious Doctrine

In ***Gunn v. Mariners Church, Inc.*** *(2008) 167 Cal. App. 4th 206, 84 Cal. Rptr. 3d 1* , a worship director sued his former church employer after the church terminated his employment because they discovered he was gay. Church leaders then made statements to the congregation that plaintiff had been "caught in a sin," had admitted to "moral and sexual actions that are sin," had suffered a "breakdown in character," and was "a broken man." Plaintiff sued for defamation, invasion of privacy, and intentional infliction of emotional distress. The trial court granted summary judgment for the church. Plaintiff appealed.

The court of appeal affirmed, applying the so-called "ministerial exception" to conclude that the statements were not actionable. The court first noted that it was the established practice of that church to explain to the congregation the reasons for termination of any pastoral leader. The court then held that the truth or falsity of the statements could not be evaluated without an inquiry into the truth or falsity of the doctrinal beliefs of the church, a task the court could not undertake under established *First Amendment* doctrine regardless of the potentially tortious nature of the statements (*167 Cal. App. 4th 206, 216)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
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14-142 California Points & Authorities § 142.29

§ 142.29 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Failure to Establish Reckless Disregard for Truth

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

SUMMARY JUDGEMENT FOR DEFENDANT IS PROPER BECAUSE PLAINTIFF, A PUBLIC FIGURE, HAS FAILED TO ESTABLISH RECKLESS DISREGARD FOR TRUTH.

A. Reckless Disregard for Truth Required if Plaintiff Is Public Figure. A public figure who is suing for allegedly defamatory remarks must allege that the defendant published or broadcast the remarks with knowledge of their falsity or with reckless disregard for their truth (*Curtis Publ'g Co. v. Butts (1967) 388 U.S. 130, 164, 87 S. Ct. 1975, 18 L. Ed. 2d 1094* ; *Copp v. Paxton (1996) 45 Cal. App. 4th 829, 845, 52 Cal. Rptr. 2d 831*).

B. Clear and Convincing Evidence Required. A plaintiff must show actual malice, that is, that the defendant published or broadcast the allegedly defamatory material with knowledge of its falsity or with reckless disregard for its truth, with clear and convincing evidence (*Christian Research Institute v. Alnor (2007) 148 Cal. App. 4th 71, 84, 55 Cal. Rptr. 3d 600*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a defendant's contention in a libel action that the plaintiff has not established that the defendant acted with reckless disregard for the truth.

This form may be combined with points pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the defendant did not act with reckless disregard for the truth. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence of the defendant's knowledge at the time of the publication of the allegedly defamatory statement, and should argue that the statement was not published with reckless disregard for its truth or falsity.

[c] Related Pleading and Practice Forms

For a related discussion, see California Forms of Pleading and Practice, Ch. 340, *Libel and Slander* (Matthew Bender).

[3] Discussion of Authorities

[a] Reckless Disregard for Truth Required if Plaintiff Is Public Figure

Curtis Publ'g Co. v. Butts *(1967) 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094* , is discussed in *§ 142.25[3][a]*.

In ***Copp v. Paxton*** *(1996) 45 Cal. App. 4th 829, 52 Cal. Rptr. 2d 831* , the plaintiff, an individual who held himself out as an expert on earthquake safety, brought a libel action against a county officer for defamation and interference with prospective economic advantage. The defendant had sent a letter to an individual who requested information about the plaintiff, and in this letter questioned the plaintiff's credentials. Enclosed with the letter was a staff memorandum that implied that the plaintiff exploited people's fears for personal gain, and was thus actionable speech. The memorandum was then allegedly passed on to the sponsors of a conference that the plaintiff was promoting, and the sponsors subsequently withdrew support. The trial court granted a summary judgment for the defendant, finding that all the communications were absolutely privileged.

Although disagreeing that the communication of the memorandum to the third party was privileged, the court of appeal affirmed the defense judgment. The court found that the republication of the memorandum was entitled to a qualified privilege requiring the plaintiff to prove that the statement was made with actual malice by showing reckless disregard for its truth or falsity (*45 Cal. App. 4th 829, 845-846)* . The court stated that while it could be inferred that the memorandum reached the conference sponsors from the defendant, it was not certain that it reached them through this route. Furthermore, the memorandum could have been enclosed with the letter by a staff assistant, or by the defendant without reflection. The court concluded that the finder of fact could not reasonably infer that the defendant acted with reckless disregard for the truth or falsity of the statement (*45 Cal. App. 4th 829, 848)* .

[b] Clear and Convincing Evidence Required

In *Christian Research Institute v. Alnor (2007) 148 Cal. App. 4th 71, 55 Cal. Rptr. 3d 600* , plaintiffs were a nonprofit religious information dissemination organization and its president who brought an action for defamation against a former employee who administered an Internet site reporting on the fundraising practices of Christian organizations. The defamation claim was based on defendant's publication of a news item on his site stating that plaintiffs were the subject of a criminal mail fraud investigation after plaintiffs solicited funds from its own readers under the alleged pretense that their organization had lost a large sum of money due to the postal service's misdelivery of a substantial amount of plaintiffs' mail. Defendant filed a motion to strike the defamation cause of action under the anti-SLAPP statute, *Code Civ. Proc. § 425.16*. The trial court denied the motion and defendant appealed.

The court of appeal reversed the trial court's order after concluding that the plaintiffs failed to show a probability of success on the merits. The court first held that plaintiffs had submitted sufficient evidence to prove by a preponderance of the evidence that the defendant's statements were false (*148 Cal. App. 4th 71, 81-82)* . However, because the plaintiffs were public figures, they were required to show with clear and convincing evidence that defendant published his statements with actual malice, that is, with knowledge of their falsity or with reckless disregard for the truth. The

court also held that while a court ruling on a motion to strike does not generally weigh the strength of competing evidence, neither the trial court nor a reviewing court is required to consider the evidence of actual malice in the light most favorable to the plaintiff or draw all permissible inferences in favor of plaintiff (*148 Cal. App. 4th 71, 84-86)* . The court then concluded that plaintiffs had failed to offer clear and convincing evidence that defendant published his statements with actual malice. The court concluded in part that it was mere speculation to claim that defendant knew his statements were false when published, and the evidence established at most that defendant had been negligent in his investigation of the facts, which is insufficient to prove actual malice (*148 Cal. App. 4th 71, 87-93)* .

[4] Additional Authorities

[a] Reckless Disregard for Truth Required if Plaintiff Is Public Figure

Rosenaur v. Scherer (2001) 88 Cal. App. 4th 260, 105 Cal. Rptr. 2d 674 , is discussed in *§ 142.25[4][a]*.

In *Jackson v. Paramount Pictures Corp. (1998) 68 Cal. App. 4th 10, 80 Cal. App. 2d 1* , the plaintiff was an internationally known performer who brought suit against a motion picture studio and a reporter who allegedly slandered the plaintiff by reporting in a radio interview and on the studio's television program that a videotape existed showing the plaintiff engaged in sexual contact with an underage boy. The court of appeal affirmed summary judgment for the defendants, finding in part that the reporter lacked actual malice when making the allegedly slanderous statements because they were not made with knowledge they were false or with reckless disregard of whether they were false. The reporter in that case stated she believed her information source to be reliable, having proven reliable as a source of previous truthful information about the plaintiff. Additionally, the reporter had other reasons to believe the information to be accurate, including a well-known past criminal investigation and civil suit concerning the plaintiff involving allegations of similar sexual misconduct, the fact that a district attorney's office was in fact conducting a search for a videotape, and the fact that a newspaper report described such a videotape (*68 Cal. App. 4th 10, 34-35)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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14-142 California Points & Authorities § 142.30

§ 142.30 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Failure of Private Individual to Allege Negligence--Allegedly Defamatory Statement Relates to Matter of Public Concern

[1] FORM

[*Caption. See § 142.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION BECAUSE PLAINTIFF, A PRIVATE INDIVIDUAL, HAS FAILED TO ALLEGE NEGLIGENCE IN A DEFAMATION SUIT IN WHICH THE FACE OF COMPLAINT SHOWS THAT ALLEGEDLY DEFAMATORY STATEMENT RELATED TO MATTER OF PUBLIC CONCERN.

A. Objection by Demurrer. [*See § 142.20, Paragraph A.*]

B. Negligence Required if Allegedly Defamatory Statement Relates to Matter of Public Concern. A private individual suing for defamation cannot recover any damages under a state law that authorizes liability without fault; the defendant must have been guilty of fault under some standard of liability, such as negligence (*see Gertz v. Welch (1974) 418 U.S. 323, 347, 94 S. Ct. 2997, 41 L. Ed. 2d 789*) in suits in which the allegedly defamatory statement related to a matter of public concern (*see Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. (1985) 472 U.S. 749, 759-761, 105 S. Ct. 2939, 86 L. Ed. 2d 593*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a general demurrer to a complaint if the demurrer asserts that the complaint fails to state facts sufficient to constitute a cause of action in that it appears on the face thereof, or from any matter of which the court is required to or may take judicial notice, that the plaintiff is a private citizen who is suing for defamation, the allegedly defamatory statement related to a matter of public concern, and the complaint fails to allege at least that the defendant was negligent.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications these points may be used to support a defendant's motion for judgment on the pleadings or a defendant's motion for summary judgment [*see Code Civ. Proc. § 437c*].

[c] Related Pleading and Practice Forms

For a form of demurrer to a complaint based on a private individual's failure to allege negligence if the allegedly defamatory statement is related to a matter of public concern, see Ch. 340, *Libel and Slander* , in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Negligence Required if Allegedly Defamatory Statement Relates to Matter of Public Concern

In ***Gertz v. Welch*** *(1974) 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789* (discussed in *§ 142.25[3][c]*), the United States Supreme Court held that a private individual suing a publisher or broadcaster could not recover any damages without establishing that the language was published or broadcast with fault. The Court stated that so long as they do not impose liability without fault, the states may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual (*418 U.S. 323, 347)* . The Court suggested, but did not command, that a negligence standard of fault would be appropriate (*418 U.S. 323, 350)* .

NOTE:

A California court of appeal decision has suggested, in dicta, that the standard in California is one of negligence [*see Widener v. Pacific Gas & Elec. Co. (1977) 75 Cal. App. 3d 415, 433, 142 Cal. Rptr. 304]* .

The constitutional restrictions set forth in *Gertz* do not apply in all cases brought by private individuals. In ***Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*** *(1985) 472 U.S. 749, 105 S. Ct. 2939, 86 L. Ed. 2d 593* , the United States Supreme Court limited *Gertz* by holding that it does not apply to cases in which the allegedly defamatory statement does not relate to a matter of public concern (*472 U.S. 749, 761-763)* . In holding that a commercial credit report did not involve a matter of public concern, the Court emphasized that the type of commercial credit reporting in issue did not involve any strong interest in the free flow of commercial information nor did it require special protection to insure that debate on public issues would be robust, uninhibited, and wide-open. The Court considered the following factors relevant in reaching its finding: (1) the statement was solely in the interest of the publisher and its specific business audience; (2) it was made available to only five subscribers who had agreed not to disseminate the report further; and (3) it was made for profit (*472 U.S. 749, 761-762)* .

Prior to the *Dun & Bradstreet* decision, there was an open question as to whether the rules of *Gertz* applied if the defendant was not a member of the media [*see Hutchinson v. Proxmire (1979) 443 U.S. 111, 133 n.16, 99 S. Ct. 2675, 61 L. Ed. 2d 411* (open question as to whether the protection of *First Amendment* extends to cases involving nonmedia defendants)]. In *Dun & Bradstreet*, the four member dissent and Justice White's concurring opinion indicate that a majority of the Supreme Court feel that the rules of *Gertz* apply equally to nonmedia defendants (*86 L. Ed. 2d 593, 611)* . However, in *Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 779 n.4, 106 S. Ct. 1558, 89 L. Ed. 2d 783* (discussed in *§ 142.32[3][a]*), the Supreme Court again expressly left open the question of what standards would apply if a private plaintiff sued a nonmedia defendant, and referred to its previous footnote to the same effect in *Hutchinson.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral Overview

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14-142 California Points & Authorities § 142.31

§ 142.31 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Failure of Private Individual to Allege Actual Malice by Media Defendant if Plaintiff Seeks Compensation Only for Damages for Other Than Actual Injury and if Allegedly Defamatory Statement Related to Matter of Public Concern

[1] FORM

[*Caption. See § 142.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT PLAINTIFF, A PRIVATE INDIVIDUAL, HAS NOT SOUGHT COMPENSATION FOR DAMAGES FOR ACTUAL INJURY BUT INSTEAD HAS ONLY SOUGHT COMPENSATION FOR DAMAGES FOR OTHER THAN ACTUAL INJURY, AND HAS FAILED TO ALLEGE THAT THE MEDIA DEFENDANT ACTED WITH ACTUAL MALICE IN A DEFAMATION SUIT IN WHICH THE FACE OF THE COMPLAINT SHOWS THAT THE ALLEGEDLY DEFAMATORY STATEMENT RELATED TO A MATTER OF PUBLIC CONCERN.

A. Objection by Demurrer. [*See § 142.20, Paragraph A.*]

B. Recovery Limited to Actual Damages if Actual Malice Not Shown. A private figure plaintiff who brings a defamation action against a media defendant for publishing speech involving a matter of public concern may not recover presumed or punitive damages if that plaintiff has failed to show that the defendant published the speech with knowledge of its falsity or with reckless disregard for the truth (*Gertz v. Welch (1974) 418 U.S. 323, 349, 94 S. Ct. 2997, 41 L. Ed. 2d 789* ; *see Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. (1985) 472 U.S. 749, 759-763, 105 S. Ct. 2939, 86 L. Ed. 2d 593, 603-604)* . Instead, such a plaintiff may only recover those damages that compensate him or her for actual injury (*Gertz v. Welch (1974) 418 U.S. 323, 349-350, 94 S. Ct. 2997, 41 L. Ed. 2d 789*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a general demurrer to a complaint if the demurrer asserts that the complaint fails to state facts sufficient to constitute a cause of action in that it appears on the face thereof, or from any matter of which the court is required to or may take judicial notice, that the plaintiff is a private citizen suing a media defendant and has failed to allege actual malice in a case in which no actual injury was allegedly sustained and the face of the complaint shows that the allegedly defamatory statement related to a matter of public concern.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications these points may be used to support a defendant's motion for judgment on the pleadings or a defendant's motion for summary judgment [*see Code Civ. Proc. § 437c*].

[c] Related Pleading and Practice Forms

For a form of demurrer to a complaint based on a private individual's failure to allege actual malice if no actual injury has been alleged, see Ch. 340, *Libel and Slander* , in California Forms of Pleading and Practice (Matthew Bender). For forms of affirmative defenses based on the same ground, and a general form for summary judgment based on an affirmative defense to a defamation action, see the same chapter.

[3] Discussion of Authorities

[a] Recovery Limited to Actual Damages if Actual Malice Not Shown

The Supreme Court held in ***Gertz v. Welch*** *(1974) 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789* (discussed in *§ 142.25[3][c]*), that private individuals suing media defendants for defamation are restricted to compensation for actual injury unless they meet the *New York Times* test by proving that the defendant either knew of the falsity of the statement or had a reckless disregard for the truth of the statement (*418 U.S. 323, 349)* . The Court stated that actual injury includes impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering as well as out of pocket losses. To recover presumed or punitive damages, the Court held that the plaintiff must prove actual malice (*418 U.S. 323, 349-350)* .

The rules of *Gertz* do not apply in all cases brought by private individuals. In ***Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*** *(1985) 472 U.S. 749, 105 S. Ct. 2939, 86 L. Ed. 2d 593* , the United Supreme Court limited *Gertz* by holding that it does not apply to cases in which the allegedly defamatory statement does not relate to a matter of public concern (*472 U.S. 749, 759-763)* . For a discussion of what constitutes a matter of public concern, see *§ 142.30[3][a]*.

Prior to the *Dun & Bradstreet* decision, there was an open question as to whether the rules of *Gertz* applied if the defendant was not a member of the media [*see Hutchinson v. Proxmire (1979) 443 U.S. 111, 133 n.16, 99 S. Ct. 2675, 61 L. Ed. 2d 411* (open question as to whether the protection of *First Amendment* extends to cases involving nonmedia defendants)]. In *Dun & Bradstreet*, the four member dissent and Justice White's concurring opinion indicate that a majority of the Supreme Court feel that the rules of *Gertz* apply equally to nonmedia defendants (*86 L. Ed. 2d 593,*

611) . However, in *Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 776-777, 106 S. Ct. 1558, 89 L. Ed. 2d 783* (discussed in *§ 142.32[3][a]*), the Supreme Court again expressly left open the question of what standards would apply if a private plaintiff sued a nonmedia defendant, and referred to its previous footnote to the same effect in *Hutchinson.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral Overview

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14-142 California Points & Authorities § 142.32

§ 142.32 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Failure of Private Figure Plaintiff to Allege Falsity if Suing for Allegedly Defamatory Statement Related to Matter of Public Concern

[1] FORM

[*Caption. See § 142.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT PLAINTIFF, A PRIVATE FIGURE, HAS FAILED TO ALLEGE THAT THE STATEMENT, RELATED TO A MATTER OF PUBLIC CONCERN, PUBLISHED BY DEFENDANT, WAS FALSE.

A. Objection by Demurrer. [*See § 142.20, Paragraph A.*]

B. Private Plaintiff Suing Media Defendant Must Show Falsity. A private figure plaintiff who brings a defamation action against a media defendant for publishing speech related to a matter of public concern is constitutionally required to bear the burden of showing the falsity of the allegedly defamatory statement at issue before recovering damages in a suit for defamation (*Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 776-777, 106 S. Ct. 1558, 89 L. Ed. 2d 783* ; *James v. San Jose Mercury News, Inc. (1993) 17 Cal. App. 4th 1, 4, 11, 20 Cal. Rptr. 2d 890*).

[*Optional*] **C. Private Plaintiff Suing Nonmedia Defendant on Matter of Public Interest Must Show Falsity.** A private-figure plaintiff also bears the burden of proving the falsity of allegedly defamatory statements in an action against nonmedia defendants when the speech concerns a matter of public interest (*Integrated Healthcare Holdings, Inc. v. Fitzgibbons (2006) 140 Cal. App. 4th 515, 529, 44 Cal. Rptr. 3d 517* ; *Nizam-Aldine v. City of Oakland (1996) 47 Cal. App. 4th 364, 375, 54 Cal. Rptr. 2d 781*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a demurrer to an action brought by a private figure plaintiff against a defendant who has published speech related to a matter of public concern, if the plaintiff has failed to allege the falsity of the allegedly defamatory statement.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law raised. If appropriate, counsel may also combine these points with those in §§ 142.30-142.31.

[b] Related Uses

With appropriate modifications, these points may be used to support a defendant's motion for judgment on the pleadings or a defendant's motion for summary judgment [*see Code Civ. Proc. § 437c*].

[c] Related Pleading and Practice Forms

For related discussion and forms concerning the failure of a private individual to allege the falsity of the allegedly defamatory statement, see Ch. 340, *Libel and Slander* , in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Private Plaintiff Suing Media Defendant Must Show Falsity

In ***Philadelphia Newspapers, Inc. v. Hepps*** *(1986) 475 U.S. 767, 106 S. Ct. 1558, 89 L. Ed. 2d 783* , the plaintiffs (the principal stockholder of a franchisor corporation, the franchisor corporation, and its franchisees) brought a defamation action against a Philadelphia newspaper for publishing a series of articles. The general theme of the articles was that the plaintiffs had links to organized crime and used some of those links to influence the state of Pennsylvania's governmental processes. After both sides had presented all the evidence at the trial, the trial court concluded that Pennsylvania's statute giving a defamation defendant the burden of proving the truth of the allegedly defamatory statements violated the Federal Constitution. The trial court therefore instructed the jury that the plaintiffs bore the burden of proving the falsity of the allegedly defamatory statements. The jury ruled for the defendant, and awarded no damages to the plaintiffs. The plaintiffs appealed to the Pennsylvania Supreme Court, which reversed and remanded for a new trial on the grounds that the plaintiffs were only required to show fault in a defamation action, and that a showing of fault did not require a showing of falsity. The defendant then sought a writ of certiorari from the United States Supreme Court.

The United States Supreme Court granted certiorari, and reversed and remanded the decision of the Pennsylvania Supreme Court. The Court held that the plaintiffs, as private figures bringing a defamation action against a media defendant for publishing speech related to a matter of public concern, had the burden of showing the falsity of the allegedly defamatory statements. Specifically, the Court held that the common law rule that a defendant must bear the burden of proving truth must fall to a constitutional requirement that a plaintiff, under these circumstances, bear the burden of showing falsity as well as fault before recovering damages (*475 U.S. 767, 776-777)* . However, the Court left open the question of the quantity of proof of falsity that a private figure plaintiff is required to present before recovering damages. The Court also left open the questions of what standards apply if a private plaintiff sues a nonmedia defendant, or if a state provided a plaintiff with the opportunity to obtain a judgment that declared the speech at issue to be false but did not give rise to liability for damages (*475 U.S. 767, 779 n.4*).

In ***James v. San Jose Mercury News, Inc.*** *(1993) 17 Cal. App. 4th 1, 20 Cal. Rptr. 2d 890* , a California court held that a deputy public defender's performance, and administration of the criminal laws in general and laws relating to

child molestation in particular, were matters of legitimate public interest and concern. Therefore, the qualified constitutional protections applicable to publications by media defendants about private plaintiffs on matters of public interest or public concern applied when the deputy public defender sued a newspaper for libel for printing a column that named him in the context of a discussion of asserted violations of law by defense attorneys in criminal cases involving child victims (*17 Cal. App. 4th 1, 4, 11)* .

[b] Private Plaintiff Suing Nonmedia Defendant on Matter of Public Interest Must Show Falsity

In ***Integrated Healthcare Holdings, Inc. v. Fitzgibbons*** *(2006) 140 Cal. App. 4th 515, 44 Cal. Rptr. 3d 517* , plaintiff was a holding company heavily leveraged by debt that attempted to buy four hospitals in Orange County. Plaintiff purchased one of those hospitals after concessions were made to the medical staff to win their approval. Two months after the sale was completed, plaintiff's lender served plaintiff with a notice of default. After this was revealed, a member of the medical staff of this hospital sent an e-mail message to members of the medical executive committee critical of plaintiff. This e-mail message was subsequently forwarded to Blue Cross, with whom plaintiff was negotiating for higher insurance payments, and the message stalled negotiations, allegedly costing plaintiff over $500,000. Plaintiff sued the author of the e-mail for defamation, among other causes of action. Defendant filed a motion to strike the complaint under the anti-SLAPP statute, *Code Civ. Proc. § 425.16*. The trial court denied the motion and defendant appealed.

The court of appeal reversed the denial of the motion to strike. The court first held that the anti-SLAPP statute applied to the action because the subject of the e-mail, plaintiff's financial ability to purchase and operate the hospitals, was a matter of public interest (*140 Cal. App. 4th 515, 523)* . Thus, plaintiff was required to demonstrate a probability of success on the merits of the asserted claims in order to defeat the motion to strike. The court then held that plaintiff could not show a probability of success on the defamation claim. The court placed on plaintiff the burden of proving the falsity of the defendant's statements, noting that California courts had previously held that a private plaintiff bears the burden of establishing the falsity of a nonmedia defendant's statements when the statements concern a matter of public interest. The court then held that plaintiff failed to demonstrate the falsity of any statements in the e-mail that were arguably defamatory (*140 Cal. App. 4th 515, 529-531)* .

In ***Nizam-Aldine v. City of Oakland*** *(1996) 47 Cal. App. 4th 364, 54 Cal. Rptr. 2d 781* , the plaintiffs, who were licensed civil engineers, sued for defamation on the basis of statements allegedly accusing the plaintiffs of conducting inaccurate and fraudulent boundary surveys. The trial court instructed the jury that the defendant had the burden of proving that the allegedly defamatory statements were true, and the jury returned a plaintiffs' verdict. The defendant contended that the jury instruction constituted error.

Finding that the alleged defamatory statements pertained to a matter of public concern, the court of appeal reversed the judgment. The court noted that the United States Supreme Court has held in Philadelphia Newspapers, Inc. v. Hepps, 475 (1986) U.S. 767, *106 S. Ct. 1558, 89 L. Ed. 2d 783* , that a private-figure plaintiff cannot recover damages from a media defendant for publishing allegedly defamatory statements regarding a matter of public concern without a showing that the statements at issue are false (*47 Cal. App. 4th 364, 372)* . The court then held that a distinction between media and nonmedia defendants for this rule is inconsistent with the *First Amendment* rationale for the rule, and concluded that *Hepps* applied even though the defendant was not a media defendant (*47 Cal. App. 4th 364, 375)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral Overview

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 142 LIBEL AND SLANDER (DEFAMATION)
PART II. FORMS

14-142 California Points & Authorities § 142.33

§ 142.33 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Failure of Plaintiff Suing Publisher or Broadcaster to Allege Notice and Demand for Retraction [Civ. Code § 48a(1)] if Special Damages Are Not Sought

[1] FORM

[*Caption. See § 142.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT FAILS TO ALLEGE NOTICE AND DEMAND FOR RETRACTION AND DOES NOT SEEK SPECIAL DAMAGES.

A. Objection by Demurrer. [*See § 142.20, Paragraph A.*]

B. Demand for Correction Required. A plaintiff suing a publisher or broadcaster must allege that within 20 days after his knowledge of the publication or broadcast, he or she notified the defendant of the allegedly defamatory statements and demanded a correction of them before he or she can recover any damages except special damages (*Civ. Code § 48a(1)*).

C. Effect of Failure to Demand Correction. The recovery of any damages except special damages is barred unless the plaintiff complies with the provisions of the retraction statute (*Civ. Code § 48a*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a general demurrer to a complaint if the demurrer asserts that the complaint fails to state facts sufficient to constitute a cause of action in that it appears on the face thereof, or from any matter of which the court is required to or may take judicial notice, that the plaintiff has failed to comply with the provisions of the retraction statute and is not seeking any special damages.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications these points may be used to support a defendant's motion for judgment on the pleadings or a defendant's motion for summary judgment [*see Code Civ. Proc. § 437c*].

[c] Related Pleading and Practice Forms

For a form of demurrer to a complaint based on a plaintiff's failure to allege notice and demand for retraction if special damages are not being sought, see Ch. 340, *Libel and Slander* in California Forms of Pleading and Practice (Matthew Bender).

For a form of notice of motion for partial summary judgment with respect to general and punitive damages on the ground of noncompliance with the retraction statute, see the same chapter.

Legal Topics:

For related research and practice materials, see the following legal topics:
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14-142 California Points & Authorities § 142.34

§ 142.34 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Failure of Plaintiff Suing Publisher or Broadcaster to Notify Defendant With Sufficient Specificity What Statements Were Allegedly Defamatory if Special Damages Are Not Sought [Civ. Code § 48a(1)]

[1] FORM

[*Caption. See § 142.24.*]

SUMMARY JUDGMENT FOR DEFENDANT IS PROPER WHEN PLAINTIFF SUING A MEDIA DEFENDANT HAS FAILED TO NOTIFY DEFENDANT WITH SUFFICIENT SPECIFICITY WHAT STATEMENTS WERE DEFAMATORY AND IS NOT SEEKING SPECIAL DAMAGES.

A. Summary Judgment. [*See § 142.24, Paragraph A.*]

B. Specificity Required in Demand for Retraction. Even if the plaintiff has attempted to comply with the retraction statute (*Civ. Code § 48a*), the notice and demand must be specific enough to enable the defendant to have a reasonable comprehension of which statements the plaintiff was protesting and wished the defendant to correct (*Kapellas v. Kofman (1969) 1 Cal. 3d 20, 31-32, 81 Cal. Rptr. 360, 459 P.2d 912* ; *Gomes v. Fried (1982) 136 Cal. App. 3d 924, 938, 186 Cal. Rptr. 605*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for summary judgment if the motion asserts that the defendant is entitled to a judgment as a matter law because the plaintiff has failed to comply with the retraction statute because his notice and demand for retraction were not sufficiently specific and is not seeking any special damages.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations that support the motion [*Code Civ. Proc. § 437c*].

[b] Related Pleading and Practice Form

For a form of affirmative defense based on the plaintiff's failure to comply with the retraction statute by stating with sufficient specificity which statements allegedly defamed him, see Ch. 340, *Libel and Slander* in California Forms of Pleading and Practice (Matthew Bender). For a general form of notice of motion for summary judgment based on an affirmative defense to a defamation action, see the same chapter.

[3] Discussion of Authorities

[a] Specificity Required in Demand for Retraction

In ***Kapellas v. Kofman*** *(1969) 1 Cal. 3d 20, 31-32, 81 Cal. Rptr. 360, 459 P.2d 912* , the Supreme Court reiterated the principle enunciated in *MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 554, 343 P.2d 36* , that the key issue in evaluating the adequacy of a plaintiff's notice under the retraction statute is whether the publisher reasonably should have comprehended which statements the plaintiff protested and wished corrected. The Supreme Court upheld the plaintiff's notice, which demanded the correction of every statement concerning the conduct of her children and every statement concerning her suitability as a mother that had appeared in specified newspaper articles (*1 Cal. 3d 20, 31)* .

The facts and procedural background of ***Gomes v. Fried*** *(1982) 136 Cal. App. 3d 924, 186 Cal. Rptr. 605* , are discussed in *§ 142.20[3][c]*. One of the issues raised on appeal was whether or not the retraction was sufficient under *Civ. Code § 48a*. The court of appeal found that the retraction letter, which referred only to certain statements in the published article, was not specific enough to allow the publisher to reasonably comprehend that a retraction of a photograph and its caption was also being requested. The court held that the plaintiff had not met the condition precedent of *Civ. Code § 48a* and therefore could not recover general damages (*136 Cal. App. 3d 924, 938)* .

[4] Additional Authorities

[a] Specificity Required in Demand for Retraction

In *Anderson v. Hearst Publ'g Co. (S.D. Cal. 1954) 120 F. Supp. 850* , the federal district court applied the California retraction statute and held that the plaintiff's demand for retraction of certain statements in an allegedly libelous newspaper article was not sufficiently specific (*120 F. Supp. 850, 852)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral Overview

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14-142 California Points & Authorities § 142.35

§ 142.35 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Failure of Plaintiff Suing Publisher or Broadcaster to Notify Defendant of Allegedly Defamatory Statements Within Statutory Period if Special Damages Are Not Sought [Civ. Code § 48a(1)]

[1] FORM

[*Caption. See § 142.24.*]

SUMMARY JUDGMENT FOR DEFENDANT IS PROPER WHEN PLAINTIFF SUING A MEDIA DEFENDANT HAS FAILED TO SERVE DEMAND FOR RETRACTION ON DEFENDANT WITHIN STATUTORY PERIOD AND IS NOT SEEKING SPECIAL DAMAGES.

A. Summary Judgment. [*See § 142.24, Paragraph A.*]

B. Statutory Period for Serving Retraction Demand. Even if a plaintiff has attempted to comply with the retraction statute (*Civ. Code § 48a*), the notice and demand for correction must be served on the defendant within the 20-day period as required by subdivision (1) of *Section 48a of the Civil Code*.
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for summary judgment if the motion asserts that the defendant is entitled to a judgment as a matter of law because the plaintiff failed to comply with the retraction statute by

serving it on the plaintiff within 20 days after learning of the publication or broadcast and is not seeking any special damages.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the point of law raised. In addition, counsel should attach affidavits or declarations that support the motion [*Code Civ. Proc. § 437c*].

[b] Related Pleading and Practice Forms

For a form of affirmative defense based on the plaintiff's failure to comply with the retraction statute by notifying the defendant of the allegedly defamatory statements within the statutory period, see Ch. 340, *Libel and Slander* in California Forms of Pleading and Practice (Matthew Bender). For a general form of notice of motion for summary judgment based on a affirmative defense to a defamation action, see the same chapter.

Legal Topics:

For related research and practice materials, see the following legal topics:
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14-142 California Points & Authorities § 142.36

§ 142.36 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Failure of Plaintiff Suing Publisher or Broadcaster to Serve Demand on Owner Rather Than Originator of Allegedly Defamatory Statements if Special Damages Are Not Sought [Civ. Code § 48a(1)]

[1] FORM

[*Caption. See § 142.24.*]

SUMMARY JUDGMENT FOR DEFENDANT IS PROPER WHERE PLAINTIFF SUING A MEDIA DEFENDANT HAS SERVED DEMAND FOR RETRACTION ON THE ORIGINATOR OF STATEMENT RATHER THAN ON THE OWNER AND IS NOT SEEKING SPECIAL DAMAGES.

A. Summary Judgment. [*See § 142.24, Paragraph A.*]

B. Service of Demand on Owner. Even if a plaintiff has attempted to comply with the retraction statute (*Civ. Code § 48a*), the notice and demand for correction must be served on the owner rather than on the originator of the allegedly defamatory statements (*Field Research Corp. v. Superior Court (1969) 71 Cal. 2d 110, 113-115, 77 Cal. Rptr. 243, 453 P.2d 747* ; *Pridonoff v. Balokovich (1951) 36 Cal. 2d 788, 791, 228 P.2d 6*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for summary judgment if the motion asserts that the

defendant is entitled to a judgment as a matter of law because the plaintiff failed to comply with the retraction statute by serving it on an employee of the owner of the newspaper or broadcasting station rather than the owner and is not seeking any special damages.

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law raised. In addition, counsel should attach affidavits or declarations that support the motion [*Code Civ. Proc. § 437c*].

[b] Related Pleading and Practice Forms

For forms of affirmative defenses based on the plaintiff's failure to comply with the retraction statute, see Ch. 340, *Libel and Slander* in California Forms of Pleading and Practice (Matthew Bender). For a general form of notice of motion for summary judgment based on an affirmative defense to a defamation action, see Part II of the same chapter.

[3] Discussion of Authorities

[a] Service of Demand on Owner

In ***Field Research Corp. v. Superior Court*** *(1969) 71 Cal. 2d 110, 77 Cal. Rptr. 243, 453 P.2d 747* , the Supreme Court, in holding that the retraction statute did not apply to nonparticipants in the dissemination of news, commented as follows: "With respect to the defamations that their employees or other participants have caused to be published or broadcast, it is only the publisher or broadcaster who has the power effectively to correct or retract." Thus, "... there is good reason for the section to designate the publisher or broadcaster as the party on whom notice to retract must be served" (*71 Cal. 2d 110, 115)* .

In ***Pridonoff v. Balokovich*** *(1951) 36 Cal. 2d 788, 228 P.2d 6* , the plaintiff sued the authors of a libelous article rather than the publisher. He contended that because service of the demand for correction must be made on the publisher, the retraction statute covered only the publisher and not his employees and other participants in publishing the newspaper. The Supreme Court rejected this contention and held that the retraction statute protects all participants in newspaper publications. In so holding, it stated: "When error is made ... it is the publisher who has power to make correction. In providing for the substitution of a retraction for general and exemplary damages it was reasonable, therefore, for the legislature to provide that the notice should be served upon him" (*36 Cal. 2d 788, 791)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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14-142 California Points & Authorities § 142.37

§ 142.37 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10]--Failure of Private Party Suing Newspaper Publisher or Broadcaster to Serve Proper Demand for Retraction or Allege Special Damages [Civ. Code § 48a]

[1] FORM

[*Caption. See § 142.20.*]

PLAINTIFF'S COMPLAINT FOR DEFAMATION AGAINST DEFENDANT, A _____ [NEWSPAPER PUBLISHER *or* RADIO BROADCASTER *or* TELEVISION BROADCASTER], FAILS TO STATE A CAUSE OF ACTION BECAUSE IT DOES NOT ALLEGE EITHER A DEMAND FOR RETRACTION IN ACCORDANCE WITH SECTION 48a OF THE CIVIL CODE OR SPECIAL DAMAGES.

A. Objection by Demurrer. [*See § 142.20, Paragraph A.*]

B. Statutory Period for Serving Retraction Demand. A plaintiff suing a newspaper publisher or a broadcaster must allege that within 20 days after his or her knowledge of the publication or broadcast, he or she notified the defendant of the allegedly defamatory statements and demanded a correction of them before he or she can recover any damages except special damages (*Civ. Code § 48a(1)*).

[*Optional*] **C. Conditional Demand Does Not Comply With Statute.** A conditional request for a retraction is not a demand in accordance with *Civil Code Section 48a* (*O'Hara v. Storer Communications, Inc. (1991) 231 Cal. App. 3d 1101, 1111, 282 Cal. Rptr. 712*).

[*Optional*] **D. Retraction Demand Only Effective as to Identified Plaintiffs.** A demand for retraction is only effective as to the plaintiffs listed or so described in the demand such that the defendant fairly knows who is objecting to the challenged publication (*Anschutz Entertainment Group, Inc. v. Snepp (2009) 171 Cal. App. 4th 598, 642-643, 90 Cal. Rptr. 3d 133*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a general demurrer to a complaint if the demurrer asserts that the complaint fails to state facts sufficient to constitute a cause of action in that it appears on the face of the complaint, or from any matter of which the court is required to or may take judicial notice, that the defendant is a newspaper publisher or radio (or television [*see Civ. Code § 48.5(4)*]) broadcaster and the plaintiff failed to allege that he or she served a proper demand for a retraction in accordance with the requirements of *Civ. Code § 48a*. A defamation plaintiff who fails to demand such a retraction may recover only special damages [*see Civ. Code § 48a(1)*].

With appropriate modifications, these points may be used to support a defendant's motion for judgment on the pleadings or a defendant's motion for summary judgment [*see Code Civ. Proc. § 437c*]. They may also be adapted for use in an appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, if appropriate, counsel should show that an asserted demand for retraction is insufficient because it was merely conditional, and that the plaintiff failed to pursue communications with the defendant to an extent sufficient to inform the defendant of his or her requirements for an effective retraction.

[b] Related Pleading and Practice Forms

For discussion and forms pertaining to the retraction statute, see Ch. 340, *Libel and Slander* in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Statutory Period for Service Retraction Demand

The retraction statute, *Civ. Code § 48a*, restricts persons suing a newspaper publisher or a radio or television broadcaster to the recovery of special damages if those persons do not comply with its provisions.

[b] Conditional Demand Does Not Comply With Statute

In ***O'Hara v. Storer Communications, Inc.*** *(1991) 231 Cal. App. 3d 1101, 282 Cal. Rptr. 712* , a woman who had been a witness in a grand jury investigation brought an action against the owner of a television station, based on a television news report that transposed her name with the name of a prostitute in connection with the same investigation. A few weeks after the broadcast, the plaintiff's attorney sent a letter to the television station, requesting it to contact him or have its counsel contact him to discuss the manner of retraction. The letter emphasized that the retraction should by published only after it had been discussed with the plaintiff's attorney. The station immediately contacted the plaintiff's attorney, sent him transcripts of the various broadcasts as he had requested, and told him that it was prepared to air a retraction or correction as soon as he let the station know what form he wanted the retraction to take. Approximately a month later, the station's attorney contacted the plaintiff's attorney, who said that he would call back, but did not. Neither the station nor its attorney heard from the plaintiff's attorney again until approximately eight months later, when the attorney demanded compensation of $2.5 million by letter. Two months later, the plaintiff filed her complaint, stating four different causes of action: defamation, intentional infliction of emotional distress, negligence, and invasion

of privacy, alleging that the broadcast was slanderous because it imputed to the plaintiff the reference of being charged with a crime and a want of chastity. The trial court granted summary adjudication in favor of the defendant, finding that the plaintiff failed to comply with *Civ. Code § 48a* in making a proper demand for retraction, and that the defendant did not refuse to make a correction. At trial, in response to a series of motions in limine, the trial court made the following rulings: (1) because of the previous adjudication that the plaintiff had not complied with the retraction statute, she could not present evidence of general damages; (2) the plaintiff could not present evidence of loss of reputation, hurt feelings, and depression; (3) the plaintiff could present psychiatric testimony regarding her inability to work, with the court specially instructing the jury that it could not consider the testimony for the purposes of assessing emotional distress damages; and (4) the plaintiff could present three witness on the subject of professional capabilities before the slander. The plaintiff presented evidence regarding a loss of clients because of the defamation, as well as loss of income from her failure to obtain employment, based on her potential employer's observations that mental distress ensuing from the defamation rendered her unable to perform a job for which she might otherwise have been hired. The jury found in favor of the plaintiff, awarding $300,000 in damages. Both parties appealed.

The court of appeal affirmed in every respect except the award of prejudgment interest (*231 Cal. App. 3d 1101, 1119)* . With respect to the plaintiff's contention that the trial court erred in finding that she had failed to comply with *Civ. Code § 48a* and that the defendant had not refused to broadcast a correction, the court held that her attorney's communications with the defendant constituted only a conditional request (*231 Cal. App. 3d 1101, 1110-1111)* . The court noted that the letter sent by the plaintiff's attorney was a conditional request, with the plaintiff controlling the conditions to be met. The station promptly indicated its willingness to broadcast a retraction and meet her conditions. However, neither the plaintiff nor her attorney ever set those conditions, making it impossible for the station to comply with the conditional request for a retraction. The court held that this conditional request is not a demand in accordance with *Civ. Code § 48a* (*231 Cal. App. 3d 1101, 1111)* . The court further held that the plaintiff was properly allowed to produce evidence that a prospective employer failed to hire the plaintiff after noticing indications of the plaintiff's impaired mental condition caused by the defamation, and that this evidence supported an award of special, rather than general, damages (*231 Cal. App. 3d 1101, 1113-1115)* .

[c] Retraction Demand Only Effective as to Identified Plaintiffs

In ***Anschutz Entertainment Group, Inc. v. Snepp*** *(2009) 171 Cal. App. 4th 598, 90 Cal. Rptr. 3d 133* , plaintiffs were a parent corporation and its wholly-owned subsidiary, the latter of which owned a sports arena. Plaintiffs brought suit against media defendants who allegedly slandered plaintiffs by reporting on the arena's allegedly inadequate fire safety systems. A demand for a retraction was made to the defendants, but that demand listed only the subsidiary and did not mention the parent corporation, as apparently it was common knowledge that the arena owners were a wholly-owned subsidiary of the parent corporation. The trial court denied a special motion to strike brought under *Code Civ. Proc. § 425.16* by the media defendants as to those causes of action alleged by the parent corporation. Defendants appealed that denial, arguing that because the parent corporation was not listed in the retraction demand, that demand was not effective as to the parent corporation. Thus, plaintiff parent corporation was limited to seeking special damages, but because it had failed to specifically plead such damages, it was barred from any recovery.

The court of appeal ordered that the special motion to strike be granted as to that part of the complaint that sought to impose liability on the media defendants in favor of the parent corporation without the parent corporation being listed in the applicable demand for retraction. The court noted that *Civ. Code § 48a(1)* requires the "plaintiff" to serve the retraction demand, suggesting that the plaintiff should be named in the demand. The court also noted that naming the plaintiff who is damaged furthers the legislative purpose of allowing a media defendant to determine what needs correction, and a failure to name the specific plaintiff limits the defendant's ability to determine the necessity and scope of any correction (*171 Cal. App. 4th 598, 642*). Thus, the court held that a demand for retraction is only effective as to the plaintiffs listed or so described in the demand such that the defendant fairly knows who is objecting to the challenged publication. Under the instant facts, the court concluded that merely stating that a business entity was seeking a retraction did not preserve the rights of that entity's parent corporation to seek general or punitive damages.

Because the pleadings did not allege special damages suffered by the parent corporation, that plaintiff could recover no damages on those pleadings and the motion to strike should have been granted (*171 Cal. App. 4th 598, 642-643)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral Overview

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 142 LIBEL AND SLANDER (DEFAMATION)
PART II. FORMS

14-142 California Points & Authorities § 142.38

§ 142.38 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Nonliability of Radio or Television Broadcaster Who Has Exercised Due Care to Prevent Defamatory Statement [Civ. Code § 48.5(1)]

[1] FORM

[*Caption. See § 142.24.*]

SUMMARY JUDGMENT FOR DEFENDANT IS PROPER WHEN DEFENDANT BROADCASTER HAS EXERCISED DUE CARE TO PREVENT THE DEFAMATORY STATEMENT.

A. Summary Judgment. [*See § 142.24, Paragraph A.*]

B. Due Care as Defense. If a person who is not the owner of a broadcasting station and is not the agent of the owner makes a defamatory statement as part of a broadcast, neither the owner nor the agent is liable for damages if the owner or agent exercised due care to prevent the utterance of the statement (*Civ. Code § 48.5(1)*; *see Correia v. Santos (1961) 191 Cal. App. 2d 844, 856, 13 Cal. Rptr. 132*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for summary judgment on the ground that the defendant is entitled to a judgment as a matter of law because the defendant is either an owner of a broadcasting station or is an agent

of an owner, the allegedly defamatory statement was made by a person other than the defendant, and the defendant exercised due care to prevent the utterance of the statement.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law raised. In addition, counsel should attach affidavits or declarations that support the motion [*Code Civ. Proc. § 437c*].

[b] Related Pleading and Practice Forms

For a form of affirmative defense based on the fact that the defendant is an owner of a broadcasting station or an agent of such an owner and exercised due care to prevent the utterance of the allegedly defamatory statement, see Ch. 340, *Libel and Slander* in California Forms of Pleading and Practice (Matthew Bender). For a general form of notice of motion for summary judgment based on an affirmative defense to a defamation action, see the same chapter.

[3] Discussion of Authorities

[a] Due Care as Defense

Correia v. Santos *(1961) 191 Cal. App. 2d 844, 13 Cal. Rptr. 132* , was an action for damages for a slanderous radio broadcast. The court of appeal explained the substance of *Civ. Code § 48.5*, which provides the statutory defense for an owner or agent who is sued for defamation, but exercised due care to prevent the utterance of the statement. The court then pointed out that this statute was of no assistance to the plaintiff because it provides a defense. Moreover, because the owner and agent in this case were accused of causing and making the defamatory statements, the inapplicability of the statute to the case should have been obvious (*191 Cal. App. 2d 844, 856)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral Overview

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PART II. FORMS

14-142 California Points & Authorities § 142.39

§ 142.39 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Statements Substantially True--Private Figure Plaintiff Suing for Publishing Matter Not of Public Concern

[1] FORM

[*Caption. See § 142.24.*]

SUMMARY JUDGMENT FOR DEFENDANT IS PROPER WHEN THE STATEMENTS MADE WERE SUBSTANTIALLY TRUE.

A. Summary Judgment. [*See § 142.24, Paragraph A.*]

B. Truth as Defense. Truth provides an absolute defense against a defamation action (*Draper v. Hellman Commercial Trust & Sav. Bank (1928) 203 Cal. 26, 34, 263 P. 240* ; *Swaffield v. Universal Ecsco Corp. (1969) 271 Cal. App. 2d 147, 164, 76 Cal. Rptr. 680*).

C. Substantial Truth Sufficient. It is necessary for the defendant to prove only the substantial truth of the publication and not the literal truth of the publication (*Emde v. San Joaquin County Cent. Labor Council (1943) 23 Cal. 2d 146, 160, 143 P.2d 20* ; *Southwell v. Mallery, Stern & Warford (1987) 194 Cal. App. 3d 140, 239 Cal. Rptr. 371*).

D. Objective Truth as Standard. The objective truth of the publication, not the issue of whether the defendant subjectively believed it was either true or false, is the appropriate standard for judging the defense of justification (*Emde v. San Joaquin County Cent. Labor Council (1943) 23 Cal. 2d 146, 160, 143 P.2d 20* ; *Southwell v. Mallery, Stern & Warford (1987) 194 Cal. App. 3d 140, 239 Cal. Rptr. 371*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a defendant's contention in a libel action that the statements that the defendant made concerning the plaintiff were substantially true. However, this memorandum should only be used by a defendant who is being sued for publishing speech that is not a matter of public concern, if that defendant is sued by a private figure plaintiff. If a public figure sues for libel, or if a private figure plaintiff sues for publishing speech that is a matter of public concern, the plaintiff is constitutionally required to bear the burden of showing the falsity of the speech before recovering damages [*see Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 776-777, 779 n.4, 106 S. Ct. 1558, 89 L. Ed. 2d 783* (leaving open question of what standards apply to plaintiff who sues nonmedia defendant); *Nizam-Aldine v. City of Oakland (1996) 47 Cal. App. 4th 364, 54 Cal. Rptr. 2d 781* (extending the holding of *Hepps* to nonmedia defendants)]. A public figure plaintiff should use instead the points and *authorities in § 142.27[1]*; a private plaintiff suing for published speech of public concern should use instead the points and *authorities in § 142.32[1]* or *§ 142.40[1]*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations that support the motion [*Code Civ. Proc. § 437c*].

[b] Related Pleading and Practice Forms

For a form of affirmative defense based on justification, see Ch. 340, *Libel and Slander* , in California Forms of Pleading and Practice (Matthew Bender). For a general form of notice of motion for summary judgment based on an affirmative defense to a defamation action, see the same chapter.

[3] Discussion of Authorities

[a] Truth as Defense

Draper v. Hellman Commercial Trust & Sav. Bank *(1928) 203 Cal. 26, 263 P. 240* , was a libel action in which the Supreme Court, although acknowledging the principle that truth provides an absolute defense to a libel action, held that the defendant had not established the truth of the defamatory statements as a matter of law (*203 Cal. 26, 34)* .

In ***Swaffield v. Universal Ecsco Corp.*** *(1969) 271 Cal. App. 2d 147, 164, 76 Cal. Rptr. 680* , the court of appeal affirmed summary judgments granted on behalf of the defendants on the ground that the allegedly libelous statements were substantially true (*271 Cal. App. 2d 147, 164)* .

[b] Substantial Truth Sufficient; Objective Truth as Standard

Emde v. San Joaquin County Cent. Labor Council *(1943) 23 Cal. 2d 146, 143 P.2d 20* , was an action for libel against a union for stating that the management had violated its contract by hiring nonunion labor. The Supreme Court upheld the defense of justification, stating that a defendant needs to prove only the substantial truth of the statements in order to justify the "gist" or "sting" of the remark and that a defendant's subjective belief in the truth of the statements is immaterial as long as they were objectively true (*23 Cal. 2d 146, 160-161)* .

Southwell v. Mallery, Stern & Warford *(1987) 194 Cal. App. 3d 140, 239 Cal. Rptr. 371* , was an action by a physician against the publishers of an allegedly defamatory press release, published in two newspapers, stating that the plaintiff had been sued by a patient for malpractice in negligently removing her ovaries and uterus, although tests did not reveal evidence of cancer, and for discharging the patient from the hospital even though she had a fever of 101 degrees, and that the plaintiff's attorney had argued that the ovaries and uterus showed signs of precancer. The

defendants pleaded the affirmative defense of truth and moved for summary judgment. The trial court granted the motion, and the plaintiff appealed. Although it reversed the judgment on the ground there were material issues to be tried, the court of appeal recognized that a defendant is not required to prove the literal truth of an allegedly defamatory statement in every detail, so long as the imputation is substantially true so as to justify the "gist" or "sting" of the statement (*194 Cal. App. 3d 140, 145)* .

[4] Additional Authorities

[a] Substantial Truth Sufficient

In *Hughes v. Hughes (2004) 122 Cal. App. 4th 931, 19 Cal. Rptr. 3d 247* , the defendants were two brothers who, in the course of an interview with a reporter, stated that "our dad's a pimp," and this statement was published in the resulting magazine article. Their father sued the defendants for defamation, but the jury returned a verdict finding that the statements were not defamatory in light of evidence showing that the plaintiff had engaged in pimping activities in the past. On appeal, the plaintiff argued that the statement was made in the present tense, that he was not a pimp at the time that the statements were made, and that evidence that he may have engaged in such activities 20 years earlier could not be used to prove the truth of the statement. The court of appeal disagreed, noting that a statement is not defamatory if it is substantially true, or if the "gist" or "sting" of the remark is true (*122 Cal. App. 4th 931, 936)* . According to the court, the statement could reasonably be understood to mean that the father had engaged in pimping activity at one time in the past, and thus it was for the jury to decide how the statement should be understood. There was sufficient evidence to support the jury's apparent finding that the plaintiff had engaged in such activities at some point in the past, and thus the jury could reasonably conclude that the statement that the father "was a pimp" was substantially true (*122 Cal. App. 4th 931, 937-939)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral Overview

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14-142 California Points & Authorities § 142.40

§ 142.40 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Falsity Not Established--Private Figure Plaintiff Suing for Publishing Matter of Public Concern

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

SUMMARY JUDGMENT FOR DEFENDANT IS PROPER WHEN PLAINTIFF HAS NOT PROVEN THE STATEMENTS TO BE FALSE.

Plaintiff Must Show Falsity of Statement if Suing for Publishing Matter of Public Concern. A private-figure plaintiff can not recover damages for publishing a matter of public concern without showing that the statement at issue is false (*Nizam-Aldine v. City of Oakland (1996) 47 Cal. App. 4th 364, 372-375, 54 Cal. Rptr. 2d 781*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a defendant's contention in a libel action by a private figure plaintiff suing for publishing speech that is a matter of public concern that the plaintiff failed to establish that the statement was false.

This form may be combined with points pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the plaintiff is required to establish that a published statement is false.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that the statement at issue is a matter of public concern, and should argue that the plaintiff has not established that the statement is false.

[c] Related Memoranda

For memoranda relating to a libel action by a private plaintiff regarding a matter that is not of public concern, see *§ 142.39*.

[3] Discussion of Authorities

[a] Plaintiff Must Show Falsity of Statement if Suing for Publishing Matter of Public Concern

In ***Nizam-Aldine v. City of Oakland*** *(1996) 47 Cal. App. 4th 364, 54 Cal. Rptr. 2d 781* , the plaintiffs, who were licensed civil engineers, sued for defamation on the basis of statements allegedly accusing the plaintiffs of conducting inaccurate and fraudulent boundary surveys. The trial court instructed the jury that the defendant had the burden of proving that the allegedly defamatory statements were true, and the jury returned a plaintiffs' verdict. The defendant contended that the jury instruction constituted error.

Finding that the alleged defamatory statements pertained to a matter of public concern, the court of appeal reversed the judgment. The court noted that the United States Supreme Court has held in *Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 106 S. Ct. 1558, 89 L. Ed. 2d 783* , that a private-figure plaintiff can not recover damages from a media defendant for publishing allegedly defamatory statements regarding a matter of public concern without a showing that the statements at issue are false (*47 Cal. App. 4th 364, 372)* . The court then held that a distinction between media and nonmedia defendants for this rule is inconsistent with the *First Amendment* rationale for the rule, and concluded that Hepps applied even though the defendant was not a media defendant (*47 Cal. App. 4th 364, 375)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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14-142 California Points & Authorities § 142.41

§ 142.41 Supporting Motion for Summary Judgment Code Civ. Proc. § 437c[]--By Defendant--Adding Emphasis to Truthful Statement Not Defamatory

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

SUMMARY JUDGMENT FOR DEFENDANT IS PROPER IF DEFENDANT'S ONLY CONDUCT WAS TO ADD EMPHASIS OR HIGHLIGHTING TO AN OTHERWISE COMPLETELY ACCURATE OR TRUTHFUL STATEMENT OF FACT.

Adding Emphasis to Truthful Statement Not Defamatory. The mere addition of visible marks of simple emphasis or highlighting to an otherwise completely accurate and truthful statement of fact cannot, by itself, create a defamatory innuendo (*Smith v. Maldonado (1999) 72 Cal. App. 4th 637, 652, 85 Cal. Rptr. 2d 397*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a defendant's contention that the defendant cannot be held liable for defamation merely because the defendant republished or disseminated otherwise completely truthful and accurate statements of fact that were unedited and unchanged, aside from the addition of markings or highlighting for purposes of pointing out a particular passage or adding emphasis.

This form may be combined with points pertaining to the specific procedural context in which counsel wishes to raise this substantive issue.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence showing that the statements were completely truthful and accurate and

that the defendant did nothing other than republish or disseminate the original truthful statements with the addition of highlighting or other marks visibly emphasizing a particular passage or passages.

[3] Discussion of Authorities

[a] Adding Emphasis to Truthful Statement Not Defamatory

In ***Smith v. Maldonado*** *(1999) 72 Cal. App. 4th 637, 85 Cal. Rptr. 2d 397* , the plaintiffs alleged that they were defamed when the defendants copied and disseminated a newspaper report that mentioned the plaintiffs by name as being the clients of an attorney who was, as described in the article, the subject of a law enforcement sting operation stemming from the attorney's attempts to illegally influence a California legislator on behalf of the plaintiffs. Although the copies of the newspaper report disseminated by the defendants were otherwise completely unchanged and unedited, the paragraph naming the plaintiffs as the attorney's clients had been highlighted by the defendants with a yellow marker to draw attention to the passage. Although the plaintiffs conceded that the newspaper report was truthful and accurate, they sued the defendants for defamation, arguing that the addition of the highlighting created the impression that the plaintiffs were involved in the alleged illegal activities of the attorney discussed in the article. The trial court granted the defendants' motion for summary judgment, and the plaintiffs appealed.

The court of appeal affirmed, holding that the mere addition of simple emphasis or highlighting to an otherwise completely accurate and truthful statement of fact cannot, by itself, create a defamatory innuendo. The court noted that truth was an absolute defense to any libel action, that the truth of a statement was not changed merely by stating it more forcefully, and that a truthful and accurate statement of fact is not rendered defamatory merely by repeating it with greater emphasis. Because the plaintiffs did not argue that the newspaper article as originally published created a defamatory innuendo, the highlighting of a single paragraph in that article could not transform the republication into defamatory material (*72 Cal. App. 4th 637, 647-649)* . The court of appeal concluded that accepting the plaintiffs' argument would also have a deleterious and potentially unconstitutional effect on the dissemination of accurate news reports and would interject into defamation litigation numerous subjective considerations as to what is or is not undue emphasis (*72 Cal. App. 4th 637, 649)* . The court added that a truthful statement of fact may be transformed into potentially defamatory material only if it is substantively changed by editing or rearranging the words, removing language from or adding language to the original statement, or repeating or reproducing the statement in a different surrounding context in such a way as to render the statement reasonably susceptible of a different meaning or interpretation (*72 Cal. App. 4th 637, 652)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral Overview

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14-142 California Points & Authorities § 142.42

§ 142.42 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Presence of Qualified Privilege Disclosed on Face of Complaint

[1] FORM

[*Caption. See § 142.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT SHOWS ON ITS FACE THE PRESENCE OF A QUALIFIED PRIVILEGE.

A. Objection by Demurrer. [*See § 142.20, Paragraph A.*]

B. Qualified Privilege as Ground for Demurrer. If a complaint discloses facts that indicate that the allegedly defamatory statements were protected by a qualified privilege and there is not a sufficient allegation of malice to defeat the privilege, a demurrer is available as a matter of defense (*Locke v. Mitchell (1936) 7 Cal. 2d 599, 602, 61 P.2d 922*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a general demurrer to a complaint if the defendant asserts that the complaint fails to state facts sufficient to constitute a cause of action in that it appears on the face of the complaint that the allegedly defamatory statements were protected by a qualified privilege and there has not been a sufficient allegation of malice.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Form

For a form of demurrer to a complaint based on the presence of privilege disclosed on the face of a plaintiff's complaint see California Forms of Pleading and Practice, Ch. 340, *Libel and Slander* (Matthew Bender).

[3] Discussion of Authorities

[a] Qualified Privilege as Ground for Demurrer

In ***Locke v. Mitchell*** *(1936) 7 Cal. 2d 599, 61 P.2d 922* , the Supreme Court affirmed a general demurrer to the plaintiff's complaint on the grounds that the complaint disclosed a qualified privilege and the plaintiff had not pleaded facts showing the existence of malice at the time the communication was published (*7 Cal. 2d 599, 602-603)* .

[4] Additional Authorities

[a] Qualified Privilege as Ground for Demurrer

In *Emde v. San Joaquin County Cent. Labor Council (1943) 23 Cal. 2d 146, 143 P.2d 20* , statements had been printed in a newspaper devoted exclusively to the interests of organized labor, alleging that the plaintiff, an employer, had violated his contract with the union. The Supreme Court stated that these statements were protected by the qualified privilege and, because there was no evidence of malice of defeat the privilege in the record, the judgment for the plaintiff was reversed (*23 Cal. 2d 146, 161-162)* .

In *Tschirky v. Superior Court (1981) 124 Cal. App. 3d 534, 177 Cal. Rptr. 357* , the plaintiff was a union official who claimed he had been libeled by the defendant, a local political candidate, in the defendant's campaign advertisement. The defendant demurred, the trial court overruled the demurrer, and the defendant petitioned the court of appeal for a writ of mandate to compel the trial court to sustain the demurrer. The court of appeal issued the writ on the primary ground that the plaintiff's complaint revealed that the qualified privilege of fair comment applied to the defendant's statement. In order for the complaint to state a cause of action for libel, it had to allege facts constituting actual malice or lack of reasonable grounds for a belief in the truth of the statement by the defendant. Mere allegations of ill will, such as those made by the plaintiff, were not sufficient to override the privilege (*124 Cal. App. 3d 534, 538-539)* .

In *Deaile v. General Tel. Co. of Cal. (1974) 40 Cal. App. 3d 841, 115 Cal. Rptr. 582* , the plaintiff appealed from a jury's judgment for the defendant. The plaintiff had been employed by the defendant when it came to the defendant's attention that the plaintiff had been lying about her absences from work. The plaintiff was given a choice of either quitting, retiring, or being fired; she chose to retire. The plaintiff later filed a complaint in which she alleged that the defendant had defamed her when other employees were told the reasons underlying her resignation. The court of appeal held that the qualified privilege was applicable to the defendant's statements and that the jury was entitled not to believe that the defendant's statements were uttered with malice. Thus, judgment for the defendant was affirmed (*40 Cal. App. 3d 841, 846-849)* .

In *Noonan v. Rousselot (1966) 239 Cal. App. 2d 447, 48 Cal. Rptr. 817* , the court of appeal affirmed a judgment of dismissal after a demurrer was sustained. The plaintiff was a defeated candidate in the Republican primary election for a

congressional seat in the House of Representatives and had alleged that the defendants libeled him during the course of the campaign. The court of appeal held that the *New York Times* standard applied to political candidates as well as to public officials, and that the rules of pleading malice under the statutory privilege also applied to pleading constitutional malice. Judged by the standard that malice must be pleaded with specificity, the plaintiff's allegation that the defendants published the allegedly libelous material "wickedly and maliciously" was insufficient and thus the qualified privilege was properly determined to afford the ground for a demurrer (*239 Cal. App. 2d 447, 452-455)* .

In *Lesperance v. North Am. Aviation, Inc. (1963) 217 Cal. App. 2d 336, 31 Cal. Rptr. 873* , the plaintiff had been terminated by the defendant for absences from work without notifying the defendant. In response to an inquiry from a prospective employer, the defendant's reply was that the plaintiff had been terminated as a result of five consecutive working days' absence without notification. Holding that the complaint indicated on its face that the cause of action was protected by the qualified privilege, the court of appeal affirmed the granting of a general demurrer because the plaintiff had set forth no facts that showed that malice existed on the part of the defendant at the time it made its requested reports (*217 Cal. App. 2d 336, 341-342)* .

In *Everett v. California Teachers Ass'n (1962) 208 Cal. App. 2d 291, 25 Cal. Rptr. 120* , the plaintiff was an assistant superintendent of a school district at the time that a report was made concerning a professional problem in the district's elementary schools. The court of appeal affirmed a judgment of dismissal after a demurrer was sustained; it stated that the report was cloaked in the qualified privilege and that the plaintiff had not alleged malice with sufficient specificity (*208 Cal. App. 2d 291, 293-297)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral Overview

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14-142 California Points & Authorities § 142.43

§ 142.43 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Presence of Absolute Privilege Disclosed on Face of Complaint

[1] FORM

[*Caption. See § 142.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT SHOWS ON ITS FACE THE PRESENCE OF AN ABSOLUTE PRIVILEGE.

A. Objection by Demurrer. [*See § 142.20, Paragraph A.*]

B. Absolute Privilege as Ground for Demurrer. If a complaint discloses facts that indicate that the allegedly defamatory statements were protected by an absolute privilege, a demurrer is available as a matter of defense (*Whelan v. Wolford (1958) 164 Cal. App. 2d 689, 693, 331 P.2d 86*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a general demurrer to a complaint if the demurrer asserts that the complaint fails to state facts sufficient to constitute a cause of action in that it appears on the face thereof that the allegedly defamatory statements were absolutely privileged.

Counsel should insert argument in this form showing the relationship between the facts of his case and the point of law raised.

[b] Related Pleading and Practice Form

For a form of demurrer to a complaint based on the presence of privilege disclosed on the face of a plaintiff's complaint, see California Forms of Pleading and Practice, Ch. 340, *Libel and Slander* (Matthew Bender).

[3] Discussion of Authorities

[a] Absolute Privilege as Ground for Demurrer

In ***Whelan v. Wolford*** *(1958) 164 Cal. App. 2d 689, 331 P.2d 86* , the court of appeal affirmed a demurrer to a complaint in which it was disclosed that the defamatory matter was contained in a report to the city planning commission that protested the granting of a variance. The court held that the protest was made in the course of an official proceeding and, hence, it was protected by the absolute privilege of former Civ. Code § 47(2) [*now see Civ. Code § 47(b)*] (*164 Cal. App. 2d 689, 694)* .

[4] Additional Authorities

[a] Absolute Privilege as Ground for Demurrer

In *Young v. County of Marin (1987) 195 Cal. App. 3d 863, 241 Cal. Rptr. 169* , the plaintiff, an appointed county public defender, sued the county for damages based on the county administrator's dismissal of the plaintiff from her position and a release to the press of a memorandum addressed to the county board of supervisors, stating the reasons for the dismissal. With respect to the cause of action for libel, the court of appeal upheld the trial court's sustaining of the demurrer to the complaint, holding that the contents of the press release were protected under the "fair comment" privilege, as well as the absolute privilege under former Civ. Code § 47(2) [*now see Civ. Code § 47(b)*] (*195 Cal. App. 3d 863, 872)* .

In *Green v. Cortez (1984) 151 Cal. App. 3d 1068, 199 Cal. Rptr. 221* , the court of appeal upheld a dismissal entered after the demurrers of the defendants were sustained without leave to amend. The defendants were members of the media who had accurately reported defamatory statements made at a city council meeting. The statements were proven false and may have been reported either with knowledge of their falsity or in reckless disregard of their truth. Holding that the media enjoy an absolute privilege under former Civ. Code § 47(4) [*now see Civ. Code § 47(d)*], the court ruled that a city council meeting was an official proceeding authorized by law and that malice was not an issue (*151 Cal. App. 3d 1068, 1073-1074)* .

In *Pettitt v. Levy (1972) 28 Cal. App. 3d 484, 104 Cal. Rptr. 650* , the court of appeal sustained a demurrer to a complaint that alleged that the defendants had forged a document and submitted it to a city council and planning commission, thus causing the plaintiffs' application for a zoning variance to be denied. The court affirmed a determination that the absolute privilege applies even to a forged document if the document has a reasonable relation to the action and is made for the purpose of achieving the objects of the proceedings (*28 Cal. App. 3d 484, 489, 491)* .

In *Scott v. McDonnell Douglas Corp. (1974) 37 Cal. App. 3d 277, 112 Cal. Rptr. 609* , the court of appeal held that a demurrer to a complaint for libel and slander was properly sustained because the plaintiff alleged that several letters written to the plaintiff that criticized his work as a former city manager and that were read at a city council meeting were defamatory. It held that the statements were connected with the work of the city council and thus that they were absolutely privileged (*37 Cal. App. 3d 277, 285-286)* .

In *Friedman v. Knecht (1967) 248 Cal. App. 2d 455, 56 Cal. Rptr. 540* , the court of appeal sustained the granting of a

demurrer to a complaint for slander based on remarks that were made during the course of criminal proceedings in which the defendant was the Deputy District Attorney and was moving for a continuance and the plaintiff was defense counsel. The court held that the absolute privilege for statements made in a judicial proceeding applied because the defendant's remarks were related to the proceedings (*248 Cal. App. 2d 455, 457-463)* .

In *Thornton v. Rhoden (1966) 245 Cal. App. 2d 80, 53 Cal. Rptr. 706* , the court of appeal sustained a demurrer. The complaint for defamation had arisen out of a series of questions that the defendant, an attorney for a plaintiff in a related action, had asked at a deposition. The court held that the statements and questions were related to the litigation that gave rise to the deposition and, thus, that they were absolutely privileged (*245 Cal. App. 2d 80, 82-93)* .

In *Jordan v. Lemaire (1963) 222 Cal. App. 2d 622, 35 Cal. Rptr. 337* , the court of appeal held that the absolute privilege for judicial proceedings applied to statements uttered during the course of a prior proceeding to quiet title to property. Thus, the trial court properly sustained a demurrer to the complaint for slander (*222 Cal. App. 2d 622, 624-625)* .

In *Lewis v. Linn (1962) 209 Cal. App. 2d 394, 26 Cal. Rptr. 6* , the plaintiff was an attorney who was suing a municipal judge for allegedly slanderous remarks that the judge made from the bench during the course of a debate over a motion made by the plaintiff to disqualify him in a criminal proceeding. The court of appeal sustained the demurrer and held that the absolute privilege for judicial immunity applied because the statements had some relationship to the judicial function that the judge was performing and to the proceeding over which he had jurisdiction (*209 Cal. App. 2d 394, 398-400)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationDefensesPrivilegesAbsolute PrivilegesTortsIntentional TortsDefamationElementsGeneral Overview

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 142 LIBEL AND SLANDER (DEFAMATION)
PART II. FORMS

14-142 California Points & Authorities § 142.44

§ 142.44 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Complaint in Action for Defamation Arising Out of Criminal Prosecution for Child Abuse Fails to Allege Complaint Is Not Barred by Civ. Code § 48.7(a) [Civ. Code § 48.7(c)]

[1] FORM

[*Caption. See § 142.20.*]

A DEMURRER TO PLAINTIFF'S COMPLAINT FOR DEFAMATION SHOULD BE SUSTAINED BECAUSE THE COMPLAINT ARISES OUT OF A CRIMINAL PROSECUTION FOR CHILD ABUSE AND FAILS TO ALLEGE THAT THE ACTION IS NOT BARRED BY THE PROVISIONS OF SECTION 48.7(a) OF THE CIVIL CODE.

A. Objection by Demurrer. [*See § 142.20, Paragraph A.*]

B. Limitation on Commencement of Action. No person charged by _____ [indictment *or* information *or* other accusatory pleading] of child abuse may, while the charges are pending in the trial court, bring a civil libel or slander action against _____ [the minor *or* the _____ (parent *or* guardian) of the minor *or* any witness] based on any statements made by the _____ [minor *or* parent *or* guardian *or* witness] that are reasonably believed to be in furtherance of the prosecution of the criminal charges (*Civ. Code § 48.7(a)*).

[*EITHER*]

C. Child Abuse as Nonaccidental Injury Inflicted on Child. "Child abuse," as used in *Section 48.7 of the Civil Code*, includes a physical injury or death that is inflicted by other than accidental means on a child by another person (*Civ. Code § 48.7(f)*; *Penal Code § 11165.6*).

[*OR*]

C. Child Abuse as Sexual Assault on Child. "Child abuse," as used in *Section 48.7 of the Civil Code*, includes the sexual assault of a child (*Civ. Code § 48.7(f)*; *Penal Code § 11165.6*). The term "sexual assault" includes conduct in violation of Section _____ [261 (rape) *or* 261.5 (statutory rape) *or* 264.1 (rape in concert) *or* 285 (incest) *or* 286 (sodomy) *or* 288 (a) and (b) (lewd or lascivious acts on a child under 14 years of age) *or* 288a (oral copulation) *or* 289 (penetration of a genital or anal opening by a foreign object) *or* 647a (child molestation)] of the Penal Code (*Penal Code § 11165.1*).

[*OR*]

C. Child Abuse Includes Willful Harming or Endangering. "Child abuse," as used in *Civil Code Section 48.7*, includes the willful causing, permitting, or inflicting of unjustifiable physical pain or mental suffering on a child, or willfully causing or permitting child in one's custody or care to be placed in a situation that endangers the child's person or health (*Civ. Code § 48.7(f)*; *Penal Code §§ 11165.3, 11165.6*).

[*OR*]

C. Child Abuse Includes Unlawful Corporal Punishment. "Child abuse," as used in *Civil Code Section 48.7*, includes the infliction of unlawful corporal punishment or injury, which means willfully inflicting on a child any cruel or inhuman corporal punishment or injury resulting in a traumatic condition (*Civ. Code § 48.7(f)*; *Penal Code §§ 11165.4, 11165.6*).

[*OR*]

C. Child Abuse as Neglect of Child. "Child abuse," as used in *Section 48.7 of the Civil Code*, includes neglect of a child (*Civ. Code § 48.7(f)*; *Penal Code § 11165.6*), which means the negligent failure of a person having the care or custody of a child to protect the child from severe malnutrition or medically diagnosed nonorganic failure to thrive (*Penal Code § 11165.2(a)*).

[*OR*]

C. Child Abuse as Neglect in Out-of-Home Care. "Child abuse," as used in *Section 48.7 of the Civil Code*, includes abuse in out-of-home care (*Civ. Code § 48.7(f)*; *Penal Code § 11165.6*), which means situations of suspected physical injury on a child that is inflicted by other than accidental means, or of sexual abuse or neglect, or unlawful corporal punishment or injury, or the willful cruelty or unjustifiable punishment of a child, as defined in *Penal Code §§ 11164-11174.1*, if the person responsible for the child's welfare is the _____ [_____ (licensee *or* administrator *or* employee) of any facility licensed to care for children *or* an _____ (administrator *or* employee) of a _____ (public school *or* private school *or specify other institution or agency*)] (*Penal Code § 11165.5*).

D. Child Defined. A child is a person under the age of 18 years (*Civ. Code § 48.7(f)*; *Penal Code § 11165*).

E. Failure to State Action Not Barred by *Civ. Code § 48.7(a)*. The failure of a complaint for damages for libel or slander arising out of a criminal prosecution for child abuse to include the statement that the action is not barred by the provisions of *Civ. Code § 48.7(a)* is a ground for demurrer (*Civ. Code § 48.7(c)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a general demurrer (on ground of prematurity of action) to a complaint for damages for libel or slander arising out of a criminal prosecution for child abuse if the complaint fails to include the statement that the action is not barred by the provisions of *Civ. Code § 48.7(a)*. For a memorandum supporting a demurrer to the complaint on the ground that the action is time-barred, which includes an optional paragraph asserting that *Civ. Code § 48.7* does not apply to a defendant who is a newsperson, see *§ 142.56*.

With respect to the next to last alternative (Child Abuse as Neglect of Child) set forth in Paragraph C of the form, *Penal Code § 11165(c)* further provides that a child receiving treatment by spiritual means as provided in *Welf. & Inst. Code § 16509.1* shall not for that reason alone be considered a neglected child.

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated.

[b] Judicial Notice

Counsel should attach to this form a request that the court take judicial notice of the pendency of the criminal action [*see Code Civ. Proc. § 430.70*; *Evid. Code §§ 452(d), 453*)].

[c] Attorney's Fees and Costs

If the demurrer is sustained on the basis that the complaint was filed in violation of *Civ. Code § 48.7*, attorney's fees and costs must be awarded to the prevailing party [*Civ. Code § 48.7(d)*].

[d] Tolling of Statute of Limitations

The applicable statute of limitations on the action for libel or slander is tolled during the period that the criminal charges are pending before a trial court [*Civ. Code § 48.7(a)*].

[e] Pendency of Criminal Action

The criminal charges are not pending, within the meaning of *Civ. Code § 48.7*, after dismissal, after pronouncement of judgment, or during an appeal from a judgment [*Civ. Code § 48.7(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral Overview

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14-142 California Points & Authorities § 142.45

§ 142.45 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Privileges of Civil Code Section 47 Apply to Conduct in Mexico [Civ. Code § 47]

[1] FORM

[*Caption. See § 142.24.*]

THE PRIVILEGES OF *CIVIL CODE SECTION 47* MAY BE APPLIED TO PROTECT CONDUCT THAT OCCURS IN MEXICO IN CONJUNCTION WITH LEGAL PROCEEDINGS INITIATED IN THAT COUNTRY.

Privileges Apply to Conduct Occurring in Mexico. The privileges of *Civil Code Section 47* may be applied to protect conduct that occurs in Mexico in conjunction with legal proceedings in that country (*Beroiz v. Wahl (2000) 84 Cal. App. 4th 485, 493-494, 100 Cal. Rptr. 2d 905*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion for summary judgment by a defendant in a defamation action if the defendant asserts that the conduct that forms the basis for the action is privileged under *Civ. Code § 47* even though the conduct took place in Mexico. Although the case authority discussed here deals specifically with conduct in Mexico, the form and supporting argument can be modified for use if the conduct occurred in a different foreign jurisdiction.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should include facts detailing the defendant's conduct and argue that this conduct is privileged under one of the privileges contained in *Civ. Code § 47*. In addition, counsel should attach affidavits or declarations that support the motion [*see Code Civ. Proc. § 437c*].

[3] Related Pleading and Practice Forms

For forms for asserting an affirmative defense based on the privileges of Civ. Code § 47, or for a general form of notice

of motion for summary judgment based on an affirmative defense to a defamation action, see California Forms of Pleading and Practice, Ch. 340, *Libel and Slander* (Matthew Bender).

[4] Discussion of Authorities

[a] Privileges Apply to Conduct Occurring in Mexico

In ***Beroiz v. Wahl*** *(2000) 84 Cal. App. 4th 485, 100 Cal. Rptr. 2d 905* , the plaintiffs were residents of a condominium complex in Mexico, as well as members of the homeowners association. From 1991 to 1996, they also served on a vigilance committee that oversees the complex's professional administrator. During this period, the defendants violated the homeowners association rules, requiring action by the plaintiffs as members of the vigilance committee. In response, the defendants allegedly entered into a conspiracy to defame the plaintiffs. According to the plaintiffs, some or all of the defendants allegedly made defamatory criminal accusations against the plaintiffs, filed a false and defamatory claim against the condominium complex, and published defamatory letters to members of the homeowners association. After the plaintiffs' defamation suit was filed in California in 1997, some defendants settled and the remaining defendants filed motions for summary judgment or adjudication, contending that they had not conspired to defame the plaintiffs and that their conduct was privileged under *Civ. Code § 47*. Evidence tendered in support of the motion showed that: (1) one defendant had filed a criminal charge against the condominium on the advice of a Mexican attorney that a basis for the charges existed; (2) the other two defendants had only provided testimony to the local district attorney in the course of an investigation into the criminal charges, an investigation that the district attorney eventually dropped; and (3) none of the remaining defendants played any role in the defamatory letters that were sent to the homeowners association. The trial court granted the motions for summary judgment, concluding that the conduct at issue was privileged, and the plaintiffs appealed.

The court of appeal affirmed, concluding as an apparent matter of first impression that the privileges of *Civ. Code § 47* could be applied to conduct that occurred in Mexico. The court noted that the few cases dealing with the issue in other jurisdictions had uniformly held that similar privileges applied to foreign proceedings and communications (*84 Cal. App. 4th 485, 493-494)* . Moreover, the court concluded that applying the privileges to such proceedings and communications tended to promote the policies underlying the privileges. For example, applying the absolute judicial privilege of *Civ. Code § 47(b)* to fair judicial proceedings in foreign countries encourages American citizens in these countries to resolve disputes in the courtroom, rather than by self-help, promotes the finality of judgment, and limits derivative tort litigation in California courts. Applying the qualified privilege of *Civ. Code § 47(c)* (which protects good faith communications serving significant interests and is normally overcome only on a showing of malice) to American citizens in foreign countries protects their good faith communications regarding their legitimate interests (*84 Cal. App. 4th 485, 494)* .

The court then considered the extent to which the defendants' conduct fell within the absolute privilege. The court agreed that communications that initiate or prompt criminal investigations are subject to the absolute privilege. However, because cases applying the absolute privilege to police reports extend the privilege only to police reports that trigger adequate procedural safeguards, the court added that if there is evidence on summary judgment that a particular report of potential criminal activity in a foreign country has triggered an investigation lacking adequate procedural safeguards, there may be a triable issue of fact as to whether the police report is subject to the absolute privilege, rather than the qualified privilege (*84 Cal. App. 4th 485, 496)* . In this case, the court concluded that there was no triable issue about the procedural fairness of the pertinent Mexican proceedings. Because the absolute privilege therefore applied, summary judgment was properly granted, and the court had no need to consider whether the defendants acted with malice in order to defeat the qualified privilege (*84 Cal. App. 4th 485, 496-497)* .

Legal Topics:

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

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14-142 California Points & Authorities § 142.46

§ 142.46 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Absolute Privilege for Executive Officer [Civ. Code § 47(a)]

[1] FORM

[*Caption. See § 142.24.*]

SUMMARY JUDGMENT FOR DEFENDANT IS PROPER WHEN DEFENDANT IS A STATE EXECUTIVE OFFICER AND HIS/HER STATEMENTS ARE PROTECTED BY ABSOLUTE PRIVILEGE.

A. Summary Judgment. [*See § 142.24, Paragraph A.*]

B. Absolute Privilege for Executive Officer. Statements made by an executive officer of the state government in his or her official capacity and which bear a relationship to the proceeding in which he or she was participating are absolutely privileged (*Civ. Code § 47(a)*; *Kilgore v. Younger (1982) 30 Cal. 3d 770, 782, 180 Cal. Rptr. 657, 640 P.2d 793* ; *Saroyan v. Burkett (1962) 57 Cal. 2d 706, 710, 21 Cal. Rptr. 557, 371 P.2d 293*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for summary judgment by the defendant in a defamation action if the defendant asserts that he or she is entitled to a judgment as a matter of law because he or she is a state officer and made the statements in an executive proceeding to which the statements clearly had a relationship.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations to support the motion [*see Code Civ. Proc. § 437c*].

[b] Related Pleading and Practice Forms

For a form of affirmative defense based on the absolute privilege conferred on state executive officers, and for a general form of notice of motion for summary judgment based on an affirmative defense to a defamation action, see California Forms of Pleading and Practice, Ch. 340, *Libel and Slander* (Matthew Bender).

[3] Discussion of Authorities

[a] Absolute Privilege for Executive Officer

In ***Kilgore v. Younger*** *(1982) 30 Cal. 3d 770, 180 Cal. Rptr. 657, 640 P.2d 793* , the state Attorney General held a press conference and released a report on organized crime containing the plaintiff's name. The plaintiff brought an action for defamation, intentional infliction of emotional distress, and invasion of privacy. The Attorney General demurred on the ground that publication of the information was privileged. The trial court sustained the demurrer without leave to amend and dismissed the action, and the plaintiff appealed. The Supreme Court affirmed the judgment, holding that the absolute privilege for executive officers was applicable to the Attorney General because he was discharging an official duty (law enforcement) when he held the press conference (*30 Cal. 3d 770, 779)* . The Court stated that regardless of the propriety of releasing the report to the media, failure to apply the absolute privilege would create a chilling effect on the performance of public duties (*30 Cal. 3d 770, 782)* .

In ***Saroyan v. Burkett*** *(1962) 57 Cal. 2d 706, 21 Cal. Rptr. 557, 371 P.2d 293* , the Supreme Court affirmed a judgment on the pleadings. It held that a press release that was issued by the Superintendent of Banks and that stated that a former attorney in his department had been fired was absolutely privileged because it related to a defense of the policies of his department (*57 Cal. 2d 706, 710-711)* .

[4] Additional Authorities

[a] Absolute Privilege for Executive Officer

In *Maranatha Corrections, LLC v. Department of Corrections & Rehabilitation (2008) 158 Cal. App. 4th 1075, 70 Cal. Rptr. 3d 614* , a private prison contractor and its CEO sued the State, the Department of Corrections & Rehabilitation, and its former Director, alleging defamation caused when the Director released to the public a letter explaining that the State terminated its contract with plaintiffs because plaintiffs had wrongfully misappropriated $1.6 million in funds allegedly owed to the State. The funds in dispute were commissions generated when inmates at plaintiffs' facility used specified telephone services, and a genuine dispute existed under the contract over whether the funds belonged to the State or to plaintiffs. The trial court granted defendants' motion to strike plaintiffs' cause of action under the anti-SLAPP statute, *Code Civ. Proc. § 425.16*. The court of appeal affirmed. The court held first that the conduct forming the basis of the complaint was protected conduct under the anti-SLAPP statute (*158 Cal. App. 4th 1075, 1085-1086)* . The court then held that plaintiffs had failed to demonstrate a probability of success on the merits because the Director's conduct was absolutely privileged under *Civ. Code § 47(a)* as an act in the proper discharge of an official duty. The court noted that as chief executive officer of a statutorily created department of the executive branch, the Director was a policymaking official whose conduct could be protected under *Civ. Code § 47(a)*. Because the Director had released the letter to the press in defense of her policy decision to terminate the contract, the issue of the appropriated funds was of public concern, and she had an official duty to communicate with the press about matters of public concern, the Director's conduct was privileged (*158 Cal. App. 4th 1075, 1088-1089)* .

In *Morrow v. Los Angeles Unified School Dist. (2007) 149 Cal. App. 4th 1424, 57 Cal. Rptr. 3d 885* , a high school

principal brought actions for defamation and invasion of privacy against his former school district, a local superintendent, and the district superintendent after a newspaper reported that plaintiff was being replaced six months before his planned retirement due to the perceived need for "stronger leadership" at the plaintiff's school in light of several recent outbursts of violence among the students. The report also indicated that the district superintendent stated that the principal's retirement plans "did not fit with the district's needs" and the principal's handling of the violence had "accelerated" the decision to replace plaintiff. The trial court granted a motion to strike the causes of action under *Code Civ. Proc. § 425.16*, the anti-SLAPP statute, and the court of appeal affirmed. The court of appeal held that the defamation cause of action could not succeed because the challenged statements were protected under the executive officer privilege of *Civ. Code § 47(a)*. While noting that some appellate decisions had refused to extend the privilege to officials who were not corresponding in rank to federal cabinet members, the court agreed with other opinions that had extended the privilege to lower ranking officials, so long as the conduct at issue encompassed a discretionary act essential to the proper exercise of an executive function decision. The court concluded that the school superintendent's statements to the press that plaintiff was being replaced as part of the school district's response to a well-publicized crisis in a public high school, made by the superintendent in his capacity of chief executive officer of the governing board of the school district, were protected statements (*149 Cal. App. 4th 1424, 1440-1443)* .

In *Tutor-Saliba Corp. v. Herrera (2006) 136 Cal. App. 4th 604, 39 Cal. Rptr. 3d 21* , a city attorney gave a speech as an invited speaker before the Chinese-American Democratic Club. During the speech, the city attorney discussed the merits of pending litigation that his office would be pursuing involving fraud by construction contractors on a large public project. One of the contractors sued the city attorney for defamation for comments made during the speech. The trial court determined that the statements were absolutely privileged under the official duty privilege of *Civ. Code § 47(a)* and granted the city attorney's motion to strike the complaint under *Code Civ. Proc. § 425.16*, the anti-SLAPP statute. The court of appeal held that the motion to strike was properly granted because the plaintiff could not establish a probability of prevailing because the attorney's statements were absolutely privileged. It was undisputed that the city attorney was invited to speak in his official capacity as the city attorney. The city's Board of Supervisors had appropriated substantial money to pay for the litigation, but the mayor had expressed his intention to veto the appropriation and had also implied that the city attorney agreed with the veto decision. The city attorney decided to use the speech as an opportunity before a public forum to clarify his support for and express his opinion about the merits of the litigation. The court held that the comments made during the speech were within the scope of the city attorney's official duties and were protected (*136 Cal. App. 4th 604, 615)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral Overview

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14-142 California Points & Authorities § 142.47

§ 142.47 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Absolute Privilege for Statement Made in Legislative Proceeding [Civ. Code § 47(b)]

[1] FORM

[*Caption. See § 142.24.*]

SUMMARY JUDGMENT FOR DEFENDANT IS PROPER WHEN DEFENDANT MADE THE STATEMENTS IN A LEGISLATIVE PROCEEDING.

A. Summary Judgment. [*See § 142.24, Paragraph A.*]

B. Absolute Privilege for Legislative Proceeding. Statements made in a legislative proceeding that have a relationship to the proceeding are absolutely privileged (*Civ. Code § 47(b)*; *Scott v. McDonnell Douglas Corp. (1974) 37 Cal. App. 3d 277, 288, 112 Cal. Rptr. 609*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for summary judgment by the defendant in a defamation action if the defendant asserts that he or she is entitled to a judgment as a matter of law because he or she made the statements in a legislative proceeding to which the statements clearly had a relationship.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations that support the motion [*see Code Civ. Proc. § 437c*].

[b] Related Pleading and Practice Forms

For a form of affirmative defense based on the absolute privilege conferred on publications made in relation to legislative proceedings, and for a general form of notice of motion for summary judgment based on an affirmative defense to a defamation action, see California Forms of Pleading and Practice, Ch. 340, *Libel and Slander* (Matthew Bender).

[c] Opposing Memoranda

In an appropriate case, the points *in § 142.77* may be used to oppose these points.

[3] Discussion of Authorities

[a] Absolute Privilege for Legislative Proceeding

In ***Scott v. McDonnell Douglas Corp.*** *(1974) 37 Cal. App. 3d 277, 112 Cal. Rptr. 609* , the court of appeal affirmed the sustaining of a demurrer to a cause of action for libel and slander that was based on several letters to the plaintiff that criticized his work as a former city manager and that were read at a city council meeting. The court held that the allegedly defamatory statements were connected with the work of the city council and thus were absolutely privileged under *Civ. Code § 47(b)*, which provides a privilege for publications made in relation to a legislative proceeding (*37 Cal. App. 3d 277, 285-286)* .

[4] Additional Authorities

[a] Absolute Privilege for Legislative Proceeding

In *Cayley v. Nunn (1987) 190 Cal. App. 3d 300, 235 Cal. Rptr. 385* , the court of appeal affirmed summary judgment for the defendants who, while circulating a neighborhood petition in preparation for a city council hearing on their request for a height variance, falsely accused the plaintiff, a neighbor opposed to the variance, of wiretapping the defendants' phone. The court distinguished *Frisk v. Merrihew (1974) 42 Cal. App. 3d 319, 325, 116 Cal. Rptr. 781* , in which the question of whether there was the required connection between the defamatory statement and the objective of the proceedings was improperly taken from the jury (*190 Cal. App. 3d 300, 305)* . The court also held that the absolute privilege of former Code Civ. Proc. § 47(2) [*now see Civ. Code § 47(b)*] shielded the defendants' accusations as a matter of law because the complaint itself alleged that the defamatory statements were made to encourage neighbors to sign the defendants' petition and to attempt to influence the outcome of a city council vote. The court concluded that those facts showed a logical connection between the defamatory statements and the objective of the city council proceedings (*190 Cal. App. 3d 300, 306)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationDefensesPrivilegesAbsolute PrivilegesTortsIntentional TortsDefamationElementsGeneral Overview

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14-142 California Points & Authorities § 142.48

§ 142.48 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Absolute Privilege for Publication Made in Judicial Proceeding [Civ. Code § 47(b)]

[1] FORM

[*Caption. See § 142.24.*]

SUMMARY JUDGMENT FOR DEFENDANT IS PROPER BECAUSE DEFENDANT MADE THE STATEMENTS IN A JUDICIAL PROCEEDING.

A. Summary Judgment. [*See § 142.24, Paragraph A.*]

B. Absolute Privilege for Judicial Proceeding. Statements made in a judicial proceeding that have a relationship to the proceeding are absolutely privileged (*Civ. Code § 47(b)*; *Albertson v. Raboff (1956) 46 Cal. 2d 375, 379, 295 P.2d 405* ; *McClatchy Newspapers, Inc. v. Superior Court (1987) 189 Cal. App. 3d 961, 968-971, 234 Cal. Rptr. 702*).

[*Optional*] **C. Privilege Applicable to Proposed Judicial Proceeding.** If a communication has some relation to a proceeding that is actually contemplated in good faith and under serious consideration by a possible party to the proceeding, the communication is absolutely privileged (*Block v. Sacramento Clinical Labs, Inc. (1982) 131 Cal. App. 3d 386, 393-394, 182 Cal. Rptr. 438*).

[*Optional*] **D. Absolute Privilege for Attorney's Communications Related to Proceeding.** An attorney is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which the attorney participates as counsel, if it has some relation to the proceeding (*Financial Corp. of Am. v. Wilburn (1987) 189 Cal. App. 3d 764, 773, 234 Cal. Rptr. 653*).

[*Optional*] **E. Absolute Privilege for Insurer That Defends Party.** The privilege under *Section 47(b) of the Civil Code* applies to an insurer that defends a party (*Doctors' Co. Ins. Servs. v. Superior Court (1990) 225 Cal. App. 3d 1284, 1295-1298, 275 Cal. Rptr. 674*).

[*Optional*] **F. Privilege Applicable to Nonparties as Well as Parties.** The judicial privilege is accorded not only to parties but to nonparties. The focus of the applicability of judicial privilege lies in whether the publication was connected or related to the underlying proceedings; not the status of the plaintiff in the subsequent proceeding (*Obos v. Scripps Psychological Assocs., Inc. (1997) 59 Cal. App. 4th 103, 108, 69 Cal. Rptr. 2d 30*).

[*Optional*] **G. Privilege Applicable to Quasi-Judicial Proceedings.** The judicial privilege applies to communications involving quasi-judicial proceedings, including workers' compensation proceedings (*Harris v. King (1998) 60 Cal. App. 4th 1185, 1188, 70 Cal. Rptr. 2d 790*).

[Optional] H. **Privilege Extends to Category of Communications Permitted by Law.** The judicial privilege applies to communications the category of which are permitted by law, even if the specific communication at issue may be in violation of the law (*Jacob B. v. County of Shasta (2007) 40 Cal. 4th 948, 957-959, 56 Cal. Rptr. 3d 477, 154 P.3d 1003*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for summary judgment by the defendant in a defamation action if the defendant asserts that he or she is entitled to a judgment as a matter of law because he or she made the statements in a judicial proceeding to which the statements clearly had a relationship. Optional Paragraph C may be used if the statement is related to a proposed, rather than an ongoing, judicial proceeding. Optional Paragraph D may be used if the defendant is an attorney and the communication has some relation to an existing or proposed proceeding. Optional Paragraph E may be used if the defendant is the insurer of a party to the proceeding [*see Doctors' Co. Ins. Servs. v. Superior Court (1990) 225 Cal. App. 3d 1284, 1295-1298, 275 Cal. Rptr. 674* ; *but see Bradley v. Hartford Accident & Indem. Co. (1973) 30 Cal. App. 3d 818, 828, 106 Cal. Rptr. 718* (discussed in *§ 142.48[3][d]*)].

This memorandum may be adapted for use in other appropriate circumstances, for example, in opposition to a demurrer to the complaint, or in an appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations that support the motion [*see Code Civ. Proc. § 437c*].

[b] Opposing Memoranda

In an appropriate case, the points in *§ 142.77* may be used to oppose these points.

[c] Related Pleading and Practice Forms

For a form of affirmative defense based on the absolute privilege conferred on publications made in relation to judicial proceedings, see California Forms of Pleading and Practice, Ch. 340, *Libel and Slander* (Matthew Bender). For a general form of notice of motion for summary judgment based on an affirmative defense to a defamation action, see the same chapter.

[3] Discussion of Authorities

[a] Absolute Privilege for Judicial Proceeding

Pursuant to *Civ. Code § 47(b)*, a publication or broadcast made in any judicial proceeding is privileged, except as follows:

- An allegation or averment contained in any pleading or affidavit filed in an action for marital dissolution or legal separation made of or concerning a person by or against whom no affirmative relief is prayed in the action is not a privileged publication or broadcast as to the person making the allegation or averment within the meaning of *Civ. Code § 47* unless the pleading is verified or affidavit sworn to, and is made without malice, by one having reasonable and probable cause for believing the truth of the allegation or averment and unless the allegation or averment is material and relevant to the issues in the action.

- *Civ. Code § 47(b)* does not make privileged any communication carried out in furtherance of an act of intentional destruction or alteration of physical evidence undertaken for the purpose of depriving a party to litigation of the use of that evidence, whether or not the content of the communication is the subject of a subsequent publication or broadcast that is privileged pursuant to *Civ. Code § 47*. Physical evidence is defined as evidence specified in *Evid. Code § 250* or evidence that is property of any type specified in *Code Civ. Proc. § 2031.010 et seq.*.

- *Civ. Code § 47(b)* does not make privileged any communication made in a judicial proceeding knowingly concealing the existence of an insurance policy or policies. However, this exception does not apply to statements that conceal only the terms of a policy that is known to exist, including statements that misrepresent the amount of the policy coverage [*Home Ins. Co. v. Zurich Ins. Co. (2002) 96 Cal. App. 4th 17, 24-25, 116 Cal. Rptr. 2d 583]* .

- A recorded lis pendens is not a privileged publication unless it identifies an action previously filed with a court of competent jurisdiction that affects the title or right of possession of real property, as authorized or required by law.

In ***Albertson v. Raboff*** *(1956) 46 Cal. 2d 375, 295 P.2d 405* , the Supreme Court held the privilege conveyed by former Civ. Code § 47(2) [*now see Civ. Code § 47(b)*] is an absolute privilege. The plaintiff had brought an action for slander of title based on the defendant's filing of a lis pendens but the Court stated that essentially the same privileges apply to slander of title actions as apply to defamation actions and that, consequently, the publication of the lis pendens was absolutely privileged (*46 Cal. 2d 375, 378-379)* .

In ***McClatchy Newspapers, Inc. v. Superior Court*** *(1987) 189 Cal. App. 3d 961, 234 Cal. Rptr. 702* , a libel action, the defendants wrote and published a newspaper article concerning deposition testimony by one of its reporters in an unrelated libel action, in which the reporter linked the plaintiff with organized crime. The defendants filed a motion for summary judgment on the ground that none of the disputed communications were actionable, pursuant to the absolute privileges of former Civ. Code § 47(2), (4) [*now see Civ. Code § 47(b), (d)*]. The trial court denied the motion, finding a triable fact in whether the defendants conspired to present defamatory statements through the reporter's deposition, for the purpose of later publishing libelous information in the newspaper. The defendants unsuccessfully filed a petition for an extraordinary writ. The Supreme Court granted review, and transferred the case to the court of appeal with directions to issue an alternative writ of mandate.

In issuing the writ, the court of appeal held that the privilege afforded by former Civ. Code § 47(2) [*now see Civ. Code § 47(b)*] for statements made in a judicial proceeding is absolute, provided the statements have a logical connection,

liberally construed, to the underlying litigation (*189 Cal. App. 3d 961, 968-974)* . A deposition is a judicial proceeding for the purposes of former Civ. Code § 47(2) (*189 Cal. App. 3d 961, 968 n.2*). Appellate court opinions conflict regarding whether conspiracy, if found, would defeat the privilege (*189 Cal. App. 3d 961, 968-969)* . The court, however, rejected the holding in *Bradley v. Hartford Acc. & Indem. Co. (1973) 30 Cal. App. 3d 818, 106 Cal. Rptr. 718* , which precludes application of the privilege to statements made in furtherance of a conspiracy, because the communication must be made in furtherance of the litigation and to promote the interest of justice (*189 Cal. App. 3d 961, 969-971)* . Legislative history indicates an intent to establish an absolute privilege (*189 Cal. App. 3d 961, 969-970)* . In enacting former Civ. Code § 47(2), the legislature omitted a provision that the statements be made without malice, which provision was originally included in other subsections of the statute (*189 Cal. App. 3d 961, 969)* . Moreover, a subsequent amendment added the malice requirement only with respect to dissolution proceedings, which manifests an intent to change the privilege from absolute to conditional only in that one circumstance (*189 Cal. App. 3d 961, 970)* . The policy underlying the absolute nature of the privilege is expressed in *Briscoe v. LaHue (1983) 460 U.S. 325, 332-333, 103 S. Ct. 1108, 75 L. Ed. 2d 96* , holding that claims of individuals must yield to the dictates of public policy, which requires that the paths that lead to the ascertainment of truth should be left as free and unobstructed as possible (*189 Cal. App. 3d 961, 971)* . Consequently, allegations of conspiracy do not pierce the protective shield embodied in the statute (*189 Cal. App. 3d 961, 971)* . In rejecting the plaintiff's contentions that the statements were not protected because they did not in any way relate to the other libel action, the court noted that the publication need not be pertinent, relevant, or material in a technical sense to any issue if it has some connection or relation to the proceedings (*189 Cal. App. 3d 961, 972)* . The court also held that the privilege for reporting judicial proceedings in a public journal under former Civ. Code § 47(4) [*now see Civ. Code § 47(d)*] is absolute, based on the legislature's deletion of a provision in the statute requiring that the report be without malice (*189 Cal. App. 3d 961, 974)* .

[b] Privilege Applicable to Proposed Judicial Proceeding

In ***Block v. Sacramento Clinical Labs, Inc.*** *(1982) 131 Cal. App. 3d 386, 182 Cal. Rptr. 438* , a toxicologist negligently prepared a report analyzing the blood of the plaintiff's deceased child on the request of the district attorney's office, which was investigating whether or not probable cause existed to initiate criminal charges against the plaintiff. The report was used as grounds for filing criminal charges against the plaintiff, but the charges were dismissed when the toxicologist's error was discovered. The plaintiff then initiated an action for damages for professional negligence based on publication of an injurious falsehood. The trial court sustained the defendant's motion for summary judgment on the ground that the report was absolutely privileged pursuant to former Civ. Code § 47(2) [*now see Civ. Code § 47(b)*] as a publication made in a judicial proceeding, and the court of appeal affirmed. The court stated that if a communication has some relation to a proceeding that is actually contemplated in good faith and under serious consideration by a possible party to the proceeding, the communication is privileged (*131 Cal. App. 3d 386, 393-394)* .

[c] Absolute Privilege for Attorney's Communications Related to Proceeding

In ***Financial Corp. of Am. v. Wilburn*** *(1987) 189 Cal. App. 3d 764, 234 Cal. Rptr. 653* , a publicly traded financial corporation and its subsidiary brought an action for intentional interference with economic advantage and abuse of process against an attorney for accusing the parent corporation of certain illegal activities. The disputed communications included (1) statements to specific persons interviewed regarding future litigation, (2) statements to "persons throughout Northern California," (3) allegations in a federal complaint filed under *18 U.S.C.S. § 1964(c)* (RICO) against the parent corporation, and (4) threats of additional litigation. The plaintiffs contended that the defendant made the accusations knowing they were false, and filed the complaint not to obtain legal redress, but rather to allow republication by the news media under the guise of privileged communication, in order to interfere with the plaintiffs' business and extort their money in exchange for dismissing the lawsuit. The trial court sustained the defendant's general demurrer to the complaint, on the ground that the communications were absolutely protected under former Civ. Code § 47(2) [*now see Civ. Code § 47(b)*], and the plaintiff appealed.

The court of appeal reversed for further proceedings, holding that statements to "persons throughout Northern

California" might be outside the privilege if they were completely unrelated to the underlying proceedings (*189 Cal. App. 3d 764, 778)* . However, the remaining communications were absolutely protected publications made in a judicial proceeding, pursuant to former Civ. Code § 47(2) [*now see Civ. Code § 47(b)*] (*189 Cal. App. 3d 764, 771-778)* . An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which the attorney participates as counsel, if it has some relation to the proceeding (*189 Cal. App. 3d 764, 773)* . The defendant's threats to file lawsuits are privileged demands to resolve disputes made in actual good-faith anticipation of litigation, in light of the plaintiffs' failure to allege bad faith in connection with that litigation (*189 Cal. App. 3d 764, 777)* . The defendant's remarks to the plaintiffs' present and former employees, depositors, and others, from whom he sought confidential information, are privileged preliminary conversations and interviews connected with a pending or contemplated action (*189 Cal. App. 3d 764, 777-778)* . With regard to the federal complaint itself, there was nothing on the face of the complaint to show that any of its allegations were not related to the action or made in furtherance of it (*189 Cal. App. 3d 764, 776)* . Moreover, the defendant's subjective intent, purpose, or knowledge cannot destroy the privileged status of otherwise privileged statements (*189 Cal. App. 3d 764, 777)* . The court noted that the privilege under former Civ. Code § 47(2) applies to a variety of relevant theories of recovery, including interference with economic advantage (*189 Cal. App. 3d 764, 771)* .

[d] Absolute Privilege for Insurer That Defends Party

In ***Doctors' Co. Ins. Servs. v. Superior Court*** *(1990) 225 Cal. App. 3d 1284, 275 Cal. Rptr. 674* , a minor and her parents sued the insurer of the minor's doctor, based on its conduct in connection with a previous medical-malpractice action filed against the minor's doctor, and stating causes of action for violation of the Insurance Code [*Ins. Code § 790.03*], and conspiracy to violate the Insurance Code. The complaint alleged that the minor's doctor admitted his liability to his malpractice insurer, which nevertheless failed to attempt to settle the claim for several years. The complaint further alleged (1) that the insurer advised the insured to lie in his deposition, in order to avoid revealing the liability of another doctor, who would otherwise give deposition testimony establishing the insured's liability; and (2) that the insured and the other doctor consequently gave inaccurate and misleading testimony in their depositions.

After the insured's deposition was taken, the plaintiffs stated their intent to amend their malpractice complaint to add a fraud claim. The insured then retained independent counsel, who assertedly demanded that the insurer settle the claim on the insured's behalf. The insurer failed to do so for approximately one year and then unsuccessfully attempted to condition settlement on the plaintiffs' waiver of any bad-faith claims against it. Ultimately, the parties reached a settlement under which the insurer paid the policy limits to the plaintiffs in exchange for dismissal of the insured from the malpractice action.

In this action, the plaintiffs alleged that the insurer's conduct violated its contractual and statutory obligations under *Ins. Code § 790.03* (regarding unfair and deceptive practices in insurance business) and sought to recover damages for loss of interest on the settlement proceeds, reduction of benefits due to increase in the cost of the annuity purchased with the settlement proceeds, and emotional distress. The defendants demurred to the complaint on the grounds of failure to state facts sufficient to constitute a cause of action and failure to allege a cognizable claim for conspiracy.

The trial court overruled the demurrer, and the defendant petitioned the court of appeal for a writ of mandate to compel the trial court to sustain the demurrer, on the grounds that (1) the entire action should be dismissed because of the lack of a binding admission of liability, a requirement under *Royal Globe Ins. Co. v. Superior Court (1979) 23 Cal. 3d 880, 153 Cal. Rptr. 842, 592 P.2d 329* (discussed in Ch. 120, *Insurance*); (2) the conspiracy claim offended due process concerns and the litigation privilege of former Civ. Code § 47(2) [*now see Civ. Code § 47(b)*; subsequent discussion will refer to § 47(b)]; and (3) the action was premature in that the underlying action against the insurer's alleged co-conspirators had not been concluded. The court of appeal denied the petition.

Subsequently, the California Supreme Court transferred the matter to the court of appeal, directing the court to vacate its

order denying mandate and to issue an alternative writ [*see* *Doctors' Co. v. Superior Court (1989) 49 Cal. 3d 39, 45, 260 Cal. Rptr. 183, 775 P.2d 508* (noninsurer defendants, as agents of insurer, were not liable for conspiracy to violate duty peculiar to the insurer); *Moradi-Shalal v. Fireman's Fund Ins. Cos. (1988) 46 Cal. 3d 287, 313, 250 Cal. Rptr. 116, 758 P.2d 58* (under viable statutory action, settlement is insufficient conclusion of underlying action regarding requirement of judicial determination of insured's liability); *see generally* Ch. 120, *Insurance*].

The court of appeal let a peremptory writ of mandate issue, directing the trial court to vacate its order and enter a new order sustaining the demurrer without leave to amend (*225 Cal. App. 3d 1284, 1300-1301)* . With respect to the issue involving *Civ. Code § 47(b)*, the court of appeal noted that the defendant's conduct consists of communications made in the course of defending the insured in the prior malpractice action. The statute provides in part that a privileged publication is one made in any judicial proceeding. The court stated that the California Supreme Court delineated the scope of that provision in *Silberg v. Anderson (1990) 50 Cal. 3d 205, 212, 266 Cal. Rptr. 638, 786 P.2d 365* (discussed in *§ 142.77[3][a]*), which held that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action. *Silberg* explained that *Civ. Code § 47(b)* affords litigants the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions (*225 Cal. App. 3d 1284, 1293)* . *Silberg* held that to effectuate its vital purposes, the litigation privilege is held to be absolute; it rejected a requirement, imposed by some courts of appeal, that the communication must have been in the "interest of justice" to qualify for protection under the statute (*225 Cal. App. 3d 1284, 1294)* . The plaintiffs argued that insurers of litigants are not "participants authorized by law" to whom the privilege applies. The court stated that, although originally limited to witnesses, since 1874 the statute has placed no limitation on whom the privilege protects; the language is broad and unrestricted in its terms.

The court concluded that if the insurer provides a defense for a party, the realities of the insurer's role in the litigation dictate that the insurer be treated as an authorized participant in judicial proceedings for purposes of *Civ. Code § 47(b)*. In another context, the court has noted that in the insured-insurer relationship, the attorney characteristically is engaged and paid by the carrier to defend the insured, and that the insured and the insurer have certain obligations to each other. If the matter reaches litigation, the attorney appears of record for the insured and at all times represents him or her in terms measured by the extent of the employment (*225 Cal. App. 3d 1284, 1296)* . In that case, the insured, carrier, and attorney comprise a unitary whole with intramural relationships and reciprocal obligations and duties each to the other quite separate and apart from the extramural relations with third parties or with the world at large. The court held that, as those holding a vital stake in the progress and outcome of litigation, insurers providing a defense are entitled to the protections of the privilege when they communicate with other participants in the litigation (*225 Cal. App. 3d 1284, 1296)* .

The court rejected the plaintiffs' reliance on the holding in *Bradley v. Hartford Accident & Indem. Co. (1973) 30 Cal. App. 3d 818, 106 Cal. Rptr. 718* , in which an insurer was held not protected by *Civ. Code § 47(b)*. In *Bradley*, attorneys of record in a prior personal injury action brought a defamation action against the insurer of a defendant in the prior suit. The complaint alleged that the insurer had manufactured evidence and suborned perjury by inducing a third party falsely to charge the attorneys with colluding to dismiss another defendant in the personal injury suit in exchange for giving false testimony. In reversing the dismissal following demurrer, the appellate court held that *Civ. Code § 47(b)* protects only publications made to promote the interest of justice, which requirement *Silberg* expressly overruled (*225 Cal. App. 3d 1284, 1296-1297)* .

The court in *Bradley* noted that California cases have delineated the persons to whom the privilege applies, in harmony with the Restatement (Second) of Torts. Inasmuch as the complaint alleged that the insurer was not a party to the prior action, *Bradley* concluded that the insurer was not one of the designated persons to whom the absolute privilege has been extended by law. The court of appeal in this particular case noted, however, that the "interest of justice" test in *Bradley* has been rejected by the California Supreme Court in *Silberg;* and that the restriction of "designated persons" to those identified in the Restatement has been questioned, because the statutory language contains no such limitations [

see ITT Telecom Prods. Corp. v. Dooley (1989) 214 Cal. App. 3d 307, 262 Cal. Rptr. 773] . The court therefore declined to follow the categorical exclusion in *Bradley* of insurers from the privilege under *Civ. Code § 47(b)*, stating that *Silberg* cannot be read to support that holding because there was no issue in *Silberg* regarding whether insurers are excluded from the privilege; *Silberg* merely stated the usual formulation that the privilege applies to any communication by litigants or other participants authorized by law (*225 Cal. App. 3d 1284, 1297-1298)* . The court stated that inasmuch as the question whether an insurer is a "participant authorized by law" for purposes of *Civ. Code § 47(b)* was not considered or decided in *Silberg*, that case does not preclude the conclusion that insurers providing a defense are entitled to invoke the privilege under that statute (*225 Cal. App. 3d 1284, 1298)* .

The court also rejected the plaintiffs' contention that the privilege does not apply because the conduct of the defendant constituted noncommunicative conduct, that is, the defendant's formulation and implementation of a plan to destroy all evidence of culpability, rather than the false testimony of the insured. The court acknowledged that the statute does not apply to noncommunicative conduct and does not bar the evidentiary use of privileged communications in otherwise allowable actions (*225 Cal. App. 3d 1284, 1298)* . However, the court observed, the plaintiffs do not complain of any noncommunicative conduct; their only grievance is that the insurer concealed the insured's liability (and hence its own duty to indemnify), by communications to the insured and the other doctor to lie in their depositions. Characterizing the defendant's conduct as "destruction" of evidence does not alter the fact that the "destruction" was accomplished entirely by statements made in the litigation. That circumstance brings the action within the bounds of the privilege. The court stated that their claims, however styled, are founded on the utterance of injurious communications in or in connection with the prior action; a defendant cannot be liable without reliance on privileged communications made in the course of a judicial proceeding (*225 Cal. App. 3d 1284, 1299)* .

The court also rejected the plaintiffs' contention that the privilege should not insulate the insurer from the unethical and criminal conduct alleged in the complaint. The court stated that, at worst, the complaint alleges that the defendant suborned perjury. However, it held that it is well settled that *Civ. Code § 47(b)* bars claims based on subornation of perjury. The court did not condone the "outrageous conduct" alleged in the complaint, but stated that it is in the nature of a statutory privilege that it must deny a civil recovery for immediate wrongs in order to accomplish what the legislature perceives to be a greater good. Moreover, it noted, notwithstanding *Civ. Code § 47(b)*, perjury remains a felony offense (*225 Cal. App. 3d 1284, 1300)* .

[e] Privilege Applicable to Nonparties as Well as Parties

Obos v. Scripps Psychological Assocs., Inc. *(1997) 59 Cal. App. 4th 103, 69 Cal. Rptr. 2d 30* , raised the issue of the application of judicial privilege to communications regarding a third party, made in the course of a court-ordered child custody and placement investigation in connection with a child custody dispute. In the course of this investigation, a court-appointed psychologist was told the mother's boyfriend, had been dishonorably discharged from the military and fired from his job for dishonesty. The psychologist discussed these allegations with the children's attorney and their therapist. The mother's boyfriend then filed this action for defamation and invasion of privacy, asserting the communications with the children's attorney and therapist damaged his reputation, and contending the judicial privilege did not apply to these communications because he was not a party to the underlying action. The trial court granted the defendant's motion for summary judgment, finding the communications were privileged. The plaintiff appealed.

The court of appeal affirmed, holding that the judicial privilege is accorded not only to parties, but to nonparties as well. The court stated that the focus of the applicability of judicial privilege lies in whether the publication was connected or related to the underlying proceedings; not the status of the plaintiff in the subsequent proceeding (*59 Cal. App. 4th 103, 108)* . Here, there was ample connection to the underlying proceeding. Permitting nonparties to the underlying action, to sue on the basis of statements otherwise protected by the judicial privilege, would, according to the court, promote chaos, particularly in the realm of custody determinations. Therefore, it would not hamstring a court-appointed psychologist's efforts to ascertain the best environment for children by permitting nonparties subsequently to sue the psychologist for alleged defamation if the psychologist's communications otherwise satisfied the requisites of *Civ. Code*

§ 47 (59 Cal. App. 4th 103, 109) .

[f] Privilege Applicable to Quasi-Judicial Proceedings

In ***Harris v. King*** *(1998) 60 Cal. App. 4th 1185, 70 Cal. Rptr. 2d 790* , the plaintiff filed suit against several doctors, complaining that these doctors had prepared and submitted a medical report to the State Compensation Insurance Fund that defamed him and misrepresented his physical condition arising from an industrial accident. The trial court sustained the defendants demurrer to the complaint and the court of appeal affirmed, holding that the report was a prelitigation communication privileged under *Civ. Code § 47(b)*. The court ruled that the privilege of *Civ. Code § 47(b)* was absolute, and applied to communications involving quasi-judicial proceedings, including workers' compensation proceedings. Here, the defendants' communication satisfied the requirements for application of the litigation privilege because it was made in a quasi-judicial proceeding, by participants authorized by law to achieve the objects of the litigation, and the communication had a logical relation to that proceeding (*60 Cal. App. 4th 1185, 1188)* .

[g] Privilege Extends to Category of Communications Permitted by Law

In *Jacob B. v. County of Shasta (2007) 40 Cal. 4th 948, 56 Cal. Rptr. 3d 477, 154 P.3d 1003* , plaintiff, in 1993 when he was 15 years old, had been accused by his brother and sister-in-law of molesting plaintiff's then-five-year-old nephew. The sheriff's office investigated and while it was believed that a molestation did occur, the case was not prosecuted because of the victim's young age and inability to communicate adequately. The victim's mother did, however, apply for and receive counseling compensation on behalf of her son from the county victim witness program on the basis of their conclusion that a crime had in fact occurred. The victim witness program also made an entry into the statewide victims-of-crime database (VOX) under which the victim and plaintiff, as the perpetrator of the molestation, were both identified. Plaintiff's brother and sister-in-law were eventually divorced, and their marriage dissolution decree prohibited contact between their son and plaintiff. Plaintiff's brother remarried, and he and his new wife, who had three sons from a previous marriage, became dissatisfied with the dissolution decree prohibiting contact with plaintiff, resulting in an ongoing dispute in a family law proceeding between plaintiff's brother's new wife and her ex-husband. In 2003, the victim's mother, now remarried herself, went to the county victim witness program office distraught over the possibility that the no-contact dissolution order might be lifted in the pending family law proceeding. She asked the office staff to help her by writing to the court, which they did. Obtaining information from the VOX database, staff members in the office prepared a letter stating that the victim's mother had come to the office in 1993 on behalf of her son, established a claim that plaintiff had molested her son, and received counseling funds. This letter was taken to the family law proceeding, and a copy was eventually provided to plaintiff. Plaintiff sued the county and the office staff member who signed the letter, asserting invasion of the constitutional right to privacy and other causes of action. A trial followed and defendants moved for nonsuit on the basis of the absolute judicial privilege of *Civ. Code § 47(b)*. The trial court dismissed all causes of action except the invasion of privacy action, and the jury eventually rendered a verdict for plaintiff. Defendants appealed, and the court of appeal held that the litigation privilege protected the letter against all causes of action, including the one based on the constitutional right to privacy. Plaintiff appealed.

The California Supreme Court affirmed the court of appeal decision. The Court first held that the letter was a communication otherwise protected by the judicial privilege. Plaintiff argued in part that because he was a juvenile at the time of the alleged molestation, the information obtained from the VOX system was confidential under *Welf. & Inst. Code § 827* and could not be released without a prior court order. Because release of the information violated confidentiality laws, according to plaintiff, the letter could not be privileged. The Supreme Court disagreed. Noting that it had stated in previous opinions that the privilege applies to publications "permitted by law" or "authorized by law," the Court clarified that this language was meant to broaden application of the privilege to include any *category* of publication that was permitted by law. Regardless of whether the specific communication at issue was made in violation of the law, such as because the communication was perjurious or revealed confidential information, if it was within a category of communications permitted by law, the privilege would attach. The Court concluded that because the letter was a communication made to a family law court for purposes of determining a child welfare dispute, which was a

category of communication permitted by law, the letter was covered by the privilege even if this particular letter revealed confidential information in violation of statute (*40 Cal. 4th 948, 957-959)* . The Court then held that the judicial privilege remains an absolute privilege even as to invasion of privacy actions based on the guarantee of privacy in the California Constitution *(40 Cal. 4th 948, 961)* .

[4] Additional Authorities

[a] Absolute Privilege for Judicial Proceeding

In *Soliz v. Williams (1999) 74 Cal. App. 4th 577, 88 Cal. Rptr. 2d 184* , the court of appeal sustained a demurrer to the extent that the trial court had applied an absolute judicial privilege to statements made by a judge in the course of a judicially-imposed settlement conference, even though those statements were made in the hallway outside the courtroom. The court of appeal concluded that the plaintiff's state-law claims for monetary damages, which included claims for intentional and negligent infliction of emotional distress and defamation, could not be sustained against the defendants because the settlement conference was a judicial function that was a part of the litigation process and within the jurisdiction of the defendant when acting as a superior court judge (*74 Cal. App. 4th 577, 587-589)* . The court of appeal noted that the statements at issue were very serious, but also noted that immunity from suit for damages was not affected by the severity of the conduct (*74 Cal. App. 4th 577, 589)* .

In *Rubin v. Green (1993) 4 Cal. 4th 1187, 17 Cal. Rptr. 2d 828, 847 P.2d 1044* , the Supreme Court reversed the judgment of the court of appeal and held that attorney communications with the residents in the plaintiff's mobile home park concerning park conditions and the possibility of the attorneys being retained to prosecute an action against the park owner for failure to maintain the park had "some relation" to an anticipated lawsuit, and thus, were privileged even if the attorneys' conduct constituted wrongful solicitation (*4 Cal. 4th 1187, 1191-1196)* .

In *California Physicians' Serv. v. Superior Court (1992) 9 Cal. App. 4th 1321, 12 Cal. Rptr. 2d 95* , the court of appeal issued a writ of mandate, directing the trial court to sustain the defendant's demurrer to the plaintiffs' supplemental complaint. In that complaint, the plaintiffs sought damages for an insurer's intentional infliction of emotional distress and breach of the duty of good faith and fair dealing, alleging that the filing and contents of the defendant's answer to the plaintiffs' amended complaint gave rise to these causes of action. The appellate court held that the answer, consisting of one general denial and various affirmative defenses, constituted defensive pleading and as such was an absolutely privileged communication under *Civ. Code § 47(b)*. The court explained that, because of the privilege, defensive pleading, even though allegedly false, interposed in bad faith, or even asserted for inappropriate purposes, cannot be used as the basis for allegations of ongoing bad faith and that no complaint can be grounded on such pleading, particularly if, as in this particular case, the plaintiffs sought to use the pleading as the basis for a claim of bad faith, rather than only as evidence of prior bad faith (*9 Cal. App. 4th 1321, 1330)* .

In *Adams v. Superior Court (1992) 2 Cal. App. 4th 521, 3 Cal. Rptr. 2d 49* , the court of appeal issued a writ of mandate ordering respondent superior court to sustain the petitioners' demurrers. The petitioners were attorneys who were sued for abuse of process, based in part on a motion they attempted to file in a criminal proceeding to which they were not parties. The motion was denied due to the lack of standing. In the abuse of process action, the trial court overruled petitioners' demurrer, and petitioners sought a writ of mandate. The court of appeal granted the writ, holding that the lack of standing to bring the motion did not destroy the judicial privilege [*Civ. Code § 47(b)*] applicable to the motions (*2 Cal. App. 4th 521, 529)* . The privilege is not restricted to the actual parties to the lawsuit, but need merely be connected or related to the proceedings (*2 Cal. App. 4th 521, 529)* . Because the motion was connected to the criminal action, the ruling that petitioners lacked standing did not operate to deny the normal defense of privilege (*2 Cal. App. 4th 521, 532)* .

In *Gootee v. Lightner (1990) 224 Cal. App. 3d 587, 274 Cal. Rptr. 697* , parties to a child-custody proceeding retained a psychologist for the purpose of providing recommendations to the court based on his evaluation of their case. After

that proceeding concluded, one of the parties brought an action against the psychologist for professional negligence based on alleged intentional and negligent conduct. The court of appeal affirmed summary judgment for the defendant, holding that the absolute privilege under former Civ. Code § 47(2) [*now see Civ. Code § 47(b)*] bars a civil lawsuit seeking to impose liability for misfeasance allegedly committed in connection with the testimonial function for which the defendant was retained (*224 Cal. App. 3d 587, 591-596)* .

In *Howard v. Drapkin (1990) 222 Cal. App. 3d 843, 271 Cal. Rptr. 893* , a party in a child-custody proceeding brought an action against a psychologist whom the parties retained for the purpose of rendering nonbinding findings and recommendations to the court based on her evaluation of the facts and circumstances of the case; the action alleged professional negligence, intentional and negligent infliction of emotional distress, and fraud, based on the psychologist's alleged bias toward the opposing party and abusive conduct toward the plaintiff. The court of appeal affirmed dismissal, holding that the defendant's conduct constituted a communication in the furtherance of justice within the meaning of former Civ. Code § 47(2) [*now see Civ. Code § 47(b)*] as enunciated in *Silberg v. Anderson (1990) 50 Cal. 3d 205, 219-220, 266 Cal. Rptr. 638, 786 P.2d 365* (discussed in *§ 142.77[3][a]*), and otherwise satisfied the criteria for immunity under that case (*222 Cal. App. 3d 843, 863-864)* . The court also held that the defendant was afforded absolute quasi-judicial immunity under common law principles (*222 Cal. App. 3d 843, 852-860)* .

Abraham v. Lancaster Cmty. Hosp. (1990) 217 Cal. App. 3d 796, 266 Cal. Rptr. 360 , arose from a federal district court action, which stated several federal and state causes of action, e.g., anti-trust violations, stemming from an individual defendant's conduct as the assistant administrator of a hospital, in coercing patients to patronize his hospital at the expense of the plaintiff. The defendant in the federal action brought an action in state court against the plaintiff in the federal action, alleging defamation and related causes of action. The court of appeal affirmed dismissal of all causes of action, holding that former Civ. Code § 47(2) [*now see Civ. Code § 47(b)*] provides an absolute privilege to statements made in the course of judicial proceedings, which includes the filing of a lawsuit (*217 Cal. App. 3d 796, 812-813, 822)* .

In *Rosenthal v. Irell & Manella (1982) 135 Cal. App. 3d 121, 185 Cal. Rptr. 92* , the court of appeal affirmed the trial court's holding that the plaintiff's action was barred by former Civ. Code § 47(2) [*now see Civ. Code § 47(b)*]. The plaintiff brought an action against members of a law firm for inducing breach of contract, intentional interference with prospective economic advantage, and intentional infliction of emotional distress for alleged utterances made by the defendants that allegedly induced the plaintiff's attorneys to settle the action without his consent. The plaintiff argued that the privilege extended only to publication of false statements. The court of appeal, however, held that the privilege applies to an injurious publication of whatever nature, in a protected proceeding, and not just to false statements (*135 Cal. App. 3d 121, 127-128)* .

In *Portman v. McDonald Law Corp. (1979) 99 Cal. App. 3d 988, 160 Cal. Rptr. 505* , the court of appeal affirmed the trial court's granting of respondent attorneys' motion for judgment on the pleadings on the basis of the privilege accorded by former Civ. Code § 47(2) [*now see Civ. Code § 47(b)*]. The action was based on negligent misrepresentation arising from an earlier, related action in which respondents were attorneys of record for an insurance corporation that suffered a money judgment against it in appellants' favor. When the corporation appealed in that action, respondents sought to avoid the filing of an undertaking to stay enforcement on behalf of their clients and advised appellants' counsel both orally and by letter that the corporation was financially sound although the company was insolvent when the statement was made. The court of appeal held that the statement was absolutely privileged because it was related to the judicial proceedings (*99 Cal. App. 3d 988, 991)* .

In *Rader v. Thrasher (1972) 22 Cal. App. 3d 883, 99 Cal. Rptr. 670* , the court of appeal affirmed the trial court's granting of summary judgment for the defendants. The plaintiff was the former husband's former attorney in a prior divorce proceeding, and the plaintiff alleged that the defendants (the former husband and his current attorney) had defamed him in a deposition and also in a pleading filed in one of the many proceedings resulting from the divorce proceeding. The court held that all of the allegedly defamatory statements were protected by the absolute privilege for

judicial proceedings and, thus, that the summary judgments were properly granted (*22 Cal. App. 3d 883, 887-889)* .

In *Smith v. Hatch (1969) 271 Cal. App. 2d 39, 76 Cal. Rptr. 350* , the court of appeal affirmed summary judgments for the defendants. The complaint was based on two letters written by the defendant who was, at the time, the attorney for a contractors association. The first letter was written to the association concerning pending litigation between the association and another association; the second letter was written to the judge in the pending litigation. The court held that both letters were absolutely privileged because they were related to the judicial proceedings before the court (*271 Cal. App. 2d 39, 45-50)* .

Thornton v. Rhoden (1966) 245 Cal. App. 2d 80, 53 Cal. Rptr. 706 , reaffirmed the principle that the privilege conferred on publications made in connection with judicial proceedings is absolute. The court held that questions asked by an attorney in a deposition are absolutely privileged (*245 Cal. App. 2d 80, 85, 90)* .

[b] Privilege Applicable to Proposed Judicial Proceeding

In *Aronson v. Kinsella (1997) 58 Cal. App. 4th 254, 68 Cal. Rptr. 2d 305* , the appellate court affirmed the trial court's grant of summary judgment for the defendant, in the plaintiff's libel per se action. The action was based on allegedly false prelitigation statements about the plaintiff published in a letter. The summary judgment was granted on the ground that the statements were absolutely privileged under *Civ. Code § 47(b)*. The plaintiff had two arguments on appeal; that the privilege for prelitigation statements was a qualified rather than an absolute privilege that could be defeated by a showing of malice, and that in order for the prelitigation privilege to apply the contemplated litigation must be imminent. The court rejected both. As to the first argument, the court determined that the case the plaintiff cited for the qualified privilege argument, was not authority for the proposition that the privilege for prelitigation statements was a qualified rather than an absolute privilege. It concluded that if the prelitigation statement was made with a good faith belief in a legally viable claim and in serious contemplation of litigation, then the statement would be absolutely privileged (*58 Cal. App. 4th 254, 266)* . As to the second argument, the court found that the litigation privilege was not conditioned on an imminency requirement separate from the requirement that prelitigation statements be made in serious and good faith consideration of litigation (*58 Cal. App. 4th 254, 268)* .

[c] Absolute Privilege for Attorney's Communications Related to Proceeding

In *Kashian v. Harriman (2002) 98 Cal. App. 4th 892, 120 Cal. Rptr. 2d 576* , the plaintiff brought a cause of action against an attorney and his client, an environmental organization, based on the attorney's actions in sending a letter to the Attorney General requesting an investigation into the plaintiff's business dealings and potential conflicts of interest. In the letter, the attorney charged that the plaintiff, who served as chairman of the board of trustees of a nonprofit, tax-exempt corporation building a local heart hospital, stood to benefit financially from the hospital because of business ventures not being made public, and also sought an inquiry into the corporation's tax-exempt status. The attorney acknowledged sending copies of the letter to clients of his who were involved in related proceedings, and parts of the letter eventually saw publication in the local newspaper, although the attorney denied providing the newspaper a copy. The plaintiff then sued, alleging causes of action for defamation and unfair competition, basing the unfair competition cause of action on assertions that the attorney's representation of environmental interest groups was a sham in that he formed his own groups to create the impression that he had more broad public support for what were essentially his own private interests and then used this as leverage to force litigation opponents to settle. The attorney filed a special motion to strike under *Code Civ. Proc. § 425.16*, arguing that the letter and his litigation activities in general were absolutely privileged under *Civ. Code § 47(b)* and, in any event, failed to constitute defamation or unfair competition.

The trial court granted the special motion to strike, and the court of appeal affirmed. Addressing the unfair competition claim, the court of appeal held that the attorney's litigation practices were communicative conduct protected by the judicial privilege, despite allegations that the conduct may have been unethical or even illegal (*98 Cal. App. 4th 892, 915-921)* . Although an attorney's violation of statutory constraints may form the basis for an unfair competition claim,

the plaintiff in this case failed to establish a probability of success on the merits, because the evidence provided by the plaintiff did not establish a pattern or practice of deceit (*98 Cal. App. 4th 892, 921-926)* . Addressing the defamation claims, the court concluded first, that delivery of the letter to the Attorney General was also absolutely privileged under *Civ. Code § 47(b)*, as an official proceeding authorized by law (*98 Cal. App. 4th 892, 926-927)* . Second, the court concluded that the plaintiff failed to show that the attorney provided the letter to the newspaper (*98 Cal. App. 4th 892, 928-930)* . Finally, the court held that the attorney's conduct in providing the letter to other clients interested in the matter was in part covered by the litigation privilege and in part by the qualified privileged of *Civ. Code § 47(b)*, and that the plaintiff failed to provide evidence of malice sufficient to defeat the qualified privilege (*98 Cal App. 4th 892, 930-933)* .

In *Knoell v. Petrovich (1999) 76 Cal. App. 4th 164, 90 Cal. Rptr. 2d 162* , the plaintiff sued an attorney for defamation and other causes of action stemming from the attorney's representation of a client who alleged that the plaintiff may have forged the client's signature on an easement deed. The suit against the attorney was based on a demand letter the attorney wrote to the plaintiff on behalf of the client, as well as a letter written to the city attorney concerning the easement dispute. Although the attorney never specifically accused the plaintiff of a crime, the attorney commented in the letter to the plaintiff that the signature on the easement deed "may or may not be a forgery" and mentioned in the letter to the city attorney that her client took the position that the easement was obtained by fraud and deception. The plaintiff eventually settled with the attorney's client over the easement dispute, but then successfully sued that client and later brought suit against her attorney. The trial court granted the attorney's demurrer, finding that the suit was barred by the applicable statutes of limitation and also by the litigation privilege. The court of appeal agreed. Regarding the litigation privilege, the court noted that the privilege has been applied to demand letters and other pre-litigation communications by an attorney and can apply to all torts except malicious prosecution (*76 Cal. App. 4th 164, 169-170)* . The letters written by the attorney in this case were timely, specifically concerned the easement dispute, and were in anticipation of litigation. The court also rejected the plaintiff's argument that the privilege could be overcome if the allegedly actionable statements were made to "leverage" a settlement (*76 Cal. App. 4th 164, 170-171)* .

In *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman (1996) 47 Cal. App. 4th 777, 54 Cal. Rptr. 2d 830* , a law firm sent letters to various individuals in preparation of a lawsuit. In those letters, the firm stated that its client had been damaged by business activities of the plaintiff. The plaintiff filed an action against the law firm for libel and interference with economic relationship. The trial court sustained a demurrer on the ground that the letter was protected by the litigation privilege of *Civ. Code § 47(b)*, and the court of appeal affirmed. The plaintiff contended that the litigation privilege did not apply because the communication was between private parties not acting in an official capacity. However, the privilege is not limited to communications to or from government officials. It applies to communications preliminary to a proposed judicial proceeding, such as a demand letter from an attorney to a potential adversary, and to communications made during an attorney's investigatory interviews with private individuals preparatory to a hearing (*47 Cal. App. 4th 777, 781)* .

In *Passman v. Torkan (1995) 34 Cal. App. 4th 607, 40 Cal. Rptr. 2d 291* , attorneys representing one party in litigation brought a defamation action against the opposing party based on statements he made regarding the attorneys in letters to his counsel. In the underlying action, the defendant sued his business partner for dissolution of a corporation and appointment of a receiver, claiming that his partner had fraudulently failed to report and account for the corporation's gross receipts. After the trial court determined that the defendant held a 20 percent stock ownership interest in the corporation, the partner elected in lieu of dissolution to purchase defendant's interest. When the two could not agree on the fair market value of the interest, the trial court appointed three appraisers to ascertain the value of the corporation's assets and the value of the corporation as an ongoing business. During the course of litigation, defendant wrote a letter to his attorney and sent copies of the letter to the court-appointed appraisers. The plaintiff instituted a libel action based on statements made in the letter; defendant demurred to the complaint on the grounds that the litigation privilege of *Civ. Code § 47(b)* operated as a complete defense to the cause of action. The trial court sustained the demurrer without leave to amend and dismissed the complaint.

The court of appeal affirmed the trial court's decision regarding the publications to counsel. It concluded that the statements made in defendant's letter to his attorney were absolutely privileged under *Civ. Code § 47(b)(2)* as publications made in a judicial proceeding. Crucial to the court's decision was its interpretation of the following rule: that in order for communications to be absolutely privileged they must be (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) have some connection or logical relation to the action. While the plaintiff's conceded that defendant's letter satisfied the first three requirements, they challenged whether the communication had some connection or logical relation to the action. The court found that the statements did have some connection or logical relation to the action because the whole purpose of the letter was to prompt action by defendant's attorney to conclude the litigation before the opposing party could dissipate any more funds from the business (*34 Cal. App. 4th 607, 613)* . The court ruled that the letter not only had "some logical relation to" the lawsuit, it bore directly on the subject matter being litigated, namely the value of the business as a going concern (*34 Cal. App. 4th 607, 615)* . Lastly, the plaintiff's argument that the absolute privilege of § 47(b) should be limited to only those publications made without malice was rejected; the court held that the absolute privilege applies regardless of whether the publication was made with malice and that to hold otherwise would be contrary to decisions of the California Supreme Court (*34 Cal. App. 4th 607, 616)* .

[d] Privilege Applicable to Nonparties as Well as Parties

In *Sacramento Brewing Co. v. Desmond, Miller & Desmond (1999) 75 Cal. App. 4th 1082, 89 Cal. Rptr. 2d 760* , the plaintiff brought an action for defamation against a law firm that had erroneously identified the plaintiff as the debtor in the caption of a notice of motion to sell personal property filed in the course of a bankruptcy proceeding. In fact, the plaintiff had no connection at all to the bankruptcy proceeding. The law firm successfully demurred to the defamation complaint on the grounds that the mistake, which had been corrected with an amended notice of motion filed two days after the original notice, was absolutely privileged under *Civ. Code § 47(b)*. The court of appeal agreed, rejecting the plaintiff's argument that because the plaintiff was not actually involved with the underlying bankruptcy proceeding, the defective notice of motion had no connection to the bankruptcy case, and the litigation privilege did not apply. The court of appeal noted that it was the subject matter or context of the misstatement that was the relevant consideration, and not the isolated misstatement itself. Therefore, the court concluded that because the contextual document in which the allegedly defamatory mistake occurred--the notice of motion--was filed to further the objects of the bankruptcy litigation, the litigation privilege applied despite the fact that the plaintiff was not actually a party to the underlying proceeding (*75 Cal. App. 4th 1082, 1089-1090)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationDefensesPrivilegesGeneral OverviewTortsIntentional TortsDefamationDefensesPrivilegesAbsolute PrivilegesTortsIntentional TortsDefamationElementsGeneral Overview

California Points & Authorities

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CHAPTER 142 LIBEL AND SLANDER (DEFAMATION)
PART II. FORMS

14-142 California Points & Authorities § 142.49

§ 142.49 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Participant in Arbitration Immune From Liability for Statements Made in Contractual Arbitration Proceeding [Civ. Code § 47(b)]

[1] FORM

[*Caption. See § 142.24.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION BECAUSE THE STATEMENTS COMPLAINED OF WERE MADE IN THE COURSE OF A PRIVATE, CONTRACTUAL ARBITRATION PROCEEDING AND ARE THEREFORE PRIVILEGED BY THE STATUTORY LITIGATION PRIVILEGE.

A. Summary Judgment. [*See § 142.24, Paragraph A.*]

B. Absolute Privilege. *Civil Code Section 47* provides an absolute privilege to statements made in "any judicial proceeding" (*Civ. Code § 47(b)*].

C. Privilege Applies to Contractual Arbitration. The litigation privilege embodied in *Civil Code Section 47(b)* protects statements made in the course of a private contractual arbitration (*Moore v. Conliffe (1994) 7 Cal. 4th 634, 658, 29 Cal. Rptr. 2d 152, 871 P.2d 204*).

[*Optional*] **D. Privilege Applies to Deposition Testimony.** A witness who testifies at a deposition held in connection with a private, contractual arbitration is protected by the litigation privilege of *Civil Code Section 47(b)* (*Moore v. Conliffe (1994) 7 Cal. 4th 634, 637-638, 658, 29 Cal. Rptr. 2d 152, 871 P.2d 204*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum may be used to support a summary judgment motion by a participant, such as an expert witness, in an arbitration proceeding if the plaintiff seeks damages or other relief against the participant because of statements the participant allegedly made in the course of the proceeding. The basis for the motion is that the participant has an absolute privilege for statements under the litigation privilege of *Civ. Code § 47(b)*.

This form may be adapted for use in other appropriate circumstances, as for example in a trial or appellate brief.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. For example, if the suit is based on statements made at a deposition taken in the course of a contractual arbitration [*see, e.g., Moore v. Conliffe (1994) 7 Cal. 4th 634, 639, 29 Cal. Rptr. 2d 152, 871 P.2d 204]* , counsel would refer to documents such as a neutral arbitrator's order to take deposition and subpoena issued by the arbitrator's sponsoring organization to establish that the statements were made in the course of the arbitration proceedings.

[3] Discussion of Authorities

[a] Privilege Applies to Contractual Arbitration

Moore v. Conliffe *(1994) 7 Cal. 4th 634, 29 Cal. Rptr. 2d 152, 871 P.2d 204* , involved an action by a decedent's survivor against an expert witness alleging concealment and suppression of evidence, intentional misrepresentation, and other torts. The witness testified at a deposition during a private, contractual arbitration arising from the alleged wrongful death of the plaintiff's daughter. Some time after the arbitrators rendered their decision, the plaintiff discovered that three months prior to the defendant's testimony, the defendant published an article in a medical journal taking a different position than he had taken at the deposition. The plaintiff commenced the action and the defendant demurred. The trial court sustained the demurrer and dismissed the complaint with prejudice, asserting that the testimony was privileged under *Civ. Code § 47(b)*. The court of appeal reversed, concluding that the privilege only applies to statements made in a court proceeding. The defendant petitioned for review by the Supreme Court, and review was granted.

The Supreme Court reversed the judgment of the court of appeal. The Court noted that in an earlier decision, it had stated that the principal purpose of *Civ. Code § 47(b)* was to afford litigants and witnesses the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions. That purpose, stated the Court, supports application of the privilege to private arbitration proceedings. Furthermore, the legislative history of the section supports the application because the statute is derived from the common law. The Comments to the Restatement (Second) of Torts, § 588, provide that arbitration proceedings may be included within the scope of the privilege (*7 Cal. 4th 634, 649)* . Thus, the Court held that statements made in the course of a private contractual arbitration proceeding are protected by the litigation privilege embodied in *Civ. Code § 47(b)* (*7 Cal. 4th 634, 658)* .

[b] Privilege Applies to Deposition Testimony

The facts and procedural background of ***Moore v. Conliffe*** *(1994) 7 Cal. 4th 634, 29 Cal. Rptr. 2d 152, 871 P.2d 204* , are discussed in *§ 142.49[3][a]*. The defendant in the action was an expert witness who was being sued for damages arising from his alleged false testimony. The complaint did not allege that the witness testified at the arbitration hearing itself or that his deposition testimony was introduced at the hearing. Rather, the deposition was taken during a break in the hearing. Nonetheless, the Court held that the statements were made in the course of a private, contractual arbitration and were privileged under *Civ. Code § 47(b)(2)* (*7 Cal. 4th 634, 638-639)* .

NOTE:

The Court stated that, because the statements at issue in the case before it were made in the course of a private contractual arbitration proceeding authorized by *Code Civ. Proc. § 1280 et seq.*, it had no occasion to determine whether the litigation privilege applied to statements made in the course of "alternative dispute resolution" proceedings other than those involving arbitration (*7 Cal. 4th 634, 651 n.8*). However, the Court's reliance on the similarities between arbitration proceedings and proceedings in the judicial system would seem to support an argument that alternative dispute resolution proceedings should also be within the rationale of this case to the extent that the proceedings are similar to judicial proceedings in purpose and in their reliance on the privilege to provide finality and certainty (*see 7 Cal. 4th 634, 641-644)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationDefensesPrivilegesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral Overview

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CHAPTER 142 LIBEL AND SLANDER (DEFAMATION)
PART II. FORMS

14-142 California Points & Authorities § 142.50

§ 142.50 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Absolute Privilege for Publication Made in Official Proceeding Authorized by Law or Initiation or Course of Proceeding Authorized by Law and Reviewable by Mandate [Civ. Code § 47(b)]

[1] FORM

[*Caption. See § 142.24.*]

SUMMARY JUDGMENT FOR DEFENDANT IS PROPER BECAUSE THE ALLEGEDLY DEFAMATORY _____ [STATEMENT *or* COMMUNICATION] WAS MADE IN _____ [AN OFFICIAL PROCEEDING AUTHORIZED BY LAW *or* THE _____ (INITIATION *or* COURSE) OF A PROCEEDING AUTHORIZED BY LAW AND REVIEWABLE BY MANDATE].

A. Summary Judgment. [*See § 142.24, Paragraph A.*]

[*EITHER*]

B. Privilege for Proceedings of Government Agencies. Statements or communications made in an official proceeding authorized by law, other than a legislative or judicial proceeding, are privileged (*Civ. Code § 47(b)*].

[*AND/OR*]

B. Privilege for Proceedings Authorized by Law and Reviewable by Mandate. Statements or communications made in the initiation or course of a proceeding that is not a legislative, judicial, or other official proceeding, but is a proceeding authorized by law and is reviewable pursuant to *Code of Civil Procedure Sections 1084 through 1097* are privileged (*Civ. Code § 47(b)*].

C. Privilege Is Absolute. The privilege conferred by *Civil Code Section 47(b)* is absolute and is unaffected by the existence of malice (*Dorn v. Mendelzon (1987) 196 Cal. App. 3d 933, 941, 242 Cal. Rptr. 259* ; *see also Ascherman*

v. Natanson (1972) 23 Cal. App. 3d 861, 864-865, 100 Cal. Rptr. 656).

[*Optional*] **D. Determining Quasi-Judicial Function.** If a proceeding is being conducted in a manner similar to a judicial proceeding, including notice, informal pleadings, and a hearing, and the administrative agency or body performs an important public duty and decides issues of significant public concern, the participants in that proceeding should be vested with absolute immunity (*Ascherman v. Natanson (1972) 23 Cal. App. 3d 861, 866, 100 Cal. Rptr. 656*). In determining whether an administrative body or agency possesses such quasi-judicial power, the preliminary factors to be considered are: (1) whether the administrative body is vested with discretion based on investigation and consideration of evidentiary facts, (2) whether it is entitled to hold hearings and decide the issue by the application of rules of law to the ascertained facts and, more importantly, (3) whether its power affects the personal or property rights of private persons (*Tiedemann v. Superior Court (1978) 83 Cal. App. 3d 918, 925, 148 Cal. Rptr. 242* ; *Ascherman v. Natanson (1972) 23 Cal. App. 3d 861, 866, 100 Cal. Rptr. 656*).

[*Optional*] **E. Proceedings of Board of Medical Quality Assurance.** Any publication in connection with proceedings of the Board of Medical Quality Assurance is clothed with the absolute privilege set forth in *Civil Code Section 47(b)* as having been made in the course of an "official proceeding" (*Civ. Code § 47(b)* cl. (3)) and proceedings reviewable by writ of mandate (*Civ. Code § 47(b)* cl. (4)) (*Dorn v. Mendelzon (1987) 196 Cal. App. 3d 933, 941, 242 Cal. Rptr. 259*).

[*Optional*] **F. Communications Prompting Official Action.** Letters or communications designed to prompt official action are as much a part of an official proceeding as a communication made after the proceeding has commenced (*Dorn v. Mendelzon (1987) 196 Cal. App. 3d 933, 941, 242 Cal. Rptr. 259*).

[*Optional*] **G. Pleading Tort Theory Other Than Libel or Slander.** The privilege provided by *Civil Code Section 47(b)* may not be defeated by asserting a different tort theory based on the same protected communication (*Dorn v. Mendelzon (1987) 196 Cal. App. 3d 933, 943, 242 Cal. Rptr. 259*).

[*Optional*] **H. Absolute Privilege Applies to Employer Response to Request for Information From Law Enforcement Agency Conducting Employment Background Investigation.** Although

Government Code Section 1031.1 provides a qualified immunity for information provided by employers to law enforcement agencies conducting background checks on applicants, that statute also contains a savings clause that preserves application of the absolute immunity of *Civil Code Section 47(b)* to such responses (*Bardin v. Lockheed Aeronautical Sys. Co. (1999) 70 Cal. App. 4th 494, 504, 82 Cal. Rptr. 2d 726*).

[*Optional*] **I. Absolute Privilege Applies to Pupil Expulsion Hearings.** In addition to any other immunity that may exist, any testimony provided by a pupil as a witness in an expulsion hearing is specifically protected by the absolute privilege of *Civil Code Section 47(b)* (*Educ. Code § 48918.6*).

[*Optional*] **J. Statements Made to Police Reporting Potential Criminal Conduct Absolutely Privileged.** Unless the elements of malicious prosecution can be proven, statements made to the police regarding potential criminal activity are protected from civil liability by an absolute privilege under *Civ. Code § 47(b)* (*Hagberg v. California Fed. Bank (2004) 32 Cal. 4th 350, 355, 7 Cal. Rptr. 3d 803, 81 P.3d 244*).

[*Optional*] **K. No Particular Action by Official Body Required for Complaint to Be Protected.** Because a complaint constitutes part of the official proceedings, it is not necessary that an official body take any particular action on the complaint for the complaint itself to be protected (*Lee v. Fick (2005) 135 Cal. App. 4th 89, 97, 37 Cal. Rptr. 3d 375*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for summary judgment if the motion asserts that the defendant is entitled to judgment as a matter of law on the basis that statements made in an official proceeding authorized by law, other than a legislative or judicial proceeding [*see § 142.47* and *§ 142.48*], or in any other proceeding authorized by law and reviewable by mandate, are absolutely privileged. If the statements were made in an official proceeding of a government agency, the first alternative for Paragraph B should be used [*see Hackethal v. Weissbein (1979) 24 Cal. 3d 55, 64, 154 Cal. Rptr. 423, 592 P.2d 1175* (decided prior to 1979 amendment to Civ. Code § 47(2), holding that official proceedings under that section limited to government agencies)]. If this first alternative is used, optional Paragraph D should be used as well. The second alternative would be used if the proceedings in question are other than an official proceeding but are authorized by law and reviewable by mandate [*see Civ. Code § 47(b)*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For a form of affirmative defense based on the absolute privilege conferred on publications made in relation to administrative proceedings, and for a general form of notice of motion for summary judgment based on an affirmative defense to a defamation action, see California Forms of Pleading and Practice, Ch. 340, *Libel and Slander* (Matthew Bender). For a discussion of types of proceedings that are reviewable by mandate, see California Forms of Pleading and Practice, Ch. 358, *Mandate and Prohibition* , and Ch. 474C, *Procedures in Reviewing Agency Decisions* (Matthew Bender).

[c] Opposing Memoranda

In an appropriate case, the points *in § 142.77* may be used to oppose these points.

[3] Discussion of Authorities

[a] Privilege for Proceedings of Governmental Agencies

Civ. Code § 47(b) provides that a privileged publication or broadcast is one made in any (1) legislative or (2) judicial proceeding, or (3) other official proceeding authorized by law.

Civ. Code § 47(b) also provides that an allegation or averment contained in any pleading or affidavit filed in an action for marital dissolution or legal separation made of or concerning a person by or against whom no affirmative relief is prayed in the action is not a privileged publication or broadcast as to the person making the allegation or averment within the meaning of *Civ. Code § 47* unless the pleading is verified or affidavit sworn to, and is made without malice, by one having reasonable and probable cause for believing the truth of the allegation or averment and unless the allegation or averment is material and relevant to the issues in the action [*Civ. Code § 47(b)(1)*].

In addition, *Civ. Code § 47(b)* does not make privileged any communication made in furtherance of an act of intentional destruction or alteration of physical evidence undertaken for the purpose of depriving a party to litigation of the use of

that evidence, whether or not the content of the communication is the subject of a subsequent publication or broadcast that is privileged pursuant to *Civ. Code § 47. Civ. Code § 47(b)(2)* defines "physical evidence" as evidence specified in *Evid. Code § 250* or evidence that is property of any type specified in *Code Civ. Proc. § 2031.010 et seq.*.

[b] Privilege for Proceedings Authorized by Law and Reviewable by Mandate

Civ. Code § 47(b) provides that a privileged publication or broadcast is one made in the initiation or course of any other proceeding authorized by law and reviewable pursuant to *Code Civ. Proc. §§ 1084-1097*, governing mandate.

The statutory exceptions to *Civ. Code § 47(b)* are set out in *§ 142.50[3][a]*.

[c] Privilege Is Absolute

Dorn v. Mendelzon *(1987) 196 Cal. App. 3d 933, 242 Cal. Rptr. 259* , was an action by an orthopedic surgeon for damages for defamation against two hospitals to which the plaintiff had some years in the past applied for staff privileges as an orthopedic surgeon and at which he had performed surgery, and against their respective administrators, arising from the disclosure of evaluative information contained in the plaintiff's personnel file. The disclosure by the administrator of the first hospital had been made to the Board of Medical Quality Assurance (BMQA), and the disclosure by the administrator of the second hospital had been made to another hospital that had requested the information in order to aid in its consideration of whether to grant the plaintiff staff privileges. The trial court granted the defendants' motions for summary judgment, and the plaintiff appealed. In affirming the judgment, the court of appeal said that the privilege conferred by former Civ. Code § 47(2) [*now see Civ. Code § 47(b)*] is absolute and is unaffected by the existence of malice (*196 Cal. App. 3d 933, 941)* .

The court of appeal in ***Ascherman v. Natanson*** *(1972) 23 Cal. App. 3d 861, 100 Cal. Rptr. 656* , affirmed a judgment notwithstanding the verdict on the grounds that statements made by the defendant, a physician, during the course of an interview with an attorney representing a hospital district, who was preparing for an administrative hearing by the district to review a rejection of the plaintiff's application for staff privileges, were absolutely privileged from an action for slander by the plaintiff, also a physician. The court held that the administrative hearing was quasi-judicial in nature and that, therefore, the defendant's statements were privileged under the portion of former Civ. Code § 47(2) [*now see Civ. Code § 47(b)*] protecting statements made in official proceedings, other than judicial or legislative proceedings, authorized by law. The court said that although the statute does not explicitly so provide, the cases make it clear that the privilege conferred by former Civ. Code § 47(2) is absolute and that it is in no way affected by the presence of malice (*23 Cal. App. 3d 861, 864-865)* .

[d] Determining Quasi-Judicial Function

Ascherman v. Natanson *(1972) 23 Cal. App. 3d 861, 100 Cal. Rptr. 656* , is discussed in *§ 142.50[3][c]*. After developing the criteria in Paragraph D of this form and noting also that the absolute privilege extends to preliminary conversations and interviews between a prospective witness and an attorney if the communications are related to or connected with a pending or contemplated action, the court held that the hearing was quasi-judicial in character. Relying particularly on *Wyatt v. Tahoe Forest Hosp. Dist. (1959) 174 Cal. App. 2d 709, 345 P.2d 93* , the court reasoned that because staff privileges are, as a practical matter, a special license, that is, a means by which a physician is permitted to fully practice his profession, the hearing was quasi-judicial in character because it functioned to ascertain facts on which the right to engage in the practice of a profession depended (*23 Cal. App. 3d 861, 866-867)* .

In ***Tiedemann v. Superior Court*** *(1978) 83 Cal. App. 3d 918, 148 Cal. Rptr. 242* , the defendant allegedly made slanderous statements, which concerned his former employer's failure to report certain income to the intelligence division of the federal Internal Revenue Service. He also reported that the plaintiff, his employer, had terminated the defendant's prior employment because he had improperly claimed personal expenditures. The trial court overruled the

defendant's demurrer on the ground that the statements were absolutely privileged and subsequently denied the defendant's motions for judgment on the pleading and summary judgment made on the same ground. The defendant's petition for a writ of mandate to compel the entry of summary judgment was granted by the court of appeal. Applying the principles in Paragraph D of this form, the court determined that proceedings undertaken by an official, investigative and enforcement branch of the IRS qualified as a quasi-judicial agency and that communications to the agency designed to prompt regulatory enforcement action must be considered part of the official proceeding itself, even if the communications were motivated by malice (*83 Cal. App. 3d 918, 924-927)* .

[e] Proceedings of Board of Medical Quality Assurance

The factual and procedural background of ***Dorn v. Mendelzon*** *(1987) 196 Cal. App. 3d 933, 242 Cal. Rptr. 259* , is discussed in *§ 142.50[3][c]*. In affirming a summary judgment for the defendants, the court of appeal said that the BMQA is an administrative agency created by the legislature whose responsibilities include enforcement of the Medical Practice Act and review of the performance of physicians and surgeons licensed in California. The court said that the BMQA was an agency analogous to the State Bar of California, with the duty to investigate complaints and the power to initiate disciplinary proceedings against practitioners, and that disciplinary actions taken against a licensee are reviewable by application for writ of mandate. Accordingly, the court said, any publication in connection with BMQA proceedings is clothed with the absolute privilege set forth in former Civ. Code § 47(2) [*now see Civ. Code § 47(b)*], as having been made in the course of an "official proceeding" (*Civ. Code § 47(b)* cl. (3)) and proceedings reviewable by writ of mandate (*Civ. Code § 47(b)* cl. (4)) (*196 Cal. App. 3d 933, 941)* .

The court also held that the disclosure by the administrator of the second hospital to another hospital was protected by the qualified privileges set forth in *Civ. Code § 43.8* (communication of information by person in possession of it to, among others, any hospital, hospital medical staff, or peer review committee if such communication is intended to aid in evaluation of qualifications, fitness, character, or insurability of practitioner of, among others, healing arts) and former Civ. Code § 47(3) (communication, without malice, to person interested therein by, among others, one who stands in such relation to person interested as to afford reasonable ground for supposing motive for communication innocent, or who is requested by person interested to give information), and that because there was no showing that the second hospital and its administrator had acted maliciously in making the communication, the summary judgment regarding them was proper (*196 Cal. App. 3d 933, 944-946)* .

[f] Communications Prompting Official Action

The factual and procedural background of ***Dorn v. Mendelzon*** *(1987) 196 Cal. App. 3d 933, 242 Cal. Rptr. 259* , is discussed in *§ 142.50[3][c]*. In affirming summary judgment in favor of the defendants, the court of appeal said that letters or communications designed to prompt official action are as much a part of an "official proceeding" as a communication made after the proceeding has commenced (*196 Cal. App. 3d 933, 941)* . The court explained the reason for this rule is that an administrative agency, to function effectively, must have an "open channel" by which concerned persons may call attention to suspected wrongdoing and that as a matter of public policy, the importance of providing citizens free and open access to governmental agencies for the reporting of suspected illegal activity outweighs the occasional harm that might befall a defamed individual (*196 Cal. App. 3d 933, 941-942)* .

[g] Pleading Tort Theory Other Than Libel or Slander

The factual and procedural background of ***Dorn v. Mendelzon*** *(1987) 196 Cal. App. 3d 933, 242 Cal. Rptr. 259* , is discussed in *§ 142.50[3][c]*. The plaintiff's complaint had pleaded both libel and slander and intentional infliction of emotional distress. After holding that the communications to the Board of Medical Quality Assurance were absolutely privileged, the court said that although the complaint sets forth an alternative cause of action for intentional infliction of emotional distress, it is settled that the privilege provided by former Civ. Code § 47(2) [*now see Civ. Code § 47(b)*] may not defeated by asserting a different tort theory based on the same protected communication (*196 Cal. App. 3d 933,*

943) .

[h] Absolute Privilege Applies to Employer Response to Request for Information From Law Enforcement Agency Conducting Employment Background Investigation

In ***Bardin v. Lockheed Aeronautical Sys. Co.*** *(1999) 70 Cal. App. 4th 494, 82 Cal. Rptr. 2d 726* , the plaintiff had applied for a job with the Los Angeles Police Department. In the course of conducting a background investigation, the Department requested and received information about the plaintiff from the plaintiff's former employer. The information provided by the former employer suggested that the employer had had problems with the plaintiff, and based on this information the plaintiff's application with the Department was suspended. Alleging that the information supplied was false, the plaintiff brought suit against the former employer for defamation, intentional infliction of emotional distress, and intentional interference with prospective economic advantage, among other contractual and statutory causes of action. Summary judgment was granted for the defendant based on *O'Shea v. General Tel. Co. (1987) 193 Cal. App. 3d 1040, 238 Cal. Rptr. 715* , which held that information given by a former employer in response to a background investigation by a police agency is absolutely privileged under *Civ. Code § 47(b)*. The plaintiff appealed.

The court of appeals affirmed. The court agreed that *O'Shea* was directly on point and controlling, despite the subsequent enactment of *Gov. Code § 1031.1*, which provides only a qualified immunity for employers providing information to law enforcement agencies conducting background investigations on applicants for employment. The court held that the savings clause of *Gov. Code § 1031.1(b)* preserving "existing common law or statutory privileges and immunities" acted to preserve the holding of *O'Shea* that an absolute privilege under *Civ. Code § 47(b)* was also available (*70 Cal. App. 4th 494, 500-504)* .

[i] Statements Made to Police Reporting Potential Criminal Conduct Absolutely Privileged

In ***Hagberg v. California Fed. Bank*** *(2004) 32 Cal. 4th 350, 7 Cal. Rptr. 3d 803, 81 P.3d 244* , the plaintiff was a woman of Hispanic descent who attempted to cash a check at a bank. Prompted by seeming irregularities with the printed check, the bank teller consulted with her supervisor about the possibility that the check might be counterfeit. The supervisor called the alleged issuer of the check, who told her that the check was not a valid check. The supervisor then called the police to report that she had a customer attempting to cash an apparent counterfeit check. While the supervisor was speaking with the police dispatcher, the bank's regional security manager again phoned the alleged issuer of the check, who this time informed the bank that the check was in fact valid. This information was relayed to the supervisor, but by then the police had arrived on the scene. The supervisor tried to stop the police before they approached the plaintiff, but she was unsuccessful. The police proceeded to detain the plaintiff. They questioned her, searched her, handcuffed her, and, after about twenty minutes, released her. The plaintiff sued the bank for various causes of action, including slander, false arrest and imprisonment, and civil rights violations. The trial court granted summary judgment for the defendant on the grounds that the statements to the police were absolutely privileged pursuant to *Civ. Code § 47(b)*, and the plaintiff appealed. The court of appeal affirmed, and the plaintiff again appealed.

The California Supreme Court affirmed. The court agreed with the majority of court of appeal cases that had addressed the issue that statements to the police reporting suspected criminal conduct were absolutely privileged under *Civ. Code § 47(b)* (*32 Cal. 4th 350, 355)* . The Court noted the established rule that statements made in preparation for an official proceeding, or intended to prompt an official investigation, were covered by the absolute privilege, and need not have been made during an actual proceeding (*32 Cal. 4th 350, 361-364)* . According to the Court, applying the absolute privilege to statements to police, which are generally made in preparation for or intended to prompt investigation that could result in an official proceeding, serves the important public interest of securing open channels of communication between citizens and law enforcement personnel (*32 Cal. 4th 350, 368-372)* . The Court, recognizing an established exception to the absolute privilege for a cause of action for malicious prosecution (*32 Cal. 4th 350, 361)* , refused to create another exception for the tort of false imprisonment, and the Court expressly disapproved of language in earlier

cases that had suggested that statements to the police were only protected from potential liability for false imprisonment if made in bad faith (*32 Cal. 4th 350, 373-375* & n.8).

[j] No Particular Action by Official Body Required for Complaint to Be Protected

In ***Lee v. Fick*** *(2005) 135 Cal. App. 4th 89, 37 Cal. Rptr. 3d 375* , the plaintiff was hired as a high school baseball coach, but he was terminated from this employment after the parents of several of his players complained that he was verbally and physically abusive. The plaintiff brought suit against these parents for libel, slander, and interference with prospective economic advantage. The parents brought a special motion to strike under *Code Civ. Proc. § 425.16*, which the trial court granted as to the libel cause of action, although it denied the motion on the other causes of action. Both sides appealed.

The court of appeal affirmed the trial court's decision to grant the motion to strike the libel cause of action, but reversed the trial court's denial of the motion to strike the rest of the complaint. The court held that the plaintiff could not prevail on any of the causes of action because the parents' conduct was absolutely privileged under *Civ. Code § 47(b)*. The lawsuit was premised largely on letters of complaint written by the parents that were submitted directly to the school board and not submitted to any other person or to the press. The court held that these letters, which clearly were designed to prompt an investigation, and in fact resulted in the coach's firing, were privileged as part of an "official proceeding" (*135 Cal. App. 4th 89, 96)* . The plaintiff argued that the complaints were not protected communications because he was fired after informal discussions between the parties and no official proceeding or hearing was ever held in response to the complaints. However, the court held that the privilege does not depend on what action, if any, an official agency takes in response to a complaint. The complaint itself is part of the "official proceeding" envisioned by the statute and remains protected by the privilege. Moreover, the court noted that many disputes are resolved informally and that the plaintiff never requested a formal hearing or otherwise challenged the school board's decision in any way (*135 Cal. App. 4th 89, 97)* .

[4] Additional Authorities

[a] Summary Judgment

The factual and procedural background of *Dorn v. Mendelzon (1987) 196 Cal. App. 3d 933, 242 Cal. Rptr. 259* , is discussed in *§ 142.50[3][c]*. In affirming the judgment, the court of appeal said that summary judgment is properly granted if the evidence in support of the moving party conclusively negates a necessary element of the plaintiff's case or establishes a complete defense, and thus demonstrates that under no hypothesis whatever is there a material factual issue that requires a trial (*196 Cal. App. 3d 933, 940)* .

[b] Privilege for Proceedings of Government Agencies

In *Braun v. Bureau of State Audits (1998) 67 Cal. App. 4th 1382, 79 Cal. Rptr. 2d 791* , the former medical director of a research and training center at a state university medical center brought an action for defamation and other torts against the Bureau of State Audits, the State Auditor, and others. The lawsuit stemmed from statements made in the course of an investigative audit by the State Auditor under the Reporting of Improper Governmental Activities Act, *Gov. Code § 8547 et seq*, in which the Auditor concluded that the plaintiff "grossly mismanaged" the center. The trial court sustained the defendants' demurrer on the grounds that the statements were absolutely privileged under *Civ. Code § 47(b)*, and the court of appeal affirmed. The court of appeal concluded that an investigative audit by the State Auditor under the Reporting of Improper Governmental Activities Act was an "official proceeding authorized by law" and all statements made in furtherance of the audit were absolutely privileged (*67 Cal. App. 4th 1382, 1388-1389)* . The fact that the audit report had been released to the public did not affect application of the privilege, because the Act authorized public disclosure of reports and their findings (*67 Cal. App. 4th 1382, 1393)* .

In *Ghebreselassie v. Coleman Sec. Serv. (9th Cir. 1987) 829 F.2d 892, 898* , the Ninth Circuit affirmed that part of a

summary judgment for an employer sued for defamation that had been based on the employer's statements in its termination report to a state unemployment office. The Ninth Circuit held that under former Civ. Code § 47(2) [*now see Civ. Code § 47(b)*], the employer's communications to the unemployment office regarding the plaintiff employee's dismissal were entitled to a qualified privilege. Further, the Ninth Circuit held that other reports by investigators and the employer were also entitled to a qualified privilege, under former Civ. Code § 47(3) (*829 F.2d 892, 898)* .

In *Long v. Pinto (1981) 126 Cal. App. 3d 946, 179 Cal. Rptr. 182* , the court of appeal affirmed summary judgment for the defendant and held that a letter regarding a physician's qualifications sent to the Board of Medical Quality Assurance (BMQA) by the appointee of a hospital review board was absolutely privileged under former Civ. Code § 47(2) [*now see Civ. Code § 47(b)*]. The letter implicated, but did not name, the plaintiff as the doctor who had performed a large number of allegedly unnecessary operations on elderly rest home patients. The court found that the letter was sent to BMQA to alert the administrative agency to the situation and to prompt board action and was therefore part of an official proceeding (*126 Cal. App. 3d 946, 948)* .

[c] Privilege for Proceedings Authorized by Law and Reviewable by Mandate

In *Long v. Pinto (1981) 126 Cal. App. 3d 946, 179 Cal. Rptr. 182* , which is discussed in *§ 142.50[4][b]*, a copy of a letter regarding a physician's qualifications sent by the appointee of a hospital review board to the board of directors of another private hospital where the plaintiff was on staff was also held to be absolutely privileged because the amendment to former Civ. Code § 47(2) [*now see Civ. Code § 47(b)*] that states that a publication is privileged if made in the initiation or course of any other proceeding authorized by law and if reviewable by a writ of mandate would apply to proceedings by a private hospital regarding the fitness of a staff doctor. Although there was no investigation of the plaintiff underway at the private hospital nor any request for information, the letter sent by the defendant was intended to prompt action by the hospital and was thus part of an official proceeding. The Supreme Court's decision in *Hackethal v. Weissbein (1979) 24 Cal. 3d 55, 154 Cal. Rptr. 423, 592 P.2d 1175* , that a hearing before the judicial commission of a private medical society was not an official proceeding protected by absolute privilege under former Civ. Code § 47(2) was not applied retroactively to *Long*, because at the time the defendant sent the letter he was immune from liability for libel under prior judicial interpretations of former Civ. Code § 47(2), which were subsequently confirmed by the statutory amendment added shortly after the decision in *Hackethal* (*126 Cal. App. 3d 946, 949-950)* .

In *Wallin v. Vienna Sausage Mfg. Co. (1984) 156 Cal. App. 3d 1051, 203 Cal. Rptr. 375* , the court of appeal affirmed a summary judgment for the defendant in an action for slander and intentional infliction of emotional distress based on statements made in a grievance hearing. In its decision the court noted that if a grievance hearing results in the loss of a fundamental vested right, such as employment, it is subject to review by mandate, and the former Civ. Code § 47(2) [*now see Civ. Code § 47(b)*] privilege applies to statements made in the hearing (*156 Cal. App. 3d 1051, 1055-1056)* .

[d] Privilege Is Absolute

Tiedemann v. Superior Court (1978) 83 Cal. App. 3d 918, 148 Cal. Rptr. 242 , is discussed in *§ 142.50[3][d]*. In ordering issuance of a writ of mandate directing that summary judgment be entered in favor of petitioner, the court of appeal said that it is now well established in California case law that the privilege conferred under former Civ. Code § 47(2) [*now see Civ. Code § 47(b)*] is absolute and unaffected by the presence of malice (*83 Cal. App. 3d 918, 924)* .

[e] Determining Quasi-Judicial Function

In *Picton v. Anderson Union High School Dist. (1996) 50 Cal. App. 4th 726, 57 Cal. Rptr. 2d 829* , a high school teacher sued his former employer, a school district, for defamation. The plaintiff had been accused of unprofessional conduct by four female students and then entered into a settlement agreement with the school district in exchange for which he resigned from his teaching position. The agreement contained a nondisclosure provision that prescribed the

procedure to be followed with respect to all third party inquiries concerning the plaintiff. After the plaintiff had agreed to resign, two individuals representing the school district testified before the Committee of Credentials regarding the accusations. The plaintiff sued the school district for defamation, alleging that the defendant breached the nondisclosure provision of the settlement agreement. The defendants demurred and the trial court sustained the demurrer. The court of appeal affirmed, concluding that the communications to the committee were absolutely privileged under *Civ. Code § 47(b)*, as they were made in an official proceeding authorized by law. The court applied the three criteria in Paragraph D of this form to determine whether an agency possesses quasi-judicial power, and held that the Committee satisfied all three (*50 Cal. App. 4th 726, 737)* .

[f] Communications Prompting Official Action

In *Passman v. Torkan (1995) 34 Cal. App. 4th 607, 40 Cal. Rptr. 2d 291* , attorney representing one party in business litigation brought a defamation action against the opposing party based on statements he had made regarding the attorneys in a letter to the district attorney. This letter referred to the attorneys as crooked and accused them, along with the opposing party, of conspiring to defraud him. The defendant demurred to the complaint on the grounds that the privilege of statements made in official proceedings, under *Civ. Code § 47(b)*, operated as a complete defense to the action. The trial court ruled in the defendant's favor and dismissed the complaint. The court of appeal affirmed, ruling that the defendant's communication to the district attorney's office was absolutely privileged under *Civ. Code § 47(b)(3)* as a publication made in an official proceeding. The purpose and intent of the letter was designed to prompt a criminal prosecution by the official agency empowered to do so (*34 Cal. App. 4th 607, 616)* .

[g] Pleading Tort Theory Other Than Libel or Slander

The facts and procedural background of *Devis v. Bank of Am. (1998) 65 Cal. App. 4th 1002, 77 Cal. Rptr. 2d 238* , are discussed in *§ 142.50[4][h]*. The plaintiff attempted to avoid the privilege of *Civ. Code § 47(b)* by alleging that the defendant, a bank, was negligent in conducting the investigation that led to its report to the police. In sustaining summary judgment for the defendant, the court held that, in order to protect the privilege as applied to statements made to the police, the privilege must apply to a claim that the party who made the report to the police conducted a negligent investigation prior to making the report. Any other result would, according to the court, discourage the making of reports to the police and defeat the purpose of the privilege (*65 Cal. App. 4th 1002, 1008-1009)* .

[h] Statements Made to Police Reporting Potential Criminal Conduct Absolutely Privileged

In *Kemps v. Beshwate (2009) 180 Cal. App. 4th 1012, 103 Cal. Rptr. 3d 480* , plaintiff was the owner of a company that provided medical examinations and was the custodian of records for the physicians employed by the company. An attorney hired to provide a criminal defense to a third party tried to provide an alibi for his client by proving that the client was being examined by one of plaintiff's doctors on the day of the crime. The attorney and his hired investigators allegedly spoke with plaintiff prior to the criminal trial, but plaintiff demanded $150 per hour to appear at trial. They refused to pay, but they served plaintiff with a trial subpoena. Plaintiff failed to appear for trial, however, and the criminal defense attorney obtained a warrant for her arrest. After being held in custody for several hours, plaintiff agreed to appear at the trial later that day and did so. Plaintiff then sued the attorney and his investigators for conduct when obtaining the arrest warrant that she alleged was illegal. Defendants filed a successful motion to strike the complaint under *Code Civ. Proc. § 425.16*, the anti-SLAPP statute. Plaintiff appealed, but the court of appeal affirmed. The court first held that *Code Civ. Proc. § 425.16* applied to the action because it was based on defendants' exercise of the constitutional right to petition the government. Moreover, even if there was a factual dispute over what defendants did to obtain the warrant and whether some of their conduct may have been illegal, defendants' conduct was not clearly illegal as a matter of law (*180 Cal. App. 4th 1012, 1017-1018)* . The court then held that plaintiff failed to prove a probability of success on the merits because defendants' conduct was protected by the absolute litigation privilege of *Civ. Code § 47(b)*. The court noted that because the right to compel the attendance at trial of witnesses on behalf of a criminal defendant is a constitutionally-protected right, conduct undertaken to compel a witness to attend and testify is

protected under the litigation privilege (*180 Cal. App. 4th 1012, 1018-1019)* .

In *Navarette v. Holland (2003) 109 Cal. App. 4th 13, 134 Cal. Rptr. 2d 403* , the plaintiff brought an action against his former wife for defamation, intentional infliction of emotional distress, and malicious prosecution, based on her reports to the police and her neighbor that the plaintiff had physically abused her once while they were married. The wife's report to the police led to the plaintiff's being prosecuted for spousal abuse, although he was acquitted apparently in large part because of his wife's testimony. Although she had originally claimed that he had thrown her down a flight of stairs, at trial she testified that he had lost his balance and inadvertently dropped her. The trial court sustained the defendant's demurrer to the defamation and intentional infliction of emotional distress claims based on the absolute judicial privilege of *Civ. Code § 47(b)*, and granted summary judgment on the malicious prosecution claim based on a finding of probable cause. The court of appeal agreed that as pleaded in the complaint, the wife's conduct in reporting the alleged abuse, even if false and malicious, was protected by the absolute judicial privilege. The court of appeal noted that most court of appeal opinions that had addressed the issue had agreed that statements to the police reporting suspected criminal conduct were absolutely protected. One earlier court of appeal opinion, *Fenelon v. Superior Court (1990) 223 Cal. App. 3d 1476, 1483, 273 Cal. Rptr. 367* , which had been issued by the same district of the court of appeal, had reached a contrary conclusion. However, subsequent court of appeal opinions had universally criticized that opinion, and the court concluded that it should abandon that earlier opinion as well (*109 Cal. App. 4th 13, 20)* . The court also held that the wife's statements made to a neighbor in conjunction with her attempt to phone her report of spousal abuse to the police, which were made right after the alleged abuse occurred, were also privileged, because these statements were an integral part of her report to the police and were in furtherance of that report. The court went on to conclude, however, that it was error to refuse to allow the plaintiff to attempt to amend his complaint to allege actionable statements by his wife that were wholly unconnected with her report to police or prosecutors (*109 Cal. App. 4th 13, 21-23)* .

In *Devis v. Bank of Am. (1998) 65 Cal. App. 4th 1002, 77 Cal. Rptr. 2d 238* , the plaintiff was mistakenly arrested and imprisoned after bank personnel publicly informed police that the plaintiff had stolen checks from a depositor and tried to cash them. The plaintiff brought an action against the bank and the depositor alleging slander and negligence in performing an investigation. The trial court granted summary judgment for the defendants, and the court of appeal affirmed. The court reaffirmed the established principle that statements made to the police regarding potential criminal activity are protected under *Civ. Code § 47(b)* as an "official proceeding" (*65 Cal. App. 4th 1002, 1007-1008)* . The court further held that a report made to the police is privileged even if third parties may incidentally hear the report (*65 Cal. App. 4th 1002, 1011-1012)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationDefensesPrivilegesAbsolute PrivilegesTortsIntentional TortsDefamationElementsGeneral Overview

California Points & Authorities

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 142 LIBEL AND SLANDER (DEFAMATION)
PART II. FORMS

14-142 California Points & Authorities § 142.51

§ 142.51 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Absolute Privilege for Publication Which Was Fair and True Report in or Communication to Public Journal [Civ. Code § 47(d)]

[1] FORM

[*Caption. See § 142.24.*]

SUMMARY JUDGMENT FOR DEFENDANT IS PROPER WHERE DEFENDANT MADE THE STATEMENTS IN A FAIR AND TRUE REPORT IN OR COMMUNICATION TO A PUBLIC JOURNAL.

A. Summary Judgment. [*See § 142.24, Paragraph A.*]

B. Absolute Privilege for Public Journal. Statements contained in a fair and true report in, or communication to, a public journal that describe _____ [a judicial proceeding *or* a legislative proceeding *or* a public official proceeding *or* statements made in the course of a public official proceeding *or* a verified charge or complaint made by a person to a public official on which a warrant has been issued] with substantial accuracy are absolutely privileged (*Civ. Code § 47(d)*; *Grillo v. Smith (1983) 144 Cal. App. 3d 868, 873, 193 Cal. Rptr. 414* ; *Handelsman v. San Francisco Chronicle (1970) 11 Cal. App. 3d 381, 386, 90 Cal. Rptr. 188*).

[*Optional*] **C. Privilege Not Lost if Proceeding Is Confidential.** The privilege of *Civil Code Section 47(d)* is not lost on the ground that the proceeding being reported about is confidential (*Braun v. Chronicle Publ'g Co. (1997) 52 Cal. App. 4th 1036, 1050, 61 Cal. Rptr. 2d 58*).

[*Optional*] **D. Proceeding Which is Closed to Public Is Still Public Official Proceeding.** The fact that a proceeding is closed to the public does not prevent it from being a "public official proceeding" for purposes of *Civil Code Section 47(d)* (*Braun v. Chronicle Publ'g Co. (1997) 52 Cal. App. 4th 1036, 1051, 61 Cal. Rptr. 2d 58*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted by a defendant in support of a motion for summary judgment if the defendant asserts that he or she is entitled to a judgment as a matter of law because the statements were made in a fair and true report in, or a communication to, a public journal that described one of the five types of events described in *Civ. Code § 47(d)* with substantial accuracy.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations that support the motion. The supporting papers must also include a separate statement of material facts that the moving party contends are undisputed, along with supporting evidence for each fact [*see Code Civ. Proc. § 437c(b)*].

[b] Related Pleading and Practice Forms

For a form of affirmative defense based on the absolute privilege conferred on publications that were a fair and true report contained in public journals, see Ch. 340, *Libel and Slander* in California Forms of Pleading and Practice (Matthew Bender). For a general form of notice of motion for summary judgment based on an affirmative defense to a defamation action, see the same chapter.

[3] Discussion of Authorities

[a] Absolute Privilege for Public Journal

In ***Grillo v. Smith*** *(1983) 144 Cal. App. 3d 868, 193 Cal. Rptr. 414* , the defendant, a newspaper, moved for summary judgment in a libel action involving its publication of an article and editorial concerning improper official conduct by the plaintiff, a presiding municipal court judge. The trial court granted the motion, and the plaintiff appealed. The court of appeal affirmed the order, stating first that the editorial, as an expression of opinion concerning the conduct of a public official in office, however unfavorable, was absolutely privileged under the *First* and *Fourth Amendments of the United States Constitution*, as well as under *Cal. Const., Art. I, § 9* (*144 Cal. App. 3d 868, 872)* . The court also held that the newspaper article was privileged as a fair and true report of a judicial proceeding under former Civ. Code § 47(4) [*now see Civ. Code § 47(d)*] (*144 Cal. App. 3d 868, 873)* . The court went on to say that if the object of the report is the presiding judicial officer himself, even a report that is not fair and true will not support the imposition of liability in the absence of a showing of malice (*144 Cal. App. 3d 868, 873)* .

In ***Handelsman v. San Francisco Chronicle*** *(1970) 11 Cal. App. 3d 381, 90 Cal. Rptr. 188* , the court of appeal affirmed a special jury verdict that a report of a complaint filed in a superior court action was substantially accurate and thus absolutely privileged under former Civ. Code § 47(4) [*now see Civ. Code § 47(d)* (*11 Cal. App. 3d 381, 386)*].

[b] Privilege Not Lost if Proceeding Is Confidential

In ***Braun v. Chronicle Publ'g Co.*** *(1997) 52 Cal. App. 4th 1036, 61 Cal. Rptr. 2d 58* , the plaintiff sued a newspaper publisher for defamation. The plaintiff had been accused of mismanagement in her position as director of a hospital training program, and was subject to a confidential investigative audit by the State Auditor. During the audit, the defendant published five articles about the audit and the events that led up to the investigation. The defendant moved to strike the plaintiff's claims based on the anti-SLAPP statute. The plaintiff contended that she could prevail on her claims because she could defeat application of *Civ. Code § 47(d)*, and thus escape the anti-SLAPP provisions. One of her

grounds for challenging the application of the news media privilege was that the defendant could not report on the investigative audit because the investigation itself was confidential. The trial court granted the motion to strike, and entered judgment for the defendant.

With regard to the plaintiff's claim that the privilege did not apply because the audit was confidential, the court stated that the confidentiality of the audit was immaterial. In the context of judicial proceedings, case law is clear that news reports that comprise a history of the proceeding come with the privilege, and the court saw no basis to give the press less room for reporting public official proceedings than in judicial proceedings. Stating that the news reports in question constituted a history of the investigative audit, the court concluded that they came squarely within the *Civ. Code § 47(d)* privilege for reports of public official proceedings (*52 Cal. App. 4th 1036, 1050-1051)* .

[c] Proceeding Which is Closed to Public Is Still Public Official Proceeding

The facts and procedural history of ***Braun v. Chronicle Publ'g Co.*** *(1997) 52 Cal. App. 4th 1036, 61 Cal. Rptr. 2d 58* , are discussed in Discussion of Authorities, Privilege Not Lost if Proceeding Is Confidential. As an additional argument that *Civ. Code § 47(d)* should not apply to the defendant's articles about the State Auditor's investigation of allegations of the plaintiff's mismanagement, the plaintiff contended that the investigation did not qualify as a "public official proceeding" because the investigation was closed to the public. However, the court of appeal noted that other courts have extended *Civ. Code § 47(d)* to apply to confidential proceedings. Furthermore, the court agreed with the reasoning that in this context the word "public" means "governmental" as opposed to "private" action (*52 Cal. App. 4th 1036, 1052)* .

[4] Additional Authorities

[a] Absolute Privilege for Public Journal

In *Colt v. Freedom Communications, Inc. (2003) 109 Cal. App. 4th 1551, 1 Cal. Rptr. 3d 245* , the plaintiffs sued a newspaper and its affiliated web site for libel and related causes of action based on the defendants' publication of articles about the plaintiffs' allegedly causing the price of certain stocks to increase so that they could sell their shares at the higher price. The source for the defendants' articles was an investigation by the SEC into the plaintiffs' alleged misconduct, an investigation that was resolved when the plaintiffs entered into a consent decree with the SEC under which they were forced to disgorge any profits from the transactions without admitting guilt. The defendants successfully moved to strike the complaint as an anti-SLAPP suit under *Code Civ. Proc. § 425.16*. The court of appeal affirmed. The court held that the plaintiffs could not establish a probability of success in the action, because the defendants' conduct was privileged under *Civ. Code § 47(d)* as a fair and true report of the SEC proceedings. The privilege applies even if there may be some errors in the published account, so long as the account captures the substance of the official report. The court noted that although there were some admitted inaccuracies in the defendants' account of the plaintiffs' conduct, the reports were substantially accurate overall and were a fair description of the plaintiffs' misconduct as described in the SEC filings (*109 Cal. App. 4th 1551, 1558-1560)* .

In *Howard v. Oakland Tribune (1988) 199 Cal. App. 3d 1124, 245 Cal. Rptr. 449* , the defendant, a newspaper, published articles on the investigation of a state-subsidized child care program, with specific references to charges of misuse of funds made against the plaintiffs, an administrator and her husband. The plaintiffs' defamation actions were dismissed after the defendant obtained a summary judgment on the basis of former Civ. Code § 47(4) [*now see Civ. Code § 47(d)*] privilege. The court of appeal affirmed. It said that whether or not a privileged occasion exists within the meaning of former Civ. Code § 47(4) is a question of law. The court concluded that a state administrative agency investigation into the expenditure of public funds is a public official proceeding. Thus, the defendant's reports were privileged. The court also observed that the privilege is an absolute privilege, and is not defeated by malice on the part of the media nor the fact that the author of the reported statements may have abused his or her personal privilege (*199 Cal. App. 3d 1124, 1128)* .

The facts and procedural background of *McClatchy Newspapers, Inc. v. Superior Court (1987) 189 Cal. App. 3d 961, 234 Cal. Rptr. 702* , are discussed in *§ 142.48[3][a]*. In *McClatchy*, the court of appeal held that the privilege afforded by former Civ. Code § 47(2) [*now see Civ. Code § 47(b)*] for statements made in a judicial proceeding is absolute, provided they have a logical connection, liberally construed, to the underlying litigation (*189 Cal. App. 3d 961, 968-974)* . The court further held that former Civ. Code § 47(4) [*now see Civ. Code § 47(d)*] provides an absolute privilege for a report in a public journal of a judicial proceeding that is not vitiated by conspiracy claims, providing that the report is fair and accurate (*189 Cal. App. 3d 961, 974-975)* .

In *Jennings v. Telegram-Tribune Co. (1985) 164 Cal. App. 3d 119, 210 Cal. Rptr. 485* , the court of appeal affirmed an order granting the defendants' motion for nonsuit. The plaintiff's libel action was based on the defendants' newspaper report of a criminal proceeding, which the court held to be absolutely privileged under former Civ. Code § 47(4) [*now see Civ. Code § 47(d)*]. The court reasoned that even though the report perhaps exaggerated the charges against the plaintiff, only substantial accuracy was required under former Civ. Code § 47(4), and the exaggeration was sufficiently within the permissible "literary license" of fair reporting (*164 Cal. App. 3d 119, 122, 125-127)* .

In *Green v. Cortez (1984) 151 Cal. App. 3d 1068, 199 Cal. Rptr. 221* , the court of appeal upheld a dismissal entered after the demurrers of the defendants were sustained without leave to amend. The defendants were members of the media who had accurately reported defamatory statements made at a city council meeting. The statements were proven false and may have been reported either with knowledge of their falsity or in reckless disregard of their truth. Holding that the media enjoys an absolute privilege under former Civ. Code § 47(4) [*now see Civ. Code § 47(d)*], the court said that a city council meeting was an official proceeding authorized by law and malice was not an issue (*151 Cal. App. 3d 1068, 1073-1074)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationDefensesPrivilegesAbsolute PrivilegesTortsIntentional TortsDefamationElementsGeneral Overview

California Points & Authorities

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 142 LIBEL AND SLANDER (DEFAMATION)
PART II. FORMS

14-142 California Points & Authorities § 142.52

§ 142.52 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Absolute Privilege for Publication Which Was Fair and True Report of Public Meeting [Civ. Code § 47(e)]

[1] FORM

[*Caption. See § 142.24.*]

SUMMARY JUDGMENT FOR DEFENDANT IS PROPER WHEN THE STATEMENTS WERE CONTAINED IN A FAIR AND TRUE REPORT OF A PUBLIC MEETING.

A. Summary Judgment. [*See § 142.24, Paragraph A.*]

B. Absolute Privilege for Report of Public Meeting. Statements contained in a fair and true report in a public journal that accurately describe the proceeding of a public meeting held for a lawful purpose or a public meeting for the public benefit are absolutely privileged (*Civ. Code § 47(e)*; *Kilgore v. Younger (1982) 30 Cal. 3d 770, 778, 180 Cal. Rptr. 657, 640 P.2d 793* ; *Williams v. Daily Review, Inc. (1965) 236 Cal. App. 2d 405, 418-419, 46 Cal. Rptr. 135*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion for summary judgment by the defendant in a defamation action if the defendant asserts that he or she is entitled to a judgment as a matter of law because the statements were made in a fair and true report in a public journal that described either the proceeding of a public meeting held for a lawful purpose

and open to the public or a public meeting for the public benefit and thus are absolutely privileged.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations that support the motion [*see Code Civ. Proc. § 437c*].

[b] Related Pleading and Practice Forms

For a form of affirmative defense based on the absolute privilege conferred on publications that were a fair and true report of public meetings, see Ch. 340, *Libel and Slander* in California Forms of Pleading and Practice (Matthew Bender). For a general form of notice of motion for summary judgment based on an affirmative defense to a defamation action, see the same chapter.

[3] Discussion of Authorities

[a] Absolute Privilege for Report of Public Meeting

In ***Kilgore v. Younger*** *(1982) 30 Cal. 3d 770, 180 Cal. Rptr. 657, 640 P.2d 793* (also discussed in *§ 142.46[3][a]*), the plaintiff brought an action for defamation, intentional infliction of emotional distress, and invasion of privacy against media defendants who published summaries of a report on organized crime that included the plaintiff's name among a list of persons suspected of criminal involvement. The report, prepared by the Organized Crime Control Commission, had been adopted by the state Attorney General and released by him at a press conference. The defendants demurred on the ground that the information was privileged. The trial court sustained the demurrer and dismissed the action, and the plaintiff appealed.

The Supreme Court affirmed the judgment, holding that the absolute privilege for fair and true reports of the proceedings of public meetings [former Civ. Code § 47(5) (*now see Civ. Code § 47(e)*)] applied to the defendants (*30 Cal. 3d 770, 776)* . The Court stated that the media articles were merely giving further publicity to information about the plaintiff that was already public and that they were fair and true reports because they captured the substance of the Attorney General's release and had stated the alleged nature of the crime report (*30 Cal. 3d 770, 778)* .

In ***Williams v. Daily Review, Inc.*** *(1965) 236 Cal. App. 2d 405, 46 Cal. Rptr. 135* , the court of appeal reversed a judgment for the defendants on the basis of erroneous jury instructions. The plaintiffs were engineering contractors who had sued a newspaper for a libelous article that insinuated they were responsible for delay in a paving project and incompetent in the preparation of bids and job performance. With regard to the issue of the applicability of the privilege available under former Civ. Code § 47(5) [*now see Civ. Code § 47(e)*], the trial court erroneously injected malice into the jury instructions and also purported to instruct the jury that the publication was privileged if it was for the public benefit. The court held that a publication is privileged if it is a fair and true report of the proceedings of a public meeting lawfully convened for a lawful purpose and open to the public, or, alternatively, if it is a fair and true report of the proceedings of a public meeting that is not lawfully convened for a lawful purpose or not open to the public, provided that the publication is for the public benefit (*236 Cal. App. 2d 405, 418)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationDefensesPrivilegesAbsolute PrivilegesTortsIntentional TortsDefamationElementsGeneral Overview

California Points & Authorities

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 142 LIBEL AND SLANDER (DEFAMATION)
PART II. FORMS

14-142 California Points & Authorities § 142.53

§ 142.53 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Qualified Privilege for Publication [Civ. Code § 47(c)]

[1] FORM

[*Caption. See § 142.24.*]

SUMMARY JUDGMENT FOR DEFENDANT IS PROPER WHERE DEFENDANT'S STATEMENTS ARE CLOAKED WITH A QUALIFIED PRIVILEGE.

A. Summary Judgment. [*See § 142.24, Paragraph A.*]

B. Qualified Privilege. Statements made without malice by a defendant who _____ _____ [*either* was interested in the subject matter of the communication *or* was related to _____ (*name*) in that _____ (*specify relationship*) and had an innocent motive in making the statements complained of by the plaintiff *or* was requested by _____ (*name*) to make the statements] are eligible for the qualified privilege under *Civil Code Section 47(c)* (*Deaile v. General Tel. Co. of Cal. (1974) 40 Cal. App. 3d 841, 845-847, 115 Cal. Rptr. 582*).

[*Optional*] **C. Communication by Employer.** The qualified privilege of *Civil Code Section 47(c)* applies to and includes a communication concerning the job performance or qualifications of an applicant for employment, based on credible evidence, made without malice, by a current or former employer of the applicant to, and on request of, the prospective employer (*Civ. Code § 47(c)*).

D. Plaintiff Has Burden of Establishing Malice. Once the defendant has established that the allegedly defamatory communication was made on a privileged occasion, the plaintiff then has the burden of proving that the defendant made the statement with malice (*Lundquist v. Reusser (1994) 7 Cal. 4th 1193, 1202-1203, 31 Cal. Rptr. 2d 776, 875 P.2d 1279*).

[*Optional*] **E. Privilege for Employer Not Defeated by Mere Negligence.** Language in *Civ. Code § 47(c)* requiring that the communication of an employer be "based on credible evidence" to be privileged does not mean that the

privilege is defeated because of the employer's negligence, but instead means that the privilege is defeated only if the communication consists of mere rumors or unfounded gossip (*Noel v. River Hills Wilsons, Inc. (2003) 113 Cal. App. 4th 1363, 1375, 7 Cal. Rptr. 3d 216*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for summary judgment if the motion asserts that the defendant is entitled to a judgment as a matter of law because the statements were made without malice and were eligible for the qualified privilege under *Civ. Code § 47(c)*. Optional Paragraphs C and E may be used if the communication at issue concerns the job performance or qualifications of an applicant for employment, made at the request of a prospective employer.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should refer to the specific facts supporting the defendant's contention that the allegedly defamatory communication was made on an occasion within the scope of the *Civ. Code § 47(c)* privilege, and that the plaintiff has not established that the statement was made with malice. In addition, counsel should attach affidavits or declarations that support the motion [*Code Civ. Proc. § 437c(b)*]..

[b] Related Pleading and Practice Forms

For a form of affirmative defense based on the qualified privilege, see Ch. 340, *Libel and Slander* in California Forms of Pleading and Practice (Matthew Bender). For a general form of notice of motion for summary judgment based on an affirmative defense to a defamation action, see the same chapter.

[3] Discussion of Authorities

[a] Qualified Privilege

The court of appeal affirmed judgment for the defendant on the basis of former Civ. Code § 47(3) [*now see Civ. Code § 47(c)*] in ***Deaile v. General Tel. Co. of Cal.*** *(1974) 40 Cal. App. 3d 841, 115 Cal. Rptr. 582* . The plaintiff was a chief operator in a telephone company when it was discovered that she had lied about several absences from work. Rather than be fired, the plaintiff chose to retire. Shortly thereafter, rumors began to circulate among the plaintiff's fellow employees. To correct some of this misinformation, the plaintiff's superiors called a meeting and told the other employees of the plaintiff's actions that resulted in her leaving. The communications made at this meeting were held to be privileged under former Civ. Code § 47(3) by the court (*40 Cal. App. 3d 841, 845-847)* .

[b] Communication by Employer

The qualified privilege of *Civil Code Section 47(c)* applies to and includes a communication concerning the job performance or qualifications of an applicant for employment, based on credible evidence, made without malice, by a current or former employer of the applicant to, and on request of, the prospective employer. This communication includes the answer of a current or former employer, or the employer's agent, to the question of whether or not the

employer would rehire a current or former employee. However, the privilege does not apply to a communication concerning the speech or activities of an applicant for employment if the speech or activities are constitutionally protected, or otherwise protected by *Code Civ. Proc. § 527.3* or any other provision of law [*Civ. Code § 47(c)*].

[c] Plaintiff Has Burden of Establishing Malice

In ***Lundquist v. Reusser*** *(1994) 7 Cal. 4th 1193, 31 Cal. Rptr. 2d 776, 875 P.2d 1279* , the plaintiffs sued for defamation based on statements made by the defendants that a horse owned by the defendants had a conformational defect, which had been surgically corrected before the defendants' purchase; the complaint alleged that the horse was recognized by some persons who saw the defendants' picture of the horse as having been sold by the plaintiff. The statements were made at a seminar attended by 30 to 40 owners and breeders of a specific breed of horse. The trial court instructed the jury that the plaintiff bore the burden of proving that the statements in question were made by the defendants and were defamatory, and that the defendants bore the burden of proving that the statements were made on a privileged occasion and were made without malice. The trial court also gave jury instructions regarding punitive damages, which gave the plaintiff the burden of proving, by clear and convincing evidence, that the defendant had acted with oppression or malice. The jury returned special verdicts finding for the plaintiff and awarding compensatory and punitive damages to the plaintiff. The court of appeal reversed, on the ground that the trial court erred in giving the jury instruction requiring the defendant to bear the burden of proving that the statement was made without malice. The court of appeal also held that the error was prejudicial notwithstanding the award of punitive damages, because a jury properly instructed on the privilege issue might not have reached the question of punitive damages. The Supreme Court granted review, and while agreeing with the court of appeal that the plaintiff has the burden of proving malice, reversed the judgment of the court of appeal insofar as it reversed the trial court's judgment in the plaintiff's favor.

The Court noted that the language of neither *Civ. Code § 47(c)*, nor *Civ. Code § 48* (providing that malice cannot be inferred from the communication itself), is dispositive on the issue of the burden of proving malice. The Court examined the legislative history of *Civ. Code § 47(c)* as discussed in *Brown v. Kelly Broad. Co. (1989) 48 Cal. 3d 711, 726-729, 257 Cal. Rptr. 708, 771 P.2d 406* , especially its conclusion that *Civ. Code § 47(c)* was intended as a codification of the common-law privilege of common interest. The common law established a two-step analysis: the defendant bore the initial burden of demonstrating that the allegedly defamatory communication was made on a privileged occasion; the plaintiff then has the burden of proving that the defendant made the statement with malice. The Court concluded that the statute requires the same allocation. The Court rejected the plaintiff's reliance on *Snively v. Record Publ'g Co. (1921) 185 Cal. 565, 578, 198 P. 1* , and cases that followed its holding that the defendant had the burden of proving an absence of malice, on the ground that the later holding in *Locke v. Mitchell (1936) 7 Cal. 2d 599, 602-604, 61 P.2d 922* , that the plaintiff must plead malice in order to defeat a qualified privilege, had undercut *Snively's* rationale, a position adopted by the majority of court of appeal decisions. The Court also rejected the contention that the general allocation of the burden of proof set forth in *Evid. Code § 500* superseded the common-law allocation of the burden of proof of malice (*7 Cal. 4th 1193, 1202-1213)* .

The Court found the instructional error harmless, however, because the jury's award of punitive damages, after an instruction placing the burden on the plaintiff to establish oppression or malice by clear and convincing evidence, necessarily showed that the jury believed the defendants had acted with the malice sufficient to overcome the qualified privilege (*7 Cal. 4th 1193, 1213-1214)* .

[d] Privilege for Employer Not Defeated by Mere Negligence

In ***Noel v. River Hills Wilsons, Inc.*** *(2003) 113 Cal. App. 4th 1363, 7 Cal. Rptr. 3d 216* , the plaintiff was hired by a new employer on a contingent basis, but was fired after the new employer learned of the plaintiff's past criminal conduct and prison time. As part of the employer's investigation into the plaintiff's past, the employer sent an inquiry to a former employer of the plaintiff, who said that the plaintiff had been terminated for "loss prevention issues" and had an "unfavorable rehire status." However, the manager at the former employer had mistakenly believed that the inquiry

concerned a different former employee, and the information conveyed did not accurately describe the circumstances surrounding the plaintiff's dismissal from the former employer. After being terminated by the new employer, the plaintiff sued the former employer for slander for providing the false and damaging information to the inquiring employer. The trial court granted summary judgment for the defendant on the grounds of the common interest privilege of *Civ. Code § 47(c)*. The plaintiff appealed.

The court of appeal affirmed. The court noted the established rule that under the common interest privilege, malice sufficient to defeat the privilege is not established by a showing of mere negligence, such as an oversight or unintentional error. Therefore, under the undisputed facts, the manager's mistake as to the subject of the inquiry was insufficient to constitute malice necessary to defeat the privilege (*113 Cal. App. 4th 1363, 1370-1373)* . The court also rejected the plaintiff's claim that the privilege was defeated because the statements were not "based on credible evidence," as required by *Civ. Code § 47(c)*. The court held that language in *Civ. Code § 47(c)* requiring that the communication of an employer be "based on credible evidence" does not mean that the qualified privilege is lost because of negligence, but instead that the privilege is defeated only if the communication is made up of mere rumors or unfounded gossip. In this case, the manager that provided the false information did not report rumors or gossip, and she had no improper purpose in making the statements. Instead, the statements were caused by mere carelessness on her part about the subject of the inquiry, circumstances that were insufficient to defeat the privilege (*113 Cal. App. 4th 1363, 1375)* .

[4] Additional Authorities

[a] Qualified Privilege

In *King v. United Parcel Service, Inc. (2007) 152 Cal. App. 4th 426, 60 Cal. Rptr. 3d 359* , plaintiff, a supervisor with a package shipping company, was terminated from his employment for allegedly falsifying an employee's time card or causing the employee to falsify his own card. Plaintiff, who argued that he was really fired for having a disability, sued his former employer for discrimination and related claims, as well as for defamation based on statements that a representative of the employer made to other employees about the reasons for plaintiff's termination. The trial court granted summary judgment for the defendant and the court of appeal affirmed. The court first held that plaintiff failed to raise a triable issue that the employer's stated reason for terminating plaintiff's employment was a pretext (*152 Cal. App. 4th 426, 432-438)* . Addressing the defamation claim, the court held that the statements made to employees of the company about the reason for plaintiff's firing were qualifiedly privileged under *Civ. Code § 47(c)*, and that plaintiff failed to provide evidence of malice necessary to defeat the privilege. Plaintiff had been warned that it was his responsibility to monitor his drivers to ensure that they did not exceed maximum driving hours in violation of federal safety requirements. Because plaintiff chose to falsify an employee's timecard rather than limit the driver's hours, especially on a day when inclement weather was present, plaintiff was fired. The court held that statements explaining to other employees the reason for the termination, and that plaintiff had violated the company's integrity policy, were appropriate under the circumstances and privileged because the employer and its employees had a common interest in discharging their responsibilities at the facility at which plaintiff had worked (*152 Cal. App. 4th 426, 440-442)* .

In *Terry v. Davis Cmty. Church (2005) 131 Cal. App. 4th 1534, 33 Cal. Rptr. 3d 145* , the plaintiffs were former church youth group leaders who brought suit against their former church and church leaders. The plaintiffs alleged that they were defamed by written and oral statements made in connection with church-led discussions regarding allegations that the plaintiffs had engaged in an inappropriate relationship with a 16-year-old church youth. Although the court of appeal concluded that none of the statements of which the plaintiffs complained were actionable, the court also held that any defamatory statements would be privileged as matters of common interest under the qualified privilege of *Civ. Code § 47(c)*. The court reaffirmed that communications between church members on matters of church interest fell within the privilege. Although not all of the persons at the church meetings were actually church members, the non-members were parents of children who attended the church youth programs. Given that fact and the plaintiffs' failure to demonstrate malice, the privilege applied (*131 Cal. App. 4th 1534, 1556-1558)* .

In *Rodas v. Spiegel (2001) 87 Cal. App. 4th 513, 104 Cal. Rptr. 2d 439* , the plaintiff was a hardwood flooring installer who brought an action against an evaluator hired by an insurance company to evaluate and submit a report reviewing and providing repair estimates for work done by the plaintiff at a home insured by the insurance company. The lawsuit included various tort claims based on the evaluator's report, submitted to the Contractors' State License Board, which found that the home's owner suffered damage caused by improper floor installation. The plaintiff alleged that the conclusions of the report were false, that the damage was caused by water from a roof leak, and that the homeowner and the insurer knew of the leak and the cause of damage, but concealed it. The trial court dismissed the complaint as to the evaluator, and the court of appeal affirmed. As to all of the tort claims except a claim for malicious prosecution, the court of appeal held that all of the evaluator's publications were privileged under *Civ. Code § 47(c)*, because the report was requested by two interested parties, the insurer and the homeowner. Moreover, according to the plaintiff's own allegations, knowledge of the roof leak and subsequent water damage was hidden from the evaluator. Therefore, the plaintiff was unable to overcome the qualified privilege by alleging malice on the part of the evaluator (*87 Cal. App. 4th 513, 519-520)* .

In *Cruey v. Gannett Co. (1998) 64 Cal. App. 4th 356, 369, 76 Cal. Rptr. 2d 670* , a discharged supervisory employee brought a libel and slander action against an employee formerly supervised by the plaintiff. The libel and slander charges brought against the employee were based on complaints of sexual harassment made against the plaintiff by the employee to the EEOC and to the employer's vice-president of human resources. While the complaint about harassment made to the EEOC was absolutely privileged under *Civ. Code § 47(b)* (*64 Cal. App. 4th 356, 368)* , the court of appeal held that complaints made by an employee to his or her employer about workplace harassment are qualifiedly privileged under *Civ. Code § 47(c)*, because the complaint pertains to a matter of mutual interest to the employer and its employees. To hold otherwise, the court concluded, would have a chilling effect on an employee's right to be free from sexual harassment or discrimination in the workplace by exposing the employee to the risk of litigation when seeking enforcement of this right (*64 Cal. App. 4th 356, 369)* .

In *Stockton Newspapers, Inc. v. Superior Court (1988) 206 Cal. App. 3d 966, 254 Cal. Rptr. 389* , a police officer sued a newspaper for libel based on a story reporting that the officer had influenced a mentally retarded black teenager to confess to a murder he did not commit. The court of appeal issued a peremptory writ of mandate directing the court to enter an order granting the newspaper's motion for summary judgment based on the qualified privilege for communications to interested persons under former Civ. Code § 47(3) [*now see Civ. Code § 47(c)*]. The court stated that the conditional privilege applies to a newspaper's printing of a fair report, attributed to a third party, of a claim of official misconduct, even if the misconduct is denied by the official, and the newspaper is under no duty to resolve conflicting claims of what happened (*40 Cal. App. 3d 841, 849-850)* .

In *Cuenca v. Safeway S.F. Employees Fed. Credit Union (1986) 180 Cal. App. 3d 985, 225 Cal. Rptr. 852* , the supervisory committee of a credit union prepared a report concerning an employee (the credit union manager), and on the basis of the report the board of directors asked the employee to resign. The employee sued for defamation. The trial court granted the defendants' motion for summary judgment and the court of appeal affirmed, holding that although the investigation and report by the supervisory committee was not absolutely privileged under former Civ. Code § 47(1) or (2) [*now see Civ. Code § 47(a), (b)*], it was conditionally privileged under former Civ. Code § 47(3) [*now see Civ. Code § 47(c)*]. The court stated that the conditional privilege applies to a communication made without malice to an interested person by an interested person. The court defined "interested persons" as a communicator and recipient with a common interest, although it stated that to be protected, the communication must be one reasonably calculated to further that interest. It added that communications made in a commercial setting relating to the conduct of an employee have been held to fall squarely within the qualified privilege for communications to interested persons, and cited in this regard *Deaile v. General Tel. Co. of Cal. (1974) 40 Cal. App. 3d 841, 115 Cal. Rptr. 582* (discussed in *§ 142.53[3][a]*). Because the communication in *Cuenca* was directly relevant to the plaintiff's fitness as manager of the credit union, the matters were of direct interest to the supervisory committee and its auditor and board of directors, and were, therefore, qualifiedly privileged (*180 Cal. App. 3d 985, 995-996)* .

In *Kelly v. General Tel. Co. (1982) 136 Cal. App. 3d 278, 186 Cal. Rptr. 184* , the plaintiff sued his former employer, alleging a cause of action for slander based on statements his former supervisor allegedly made to other employees of his former employer. The plaintiff alleged that his former supervisor stated that the plaintiff misused company funds and falsified invoices. The defendant's general demurrer to the plaintiff's second amended complaint was sustained without leave to amend. The court of appeal stated that communications among company employees designed to insure honest and accurate records are protected by the qualified privilege of former Civ. Code § 47(3) [*now see Civ. Code § 47(c)*] (*136 Cal. App. 3d 278, 285)* . However, the court held that the plaintiff had sufficiently pleaded malice, thereby preventing application of the qualified privilege. Therefore, the court held that the trial court had erred in sustaining the demurrer to that cause of action (*136 Cal. App. 3d 278, 285)* .

In *Institute of Athletic Motivation v. University of Ill. (1980) 114 Cal. App. 3d 1, 170 Cal. Rptr. 411* , the defendant, a sports psychologist, sent a letter criticizing a sports psychology test to numerous athletic organizations and several sports magazines. At trial, a jury was instructed that the qualified privilege for communications to interested persons was applicable. The court of appeal affirmed and held that the privilege was applicable because the communication was only directed at those interested therein and there was an adequate opportunity to reply (*114 Cal. App. 3d 1, 12-13)* .

[b] Plaintiff Has Burden of Establishing Malice

In *Bierbower v. FHP, Inc. (1999) 70 Cal. App. 4th 1, 82 Cal. Rptr. 2d 393* , a former employee accused of three incidents of sexual harassment by a co-worker brought a defamation action her former employer based on a memo written by a supervisor informing the personnel department of the allegations. According to the plaintiff, the memo was sent to personnel with malice because a discrepancy in the memo as to the date of the allegations demonstrated that the most recent allegation was false and the supervisor knew this. After the plaintiff presented her case at trial, nonsuit was granted to the defendant on the grounds that the plaintiff had failed to present any substantial evidence of malice. The court of appeal affirmed, agreeing that the plaintiff had failed to show that the memo was written with malice sufficient to defeat the qualified privilege of *Civ. Code § 47(c)*. The court concluded that the discrepancy as to the date of the most recent allegation had been explained without contradiction to have been a simple typing mistake by the supervisor. Absent that discrepancy, the plaintiff had failed to show that the supervisor had acted with malice in sending the report to the personnel department, which the supervisor was required to do under the company's anti-harassment policy (*70 Cal. App. 4th 1, 6-9)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationDefensesPrivilegesQualified PrivilegesTortsIntentional TortsDefamationElementsGeneral Overview

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CHAPTER 142 LIBEL AND SLANDER (DEFAMATION)
PART II. FORMS

14-142 California Points & Authorities § 142.54

§ 142.54 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Consent of Plaintiff to Defamatory Publication

[1] FORM

[*Caption. See § 142.24.*]

SUMMARY JUDGMENT FOR DEFENDANT IS PROPER WHERE PLAINTIFF CONSENTED TO DEFENDANT'S STATEMENTS.

A. Summary Judgment. [*See § 142.24, Paragraph A.*]

B. Consent. The publication of statements to which the plaintiff consented is not defamatory (*see Puchan v. Godeau (1914) 167 Cal. 692, 694, 140 P. 952* (dictum); *Moranville v. Aletto (1957) 153 Cal. App. 2d 667, 671, 315 P.2d 91* (dictum)).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for summary judgment if the motion asserts that the defendant is entitled to a judgment as a matter of law because the plaintiff consented to publication of the statements.

If appropriate, counsel should insert argument in this form showing the relationship between the facts of his case and

the point of law raised. In addition, counsel should attach affidavits or declarations that support the motion [*Code Civ. Proc. § 437c*].

[b] Related Pleading and Practice Forms

For a form of affirmative defense based on consent, see Ch. 340, *Libel and Slander* in California Forms of Pleading and Practice (Matthew Bender). For a general form of notice of motion for summary judgment based on an affirmative defense to a defamation action, see the same chapter.

[3] Discussion of Authorities

[a] Consent

Puchan v. Godeau *(1914) 167 Cal. 692, 140 P. 952* , and ***Moranville v. Aletto*** *(1957) 153 Cal. App. 2d 667, 315 P.2d 91* , presented identical factual situations in which the defendant had called the plaintiff a thief. In *Pouchan*, the Supreme Court held that the fact that the plaintiff elicited a reiteration of the charge in more explicit language did not make consent a viable defense (*167 Cal. 692, 694)* . In *Moranville*, the court of appeal affirmed a jury verdict for the plaintiff and stated that the question of consent was a question for the jury (*153 Cal. App. 2d 667, 671)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral Overview

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14-142 California Points & Authorities § 142.55

§ 142.55 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Person Authorized to Make Report of Child Abuse [Penal Code § 11166] Immune From Liability for Report Not Made With Knowledge of Falsity or Reckless Disregard for Truth or Falsity [Penal Code § 11172(a)]

[1] FORM

[*Caption. See § 142.24.*]

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD BE GRANTED BECAUSE PLAINTIFF HAS NOT ESTABLISHED THAT DEFENDANT MADE A FALSE REPORT WITH KNOWLEDGE OF ITS FALSITY, OR RECKLESS DISREGARD OF THE TRUTH OR FALSITY OF THE REPORT, AND DEFENDANT IS THEREFORE IMMUNE FROM LIABILITY AS A RESULT OF ANY REPORT OF KNOWN OR SUSPECTED CHILD ABUSE MADE PURSUANT TO PENAL CODE SECTION 11164 ET SEQ.

A. Summary Judgment. [*See § 142.24, Paragraph A.*]

B. Qualified Immunity for Report of Child Abuse. Any person reporting a known or suspected instance of child abuse, other than a mandated reporter, is immune from liability as a result of any report authorized by *Sections 11164-11174.1 of the Penal Code* unless it can be proven that a false report was made and the person knew that the report was false or made the report with reckless disregard of its truth or falsity (*Penal Code § 11172(a)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion for summary judgment by the defendant in a defamation action. The ground for the motion is that the defendant is entitled to a judgment as a matter of law because the plaintiff has not established that the defendant made a false report either with knowledge of it falsity, or reckless disregard of its truth or falsity, and therefore he or she is immune from civil liability as a result of any report of known or suspected child abuse authorized by *Penal Code §§ 11164-11174.1* (reporting and investigation of child abuse) [*Penal Code § 11172(a)*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Counsel should also attach affidavits or declarations that support the memorandum [*see Code Civ. Proc. § 437c*].

[b] Persons to Whom Immunity Applies

Any person, other than those persons required to report child abuse, who has knowledge of or observes a child whom he or she knows or reasonably suspects has been a victim of child abuse may report the known or suspected instance of child abuse to a child protective agency [*Penal Code § 11166(g)*]. For these purposes, "any other person" includes a mandated reporter who acts in his or her private capacity and not in his or her professional capacity or within the scope of his or her employment [*Pen. Code § 11166(g)*].

[3] Discussion of Authorities

[a] Qualified Immunity for Report of Child Abuse

Any person, other than those mandated reporters specified in *Penal Code § 11166*, who reports a known or suspected instance of child abuse shall not incur civil or criminal liability as a result of any report authorized by *Penal Code §§ 11164-11174.1* unless it can be proven that a false report was made and the person knew that the report was false or was made with reckless disregard of the truth or falsity of the report. Any person who makes a report of child abuse known to be false or with reckless disregard of the truth or falsity of the report is liable for any damages caused [*Penal Code § 11172(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral Overview

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14-142 California Points & Authorities § 142.55A

§ 142.55A Supporting Contention That Liability for Making False Report of Child Abuse Does Not Apply to Alleged Victim of Abuse [Penal Code § 11172(a)]

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

DEFENDANT MAY NOT BE HELD LIABLE FOR ALLEGEDLY MAKING A FALSE REPORT OF CHILD ABUSE UNDER PENAL CODE SECTION 11172(a) BECAUSE THAT STATUTORY PROVISION DOES NOT CREATE A CAUSE OF ACTION AGAINST THE ALLEGED VICTIM OF THE CHILD ABUSE.

No Cause of Action Under *Penal Code Section 11172(a)* Against Alleged Victim of Child Abuse. *Penal Code Section 11172(a)*, which generally permits a cause of action for making a false report of child abuse, applies only to reports of actual or suspected child abuse made by third parties and does not apply to a report of child abuse made by the alleged victim of the abuse (*Chabak v. Monroy (2007) 154 Cal. App. 4th 1502, 1515-1519, 65 Cal. Rptr. 3d 641*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that *Penal Code § 11172(a)*, which generally permits a cause of action for making a false report of child abuse, does not apply to a report of child abuse made by the alleged victim of the abuse. Absence application of *Penal Code § 11172(a)*, a child who reported his or her own alleged abuse to the appropriate authorities, such as police or parents, may defend a cause of action based on the report by asserting the litigation privilege of *Civ. Code § 47(b)* [*see § 142.48*].

This form may be combined with points relating to the specific procedural context in which the issue of defendant's liability arises, or combined with other forms in this chapter, as appropriate. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law stated. Thus, counsel should include facts showing that the cause of action against defendant arose solely from defendant's report of his or her own child abuse to appropriate persons, such as parents or police, and argue that defendant's report was privileged under the litigation privilege of *Civ. Code § 47(b)*.

[3] Discussion of Authorities

[a] No Cause of Action Under Penal Code Section 11172(a) Against Alleged Victim of Child Abuse

In ***Chabak v. Monroy*** *(2007) 154 Cal. App. 4th 1502, 65 Cal. Rptr. 3d 641* , plaintiff was a physical therapist accused of inappropriate conduct by a 17-year-old female athlete who was being treated by plaintiff for an injury. Although the girl did not immediately report plaintiff's alleged conduct, she eventually reported to police and her parents that plaintiff had touched and pinched her inappropriately while massaging her legs and made comments and jokes of a sexual nature. The police investigated but no charges were filed against plaintiff. Plaintiff then sued the girl for allegedly filing a false report of abuse with the police. Defendant filed a motion to strike the complaint under the anti-SLAPP statute, *Code Civ. Proc. § 425.16*. The trial court denied the motion and defendant appealed.

The court of appeal reversed and ordered that the motion to strike be granted. The court first held that defendant's conduct in reporting the alleged abuse to the police and to her parents was petitioning activity, making the complaint subject to a motion to strike under *Code Civ. Proc. § 425.16* (*154 Cal. App. 4th 1502, 1512)* . The court then held that plaintiff failed to show a probability of success on the merits. The court concluded that plaintiff could not state a cause of action under *Penal Code § 11172(a)*, which generally permits a cause of action for making a false report of child abuse, against the alleged victim of child abuse who reports such abuse, and defendant's conduct was otherwise absolutely privileged under the litigation privilege of *Civ. Code § 47(b)*. Distinguishing other court opinions holding that *Penal Code § 11172(a)* created an exception to the litigation privilege, the court of appeal held that the Child Abuse and Neglect Reporting Act, *Penal Code § 11164 et seq.*, did not apply to reports of abuse made by the alleged victim of the abuse. The court noted that the liability imposed under *Penal Code § 11172(a)* applied to "any report authorized" by the Act, but the only reports "authorized by" the Act were those reports made by mandatory or voluntary reporters who report their observations. Reports made by the alleged victims were not dealt with in, thus not "authorized by," the Act. The court also noted that the purpose of the act was to increase reports of suspected child abuse made by specified reporters in order to protect children from abuse, and this goal would not be furthered by imposing civil liability on a child who makes a report of his or her own abuse. The court also reviewed the legislative history and found nothing to support the conclusion that the Legislature intended the Act to apply to reports made by the alleged victim (*154 Cal. App. 4th 1502, 1516-1517)* . Because an alleged victim of child abuse could not be held liable under these provisions, the court concluded that the litigation privilege of *Civ. Code § 47(b)* immunized defendant from liability for making statements about the alleged abuse to her parents or the police in anticipation of litigation (*154 Cal. App. 4th 1502, 1519)* .

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14-142 California Points & Authorities § 142.56

§ 142.56 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Bar of Statute of Limitations [Code Civ. Proc. § 340(c)] Affirmatively Appearing on Face of Pleading

[1] FORM

[*Caption. See § 142.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT SHOWS ON ITS FACE THAT IT IS BARRED BY THE STATUTE OF LIMITATIONS.

A. Objection by Demurrer. [*See § 142.20, Paragraph A.*]

B. One-Year Period. The statute of limitations for a defamation action is one year (*Code Civ. Proc. § 340(c)*).

C. Publication Activates Statute of Limitations. The statute of limitations begins to run from the time of publication (*Campbell v. Jewish Comm. for Pers. Serv. (1954) 125 Cal. App. 2d 771, 774, 271 P.2d 185*).

[*Optional*] **D. Date of Actual Distribution to Public.** For purposes of the statute of limitations, the cause of action accrues on the date of first general distribution of the publication to the public, and not on the cover date of the publication (*McGuiness v. Motor Trend Magazine (1982) 129 Cal. App. 3d 59, 62, 180 Cal. Rptr. 784*).

[*Optional*] **E. Rule of Discovery Inapplicable to Public Defamation.** The rule of discovery, which permits the statute of limitations under *Code Civ. Proc. § 340(c)* to be tolled until the plaintiff discovers the defamation, does not apply if the defendant has not concealed the defamation and if it is contained in a publication such as a book, magazine, or newspaper that is available to the general public, including the plaintiff (*Shively v. Bozanich (2003) 31 Cal. 4th 1230, 1250-1251, 7 Cal. Rptr. 3d 576, 80 P.3d 676* ; *McGuiness v. Motor Trend Magazine (1982) 129 Cal. App. 3d 59, 62-63, 180 Cal. Rptr. 784*).

[*Optional*] **F. Discovery Rule Inapplicable Even When Publication Is Not Widely Disseminated to Public.** The discovery rule is inapplicable to a publication available to the public even if the publication is not widely disseminated or mass marketed. (*Hebrew Academy of San Francisco v. Goldman (2007) 42 Cal. 4th 883, 894-895, 70 Cal. Rptr. 3d*

178, 173 P.3d 1004).

[*Optional*] **G. Discovery Rule Inapplicable Once Secret Defamation Is Revealed in Subsequent Public Publication.** Once defamatory material is published in a book that is available to the general public, the equitable grounds for applying the discovery rule to toll the running of the statute of limitations disappear not only for any cause of action based on that publication, but also for any cause of action based on earlier publications that were inherently secret or confidential at the time, but are revealed in the published book (*Shively v. Bozanich (2003) 31 Cal. 4th 1230, 1252-1253, 7 Cal. Rptr. 3d 576, 80 P.3d 676*).

[*Optional*] **H. Statute Tolling Limitation Period Regarding Criminal Child Abuse Is Inapplicable to Newsperson.** A newsperson who reports the events of criminal child-abuse proceedings is not a witness within the meaning of *Section 48.7(a) of the Civil Code*, which therefore does not toll the limitations period regarding a defamation action brought against the newsperson based on statements made in connection with the criminal proceedings (*Satz v. Superior Court (1990) 225 Cal. App. 3d 1525, 1531-1533, 275 Cal. Rptr. 710*).

[*Optional*] **I. Single Publication Rule Applies to Internet Publication.** For purposes of establishing the date on which the statute of limitations begins to run, the single publication rule applies to the publication of allegedly defamatory material on an Internet web site (*Traditional Cat Ass'n, Inc. v. Gilbreath (2004) 118 Cal. App. 4th 392, 404, 13 Cal. Rptr. 3d 353*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a general demurrer to a complaint if the complaint fails to state facts sufficient to constitute a cause of action in that it appears on the face thereof, or from any matter of which the court is required to or may take judicial notice, that the one-year statute of limitations bars the action. Optional Paragraph D may be used to assert that the cause of action accrues on the date of first general distribution of the publication to the public. Optional Paragraphs E, F and G may be used to state that the discovery rule is inapplicable. Optional Paragraph H may be used to argue that the defendant, as a newsperson, is not within the purview of *Civ. Code § 48.7(a)* [*see § 142.44*], which tolls the limitation period in actions against certain person (e.g., witnesses) regarding statements made in connection with the criminal proceedings. Optional Paragraph I may be used to argue that the single publication rule applies to alleged defamation that is published on an Internet web site.

This form may be adapted for use to support a defendant's motion for judgment on the pleadings or a defendant's motion for summary judgment [*Code Civ. Proc. § 437c*]. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Therefore, the defendant should set forth the relevant dates showing that the action was filed after the expiration of the one-year limitation period.

[b] Related Pleading and Practice Forms

For a form of demurrer to a complaint based on the statute of limitations, see California Forms of Pleading and

Practice, Ch. 340, *Libel and Slander* (Matthew Bender). For a form of affirmative defense on the same ground, and a general form of notice of motion for summary judgment based on an affirmative defense to a defamation action, see the same chapter.

[3] Discussion of Authorities

[a] Publication Activates Statute of Limitations

In ***Campbell v. Jewish Comm. for Pers. Serv.*** *(1954) 125 Cal. App. 2d 771, 271 P.2d 185* , the court of appeal affirmed a judgment for the defendant on several grounds. One of the grounds was that the complaint was filed more than six years after the libel was published. The court stated that a libel that was uttered only one time is not continuous and occurs only on publication (*125 Cal. App. 2d 771, 774)* .

[b] Date of Actual Distribution to Public

In ***McGuiness v. Motor Trend Magazine*** *(1982) 129 Cal. App. 3d 59, 180 Cal. Rptr. 784* , the plaintiff filed a complaint for libel on July 29, 1976. The plaintiff alleged that he was libeled in the August 1975 issue of *Motor Trend Magazine* by a photo caption that indicated that he, along with three others in the photo, had been indicted. That issue of *Motor Trend Magazine* was distributed to the general public and subscribers no later than July 24, 1975, in accordance with the magazine's general policy. The defendants moved for summary judgment on the ground that the action was barred by the one-year limitations period of former Code Civ. Proc. § 340(3) [*now see Code Civ. Proc. § 340(c)*]. When the motion was granted, the plaintiff appealed.

The court of appeal affirmed, stating that California follows the general rule that for purposes of the statute of limitations, the cause of action accrued on the first general distribution of the publication to the public (*129 Cal. App. 3d 59, 61)* . The court noted that the plaintiff's complaint was filed more than one year beyond the date of the first general distribution to the public, and therefore was untimely. The court added that the courts have uniformly rejected the contention that the date of the cover of the publication is controlling, and that the plaintiff's suggestion that equity demanded that the cover date of the magazine be deemed the legal publication date was without merit. The court did not accept the plaintiff's contention that the industry-wide practice of postdating magazines constituted active concealment of the date of publication (*129 Cal. App. 3d 59, 62)* .

[c] Rule of Discovery Inapplicable to Public Defamation

In ***Shively v. Bozanich*** *(2003) 31 Cal. 4th 1230, 7 Cal. Rptr. 3d 576, 80 P.3d 676* , the plaintiff was a potential prosecution witness in the high-profile capital murder trial of former football star O.J. Simpson. Although the plaintiff testified before the grand jury in that case, she was not called as a witness at trial, allegedly because she had sold her story to a television news magazine. However, the apparent real reason she was not called as a trial witness was because a former boyfriend had told a deputy district attorney that the plaintiff was "a felony probationer." This was subsequently repeated by the deputy district attorney to an author, who then recounted the information and its source in a nationally published book. Alleging that the statement that she was a felony probationer was false, the plaintiff sued her former boyfriend, the deputy district attorney, the county, the author, and the book publisher for defamation based on three publications of the statement: the first made by the boyfriend, the second made by the deputy district attorney, and the third contained in the book. The plaintiff alleged that her causes of action accrued when she first bought and read a copy of the book, which was several months after the book became widely distributed in California. However, the trial court sustained a demurrer in favor of the former boyfriend on the grounds that he had made his statement more than a year before the action was filed and therefore the claim against him was barred by the statute of limitations. The trial court also granted summary judgment for the deputy district attorney and his employer, the county, on the grounds that the plaintiff had failed to file a claim with the county as required by the Tort Claims Act within six months after the cause of action accrued, which the defendants argued was the date the book became widely distributed in California, rather than when the plaintiff read the book. The plaintiff appealed both rulings, and the court of appeal reversed. The

court of appeal held that the trial court erred in failing to consider the accrual date of the plaintiff's cause of actions under the delayed discovery rule, under which the causes of action accrued when the plaintiff knew, or with reasonable diligence should have known, of the defamatory statements. Another appeal followed.

The California Supreme Court reversed the court of appeal, holding that the discovery rule could not be used to toll the accrual of a cause of action for defamation beyond the point at which the defamation was made public in a book and no longer remained secret. The Court noted that California courts had applied the delayed discovery rule in certain defamation cases, generally if the defamatory statements were hidden from view or otherwise kept secret from the plaintiff (*31 Cal. 4th 1230, 1248-1249)* . The Court also noted, however, that the discovery rule has not been applied to a cause of action based on publication of defamatory statements published in a book, magazine, or newspaper. Applying the rule to such actions would undermine the protection provided by the single publication rule, under which there is only considered to be a single publication of a defamatory statement for any single edition of a book or newspaper, no matter how many copies are distributed. This rule was designed in part to prevent indefinite tolling of the statute of limitations that would occur if every copy of the book created the potential for another lawsuit. The Court then held that because a cause of action for defamation based on publication in a book or newspaper accrues when the book or newspaper is first generally distributed to the public, the causes of action based on the publication in the book were not subject to delayed discovery. Because the plaintiff filed her actions more than a year after the book was first widely distributed to the public in California, those actions were time-barred (*31 Cal. 4th 1230, 1250-1251)* .

The factual and procedural background of ***McGuiness v. Motor Trend Magazine*** *(1982) 129 Cal. App. 3d 59, 180 Cal. Rptr. 784* , is discussed in *§ 142.56[3][b]*. The court of appeal held that the rule of discovery did not apply in this case. This rule, which states that the statute of limitations should not be deemed to have commenced until the plaintiff discovers the libel, applies only to cases in which the libel is committed in an inherently secretive manner. The court stated that it has no application to a public libel in a nationally distributed magazine that is widely available to the public, including the plaintiff. The court distinguished *Manguso v. Oceanside Unified School Dist. (1979) 88 Cal. App. 3d 725, 152 Cal. Rptr. 27* , in which the rule of discovery was applied. In *Manguso*, the court noted that the libel was in a letter that was placed by a supervisor in the plaintiff's confidential permanent personnel file, which the plaintiff did not discover for 16 years. In contrast to *Manguso*, the court in *McGuiness* found that there was no concealment of the defamation (*129 Cal. App. 3d 59, 62-63)* .

[d] Discovery Rule Inapplicable Even When Publication Is Not Widely Disseminated to Public

In ***Hebrew Academy of San Francisco v. Goldman*** *(2007) 42 Cal. 4th 883, 70 Cal. Rptr. 3d 178, 173 P.3d 1004* , plaintiffs were a Hebrew academy and its founder who sued an individual and related organizations for allegedly libelous comments that were made about plaintiffs in an "oral history" that was copyrighted in 1993. A transcript of the oral history was kept in a restricted-access research library at the University of California, and a few copies were made and provided to 2 other similar libraries. While any member of the general public could access the transcript by going through the proper procedures, no more than 10 copies of the transcript had apparently been made. Plaintiffs became aware of the libelous comments in the transcript in 2001 after a researcher, who had read part of the transcript while researching a book, sent copies of some pages to the academy founder. Plaintiffs sued, but the trial court granted summary judgment for defendants on the basis of the one-year statute of limitations of *Code Civ. Proc. § 340(c)*. Plaintiffs appealed. The court of appeal reversed after concluding that the single publication rule did not apply to this limited publication and, under these particular circumstances, the discovery rule tolled the running of the statute of limitations. Defendants appealed.

The California Supreme Court reversed the court of appeal and upheld the summary judgment granted by the trial court. The Supreme Court, after reviewing the rationale underling its earlier opinion in *Shively v. Bozanich*, discussed in [c], *above*, first held that the single publication rule applied not only to books and newspapers that are published with general circulation, but also to publications that are given only limited circulation and are not generally distributed to the public (*42 Cal. 4th 883, 892-893)* . The Court then held that the discovery rule did not delay the running of the

statute of limitations under the circumstances of the case. The Court noted that the discovery rule has been applied when the defamatory material is inherently secret and hidden from view, such as when it is contained in a confidential personnel file that cannot be inspected by the plaintiff. However, the Court distinguished that situation from the facts at hand, noting that the defamatory material alleged by plaintiffs, although not widely disseminated, was not published in an inherently secretive manner and was available for inspection by the public from the moment of its original publication as an oral history transcript in 1993 (*42 Cal. 4th 883, 894-895)* .

[e] Discovery Rule Inapplicable Once Secret Defamation Is Revealed in Subsequent Public Publication

The factual and procedural background of ***Shively v. Bozanich*** *(2003) 31 Cal. 4th 1230, 7 Cal. Rptr. 3d 576, 80 P.3d 676* , is described in § 142.56[3][c]. After determining that the discovery rule could not be applied to causes of action based on publications made in a book available for distribution to the general public, the California Supreme Court went on to hold that once defamatory material is published in a book that is available to the general public, the equitable grounds for applying the discovery rule disappear not only for a cause of action based on that publication, but also for any cause of action based on earlier publications that were inherently secret or confidential at the time, but were revealed in the published book. Therefore, the delayed discovery rule was also inapplicable to the causes of action against the former boyfriend for his original defamatory statement, and to the causes of action based on the repetition by the deputy district attorney, at least from the point at which attribution of the defamatory statements to those parties was revealed in the book when it was distributed to the general public (*31 Cal. 4th 1230, 1252-1253)* .

[f] Statute Tolling Limitation Period Regarding Criminal Child Abuse Is Inapplicable to Newsperson

In ***Satz v. Superior Court*** *(1990) 225 Cal. App. 3d 1525, 275 Cal. Rptr. 710* , the plaintiffs brought an action against a television news reporter based on statements made while covering a criminal trial in which the plaintiffs were prosecuted for violation of child-abuse laws. The plaintiffs alleged that the action was not barred under *Civ. Code § 48.7(a)*, which states that no person charged with violation of child-abuse laws may bring a defamation action against the minor, parents, guardians, or witnesses, in connection with the underlying criminal prosecution; it also tolls the applicable statute of limitations period while the charges are pending [*see § 142.43*]. The defendant brought a motion to strike those portions of the complaint that alleged claims based on broadcasts that had been aired more than one year before the action was filed. The trial court denied the motion, as well as a subsequent motion for reconsideration. The defendant filed a petition for a writ of mandate, to determine whether he was a "witness" within the meaning of *Civ. Code § 48.7*, in which case the older claims would not be time-barred.

The court of appeal let a writ of mandate issue directing the trial court to vacate its order denying the defendant's motion to strike, and to enter a new order granting the motion insofar as it is based on *Civ. Code § 48.7* (*225 Cal. App. 3d 1525, 1533)* . The plaintiffs contended that the defendant is a "witness" within the meaning of statute, and that, therefore, their claims for defamation were tolled while the criminal charges against them were pending. The defendant contended that, because he had not witnessed any act of child abuse that was the subject of the criminal prosecution, the statute does not apply to him. The court concluded that the plain language of *Civ. Code § 48.7*, its legislative history, and general rules of statutory construction supported the defendant's position (*225 Cal. App. 3d 1525, 1530)* . The plain meaning of the statute, the court found, is to protect victims of child abuse, their parents or guardian, and witnesses to the acts of abuse from harassment by civil lawsuits for defamation while criminal proceedings are still pending (*225 Cal. App. 3d 1525, 1531)* . It noted that the legislation was introduced as a result of judicial concern that civil actions have intimidated witness in child abuse cases, and have inhibited the prosecution of those cases. There is nothing in the language of the statute or in its history to suggest that the legislature meant anything other than what it said: that a defamation action against the child, its parent (or guardian) or any witness to the child abuse charged in the criminal proceeding cannot be filed until after the criminal proceedings are concluded. Accordingly, the court found, the plaintiffs' allegations are wholly insufficient to invoke the tolling provisions of *Civ. Code § 48.7*, and there is no conceivable way they could by amendment cure the deficiency. By the plain terms of the pleading, the court noted, the defendant allegedly stated to the public, on nationwide media broadcasts, that the plaintiffs were guilty of child abuse,

or, that he exceeded his role as news gatherer and reporter to become a participant in the events, and to that extent became a creator of false news. There is no allegation, and there could none be under the facts, that the defendant was a witness to any act of child abuse (*225 Cal. App. 3d 1525, 1532)* .

[g] Single Publication Rule Applies to Internet Publication

In ***Traditional Cat Ass'n, Inc. v. Gilbreath*** *(2004) 118 Cal. App. 4th 392, 13 Cal. Rptr. 3d 353* , the plaintiffs were a cat breeding association and its president who brought suit against another cat breeding association and its officers. The plaintiffs' suit alleged causes of action for defamation, unfair competition, and conversion. The defamation action was based on allegedly defamatory statements published on an Internet web site created by one of the individual defendants to report on the status of earlier, ongoing litigation between the parties. The defendants filed a motion to strike the defamation cause of action under *Code Civ. Proc. § 425.16*, the anti-SLAPP statute, arguing that the plaintiffs could not prevail on the defamation claim because that claim was filed more than a year after the last time the allegedly defamatory material on the web site was updated. Even though the trial court agreed that the statements on the web site were made in furtherance of the defendant's free speech rights, as required to come within the ambit of the anti-SLAPP statute, the court denied the motion to strike in part because it concluded that the anti-SLAPP statute could not be used to strike a cause of action based on a statute of limitations defense. The defendants appealed the denial of the motion to strike.

The court of appeal reversed the denial of the motion to strike. The court first determined that the anti-SLAPP statute could be used to strike an applicable cause of action if the defendant shows conclusively that the cause of action is barred by the applicable statute of limitations (*118 Cal. App. 4th 392, 398-399)* . The court then held that for purposes of establishing the date on which the statute of limitations begins to run, the single publication rule applies to the publication of allegedly defamatory material on an Internet web site. The court rejected the plaintiffs' argument that the defamation cause of action arose continuously while the web site was operating, and concluded instead that the same interests that justified applying the single-publication rule to more traditional mass-market publishing mediums, including the desire to curtail potentially perpetual liability and eliminate stale claims, applied to Internet publishing (*118 Cal. App. 4th 392, 403-404)* . Because the defendants established that the plaintiffs' action for defamation was filed more than a year after the last update to the allegedly defamatory material published on the web site, and because there was no evidence that the defamatory material had been republished by any other means within the year prior to the filing of the lawsuit, the defendants had shown that the defamation action was time-barred, and the trial court erred in failing to strike that cause of action (*118 Cal. App. 4th 392, 404-405)* .

[4] Additional Authorities

[a] Date of Actual Distribution to Public

In *Strick v. Superior Court (1983) 143 Cal. App. 3d 916, 192 Cal. Rptr. 314* , the trial court granted the defendant's motion for summary judgment because the action was filed one day after the expiration of the one-year statute of limitations (former Code Civ. Proc. § 340(3) (*now see Code Civ. Proc. § 340(c)*). The court of appeal upheld the dismissal based on the single publication rule (*Civ. Code § 3425.3*), stating that the date of actual distribution of the publication to the public occurred on the first day that a substantial body of copies of the publication was delivered to retail outlets for sale and distribution (*143 Cal. App. 3d 916, 922)* .

[b] Rule of Discovery Inapplicable to Public Defamation

In *Long v. Walt Disney Co. (2004) 116 Cal. App. 4th 868, 10 Cal. Rptr. 3d 836* , the plaintiffs sued an entertainment company after their sixth-grade yearbook photographs had been used as templates for the creation of fictional, cartoon-like characters in a series of Saturday morning vignettes, accompanied by retail products and other Internet tie-ins. The plaintiffs alleged that this use of their likenesses subjected them to ridicule, humiliation, and defamation. The trial court granted the defendant's motion for summary adjudication on the grounds that the suit was brought more

than two years after the last broadcast of the likenesses. The court of appeal affirmed. After briefly reviewing the Supreme Court's decision in *Shively v. Bozanich (2003) 31 Cal. 4th 1230, 7 Cal. Rptr. 3d 576, 80 P.3d 676* [*see § 142.56[3][c]*], the court of appeal held that the claim was governed by the Uniform Single Publication Act, *Civ. Code § 3425.1 et seq.* Therefore, the court rejected the plaintiffs' argument that the statute of limitations was tolled until the plaintiffs discovered the broadcasts. Instead, the claims accrued when the defamation was first made available to the general public through weekly broadcasts on national network television, regardless of when the plaintiffs actually became aware of the broadcasts (*116 Cal. App. 4th 868, 875)* . The court also rejected the plaintiffs' attempts to characterize the claims for emotional distress as something other than a claim for defamation, noting that the same result would be reached regardless of the exact tort claimed (*116 Cal. App. 4th 868, 873)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationDefensesStatutes of LimitationsTortsIntentional TortsDefamationElementsGeneral Overview

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14-142 California Points & Authorities § 142.57

§ 142.57 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Publication Did Not Convey Defamatory Meaning

[1] FORM

[*Caption. See § 142.24.*]

SUMMARY JUDGMENT FOR DEFENDANT IS PROPER WHERE NO DEFAMATORY MEANING WAS CONVEYED.

A. Summary Judgment. [*See § 142.24, Paragraph A.*]

B. No Defamatory Meaning Conveyed. Words that were not understood at all, words that were taken in jest, or words that had some meaning other than the obvious one do not subject the defendant to damages for defamation because the words did not convey a defamatory meaning (*Arno v. Stewart (1966) 245 Cal. App. 2d 955, 962-966, 54 Cal. Rptr. 392*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion for summary judgment if the motion asserts that the statements complained of did not convey a defamatory meaning to those who read or heard them.

Counsel should insert argument in this form showing the relationship between the facts of his case and the point of law raised. In addition, counsel should attach affidavits or declarations that support the motion [*Code Civ. Proc. § 437c*].

[b] Related Pleading and Practice Forms

For a form of affirmative defense based on the failure of the publication to convey a defamatory meaning, see California Forms of Pleading and Practice, Ch. 340, *Libel and Slander* (Matthew Bender). For a general form of notice of motion for summary judgment based on an affirmative defense to a defamation action, see the same chapter.

[3] Discussion of Authorities

[a] No Defamatory Meaning Conveyed

In ***Arno v. Stewart*** *(1966) 245 Cal. App. 2d 955, 54 Cal. Rptr. 392* , the court of appeal held that the defendant's alleged slander on a television program in referring to the plaintiff as an "iron-clad singing member of the Mafia" could reasonably be interpreted as a joke that was devoid of any defamatory meaning. Thus, the court held that it would have been error for the court to dissociate the statement from the jocular context in which it was made and received and, thus, affirmed judgment for the defendants (*245 Cal. App. 2d 955, 962-966)* .

[4] Additional Authorities

[a] No Defamatory Meaning Conveyed

In *Balzaga v. Fox News Network, LLC (2009) 173 Cal. App. 4th 1325, 93 Cal. Rptr. 3d 782* , plaintiffs were immigrant laborers who brought a defamation action against a television news network based on a story aired by the network. The news story consisted of an interview with an anti-illegal immigration activist who accused plaintiffs of attacking him when he went to their migrant labor camp and took their photographs. The activist complained in the report that he felt that police were not doing enough in response to his complaint, and taking matters into his own hands, the activist displayed a poster that he created that had photographs of each of the plaintiffs, along with the caption "Wanted--Robbery, Assault and Battery." The news report showed a close up of each photograph on the poster. In addition, during the length of the four-minute news story, the network ran on the screen the headline "MANHUNT AT THE BORDER," although the hosts of the news show stated that police were only "investigating" the activist's complaint and in fact had also been investigating the activist for his role in instigating the fight. Plaintiffs' complaint against the network was based solely on their use of the caption "MANHUNT AT THE BORDER," which according to plaintiffs suggested that police were actively looking for them for criminal conduct when in fact they were not. The trial court granted the network's motion to strike the complaint against it under the anti-SLAPP statute, *Code Civ. Proc. § 425.16*, after concluding that plaintiffs had not shown a probability of success on the merits. In a split decision, the court of appeal affirmed. The court majority held that taking the report in its entirety, no reasonable person could conclude that the caption about a "MANHUNT AT THE BORDER" was referring to a police manhunt for plaintiffs, rather than a hunt being waged by the interviewed activist. The court noted that the program hosts had made clear in their report that police were only "investigating" the incident, including the activist's role as a potential instigator, and that the real search was being made by the activist, who considered himself to be the victim of an assault. Because plaintiffs' claim against the network was based solely on the meaning of the headline banner, which the court concluded conveyed no defamatory meaning, plaintiffs' defamation claim against the network had to fail (*173 Cal. App. 4th 1325, 1340-1341)* .

In *Couch v. San Juan Unified Sch. Dist. (1995) 33 Cal. App. 4th 1491, 39 Cal. Rptr. 2d 848* , the plaintiff, a high school campus security officer, sued the school district for libel, based on a portion of an article in the school newspaper. For the period of time preceding the publishing of the article, the plaintiff was the only African-American employee at the school, whose student body was overwhelmingly white. On arriving at work one morning, the plaintiff was shown a portion of an article in the school paper that read "What's the story behind the new narc? (a) They felt that we needed someone who's actually committed murder to hand out discipline at the high school. (b) They wanted to find

someone who blends in well with the students. (c) He's part of the school's new motto, We're gonna kick some ass! (d) I don't know his story, but he sells primo drugs, cheap too!" After reading this portion of the article, the plaintiff concluded that it was about him and that it accused him of being a murderer, a drug dealer, and a bully. The defendant moved for summary judgment, contending that the statements could not constitute actionable libel, because they could not reasonably be understood as implying a provably false assertion of fact, and that they were not "of and concerning" the plaintiff. The trial court granted summary judgment, finding as a matter of law that the average reader, on viewing the article in its entirety, would recognize it as a parody or joke and not as assertions of fact.

The court of appeal affirmed the summary judgment for the defendant. The court acknowledged that statements intended as humor or parody may in certain circumstances convey a defamatory meaning and be actionable even if the words used could not be understood in their literal sense or be believed to be true. However, if, as in this case, the average reader of the statements would understand that they could not have been intended to convey a provably false assertion of fact, but were clearly a mere joke or parody, there is no defamation as a matter of law (*33 Cal. App. 4th 1491, 1501)* . The court first noted that the average reader of this publication was a student or teacher at the high school in the habit of reading the newspaper. The court then reasoned that almost everything about the newspaper article, beginning with the introduction, would have revealed it to the average reader as a parody (*33 Cal. App. 4th 1491, 1502)* .

In *Polygram Records v. Superior Court (1985) 170 Cal. App. 3d 543, 216 Cal. Rptr. 252* , the court of appeal rejected the defendant's contention that comedy is a form of expression categorically protected by the *First Amendment* because humor is a useful and necessary form of social commentary, comparable in certain respects to political speech and religious expression. The defendant also contended that comedy is, by definition, not taken seriously or literally. Although the court of appeal agreed that under the facts of this case, the joke was not actionable as a matter of law, it rejected the defendant's broader contentions (*170 Cal. App. 3d 543, 551-552)* . The court declined to articulate a general principle to define comedy and held that the issue was whether the joke could reasonably be understood in a defamatory sense by those who heard it (*170 Cal. App. 3d 543, 554)* . The court held that not only is the language employed to be regarded with reference to the actual words used, but according to the sense and meaning that might be conveyed to those to whom it was published. Therefore, the jocular intent of the publisher will not relieve the publisher from liability if it is reasonable to not understand the utterance as a joke (*170 Cal. App. 3d 543, 555)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral Overview

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14-142 California Points & Authorities § 142.58

§ 142.58 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Failure of Plaintiff Suing Public Employee to File Claim With Public Entity

[1] FORM

[*Caption. See § 142.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT FAILS TO ALLEGE THAT PLAINTIFF FILED A CLAIM WITH DEFENDANT'S PUBLIC EMPLOYER PRIOR TO COMMENCING SUIT.

A. Objection by Demurrer. [*See § 142.20, Paragraph A.*]

B. Necessity of Filing Claim. A person who desires to sue a public employee for defamation must file a claim with the relevant public entity as a prerequisite to such a suit (*Neal v. Gatlin (1973) 35 Cal. App. 3d 871, 875-877, 111 Cal. Rptr. 117*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a general demurrer to a complaint if the demurrer asserts that the complaint fails to state facts sufficient to constitute a cause of action in that it appears on the face thereof that the defendant is a public employee and the plaintiff has failed to allege he filed a claim with the appropriate public entity.

If appropriate, counsel should insert argument in this form showing the relationship between the facts of his case and the point of law raised.

[b] Related Uses

With appropriate modifications these points may be used to support a defendant's motion for judgment on the pleadings or a defendant's motion for summary judgment [*see Code Civ. Proc. § 437c*].

[c] Related Pleading and Practice Form

For a form of demurrer to a complaint based on the plaintiff's failure to allege filing a claim with the appropriate public entity if the defendant is a public employee, see Ch. 340, *Libel and Slander* in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Necessity of Filing Claim

In ***Neal v. Gatlin*** *(1973) 35 Cal. App. 3d 871, 111 Cal. Rptr. 117* , the court of appeal affirmed the sustaining of a general demurrer to a complaint filed by an assistant professor who had been denied tenure. He had filed an action for libel and slander relating to his professional competency against his former colleagues, but the court of appeal held that the filing of a claim with the employing public entity was a condition precedent to the defamation action (*35 Cal. App. 3d 871, 875-877)* .

[4] Additional Authorities

[a] Necessity of Filing Claim

In *Hopper v. Allen (1968) 266 Cal. App. 2d 797, 72 Cal. Rptr. 435* , the court of appeal affirmed a summary judgment granted to a city police chief after a former officer of the department had brought an action based on statements that the chief had made to the press and subordinate officers. The court held that the defendant's affidavits adequately showed that his statements were made in the course and scope of his employment and, hence, the plaintiff's failure to file a claim with his employer made his complaint fatally defective (*266 Cal. App. 2d 797, 799-804)* .

Two other cases, each involving suits by private citizens against public employees, support the principle that a claim must be filed with the employee's employer as a condition precedent to maintaining an action for defamation. In *Miller v. Hoagland (1966) 247 Cal. App. 2d 57, 55 Cal. Rptr. 311* , the court of appeal affirmed a general demurrer to a complaint by a citizen against a city attorney for having written an allegedly defamatory letter to a trial judge on the basis of the fact that the plaintiff had not filed a claim with the city (*247 Cal. App. 2d 57, 61-62)* . In *Burgdorf v. Funder (1966) 246 Cal. App. 2d 443, 54 Cal. Rptr. 805* , the court of appeal affirmed the defendant's motion for judgment on the pleadings. In that case, a citizen was suing the chief of the State Division of Tax Collection for the publication of an allegedly libelous letter. However, the plaintiff's failure to file a claim was held to be fatal to his cause of action (*246 Cal. App. 2d 443, 448)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral Overview

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14-142 California Points & Authorities § 142.59

§ 142.59 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Public Employee Immune for Statement Made Within Scope of Authority [Gov. Code § 820.2]

[1] FORM

[*Caption. See § 142.24.*]

SUMMARY JUDGMENT FOR DEFENDANT IS PROPER WHERE STATEMENTS WERE MADE BY A PUBLIC EMPLOYEE WITHIN THE SCOPE OF HIS EMPLOYMENT.

A. Summary Judgment. [*See § 142.24, Paragraph A.*]

B. Public Employee Immunity. Statements made by a public employee in the exercise of discretion properly vested in him and within the scope of his employment are immune to a cause of action for defamation (*Gov. Code § 820.2*; *Lipman v. Brisbane Elementary Sch. Dist. (1961) 55 Cal. 2d 224, 229, 233, 11 Cal. Rptr. 97, 359 P.2d 465* (school trustees); *Burgdorf v. Funder (1966) 246 Cal. App. 2d 443, 448-449, 54 Cal. Rptr. 805* (tax official)).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for summary judgment if the motion asserts that the statements complained of were made by a public employee, were within the proper exercise of discretion, were within the scope of his employment, and thus are immune from an action for defamation.

If appropriate, counsel should insert argument in this form showing the relationship between the facts of his case and the point of law raised. In addition, counsel should attach affidavits or declarations that support the motion [*Code Civ. Proc. § 437c*].

[b] Related Pleading and Practice Forms

For a form of affirmative defense based on a public employee's immunity for a statement made within the scope of his authority, see Ch. 340, *Libel and Slander* in California Forms of Pleading and Practice (Matthew Bender). For a general form of notice of motion for summary judgment based on an affirmative defense to a defamation action, see the same chapter.

[3] Discussion of Authorities

[a] Public Employee Immunity

In ***Lipman v. Brisbane Elementary Sch. Dist.*** *(1961) 55 Cal. 2d 224, 11 Cal. Rptr. 97, 359 P.2d 465* , the Supreme Court held that certain questions that school district trustees asked were immune to a cause of action for defamation. The questions, which they asked of various persons concerning the plaintiff's fitness for his job as superintendent, were within the scope of the powers inherent in the investigative function of their office (*55 Cal. 2d 224, 233-234)* .

In ***Burgdorf v. Funder*** *(1966) 246 Cal. App. 2d 443, 54 Cal. Rptr. 805* , the court of appeal affirmed a judgment of dismissal after the defendant's motion for judgment on the pleadings was granted. The court held that a letter written by the chief of the Division of Tax Collection and Refund of the State Controller's Office was immune from an action for libel because the official's action was discretionary and in the scope of his authority (*246 Cal. App. 2d 443, 448-449)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationDefensesPrivilegesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral Overview

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14-142 California Points & Authorities § 142.60

§ 142.60 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Public Entity Immune for Discretionary Statement of Public Employee

[1] FORM

[*Caption. See § 142.24.*]

SUMMARY JUDGMENT FOR DEFENDANT PUBLIC ENTITY IS PROPER WHERE THE STATEMENT MADE WAS A DISCRETIONARY STATEMENT OF A PUBLIC EMPLOYEE.

A. Summary Judgment. [*See § 142.24, Paragraph A.*]

B. Public Entity Immunity. A public entity may be held immune for the discretionary statements of its employees made in the course of their employment (*Lipman v. Brisbane Elementary Sch. Dist. (1961) 55 Cal. 2d 224, 229-230, 11 Cal. Rptr. 97, 359 P.2d 465*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for summary judgment if the motion asserts that the statements complained of were made by an employee of a public entity in the course of his employment and, thus, the public entity should be held immune for any damages that resulted from them.

If appropriate, counsel should insert argument in this form showing the relationship between the facts of his case and the point of law raised. In addition, counsel should attach affidavits or declarations that support the motion [*Code Civ. Proc. § 437c*].

[b] Related Pleading and Practice Forms

For a form of affirmative defense based on a public entity's immunity for a discretionary statement of a public employee, see California Forms of Pleading and Practice, Ch. 340, *Libel and Slander* (Matthew Bender). For a general form of notice of motion for summary judgment based on an affirmative defense to a defamation action, see the same chapter.

[3] Discussion of Authorities

[a] Public Entity Immunity

In ***Lipman v. Brisbane Elementary Sch. Dist.*** *(1961) 55 Cal. 2d 224, 11 Cal. Rptr. 97, 359 P.2d 465* , the Supreme Court held that although a governmental agency's immunity from liability for the discretionary conduct of its officials is not coextensive with the immunity afforded its officials in all instances, in this case a school district was immune from any liability for questions that school trustees asked concerning the plaintiff's fitness for her job as superintendent (*55 Cal. 2d 224, 229-230)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationDefensesPrivilegesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral Overview

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14-142 California Points & Authorities § 142.60A

§ 142.60A Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Federal Communications Decency Act of 1996 Provides Absolute Immunity for Republication of Defamatory Material on Internet

[1] FORM

[*Caption. See § 142.24.*]

THE COMMUNICATIONS DECENCY ACT OF 1996, *47 U.S.C. § 230*, PROVIDES IMMUNITY FROM COMMON-LAW TORT LIABILITY WHEN A PARTY REPUBLISHES DEFAMATORY MATERIAL ON THE INTERNET THAT ORIGINATES WITH A THIRD PERSON, REGARDLESS OF WHETHER THE REPUBLISHING PARTY KNOWS OR HAS REASON TO KNOW OF THE MATERIAL'S DEFAMATORY CONTENT.

A. Communications Decency Act of 1996. No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider, and no cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this provision (*47 U.S.C.S. § 230(c)(1), (e)(3)*).

[*Optional*] **B. Act Provides Absolute Immunity for Republishing Defamatory Material on Internet.** The federal Communications Decency Act of 1996 provides immunity from liability for republishing material that originates with a third person, even if the party republishing the defamatory material has knowledge or reason to know of the material's defamatory content (*Barrett v. Rosenthal (2006) 40 Cal. 4th 33, 43-49, 51 Cal. Rptr. 3d 55, 146 P.3d 510*).

[*Optional*] **C. "User" Defined.** Under the Communications Decency Act, the term "user" extends to all individuals who use an interactive computer service, regardless of whether the "use" at issue consists of merely receiving defamatory information, or screening and removing defamatory publication from an Internet site, or some other use of the interactive computer service (*Barrett v. Rosenthal (2006) 40 Cal. 4th 33, 58-60, 51 Cal. Rptr. 3d 55, 146 P.3d 510*).

[*Optional*] **D. Employer is "Provider" When Providing Internet Access to Employees.** An employer that provides its employees with Internet access through the company's internal computer system is a "provider" of an interactive

computer service for purposes of the Act (*Delfino v. Agilent Technologies, Inc. (2006) 145 Cal. App. 4th 790, 806, 52 Cal. Rptr. 3d 376*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant: _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that a party who republishes on the Internet defamatory content that originated with another person is absolutely immune from tort liability under the federal Communications Decency Act of 1996, *47 U.S.C.S. § 230*, even if the republishing party knows or has reason to know of the material's defamatory content.

This form may be adapted for use depending on the specific procedural context in which the plaintiff wishes to raise the issue that the defendant is immune from liability under the Act. For example, they may be used to support a motion for summary judgment or a special motion to strike under *Code Civ. Proc. § 425.16*.

[b] Argument

Counsel should insert argument in the form showing the relationship between the facts of the case and the point of law raised. Thus, counsel should include facts showing that the defendant was not the originator of the defamatory material, but was merely republishing the information on the Internet.

[3] Discussion of Authorities

[a] Act Provides Absolute Immunity for Republishing Defamatory Material on Internet

In ***Barrett v. Rosenthal*** *(2006) 40 Cal. 4th 33, 51 Cal. Rptr. 3d 55, 146 P.3d 510* , plaintiffs were two doctors engaged in fighting the promotion of alternative healthcare practices and products. Defendant, a participant in two Internet newsgroups focusing on alternative medicine, posted several messages on those newsgroups referring to plaintiffs as "quacks," accusing them of bullying tactics, and repeated one story she had received that accused one of the plaintiffs of engaging in the criminal conduct of stalking women. Plaintiffs informed defendant that the story of alleged stalking was false, asked that she remove the posting, and threatened to sue her. Defendant refused, and in fact, republished the story multiple times along with details of the plaintiffs' threat to sue. Plaintiffs sued defendant for libel, libel per se, and conspiracy. Defendant filed a motion to strike the complaint under the anti-SLAPP statute, *Code Civ. Proc. § 425.16*. The trial court granted the motion to strike, concluding that the plaintiffs could not establish a probability of prevailing on their claims. The trial court held, in part, that the defendant was immune from liability under the federal Communications Decency Act (CDA), *47 U.S.C.S. § 230*, because she republished but did not originate the defamatory material. The plaintiffs appealed. The court of appeal reversed in part, holding that the CDA did not abrogate the traditional rule making persons who distribute defamatory material, without engaging in actual publication, liable if they know or have reason to know of the defamatory nature of the material they disseminate. Defendant appealed.

The California Supreme Court reversed the court of appeal. The Supreme Court concluded that the court of appeal erred in rejecting the prevailing view, most prominently articulated in *Zeran v. America Online, Inc. (4th Cir. 1997) 129 F.3d 327* , *cert. den., (1998) 524 U.S. 937* , that the CDA barred lawsuits seeking to impose liability on an internet service

provider for its exercise of a publisher's traditional editorial functions, such as deciding whether to publish, withdraw, postpone, or alter content provided by another, regardless of whether the publication of another person's content is made with knowledge of the possible defamatory nature of the content. The Supreme Court agreed with this approach and concluded that the court of appeal gave insufficient consideration to the burden that its rule would impose on Internet speech when it found that "distributor" liability survived passage of the CDA. Subjecting mere distributors to defamation liability would chill Internet speech, in contravention to one of the primary goals of the Act. The court of appeal's rule would also create the anomalous result that a publisher, who plays a greater role in causing material to be published, would be absolutely immune under the Act, while a mere distributor would not (*40 Cal. 4th 33, 43-49)* . The Supreme Court concluded that Congress, in passing the CDA, intended to promote self-regulation of the Internet and protect from tort liability even the most active Internet publishers, those who take an aggressive role in republishing third-party content (*40 Cal. 4th 33, 53)* .

[b] "User" Defined

The factual and procedural background of *Barrett v. Rosenthal (2006) 40 Cal. 4th 33, 51 Cal. Rptr. 3d 55, 146 P.3d 510* , is described in [a], *above*. The Supreme Court noted that the defendant in the case before it was not herself an internet service provider, thus presenting the question of whether the defendant was a "user" of an interactive computer service for purposes of establishing immunity under the Act. Noting that the Act itself does not define the term "user," the Court concluded that the term extends to all individuals who use an interactive computer service, regardless of whether the "use" at issue consists of merely receiving defamatory information, or screening and removing defamatory publication from an Internet site, or some other use of the interactive computer service. In so concluding, the Court rejected application of a distinction between "active" and "passive" use (*40 Cal. 4th 33, 58-60)* . Because the defendant used the Internet to gain access to newsgroups where she posted the defamatory article, the Court held that she was a "user" under the provisions of the Act *(40 Cal. 4th 33, 59)* . However, the Supreme Court cautioned that, at some point, active involvement in the creation of a defamatory Internet posting may expose a defendant to liability as the originator of the defamatory content, while also noting that other courts have required conduct that goes beyond the traditional editorial role of a publisher in order to overcome the immunity provided by the Act *(40 Cal. 4th 33, 60*).

[c] Employer is "Provider" When Providing Internet Access to Employees

In *Delfino v. Agilent Technologies, Inc. (2006) 145 Cal. App. 4th 790, 52 Cal. Rptr. 3d 376* , plaintiffs were the targets of threats communicated by an individual through e-mails and postings on Internet bulletin boards. For at least some of these communications, the sender accessed the Internet using a computer at his place of employment, although the threatening content of the messages had no connection with the sender's employer. The employer did not learn that the employee had been using the employer's computer system for these purposes until months after first learning that the employee was being investigated by law enforcement. Upon learning that company equipment was being used to access the Internet for these purposes, the employer promptly terminated the sender's employment. In addition to suing the sender, plaintiffs sued the sender's employer for various torts, including intentional and negligent infliction of emotion distress. The trial court granted summary judgment for the employer on the grounds that the employer was immune from suit as a "provider" of an interactive computer service under the federal Communications Decency Act. Plaintiffs appealed.

The court of appeal affirmed. The court noted that the Communications Decency Act includes in the definition of a "provider of an interactive computer service" one who "provides or enables computer access by multiple users to a computer server." Under this broad definition, the court easily concluded that an employer that provides its employees with Internet access through the company's internal computer system is a "provider" of an interactive computer service (*145 Cal. App. 4th 790, 805-806)* . As such, the employer was entitled to immunity under the Act for the threatening communications made without its knowledge by its employee (*145 Cal. App. 4th 790, 807-808)* .

[4] Additional Authorities

[a] Act Provides Absolute Immunity for Republishing Defamatory Material on Internet

In *Phan v. Pham (2010) 182 Cal. App. 4th 323, 105 Cal. Rptr. 3d 791* , defendant received an e-mail accusing plaintiff, a former veteran of the Navy of the Republic of Vietnam, of having been disciplined by that Navy for abusive behavior during the last days of the Vietnam War. Defendant forwarded that e-mail message to at least one other member of a Vietnam veterans group. Defendant added a brief comment prior to the original message stating that "[e]verything will come out to the daylight" and inviting the recipients to read the original message. Plaintiff sued defendant for defamation for forwarding the defamatory e-mail. However, the court of appeal held that defendant could not be held liable for forwarding the e-mail to others merely because he added prefatory remarks to the forwarded message that essentially stated that the truth would come out in the end. The court concluded that this comment made no material contribution to the alleged defamation contained in the message being forwarded. As such, the immunity for republication provided under the federal Communications Decency Act, as interpreted by the California Supreme Court in *Barrett v. Rosenthal* and as described in [3][a], *above*, applied to defendant's conduct (*182 Cal. App. 4th 323, 328)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCommunications LawFederal ActsCommunications Decency ActTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationDefensesPrivilegesAbsolute Privileges

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 142 LIBEL AND SLANDER (DEFAMATION)
PART II. FORMS

14-142 California Points & Authorities § 142.61

§ 142.61 Supporting Motion for Summary Adjudication [Code Civ. Proc. § 437c(f)]--By Defendant--Republication Was Neither Authorized Nor Intended

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF MOTION FOR
Plaintiff,	)	SUMMARY ADJUDICATION
vs.	)	[*Code Civ. Proc. § 437c(f)*]
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed:_____
	)	Trial Date:_____

_____

DEFENDANT IS ENTITLED TO SUMMARY ADJUDICATION OF THE CAUSE OF ACTION BASED ON THE ALLEGED REPUBLICATION OF THE _____ [LIBELOUS *and/or* SLANDEROUS] STATEMENT BECAUSE DEFENDANT NEITHER AUTHORIZED NOR INTENDED SUCH PUBLICATION TO BE MADE.

A. Motion for Summary Adjudication of Issue by Defendant. If it is contended that a cause of action within an action has no merit, any party may move for summary adjudication as to that cause of action. [A cause of action has no merit if one or more of the elements of the cause of action, even if not separately pleaded, cannot be established, or if a defendant establishes an affirmative defense to that cause of action] (*Code Civ. Proc. § 437c(f)(1), (n)*).

B. No Liability for Unauthorized and Unintended Republication. The author of defamatory statements is not liable for a publication of those statements if he or she neither authorized nor intended such publication to be made (*Draper v. Hellman Commercial Trust & Sav. Bank (1928) 203 Cal. 26, 39, 263 P. 240*).

[*Optional*] **C. Voluntary Disclosure by Plaintiff.** If the defamed person voluntarily discloses the contents of a libelous communication to others, the originator of the libel is not responsible for the resulting damage (*see Shoemaker v. Friedberg (1947) 80 Cal. App. 2d 911, 916, 183 P.2d 318*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for summary adjudication of a cause of action based on republication of a defamatory statement, if it is contended that the cause of action has no merit because the originator of the defamatory statement neither authorized nor intended republication.

Optional Paragraph C should be used if the defamed person republished the defamatory statement voluntarily.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Counsel should show that the originator of the defamatory statement did not intend the statement to be republished and did not authorize anyone to republish it. If the republication is made by the person defamed, counsel should show that it was made voluntarily.

[b] Related Uses

This memorandum may be adapted for use in other procedural contexts in which counsel wishes to raise the substantive issue of republication. For example, they may be combined with points in support of a demurrer if the cause of action shows on its face that the defendant neither authorized nor intended the republication. It may also be adapted for use in a trial or appellate brief.

[c] Related Pleading and Practice Forms

For discussion and forms relating to libel and slander generally, see California Forms of Pleading and Practice, Ch. 340, *Libel and Slander* (Matthew Bender). For discussion and forms relating to summary judgment generally, see Ch. 537, *Summary Judgment* in that publication.

[d] Related Memoranda

For points relating to summary judgment and summary adjudication, see Ch. 221, *Summary Judgments* .

[e] Opposing Memoranda

The points *in § 142.84* may be used in an appropriate case to oppose a motion for summary adjudication supported by this memorandum.

[3] Discussion of Authorities

[a] No Liability for Unauthorized and Unintended Republication

Draper v. Hellman Commercial Trust & Sav. Bank *(1928) 203 Cal. 26, 263 P. 240* , was an action for damages for the publication by the defendant of libelous communications concerning the plaintiff. The defendant, finding some funds missing upon the termination of the plaintiff's employment with it, wrote the plaintiff's present employer on the pretext of obtaining the plaintiff's address. Thereupon the employer sought the reasons for the defendant's inquiry. The defendant instructed a detective agency to inform a local branch of the plaintiff's employer that the plaintiff was suspected of theft. This information was forwarded to the employer by the branch. The plaintiff sued for these libelous communications. The defendant contended that it could not be held liable for any injury to the plaintiff's reputation resulting from the branch office's republication of the information on the grounds that the information was sent without its consent or authorization. The trial court entered judgment for the plaintiff, and the defendant appealed.

The Supreme Court held that it was the rule that the author of defamatory statements is not liable for a publication of those statements if he or she neither authorized nor intended such publication to be made. In this case, however, the Court found that the defendant was responsible for the communication because it informed the branch office with the intention that they should in turn communicate with the plaintiff's employer (*203 Cal. 26, 39)* .

[b] Voluntary Disclosure by Plaintiff

Shoemaker v. Friedberg *(1947) 80 Cal. App. 2d 911, 183 P.2d 318* , was an action for damages for slander consisting of a statement by the defendant to the effect that the plaintiff was suffering from a venereal disease. The defendant sent a letter informing the plaintiff of the results of a laboratory report indicating the existence of venereal disease. The plaintiff revealed the contents of this letter to her landlady, her mother, and a neighbor. When pressed by the plaintiff's landlady to discuss the letter, the defendant told the plaintiff that she had gonorrhea. This statement was overheard by the landlady, the plaintiff's mother, and a neighbor. The trial court granted a motion by the defendant for judgment notwithstanding the verdict and entered judgment for the defendant. The plaintiff appealed.

The court of appeal affirmed. The court held that it was the duty of the defendant to treat the plaintiff and to inform her of the ills from which he believed she was suffering. It found that the letter written by him was addressed to the plaintiff and truthfully conveyed to her the information given him by a reputable laboratory, which information he believed to be true. The court held that the subject matter of the letter concerned a subject in which both parties were interested, and therefore it was privileged as to the plaintiff. It further found that the writing of this letter to the plaintiff was not a publication of its contents under the slander laws of California and that its original publication was by the plaintiff herself when she disclosed its contents to her landlady, her mother, and a neighbor. It held that as the defendant had no part in this publication, he cannot be held responsible for it (*80 Cal. App. 2d 911, 916)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral Overview

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CHAPTER 142 LIBEL AND SLANDER (DEFAMATION)
PART II. FORMS

14-142 California Points & Authorities § 142.62

§ 142.62 Supporting Motion for Summary Adjudication [Code Civ. Proc. 437c(f)] of Claim for Exemplary Damages [Civ. Code § 3294]--By Defendant--Retraction Was Sufficient [Civ. Code § 48a(3)]

[1] FORM

[*Caption. See § 142.61.*]

DEFENDANT IS ENTITLED TO SUMMARY ADJUDICATION OF THE PLAINTIFF'S CLAIM FOR EXEMPLARY DAMAGES BECAUSE THE UNDISPUTED FACTS SHOW THAT DEFENDANT'S RETRACTION WAS SUFFICIENT AS A MATTER OF LAW UNDER THE STATUTORY STANDARD OF SECTION 48a OF THE CIVIL CODE.

A. Motion for Summary Adjudication of Claim for Exemplary Damages. If it is contended that there is no merit to a claim for damages as specified in *Civil Code Section 3294*, any party may move for summary adjudication with regard to that claim for damages (*Code Civ. Proc. § 437c(f)(1)*).

B. Statutory Requirement That Retraction Be Made in Substantially as Conspicuous a Manner as Allegedly Libelous Statement. A retraction made for purposes of giving the defendant immunity from liability for general or punitive damages must be made in "substantially as conspicuous a manner" as the allegedly libelous statement was made (*Civ. Code § 48a(3)*).

C. Summary Adjudication of Claim for Exemplary Damages Based on Insufficiency of Retraction Is Proper if No Reasonable Juror Could Find Retraction Insufficient. Although the issue of whether a retraction pursuant to *Civil Code Section 48a* of an allegedly libelous statement is generally a question for the jury to decide, under circumstances in which no reasonable juror could find the retraction insufficient, summary adjudication of a claim for exemplary damages based on the insufficiency of the retraction is proper (*see Twin Coast Newspapers, Inc. v. Superior Court (1989) 208 Cal. App. 3d 656, 660-662, 256 Cal. Rptr. 310*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]

By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion for summary adjudication of a claim for exemplary damages that is grounded on the allegation that a defendant in a libel case did not publish a retraction sufficient to meet the requirements of *Civ. Code § 48a*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth facts showing that the retraction met the requirements of *Civ. Code § 48a*.

[b] Related Uses

With appropriate modifications, these points may be used to support a motion for summary judgment [*see Code Civ. Proc. § 437c*] if there are no other triable issues of fact.

[c] Opposing Memoranda

In an appropriate case, the points *in § 142.88* may be used to oppose the motion supported by these points.

[3] Discussion of Authorities

[a] Summary Adjudication of Claim for Exemplary Damages Based on Insufficiency of Retraction Is Proper if No Reasonable Juror Could Find Retraction Insufficient

In ***Twin Coast Newspapers, Inc. v. Superior Court*** *(1989) 208 Cal. App. 3d 656, 256 Cal. Rptr. 310* , a newspaper published an account of a crime and stated that the plaintiff had been arrested as a suspect. The article was published in both editions of the newspaper. The plaintiff demanded a retraction on the day the article was published. The defendant printed a retraction in both editions on the next day and several weeks later. The retractions appeared in the same location as the defamatory subheadline, the print of the retraction's headline was larger than that of the defamatory subheadline, and the headline and article corrected every aspect of the defamatory article and expressed regret for the error. In addition, the paper acknowledged its error twice more: in an article reporting the plaintiff's libel action, and in a response to a letter to the editor. At trial, the defendants moved for a summary adjudication of the issue that the retractions were published in substantially as conspicuous a manner as the allegedly defamatory statements, as required by *Civ. Code § 48a(3)*. The court refused to grant the motion, agreeing with the plaintiff that the issue must be resolved by the jury. The defendant sought a writ of mandate to compel summary adjudication of the issue.

The court of appeal stated that the precedents were sparse on the subject. The court held that the issue is one of fact. The court pointed out that the issue of whether one newspaper article is substantially as conspicuous as another could hardly be characterized as one of law. However, the court held that under the facts before it, no reasonable juror could find the retractions insufficient under the standard of *Civ. Code § 48a(3)* (*208 Cal. App. 3d 656, 662-663)* .

NOTE:

Code Civ. Proc. § 437c(f) was subsequently amended to eliminate summary adjudication of "issues." It now provides for summary adjudication of a cause of action, defense, claim for punitive damages, or the issue whether one or more defendants owed a duty to one or more plaintiffs [*Code Civ. Proc. § 437c(f)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral OverviewTortsIntentional TortsDefamationRemediesRetractions

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14-142 California Points & Authorities § 142.63

§ 142.63 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10]--Special Damages Not Essential Allegation if Language Defamatory on Its Face

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM OF POINTS
_____ [*name*],	)	AND AUTHORITIES IN
Plaintiff,	)	OPPOSITION TO
vs.	)	DEMURRER TO
_____ [*name(s)*],	)	COMPLAINT
Defendant(s).	)	[*Code Civ. Proc. § 430.10*]
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	

_____

THE DEMURRER SHOULD BE OVERRULED BECAUSE AN ALLEGATION OF SPECIAL DAMAGES IS UNNECESSARY IN THAT THE LANGUAGE COMPLAINED OF IS LIBELOUS ON ITS FACE.

A. Libel on Its Face. Special damages need not be alleged in a complaint for libel if the alleged defamatory language is libelous on its face, despite the existence of a possible nondefamatory meaning of the words used (*MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 537-551, 343 P.2d 36*).

[*EITHER*]

B. Language Charging Crime. Language that charges the plaintiff with having committed a crime is libelous on its face (*Draper v. Hellman Commercial Trust & Sav. Bank (1928) 203 Cal. 26, 34, 263 P. 240* ; *Boyich v. Howell (1963) 221 Cal. App. 2d 801, 802, 34 Cal. Rptr. 794*).

[*OR*]

B. Language Adversely Affecting Occupation. Language that has a tendency to injure the plaintiff in his or her occupation is libelous on its face (*Civ. Code § 45*; *Maidman v. Jewish Publ'ns, Inc. (1960) 54 Cal. 2d 643, 651, 7 Cal. Rptr. 617, 355 P.2d 265* ; *Cameron v. Wernick (1967) 251 Cal. App. 2d 890, 893-895, 60 Cal. Rptr. 102*).

[*OR*]

B. Language Charging Violation of Confidence. Language that falsely charges a person with violating a confidence reposed in him or her is libelous on its face (*Selleck v. Globe Int'l, Inc. (1985) 166 Cal. App. 3d 1123, 1132, 212 Cal. Rptr. 838*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a general demurrer to a complaint if the demurrer asserts that the complaint fails to allege special damages.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law raised.

[3] Discussion of Authorities

[a] Libel on Its Face

In ***MacLeod v. Tribune Publ'g Co.*** *(1959) 52 Cal. 2d 536, 343 P.2d 36* , the Supreme Court reversed a general demurrer granted on the basis of the "possible innocent interpretation" rule. It held that the plaintiff's allegation that an article that had stated that a communist newspaper supported his candidacy was libelous on its face despite the possible interpretation that communist support did not mean communist sympathy (*52 Cal. 2d 536, 547-551)* .

[b] Language Charging Crime

In ***Draper v. Hellman Commercial Trust & Sav. Bank*** *(1928) 203 Cal. 26, 263 P. 240* , the defendant had employed

the plaintiff as a night teller before the plaintiff voluntarily terminated his job and returned to work for a former employer. The defendant sent a telegram to the plaintiff's employer charging the plaintiff with having fraudulently appropriated funds while he was working for the bank. The Supreme Court upheld a jury verdict for the plaintiff, stating that the telegram was clearly libelous per se (*203 Cal. 26, 34)* .

In ***Boyich v. Howell*** *(1963) 221 Cal. App. 2d 801, 34 Cal. Rptr. 794* , the court of appeal held that a circular that charged the plaintiff, a candidate for reelection to the city council, with having been convicted of stuffing the ballot box during a union election was libelous on its face (*221 Cal. App. 2d 801, 802)* . Thus, although the complaint was uncertain and subject to a special demurrer, the granting of a general demurrer was error. Furthermore, because a libel per se was charged, an allegation of special damages was not necessary (*221 Cal. App. 2d 801, 802-803)* .

[c] Language Adversely Affecting Occupation

In ***Maidman v. Jewish Publ'ns, Inc.*** *(1960) 54 Cal. 2d 643, 7 Cal. Rptr. 617, 355 P.2d 265* , the Supreme Court held that a publication that accused an attorney of deliberately misleading a court was libelous per se because it obviously injured his reputation, both generally and with respect to his profession. Thus, it was error to grant the defendants' demurrer (*54 Cal. 2d 643, 651)* .

In ***Cameron v. Wernick*** *(1967) 251 Cal. App. 2d 890, 60 Cal. Rptr. 102* , the court of appeal held that an article about the plaintiff that accused him of being interested in a "fast buck" had a tendency to injure the plaintiff in his reputation and occupation and thus was libelous on its face. Hence, the plaintiff did not need to allege special damages, and the granting of a demurrer to the complaint was reversed (*251 Cal. App. 2d 890, 893-895)* .

[d] Language Charging Violation of Confidence

In ***Selleck v. Globe Int'l, Inc.*** *(1985) 166 Cal. App. 3d 1123, 212 Cal. Rptr. 838* , the court of appeal held that an article in a weekly newspaper purporting to be an interview with the father of a famous celebrity in which the father revealed his son's love secrets was libelous on its face because it implied that the father violated confidences of his son. The court stated that falsely charging a person with a violation of confidence reposed in him or her is libel per se, for which special damages need not be pleaded (*166 Cal. App. 3d 1123, 1132)* .

[4] Additional Authorities

[a] Language Charging Crime

In *Morris v. National Fed'n of Blind (1961) 192 Cal. App. 2d 162, 13 Cal. Rptr. 336* , the court of appeal reversed the granting of a general demurrer on the ground that the complaint failed to allege special damages. The court held a charge asserting the plaintiff to be a "racketeer" was libelous per se because the term connotes a connection with the criminal underworld (*192 Cal. App. 2d 162, 164)* .

[b] Language Adversely Affecting Occupation

In *Pridonoff v. Balokovich (1951) 36 Cal. 2d 788, 228 P.2d 6* , the Supreme Court held that a newspaper article, which charged the plaintiff with having been engaged in such flagrant espionage activity while a member of the American Embassy that his recall was requested, had a direct tendency to injure the plaintiff in his occupation. Therefore, the article was libelous on its face (*36 Cal. 2d 788, 790)* .

In *Bates v. Campbell (1931) 213 Cal. 438, 2 P.2d 383* , the plaintiff had worked for the local bar association as its publicity agent. The defendant published a letter accusing the plaintiff of having flagrantly violated the confidence and trust given to her by continuing to use her former employer's stationery and failing to disclose the fact that she no longer worked for the bar association. The Supreme Court held that the complaint sufficiently alleged language that was

libelous on its face both because it tended to injure the plaintiff in her occupation and because it exposed her to obloquy; thus, the granting of a demurrer to the complaint was error (*213 Cal. 438, 445-446)* .

In *Fairfield v. Hagan (1967) 248 Cal. App. 2d 194, 56 Cal. Rptr. 402* , the court of appeal affirmed judgment for the plaintiff based on letters that the defendant sent to creditors of a bankrupt estate. The letters charged the plaintiff with "milking" the estate and doing little work, charges that had a natural tendency to injure the plaintiff's reputation and that were therefore libelous per se (*248 Cal. App. 2d 194, 199-201)* .

In *Williams v. Daily Review, Inc. (1965) 236 Cal. App. 2d 405, 46 Cal. Rptr. 135* , the court of appeal held that it was prejudicial error not to instruct the jury that an article was libelous on its face. The article insinuated that the plaintiffs were incompetent in the preparation of bids for a paving job and in performing the job. Thus, judgment for the defendants was reversed (*236 Cal. App. 2d 405, 409-413)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral OverviewTortsIntentional TortsDefamationRemediesDamages

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 142 LIBEL AND SLANDER (DEFAMATION)
PART II. FORMS

14-142 California Points & Authorities § 142.64

§ 142.64 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10]--Actual Damages Not Essential Allegation if Language Slanderous Per Se

[1] FORM

[*Caption. See § 142.63.*]

ACTUAL DAMAGES ARE NOT AN ESSENTIAL ALLEGATION WHERE LANGUAGE IS SLANDEROUS PER SE.

A. Slander Per Se. Actual damages need not be pleaded or proved if words spoken are fairly susceptible of a defamatory meaning within subdivisions (1) through (4) of *Section 46 of the Civil Code*, even if it is necessary to plead an innuendo and inducement to elucidate the defamatory meaning (*Jarman v. Rea (1902) 137 Cal. 339, 345-346, 70 P. 216* ; *White v. Valenta (1965) 234 Cal. App. 2d 243, 251-254, 44 Cal. Rptr. 241*).

[*EITHER*]

B. Language Charging Crime. Language that charges any person with crime, or with having been indicted, convicted, or punished for crime, is slanderous per se (*Civ. Code § 46(1)*; *Cunningham v. Simpson (1969) 1 Cal. 3d 301, 306, 81 Cal. Rptr. 855, 461 P.2d 39* ; *Moranville v. Aletto (1957) 153 Cal. App. 2d 667, 672, 315 P.2d 91*).

[*OR*]

B. Language Imputing Disease. Language that imputes in any person the present existence of an infectious, contagious, or loathsome disease is slanderous per se (*Civ. Code § 46(2)*; *Schessler v. Keck (1954) 125 Cal. App. 2d 827, 832, 271 P.2d 588*).

[*OR*]

B. Language Injuring Business. Language that tends directly to injure a person in respect to his or her office, profession, trade, or business, either by imputing to that person general disqualification in those respects that the office or other occupation peculiarly requires, or by imputing something with reference to his or her office, profession, trade, or business that has a natural tendency to lessen its profits is slanderous per se (*Civ. Code § 46(3)*; *Washer v. Bank of Am. (1943) 21 Cal. 2d 822, 828-829, 136 P.2d 297* ; *Rodriguez v. North Am. Aviation, Inc. (1967) 252 Cal. App. 2d 889, 894, 61 Cal. Rptr. 579*).

[*OR*]

B. Language Imputing Lack of Chastity. Language that imputes a lack of chastity to a person is slanderous per se (*Civ. Code § 46(4)*; *Preston v. Frey (1891) 91 Cal. 107, 109, 111, 27 P. 533* ; *Hitchcock v. Caruthers (1890) 82 Cal. 523, 526, 23 P. 48*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a general demurrer to a complaint if the demurrer asserts that the complaint fails to allege special damages.

If appropriate, counsel should insert argument in this form showing the relationship between the facts of his case and the point of law raised.

[3] Discussion of Authorities

[a] Slander Per Se

In ***Jarman v. Rea*** *(1902) 137 Cal. 339, 70 P. 216* , the plaintiff was a member of the city council and alleged that the defendant had accused him of accepting a bribe. The defendant contended that the words were not actionable per se and, thus, were subject to a demurrer because special damages had not been pleaded and proved. The Supreme Court rejected this contention, however, and stated that words may be slanderous per se even if the assistance of an inducement or colloquium is required (*137 Cal. 339, 345-346)* .

In ***White v. Valenta*** *(1965) 234 Cal. App. 2d 243, 44 Cal. Rptr. 241* , the court of appeal reiterated the principle that spoken words may be slanderous per se if they are fairly susceptible of a defamatory meaning, even though they require the assistance of an innuendo and inducement. In such a case, no special damages need to be pleaded or proved (*234 Cal. App. 2d 243, 251-254)* .

[b] Language Charging Crime

In ***Cunningham v. Simpson*** *(1969) 1 Cal. 3d 301, 306, 81 Cal. Rptr. 855, 461 P.2d 39* , the Supreme Court sustained a judgment for the plaintiff based on a complaint for slander although it remanded the case for a new trial on the issue

of damages. The defendant had charged the plaintiff with having a "hot title" to a car, and the Court concluded that this accusation could reasonably be understood as implying that the plaintiff had acquired the car by some illegal means (*1 Cal. 3d 301, 306)* .

In ***Moranville v. Aletto*** *(1957) 153 Cal. App. 2d 667, 315 P.2d 91* , the complaint alleged that the defendant had called the plaintiff a thief. The court of appeal affirmed judgment by the jury for the plaintiff. It stated that because a cause of action for slander per se was stated, general damages were presumed as a matter of law, especially because theft is a serious charge that implies a high degree of moral turpitude (*153 Cal. App. 2d 667, 672)* .

[c] Language Imputing Disease

In ***Schessler v. Keck*** *(1954) 125 Cal. App. 2d 827, 271 P.2d 588* , the defendants conceded that utterances that charged the plaintiff with having syphilis were slanderous per se if they were false and unprivileged when published. They also conceded that an action would lie even without an allegation of special damages and based their main line of argument on the statute of limitations and several alleged pleading defects (*125 Cal. App. 2d 827, 832)* .

[d] Language Injuring Business

Washer v. Bank of Am. *(1943) 21 Cal. 2d 822, 136 P.2d 297 , overruled on other grounds, MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 343 P.2d 36* , was an action for libel and slander based on the same language. The plaintiff had been employed by the defendant and after a stormy career he was discharged. After his discharge, an officer of the defendant made a statement concerning him to newspaper reporters that charged him with having admitted the falsification of an expense account and with having been guilty of flagrant insubordination. The Supreme Court held that, insofar as the charges injured the plaintiff in his occupation, they were defamatory per se and that it was unnecessary for him to allege special damages. Thus, the granting of the defendant's demurrer to the complaint was reversed (*21 Cal. 2d 822, 828-829)* .

In ***Rodriguez v. North Am. Aviation, Inc.*** *(1967) 252 Cal. App. 2d 889, 61 Cal. Rptr. 579* , the court of appeal reversed the granting of a demurrer based on the assertion that the plaintiff had failed to sufficiently allege special damages. The court held that statements that the plaintiff was "not a competent engineer" and was "a traitor to the company" were slanderous per se under *Civ. Code § 46(3)* and, thus, that no allegation of special damages was necessary (*252 Cal. App. 2d 889, 894)* .

[e] Language Imputing Lack of Chastity

In ***Preston v. Frey*** *(1891) 91 Cal. 107, 111, 27 P. 533* , the Supreme Court affirmed judgment for the plaintiff. It held that statements that the plaintiff had been in a house of prostitution, had been afflicted with venereal disease, had conceived an illegitimate child, and had offered herself to a young man were slanderous per se under *Civ. Code § 46(4)* because they unquestionably imputed a lack of chastity to her (*91 Cal. 107, 109)* .

In ***Hitchcock v. Caruthers*** *(1890) 82 Cal. 523, 23 P. 48* , the Supreme Court affirmed judgment for the plaintiff. The defendant had charged that the plaintiff was cohabiting with a man as his mistress, was being kept for immoral purposes, and was being used as a mistress. The Supreme Court held these statements slanderous per se under *Civ. Code § 46(4)* because they imputed a lack of chastity to her (*82 Cal. 523, 523)* .

[4] Additional Authorities

[a] Language Charging Crime

In *Douglas v. Janis (1974) 43 Cal. App. 3d 931, 118 Cal. Rptr. 280* , the court of appeal affirmed judgment for the plaintiff and rejected the defendant's argument that there was insufficient evidence to support the judgment. The record

indicated the defendant had accused the plaintiff of either "stealing" or "taking" money from one of the defendant's corporations, and thus the jury's determination that the defendant's remarks were understood in a defamatory manner was upheld (*43 Cal. App. 3d 931, 938-940)* .

In *Mullins v. Brando (1970) 13 Cal. App. 3d 409, 91 Cal. Rptr. 796* , the court of appeal rejected a contention that the defendant's statement did not imply murder or an execution. The defendant had been a guest on a national talk show when he alleged that the plaintiffs, who were police officers, had "shot dead and killed" a member of the Black Panther Party. The court held that the defendant issued a charge, not a vindication of the police officers, and thus that the granting of a demurrer to the complaint was error (*13 Cal. App. 3d 409, 414-415)* .

[b] Language Injuring Business

In *White v. Valenta (1965) 234 Cal. App. 2d 243, 44 Cal. Rptr. 241* , the court of appeal affirmed judgment for the plaintiff and rejected the defendant's argument that the court erred in permitting the jury to determine whether the words "you son of a bitch" were slanderous per se. The jury had been instructed that under some circumstances the language might have the effect of imputing that the plaintiff was disqualified from conducting his business, an instruction that the court of appeal affirmed (234 Cal. App. 2d 243, 257-258).

In *Hanley v. Lund (1963) 218 Cal. App. 2d 633, 32 Cal. Rptr. 733* , the court of appeal affirmed judgment for the plaintiff, a doctor. The defendant, an attorney, had accused the plaintiff of medical malpractice and negligence. The court stated that such statements were slanderous per se under *Civ. Code § 46(3)* (*218 Cal. App. 2d 633, 644)* .

In *Larive v. Willitt (1957) 154 Cal. App. 2d 140, 315 P.2d 732* , the court of appeal reversed the granting of a demurrer to the plaintiff's action for slander. The court held that the complaint, which alleged that the defendants had accused the plaintiff, a high school principal, of allowing students to "pet" and "embrace" in the hallways in his sight without taking any action against them, stated a cause of action under *Civ. Code § 46(3)* (*154 Cal. App. 2d 140, 142)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefamation Per SeTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationRemediesDamages

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 142 LIBEL AND SLANDER (DEFAMATION)
PART II. FORMS

14-142 California Points & Authorities § 142.65

§ 142.65 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Public Figure Plaintiff--Inaccurate or Fabricated Quotations May Be Basis of Cause of Action and Show Actual Malice

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN OPPOSITION TO MOTION
vs.	)	FOR SUMMARY JUDGMENT
_____ [*name*],	)	[*Code Civ. Proc. § 437c*]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Trial Date: _____]

_____

SUMMARY JUDGMENT FOR DEFENDANT IS IMPROPER BECAUSE TRIABLE ISSUES OF MATERIAL FACT REMAIN REGARDING WHETHER THE QUOTATIONS ATTRIBUTED TO PLAINTIFF BY DEFENDANT ARE ACCURATE, AND, IF INACCURATE, WHETHER DEFENDANT'S ALTERATION OF PLAINTIFF'S WORDS RESULTED IN A MATERIAL CHANGE IN THE MEANING CONVEYED IN THE STATEMENTS ACTUALLY MADE TO AN EXTENT SUFFICIENT TO SHOW THAT DEFENDANT ACTED WITH ACTUAL MALICE.

Deliberate Alteration That Materially Changes Meaning Constitutes Actual Malice. A deliberate alteration of words uttered by a plaintiff constitutes knowledge of falsity for purposes of establishing actual malice in a defamation

action brought by a public figure if the alteration results in a material change in the meaning conveyed by the statement with respect to the defamatory nature of the quotation (*Masson v. New Yorker Magazine, Inc. (1991) 501 U.S. 496, 517-519, 111 S. Ct. 2419, 115 L. Ed. 2d 447*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion for summary judgment if the complaint arises from the defendant's inaccurate or fabricated quotations of the plaintiff's words, if the plaintiff is a public figure, and the motion asserts protection under the *First Amendment*. The basis of the opposition is that the defendant's deliberate alteration of the plaintiff's words materially changed the meaning of the plaintiff's actual statements, for purposes of establishing their defamatory character, and that they were made with the "actual malice" required by the *First Amendment* [*see Masson v. New Yorker Magazine, Inc. (1991) 501 U.S. 496, 517, 111 S. Ct. 2419, 115 L. Ed. 2d 447]* .

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. If appropriate, counsel should contrast the published material to any evidence available of the plaintiff's actual words, and show that the alteration was material and injurious to the plaintiff's reputation. In addition, counsel should attach affidavits or declarations that support the memorandum [*Code Civ. Proc. § 437c*].

[3] Discussion of Authorities

[a] Deliberate Alteration That Materially Changes Meaning Constitutes Actual Malice

In *Masson v. New Yorker Magazine, Inc. (1991) 501 U.S. 496, 111 S. Ct. 2419, 115 L. Ed. 2d 447* , a psychoanalyst and scholar brought an action in federal district court against an author, a magazine publisher, and a book publisher based on a published work (regarding the Sigmund Freud Archives in London, of which the plaintiff had been hired and fired as Projects Director) that employed extensive quotations attributed to the plaintiff that were allegedly inaccurate or fabricated. Among several passages that ultimately formed the basis of the plaintiff's suit were the following statements attributed, within quotations marks, to the plaintiff: (1) that the man who headed the archives and Dr. Anna Freud considered the plaintiff to be "an intellectual gigolo"; (2) that if he were head of the archives, the Freud House (in which the archives were kept) would "have been a place of sex, women, fun"; and (3) that he considered himself to be the "greatest analyst who ever lived." The trial court granted the author's motion for summary judgment. The parties agreed that the plaintiff was a public figure and therefore could escape summary judgment only if the evidence in the record permitted a reasonable finder of fact to conclude, by clear and convincing evidence, that the defendants published a defamatory statement with actual malice. The district court analyzed each of the passages and held that the alleged inaccuracies did not raise a jury question, that the allegedly fabricated quotations were either substantially true, or were among several possible rational interpretations of ambiguous conversations or events, and as such were entitled to constitutional protection. The federal court of appeals affirmed, assuming for much of its opinion that the author had deliberately altered each quotation not found on the tape recordings, but holding nevertheless that the plaintiff failed to raise a jury question of actual malice, in large part for the same reasons as those set forth by the district court. The United States Supreme Court granted certiorari.

The Supreme Court reversed, holding that triable issues of material fact existed regarding whether actual malice was

evidenced in the publication of several of the quotations in question. The Court stated that, pursuant to *Civ. Code § 45* California law defines libel as a false and unprivileged publication by writing that exposes any person to hatred, contempt, ridicule, or obloquy, that causes the person to be shunned or avoided, or that has a tendency to injure the person in his or her occupation. False attribution of statements to a person may constitute libel, if the falsity exposes that person to an injury comprehended by the statute. Further, it does not matter under the statute that the plaintiff alleges only part of the work to be false, because the test of libel is not quantitative (*501 U.S. 496, 508-510)* .

The Court stated that the *First Amendment* limits California's libel law in various respects. A plaintiff who is a public figure cannot recover unless he or she proves by clear and convincing evidence that the defendant published the defamatory statement with actual malice, that is, with knowledge that it was false or with reckless disregard of whether it was false or not. Mere negligence does not suffice. Rather, the plaintiff must demonstrate that the author in fact entertained serious doubts as to the truth of the publication (*501 U.S. 496, 508)* . The Court noted that the term "actual malice" is in fact a shorthand expression in the context of *First Amendment* protections for speech, and that with regard to jury instructions, it should be replaced by the phrase "knowledge of falsity or reckless disregard as to truth or falsity," emphasizing that the phrase is crucial in this particular case (*501 U.S. 496, 508-509)* .

In general, the Court stated, quotation marks around a passage indicate to the reader that the passage reproduces the speaker's word verbatim. They inform the reader that he or she is reading the statement of the speaker, not a paraphrase or other indirect interpretation by an author. By providing this information, quotations add authority to the statement and credibility to the author's work. They allow the reader to form his or her own conclusions, and to assess the conclusions of the author, instead of relying entirely on the author's characterization of the subject. The Court stated that a fabricated quotation may injure reputation in at least two senses, either giving rise to a conceivable claim of defamation. First, the quotation might attribute an untrue factual assertion to the speaker, for example, a fabricated quotation of a public official admitting that he or she had been convicted of a serious crime if in fact he or she had not. Second, regardless of the truth or falsity of the factual matter asserted within the quoted statement, the attribution may result in injury to reputation because the manner of expression or even the fact that the statement was made indicates a negative personal trait or an attitude that the speaker does not hold, for example, a fabricated assertion of grandiosity or arrogance. In that situation, one need not determine whether the assertion is true in order to determine whether the report that the plaintiff made the assertion might have injured his or her reputation. The Court further stated that a self-condemnatory quotation may carry more force than criticism by another, in that it would constitute an admission against the speaker's interest (*501 U.S. 496, 511-512)* . The Court noted that under some circumstances, quotations are not designed to convey that the speaker actually stated the quoted material, for example, in an historical fiction piece or a clearly hypothetical conversation (*501 U.S. 496, 511-513)* . In this particular case, however, the work in question provides no clue that the quotations are used as a rhetorical device or to paraphrase the speaker's actual statements. To the contrary, a trier of fact could conclude that the work purports to be nonfiction. Neither the author nor the publishers indicate that the lengthy quotations attributed to the plaintiff are anything but the reproduction of actual conversations. Further, the articles were published in a magazine that "seemed to enjoy a reputation for scrupulous factual accuracy," according to the Court. These factors, the Court stated, would, or at least could, lead a reader to take the quotations at face value. The Court described the constitutional question as whether, in the framework of a summary judgment motion, the evidence suffices to show that the defendants acted with the requisite knowledge of falsity or reckless disregard as to truth or falsity. This inquiry in turn requires the consideration of the concept of falsity, that is, whether the requisite falsity inheres in the attribution of words to the plaintiff that he did not speak. In some sense, the Court stated, any alteration of a verbatim quotation is false. However, minor changes to correct grammar or syntax do not amount to falsity for purposes of proving actual malice (*501 U.S. 496, 512-513)* .

The Court rejected the plaintiff's assertion that any alteration of a public figure's words beyond this "technical falsity" demonstrates actual malice, holding that an author would, under that standard, lack *First Amendment* protection by reporting as quotations the substance of a subject's derogatory self-descriptive statements. In practice, the Court noted, the full and exact statement of a public figure's words are reported only rarely, because the author may alter the speaker's words to preserve the intended meaning, for example, by adding punctuation or rewriting to preserve

coherency. Conversely, an exact quotation out of context can distort meaning, although the speaker did use each reported word (*501 U.S. 496, 513-515)* . The Court stated that if an author alters a speaker's words but effects no material change in meaning, including any meaning conveyed by the manner or fact of expression, the speaker suffers no injury to reputation that is compensable as a defamation.

The Court also refused to create a discrete body of jurisprudence directed to the special case of inaccurate quotations, concluding, rather, that the essential principles of defamation law accommodate this area sufficiently. The Court noted that the common law of libel overlooks minor inaccuracies and concentrates on substantial truth. A statement is not considered false unless it would have a different effect on the mind of the reader from that of the pleaded truth (*501 U.S. 496, 515-517)* . The Court concluded that a deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity for purposes of *New York Times v. Sullivan,* unless the alteration results in a material change in the meaning conveyed by the statement [*see New York Times v. Sullivan (1964) 376 U.S. 254, 279-280, 84 S. Ct. 710, 11 L. Ed. 2d 686* , discussed in *§ 142.24[3][a]*].

The Court stated that the use of quotations to attribute words not in fact spoken bears in a most important way on that inquiry, but it is not dispositive in every case. Deliberate or reckless falsification that comprises actual malice turns on words and punctuation only because words and punctuation express meaning. Therefore, quotations may be a devastating instrument for conveying false meaning. The Court noted that in this particular case, readers of the book may have found the author's portrait of the plaintiff especially damning because so much of it appeared to be told by the plaintiff in his own words; and that if the alterations of the plaintiff's words gave a different meaning to the statements, bearing on their defamatory character, then the device of quotations might well be critical in finding the words actionable (*501 U.S. 496, 517-519)* . The Court disapproved the appellate court's conclusion that an altered quotation is protected so long as it a rational interpretation of an actual statement. Generally, the protection for rational interpretation serves *First Amendment* principles by allowing an author the interpretive license that is necessary when relying on ambiguous sources. However, if a writer uses a quotation, and a reasonable reader would conclude that the quotation purports to be a verbatim repetition the speaker's actual statement, quotation marks indicate that the author is not involved in an interpretation of the speaker's ambiguous statement, but rather is attempting to convey what the speaker said. The quotations at issue, absent any qualification, purport to set forth the plaintiff's statement, not the author's rational interpretation of his statements or thoughts.

The Court stated that the press, as well as public figures, would suffer under a rule that would give journalists the freedom to "place statements in their subjects' mouths" without fear of liability, and that the *First Amendment* would be ill-served by its granting near absolute, constitutional protection for that practice (*501 U.S. 496, 519-520)* . The Court then applied the applicable principles to the passages in question. It noted that on summary judgment, it is required to draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded particular evidence. Consequently, it assumed, except if otherwise evidenced, that the plaintiff is correct in denying that he made the statements attributed to him by the author, and that she reported with knowledge or reckless disregard of the differences between what the plaintiff said and what was quoted. (To ascertain what the plaintiff actually said, for comparison purposes, the Court considered only the tape-recorded conversations, rejecting the author's assertion that her typewritten notes of conversations should also be given weight.) The Court described its task as the determination whether the published passages differ materially in meaning from the corresponding tape-recorded statement so as to create an issue of fact for a jury regarding falsity. The Court examined each of the allegedly defamatory passages and the corresponding portions of the tape-recorded interviews in light of this standard, and concluded that a reasonable trier of fact could conclude both that the changes were defamatory, and that the changes amounted to actual malice. The Court reversed and remanded for further proceedings (*501 U.S. 496, 520-525)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewTortsIntentional

TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral Overview

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CHAPTER 142 LIBEL AND SLANDER (DEFAMATION)
PART II. FORMS

14-142 California Points & Authorities § 142.66

§ 142.66 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Plaintiff--Plaintiff Is Not Public Official--Actual Malice Need Not Be Alleged

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN OPPOSITION TO MOTION
vs.	)	FOR SUMMARY JUDGMENT
_____ [*name(s)*],	)	[*Code Civ. Proc. § 437c*]
Defendant(s).	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Trial Date: _____]

_____

PLAINTIFF IS NOT REQUIRED TO ALLEGE ACTUAL MALICE, BECAUSE HE/SHE IS NOT A PUBLIC OFFICIAL.

A. Public Official. A public official is someone who is in the government's employ and who (1) has or appears to have substantial responsibility for or control over the conduct of governmental affairs; (2) usually enjoys significantly greater access to the mass media and therefore has a more realistic opportunity to contradict false statements than has a private individual; (3) holds a position in government that has such apparent importance that the public has an independent interest in the person's qualifications and performance beyond the general public interest in the qualifications and performance of all government employees; and (4) holds a position that invites public scrutiny and discussion of the

person holding it entirely apart from the scrutiny and discussion occasioned by the particular controversy (*Mosesian v. McClatchy Newspapers (1988) 205 Cal. App. 3d 597, 608-609, 252 Cal. Rptr. 586* ; *see* *Rosenblatt v. Baer (1966) 383 U.S. 75, 85, 86 S. Ct. 669, 15 L. Ed. 2d 597*).

B. Actual Malice. One who is not a public official need not allege actual malice in a defamation action (*cf.* *New York Times Co. v. Sullivan (1964) 376 U.S. 254, 283, 84 S. Ct. 710, 11 L. Ed. 2d 686*).

[*Optional*] **C. Licensee Is Not Public Official.** Holding a governmental license pursuant to the state's regulatory authority over private enterprise does not make the licensee a public official (*Mosesian v. McClatchy Newspapers (1988) 205 Cal. App. 3d 597, 610, 252 Cal. Rptr. 586*).

[*Optional*] **D. School Teacher Is Not Public Official.** A public school teacher is not a public official (*Franklin v. Benevolent & Protective Order of Elks (1979) 97 Cal. App. 3d 915, 924-925, 159 Cal. Rptr. 131*).

[*Optional*] **E. Deputy Public Defender Is Not Public Official.** A deputy public defender is not a public official (*James v. San Jose Mercury News, Inc. (1993) 17 Cal. App. 4th 1, 11, 20 Cal. Rptr. 2d 890*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion for summary judgment if the motion asserts that the complaint did not allege actual malice even though the plaintiff is a public official. The basis for the opposition to the motion is that the plaintiff is not a public official, and as a private figure need not allege actual malice.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach opposing affidavits or declarations and a separate statement of undisputed facts [*see Code Civ. Proc. § 437c(b)*] that include facts showing that the plaintiff is not a public official.

[3] Discussion of Authorities

[a] Public Official

Mosesian v. McClatchy Newspapers *(1988) 205 Cal. App. 3d 597, 252 Cal. Rptr. 586* , was an action for libel brought by an individual who was the president, a director, and a significant shareholder in a corporation that applied for and was granted a license by the California Horse Racing Board to conduct horse racing at a county fairgrounds. The trial court granted the defendants' motion for summary adjudication of issues, holding that the plaintiff was a public official. The court then granted the defendants' motion for summary judgment because there was insufficient evidence of actual malice--that is, of knowledge of the falsity of the publication or reckless disregard of whether or not it was true [*see § 142.66[3][b]*].

The appellate court reversed, finding that the plaintiff was not a public official for purposes of defamation law. First, the court noted that whether or not one is a public official may not be decided by state law standards, but must be determined from the United States Supreme Court's construction of the *First Amendment*. The court reviewed the

plurality and concurring opinions of the United States Supreme Court in *Rosenblatt v. Baer*, and concluded that the Supreme Court's view of a public official is someone who is in the government's employ and who: (1) has or appears to have substantial responsibility for or control over the conduct of governmental affairs; (2) usually enjoys significantly greater access to the mass media and therefore has a more realistic opportunity to contradict false statements than has a private individual; (3) holds a position in government that has such apparent importance that the public has an independent interest in the person's qualifications and performance beyond the general public interest in the qualifications and performance of all government employees; and (4) holds a position that invites public scrutiny and discussion of the person holding it entirely apart from the scrutiny and discussion occasioned by the particular controversy. Because the plaintiff was not a government employee, the condition precedent was lacking, and he was not a public official (*205 Cal. App. 3d 597, 602-609)* .

For discussion of a subsequent published opinion based on this case (*Mosesian v. McClatchy Newspapers (1991) 233 Cal. App. 3d 1685, 285 Cal. Rptr. 430*), in which the plaintiff was found to be a limited-purpose public figure, see *§ 142.25[3][d]*.

Rosenblatt v. Baer *(1966) 383 U.S. 75, 86 S. Ct. 669, 15 L. Ed. 2d 597* , was an action by a former governmental employee who had been the proprietor of a government-owned-and-operated ski recreation area. A state court jury awarded the plaintiff damages for libel before the decision of the United States Supreme Court in *New York Times v. Sullivan* [*New York Times Co. v. Sullivan (1964) 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686* ; *see [§ 142.66[3]*b]]. Hearing the appeal after *New York Times v. Sullivan*, the United States Supreme Court reversed and remanded the case to the state court. Among the issues that were to be considered on remand was whether the plaintiff was a public official encumbered with the burden of proving actual malice.

In the lead opinion, Justice Brennan addressed the question of who might be a public official. Noting the conflicting policy issues of the legitimate interest in protection of reputation and the need for vigorous debate on public issues and persons who influence public issues, he stated that the "public-official" designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs. If a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, the person is a public official (*383 U.S. 75, 84-86)* .

NOTE:

In the view of a California appellate court, Justice Brennan's opinion failed to command a majority for the public-official issue and is dicta on this point because the judgment was reversed on other grounds. Nevertheless, the court chose to adopt the reasoning and much of the language of the Brennan opinion [*Mosesian v. McClatchy Newspapers (1988) 205 Cal. App. 3d 597, 607, 252 Cal. Rptr. 586]* . This court's vote-counting is open to question, because the part of the opinion in which the issue is addressed appears to have the support of five justices (Brennan, Warren, White, Stewart, who concurred separately without expressly mentioning the issue, and Harlan, who concurred in this part but dissented from a different part). The conclusion that the language is dicta is probably correct and makes moot the question of the number of justices who concurred in it.

[b] Actual Malice

The actual-malice requirement as set down by the *United States Supreme Court in* ***New York Times Co. v. Sullivan*** *(1964) 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686* , is discussed in *§ 142.24[3][a]*.

[c] Licensee Is Not Public Official

The facts of ***Mosesian v. McClatchy Newspapers*** *(1988) 205 Cal. App. 3d 597, 252 Cal. Rptr. 586* , are discussed in *§ 142.66[3][a]*. In addition to holding that the plaintiff was not a public official because he was not in the government's employ, the court considered the defendant's argument that the plaintiff was a public official because he was engaged in a governmental business or function, namely, state-sanctioned horse racing. The court rejected this argument, holding that a license to perform a job and governmental power to regulate the performance of a job does not make the job a governmental function. The court analogized to attorneys, who are required to be licensed and whose performance is subject to judicial scrutiny, stating that this oversight does not make lawyering a governmental function or a lawyer a public official. Horse racing is a heavily regulated, but nevertheless private, enterprise (*205 Cal. App. 3d 597, 610-611)* .

[d] School Teacher Is Not Public Official

Franklin v. Benevolent & Protective Order of Elks *(1979) 97 Cal. App. 3d 915, 159 Cal. Rptr. 131* , was an action for defamation, by a public high school teacher who was accused in a fraternal order magazine of "expounding communist, Godless philosophies to our young people" because of her selection and defense of certain controversial teaching materials. The defendants' motion for summary judgment on the ground that she was a public official who must prove actual malice was denied, but granted on other grounds. On cross appeal, the court affirmed the finding that the plaintiff was not a public official. The court noted language from *Rosenblatt v. Baer* [*Rosenblatt v. Baer (1966) 383 U.S. 75, 86-87 n.13, 86 S. Ct. 669, 15 L. Ed. 2d 597* (discussed in *§ 142.66[3*][a])] that a public official must be one whose position would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy. The court stated that the governance or control that a public classroom teacher might be said to exercise over the conduct of government is at most remote and philosophical. The court refused to hold that a school teacher must be deemed to have assumed the risk of nonmalicious defamation. Such a rule would be an intolerable danger to freedom of intellect and of expression, which the teacher must have to teach effectively (*97 Cal. App. 3d 915, 922-924)* .

[e] Deputy Public Defender Is Not Public Official

The court in ***James v. San Jose Mercury News, Inc.*** *(1993) 17 Cal. App. 4th 1, 20 Cal. Rptr. 2d 890* , has held that a deputy public defender is not a public official because he or she does not have "substantial responsibility for or control over the conduct of governmental affairs." As stated by the court, the control that a deputy public defender may exercise over the management of a particular case must invariably be controlled in turn by considerations of the best interests of the individual client, tempered only by professional constraints applicable to all attorneys and not by any generalized public interest beyond concern that indigent defendants should be competently and professionally represented. The court expressly rejected the holding of *Tague v. Citizens for Law & Order, Inc. (1977) 75 Cal. App. 3d Supp. 16, 23-24* , *142 Cal. Rptr. 689* , that an assistant public defender is a public official (*17 Cal. App. 4th 1, 11)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral Overview

California Points & Authorities

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 142 LIBEL AND SLANDER (DEFAMATION)
PART II. FORMS

14-142 California Points & Authorities § 142.67

§ 142.67 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Plaintiff--Plaintiff Is Not Public Figure--Actual Malice Need Not Be Alleged

[1] FORM

[*Caption. See § 142.66.*]

PLAINTIFF IS NOT REQUIRED TO ALLEGE ACTUAL MALICE, BECAUSE HE/SHE IS NOT A PUBLIC FIGURE.

A. Public Figure Defined. A person is not deemed a "public figure" unless he either enjoys a general, national fame or has become involved in a particular controversy (*Gertz v. Welch (1974) 418 U.S. 323, 352, 94 S. Ct. 2997, 41 L. Ed. 2d 789*).

[*Optional*] **B. Private Individual Involved in Public Matter.** A private individual is not automatically transformed into a public figure by becoming involved in or associated with a matter that attracts public attention (*Wolston v. Reader's Digest Ass'n, Inc. (1979) 443 U.S. 157, 167, 99 S. Ct. 2701, 61 L. Ed. 2d 450*).

[*Optional*] **C. Person Who Engaged in Criminal Conduct.** A person who engages in criminal conduct does not automatically become a public figure for purposes of comment on a limited range of issues relating to his or her conviction (*Wolston v. Reader's Digest Ass'n, Inc. (1979) 443 U.S. 157, 168-169, 99 S. Ct. 2701, 61 L. Ed. 2d 450*).

[*Optional*] **D. Plaintiff Not Seeking to Influence Resolution of Issues.** To be a "public figure," the plaintiff must be shown to have voluntarily and actively sought, in connection with a given matter of public interest, to influence the resolution of the issues involved (*Franklin v. Benevolent & Protective Order of Elks (1979) 97 Cal. App. 3d 915, 929, 159 Cal. Rptr. 131*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion for summary judgment if the motion asserts that the complaint did not allege actual malice even though the plaintiff is a public figure. The basis for the opposition to the motion is that the plaintiff is not a public official, and as a private figure need not allege actual malice.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach opposing affidavits or declarations and a separate statement of undisputed facts [*see Code Civ. Proc. § 437c(b)*] that include facts showing that the plaintiff is not a public figure.

[3] Discussion of Authorities

[a] Public Figure Defined

In ***Gertz v. Welch*** *(1974) 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789, 812* , the facts and procedural background of which are discussed in *§ 142.25[3][c]*, the Supreme Court held that absent clear evidence of general fame or notoriety in the community and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation (*418 U.S. 323, 352)* . Applying this reasoning, the Court held that the plaintiff, an attorney, was not a public figure for the purposes of that case.

[b] Private Individual Involved in Public Matter

In ***Wolston v. Reader's Digest Ass'n, Inc.*** *(1979) 443 U.S. 157, 99 S. Ct. 2701, 61 L. Ed. 2d 450* , the plaintiff sued the author and publishers of a book for stating that the plaintiff had been indicted for espionage and had been a Soviet agent. The plaintiff had pled guilty to contempt for not appearing before a grand jury that was investigating espionage activities in the United States. The Supreme Court held that a private individual is not automatically transformed into a public figure by becoming involved in or associated with a matter that attracts public attention and, consequently, the plaintiff was not a public figure (*443 U.S. 157, 167)* .

[c] Person Who Engaged in Criminal Conduct

The facts of ***Wolston v. Reader's Digest Ass'n, Inc.*** *(1979) 443 U.S. 157, 99 S. Ct. 2701, 61 L. Ed. 2d 450* , are discussed in *§ 142.67[3][b]*. The Supreme Court rejected the contention that any person who engaged in criminal conduct automatically becomes a public figure for purposes of comment on a limited range of issues relating to his or her conviction (*443 U.S. 157, 168-169)* .

[d] Plaintiff Not Seeking to Influence Resolution of Issues

In ***Franklin v. Benevolent & Protective Order of Elks*** *(1979) 97 Cal. App. 3d 915, 159 Cal. Rptr. 131* , the plaintiff was a public school teacher whose handling of controversial materials in a civics course had been challenged by the defendant's local branch and then condemned in an editorial in its national magazine. In a defamation action, summary judgment for the defendant was reversed. The court of appeal noted that the definition of a "public figure" had evolved through key decisions to the point where it now incorporated a requirement that the libel plaintiff must have voluntarily and actively sought, in connection with any given matter of public interest, to influence the resolution of the issues

involved. Only by such voluntary and active participation could an individual be said to have relinquished an interest in the protection of such person's own name (*97 Cal. App. 3d 915, 929)* . In concluding that appellant was not a public figure, the court observed that there was no showing she had ordered materials for the purpose of inciting controversy; she had declared without contradiction that she did not anticipate controversy; and it was not clear that, but for the defendant's vigorous reaction, there would have been any controversy. There was no indication that any of her subsequent activities in connection with the controversy extended beyond what was required of her by school district regulations or to respond to inquiries initiated by the media. She did not call press conferences, take her case to the public in an attempt to influence resolution of the issues, or in any other sense assume "special prominence" beyond the prominence that the defendant thrust on her (*97 Cal. App. 3d 915, 931)* .

[4] Additional Authorities

[a] Public Figure Defined

In *Vegod Corp. v. American Broad. Cos., Inc. (1979) 25 Cal. 3d 763, 160 Cal. Rptr. 97, 603 P.2d 14* , the Supreme Court reversed a judgment for the defendants that had been granted on the basis of the trial court's ruling that the plaintiffs were public figures. The Court held that the plaintiffs, two corporations hired to conduct a closeout sale for a well known landmark department store, had not attained public figure status merely because they were doing business with parties to a public controversy or selling goods to the public (*25 Cal. 3d 763, 769)* . The Court also held that criticism of commercial conduct is not deserving of the special protection of the actual malice test (*25 Cal. 3d 763, 770)* .

In *Gallagher v. Connell (2004) 123 Cal. App. 4th 1260, 20 Cal. Rptr. 3d 673* , a Catholic priest had been helping to care for an elderly woman, who made him a beneficiary of her sizable estate and appointed him trustee of her trust. However, other parties challenged this appointment. In the course of this legal challenge, the woman's neighbor made a statement to the press, which was published, implying that the priest had been trying to influence the elderly woman in order to become the beneficiary of her estate. The priest sued the neighbor for slander. The defendant made a motion to strike the complaint under *Code Civ. Proc. § 425.16*, the so-called anti-SLAPP statute, but the trial court denied the motion, and the defendant appealed. The court of appeal affirmed, holding that the plaintiff was not a public figure for purposes of the slander action and did not have to show that the defendant acted with malice. The court rejected the notion that being a priest, by itself, was sufficient to make a person a public figure. The court noted that the plaintiff was not particularly well-known because of religious, civic, or political activities, and that he had not sought or received notoriety or public attention by reason of his position or achievements. The court also noted that this was not a situation in which the plaintiff had thrust himself into a public controversy. The plaintiff had not been the party to challenge his appointment as trustee, and there was no public controversy until the article was published containing the defamatory statement (*123 Cal. App. 4th 1260, 1272-1273)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral Overview

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 142 LIBEL AND SLANDER (DEFAMATION)
PART II. FORMS

14-142 California Points & Authorities § 142.68

§ 142.68 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Public Figure or Public Official Plaintiff--Plaintiff Has Shown Actual Malice by Clear and Convincing Evidence

[1] FORM

[*Caption. See § 142.65.*]

SUMMARY JUDGMENT FOR DEFENDANT IS IMPROPER BECAUSE TRIABLE ISSUES OF MATERIAL FACT REMAIN WITH RESPECT TO THE EXISTENCE OF ACTUAL MALICE, IN THAT PLAINTIFF HAS SHOWN BY CLEAR AND CONVINCING EVIDENCE THAT DEFENDANT MADE THE DEFAMATORY STATEMENTS WITH ACTUAL MALICE.

A. Clear and Convincing Evidence of Actual Malice Defeats Summary Judgment Motion. In a defamation action, a defendant's properly supported motion for summary judgment is defeated by the plaintiff's presentation of affirmative evidence showing actual malice by clear and convincing evidence (*Antonovich v. Superior Court (1991) 234 Cal. App. 3d 1041, 1047, 285 Cal. Rptr. 863*).

[*Optional*] **B. Failure to Investigate Amounting to Avoidance of Truth Supports Finding of Actual Malice.** A failure to investigate the truth of a matter, resulting from a deliberate decision not to acquire knowledge of facts that amounts to a purposeful avoidance of the truth, supports a finding of actual malice (*Khawar v. Globe Int'l, Inc. (1998) 19 Cal. 4th 254, 279, 79 Cal. Rptr. 2d 178, 965 P.2d 696* ; *Antonovich v. Superior Court (1991) 234 Cal. App. 3d 1041, 1048, 1053, 285 Cal. Rptr. 863*).

[*Optional*]. **C. Political Candidate Not Protected if Statement Uttered With Actual Malice.** The broad protection of the *First Amendment* does not extend to a false statement uttered with actual malice by a candidate in a political campaign (*Antonovich v. Superior Court (1991) 234 Cal. App. 3d 1041, 1047, 285 Cal. Rptr. 863*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for Plaintiff

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a defendant's motion for summary judgment in a defamation action, to assert that the plaintiff has shown by clear and convincing evidence that the defendant made the defamatory statements with actual malice [*see Antonovich v. Superior Court (1991) 234 Cal. App. 3d 1041, 1047, 1054, 285 Cal. Rptr. 863]* . Optional Paragraph B is for use to assert that a failure to investigate supports a finding of actual malice, if it amounts to a purposeful avoidance of the truth. Optional Paragraph C is for use to assert that a political candidate is subject to liability for defamation with respect to false campaign charges made with actual malice.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. If actual malice is the pivotal issue in a defamation case, summary judgment in favor of a publisher of the defamatory statement is a favored remedy if the opponent fails to present clear and convincing evidence of actual malice [*Reader's Digest Assn. v. Superior Court (1984) 37 Cal. 3d 244, 252, 208 Cal. Rptr. 137, 690 P.2d 610* (discussed in *§ 142.25[3*][a])]. Counsel should therefore thoroughly discuss all facts relating to the defendant's actual knowledge of the statement's falsity, or reckless disregard for whether the statement was false or true. For example, if appropriate, counsel should show that the defendant failed to investigate the matter based on a deliberate decision to avoid discovering the truth. This point can be illustrated, for example, by showing the defendant had time to investigate, and was put on notice and given an opportunity to do so, but deliberately declined to do so. In addition, counsel should attach affidavits or declarations that support the memorandum [*Code Civ. Proc. § 437c*].

In an appropriate case, these points may be submitted in opposition to a motion for summary judgment supported by the points *in § 142.25*.

[b] Related Pleading and Practice Forms

For discussion and forms regarding campaign practices, see Ch. 243, *Elections* in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Clear and Convincing Evidence of Actual Malice Defeats Summary Judgment Motion

In ***Antonovich v. Superior Court*** *(1991) 234 Cal. App. 3d 1041, 285 Cal. Rptr. 863* , a politician brought a defamation action against his former opponent based on assertions by the defendant that the plaintiff had removed and destroyed office files prior to his vacating the office after his defeat as an incumbent. The plaintiff, an incumbent county supervisor, was defeated in his race for reelection by the defendant in 1980. In 1984, the defendant was reelected. In the 1988 election campaign, the plaintiff, a public figure, ran against the defendant. During that election, certain statements were attributed to the defendant charging the plaintiff with removing and/or destroying files from his office prior to the defendant's occupancy in 1980. The statements at issue, all made in 1988, include the following: (1) the assertion on a television news program that the plaintiff shredded and destroyed all the files the day the defendant took office; (2) the assertion during a debate, that the plaintiff deliberately destroyed the office files; (3) the assertion in a campaign mailer, that the plaintiff took with him critically important files when he vacated the office; and (4) television ads with the slogan "Empty Files, Empty Promises." In the following year, the plaintiff filed a libel action against the defendant, who moved for summary judgment on the ground that the plaintiff could not establish the element of actual malice. The trial court denied the motion on the ground that there was a triable issue of fact with respect to malice. The defendant filed a petition for writ of mandate, and the court of appeal issued an alternative writ of mandate.

The court of appeal denied the petition for writ of mandate, and discharged the alternative writ (*234 Cal. App. 3d 1041, 1054)* . If actual malice is the pivotal issue in a defamation case, summary judgment in favor of a publisher of the defamatory statement is a favored remedy if the opponent fails to present clear and convincing evidence of actual malice. Nonetheless, a trial court should act with caution in granting summary judgment. Although the moving party has the burden of showing there is no genuine issue of fact, the plaintiff must present affirmative evidence to show actual malice by clear and convincing evidence in order to defeat a properly supported motion for summary judgment. The court stated that the critical issue is the publisher's actual belief as to the truth or falsity of the statements, which is determined by a subjective test (*234 Cal. App. 3d 1041, 1047)* . A public figure may not recover damages for a defamatory falsehood without clear and convincing proof that the false statement was made with actual malice, that is, with knowledge that it was false or with reckless disregard of whether it was false or not (*234 Cal. App. 3d 1041, 1047-1048)* . The court concluded that the plaintiff had made a showing of actual malice sufficient to defeat the summary judgment motion (*234 Cal. App. 3d 1041, 1053-1054)* .

[b] Failure to Investigate Amounting to Avoidance of Truth Supports Finding of Actual Malice

The facts and procedural background of ***Khawar v. Globe Int'l, Inc.*** *(1998) 19 Cal. 4th 254, 79 Cal. Rptr. 2d 178, 965 P.2d 696* , are discussed in *§ 142.89[3][a]*. The California Supreme Court upheld a finding that the defendant, a tabloid newspaper, acted with actual malice in publishing a photograph and story identifying the plaintiff as the actual killer of Robert Kennedy, based on a published book about the assassination. After noting that actual malice is judged by a subjective standard, the Court repeated established principles holding that, while failure to investigate a third party's defamatory falsehoods before publishing, even if a reasonably prudent person would have done so, is insufficient to support a finding of actual malice, such a finding may be upheld if there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports, and the defendant fails to interview obvious witnesses who could have confirmed or disproved the allegations or to consult relevant documentary sources. The Court then concluded that there were obvious reasons to doubt the accuracy of the book's accusation that the plaintiff killed Kennedy, given the prominent nature of the event, the extent of the investigation by state and federal law enforcement agencies, and the vast quantity of evidence pointing to Sirhan Sirhan as the lone assassin and leading to his subsequent conviction (*19 Cal. 4th 254, 276)* . Given the obvious reasons to doubt the accuracy of the book's claim, and because that claim was an inherently defamatory accusation against the plaintiff, the jury could properly conclude that the defendant newspaper acted with actual malice in republishing that claim if it found also that the defendant failed to use readily available means to verify the accuracy of the claim by interviewing obvious witnesses who could have confirmed or disproved the allegations or by inspecting relevant documents or other evidence. The Court then found that the evidence at trial supported the jury's implied finding that neither the newspaper writer nor the editors made any effort to investigate the highly dubious claim (*19 Cal. 4th 254, 276-277)* .

In response to the defendant's further argument that the article was a neutral and accurate report of the book and that it had no duty to verify the claims, no matter how improbable, of a prominent and responsible source such as the author of the book, the Court found no substantial evidence in the record that the newspaper writer or editors were aware of facts about the author of the book that would justify unquestioning reliance on the highly improbable accusations. The defendant had no prior experience with the book's author, the author did not hold high public office or a position of great social responsibility, and there was no evidence his reputation in the scientific, academic, or journalistic community qualified him as a credible and reliable commentator on public affairs. To the contrary, evidence presented by one witness called by the plaintiff with substantial experience in studying the Kennedy assassinations, established that the majority of the researchers in the area considered the book's author to be unreliable. The Court thus concluded that there was no justification for failing to make any effort to verify the truth of the book's inherently incredible accusation against the plaintiff, and that the finding of actual malice should be upheld (*19 Cal. 4th 254, 277-279)* .

The facts and procedural background of ***Antonovich v. Superior Court*** *(1991) 234 Cal. App. 3d 1041, 285 Cal. Rptr. 863* , are discussed in *§ 142.68[3][a]*. The question of whether the evidence is sufficient to support a finding of actual

malice is one of law. The standard in determining reckless conduct is a subjective one; there must be sufficient evidence to permit the conclusion that the defendant actually had a high degree of awareness of probable falsity. As a result, failure to investigate before publishing, even if a reasonably prudent person would have done so, is not sufficient to establish reckless disregard. Although the mere failure to investigate will not support a finding of actual malice, the purposeful avoidance of truth is in a different category. Inaction, that is, failure to investigate, that was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of a statement will support a finding of actual malice (*234 Cal. App. 3d 1041, 1048)* . The court noted that the statements at issue were published on six or more different occasions, in late 1988, about eight years after the alleged events on which they were predicated. The trial court reasoned that actual malice was properly inferred from the fact that there was circumstantial evidence alerting the defendant of the probable falsity of his statements, and placing him on inquiry notice after the initial statement was made, and from the fact that the defendant thereafter made no efforts to ascertain the truth prior to making the subsequent statements. The court noted that the defamatory statements fall within two categories: the destruction of the files, and the removal of the files (*234 Cal. App. 3d 1041, 1049)* . The court noted that the defendant moved only for summary judgment, rather than summary adjudication of issues regarding each statement (this motion was subject to former Code Civ. Proc. § 473c, prior to its 1990 amendment; the amended version of the statute, which severely limits issues that may be subject to summary adjudication, is discussed in Ch. 221, *Summary Judgments*). In support of his motion, the defendant submitted evidence to show that he made the statements with a good-faith belief that they were true (*234 Cal. App. 3d 1041, 1050)* .

As the factual basis for his belief, the defendant stated that when he moved into the office, he found that it contained almost no files of any kind, and none relating to constituents of that political district. Because so many files were missing, and because the plaintiff had occupied the office and had control over the files on the Friday prior to the Monday the defendant moved in, he concluded that the files had been removed from the office by the plaintiff, or at the plaintiff's direction (*234 Cal. App. 3d 1041, 1050-1051)* . A trier of fact could therefore find that the defendant had a subjective belief that the paucity of files in the office when he moved into it was attributable to the plaintiff and that the belief was in good faith. On the other hand, the court stated, the evidence would not support a finding that the defendant subjectively believed that the plaintiff had destroyed the files, and does not give rise to a reasonable inference that the plaintiff shredded and destroyed all of the files the day the defendant moved into the office, or that the plaintiff deliberately destroyed the files of the constituents of his district. The court observed that the record is in fact devoid of any factual basis to support a subjective belief, good-faith or otherwise, on the defendant's part, that the statements asserting that the plaintiff shredded and destroyed the files were true at the time they were uttered in 1988. Accordingly, the court held, with regard to the defamatory statements concerning the destruction of files, the defendant failed to carry his burden to establish a prima facie showing that he uttered them with a good-faith belief in their truth.

With regard to the remaining defamatory statements, the court found that the defendant made the requisite prima facie showing, that is, a subjective good-faith belief in the truth of the statements regarding the plaintiff's removal of the files in 1980 (*234 Cal. App. 3d 1041, 1051)* . However, the court found that the plaintiff submitted clear and convincing evidence from which the trier of fact could nonetheless find actual malice, that is, reckless disregard of whether they were false or not (*234 Cal. App. 3d 1041, 1051-1052)* . In response, the plaintiff submitted evidence to show that when he vacated the office in 1980, he left files enough to fill at least 177 boxes, which were placed in storage eight months after the defendant first took office. The evidence also showed that the defendant's staff discussed the fact that files from the plaintiff's office still existed and were included within filing cabinets used by the defendant's staff as late as 1988. From that evidence, a trier of fact could properly find that the defendant must have entertained a serious doubt as to the truth of his published statements prior to making them; and that the good-faith belief that the defendant may have held in 1980 no longer existed in 1988, because he knew or should have known at that point that they were false. In other words, there was sufficient evidence to support the conclusion that in 1988, the defendant actually had a high degree of awareness of the probable falsity of the statements. The court noted that the plaintiff also submitted evidence that the defendant was offered the opportunity, by virtue of the plaintiff's challenge in a 1988 campaign debate, to investigate the truth regarding the charges about the missing files, but avoided the opportunity to do so (*234 Cal. App. 3d 1041, 1052-1053)* . Moreover, the evidence reveals that the defendant continued to make similar statements after that point.

The court concluded that from this evidence, the trier of fact was entitled to find that the defendant's inaction was the product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of the charges, which amounts to a purposeful avoidance of the truth, and supports a finding of actual malice (*234 Cal. App. 3d 1041, 1053)* . The court held that the motion was properly denied on the ground that triable issues of fact remained regarding the existence of actual malice (*234 Cal. App. 3d 1041, 1053-1054)* . With regard to the defamatory statements concerning destruction of the files, the defendant failed to carry his burden to establish a prima facie showing that he had a subjective good-faith belief in the truth of those statements, which per se justifies denial of the summary judgment motion. Moreover, with regard to the statements concerning the emptying of the cabinets and removal of the files, the plaintiff submitted clear and convincing evidence from which a trier of fact could find that the defendant made those statements with actual malice, that is, reckless disregard of the truth (*234 Cal. App. 3d 1041, 1054)* .

[c] Political Candidate Not Protected if Statement Uttered With Actual Malice

The facts and procedural background of ***Antonovich v. Superior Court*** *(1991) 234 Cal. App. 3d 1041, 285 Cal. Rptr. 863* , are discussed in *§ 142.68[3][a]*. The court noted that the *First Amendment* precludes a defamation action based merely on an unfavorable characterization of a political opponent during an election campaign. Therefore, in enacting the Elections Code [*see, e.g.,* Elec. Code § 29000 et seq.], the legislature recognized that any attempt at wholesale regulation of, or government intrusion into, the content of political literature is constitutionally impermissible. However, the broad protection of the *First Amendment* does not extend to a false statement uttered with actual malice by a candidate in a political campaign (*234 Cal. App. 3d 1041, 1047)* .

[4] Additional Authorities

[a] Failure to Investigate Amounting to Avoidance of Truth Supports Finding of Actual Malice

In *Masson v. New Yorker Magazine, Inc. (9th Cir. 1992) 960 F.2d 896* , one of the questions presented was whether the plaintiff presented sufficient evidence to establish that the defendant, a magazine, acted with actual malice when it published a story containing allegedly inaccurate quotes from the plaintiff (*960 F.2d 896, 897-898)* . The Ninth Circuit held that a trier of fact could conclude that the defendant acted with malice in publishing the story because it had a high degree of awareness of probable falsity, or it had reason to doubt the veracity of the author of the story or the accuracy of the facts and quotations in the story and it failed to take reasonable steps to dispel those doubts (*960 F.2d 896, 900)* . The plaintiff claimed that he made several protestations to the defendant's fact-checker that several quotations in the story about him were inaccurate, and when he asked to review portions of the article, the fact-checker promised to get back to him but never did. The plaintiff also claimed that he asked the fact-checker to speak with the author of the story about the accuracy of the quotations and was assured that there were tape recordings of all the conversations and the quotations would be verbatim and accurate, and that a number of corrections he suggested to the fact-checker found their way into galleys but were changed back by the time the magazine was published (*960 F.2d 896, 900)* .

The Ninth Circuit pointed out that although the plaintiff's protestations alone do not support an inference that the defendant entertained serious doubts about or even had obvious reasons to doubt the accuracy of the quotations, the plaintiff's objections were raised during a fact-checking process initiated by the defendant as part of its policy of maintaining the accuracy of its stories. The court stated that a jury could reasonably conclude that claims of inaccuracy raised in this context would be taken seriously (*960 F.2d 896, 900-901)* , and that one possible conclusion a jury might draw is that the defendant's fact-checker did in fact develop a serious doubt about the accuracy of the quotations; that she looked into the matter by talking to the author and/or listening to the tapes; that she (or someone else) decided it was necessary to make some of the changes in order to remove known inaccuracies; and that the quotations were changed back as the result of a conscious decision to sacrifice accuracy to creativity (*960 F.2d 896, 901)* .

The court also pointed out that even though a jury could find that the defendant's editors did not make a conscious decision to let the author alter the plaintiff's statements, a jury could nevertheless conclude that the defendant had

developed obvious reasons to doubt the accuracy of the quotations but, in an effort to purposefully avoid the truth, failed to conduct a reasonable investigation of the plaintiff's claims of inaccuracy (*960 F.2d 896, 901)* . The court stated that once doubt exists as to the accuracy of a story, the publisher must act reasonably in dispelling it. Thus, if the publisher undertakes to investigate the accuracy of a story and learns facts casting doubt on the information contained in the story, it may not ignore those doubts, even though it had no duty to conduct the investigation in the first place (*960 F.2d 896, 901)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral Overview

California Points & Authorities

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 142 LIBEL AND SLANDER (DEFAMATION)
PART II. FORMS

14-142 California Points & Authorities § 142.69

§ 142.69 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10]--No Compliance With Retraction Statute [Civ. Code § 48a] Necessary if Defamatory Matter Not Published in Newspaper or on Radio or Television Broadcast

[1] FORM

[*Caption. See § 142.63.*]

COMPLIANCE WITH THE RETRACTION STATUTE IS NOT NECESSARY WHERE THE STATEMENT WAS NOT PUBLISHED IN A NEWSPAPER OR ON RADIO OR TELEVISION.

Compliance With Retraction Statute Not Necessary. It is not necessary for the plaintiff to allege compliance with the retraction statute if allegedly defamatory matter has been published by means other than by a newspaper or on a radio or television broadcast (*Morris v. National Fed'n of Blind (1961) 192 Cal. App. 2d 162, 165-166, 13 Cal. Rptr. 336* ; *Farr v. Bramblett (1955) 132 Cal. App. 2d 36, 45-46, 281 P.2d 372* , *overruled on other grounds,* *Field Research Corp. v. Superior Court (1969) 71 Cal. 2d 110, 77 Cal. Rptr. 243, 453 P.2d 747*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a general demurrer to a complaint if the demurrer asserts that the complaint fails to allege compliance with the retraction statute.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Compliance With Retraction Statute Not Necessary

In ***Morris v. National Fed'n of Blind*** *(1961) 192 Cal. App. 2d 162, 13 Cal. Rptr. 336* , the court of appeal reversed a judgment of dismissal following the sustaining of the defendant's general demurrer on the ground of noncompliance with the retraction statute. The court of appeal held that the retraction statute [*Civ. Code § 48a*] does not apply to magazines. It applies on its face only to publications in newspapers or by radio broadcasts, and, furthermore, the policy of free dissemination of news does not support its application to magazines (*192 Cal. App. 2d 162, 165-166)* .

In ***Farr v. Bramblett*** *(1955) 132 Cal. App. 2d 36, 281 P.2d 372 , overruled on other grounds, Field Research Corp. v. Superior Court (1969) 71 Cal. 2d 110, 77 Cal. Rptr. 243, 453 P.2d 747* , the court of appeal reversed the granting of the defendants' motions to strike allegations of general and exemplary damages with regard to some of the causes of action. The court stated that it was not necessary to comply with the retraction statute if the newspaper had failed or refused to publish the libelous matter submitted to it for publication. In such cases, it was sufficient for the plaintiff to allege that the copy or matrix containing the libelous matter was "published" when the defendants submitted it to the newspaper's employees for printing (*132 Cal. App. 2d 36, 45-46)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral OverviewTortsIntentional TortsDefamationRemediesRetractions

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CHAPTER 142 LIBEL AND SLANDER (DEFAMATION)
PART II. FORMS

14-142 California Points & Authorities § 142.70

§ 142.70 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10]--No Compliance With Retraction Statute [Civ. Code § 48a] Necessary if Slander Complete Prior to Publication in Newspaper

[1] FORM

[*Caption. See § 142.63.*]

A DEMAND FOR RETRACTION IS NOT NECESSARY WHERE THE SLANDEROUS STATEMENT IS LATER REPRINTED IN A NEWSPAPER.

A. Republication of Slander Not Libel. The republication of slander in a newspaper bears on the extent of liability of the original slanderer, but it does not transform slander into libel and make the retraction statute applicable to persons who slander others and then find that their remarks have been reprinted in a newspaper (*Mercado v. Hoefler (1961) 190 Cal. App. 2d 12, 18-19, 11 Cal. Rptr. 787*).

B. Demand for Retraction. A demand for retraction need not be alleged in the complaint if the defamatory language was published in a newspaper or on a radio or television broadcast only after it was published by some other means (*Mercado v. Hoefler (1961) 190 Cal. App. 2d 12, 18-19, 11 Cal. Rptr. 787*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a general demurrer to a complaint if the demurrer asserts that the

complaint fails to allege compliance with the retraction statute.

If appropriate, counsel should insert argument in this form showing the relationship between the facts of his case and the point of law raised.

[3] Discussion of Authorities

[a] Republication of Slander

In ***Mercado v. Hoefler*** *(1961) 190 Cal. App. 2d 12, 11 Cal. Rptr. 787* , a real estate salesman sued his former employer for slanderous remarks made to a newspaper reporter. The court of appeal affirmed judgment for the plaintiff, holding that the mere fact that oral defamation is subsequently quoted or printed in a newspaper does not make it libel. It is still slander. The repetition of slander may be shown because it bears on the extent of liability (*190 Cal. App. 2d 12, 18)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationElementsSlanderTortsIntentional TortsDefamationRemediesRetractions

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14-142 California Points & Authorities § 142.71

§ 142.71 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10]--No Compliance With Retraction Statute [Civ. Code § 48a] Necessary if Slander Committed by Unauthorized Intruder on Radio or Television Broadcast

[1] FORM

[*Caption. See § 142.63.*]

PLAINTIFF NEED NOT ALLEGE COMPLIANCE WITH THE RETRACTION STATUTE WHERE DEFENDANT WAS AN INTRUDER ON A RADIO OR TELEVISION BROADCAST.

Intruder Not Protected by Retraction Statute. An intruder on a radio or television program who slanders a person on a live broadcast is not protected [by the retraction statute] from a defamation action for general and punitive damages (*White v. Valenta (1965) 234 Cal. App. 2d 243, 247-250, 44 Cal. Rptr. 241*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a general demurrer to a complaint if the demurrer asserts that the complaint fails to allege compliance with the retraction statute.

If appropriate, counsel should insert argument in this form showing the relationship between the facts of his case and the point of law raised.

[3] Discussion of Authorities

[a] Intruder Not Protected by Retraction Statute

In ***White v. Valenta*** *(1965) 234 Cal. App. 2d 243, 44 Cal. Rptr. 241* , the court of appeal affirmed judgment for the plaintiff and held that an intruder on a radio or television broadcast is not protected by the provisions of the retraction statute (*234 Cal. App. 2d 243, 247-250)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral OverviewTortsIntentional TortsDefamationElementsSlanderTortsIntentional TortsDefamationRemediesRetractions

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14-142 California Points & Authorities § 142.72

§ 142.72 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10]--No Compliance With Retraction Statute [Civ. Code § 48a(1)] Necessary if Defendant Is Magazine Rather Than Newspaper

[1] FORM

[*Caption. See § 142.63.*]

DEFENDANT'S DEMURRER SHOULD BE OVERRULED BECAUSE DEFENDANT IS A MAGAZINE RATHER THAN A "NEWSPAPER" WITHIN THE MEANING OF THE RETRACTION STATUTE (*CIVIL CODE SECTION 48a*) AND IS THEREFORE NOT ENTITLED TO THE PROTECTION OF THAT STATUTE.

Magazine Not Covered by Retraction Statute. A defendant that is a magazine rather than a newspaper within the meaning of *Civil Code Section 48a* is not entitled to the protection of that statute (*see Burnett v. National Enquirer, Inc. (1983) 144 Cal. App. 3d 991, 1000-1001, 193 Cal. Rptr. 206*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a demurrer to a complaint for defamation if the basis for the demurrer is the plaintiff's failure to allege compliance with the retraction statute [*see Civ. Code § 48a*]. The basis of the opposition is that the defendant is a magazine rather than a newspaper within the meaning of the statute.

The form may also be adapted for use in opposition to a motion for summary judgment or summary adjudication on the

same grounds if the alleged defect does not appear on the face of the complaint (that is, the nature of the defendant's business is not clear from the face of the complaint, but the defendant claims it is in fact a newspaper). If so adapted, counsel should attach opposing affidavits or declarations and a separate statement of undisputed facts [*Code Civ. Proc. § 437c(b)*] showing the legal sufficiency of the notice and demand.

The retraction statute does not completely bar a cause of action for defamation, but rather limits the plaintiff to recovery of special damages [*see Civ. Code § 48a(1)*]. Thus, if the plaintiff seeks recovery of general or punitive damages in addition to special damages, this point may be raised in opposition to a motion to strike the prayer for general or punitive damages [*see Code Civ. Proc. §§ 435-437*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law stated. Thus, counsel should show how the uncontradicted facts show that the defendant is not a newspaper within the meaning of the retraction statute.

[b] Related Pleading and Practice Forms

For discussion and forms pertaining to the retraction statute, see Ch. 340, *Libel and Slander* in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Magazine Not Covered by Retraction Statute

In ***Burnett v. National Enquirer, Inc.*** *(1983) 144 Cal. App. 3d 991, 193 Cal. Rptr. 206* , a celebrity brought a libel action against the National Enquirer publication. Immediately prior to trial of the action, the court determined, on the plaintiff's motion to vacate a prior order granting partial summary judgment to the defendant, that the defendant was not a newspaper within the provisions of *Civ. Code § 48a* and therefore was not entitled to the protection of the retraction statute. Trial resulted in a verdict for the plaintiff, and the defendant appealed.

One of the principal issues on appeal was the Enquirer's status as a newspaper with concomitant entitlement to the protection of the retraction statute. On this issue, the court of appeal affirmed the trial court's ruling and held the Enquirer should not be deemed a newspaper for the purposes of this case (*144 Cal. App. 3d 991, 1005)* . In support of its holding, the court noted that, although the defendant called itself a newspaper and was a member of a newspaper association, ample evidence demonstrated otherwise. Numerous media directories classified it as a magazine, its classification had been changed to that of a magazine by the Audit Bureau of Circulation, and it did not subscribe to the Associated Press or United Press International news services. Furthermore, its content consisted of "how-to" stories; celebrity, medical, or personal improvement articles; and gossip or television column items, as opposed to coverage of politics, sports, or crime. Another important factor noted by the court was the lack of reference to time in the articles and the fact that lead time for the stories was one to three weeks (*144 Cal. App. 3d 991, 1000)* . The issue of lead time related to the purpose of the retraction statute, to protect newspapers who, by virtue of their manner of operation, are not generally in a position to adequately ascertain the truth of a story before the publication deadline (*144 Cal. App. 3d 991, 1001)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral OverviewTortsIntentional TortsDefamationRemediesRetractions

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14-142 California Points & Authorities § 142.73

§ 142.73 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10]--No Compliance With Retraction Statute [Civ. Code § 48a] Necessary if Defamation Committed by Nonparticipant in Process of News Dissemination

[1] FORM

[*Caption. See § 142.63.*]

PLAINTIFF NEED NOT ALLEGE COMPLIANCE WITH THE RETRACTION STATUTE BECAUSE THE DEFENDANT IS A NONPARTICIPANT IN THE PROCESS OF NEWS DISSEMINATION.

Nonparticipant Not Covered by Retraction Statute. A person who is a nonparticipant in the dissemination of news does not qualify for the protection of the retraction statute (*Field Research Corp. v. Superior Court (1969) 71 Cal. 2d 110, 113-116, 77 Cal. Rptr. 243, 453 P.2d 747*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a general demurrer to a complaint if the demurrer asserts that the complaint fails to allege compliance with the retraction statute.

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law stated.

[3] Discussion of Authorities

[a] Nonparticipant Not Covered by Retraction Statute

In ***Field Research Corp. v. Superior Court*** *(1969) 71 Cal. 2d 110, 77 Cal. Rptr. 243, 453 P.2d 747* , the Supreme Court granted a writ of mandate to compel the superior court to vacate an order that had granted the defendant's motion for partial summary judgment with regard to general and exemplary damages because the plaintiffs had not complied with the requirements of the retraction statute. The plaintiffs, a corporation and its president, alleged that the defendant had defamed them in attacking the accuracy of the plaintiffs' public opinion poll, which indicated the degree of public preference for three Republican gubernatorial candidates. The Court held that a third party whose statements are reported to the public by newspaper, radio, or television, and who is not engaged in the news dissemination industry, is not protected by the retraction statute (*71 Cal. 2d 110, 113-116)* .

[4] Additional Authorities

[a] Nonparticipant Not Covered by Retraction Statute

In *Burnett v. National Enquirer, Inc. (1983) 144 Cal. App. 3d 991, 193 Cal. Rptr. 206* , a libel action brought by a celebrity against the National Enquirer publication, the trial court had determined that the defendant was not a newspaper within the provisions of *Civ. Code § 48a* and therefore was not entitled to the protection of the retraction statute. On appeal, the ruling was affirmed. The court of appeal noted that although the defendant called itself a newspaper and was a member of a newspaper association, ample evidence demonstrated otherwise. Numerous media directories classified it as a magazine, its classification had been changed to that of a magazine by the Audit Bureau of Circulation, and it did not subscribe to Associated Press or United Press International news services. Furthermore, its content consisted of "how-to" stories, gossip or television column items, and celebrity, medical, or personal improvement articles, as opposed to coverage of politics, sports, or crime. Another important factor noted by the court was the lack of reference to time in the articles and the fact that lead time for the stories was one to three weeks (*144 Cal. App. 3d 991, 1000)* . The issue of lead time related to the purpose of the retraction statute, which is to protect newspapers that, by virtue of their manner of operation, are not generally in a position to adequately ascertain the truth of a story before the publication deadline (*144 Cal. App. 3d 991, 1001)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral OverviewTortsIntentional TortsDefamationRemediesRetractions

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14-142 California Points & Authorities § 142.74

§ 142.74 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10]--Plaintiff's Notice and Demand for Correction Identifying Defendant's Defamatory Statements Were Sufficiently Specific to Comply With Retraction Statute [Civ. Code § 48a]

[1] FORM

[*Caption. See § 142.63.*]

A DEMAND FOR CORRECTION IS SUFFICIENTLY SPECIFIC WHERE THE DEFENDANT HAS A REASONABLE COMPREHENSION OF WHICH STATEMENTS ARE ALLEGEDLY DEFAMATORY.

Sufficiency of Demand for Correction. The method by which the plaintiff notifies the defendant of the allegedly defamatory statements contained in a libelous newspaper publication or slanderous radio or television broadcast and demands their correction only needs to be specific enough to enable the defendant to have a reasonable comprehension of which statements are objectionable (*Kapellas v. Kofman (1969) 1 Cal. 3d 20, 31-32, 81 Cal. Rptr. 360, 459 P.2d 912* ; *MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 554, 343 P.2d 36*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a general demurrer to a complaint if the demurrer asserts that the notice and demand for correction served on the defendant did not comply with *Civ. Code § 48a(1)* because the plaintiff did not sufficiently identify which statements in the publication or broadcast were defamatory.

The form may also be adapted for use in opposition to a motion for summary judgment or summary adjudication on the same grounds if the alleged defect does not appear on the face of the complaint (that is, the plaintiff alleges making a demand for retraction, but the defendant claims that the plaintiff did not in fact make an adequate demand). If so adapted, counsel should attach opposing affidavits or declarations and a separate statement of undisputed facts [*Code Civ. Proc. § 437c(b)*] showing the legal sufficiency of the notice and demand.

The retraction statute does not completely bar a cause of action for defamation, but rather limits the plaintiff to recovery of special damages [*see Civ. Code § 48a(1)*]. Thus, if the plaintiff seeks recovery of general or punitive damages in addition to special damages, this point may be raised in opposition to a motion to strike the prayer for general or punitive damages [*see Code Civ. Proc. §§ 435-437*].

Counsel should insert argument in the form showing the relationship between the facts of the case and the point of law stated.

[b] Related Pleading and Practice Forms

For discussion and forms pertaining to the retraction statute, see California Forms of Pleading and Practice, Ch. 340, *Libel and Slander* (Matthew Bender).

[3] Discussion of Authorities

[a] Sufficiency of Demand for Correction

In ***Kapellas v. Kofman*** *(1969) 1 Cal. 3d 20, 81 Cal. Rptr. 360, 459 P.2d 912* , the plaintiff, a city council candidate, brought an action for libel and invasion of privacy against the defendant, the publisher of the Alameda Times Star and Times Star Advertiser newspapers. The action arose out of an editorial that the defendant ran in both papers disclosing the criminal activities of the plaintiff's children, and questioning the plaintiff's qualifications for public office. As part of the libel cause of action, the complaint alleged the plaintiff's timely service on the defendant of a notice of statements claimed to be libelous and a demand for correction, as required by *Civ. Code § 48a(1)*. The notice labeled as libelous, and requested correction of, every statement concerning the conduct of the plaintiff's children and every statement concerning the plaintiff's qualifications for the city council and her suitability as a mother contained in the specified editorials. In demurring to all causes of action in the complaint, the defendant specified the plaintiff's failure to allege a sufficient demand for correction in the manner required by *Civ. Code § 48a(1)* as one basis for demurrer. The trial court sustained the demurrer on all grounds without leave to amend and dismissed the entire action. The plaintiff appealed from the judgment of dismissal.

The Supreme Court reversed the judgment of dismissal as to the libel causes of action with directions to the trial court to overrule the demurrer as to these causes of action and allow the defendant to answer. In so ruling, the Court held the plaintiff's notice and demand sufficiently and specifically satisfied the terms of the retraction statute (*1 Cal. 3d 20, 30)* . In support of its holding, the Court stated that the crucial issue in evaluating the adequacy of the plaintiff's notice is whether the publisher reasonably should have comprehended which statement the plaintiff protested and wished corrected (*1 Cal. 3d 20, 31)* . In light of this principle, the Court expressed its disbelief that the defendant was so unaware of the significance of what it printed that it did not realize what the plaintiff objected to and wished corrected (*1 Cal. 3d 20, 34)* . The Court found the plaintiff's notice and demand specific and comprehensible, especially when read in conjunction with the editorials in issue. The Court also found that, because the length of the editorial in and of itself was not determinative of anything, the notice and demand were not rendered incomprehensible just because they

referred to statements comprising only a part of a longer editorial (*1 Cal. 3d 20, 32)* . The Court further found that, under the circumstances of the plaintiff's candidacy for public office, the plaintiff could reasonably demand correction of the editorial's implications rather than demanding retraction or rectification of specific statements therein. The Court finally found that nothing in the complaint or the demurrer indicated that the defendant encountered any difficulty in interpreting the plaintiff's notice and demand (*1 Cal. 3d 20, 34)* .

In ***MacLeod v. Tribune Publ'g Co.*** *(1959) 52 Cal. 2d 536, 343 P.2d 36* , the plaintiff, a candidate for city election, brought a libel action against the Oakland Tribune, a newspaper. The complaint alleged that the defendant published an article that included an intimation that another journal, a so-called "Communist-line paper," endorsed the plaintiff's candidacy for city office, thereby insinuating that the plaintiff was a communist sympathizer or fellow traveler. The complaint also alleged that the plaintiff timely served the defendant with a notice of statements deemed libelous and a demand for correction, pursuant to *Civ. Code § 48a*. The demand set forth the offending article and stated simply that the article was grossly libelous and that the plaintiff therefore demanded its correction or retraction as provided in *Civ. Code § 48a*. The defendant demurred to the complaint on the ground, among others, that the plaintiff did not adequately specify the statements claimed to be libelous so as to permit it intelligently to comply with the plaintiff's demand for correction. The trial court sustained the demurrer without leave to amend and dismissed the action. The plaintiff appealed from the judgment of dismissal.

The Supreme Court reversed the judgment. In so doing, the Court upheld the sufficiency of the plaintiff's notice and demand. The Court noted that the allegedly libelous newspaper article was short, it was set out in the plaintiff's demand, and it made only one reference to him. By stating that the article was libelous and demanding correction or retraction, the plaintiff made clear that he was objecting to the statement that referred to him in the article. The Court also noted that the statement was libelous on its face (*52 Cal. 2d 536, 553)* . In light of these facts, the Court expressed its disbelief that the defendant was so unaware of the significance of what it printed that it did not realize what language the plaintiff objected to and wished corrected (*52 Cal. 2d 536, 554)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral OverviewTortsIntentional TortsDefamationRemediesRetractions

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14-142 California Points & Authorities § 142.75

§ 142.75 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10]--Plaintiff Meets Requirement that Notice and Demand for Correction [Civ. Code § 48a(1)] Be Served on Publisher of Newspaper

[1] FORM

[*Caption. See § 142.63.*]

DEFENDANT'S DEMURRER SHOULD BE OVERRULED BECAUSE PLAINTIFF MET THE REQUIREMENT OF *CIVIL CODE SECTION 48a(1)* THAT THE NOTICE OF STATEMENTS CLAIMED TO BE LIBELOUS AND DEMAND FOR CORRECTION BE SERVED ON THE PUBLISHER BY SERVING _____ [A PERSON DESIGNATED BY DEFENDANT PUBLISHER TO RECEIVE THE NOTICE AND DEMAND *or* SOMEONE EMPLOYED AT THE DEFENDANT NEWSPAPER OTHER THAN THE PUBLISHER OR THE PUBLISHER'S DESIGNEE BECAUSE THE PUBLISHER ACQUIRED ACTUAL KNOWLEDGE OF THE NOTICE AND DEMAND WITHIN THE TIME LIMIT SET FORTH IN THE RETRACTION STATUTE].

A. Requirement of Service of Notice and Demand on Publisher Not Intended as Technical Barrier to Recovery. The requirement of *Civil Code Section 48a(1)* that the plaintiff serve the notice and demand for correction on the publisher is not intended to impose a technical barrier to recovery if the purposes of the retraction statute are satisfied, either by service on a person designated by the publisher to receive the notice and demand or by service on an employee other than the publisher's designee if the publisher timely acquires actual knowledge of the demand (*Freedom Newspapers, Inc. v. Superior Court (1992) 4 Cal. 4th 652, 658, 14 Cal. Rptr. 2d 839, 842 P.2d 138*).

[*EITHER*]

B. Plaintiff Meets Requirement of Service of Notice and Demand on Publisher by Service on Publisher's Designee. A plaintiff meets the service requirement of *Civil Code Section 48a(1)* if the plaintiff serves the notice and demand for correction on a person designated by the publisher to receive it (*Freedom Newspapers, Inc. v. Superior Court (1992) 4 Cal. 4th 652, 658, 14 Cal. Rptr. 2d 839, 842 P.2d 138*).

[*OR*]

B. Plaintiff Meets Requirement of Service of Notice and Demand on Publisher by Service on Employee Other Than Publisher or Publisher's Designee if Publisher Timely Acquires Actual Knowledge of Notice and Demand. A plaintiff meets the service requirement of *Civil Code Section 48a(1)* if the plaintiff serves the notice and demand for correction on someone employed at the newspaper, other than the publisher or the publisher's designee, if the publisher acquires actual knowledge of the notice and demand within the time limit set forth in *Civil Code Section 48a(1)* (*Freedom Newspapers, Inc. v. Superior Court (1992) 4 Cal. 4th 652, 658, 14 Cal. Rptr. 2d 839, 842 P.2d 138*).

[*Optional*] **C. Notice and Demand Not Required to Be Sent by Registered Mail.** Neither *Civil Code Section 48a(1)* nor *Code of Civil Procedure Section 1020* requires the plaintiff to serve the notice and demand for correction by registered mail (*Freedom Newspapers, Inc. v. Superior Court (1992) 4 Cal. 4th 652, 658 n.2, 14 Cal. Rptr. 2d 839, 842 P.2d 138*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a general demurrer to a complaint if the demurrer asserts that the complaint fails to allege service on a newspaper publisher of the notice of statements claimed to be libelous and of the demand for correction, as required by *Civ. Code § 48a(1)*. The form may also be adapted for use in opposition to a motion to strike a prayer for general and/or punitive damages on the ground that the plaintiff failed to serve the publisher of the newspaper with the notice and demand [*see* *Freedom Newspapers, Inc. v. Superior Court (1992) 4 Cal. 4th 652, 655-656, 14 Cal. Rptr. 2d 839, 842 P.2d 138* ; *see also Code Civ. Proc. §§ 435-437* (governing motions to strike)].

Optional Paragraph C should be used in response to a defendant's argument that the notice and demand were not sent by registered mail [*see* *Freedom Newspapers, Inc. v. Superior Court (1992) 4 Cal. 4th 652, 658 n.2, 14 Cal. Rptr. 2d 839, 842 P.2d 138]* .

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion and forms pertaining to the retraction statute, see Ch. 340, *Libel and Slander* in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Requirement of Service of Notice and Demand on Publisher Not Intended as Technical Barrier to Recovery

In ***Freedom Newspapers, Inc. v. Superior Court*** *(1992) 4 Cal. 4th 652, 14 Cal. Rptr. 2d 839, 842 P.2d 138* , the

plaintiff was a municipal court judge who filed a libel action for general, special, and punitive damages against a newspaper publishing company. The complaint alleged that the Orange County Register, published by one of the defendants, ran a series of articles falsely stating that the plaintiff rendered favorable decisions in return for sexual favors from prostitutes. The complaint further alleged that the plaintiff timely sent a letter, a copy of which was attached to the complaint, to the editor of the newspaper demanding a correction of the most recent article but that no correction was printed. The complaint further alleged that, even though the letter was addressed and sent to the editor rather than the publisher, the letter was known to the publisher at or about the time it was written and that the editor had actual authority, either by delegation from the publisher or by a pattern or practice developed over a period of years, to determine on behalf of the paper whether and how to respond to demands for correction and to make corrections if he determined to do so. The defendants moved to strike the prayer for general and punitive damages on the ground, among others, that the plaintiff's demand for correction failed to comply with the requirement of *Civ. Code § 48a(1)* that the notice of statements claimed to be libelous and demand for correction be served on the publisher of the newspaper. The trial court denied the motion to strike, and the defendants petitioned the court of appeal for a writ of mandate. The court of appeal granted the petition and issued the writ, directing the trial court to vacate its order denying the motion and to enter a new order granting the motion. The plaintiff then sought Supreme Court review of the court of appeal judgment.

The Supreme Court reversed the judgment and remanded the case for further proceedings consistent with its opinion. The Court held that the *Civ. Code § 48a(1)* requirement that a plaintiff serve the notice and demand on the publisher of a newspaper was not intended to impose a technical barrier to recovery if the purposes designed to be served by the statute are satisfied (*4 Cal. 4th 652, 658)* . One of the purposes of the statute is to afford a publisher an opportunity to correct committed errors before subjecting the publisher to liability. The Court held, therefore, that the requirement of *Civ. Code § 48a(1)* that the publisher be served with the notice and demand is satisfied if the notice and demand are (1) served on the publisher, (2) served on a person designated by the publisher to receive such notices, or (3) served on someone employed at the newspaper, other than the publisher or the publisher's designee, if the publisher acquires actual knowledge of the request for correction within the time limit set forth in the statute. The Court found this rule to be consistent with both the language of the statute and the policy it was designed to serve (*4 Cal. 4th 652, 658)* . For these reasons, the Court held that the allegations in the plaintiff's second amended complaint, if proved, were sufficient to establish that notice was served on the publisher within the meaning of *Civ. Code § 48a(1)* (*4 Cal. 4th 652, 657)* .

[b] Plaintiff Meets Requirement of Service of Notice and Demand on Publisher by Service on Publisher's Designee

The factual and procedural background of ***Freedom Newspapers, Inc. v. Superior Court*** *(1992) 4 Cal. 4th 652, 14 Cal. Rptr. 2d 839, 842 P.2d 138* , is discussed in *§ 142.75[3][a]*. The Supreme Court held that the requirement of *Civ. Code § 48a(1)*, that the notice of statements claimed to be libelous and demand for correction be served on the newspaper publisher, is met if the plaintiff serves the notice and demand on a person designated by the publisher to receive those types of notices (*4 Cal. 4th 652, 658)* . The Court found that this construction of the statute comports with legislative intent that *Civ. Code § 48a(1)* not function as a technical barricade to recovery by a plaintiff who has given notice sufficient to advise a reasonable publisher acting in good faith of a claimed error in publication (*4 Cal. 4th 652, 657-658)* . The Court therefore permitted the plaintiff to prove his allegations that a specified editor was designated by the publisher to receive the plaintiff's notice and demand and that the publisher had actual notice of the plaintiff's notice and demand within the time period of *Civ. Code § 48a(1)* (*4 Cal. 4th 652, 655)* .

[c] Plaintiff Meets Requirement of Service of Notice and Demand on Publisher by Service on Employee Other than Publisher or Publisher's Designee if Publisher Timely Acquires Actual Knowledge of Notice and Demand

The factual and procedural background of ***Freedom Newspapers, Inc. v. Superior Court*** *(1992) 4 Cal. 4th 652, 14 Cal. Rptr. 2d 839, 842 P.2d 138* , is discussed in *§ 142.75[3][a]*. The Supreme Court held that the requirement of *Civ. Code § 48a(1)*, that the notice of statements claimed to be libelous and demand for correction be served on the

newspaper publisher, is met if the plaintiff serves the notice and demand on someone employed at the newspaper, other than the publisher or the publisher's designee, if the publisher acquires actual knowledge of the notice and demand within the time limit set forth in *Civ. Code § 48a(1)*. The Court found that this construction of the statute comports with legislative intent that *Civ. Code § 48a(1)* not function as a technical barricade to recovery by a plaintiff who has given notice sufficient to advise a reasonable publisher acting in good faith of a claimed error in publication (*4 Cal. 4th 652, 657-658)* .

[d] Notice and Demand Not Required To Be Sent by Registered Mail

The factual and procedural background of ***Freedom Newspapers, Inc. v. Superior Court*** *(1992) 4 Cal. 4th 652, 14 Cal. Rptr. 2d 839, 842 P.2d 138* , is discussed in *§ 142.75[3][a]*. The Supreme Court held that neither *Civ. Code § 48a(1)* nor *Code Civ. Proc. § 1020* requires a plaintiff who serves a notice of statements claimed to be libelous and demand for correction to serve the notice and demand by registered mail. Construing *Code Civ. Proc. § 1020*, the Court reasoned that *Code Civ. Proc. § 1020* is, by its terms, permissive rather than mandatory and therefore does not require a notice that may be served by mail to be sent by registered mail. Any suggestion to the contrary in *San Leandro Collection Service v. Dunbar (1968) 259 Cal. App. 2d Supp. 933, 935* , *66 Cal. Rptr. 495* , was disapproved (*4 Cal. 4th 652, 658 n.2*). Construing *Civ. Code § 48a(1)*, the Court reasoned that imposing a registered mail requirement on the permissive terms of *Code Civ. Proc. § 1020* is tantamount to building a technical barricade to recovery by the defamation plaintiff who has given notice sufficient to advise a reasonable publisher acting in good faith of a claimed error in publication. Imposition of such a technical requirement is contrary to the legislative intent of the notice and demand requirement of *Civ. Code § 48a(1)* (*4 Cal. 4th 652, 657-658)* .

While this case applies on the facts to service of the notice and demand on a newspaper publisher in an action for libel, it appears from the reasoning of the opinion that the registered mail holding can be extended to service of the notice and demand on a broadcaster in an action for slander.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral OverviewTortsIntentional TortsDefamationRemediesGeneral Overview

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14-142 California Points & Authorities § 142.76

§ 142.76 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--Statutory Defense of Due Care [Civ. Code § 48.5] as Not Applicable if Allegedly Defamatory Statements Made by Owner or Employee of Broadcasting Station

[1] FORM

[*Caption. See § 142.66.*]

DEFENSE OF DUE CARE IS NOT APPLICABLE TO OWNER OF BROADCASTING STATION OR OWNER'S EMPLOYEE.

Due Care Defense Not Applicable to Owner or Employee. A defendant who is accused of having the responsibility for making slanderous remarks and who is either the owner of a broadcasting station or the owner's employee cannot take advantage of the statutory defense of due care afforded by *Civil Code Section 48.5* (*Correia v. Santos (1961) 191 Cal. App. 2d 844, 855-856, 13 Cal. Rptr. 132* (dictum)).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion for summary judgment on the basis of the defense granted by *Civ. Code § 48.5* if the defendant does not qualify for the defense.

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law

stated. Additionally, counsel should attach opposing affidavits or declarations and a separate statement of undisputed facts [*Code Civ. Proc. § 437c(b)*] showing the inapplicability of the defense.

[3] Discussion of Authorities

[a] Due Care Defense Not Applicable to Owner or Employee

In ***Correia v. Santos*** *(1961) 191 Cal. App. 2d 844, 13 Cal. Rptr. 132* , the plaintiff and the defendant were rival broadcasters. The plaintiff attempted to rely on the provisions of *Civ. Code § 48.5*. The court of appeal pointed out that *Civ. Code § 48.5* confers a defense on the owner and agent under the prescribed circumstances, but does not raise a cause of action against them in favor of the person defamed. Because the owner and agent caused and made the broadcast that the plaintiff was objecting to, the court stated that the inapplicability of the section to the facts in that case was apparent (*191 Cal. App. 2d 844, 855-856)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral Overview

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14-142 California Points & Authorities § 142.77

§ 142.77 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--Absolute Privilege [Civ. Code § 47(b)] Not Available to Defendant--Defamatory Statements Not Related to and Did Not Achieve Object of Proceeding

[1] FORM

[*Caption. See § 142.66.*]

THE DEFENSE OF ABSOLUTE PRIVILEGE IS LIMITED TO STATEMENTS THAT ARE RELATED TO AND ACHIEVE THE OBJECT OF THE PROCEEDING.

A. Privilege Does Not Apply if Communication Is Not Related to or Does Not Achieve Object of Proceeding. The application of the absolute privilege granted by *Code of Civil Procedure Section 47* subdivision (b) requires that the communication achieve the objects of the litigation and have some connection or logical relation to the action (*Silberg v. Anderson (1990) 50 Cal. 3d 205, 212, 266 Cal. Rptr. 638, 786 P.2d 365* ; *Carney v. Rotkin, Schmerin & McIntyre (1988) 206 Cal. App. 3d 1513, 1521, 254 Cal. Rptr. 478*).

[*Optional*] **B. Publication Has Both a Litigation and Nonlitigation Purpose.** A communication cannot be immunized from use in later judicial proceedings just because it serves a litigation purpose as well as its nonlitigation purpose (*Stacy & Witbeck, Inc. v. City & County of San Francisco (1996) 47 Cal. App. 4th 1, 8, 54 Cal. Rptr. 2d 530*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion for summary judgment made on the basis of an absolute privilege conveyed by *Civ. Code § 47(b)*, if the defamatory statements were neither connected to nor achieved the object of the proceeding, and thus do not qualify for the privilege.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the point of law stated. In addition, counsel should attach affidavits or declarations that support the memorandum [*Code Civ. Proc. § 437c*].

In an appropriate case, this form may be submitted in opposition to the points *in § 142.47 -142.50*.

[3] Discussion of Authorities

[a] Privilege Does Not Apply if Communication Is Not Related to or Does Not Achieve Object of Proceeding

In ***Silberg v. Anderson*** *(1990) 50 Cal. 3d 205, 212, 266 Cal. Rptr. 638, 786 P.2d 365* , the plaintiff, who was the husband in a previous marital dissolution proceeding, sued the attorney of his former wife for "intentional tort," among other causes of action. The action was based on the husband's allegations that the psychologist the wife's attorney had recommended as a neutral and independent psychologist to decide visitation issues was in fact biased and produced an inaccurate and defamatory report against husband. The attorney demurred to the complaint on the ground of absolute privilege under former Civ. Code § 47(2) [*now see Civ. Code § 47(b)*]. The trial court sustained the demurrer without leave to amend and entered a judgment of dismissal as to the defendant.

On the husband's appeal, the court of appeal affirmed the judgment of dismissal on all other causes of action, but reversed on the intentional tort cause of action because the court stated that the privilege would not apply if the attorney's communication was made to achieve a personal objective or advantage through deceit because it would not meet the requirement that the communication be made to promote the "interest of justice." The attorney appealed.

The Supreme Court reversed and ordered reinstatement of the dismissal because it agreed that the privilege is absolute, and the Court disapproved a line of appellate court cases that had employed the interest of justice test (*50 Cal. 3d 205, 209, 218-219)* . The Court stated that the privilege for statements made in judicial proceedings applies to all tort actions except malicious prosecution (*50 Cal. 3d 205, 212)* . The Court stated that for the privilege to apply the communication must be (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation, and (4) have some connection or logical relation to the action (*50 Cal. 3d 205, 212)* .

In ***Carney v. Rotkin, Schmerin & McIntyre*** *(1988) 206 Cal. App. 3d 1513, 254 Cal. Rptr. 478* , the plaintiff, a 74-year-old widow, filed an action for emotional distress, abuse of process, and unfair debt collection practices against her judgment creditor and its attorney. The attorney had falsely represented to the plaintiff that a bench warrant had been issued for her arrest for her failure to appear at a judgment-debtor examination and that she would be arrested if she did not pay her debt. The trial court sustained a demurrer based on the absolute privilege for judicial proceedings pursuant to former Civ. Code § 47(2) [*now see Civ. Code § 47(b)*].

The court of appeal reversed, holding that the absolute privilege for judicial proceedings was inapplicable under the circumstances because the statement was not made to achieve the objective of the litigation, one of the four requirements for application of the privilege. The purpose of the court hearing was to determine whether the plaintiff had any assets to satisfy the money judgment against the plaintiff, so the statement was not made for the purpose of settlement or any other valid reason, but rather to deceive the plaintiff and obtain an advantage over her (*206 Cal. App. 3d 1513, 1521-1523)* .

[b] Publication Has Both a Litigation and Nonlitigation Purpose

In ***Stacy & Witbeck, Inc. v. City & County of San Francisco*** *(1996) 47 Cal. App. 4th 1, 8, 54 Cal. Rptr. 2d 530* , after a public contractor filed a contract claim and then sued a city on a construction contract claim, the city filed a cross-complaint under the False Claim Act (*Gov. Code §§ 12650 et seq.*). The trial court granted a summary judgment to the contractor on the cross-complaint, ruling that the alleged false claim was absolutely privileged under *Civ. Code § 47(b).*

The court of appeal reversed, emphasizing that the filing of the claim by the contractor fulfilled two independent functions and served dual purposes. First, the claim was required under the contract as the method to submit change orders. This procedure thus had a life of its own wholly apart from any judicial action. Secondly, the claim served a litigation purpose because once it was rejected the contractor initiated its breach of contract action. Furthermore, the court noted that even if the contractor had not sued the city, the city would have had the discretion to file its own suit under the False Claim Act. The court concluded that if a public contractor delivers a contract claim according to procedures prescribed by the contract, that claim does not become privileged simply because the contractor also anticipated suing the agency (*47 Cal. App. 4th 1, 6-7)* .

[4] Additional Authorities

[a] Privilege Does Not Apply if Communication Is Not Related to or Does Not Achieve Object of Proceeding

In *Wise v. Thrifty Payless, Inc. (2000) 83 Cal. App. 4th 1296, 100 Cal. Rptr. 2d 437* , the plaintiff filed an action against a pharmacy based on the pharmacy's unauthorized disclosure of the plaintiff's confidential information concerning her medications and drug treatment. The disclosure was made to the plaintiff's estranged husband, who said the information was needed for tax purposes, but who used the information to harass the plaintiff and obtain a tactical advantage during marriage dissolution and child custody proceedings, and who also submitted the information to the Department of Motor Vehicles to instigate an evaluation by the Department of the plaintiff's fitness to drive. The court of appeal rejected the pharmacy's claim that the judicial privilege of *Civ. Code § 47(b)* could be used to shield the pharmacy from liability for damages caused by the unauthorized dissemination of information to the husband. Even though the plaintiff's former husband may have been protected from liability by his use of the information, the pharmacy could not hide behind the husband's privilege. The pharmacy's own tortious conduct in initially revealing the private information to the plaintiff's estranged husband was clearly not protected by the judicial privilege, because it failed to meet any of the requirements set forth by the Supreme Court in *Silberg* [*see § 142.77[3][a]*]. The pharmacy's communication to the plaintiff's husband was not made in the course of a judicial or quasi-judicial proceeding, the pharmacy was not a litigant or other participant in the legal proceedings between the plaintiff and her husband, the disclosure to the husband had not been made to further the object of litigation, and the communication to the husband had no logical relation to any ongoing or contemplated legal proceeding (*83 Cal. App. 4th 1296, 1303-1304)* . The court also concluded that allowing a party at fault to evade responsibility for its wrongful conduct based on a statutory privilege enjoyed by a third party conflicted with general principles of tort law that make each person responsible for his or her own lack of care and provide for recovery of all damages, whether anticipated or not, caused by a defendant's wrongful conduct (*83 Cal. App. 4th 1296, 1304-1305)* .

In *Nguyen v. Proton Tech. Corp. (1999) 69 Cal. App. 4th 140, 81 Cal. Rptr. 2d 392* , the plaintiff brought a libel action against his former employer based on statements made by the defendant in a demand letter to the plaintiff's current employer concerning the possibility of legal action against the current employer for wrongfully soliciting the defendant's employees and customers. In the demand letter, the defendant erroneously stated that the plaintiff had been in prison for assaulting his wife, when in fact the plaintiff had been in county jail only, and only for vandalism and firing a gun at an unoccupied car. The trial court granted the defendant's motion for summary judgment based on the litigation privilege, but the court of appeal reversed. The court of appeal held that the privilege will not protect prelitigation communications that are not reasonably relevant to anticipated litigation, especially if the particular

communications are defamatory comments about an individual. The court then concluded that the statements about the plaintiff's past criminal history were not reasonably relevant to the subject of the demand letter, which was the charges of unfair competitive business behavior, and that the statements were primarily vindictive in nature (*69 Cal. App. 4th 140, 150-152)* . The court also held that subsequent statements made by the defendant to the plaintiff's parole officer, essentially repeating the charges in the letter, were also unprotected by the privilege (*69 Cal. App. 4th 140, 152-153)* .

In *Susan A. v. County of Sonoma (1991) 2 Cal. App. 4th 88, 3 Cal. Rptr. 2d 27* , a psychotherapist, hired by a county public defender to evaluate a minor criminal defendant, expressed his impressions of the minor to the media, which published his statements. The minor's parents brought an action against the psychotherapist and the county (which had consented to the media interview), stating several causes of action, including defamation. The court of appeal reversed the trial court's finding that the psychotherapist's statements were protected under *Civ. Code § 47(b)*, holding that the privilege does not afford a blanket authorization to republish otherwise privileged material on a nonprivileged occasion to persons to whom the privilege does not apply (*2 Cal. App. 4th 88, 95)* . The court noted that there was no evidence that the press would have had access to the information disclosed, or that the statements were part of a publicly available record (*2 Cal. App. 4th 88, 96)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral Overview

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14-142 California Points & Authorities § 142.78

§ 142.78 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--Absolute Privilege [Civ. Code § 47(b)] Not Available to Defendant--Statements to Media Concerning Litigation Not Privileged if They Are Neither Reports of Proceeding Nor Have Some Logical Relation to Proceeding

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE PRIVILEGE DOES NOT APPLY TO DEFENDANT BECAUSE THE COMMUNICATION OF A PARTY TO NEWS MEDIA CONCERNING LITIGATION IS NOT PROTECTED UNDER THE LITIGATION PRIVILEGE UNLESS THE COMMUNICATION IS A REPORT OF, OR BEARS SOME LOGICAL CONNECTION TO, THE ACTION.

Communications to Media That Are Not Within Litigation Privilege. Communications to news media about anticipated litigation are not protected by the litigation privilege of *Civil Code Section 47(b)* unless the communication has some connection or logical relation to the action (*Rothman v. Jackson (1996) 49 Cal. App. 4th 1134, 1145, 57 Cal. Rptr. 2d 284*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a plaintiff's contention in a defamation action that the litigation privilege of *Civ. Code § 47(b)* is not applicable to the defendant's statements. The basis for this contention is that the communication was made to the news media, and had no connection or logical relation to the legal action.

This form may be combined with points pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the defendant is not entitled to the defense of the litigation privilege, for example in a motion for summary judgment. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence of the defendant's statements to the news media, and should argue that the statements have no logical relation with the litigation.

[3] Discussion of Authorities

[a] Communications to Media That Are Not Within Litigation Privilege

In ***Rothman v. Jackson*** *(1996) 49 Cal. App. 4th 1134, 57 Cal. Rptr. 2d 284* , an attorney, who had previously been retained to seek redress against a popular singer for alleged torts against a minor, brought a defamation action against the singer and his attorneys. In the underlying matter, the plaintiff had begun negotiations with the defendants on behalf of his client, but had not filed a lawsuit. During negotiations, a psychological evaluation of the minor was leaked to the press and the matter attracted massive publicity. The defendants responded to this negative public exposure by calling a press conference where they not only denied the charges, but also claimed that the plaintiff and his clients had knowingly made false accusations in order to extort money from the singer. In his defamation action, the plaintiff stated that the charge of extortion was damaging to his professional reputation, and caused him additional economic damage because he felt compelled to withdraw from representation of his clients. The defendants demurred to the complaint on the ground of the litigation privilege of *Civ. Code § 47(b)*. The trial court sustained the demurrer and dismissed the action.

The court of appeal reversed, holding that the litigation privilege did not apply to the defendants' statements. A communication is privileged if made in, or in anticipation of, litigation by litigants or authorized participants to achieve the objects of the litigation, and if the communication has some connection or logical relation to the action (*49 Cal. App. 4th 1134, 1145)* . The court explained that this logical relation must bear a functional connection to the litigation, so that the communication act must be a necessary or useful step in the litigation process. The privilege thus protects uninhibited discussion in, and only in, judicial or quasi-judicial arenas. Public mudslinging is one of the kinds of harmful feuding that courts exist to prevent, and it would be counterproductive to provide it the same protection that *Civ. Code § 47(b)* gives to court processes (*49 Cal. App. 4th 1134* , 1146). Concluding that the litigation privilege should not be extended to "litigating in the press," the court remanded the matter for further proceedings.

[4] Additional Authorities

[a] Communications to Media That Are Not Within Litigation Privilege

In *Soliz v. Williams (1999) 74 Cal. App. 4th 577, 88 Cal. Rptr. 2d 184* , the court of appeal reversed a demurrer to the extent that the trial court had applied an absolute judicial privilege to allegedly defamatory statements concerning a pending lawsuit made by a judge to a news reporter. The case before the court of appeal involved a verified complaint alleging that the defendant had made false statements to the press that made the plaintiff appear to be a liar, and under the circumstances, the court of appeal agreed with the plaintiff that the defendant was not acting in a judicial capacity when speaking to the reporter. Although recognizing that statements to a journalist might further the judicial function during litigation under some circumstances, the court of appeal noted that speaking to a reporter about a pending lawsuit is not a normal judicial function (*74 Cal. App. 4th 577, 591-595)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationDefensesPrivilegesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral Overview

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14-142 California Points & Authorities § 142.79

§ 142.79 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--Absolute Privilege [Civ. Code § 47(b)] Not Available to Defendant--False Report of Child Abuse [Penal Code § 11172]

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE PRIVILEGE DOES NOT APPLY TO DEFENDANT BECAUSE THE PRIVILEGE OF *CIVIL CODE SECTION 47(b)* DOES NOT IMMUNIZE A PARTY WHO WOULD OTHERWISE BE LIABLE FOR MAKING A FALSE REPORT OF CHILD ABUSE.

False Report of Child Abuse Not Within Litigation Privilege. The statutory privilege of *Civ. Code § 47(b)* does not immunize a party who would otherwise be liable for making a false report of child abuse under *Penal Code § 11172* (*Begier v. Strom (1996) 46 Cal. App. 4th 877, 885, 54 Cal. Rptr. 2d 158*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a plaintiff's contention in a libel action that the defendant's communication was not privileged under *Civ. Code § 47(b)* because the communication consisted of a false report of child abuse.

This form may be combined with points pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the defendant's statements, which might otherwise be privileged, were not entitled to the protection of *Civ. Code § 47(b)* because the communication consisted of a false report of child abuse. This form may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law

stated. Thus, counsel should discuss evidence of the nature of the communication at issue, and should argue that the communication constituted a false report of child abuse under *Penal Code § 11172*.

[3] Discussion of Authorities

[a] False Report of Child Abuse Not Within Litigation Privilege

In ***Begier v. Strom*** *(1996) 46 Cal. App. 4th 877, 54 Cal. Rptr. 2d 158* , the plaintiff filed an action against his former wife for intentional infliction of emotional distress based upon her alleged conduct in filing a false police report accusing the plaintiff of molesting the couple's young daughter, and repeating that charge in the couple's dissolution action. The trial court sustained a demurrer by the defendant on the basis that the police report was protected by the unqualified privilege of *Civ. Code § 47(b)*.

The court of appeal reversed, finding that the requirement of *Penal Code § 11172* that a person who knowingly makes a false report of child abuse is liable for any damages caused by the report creates a limited exception to the privilege under *Civ. Code § 47(b)*. The court noted that although it is referred to as "absolute," the privilege of *Civ. Code § 47(b)* has been limited in other situations. The court concluded that *Penal Code § 11172* would be rendered meaningless if it did not hold that the *Civ. Code § 47(b)* privilege did not apply to false reports of child abuse (*46 Cal. App. 4th 877, 885)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral Overview

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 142 LIBEL AND SLANDER (DEFAMATION)
PART II. FORMS

14-142 California Points & Authorities § 142.80

§ 142.80 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10]--Qualified Privilege for Publication [Civ. Code § 47(c)] Defeated by Existence of Malice

[1] FORM

[*Caption. See § 142.63.*]

MALICE DEFEATS A QUALIFIED PRIVILEGE.

Qualified Privilege Defeated by Malice. A sufficient allegation of malice defeats a qualified privilege, the presence of which on the face of the complaint would otherwise make the complaint subject to a demurrer (*Slaughter v. Friedman (1982) 32 Cal. 3d 149, 155-159, 185 Cal. Rptr. 244, 649 P.2d 886* ; *Kapellas v. Kofman (1969) 1 Cal. 3d 20, 28-29, 81 Cal. Rptr. 360, 459 P.2d 912*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a general demurrer to a complaint if the demurrer asserts that the complaint fails to state a cause of action because it shows on its face that it is covered by a qualified privilege and that there has not been a sufficient allegation of malice.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the point of law stated. For example, counsel should show facts to support a sufficient allegation of malice that would defeat a claim of

qualified privilege.

[3] Discussion of Authorities

[a] Qualified Privilege Defeated by Malice

In ***Slaughter v. Friedman*** *(1982) 32 Cal. 3d 149, 185 Cal. Rptr. 244, 649 P.2d 886* , the Supreme Court reversed the dismissal of the plaintiff's action for libel after the granting of the defendant's demurrer. The plaintiff alleged that the defendants, a dental insurance company its administrative officer, had defamed him by enclosing in notices to his patients of the denial of claims for dental work a statement that the plaintiff's dental work was unnecessary and that the company would no longer process dental treatment claims from the plaintiff because of overcharging. The Court held that although the defendants were required by law to provide to patients an explanation of the specific basis for denial of the claim, the publication of explanations as to a denial of claims was not protected by any absolute privilege; nevertheless the Court added that publications made by persons required by law to communicate with others, but who maintain control over the contents of those communications, are protected by a qualified privilege as provided by former Civ. Code § 47(3) [*now see Civ. Code § 47(c)*]. However, the Court stated, the allegation that the defendants acted maliciously was sufficient to defeat the defendants' claim of a qualified privilege (*32 Cal. 3d 149, 155-159)* .

In ***Kapellas v. Kofman*** *(1969) 1 Cal. 3d 20, 81 Cal. Rptr. 360, 459 P.2d 912* , the Supreme Court reversed the dismissal of two causes of action for libel after the granting of demurrers. The plaintiff was a candidate for a position on the city council at the time an allegedly libelous editorial was published in the local newspaper. The trial court sustained the demurrers on the twin grounds that the demand for retraction was not adequately alleged and that the publication was subject to the qualified privilege. The Supreme Court stated that the plaintiff's allegation of malice was sufficiently supported by facts that alleged past and continuing conflicts between the defendant and the plaintiff and, thus, that the defendant's claim of privilege was defeated (*1 Cal. 3d 20, 28-29)* .

[4] Additional Authorities

[a] Qualified Privilege Defeated by Malice

In *SDV/ACCI, Inc. v. AT & T Corp. (9th Cir. 2008) 522 F.3d 955* , one corporation supplied temporary workers to another corporation and its subsidiaries. However, after the owners of the supplying company notified the procurement specialist for the client corporation that they were going to terminate the agreement to provide workers for failure to pay invoices in a timely manner, the procurement specialist sent e-mails to several corporate managers in her company, as well as to several competitors of the supplying company, stating that the supplying company was having financial difficulties and could no longer provide services to her company. The supplying company sued the client company for defamation. The federal district court granted summary judgment for defendant corporation, but the Ninth Circuit Court of Appeals reversed. The Court held that the issue of whether the qualified common-interest privilege protected the specialist's communications suggesting that plaintiff was unable to supply services due to its financial problems could not be resolved on summary judgment, as there were triable issues regarding malice and a good-faith belief in the truth of the specialist's statements (*522 F.3d 955, 962-964)* .

In *Stationers Corp. v. Dun & Bradstreet, Inc. (1965) 62 Cal. 2d 412, 418, 42 Cal. Rptr. 449, 398 P.2d 785* , the Supreme Court reversed the granting of summary judgment in favor of the defendant, a credit reporting company. The Court stated that at least one triable issue of fact existed, namely whether defendant had probable cause to believe its statements about the plaintiff were true and, therefore, whether it had acted with malice.

In *Maidman v. Jewish Publ'ns, Inc. (1960) 54 Cal. 2d 643, 7 Cal. Rptr. 617, 355 P.2d 265* , the Supreme Court reversed demurrers to a complaint for libel. The plaintiff's cause of action arose out of an editorial that the defendant published about the plaintiff's participation in a trial and several remarks he allegedly made therein concerning Rosh Hashanah. The Court held that while the publication was entitled to the defense of fair comment under the qualified

privilege, the plaintiff had alleged the existence of detailed facts that would justify the trier of facts in finding malice and that thus enabled the complaint to state a cause of action for libel per se (*54 Cal. 2d 643, 650-654)* .

In *MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 343 P.2d 36* , the Supreme Court held that a complaint that alleged that an editorial charged the plaintiff with being a communist sympathizer or fellow traveler could be easily amended to allege the existence of malice, and, thus, that the granting of the defendant's general demurrer was not proper. The plaintiff had alleged that the defendant's article was false. The Court held that although the plaintiff had not specifically alleged that the defendant knew that its article was false, had no honest belief in its truth, or had no reasonable grounds for believing it to be true, the circumstances of the case indicated that at least one of those grounds was implicit in the allegation of falsity. Hence, the plaintiff could have easily cured the error by amendment and, therefore, the general demurrer was improperly granted (*52 Cal. 2d 536, 552-553)* .

In *Brewer v. Second Baptist Church (1948) 32 Cal. 2d 791, 797-798, 197 P.2d 713* , the Supreme Court held that there was sufficient evidence to defeat the existence of the qualified privilege and sustain a verdict for the plaintiffs. The Court held that there was ample evidence to support the jury's implied finding that the defendants were motivated by a malicious or other improper motive or that they published charges against the plaintiffs that resulted in their expulsion from the church without reasonable grounds for believing the charges. The Court also held that an inference of malice could be made from the charges themselves because the tenor of a statement made by them was evidence of malice (*32 Cal. 2d 791, 799)* .

In *Hailstone v. Martinez (2008) 169 Cal. App. 4th 728, 87 Cal. Rptr. 3d 347* , plaintiff, who was formerly employed as a senior business agent for the Teamsters Local Union, brought suit against three labor union officials for defamation. Plaintiff based his suit on statements made by defendants to other union members stating that plaintiff had committed a crime on several different occasions by accepting reimbursement from two different union affiliates for the same travel mileage. Defendants brought a motion to strike under the anti-SLAPP statute, but the trial court held that defendants' conduct was not protected under that statute. The court of appeals affirmed the order, but for different reasons. The court first held that the conduct was protected by the anti-SLAPP statute (*169 Cal. App. 4th 728, 738)* . However, the court went on to conclude that plaintiff had made a sufficient showing on the probability of success on the merits to avoid having the action struck. While defendants argued that their statements were covered by the common-interest privilege, the court held that plaintiff had provided sufficient evidence of actual malice to withstand the motion to strike. Plaintiff's evidence indicated that at least one defendant had reasons to harbor ill will against plaintiff. For example, that defendant knew that plaintiff had assisted the Department of Justice with an investigation into allegations that defendant had engaged in illegal ballot stuffing during union elections. In addition, that defendant had also engaged in a heated confrontation with plaintiff concerning the implementation of a contract provision requiring just cause before a business agent could be fired (*169 Cal. App. 4th 728, 740)* .

In *Manguso v. Oceanside Unified Sch. Dist. (1984) 153 Cal. App. 3d 574, 200 Cal. Rptr. 535* , a teacher sued her former supervisor and employer for a libelous letter directed to potential employers and placed in the plaintiff's master file. The defendants obtained a jury verdict in their favor after relying on the qualified privilege of former Civ. Code § 47(3) [*now see Civ. Code § 47(c)*] (*153 Cal. App. 3d 574, 577-580)* . On the plaintiff's appeal, the court of appeal affirmed. However, the court preceded its decision by holding that it was error to instruct the jury that the teacher had to prove "actual malice" within the meaning of *Civ. Code § 48a(4)(d)* to defeat the qualified privilege of former Civ. Code § 47(3). The court reasoned that the statutory definition, requiring a showing of both hatred or ill will and a lack of good-faith belief in the truth of the defamatory publication, set forth a stricter standard that applied only if a plaintiff sought punitive damages under *Civ. Code § 48a(2), (4)(c)*. By contrast, the court stated that the "malice" required to defeat the qualified privilege of former Civ. Code § 47(3) could be established by showing hatred, ill will, or other improper motive, or by showing a lack of good-faith belief in the truth of the defamatory publication (*153 Cal. App. 3d 574, 580-581)* . The court affirmed after finding this error harmless under the circumstances (*153 Cal. App. 3d 574, 583-584)* .

In *Kelly v. General Tel. Co. (1982) 136 Cal. App. 3d 278, 186 Cal. Rptr. 184* , the plaintiff sued his former employer, alleging a cause of action for slander based on statements his former supervisor allegedly made to other employees of his former employer. The defendant's general demurrer to the plaintiff's second amended complaint was sustained without leave to amend. The court of appeal held that malice necessary to prevent application of a qualified privilege may be alleged by pleading that the publication was motivated by hatred or ill will toward the plaintiff. The court found that the plaintiff's allegations were sufficient and that the trial court erred in sustaining the demurrer to that cause of action (*136 Cal. App. 3d 278, 285)* .

In *Dietrich v. Litton Indus., Inc. (1970) 12 Cal. App. 3d 704, 90 Cal. Rptr. 856* , one of the causes of action was based on a circular that was directed by the company's vice-president to all the company's employees. The circular had been prepared to counter charges that the plaintiff had made in a deposition in connection with other litigation against the company and its president. The jury returned a verdict for the plaintiff, but the judge later granted the defendants' motion for judgment notwithstanding the verdict on the ground that the circular was protected by the qualified privilege. The court of appeal reversed, stating that there was substantial evidence that the defendant was motivated by actual malice towards the plaintiff in publishing the circular (*12 Cal. App. 3d 704, 713-715)* .

In *Patton v. Royal Indus., Inc. (1968) 263 Cal. App. 2d 760, 70 Cal. Rptr. 44* , the defendants had sent a letter to their customers and potential customers stating that the plaintiffs had been fired. In reality, the plaintiffs had resigned and had notified the defendants that they intended to go into business for themselves. The trial court had refused an instruction that a publication that contains known falsehoods is not protected by the qualified privilege. The court of appeal reversed the jury's judgment for the defendants and stated that the deliberate publication of known false and defamatory statements destroys the qualified privilege (*263 Cal. App. 2d 760, 765-766)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationDefensesPrivilegesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral Overview

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14-142 California Points & Authorities § 142.81

§ 142.81 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--Plaintiff Sought Reiteration of Defamatory Statement From Defendant but Did Not Consent to Publication

[1] FORM

[*Caption. See § 142.66.*]

A PERSON DOES NOT CONSENT TO REMARKS WHEN A REITERATION IS REQUESTED.

Reiteration Not Consent. A person does not consent to the publication of defamatory statements if he or she merely requests a reiteration of defamatory statements that have already been published (*Puchan v. Godeau (1914) 167 Cal. 692, 694, 140 P. 952* ; *Moranville v. Aletto (1957) 153 Cal. App. 2d 667, 671, 315 P.2d 91*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion for summary judgment on the basis of the defense of consent if the plaintiff merely asked the defendant to repeat the defamatory statements that had already been published concerning the plaintiff.

Counsel should insert argument in this form, showing the relationship between the facts of his case and the point of law raised. In addition, counsel should attach affidavits or declarations that support the memorandum [*Code Civ. Proc. § 437c*].

[3] Discussion of Authorities

[a] Reiteration Not Consent

Puchan v. Godeau *(1914) 167 Cal. 692, 140 P. 952* , and ***Moranville v. Aletto*** *(1957) 153 Cal. App. 2d 667, 315 P.2d 91* , presented identical factual situations in which the defendant had called the plaintiff a thief. In *Pouchan,* the Supreme Court held that the fact that the plaintiff elicited a reiteration of the charge in more explicit language did not make consent a viable defense (*167 Cal. 692, 694)* . In *Moranville,* the court of appeal affirmed a jury verdict for the plaintiff and stated that the question of consent was a question for the jury (*153 Cal. App. 2d 667, 671)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral Overview

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14-142 California Points & Authorities § 142.82

§ 142.82 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--Public Employee Not Immune for Statement Made Outside Scope of Authority

[1] FORM

[*Caption. See § 142.66.*]

PUBLIC EMPLOYEE'S STATEMENTS MADE OUTSIDE SCOPE OF AUTHORITY ARE NOT PROTECTED BY RULE OF IMMUNITY.

Statements Not Shielded by Rule of Immunity for Public Employee. Statements made by a public employee that are outside the scope of his authority are not shielded by the immunity rule that public employees are not personally liable for discretionary acts within the scope of their authority (*Lipman v. Brisbane Elementary Sch. Dist. (1961) 55 Cal. 2d 224, 233-234, 11 Cal. Rptr. 97, 359 P.2d 465*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion for summary judgment by a public employee who alleges that his statements were immune from liability if the statements were, in fact, made outside the scope of the employee's authority.

If appropriate, counsel should insert argument in this form showing the relationship between the facts of his case and

the point of law raised. In addition, counsel should attach affidavits or declarations that support the memorandum [*Code Civ. Proc. § 437c*].

[3] Discussion of Authorities

[a] Statements Not Shielded by Rule of Immunity for Public Employee

In ***Lipman v. Brisbane Elementary Sch. Dist.*** *(1961) 55 Cal. 2d 224, 11 Cal. Rptr. 97, 359 P.2d 465* , the Supreme Court held statements by three school trustees concerning the plaintiff, a school superintendent, which alleged she had suppressed facts from the board, received "kickbacks" from district employees, engaged in "shady dealings," and "cleaned up" on business transactions involving the district to be beyond the scope of the trustees' powers. Thus, the Court held that the defense of immunity was not available to the trustees (*55 Cal. 2d 224, 233-234)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationDefensesPrivilegesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral Overview

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14-142 California Points & Authorities § 142.83

§ 142.83 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--Qualified Immunity for Report of Child Abuse [Penal Code § 11172(a)] Not Available to Defendant

[1] FORM

[*Caption. See § 142.66.*]

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE A DEFENDANT IS NOT IMMUNE FROM LIABILITY FOR DAMAGES CAUSED BY DEFENDANT'S REPORT OF CHILD ABUSE _____ [IF THE REPORT WAS MADE WITH KNOWLEDGE OF ITS FALSITY, OR WITH RECKLESS DISREGARD OF ITS TRUTH AND FALSITY *or* IF DEFENDANT HAS FAILED TO FOLLOW THE STATUTORY PROCEDURES FOR REPORTING CHILD ABUSE].

[*EITHER*]

Qualified Immunity Defeated by Malice. A person who reports a known or suspected instance of child abuse, who is not required to do so under *Section 11166 of the Penal Code*, is liable for any damages caused if the person makes the report either knowing it to be false or with reckless disregard of its truth or falsity (*Penal Code § 11172(a)*).

[*OR*]

No Qualified Immunity if Defendant Did Not Follow Statutory Reporting Procedure. A person required to report a known or suspected instance of child abuse under Penal Code Section 11166(a) is not immune under *Penal Code Section 11172(a)* from liability for damages caused by the report if the person fails to follow the statutory procedure set forth in *Penal Code Section 11166(a)* to report the known or suspected instance of child abuse to a child protection agency immediately or as soon as practically possible by telephone and prepare and send a written report of the known or suspected instance of child abuse within 36 hours of receiving the information concerning the incident (*Searcy v. Auerbach (9th Cir. 1992) 980 F.2d 609, 610-611)* .
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Comments

[a] Use of Form

This memorandum may be submitted by the plaintiff in opposition to the defendant's motion for summary judgment if the defendant, who reported a known or suspected instance of child abuse, alleges that he or she is immune from liability, under *Penal Code § 11172(a)*, as a result of the report.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. In addition, if arguing that the qualified immunity is defeated by malice, counsel should attach opposing affidavits or declarations and a separate statement of undisputed facts [*see Code Civ. Proc. § 437c(b)(2), (3)*], which include facts showing that the defendant either knew that the report was false, or acted with reckless disregard of the report's truth or falsity.

In an appropriate case in which malice is at issue, these points may be submitted in opposition to the motion for summary judgment supported by the points *in § 142.55*.

[b] Persons to Whom Immunity Applies

A person who is a mandated reporter of suspected child abuse or neglect, which includes a person such as a child care custodian, health practitioner, employee of a child protective agency, child visitation monitor, or commercial film and photographic print processor, is immune from liability for any report required or authorized under *Penal Code § 11166*, even if the reporter acquired the knowledge or reasonable suspicion of child abuse or neglect outside of his or her professional capacity or outside the scope of employment [*Penal Code § 11172(a)*].

Any person, other than those persons required to report child abuse, who has knowledge of or observes a child whom he or she knows or reasonably suspects has been a victim of child abuse may report the known or suspected instance of child abuse to a child protective agency [*Penal Code § 11166(g)*] and is immune from liability unless malice is shown [*see Penal Code § 11172(a)*]. For these purposes, "any other person" includes a mandated reporter who acts in his or her private capacity and not in his or her professional capacity or within the scope of his or her employment [*Pen. Code § 11166(g)*].

[3] Discussion of Authorities

[a] Qualified Immunity Defeated by Malice

Any person, other than those mandated reporters as specified in *Penal Code § 11166*, reporting a known or suspected instance of child abuse shall not incur civil or criminal liability as a result of any report authorized by *Penal Code §§ 11165-11174.5* (reporting and investigation of child abuse) unless it can be proven that a false report was made and the person knew that the report was false or was made with reckless disregard of the truth or falsity of the report. Any person who makes a report of child abuse known to be false or with reckless disregard of the truth or falsity of the report is liable for any damages caused [*Penal Code § 11172(a)*].

[b] No Qualified Immunity if Defendant Did Not Follow Statutory Reporting Procedure

In ***Searcy v. Auerbach*** *(9th Cir. 1992) 980 F.2d 609* , the Ninth Circuit reversed the District Court's order granting summary judgment to a clinical psychologist claiming immunity under *Penal Code § 11172*. The appellate court held that the psychologist lacked immunity for reporting child abuse because he failed to follow the procedures set forth in the statute. Specifically, he violated the statute by (1) failing to report suspected child abuse to a child protective agency either immediately by telephone or within 36 hours in writing as required by *Penal Code § 11166(a)*, and *(2)* disclosing his opinion regarding abuse of the plaintiff's daughter to the plaintiff's ex-husband, a person not authorized to receive the report under *Penal Code § 11167.5*. As stated by the court, "[t]he statutory procedures for reporting are essential to the accomplishment of that purpose." Moreover, the statute makes no provisions for intermediate reporting through a layperson. Instead, it meticulously notes those agencies or individuals authorized to receive the report it mandates (*980 F.2d 609, 610-611)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationDefensesPrivilegesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral Overview

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14-142 California Points & Authorities § 142.84

§ 142.84 Opposing Motion for Summary Adjudication [Code Civ. Proc. § 437c(f)]--Republication Was Reasonably Foreseeable

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN OPPOSITION TO MOTION
Plaintiff,	)	FOR SUMMARY ADJUDICATION
vs.	)	[*Code Civ. Proc. § 437c(f)*]
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Trial Date: _____]
	)	[Attached Documents: _____]

_____

DEFENDANT'S MOTION FOR SUMMARY ADJUDICATION OF THE CAUSE OF ACTION BASED ON REPUBLICATION SHOULD BE DENIED BECAUSE THERE IS A TRIABLE ISSUE OF FACT CONCERNING WHETHER DEFENDANT, AS THE ORIGINATOR OF THE DEFAMATORY STATEMENT, SHOULD BE HELD LIABLE FOR ITS REPUBLICATION BECAUSE HE OR SHE COULD REASONABLY HAVE FORESEEN THAT THE STATEMENT WOULD BE REPUBLISHED.

A. Reasonably Foreseeable Republication. The original publisher is liable for a republication if it was a result that he or she might have reasonably foreseen as likely to occur (*Siemon v. Finkle (1923) 190 Cal. 611, 617, 213 P. 954*).

[*Optional*] **B. Plaintiff's Republication.** The originator of a defamatory statement will be liable for damages caused by the republication of the defamatory statement by the person defamed if that person is operating under a strong compulsion to republish the defamatory statement and the circumstances that created the strong compulsion are known to the originator of the defamatory statement at the time he or she communicates it to the person defamed (*McKinney v. County of Santa Clara (1980) 110 Cal. App. 3d 787, 797-798, 168 Cal. Rptr. 89*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a defendant's motion for summary adjudication of a cause of action for republication. The ground for opposition is that there is a triable issue of fact concerning the defendant's liability, based on whether republication was reasonably foreseeable at the time the original statement was made.

In an appropriate case, this memorandum may be submitted in opposition to a motion for summary adjudication supported by the points *in § 142.61*. It may also be adapted for use in another procedural context in which counsel wishes to raise the substantive issue of reasonable foreseeability of republication. For example, it may be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel should show that the originator of the defamatory statement could reasonably foresee that the statement would be republished. If the plaintiff was the one who republished the statement, counsel should show that he or she was under a strong compulsion to disclose the defamatory statement and that the originator of the defamatory statement knew of the circumstances creating this strong compulsion at the time he or she communicated the statement to the plaintiff. For example, counsel might show that the plaintiff was seeking new employment and was under a strong compulsion to disclose statements concerning the reasons for the termination of his or her previous employment.

[b] Related Pleading and Practice Forms

For discussion and forms relating to libel and slander generally, see Ch. 340, *Libel and Slander* in California Forms of Pleading and Practice (Matthew Bender). For discussion and forms relating to summary judgment generally, see Ch. 537, *Summary Judgment* in that publication.

[c] Related Memoranda

For memoranda relating to summary judgment and summary adjudication, see Ch. 221, *Summary Judgments* in this publication.

[3] Discussion of Authorities

[a] Reasonably Foreseeable Republication

Siemon v. Finkle *(1923) 190 Cal. 611, 213 P. 954* , was an action for libel based upon the publication of two letters

written by Finkle to McCowan, the district attorney, and shown by McCowan to others. The first letter sent by Finkle claimed that the plaintiff had undertaken some very questionable business while he was one of McCowan's deputy district attorney and stated that he was not a suitable person to act as deputy district attorney anywhere. The trial court found that as to this letter the statements pertaining to the plaintiff were false and defamatory but that the publication thereof by the defendants was not joint and for that reason the plaintiff was not entitled to recover. The second letter sent by Finkle, solicited by McCowan, charged that while serving as a deputy district attorney, the plaintiff assisted a client in defrauding his creditors. The trial court found that certain statements in this letter were false and defamatory, that the defendants knew the statements were false when they published them, and that the publication was wanton, malicious, and done for the purpose of injuring the plaintiff.

The Supreme Court affirmed, dismissing Finkle's contention that he should not be liable for McCowan's use of the information. The Court found that Finkle wrote the letter knowing that McCowan was embroiled in a bitter political battle with the plaintiff, who was endeavoring to procure McCowan's recall from the office of district attorney. The Court held that this, together with the context of the entire letter, readily warranted the inference that it was Finkle's intent and purpose that McCowan could and should use the said information for the purpose of damnifying and defeating the plaintiff in his effort to recall McCowan. The Court held that under the circumstances existing at the time of the writing and receipt of the letter, the publication by McCowan was a result that Finkle might have reasonably foreseen as likely to occur; therefore, it followed that Finkle's act in writing and sending the letter was the proximate cause of the publication by McCowan. The Court held Finkle liable for the publication by McCowan because it was in fact a publication contemplated and countenanced by Finkle (*190 Cal. 611, 617)* .

[b] Plaintiff's Republication

McKinney v. County of Santa Clara *(1980) 110 Cal. App. 3d 787, 168 Cal. Rptr. 89* , involved causes of action for libel and slander resulting from the plaintiff's republications of a defamatory statement originally made by the defendant, a county. The plaintiff was terminated by the defendant from his employment as a probationary deputy sheriff. The defendant gave the plaintiff false and defamatory reasons for his dismissal. While seeking new employment, the plaintiff republished these statements by informing the prospective employer of the reasons for the termination of his previous employment. At trial, the court sustained a motion by the county to dismiss the causes of action for libel and slander resulting from the plaintiff's republications on the ground that they were without merit, because of the plaintiff's admission that he had made the republications.

The court of appeal reversed the dismissal with respect to the cause alleging the county's liability for republication by the plaintiff. The court said that the rationale for making the originator of a defamatory statement liable for its foreseeable republication was the strong causal link between the actions of the originator and the damage caused by the republication. It held that this causal link was no less strong if (1) the foreseeable republication is made by the person defamed and that person is operating under a strong compulsion to republish the defamatory statement and (2) the circumstances that create the strong compulsion are known to the originator of the defamatory statement at the time he or she communicates it to the person defamed. Thus, the court held that the originator of the defamatory statement could be held liable for the plaintiff's republication. The court found that the defendant communicated the alleged defamatory statements regarding the reasons for the plaintiff's dismissal from the police department to the plaintiff under circumstances that placed the plaintiff under a strong compulsion to disclose the contents of the alleged defamatory statements to third parties (that is, to prospective employers), that it was reasonably foreseeable by the defendant that the plaintiff would disclose the alleged defamatory statements to third parties, and that the plaintiff actually made such disclosures. The court therefore held that there was a triable issue and that the causes of action should not have been dismissed (*110 Cal. App. 3d 787, 798)* .

NOTE:

Imposing liability on the original publisher for forced republication by the defamed person requires an actual republication of the defamatory comments. Mere foreseeability that the defamed person might

have to repeat the defamatory comments at some point in the future is an insufficient basis for imposing liability [*Dible v. Haight Ashbury Free Clinics, Inc. (2009) 170 Cal. App. 4th 843, 855, 88 Cal. Rptr. 3d 464* ; *see § 142.22*].

[4] Additional Authorities

[a] Reasonably Foreseeable Republication

Di Giorgio Corp. v. Valley Labor Citizen (1968) 260 Cal. App. 2d 268, 67 Cal. Rptr. 82 , was an action to recover general and punitive damages for the publication of a false and libelous article. An article containing the alleged defamatory statements was published in two newspapers. The author of the article intended that the article be published in the first newspaper, but the second newspaper received a clipping of the first published article from the author's informant and published it without discussing it with anyone. At trial, the jury returned a verdict holding the newspapers as well as the author of the article jointly and severally liable for the publication. The author of the article moved for judgment notwithstanding the verdict for himself only, which the trial court denied. Judgment was entered against all the defendants, and they appealed.

The court of appeal, holding that there was no substantial evidence to prove that the author authorized, consented to, or participated in the republication of the article in the second newspaper and that the trial court's judgment holding all defendants jointly and severally liable for punitive damages was not reasonably subject to separation, reversed the judgment (*260 Cal. App. 2d 268, 277)* . The court stated that the general rule, that the author of defamatory statements is not liable for a publication of those statements if he or she neither authorized nor intended such publication to be made, is qualified if the republication is reasonably foreseeable (*260 Cal. App. 2d 268, 273)* . In this case, however, the court found that the plaintiff had not raised the foreseeability issue at trial; therefore, he could not recover damages (*260 Cal. App. 2d 268, 276)* .

Curley v. Vick (1963) 211 Cal. App. 2d 670, 27 Cal. Rptr. 501 , was an action for damages for publication and republication of an allegedly libelous letter. The manager of an apartment house gave the plaintiffs notice to vacate their apartment by a letter that claimed that the plaintiffs had been having very noisy parties with drinking going on until late at night and that one night they threw drinking glasses from the top floor to the patio. A copy of this letter was given to another tenant who worked with the plaintiffs. Later the letter was posted by this person on the employer's bulletin board. The plaintiffs sued the apartment house owners, on an agency theory, and others for the original publication by delivery of the letter to the other tenant and for the republication by posting on the employer's bulletin board. The trial court, not making a distinction between the causes of action, entered a joint and several judgment against all defendants, but made the finding that the apartment house owners did not authorize the republication by the plaintiffs' employer nor directly or proximately cause it to be republished. The court of appeal reversed and remanded the case for a new trial. The court held that the general rule that the author of a defamatory statement is not liable for a publication of that statement if he or she neither authorized nor intended such publication to be made, was qualified if the republication was reasonably foreseeable. The court said that there was perhaps room for inference that some sort of republication was foreseeable in this case but that because foreseeability was a principal element of proximate cause, the trial court's specific finding that proximate cause did not exist negated foreseeability and destroyed any basis upon which the owners of the apartment house could be held liable for republication (*211 Cal. App. 2d 670, 673)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral Overview

California Points & Authorities

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 142 LIBEL AND SLANDER (DEFAMATION)
PART II. FORMS

14-142 California Points & Authorities § 142.85

§ 142.85 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10]--Statement Asserts Fact That is Susceptible to Being Proved False

[1] FORM

[*Caption. See § 142.63.*]

THE DEMURRER TO THE COMPLAINT SHOULD BE OVERRULED BECAUSE THE STATEMENT THAT IS THE SUBJECT OF THIS ACTION IS REASONABLY SUSCEPTIBLE TO BEING PROVED FALSE.

A. Liability for Statements Implying Provably False Assertion. Liability for defamation may be imposed for a statement that can reasonably be interpreted to assert, expressly or impliedly, a fact that is susceptible to being proved false (*Kahn v. Bower (1991) 232 Cal. App. 3d 1599, 1607-1608, 284 Cal. Rptr. 244* ; *Weller v. American Broad. Cos., Inc. (1991) 232 Cal. App. 3d 991, 1001, 283 Cal. Rptr. 644*).

B. Allocations of Questions of Law and Fact. The court must first determine as a question of law whether the statement is reasonably susceptible of a defamatory interpretation. If the statement satisfies this requirement, it is for the jury to determine whether a defamatory meaning was in fact conveyed (*Kahn v. Bower (1991) 232 Cal. App. 3d 1599, 1608, 284 Cal. Rptr. 244*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a general demurrer to a complaint if the demurrer asserts that the complaint fails to state facts sufficient to constitute a cause of action for defamation in that the allegedly defamatory statement does not imply a provably false assertion [*see Kahn v. Bower (1991) 232 Cal. App. 3d 1599, 1607-1608, 284 Cal. Rptr. 244]* . It may be combined with § 142.86 if counsel also wishes to contend that there is no constitutional privilege for opinion.

This memorandum may also be adapted for use in other procedural contexts, for example, in opposition to the defendant's motion for judgment on the pleadings, and may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel should therefore show that the statement expressly or impliedly asserts a fact that is susceptible to being proved false [*see, e.g., Weller v. American Broad. Cos., Inc. (1991) 232 Cal. App. 3d 991, 1002-1003, 283 Cal. Rptr. 644* (statements could reasonably be understood as implying defamatory facts)].

In an appropriate case, these points may be submitted in opposition to the points *in § 142.21*.

[3] Discussion of Authorities

[a] Liability for Statements Implying Provably False Assertion

In ***Kahn v. Bower*** *(1991) 232 Cal. App. 3d 1599, 284 Cal. Rptr. 244* , a former county child-welfare worker brought a defamation action against a privately employed children's counselor, based on a letter to the plaintiff's supervisor in which the defendant criticized the plaintiff's professional conduct. In the letter, the defendant complained of the plaintiff's attitude and conduct regarding several children counseled by the defendant. The letter stated, among other things, that the plaintiff's "incompetence" adversely affected certain children's lives, and that the defendant wondered whether the plaintiff held "some kind of hostility" toward a particular child or handicapped children in general. As a result of the letter, the plaintiff's employment was terminated. The plaintiff brought a defamation action against the counselor and the private facility for which she worked. The trial court deemed the defendants' trial brief to be a motion for judgment on the pleadings, which it granted on the ground that the statements were nonactionable statements of opinion. The plaintiff appealed.

The court of appeal affirmed, ultimately finding that although one of the statements is susceptible of being proved false, the plaintiff was a public official and failed to allege actual malice (*232 Cal. App. 3d 1599, 1609-1615)* . The court noted that the granting of judgment on the pleadings is the equivalent of sustaining a general demurrer (*232 Cal. App. 3d 1599, 1605)* . *Pursuant to Milkovich v. Lorain Journal Co. (1990) 497 U.S. 1, 19-20, 110 S. Ct. 2695, 111 L. Ed. 2d 1* (discussed in *§ 142.86[3][a]*), there is no wholesale *First Amendment* exemption from liability for anything that might be labeled opinion. Accordingly, if a defendant asserts that the allegedly defamatory statement is opinion, the dispositive question is whether a reasonable fact finder could conclude that the published statements imply a provably false factual assertion (*232 Cal. App. 3d 1599* , 1607). The court concluded that the sentence in the letter concerning the plaintiff's possible hostility toward children could not be reasonably understood to assert the actual fact of hostility. Rather, it amounted to nothing more than speculation or rumination--something less even than surmise or conjecture (*232 Cal. App. 3d 1599, 1608-1609)* . However, the court stated that the same could not be said of the imputation of incompetence. Because of the defendant's professional status, and the professional status of the person receiving the letter (the plaintiff's supervisor), the letter was susceptible of the interpretation that the plaintiff's incompetence was asserted as an actual condition, that is, as a matter of fact. Therefore, the statements conveying an imputation of incompetence appeared actionable as against the objection that they lack the requisite factual content (*232 Cal. App. 3d 1599, 1609)* . The court further stated that the plaintiff's considerable discretionary authority over the people affected by her work placed her in a role similar to that of a prosecutor or police officer, and consequently that she was a public official for purposes of application of the actual malice standard. Because she did not plead that element, the dismissal of the action was proper (*232 Cal. App. 3d 1599, 1610-1615)* .

In ***Weller v. American Broad. Cos., Inc.*** *(1991) 232 Cal. App. 3d 991, 283 Cal. Rptr. 644* , an antique dealer brought a defamation action against a television station based on broadcasts regarding the plaintiff's sale of a certain antique to a local museum. The plaintiff marketed certain antique silver candelabra to a museum from an anonymous seller, which he described generally as a Texas estate that had possessed the candelabra for over 100 years. After the sale, the defendant received information that the candelabra had been overpriced and perhaps stolen. The defendant broadcast news reports, entitled "Museum Fraud?", which contained statements that the plaintiff had misrepresented the owner, that the candelabra had possibly been stolen from a local artist, and that, because of repairs made prior to the sale, they might have been overpriced. Those reports were aired following a report entitled "Antique Fraud," which concerned the recent felony conviction of an unrelated person for making false insurance claims for stolen silver. A jury trial resulted in judgment and an award of damages for the plaintiff. The defendants appealed.

The court of appeal affirmed, holding that the statements asserted facts susceptible of being proved false (*232 Cal. App. 3d 991, 1005-1006)* . The court noted that under *Milkovich v. Lorain Journal Co. (1990) 497 U.S. 1, 19-20, 110 S. Ct. 2695, 111 L. Ed. 2d 1* (discussed in *§ 142.86[3][a]*), there is no absolute *First Amendment* privilege for statements of opinion (*232 Cal. App. 3d 991, 999-1000)* . Pursuant to *Milkovich,* the court stated, it must determine: (1) whether the statements that form the basis of a defamation claim expressly or impliedly assert a fact that is susceptible to being proved false; and (2) whether the language and tenor is such that it cannot reasonably be interpreted as stating actual facts (*232 Cal. App. 3d 991, 1001)* . Considering the statements in context, the court concluded that unquestionably, the news reports could have been understood as implying that the plaintiff, at worst, had knowingly sold stolen property to the museum, and, at best, had lied about their origin and had sold them at an inflated price (*232 Cal. App. 3d 991, 1002)* . The court rejected the defendant's contention that the broadcasts were entitled to constitutional protection because they made no assertions, but rather posed open questions subject to further investigation. The court held that the publication of implied defamatory statements against the background of apparently objective and neutral reporting is almost certain to be understood as factual (*232 Cal. App. 3d 991, 1003-1004)* . With regard to this issue, the court noted that the plaintiff's claim was that the broadcasts implied certain defamatory statements. It stated that a defendant who juxtaposes a series of facts in a manner that implies a defamatory connection between them, or otherwise creates a defamatory implication, may be held responsible for the defamatory implication even though the particular facts are correct. Therefore, it is the defamatory implication, not the underlying assertions giving rise to the implication, that must be examined to discern whether the statements are entitled to full constitutional protection (*232 Cal. App. 3d 991, 1003 n.10*). Moreover, the court stated, the implied defamatory facts in this context may be given even more credence by the listener if the reports profess to be objective, yet subtly imply that the publisher tends to believe the sources alleging the defamatory facts. The court also held that the use of interrogative language alone does not entitle statements to constitutional protection if they otherwise can be understood to imply defamatory fact (*232 Cal. App. 3d 991, 1004)* .

[b] Allocations of Questions of Law and Fact

The facts and procedural background of ***Kahn v. Bower*** *(1991) 232 Cal. App. 3d 1599, 284 Cal. Rptr. 244* , are discussed in *§ 142.85[3][a]*. The court of appeal held that a statement is actionable if a reasonable fact finder concludes that it implies a provably false factual assertion (*232 Cal. App. 3d 1599, 1607)* . The court also stated that the allocation of functions between the court and jury with respect to factual content is analogous to the allocation with respect to defamatory meaning in general. The court must first determine as a question of law whether the statement is reasonably susceptible of a defamatory interpretation. If the statement satisfies that requirement, it is for the jury to determine whether a defamatory meaning was in fact conveyed to the listener or reader (*232 Cal. App. 3d 1599, 1608)* .

[4] Additional Authorities

[a] Liability for Statements Implying Provably False Assertion

In *Manufactured Home Communities v. County San Diego (9th Cir. 2008) 544 F. 3d 959* , plaintiff real estate investment company brought suit against a county and a county supervisor based on public statements made by the supervisor after plaintiff imposed rent increases at several of its mobilehome parks. The statements included a statement by the supervisor that plaintiff lied to the county and said that a sewage problem was fixed; a statement that plaintiff had a reputation for running people out of older mobilehome parks, causing an increase in market value, and then selling the parks at a profit; and a statement that the incoming District Attorney was "very interested" in determining whether civil or criminal actions should be filed against plaintiff. The trial court granted defendants' motion to strike the action under *Code Civ. Proc. § 425.16*, the anti-SLAPP statute. The court of appeal reversed, however, concluding that plaintiff had demonstrated a reasonable probability of success on the merits. The court held that a reasonable juror could conclude that the statements of the county supervisor were provably false factual assertions, rather than merely political hyperbole or opinion (*544 F.3d 959, 963-964)* .

In *Overstock.com, Inc. v. Gradient Analytics, Inc. (2007) 151 Cal. App. 4th 688, 61 Cal. Rptr. 3d 29* , plaintiff was an Internet clearinghouse retailer that sued a company that prepares analytical reporting services on publicly traded companies, as well as the customer that had hired the reporting company to prepare a report on plaintiff. Defendant company had prepared and published a series of reports about plaintiff suggesting that plaintiff had been engaging in accounting irregularities in order to inflate the price of its stock. Upon publication of defendant's reports, plaintiff's stock price went through a prolonged period of decline during which time it lost almost two-thirds of its value. Plaintiff alleged that the customer had requested a negative financial report on plaintiff in order to depress the stock price so the customer could purchase after the stock had been devalued, that this customer had actively worked with defendant company to prepare the negative financial reports, and that the reports were biased and contained provably false factual assertions about plaintiff's financial accounting. The trial court denied defendants' motion to strike the complaint under *Code Civ. Proc. § 425.16*, the anti-SLAPP statute, and the court of appeal affirmed. The court of appeal held that the plaintiff had demonstrated a sufficient probability of success on its cause of action for libel to withstand the motion to strike. Defendant's reports contained provably false factual assertions, despite language in the reports suggesting that the reports were just the preparer's "opinion," "judgment," or "belief." There were sufficient factual assertions, either explicit or implied, forming the basis for the reports to suggest that the preparer was implying that plaintiff changed its accounting method in order to boost revenue figures artificially, that this change was a violation of generally accepted accounting principles and led to continual overstatements of revenue, that plaintiff knowingly inflated its cash flow, and that plaintiff's president and CFO resigned because of these transgressions (*151 Cal. App. 4th 688, 704-705)* .

In *Del Junco v. Hufnagel (2007) 150 Cal. App. 4th 789, 60 Cal. Rptr. 3d 22* , plaintiff was a trained general and vascular surgeon licensed in California with an Internet web site used to provide information about procedures performed by him for women with significant fibroid disease or endometriosis. He brought suit for defamation against the operator of another Internet web site that mimicked plaintiff's site and contained statements that plaintiff was a vascular student and "had no specialized medical training in medicine or in female medicine." The trial court entered a default judgment in favor of plaintiff. The court of appeal reversed an award of punitive damages, but otherwise affirmed. The court held that the statements made by defendant on her web site asserting that plaintiff was untrained and lacked proper credentials were not mere opinion, but were actionable factual assertions. Because plaintiff was a fully licensed, practicing physician specializing in general and vascular surgery, with all of the necessary training to perform surgeries, the statements on defendant's web site were provably false factual assertions that cast serious doubt on plaintiff's professional ability and were defamatory (*150 Cal. App. 4th 789, 798-799)* .

In *Ruiz v. Harbor View Cmty. Ass'n (2005) 134 Cal. App. 4th 1456, 37 Cal. Rptr. 3d 133* , the plaintiff was a homeowner who brought suit for libel against the attorney for the plaintiff's homeowners' association for statements made in a letter written to the plaintiff. In this letter, the defendant had accused the plaintiff of acting "unconscionably" and "in violation of his ethical duties as a lawyer" by concealing the fact that he was an attorney from the homeowners' association and by engaging in "bullying" tactics. The letter was written in response to letters written by the plaintiff as part of an ongoing dispute with the homeowners' association, which involved the association's denial of the plaintiff's

plans for rebuilding his house. Although there was an unresolved issue of whether the letter was actually published to a third party, the court of appeal held that the plaintiff, in response to a motion to strike brought under *Code Civ. Proc. § 425.16*, had met his burden of presenting a prima facie case that the factual assertions supporting the opinions in the letter were demonstrably false. The plaintiff provided declarations showing that he had not concealed the fact that he was an attorney from the association. Moreover, the court concluded that the words accusing plaintiff of acting "unconscionably" and "in violation of his ethical duties as a lawyer" were not mere hyperbole, epithet, or subjective expressions of disapproval. The statements contended that the plaintiff violated a specific code section based on identified conduct. Moreover, the letter was written by an attorney in "legal verbiage" and included citations to authority in support of the writer's conclusions (*134 Cal. App. 4th 1456, 1472)* .

In *Gallagher v. Connell (2004) 123 Cal. App. 4th 1260, 20 Cal. Rptr. 3d 673* , a Catholic priest had been helping to care for an elderly woman, who made him a beneficiary of her sizable estate and appointed him trustee of her trust. However, other parties challenged this appointment. In the course of this legal challenge, the woman's neighbor made a statement to the press, which was published, that the priest "was not there to help [the elderly woman], but he was there to help himself." The priest sued this neighbor for slander. The defendant made a motion to strike the complaint under *Code Civ. Proc. § 425.16*, the so-called anti-SLAPP statute, but the trial court denied the motion, and the defendant appealed. The court of appeal affirmed, concluding that the plaintiff had made the requisite showing of probability of success on the merits of the slander claim. The court held that a reasonable person reading the neighbor's statement would conclude that she was implying that the plaintiff had been trying to become the beneficiary of the estate of the elderly woman through deceit, fraud, or undue influence. The court concluded that this was an assertion of fact that was capable of being proven either true or false. Relevant evidence might include evidence of an increase or decrease in the elderly woman's care or maintenance after the plaintiff became involved in her life, evidence of any changes in the elderly woman's financial condition, evidence of whether the plaintiff knew she was planning to make him beneficiary of her estate, evidence showing the extent to which the plaintiff was involved in bringing about the changes to the elderly woman's estate plan, and evidence of the elderly woman's mental state at the time she made the changes to her estate (*123 Cal. App. 4th 1260, 1270-1271)* .

In *Sommer v. Gabor (1995) 40 Cal. App. 4th 1455, 48 Cal. Rptr. 2d 235* , the plaintiff recovered damages for defamation based on the defendant's statements printed in a magazine that the plaintiff, a movie actress, was broke, had to sell her house, now lived in the worst section of town, and hung out in sleazy bars. The defendant appealed, contending that the statements were subjective opinions that were not provably false. The court rejected this, stating that the evidence established that the plaintiff did not frequent bars of any nature, was not broke, did not have to sell her house, and did not move either to the best or worst part of town. Thus, the statements were proven false in their broad sense, so that it did not matter what kind of bars were described or what part of town she was alleged to have moved to. Furthermore, the court concluded that the statements were defamatory because they attributed characteristics to the plaintiff's lifestyle that exposed her to contempt, ridicule, and disgrace (*40 Cal. App. 4th 1455, 1476)* . The court thus affirmed the judgment in favor of the plaintiff.

In *Gould v. Maryland Sound Indus., Inc. (1995) 31 Cal. App. 4th 1137, 37 Cal. Rptr. 2d 718* , a sales representative brought a defamation action against his employer based on an accusation by a senior project manager, that the sales representative had made a $100,000 error in the estimating of a bid. The trial court sustained the defendant's demurrer and entered a judgment of dismissal. The court of appeal reversed, stating that the accusatory statement would tend to injure the sales representative by imputing to him incompetence in his trade. The court of appeal concluded that the accusation was a statement of fact susceptible to proof or refutation by reference to concrete, provable data (*31 Cal. App. 4th 1137, 1154)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProceduresPleading &

PracticeDefenses, Demurrers & ObjectionsDemurrersTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral Overview

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 142 LIBEL AND SLANDER (DEFAMATION)
PART II. FORMS

14-142 California Points & Authorities § 142.86

§ 142.86 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10]--No Constitutional Privilege for Opinion

[1] FORM

[*Caption. See § 142.63.*]

THE DEMURRER SHOULD BE OVERRULED BECAUSE THERE IS NO CONSTITUTIONAL PRIVILEGE UNDER THE *FIRST AMENDMENT* FOR OPINION AS OPPOSED TO FACT, AND THE FALSITY AND DEFAMATORY NATURE OF DEFENDANT'S STATEMENTS CAN BE PROVED FROM THE FACTS OF THE CASE.

A. No Federal Constitutional Privilege for Opinion. There is no wholesale defamation exemption under the *First Amendment to the United States Constitution* for anything that might be labeled "opinion," as opposed to "fact," and whether a statement is defamatory depends not on this distinction, but on whether the statement is of a defamatory nature based on the facts presented and under existing constitutional guarantees (*Milkovich v. Lorain Journal Co. (1990) 497 U.S. 1, 19-20, 110 S. Ct. 2695, 111 L. Ed. 2d 1*).

B. No Broader Protection Afforded Under California Constitution. The California Constitution does not provide a protection to statements of opinion broader than that provided under the *First Amendment to the United States Constitution* (*Edwards v. Hall (1991) 234 Cal. App. 3d 886, 904-906, 285 Cal. Rptr. 810*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a general demurrer to a complaint if the demurrer asserts that an allegedly defamatory statement is, as a matter of law, constitutionally protected opinion.

Counsel should insert argument in the form showing the relationship between the facts of the case and the point of law raised.

[3] Discussion of Authorities

[a] No Constitutional Privilege for Opinion

In ***Milkovich v. Lorain Journal Co.*** *(1990) 497 U.S. 1, 110 S. Ct. 2695, 111 L. Ed. 2d 1* , a school wrestling coach brought a defamation action in Ohio against a newspaper and its reporter on the basis of a newspaper story that was published in which the writer stated that the coach had perjured himself at a hearing by lying about the cause of a violent altercation that took place at a wrestling match. The action went through the state courts twice, with the state Supreme Court holding on the second round that the plaintiff was not a public figure nor a public official and that the statements in issue were factual assertions as a matter of law. Subsequently, in a separate action based on the same incident, the school superintendent, Scott, brought a defamation action against the same defendants on the identical factual issues. The state Supreme Court reversed its previous position and held that the article in question was constitutionally protected opinion. Considering itself bound by the *Scott* decision, the appellate court in *Milkovich* affirmed a trial court's granting of summary judgment to the defendants. The United States Supreme Court granted certiorari to consider the important questions raised by the state court's recognition of a constitutionally-required opinion exception to the application of its defamation laws.

The Supreme Court reversed, holding that there is no separate constitutional privilege for opinion required to ensure the freedom of expression guaranteed by the *First Amendment*. The court stated that the widely-quoted statement in *Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 339-340, 94 S. Ct. 2997, 41 L. Ed. 2d 789* (discussed in *§ 142.25[3][c]*), that "[h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas," was dictum, and not intended to create a wholesale defamation exemption for anything that might be labeled opinion (*497 U.S. 1, 18)* . Instead, the Court held that *First Amendment* freedom of expression is adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between "opinion" and "fact" (*497 U.S. 1, 19)* . The Court listed such constitutional protections as the requirement of a showing of actual malice in cases involving public figures or officials, protection for statements that are obviously rhetorical hyperbole, the requirement that statements on matters of public concern must be provable as false, and the requirement of enhanced appellate review of cases involving *First Amendment* issues (*497 U.S. 1, 19)* . Thus, the Court said that the factfinder must conclude, based on the facts presented, and under the existing constitutional guarantees, whether the statements in question are of a defamatory nature. Under the facts before it, the Court concluded that the connotation of whether the plaintiff had committed perjury was sufficiently factual to be able to be proved true or false on remand (*497 U.S. 1, 20)* .

[b] No Broader Protection Afforded Under California Constitution

In ***Edwards v. Hall*** *(1991) 234 Cal. App. 3d 886, 285 Cal. Rptr. 810* , the head of the local branch of the National Association for the Advancement of Colored People (NAACP) brought a defamation action against a television talk show host based on statements by the defendant charging the plaintiff with "extortion," or having made a demand for a contribution to the NAACP in exchange for the plaintiff's forbearance from publicizing the defendant's allegedly discriminatory hiring practices. The defendant, the host of a nationally syndicated talk show, agreed to a meeting with the plaintiff, president of a local chapter of the NAACP, to discuss allegations of discriminatory hiring practices in connection with his show. Based on that interview, the plaintiff criticized, in an article published in a local newspaper, the show's failure to hire African-Americans in important positions. The defendant, angered by the plaintiff's comments

and the newspaper's failure to obtain his views, contacted the newspaper and arranged an interview with two reporters. During that interview, the defendant denied the plaintiff's discrimination charges, and said that during their meeting the plaintiff asked him for $40,000. When asked to clarify the remark, the defendant stated that the plaintiff engaged in the practice of demanding donations to the NAACP from television show personnel, on threats of public charges of discrimination; that the plaintiff was, based on that conduct, an "extortionist"; and that the defendant refused to give the plaintiff any money because he felt he was being "extorted." The defendant specified that following the meeting, the plaintiff broached the subject of the $40,000 donation to the defendant in the hall, in the presence of the defendant's manager, and that the defendant refused the request personally, also telling his manager not to give the plaintiff any money. The newspaper published a second article quoting in detail the defendant's remarks about the plaintiff, and the plaintiff's refutations of the charges. Subsequently, the defendant appeared on a local radio talk show, and repeated the substance of his newspaper interview--that he did not engage in discriminatory hiring practices, and that the plaintiff had asked for a $40,000 donation in an attempt to "manipulate" him.

The plaintiff filed a complaint alleging causes of action for defamation (libel and slander), and intentional infliction of emotional distress. The defendant moved for summary judgment. In support of the motion, the defendant filed a declaration stating that after the meeting between the plaintiff and the defendant, the plaintiff asked to speak privately with the defendant's manager, after which his manager told the defendant that the plaintiff said he needed $40,000 for a particular television show, and that he had the clear impression that he was being pressured to donate money in exchange for the plaintiff's agreement to refrain from further attacks. The defendant further stated in the declaration that the purpose of the newspaper interview was to refute misstatements made in the first newspaper article about him; and that throughout the interview he was expressing his opinion of what he believed the plaintiff and the NAACP were doing, including the exertion of unjustified pressure on him with the threat of reprisal. The defendant specified that he attempted to describe his impression of the pressure exerted by the plaintiff by indicating that he believed he was being extorted by the plaintiff, but at no time did he intend to say that he accused the plaintiff of having committed a crime. With respect to the radio interview, the defendant asserted that his comments were "defensive in nature," and that he was expressing his opinion regarding the dispute and why and how the plaintiff instigated it. The declaration of the defendant's manager stated that the plaintiff told him, in a private conversation, that the entire matter would "turn out alright," and that he needed $40,000 for a particular television show. He further stated that he believed the plaintiff was attempting to pressure the defendant into giving him money, and that when told about the conversation, the defendant refused to pay. In opposition to the motion, the plaintiff categorically denied having requested any donation from the defendant or anyone else during the meeting. The trial court grant the motion, finding that: (1) the defendant's statements were opinions, not facts; (2) the defendant's statements cannot reasonably be interpreted by a fact-finder as charging the plaintiff with a crime; and (3) the plaintiff failed to produce clear and convincing evidence that the defendant made the statements with actual malice. The plaintiff appealed.

The court of appeal reversed, holding that the defendant's statements were sufficiently factual to be susceptible of being proved true or false, and that triable issues of material fact existed regarding whether the defendant acted with actual malice (*234 Cal. App. 3d 886, 903-909)* . With regard to the defendant's assertion that his comments were statements of opinion, rather than assertions of fact, the court discussed *Milkovich v. Lorain Journal Co. (1990) 497 U.S. 1, 110 S. Ct. 2695, 111 L. Ed. 2d 1* [*see § 142.86[3][a]*]. In *Milkovich*, the United States Supreme Court held that no separate constitutional privilege for opinion is required to ensure the freedom of expression guaranteed by *U.S. Const. amend. I*. In determining whether a false statement is actionable, a court must decide whether a reasonable trier of fact could conclude that the published statements imply a provably false factual assertion (*234 Cal. App. 3d 886, 902-903)* . Using the *Milkovich* approach, the court analyzed the defendant's statements. The court observed that the defendant's characterization of the plaintiff as an "extortionist," taken in context, did not amount to a literal criminal charge; rather, it asserted the plaintiff's wrongful use of his position with the NAACP to solicit contributions by either threatening to create a baseless public controversy or promising to ignore a genuine discrimination problem (*234 Cal. App. 3d 886, 903)* . The court then discussed whether this assertion is sufficiently factual to be susceptible of being proved true or false. The defendant argued that, regardless of what *Milkovich* may dictate under the *First Amendment*, the California Constitution [*Cal. Const. art. I, § 2(a)*] provides broader protection to freedom of speech and protects statements of

opinion, pursuant to *Baker v. Los Angeles Herald Examiner (1986) 42 Cal. 3d 254, 228 Cal. Rptr. 206, 721 P.2d 87* . The court noted that *Baker*, which described a "totality of circumstances" test to determine whether a statement was one of fact or opinion, neither discussed nor relied on *Cal. Const. art. I, § 2(a)*, but rested its decision solely on the *First Amendment* (*234 Cal. App. 3d 886, 905)* .

Furthermore, the court stated, *Baker* drew a distinction between statements of fact and opinion, relying on language of cases disapproved of by *Milkovich*, which explained that the breathing space that freedoms of expression require in order to survive is adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between opinion and fact (*234 Cal. App. 3d 886, 906)* .

Moreover, the court noted that the California Supreme Court has expressed the view that an expanded constitutional protection for media defendants is not warranted under the California Constitution (construing language not on point in *Brown v. Kelly Broad. Co. (1989) 48 Cal. 3d 711, 257 Cal. Rptr. 708, 771 P.2d 406* , discussed in *§ 142.87[3][a]*) (*234 Cal. App. 3d 886, 906)* . The court further stated that even assuming the continued vitality of *Baker*'s approach on independent state grounds, the defendant's comments are nonetheless actionable, because under the "totality of circumstances" test, an average listener could reasonably understand the statements to be factual (*234 Cal. App. 3d 886, 907)* . The court also concluded that, by virtue of the sharply contrasting versions of the events that transpired at the meeting between the plaintiff and the defendant, as well as the conflicting inferences capable of being drawn from the evidence, triable issues of material fact exist (*234 Cal. App. 3d 886, 907-908)* .

[4] Additional Authorities

[a] No Broader Protection Afforded Under California Constitution

The facts and procedural background of *Weller v. American Broad. Cos., Inc. (1991) 232 Cal. App. 3d 991, 283 Cal. Rptr. 644* , are discussed in *§ 142.85[3][a]*. The court of appeal held that the allegedly defamatory statements impliedly asserted facts that were susceptible of being proved false, and hence were actionable (*232 Cal. App. 3d 991, 1002-1003)* . The court also rejected the defendant's contention that it should construe *Cal. Const. art. I, § 2(a)* to extend even greater protection to this type of speech than the *First Amendment* (*232 Cal. App. 3d 991, 1006-1007)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationDefensesFair Comment & OpinionTortsIntentional TortsDefamationElementsGeneral Overview

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CHAPTER 142 LIBEL AND SLANDER (DEFAMATION)
PART II. FORMS

14-142 California Points & Authorities § 142.87

§ 142.87 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--Media Defendant Has No Public-Interest Privilege Under Civ. Code § 47(c) in Action by Private-Figure Plaintiff

[1] FORM

[*Caption. See § 142.66.*]

IN AN ACTION BROUGHT BY A PRIVATE FIGURE, *CIVIL CODE SECTION 47(c)* DOES NOT GIVE A MEDIA DEFENDANT A PRIVILEGE FOR PUBLICATION OF DEFAMATORY STATEMENTS BASED ON PUBLIC INTEREST.

No Public-Interest Privilege for Media in *Civil Code Section 47(c)* in Defamation Action Brought by Private Individual. A publication or broadcast by the news media to the general public regarding a private person is not privileged under *Civ. Code § 47(c)*, regardless of whether the communication pertains to a matter of public interest (*Brown v. Kelly Broad. Co. (1989) 48 Cal. 3d 711, 719, 738, 257 Cal. Rptr. 708, 771 P.2d 406* (decided under former Civ. Code § 47(3)).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion for summary judgment on the basis that the defendant has no public-interest privilege under *Civ. Code § 47(c)* because the plaintiff is a private figure.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should refer to facts showing that the plaintiff is not a public official or a public figure. For forms of memoranda supporting this argument, see *§ 142.66* and *§ 142.67*.

[3] Discussion of Authorities

[a] No Public-Interest Privilege for Media in Civil Code Section 47(c) in Defamation Action Brought by Private Individual

In ***Brown v. Kelly Broad. Co.*** *(1989) 48 Cal. 3d 711, 257 Cal. Rptr. 708, 771 P.2d 406* , the plaintiff was a licensed contractor who sued a television station and its reporter for broadcasting two stories stating that the plaintiff's work on remodeling a home was shoddy and that she had refused to correct mistakes she had made. The trial court granted the defendants' motion for summary judgment based on the conditional privilege of former Civ. Code § 47(3) [*now see Civ. Code § 47(c)*]. The court of appeal reversed the judgment, agreeing that the privilege applied but stating that a triable issue of fact regarding malice had been alleged.

The Supreme Court affirmed the judgment of the court of appeal, but not on the basis that a triable issue of malice existed. Rather, the Court based its affirmance on the ground that the broadcasts were not subject to privilege under the statute. The Court held that the news media has no public-interest privilege under former Civ. Code § 47(3) [*now see Civ. Code § 47(c)*] to make false statements regarding a private individual (*48 Cal. 3d 711, 719, 756)* . The Court stated that the wording of the statute, its legislative history, and judicial constructions of it did not support the interpretation that such an expansive privilege existed (*48 Cal. 3d 711, 723-738)* . The Court further stated that policy considerations also favor the right of private individuals who have not thrust themselves in the public light to protection of their reputations. In addition, the Court pointed out that media defendants already have constitutional protections. Private-figure plaintiffs are already required to prove at least negligence to recover any damages, and if the statement involves a matter of public concern, private-figure plaintiffs must prove the falsity of the defamation. They must also prove actual malice to recover presumed or punitive damages (*48 Cal. 3d 711, 742-746)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationDefensesPrivilegesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral Overview

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14-142 California Points & Authorities § 142.88

§ 142.88 Opposing Motion for Summary Adjudication [Code Civ. Proc. 437c(f)] of Claim for Exemplary Damages [Civ. Code § 3294]--By Plaintiff--Conspicuousness of Retraction Is Jury Question [Civ. Code § 48a]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN OPPOSITION TO MOTION
vs.	)	FOR SUMMARY ADJUDICATION
_____ [*name*],	)	[*Code Civ. Proc. § 437c(f)*]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Trial Date: _____]

_____

A COURT CANNOT DECIDE AS A MATTER OF LAW THAT A NEWSPAPER'S RETRACTION WAS PRINTED IN SUBSTANTIALLY AS CONSPICUOUS A MANNER AS THE ALLEGEDLY LIBELOUS STATEMENTS; THAT IS A QUESTION OF FACT FOR THE JURY TO DECIDE WHEN UNDER THE FACTS REASONABLE JURORS COULD DIFFER.

A. Statutory Requirement That Retraction Be Made in Substantially as Conspicuous a Manner as Allegedly Libelous Statement. [*See § 142.62, Paragraph B.*]

B. Conspicuousness of Retraction Is Question of Fact for Jury. The conspicuousness of the retraction in comparison

with the conspicuousness of the original allegedly libelous statements is a question of fact for the jury to decide, and it is error for the court to decide this issue as a matter of law (*Pierce v. San Jose Mercury News (1989) 214 Cal. App. 3d 1626, 1630-1633, 263 Cal. Rptr. 410*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a defendant's motion for summary adjudication of a claim for exemplary damages that is grounded on the insufficiency of the plaintiff's retraction under *Civ. Code § 48a*. The basis for opposition to the motion is that the conspicuousness of the retraction is a question for the jury, not the court, to decide.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach opposing affidavits or declarations and a separate statement of undisputed facts [*see Code Civ. Proc. § 437c(b)*] that include facts showing that the retraction was not as conspicuously placed as were the original libelous statements.

In an appropriate case, these points may be submitted in opposition to the motion supported by the points *in § 142.62*.

[3] Discussion of Authorities

[a] Conspicuousness of Retraction Is Question of Fact for Jury

In ***Pierce v. San Jose Mercury News*** *(1989) 214 Cal. App. 3d 1626, 263 Cal. Rptr. 410* , a newspaper published an account in its morning edition of an internal investigation by the police that had led to disciplinary action being taken against certain officers. The article stated that the plaintiff, a police captain, had been given an official letter of reprimand. The plaintiff had not been given an official letter of reprimand, nor had he been disciplined. The chief of police called the newspaper and advised several people, including the article's author and the editor, of the mistake concerning the plaintiff and of a number of other mistakes in the article. The chief asked if corrections could be made in the afternoon edition and was told it was not too late for corrections to be made. The plaintiff also called the article's author and told her that he had not been reprimanded or disciplined. However, the same article was printed in the afternoon edition, at the top of the front page with a bold headline concerning the investigation and disciplinary action. The next day, the newspaper published an article under the headline, "Police Officials Dispute Extent of Misconduct." Subsequently, the plaintiff mailed a written retraction demand to the paper. On Christmas Day, the newspaper printed a retraction in its regular column entitled, "Setting the Record Straight," on page two, in part stating that the plaintiff had not received a letter of reprimand nor been disciplined. The plaintiff sued for libel and intentional infliction of emotional distress. The defendant moved for summary judgment or summary adjudication of the issues. The court held as a matter of law that the paper's retraction complied with *Civ. Code 48a* insofar as the conspicuousness of the retraction, and that, therefore, the plaintiff's award was limited to special damages. The plaintiff appealed.

The court of appeal reversed, holding that that the issue of whether a retraction is sufficiently conspicuous is a question for the jury and not the court to decide (*214 Cal. App. 3d 1626, 1630-1631)* . The court stated that all California courts that have considered the issue have found that this question is for the jury. The court discussed another court of appeal opinion, *Twin Coast Newspapers, Inc. v. Superior Court (1989) 208 Cal. App. 3d 656, 659-660, 256 Cal. Rptr. 310*

[for discussion, *see § 142.62[3][a]*], which held that the conspicuousness of a retraction is a question of fact for the jury, but that under its facts, no reasonable juror could find the retractions insufficient under the statutory standard (*214 Cal. App. 3d 1626, 1633)* . In contrast, in the present case, the court stated that reasonable jurors could differ on the finding of the sufficiency of the retraction based on the facts. The retraction had no headline other than the usual "Setting the Record Straight," and the retraction was on the bottom of page two in a holiday edition of the paper. The defamatory statement, however, appeared in the afternoon edition, was headlined "Cops Accused," mentioned in the second sentence that a captain was disciplined, and named the plaintiff first in its list of those accused. Accordingly, the court held that the question should have been submitted to the jury.

NOTE:

Code Civ. Proc. § 437c(f) has subsequently been amended to eliminate summary adjudication of "issues." It now provides for summary adjudication of a cause of action, defense, claim for punitive damages, or the issue whether one or more defendants owed a duty to one or more plaintiffs [*Code Civ. Proc. § 437c(f)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral OverviewTortsIntentional TortsDefamationRemediesDamagesTortsIntentional TortsDefamationRemediesRetractions

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14-142 California Points & Authorities § 142.89

§ 142.89 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10]--No Constitutional Neutral Reportage Privilege For Publishing Defamatory Material About Private Figure

[1] FORM

[*Caption. See § 142.63.*]

THE DEMURRER SHOULD BE OVERRULED BECAUSE THERE IS NO CONSTITUTIONAL NEUTRAL REPORTAGE PRIVILEGE RECOGNIZED IN CALIFORNIA FOR REPUBLICATION OF A LIBEL CONCERNING A PRIVATE FIGURE.

A. No State or Federal Constitutional Privilege For Republication of Libel Concerning Private Figure. There is no federal or state constitutional "neutral reportage" privilege for the republication of libelous materials concerning a private figure (*Khawar v. Globe Int'l, Inc. (1998) 19 Cal. 4th 254, 273, 79 Cal. Rptr. 2d 178, 965 P.2d 696*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a general demurrer to a complaint if the demurrer asserts a constitutional privilege protecting the neutral republication of allegedly defamatory materials about a private person. This form may also be adapted for use in another procedural context, such as a trial or appellate brief, in which counsel wishes to raise the issue of the lack of a neutral reportage privilege for materials about a private person.

Counsel should insert argument in the form showing the relationship between the facts of the case and the point of law raised. Thus, counsel should insert facts showing that the plaintiff is a private figure, rather than a public figure, as to the events that are the subject of the allegedly defamatory materials.

[3] Discussion of Authorities

[a] No State or Federal Constitutional Privilege For Republication of Libel Concerning Private Figure

In ***Khawar v. Globe Int'l, Inc.*** *(1998) 19 Cal. 4th 254, 79 Cal. Rptr. 2d 178, 965 P.2d 696* , the plaintiff, who in 1968 as a young Pakistani journalist had been photographed standing on a podium near Robert Kennedy minutes before his assassination, was identified as the actual killer of Kennedy in 1989 in an article in a tabloid newspaper. The newspaper article, which was based on a published book about the assassination, contained an enlarged copy of the photograph with an arrow identifying the plaintiff and statements identifying the plaintiff by name. The book on which the article was based did not identify the plaintiff by name, nor was identification through its published photograph possible. At the time the article was published, the plaintiff was a naturalized United States citizen living with his wife and children in Bakersfield, California, where he owned and operated a farm. After publication of the article, the plaintiff and his family were the subject of accusatory and threatening phone calls and threats, and their home and a car were vandalized. The plaintiff brought an action for defamation against the tabloid, and after a jury trial, was awarded actual, presumed, and punitive damages totaling $1,175,000. The court of appeal upheld the trial court judgment, finding that the plaintiff was not a public figure and that California has not adopted a neutral reportage privilege for private figures.

The California Supreme Court upheld the judgment against the tabloid newspaper. The Court first considered the question of whether the plaintiff was a public figure for purposes of the action. After reviewing the basic principles articulated by the United States Supreme Court in cases such as *Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789* (discussed in *§ 142.25[3][c]*), the California Supreme Court agreed with the lower courts that the plaintiff was not a public figure or limited purpose public figure for purposes of this controversy. The Court noted that the plaintiff had not intentionally placed himself into any public controversy, and that under the facts present, the plaintiff had not involuntarily become a public figure for purposes of the lawsuit. The court concluded that characterization as an involuntary public figure, if ever proper, can only occur if that person, not having voluntarily engaged the public's attention in order to influence the outcome of a public controversy, has nonetheless acquired such prominence in relation to the controversy as to permit media access sufficient to counter media-published defamatory statements. In the present case, the only evidence in the record that the plaintiff was ever questioned or interviewed about the events surrounding the assassination, the book, or the tabloid article occurred *after* and in response to the tabloid article. However, defendants charged with defamation cannot by their own actions transform a private figure into a public figure, and as such, the Court ruled that the plaintiff did not have sufficient media access to become an involuntary public figure (*19 Cal. 4th 254, 265-266)* . Further, the Court rejected the defendant's argument that the plaintiff had voluntarily elected to encounter an increased risk of injury from defamatory falsehoods by seeking and obtaining a position on the podium close to Kennedy, knowing that there would be substantial media coverage. This argument was rejected in part because the plaintiff by his conduct on the podium did not voluntarily associate himself with any controversy relevant to the lawsuit, whether the controversy was considered the assassination or any post-assassination theorizing about the identity of the killer, because his actions occurred prior to these controversies arising (*19 Cal. 4th 254, 266-267)* .

The Court then addressed the issue of whether a "neutral reportage" privilege based on constitutional principles protects the republication of defamatory statements about private figures. The Court noted that some lower courts in other jurisdictions had held that such a privilege exists if the materials concern public figures, although neither the United States nor California Supreme Courts had ever held that the privilege exists. Without deciding whether the privilege would ever be required by state or federal constitutional principles as to public figures, however, the Court held that the privilege did not exist if the allegedly defamatory publication involves a private figure such as the plaintiff. In reaching its decision, the Court noted that most courts that had recognized the privilege had restricted it to defamatory publications concerning public figures (*19 Cal. 4th 254, 268-271)* .

The Court also held that the status of the original defaming party as a public figure does not justify protecting republication of their statements, even if the statements concern private figures. Reviewing the opinions of legal commentators, the Court agreed with the majority that had concluded that although the public has a legitimate interest in knowing that prominent individuals have made charges, perhaps unfounded, against a private figure, recognition of an absolute privilege for the republication of those charges would be inconsistent with the United States Supreme

Court's insistence on the need for balancing the *First Amendment* interest in promoting the broad dissemination of information relevant to public controversies against the reputation interests of private figures. The Court concluded that the reporting of false and defamatory accusations about a private person will rarely provide valuable information in the resolution of a matter of public concern, while such reporting can have a devastating effect on the reputation of the accused individual. Further, a private person, by virtue of his or her status as a private person, has not voluntarily elected to encounter an increased risk of defamation by entering a public debate and may lack sufficient media access to counter the accusations (*19 Cal. 4th 254, 271-273)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationDefensesPrivilegesGeneral OverviewTortsIntentional TortsDefamationDefensesPrivilegesConstitutional Privileges

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14-142 California Points & Authorities § 142.90

§ 142.90 Supporting Injunctive Relief--Injunction Against Repeating Defamatory Statements Permitted

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

AN INJUNCTION PREVENTING DEFENDANT FROM REPEATING STATEMENTS ADJUDICATED TO BE DEFAMATORY IS A PERMISSIBLE REMEDY AND DOES NOT CONSTITUTE A PRIOR RESTRAINT.

Injunction Prohibiting Repetition of Defamatory Statements Permitted. A narrowly-drawn injunction issued after a trial at which defendant's particular speech has been adjudicated to be defamatory may properly enjoin the defendant from repeating the defamation and is not considered an unconstitutional prior restraint on speech (*Balboa Island Village Inn, Inc. v. Lemen (2007) 40 Cal. 4th 1141, 1155-1156, 57 Cal. Rptr. 3d 320, 156 P.3d 339*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of the proposition that a plaintiff may seek an injunction to prevent a defendant from repeating in the future statements that are adjudicated at trial to be defamatory.

[b] Argument

Counsel should include argument in the form showing the relationship between the facts of the case and the point of law stated. Thus, counsel should include facts detailing the defamatory statements made by the specific defendant and discuss the narrow scope of the injunction being sought.

[c] Opposing Memoranda

This form may be submitted in opposition to the points discussed in *§ 142.23*.

[3] Discussion of Authorities

[a] Injunction Prohibiting Repetition of Defamatory Statements Permitted

In *Balboa Island Village Inn, Inc. v. Lemen (2007) 40 Cal. 4th 1141, 57 Cal. Rptr. 3d 320, 156 P.3d 339* , plaintiff owned a nightclub that was adjacent to defendant's residence. Annoyed by the noise and late-night activity created by the club, defendant engaged in activities such as photographing and videotaping patrons and workers at the club, circulating petitions, and making disparaging comments about the club and the activities occurring there, suggesting that the club was owned by organized crime and was the site of activities such as prostitution, drug sales, and the filming of pornographic videos. Plaintiff sued defendant, seeking injunctive relief to prevent defendant from engaging in such activities in the future. After a bench trial, the trial court found for plaintiff and issued a permanent injunction that prohibited defendant from initiating contact with any persons known by defendant to be employed by the club, prohibited defendant from making specified disparaging comments about the club, and prohibited defendant from filming within 25 feet of the club, unless filming from her own property or documenting an actual, immediate disturbance or damage to her property. Defendant appealed. The court of appeal upheld the filming ban, but reversed the other two elements of the injunction as unconstitutional prior restraints on defendant's free speech rights. The California Supreme Court granted review.

The Supreme Court affirmed the judgment of the court of appeal, while disagreeing with that court's rationale, and remanded. The Supreme Court agreed that the trial court's injunction was overly broad, but held that a narrowly-drawn injunction issued after a trial at which defendant's particular speech has been adjudicated to be defamatory may properly enjoin the defendant from repeating the defamation and is not an unconstitutional prior restraint on speech (*40 Cal. 4th 1141, 1155-1156)* . The Court noted the distinction between prohibiting a person from making or writing a statement before the statement is made or written and prohibiting a person from repeating a statement or republishing a writing that has already determined at trial to be defamatory and unlawful (*40 Cal. 4th 1141, 1150)* . The trial court's injunction was overly broad because it applied not just to the particular defendant, but also to her agents and other persons acting in concert with her or on her behalf, despite the lack of evidence that anyone other than defendant had defamed the restaurant (*40 Cal. 4th 1141, 1160)* . The Supreme Court noted that if a statement that was once false becomes true at a later time, the defendant may move the court to modify or dissolve the injunction (*40 Cal. 4th 1141, 1161)* . However, the Court also noted that an otherwise permissible injunction may not prevent a defendant from presenting grievances to government officials with relevant enforcement responsibilities (*40 Cal. 4th 1141, 1160-1161)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationElementsGeneral OverviewTortsIntentional TortsDefamationRemediesGeneral OverviewTortsIntentional TortsDefamationRemediesEquitable Remedies

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CHAPTER 143 LIMITATION OF ACTIONS

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§ 143.syn Synopsis to Chapter 143: LIMITATION OF ACTIONS

§ 143.01 Scope of Chapter

§ 143.02 Governing Statutes

§ 143.03 How to Use the Forms in This Chapter

[1] Page Limits on Memoranda

[2] Using the Forms to Build a Draft Memorandum

§ 143.04 Raising Defense of Statute of Limitations

[1] By Demurrer

[2] By Answer

[3] By Other Methods

§ 143.05 Related Pleading and Practice Chapters

§ 143.06 Related Memoranda Chapters

§§ 143.07-143.19 [Reserved]

§ 143.20 Supporting General Demurrer to Complaint [Code Civ. Proc. § 430.10]--Bar of Statute of Limitations (General Form) [Code Civ. Proc. § 430.10(e)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Raising Statute of Limitation by Demurrer

[b] Commencement of Action

[c] Accrual of Cause of Action

[d] Running of Period of Limitation

[4] Additional Authorities

[a] Raising Statute of Limitations by Demurrer

[b] Accrual of Cause of Action

[c] Running of Period of Limitation

§ 143.21 Supporting General Demurrer to Complaint [Code Civ. Proc. § 430.10]--Bar of Statute of Limitations [Code Civ. Proc. § 430.10(e)]--Later Enacted and More Specific of Two Statutes of Limitations Is Controlling

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Later, More Specific Statute Controls

[4] Additional Authorities

[a] Later, More Specific Controls

§ 143.22 Supporting General Demurrer to Complaint [Code Civ. Proc. § 430.10]--Bar of Statute of Limitations [Code Civ. Proc. § 430.10(e)]--Shorter Period of Two Equally Applicable Statutes of Limitations Is Controlling

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Shorter Limitation Period Controls

§ 143.23 Supporting General Demurrer to Complaint [Code Civ. Proc. § 430.10]--Bar of Statute of Limitations [Code Civ. Proc. § 430.10(e)]--Amended Statute of Limitations Is Controlling

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Shortened Statute of Limitations Applicable Retroactively

§ 143.24 Supporting General Demurrer to a Complaint [Code Civ. Proc. § 430.10]--Bar of Statute of Limitations [Code Civ. Proc §§ 340.1(l), 430.10(f)]--Failure of Plaintiff to Timely File Required Certificates of Merit in Childhood Sexual Abuse Case When Plaintiff 26 Years or Older at Time Action Filed [Code Civ. Proc. §§ 340.1(g), (h)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Sustaining Demurrer Without Leave to Amend

[4] Additional Authorities

[a] Required Certificate of Merit

§ 143.25 Supporting General Demurrer to a Complaint [Code Civ. Proc. § 430.10]--Bar of Statute of Limitations [Code Civ. Proc. § 340.1(a), (b)]--Failure of Plaintiff to File Timely Action for Recovery of Damages Suffered as a Result of Childhood Sexual Abuse When Plaintiff 26 Years or Older at Time Action Commenced

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Limitation Period for Bringing Action

§ 143.26 Supporting General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Bar of Statute of Limitations [Code Civ. Proc. § 366.2]--Failure of Plaintiff to Timely File Equitable Indemnity Action Against Decedent's Personal Representative

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Limitation Period for Bringing Action Against Decedent's Personal Representative.

[b] Code of Civil Procedure Section 366.2 Limitations Period Applies to Equitable Indemnity Action Against Decedent's Personal Representative

[4] Additional Authorities

[a] Application of Code of Civil Procedure Section 366.2

§ 143.27 Supporting General Demurrer to Complaint [Code Civ. Proc. § 430.10]--Bar of Statute of Limitations [Code Civ. Proc. § 430.10(e)]--Discovery Rule Inapplicable

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Discovery Rule Inapplicable

[b] The Single Publication Rule Renders The Delayed Discovery Rule Inapplicable

§ 143.28 Supporting General Demurrer to Complaint [Code Civ. Proc. § 430.10]--Bar of Statute of Limitations [Code Civ. Proc. § 430.10(e)]--Tolling for Minority Under Code Civ. Proc. § 352(a) Inapplicable

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Minor's Tolling Provision of Code of Civil Procedure § 352(a) Ceases to Apply and Minor's Causes of Action Accrue on Date of Emancipation

§ 143.29 Supporting Motion for Separate Trial of Special Defense [Code Civ. Proc. § 597]--Bar of Statute of Limitations

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

§ 143.30 Supporting Motion for Separate Trial of Defense on Statute of Limitations--Medical Malpractice [Code Civ. Proc. § 597.5]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Separate Trial for Defense of Statute of Limitations

§ 143.31 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10]--Bar of Statute of Limitations Not Apparent on Face of Complaint--General Form

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Defect Required to Appear on Face of Complaint

[4] Additional Authorities

[a] Defect Required to Appear on Face of Complaint

§ 143.32 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10]--Action Commenced Timely

[1] FORM

[2] Comments

[a] Use of Form

[b] Procedure

[3] Discussion of Authorities

[a] Action Timely Commenced When Complaint Complying With State Requirements Presented Timely to Clerk for Filing

[4] Additional Authorities

[a] In General

§ 143.33 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10]--Action Not Appearing Wholly Barred

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Action Not Entirely Barred

[b] Actionable and Appreciable Harm Occurring Before and Within Limitations Period

§ 143.34 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Complaint Alleges Defendant's Absence From State [Code Civ. Proc. § 351]

[1] FORM

[2] Comments

[a] Use of Form

[b] Business Entities

[c] Cases Arising in Interstate Commerce

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Absence From State

[4] Additional Authorities

[a] Absence From State

§ 143.35 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10]--Complaint Alleges Disability--Minority [Code Civ. Proc. §§ 328, 352(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

§ 143.36 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10]--Complaint Alleges Disability--Insanity [Code Civ. Proc. §§ 328, 352(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Memoranda

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Insanity Based on Injury or Illness

[b] Injury Causing Disability Is Basis of Cause of Action

[c] Appointment of Conservator or Guardian Ad Litem

§ 143.37 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Complaint Alleges Disability--Imprisonment [Code Civ. Proc. §§ 328.5, 352.1]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Possibility of Parole

§ 143.38 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Complaint Alleges Disability--War [Code Civ. Proc. § 354]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

§ 143.39 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Complaint Alleges Disability--Disability of Attorney

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

[3] Discussion of Authorities

[a] Disability of Attorney Rendering Compliance Impossible

§ 143.40 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10]--Complaint Alleges Death of Person Entitled to Sue [Code Civ. Proc. § 366.1; Prob. Code §§ 551, 552(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

§ 143.41 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Complaint Alleges Death of

Person Against Whom Action May Be Brought [Code Civ. Proc. § 366.2; Former Code Civ. Proc. § 353(b)-(d)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Substitution of Personal Representative

§ 143.42 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Complaint Alleges Court's Assumption of Jurisdiction Over Attorney's Practice Pursuant to Bus. & Prof. Code § 6180 or 6190 [Code Civ. Proc. § 353.1]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

§ 143.43 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Complaint Alleges Reversal of Judgment for Plaintiff on Appeal [Code Civ. Proc. § 355]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

§ 143.44 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Complaint Alleges Legal Inhibition to Sue [Code Civ. Proc. § 356]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

§ 143.45 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Period of Limitation Suspended

During Required Exhaustion of Administrative Remedies [Code Civ. Proc. § 356]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Other Legal Prevention

[b] Required Exhaustion of Administrative Remedies

[c] Effect of Suspension Period is to Extend Statutory Period

[4] Additional Authorities

[a] Required Exhaustion of Administrative Remedies

§ 143.46 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Statute of Limitations Equitably Tolled by Reasonable and Good Faith Pursuit of Alternative Remedy

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

[3] Discussion of Authorities

[a] Equitable Tolling of Statute of Limitations

[b] Reasonable and Good Faith Pursuit of Alternative Remedy

[c] Optional Exhaustion of Administrative Remedies

[d] Reasonable Promptness in Refiling

[4] Additional Authorities

[a] Equitable Tolling of Statute of Limitations

[b] Reasonable and Good-Faith Pursuit of Alternative Remedy

§ 143.47 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Period of Limitation Tolled by

Fraudulent Concealment of Defendant's Identity

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Tolling of Statute of Limitations by Fraudulent Concealment of Defendant's Identity

§ 143.48 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Period of Limitation Tolled by Secretly Committed Breach of Contract

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Tolling of Statute of Limitations by Defendant's Secretly Committed Breach of Contract

§ 143.49 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Period of Limitation Tolled by Commencement of Class Action for Members of Putative Class

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Tolling of Statute of Limitations by Commencement of Class Action

[4] Additional Authorities

[a] Tolling of Statute of Limitations by Commencement of Class Action in Another State

§ 143.50 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Complaint Alleges Estoppel to Raise Defense of Bar of Statute of Limitations

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Delay Induced by Defendant

[b] Fraud Not Necessary

[c] Requirements for Delay Due to Fraud

[d] Delay Resulted From Duress Caused by Defendant's Threats Against Plaintiff

[e] Equitable Estoppel Can Apply No Matter How Unequivocally the Statutory Language Containing the Applicable Limitations Period Is Expressed

[f] Equitable Estoppel Can Apply Although No Affirmative Conduct Is Involved

[4] Additional Authorities

[a] Delay Induced by Defendant

[b] Fraud Not Necessary

§ 143.51 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Complaint Alleges Defendant on Probation and Under Order of Restitution [Code Civ. Proc. § 352.5]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

§ 143.52 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Complaint Alleges Facts Showing Delayed Accrual of Cause of Action--Generally

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Action Based on Fraud or Mistake

[b] Breach of Fiduciary Duty

[4] Additional Authorities

[a] Action Based on Fraud or Mistake

[b] Breach of Fiduciary Duty

[c] Theft of Trade Secret

§ 143.53 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Complaint Alleges Facts Showing Delayed Accrual of Cause of Action--Action for Personal Injury Sustained Without Perceptible Trauma

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Delayed Accrual of Cause of Action in Certain Personal Injury Actions With No Perceptible Trauma

[4] Additional Authorities

[a] Delayed Accrual of Cause of Action in Certain Personal Injury Actions With No Perceptible Trauma

§ 143.54 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Complaint Alleges Facts Showing Delayed Accrual of Cause of Action--Injuries Arising Out of Exposure to Asbestos [Code Civ. Proc. § 340.2(a)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Time for Filing Claim for Injury or Illness Based on Exposure to Asbestos

[b] "Disability" Defined

[c] No Disability Within Meaning of Code of Civil Procedure Section 340.2 When Retirement Unrelated to Asbestos Exposure

[d] Asbestos Claim Not Extinguished by Operation of Law Until Adjudicated by a Court

§ 143.55 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Complaint Alleges Facts Showing Delayed Accrual of Cause of Action--Injuries Arising Out of Exposure to Hazardous Material or Toxic Substance [Code Civ. Proc. § 340.8]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Time for Filing Claim for Injury or Illness Arising Out of Exposure to Hazardous Material or Toxic Substance

[b] Media Reports, Alone, Do Not Give Rise to Inquiry Notice

§ 143.56 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Complaint Alleges Facts Showing Delayed Accrual of Cause of Action--Newly Discovered Claim During Action

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Discovery Rule Applies to Newly Discovered Claims During Action

§ 143.57 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Complaint Alleges Facts Showing Delayed Accrual of Cause of Action--Action for Damages Suffered as Result of Childhood Sexual Abuse [Code Civ. Proc. § 340.1(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Period of Limitation

[b] "Childhood Sexual Abuse" Defined

[c] Injury at Time of Abuse Does Not Prohibit Delayed Discovery

[d] Recollection of Childhood Abuse Does Not Prohibit Applying Delayed Discovery Principles to Plaintiff's Claim

[e] Enlarged Limitation Period of Code Civ. Proc. § 340.1 Applies to Childhood Sexual Abuse Continuing Beyond Childhood

[f] Period of Revival for Causes of Action Pursuant to Code Civ. Proc. § 340.1(a)(2) and (3)

§ 143.58 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Complaint Alleges Facts Showing Delayed Accrual of Cause of Action--Strict Liability or Negligence Action for Property Damage Caused by Asbestos

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Cause of Action for Property Damage by Asbestos Accrues When Asbestos Causes Contamination

§ 143.59 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Complaint Alleges Facts Showing Delayed Accrual of Cause of Action--Enforcement of Affirmative Covenant Running With Land

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Action for Breach of Covenant Running With the Land

§ 143.59A Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Complaint Timely Filed--Statute of Limitations for Action to Quiet Title Does Not Commence Until Adverse Claim Made Against Person Holding the Property

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Action to Quiet Title

§ 143.60 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Complaint Alleges Facts Showing Delayed Accrual of Cause of Action--Breach of Contract Committed in Secret

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Delayed Discovery Rule Applies to Breaches of Contract That Are Committed in Secret

§ 143.61 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Complaint Alleges Facts Showing Delayed Accrual of Cause of Action--Professional Malpractice--Other Than Legal or Medical

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Statute of Limitations

[b] Action Accrues on Later of Discovery or Damage

[c] Action Does Not Accrue Absent Damage

[d] Actual Harm Is Question of Fact

[e] Real Estate Appraiser

[f] Accountant

[4] Additional Authorities

[a] Accountant

§ 143.62 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Amended Statute of Limitations Does Not Apply

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Statute as Amended, if Applied, Would Cut Off Plaintiff's Cause of Action

§ 143.63 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Complaint Alleges Facts Showing That Cause of Action Arose Out of Insurer's Breach of Continuing Contractual Duty to Defend Plaintiff in Prior Action

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Breach of Title Insurer's Duty to Defend

[b] Breach of Liability Insurer's Duty to Defend

§ 143.64 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Amendment of Limitation Period Revived Lapsed Claim

[1] FORM

[2] Comments

[a] Use of Form

[b] Reply Memorandum

[3] Discussion of Authorities

[a] Lapsed Claims Subject to Revival

[4] Additional Authorities

[a] Lapsed Claims Subject to Revival

§ 143.65 Reply Memorandum Supporting General Demurrer to Complaint [Code Civ. Proc. § 430.10]--Bar of Statute of Limitations [Code Civ. Proc. § 430.10(e)]--Amendment of Limitation Period Does Not Revive Lapsed Claims

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Claims Generally Not Revived by Amendment

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14-143 California Points & Authorities § 143.01

§ 143.01 Scope of Chapter

This chapter contains points and authorities for use in supporting a general demurrer to a complaint based on the ground that the action is barred by a statute of limitations [*see §§ 143.20*-143.28]. It also includes forms opposing a demurrer based on the statute of limitations [*see §§ 143.31*-143.64] and a reply memorandum [*see § 143.65*].

The chapter also provides memoranda supporting separate trial of the statute of limitations defense, one for general use [*see § 143.29*] and one for use in medical malpractice actions [*see § 143.30*].

For points and authorities relating to the statute of limitations in legal and medical malpractice cases, including delayed discovery and tolling issues, see Ch. 24A, *Attorneys at Law: Malpractice* , and Ch. 175, *Physicians and Surgeons: Medical Malpractice* , respectively.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersGovernmentsLegislationStatutes of LimitationsGeneral Overview

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14-143 California Points & Authorities § 143.02

§ 143.02 Governing Statutes

The periods of time within which civil actions, and special proceedings of a civil nature [*see Code Civ. Proc. § 363,* must be commenced, in all cases except those in which a different period is specifically prescribed by statute, are set out in Title 2 of Part 2 (§ 312 et seq.)] of the Code of Civil Procedure [*Code Civ. Proc. § 312*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral Overview

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14-143 California Points & Authorities § 143.03

§ 143.03 How to Use the Forms in This Chapter

[1] Page Limits on Memoranda

One of the more significant drafting requirements to keep in mind are page limits: supporting and opposing memoranda must not exceed 15 pages, or 20 pages in summary judgment proceedings. A reply or closing memorandum may not exceed 10 pages. Exhibits, declarations, attachments, tables of contents, a table of authorities, or proof of service are not counted. Any party must obtain leave of court to file a longer memorandum [*see Cal. Rules of Ct., Rule 3.1113*]. These and other drafting requirements are discussed in further detail in *Ch. 1, Writing Legal Memoranda and Briefs, § 1.05*.

[2] Using the Forms to Build a Draft Memorandum

The forms included in this chapter are designed to be combined with other points and authorities to form a complete memorandum. For a detailed discussion on how to select and use the forms in the publication to build a draft memorandum and complete the draft, with detailed discussion of all drafting requirements and strategic or stylistic considerations, see *Ch. 1, Writing Legal Memoranda and Briefs, §§ 1.03*-1.06. For a skeletal form of memorandum for use in creating a properly formatted outline in which to compile relevant forms from this publication, see *Ch. 1, Writing Legal Memoranda and Briefs, § 1.10*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeContent & Form

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14-143 California Points & Authorities § 143.04

§ 143.04 Raising Defense of Statute of Limitations

[1] By Demurrer

The defense that an action is barred by a statute of limitations may be raised by demurrer [*see Code Civ. Proc. §§ 430.10-430.80*] when the ground of objection appears on the face of the pleading or from matter of which a court must or may take judicial notice [*see Code Civ. Proc. § 430.30*; *see also Basin Construction Corp. v. Department of Water & Power (1988) 199 Cal. App. 3d 819, 821-823, 245 Cal. Rptr. 178]* .

[2] By Answer

The defense may be raised by answer whenever it cannot be raised by demurrer [*see Code Civ. Proc. § 430.30*].

[3] By Other Methods

The defense of bar of a statute of limitations has been raised by methods other than demurrer and answer, such as the following:

- Motion for judgment on the pleadings [*see Wrightson v. Dougherty (1936) 5 Cal. 2d 257, 261-265, 54 P.2d 13* ; *but see Berendsen v. McIver (1954) 126 Cal. App. 2d 347, 353, 272 P.2d 76]* .

- Motion for nonsuit [*see Wrightson v. Dougherty (1936) 5 Cal. 2d 257, 265, 54 P.2d 13* ; *Bass v. Hueter (1928) 205 Cal. 284, 286-291, 270 P. 958* ; *Magpali v. Farmers Group, Inc. (1996) 48 Cal. App. 4th 471, 480, 55 Cal. Rptr. 2d 225]* .

- Motion for summary judgment [*see Graham v. Bank of Cal. (1961) 197 Cal. App. 2d 438, 439-444, 17 Cal. Rptr. 279* ; *see also Love v. Fire Ins. Exchange (1990) 221 Cal. App. 3d 1136, 1142-1143, 271 Cal. Rptr. 246]* .

- Motion to strike [*see PH II, Inc. v. Superior Court (1995) 33 Cal. App. 4th 1680, 1683, 40 Cal. Rptr. 2d 169* ; *Sullivan v. Wright (1954) 124 Cal. App. 2d 836, 837-838, 269 P.2d 671]* .

- Objection to introduction of evidence [*see Neff v. New York Life Ins. Co. (1947) 30 Cal. 2d 165, 174-175, 180 P.2d 900* ; *Staples v. Zoph (1935) 9 Cal. App. 2d 369, 370, 49 P.2d 1131* (*disapproved on other grounds in Bernson v. Browning-Ferris Industries (1994) 7 Cal. 4th 926, 936 n.6, 30 Cal. Rptr. 2d 440, 873 P.2d 613*); *but see Berendsen v. McIver (1954) 126 Cal. App. 2d 347, 353, 272 P.2d 76* ; *Salveter v. Salveter (1933) 135 Cal. App. 238, 239-241, 26 P.2d 836]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersGovernmentsLegislationStatutes of LimitationsGeneral Overview

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14-143 California Points & Authorities § 143.05

§ 143.05 Related Pleading and Practice Chapters

For further discussion and forms of allegations, affirmative defenses, and demurrers involving the limitation of actions, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* .

Chapters that cover particular causes of action in California Forms of Pleading and Practice frequently include discussion and forms relating to the applicable statute or statutes of limitations. For further reference, see the General Index to that publication or the chapter covering a particular cause of action.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersGovernmentsLegislationStatutes of LimitationsGeneral Overview

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14-143 California Points & Authorities § 143.06

§ 143.06 Related Memoranda Chapters

Related forms of memoranda of points and authorities that may be useful in particular cases involving the limitation of actions may be found in many chapters in this publication, including the following:

- Ch. 12, *Accounting*.
- Ch. 24, *Attorneys at Law: Substitution, Withdrawal, Disqualification, and Authority to Appear*.
- Ch. 24A, *Attorneys at Law: Malpractice*.
- Ch. 46, *Conspiracy*.
- Ch. 71, *Demurrers and Motions for Judgment on the Pleadings*.
- Ch. 104, *Fictitiously Named Defendants (DOES)*.
- Ch. 105, *Fraud and Deceit*.
- Ch. 131, *Judgments*.
- Ch. 160, *Motions to Strike*.
- Ch. 175, *Physicians and Surgeons: Medical Malpractice*.
- Ch. 176, *Physicians and Surgeons: Licensing and Professional Discipline*.
- Ch. 196, *Public Entities*.
- Ch. 230, *Trust Deeds and Real Property Mortgages*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeGeneral Overview

California Points & Authorities

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 143 LIMITATION OF ACTIONS
PART I. INTRODUCTION

14-143 California Points & Authorities §§ 143.07-143.19

[Reserved]

§§ 143.07[Reserved]

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 143 LIMITATION OF ACTIONS
PART II. FORMS

14-143 California Points & Authorities § 143.20

§ 143.20 Supporting General Demurrer to Complaint [Code Civ. Proc. § 430.10]--Bar of Statute of Limitations (General Form) [Code Civ. Proc. § 430.10(e)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF GENERAL DEMURRER OF _____ [*name*] TO COMPLAINT OF _____ [*name*]
vs.	)	
_____ [*name*],	)	
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT SHOWS ON ITS FACE THAT IT IS BARRED BY THE STATUTE OF LIMITATIONS.

A. Objection by Demurrer. The party against whom a complaint has been filed may object, by demurrer as provided in *Section 430.30 of the Code of Civil Procedure*, to the complaint on the ground that it does not state facts sufficient to constitute a cause of action (*Code Civ. Proc. § 430.10(e)*). When any ground for objection to a complaint appears on the face thereof (*or* from any matter of which the court is required to or may take judicial notice), the objection on that ground may be taken by a demurrer to the complaint (*Code Civ. Proc. § 430.30(a)*).

B. Raising Statute of Limitations by Demurrer. The objection that an action is barred by a statute of limitations may be set up by demurrer (*California Safe Deposit & Trust Co. v. Sierra Valleys Ry. Co. (1910) 158 Cal. 690, 697-699, 112 P. 274* ; *Kendrick v. City of Eureka (2000) 82 Cal. App. 4th 364, 367, 98 Cal. Rptr. 2d 153*). The objection that an action is barred by a statute of limitations is deemed to be included in the general ground of demurrer that the complaint does not state facts sufficient to constitute a cause of action (*Bell v. Bank of Cal. (1908) 153 Cal. 234, 245, 94 P. 889* ; *see Iverson, Yoakum, Papiano & Hatch v. Berwald (1999) 76 Cal. App. 4th 990, 995, 90 Cal. Rptr. 2d 665* (complaint showing action barred by statute of limitations is subject to general demurrer)).

C. Limitation on Commencement of Action. Civil actions, without exception, can be commenced only within the periods prescribed in Title 2 of Part 2 (Section 312 et seq.) of the Code of Civil Procedure, after the cause of action shall have accrued, unless where, in special cases, a different limitation is prescribed by statute (*Code Civ. Proc. § 312*).

D. Commencement of Action. An action is commenced, within the meaning of Title 2 of Part 2 (Section 312 et seq.) of the Code of Civil Procedure, when the complaint is filed (*Code Civ. Proc. § 350*). It is mandatory for court clerks to demand and receive the fee required by statute before documents or pleadings are filed (*Duran v. St. Luke's Hospital (2004) 114 Cal. App. 4th 457, 459, 8 Cal. Rptr. 3d 1*). A petition to preserve evidence does not constitute commencement of a suit (*Orr v. City of Stockton (2007) 150 Cal. App. 4th 622, 633, 58 Cal. Rptr. 3d 662*).

E. Accrual of Cause of Action. A cause of action invariably accrues when there is a remedy available (*Heyer v. Flaig (1969) 70 Cal. 2d 223, 230, 74 Cal. Rptr. 225, 449 P.2d 161*).

F. Running of Period of Limitation. The period of limitation begins to run when a suit may be maintained; that is, when actual and appreciable harm is inflicted (*Osborn v. Hopkins (1911) 160 Cal. 501, 506, 117 P. 519* ; *Barton v. New United Motor Manufacturing, Inc. (1996) 43 Cal. App. 4th 1200, 1209, 51 Cal. Rptr. 2d 328*). The on-going effects of harm, alone, cannot breathe life into prior, uncharged acts (*Ledbetter v. Goodyear Tire & Rubber Co. (2007) 550 U.S. 618, 127 S. Ct. 2162, 167 L. Ed. 2d 982*).

G. Period of Limitation. An action for _____ [*type of present action*] must be commenced within _____ [*period of limitation*] after the cause of action has accrued (_____ [*statutory and/or decisional authority*]).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a general demurrer to a complaint (or, with slight modification of wording, a cross complaint), where the demurrer asserts that the complaint fails to state facts sufficient to constitute a cause of action in that it appears on the face thereof, or from a matter of which the court is

required to or may take judicial notice, that the action is barred by a statute of limitation.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications these points and authorities may be used to support a defendant's motion for judgment on the pleadings [*see Wrightson v. Dougherty (1936) 5 Cal. 2d 257, 261-265, 54 P.2d 13]* , or a defendant's motion for summary judgment [*see Code Civ. Proc. § 437c*; *State Farm Fire & Casualty Co. v. Superior Court (1989) 210 Cal. App. 3d 604, 606, 612-613, 258 Cal. Rptr. 413* ; *Graham v. Bank of Cal. (1961) 197 Cal. App. 2d 438, 439-444, 17 Cal. Rptr. 279]* .

[c] Related Pleading and Practice Forms

For a form of demurrer to a complaint based on the bar of a statute of limitations, see Ch. 345, *Limitation of Actions* , in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Raising Statute of Limitation by Demurrer

California Safe Deposit & Trust Co. v. Sierra Valleys Ry. Co. *(1910) 158 Cal. 690, 112 P. 274* , was an action to foreclose a deed of trust securing corporate bonds. The defendant did not demur but asserted in the answer that the action was barred by a statute of limitations. On appeal from a judgment on the merits, it was contended that the defense of limitation was waived by failure to raise it in a demurrer. The Supreme Court said, "[T]he only ground of demurrer applicable [in this case] is the failure to state facts sufficient [to constitute a cause of action], and this ground is, by the express provision of section 434 [superseded by *Code Civ. Proc. § 430.80(a)*], not waived by failure to demur. The true rule, under our practice, is, we think, that the defendant may, if the defect appears on the face of the complaint, set up the bar of the statute either by demurrer or by answer. If the complaint does not show that the statute has run, the defendant must plead his right by answer."

Bell v. Bank of Cal. *(1908) 153 Cal. 234, 94 P. 889* , was an action for the recovery of shares of stock. The defendant asserted in a general demurrer that the action was barred by a statute of limitations, and the trial court sustained the demurrer and dismissed the action. The method of asserting the defense of bar of a statute of limitations was not, apparently, an issue either in the trial court or on appeal; but the Supreme Court said the bar of the statute of limitations is not specified in the code as a ground of demurrer and that objection to a complaint, while required to be stated in the demurrer, must be deemed to be included within the ground of want of facts sufficient to constitute a cause of action (*153 Cal. 234, 245)* .

Kendrick v. City of Eureka *(2000) 82 Cal. App. 4th 364, 98 Cal. Rptr. 2d 153* , involved an action for wrongful death and due process violations arising out of the death of plaintiff's decedents in a county jail. The plaintiffs filed an action in federal court that asserted federal claims and supplemental state claims. The district court determined all the federal claims in defendants' favor on motions for summary judgment. The district court also declined to exercise jurisdiction over the state claims and dismissed them without prejudice. The trial court sustained the defendant's demurrer to plaintiff's complaint based on the ground that statute of limitations had expired. Plaintiff's appealed the latter order, which was affirmed. The United States Supreme Court denied the plaintiffs' petition for certiorari. Thereafter, plaintiffs filed a complaint in state court. The defendants demurrered on the basis of the statute of limitations, and the trial court sustained the demurrer and dismissed the action. Plaintiffs appealed.

The court of appeal affirmed. The court noted that when a complaint shows on its face that the action is barred by the

statute of limitations, a general demurrer for failure to state a cause of action will lie (*82 Cal. App. 4th 364, 367)* . The court concluded that although the plaintiffs had 30 days from the time the federal action was dismissed to file an action, they had waited too long because the 30-day period ran from the date the court of appeals affirmed the dismissal, not from the date the United States Supreme Court denied the plaintiffs' petition for certiorari (*82 Cal. App. 4th 364, 368-372)* .

In ***Iverson, Yoakum, Papiano & Hatch v. Berwald*** *(1999) 76 Cal. App. 4th 990, 995, 90 Cal. Rptr. 2d 665* , plaintiff law firm sued former clients for fees. Defendants demurred to the complaint on the ground that the plaintiff's failure to allege a valid written fee agreement under *Bus. & Prof. Code § 6148(a)* barred plaintiff from collecting fees under a contract theory. Plaintiff was entitled to recover only under claims for common counts, which claims were barred in turn by lapse of the applicable statutory period of limitation that began to run in 1992. The trial court sustained the demurrer and entered a dismissal, and plaintiff appealed.

The court of appeal affirmed. Initially, the court noted that a complaint showing on its face the cause of action is barred by the statute of limitations is subject to a general demurrer. The court concluded that the promissory note, as a matter of law, did not comply with *Bus. & Prof. Code § 6148*, were voidable, and had been voided by the client. Plaintiff's only resulting claim, based on quantum meruit for service rendered, was barred the applicable two-year period of limitation (*76 Cal. App. 4th 990, 996-997)* .

[b] Commencement of Action

Duran v. St. Luke's Hospital *(2004) 114 Cal. App. 4th 457, 459, 8 Cal. Rptr. 3d 1*) was a malpractice action where the plaintiffs' attorney mailed the complaint two days before the final day for filing and learned that the enclosed fee was inadequate after the statute of limitations expired. The filing clerk of the San Francisco Superior Court, California, received plaintiffs' complaint by mail, but did not file it, because the fee was $3 short. The statute of limitations expired the next day. The trial court granted a petition to deem the complaint filed when it was received, but subject to a motion to strike by defendants, and ultimately entered a judgment of dismissal (*114 Cal. App. 4th 457, 459)* .

The reviewing court affirmed the dismissal. An unbroken line of decisions by the California Supreme Court holds that it is mandatory for court clerks to demand and receive the fee required by statute before documents or pleadings are filed. Government Code statutes make it clear that the Legislature has mandatorily required that filing fees in civil actions must be paid in advance. Not only do they declare that they shall be so paid and that the clerk shall so collect them before he or she shall perform any official act, that is to say, receive for filing and file any document for the filing of which the payment of a fee is required, but the Legislature has also provided, by way of interpretation of its own language, that the word 'shall is mandatory.' ... Under the plain code provisions it must be held that the clerk properly refused to perform the official service of filing the notice until he received the proper fees (*114 Cal. App. 4th 457, 460)* .

In ***Orr v. City*** *of Stockton (2007) 150 Cal. App. 4th 622, 58 Cal. Rptr. 3d 662* , plaintiff Orr was involved in a May 12, 2002 automobile collision with a City of Stockton police officer who was driving a patrol car. On October 16, 2002, Orr filed a petition to perpetuate testimony and/or preserve evidence related to the collision. Orr sought evidence of police radio communications around the time of the collision. A hearing on the petition was slated for November 26, 2002. Orr took the petition off calendar, without prejudice, after the City agreed to provide him with the requested information. On October 17, 2002, Orr presented a claim to the City under the Tort Claims Act. The City notified Orr on December 5, 2002, that it had rejected his claim. The notice contained a warning stating that subject to certain exceptions, Orr had only six months from the date this notice was personally delivered or deposited in the mail to file a court action on his state law claims. On August 4, 2003, Orr filed a document entitled First Amended Complaint for Damages and to Perpetuate Testimony, the first pleading denominated a complaint that Orr filed. The City demurred to the First Amended Complaint, citing the six-month statute of limitations set forth in *Gov. Code § 945.6(a)(1)*. Orr countered that his petition to preserve evidence constituted an action that satisfied this statute of limitations. The trial court sustained

the City's demurrer with leave to amend. Orr then filed a second amended complaint and the City similarly demurred on statute of limitations grounds. This time, though, the trial court overruled the City's demurrer, concluding that under *Code of Civ. Proc. § 363*, a special proceeding is included in the statutory use of the word action, and that the petition to preserve evidence filed October 16, 2002 was sufficient to meet the purposes of *Gov. Code § 945.6*. The City then answered Orr's second amended complaint, trial occurred, and the jury returned a verdict against the City for $221,218.62.

Based on the statute of limitations issue, the City appealed. In reversing, the appellate court concluded that a proceeding initiated by a petition to preserve evidence does not constitute a suit because it is not an adversarial proceeding to enforce a right or redress an injury. Such a petition merely allows the petitioner to obtain discovery for the limited purpose of perpetuating testimony or preserving evidence, for use in the event an action is subsequently filed. The petition proceeding does not provide the petitioner with any further relief beyond obtaining discovery materials, nor does it attempt to redress any injury or enforce any substantive right against another party (*150 Cal. App. 4th 622, 633)* .

[c] Accrual of Cause of Action

Heyer v. Flaig *(1969) 70 Cal. 2d 223, 74 Cal. Rptr. 225, 449 P.2d 161* , was an action for damages arising from alleged malpractice by an attorney. The issue on appeal from a judgment of dismissal which followed the sustaining of the defendant's demurrer was whether the action was barred by a statute of limitations, and this issue depended in turn on when the cause of action accrued.

The plaintiffs were beneficiaries under a will negligently drafted by the defendant attorney. The Supreme Court observed that the plaintiffs could not have brought an action before the testator's death, since they had no recognized legal interest in the estate until then; therefore, the cause of action did not accrue until then. The Court said, "A statute of limitations does not commence to run until a cause of action accrues, and 'a cause of action ... invariably accrues when there is a remedy available.' (*Irvine v. Bossen (1944) 25 Cal. 2d 652, 658 [155 P.2d 9]* .)"

[d] Running of Period of Limitation

Osborn v. Hopkins *(1911) 160 Cal. 501, 117 P. 519* , was an action by an assignee of an attorney to recover the reasonable value of his services. A judgment was rendered for the plaintiff, but the trial court ordered a new trial on the ground that part of the sum awarded by the jury, which the plaintiff refused to give up, was barred by a statute of limitations. On appeal the Supreme Court stated, in its discussion, that "it is elementary law that the statute of limitations begins to run upon the accrual of the right of action, that is, when a suit may be maintained, and not until that time."

In ***Barton v. New United Motor Manufacturing, Inc.*** *(1996) 43 Cal. App. 4th 1200, 51 Cal. Rptr. 2d 328* , an action for wrongful termination, defendant filed a demurrer on the ground that the action was barred by the statute of limitations. The trial court sustained the demurrer without leave to amend, and dismissed the action. On appeal plaintiff contended that he was entitled to the benefit of a delayed discovery rule because he did not fully understand the dimensions of his wrongful termination until two years after being discharged.

The court of appeal affirmed the judgment. The court held that the infliction of actual and appreciable harm commences the statutory period, even if there is uncertainty as to the amount of damages (*43 Cal. App. 4th 1200, 1209)* . The court granted that under some circumstances, the statute of limitations will not begin to run until the injured party discovers or should have discovered the facts supporting liability. However, it was apparent from plaintiff's own complaint that he suffered actual and appreciable harm when he was terminated, and the delayed discovery rule was thus of no assistance to him (*43 Cal. App. 4th 1200, 1209-1210)* .

In ***Ledbetter v. Goodyear Tire & Rubber Co.*** *(2007) 550 U.S. 618, 127 S. Ct. 2162, 167 L. Ed. 2d 982* , plaintiff retired employee brought a pay discrimination claim under Title VII of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000e et seq.*, against defendant, her former employer. The employee introduced evidence that during the course of her employment several supervisors had given her poor evaluations because of her sex, that as a result of these evaluations her pay was not increased as much as it would have been if she had been evaluated fairly, and that these past pay decisions continued to affect the amount of her pay throughout her employment. Her arguments that her paychecks and a raise denial each violated Title VII and triggered a new charging period could not be reconciled with case law. The on-going effects alone could not breathe life into prior, uncharged discrimination. The employee's attempt to take the intent associated with prior pay decisions and shift it to the later pay decision was unsound. The Court rejected the argument that it adopt a special rule for pay cases noting that the particular characteristics of this case was certainly not representative of all pay cases and may not have even been typical. The court held that the employee's policy arguments for giving special treatment to pay claims found no support in the statute and was inconsistent with Supreme Court precedents (*167 L. Ed. 2d 982, 998* ; *but see Hammond v. County of Los Angeles (2008) 160 Cal. App. 4th 1579, 1597, 73 Cal. Rptr. 3d 690* (discrete decisions concerning plaintiff's workload within the limitations period, each of which may be a fresh violation of the FEHA)).

[4] Additional Authorities

[a] Raising Statute of Limitations by Demurrer

In *Cameron v. San Francisco (1886) 68 Cal. 390, 391, 9 P. 430* , affirming a judgment for the plaintiff on the assumption that there was sufficient evidence at the trial to show that the action was not barred, the court stated regarding raising the defense of limitation that when it clearly appears on the face of the complaint that the period of limitation has run, the objection may be made by demurrer.

In *Basin Construction Corp. v. Department of Water & Power (1988) 199 Cal. App. 3d 819, 245 Cal. Rptr. 178* , the trial court dismissed a complaint in intervention after sustaining a demurrer without leave to amend on the ground that the action asserted was barred by the statute of limitations. The court of appeal affirmed, stating that a complaint showing on its face the cause of action is barred by the statute of limitations is subject to general demurrer (*199 Cal. App. 3d 819, 823)* .

In *Anderson v. McNally (1957) 150 Cal. App. 2d 778, 783-784, 310 P.2d 975* , affirming a judgment of dismissal following the sustaining of a demurrer to the complaint in a wrongful death action, although the sustaining of the demurrer was error because the defect (admitted by the plaintiffs) was not apparent on the face of the complaint, the court stated that a demurrer based on failure to state facts sufficient to constitute a cause of action in that the action was not commenced within the applicable period of limitation must be considered a general demurrer.

[b] Accrual of Cause of Action

In *Truong v. Glasser (2009) 181 Cal. App. 4th 102, 103 Cal.Rptr.3d 811* , plaintiff Vision Manufacturing, Inc. (VMI), and its president, plaintiff Steven Truong, filed a legal malpractice action against attorney Glasser arising out of his purported negligent advice in a real estate transaction. The gravamen of the complaint alleged that Glasser was negligent and breached his fiduciary duty to plaintiffs by not properly advising them concerning a property lease and lease addendum. The action sought damages because plaintiffs incurred attorney fees, costs, and other losses arising from their attempt to rescind the lease addendum and were also injured by their inability to use the property. Glasser moved for, and the court granted, summary judgment in favor of Glasser on the ground the action was barred by the *Code of Civ. Proc. § 340.6* one-year statute of limitations. In affirming, the court of appeal explained that in this legal malpractice action, plaintiffs first sustained actual injury when they obtained and were obligated to pay new counsel to file a lawsuit seeking to escape the consequences of their signing the lease documents, and therefore sustained actual injury more than one year before the malpractice action was filed.

In *McCoy v. Gustafson (2009) 180 Cal. App. 4th 56, 104, 103 Cal. Rptr. 3d 37* , the complaint alleged that oil was discharged into the ground and migrated downhill. A previous owner of the downhill property had complained about the oil about 16 years before the suit was filed. Cleanup efforts were unsuccessful. By special verdict, the jury stated that it was unknown whether the contamination could be abated at a reasonable cost by reasonable means. The court held that the nuisance was a permanent nuisance because the evidence did not show that the contamination reasonably could be abated. Thus, the cause of action was barred by the three-year statute of limitations in *Code Civ. Proc. § 338(b)*, for damages to real property, which began to run when the previous owner discovered the oil. It is the underlying injury and not the legal theories of recovery superimposed on the injury that dictates the applicable statute of limitations. For limitations purposes the harm implicit in a tortious injury to property is harm to the property itself, and thus to any owner of the property once the property has been injured and not necessarily to a particular owner. An owner must bring its claim to court within the statutory period or the claim will be barred for that and all subsequent owners.

Stewart v. Seward (2007) 148 Cal. App. 4th 1513 involved a claimant's complaint for breach of a promise to executive a will. Specifically, the claimant asserted that the decedent had breached a promise to execute a will leaving a one-half interest in the family home to the claimant. Approximately nine months after the decedent's death, the claimant filed a creditor's claim in the probate proceeding. The administrator rejected that claim eight days later, using a standard rejection form that contained an advisement regarding the statutory three-month period of *Prob. Code § 9353(a)(1)*, for a creditor to file suit after a rejection of a claim. Within three months after receiving the rejection notice, but more than one year after the decedent's death, the claimant filed suit. In affirming the trial court's decision sustaining the administrator's demurrer to the complaint, the Court of Appeal held that because the claim arose from an alleged oral promise or agreement concerning distribution from the decedent's estate, the action was governed by the limitations period of *Code Civ. Proc. § 366.3*, which provides that a one-year limitation period applies to a promise or agreement with a decedent to distribution from an estate and specifically states that the limitations period cannot be tolled or extended. The complaint was untimely because it was filed more than one year after the decedent's death. Further, the administrator's actions in rejecting the claim did not give rise to equitable estoppel or waiver.

In *Lehman v. Superior Court (2006) 145 Cal. App. 4th 109, 51 Cal. Rptr. 3d 411* , two directors of a corporation petitioned for a writ of mandate after the trial court overruled their demurrer to the complaint of the corporation's chapter 7 trustee that asserted a cause of action for breach of fiduciary duty against them. The directors demurred on the ground that the action was barred by the statute of limitations, specifically *Code Civ. Proc. § 359*. Although the trial court overruled the demurrer, it requested interlocutory review of whether Section 359 applied to the trustee's claim, noting that there was a split of authority on the issue. The Court of Appeal denied the petition, holding that § 359 governs a fiduciary duty claim where the basis of the directors' liability was first authorized by a statute or the Constitution. If the basis of liability existed at common law, it was not "created by law" within the meaning of Section 359, even if the common law theory of liability has since been codified. The court concluded that Section 359 was not applicable because the directors had not shown that their alleged liability was first authorized by a statute or the Constitution. In their writ petition, the directors had shown, at most, that some of the trustee's allegations might give rise to liability under various statutes, assuming the existence of facts not in the complaint. That was insufficient to invoke Section 359. Nor had the directors established that the liability authorized by those statutes did not exist at common law. As to other allegations, the directors argued that liability did not exist at common law, but they failed to identify a statute or constitutional provision that imposed such liability. That, too, was inadequate for purposes of Section 359 because a statutory or constitutional basis--a "law" within the meaning of Section 359--must exist.

In *Magpali v. Farmers Group, Inc. (1996) 48 Cal. App. 4th 471, 55 Cal. Rptr. 2d 225* , plaintiff brought an action for fraud arising out of his tenure as an insurance agent for defendant. The complaint alleged that defendant fraudulently concealed a Limited Underwriting Authority program which it subsequently used to place restrictions on plaintiff's ability to conduct business and bind defendant's policies. The complaint, filed in July, 1992, alleged that defendant made various representations which omitted information about Limited Underwriting Authority in 1984 and 1985. Plaintiff was designated a Limited Underwriting Authority agent in April, 1989. After hearing plaintiff's side at trial, the

trial court granted a defense motion or nonsuit, ruling that the fraud claim was barred by the statute of limitations. The court of appeal agreed with the trial court, noting that plaintiff did not file his complaint within three years of being designated a Limited Underwriting Authority agent. Plaintiff contended that the notice that he was going to be a Limited Underwriting Authority agent did not trigger the statute of limitations because he believed the status was only temporary. However, the court ruled that plaintiff's belief made no difference because a cause of action accrues when the plaintiff has all the information essential to the claim (*48 Cal. App. 4th 471, 483)* . The court thus affirmed the judgment on nonsuit.

In *Van Dyke v. Dunker & Aced (1996) 46 Cal. App. 4th 446, 53 Cal. Rptr. 2d 862* , plaintiffs brought a professional malpractice action against an accountant for erroneous tax advice. According to plaintiffs' complaint, defendant negligently advised plaintiffs to make a donation of real estate in order to receive a tax deduction of equal value. Plaintiffs donated the real estate, but only received a partial tax credit, thus resulting in a net loss on the transaction. Plaintiffs subsequently retained a different tax preparer who filed amended returns for the previous years and engaged in protracted negotiations with the IRS regarding the impact of the charitable property donation. The complaint was filed after plaintiffs' new tax preparer filed the amended returns. Defendant moved for summary judgment on the ground that the complaint was barred by the statute of limitations. Plaintiffs argued that their cause of action did not accrue until the IRS finally determined the impact of the charitable donation on their tax obligation, but the trial court concluded that plaintiffs had both discovered the negligence and suffered injury when they filed the original return.

The court of appeal affirmed. The court recognized that if a breach of professional duty causes only speculative harm or the threat of future harm then it does not suffice to create a cause of action for negligence, and the statute of limitations does not begin to run until the occurrence of appreciable and actual harm (*46 Cal. App. 4th 446, 452)* . However, the court concluded that plaintiffs suffered damages when they donated the property, lost appreciable expected tax benefits, and paid unanticipated taxes. There was actual injury at that point, regardless of the outcome of the eventual IRS audit (*46 Cal. App. 4th 446, 457)* .

[c] Running of Period of Limitation

In *Aguilera v. Heiman (2009) 174 Cal. App. 4th 590, 95 Cal. Rptr. 3d 18* , plaintiff was injured when he came into contact with a high voltage electrical wire while installing rain gutters on a condominium. Almost 10 years later, he filed a civil action against defendants, an owners association and a property management business and associated individual. The trial court sustained defendants' demurrer on the basis that the action was barred by the statute of limitations.

The Court of Appeal affirmed the judgment of dismissal. The court held that the one-year statute of limitation in former Code Civ. Proc. § 340(3) applied to the action, which arose from an incident on November 5, 1997. New *Code Civ. Proc. § 335.1*, which took effect on January 1, 2003 and extended the statute of limitations for personal injury suits to two years, did not apply retroactively. The statute of limitations was not equitably tolled while plaintiff was pursuing his workers' compensation remedy, even though he filed a little over two months after his injury, because defendants were not joined as defendants to the workers' compensation proceeding until after the one-year statute of limitations had already expired. The action was time-barred even if a three-year statute of limitations applied under *Lab. Code § 3706*. Under the facts of the case, in which plaintiff knew or had the means to know in 2002 that he had a civil action at law against defendants but waited over four and a half years further to bring his action, the court declined to toll the running of the three-year statute of limitations (*174 Cal. App. 4th 590, 604)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative

DefensesGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersGovernmentsLegislationStatutes of LimitationsGeneral Overview

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 143 LIMITATION OF ACTIONS
PART II. FORMS

14-143 California Points & Authorities § 143.21

§ 143.21 Supporting General Demurrer to Complaint [Code Civ. Proc. § 430.10]--Bar of Statute of Limitations [Code Civ. Proc. § 430.10(e)]--Later Enacted and More Specific of Two Statutes of Limitations Is Controlling

[1] FORM

[*This form should be combined with a general form of memorandum of points and authorities supporting a general demurrer (see § 143.20).*]

_____ [*Specify particular statute, e.g.,* SECTION 340.5 OF THE CODE OF CIVIL PROCEDURE] APPLIES IN THIS ACTION AND OPERATES AS A BAR TO PLAINTIFF'S COMPLAINT, BECAUSE IT IS A LATER AND MORE SPECIFIC STATUTE THAN _____ [*specify more general statute, e.g.,* CODE OF CIVIL PROCEDURE SECTION 340.4] WITH REGARD TO _____ [*specify cause of action, e.g.,* MEDICAL MALPRACTICE ACTIONS].

Later, More Specific Statute Controls. When two different statutes of limitations appear to govern an action, the later, more specific statute is controlling over the earlier statute, even though the earlier statute would by its terms cover the present action (*Young v. Haines (1986) 41 Cal. 3d 883, 894, 226 Cal. Rptr. 547, 718 P.2d 909*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities should be combined with a general memorandum in support of a general demurrer to a complaint [*see § 143.20*], when the party seeking to demur claims that the plaintiff's action is time-barred under a particular statute of limitations, even though the action is not time-barred under a different statute of limitations, because the former statute is the later, more specific statute and is therefore controlling.

The authority underlying this form involved a newer specific statute construed as an exception to the earlier general statute, and the court incorporated that fact into its statement of the rule [*see Young v. Haines (1986) 41 Cal. 3d 883, 226 Cal. Rptr. 547, 718 P.2d 909]* . However, as a general rule, a specific statute prevails over a general statute regardless of which was enacted first [*see Agricultural Labor Relation Bd. v. Superior Court (1976) 16 Cal. 3d 392,*

420, 128 Cal. Rptr. 183, 546 P.2d 687 ; *see also Collection Bureau of San Jose v. Rumsey (2000) 24 Cal. 4th 301, 310-311, 99 Cal. Rptr. 2d 792, 6 P.3d 713* (statute of limitations case applying rule that more specific provisions take precedence over more general ones and that later enactments supersede earlier ones)]. For a form of points and authorities that may be combined with this form if the general statute of limitations is later-enacted than the specific one, see *Ch. 217, Statutory Interpretation, § 217.61*, which deals with this general rule of statutory construction, although not in the context of statutes of limitation.

Counsel should insert argument in the form showing the relationship between the facts of his or her case and the points of law stated.

[b] Related Pleading and Practice Forms

For a form of demurrer to a complaint based on the bar of a statute of limitations, see Ch. 345, *Limitation of Actions* , in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Later, More Specific Statute Controls

In ***Young v. Haines*** *(1986) 41 Cal. 3d 883, 226 Cal. Rptr. 547, 718 P.2d 909* , plaintiff sustained injuries during birth that were not discovered until shortly before her eighth birthday. Plaintiff filed a malpractice action against the health care providers, alleging negligence. The complaint was brought within the statutory time period of former Civ. Code § 29 (repealed; *now see Code Civ. Proc. § 340.4*), which governed actions for injuries incurred during birth and incorporated a "delayed discovery" rule that tolled the running of the statute until after discovery of the injury. Defendant demurred, however, on the grounds that the action was time-barred because it was not brought within the three-year statutory time period of *Code Civ. Proc. § 340.5*, which governs medical malpractice actions and does not incorporate a "delayed discovery" rule. The trial court agreed, sustained the demurrer, and dismissed the complaint.

The California Supreme Court reversed and remanded, holding that the action was controlled by *Code Civ. Proc. § 340.5* but would not be time-barred if plaintiff were allowed to amend her complaint to allege facts that would invoke a separate tolling provision of that statute. With regard to which statute of limitations was applicable to the action, the Court explained that at first glance, former *Civ. Code § 29* appeared to apply to the action, because it governs all actions for prenatal and birth injuries. However, the Court also explained that *Code Civ. Proc. § 340.5* is a later-enacted statute that was passed by the Legislature with the intent to cover all personal injury claims arising from medical malpractice, and to respond to a major health care crisis in California attributable to skyrocketing malpractice premium costs. Thus, the Legislature sought to change the rules applicable to personal injury actions by malpractice victims, and to treat all malpractice victims differently from other personal injury victims. Because *Code Civ. Proc. § 340.5* is part of an interrelated legislative scheme enacted to deal specifically with all medical malpractice claims, it is the later, more specific statute that must be found controlling over an earlier statute, even though the earlier statute would by its terms cover the present situation. Thus, *Code Civ. Proc. § 340.5* and not former *Civ. Code § 29* was controlling. However, the Court noted that the action in this case might not be time-barred under *Code Civ. Proc. § 340.5* if plaintiff were to allege intentional concealment of the injury, which would toll the limitations period under that statute of limitations. Thus, the case was remanded to give plaintiff an opportunity to amend her complaint to allege concealment and avoid the time-bar of the statute (*41 Cal. 3d 883, 891-894, 901-902)* .

[4] Additional Authorities

[a] Later, More Specific Controls

In *Collection Bureau of San Jose v. Rumsey (2000) 24 Cal. 4th 301, 99 Cal. Rptr. 2d 792, 6 P.3d 713* , plaintiff brought an action, based on accounts receivable for medical expenses that were technically open book accounts, against

a surviving spouse for recovery of hospital and medical expenses of the deceased spouse's last illness. Plaintiff filed its action nearly four years after defendant's spouse had died. At the conclusion of trial, the trial court ruled that *Prob. Code § 13554(c)*, concerning enforcement of a deceased spouse's debt against a surviving spouse and which formerly provided that *Code Civ. Proc. § 353* (but now provides that *Code Civ. Proc. § 366.2*) applies to actions under it, controlled, and thus the one year limitation period of former Code Civ. Proc. § 353 barred plaintiff's action (*24 Cal. 4th 301, 304-305)* . The court of appeal reversed, concluding that plaintiff's action was timely in that a separate and independent cause of action for recovery of the debt from the surviving spouse existed under *Fam. Code § 914*, which makes spouses personally liable for each other's debts incurred for necessaries of life, and that the Family Code action was governed by the four-year limitation period of *Code Civ. Proc. § 337* generally applicable to open book accounts (*24 Cal. 4th 301, 304-306, 309)* .

The Supreme Court reversed the court of appeal (*24 Cal. 4th 301, 313)* . The Supreme Court discussed and rejected the court of appeal's conclusion that an independent cause of action was stated under *Fam. Code § 914* and that the four-year limitation period of *Code Civ. Proc. § 337* applied (*24 Cal. 4th 301, 311-313)* . Rather, the court held that *Prob. Code. § 13554* controlled, expressly making the one-year limitations period of former Code Civ. Proc. § 353 applicable to plaintiff's action against defendant (*24 Cal. 4th 301, 313)* . In so concluding, the court applied the rules that if conflicting statutes cannot be reconciled, later enactments supersede earlier ones and more specific provisions take precedence over more general ones. The Court found *Prob. Code § 13550 et seq.* to be more specific than *Fam. Code. 914* in that the Probate Code provisions specifically address the liability of a married person for debts incurred by the other spouse on death of that spouse, whereas *Fam Code § 914* merely addresses the general liability of a spouse for the debts of the other spouse incurred during marriage. Moreover, the one-year statute of limitations of former Code Civ. Proc. § 353, expressly made applicable by *Prob. Code § 13554*, is the more specific limitations provision, as it prescribes the limitations period for surviving causes of action on the liabilities of decedents, whereas *Code Civ. Proc. § 337* merely sets forth a four-year limitation period generally applicable to all open book accounts (*24 Cal. 4th 301, 310-311)* . With regard to the rule that if conflicting statutes cannot be reconciled the later enactments supersede the earlier ones, again the statutory scheme of *Prob. Code § 13550 et seq.* were found to control rather than *Fam. Code. 914* in that they were enacted later (*24 Cal. 4th 301, 311)* .

In *Howard Jarvis Taxpayers Assn. v. City of Los Angeles (2000) 79 Cal. App. 4th 242, 93 Cal. Rptr. 2d 742* , a taxpayer's suit challenging a home occupation ordinance, the trial court granted summary judgment in defendant's favor, finding that the lawsuit was barred by the 90-day statute of limitations in former Gov. Code § 65009(c)(2) (*now Gov. Code § 65009(c)(1)(B)*). The court of appeal affirmed. In holding that the 90-day limitation period barred the lawsuit, the court stated that a specific limitations provision prevails over a more general provision. When a specific shortened limitations period applies, the general limitations period of *Code Civ. Proc. § 338* does not apply because general statutes of limitation are applicable only if no different limitation is prescribed by statute (*79 Cal. App. 4th 242, 248)* .

In *Loken v. Century 21-Award Properties (1995) 36 Cal. App. 4th 263, 268-273, 42 Cal. Rptr. 2d 683* , *cert. denied, 516 U.S. 1113, 116 S. Ct. 912, 133 L. Ed. 2d 843* , the court concluded that a home purchaser was time barred from proceeding against a seller's real estate brokerage and agent for, among other things, negligent misrepresentation. Regarding negligent representation, the court held that *Civ. Code § 2079.4*, containing a two-year limitation period for actions stemming from breach of duty imposed under *Civ. Code § 2079*, was a specific statute that prevails over the general statute of limitations of three years for fraud and negligent misrepresentation causes of action under *Code Civ. Proc. § 338(d)* (*36 Cal. App. 4th 263, 273-274)* . The court quoted *Maloy v. Municipal Court (1968) 266 Cal. App. 2d 414, 418, 72 Cal. Rptr. 207* , for the statement that when there are two inconsistent statutes, one general and the other specific, that cover the same subject matter, the special one, *whether or not enacted first,* is treated as an exception to the general one and controls unless a contrary intent clearly appears (*36 Cal. App. 4th 263, 273)* .

In *Krieger v. Nick Alexander Imports, Inc. (1991) 234 Cal. App. 3d 205, 285 Cal. Rptr. 717* , the court held that an action brought under the Song-Beverly Consumer Warranty Act (*Civ. Code § 1792 et seq.*) was controlled by the specific limitation period of *Com. Code § 2725* instead of the general limitation period of *Code Civ. Proc. § 338* (*234*

Cal. App. 3d 205, 213-215) .

Donabedian v. Manzer (1986) 187 Cal. App. 3d 1021, 232 Cal. Rptr. 325 , was a case with substantially similar facts as those in *Young v. Haines (1986) 41 Cal. 3d 883, 226 Cal. Rptr. 547, 718 P.2d 909* , discussed in *§ 143.21[4][a]*. The court of appeal followed the *Young* opinion and its holding that *Code Civ. Proc. § 340.5* is a later, more specific statute that is controlling over the earlier statute, former Civ. Code § 29 (*now see Code Civ. Proc. § 340.4*). As with *Young*, however, the court of appeal reversed and remanded to give plaintiff an opportunity to amend his complaint to allege facts that would invoke a tolling provision of *Code Civ. Proc. § 340.5* (*187 Cal. App. 3d 1021, 1026-1027, 1029)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersGovernmentsLegislationStatutes of LimitationsGeneral Overview

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 143 LIMITATION OF ACTIONS
PART II. FORMS

14-143 California Points & Authorities § 143.22

§ 143.22 Supporting General Demurrer to Complaint [Code Civ. Proc. § 430.10]--Bar of Statute of Limitations [Code Civ. Proc. § 430.10(e)]--Shorter Period of Two Equally Applicable Statutes of Limitations Is Controlling

[1] FORM

[*This form should be combined with a general form of memorandum of points and authorities supporting a general demurrer (see § 143.20).*]

BOTH _____ [*specify first statute, e.g.,* SECTION 945.6 OF THE GOVERNMENT CODE] AND _____ [*specify second statute, e.g.,* SECTION 340.5 OF THE CODE OF CIVIL PROCEDURE] STAND ON EQUAL FOOTING WITH REGARD TO _____ [*specify type of cause of action, e.g.,* MEDICAL MALPRACTICE ACTIONS AGAINST PUBLIC ENTITIES], WITH NEITHER BEING MORE SPECIFIC THAN THE OTHER. THEREFORE, BOTH STATUTES ARE GIVEN EFFECT AND THE SHORTER LIMITATION PERIOD IS CONTROLLING.

Shorter Limitation Period Controls. When two different statutes of limitations apply to a cause of action, and each addresses a specific area of the law so that neither is more specific than the other, and the legislative schemes for each stand on equal footing, both statutes are given effect. Thus, the statute with the shorter limitation period is controlling and bars an action brought after its period has run, even if the action is brought within the second statutory period (*Anson v. County of Merced (1988) 202 Cal. App. 3d 1195, 1199, 1202, 249 Cal. Rptr. 457*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities should be combined with a general memorandum in support of a general demurrer to a complaint [*see § 143.30*], when the party seeking to demur claims that the plaintiff's action is time-barred under a particular statute of limitations, even though the action is not time-barred under a different statute of limitations, because the two statutes have equal application but the former sets forth a shorter period of limitation than the latter and is therefore controlling.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For a form of demurrer to a complaint based on the bar of a statute of limitations, see Ch. 345, *Limitation of Actions* , in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Shorter Limitation Period Controls

In ***Anson v. County of Merced*** *(1988) 202 Cal. App. 3d 1195, 249 Cal. Rptr. 457* , plaintiff served a claim for damages for medical negligence by county health care providers on the county's board of supervisors. The claim was rejected, and plaintiff served a notice of intention to file suit on defendants pursuant to *Code Civ. Proc. § 364*. Plaintiff filed a complaint within the one-year statute of limitations period of *Code Civ. Proc. § 340.5* for medical malpractice actions, but after the expiration of the six-month statutory period of *Gov. Code § 945.6* for filing an action against a public entity after a claim is rejected. Defendant demurred on statute of limitations grounds. Plaintiff unsuccessfully argued that the action was governed by *Code Civ. Proc. § 340.5* and not by *Gov. Code § 945.6*. The trial court disagreed, sustained the demurrer, and dismissed the action.

The court of appeal reversed, agreeing that *Gov. Code § 945.6* applied but also holding that the action was not time-barred under that statute because the filing of the notice of intention under *Code Civ. Proc. § 364* had been timely and had tolled the limitations period (*202 Cal. App. 3d 1195, 1204-1205)* . In reaching its conclusion that *Gov. Code § 945.6* applied, the court explained that both that statute and *Code Civ. Proc. § 340.5* are given effect. The court discussed both statutes as being parts of two separate legislative schemes (MICRA (Medical Injury Compensation Reform Act) and the Torts Claims Act) that stand on equal footing, neither being more specific than the other. Both address specific areas of the law, government tort liability and medical negligence liability. The medical negligence statute, *Code Civ. Proc. § 340.5*, enacted after *Gov. Code § 945.6*, was a response to a growing crisis over malpractice insurance premiums, with the intent of limiting medical malpractice claims. Although *Code Civ. Proc. § 340.5* fails to address the conflict with *Gov. Code § 945.6*, an intent may be inferred that the statutory period of *Gov. Code § 945.6* remain in full force and effect. Thus, long-standing principles of statutory construction and the legislative intent behind both statutes to limit actions required the conclusion that both statutes be given effect, resulting in the shorter *Gov. Code § 945.6* period being applied as the controlling one (*202 Cal. App. 3d 1195, 1199-1202)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersGovernmentsLegislationStatutes of LimitationsGeneral Overview

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 143 LIMITATION OF ACTIONS
PART II. FORMS

14-143 California Points & Authorities § 143.23

§ 143.23 Supporting General Demurrer to Complaint [Code Civ. Proc. § 430.10]--Bar of Statute of Limitations [Code Civ. Proc. § 430.10(e)]--Amended Statute of Limitations Is Controlling

[1] FORM

[*This form should be combined with a general form of memorandum of points and authorities supporting a general demurrer (see § 143.20)*]

_____ [*Specify particular statute*], AS AMENDED, EFFECTIVE _____[*specify date*], SHORTENED THE LIMITATION PERIOD FOR COMMENCING AN ACTION FOR _____ [*specify nature of action*] AND APPLIES RETROSPECTIVELY TO BAR PLAINTIFF'S ACTION.

Shortened Statute of Limitations Applicable Retroactively. It is well settled that retrospective application of a shortened limitations period is permissible provided the party has reasonable time to avail himself or herself of his or her remedy before the statute cuts off his or her rights (*Edward Fineman Co. v. Superior Court (1998) 66 Cal. App. 4th 1110, 1125, 78 Cal. Rptr. 2d 478* (quoting *Aronson v. Superior Court (1987) 191 Cal. App. 3d 294, 297, 236 Cal. Rptr. 347*)).

[2] Comments

[a] Use of Form

This memorandum of points and authorities should be combined with a general memorandum in support of a general demurrer to a complaint [*see § 143.20*], when the party seeking to demur claims that the plaintiff's action is time-barred under an amended statute of limitations that has shortened the limitations period and the plaintiff under the amended statute still had a reasonable time within which to proceed with plaintiff's cause of action. For further discussion of the effect of amending a statute of limitations extending, or shortening, the period, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* (Matthew Bender).

Counsel should insert argument in the form showing the relationship between the facts of his or her case and the points of law stated.

[b] Related Pleading and Practice Forms

For a form of demurrer to a complaint based on the bar of a statute of limitations, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* (Matthew Bender).

[3] Discussion of Authorities

[a] Shortened Statute of Limitations Applicable Retroactively

Edward Fineman Co. v. Superior Court *(1998) 66 Cal. App. 4th 1110, 78 Cal. Rptr. 2d 478* , involved an action for breach of contract, negligence, and for damages under *Com. Code § 4103*. Plaintiff maintained a payroll checking account at defendant's bank between 1991 and 1997. Between January 1, 1991, and June 1, 1996, defendant honored and paid 83 checks drawn on the account signed by one rather than two authorized signatures as required by the terms of the account. On May 24, 1996, defendant bank was contacted by plaintiff and directed to remove the signer as an authorized signature for the plaintiff's checking account. This was the first time defendant received any information that the signer had drawn and negotiated checks on the plaintiff's account contrary to the terms of the account signature contract. Plaintiff demanded that defendant replace and recredit plaintiff's payroll checking account in the amount of all sums charged for payment of the checks signed by the one signer. Defendant refused and plaintiff sued to recover the sums paid on the checks. Plaintiff initially filed its action in July, 1997. Defendant bank moved for summary adjudication of issues with respect to twenty-three checks drawn between January 1, 1991, and January 1, 1993, on the grounds that the claims were barred by *Com. Code § 4111* (three-year statute of limitation) and *Com. Code § 4406(f)* (no action against bank for unauthorized payment if customer fails to discover and report unauthorized signature or alteration within one year of availability of statement or cancelled checks). Plaintiff opposed the motion arguing, among other things, that *Com. Code § 4111* and *Com. Code § 4406(f)* did not apply because they were not enacted until 1992 and only became effective in January, 1993. Th argument regarding *Com. Code § 4406(f)* necessarily involved application of *Com. Code § 3403(b)*, also amended in 1992 and effective 1993, which defines an unauthorized signature to include checks lacking a required signature. Because *Com. Code § 4406(f)*'s discover and report provisions are only triggered by checks with unauthorized signatures, the retroactive application of *Com. Code § 3403(b)* was necessarily implicated. The trial court granted defendant bank's motion and issued an order of summary adjudication holding that plaintiff's claim concerning the twenty-three 1991-1993 checks were barred by *Com. Code §§ 4111*, and *4406(f)*. Plaintiff sought writ review (*66 Cal. App. 4th 1110, 1113-1115)* .

The court of appeal denied plaintiff's petition (*66 Cal. App. 4th 1110, 1126)* . With regard to *Com. Code § 4111*, the court noted that the three-year statute of limitations of *Com. Code § 4111* became effective in January, 1993. Section 4111 provides that specified actions shall be commenced within three years after the cause of action accrues. All the causes of action based on the twenty-three 1991-1993 checks accrued within that time span. Thus, the time in which to pursue recovery expired because the present action was not filed until 1997 (*66 Cal. App. 4th 1110, 1125)* . There was no dispute that *Com. Code § 4111* is a statute of limitations. As such it applies retroactively (*66 Cal. App. 4th 1110, 1125)* . Quoting *Aronson v. Superior Court (1987) 191 Cal. App. 3d 294, 297, 236 Cal. Rptr. 347* , the court stated it is well settled that retrospective application of a shortened limitations period is permissible provided the party has reasonable time to avail himself or herself of his or her remedy before the statute cuts off his or her rights (*66 Cal. App. 4th 1110, 1125)* . *Com. Code § 4111* became effective in 1993, leaving plaintiff with an entire year to file its action (*66 Cal. App. 4th 1110, 1125)* .

With regard to *Com. Code § 4406(f)*, the court concluded that Section 4406 is not per se a statute of limitations but instead is an issue-preclusion statute. Unlike a statute of limitations, it does not purport to bar an action against a bank. Rather, it simply precludes a customer from asserting a forgery or alteration against the bank if the customer failed to discover and report the forgery or alteration to the bank. That is, the statutory prerequisite of timely reporting discrepancies is a condition precedent to suing for recovery of any unauthorized payments (*66 Cal. App. 4th 1110, 1119)* . Prior to 1993, in *Far West Citrus, Inc. v. Bank of America (1979) 91 Cal. App. 3d 913, 154 Cal. Rptr. 464* , it

was held that a check bearing only one of two required signatures was not an item bearing an "unauthorized" signature (*66 Cal. App. 4th 1110, 1119-1120)* . *Com. Code § 3403(b)* was amended in 1993 to provide that if more than one person's signature is required to constitute the authorized signature of an organization, the organization's signature is unauthorized if one of the required signatures is lacking. The amendment is directly contrary to the holding in *Far West Citrus, Inc.* and unequivocally imposes the obligations of *Com. Code § 4406(f)* on customers with checking accounts that require more than one signature (*66 Cal. App. 4th 1110, 1120)* . Plaintiff contended that the amendment was a change in substantive law that could not be applied retroactively. On the other hand, defendant bank argued that the Legislature intended *Com. Code § 3403(b)* to be clarifying legislation declaring not only what the law is, but what it had been. When the Legislature clarifies an existing provision of law it operates retroactively on the premise that the clarification is simply stating what the declared law is and as always been (*66 Cal. App. 4th 1110, 1120-1122*). The court noted authority in accord with the proposition that clarifying enactments and amendments operate retroactively and nullify decisional law inconsistent with the Legislature's declared intent (*66 Cal. App. 4th 1110, 1122-1124)* . Construing Section 3403(b) as a clarification of existing law, the court concluded that the twenty-three 1991-1993 checks, lacking a second required signature, fell within the classification of items that must be discovered and reported pursuant to Section 4406(f). Having failed to discover and report them within the one-year period, plaintiff was precluded from pursuing recovery against defendant bank (*66 Cal. App. 4th 1110, 1125)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersGovernmentsLegislationStatutes of LimitationsGeneral Overview

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CHAPTER 143 LIMITATION OF ACTIONS
PART II. FORMS

14-143 California Points & Authorities § 143.24

§ 143.24 Supporting General Demurrer to a Complaint [Code Civ. Proc. § 430.10]--Bar of Statute of Limitations [Code Civ. Proc §§ 340.1(*l*), 430.10(f)]--Failure of Plaintiff to Timely File Required Certificates of Merit in Childhood Sexual Abuse Case When Plaintiff 26 Years or Older at Time Action Filed [Code Civ. Proc. §§ 340.1(g), (h)]

[1] FORM

[*Caption. See § 143.20[1]).*]

THE COURT SHOULD SUSTAIN THE DEMURRER TO PLAINTIFF'S COMPLAINT WITHOUT LEAVE TO AMEND BECAUSE PLAINTIFF WAS _____ [26 YEARS OLD *or* OVER 26 YEARS OF AGE] WHEN HE/SHE FILED THIS ACTION FOR DAMAGES ALLEGEDLY SUFFERED AS A RESULT OF CHILDHOOD SEXUAL ABUSE AND PLAINTIFF FAILED TO TIMELY FILE THE CERTIFICATES OF MERIT REQUIRED BY CODE OF CIVIL PROCEDURE SECTION 340.1(e), (f).

A. Limitation Period for Bringing an Action. A civil action for recovery of damages suffered as a result of childhood sexual abuse must be commenced within eight years of the date plaintiff attains the age of majority or within three years of the date the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by sexual abuse, whichever period expires later, for any of the following actions: (1) an action against any person for committing an act of childhood sexual abuse; (2) an action for liability against any person or entity who owed a duty of care to the plaintiff, where a wrongful or negligent act by that person or entity was a legal cause of the childhood sexual abuse which resulted in the injury to the plaintiff; (3) an action for liability against any person or entity where an intentional act by that person or entity was a legal cause of the childhood sexual abuse which resulted in the injury to the plaintiff (*Code Civ. Proc. § 340.1(a)(1)-(3)*). No action described in *Code of Civil Procedure, Section 340.1(a)(2)* or *(3)*, however, may be commenced on or after the plaintiff's 26th birthday (*Code Civ. Proc. 340.1(b)(1)*), unless the person or entity against whom the action is commenced pursuant to *Code Civ. Proc. § 340.1(a)(2)* or *(3)* knew, had reason to know, or was otherwise on notice, of any unlawful sexual conduct by an employee, volunteer, representative, or agent, and failed to take reasonable steps, and implement reasonable safeguards, to avoid future acts of unlawful sexual conduct (*Code Civ. Proc. § 340.1(b)(2)*) (as to revival of such actions, *see Code*

Civ. Proc. § 340.1(c)).

B. Required Certificates of Merit. Every plaintiff 26 years old or more at the time an action for damages for childhood sexual abuse is filed must file certificates of merit as specified in *Code of Civil Procedure Section 340.1(g)* (*Code Civ. Proc. § 340.1(g)*). These certificates consist of a certificate of merit executed by plaintiff's attorney after plaintiff's attorney has consulted with at least one licensed mental health practitioner, and a certificate of merit executed by a licensed mental health practitioner (*Code Civ. Proc § 340.1(h)(1), (2)*). If plaintiff's attorney is unable to consult with a licensed mental health practitioner before the running of the statute of limitations, and thus is unable to execute a certificate of merit and obtain a licensed mental health practitioner's certificate of merit before expiration of the statute of limitations, plaintiff's attorney must file a certificate explaining this. When such a certificate is filed, the plaintiff's attorney certificate of merit and the licensed mental health practitioner's certificate of merit must be filed within 60 days after filing of the complaint (*Code Civ. Proc § 340.1(h)*). The attorney for the plaintiff must execute a separate certificate of merit for each defendant named in the complaint (*Code Civ. Proc. § 340.1(i)*).

C. Objection by Demurrer. The failure to file certificates in accordance with *Code of Civil Procedure Section 340.1* is grounds for a demurrer under *Code of Civil Procedure Section 430.10* (*Code Civ. Proc § 340.1*(*l*)). The party against whom a complaint has been filed may object to the complaint on the grounds that it does not state facts sufficient to constitute a cause of action (*Code Civ. Proc. § 430.10(g)*). When any ground for objection to a complaint appears on the face thereof, or from any matter of which the court is required to or may take judicial notice, the objection on that ground may be taken by a demurrer to the complaint (*Code Civ. Proc. § 430.30(a)*).

D. Raising Statute of Limitations by Demurrer. [*See § 143.20[1], Paragraph B.*]

E. Sustaining Demurrer Without Leave to Amend. When a complaint seeking to recover damages for childhood sexual abuse is timely filed, but the certificates of merit required by *Code of Civil Procedure Section 340.1(g)* as specified in *Code of Civil Procedure Section 340.1(h)(1), (2)* have not been filed within the statute of limitations period for the action and plaintiff's attorney has not filed within that period a certificate in accordance with *Code of Civil Procedure Section 340.1(h)(3)* explaining that he or she was unable to consult with a licensed mental health practitioner as required by *Code of Civil Procedure Section 340.1(h)(1)* before the running of the statute of limitations and could not execute a certificate of merit and obtain a licensed mental health practitioner's certificate of merit as required by *Code of Civil Procedure Section 340.1(h)(1), (2)* before expiration of the statute of limitations, a demurrer to the complaint should be sustained without leave to amend (*Doyle v. Fenster (1996) 47 Cal. App. 4th 1701, 1705-1707, 55 Cal. Rptr. 2d 327*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a general demurrer to a complaint brought

by a plaintiff 26 years of age or older at the time the action is filed who seeks recovery of damages allegedly suffered as a result of childhood sexual abuse when the action is barred by the applicable statute of limitations period because (1) the certificates of merit required by *Code Civ. Proc § 340.1(g)* as specified in *Code Civ. Proc § 340.1(h)(1), (2)*, that is, the certificates of merit executed by the plaintiff's attorney and a licensed mental health practitioner, have not been filed within the statute of limitations period for the action and (2) plaintiff's attorney has not filed within that period a certificate in accordance with *Code Civ. Proc § 340.1(h)(3)* explaining that he or she was unable to consult with a licensed mental health practitioner as required by *Code Civ. Proc § 340.1(h)(1)* before the running of the limitations period and was unable to execute a certificate of merit and obtain a licensed mental health practitioner's certificate of merit as required by *Code Civ. Proc § 340.1(h)(1), (2)* before expiration of the statute of limitations.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated, specifically identifying the paragraph or paragraphs in the complaint that show the plaintiff's age at the time of filing the complaint, and the absence from the record of the required certificates or the untimeliness of any certificates that may have been filed.

Counsel should consult local court rules at ascertain if there are any local requirements concerning demurrers or the taking of judicial notice.

[b] Related Uses

With appropriate modifications these points and authorities may be used to support a defendant's motion to strike. The failure to file certificates in accordance with *Code Civ. Proc § 340.1* is grounds for a motion to strike pursuant to *Code Civ. Proc § 435* [*Code Civ. Proc § 340.1*(*l*)].

[c] Related Pleading and Practice Forms

For a form of demurrer to a complaint based on the bar of a statute of limitations, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* (Matthew Bender).

[3] Discussion of Authorities

[a] Sustaining Demurrer Without Leave to Amend

In ***Doyle v. Fenster*** *(1996) 47 Cal. App. 4th 1701, 55 Cal. Rptr. 2d 327* , plaintiff, who was 28 years old, filed an action seeking to recover damages for psychological injury that resulted from sexual abuse that she allegedly suffered as a child. It was not disputed that plaintiff's complaint was filed within the statutory limitations period. However, the certificates of merit required by *Code Civ. Proc § 340.1(d)* (*now Code Civ. Proc. § 340.1(g)*) as specified in *Code Civ. Proc § 340.1(e)(1), (2)* (*now Code Civ. Proc. § 340.1(h)(1), (2)*), that is, the certificates of merit executed by the plaintiff's attorney and a licensed mental health practitioner, were not filed with the complaint nor were they filed before the three year statutory period ended in which to bring the action. Moreover, plaintiff's attorney never filed a certificate under *Code Civ. Proc § 340.1(e)(3)* (*now Code Civ. Proc. § 340.1(h)(3)*) explaining that he or she was unable to consult with a licensed mental health practitioner as required by *Code Civ. Proc § 340.1(e)(1)* (*now Code Civ. Proc. § 340.1(h)(1)*) before the running of the statute of limitations and that the certificates of merit from plaintiff's attorney and the mental health practitioner as required by *Code Civ. Proc § 340.1(e)(1), (2)* (*now Code Civ. Proc. § 340.1(h)(1), (2)*) could not be obtained before the running of the statute of limitations. After being served with the complaint, defendants filed a demurrer to it pursuant to *Code Civ. Proc § 340.1(i)* (*now Code Civ. Proc. § 340.1*(*l*)) which provides that the failure to file certificates in accordance with *Code Civ. Proc § 340.1* is grounds for a demurrer pursuant to *Code Civ. Proc § 430.10*. The trial court sustained the defendants' demurrer and dismissed plaintiff's action agreeing with the defendants' argument that the certificates of merit required by *Code Civ. Proc § 340.1(e)(1), (2)* (*now Code Civ. Proc. § 340.1(h)(1), (2)*) must be filed prior to or at the filing of the complaint unless plaintiff's attorney files a certificate under *Code Civ. Proc § 340.1(e)(3)* (*now Code Civ. Proc. § 340.1(h)(3)*) explaining why the certificates could not be obtained

before the running of the statute of limitations (*47 Cal. App. 4th 1701, 1705)* .

The court of appeal affirmed the sustaining of the demurrer and the dismissal of the action. In so doing the court held that *Code Civ. Proc § 340.1(e)(1), (2)* (*now Code Civ. Proc. § 340.1(h)(1), (2)*) certificates of merit required by *Code Civ. Proc § 340.1(d)* (*now Code Civ. Proc. § 340.1(g)*) must be filed within the statute of limitations period for bring an action for damages suffered as a result of childhood sexual abuse (*47 Cal. App. 4th 1701, 1705-1707)* .

[4] Additional Authorities

[a] Required Certificate of Merit

In *Tietge v. Western Province Of The Servites, Inc. (1997) 55 Cal. App. 4th 382, 64 Cal. Rptr. 2d 53* , plaintiffs alleged they were sexually molested over a period of time, and filed separate actions against a religious brother who was also a parochial schoolteacher, and his religious order. Defendants demurred on the grounds that the actions were time barred, pointing out the alleged molestation occurred from 9 to 26 years before the actions were filed. Relying on the then applicable statute of limitations, the trial court sustained the demurrers without leave to amend, but while plaintiffs' appeals were pending, the legislature retroactively amended the statute of limitations.

The court of appeal affirmed the judgment as to the religious order, holding that the limitation period of Code Civ. Proc. § 340.1did not apply to the religious order. The court reversed the judgment as to the brother, holding that the enlarged limitation period of *Code Civ. Proc. § 340.1* applied to that action. In response to the brother's argument that the plaintiffs failed to file a certificate of merit as required by *Code Civ. Proc. § 340.1(e)* (*see now Code Civ. Proc. § 340.1(g)*), the court held that just as the plaintiffs received the benefits of the 1994 amendment (providing for retroactive application of the statute), they must also assume its burdens. To the extent the plaintiffs did not comply with the procedural requirements of the statute, the brother may raise those claims in the trial court (*55 Cal. App. 4th 382, 387)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersGovernmentsLegislationStatutes of LimitationsGeneral Overview

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 143 LIMITATION OF ACTIONS
PART II. FORMS

14-143 California Points & Authorities § 143.25

§ 143.25 Supporting General Demurrer to a Complaint [Code Civ. Proc. § 430.10]--Bar of Statute of Limitations [Code Civ. Proc. § 340.1(a), (b)]--Failure of Plaintiff to File Timely Action for Recovery of Damages Suffered as a Result of Childhood Sexual Abuse When Plaintiff 26 Years or Older at Time Action Commenced

[1] FORM

[*Caption, See § 143.20[1].*]

THE COURT SHOULD SUSTAIN THE DEMURRER TO PLAINTIFF'S COMPLAINT WITHOUT LEAVE TO AMEND BECAUSE PLAINTIFF WAS _____[26 YEARS OLD *or* OVER 26 YEARS OF AGE] WHEN HE/SHE FILED THIS ACTION FOR DAMAGES ALLEGEDLY SUFFERED AS A RESULT OF CHILDHOOD SEXUAL ABUSE AND CODE OF CIVIL PROCEDURE § 340.1 [(a) or (a), (b)] BARS COMMENCEMENT OF THE ACTION.

A. Limitation Period For Bringing Action. A civil action for recovery of damages suffered as a result of childhood sexual abuse must be commenced within eight years of the date plaintiff attains the age of majority or within three years of the date plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by sexual abuse, whichever period expires later, for any of the following actions: (1) an action against any person for committing an act of childhood sexual abuse; (2) an action for liability against any person or entity who owed a duty of care to the plaintiff, where a wrongful or negligent act by that person or entity was a legal cause of the childhood sexual abuse which resulted in the injury to the plaintiff; (3) an action for liability against any person or entity where an intentional act by that person or entity was a legal cause of the childhood sexual abuse which resulted in the injury to the plaintiff (*Code Civ. Proc. § 340.1(a)(1)-(3)*). No action described in *Code of Civil Procedure Section 340.1(a)(2)* or *(3)*, however, may be commenced on or after the plaintiff's 26th birthday (*Code Civ. Proc. § 340.1(b)(1)*), unless the person or entity against whom the action is commenced pursuant to *Code Civ. Proc. § 340.1(a)(2)* or *(3)* knew, had reason to know, or was otherwise on notice, of any unlawful sexual conduct by an employee, volunteer, representative, or agent, and failed to take reasonable steps, and implement reasonable safeguards, to avoid future acts of unlawful sexual conduct (*Code Civ. Proc. § 340.1(b)(2)*) (as to revival of such actions, *see Code Civ. Proc. § 340.1(c)*; *Hightower v. Roman Catholic Bishop of Sacramento (2006) 142 Cal. App. 4th 759, 48 Cal.*

Rptr. 3d 420). The revival language of *Code Civ. Proc. § 340.1* is inapplicable to childhood sex abuse actions where a final judgment had been entered under the statute of limitations that previously existed (*Perez v. Roe 1 (2006) 146 Cal. App. 4th 171, 187-188, 52 Cal. Rptr. 3d 762* (separation of powers doctrine)).

B. Objection by Demurrer. [*See § 143.20[1], Paragraph A.*]

C. Raising Statute of Limitations by Demurrer. [*See § 143.20[1], Paragraph B.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a general demurrer to a complaint brought by a plaintiff 26 years of age or older at the time the action is commenced who seeks recovery of damages allegedly suffered as a result of childhood sexual abuse when the action is barred by the applicable statute of limitations period set forth in *Code Civ. Proc. § 340.1(a), (b)*.

Counsel may consider adding to the form a paragraph D. Sustaining Demurrer Without Leave to Amend. For an example of such a paragraph, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

If the facts warrant, counsel may also consider adding a point dealing with *Code Civ. Proc. § 340.1* concerning nonrevival of actions or causes of action as to which there has been a final adjudication before January 1, 1999. See *§ 143.52* Optional Point F, that may be modified concerning this point.

Similarly, if the facts warrant, counsel may also consider adding a point dealing with *Code Civ. Proc. § 340.1(t)* which provides that nothing in the amendments to *Code Civ. Proc. § 340.1* enacted at the 1998 portion of the 1997-1998 Regular Session is intended to create a new theory of liability [*see Code Civ. Proc. § 340.1*; Stats 1998, Ch 1032].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated, specifically identifying the paragraph or paragraphs in the complaint that show the plaintiff's age at the time of commencement of the action and the action's untimeliness.

Counsel should consult local court rules to ascertain any local requirements concerning demurrers or judicial notice.

[b] Related Pleading and Practice Forms

For a form of demurrer to a complaint based on the bar of a statute of limitations, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* (Matthew Bender).

[3] Discussion of Authorities

[a] Limitation Period for Bringing Action

In ***Hightower v. Roman Catholic Bishop of Sacramento*** *(2006) 142 Cal. App. 4th 759, 48 Cal. Rptr. 3d 420* , plaintiff sued the church bishop for sexual assault allegedly committed by a priest from 1970 to 1972. The trial court sustained the bishop's demurrers to the complaint without leave to amend on the ground the statue of limitations had expired. The Court of Appeal affirmed the judgment. The court concluded the plaintiff's claims were time-barred. Plaintiff's complaint fell within the class of claims described by *Code Civ. Proc. § 340.1(b)(2)*. Because plaintiff was older than 26 years of age when the 1998 amendments to the statute took effect, the statute of limitations ran on those claims in 1977, and plaintiff's complaint was subject to the one-year revival period of *Code Civ. Proc. § 340.1(c)*. Plaintiff contended that he met the filing deadline because the notice of intent to sue he filed on December 31, 2003, was in fact a complaint. The Court of Appeal disagreed, concluding that the document was a motion and not a complaint and failed to invoke the court's jurisdiction. The court rejected the plaintiff's contention that his April 2004 complaint was timely because the delayed discovery rule of *Code Civ. Proc. § 340.1(a)*, and *(b)(2)* applied. Although the Legislature extended the limitations period date when the plaintiff discovered that his psychological injuries were caused by sexual abuse, it revived for only one year all such claims that were already time-barred. Therefore, the new discovery rule did not revive plaintiff's previously lapsed claims.

In ***Perez v. Roe 1*** *(2006) 146 Cal. App. 4th 171, 52 Cal. Rptr. 3d 762* , two plaintiffs brought suit against a Roman Catholic bishop in July 2003, alleging that they had been the victims of sexual abuse by one of its parish priests in the late 1970s and early 1980s, when they were both minors. Plaintiffs had each sued the bishop in previous suits, but their complaints were dismissed in 1994 and 1995, respectively, under the then applicable one-year statute of limitations. The trial court dismissed plaintiffs' current lawsuit against the bishop on the ground that the statute purporting to revive their previously dismissed complaints (*Code Civ. Proc., § 340.1*) violated the state's constitutional separation of powers doctrine. The Court of Appeal affirmed the judgment, concluding that the Legislature violated the separation of powers doctrine when it amended *Code Civ. Proc. § 340.1* to revive childhood sex abuse actions because final judgments had been entered in the earlier actions under the statute of limitations that previously existed. Once the judgments against plaintiffs in the previous actions were upheld on appeal, they became final for separation of powers purposes and could not be legislatively revived. Because the power to conclusively resolve cases by rendering dispositive judgments rests with the judiciary alone, the Legislature could not reverse final judgments that were rendered under the previous limitations period of § 340.1 (*146 Cal. App. 4th 171, 187-188)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersGovernmentsLegislationStatutes of LimitationsGeneral Overview

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14-143 California Points & Authorities § 143.26

§ 143.26 Supporting General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Bar of Statute of Limitations [Code Civ. Proc. § 366.2]--Failure of Plaintiff to Timely File Equitable Indemnity Action Against Decedent's Personal Representative

[1] FORM

[*Caption, See § 143.20[1].*]

THE COURT SHOULD SUSTAIN THE DEMURRER ON THE GROUND THAT THE ACTION IS BARRED BY THE ONE YEAR LIMITATION PERIOD OF CODE OF CIVIL PROCEDURE SECTION 366.2(a) BECAUSE THE COMPLAINT DEMONSTRATES THAT THE ACTION FOR EQUITABLE INDEMNITY WAS UNTIMELY COMMENCED AGAINST THE PERSONAL REPRESENTATIVE(S) FOR DECEDENT'S ESTATE.

A. Limitation Period for Bringing Action Against Decedent's Personal Representative. If a person against whom an action may be brought on a liability of the person, whether arising in contract, tort, or otherwise, and whether or not accrued, dies before the expiration of the applicable limitations period, and the cause of action survives, an action may be commenced within one year after the date of death, and the limitations period that would have been applicable does not apply (*Code Civ. Proc. § 366.2(a)*). The Legislature's intent behind *Code Civ. Proc. § 366.2* is that the one-year statute of limitations applies to *all* actions against a decedent on which the statute of limitations otherwise applicable had not run at the time of death (*Stoltenberg v. Newman (2009) 179 Cal. App. 4th 287, 296, 101 Cal. Rptr. 3d 606*).

B. *Code of Civil Procedure Section 366.2* Limitations Period Applies to Equitable Indemnity Action Against Decedent's Personal Representative. *Code of Civil Procedure Section 366.2* refers without qualification or restriction to "an action" on a liability of the decedent and applies to a liability "whether accrued or not accrued." Thus, section 366.2(a) bars a complaint or cross complaint for equitable indemnity against the personal representative(s) of decedent's estate filed more than one year after the decedent's death, despite the ordinary rule that an indemnity action does not accrue for statute of limitation purposes until a tort defendant pays a judgment or settlement for which that defendant is entitled to indemnity, when the one year limitation period of section 366.2(a) has not been tolled as provided for in *Code Civ. Proc. § 366.2(b)* and the _____ [complaint's *or* cross complaint's] allegations fail to show

that decedent had any insurance that would cover any of the claims at issue (*see Bradley v. Breen (1999) 73 Cal. App. 4th 798, 800, 803-805, 86 Cal. Rptr. 2d 726*). The _____ [complaint's *or* cross complaint's] allegations show that the equitable indemnity action against the decedent's personal representative(s) was commenced more than one year after the decedent's death in that _____ [*specify*]. The _____ [complaint's *or* cross complaint's] allegations _____ [show that the one year limitation period of section 366.2(a) was not tolled *or* do not show any basis on which the one year limitation period of section 366.2(a) would have been tolled] under *Code Civ. Proc. § 366.2(b)*. Moreover, the allegations fail to show that decedent had any insurance that would cover any of the claims at issue.

C. Objection by Demurrer. [*See § 143.20[1], Paragraph A.*]

D. Raising Statute of Limitations by Demurrer. [*See § 143.20[1], Paragraph B.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a general demurrer to a complaint for equitable indemnity brought against the personal representative for the decedent's estate when the action for equitable indemnity has been commenced more than one year after the decedent's death, the one year limitation period of *Code Civ. Proc. § 366.2(a)* has not been tolled [*see Code Civ. Proc. § 366.2(b)*], and the decedent does not have any insurance that would cover any of the claims at issue [*see Bradley v. Breen (1999) 73 Cal. App. 4th 798, 800, 803-805, 86 Cal. Rptr. 2d 726*].

Use of this form would not be appropriate if the action was commenced under *Prob. Code § 550 et seq.* against the decedent's estate to establish the decedent's liability for which the decedent was protected by insurance, because a different statute of limitations would apply in that case [*see Prob. Code § 551*].

Subject to the provisions governing creditor's claims, (*Prob. Code § 9000 et seq.*), a cause of action against a decedent that survives may be asserted against the decedent's personal representative, or to the extent provided by statute, against the decedent's successor in interest [*see Code Civ. Proc. § 377.40*].

Paragraph A assumes that the decedent died on or after January 1, 1993 [*see Code Civ. Proc. § 366.2(c)*]. Other versions of *Code Civ. Proc. § 366.2* apply to decedents who died before that date [*see § 143.40*].

Counsel may consider adding to the form a Paragraph F. Sustaining Demurrer Without Leave to Amend. For an example of such a paragraph, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For a form of demurrer to a complaint based on the bar of a statute of limitations, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* (Matthew Bender).

[3] Discussion of Authorities

[a] Limitation Period for Bringing Action Against Decedent's Personal Representative.

In ***Stoltenberg v. Newman*** *(2009) 179 Cal. App. 4th 287, 101 Cal. Rptr. 3d 606* , plaintiff limited partners sought review of a summary judgment in favor of defendants, a trust, a corporation, and a shareholder, in a suit for breach of fiduciary duty and an accounting. The trust was a general partner of two entities that owned a shopping mall in which the limited partners had invested. After the trustee died and his wife became the successor trustee, the mall was sold. More than one year after the trustee's death, the limited partners filed a complaint alleging that the trustee had obtained their consent to a refinancing transaction by concealing information from them. The court held that the action was one that could have been brought on a liability of the person, within the meaning of *Code Civ. Proc. § 366.2(a)*, and that it was based on a debt of the decedent trustee even though it had been brought against the successor trustee. The complaint named the successor trustee as the party defendant only to pursue trust assets for the alleged personal misconduct of the decedent trustee, based on acts completed entirely before he died, and for which he could have been held personally liable. The court stated that *Code Civ. Proc. § 366.2* was intended to impose a time limit on such claims, regardless of the party against whom the action was brought. The substance of the claims in the case was for the personal misconduct of the settlor/trustee on behalf of and for the benefit of the trust, that was completed entirely before the settlor/trustee died, and for which the settlor/trustee could have been held personally liable. The action is one that could have been "brought on a liability of the person" (*Code Civ. Proc. § 366.2(a)*), and is based " 'on a debt of the decedent' " (citing *Collection Bureau of San Jose v. Rumsey (2000) 24 Cal. 4th 301, 308, 99 Cal. Rptr. 2d 792, 6 P.3d 713*) even though brought against the successor trustee. The successor trustee is the named party defendant only to pursue trust assets for the acts of the deceased. Section 366.2 was intended to impose a time limit on such claims, "regardless of whom the action was brought against ... ." Accordingly, the claims against the trust were barred by section 366.2 (*179 Cal. App. 4th 287, 293-294)* .

[b] Code of Civil Procedure Section 366.2 Limitations Period Applies to Equitable Indemnity Action Against Decedent's Personal Representative

In ***Bradley v. Breen*** *(1999) 73 Cal. App. 4th 798, 86 Cal. Rptr. 2d 726* , decedent in 1990 pled guilty in a case involving lewd acts with a minor. Also in 1990, the minor filed an action against the decedent. In 1993, the decedent died in prison. Almost four years after decedent's death, in January, 1997, the minor filed a personal injury action against two individuals alleging, among other things, that they aided and abetted in decedent's molestation of him and seeking damages under various legal theories. The minor alleged that he was not aware of the individuals' complicity in causing his injuries until February of 1996, because of repressed memory syndrome related to the childhood sexual abuse. The individual defendants then cross complained against the decedent's estate and others for indemnity, apportionment of fault, and declaratory relief. The estate filed a demurrer to the cross-complaint based on the statute of limitations in *Code Civ. Proc. § 366.2*. The trial court sustained the demurrer without leave to amend and dismissed the cross complaint as against the estate and its personal representatives. An appeal ensued (*73 Cal. App. 4th 798, 800-801)* .

The court of appeal affirmed. The court initially held that *Code Civ. Proc. § 366.2* applies to cross complaints as well as to direct actions (*73 Cal. App. 4th 798, 803-804)* . Then the court, noting that section 366.2 applies to a liability "whether accrued or not accrued," concluded that the cross complaint against the decedent's estate for equitable indemnity, filed more than one year after decedent's death, was barred by section 366.2 despite the ordinary rule that an indemnity action does not accrue for statute of limitation purposes until a tort defendant pays a judgment or settlement

for which that defendant is entitled to indemnity. The only conclusion possible from the plain and unambiguous language of section 366.2, is that it applies to bar the action for equitable indemnity, regardless of whether that action has accrued under ordinary rules applicable to such claims (*73 Cal. App. 4th 798, 800, 804-805)* . The court further noted that with section 366.2, the Legislature has made a public policy determination that effectively limits or qualifies the right to indemnity. The Legislature has determined that the one-year statute of limitations will best effectuate the strong public policy of expeditious and final estate administration, despite the possibility that in a rare case, such as the present one, an action for equitable indemnity may be foreclosed (*73 Cal. App. 4th 798, 800, 805-806)* .

The court also rejected cross complainants' suggestion that they should have been permitted to amend their complaint to state a cause of action for which decedent had insurance, to which to section 366.2 statute of limitations would not apply. The court noted that the cross complainants made no showing that decedent had any insurance that would cover any of the claims at issue and did not sustain their burden to prove the reasonable probability that the defects in their cross complaint could be cured by amendment (*73 Cal. App. 4th 798, 800, 806)* .

[4] Additional Authorities

[a] Application of Code of Civil Procedure Section 366.2

Farb v. Superior Court (2009) 174 Cal. App. 4th 678, 94 Cal. Rptr. 3d 586 arose from a surrogacy contract between a decedent and his former wife and a surrogate mother. Prior to the children's birth, the decedent dissolved the marriage, and he provided no financial support for the children. It was undisputed that the complaint was filed more than one year after the decedent's death and that none of the enumerated exceptions in *Code Civ. Proc. § 366.2* applied. In accordance with the plain language of § 366.2, the one-year limitations period was not tolled during the minority of the children. Moreover, the one-year limitations period in Section 366.2 applied to an action on the liability of a deceased person, without regard to the location of the decedent's personal representative or estate.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersGovernmentsLegislationStatutes of LimitationsGeneral Overview

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14-143 California Points & Authorities § 143.27

§ 143.27 Supporting General Demurrer to Complaint [Code Civ. Proc. § 430.10]--Bar of Statute of Limitations [Code Civ. Proc. § 430.10(e)]--Discovery Rule Inapplicable

[1] FORM

[*This form should be combined with a general form of memorandum of points and authorities supporting a general demurrer (see § 143.20).*]

THE COURT SHOULD SUSTAIN THE DEMURRER TO PLAINTIFF'S COMPLAINT BECAUSE THE PLAINTIFF CANNOT ESTABLISH THAT THE DISCOVERY RULE IS APPLICABLE.

A. Discovery Rule Inapplicable. A plaintiff whose complaint shows on its face that his or her complaint would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence. The burden is on the plaintiff to show diligence and conclusory allegations will not withstand demurrer (*Shively v. Bozanich (2003) 31 Cal. 4th 1230, 1248, 7 Cal. Rptr. 3d 576, 80 P.3d 676* ; *State of California v. CCC Information Services, Inc. (2007) 149 Cal. App. 4th 402, 413, 57 Cal. Rptr. 3d 156* ; *Traditional Cat Association, Inc. v. Gilbreath (2004) 118 Cal. App. 4th 392, 404, 13 Cal. Rptr. 3d 353* ; *McKelvey v. Boeing North American, Inc. (1999) 74 Cal. App. 4th 151, 160, 86 Cal. Rptr. 2d 645*).

B. The Single Publication Rule Renders The Delayed Discovery Rule Inapplicable. The single-publication rule provides that, for any single edition of a newspaper or book, there is but a single potential action for a defamatory statement contained in the newspaper or book, no matter how many copies of the newspaper or the book were distributed; and the accrual of the cause of action in that case is not delayed by the discovery rule when the defamation occurred by means of a book, magazine, or newspaper that was distributed to the public (*Shively v. Bozanich (2003) 31 Cal. 4th 1230, 1248, 7 Cal. Rptr. 3d 576, 80 P.3d 676*). The single publication rule applies to all publications, including those that receive only limited circulation and, thus, are not generally distributed to the public (*Hebrew Academy of San Francisco v. Goldman (2007) 42 Cal. 4th 883, 890, 70 Cal. Rptr. 3d 178, 173 P.3d 1004*).

[2] Comments

[a] Use of Form

This memorandum should be combined with a general memorandum in support of a general demurrer to a complaint [*see § 143.20*], when the demurrer asserts that the complaint fails to state facts sufficient to constitute a cause of action in that it appears on the face thereof, of from matter of which the court is required or may take judicial notice, that the action is barred by the statute of limitation and the plaintiff has not alleged facts showing a delayed accrual of the cause of action based on the discovery rule.

Counsel should insert argument in the form showing the relationship between the facts of his or her case and the points of law stated.

[b] Related Pleading and Practice Forms

For a form of demurrer to a complaint based on the bar of a statute of limitations, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* (Matthew Bender).

[3] Discussion of Authorities

[a] Discovery Rule Inapplicable

In ***Shively v. Bozanich*** *(2003) 31 Cal. 4th 1230, 7 Cal. Rptr. 3d 576, 80 P.3d 676* , plaintiff's complaint alleged defamation based on the boyfriend's telling the attorney that plaintiff was a felony probationer, the attorney's repetition of the statement to the author, and the author's publication of a book containing the same statement. The boyfriend's demurrer was sustained based on the one-year statute of limitations in *Code Civ. Proc. § 340(c)*, and the court granted summary judgment to the attorney and the county. Plaintiff filed her claim with the County on May 12, 1997, and her complaint on October 22, 1997. By contrast, the first alleged defamation was published in 1994, more than one year prior to the filing of the complaint and more than six months prior to the filing of the claim with the County. The second alleged defamation was published in 1996 sometime prior to September. The third alleged defamation was communicated by means of the book, thousands of copies of which were distributed for sale in California, on a date (as plaintiff concedes) prior to October 21, 1996. Even considering October 21, 1996 to be the date of publication, the complaint was filed a year and a day after that date and the claim with the County was filed more than six months after that date. Plaintiff appealed contending that pursuant to the so-called discovery rule, all of her causes of action accrued when she first learned of the defamatory statement. She urges that, as a general rule of tort law, the accrual of a cause of action is tolled until the time the plaintiff knows (or with reasonable diligence should have known) that the injury occurred. In her case, she claims, accrual occurred in December 1996, when she bought and read a copy of the book, *A Problem of Evidence*. She asserted that the applicable statute of limitations should run from that time for all of her causes of action.

The appellate court held that in a claim for defamation, as with other tort claims, the period of limitations commences when the cause of action accrues, and a cause of action for defamation accrues at the time the defamatory statement is "published" (using the term "published" in its technical sense) (*31 Cal. 4th 1230, 1246-1247)* . With respect to books and newspapers, publication occurs (and the cause of action accrues) when the book or newspaper is first generally distributed to the public. When the basis for a claim has been published in the public record or has been the subject of publicity, several cases have declined to apply the discovery rule, commenting that the plaintiff may be expected to be sufficiently diligent to discover the basis for his or her claim within the statutory period. Courts in California and elsewhere have recognized that in certain circumstances it may be appropriate to apply the discovery rule to delay the accrual of a cause of action for defamation or to impose an equitable estoppel against defendants who assert the defense after the limitations period has expired. However, that rule has been applied when the defamatory statement is hidden from view as, for example, in a personnel file that generally cannot be inspected by the plaintiff (*31 Cal. 4th 1230, 1249)* . The discovery rule has not, however, been applied to postpone the accrual of a cause of action based upon the

publication of a defamatory statement contained in a book or newspaper. The rule constitutes an exception to general rules concerning the accrual of a cause of action--an exception based upon equity. Courts uniformly have *rejected* the application of the discovery rule to libels published in books, magazines, and newspapers, pointing out that application of the discovery rule would undermine the protection provided by the single-publication rule (*31 Cal. 4th 1230, 1250)* .

In ***State of California v. CCC Information Services, Inc.*** *(2007) 149 Cal. App. 4th 402, 57 Cal. Rptr. 3d 156* , plaintiff insured filed a qui tam action on behalf of the State of California, alleging that defendant company violated *Ins. Code § 1871.7* by making false or misleading statements in connection with the settlement of the insured's automobile insurance claim following an accident in which the insured's car suffered a total loss; the statements at issue consisted of the "comparable automobile" valuations defendant provided to the insured's insurance company in the claim settlement process. The trial court found the action barred by the three-year statute of limitations specified in *Ins. Code § 1871.7*, as the insured had inquiry notice more than three years before he filed the complaint against defendant. The insured's action did not involve a recurring obligation or any such periodic payment obligations, nor did the insured's conspiracy allegations toll the running of the statute because they amounted to bare legal conclusions.

In affirming the trial court's holding, the court of appeal considered the legal question of whether *Ins. Code § 1871.7*'s limitation period requires reasonable inquiry notice or actual notice of the actionable facts. The court held that the plaintiff discovers the cause of action when he at least suspects a factual basis, as opposed to a legal theory, for its elements, even if he lacks knowledge thereof. He has reason to discover the cause of action when he has reason at least to suspect a factual basis for its elements. Such reasonable suspicion exists when the plaintiff has notice or information of circumstances to put a reasonable person on inquiry (*149 Cal. App. 4th 402, 413)* .

In ***Traditional Cat Association, Inc. v. Gilbreath*** *(2004) 118 Cal. App. 4th 392, 13 Cal. Rptr. 3d 353* , plaintiffs brought an action alleging that statements made by defendants on an Internet Web site were defamatory. The Web site at issue was created by defendants in 1998; however, the lawsuit was not brought by plaintiffs until 2002. The statute of limitations for defamation actions is one year. Accordingly, the defendants challenged the complaint through a motion to strike and a demurrer on the ground that it was barred by the statute of limitations. The accrual of causes of action growing out of the publication of defamatory or other tortious statements is governed by the single-publication rule. This rule states that one cause of action will arise and the statute of limitations will begin running upon the first general publication or broadcast of a tortious statement, no matter how many copies are distributed or how many people hear or see the broadcast. A subsequent republication gives rise to a new single cause of action. The court held that this single-publication rule applies to statements published on Internet Web sites (*118 Cal. App. 4th 392, 404)* . In this instance, therefore, the cause of action began to accrue when the statements were first made on the Web site. There was no evidence of republication within the limitations period. Therefore, the appellate court held that the defamation claim should be stricken from the complaint as a matter of law (*118 Cal. App. 4th 392, 404)* .

In ***McKelvey v. Boeing North American, Inc.*** *(1999) 74 Cal. App. 4th 151, 86 Cal. Rptr. 2d 645* , involving consolidated cases, a class action naming several defendants, the issue was whether plaintiffs had pled facts sufficient to establish delayed discovery of their claims. Defendants in the class action, and defendant in the other actions (who had also been named as a defendant in the class action), had demurred to all causes of action in plaintiffs complaints contending the substantive claims were all barred by *Code Civ. Proc. § 338(b)* and *Code Civ. Proc. § 340(b)* (*see now Code Civ. Proc. § 340(c)*) and on its face the pleadings were insufficient to show delayed discovery. In two earlier actions, including the class action, the trial court had sustained the demurrers, final orders of dismissal were entered and plaintiffs appealed. In two later actions, the trial court overruled most of the demurrers, although one was sustained without leave to amend and two were sustained with leave to amend. Defendant in those actions then filed petitions for writ of mandate in which it asked the court of appeal to compel the trial judge to vacate the orders and sustain the demurrers without leave to amend (*74 Cal. App. 4th 151, 155-159)* .

The court of appeal, with regard to the earlier two actions affirmed the judgments, and with regard to the two later

actions granted the petitions and issued peremptory writs directing the trial court (1) to vacate its orders on the demurrers and (2) to issue new orders sustaining the demurrers without leave to amend (*74 Cal. App. 4th 151, 162)* . The court noted that by their reliance on the "discovery rule" plaintiffs conceded by implication that, without it, their claims were barred by one or more statutes of limitations. The common law rule, that an action for personal injury or property damages accrues on the date of injury, applies only as modified by the discovery rule, which provides that the accrual date of a cause of action is delayed until the plaintiff is aware of his or her injury and its negligent cause. The plaintiff is charged with this awareness as of date plaintiff suspects or should suspect that his or her injury was caused by wrongdoing, that someone has done something wrong to him or her. Accordingly, the period of limitations begins to run without regard to whether the plaintiff is aware of the specific facts necessary to establish his or her claim, provided that plaintiff has suspicion of wrongdoing, which he or she is charged with once he or she has notice or information of circumstances that would cause a reasonable person to inquire. A plaintiff whose complaint shows on its fact that his or her claim woul d be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence. The burden is on the plaintiff to show diligence and conclusory allegations will not withstand demurrer (*74 Cal. App. 4th 151, 160)* . The court concluded that none of the complaints or amended complaints were sufficient because none of them disclosed the time or manner of discovery by any plaintiff. They offered only conclusory allegations. Plaintiffs did not allege that they were not aware of facts sufficient to make a reasonable prudent person sufficiently suspicious to investigate further. They did not allege facts about the time or manner of discovery and failed to allege facts showing their inability to have made earlier discovery despite due diligence (*74 Cal. App. 4th 151, 160-161)* . Moreover, plaintiffs on appeal and in opposition to the petitions did not suggest there were additional facts they could plead to satisfy the discovery rule, but instead asserted an abstract right to amend. They have no such right. The burden is on the plaintiff to show the manner in which plaintiff can amend, and how the amendment will cure the defect (*74 Cal. App. 4th 151, 161)* .

In regard to cases of injury or death arising from exposure to hazardous material or toxic substances, *McKelvey v. Boeing North America, Inc. (1999) 74 Cal. App. 4th 151, 86 Cal. Rptr. 2d 645* has been overruled by the codification of *Code Civ. Proc. § 340.8* to the extent it is consistent with the following statutory language: Media reports regarding the hazardous material or toxic substance contamination do not, in and of themselves, constitute sufficient facts to put a reasonable person on inquiry notice that the injury or death was caused or contributed to by the wrongful act of another [Stats. 2003, Ch. 873; *see § 143.55*].

[b] The Single Publication Rule Renders The Delayed Discovery Rule Inapplicable

The facts and analysis of ***Shively v. Bozanich*** *(2003) 31 Cal. 4th 1230, 7 Cal. Rptr. 3d 576, 80 P.3d 676* are discussed in *§ 143.27[3][a], above*.

In ***Hebrew Academy of San Francisco v. Goldman*** *(2007) 42 Cal. 4th 883, 70 Cal. Rptr. 3d 178* , plaintiffs, a Hebrew academy and its dean, sued defendants, a former president of the Jewish Community Federation of San Francisco and others, for defamation. The dean alleged that he had been defamed during an interview of the former president, as part of an oral history project that was published with only limited circulation. The interview was conducted in 1992, copyrighted for publication, and published in 1993. The trial court found that the action was barred by the one-year statute of limitations set forth in *Code Civ. Proc. § 340(c)*. The transcript of the interview was not published in an inherently secretive manner. Although not widely distributed, the transcript was available to the public. Because plaintiffs had access to the document from the time it was published, the discovery rule did not apply. The cause of action for defamation accrued under the single-publication rule no later than 1993, when the interview was published. The discovery rule did not delay the accrual of the cause of action, even though the interview received only limited circulation. The Court of Appeal reversed, concluding that the alleged defamation was not subject to the single-publication rule, and that the action was tolled by the discovery rule because the alleged libel was hidden or beyond what the ordinary person could be expected to immediately detect or comprehend.

The California Supreme Court reversed the appellate court decision, holding that the single publication rule, as codified

by Civ. Code § 3245.3, applies to all publications, including those that receive only limited circulation and, thus, are not generally distributed to the public (*42 Cal. 4th 883, 893*). Although the transcript at issue here was not published and not widely distributed, the transcript was available to the public. Rabbi Lipner became aware of the transcript when a colleague discovered it while conducting research for a book about him. As stated in Shively, the discovery rule has been applied to defamation cases "when the defamatory statement is hidden from view as, for example, in a personnel file that generally cannot be inspected by the plaintiff ... . The cases turn upon the circumstances in which the defamatory statement is made and frequently involve a defamatory writing that has been kept in a place to which the plaintiff has no access or cause to seek access." Because plaintiffs in the present case had access to the document from the time it was published, the discovery rule did not apply (*42 Cal. 4th 883, 894-895)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersGovernmentsLegislationStatutes of LimitationsGeneral Overview

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CHAPTER 143 LIMITATION OF ACTIONS
PART II. FORMS

14-143 California Points & Authorities § 143.28

§ 143.28 Supporting General Demurrer to Complaint [Code Civ. Proc. § 430.10]--Bar of Statute of Limitations [Code Civ. Proc. § 430.10(e)]--Tolling for Minority Under Code Civ. Proc. § 352(a) Inapplicable

[1] FORM

[*This form should be combined with a general form of memorandum of points and authorities supporting a general demurrer (see § 143.20).*]

THE COURT SHOULD SUSTAIN THE DEMURRER TO PLAINTIFF'S COMPLAINT WITHOUT LEAVE TO AMEND BECAUSE THE TOLLING PROVISION FOR MINORITY UNDER CODE OF CIVIL PROCEDURE § 352(a) IS INAPPLICABLE BECAUSE THE PLAINTIFF HAS BEEN EMANCIPATED AND THE APPLICABLE STATUTE OF LIMITATIONS HAS EXPIRED.

Minor's Tolling Provision of *Code of Civil Procedure § 352(a)* Ceases to Apply and Minor's Causes of Action Accrue on Date of Emancipation. A minor who is emancipated by court order under *Family Code section 7000 et seq.* is, by operation of law, subject to all legal consequences of emancipation which are set forth in *Family Code section 7050*, including the right to sue or be sued in the minor's own name. Once emancipated, a minor is under no legal disability with respect to bringing his or her own claim. Therefore, the minor's tolling provision of *Code of Civil Procedure § 352(a)* no longer applies and the emancipated minor's causes of action accrue, and statute of limitations begins to run, on the date of emancipation (*West Shield Investigations & Security Consultants v. Superior Court (2000) 82 Cal. App. 4th 935, 949-951, 98 Cal. Rptr. 2d 612*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities should be combined with a general memorandum in support of a general demurrer to a complaint [*see § 143.20*], when the demurrer asserts that the complaint fails to state facts sufficient to constitute a cause of action in that it appears on the face thereof, or from matter of which the court is required or may take judicial notice, that the action is barred by the statute of limitations because minor plaintiff was emancipated by a court order and the applicable statute of limitations has expired.

Counsel should insert argument in the form showing the relationship between the facts of his or her case and the points of law stated.

[b] Related Pleading and Practice Forms

For a form of demurrer to a complaint based on the bar of a statute of limitations, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* (Matthew Bender).

[3] Discussion of Authorities

[a] Minor's Tolling Provision of Code of Civil Procedure § 352(a) Ceases to Apply and Minor's Causes of Action Accrue on Date of Emancipation

In ***West Shield Investigations & Security Consultants v. Superior Court*** *(2000) 82 Cal. App. 4th 935, 98 Cal. Rptr. 2d 612* , plaintiff was emancipated from her parents by court order on May 8, 1995. Plaintiff turned 18 on September 8, 1995. On September 9, 1996, plaintiff filed suit against several defendants alleging numerous tort and civil rights causes of action. Defendants moved for summary judgment, or in the alternative, summary adjudication, arguing in relevant part that *Code Civ. Proc. § 352*, which mandates that statutes of limitations are tolled for minors, ceases to apply once the minor is emancipated because *Fam. Code § 7050(e)(4)* expressly provides that an emancipated minor's adult powers include the right to sue, and thus, the applicable statutes of limitations barred the actions. The trial court denied defendants' motions for summary judgment and denied in part and granted in part the motions for summary adjudication. Thereafter the defendants filed writ petitions seeking extraordinary relief from the trial court's order denying their motions for summary judgment and denying in part their motions for summary adjudication.

The court of appeal granted in part and denied in part the petitions for extraordinary relief (*82 Cal. App. 4th 935, 940, 957)* . In so doing, the court noted that a minor who is emancipated by court order under *Family Code § 7000 et seq.* is, by operation of law, subject to all legal consequences of emancipation which are set forth in *Family Code § 7050*, including the right to sue or be sued in the minor's own name. Once emancipated, a minor is under no legal disability with respect to bringing his or her own claim (*82 Cal. App. 4th 935, 949)* . Therefore, the court held that when a minor is emancipated by court order under *Family Code § 7000 et seq.*, the minor's tolling provision of *Code of Civil Procedure § 352(a)* no longer applies and the emancipated minor's causes of action accrue, and statute of limitations begin to run, on the date of emancipation (*82 Cal. App. 4th 935, 949-951)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersGovernmentsLegislationStatutes of LimitationsGeneral Overview

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14-143 California Points & Authorities § 143.29

§ 143.29 Supporting Motion for Separate Trial of Special Defense [Code Civ. Proc. § 597]--Bar of Statute of Limitations

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN SUPPORT OF MOTION FOR SEPARATE
vs.	)	TRIAL OF SPECIAL DEFENSE
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

A MOTION FOR A SEPARATE TRIAL OF A SPECIAL DEFENSE IS PROPERLY GRANTED WHERE THE ANSWER PLEADS THE STATUTE OF LIMITATIONS AS A BAR TO THE ACTION.

Separate Trial for Defense of Statute of Limitations. When the answer pleads that the action is barred by the statute of limitations, the court may, either on the court's own motion or on the motion of any party, proceed to the trial of such special defense before the trial of any other issue in the case (*Code Civ. Proc. § 597*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a defendant's motion for the separate trial of the special defense, which has been pleaded in the answer, that the action is barred by a statute of limitations.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For a form of notice of motion for the separate trial of the special defense of limitation, and a form of order granting such a motion, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePretrial MattersSeparate TrialsGovernmentsLegislationStatutes of LimitationsGeneral Overview

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14-143 California Points & Authorities § 143.30

§ 143.30 Supporting Motion for Separate Trial of Defense on Statute of Limitations--Medical Malpractice [Code Civ. Proc. § 597.5]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN SUPPORT OF MOTION FOR SEPARATE
vs.	)	TRIAL OF DEFENSE ON STATUTE OF LIMITA-
_____ [*name*],	)	TIONS
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

A MOTION FOR A SEPARATE TRIAL OF A DEFENSE ON THE STATUTE OF LIMITATIONS IN AN ACTION AGAINST A _____ [*specify, e.g.*, PHYSICIAN] IS PROPERLY GRANTED WHEN THE ANSWER PLEADS THE STATUTE OF LIMITATIONS AS A BAR TO THE ACTION.

Separate Trial for Defense of Statute of Limitations. When the answer in an action for medical malpractice pleads that the action is barred by the statute of limitations, the court must, on the motion of either party, or on its own motion,

proceed to try the issue separately and before any other issues in the case are tried (*Code Civ. Proc. § 597.5*; *Kelemen v. Superior Court (1982) 136 Cal. App. 3d 861, 864, 186 Cal. Rptr. 566*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a defendant's motion for a separate trial on the issue of the statute of limitations as a bar to an action involving medical malpractice pursuant to *Code Civ. Proc. § 597.5*.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, in an action against a physician alleging professional negligence, counsel should cite the applicable statute that prescribes a certain time period in which to bring an action against the physician [*see, e.g., Code Civ. Proc. § 340.5*], and allege facts showing that the action was not brought within the applicable time period.

[3] Discussion of Authorities

[a] Separate Trial for Defense of Statute of Limitations

Code Civ. Proc. § 597.5 provides that in an action against a physician or surgeon, dentist, registered nurse, dispensing optician, optometrist, registered physical therapist, podiatrist, licensed psychologist, osteopathic physician and surgeon chiropractor, clinical laboratory bioanalyst, clinical laboratory technologist, veterinarian, or a licensed hospital as the employer of any such person, based on such person's alleged professional negligence, or for rendering professional services without consent, or for error or omission in such person's practice, if the answer pleads that the action is barred by the statute of limitations, and if any party so moves or the court on its own motion requires, the issues raised thereby must be tried separately and before any other issues in the case are tried.

In ***Kelemen v. Superior Court*** *(1982) 136 Cal. App. 3d 861, 186 Cal. Rptr. 566* , a minor, through her mother as guardian ad litem, brought an action for prenatal medical malpractice against defendant hospitals, alleging that her cerebral palsy was caused by defendants' negligence before and during her birth. The complaint alleged that plaintiff's mother did not know or have information by virtue of which she reasonably could have known of the injury and its negligent cause until seven months before the action was filed. Plaintiff was seven years old when the action was filed. One of the defendants who answered the complaint moved for a separate trial on the defense of the statute of limitations pursuant to *Code Civ. Proc. § 597.5*, contending that the limitation period in former Civ. Code § 29 (*now see Code Civ. Proc. § 340.4*) applied. Former Section 29 provided that an action for prenatal injuries must be brought within six years from birth. Plaintiff argued that *Code Civ. Proc. § 340.5* defined the applicable limitations period. *Code Civ. Proc. § 340.5* provides that a minor's medical malpractice action must be brought within three years or prior to his or her eighth birthday, whichever is the longer period. The trial court granted the motion on the ground that the legal question of which statute applied must be decided at a separate trial. Plaintiff sought a writ of mandate to set aside the order,

contending that *Code Civ. Proc. § 340.5* defined the applicable period of limitations and she was within that period as a matter of law.

The court of appeal denied the petition. The court held that pursuant to *Code Civ. Proc. § 597.5*, the trial court was required to try the statute of limitations issue separately before proceeding to trial on any other issues once defendant had pleaded the statute of limitations as a defense and had moved for a separate trial on the issue (*136 Cal. App. 3d 861, 864)* . The court went on to state that the limitation specified in *Code Civ. Proc. § 340.5* rather than former Civ. Code § 29 was applicable in the underlying action because it was the later and more specific of the two statutes in question, and it is an integral part of an interrelated, comprehensive legislative scheme governing medical malpractice actions that supplanted the limitations period in former Section 29 (*136 Cal. App. 3d 861, 864-868)* .

Additional cases, which hold that medical malpractice actions by minors for injuries sustained prior to or in the course of birth are governed by *Code Civ. Proc. § 340.5* and not former Civ. Code § 29 (*now see Code Civ. Proc. § 340.4*), include *Young v. Haines (1986) 41 Cal. 3d 883, 894, 226 Cal. Rptr. 547, 718 P.2d 909* , and *Donabedian v. Manzer (1986) 187 Cal. App. 3d 1021, 1025, 232 Cal. Rptr. 325* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePretrial MattersSeparate TrialsGovernmentsLegislationStatutes of LimitationsGeneral OverviewTortsMalpractice & Professional LiabilityGeneral Overview

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14-143 California Points & Authorities § 143.31

§ 143.31 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10]--Bar of Statute of Limitations Not Apparent on Face of Complaint--General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN OPPOSITION TO DEMURRER TO COM-
vs.	)	PLAINT
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

A DEMURRER BASED ON A STATUTE OF LIMITATIONS SHOULD NOT BE SUSTAINED WHEN THE BAR DOES NOT APPEAR ON THE FACE OF THE PLEADING.

Defect Required to Appear on Face of Complaint. In order for the bar of a statute of limitations to be raised by demurrer, the defect must clearly and affirmatively appear on the face of the pleading. It is not enough that the complaint shows merely that the action may be barred (*McMahon v. Republic Van & Storage Co., Inc. (1963) 59 Cal. 2d 871, 874, 31 Cal. Rptr. 603, 382 P.2d 875* ; *Mangini v. Aerojet-General Corp. (1991) 230 Cal. App. 3d 1125, 281*

Cal. Rptr. 827).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a general demurrer to the complaint, where the demurrer asserts that the action is barred by a statute of limitations, but it does not clearly and affirmatively appear on the face of the complaint, or from a matter of which the court is required to or may take judicial notice, that the action is barred.

Counsel for plaintiff in such a case should be alert to the possibility that although the complaint may withstand a general demurrer, the trial court might be disposed to sustain a special demurrer on the ground of uncertainty or ambiguity where a fact bearing on the limitation of the action (such as a relevant date) has been omitted. If the action is in fact not barred, then perhaps the better practice is to offer a clarifying amendment to show that it is not barred, rather than to oppose the demurrer on what amounts to a technicality.

Counsel should insert argument in the form showing the relationship between the facts of his case and the points of law stated.

[3] Discussion of Authorities

[a] Defect Required to Appear on Face of Complaint

McMahon v. Republic Van & Storage Co., Inc. *(1963) 59 Cal. 2d 871, 31 Cal. Rptr. 603, 382 P.2d 875* , was an action for the recovery of allegedly fraudulent overcharges for the storage and interstate transportation of goods. The trial court sustained a demurrer on the ground that the action was barred by a federal statute of limitations [former 49 U.S.C. § 16]; but the Supreme Court observed that as to some of the demurring defendants, there was no allegation in the complaint showing them to be carriers subject to the federal statute. The court held that in order for the bar of a statute of limitations to be raised by demurrer, the defect must clearly and affirmatively appear on the face of the pleading. The court reversed the judgment of dismissal that had been entered following the sustaining of the demurrer (*59 Cal. 2d 871, 874-875)* .

Mangini v. Aerojet-General Corp. *(1991) 230 Cal. App. 3d 1125, 281 Cal. Rptr. 827* , was an action by real property owners against parties who leased the property from prior owners and who allegedly contaminated the property with hazardous waste during the leasehold. The complaint alleged numerous counts, including one for equitable indemnity for the costs of testing the property and abatement of hazardous conditions that plaintiffs were compelled to incur by the government and one for declaratory relief delineating the parties' respective obligations for the testing and abatement costs. Defendants demurred to all counts on the grounds each failed to state facts sufficient to constitute a cause of action and were barred by the statute of limitations. The trial court sustained the demurrer without leave to amend, and

plaintiffs appealed.

The court of appeal reversed as to all but four of the counts. In reversing with respect to the 10th and 11th counts (equitable indemnity and declaratory relief, respectively), the court stated that in order for the bar of the statute of limitations to be raised by demurrer, the defect must clearly and affirmatively appear on the face of the complaint, and that it is not enough that the complaint shows merely that the action may be barred. Because the compliant did not disclose when the plaintiff incurred costs for testing or cleanup of the hazardous waste, neither the count for equitable indemnity nor the related claim for declaratory relief was subject to demurrer based on the statute of limitations (*230 Cal. App. 3d 1125, 1155)* .

[4] Additional Authorities

[a] Defect Required to Appear on Face of Complaint

Baright v. Willis (1984) 151 Cal. App. 3d 303, 198 Cal. Rptr. 510 , was an action for legal malpractice. The trial court sustained a demurrer without leave to amend on the grounds that the statute of limitations for the action had run. The court of appeal reversed the trial court's order. The court noted that under *Code Civ. Proc. § 340.6*, a legal malpractice action must be filed within four years of the date when the alleged tort occurred and within one year of the date when the alleged tort was or should have been discovered (*151 Cal. App. 3d 303, 308)* . The court held that the action was filed within the four-year period. With respect to the one-year period, the trial court had found plaintiff to have had knowledge of the tort at a time more than one year before the action was filed when he consulted a second attorney as to possible actions to take against defendant. But the trial court had disregarded plaintiff's allegations that he was ignorant of the tort until he was informed of it by a third attorney, before the one-year filing period (*151 Cal. App. 3d 303, 310)* . The court restated the rule that when ruling on a general demurrer, all allegations must be deemed to be true and that a demurrer on the ground of the bar of limitations does not lie when the complaint merely shows that the action may have been barred. It must appear affirmatively that, on the facts alleged, the right of action is necessarily barred (*151 Cal. App. 3d 303, 310-311)* . The question of whether or not there has been a belated discovery of the cause of action is a question of fact which becomes a question of law only when reasonable minds can draw but one conclusion from the evidence. The court held that the complaint on its face did not support a conclusion as a matter of law that, in the exercise of due diligence, plaintiff should have discovered defendant's alleged negligence and failed to do so (*151 Cal. App. 3d 303, 311)* . The court noted that when there is a professional relationship between a plaintiff and defendant, the degree of diligence required of the plaintiff in ferreting out negligence for purposes of the statute of limitations is diminished. Plaintiff in this action was entitled to rely on the second attorney's advice, that no cause of action existed in not filing the action, until receiving advice from the third attorney (*151 Cal. App. 3d 303, 311-312)* .

Childs v. State of California (1983) 144 Cal. App. 3d 155, 192 Cal. Rptr. 526 , was a personal injury action against the state. The complaint alleged that a claim was presented and rejected by notice dated and mailed "on or about" six months and one day before the complaint was filed. Defendant demurred on the ground that the action was barred by *Gov. Code § 945.6(a)(1)*, requiring that any action be filed within six months of the date that a rejection is deposited in the mail, and the trial court sustained the demurrer. The court of appeal reversed, holding that the allegation revealed only that the action might be barred by the statute of limitations (*144 Cal. App. 3d 155, 161)* . The court held that, since a demurrer can be sustained on statute of limitations grounds only if the facts alleged show that the right of action is necessarily barred, the statute of limitations defense depended on a factual resolution and was not resolvable by demurrer (*144 Cal. App. 3d 155, 161-162)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsAffirmative

DefensesGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersGovernmentsLegislationStatutes of LimitationsGeneral Overview

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CHAPTER 143 LIMITATION OF ACTIONS
PART II. FORMS

14-143 California Points & Authorities § 143.32

§ 143.32 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10]--Action Commenced Timely

[1] FORM

[*Caption. See § 143.31[1].*]

A DEMURRER BASED ON A STATUTE OF LIMITATIONS SHOULD NOT BE SUSTAINED WHEN THE COMPLAINT IS IN A FORM THAT COMPLIES WITH STATE REQUIREMENTS AND WAS TIMELY PRESENTED TO THE CLERK FOR FILING. THE CLERK HAS NO AUTHORITY TO REJECT A FILING FOR FAILURE TO COMPLY WITH A LOCAL RULE.

Action Timely Commenced When Complaint Complying With State Requirements Presented Timely to Clerk for Filing. An action is commenced within the meaning of Title 2 of Part 2 (Section 312 et seq.) of the Code of Civil Procedure, when the complaint is filed (*Code Civ. Proc. § 350*). In legal effect, a complaint is deemed filed when it is presented to the clerk for filing during business hours in the form required by state law. A local superior court may not condition the filing of a complaint on local rule requirements. So long as a complaint complies with state requirements, the clerk has a ministerial duty to file it (*Carlson v. Department of Fish & Game (1998) 68 Cal. App. 4th 1268, 1270, 1272-1276, 80 Cal. Rptr. 2d 601*). Therefore, when such a complaint has been presented to the clerk for filing during business hours before expiration of the statute of limitations, the action is timely commenced, and a demurrer based on the theory that the complaint is barred by the statute of limitations should be overruled (*see Carlson v. Department of Fish & Game (1998) 68 Cal. App. 4th 1268, 1270, 1282-1283, 80 Cal. Rptr. 2d 601*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a general demurrer to the complaint, where the demurrer asserts that the action is barred by a statute of limitations, when the complaint, in the form required by state law, was initially presented to the clerk for filing during business hours before expiration of the statute of limitations, but the clerk declined to file it until plaintiff complied with a local rule requirement.

Counsel should insert argument in the form showing the relationship between the facts of his case and the points of law stated.

[b] Procedure

The procedure for opposing a demurrer based on the clerk having improperly rejected a timely filing is unclear. The party opposing the demurrer will have to show the date the complaint was initially presented to the clerk for filing and that the clerk declined to do so until compliance with the local rule requirement. Although on a hearing on a demurrer, a court is not entitled to consider facts presented to it through affidavits (or declarations under *Code Civ. Proc. § 2015.5*) [*Childs v. State of California (1983) 144 Cal. App. 3d 155, 163, 192 Cal. Rptr. 526*), there have been some exceptions to this rule (*see, e.g.*, cases discussed in *California Forms of Pleading and Practice, Ch. 321, Judicial Notice, § 321.15[4*][b][ii] (Matthew Bender)). Thus, to enhance the possibility that the court will consider such facts on the hearing on the demurrer, in addition to submitting an opposing memorandum of points and authorities, the opposing party should probably respond by (1) submitting an opposing declaration showing the date the complaint was initially presented to the clerk for filing and the clerk's refusal to do so until compliance with the local rule requirement, (2) moving for an order correcting the date of filing to the date on which the complaint was first presented for filing (which motion would include a supporting declaration), and (3) making an appropriate request that judicial notice be taken concerning the date the complaint was initially presented for filing. In *Carlson v. Department of Fish & Game (1998) 68 Cal. App. 4th 1268, 80 Cal. Rptr. 2d 601* , cited as authority in the form above, after defendants demurred, plaintiff responded by moving for an order correcting the date of filing to the date on which the complaint was first presented for filing [*Carlson v. Department of Fish & Game (1998) 68 Cal. App. 4th 1268, 1270, 80 Cal. Rptr. 2d 601]* . The court of appeal did not discuss plaintiff's responding motion or judicial notice, but nevertheless concluded that the trial court should have overruled defendants' demurrer [*Carlson v. Department of Fish & Game (1998) 68 Cal. App. 4th 1268, 1282-1283, 80 Cal. Rptr. 2d 601]* .

[3] Discussion of Authorities

[a] Action Timely Commenced When Complaint Complying With State Requirements Presented Timely to Clerk for Filing

In ***Carlson v. Department of Fish & Game*** *(1998) 68 Cal. App. 4th 1268, 80 Cal. Rptr. 2d 601* , plaintiff, represented by out-of-county counsel, desired to sue in Los Angeles County. Plaintiff's counsel prepared a complaint and sent it by Federal Express to the Los Angeles Superior Court in Santa Monica. The complaint complied in all respects with state requirements, but plaintiff did not include a "Certificate of Assignment" required by local rule. Because the certificate was missing, the court clerk did not file the complaint, but mailed it back to plaintiff's counsel. Counsel returned the complaint together with a Certificate of Assignment to the court several days later, but by that time the statute of limitations period had elapsed. Defendants demurred on several grounds, including that the complaint was barred by the statute of limitations. Plaintiff responded by moving for an order correcting the date of filing to the date on which the

complaint was first presented for filing. The trial court denied plaintiff's motion, sustained defendants' demurrer without leave to amend, and dismissed the complaint (*68 Cal. App. 4th 1268, 1270)* .

The court of appeal reversed and remanded with directions to grant leave to amend the complaint. The court held that a local superior court may not condition the filing of a complaint on local rule requirements. Instead, so long as a complaint complies with state requirements, the clerk has a ministerial duty to file. In legal effect, a complaint is deemed filed when it is presented to the clerk for filing during business hours in the form required by state law. Thus, plaintiff's complaint was effectively filed when it was first presented to the clerk, and the statute of limitations therefore did not run (*68 Cal. App. 4th 1268, 1270, 1273)* . Accordingly, defendants' demurrer should have been overruled (*68 Cal. App. 4th 1268, 1282-1283)* . The court noted that for purposes of the statute of limitations, filing means delivery to the clerk during business hours (*68 Cal. App. 4th 1268, 1273)* . The court also distinguished *City of Los Angeles v. Superior Court (1968) 264 Cal. App. 2d 766, 70 Cal. Rptr. 826* , in which plaintiff's counsel first presented a complaint for filing on behalf of a minor, then withdrew it either because counsel failed to apply for a guardian ad litem or because counsel's petition for appointment of a guardian was defective. The complaint was again presented for filing after the statute of limitations had run. The *City of Los Angeles* court ruled that the complaint could not be back-dated to reflect filing on the date it was first presented to the clerk because it had not in fact been left with the clerk for filing on that date. Instead, counsel had withdrawn it. In the instant case, by contrast, plaintiff's counsel did not submit and then withdraw the complaint. Instead, counsel submitted it and the clerk declined to file it. Quoting from *United Farm Workers of America v. Agricultural Labor Relations Bd. (1985) 37 Cal. 3d 912, 918, 210 Cal. Rptr. 453, 694 P.2d 138* , the court noted that it is the filer's actions that are scrutinized to determine whether the petition was timely filed. Rejection of the petition by the clerk for a technical defect cannot undo a filing that has already occurred. Scrutinizing the filer's actions in *City of Los Angeles* reveals that the filer did not leave the complaint with the clerk for filing, but instead withdrew it. Scrutinizing the filer's actions in the instant case reveals that plaintiff's counsel never withdrew plaintiff's complaint; instead the clerk erroneously mailed it back (*68 Cal. App. 4th 1268, 1274-1275)* . The court went on to note that the conclusion that a clerk lacks authority to enforce the Los Angeles Superior Court local rules by rejecting papers that comply with former Cal. Rules of Ct., Rule 201 see now 2.100-2.119 does not mean that those local rules cannot be enforced. Rather it simply means they cannot be enforced by rejecting filings that conform to state law. After a paper is filed, the panoply of possible sanctions provided for in *Code Civ. Proc. § 575.2*, former Cal. Rules of Ct., Rule 227 [*see now* Rule 2.30] and elsewhere become available to redress local rule violations (*68 Cal. App. 4th 1268, 1281-1282)* .

[4] Additional Authorities

[a] In General

Duran v. St. Luke's Hospital (2004) 114 Cal. App. 4th 457, 459, 8 Cal. Rptr. 3d 1 , was a malpractice action where the plaintiffs' attorney mailed the complaint two days before the final day for filing and learned that the enclosed fee was inadequate after the statute of limitations expired. The filing clerk of the San Francisco Superior Court, California, received plaintiffs' complaint by mail, but did not file it, because the fee was $3 short. The statute of limitations expired the next day. The trial court granted a petition to deem the complaint filed when it was received, but subject to a motion to strike by defendants, and ultimately entered a judgment of dismissal (*114 Cal. App. 4th 457, 459)* .

The reviewing court affirmed the dismissal. An unbroken line of decisions by the California Supreme Court holds that it is mandatory for court clerks to demand and receive the fee required by statute before documents or pleadings are filed. The court rejected the plaintiff's assertion that *Carlson v. Department of Fish and Game (1998) 68 Cal. App. 4th 1268, 80 Cal. Rptr. 2d 601* was controlling because the present case did not involve conflicting court rules but with dealt with state statutes of unambiguous language and meaning, which make the payment of fees the condition precedent to the filing of court documents or pleadings (*114 Cal. App. 4th 457, 461)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersGovernmentsLegislationStatutes of LimitationsGeneral Overview

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14-143 California Points & Authorities § 143.33

§ 143.33 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10]--Action Not Appearing Wholly Barred

[1] FORM

[*Caption. See § 143.31[1].*]

A DEMURRER BASED ON A STATUTE OF LIMITATIONS SHOULD NOT BE SUSTAINED WHERE IT APPEARS THAT THE ACTION IS NOT ENTIRELY BARRED.

Action Not Entirely Barred. A demurrer based on the statute of limitations may not be sustained if it appears that the plaintiff's cause of action is not entirely barred (*Vassere v. Joerger (1938) 10 Cal. 2d 689, 694, 76 P.2d 656*).

Actionable and Appreciable Harm Occurring Before and Within Limitations Period. A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent actionable acts that entail adverse effects resulting from the past actionable acts. However, if a defendant engages in a series of acts each of which is intentionally discriminatory, then a fresh violation takes place when each act is committed (*Hammond v. County of Los Angeles (2008) 160 Cal. App. 4th 1579, 1597, 73 Cal. Rptr. 3d 690*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a general demurrer to the complaint, where the demurrer asserts that the action is barred by a statute of limitations, but it appears on the face of the complaint that the action is not entirely barred.

Counsel should insert argument in the form showing the relationship between the facts of his case and the points of law stated.

[3] Discussion of Authorities

[a] Action Not Entirely Barred

Vassere v. Joerger *(1938) 10 Cal. 2d 689, 76 P.2d 656* , was an action for the collection of a debt. It was based on three acknowledgments of three debts, each for a different amount. The trial court sustained the defendant's demurrer on the ground that the action was barred and entered a judgment of dismissal, from which the plaintiff appealed.

The Supreme Court observed that as to one of the three acknowledgments, it was equally possible that the acknowledgment was executed before the period of limitation on the original debt expired, or that it was executed after expiration of that period. Nothing in the complaint or in the words of the acknowledgment indicated which was the case. Thus, it was possible that the action was barred as to the one debt; and possible that the action was not barred. This problem was not important, however, the court stated, since there was no such difficulty with the other two acknowledgments, and "[a] demurrer based on the statute of limitations may not properly be sustained if any part of the cause of action be not barred" (*10 Cal. 2d 689, 693-694)* .

It is apparent that in using the phrase "part of the cause of action," the court did not imply the splitting of a cause of action. In truth, in the *Vassere* case, *above,* there were three causes of action (one on each of the three debts) united in one complaint. The import of the court's statement is, as the point in this memorandum suggests, that a general demurrer based on the statute of limitations may not be sustained unless the action commenced by the complaint is in all respects barred. The rule supported by the *Vassere* case would most likely be applied where there are two or more plaintiffs or defendants, and the action is barred as to one of them but not as to another, or where, as in the *Vassere* case, two or more causes of action are united in one complaint, and the action on one of them is barred.

[b] Actionable and Appreciable Harm Occurring Before and Within Limitations Period

In ***Hammond v. County of Los Angeles*** *(2008) 160 Cal. App. 4th 1579, 1597, 73 Cal. Rptr. 3d 690* , plaintiff, a county employee, appealed a summary judgment from trial court in favor of defendants, the county and a supervisor, in an action alleging violations of the Fair Employment and Housing Act (FEHA). The employee submitted evidence of statements and actions before the limitations period of *Gov. Code § 12960(d),* suggesting that a reduction in her classroom teaching assignments was based on age and race. However, after July 2003, i.e., within the limitations period, the court of appeal found evidence that defendant continued to limit the number and types of teaching assignments that plaintiff would receive. In doing so, defendant made discrete decisions concerning plaintiff's workload within the limitations period, each of which was arguably a fresh violation of the FEHA. Thus, even if the analysis of *Ledbetter v. Goodyear Tire & Rubber Co. (2007) 550 U.S.618, 127 S. Ct. 2162, 167 L. Ed. 2d 982* , applies to FEHA cases, the court of appeal held that plaintiff has raised a triable issue of fact concerning whether an actionable adverse employment action under the FEHA occurred within the limitations period.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersGovernmentsLegislationStatutes of LimitationsGeneral Overview

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14-143 California Points & Authorities § 143.34

§ 143.34 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Complaint Alleges Defendant's Absence From State [Code Civ. Proc. § 351]

[1] FORM

[*Caption. See § 143.31[1].*]

A DEMURRER BASED ON A STATUTE OF LIMITATIONS SHOULD NOT BE SUSTAINED WHEN THE COMPLAINT ALLEGES THE DEFENDANT'S ABSENCE FROM THE STATE.

Absence From State. If, when a cause of action accrues against a person, and he or she is out of the state, the action may be commenced within the term limited in the Code of Civil Procedure, after his or her return to the state; and if, after the cause of action accrues, he or she departs from the state, the time of his or her absence is not part of the time limited for the commencement of the action (*Code Civ. Proc. § 351*; *see Heritage Marketing & Ins. Services, Inc. v. Chrustawka (2008) 160 Cal. App. 4th 754, 763, 73 Cal. Rptr. 3d 126* ; *Mounts v. Uyeda (1991) 227 Cal. App. 3d 111, 115-122, 277 Cal. Rptr. 730*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a general demurrer to the complaint, where the demurrer asserts that the action is barred by a statute of limitations, but the complaint alleges the defendant's absence from the state for a sufficient period after the cause of action accrued so that the action was in fact commenced within the period of limitation.

Counsel should insert argument in the form showing the relationship between the facts of his or her case and the points of law stated.

[b] Business Entities

Code Civ. Proc. § 351 does not apply to a foreign corporation, because *Corp. Code §§ 2110, 2111*, and *2114* authorize service of summons on foreign corporations by delivery of the summons to the California Secretary of State [*see Cardoso v. American Medical Systems, Inc. (1986) 183 Cal. App. 3d 994, 997-999, 228 Cal. Rptr. 627* ; *Loope v. Greyhound Lines, Inc. (1952) 114 Cal. App. 2d 611, 614, 250 P.2d 651* (involving former Corp. Code §§ 6403, 6500, 6501)].

Nor does Section 351 apply to a domestic corporation, because it cannot depart from or be absent from the state [*Loope v. Greyhound Lines, Inc. (1952) 114 Cal. App. 2d 611, 614, 250 P.2d 651]* , or a domestic limited partnership that has designated an agent for service of process [*see Cardoso v. American Medical Systems, Inc. (1986) 183 Cal. App. 3d 994, 997-999, 228 Cal. Rptr. 627* ; *Epstein v. Frank (1981) 125 Cal. App. 3d 111, 120, 177 Cal. Rptr. 831]* .

[c] Cases Arising in Interstate Commerce

Insofar as *Code Civ. Proc. § 351* has been applied to a nonresident defendant who is sued on a contractual obligation incurred in interstate commerce, it has been held to violate the Commerce Clause of the U.S. Constitution and is to that extent unconstitutional, because it forces the nonresident individual to choose between being present in California for several years or forfeiting his or her statute of limitations defense, remaining subject to suit in California in perpetuity [*Abramson v. Brownstein (9th Cir. 1990) 897 F.2d 389, 391-393]* . Similarly, *Code Civ. Proc. § 351* impermissibly burdens interstate commerce with respect to residents who travel in the course of interstate commerce. This conclusion, however, is limited to travel for the facilitation of interstate commerce. The commerce clause does not bar applying the tolling provisions of Section 351 to interstate travel unrelated to the facilitation of interstate commerce (e.g., vacation trips) [*Filet Menu, Inc. v. Cheng (1999) 71 Cal. App. 4th 1276, 1282-1284, 84 Cal. Rptr. 2d 384]* .

[d] Related Pleading and Practice Forms

For a form of allegation regarding the defendant's absence from the state, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* .

[3] Discussion of Authorities

[a] Absence From State

In ***Heritage Marketing & Ins. Services, Inc. v. Chrustawka*** *(2008) 160 Cal. App. 4th 754, 73 Cal. Rptr. 3d 126* , defendants moved out of California in 2000; four years later plaintiffs sued defendants for breach of contract, conspiracy to defraud, defamation, tortious interference with economic advantage, slander per se, and violation of California's Uniform Trade Secrets Act. Defendants moved for summary adjudication on various grounds, including that the second through sixth causes of action are barred by enumerated statutes of limitations. Plaintiffs opposed the motion, asserting that *Code Civ. Proc. § 351* tolled the limitation periods.

The court of appeal noted that the tolling provisions of *Code Civ. Proc. § 351* have been applied to nonresident defendants who have never entered the state and to resident defendants who are temporarily absent from the state. In the instant case, however, the court had to determine whether § 351 applies to resident defendants who are permanently absent from California, i.e., those who move out of state. The court concluded that § 351 penalizes people who move out of state by imposing a longer statute of limitations on them than on those who remain in the state, and that the *commerce clause* protects persons from such restraints on their movements across state lines (*160 Cal. App. 4th 754, 763)* .

Mounts v. Uyeda *(1991) 227 Cal. App. 3d 111, 277 Cal. Rptr. 730* , was an action for damages, filed on January 31, 1989, arising from defendant's having negligently or intentionally waved or pointed a gun at plaintiff in a threatening manner on January 30, 1988, as she drove behind defendant on a California highway, as a result of which plaintiff suffered severe emotional distress. Defendant moved for summary judgment on the ground the action was barred by *Code Civ. Proc. § 340* because it was not filed within one year. Plaintiff contended that under *Code Civ. Proc. § 351*, the statute was tolled during the four days that defendant was out of the state in July 1988, and that the complaint was, therefore, timely filed. Defendant argued that the action was excepted from the tolling provisions of *Code Civ. Proc. § 351* by *Veh. Code § 17463*, which in pertinent part provides that notwithstanding any provisions of *Code Civ. Proc. § 351* to the contrary, when summons may be personally served on a person as provided in *Veh. Code §§ 17459* and *17460*, the time of his or her absence from the state is part of the time limited for the commencement of the action described in those sections. *Veh. Code §§ 17459* and *17460* provide that acceptance by a California resident of, respectively, a certificate of ownership or registration, or a driver's license, constitutes consent by that person that personal service in an action arising out of the operation or ownership of a motor vehicle in California may be made within or without the state, regardless of a subsequent change of residency. The motion for summary judgment was granted, and plaintiff appealed.

The court of appeal reversed. The court held that although a vehicle was used in perpetrating the assault, the action did not arise out of the operation or ownership of a motor vehicle within the meaning of *Veh. Code §§ 17459* and *17460*, and that *Code Civ. Proc. § 351* did apply to toll the running of the statute of limitations (*227 Cal. App. 3d 111, 115-120)* . With respect to the constitutionality of *Code Civ. Proc. § 351*, the court pointed out that *Abramson v. Brownstein (9th Cir. 1990) 897 F.2d 389* (discussed in *§ 143.34[2][c]*), did not declare *Code Civ. Proc. § 351* to be facially unconstitutional. The court said that the statute was not invalid on its face, that it applied in this case, and that because it did not run afoul of the commerce clause, there was no constitutional infirmity to its application (*227 Cal. App. 3d 111, 121-122)* .

[4] Additional Authorities

[a] Absence From State

In *Kaplan v. Mamelak (2008) 162 Cal. App. 4th 637, 643-644, 75 Cal. Rptr. 3d 861* , plaintiff patient sued defendant surgeon for operating on the wrong spinal disk. A jury returned a special verdict for the surgeon on his defense under the one-year statute of limitations for medical malpractice in *Code Civ. Proc. § 340.5*. Plaintiff's notice of intent to sue was filed six days late, and at trial the surgeon testified that he was outside California for only three days. On appeal, plaintiff argued that harm resulted from the trial court's refusal to allow plaintiff to conduct discovery as to whether the doctor was outside of California for more than three days during the limitations period. The court of appeal agreed, noting that an absence for three more days--merely a long weekend perhaps--would have made a world of difference to the timeliness of the complaint. Thus, denying discovery prevented the patient from gathering evidence on a dispositive issue. The patient did not have to accept the surgeon's testimony as the final word.

Legal Topics:

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

Civil ProceduresPleading & PracticeGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersGovernmentsLegislationStatutes of LimitationsGeneral Overview

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14-143 California Points & Authorities § 143.35

§ 143.35 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10]--Complaint Alleges Disability--Minority [Code Civ. Proc. §§ 328, 352(a)]

[1] FORM

[*Caption. See § 143.31[1].*]

A DEMURRER BASED ON A STATUTE OF LIMITATION SHOULD NOT BE SUSTAINED WHERE THE COMPLAINT ALLEGES PLAINTIFF'S MINORITY AS A DISABILITY.

[*EITHER*]

Minority as Disability. If a person entitled to commence an action for the recovery of _____ [*insert, if appropriate*: the possession of] real property is, at the time the title to the real property first descends to him, under the age of majority, the time, not exceeding 20 years, during which such disability continues is not deemed any portion of the time limited in Chapter 2 of Title 2 of Part 2 (Sections 315 through 330) of the Code of Civil Procedure for the commencement of such action, but such action may be commenced within the period of five years after _____ [such disability shall cease *or* the death of the person entitled, if he died under such disability] (*Code Civ. Proc. § 328*).

[*OR*]

Minority as Disability. If a person entitled to bring an action mentioned in Chapter 3 of Title 2 of Part 2 (Sections 335 through 3493/4) of the Code of Civil Procedure be, at the time the cause of action accrued, under the age of majority, the time of such disability is not a part of the time limited for the commencement of the action (*Code Civ. Proc. § 352(a)*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a general demurrer to the complaint, where the demurrer asserts that the action is barred by a statute of limitation, but the complaint alleges that the plaintiff was disabled for a period of time from suing because of being under the age of majority.

The first alternative paragraph would be used where the action is one relating to real property governed by *Code Civ. Proc. §§ 315-330*; the second alternative would be used in any other case, except those involving childhood sexual abuse cases in which *Code Civ. Proc. § 340.1(a)* applies [*see Code Civ. Proc. § 340.1(a)*; for a form of memorandum for opposing a demurrer based on the statute of limitations in a childhood sexual abuse case, *see § 143.57*].

Where appropriate, counsel should insert argument in the form showing the relationship between the facts of his or her case and the points of law stated.

[b] Related Pleading and Practice Forms

For a form of allegation regarding the plaintiff's disability because of minority, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTolling

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CHAPTER 143 LIMITATION OF ACTIONS
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14-143 California Points & Authorities § 143.36

§ 143.36 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10]--Complaint Alleges Disability--Insanity [Code Civ. Proc. §§ 328, 352(a)]

[1] FORM

[*Caption. See § 143.31[1].*]

A DEMURRER BASED ON A STATUTE OF LIMITATION SHOULD NOT BE SUSTAINED IF THE COMPLAINT ALLEGES PLAINTIFF'S INSANITY AS A DISABILITY.

[*EITHER*]

Insanity as Disability. If a person entitled to bring an action mentioned in Chapter 3 of Title 2 of Part 2 (Sections 335 through 3493/4) of the Code of Civil Procedure be, at the time the cause of action accrued, insane, the time of such disability is not a part of the time limited for the commencement of the action (*Code Civ. Proc. § 352(a)*).

[*OR, if action involves possession of, or title to, real property*]

Insanity as Disability. If a person entitled to commence an action for the recovery of _____ [*insert, if appropriate:* the possession of] real property is, at the time the title to the real property first descends to him or her, insane, the time, not exceeding twenty years, during which such disability continues is not deemed any portion of the time limited in Chapter 2 of Title 2 of Part 2 (Sections 315 through 330) of the Code of Civil Procedure for the commencement of such action, but such action may be commenced within the period of five years after _____ [such disability shall cease *or* the death of the person entitled, if he or she died under such disability] (*Code Civ. Proc. § 328*).

[*Optional*] **B. Insanity Based on Injury or Illness.** The term "insane" includes the condition of someone who has been

injured so severely or suffers from an illness as to be rendered incapable of caring for his or her property, transacting business, or understanding the nature or effects of his or her acts (*see Tzolov v. International Jet Leasing, Inc. (1991) 232 Cal. App. 3d 117, 118-119, 283 Cal. Rptr. 314* ; *Alcott Rehabilitation Hospital v. Superior Court (2001) 93 Cal. App. 4th 94, 101, 112 Cal. Rptr. 2d 807*).

[*Optional*] **C. Injury Causing Disability Is Basis of Cause of Action.** When an incompetency results from a tortious act, the disability exists from the time of the act, and the limitation period is tolled the entire time the person is disabled (*Code Civ. Proc. § 357*; *Weinstock v. Eissler (1964) 224 Cal. App. 2d 212, 230-231, 36 Cal. Rptr. 537* ; *Tzolov v. International Jet Leasing, Inc. (1991) 232 Cal. App. 3d 117, 118, 120, 283 Cal. Rptr. 314*).

[*Optional*] **D. Appointment of Conservator or Guardian Ad Litem.** The limitation period remains tolled even when a _____ [conservator *or* guardian ad litem] is appointed for an incompetent person (*Tzolov v. International Jet Leasing, Inc. (1991) 232 Cal. App. 3d 117, 118, 120, 283 Cal. Rptr. 314*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a general demurrer to the complaint, when the demurrer asserts that the action is barred by a statute of limitation, but the complaint alleges that the plaintiff was disabled for a period of time from suing because of insanity.

The first alternative Paragraph A may be used for all causes of action except those for possession of, or title to, real property. The second alternative Paragraph A may be used for action relating to real property governed by *Code Civ. Proc. §§ 315-330*. Optional Paragraph B is to be used when "insanity" is based on traumatic injury; Optional Paragraph C when the basis of the cause of action is a traumatic injury causing disability; and Optional Paragraph D when a conservator or guardian ad litem has been appointed for the disabled person.

When appropriate, counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Memoranda

For a form to be used in opposing a general demurrer to a complaint for damages for injury or illness suffered as a result of childhood sexual abuse when the demurrer asserts that the action is barred by a statute of limitation, see *§ 143.57*.

[c] Related Pleading and Practice Forms

For a form of allegation regarding the plaintiff's disability because of insanity; see California Forms of Pleading and Practice in Ch. 345, *Limitation of Actions* .

[3] Discussion of Authorities

[a] Insanity Based on Injury or Illness

In ***Tzolov v. International Jet Leasing, Inc.*** *(1991) 232 Cal. App. 3d 117, 283 Cal. Rptr. 314* , plaintiff brought an action for damages for severe head injuries that rendered him permanently incompetent. Defendant demurred generally and moved to strike the complaint, claiming that the action was barred by the one-year statute of limitation [*see Code Civ. Proc. § 340(c)*], running from the date a guardian ad litem was appointed. After the motion to strike was granted and a judgment of dismissal was entered, the plaintiff appealed.

The court of appeal reversed, citing *Code Civ. Proc. § 352(a)(2)*, which provides for tolling the limitation period during a plaintiff's "insanity." Holding that the appointment of a guardian ad litem does not start the statutory period running, the court applied the general rule that when an individual has been injured so severely as to be rendered incapable of caring for his or her property, transacting business, or understanding the nature or effects of his or her acts, the limitation period is tolled as long as the incompetence lasts (*232 Cal. App. 3d 117, 118)* .

In ***Alcott Rehabilitation Hospital v. Superior Court*** *(2001) 93 Cal. App. 4th 94, 112 Cal. Rptr. 2d 807* , the plaintiff, an elderly woman, was an inpatient at the defendant's licensed skilled nursing facility. Both of her legs were amputated allegedly as a result of the facility's failure to provide her with proper care. The facility claimed the one-year statute of limitations in *Code Civ. Proc. § 340.5* for health care providers barred the wrongful acts and omission occurring on or before the first admission. However, the statute of limitations was tolled because the elderly woman was insane due to a stroke and within the tolling provisions of *Code Civ. Proc. § 352*. The facility did not contest the plaintiff was insane, and the court properly denied the facility's motion for summary adjudication because the one-year statute of limitations was tolled by the plaintiff's insanity (*93 Cal. App. 4th 94, 105-106)* .

[b] Injury Causing Disability Is Basis of Cause of Action

In ***Weinstock v. Eissler*** *(1964) 224 Cal. App. 2d 212, 36 Cal. Rptr. 537* , the plaintiff alleged negligence on the part of several doctors and the hospital where an angiogram and spinal tap were performed that left the plaintiff paralyzed for approximately two months. The trial court sustained general demurrers for each defendant on plaintiff's third amended complaint and plaintiff refused to amend further. The plaintiff appealed from the judgment rendered after the demurrers were sustained. After determining that the demurrers were sustained on the ground that the cause of action was barred by the one-year statute of limitation on medical malpractice claims, the Supreme Court held that the limitation period was tolled during the time the plaintiff was insane because of his paralysis [*see Code Civ. Proc. § 352(a)(2)*]. The Court also held that when the condition of insanity results directly from, and occurs on the same day as, the wrongful act that is the basis of the action, the two events are legally simultaneous. Thus, the limitation period was suspended from the time of the operation until the plaintiff's competency was restored (*224 Cal. App. 2d 212, 231-232)* .

[c] Appointment of Conservator or Guardian Ad Litem

The facts and procedural background of ***Tzolov v. International Jet Leasing, Inc.*** *(1991) 232 Cal. App. 3d 117, 283 Cal. Rptr. 314* , are discussed in *§ 143.36[3][a]*. In *Tzolov*, the court further held that the appointment of a guardian ad litem does not start the running of the statute of limitation as long as the plaintiff remains disabled by insanity. The court reasoned that the tolling provision in *Code Civ. Proc. § 352* refers only to the competence of the plaintiff and not the nature or quality of his or her representation. Although a guardian ad litem is charged with protecting the plaintiff's cause of action, to start running the statute of limitation on appointment would leave the incompetent person totally at the mercy of the guardian ad litem. The court also analogized to the rule that the appointment of a general guardian (conservator) for an incompetent does not start the running of a limitation period and that the appointment of a guardian ad litem for a minor does not prejudice the minor's cause of action after he or she reaches majority (*232 Cal. App. 3d 117, 119, 120)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTolling

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14-143 California Points & Authorities § 143.37

§ 143.37 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Complaint Alleges Disability--Imprisonment [Code Civ. Proc. §§ 328.5, 352.1]

[1] FORM

[*Caption. See § 143.31[1].*]

A DEMURRER BASED ON A STATUTE OF LIMITATIONS SHOULD NOT BE SUSTAINED WHERE THE COMPLAINT ALLEGES PLAINTIFF'S IMPRISONMENT AS A DISABILITY.

[*EITHER*]

A. Imprisonment as Disability. If a person entitled to commence an action for the recovery of [the possession of] real property is, at the time the title to the real property first descends to him, imprisoned on a criminal charge, or in execution upon conviction of a criminal offense, for a term less than life, the time, not exceeding two years, during which the imprisonment continues is not deemed any portion of the time limited in Chapter 2 of Title 2 of Part 2 (commencing with *Section 315) of the Code of Civil Procedure* for the commencement of the action, but such action may be commenced within the period of five years after _____ [the imprisonment ceases *or* the death of the person entitled, if he/she died while imprisoned] (*Code Civ. Proc. § 328.5*).

[*OR*]

A. Imprisonment as Disability. If a person entitled to bring an action mentioned in Chapter 3 of Title 2 of Part 2 (commencing with *Section 335) of the Code of Civil Procedure* is, at the time the cause of action accrued, imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than for life, the time of the disability is not a part of the time limited for the commencement of the action, not to exceed two years (*Code Civ. Proc. § 352.1(a)*).

[*Optional*] **B. Possibility of Parole.** A person is under a disability within the meaning of Section _____ [328.5 *or* 352.1] of the Code of Civil Procedure if he/she is imprisoned for a term of life but has the possibility of parole (*Grasso v. McDonough Power Equip., Inc. (1968) 264 Cal. App. 2d 597, 599, 70 Cal. Rptr. 458*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a general demurrer to the complaint, where the demurrer asserts that the action is barred by a statute of limitations, but the complaint alleges that the plaintiff was disabled for a period of time from suing because of being imprisoned. Note however, that the suspension of the period of limitation does not apply to an action, other than an action to recover damages or that portion of an action that is for the recovery of damages, relating to the conditions of confinement, including an action brought by that person pursuant to *42 U.S.C. § 1983* (civil action for deprivation of constitutional rights) [*Code Civ. Proc. § 352.1(c)*] *Code Civ. Proc. § 352.1* is retroactive and its two-year tolling period rather than the period provided in former Code Civ. Proc. § 352(a)(3) applies to tort actions accruing before January 1, 1995, the date of its enactment [*Carlson v. Blatt (2001) 87 Cal. App. 4th 646, 649-651, 105 Cal. Rptr. 2d 42]* .

The tolling provision of *Code Civ. Proc. § 352.1(c)* has been held inapplicable to medical malpractice actions which are controlled by the limitations period in *Code Civ. Proc. § 340.5* [*Hollingsworth v. Kofoed (1996) 45 Cal. App. 4th 423, 52 Cal. Rptr. 2d 808]* .

The first Alternative Paragraph A would be used where the action is one relating to real property governed by *Code Civ. Proc. §§ 315-330*; the second alternative would be used in any other case.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For a form of allegation regarding the plaintiff's disability because of imprisonment, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* .

[3] Discussion of Authorities

[a] Possibility of Parole

Grasso v. McDonough Power Equip., Inc. *(1968) 264 Cal. App. 2d 597, 70 Cal. Rptr. 458* , was an action for

damages for personal injury resulting from negligence in the manufacture of a lawnmower. At the time of commencement of the action, the plaintiff was imprisoned for a term of life, and her term had not then been fixed at a number of years. Two months before commencement of the action, the plaintiff's civil rights were restored to a limited extent for the purpose of commencing and maintaining the action. The injuries in question were sustained about eight and one half years earlier, while the plaintiff was imprisoned. She had not been released or restored to her civil rights at any time during those eight and one half years. The defendant demurred, asserting the bar of former Code Civ. Proc. § 352 (*now see Code Civ. Proc. § 352.1*); the trial court sustained the demurrer without leave to amend, and dismissed the action. The appellate court reversed with directions to overrule the demurrer insofar as it was based on the statute of limitations, observing that times had changed very much since 1872 when *Code Civ. Proc. § 352* was enacted; unlike in those times, nowadays a life sentence often means fewer actual years of imprisonment than a sentence of a term of years. Since a prisoner under a term of life might be released after a few years, or at least might have his civil rights restored to a limited extent, the phrase "for a term less than for life" in *Code Civ. Proc. § 352* should not be construed literally. Rather, it should be understood to mean "for a term less than for life, or for a term of life but not without the possibility of parole." (The language in *Code Civ. Proc. § 328.5* is substantially the same.)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTolling

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14-143 California Points & Authorities § 143.38

§ 143.38 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Complaint Alleges Disability--War [Code Civ. Proc. § 354]

[1] FORM

[*Caption. See § 143.31[1].*]

A DEMURRER BASED ON A STATUTE OF LIMITATIONS SHOULD NOT BE SUSTAINED WHERE THE COMPLAINT ALLEGES A STATE OF WAR AS A DISABILITY TO COMMENCING THE ACTION.

State of War as Disability. When a person is, by reason of the existence of a state of war, under a disability to commence an action, the time of continuance of such disability is not part of the period limited for the commencement of the action, whether such cause of action shall have accrued prior to or during the period of such disability (*Code Civ. Proc. § 354*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a general demurrer to the complaint, where the demurrer asserts that the action is barred by a statute of limitation, but the complaint alleges that the plaintiff was disabled for a period of time from suing because of the existence of a state of war.

Counsel should insert argument in the form showing the relationship between the facts of his case and the points of law stated.

[b] Related Pleading and Practice Forms

For a form of allegation regarding the plaintiff's disability because of the existence of a state of war, see Ch. 345, *Limitation of Actions* in California Forms of Pleading and Practice.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTolling

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14-143 California Points & Authorities § 143.39

§ 143.39 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Complaint Alleges Disability--Disability of Attorney

[1] FORM

[*Caption. See § 143.31[1].*]

A DEMURRER BASED ON A STATUTE OF LIMITATIONS SHOULD NOT BE SUSTAINED WHEN THE COMPLAINT ALLEGES THAT PLAINTIFF'S ATTORNEY BECAME DISABLED PRIOR TO THE EXPIRATION OF THE STATUTE, PREVENTING COMPLIANCE WITH THE STATUTE, AND WHEN SUSTAINING THE DEMURRER WOULD BE MANIFESTLY UNJUST.

Disability of Attorney Rendering Compliance Impossible. Disability of a plaintiff's attorney occurring prior to expiration of the applicable statute of limitations tolls the statute if compliance is thereby made impossible, and manifest injustice would otherwise result (*Lewis v. Superior Court (1985) 175 Cal. App. 3d 366, 372-380, 220 Cal. Rptr. 594*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a general demurrer to the complaint, when the demurrer asserts that the action is barred by a statute of limitations, but the complaint alleges that plaintiff's attorney was disabled prior to expiration of the applicable statute, rendering compliance impossible [*see Lewis v. Superior Court (1985) 175 Cal. App. 3d 366, 372-380, 220 Cal. Rptr. 594]* .

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should discuss facts showing that the complaint alleges that plaintiff's attorney suffered disabilities that rendered compliance with the applicable statute of limitations impossible.

[b] Related Pleading and Practice Forms

For discussion and forms relating to the format of and procedure for filing demurrers, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For a discussion and forms relating to limitations of actions, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* (Matthew Bender).

[c] Related Memoranda

For memoranda of points and authorities for use regarding demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Disability of Attorney Rendering Compliance Impossible

In ***Lewis v. Superior Court*** *(1985) 175 Cal. App. 3d 366, 220 Cal. Rptr. 594* , petitioner retained an attorney to represent her in a personal injury action. Shortly prior to the expiration of the period of limitations, the attorney was struck by an automobile and rendered unconscious until after the period had expired. The attorney, a sole practitioner, had no attorney to cover his filing requirements, and, due to the ensuing disruption, his secretary neglected to pull his calendared cases. Counsel filed the action on the day he discovered the omission, which was one month after the expiration date. Defendant filed a motion to strike from the complaint all allegations pertaining to personal injuries on the ground that they were barred by the one-year period of limitation under *Code Civ. Proc. § 340(3)* (*see now Code Civ. Proc. § 335.1*, which extends statute of limitations to two years for personal injury actions). Plaintiff filed opposition, supported by her attorney's declaration reciting the events causing his disability. The trial court granted defendant's motion, and plaintiff filed a petition for writ of mandate.

The court of appeal issued the alternative writ, holding that the language of statutes of limitation must admit to implicit exceptions when compliance is impossible, and manifest injustice would otherwise result (*175 Cal. App. 3d 366, 380)* . Although the circumstances do not fall within the statutory tolling exceptions of *Code Civ. Proc. §§ 351-356*, the court noted that there is ample precedent for judicial construction of implicit tolling exceptions in appropriate circumstances (*175 Cal. App. 3d 366, 372, 376)* . Consideration of the general purpose of the tolling statutes, and the nature of the tolling circumstances of *Code Civ. Proc. § 353.1* (court's assumption of jurisdiction over attorney's practice) in particular, lead to the conclusion that the circumstances constitute an implicit tolling exception (*175 Cal. App. 3d 366, 376)* . It is wholly unreasonable to conclude that *Code Civ. Proc. §§ 312* (commencement of civil actions) and 340 were intended to admit no exceptions based on impossibility when a catastrophe prevents plaintiff's attorney from submitting or the court from accepting a complaint for timely filing. Those exceptions would not prejudice the legislative purposes of barring delinquent plaintiffs or preventing litigation of stale claims any more than do the exceptions provided for by statute (*175 Cal. App. 3d 366, 378)* . The court rejected defendant's contention that, to have tolling effect, the disability of plaintiff's attorney must have existed on the date plaintiff's claim accrued, pursuant to *Code Civ. Proc. §§ 352* and

357 (disabilities of plaintiff tolling statute). Defendant's assumption that the attorney's disability must be equated with those set forth by *Code Civ. Proc. §§ 352* and *357*, and therefore must be subject to the same requirement, is unwarranted (*175 Cal. App. 3d 366, 379)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTolling

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14-143 California Points & Authorities § 143.40

§ 143.40 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10]--Complaint Alleges Death of Person Entitled to Sue [Code Civ. Proc. § 366.1; Prob. Code §§ 551, 552(a)]

[1] FORM

[*Caption. See § 143.31[1].*]

A DEMURRER BASED ON A STATUTE OF LIMITATIONS SHOULD BE OVERRULED WHEN THE COMPLAINT SHOWS THAT THE PERSON ENTITLED TO SUE DIED BEFORE THE PERIOD OF LIMITATION EXPIRED, THAT THE ACTION SURVIVED, AND THAT THE DECEDENT'S PERSONAL REPRESENTATIVE COMMENCED THE ACTION BEFORE EXPIRATION OF THE LATER OF SIX MONTHS AFTER DEATH OR THE LIMITATIONS PERIOD THAT WOULD HAVE APPLIED HAD THE PERSON NOT DIED.

Death of Person Entitled to Sue. If a person entitled to bring an action dies before the expiration of the applicable limitations period, and the cause of action survives, an action may be commenced before expiration of the later of six months after the person's death or the limitations period that would have been applicable if the person had not died (*Code Civ. Proc. § 366.1*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a general demurrer to the complaint, when the demurrer asserts that the action is barred by a statute of limitations, but the complaint shows that the action survives the death of the person, who, but for his or her death, would have been entitled to maintain it, that such person died after accrual of the cause of action but before expiration of the period of limitation, and that the action was commenced before expiration of the later of six months after the person's death or the limitations period that would have been applicable if the person had not died.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For a form of allegation for use when the person entitled to sue has died and the action is maintained by his or her representative, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityAbatement on Death of PartyCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersGovernmentsLegislationStatutes of LimitationsGeneral Overview

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14-143 California Points & Authorities § 143.41

§ 143.41 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Complaint Alleges Death of Person Against Whom Action May Be Brought [Code Civ. Proc. § 366.2; Former Code Civ. Proc. § 353(b)-(d)]

[1] FORM

[*Caption. See § 143.31[1].*]

THE COURT SHOULD NOT SUSTAIN THE DEMURRER ON THE GROUND THAT THE ACTION IS BARRED BY THE STATUTE OF LIMITATIONS BECAUSE THE COMPLAINT DEMONSTRATES THAT THE PERSON AGAINST WHOM THE ACTION AROSE DIED BEFORE THE PERIOD OF LIMITATION EXPIRED, THE ACTION SURVIVED, AND THE ACTION WAS TIMELY COMMENCED AGAINST THE DECEDENT'S ESTATE OR REPRESENTATIVE.

[*EITHER, if decedent died on or after January 1, 1993*]

A. Death of Person to Be Sued. If a person against whom an action may be brought on a liability of the person, whether arising in contract, tort, or otherwise, and whether or not accrued, dies before the expiration of the applicable limitations period, and the cause of action survives, an action may be commenced within one year after the date of death, and the limitations period that would have been applicable does not apply (*Code Civ. Proc. § 366.2(a)*).

[*OR, if decedent died on or after January 1, 1991, and before January 1, 1993*]

A. Death of Person to Be Sued. If a person against whom an action may be brought on a liability of the person, whether arising in contract, tort, or otherwise, dies on or after January 1, 1991, and before the expiration of the time limited for the commencement of the action, and the cause of action survives, an action may be commenced within one year after the date of death, and the time otherwise limited for the commencement of the action does not apply (former Code Civ. Proc. § 353(b) (repealed by Stats. 1992, ch. 178, § 6); *see Code Civ. Proc. § 366.2(c)*, as enacted by Stats.

1992, ch. 178, § 8, limiting application of new statute of limitations to decedents dying on or after January 1, 1993).

[*OR, when decedent died on or after July 1, 1988 and before January 1, 1991*]

A. Death of Person to Be Sued. If a person against whom an action may be brought died on or after July 1, 1988, but before January 1, 1991, and before the expiration of the time limited for the commencement of the action, and the cause of action survives, an action may be commenced before _____ [January 1, 1992 *or* _____ (one year after the issuing of letters testamentary or of administration *or* the time for commencement of the action)] (former Code Civ. Proc. § 353(d) (repealed by Stats. 1992, ch. 178, § 6); *see Code Civ. Proc. § 366.2(c)*, as enacted by Stats. 1992, ch. 178, § 8, limiting application of new statute of limitations to decedents dying on or after January 1, 1993).

[*OR, when decedent died before July 1, 1988*]

A. Death of Person to Be Sued. If a person against whom an action may be brought dies before July 1, 1988, and before the expiration of the time limited for the commencement of the action, and the cause of action survives, an action may be commenced against the person's representatives before the expiration of _____ [(July 1, 1989, *or* one year after the issuing of letters testamentary or of administration) *or* the time limited for the commencement of the action] (former Code Civ. Proc. § 353(c) (repealed by Stats. 1992, ch. 178, § 6); *see Code Civ. Proc. § 366.2(c)*, as enacted by Stats. 1992, ch. 178, § 8, limiting application of new statute of limitations to decedents dying on or after January 1, 1993).

[*CONTINUE*]

[*Optional*] **B. After Rejection of Claim Against Estate.** The filing of a timely claim against decedent's estate, or a petition under *Probate Code Section 9103* to file a late claim, tolls the statute of limitations otherwise applicable and, once the claim has been rejected in whole or in part, the action may be commenced within three months after _____ [the notice of rejection was given *or* the claim became due], regardless of the statutory limitation period that would otherwise apply (*see Prob. Code §§ 9352(a), 9353(a)*).

[*Optional*] **C. After Rejection of Claim Against Decedent's Trust.** The filing of a timely claim against the trust of a decedent that was revocable during his or her lifetime tolls the statute of limitations otherwise applicable, and once the claim has been rejected in whole or in part, the action may be commenced within 90 days after _____ [notice of rejection was given *or* the claim became due] (*see Prob. Code §§ 19253(b), (d), 19255(a)*).

[*Optional*] **D. Pending Determination of *Prob. Code § 21320* Application.** Until January 1, 2010, the statute of limitations for the commencement of any motion, petition, or other act by a beneficiary, including the filing of a creditor claim under Probate Code Section _____ [9000 et seq. *or* 19000 et seq., *or* 21700 et seq.], is tolled beginning with the date of an application for the court's determination under *Probate Code Section 21320* of whether the motion, petition, or other act would constitute a will contest, and ending with the date the court's determination becomes final (*Prob. Code § 21308*). As of January 1, 2010, *Prob. Code §§ 21308* and *21320* will be repealed pursuant to Stats. 2008, ch. 174, § 1.

[*Optional*] **E. Substitution of Personal Representative.** If an action was timely commenced against the decedent, plaintiff is not required by *Code Civ. Proc. § 366.2* (formerly Code Civ. Proc. § 353(b)) to also separately commence the action against the decedent's personal representative within one year after the decedent's death (*Burgos v. Tamulonis (1994) 28 Cal. App. 4th 757, 763, 33 Cal. Rptr. 2d 728*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a general demurrer to the complaint, when the defendant asserts that the action is barred by a statute of limitations, but the complaint alleges that the person against whom the action might have been brought died before the expiration of the limitation period, that the cause of action survived, and that the action was commenced within the time provided by *Code Civ. Proc. § 366.2* and former Code Civ. Proc. § 353(b)-(d) or by *Prob. Code §§ 9352* and *9353, 19253* and *19255*, or *21308* (which is repealed as of January 1, 2010, pursuant to Stats. 2008, ch. 174, § 1).

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For a form of complaint for use when the person against whom the action might have been brought died and the action is maintained against his or her representative or the estate, see California Forms of Pleading and Practice, Ch. 454, *Probate: Claims Against the Estate* (Matthew Bender).

[3] Discussion of Authorities

[a] Substitution of Personal Representative

In ***Burgos v. Tamulonis*** *(1994) 28 Cal. App. 4th 757, 33 Cal. Rptr. 2d 728* , the plaintiff filed her personal injury action against the driver of the vehicle in an automobile accident within one year after the accident. At the time she filed the complaint, plaintiff did not know that the driver had died. By the time that plaintiff petitioned for leave to file a late claim against the estate, which was granted, and served and filed an amended complaint naming Tamulonis in her representative capacity as defendant, more than one year had passed since the driver's death. Defendant filed a demurrer to the first amended complaint on the ground that the action against the personal representative was barred by the one-year after death limitation of former Code Civ. Proc. § 353(b) (repealed effective January 1, 1993, and reenacted without substantive change as *Code Civ. Proc. § 366.2* (Stats. 1992, ch. 178, § 6)). The trial court sustained the demurrer without leave to amend and dismissed the action as to Tamulonis (*28 Cal. App. 4th 757, 759)* .

The court of appeal reversed the order of dismissal. It noted that under the survival statute, plaintiff's cause of action against the decedent survived his death and, under former Code Civ. Proc. § 353(b), the action was timely filed. It then stated that Tamulonis's argument that the action must be commenced against the personal representative within one year after the date of death reads into former Code Civ. Proc. § 353(b) language that is not there. Rather, the legislative scheme encompasses exactly the type of situation that arose in this case where it was uncontroverted the plaintiff had no

actual knowledge of the administration of the estate, did not know of the death, and timely commenced the personal injury action, naming the decedent as defendant. Finally, the court found that the first amended complaint sought recovery under the same general set of facts as the original complaint and was deemed filed as of the date of the original complaint, thus rendering the action against the personal representative timely (*28 Cal. App. 4th 757, 762-764)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityAbatement on Death of PartyCivil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrers

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14-143 California Points & Authorities § 143.42

§ 143.42 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Complaint Alleges Court's Assumption of Jurisdiction Over Attorney's Practice Pursuant to Bus. & Prof. Code § 6180 or 6190 [Code Civ. Proc. § 353.1]

[1] FORM

[*Caption. See § 143.31[1].*]

THE COURT SHOULD NOT SUSTAIN THE DEMURRER BECAUSE THE COMPLAINT SHOWS THAT THE COURT ASSUMED JURISDICTION OVER PLAINTIFF'S ATTORNEY'S PRACTICE PURSUANT TO BUSINESS AND PROFESSIONS CODE SECTION _____ [6180 *or* 6190] AND THAT THE APPLICATION FOR THE COURT TO ASSUME JURISDICTION WAS FILED PRIOR TO THE EXPIRATION OF THE APPLICABLE STATUTE OF LIMITATION.

Court's Assumption of Jurisdiction Over Attorney's Practice Pursuant to *Business and Professions Code Section 6180* or *6190*. When a person who is entitled to bring an action or other proceeding that has not been filed or otherwise instituted is represented by an attorney over whose practice a California court has assumed jurisdiction pursuant to *Business and Professions Code Section 6180* or *6190*, and an application for the court to assume jurisdiction was filed prior to the expiration of the applicable statute of limitation or claim statute, that person has six months from the date of entry of the order assuming jurisdiction to file or otherwise institute the matter if the applicable statute of limitation otherwise would have expired (*Code Civ. Proc. § 353.1*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted by plaintiff in opposition to a general demurrer to the complaint when the defendant asserts that the action is barred by a statute of limitations, but the complaint alleges that the court assumed jurisdiction over plaintiff's attorney's practice pursuant to *Bus. & Prof. Code § 6180* or *6190* [*Code Civ. Proc. § 353.1*]. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Counsel must show that the application for the court to assume jurisdiction was filed prior to the expiration of the applicable statute of limitation.

[b] Related Pleading and Practice Forms

For a form of allegation for use when an the court has assumed jurisdiction over the plaintiff's attorney's practice, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrers

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14-143 California Points & Authorities § 143.43

§ 143.43 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Complaint Alleges Reversal of Judgment for Plaintiff on Appeal [Code Civ. Proc. § 355]

[1] FORM

[*Caption. See § 143.31[1].*]

THE DEMURRER SHOULD BE OVERRULED BECAUSE THE COMPLAINT ALLEGES A FORMER ACTION FOR THE SAME RELIEF RESULTING IN JUDGMENT FOR THE PLAINTIFF, REVERSAL OF THAT JUDGMENT ON APPEAL OTHER THAN ON THE MERITS, AND COMMENCEMENT OF THE NEW ACTION WITHIN ONE YEAR AFTER THE REVERSAL.

Reversal of Judgment for Plaintiff. If an action is commenced within the time prescribed therefor, and a judgment therein for the plaintiff be reversed on appeal other than on the merits, a new action may be commenced within one year after the reversal (*Code Civ. Proc. § 355*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a general demurrer to the complaint, when the demurrer asserts that the action is barred by a statute of limitation, but the complaint alleges that the plaintiff had commenced a previous action against the defendant for the same relief, that the previous action resulted in judgment for the plaintiff, and that the judgment was reversed on appeal, other than on the merits [*see Code Civ. Proc. § 355*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For a form of allegation for use when an action has been begun within one year after reversal of a judgment for the plaintiff in a previous action, see Ch. 345, *Limitation of Actions* in California Forms of Pleading and Practice (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresAppealsGeneral Overview

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14-143 California Points & Authorities § 143.44

§ 143.44 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Complaint Alleges Legal Inhibition to Sue [Code Civ. Proc. § 356]

[1] FORM

[*Caption. See § 143.31[1].*]

A DEMURRER BASED ON A STATUTE OF LIMITATIONS SHOULD NOT BE SUSTAINED WHERE THE COMPLAINT ALLEGES THAT THE COMMENCEMENT OF THE ACTION WAS STAYED BY INJUNCTION OR STATUTORY PROHIBITION.

Injunction or Statutory Prohibition. When the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action (*Code Civ. Proc. § 356*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a general demurrer to the complaint, where the demurrer asserts that the action is barred by a statute of limitation, but the complaint alleges the existence of an injunction or a statutory prohibition preventing commencement of the action for a certain period of time.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of his case and the points of law stated.

[b] Related Pleading and Practice Forms

For a form of allegation for use where the commencement of an action was stayed for a period of time by an injunction or a statutory prohibition, see Ch. 345, *Limitation of Actions* in California Forms of Pleading and Practice (Matthew Bender).

[c] Related Memoranda

For other forms of memorandum of points and authorities relying on *Code Civ. Proc. § 356*, *see §§ 143.45*, *143.46*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrers

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14-143 California Points & Authorities § 143.45

§ 143.45 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Period of Limitation Suspended During Required Exhaustion of Administrative Remedies [Code Civ. Proc. § 356]

[1] FORM

[*Caption. See § 143.31[1].*]

A DEMURRER BASED ON A STATUTE OF LIMITATION SHOULD NOT BE SUSTAINED WHEN THE COMPLAINT ALLEGES THAT TIME WAS CONSUMED BY AN ADMINISTRATIVE PROCEEDING WHICH WAS A PREREQUISITE TO COMMENCING THE ACTION.

A. Injunction or Statutory Prohibition. When the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action (*Code Civ. Proc. § 356*).

B. Other Legal Prevention. *Section 356 of the Code of Civil Procedure* is applicable in situations when the action is legally prohibited by means other than injunction or statutory prohibition, if the plaintiff is legally prevented from taking action to protect his rights (*Hoover v. Galbraith (1972) 7 Cal. 3d 519, 526, 102 Cal. Rptr. 733, 498 P.2d 981*).

C. Required Exhaustion of Administrative Remedies. When the plaintiff must exhaust administrative remedies before bringing suit, the period of limitation is suspended during the time consumed by the administrative proceeding (*Community Cause v. Boatwright (1981) 124 Cal. App. 3d 888, 903, 177 Cal. Rptr. 657*).

D. Effect of Suspension Period is to Extend Statutory Period. When the running of a period of limitation is suspended for a given length of time, the effect is to add an equal period to the statutory period (*Estate of Caravas (1952) 40 Cal. 2d 33, 42, 250 P.2d 593* ; *see Community Cause v. Boatwright (1981) 124 Cal. App. 3d 888, 903, 177 Cal. Rptr. 657*).

E. Period of Limitation. The statutory period for commencement of an action for _____ [*type of*

present action] is _____ [*specify period of limitation*] (Code Civ. Proc. § _____ [*specify applicable code section*]).

F. Exhaustion of Requirement. _____ [*Indicate requirement that in present case administrative proceeding must precede action, e.g.,* Administrative remedies before the _____ (*specify agency*) must be exhausted before an action can be commenced in a court (_____ [*cite applicable statute or decision*])].

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a general demurrer to the complaint on the ground that the action is barred by a statute of limitations when the plaintiff has alleged in the complaint that a necessary administrative proceeding was commenced (before the statutory period of limitation expired) and concluded as a prerequisite to commencing the action. The time consumed by an administrative proceeding which the plaintiff was required to pursue before commencing an action is not part of the limitation period [*Community Cause v. Boatwright (1981) 124 Cal. App. 3d 888, 903, 177 Cal. Rptr. 657]* .

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Other Legal Prevention

Hoover v. Galbraith *(1972) 7 Cal. 3d 519, 102 Cal. Rptr. 733, 498 P.2d 981* , was an action by a judgment creditor of a defunct corporation against the former directors to collect the debt represented by his judgment. The issue on appeal was whether the action was barred by *Code Civ. Proc. § 359*. The Supreme Court concluded that the action was not barred. The statement set out as Paragraph B is part of the court's analysis of cases similar to the case in question (one of which was *Dillon v. Board of Pension Comm'rs (1941) 18 Cal. 2d 427, 116 P.2d 37, 136 ALR 800*). In the light of those cases, the court concluded that the plaintiff in the case in question had been prevented from taking action to protect his rights during the period when his judgment was on appeal and that, therefore, the time consumed by the appeal was not part of the period of limitation.

[b] Required Exhaustion of Administrative Remedies

In ***Community Cause v. Boatwright*** *(1981) 124 Cal. App. 3d 888, 177 Cal. Rptr. 657* , plaintiff sued defendant for fraudulent failure to disclose assets by a public official, pursuant to the Political Reform Act (PRA) of 1974 [*Gov. Code § 91004*], raising a number of causes of action. Defendant demurred, arguing that the two-year (*now* four-year) statute

of limitations for actions brought pursuant to *Gov. Code § 91004*, imposed by *Gov. Code § 91011*, had run on all of the causes of action raised. The trial court sustained the demurrer without leave to amend, and plaintiff appealed.

The court appeal reversed as to some of the causes of action and affirmed as to others. The court noted that *Gov. Code § 91007* requires that a person make a written request to the Fair Political Practices Commission (FPPC) to bring suit on the acts complained of before bringing suit privately under *Gov. Code § 91004*. In the present case, plaintiff made such a request on December 7, 1977, which plaintiff amended with a second letter on December 30, 1977. On March 9, 1978, the FPPC indicated that it would not proceed against defendant. The court held that the statute of limitations should have been suspended during the FPPC's investigation, stating that the long-settled rule is that whenever the exhaustion of administrative remedies is a prerequisite to the initiation of a civil action, the limitations period is tolled during the time consumed by those administrative proceedings, because during that period the plaintiff is legally prevented from taking any legal action to protect his or her rights (*124 Cal. App. 3d 888, 903)* . Note that *Gov. Code § 91007(a)(3)*, as amended by Stats 1999, Ch. 577 § 1, currently contains a tolling provision.

[c] Effect of Suspension Period is to Extend Statutory Period

Estate of Caravas *(1952) 40 Cal. 2d 33, 250 P.2d 593* , was a proceeding on behalf of a nonresident alien heir to recover property distributed to the State Treasurer pursuant to former Prob. Code § 1027 (*now see Prob. Code § 11902*) requiring that on final distribution, property not distributed to known heirs must be distributed to the state and deposited in the State Treasury, and that if a nonresident alien entitled to claim such property fails to do so within five years after succession, his rights are barred (incorporating Prob. Code § 1026, repealed [1974 Stats., ch. 701], governing the rights of nonresident aliens). The proceeding was commenced nearly six years after the nonresident alien succeeded to the claimed inheritance, and the petition alleged that during a period of approximately three years and two months after succession, the nonresident alien was prevented from making a claim because of a state of war (German military occupation of Greece, the alien's residence, from 1941 until 1944). The Supreme Court concluded that during the period when he was thus prevented from making a claim, the nonresident alien was under a disability [*see Code Civ. Proc. § 354* (disability because of war)] which had the effect of extending the five year claim period for a time equal to the duration of the disability.

Community Cause v. Boatwright (1981) 124 Cal. App. 3d 888, 903, 177 Cal. Rptr. 657 , is discussed in *§ 143.45[3][b]*.

[4] Additional Authorities

[a] Required Exhaustion of Administrative Remedies

Dillon v. Board of Pension Comm'rs (1941) 18 Cal. 2d 427, 116 P.2d 37 , was a mandate proceeding to compel the board to issue an order for the payment to the petitioner, as the widow of a police officer, of a pension including a cash sum equal to the pension funds accrued in the three years preceding the filing of the petition plus the amount accruing from that date to the date of the order which she sought to have issued. She had made a timely application to the board for the pension, which was denied; and the petition for writ of mandate was filed approximately three years and 10 months later. The board demurred to the petition on the ground that the action was barred, and the demurrer was sustained without leave to amend. The petitioner appealed from the judgment dismissing her mandate proceeding.

The Supreme Court held that the running of the period of limitation was suspended during the period of the board's deliberations on the widow's claim. The court affirmed the judgment of dismissal, however, because even when the period consumed by the administrative proceeding was excluded from the statutory period, the time between accrual of the widow's cause of action and her commencement of the mandate proceeding exceeded the applicable statutory period of three years. (The court also held that the cause of action accrued when the petitioner's husband died, not when the board's decision was rendered.)

Myers v. Orange County (1970) 6 Cal. App. 3d 626, 86 Cal. Rptr. 198 , is discussed in *§ 143.46[4][b]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawGeneral OverviewCivil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrers

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14-143 California Points & Authorities § 143.46

§ 143.46 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Statute of Limitations Equitably Tolled by Reasonable and Good Faith Pursuit of Alternative Remedy

[1] FORM

[*Caption. See § 143.31[1].*]

THE DEMURRER SHOULD NOT BE SUSTAINED ON THE GROUND THAT THE ACTION IS BARRED BY THE STATUTE OF LIMITATIONS BECAUSE THE STATUTE OF LIMITATIONS WAS EQUITABLY TOLLED BY PLAINTIFF'S REASONABLE AND GOOD FAITH PURSUIT OF AN ALTERNATIVE REMEDY.

A. Equitable Tolling of Statute of Limitations. A period of limitation applicable to one action is equitably tolled when another remedy has been sought by plaintiff and (1) defendant received timely notice of the filing of the first claim, (2) defendant was not prejudiced in gathering evidence to defend against the second claim, and (3) plaintiff acted reasonably and in good faith in filing the second claim (*Addison v. State of California (1978) 21 Cal. 3d 313, 319, 146 Cal. Rptr. 224, 578 P.2d 941* ; *Stalberg v. Western Title Ins. Co. (1994) 27 Cal. App. 4th 925, 932, 32 Cal. Rptr. 2d 750*).

B. Reasonable and Good Faith Pursuit of Alternate Remedy. When an injured person has several legal remedies and, reasonably and in good faith, pursues one designed to lessen the extent of the injury or damages, the period of limitation does not run on the other while he or she is thus pursuing the one (*McDonald v. Antelope Valley Community College Dist. (2008) 45 Cal. 4th 88, 100, 84 Cal. Rptr. 3d 734* ; *Myers v. Orange County (1970) 6 Cal. App. 3d 626, 634, 86 Cal. Rptr. 198*).

[*Optional*] **C. Optional Exhaustion of Administrative Remedies.** The exhaustion of administrative remedies will suspend the running of a period of limitation even though no statute makes it a condition to the right to sue (*McDonald v. Antelope Valley Community College Dist. (2008) 45 Cal. 4th 88, 101, 84 Cal. Rptr. 3d 734* ; *Campbell v. Graham-Armstrong (1973) 9 Cal. 3d 482, 490, 107 Cal. Rptr. 777, 509 P.2d 689* , citing *Myers v. Orange County (1970) 6 Cal. App. 3d 626, 634, 86 Cal. Rptr. 198*).

[*EITHER*]

D. Reasonable Promptness in Refiling. Although the third prerequisite of good faith and reasonable conduct is not well defined, in *Addison v. State of California (1978) 21 Cal. 3d 313, 319, 146 Cal. Rptr. 224, 578 P.2d 941* , the Supreme Court stressed that the plaintiff filed the second claim a short time after tolling ended (*Downs v. Department of Water & Power (1997) 58 Cal. App. 4th 1093, 1100, 68 Cal. Rptr. 2d 590*). Other leading cases have found equitable tolling when short intervals between dismissal and refiling were involved (*see, e.g.,* *Kolani v. Gluska (1998) 64 Cal. App. 4th 402, 410-411, 75 Cal. Rptr. 2d 257*).

[*OR*]

D. Reasonable Promptness in Refiling. When an initial federal court action has been filed containing pendent claims related to federal claims over which the federal court has supplemental jurisdiction, *28 U.S.C. § 1367(d)* substitutes a bright line rule in place of a case-by-case analysis of "reasonableness." Under *28 U.S.C. § 1367(d)*, the period of limitation for any pendent claim over which the federal court has supplemental jurisdiction is tolled while the claim is pending and for 30 days after it is dismissed unless state law provides for a longer tolling period, *i.e.*, the second suit must be filed within 30 days after dismissal of the pendent state claims without prejudice unless state law extends that period. A plaintiff under *28 U.S.C. § 1367(d)* is not allowed to tack onto the limitations period the full time during which the federal action was pending. Thus, when an initial federal action containing state pendent claims is filed and thereafter dismissed, what conduct is "reasonable" under the equitable tolling doctrine requirement of reasonable promptness in refiling must be assessed in light of the 30-day grace period set forth in *28 U.S.C. § 1367(d)* (*Kolani v. Gluska (1998) 64 Cal. App. 4th 402, 408-411, 75 Cal. Rptr. 2d 257*).

[*OR*]

D. Effect of Suspension Period is to Extend Statutory Period. [*See § 143.45[1], Paragraph D.*]

E. Period of Limitation. The statutory period for the commencement of an action _____ [*type of present action*] is _____ [*period of limitation*] (Code Civ. Proc. § _____ [*applicable code section*]).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition by plaintiff to a general demurrer to the complaint, when the defendant asserts that the action is barred by a statute of limitations, and the plaintiff has alleged in the complaint sufficient facts to show that he or she had two reasonable alternative procedures available when his or her cause of action accrued, one of which he or she promptly and in good faith pursued without success before pursuing the other. As the authorities cited in the memorandum show, it is uncertain what amount of the time consumed in a reasonable and good faith pursuit of one of two alternative remedies will be tacked onto the statutory period of limitation for pursuing the other under the doctrine of equitable tolling. Thus, point D in the memorandum is phrased in the alternative. The first version should be used when refiling of the action has been reasonably prompt. The second version should be used when the initial action was filed in federal court. The third version may be used when the facts do not warrant the reasonably prompt refiling argument.

The doctrine of equitable tolling does not apply when a plaintiff who has suffered several different wrongs pursues only one remedy for one of those wrongs [*Aerojet General Corp. v. Superior Court (1986) 177 Cal. App. 3d 950, 956, 223 Cal. Rptr. 249]* . In addition, the equitable tolling rule does not apply unless the second action is in reality a continuation of the earlier action, involving the same parties, facts, and cause of action [*Garabedian v. Skochko (1991) 232 Cal. App. 3d 836, 847, 283 Cal. Rptr. 802* (no equitable tolling because defendant in second action different than defendant in first); *but see Stalberg v. Western Title Ins. Co. (1994) 27 Cal. App. 4th 925, 32 Cal. Rptr. 2d 750* (defendant in second action for slander of title had helped plaintiff finance first action against other defendants to quiet title)].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For a form of complaint allegations establishing a factual basis for the equitable tolling of a statute of limitations, see Ch. 345, *Limitation of Actions* , in California Forms of Pleading and Practice (Matthew Bender).

[c] Related Memoranda

For a form of memorandum of points and authorities opposing a summary judgment for failure to file an action against a public entity within the time period of *Gov. Code § 945.6* on the ground that a pending federal court action tolled the period of limitation, see Ch. 196, *Public Entities* in this publication.

[3] Discussion of Authorities

[a] Equitable Tolling of Statute of Limitations

In ***Addison v. State of California*** *(1978) 21 Cal. 3d 313, 146 Cal. Rptr. 224, 578 P.2d 941* , plaintiff filed a claim for damages with defendants as required by *Gov. Code §§ 905* and *905.2*, and the claim was denied. Plaintiff filed an action in federal court alleging a federal civil rights act violation, as well as pendent state law causes of action, within the 60-day statute of limitations of *Gov. Code § 945.6*. After the 60 days expired, the federal action was dismissed for lack of federal jurisdiction and plaintiff filed a complaint in superior court. The superior court sustained defendants' demurrer to the complaint on the ground that the statute of limitations had expired and dismissed the action.

The Supreme Court reversed, holding that by filing the first action in a timely manner the statute of limitations could be equitably tolled as to the second (*21 Cal. 3d 313, 319)* . The Court noted the reasoning employed in *Elkins v. Derby (1974) 12 Cal. 3d 410, 414, 115 Cal. Rptr. 641, 525 P.2d 81* , in which it was held that an injured person faced with several remedies may reasonably and in good faith pursue one of them and have the statute of limitations tolled as to the other(s) (*21 Cal. 3d 313, 318)* . The Court then went on to explain the general application of the doctrine of equitable tolling, holding that it requires timely notice, lack of prejudice to the defendant, and reasonable and good faith conduct

on the part of plaintiff (*21 Cal. 3d 313, 319)* . Consideration of these factors was held to be a balancing process, taking into account the injustice of barring plaintiff's claim against the policy expressed by the statute of limitation. In the case before the Court, that balance was in favor of permitting plaintiff's claim to be heard on its merits, given the minimal delay and defendants' continuing knowledge (through the federal action) of the nature of plaintiff's claims (*21 Cal. 3d 313, 321)* .

Stalberg v. Western Title Ins. Co. *(1994) 27 Cal. App. 4th 925, 32 Cal. Rptr. 2d 750* , involved a slander of title action by downstream property owners against a title insurance company, based on defendant's creation of a fictitious easement across plaintiffs' properties in favor of upstream property owners. This action began in 1983, was tried to a jury, appealed, and remanded. The trial court then granted summary judgment to defendants on the ground the action was barred by the statute of limitations. Plaintiffs appealed.

The court of appeal reversed. Plaintiffs argued several theories, including that the statute of limitations should be equitably tolled (*27 Cal. App. 4th 925, 929)* . The court summarized the equitable tolling doctrine, noting that a plaintiff will be relieved from the bar of the statute of limitations when, possessing several legal remedies he or she, reasonably and in good faith, pursues the one designed to lessen the extent of his or her injuries or damage. The court further stated that application of the doctrine requires timely notice, and lack of prejudice, to the defendant, and reasonable and good faith conduct on the part of the plaintiff (*27 Cal. App. 4th 925, 932)* . The court then found that when the plaintiffs first discovered the existence of the fictitious easement, they were unaware of the role defendant played in creating it and pursued the legal remedy which most readily addressed the cloud on their title, a quiet title action. The plaintiffs gave timely notice to the defendant, defendant, participated in the quiet title action by partially financing it and receiving updates from plaintiffs' counsel. When, during the quiet title action, plaintiffs discovered defendant's role, they so informed defendant and, on completion of the quiet title action, filed the slander of title action. The court found that the defendant had made no showing at any time that its ability to defend against plaintiff's claim on the merits was prejudiced by the delay (*27 Cal. App. 4th 925, 932-933)* . Thus, having found the plaintiff entitled to the benefit of equitable tolling and the defendant not to be prejudiced by applying it, the court reversed (*27 Cal. App. 4th 925, 934)* .

[b] Reasonable and Good Faith Pursuit of Alternative Remedy

In ***McDonald v. Antelope Valley Community College Dist.*** *(2008) 45 Cal. 4th 88, 84 Cal. Rptr. 3d 734* , the trial court entered summary judgment in favor of a community college district on the ground that an employee's California Fair Employment and Housing Act (FEHA) (*Gov. Code, § 12900 et seq.*) claim was untimely under *Gov. Code, § 12960(d)*. The trial court rejected equitable tolling on the apparent ground that tolling was unavailable because the employee was advised that the alternate administrative procedure that she was pursuing was voluntary and need not be exhausted. The Court of Appeal reversed, holding that traditional equitable tolling principles may apply to extend the statute of limitations for filing a FEHA administrative complaint and that there was a triable issue of fact as to whether application of equitable tolling principles rendered the employee's administrative complaint timely.

The Supreme Court affirmed the Court of Appeal's judgment and remanded the cause for further proceedings. The doctrine of equitable tolling applies when an injured person has several legal remedies and, reasonably and in good faith, pursues one; thus, it may apply where one action stands to lessen the harm that is the subject of a potential second action; where administrative remedies must be exhausted before a second action can proceed; or where a first action, embarked upon in good faith, is found to be defective for some reason (*45 Cal. 4th 88, 100)* . The court held that when an employee voluntarily pursues an internal administrative remedy prior to filing a complaint under the FEHA, the statute of limitations on his or her FEHA claim is subject to equitable tolling. There is neither an express limit on grounds for tolling nor a rationale based on the text or legislative intent that would compel the court to decline to extend the usual rule that limitations periods are tolled while a party pursues an alternate remedy to FEHA claims. The court rejected the district's argument that the FEHA's preemption provisions (*Gov. Code, § 12993(a)-(c)*) required it to interpret *Gov. Code § 12960* as foreclosing judicial equitable tolling. Section 12993(c) speaks only to state-local

relations and preempts only local laws. The FEHA does not displace other state laws. Furthermore, the district's argument that tolling should be categorically unavailable because the employee "voluntarily abandoned" her pursuit of her internal grievance was supported by neither the law nor the record. The administrative proceedings lacked the judicial characteristics that were essential to according administrative findings collateral estoppel effect. In the absence of quasi-judicial proceedings, the employee was not required to seek judicial relief to set aside any findings or bear the consequences of their binding effect. The Court of Appeal correctly determined that equitable tolling was not barred as a matter of law The doctrine of equitable tolling applies when an injured person has several legal remedies and, reasonably and in good faith, pursues one; thus, it may apply where one action stands to lessen the harm that is the subject of a potential second action; where administrative remedies must be exhausted before a second action can proceed; or where a first action, embarked upon in good faith, is found to be defective for some reason (*45 Cal. 4th 88, 101-114)* .

Myers v. Orange County *(1970) 6 Cal. App. 3d 626, 86 Cal. Rptr. 198* , was an action for damages by the widow of a county employee who was allegedly wrongfully discharged. The plaintiff sought recovery of benefits under the county retirement program. The defendant demurred on the ground that the action was barred by a statute of limitations. The demurrer was sustained without leave to amend, and the plaintiff appealed from the judgment of dismissal.

The allegedly wrongful discharge occurred on August 22, 1966. In April 1967, the widow applied to the Retirement Board of Orange County for rescission of the order of discharge and reinstatement of her deceased husband's status as an employee for a certain period sufficient to qualify her for benefits under the county retirement program. In May, the widow was informed that her application would not be entertained; in June, she filed a petition for writ of mandate to compel the board to hear her application; in November, a judgment was entered denying the petition; in January 1968, this judgment became final. A little more than one month thereafter, in February 1968, the widow filed a claim for damages with the Board of Supervisors of Orange County; the claim was promptly rejected, and on March 7, 1968, the complaint for damages was filed.

The applicable period of limitation for filing a claim with the board of supervisors was one year, beginning at the latest on December 5, 1966, when the widow's husband died, and at the earliest on August 22, 1966, when he was discharged. The county conceded that the time consumed in pursuing administrative remedies which a person is required to pursue before an action can be commenced is not part of the period of limitation [*see § 143.45* and comments thereto]. However, the county contended that the procedures followed by the widow in this case were not necessary as prerequisites to an action; therefore, the time consumed in pursuing these procedures should not be excluded from the one year period for filing claims with the board of supervisors.

The court of appeal rejected the county's contention and made the statement set out as Paragraph B on the basis of *Tu-Vu Drive-In Corp. v. Davies (1967) 66 Cal. 2d 435, 437, 58 Cal. Rptr. 105, 426 P.2d 505* , and *Santa Clara County v. Hayes Co. (1954) 43 Cal. 2d 615, 617-619, 275 P.2d 456* , and several other decisions (*6 Cal. App. 3d 626, 634)* . The court said, "[W]e find that, upon the death of her husband, plaintiff was faced with two alternative procedures. Being uncertain of the applicability to her situation of the doctrine of the necessary exhaustion of administrative remedies, she could either [(1)] file a claim with the county for damages and thereafter institute suit, in which she would have undoubtedly been confronted with a claim by the county that the suit could not be maintained because of her failure to exhaust administrative remedies, or ... [(2)] apply for a hearing by the appeal board [of the Orange County Retirement Board] and seek to have the order of discharge rescinded and her husband reinstated as an employee from the date of discharge until the date of his death. She chose to pursue the latter remedy, and, in our opinion, in so doing, she acted reasonably, for, if she had been successful, there would have been no damages resulting from the discharge, and no claim for damages or suit for damages would have been necessary.

"Bearing in mind that a successful administrative appeal would have eliminated all claims of damage, it was likewise perfectly reasonable for plaintiff to seek the writ of mandate ... .

"We recognize, of course, that strictly speaking, the statutes requiring the presentation of a claim within one year are not statutes of limitations. These statutes are comparable, however, to a statute of limitations and have the same effect, that is, the claim is barred unless presented within one year. Additionally, the purposes of the claims statute and a statute of limitations are similar ... .

"We see no good reason, therefore, why the rule of *Tu-Vu* and *County of Santa Clara,* tolling statutes of limitation, should not be applied to toll the running of the one-year claim period, particularly in a case such as this.

"We conclude that the one-year claim period was tolled during time consumed by plaintiff's application for hearing before the appeal board, including the mandate proceeding, a total of 240 days. Assuming, as we have, the accrual of the causes of action on August 22, 1966, and December 5, 1966, respectively, the claim filed February 14, 1968, was within one year after accrual in each instance, as extended by the 240 days" (*6 Cal. App. 3d 626, 635-637)* .

[c] Optional Exhaustion of Administrative Remedies

McDonald v. Antelope Valley Community College Dist. *(2008) 45 Cal. 4th 88, 84 Cal. Rptr. 3d 734* , is discussed in [b], *above*.

Campbell v. Graham-Armstrong *(1973) 9 Cal. 3d 482, 107 Cal. Rptr. 777, 509 P.2d 689* , was a mandate proceeding to compel the governing board of a school district to reclassify the petitioners as full-time teachers for certain years prior to the 1965-1966 school year, to pay them back salaries for the school year 1964-1965, and for certain retirement benefits. The petitioners filed a claim with the respondent board in May 1966; the petition for writ of mandate was filed in December 1967. The petitioners appealed from a judgment denying retirement benefits for years before the 1964-1965 school years (but otherwise granting relief), which denial was based on the bar of the statute of limitations. On appeal, the petitioners contended that from May 1966 until December 1967 they reasonably and in good faith pursued an administrative remedy, as an alternative to a lawsuit, and that the time thus consumed should not be part of the period of limitation for commencing an action. The Supreme Court agreed with this interpretation of the law but held that in this case the petitioners were barred from relying on the point because of failure to raise it in the trial court (*9 Cal. 3d 482, 490)* .

[d] Reasonable Promptness in Refiling

In ***Kolani v. Gluska*** *(1998) 64 Cal. App. 4th 402, 75 Cal. Rptr. 2d 257* , plaintiffs on September 27, 1994, sued defendant in federal court. The eleven count complaint asserted claims for violation of RICO (the Racketeer Influenced and Corrupt Organizations Act), breach of contract, intentional and negligent interference with prospective advantage, fraud, intentional infliction of emotional distress, slander and trade libel. On June 20, 1996, the federal court granted defendant's motion for summary judgment on eight counts, and dismissed the state law counts for breach of contract and intentional and negligent interference with prospective advantage, declining to exercise supplemental jurisdiction over those claims. On September 6, 1996, 78 days after dismissal of the federal suit, plaintiffs filed a state action reasserting verbatim the claims for breach of contract and intentional and negligent interference with prospective advantage. Thereafter, the trial court sustained defendant's demurrers to the complaint finding the contract count fatally flawed and the tortious interference claims untimely. At the hearing on the demurrers and in its written order, the court indicated that plaintiffs might have viable causes of action for theft or misappropriation of confidential information or trade secrets. Plaintiffs did not request leave to amend either in their brief or at oral argument, and the court sustained the demurrers without leave to amend (*64 Cal. App. 4th 402, 405-407)* . An appeal followed.

The court of appeal affirmed the judgment insofar as it sustained demurrers, without leave to amend, to the causes of action for breach of contract and intentional and negligent interference with prospective advantage. The court, however, reversed insofar as it precluded filing of an amended complaint alleging a cause of action for misappropriation of confidential information, and remanded to permit the plaintiffs the opportunity to plead such a cause of action (*64 Cal.*

App. 4th 402, 412-413) . With regard to the interference claims, the court rejected the argument that the claims were saved by *28 U.S.C. § 1367(d)* and in the alternative by California's common law equitable tolling doctrine. The supplemental jurisdiction provisions of *28 U.S.C. § 1367* including subdivision (d), which codifies principles of equitable tolling found in state case law, was enacted in 1990. Under *28 U.S.C. § 1367(d)*, the period of limitation for any pendent claim over which the federal court has supplemental jurisdiction is tolled while the claim is pending and for 30 days after it is dismissed unless state law provides for a longer tolling period, *i.e.*, the second suit must be filed within 30 days after dismissal of the pendent state claims without prejudice unless state law extends that period.

The provisions of *28 U.S.C. § 1367(d)* codify the tolling doctrine and apply it in all supplemental jurisdiction cases when the pendent state claims are dismissed without prejudice. Two of the three requirements for equitable tolling are met in all such cases. Defendant receives notice of the claims from the filing and service of the federal suit and the defense is not prejudiced, because the defendant if diligent will interview witnesses and gather evidence to meet the claims in the federal suit (*64 Cal. App. 4th 402, 408-409)* . The third requirement, reasonable conduct by plaintiff, is addressed by *28 U.S.C. § 1367(d)*'s requirement that the second suit be filed within 30 days after dismissal of the pendent claims. This part of subdivision (d) substitutes a bright line rule in place of the case-by-case analysis of "reasonableness" found in the equitable tolling cases (*64 Cal. App. 4th 402, 409-410)* .

Moreover, *28 U.S.C. § 1367(d)* does not allow plaintiff to "tack" onto the limitations period the full time during which the federal action is pending (*64 Cal. App. 4th 402, 410-411)* . Accordingly, because plaintiffs did not refile in state court until 78 days after their federal suit was dismissed and California has no statute affording a grace period longer than 30 days, *28 U.S.C. § 1367(d)* does not save plaintiffs' claims (*64 Cal. App. 4th 402, 410)* . Neither are plaintiffs' claims saved by the equitable tolling doctrine. The leading cases finding an equitable tolling have involved short intervals between dismissal and refiling. Plaintiffs' reasonable promptness in refiling is necessary for relief under the doctrine (*64 Cal. App. 4th 402, 410-411)* . Plaintiffs made no showing justifying the 78-day delay from dismissal of the federal suit to refiling in state court. Furthermore, what conduct is "reasonable" under the equitable tolling doctrine must be assessed in light of the 30-day grace period in *28 U.S.C. § 1367(d)*. It was not reasonable for plaintiffs to refile much later than 30 days after the prior dismissal, in the face of section 1367(d)'s express 30-day requirement and absent either a state statute extending that period or some extraordinary circumstances justifying the delay (*64 Cal. App. 4th 402, 411)* .

In ***Downs v. Department of Water & Power*** *(1997) 58 Cal. App. 4th 1093, 68 Cal. Rptr. 2d 590* , plaintiff on March 15, 1993, filed a charge of racial harassment in violation of title VII of the Civil Rights Act of 1964 (*42 U.S.C. § 2000e et seq.*) with the United States Equal Employment Opportunity Commission (EEOC). On the same day the EEOC automatically filed a copy of the charge with the California Department of Fair Employment and Housing (DFEH). That same day the DFEH sent a right-to-sue letter to the plaintiff. The EEOC and the DFEH have a work sharing agreement whereby the two agencies integrate their procedures to reduce duplicate of effort. Each agency has initial responsibility for processing certain claims. The responsible agency is to notify the other agency of its final determination. Rather than waiting to issue a right-to-sue letter at the end of the EEOC's investigation, the DFEH apparently routinely issues its right-to-sue letter at the time an investigation is deferred to the EEOC under the work sharing agreement. On September 29, 1995, the EEOC sent plaintiff a letter stating that it had concluded its investigation and was dismissing the charge because it was unable to establish any violation of federal statutes. The letter also gave notice of the plaintiff's right to sue in the United States District Court and the time limit in which to do so. On December, 28, 1995, plaintiff filed suit in state court for violations of FEHA, *Cal. Const. art I, § 8*, and *Civ. Code § 51 et seq.* The trial court sustained defendant's demurrer to plaintiff's complaint without leave to amend on the grounds that the statute of limitations had expired for each cause of action, and defendant appealed (*58 Cal. App. 4th 1093, 1097-1098)* .

The court of appeal reversed. The court held that when a charge of discrimination or harassment is timely filed concurrently with the EEOC and the DFEH, the investigation of the charge is deferred by the DFEH to the EEOC under a work-sharing agreement, and the DFEH issues a right-to-sue letter upon deferral, then the one-year period to bring a FEHA action is equitably tolled during the pendency of the EEOC investigation until a right-to-sue letter from the

EEOC is received (*58 Cal. App. 4th 1093, 1102)* . The court noted that three factors determine whether the statute of limitations is equitably tolled in a particular case: (1) timely notice to defendants in filing the first claim: (2) lack of prejudice to defendants in gathering evidence to defend against a second claim; and (3) good faith and reasonable conduct by plaintiffs in filing the second claim. The timely notice requirement essentially means that the first claim must have been filed within the statutory period. Furthermore, the filing of the first claim must alert the defendant in the second claim of the need to begin investigating the facts which form the basis for the second claim. Generally, this means that the defendant in the first claim is the same one being sued in the second. The second prerequisite essentially is a requirement that the facts of the two claims be identical or at least so similar that the defendant's investigation of the first claim will put the defendant in a position to fairly defend the second. The third prerequisite of good faith and reasonable conduct on plaintiff's part is less clearly defined in the cases, but in *Addison v. State of California (1978) 21 Cal. 3d 313, 319, 146 Cal. Rptr. 224, 578 P.2d 941* , the Supreme Court did stress that the plaintiff filed the second claim a short time after tolling ended (*58 Cal. App. 4th 1093, 1100)* . The court concluded that plaintiff had filed a timely charge with the EEOC, that the FEHA action was based on the identical facts and charges as those investigated by the EEOC, and that plaintiff reasonably awaited the outcome of the EEOC investigation and promptly filed the state law action within three months of receiving the right-to-sue letter from the EEOC (*58 Cal. App. 4th 1093, 1102)* .

[4] Additional Authorities

[a] Equitable Tolling of Statute of Limitations

See *Downs v. Department of Water & Power (1997) 58 Cal. App. 4th 1093, 68 Cal. Rptr. 2d 590* , which is discussed in *§ 143.46[3][d]*.

In *McAlpine v. Superior Court (1989) 209 Cal. App. 3d 1, 257 Cal. Rptr. 32* , the court of appeal denied the petition of a city and two of its police officers for a writ of mandate to compel the trial court to sustain their demurrer to a complaint against them in tort for personal injuries. One of the officers, working alone, had stopped the motorcycle on which plaintiff was a passenger because the driver and passenger matched a citizen's description of recent robbery suspects. The officer had approached the motorcycle with a drawn gun, and the motorcycle sped away. The officer shot and killed the driver and wounded the passenger, neither of whom were armed. The passenger was apprehended and criminal charges were filed against him. On February 24, 1987, he entered a plea of nolo contendere, and on May 29, 1987, he was sentenced to five years probation with a year in the county jail. On September 8, 1987, he filed a federal court tort action against the city and officers, and on April 15, 1988, he filed the state court action, thereafter dismissing the federal action. The court held that the six-month statute of limitations on filing a civil action set forth in *Gov. Code § 945.6(a)(1)*was tolled under *Gov. Code § 945.3* for the period during which the criminal action was pending. The court held that the criminal case was pending until the date of sentencing and that the federal action was timely filed under *Gov. Code § 945.6(a)(1)* (*209 Cal. App. 3d 1, 4-5)* . The court further held that under the doctrine of equitable tolling, the timely filing of the federal court action tolled the six-month limitation period under *Gov. Code § 945.6(a)(1)* for filing the state court action, and that the state court action was therefore timely filed. The court said that under the equitable-tolling doctrine, an alternative remedy pursed during the limitations period, such as a timely filed federal action, will toll the statute of limitations (*209 Cal. App. 3d 1, 5)* .

In *Collier v. City of Pasadena (1983) 142 Cal. App. 3d 917, 191 Cal. Rptr. 681* , plaintiff was employed by defendant as a firefighter. When plaintiff was injured, he filed a workers' compensation claim alleging that the injury was incurred during his employment as a firefighter. Defendant terminated plaintiff's employment and sent him an application for pension benefits; plaintiff filled out the form requesting a disability pension, but his attorney did not file the request for over a year. In the meantime, defendant continued to contest the workers' compensation claim on the ground that the injury was not related to plaintiff's employment. Defendant denied plaintiff's request for a disability pension but did not notify him of the rejection until after a settlement of the workers' compensation claim, at which time it claimed that the application had not been timely filed. Plaintiff sought relief from the denial of the disability pension by a writ of mandate, but defendant's demurrer was sustained on the ground that the application was untimely.

The court of appeal reversed, holding that the doctrine of equitable tolling applied. The court examined the history of the doctrine, leading up to the decision in *Addison v. State of California (1978) 21 Cal. 3d 313, 146 Cal. Rptr. 224, 578 P.2d 941* , discussed in *§ 143.46[3][a]*. The timely notice requirement means that the first action must have been timely filed, and must have alerted defendant of the need to begin investigating the facts that form the basis for the second claim; the defendant in the two claims must also be essentially the same in most situations (*142 Cal. App. 3d 917, 922-924)* . However, in the case before it, the court held that the city and the retirement pension board were the same defendant for the purposes of the doctrine, given their commonality of interests and common representation by the city attorney's office (*142 Cal. App. 3d 917, 927)* . The lack of prejudice requirement was interpreted by the court to mean that the facts of the two claims must be identical, or at least so similar that defendant's investigation of the first claim will put it in a position to fairly defend the second (*142 Cal. App. 3d 917, 925)* . The court rejected defendant's argument that the two claims be mutually inconsistent for the statute of limitations to be tolled; relying on *Nichols v. Canoga Industries (1978) 83 Cal. App. 3d 956, 964, 148 Cal. Rptr. 459* , the court held that as long as the investigation of the first claim would permit a defense of the second, it is irrelevant whether the claims are alternative or parallel, consistent or inconsistent, compatible or incompatible (*142 Cal. App. 3d 917, 925-926)* . The claims before the court were both based on the relationship between plaintiff's injury and his employment, a sufficient identity to permit tolling (*142 Cal. App. 3d 917, 930)* . Finally, the requirement that plaintiff act reasonably and in good faith was held satisfied by the lack of any significant delay between the resolution of the first claim and the institution of the second, and the absence of any conduct that might have misled defendant into believing that the second claim would be abandoned (*142 Cal. App. 3d 917, 931-932)* .

[b] Reasonable and Good-Faith Pursuit of Alternative Remedy

In *Tarkington v. California Unemployment Ins. Appeals Bd. (2009) 172 Cal. App. 4th 1494, 92 Cal. Rptr. 3d 131* , the California Unemployment Insurance Appeals Board denied unemployment insurance benefits for employees during a lockout. Three employers acted as one bargaining unit in contract negotiations with a union. After workers at one of the companies went on strike, the other two employers locked out all of their union employees. On administrative appeal from the denial of unemployment insurance claims, two locked-out employees asserted that they sought unemployment benefits on a classwide basis. The appeal was unsuccessful, and a joint petition for writ of administrative mandate was timely filed by locked-out employees of both companies. The trial court ruled that the two companies had been misjoined. A second petition, styled as a class action and naming only one employer as the real party in interest, was then filed by the two employees who sought classwide relief. After sustaining a demurrer, the trial court dismissed the employees' petition for writ of administrative mandate.

The Court of Appeal reversed and remanded, holding that the second petition, although filed more than six months after the decision of the appeals board, was not time-barred under *Unemp. Ins. Code § 410*. The equitable tolling doctrine applied because the first petition was timely, the claims were almost identical, and the employees acted reasonably and in good faith. The employees' conduct was not dilatory, and the class allegations made resolution on demurrer improper (*172 Cal. App. 4th 1494, 1505)* .

In *Holdgrafer v. Unocal Corp. (2008) 160 Cal. App. 4th 907, 73 Cal. Rptr. 3d 216* , plaintiffs, commercial property owners, sued a company that owned subterranean oil pipelines for damages arising from a leak, asserting claims for trespass, nuisance, and negligence. Prior to filing suit, the parties engaged in negotiations from 1995 until early 2001, when negotiations broke down. Plaintiff filed suit in April 2001. It was undisputed that the statute of limitations on plaintiffs' claims for permanent trespass, permanent nuisance, and negligence was three years (*Code Civ. Proc. § 338(b)*), that plaintiffs became aware of the contamination on their property no later than 1989, and that they did not file their lawsuit until 2001. The jury found, however, that Unocal was equitably estopped from asserting the statute of limitations as a defense to all of the claims. On appeal, the court held that a defendant will be estopped to invoke the statute of limitations where there has been some conduct by the defendant, relied on by the plaintiff, which induces the belated filing of the action. It is not necessary that the defendant acted in bad faith or intended to mislead the plaintiff. It

is sufficient that the defendant's conduct in fact induced the plaintiff to refrain from instituting legal proceedings. Whether an estoppel exists--whether the acts, representations or conduct lulled a party into a sense of security preventing him from instituting proceedings before the running of the statute, and whether the party relied thereon to his prejudice--is a question of fact and not of law (*160 Cal. App. 4th 907, 925-926)* .

The facts and procedure of *McAlpine v. Superior Court (1989) 209 Cal. App. 3d 1, 257 Cal. Rptr. 32* , are discussed in *§ 143.46[4][a]*. In denying the petition for writ of mandate, the court explained that the doctrine of equitable tolling requires not only that plaintiff has timely filed the alternative remedy, but also that in so doing plaintiff acted reasonably and in good faith (*209 Cal. App. 3d 1, 5 n.2*).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTolling

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CHAPTER 143 LIMITATION OF ACTIONS
PART II. FORMS

14-143 California Points & Authorities § 143.47

§ 143.47 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Period of Limitation Tolled by Fraudulent Concealment of Defendant's Identity

[1] FORM

[*Caption. See § 143.31[1].*]

THE COURT SHOULD NOT SUSTAIN THE DEMURRER ON THE GROUND THAT THE ACTION IS BARRED BY THE STATUTE OF LIMITATIONS BECAUSE THE STATUTE WAS EQUITABLY TOLLED BY THE FRAUDULENT CONCEALMENT OF DEFENDANT'S IDENTITY.

A. Equitable Tolling of Statute of Limitations. [*See § 143.46[1].*].

B. Fraudulent Concealment of Defendant's Identity. Defendant should be equitably estopped from asserting the statute of limitations because, as a result of intentional concealment, plaintiff was unable to discover the defendant's actual identity (*Bernson v. Browning-Ferris Industries (1994) 7 Cal. 4th 926, 936, 30 Cal. Rptr. 2d 440, 873 P.2d 613*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted by plaintiff in opposition to a general demurrer to the complaint when the defendant has asserted that the action is barred by the statute of limitations, but the plaintiff has alleged in the complaint sufficient facts to show that the defendant had intentionally concealed his, her, or its identity from plaintiff [*see Bernson v. Browning-Ferris Industries (1994) 7 Cal. 4th 926, 936, 30 Cal. Rptr. 2d 440, 873 P.2d 613]* .

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. In particular, facts showing the plaintiff's diligence in attempting to identify the defendant should be set

forth. Facts showing the futility of normal discovery procedures to identify the defendant will also support the argument [*see Bernson v. Browning-Ferris Industries (1994) 7 Cal. 4th 926, 936-937, 30 Cal. Rptr. 2d 440, 873 P.2d 613]* .

[3] Discussion of Authorities

[a] Tolling of Statute of Limitations by Fraudulent Concealment of Defendant's Identity

Bernson v. Browning-Ferris Industries *(1994) 7 Cal. 4th 926, 936, 30 Cal. Rptr. 2d 440, 873 P.2d 613* , involved a libel action by a city council member who was the subject of a highly critical dossier, the author, sponsor, or distributor of which was unidentified. Although plaintiff obtained a copy of the report in 1988, he had no information as to the identity of the parties behind it until 1990 when two reporters informed him of the identity of Browning-Ferris Industries. The plaintiff immediately contacted Browning-Ferris Industries' legal counsel to confirm the reporters' statements; however, counsel denied any knowledge of the report or its source. In May, 1991, another reporter provided plaintiff with more specific information about the author of the dossier prepared on behalf of Browning-Ferris Industries. Plaintiff then concluded that counsel's previous representations about Browning's noninvolvement were false and less than one year later, filed the action for libel against Browning and several individual defendants who allegedly prepared the report. The trial court granted summary judgment in favor of those allegedly responsible for the libelous document on the ground that the action was not filed within one year after plaintiff learned of the existence of the document, pursuant to *Code Civ. Proc. § 340(3)* (*see now Code Civ. Proc. § 340(c)*). The court of appeal affirmed, and the supreme court granted plaintiff's petition for review.

The Supreme Court reversed. The Court noted that the general rule in California has been that ignorance of the identity of the defendant is not essential to a claim and will not toll the statute of limitations. Thus, when the plaintiff is aware of some of the defendants and he or she should use the normal procedure of filing suit against them, naming Doe defendants, and then taking discovery to identify the remainder (*7 Cal. 4th 926, 932-933)* . The Court defined the question in this case as being whether the general rule should apply when, as a result of the defendant's intentional concealment, the plaintiff is not only unaware of the defendant's identity, but is effectively precluded as a practical matter from ascertaining it through normal discovery procedures (*7 Cal. 4th 926, 934)* . The Court addressed one case, *Staples v. Zoph (1935) 9 Cal. App. 2d 369, 370, 49 P.2d 1131* , in which the court held that ignorance of the identity of the defendant did not toll the statute of limitations. The Court distinguished *Staples* on the ground that it was silent on the issue of whether the defendant had intentionally concealed his identity to the plaintiff's detriment. Furthermore, the holding had never been subsequently applied to bar an action grounded on similar facts (*7 Cal. 4th 926, 935)* .

Relying on the principle that one should not profit from one's own wrongdoing, the Court held that a defendant may be equitably estopped from asserting the statute of limitations when, as a result of intentional concealment, the plaintiff is unable to discover the defendant's actual identity. The rule of equitable estoppel includes the requirement that the plaintiff exercise reasonable diligence and, thus, the statute of limitations will toll only until such time that the plaintiff knows, or through the exercise of reasonable diligence should have discovered, the defendant's identity. Lack of knowledge alone is not sufficient to stay the statute; a plaintiff may not disregard reasonably available avenues of inquiry which, if vigorously pursued, might yield the desired information (*7 Cal. 4th 926, 936)* . In so holding, the Court disapproved the *Staples* case to the extent it is inconsistent (*7 Cal. 4th 926, 936 n.6*).

In determining whether a plaintiff has exercised reasonable diligence, courts must consider whether the filing of a timely Doe complaint would, as a practical matter, have facilitated the discovery of the defendant's identity within the requisite time period for service of process. Furthermore, if the identity of at least one defendant is known, the plaintiff must avail himself or herself of the opportunity to file a timely complaint naming Doe defendants and utilize discovery to ascertain the remaining defendants' identities. However, where discovery efforts will not be successful in ascertaining a defendant's identity because of his or her intentional concealment, the plaintiff should not be penalized (*7 Cal. 4th 926, 937)* .

In announcing this new rule of law, the California Supreme Court stated that this potential equitable estoppel will not unduly burden the trial courts because it will apply only in rare and exceptional cases (*7 Cal. 4th 926, 937)* . The Court remanded the case to determine whether, under the circumstances, defendants' actions constituted intentional concealment that deprived plaintiff, in fact, of knowledge of defendants' identity, and whether plaintiff exercised reasonable diligence in attempting to discover defendants' identity (*7 Cal. 4th 926, 937-938)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTolling

California Points & Authorities

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 143 LIMITATION OF ACTIONS
PART II. FORMS

14-143 California Points & Authorities § 143.48

§ 143.48 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Period of Limitation Tolled by Secretly Committed Breach of Contract

[1] FORM

[*Caption. See § 143.31[1].*]

THE DEMURRER ON THE GROUND THAT THE ACTION IS BARRED BY THE STATUTE OF LIMITATIONS SHOULD BE OVERRULED BECAUSE THE STATUTE WAS TOLLED BY DEFENDANT'S SECRETLY COMMITTED BREACH OF CONTRACT.

Tolling of Statute of Limitations by Defendant's Secretly Committed Breach of Contract. The discovery rule may be applied to breaches of contract which can be, and are, committed in secret and, where the harm flowing from those breaches will not be reasonably discoverable by plaintiffs until a future time, when: 1) the injury or the act causing the injury, or both, have been difficult for the plaintiff to detect; 2) the defendant has been in a far superior position to comprehend the act and the injury; and 3) the defendant had reason to believe the plaintiff remained ignorant that he/she had been wronged (*Gryczman v. 4550 Pico Partners, Ltd. (2003) 107 Cal. App. 4th 1, 4-5, 131 Cal. Rptr. 2d 680*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted by plaintiff in opposition to a general demurrer to the complaint when the defendant has asserted that the action is barred by the statute of limitations, but the plaintiff has alleged in the complaint sufficient facts to show that the injury or the act causing the injury, or both, have been difficult for the plaintiff to detect, the defendant has been in a far superior position to comprehend the act and the injury and the defendant had reason to believe the plaintiff remained ignorant that he/she had been wronged [*see Gryczman v. 4550 Pico Partners, Ltd. (2003) 107 Cal. App. 4th 1, 4-5, 131 Cal. Rptr. 2d 680]* .

[3] Discussion of Authorities

[a] Tolling of Statute of Limitations by Defendant's Secretly Committed Breach of Contract

Gryczman v. 4550 Pico Partners, Ltd. *(2003) 107 Cal. App. 4th 1, 131 Cal. Rptr. 2d 680* involved an individual plaintiff who alleged a company who had provided him with a right of first refusal on certain real property, conveyed the property to another company without allowing him to exercise the right of first refusal. The trial court dismissed the action pursuant to defendants' motion for summary judgment, on the ground it was barred by the applicable statute of limitations. The individual appealed.

The appellate court determined that the delayed discovery rule should be applied because the first company not only breached the contract within the privacy of its own offices, but the act which constituted the breach, failure to give notice of the option offer, was the very act which prevented the individual from discovering the breach. Defendants had reason to believe the individual remained ignorant he had been wronged, since they conceded for purposes of the summary judgment motion they never provided him with notice of the option offer. The appellate court ruled that the running of the statute of limitations was tolled until such time as the individual knew or should have known of the wrongful conduct at issue. Furthermore, the trial court erred in granting summary judgment, as reasonable minds could differ as to the sufficiency of the individual's diligence in discovering the breach of contract, and therefore, whether the individual exercised reasonable diligence under the circumstances was a question of fact for a jury to decide. The court found that delayed discovery is applicable under these circumstances when: 1) the injury or the act causing the injury, or both, have been difficult for the plaintiff to detect; 2) the defendant has been in a far superior position to comprehend the act and the injury; and 3) the defendant had reason to believe the plaintiff remained ignorant that he/she had been wronged (*107 Cal. App. 4th 1, 4-5)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersContracts LawBreachGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTolling

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CHAPTER 143 LIMITATION OF ACTIONS
PART II. FORMS

14-143 California Points & Authorities § 143.49

§ 143.49 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Period of Limitation Tolled by Commencement of Class Action for Members of Putative Class

[1] FORM

[*Caption. See § 143.31[1].*]

THE DEMURRER ON THE GROUND THAT THE ACTION IS BARRED BY THE STATUTE OF LIMITATIONS SHOULD BE OVERRULED BECAUSE THE STATUTE WAS TOLLED FROM _____ [*date*], THE DATE AN ACTION WAS FILED ON BEHALF OF A CLASS OF WHICH PLAINTIFF IS A PUTATIVE MEMBER, UNTIL _____ [*date*], THE DATE ON WHICH CLASS CERTIFICATION WAS DENIED, FOR A TOTAL OF _____ [*specify period, e.g.,* THIRTY DAYS].

Tolling of Statute of Limitations by Commencement of Class Action. The filing of a class action tolls the applicable statute of limitations for all members of the putative class until class certification is denied when the class action protects the efficiency and economy of litigation as promoted by the class action device, and it sufficiently notifies the defendant of the substantive claims of the members of the class and the number and generic identities of the potential plaintiffs who may participate in the judgment (*Jolly v. Eli Lilly & Co. (1988) 44 Cal. 3d 1103, 1121-1125, 245 Cal. Rptr. 658, 751 P.2d 923* ; *Becker v. McMillin Construction Co. (1990) 226 Cal. App. 3d 1493, 1498-1502, 277 Cal. Rptr. 491*).

[2] Comments

[a] Use of Form

Thos memorandum of points and authorities may be submitted by plaintiff in opposition to a general demurrer to the complaint on the ground that the action is barred by the applicable statute of limitations, when the plaintiff has alleged that his or her complaint was filed after the filing of a class action on behalf of a class of which plaintiff is a member, and certain public policy considerations have been satisfied.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Tolling of Statute of Limitations by Commencement of Class Action

Jolly v. Eli Lilly & Co. *(1988) 44 Cal. 3d 1103, 245 Cal. Rptr. 658, 751 P.2d 923* , was an action against drug manufacturers for damages for personal injury caused by an allegedly defective drug, estrogen diethylstilbestrol (DES), taken by plaintiff's mother while she was pregnant with plaintiff. Plaintiff was born in 1951 and learned in 1972 that her mother had taken DES when plaintiff was *in utero.* Plaintiff then went to a medical center clinic for a checkup and was diagnosed as having a precancerous condition. In 1976, she had an abnormal pap smear, underwent a surgical procedure to remove abnormal tissue, and in 1978 underwent a complete hysterectomy and a partial vaginectomy to remove a malignancy. Since 1972 she had been aware, or at least suspected, that her condition was a result of her mother's ingestion of DES during pregnancy. Starting in 1972 she attempted to discover the manufacturer of the DES ingested by her mother, and efforts were increased in 1976 and 1978 when plaintiff's condition became acute.

Since at least 1978, plaintiff was aware of the pendency of one or more DES suits for failure to test or failure to warn. Plaintiff erroneously believed she was unable to sue, because she couldn't discover which manufacturer made the drug ingested by her mother. In March 1980, however, the *California Supreme Court, in Sindell v. Abbott Laboratories (1980) 26 Cal. 3d 588, 163 Cal. Rptr. 132, 607 P.2d 924* , held that a plaintiff who could not identify the precise drug manufacturer of the ingested DES could nevertheless state a cause of action against the DES manufacturers of a substantial percentage of the market share of the drug. The present action was filed almost a year later.

In 1982, the trial court in *Sindell* denied class certification for lack of commonality among class members on issues of proximate cause, extent of injury, and appropriate medical examination or treatment (*44 Cal. 3d 1103, 1120)* . The trial court in the present case then granted the defendants' motion for summary judgment on the ground the action was barred by the one-year statute of limitations set forth in *Code Civ. Proc. § 340(3)* (*see now Code Civ. Proc. § 335.1*, which extends statute of limitations to two years for personal injury actions). The court of appeal reversed. The Supreme Court reversed the court of appeal with directions to affirm the summary judgment.

Although she did not raise the issue in the trial court, plaintiff, on appeal, argued that under *American Pipe & Construction Co. v. Utah (1974) 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713* , and its progeny, the filing of the class action in *Sindell* tolled the statute of limitations with respect to individual members of the putative class until the class was denied certification in 1982, and that her action was, therefore, timely. *Sindell* was an action by a woman suing on her own behalf and, "with respect to certain relief," on behalf of a class of women allegedly similarly situated. For herself individually, Sindell claimed damages for specific personal injury suffered as a result of her mother's ingestion of DES during pregnancy. In her cause of action relating to the class claims, Sindell described the class as female residents of California "who have been exposed to DES before birth and who may or may not know that fact or danger, and as a result of which, have or may have contracted or in the future may contract adenocarcinoma or vaginal or cervical adenosis or precancerous tumors of the breast or cancer of the bladder." For the class, Sindell sought only declaratory relief and an order directing defendants to publicize the dangers of DES and the necessity of medical evaluations and to fund the establishment and maintenance of clinics to provide free examinations to the DES daughters.

The Supreme Court rejected plaintiff's argument. Although it held it was not bound by the decision in *American Pipe* (*44 Cal. 3d 1103, 1119)* , the Court nevertheless explained when that case would apply to toll the running of the statute of limitations (*44 Cal. 3d 1103, 1118-1126)* . The Court said that *American Pipe* had held that when class action status has been denied solely because of failure to demonstrate that the class is so numerous that joinder of all members is impracticable, the commencement of the original class suit tolls the running of the statute for all purported members of

the class who make timely motions to intervene after the court has found the suit inappropriate for class action status (*44 Cal. 3d 1103, 1119)* . The Court said that *Bangert v. Narmco Materials, Inc. (1984) 163 Cal. App. 3d 207, 209 Cal. Rptr. 438* , extended *American Pipe* to apply to a class action suit when class certification was denied, not for lack of numerosity, but for insufficient community interest (*44 Cal. 3d 1103, 1119-1120)* . The Court explained that underlying the tolling rule of *American Pipe* were two major policy considerations.

The first consideration is the protection of the class action device, that is, protecting the efficiency and economy of litigation (*44 Cal. 3d 1103, 1122)* . In cases when class certification is denied for "subtle factors," unforeseeable by class members, a rule that failed to protect putative class members from the statute of limitations after denial of certification would induce potential class members to file protective motions to intervene or to join in the event that a class was later found unsuitable, depriving class actions of the efficiency and economy of litigation that is a principal purpose of the procedure (*44 Cal. 3d 1103, 1121)* .

The second consideration is the effectuation of the purposes of the statute of limitations, that is, protecting the defendant from unfair claims (*44 Cal. 3d 1103, 1122)* . The requirements of ensuring essential fairness to defendants and of barring a plaintiff who has slept on his rights are satisfied when a named plaintiff who is found to be representative of a class commences a suit and thereby notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment. In these circumstances, the purposes of the statute of limitations would not be violated by a decision to toll (*44 Cal. 3d 1103, 1121)* .

The Court held that *Sindell* satisfied neither of these considerations, that it protected neither the efficiency and economy of litigation nor the defendant from unfair claims (*44 Cal. 3d 1103, 1122)* . The court said that because the *Sindell* complaint did not seek personal injury damages on behalf of the class, even those absent class members who were aware of that action could not reasonably have relied on the complaint as a basis for postponing their own personal injury actions (*44 Cal. 3d 1103, 1125)* ; that the *Sindell* complaint could not have apprised defendants of plaintiff's substantive claims (*44 Cal. 3d 1103, 1123)* ; and that because it never put defendants on notice that personal injury damages were being sought on a class basis, it would be unfair to defendants to toll the statute of limitations on such personal injury actions (*44 Cal. 3d 1103, 1125)* . The Court held that the *American Pipe* tolling rule was unavailable to Jolly, and that plaintiff and other similarly situated plaintiffs seeking personal injury damages in DES cases may not rely on the *Sindell* class action suit to toll the statute of limitations pursuant to *American Pipe* (*44 Cal. 3d 1103, 1126)* , and it disapproved *Bangert, above,* to the extent that that decision is inconsistent with its holding (*44 Cal. 3d 1103, 1126 n.20*).

Becker v. McMillin Construction Co. *(1990) 226 Cal. App. 3d 1493, 277 Cal. Rptr. 491* , was an action, filed on January 30, 1987, by Becker, the purchaser of a four-year-old single-family home in a 620-home development, many of the homes in which had been plagued with construction defects stemming from soil subsidence and other causes, against the defendant builder for damages based on strict liability and negligence. Becker had first noticed a crack in his garage floor slab in January 1984 and reported it to defendant's warranty division at that time. On September 7, 1984, another homeowner in the development, Castro, filed a construction defect action against defendant for damages for defective slabs, soil compaction, roofs, and common areas, alleging both individual and class claims on theories of breach of implied warranty, strict liability, and negligence. The development's homeowners' association, which had refused to assert Castro's claims on request, was named an unwilling plaintiff and joined as a defendant [*see Code Civ. Proc. § 382*]. Notice of Castro's action was given to the homeowners in the development. On February 11, 1987, Castro moved for certification of a class of homeowners and, if class certification was denied, alternatively for leave to file a third amended complaint naming the owners (including Becker) of 74 other homes as individual plaintiffs. Certification was denied on the ground that causation and damage among the different homes varied greatly enough so there was a lack of common questions of law and fact. In making its ruling, the trial court noted that the evidence showed some five or six potential causes of the construction defects, and several different kinds of projected damages, and ruled that because of these factors, it would be more appropriate to treat the various homeowners' claims individually, possibly

consolidated for trial into groups according to the type of problem at the site. The court then deemed filed the third amended complaint, which named the putative class members, including Becker, as individual plaintiffs, and struck the class action claims.

Becker's insurer settled with Becker for $82,797 and then proceeded, as intervener on a subrogation basis, in Becker's action against the defendant. Becker's claims in the class action were severed and consolidated with Becker's action. Trial was set for October 1988. At the outset of trial, defendant claimed that the 10-year latent-deficiency construction-defect statute (*Code Civ. Proc. § 337.15*) had run on December 14, 1986, the 10-year anniversary of the notice of completion of the property, and that both Becker's action and the amendment adding Becker as a plaintiff in the class action, filed on February 11, 1987, were untimely. Defendant argued that the rule of *American Pipe & Const. Co. v. Utah (1974) 414 U.S. 538* , was not controlling, since in that case the class certification had been denied for lack of numerosity, while the multiple-party action certification had been denied for lack of common questions of law and fact. It relied on *Jolly v. Eli Lilly & Co. (1988) 44 Cal. 3d 1103, 245 Cal. Rptr. 658, 751 P.2d 923* , discussed *above,* in which no tolling was allowed and in which the denial of class certification had been made on the basis of lack of commonality. The trial court denied defendant's motion for separate trial (*Code Civ. Proc. § 597*) on the statute-of-limitations defense (*Code Civ. Proc. § 337.15*), having found the statute tolled by the pendency of a related class action, so that Becker's individual action was timely filed. The court discussed, in particular, *Bangert v. Narmco Materials, Inc. (1984) 163 Cal. App. 3d 207, 209 Cal. Rptr. 438* , which followed *American Pipe* and was analyzed and disapproved in part by *Jolly, above.* The jury's verdict was for plaintiff, and defendant appealed from the judgment.

The court of appeal affirmed, concluding that the trial court correctly applied class action tolling rules summarized in *Jolly, above* (*226 Cal. App. 3d 1493, 1495, 1498)* . The court summarized the two policy considerations discussed in *Jolly,* namely, protecting efficiency and economy in litigation as promoted by the class action device, and notice to the defendants of the substantive claims being brought against them and of the number and generic identities of the potential plaintiffs who may participate in the judgment (*226 Cal. App. 3d 1493, 1498-1499)* . The court explained that in comparing *Sindell v. Abbott Laboratories (1980) 26 Cal. 3d 588, 163 Cal. Rptr. 132, 607 P.2d 924* , and Jolly's action, the Supreme Court found inadequate notice of Jolly's claim had been given to the defendants in *Sindell,* and disallowed tolling, and that most of the Supreme Court's discussion focused on adequate notice to the defendants (*226 Cal. App. 3d 1493, 1499)* .

The court did point out that the Supreme Court issued a warning that in the application of the *American Pipe* rule to personal injury mass tort cases, the presumption should be that "lack of commonality" will defeat certification and preclude application of the *American Pipe* tolling doctrine. Further, the Supreme Court, in a footnote dealing with alternative procedures, commented that it believed class actions can rarely be appropriate for resolution of mass-tort claims. However, the court noted that the Supreme Court had declined to decide the general issue of whether in any personal injury mass-tort case the filing of a class action complaint can serve to toll the statute of limitations for putative class members when the class ultimately is denied certification for lack of commonality, and that the *Jolly* decision concluded on the following, very specific note: "[W]e find that plaintiff and other similarly situated plaintiffs seeking personal injury damages in DES cases may not rely on the *Sindell* class action suit [citation] to toll the statute of limitations pursuant to *American Pipe*" (*226 Cal. App. 3d 1493, 1500)* . The court added that accompanying this narrow holding was the footnote: "Insofar as *Bangert v. Narmco Materials, Inc. [(1984) 163 Cal. App. 3d 207, 209 Cal. Rptr. 438*] is inconsistent with our holding, that case is disapproved" (*226 Cal. App. 3d 1493, 1500)* .

Bangert extended *American Pipe* to a class action suit against a plastics research plant seeking injunctive and monetary relief for property damage, economic loss, and physical injuries, the asserted class consisting of persons living within a half-mile radius of the plant; that is, it involved both personal injury and property damage claims allegedly incurred over a 31-year period. The court of appeal concluded that *Jolly* disapproved *Bangert* in regard to the personal injury mass-tort claims but that it did not disapprove it in regard to the property damage mass-tort claims, because the affected property owners were more readily identifiable regarding number and generic identity, making it more reasonable to expect a defendant to be put on some degree of notice of the extent of the claim by the pending class action, even when

class certification had to be denied for lack of common questions (*226 Cal. App. 3d 1493, 1500-1501)* .

The court held that even though there was clearly a lack of commonality for class certification purposes, the substantive class and individual claims were sufficiently similar to give defendant notice of the litigation for purposes of applying the tolling rule. First, on the issue of the number and generic identities of the potential plaintiffs, the filing of the Castro action on construction defect theories must reasonably be said to have put defendant on notice that a certain number of homeowners in this specific subdivision were experiencing construction defects that might well lead to extended litigation, whether in a class forum or in individual actions. The identity and number of potential claimants were thus ascertainable to a significant degree that was adequate to give the required notice of the addresses potentially involved in the action. Some turnover in home ownership was inevitable, which later discovery could reveal, but it cannot be disputed that the generic identity of plaintiffs was obvious (*226 Cal. App. 3d 1493, 1501)* .

With respect to the issue of the nature of the substantive claims, the Castro action gave defendant notice that construction defects were claimed by some homeowners at the site. It was then aware of the need to preserve evidence and witnesses respecting the claims of all the members of the class (*226 Cal. App. 3d 1493, 1502)* . The court said that an experienced developer such as defendant can be expected to have general familiarity with the nature of latent-deficiency construction-defect claims that might be brought against it, such as Castro and Becker each raised. Litigation of the substantive claims would, of course, require individualized attention to causation and degree of damage at the properties; this problem was serious enough to defeat the class-certification request. However, such problems are not fatal to the existence of an adequate degree of notice to the defendant for purposes of applying the tolling rule in the property damage context (*226 Cal. App. 3d 1493, 1502)* . The court, however, cautioned that its decision should not be broadly construed to apply to any and all construction-defect cases, and that, consistent with the Supreme Court's approach in *Jolly,* the applicability of *American Pipe* can only be determined by individualized attention to the identity of the claimants and the nature of the claims involved, and by a careful weighing of the important policy considerations in this area (*226 Cal. App. 3d 1493, 1502)* .

[4] Additional Authorities

[a] Tolling of Statute of Limitations by Commencement of Class Action in Another State

In *Clemens v. DaimlerChrysler Corp. (9th Cir. 2008) 534 F.3d 1017* , plaintiff consumer sought review of a judgment from the U.S. District Court for the Central District of California, which, among other things, ruled that plaintiff's fraud claims under *Civ. Code §§ 1709-1710* were barred by the three-year statute of limitations under *Code Civ. Proc. § 338(d),* which was not tolled by the discovery rule or by the filing of a similar action in Illinois. On appeal, the Ninth Circuit Court of Appeals noted that in some instances, a plaintiff can rely on the filing of a prior class action to vindicate the right in question and toll the statute in the event that the class is not ultimately certified. A handful of states have applied this rule when a class action is filed in another jurisdiction. However, the California Supreme Court has not adopted such cross-jurisdictional tolling, however, and few states do. Several federal courts have declined to import the doctrine into state law where it did not previously exist. Accordingly, the Ninth Circuit ruled that the weight of authority and California's interest in managing its own judicial system counsel it not to import the doctrine of cross-jurisdictional tolling into California law. The rule of *American Pipe*--which allows tolling within the federal court system in federal question class actions--does not mandate cross-jurisdictional tolling as a matter of state procedure (*534 F.3d 1017, 1025)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresClass ActionsGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of

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14-143 California Points & Authorities § 143.50

§ 143.50 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Complaint Alleges Estoppel to Raise Defense of Bar of Statute of Limitations

[1] FORM

[*Caption. See § 143.31[1].*]

DEFENDANT'S DEMURRER BASED ON THE STATUTE OF LIMITATIONS SHOULD NOT BE SUSTAINED BECAUSE THE COMPLAINT ALLEGES THAT DELAY IN COMMENCING THE ACTION WAS INDUCED BY THE CONDUCT OF DEFENDANT.

A. Delay Induced by Defendant. When delay in commencing an action is induced by the conduct of the defendant, the delay cannot be availed of as a defense (*Tresway Aero, Inc. v. Superior Court (1971) 5 Cal. 3d 431, 438, 96 Cal. Rptr. 571, 487 P.2d 1211* ; *Ateeq v. Najor (1993) 15 Cal. App. 4th 1351, 1356-1357, 19 Cal. Rptr. 2d 320*).

B. Fraud Not Necessary. When the plaintiff's delay in commencing an action was induced by the defendant, that delay is not a defense, even if there was no designed fraud on the part of the defendant (*Ginns v. Savage (1964) 61 Cal. 2d 520, 524-525, 39 Cal. Rptr. 377, 393 P.2d 689*).

[*Optional*] **C. Requirements for Delay Due to Fraud.** Whether a complaint sufficiently alleges a fraudulent concealment of the cause of action, so as to extend the period of limitation, is to be determined by the same rules that apply where the question is whether a case is within the saving provision of *Code of Civil Procedure Section 338* regarding actions based on fraud (*Kimball v. Pacific Gas & Elec. Co. (1934) 220 Cal. 203, 215, 30 P.2d 39*). The complaint must plead facts showing a lack of knowledge of the facts constituting the ground for estoppel, and a lack of means of obtaining that knowledge, and how and when plaintiff became aware of those facts (*Negaard v. Department of Aeronautics (1973) 32 Cal. App. 3d 92, 97, 107 Cal. Rptr. 920*).

[*Optional*] **D. Delay Resulted From Duress Caused by Defendant's Threats Against Plaintiff.** A defendant may be estopped from pleading the defense of the statute of limitations due to threats made by the defendant, which caused

duress on the plaintiff and resulted in plaintiff's delayed filing of the action (*Ateeq v. Najor (1993) 15 Cal. App. 4th 1351, 1356-1357, 19 Cal. Rptr. 2d 320*).

[*Optional*] **E. Equitable Estoppel Can Apply No Matter How Unequivocally the Statutory Language Containing the Applicable Limitations Period Is Expressed.** Application of equitable estoppel is wholly independent of the limitations period itself. It arises, not from the language of the statute, but from the equitable principle that a person will not be permitted to profit from that person's own wrongdoing in a court of justice. Because equitable estoppel operates directly on the defendant without abrogating the running of the statutory limitations period, it can apply no matter how unequivocally the statutory language containing the applicable limitations period is expressed in the absence of statutory language, or legislative history, to the contrary (*Battuello v. Battuello (1998) 64 Cal. App. 4th 842, 847-848, 75 Cal. Rptr. 2d 548*).

[*Optional*] **F. Equitable Estoppel Can Apply Although No Affirmative Conduct Is Involved.** Although application of equitable estoppel against the assertion of a limitations defense typically arises through some misleading affirmative conduct on a defendant's part, an estoppel may also arise from silence when there is a duty to speak (*Spray, Gould & Bowers v. Associated Internat. Ins. Co. (1999) 71 Cal. App. 4th 1260, 1263, 1268-1269, 84 Cal. Rptr. 2d 552*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a general demurrer to the complaint, when the demurrer asserts that the action is barred by a statute of limitations, but the complaint alleges facts showing that the defendant is estopped to raise that defense.

Counsel should insert argument in the form showing the relationship between the facts of his case and the points of law stated.

[b] Related Pleading and Practice Forms

For a form of allegation that the defendant is estopped to raise the defense of bar of a statute of limitations, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* .

[3] Discussion of Authorities

[a] Delay Induced by Defendant

Tresway Aero, Inc. v. Superior Court *(1971) 5 Cal. 3d 431, 96 Cal. Rptr. 571, 487 P.2d 1211* , was a mandamus proceeding to compel the respondent court to quash service of summons and to dismiss an action for failure to serve summons within three years, pursuant to former Code Civ. Proc. § 581a (*now see Code Civ. Proc. § 583.210 et seq.*). A

defective summons was served within the three year period. The defendant (petitioner) requested and received an extension for appearance beyond the date three years after filing the complaint and, the Supreme Court stated, thereby effectively prevented the plaintiff from discovering the defect in service until after the three year period had elapsed. The Supreme Court made the statement set out as Paragraph A while discussing analogous cases dealing with statutes of limitations (*5 Cal. 3d 431, 438)* . (Writ denied as to dismissal but granted as to quashing service for summons.) Note that *Code Civ. Proc. § 583.110 et seq.*, replacing former Code Civ. Proc. §§ 581a and 583, neither abrogate nor otherwise affect the principles of waiver and estoppel [*Code Civ. Proc. § 583.140*; *cf.* former Code Civ. Proc. § 581a(f)(1)].

Plaintiff in ***Ateeq v. Najor*** *(1993) 15 Cal. App. 4th 1351, 19 Cal. Rptr. 2d 320* , an Iraqi citizen, entered into a partnership with defendant and plaintiff's cousin to purchase land in the United States as investments. Plaintiff gave defendant and his cousin a power of attorney to handle the investments. Defendant attempted to help plaintiff obtain residency in the United States through a business investor program, which resulted in plaintiff acquiring one-half interest in one of defendant's businesses. After further transactions, a disagreement arose between the parties, and plaintiff revoked the power of attorney. Plaintiff discovered many discrepancies, including defendant's 1987 sale of one of the properties without sharing the proceeds. Plaintiff sued defendant and his cousin, alleging undue influence, conspiracy to commit fraud, violations of trust, and constructive fraud. The jury found by special verdict that certain properties should be equally divided among the investors, that a confidential relationship existed between the investors, that defendant threatened to have plaintiff deported if plaintiff contested the accountings, and that plaintiff actually believed such threats would be carried out, and awarded general and punitive damages to plaintiff. The court entered judgment in accordance with the special verdict against defendant, and denied defendant's motion for judgment based on the statute of limitations. Defendant appealed from the judgment.

The court of appeal affirmed the judgment, stating that it could not reweigh the evidence on appeal and concluding that the trial court did not err in finding defendant was estopped from pleading the defense of the statute of limitations. The special verdicts and the court findings on denying defendant's motion for judgment supported that duress occurred, that plaintiff reasonably believed defendant would carry out the threats, that plaintiff's forbearance to bring the suit was reasonable, and that duress continued up to three years before plaintiff filed the action. The appellate court found no specific California case that holds a defendant may be estopped from pleading the defense of the statute of limitations due to threats made by the defendant and causing duress on the plaintiff. However, there is ample case law on the principles of equitable estoppel. Equitable estoppel will preclude a defendant from pleading the bar of the statute of limitations when the plaintiff was induced to refrain from bringing a timely action by the fraud, misrepresentation, or deceptions of defendant. Statutes of limitation are not so rigid that under certain circumstances principles of equity and justice will not allow them to be extended or tolled. When delay in commencing an action is induced by the defendant's conduct, defendant cannot avail himself or herself of the defense of the statute. The appellate court found that the circumstances of this case clearly fell within established principles of equitable estoppel (*15 Cal. App. 4th 1351, 1356-1357)* .

The appellate court rejected defendant's argument that duress is fraud for purposed of applying the three-year limitation period of *Code Civ. Proc. § 338(d)*. That section does not apply when the duress imposed is not part of the underlying cause of action, but is rather a separate wrongful action by a defendant intended to delay a filing of a lawsuit. The equitable estoppel finding was not based on fraud or concealment of the underlying action, nor was it based on any confidential relationship between the parties that was found to have ended in 1981 or 1982. Rather, it was based on independent actions consisting of defendant's threats to have plaintiff deported if he caused problems regarding the accountings (*15 Cal. App. 4th 1351, 1357-1358)* .

The reviewing court also rejected defendant's assertion that plaintiff could not rely on equitable estoppel because plaintiff failed to plead in the complaint the specific facts of duress resulting from the deportation threats. If the facts alleged in a complaint clearly show the statute has run, then the plaintiff may be required to affirmatively and specifically plead facts supporting estoppel. Plaintiff's complaint, however, did not clearly indicate the statute would

have run. Accordingly, plaintiff was not required to specifically plead the deportation threats at the initial stage of filing the complaint. Plaintiff may not have necessarily known the statute was an issue until defendant raised it as an affirmative defense in his answer. Since plaintiff timely raised the issue of estoppel due to the threats in response to defendant's motion for a defense judgment, plaintiff was not precluded from relying on equitable estoppel for failure to specifically plead it in the complaint (*15 Cal. App. 4th 1351, 1358)* .

Finally, the court rejected defendant's argument that plaintiff should be prevented by laches from pursuing the action. Defendant's claimed prejudice was the loss of bank records. But these records were under defendant's control at the time defendant knew a dispute could arise. Laches, like estoppel, is founded on equitable principles. The delay was caused by defendant's wrongdoing. If defendant didn't retain all the records necessary to adequately defend himself, it resulted from his wrongful actions and equity will not condone the wrongdoing by allowing him to plead laches (*15 Cal. App. 4th 1351, 1359)* .

[b] Fraud Not Necessary

Ginns v. Savage *(1964) 61 Cal. 2d 520, 39 Cal. Rptr. 377, 393 P.2d 689* , was a mandate proceeding that the trial court dismissed following the sustaining of a demurrer on the ground of failure to commence it within the statutory period. Plaintiff contended (but did not plead) that she relied on representations by defendant's attorney to the effect that plaintiff had a longer period of time in which to commence the proceeding than was the fact. The Supreme Court reversed with directions that plaintiff be given leave to amend to set up facts showing estoppel. When delay in commencing an action is induced by conduct of the defendant, it cannot be availed of by him as a defense, even though there was no designed fraud on the part of the person sought to be estopped (*61 Cal. 2d 520, 524-525)* .

[c] Requirements for Delay Due to Fraud

Kimball v. Pacific Gas & Elec. Co. *(1934) 220 Cal. 203, 30 P.2d 39* , was an action for damages based on personal injury resulting from negligence. The trial court directed a verdict in favor of the allegedly negligent party on the ground that the action was barred by the statute of limitations, but the jury gave a verdict against that party's employer, who was then the only defendant, and that defendant appealed. One issue on appeal was whether the complaint alleged fraudulent concealment of the cause of action, so that defendant should have been held estopped to raise the defense of limitation. The Supreme Court stated that although the case did not fall within the provisions of *Code Civ. Proc. § 338*, "the same rules of pleading should apply and the same particularity should be required as is necessary to bring that section into operation" (*220 Cal. 203, 215)* .

Negaard v. Department of Aeronautics *(1973) 32 Cal. App. 3d 92, 107 Cal. Rptr. 920* was a mandate proceeding. The trial court dismissed following the sustaining of a demurrer on the ground that the action was barred. The court of appeal affirmed, noting that although an attempt was made to plead estoppel, it failed because nowhere in the petition was it alleged when the petitioner became aware of the facts on which he based his contention of estoppel. The court cited *Casualty Ins. Co. v. Rees Inv. Co. (1971) 14 Cal. App. 3d 716, 720, 92 Cal. Rptr. 857* , in which the court had set out the facts (stated in Paragraph C) which must be alleged as an excuse for late commencement of an action based on fraud, pursuant to *Code Civ. Proc. § 338* (*32 Cal. App. 3d 92, 97)* .

[d] Delay Resulted From Duress Caused by Defendant's Threats Against Plaintiff

Ateeq v. Najor *(1993) 15 Cal. App. 4th 1351, 19 Cal. Rptr. 2d 320* , is discussed in *§ 143.50[3][a]*.

[e] Equitable Estoppel Can Apply No Matter How Unequivocally the Statutory Language Containing the Applicable Limitations Period Is Expressed

In ***Battuello v. Battuello*** *(1998) 64 Cal. App. 4th 842, 75 Cal. Rptr. 2d 548* , plaintiff worked on the family vineyard for many years. From his childhood, plaintiff's parents told him that he would be given the vineyard when his father

died. In reliance on those promises, plaintiff attended college to learn the formal aspects of running a business. From 1970 through 1995 plaintiff farmed and managed the vineyard. In 1988, plaintiff's parents had executed a trust that specified that plaintiff would receive the vineyard on the death of the survivor of plaintiff's parents. Plaintiff's father died on December 10, 1995, and shortly thereafter plaintiff learned that in 1994, plaintiff's parents executed another trust and related documents that stated that plaintiff would not receive the vineyard as promised. Plaintiff objected when plaintiff learned this and entered into settlement negotiations with his mother and her legal advisors. As a result of these negotiations, plaintiff's mother promised plaintiff that he would receive the vineyard no later than the end of 1996. In reliance on those promises, plaintiff refrained from making any objection when his mother filed a petition in superior court to confirm that the 1994 trust had title to the vineyard. The court in 1996 ruled that the trust had title to the vineyard. Shortly thereafter, plaintiff's mother repudiated the settlement agreement and took the position that plaintiff did not have any right to the vineyard other than that to which plaintiff might be entitled pursuant to the 1994 trust. Plaintiff then brought suit seeking to enforce the father's promise to give the vineyard to plaintiff when the father died. The mother, acting individually, as trustee of the trust, and apparently on behalf of the father's estate demurred to the complaint, asserting that the one year limitation period of *Code Civ. Proc. § 366.2* barred the action. The trial court agreed and sustained the demurer without leave to amend (*64 Cal. App. 4th 842, 845-846)* . Plaintiff appealed.

The court of appeal reversed. The court, quoting *Bomba v. W.L. Belvidere, Inc. (7th Cir. 1978) 579 F.2d 1067, 1070* , noted that equitable estoppel, unlike tolling, is neither concerned with the point at which a limitations period commences to run nor with the circumstances which may suspend running of the limitation period. Rather, equitable estoppel comes into play after a limitations period has expired and addresses itself to the circumstances in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because that party's conduct has induced another into forebearing suit within the applicable limitations period. Application of equitable estoppel is wholly independent of the limitations period itself. It arises, not from the language of the statute, but from the equitable principle that a person will not be permitted to profit from that person's own wrongdoing in a court of justice. Because equitable estoppel operates directly on the defendant without abrogating the running of the statutory limitations period, it might apply no matter how unequivocally the statutory language containing the applicable limitations period is expressed (*64 Cal. App. 4th 842, 847-848)* . Although former Code Civ. Proc. § 366.2(a)(2), see now 366.2(b) which provides that "[t]he limitations period provided in this section for commencement of an action shall not be tolled or extended for any reason," except as specified in § 366.2(b)(1)-(4), clearly shows the Legislature intended that the statute of limitations set forth in that section not be "tolled" or "extended," the statute is silent about equitable estoppel. Absent such language, or legislative history suggesting that the Legislature intended to abrogate the doctrine of equitable estoppel, the doctrine of equitable estoppel still applies (*64 Cal. App. 4th 842, 848)* . The court concluded that plaintiff had alleged facts sufficient to come within the doctrine of equitable estoppel because he had claimed that during the settlement negotiations which followed the death of his father, his mother convinced him not to file a timely suit by telling him that he would receive the vineyard. By the time plaintiff learned that his mother's promise was false, the statute of limitations had passed (*64 Cal. App. 4th 842, 848)* .

[f] Equitable Estoppel Can Apply Although No Affirmative Conduct Is Involved

In ***Spray, Gould & Bowers v. Associated Internat. Ins. Co.*** *(1999) 71 Cal. App. 4th 1260, 84 Cal. Rptr. 2d 552* , defendant had sold to plaintiff, a law firm, a combined business interruption and extra expense insurance policy with an effective period of September 2, 1993, to September 2, 1994. The policy contained a contractual limitations clause which in part required suit for recovery of any claim on the policy to be commenced within twelve months after discovery by the insured of the occurrence that gave rise to the claim. Plaintiffs filed a complaint on September 16, 1996, alleging causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, and declaratory relief, alleging that the plaintiff had suffered loss as a result of the Northridge earthquake on January 1994, that the claim on the insurance contract had been timely made and that the defendant had wrongly refused to pay. The defendant filed its answer raising a contract limitations affirmative defense, and later moved for summary judgment based on the contract limitations clause. The facts adduced in support of the summary judgment motion showed that the loss occurred on January 17, 1994, and was discovered by the insured on January 17-18, 1994. Plaintiff made a claim

under the policy on November 21, 1994, and the defendant denied the claim on April 15, 1995. Taking into account a period for tolling between the date of the claim and the date of denial of the claim, the action was untimely because it was brought approximately 27 months past the contract limitations period of twelve months. In opposition, plaintiff submitted declarations and discovery responses that stated that the plaintiff's employees charged with the responsibility for the claim were unaware of the 12-month policy limitations period and that the defendant did not advise plaintiff of the 12-month limit in the exchange of correspondence relating to the claim. Plaintiff submitted in evidence *10 Cal. Code Reg. §§ 2695.1* and *2695.4*, which are part of the Fair Claims Settlement Practices Regulations (*10 Cal. Code Reg. § 2695.1 et seq.*). 10 Cal. Code Reg. § 1695.4 (as in effect at the time of the issuance of the policy, the loss, and the submission and denial of the claim) required insurers to disclose to insureds time limits which apply to submitted claims. Plaintiffs contended that defendant had failed to notify plaintiff of the time limit for filing an action on the policy (other than the admitted existence of the policy provision) and in light of plaintiff's lack of actual knowledge of the time limit, defendant should be estopped from relying on the policy limitations provision. Defendant did not dispute the alleged violation of the regulation, but denied the applicability of *10 Cal. Code Reg. § 2695.4(a)*, under traditional contract and estoppel principles, to the limitations dispute The trial court granted summary judgment in defendant's favor and plaintiff appealed.

The court of appeal reversed and remanded the matter for further proceedings consistent with the views expressed in the opinion. The court agreed with plaintiff that a triable issue of fact was raised whether defendant should be estopped from raising the limitations defense (*71 Cal. App. 4th 1260, 1265)* . The court held that an insurer's direct violation of duly promulgated administrative regulations issued by the California Insurance Commissioner, requiring the insurer to notify a claimant insured of time limits pertaining to a claim, may provide the basis of an estoppel against the insurer's assertion of a contract limitations defense (*71 Cal. App. 4th 1260, 1263, 1265)* . In reaching this conclusion, the court noted that to establish an equitable estoppel ordinarily four elements must be proved: (1) knowledge of the facts by the party against whom the estoppel is sought; (2) conduct by that party intended to be acted on or that the party seeking the estoppel had a right to believe was intended to be acted on; (3) ignorance of the facts by the party seeking the estoppel; and (4) reliance on the conduct by the party seeking the estoppel to that party's injury. Application of equitable estoppel against the assertion of a limitations defense typically arises through some misleading affirmative conduct on defendant's part. An estoppel may also arise from silence when there is duty to speak (*71 Cal. App. 4th 1260, 1268)* . The duty to speak arose from the regulation imposing on insurers an unmistakable duty to advise claimant insureds of applicable time limits. The court saw no reason not to adopt this public policy as giving rise to a duty to speak for the purpose of applying the doctrine of equitable estoppel (*71 Cal. App. 4th 1260, 1269)* . Moreover, the court also concluded that estoppel was not precluded by the limits of the Commissioner's regulatory authority (*71 Cal. App. 4th 1260, 1269-1271)* , or by *Moradi-Shalal v. Fireman's Fund Ins. Companies (1998) 46 Cal. 3d 287, 250 Cal. Rptr. 116, 758 P.2d 58* (*71 Cal. App. 4th 1260, 1271-1272)* , and that estoppel was not inconsistent with *Waller v. Truck Ins. Exchange, Inc. (1995) 11 Cal. 4th 1, 34, 44 Cal. Rptr. 2d 370, 900 P.2d 619* (*71 Cal. App. 4th 1260, 1272)* .

[4] Additional Authorities

[a] Delay Induced by Defendant

In *Lerner v. Los Angeles City Bd. of Educ. (1963) 59 Cal. 2d 382, 29 Cal. Rptr. 657, 380 P.2d 97* , reversing a judgment denying relief against a local board of education in an action by a teacher seeking reinstatement and rejecting the board's assertion of the defense of limitation on the basis of estoppel, the Supreme Court stated that the board's advice to plaintiff, that it lacked jurisdiction or authority to restore his teaching credential and that no school district could legally employ him, induced plaintiff's inaction and would estop the state board from later relying on limitation; and that the privity between the city and state boards is such that the estoppel of the state board binds the city board (*59 Cal. 2d 382, 396-397)* .

In *Stafford v. Shultz (1954) 42 Cal. 2d 767, 270 P.2d 1* , reversing a judgment after the sustaining of a demurrer, on the ground that one of the defendants was estopped from asserting limitation because of fraudulent misrepresentation and

concealment, the Supreme Court stated that the ground of relief is that defendant, having by fraud and deceit concealed material facts and by misrepresentations hindered plaintiff from bringing an action within the statutory period, is estopped from taking advantage of his own wrong (*42 Cal. 2d 767, 779)* .

In *Carruth v. Fritch (1950) 36 Cal. 2d 426, 224 P.2d 702* , reversing a judgment following the sustaining of a demurrer, on the ground of estoppel, the Supreme Court stated that one cannot justly or equitably lull the adversary into a false sense of security, and thereby cause the adversary to subject his or her claim to the bar of the statue of limitations, and then be permitted to plead the delay caused by this course of conduct as a defense to the action (*36 Cal. 2d 426, 431-434)* .

In *Tyra v. Board of Police & Fire Comm'r of Long Beach (1948) 32 Cal. 2d 666, 197 P.2d 710* , reversing a judgment for defendant in a mandate proceeding to compel granting retirement and benefits to firemen, the Supreme Court stated that since the delay charged to plaintiffs was induced by the erroneous position and advice of defendants and their attorneys, they could not interpose the defense of limitation because they were estopped to do so (*32 Cal. 2d 666, 670-671)* .

In *Lukovsky v. City and County of San Francisco (9th Cir. 2008) 535 F.3d 1044* , plaintiff applicants claimed that they applied for several permanent electrical transit systems mechanics but were rejected because defendants gave preferential hiring treatment to Asian and Filipino workers. Plaintiffs argued that defendants should be equitably estopped from asserting a statute of limitations defense because, they contend, the defendants' misrepresentations about requiring written verification of qualifying experience concealed that they were hiring unqualified Asian and Filipino applicants instead. The Ninth Circuit rejected this argument, noting that the primary problem with plaintiffs' argument is that their alleged basis for equitable estoppel was the same as their cause of action, and that a plaintiff must point to some fraudulent concealment, some active conduct by the defendant above and beyond the wrongdoing upon which the plaintiff's claim is filed, to prevent the plaintiff from suing in time (*535 F.3d 1044, 1052)* .

In *California v. Greka Energy Corp. (2008) 165 Cal. App. 4th 129, 80 Cal. Rptr. 3d 738* , upholding a judgment ordering specific performance of a contractual obligation requiring real estate buyers to plug and abandon idle oil wells on various properties, the Court of Appeal held that the action was not partially barred by the four-year statute of limitations in *Code Civ. Proc. § 337* because, among other things, the buyers were estopped from asserting limitations because they induced the seller not to sue pending settlement (*165 Cal. App. 4th 129, 138)* .

In *Leasequip, Inc. v. Dapeer (2002) 103 Cal. App. 4th 394, 126 Cal. Rptr. 2d 782* an attorney was equitably estopped from asserting the statute of limitations defense in a legal malpractice lawsuit when the attorney advised the corporate client that the failure to comply with required corporate formalities would have no negative impact, the corporate client followed the attorney's advice and did not comply with required corporate formalities, and the statute of limitations expired because the corporation failed to comply with corporate formalities (*103 Cal. App. 4th 394, 403-408)* .

In *Kurokawa v. Blum (1988) 199 Cal. App. 3d 976, 245 Cal. Rptr. 463* , the court of appeal stated the rule that estoppel to assert the defense of the statute of limitations may be invoked when the delay in commencing an action is induced by the defendant's conduct (*199 Cal. App. 3d 976, 990)* . The court went on, however, to find the rule inapplicable to the case before it.

[b] Fraud Not Necessary

In *Benner v. Industrial Acci. Com. (1945) 26 Cal. 2d 346, 159 P.2d 24* , annulling an order denying workmen's compensation when the evidence indicated estoppel to plead limitation, the Supreme Court stated that when the delay in commencing an action was induced by the party sought to be charged, he may not invoke such conduct to defeat recovery, although there was not any designed fraud on the part of the party sought to be charged (*26 Cal. 2d 346, 349)* .

In *Barr v. ACandS, Inc. (1997) 57 Cal. App. 4th 1038, 67 Cal. Rptr. 2d 494* , the court, although finding that estoppel did not apply in the case before it, noted that the conduct that forms the estoppel need not be fraudulent, performed in bad faith, or with an intent to mislead the plaintiff (*57 Cal. App. 4th 1038, 1057)* .

In *Kunstman v. Mirizzi (1965) 234 Cal. App. 2d 753, 756-757, 44 Cal. Rptr. 707* , the court noted that it is unnecessary for the plaintiff to allege actual fraud when asserting estoppel, since actual fraud in the technical sense, or bad faith or an intent to mislead, is not essential to create an estoppel (*234 Cal. App. 2d 753, 756-757)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsEquitable Estoppel

California Points & Authorities

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 143 LIMITATION OF ACTIONS
PART II. FORMS

14-143 California Points & Authorities § 143.51

§ 143.51 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Complaint Alleges Defendant on Probation and Under Order of Restitution [Code Civ. Proc. § 352.5]

[1] FORM

[*Caption. See § 143.31[1].*]

A DEMURRER BASED ON A STATUTE OF LIMITATIONS SHOULD NOT BE SUSTAINED WHERE THE COMPLAINT ALLEGES THAT FOR A SPECIFIED PERIOD AFTER ACCRUAL OF THE CAUSE OF ACTION DEFENDANT WAS UNDER AN ORDER OF RESTITUTION AS A CONDITION OF PROBATION WITH RESPECT TO THE ACT GIVING RISE TO THE CAUSE OF ACTION, IF THE ACTION WAS COMMENCED WITHIN THE STATUTORY PERIOD AS EXTENDED BY ADDITION OF THE PERIOD WHEN THE ORDER OF RESTITUTION WAS IN FORCE.

Extension of Period by Probationary Order for Restitution. If, after a cause of action accrues against a person, that person comes under an order for restitution as a condition of probation with respect to the specific act or omission giving rise to such person's liability, the time during which the order is in effect is not a part of the time limited for the commencement of such an action based upon that act or omission (*Code Civ. Proc. § 352.5*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a general demurrer to the complaint, where the demurrer asserts that the action is barred by a statute of limitation, but the complaint alleges that during the statutory period the defendant was under an order for restitution as a condition of probation with respect to the act or omission giving rise to the cause of action.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For a form of allegation for use where the defendant is under an order for restitution, and the statutory period of limitation is thereby extended, see Ch. 345, *Limitation of Actions* , in California Forms of Pleading and Practice.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersGovernmentsLegislationStatutes of LimitationsGeneral Overview

California Points & Authorities

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 143 LIMITATION OF ACTIONS
PART II. FORMS

14-143 California Points & Authorities § 143.52

§ 143.52 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Complaint Alleges Facts Showing Delayed Accrual of Cause of Action--Generally

[1] FORM

[*Caption. See § 143.31[1].*]

THE COURT SHOULD OVERRULE THE DEMURRER TO THE COMPLAINT ON THE GROUND THE ACTION IS BARRED BY THE STATUTE OF LIMITATIONS BECAUSE THE COMPLAINT SHOWS ON ITS FACE THAT PLAINTIFF DID NOT DISCOVER THE FACTS GIVING RISE TO THE CAUSE OF ACTION UNTIL _____ [*date*], THAT PLAINTIFF IN THE EXERCISE OF REASONABLE DILIGENCE COULD NOT HAVE DISCOVERED THE FACTS AT AN EARLIER DATE THAT DESPITE DILIGENT INVESTIGATION OF THE CIRCUMSTANCES, PLAINTIFF COULD NOT HAVE REASONABLY DISCOVERED FACTS SUPPORTING THE CAUSE OF ACTION AT AN EARLIER DATE, AND THAT THE STATUTE OF LIMITATIONS DID NOT COMMENCE RUNNING UNTIL THE DATE OF DISCOVERY.

[*EITHER*]

A. Action Based on Theft of Art or Artifact. A cause of action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property, must be commenced within three years, but a cause of action based on theft, as defined in *Penal Code Section 484*, of any article of historical, interpretive, scientific, or artistic significance is not deemed to have accrued until the discovery of the whereabouts of the article by the aggrieved party or his or her agent, or the law enforcement agency that originally investigated the theft (*Code Civ. Proc. § 338(c)*).

[*OR*]

A. Action Based on Fraud or Mistake. An action for relief on the ground of fraud or mistake must be commenced within three years, but a cause of action based on fraud or mistake is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake (*Code Civ. Proc. § 338(d)*; *E-Fab, Inc. v. Accountants, Inc. Services (2007) 153 Cal. App. 4th 1308, 1322, 64 Cal. Rptr. 3d 9*).

[*OR*]

A. Action on Official Bond. An action on the bond of a public official must be commenced within three years, but a cause of action based on fraud or embezzlement is not deemed to have accrued until the discovery, by the aggrieved party or his or her agent, of the facts constituting the cause of action on the bond (*Code Civ. Proc. § 338(e)*).

[*OR*]

A. Action Against Notary Public. An action against a notary public on his or her bond or in his or her official capacity must be commenced within three years, but any cause of action based on malfeasance or misfeasance is not deemed to have accrued until discovery, by the aggrieved party or his or her agent, of the facts constituting the cause of action; provided that any action based on malfeasance or misfeasance must be commenced within one year from such discovery or within three years from the performance of the notarial act giving rise to the action, whichever is later, and provided further that any action against a notary public on his or her bond or in his or her official capacity must be commenced within six years (*Code Civ. Proc. § 338(f)*).

[*OR*]

A. Action for Civil Penalty for False Representations to the Public. An action commenced under *Business and Professions Code Section 17536* must be commenced within three years, but the cause of action is not deemed to have accrued until the discovery by the aggrieved party, the Attorney General, the district attorney, county counsel, the city prosecutor, or the city attorney of the facts constituting grounds for commencing the action (*Code Civ. Proc. § 338(h)*).

[*OR*]

A. Action for Civil Penalty for Diversion or Obstruction of Designated River, Stream, or Lake. An action commenced under *Fish and Game Code Section 1603.1* must be commenced within three years, but the cause of action is not deemed to have accrued until the discovery by the agency bringing the action of the facts constituting grounds for commencing the action (*Code Civ. Proc. § 338*(*l*)).

[*OR*]

A. Action for Civil Penalty for Pollution. An action commenced under *Fish and Game Code Section 5650.1* must be commenced within three years, but the cause of action is not deemed to have accrued until the discovery by the agency bringing the action of the facts constituting grounds for commencing the action (*Code Civ. Proc. § 338*(*l*)).

[*OR*]

A. Action Based on Rescission of Written Contract for Fraud or Mistake. An action based on the rescission of a

written contract must be commenced within four years. The time begins to run from the date on which the facts that entitle the aggrieved party to rescind occurred, but when the ground of rescission is fraud or mistake, the time does not begin to run until the discovery by the aggrieved party of the facts constituting the fraud or mistake. When the ground for rescission is misrepresentation under *Ins. Code § 359* (authorizing rescission of insurance contract for false representation in material point), the time does not begin to run until the representation becomes false (*Code Civ. Proc. § 337(3)*).

[*OR*]

A. Action Based on Rescission of Oral Contract for Fraud or Mistake. An action based on the rescission of a contract not in writing is two years, and the time begins to run from the date on which the facts that entitle the aggrieved party to rescind occurred. But when the ground for rescission is fraud or mistake, the time does not begin to run until the discovery by the aggrieved party of the facts constituting the fraud or mistake (*Code Civ. Proc. § 339(3)*).

[*OR*]

A. Action Founded on Contract, Obligation, or Liability Evidenced by Certificate, or Abstract or Guaranty of Title of Real Property, or by Title Insurance Policy. An action founded on a contract, obligation, or liability, evidenced by a certificate, or abstract or guaranty of title of real property, or by a policy of title insurance must be commenced within two years, but the action is not deemed to have accrued until the discovery of the loss or damage suffered by the aggrieved party thereunder (*Code Civ. Proc. § 339(1)*).

[*OR*]

A. Action for Relief by Good-Faith Improver of Land. An action by a good-faith improver for relief under *Code Civ. Proc. §§ 871.1-871.7* (relating to good-faith improver of land owned by another) must be commenced within one year, but the time begins to run from the date on which the good-faith improver discovers that he or she is not the owner of the land on which the improvements have been made (*Code Civ. Proc. § 340(e)*).

[*CONTINUE*]

[*Optional*] **B. Breach of Fiduciary Duty.** The delayed discovery rule applies to a breach of duty by a fiduciary even though the breach of duty may constitute a breach of contract as well (*Lee v. Escrow Consultants, Inc. (1989) 210 Cal. App. 3d 915, 922-923, 259 Cal. Rptr. 117*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a general demurrer to the complaint when the demurrer asserts the action is barred by a statute of limitations. The basis of the opposition is that the complaint alleges facts showing that the delayed discovery rule applies and that the statute of limitations did not commence running on the date the cause of action actually accrued, but on some later date when plaintiff discovered the facts giving rise to the cause of action, and that the complaint was therefore timely filed.

The points set forth in alternative Paragraphs A of the form are some of the most frequently cited statutes in cases involving delayed discovery. However, other statutes exist [*see, e.g., Civ. Code § 3426.6* (misappropriation of trade secret); *Code Civ. Proc. § 336* (action for violation of a restriction, as defined in *Civ. Code § 784*); *Code Civ. Proc. § 338(i), (k)* (certain actions normally prosecuted by a public officer or entity); *Code Civ. Proc. § 340.15* (damages resulting from domestic violence)].

Under still other statutes, the discovery rule applies to shorten the applicable statute of limitations [*see, e.g., Code Civ. Proc. § 340.5* (actions against health care providers based on professional negligence); *Code Civ. Proc. § 340.6* (actions against attorneys for a wrongful act or omission other than fraud, but including tolling provisions in specified circumstances)].

For points and authorities supporting applicability of the delayed discovery rule to an action for personal injury without perceptible trauma, see *§ 143.53*. For points and authorities for use in an action for damages for injuries arising out of asbestos exposure, see *§ 143.54*. For a form of points and authorities for use in an action for damages arising out of childhood sexual abuse, see *§ 143.57*. For points and authorities for use when the plaintiff pleads facts that raise an estoppel against defendant to plead the statute of limitations, see *§ 143.50*.

Counsel should insert argument in the form showing the relationship between the facts of the case alleged and the points of law stated.

[3] Discussion of Authorities

[a] Action Based on Fraud or Mistake

In ***E-Fab, Inc. v. Accountants, Inc. Services*** *(2007) 153 Cal. App. 4th 1308, 64 Cal. Rptr. 3d 9* , an agency placed a temporary accountant with the client's company, representing that it had conducted a background screening of the accountant and had verified her credentials. The client later gave her a permanent job. Over a period of about seven years, the accountant embezzled over $1 million and altered the company's bank statements. After learning of the embezzlement, the client discovered that the accountant had prior criminal convictions, had been incarcerated, and had falsified her academic credentials, but the agency had failed to discover any of those problems in its screening process. The client filed suit against the agency within two years of discovering her background. The trial court held the suit was untimely, granted the defendant's demurrer, and the plaintiff appealed.

The court held that the suit was timely under *Code Civ. Proc., §§ 337, 338(d), 339*, because the discovery rule applied. The accrual trigger was the client's discovery that the agency had misrepresented the accountant's record, which put the client on notice under *Civ. Code, §§ 18, 19*. The complaint adequately alleged that the client had no previous reason to suspect inadequate screening and specifically described both the time and the circumstances of the client's discovery of its claim. The court found the plaintiff pleading sufficiently alleged the plaintiff was not aware of the employee's prior convictions for theft and welfare fraud and that her academic credentials had not been verified until after her embezzlement became known in November 2003 when plaintiff was first informed of the employee's criminal record by

the police. Sufficient pleading also existed to support a claim an inability to have made an earlier discovery, because plaintiff alleges that it had "no reason to suspect that [defendant] did not screen plaintiff and failed to discover she had prior convictions for theft and welfare fraud, or that her academic credentials were misrepresented, or that she was embezzling money as Vickie Hunt appeared to be a competent and honest employee" (*153 Cal. App. 4th 1308, 1326)* .

[b] Breach of Fiduciary Duty

Lee v. Escrow Consultants, Inc. *(1989) 210 Cal. App. 3d 915, 259 Cal. Rptr. 117* , was an action for fraud, breach of contract, negligence, conversion, and civil conspiracy against an escrow company and named individuals, arising out of plaintiff's $100,000 investment in a real property transaction, based on the escrow's unauthorized disbursement of funds from plaintiff's escrow under a forged signature. Plaintiff alleged that the defendant did not attempt to verify his signature on the escrow amendment authorizing the release of funds, that he did not learn of the withdrawals for a number of years, and that, during that time, in response to his inquiries, he was informed that title to the property had passed to him and that the escrow was being taken care of. Title to the property had in fact not passed to him. The wrongful conduct alleged thus related to the defendant's failure to carry out the escrow instructions by disbursing funds pursuant to a forged amendment. The final wrongful act alleged by plaintiff occurred on September 25, 1981, and the original complaint was filed on November 21, 1986. Plaintiff alleged that he did not learn of defendant's wrongful conduct until August 1986. Defendant escrow's demurrer to the "corrected second amended complaint" was sustained without leave to amend on the ground the actions were barred by the statute of limitations.

Plaintiff appealed, first urging that *Code Civ. Proc. §§ 337* and *339* provide that when the ground of rescission of either an oral or written contract is fraud or mistake the time does not begin to run until discovery by the aggrieved party of the facts constituting the fraud or mistake. The appellate court noted that this assertion was targeted only to the timeliness of plaintiff's breach of contract cause of action and that it did not directly address the propriety of the trial court's ruling with respect to the fraud, negligence, conversion, and civil conspiracy causes of action. The court said, however, that each of those causes of action was premised on the identical alleged wrongful conduct and that under the facts of the case the same timeliness analysis applied to each cause of action (*210 Cal. App. 3d 915, 919-920)* . As to whether the delayed discovery rule could apply to a cause of action for breach of contract, the court, relying on *April Enterprises, Inc. v. KTTV (1983) 147 Cal. App. 3d 805, 828, 195 Cal. Rptr. 421* , held that it did when the breach of contract also constituted a breach of fiduciary duty (*210 Cal. App. 3d 915, 920, 922)* . The court said that the breach of contract claim was premised on the identical wrongful disbursement of funds that was at the heart of plaintiff's fraud cause of action and since that alleged wrongful disbursement constituted a breach of fiduciary duty by defendant the discovery rule should apply to both causes of action (*210 Cal. App. 3d 915, 922-924)* ; the court noted that as an alternative basis for the decision in *April Enterprises* holding that the delayed discovery rule applied, the court there concluded that the discovery rule may be applied to breaches of contract that can be, and are, committed in secret and, moreover, where the harm flowing from those breaches will not be reasonably discoverable by plaintiffs until a future tme (*210 Cal. App. 3d 915, 923 n.5*). The court said that under this alternative holding the discovery rule applies where, as in the case before it, an escrow holder allegedly disburses funds pursuant to a forged amendment to the escrow instructions without informing plaintiff (*210 Cal. App. 3d 915, 923, n.5*). Consequently, the court concluded that the trial court could not have properly sustained defendant's demurrer on statute of limitations grounds (*210 Cal. App. 3d 915, 923)* . The court further held that because the case involved a fiduciary relationship the duty of the plaintiff to exercise diligence to discover the fraud was relaxed; the court said that the nature of the relationship was such as to cause the plaintiff to rely on the fiduciary, and that awareness of facts that would ordinarily call for investigation did not excite suspicion under those special circumstances (*210 Cal. App. 3d 915, 920-921)* .

[4] Additional Authorities

[a] Action Based on Fraud or Mistake

In *Broberg v. The Guardian Life Ins. Co. of America (2009) 171 Cal. App. 4th 912, 90 Cal. Rptr. 3d 225* , a consumer

purchased a $ 500,000 whole life insurance policy from Guardian Life on August 27, 1993. The policy was described to the consumer by the insurance agent as a vanishing life policy--that is, one where, after a certain number of out of pocket premium payments had been made, the policy itself would generate sufficient sums through its dividend and interest income to pay future premiums for the balance of the insured's life. For 11 years the consumer paid the annual premiums. In September 2004 Guardian Life informed him that, because dividends had steadily declined, he would be required to continue making out of pocket premium payments extending beyond the 11th year of the policy, for the policy to remain in effect. Believing the demand for further out of pocket premiums breached Guardian Life's sales promises, on June 30, 2006 consumer filed a complaint for fraud, negligent misrepresentation, unfair competition and false advertising and violation of the Consumers Legal Remedies Act against Guardian Life arising out of the marketing, promotion and sale of the vanishing premium policy. The trial court sustained the defendants' demurrers to the claims for fraud, negligent misrepresentation, and unfair competition upon finding that those claims were time barred. The trial court ruled that the claims accrued upon the purchase of the policy and that justifiable reliance could not be shown. The appellate court noted that a claim for unfair competition under *Bus. & Prof. Code § 17200* must be brought within four years of its accrual. However, the Supreme Court has not yet decided, and the Courts of Appeal are in disagreement, whether the delayed discovery rule applies to claims for unfair competition. The court concluded that--at least in the context of unfair competition claims based on a defendant's allegedly deceptive marketing materials and sales practices, which is simply a different legal theory for challenging fraudulent conduct and where the harm from the unfair conduct will not reasonably be discovered until a future date--the time to file a section 17200 cause of action starts to run only when a reasonable person would have discovered the factual basis for a claim (*171 Cal. App. 4th 912, 920-921)* . The court held that under the circumstances of this case, it is a question for the trier of fact concerning the presence or absence of a manifest unreasonableness in the consumer's reliance on Guardian Life's deceptive policy illustration and its agent's promise that out of pocket premiums would not be required after the 11th year of the policy: "Certainly, if the evidence ultimately establishes the disclaimers were read and understood, they may be sufficient to defeat [plaintiff's] claims. But the placement of the disclaimers (buried in a sea of same sized, capitalized print), coupled with the absence of any cautionary language on the first page of the policy illustration, which contains the deceptive language and figures indicating [plaintiff's] out of pocket payments will 'vanish,' preclude a determination the disclaimers are adequate as a matter of law" (*171 Cal. App. 4th 912, 922-923)* .

In *Cleveland v. Internet Specialties West, Inc. (2009) 171 Cal. App. 4th 24, 88 Cal. Rptr. 3d 892* , the trial court ruled that the applicable limitations periods had expired in a lawsuit brought by investors against corporate officers and shareholders alleging breach of contract, fraud, and other causes of action. The investors had provided funds for a new business project under an agreement stating that the invested funds would be repaid out of the net cash receipts from the project. Later that year, the investors learned that the project was having financial problems, and the company did not respond to their requests for an accounting. Two years later, the company's lawyer told the investors that the project had failed. One of the officers and shareholders also told the investors that the project had gone out of business. Thereafter, about ten years after the investors first had difficulty getting financial information on the project, they learned that the project was still in business and generating revenue. The Court of Appeal reversed and remanded, holding that the trial court had intruded on the province of the trier of fact when it concluded, as a matter of law, that the applicable limitations periods commenced when the investors' requests for an accounting were denied. The causes of action could not have accrued at that time because no net cash receipts had yet been earned. Whether the investors exercised reasonable diligence after the project began generating revenue was a question for the trier of fact (*171 Cal. App. 4th 24, 30-34)* .

[b] Breach of Fiduciary Duty

In *Cross v. Bonded Adjustment Bureau (1996) 48 Cal. App. 4th 266, 55 Cal. Rptr. 2d 801* , plaintiffs alleged causes of action against defendants for negligence, breach of contract, breach of fiduciary duty, and intentional infliction of emotional distress. In 1987, plaintiffs retained defendant attorney to collect on a 1979 judgment. In 1988, plaintiffs assigned their rights in the judgment to defendant collection agency. Plaintiffs' negligence claim alleged that defendant attorney acted as the attorney for both the plaintiffs and the defendant collection agency and that together defendants

failed to preserve the plaintiffs' lien on the judgment debtor's real property by failing to record a certified copy of the renewal application and failing to serve the judgment debtor with a notice of renewal of the judgment. These failures allegedly caused plaintiffs to lose their lien priority on the property and allowed the judgment debtor to quitclaim the property to his wife as her sole property. Defendants concealed these failures from the plaintiffs and convinced them to give the judgment debtor a full satisfaction of judgment in exchange for $40,000. Had defendants properly recorded and served notice of renewal of judgment, the plaintiffs' lien would have been preserved and they would have been able to satisfy the lien either in full or in an amount significantly greater than $40,000. Plaintiffs second cause of action, for breach of contract, alleged that the plaintiffs had separate contracts, oral or implied, with the defendants, respectively. The purpose of each contract was to pursue collection activities for plaintiffs' benefit. The defendants breached the contracts by failing to act in a manner consistent with their fiduciary duties and with the standard of practice ordinarily followed by other attorneys and collection agencies. The third cause of action alleged breach of fiduciary duty and the fourth cause of action alleged intentional infliction of emotional distress.

The trial court sustained defendant collection agency's demurrer to the third and fourth causes of action without leave to amend on the grounds that they failed to state facts sufficient to constitute causes of action. The trial court concluded as to the breach of fiduciary claim that defendant owed no fiduciary duty to plaintiffs, and concluded as to the intentional infliction of emotional claim that the lack of a fiduciary relationship and the lack of outrageous conduct rendered the causes of action defective (*48 Cal. App. 4th 266, 273-274)* .

Thereafter, defendant collection agency moved for summary judgment on the first and second causes of action on the ground that they were barred by the two-year statute of limitation contained in *Code Civ. Proc. § 339*. The trial court found as an undisputed fact that plaintiff was concerned about renewal of the judgment and lien priority in January, 1991, and that the two year period commenced to run at that time and thus the negligence and breach of contract claims, filed in March, 1993, were time barred (*48 Cal. App. 4th 266, 274)* . Judgment was entered in favor of defendant collection agency, and plaintiffs appealed seeking review of the rulings on the demurrer as well as the summary judgment.

The court of appeal reversed. Regarding the cause of action for breach of fiduciary duty, the appellate court concluded that a fiduciary relationship between the parties existed and thus defendant owed a fiduciary duty to the plaintiffs. The trial court should have overruled the demurrer (*48 Cal. App. 4th 266, 274-277)* . Similarly, regarding the claim for intentional infliction of emotional distress, given the fiduciary nature of the parties the appellate court could not say that the plaintiffs failed to allege extreme and outrageous conduct as a matter of law. Accordingly, the trial court should have overruled the demurrer (*48 Cal. App. 4th 266, 282-284)* .

With regard to the causes of action for negligence and breach of contract, the court of appeal concluded that the trial court should not have granted summary judgment based on the statute of limitations (*48 Cal. App. 4th 266, 282)* . The evidence on the summary judgment motion established: (1) the plaintiffs on numerous occasions inquired about the status of the collection; (2) defendants did not inform the plaintiffs in a timely matter about the expiration of the lien and the transfer of the property before the plaintiffs in April, 1991, gave the judgment debtor an acknowledgement that the debtor satisfied the judgment in full by paying $40,000; (3) defendant collection agency in January, 1991, affirmatively misrepresented that a certified copy of the application to renew the judgment had been recorded with the county recorder; (4) plaintiffs first received their files from defendant collection agency in February, 1992, only after defendant collection agency had been threatened with a suit; and (5) after reviewing the files plaintiffs for the first time in April, 1992, learned about the expiration of the lien on the judgment debtor's property and the transfer of the property. Although the trial court found as an undisputed fact that plaintiff was concerned in January, 1991, about renewal of the judgment and whether the lien had been preserved, the court of appeal noted that it does not follow, however, that the two-year statute of limitation contained in *Code Civ. Proc. § 339(1)* commenced to run at that time. The discovery rule applied to those claims (*48 Cal. App. 4th 266, 278-281)* .

Under the discovery rule, the statute of limitations does not begin to run until plaintiff either (1) actually discovers the

injury or its cause or (2) could have discovered the injury and its cause through the exercise of reasonable diligence. The defendant collection agency nonetheless pointed out that even under the discovery rule, the limitations period begins once the plaintiff has notice or information of circumstances to cause inquiry by a reasonable person and that plaintiffs had such notice no later than January, 1991, so that the limitations period expired in January, 1993, two months before the suit was filed. The court noted that this argument overlooks the principle that defendants as fiduciaries had a duty to make full and fair disclosure to plaintiffs of all facts that affected their rights and interests. This principle has been applied and expressed in one form or another in several decisions dealing with the question of fraudulent concealment of a cause of action in its relationship to the statute of limitations. The breach of a duty to disclose known facts with intention to and which hinder commencement of an action until the action would be outlawed, is a fraud practiced on the plaintiff which in conscience estops the defendant's reliance on the statute of limitations. When there is a duty to disclose, the disclosure must be full and complete and any concealment or misrepresentation amounts to fraud sufficient to entitle a party injured thereby to an action. When a fiduciary relationship exists, plaintiffs' usual duty of diligence to discover facts does not exist. If the defendant's conduct induces delay in commencing an action, the defendant cannot avail himself or herself of the statute of limitations defense (*48 Cal. App. 4th 266, 280-281)* .

The court of appeal concluded that the defendants' failures to disclose the ongoing status of the collection matter precluded plaintiffs from discovery of defendant collection agency's wrongful conduct thus preventing plaintiffs from learning they had a cause of action. Without deciding precisely when the statute of limitation began to run, the court held that the statute did not begin to run until some time after the end of March, 1991, less than two years before the plaintiffs filed suit (*48 Cal. App. 4th 266, 282)* .

Parsons v. Tickner (1995) 31 Cal. App. 4th 1513, 37 Cal. Rptr. 2d 810 , involved, among other things, a first amended complaint containing causes of action labeled fraud, breach of fiduciary duty and conversion, brought by the daughter of a deceased musician against several defendants. The first amended complaint alleged in part that decedent, a musician and composer, entered into an agreement in 1972 with two of the defendants to manage his musical career, that these defendants were to collect the royalties due him, that the decedent never transferred any copyrights for his music to them, but that after his death in 1973, these defendants wrongfully converted a company owned by the decedent and its catalog of decedent's songs to their own company and exploited the decedent's company catalog for their own economic advantage.

Following the decedents death intestate, probate proceeding were opened in September, 1973, and decedent's wife was appointed administrator of his estate. Among the personal property inventoried in the estate were royalty rights for the music decedent had composed with the royalty rights referring to contracts scheduled in the inventory according to the publisher's name, royalty percentage and the respective catalog of songs. One of the royalty contracts scheduled in the inventory involved songs published by the decedent's company. In 1985, the estate was distributed in accordance with a stipulation between decedent's wife and the plaintiff, approved by the court, under which any unmarshalled assets, after discovered assets, and assets not shown on the estate's inventory were to be distributed solely to the plaintiff (*31 Cal. App. 4th 1513, 1518-1519)* .

The defendants who were collecting the royalties concealed the fact that the decedent never transferred any interest in his company's catalog of songs to them, but instead falsely represented to the plaintiff and decedent's wife that they were entitled to publish the catalog, subject only to the limited obligation to distribute to the estate and heirs specified royalty payments. Neither the plaintiff nor the decedent's wife became aware of these defendant's unlawful exploitation of the decedent's company catalog until June, 1991, when another defendant, the alleged purchaser of the catalog, informed the plaintiff's attorney that there were no documents or agreements transferring the decedents's copyrighted compositions to the defendants. Plaintiff sought a return of all earned revenues, royalties, and income received by the defendants (*31 Cal. App. 4th 1513, 1520)* . The trial court sustained the defendants general demurrer to the plaintiff's first amended complaint without leave to amend and entered judgment of dismissal. Plaintiff appealed.

The court of appeal reversed. The defendants argued that even assuming the three year (fraud) limitation period applied

to all the plaintiff's causes of action, the time for bringing those claims would have passed more than sixteen years earlier, in 1976 (three years after decedent's death) and thus plaintiff's action was time barred. The appellate court, however, rejected this argument insofar as it measured the limitation period from the decedent's death (*31 Cal. App. 4th 1513, 1525)* . The court initially noted that under *Code Civ. Proc. § 366.1*, causes of action that survive may be commenced before the later of (1) six months after the person's death, or (2) the limitation period that would have been applied if the person had not died. The plaintiff invoked the delayed accrual rule which allows a party to pursue an otherwise time barred action when the injury was not and could not have been reasonably discovered within the operative statute of limitations (*31 Cal. App. 4th 1513, 1525)* , and the court noted that under *Code Civ. Proc. § 338(d)* the cause of action is not deemed to accrue until the discovery by the aggrieved party of facts constituting the fraud or mistake. The court also recognized that the plaintiff has a duty to exercise diligence to discover the facts (*31 Cal. App. 4th 1513, 1525)* .

The court then found that plaintiff had alleged and judicial notice of the probate proceeding revealed that the defendants had concealed from the decedent's estate, heirs, and survivors in interest, the key fact that the decedent had never transferred his catalog of songs to them, and moreover, falsely represented they were the catalog's producer, only obligated to distribute specified royalty payments. Given the fact that the defendants held themselves out as the producers and that they distributed royalty payments in that capacity, it was not unreasonable for either the estate or the plaintiff to assume that they had a right to do so (*31 Cal. App. 4th 1513, 1527)* . The court concluded that plaintiff could not have learned of the claims that plaintiff was asserting before June, 1991. Before that date, the plaintiff did not know and could not have discovered in the exercise of reasonable diligence that the defendants had no lawful right to the catalog (*31 Cal. App. 4th 1513, 1526-1529)* . Thus, the delayed discovery rule applied to all of plaintiff's pleaded theories for recovery. Although the defendants claimed they owed no duty of disclosure to plaintiff, the fact specific allegations suggest they did both as fiduciaries of the decedent and because they could not pass themselves off as the owners of the catalog if they had no lawful rights to the decedent's music (*31 Cal. App. 4th 1513, 1529)* . Quoting from *April Enterprises, Inc. v. KTTV (1983) 147 Cal. App. 3d 805, 827, 195 Cal. Rptr. 421* , the court noted that thus it has been held that the date-of-discovery rule is applied to a fiduciary when strict adherence to the date of injury rule would result in unfairness to the plaintiff and would encourage wrongdoers to misled their fiduciary to delay bring suit. It is particularly appropriate when the defendant maintains custody and control of a plaintiff's property or interest. It follows that the defendants have no lawful right to the catalog an that their conduct amounted to a misappropriation of decedents music so that the income generated from its promotion is subject to a constructive trust for the benefit of the plaintiff, decedent's successor in interest, and that plaintiff's claims, although delayed for nineteen years, are not time barred (*31 Cal. App. 4th 1513, 1529)* .

Eisenbaum v. Western Energy Resources, Inc. (1990) 218 Cal. App. 3d 314, 267 Cal. Rptr. 5 , was an action by the purchaser of a limited partnership interest in an out-of-state partnership to recover his investment. Among the documents plaintiff received was a private placement memorandum, which told him, in essence, that the investment was exempt from registration under federal and state security laws. Plaintiff signed the subscription agreement for the limited partnership interest and made payments commencing on June 21, 1982. The security was neither qualified for sale by the California Department of Corporations nor exempt from qualification, and hence the sale was in violation of *Corp. Code § 25110*, entitling plaintiff to rescind under *Corp. Code § 25503*. The partnership did not succeed financially, and on June 13, 1984, plaintiff sued to rescind and for damages. *Corp. Code § 25507(a)* provides that no action shall be maintained to enforce any liability created under *Corp. Code § 25503* unless brought before expiration of two years after the violation on which it is based or the expiration of one year after the discovery by the plaintiff of the facts constituting the violation, whichever shall first expire. Defendants' motion for summary judgment on the ground the action was barred by the one year period set forth in *Corp. Code § 25507(a)* was granted and plaintiff appealed.

The appellate court reversed on two grounds. First, it said that (1) when a fiduciary obligation is present, the accrual of the cause of action is postponed until the beneficiary has knowledge or notice of the act constituting a breach of fidelity, that the existence of a trust relationship limits the duty of inquiry, and that when a potential plaintiff is in a fiduciary relationship with another individual, that plaintiff's burden of discovery is reduced and he is entitled to rely on the

statements and advice provided by the fiduciary (*218 Cal. App. 3d 314, 324)* ; and (2) a plaintiff need not establish that due diligence was exercised to discover the facts within the limitations period unless a duty existed to inquire and the circumstances were such that failure to inquire would be negligent, and that when the plaintiff is not under such duty to inquire the limitations period does not begin to run until plaintiff actually discovers the facts constituting the cause of action, even though the means for obtaining the information are available (*218 Cal. App. 3d 314, 325)* . The court held that the defendants occupied a position of trust and owed a fiduciary duty to those they sought to entice into the venture as limited partners (*218 Cal. App. 3d 314, 322)* . The court explained that a fiduciary relation arises whenever confidence is reposed on one side and domination and influence result on the other, that the relation can be legal, social, domestic, or merely personal, that confidential and fiduciary relations are, in law, synonymous, that from plaintiff's factual assertions it could be reasonably inferred he reposed confidence and trust in the defendants, who gained a financial advantage over him by the sale, and therefore owed him a fiduciary duty, and that a promoter or insider, or a seller of a limited partnership interest, owes a fiduciary duty to the prospective purchaser of such an interest (*218 Cal. App. 3d 314, 322)* .

Secondly, the court held that apart from the fiduciary duty resulting in application of the delayed discovery rule, the language of *Corp. Code § 25507(a)*, which requires "discovery ... of the facts" requires plaintiff's actual knowledge of the facts before the one-year statute commences to run and that, by its plain language, the statute requires actual knowledge, not just inquiry notice (*218 Cal. App. 3d 314, 325)* . The court concluded that a fiduciary duty existed between the defendants and plaintiff, that the usual duties of diligence to discover facts did not exist, and that, because plaintiff had received a private placement memorandum from the partnership telling him that his investment was exempt from registration under state and federal securities laws, he was entitled to rely on it, and therefore did not have actual knowledge of the facts as required to commence the one-year period of limitation set forth in *Corp. Code § 25507(a)* until advised by his lawyer that the security was nonexempt (*218 Cal. App. 3d 314, 326)* .

In *Evans v. Eckelman (1990) 216 Cal. App. 3d 1609, 265 Cal. Rptr. 605* , plaintiff brothers sued their uncle, who was also their former foster father, for damages resulting from his sexual abuse of them in 1966 through 1968 when plaintiffs were minors. They developed psychological blocks, which began to break down in 1986, at which point they alleged they first discovered the nature of their injuries and causal connection to the defendant's acts. The action was filed in 1987, at which time the longest possible applicable period of limitation was three years from the act. Although that period was tolled during the plaintiff's minority, it had begun to run in 1977 as to the youngest of the minors. The trial court sustained defendants' demurrers without leave to amend on the basis of the statute of limitations, and the plaintiff appealed.

In reversing, the court of appeal pointed out that courts have relied on the nature of the relationship between defendant and plaintiff to explain application of the delayed discovery rule, and that the rule is generally applicable to confidential or fiduciary relationships. The court said that the fiduciary relationship carries a duty of full disclosure, and application of the discovery rule prevents the fiduciary from obtaining immunity for an initial breach of duty by a subsequent breach of the obligation of disclosure (*216 Cal. App. 3d 1609, 1615)* . Quoting *April Enterprises, Inc. v. KTTV (1983) 147 Cal. App. 3d 805, 831, 195 Cal. Rptr. 421* , the court said that in most instances, in fact, the defendant had been in a far superior position to comprehend the act and the injury. In many, the defendant had reason to believe the plaintiff remained ignorant that he had been wronged. Thus, there is an underlying notion that plaintiffs should not suffer where circumstances prevent them from knowing that they have been harmed. Often this is accompanied by the corollary notion that defendants should not be allowed to knowingly profit from their injuree's negligence (*216 Cal. App. 3d 1609, 1615)* .

[c] Theft of Trade Secret

In *Cypress Semiconductor Corp. v. Superior Court (2008) 163 Cal. App. 4th 575, 77 Cal. Rptr. 3rd 685* , real party in interest, a trade secret owner, sued petitioner, a customer of an original misappropriator, alleging that the customer had notice and continued to use a software product incorporating the owner's source code. Respondent trial court concluded

that the action was timely because the statute of limitations did not begin to run until the customer knew of the wrongfulness of its conduct. On appeal, the court held that the customer was entitled to a jury determination of its statute of limitations defense under *Civ. Code § 3426.6*. The single-claim rule did not apply. If the owner had a misappropriation claim against the customer, it was a separate claim with its own limitations period because the owner did not allege that the customer was involved in the original misappropriation and sought damages only from the customer's use of the software after learning of the misappropriation. However, the trial court erred in ruling that the statute did not begin to run until the customer actually learned that the program contained trade secrets. The question was when the owner first had reason to suspect that a customer of the original misappropriator had obtained or used the software knowing, or with reason to know, that it contained the trade secrets. The statute began to run when a plaintiff had any reason to suspect that a third party knew or reasonably should have known that the information was a trade secret. The third party's actual state of mind did not affect the running of the statute. Based on the record, that question could not be answered as a matter of law (*163 Cal. App. 4th 575, 587)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersGovernmentsLegislationStatutes of LimitationsGeneral Overview

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California Points & Authorities

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 143 LIMITATION OF ACTIONS
PART II. FORMS

14-143 California Points & Authorities § 143.53

§ 143.53 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Complaint Alleges Facts Showing Delayed Accrual of Cause of Action--Action for Personal Injury Sustained Without Perceptible Trauma

[1] FORM

[*Caption. See § 143.31[1].*]

DEFENDANT'S GENERAL DEMURRER, BASED ON THE LAPSE OF THE PERIOD SET OUT IN _____ [*specify applicable statute of limitations, e.g.,* SECTION 340(c) OF THE CODE OF CIVIL PROCEDURE], SHOULD NOT BE SUSTAINED, BECAUSE PLAINTIFF'S COMPLAINT ALLEGES FACTS SHOWING THAT HIS/HER CAUSE OF ACTION DID NOT ACCRUE AT THE TIME OF DEFENDANT'S WRONGFUL ACT, BUT AT THE TIME THAT PLAINTIFF, EXERCISING REASONABLE DILIGENCE, DISCOVERED DEFENDANT'S ACT TO BE THE CAUSE OF HIS/HER INJURY.

Delayed Accrual of Cause of Action in Certain Personal Injury Actions With No Perceptible Trauma. In cases in which a plaintiff suffers injury because of a defendant's wrongful act, but is unaware of that injury or its cause at the time of the wrong because there is no perceptible trauma, the statute of limitations does not begin to run until the plaintiff discovers, or by the exercise of reasonable diligence should have discovered, the cause of the injury (*Pereira v. Dow Chemical Co. (1982) 129 Cal. App. 3d 865, 873-874, 181 Cal. Rptr. 364* ; *G. D. Searle & Co. v. Superior Court (1975) 49 Cal. App. 3d 22, 25-26, 122 Cal. Rptr. 218* ; *Warrington v. Charles Pfizer & Co. (1969) 274 Cal. App. 2d 564, 569-570, 80 Cal. Rptr. 130*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a general demurrer to the complaint in certain personal injury actions, when the demurrer asserts that the action is barred by a statute of limitations. The ground for opposition is that the complaint alleges facts showing that plaintiff suffered an injury involving no perceptible trauma, and therefore his or her cause of action should not be deemed to accrue until the time that he or she discovered or reasonably should have discovered the cause of the injury.

Counsel should insert argument in this form showing the relationship between the facts of his or her case and the points of law stated.

[3] Discussion of Authorities

[a] Delayed Accrual of Cause of Action in Certain Personal Injury Actions With No Perceptible Trauma

Pereira v. Dow Chemical Co. *(1982) 129 Cal. App. 3d 865, 181 Cal. Rptr. 364* , was an action to recover damages for personal injuries, consisting of a permanent, severe kidney disorder, sustained by an employee who was injured by a chemical spill at his place of employment, as well as for the alleged cumulative effect of exposure to the vapors of the various chemical products manufactured or distributed by defendant companies and used at the employee's place of employment. The complaint set forth causes of action in strict liability, negligence, and implied warranty. The trial court granted defendants' motions for summary judgment, finding that no disputable issue of fact existed regarding defendants' causation and that the causes of action asserted were barred by the one-year statute of limitations under *Civ. Proc. § 340(3)* (*see now Code Civ. Proc. § 335.1*, which extends statute of limitations to two years for personal injury actions).

The court of appeal reversed, holding that defendant had failed to negate conclusively a necessary element of plaintiff's case or to establish a complete defense, because factual issues existed on causation (*129 Cal. App. 3d 865, 871)* and on when the statute of limitations, under the discovery rule, commenced to run (*129 Cal. App. 3d 865, 873-874)* .

G. D. Searle & Co. v. Superior Court *(1975) 49 Cal. App. 3d 22, 122 Cal. Rptr. 218* , was an action to recover damages for personal injuries, consisting of alleged physical and emotional trauma, sustained by a user of oral contraceptives manufactured and sold by the defendant. The complaint set forth causes of action in negligence, and in a seeming combination of elements of strict liability, fraud, and failure to warn. The complaint showed on its face that plaintiff had last used the defendant's contraceptives almost six years before filing the complaint. The defendant filed a general and special demurrer based, among other things, on the lack of allegations in plaintiff's complaint necessary to satisfy the statute of limitations. The trial court denied defendant's demurrer, and defendant petitioned for a writ of mandate.

The court of appeal issued a peremptory writ of mandate directing the trial court to vacate its order overruling the demurrer to the complaint, and to sustain the demurrer with leave to amend. The court found that on its face, the plaintiff's complaint showed a claim that was barred by the one-year statute of limitations because, although it alleged she had last used the defendant's products six years before she had filed the complaint, it failed to allege when the plaintiff discovered the harmful effect of the contraceptives, the circumstances surrounding the discovery, and why, in the exercise of reasonable diligence, she could not have made the discovery sooner (*49 Cal. App. 3d 22, 25-26)* .

Warrington v. Charles Pfizer & Co. *(1969) 274 Cal. App. 2d 564, 80 Cal. Rptr. 130* , was an action to recover damages for personal injuries sustained by a plaintiff who took, while pregnant, a prescribed drug manufactured by the defendant. The trial court sustained the defendant's general demurrer to the complaint and entered judgment of dismissal, ruling that the causes of action arising from personal injuries alleged in the complaint were barred by the one-year statute of limitations under *Code Civ. Proc. § 340(3)* (*see now Code Civ. Proc. § 335.1*, which extends statute of limitations to two years for personal injury actions).

The court of appeal reversed, holding that the statute of limitations did not begin to run until the plaintiff discovered, or in the exercise of reasonable care should have discovered, that she had been tortiously injured by defendant's product (*274 Cal. App. 2d 564, 569-570)* .

[4] Additional Authorities

[a] Delayed Accrual of Cause of Action in Certain Personal Injury Actions With No Perceptible Trauma

In *Jolly v. Eli Lilly & Co. (1988) 44 Cal. 3d 1103, 245 Cal. Rptr. 658, 751 P.2d 923* , the Supreme Court upheld the trial court's grant of summary judgment to the defendant manufacturer of DES on the ground that the action was barred by the one-year statute of limitations under *Code Civ. Proc. § 340(3)* (*see now Code Civ. Proc. § 335.1*, which extends statute of limitations to two years for personal injury actions, *and Code Civ. Proc. § 340.8* which codifies *Jolly* and extends statute of limitations to two years for personal injury action based upon exposure to a hazardous material or toxic substance; *see § 143.55*). The Court stated the rule that the statute of limitations began to run when the plaintiff suspected, or should have suspected, that her injury was caused by someone's wrongdoing. Plaintiff's reasonable duty, however, was to use pretrial discovery to establish the specific facts necessary for her claim, as opposed to "waiting for the facts to find her" (*44 Cal. 3d 1103, 1111)* .

In *Kensinger v. Abbott Laboratories (1985) 171 Cal. App. 3d 376, 217 Cal. Rptr. 313* , the court reversed an order of summary judgment in favor of a defendant manufacturer of DES granted on the ground that the action was barred by the one-year statute of limitations under *Code Civ. Proc. § 340(3)* (*see now Code Civ. Proc. § 335.1*, which extends statute of limitations to two years for personal injury actions) and stated that the question of whether the plaintiff should have been aware of the factual basis of her suit more than one year before she filed her complaint was an issue of fact that precluded summary judgment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersGovernmentsLegislationStatutes of LimitationsGeneral OverviewTortsGeneral Overview

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 143 LIMITATION OF ACTIONS
PART II. FORMS

14-143 California Points & Authorities § 143.54

§ 143.54 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Complaint Alleges Facts Showing Delayed Accrual of Cause of Action--Injuries Arising Out of Exposure to Asbestos [Code Civ. Proc. § 340.2(a)]

[1] FORM

[*Caption. See § 143.31[1].*]

THE DEMURRER SHOULD NOT BE SUSTAINED, BECAUSE PLAINTIFF'S COMPLAINT WAS TIMELY FILED UNDER SECTION 340.2(a) OF THE CODE OF CIVIL PROCEDURE AND BEFORE PLAINTIFF BECAME DISABLED AS A RESULT OF HIS/HER EXPOSURE TO ASBESTOS.

A. Time for Filing Claim for Injury or Illness Based on Exposure to Asbestos. Any civil action for injury or illness based on exposure to asbestos must commence within the later of the following: (1) one year after the date plaintiff first suffered disability or (2) one year after the date plaintiff either knew, or through the exercise of reasonable diligence should have known, that the disability was caused or contributed to by the exposure (*Code Civ. Proc. § 340.2(a)*; *see Hamilton v. Asbestos Corp. (2000) 22 Cal. 4th 1127, 1137-1138, 95 Cal. Rptr. 2d 701, 998 P.2d 403* ; *Nelson v. Flintkote Co. (1985) 172 Cal. App. 3d 727, 730, 218 Cal. Rptr. 562*). Section 340.2(a) does not make the limitations period run from the date of that injury or illness or its discovery, as similar statutes commonly provide, but rather makes the limitation period run from the date the plaintiff suffered "disability" and discovered that the disability was caused by asbestos exposure. Because a plaintiff cannot discover that his or her disability was caused by asbestos exposure before he or she suffers that disability, the disability must in all cases either precede or accompany its discovery. Thus, *Code Civ. Proc. Section 340.2(a)(1), (2)* may be read as providing in effect that an action for injury or illness arising from asbestos exposure must be filed within one year after the date the plaintiff first suffered disability and either knew or should have known the disability was caused or contributed to by that exposure (*Hamilton v. Asbestos Corp. (2000) 22 Cal. 4th 1127, 1138, 95 Cal. Rptr. 2d 701, 998 P.2d 403*).

B. "Disability" Defined. "Disability" as used in *Code Civil Procedure Section 340.2(a)* means the loss of time from work as a result of exposure to asbestos that precludes the performance of the employee's regular occupation (*Code Civ.*

Proc. § 340.2(b); *see* *Hamilton v. Asbestos Corp. (2000) 22 Cal. 4th 1127, 1138-1142, 95 Cal. Rptr. 2d 701, 998 P.2d 403* ; *Nelson v. Flintkote Co. (1985) 172 Cal. App. 3d 727, 730, 218 Cal. Rptr. 562*).

[*Optional*] **C. No Disability Within Meaning of *Code of Civil Procedure Section 340.2* When Retirement Unrelated to Asbestos Exposure.** A person does not suffer a "disability" within the meaning of *Code Civil Procedure Section 340.2(a)* when that person retires for reasons unrelated to his or her earlier asbestos exposure. Under such circumstances, the limitation period specified in *Code Civil Procedure Section 340.2(a)* does not commence to run (*Hamilton v. Asbestos Corp. (2000) 22 Cal. 4th 1127, 1138-1142, 95 Cal. Rptr. 2d 701, 998 P.2d 403* ; *Duty v. Abex Corp. (1989) 214 Cal. App. 3d 742, 748-752, 263 Cal. Rptr. 13*).

[*Optional*] **D. Asbestos Claim Not Extinguished by Operation of Law Until Adjudicated by a Court.** In order for a claim for damages for injury or illness based on exposure to asbestos to have been extinguished as a matter of law, a court must have adjudicated the timeliness of the claim. When a court has not, prior to the effective date of *Code Civ. Proc. § 340.2*, adjudicated the timeliness of an asbestos claim under the limitation period of a formerly applicable, shorter, statute of limitation such as *Code Civ. Proc. § 340 subd. (3)* (former one-year limitation period for tort actions), the claim is considered still pending or potential, and governed by the changed rules of *Code Civ. Proc. § 340.2* for accrual of the cause of action (*Nelson v. Flintkote Co. (1985) 172 Cal. App. 3d 727, 732, 218 Cal. Rptr. 562*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a general demurrer to a complaint for damages for injury or illness based on exposure to asbestos, when the demurrer asserts that the action is barred by the statute of limitations. Optional Paragraph C is for use when the plaintiff is a retiree who retired for reasons unrelated to his or her earlier asbestos exposure, and Optional Paragraph D is for use if it is claimed that the action is barred by a statute of limitation other, and shorter, than *Code Civ. Proc. § 340.2(a)*.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. For example, counsel should refer to the allegations of the complaint that allege the facts showing that plaintiff's claim is timely filed under *Code Civ. Proc. § 340.2(a)*, if necessary, refer to allegations showing that, at the time of filing the claim, plaintiff was not disabled within the meaning of *Code Civ. Proc. § 340.2(b)*.

[3] Discussion of Authorities

[a] Time for Filing Claim for Injury or Illness Based on Exposure to Asbestos

In ***Hamilton v. Asbestos Corp.*** *(2000) 22 Cal. 4th 1127, 95 Cal. Rptr. 2d 701, 998 P.2d 403* , beginning in the early 1940's plaintiffs' decedent (plaintiff) was employed in various industrial workplaces where he was exposed to asbestos. Plaintiff's exposure ended in 1963. Plaintiff began experiencing shortness of breath in the late 1970's and in 1979 was

diagnosed with asbestosis. Nevertheless, plaintiff was able to continue to work for another decade and retired in 1989, not because of breathing difficulties, but because plaintiff reached the normal age of 65 and was tired of working. Plaintiff's shortness of breath gradually grew worse and on October 13, 1993, plaintiff filed an action to recover compensatory and punitive damages for plaintiff's asbestosis. In December 1995, before trial began, plaintiff began to experience abdominal pain and in January 1996 was diagnosed with a malignant peritoneal mesothelioma, a fatal cancer primarily triggered by exposure to asbestos. Within a month, on February 3, 1996, plaintiff filed a second action seeking to recover compensatory and punitive damages for plaintiff's mesothelioma. The actions were consolidated. At trial, after both sides had rested, defendant moved to dismiss the portion of the action seeking damages for plaintiff's mesothelioma. The sole ground was that plaintiff's second action was barred by the statute of limitations set forth in *Code Civ. Proc. § 340.2* as construed in *Darden v. General Motors Corp. (1995) 40 Cal. App. 4th 349, 47 Cal. Rptr. 2d 580* . The motion was denied and the jury returned a verdict in plaintiff's favor. Defendant asserted the statute of limitations again in motions for judgment notwithstanding the verdict and new trial, which were denied. Defendant appealed from the judgment (*22 Cal. 4th 1127, 1132-1137)* .

The court of appeal reversed the judgment in its entirety. The court first held that plaintiff's second action was time barred under *Code Civ. Proc. § 340.2*. Second, the court held that the trial court lacked personal jurisdiction over defendant in plaintiff's first action because defendant had not been served in that action. The California Supreme Court granted review (*22 Cal. 4th 1127, 1137)* .

The Supreme Court reversed the judgment of the court of appeal with directions to resolve certain remaining issues in that court. Regarding plaintiff's second action, the court noted that although *Code Civ. Proc. § 340.2* applies only to actions for injury or illness arising from asbestos exposure, the statute does not make the limitations period run from the date of that injury or illness or its discovery as similar statutes commonly provide. Rather, the Section 340.2(a) limitations period runs from the date the plaintiff suffered "disability" and discovered that the disability was caused by asbestos exposure. Section 340.2(a) provides that an action for injury or illness based on exposure to asbestos shall be commenced within the later of the following: (1) within one year after the date the plaintiff first suffered disability; (2) within one year after the date the plaintiff either knew, or through the exercise of reasonable diligence should have known, that such disability was caused or contributed to by such exposure. Under *Code Civ. Proc. § 340.2(b)*, "disability" as used in *Code Civ. Proc. § 340.2(a)* means the loss of time from work as a result of such exposure which precludes the employee's regular occupation. Because a plaintiff cannot discover that his or her disability was caused by asbestos exposure before he or she suffers disability, the disability must in all cases either precede or accompany its discovery. Thus, *Code Civ. Proc. § 340.2(a)(1), (2)* may be read as providing in effect that an action for injury or illness arising from asbestos exposure must be filed within one year after the date the plaintiff first suffered disability and either knew or should have known the disability was caused or contributed to by that exposure (*22 Cal. 4th 1127* , 1137-1138). The court then discussed several relevant court of appeal decisions that have construed Section 340.2, including *Duty v. Abex Corp (1989) 214 Cal. App. 3d 742, 749-751, 263 Cal. Rptr. 13* , and *Williamson v. Plant Insulation Co. (1994) 23 Cal. App. 4th 1406, 1419, 28 Cal. Rptr. 2d 751* . *Duty* reasoned that Section 340.2(a) is not narrowly limited to actions by employees, but broadly applies on its face to "any civil action" for asbestos-related injury or illness, and therefore includes actions by retirees as well. The *Duty* court held, however, that the special definition of "disability" provided in Section 340.2(b) is not broad enough to include persons who retire for reasons unrelated to asbestos exposure (*22 Cal. 4th 1127, 1140)* . *Williamson* reiterated the *Duty* holding (*22 Cal. 4th 1127, 1141-1142)* . Noting that *Duty* and *Williamson* were directly in point, the court concluded that the one-year limitation period in the statute had not begun to run when plaintiff's second action was filed and thus that action was timely. Plaintiff retired for reasons unrelated to his earlier asbestos exposure and therefore did not suffer "disability" within the meaning of Section 340.2. For the same reasons, the one-year limitations period had not begun to run when plaintiff's first action was filed and thus that action was timely (*22 Cal. 4th 1127, 1142)* . The court disapproved *Darden* and its progeny, *Barr v. ACandS, Inc. (1997) 57 Cal. App. 4th 1038, 67 Cal. Rptr. 2d 494* , to the extent they are inconsistent with the court's analysis (*22 Cal. 4th 1127, 1147)* .

In ***Nelson v. Flintkote Co.*** *(1985) 172 Cal. App. 3d 727, 218 Cal. Rptr. 562* , plaintiff was exposed to asbestos fibers

and dust in his employment as a boiler inspector and operator from 1949 through 1956, and from 1963 to 1985. In September 1976, a medical doctor informed plaintiff that he had suffered damage to his lungs and contracted the disease of asbestosis as a result of the exposure to asbestos. Despite the onset of the disease, plaintiff continued working. In 1981, plaintiff filed a complaint against defendants for damages for injuries arising from his work-related exposure to asbestos. Defendants demurred to the complaint on the ground that the applicable statute of limitations was *Code Civ. Proc. § 340 subd. (3)* (one-year limitation period for tort actions) (*see now Code Civ. Proc. § 335.1*, which extends statute of limitations to two years for personal injury actions) and therefore, plaintiff's causes of action were time-barred because his complaint was filed more than one year after receiving an "informed diagnosis" of his asbestos-related disease. Plaintiff argued that *Code Civ. Proc. § 340.2* applied and therefore his complaint was timely because it was filed prior to his becoming disabled from work as a result of his exposure to asbestos. The trial court rejected plaintiff's claim, sustained a demurrer without leave to amend to plaintiff's second amended complaint, and entered an order dismissing his complaint. Plaintiff appealed from the order of dismissal.

The court of appeal reversed the trial court's order of dismissal and remanded the case for further proceedings consistent with the views expressed in the appellate court opinion (*172 Cal. App. 3d 727, 736)* . The court held that the trial court erred in dismissing the complaint in that plaintiff's complaint was timely filed because *Code Civ. Proc. § 340.2*, not *Code Civ. Proc. § 340 subd. (3)* (*see now Code Civ. Proc. § 335.1*, which extends statute of limitations to two years for personal injury actions), properly applied to plaintiff's causes of action (*172 Cal. App. 3d 727, 731)* . In so holding, the court ruled that, under *Code Civ. Proc. § 340.2(a)*, in any civil action for injury or illness based on exposure to asbestos, the time for the commencement of the action shall be the later of the following: (1) within one year after the date the plaintiff first suffered disability; (2) within one year after the date the plaintiff either knew, or through the exercise of reasonable diligence should have known, that the disability was caused or contributed to by the exposure (*172 Cal. App. 3d 727, 730)* .

[b] "Disability" Defined

The facts and procedural background of ***Hamilton v. Asbestos Corp.*** *(2000) 22 Cal. 4th 1127, 95 Cal. Rptr. 2d 701, 998 P.2d 403* , are discussed in *§ 143.54[3][a]*. The Supreme Court noted that under *Code Civ. Proc. § 340.2(b)*, "disability" means the loss of time from work as a result of exposure to asbestos which precludes the performance of the employee's regular occupation (*22 Cal. 4th 1127, 1138)* . The court applied the holding of *Duty v. Abex Corp (1989) 214 Cal. App. 3d 742, 749-751, 263 Cal. Rptr. 13* , reiterated in *Williamson v. Plant Insulation Co. (1994) 23 Cal. App. 4th 1406, 1419, 28 Cal. Rptr. 2d 751* , that the special definition of "disability" provided for in Section 340.2(b) is not broad enough to include persons who retire for reasons unrelated to asbestos exposure (*22 Cal. 4th 1127, 1140-1142)*

The facts and procedural background of ***Nelson v. Flintkote Co.*** *(1985) 172 Cal. App. 3d 727, 218 Cal. Rptr. 562* , are discussed in *§ 143.54[3][a]*. In *Nelson*, the court noted that under *Code Civ. Proc. § 340.2(b)*, "disability" means the loss of time from work as a result of exposure to asbestos which precludes the performance of the employee's regular occupation (*172 Cal. App. 3d 727, 730)*

[c] No Disability Within Meaning of Code of Civil Procedure Section 340.2 When Retirement Unrelated to Asbestos Exposure

The facts and procedural background of ***Hamilton v. Asbestos Corp.*** *(2000) 22 Cal. 4th 1127, 95 Cal. Rptr. 2d 701, 998 P.2d 403* , are discussed in *§ 143.54[3][a]*. The court applied the holding of *Duty v. Abex Corp (1989) 214 Cal. App. 3d 742, 749-751, 263 Cal. Rptr. 13* , reiterated in *Williamson v. Plant Insulation Co. (1994) 23 Cal. App. 4th 1406, 1419, 28 Cal. Rptr. 2d 751* , that the special definition of "disability" provided for in *Code Civ. Proc. § 340.2(b)* is not broad enough to include persons who retire for reasons unrelated to asbestos exposure (*22 Cal. 4th 1127, 1140-1142)*

Duty v. Abex Corp. *(1989) 214 Cal. App. 3d 742, 263 Cal. Rptr. 13* , was an action filed by an 82-year-old woman born in 1903 for damages for personal injury due to exposure to asbestos. She retired in 1968. After 1973, when her husband died, she lived alone, doing housework, shopping, gardening, going to church meetings, and occasionally helping to clean her daughter's house. In 1979, X-rays revealed she had lung cancer, and she was told by her doctors that the cancer was caused by her earlier exposure to asbestos. Surgery was performed. Within a few months she resumed light household tasks and helping her daughter with light housecleaning. The complaint was filed in 1985. The trial court granted defendant's motion for directed verdict, finding that the period of limitations ran one year after plaintiff's surgery in 1979 and that the action was barred. Plaintiff appealed.

In reversing the judgment, the court of appeal examined the wording and legislative history of *Code Civ. Proc. § 340.2* and, interpreting the statute in accordance with its "plain meaning," held that the section applies to civil actions by retirees for injury caused by asbestos exposure, but that, because the statutory definition of "disability" does not apply to a retired person who retired for reasons unrelated to his or her earlier asbestos exposure, the limitations period had not yet commenced to run and that the action was not barred (*214 Cal. App. 3d 742, 745, 748-753)* .

[d] Asbestos Claim Not Extinguished by Operation of Law Until Adjudicated by a Court

The facts and procedural background of ***Nelson v. Flintkote Co.*** *(1985) 172 Cal. App. 3d 727, 218 Cal. Rptr. 562* , are discussed in *§ 143.54[3][a]*. In *Nelson*, the court held that *Code Civ. Proc. § 340.2* properly applied to asbestosis victims such as plaintiff, whose complaints had not been adjudicated prior to the effective date of *Code Civ. Proc. § 340.2* (January 1, 1980). The court noted defendants' reliance on language in the bill enacting *Code Civ. Proc. § 340.2*, although not itself enacted into law, providing that *Code Civ. Proc. § 340.2* shall apply to those causes of action that accrued prior to the change in the law made by the bill and have not otherwise been "extinguished by operation of law" (*172 Cal. App. 3d 727, 730)* . The court rejected defendants' arguments that plaintiff's causes of action were "automatically extinguished by operation of law" in September 1977, since he had received an informed diagnosis in September 1976 (*172 Cal. App. 3d 727, 731)* . Citing *Puckett v. Johns-Manville Corp. (1985) 169 Cal. App. 3d 1010, 1016-1017, 215 Cal. Rptr. 726* , and *Blakey v. Superior Court (1984) 153 Cal. App. 3d 101, 106, 200 Cal. Rptr. 52* , the court held that asbestosis plaintiffs whose claims were not adjudicated prior to the effective date of *Code Civ. Proc. § 340.2* (January 1, 1980), are not subject to *Code Civ. Proc. § 340(3)* (*see now Code Civ. Proc. § 335.1*, which extends statute of limitations to two years for personal injury actions). Instead, they are entitled to the benefits conferred by *Code Civ. Proc. § 340.2* regardless of when they received an informed diagnosis. In order for an asbestos claim to have been "extinguished by operation of law," a court must have adjudicated the matter. There is no automatic magical extinguishment of a cause of action by the mere passage of time. When, as in the instant case, a court has not adjudicated the timeliness of the action with reference to *Code Civ. Proc. § 340(3)* (*see now Code Civ. Proc. § 335.1*, which extends statute of limitations to two years for personal injury actions), prior to the effective date of *Code Civ. Proc. § 340.2*, the claim is considered still pending or potential and governed by the changed rules for accrual of *Code Civ. Proc. § 340.2* (*172 Cal. App. 3d 727, 732)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersEnvironmental LawHazardous Wastes & Toxic SubstancesAsbestosGeneral OverviewEnvironmental LawHazardous Wastes & Toxic SubstancesAsbestosStatutes of LimitationsGovernmentsLegislationStatutes of LimitationsGeneral Overview

California Points & Authorities

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 143 LIMITATION OF ACTIONS
PART II. FORMS

14-143 California Points & Authorities § 143.55

§ 143.55 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Complaint Alleges Facts Showing Delayed Accrual of Cause of Action--Injuries Arising Out of Exposure to Hazardous Material or Toxic Substance [Code Civ. Proc. § 340.8]

[1] FORM

[*Caption. See § 143.31[1].*]

THE DEMURRER SHOULD NOT BE SUSTAINED, BECAUSE PLAINTIFF'S COMPLAINT ALLEGES FACTS SHOWING HIS/HER CAUSE OF ACTION DID NOT ACCRUE AT THE TIME OF DEFENDANT'S WRONGFUL ACT, BUT AT THE TIME THAT PLAINTIFF, EXERCISING REASONABLE DILIGENCE, DISCOVERED DEFENDANT'S ACTS TO BE THE CAUSE OF HIS/HER INJURY ARISING OUT OF EXPOSURE TO A HAZARDOUS MATERIAL OR TOXIC SUBSTANCE.

A. Time for Filing Claim for Injury or Illness Arising Out of Exposure to Hazardous Material or Toxic Substance. In any civil action for injury or illness based upon exposure to a hazardous material or toxic substance, the time for commencement of the action is no later than either two years from the date of injury, or two years after the plaintiff becomes aware of, or reasonably should have become aware of 1) an injury, 2) the physical cause of the injury, and 3) sufficient facts to put a reasonable person on inquiry notice that the injury was caused or contributed to by the wrongful act of another, whichever occurs later (*Code Civ. Proc. § 340.8(a)*).

B. Time for Filing Claim for Wrongful Death Arising Out of Exposure to Hazardous Material or Toxic Substance. In an action for the wrongful death of any plaintiff's decedent, based upon exposure to a hazardous material or toxic substance, the time for commencement of an action shall be no later than either (1) two years from the date of the death of the plaintiff's decedent, or (2) two years from the first date on which the plaintiff is aware of, or reasonably should have become aware of, the physical cause of the death and sufficient facts to put a reasonable person on inquiry notice that the death was caused or contributed to by the wrongful act of another, whichever occurs later (*Code Civ. Proc. § 340.8(b)*).

C. "Civil Action" Defined. A "civil action for injury or illness based upon exposure to a hazardous material or toxic substance" does not include an action subject to *Code of Civil Procedure Sections 340.2* (exposure to asbestos) or 340.5 (professional negligence of health care provider).

D. Media Reports, Alone, Do Not Give Rise to Inquiry Notice. Media reports regarding the hazardous material or toxic substance contamination do not, in and of themselves, constitute sufficient facts to put a reasonable person on inquiry notice that the injury or death was caused or contributed to by the wrongful act of another (*Code Civ. Proc. § 340.8(c)(2)*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted by plaintiff in opposition to a general demurrer to the complaint when the defendant has asserted that the action is barred by the statute of limitations, and the plaintiff has alleged in the complaint sufficient facts to show that the injury or the act causing the injury, or both, are due to the exposure of a hazardous material or toxic substance.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. For example, counsel should refer to the allegations of the complaint that allege the facts showing that plaintiff's claim is timely filed under *Code Civ. Proc. § 340.8*, and refer to allegations supporting plaintiff's claim that discovery was delayed until sufficient facts were found to put a reasonable person on inquiry notice that the injury was caused or contributed to by the wrongful act of another.

[3] Discussion of Authorities

[a] Time for Filing Claim for Injury or Illness Arising Out of Exposure to Hazardous Material or Toxic Substance

The legislature has expressly declared that it is the intent of *Code Civ. Proc. § 340.8(a), (b)* to codify the rulings in *Jolly v. Eli Lilly & Co. (1988) 44 Cal. 3d 1103* , *Norgart v. Upjohn Co. (1999) 21 Cal. 4th 383* , and *Clark v. Baxter HealthCare Corp. (2000) 83 Cal. App. 4th 1048* [Stats. 2003, ch. 873].

[b] Media Reports, Alone, Do Not Give Rise to Inquiry Notice

The legislature has expressly declared that it is the intent of *Code Civ. Proc. § 340.8(c)(2)* to disapprove the ruling of *McKelvey v. Boeing North America, Inc. (1999) 74 Cal. App. 4th 151, 86 Cal. Rptr. 2d 645* to the extent it is inconsistent with the language of *Code Civ. Proc. § 340.8(c)(2)* [Stats. 2003, ch. 873].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersEnvironmental LawHazardous Wastes & Toxic SubstancesGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral Overview

California Points & Authorities

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 143 LIMITATION OF ACTIONS
PART II. FORMS

14-143 California Points & Authorities § 143.56

§ 143.56 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Complaint Alleges Facts Showing Delayed Accrual of Cause of Action--Newly Discovered Claim During Action

[1] FORM

[*Caption. See § 143.31[1].*]

DEFENDANT'S DEMURRER BASED ON THE GROUND THAT THE ACTION IS BARRED BY THE STATUTE OF LIMITATIONS SHOULD BE OVERRULED BECAUSE THE PLAINTIFF HAS PLEAD SUFFICIENT FACTS FOR THE NEWLY DISCOVERED CLAIM TO BE SUBJECT TO THE DELAYED DISCOVERY RULE.

A. Discovery Rule Applies to Newly Discovered Claims During Action. If a plaintiff pleads and proves that a reasonable investigation at that time would not have revealed a factual basis for that particular cause of action, the delayed discovery rule applies and the statute of limitations is tolled until such time as a reasonable investigation would have revealed its factual basis; if a plaintiff's reasonable and diligent investigation discloses only one kind of wrongdoing when the injury was actually caused by tortious conduct of a wholly different sort, the discovery rule postpones accrual of the statute of limitations on the newly discovered claim (*Fox v. Ethicon Endo-Surgery, Inc. (2005) 35 Cal. 4th 797, 808-809, 27 Cal. Rptr. 3d 661*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a general demurrer to the complaint when the demurrer asserts the action is barred by a statute of limitations. The basis of the opposition is that the complaint alleges facts showing that the delayed discovery rule applies and that the statute of limitations did not commence running on the date the cause of action actually accrued, but on some later date when plaintiff discovered the facts giving rise to the cause of action, and that the complaint was therefore timely filed.

[3] Discussion of Authorities

[a] Discovery Rule Applies to Newly Discovered Claims During Action

In ***Fox v. Ethicon Endo-Surgery, Inc.*** *(2005) 35 Cal. 4th 797, 27 Cal. Rptr. 3d 661, 110 P.3d 914* began as a medical malpractice action to recover damages after a gastric bypass operation resulted in severe complications to plaintiff. During the course of discovery in the medical malpractice action, plaintiff received information that a medical device used during the surgery may have malfunctioned causing her injury. Plaintiff then amended her complaint to add a products liability cause of action against the manufacturer of the device. The defendant demurred raising a statute of limitations defense to which plaintiff responded by relying on the delayed discovery rule. The trial court granted the demurrer. The court of appeal reversed and granted leave to amend for plaintiff to allege facts explaining why she did not have reason to discover the factual basis of her claim at a an earlier date. The California Supreme Court upheld the court of appeal's ruling.

The California Supreme Court held that in order to employ the discovery rule, a person who suspects that an injury has been wrongfully caused must conduct a reasonable investigation of all potential causes of that injury. If that investigation would have disclosed a factual basis for a cause of action, the statute of limitations begins to run when the investigation would have brought such information to light. If, however, a plaintiff pleads and proves that a reasonable investigation at that time would not have revealed a factual basis for that particular cause of action, the delayed discovery rule applies and the statute of limitations is tolled until such time as a reasonable investigation would have revealed its factual basis.

According to the Court, the plaintiff must plead that, despite diligent investigation of the circumstances of the injury, he or she could not have reasonably discovered facts supporting the cause of action within the statute of limitations period. In this case, the plaintiff sought leave to amend the complaint to add facts that she had no reason to suspect that a medical device used during the surgery had malfunctioned until during the deposition of the doctor who performed the surgery. During his deposition, the doctor testified that the device had given him problems on previous occasions. The plaintiff also sought to add that no reasonable person would have suspected that the device had malfunctioned. Thus, the amendment would have properly alleged that the products liability cause of action could not reasonably have been discovered within the limitations period, and the court of appeal properly ordered the trial court to grant plaintiff leave to amend. In addition, the Court noted that if a plaintiff's reasonable and diligent investigation discloses only one kind of wrongdoing when the injury was actually caused by tortious conduct of a wholly different sort, the discovery rule postpones accrual of the statute of limitations on the newly discovered claim.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersGovernmentsLegislationStatutes of LimitationsGeneral Overview

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 143 LIMITATION OF ACTIONS
PART II. FORMS

14-143 California Points & Authorities § 143.57

§ 143.57 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Complaint Alleges Facts Showing Delayed Accrual of Cause of Action--Action for Damages Suffered as Result of Childhood Sexual Abuse [Code Civ. Proc. § 340.1(a)]

[1] FORM

[*Caption. See § 143.31[1].*]

DEFENDANT'S GENERAL DEMURRER BASED ON THE GROUND THAT THE ACTION IS BARRED BY THE STATUTE OF LIMITATIONS SHOULD BE OVERRULED BECAUSE THE COMPLAINT SHOWS ON ITS FACE THAT PLAINTIFF BROUGHT THIS ACTION WITHIN _____ [EIGHT YEARS OF ATTAINING THE AGE OF MAJORITY *or* THREE YEARS OF _____ (*date*), THE DATE PLAINTIFF DISCOVERED THAT HIS/HER PSYCHOLOGICAL ILLNESS OR INJURY, WHICH OCCURRED AFTER HE/SHE ATTAINED THE AGE OF MAJORITY, WAS CAUSED BY SEXUAL ABUSE].

A. Period of Limitation. A civil action commenced on or after January 1, 1991, for recovery of damages suffered as a result of childhood sexual abuse must be commenced within eight years of the date the plaintiff attains the age of majority, that is, by the date on which plaintiff becomes 26 years of age, or within three years of the date the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the sexual abuse, whichever period expires later, for any of the following actions: (1) an action against any person for committing an act of childhood sexual abuse; (2) an action for liability against any person or entity who owed a duty of care to the plaintiff, where a wrongful or negligent act by that person or entity was a legal cause of the childhood sexual abuse which resulted in the injury to the plaintiff; (3) an action for liability against any person or entity where an intentional act by that person or entity was a legal cause of the childhood sexual abuse which resulted in the injury to the plaintiff (*Code Civ. Proc. § 340.1(a)(1)-(3), (r), (s)*; *see Fam. Code § 6502* (age of 18 years is age of majority)). No action described in *Code of Civil Procedure, Section 340.1(a)(2)* or *(3)*, however, may be commenced on or after the plaintiff's 26th birthday (*Code Civ. Proc. § 340.1(b)(1)*), unless the person or entity against whom the action is commenced pursuant to *Code Civ. Proc. § 340.1(a)(2)* or *(3)*, knew, had reason to know, or was otherwise on notice, of any unlawful sexual conduct by an employee, volunteer, representative, or agent, and failed to take reasonable steps,

and implement reasonable safeguards, to avoid future acts of unlawful sexual conduct (*Code Civ. Proc. § 340.1(b)(2)*) (as to revival of such actions, see *Code Civ. Proc. § 340.1(c)*).

[*Optional*] **B. "Childhood Sexual Abuse" Defined.** Childhood sexual abuse includes incest between parents and children, ancestors and descendants of every degree, brothers and sisters of the half as well as the whole blood, uncles and nieces, or aunts and nephews; sodomy; oral copulation; lewd or lascivious acts with person under 14 years of age or by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury with the intent of arousing, appealing to, or gratifying sexual desire; penetration of the vaginal or anal opening of another person with a foreign or unknown object for purpose of sexual arousal, gratification, or abuse; providing or otherwise making available to another person a child under the age of 16 for lewd or lascivious purposes; or annoying or molesting a child if the act committed by the defendant against the plaintiff occurred when the plaintiff was under the age of 18 years (*Code Civ. Proc. § 340.1(e)*; *Penal Code §§ 266j, 285, 286(b), (c), 288(a), (b), 288a(b), (c), 289(h)-(j), 647.6*; *see also Fam. Code § 2200* (degrees of consanguinity referred to in *Penal Code § 285*). Nothing in *Code of Civil Procedure, Section 340.1(e)* limits the availability of causes of action permitted under *Code of Civil Procedure Section 340.1(a)*, including causes of action against persons or entities other than the alleged perpetrator of the abuse (*Code Civ. Proc. § 340.1(e)*).

[*Optional*] **C. Injury at Time of Abuse Does Not Prohibit Delayed Discovery.** Whether or not plaintiff suffered an actual injury at the time of the occurrence of childhood sexual abuse is not relevant to the application of a delayed discovery claim under *Code Civil Procedure Section 340.1* (*Lent v. Doe (1995) 40 Cal. App. 4th 1177, 1185, 47 Cal. Rptr. 2d 389*).

[*Optional*] **D. Recollection of Childhood Abuse Does Not Prohibit Applying Delayed Discovery Principles to Plaintiff's Claim.** *Code of Civil Procedure Section 340.1* allows tolling of the statute of limitations until the plaintiff discovered, or should have discovered, the connection between the abuse and current injuries. It is intended to toll the statute of limitations for plaintiffs who recall their abuse. Nothing in *Code of Civil Procedure Section 340.1* requires that memories of abuse be repressed as a prerequisite to a delayed discovery claim (*Sellery v. Cressey (1996) 48 Cal. App. 4th 538, 545-547, 55 Cal. Rptr. 2d 706* ; *Lent v. Doe (1995) 40 Cal. App. 4th 1177, 1186, 47 Cal. Rptr. 2d 389*).

[*Optional*] **E. Enlarged Limitation Period of *Code Civ. Proc. § 340.1* Applies to Childhood Sexual Abuse Continuing Beyond Childhood.** When alleged childhood sexual conduct is part of a course of conduct that continues beyond childhood (*i.e.*, the alleged molestation continues as the plaintiff transitions from childhood to adulthood), the limitations period of *Code of Civil Procedure Section 340.1* applies (*Tietge v. Western Province Of The Servites, Inc. (1997) 55 Cal. App. 4th 382, 386, 64 Cal. Rptr. 2d 53*).

[*Optional*] **F. Statute's Applicability to Causes of Action That Would Have Been Barred by Laws in Effect Before January 1, 1999.** *Code of Civil Procedure Section 340.1(a)(1)-(3)* was created by amendments to *Code of Civil Procedure Section 340.1(a)* enacted at the 1998 portion of the 1997-1998 Regular Session (*see* Stats. 1998, Ch. 1032, § 1). These amendments, and therefore *Code of Civil Procedure Section 340.1(a)(1)-(3)*, apply to any action commenced on or after January 1, 1999, and to any action filed before January 1, 1999, and still pending on that date, including any action or causes of action that would have been barred by the laws in effect before January 1, 1999 (*Code Civ. Proc § 340.1(u)*). [Nothing in *Code of Civil Procedure Section 340.1(s)*, however, is intended to revive actions or causes of action as to which there has been a final adjudication before January 1, 1999 (*Code Civ. Proc § 340.1(u)*)].

[*Optional*] **G. Period of Revival for Causes of Action Pursuant to *Code Civ. Proc. § 340.1(a)(2)* and *(3)*.** *Code of Civil Procedure Section 340.1* was amended at the 2002 portion of the 2001-2002 Regular Session (*see* Stats. 2002, Ch. 149, § 1) to provide that actions pursuant to *Code Civ. Proc. § 340.1(a)(2)* or *(3)* may be commenced after the plaintiff's 26th birthday if the person or entity against whom the action is commenced knew, had reason to know, or was otherwise on notice, of any unlawful sexual conduct by an employee, volunteer, representative, or agent, and failed to take reasonable steps, and implement reasonable safeguards, to avoid future acts of unlawful sexual conduct (*Code Civ. Proc. § 340.1(b)*). As this amendment became effective January 1, 2003, a provision was also included to revive such

actions for a period of one year. Therefore, any claim for damages described in paragraph (2) or (3) of subdivision (a) that is permitted to be filed pursuant to paragraph (2) of subdivision (b) that would otherwise be barred as of January 1, 2003, solely because the applicable statute of limitations has or had expired, is revived, and, in that case, a cause of action may be commenced within one year of January 1, 2003 (*Code Civ. Proc. § 340.1(c)*). However, the revival period does not apply to claims that have been litigated to finality on the merits in any court of competent jurisdiction prior to January 1, 2003, or any written, compromised settlement agreements which have been entered into between a plaintiff and a defendant where the plaintiff was represented by an attorney who was admitted to practice law in California at the time of the settlement, and the plaintiff signed the agreement (*Code Civ. Proc. § 340.1(d)*). Plaintiffs may raise triable issues of fact whether a plaintiff was on notice of defendant's unlawful sexual conduct as required by *Code Civ. Proc. § 340.1(b)(2)* to defeat a motion for summary judgment involving the period of revival (*Santillan v. Roman Catholic Bishop of Fresno (2008) 163 Cal. App. 4th 4, 10-11, 77 Cal. Rptr. 3d 343*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a general demurrer to a complaint for damages for injury or illness suffered as a result of childhood sexual abuse when the demurrer asserts that the action is barred by a statute of limitations other, and shorter, than *Code Civ. Proc. § 340.1*. The form can be used in actions commenced on or after January 1, 1991. Although *Code Civ. Proc. § 340.1*, as amended by 1990 stats., ch. 1578, and 1994 stats., ch. 288, expressly revives actions barred by the period of limitations in effect before January 1, 1991, it applies only to actions commenced on or after January 1, 1991 [*see Code Civ. Proc. § 340.1(r), (s)*]. Prior law governs actions that were commenced prior to January 1, 1991. For discussion of the prior law, see California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly* (Matthew Bender).

In any event, *Code Civ. Proc. § 340.1(u)* provides that the amendments to subdivision (a) enacted at the 1998 portion of the 1997-1998 Regular session, *i.e.*, *Code Civ. Proc. § 340.1(a)(1)-(3)* (*see* Stats. 1998, Ch. 1032, § 1), apply to any action commenced on or after January 1, 1999, and to any action filed before January 1, 1999, and still pending on that date, including any action or causes of action that would have been barred by the laws in effect before January 1, 1999. *Code Civ. Proc. § 340.1(u)*, however, also expressly provides that nothing in *Code Civ. Proc. § 340.1(u)* is intended to revive actions or causes of action as to which there has been a final adjudication before January 1, 1999 [*Code Civ. Proc. § 340.1(u)*].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should refer to the specific allegations in the complaint that set forth the time of the crucial discovery. In addition, because of the psychological defenses characteristically manifested by victims of childhood sexual abuse, it may be helpful to include information from psychological and sociological literature about incestuous sexual abuse.

This memorandum of points and authorities may be adapted for use in some other procedural context, such as a trial or appellate brief.

[b] Related Pleading and Practice Forms

For discussion and forms related to childhood sexual abuse under Code Civ. Proc. § 340.1, see California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly* (Matthew Bender).

[3] Discussion of Authorities

[a] Period of Limitation

Code Civ. Proc. § 340.1(a) institutes a rule that avoids the barrier to the application of the delayed discovery exception involved in *Evans v. Eckelman (1990) 216 Cal. App. 3d 1609, 1617-1620, 265 Cal. Rptr. 605* , and *DeRose v. Carswell (1987) 196 Cal. App. 3d 1011, 1016-1021, 242 Cal. Rptr. 368* , namely plaintiff's awareness of the acts of molestation. Under *Code Civ. Proc. § 340.1(a)*, the crucial discovery, or the thing that reasonably should be discovered, for purposes of the limitation period is "that psychological injury or illness occurring after the age of majority was caused by the sexual abuse."

For points and authorities relating to the revival of previously barred claims by the enactment of *Code Civ. Proc. § 340.1*, see *§ 143.64*.

[b] "Childhood Sexual Abuse" Defined

"Childhood sexual abuse" includes acts proscribed by the following Penal Code sections, or any prior California laws of similar effect at the time the act was committed, if the act committed by the defendant against the plaintiff occurred when the plaintiff was under the age of 18 years [*Code Civ. Proc. § 340.1(e)*]:

- *Penal Code § 285*, which proscribes incest between parents and children, ancestors and descendants of every degree, bothers and sisters of the half as well as the whole blood, uncles and nieces, or aunts and nephews [*see Fam. Code § 2200* (degrees of consanguinity referred to in *Pen. Code § 285*)];

- *Penal Code § 266j*, which proscribes providing or otherwise making available to another person a child under the age of 16 for lewd or lascivious purposes;

- *Penal Code § 286(b), (c)*, which proscribes sodomy;

- *Penal Code § 288(a), (b)*, which proscribes lewd or lascivious acts with person under 14 years of age or by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury with the intent of arousing, appealing to, or gratifying sexual desire;

- *Penal Code § 288a(b), (c)*, proscribing oral copulation;

- *Penal Code § 289(h)-(j)*, proscribing penetration of the vaginal or anal opening of another person with a foreign or unknown object for purpose of sexual arousal, gratification, or abuse; or

- *Penal Code § 647.6*, proscribing annoying or molesting a child.

[c] Injury at Time of Abuse Does Not Prohibit Delayed Discovery

In ***Lent v. Doe*** *(1995) 40 Cal. App. 4th 1177, 47 Cal. Rptr. 2d 389* , defendant demurred to an action for childhood

sexual abuse, arguing that the complaint was barred by the statute of limitations. The trial court sustained the demurrer, rejecting plaintiff's theory of delayed discovery under *Code Civ. Proc. § 340.1*. The trial court ruled that delayed discovery did not apply because plaintiff's allegations indicated that he knew of the wrongfulness of defendant's conduct when it occurred, and that he suffered appreciable injury at that time.

The court of appeal reversed, emphasizing that to satisfy delayed discovery, a plaintiff need only allege the onset of psychological injury after the age of majority, and then commence the action within three years of the time the psychological injury or illness is discovered (*40 Cal. App. 4th 1177, 1186)* . The court reasoned that neither the suffering of an injury at the time of the abuse nor the repression of memories of abuse are relevant to delayed discovery claims (*40 Cal. App. 4th 1177, 1185-1186)* . Plaintiff's complaint included adequate facts to support delayed discovery, since plaintiff alleged that he did not discover the connection between psychological injury and illness he suffered as an adult and defendant's sexual misconduct until he began counseling. The court stated that it recognized the difficulty for defendants in defending an action years after the alleged acts took place, but noted that this is a legislative matter which has been resolved in favor of allowing recovery of late-discovered causes of action in child sex abuse cases (*40 Cal. App. 4th 1177, 1186-1187)* .

[d] Recollection of Childhood Abuse Does Not Prohibit Applying Delayed Discovery Principles to Plaintiff's Claim

In ***Sellery v. Cressey*** *(1996) 48 Cal. App. 4th 538, 55 Cal. Rptr. 2d 706* , plaintiff was born on May 15, 1955, was married on March 15, 1984, and sued her parents on August 11, 1992, for battery, assault and intentional infliction of emotional distress arising out of alleged childhood sexual abuse. Plaintiff's husband joined in the suit alleging a claim for loss of consortium. Plaintiff acknowledged that she never forgot certain events which she described, but claimed that she repressed all memory of the most profound abuse that she described until she entered psychotherapy in 1991 for treatment of depression, dissociation, and sexual dysfunction. Plaintiff contended that it was through therapy that her worst memories resurfaced and that she came to realize that her psychological ailments were caused by the abuse. Plaintiff's husband echoed her testimony. Plaintiff's psychological expert explained that plaintiff's failure to see the connection between the abuse and her psychological problems was due to the phenomenon of "dissociation" which the expert defined and plaintiff's psychological expert and plaintiff's psychotherapist agreed that until the plaintiff had entered therapy, she had not appreciated the wrongfulness of the abuse nor connected it to her current psychological problems (*48 Cal. App. 4th 538, 542-543)* . In 1994, the defendants moved for summary judgment. After a hearing, the trial court found by reason of plaintiff's admitted conscious memory of torts committed against her during minority, that plaintiff's claim was time barred under *Code Civ. Proc. § 340.1* which provided a three year statute of limitation after plaintiff discovered, or should have discovered, her injuries were caused by sexual abuse. The trial court also found that plaintiff's husband failed to state a cause of action and that even if he did it was time barred for the same reasons his wife's claim were barred. Thereafter the trial court entered judgment and dismissed the case (*48 Cal. App. 4th 538, 543)* .

The court of appeal reversed the dismissal as to the plaintiff wife and without discussion affirmed the dismissal as to plaintiff's husband. The appellate court noted that the trial court had committed error by reasoning that because plaintiff remembered some of the abuse, there was no basis for applying delayed discovery principles to her claim and thus her causes of action had expired when she turned 26 (i.e., eight years after reaching the age of majority) (*48 Cal. App. 4th 538, 544)* . In 1990, the legislature amended *Code Civ. Proc. § 340.1* to allow tolling of the statute of limitations until the plaintiff discovered or should have discovered, the connection between the abuse and current injuries. The amendment's legislative history establishes that it was intended to toll the statute of limitations even for plaintiffs who recall their abuse. The court cited *Lent v. Doe (1995) 40 Cal. App. 4th 1177, 1186, 47 Cal. Rptr. 2d 389* , as supporting its analysis wherein that court held that nothing in *Code Civ. Proc. § 340.1* requires that memories of abuse be repressed as a prerequisite to a delayed discovery claim, but to the contrary, to satisfy delayed discovery plaintiff need only allege the onset of psychological injury or illness after the age of majority and that plaintiff commenced his or her action within three years of the time plaintiff discovered such psychological injury or illness was caused by childhood sexual

abuse (*48 Cal. App. 4th 538, 545-547)* .

Turning to the facts in the present case, the court noted that plaintiff first saw the connection between her current psychological ailments and her abuse when she entered therapy in 1991, and accepting her claim as true, the court held that her lawsuit was timely filed when filed in 1992, and therefore its dismissal was error. The defendants' primary argument in defense of the trial court's judgment, that is, that the statute of limitations was never tolled and the complaint was time barred because plaintiff always remembered some instances of abuse, was unavailing because total repression of all memory of the abuse is not necessary to toll the statute (*48 Cal. App. 4th 538, 547)* . Moreover, the court rejected the defendants' argument that the complaint was time-barred after 1987 because the psychological problems for which plaintiff ultimately sought treatment started surfacing in 1984, which according to the defendants, started the running of the three year period in which plaintiff should have discovered the connection between her problems and the abuse. Plaintiff, however, had offered various expert psychological testimony showing that she used various defenses mechanisms such as dissociation as a defense against fully understanding and remembering the abuse and connecting it with her present psychological injuries until her therapeutic work beginning in 1991. The court found that such expert testimony created a triable issue of fact as to the time when the plaintiff should have discovered the connection between her abuse and injuries, making summary judgment improper (*48 Cal. App. 4th 538, 547-548)* .

The facts and procedural background of ***Lent v. Doe*** *(1995) 40 Cal. App. 4th 1177, 47 Cal. Rptr. 2d 389* , are discussed in *§ 143.57[3][c]*. In *Lent*, plaintiff admitted that he had never forgotten the sexual abuse that he suffered. He alleged, however, that he had not discovered the connection between his psychological illness and the acts of abuse until he began counseling. The defendant argued that application of delayed discovery was barred because plaintiff had uninterrupted memory of the abuse (*40 Cal. App. 4th 1177, 1185-1186)* . The court rejected this argument holding that nothing in *Code Civ. Proc. § 340.1* requires that memories of abuse be repressed as a prerequisite to a delayed discovery claim (*40 Cal. App. 4th 1177, 1186)* .

[e] Enlarged Limitation Period of Code Civ. Proc. § 340.1 Applies to Childhood Sexual Abuse Continuing Beyond Childhood

In ***Tietge v. Western Province Of The Servites, Inc.*** *(1997) 55 Cal. App. 4th 382, 64 Cal. Rptr. 2d 53* , plaintiffs alleged they were sexually molested over a period of time, and filed separate actions against a religious brother who was also a parochial schoolteacher, and his religious order. Defendants demurred on the grounds that the actions were time barred, pointing out the alleged molestation occurred from 9 to 26 years before the actions were filed. Relying on the then applicable statute of limitations, the trial court sustained the demurrers without leave to amend, but while plaintiffs' appeals were pending, the legislature retroactively amended the statute of limitations.

The court of appeal affirmed the judgment as to the religious order, holding that the limitation period of *Code Civ. Proc. § 340.1* did not apply to the religious order. The court reversed the judgment as to the brother, holding that the enlarged limitation period of *Code Civ. Proc. § 340.1* applied to that action. In response to the brother's argument that the plaintiffs failed to file a certificate of merit as required by *Code Civ. Proc. § 340.1(e)* (*now Code Civ. Proc. § 340.1(h)*), the court held that just as the plaintiffs received the benefits of the 1994 amendment (providing for retroactive application of the statute), they must also assume its burdens. To the extent the plaintiffs did not comply with the procedural requirements of the statute, the brother may raise those claims in the trial court (*55 Cal. App. 4th 382, 387)* .

[f] Period of Revival for Causes of Action Pursuant to Code Civ. Proc. § 340.1(a)(2) and (3)

The 2002 amendment to *Code Civ. Proc. § 340.1* (*see* Stats. 2002, Ch. 149, § 1) provides that actions pursuant to *Code Civ. Proc. § 340.1(a)(2)* or *(3)* may be commenced after the plaintiff's 26th birthday if the person or entity against whom the action is commenced knew, had reason to know, or was otherwise on notice, of any unlawful sexual conduct by an employee, volunteer, representative, or agent, and failed to take reasonable steps, and implement reasonable

safeguards, to avoid future acts of unlawful sexual conduct also added a revival provision. Such an action, therefore, that is permitted to be filed pursuant to paragraph (2) of subdivision (b) that would otherwise be barred as of January 1, 2003, solely because the applicable statute of limitations has or had expired, is revived, and, in that case, a cause of action may be commenced within one year of January 1, 2003 (*Code Civ. Proc. § 340.1(c)*). This revival period does not apply, however, to claims that have been litigated to finality on the merits in any court of competent jurisdiction prior to January 1, 2003, or any written, compromised settlement agreements which have been entered into between a plaintiff and a defendant where the plaintiff was represented by an attorney who was admitted to practice law in California at the time of the settlement, and the plaintiff signed the agreement (*Code Civ. Proc. § 340.1(d)*).

Santillan v. Roman Catholic Bishop of Fresno *(2008) 163 Cal. App. 4th 4, 10-11, 77 Cal. Rptr. 3d 343* , involved plaintiffs' allegation of childhood sexual abuse by a cleric. The trial court entered summary judgment for defendant bishop, finding that the complaint was barred by the statute of limitations. The issue on appeal was whether plaintiffs, who were brothers, raised triable issues of fact as to whether the diocese, the bishop's predecessor in operating the parish, was on notice of the unlawful sexual conduct, as required for revival under *Code Civ. Proc. § 340.1(b)(2), (c)*. The court held that triable issues were raised as to whether the cleric's housekeeper, who died before the case was filed, knew of the alleged abuse. According to plaintiffs, she knew that they were often alone with the cleric in his bedroom with the door shut, and when their mother accused her of having known, she did not deny the charge, cried, and later said she was sorry. An inference was raised that she knew about the alleged abuse while it was ongoing. There was also a triable issue as to the housekeeper's duty to report, for purposes of imputing her knowledge to the diocese, because a cardinal testified that he would have expected her to tell somebody if she had any well-founded suspicions of sexual misconduct. Although his testimony did not expressly identify her job duties, an inference could be drawn that his expectation was based on his knowledge of the duties of parish employees (*163 Cal. App. 4th 4, 10-11)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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CHAPTER 143 LIMITATION OF ACTIONS
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14-143 California Points & Authorities § 143.58

§ 143.58 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Complaint Alleges Facts Showing Delayed Accrual of Cause of Action--Strict Liability or Negligence Action for Property Damage Caused by Asbestos

[1] FORM

[*Caption. See § 143.31[1].*]

DEFENDANT'S GENERAL DEMURRER SHOULD NOT BE SUSTAINED, BECAUSE PLAINTIFF'S CAUSE OF ACTION DID NOT ACCRUE UNTIL THE TIME OF CONTAMINATION BY ASBESTOS, RATHER THAN THE TIME THAT PLAINTIFF DISCOVERED THE PRESENCE OF ASBESTOS.

Cause of Action for Property Damage by Asbestos Accrues When Asbestos Causes Contamination. In an asbestos-in-building case, contamination by friable asbestos is the physical injury that must exist before a property owner's strict liability or tort cause of action accrues against an asbestos manufacturer (*San Francisco Unified School Dist. v. W.R. Grace & Co. (1995) 37 Cal. App. 4th 1318, 1335, 44 Cal. Rptr. 2d 305*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a general demurrer to a complaint for property damage based on the construction of a building with materials containing asbestos.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel must oppose the substantive issue that a property owner's cause of action for strict liability or negligence against an asbestos manufacturer is time-barred, for example in a motion for summary judgment. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence of the time at which contamination by asbestos occurred, and should argue that the date of the occurrence of contamination is within the time period for the statute of limitations [*see San Francisco Unified School Dist. v. W.R. Grace & Co. (1995) 37 Cal. App. 4th 1318, 44 Cal. Rptr. 2d 305]* .

[3] Discussion of Authorities

[a] Cause of Action for Property Damage by Asbestos Accrues When Asbestos Causes Contamination

In ***San Francisco Unified School Dist. v. W.R. Grace & Co.*** *(1995) 37 Cal. App. 4th 1318, 44 Cal. Rptr. 2d 305* , plaintiff, a school district, brought an action for strict liability and negligence against the manufacturer of asbestos-containing products for property damage to plaintiff's buildings. Defendant moved for summary judgment based on the statute of limitations. The trial court granted the motion, finding that the limitations period commenced when plaintiff became aware that its schools contained potentially damaging asbestos. On appeal, plaintiff contended that the trial court adopted the wrong legal standard for commencing the limitations period, urging that the limitations period for a strict liability or negligence cause of action does not commence until asbestos contamination occurs.

The court of appeal reversed, holding that in an asbestos-in-building case, the mere presence of asbestos constitutes only a threat of future harm, and that contamination by friable asbestos is the physical injury which must exist before a property owner's strict liability or tort cause of action against an asbestos manufacturer accrues (*37 Cal. App. 4th 1318, 1335)* . The court initially noted that a plaintiff in an action for property damage cannot state a cause of action for strict liability or negligence until physical injury occurs (*37 Cal. App. 4th 1318, 1327)* . Applying this rule in the context of an asbestos-in-building case, a tort recovery for loss of economic value of the building is precluded until physical injury to property occurs (*37 Cal. App. 4th 1318, 1329)* . The trial court had held that the mere presence of asbestos in plaintiff's buildings constituted the required injury. However, until contamination occurs, the only damages that arise are economic losses that do not constitute physical injury to property (*37 Cal. App. 4th 1318, 1330)* . The court thus concluded that physical injury resulting from asbestos contamination, rather than the mere presence of asbestos, must occur before a cause of action for strict liability or negligence can accrue in an asbestos-in-building case (*37 Cal. App. 4th 1318, 1330)* . The court reversed the summary judgment for defendant, and remanded for predetermination of whether the action was filed within the limitations period (*37 Cal. App. 4th 1318, 1342)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersEnvironmental LawHazardous Wastes & Toxic SubstancesGeneral OverviewEnvironmental LawHazardous Wastes & Toxic SubstancesAsbestosGeneral OverviewTortsStrict LiabilityGeneral Overview

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
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PART II. FORMS

14-143 California Points & Authorities § 143.59

§ 143.59 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Complaint Alleges Facts Showing Delayed Accrual of Cause of Action--Enforcement of Affirmative Covenant Running With Land

[1] FORM

[*Caption. See § 143.31[1].*]

DEFENDANT'S GENERAL DEMURRER SHOULD NOT BE SUSTAINED, BECAUSE PLAINTIFF'S CAUSE OF ACTION DID NOT ACCRUE UNTIL PLAINTIFF DEMANDED THAT DEFENDANT _____ [*specify action defendant is required to take under affirmative covenant running with the land, e.g.,* REPAIR AND STABILIZE THE HILLSIDE ON PLAINTIFF'S LOT].

Action for Breach of Covenant Running With the Land. The four-year period of limitation for an action arising from a written instrument (*Code Civ. Proc. § 337*) applies to an action to enforce covenants that run with the land (*see Cutujian v. Benedict Hills Estates Assn. (1996) 41 Cal. App. 4th 1379, 1385, 49 Cal. Rptr. 2d 166*). In the case of a cause of action to enforce an affirmative covenant running with the land, the statute of limitations commences when a demand for performance is made (*Cutujian v. Benedict Hills Estates Assn. (1996) 41 Cal. App. 4th 1379, 1387, 49 Cal. Rptr. 2d 166*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a general demurrer to a complaint for enforce an affirmative covenant running with land, such as a maintenance obligation imposed on a homeowners' association by a recorded declaration of conditions, covenants, and restrictions.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel must oppose the substantive issue that a property owner's cause of action to enforce an affirmative covenant is time-barred, for example in a motion for summary judgment. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts alleged in the complaint, or other evidence if the issue is not raised on demurrer, regarding the time at which the plaintiff demanded that the defendant perform the perform the action that is required by the covenant, and should argue that the date of the demand is within the time period for the statute of limitations [*see Cutujian v. Benedict Hills Estates Assn. (1996) 41 Cal. App. 4th 1379, 1386-1388, 49 Cal. Rptr. 2d 166]* .

[3] Discussion of Authorities

[a] Action for Breach of Covenant Running With the Land

In ***Cutujian v. Benedict Hills Estates Assn.*** *(1996) 41 Cal. App. 4th 1379, 49 Cal. Rptr. 2d 166* , plaintiff sought to repair damage to a slope on a residential lot he had purchased in a common interest residential development. The development was subject to a declaration of conditions, covenants and restrictions (CC&R's), and was governed by defendant Association. The CC&R's required defendant to maintain natural and manmade slopes both in the common areas and within individual lots. Defendant demurred, raising the statute of limitations, and the trial court sustained the demurrer. Plaintiff appealed, contending that the slump on his property was a continuing nuisance which defendant had a duty to abate under the CC&R's.

The court of appeal reversed the judgment of dismissal, finding that the cause of action for breach of the CC&R's was timely (*41 Cal. App. 4th 1379, 1390)* . The court initially noted that CC&R's may be enforced as equitable servitudes and as covenants running with the land (*41 Cal. App. 4th 1379, 1384)* . The court found no California statute or judicial decision directly addressing the question of when the statute of limitations commences for enforcement of a covenant running with the land which requires the performance of an affirmative act, but noted that courts in other jurisdictions have generally concluded that the statute does not commence until there is a demand for performance (*41 Cal. App. 4th 1379, 1385)* . Reviewing the CC&R's, the court found that they stated that they would "run with the Property and Additions" and imposed on defendant an affirmative duty to maintain the slope areas in the development in a neat and safe condition, a duty which included repair when necessary or appropriate. The court concluded that the most reasonable rule of law is that the statute of limitations to enforce affirmative covenants running with the land, including duties in a declaration of CC&R's, commences when a demand for performance is made. Under this rule, the court found plaintiff's lawsuit timely (*41 Cal. App. 4th 1379, 1387)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProceduresPleading &

PracticeDefenses, Demurrers & ObjectionsDemurrersGovernmentsLegislationStatutes of LimitationsGeneral OverviewReal Property LawRestrictive CovenantsCovenants Running With Land

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2-143 California Points & Authorities § 143.59A

§ 143.59A Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Complaint Timely Filed--Statute of Limitations for Action to Quiet Title Does Not Commence Until Adverse Claim Made Against Person Holding the Property

[1] FORM

[*Caption. See § 143.31[1].*]

DEFENDANT'S GENERAL DEMURRER SHOULD NOT BE SUSTAINED, BECAUSE THE STATUTE OF LIMITATIONS FOR AN ACTION TO QUIET TITLE DOES NOT COMMENCE UNTIL AN ADVERSE CLAIM IS MADE AGAINST THE PERSON HOLDING THE PROPERTY, AND THUS PLAINTIFF'S CAUSE OF ACTION DID NOT ACCRUE UNTIL DEFENDANT _____ [*specify action constituting an adverse claim made by defendant against the holder of the property*].

Action to Quiet Title. The four-year period of limitation for an action arising from a writing such as a homeowner association's conditions, covenants, and restrictions governing the property (*Code Civ. Proc. § 337*) applies to an action to quiet title (*Crestmar Owners Assn. v. Stapakis (2007) 157 Cal. App. 4th 1223, 1226, 69 Cal. Rptr. 3d 231*). The statute of limitations for an action to quiet title does not begin to run until someone presses an adverse claim against the person holding the property (*Crestmar Owners Assn. v. Stapakis (2007) 157 Cal. App. 4th 1223, 1228, 69 Cal. Rptr. 3d 231*).

Dated:_____.

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____

[*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a general demurrer to a complaint to enforce a writing such as a homeowner association's conditions, covenants, and restrictions governing real property. These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel must address the substantive issue of which party is in fact in possession of the property in question. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts alleged in the complaint, or other evidence if the issue is not raised on demurrer, regarding the time at which an adverse claim was made against the person holding the property, and should argue that the date of the adverse claim is within the time period for the statute of limitations [*see Crestmar Owners Assn. v. Stapakis (2007) 157 Cal. App. 4th 1223, 1228, 69 Cal. Rptr. 3d 231]* .

[3] Discussion of Authorities

[a] Action to Quiet Title

In ***Crestmar Owners Assn. v. Stapakis*** *(2007) 157 Cal. App. 4th 1223, 69 Cal. Rptr. 3d 231* , after a condominium conversion, the conditions, covenants, and restrictions (CCRs) governing the property obligated the property management corporation to transfer parking spaces in the building's garage to condominium buyers and, if any condominiums remained unsold three years after the first unit was purchased, to convey all remaining unassigned parking spaces to the homeowners' association. Two parking spaces remained unassigned and were not deeded to the homeowners' association. More than 20 years later, the corporation conveyed the spaces to its president. The homeowners' association, which had been continuously using the spaces, challenged the validity of that conveyance. Following a one-day trial, the trial court quieted title to the two spaces in the homeowners' association.

The Court of Appeal affirmed. The action was timely under *Cal. Code Civ. Proc. § 337*, because the statute of limitations for an action to quiet title did not begin to run until a claim adverse to the person holding the property was asserted. Further, the court found that the homeowners' association had exclusive and undisputed possession of the spaces during the quarter century before it filed its lawsuit to quiet title (*157 Cal. App. 4th 1223, 1228)* .

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14-143 California Points & Authorities § 143.60

§ 143.60 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Complaint Alleges Facts Showing Delayed Accrual of Cause of Action--Breach of Contract Committed in Secret

[1] FORM

[*Caption. See § 143.31[1].*]

THE DEMURRER ON THE GROUND THAT THE ACTION IS BARRED BY THE STATUTE OF LIMITATIONS SHOULD BE OVERRULED BECAUSE THE PERIOD OF LIMITATION DID NOT BEGIN TO RUN UNTIL THE PLAINTIFF DISCOVERED THE BREACH OF CONTRACT THAT WAS COMMITTED IN SECRET BY THE DEFENDANT.

Delayed Discovery Rule Applies to Breaches of Contract That Are Committed in Secret. The delayed discovery rule applies to not only actions involving fraud, professional negligence, and breaches of fiduciary duty, but also to breaches of contract committed in secret and where the harm flowing from those breaches will not be reasonably discoverable by the plaintiff until a future time (*Gryczman v. 4550 Pico Partners, Ltd. (2003) 107 Cal. App. 4th 1, 4, 131 Cal. Rptr. 2d 680*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a general demurrer to the complaint in certain breach of contract actions, where the demurrer asserts that the action is barred by a statute of limitations. The ground for the opposition is that the complaint alleges facts showing that plaintiff suffered damages because the defendant secretly committed the breach in the privacy of its own offices and failed to notify the plaintiff of the breach.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. This memorandum of points and authorities may be accompanied by counter affidavits [*Code Civ. Proc. § 2009*] or counter declarations under penalty of perjury [*Code Civ. Proc. § 2015.5*].

[3] Discussion of Authorities

[a] Delayed Discovery Rule Applies to Breaches of Contract That Are Committed in Secret

Gryczman v. 4550 Pico Partners, Ltd. *(2003) 107 Cal. App. 4th 1, 131 Cal. Rptr. 2d 680* was a breach of contract action where the plaintiff alleged the defendant conveyed real property to another company without first notifying the plaintiff before the sale so he could exercise his contractual right of first refusal. The Superior Court dismissed the action at summary judgment on the ground that the statute of limitation barred the action. The appellate court reversed the ruling and held that the delayed discovery rule should be extended beyond actions involving fraud, professional negligence, and breaches of fiduciary duty, and be applied to breaches of contract committed in secret and where the harm flowing from those breaches will not be reasonably discoverable by the plaintiff until a future time. This exception applies when 1) the injury or the act causing the injury, or both, have been difficult for the plaintiff to detect, 2) the defendant has been in a far superior position to comprehend the act and the injury, and 3) the defendant had reason to believe the plaintiff remained ignorant that he had been wronged. In these instances, the plaintiffs should not suffer where circumstances prevented them from knowing they have been harmed and defendants should not be allowed to knowingly profit from the injured party's ignorance. The appellate court determined that the delayed discovery rule should be applied because the first company not only breached the contract within the privacy of its own offices, but the act which constituted the breach, failure to give notice of the option offer, was the very act which prevented the individual from discovering the breach. Defendants had reason to believe the individual remained ignorant he had been wronged, since they conceded for purposes of the summary judgment motion they never provided him with notice of the option offer. The appellate court ruled that the running of the statute of limitations was tolled until such time as the individual knew or should have known of the wrongful conduct at issue. Furthermore, the trial court erred in granting summary judgment, as reasonable minds could differ as to the sufficiency of the individual's diligence in discovering the breach of contract, and therefore, whether the individual exercised reasonable diligence under the circumstances was a question of fact for a jury to decide (*107 Cal. App. 4th 1, 4-7)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersContracts LawBreachGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral Overview

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14-143 California Points & Authorities § 143.61

§ 143.61 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Complaint Alleges Facts Showing Delayed Accrual of Cause of Action--Professional Malpractice--Other Than Legal or Medical

[1] FORM

[*Caption. See § 143.31[1].*]

THE COURT SHOULD OVERRULE THE DEMURRER TO THE COMPLAINT BASED ON THE STATUTE OF LIMITATIONS BECAUSE THE PERIOD OF LIMITATION DID NOT BEGIN TO RUN UNTIL THE PLAINTIFF BOTH SUSTAINED DAMAGE AND DISCOVERED, OR SHOULD HAVE DISCOVERED, THE NEGLIGENCE, AND THE COMPLAINT SHOWS ON ITS FACE THAT PLAINTIFF _____ [DID NOT DISCOVER THE FACTS GIVING RISE TO THE CAUSE OF ACTION *and/or* SUSTAINED NO DAMAGE] UNTIL _____ [*date*].

A. Statute of Limitations. The two-year period of limitation under *Code of Civil Procedure Section 339(1)*, which refers to an obligation or liability not founded upon an instrument of writing, is commonly applied to negligence by professionals that damages intangible property interests (*Slavin v. Trout (1993) 18 Cal. App. 4th 1536, 1539, 23 Cal. Rptr. 2d 219*). The two-year statute of limitations is applicable, notwithstanding the existence of other claims against the professionals, such as misrepresentation, for which a different statute of limitations might otherwise apply (*Sahadi v. Scheaffer (2007) 155 Cal. App. 4th 704, 714, 66 Cal. Rptr. 3d 517*).

B. Action Accrues on Later of Discovery or Damage. A cause of action in tort for professional negligence does not accrue until the plaintiff both (1) sustains damage, and (2) discovers, or should discover, the negligence (*Slavin v. Trout (1993) 18 Cal. App. 4th 1536, 1540, 23 Cal. Rptr. 2d 219* , citing *Budd v. Nixen (1971) 6 Cal. 3d 195, 203, 98 Cal. Rptr. 849, 491 P.2d 433*).

[*Optional*] **C. Action Does Not Accrue Absent Damage.** The mere breach of a professional duty, causing only nominal damage, speculative harm, or the threat of future harm not yet realized does not suffice to create a cause of action for negligence (*Slavin v. Trout (1993) 18 Cal. App. 4th 1536, 1540, 23 Cal. Rptr. 2d 219* , citing *Budd v.*

Nixen (1971) 6 Cal. 3d 195, 200, 98 Cal. Rptr. 849, 491 P.2d 433).

[*Optional*] **D. Actual Harm Is Question of Fact**. Narrowly drawn cases such as *International Engine Parts, Inc. v. Feddersen & Co. (1995) 9 Cal. 4th 606, 38 Cal. Rptr. 2d 150, 888 P.2d 1279* , identifying a particular point at which actual injury occurs, are not paradigms, and do not articulate a rule for all circumstances. As recognized in *Budd v. Nixen (1971) 6 Cal. 3d 195, 200, 98 Cal. Rptr. 849, 491 P.2d 433* , depending on the particulars, actionable harm may occur at any one of several points in time subsequent to a professional's negligence. Hence, as with other causes of action, the determination of when actionable harm occurs is generally a question of fact (*see* *Adams v. Paul (1995) 11 Cal. 4th 583, 588, 46 Cal. Rptr. 2d 594, 904 P.2d 1205* (construing *Code Civ. Proc. § 340.6* regarding attorney malpractice)).

[*Optional*] **E. Real Estate Appraiser.** In an action by a secured lender against a real estate appraiser the cause of action does not accrue until the lender acquires the property by foreclosure or power of sale (*Slavin v. Trout (1993) 18 Cal. App. 4th 1536, 1542-1543, 23 Cal. Rptr. 2d 219*).

[*Optional*] **F. Accountant.** Under *Code of Civil Procedure Section 339(1)*, a cause of action for accountant malpractice specifically accrues on "discovery of the loss or damage suffered by the aggrieved party," but until the client suffers damage or actual injury from the negligence, a cause of action for professional negligence cannot be established (*International Engine Parts, Inc. v. Feddersen & Co. (1995) 9 Cal. 4th 606, 620, 38 Cal. Rptr. 2d 150, 888 P.2d 1279*). ["Actual injury" caused by an accountant's negligent filing of tax returns occurs when the Internal Revenue Service actually assesses the tax deficiency (*International Engine Parts, Inc. v. Feddersen & Co. (1995) 9 Cal. 4th 606, 608-609, 620, 38 Cal. Rptr. 2d 150, 888 P.2d 1279*)]. The two-year statute of limitations prescribed by *Code Civ. Proc. § 339(1)* applies to actions for accounting malpractice, and where the gravamen of the case is accounting negligence, the two-year statute is applicable, notwithstanding the existence of other claims against the professionals, such as misrepresentation, for which a different statute of limitations might otherwise apply (*Sahadi v. Scheaffer (2007) 155 Cal. App. 4th 704, 714, 66 Cal. Rptr. 3d 517*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a general demurrer to a complaint for damages for professional negligence when the demurrer asserts that the action is barred by the statute of limitations. The basis of the opposition is that the complaint alleges facts showing that the complaint was timely filed because the limitation period did not begin to run until the plaintiff both sustained damage and discovered the negligence.

This form should not be used in actions for professional negligence arising out of legal or health care provider services. These actions have their own periods of limitation [*see Code Civ. Proc. §§ 340.6* (attorneys), 340.5 (health care providers)]. For forms of points and authorities relating to these limitation periods, see Ch. 24, *Attorneys at Law:*

Substitution, Withdrawal, Disqualification, and Authority to Appear , Ch. 24A, *Attorneys at Law: Malpractice* , Ch. 175, *Physicians and Surgeons: Medical Malpractice* , and Ch. 176, *Physicians and Surgeons: Licensing and Professional Discipline* .

Counsel should insert argument in this form showing the relationship between the facts of the case alleged and the points of law stated.

[3] Discussion of Authorities

[a] Statute of Limitations

The plaintiff in ***Slavin v. Trout*** *(1993) 18 Cal. App. 4th 1536, 23 Cal. Rptr. 2d 219* , was an investor who relied on the defendant's appraisal of a parcel of real property in agreeing to lend money secured by a second trust deed on that property. If the appraisal had been accurate, the transaction would have satisfied the plaintiff's investment standards regarding ratio between the amount of the loan and the value of the security. The plaintiff made the loan in November, 1986, in reliance on the appraisal. In March, 1987, the borrower defaulted. Foreclosure commenced, with sale scheduled for October, 1987. Sale was stayed by when the borrower filed for bankruptcy, and the stay was not lifted until October, 1988. In March, 1988, the plaintiff became aware that the defendant's appraisal had been much too high. In October, 1988, having obtained relief from the bankruptcy stay, the plaintiff purchased the property at a foreclosure sale. After incurring additional expenses while holding the property, the plaintiff sold it, netting less than he had loaned. In August, 1990, the plaintiff filed the complaint against the defendant alleging that he negligently over-appraised the property, that the plaintiff relied on the appraisal in making the loan, and was thereby damaged. The trial court granted the defendant's motion for summary judgment, and the plaintiff appealed.

The court of appeal reversed. The only issue on appeal was the statute of limitations; specifically, the question of law as to the date on which the cause of action accrued (*18 Cal. App. 4th 1536, 1538)* . The court noted that the parties agreed that the two year limit of *Code Civ. Proc. § 339(1)* applied to the case, and also stated that this section is commonly applied to negligence by professionals which damages intangible property interests (*18 Cal. App. 4th 1536, 1539)* .

In ***Sahadi v. Scheaffer*** *(2007) 155 Cal. App. 4th 704, 66 Cal. Rptr. 3d 517* , appellant clients retained the respondent accountants to prepare and file their federal and state income tax returns. Separate audits resulted in federal and state notices of deficiency. After more than five years of negotiation, the clients obtained a withdrawal of the proposed federal assessment and a refund. The clients' state refund proceedings, which had been suspended during the negotiations, resulted in a refund based on the federal adjustments. The clients brought a negligence suit against the accountants less than two years after the withdrawal of the proposed assessment. In bifurcated trial proceedings, the court concluded the action was barred by the applicable statute of limitations and entered judgment in the accountants' favor. On appeal, the clients argued that the statute of limitations on their malpractice claim was tolled until the audit process was concluded by the IRS' formal withdrawal of its proposed tax deficiency assessment. The clients contended that the action was timely because their accounting malpractice suit was filed within two years of that formal withdrawal.

The court of appeal reversed, finding the action timely because the two-year statute of limitations under *Code Civ. Proc. § 339(1)* for negligent preparation of tax returns commences when the federal audit is complete. The complaint, liberally construed under *Code Civ. Proc. § 452*, alleged negligence both in the preparation of tax returns and in the audit process. Although the clients sustained costs associated with the audit prior to its conclusion, actual injury in law occurred for limitations purposes on the date when the assessment was withdrawn. The claims based upon the preparation of state income tax returns were also timely (*155 Cal. App. 4th 704, 714)* .

[b] Action Accrues on Later of Discovery or Damage

The facts and procedural background of ***Slavin v. Trout*** *(1993) 18 Cal. App. 4th 1536, 23 Cal. Rptr. 2d 219* , are discussed in *§ 143.61[3][a]*. The court of appeal reversed, applying *Code Civ. Proc. § 339(1)*. The court held that a cause of action in tort for professional negligence does not accrue until the plaintiff both (1) sustains damage and (2) discovers, or should discover, the negligence (*18 Cal. App. 4th 1536, 1540)* . The court cited *Budd v. Nixen (1971) 6 Cal. 3d 195, 203, 98 Cal. Rptr. 849, 491 P.2d 433* , for this proposition. *Budd* is an attorney malpractice case decided under *Code Civ. Proc. § 339(1)*, prior to the enactment of *Code Civ. Proc. § 340.6*, which now governs attorney malpractice cases.

[c] Action Does Not Accrue Absent Damage

The facts and procedural background of ***Slavin v. Trout*** *(1993) 18 Cal. App. 4th 1536, 23 Cal. Rptr. 2d 219* , are discussed in *§ 143.61[3][a]*. The court of appeal reversed, applying *Code Civ. Proc. § 339(1)*. The plaintiff contended that although he had discovered the defendant's negligence by March, 1988, over two years before the complaint was filed, he did not sustain damage and the statute of limitations did not begin to run, until he acquired the property at foreclosure less than two years before the complaint was filed. The court agreed, finding this to be the unusual case in which the negligence was discovered before the damage occurred (*18 Cal. App. 4th 1536, 1540)* . Citing *Budd v. Nixen (1971) 6 Cal. 3d 195, 200, 98 Cal. Rptr. 849, 491 P.2d 433* , the court held that mere breach of a professional duty, causing only nominal damage, speculative harm, or the threat of future harm not yet realized does not suffice to create a cause of action for negligence (*18 Cal. App. 4th 1536, 1540)* . The court then noted that although the plaintiff relied on defendant's appraisal in 1986 by making the loan, he did not immediately suffer damage by so doing. As a secured lender, he could resort to the security *if* the lender defaulted, so that as long as the borrowers meet their obligations, the alleged negligence created only potential injury, there being no need to resort to the security (*18 Cal. App. 4th 1536, 1540)* .

The court further rejected the default as the time when the statute begins to run. The court declined to follow *Johnson v. Simonelli (1991) 231 Cal. App. 3d 105, 282 Cal. Rptr. 205* , in which plaintiffs alleged that attorneys negligently failed to determine that the security for a transaction was inadequate, and in which the court fixed the date of default as the time when the statute commenced to run (*18 Cal. App. 4th 1536, 1541)* . The *Slavin* court noted that default does not give resort to the security until a detailed statutory scheme has been followed, which takes a large amount of time and during which the default may be cured in a variety of ways. Whether the lender actually suffers for the erroneous appraisal depends on the value of the property when the lender acquires it, which is when the lender truly resorts to the security (*18 Cal. App. 4th 1536, 1541-1542)* . The court also pointed out that the lender should not be deemed to have a cause of action at the time of default because it could lead to a multiplicity of unnecessary lawsuits against appraisers. Also, if the borrower cured the default while litigation was pending, leading to dismissal of the action, the dismissal might act as a bar to a later action against the appraiser if the borrower later defaulted and failed to reinstate, leading to an unjust result (*18 Cal. App. 4th 1536, 1542)* . The court stated that these anomalies could be avoided by holding that the action does not accrue until the lender acquires the property by foreclosure or power of sale and thereby resorts to the security. This rule provides an unalterable and definitive event that will fairly fix the starting point for the statute of limitation (*18 Cal. App. 4th 1536, 1542)* .

[d] Actual Harm Is Question of Fact

Adams v. Paul *(1995) 11 Cal. 4th 583, 46 Cal. Rptr. 2d 594, 904 P.2d 1205* , involved an action for attorney malpractice based on the attorney having missed a statute of limitations. The trial court sustained defendant attorney's demurrer to the complaint without leave to amend based on the statute of limitations for attorney malpractice. The court of appeal affirmed.

The Supreme Court reversed, holding that the issue of when actionable harm occurs for the purposes of the statute of limitations in attorney negligence cases is a question of fact. The Court noted that *International Engine Parts, Inc. v. Feddersen & Co. (1995) 9 Cal. 4th 606, 38 Cal. Rptr. 2d 150, 888 P.2d 1279* , discussed in *§ 143.61[3][f]* and another

recent case had identified particular points at which actual injury occurs in very narrowly drawn circumstances. The Court went on to state that these cases are not paradigms, and do not articulate a rule for all seasons. The Court held that depending on the particulars, actionable harm may occur at any one of several points in time subsequent to an attorney's negligence, and that hence, as with other causes of action, the determination is generally a question of fact. The Court strongly reaffirmed the established standard recognized in *Budd v. Nixen (1971) 6 Cal. 3d 195, 200, 98 Cal. Rptr. 849, 491 P.2d 433* regarding attorney malpractice (to the extent it has not been affected by later legislation) (*11 Cal. 4th 583, 588-589)* .

Although *Adams* involves attorney malpractice, it does call into question all "bright line" rules for purposes of determining when actual injury occurs in any professional negligence action. While these rules may well apply in many typical cases, in relying on them, counsel must bear in mind that the issue is a question of fact.

[e] Real Estate Appraiser

Slavin v. Trout *(1993) 18 Cal. App. 4th 1536, 23 Cal. Rptr. 2d 219* , is discussed in *§ 143.61[3][c]*.

In relying on the rule of *Slavin*, counsel should take into consideration the California Supreme Court holding in *Adams v. Paul (1995) 11 Cal. 4th 583, 588-589, 46 Cal. Rptr. 2d 594, 904 P.2d 1205* , discussed in *§ 143.61[3][d]* that the issue of when actual injury occurs is a question of fact.

[f] Accountant

In ***International Engine Parts, Inc. v. Feddersen & Co.*** *(1995) 9 Cal. 4th 606, 38 Cal. Rptr. 2d 150, 888 P.2d 1279* , the defendant accounting firm was the plaintiffs' tax preparer. One of the plaintiffs was incorporated as a subsidiary of the other to act as a "domestic international stock corporation" (DISC), a status conferring certain tax benefits. The defendant failed to provide the documentation necessary to maintain DISC status for plaintiff's 1983 and 1984 income tax returns. In 1985, an IRS agent audited the subsidiary's status, and plaintiffs learned that defendant had forgotten or missed the required document filing. Defendant continued to represent plaintiffs to attempt to mitigate the error. In 1986, the IRS agent advised plaintiffs that the subsidiary would be disqualified as a DISC. As a result of learning the extent of the potential liability, plaintiffs withdrew a settlement offer in unconnected litigation. At the same time a bank reduced plaintiffs' line of credit in light of the potential liability. The IRS issued a preliminary audit report in 1987, disqualifying the subsidiary as a DISC. In 1988, the IRS assessed the deficiency and imposed taxes and penalties.

Plaintiffs filed the accountant malpractice action against the defendant in 1990, one day short of two years after the tax deficiency was assessed. The defendant moved for summary judgment on the ground the action was barred by the two-year limit of *Code Civ. Proc. § 339(1)*. Defendant argued that actual injury occurred no later than 1986, when the subsidiary had to withdraw the settlement offer in unrelated litigation and the bank reduced its line of credit. Defendant also urged that payment of attorney's fees throughout the audit constituted actual injury. The trial court granted the motion, and the court of appeal affirmed.

The Supreme Court reversed after granting review to resolve the narrow, but recurring, issue of when actual injury, caused by an accountant's negligent filing of tax returns, occurs so as to commence the running of the *Code Civ. Proc. § 339(1)* period of limitations (*9 Cal. 4th 606, 608)* .

The Court outlined IRS procedures, noting that the examiner's premliminary findings are proposed findings subject to negotiation prior to any determination of tax deficiency, and that once a deficiency is assessed by taxpayer's consent to a deficiency assessment or by a final deficiency notice, the matter is final as to the IRS (*9 Cal. 4th 606, 613)* .

The Court then reviewed the development of the law regarding when an action for professional negligence accrues, including the development of the actual injury requirement and the disapproval of the "irremediable injury" test (*9 Cal.*

4th 606, 613-619) . Applying these established rules, the Court held that actual injury occurs when the IRS issues its penalty tax assessment. Although the plaintiff's withdrawal of a settlement offer and loss of credit may have represented "palpable harm," they were based on a tentative assessment of potential liabiltiy only. The alleged negligence may have been discovered during the audit, but that potential liability could not amount to actual harm until the date of the deficiency tax assessment or finality of the audit process. Applying the rule in this fashion conserves judicial resources by relieving the plaintiff of the need to sue the accountant while the audit is pending (*9 Cal. 4th 606, 620)* .

The Court expressly declined to reach the issue of whether the statute was tolled by the "continuous representation" of plaintiffs by the defendant accountant, but at the same time stated that any broadening of that rule should come from the Legislature (*9 Cal. 4th 606, 622)* .

Concurring, Justice Mosk would have held that actual injury would not occur until even later, when the deficiency assessment, which is subject to a petition for redetermination and to judicial review, became final (*9 Cal. 4th 606, 622-623)* . Concurring and dissenting, Justice Kennard would have held that actual harm occurred earlier, when plaintiffs incurred nontrivial audit-related costs, but that the statute was tolled by the defendant's continuing representation of plaintiffs in the matter (*9 Cal. 4th 606, 627-628)* .

In relying on *International Engine Parts, Inc.*, counsel should take into consideration the California Supreme Court holding in *Adams v. Paul (1995) 11 Cal. 4th 583, 588-589, 46 Cal. Rptr. 2d 594, 904 P.2d 1205* , discussed in *§ 143.61[3][d]* that the issue of when actual injury occurs is a question of fact. The Court in *Adams* specifically pointed out *International Engine Parts, Inc.*, as a decision that is not a paradigm and does not articulate a rule for all seasons.

Thus, in *Van Dyke v. Dunker & Aced (1996) 46 Cal. App. 4th 446, 53 Cal. Rptr. 2d 862* , the facts and procedural background of which are discussed in *§ 143.20[4][b]*, the court stated that *International Engine Parts, Inc.* did not apply because the rule of that case was expressly limited to a specific type of accountant malpractice, that is, the negligent preparation of tax returns, while the claim in *Van Dyke* was based not on negligent tax return preparation but on allegedly erroneous tax advice upon which plaintiffs relied to their detriment [*Van Dyke v. Dunker & Aced (1996) 46 Cal. App. 4th 446, 454, 53 Cal. Rptr. 2d 862]* . In *Van Dyke*, the court of appeal affirmed summary judgment in the defendant's favor, rejecting plaintiffs argument that their cause of action did not accrue until the IRS finally determined the impact of the allegedly negligently-advised charitable donation on their tax obligation. The court stated that the propriety of the tax advice was not contingent on the outcome of the IRS audit, and that there was nothing speculative about the damages originally suffered as a result of the alleged erroneous advice. The later determination by the IRS merely resolved the extent of the loss [*Van Dyke v. Dunker & Aced (1996) 46 Cal. App. 4th 446, 455, 53 Cal. Rptr. 2d 862]* . Thus, the bright-line rule of *International Engine Parts, Inc.* simply did not apply to the facts of *Van Dyke* [*Van Dyke v. Dunker & Aced (1996) 46 Cal. App. 4th 446, 457 53 Cal. Rptr. 2d 862]* .

In ***Sahadi v. Scheaffer*** *(2007) 155 Cal. App. 4th 704, 66 Cal. Rptr. 3d 517* , appellant clients retained the respondent accountants to prepare and file their federal and state income tax returns. Separate audits resulted in federal and state notices of deficiency. After more than five years of negotiation, the clients obtained a withdrawal of the proposed federal assessment and a refund. The clients' state refund proceedings, which had been suspended during the negotiations, resulted in a refund based on the federal adjustments. The clients brought a negligence suit against the accountants less than two years after the withdrawal of the proposed assessment. In bifurcated trial proceedings, the court concluded the action was barred by the applicable statute of limitations and entered judgment in the accountants' favor. On appeal, the clients argued that the statute of limitations on their malpractice claim was tolled until the audit process was concluded by the IRS' formal withdrawal of its proposed tax deficiency assessment. The clients contended that the action was timely because their accounting malpractice suit was filed within two years of that formal withdrawal.

The court of appeal reversed, finding the action timely because the two-year statute of limitations under *Code Civ. Proc. § 339(1)* for negligent preparation of tax returns commences when the federal audit is complete. The complaint,

liberally construed under *Code Civ. Proc. § 452,* alleged negligence both in the preparation of tax returns and in the audit process. Although the clients sustained costs associated with the audit prior to its conclusion, actual injury in law occurred for limitations purposes on the date when the assessment was withdrawn. The claims based upon the preparation of state income tax returns were also timely (*155 Cal. App. 4th 704, 714)* .

[4] Additional Authorities

[a] Accountant

In *Schrader v. Scott (1992) 8 Cal. App. 4th 1679, 11 Cal. Rptr. 2d 433* , the plaintiff sued an accountant for malpractice in giving unreliable tax advice on which the plaintiff acted. The complaint was filed more than two years after the plaintiff received a notice of final adjustment and deficiency from the Internal Revenue Service [*see I.R.C. § 6212* (notice of deficiency)] but within one year after the plaintiff and the IRS signed a closing agreement. The trial court granted a defense motion for summary judgment on the ground that the action was barred by the statute of limitation.

The court of appeal affirmed. There was no dispute over when the negligence was discovered, over three years before filing of the complaint. The dispositive issues on appeal whether the statute of limitations for accountant malpractice based on faulty tax advice (1) ran from the time plaintiffs sustained actual or appreciable harm as a result of the negligence, or (2) was tolled until the negligence had become irremediable, and (3) whether irremediabilty would occur only when plaintiff's administrative appeals with the taxing agencies had been exhausted (*8 Cal. App. 4th 1679, 1684)* . The court did not identify the statute of limitations it was applying, but compared accounting malpractice to legal malpractice. The court first rejected the irremediable damage test, citing *Laird v. Blacker (1992) 2 Cal. 4th 606, 7 Cal. Rptr. 2d 550, 828 P.2d 691* , for the rule in legal malpractice cases that the cause of action accrues when the client discovers or should have discovered the negligence and suffers appreciable and actual harm (*8 Cal. App. 4th 1679, 1684-1685)* .

The court noted that *Laird* held that the victim of legal malpractice sustained actual injury when the underlying action was dismissed as a result of the negligence and specifically rejected the argument that a legal malpractice plaintiff's damages were only speculative until appellate remedies in the underlying action were completed. The *Laird* court had noted that the relevant issue was whether the plaintiff knew she had been damaged, not whether the amount of the damage had been finally established (*8 Cal. App. 4th 1679, 1685)* . The *Schrader* court also reviewed two negligent tax advice cases. One had found appreciable harm when the plaintiff paid attorney fees for representation in a tax court proceeding. The other held that the action for negligent preparation of tax returns accrued when the plaintiff received the notice that a penalty was to be assessed against him; the court holding that the harm occurred when plaintiff became liable for the tax penalty, and was not delayed until actual payment of the penalty (*8 Cal. App. 4th 1679, 1686-1687)* . Having made it clear that the statute was not delayed until the closing agreement between plaintiff and the IRS, the only event that would have made the complaint timely, the *Schrader* court affirmed the summary judgment against plaintiffs without identifying at which earlier point the statute of limitations had begun to run (*8 Cal. App. 4th 1679, 1687)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersGovernmentsLegislationStatutes of LimitationsGeneral OverviewTortsMalpractice & Professional LiabilityGeneral Overview

California Points & Authorities

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 143 LIMITATION OF ACTIONS
PART II. FORMS

14-143 California Points & Authorities § 143.62

§ 143.62 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Amended Statute of Limitations Does Not Apply

[1] FORM

[*Caption. See § 143.31[1].*]

THE DEMURRER SHOULD NOT BE SUSTAINED BECAUSE THE STATUTE OF LIMITATIONS RELIED ON BY DEFENDANT DOES NOT APPLY, IN THAT IT WAS AMENDED AFTER PLAINTIFF'S CAUSE OF ACTION ACCRUED TO SHORTEN THE TIME WITHIN WHICH TO SUE, AND THE STATUTE AS AMENDED _____ [*either* CUT OFF PLAINTIFF'S CAUSE OF ACTION ALTOGETHER *or* LEFT PLAINTIFF WITH AN UNREASONABLY SHORT TIME WITHIN WHICH TO FILE HIS/HER COMPLAINT].

Statute as Amended, if Applied, Would Cut Off Plaintiff's Cause of Action. A statute of limitations which is amended to shorten the period within which to sue and thereby either eliminates a person's cause of action altogether or leaves that person with an unreasonably short period within which to file suit does not apply to the cause of action (*Rosefield Packing Co. v. Superior Court (1935) 4 Cal. 2d 120, 122-123, 47 P.2d 716* ; *Aronson v. Superior Court (1987) 191 Cal. App. 3d 294, 297, 236 Cal. Rptr. 347*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a general demurrer to a complaint based on the bar of the statute of limitations when the statute was amended after the cause of action accrued to shorten the period within which to sue and thereby eliminated plaintiff's cause of action or allowed an unreasonably short period within which to file the complaint. With appropriate modifications, the form may also be used in opposition to a motion for judgment on the pleadings, a motion for summary judgment, or an objection to the introduction of evidence based on the bar of the statute or in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Statute as Amended, if Applied, Would Cut Off Plaintiff's Cause of Action

In *Rosefield Packing Co. v. Superior Court (1935) 4 Cal. 2d 120, 47 P.2d 716* , involving application of former Code Civ. Proc. § 583 [*now see Code Civ. Proc. §§ 583.310, 583.360*] that required dismissal of an action not brought to trial within five years after filing of the *answer* and was amended to change answer to *action*, thereby shortening the time within which the action had to be brought to trial, the Supreme Court said that the Legislature may shorten or extend the period of the statute of limitations, or similar time statutes relating to procedure, and the changed period may be made applicable to pending proceedings, but that there is one important qualification to the rule: when the change in remedy, as, for example, the shortening of a time limit provision, is made retroactive, there must be a reasonable time permitted for the party affected to avail himself or herself of his or her remedy before the statute takes effect. If the statute operates immediately to cut off the existing remedy, or within so short a time as to give the party no reasonable opportunity to exercise the remedy, then the retroactive application of it is unconstitutional to such party (*4 Cal. 2d 120, 122-123)* .

In *Aronson v. Superior Court (1987) 191 Cal. App. 3d 294, 236 Cal. Rptr. 347* , a 14-year-old boy, born in 1971, through his aunt as guardian ad litem, sued a physician and a university for medical malpractice based on negligent prenatal and delivery care which caused the boy total paralysis and the inability to speak. At the time the boy was born, the applicable statute of limitations for medical malpractice was four years from the date of injury or one year from actual or constructive discovery, whichever occurred first, subject to tolling during minority (former Code Civ. Proc. §§ 340.5, *352*). But *Code Civ. Proc. § 340.5* was amended in 1975 to give a minor plaintiff either three years from the date of injury, or, if the injury occurred before the plaintiff was six years old, until the plaintiff's eight birthday, whichever period is longer, to file the action. The action was filed in 1985. Plaintiff alleged that his parents failed or refused to bring the action on his behalf. Defendants' demurrers to the complaint based on the bar of the statute of limitations were overruled, and defendants petitioned the court of appeal for a writ of mandate.

The court of appeal said well-settled law establishes that retrospective application of a shortened limitations period is permissible provided the party has a reasonable time to avail himself or herself of his or her remedy before the statute cuts off the right (*191 Cal. App. 3d 294, 297)* . The court explained that the doctrine of retrospectivity of limitations statutes is one of constitutional dimension and that statutes of limitation, being procedural, are normally retroactively applied to accrued causes of action. But the court must inquire whether, in a given case, that retrospective application may violate due process by in effect eliminating the plaintiff's right. If the time left to file suit is reasonable, no such constitutional violation occurs, and the statute is applied as enacted. If no time is left, or only an unreasonably short time remains, then the statute cannot be applied at all (*191 Cal. App. 3d 294, 297)* . The court held, however, that whether the time that remains is unreasonably short is a question of law and that the four years that remained to plaintiff

under *Code Civ. Proc. § 340.5* as amended within which he could have sued (before his eighth birthday) was a reasonable time (*191 Cal. App. 3d 294, 297-298)* . The court therefore granted the writ directing the trial court to vacate its orders overruling the demurrers and to sustain them on the ground the action was barred by the statute of limitations (*191 Cal. App. 3d 294, 300)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersGovernmentsLegislationStatutes of LimitationsGeneral Overview

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 143 LIMITATION OF ACTIONS
PART II. FORMS

14-143 California Points & Authorities § 143.63

§ 143.63 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Complaint Alleges Facts Showing That Cause of Action Arose Out of Insurer's Breach of Continuing Contractual Duty to Defend Plaintiff in Prior Action

[1] FORM

[*Caption. See § 143.31[1].*]

THE GENERAL DEMURRER TO THE COMPLAINT ON THE GROUND THE ACTION IS BARRED BY THE _____ [FOUR-YEAR *or* TWO-YEAR] LIMITATION PERIOD OF CODE OF CIVIL PROCEDURE SECTION _____ [337(1) *or* 339(1)] SHOULD BE OVERRULED, BECAUSE THIS ACTION IS FOR DAMAGES RESULTING FROM THE DEFENDANT'S BREACH OF ITS CONTRACTUAL DUTY UNDER THE TERMS OF ITS POLICY TO DEFEND THE PLAINTIFF IN A PRIOR ACTION AGAINST THE PLAINTIFF WHEN THAT DEFENSE WAS TENDERED. THAT DUTY WAS A CONTINUING ONE, AND THE RUNNING OF THE STATUTE OF LIMITATIONS WAS EQUITABLY TOLLED UNTIL THE UNDERLYING ACTION WAS TERMINATED BY FINAL JUDGMENT.

[*EITHER*]

Breach of Title Insurer's Duty to Defend. A title insurer's duty to defend is a continuing one, commencing on the tender of defense and continuing until the underlying lawsuit is concluded, and may therefore be assumed by the insurer at any time before entry of a final judgment in that action. Hence, although the limitation period (*Code Civ. Proc. § 339(1)*) on an action against a title insurer under its policy for the breach of its duty to defend its insured accrues when the insurer refuses the insured's tender of defense, the limitation period is equitably tolled until the underlying action is terminated by final judgment, and plaintiff may elect to wait until a final judgment has been entered and the duty to defend has ceased before filing suit (*Lambert v. Commonwealth Land Title Ins. Co. (1991) 53 Cal. 3d 1072, 1078, 282 Cal. Rptr. 445, 811 P.2d 737* (disapproving contrary language in *Central Bank v. Transamerica Title Ins. Co. (1978) 85 Cal. App. 3d 859, 149 Cal. Rptr. 822*); *see also Israelsky v. Title Ins. Co. (1989) 212 Cal. App. 3d 611, 616,*

261 Cal. Rptr. 72).

[*OR*]

Breach of Liability Insurer's Duty to Defend. A liability insurer's duty to defend is a continuing one, commencing on the tender of defense and continuing until the underlying lawsuit is concluded, and may therefore be assumed at any time before entry of a final judgment in that action. Hence, although the limitation period (*Code Civ. Proc. § 337(1)*) on an action against a liability insurer under its policy accrues when the insurer refuses the insured's tender of defense, the limitation period is equitably tolled until the underlying action is terminated by a final judgment, and plaintiff may elect to wait until a final judgment has been entered and the duty to defend has ceased before filing suit (*see Lambert v. Commonwealth Land Title Ins. Co. (1991) 53 Cal. 3d 1072, 1077-1078, 282 Cal. Rptr. 445, 811 P.2d 737* ; *Oil Base, Inc. v. Continental Cas. Co. (1969) 271 Cal. App. 2d 378, 389, 76 Cal. Rptr. 594*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a general demurrer to the complaint in an action by an insured against his or her insurer for the insurer's breach of its duty to defend plaintiff in a prior lawsuit against the plaintiff, when the ground of the demurrer is that the action accrued and the statute of limitations began to run when the defendant refused the plaintiff's tender of defense, and plaintiff delayed suit until after final judgment in the underlying action, and that the present action is therefore barred by the applicable period of limitations. The ground for opposition is that the applicable statute of limitations was equitably tolled from the time the action accrued until after the prior action in which the defendant refused the tender of defense was terminated by a final judgment.

With appropriate modifications, the memorandum may also be used in opposition to a defense motion for judgment on the pleadings or to a motion by defendant for summary judgment. In addition, the authorities cited and the cases they discuss may also be used in opposition to a general demurrer, defense motion for judgment on the pleadings, or motion by defendant for summary judgment based on the running of the statute of limitations in an action for breach of any other continuing contractual duty, if the action would be barred by the statute of limitations if the statute were not tolled from the time of the defendant's breach until termination of the time the duty could have been assumed.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Breach of Title Insurer's Duty to Defend

In *Lambert v. Commonwealth Land Title Ins. Co. (1991) 53 Cal. 3d 1072, 282 Cal. Rptr. 445, 811 P.2d 737* , the defendant issued plaintiff a title insurance policy in January 1984 in connection with the plaintiff's purchase of real property. The policy provided coverage for losses, including attorney's fees, incurred by reason of title to the estate or interest of the insured being vested other than as stated therein, including any defect or lien or encumbrance on such title. The policy excluded any losses resulting from a claim of easement that was not shown by the public records. In November 1984, the adjoining property owner sued plaintiff, claiming an easement by implication over the property covered by the policy and seeking reformation of a recorded easement. Plaintiff tendered the defense to the insurer, which on April 26, 1985, notified plaintiff in writing that it would not provide him with a defense and denied coverage under the policy. Plaintiff successfully defended the underlying suit, and judgment was entered in his favor on October 26, 1987. On October 24, 1988, plaintiff filed the present action against the insurer for wrongful refusal to defend. The trial court sustained the defendant's demurrer to the complaint without leave to amend, on the ground that all causes of action were barred by the two-year statute of limitations (*Code Civ. Proc. § 339(1)*), and dismissed the action.

The court of appeal, following *Central Bank v. Transamerica Title Ins. Co. (1978) 85 Cal. App. 3d 859, 149 Cal. Rptr. 822* , and rejecting *Israelsky v. Title Ins. Co. (1989) 212 Cal. App. 3d 611, 261 Cal. Rptr. 72* (discussed *below*), affirmed, holding that plaintiff's cause of action had accrued when the defendant rejected his claim, more than two years before plaintiff commenced the instant suit, and that it was barred under *Code Civ. Proc. § 339(1)*.

The Supreme Court granted review to resolve a conflict among the courts of appeal, namely, between *Central Bank, above,* which held that an action for breach of the duty to defend a claim under a title insurance policy accrued when tender of the defense was refused, not when final judgment was entered against the insured in the underlying dispute, and *Israelsky,* which adopted the rule of delayed commencement in cases of a continuing duty as set forth in *Oil Base, Inc. v. Continental Cas. Co. (1969) 271 Cal. App. 2d 378, 389, 76 Cal. Rptr. 594* (discussed in *§ 143.63[3][b]*). The Supreme Court rejected *Central Bank* and approved the result in *Israelsky,* but found the *Israelsky* decision flawed in one respect: it overlooked the language of *Code Civ. Proc. § 312* that the action must be commenced within the statutory period after the cause of action has "accrued." The Court said that the cause of action accrued when the insurer refused to defend, and that unless equitably tolled, the statute of limitation commenced to run on the day the insurer refused the tender of defense (*53 Cal. 3d 1072, 1077-1078)* . The Court, however, concluded that *Israelsky* was, although it did not so state, in fact applying the California doctrine of equitable tolling, that is, although the statutory period commences on the refusal to defend, it is equitably tolled until the underlying action is terminated by final judgment (*53 Cal. 3d 1072, 1077)* . Citing *Israelsky,* the Court said that the duty to defend in a title insurance case is governed by the same principles that govern the duty to defend under general liability policies, and citing *Oil Base,* the Court said that the duty commences on tender of the defense and continues until the underlying lawsuit is concluded (*53 Cal. 3d 1072, 1077)* .

The Court, again citing *Israelsky,* pointed out that California courts have long given the plaintiff, in cases where a continuing duty has been breached, the option of filing suit when the time for complete performance had passed (*53 Cal. 3d 1072, 1078)* . The Court explained that the Legislature has enacted several tolling provisions in which certain periods of time are not counted toward the time limit, that, in addition, California decisions have implied tolling exceptions in a variety of situations, that the Legislature cannot predict all of the circumstances that come within the purpose of the tolling exceptions, and that it was therefore appropriate for courts to construe the statutory tolling scheme and implicit tolling exceptions to effect the ostensible legislative purpose (*53 Cal. 3d 1072, 1078-1079)* . The Court said that the duty to defend is a continuing duty, and that it was equitable and consistent with the legislative intent to toll the limitations period in which this duty continues from the date of accrual of a cause of action to final judgment (*53 Cal. 3d 1072, 1079)* . The Court held, in sum, that the limitation period for an action under a title insurance policy for failure to defend accrues when the insurer refuses the insured's tender of defense, but is tolled until the underlying action is terminated by final judgment, and disapproved the contrary language in *Central Bank, above* (*53 Cal. 3d 1072, 1080)* .

Israelsky v. Title Ins. Co. (1989) 212 Cal. App. 3d 611, 261 Cal. Rptr. 72 , was an action on a variety of theories by

the buyers of real property against their title insurer for the latter's refusal to defend them in an action by the sellers involving the purchased property. The sellers' complaint alleged that an amendment to the escrow instructions, relating to the sale of the property and to the circumstances under which the buyers would reconvey a portion of the property to the sellers, did not properly reflect the sellers' agreement with the buyers. Tender of the defense of the sellers' action was twice made by the buyers to the insurance company and twice refused. The buyers' action against the insurer was commenced while the sellers' action was pending. The trial court ruled that the action against the insurer was barred by *Code Civ. Proc. § 339(1)* on the ground that more than two years had elapsed between the insurer's rejection of the buyers' tender of defense and the time the complaint was filed, and granted the insurer's motion for summary judgment. Plaintiffs appealed.

Rejecting the contrary holding in *Central Bank v. Transamerica Title Ins. Co. (1978) 85 Cal. App. 3d 859, 865-866* , which the *Israelsky* court found to be unpersuasive, and adopting the reasoning in *Oil Base, Inc. v. Continental Cas. Co. (1969) 271 Cal. App. 2d 378, 389, 76 Cal. Rptr. 594* (discussed in *§ 143.63[3][b]*), the court of appeal reversed. Quoting *Oil Base*, the court said that in the case of an executory contract, if the parties do not mutually abandon and rescind it, it is optional with the plaintiff to sue immediately on defendant's breach of a continuing duty or to wait until the expiration of the time designated in the contract before commencing an action (*212 Cal. App. 3d 611, 616)* . The court said that an insurer's duty to defend is continuing and may be assumed at any time before the entry of a final judgment in the action on the underlying claim (*212 Cal. App. 3d 611, 616)* . The court held that in an action for breach of the duty to defend in a title insurance policy the statute of limitations does not commence to run until a final judgment in the underlying action has been entered (*212 Cal. App. 3d 611, 616, 623)* .

NOTE:

It was this latter statement that the Supreme Court in *Lambert v. Commonwealth Land Title Ins. Co. (1991) 53 Cal. 3d 1072, 1078, 282 Cal. Rptr. 445, 811 P.2d 737* , discussed *above*, found faulty and for which it substituted the rule that the action accrues when the tender of defense is refused, but the running of the statute of limitations is equitably tolled until the insurer's continuing duty to defend is terminated by a final judgment in the underlying action.

[b] Breach of Liability Insurer's Duty to Defend

The facts, procedural background, and holding of ***Lambert v. Commonwealth Land Title Ins. Co.*** *(1991) 53 Cal. 3d 1072, 282 Cal. Rptr. 445, 811 P.2d 737* , are discussed in *§ 143.63[3][a]*.

Oil Base, Inc. v. Continental Cas. Co. *(1969) 271 Cal. App. 2d 378, 76 Cal. Rptr. 594* , was an action by an insured manufacturer of oil base drilling mud against its liability insurer to recover expenses and fees expended by it in defense of a California action by a Venezuela company, which had purchased some of plaintiff's mud, for damages resulting from the spontaneous combustion of the mud while it was in a warehouse in Venezuela where it was stored by the purchaser. The insurer denied coverage on the ground that the policy applied only to accidents that occurred within the United States, its territories or possessions, or Canada, and subsequently refused to defend the action. Plaintiff employed its own counsel, defended the action, recovered a defense judgment that became final, and eight days later sued the insurer. The action against the insurer was filed some six and one-half years after the insurer denied coverage and more than five years after it had refused to defend the plaintiff. The trial court ruled that the action was barred by *Code Civ. Proc. § 337(1)*. The court of appeal reversed. After holding that the word "accident" was ambiguous and that under the facts of the case the policy covered the incident in question, the court said that, in those cases in which a continuing contract involves the rendering of benefits to the plaintiff before the date for final performance, the rule is that, in the case of a continuing executory contract, if the parties do not abandon it, it is optional with the plaintiff to sue immediately on the breach or to wait until the expiration of the time designated in the contract before commencing his or her action (*271 Cal. App. 2d 378, 389)* . In holding that the action was not barred by the statute of limitations and reversing the judgment for the insurer, the appellate court said the insurer's duty to defend was a continuing duty that it could have assumed at any time before final judgment, that the insurer could have indicated its willingness to appear

and defend at any time before trial, during trial, and at any stage before final judgment, and that until the underlying action was terminated by final judgment, the insurer had a duty that it could elect to assume (*271 Cal. App. 2d 378, 389-390)* . The court held that because the insurer's duty was a continuous one, the insured could elect to wait to sue until a final judgment had been entered and the duty to defend had ceased (*271 Cal. App. 2d 378, 390)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersInsurance LawClaims & ContractsGood Faith & Fair DealingGeneral OverviewInsurance LawClaims & ContractsGood Faith & Fair DealingDuty to Defend

California Points & Authorities

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 143 LIMITATION OF ACTIONS
PART II. FORMS

14-143 California Points & Authorities § 143.64

§ 143.64 Opposing General Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Amendment of Limitation Period Revived Lapsed Claim

[1] FORM

[*Caption. See § 143.31[1].*]

THE DEMURRER SHOULD BE OVERRULED BECAUSE THE AMENDMENT OF THE STATUTE OF LIMITATIONS, _____ [*specify code section, e.g.,* CODE OF CIVIL PROCEDURE SECTION 340.1] BY _____ [*specify legislation, e.g.,* STATS. 1986, ch. 914, § 1] REVIVED PLAINTIFF'S CLAIM.

Lapsed Claims Subject to Revival. The Legislature has the power to expressly revive time-barred civil common law causes of action (*Liebig v. Superior Court (1989) 209 Cal. App. 3d 828, 835, 257 Cal. Rptr. 574* ; *see also Lent v. Doe (1995) 40 Cal. App. 4th 1177, 47 Cal. Rptr. 2d 389* (following *Liebig* and rejecting contention that *Liebig* was wrongly decided)).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to a general demurrer to a complaint based on the bar of the statute of limitations when the statute was amended to enlarge the period of limitation and expressly provided that causes of action barred under the statute prior to amendment are revived [*see Liebig v. Superior Court (1989) 209 Cal. App. 3d 828, 835, 257 Cal. Rptr. 574]* . The form should be used only if the cause of action is based on common law. The Legislature does not appear to have power to revive a liability created by statute [*see Liebig v. Superior Court (1989) 209 Cal. App. 3d 828, 832-833, 257 Cal. Rptr. 574* ; *see § 143.65*].

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. In particular, counsel should pinpoint the language expressly reviving previously lapsed claims.

[b] Reply Memorandum

In an appropriate case, the points and authorities set out in *§ 143.65* may be used to reply to the contention supported by this form.

[3] Discussion of Authorities

[a] Lapsed Claims Subject to Revival

In ***Liebig v. Superior Court*** *(1989) 209 Cal. App. 3d 828, 257 Cal. Rptr. 574* , plaintiff brought an action for tort damages against defendant for alleged sexual molestation. The defendant demurred on the ground the complaint was time-barred. The plaintiff argued that *Code Civ. Proc. § 340.1*, enacted in 1986, extended the limitation period and expressly revived causes of action that were time barred under the former period of limitations but timely under the extension. The trial court rejected the defendant's argument that the Legislature could not effect such a revival and overruled the demurrer. The defendant sought review by extraordinary writ.

The court of appeal summarily denied the writ, but the Supreme Court granted review and retransferred the matter, directing the court of appeal to issue an alternative writ. The court of appeal did so, but ultimately denied the petition. The court first noted that the statute of limitations originally barred the action in 1985, but that *Code Civ. Proc. § 340.1*, enacted in 1986, expressly provided that it applied to all actions commenced on or after January 1, 1987, including those that would be barred under prior law (*209 Cal. App. 3d 828, 830-831)* . The court went on to note that federal law allows the Legislature to revive cause of action after the statute has expired unless the passage of the statute of limitations creates a prescriptive property right, such as title in adverse possession (*209 Cal. App. 3d 828, 831-832)* . The court recognized that the California Supreme Court has held that the Legislature cannot revive a cause of action once the original period has elapsed, but pointed out that all these cases involved a limitations period for a liability created by statute, and not by the common law (*209 Cal. App. 3d 828, 832)* . The court found the uncertainty of the rule heightened by the Supreme Court's dicta in *Douglas Aircraft Co. v. Cranston (1962) 58 Cal. 2d 462, 465, 24 Cal. Rptr. 851, 374 P.2d 819* , that unless the statute expressly provides to the contrary an enlargement of the statute of limitations applies to matters pending but not already barred (*209 Cal. App. 3d 828, 833)* . Noting that the Supreme Court in *Douglas Aircraft* had expressly declined to address the issue (*209 Cal. App. 3d 828, 833)* , the court adopted the distinction between statutory and common law causes of action, and held that the Legislature has power to expressly revive time-barred civil common law causes of action (*209 Cal. App. 3d 828, 835)* .

In ***Lent v. Doe*** *(1995) 40 Cal. App. 4th 1177, 47 Cal. Rptr. 2d 389* , defendant demurred to an action for childhood sexual abuse, arguing that the complaint was barred by the statute of limitations. The trial court sustained the demurrer, rejecting plaintiff 's theory of delayed discovery under *Code Civ. Proc. § 340.1* on the basis that the plaintiff know of the wrongfulness of the defendant's conduct when it occurred and suffered appreciable injury at that time and that the period of limitation expired in 1981. The court dismissed the action, and plaintiff appealed.

The court of appeal reversed, holding that *Code Civ. Proc. § 340.1* revived plaintiff 's cause of action and that plaintiff timely filed the action under Section 340.1. The court initially addressed defendant's argument that *Liebig v. Superior Court (1989) 209 Cal. App. 3d 828, 257 Cal. Rptr. 574* , was wrongfully decided. The court stated that it reviewed the cases discussed in *Liebig* and found *Liebig*'s conclusions regarding the power of the Legislature to revive lapsed claims to be supported. Failing to be persuaded that *Liebig* was wrongly decided, the court followed its rule that the Legislature has the power retroactively to revive a civil cause of action time-barred under the former statute of limitations (*40 Cal. App. 4th 1177, 1184)* .

[4] Additional Authorities

[a] Lapsed Claims Subject to Revival

The defendant in *Nelson v. Flintkote Co. (1985) 172 Cal. App. 3d 727, 218 Cal. Rptr. 562* , demurred to a complaint for damages for asbestos-related injuries on the ground it was time-barred. The trial court sustained the demurrer and dismissed the case. The court of appeal reversed, holding that the plaintiff's cause of action was revived by the enactment of the special statute of limitations for asbestos claims, *Code Civ. Proc. § 340.2*. The court noted that a statute of limitations for a common law tort is a procedural rule not affecting vested rights (*172 Cal. App. 3d 727, 733)* . The court also noted that *Chambers v. Gallagher (1918) 177 Cal. 704, 171 P. 931* , to the contrary, involved liabilities created by statute, which are sometimes deemed substantive rather than statutory (*172 Cal. App. 3d 727, 733 n.2*).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsExtension & Revival

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CHAPTER 143 LIMITATION OF ACTIONS
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14-143 California Points & Authorities § 143.65

§ 143.65 Reply Memorandum Supporting General Demurrer to Complaint [Code Civ. Proc. § 430.10]--Bar of Statute of Limitations [Code Civ. Proc. § 430.10(e)]--Amendment of Limitation Period Does Not Revive Lapsed Claims

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*]	)	REPLY MEMORANDUM OF POINTS AND AU-
Plaintiff,	)	THORITIES IN SUPPORT OF GENERAL DEMUR-
vs.	)	RER TO COMPLAINT OF _____
_____ [*name*],	)	[*name*]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		Trial Date: None set

_____

AN AMENDMENT OF A STATUTE OF LIMITATIONS IS PRESUMED NOT TO REVIVE LAPSED CLAIMS UNLESS THE LEGISLATURE PROVIDES FOR REVIVAL IN UNMISTAKABLE TERMS. THE AMENDMENT OF _____ [*specify code section*], BY STATS. _____ [*number*], CH. _____ [*number*], OPERATIVE _____ [*date*], LIBERALIZING THE STATUTE OF LIMITATIONS APPLICABLE TO CLAIMS BASED ON _____ [*specify subject matter*], DID NOT REVIVE CLAIMS THAT LAPSED BEFORE _____ [*date*].

Claims Generally Not Revived by Amendment. A legislative change in the statute of limitations is presumed not to revive lapsed claims unless the amending act expressly mandates such an effect. If the Legislature wishes to revive lapsed claims, it should so declare in unmistakable terms (*Krupnick v. Duke Energy Morro Bay (2004) 115 Cal. App. 4th 1026, 1030, 9 Cal. Rptr. 3d 767* ; *Douglas Aircraft Co. v. Cranston (1962) 58 Cal. 2d 462, 466, 24 Cal. Rptr. 851, 374 P.2d 819* ; *David A. v. Superior Court (1993) 20 Cal. App. 4th 281, 286, 24 Cal. Rptr. 2d 537*). Otherwise, such claims will be left to lie in repose. If an attempt to assert them is met by timely interposition of a defense of limitations, they will be dismissed (*David A. v. Superior Court (1993) 20 Cal. App. 4th 281, 286, 24 Cal. Rptr. 2d 537*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in a reply memorandum supporting a general demurrer based on the statute of limitations. The basis of the reply is that the legislature did not clearly revive previously barred actions, and that therefore those actions were not revived.

In an appropriate case, these points and authorities may be submitted in reply to the contention supported by the points and authorities set out in *§ 143.64*.

[3] Discussion of Authorities

[a] Claims Generally Not Revived by Amendment

In ***Krupnick v. Duke Energy Morro Bay*** *(2004) 115 Cal. App. 4th 1026, 9 Cal. Rptr. 3d 767* , a personal injury action was filed on January 8, 2003, and alleged that, on January 26, 2001, appellant fell on defendant's premises due to the pooling of water and other material on the floor. In affirming the dismissal, the court held that the one-year statute of limitations of former Code Civ. Proc. § 340(3) applied. The two year statute of limitations in *Code Civ. Proc. § 335.1* became effective on January 1, 2003 and did not operate retroactively to revive the lapsed claim. The plaintiff appealed.

The appellate court held that *Code Civ. Proc. § 335.1* does not expressly provide that it applies retroactively to claims already time-barred under former Code Civ. Proc. § 340(3). Even though the same act that added § 335.1 also added *Code Civ. Proc. § 340.10*, which provided for retroactivity, that statute expressly singled out only one class of plaintiffs, September 11 terrorist victims, as entitled to the retroactive application of *Code Civ. Proc. § 335.1*. Appellant was not a member of that class, and pursuant to general principles of statutory construction, § 335.1 could not be construed as applying retroactively to him. As a rule of statutory construction, it is established that an enlargement of limitations operates prospectively unless the statute expressly provides otherwise. The reason for this rule is a judicial perception of unfairness in reviving a cause after the prospective defendant has assumed its expiration and has conducted his affairs accordingly (*115 Cal. App. 4th 1026, 1029)* . Under the familiar rule of construction, *expressio unius est exclusio alterius*, where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed. Here the Legislature specified a single exception for "9/11" terrorist victims to the general rule that statutes operate prospectively. It follows that other exceptions should not be implied or presumed (*115 Cal. App. 4th 1026, 1030)* .

In ***Douglas Aircraft Co. v. Cranston*** *(1962) 58 Cal. 2d 462, 24 Cal. Rptr. 851, 374 P.2d 819* , the plaintiff sought declaratory relief against the State Controller to determine whether it was required to pay some unpaid wage claims to the state under the Uniform Disposition of Unclaimed Property Act, *Code Civ. Proc. § 1500 et seq.* The statute of limitations on the wage claims had run before the Act was enacted, and plaintiff claimed that due process precluded the Legislature from abrogating the defense of the statute of limitations after it had run. The trial court held that that plaintiff could not constitutionally be required to pay the claims to the Controller, and the Controller appealed.

The Supreme Court affirmed, but declined to reach the constitutional issue. The Court acknowledged the Controller's citation of *Chase Securities Corp. v. Donaldson (1945) 325 U.S. 304, 315-316, 65 S. Ct. 1137, 89 L. Ed. 1628,*

1636-1637 , and *Campbell v. Holt (1885) 115 U.S. 620, 6 S. Ct. 209, 29 L. Ed. 483* , which had found no federal constitutional impediment to revival of lapsed causes of action. However, the constitutional issues did not have to be addressed unless it clearly appeared that the Act provided for retroactive abrogation of the defense of the statute of limitations (*58 Cal. 2d 462, 464-465)* . The Court then cited *Code Civ. Proc. § 3*, which declares that no part of that code is retroactive unless so expressly declared. The Court also noted the general rule that amendments enlarging the statute of limitations period apply to matters pending but not yet barred (*58 Cal. 2d 462, 465)* . The Court went on, however, to recognize that once the statute has run, it is important to allow potential defendants to rely on it in conducting their affairs and concluded that had the Legislature intended the Act to apply retroactively, it would have expressed itself in unmistakable terms (*58 Cal. 2d 462, 465-466)* . The Court did not find such an unmistakable expression in the Act, and held that the California rule against retroactivity applied (*58 Cal. 2d 462, 466-468)* .

David A. v. Superior Court *(1993) 20 Cal. App. 4th 281, 24 Cal. Rptr. 2d 537* , involved claims for injuries based on childhood sexual abuse that occurred some 18 years before the action was filed in 1992. The defendants demurred on the ground the action was barred by the statute of limitations. The trial court overruled the demurrer, and the defendants sought review by writ of mandate.

The court of appeal reviewed the history of *Code Civ. Proc. § 340.1* and the instant case. The court found that the plaintiff's claims were first barred when she reached her 19th birthday in 1986, but were revived when the original Section 340.1 took effect on January 1, 1987. The claims lapsed again when plaintiff turned 21. The question before the court was whether they were revived again on January 1, 1991, when Section 340.1 was again amended to further liberalize the period of limitation (*20 Cal. App. 4th 281, 284-285)* . The court recognized the Legislature's power to revive a lapsed claim, but stated that that did not mean that every liberalization of a statute of limitations will revive lapsed claims. Indeed, the court further recognized that in a particular case, retroactivity could so gravely infringe settled rights as to violate due process, and that revival of lapsed claims may be unfair and dishonest (*20 Cal. App. 4th 281, 285)* . The court stated that, accordingly, a legislative change in the statute of limitations is presumed not to revive lapsed claims unless the amending act expressly mandate such an effect. If the Legislature wishes to revive lapsed claims, it should so declare in unmistakable terms. Otherwise, such claims will be left to lie in repose, and if an attempt to assert them is met by timely interposition of a defense of limitations, they will be dismissed (*20 Cal. App. 4th 281, 286)* . Finding that the Legislature did not intend to revive lapsed claims, the court issued the writ directing the trial court to vacate the order overruling the demurrer and to enter an order sustaining the demurrer without leave to amend (*20 Cal. App. 4th 281, 286-289)* .

David A. cannot be relied on to avoid the effect of *Code Civ. Proc. § 340.1*. The legislature amended Section 340.1 in 1994 Stats., ch. 288, to expressly provide that the 1990 amendments of the limitation period are intended to apply to all actions commenced on or after January 1, 1991, including any action barred by the period of limitation in effect prior to January 1, 1991, thereby reviving those causes of action that had lapsed under prior law [*see Code Civ. Proc. § 340.1(r), (s)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsExtension & Revival

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 145 LIS PENDENS

14-145 California Points & Authorities 145.syn

§ 145.syn Synopsis to Chapter 145: LIS PENDENS

§ 145.01 Scope of Chapter

§ 145.02 Governing Statutes

§ 145.03 Page Limits on Points and Authorities

§ 145.04 Using the Forms to Build a Draft Memorandum

§ 145.05 Related Pleading and Practice Forms

§§ 145.06-145.19 [Reserved]

§ 145.20 Supporting Motion to Expunge Notice of Lis Pendens [Code Civ. Proc. § 405.30] and for Attorney's Fees and Costs [Code Civ. Proc. § 405.38]--Action Does Not Affect Title to, or Right to Possession of, Specific Real Property or Use of Easement Identified in Pleading [Code Civ. Proc. §§ 405.4, 405.31]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[c] Related Pleading and Practice Forms

[d] Special Issues Relating to Status of Creditors' Suits

[3] Discussion of Authorities

[a] Expungement Is Proper if Pleading Does Not Contain Real Property Claim

[b] Complaint for Money Damages Does Not Relate to Real Property

[4] Additional Authorities

[a] Expungement Is Proper if Pleading Does Not Contain Real Property Claim

[b] Complaint for Money Damages Does Not Relate to Real Property

§ 145.21 Supporting Motion to Expunge Notice of Lis Pendens [Code Civ. Proc. § 405.30] and for Attorney's Fees and Costs [Code Civ. Proc. § 405.38]--Claim on Which Notice of Lis Pendens Is Based Lacks Probable Validity [Code Civ. Proc. § 405.32]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Motion to Expunge Lis Pendens Notice

§ 145.22 Supporting Motion to Expunge Notice of Lis Pendens [Code Civ. Proc. § 405.30] and for Attorney's Fees and Costs [Code Civ. Proc. § 405.38]--Undertaking Will Secure Adequate Relief for Claimant [Code Civ. Proc. § 405.33]

[1] FORM

[2] Comments

[a] Use of Form

[b] Attorney's Fees

[c] Opposing Points and Authorities

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Bond Adequately Secures Relief

[b] Amount of Bond in Court's Discretion

[4] Additional Authorities

[a] Amount of Bond in Court's Discretion

§ 145.23 Supporting Motion to Expunge Notice of Lis Pendens [Code Civ. Proc. § 405.30] and for Attorney's Fees and Costs [Code Civ. Proc. § 405.38]--Failure to File and Serve Notice [Code Civ. Proc. § 405.23]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Lis Pendens Notice Void and Invalid

[b] Expungement Appropriate Remedy

§ 145.24 Supporting Motion to Require Claimant to Give Undertaking as Condition of Maintaining Lis Pendens [Code Civ. Proc. § 405.34] and for Attorney's Fees and Costs [Code Civ. Proc. § 405.38]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Undertaking as Condition of Maintaining Lis Pendens

§ 145.25 Opposing Motion to Expunge Notice of Lis Pendens [Code Civ. Proc. § 405.30] and for Attorney's Fees and Costs [Code Civ. Proc. § 405.38]--Action Affects Title to, or Right to Possession of, Specific Real Property or Use of Easement Identified in Pleading [Code Civ. Proc. §§ 405.4, 405.31]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Special Issues Relating to Status of Creditors' Suits

[3] Discussion of Authorities

[a] Leasehold Affects Right of Possession of Real Property

[b] Fraudulent Conveyance Action Constitutes Real Property Claim

[c] Right of Possession Includes Right of Access and Occupation

[d] Lis Pendens May be Recorded Against Dominant Tenement in Easement Dispute

[4] Additional Authorities

[a] Fraudulent Conveyance Action Constitutes Real Property Claim

§ 145.26 Opposing Motion to Expunge Notice of Lis Pendens [Code Civ. Proc. § 405.30] and for Attorney's Fees and Costs [Code Civ. Proc. § 405.38]--Claim on Which Notice of Lis Pendens Is Based Has Probable Validity [Code Civ. Proc. §§ 405.3, 405.32]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Real Property Claim Has Probable Validity

§ 145.27 Opposing Motion to Expunge Notice of Lis Pendens [Code Civ. Proc. § 405.30] and for Attorney's Fees and Costs [Code Civ. Proc. § 405.38]--Undertaking Will Not Secure Adequate Relief for Claimant [Code Civ. Proc. § 405.33]

[1] FORM

[2] Comments

[a] Use of Form

[b] Attorney's Fees

[3] Additional Authorities

[a] Undertaking Cannot Adequately Secure Relief

§ 145.28 Supporting Contention That Notice of Lis Pendens Does Not Protect Interest Not Alleged in Underlying Action

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Interest in Real Property Not Protected if Pleadings Do Not Indicate Nature and Extent of Relief Sought

§ 145.29 Supporting Contention That Expungement of Lis Pendens Does Not Affect Judgment Lien

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Expungement of Lis Pendens Does Not Affect Judgment Lien

§ 145.30 Supporting Contention That Moving Party Is Entitled to Attorneys' Fees and Costs [Code Civ. Proc. § 405.38] Despite Withdrawal of Lis Pendens

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Withdrawal of Lis Pendens Does Not Preclude Recovery of Attorneys' Fees and Costs

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CHAPTER 145 LIS PENDENS
PART I. INTRODUCTION

14-145 California Points & Authorities § 145.01

§ 145.01 Scope of Chapter

This chapter contains forms of points and authorities relating to notices of lis pendens. It includes the following types of forms:

- Points and authorities for use in supporting [*see §§ 145.20*-145.23] and opposing [*see §§ 145.25*-145.27] notices of motion to expunge a lis pendens notice.

- Points and authorities supporting a motion to require a claimant to post an undertaking as a condition of maintaining a lis pendens [*see § 145.24*].

- Points and authorities in support of contentions (1) that a notice of lis pendens does not protect an interest not alleged in the underlying action [*see § 145.28*], (2) that expungement of a lis pendens does not affect a judgment lien [*see § 145.29*], and (3) that a moving party is entitled to attorney's fees and costs [*see § 145.30*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedureRemediesGeneral OverviewCivil ProcedureRemediesLis PendensGeneral OverviewCivil ProcedureRemediesLis PendensNoticesCivil ProcedureRemediesLis PendensTerminations

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14-145 California Points & Authorities § 145.02

§ 145.02 Governing Statutes

Notices of lis pendens are governed generally by *Code Civ. Proc. § 405 et seq.* The requirements for expunging a notice of lis pendens and other relief are outlined in *Code Civ. Proc. § 405.30 et seq.*, and the provision for expunging a notice after the giving of a sufficient undertaking is contained in *Code Civ. Proc. § 405.33*. An award of attorney's fees to the prevailing party when a motion is granted or denied is governed by *Code Civ. Proc. § 405.38*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedureRemediesGeneral OverviewCivil ProcedureRemediesLis PendensGeneral Overview

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14-145 California Points & Authorities § 145.03

§ 145.03 Page Limits on Points and Authorities

One of the more significant drafting requirements to keep in mind are page limits; supporting and opposing memoranda must not exceed 15 pages, or 20 pages in summary judgment or summary adjudication proceedings. A reply or closing memorandum may not exceed 10 pages. Exhibits, declarations, attachments, a table of contents, a table of authorities, and the proof of service are excluded from these page limits [*Cal. Rules of Ct., Rule 3.1113(d)*]. Any party must obtain leave of court to file a longer memorandum [*see Cal. Rules of Ct., Rule 3.1113(e)*]. These and other drafting requirements are discussed in further detail in Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedureRemediesGeneral OverviewCivil ProcedureRemediesLis PendensGeneral Overview

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14-145 California Points & Authorities § 145.04

§ 145.04 Using the Forms to Build a Draft Memorandum

The forms included in this chapter are designed to be combined with other points and authorities to form a complete memorandum. For a detailed discussion on how to select and use the forms in the publication to build a draft memorandum and complete the draft, with detailed discussion of all drafting requirements and strategic or stylistic considerations, see Ch. 1, *Writing Legal Memoranda and Briefs* . For a skeletal form of memorandum for use in creating a properly formatted outline in which to compile relevant forms from this publication, see also Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureRemediesGeneral OverviewCivil ProcedureRemediesLis PendensGeneral Overview

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14-145 California Points & Authorities § 145.05

§ 145.05 Related Pleading and Practice Forms

For a discussion of the statutory requirements for giving a notice of lis pendens and the procedure for expunging a notice of lis pendens, as well as other related forms, see California Forms of Pleading and Practice, Ch. 348, *Lis Pendens* (Matthew Bender). For further discussions of lis pendens in specific situations, see the following chapters in that set:

- Ch. 11, *Adjoining Landowners*.
- Ch. 13, *Adverse Possession*.
- Ch. 62, *Attachment*.
- Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake*.
- Ch. 247, *Eminent Domain and Inverse Condemnation*.
- Ch. 270, *Fraudulent Conveyances*.
- Ch. 361, *Mechanics' Liens*.
- Ch. 397, *Partition*.
- Ch. 482, *Quieting Title*.
- Ch. 555, *Trust Deeds and Real Property Mortgages*.

Legal Topics:

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

Civil ProcedureRemediesGeneral OverviewCivil ProcedureRemediesLis PendensGeneral OverviewCivil ProcedureRemediesLis PendensNoticesCivil ProcedureRemediesLis PendensTerminations

California Points & Authorities

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 145 LIS PENDENS
PART I. INTRODUCTION

14-145 California Points & Authorities §§ 145.06-145.19

[Reserved]

§§ 145.06[Reserved]

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 145 LIS PENDENS
PART II. FORMS

14-145 California Points & Authorities § 145.20

§ 145.20 Supporting Motion to Expunge Notice of Lis Pendens [Code Civ. Proc. § 405.30] and for Attorney's Fees and Costs [Code Civ. Proc. § 405.38]--Action Does Not Affect Title to, or Right to Possession of, Specific Real Property or Use of Easement Identified in Pleading [Code Civ. Proc. §§ 405.4, 405.31]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff [and Cross Defendant],	)	NO. _____
vs.	)	MEMORANDUM OF POINTS AND AUTHORITIES SUPPORTING MOTION TO EXPUNGE NOTICE OF LIS PENDENS AND FOR ATTORNEY'S FEES AND COSTS
_____ [*name*],	)	[Limited Civil Case]
Defendant [and Cross Complainant].	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Discovery Cut-Off: _____
	)	Motion Cut-Off: _____
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

_____ [DEFENDANT'S *or* CROSS DEFENDANT'S] MOTION TO EXPUNGE THE NOTICE OF LIS PENDENS SHOULD BE GRANTED BECAUSE THE _____ [COMPLAINT *or* CROSS COMPLAINT] DOES NOT AFFECT TITLE TO, OR THE RIGHT TO POSSESSION OF, SPECIFIC REAL PROPERTY OR THE USE OF AN EASEMENT IDENTIFIED IN THE _____ [COMPLAINT *or*

CROSS COMPLAINT].

A. Expungement Is Proper if Pleading Does Not Contain Real Property Claim. The court must order that a notice of pendency of an action be expunged if the court finds that the pleading on which the notice is based does not affect title to, or right of possession of, specific real property or the use of an easement identified in the pleading (*Code Civ. Proc. §§ 405.4, 405.30, 405.31*; *see Westbrook v. Superior Court (1986) 176 Cal. App. 3d 703, 222 Cal. Rptr. 317*).

B. Burden of Proof. The claimant has the burden of proving that the pleading on which the notice is based does contain a real property claim (*Code Civ. Proc. § 405.30*).

[*Optional*] **C. Complaint for Money Damages Does Not Relate to Real Property.** A lis pendens must be expunged when the complaint seeks only money damages and does not allege a lien on real property even though real property is involved in the dispute (*La Paglia v. Superior Court (1989) 215 Cal. App. 3d 1322, 264 Cal. Rptr. 63* ; *Wardley Development, Inc. v. Superior Court (1989) 213 Cal. App. 3d 391, 262 Cal. Rptr. 87* ; *see Campbell v. Superior Court (2005) 132 Cal. App. 4th 904, 918-919, 34 Cal. Rptr. 3d 68* ; *Lewis v. Superior Court (1994) 30 Cal. App. 4th 1850, 37 Cal. Rptr. 2d 63* ; *BGJ Associates v. Superior Court (1999) 75 Cal. App. 4th 952, 971-972, 89 Cal. Rptr. 2d 693*).

D. Attorney's Fees and Costs. When an order is made granting a motion to expunge a notice of pendency of an action, the order must direct that the prevailing party be awarded reasonable attorney's fees and costs, unless the court finds that the other party acted with substantial justification or that other circumstances make the imposition of attorney's fees and costs unjust (*Code Civ. Proc. § 405.38*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for [Cross] Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion to expunge a notice of lis pendens when the complaint or cross complaint does not affect either title to, or the right to possession of, specific real property, or the use of an easement that is identified in the pleading [*Code Civ. Proc. §§ 405.4, 405.30, 405.31*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Opposing Points and Authorities

The points and authorities set out in *§ 145.25* may be used in an appropriatecase to oppose a motion for expungement supported by this memorandum.

[c] Related Pleading and Practice Forms

For a discussion of the expungement of notices of lis pendens and forms of notices of motions to expunge these notices, see California Forms of Pleading and Practice, Ch. 348, *Lis Pendens* (Matthew Bender).

[d] Special Issues Relating to Status of Creditors' Suits

The cases supporting Optional Paragraph C of this form reflect the majority view under the former lis pendens statute [*see* former Code Civ. Proc. § 409 et seq., repealed as of January 1, 1993] regarding the status of creditors' suits as claims affecting real property. However, in a case decided under the current lis pendens law, the California Supreme Court refused to extend that line of decisions to a fraudulent conveyance cause of action [*see Kirkeby v. Superior Court (2004) 33 Cal. 4th 642, 648-652, 15 Cal. Rptr. 3d 805, 93 P.3d 395* ; *Hunting World, Inc. v. Superior Court (1994) 22 Cal. App. 4th 67, 26 Cal. Rptr. 2d 923]* . Because it was not at issue in *Kirkeby*, the Supreme Court did not decide whether a claim that seeks to impose a constructive trust or equitable lien may be a basis for a lis pendens [*Kirkeby v. Superior Court (2004) 33 Cal. 4th 642, 650 n.7, 15 Cal. Rptr. 3d 805, 93 P.3d 395]* . For additional coverage of these issues, see *§ 145.20[3][b]*.

[3] Discussion of Authorities

[a] Expungement Is Proper if Pleading Does Not Contain Real Property Claim

The court may not order an undertaking as a condition to expungement if the court finds the pleading does not contain a real property claim [*Code Civ. Proc. § 405.31*].

The court of appeal in ***Westbrook v. Superior Court*** *(1986) 176 Cal. App. 3d 703, 222 Cal. Rptr. 317* , upheld the expungement of a lis pendens in an action against a promissor on his alleged promise to leave all his real and personal property by will to the promissee. The court's affirmance was based on the ground that the action did not affect title to, or right of possession of, the real property in question (*176 Cal. App. 3d 703, 710)* . The court noted that a promisee may have a constructive trust imposed (and file a lis pendens) if (1) specific property is identified or identifiable as the subject of the promise to make the will and (2) the promisor has no right to consume that property for maintenance and support or otherwise dispose of it during his or her lifetime. However, this case involved only a general promise and would be binding, if at all, only with respect to property owned by the promisor at death (*176 Cal. App. 3d 703, 711-715)* .

[b] Complaint for Money Damages Does Not Relate to Real Property

As mentioned in *§ 145.20[2][d]*, the cases supporting Optional Paragraph C (discussed *below*) reflect the majority view under the former lis pendens statute [*see* former Code Civ. Proc. § 409 et seq.]. The issue in most of these cases was whether a lis pendens was appropriate when a creditor sought to impose an equitable lien or constructive trust on real property in order to recover on a debt, for example, by alleging that the real property was purchased with funds that the debtor fraudulently transferred to avoid paying the creditor. The question under the prior law was whether a notice of lis pendens could properly be filed in these creditors' suits because they affected "title to or right of possession of" real property [*cf. Code Civ. Proc. § 405.4*].

In ***La Paglia v. Superior Court*** *(1989) 215 Cal. App. 3d 1322, 264 Cal. Rptr. 63* , the complaint sought to impose a constructive trust on property allegedly purchased with misappropriated money. A lis pendens was recorded on the property. The trial court refused to expunge the lis pendens, and defendant sought a writ of mandate.

The court of appeal granted the writ. It held that the complaint did not affect title to or possession of real property. The purpose of the constructive trust was merely to secure payment of a debt and therefore the action for a constructive trust did not affect title to the property (*215 Cal. App. 3d 1322, 1329)* .

In ***Wardley Development, Inc. v. Superior Court*** *(1989) 213 Cal. App. 3d 391, 262 Cal. Rptr. 87* , a bank filed a

creditor's suit against Wardley, who was allegedly the transferee of assets from Chuang, against whom the bank had a money judgment. The bank recorded a lis pendens on Wardley's real property. Wardley moved to expunge the lis pendens. The trial court refused to expunge, and Wardley sought a writ of mandate.

The court of appeal issued the writ. It held that when the beneficial interest claimed in the real property was solely to secure a claim for money damages, the action did not affect title to the real property. The lien of the creditor's suit was not entitled to be perfected by recording a lis pendens. The purpose of a lis pendens is to give notice of the action, not to indirectly obtain lien priority that cannot be obtained directly (*213 Cal. App. 3d 391, 394-399)* .

A different result was reached in ***Kirkeby v. Superior Court*** *(2004) 33 Cal. 4th 642, 15 Cal. Rptr. 3d 805, 93 P.3d 395* . The facts and procedural background of *Kirkeby* are discussed in *§ 145.25[3][b]*. In *Kirkeby*, the Supreme Court held that a fraudulent conveyance claim affects title to or the right to possession of specific real property and therefore supports the recording of a lis pendens. The Court explained that a fraudulent conveyance claim requesting avoidance of a transfer or obligation pursuant to *Civ. Code § 3439.07(a)(1)* may result in the voiding ofa transfer of title of specific real property. By definition, the voiding of a transfer of real property affects title to or possession of real property. Therefore, the Court concluded that a fraudulent conveyance action seeking avoidance of a transfer under *Civ. Code § 3439.07(a)(1)* clearly "affects title to, or the right to possession of" real property and is a real property claim for the purposes of the lis pendens statutes (*33 Cal. 4th 642, 648)* . The Court expressly did not reach the question of whether a claim seeking to impose a constructive trust or equitable lien may be a basis for a lis pendens (*33 Cal. 4th 642, 650 n.7*).

The Court in *Kirkeby* held that the plaintiff adequately pled a fraudulent conveyance claim by alleging that the defendants transferred title of certain properties with the intent to defraud. The plaintiff asked the court to void the transfers of both properties to the extent necessary to satisfy the claims in her complaint. As such, her fraudulent conveyance claim, if successful, would affect title to specific real property. Accordingly, the Court held that the plaintiff's lis pendens was improperly expunged (*33 Cal. 4th 642, 650-651)* .

For points and authorities reflecting *Kirkeby*, and for further discussion, see *§ 145.25*.

The Supreme Court in *Kirkeby* cited with approval ***Hunting World, Inc. v. Superior Court*** *(1994) 22 Cal. App. 4th 67, 26 Cal. Rptr. 2d 923* , which was the first case to consider a creditor's suit after the enactment of the current lis pendens law [*see Code Civ. Proc. § 405 et seq.*]. The facts and procedural background of *Hunting World* are discussed in *§ 145.25[3][b]*. In *Hunting World*, the court of appeal held that a creditor's action to set aside as fraudulent a debtor's transfer of real property, brought under the Uniform Fraudulent Transfer Act [*Civ. Code § 3439 et seq.*], is a "real property claim" within the meaning of *Code of Civil Procedure Section 405.4* because it is a cause of action that would, if meritorious, affect title to real property (*22 Cal. App. 4th 67, 72)* . Further, the *Hunting World* court found that an extension of the majority line of cases under the former law (1) was not necessary because the current lis pendens law is designed to curb abuses of lis pendens, and (2) was not warranted because the clear wording of *Code Civ. Proc. § 405.31* covers a claim to set aside a conveyance of real property (*22 Cal. App. 4th 67, 73)* . The court acknowledged, however, that most of those cases involved constructive trust or equitable lien causes of action that were appended to lawsuits that centered on money damages; thus, those courts could conclude that the actions primarily sought money damages and did not affect title to real property. By contrast, the uniform fraudulent transfer action covered by the lis pendens in *Hunting World* affected only title to real property (*22 Cal. App. 4th 67, 73-74)* .

For points and authorities reflecting *Hunting World,* and for further discussion, see *§ 145.25*.

After the decision in *Hunting World*, the court of appeal in ***Lewis v. Superior Court*** *(1994) 30 Cal. App. 4th 1850, 37 Cal. Rptr. 2d 63* , addressed the effect of the revisions to the lis pendens law on the use of lis pendens in constructive trust cases. In that case, purchasers of real property sought expungement of a federal lis pendens filed in an action alleging that the seller of the property had originally purchased the property with misappropriated funds. The trial court

denied plaintiffs' motion for summary judgment and for expungement of the lis pendens.

The court of appeal granted plaintiffs petition for a peremptory writ. It held that the lis pendens was a nullity, because all of the claims supporting it involved alleged fraud and conversion and attempts to assert a constructive trust, not disputes over title (*30 Cal. App. 4th 1850, 1861-1862)* . The fact that one of the claims was labelled "fraudulent conveyance" was irrelevant, because there was no allegation of a conveyance of real property. The complaint alleged that the original owner of the property used misappropriated money to purchase not to convey the property (*30 Cal. App. 4th 1850, 1864-1865)* .

The court found that the revisions to the lis pendens statute did not overrule the majority line of cases precluding the use of lis pendens in constructive trust cases (*30 Cal. App. 4th 1850, 1863-1864)* . Further, it found no reason to believe that the Legislature intended to change the scope of the term "real property claim." It concluded that in light of a State Bar Report, which stated that the term "neither includes nor excludes claims of constructive trust or equitable lien" and which suggested that the area should be left for further judicial development, the fact the Legislature made no definitional change in the statute created a strong presumption that it was satisfied with the restrictive interpretation applied by the majority line of decisions (*30 Cal. App. 4th 1850, 1863-1864)* .

In ***BGJ Associates v. Superior Court*** *(1999) 75 Cal. App. 4th 952, 89 Cal. Rptr. 2d 693* , the complaint had some causes of action that would support the imposition of a constructive trust based on a breach of fiduciary duty in the acquisition of property. Plaintiffs alleged that defendants, in breach of their fiduciary duties, wrongfully acquired certain properties for themselves, to the exclusion of plaintiffs. Plaintiffs asserted multiple causes of action, sought imposition of a constructive trust, and recorded a lis pendens. The trial court expunged the lis pendens notice on the ground that plaintiffs' pleading did not contain a real property claim within the meaning of the lis pendens statute. Plaintiffs petitioned for a writ of mandate to compel the trial court to vacate its expungement of the lis pendens notice.

The court of appeal held that the trial court properly expunged the lis pendens. For purposes of the lis pendens statute, this action, against partners and a third party, for usurping to themselves the partnership's opportunity to purchase the disputed property, should be interpreted as primarily for money damages even though it included a request to impose a constructive trust on the property. The lis pendens was not available in what was essentially a fraud action seeking moneydamages with additional allegations urged to support the equitable remedies of a constructive trust (*75 Cal. App. 4th 952, 971-972)* .

In reaching this result, the court distinguished the line of cases that includes *La Paglia* and *Lewis*. It found the case at issue was unlike any of those cases because they all involved situations in which the action was essentially for money (*75 Cal. App. 4th 952, 968)* , while here plaintiffs did not seek a constructive trust remedy "solely" as "collateral" for money damages. In part the plaintiffs sought to be awarded title to the same specific real property, the property they bargained for, which was the subject of the same wrongful conduct giving rise to the constructive trust remedy in the first place. However, the complaint had 11 causes of action. Only the tenth and eleventh causes of action focused narrowly on imposition of a constructive trust. The other causes of action sought compensatory and punitive damages on fraud and tort theories, or a combination of compensatory and punitive damages with imposition of a constructive trust. The plaintiffs argued that at this pleading stage they were not required to elect between inconsistent remedies, but the court found it was apparent that, depending on market conditions, circumstances affecting the particular parcel of property, or other tactical considerations, plaintiffs could ultimately decide, if they prevailed, that they preferred to be compensated by money damages rather than transfer of title to the property. The question presented was whether plaintiffs were entitled to maintain a lis pendens on the property in the meantime. The court concluded that in the particular circumstances of this case they could not (*75 Cal. App. 4th 952, 971)* .

The court of appeal in *Campbell v. Superior Court (2005) 132 Cal. App. 4th 904, 34 Cal. Rptr. 3d 68* followed the majority line of cases in holding that claims seeking imposition of a constructive trust and equitable lien did not support the recording of a lis pendens. In *Campbell*, the plaintiff, as trustee of a trust established by his now-deceased father,

filed a complaint alleging that the defendant exercised undue influence against the father in persuading him to expend approximately $200,000 in trust funds to pay for the remodeling of the defendant's house. The plaintiff requested the imposition of a constructive trust and an equitable lien on the defendant's house and recorded a lis pendens on the house. In affirming the expungement of the lis pendens, the court of appeal agreed with the cases holding that to allow a party to record a lis pendens where the party seeks only "to freeze the real property as a res from which to satisfy a money judgment" is not consistent with the history and purpose of the lis pendens statutes (*132 Cal. App. 4th 904, 918-919)* .

[4] Additional Authorities

[a] Expungement Is Proper if Pleading Does Not Contain Real Property Claim

The facts and procedural background of *Kendall-Brief Co. v. Superior Court (1976) 60 Cal. App. 3d 462, 131 Cal. Rptr. 515* , are discussed in *§ 145.25[3][c]*. The court of appeal denied a petition for a writ of mandate commanding the superior court to expunge the lis pendens. Among other issues, the court considered the contention of real parties in interest that, because former Code Civ. Proc. § 409 permitted the recordation of a lis pendens in an action concerning real property or affecting the title or the right of possession of real property, while former Code Civ. Proc. § 409.1(a) permitted a lis pendens to be expunged only if the action does not affect title to or right of possession of the real property, the two sections should be interpreted together so that a lis pendens may not be expunged when the litigation concerns real property. The court rejected this contention based on the general rule of statutory construction that the statutes should be construed together if they harmonize and achieve a uniform and consistent legislative purpose. Because former Code Civ. Proc. § 409.1 was enacted nine years after the inclusion of the word "concerning" in former Code Civ. Proc. § 409 and the Legislature if it had wanted to use that word could have done so, the court stated that the clear implication was that the phrase "concerning real property" should be construed as having the same meaning as the words "affecting the title or the right of possession of real property" (*60 Cal. App. 3d 462, 466-467)* . Note that currently applicable *Code Civ. Proc. § 405.4* continues the use of the term "affect."

[b] Complaint for Money Damages Does Not Relate to Real Property

In *BGJ Assocs. v. Superior Court (1999) 75 Cal. App. 4th 952, 89 Cal. Rptr. 2d 693* , the plaintiffs alleged that they formed a joint venture with one of the defendants to buy certain real properties, but that defendant and others wrongfully acquired the properties for themselves. Plaintiffs' complaint asserted 11 causes of action. All but two sought compensatory and punitive damages on fraud and tort theories, or a combination of compensatory and punitive damages with imposition of a constructive trust. Two causes of action focused narrowly on imposition of a constructive trust and sought orders compelling defendants to convey to plaintiffs an interest in and possession of a described portion of the properties. The court of appeal upheld the trial court's expungement of the lis pendens notice even though the plaintiffs might have been entitled to imposition of a constructive trust requiring the defendants to convey to plaintiffs the share of the legal title plaintiffs would have acquired had the defendants not breached their duties toward plaintiffs (*75 Cal. App. 4th 952, 971)* . The court concluded that when a pleading combinestheories of liability for monetary damages and for a constructive trust, plaintiffs should not be able to maintain a lis pendens. The court reasoned that the danger is too great that a lis pendens, which effectively renders the property unmarketable, would have the coercive effects condemned by *Lewis v. Superior Court (1994) 30 Cal. App. 4th 1850, 37 Cal. Rptr. 2d 63* (discussed in *§ 145.20[3][b]*) and earlier decisions (*75 Cal. App. 4th 952, 972)* .

In *Urez Corp. v. Superior Court (1987) 190 Cal. App. 3d 1141, 235 Cal. Rptr. 837* , the complaint was based on fraud in connection with the purchase of real property by one joint venturer at a foreclosure sale. The complaint sought a constructive trust. The court stated that an action for money damages alone will not support a lis pendens. The court found that allegations of equitable remedies, even if colorable, will not support a lis pendens if the allegations ultimately are a collateral means to collect money damages. The court held that plaintiff's claims of an interest in the property were only for the purpose of securing a claim for monetary damages (*190 Cal. App. 3d 1141, 1145-1149)* .

In *Deane v. Superior Court (1985) 164 Cal. App. 3d 292, 210 Cal. Rptr. 406* , plaintiff alleged that it was owed money for a real estate commission and sought a constructive trust and damages. Plaintiff recorded a lis pendens, and defendant moved to expunge it on the ground that the action did not affect title to real property. The trial court refused to expunge on that ground, and defendant sought a writ of mandate. The court of appeal granted the writ and ordered the lis pendens expunged without a bond. It held that the complaint was basically for money owed, that such a cause of action did not support a constructive trust, and thus the action did not affect title to real property. Therefore, the lis pendens was not proper (*164 Cal. App. 3d 292, 296-297)* .

In *North Coast Business Park v. Superior Court (1984) 158 Cal. App. 3d 858, 205 Cal. Rptr. 81* , plaintiffs were three limited partners who sued the limited partnership to impose a constructive trust on real property transferred by the partnership. Plaintiffs recorded a lis pendens, and defendants moved to have it expunged on the grounds that the action did not affect title to or possession of property. After the trial court denied the motion, defendants sought a writ of mandate. The court of appeal issued the mandate and directed that the lis pendens be expunged. It held that the limited partner's interest was in the partnership and not in the land and thus that the limited partners did not have an interest in the land and the action did not affect title to or possession of real property (*158 Cal. App. 3d 858, 860)* .

In *Burger v. Superior Court (1984) 151 Cal. App. 3d 1013, 199 Cal. Rptr. 227* , plaintiff recorded a lis pendens in an action for a constructive trust against real property. The complaint alleged that the property had been improved with funds that were to have been used for another purpose. A motion to expunge was denied and plaintiff petitioned for a writ of mandate. The court of appeal issued the writ and ruled that the lis pendens should have been expunged. It held that the constructive trust action did not affect title to or possession of real property. The action was essentially one seeking money damages (*151 Cal. App. 3d 1013, 1018-1019)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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14-145 California Points & Authorities § 145.21

§ 145.21 Supporting Motion to Expunge Notice of Lis Pendens [Code Civ. Proc. § 405.30] and for Attorney's Fees and Costs [Code Civ. Proc. § 405.38]--Claim on Which Notice of Lis Pendens Is Based Lacks Probable Validity [Code Civ. Proc. § 405.32]

[1] FORM

[*Caption. See § 145.20.*]

_____ [DEFENDANT'S *or* CROSS DEFENDANT'S] MOTION TO EXPUNGE THE NOTICE OF LIS PENDENS SHOULD BE GRANTED BECAUSE THE CLAIM ON WHICH THE NOTICE OF LIS PENDENS IS BASED LACKS PROBABLE VALIDITY.

A. Expungement Proper if Claimant Has Not Established Probable Validity of Real Property Claim. The court must order that a notice of pendency of an action be expunged if the court finds that the claimant has not established by a preponderance of the evidence the probable validity of the real property claim (*Code Civ. Proc. § 405.32*; *Mix v. Superior Court (2004) 124 Cal. App. 4th 987, 989, 21 Cal. Rptr. 3d 826*).

B. Burden of Proof. The claimant has the burden of proving the probable validity of the real property claim (*Code Civ. Proc. § 405.30*).

C. Attorney's Fees and Costs. [*See § 145.20[1], Paragraph D.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion to expunge a notice of lis pendens when the claim on which notice of lis pendens is based lacks probable validity [*Code Civ. Proc. § 405.32*].

Counsel should insert argument in the foregoing form showing the relationshipbetween the facts of the case and the points of law stated.

[b] Opposing Points and Authorities

The points and authorities set out in *§ 145.21* may be used in an appropriate case to oppose a motion for expungement supported by the foregoing memorandum.

[c] Related Pleading and Practice Forms

For a discussion of the expungement of notices of lis pendens and forms of notices of motions to expunge such notices, see California Forms of Pleading and Practice, Ch. 348, *Lis Pendens* (Matthew Bender).

[3] Discussion of Authorities

[a] Motion to Expunge Lis Pendens Notice

Probable validity means that it is more likely than not that the claimant will obtain a judgment on the claim [*Code Civ. Proc. § 405.3*]. This appears to be the same statutory standard that applies to applications for right to attach orders and the issuance of writs of attachment under *Code Civ. Proc. § 484.050* [*see* Ch. 23, *Attachment*].

The court may not order an undertaking as a condition of expungement if the court finds the claimant has not established the probable validity of the real property claim [*Code Civ. Proc. § 405.32*].

In ***Mix v. Superior Court*** *(2004) 124 Cal. App. 4th 987, 21 Cal. Rptr. 3d 826* , the trial court rejected a motion to expunge a notice of pending litigation brought by the winners at trial, the owners of the property in question, on the ground a substantial issue existed for appeal. The court of appeal granted the owners' petition for a writ of mandate and issued a writ directing the trial court to grant the expungement motion (*124 Cal. App. 4th 987, 998)* . The court observed that in denying the motion to expunge, the trial court had applied the "substantial issue on appeal" test articulated in *Peery v. Superior Court (1981) 29 Cal. 3d 837, 845, 176 Cal. Rptr. 533, 633 P.2d 198* for evaluating motions to expunge under former Code Civ. Proc. § 409.1. However, the court concluded that the *Peery* test is no longer good law in light of 1992 legislation repealing § 409.1 and enacting *Code Civ. Proc. § 405.32* (*124 Cal. App. 4th 987, 994)* . The court held that § 405.32 requires nothing less than that the trial court grant a motion for the expungement of a lis pendens pending appeal in the wake of the claimant's defeat in the trial court. It stated that there is only one exception inherent in the statutory language of "probable validity": If the trial judge himself or herself is willing to find, on the record, that the trial court's ruling will "probably" be overturned on appeal (*124 Cal. App. 4th 987, 994)* .

If the opposing party sustains the burden of establishing by a preponderance of the evidence that the real property claim has probable validity, the court may not order expungement of the notice of pendency of action unless the court finds

that adequate relief can be secured to the claimant by the giving of an undertaking. In that case, the court is required to order expungement conditioned on the giving of an undertaking [*Code Civ. Proc. § 405.33*; *see § 145.22*]. Alternatively, on a motion by a person with an interest in the property, the court is permitted to require the claimant to give the moving party an undertaking as a condition of maintaining the notice of lis pendens [*Code Civ. Proc. § 405.34*; *see § 145.24*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesGeneral OverviewCivil ProcedureRemediesLis PendensGeneral OverviewCivil ProcedureRemediesLis PendensTerminations

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14-145 California Points & Authorities § 145.22

§ 145.22 Supporting Motion to Expunge Notice of Lis Pendens [Code Civ. Proc. § 405.30] and for Attorney's Fees and Costs [Code Civ. Proc. § 405.38]--Undertaking Will Secure Adequate Relief for Claimant [Code Civ. Proc. § 405.33]

[1] FORM

[*Caption. See § 145.20.*]

_____ [DEFENDANT'S *or* CROSS DEFENDANT'S] MOTION TO EXPUNGE THE NOTICE OF LIS PENDENS SHOULD BE GRANTED BECAUSE THE PROVISION OF AN UNDERTAKING WILL SECURE ADEQUATE RELIEF FOR _____ [PLAINTIFF *or* CROSS COMPLAINANT] WHO RECORDED THE LIS PENDENS.

A. Expungement by Giving Undertaking. If the court finds that the real property claim has probable validity, but adequate relief can be secured to the claimant by the giving of an undertaking, the court must order that the notice be expunged. The order shall be conditioned on the giving of an undertaking of such nature and in such amount as will indemnify the claimant for all damages proximately resulting from the expungement that the claimant may incur if the claimant prevails on the real property claim (*Code Civ. Proc. § 405.33*).

[*Optional*] **B. Bond Adequately Secures Relief.** If a party is interested in real property only for its monetary value, expungement of the notice of pendency of action by posting a bond provides adequate security for the party who recorded the notice (*Trapasso v. Superior Court (1977) 73 Cal. App. 3d 561, 567-568, 140 Cal. Rptr. 820* ; *Empfield v. Superior Court (1973) 33 Cal. App. 3d 105, 108, 108 Cal. Rptr. 375*).

[*Optional*] **C. Amount of Bond in Court's Discretion.** The court has discretion in fixing the amount of the bond to provide adequate security for the person who recorded the notice of pendency of action and does not have to fix the bond in the amount claimed by such person (*Howden-Goetzl v. Superior Court (1970) 7 Cal. App. 3d 135, 139-140, 86 Cal. Rptr. 323*).

D. Attorney's Fees. [*See § 145.20[1], Paragraph D.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant *or* Cross Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion to expunge a notice of lis pendens by posting a bond to secure adequate relief for the party who recorded the lis pendens [*Code Civ. Proc. § 405.33*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Attorney's Fees

A party who moves for and obtains expungement by posting a bond is not necessarily the prevailing party for the purposes of obtaining attorney's fees. If the party opposing the motion contends that the proffered bond is inadequate and succeeds in having the amount of the bond raised, neither party is the prevailing party and no attorney's fees should be awarded. Only if the court expunges the lis pendens and sets the bond in the amount proposed by the moving party is the moving party entitled to attorney's fees [*Trapasso v. Superior Court (1977) 73 Cal. App. 3d 561, 569-571, 140 Cal. Rptr. 820]* .

[c] Opposing Points and Authorities

The points and authorities set out in *§ 145.27* may be used in an appropriate case to oppose a motion for expungement supported by this memorandum.

[d] Related Pleading and Practice Forms

For a form of motion to expunge a lis pendens by posting a bond, California Forms of Pleading and Practice, see Ch. 348, *Lis Pendens* , (Matthew Bender).

[3] Discussion of Authorities

[a] Bond Adequately Secures Relief

The presumption of *Civ. Code § 3387* that real property is unique does not apply in determining whether an undertaking will secure adequate relief to the claimant, except in the case of real property improved with a single-family dwelling that the claimant intends to occupy [*Code Civ. Proc. § 405.33*; *see § 145.27*].

In ***Trapasso v. Superior Court*** *(1977) 73 Cal. App. 3d 561, 140 Cal. Rptr. 820* , plaintiff's complaint alleged that he

paid for but did not receive a one-third interest in an apartment. The complaint sought specific performance and partition by sale. Defendant moved to expunge the lis pendens by posting a bond, and the trial court ordered the expungement on posting a $50,000 bond. Plaintiff sought a writ of mandate to review the trial court's order.

The court of appeal found that expungement by posting a bond is proper prior to judgment (*73 Cal. App. 3d 561, 567)* . In response to plaintiff's contention that real property is unique and breach of a contract to convey cannot adequately be relieved by pecuniary compensation, the court held that if a party is interested in real property only for its monetary value, the expungement of a lis pendens by posting a bond is proper, relying on *Empfield v. Superior Court (1973) 33 Cal. App. 3d 105, 108 Cal. Rptr. 375* (discussed *below*). Plaintiff was seeking only monetary relief because he was seeking partition by sale, which would result in a monetary award (*73 Cal. App. 3d 561, 567-568)* . Finally, the court held that the award of attorney's fees to defendant was improper because defendant was not a prevailing party in that the court increased the amount of security tendered by defendant's motion (*73 Cal. App. 3d 561, 569-570)* . The writ was granted commanding that the attorney's fees award be vacated.

In ***Empfield v. Superior Court*** *(1973) 33 Cal. App. 3d 105, 108 Cal. Rptr. 375* , plaintiff filed a complaint for foreclosure of a deed of trust securing the purchase price of property purchased by defendants from plaintiff. Defendants cross complained for rescission or reformation and recorded a lis pendens against property given plaintiff as the down payment, on which plaintiff had constructed two houses. Plaintiff moved to expunge the notice of lis pendens by posting a bond, which motion was denied, and then sought a writ of mandate to review the denial.

The court of appeal issued the writ, directing expungement on the posting of an adequate bond. It held that, despite the fact that real property is presumed to be unique [*see Civ. Code § 3387* (breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation)], a bond was adequate to secure relief to cross defendants in this situation because cross defendants claimed the property only as a source of future income and support. Pecuniary relief would provide such income and support. Moreover, the court could not return the property to cross defendants in its original state because two houses had been built on it. Therefore, a bond could secure adequate relief for cross defendants and the trial court should not have denied the motion (*33 Cal. App. 3d 105, 107-108)* . The court of appeal also found that the lis pendens statute was constitutional (*33 Cal. App. 3d 105, 108)* .

[b] Amount of Bond in Court's Discretion

In ***Howden-Goetzl v. Superior Court*** *(1970) 7 Cal. App. 3d 135, 86 Cal. Rptr. 323* , plaintiffs recorded a notice of a lis pendens on a hospital in a complicated dispute involving allegations of breach of fiduciary duty by corporate insiders. The trial resulted in judgment for defendants. Thereafter, the trial court ordered the lis pendens expunged on the posting of a $10,000 bond. Plaintiffs sought a writ of prohibition contending that the trial court abused its discretion in expunging the lis pendens.

The court of appeal denied the petition. It held that the trial court could expunge the lis pendens even after judgment (*7 Cal. App. 3d 135, 138-139)* . The court then considered the adequacy of the bond, and held that the statute gives the trial court discretion as to the amount of the bond and that the court does not have to order the bond in the amount of damages claimed by plaintiff. The court based its holding on the the language contained in former Code Civ. Proc. § 409.2 (now see *Code Civ. Proc. § 405.33*) and on the fact that the amount of the bond should not be set merely by plaintiffs' claims of alleged damages. The trial court has the discretion to examine the evidence presented by the parties and determine the proper amount for the bond (*7 Cal. App. 3d 135, 139-140)* .

[4] Additional Authorities

[a] Amount of Bond in Court's Discretion

Trapasso v. Superior Court (1977) 73 Cal. App. 3d 561, 140 Cal. Rptr. 820 , is discussed in *§ 145.22[3][a]*. On the

issue of the adequacy of the bond, the court of appeal found that the bond of $50,000 was sufficient to secure possible recovery of $33,000, which was the value of the alleged one-third interest based on defendant's testimony as to the value of the property. The court noted that plaintiff had testified as to a much higher value for the property but that such testimony only created a conflict in the evidence, which was for the trial court to resolve (*73 Cal. App. 3d 561, 568)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesGeneral OverviewCivil ProcedureRemediesLis PendensGeneral OverviewCivil ProcedureRemediesLis PendensTerminations

California Points & Authorities

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 145 LIS PENDENS
PART II. FORMS

14-145 California Points & Authorities § 145.23

§ 145.23 Supporting Motion to Expunge Notice of Lis Pendens [Code Civ. Proc. § 405.30] and for Attorney's Fees and Costs [Code Civ. Proc. § 405.38]--Failure to File and Serve Notice [Code Civ. Proc. § 405.23]

[1] FORM

[*Caption. See § 145.20.*]

_____ [DEFENDANT'S *or* CROSS DEFENDANT'S] MOTION TO EXPUNGE THE NOTICE OF LIS PENDENS SHOULD BE GRANTED BECAUSE _____ [PLAINTIFF *or* CROSS COMPLAINANT] FAILED TO FILE THE NOTICE AND SERVE IT ON _____ [DEFENDANT *or* CROSS DEFENDANT] AS REQUIRED BY STATUTE.

A. Lis Pendens Notice Void and Invalid. A notice of pendency of action is void and invalid as to any adverse party or owner of record if the notice is not served on the adverse party or owner and filed with the court and if a proper proof of service is not recorded with the notice (*Code Civ. Proc. §§ 405.22, 405.23*).

B. Expungement Appropriate Remedy. A motion for expungement is an appropriate remedy when the statutory requirements of filing and service have not been met (*McKnight v. Superior Court (1985) 170 Cal. App. 3d 291, 301-304, 215 Cal. Rptr. 909*).

C. Attorney's Fees and Costs. [*See § 145.20[1], Paragraph D.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant *or* Cross Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a motion to expunge a notice of lis pendens for failure to serve and file the notice pursuant to statute [*Code Civ. Proc. §§ 405.22, 405.23*].

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should set forth facts that establish a failure to comply with the statutory filing and service requirements.

[3] Discussion of Authorities

[a] Lis Pendens Notice Void and Invalid

Prior to recordation of the notice, the claimant must cause a copy of the notice to be mailed, by registered or certified mail, return receipt requested, to all known addresses of the parties to whom the real property claim is adverse and to all owners of record of the real property affected by the real property claim as shown by the latest county assessment roll. If there is no known address for service on an adverse party or owner, the claimant must record a declaration under penalty of perjury to that effect instead of the proof of service otherwise required. Serviceon that party or owner shall not be required. Immediately following recordation, a copy of the notice must also be filed with the court in which the action is pending. Service must also be made immediately and in the same manner on each adverse party later joined in the action [*Code Civ. Proc. § 405.22*].

A notice of pendency of action is void and invalid as to any adverse party or owner of record unless the above requirements are met for that party or owner and a proof of service in the form and content specified in *Code Civ. Proc. § 1013a* has been recorded with the notice of pendency of action [*Code Civ. Proc. § 405.23*].

[b] Expungement Appropriate Remedy

In ***McKnight v. Superior Court*** *(1985) 170 Cal. App. 3d 291, 215 Cal. Rptr. 909* , the complaint alleged a fraudulent conveyance, and plaintiff recorded a lis pendens. Defendant moved to expunge the lis pendens, and the motion was granted. Plaintiff filed a petition for a writ of mandate.

The court of appeal denied the writ. The court held that the expungement was proper because plaintiff had not served the notice of lis pendens on defendant or filed it with the court as required under former Code Civ. Proc. § 409(c) (*now see Code Civ. Proc. § 422*). Thus, under former Code Civ. Proc. § 409(d), the lis pendens was void and invalid because the statutory requirements were not met (*170 Cal. App. 3d 291, 303)* .

The court held that expungement was an appropriate remedy for failure to serve and file notice. Expungement was historically the remedy for the recording of a lis pendens that did not affect title to real property. Expungement was then codified as the appropriate remedy in former Code Civ. Proc. § 409.1 if the action did not affect title to real property or was not commenced or prosecuted in good faith. Thus there was no indication in the statute that its bases were the only bases for expungement, and therefore expungement is the appropriate remedy for failure to serve and file. The court stated that expungement accomplished the purposes of establishing that the lis pendens was void and invalid and of clearing the owner's title from the cloud of the lis pendens. The court also held that in this situation the notice of lis pendens could be refiled after expungement in accordance with the statutory procedures (*170 Cal. App. 3d 291, 301-303)* .

Counsel should note that a technical defect in the service and filing requirements may not be enough to support a motion for expungement in all circumstances. For example, in *Biddle v. Superior Court (1985) 170 Cal. App. 3d 135, 215 Cal. Rptr. 848* , a notice of lis pendens was recorded but was not served on defendants or filed with the court. Defendants successfully moved to expunge the notice on the ground that the service and filing requirements had not been met. However, the court of appeal, on plaintiff's petition, issued a writ of mandate directing the trial court to vacate its order, concluding that plaintiffs had substantially complied with the notice requirement in that they conveyed actual notice to the defendants. Moreover, defendants had waived the service defects by filing two prior motions to expunge and waiting for more than a year to assert the defects (*170 Cal. App. 3d 135, 137-138)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesGeneral OverviewCivil ProcedureRemediesLis PendensGeneral OverviewCivil ProcedureRemediesLis PendensTerminations

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 145 LIS PENDENS
PART II. FORMS

14-145 California Points & Authorities § 145.24

§ 145.24 Supporting Motion to Require Claimant to Give Undertaking as Condition of Maintaining Lis Pendens [Code Civ. Proc. § 405.34] and for Attorney's Fees and Costs [Code Civ. Proc. § 405.38]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*],	)	IES SUPPORTING MOTION TO REQUIRE
Plaintiff [and Cross Defendant],	)	CLAIMANT TO POST UNDERTAKING AS CON-
vs.	)	DITION OF MAINTAINING LIS PENDENS AND
_____ [*name*],	)	FOR ATTORNEY'S FEES AND COSTS
Defendant [and Cross Complainant].	)	Date: _____
	)	Time: _____
	)	Dept.: _____
		Discovery Cut-Off: _____
		Motion Cut-Off: _____
		Trial Date: _____

_____

_____ [DEFENDANT'S *or* CROSS DEFENDANT'S *or* INTERVENOR'S] MOTION TO REQUIRE CLAIMANT TO GIVE MOVING PARTY AN UNDERTAKING AS A CONDITION OF MAINTAINING THE LIS PENDENS SHOULD BE GRANTED BECAUSE MOVING PARTY WILL SUFFER DAMAGES IN THE EVENT THAT CLAIMANT DOES NOT PREVAIL ON THE REAL PROPERTY CLAIM.

A. Undertaking as Condition of Maintaining Lis Pendens. On the motion of any person with an interest in the property, the court in which an action is pending may require the claimant to give the moving party an undertaking as a condition of maintaining the notice in the record title. The undertaking must be of such nature and in such amount as the court determines just. The court may permit evidence to be received in the form of oral testimony and may make any orders it deems just to provide for discovery by any affected party [*Code Civ. Proc. § 405.34*].

B. Attorney's Fees and Costs. When an order is made granting a motion to require claimant to post an undertaking, the order must direct that the prevailing party be awarded reasonable attorney's fees and costs, unless the court finds that the other party acted with substantial justification or that other circumstances make the imposition of attorney's fees and costs unjust (*Code Civ. Proc. § 405.38*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant *or* Cross Defendant
_____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion to require the claimant to post an undertaking, usually in the form of a bond, as a condition of maintaining the notice in the record title [*Code Civ. Proc. § 405.34*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For a form of motion to require the claimant to give the moving party an undertaking, see California Forms of Pleading and Practice, Ch. 348, *Lis Pendens* (Matthew Bender).

[3] Discussion of Authorities

[a] Undertaking as Condition of Maintaining Lis Pendens

If the moving party is not a party to the action, he or she must obtain leave of court to intervene at or before presenting the motion [*Code Civ. Proc. § 405.34*].

If the court grants the motion requiring the claimant to provide an undertaking, it must set a return date for the claimant to show compliance. If the claimant fails to show compliance on the return date, the court must order the lis pendens expunged without further notice or hearing [*Code Civ. Proc. § 405.34*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesGeneral OverviewCivil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureRemediesLis PendensGeneral OverviewCivil ProcedureRemediesLis PendensNotices

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 145 LIS PENDENS
PART II. FORMS

14-145 California Points & Authorities § 145.25

§ 145.25 Opposing Motion to Expunge Notice of Lis Pendens [Code Civ. Proc. § 405.30] and for Attorney's Fees and Costs [Code Civ. Proc. § 405.38]--Action Affects Title to, or Right to Possession of, Specific Real Property or Use of Easement Identified in Pleading [Code Civ. Proc. §§ 405.4, 405.31]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM OPPOSING MOTION TO EX-
_____ [*name*],	)	PUNGE NOTICE OF LIS PENDENS AND FOR
Plaintiff [and Cross Defendant],	)	ATTORNEY'S FEES AND COSTS
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant [and Cross Complainant].	)	Dept.: _____
	)	Discovery Cut-Off: _____
	)	Motion Cut-Off: _____
		Trial Date: _____

_____

_____ [DEFENDANT'S *or* CROSS DEFENDANT'S] MOTION TO EXPUNGE THE NOTICE OF LIS PENDENS SHOULD BE DENIED BECAUSE THE _____ [COMPLAINT *or* CROSS COMPLAINT] AFFECTS THE TITLE TO, OR RIGHT OF POSSESSION OF, SPECIFIC REAL PROPERTY OR USE OF AN EASEMENT IDENTIFIED IN THE PLEADING.

A. When Notice of Lis Pendens May Be Recorded. A _____ [plaintiff *or* cross complainant] may

file a notice of the pendency of an action when the action affects the title to, or right to possession of, specific real property or use of an easement described in the pleading (*Code Civ. Proc. §§ 405.4, 405.20*).

[*Optional*] **B. Leasehold Affects Right of Possession of Real Property.** A lis pendens is proper in an action involving a leasehold interest in real property because a leasehold is an estate in real property and therefore affects the right of possession of real property (*Parker v. Superior Court (1970) 9 Cal. App. 3d 397, 400, 88 Cal. Rptr. 352*).

[*Optional*] **C. Fraudulent Conveyance Action Constitutes Real Property Claim.** A creditor's action to set aside as fraudulent a debtor's transfer of real property, brought under the Uniform Fraudulent Transfer Act [*Civ. Code § 3439 et seq.*], is a "real property claim" within the meaning of *Code of Civil Procedure Section 405.4* (*Kirkeby v. Superior Court (2004) 33 Cal. 4th 642, 649, 15 Cal. Rptr. 3d 805, 93 P.3d 395* ; *Hunting World, Inc. v. Superior Court (1994) 22 Cal. App. 4th 67, 72, 26 Cal. Rptr. 2d 923*).

[*Optional*] **D. Right of Possession Includes Right of Access and Occupation.** For purposes of the lis pendens statute, the right of possession of land encompasses more than mere ownership of the property in question; it includes the right to have access to and to occupy the property (*Kendall-Brief Co. v. Superior Court (1976) 60 Cal. App. 3d 462, 468, 131 Cal. Rptr. 515*).

[*Optional*] **E. Lis Pendens May be Recorded Against Dominant Tenement in Easement Dispute**. An easement dispute affects the title or right of possession of the dominant tenement, and therefore a lis pendens may be recorded on the dominant tenement (*Park 100 Investment Group II v. Ryan (2009) 180 Cal. App. 4th 795, 812, 103 Cal. Rptr. 3d 218*).

F. Attorney's Fees and Costs. When an order is made denying a motion to expunge a notice of pendency of an action, the order must direct that the prevailing party be awarded reasonable attorney's fees and costs, unless the court finds that the other party acted with substantial justification or that other circumstances make the imposition of attorney's fees and costs unjust (*Code Civ. Proc. § 405.38*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff *or* Cross Complaintant
_____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion to expunge a notice of lis pendens when the complaint or cross complaint underlying the notice affects the title to, or right to possession of, specific real property or the use of an easement described in the pleading [*Code Civ. Proc. §§ 405.4, 405.32*].

One or more of the optional paragraphs of this form should be used if the complaint or cross complaint involves (1) a leasehold interest (Optional Paragraph B), (2) a fraudulent conveyance (Optional Paragraph C), or (3) a right of access

and occupation (Optional Paragraph D).

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

This form may be used in opposition to the points set forth in *§ 145.20*.

[b] Related Pleading and Practice Forms

For discussion and forms of notices of motion to expunge a notice of lis pendens, see California Forms of Pleading and Practice, Ch. 348, *Lis Pendens* (Matthew Bender).

[c] Special Issues Relating to Status of Creditors' Suits

The law is unsettled regarding the status of creditors' suits as real property claims. The California Supreme Court has held that a creditor's action to set aside as fraudulent a debtor's transfer of real property, brought under the Uniform Fraudulent Transfer Act [*Civ. Code § 3439 et seq.*], is a "real property claim" within the meaning of *Code Civ. Proc. § 405.4* because it is a cause of action that would, if meritorious, affect title to real property [*Kirkeby v. Superior Court (2004) 33 Cal. 4th 642, 649, 15 Cal. Rptr. 3d 805, 93 P.3d 395* ; *see Hunting World, Inc. v. Superior Court (1994) 22 Cal. App. 4th 67, 72, 26 Cal. Rptr. 2d 923* ; *see also* Optional Paragraph C of this form]. However, under the prior lis pendens statute [*see* former Code Civ. Proc. § 409 et seq., repealed January 1, 1993], the majority view held that creditors' suits seeking to impose an equitable lien or constructive trust on real property did not affect title to real property for the purpose of recording a notice of lis pendens [*see, e.g., La Paglia v. Superior Court (1989) 215 Cal. App. 3d 1322, 1327-1329, 264 Cal. Rptr. 63]* . In *Kirkeby*, the Supreme Court expressly did not reach the question of whether a claim seeking to impose a constructive trust or equitable lien may be a basis for a lis pendens [*Kirkeby v. Superior Court (2004) 33 Cal. 4th 642, 650 n.7, 15 Cal. Rptr. 3d 805, 93 P.3d 395]* . For memoranda reflecting the majority view under the former statute, see *§ 145.20*. For further coverage of these issues, see *§ 145.25[3][b]*.

[3] Discussion of Authorities

[a] Leasehold Affects Right of Possession of Real Property

Parker v. Superior Court *(1970) 9 Cal. App. 3d 397, 88 Cal. Rptr. 352* , presented the question of whether a lis pendens may be properly recorded on a leasehold interest for years on real property. After a lis pendens was recorded on such an interest, the affected property was sold and the purchaser filed a motion in the superior court to expunge the lis pendens. The court denied the motion, and the plaintiff sought a writ of mandamus directing the trial court to order the expungement.

The court of appeal denied the petition. It observed that while a leasehold is not "real property" or "real estate," it nevertheless is an estate in real property. The court noted that the lis pendens statute then in effect provided for a lis pendens in "an action concerning real property or affecting the title or *the right of possession of real property*" (emphasis added) [*see* former Code Civ. Proc. § 409; *now see Code Civ. Proc. § 405.4*]. Because a leasehold is an estate in real property, the leasehold at issue came within the broad language of the statute. According to the court, to hold that a leasehold estate does not affect the right of possession of real property would be unreasonable (*9 Cal. App. 3d 397, 400)* .

[b] Fraudulent Conveyance Action Constitutes Real Property Claim

In ***Kirkeby v. Superior Court*** *(2004) 33 Cal. 4th 642, 15 Cal. Rptr. 3d 805, 93 P.3d 395* , the plaintiff started a business with her brother and his wife (defendants). Plaintiff alleged that after she resigned from the company board of directors, defendants began looting the corporation through fraud and self-dealing. Plaintiff filed a lawsuit against

defendants alleging numerous causes of action including a cause of action for fraudulent conveyance, and seeking declaratory and injunctive relief as well as damages. In her fraudulent conveyance cause of action, plaintiff alleged that her brother obtained a $50,000 loan from the business by representing that he would use the borrowed funds to construct a building to house the business operations. However, plaintiff alleged that defendants used the loan to purchase residential income property and immediately transferred their interest in the property to a family limited partnership. Plaintiff also alleged that her brother transferred his interest in his family's residence to a family trust and that defendants, as trustees of that trust, subsequently transferred the trust's interest in the residence to the family partnership. Plaintiff alleged that defendants made both of the transfers to defraud creditors, and requested that the transfers be voided to the extent necessary to satisfy the claims set forth in her complaint. These transfers formed the bases of plaintiff's fraudulent conveyance claim. Plaintiff recorded a notice of lis pendens on the two properties in question. The trial court granted defendants' motion to expunge the lis pendens on the ground the complaint primarily sought money damages. The court of appeal denied plaintiff's petition for a writ. The Supreme Court reversed the court of appeal judgment and remanded the action.

The Supreme Court stated that in determining whether the pleading on which the notice is based does not contain a real property claim, the trial court must engage in a demurrer-like analysis. Thus, the court may not look through the pleadings to ascertain the purpose of the party seeking to maintain notice of lis pendens, but may only determine whether a real property claim has been properly pled by the claimant (*33 Cal. 4th 642, 647-648)* .

The Court explained that a fraudulent conveyance claim requesting avoidance of a transfer or obligation pursuant to *Civ. Code § 3439.07(a)(1)* may result in the voiding of a transfer of title of specific real property. By definition, the voiding of a transfer of real property will affect title to or possession of real property. Therefore, the Court concluded that a fraudulent conveyance action seeking avoidance of a transfer under *Civ. Code § 3439.07(a)(1)* clearly "affects title to, or the right to possession of" real property and is a real property claim for thepurposes of the lis pendens statutes (*33 Cal. 4th 642, 648-649)* . The Court held that the plaintiff in *Kirkeby* adequately pled a fraudulent conveyance claim by alleging that the defendants transferred title of the subject properties with the intent to defraud. Plaintiff also asked the court to void the transfers of both properties to the extent necessary to satisfy the claims in her complaint. As such, her fraudulent conveyance claim, if successful, would affect title to specific real property. Accordingly, the Court held that the plaintiff's lis pendens was improperly expunged (*33 Cal. 4th 642, 649-651)* .

The Supreme Court in *Kirkeby* cited with approval ***Hunting World, Inc. v. Superior Court*** *(1994) 22 Cal. App. 4th 67, 26 Cal. Rptr. 2d 923* , in which the plaintiff creditor filed a federal action against Charles W. Bogar claiming trademark infringement and counterfeiting of plaintiff's merchandise. Shortly thereafter, Bogar quitclaimed to his wife his interest in their residence. Several months later, plaintiff filed a complaint in superior court against the Bogars to set aside as fraudulent the above conveyance, and recorded a notice of pendency of that action. The Bogars moved to expunge the notice of lis pendens. The court granted the motion, and plaintiff filed a petition for a writ of mandate.

The court of appeal found that the trial court erred, and issued a writ of mandate directing the trial court to vacate its order expunging the lis pendens. The court found that a creditor's action to set aside as fraudulent a transfer of real property, brought under the Uniform Fraudulent Transfer Act [*Civ. Code § 3439 et seq.*], is a "real property claim" within the meaning of *Code Civ. Proc Section 405.4* because it is a cause of action that would, if meritorious, affect title to real property (*22 Cal. App. 4th 67, 72)* .

The court of appeal noted that, under the prior lis pendens law, the courts of appeal were in conflict on the issue whether a lis pendens was appropriate when a creditor sought to impose an equitable lien or constructive trust on real property in order to recover on a debt, for example, by alleging that the real property was purchased with funds that the debtor fraudulently transferred to avoid paying the creditor. The minority view held that creditors' suits did affect title to real property for the purpose of recording a notice of lis pendens [*see Okuda v. Superior Court (1983) 144 Cal. App. 3d 135, 138-141, 192 Cal. Rptr. 388* ; *Coppinger v. Superior Court (1982) 134 Cal. App. 3d 883, 890-891, 185 Cal. Rptr. 24* (both of these cases are discussed in *§ 145.25[4]* [a])]. The majority view favored a restrictive application of the law

because of the potential for abuse by creditors to use the notice of lis pendens to obtain an unfair advantage in the prosecution of their cases. These courts held that creditor suits did not affect title to real property for the purpose of recording a notice of lis pendens, reasoning that the creditors did not have a claim to a present interest in the real property, but were simply pursuing claims for an equitable lien or constructive trust on the real property as a means of securing recovery on a debt unrelated to the real property [*see La Paglia v. Superior Court (1989) 215 Cal. App. 3d 1322, 1327-1329, 264 Cal. Rptr. 63* ; *Wardley Development, Inc. v. Superior Court (1989) 213 Cal. App. 3d 391, 393, 394 n.3, 394-398, 262 Cal. Rptr. 87* ; *Elder v. Carlisle Ins. Co. (1987) 193 Cal. App. 3d 1313, 1320 n.8, 238 Cal. Rptr. 897* ; *Urez Corp. v. Superior Court (1987) 190 Cal. App. 3d 1141, 1147-1149, 235 Cal. Rptr. 837* ; *Burger v. Superior Court (1984) 151 Cal. App. 3d 1013, 1017-1019, 199 Cal. Rptr. 227]* .

The court of appeal found that an extension of this majority line of cases to a uniform fraudulent transfer action was not necessary because the current lis pendens law is designed to curb abuses of lis pendens. It provides for expungement if the claimant cannot show by a preponderance of the evidence that the action is probably valid. Further, the court may protect the property owner by expungement if adequate relief for the claimant may be secured by a bond or by requiring a bond as a condition of the lis pendens (*22 Cal. App. 4th 67, 73)* . The court also found that an extension of the majority line of cases was unwarranted because the clear wording of *Code Civ. Proc. § 405.31* covers a claim to set aside a conveyance of real property. According to the court, in most of those cases, constructive trust or equitable lien causes of action were appended to lawsuits that centered on money damages; thus, those courts could conclude that the actions primarily sought money damages and did not affect title to real property. By contrast, the uniform fraudulent transfer action covered by the lis pendens in the present case affected only title to real property (*22 Cal. App. 4th 67, 73-74)* .

[c] Right of Possession Includes Right of Access and Occupation

In ***Kendall-Brief Co. v. Superior Court*** *(1976) 60 Cal. App. 3d 462, 131 Cal. Rptr. 515* , petitioner was an owner and developer of lots in Tract 6349 of a planned development known as Lake Forest. He contended that a private road in an adjoining tract, Tract 6353, could be used for ingress and egress by other owners of lots on Tract 6349, based on the fact that there was an easement over the private streets in Tract 6353 that was appurtenant to Tract 6349. In response to this claim of easement, real parties in interest filed an action to enjoin trespass, quiet title, enjoin violation of restrictive covenants, abate nuisance, and for violation of the California Environmental Quality Control Act in an attempt to restrain the owners of lots in Tract 6349 from using the private road. In conjunction with the filing of the action, a notice of pendency of action was recorded describing the road and Tract 6349. The superior court denied petitioner's motion to expunge the lis pendens regarding Tract 6349. Petitioner sought a writ of mandate commanding the superior court to expunge the lis pendens.

The court of appeal denied the petition. After examining whether a lis pendens may be expunged if the action affects real property [*see § 145.20[4][a]*], the court examined the phrase "right of possession." In the court's view, "right of possession" encompassed more than mere ownership of a lot in a land-locked subdivision: it included the right to have access to and to occupy such property (*60 Cal. App. 3d 462, 467-468)* . Note that currently applicable *Code Civ. Proc. § 405.4* now specifically includes the use of an easement in real property as part of its definition of a "real property claim."

[d] Lis Pendens May be Recorded Against Dominant Tenement in Easement Dispute

In *Park 100 Investment Group II v. Ryan (2009) 180 Cal. App. 4th 795, 103 Cal. Rptr. 3d 218* , the defendants were attorneys who, in the course of representing a real property owner in a prior lawsuit involving an easement dispute, filed a lis pendens on the dominant tenement. The owners of the dominant tenement sued the attorneys, claiming the lis pendens was wrongfully recorded. The attorneys appealed from the denial of their anti SLAPP [*Code Civ. Proc. § 425.16*] motion. The court of appeal reversed the trial court's order denying the anti-SLAPP motion, holding that it is proper to record a notice of pendency of action on a dominant tenement when the litigation is an easement dispute (*180*

Cal. App. 4th 795, 812) . The dominant tenement's title is affected as the easement carries with it the right to use the servient tenement (*180 Cal. App. 4th 795, 811)* . In addition, the 1992 amendments to *Code Civ. Proc. §§ 405.4* and *405.20* were intended to include within the definition of a "real property claim" a lis pendens recorded on either the dominant or servient tenements in an easement dispute, i.e., the use of an easement upon or appurtenant to the property affected by the action (*180 Cal. App. 4th 795, 812)* . Because a lis pendens affects the use of an easement upon or appurtenant to the property affected by the action, as a matter of law, the attorneys were entitled to file the lis pendens on the dominant tenement because they were asserting a real property claim. The court rejected the argument that the definition of "real property claim" should be limited to permit (1) the recording of a lis pendens on the servient tenement or (2) the recording of a lis pendens on the dominant tenement only when the dispute involves a landlocked piece of property, as was the case in *Kendall Brief Co. v. Superior Court (1976) 60 Cal. App. 3d 462, 131 Cal. Rptr. 515* [*see* [c], *above*] (*180 Cal. App. 4th 795, 810*). Even though the court could not correct the trial court's expungement order, which occurred in the prior litigation involving the easement, it could not be used by the owner of the dominant tenement to establish that there was a probability it would prevail on its claims against the attorneys for intentional interference with prospective economic advantage and slander of title (*180 Cal. App. 4th 795, 812*).

[4] Additional Authorities

[a] Fraudulent Conveyance Action Constitutes Real Property Claim

In *Coppinger v. Superior Court (1982) 134 Cal. App. 3d 883, 185 Cal. Rptr. 24* , plaintiff filed an action for a constructive trust on real property and recorded a lis pendens. The complaint alleged that a constructive trust was proper because the real property had been purchased with the proceeds of a sale to plaintiff that was fraudulently induced. Defendants moved to expunge the lis pendens, but the motion was denied. On appeal, defendants contended that a constructive trust was not an action affecting title to, or possession of, real property and so the lis pendens was not proper. The court held that an action to impose a constructive trust on real property does affect title to, or right to possession of, the property (*134 Cal. App. 3d 883, 890-891)* . The court then held that the denial of expungement was improper on other grounds.

In *Okuda v. Superior Court (1983) 144 Cal. App. 3d 135, 192 Cal. Rptr. 388* , plaintiff brought an action for statutory relief as a good-faith improver of land [*see Code Civ. Proc. § 871.1 et seq.*] and filed a lis pendens. Defendants moved to expunge the lis pendens on grounds that the action did not affect title to or possession of real property. The trial court granted the motion, and the plaintiffs sought a writ of mandate. The court of appeal issued the writ and directed the trial court to vacate the order of expungement. It held that the action did affect title to, or right to possession of, real property because the court is authorized to fashion an equitable remedy that could affect title or possession (*144 Cal. App. 3d 135, 139-141)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureRemediesLis PendensGeneral OverviewCivil ProcedureRemediesLis PendensTerminationsReal Property LawPriorities & RecordingLis Pendens

California Points & Authorities

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 145 LIS PENDENS
PART II. FORMS

14-145 California Points & Authorities § 145.26

§ 145.26 Opposing Motion to Expunge Notice of Lis Pendens [Code Civ. Proc. § 405.30] and for Attorney's Fees and Costs [Code Civ. Proc. § 405.38]--Claim on Which Notice of Lis Pendens Is Based Has Probable Validity [Code Civ. Proc. §§ 405.3, 405.32]

[1] FORM

[*Caption. See § 145.25.*]

_____ [DEFENDANT'S *or* CROSS DEFENDANT'S] MOTION TO EXPUNGE THE NOTICE OF LIS PENDENS SHOULD BE DENIED BECAUSE THE REAL PROPERTY CLAIM ON WHICH THE NOTICE IS BASED HAS PROBABLE VALIDITY.

A. Real Property Claim Has Probable Validity. The lis pendens should not be expunged when the party filing the notice shows by a preponderance of the evidence that the real property claim on which the notice is based has probable validity (*Code Civ. Proc. §§ 405.3, 405.32*).

B. Attorney's Fees and Costs. [*See § 145.25[1], Paragraph D.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff *or* Cross Complaintant
_____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion to expunge a notice of lis pendens when the real property claim on which the notice is based has probable validity [*Code Civ. Proc. §§ 405.3, 405.32*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

This form may be used in opposition to the points set forth in *§ 145.21*.

[b] Related Pleading and Practice Forms

For discussion and forms of notices of motion to expunge a notice of lis pendens, see California Forms of Pleading and Practice, Ch. 348, *Lis Pendens* (Matthew Bender).

[3] Discussion of Authorities

[a] Real Property Claim Has Probable Validity

Probable validity means that it is more likely than not that the claimant will obtain a judgment on the claim [*Code Civ. Proc. § 405.3*]. This appears to be the same statutory standard that applies to applications for right-to-attach orders and the issuance of writs of attachment under *Code Civ. Proc. § 484.050* [*see* Ch. 23, *Attachment*].

If the opposing party sustains the burden of establishing by a preponderance of the evidence that a real property claim has probable validity, the court may not order expungement of the notice of pendency of action unless the court finds thatadequate relief can be secured to the claimant by the giving of an undertaking. In that case, the court is required to order expungement conditioned on the giving of the undertaking [*Code Civ. Proc. § 405.33*; *see § 145.27*]. Alternatively, on a motion by a person with an interest in the property, the court may require the claimant to give the moving party an undertaking as a condition of maintaining the notice of lis pendens [*Code Civ. Proc. § 405.34*; *see § 145.24*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesGeneral OverviewCivil ProcedureRemediesLis PendensGeneral OverviewCivil ProcedureRemediesLis PendensTerminations

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14-145 California Points & Authorities § 145.27

§ 145.27 Opposing Motion to Expunge Notice of Lis Pendens [Code Civ. Proc. § 405.30] and for Attorney's Fees and Costs [Code Civ. Proc. § 405.38]--Undertaking Will Not Secure Adequate Relief for Claimant [Code Civ. Proc. § 405.33]

[1] FORM

[*Caption. See § 145.25.*]

_____ [DEFENDANT'S *or* CROSS DEFENDANT'S] MOTION TO EXPUNGE THE NOTICE OF LIS PENDENS SHOULD BE DENIED BECAUSE PROVIDING AN UNDERTAKING WILL NOT SECURE ADEQUATE RELIEF FOR _____ [PLAINTIFF *or* CROSS COMPLAINANT], WHO RECORDED THE LIS PENDENS.

A. Undertaking Cannot Adequately Secure Relief. A notice of pendency of action may not be expunged by the giving of an undertaking unless the court finds that adequate relief to the party who recorded the notice can be secured by the undertaking (*Code Civ. Proc. § 405.33*).

[*Optional*] **B. Undertaking Insufficient in Action for Specific Performance Involving Single-Family Dwelling That Claimant Intends to Occupy.** For purposes of determining whether the giving of an undertaking will secure adequate relief to the claimant, the presumption of *Civil Code Section 3387* that real property is unique applies only in the case of real property improved with a single-family dwelling that the claimant intends to occupy. If the presumption applies, an award of damages is not adequate relief for a breach of a contract to convey real property, and thus an undertaking cannot provide adequate security (*Code Civ. Proc. § 405.33*).

C. Attorney's Fees and Costs. [*See § 145.25[1], Paragraph D.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff *or* Cross Complaintant _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted in opposition to a motion to expunge a notice of lis pendens when an undertaking will not adequately secure relief to the party who recorded the lis pendens [*Code Civ. Proc. § 405.33*].

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

This form may be used in opposition to the points and authorities set forth in *§ 145.22*.

[b] Attorney's Fees

A party who moves for and obtains expungement by posting a bond is not necessarily the prevailing party for the purposes of obtaining attorney's fees. If the party opposing the motion contends that the proffered bond is inadequate and succeeds in having the amount of the bond raised, neither party is the prevailing party and no attorney's fees should be awarded. Only when the court expunges the lis pendens and sets the bond in the amount proposed by the moving party is the moving party entitled to attorney's fees [*Trapasso v. Superior Court (1977) 73 Cal. App. 3d 561, 569-571, 140 Cal. Rptr. 820]* .

[3] Additional Authorities

[a] Undertaking Cannot Adequately Secure Relief

In *Stewart Development Co. v. Superior Court (1980) 108 Cal. App. 3d 266, 166 Cal. Rptr. 450* , the court of appeal noted that in considering whether a bond secures adequate relief, the trial court may consider the likelihood that the party who recorded the lis pendens will prevail on the merits. It held, however, that if it appears that there will be a close contest on the merits, the trial court should not conduct a minitrial of the merits as a means of determining whether the bond will provide adequate security (*108 Cal. App. 3d 266, 275)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureRemediesLis PendensGeneral OverviewCivil ProcedureRemediesLis PendensTerminations

California Points & Authorities

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CHAPTER 145 LIS PENDENS
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14-145 California Points & Authorities § 145.28

§ 145.28 Supporting Contention That Notice of Lis Pendens Does Not Protect Interest Not Alleged in Underlying Action

[1] FORM

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

_____ [PLAINTIFF *or* DEFENDANT] IS ESTOPPED FROM CONTENDING THAT THE LIS PENDENS THAT HE/SHE/IT FILED PROTECTS AN INTEREST IN PROPERTY BECAUSE THE PLEADINGS IN THE ACTION UNDERLYING THE LIS PENDENS DID NOT PUT THE _____ [DEFENDANT *or* PLAINTIFF] ON NOTICE THAT _____ [OWNERSHIP *or* POSSESSION] OF THIS PARTICULAR INTEREST WAS IN ISSUE.

Interest in Real Property Not Protected if Pleadings Do Not Indicate Nature and Extent of Relief Sought. Filing a lis pendens does not protect the interest of a party in real property when the pleadings in the action forming the basis of the lis pendens do not indicate the nature and extent of relief sought so as to put the opposing party on notice that the pending action may have the effect of changing the ownership of the property and thus affect the interests of the opposing party (*see Albertson v. Raboff (1956) 46 Cal. 2d 375, 379, 295 P.2d 405* ; *Head v. Crawford (1984) 156 Cal. App. 3d 11, 16, 202 Cal. Rptr. 534*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a lis pendens did not effectively protect a party's interest in real property because the lis pendens did not adequately put the moving party on notice that the interest was in issue. For example, the form may be used in a summary judgment motion in which the moving party is attempting to assert a lien on real property obtained after the filing of the lis pendens and the opposing party is attempting to rely on the lis pendens to protect an interest granted in the action underlying the lis pendens.

[b] Related Pleading and Practice Forms

For a general discussion and additional forms relating to lis pendens, see California Forms of Pleading and Practice, Ch. 348, *Lis Pendens* (Matthew Bender).

[3] Discussion of Authorities

[a] Interest in Real Property Not Protected if Pleadings Do Not Indicate Nature and Extent of Relief Sought

In ***Albertson v. Raboff*** *(1956) 46 Cal. 2d 375, 295 P.2d 405* , the Supreme Court noted that, as a general rule, anyone with actual notice of the pendency of an action who acquires an interest in property takes the property subject to any judgment that may be rendered in the action. The sole purpose of recording a notice of lis pendens is to secure this same result by giving constructive notice of the pendency of the proceeding. The lis pendens is incidental to the action on which it is based and serves to give constructive notice of that which is contained in the pleadings by, in effect, republishing the pleadings (*46 Cal. 2d 375, 379)* .

In ***Head v. Crawford*** *(1984) 156 Cal. App. 3d 11, 202 Cal. Rptr. 534* , a wife filed a lis pendens in a dissolution action. In her petition for dissolution, she alleged that the real property in issue was community property. Before this action, the husband had encumbered the property. After the wife had filed the lis pendens, and after the court in the dissolution action had awarded her all of the property as her separate property, the holder of the husband's debt attempted to enforce a lien on the property. The court of appeal stated that the wife could have protected all of the interest she was awarded in the property if she had given constructive notice of a claim to all of the property in her pleadings. By filing the lis pendens, the court noted, a party draws attention to the action and may obtain priority over a prior creditor of another with a record interest if the creditor either acts with constructive notice or fails to record a lien document until after the filing of the lis pendens. In this case, however, the wife had not alleged a separate property interest in the property. Rather, she had through her pleadings represented that she was entitled only to a one-half interest in the property, and was thus estopped from challenging the creditor who had relied on the representations made in her pleadings. Thus, the creditor was allowed to enforce the debt of the husband against one half of the property (*156 Cal. App. 3d 11, 16)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesGeneral OverviewCivil ProcedureRemediesLis PendensGeneral OverviewCivil ProcedureRemediesLis PendensNotices

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14-145 California Points & Authorities § 145.29

§ 145.29 Supporting Contention That Expungement of Lis Pendens Does Not Affect Judgment Lien

[1] FORM

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

_____ [DEFENDANT *or* CROSS DEFENDANT] MAY NOT "EXPUNGE" AN ABSTRACT OF JUDGMENT AS A JUDGMENT LIEN CREATED BY A RECORDED ABSTRACT OF JUDGMENT BEARS LITTLE RESEMBLANCE TO A LIS PENDENS AND THERE IS NO STATUTORY PROCEDURE FOR EXPUNGING AN ABSTRACT OF JUDGMENT; EXPUNGING A LIS PENDENS DOES NOT EXTINGUISH A RECORDED ABSTRACT.

Expungement of Lis Pendens Does Not Affect Judgment Lien. A recorded order expunging a lis pendens does not extinguish or otherwise effect a previously recorded abstract of judgment (*Federal Deposit Ins. Corp. v. Charlton (1993) 17 Cal. App. 4th 1066, 1069-1070, 21 Cal. Rptr. 2d 686*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of thecontention that an expungement of a lis pendens does not affect a judgment lien.

These points and authorities may be combined with a memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the argument that an order expunging a lis pendens does not extinguish a previously recorded abstract of judgment. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For a general discussion and additional forms relating to lis pendens, see California Forms of Pleading and Practice, Ch. 348, *Lis Pendens* (Matthew Bender).

[3] Discussion of Authorities

[a] Expungement of Lis Pendens Does Not Affect Judgment Lien

In ***Federal Deposit Ins. Corp. v. Charlton*** *(1993) 17 Cal. App. 4th 1066, 21 Cal. Rptr. 2d 686* , Coronado Bank obtained a judgment in Texas against Prata as administrator of a debtor's estate. The bank then entered the sister state judgment in California and recorded abstracts of judgment in Los Angeles County where Prata held real property for the estate. The property was distributed to Prata, and the bank filed an action to foreclose the lien created by the abstracts of judgment. In that action, the bank recorded a lis pendens, which was expunged. Prata then sold the property to the Charltons. The bank then added the Charltons to its foreclosure action. The Charltons moved for summary judgment contending that they were bona fide purchasers because the order expunging the lis pendens removed all clouds on the title, including the judgment liens. The trial court agreed and granted summary judgment. The Court of Appeal reversed.

The Court of Appeal found that a recorded abstract of judgment attaches to all interests owned by the judgment debtor in real property in the county and creates a judgment lien on the property. When the property encumbered by the abstract of judgment is transferred, the transferees are charged with constructive knowledge of the encumbrance and take title subject to the lien. On the other hand, a lis pendens is recorded by a person asserting a real property claim. A transfer after a lis pendens is recorded binds the transferee to a judgment rendered in the pending action but does not make the party who recorded the lis pendens a secured creditor. Conversely, the abstract of judgment is recorded after a judgment is rendered and makes the judgment creditor a secured creditor. There is no statutory procedure for expunging an abstract of judgment. Because of the different statutory schemes, there is no reason to believe that an order expunging a lis pendens extinguishes a previously recorded judgment lien (*17 Cal. App. 4th 1066, 1069-1070)* .

The court distinguished *Knapp Development & Design v. Pal-Mal Properties, Ltd. (1987) 195 Cal. App. 3d 786, 240 Cal. Rptr. 920* , because it involved a mechanics' lien, which is a transitory lien that can be released by petition if it is not enforced (*17 Cal. App. 4th 1066, 1070)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesGeneral OverviewCivil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesLis PendensGeneral OverviewCivil ProcedureRemediesLis PendensNotices

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14-145 California Points & Authorities § 145.30

§ 145.30 Supporting Contention That Moving Party Is Entitled to Attorneys' Fees and Costs [Code Civ. Proc. § 405.38] Despite Withdrawal of Lis Pendens

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	NO. _____
Plaintiff [and Cross Defendant],	MEMORANDUM OF POINTS AND AUTHORITIES SUPPORTING MOTION FOR ATTORNEYS' FEES AND COSTS
vs.	[Limited Civil Case]
_____ [*name*],	Date: _____
Defendant [and Cross Complainant].	Time: _____
	Location: _____
	Judge: _____
	Discovery Cut-Off: _____
	Motion Cut-Off: _____
	Date Action Filed: _____
	[Trial Date:]

_____

_____ [DEFENDANT'S *or* CROSS DEFENDANT'S] REQUEST FOR ATTORNEYS' FEES SHOULD BE GRANTED DESPITE THE WITHDRAWAL OF THE NOTICE OF LIS PENDENS BECAUSE _____ [DEFENDANT *or* CROSS DEFENDANT] HAS REALIZED ITS LITIGATION OBJECTIVES AND THEREFORE IS A PREVAILING PARTY.

Withdrawal of Lis Pendens Does Not Preclude Recovery of Attorneys' Fees and Costs. When a lis pendens is

withdrawn while a motion to expunge is pending, the moving party is not automatically entitled to, nor should it automatically be denied, attorneys' fees and costs. The trial court should use a practical approach under which it must determine whether the moving party realized its litigation objectives (*Castro v. Superior Court (2004) 116 Cal. App. 4th 1010, 1022-1023, 10 Cal. Rptr. 3d 865*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of the contention that the moving party is entitled to attorneys' fees and costs under *Code Civ. Proc. § 405.38* following the withdrawal of a lis pendens.

These points and authorities may be combined with a memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the argument that the moving party is entitled to attorneys' fees and costs following the withdrawal of a lis pendens. This form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For a general discussion and additional forms relating to lis pendens, see California Forms of Pleading and Practice, Ch. 348, *Lis Pendens* (Matthew Bender).

[3] Discussion of Authorities

[a] Withdrawal of Lis Pendens Does Not Preclude Recovery of Attorneys' Fees and Costs

In ***Castro v. Superior Court*** *(2004) 116 Cal. App. 4th 1010, 10 Cal. Rptr. 3d 865* , the court of appeal held that when a lis pendens is withdrawn while a motion to expunge is pending, the moving party is not automatically entitled to, nor should it automatically be denied, attorneys' fees and costs under *Code Civ. Proc. § 405.38*. Rather, the trial court should use the "practical approach," pursuant to which it must determine whether the moving party realized its litigation objectives (*116 Cal. App. 4th 1010, 1022-1023)* . Using the "practical approach," the trial court has the discretion to award attorneys' fees and costs based on a determination of which party would have prevailed on the motion and whether the lis pendens claimant acted with substantial justification in withdrawing the lis pendens, or whether, in light of all of the circumstances, the imposition of fees and costs would otherwise be unjust (*116 Cal. App. 4th 1010, 1022-1023)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureRemediesLis PendensGeneral OverviewCivil ProcedureRemediesLis PendensTerminations

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CHAPTER 146 LITERARY PROPERTY, COPYRIGHT, AND THE PROTECTION OF IDEAS

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§ 146.syn Synopsis to Chapter 146: LITERARY PROPERTY, COPYRIGHT, AND THE PROTECTION OF IDEAS

§ 146.01 Scope of Chapter

§ 146.02 Literary Property

§ 146.03 Governing Law

[1] Federal Constitutional and Statutory Law

[2] Copyright Act of 1976

[3] Copyright Act of 1909

[4] California Copyright Law

[5] State Statutes of Limitation

§ 146.04 Related Pleading and Practice Chapters

§ 146.05 Related Points and Authorities Chapters

§§ 146.06-146.19 [Reserved]

§ 146.20 Supporting Contention That Cause of Action Under State Law Is Preempted by Federal Copyright Law [U.S. Const., Art. I, § 8, cl. 8; Art. VI, cl 2; 17 U.S.C. § 301(a)]--Rights Equivalent to Those Protected by, and Subject Matter as Falling Under, Federal Copyright Law

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Preemptive Effect of Copyright Act of 1976

[4] Additional Authorities

[a] Supremacy Clause

[b] Preemptive Effect of Copyright Act of 1976

§ 146.21 Supporting Contention That Cause of Action Under State Law Is Preempted by Federal Copyright Law [US Const, Art I, § 8, cl 8; Art VI, cl 2; 17 U.S.C. § 301(a)]--State Law May Not Prohibit Copying of Uncopyrighted Article

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] State Law Prohibiting Copying of Uncopyrighted Article Is Preempted

[b] No Cause of Action for Unfair Competition Is Stated Under California Law

[4] Additional Authorities

[a] No Cause of Action for Unfair Competition Under California Law

§ 146.22 Supporting Contention That Cause of Action Under State Copyright Law Is Preempted by Federal Copyright Law [17 U.S.C. § 301(b)(2)]--Cause of Action Arose From Undertakings Commenced After January 1, 1978

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Preemption Test

[b] Undertakings Commenced Before January 1, 1978

§ 146.23 Opposing Contention That Cause of Action Under State Law Is Preempted by Federal Copyright Law [17 U.S.C. § 301(b)(3)]--Rights Sought to Be Protected Under State Law as Not Equivalent to Exclusive Rights Protected by Federal Copyright Law

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] No Preemption When Cause of Action Under State Law Involves Actions Different From Those Proscribed by Federal Copyright Law

[b] No Preemption When Cause of Action Under State Law Involves Interests Different From Those Protected by Federal Copyright Law

[4] Additional Authorities

[a] No Preemption When Cause of Action Under State Law Involves Actions Different From Those Proscribed by Federal Copyright Law

§ 146.24 Opposing Contention That Cause of Action Under State Law Is Preempted by Federal Copyright Law [17 U.S.C. § 301(b)(1)]--Subject Matter of Cause of Action as Not Within Subject Matter of Copyright Under Federal Copyright Law [17 U.S.C. §§ 102, 103]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Ideas Are Not Within Subject Matter of Copyright Act of 1976

[b] Action Based on Unauthorized Use of Plaintiff's Likeness Is Not Preempted

§ 146.25 Opposing Contention That State Statute Is Preempted by Federal Copyright Law [17 U.S.C. § 301(c)]--State Law Governs Protection of Sound Recordings Fixed Before February 15, 1972

[1] FORM

[2] Comments

[a] Use of Form

[b] Criminal Penalties for Unauthorized Use of Sound Recordings Fixed Before February 15, 1972

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Preemptive Effect of Copyright Act of 1976

[b] "Sound Recording" Defined

§ 146.26 Opposing Contention That Cause of Action Under Federal Statute Is Preempted by Federal Copyright Law [17 U.S.C. § 301(d)]--Federal Copyright Law Does Not Affect State Jurisdiction Over Claims Arising Under Other Federal Laws

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Federal Statute Is Not Preempted

[b] Preemption of State Law as Unrelated to State Court Subject Matter Jurisdiction of Federal Claim

§§ 146.27-146.39 [Reserved]

§ 146.40 Supporting Contention That Author of Original Work Has Exclusive Ownership Under California Copyright Law in Representation or Expression of Work--Work Not Fixed in Tangible Medium of Expression [Civ. Code § 980(a)(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Works Not Fixed in Tangible Medium of Expression

[c] Related Pleading and Practice Forms

§ 146.41 Supporting Contention That Author Has Exclusive Ownership Under California Law in Sound Recording--Sound Recording Fixed Before February 15, 1972 [Civ. Code § 980(a)(2)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

§§ 146.42-146.59 [Reserved]

§ 146.60 Supporting Contention That Purveyor of Idea May Recover in Express or Implied-in-Fact Contract for Disclosure of Valuable Idea

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Express or Implied-in-Fact Contract to Pay for Disclosure of Idea Is Enforceable

[b] Idea May Be Subject Matter of Contract

[c] Adequacy of Consideration

[d] Novelty or Concreteness Not Required

[e] Past Consideration Supports Express Contract to Pay for Disclosure of Idea

[4] Additional Authorities

[a] Express or Implied-in-Fact Contract to Pay for Disclosure of Idea Is Enforceable

§ 146.61 Supporting Contention That Implied-in-Fact Contract Exists to Pay for Disclosure of Valuable Idea

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Evidence Required to Show Existence of Implied-in-Fact Contract

[b] Use of Idea Shown by Substantial Similarity Between Idea and Manner in Which It Is Used

§ 146.62 Supporting Contention That Another's Unauthorized Disclosure or Use of Idea Is Breach of Confidence

[1] FORM

[2] Comments

[a] Use of Form

[b] Existence of Breach of Confidence Cause of Action

[c] Recovery in Quasi-Contract or in Tort

[d] Related Pleading and Practice Forms

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Confidence Breached When Idea Is Disclosed or Used Without Permission of Confiding Party

[b] Relationship of the Parties

[c] Confidence Breached When Idea Is Disclosed or Used for Benefit of Confidant and to Detriment of Confiding Party

[d] Novelty of Idea

§ 146.63 Opposing Contention That Purveyor of Idea May Recover in Quasi-Contract for Unauthorized Use of Idea--Idea Is Not Protectible Property

[1] FORM

[2] Comments

[a] Use of Form

[b] Action in Quasi-Contract as Distinguished From Action for Breach of Confidence

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Material Used Must Constitute Protectible Property

[b] Ideas Are Not Protectible Property

§ 146.64 Opposing Contention That Implied-in-Fact Contract Exists to Pay for Disclosure of Valuable Idea

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Elements of Implied-in-Fact Contract to Pay for Use or Disclosure of Idea

[b] Promise to Pay Not Implied in Mere Facts That Idea Is Conveyed, Is Valuable, and Is Used for Profit

[c] Obligation to Pay for Disclosure of Idea Cannot Be Inferred From Mere Fact of Submission of Idea

[d] Party to Whom Idea Is Disclosed Must Use Idea

[e] Idea Must Be Submitted to Party to Whom Idea Is Disclosed

[f] Idea Does Not Consist of Rights Capable of Divisible Assignability

[4] Additional Authorities

[a] Obligation to Pay for Disclosure of Idea Cannot Be Inferred From Mere Fact of Submission of Idea

§ 146.65 Opposing Contention That Disclosure of Idea Is Breach of Confidence

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Requirements for Actionable Breach of Confidence

[b] Evidence of Communication of Idea's Confidentiality Required

[c] Knowledge of Confidential Nature of Idea Required to Precede Conveyance of Idea

[d] Actual Notice of Confidential Nature of Idea Required

[e] Opportunity to Reject Idea Required

[f] Agreement Between Parties to Maintain Confidentiality of Idea Required

[4] Additional Authorities

[a] Agreement Between Parties to Maintain Confidentiality of Idea Required

[b] Requirements for Actionable Breach of Confidence

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14-146 California Points & Authorities § 146.01

§ 146.01 Scope of Chapter

This chapter contains points and authorities concerning (1) preemption, under the federal Copyright Act of 1976 [*17 U.S.C. §§ 101-914*], of remedies for copyright infringement [*17 U.S.C. § 301*], (2) statutory protection of works of authorship not otherwise preempted by federal law [*Civ. Code § 980*], and (3) protection of ideas under California case law.

Part II, Subpart A contains points and authorities supporting [*see §§ 146.20*-146.22] and opposing [*see §§ 146.23*-146.26] the contention that causes of action under state law are preempted by the Copyright Act of 1976.

Part II, Subpart B contains points and authorities supporting the contention that authors have specific ownership rights, under California law, in works not fixed in tangible media of expression [*see § 146.40*] and in sound recordings fixed in tangible media of expression before February 15, 1972 [*see § 146.41*].

Part II, Subpart C contains points and authorities supporting [*see §§ 146.60* and *146.61*] and opposing [*see § 146.64*] the contention that a party may recover under an express or implied-in-fact contract for the breach of an express or implied-in-fact promise to pay for the disclosure or use of an idea. Part II, Subpart C also contains points and authorities supporting [*see § 146.62*] and opposing [*see § 146.65*] the contention that disclosure of an idea constitutes a breach of confidence.

Finally, Part II, Subpart B contains points and authorities opposing [*see § 146.63*] the contention that a party may recover in quasi-contract for breach of an implied-in-law promise to pay for the disclosure or use of an idea.

Copyright infringement under federal law is beyond the scope of this chapter. In addition, because federal law has effectively preempted the field of copyright infringement, this chapter does not discuss actions for infringement under California copyright law.

For extensive treatment of copyright protection and actions for infringement under federal law, see generally Nimmer on Copyright. For a scholarly analysis of the areas of copyright law and the protection of ideas discussed in this chapter, see Nimmer on Copyright, Ch 1, *Constitutional Aspects of Copyright* , Ch. 16, *The Law of Ideas* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawGeneral OverviewCopyright LawCivil Infringement ActionsGeneral OverviewCopyright LawConstitutional ProtectionsApplication of FederalismGeneral OverviewCopyright LawOwner RightsGeneral OverviewCopyright LawSubject MatterGeneral Overview

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14-146 California Points & Authorities § 146.02

§ 146.02 Literary Property

"Literary property" is a general term that is used either to describe the interest of an author (or those who claim under an author) in his or her works (whether before or after publication or before or after copyright has been secured) or to denote the corporeal property in which an intellectual production is embodied. Literary property in an intellectual production is afforded protection by the common law, by federal statute pursuant to constitutional authorization, and by state law [*Desny v. Wilder (1956) 46 Cal. 2d 715, 740, 299 P.2d 257*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawGeneral OverviewCopyright LawSubject MatterGeneral OverviewCopyright LawSubject MatterLiterary WorksGeneral Overview

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14-146 California Points & Authorities § 146.03

§ 146.03 Governing Law

[1] Federal Constitutional and Statutory Law

With specific federal statutory exceptions, the law of copyrights is governed exclusively by federal constitutional and statutory law. U.S. Const., Art. I, § 8, cl. 8 (the Copyright Clause) and U.S. Const., Art. VI, cl. 2 (the Supremacy Clause) lay the groundwork for *17 U.S.C. §§ 101*-914 (known as the Copyright Act of 1976), which govern all issues of copyright law and preempt the bulk of state statutory or decisional copyright protection.

Title *28 U.S.C. § 1338(a)* grants exclusive jurisdiction to the federal district courts in actions arising under *17 U.S.C. §§ 101-914*.

[2] Copyright Act of 1976

Title *17 U.S.C. § 301(a)* preempts and abolishes, on and after January 1, 1978, any rights under the common law or statutes of any state that are equivalent to copyright and that extend to works, fixed in a tangible medium of expression, coming within the scope and subject matter of the Copyright Act of 1976. Title *17 U.S.C. § 301(a)* applies regardless of when a work is created and regardless of whether it is published or unpublished. Title *17 U.S.C. §§ 102* and *103* define the subject matter of copyright, and *17 U.S.C. § 106* delineates the exclusive rights that a copyright owner possesses.

Under *17 U.S.C. § 301(c)*, any rights or remedies under the common law or statutes of any state relative to sound recordings fixed before February 15, 1972, will not be annulled or limited until February 15, 2067.

[3] Copyright Act of 1909

Under *17 U.S.C. § 301(b)(2)*, the Copyright Act of 1976 does not apply to any cause of action arising from undertakings commenced before January 1, 1978. Therefore, the federal law in effect prior to January 1, 1978, former 17 U.S.C. §§ 1-216 (known as the Copyright Act of 1909) may still apply to govern these causes of action if the work in issue attained statutory copyright under the provisions of the Copyright Act of 1909 [*see, e.g., Magnuson v. Video Yesteryear (9th Cir. 1996) 85 F.3d 1424* (copyright obtained in 1968, validity of written conveyance of copyright decided under Copyright Act of 1909); *American Vitagraph, Inc. v. Levy (9th Cir. 1981) 659 F.2d 1023, 1024 n.1, 1024* (decided

under Copyright Act of 1909)].

[4] California Copyright Law

Consonant with the preemption provisions of *17 U.S.C. § 301*, California copyright law remains valid in four instances. First, federal law does not preempt state protection with respect to any subject matter that does not come within the subject matter of copyright as specified by *17 U.S.C. §§ 102* and *103* [*17 U.S.C. § 301(b)(1)*]. Title *17 U.S.C. § 102(a)* specifically excludes works not fixed in tangible media of expression from the scope of federal copyright protection. Thus, *Civ. Code §§ 980(a)(1), 981(a)*, and *982(a)* govern the ownership rights of an author of an original work of authorship that is not fixed in a tangible medium of expression.

Second, sound recordings fixed before February 15, 1972, are not preempted until February 15, 2067 [*17 U.S.C. § 301(c)*]. These sound recordings are protected under California law by *Civ. Code § 980(a)(2)*. Similarly, criminal statutes such as *Penal Code §§ 653h, 653s, 653u, 653v*, and *653w*, designed to penalize unauthorized activities relative to sound recordings and live performances remain valid until February 15, 2067.

Third, federal law does not preempt state protection against violations of legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by *17 U.S.C. § 106* [*17 U.S.C. § 301(b)(3)*].

Finally, California statutory and common law remains valid with respect to any copyright cause of action arising from undertakings commenced before January 1, 1978 [*17 U.S.C. § 301(b)(2)*].

Code Civ. Proc. § 429.30(b) governs the attachment to complaints, in actions for the infringement of rights in literary property, of copies of the work at issue, and provides for a court to view the work when necessary or desirable. While there is no case law construing *Code Civ. Proc. § 429.30*, former Code Civ. Proc. § 426(3), the predecessor of, and containing substantially the same provisions as, *Code Civ. Proc. § 429.30*, has been construed to apply in both tort and contract actions [*see, e.g., Weitzenkorn v. Lesser (1953) 40 Cal. 2d 778, 785, 256 P.2d 947* ; *see also Edgar Rice Burroughs, Inc. v. Metro-Goldwyn-Mayer, Inc. (1962) 205 Cal. App. 2d 441, 445, 23 Cal. Rptr. 14*].

[5] State Statutes of Limitation

The two-year period of limitation under *Code Civ. Proc. § 339(1)* governs actions for breach of oral express and implied-in-fact contracts to pay for the disclosure of ideas [*Thompson v. California Brewing Co. (1957) 150 Cal. App. 2d 469, 477, 310 P.2d 436*]. *Code Civ. Proc. § 339(1)* also governs actions for breach of confidence in the disclosure of ideas [*see Davies v. Krasna (1975) 14 Cal. 3d 502, 516, 121 Cal. Rptr. 705, 535 P.2d 1161*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawGeneral OverviewCopyright LawConstitutional ProtectionsApplication of FederalismGeneral OverviewCopyright LawConstitutional ProtectionsApplication of FederalismCommon LawCopyright LawConstitutional ProtectionsApplication of FederalismFederal PreemptionCopyright LawOwner RightsState Regulation

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14-146 California Points & Authorities § 146.04

§ 146.04 Related Pleading and Practice Chapters

For a discussion and forms for use in copyright infringement actions and in actions under California law for the protection of ideas, see California Forms of Pleading and Practice, Ch. 349, *Literary Property and Copyright* , (Matthew Bender).

For discussion and forms concerning related actions, see the following chapters in California Forms of Pleading and Practice (Matthew Bender):

- Ch. 57, *Art*.
- Ch. 140, *Contracts*.
- Ch. 411, *Patents and Inventions*.
- Ch. 549, *Trademarks and Trade Names*.
- Ch. 565, *Unfair Competition*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawGeneral OverviewCopyright LawCivil Infringement ActionsGeneral OverviewCopyright LawCivil Infringement ActionsRemediesGeneral OverviewCopyright LawCivil Infringement ActionsSummary JudgmentGeneral Overview

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14-146 California Points & Authorities § 146.05

§ 146.05 Related Points and Authorities Chapters

For memoranda of points and authorities for use in contract actions, see Ch. 50, *Contracts* .

For memoranda of points and authorities for use in obtaining injunctive relief in trademark and trade name infringement actions, see Ch. 116, *Injunctions* .

For memoranda of points and authorities for use in obtaining a protective order for trade secrets, see Ch. 81, *Discovery: Privileges and Other Discovery Limitations* .

For a discussion of how to use the forms in this chapter to draft a memorandum of points or authorities or a trial or appellate brief, and for a sample of a complete memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawGeneral OverviewCopyright LawCivil Infringement ActionsGeneral OverviewCopyright LawCivil Infringement ActionsRemediesInjunctive Relief

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14-146 California Points & Authorities §§ 146.06-146.19

[Reserved]

§§ 146.06[Reserved]

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PART II. FORMS
A. Preemption by Federal Copyright Law of Actions Under California and Other Federal Law

14-146 California Points & Authorities § 146.20

§ 146.20 Supporting Contention That Cause of Action Under State Law Is Preempted by Federal Copyright Law [U.S. Const., Art. I, § 8, cl. 8; Art. VI, cl 2; 17 U.S.C. § 301(a)]--Rights Equivalent to Those Protected by, and Subject Matter as Falling Under, Federal Copyright Law

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Specify party, e.g.,* PLAINTIFF'S] CAUSE OF ACTION UNDER STATE LAW IS PREEMPTED BY THE COPYRIGHT ACT OF 1976 BECAUSE IT INVOLVES LEGAL AND/OR EQUITABLE RIGHTS THAT ARE EQUIVALENT TO THE EXCLUSIVE RIGHTS WITHIN THE GENERAL SCOPE OF COPYRIGHT AND SUBJECT MATTER THAT FALLS UNDER THE COPYRIGHT ACT OF 1976.

A. Power of Congress to Regulate Copyright. The Congress has the power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries (U.S. Const., Art. I, § 8, cl. 8).

B. Supremacy Clause. The United States Constitution, and the laws of the United States made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, is the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding (U.S. Const., Art. VI, cl. 2).

C. Preemptive Effect of Copyright Act of 1976. *Section 301(a) of Title 17 of the United States Code*preempts the rights created by state common law copyright if (1) those rights are equivalent to those protected by the Copyright Act of 1976 and (2) the subject matter of the copyright falls under the Copyright Act of 1976 (*17 U.S.C. § 301(a), (b)(3)*; *Robert H. Jacobs, Inc. v. Westoaks Realtors, Inc. (1984) 159 Cal. App. 3d 637, 642, 205 Cal. Rptr. 620*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a party's cause of action under state law is preempted by federal copyright law, when the state cause of action seeks to protect legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright, as specified by *17 U.S.C. § 106* (exclusive rights of copyright owners), and the subject matter of the copyright falls under federal law, as specified by *17 U.S.C. §§ 102* and *103* (subject matter of copyright).

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of federal preemption of claims under state law. For example, these points and authorities may be included in support of a motion for judgment underCode *Civ. Proc. § 631.8(a)* [*see Robert H. Jacobs, Inc. v. Westoaks Realtors, Inc. (1984) 159 Cal. App. 3d 637, 642, 205 Cal. Rptr. 620* (defense motion for judgment)]. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Specifically, counsel should insert argument showing that the legal or equitable rights sought to be vindicated by the cause of action under state law are equivalent to one or more of the exclusive rights within the general scope of copyright, as specified by *17 U.S.C. § 106* [*see 17 U.S.C. § 301(b)(3)*].

[b] Related Pleading and Practice Forms

For discussion of and forms for use in litigating a copyright infringement action under federal law, see California Forms of Pleading and Practice, Ch. 349, *Literary Property and Copyright* (Matthew Bender).

[c] Opposing Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities set out in *§§ 146.23* and *146.24*.

[3] Discussion of Authorities

[a] Preemptive Effect of Copyright Act of 1976

In ***Robert H. Jacobs, Inc. v. Westoaks Realtors, Inc.*** *(1984) 159 Cal. App. 3d 637, 205 Cal. Rptr. 620* , plaintiff contracted with defendant realtor to provide architectural services for the construction of two homes on adjacent lots. The contracts, which plaintiff drafted, did not expressly prohibit assignment of copies of the architectural plans to others. After preparing the plans, plaintiff filed them for city approval and applied for a building permit, declaring himself the responsible architect. The approved plans that plaintiff provided defendant contained a legend declaring the plans were not transferable, but by then, defendant had already paid plaintiff's fee. Subsequently, plaintiff discovered thehomes were not being built according to his plans. Furthermore, he believed that certain construction practices violated the building code. He also learned that another defendant now owned the lots and had modified the plans, and that a second building permit had been filed, declaring the second defendant owner of the lots and plaintiff the responsible architect. After plaintiff's objection to the city building department, the second defendant agreed to substitute another architect or civil engineer to accept responsibility for the construction, and the city struck plaintiff's name from the filed documents. Plaintiff subsequently filed an action against both defendants, generally alleging an unauthorized use of his plans. Plaintiff's complaint contained a variety of causes of action, including one for common law copyright infringement under state law. After presentation of plaintiff's case, defendants moved for judgment. The trial court granted the motion and entered judgment for defendants. Among other findings, the trial court found no violation of plaintiff's common law copyright because it found defendant realtor had a license to use plaintiff's plans, the contracts did not prohibit assignment of this license, and defendant realtor ad validly assigned this license to defendant lot owner. Plaintiff appealed from the trial court's judgment.

The court of appeal affirmed the trial court's judgment. The court found a review of the evidence relating to common law copyright infringement unnecessary because the Copyright Act of 1976 abolished plaintiff's cause of action. The court held that *17 U.S.C. § 301(a)* preempts the rights created by state common law copyright if (1) those rights are equivalent to those protected by federal copyright law and (2) the subject matter of the copyright falls under the Copyright Act of 1976 (*159 Cal. App. 3d 637, 642)* . Noting that the United States Supreme Court has not determined the meaning of "equivalent rights" under *17 U.S.C. § 301(a)*, the court nonetheless held plaintiff's cause of action to be preempted because it found that the plans were within the subject matter of copyright as defined by *17 U.S.C. §§ 101* and *102*, and that the right plaintiff sought to vindicate by his cause of action for state common law copyright infringement was the same as that provided to copyright owners under *17 U.S.C. § 106(3)* (copyright owner's right to distribute copies of work to public). The court then concluded that plaintiff was required to invoke federal jurisdiction to pursue his copyright infringement claim because the federal courts possess exclusive jurisdiction in actions arising under the Copyright Act of 1976 (*159 Cal. App. 3d 637, 643)* .

[4] Additional Authorities

[a] Supremacy Clause

In *Fisher v. Dees (9th Cir. 1986) 794 F.2d 432* , an action for copyright infringement and unfair competition, the court held that even if defendants' allegedly false claim of authorship of plaintiffs' song constituted a tort separate from unfair competition under California law, that cause of action was preempted by federal copyright law. Citing *Sears, Roebuck & Co. v. Stiffel Co. (1964) 376 U.S. 225, 84 S. Ct. 784, 11 L. Ed. 2d 661, 84 S. Ct. 1131, 12 L. Ed. 2d 87* , and *Compco Corp. v. Day-Brite Lighting, Inc. (1964) 376 U.S. 234, 84 S. Ct. 779, 11 L. Ed. 2d 669, 84 S. Ct. 1162, 12 L. Ed. 2d 183* (both discussed in *§ 146.21[3][a]*), the court ruled that the Supremacy Clause of the U.S. Constitution precludes the states from protecting types of intellectual property that are already covered by the federal copyright law. Therefore, the kind of misappropriation alleged by plaintiffs could be redressed, if at all, only under federal copyright law (*794 F.2d 432, 440)* .

[b] Preemptive Effect of Copyright Act of 1976

In *Montz v. Pilgrim Films & TV, Inc. (9th Cir. 2010) 606 F.3d 1153* , the complaint made clear that the plaintiff expected to profit by retaining control of the plaintiff's work instead of by selling it. The court held, therefore, that the plaintiff's claim was fundamentally a copyright claim, and that a state law cause of action based on that claim was preempted (*606 F.3d 1153, 1158)* . To show a viable state law claim, the complaint would have to allege that the plaintiff offered the work for sale (*606 F.3d 1153, 1159-1160)* .

In *Kodadek v. MTV Networks, Inc. (9th Cir. 1998) 152 F.3d 1209* , plaintiff alleged that he originated two cartoon characters called "Beavis" and "Butthead" in 1991 and submitted his drawings to a person who two years later was credited with having created animated characters by the same name on a television show. After seeing the televised cartoon show in 1993 and having misplaced his original drawings in the interim, plaintiff drew new sketches of "Beavis" and "Butthead" from memory. In 1995 plaintiff applied for and obtained a certificate of registration by depositing with the Copyright Office two of the 1993 drawings (deemed "reconstructions" by the court), stating on his registration application that his creation was completed in 1991. Plaintiff sued the television network and others alleging copyright infringement and unfair competition in violation of *Bus. & Prof. Code § 17200 et seq.* The trial court granted summary judgment in favor of defendants. The court of appeals affirmed, holding that the infringement claim was foreclosed because a reconstruction, instead of an original work, was deposited. No copyright registration of the 1991 drawings occurred [*17 U.S.C. § 408(b)(1), (2)*], and an unfair competition claim was preempted by the Copyright Act. The latter holding was premised on a two-prong test, which found allegations of the state-law unfair competition claim were based solely on rights equivalent to those protected by federal copyright law, and the drawings were "pictorial works" clearly within the "subject matter" of the Copyright Act (*152 F.3d 1209, 1212-1213)* .

Maheu v. CBS, Inc. (1988) 201 Cal. App. 3d 662, 247 Cal. Rptr. 304 , involved actions for conversion and intentional interference with prospective economic advantage, among others, arising out of defendants' publication of plaintiff's business correspondence. The court of appeal affirmed the trial court's order of dismissal following the sustaining of a demurrer to plaintiff's fourth amended complaint without leave to amend. The court held plaintiff's conversion causes of action were preempted by *17 U.S.C. § 301* because (1) plaintiff's letters were copyrightable, being within the subject matter of copyright defined under *17 U.S.C. §§ 102* and *103, (2)* the right plaintiff sought to protect by his conversion action was equivalent to one within the general scope of copyright, in that hesought damages arising from the reproduction and distribution, rather than the physical possession, of his letters, and (3) plaintiff's conversion cause of action was time-barred (*201 Cal. App. 3d 662, 671-674)* . Plaintiff's interference cause of action was also preempted by *17 U.S.C. § 301* because, in enacting the Copyright Act of 1976, Congress intended that state law claims for interference with contract or prospective economic advantage be preempted when based on unauthorized use or copying of copyrightable property (*201 Cal. App. 3d 662, 677)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawGeneral OverviewCopyright LawCivil Infringement ActionsGeneral OverviewCopyright LawConstitutional ProtectionsGeneral OverviewCopyright LawConstitutional ProtectionsApplication of FederalismGeneral Overview

California Points & Authorities

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 146 LITERARY PROPERTY, COPYRIGHT, AND THE PROTECTION OF IDEAS
PART II. FORMS
A. Preemption by Federal Copyright Law of Actions Under California and Other Federal Law

14-146 California Points & Authorities § 146.21

§ 146.21 Supporting Contention That Cause of Action Under State Law Is Preempted by Federal Copyright Law [US Const, Art I, § 8, cl 8; Art VI, cl 2; 17 U.S.C. § 301(a)]--State Law May Not Prohibit Copying of Uncopyrighted Article

[1] FORM

[The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. The following should be combined with the points and authorities in *§ 146.20*.]

_____ [*Specify party, e.g.*, PLAINTIFF'S] CAUSE OF ACTION UNDER STATE LAW IS PREEMPTED BY THE COPYRIGHT ACT OF 1976 BECAUSE THE STATE CAUSE OF ACTION IS BASED SOLELY ON THE COPYING OF MATTER IN THE PUBLIC DOMAIN.

A. State Law Prohibiting Copying of Uncopyrighted Article Is Preempted. When protection of an uncopyrighted article is preempted by federal copyright law, state law may not forbid others to copy that article or award damages for copying it (*Sammons & Sons v. Ladd-Fab, Inc. (1982) 138 Cal. App. 3d 306, 308, 187 Cal. Rptr. 874* ; *see Sears, Roebuck & Co. v. Stiffel Co. (1964) 376 U.S. 225, 232-233, 84 S. Ct. 784, 11 L. Ed. 2d 661 , reh. denied, 376 U.S. 973, 84 S. Ct. 1131, 12 L. Ed. 2d 87* ; *Compco Corp. v. Day-Brite Lighting (1964) 376 U.S. 234, 237-238, 84 S. Ct. 779, 11 L. Ed. 2d 669 , reh. denied, 377 U.S. 913, 84 S. Ct. 1162, 12 L. Ed. 2d 183*).

[*Optional*] **B. No Cause of Action for Unfair Competition Is Stated Under California Law.** When a complaint alleges no facts other than the lawful copying of an article in the public domain, no cause of action for misappropriation of the article, under a theory of unfair competition, is stated (*Sammons & Sons v. Ladd-Fab, Inc. (1982) 138 Cal. App. 3d 306, 309, 187 Cal. Rptr. 874*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a party's cause of action under state law

is preempted by federal copyright law, when the state cause of action seeks to prohibit the copying of an article that is not protected by copyright and is thus in the public domain. Optional Paragraph B may be used if the opposing party has attempted to use state unfair competition laws to prevent the copying of an article in the public domain.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of federal preemption of claims under state law. For example, they may be included in support of a general demurrer to a complaint [*see Sammons & Sons v. Ladd-Fab, Inc. (1982) 138 Cal. App. 3d 306, 308, 187 Cal. Rptr. 874*]. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Specifically, counsel should insert argument showing that the cause of action under state law is based solely on the copying of material in the public domain [*see Sammons & Sons v. Ladd-Fab, Inc. (1982) 138 Cal. App. 3d 306, 309, 187 Cal. Rptr. 874*].

[b] Related Pleading and Practice Forms

For discussion of and forms for use in litigating a copyright infringement action under federal law, see California Forms of Pleading and Practice, Ch. 349, *Literary Property and Copyright* (Matthew Bender).

[c] Opposing Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities set out in *§ 146.23*.

[3] Discussion of Authorities

[a] State Law Prohibiting Copying of Uncopyrighted Article Is Preempted

In ***Sammons & Sons v. Ladd-Fab, Inc.*** *(1982) 138 Cal. App. 3d 306, 187 Cal. Rptr. 874* , plaintiff was engaged in the design, manufacture, and marketing of storage components used in warehousing. The components were original and unique in conception and design, and had features that distinguished them from other similar products. Subsequently, defendant became a distributor of plaintiff's components and thereby acquired a supply of them, as well as literature compiled by plaintiff relating to the components. Defendant then began to manufacture and market storage components that were exact reproductions of those made and marketed by plaintiff. Additionally, defendant published and distributed a catalog, reflecting its product line, which was an exact copy of a catalog published by plaintiff and reflecting plaintiff's product line. Plaintiff then commenced an action against defendant for damages, an accounting, and injunctive relief for unfaircompetition under *Bus. & Prof. Code § 17200* based on defendant's copying of its components and its catalog. Defendant demurred to the complaint on the ground that it failed to state facts sufficient to constitute a cause of action. Plaintiff chose not to amend its complaint. The trial court sustained the demurrer without leave to amend and dismissed the complaint. The trial court based its ruling on the propositions that (1) federal law had completely preempted state law relative to the copying of unpatented and uncopyrighted matter coming within the ambit of the patent and copyright laws; (2) under federal law, the copying of plaintiff's unpatented products and the reproduction of plaintiff's uncopyrighted catalog was permissible; and (3) this copying could not, as such, be unfair competition under California law. Plaintiff appealed from the judgment of dismissal.

The court of appeal affirmed the trial court's judgment (*138 Cal. App. 3d 306, 313)* . The court held that plaintiff had stated no cause of action, under California unfair competition law, for misappropriation of its many years of development and research on the components and the catalog (*138 Cal. App. 3d 306, 309)* . The court found that plaintiff's components were not patented and its catalog was not copyrighted. Therefore both were in the public domain and could be freely copied by defendant (*138 Cal. App. 3d 306, 310)* . The court also found that the complaint alleged no facts other than lawful copying of these products and catalog. It omitted any facts suggesting that defendant had

failed to identify the source and origin of its own products. Citing *Sears, Roebuck & Co. v. Stiffel Co. (1964) 376 U.S. 225, 84 S. Ct. 784, 11 L. Ed. 2d 661 , reh. denied, 376 U.S. 973, 84 S. Ct. 1131, 12 L. Ed. 2d 87* , and *Compco Corp. v. Day-Brite Lighting (1964) 376 U.S. 234, 84 S. Ct. 779, 11 L. Ed. 2d 669 , reh. denied, 377 U.S. 913, 84 S. Ct. 1162, 12 L. Ed. 2d 183* (both discussed *above*), the court held that by legitimizing the copying of matter in the public domain, federal law proscribes state law misapproriation claims based solely on such copying (*138 Cal. App. 3d 306, 309)* . The court held plaintiff subject to the rule of *Sears* that a state may not, when an article is unpatented and uncopyrighted, prohibit the copying of the article itself or award damages for that copying (*138 Cal. App. 3d 306, 310)* .

In ***Sears, Roebuck & Co. v. Stiffel Co.*** *(1964) 376 U.S. 225, 84 S. Ct. 784, 11 L. Ed. 2d 661 , reh. denied, 376 U.S. 973, 84 S. Ct. 1131, 12 L. Ed. 2d 87* , Stiffel secured design and mechanical patents on a pole lamp. Soon after Stiffel brought them on the market, Sears put on the market a substantially identical lamp, which it sold more cheaply. Stiffel then brought an action against Sears in the United States District Court for the Northern District of Illinois. In the first count of the complaint, Stiffel claimed that, by copying Stiffel's design, Sears had infringed Stiffel's patents. In the second count, Stiffel claimed that, by selling copies of Stiffel's lamp, Sears had caused confusion in the trade as to the source of the lamps and had thereby engaged in unfair competition under Illinois law. There was evidence that (1) identifying tags were not attached to the Sears lamps, even though labels appeared on the cartons in which they were delivered to customers, (2) that customers had asked Stiffel whether its lamps differed from those of Sears, and (3) that in two cases, customers who had bought Stiffel lamps had complained to Stiffel on learning that Sears was selling substantially identical lamps at a much lower price. The district court held the patents invalid for want of invention. The court then held Sears guilty of unfair competition, finding that Sears' lamp was a substantially exact copy of Stiffel's and that the two lamps were so much alike that confusion between them was likely and that some confusion had already occurred. The court enjoined Sears from unfairly competing with Stiffel by selling, or attempting to sell, pole lamps identical to or confusingly similar to Stiffel's lamp, and ordered an accounting to fix profits and damages resulting from Sears' unfair competition. The United States Court of Appeals for the Seventh Circuit affirmed the district court's judgment. Sears then petitioned the United States Supreme Court for a writ of certiorari.

The Supreme Court granted the petition and reversed the judgment of the court of appeals. According to the Court, the question in the case was whether a state's unfair competition law could, consistently with the federal patent laws, impose liability for or prohibit the copying of an article that is protected by neither a federal patent nor a copyright (*376 U.S. 225*). The Court first noted that the district court had held that the pole lamp sold by Stiffel was not entitled to the protection of either a mechanical or a design patent. Consequently, the Court held that an unpatentable article, like an article on which a patent has expired, is in the public domain and may be made and sold by whoever chooses to do so. According to the Court, Sears copied Stiffel's design and sold lamps almost identical to those sold by Stiffel. Under the federal patent laws, Sears had every right to do so. It was immaterial that Stiffel originated the pole lamp and made it popular (*376 U.S. 225, 231)* . The Court held that to allow a state, by use of its unfair competition law, to prevent the copying of an article that represented too slight an advance to be patented, would be to permit the state to block off from the public something that federal law had said belongs to the public (*376 U.S. 225, 231-232)* . The Court noted that Sears had been held liable for unfair competiton because of a finding of likelihood of confusion based only on the fact that Sears' lamp was copied from Stiffel's unpatented lamp and that consequently the two looked exactly alike. Of course there could be confusion over who had manufactured the nearly identical lamps. But the Court ruled that the mere inability of the public to tell two identical articles apart is not enough to support an injunction against copying or an award of damages for copying that which the federal patent laws permit to be copied. Doubtless a state may, in appropriate circumstances, require that goods, whether patented or unpatented, be labeled or that oter precautionary steps be taken to prevent customers from being misled over the source of goods, just as it may protect businesses in the use of their trademarks, labels, or distinctive dress in the packaging of goods to prevent others, by imitating these markings, from misleading purchasers over the source of the goods (*376 U.S. 225, 232)* . However,because of the preemptive effect of the federal patent laws, when an article is unpatented and uncopyrighted, a state may not prohibit the copying of the article itself or award damages for that copying (*376 U.S. 225, 232-233)* .

In ***Compco Corp. v. Day-Brite Lighting*** *(1964) 376 U.S. 234, 84 S. Ct. 779, 11 L. Ed. 2d 669 , reh. denied, 377 U.S. 913, 84 S. Ct. 1162, 12 L. Ed. 2d 183* , both parties manufactured fluorescent light fixtures of a kind widely used in offices and stores. Day-Brite secured a design patent on a reflector having cross-ribs claimed to give both strength and attractiveness to the fixture. After Day-Brite had begun selling its fixture, Compco's predecessor began making and selling fixtures very similar to Day-Brite's. Day-Brite then brought an action for an accounting and injunctive relief against Compco in the United States District Court for the Northern District of Illinois. The complaint alleged, in its first count, that Compco had infringed Day-Brite's patent. The second count of the complaint alleged, under Illinois law, that Compco had unfairly competed with Day-Brite in the sale of the fixtures in that the public and the trade had come to associate this particular design with Day-Brite, and Compco had copied Day-Brite's distinctive design so as to confuse and deceive purchasers into thinking Compco's fixtures were actually Day-Brite's. The district court held the patent invalid, found Compco guilty of unfair competition in the sale of its fixtures, ordered Compco to account to Day-Brite for damages, and enjoined Compco from selling, or attempting to sell, reflectors identical or confusingly similar to those made by Day-Brite. On appeal, the United States Seventh Circuit Court of Appeals affirmed the district court's judgment. Compco then petitioned the United States Supreme Court for a writ of certiorari.

The Supreme Court granted the petition and reversed the judgment of the court of appeals. Holding the issue to be whether the use of a state unfair competition law to give relief against the copying of an unpatented industrial design conflicted with the federal patent laws, the Court held the order for an accounting for damages and the injunction conflicted with the federal patent laws (*376 U.S. 234, 237)* . The Court reasoned that, under the federal patent laws, Day-Brite's fixture was not entitled to a patent. Therefore, the fixture was in the public domain and could be copied in every detail by whoever chose to do so. The Court cited *Sears, Roebuck & Co. v. Stiffel Co., (1964) 376 U.S. 225, 232-233, 84 S. Ct. 784, 11 L. Ed. 2d 661 , reh. denied, 376 U.S. 973, 84 S. Ct. 1131, 12 L. Ed. 2d 87* (discussed *above*), for the proposition that when an article is unprotected by a patent or a copyright, state law may not forbid others to copy that article. To forbid copying would interfere with the federal policy, found in Article I, Section 8, Clause 8 of the United States Constitution, and in the implementing federal statutes, of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain (*376 U.S. 234, 237)* .

In further explanation of when a state may act to prevent unfair competition by the copying of an unpatented or uncopyrighted article, the Court held that a state has power to impose liability on those who, knowing that the public is relying on an original manufacturer's reputation for quality and integrity, deceive the public by palming off their copies as the original. That an article copied from an unpatented article could be made in some other way, that the design is "nonfunctional" and not essential to the use of either article, that the configuration of the article copied may have a secondary meaning that identifies the maker to the trade, or that there may be confusion among purchasers over which article is which or over who is the maker, may be relevant evidence in applying a state's law requiring these precautions as labeling. However, and regardless of the copier's motives, neither these facts nor any others can furnish a basis for imposing liability for or prohibiting the actual acts of copying and selling (*376 U.S. 234, 238)* . Concomitantly, a state cannot hold a copier accountable in damages for failure to label or otherwise identify its goods unless its failure is in violation of valid state statutory or decisional law requiring the copier to label or take other precautions to prevent confusion of customers as to the source of the goods (*376 U.S. 234, 238-239)* . In dictum, the Court noted that there was no showing that Illinois had any such law (*376 U.S. 234, 239*).

[b] No Cause of Action for Unfair Competition Is Stated Under California Law

The factual and procedural background of ***Sammons & Sons v. Ladd-Fab, Inc.*** *(1982) 138 Cal. App. 3d 306, 187 Cal. Rptr. 874* , is discussed in *§ 146.21[2][a]*. In *Sammons*, the court of appeal held that plaintiff had stated no cause of action, under California unfair competition law, for misappropriation of its many years of development and research on the components and the catalog (*138 Cal. App. 3d 306, 309)* . Even though plaintiff had alleged an appropriation by defendant of plaintiff's design and development efforts, this appropriation, accomplished solely by a copying that was lawful under federal patent and copyright laws, could not be a misappropriation under state law (*138 Cal. App. 3d 306, 310)* . Even though copying of material in the public domain may be an element in an otherwise unlawful competitive

scheme, such as when free copying is accompanied by misappropriation outside the scope of copying, unfair competition claims under state law may not be based solely on that copying (*138 Cal. App. 3d 306, 311, 312)* . The court held plaintiff subject to the rule of *Sears* that because of the federal patent laws, a state may not, when an article is unpatented and uncopyrighted, prohibit the copying of the article itself or award damages for that copying (*138 Cal. App. 3d 306, 310)* . The court also held plaintiff not entitled to equitable relief for defendant's alleged failure to distinctly identify the source and origin of its products, because the allegation in the complaint did not suggest that defendant failed to identify its duplicate product and catalog as its own and because the facts alleged showed that defendant tookappropriate steps to identify the source and origin of its products (*138 Cal. App. 3d 306, 313)* .

[4] Additional Authorities

[a] No Cause of Action for Unfair Competition Under California Law

The plaintiff in *Summit Mach. Tool Mfg. v. Victor CNC Systems (9th Cir. 1993) 7 F.3d 1434* , entered into a contract with a Chinese corporation (ZMTW), under which ZMTW was to manufacture lathes from plaintiff's designs. The agreement provided that plaintiff had the exclusive right to sell outside of China all lathes manufactured by ZMTW in accordance with plaintiff's design. A few years later, defendant purchased seven lathes from ZMTW for resale in the United States. When plaintiff learned of the purchase by defendant, it notified defendant of its contract and demanded that defendant cease reselling the lathes. When defendant refused to do so, plaintiff brought suit against defendant, alleging unfair competition in violation of the federal Lanham Act [*15 U.S.C. § 1125(a)*] and California statutory and common law, among other claims. The trial court held that the state-law unfair competition claims were preempted by federal patent and copyright laws to the extent that they sought to prevent defendant from copying plaintiff's designs, and the court of appeals affirmed. The court noted that federal patent and copyright laws limit the states' ability to regulate unfair competition (*7 F.3d 1434, 1439)* . The court observed that preemption analysis involves determining whether the state law claim contains an element not shared by the federal law, that is, an element that changes the nature of the action so that it is qualitatively different from a copyright or patent infringement claim. Therefore, if copying the lathe or the plans for the lathe in itself infringes the state-created right, the state-created right is preempted (*7 F.3d 1434, 1439-1440)* . The court stated that to the extent that plaintiff complained that defendant had misappropriated the fruits of plaintiff's labor by marketing plaintiff's lathe with defendant's name on it, such a claim is really a claim for reverse palming off. State unfair competition laws that seek to prevent reverse palming off contain the requisite extra element and are not preempted by federal law (*7 F.3d 1434, 1441)* . However, to the extent that plaintiff complained that defendant had "pirated" its lathe by employing a particularly unfair method of copying, such a claim is preempted by federal law (*7 F.3d 1434, 1442)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawCivil Infringement ActionsGeneral OverviewCopyright LawConstitutional ProtectionsGeneral OverviewCopyright LawConstitutional ProtectionsApplication of FederalismGeneral OverviewCopyright LawConstitutional ProtectionsApplication of FederalismCommon LawCopyright LawConstitutional ProtectionsApplication of FederalismFederal Preemption

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 146 LITERARY PROPERTY, COPYRIGHT, AND THE PROTECTION OF IDEAS
PART II. FORMS
A. Preemption by Federal Copyright Law of Actions Under California and Other Federal Law

14-146 California Points & Authorities § 146.22

§ 146.22 Supporting Contention That Cause of Action Under State Copyright Law Is Preempted by Federal Copyright Law [17 U.S.C. § 301(b)(2)]--Cause of Action Arose From Undertakings Commenced After January 1, 1978

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Specify party, e.g.,* PLAINTIFF'S] CAUSE OF ACTION UNDER CALIFORNIA COPYRIGHT LAW IS PREEMPTED BY THE COPYRIGHT ACT OF 1976 BECAUSE THE STATE CAUSE OF ACTION UNDER STATE LAW AROSE FROM UNDERTAKINGS COMMENCED AFTER JANUARY 1, 1978.

A. Supremacy Clause. [*See § 146.20, Paragraph A.*]

B. Preemption Test. The Copyright Act of 1976 preempts state common law copyright claims if the claims arose from undertakings commenced after January 1, 1978 (*17 U.S.C. § 301(a), (b)(2)*; *Mention v. Gessell (9th Cir. 1983) 714 F.2d 87, 90* ; *Klekas v. EMI Films, Inc. (1984) 150 Cal. App. 3d 1102, 1109, 198 Cal. Rptr. 296*).

C. Undertakings Commenced Before January 1, 1978. Claims arising from infringing activities are "undertakings" within the meaning of *Section 301(b)(2) of Title 17 of the United States Code*, and the date the infringing activities occurred is dispositive of the issue of when an undertaking was commenced (*see 17 U.S.C. § 301(a), (b)(2)*; *Mention v. Gessell (9th Cir. 1983) 714 F.2d 87, 90* ; *Klekas v. EMI Films, Inc. (1984) 150 Cal. App. 3d 1102, 1110, 198 Cal. Rptr. 296*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a party's cause of action under state copyright law is preempted by federal copyright law, when the cause of action under state law is based on infringing

acts that occurred after January 1, 1978, the effective date of the Copyright Act of 1976.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of federal preemption of claims under state copyright law. For example, they may be adapted for use in a motion in limine [*see Mention v. Gessell (9th Cir. 1983) 714 F.2d 87, 90* (defense motion in limine)], and in amotion for summary judgment [*see Klekas v. EMI Films, Inc. (1984) 150 Cal. App. 3d 1102, 1106, 198 Cal. Rptr. 296* (defense motion for summary judgment)]. They may also be adapted for use in a trial or appellate brief [*see Landsberg v. Scrabble Crossword Game Players, Inc. (9th Cir. 1984) 736 F.2d 485, 486 , cert. denied 469 U.S. 1037, 105 S. Ct. 513, 83 L. Ed. 2d 403 (1984)* (appeal from judgment)].

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Specifically, counsel should insert argument showing that the infringing acts complained of occurred after January 1, 1978.

[b] Related Pleading and Practice Forms

For discussion of and forms for use in litigating causes of action under the Copyright Act of 1976, see California Forms of Pleading and Practice, Ch. 349, *Literary Property and Copyright* (Matthew Bender).

[3] Discussion of Authorities

[a] Preemption Test

In ***Mention v. Gessell*** *(9th Cir. 1983) 714 F.2d 87* , plaintiffs, partners in an Oregon architectural firm, contracted with a county housing authority in Oregon to design migrant labor housing. The contract was based on architectural plans and drawings developed by plaintiffs in 1974 and 1975. The housing was financed by the Farmers Home Administration (hereinafter "FmHA") and was completed in 1975. Defendants, partners in a Washington architectural firm, contracted in 1974 with a county housing authority in Washington to design migrant labor housing. This housing was also financed by the FmHA. In 1976, after the FmHA had twice rejected defendants' housing plans, defendants were furnished with a floor plan print for migrant labor housing, from plaintiffs' plan sets, during a county housing authority meeting. Subsequently, the FmHA furnished defendants with one of plaintiffs' complete plan sets. After receiving indications from both the housing authority and the FmHA that plaintiffs' prints were acceptable, defendants used the prints in preparing their third proposal, which the FmHA accepted in 1976. The Washington housing was constructed in 1976. In 1978, defendants again contracted with the housing authority for a second phase of the project, and used the 1976 design work as a schematic concept in applying to the FmHA for funds for the 1978 project. The FmHA accepted defendants' second phase proposal, and construction began in 1978. Later that year, plaintiffs learned of the Washington project and of defendants' design. In 1979, plaintiffs filed an action against defendants for common law copyright infringement under Oregon law in the United States District Court of Oregon. After trial, the jury returned a verdict for plaintiffs and awarded damages. The district court denied defendants' motions for judgment notwithstanding verdict or a new trial. Defendants then appealed from the judgment.

The court of appeals reversed the district court's judgment, holding that plaintiffs' claim was barred, in whole or in part, by an Oregon statute of limitations, and was preempted, in part, by the Copyright Act of 1976 (*714 F.2d 87, 89)* . Relative to the preemption issue, the court held that defendants' alleged infringing activities occurred in the fall of 1978, during the second phase of defendants' housing design. Plaintiffs' common law copyright claim under Oregon law was therefore preempted by the Copyright Act of 1976, through the operation of *17 U.S.C. § 301(b)(2)*, since their claim was based on an undertaking that commenced after January 1, 1978 (*714 F.2d 87, 90)* .

In ***Klekas v. EMI Films, Inc.*** *(1984) 150 Cal. App. 3d 1102, 198 Cal. Rptr. 296* , plaintiff instituted an action against defendants arising out of the unauthorized use of his unpublished novel. The complaint contained causes of action under

California law for common law copyright infringement and plagiarism, among others, and sought damages and the imposition of a constructive trust. The complaint generally alleged that plaintiff's novel served as the basis for the production, including the screenplay, of the film "The Deer Hunter" and for the subsequent publication of a paperback book of the same title. Following the parties' completion of discovery, defendants moved the trial court for summary judgment, contending, among other things, that neither the screenplay, the film, nor the novelization of "The Deer Hunter" were substantially similar to any protectable material or expression in plaintiff's novel, and thus not infringements of plaintiff's copyright in the novel. The trial court found that plaintiff's cause of action for plagiarism was, in part, preempted by the Copyright Act of 1976 and that the court therefore lacked subject matter jurisdiction over any claims relating to defendants' film or book. After determining that it did have jurisdiction over the screenplay, the trial court found, as a matter of law, that there was no substantial similarity between that work and plaintiff's novel, and thus no infringement of the copyright in plaintiff's novel. The trial court resolved all other issues in favor of defendants and entered judgment dismissing the complaint. Plaintiff then appealed from the judgment.

The court of appeal affirmed the trial court's judgment. The court noted that the threshold issue to be resolved was the preemptive impact of the Copyright Act of 1976 on plaintiff's cause of action for infringement of his novel (*150 Cal. App. 3d 1102, 1108)* . In this respect, the court held the act did not affect any right plaintiff may have had under a theory of common law copyright if his cause of action arose from undertakings commenced before January 1, 1978 (*150 Cal. App. 3d 1102, 1109)* . Thus, if defendants' acts occurred after January 1, 1978, then the Copyright Act of 1976 applied to preempt any claim plaintiff may have had based on a theory of infringement of state common law copyright. If, on the other hand, defendants' unauthorized copying occurred before January 1, 1978, plaintiff could still pursue a claim predicated on state law. Turning to the facts of the case, the court agreed with the trial court's finding that to the extent that plaintiff had any cause of actionunder state law for infringement relative to the screenplay, that cause of action arose in 1976 or 1977 when the screenplay was written, and the trial court properly determined that it could adjudicate that claim (*150 Cal. App. 3d 1102, 1110)* . The distribution of the film and the publication of the novelization, however, occurred after January 1, 1978. The court found that the trial court correctly concluded that any claim based on those activities was covered by the Copyright Act of 1976 (*150 Cal. App. 3d 1102, 1111)* . The court then found that plaintiff failed to establish any of his claims under state law, including the copyright infringement claim, and that therefore the trial court properly granted the motion for summary judgment (*150 Cal. App. 3d 1102, 1111-1115)* . The court found no basis for imposition of a constructive trust and, as a matter of law, plaintiff was entitled to take nothing by his complaint (*150 Cal. App. 3d 1102, 1115)* .

[b] Undertakings Commenced Before January 1, 1978

The facts and procedural background of ***Mention v. Gessell*** *(9th Cir. 1983) 714 F.2d 87* , are discussed in *§ 146.22[3][a]*. In *Mention*, the court of appeals held plaintiffs' common law copyright claim under Oregon law to be preempted by *17 U.S.C. § 301(b)(2)* because the claim arose from undertakings commenced after January 1, 1978. The court held that claims arising from infringing activities are "undertakings" within the meaning of *17 U.S.C. § 301(b)(2)*. Therefore, because defendants' alleged infringing activities occurred after January 1, 1978, they were not "commenced before January 1, 1978," within the meaning of *17 U.S.C. § 301(b)(2)* (*714 F.2d 87, 90)* .

The facts and procedural background of ***Klekas v. EMI Films, Inc.*** *(1984) 150 Cal. App. 3d 1102, 198 Cal. Rptr. 296* , are discussed in *§ 146.22[3][a]*. In *Klekas*, the court of appeals held that if defendants' unauthorized copying of plaintiff's work occurred after January 1, 1978, then *17 U.S.C. § 301(b)(2)* applied to preempt any claim plaintiff may have had based on a common law copyright theory under California law (*150 Cal. App. 3d 1102, 1110)* . In reaching this conclusion, the court acknowledged that the difficult question was the meaning of the phrase "undertakings commenced before January 1, 1978" in *17 U.S.C. § 301(b)(2)* (*150 Cal. App. 3d 1102, 1109)* . The court then held that the date when a plaintiff created or began creation of a work that was allegedly subsequently plagiarized by a defendant is of no legal significance. What is dispositive of the issue of when an undertaking is commenced is the date the alleged plagiarism occurred. The court found it difficult to conceive of how a cause of action could arise before there had been some activity by a defendant that compromised a plaintiff's work (*150 Cal. App. 3d 1102, 1110)* . Because the

distribution of defendants' allegedly infringing film and paperback book occurred after January 1, 1978, the court found that any claim based on those activities was covered by the Copyright Act of 1976, and plaintiff's cause of action for common law copyright infringement under California law was therefore preempted by *17 U.S.C. § 301(b)(2)* (*150 Cal. App. 3d 1102, 1111)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawCivil Infringement ActionsGeneral OverviewCopyright LawConstitutional ProtectionsGeneral OverviewCopyright LawConstitutional ProtectionsApplication of FederalismGeneral OverviewCopyright LawConstitutional ProtectionsApplication of FederalismCommon LawCopyright LawConstitutional ProtectionsApplication of FederalismFederal Preemption

California Points & Authorities

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 146 LITERARY PROPERTY, COPYRIGHT, AND THE PROTECTION OF IDEAS
PART II. FORMS
A. Preemption by Federal Copyright Law of Actions Under California and Other Federal Law

14-146 California Points & Authorities § 146.23

§ 146.23 Opposing Contention That Cause of Action Under State Law Is Preempted by Federal Copyright Law [17 U.S.C. § 301(b)(3)]--Rights Sought to Be Protected Under State Law as Not Equivalent to Exclusive Rights Protected by Federal Copyright Law

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Specify party, e.g.,* PLAINTIFF'S] CAUSE OF ACTION UNDER STATE LAW IS NOT PREEMPTED BY THE COPYRIGHT ACT OF 1976, BECAUSE THE CAUSE OF ACTION INVOLVES _____ [ACTIONS DIFFERENT FROM THOSE PROSCRIBED *and/or* INTERESTS DIFFERENT FROM THOSE PROTECTED] BY THE COPYRIGHT ACT OF 1976.

A. Preemption Test. Nothing in the Copyright Act of 1976, Title *17 of the United States Code, Section 101* et seq., annuls or limits any rights or remedies under the common law or statutes of any state with respect to activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by Title *17 of the United States Code Section 106* (*17 U.S.C. § 301(b)(3)*).

[*EITHER*]

B. No Preemption When Cause of Action Under State Law Involves Actions Different From Those Proscribed by Federal Copyright Law. If violation of a state right is predicated on an act incorporating elements beyond mere reproduction or the like, there is no preemption; when a party's state law claims involve actions different from those proscribed by the copyright laws, the state law claims are not preempted by federal law (*G.S. Rasmussen & Assoc. v. Kalitta Flying Service (9th Cir. 1992) 958 F.2d 896, 904, 906-907* ; *Oddo v. Ries (9th Cir. 1984) 743 F.2d 630, 635)* .

[*AND/OR*]

C. No Preemption When Cause of Action Under State Law Involves Interests Different From Those Protected by Federal Copyright Law. If violation of a state right is predicated on an act incorporating elements beyond mere reproduction or the like, there is no preemption; when a party's state law claims involve interests different from those protected by the copyright laws, the state law claims are not preempted by federal law (*G.S. Rasmussen & Assoc. v. Kalitta Flying Service (9th Cir. 1992) 958 F.2d 896, 904, 908* ; *Oddo v. Ries (9th Cir. 1984) 743 F.2d 630, 635)* .

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a party's cause of action under state law is preempted by federal copyright law, when the state cause of action seeks to protect legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright, as specified by *17 U.S.C. § 106*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of federal preemption of claims under state law. These points and authorities may also be adapted for use in a trial or appellate brief [*see Oddo v. Ries (9th Cir. 1984) 743 F.2d 630, 632* (appeal from judgment)].

Counsel should insert argument in this foregoing form, showing the relationship between the facts of the case and the points of law stated. Specifically, counsel should insert argument showing that the legal or equitable rights sought to be protected are not equivalent to any of the exclusive rights within the general scope of copyright, as specified by *17 U.S.C. § 106* [*see 17 U.S.C. § 301(b)(3)*]. For example, counsel may include facts showing that the state cause of action is predicated on acts incorporating elements beyond mere reproduction or the like. Counsel may also include facts showing that the state cause of action either involves actions different from those proscribed by the federal copyright laws, or seeks to protect interests or vindicate duties different from those protected or vindicated by the federal copyright laws [*see Oddo v. Ries (9th Cir. 1984) 743 F.2d 630, 635*].

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities set out in *§ 146.20*.

[b] Related Pleading and Practice Forms

For discussion of and forms for use in litigating state causes of action not preempted by federal law, see California Forms of Pleading and Practice, Ch. 349, *Literary Property and Copyright* (Matthew Bender).

[3] Discussion of Authorities

[a] No Preemption When Cause of Action Under State Law Involves Actions Different From Those Proscribed by Federal Copyright Law

In ***G.S. Rasmussen & Assoc. v. Kalitta Flying Service*** *(9th Cir. 1992) 958 F.2d 896* , plaintiff aeronautical engineer developed modifications to the DC-8 cargo airplane to enable the aircraft safely to carry tens of thousands more pounds than that for which it originally was designed. Based on these modifications, the Federal Aviation Administration (FAA) issued plaintiff a Supplemental Type Certificate certifying the airworthiness of this type of aircraft as modified by plaintiff. As a result, any DC-8 owner desiring to obtain airworthiness certification to operate a particular DC-8 with the increased cargo capacity is required to, among other things, present the FAA with a photocopy of plaintiff's certificate to verify that the modifications conform to a design that has been approved by the FAA as airworthy. Typically, the owner obtains the photocopy by paying a licensing fee to plaintiff, who is permitted by FAA rules to license his certificate for this purpose. The alternative to licensed use of the certificate requires the DC-8 owner to

obtain its own Supplemental Type Certificate by independently proving to the FAA that the modification is safe. This independent proof entails hundreds of hours of engineering work and the submission of volumes of technical data to the FAA.

Defendant DC-8 owner, desiring to convert one of its passenger planes to a cargo plane in conformance with plaintiff's modifications, declined plaintiff's offer to license the certificate and, instead, pirated the certificate by obtaining a photocopy from a source other than plaintiff. The FAA subsequently certified defendant's modified aircraft as airworthy on the basis of, among other requirements, defendant's submission of the photocopied certificate. Plaintiff thereafter commenced actions in federal district court for damages under California law for defendant's conversion of the certificate and for unjust enrichment arising out of defendant's unauthorized use of his certificate. The district court granted summary judgment for defendant, holding plaintiff had no protectible property interest in his certificate and, even if he did, his action was preempted by federal copyright and patent laws. Plaintiff appealed from the judgment.

A panel of the Ninth Circuit Court of Appeals reversed the district court's judgment. First, the court held plaintiff had a protectible property interest in his certificate under California statutory and case law (*958 F.2d 896, 903)* . Second, relying on *Oddo v. Ries (9th Cir. 1984) 743 F.2d 630, 635* (discussed *below*), the court held federal copyright law did not preempt plaintiff's actions under state law. Even though federal copyright law allowed defendant to make copies of plaintiff's certificate, it did not allow defendant to then use those copies to obtain airworthiness certificates from the FAA for particular DC-8 aircraft. Additionally, plaintiff's right to use his certificate as a basis for obtaining an airworthiness certificate for an airplane that is modified in a particular way was not a right equivalent to any right within the general scope of federal copyright law (*958 F.2d 896, 904)* . Neither federal patent law nor the Federal Aviation Act preempted plaintiff's state law actions (*958 F.2d 896, 904-906)* . The court held defendant not only had tortiously converted plaintiff's certificate under California law by using the photocopy of it to obtain airworthiness certification for its modified DC-8, butalso was thereby unjustly enriched (*958 F.2d 896, 906-907)* . The court remanded the case to the district court to fix the terms of the implied contract thus breached by defendant (*958 F.2d 896, 907)* .

In ***Oddo v. Ries*** *(9th Cir. 1984) 743 F.2d 630* , plaintiff and defendants entered into a partnership to create and publish a book describing how to restore Ford F-100 pickup trucks. Under the partnership agreement, the named defendant was to provide capital and supervise the business end of the venture, and plaintiff was to write and edit the book. Almost two years after the partnership agreement was entered into, plaintiff delivered to the named defendant a manuscript that contained much, but not all, of the material the partners planned to include in the book. This manuscript consisted partly of a reworking of previously published magazine articles that plaintiff had written, and partly of new material, also written by plaintiff, that had never before been published. At about the same time, the named defendant became dissatisfied with plaintiff's progress on the manuscript. The named defendant hired another writer to complete plaintiff's manuscript, and then published the finished product. The book that the named defendant eventually published contained substantial quantities of plaintiff's manuscript, but also contained material added by the new writer. Plaintiff then sued his copartners on a claim, under the Copyright Act of 1976, for copyright infringement, and on claims, under state law, for conversion of the papers comprising plaintiff's manuscript and breach of the named defendant's fiduciary duty owed to plaintiff as a partner. The district court entered judgment in plaintiff's favor, and awarded him statutory damages for copyright infringement, attorneys' fees, general damages on his state causes of action, and costs of suit. Defendants appealed from the judgment, seeking reversal of the general damages award and contending, among other things, that plaintiff's state causes of action were preempted by *17 U.S.C. § 301(a).*

The court of appeals vacated the district court's judgment awarding plaintiff statutory damages and attorneys' fees, and remanded the cause for an award of the actual damages that plaintiff suffered from infringement of his copyrights in the magazine articles. However, the appellate court let stand the general damages award on plaintiff's cause of action under state law for conversion, holding that *17 U.S.C. § 301(a)* did not preempt that cause of action. The court cited *Harper & Row Publishers, Inc. v. Nation Enterprises (2d Cir. 1983) 723 F.2d 195, 200* (*reversed on other grounds 471 U.S. 539, 105 S. Ct. 2218, 85 L. Ed. 2d 588 (1985))* , as persuasive authority for the proposition that *17 U.S.C. § 301(a)* preempts a state-created right if that right may be abridged by an act which, in and of itself, would infringe one of the

exclusive rights listed in *17 U.S.C. § 106*. However, if violation of the state right is predicated on an act incorporating elements beyond mere reproduction or the like, there is no preemption. The court ruled that the conversion claim passed the preemption test, and therefore that the district court's general damages award in plaintiff's favor on this cause of action should stand. In so ruling, the court found that conversion of tangible property involves actions different from those proscribed by the copyright laws, and thus is not preempted (*743 F.2d 630, 635)* .

[b] No Preemption When Cause of Action Under State Law Involves Interests Different From Those Protected by Federal Copyright Law

The facts and procedural background of ***G.S. Rasmussen & Assoc. v. Kalitta Flying Service*** *(9th Cir. 1992) 958 F.2d 896* , are discussed in *§ 146.23[3][a]*. In *Rasmussen*, the court of appeals held the use of a Supplemental Type Certificate to obtain Federal Aviation Administration certification of the airworthiness of a type of aircraft is a property right under California law. As such, the protection of that property interest is not preempted by federal law, because that interest (the right to use a certificate to obtain a valuable governmental privilege) is different from the interest (the right to copy original works) protected by federal copyright and patent law (*958 F.2d 896, 908)* . Plaintiff was thereby permitted to bring state law actions for unjust enrichment and for damages for conversion arising out of defendant's unauthorized use of plaintiff's certificate (*958 F.2d 896, 906-907)* .

The facts and procedural background of ***Oddo v. Ries*** *(9th Cir. 1984) 743 F.2d 630* , are discussed in *§ 146.23[3][a]*. In *Oddo*, plaintiff's complaint for infringement of copyright contained a cause of action under California law for breach of one partner's fiduciary duty to another partner. The court of appeals held that *17 U.S.C. § 301(a)* did not preempt this cause of action, because a partner's duty to his or her copartner is quite different from the interests protected by copyright (*743 F.2d 630, 635)* .

[4] Additional Authorities

[a] No Preemption When Cause of Action Under State Law Involves Actions Different From Those Proscribed by Federal Copyright Law

In *Grosso v. Miramax Film Corp. (9th Cir. 2004) 383 F.3d 965* , the plaintiff alleged a state law claim based on the defendant's implied promise to pay the reasonable value of material that the plaintiff disclosed to the defendant [*see Desny v. Wilder (1956) 46 Cal. 2d 715, 738, 299 P.2d 257* ; *§ 146.61*[3][a]]. In holding that the claim was not preempted by the Copyright Act, the court stated that to survive preemption, the state cause of action must protect rights that are qualitatively different from the rights protected by copyright; in other words, the complaint must allege an extra element that changes the nature of the action. The implied promise to pay required by *Desny* is such an extra element for purposes of avoiding preemption (*383 F.3d 965, 968)* .

In *Anderson v. Nidorf (9th Cir. 1994) 26 F.3d 100* , petitioner sought a writ ofhabeas corpus to challenge his conviction under *Penal Code § 653w*, which provides criminal penalties for selling a sound recording without disclosing its "origin" (that is, manufacturer, artist, producer, etc.). Among other things, petitioner argued that the statute was preempted by federal copyright law. In affirming the district court's denial of the petition, the court of appeals rejected this argument. The court noted that the copyright law [*17 U.S.C. § 301(a)*] preempts a state-created right if that right may be abridged by an act which, in and of itself, would infringe one of the exclusive rights under the copyright law. However, if violation of the state right is predicated on an act incorporating elements beyond mere reproduction or the like, there is no preemption (citing *Oddo v. Ries (9th Cir. 1984) 743 F.2d 630, 635* , discussed in *§ 146.23[3][a]*). The court observed that although the prevention of pirating of sound recordings is one purpose of *Penal Code § 653w*, the statute also has the purpose of protecting the public from being victimized by false and deceptive commercial practices. The statute criminalizes selling recordings whose labels fail to disclose the manufacturer or author; it does not criminalize unauthorized duplication or "bootlegging" of copyrighted works. The court therefore held federal copyright laws do not preempt the state statute (*26 F.3d 100, 102)* .

Summit Mach. Tool Mfg. v. Victor CNC Systems (9th Cir. 1993) 7 F.3d 1434 , is discussed in *§ 146.21[3][a]*.

In *Durgom v. Janowiak (1999) 74 Cal. App. 4th 178, 87 Cal. Rptr. 2d 619* , the plaintiff sued to enforce an assignment of royalties on a copyrighted song. After the parties made an oral settlement agreement in open court, the defendant moved to dismiss for lack of subject-matter jurisdiction on the ground that the copyright had revested in the author and the plaintiff's right to receive royalties therefore had been cut off. The defendant urged that the presence of this issue in the case invoked exclusive federal copyright jurisdiction. The court of appeal observed and held that "federal jurisdiction cannot be based solely on a federal defense. This is true even where the parties agree that the federal defense is the only disputed issue to be resolved. State courts are fully competent to adjudicate state-law breach of contract claims, even where the underlying contract involves the ownership, assignment, or license of a copyright, much less the mere assignment of royalties from a copyrighted work. Thus, despite [the] federal copyright law defense, the trial court had jurisdiction" (*74 Cal. App. 4th 178, 180)* .

In *Gladstone v. Hillel (1988) 203 Cal. App. 3d 977, 250 Cal. Rptr. 372* , a jewelry designer brought a state action against his former business associates for fraud and conversion, alleging that they misappropriated his design molds, jewelry, sketches, and other work materials in a business dispute. Plaintiff further alleged that defendants went on to produce a line of jewelry incorporating plaintiff's designs, either by directly using defendant's design molds or by making new molds from jewelry he had completed. The trial court awarded plaintiff damages and issued an injunction restraining defendants from using for any purpose plaintiff's molds, jewelry, sketches, designs, and other representations of plaintiff's work in their possession.

The court of appeal modified the injunction, so it would be more closely tailored to rights conferred by state law, and affirmed the damages award (*203 Cal. App. 3d 977, 990)* . In holding that the preemptive effect of federal copyright law did not preclude the admission of evidence showing that defendants copied plaintiff's molds and jewelry, the court used an "extra element test" to distinguish a valid state cause of action from one equivalent to a copyright claim: If, under state law, the act of reproduction, performance, distribution, or display will *in itself* infringe the state-created right, then the right is preempted; however, if other elements are required, in addition to or instead of, the acts of reproduction, performance, distribution, or display, in order to constitute a state-created cause of action, then the right does not lie within the general scope of copyright and there is no preemption. The extra element must be one that changes the nature of the action so that it is qualitatively different from a copyright infringement claim. Therefore, a state cause of action for conversion is not preempted, because conversion involves the extra element of wrongful possession of the tangible embodiment of a work (*203 Cal. App. 3d 977, 987)* .

Note that former Bus. & Prof. Code § 17300, which the *Gladstone* court referred to in discussing proof of violations of state unfair competition statutes, was repealed in 1991 in response to the United States Supreme Court opinion in *Bonito Boats v. Thunder Craft Boats (1989) 489 U.S. 141, 167-168, 109 S. Ct. 971, 103 L. Ed. 2d 118* . *Bonito Boats* is discussed in Ch. 235, *Unfair Competition* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawCivil Infringement ActionsGeneral OverviewCopyright LawConstitutional ProtectionsGeneral OverviewCopyright LawConstitutional ProtectionsApplication of FederalismGeneral OverviewCopyright LawConstitutional ProtectionsApplication of FederalismCommon LawCopyright LawConstitutional ProtectionsApplication of FederalismFederal Preemption

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CHAPTER 146 LITERARY PROPERTY, COPYRIGHT, AND THE PROTECTION OF IDEAS
PART II. FORMS
A. Preemption by Federal Copyright Law of Actions Under California and Other Federal Law

14-146 California Points & Authorities § 146.24

§ 146.24 Opposing Contention That Cause of Action Under State Law Is Preempted by Federal Copyright Law [17 U.S.C. § 301(b)(1)]--Subject Matter of Cause of Action as Not Within Subject Matter of Copyright Under Federal Copyright Law [17 U.S.C. §§ 102, 103]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Specify party, e.g.,* PLAINTIFF'S] CAUSE OF ACTION UNDER STATE LAW IS NOT PREEMPTED BY THE COPYRIGHT ACT OF 1976 BECAUSE THE CAUSE OF ACTION INVOLVES SUBJECT MATTER THAT IS NOT WITHIN THE SUBJECT MATTER OF COPYRIGHT WITHIN THE MEANING OF THAT ACT.

A. Preemption Test. Nothing in the Copyright Act of 1976, Title *17 of the United States Code Section 101* et seq., annuls or limits any rights or remediesunder the common law or statutes of any state with respect to subject matter that does not come within the subject matter of copyright as specified by Title *17 of the United States Code Sections 102* and *103*, including works of authorship not fixed in any tangible medium of expression (*17 U.S.C. § 301(b)(1)*).

[*Optional*] **B. Ideas Are Not Within Subject Matter of Copyright Act of 1976.** A claim of misappropriation of ideas does not implicate the federal copyright law because copyright protection for an original work of authorship does not extend to any idea (*17 U.S.C. § 102(b)*; *Whitfield v. Lear (2d Cir. 1984) 751 F.2d 90, 92* (applying California law); *United States Golf Association v. Arroyo Software Corporation (1999) 69 Cal. App. 4th 607, 621-622, 81 Cal. Rptr. 2d 708*).

[*Optional*] **C. Action Based on Unauthorized Use of Plaintiff's Likeness Is Not Preempted.** An action that is based on the defendant's unauthorized use of the plaintiff's likeness, even if that likeness is captured in a copyrightable photograph, is not preempted when the plaintiff asserts a state-law right not essentially equivalent to an exclusive right under the Copyright Act, since a human likeness is not itself copyrightable subject matter (*KNB Enterprises v. Matthews (2000) 78 Cal. App. 4th 362, 365, 92 Cal. Rptr. 2d 713*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a party's cause of action under state law is preempted by federal copyright law, when the state cause of action seeks to protect subject matter that does not come within the subject matter of the Copyright Act of 1976, as specified by *17 U.S.C. §§ 102* and *103*.

Optional Paragraph B may be used when the subject matter of the cause of action is an idea. Ideas are expressly excluded from the subject matter of copyright protection under the Copyright Act of 1976 [*17 U.S.C. § 102(b)*]. Optional Paragraph C may be used if the action is based on the unauthorized use of the plaintiff's likeness, since a human likeness is not copyrightable subject matter (even though it may be captured in a copyrightable photograph), as long as the plaintiff asserts a right that is not essentially equivalent to an exclusive right under the Copyright Act. An example of such a right would be the right of publicity protected by *Civ. Code § 3344*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of federal preemption of claims under state law. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Specifically, counsel should insert argument showing that the subject matter sought to be protected does not come within the subject matter of the Copyright Act of 1976, as specified by *17 U.S.C. §§ 102* and *103* [*see 17 U.S.C. § 301(b)(1)*]. For example, counsel may include facts showing that the state cause of action is predicated on the copying of an idea, or of a procedure, process, system, method of operation, concept, principle, or discovery [*see, e.g., Whitfield v. Lear (2d Cir. 1984) 751 F.2d 90, 92* (applying California law to cause of action for misappropriation of idea contained in written work)].

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities set out in *§ 146.20*.

[b] Related Pleading and Practice Forms

For discussion of the protection of ideas under state law, together with forms for use in litigating state causes of action not preempted by federal law, see California Forms of Pleading and Practice, Ch. 349, *Literary Property and Copyright* (Matthew Bender).

[3] Discussion of Authorities

[a] Ideas Are Not Within Subject Matter of Copyright Act of 1976

In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in the work (*17 U.S.C. § 102(b)*).

In ***Whitfield v. Lear*** *(2d Cir. 1984) 751 F.2d 90* , plaintiff developed a format for a television series and eventually copyrighted a script for a television show. This was a dramatic show about an interracial, crime-fighting rock band. The members of the band were recent graduates of the same high school, where they had formed the band. In the script, the band members fight crime using their athletic talents. During the time that plaintiff was developing his format, one of defendants also developed a proposed television series, involving a multiracial rock band of junior high school students. A primary theme of this series was the interaction of youths in a multiracial setting. After copyrighting his script, plaintiff submitted it to a second defendant and that defendant's production company. Subsequent to plaintiff's

submission of his script, a series was broadcast on network television, produced by the first defendant. Plaintiff then commenced an action alleging generally that the broadcast series bore a strong resemblance to the script that plaintiff had submitted to the second defendant and that defendant's production company. Plaintiff alleged that this resemblance resulted from the first defendant's access to plaintiff's script through the second defendant's productioncompany and from the first defendant's misappropriation of the ideas contained in plaintiff's script. Plaintiff sought recovery under federal law for copyright and trademark infringement. He also sought recovery under California law, on a variety of theories, for the unauthorized use of the ideas in his script. The district court granted defendants' motion for summary judgment, and plaintiff appealed from the judgment.

The Second Circuit reversed the district court's judgment. The court held that the alleged similarities between plaintiff's script and the broadcast series were sufficient to allow a trier of fact to find that plaintiff's ideas were misappropirated under California law (*751 F.2d 90 95)* . In so holding, the court noted that plaintiff had never alleged that defendants actually copied from his script; he had only alleged that they misappropriated ideas contained in the script. Plaintiff claimed an interest in the ideas contained in the script, and sought redress for misappropriation of the ideas, and not for their literary or artistic expression. The court held that plaintiff's claim did not implicate the federal copyright laws, and noted that plaintiff correctly withdrew his copyright and trademark infringement claims in the district court (*751 F.2d 90 92)* .

In ***United States Golf Association v. Arroyo Software Corporation*** *(1999) 69 Cal. App. 4th 607, 81 Cal. Rptr. 2d 708* , a national golf association (USGA) brought an action for common law misappropriation against a computer software company, seeking to enjoin an unauthorized commercial use of USGA's handicap system, formulas, and service marks. In the trial court defendant conceded that a golfing handicap formula "is not the type of subject matter that can receive copyright protection."

Affirming a permanent injunction, the court of appeal rejected a defense contention that because the handicap formulas at issue constituted a "process" or "system" that is uncopyrightable within meaning of *17 U.S.C. § 102(b)*, Congress intended any such formulas or system should be available freely to the public without limitation. The court held that USGA's claims based on misappropriation were not preempted by federal copyright law because none of the prerequisites for preemption applied in that USGA's handicap system and formulas were not works of authorship within the subject of copyright, and the state common law rights at issue were not equivalent to any of the exclusive rights granted by the Copyright Act. What USGA sought and the trial court ordered was an injunction preventing defendant from using the USGA formulas or misappropriating them as its own. USGA's common law misappropriation claim did not seek to bar a simple copying of the formulas. "Use" and "appropriation" are not among the "exclusive rights" granted to copyright owners under the Copyright Act. Because use and appropriation are not equivalent to the exclusive rights granted to copyright owners, USGA's misappropriation claim was not preempted (*69 Cal. App. 4th 607, 621-622)* .

[b] Action Based on Unauthorized Use of Plaintiff's Likeness Is Not Preempted

In ***KNB Enterprises v. Matthews*** *(2000) 78 Cal. App. 4th 362, 92 Cal. Rptr. 2d 713* , the plaintiff sued under *Civ. Code § 3344*, claiming violation of the right of publicity of the plaintiff's assignor, a model whose likeness the defendant, without authorization, used as part of the revenue-generating content on a web site. The likeness was embodied in a copyrighted photograph. The trial court granted the defendant's summary judgment motion based on an assertion of preemption (even though the plaintiff made no claim under the Copyright Act), but the court of appeal reversed. The appellate court held that the action was not a copyright infringement action because the asserted right of publicity was not essentially equivalent to any exclusive right under the Copyright Act, and the model's likeness was not copyrightable subject matter. The action was not preempted. It was irrelevant that the likeness in question was embodied in a copyrighted photograph (*78 Cal. App. 4th 362, 365)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawCivil Infringement ActionsGeneral OverviewCopyright LawConstitutional ProtectionsGeneral OverviewCopyright LawConstitutional ProtectionsApplication of FederalismGeneral OverviewCopyright LawConstitutional ProtectionsApplication of FederalismCommon LawCopyright LawConstitutional ProtectionsApplication of FederalismFederal Preemption

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California Points & Authorities

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 146 LITERARY PROPERTY, COPYRIGHT, AND THE PROTECTION OF IDEAS
PART II. FORMS
A. Preemption by Federal Copyright Law of Actions Under California and Other Federal Law

14-146 California Points & Authorities § 146.25

§ 146.25 Opposing Contention That State Statute Is Preempted by Federal Copyright Law [17 U.S.C. § 301(c)]--State Law Governs Protection of Sound Recordings Fixed Before February 15, 1972

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Specify statute, e.g.,* SECTION 653h OF THE PENAL CODE] IS NOT PREEMPTED BY THE COPYRIGHT ACT OF 1976, BECAUSE NOTHING IN THE COPYRIGHT ACT OF 1976 ANNULS OR LIMITS ANY RIGHTS OR REMEDIES UNDER THE COMMON LAW OR STATUTES OF ANY STATE WITH RESPECT TO SOUND RECORDINGS FIXED BEFORE FEBRUARY 15, 1972, UNTIL FEBRUARY 15, 2067.

A. Preemptive Effect of Copyright Act of 1976. With respect to sound recordings fixed in a tangible medium of expression before February 15, 1972, any rights or remedies under the common law or statutes of any state shall not be annulled or limited by Title 17 of the United States Code until February 15, 2067 (*17 U.S.C. § 301(c)*; *Goldstein v. California (1973) 412 U.S. 546, 571, 93 S. Ct. 2303, 37 L. Ed. 2d 163*).

B. "Sound Recording" Defined. A "sound recording" is a work that results from the fixation of a series of musical, spoken, or other sounds. A "sound recording" does not include the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which the sounds are embodied (*17 U.S.C. § 101*).

C. When Work Is Fixed in Tangible Medium of Expression. A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of the Copyright Act of 1976 if a fixation of the work is being made simultaneously with its transmission (*17 U.S.C. § 101*).

[*Optional*] **D. "Phonorecord" Defined.** A "phonorecord" is a material object in which sounds, other than those

accompanying a motion picuure or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecord" includes the material object in which the sounds are first fixed (*17 U.S.C. § 101*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that state common or statutory law governing the protection of sound recordings fixed in a tangible medium of expression before February 15, 1972, is preempted by *17 U.S.C. § 301(a)* [*see 17 U.S.C. § 301(c)*]. If the tangible medium of expression involved is a phonorecord, Optional Paragraph D may be used to define the term "phonorecord."

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of preemption under the Copyright Act of 1976. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Specifically, counsel should insert argument showing that the sound recording in issue was fixed in a tangible medium of expression before February 15, 1972.

[b] Criminal Penalties for Unauthorized Use of Sound Recordings Fixed Before February 15, 1972

In addition to the civil copyright protection of *Civ. Code § 980(a)(2)*, various criminal penalties provide protection under California law for owners of sound recordings fixed in tangible media of expression before February 15, 1972 [*see Penal Code §§ 653h* (violations relating to transferring sound recordings), 653s, 653u (violations relating to recording live performances), 653w (violations relating to nondisclosure of origins of recording)]. When a person is convicted under *Penal Code § 653h*, *653s*, *653u*, or *653w*, a court must, in addition to other statutory penalties, order the forfeiture, destruction, or other disposition of all articles on which sounds can be recorded or stored, and all devices for manufacturing, reproducing, or assembling these articles [*Penal Code § 653v*]. Neither *Penal Code § 653h* nor *653s* enlarges or diminishes the rights and remedies of parties in civil litigation [*see Penal Code §§ 653h(f)*, *653s(e)*].

[c] Related Pleading and Practice Forms

For discussion of the protection, under state law, of sound recordings fixed before February 15, 1972, and forms for use in litigating state causes of action not preempted by federal law, see California Forms of Pleading and Practice, Ch. 349, *Literary Property and Copyright* (Matthew Bender).

[3] Discussion of Authorities

[a] Preemptive Effect of Copyright Act of 1976

In ***Goldstein v. California*** *(1973) 412 U.S. 546, 93 S. Ct. 2303, 37 L. Ed. 2d 163* , defendants purchased and copied tape or phonograph recordings produced by companies with whom they had no contractual relationship. They labeled the duplicates in like manner as the originals, and distributed them for sale in competition with the originals. Defendants did not pay for the use of the album titles and artists' names that they copied, did not pay the various artists whose performances were copied, and did not pay those who incurred the costs of producing the originals. The state prosecuted defendants for "tape piracy" or "record piracy" in violation of *Penal Code § 653h*, which prohibits unauthorized duplication of fixed recordings with the intent to sell the duplicates. Defendants moved to dismiss the charges on the ground that *Penal Code § 653h* was preempted by U.S. Const., art. I, § 8, cl. 8 (the "Copyright Clause") and the federal

copyright law. On denial of this motion, defendants pleaded no contest and were convicted on several counts. The appellate department of the superior court affirmed their convictions, and defendants thereafter sought review by the United States Supreme Court.

The United States Supreme Court affirmed, holding that *Penal Code § 653h* did not conflict with either U.S. Const., art. I, § 8, cl. 8 or the Copyright Act of 1909 (the federal copyright law in effect at the time of defendants' acts) (*412 U.S. 546, 571)* . Under the Copyright Act of 1909, federal copyright protection was available to sound recordings fixed, published, and copyrighted on and after February 15, 1972, and before January 1, 1975, whereas the recordings that petitioners copied were all fixed before February 15, 1972 (*412 U.S. 546, 552)* . The Court concluded that there was no national interest in copyright protection that would require any inference that the states, under the Copyright Clause, had relinquished all power to grant copyright protection (*412 U.S. 546, 558, 560, 561-562)* . The Court distinguished its prior holdings in *Sears, Roebuck & Co. v. Stiffel Co. (1964) 376 U.S. 225, 84 S. Ct. 784, 11 L. Ed. 2d 661* , and *Compco Corp. v. Day-Brite Lighting (1964) 376 U.S. 234, 84 S. Ct. 779, 11 L. Ed. 2d 669* , (discussed in *§ 146.21[3][a]*), by holding that Congress, under the Copyright Act of 1909, had indicated neither that it wished to protect, nor to free from protection, recordings of musical performances fixed before February 15, 1972 (*412 U.S. 546, 571)* . Thus, Congress left the states free to act with respect to sound recordings fixed prior to February 15, 1972, and there was no conflict such as that which had existed in *Sears* and *Compco* between federal copyright law and state unfair competition law (*412 U.S. 546, 570)* .

Counsel should note that the Copyright Act of 1976 incorporates the holding in *Goldstein*, with the proviso that state protection of sound recordings fixed in a tangible medium of expression before February 15, 1972 will eventually be prempted on February 15, 2067 [*17 U.S.C. § 301(c)*; see Notes of Committee on the Judiciary to § 301, House Report No. 94-1476].

[b] "Sound Recording" Defined

As defined in *17 U.S.C. § 101*, copyrightable sound recordings are original works of authorship comprising an aggregate of musical, spoken, or other sounds that have been fixed in tangible form. The copyrightable work comprises the aggregation of sounds, rather than the tangible medium of fixation. Thus "sound recordings," as copyrightable subject matter, are distinguished from "phonorecords," the latter being physical objects in which sounds are fixed. "Sound recordings" are also distinguished from any copyrighted literary, dramatic, or musical works that may be reproduced on a "phonorecord" [see Notes of Committee on the Judiciary to § 101, House Report No. 94-1476].

The copyrightable elements in a sound recording will usually, although not always, involve authorship, both on the part of the performer whose performance is captured, and on the part of the record producer responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording. There may, however, be cases when the record producer's contribution is so minimal that the performance is the only copyrightable element in the work. On the other hand, there may be cases (for example, recordings of birdcalls or sounds of racing cars) when only the record producer's contribution is copyrightable [see Notes of Committee on the Judiciary to § 101, House Report No. 94-1476].

Sound tracks of motion pictures are expressly included in the definition of "motion pictures" under *17 U.S.C. § 101* and are excluded from the definition of "sound recordings" [*17 U.S.C. § 101*; see Notes of Committee on the Judiciary to § 101, House Report No. 94-1476].

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawConstitutional ProtectionsGeneral OverviewCopyright LawConstitutional ProtectionsApplication of FederalismGeneral OverviewCopyright LawConstitutional ProtectionsApplication of FederalismCommon

LawCopyright LawConstitutional ProtectionsApplication of FederalismFederal PreemptionCopyright LawSubject MatterSound Recordings

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14-146 California Points & Authorities § 146.26

§ 146.26 Opposing Contention That Cause of Action Under Federal Statute Is Preempted by Federal Copyright Law [17 U.S.C. § 301(d)]--Federal Copyright Law Does Not Affect State Jurisdiction Over Claims Arising Under Other Federal Laws

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Specify party, e.g.,* PLAINTIFF'S] CAUSE OF ACTION UNDER _____ [*specify federal statute, e.g., SECTION 605 OF TITLE 47 OF THE UNITED STATES CODE*] IS NOT PREEMPTED BY THE COPYRIGHT ACT OF 1976, BECAUSE NOTHING IN THE COPYRIGHT ACT OF 1976 ANNULS OR LIMITS ANY RIGHTS OR REMEDIES UNDER ANY OTHER FEDERAL STATUTE.

A. Federal Statute Is Not Preempted. By their terms, the preemptive provisions ofSection 301 of Title 17 of the United States Codeare limited to state law, and nothing in the Copyright Act of 1976 annuls or limits any rights or remedies under any other federal statute (*17 U.S.C. § 301(d)*; *California Satellite Systems, Inc. v. Nichols (1985) 170 Cal. App. 3d 56, 64, 216 Cal. Rptr. 180*).

B. Preemption of State Law as Unrelated to State Court Subject Matter Jurisdiction of Federal Claim. When a state court in fact does have concurrent jurisdiction with the federal courts to enforce rights and obligations arising under a federal statute, it is a non sequitur to argue that because specified state causes of action are preempted by the Copyright Act of 1976, state courts lack subject matter jurisdiction to entertain a federal claim, even one sounding in copyright (*California Satellite Systems, Inc. v. Nichols (1985) 170 Cal. App. 3d 56, 64, 216 Cal. Rptr. 180* ; *see 17 U.S.C. §§ 301(a), (d)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a party's cause of action under a

federal statute is preempted by federal copyright law, and that therefore, the state court is deprived of subject matter jurisdiction of the federal claim.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of preemption under the Copyright Act of 1976. They may also be adapted for use in a trial or appellate brief [*see California Satellite Systems, Inc. v. Nichols (1985) 170 Cal. App. 3d 56, 61, 216 Cal. Rptr. 180* (appeal from order granting preliminary injunction)].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Specifically, counsel should insert argument showing that there exists no Congressional directive placing exclusive jurisdiction of the federal claim in the federal courts or that there exists no disabling incompatibility between the federal claim and state-court adjudication [*see California Satellite Systems, Inc. v. Nichols (1985) 170 Cal. App. 3d 56, 61, 216 Cal. Rptr. 180*].

[3] Discussion of Authorities

[a] Federal Statute Is Not Preempted

In ***California Satellite Systems, Inc. v. Nichols*** *(1985) 170 Cal. App. 3d 56, 216 Cal. Rptr. 180* , plaintiff was engaged in the distribution of Home Box Office (hereinafter HBO) television programs to subscribers. By contractual arrangements, plaintiff paid HBO for the exclusive license to distribute HBO programming in the area. Plaintiff also paid a licensed common carrier to transmit the microwave signal by which HBO subscribers received their programming. Plaintiff, in turn, charged its HBO subscribers a monthly service fee, plus an initial charge for supplying and installing a specially designed microwave antenna, a down converter (to translate the microwave signal into a frequency transmitted by ordinary television channels), and a power supply for the converter. Plaintiff had invested substantial sums to enable it to provide exclusive HBO programming to its subscribers. These sums included the costs of purchasing and servicing special equipment, programming license fees, and common carrier fees. Plaintiff sought preliminary injunctive relief under *47 U.S.C. § 605* (injunctive relief to enjoin unauthorized interception and use of microwave transmissions of television signals intended by distributor for exclusive use of paying subscribers) to enjoin defendants from manufacturing, selling, and installing microwave antennae, down converters, and power supplies locally for the purpose of enabling residents in plaintiff's service area to receive HBO television programs without paying the fee plaintiff charged its subscribers. The trial court issued a preliminary injunction, restraining defendants, during the pendency of the action, from selling or distributing any directional antenna, down converter, or power supply with the intent, understanding, or knowledge that the equipment would or may be used by residents in plaintiff's service area to intercept and receive plaintiff's HBO programs. Defendants appealed from the order granting the injunction, contending, among other things, that because plaintiff's complaint sounded in copyright infringement, it was preempted by *17 U.S.C. § 301(a)*, and the state court lacked subject matter jurisdiction to adjudicate the claim.

The court of appeal held that the state court may entertain a private action under *47 U.S.C. § 605* and affirmed the issuance of the preliminary injunction based on probable violations of *47 U.S.C. § 605*. Addressing defendants' preemption defense, the court of appeal saw the issue not as one of preemption but one of a state court's subject matter jurisdiction over private causes of action arising under *47 U.S.C. § 605*. The court found it clear that *17 U.S.C. § 301(a)* preempts legal and equitable causes of action brought under the common law or statutes of any state which are equivalent to any of the exclusive rights within the general scope of copyright. But, by its terms, the preemptive effect of *17 U.S.C. § 301(a)* is limited to state law. The court held that nothing in the Copyright Act of 1976 annuls or limits any rights or remedies under any other federal statute (*170 Cal. App. 3d 56, 64)* .

[b] Preemption of State Law as Unrelated to State Court Subject Matter Jurisdiction of Federal Claim

The facts and procedural background of ***California Satellite Systems, Inc. v. Nichols*** *(1985) 170 Cal. App. 3d 56, 216*

Cal. Rptr. 180 , are discussed in *§ 146.26[3][a]*. In *California Satellite*, the court of appeal held that *17 U.S.C. § 301(a)* of the Copyright Act of 1976 did not deprive the state trial court of subject matter jurisdiction to adjudicate plaintifff's claim based on *47 U.S.C. § 605* of the Communications Act of 1934. In so holding, the court noted that the preliminary injunction was issued on the basis of a probable violation of a federal, rather than a state, statute. Therefore, the court held it a non sequitur to argue that because state causes of action are preempted by *17 U.S.C. § 301(a)*, state courts lack subject matter jurisdiction to entertain a federal claim, even one sounding in copyright (*170 Cal. App. 3d 56, 64)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawConstitutional ProtectionsGeneral OverviewCopyright LawConstitutional ProtectionsApplication of FederalismGeneral OverviewCopyright LawConstitutional ProtectionsApplication of FederalismCommon LawCopyright LawConstitutional ProtectionsApplication of FederalismFederal Preemption

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14-146 California Points & Authorities §§ 146.27-146.39

[Reserved]

§§ 146.27[Reserved]

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B. Rights in Literary Property Under California Copyright Law

14-146 California Points & Authorities § 146.40

§ 146.40 Supporting Contention That Author of Original Work Has Exclusive Ownership Under California Copyright Law in Representation or Expression of Work--Work Not Fixed in Tangible Medium of Expression [Civ. Code § 980(a)(1)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

UNDER CALIFORNIA LAW, _____ [*specify party, e.g.,* PLAINTIFF] HAS AN EXCLUSIVE OWNERSHIP IN THE_____ [REPRESENTATION *or* EXPRESSION] OF HIS/HER WORK BECAUSE PLAINTIFF IS THE AUTHOR OF THE WORK, THE WORK IS AN ORIGINAL WORK OF AUTHORSHIP, AND THE WORK IS NOT FIXED IN A TANGIBLE MEDIUM OF EXPRESSION.

A. Exclusive Ownership in Representation or Expression of Work Under California Law. The author of any original work of authorship that is not fixed in any tangible medium of expression has an exclusive ownership in the representation or expression of the work as against all persons, except one who originally and independently creates the same or similar work (*Civ. Code § 980(a)(1)*).

B. When Work Is Not Fixed in Tangible Medium of Expression. A work shall be considered not fixed when it is not embodied in a tangible medium of expression or when its embodiment in a tangible medium of expression is not sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration, either directly or with the aid of a machine or device (*Civ. Code § 980(a)(1)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the author of an original work of authorship that is not fixed in a tangible medium of expression has an exclusive ownership, under California law, in the representation or expression of the work, as against all persons, except one who originally and independently creates the

same or similar work [*see Civ. Code § 980(a)(1)*].

The foregoing points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of an author's exclusive ownership in the representation or expression of his, her, or its original work of authorship. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Specifically, counsel should insert argument showing that (1) the party supporting the contention is the author of the work, (2) the work is one of original authorship, and (3) the work is not fixed in a tangible medium of expression [*see Civ. Code § 980(a)(1)*].

[b] Works Not Fixed in Tangible Medium of Expression

By its terms, *17 U.S.C. § 301(b)(1)* explicitly preserves copyright protection under state law for works that have not been fixed in any tangible medium of expression [*17 U.S.C. § 301(b)(1)*]. Examples of these works could include choreography that has never been filmed or notated, an extemporaneous speech, original works of authorship communicated solely through conversation or live broadcasts, a dramatic sketch or musical composition improvised or developed from memory and without being recorded or written down, or data displayed on the cathode ray tube of a computer terminal when the data are not displayed for a period of more than transitory duration. Works not fixed in a tangible medium of expression are not subject to the preemptive effect of *17 U.S.C. § 301(a)*, and are subject to protection under state statute or common law until fixed in tangible form [*see* Notes of Committee on the Judiciary to *17 U.S.C. § 301*, House Report No. 94-1476].

[c] Related Pleading and Practice Forms

For discussion of protection, under California law, of original works of authorship not fixed in a tangible medium of expression, see California Forms of Pleading and Practice, Ch. 349, *Literary Property and Copyright* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawGeneral OverviewCopyright LawConstitutional ProtectionsGeneral OverviewCopyright LawSubject MatterLiterary WorksGeneral OverviewCopyright LawSubject MatterLiterary WorksScope of Protection

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B. Rights in Literary Property Under California Copyright Law

14-146 California Points & Authorities § 146.41

§ 146.41 Supporting Contention That Author Has Exclusive Ownership Under California Law in Sound Recording--Sound Recording Fixed Before February 15, 1972 [Civ. Code § 980(a)(2)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

UNDER CALIFORNIA LAW,_____ [*specify party, e.g.,* PLAINTIFF] HAS AN EXCLUSIVE OWNERSHIP IN THE SOUND RECORDING UNTIL FEBRUARY 15, 2047, BECAUSE PLAINTIFF IS THE AUTHOR OF THE WORK, THE WORK IS AN ORIGINAL WORK OF AUTHORSHIP, AND THE WORK CONSISTS OF A SOUND RECORDING INITIALLY FIXED BEFORE FEBRUARY 15, 1972.

A. Exclusive Ownership in Sound Recording Fixed Before February 15, 1972. The author of an original work of authorship consisting of a sound recording initially fixed prior to February 15, 1972, has an exclusive ownership in the sound recording until February 15, 2047 (*Civ. Code § 980(a)(2)*).

B. Extent of Exclusive Ownership. The author has an exclusive ownership in the sound recording, until February 15, 2047, as against all persons except one who independently makes or duplicates another sound recording that does not directly or indirectly recapture the actual sounds fixed in the prior sound recording, but consists entirely of an independent fixation of other sounds, even though those sounds imitate or simulate the sounds contained in the prior sound recording (*Civ. Code § 980(a)(2)*).

C. "Sound Recording" Defined. [*See § 146.25, Paragraph B.*].

D. When Work Is Fixed in Tangible Medium of Expression. [*See § 146.25, Paragraph C.*]

[*Optional*] **E. "Phonorecord" Defined.** [*See § 146.25, Paragraph D.*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the author of an original work of authorship that consists of a sound recording initially fixed in a tangible medium of expression before February 15, 1972, has an exclusive ownership, under California law, in the sound recording, until February 15, 2047, as against all persons, except one who independently makes or duplicates another sound recording that does not directly or indirectly recapture the actual sounds fixed in the prior sound recording [*see Civ. Code § 980(a)(2)*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of an author's exclusive ownership in a sound recording fixed before February 15, 1972. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Specifically, counsel should insert argument showing that (1) the party supporting the contention is the author of the work, (2) the work is one of original authorship, and (3) the work consists of a sound recording initially fixed in a tangible medium of expression before February 15, 1972 [*see Civ. Code § 980(a)(2)*].

[b] Related Pleading and Practice Forms

For discussion of protection, under California law, of sound recordings fixed in a tangible medium of expression before February 15, 1972, see California Forms of Pleading and Practice, Ch. 349, *Literary Property and Copyright* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawGeneral OverviewCopyright LawOwner RightsState RegulationCopyright LawSubject MatterGeneral OverviewCopyright LawSubject MatterSound Recordings

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14-146 California Points & Authorities §§ 146.42-146.59

[Reserved]

§§ 146.42[Reserved]

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C. Protection of Ideas Under California Law

14-146 California Points & Authorities § 146.60

§ 146.60 Supporting Contention That Purveyor of Idea May Recover in Express or Implied-in-Fact Contract for Disclosure of Valuable Idea

[1] FORM

[The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It may also be combined with the points and authorities set out in *§ 146.24*.]

_____ [*Specify party, e.g.,* PLAINTIFF] CAN RECOVER IN CONTRACT, EXPRESS OR IMPLIED-IN-FACT, FOR HIS/HER DISCLOSURE OF A VALUABLE IDEA, BECAUSE THE POLICY THAT PRECLUDES PROTECTION OF AN ABSTRACT IDEA BY COPYRIGHT DOES NOT PREVENT ITS PROTECTION BY CONTRACT.

A. Express or Implied-in-Fact Contract to Pay for Disclosure of Idea Is Enforceable. California law will enforce a contract, whether express or implied-in-fact, to pay for the disclosure of an uncopyrightable idea (*Landsberg v. Scrabble Crossword Game Players, Inc. (9th Cir. 1984) 736 F.2d 485, 489 , cert. denied 469 U.S. 1037, 105 S. Ct. 513, 83 L. Ed. 2d 403* ; *Donahue v. Ziv Television Programs, Inc. (1966) 245 Cal. App. 2d 593, 605, 54 Cal. Rptr. 130*).

B. Idea May Be Subject Matter of Contract. The policy that precludes protection of an abstract idea by copyright does not prevent its protection by contract, and even though an idea is not property subject to exclusive ownership, its disclosure may be of substantial benefit to the person to whom it is disclosed (*Desny v. Wilder (1956) 46 Cal. 2d 715, 733, 299 P.2d 257* ; *Blaustein v. Burton (1970) 9 Cal. App. 3d 161, 178, 88 Cal. Rptr. 319*).

C. Adequacy of Consideration. An idea, if valuable, may be the subject of contract, and its disclosure may be valid consideration for a promise to pay (*Weitzenkorn v. Lesser (1953) 40 Cal. 2d 778, 792, 256 P.2d 947* ; *Donahue v. Ziv Television Programs, Inc. (1966) 245 Cal. App. 2d 593, 601, 54 Cal. Rptr. 130*).

D. Novelty or Concreteness Not Required. An idea that can be the subject matter of a contract need not be novel or

concrete (*Minniear v. Tors (1968) 266 Cal. App. 2d 495, 502, 72 Cal. Rptr. 287* ; *Chandler v. Roach (1957) 156 Cal. App. 2d 435, 443, 319 P.2d 776*).

[*Optional*] **E. Past Consideration Supports Express Contract to Pay for Disclosure of Idea.** An express promise to pay for the disclosure of an idea will be enforced even though the promise is made after the disclosure and, strictly speaking, the consideration for the promise is "past," because the promise is deemed supported by moral consideration (*Desny v. Wilder (1956) 46 Cal. 2d 715, 738, 299 P.2d 257* ; *Donahue v. Ziv Television Programs, Inc. (1966) 245 Cal. App. 2d 593, 605-606, 54 Cal. Rptr. 130*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a party may recover in contract for breach of a promise to pay for the disclosure of his or her ideas. These points and authorities may be used to support the contention that recovery is available on either an express contract theory or an implied-in-fact contract theory. Optional Paragraph E may be used to support the contention that past consideration will support an express or implied-in-fact contract to pay for the disclosure of an idea.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of recovery in contract for breach of a promise to pay for the disclosure of ideas. For example, they may be adapted for use in opposition to a demurrer to a complaint seeking recovery in contract for the unauthorized use of an idea [*see* *Weitzenkorn v. Lesser (1953) 40 Cal. 2d 778, 779, 256 P.2d 947*]. They may also be adapted for use in a trial or appellate brief [*see* *Landsberg v. Scrabble Crossword Game Players, Inc. (9th Cir. 1984) 736 F.2d 485, 486 , cert. denied* *469 U.S. 1037, 105 S. Ct. 513, 83 L. Ed. 2d 403* (appeal from judgment)].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Specifically, counsel should insert argument showing either the existence of an express contract to pay for the disclosure of an idea, or conduct from which a contract to pay for the disclosure of an idea can be inferred.

In an appropriate case, the points and authorities set out in *§ 146.64* may be used to oppose the contention supported by these points and authorities.

[b] Related Pleading and Practice Forms

For discussion of and a form for use in seeking recovery under theories of breach of express and implied-in-fact contract to pay for the disclosure of an idea, see California Forms of Pleading and Practice, Ch. 349, *Literary Property and Copyright* (Matthew Bender).

[3] Discussion of Authorities

[a] Express or Implied-in-Fact Contract to Pay for Disclosure of Idea Is Enforceable

In ***Landsberg v. Scrabble Crossword Game Players, Inc.*** *(9th Cir. 1984) 736 F.2d 485 , cert. denied* *469 U.S. 1037, 105 S. Ct. 513, 83 L. Ed. 2d 403* , plaintiffdeveloped a systematic strategy for playing Scrabble. He committed his system to writing in a manuscript and took steps to publish the manuscript. In response to his request for permission to use the word "Scrabble," the owner of the "Scrabble" trademark and producer of Scrabble brand crossword games requested that he send it a copy of his manuscript for evaluation. After plaintiff did so, the owner sent a copy of the manuscript to an expert "Scrabble" player to evaluate plaintiff's work. The expert found the work excellent, and contracted with the "Scrabble" owner to produce a section on strategy for a "Scrabble" handbook that the owner was

considering producing. Part of the contract included an outline that the expert had copied from plaintiff's manuscript. In the meantime, the owner entered into negotiations with plaintiff for rights in the manuscript. The district court subsequently found these negotiations to be a bad-faith tactic to keep plaintiff dangling while the owner prepared its handbook based on plaintiff's work (*736 F.2d 485, 487)* . Plaintiff finally demanded the return or destruction of all copies of his manuscript in the owner's possession. However, the district court found not only that the owner kept copies of the manuscript, but also that the expert used his copy of the manuscript as the basis for his section of defendants' handbook (*736 F.2d 485, 487)* . The owner then severed its relationship with plaintiff shortly before it brought out its "Scrabble" handbook. Plaintiff sued the owner, its corporate subsidiary, and a publisher in a California superior court on several causes of action, including infringement of common-law copyright and breach of contract, under California law, to pay him for the use of his manuscript. Defendants successfully moved to have the case removed to the United States Distrit Court for the Central District of California. After a bench trial, the district court rendered judgment for plaintiff on his common-law copyright cause of action. However, the owner ignored the judgment and continued to sell and print its handbook. Plaintiff sued again for continuing copyright infringement, this time under the Copyright Act of 1976, rather than California law, because of the preemptive effect of *17 U.S.C. § 301(a)*. The court granted plaintiff summary judgment and damages. The owner appealed from both judgments of the district court.

The United States Court of Appeals for the Ninth Circuit reversed the district court's judgment on the infringement claim, finding that defendants did not infringe on plaintiff's manuscript in the production of the handbook. The court noted that if it were to hold defendants' handbook to be an infringement, it did not see how anyone could state plaintiff's ideas without also being held to have infringed, and plaintiff would, in effect, have obtained a copyright on the ideas contained in his work. However, the court remanded the case to the district court for further proceedings on the breach of contract claim (*736 F.2d 485, 490)* . In so ruling, the court held that California law will enforce a contract, whether express or implied-in-fact, to pay for the disclosure of an uncopyrightable idea. The court noted that the district court found that because of the owner's conduct, plaintiff reasonably believed that the owner would not use or copy his manuscript, or any part of it, without his consent and without payment to him of an acceptable sum. The court held that this was conduct that could create an implied-in-fact contract (*736 F.2d 485, 489)* .

In ***Donahue v. Ziv Television Programs, Inc.*** *(1966) 245 Cal. App. 2d 593, 54 Cal. Rptr. 130* , plaintiffs commenced an action for breach of express and implied-in-fact contract against a television production company and a television producer. In their complaint, plaintiffs alleged that they conceived an idea for a television format about an underwater adventure series and submitted the format in written form, together with story outlines, a screenplay, and a proposed budget, to the production company. Plaintiffs alleged that it was expressly and impliedly agreed between plaintiffs and the production company that if the company used plaintiffs' format, the company would pay for its use. During this time, the producer was an employee of the production company. Subsequently, both defendants produced a television program entitled "Sea Hunt," an underwater adventure program that, according to plaintiffs, used, exploited, and utilized plaintiffs' format and story outlines. Plaintiffs received no compensation from defendants for use of the format and outlines. After a jury verdict for plaintiffs, defendants moved for judgment notwithstanding the verdict and for a new trial. The trial court granted the motions, and plaintiffs appealed from both the judgment and the order.

The court of appeal reversed judgment notwithstanding the verdict in regard to the production company and affirmed in regard to the producer. The court also affirmed the order granting a new trial in regard to the production company and held the order ineffective in regard to the producer because judgment was affirmed in regard to him (*245 Cal. App. 2d 593, 614)* . The court held that the circumstances preceding and attending disclosure of plaintiffs' idea, format, and story outlines to the production company supported the jury's implied finding that there was a contract between plaintiffs and the company (*245 Cal. App. 2d 593, 606)* . The court noted that the policy that precludes protection of an abstract idea by copyright does not prevent its protection by contract (*245 Cal. App. 2d 593, 601)* . Recovery for the use of an idea must be based on a true contract that, were it not for precedent, the court would prefer to call an express contract, which may be proved by either express promises or circumstantial evidence. However, the court recognized that usage, together with *Civ. Code § 1621*(defining an implied contract), had established the term "implied-in-fact" for express contracts proved by circumstantial evidence. The court distinguished express and implied-in-fact contracts from

implied-in-law contracts, or quasi-contracts, which are imposed by the law for the purpose of bringing about justice regardless of the parties' intentions. The court then held that recovery for the use of an idea must be based on either an express or an implied-in-fact contract. According to the court, the law will not imply a promise, which has never been made expressly or impliedly, topay for something that defendant can have for the taking (*245 Cal. App. 2d 593, 605)* .

[b] Idea May Be Subject Matter of Contract

In ***Desny v. Wilder*** *(1956) 46 Cal. 2d 715, 299 P.2d 257* , plaintiff telephoned the office of one of defendants, a motion picture producer, and asked to speak to the producer. At the insistence of the producer's secretary that plaintiff explain the nature of his call, plaintiff told her of an idea he had for a motion picture. Plaintiff sought to send the producer a copy of the story, but when the secretary learned of its length, she stated that the producer would not read it and that he wanted stories in synopsis form. At the secretary's invitation, and in a subsequent telephone call, plaintiff dictated a brief synopsis of his idea over the telephone to the secretary. Following this disclosure, plaintiff stated that he expected to be paid if the idea were used, and the secretary acknowledged that he would be. Plaintiff did not at any time speak to the producer. Thereafter, the producer and the production company that employed him produced a film, the photoplay of which closely paralleled both plaintiff's synopsis and the historical material surrounding the life and death of the main character of both the film and plaintiff's synopsis. In addition, the film included a fictional incident that appeared in plaintiff's synopsis and that he claimed was his creation. Plaintiff then commenced an action in three counts, including breach of express or implied-in-fact contract, against the producer and the production company to recover the reasonable value of either the synopsis or his idea for the photoplay, alleging that defendants accepted and used both the synopsis and the idea in producing their film. Defendants answered the complaint and denied its material allegations. Defendants then moved for summary judgment, and the trial court granted the motion and entered judgment in favor of defendants. Plaintiff appealed from the judgment.

The Supreme Court affirmed the trial court's judgment on the noncontract counts, but reversed judgment on the contract count and remanded the case for further proceedings consistent with its opinion (*46 Cal. 2d 715, 752)* . In so ruling, the Court held that a question of fact existed regarding whether defendants breached an implied-in-fact contract to pay plaintiff for the synopsis embodying, implementing, and adapting plaintiff's idea for their photoplay (*245 Cal. App. 2d 593)* . The Court held that the policy that precludes protection of an abstract idea by copyright does not prevent its protection by contract. Even though an idea is not property subject to exclusive ownership, its disclosure may be of substantial benefit to the person to whom it is disclosed. That disclosure may therefore be consideration for a promise to pay. According to the Court, the foregoing principles, first enunciated in Justice Traynor's dissent in *Stanley v. Columbia Broadcasting System (1950) 35 Cal. 2d 653, 674, 221 P.2d 73* , are now accepted as the law of California (*245 Cal. App. 2d 593)* .

In ***Blaustein v. Burton*** *(1970) 9 Cal. App. 3d 161, 88 Cal. Rptr. 319* , plaintiff motion picture producer filed a complaint against defendants, two actors and a director, for damages for breach of contract, unjust enrichment, breach of confidential relationship, and services rendered and benefits conferred. In substance, plaintiff alleged that he conceived an idea for producing a film of Shakespeare's play "The Taming of the Shrew." The idea included casting a famous husband-and-wife team of actors as the stars of the film, using a well-known stage and opera director to direct the film, eliminating the play-within-a-play device used in previous film versions of the play, including in the film two key scenes that in the play occur offstage, and filming in Italy using the actual settings described by Shakespeare. Plaintiff further alleged, in substance, that he disclosed his idea to defendant actors and director, and to their agents, and that defendants, by their words and conduct, agreed to participate in the film with plaintiff as producer. Plaintiff further alleged that some time after his negotiations with defendants, a film of "The Taming of the Shrew," starring defendant actors and directed by defendant director, was produced and released. According to plaintiff, the film used his ideas for casting, director, elimination of the play-within-a-play, and inclusion of the two scenes that occur offstage in the play. Additionally, the film was photographed in Italy, although not in the actual locales described by Shakespeare. Plaintiff was not involved in any way in this film, and defendants neither paid plaintiff nor accorded him any screen or advertising credit. Thereafter, defendants moved for summary judgment, contending, among other things, that no triable

issues of fact existed regarding whether a contract was entered into between plaintiff and defendants pursuant to which plaintiff was entitled to compensation because of defendants' use of the idea disclosed to them by plaintiff. The trial court granted the motion, denied a motion for reconsideration, and entered summary judgement in favor of defendants. Plaintiff appealed from the judgment.

The court of appeal reversed the trial court's judgment, holding plaintiff's idea to be one that may be protected by contract (*9 Cal. App. 3d 161, 184, 187)* . The court found that whether the parties, by their oral declarations and conduct, entered into a contract whereby defendants agreed to compensate plaintiff in the event they used his idea, was a question of fact that could not be properly resolved in a summary judgment proceeding but had to be resolved on a trial of the issue (*9 Cal. App. 3d 161, 184)* . The court cited *Desny v. Wilder (1956) 46 Cal. 2d 715, 733, 299 P.2d 257* (discussed *above*), for the proposition that the policy that precludes protection of an abstract idea by copyright does not prevent its protection by contract. Even though an idea is not property subject to exclusive ownership, its disclosure may be of substantial benefit to the person to whom it is disclosed. That disclosure may therefore be consideration for a promise to pay (*9 Cal. App. 3d 161, 178)* .

[c] Adequacy of Consideration

In ***Weitzenkorn v. Lesser*** *(1953) 40 Cal. 2d 778, 256 P.2d 947* , plaintiff commenced an action for damages against a motion picture producer and two motion picture production companies, arising out of defendants' alleged unauthorized use of plaintiff's literary work, and the ideas contained in it, in the production of a film about Tarzan. The first count of her complaint alleged breach of an express contract, under which plaintiff wrote a literary composition and submitted it to defendants at their request and pursuant to an express oral agreement that, in consideration for submission of the work, she would be paid the reasonable value of the work and given screen credit as author if defendants used all or part of her work. Thereafter, defendants produced and distributed a film patterned on and using plaintiff's work, but paid her nothing and gave her no screen credit. The second count of the complaint alleged the common count of quantum valebant, and sought recovery under either an implied-in-fact or an implied-in-law (quasi) contract for the reasonable value of plaintiff's work. The third count of the complaint alleged plagiarism under former Civ. Code § 980 (*now see Civ. Code § 980* (revised to conform to the preemption provisions of the Copyright Act of 1976)), in that, without plaintiff's knowledge, authority, or consent, defendants produced and distributed their film, substantially copying and misappropriating her work. Defendants demurred to the complaint on the grounds that each count failed to state facts sufficient to constitute a cause of action and that, in certain particulars, each count was ambiguous, unintelligible, or uncertain. The trial court sustained the demurrers without leave to amend the complaint and entered judgment dismissing the complaint. Plaintiff appealed from the judgment of dismissal.

The Supreme Court affirmed the trial court's judgment on the plagiarism count, but reversed the judgment on the contract counts, with directions to permit defendants to answer (*40 Cal. 2d 778, 795)* . In reversing the judgment of dismissal on the contract counts, the Court held that the question of whether plaintiff had any legally protectible property rights in her work, or the ideas contained in it, did not need to be considered in her claims for breach of an express or implied-in-fact contract (*40 Cal. 2d 778, 791, 794)* . An idea, if valuable, may be the subject of contract. While the idea disclosed may be common, or even open to public knowledge, disclosure of the idea, if protected by contract, is sufficient consideration for the promise to pay for use of the idea (*40 Cal. 2d 778, 791-792)* . Because the contract counts were pleaded, the proof could show that defendants agreed to pay for plaintiff's composition if they used it, or any portion of it, regardless of its originality (*40 Cal. 2d 778, 791)* .

The facts and procedural background of ***Donahue v. Ziv Television Programs, Inc.*** *(1966) 245 Cal. App. 2d 593, 54 Cal. Rptr. 130* , are discussed in *§ 146.60[3][a]*. In holding that the circumstances preceding and attending disclosure of plaintiffs' idea, format, and story outlines to defendant production company supported the jury's implied finding that there was a contract between plaintiffs and the company, the court of appeal ruled that because the disclosure of an idea may be of substantial benefit to the person to whom it is disclosed, that disclosure may be consideration for a promise to pay for the use of the idea disclosed (*245 Cal. App. 2d 593, 601)* .

[d] Novelty or Concreteness Not Required

In ***Minniear v. Tors*** *(1968) 266 Cal. App. 2d 495, 72 Cal. Rptr. 287* , which involved an appeal from two cases consolidated for trial, plaintiff conceived the idea of making an underwater adventure series for sale to television. Plaintiff wrote a script and completed a pilot film for the series, pooling his efforts with one of defendants, an underwater photographer. Plaintiff then screened the film in a private showing that was attended by another of the defendants, a television producer. After the screening, the producer told plaintiff that he had been contemplating making a series on skindivers but had not found a satisfactory format and that he felt the film contained an excellent idea. At that time, plaintiff offered the producer a booklet containing the outline of future programs for the series, including a story about a jet pilot trapped under the sea. Plaintiff was subsequently unsuccessful in his efforts to sell his pilot and series format, and the underwater photographer subsequently disassociated himself from plaintiff's project. About one month after the screening, the producer commenced production of "Sea Hunt," a television underwater adventure series, for a production company not associated with plaintiff. The producer also purchased, for the production company and from the underwater photographer, the story of a jet pilot who was trapped under the sea, and used the idea in the premiere episode of the series. Plaintiff then commenced an action against the photographer, the producer, and the production company for damages for conspiracy to defraud and convert literary material consisting of his pilot film and story outlines for subsequent episodes. Plaintiff commenced an additional action against the production company alone for damages on a contract to purchase literary material for the pilot film. In both actions, plaintiff alleged that the "Sea Hunt" series was essentially his series, and that defendants employed the same format, stories, character, develpment, and plot plays as those in his pilot film and story outlines. Plaintiff particularly alleged that one episode of the "Sea Hunt" series was a substantial copy of his pilot film and that the jet plane episode was taken from his prologue and written synopsis obtained by defendant photographer. After several days of trial before a jury, the trial court granted defense motions for nonsuit and dismissal in each case. Plaintiff appealed from the judgments of nonsuit in each case, contending, among other things, that there was sufficient and substantial evidence to take both cases to the jury.

The court of appeal affirmed the judgment of nonsuit in the conversion-fraudaction but reversed the judgment of nonsuit in the contract action (*266 Cal. App. 2d 495, 506-507)* . In reversing judgment in the contract action, the court held that all of the elements of an implied contract between plaintiff and defendants were present if defendant production company made use of plaintiff's ideas and format (*266 Cal. App. 2d 495, 504)* . The court then concluded that there were enough similarities in the basic plot ideas, themes, sequences, and dramatic "gimmicks" between plaintiff's pilot and story outlines and "Sea Hunt" for a jury to infer that plaintiff's ideas and format were the inspiration for "Sea Hunt" and that defendant production company used plaintiff's ideas and format (*266 Cal. App. 2d 495, 505)* . In so holding, the court ruled that an idea that can be the subject matter of a contract need not be novel or concrete (*266 Cal. App. 2d 495, 502)* .

In ***Chandler v. Roach*** *(1957) 156 Cal. App. 2d 435, 319 P.2d 776* , plaintiff conceived an idea for a dramatic work based on the activities of a public defender's office. Plaintiff's agent then met with a television producer and gave him an oral and a written summary of plaintiff's idea. The producer displayed considerable interest in the project and met with plaintiff. Plaintiff interested the producer in the idea of a television series based on the activities of a public defender's office, as suggested by plaintiff, and the parties proceeded to work out terms under which the series was to be produced. Under the terms of the agreement, plaintiff was to receive for his idea, among other things, a percentage of the receipts from the series and certain other amounts for his services. At the producer's request, plaintiff subsequently prepared a script and revised it to meet with the producer's suggestions, for the producer's use in attempting to sell the series to an advertiser. Thereafter, the producer's attorneys drafted a contract that was sent to plaintiff. Plaintiff suggested certain changes in the contract, and the attorneys prepared a second written contract, which was sent to plaintiff. It appears that plaintiff did not sign the contract. Plaintiff did not hear from the producer until approximately two years later when, at a chance meeting, the producer told plaintiff that the series was "too good an idea." The producer never paid plaintiff for his ideas or services but subsequently produced a television series along the lines suggested by plaintiff. Plaintiff then commenced an action against the producer and others for breach of a contract to pay him for the use of his ideas. At the conclusion of the trial, the parties submitted jury instructions relative to

implied-in-fact contracts to pay for the use of ideas. The instructions submitted by defendants and given by the court set forth the requirements that an idea must be both novel and concrete to create an implied-in-fact contract to pay for its use. After considerable deliberation, and after having these particular instructions reread to them, the jury returned a verdict for defendants, and judgment was entered accordingly. Plaintiff appealed from the judgment.

The court of appeal reversed the judgment, finding the instructions in question to be prejudicially erroneous (*156 Cal. App. 2d 435, 445)* . The court held there was no necessity to add the elements of novelty and concreteness to an implied-in-fact contract to pay an author for the use of his or her ideas. The court ruled that the status of an author should be the same as that of any other person in any other implied-in-fact contract situation. Therefore, courts should not engraft to the requirements of an implied-in-fact contract, in the case of an author, something that neither party has contemplated and that is not a requirement in any other form of implied-in-fact contract. Courts should permit the parties to contract with each other as they see fit, rather than arbitrarily injecting into the contract the requirements that the idea be novel and concrete. If, on the other hand, the parties to a contract agree that an idea must be novel and concrete to warrant payment for its use, then a different situation from that in the case at bench arises, and the idea's novelty and concreteness become questions of fact for a jury to decide (*156 Cal. App. 2d 435, 443)* . The court reasoned that while novelty and concreteness are part of the test applied in common-law copyright actions for the protection of literary property rights, this property right test is not part of any traditional contract action. Additionally, there is no reason for adopting this test in a contract action to pay for the use of ideas. The reason for the requirements of novelty and concreteness in common-law copyright was that, to have a remedy good as against the world, a property right in a work must be shown. However, this reason is missing in a contract action, because, unlike a copyright, a contract creates no monopoly. A contract to pay for the use of an idea is effective only between the contracting parties, it does not withdraw the idea from general circulation, and any person not a party to the contract is free to use the idea without restriction. Furthermore, to apply the novelty test to the consideration for a contract is, in effect, questioning the adequacy of the consideration, a practice traditionally not allowed by the courts. All that must be shown is that the idea has sufficient concreteness to be the consideration for a contract (*156 Cal. App. 2d 435, 444)* .

[e] Past Consideration Supports Express Contract to Pay for Disclosure of Idea

The facts and procedural background of ***Desny v. Wilder*** *(1956) 46 Cal. 2d 715, 299 P.2d 257* , are discussed in *§ 146.60[3][b]*. In *Desny,* the Supreme Court held a question of fact existed regarding whether defendants breached an implied-in-fact contract to pay plaintiff for a synopsis embodying, implementing, and adapting plaintiff's idea for a photoplay of a film produced by defendants (*46 Cal. 2d 715, 740)* . With respect to the action to recover damages for breach of an express contract to pay for the use or disclosure of an idea, the Court held that the purveyor of the idea could not prevail unless he or she obtained from the recipient an express promise to pay, either before or after conveying the idea. The Court saw no reason why the person who received and benefited from the idea could not make an enforceable promise to pay reasonable compensation *after* receiving the idea. The Court took the view that when a person has rendered services in the past with an expectation that he or she will receive reasonable compensation, a moralobligation arises on the part of anyone who receives a material or pecuniary benefit from those services, and this moral obligation is sufficent to support an executory promise to pay for the past services, even though the promisor had no legal obligation to pay before making the promise (*46 Cal. 2d 715, 738)* .

The facts and procedural background of ***Donahue v. Ziv Television Programs, Inc.*** *(1966) 245 Cal. App. 2d 593, 54 Cal. Rptr. 130* , are discussed in *§ 146.60[3][a]*. In *Donahue,* the court held that the circumstances preceding and attending disclosure of plaintiffs' idea, format, and story outlines to defendant production company supported the jury's implied finding that there was a contract between plaintiffs and the company (*245 Cal. App. 2d 593, 601)* . In examining the requirements of express and implied-in-fact contracts to pay for the disclosure or use of ideas, the court held that an express promise to pay for the conveyance of an idea, made by one who receives the idea and finds it valuable, will be enforced even though the promise is made after the conveyance and, strictly speaking, the consideration for the promise is "past." In this situation, the promise is deemed supported by moral consideration (*245 Cal. App. 2d 593, 606)* .

[4] Additional Authorities

[a] Express or Implied-in-Fact Contract to Pay for Disclosure of Idea Is Enforceable

In *Thompson v. California Brewing Co. (1957) 150 Cal. App. 2d 469, 310 P.2d 436* , an action for the recovery of the reasonable value of an idea for the advertising and promotion of the sale of beer, the court of appeal reversed the trial court's orders sustaining demurrers to counts for breach of express and implied-in-fact contracts in plaintiff's complaint and allowed plaintiff the opportunity to amend these counts to plead facts, if any existed, that would overcome the seeming bar of the statute of limitations, *Code Civ. Proc. § 339 subd (1)*. The court held that the following allegations of the plaintiff stated facts constituting a cause of action for the breach of an express oral contract to pay for use of plaintiff's idea: (1) that at defendants' request, plaintiff disclosed and offered them, orally and in writing, a new and novel idea conceived by him; (2) that defendants expressly and orally agreed to pay plaintiff the reasonable value of the idea if and when they used it; (3) that defendants used the idea; (4) that by this use defendants were obligated to pay plaintiff a sum alleged to be the reasonable value of the idea; and (5) that defendants refused to pay and the amount is due and owing (*150 Cal. App. 2d 469, 472-473)* . The court also held that the allegation of these facts stated a cause of action for breach of an implied-in-fact contract to pay for the use of plaintiff's idea when, in lieu of the allegation of the defendants' express promise to pay, plaintiff alleged that when defendants received the idea, they understood that plaintiff expected to be paid for its reasonable value if it was used (*150 Cal. App. 2d 469, 473)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawGeneral OverviewCopyright LawOwner RightsState RegulationCopyright LawSubject MatterIdeasGeneral Overview

California Points & Authorities

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CHAPTER 146 LITERARY PROPERTY, COPYRIGHT, AND THE PROTECTION OF IDEAS
PART II. FORMS
C. Protection of Ideas Under California Law

14-146 California Points & Authorities § 146.61

§ 146.61 Supporting Contention That Implied-in-Fact Contract Exists to Pay for Disclosure of Valuable Idea

[1] FORM

[The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with the points and authorities set out in *§ 146.60.*]

AN IMPLIED-IN-FACT CONTRACT EXISTS TO PAY FOR _____'S [*specify party, e.g.,* PLAINTIFF] DISCLOSURE OF AN IDEA TO_____ [*specify party, e.g.,* DEFENDANT], BECAUSE THE CIRCUMSTANCES PRECEDING AND ATTENDING THAT DISCLOSURE, TOGETHER WITH THE CONDUCT OF DEFENDANT, WHO ACTED WITH KNOWLEDGE OF THE CIRCUMSTANCES, FURNISH EVIDENCE OF DEFENDANT'S IMPLIED-IN-FACT PROMISE TO PAY FOR PLAINTIFF'S DISCLOSURE IF DEFENDANT USED THE IDEA.

A. Evidence Required to Show Existence of Implied-in-Fact Contract. An implied-in-fact contract to pay for plaintiff's disclosure of a valuable idea exists when the circumstances preceding and attending disclosure of the idea, together with the conduct of defendant, who acted with knowledge of the circumstances, show that (1) plaintiff clearly conditioned disclosure of the idea on defendant's obligation to pay for disclosure, if defendant used the idea; (2) defendant knew the condition before he or she knew the idea and voluntarily accepted the disclosure; (3) defendant found the idea valuable; and (4) defendant used the idea (*Desny v. Wilder (1956) 46 Cal. 2d 715, 738, 299 P.2d 257* ; *Donahue v. Ziv Television Programs, Inc. (1966) 245 Cal. App. 2d 593, 606, 54 Cal. Rptr. 130*).

[*Optional*] **B. Use of Idea Shown by Substantial Similarity Between Idea and Manner in Which It Is Used.** Defendant is deemed to have used plaintiff's idea when there is some substantial similarity between the idea and the manner in which the idea is ultimately used (*Whitfield v. Lear (2d Cir. 1984) 751 F.2d 90, 93-94* (applying California law); *see Minniear v. Tors (1968) 266 Cal. App. 2d 495, 504-505, 72 Cal. Rptr. 287*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that an implied-in-fact contract exists to pay for the disclosure of an idea. Optional Paragraph B may be used when there exists a substantial similarity between the idea disclosed and the manner in which the idea is ultimately used.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise thesubstantive issue of recovery in contract for breach of a promise to pay for the disclosure of ideas. They may also be adapted for use in a trial or appellate brief [*see Mann v. Columbia Pictures, Inc. (1982) 128 Cal. App. 3d 628, 630-631, 180 Cal. Rptr. 522* (appeal from judgment notwithstanding verdict and conditional grant of new trial)].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Specifically, counsel should insert argument showing that disclosure of the idea is conditioned on an obligation to pay for that disclosure if the idea is used, and that the party to whom the idea was disclosed (1) knew of that condition before knowing the idea, (2) had an opportunity to reject disclosure, (3) found the idea to be valuable, and (4) used the idea [*see Mann v. Columbia Pictures, Inc. (1982) 128 Cal. App. 3d 628, 646, 647 n.6, 180 Cal. Rptr. 522*].

[b] Related Pleading and Practice Forms

For discussion of and a form for use in seeking recovery under a theory of implied-in-fact contract for breach of an implied-in-fact promise to pay for the disclosure of an idea, see California Forms of Pleading and Practice, Ch. 349, *Literary Property and Copyright* (Matthew Bender).

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities set out in *§ 146.64* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Evidence Required to Show Existence of Implied-in-Fact Contract

The facts and procedural background of ***Desny v. Wilder*** *(1956) 46 Cal. 2d 715, 299 P.2d 257* , are discussed in *§ 146.60[3][b]*. In *Desny,* the Supreme Court held a question of fact existed about whether defendants breached an implied-in-fact contract to pay plaintiff for a synopsis embodying, implementing, and adapting plaintiff's idea for a photoplay of a film produced by defendants (*46 Cal. 2d 715, 740)* . Furthermore, the fact, if found by the trial court, that the basic idea for defendants' photoplay had been conveyed to defendants before they saw plaintiff's synopsis would not preclude the finding of an implied-in-fact contract to pay for the synopsis, including its implemented idea, if defendants used the synopsis (*46 Cal. 2d 715, 750)* . The Court held that an idea purveyor cannot prevail in an action to recover compensation for an abstract idea unless (1) before or after disclosure he or she has obtained an express promise to pay, or (2) the circumstances preceding and attending disclosure, together with the conduct of the person to whom the idea is offered, acting with knowledge of the circumstances, show a promise of the type usually referred to as "implied" or "implied-in-fact" (*46 Cal. 2d 715, 738)* . If the idea purveyor has clearly conditioned the offer to convey the idea on an obligation to pay for it if used, and the person to whom the offer is made, knowing the condition before he or she knows the idea, voluntarily accepts its disclosure, finds the idea valuable, and uses it, a court will either apply the objective test for the creation of a contract and hold that the parties have made an express (sometimes called implied-in-fact) contract, or will imply a promise to compensate in order to prevent fraud and unjust enrichment. The promise must be based on circumstances that were known to the person to whom the offer is made at and preceding the time the idea is disclosed (*46 Cal. 2d 715, 739)* .

One court of appeal has stated that the holding in *Desny* does not blur the distinction between implied-in-fact contracts and those implied by law (quasi-contracts), which had been so clearly drawn in *Weitzenkorn v. Lesser (1953) 40 Cal. 2d 778, 794, 256 P.2d 947* (discussed in *§ 146.63[3][a]*). In ***Donahue v. Ziv Television Programs, Inc.*** *(1966) 245 Cal. App. 2d 593, 54 Cal. Rptr. 130* (discussed in *§ 146.60[3][a]*), the court interpreted *Desny* 's apparent reference to quasi-contracts as a reference to the possibility of the creation of an implied-in-fact contract, notwithstanding exculpatory contemporaneous statements by the parties (*245 Cal. App. 2d 593, 606 n 10*).

The facts and procedural background of ***Donahue v. Ziv Television Programs, Inc.*** *(1966) 245 Cal. App. 2d 593, 54 Cal. Rptr. 130* , are discussed in *§ 146.60[3][a]*. In *Donahue,* the court of appeal found the circumstances preceding and attending disclosure of plaintiffs' idea for a television series to defendant television production company supported the jury's implied finding that there was an implied-in-fact contract between plaintiffs and the production company under which the production company promised to pay plaintiffs for the disclosure of their idea (*245 Cal. App. 2d 593, 602, 606, 607)* . Relying on *Desny v. Wilder (1956) 46 Cal. 2d 715, 738, 299 P.2d 257* (discussed supra), the court held the circumstances preceding and attending disclosure, together with the conduct of the person to whom the idea is disclosed, acting with knowledge of the circumstances, must furnish the evidence of a promise implied in fact. If the idea purveyor has clearly conditioned the offer to convey the idea on an obligation to pay for it if used, and the person to whom the idea is to be disclosed, knowing the condition before he or she knows the idea, voluntarily accepts disclosure, finds the idea valuable, and uses it, a court will either apply the objective test and hold that the parties have made an express (sometimes called implied-in-fact) contract, or imply a promise to compensate in order to prevent fraud and unjust enrichment (*245 Cal. App. 2d 593, 606)* .

[b] Use of Idea Shown by Substantial Similarity Between Idea and Manner in Which It Is Used

The facts and procedural background of ***Whitfield v. Lear*** *(2d Cir. 1984) 751 F.2d 90* , are discussed in *§ 146.24[3][a]*. In *Whitfield,* the court of appeals held that the claimed similarities between the ideas embodied in plaintiff's work and defendants' television series were sufficient to allow a trier of fact to find that defendants misappropriated plaintiff's ideas under California law (*751 F.2d 90, 95)* . The court also held that to support recovery on an implied-in-fact contract to pay for disclosure of his ideas, plaintiff had to show that defendants actually used his ideas, by demonstrating some substantial similarity between his ideas and the themes of programs in defendants' television series (*751 F.2d 90, 93-94)* . In reversing the district court's summary judgment for defendants, the court ruled that it was unable to conclude there was no similarity between plaintiff's ideas and defendants' work, because no scripts of the series, as televised, were in the record and because the materials that were in the record were in utter conflict over the existence of similarities between the televised series and the ideas in plaintiff's script (*751 F.2d 90, 94)* .

The facts and procedural background of ***Minniear v. Tors*** *(1968) 266 Cal. App. 2d 495, 72 Cal. Rptr. 287* , are discussed in *§ 146.60[3][d]*. In *Minniear,* the court of appeal found that there were enough similarities between plaintiff's pilot television program and story outlines and defendants' television series for a jury to infer that plaintiff's ideas and format were the inspiration for defendants' series and that defendant production company in fact used plaintiff's ideas and format. In determining defendant's use of plaintiff's ideas, the court noted that the type of television series in issue (an underwater sea adventure series) had certain basic similarities that could not be avoided. However, the court found enough similarities in the basic plot ideas, themes, sequences, and dramatic "gimmicks" between plaintiff's ideas and format and defendant's series for the jury to infer that defendant used plaintiff's ideas and format (*266 Cal. App. 2d 495, 505)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawGeneral OverviewContracts LawTypes of ContractsImplied-in-Fact ContractsCopyright LawSubject MatterGeneral OverviewCopyright LawSubject MatterIdeasGeneral OverviewCopyright LawSubject MatterIdeasMisappropriation

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California Points & Authorities

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 146 LITERARY PROPERTY, COPYRIGHT, AND THE PROTECTION OF IDEAS
PART II. FORMS
C. Protection of Ideas Under California Law

14-146 California Points & Authorities § 146.62

§ 146.62 Supporting Contention That Another's Unauthorized Disclosure or Use of Idea Is Breach of Confidence

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____'S [*Specify party, e.g.,* DEFENDANT] [DISCLOSURE *and/or* USE] OF _____'S [*specify party, e.g.,* PLAINTIFF] IDEA IS A BREACH OF CONFIDENCE BECAUSE THE IDEA HAS SUFFICIENT NOVELTY TO WARRANT PROTECTION, PLAINTIFF OFFERED IT AND DEFENDANT RECEIVED IT IN CONFIDENCE, AND DEFENDANT THEREAFTER_____ [DISCLOSED *and/or* USED] IT FOR HIS/HER OWN BENEFIT WITHOUT PLAINTIFF'S CONSENT AND TO PLAINTIFF'S DETRIMENT.

A. Confidence Breached When Idea Is Disclosed or Used Without Permission of Confiding Party. An action for breach of confidence arises whenever an idea, offered and received in confidence, is later disclosed or used without the permission of the confiding party (*Davies v. Krasna (1975) 14 Cal. 3d 502, 510, 121 Cal. Rptr. 705, 535 P.2d 1161* ; *Blaustein v. Burton (1970) 9 Cal. App. 3d 161, 187, 88 Cal. Rptr. 319*).

B. Relationship of the Parties. The existence of a confidential relationship is not essential to a cause of action for breach of confidence, because the element of confidence is not necessarily limited to the type of case in which there is a fiduciary relationship (*Davies v. Krasna (1975) 14 Cal. 3d 502, 510, 121 Cal. Rptr. 705, 535 P.2d 1161* ; *Thompson v. California Brewing Co. (1957) 150 Cal. App. 2d 469, 475, 310 P.2d 436*).

C. Confidence Breached When Idea Is Disclosed or Used for Benefit of Confidant and to Detriment of Confiding Party. When a party receives an idea for use in the interests and for the benefit of the party confiding the idea, the party receiving the confidence is under a duty not to use the idea to the detriment of the confiding party, and use of the idea adversely to the interests of the confiding party is a breach of that duty (*Ojala v. Bohlin (1960) 178 Cal. App. 2d 292, 300, 2 Cal. Rptr. 919*).

D. Novelty of Idea. Even though an idea may not be protectible under copyright law, it is entitled to protection in a cause of action for breach of confidence for its unauthorized use or disclosure when, as a matter of law, it is novel and concrete (*Fink v. Goodson-Todman Enterprises, Ltd. (1970) 9 Cal. App. 3d 996, 1009, 1013, 88 Cal. Rptr. 679*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that use or disclosure of an idea offered and received in confidence, and without the permission of the confiding party, is a breach of confidence.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of breach of confidence. For example, they may be adapted for use in opposition to a demurrer to a complaint for breach of confidence [*see* *Fink v. Goodson-Todman Enterprises, Ltd. (1970) 9 Cal. App. 3d 996, 999, 88 Cal. Rptr. 679]* . They may also be adapted for use in a trial or appellate brief [*see* *Tele-Count Engineers, Inc. v. Pacific Tel. Tel. Co. (1985) 168 Cal. App. 3d 455, 459, 214 Cal. Rptr. 276* (appeal from judgment) discussed in *§ 146.65*[3][a]].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Specifically, counsel should insert argument showing that an idea was conveyed and received in confidence, that the idea was disclosed or used by the confidant for his or her benefit to the detriment and without the permission of the confiding party, and that the idea was sufficiently novel as to warrant protection under a breach of confidence theory.

[b] Existence of Breach of Confidence Cause of Action

The California Supreme Court has never ruled that a cause of action for breach of confidence can rest on a basis other than a contract that protects that confidence [*Davies v. Krasna (1975) 14 Cal. 3d 502, 505, 121 Cal. Rptr. 705, 535 P.2d 1161*]. Numerous courts of appeal have, however, recognized the existence of the cause of action and have recognized it as resting on a noncontractual basis [*see, e.g.,* *Tele-Count Engineers, Inc. v. Pacific Tel. & Tel. Co. (1985) 168 Cal. App. 3d 455, 462, 214 Cal. Rptr. 276* (and cases cited therein)]. One court of appeal has noted that it knows of no authority requiring approval of legal theory by the California Supreme Court before it can be pleaded [*Faris v. Enberg (1979) 97 Cal. App. 3d 309, 321, 158 Cal. Rptr. 704*].

[c] Recovery in Quasi-Contract or in Tort

An action for breach of confidence lies either in quasi-contract or in tort, because the obligation incurred lies not in contractual language, but is imposed by law [*Davies v. Krasna (1975) 14 Cal. 3d 502, 508, 121 Cal. Rptr. 705, 535 P.2d 1161* ; *see* *Fink v. Goodson-Todman Enterprises, Ltd. (1970) 9 Cal. App. 3d 996, 1009, 88 Cal. Rptr. 679* (seeking recovery in quasi-contract for breach of confidence)].

[d] Related Pleading and Practice Forms

For discussion of and a form for use in breach of confidence actions involving the use or disclosure of an idea, see California Forms of Pleading and Practice, Ch. 349, *Literary Property and Copyright* (Matthew Bender).

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities set out in *§ 146.65* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Confidence Breached When Idea Is Disclosed or Used Without Permission of Confiding Party

In ***Davies v. Krasna*** *(1975) 14 Cal. 3d 502, 121 Cal. Rptr. 705, 535 P.2d 1161* , the parties, for purposes of resolution of a statute of limitations issue in the Supreme Court, stipulated that Valentine Davies submitted a written story to defendant in confidence and that defendant incorporated the idea, central theme, and dramatic core of that story into a successful play. Davies filed an action against defendant for breach of contract and breach of confidence. Valentine died before trial, and plaintiff pursued the litigation as the executrix of the estate. After two trials, the court dismissed the breach of confidence claim for insufficient evidence, and the jury rendered a verdict for defendant on the breach of contract claim. The court of appeal subsequently affirmed the verdict on the contract claim, reversed the judgment on the breach of confidence claim, and remanded the breach of confidence claim for a possible third trial. Defendant filed an amended answer to assert the defenses of res judicata and estoppel. Concluding that the verdict on the contract claim resolved all fact issues relevant to the breach of confidence claim, the trial court granted defendant's motion for judgment on the pleadings. The court of appeal again reversed. Defendant filed another amended answer, asserting the defense of the statute of limitations. Following a proceeding under *Code Civ. Proc. § 597* devoted solely to resolving the limitations issue, the trial court held that the two-year limitations period of *Code Civ. Proc. § 339 subd (1)* barred the breach of confidence claim. Plaintiff then appealed the trial court's judgment.

The Supreme Court affirmed, holding that if plaintiff had a cause of action for breach of confidence, that cause of action was subject to and barred by the two-year limitation of *Code Civ. Proc. § 339 subd (1)* (*14 Cal. 3d 502, 516)* . In so ruling, the Court addressed the breach of confidence cause of action. The Court initially noted that it has never ruled that a cause of action for breach of confidence can rest on a basis other than a contract that protects that confidence (*14 Cal. 3d 502, 505)* . However, because the Court was compelled to follow the law of the case, it assumed that plaintiff had stated a valid cause of action for breach of confidence (*14 Cal. 3d 502, 505, 508)* . The Court held that an action for breach of confidence arises whenever an idea, offered and received in confidence, is later disclosed without the permission of the confiding party (*14 Cal. 3d 502, 510)* . When defendant received the idea, with the understanding that the idea was confidential, defendant incurred an obligation not to use or disclose that idea without the confiding party's consent (*14 Cal. 3d 502, 508)* .

The facts and procedural background of ***Blaustein v. Burton*** *(1970) 9 Cal. App. 3d 161, 88 Cal. Rptr. 319* are discussed in *§ 146.60[3][b]*. In this case the court held that the complaint, together with plaintiff's declaration in opposition to defendants' motion for summary judgment, was sufficient to raise a triable issue of fact over whether the disclosure of plaintiff's idea to respondents was made in confidence, and was accepted by defendants on the understanding that they would not use it without plaintiff's consent. In his declaration, plaintiff stated that because he had prior dealings with the agent for one of defendants, and knew theagent to be highly reputable, and because he had the same firm of attorneys as two of defendants, and had been the recipient of a constantly renewed invitation to disclose his ideas and render services on a film project, he reposed trust and confidence in these two defendants and their representatives and expected that his ideas would be kept in confidence by them. He did not expect or intend that defendants would go forward with production of the film and make use of his ideas without his participation (*9 Cal. App. 3d 161, 187)* .

[b] Relationship of the Parties

The facts and procedural background of ***Davies v. Krasna*** *(1975) 14 Cal. 3d 502, 121 Cal. Rptr. 705, 535 P.2d 1161* , are discussed in *§ 146.62[3][a]*. In holding that a cause of action for breach of confidence was barred under *Code Civ. Proc. § 339 subd (1)*, the Court noted that the creator of an idea may transmit an idea in the protective context of a confidential relationship, as, for example, when an inventor reveals his or her concept to a patent lawyer. The Court held, however, that the existence of a confidential relationship is not essential to a cause of action for violation of confidence, because ideas may also be transmitted in the course of arm's-length negotiations between business people

who can profit from their exploitation (*14 Cal. 3d 502, 510)* . Because a confidential relationship was not required, the Court concluded that the action could not be classified as a constructive fraud and was therefore subject to the limitation period of *Code Civ. Proc. § 339 subd (1)* (*14 Cal. 3d 502, 511)* .

In ***Thompson v. California Brewing Co.*** *(1957) 150 Cal. App. 2d 469, 310 P.2d 436* , plaintiff sought to recover the reasonable value of a new and novel idea for the advertising and promotion of the sale of beer by defendant brewing company. Plaintiff's complaint alleged counts for breach of express and implied-in-fact contract and for breach of confidence arising out of defendants' use of the idea. Defendants demurred to all counts in the complaint on the ground that each was barred by the two-year limitations period of *Code Civ. Proc. § 339 subd (1)*. The trial court sustained the demurrers without leave to amend, and plaintiff appealed from the trial court's judgment dismissing his complaint.

The court of appeal affirmed the trial court's judgment that plaintiff's breach of confidence count was barred by *Code Civ. Proc. § 339(1)* (*150 Cal. App. 2d 469, 478)* . However, the court found that but for the limitations bar, plaintiff had alleged facts sufficient to state a cause of action for breach of confidence (*150 Cal. App. 2d 469, 474)* . The court found that plaintiff had alleged defendants' voluntary assumption of a confidential relationship, and found no reason why defendants should not have assumed that relationship. Furthermore, the court found no reason why a duty should not arise, on defendants' part, not to use or disclose the idea without plaintiff's consent, if the evidence should show defendants were looking for ideas and that plaintiff undertook to supply several ideas on the condition that they not be disclosed or used without his consent (*150 Cal. App. 2d 469, 475)* . The court concluded that the element of confidence is not necessarily limited to the type of case in which there is a fiduciary relationship (such as that between partners or joint venturers or employer and employee) between the parties. Other circumstances may create a duty not to disclose or use without the consent of the originator of the idea (*150 Cal. App. 2d 469, 475)* . Analogizing to the law of trade secrets, the court noted the example of *A*, who has a trade secret that he or she wishes to sell with or without his or her business, and *B*, who is a prospective purchaser. In the course of negotiations, *A* discloses the secret to *B* solely for the purpose of enabling *B* to appraise its value (*150 Cal. App. 2d 469, 475-476)* . Or, *A* requests a loan from *B*, a banker, for the purpose of aiding the manufacture of a product by *A* 's secret process. In order to assure *B* of the soundness of the loan, *A* discloses the secret to *B* in confidence. In both cases, *B* is under a duty not to disclose the secret or use it adversely to *A*. Additionally, this confidence may exist even when no business relation betwee *A* and *B* exists or is contemplated, as when *A* comes to *B*, *A* 's former teacher, for free advice that *B* is willing to give with respect to the secret and discloses the secret to *B* in confidence. Even though given information is not a trade secret, one who receives the information in a confidential relation or discovers it by improper means may be under some duty not to disclose or use the information. Because of the confidential relation or the impropriety of the means of discovery, he or she may be compelled to go to other sources for the information (*150 Cal. App. 2d 469, 476)* .

[c] Confidence Breached When Idea Is Disclosed or Used for Benefit of Confidant and to Detriment of Confiding Party

In ***Ojala v. Bohlin*** *(1960) 178 Cal. App. 2d 292, 2 Cal. Rptr. 919* , plaintiff conceived and developed a design for a gun holster that would permit the cocking of a single action revolver and free turning of the cylinder while being withdrawn from the holster. Plaintiff then took his metal designs and patterns to defendant, who agreed to make the holsters. Defendant agreed not to compete with plaintiff in the manufacture or sale of the holster. When defendant increased his price for manufacturing the holsters, plaintiff resumed making the holsters himself. Thereafter, defendant advertised a holster that was a substantial duplicate of plaintiff's in a magazine in which plaintiff had advertised his holster. Defendant's advertisement stated that he had pioneered the holster, and contained a picture of a holster that was also a substantial duplicate of plaintiff's. Plaintiff commenced an action against defendant for damages and injunctive relief for unfair competition. At the conclusion of trial, the trial court found defendant had engaged in unfair competition, enjoined him from making or selling holsters under plaintiff's original design, and awarded plaintiff damages. Defendant appealed from the judgment, contending, among other things, that there was no substantial evidenceto support the finding that plaintiff's communication of his design to defendant was confidential information.

The court of appeal affirmed the trial court's judgment (*178 Cal. App. 2d 292, 305)* . The court specifically affirmed the trial court's finding that plaintiff communicated his design to defendant in confidence. The court found that plaintiff entrusted the design to defendant for the sole purpose of manufacturing the holsters for plaintiff (*178 Cal. App. 2d 292, 299)* . It regarded defendant's agreement not to compete as potent evidence of his duty as a trustee of the design. Having received the design for use in the interests and for the benefit of plaintiff, defendant had no right to use it in any other manner to plaintiff's detriment. It noted that the trial court found the design was given to defendant in confidence, that the information imparted was of great value to plaintiff, and that it was imparted because of plaintiff's trust and belief in defendant's integrity and because of plaintiff's confidence that defendant would keep his promise not to compete. The court found it clear from these facts that defendant assumed the duties of a trustee relative to information that was to be used solely for plaintiff's benefit. One who is so entrusted violates his duty when he uses the information for his own benefit and to the detriment of the trustor. The fact that defendant accepted the confidence reposed in him was amply shown by the assurance he gave plaintiff that he would not use the design for his own benefit. Using the design in competition with plaintiff was a breach of the relation of personal confidence that defendant had voluntarily assumed. It was a violation of defendant's duty not to use confidential information adversely to plaintiff's interests (*178 Cal. App. 2d 292, 300)* .

[d] Novelty of Idea

In ***Fink v. Goodson-Todman Enterprises, Ltd.*** *(1970) 9 Cal. App. 3d 996, 1009, 88 Cal. Rptr. 679* , plaintiff conceived of an idea for a television series and embodied the idea in a written program. At defendants' special request, plaintiff submitted his program in confidence to defendants and in reliance on the understanding that they would never make use of it, or any material element of it, without his consent. Defendants accepted the submission. Defendants subsequently conferred with plaintiff about the program and later requested, and plaintiff granted, an option giving them the exclusive right to acquire plaintiff's program. Defendants thereafter produced and broadcast, without plaintiff's consent, a television series based on, using, and embodying plaintiff's program. Plaintiff then commenced an action against defendants for breach of express and implied-in-fact contract, breach of confidence, infringement of common-law copyright, and fraud. On his breach of confidence count, plaintiff sought relief in quasi-contract. Defendants demurred to the complaint and the trial court sustained the demurrers. Plaintiff declined to amend the complaint, and the trial court entered judgment dismissing the complaint. Plaintiff appealed from the dismissal judgment.

The court of appeal reversed the trial court's judgment dismissing the breach of confidence count (*9 Cal. App. 3d 996, 1016)* . In so ruling, the court found plaintiff's program, and the ideas contained in it, to contain sufficient novelty to withstand demurrer (*9 Cal. App. 3d 996, 1015-1016)* . The court held that the right of plaintiff's work to protection by reason of sufficient novelty and elaboration of the idea contained in it was a prerequisite in his breach of confidence count (*9 Cal. App. 3d 996, 1009)* . This was so because this count was not based on and did not have the limitation of contractual promises. The function of a quasi-contract is to raise an obligation in law when the parties make no promise. It is not based on the apparent intentions of the parties. Unlike a contract action, quasi-contract reaches and renders liable persons other than the limited number who may have consented to a contractual relationship. Therefore, without the required novelty, there is the danger of monopoly and restraint on progress in art (*9 Cal. App. 3d 996, 1010)* . In assessing the novelty of plaintiff's program, the court found the composite of elements in the program, including the back story, the molding of an important part of the hero's character and personality, the method for presenting and recapturing the back story in the sequential episodes, and various portrayal techniques, to be sufficiently concrete and novel, as a matter of law, to warrant protection under the breach of confidence count. The court found it unlikely that defendants would have produced their program if plaintiff had not provided his idea (*9 Cal. App. 3d 996, 1013, 1014)* . The court also found that it could be inferred from the pleading that defendants made up their presentation from plaintiff's program, thus showing either that they felt there was novelty in the program or that they wanted it despite a lack of novelty. Finally, the court noted plaintiff's allegation that defendants specially requested him to sell them, and on his assent they did buy from him, the exclusive right to use his program This strongly indicated a viewpoint, sufficient on demurrer, that plaintiff's program did have concreteness and novelty (*9 Cal. App. 3d 996, 1015)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawGeneral OverviewCopyright LawSubject MatterGeneral OverviewCopyright LawSubject MatterIdeasGeneral OverviewCopyright LawSubject MatterIdeasMisappropriation

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CHAPTER 146 LITERARY PROPERTY, COPYRIGHT, AND THE PROTECTION OF IDEAS
PART II. FORMS
C. Protection of Ideas Under California Law

14-146 California Points & Authorities § 146.63

§ 146.63 Opposing Contention That Purveyor of Idea May Recover in Quasi-Contract for Unauthorized Use of Idea--Idea Is Not Protectible Property

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Specify party, e.g.,* PLAINTIFF] CANNOT RECOVER IN HIS/HER ACTION IN QUASI-CONTRACT FOR THE UNAUTHORIZED USE OF HIS/HER IDEAS, BECAUSE RECOVERY IN SUCH AN ACTION IS PREDICATED ON THE UNAUTHORIZED USE OF MATERIAL THATCONSTITUTES LEGALLY PROTECTIBLE PROPERTY, AND IDEAS DO NOT CONSTITUTE PROTECTIBLE PROPERTY.

A. Material Used Must Constitute Protectible Property. The material allegedly used must constitute protectible property if a party is to recover in quasi-contract for unauthorized use of the property (*Weitzenkorn v. Lesser (1953) 40 Cal. 2d 778, 795, 256 P.2d 947* ; *Mann v. Columbia Pictures, Inc. (1982) 128 Cal. App. 3d 628, 634, 180 Cal. Rptr. 522*).

B. Ideas Are Not Protectible Property. Under California law, there is no legally protectible property right in an idea (*Weitzenkorn v. Lesser (1953) 40 Cal. 2d 778, 789, 795, 256 P.2d 947* ; *Whitfield v. Lear (2d Cir. 1984) 751 F.2d 90, 92* (applying California law)).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a party may recover in quasi-contract for the unauthorized use of his or her idea.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the protection of ideas under state law. For example, they may

be used in support of a demurrer to a complaint seeking recovery in quasi-contract for the unauthorized use of an idea [*see Weitzenkorn v. Lesser (1953) 40 Cal. 2d 778, 779, 256 P.2d 947*]. They may also be adapted for use in a trial or appellate brief [*see Mann v. Columbia Pictures, Inc. (1982) 128 Cal. App. 3d 628, 630-631, 180 Cal. Rptr. 522* (appeal from judgment notwithstanding verdict)].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Specifically, counsel should insert argument showing that the property, for the unauthorized use of which recovery is sought, consists of an idea, which is not legally protectible personal property.

[b] Action in Quasi-Contract as Distinguished From Action for Breach of Confidence

An action in quasi-contract for breach of a contract implied in law to pay for the disclosure or use of an idea is to be distinguished from an action in quasi-contract for breach of confidence based on the unauthorized disclosure or use of an idea imparted in confidence. An action for breach of confidence for the wrongful disclosure of an idea will lie in either quasi-contract or tort [*Davies v. Krasna (1975) 14 Cal. 3d 502, 508, 121 Cal. Rptr. 705, 535 P.2d 1161* ; *see Fink v. Goodson-Todman Enterprises, Ltd. (1970) 9 Cal. App. 3d 996, 1009, 88 Cal. Rptr. 679* (seeking recovery in quasi-contract for breach of confidence); *see, e.g., § 146.62*].

[c] Related Pleading and Practice Forms

For discussion of the protection of ideas under state law, see California Forms of Pleading and Practice, Ch. 349, *Literary Property and Copyright* (Matthew Bender).

[3] Discussion of Authorities

[a] Material Used Must Constitute Protectible Property

The facts and procedural background of ***Weitzenkorn v. Lesser*** *(1953) 40 Cal. 2d 778, 256 P.2d 947* , are discussed in *§ 146.60[3][c]*. In affirming trial court's judgment dismissing plaintiff's plagiarism count, but reversing the dismissal judgment on plaintiff's contract counts, the Supreme Court initially noted that because only the product of a writer's creative mind is protectible, a plaintiff must establish, as the subject of a cause of action for the protection of literary property or ideas, a right in the nature of property that is capable of ownership (*40 Cal. 2d 778, 786)* . In holding that plaintiff had stated a cause of action in quantum valebant for the reasonable value of her work, the Court held that plaintiff could not recover in quasi-contract, that is, a contract implied in law, for the use of her ideas, even though the quantum valebant common count is sufficient to state a cause of action on either a contract implied in fact or a contract implied in law (*40 Cal. 2d 778, 793, 795)* . The Court held that quasi-contractual recovery is based on benefit accepted or derived for which the law implies an obligation to pay. When no benefit is accepted or derived, there is nothing from which a contract can be implied. The existence of a quasi-contract under a quantum valebant count depends on whether defendant has used for its benefit any property of plaintiff in such a manner and under such circumstances that the law will impose a duty of compensation therefor (*40 Cal. 2d 778, 794)* . The material that is used must therefore constitute protectible property if recovery is to be had in quasi-contract. Therefore, the proof necessary to recover on a theory of quasi-contract is the same as that required by the tort action for plagiarism. Similarity must exist between plaintiff's written work and defendants' movie regarding form and manner of expression, those portions of literary property that may be protectible property. Because defendants used no property beloning to plaintiff, plaintiff could not recover on a quasi-contractual theory (*40 Cal. 2d 778, 795)* .

In ***Mann v. Columbia Pictures, Inc.*** *(1982) 128 Cal. App. 3d 628, 180 Cal. Rptr. 522* , plaintiff sought to recover the reasonable value of ideas embodied in a written format that she allegedly submitted for defendant's consideration as the basis for a motion picture. Contending that defendant accepted and used her outline in the production of the movie "Shampoo," plaintiff sought damages, an accounting, and the imposition of a constructive trust in counts in her complaintalleging plagiarism, quasi-contract, breach of implied-in-fact contract, and breach of fiduciary or confidential

relationship. Defendants moved for summary judgment or an alternative order specifying issues without substantial controversy. The trial court found certain triable issues of fact and denied summary judgment. However, the court summarily adjudicated the causes of action for plagiarism, breach of a confidential relationship, and constructive trust in favor of defendants. At trial, in response to defendants' motion in limine relative to evidence of plaintiff's damages, the trial court determined that the summary adjudication distinguished the question presented by plaintiff's quasi-contract cause of action. While the allegations of a implied-in-fact contract between plaintiff and defendants raised triable issues, the trial judge dismissed the contentions of an implied-in-law obligation. Having dispensed with quasi-contract, plaintiff's potential recovery was restricted to the reasonable value of her ideas allegedly used in the production of the movie. Evidence relative to the movie's earnings and number of showings was irrelevant and the cause of action for an accounting was accordingly removed. The jury awarded plaintiff a verdict on her breach of implied-in-fact contract claim. Thereafter, the trial court granted defendants' motion for judgment notwithstanding the verdict. Plaintiff then appealed from both the judgment and the trial court's order specifying certain issues to be without substatial controversy, contending, among other things, that she was prejudiced by the summary dismissal of her count for quasi-contract.

The court of appeal affirmed the trial court's order granting judgment notwithstanding the verdict and held dismissal of plaintiff's quasi-contract count proper (*128 Cal. App. 3d 628, 634, 651)* . In ruling on the quasi-contract claim, the court cited *Weitzenkorn v. Lesser (1953) 40 Cal. 2d 778, 795, 256 P.2d 947* (discussed *above*), for the proposition that the material allegedly used by defendants must constitute protectible property if plaintiff was to recover in quasi-contract (*128 Cal. App. 3d 628, 634)* . Because the court found that plaintiff's outline of various characters and scenes was no more than a collection of ideas that was never developed in the form of a script or story, defendant had used no property belonging to plaintiff, and plaintiff could not, therefore, recover on a quasi-contractual theory for the alleged use of her ideas (*128 Cal. App. 3d 628, 633, 634)* .

[b] Ideas Are Not Protectible Property

The facts and procedural background of ***Weitzenkorn v. Lesser*** *(1953) 40 Cal. 2d 778, 256 P.2d 947* , are discussed in *§ 146.60[3][c]*. In *Weitzenkorn,* the Supreme Court held that plaintiff could not recover in quasi-contract for the unauthorized use of ideas contained in her written work, because defendants had not used any property of plaintiff for their benefit (*40 Cal. 2d 778, 795)* . In so holding, the Court held that an idea alone, including a bare, undeveloped story situation or theme, is not protectible property under California law. The Court held also that former Civ. Code § 980 (*now see Civ. Code § 980* as amended to reflect preemptive provisions of Copyright Act of 1976) gives state copyright protection only to the representation or expression of a literary work, and not to the ideas embodied therein. The Court found that the Legislature had abrogated the rule of protectibility of an idea and that California now accepts the traditional theory of protectible property under common-law copyright (*40 Cal. 2d 778, 789)* .

The facts and procedural background of ***Whitfield v. Lear*** *(2d Cir. 1984) 751 F.2d 90* , are discussed in *§ 146.24[3][a]*. In *Whitfield,* plaintiff claimed an interest in ideas contained in his script for a television program, and sought redress for defendants' alleged misappropriation of these ideas in their television series (*751 F.2d 90, 92)* . Applying California law to plaintiff's claims, and citing *Weitzenkorn v. Lesser (1953) 40 Cal. 2d 778, 789, 256 P.2d 947* (discussed *above*), the court of appeals held that plaintiff's quasi-contract claim was actionable only to vindicate legally protected property interests and that an idea is not recognized as a property right (*751 F.2d 90, 92)* . While plaintiff's quasi-contract claim was thus precluded, the court went on to find the alleged similarities between plaintiff's script and defendants' television series sufficient to allow a trier of fact to find that defendants misappropriated plaintiff's ideas and thereby breached an implied-in-fact contract with plaintiff by failing to pay him for the use of his ideas (*751 F.2d 90, 95)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawGeneral OverviewCopyright LawSubject MatterIdeasGeneral OverviewCopyright LawSubject

MatterIdeasMisappropriation

California Points & Authorities

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 146 LITERARY PROPERTY, COPYRIGHT, AND THE PROTECTION OF IDEAS
PART II. FORMS
C. Protection of Ideas Under California Law

14-146 California Points & Authorities § 146.64

§ 146.64 Opposing Contention That Implied-in-Fact Contract Exists to Pay for Disclosure of Valuable Idea

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

AN IMPLIED-IN-FACT CONTRACT DOES NOT EXIST TO PAY FOR_____'S [*specify party, e.g.,* PLAINTIFF] DISCLOSURE OF AN IDEA TO_____ [*specify party, e.g.,* DEFENDANT], BECAUSE_____ [THE CIRCUMSTANCES PRECEDING AND ATTENDING THAT DISCLOSURE *and/or* THE CONDUCT OF DEFENDANT] FURNISH NO EVIDENCE OF DEFENDANT'S IMPLIED-IN-FACT PROMISE TO PAY FOR PLAINTIFF'S DISCLOSURE IF DEFENDANT USED THE IDEA.

A. Elements of Implied-in-Fact Contract to Pay for Use or Disclosure of Idea. To establish an implied-in-fact contract to pay for the use or disclosure of an idea, plaintiff must show that (1) he or she clearly conditioned disclosure of the idea on defendant's obligation to pay for it if defendant used the idea; (2) defendant, knowing the condition before he or she knew the idea, voluntarily accepted the disclosure; (3) defendant found the idea valuable; and (4) defendant used the idea (*Mann v. Columbia Pictures, Inc. (1982) 128 Cal. App. 3d 628, 646, 647 n.6, 180 Cal. Rptr. 522* ; *Faris v. Enberg (1979) 97 Cal. App. 3d 309, 318, 158 Cal. Rptr. 704*).

[*EITHER*]

B. Promise to Pay Not Implied in Mere Facts That Idea Is Conveyed, Is Valuable, and Is Used for Profit. The law will not imply a promise to pay for an idea in the mere facts that the idea is conveyed, is valuable, and is used for profit; this is true even though the conveyance has been made with the hope or expectation that some obligation will ensue (*Klekas v. EMI Films, Inc. (1984) 150 Cal. App. 3d 1102, 1115, 198 Cal. Rptr. 296* ; *Faris v. Enberg (1979) 97 Cal. App. 3d 309, 318, 158 Cal. Rptr. 704*).

[*AND/OR*]

C. Obligation to Pay for Disclosure of Idea Cannot Be Inferred From Mere Fact of Submission of Idea. When there exists no evidence that plaintiff expects, or indicates an expectation of, receiving compensation for the service of revealing an idea, defendant's obligation to pay for the submission cannot be inferred from the mere fact of submission of the idea (*Faris v. Enberg (1979) 97 Cal. App. 3d 309, 318, 319, 158 Cal. Rptr. 704*).

[*AND/OR*]

D. Party to Whom Idea Is Disclosed Must Use Idea. If defendant does not use the idea, plaintiff has no cause of action for breach of an implied-in-fact contract to pay for its use (*Klekas v. EMI Films, Inc. (1984) 150 Cal. App. 3d 1102, 1114, 1115, 198 Cal. Rptr. 296* ; *Mann v. Columbia Pictures, Inc. (1982) 128 Cal. App. 3d 628, 649, 180 Cal. Rptr. 522*).

[*AND/OR*]

E. Idea Must Be Submitted to Party to Whom Idea Is Disclosed. Submission of an idea is a requirement for the implied-in-fact contractual obligation to pay for the use or disclosure of an idea (*Mann v. Columbia Pictures, Inc. (1982) 128 Cal. App. 3d 628, 647, 180 Cal. Rptr. 522*).

[*AND/OR*]

F. Idea Does Not Consist of Rights Capable of Divisible Assignability. The purported assignment of various interests in an abstract idea does not give the assignee the right to pursue a cause of action for breach of an implied-in-fact contract for the sale of an idea that may have previously arisen as the result of negotiations between the originator of the idea and a third party (*Rokos v. Peck (1986) 182 Cal. App. 3d 604, 616, 227 Cal. Rptr. 480*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a party may recover under a contract implied in fact to pay for the disclosure and/or use of his, her, or its idea.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the protection of ideas under state law. For example, they may be used in support of a motion for summary judgment [*see, e.g.,* *Klekas v. EMI Films, Inc. (1984) 150 Cal. App. 3d 1102, 1106, 198 Cal. Rptr. 296* (defense motion for summary judgment)]. They may also be adapted for use in a trial or appellate brief [*see* *Mann v. Columbia Pictures, Inc. (1982) 128 Cal. App. 3d 628, 630-631, 180 Cal. Rptr. 522* (appeal from judgment notwithstanding verdict)].

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Specifically, counsel should insert argument showing that the party seeking to enforce the contract has failed to establish one or more of the requisite elements of the contract.

In an appropriate case, these points and authorities may be submitted in opposition to the contention set out in *§ 146.61*.

[b] Related Pleading and Practice Forms

For discussion of and a form for use in seeking recovery under a theory of implied-in-fact contract for breach of an implied-in-fact promise to pay for the use or disclosure of an idea, see California Forms of Pleading and Practice, Ch. 349, *Literary Property and Copyright* (Matthew Bender).

[3] Discussion of Authorities

[a] Elements of Implied-in-Fact Contract to Pay for Use or Disclosure of Idea

The facts and procedural background of ***Mann v. Columbia Pictures, Inc.*** *(1982) 128 Cal. App. 3d 628, 180 Cal. Rptr. 522* , are discussed in *§ 146.63[3][a]*. In *Mann*, the court of appeal affirmed the trial court's judgment for defendants, notwithstanding jury verdict for plaintiff on her cause of action for breach of an implied-in-fact contract to pay her for use of her ideas embodied in her format for a film (*128 Cal. App. 3d 628, 651)* . The court of appeal affirmed the trial court's finding that there existed no contractual obligation to enforce (*128 Cal. App. 3d 628, 650)* . The court held that for it to find that plaintiff and defendant production company entered an implied-in-fact contract, plaintiff had to demonstrate that she clearly conditioned the offer of her format on an obligation to pay for it, or its ideas, if used by defendant, and that defendant, knowing the condition before it knew the ideas, voluntarily accepted their disclosure, found them valuable, and used them. Defendant's implied promise, if it was to be found, had to be based on circumstances known to it at and preceding the time the ideas were allegedlydisclosed to it. Defendant must have voluntarily accepted plaintiff's format with knowledge of the conditions of tender. Thus, plaintiff had to prove defendant's conduct from which defendant's promise could be implied (*128 Cal. App. 3d 628, 646, 647 n 6*). The court of appeal affirmed the trial court's findings that plaintiff's format was never submitted to defendant and that defendant, consequently, did not use the ideas contained in the format (*128 Cal. App. 3d 628, 650)* .

In ***Faris v. Enberg*** *(1979) 97 Cal. App. 3d 309, 158 Cal. Rptr. 704* , plaintiff conceived an idea for a sports quiz show and prepared a format of the idea. Subsequently, plaintiff and defendant television sports announcer held a telephone conversation in which plaintiff told the announcer that plaintiff had a sports-oriented television show that he intended to produce and that he wanted to talk to the announcer about the announcer's participation in the show as master of ceremonies. Thereafter, plaintiff and the announcer met. At the meeting, plaintiff told him the format of the show and gave him a copy of the format. The announcer expressed interest in the idea, told plaintiff he was going to talk with some television station producers, and asked plaintiff to leave a copy of the format for his review. Some time following this meeting, a television quiz show entitled "Sports Challenge" appeared on television, with the announcer as master of ceremonies, and a third party as producer. There were certain differences and similarities between the show and plaintiff's idea. Plaintiff subsequently filed two actions against the announcer, the producer, and others. One action contained counts for breach of an express contract, breach of an implied contract, and breach of confidence. The other action contained counts for plagiarism and breach of an implied contract. The cases were consolidated in trial. In the latter action, defendants demurred to the complaint, and the trial court granted the demurrer and dismissed the case. Plaintiff appealed that decision. At about the same time, all parties stipulated in both cases to (1) stay further proceedings in the former case until a final decision on appeal in the latter case, (2) waive Code Civ. Proc. § 583 subd (b) (relating to the five-year limitation on bringing a case to trial) regarding the former case, and (3) agree that the former case would be dismissed if the demurrer and dismissal in the latter case were affirmed on appeal. In an unpublished opinion, the court of appeal affirmed the trial court's dismissal of the plagiarism count in the latter case, affirmed dismissal of the breach of implied-in-law contract count, but reversed dismissal of the breach of implied-in-fact contract count. Defendants then moved for summary judgment in both cases. The trial court granted the motion and entered judgment for defendants. Plaintiff appealed from the judgment.

The court of appeal affirmed the trial court's summary judgment (*97 Cal. App. 3d 309, 325)* . The court held that to establish an implied-in-fact contract, one must show (1) that he or she prepared the work (or conceived the idea); (2) that he or she disclosed the work (or the idea) for sale to the party to whom the work or idea was disclosed; (3) that

under all circumstances attending disclosure it could be concluded that the party to whom the work or idea was disclosed voluntarily accepted disclosure knowing the conditions on which it was tendered (i.e., the person to whom the work or idea was disclosed had an opportunity to reject the attempted disclosure if the conditions were unacceptable); and (4) the reasonable value of the work or idea. Applying these elements to the case, the court found the trial court correctly determined there was no triable issue of fact on a cause of action for an implied-in-fact contract. The trial court correctly concluded that defendant was entitled to summary judgment because there was no evidence to support an implied-in-fact contract for the services of revealing plaintiff's format, containing plaintiff's idea, to him. In fact, all evidence was to the contrary (*97 Cal. App. 3d 309, 318)* .

[b] Promise to Pay Not Implied in Mere Facts That Idea Is Conveyed, Is Valuable, and Is Used for Profit

The facts and procedural background of ***Klekas v. EMI Films, Inc.*** *(1984) 150 Cal. App. 3d 1102, 198 Cal. Rptr. 296* , are discussed in *§ 146.22[3][a]*. In *Klekas,* the court of appeal affirmed the trial court's order granting summary judgment for defendants on plaintiff's count, among others, for breach of an implied-in-fact contract to pay him for use of the ideas in his unpublished novel, which defendants allegedly used in the production and screenplay of the film "The Deer Hunter" and in the subsequent publication of a paperback book of the same title (*150 Cal. App. 3d 1102, 1115)* . The court found that the only defendant to whom plaintiff submitted his work, and the ideas contained in it, had nothing to do with the writing of the screenplay or the production of the film (*150 Cal. App. 3d 1102, 1114-1115)* . Therefore, although plaintiff may have submitted his literary effort to one of the named defendants, there was nothing in the record to establish the use of his work, or his ideas, in the writing or making of the film. The court held that the law will not imply a promise to pay for an idea in the mere facts that the idea has been conveyed, is valuable, and has been used for profit. The court held this true even though the conveyance has been made with the hope or expectation that some obligation will ensue (*150 Cal. App. 3d 1102, 1115)* .

The facts and procedural background of ***Faris v. Enberg*** *(1979) 97 Cal. App. 3d 309, 158 Cal. Rptr. 704* , are discussed in *§ 146.64[3][a]*. In *Faris,* the court of appeal affirmed the trial court's finding that there existed no evidence to support an implied-in-fact contract for plaintiff's services in revealing his ideas to defendant. The court held that the law will not imply a promise to pay for an idea from the mere facts that the idea has been conveyed, is valuable, and has been used for profit. The court held this true even though the conveyance has been made with the hope or expectation that some obligation will ensue. The court found that both plaintiff and defendant agreed that plaintiff's format, containing his ideas, was submitted to defendant in connection with an inquiry of whether defendant would act as master of ceremonies for plaintiff's proposed televisionshow. There was absolutely no evidence that plaintiff expected, or indicated his expectation of receiving, compensation for the service of revealing the format to defendant. On the contrary, the sole evidence was that plaintiff voluntarily submitted it to defendant for the sole purpose of enabling defendant to make a determination of his willingness to enter into a future business relationship with plaintiff (*97 Cal. App. 3d 309, 318)* .

[c] Obligation to Pay for Disclosure of Idea Cannot Be Inferred From Mere Fact of Submission of Idea

The facts and procedural background of ***Faris v. Enberg*** *(1979) 97 Cal. App. 3d 309, 158 Cal. Rptr. 704* , are discussed in *§ 146.64[3][a]*. In *Faris,* the court of appeal affirmed the trial court's finding that there existed no evidence to support an implied-in-fact contract for plaintiff's services in revealing his ideas to defendant. The court held that an obligation to pay could not be inferred from the mere fact of submission of plaintiff's idea, on the theory that everyone knows that the "idea man" expects to be paid (*97 Cal. App. 3d 309, 319)* . The court found that as far as the record revealed, plaintiff never thought of selling his idea for a sports quiz show to anyone, including defendant (*97 Cal. App. 3d 309, 318)* . Plaintiff never intended to submit the property for sale and did not tell defendant that he was submitting it for sale. There was no reason to think that defendant, or anyone else with whom defendant spoke, would have believed that plaintiff's submission was an offer to sell something, which if used, would oblige the user to pay. Additionally, no obligation to pay could be inferred from plaintiff's comment that the format was his "creation" and "literary property." Just as the mere submission of an idea by a writer cannot create an obligation to pay for it, so too, knowledge on the part

of the recipient of an idea that the submitter is a writer possessing an unprotected literary creation cannot create an obligation to pay. Finally, the court rejected plaintiff's argument that when the recipient of an idea permits submission of an idea with an awareness that the submitter does so in the expectation of payment if the idea is used, conduct arises from which a promise to pay may be inferred. The court held the weakness in this argument was that there was no evidence that plaintiff expected defendant to pay. Thus, defendant could not be charged with an awareness that plaintiff himself did not have (*97 Cal. App. 3d 309, 319)* .

[d] Party to Whom Idea Is Disclosed Must Use Idea

The facts and procedural background of ***Klekas v. EMI Films, Inc.*** *(1984) 150 Cal. App. 3d 1102, 198 Cal. Rptr. 296* , are discussed in *§ 146.22[3][a]*. In *Klekas,* the court of appeal affirmed the trial court's order granting summary judgment for defendants on plaintiff's count, among others, for breach of an implied-in-fact contract to pay him for use of the ideas in his unpublished novel, which defendants allegedly used in the production and screenplay of the film "The Deer Hunter" and in the subsequent publication of a paperback book of the same title (*150 Cal. App. 3d 1102, 1115)* . The court held that the trial court correctly concluded that no contract existed between plaintiff and defendants with respect to the use of plaintiff's literary work, embodying his ideas, because defendants made no use of any material portion of his work, or his ideas, in their screenplay (*150 Cal. App. 3d 1102, 1114)* . Although plaintiff may have submitted his literary work to one of the named defendants, there was nothing in the record to establish the use of that work in the writing or making of defendants' film (*150 Cal. App. 3d 1102, 1115)* .

The facts and procedural background of ***Mann v. Columbia Pictures, Inc.*** *(1982) 128 Cal. App. 3d 628, 180 Cal. Rptr. 522* , are discussed in *§ 146.63[3][a]*. In *Mann,* the court of appeal affirmed the trial court's judgment for defendants, notwithstanding jury verdict for plaintiff on her cause of action for breach of an implied-in-fact contract to pay her for use of her ideas embodied in her format for a film (*128 Cal. App. 3d 628, 651)* . The court of appeal affirmed the trial court's finding that there existed no contractual obligation to enforce (*128 Cal. App. 3d 628, 650)* . The court held that the similarities between plaintiff's format and defendants' film were not sufficient to show either a submission of the format to defendant production company or access to and use of plaintiff's ideas by defendant writers. The trial record showed only that defendant writers independently wrote the film screenplay and subsequent script changes (*128 Cal. App. 3d 628, 635)* . The court then held that if defendant writers did not use plaintiff's ideas in the shooting script for their film, the fact that the film may strongly resemble plaintiff's format, and the ideas contained in it, would not afford plaintiff a cause of action against defendant production company for breach of an implied contract to pay for use of the ideas (*128 Cal. App. 3d 628, 649)* . The court found the jury's finding of access and use by defendant writers was rebutted by clear, positive, and uncontradicted evidence that any similarity between plaintiff's ideas and the screenplay and script changes resulted from the independent effort of defendant writers, and not from the writers' access to or use of plaintiff's format. Defendants were thus provided with a complete defense against the contractual obligation alleged (*128 Cal. App. 3d 628, 650)* .

[e] Idea Must Be Submitted to Party to Whom Idea Is Disclosed

The facts and procedural background of ***Mann v. Columbia Pictures, Inc.*** *(1982) 128 Cal. App. 3d 628, 180 Cal. Rptr. 522* , are discussed in *§ 146.63[3][a]*. In *Mann,* the court of appeal affirmed the trial court's judgment for defendants, notwithstanding jury verdict for plaintiff on her cause of action for breach of an implied-in-fact contract to pay her for use of her ideas embodied in her format for a film (*128 Cal. App. 3d 628, 651)* . The court of appeal affirmed the trial court's finding that there existed no contractual obligation to enforce between plaintiff and defendant production company (*128 Cal. App. 3d 628, 650)* . The court heldthat submission of plaintiff's format to defendant production company was a requirement for establishment of the contract. Submission was also the basis for plaintiff's argument that defendant writers had access to and used her ideas. The court noted that plaintiff's alleged chain of submission of her format to defendant production company had several missing links (*128 Cal. App. 3d 628, 644)* . Plaintiff submitted her format, in an envelope, to a friend, who delivered it to a neighbor, who delivered it to a production manager employed by a different production company (but whose salary was then paid by defendant production company, as a

result of the production manager's work on one of defendant's films). The production manager, in turn, delivered the format to a story editor at the production company that employed him (*128 Cal. App. 3d 628, 636-637)* . The chain of submission essentially stopped at that point, and the court found that the format was never submitted to defendant production company (*128 Cal. App. 3d 628, 650-651)* . The court found further that the similarities between plaintiff's ideas and defendant writers' screenplay and script changes did not prove submission of the format to the production company, since the similarities resulted from the independent writing efforts of defendant writers, rather than from the writers' access to and use of the ideas in plaintiff's format (*128 Cal. App. 3d 628, 650)* .

[f] Idea Does Not Consist of Rights Capable of Divisible Assignability

In ***Rokos v. Peck*** *(1986) 182 Cal. App. 3d 604, 227 Cal. Rptr. 480* , one plaintiff wrote a film script on the subject of teenage suicide and sent a copy of it to a psychologist practicing in the area of suicide prevention, seeking the psychologist's assistance in getting a film or television program made of her script. The psychologist later wrote plaintiff, telling her he was unable to generate interest in the film industry in her script. Subsequently, plaintiff contracted with the named plaintiff to produce and promote the script. In this contract (a copy of which was not part of the record on appeal), the author purported to assign to the named plaintiff the production rights in the script and in the ideas contained therein. After the contract between the plaintiffs, a television network aired a movie about teenage suicide, containing substantially the same ideas and plot as those in the plaintiff's script and crediting the psychologist and the treatment center employing him as technical consultants. Plaintiffs then commenced an action against the network, the psychologist, and the treatment center for plagiarism, breach of an implied-in-fact contract to pay for use of the ideas, and unjust enrichment arising out of the alleged unauthorized use of the ideas contained in the script. Before trial, all defendants, except the psychologist and the treatment center, settled with plaintiffs, and the trial court entered a summary judgment on the plagiarism cause of action, and a judgment on the pleadings on the unjust enrichment claim, in favor of the remaining defendants. The plaintiff-author proceeded to trial on her claim for breach of an implied-in-fact contract, and judgment was awarded in her favor. As to the named plaintiff, the trial court granted defendants' motion for nonsuit on the breach of implied-in-fact contract cause of action, and the named plaintiff appealed from the trial court's ruling.

The court of appeal affirmed. The court held the named plaintiff had no standing to sue the nonsettling defendants for breach of an implied-in-fact contract to pay for the use of the coplaintiff's idea, because an idea, unlike literary or other property entitled to copyright protection, cannot be segmented into varying rights that may each be independently assigned (*182 Cal. App. 3d 604, 616)* . The court acknowledged that a full-blown and known cause of action, including an action for breach of an implied-in-fact contract, can be assigned. However, that is not the same as saying that a purported assignment of various interests in an idea gives the assignees the right to pursue a cause of action for breach of an implied-in-fact contract for the sale of an idea that may have previously arisen as the result of negotiations between the creator of the idea and a third party (*182 Cal. App. 3d 604, 616)* . According to the court, the creation of an implied-in-fact contract between an author, on the one hand, and an agent, producer, or director, on the other hand, is of such a personal nature that it is effective only between the contracting parties (*182 Cal. App. 3d 604, 617)* .

[4] Additional Authorities

[a] Obligation to Pay for Disclosure of Idea Cannot Be Inferred From Mere Fact of Submission of Idea

Aliotti v. R. Dakin & Co. (9th Cir. 1987) 831 F.2d 898 , was an action for breach of an implied-in-fact contract to pay for the use of an idea in the design of stuffed animal toys, arising out of defendant's manufacture and sale of stuffed animals similar to those designed by plaintiff. Plaintiff argued that she disclosed her ideas to defendant because she hoped to obtain employment with defendant and to "put her ideas to work for [defendant]." Affirming the trial court's grant of summary judgment for defendant, the court of appeals held that no contract may be implied when a plaintiff discloses an idea to a defendant solely for the purpose of inducing the defendant to enter into a future business relationship with plaintiff, rather than for the purpose of gaining compensation for the idea (*831 F.2d 898, 902)* . The

court ruled that even if it accepted the premise of plaintiff's argument, the uncontradicted evidence indicated that plaintiff showed her designs to defendant even before defendant's executives suggested that their company might consider hiring her (*831 F.2d 898, 903)* .

Legal Topics:

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CHAPTER 146 LITERARY PROPERTY, COPYRIGHT, AND THE PROTECTION OF IDEAS
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14-146 California Points & Authorities § 146.65

§ 146.65 Opposing Contention That Disclosure of Idea Is Breach of Confidence

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____'S [*Specify party, e.g.,* DEFENDANT] DISCLOSURE OF _____'S [*specify party, e.g.,* PLAINTIFF'S IDEA IS NOT A BREACH OF CONFIDENCE, BECAUSE THERE EXISTS NO EVIDENCE OF COMMUNICATION OF THE CONFIDENTIALITY OF THE IDEA, OR EVIDENCE FROM WHICH A CONFIDENTIAL RELATIONSHIP BETWEEN THE PARTIES CAN BE INFERRED.

A. Requirements for Actionable Breach of Confidence. An actionable breach of confidence only arises if an idea, whether or not protectible, is offered to another in confidence and is voluntarily received by the offeree in confidence with the understanding that it is not to be disclosed to others and is not to be used by the offeree for purposes beyond the limits of the confidence without the offeror's permission (*Tele-Count Engineers, Inc. v. Pacific Tel. & Tel. Co. (1985) 168 Cal. App. 3d 455, 462, 214 Cal. Rptr. 276* ; *Faris v. Enberg (1979) 97 Cal. App. 3d 309, 323, 158 Cal. Rptr. 704*).

B. Evidence of Communication of Idea's Confidentiality Required. A confidential relationship will not be created from the mere submission of an idea to another; there must exist evidence of the communication of the confidentiality of the submission, or evidence from which a confidential relationship can be inferred (*Tele-Count Engineers, Inc. v. Pacific Tel. & Tel. Co. (1985) 168 Cal. App. 3d 455, 462, 214 Cal. Rptr. 276* ; *Faris v. Enberg (1979) 97 Cal. App. 3d 309, 323, 158 Cal. Rptr. 704*).

C. Knowledge of Confidential Nature of Idea Required to Precede Conveyance of Idea. It is settled that knowledge of the confidential nature of the idea must precede its conveyance (*Tele-Count Engineers, Inc. v. Pacific Tel. & Tel. Co. (1985) 168 Cal. App. 3d 455, 465, 214 Cal. Rptr. 276* ; *see Faris v. Enberg (1979) 97 Cal. App. 3d 309, 322, 158 Cal. Rptr. 704*).

D. Actual Notice of Confidential Nature of Idea Required. Actual, rather than constructive, notice of confidentiality

is necessary to establish knowledge of the confidentiality of the idea (*Tele-Count Engineers, Inc. v. Pacific Tel. & Tel. Co. (1985) 168 Cal. App. 3d 455, 465, 214 Cal. Rptr. 276*).

E. Opportunity to Reject Idea Required. An opportunity to reject the idea is mandatory if the party who allegedly wrongfully disclosed the information is to be charged with having voluntarily assumed the obligation to maintain the confidentiality of the idea (*Tele-Count Engineers, Inc. v. Pacific Tel. & Tel. Co. (1985) 168 Cal. App. 3d 455, 465, 214 Cal. Rptr. 276* ; *Faris v. Enberg (1979) 97 Cal. App. 3d 309, 324, 158 Cal. Rptr. 704*).

F. Agreement Between Parties to Maintain Confidentiality of Idea Required. There can be no tortious breach of confidence in the absence of an understanding between the parties that the confidential nature of the idea will be maintained (*Tele-Count Engineers, Inc. v. Pacific Tel. & Tel. Co. (1985) 168 Cal. App. 3d 455, 466, 214 Cal. Rptr. 276* ; *Faris v. Enberg (1979) 97 Cal. App. 3d 309, 322-323, 158 Cal. Rptr. 704*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a party has disclosed an idea in breach of confidence.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of breach of confidence. They may also be adapted for use in a trial or appellate brief [*see* *Tele-Count Engineers, Inc. v. Pacific Tel. & Tel. Co. (1985) 168 Cal. App. 3d 455, 459, 214 Cal. Rptr. 276* (appeal from judgment)].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Specifically, counsel should insert argument showing that there exists insufficient evidence either to show communication of the confidentiality of the idea, or to infer the existence of a confidential relationship between the parties [*see* *Faris v. Enberg (1979) 97 Cal. App. 3d 309, 323, 158 Cal. Rptr. 704*]. Counsel should also insert argument showing that one or more of the requisite elements for a breach of confidence action is missing [*see* *Tele-Count Engineers, Inc. v. Pacific Tel. & Tel. Co. (1985) 168 Cal. App. 3d 455, 462, 214 Cal. Rptr. 276*].

In an appropriate case, these points and authorities may be submitted in opposition to the contention set out in *§ 146.62*.

[b] Related Pleading and Practice Forms

For discussion of and form for use in breach of confidence actions involving the use or disclosure of an idea, see California Forms of Pleading and Practice, Ch. 349, *Literary Property and Copyright* (Matthew Bender).

[3] Discussion of Authorities

[a] Requirements for Actionable Breach of Confidence

In ***Tele-Count Engineers, Inc. v. Pacific Tel. & Tel. Co.*** *(1985) 168 Cal. App. 3d 455, 214 Cal. Rptr. 276* , the president of plaintiff corporation conceived ofnovel and unique ideas for forms for use in defendant telephone company's annual cable counting, a process by which the company takes inventory of its telephone system. The president disclosed his new forms to the company with the reservation that no other of the company's contractors were to be shown or use them. According to the president, the company agreed to this condition. Subsequently, the president wrote to the company informing it that his suggestion for improving the forms was without reservation or compensation to his corporation, and requesting that disclosure to any competing bidder relative to the work on computer forms, programs, or methods be prohibited. Thereafter, the company contracted with the corporation to perform the 1971 cable

count for the company. The contract gave the company the unrestricted right to reproduce, use, and disclose any and all information, knowledge, or data originated by the corporation, its employees, and its agents in connection with the work performed, with the exception of the computer program used by the corporation. In 1972, a similar contract was executed, giving the company the unrestricted right to use or disclose all information originated by the corporation, without the computer program limitation in the 1971 contract. The president knew the 1972 agreement did not provide him with protection for the computer forms or the program. The corporation performed cable counting for the company in 1972 and 1973. In 1973, the president discovered that the company had given computer forms designed by him to another contractor for use in the cable-counting process. The company did not tell the other contractor that the forms were developed by the president, nor did the forms carry any mark identifying plaintiff as their owner. The forms carried the company's logo, and the company tod the contractor to have the forms printed at its own expense. At trial, defendants offered testimony of the custom and practice in the computer service industry to protect products and trade secrets by some form of warning, or at least a name or logo, on any item considered confidential. Plaintiff's forms did not contain any warning or claim to be confidential, even though the president distributed the forms to numerous telephone companies in the course of his sales presentations. Plaintiff then commenced an action against the telephone company and the contractor for conspiracy to misappropriate trade secrets and disclosure of confidential information. At trial, the court instructed the jury that in order to find a breach of confidence, it had to find that plaintiff conveyed "substantially secret" information to the telephone company. The jury returned a verdict for defendants, and plaintiff appealed, challenging the propriety of the jury instruction.

The court of appeal affirmed the propriety of the instruction, holding that because an idea must be confidential and novel to warrant protection on a breach of confidence theory, inclusion in the instruction of the requirement that plaintiff conveyed "substantially secret" information to the telephone company found support in the law (*168 Cal. App. 3d 455, 463)* . The court then held that an actionable breach of confidence will arise when an idea, whether or not protectible, is offered to another in confidence, and is voluntarily received by the offeree in confidence with the understanding that it is not to be disclosed to others, and is not to be used by the offeree for purposes beyond the limits of the confidence without the offeror's permission (*168 Cal. App. 3d 455, 462)* .

The facts and procedural background of ***Faris v. Enberg*** *(1979) 97 Cal. App. 3d 309, 158 Cal. Rptr. 704* , are discussed in *§ 146.64[3][a]*. In *Faris*, the court affirmed the trial court's summary judgment for defendants on plaintiff's breach of confidence count. The court found that plaintiff's submission of his idea was so tenuous and careless that, as a matter of law, the trial court correctly concluded that there were insufficient facts to warrant a trial (*97 Cal. App. 3d 309, 325)* . The court held that an actionable breach of confidence will arise when an idea, whether or not protectible (under copyright law), is offered to another in confidence, and is voluntarily received by the offeree in confidence with the understanding that it is not to be disclosed to others, and is not to be used by the offeree for purposes beyond the limits of the confidence without the offeror's permission (*97 Cal. App. 3d 309, 323)* .

[b] Evidence of Communication of Idea's Confidentiality Required

The facts and procedural background of ***Tele-Count Engineers, Inc. v. Pacific Tel. & Tel. Co.*** *(1985) 168 Cal. App. 3d 455, 214 Cal. Rptr. 276* , are discussed in *§ 146.65[3][a]*. In *Tele-Count*, the court held that in order to prevent the unwarranted creation or extension of a monopoly and restraint on progress in art, a confidential relationship will not be created from the mere submission of an idea to another. There must exist evidence of the communication of the confidentiality of the submission or evidence from which a confidential relationship can be inferred (*168 Cal. App. 3d 455, 462)* .

The facts and procedural background of ***Faris v. Enberg*** *(1979) 97 Cal. App. 3d 309, 158 Cal. Rptr. 704* , are discussed in *§ 146.64[3][a]*. In *Faris*, the court held that in order to prevent the unwarranted creation or extension of a monopoly and restraint on progress in art, a confidential relationship will not be created from the mere submission of an idea to another. There must exist evidence of the communication of the confidentiality of the submission or evidence from which a confidential relationship can be inferred. Among the factors from which this inference can be drawn are

proof of the existence of an implied-in-fact contract to pay for the use or disclosure of the idea, proof that the material submitted was protected by reason of sufficient novelty and elaboration, or proof of a particular relationship such as partners, joint adventurers, principal and agent, or buyer and seller under certain circumstances (*97 Cal. App. 3d 309, 323)* . In dictum, the court noted Professor Nimmer's view that in some instances proof that a plaintiff offered an idea on condition of confidence and on a clear understanding that payment would be made on use of the idea would suffice to establish a confidential relationship (*97 Cal. App. 3d 309, 322)* . The court did not believe that theunsolicited submission of an idea to a potential employee or potential business partner, even if that person then passed the information to a competitor, presented a triable issue of fact for confidentiality. To allow the disclosure that took place in the instant case to result in a confidential relationship, absent more, would greatly expand the creation of monopolies and bear the concomitant danger to the free communication of ideas. The court's conclusion that evidence of knowledge of confidence or in which a confidential relationship can be implied was a minimum prerequisite to the protecton of freedom in the arts. In the case at bench, there was no direct evidence that either party believed plaintiff was submitting his idea to defendant sports announcer in confidence. While in plaintiff's response to a defense summary judgment motion there was reference to his own thoughts from which one might infer that he felt a confidence existed, he never communicated these thoughts to the sports announcer, and nothing of an understanding of confidence could be inferred from the announcer's conduct. There was no evidence of more than a conversation that might have developed into a later relationship (*97 Cal. App. 3d 309, 324)* .

[c] Knowledge of Confidential Nature of Idea Required to Precede Conveyance of Idea

The facts and procedural background of ***Tele-Count Engineers, Inc. v. Pacific Tel. & Tel. Co.*** *(1985) 168 Cal. App. 3d 455, 214 Cal. Rptr. 276* , are discussed in *§ 146.65[3][a]*. In *Tele-Count,* the court upheld a jury instruction that a breach of confidence cause of action places on the plaintiff the burden to show that the confidential nature of the information was made known to the defendant before its disclosure (*168 Cal. App. 3d 455, 463, 465)* . The court held knowledge of the confidential nature of the information must precede its disclosure. By instructing the jury on a plaintiff's burden to establish that the confidential nature of the information was made known to defendant, the trial court properly focused attention on the element of an understanding between the parties (*168 Cal. App. 3d 455, 465)* . In all cases, the gravamen of the tort of breach of confidence is an understanding between the parties that an idea is offered on a condition of confidence (*168 Cal. App. 3d 455, 464)* . An understanding that confidential information has been disclosed cannot arise absent evidence of knowledge of confidence (*168 Cal. App. 3d 455, 465)* .

The facts and procedural background of ***Faris v. Enberg*** *(1979) 97 Cal. App. 3d 309, 322, 158 Cal. Rptr. 704* , are discussed in *§ 146.64[3][a]*. In *Faris,* the court noted in dictum that Professor Nimmer's view is that protection of information or ideas through a breach of confidence action takes place only if the confidential nature of the information is made clear prior to its exhibition (*97 Cal. App. 3d 309, 322)* .

[d] Actual Notice of Confidential Nature of Idea Required

The facts and procedural background of ***Tele-Count Engineers, Inc. v. Pacific Tel. & Tel. Co.*** *(1985) 168 Cal. App. 3d 455, 214 Cal. Rptr. 276* , are discussed in *§ 146.65[3][a]*. In *Tele-Count,* the court upheld the trial court's jury instruction that a breach of confidence places on plaintiff the burden to show that the confidential nature of the information was made known to defendant before the information was communicated to defendant (*168 Cal. App. 3d 455, 463)* . The court rejected plaintiff's contention that no particular form of notice of confidentiality is required in a breach of confidence cause of action, including constructive notice of confidentiality (*168 Cal. App. 3d 455, 463-464)* . The court held that an understanding that confidential information has been communicated cannot arise absent evidence of knowledge of confidence, and that actual notice of confidentiality is necessary to establish this knowledge. Mere constructive notice, or a showing that defendant should have known of the confidential nature of the information imparted, would improperly subject defendant to liability without the requisite understanding or voluntary acceptance of the confidential disclosure (*168 Cal. App. 3d 455, 465)* . The court did not read the decision in *Thompson v. California Brewing Co. (1957) 150 Cal. App. 2d 469, 475-476, 310 P.2d 436* (discussed in *§ 146.62[3][b]*) as

permitting liability to be imposed for mere constructive notice of confidentiality (*168 Cal. App. 3d 455, 464)* .

[e] Opportunity to Reject Idea Required

The facts and procedural background of ***Tele-Count Engineers, Inc. v. Pacific Tel. & Tel. Co.*** *(1985) 168 Cal. App. 3d 455, 214 Cal. Rptr. 276* , are discussed in *§ 146.65[3][a]*. In *Tele-Count,* the court upheld the trial court's jury instruction that plaintiff had the burden to prove that defendant telephone company had an opportunity to reject receipt of plaintiff's idea and information on a confidential basis before plaintiff submitted it. The court held that an opportunity to reject was mandatory if defendant was to be charged with having voluntarily assumed the obligation to maintain the confidentiality of the information (*168 Cal. App. 3d 455, 465)* . The opportunity to reject the information may be established by circumstantial evidence or inferred from circumstances surrounding communication of the information (*168 Cal. App. 3d 455, 465-466)* . Even though the court's instruction omitted reference to proof of the opportunity to reject, the court did not find the instruction erroneous as read, particularly since the trial court otherwise instructed the jury that circumstantial evidence and inferences could be used to prove any fact (*168 Cal. App. 3d 455, 466)* .

The facts and procedural background of ***Faris v. Enberg*** *(1979) 97 Cal. App. 3d 309, 322, 158 Cal. Rptr. 704* , are discussed in *§ 146.64[3][a]*. In *Faris,* the court found there were insufficient facts to warrant a trial on plaintiff's breach of confidence count (*97 Cal. App. 3d 309, 325)* . Specifically, the court found that one could not infer from anything defendant sports announcer did or said that he wasgiven the chance to reject plaintiff's information in advance (*97 Cal. App. 3d 309, 324)* .

[f] Agreement Between Parties to Maintain Confidentiality of Idea Required

The facts and procedural background of ***Tele-Count Engineers, Inc. v. Pacific Tel. & Tel. Co.*** *(1985) 168 Cal. App. 3d 455, 214 Cal. Rptr. 276* , are discussed in *§ 146.65[3][a]*. In *Tele-Count,* the court upheld the trial court's jury instruction that breach of confidence requires a showing that defendant agreed to maintain the confidentiality of information communicated to it. The court rejected plaintiff's contention that that part of the instruction giving plaintiff the burden to prove that defendant telephone company voluntarily accepted plaintiff's information with the understanding and in agreement that it would keep the information confidential improperly interjected elements of contract law into a breach of confidence cause of action (*168 Cal. App. 3d 455, 466, 467)* . The court held there can be no tortious breach of confidence in the absence of an understanding between the parties that the confidential nature of the information will be maintained. According to the court, the breach of confidence tort is not predicated solely on an express agreement protecting the confidence. The basis of the action is an obligation created by law for reasons of justice when no contract otherwise exists. Thus, the tort can be established without proof of a promise. However, the trial court's instruction did not add an element of contract law to the cause of action. The instruction did not require a formal or comprehensive agreement. It did require that the parties be in agreement on the specific point that plaintiff's forms should remain confidential (*168 Cal. App. 3d 455, 466)* . The court suggested the "in agreement" language be omitted from the instruction in the future, but it was not convinced that inclusion of that language in the instant case could have mistakenly led the jury to believe that plaintiff was not entitled to recover absent an express agreement with the telephone company to keep the information confidential. The court did not see how use of the language "with the understanding and in agreement" in the context of the whole instruction led the jury to believe mistakenly that plaintiff's breach of confidence action demanded proof of a contract (*168 Cal. App. 3d 455, 467)* .

The facts and procedural background of ***Faris v. Enberg*** *(1979) 97 Cal. App. 3d 309, 322, 158 Cal. Rptr. 704* , are discussed in *§ 146.64[3][a]*. In *Faris,* the court held that one of the elements of a breach of confidence cause of action is that the idea be received by the offeree with the understanding that it is not to be disclosed to others (*97 Cal. App. 3d 309, 323)* . The court found that in the case at bench, no rational receiver of the communications from plaintiff could be bound to an understanding that a secret was being imparted. One could not infer from anything defendant sports announcer said or did that he voluntarily received plaintiff's idea with an understanding that it was not to be given to others (*97 Cal. App. 3d 309, 324)* . The court noted, in dictum, Professor Nimmer's view that proof that a plaintiff

offered an idea on a condition of confidence and a clear understanding that payment would probably be made on use of the idea would suffice in some instances to establish a confidential relationship (*97 Cal. App. 3d 309, 322)* .

[4] Additional Authorities

[a] Agreement Between Parties to Maintain Confidentiality of Idea Required

The facts and procedural background of *Rokos v. Peck (1986) 182 Cal. App. 3d 604, 227 Cal. Rptr. 480* , are discussed in *§ 146.64[3][f]*. In *Rokos*, the court also upheld the trial court's judgment on the pleadings in favor of defendants and against the named plaintiff on her claim for unjust enrichment. The court treated that claim as, in fact, a cause of action for breach of confidence (*182 Cal. App. 3d 604, 618)* . In so ruling, the court noted that as in a claim for breach of an implied-in-fact contract to pay for the use of an idea, the cause of action for breach of confidence focuses on the nature of the personal relationship existing between the original parties to the agreement, one of whom obligates himself or herself not to disclose the ideas revealed in confidence. In the case at bench, the named plaintiff had no contact with either defendant and thus could not assert a claim that defendants had somehow breached their obligation to her regardless of a purported assignment of production rights in her coplaintiff's idea (*182 Cal. App. 3d 604, 619)* .

[b] Requirements for Actionable Breach of Confidence

Aliotti v. R. Dakin & Co. (9th Cir. 1987) 831 F.2d 898 , is discussed in *§ 146.64[4][a]*. In that case the court of appeals further held that plaintiff failed to establish the requisite elements of a breach of confidence cause of action, after concluding that plaintiff had conveyed no confidential information to defendant concerning three of her stuffed animal designs, which were already on the market when she showed them to defendant. Further, plaintiff presented neither testimony that defendant knew her information was conveyed in confidence nor testimony that she and defendant agreed that any confidences would be maintained (*831 F.2d 898, 903)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawGeneral OverviewCopyright LawSubject MatterGeneral OverviewCopyright LawSubject MatterIdeasGeneral OverviewCopyright LawSubject MatterIdeasMisappropriation

California Points & Authorities

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CHAPTER 147 MALICIOUS PROSECUTION AND ABUSE OF PROCESS

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§ 147.syn Synopsis to Chapter 147: MALICIOUS PROSECUTION AND ABUSE OF PROCESS

§ 147.01 Scope of Chapter

§ 147.02 Governing Statutes

§ 147.03 Distinction Between Malicious Prosecution and Abuse of Process

§ 147.04 Page Limits on Memoranda

§ 147.05 Related Pleadings and Practice Forms

§ 147.06 Related Points and Authorities Chapters

§ 147.07 Related California Torts Chapters

§§ 147.08-147.19 [Reserved]

§ 147.20 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] for Malicious Prosecution--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Failure to Allege Favorable Termination of Action on Which Complaint Is Based

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Opposing Memoranda

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Favorable Termination Requirement

[b] Conclusionary Pleading Insufficient

[c] Consideration Should Be Given to Judgment as Whole

[d] Conviction Not Favorable Termination

[e] Mental Commitment Not Favorable Termination

[f] Judgment Notwithstanding the Verdict Not Sufficient

[g] Judgment Obtained Against Plaintiff by Fraud Not Favorable Termination

[h] Action on Which Complaint Based Not Yet Terminated

[i] Judgment Based on Statute of Limitations Not Favorable Termination

[j] Dismissal of Action Not Necessarily Favorable Termination

[k] Dismissal Based on Negotiation, Settlement, or Compromise Not Favorable Termination

[l] Dismissal Based on Plea Bargain Not Favorable Termination

[m] Voluntary Dismissal Not Favorable Termination When Based on Litigant's Motivation to Avoid Further Costs, Attorney's Fees, and Litigation

[n] Dismissal Based on Defense of Laches Not Favorable Determination

[o] Voluntary Dismissal Based On Technical Defect Is Not Favorable Termination

[p] Stipulated Judgment Not Favorable Termination

[q] Dismissal for Failure to Comply with Discovery Orders Not Favorable Termination

[r] Summary Judgment Based on Statute of Frauds Not Favorable Termination

[s] Dismissal Due to Lack of Standing Not Favorable Termination

[t] Adverse Termination More Favorable Than Settlement Offer Is Not Favorable Termination

[u] Termination Based on Failure to Comply With Compulsory Cross-Complaint Rule Is Not Favorable Termination

[v] Voluntary Dismissal of Malicious Prosecution Action Based on Adverse Appellate Decision in Underlying Action is Not Favorable Termination

[4] Additional Authorities

[a] Favorable Termination Requirement

[b] Consideration Should Be Given to Judgment as Whole

[c] Conviction Not Favorable Termination

[d] Action on Which Complaint Based Not Yet Terminated

[e] Judgment Based on Statute of Limitations Not Favorable Termination

[f] Dismissal of Action Not Necessarily Favorable Termination

[g] Dismissal Based on Negotiation, Settlement, or Compromise Not Favorable Termination

[h] Voluntary Dismissal Not Favorable Termination When Based on Litigant's Motivation to Avoid Further Costs, Attorney's Fees, and Litigation

[i] Voluntary Dismissal Based On Technical Grounds Not Favorable Termination

[j] Stipulated Judgment Not Favorable Termination

§ 147.21 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] for Malicious Prosecution--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Failure to Allege Malice

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Malice Requirement

[b] No Malice in Reporting Facts to Authorities

[4] Additional Authorities

[a] Malice Requirement

[b] No Malice in Reporting Facts to Authorities

§ 147.22 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] for Malicious Prosecution--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--No Action Prosecuted by Defendant

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Prosecution of Action or Proceeding Is Required

[b] Subsidiary Procedure Within Lawsuit Insufficient

[c] Causing Investigation Not Sufficient

[d] Filing Request for Admissions Is Not Sufficient

[e] Application for License and Resulting Comparative Hearing Not Sufficient

[4] Additional Authorities

[a] Causing Investigation Is Not Sufficient

§ 147.23 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] for Malicious Prosecution--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Action in Small Claims Court Not Adequate Basis

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[3] Discussion of Authorities

[a] Small Claims Action Is Insufficient Basis

[4] Additional Authorities

[a] Small Claims Action Is Insufficient Basis

§ 147.24 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] for Malicious Prosecution--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Ancillary Contempt Proceeding Not Adequate Basis

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[3] Discussion of Authorities

[a] Defendant's Failure to Prevail on Order to Show Cause re Contempt Is Insufficient Basis

[b] Contempt Proceeding to Sanction Discovery Abuse Is Insufficient Basis

[c] Order to Show Cause Taken Off Calendar Before Hearing Is Insufficient Basis

§ 147.25 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] for Malicious Prosecution--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Motion to Disqualify Opposing Attorney Not Adequate Basis

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[3] Discussion of Authorities

[a] Defendant's Failure to Prevail on Motion to Disqualify Opposing Counsel Is Insufficient Basis

§ 147.26 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] for Malicious Prosecution--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Filing Motion in Lawsuit to Which Defendant Was Not Party Is Not Adequate Basis

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[3] Discussion of Authorities

[a] Defendant's Filing of Motion in Litigation to Which Defendant Was Not Party Is Not Adequate Basis.

§ 147.27 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Unsuccessful Family Law Motion or Order to Show Cause Cannot Be Basis of Malicious Prosecution Action

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Memoranda

[3] Discussion of Authorities

[a] Malicious Prosecution Action Cannot Be Based on Family Law Proceedings

[4] Additional Authorities

[a] Malicious Prosecution Action Cannot Be Based on Family Law Proceedings

§ 147.28 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Application for Writ of Sale to Enforce Judgment is Not Adequate Basis for Malicious Prosecution Action

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[3] Discussion of Authorities

[a] Malicious Prosecution Action Cannot be Based on Motion for Writ of Sale to Enforce Judgment

§ 147.29 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Action for Malicious Prosecution May Not Be Based On Proceeding Terminated Through Contractual Arbitration

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[3] Discussion of Authorities

[a] Malicious Prosecution Action May Not Be Based on Underlying Proceeding Terminated Through Contractual Arbitration

[4] Additional Authorities

[a] Malicious Prosecution Action May Not Be Based on Underlying Proceeding Terminated Through Contractual Arbitration

§ 147.29A Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Unsuccessful Petition for Injunction Against Harassment or Workplace Violence Is Not Adequate Basis

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Malicious Prosecution Action Cannot Be Based on Failed Attempt to Obtain Injunction Under Code Civ. Proc. § 527.6

[b] Malicious Prosecution Action Cannot Be Based on Failed Attempt to Obtain Injunction Under Code Civ. Proc. § 527.8

§ 147.30 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] for Malicious Prosecution--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Bar of Statute of Limitations

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Form

[d] Related Memoranda

[3] Discussion of Authorities

[a] Failure to State Cause of Action

[b] Period of Limitation

[c] Accrual of Cause of Action

[d] Effect of Appeal on Period of Limitation

[4] Additional Authorities

[a] Effect of Appeal on Period of Limitation

§ 147.31 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] for Malicious Prosecution--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Public Entity Immune From Liability [Gov. Code §§ 815.2(b), 821.6]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Opposing Memoranda

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Immunity of Public Employee

[b] Immunity of Public Entity

[4] Additional Authorities

[a] Immunity of Public Employee

§ 147.32 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] for Malicious Prosecution--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Right to Bring Action Waived by Seeking Defense Costs Under Code Civ. Proc. § 1038(c)

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[3] Discussion of Authorities

[a] Waiver by Seeking Defense Costs

[b] Judicial Notice

§ 147.33 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] for Malicious Prosecution--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Governmental Entity Not Permitted to Bring Malicious Prosecution Suit

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[3] Discussion of Authorities

[a] Governmental Entities Not Permitted to Sue for Malicious Prosecution

§ 147.34 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Malicious Prosecution Action--By Defendant--Defendant Had Probable Cause to Institute Civil Action on Which Complaint Is Based

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

[3] Discussion of Authorities

[a] Lack of Probable Cause Must Be Shown

[b] Probable Cause as Legal Issue

[c] Summary Judgment Is Proper When Declarations or Affidavits Establish Existence of Probable Cause

[d] Favorable Outcome of Action as Establishing Probable Cause

[e] Probable Cause for Initiating Action Establishes Probable Cause for Continuing Action After Reversal on Appeal

[f] Attorney's Probable Cause

[g] Irrelevance of Attorney Research to Issue of Probable Cause

[h] Extent of Attorney's Knowledge Irrelevant Where Underlying Action Was Tenable

[i] Denial of Defendant's Summary Judgment Motion in Underlying Civil Action Normally Establishes Probable Cause

[j] Preliminary Injunction in Underlying Action Establishes Probable Cause

[k] Fraud Exception to Interim Adverse Judgment Rule Cannot Be Relitigated in Malicious Prosecution Action

[l] Failure to Post Undertaking Does Not Negate Probable Cause Established by Order for Preliminary Injunction

[4] Additional Authorities

[a] Summary Judgment Is Proper When Declarations or Affidavits Establish Existence of Probable Cause

[b] Attorney's Probable Cause

[c] Preliminary Injunction in Underlying Action Establishes Probable Cause

§ 147.35 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Malicious Prosecution Action--By Defendant--Defendant Had Probable Cause to Institute Criminal Proceedings on Which Action Is Based

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Conviction Establishes Probable Cause

[b] Innocence of Plaintiff Does Not Establish Lack of Probable Cause

[c] Setting Aside of Indictment or Information Does Not Establish Lack of Probable Cause

[d] Dismissal of Charges on Day of Trial Does Not Establish Lack of Probable Cause

[4] Additional Authorities

[a] Innocence of Plaintiff as Not Establishing Lack of Probable Cause

§ 147.36 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Malicious Prosecution Action--By Defendant--Defendant Not Instrumental in Causing Criminal Prosecution

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] No Cause of Action When Defendant Not Instrumental in Causing Prosecution

§ 147.37 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Malicious Prosecution Action--By Defendant--Probable Cause Established by Reliance on Advice of Attorney

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[c] Related Pleading and Practice Form

[3] Discussion of Authorities

[a] Reliance on Advice of Counsel

[b] Effect of Mistaken Advice

[c] Investigation Not Required

[4] Additional Authorities

[a] Reliance on Advice of Counsel

§ 147.38 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Malicious Prosecution Action--By Defendant--Malice May Not Be Inferred From Lack of Probable Cause, Because Defendant Was Only Negligent

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Memoranda

[3] Discussion of Authorities

[a] No Inference of Malice Solely From Lack of Probable Cause

[b] Negligence Alone Cannot Constitute Malice

[4] Additional Authorities

[a] Negligence Alone Cannot Constitute Malice

§ 147.39 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Malicious Prosecution Action--By Defendant--Unclean Hands Doctrine Applicable

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Memoranda

[3] Discussion of Authorities

[a] Unclean Hands

[b] Conduct Supporting Defense Need Not Relate Directly to Decision to File Underlying Action

§ 147.40 Opposing Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)] for Malicious Prosecution--Dismissal of Prior Action as Favorable Termination if It Indicates Innocence or Lack of Merit

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Dismissal of Criminal Action as Sufficient

[b] Dismissal of Civil Action as Sufficient

[c] Dismissal of Civil Action for Want of Prosecution as Sufficient

[d] Dismissal of Criminal Action for Lack of Evidence as Sufficient

[e] Voluntary Dismissal of Civil Action as Sufficient

[f] Final Termination Does Not Have to Be Bar to Further Action

[g] Favorable Termination May Occur by Reason of Appellate Decision

[h] Dismissal of Civil Action as Discovery Sanction as Favorable Termination if Reflecting on Merits

[i] Dismissal of Appeal With Settlement That Preserves Favorable Trial Court Judgment as Favorable Termination

[4] Additional Authorities

[a] Dismissal of Criminal Action as Sufficient

[b] Dismissal of Civil Action as Sufficient

[c] Dismissal of Criminal Action for Lack of Evidence as Sufficient

[d] Final Termination Does Not Have to Be Bar to Further Action

[e] Dismissal of Civil Action as Discovery Sanction as Favorable Termination if Reflecting on Merits

§ 147.41 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Malicious Prosecution--Action for Malicious Prosecution as Able to Be Based on Institution of Proceedings Other Than Civil or Criminal Complaints

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Cross Complaint as Sufficient

[b] Will Contest as Sufficient

[c] Administrative Proceeding as Sufficient

[d] Cross-Complaint Filed During Marital Dissolution Action as Sufficient

[4] Additional Authorities

[a] Administrative Proceeding as Sufficient

§ 147.42 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Malicious Prosecution--Private Party Permitted to Sue for Malicious Prosecution Based on Underlying Action in Which Public Entity Was Also Defendant

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Private Party May Sue Based on Underlying Action in Which Public Entity Was Also Defendant

§ 147.43 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Malicious Prosecution--Defendant Public Employee Is Not Immune Because He or She Was Acting Outside the Scope of Employment

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[3] Discussion of Authorities

[a] No Immunity When Acting Outside Scope of Employment

§ 147.44 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Malicious Prosecution--Action for Malicious Prosecution May Be Based on Partial Favorable Termination of Underlying Action

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[3] Discussion of Authorities

[a] Partial Favorable Termination Is Sufficient Basis

§ 147.45 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Malicious Prosecution--Cause of Action Can Be Based on Allegations That Any Ground of Underlying Action Was Asserted Without Probable Cause Notwithstanding Probable Cause for Other Grounds Asserted in That Action

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Cause of Action Can Be Based on One Ground Asserted in Underlying Action

[4] Additional Authorities

[a] Cause of Action Can Be Based on One Ground Asserted in Underlying Action

§ 147.46 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Malicious Prosecution Action--Reliance on Attorney's Advice Not Established

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Memoranda

[3] Discussion of Authorities

[a] Rules Governing Summary Judgment Procedure

[b] Failure to Make Fair Disclosure of All Facts

[c] Lack of Good Faith

[d] No Belief in Guilt

[4] Additional Authorities

[a] Failure to Make Fair Disclosure of All Facts

§ 147.47 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Malicious Prosecution Action--Judicial Arbitration Award as Sufficient Basis for Action If Award Indicates Absence of Misconduct and Lack of Merit

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Uses

[3] Discussion of Authorities

[a] Judicial Arbitration Award as Sufficient Basis for Action

[b] Final Decision by Arbitrator as Favorable Termination

§ 147.48 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Malicious Prosecution Action--Underlying Judgment Reached Through Application of Parol Evidence Rule May Constitute Favorable Termination for Purposes of Bringing Malicious Prosecution Action

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Judgment Reached After Application of Parol Evidence Rule May Support Malicious Prosecution Action

§ 147.49 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Malicious Prosecution

Action--Denial of Motions for Nonsuit and Summary Judgment or Motion to Strike Does Not Establish Existence of Probable Cause

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Denial of Nonsuit and Summary Judgment Motions Do Not Show Probable Cause

[b] Denial of Anti-SLAPP Motion Does Not Show Probable Cause

§ 147.50 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Malicious Prosecution Action--Default Judgment Does Not Establish Probable Cause for Bringing Underlying Action

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Default Judgment Does Not Establish Probable Cause

§ 147.51 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Malicious Prosecution Action--Attorney Had No Probable Cause to Institute Action

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Memoranda

[3] Discussion of Authorities

[a] Probable-Cause Test Focuses Only on Theory Advanced in Action

[b] Legal Complexity Does Not Establish Probable Cause

[4] Additional Authorities

[a] Probable-Cause Test Focuses Only on Theory Advanced in Action

§ 147.52 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Malicious Prosecution Action--No Probable Cause to Institute Underlying Civil Action--Defendant Was on Notice of Lack of Factual Support for Fundamental Element of Claim

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Defendant Lacked Factual Support to Prosecute Underlying Action

[4] Additional Authorities

[a] Defendant Lacked Factual Support to Prosecute Underlying Action

§ 147.53 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Malicious Prosecution Action--Attorney Continued to Prosecute Underlying Action After Discovering Lack of Probable Cause

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Defendant Lacked Probable Cause to Continue Prosecuting Underlying Action

[b] Filing of Appeal is Continuation of Action

[c] Cocounsel Joining After Suit is Filed May Be Liable for Failing to Take Corrective Steps

§§ 147.54-147.69 [Reserved]

§ 147.70 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] for Abuse of Process--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--No Improper Use of Process Alleged

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Improper Use Requirement

[b] Bad Motive or Malice Insufficient

[c] Exercise of Right to Appeal Not Sufficient

[d] Proper Use of Attachment Not Sufficient

[e] Proper Examination of Judgment Debtor Not Sufficient

[f] Mere Filing of Complaint or Cross Complaint Not Sufficient

[g] Proper Use of Summons Not Sufficient

[h] Application for Receiver Not Sufficient

[i] Levy of Writ of Execution Not Sufficient

[j] Continued Pursuit of Meritless Litigation for Improper Collateral Purpose Not Actionable

[4] Additional Authorities

[a] Improper Use Requirement

[b] Bad Motive or Malice Insufficient

[c] Mere Filing of Complaint or Cross Complaint Not Sufficient

§ 147.71 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] for Abuse of Process--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Insufficient Allegation of Ulterior Motive to Obtain Collateral Advantage

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Ulterior Motive to Obtain Collateral Advantage Required

[b] Manner of Service Not Collateral Advantage

[c] Humiliation, Embarrassment and Intimidation Insufficient

[4] Additional Authorities

[a] Ulterior Motive to Obtain Collateral Advantage Required

[b] Manner of Service Not Collateral Advantage

§ 147.72 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] for Abuse of Process--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--No Allegation of Action Taken Pursuant to Judicial Authority

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Form

[3] Discussion of Authorities

[a] No Judicial Authority

[4] Additional Authorities

[a] No Judicial Authority

§ 147.73 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] for Abuse of Process--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Bar of Statute of Limitations

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Statute of Limitations

[4] Additional Authorities

[a] Statute of Limitations

§ 147.74 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] for Abuse of Process--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Absolute Privilege of Publication in Judicial Proceeding [Civ. Code § 47(b)] Applicable

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Privilege for Publication in Judicial Proceeding Applicable

[b] Publication Outside Courtroom

[c] Publication Need Not Be Relevant or Material in Technical Sense

[d] Judicial Enforcement Efforts Fall Within Scope of Litigation Privilege

[4] Additional Authorities

[a] Privilege for Publication in Judicial Proceeding Applicable

[b] Publication Need Not Be Relevant or Material in Technical Sense

§ 147.75 Supporting Motion for New Trial [Code Civ. Proc. § 657(6)] by Defendant--Insufficiency of Evidence to Justify Finding of Ulterior Motive

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

[3] Discussion of Authorities

[a] Insufficient Evidence of Ulterior Motive

§ 147.76 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] for Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)] for Abuse of Process--Complaint Sufficiently Alleges Facts Constituting Improper Use of Process

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Abuse of Process

[b] Improper Purpose

[c] Broad Interpretation of Process

[d] Filing Complaint for Improper Purpose

[e] Excessive Attachment

[f] Improper Use of Provisional Remedy of Claim and Delivery

[g] Garnishment on Exempt Property

[h] Improper Use of Interrogatory

[i] Notice of Deposition for Improper Purpose

[j] Improper Use of Contempt Order

[k] Improperly Obtaining Judgment and Levying Execution on Self

[l] Improper Use of Appellate Process

[m] Improper Use of Writ of Execution

[4] Additional Authorities

[a] Improper Purpose

[b] Filing Complaint for Improper Purpose

[c] Improper Use of Interrogatory

§ 147.77 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] for Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)] for Abuse of Process--Absolute Privilege of Publication in Judicial Proceeding [Civ. Code § 47(b)] Inapplicable

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Publication Not Related to Proceeding

[b] Non-Communicative Conduct Not Protected by Judicial Privilege

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PART I. INTRODUCTION

14-147 California Points & Authorities § 147.01

§ 147.01 Scope of Chapter

This part contains memoranda for use in supporting [*see §§ 147.20*-147.33] and opposing [*see §§ 147.40*-147.45] general demurrers to complaints for malicious prosecution, and for use in supporting [*see §§ 147.34*-147.39] and opposing [*see §§ 147.46*-147.52] motions for summary judgment in such actions.

This part contains memoranda for use in supporting [*see §§ 147.70*-147.74] and opposing [*see §§ 147.76*-147.77] general demurrers to complaints for abuse of process. Also included is a form for use in supporting a motion for a new trial [*see § 147.75*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsGeneral OverviewTortsIntentional TortsAbuse of ProcessGeneral OverviewTortsIntentional TortsMalicious ProsecutionGeneral Overview

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PART I. INTRODUCTION

14-147 California Points & Authorities § 147.02

§ 147.02 Governing Statutes

The immunity of public employees from suit for malicious prosecution is governed by *Gov. Code § 821.6*.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsGeneral OverviewTortsIntentional TortsAbuse of ProcessGeneral OverviewTortsIntentional TortsMalicious ProsecutionGeneral Overview

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14-147 California Points & Authorities § 147.03

§ 147.03 Distinction Between Malicious Prosecution and Abuse of Process

To establish a cause of action for malicious prosecution, a plaintiff must plead and prove that the prior action was commenced by defendant and favorably terminated in plaintiff's favor, was brought without probable cause, and was initiated with malice [*Bertero v. National Gen. Corp. (1974) 13 Cal. 3d 43, 50, 118 Cal. Rptr. 184, 529 P.2d 608]* . Abuse of process differs from malicious prosecution in that the gist of the tort is not commencing an action or causing process to issue without justification but misusing or misapplying process, justified in itself, for an end other than it was designed to accomplish. The purpose for which the process is used, once it is issued, is the only thing of importance. Consequently, in an action for abuse of process, it is unnecessary for the plaintiff to prove that the proceeding was terminated in his or her favor or that it was initiated without probable cause [*Spellens v. Spellens (1957) 49 Cal. 2d 210, 232, 317 P.2d 613* ; *see Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc. (1986) 42 Cal. 3d 1157, 1168-1169, 232 Cal. Rptr. 567, 728 P.2d 1202]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsAbuse of ProcessGeneral OverviewTortsIntentional TortsAbuse of ProcessElementsTortsIntentional TortsMalicious ProsecutionGeneral OverviewTortsIntentional TortsMalicious ProsecutionElementsGeneral Overview

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14-147 California Points & Authorities § 147.04

§ 147.04 Page Limits on Memoranda

Generally, a memorandum must not exceed 15 pages in length, or in the case of a motion for summary judgment or summary adjudication, 20 pages in length. A reply or closing memorandum may not exceed 10 pages in length [*see Cal. Rules of Ct., Rule 3.1113(d)*]. Any party desiring to file a longer memorandum must obtain leave of court [*see Cal. Rules of Ct., Rule 3.1113(e)*]. For further discussion of the page limitations under *Cal. Rules of Ct., Rule 3.1113*, and of other basic format requirements of memoranda, see Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormTortsIntentional TortsGeneral OverviewTortsIntentional TortsAbuse of ProcessGeneral OverviewTortsIntentional TortsMalicious ProsecutionGeneral Overview

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14-147 California Points & Authorities § 147.05

§ 147.05 Related Pleadings and Practice Forms

For a discussion, procedural guide, and forms involving actions for malicious prosecution, or the tort abuse of process, see Ch. 357, *Malicious Prosecution and Abuse of Process* in California Forms of Pleading and Practice (Matthew Bender).

For discussion and a complaint involving wrongful attachment as an abuse of process, see Ch. 62, *Attachment* , in that same set. For discussion and forms for use in actions involving torts which protect interests that are similar to the interest in avoiding the improper use of process protected by abuse of process actions, see the following chapters in that set:

- Ch. 257, *False Imprisonment*.
- Ch. 340, *Libel and Slander*.
- Ch. 362, *Mental Suffering and Emotional Distress*.
- Ch. 429, *Privacy*.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsGeneral OverviewTortsIntentional TortsAbuse of ProcessGeneral OverviewTortsIntentional TortsMalicious ProsecutionGeneral Overview

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14-147 California Points & Authorities § 147.06

§ 147.06 Related Points and Authorities Chapters

For a discussion of how to use the forms in this chapter to draft a memorandum of points or authorities or a trial or appellate brief, and for a sample of a complete memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeGeneral OverviewCivil ProceduresPleading & PracticeMotion PracticeGeneral OverviewCivil ProceduresPleading & PracticeMotion PracticeContent & FormCivil ProceduresPleading & PracticeMotion PracticeSupporting Memoranda

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14-147 California Points & Authorities § 147.07

§ 147.07 Related California Torts Chapters

For full discussion of the causes of action for malicious prosecution and abuse of process, see Levy, Golden, and Sacks, California Torts, Ch. 43, (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsGeneral OverviewTortsIntentional TortsAbuse of ProcessGeneral OverviewTortsIntentional TortsMalicious ProsecutionGeneral Overview

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14-147 California Points & Authorities §§ 147.08-147.19

[Reserved]

§§ 147.08[Reserved]

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PART II. FORMS
A. Malicious Prosecution

14-147 California Points & Authorities § 147.20

§ 147.20 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] for Malicious Prosecution--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Failure to Allege Favorable Termination of Action on Which Complaint Is Based

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM IN SUPPORT OF DEMURRER
_____ [*name*],	)	TO COMPLAINT
Plaintiff,	)	[*Code Civ. Proc. §§ 430.10(e), 430.30(a)*]
vs.	)	
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION FOR MALICIOUS PROSECUTION BECAUSE IT FAILS TO ADEQUATELY ALLEGE THAT THE ACTION ON WHICH THE COMPLAINT IS BASED WAS TERMINATED FAVORABLY TO PLAINTIFF.

A. Objection by Demurrer. The party against whom a complaint has been filed may object to the complaint by demurrer on the ground that it does not state facts sufficient to state a cause of action where such ground appears on the face of the complaint [or from any matter of which the court is required to take or may take judicial notice] (*Code Civ. Proc. §§ 430.10(e), 430.30(a)*).

B. Favorable-Termination Requirement. To state a cause of action for malicious prosecution, plaintiff must plead that the prior judicial proceeding of which he or she complains terminated in his or her favor (*Babb v. Superior Court (1971) 3 Cal. 3d 841, 845-846, 92 Cal. Rptr. 179, 479 P.2d 379* ; *Kachig v. Boothe (1971) 22 Cal. App. 3d 626, 638-639, 99 Cal. Rptr. 393*).

C. Conclusionary Pleading Insufficient. An allegation that only states that the proceedings were terminated favorably to plaintiff without pleading any facts to support the allegation is a mere conclusion and insufficient to support the statement of a cause of action for malicious prosecution (*Webb v. Youmans (1967) 248 Cal. App. 2d 851, 854-855, 57 Cal. Rptr. 11*).

D. Consideration Should Be Given to Judgment as Whole. In determining whether a proceeding alleged to have been maliciously prosecuted has been terminated in favor of the party injured by such proceeding, consideration should be given to the judgment as a whole (*Staffpro, Inc. v. Elite Show Servs., Inc. (2006) 136 Cal. App. 4th 1392, 1402-1405, 39 Cal. Rptr. 3d 682* ; *Freidberg v. Cox (1987) 197 Cal. App. 3d 381, 385, 386, 242 Cal. Rptr. 851*).

[*Optional*] **E. Conviction Not Favorable Termination.** When the proceedings of which plaintiff is complaining terminated in his or her conviction, plaintiff cannot allege favorable termination of the proceedings (*Roos v. Harris (1928) 203 Cal. 201, 202, 263 P. 225*).

[*Optional*] **F. Mental Commitment Not Favorable Termination.** When the proceedings of which plaintiff is complaining terminated with a judicial order committing plaintiff to a mental institution, plaintiff cannot allege favorable termination of the proceeding (*Rouse v. Twin Pines Sanitarium, Inc. (1958) 162 Cal. App. 2d 639, 642-643, 328 P.2d 536*).

[*Optional*] **G. Judgment Notwithstanding the Verdict Not Sufficient.** When the underlying action resulted in a jury verdict and then a judgment notwithstanding the verdict in favor of plaintiff in the malicious prosecution action, the action was not terminated favorably for plaintiff in the malicious prosecution action so as to support a cause of action for malicious prosecution (*Cowles v. Carter (1981) 115 Cal. App. 3d 350, 354-359, 171 Cal. Rptr. 269*).

[*Optional*] **H. Judgment Obtained Against Plaintiff by Fraud Not Favorable Termination.** When judgment in the prior action on which plaintiff bases the action for malicious prosecution was against plaintiff and in favor of the defendant, plaintiff cannot allege favorable termination of the action even by alleging that the judgment was obtained by fraud (*Kachig v. Boothe (1971) 22 Cal. App. 3d 626, 636-639, 99 Cal. Rptr. 393*).

[*Optional*] **I. Action on Which Complaint Based Not Yet Terminated.** When the action on which the malicious prosecution complaint is based is not yet final, plaintiff cannot allege favorable termination of the action because it has not terminated and plaintiff's cause of action for malicious prosecution has not yet accrued (*Babb v. Superior Court (1971) 3 Cal. 3d 841, 845-850, 92 Cal. Rptr. 179, 479 P.2d 379* ; *Rich v. Siegel (1970) 7 Cal. App. 3d 465, 467-470, 86 Cal. Rptr. 665*).

[*Optional*] **J. Judgment Based on Statute of Limitations Not Favorable Termination.** When the prior action on which the action for malicious prosecution is based was dismissed because it was not filed within the relevant period of limitations, the prior action did not reflect on the merits and thus was not favorably terminated so as to support an action for malicious prosecution (*Lackner v. La Croix (1979) 25 Cal. 3d 747, 750-752, 159 Cal. Rptr. 693, 602 P.2d 393* ; *Warren v. Wasserman, Comden & Casselman (1990) 220 Cal. App. 3d 1297, 1302, 271 Cal. Rptr. 579*).

[*Optional*] **K. Dismissal of Action Not Necessarily Favorable Termination.** An allegation that the action on which the complaint for malicious prosecution is based was dismissed is not sufficient to state a cause of action when there are no allegations as to the reason for the dismissal (*Webb v. Youmans (1967) 248 Cal. App. 2d 851, 853-854, 57 Cal. Rptr. 11* ; *see* *Weaver v. Superior Court (1979) 95 Cal. App. 3d 166, 184-185, 156 Cal. Rptr. 745*).

[*Optional*] **L. Dismissal Based on Negotiation, Settlement, or Compromise Not Favorable Termination.** When the prior action on which the complaint for malicious prosecution was dismissed because by reason of negotiation, settlement, or compromise between the parties, the prior action was not favorably terminated so as to support a cause of action for malicious prosecution (*Weaver v. Superior Court (1979) 95 Cal. App. 3d 166, 184-185, 156 Cal. Rptr. 745* ; *Webb v. Youmans (1967) 248 Cal. App. 2d 851, 853, 57 Cal. Rptr. 11*).

[*Optional*] **M. Dismissal Based on Plea Bargain Not Favorable Termination.** When criminal charges are dismissed pursuant to a plea bargain agreement under which the defendant agrees to enter a plea of guilty or nolo contendere to lesser charges, the dismissal does not constitute a favorable termination for purposes of a malicious prosecution action (*Cote v. Henderson (1990) 218 Cal. App. 3d 796, 803-804, 267 Cal. Rptr. 274*).

[*Optional*] **N. Voluntary Dismissal Not Favorable Termination When Based on Litigant's Motivation to Avoid Further Costs, Attorney's Fees, and Litigation.** A voluntary dismissal entered not on the merits of the underlying action but solely for the purpose of avoiding the payment of further attorney's fees and court costs and the inconvenience of further litigation is not a favorable termination for purposes of a malicious prosecution action (*Oprian v. Goldrich, Kest & Assocs. (1990) 220 Cal. App. 3d 337, 345, 269 Cal. Rptr. 429*).

[*Optional*] **O. Dismissal Based on Defense of Laches Not Favorable Determination.** Dismissal of an action when based on the successful raising of the defense of laches is not a favorable determination for purposes of a malicious prosecution action (*Asia Inv. Co. v. Borowski (1982) 133 Cal. App. 3d 832, 838-839, 184 Cal. Rptr. 317*).

[*Optional*] **P. Voluntary Dismissal Based On Technical Defect Is Not Favorable Termination.** When a complaint is voluntarily dismissed because of a technical defect such as a pending appeal, the dismissal is not a favorable termination for purposes of a subsequent malicious prosecution action (*Eells v. Rosenblum (1995) 36 Cal. App. 4th 1848, 1856, 43 Cal. Rptr. 2d 323*).

[*Optional*] **Q. Stipulated Judgment Not Favorable Termination.** When a complaint is terminated by way of agreement of the parties for a stipulated judgment, the judgment is not a favorable termination for purposes of a subsequent malicious prosecution action (*Dalany v. American Pac. Holding Corp. (1996) 42 Cal. App. 4th 822, 828, 50 Cal. Rptr. 2d 13*).

[*Optional*] **R. Dismissal for Failure to Comply with Discovery Orders Not Favorable Termination.** The dismissal of an action for failure to comply with discovery orders does not constitute a favorable termination if there is any doubt as to the liability or innocence of the prevailing party in the action that was dismissed (*Pattiz v. Minye (1998) 61 Cal. App. 4th 822, 827, 71 Cal. Rptr. 2d 802*).

[*Optional*] **S. Summary Judgment Based on Statute of Frauds Not Favorable Termination.** Summary judgment in the underlying action in favor of the malicious prosecution plaintiff is not a favorable termination for purposes of the malicious prosecution action when the underlying judgment was based on the statute of frauds (*Hall v. Harker (1999) 69 Cal. App. 4th 836, 844-845, 82 Cal. Rptr. 2d 44 , disapproved on other grounds,* *Casa Herrera, Inc. v. Beydoun (2004) 32 Cal. 4th 336, 349, 9 Cal. Rptr. 3d 97, 83 P.3d 497*).

[*Optional*] **T. Dismissal Due to Lack of Standing Not Favorable Termination.** A dismissal of the underlying action due to a lack of standing, which is a jurisdictional defect, does not constitute a favorable termination reflecting on the

merits of that action for purposes of a subsequent malicious prosecution action (*Hudis v. Crawford (2005) 125 Cal. App. 4th 1586, 1592, 24 Cal. Rptr. 3d 50*).

[*Optional*] **U. Adverse Termination More Favorable Than Settlement Offer Is Not Favorable Termination.** A malicious prosecution plaintiff cannot meet the favorable termination requirement merely by demonstrating that the termination was more favorable to that party than the terms of a settlement offer made by that party earlier in the underlying action (*Staffpro, Inc. v. Elite Show Servs., Inc. (2006) 136 Cal. App. 4th 1392, 1400-1401, 39 Cal. Rptr. 3d 682*).

[*Optional*] **V. Termination Based on Failure to Comply With Compulsory Cross-Complaint Rule is Not Favorable Termination.** The dismissal of a cause of action because the plaintiff was required to pursue the matter as a compulsory cross-complaint in a related action, but failed to do so, is a technical disposition not related to the merits of the claim and will not constitute a favorable termination for purposes of a subsequent malicious prosecution action (*Drummond v. Desmarais (2009) 176 Cal. App. 4th 439, 450, 98 Cal. Rptr. 3d 183*).

[*Optional*] **W. Voluntary Dismissal of Malicious Prosecution Action Based on Adverse Appellate Decision in Underlying Action is Not Favorable Termination.** If a malicious prosecution action is stayed on the grounds that an appeal from the underlying judgment is pending, and the underlying appeal is then resolved adversely to the malicious prosecution plaintiff, a voluntary dismissal of the malicious prosecution action by that plaintiff in response to losing the underlying appeal is considered a technical disposition and not a termination on the merits for purposes of any subsequent malicious prosecution action that might be brought by the defendant in the first malicious prosecution action (*Drummond v. Desmarais (2009) 176 Cal. App. 4th 439, 459, 98 Cal. Rptr. 3d 183*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a general demurrer to a complaint for malicious prosecution when the demurrer asserts that the complaint fails to state a cause of action because it does not adequately allege favorable termination of the action on which the complaint is based.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, these points may be used to support a motion for summary judgment [*see Code Civ. Proc. § 437c*] based on the contention that there was not a favorable termination of the action on which the complaint is based.

[c] Opposing Memoranda

The points in *§ 147.40* may be used in an appropriate case to oppose a demurrer supported by this memorandum.

[d] Related Pleading and Practice Forms

For a form of demurrer based on lack of a favorable termination allegation, see California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process* (Matthew Bender).

[3] Discussion of Authorities

[a] Favorable Termination Requirement

Babb v. Superior Court *(1971) 3 Cal. 3d 841, 92 Cal. Rptr. 179, 479 P.2d 379* , involved an action for medical malpractice. Defendant doctor filed a cross complaint for declaratory relief against the plaintiff and her attorney seeking a judgment that, if the malpractice action terminated favorably as to defendant, plaintiff and her attorney be found to have brought the action maliciously. Plaintiff demurred to the cross complaint, but the trial court overruled the demurrer on the basis that it was proper because the complaint only sought declaratory relief. Plaintiff sought a writ of prohibition against the trial court proceeding with the cross complaint, which the Supreme Court granted.

The Court first held that it is hornbook law that the plaintiff in a malicious prosecution action must plead and prove that the prior judicial proceeding of which he or she complains terminated in his or her favor. The Court noted that the rationale for the requirement is that favorable termination indicates that the action did not have merit (*3 Cal. 3d 841, 845-846)* . The Court then held that, because of inability to plead favorable termination as required, a defendant cannot cross complain for malicious prosecution in the main action.

The Court found that the favorable termination rule is supported by conceptual, practical, and policy reasons. Conceptually, a cause of action for malicious prosecution does not exist until there is favorable termination because the cause of action only accrues when the underlying action is terminated (*3 Cal. 3d 841, 845-846)* . Practically, the favorable termination rule avoids the possibility of inconsistent judgments which might result if malicious prosecution actions could be brought before the termination of the underlying action, and it also avoids unnecessary litigation since defendants who lose cannot bring such actions. The favorable termination rule also furthers the policy that malicious prosecution actions are not favored by the law and keeps such actions from being used to harass plaintiffs (*3 Cal. 3d 841, 847-848)* . The Court then found that declaratory relief was not appropriate in this situation and issued the writ of prohibition (*3 Cal. 3d 841, 848-850)* .

In ***Kachig v. Boothe*** *(1971) 22 Cal. App. 3d 626, 99 Cal. Rptr. 393* , plaintiffs sued real estate brokers and their attorney for fraud and malicious prosecution. The brokers had sued plaintiffs for a real estate commission and obtained a judgment which plaintiffs paid. Plaintiffs later ascertained that a key document in the case against them was forged and had criminal charges brought against the brokers and the brokers' attorney. One of the brokers was granted immunity and testified against the others. However, only the attorney was found guilty. The trial court granted defendants' motion for judgment on the pleadings in plaintiffs' action for fraud and malicious prosecution. The court of appeal upheld the judgment. It held that there was not sufficient evidence to set aside the judgment because the introduction of perjured testimony was intrinsic fraud which is not sufficient for setting aside a judgment. It then found that the fraud and malicious prosecution causes of action were collateral attacks on the prior judgment, and such final judgment is not subject to such collateral attack.

With regard to the malicious prosecution cause of action, the court found that plaintiffs could not plead the favorable termination of the prior action, and that this was fatal to their cause of action. The court held that the fact that the prior judgment was procured by perjured testimony was not sufficient to excuse the favorable termination requirement. The court found that one policy basis for the requirement was the doctrine of finality of judgments and the policy underlying that doctrine (*22 Cal. App. 3d 626, 638-639)* . The court also refused to hold that favorable termination should not be required in a malicious prosecution cause of action (*22 Cal. App. 3d 626, 639)* .

[b] Conclusionary Pleading Insufficient

In ***Webb v. Youmans*** *(1967) 248 Cal. App. 2d 851, 57 Cal. Rptr. 11* , plaintiff had been the defendant in an action for damaging the malicious prosecution defendants' property, in which the malicious prosecution defendants had obtained a preliminary injunction for property damage which was later quashed as being a void order. The action for property damage was then dismissed with prejudice. Plaintiff instituted an action for malicious prosecution. Defendants demurred on the ground of uncertainty and the demurrer was sustained. Plaintiff did not amend; the action was dismissed and plaintiff appealed. The court of appeal held that one of the essential elements of an action for malicious prosecution is favorable termination of the underlying action. However, termination based on negotiation, settlement, or consent does not constitute such favorable termination. Since the complaint merely alleged the quashing of the injunction and dismissal of the underlying action, the dismissal could have been based on agreement or consent and thus the allegations were insufficient to state a cause of action (*248 Cal. App. 2d 851, 853-854)* . The court noted that a mere conclusionary pleading of favorable termination would not be sufficient and that plaintiff had to clearly allege why the termination was favorable (*248 Cal. App. 2d 851, 854-855)* .

[c] Consideration Should Be Given to Judgment as Whole

In ***Staffpro, Inc. v. Elite Show Servs., Inc.*** *(2006) 136 Cal. App. 4th 1392, 39 Cal. Rptr. 3d 682* , the plaintiff was in the business of providing personnel and services, such as security guards and traffic control staff, for large events. The plaintiff had been sued by a competitor who alleged that the plaintiff had been engaging in unlawful practices, such as using unlicensed personnel and failing to pay proper benefits, in order to lower costs and underbid the competition. In that underlying lawsuit, the trial court had ordered the plaintiff to make certain changes to its business practices in response to the allegations of the first cause of action in the complaint. The trial court denied injunctive relief to compel further changes in the plaintiff's practices, although it recognized that there was significant evidence that some of those practices may have been unlawful as well. The trial court made further findings suggesting that it believed that the complaint had been brought in good faith by the plaintiff's competitor, although the remaining causes of action were terminated favorably to the plaintiff. After resolution of that suit, the plaintiff sued its competitor for malicious prosecution. The trial court granted the defendant's motion to strike under *Code Civ. Proc. § 425.16*, the anti-SLAPP statute, after finding that the plaintiff could not show that the underlying action was terminated favorably to the plaintiff. The plaintiff appealed.

The court of appeal affirmed. The court recognized that there was a split among court of appeal opinions as to whether the favorable termination element may be met if the underlying proceeding involved multiple, severable causes of action, only some of which were terminated in favor of the malicious prosecution plaintiff. Although some opinions had held that the element may be met if favorable termination can be shown on at least one severable cause of action, the court of appeal was of the opinion that the Supreme Court's analysis in *Crowley v. Katleman (1994) 8 Cal. 4th 666, 34 Cal. Rptr. 2d 386, 881 P.2d 1083* [*see § 147.45[3][a]*], mandated a different conclusion. Based largely on the analysis in that opinion, the court of appeal held that severability only comes into play in analyzing the lack of probable cause element of the malicious prosecution cause of action, and that the element of favorable termination is concerned only with the result in the underlying proceeding as a whole (*136 Cal. App. 4th 1392, 1402-1405*). Because the defendant achieved success on one of the causes of action in the underlying suit, the plaintiff could not show favorable termination of that suit as a whole for purposes of making a claim for malicious prosecution (*136 Cal. App. 4th 1392, 1407*).

In ***Freidberg v. Cox*** *(1987) 197 Cal. App. 3d 381, 242 Cal. Rptr. 851* , the underlying action involved a dispute between two attorneys, Ingraham and Ritter, over the division of a fee from a mutual client. Ingraham brought an action against Ritter, demanding a portion of the disputed fee and asserting three legal theories: quantum meruit, joint venture, and interference with contract. The court awarded Ingraham fees based on quantum meruit, but dismissed the parts of the action premised on the other two legal theories. Ritter then filed an action for malicious prosecution against Ingraham and Ingraham's attorneys, alleging that the two theories unsuccessfully asserted by defendants were prosecuted maliciously. The trial court granted summary judgment in favor of defendants.

The court of appeal affirmed. The court rejected plaintiff's assertion that the element of favorable termination was satisfied by dismissal of the part of the action premised on theories of joint venture and interference with contract. The question of whether the original suit was successfully prosecuted against the plaintiff must be determined by the judgment or decree therein on the final adjudication, and not by the separate allegations and charges and the proof for and against each (*197 Cal. App. 3d 381, 385)* . Under the "primary right" theory of pleading followed in California, a cause of action is based on the injury suffered by a plaintiff, regardless of the particular legal theory or theories on which plaintiff seeks redress. Here, defendants' assertion in the action for attorney's fees on theories of joint venture and tortious interference with contract were aimed at remedying but one breach of primary right--Ingraham's right to share an attorney's fee. Defendants' various theories of recovery were merely different legal theories of the nature of the single wrong. If Ingraham had sued to recover attorney's fees solely on one theory, such as quantum meruit, and the matter had gone to final judgment, a later action to recover attorney's fees on the basis of joint venture or tortious interference with contract would be foreclosed by the doctrine of res judicata; separate prosecution of each theory would constitute splitting a cause of action (*197 Cal. App. 3d 381, 388)* . In the instant case, there was but one injury and one cause of action for recovery of attorney's fees. Because that action did not terminate in favor of plaintiff, the plaintiff could not maintain an action for malicious prosecution (*197 Cal. App. 3d 381, 389)* .

[d] Conviction Not Favorable Termination

In ***Roos v. Harris*** *(1928) 203 Cal. 201, 263 P. 225* , plaintiff's complaint for malicious prosecution was based on a proceeding in which she was tried and found guilty. The complaint further alleged that the prosecution was malicious. The trial court granted defendants' motion for judgment on the pleadings and plaintiff appealed. The Supreme Court upheld the judgment against plaintiff. It held that plaintiff could not state a cause of action for malicious prosecution because she could not plead favorable termination. It held that the final judgment of conviction could not be so collaterally attacked and was conclusive on the issue of probable cause for the prosecution of the first action (*203 Cal. 201, 202)* .

[e] Mental Commitment Not Favorable Termination

In ***Rouse v. Twin Pines Sanitarium, Inc.*** *(1958) 162 Cal. App. 2d 639, 328 P.2d 536* , plaintiff's action for malicious prosecution was based on defendant physician's actions in having plaintiff committed to the state mental hospital, which commitment was ordered after a judicial hearing. The trial court entered a judgment of nonsuit and plaintiff appealed. The court of appeal held that the cause of action for malicious prosecution was barred by the fact that plaintiff's commitment was ordered, which precluded any finding of favorable termination (*162 Cal. App. 2d 639, 642-643)* .

[f] Judgment Notwithstanding the Verdict Not Sufficient

In ***Cowles v. Carter*** *(1981) 115 Cal. App. 3d 350, 171 Cal. Rptr. 269* , defendant in the malicious prosecution action had brought an action against the malicious prosecution plaintiff and obtained a jury verdict. The court then granted a motion for a judgment notwithstanding the verdict. Plaintiff brought a malicious prosecution action based on prosecution of the action that had resulted in the judgment notwithstanding the verdict in his favor. Defendant demurred for failure to state a cause of action, and the demurrer was sustained without leave to amend on the basis that the prior verdict established probable cause. Plaintiff appealed and the court of appeal affirmed. The court noted that the favorable termination requirement was closely related to the probable cause requirement and that judgment for plaintiff in the prior action established probable cause (*115 Cal. App. 3d 350, 358)* . The court then held that the jury verdict for the malicious prosecution defendant in the underlying action was sufficient to establish probable cause despite the judgment notwithstanding the verdict. The court analogized to the cases holding that reversal of a jury verdict on appeal was not sufficient to establish favorable termination (*115 Cal. App. 3d 350, 355-357)* . The court also noted that its holding reinforces the sound principle that nonmeritorious malicious prosecution actions should be prevented from clogging the judicial system (*115 Cal. App. 3d 350, 359-360)* .

[g] Judgment Obtained Against Plaintiff by Fraud Not Favorable Termination

Kachig v. Boothe *(1971) 22 Cal. App. 3d 626, 99 Cal. Rptr. 393* , is discussed in *§ 147.20[3][a]*.

[h] Action on Which Complaint Based Not Yet Terminated

Babb v. Superior Court *(1971) 3 Cal. 3d 841, 92 Cal. Rptr. 179, 479 P.2d 379* , is discussed in *§ 147.20[3][a]*. The Supreme Court held that a cross complaint for malicious prosecution was not proper because the cross complainant could not allege favorable termination of the action, which was still pending (*3 Cal. 3d 841, 845-847)* .

In ***Rich v. Siegel*** *(1970) 7 Cal. App. 3d 465, 86 Cal. Rptr. 665* , plaintiff, defendant in the prior action for wrongful attachment, obtained a ruling that he should be granted a partial summary judgment on one cause of action against one plaintiff in that action. However, the action was still pending against other defendants. Plaintiff then filed an action for malicious prosecution against the plaintiff in the first action and pled that the granting of the motion for summary judgment was sufficient favorable termination. Defendant successfully demurred and the case was dismissed. Plaintiff appealed and the court of appeal upheld the judgment against plaintiff. The court held that the granting of the motion for summary judgment was not in fact a judgment but was an order directing the subsequent entry of a judgment. Therefore, the proceeding had not been terminated and would not be final until judgment was entered and the time for appeal had expired. Thus, the favorable termination requirement was not met. The court held that termination did not have to be such that the action could not be refiled but that the action did have to be terminated (*7 Cal. App. 3d 465, 468-469)* .

[i] Judgment Based on Statute of Limitations Not Favorable Termination

Lackner v. La Croix *(1979) 25 Cal. 3d 747, 159 Cal. Rptr. 693, 602 P.2d 393* , was an action for malicious prosecution based on an action which defendant had previously brought for medical malpractice. Defendant patient's malpractice action had been dismissed after the jury found that it had not been commenced within the applicable limitations period. Plaintiff physician then brought the action for malicious prosecution, which was dismissed by the trial court after it granted a motion for summary judgment in favor of defendant patient.

The Supreme Court upheld the trial court. It held that, although it is not essential for the prior proceeding to have been favorably terminated after a trial on the merits, it is necessary that the prior proceeding's termination reflect on the merits of the action. If the termination does not relate to the merits--reflecting on neither innocence of nor responsibility for the alleged misconduct--the termination is not favorable in the sense of supporting a subsequent action for malicious prosecution. Therefore, a dismissal on the basis of the statute of limitations in the prior action for malpractice is not sufficient because it does not bear on the issue of plaintiff's malpractice (*25 Cal. 3d 747, 750-751)* .

The Court noted that policy reasons run against the maintenance of a cause of action for malicious prosecution based on an action dismissed for limitations reasons. Such an action for malicious prosecution would bring up the same stale issues that the limitations defense precludes from litigation in the underlying action. It would also be unfair to allow plaintiff to use the statute of limitations as a defense and then to use such termination of the prior action as the basis of a cause of action for malicious prosecution. The Court noted that plaintiff physician had not alleged that the malpractice action was brought with knowledge that the limitations period had run and that the Court was not ruling on the right to relief in such a situation (*25 Cal. 3d 747, 752)* .

In ***Warren v. Wasserman, Comden & Casselman*** *(1990) 220 Cal. App. 3d 1297, 271 Cal. Rptr. 579* , the trial court granted summary judgment on the plaintiff's malicious prosecution count, finding that the termination of the prior action by a successful defense based on the statute of limitations was not a termination in plaintiff's favor. Plaintiff appealed.

The court of appeal affirmed the judgment. Relying on *Lackner v. La Croix (1979) 25 Cal. 3d 747, 752 n.3, 159 Cal.*

Rptr. 693, 602 P.2d 393 , discussed *above,* the plaintiff had argued on appeal that the dismissal of a prior action on limitations grounds constitutes a favorable termination when the complaint alleges the prior action was prosecuted with knowledge that the statute of limitations had run. The court of appeal found plaintiff's argument to be without merit, and noted that the policy reasons behind requiring a favorable termination would be thwarted if a litigant could meet the favorable termination requirement simply by alleging defendants knew the action was barred by the statute of limitations (*220 Cal. App. 3d 1297, 1301, 1303)* .

[j] Dismissal of Action Not Necessarily Favorable Termination

Webb v. Youmans *(1967) 248 Cal. App. 2d 851, 57 Cal. Rptr. 11* , is discussed in *§ 147.20[3][b]*.

In ***Weaver v. Superior Court*** *(1979) 95 Cal. App. 3d 166, 156 Cal. Rptr. 745* , plaintiff brought an action for malicious prosecution against a patient and her attorney based on a malpractice action which had been voluntarily dismissed. Defendants moved for summary judgment, which was denied. Defendant attorney then sought a writ of mandate to compel the court to rule in his favor. Defendant's basic contention on the malicious prosecution cause of action was that the decision to dismiss was based on the expense of litigation and the small possible recovery and thus was not a favorable termination in plaintiff's favor. In ruling on the contention, the court of appeal stated that a dismissal based on negotiation, settlement, or consent was not a favorable termination (*95 Cal. App. 3d 166, 184-185)* . The court then found that there was an issue of fact as to the reasons for the dismissal and upheld the denial of the summary judgment as to plaintiff's malicious prosecution cause of action (*95 Cal. App. 3d 166, 185-187)* .

[k] Dismissal Based on Negotiation, Settlement, or Compromise Not Favorable Termination

Weaver v. Superior Court *(1979) 95 Cal. App. 3d 166, 156 Cal. Rptr. 745* , is discussed in *§ 147.20[3][j]*.

Webb v. Youmans *(1967) 248 Cal. App. 2d 851, 57 Cal. Rptr. 11* , is discussed in *§ 147.20[3][b]*.

[l] Dismissal Based on Plea Bargain Not Favorable Termination

In ***Cote v. Henderson*** *(1990) 218 Cal. App. 3d 796, 267 Cal. Rptr. 274* , plaintiff brought an action alleging that defendant maliciously instigated the filing of criminal charges against him by reporting to the police and to the district attorney that he had forced her to engage in various nonconsensual sex acts. The district attorney filed a multiple-count felony indictment against the plaintiff based on the defendant's report, but later dismissed all of the charges except one in exchange for plaintiff pleading nolo contendere to the excepted charge. The trial court sustained defendant's demurrer to the malicious prosecution cause of action without leave to amend, and plaintiff appealed.

The court of appeal affirmed. It noted that the dispositive issue was whether the prior action was pursued to a legal termination in the plaintiff's favor. The court concluded that it was not (*218 Cal. App. 3d 796, 802)* . The court noted that the plaintiff's nolo contendere plea in the underlying action was the legal equivalent of a guilty plea (*218 Cal. App. 3d 796, 803)* . It held that, as a matter of law, the favorable termination that is essential to the plaintiff in a malicious prosecution action cannot be based on the dismissal of the criminal charges remaining after the defendant in a criminal proceeding has entered a plea of nolo contendere to one or more of the charges in the accusatory pleading pursuant to a plea bargain (*218 Cal. App. 3d 796, 804)* . In the present case, the court found that the People's dismissal of multiple counts did not give rise to the requisite inference that plaintiff was innocent of the charged offenses. Instead, the dismissal was the result of a plea bargain, an agreement or settlement between plaintiff and the People. As such, the dismissal of the remaining criminal charges was of a procedural nature rather than on the merits or reflecting the accused's innocence (*218 Cal. App. 3d 796, 805)* .

[m] Voluntary Dismissal Not Favorable Termination When Based on Litigant's Motivation to Avoid Further Costs, Attorney's Fees, and Litigation

In ***Oprian v. Goldrich, Kest & Assocs.*** *(1990) 220 Cal. App. 3d 337, 269 Cal. Rptr. 429* , the underlying litigation involved a dispute over the validity of a purchase option on a parcel of land. After it became apparent to the holders of the option that the landowner was not going to honor the option, they filed a complaint against the landowner, who subsequently cross complained against the option holders. Following trial on the option holders' complaint and the landowner's cross complaint, the jury returned an award for the landowner on both the complaint and cross complaint. Subsequently, however, the court of appeal reversed, directing the court to enter judgment on the cross complaint in favor of the option holders. At the conclusion of its opinion, the court of appeal also directed that the option holders' complaint be dismissed, "based on representations of counsel at oral argument." At oral argument, one of the justices asked counsel for the option holders whether he would retry the complaint if the court reversed the judgment on the landowner's cross complaint. Counsel responded he had not discussed the matter with his clients, but that if the judgment on the cross complaint were reversed, the option holders would probably be willing to forego further prosecution of the complaint rather than incur additional attorney's fees and the inconvenience of pursuing a second trial. The landowner subsequently filed a complaint for malicious prosecution, naming the option holders as defendants. The option holders filed motions for summary judgment contending, inter alia, the prior action did not result in a favorable determination to the landowner. The trial court granted the motions and entered judgments for defendants.

The court of appeal affirmed, concluding that the plaintiff did not establish that the underlying cause of action terminated in his favor (*220 Cal. App. 3d 337, 345)* . The court stated that the dismissal of the option holders' complaint following oral argument was not on the merits; had the court found that the option holders' complaint was based on reversible error or was without substance, it would most certainly have reversed the judgment on the complaint. Here, however, having determined to reverse the jury's verdict in favor of the landowner on the cross complaint, the court of appeal merely inquired as to whether counsel would be willing to dismiss the complaint if the judgment on the cross complaint were reversed (*220 Cal. App. 3d 337, 344)* . The option holders agreed to dismiss the complaint against the landowner if they received a favorable determination on the cross complaint. The motivation was to avoid the payment of further attorney's fees and court costs and the inconvenience of a second trial. The court noted that the dismissal was not on the merits and resulted from a practical decision that further litigation was too expensive to pursue (*220 Cal. App. 3d 337, 345)*

[n] Dismissal Based on Defense of Laches Not Favorable Determination

Plaintiffs in ***Asia Inv. Co. v. Borowski*** *(1982) 133 Cal. App. 3d 832, 184 Cal. Rptr. 317* , brought an action for malicious prosecution and abuse of process based on defendants' filing a petition for writ of mandate to compel plaintiff to comply with provisions of the California Environmental Quality Act. The petition was denied by the trial court in that action after plaintiff raised the issues of laches. Thereafter plaintiff filed the malicious prosecution action. After the close of the trial, the trial court granted defendants' motion for summary judgment and took undersubmission plaintiff's motion for leave to amend the complaint. After the trial court denied leave to amend, plaintiff appealed from the judgment of the trial court, contending, among other things, that the order dismissing defendant's petition for writ of mandate on the basis of laches was a termination of that action favorable to plaintiff.

In affirming the judgment of the trial court, the court of appeal rejected plaintiff's contentions, holding that a successful laches defense does not reflect on the merits of a petition for a writ of mandate. The court stated that the successful laches defense in the present case had no more bearing on any alleged wrongful conduct than would a statute of limitations defense [*see Lackner v. La Croix (1979) 25 Cal. 3d 747, 751, 159 Cal. Rptr. 693, 602 P.2d 393* ; *see also § 147.20[3][a]*]. The trial court in the petition case, the court observed, tried the laches defense first and never reached the merits of the petition. Consequently, the court concluded, the present case was more than appropriate for the exercise of the summary judgment procedure (*133 Cal. App. 3d 832, 838-839)* .

[o] Voluntary Dismissal Based On Technical Defect Is Not Favorable Termination

In ***Eells v. Rosenblum*** *(1995) 36 Cal. App. 4th 1848, 43 Cal. Rptr. 2d 323* , an independent claims adjuster filed a

malicious prosecution action against an auto insurance broker, the president of the brokerage, and the attorney representing both. The malicious prosecution action was the fourth in a series of related lawsuits involving an auto accident and subsequent bad faith insurance claims. The adjuster filed the malicious prosecution action alleging that the voluntary dismissal without prejudice of case No. 3 constituted a termination in his favor on the merits. He asserted that case No. 3 had been filed prematurely because the appeal from case No. 2 was still pending. He alleged, however, that prematurity was not a technical defect, and thus, that the case had been dismissed on substantive, not procedural grounds. Defendants filed a demurrer, arguing that the cause of action could not be maintained because the termination of case No. 3 had not been on the merits. The trial court sustained the demurrer without leave to amend, concluding that case No. 3 had not terminated in the adjuster's favor because it had been voluntarily dismissed upon a technical defect.

The court of appeal affirmed, ruling that because the dismissal of case No. 3 was based solely upon procedural grounds, it did not reflect on the substantive merits, and therefore was not a favorable termination (*36 Cal. App. 4th 1848, 1856)* . To determine whether the termination by dismissal was favorable, the court analyzed whether the termination indicated the innocence of the defendant or simply involved technical, procedural, or other reasons not inconsistent with the defendant's guilt (*36 Cal. App. 4th 1848, 1855)* . The court found that when the attorney filed the complaint in case No. 3, he did so only because he misunderstood the effect of the pending appeal in case No. 2. The complaint in case No. 3 was filed to prevent a statute of limitations defense, and was then dismissed only because the procedural posture of the case prevented it from going forward. Because the dismissal of case No. 3 was based on a technical defect, that is, the pending appeal of case No. 2, the dismissal did not reflect on the substantive merits of the action (*36 Cal. App. 4th 1848, 1856)* . The court concluded that plaintiff's failure to plead facts sufficient to satisfy the favorable termination element of his malicious prosecution action constituted a failure to allege a cause of action for malicious prosecution (*36 Cal. App. 4th 1848, 1856)* .

[p] Stipulated Judgment Not Favorable Termination

In ***Dalany v. American Pac. Holding Corp.*** *(1996) 42 Cal. App. 4th 822, 50 Cal. Rptr. 2d 13* , plaintiff resigned as president of defendant corporation rather than sell his shares, and then sued the corporation to collect loans he had advanced it. The corporation alleged affirmative defenses, and filed a cross-complaint alleging various breaches of fiduciary duty by plaintiff. The parties entered into settlement negotiations, and reached an agreement which was culminated with a stipulated judgment in favor of plaintiff. Plaintiff then filed a malicious prosecution action, alleging that the cross-complaint in the prior action had been filed without probable cause. The corporation moved for summary judgment on the ground that the prior action had not been terminated in plaintiff's favor, and the trial court granted the motion.

On appeal, plaintiff contended that because the cross-complaint ended by way of a stipulated judgment in his favor instead of a stipulated dismissal that he had obtained a favorable termination. However, the court of appeal stated that cases involving settlements effected by way of dismissal do not turn on the method by which the parties choose to terminate the litigation, but on whether the termination was the result of an agreement of the parties. The court held that where termination is by way of an agreement of the parties, whether the parties use a dismissal or a stipulated judgment, there is ambiguity with respect to the merits of the proceeding and in general no favorable termination occurs for purposes of pursuing a malicious prosecution action (*42 Cal. App. 4th 822, 828-829)* . The court thus affirmed the summary judgment entered by the trial court.

[q] Dismissal for Failure to Comply with Discovery Orders Not Favorable Termination

In ***Pattiz v. Minye*** *(1998) 61 Cal. App. 4th 822, 71 Cal. Rptr. 2d 802* a an attorney brought an action for malicious prosecution against his former client, alleging that the client acted with malice and without probable cause in prosecuting her cross-complaint against the attorney. In the underlying action, the attorney had performed estate planning services, and billed the client for the money. She paid the bill and requested that he stop further work because she believed that his fees were "exorbitant" and "shocking." The attorney sued the client for the unpaid amounts. She

responded with a cross-complaint against the attorney for breach of fiduciary duty and recovery of money paid by mistake. During discovery, the attorney sought production of the client's family financial records and other documents related to his legal services. The prior year the attorney had returned these documents to the client in a file storage box. When the client produced the box during discovery, the attorney found the papers were in disarray and some had vanished. The client insisted that she had never seen the missing documents and did not know their whereabouts. An attorney representing the client in the cross claim, declared that she removed some of the papers from the box, believing that they were irrelevant or privileged. This attorney offered to produce the missing records but her offer was refused. The trial court resolved the discovery dispute by dismissing the client's cross-claim ruling that the actions of defendant cross-complainant were egregious and a misuse of discovery process by failing to even minimally comply with the court's orders compelling discovery. The lawyer proceeded to trial in his action for unpaid fees and received a judgment against the client. Subsequently, the lawyer brought an action for malicious prosecution, alleging that the client acted with malice and without probable cause in prosecuting her cross-complaint. He also alleged that the trial court's dismissal of the cross-complaint was a favorable termination to him. The client brought a motion for summary judgment, the trial court ruled that dismissal of the cross-complaint did not reflect on the merits and entered summary judgment for the client. The attorney appealed.

The court of appeal affirmed, holding that the trial court properly granted summary judgment because the attorney could not establish that he obtained a favorable termination of the cross-action. The dismissal due to the client's failure to comply with discovery orders did not reflect the innocence of the attorney or the or the lack of merits of the action (*61 Cal. App. 4th 822, 827*). According to the court, declarations submitted by the client, her daughter, and her attorney in the cross-complaint reflected that the client did not abandon her action or refuse to cooperate in discovery. Further, the trial court's ruling made no express findings concerning the merits of the cross complaint, it stated only that the client had "misused the discovery process and egregiously failed to comply with court-ordered discovery" (61 Cal. App. 4th 822, 828).

[r] Summary Judgment Based on Statute of Frauds Not Favorable Termination

In ***Hall v. Harker*** *(1999) 69 Cal. App. 4th 836, 82 Cal. Rptr. 2d 44 , overruled in part, Casa Herrera, Inc. v. Beydoun (2004) 32 Cal. 4th 336, 9 Cal. Rptr. 3d 97, 83 P.3d 497* , an investment fund company and its CEO brought a malicious prosecution action against the attorney of a former employee. The malicious prosecution claim was based on an underlying cross complaint alleging various causes of action filed by the attorney in response to a defamation action filed against his client by the investment company and its CEO. The underlying defamation action stemmed from letters written by the employee and his attorney and sent to various parties during a dispute between the employee and the company concerning alleged promises by the CEO that the employee would receive a bonus commission that was not otherwise mentioned in the employee's written employment contracts. Summary judgment was granted on the underlying cross complaint when the trial court ruled that the statute of frauds and the parol evidence rule precluded consideration of alleged oral statements contrary to those contained in the fully integrated written employment contracts. The investment company and its CEO eventually prevailed on their defamation action, and subsequently filed their malicious prosecution action. After a court trial, the plaintiffs prevailed on their malicious prosecution action and defendant appealed.

The court of appeal reversed. The court ruled first that the trial court's constant negative comments about attorneys and abuses in the practice of law demonstrated judicial bias sufficient to warrant reversal and remand for a new trial before a new judge (*69 Cal. App. 4th 836, 841-843)* . However, in lieu of remand, the court reversed and rendered on the basis that the disposition of the underlying cross complaint was not a favorable termination that would support a subsequent malicious prosecution action. Noting the rule that a termination to an underlying action that involves technical, procedural, or other reasons not substantive in nature will not support a malicious prosecution action, the court ruled that the statute of frauds was a purely procedural defense rendering certain types of contracts unenforceable, rather than invalid (*69 Cal. App. 4th 836, 844)* . The court then ruled that a disposition based on the parol evidence rule was also insufficient to support a malicious prosecution action. Although the court noted that the parol evidence rule was a rule

of substantive law and not just an evidentiary rule, the court concluded that while the rule may render evidence of collateral agreements legally irrelevant, the rule could not erase the actual existence of any such agreements. Thus, if such agreements actually existed, their legal irrelevancy as an evidentiary matter precludes a substantive legal determination of any culpability based on such collateral agreements. The court then held that this resolution was not a "favorable termination" sufficient to support a subsequent malicious prosecution action (*69 Cal. App. 4th 836, 844-845) , overruled in part, Casa Herrera, Inc. v. Beydoun (2004) 32 Cal. 4th 336, 9 Cal. Rptr. 3d 97, 83 P.3d 497* .

NOTE:

The California Supreme Court has overruled *Hall v. Harker* to the extent that the court of appeal held that application of the parol evidence rule to reach a judgment does not constitute a favorable termination for purposes of a subsequent malicious prosecution action [*Casa Herrera, Inc. v. Beydoun (2004) 32 Cal. 4th 336, 349, 9 Cal. Rptr. 3d 97, 83 P.3d 407* ; *see § 147.48[3][a]*].

[s] Dismissal Due to Lack of Standing Not Favorable Termination

In ***Hudis v. Crawford*** *(2005) 125 Cal. App. 4th 1586, 24 Cal. Rptr. 3d 50* , an attorney brought an action under the Elder Abuse statute on behalf of two clients who alleged that the two persons being sued were liable to the clients for elder abuse of the clients' deceased aunt. The action for elder abuse was dismissed, however, on the grounds that the clients were not the successors in interest to the decedent and therefore lacked standing to sue for her abuse. The persons sued for elder abuse then sued the clients and their attorney for malicious prosecution for bringing the elder abuse action. The attorney demurred to the complaint on the grounds that the dismissal of the underlying action for lack of standing did not constitute a favorable termination for purposes of bringing a malicious prosecution action. The trial court sustained the demurrer without leave to amend. The plaintiffs appealed.

The court of appeal affirmed. The court held that lack of standing is a jurisdictional defect that does not reflect on the merits of the action--that is, it does not reflect on the issue of whether or not the persons sued actually committed elder abuse against the decedent. The underlying dismissal demonstrated only that the attorney's clients were not the proper parties to bring the action. As such, the underlying dismissal did not constitute a favorable termination for purposes of supporting a malicious prosecution action (*125 Cal. App. 4th 1586, 1592)* .

[t] Adverse Termination More Favorable Than Settlement Offer Is Not Favorable Termination

The factual and procedural background of ***Staffpro, Inc. v. Elite Show Servs., Inc.*** *(2006) 136 Cal. App. 4th 1392, 39 Cal. Rptr. 3d 682* , is discussed in *§ 147.20[3][c]*. The plaintiff in that malicious prosecution action argued that although his business competitor had achieved some success on one cause of action in the underlying lawsuit, the cause of action was actually terminated favorably to the plaintiff because the changes to the plaintiff's business practices ordered by the court on that cause of action were narrower than changes that the plaintiff had offered to make as part of a settlement offer earlier in the proceedings. The court of appeal disagreed, noting the lack of legal authority for the plaintiff's argument, and held that a malicious prosecution plaintiff cannot meet the favorable termination requirement by demonstrating that although an underlying cause of action was actually terminated against that party, the details of the termination were more favorable to that party than the terms of a settlement offer made by that party earlier in the underlying action (*136 Cal. App. 4th 1392, 1400-1401*).

[u] Termination Based on Failure to Comply With Compulsory Cross-Complaint Rule Is Not Favorable Termination

In ***Drummond v. Desmarais*** *(2009) 176 Cal. App. 4th 439, 98 Cal. Rptr. 3d 183* , plaintiffs sued their former attorney for malicious prosecution based on two previous actions that the attorney had filed against them. In one of the previous actions, the attorney, who had represented plaintiffs in a will probate dispute, filed a petition in the probate court seeking attorney's fees he alleged that plaintiffs owed to him under his contract of representation in the probate matter, fees which plaintiffs had contested. While the attorney eventually succeeded in recovering at least some of the contested

fees, the fee petition filed with the probate court failed when an appellate court determined that the fee dispute was not properly filed with the probate court, but instead should have been brought as a compulsory cross-complaint in another lawsuit that the plaintiffs had already filed against the attorney for his alleged wrongdoing in handling the probate matters. The trial court granted the attorney's motion to strike under the anti-SLAPP statute, *Code Civ. Proc. § 425.16*, after concluding that plaintiffs could not demonstrate a probability of success on the merits of their malicious prosecution claim based on either of the attorney's underlying actions against them. Plaintiffs appealed.

The court of appeal affirmed. As to the malicious prosecution claim based on the underlying attorney fee petition, the court held that the dismissal of the fee petition for failure to bring the petition as a compulsory cross-complaint in plaintiff's earlier lawsuit was merely an interim decision and a technical disposition that did not reflect on the merits of the fee petition. As such, plaintiffs could not predicate a malicious prosecution action on that petition (*176 Cal. App. 4th 439, 450)* .

[v] Voluntary Dismissal of Malicious Prosecution Action Based on Adverse Appellate Decision in Underlying Action is Not Favorable Termination

The factual and procedural background of ***Drummond v. Desmarais*** *(2009) 176 Cal. App. 4th 439, 98 Cal. Rptr. 3d 183* , is described in subsection [u], *above*. In addition to plaintiffs' malicious prosecution claim based on their former attorney's fee petition, plaintiffs also based a malicious prosecution claim on an earlier malicious prosecution lawsuit that the attorney had filed against them after they had objected to his petition seeking to have his fees paid out of the disputed estate. Plaintiffs appealed the trial court's decision to strike this cause of action under *Code Civ. Proc. § 425.16*.

The court of appeal affirmed. The court first concluded that the evidence was sufficient to support a jury finding that the attorney had filed the underlying malicious prosecution action with malice and without probable cause, as that malicious prosecution action had been based solely on plaintiffs' objection to his fee demands and he could not have proven that plaintiffs had acted with malice in doing so (*176 Cal. App. 4th 439, 451-455)* . However, the court also concluded that plaintiffs could not prove a favorable termination of the attorney's underlying malicious prosecution action. The attorney's underlying malicious prosecution action had been stayed pending appeal of the dispute over the fee petition that had been filed with the probate court. Within days after the appellate court ruled that the petition was improperly filed in the probate court, the attorney had voluntarily dismissed his malicious prosecution action. Faced with those circumstances, the court of appeal held that if a malicious prosecution action is stayed on the grounds that an appeal from the underlying judgment is pending, and the underlying appeal is then resolved adversely to the malicious prosecution plaintiff, a voluntary dismissal of the malicious prosecution action by that plaintiff in response to losing the underlying appeal is considered a technical disposition and not a termination on the merits for purposes of any subsequent malicious prosecution action that might be brought by the defendant in the first malicious prosecution action. As such, plaintiffs could not prove a favorable termination of that earlier malicious prosecution action for purposes of supporting their own malicious prosecution action (*176 Cal. App. 4th 439, 459-460)* .

[4] Additional Authorities

[a] Favorable Termination Requirement

Lackner v. La Croix (1979) 25 Cal. 3d 747, 749, 159 Cal. Rptr. 693, 602 P.2d 393 , is discussed in *§ 147.20[3][i]*.

In *De La Pena v. Wolfe (1986) 177 Cal. App. 3d 481, 223 Cal. Rptr. 325* , plaintiff was originally sued by a corporation for money owed and the action was dismissed for failure of the corporation to answer interrogatories. Shortly thereafter, an attorney who was recently hired by the corporation to pursue collections, believing the action was ongoing, filed a substitution of attorney form and an at-issue memorandum in the case. Plaintiff then brought a malicious prosecution action against the attorney and others. The trial court sustained summary judgment in favor of the

attorney, and plaintiff appealed. The court of appeal stated the rule that a favorable termination is one that tends to indicate the innocence of the accused, and while the termination need not be one that follows a trial on the merits, it must reflect the merits of the underlying action (*177 Cal. App. 3d 481, 484)* . The court affirmed the trial court's summary judgment, holding that a favorable termination did not exist, because the dismissal did not reflect the merits of the underlying action under the facts of the case (*177 Cal. App. 3d 481, 484-486)* .

In *Sierra Club v. Superior Court (1985) 168 Cal. App. 3d 1138, 214 Cal. Rptr. 740* , an environmental organization brought a petition for administrative mandate challenging the California Coastal Commission's decision regarding a proposed development and expansion of certain property. The superior court ordered the matter remanded for reconsideration with respect to the correctness of the standard used to assess the evidence, and ultimately denied the petition. The owners of the property then brought an action against the organization for malicious prosecution; defendant unsuccessfully moved for summary judgment on the ground, among others, that plaintiffs could not establish the element of favorable termination. The court of appeal reversed, holding that defendant essentially prevailed on the procedural challenge, even though its petition was ultimately denied (*168 Cal. App. 3d 1138, 1144-1147)* .

Minasian v. Sapse (1978) 80 Cal. App. 3d 823, 145 Cal. Rptr. 829 , is discussed in *§ 147.40[3][b]*. In the course of holding that dismissal for want of prosecution is a favorable termination, the court of appeal noted that favorable termination is one of the requirements for a cause of action for malicious prosecution (*80 Cal. App. 3d 823, 825)* .

In *Caraker v. Webster (1938) 24 Cal. App. 2d 300, 74 P.2d 1048* , plaintiff's complaint for malicious prosecution was against persons who had cited him before the Civil Service Commission under a charge of insubordination, which proceedings resulted in his discharge as hog ranch operator at a state hospital. The trial court dismissed the action after plaintiff refused to amend his fourth amended complaint. The court of appeal upheld the dismissal and judgment against plaintiff. It held that the complaint showed on its face that the proceeding against plaintiff had been successful and thus the malicious prosecution proceeding amounted to a collateral attack on the judgment that could not be sustained in the absence of allegations of extrinsic fraud (*24 Cal. App. 2d 300, 301)* .

[b] Consideration Should Be Given to Judgment as Whole

In ***Murdock v. Gerth*** *(1944) 65 Cal. App. 2d 170, 150 P.2d 489* , the underlying action concerned a series of partnership dissolution contracts entered into between Murdock and Wolf. Among the contracts were agreements dated June 21, 1937, and July 6, 1937. Wolf, through his attorney (Gerth), filed suit against Murdock on the contract dated June 21, 1937, seeking $5,050 in damages. After trial of the action, the court entered judgment in favor of Wolf, awarding him $200 in damages. The judgment, however, was not based on the contract dated June 21, 1937, but on the contract dated July 6, 1937, which Wolf neither pleaded nor relied on in his complaint. Murdock filed suit for malicious prosecution, alleging that Gerth sought maliciously to enforce the provisions and terms of the contract dated June 21, 1937. Murdock prevailed in the trial court, and Gerth appealed.

The court of appeal reversed. The court stated that in determining whether a proceeding alleged to have been maliciously prosecuted has been terminated in favor of the party injured by that proceeding, consideration must be given to the judgment as a whole. Holding otherwise would defeat the purpose of the rule that seeks to prevent collateral attack on judgments of duly constituted courts. Therefore, the decree or judgment itself in the former action is the criterion by which to determine who was the successful party in the former action. In this particular case, Wolf actually obtained a judgment against Murdock for $200. Although the sum was less than the damages requested, this judgment was conclusive proof that Murdock had an obligation to Wolf that was due and unpaid. The situation was not altered by the fact that the trial court did not adopt Wolf's theory in the prior action. The fact remains that the judgment, framed on the pleadings filed and the issues raised by those pleadings, was not in favor of Murdock (*65 Cal. App. 2d 170, 177*).

[c] Conviction Not Favorable Termination

In *Andrews v. Young (1937) 21 Cal. App. 2d 523, 69 P.2d 891* , plaintiff had pled guilty to charges of contributing to the delinquency of a minor and had been given a suspended sentence. He sued the court and its officers for malicious prosecution. The trial court sustained demurrers to his complaint and dismissed the action. On appeal, the court upheld the dismissal. It held that the fact that defendant was convicted and the judgment was final precluded a collateral attack on the judgment by an action for malicious prosecution. It stated that it was a prerequisite to the maintenance of a cause of action for malicious prosecution that the plaintiff affirmatively allege a favorable termination of the underlying proceeding (*21 Cal. App. 2d 523, 526)* .

[d] Action on Which Complaint Based Not Yet Terminated

In *Jenkins v. Pope (1990) 217 Cal. App. 3d 1292, 266 Cal. Rptr. 557* , an attorney sued her former client for various causes of action, including fraud. The attorney later amended her complaint to delete the fraud cause of action, and the client cross complained, alleging, inter alia, malicious prosecution of the deleted fraud cause of action. At the time the client cross complained, the attorney's other causes of action against the client were still pending. The trial court sustained the attorney's demurrer to the cross complaint without leave to amend for failure to state a cause of action and dismissed it. The court of appeal affirmed the judgment, holding that the deletion of the fraud cause of action did not constitute a favorable termination for purposes of malicious prosecution. The court held that the client could not complain for malicious prosecution with respect to the deleted cause until the entire proceeding against him had reached a final termination in his favor (*217 Cal. App. 3d 1292, 1298-1301)* .

In *Friedman v. Stadum (1985) 171 Cal. App. 3d 775, 217 Cal. Rptr. 585* , plaintiff sued defendant for malicious prosecution and abuse of process. Defendant demurred on the ground that the action was premature because an appeal was pending on the action on which plaintiff's suit was based. The trial court sustained the demurrer without leave to amend, and plaintiff appealed. The court of appeal affirmed, holding that a plaintiff in a civil malicious prosecution action must establish that the underlying proceeding terminated in his or her favor. The court rejected plaintiff's contention that he received a favorable termination of the underlying action when a judgment of dismissal was entered, notwithstanding defendant's appeal from the judgment. The court held that the general rule is that a civil action for malicious prosecution will not lie while an appeal in the underlying action is pending (*171 Cal. App. 3d 775, 778)* . Thus, there was no favorable termination of the underlying action at the time plaintiff brought his suit (*171 Cal. App. 3d 775, 779)* .

NOTE:

Making a showing in support of a demurrer comparable to the showing made in the *Friedman* case will not necessarily result in obtaining dismissal. In *Feld v. Western Land & Development Co. (1992) 2 Cal. App. 4th 1328, 1336, 4 Cal. Rptr. 2d 23* , the court recommended, in dictum, that when a malicious prosecution action is brought while appeal is pending in the underlying action, the malicious prosecution action should be abated rather than dismissed [*see §§ 147.30[3][b]* and *147.30[3][d*]].

In *Baker v. Littman (1956) 138 Cal. App. 2d 510, 292 P.2d 595* , plaintiff filed an action for attorney's fees. Certain defendants cross complained for malicious prosecution. Plaintiff demurred to the cross complaints and they were dismissed. Cross complainants appealed and the court of appeal upheld the dismissal. It held that one of the essential elements of a cause of action for malicious prosecution is favorable termination of the underlying action and that cross complainants could not establish such termination when the underlying action was still pending (*138 Cal. App. 2d 510, 514)* .

[e] Judgment Based on Statute of Limitations Not Favorable Termination

In *Drasin v. Jacoby & Meyers (1984) 150 Cal. App. 3d 481, 197 Cal. Rptr. 768* , the trial court sustained an attorney's demurrer to an action for malicious prosecution based on an earlier suit for legal malpractice. The malpractice action

had been dismissed on the ground that it was barred by the statute of limitations. The court of appeal affirmed the judgment sustaining the demurrer, citing *Lackner v. La Croix (1979) 25 Cal. 3d 747, 159 Cal. Rptr. 693, 602 P.2d 393* [*see § 147.20[3][i]*], for the rule that a bar raised by a statute of limitations does not reflect on the merits of the action and thus is not a favorable termination for purposes of a subsequent malicious prosecution action (*150 Cal. App. 3d 481, 484)* .

[f] Dismissal of Action Not Necessarily Favorable Termination

In *Zeavin v. Lee (1982) 136 Cal. App. 3d 766, 186 Cal. Rptr. 545* , two physicians sued an attorney for malicious prosecution, based on a prior malpractice action filed by the attorney on behalf of a client. The complaint alleged that the prior suit was dismissed with prejudice because the client refused to cooperate with her attorney or to make discovery. A general demurrer to the malicious prosecution action was sustained without leave to amend, and plaintiffs appealed. The court of appeal affirmed, holding that the allegation relating to the prior dismissal did not constitute a favorable termination as required for a malicious prosecution action because it did not reflect the plaintiffs' innocence or the prior action's lack of merit (*136 Cal. App. 3d 766, 771)* .

In *Oppenheimer v. Tamblyn (1959) 167 Cal. App. 2d 158, 334 P.2d 152* , plaintiff sued the city attorney for malicious prosecution of a traffic offense. The complaint alleged that the action was dismissed after trial, and the trial court sustained a demurrer without leave to amend. On appeal, the court of appeal reversed. It held, relying on the Supreme Court case of *Jaffe v. Stone (1941) 18 Cal. 2d 146, 114 P.2d 335* , that the allegation of dismissal after trial was insufficient because it did not necessarily indicate the innocence of the plaintiff. It ruled however that plaintiff should have been allowed to amend because he might have been able to allege that the dismissal was a favorable termination by showing the reason for the dismissal (*167 Cal. App. 2d 158, 161-162)* .

Oppenheimer v. Tamblyn (1958) 162 Cal. App. 2d 293, 327 P.2d 574 , was an earlier appeal in the same case as *Oppenheimer v. Tamblyn (1959) 167 Cal. App. 2d 158, 334 P.2d 152* . Plaintiff had alleged that the complaint against him had been dismissed, and the trial court sustained a demurrer. The court of appeal reversed the judgment for defendant. It held that the allegation of dismissal was insufficient because it did not indicate favorable termination but that plaintiff should have been given leave to amend (*162 Cal. App. 2d 293, 295-296)* .

[g] Dismissal Based on Negotiation, Settlement, or Compromise Not Favorable Termination

In *Haight v. Handweiler (1988) 199 Cal. App. 3d 85, 244 Cal. Rptr. 488* , the plaintiff in the underlying action voluntarily dismissed a defendant from the action as a condition of settlement with another defendant. The court held that such a termination did not necessarily reflect the plaintiff's opinion that his action against the dismissed defendant lacked merit, and thus did not qualify as a termination in the dismissed defendant's favor in the context of that defendant's subsequent malicious prosecution action (*199 Cal. App. 3d 85, 89)* .

[h] Voluntary Dismissal Not Favorable Termination When Based on Litigant's Motivation to Avoid Further Costs, Attorney's Fees, and Litigation

In *Contemporary Services Corp. v. Staff Pro Inc. (2007) 152 Cal. App. 4th 1043, 61 Cal. Rptr. 3d 434* , plaintiff company sued a competitor for unfair business practices. Three years later, the competitor sued plaintiff for defamation and unfair competition. Both actions came up for trial at the same time, and because the first action was reaching its 5-year limit for prosecution, it could not be continued. Even though the competitor continued to believe in the merits of its own lawsuit, because it lacked the resources to both prepare its defense in the first action and put together a case in its own lawsuit, the competitor chose to voluntarily dismiss its own lawsuit without prejudice. Plaintiff subsequently sued the competitor for malicious prosecution, abuse of process, defamation, and interference with economic advantage stemming from the underlying lawsuit and related activity undertaken by the competitor. The trial court granted the competitor's motion to strike plaintiff's action under *Code Civ. Proc. § 425.16*, the anti-SLAPP statute, and the court of

appeal affirmed. The court held that the statute applied to all of plaintiff's causes of action, and plaintiff failed to show a probability of success on the merits. As to the malicious prosecution cause of action, plaintiff could not show that the underlying action brought by the competitor was terminated in plaintiff's favor for purposes of supporting a subsequent action for malicious prosecution. While preparing a defense to plaintiff's earlier claims, the competitor voluntarily dismissed the underlying action in order to save the cost and resources of further litigation on its own claim. The competitor continued to believe in the merits of its underlying claim and in fact had suffered no adverse rulings in that litigation that would create doubt as to the validity of the action. As such, the voluntary dismissal did not reflect on the merits of the claim and could not be used to support a malicious prosecution action (*152 Cal. App. 4th 1043, 1056-1057)* .

[i] Voluntary Dismissal Based On Technical Grounds Not Favorable Termination

In *Robbins v. Blecher (1997) 52 Cal. App. 4th 886, 60 Cal. Rptr. 2d 815* , plaintiff brought an action for malicious prosecution based on defendant's filing of an alter ego action against plaintiff to enforce a judgment defendant had against a corporation. After the underlying judgment was reversed on appeal, defendant voluntarily dismissed its alter ego action, and plaintiff initiated its malicious prosecution action. Defendant demurred on the ground that plaintiff could not sufficiently allege the element of favorable termination. The trial court sustained the demurrer, and an order of dismissal was filed. The court of appeal affirmed, noting that it had reasoned in *Eells v. Rosenblum (1995) 36 Cal. App. 4th 1848, 43 Cal. Rptr. 2d 323* , that the key to whether the termination of an underlying action is favorable for purposes of a malicious prosecution action is whether the termination reflects on the underlying defendant's innocence (*52 Cal. App. 4th 886, 893)* . The court held that a voluntary dismissal on technical grounds, such as lack of jurisdiction, laches, the statute of limitations or prematurity, does not constitute a favorable termination because it does not reflect on the substantive merits of the underlying claim. Since defendant's dismissal of its alter ego action did not reflect on the merits of the action, but only on its mootness, it did not constitute a favorable termination on the merits (*52 Cal. App. 4th 886, 894-895)* .

[j] Stipulated Judgment Not Favorable Termination

In *Ferreira v. Gray, Cary, Ware & Freidenrich (2001) 87 Cal. App. 4th 409, 104 Cal. Rptr. 2d 683* , the plaintiff brought a malicious prosecution action against a law firm, based on its role in filing a cross-complaint against the plaintiff in the plaintiff's underlying action against the firm's clients. In the underlying action, the jury found for the plaintiff in large part, awarding him $75,982 in damages, although they also found for the defendants on a few claims brought in the cross-complaint and awarded them nominal damages. Shortly after judgment on the verdict was entered, the parties agreed to settle the litigation, with the plaintiff agreeing to accept a nominal payment in return for a waiver of appeal. An amended judgment was entered shortly thereafter based on the terms of the negotiated settlement. Eight months later, the plaintiff filed his malicious prosecution action against the law firm, and the trial court granted summary judgment for the law firm on the grounds that the underlying action had not terminated in favor of the plaintiff. The court of appeals agreed, holding that if the underlying litigation ends through a stipulated judgment following a negotiated settlement, there is no favorable termination for purposes of pursuing a malicious prosecution action. Even though the jury had returned a verdict in favor of the plaintiff, the litigation terminated as a result of the negotiated settlement, not the judgment entered initially on the jury verdict (*87 Cal. App. 4th 409, 413)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsTortsIntentional TortsGeneral OverviewTortsIntentional TortsMalicious ProsecutionGeneral Overview

California Points & Authorities

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 147 MALICIOUS PROSECUTION AND ABUSE OF PROCESS
PART II. FORMS
A. Malicious Prosecution

14-147 California Points & Authorities § 147.21

§ 147.21 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] for Malicious Prosecution--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Failure to Allege Malice

[1] FORM

[*Caption. See § 147.20*].

A COMPLAINT THAT DOES NOT ALLEGE MALICE ON THE PART OF THE DEFENDANT DOES NOT STATE A CAUSE OF ACTION FOR MALICIOUS PROSECUTION.

A. Objection by Demurrer. [*See § 147.20, Paragraph A*].

B. Malice Requirement. Pleading of malice on the part of the defendant is an essential element of a cause of action for malicious prosecution (*Gogue v. MacDonald (1950) 35 Cal. 2d 482, 486, 218 P.2d 542*).

[*Optional*] **C. No Malice in Reporting Facts to Authorities.** A cause of action for malicious prosecution is not stated when the complaint alleges that the defendant reported the facts to authorities, and took no active part in the arrest, and the complaint does not allege bad faith in making the report (*Gogue v. MacDonald (1950) 35 Cal. 2d 482, 487, 218 P.2d 542*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a general demurrer to a complaint for malicious prosecution when the demurrer asserts that the complaint fails to state a cause of action because it does not allege malice.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, these points may be used to support a motion for summary judgment [*see Code Civ. Proc. § 437c*] based on the contention that defendant did not act with malice.

[c] Related Pleading and Practice Forms

For a form of affirmative defense based on an honest statement of facts to the authorities, see California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process* (Matthew Bender).

[3] Discussion of Authorities

[a] Malice Requirement

In ***Gogue v. MacDonald*** *(1950) 35 Cal. 2d 482, 218 P.2d 542* , the complaint alleged that defendant had gone before a justice of the peace and complained that plaintiff had removed himself and his belongings from defendant's cottage without paying rent. The justice of the peace had issued a complaint and had plaintiff arrested. The charges were later dismissed because the facts stated did not constitute a criminal offense. A demurrer for failure to state a cause of action was sustained to the malicious prosecution complaint and plaintiff appealed from the judgment for defendant. The Supreme Court affirmed. It held that malice was an essential element of a cause of action for malicious prosecution and must be pleaded and proved. It then concluded that a cause of action for malicious prosecution is not stated when the complaint does not allege malice and merely alleges that the defendant stated the facts of the case to the authorities and took no part in the arrest, even though the facts stated to the authorities did not constitute a public offense (*35 Cal. 2d 482, 484-487)* .

[b] No Malice in Reporting Facts to Authorities

Gogue v. MacDonald *(1950) 35 Cal. 2d 482, 218 P.2d 542* , is discussed in *§ 147.21[3][a]*.

[4] Additional Authorities

[a] Malice Requirement

Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc. (1986) 42 Cal. 3d 1157, 1169, 232 Cal. Rptr. 567, 728 P.2d 1202 , is discussed in *§ 147.70[4][a]*.

The issue in *Maxon v. Security Ins. Co. (1963) 214 Cal. App. 2d 603, 29 Cal. Rptr. 586* , was whether an insurance policy required the insurance company to provide a defense against an action for malicious prosecution. In the course of deciding that there was no coverage, the court of appeal stated that the chief element of a cause of action for malicious prosecution is malice, which requires an improper motive or purpose (*214 Cal. App. 2d 603, 615)* .

[b] No Malice in Reporting Facts to Authorities

In *Gomez v. Garcia (1980) 112 Cal. App. 3d 392, 169 Cal. Rptr. 350* , plaintiff was a former employee of a nonprofit

corporation of which defendants were officers. Plaintiff had attended an employee's meeting and was asked to leave. One defendant called police who advised him that the only way they could remove plaintiff was if a citizen's arrest was made. They advised the defendant how to make the citizen's arrest and to state that it was for disturbing the peace. Defendant made the citizen's arrest and later signed a misdemeanor complaint for disturbing the peace against plaintiff. After plaintiff was acquitted, he filed the malicious prosecution action. After a jury verdict for plaintiff, defendants appealed. The court of appeal reversed. It held that in the absence of any evidence that the defendant who made the citizen's arrest did anything more than truthfully recount his observations to the police and prosecutor, the evidence was insufficient to establish that he acted with malice and without probable cause (*112 Cal. App. 3d 392, 399-400)* . The court noted that the fact that plaintiff was acquitted of disturbing the peace had no bearing on the validity of the arrest. It was the advice of the police to charge plaintiff with that crime and, even though he was not guilty of that crime, his own testimony established that he was guilty of the crime of trespass (*112 Cal. App. 3d 392, 400)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsTortsIntentional TortsMalicious ProsecutionGeneral OverviewTortsIntentional TortsMalicious ProsecutionElementsMalice

California Points & Authorities

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 147 MALICIOUS PROSECUTION AND ABUSE OF PROCESS
PART II. FORMS
A. Malicious Prosecution

14-147 California Points & Authorities § 147.22

§ 147.22 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] for Malicious Prosecution--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--No Action Prosecuted by Defendant

[1] FORM

[*Caption. See § 147.20*].

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION FOR MALICIOUS PROSECUTION BECAUSE IT DOES NOT ALLEGE THAT DEFENDANT PROSECUTED AN ACTION AGAINST PLAINTIFF.

A. Objection by Demurrer. [*See § 147.20, Paragraph A*].

B. Prosecution of Action or Proceeding Is Required. To state a cause of action for malicious prosecution, plaintiff must allege the prosecution of an action or proceeding by defendant against plaintiff (*Adams v. Superior Court (1992) 2 Cal. App. 4th 521, 528, 3 Cal. Rptr. 2d 49* ; *Rutherford v. Johnson (1967) 250 Cal. App. 2d 316, 319-320, 58 Cal. Rptr. 546*).

[*Optional*] **C. Subsidiary Procedure Within Lawsuit Insufficient.** A subsidiary procedural action within a lawsuit is not an "action or proceeding" that can be the basis for a malicious prosecution action (*Adams v. Superior Court (1992) 2 Cal. App. 4th 521, 528, 3 Cal. Rptr. 2d 49*).

[*Optional*] **D. Causing Investigation Is Not Sufficient.** Defendant's actions in causing an administrative body to investigate an incident and plaintiff's participation therein are not alone a sufficient basis for an action for malicious prosecution (*Lebbos v. State Bar (1985) 165 Cal. App. 3d 656, 670, 211 Cal. Rptr. 847* ; *Brody v. Montalbano (1978) 87 Cal. App. 3d 725, 736, 151 Cal. Rptr. 206*).

[*Optional*] **E. Filing Request for Admissions Is Not Sufficient.** Filing a request for admissions is not an ancillary proceeding sufficient to support a complaint for malicious prosecution (*Twyford v. Twyford (1976) 63 Cal. App. 3d 916, 922, 134 Cal. Rptr. 145*).

[*Optional*] **F. Application for License and Resulting Comparative Hearing Not Sufficient.** Filing an application for a license, even if the result is a comparative hearing that denies license to another, cannot be basis for malicious prosecution action (*Stolz v. Wong Communications Limited Partnership (1994) 25 Cal. App. 4th 1811, 1820-1822, 31 Cal. Rptr. 2d 229*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a general demurrer to a complaint for malicious prosecution when the demurrer asserts that the complaint fails to state a cause of action because it fails to allege the prosecution of an action against defendant.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, these may be used to support a motion for summary judgment [*see Code Civ. Proc. § 437c*] based on the contention that there was no prosecution of an action against defendant.

[c] Opposing Memoranda

The points in *§ 147.41* may be used in an appropriate case to oppose a demurrer supported by this memorandum.

[3] Discussion of Authorities

[a] Prosecution of Action or Proceeding Is Required

In ***Adams v. Superior Court*** *(1992) 2 Cal. App. 4th 521, 3 Cal. Rptr. 2d 49* , petitioners were attorneys representing clients in a civil lawsuit pending against real party in interest. During the course of this lawsuit, petitioners attempted to intervene in criminal cases in two separate counties in which real party was attempting to have her prior felony convictions reduced to misdemeanors or expunged. After real party was successful in having one conviction reduced to a misdemeanor and the other expunged, petitioners filed motions for reconsideration in both cases, seeking to bring to the attention of the respective courts real party's alleged conduct in the fraudulent real estate sale that was the subject of the litigation between their clients and real party. Petitioners' motions were denied in both courts. Real party then commenced an action against petitioners for malicious prosecution and abuse of process. In her malicious prosecution cause of action, she contended that petitioners' motive in intervening in the criminal cases was their wish to preserve the felony convictions to impeach her testimony in the civil lawsuit. Petitioners demurred to the malicious prosecution cause of action, and the trial court sustained the demurrer with leave to amend. Petitioners then sought a writ of mandate from the court of appeal to compel the trial court to sustain their demurrer without leave to amend.

The court of appeal issued the writ. The court noted that it issued the writ because potential destruction of the professional relationship between petitioners and their clients in ongoing litigation justified interlocutory writ review (

2 Cal. App. 4th 521, 525) . The court then held that the tort of malicious prosecution requires the initiation of a full-blown action as well as its favorable termination for the malicious prosecution plaintiff, and that subsidiary procedural actions within a lawsuit, such as an application for a restraining order or for a lien, will not support a claim of malicious prosecution. The court stated that the reason courts have refused to ground malicious prosecution suits on actions taken within pending litigation is that permitting suits on these bases would disrupt the ongoing lawsuit by injecting tort claims against the parties' lawyers and because the appropriate remedy for actions taken within a lawsuit lies in the invocation of the court's broad powers to control judicial proceedings. The court concluded that petitioners' mere making of motions to reconsider in the criminal cases was not an independent action and could not constitute initiation of a lawsuit against real party for purposes of defining the tort of malicious prosecution. The trial court therefore should have sustained the demurrer to that claim without leave to amend (*2 Cal. App. 4th 521, 528)* .

In ***Rutherford v. Johnson*** *(1967) 250 Cal. App. 2d 316, 58 Cal. Rptr. 546* , the complaint for malicious prosecution was based on an affidavit filed by defendant in a divorce action. The affidavit charged that plaintiff and defendant's former wife had a relationship which made her unfit for child custody. Plaintiff was not a party in the divorce proceedings. A demurrer was sustained and the action for malicious prosecution was dismissed. Plaintiff appealed. The court first held that the statute of limitations had run whether the action was for malicious prosecution or for libel (*250 Cal. App. 2d 316, 318-319)* . The court then held that a cause of action for malicious prosecution was not stated because the complaint did not allege that an action had been brought against plaintiff, or the favorable termination of such an action (*250 Cal. App. 2d 316, 320)* .

[b] Subsidiary Procedure Within Lawsuit Insufficient

The facts and procedural background of ***Adams v. Superior Court*** *(1992) 2 Cal. App. 4th 521, 3 Cal. Rptr. 2d 49* , are discussed in *§ 147.22[3][a]*. The court concluded that defendant's motions to reconsider, made in the criminal cases that had already been prosecuted, did not constitute an action or proceeding that could be the basis of a malicious prosecution action (*2 Cal. App. 4th 521, 528)* .

[c] Causing Investigation Not Sufficient

In ***Lebbos v. State Bar*** *(1985) 165 Cal. App. 3d 656, 211 Cal. Rptr. 847* , defendant county bar association received 24 complaints from clients of plaintiff attorney concerning fee disputes. It forwarded the complaints to defendant State Bar without any direct requests to do so by the complainants and informed the complainants of its action. The State Bar initiated an investigation. After an informal hearing with a referee, plaintiff was exonerated of any misconduct. Plaintiff then filed a complaint against defendants county bar association and State Bar, among others, alleging numerous causes of action, including one for malicious prosecution. Defendants demurred to the initial complaint and to the complaint as subsequently amended. The trial court sustained without leave to amend demurrers to the third amended complaint and entered judgment in favor of defendants. Plaintiff appealed from the judgment.

As to the malicious prosecution cause of action, the court of appeal affirmed the judgment on the ground that the complaint did not state a prima facie cause of action for malicious prosecution. The court held that none of the proceedings that occurred constituted prosecution within the meaning of a malicious prosecution action. The court further held that investigations that do not lead to initiation of proceedings before an official body or administrative board having the power to take action adversely affecting legally protected interests of the accused are not a sufficient basis on which to found an action for malicious prosecution. Because the State Bar investigation and proceedings were informal, to determine whether there was sufficient evidence to issue an order to show cause in attorney disciplinary proceedings, and ended in the investigatory stage without additional proceedings, the court held that no "prosecution" had taken place (*165 Cal. App. 3d 656, 670-671)* .

The complaint in ***Brody v. Montalbano*** *(1978) 87 Cal. App. 3d 725, 151 Cal. Rptr. 206* , was based on the actions of parents of boys involved in a scuffle at school in which a boy was injured. Plaintiff was a vice-principal of the school,

and he had determined who the culprits were and had them arrested without calling their parents. The parents filed a complaint about plaintiff's actions with the school board. The school board conducted a formal investigation but determined that the principal had acted in conformance with the rules, although it also agreed with some of the parents' contentions. Plaintiff vice-principal's complaint was based on libel and malicious prosecution. After a trial, defendant parents' motion for a directed verdict was granted and plaintiff appealed. The court of appeal affirmed. With regard to malicious prosecution, it held that there was not sufficient evidence of malicious prosecution because no formal proceedings were ever initiated against plaintiff. The parents' complaint only led to an investigation by the board, which in essence vindicated plaintiff. Thus, there was no basis for an action for malicious prosecution (*87 Cal. App. 3d 725, 735-737)* .

[d] Filing Request for Admissions Is Not Sufficient

In ***Twyford v. Twyford*** *(1976) 63 Cal. App. 3d 916, 134 Cal. Rptr. 145* , the malicious prosecution complaint was based on a request for admissions in a dissolution proceeding. The request asked plaintiff to admit he had forged his ex-wife's signature to an income tax refund check. A demurrer to the complaint for malicious prosecution was sustained without leave to amend and plaintiff appealed. The court of appeal affirmed, holding that filing a request for admissions is not the type of ancillary proceedings that will support an action for malicious prosecution; it is not a separate proceeding and has no independent existence (*63 Cal. App. 3d 916, 922)* . The court noted that the type of ancillary proceedings on which a complaint for malicious prosecution can be based are those which have an independent basis, such as a cross complaint, an insanity proceeding, or a will contest (*63 Cal. App. 3d 916, 921-922)* .

[e] Application for License and Resulting Comparative Hearing Not Sufficient

In ***Stolz v. Wong Communications Limited Partnership*** *(1994) 25 Cal. App. 4th 1811, 31 Cal. Rptr. 2d 229* , plaintiff had been the holder of a Federal Communications Commission (FCC) license to operate a radio station at a specific frequency. Defendant filed an application with the FCC to compete with plaintiff for that license at the time the license was due for renewal. After the FCC awarded the license to plaintiff, plaintiff instituted an action for malicious prosecution, abuse of process, and interference with economic relations, based on the filing by defendant. The trial court granted defendant's motion for summary judgment, and plaintiff appealed.

The court of appeal affirmed, holding that the application was not an action or proceeding instituted against plaintiff (*25 Cal. App. 4th 1811, 1820)* . The nature of an application for an FCC license, even if the granting of the application would deny the license to another, requires the FCC to consider the public interest and how it would best be served between the applicants. The relative weighing of merits between two applicants is not the type of accusatory proceeding that can be the basis of a malicious prosecution action (*25 Cal. App. 4th 1811, 1820-1822)* .

[4] Additional Authorities

[a] Causing Investigation Is Not Sufficient

In *Rodas v. Spiegel (2001) 87 Cal. App. 4th 513, 104 Cal. Rptr. 2d 439* , the plaintiff was a hardwood flooring installer who brought an action against an evaluator hired by an insurance company to evaluate and submit a report reviewing and providing repair estimates for work done by the plaintiff at a home insured by the insurance company. The lawsuit included a cause of action for malicious prosecution based on the evaluator's report, submitted to the Contractors' State License Board, which found that the homeowner suffered damage caused by improper floor installation. The plaintiff alleged that the conclusions of the report were false, that the damage was caused by water from a roof leak, and that the homeowner and the insurer knew of the leak and the cause of the damage, but concealed it. The trial court dismissed the complaint as to the evaluator, and the court of appeal affirmed. As to the cause of action for malicious prosecution, the court of appeal held that if a state licensing board is empowered and directed to conduct an investigation of complaints from the public, a person alleged to have filed a false report with the board that results in the filing of charges against a licensee is not subject to an action for malicious prosecution. The court noted that it is the State License Board, rather

than the evaluator, that actually initiates the citation proceeding based on its investigation of the charges (*87 Cal. App. 4th 513, 520-521)* .

In *Imig v. Ferrar (1977) 70 Cal. App. 3d 48, 138 Cal. Rptr. 540* , the cause of action for malicious prosecution was based on a complaint filed by defendant with the police about the actions of plaintiff police officer during an altercation at a store. The court of appeal reversed the trial court's judgment dismissing the action after sustaining defendant's demurrer without leave to amend for failure to state a cause of action. The court held that defendant's complaint had only led to an investigation by the police department but had not resulted in formal charges against plaintiff. Therefore, it was insufficient as the basis of a cause of action for malicious prosecution (*70 Cal. App. 3d 48, 58-59)* . The court held, however, that sometimes the invasion of a plaintiff's legally protected interest occurs without a formal hearing, such as when the plaintiff must initiate action to secure reinstatement of a position or license. Therefore, plaintiff should have been given leave to amend the complaint to allege, if he could, that he was suspended pending the investigation and that the investigation was required to reinstate plaintiff. These allegations would state a cause of action (*70 Cal. App. 3d 48, 60)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsTortsIntentional TortsMalicious ProsecutionGeneral OverviewTortsIntentional TortsMalicious ProsecutionDefensesTortsIntentional TortsMalicious ProsecutionElementsGeneral Overview

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14-147 California Points & Authorities § 147.23

§ 147.23 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] for Malicious Prosecution--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Action in Small Claims Court Not Adequate Basis

[1] FORM

[*Caption. See § 147.20*].

A COMPLAINT FOR MALICIOUS PROSECUTION DOES NOT STATE A CAUSE OF ACTION WHEN IT IS BASED ON THE FILING OF A COMPLAINT IN SMALL CLAIMS COURT.

A. Objection by Demurrer [*See § 147.20, Paragraph A*].

B. Small Claims Action Is Insufficient Basis. Filing an action in small claims court is not a sufficient basis for an action for malicious prosecution because allowing such actions would frustrate the purposes of small claims courts (*Pace v. Hillcrest Motor Co. (1980) 101 Cal. App. 3d 476, 478-479, 161 Cal. Rptr. 662*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a general demurrer to a complaint for malicious prosecution when the demurrer asserts that an action for malicious prosecution cannot be based on filing a complaint in small claims court.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, these points may be used to support a motion for summary judgment [*see Code Civ. Proc. § 437c*] on the basis that an action in small claims court will not support an action for malicious prosecution.

[3] Discussion of Authorities

[a] Small Claims Action Is Insufficient Basis

In ***Pace v. Hillcrest Motor Co.*** *(1980) 101 Cal. App. 3d 476, 161 Cal. Rptr. 662* , defendant in the malicious prosecution action had sued plaintiff, an attorney, in small claims court for $167.33 for unpaid automobile repairs. After a favorable judgment in the small claims action, plaintiff brought an action for malicious prosecution for over $100,000. Defendant filed a demurrer, which was sustained, and the action was dismissed. Plaintiff appealed and the judgment was affirmed. The court of appeal first discussed the procedure in small claims court and stated that it was designed to expedite the settlement of small disputes inexpensively without the intervention of lawyers (*101 Cal. App. 3d 476, 478)* . The court recognized that a small claims action could be brought maliciously but held that allowing a malicious prosecution action would frustrate the purposes of small claims courts and thus could not be the basis for a malicious prosecution action. The court noted that allowing malicious prosecution actions would inject into the small claims proceedings elements of time, expense, and complexity which the small claims procedure was designed to avoid and might require the litigant to consult an attorney to make sure that he or she would not be liable for malicious prosecution before filing a small claims action (*101 Cal. App. 3d 476, 479)* .

[4] Additional Authorities

[a] Small Claims Action Is Insufficient Basis

In *Cooper v. Pirelli Cable Corp. (1984) 160 Cal. App. 3d 294, 206 Cal. Rptr. 581* , defendant initiated and obtained judgment against plaintiff in a small claims action. Plaintiff appealed to the superior court and obtained a trial de novo. After commencement of the trial de novo, both the original small claims action and the appeal were dismissed with prejudice by stipulation. The court of appeal affirmed the trial court's dismissal for failure to state a cause of action, citing *Pace v. Hillcrest Motor Co. (1980) 101 Cal. App. 3d 476, 479, 161 Cal. Rptr. 662* [*see § 147.23[3][a]*] for the rule that a small claims action could not be a basis for a malicious prosecution action (*160 Cal. App. 3d 294, 298)* . The court rejected plaintiff's argument that the present case was distinguishable from *Pace* because in the present case, plaintiff had appealed the small claims judgment to the superior court. The court held that despite plaintiff's appeal, plaintiff's malicious prosecution action was necessarily founded on the original small claim filed by defendant (*160 Cal. App. 3d 294, 298)* . Thus, the court concluded the unequivocal holding of *Pace* was applicable to the case (*160 Cal. App. 3d 294, 298-299)* .

In *Black v. Hepner (1984) 156 Cal. App. 3d 656, 202 Cal. Rptr. 799* , defendant demurred to plaintiff's action for malicious prosecution, on the ground that it was based on a small claims proceeding and could not be maintained under the rule announced in *Pace v. Hillcrest Motor Co. (1980) 101 Cal. App. 3d 476, 161 Cal. Rptr. 662* [*see § 147.23[3][a]*]. The trial court sustained the demurrer without leave to amend, and plaintiff appealed. Plaintiff contended that the *Pace* decision was outdated after the 1981 amendment to former Code Civ. Proc. § 117.18 [*now see Code Civ. Proc. §§ 116.260, 116.940*], which mandated free legal advisory services for small claims litigants. Plaintiff argued that the amendment eliminated the basis for the *Pace* decision, i.e., the concern that allowing malicious prosecution actions founded on small claims proceedings would require litigants to consult with attorneys, contrary to the legislative intent to provide an attorney-free method of resolving small claims (*156 Cal. App. 3d 656, 658-659)* . The court of appeal

affirmed. The court reasoned that the amendment in question neither required litigants to seek advice, nor insured that if they did, they would actually see an attorney or receive advice about the merit of their claims (*156 Cal. App. 3d 656, 659)* . The court also noted that the nature of the small claims procedure limited any potential harm to defendants due to malicious prosecution, but to allow actions to remedy this harm would countervail the very reason for the procedure's existence (*156 Cal. App. 3d 656, 659-660)* . The court concluded that *Pace* had been correctly decided and had not been diluted by the amendment to former Code Civ. Proc. § 117.18 [*now see Code Civ. Proc. §§ 116.260, 116.940*] (*156 Cal. App. 3d 656, 660-661)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsTortsIntentional TortsMalicious ProsecutionGeneral OverviewTortsIntentional TortsMalicious ProsecutionDefensesTortsIntentional TortsMalicious ProsecutionElementsGeneral Overview

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14-147 California Points & Authorities § 147.24

§ 147.24 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] for Malicious Prosecution--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Ancillary Contempt Proceeding Not Adequate Basis

[1] FORM

[*Caption. See § 147.20*].

A COMPLAINT FOR MALICIOUS PROSECUTION DOES NOT STATE A CAUSE OF ACTION WHEN IT IS BASED ON A CONTEMPT PROCEEDING THAT IS ANCILLARY TO THE UNDERLYING CAUSE OF ACTION.

A. Objection by Demurrer. [*See § 147.20, Paragraph A*].

B. Prosecution of Action or Proceeding Is Required. [*See § 147.22, Paragraph B*].

C. Defendant's Failure to Prevail on Order to Show Cause re Contempt Is Insufficient Basis. Not prevailing on an order to show cause re contempt brought to enforce a prior court order in ongoing litigation cannot constitute the basis for a malicious prosecution action against the attorney for the moving party (*Lossing v. Superior Court (1989) 207 Cal. App. 3d 635, 638, 255 Cal. Rptr. 18*).

[*Optional*] **D. Contempt Proceeding to Sanction Discovery Abuse Is Insufficient Basis.** Contempt proceedings to sanction discovery abuse are ancillary proceedings without sufficient independence to support a cause of action for malicious prosecution (*Lossing v. Superior Court (1989) 207 Cal. App. 3d 635, 639, 255 Cal. Rptr. 18*).

[*Optional*] **E. Order to Show Cause Taken Off Calendar Before Hearing Is Insufficient Basis.** Bringing orders to show cause re contempt that are taken off calendar before hearing cannot constitute the basis for a malicious prosecution action against the attorney for the moving party (*Green v. Uccelli (1989) 207 Cal. App. 3d 1112, 1121, 255 Cal. Rptr. 315*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a general demurrer to a complaint for malicious prosecution when the demurrer asserts that an action for malicious prosecution cannot be based on a contempt proceeding.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, these points may be used to support a motion for summary judgment [*see Code Civ. Proc. § 437c*] on the basis that a contempt proceeding will not support an action for malicious prosecution.

[3] Discussion of Authorities

[a] Defendant's Failure to Prevail on Order to Show Cause re Contempt Is Insufficient Basis

In ***Lossing v. Superior Court*** *(1989) 207 Cal. App. 3d 635, 255 Cal. Rptr. 18* , plaintiffs brought an action for malicious prosecution against an attorney who had, in an underlying personal injury action, unsuccessfully sought contempt sanctions against them for alleged failure to comply with a discovery order. The malicious prosecution complaint alleged that the attorney did not honestly, reasonably, and in good faith believe the plaintiffs to be guilty of contempt, and that the attorney acted maliciously to intimidate the plaintiffs and coerce them to settle the personal injury case. The attorney filed a general demurrer to the complaint. The court declined to sustain the demurrer in regard to the malicious prosecution action. The attorney then petitioned the court of appeal for a writ of mandate, contending that his demurrer to the causes of action for malicious prosecution should have been sustained without leave to amend.

The court of appeal directed the trial court to sustain the demurrer without leave to amend (*207 Cal. App. 3d 635, 641)* . It held that a malicious prosecution action cannot be grounded on the institution of a contempt proceeding in an ongoing action. The court remarked that a party aggrieved by a bad-faith misuse of discovery by opposing counsel could seek compensation under *Code Civ. Proc. §§ 128.5* and *2023.030* (*207 Cal. App. 3d 635, 638-639)* . Noting the availability of a statutory remedy and the disfavored status of malicious prosecution as a cause of action, the court concluded that contempt proceedings to sanction discovery abuse are ancillary proceedings without sufficient independence to support a cause of action for malicious prosecution (*207 Cal. App. 3d 635, 639)* .

[b] Contempt Proceeding to Sanction Discovery Abuse Is Insufficient Basis

Lossing v. Superior Court *(1989) 207 Cal. App. 3d 635, 255 Cal. Rptr. 18* , is discussed in *§ 147.24[3][a]*.

[c] Order to Show Cause Taken Off Calendar Before Hearing Is Insufficient Basis

In ***Green v. Uccelli*** *(1989) 207 Cal. App. 3d 1112, 255 Cal. Rptr. 315* , the malicious prosecution defendant, an attorney, had represented the plaintiff's former wife in an underlying dissolution action. In this underlying action, the trial court issued two orders to show cause re contempt, on the basis of the defendant's declarations that plaintiff had failed to comply with two court orders. The resolution of the first of these orders to show cause, involving the plaintiff's

purported failure to pay court-ordered attorney's fees, was disputed; plaintiff contended that the order was dismissed for lack of prosecution, while defendant contended that he took the contempt proceeding off calendar when the plaintiff paid the court-ordered fees. Concerning the second order to show cause, involving plaintiff's purported failure to comply with a court order to return certain property to his former spouse, defendant took the contempt hearing off calendar when plaintiff returned the property. Plaintiff, while his dissolution action was still pending, filed a complaint against defendant based on the defendant's withdrawal of the orders to show cause. Plaintiff alleged several tort causes of action against defendant, including two for malicious prosecution. The trial court sustained defendant's demurrer without leave to amend and dismissed the plaintiff's entire tort action. Plaintiff appealed.

The court of appeal affirmed (207 Cal. App. 3d 1112, 1125). The court stated the general rule that the plaintiff in a malicious prosecution action must establish that the prior action terminated in his or her favor (*207 Cal. App. 3d 1112, 1120)* . It then noted that there had been no termination of the underlying dissolution action in plaintiff's favor, since plaintiff's appeal was still pending. The court held that bringing orders to show cause re contempt that are taken off calendar before hearing cannot constitute the basis for a malicious prosecution action against the attorney for the moving party (*207 Cal. App. 3d 1112, 1121)* . Any decision to the contrary, said the court, would have a chilling effect on access to the courts to enforce orders and on the vigorous legal representation to which the client is entitled (*207 Cal. App. 3d 1112, 1122)* . The court noted that if the contempt proceedings were brought in bad faith or for harassment or other improper purpose, relief would be properly sought through a request for attorney's fees and sanctions within the underlying action, not through an independent action for malicious prosecution (*207 Cal. App. 3d 1112, 1121)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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14-147 California Points & Authorities § 147.25

§ 147.25 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] for Malicious Prosecution--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Motion to Disqualify Opposing Attorney Not Adequate Basis

[1] FORM

[*Caption. See § 147.20*].

A COMPLAINT FOR MALICIOUS PROSECUTION DOES NOT STATE A CAUSE OF ACTION WHEN IT IS BASED ON AN UNSUCCESSFUL MOTION TO DISQUALIFY OPPOSING COUNSEL.

A. Objection by Demurrer. [*See § 147.20, Paragraph A*].

B. Prosecution of Action or Proceeding Is Required. [*See § 147.22, Paragraph B*].

C. Defendant's Failure to Prevail on Motion to Disqualify Opposing Counsel Is Insufficient Basis. Not prevailing on a motion to disqualify the attorney of an adverse party cannot constitute the basis for a malicious prosecution action against the moving party (*Silver v. Gold (1989) 211 Cal. App. 3d 17, 23, 259 Cal. Rptr. 185*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a general demurrer to a complaint for malicious prosecution when the demurrer asserts that an action for malicious prosecution cannot be based on a motion to disqualify an opposing attorney.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, these points may be used to support a motion for summary judgment [*see Code Civ. Proc. § 437c*] on the basis that a disqualification motion will not support an action for malicious prosecution.

[3] Discussion of Authorities

[a] Defendant's Failure to Prevail on Motion to Disqualify Opposing Counsel Is Insufficient Basis

In ***Silver v. Gold*** *(1989) 211 Cal. App. 3d 17, 259 Cal. Rptr. 185* , an attorney filed a complaint for malicious prosecution against the defendant in an underlying civil action and the defendant's attorneys, on the basis of their having filed a motion to disqualify the attorney from representing the plaintiff in that underlying action. The attorney appealed from a judgment of dismissal entered after an order sustaining a demurrer to his first amended complaint without leave to amend.

The court of appeal affirmed. It noted that to establish a cause of action for the malicious prosecution of a civil proceeding, a plaintiff must plead and prove, inter alia, that a prior action was commenced by or at the direction of the defendant (*211 Cal. App. 3d 17, 22)* . The court concluded that the defendants' motion would not support a suit for malicious prosecution. The filing of a motion to disqualify counsel, stated the court, is merely one of numerous procedures that can be invoked during the course of litigation; it does not constitute a separate action or proceeding on which a suit for malicious prosecution can be premised (*211 Cal. App. 3d 17, 23-24)* . The court noted in dicta that a motion to disqualify can be the basis of an action for abuse of process if the elements of that cause of action are present (*211 Cal. App. 3d 17, 24)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsTortsIntentional TortsMalicious ProsecutionGeneral OverviewTortsIntentional TortsMalicious ProsecutionDefensesTortsIntentional TortsMalicious ProsecutionElementsGeneral Overview

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14-147 California Points & Authorities § 147.26

§ 147.26 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] for Malicious Prosecution--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Filing Motion in Lawsuit to Which Defendant Was Not Party Is Not Adequate Basis

[1] FORM

[*Caption. See § 147.20*].

A COMPLAINT FOR MALICIOUS PROSECUTION DOES NOT STATE A CAUSE OF ACTION WHEN IT IS BASED ON DEFENDANT'S FILING OF A MOTION ADVERSE TO PLAINTIFF IN LITIGATION TO WHICH DEFENDANT WAS NOT PARTY AT A TIME WHEN OTHER LITIGATION WAS PENDING BETWEEN PLAINTIFF AND DEFENDANT.

A. Objection by Demurrer. [*See § 147.20, Paragraph A*].

B. Prosecution of Action or Proceeding Is Required. [*See § 147.22, Paragraph B*].

C. Defendant's Filing of Motion in Litigation to Which Defendant Was Not Party Is Not Adequate Basis. A malicious prosecution cause of action cannot be based on defendant's filing of a motion in litigation to which he or she is not a party when the motion is filed for tactical reasons as part of other ongoing litigation between plaintiff and defendant. The cause of action cannot be allowed, when to do so will disrupt the ongoing litigation and when the appropriate remedy for action taken in the litigation to which defendant is not a party rests with the inherent powers of the court with jurisdiction over that litigation to control the proceedings before it (*Adams v. Superior Court (1992) 2 Cal. App. 4th 521, 528, 3 Cal. Rptr. 2d 49*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a general demurrer to a complaint for malicious prosecution when the demurrer asserts that an action for malicious prosecution cannot be based on a motion that was filed in litigation to which defendant was not a party, and that was filed for tactical reasons relating to ongoing litigation between the defendant and the plaintiff.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, these points may be used to support a motion for summary judgment [*see Code Civ. Proc. § 437c*] on the basis that a motion that was filed by defendant in litigation to which defendant was not a party, and that was filed for tactical reasons relating to ongoing litigation between the defendant and the plaintiff, cannot be the basis of a malicious prosecution cause of action.

[3] Discussion of Authorities

[a] Defendant's Filing of Motion in Litigation to Which Defendant Was Not Party Is Not Adequate Basis.

The facts and procedural background of ***Adams v. Superior Court*** *(1992) 2 Cal. App. 4th 521, 3 Cal. Rptr. 2d 49* , are discussed in *§ 147.22[3][a]*. In that case, the court of appeal held that petitioners' motions filed in criminal proceedings to which they were not parties for reconsideration of orders reducing one and expunging another of real party's prior felony convictions failed to constitute initiation of a full-blown action on which a claim of malicious prosecution could be based. Rather, the court found the motions were made in pursuit of the interests of the clients of petitioners in litigation pending against real party. Therefore, to ground a malicious prosecution action on those motions would disrupt, if not destroy, petitioners' ability to represent their clients. Moreover, the courts having jurisdiction over the criminal cases had inherent judicial power over the proceedings before them sufficient to control any problems generated by petitioners' motions, and those powers provided a remedy to real party for any filing made by petitioners in those cases. Indeed, the courts dismissed the motions in both cases (*2 Cal. App. 4th 521, 528)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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14-147 California Points & Authorities § 147.27

§ 147.27 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Unsuccessful Family Law Motion or Order to Show Cause Cannot Be Basis of Malicious Prosecution Action

[1] FORM

[*Caption. See § 147.20*].

A COMPLAINT FOR MALICIOUS PROSECUTION DOES NOT STATE A CAUSE OF ACTION IF IT IS BASED ON AN UNSUCCESSFUL FAMILY LAW MOTION OR ORDER TO SHOW CAUSE.

Malicious Prosecution Action Cannot Be Based on Family Law Proceedings. No malicious prosecution action may arise out of unsuccessful family law motions or orders to show cause (*Bidna v. Rosen (1993) 19 Cal. App. 4th 27, 37, 23 Cal. Rptr. 2d 251*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a general demurrer to a complaint for malicious prosecution when the demurrer asserts that an action for malicious prosecution cannot be based on unsuccessful family law motions or orders to show cause.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the family-law nature of the underlying litigation that is the basis of plaintiff's complaint.

[b] Related Memoranda

With appropriate modifications, this form may be used to support a motion for summary judgment [*see Code Civ. Proc. § 437c*] on the basis that an unsuccessful motion or order to show cause filed in a family law proceeding cannot be the basis of a malicious prosecution cause of action.

[3] Discussion of Authorities

[a] Malicious Prosecution Action Cannot Be Based on Family Law Proceedings

In ***Bidna v. Rosen*** *(1993) 19 Cal. App. 4th 27, 23 Cal. Rptr. 2d 251* , plaintiff had been awarded primary physical custody of his daughter in a marital dissolution proceeding. Thereafter, defendant (plaintiff's ex-wife) brought a series of six ex parte motions and orders to show cause (OSCs), seeking to change custody. Plaintiff brought a cause of action alleging that the meritless motions and OSCs were brought with the financial backing of defendant's mother, in order to force plaintiff to give up custody for financial reasons, and constituted malicious prosecution. The trial court granted defendant's demurrer and dismissed the action, and plaintiff appealed.

The court of appeal affirmed the judgment of dismissal (*19 Cal. App. 4th 27, 39)* . The court agreed with plaintiff that affirming the judgment would consign plaintiff to the various family remedies, which do not include punitive damages or damages for emotional distress (*19 Cal. App. 4th 27, 30)* . However, the court also pointed out that permitting malicious prosecution causes of action based on conduct in family proceedings would "open the sluice gates to the rivers of bitterness that often typify family law cases," and could also discourage meritorious proceedings (*19 Cal. App. 4th 27, 30)* . In balancing these competing considerations, the court was persuaded that the balance tilted against malicious prosecution actions. In discussing the cases that have dealt with the issue, the court stated that no California case had yet extended the tort of malicious prosecution to family actions; the opinion in *Chauncey v. Niems (1986) 182 Cal. App. 3d 967, 975-976, 227 Cal. Rptr. 718* , which had stated that an order to show cause seemed a sufficient basis for a malicious prosecution action, was rejected as unpersuasive dicta (*19 Cal. App. 4th 27, 32-33)* . The court concluded that the California Supreme Court's statements in *Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal. 3d 863, 872-874, 254 Cal. Rptr. 336, 765 P.2d 448* , setting forth the basic judicial policy in favor of curing the evil of abusive litigation at its source, by the use of sanctions, rather than allowing the abusive litigation to engender more litigation, required the plaintiff here to rely on sanctions by the family law court; a malicious prosecution cause of action could not be stated (*19 Cal. App. 4th 27, 37-39)* .

[4] Additional Authorities

[a] Malicious Prosecution Action Cannot Be Based on Family Law Proceedings

In *Begier v. Strom (1996) 46 Cal. App. 4th 877, 54 Cal. Rptr. 2d 158* , plaintiff filed an action against his former wife for malicious prosecution, alleging that she injected false allegations of child molestation into their dissolution action for the purpose of terminating plaintiff's relationship with his daughter. The trial court granted summary judgment for defendant, and the court of appeal affirmed. The court noted that in *Bidna v. Rosen (1993) 19 Cal. App. 4th 27, 23 Cal. Rptr. 2d 251* , the court recognized an abiding judicial reluctance to entertain malicious prosecution actions arising out of family law proceedings (*46 Cal. App. 4th 877, 886)* . The court found *Bidna* persuasive, and found no basis for distinguishing it.

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14-147 California Points & Authorities § 147.28

§ 147.28 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Application for Writ of Sale to Enforce Judgment is Not Adequate Basis for Malicious Prosecution Action

[1] FORM

[*Caption. See § 147.20*].

A COMPLAINT FOR MALICIOUS PROSECUTION FAILS TO STATE A CAUSE OF ACTION IF IT IS BASED ON AN APPLICATION FOR WRIT OF SALE EMPLOYED TO ENFORCE A JUDGMENT.

A. Objection by Demurrer. [*See § 147.20, Paragraph A*].

B. Malicious Prosecution Action Cannot be Based on Motion for Writ of Sale to Enforce Judgment. The filing of a motion for writ of sale as an attempt to enforce an existing judgment cannot be the basis for a malicious prosecution action, since the writ action is not a separate and distinct proceeding but merely the continuation of existing litigation (*Merlet v. Rizzo (1998) 64 Cal. App. 4th 53, 60-64, 75 Cal. Rptr. 2d 83*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a general demurrer to a complaint for malicious prosecution when the

demurrer asserts that an action for malicious prosecution cannot be based on an application for writ of sale to enforce a judgment.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, this form may be used to support a motion for summary judgment [*see Code Civ. Proc. § 437c*] on the basis that an action for malicious prosecution cannot be based on an application for writ of sale to enforce a judgment.

[3] Discussion of Authorities

[a] Malicious Prosecution Action Cannot be Based on Motion for Writ of Sale to Enforce Judgment

In ***Merlet v. Rizzo*** *(1998) 64 Cal. App. 4th 53, 75 Cal. Rptr. 2d 83* , plaintiff had opposed an application for writ of sale against property owned by plaintiff and his wife brought by defendants, attorneys and their client who had brought the writ motion in an attempt to satisfy a judgment that had been entered against the plaintiff's wife in an underlying tort action. After successfully defeating the motion for writ of sale, plaintiff filed an action for malicious prosecution and abuse of process. The trial court sustained a demurrer without leave to amend and dismissed the plaintiff's claims. The plaintiff appealed.

The court of appeal affirmed the dismissal of the complaint. The court agreed with the defendants that an application for an order for a writ of sale cannot support a later claim for malicious prosecution. After reviewing the decisions of earlier cases in which malicious prosecution claims were allowed or not based on the nature of the underlying proceeding, the court concluded that malicious prosecution claims are not allowed when based on a prior proceeding that is: (1) less formal or unlike the process in the superior court (for example, a small claims hearing or an investigation or application not resulting in a formal proceeding); (2) purely defensive in nature; or (3) a continuation of an existing proceeding. The question before the court was whether or not an application for a writ of sale was a continuation of an existing proceeding. Analyzing the Supreme Court's holding in *Crowley v. Katleman (1994) 8 Cal. 4th 666, 34 Cal. Rptr. 2d 386, 881 P.2d 1083* , in which the Court held that a will contest could support a malicious prosecution action, the court of appeal concluded that injecting new facts and legal issues into a proceeding and imposing on a party the burden of mounting a defense were insufficient by themselves to constitute the initiation of a new, distinct proceeding. The court noted that, unlike a will contest following an initial petition for probate of the will, a motion for writ of sale occurs after liability and damages have been determined and does not result in a separate and distinct proceeding. The motion for writ of sale simply provides an expeditious statutory means to enforce a judgment and does not result in protracted litigation, while allowing a malicious prosecution action based on a writ of sale would permit a party to transform what should be a summary procedure into a full-scale lawsuit (*64 Cal. App. 4th 53, 60-61)* . In addition, unlike an improperly filed writ of attachment, which may support a malicious prosecution action, an application for writ of sale does not burden the property at issue and is filed only after obtaining a valid, unsatisfied judgment (*64 Cal. App. 4th 53, 62)* . Finally, the court rejected the plaintiff's argument that a claim for malicious prosecution is stated if the underlying proceeding was adversarial in nature, added new issues, forced the plaintiff to muster a defense, and subjected the plaintiff to the emotional strain of the proceeding. The court concluded that consideration of these factors alone was insufficient, that instead the court must consider the degree of burden created, and the burden of defending an application for writ of sale was relatively light. The court stated that applying for a writ of sale was analogous to taking an appeal, and that the Supreme Court had held in *Coleman v. Gulf Ins. Group (1986) 41 Cal. 3d 782, 226 Cal. Rptr. 90, 718 P.2d 77* that such a subsidiary proceeding cannot be the basis for a malicious prosecution action (*64 Cal. App. 4th 53, 63)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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14-147 California Points & Authorities § 147.29

§ 147.29 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Action for Malicious Prosecution May Not Be Based On Proceeding Terminated Through Contractual Arbitration

[1] FORM

[*Caption. See § 147.20*].

A CAUSE OF ACTION FOR MALICIOUS PROSECUTION MAY NOT BE BROUGHT BASED ON AN UNDERLYING PROCEEDING THAT WAS TERMINATED THROUGH BINDING CONTRACTUAL ARBITRATION.

A. Objection by Demurrer. [*See § 147.20, Paragraph A*].

B. Malicious Prosecution Action May Not Be Based on Underlying Proceeding Terminated Through Contractual Arbitration. A proceeding terminated through contractual arbitration cannot be the basis for a subsequent malicious prosecution action, regardless of whether the underlying action originated in court or in arbitration (*Brennan v. Tremco Inc. (2001) 25 Cal. 4th 310, 314, 105 Cal. Rptr. 2d 790, 20 P.3d 1086*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a general demurrer to a complaint for malicious prosecution if the demurrer asserts that an action for malicious prosecution cannot be based on an underlying proceeding that was terminated through binding contractual arbitration.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include facts showing that the underlying proceeding was terminated through binding contractual arbitration.

[b] Related Uses

With appropriate modifications, this form may be used to support a motion for summary judgment [*see Code Civ. Proc. § 437c*] if the motion alleges that a cause of action for malicious prosecution cannot be based on an underlying proceeding terminated through contractual arbitration.

[3] Discussion of Authorities

[a] Malicious Prosecution Action May Not Be Based on Underlying Proceeding Terminated Through Contractual Arbitration

In ***Brennan v. Tremco Inc.*** *(2001) 25 Cal. 4th 310, 105 Cal. Rptr. 2d 790, 20 P.3d 1086* , the plaintiff brought an action for malicious prosecution against his former employer and its attorneys based on their prosecution of an underlying civil suit against him. In the underlying suit, the employer alleged various contractual and tort causes of action stemming from the employee's decision to go to work for a competitor. In that suit, the employee obtained summary adjudication in court of several of the causes of action, and the parties then agreed to binding arbitration of the remaining claims. The arbitrator ultimately ruled in favor of the employee on those remaining claims, and the court affirmed the arbitrator's award and entered judgment accordingly. The plaintiff then brought his action for malicious prosecution. The attorneys settled with the plaintiff, and the trial court then sustained the former employer's demurrer to the malicious prosecution claim. Citing the court of appeal's decision in *Sagonowsky v. More (1998) 64 Cal. App. 4th 122, 75 Cal. Rptr. 2d 118* [*see § 147.29[4]*], the trial court concluded that a malicious prosecution action cannot be based on an underlying private arbitration. The plaintiff appealed, the court of appeal reversed, and the defendant appealed.

The Supreme Court reversed the court of appeal and held that a proceeding terminated successfully through contractual arbitration does not constitute a favorable termination for purposes of the tort of malicious prosecution and cannot be the basis for a subsequent malicious prosecution action, regardless of whether the underlying action originated in court or in arbitration. The Court based its decision on the trend against creating or expanding derivative tort remedies, together with the recognition that parties who voluntarily choose arbitration generally expect and desire that the arbitration will end the dispute (*25 Cal. 4th 310, 315)* . Although recognizing that established case law holds that a malicious prosecution action may be based on underlying judicial arbitration, the Court noted that binding contractual arbitration is fundamentally different from judicial arbitration in important ways. A dissatisfied party to private contractual arbitration does not have a right to request a trial de novo or judicial review of the arbitrator's decision. Moreover, an arbitrator in most instances of contractual arbitration does not even need to provide an explanation of the basis for the decision. The lack of a written rationale for the decision would frustrate any determination of whether or why the action was terminated in favor of a particular party. Noting that an action in small claims court will not support a malicious prosecution action, in part because the small claims process is designed to function quickly and informally, the Court also concluded that similar concerns support the same result if the underlying claim is terminated through contractual arbitration ((*25 Cal. 4th 310, 317)* .

NOTE:

The Supreme Court in *Brennan v. Tremco Inc. (2001) 25 Cal. 4th 310, 105 Cal. Rptr. 2d 790, 20 P.3d 1086* , explicitly disapproved of the court of appeal decision in *Rogers v. Peinado (2000) 85 Cal. App.*

4th 1, 101 Cal. Rptr. 2d 817 , which would have allowed a malicious prosecution action against an attorney who was not actually a party to the underlying arbitration agreement. Thus, *Brennan* prohibits a malicious prosecution action against both the actual party who brought the underlying action and that party's attorney [*Brennan v. Tremco Inc. (2001) 25 Cal. 4th 310, 317, 105 Cal. Rptr. 2d 790, 20 P.3d 1086]* .

The Supreme Court's opinion does not entirely foreclose the possibility that a malicious prosecution action may be brought if the arbitration agreement explicitly states that such an action may be brought. However, because the arbitration agreement at issue was silent on the intent of the parties as to a subsequent malicious prosecution action, the Court explicitly rejected the attempt by the court of appeal to remand for a hearing to determine if a mutual intent could be discerned [*see* *Brennan v. Tremco Inc. (2001) 25 Cal. 4th 310, 318, 105 Cal. Rptr. 2d 790, 20 P.3d 1086]* .

[4] Additional Authorities

[a] Malicious Prosecution Action May Not Be Based on Underlying Proceeding Terminated Through Contractual Arbitration

In *Sagonowsky v. More (1998) 64 Cal. App. 4th 122, 75 Cal. Rptr. 2d 118* , the plaintiffs, three tenants in common, brought actions for malicious prosecution against the attorney that had previously represented the fourth tenant in common. The fourth tenant had previously brought claims pertaining to a real estate dispute against the other tenants, against which the other tenants had made counterclaims. All of these claims were subject to a clause in the tenancy-in-common agreement providing for binding arbitration of "any dispute regarding this Agreement or the duties, obligations, and benefits of ownership in the Property," as well as an arbitration clause in the original contract of sale of the property at the center of the disputes. Following arbitration, at which the arbitrator denied the claims and counterclaims of all parties, the plaintiffs filed their actions for malicious prosecution against the attorney. The attorney demurred to the complaints, the trial court sustained the demurrers without leave to amend, and the plaintiffs appealed. The court of appeal affirmed the judgment of dismissal. After first determining that the plaintiffs' successful defense of the claims brought against them by the fourth tenant in common constituted a favorable termination of the underlying action (*64 Cal. App. 4th 122, 129-130)* , the court distinguished the rule permitting a malicious prosecution action based on an underlying judicial arbitration, noting that judicial arbitration stems from an action filed in court and lacks the finality of contractual arbitration in that any party to judicial arbitration can request a trial de novo. The court then concluded that permitting a malicious prosecution claim based on private contractual arbitration would likely increase litigation and undermine the finality of the arbitration decision, contrary to the expectations of the parties when the agreement to arbitrate was made. The court read the arbitration provisions at issue in this case broadly and found that they could not be construed to allow for filing claims of malicious prosecution in court following arbitration (*64 Cal. App. 4th 122, 131-134)* .

Legal Topics:

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14-147 California Points & Authorities § 147.29A

§ 147.29A Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)]--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Unsuccessful Petition for Injunction Against Harassment or Workplace Violence Is Not Adequate Basis

[1] FORM

[*Caption. See § 147.20.*]

A COMPLAINT FOR MALICIOUS PROSECUTION DOES NOT STATE A CAUSE OF ACTION IF IT IS BASED ON AN UNSUCCESSFUL PETITION FOR AN INJUNCTION AGAINST _____ [HARASSMENT BROUGHT UNDER CODE OF CIVIL PROCEDURE SECTION 527.6 *or* WORKPLACE VIOLENCE BROUGHT UNDER CODE OF CIVIL PROCEDURE SECTION 527.8].

A. Objection by Demurrer. [*See § 147.20, Paragraph A.*]

[*Optional*] **B. Malicious Prosecution Action Cannot Be Based on Failed Attempt to Obtain Injunction Under *Code Civ. Proc. § 527.6*.** An unsuccessful petition for an injunction prohibiting harassment under *Code Civ. Proc. § 527.6* is not a proper basis for a subsequent malicious prosecution action (*Siam v. Kizilbash (2005) 130 Cal. App. 4th 1563, 1572-1574, 31 Cal. Rptr. 3d 368*).

[*Optional*] **C. Malicious Prosecution Action Cannot Be Based on Failed Attempt to Obtain Injunction Under *Code Civ. Proc. § 527.8*.** Filing an action for an injunction under the Workplace Violence Safety Act, *Code Civ. Proc. § 527.8*, will not support a subsequent malicious prosecution action if the request for an injunction is denied (*Robinzine v. Vicory (2006) 143 Cal. App. 4th 1416, 1422-1424, 50 Cal. Rptr. 3d 65*).
Dated: _____

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of the claim that a malicious prosecution action cannot be based on a failed attempt to obtain an injunction against harassment under *Code Civ. Proc. § 527.6*, or a failed attempt to obtain an injunction against workplace violence under *Code Civ. Proc. § 527.8*.

This form may be combined with points pertaining to the specific procedural context in which these points are raised. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form showing the relationship between the facts of the case and the point of law stated. Thus, for example, counsel should include facts showing that the sole basis for the plaintiff's malicious prosecution action was a failed attempt by the defendant to obtain an injunction under *Code Civ. Proc. § 527.6* or *Code Civ. Proc. § 527.8*.

[3] Discussion of Authorities

[a] Malicious Prosecution Action Cannot Be Based on Failed Attempt to Obtain Injunction Under Code Civ. Proc. § 527.6

In ***Siam v. Kizilbash*** *(2005) 130 Cal. App. 4th 1563, 31 Cal. Rptr. 3d 368* , the plaintiff was the boyfriend of the defendant's former wife. During especially contentious proceedings to determine custody of the defendant's two sons, the defendant accused the plaintiff of abusing the two boys and reported the alleged abuse to school officials and people involved in the family law proceedings. Although resulting investigations did not reveal any abuse, the defendant filed a petition under *Code Civ. Proc. § 527.6*, the civil harassment statute, to obtain an injunction prohibiting the plaintiff from coming near the children. The trial court granted a temporary restraining order, but eventually denied the petition for a permanent injunction. The plaintiff then filed suit against the defendant, asserting a cause of action for malicious prosecution. The defendant filed a special motion to strike all causes of action under *Code Civ. Proc. § 425.16*, the anti-SLAPP statute. The trial court denied the motion, and the defendant appealed.

The court of appeal reversed the denial of the motion to strike as to the malicious prosecution action. For many of the same reasons that neither a small claims action nor a family law motion will support a malicious prosecution action, the court held that an unsuccessful petition for an injunction prohibiting harassment under *Code Civ. Proc. § 527.6* is not a proper basis for a subsequent malicious prosecution action. The court noted that harassment actions often stem from bitter and even irrational disputes, and this background of bitterness often makes it difficult to distinguish between a malicious petition and one that is not malicious. The court also noted that *Code Civ. Proc. § 527.6* provides for attorney's fees as a sanction for filing a frivolous petition. Moreover, proceedings under *Code Civ. Proc. § 527.6* were designed to be processed simply and expeditiously, with little or no involvement by attorneys, a goal that the court determined would be frustrated if consultation with an attorney were necessary to protect against a subsequent lawsuit for malicious prosecution. Because the plaintiff could not show a probability of success on the malicious prosecution claim, the trial court should have granted the motion to strike that cause of action (*130 Cal. App. 4th 1563, 1572-1574)* .

[b] Malicious Prosecution Action Cannot Be Based on Failed Attempt to Obtain Injunction Under Code Civ. Proc. § 527.8

In *Robinzine v. Vicory (2006) 143 Cal. App. 4th 1416, 50 Cal. Rptr. 3d 65* , plaintiffs were a husband and wife who filed suit for malicious prosecution against the wife's former employer. The malicious prosecution claim was based on

the employer's earlier attempt to obtain an injunction against the husband under the Workplace Violence Safety Act, *Code Civ. Proc. § 527.8*. When filing its petition, the employer had obtained a temporary restraining order against the husband, but that order was dissolved and the request for an injunction denied when the husband presented evidence contradicting the employer's claim that the husband had threatened violence. Plaintiffs' malicious prosecution claim followed. Defendants filed a motion to strike the complaint under *Code Civ. Proc. § 425.16*, the anti-SLAPP statute, but the trial court denied the motion on the grounds that the plaintiffs had shown a reasonable probability of success on the merits. Defendants appealed.

The court of appeal reversed and remanded with directions to grant the motion to strike. The court of appeal held that filing an action for an injunction under the *Code Civ. Proc. § 527.8* will not support a subsequent malicious prosecution action if the request for an injunction is denied. The court reviewed the then-recent opinion in *Siam v. Kizilbash (2005) 130 Cal. App. 4th 1563, 31 Cal. Rptr. 3d 368* , discussed in [a], *above*, and concluded that because the provisions and goals of *Code Civ. Proc. § 527.8* are substantially similar to those of *Code Civ. Proc. § 527.6*, the justification for not allowing a subsequent malicious prosecution action following an unsuccessful petition under *Code Civ. Proc. § 527.6* applied with equal force to an unsuccessful petition under *Code Civ. Proc. § 527.8*. Both statutory schemes provide streamlined procedures for obtaining an injunction, without the need for hiring an attorney, and both provide their own mechanisms for sanctioning baseless or harassing allegations, eliminating the need for a subsequent action for malicious prosecution. Thus, because the plaintiffs could not show a probability of success on their malicious prosecution claim, the motion to strike should have been granted (*143 Cal. App. 4th 1416, 1422-1424)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsTortsIntentional TortsMalicious ProsecutionGeneral OverviewTortsIntentional TortsMalicious ProsecutionDefensesTortsIntentional TortsMalicious ProsecutionElementsGeneral Overview

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 147 MALICIOUS PROSECUTION AND ABUSE OF PROCESS
PART II. FORMS
A. Malicious Prosecution

14-147 California Points & Authorities § 147.30

§ 147.30 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] for Malicious Prosecution--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Bar of Statute of Limitations

[1] FORM

[*Caption. See § 147.20*].

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION FOR MALICIOUS PROSECUTION BECAUSE IT APPEARS ON ITS FACE AND FROM MATTERS OF WHICH JUDICIAL NOTICE CAN BE TAKEN THAT THE STATUTE OF LIMITATIONS HAS RUN.

A. Objection by Demurrer. [*See § 147.20, Paragraph A*].

B. Failure to State Cause of Action. The objection that an action is barred by a statute of limitations may be set up by demurrer (*Baillargeon v. Department of Water & Power (1977) 69 Cal. App. 3d 670, 675, 138 Cal. Rptr. 338*) and must be deemed to be included in the ground of demurrer that the complaint does not state facts sufficient to constitute a cause of action (*Bell v. Bank of Cal. (1908) 153 Cal. 234, 245, 94 P. 889*).

C. Period of Limitation. An action for malicious prosecution must be filed within two years (one year, prior to 2003) after the accrual of the cause of action (*Code Civ. Proc. § 335.1*; *see* former Code Civ. Proc. § 340(3); *Stavropoulos v. Superior Court (2006) 141 Cal. App. 4th 190, 197, 45 Cal. Rptr. 3d 705*).

D. Accrual of Cause of Action. The statute of limitations on a cause of action for malicious prosecution begins to run on the date that the proceedings in the prior action were dismissed or terminated, not the date that the time for appeal from the dismissal or termination expires (*Babb v. Superior Court (1971) 3 Cal. 3d 841, 846, 92 Cal. Rptr. 179, 479 P.2d 379* ; *Soble v. Kallman (1976) 57 Cal. App. 3d 719, 721-722, 129 Cal. Rptr. 373*).

[*Optional*] **E. Effect of Appeal on Period of Limitation.** When an appeal is filed in the underlying action, the statute of limitations runs from the date the cause of action accrues on entry of judgment to the date of filing notice of appeal; the statute is then tolled during the pendency of the appeal, but recommences to run on the date the appeal process is

exhausted (*Feld v. Western Land & Dev. Co. (1992) 2 Cal. App. 4th 1328, 1334, 4 Cal. Rptr. 2d 23* ; *Gibbs v. Haight, Dickson, Brown & Bonesteel (1986) 183 Cal. App. 3d 716, 722, 228 Cal. Rptr. 398*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a general demurrer to a complaint for malicious prosecution if the demurrer asserts that the complaint fails to state a cause of action because it is barred by the statute of limitations.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications this form may be used to support a motion for summary judgment [*see Code Civ. Proc. § 437c*] based on the statute of limitations.

[c] Related Pleading and Practice Form

For a form of demurrer for use generally in asserting the bar of the statute of limitations, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* (Matthew Bender).

[d] Related Memoranda

For memoranda supporting a demurrer based on the statute of limitations, see Ch. 143, *Limitation of Actions* in this set, and for a memorandum for use when a demurrer is based on material of which the court must take judicial notice, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Failure to State Cause of Action

In ***Baillargeon v. Department of Water & Power*** *(1977) 69 Cal. App. 3d 670, 138 Cal. Rptr. 338* , plaintiff brought an action against defendant for breach of contract, infliction of mental distress, and declaratory relief. Defendant's answer included the affirmative defense of statute of limitations. After discovery, the trial court granted defendant's motion for judgment on the pleadings apparently on the basis that the action was barred by the statute of limitations. The court of appeal reversed the decision on the cause of action for breach of contract. The court stated that the defense of statute of limitations may be raised by demurrer and noted that since judgment on the pleadings is similar to a judgment following the sustaining of a demurrer, the standard of appellate review is the same (*69 Cal. App. 3d 670, 675-676)* .

Bell v. Bank of Cal. *(1908) 153 Cal. 234, 94 P. 889* , was an action for the recovery of shares of stock. The defendant asserted in a general demurrer that the action was barred by a statute of limitations, and the trial court sustained the demurrer and dismissed the action. The method of asserting the defense of bar of a statute of limitations was not,

apparently, an issue either in the trial court or on appeal. The Supreme Court, however, said that the bar of the statute of limitations is not specified as a ground of demurrer in the code, and that this objection to a complaint, while required to be stated in the demurrer, must be deemed to be included within the ground of want of facts sufficient to constitute a cause of action (*153 Cal. 234, 245)* .

[b] Period of Limitation

In *Stavropoulos v. Superior Court (2006) 141 Cal. App. 4th 190, 45 Cal. Rptr. 3d 705* , plaintiff filed a malicious prosecution action against defendant on June 24, 2005, based on an underlying fraud action. The trial court had entered judgment in the fraud action on February 19, 2003, an appeal was filed on February 26, 2003, the court of appeals affirmed the judgment on April 1, 2004, and a remittitur issued on June 25, 2004. In the malicious prosecution action, defendant demurred on the grounds that the action was untimely under the one-year statute of limitations of *Code Civ. Proc. § 340(c)*. Plaintiff opposed the demurrer on the grounds that when the Legislature amended and redesignated the one-year limitations period of former Code Civ. Proc. § 340(3) to *Code Civ. Proc. § 340(c)*, and enacted a separate two-year limitations period in *Code Civ. Proc. § 335.1* applicable to actions for "injury to... an individual caused by the wrongful act or neglect of another," the limitations period for malicious prosecution was expanded to two years. The trial court agreed with plaintiff and overruled the demurrer. Defendant filed a petition for writ of mandate.

The court of appeal denied the petition. The court noted that while California has never provided a statute of limitation specifically for malicious prosecution actions, prior to the 2002 amendments courts had held that the appropriate limitations period was the one-year limitations period of former Code Civ. Proc. § 340(3). That statute was specifically applicable to certain intentional torts, as well as to actions "for injury to or for the death of one caused by the wrongful act or neglect of another," and courts had concluded that malicious prosecution actions should be grouped with injuries to the person described by that language. In 2002, however, that language was moved to *Code Civ. Proc. § 335.1* and tied to a two-year limitations period. Recognizing that a malicious prosecution action could be grouped with the other intentional torts that are specifically governed by the one-year limitations period of current *Code Civ. Proc. § 340(c)*, the court concluded that because the catch-all language for personal injury actions quoted above was now in *Code Civ. Proc. § 335.1*, that was the applicable statute of limitations in malicious prosecution actions. Placing malicious prosecution actions with the other intentional torts specifically listed in *Code Civ. Proc. § 340(c)* would require legislative action (*141 Cal. App. 4th 190, 197)* . Because the limitations period on the malicious prosecution action was tolled while the appeal in the underlying action was pending, plaintiff's malicious prosecution action was timely under the two-year period (*141 Cal. App. 4th 190, 197-198)* .

[c] Accrual of Cause of Action

The facts and procedural background of ***Babb v. Superior Court*** *(1971) 3 Cal. 3d 841, 92 Cal. Rptr. 179, 479 P.2d 379* , are discussed in *§ 147.20[3][h]*. In holding that a cause of action for malicious prosecution could not be stated in a cross complaint to the action complained of, the Supreme Court held that a cause of action for malicious prosecution first accrues at the conclusion of the litigation in favor of the party allegedly prosecuted maliciously. Thus, the statute of limitations begins to run on the date that the proceedings in the prior action were dismissed or terminated (*3 Cal. 3d 841, 846)* .

Soble v. Kallman *(1976) 57 Cal. App. 3d 719, 129 Cal. Rptr. 373* , is discussed in *§ 147.30[3][b]*.

[d] Effect of Appeal on Period of Limitation

The facts and procedural background of ***Feld v. Western Land & Dev. Co.*** *(1992) 2 Cal. App. 4th 1328, 4 Cal. Rptr. 2d 23* , are discussed under *§ 147.30[3][b]*. In that case, the court addressed, as it did in *Gibbs v. Haight, Dickson, Brown & Bonesteel (1986) 183 Cal. App. 3d 716, 228 Cal. Rptr. 398* (discussed *below*), the effect of an appeal on the running of the statute of limitations. The court followed *Gibbs* and held that, in a malicious prosecution case in which

an appeal is filed in the underlying action, the statute of limitations runs from accrual of the cause of action on entry of judgment in that action until the date of filing a notice of appeal. The statute is then tolled during the pendency of the appeal. The statute begins to run again on the date the appellate process is exhausted. In the instant case, the appellate process was deemed to be exhausted on the date the remittitur issued in the underlying action (*2 Cal. App. 4th 1328, 1334)* . In so ruling, the court harmonized the results of *Friedman v. Stadum (1985) 171 Cal. App. 3d 775, 778-779, 217 Cal. Rptr. 585* [*see § 147.20[4][c]*] and *Gibbs*, and found *Gibbs* controlling. The court noted, but refused to apply to statute of limitations cases, *Friedman's* unstated assumption that a malicious prosecution cause of action does not accrue until an appeal from the underlying action is resolved (*2 Cal. App. 4th 1328, 1335-1336)* .

In ***Gibbs v. Haight, Dickson, Brown & Bonesteel*** *(1986) 183 Cal. App. 3d 716, 228 Cal. Rptr. 398* , plaintiff Gibbs commenced an action against his former law clients for recovery of attorney's fees and expenses. The clients cross complained against him for breach of contract and legal malpractice. Following a jury trial, a verdict was rendered in his favor on both the complaint and the cross complaint. The clients appealed, but the judgment was affirmed in an unpublished court of appeal opinion. Gibbs then commenced a malicious prosecution action against the clients and their attorneys. The attorney defendants demurred on the ground that the one-year limitations period had elapsed. The trial court sustained the demurrer without leave to amend and entered judgment dismissing the action as to the attorney defendants. Plaintiff appealed from the judgment of dismissal.

The court of appeal affirmed. In what appears to be a case of first impression, the court relied on case law in which the underlying action remained unchallenged to hold that the running of the statute of limitations is not tolled during the time for appeal from the judgment in the underlying action (*183 Cal. App. 3d 716, 721-722)* . However, when an appeal of that action is taken, the statute is tolled from the filing of the notice of appeal until exhaustion of the appeals process, on which date the statute commences to run again. In the instant case, judgment in the underlying action was entered August 31, 1979. The statute ran for 53 days until the notice of appeal was filed October 23, 1979. The statute thereafter was tolled for three years, six months, and eleven days during the pendency of the appeal (October 23, 1979 to May 4, 1983), and commenced to run again on May 4, 1983, when the appeal process was exhausted with the denial of the clients' petition for hearing in the Supreme Court. Gibbs filed his malicious prosecution action 361 days later, on April 30, 1984. Because the resulting total of 414 days exceeded the applicable one-year limitation period, Gibbs' action was time-barred (*183 Cal. App. 3d 716, 722)* .

[4] Additional Authorities

[a] Effect of Appeal on Period of Limitation

In *White v. Lieberman (2002) 103 Cal. App. 4th 210* , the plaintiff brought a malicious prosecution action after an earlier action brought against him was successful at the trial court level, but reversed on appeal. The appellate court in the underlying action filed its remittitur on February 23, 1999, but the trial court did not enter judgment on that reversal until March 26, 1999. The plaintiff filed his malicious prosecution action on March 24, 2000. The court of appeal held that the malicious prosecution action was barred by the applicable one-year statute of limitations. The court noted that when a case is affirmed on appeal, the statute of limitations, which is tolled while the appeal is pending, begins running again on the issuance of the remittitur. The court then concluded that the same rationale should apply when a case is reversed on appeal. Therefore, the statute of limitations began to run when the appellate court issued its remittitur, rather than when the trial court entered judgment on the remittitur, and the action was untimely (*103 Cal. App. 4th 210, 216-217)* .

In *Bellows v. Aliqout Assocs., Inc. (1994) 25 Cal. App. 4th 426, 30 Cal. Rptr. 2d 723* , the issue before the court of appeal was the date that the statute of limitations began to run again after an appeal was final: either the date that the appellate court issued the remittitur, or the date that the remittitur was filed in the trial court. The court of appeal held that, under *Cal. Rules of Ct., Rule 8.272(a)* formerly Rule 25(a)), the trial court regains jurisdiction over an action when the appellate court issues the remittitur. The date that the remittitur is filed in the lower court is not material for the

purposes of the statute of limitations (*25 Cal. App. 4th 426, 432-434)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsTortsIntentional TortsMalicious ProsecutionGeneral OverviewTortsIntentional TortsMalicious ProsecutionDefensesTortsIntentional TortsMalicious ProsecutionElementsGeneral Overview

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14-147 California Points & Authorities § 147.31

§ 147.31 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] for Malicious Prosecution--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Public Entity Immune From Liability [Gov. Code §§ 815.2(b), 821.6]

[1] FORM

[*Caption. See § 147.20*].

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION AGAINST DEFENDANT BECAUSE IT IS A PUBLIC ENTITY AND THE COMPLAINT IS BASED ON MISREPRESENTATIONS OF A PUBLIC EMPLOYEE WHO IS IMMUNE FROM LIABILITY FOR MALICIOUS PROSECUTION, THEREBY MAKING THE PUBLIC ENTITY IMMUNE.

A. Objection by Demurrer. [*See § 147.20, Paragraph A*].

B. Immunity of Public Employee. A public employee is not liable for injury caused by his or her instituting or prosecuting any judicial or administrative proceeding within the scope of his or her employment, even if he or she acts maliciously (*Gov. Code § 821.6*; *see Tur v. City of Los Angeles (1996) 51 Cal. App. 4th 897, 901, 59 Cal. Rptr. 2d 470*).

C. Immunity of Public Entity. A public entity is not liable for an injury resulting from the act or omission of an employee of a public entity when the employee is immune from liability (*Gov. Code § 815.2(b)*; *Citizens Capital Corp. v. Spohn (1982) 133 Cal. App. 3d 887, 888-889, 184 Cal. Rptr. 269* ; *Johnson v. Pacifica (1970) 4 Cal. App. 3d 82, 85, 84 Cal. Rptr. 246*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a general demurrer to a complaint for malicious prosecution when the demurrer asserts that the complaint fails to state a cause of action because the defendant is a public entity that is immune from liability for malicious prosecution because its employee, who is alleged to have made the misrepresentations, is immune from liability.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. For example, counsel should show that since police officers causing institution of criminal proceedings against plaintiff are immune from liability under the provisions of *Gov. Code § 821.6*, the city which employed them is also immune under *Gov. Code § 815.2(b)* [*Johnson v. Pacifica (1970) 4 Cal. App. 3d 82, 84-87, 84 Cal. Rptr. 246* ; *see § 147.31[3][b]*].

[b] Related Uses

With appropriate modifications, these points may be used to support a motion for summary judgment [*Code Civ. Proc. § 437c*] based on the immunity.

[c] Opposing Memoranda

The points in *§ 147.43* may be used in an appropriate case to oppose a demurrer supported by this memorandum.

[d] Related Pleading and Practice Forms

For forms of demurrers based on public employee and public entity immunity, see California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process* (Matthew Bender).

[3] Discussion of Authorities

[a] Immunity of Public Employee

In ***Tur v. City of Los Angeles*** *(1996) 51 Cal. App. 4th 897, 59 Cal. Rptr. 2d 470* , plaintiff, a free-lance reporter, brought a malicious prosecution action against a firefighter who had made accusations which resulted in a criminal complaint being brought against plaintiff. Plaintiff had trained a bright spotlight on defendant's rescue helicopter during a night mission, causing defendant to momentarily lose control and thus imperiling the crew. Defendant complained to the Federal Aviation Administration (FAA), which, after an investigation, exonerated plaintiff. Defendant then presented the same accusation to the city attorney, without revealing the FAA adjudication or plaintiff's exculpatory evidence. Plaintiff was charged with interfering with a firefighter in the performance of an official duty until, on the eve of trial, the city attorney learned of the FAA adjudication and dismissed the case. In the malicious prosecution action defendant asserted immunity under *Gov. Code § 821.6*. However, the trial court ruled that *Gov. Code § 821.6* was not applicable and that defendant's immunity, if any, was based on *Gov. Code § 822.2*, which immunizes public entities and public employees from liability for misrepresentations unless the employees are guilty of actual fraud, corruption or malice.

The court of appeal reversed, concluding that *Gov. Code § 822.2* does not create an exception to a public employee's *Gov. Code § 821.6* immunity from liability for malicious prosecution. The court noted that the purpose of *Gov. Code § 822.2* is to immunize public entities and their employees from liability for actions for deceit, which is a special, distinct,

tort. Since plaintiff's action was based on malicious prosecution rather than deceit, *Gov. Code § 822.2* did not apply. The court also noted that legislative history indicated that the bill which enacted *Gov. Code § 822.2* originally contained a section which would have imposed liability on public entities for malicious prosecution but this section was deleted. Finally, the court reasoned that plaintiff's proposed exception would swallow the rule because in every case of malicious prosecution the injured party can point to a "misrepresentation" in the generic sense of the word (*51 Cal. App. 4th 897, 902-903)* . The court thus reversed the judgment entered in favor of plaintiff.

[b] Immunity of Public Entity

In ***Citizens Capital Corp. v. Spohn*** *(1982) 133 Cal. App. 3d 887, 184 Cal. Rptr. 269* , plaintiffs alleged a conspiracy to destroy their businesses as collection agencies by the state and various state officials involved in an investigation of plaintiffs' businesses. The complaint was based on the institution by the state officials involved in dissemination of widespread newspaper publicity charging plaintiffs with improper conduct in the operation of their respective collection agencies and the institution of proceedings seeking to revoke their licenses. The trial court sustained defendants' demurrer on the ground that the conduct relied on by plaintiffs was absolutely privileged under *Gov. Code §§ 815.2* and *821.6*. Plaintiffs appealed from the order of the trial court.

The court of appeal agreed with the judgment of the trial court and affirmed. Pursuant to *Gov. Code § 821.6*, the court observed, a public employee was immune from any liability arising out of his or her instituting or prosecuting any judicial or administrative proceeding within the scope of his or her employment, even if he or she acts maliciously and without probable cause. The immunity afforded by this statute, the court held, extended to the dissemination of publicity that merely reported the results of official investigations of plaintiffs and the revocation action based on those investigations. Since the state employees were immune from liability, the court concluded, the state, pursuant to *Gov. Code § 815.2*, was also exempt from liability (*133 Cal. App. 3d 887, 888-889)* .

Johnson v. Pacifica *(1970) 4 Cal. App. 3d 82, 84 Cal. Rptr. 246* , is discussed in *§ 147.31[3][a]*. The court held that since the city's employees were immune, the city was immune under the provisions of *Gov. Code § 815.2(b)* (*4 Cal. App. 3d 82, 85)* .

[4] Additional Authorities

[a] Immunity of Public Employee

In *Scannell v. County of Riverside (1984) 152 Cal. App. 3d 596, 199 Cal. Rptr. 644* , the court of appeal upheld the trial court's orders sustaining general demurrers without leave to amend to plaintiff's causes of action for malicious prosecution against a county and one of its employees. The court found the county employee to be acting within the scope of his employment and therefore immune from prosecution by virtue of *Gov. Code § 821.6*, regardless of alleged malice. The court further found that because the employee was immune, the county employing him was likewise immune under *Gov. Code § 815.2(b)* (*152 Cal. App. 3d 596, 604)* .

In *Blackburn v. Los Angeles County (1974) 42 Cal. App. 3d 175, 116 Cal. Rptr. 622* , a malicious prosecution action was brought against the county and certain of its employees who had brought grand theft charges against plaintiff. The county demurred based on the immunity under *Gov. Code § 821.6* of its employees for malicious prosecution actions and its own immunity under *Gov. Code § 815.2(b)* when its employees are immune. The demurrer was sustained and judgment was entered for the county. Plaintiff appealed and the judgment was affirmed. The sole issue on appeal was the constitutionality of the immunity statutes. The court of appeal held that they were constitutional. It noted that immunity statutes have repeatedly been held to be constitutional. It also relied on the important public policy in protecting public employees from the harassment of baseless malicious prosecution actions (*42 Cal. App. 3d 175, 178-179)* .

In *Johnson v. Pacifica (1970) 4 Cal. App. 3d 82, 84 Cal. Rptr. 246* , the complaint alleged that two Pacifica police officers had negligently caused the institution of proceedings against plaintiff for passing bad checks. The city demurred and the complaint was dismissed as to the city. Plaintiff appealed and the judgment was affirmed. The court of appeal held that the police officers were immune under the provisions of *Gov. Code § 821.6* from liability for malicious prosecution. In response to plaintiff's contention that *Gov. Code § 821.6* was only intended to apply to prosecuting attorneys and not police officers, the court held that the statute used the broad term "employees" and must therefore have been intended to apply to police officers (*4 Cal. App. 3d 82, 84-87)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsTortsIntentional TortsMalicious ProsecutionGeneral OverviewTortsIntentional TortsMalicious ProsecutionDefensesTortsIntentional TortsMalicious ProsecutionElementsGeneral Overview

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14-147 California Points & Authorities § 147.32

§ 147.32 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] for Malicious Prosecution--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Right to Bring Action Waived by Seeking Defense Costs Under Code Civ. Proc. § 1038(c)

[1] FORM

[*Caption. See § 147.20*].

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION FOR MALICIOUS PROSECUTION BECAUSE IN THE UNDERLYING ACTION _____ [UNDER THE TORT CLAIMS ACT *or* FOR INDEMNITY *or* FOR CONTRIBUTION] PLAINTIFF SOUGHT DEFENSE COSTS.

A. Objection by Demurrer. [*See § 147.20, Paragraph A*].

B. Waiver by Seeking Defense Costs. If a defendant in an action _____ [under the Tort Claims Act *or* for _____ (express *or* implied) indemnity *or* for contribution] prevails on a motion for _____ [summary judgment *or* nonsuit *or* directed verdict *or* judgment under *Code of Civil Procedure Section 631.8*] and seeks its defense costs under the provisions of *Code of Civil Procedure Section 1038*, that defendant waives the right to seek damages for malicious prosecution (*Code Civ. Proc. § 1038(c)*).

C. Judicial Notice. The court must take, and is hereby requested to take, judicial notice of the attached records of the _____ [*specify*] Court of the County of _____, Case NO. _____, in which plaintiff sought defense costs (*Evid. Code §§ 452(d), 453*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a general demurrer to a complaint for malicious prosecution when the demurrer asserts that the right to bring an action for malicious prosecution was waived because plaintiff sought defense costs, pursuant to *Code Civ. Proc. § 1038*, in a previous action.

The memorandum includes a request for the court to take judicial notice of the records in the case in which defense costs were sought, to enable the defendant to establish that fact. Certified copies of the relevant court records should be attached to the demurrer and points. For additional authorities for use in requesting the court to take judicial notice, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, these points may be used to support a motion for summary judgment based on waiver by seeking defense costs.

[3] Discussion of Authorities

[a] Waiver by Seeking Defense Costs

Code Civ. Proc. § 1038 provides that in any civil proceeding under the California Tort Claims Act (*Gov. Code § 810 et seq.*) or for express or implied indemnity or for contribution in any civil action, in which the defendant or cross defendant has made a motion for summary judgment, judgment under *Code Civ. Proc. § 631.8*, directed verdict, or nonsuit, and the motion is granted, the court shall, on the defendant's or cross defendant's motion, at the time of granting the motion or at a later time set forth by rule of the Judicial Council adopted under *Code Civ. Proc. § 1034*, determine whether the plaintiff, petitioner, cross complainant, or intervenor brought the proceeding with reasonable cause and in the good-faith belief that there was a justiciable controversy under the facts and law which warranted the filing of the complaint, petition, cross complaint, or complaint in intervention [*Code Civ. Proc. § 1038(a), (d)*]. If the court determines the proceeding was not brought in good faith and with reasonable cause, an additional issue shall be decided regarding the defense costs reasonably and necessarily incurred by the party or parties opposing the proceeding, and the court shall render judgment in favor of that party in the amount of all reasonable and necessary defense costs, in addition to those costs normally awarded to the prevailing party [*Code Civ. Proc. § 1038(a)*]. Items constituting or not constituting costs normally awarded to the prevailing party under *Code Civ. Proc. § 1032* are set forth in *Code Civ. Proc. § 1033.5*. An award of defense costs under *Code Civ. Proc. § 1038* can only be made on notice contained in a party's papers and an opportunity to be heard [*Code Civ. Proc. § 1038(a)*]. "Defense costs" includes reasonable attorney's fees, expert witness fees, the expense of services of experts, advisers, and consultants, when reasonably and necessarily incurred in defense o the proceeding [*Code Civ. Proc. § 1038(b)*]. If a motion for defense costs is made, the right to seek damages for malicious prosecution is waived. However, failure to make the motion is not a waiver of the right to seek damages for malicious prosecution [*Civ. Proc. § 1038(c)*].

[b] Judicial Notice

Evid. Code § 452(d) provides that the court may take judicial notice of the records of any court in California or of any court of record of the United States or of any state of the United States. *Evid. Code § 453* provides that a court must take judicial notice of any matter specified in *Evid. Code § 452* if: (1) a party requests it, (2) each adverse party is given sufficient notice of the request, through the pleadings or otherwise, to enable that adverse party to prepare to meet the

request, and (3) the court is furnished with sufficient information to enable it to take judicial notice.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsTortsIntentional TortsMalicious ProsecutionGeneral OverviewTortsIntentional TortsMalicious ProsecutionDefensesTortsIntentional TortsMalicious ProsecutionElementsGeneral Overview

California Points & Authorities

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 147 MALICIOUS PROSECUTION AND ABUSE OF PROCESS
PART II. FORMS
A. Malicious Prosecution

14-147 California Points & Authorities § 147.33

§ 147.33 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] for Malicious Prosecution--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Governmental Entity Not Permitted to Bring Malicious Prosecution Suit

[1] FORM

[*Caption. See § 147.20*].

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION FOR MALICIOUS PROSECUTION BECAUSE PLAINTIFF IS A GOVERNMENTAL ENTITY AND THEREFORE MAY NOT BRING A SUIT FOR MALICIOUS PROSECUTION.

A. Objection by Demurrer. [*See § 147.20, Paragraph A*].

B. Governmental Entities Not Permitted to Sue for Malicious Prosecution. Governmental entities may not maintain actions for malicious prosecution against those who have previously sued the entities without success; the bringing of suits against the government is absolutely privileged and cannot form the basis for the imposition of civil liability for malicious prosecution (*City of Long Beach v. Bozek (1982) 31 Cal. 3d 527, 538-539, 183 Cal. Rptr. 86, 645 P.2d 137 , cert. granted and opinion vacated, (1983) 459 U.S. 1095, 103 S. Ct. 712, 74 L. Ed. 2d 943 , opinion reinstated, (1983) 33 Cal. 3d 727, 190 Cal. Rptr. 918, 661 P.2d 1072*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a general demurrer to a complaint for malicious prosecution on the ground that the complaint on its face shows that plaintiff is a governmental entity and therefore may not bring an action for malicious prosecution.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[B] Related Uses

With appropriate modifications, these points may be used to support a motion for summary judgment [*see Code Civ. Proc. § 437c*] on the ground that an action for malicious prosecution cannot be brought by a governmental entity.

[3] Discussion of Authorities

[a] Governmental Entities Not Permitted to Sue for Malicious Prosecution

In ***City of Long Beach v. Bozek*** *(1982) 31 Cal. 3d 527, 183 Cal. Rptr. 86, 645 P.2d 137 , cert. granted and opinion vacated, (1983) 459 U.S. 1095, 103 S. Ct. 712, 74 L. Ed. 2d 943 , opinion reinstated, (1983) 33 Cal. 3d 727, 190 Cal. Rptr. 918, 661 P.2d 1072* , defendant filed suit against the city of Long Beach and two city police officers for false imprisonment, false arrest, negligent hiring, assault, and battery. A jury found for the city and the two officers, who then instituted an action for malicious prosecution against defendant. Defendant generally demurred to the city's complaint, and the trial court sustained his demurrer without leave to amend only as to the city on the ground that municipalities should not be permitted to sue for malicious prosecution. The city appealed, and the judgment was affirmed. The Supreme Court stated that in order to avoid the chilling effect upon the constitutional right of petition which would result if municipalities were allowed to maintain actions for malicious prosecution, the best course is to defer to the legislatively provided remedy. The Court noted that an award of the expenses of suit by a trial court in an initial action, under former Code Civ. Proc. § 128.5(a) [*now see Code Civ. Proc. § 128.5(a), (e)*] and *Code Civ. Proc. § 1021.7*, will fully compensate a municipality for its expenses of defending suit. The availability of the award, in combination with the criminal sanctions provided in *Penal Code § 72* for the filing of false claims with the government and the possibility of malicious prosecution actions by individual city employees, such as the police officers in this case, provide an adequate deterrent to unwarranted lawsuits without unduly infringing on the right of petition. Accordingly, the Court held that governmental entities may not maintain actions for malicious prosecution against those who have previously sued these entities without success; the bringing of suits against the government is absolutely privileged and cannot form the basis for imposition of civil liability for malicious prosecution (*31 Cal. 3d 527, 538-539)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsTortsIntentional TortsMalicious ProsecutionGeneral OverviewTortsIntentional TortsMalicious ProsecutionDefensesTortsIntentional TortsMalicious ProsecutionElementsGeneral Overview

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 147 MALICIOUS PROSECUTION AND ABUSE OF PROCESS
PART II. FORMS
A. Malicious Prosecution

14-147 California Points & Authorities § 147.34

§ 147.34 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Malicious Prosecution Action--By Defendant--Defendant Had Probable Cause to Institute Civil Action on Which Complaint Is Based

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF MOTION FOR
Plaintiff,	)	SUMMARY JUDGMENT
vs.	)	[*Code Civ. Proc. § 437c*]
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD BE GRANTED WHEN THE AFFIDAVITS ESTABLISH PROBABLE CAUSE FOR INSTITUTING THE PREVIOUS CIVIL ACTION WHICH IS THE BASIS OF THE COMPLAINT FOR MALICIOUS PROSECUTION.

A. Summary Judgment. A defendant may move for summary judgment in any action or proceeding if it is contended that the action has no merit. The motion must be granted if all the papers submitted show that there is no triable issue as

to any material fact and that defendant is entitled to judgment as a matter of law (*Code Civ. Proc. § 437c*).

B. Lack of Probable Cause Must Be Shown. In order to establish a cause of action for malicious prosecution, a plaintiff must demonstrate that the prior action was brought without probable cause. The probable-cause element of malicious prosecution requires a determination of whether, on the basis of the facts known to the defendant, the institution of the prior action was legally tenable (*Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal. 3d 863, 871, 878, 254 Cal. Rptr. 336, 765 P.2d 498*).

C. Probable Cause Is Legal Issue. The existence or absence of probable cause is a question of law to be determined by the court, rather than a question of fact for the jury (*Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal. 3d 863, 875, 254 Cal. Rptr. 336, 765 P.2d 498* ; *Pond v. Insurance Co. of North America (1984) 151 Cal. App. 3d 280, 289, 198 Cal. Rptr. 517*).

D. Summary Judgment Is Proper When Declarations or Affidavits Establish Existence of Probable Cause. If a defendant's declarations or affidavits establish that he or she had probable cause to institute the underlying action, defendant's motion for summary judgment should be granted (*Kassan v. Bledsoe (1967) 252 Cal. App. 2d 810, 815-817, 60 Cal. Rptr. 799*).

[*Optional*] **E. Favorable Outcome of Action as Establishing Probable Cause.** When the action on which the malicious prosecution action is based concluded favorably to defendant (plaintiff in the prior action), probable cause for bringing the action is conclusively established notwithstanding reversal of the underlying action on appeal (*Fairchild v. Adams (1959) 170 Cal. App. 2d 10, 15, 338 P.2d 191*).

[*Optional*] **F. Probable Cause for Initiating Action Establishes Probable Cause for Continuing Action After Reversal on Appeal.** If probable cause for bringing the underlying action is established, probable cause also exists for the continuation of the same action after it has been reversed on appeal (*Vanzant v. DaimlerChrysler Corp. (2002) 96 Cal. App. 4th 1283, 1291, 118 Cal. Rptr. 2d 48*).

[*Optional*] **G. Attorney's Probable Cause.** In a malicious prosecution action, the objective standard of probable cause with regard to the initiation of an allegedly malicious action by an attorney is measured by whether, on the basis of the facts known to the defendant attorney, the filing of the action was objectively reasonable. The test is whether any reasonable attorney would have thought the claim tenable. Tenability must be measured in light of both the existing authorities and the leeway a litigant must be given to argue for an evolution of legal precedents (*Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal. 3d 863, 886, 254 Cal. Rptr. 336, 765 P.2d 498*).

[*Optional*] **H. Irrelevance of Attorney Research to Issue of Probable Cause.** The adequacy of an attorney's research is not relevant to the court's determination of probable cause (*Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal. 3d 863, 883, 254 Cal. Rptr. 336, 765 P.2d 498*).

[*Optional*] **I. Extent of Attorney's Knowledge Irrelevant Where Underlying Action Was Tenable.** The extent of an attorney's knowledge at the time an action is filed is irrelevant where the actual facts establish that the underlying action was tenable (*Hufstedler, Kaus & Ettinger v. Superior Court (1996) 42 Cal. App. 4th 55, 61, 49 Cal. Rptr. 2d 551*).

[*Optional*] **J. Denial of Defendant's Summary Judgment Motion in Underlying Civil Action Normally Establishes Probable Cause.** Denial of the defendant's motion for summary judgment in the underlying civil action is normally sufficient to establish probable cause for bringing the underlying action (*Roberts v. Sentry Life Ins. (1999) 76 Cal. App. 4th 375, 384, 90 Cal. Rptr. 2d 408*).

[*Optional*] **K. Preliminary Injunction in Underlying Action Establishes Probable Cause.** A preliminary injunction granted to the plaintiff in the underlying action after a hearing on the merits establishes probable cause as to all causes

of action that were reasonably related to the injunction (*Fleishman v. Superior Court (2002) 102 Cal. App. 4th 350, 355-358, 125 Cal. Rptr. 2d 383*).

[*Optional*] **L. Fraud Exception to Interim Adverse Judgment Rule Cannot Be Relitigated in Malicious Prosecution Action.** Although there is a fraud exception to the general rule that a trial court judgment in the underlying action in favor of the malicious prosecution defendant will establish probable cause for bringing the action even if that decision is subsequently reversed on appeal, if the claims of fraud or perjury are litigated and rejected by the fact finder in the underlying action, the malicious prosecution plaintiff cannot rely on those same claims of fraud or perjury to establish the absence of probable cause in the malicious prosecution action (*Plumley v. Mockett (2008) 164 Cal. App. 4th 1031, 1056, 79 Cal. Rptr. 3d 822*).

[*Optional*] **M. Failure to Post Undertaking Does Not Negate Probable Cause Established by Order for Preliminary Injunction.** The failure to post a required undertaking or bond under *Code of Civil Procedure Section 529(a)* in order to perfect a preliminary injunction granted in an underlying action does not negate that the order granting the preliminary injunction conclusively establishes probable cause for bringing that action (*Paiva v. Nichols (2008) 168 Cal. App. 4th 1007, 1024, 85 Cal. Rptr. 3d 838*).

[2] Comments

[a] Use of Form

This memorandum may be submitted by a defendant in a malicious prosecution action in support of a motion for summary judgment if defendant's declarations in support of the motion establish that there was probable cause for bringing the underlying civil action.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations that support the motion [*Code Civ. Proc. § 437c*].

[b] Related Pleading and Practice Forms

For forms of affirmative defenses based on lack of probable cause, see California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process* (Matthew Bender).

[c] Related Memoranda

For forms relating to summary judgment in general, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Lack of Probable Cause Must Be Shown

In ***Sheldon Appel Co. v. Albert & Oliker*** *(1989) 47 Cal. 3d 863, 254 Cal. Rptr. 336, 765 P.2d 498* , a real estate company brought an action for malicious prosecution based on defendant law firm's unsuccessful attempt to assert a lien claim and impose a lis pendens on defendant's property. Over objection, the trial court permitted an attorney called by plaintiff to testify as an expert witness on the question of the legal tenability of the prior action. The court also admitted evidence with respect to the adequacy of the legal research that had been performed by defendant before the institution of the action. In submitting the probable-cause issue to the jury, the court instructed the jury that to constitute probable cause for the prosecution of a proceeding against plaintiff, the evidence must establish that defendant, after a reasonable investigation and industrious search of legal authority, had an honest belief that its client's claims were tenable, and that defendant prosecuted claims that a reasonable lawyer would regard as tenable or did not unreasonably neglect to investigate the facts and law in making their determination to proceed with the prior action. As so instructed, the jury

found in favor of plaintiff. On defendant's appeal, the court of appeal affirmed.

The Supreme Court reversed, and remanded the case with directions to order the entry of judgment in favor of defendant on the malicious prosecution claim (*47 Cal. 3d 863, 886)* . The Court stated that in order to establish a cause of action for malicious prosecution, a plaintiff must demonstrate that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in his or her favor, (2) was brought without probable cause, and (3) was initiated with malice (*47 Cal. 3d 863, 871)* . The Court noted that the probable-cause element in the malicious prosecution tort plays a role quite distinct from the separate "malice" element of the tort. While the malice element is directly concerned with the subjective mental state of the defendant in instituting the prior action, the probable-cause element calls on the trial court to make an objective determination of the reasonableness of the defendant's conduct: to determine whether, on the basis of the facts known to the defendant, the institution of the prior action was legally tenable (*47 Cal. 3d 863, 878)* . On reviewing the evidence and the applicable legal authorities, the Court concluded that the standard for legal tenability was met (*47 Cal. 3d 863, 885-886)* .

[b] Probable Cause as Legal Issue

The facts and procedural background of ***Sheldon Appel Co. v. Albert & Oliker*** *(1989) 47 Cal. 3d 863, 254 Cal. Rptr. 336, 765 P.2d 498* , are discussed under *§ 147.34[3][a]*. The Supreme Court noted that the existence or absence of probable cause has traditionally been viewed as a question of law to be determined by the court, rather than a question of fact for the jury (*47 Cal. 3d 863, 875)* . Underlying this rule is the fact that jurors are often not capable of the sensitive evaluation of legal principles and precedents that is necessary for determining probable cause (*47 Cal. 3d 863, 875)* . The Court noted that when there is a dispute about the state of the defendant's knowledge, and the existence of probable cause turns on the resolution of that dispute, the question of the defendant's factual knowledge or belief is properly resolved by the jury (*47 Cal. 3d 863, 881)* . In the instant case, however, there were no disputed questions of factual knowledge or belief. Therefore, submission of the probable-cause issue to the jury was improper (*47 Cal. 3d 863, 876)* . On its independent evaluation of probable cause, the Court found that defendants did have probable cause to bring the underlying action (*47 Cal. 3d 863, 886)* .

In ***Pond v. Insurance Co. of North America*** *(1984) 151 Cal. App. 3d 280, 198 Cal. Rptr. 517* , defendant insurer instituted an action for indemnification against plaintiff, one of its agents, after settlement of a wrongful death suit. The indemnification action was decided on behalf of plaintiff, and plaintiff subsequently brought the present action for malicious prosecution. Defendant moved for, and the trial court granted, summary judgment on the ground that there was probable cause for the indemnification suit and that no issue of material fact was disputed. Plaintiff appealed.

The court of appeal upheld summary judgment for defendant. The court stated that when the facts are uncontroverted, the court itself must determine probable cause (*151 Cal. App. 3d 280, 289)* . The court noted that plaintiff had not disputed the statements in a declaration offered by defendant showing the existence of probable cause without any contrary evidence (*151 Cal. App. 3d 280, 288)* . The court further noted that the only evidentiary bases on which plaintiff might have based a claim defeating the existence of probable cause had been properly excluded by the trial court (*151 Cal. App. 3d 280, 289)* . The court held that the trial court was well within its discretion in allowing summary judgment on the issue of existence of probable cause (*151 Cal. App. 3d 280, 288)* .

[c] Summary Judgment Is Proper When Declarations or Affidavits Establish Existence of Probable Cause

In ***Kassan v. Bledsoe*** *(1967) 252 Cal. App. 2d 810, 60 Cal. Rptr. 799* , an attorney brought an action for malicious prosecution based on two lawsuits in which he had been a defendant. Defendants moved for summary judgment in the malicious prosecution action on the basis of affidavits establishing their careful investigation of the cause of action against plaintiff and their reasonable belief that he was liable. Plaintiff's affidavit did not contradict defendants' affidavits and merely stated that he had done nothing wrong and that defendants had acted maliciously in joining him in the underlying action. It did not present any facts to show why defendants did not have probable cause to join him. The

trial court granted the motion for summary judgment and plaintiff appealed.

The court of appeal affirmed the judgment. It noted that probable cause constitutes a complete defense in an action for malicious prosecution and that it is essential to the plaintiff's case that there be substantial evidence to create a conflict or an inference of lack of probable cause. The court concluded that the affidavits submitted by defendants established that defendants had probable cause for instituting the prior lawsuits and that plaintiff's lawsuits stated no facts sufficient to create a conflict (*252 Cal. App. 2d 810, 816-817)* .

[d] Favorable Outcome of Action as Establishing Probable Cause

In ***Fairchild v. Adams*** *(1959) 170 Cal. App. 2d 10, 338 P.2d 191* , a brother sued his sister for instituting a will contest concerning the will of a second sister. The trial court found undue influence by the brother in the will contest, but the Supreme Court reversed, holding that there was not sufficient evidence of the undue influence. In the malicious prosecution action, the trial court entered a judgment for defendant sister and plaintiff brother appealed. The court of appeal affirmed. It upheld the trial court's finding that defendant had probable cause for bringing the will contest. It held that the favorable termination of the will contest in the trial court conclusively established probable cause despite the fact that the verdict was reversed by the Supreme Court. The Court noted that 10 jurors, the trial judge, three judges of the court of appeal, and two Supreme Court justices had ruled in defendant's favor in the will contest, which showed that there was probable cause for bringing it (*170 Cal. App. 2d 10, 14-15)* .

[e] Probable Cause for Initiating Action Establishes Probable Cause for Continuing Action After Reversal on Appeal

In ***Vanzant v. DaimlerChrysler Corp.*** *(2002) 96 Cal. App. 4th 1283, 118 Cal. Rptr. 2d 48* , a manufacturer and seller of radiator grille overlays was sued in federal court for trademark infringement and related causes of action by an automobile manufacturer, who held registered trademarks for the radiator grille designs on its vehicles. The district court in the underlying federal action granted a partial summary judgment for the automobile manufacturer and issued a permanent injunction against the grille overlay seller. However, the federal court of appeals reversed the district court and remanded for further proceedings. On remand, the district court granted summary judgment for the grille overlay seller, who subsequently filed a malicious prosecution action against the automobile manufacturer and its attorneys. The plaintiff argued that the defendants lacked probable cause for prosecuting the underlying action. The defendants demurred to the malicious prosecution complaint, arguing that the rulings in the federal district court in the defendants' favor conclusively established probable cause for bringing the action. The plaintiff argued that although those rulings may have established probable cause for bringing the action, they did not establish probable cause for continuing the action after it was reversed on appeal. The trial court sustained the demurrer, and the plaintiff appealed.

The court of appeal affirmed. The court applied the established rule that if a plaintiff in the underlying action obtains a favorable judgment on the merits, that judgment, unless procured by fraud, establishes probable cause for prosecuting the underlying action even if the judgment is subsequently reversed on appeal (*96 Cal. App. 4th 1283, 1289)* . The court then rejected the argument of the plaintiff in this case that, notwithstanding the existence of probable cause for the defendants' initiating the underlying action, the plaintiff's malicious prosecution action could be predicated on a lack of probable cause for continuing to prosecute the underlying action after it was reversed and remanded. The court noted that California courts had typically refused to permit malicious prosecution claims based on the continuation of a properly initiated existing proceeding, because a contrary rule would disrupt ongoing litigation by injecting tort claims against the parties' lawyers and because the appropriate remedy for actions taken within a lawsuit lies in the trial court's broad powers to control judicial proceedings. In this particular case, because probable cause was conclusively established for initiating the underlying action, the court held that probable cause existed for continuing the same action after reversal on appeal (*96 Cal. App. 4th 1283, 1290-1291)* .

NOTE:

In 2004, the California Supreme Court held in *Zamos v. Stroud (2004) 32 Cal. 4th 958, 970, 12 Cal. Rptr. 3d 54, 87 P.3d 802* [*see § 147.53*], that an attorney may be liable for malicious prosecution for continuing to prosecute a claim after the attorney discovers that the action in fact lacks probable cause, even if the attorney had probable cause to initiate the action. The Court specifically disapproved of any contrary language that may be found in *Vanzant v. DaimlerChrysler Corp. (2002) 96 Cal. App. 4th 1283, 118 Cal. Rptr. 2d 48* , as well as in *Swat-Fame, Inc. v. Goldstein (2002) 101 Cal. App. 4th 613, 124 Cal. Rptr. 2d 556* , and *Morrison v. Rudolph (2002) 103 Cal. App. 4th 506, 126 Cal. Rptr. 2d 747* [*see § 147.34[3][f]*]. Therefore, although continuing to prosecute a case after reversal on appeal will not always subject an attorney to liability for malicious prosecution, the attorney should exercise caution to ensure that probable cause for continuing the action still exists.

[f] Attorney's Probable Cause

The facts and procedural background of ***Sheldon Appel Co. v. Albert & Oliker*** *(1989) 47 Cal. 3d 863, 254 Cal. Rptr. 336, 765 P.2d 498* , are discussed under *§ 147.34[3][a]*. The Supreme Court adopted the probable-cause standard for frivolous appeals as the standard for determining an attorney's probable cause in a malicious prosecution action. The court noted that in *In re Marriage of Flaherty (1982) 31 Cal. 3d 637, 650, 183 Cal. Rptr. 508, 646 P.2d 179* , it had concluded that an appeal could properly be found frivolous only if any reasonable attorney would agree that the appeal was totally and completely without merit. In a subsequent case, *Williams v. Coombs (1986) 179 Cal. App. 3d 626, 639, 224 Cal. Rptr. 865* , the court of appeal suggested that this standard was insufficiently stringent as a test for probable cause in the malicious prosecution context and instead proposed that probable cause be measured by whether a prudent attorney after such investigation of the facts and research of the law as the circumstances reasonably warrant, would have considered the action to be tenable on the theory advanced. The Supreme Court stated that to the extent the *Flaherty* and *Williams* formulations differ, the less stringent *Flaherty* standard more appropriately reflects the important public policy of avoiding the chilling of novel or debatable legal claims. That policy is no less applicable to the institution of actions at the trial stage than to the pursuit of appeals. In contrast to the "prudent attorney" language of *Williams*, the *Flaherty* standard, modified to fit the context of the instant case, may make it clearer that in evaluating whether or not there was probable cause for malicious prosecution purposes, a court must properly take into account the evolutionary potential of legal principles. Thus, the appropriate probable-cause standard in the malicious prosecution action is whether any reasonable attorney would have thought the defendant's claim tenable. Applying this standard, the court concluded that the lien claim pursued by defendant, although not ultimately successful, was legally tenable and that there was probable cause to support both the lien claim and the lis pendens (*47 Cal. 3d 863, 885-886)* .

[g] Irrelevance of Attorney Research to Issue of Probable Cause

The facts and procedural background of ***Sheldon Appel Co. v. Albert & Oliker*** *(1989) 47 Cal. 3d 863, 254 Cal. Rptr. 336, 765 P.2d 498* , are discussed under *§ 147.34[3][a]*. The Court held that the adequacy of an attorney's research is not relevant to the determination of probable cause. The Court rejected a dictum in *Tool Research & Engineering Corp. v. Henigson (1975) 46 Cal. App. 3d 675, 120 Cal. Rptr. 291* , that had suggested an attorney's reasonable investigation and industrious research of legal authority is an essential component of probable cause. The Court noted that this dictum shifts the focus of the probable-cause inquiry from the objective tenability of the prior claim to the adequacy of the particular defendant's performance as an attorney. Furthermore, this component is at odds with a consistent line of California decisions that have made clear that an attorney's duty of care runs primarily to the client rather than the client's adversary, and which have precluded the adversary from maintaining a negligence cause of action against its opponent's attorney. Allowing inadequate research to serve as an independent basis for proving the absence of probable cause on the part of an attorney would tend to create a conflict of interest between the attorney and client, tempting a cautious attorney to create a record of diligence by performing extensive legal research, not for the benefit of the client, but simply to protect himself or herself from the client's adversaries in the event the initial suit fails (*47 Cal. 3d 863, 882-883)* .

[h] Extent of Attorney's Knowledge Irrelevant Where Underlying Action Was Tenable

In ***Hufstedler, Kaus & Ettinger v. Superior Court*** *(1996) 42 Cal. App. 4th 55, 49 Cal. Rptr. 2d 551* , a writer of a financial newsletter sued a bank and its attorney for malicious prosecution after he had been sued for libel for an article critical of a bank offer of certificates of deposit. The defendant attorney moved for summary judgment, contending that probable cause existed for the underlying suit. Plaintiff opposed the motion, contending that there were triable issues of fact about the extent of the attorney's knowledge at the time she filed the libel action. The trial court denied the motion, and the attorney petitioned for a writ of mandate, contending that the nature and extent of her knowledge was irrelevant since the facts establish that the underlying lawsuit was tenable.

The court of appeal relied extensively on *Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal. 3d 863, 254 Cal. Rptr. 336, 765 P.2d 498* , discussed under *§ 147.34[3][e]*. The court noted that where the facts known by the attorney are not in dispute, the probable cause issue is properly determined by the trial court under an objective standard, without a determination of whether the attorney subjectively believed that the prior claim was legally tenable (*42 Cal. App. 4th 55, 63)* . Thus, a determination of probable cause should not be second-guessed in a malicious prosecution action (*42 Cal. App. 4th 55, 65)* . Furthermore, the court held that the attorney's knowledge had nothing to do with plaintiff's theory of the case, since his position was that any reasonable attorney should have known that the bank could not prevail in the libel action. With regard to whether a reasonable attorney would have thought that the bank's claim was tenable, the court noted that plaintiff did not dispute that his statements were defamatory, and admitted that he knew that some of them were false when published. Plaintiff's legal positions were that his statements were opinions, that the bank was a public figure, and that he acted without malice. The court concluded that plaintiff was not so absolutely correct that no reasonable attorney would have thought otherwise (*42 Cal. App. 4th 55, 67)* . The court thus issued a peremptory writ of mandate compelling the trial court to grant the attorney's motion for summary judgment.

[i] Denial of Defendant's Summary Judgment Motion in Underlying Civil Action Normally Establishes Probable Cause

In ***Roberts v. Sentry Life Ins.*** *(1999) 76 Cal. App. 4th 375, 90 Cal. Rptr. 2d 408* , a physician brought an action for malicious prosecution against a disability insurer and its attorneys for earlier tort claims brought in federal court against the physician for fraud and bad faith. The underlying tort claims stemmed from the payment of disability compensation to the physician under a policy issued by the insurer, under which the insurer was obligated to pay the physician $3,000 per month while he was totally disabled, with the payments reduced by 50 percent of compensation earned if he returned to work. The insurer in the underlying suit argued that the disability payments made over the course of several years were fraudulently obtained because, although the physician reported that he received no salary for 11 months out of 12 for the relevant years, he refused to report the amount of the salary payments made once a year to him by his wholly owned personal corporation, which were usually approximately $400,000. Although the underlying claims were eventually decided in favor of the physician, the trial court had denied the physician's motion for summary judgment on the fraud claim, on the grounds that triable issues existed as to whether the physician concealed material facts from the insurer with the intent to deceive. In the malicious prosecution action, the trial court granted summary judgment in favor of the defendants, and the physician appealed, arguing that factual issues existed as to whether there had been probable cause to bring the underlying claims and whether the claims had been brought maliciously.

The court of appeal affirmed, holding that the denial of the physician's motion for summary judgment in the underlying civil action established that the claims were supported by probable cause. The court concluded that denial of a defendant's motion for summary judgment in the underlying suit will normally be sufficient to establish probable cause, because denial of the motion provides persuasive evidence that the suit does not totally lack merit. The court noted that summary judgment motions are usually heard only after full discovery develops evidence relevant to the claim, and that the judge ruling on the motion is impartial and his or her denial of a summary judgment motion suggests that some reasonable lawyers could find the claim to be at least arguably meritorious (*76 Cal. App. 4th 375, 384)* . However, the court of appeal noted that under certain circumstances, a denial of summary judgment in the underlying action would

not preclude a finding that probable cause was lacking--for example, if the underlying motion for summary judgment was denied due to materially false facts submitted in opposition (*76 Cal. App. 4th 375, 384)* . In this case, however, the court rejected the argument that the underlying denial of summary judgment had been based on false evidence presented in opposition. The court also concluded that, independent of the summary judgment ruling in the underlying civil action, a reasonable lawyer representing the insurer could have concluded that a tenable claim for fraud against the physician existed (*76 Cal. App. 4th 375, 385-386)* .

Note that, although stopping short of holding that the denial of a defendant's motion for summary judgment in the underlying action conclusively establishes probable cause, the court of appeal in *Roberts* questioned the continued viability of that part of the holding in *Lucchesi v. Giannini & Uniack (1984) 158 Cal. App. 3d 777, 205 Cal. Rptr. 62* , discussed in *§ 147.49[3][a]*, which declined to treat denial of summary judgment as conclusive that probable cause existed. *Lucchesi* was decided when probable cause included an element of subjective good faith, an element later eliminated by the California Supreme Court. As noted in *Roberts*, denial of summary judgment may show objective legal tenability, but does not address the plaintiff's subjective good faith (*76 Cal. App. 4th 375, 384)* .

[j] Preliminary Injunction in Underlying Action Establishes Probable Cause

In ***Fleishman v. Superior Court*** *(2002) 102 Cal. App. 4th 350, 125 Cal. Rptr. 2d 383* , the plaintiff brought a malicious prosecution action against an attorney for the plaintiff's former employer, which had previously brought an action against the plaintiff. The underlying lawsuit alleged various causes of action based generally on trade secret misappropriation, interference with contract, and false advertising, and stemmed from the plaintiff's conduct in soliciting purchasers of timeshare interests in an inn to sell their interests and repurchase at a lower price, with the plaintiff as broker. In that underlying action, the trial court granted a preliminary injunction in favor of the plaintiff's former employer, although eventually the former employer voluntarily dismissed its action against the plaintiff without prejudice. The plaintiff then filed the malicious prosecution action. The trial court denied the defendant's demurrer and motion for judgment on the pleadings. The defendant sought a writ of mandate.

The court of appeal granted the writ of mandate, ordering the trial court to vacate its order and grant the defendant judgment on the pleadings. The court of appeal briefly reviewed the Supreme Court's opinion in *Wilson v. Parker, Covert & Chidester (2002) 28 Cal. 4th 811, 123 Cal. Rptr. 2d 19, 50 P.3d 733* [*see § 147.34[3][j]*]. The court then concluded that if a denial of a special motion to strike under the anti-SLAPP statute conclusively establishes probable cause, then the issuing of a preliminary injunction must have the same effect. In deciding whether to issue a preliminary injunction, a trial court must evaluate the likelihood that the party seeking the injunction will ultimately prevail on the merits, as well as balance the comparative consequences of the issuance and nonissuance of the injunction. The trial court must carefully weigh the evidence, evaluate the credibility of witnesses, and make factual findings on disputed evidence. Therefore, a preliminary injunction granted to the plaintiff in the underlying action after a hearing on the merits establishes probable cause as to all causes of action that were reasonably related to the injunction (*102 Cal. App. 4th 350, 355-356)* . The court cautioned, however, that probable cause would not be established as to any causes of action that were not reasonably related to the injunction, although the court concluded that each cause of action alleged in the underlying lawsuit was reasonably related to the preliminary injunction that the trial court issued in that case (*102 Cal. App. 4th 350, 358-359)* .

[k] Fraud Exception to Interim Adverse Judgment Rule Cannot Be Relitigated in Malicious Prosecution Action

In ***Plumley v. Mockett*** *(2008) 164 Cal. App. 4th 1031, 79 Cal. Rptr. 3d 822* , plaintiff, a sales representative, and defendant, president of a company that marketed furniture-related products, sought competing patents for a pivoting-tab grommet used in the construction of desk tops. Shortly after the patent was issued to plaintiff, defendant challenged the patent before the Board of Patent Appeals and Interferences, claiming that he invented the grommet first and had provided plaintiff with the idea through communications with plaintiff. While the patent proceeding was pending,

defendant also sued plaintiff in state court on various causes of action, including unfair competition and misappropriation of trade secrets. In that action, the trial judge found in favor of the plaintiff on the unfair competition claim and made factual findings suggesting that much of defendant's evidence had been fabricated. Not bound by the state court's ruling, however, the Board of Patent Appeals found in favor of defendant on his patent interference claim, after concluding based on circumstantial evidence that defendant's claim appeared more likely to be truthful than plaintiff's. However, a federal district court reversed the Board's decision on the grounds that the Board erred in inferring based solely on circumstantial evidence that defendant had communicated the design for the pivoting-tab grommet to plaintiff. On remand, the Board found that defendant had insufficient evidence to substantiate his claim and issued a decision in favor of plaintiff, which was upheld on appeal. Plaintiff then filed a malicious prosecution action against defendant and his attorney based on the filing of the patent challenge with the Board. Defendants filed a motion to strike under *Code Civ. Proc. § 425.16*, the anti-SLAPP statute, arguing that plaintiff could not establish a probability of success on the merits because he could not show that the underlying action for patent interference was brought without probable cause and with malice. The trial court denied the motion to strike, however, and defendants appealed.

The court of appeal reversed, concluding that the motion to strike should have been granted because plaintiff could not establish that the underlying patent challenge was brought without probable cause. Plaintiff recognized that while a trial court judgment in the underlying action in favor of a malicious prosecution defendant will generally establish probable cause for bringing the action even if that decision is subsequently reversed on appeal, an established exception to this so-called "interim adverse judgment rule" applied when the underlying initial judgment was procured by fraud or perjury. Plaintiff argued that the state court judge's findings that much of defendants' evidence had been fabricated was entitled to collateral estoppel effect, thereby justifying application of the fraud exception to the interim adverse judgment rule. The court rejected plaintiff's collateral estoppel argument, however, after concluding that plaintiff failed to show that the issues decided in the state court action were identical to the issues involved in the present malicious prosecution action (*164 Cal. App. 4th 1031, 1048-1050)* . The court of appeal went on to hold that defendants' initial victory in the underling action brought before the Board, even though eventually reversed on appeal, conclusively established probable cause for bringing the patent challenge. Consistent with the general rule that the law places upon litigants the burden of exposing during trial the bias of witnesses and the falsity of evidence, thereby enhancing the finality of judgments and avoiding unending rounds of litigation, the court held that when applying the fraud exception to the interim judgment rule, if claims of fraud or perjury are litigated and rejected by the fact finder in the underlying action, the malicious prosecution plaintiff cannot rely on those same claims of fraud or perjury to establish the absence of probable cause in a subsequent malicious prosecution action. In the instant case, the Board had effectively found that it believed the testimony and evidence of defendants more than the competing evidence of plaintiff, thereby rejecting the same claims of fraud and perjury that plaintiff sought to prove in his malicious prosecution action. Thus, the court concluded that the motion to strike should have been granted because plaintiff could not establish that defendants had lacked probable cause to bring the patent challenge (*164 Cal. App. 4th 1031, 1056)* .

[l] Failure to Post Undertaking Does Not Negate Probable Cause Established by Order for Preliminary Injunction

In ***Paiva v. Nichols*** *(2008) 168 Cal. App. 4th 1007, 85 Cal. Rptr. 3d 838* , plaintiff filed a malicious prosecution action against two across-the-street neighbors based on the neighbors' prior trespass action brought against plaintiff. The underlying action stemmed from plaintiff's attempt to have aerial power lines relocated underneath the ground, which required building a trench through the street in front of the neighbors' yards and connecting the underground lines with a utility pole located on the property of one of the neighbors. While the neighbors achieved both a temporary restraining order and a preliminary injunction in the underlying trespass action, plaintiff eventually prevailed in that action, prompting his filing of the subsequent malicious prosecution action. Defendants filed a motion to strike the malicious prosecution action under the anti-SLAPP statute, *Code Civ. Proc. § 425.16*, but the trial court denied the motion. Defendants appealed.

The court of appeal reversed the trial court's denial of the motion to strike, concluding that plaintiff could not establish

that the underlying trespass action was brought without probable cause. The court first held that under the rationale of *Fleishman v. Superior Court (2002) 102 Cal. App. 4th 350, 125 Cal. Rptr. 2d 383* , discussed in [j], *above*, the trial court's granting of a preliminary injunction in the underlying trespass action conclusively established probable cause for bringing that action. In reaching that conclusion, the court of appeal noted that the trial court in the trespass suit had held two hearings, one resulting in a temporary restraining order and the other in the preliminary injunction, and had heard evidence and received documentary evidence from both sides at these hearings before concluding that the neighbors had established a reasonable probability of succeeding on their trespass claims (*168 Cal. App. 4th 1007, 1021-1022)* . The court of appeal then held that the failure of the neighbors to post an undertaking or bond under *Code Civ. Proc. § 529(a)* as required to perfect the preliminary injunction did not result in depriving those parties of the right to rely on the order granting the preliminary injunction to establish probable cause. The court noted that the rationale supporting the *Fleishman* holding--that probable cause is established if, after receiving evidence and legal argument from both sides during a hearing, the underlying court comes to the conclusion that the plaintiff in that action is likely to succeed on the merits--is not affected by a subsequent failure to perfect the preliminary injunction due to the failure to post a required bond or undertaking (*168 Cal. App. 4th 1007, 1024)* .

[4] Additional Authorities

[a] Summary Judgment Is Proper When Declarations or Affidavits Establish Existence of Probable Cause

In *Sangster v. Paetkau (1998) 68 Cal. App. 4th 151, 80 Cal. Rptr. 2d 66* , plaintiff was a secretary who brought a malicious prosecution action against her former employer and a local equestrian festival based on an alleged lack of probable cause in bringing cross suit against plaintiff for fraud and breach of fiduciary duty in the course of defending an action brought by a third party. The underlying actions against the secretary stemmed from her conduct in the preparation of, and billing for, printed programs for a horse show sponsored by the malicious prosecution defendants. The trial court in the malicious prosecution action granted summary judgment for the defendants, finding that defendants had probable cause to file the underlying actions, and the court of appeal agreed. The court of appeal rejected plaintiff's argument that summary judgment was inappropriate due to conflicting evidence about whether defendants had fabricated some of the evidence in the underlying cross suit. The court relied on other, undisputed evidence that was sufficient to provide an objectively reasonable basis for bringing the underlying action, including the deposition testimony and interrogatory answers of the original plaintiff in the underlying action (*68 Cal. App. 4th 151, 166-168)* .

Nicholson v. Lucas (1994) 21 Cal. App. 4th 1657, 26 Cal. Rptr. 2d 778 , involved an action by a dentist who was denied surgical privileges at a hospital, alleging that the proceeding to deny him the privileges constituted malicious prosecution. Defendant's motion for summary judgment included evidence that the hospital staff considered before it instituted the proceeding, consisting of patients' charts and an analysis of those charts by dentists, both on the staff and from outside. The trial court granted defendants' motion and the court of appeal affirmed, holding that the evidence established as a matter of law that the decision to institute the proceeding was reasonable, and was made with probable cause (*21 Cal. App. 4th 1657, 1666-1669)* . The court also held that plaintiff's evidence, which disputed the merits of the conclusion reached by the committee to terminate the surgical privileges, did not raise a triable issue of fact concerning the reasonableness of the decision to institute the proceedings (*21 Cal. App. 4th 1657, 1669-1671)* .

In *Walsh v. Bronson (1988) 200 Cal. App. 3d 259, 245 Cal. Rptr. 888* , the malicious prosecution plaintiffs were newspaper reporters who had been sued by defendant attorneys in an underlying libel action. The trial court granted summary judgment to the attorney defendants, and the plaintiffs appealed. The court of appeal affirmed, finding that the defendants' declarations and other supporting documents established that the defendants had probable cause to bring the underlying libel action (*200 Cal. App. 3d 259, 268, 271)* .

[b] Attorney's Probable Cause

In *Marijanovic v. Gray, York & Duffy (2006) 137 Cal. App. 4th 1262, 40 Cal. Rptr. 3d 867* , a commercial painter sued a general contractor and the attorney for the general contractor for malicious prosecution. This malicious prosecution cause of action was based on an underlying cross-complaint filed against the painter when a condominium association sued the general contractor for construction defects. The general contractor and the attorney filed motions to strike the malicious prosecution action, but the trial court denied the motions. The court of appeal reversed. The court of appeal held that the painter could not establish a lack of probable cause for bringing the underlying cross-complaint. When bringing the underlying cross-complaint, the attorney for the general contractor was faced with a complaint from the condominium association alleging a failure of water-exposed exterior surfaces, as well as a defect report from an expert that attributed a certain percentage of fault for those failures to the painter of those surfaces. Although the painter's attorney asserted to the attorney for the general contractor that the painter was not liable because the scope of his work on the construction project had been limited, the painter's attorney did not, at that earlier time when the underlying action was being maintained, provide any evidence documenting the precise nature of his client's limited work on the project, such as a copy of the painter's contract for the project showing that the painter was not responsible for the areas where the faulty workmanship was found. Under those circumstances, the mere assertion by the painter's attorney to the contractor's attorney that the painter was not liable for any of the defects, without more, was not enough to defeat a finding that the general contractor had probable cause to bring the cross-complaint against the painter (*137 Cal. App. 4th 1262, 1271-1272*).

In *Morrison v. Rudolph (2002) 103 Cal. App. 4th 506, 126 Cal. Rptr. 2d 747* , the buyer of a condominium unit allowed the bank to foreclose on her mortgage when she was unable to make the mortgage payments as well as pay for repairs allegedly necessary to make the unit habitable due to construction defects that were present but undisclosed to her at the time she purchased the unit. When the homeowners association then sued her for unpaid assessments, she brought a cross complaint against both the association and the parties who sold the unit to her for fraud and negligent misrepresentations. The trial court granted summary judgment to the sellers on the cross complaint, finding that there was no evidence of causation. The sellers then brought an action for malicious prosecution against the buyer's attorney for prosecuting the cross complaint without probable cause. The trial court granted summary judgment for the attorney, and the court of appeal affirmed. The court noted that an attorney is entitled to rely on information provided by the client, absent notice of specific factual mistakes in the client's version of events. In this case, the attorney's client in the underlying suit told him that she could not afford to make the mortgage payments and pay for necessary repairs, that she was forced to choose foreclosure, and that if the sellers had disclosed the defects, she never would have purchased the condominium. The client also alleged that the sellers knew of the defects and intentionally failed to disclose them. The court concluded that an attorney would consider this to be tenable as a routine claim for misrepresentation in the sale of real estate. Because the sellers could provide no reason the attorney should not have believed the facts presented by his client, the attorney had probable cause for prosecuting the underlying claim, and summary judgment in the attorney's favor on the malicious prosecution claim was appropriate (*103 Cal. App. 4th 506, 512-514)* .

In *Swat-Fame, Inc. v. Goldstein (2002) 101 Cal. App. 4th 613, 124 Cal. Rptr. 2d 556 , overruled in part, Zamos v. Stroud (2004) 32 Cal. 4th 958, 973, 12 Cal. Rptr. 3d 54, 87 P.3d 802* , the plaintiff was an employer who brought a malicious prosecution action against a former employee and her attorneys, based on the former employee's underlying action for fraudulent inducement to enter into an employment contract. The trial court granted summary judgment for the defendants on the grounds that probable cause existed for bringing the underlying action. The court of appeal affirmed the summary judgment as to the attorneys, but reversed as to the former employee. The court held that the undisputed facts demonstrated that the attorneys had probable cause to bring the underlying claim, based on the facts that were provided to the attorneys by the former employee, which were accurately reflected in the underlying complaint. Although the facts known to the attorneys turned out to be false, the attorneys had no way of knowing at the time they filed the underlying action that their client may have been lying to them, and a brief statement in a letter from the employer's attorney telling the employee's attorneys that they were "substantially misinformed regarding the facts" was deemed insufficient to put the attorneys on notice that their version of the facts was false (*101 Cal. App. 4th 613, 625, 627)* . However, even if probable cause existed as to the attorneys, the client could still be liable for malicious prosecution if the client knew the facts as given were false, and triable issues of fact remained on the issue of the client's

liability (*101 Cal. App. 4th 613, 629-632 & n.14*).

In *Copenbarger v. International Ins. Co. (1996) 46 Cal. App. 4th 961, 54 Cal. Rptr. 2d 1* , an action for malicious prosecution against attorneys who filed an indemnity action against successor attorneys, defendants appealed a trial court ruling of probable cause. The court of appeal recognized that there were various policies militating against permitting the assertion of indemnity and contribution claims against successor attorneys (*46 Cal. App. 4th 961, 965)* . However, the court found that there was a conflict among appellate cases regarding whether such cases were allowed, and concluded that in the absence of a resolution by the Supreme Court it could not be said that no reasonable attorney would have thought that filing a claim for indemnity against the defendants would be tenable (*46 Cal. App. 4th 961, 966)* . The court thus concluded that there was probable cause for the institution of the indemnity action.

In *Bixler v. Goulding (1996) 45 Cal. App. 4th 1179, 53 Cal. Rptr. 2d 246* , plaintiff, a physician, brought an action for malicious prosecution against an attorney who had filed a cross complaint against the physician on behalf of a mental health counseling center. The physician and the center had been co-defendants in a malpractice action alleging negligence in causing a patient who was the plaintiff in the underlying action to be detained against her will. The patient had spoken to a psychologist at the center, at which time she appeared depressed and gave a history of suicide attempts. The psychologist contacted the physician, and the physician recommended that the patient be committed. The psychologist then contacted the police and had the patient transported to a medical center. Both the center and the physician obtained summary judgments in the action by the patient. In the physician's action for malicious prosecution against the center's attorney, he contended that the attorney failed to review the merits of the patient's complaint. The trial court granted a summary judgment in favor of the attorney, and the court of appeal affirmed. The court stated that to establish a cause of action for malicious prosecution a plaintiff must prove that the prior action was brought without probable cause. The probable cause element calls on the trial court to make an objective determination of the "reasonableness" of the defendant's conduct (*45 Cal. App. 4th 1179, 1188)* . The evidence indicated that the center and its insurer viewed the patient's action as one involving possible liability, and that the physician was clearly involved in the decision to have the patient involuntarily detained. The court concluded that a reasonable attorney having been apprised of these facts would have thought the indemnity claim tenable (*45 Cal. App. 4th 1179, 1190)* .

[c] Preliminary Injunction in Underlying Action Establishes Probable Cause

Paiva v. Nichols (2008) 168 Cal. App. 4th 1007, 85 Cal. Rptr. 3d 838 , which holds that a preliminary injunction issued in an underlying trespass action conclusively established probable cause for bringing that action (*168 Cal. App. 4th 1007, 1021-1022)* , is discussed in [3][l], *above*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewTortsIntentional TortsMalicious ProsecutionGeneral OverviewTortsIntentional TortsMalicious ProsecutionDefensesTortsIntentional TortsMalicious ProsecutionElementsGeneral OverviewTortsIntentional TortsMalicious ProsecutionElementsProbable CauseGeneral Overview

California Points & Authorities

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 147 MALICIOUS PROSECUTION AND ABUSE OF PROCESS
PART II. FORMS
A. Malicious Prosecution

14-147 California Points & Authorities § 147.35

§ 147.35 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Malicious Prosecution Action--By Defendant--Defendant Had Probable Cause to Institute Criminal Proceedings on Which Action Is Based

[1] FORM

[*Caption. See § 147.34*].

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD BE GRANTED WHEN THE AFFIDAVITS OR DECLARATIONS ESTABLISH PROBABLE CAUSE FOR INSTITUTING THE CRIMINAL PROCEEDINGS THAT ARE THE BASIS FOR THE MALICIOUS PROSECUTION ACTION.

A. Summary Judgment. [*See § 147.34, Paragraph A*].

B. Lack of Probable Cause Must Be Shown. [*See § 147.34, Paragraph B*].

C. Probable Cause Is Legal Issue. [*See § 147.34, Paragraph C*].

D. Summary Judgment Is Proper When Declarations or Affidavits Establish Existence of Probable Cause. [*See § 147.34, Paragraph D*].

[*Optional*] **E. Conviction Establishes Probable Cause.** Where plaintiff in an action for malicious prosecution was convicted in the action on which the malicious prosecution action is based, the conviction conclusively establishes probable cause for instituting the underlying action even if the conviction is later reversed (*Bealmear v. Southern Cal. Edison Co. (1943) 22 Cal. 2d 337, 340, 139 P.2d 20*).

[*Optional*] **F. Innocence of Plaintiff Does Not Establish Lack of Probable Cause.** The fact that plaintiff was found not guilty in the proceeding on which the action for malicious prosecution is based does not establish that there was no probable cause for instituting the underlying action (*Clary v. Hale (1959) 175 Cal. App. 2d 880, 886, 1 Cal. Rptr. 91* ; *Sebastian v. Crowley (1940) 38 Cal. App. 2d 194, 202, 101 P.2d 120* ; *see Northrup v. Baker (1962) 202 Cal. App. 2d*

347, 354, 20 Cal. Rptr. 797).

[*Optional*] **G. Setting Aside of Indictment or Information Does Not Establish Lack of Probable Cause.** The setting aside of an indictment or information under *Section 955 of the Penal Code* does not establish lack of probable cause (*Cummings v. Farmers Ins. Exch. (1988) 202 Cal. App. 3d 1407, 1421, 249 Cal. Rptr. 568*).

[*Optional*] **H. Dismissal of Charges on Day of Trial Does Not Establish Lack of Probable Cause.** The determination of the district attorney to dismiss charges on the day of trial does not indicate lack of probable cause (*Williams v. Taylor (1982) 129 Cal. App. 3d 745, 755, 181 Cal. Rptr. 423*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted by a defendant in a malicious prosecution action in support of a motion for summary judgment where defendant's affidavits establish that there was probable cause for instituting the criminal proceedings on which the complaint is based.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations which support the motion [*Code Civ. Proc. § 437c*].

[3] Discussion of Authorities

[a] Conviction Establishes Probable Cause

In ***Bealmear v. Southern Cal. Edison Co.*** *(1943) 22 Cal. 2d 337, 139 P.2d 20* , plaintiff was charged with and convicted of stealing electricity from a public utility. He appealed and obtained a reversal. He was retried and the proceedings were dismissed on plain tiff's motion for lack of evidence. Plaintiff then commenced an action for malicious prosecution. The trial court entered a judgment for defendant after granting defendant's motion for nonsuit. Plaintiff appealed and the Supreme Court upheld the judgment for defendant. It held that in an action for malicious prosecution, the plaintiff must prove that the proceedings were prosecuted without probable cause and that the conviction of plaintiff was conclusive evidence of probable cause even where the conviction was reversed on appeal (*22 Cal. 2d 337, 340)* .

[b] Innocence of Plaintiff Does Not Establish Lack of Probable Cause

In ***Clary v. Hale*** *(1959) 175 Cal. App. 2d 880, 1 Cal. Rptr. 91* , defendant had advanced money to plaintiff for expenses to haul defendant's merchandise in plaintiff's truck. Plaintiff had trouble with his truck and did not make the trip but refused to return the money. Defendant consulted with his attorney and then signed a complaint charging plaintiff with embezzlement. Plaintiff was tried and acquitted. He then sued defendant for malicious prosecution. The case was tried before the court without a jury and the court found for defendant, and plaintiff appealed. The court of appeal affirmed the judgment. It defined probable cause as a suspicion founded on circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true. It stated that proof that no crime was committed or the

innocence of the plaintiff does not negate the existence of probable cause, nor create a conflict on the issue of probable cause (*175 Cal. App. 2d 880, 886)* . The court found that there was probable cause for the instigation of criminal proceedings in that defendant had an honest and reasonable belief that plaintiff was guilty (*175 Cal. App. 2d 880, 888-889)* .

In ***Sebastian v. Crowley*** *(1940) 38 Cal. App. 2d 194, 101 P.2d 120* , the malicious prosecution action stemmed from a criminal complaint made by a hotel manager against an actress for defrauding an innkeeper. The complaint was later dismissed for lack of evidence although a producer was convicted for the same crime. The jury in the malicious prosecution action found for plaintiff after a motion for a directed verdict was denied.

Defendant appealed and the judgment was reversed, with an order to enter a verdict for defendant. The court of appeal defined probable cause as a suspicion founded on circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true. It held that the existence of probable cause is not negated merely by showing that no crime was committed or that the plaintiff was innocent (*38 Cal. App. 2d 194, 202)* . The court then found that the defendant acted on probable cause to believe that plaintiff was guilty and only after making a fair statement of the case to the district attorney (*38 Cal. App. 2d 194, 202-204)* .

In ***Northrup v. Baker*** *(1962) 202 Cal. App. 2d 347, 20 Cal. Rptr. 797* , defendant was sued for malicious prosecution after defendant had charged plaintiff with assault and battery. Plaintiff was acquitted of the charge. In the malicious prosecution action, there was a verdict for plaintiff and defendant appealed. The court of appeal affirmed the verdict. It defined probable cause and stated that proof that no crime was committed or that the plaintiff was innocent did not negate the existence of probable cause (*202 Cal. App. 2d 347, 354)* . The court then found that there was a conflict in evidence relating to probable cause and thus that the issue had been properly given to the jury (*202 Cal. App. 2d 347, 354-355)* .

[c] Setting Aside of Indictment or Information Does Not Establish Lack of Probable Cause

In ***Cummings v. Farmers Ins. Exch.*** *(1988) 202 Cal. App. 3d 1407, 249 Cal. Rptr. 568* , plaintiff's property insurer instigated a criminal action against plaintiff under former Ins. Code § 556 [*now see Ins. Code § 1871.1*] for filing a fraudulent insurance claim. Plaintiff was bound over for trial at her preliminary hearing but the fraud charges were dismissed when the superior court granted plaintiff's motion under *Penal Code § 995*. Plaintiff brought an action against the insurer alleging several causes of action, including one for malicious prosecution. Defendant's motion for summary judgment was granted and plaintiff appealed.

The court of appeal affirmed. It noted that a plaintiff in a malicious prosecution action is required to show that defendant acted without probable cause; such probable cause has both a subjective element, based on the defendant's actual state of mind, and an objective element, based on the reasonableness of defendant's conduct (*202 Cal. App. 3d 1407, 1419)* . The court found that the subjective element of probable cause was clearly established; defendant presented uncontraverted evidence that it had formed an honest belief that plaintiff's misrepresentations constituted a violation of former Ins. Code § 556 [*now see Ins. Code § 1871.1*] (*202 Cal. App. 3d 1407, 1420)* . Plaintiff contended, however, that the objective aspect of probable cause (whether there were facts strong enough to warrant the average person's belief that a violation of former Ins. Code § 556 [*now see Ins. Code § 1871.1*] had been committed) had been determined in her favor, because her *Penal Code § 995* motion to dismiss was granted. The court disagreed, noting that Restatement (Second) of Torts § 663 allows a defendant accused of malicious prosecution to present evidence of probable cause in spite of the prior discharge of a criminal action (*202 Cal. App. 3d 1407, 1421)* . Finding that the undisputed facts were sufficiently strong to warrant the average person in believing the charge of fraud to be true, the court held that the objective element of probable cause was established by defendant in its motion for summary judgment (*202 Cal. App. 3d 1407, 1421-1422)* .

[d] Dismissal of Charges on Day of Trial Does Not Establish Lack of Probable Cause

In ***Williams v. Taylor*** *(1982) 129 Cal. App. 3d 745, 181 Cal. Rptr. 423* , plaintiff, at the instigation of his former employer, had been charged, by criminal complaint, with two counts of grand theft and two counts of embezzlement. A preliminary examination was held at which the magistrate made no findings with respect to one charge each of grand theft and embezzlement, but bound plaintiff over for trial with respect to the other two counts. On the day of trial, the grand theft charge was dismissed on the People's motion and plaintiff was thereafter acquitted by the jury of the remaining charge of embezzlement. Plaintiff then sued his former employer for damages for slander and malicious prosecution. Defendant's motion for summary judgment was granted, and plaintiff appealed. The court of appeal affirmed.

With respect to the malicious prosecution cause of action, the court noted that there was no evidence raising a triable issue of fact about whether defendant had sufficient probable cause to seek initiation of criminal charges against plaintiff. The court pointed out that plaintiff's acquittal on the charge of embezzlement was not evidence of the lack of probable cause and that such evidence could not be found in the fact that the prosecutor, on the day of trial, voluntarily dismissed the charge of grand theft. Quoting from Restatement of Torts (2d), § 667, the court explained that if the prosecution of proceedings has passed out of the control of the person who initiated them and into that of the public prosecutor, the abandonment of the proceedings by the latter is not a matter to be considered by the court in a malicious prosecution action when determining the existence of probable cause, if the public prosecutor acted on his own initiative, and that the accuser cannot be prejudiced by the actions of the public prosecutor over whom he or she has no control (*129 Cal. App. 3d 745, 755)* . The court further pointed out that the rule that a discharge of the accused by a magistrate is conclusive of the lack of probable cause applies only when the discharge is on the merits, that the magistrate in the criminal proceeding expressly refrained from ruling on the merits, and that this action did not result in a discharge of plaintiff; rather, the People were free to reallege both charges in the information. The fact that the People decided to dismiss these charges brought the claim back within the scope of the rule that the action of the prosecutor in dismissing a criminal action on his or her own initiative provides no evidence of lack of probable cause (*129 Cal. App. 3d 745, 755)* .

[4] Additional Authorities

[a] Innocence of Plaintiff as Not Establishing Lack of Probable Cause

In *Ecker v. Raging Waters Group, Inc. (2001) 87 Cal. App. 4th 1320, 1332, 105 Cal. Rptr. 2d 320* , security personnel at a water amusement park detained the plaintiff for several hours, pending arrival of the police, following a complaint made by several adolescent boys that the plaintiff had been surreptitiously videotaping them at the park. The plaintiff was eventually arrested for and acquitted of criminal charges of annoying or molesting a child under the age of 18. He then brought an action against the amusement park, alleging malicious prosecution and other torts. The trial court granted nonsuit on the malicious prosecution cause of action after finding that the amusement park had probable cause to arrest the plaintiff, and the court of appeal affirmed that ruling. Even though the plaintiff was eventually acquitted of the criminal charges, the court of appeal held that based on undisputed facts, it was objectively reasonable at the time to suspect that the plaintiff had committed some crime by his covert videotaping of young boys at the water park. The court also held that the fact that park personnel were uncertain at the time of plaintiff's detention as to the precise crime committed was irrelevant to the determination that probable cause existed for the arrest. Determining the precise charges to be brought was the responsibility of the prosecuting agency, not the park (*87 Cal. App. 4th 1320, 1332)* .

Williams v. Taylor (1982) 129 Cal. App. 3d 745, 181 Cal. Rptr. 423 , is discussed in *§ 147.35[3][d]*.

In *Centers v. Dollar Mkts. (1950) 99 Cal. App. 2d 534, 222 P.2d 136* , plaintiff was charged with obtaining money under false pretenses from a grocery store. After the complaint was dismissed by the defendant, plaintiff sued the checker involved and several other employees of the grocery company as well as the company itself for malicious prosecution. The court directed a verdict in favor of all defendants and plaintiff appealed. The court of appeal defined

probable cause and held that the fact that plaintiff was not found guilty did not negate the existence of probable cause. The court then found that defendants other than the checker had probable cause in that they acted reasonably based on the information given to them (*99 Cal. App. 2d 534, 541)* . It found, however, that there was a conflict in the evidence as to whether the checker knew the charges were false and that such conflict should have been given to the jury. Therefore, the court affirmed the judgments as to all the defendants except the checker and the corporation, and reversed the judgment as to them (*99 Cal. App. 2d 534, 543-546)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewTortsIntentional TortsMalicious ProsecutionGeneral OverviewTortsIntentional TortsMalicious ProsecutionDefensesTortsIntentional TortsMalicious ProsecutionElementsGeneral OverviewTortsIntentional TortsMalicious ProsecutionElementsProbable CauseGeneral Overview

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CHAPTER 147 MALICIOUS PROSECUTION AND ABUSE OF PROCESS
PART II. FORMS
A. Malicious Prosecution

14-147 California Points & Authorities § 147.36

§ 147.36 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Malicious Prosecution Action--By Defendant--Defendant Not Instrumental in Causing Criminal Prosecution

[1] FORM

[*Caption. See § 147.34*].

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD BE GRANTED BECAUSE HIS/HER DECLARATIONS ESTABLISH THAT HE/SHE WAS NOT ACTIVELY INSTRUMENTAL IN CAUSING THE CRIMINAL PROSECUTION OF PLAINTIFF.

A. Summary Judgment. [*See § 147.34, Paragraph A*].

B. No Cause of Action When Defendant Not Instrumental in Causing Prosecution. For an action for malicious prosecution to lie against a private person, the defendant must have been actively instrumental in causing the prosecution (*Cedars-Sinai Med. Ctr. v. Superior Court (1988) 206 Cal. App. 3d 414, 417, 253 Cal. Rptr. 561*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted by a defendant in a malicious prosecution action in support of a motion for summary judgment when defendant's affidavits or declarations establish that he or she was not actively instrumental in

causing the criminal prosecution of plaintiff.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits that support the motion [*Code Civ. Proc. § 437c*].

[3] Discussion of Authorities

[a] No Cause of Action When Defendant Not Instrumental in Causing Prosecution

In ***Cedars-Sinai Med. Ctr. v. Superior Court*** *(1988) 206 Cal. App. 3d 414, 253 Cal. Rptr. 561* , plaintiff was a suspect in a series of arson fires at a hospital. Police investigators asked defendants, employees of the hospital, to listen to an audiotape of a telephoned bomb threat that was thought to have been made by plaintiff. Defendants identified the voice as plaintiff's. Plaintiff was arrested and incarcerated. Defendants testified at the plaintiff's preliminary hearing but took no other steps regarding the criminal action against plaintiff. After charges against plaintiff were dismissed for insufficient evidence, plaintiff brought an action for malicious prosecution against the defendants, who had identified him from the audiotape. Defendants moved for summary judgment. In opposition to the motions, plaintiff conceded that his arrest was not based solely on the identifications provided by defendants, and that the defendants had not sought out the authorities. Nevertheless, the trial court denied defendants' motions for summary judgment. Defendants then petitioned for a writ of mandate in the court of appeal.

The court of appeal granted defendants' petition for a writ of mandate and directed the trial court to vacate its denial of the motions for summary judgment. The court noted that a key element of malicious prosecution is that the defendant be actively instrumental in causing the prosecution. This element was not present in the instant case; the evidence established that defendants did not instigate, nor were they actively instrumental in causing, the criminal prosecution of plaintiff. The court noted that public policy requires that private persons who aid in law enforcement should be given an effective protection against the prejudice that is likely to arise from termination of a prosecution in favor of the accused (*206 Cal. App. 3d 414, 417-418)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewTortsIntentional TortsMalicious ProsecutionGeneral OverviewTortsIntentional TortsMalicious ProsecutionDefensesTortsIntentional TortsMalicious ProsecutionElementsGeneral Overview

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14-147 California Points & Authorities § 147.37

§ 147.37 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Malicious Prosecution Action--By Defendant--Probable Cause Established by Reliance on Advice of Attorney

[1] FORM

[*Caption. See § 147.34*].

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD BE GRANTED BECAUSE HIS/HER DECLARATIONS ESTABLISH THAT HE/SHE FAIRLY REPORTED THE FACTS TO AN ATTORNEY AND THE ATTORNEY ADVISED HIM/HER TO INSTITUTE THE ACTION.

A. Summary Judgment. [*See § 147.34, Paragraph A*].

B. Probable Cause as Legal Issue. [*See § 147.34, Paragraph C*].

[*EITHER*]

C. Reliance on Advice of Counsel. If a defendant in a malicious prosecution action instituted the complained-of civil action on the opinion and advice of counsel to the effect that he or she had a good cause of action after presenting all of the facts of the case in good faith before the attorney, probable cause, which is a complete defense to the malicious prosecution action, is established (*Bisno v. Douglas Emmett Realty Fund 1988 (2009) 174 Cal. App. 4th 1534, 1544, 95 Cal. Rptr. 3d 492* ; *Pond v. Insurance Co. of North America (1984) 151 Cal. App. 3d 280, 289, 198 Cal. Rptr. 517*).

[*OR*]

C. Reliance on Advice of Counsel. If a defendant in a malicious prosecution action instituted the complained-of criminal proceedings after fairly disclosing all the facts to an attorney and having been advised that a crime was

committed, probable cause, which is a complete defense to the malicious prosecution action, is established (*Keylon v. Kelley (1961) 188 Cal. App. 2d 490, 494-495, 10 Cal. Rptr. 549*).

[*Optional*] **D. Effect of Mistaken Advice.** The fact that the advice given by the attorney as to the merits of defendant's case was mistaken does not destroy the defense of acting on advice of counsel if the client acts in good faith (*Brinkley v. Appleby (1969) 276 Cal. App. 2d 244, 247, 80 Cal. Rptr. 734*).

[*Optional*] **E. Investigation Not Required.** A client is not required to investigate all the circumstances of the basis of his or her instigation of the action, and probable cause is established if he or she fairly relates all the circumstances within his or her knowledge to the attorney and relies on the attorney's advice (*Richter v. Neilson (1936) 11 Cal. App. 2d 503, 514-515, 54 P.2d 54*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted by a defendant in a malicious prosecution action in support of a motion for summary judgment where defendant's affidavits or declarations establish that he or she acted in good faith on advice of counsel. The first paragraph is for use when the complaint is based on a prior civil action and the second is for use when the complaint is based on a prior criminal action.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits which support the motion [*Code Civ. Proc. § 437c*].

[b] Opposing Memoranda

The points in *§ 147.46* may be used in an appropriate case to oppose a motion for summary judgment supported by this memorandum.

[c] Related Pleading and Practice Form

For a form of affirmative defense based on probable cause established by advice of counsel, see California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process* (Matthew Bender).

[3] Discussion of Authorities

[a] Reliance on Advice of Counsel

In ***Bisno v. Douglas Emmett Realty Fund 1988*** *(2009) 174 Cal. App. 4th 1534, 95 Cal. Rptr. 3d 492* , plaintiff brought a malicious prosecution action against an apartment landlord based on the landlord's earlier prosecution of an unlawful detainer action against him. The underlying dispute was triggered when the landlord tried to more than quadruple plaintiff's rent after plaintiff's wife, who had not been listed as a tenant on the plaintiff's lease, tried to take over full-time, sole occupancy of the apartment unit. When plaintiff refused to pay the requested increase, the landlord

sought to evict. Eventually, the landlord dismissed the unlawful detainer action on advice of counsel, and plaintiff subsequently filed his malicious prosecution action. However, the trial court granted summary adjudication in favor of the landlord on that cause of action on the basis of the landlord's affirmative defense that the conduct was taken on advice of counsel. Plaintiff appealed this grant of summary adjudication.

The court of appeal affirmed the trial court's ruling. The plaintiff had argued that the advice of counsel defense was not proven because there was no probable cause to seek a more than quadrupled rent when the lease had a provision that specifically limited any rent increase to $2,000, an amount well below the amount sought by the landlord. Plaintiff argued that because the landlord had failed to provide the attorneys with copies of the tenant file, failed to point out the limiting contractual provision, and failed to point out certain statutory provisions that may have been relevant, the landlord could not show full disclosure to the attorneys before relying on their advice. The court rejected this argument, noting that in order to rely on the advice of counsel defense, the requisite disclosure is the disclosure of *facts*, and a client who turns over evidence to his or her attorney is not required to advance any particular legal theory or point out any statute or particular aspect of the evidence that may seem especially relevant. The court concluded that the evidence showed that the landlord had disclosed all relevant facts. The attorneys had a copy of the lease when providing advice to their client and the attorneys had a copy of or had otherwise been informed of the contents of plaintiff's tenant file. Disclosure of these materials was sufficient to justify application of the advice of counsel defense (*174 Cal. App. 4th 1534, 1545-1549)* .

The facts and procedural background of *Pond v. Insurance Co. of North America (1984) 151 Cal. App. 3d 280, 198 Cal. Rptr. 517* , are discussed in *§ 147.34[3][h]*. In that case, the court held that reliance on the advice of counsel, in good faith and after full disclosure of the facts, customarily establishes probable cause (*151 Cal. App. 3d 280, 288)* . Applying this rule to the case before it, the court noted that plaintiff had conceded that the decision to initiate the original action against plaintiff was made by defendant's counsel. The court noted that in his moving papers plaintiff had accused defendant of disclosing certain material facts to its counsel. However, the court observed that defendant's counsel had stated in detail in his uncontroverted declaration that these facts were disclosed to him well in advance of his decision to recommend the original action against plaintiff (151 Cal. App. 3d 280, 288). The court noted further that the only evidentiary bases on which plaintiff could have based a claim that defendant did not rely in good faith on its counsel's advice had been properly excluded by the trial court (*151 Cal. App. 3d 280, 289)* .

In ***Keylon v. Kelley*** *(1961) 188 Cal. App. 2d 490, 10 Cal. Rptr. 549* , defendant, a marshal of the municipal court, filed a complaint for assault and disturbing the peace against plaintiff based on statements made to him about plaintiff's acts when a deputy marshal was levying an attachment on plaintiff's property. Defendant moved for and obtained a summary judgment. Plaintiff appealed and the court of appeal affirmed the judgment. Defendant's affidavit stated that he was acting as a public officer and was therefore immune from liability and that he had fully disclosed all of the facts to a district attorney, who had advised signing the complaint. Plaintiff's opposing affidavit did not really challenge either assertion. The court of appeal first found that the defense of immunity was sufficient (*188 Cal. App. 2d 490, 493-494)* . The court then found that defendant's affidavit established that he had fully disclosed all the facts to the district attorney and that this affidavit had not been challenged by plaintiff's affidavit. The court held that acting on advice of an attorney after good faith full disclosure of all the facts is a defense to an action for malicious prosecution, and that the defense was established by defendant's affidavit (*188 Cal. App. 2d 490, 494-496)* .

[b] Effect of Mistaken Advice

Brinkley v. Appleby *(1969) 276 Cal. App. 2d 244, 80 Cal. Rptr. 734* , is discussed in *§ 147.37[4][a]*.

[c] Investigation Not Required

In ***Richter v. Neilson*** *(1936) 11 Cal. App. 2d 503, 54 P.2d 54* , the malicious prosecution action was based on defendant's instigation of charges of grand theft against plaintiff, arising out of a dispute over a building contract. The

charges were dismissed at the preliminary hearing and plaintiff filed the malicious prosecution action. After judgment for plaintiff, defendant appealed and the court of appeal reversed the judgment. It held that reliance on the advice of an attorney was a complete defense and that there was ample evidence that defendant did so rely when she fairly stated all the facts in her knowledge to the district attorney who advised her that she could file a criminal complaint (*11 Cal. App. 2d 503, 508-513)* . Plaintiff asserted that defendant should have investigated whether certain payments were made. The court of appeal held, however, that there was no duty to make a complete investigation as long as all the facts within defendant's knowledge were fairly stated to the attorney (*11 Cal. App. 2d 503, 514-515)* .

[4] Additional Authorities

[a] Reliance on Advice of Counsel

In ***Brinkley v. Appleby*** *(1969) 276 Cal. App. 2d 244, 80 Cal. Rptr. 734* , defendant instituted an action for quiet title against plaintiffs and plaintiffs prevailed. Defendant then brought an action for a prescriptive easement against plaintiffs and a demurrer was sustained without leave to amend. Plaintiffs instituted an action for malicious prosecution against defendant based on the prescriptive easement action. The court rendered judgment for defendant and plaintiffs appealed. The court of appeal affirmed. It held that the defense of reliance on advice of counsel was established because defendant had disclosed all the facts to his attorney and relied on his attorney's advice in filing the actions. Such reliance establishes a defense of probable cause. The fact that the attorney's advice was mistaken does not preclude the defense as long as defendant acted in good faith (*276 Cal. App. 2d 244, 247-248)* . Plaintiffs' contention that defendant should have known that he did not have a cause of action was rejected because it assumed that defendant should have known more than his attorney about the law (*276 Cal. App. 2d 244, 248)* .

The facts and procedural background of *Kassan v. Bledsoe (1967) 252 Cal. App. 2d 810, 60 Cal. Rptr. 799* , are discussed in *§ 147.34[3][c]*. The court of appeal held that the good faith reliance on advice of counsel after having fairly stated all the facts to the counsel was a defense to an action for malicious prosecution, even though the advice might have been mistaken (*252 Cal. App. 2d 810, 816)* . Citing *Johnson v. Southern Pac. Co. (1910) 157 Cal. 333, 107 P. 611* , it then found that the declarations established the defense (*252 Cal. App. 2d 810, 816-817)* .

The facts and procedural background of *Clary v. Hale (1959) 175 Cal. App. 2d 880, 1 Cal. Rptr. 91* , are discussed in *§ 147.35[3][b]*. In holding that defendant had probable cause to initiate the complaint, the court of appeal held that the advice of an attorney establishes probable cause if it was sought in good faith and all the facts were disclosed to the attorney. It then held that there was ample evidence that defendant related all the facts to both his own attorney and to the district attorney (*175 Cal. App. 2d 880, 886-887)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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14-147 California Points & Authorities § 147.38

§ 147.38 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Malicious Prosecution Action--By Defendant--Malice May Not Be Inferred From Lack of Probable Cause, Because Defendant Was Only Negligent

[1] FORM

[*Caption. See § 147.34*].

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD BE GRANTED BECAUSE EVEN IF THE ACTION WAS INSTITUTED WITHOUT PROBABLE CAUSE, DEFENDANT'S DECLARATIONS ESTABLISH THAT DEFENDANT WAS MERELY NEGLIGENT IN INSTITUTING THE ACTION.

A. No Inference of Malice Solely From Lack of Probable Cause. Although malice may be inferred from the institution of an action without probable cause, such an inference is not automatic; the party's prefiling behavior must have been clearly unreasonable (*Grindle v. Lorbeer (1987) 196 Cal. App. 3d 1461, 1465-1466, 242 Cal. Rptr. 562*).

B. Negligence Alone Cannot Constitute Malice. Negligence does not equate with malice, and the negligent filing of a case does not necessarily constitute the malicious prosecution of the case (*Grindle v. Lorbeer (1987) 196 Cal. App. 3d 1461, 1465-1466, 242 Cal. Rptr. 562*).

[2] Comments

[a] Use of Form

This form may be submitted by a defendant in a malicious prosecution action in support of a motion for summary judgment if defendant's affidavits establish that the initiation of an action without probable cause was due to nothing more than the defendant's negligence. Although the points are supported only by authorities involving a civil action, they should be equally applicable, conceptually, with regard to a criminal action initiated without probable cause, but only because of the defendant's negligent conduct.

Counsel should insert argument in this form that shows the relationship between the facts of the case and the points of law stated. In addition, counsel should attach declarations that support the motion [*Code Civ. Proc. § 437c(b)*].

[b] Related Memoranda

For memoranda relating to summary judgment generally, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] No Inference of Malice Solely From Lack of Probable Cause

In ***Grindle v. Lorbeer*** *(1987) 196 Cal. App. 3d 1461, 242 Cal. Rptr. 562* , the underlying action that formed the basis of the malicious prosecution action involved a cross complaint for equitable indemnity against an injured plaintiff. Plaintiff had been injured in a golf cart accident and sued the driver of the cart. The driver, in a separate action, sued the golf club for indemnity. In that action, the golf club's representative brought a cross complaint for equitable indemnity against the injured plaintiff in the original action.

The injured person's attorney made an immediate demand for dismissal of the cross complaint. The club's attorney refused the request, but did dismiss the action several months later after reviewing the depositions in the original personal injury action and determining that there was no basis for comparative negligence of the injured person.

The injured person then sued the golf club's representative, its insurer, and its counsel for the malicious prosecution of the cross complaint. The court granted all defendants' motion for summary judgment.

In affirming, the appellate court noted that although malice may be inferred from probable cause, the inference is not automatic, citing *Weaver v. Superior Court (1979) 95 Cal. App. 3d 166, 193, 156 Cal. Rptr. 745* . Malice means actual ill will or some improper purpose, whether express or implied. In order to infer malice from the evidence supporting lack of probable cause, the parties' prefiling behavior must have been clearly unreasonable. However, even unreasonable behavior is insufficient unless the presence of malice is found as a matter of fact (*196 Cal. App. 3d 1461, 1465-1466)* .

[b] Negligence Alone Cannot Constitute Malice

The factual and procedural background of ***Grindle v. Lorbeer*** *(1987) 196 Cal. App. 3d 1461, 242 Cal. Rptr. 562* , is discussed in *§ 147.38[3][a]*. After analyzing the behavior of the attorney who filed the underlying action with regard to both legal and factual research to determine if an inference of malice was possible, the court refused to find any inadequacy in the attorney's legal research. The right of defendant to bring a cross complaint for equitable indemnity against an injured plaintiff was not clearly settled at the time the cross complaint was filed. The court noted that public policy favors zealous representation, which sometimes requires that an attorney fashion innovative and creative theories of liability and defense.

With regard to the attorney's factual research, the court stated that his failure to obtain and review certain depositions before filing the cross complaint could be considered as carelessness, but not indifference or malice. The fact that the action was dismissed immediately after the attorney finally read the depositions refuted the existence of a malicious ulterior motive. The court held that negligence does not equate with malice and that the negligent filing of an action does not necessarily constitute the malicious prosecution of that case (*196 Cal. App. 3d 1461, 1466-1468)* .

[4] Additional Authorities

[a] Negligence Alone Cannot Constitute Malice

The background of *Daniels v. Robbins (2010) 182 Cal. App. 4th 204, 105 Cal. Rptr. 3d 683* , is described in § 147.40[4][e]. In that defamation action, while the court of appeal held that plaintiff had shown a probability of success on the elements of favorable termination and lack of probable cause, the court also concluded that plaintiff had not provided evidence to support a finding that the attorneys for the plaintiff in the underlying defamation action had maintained that action with malice, even though their client may have acted with malice. As to those attorneys, the evidence provided by the malicious prosecution plaintiff showed only a lack of evidentiary support for the allegations in the underlying complaint, a lack of factual investigation after the complaint was filed as evidenced by an inability to comply with discovery requests, a client who may have had ill will against the underlying defendant, and a refusal of the underlying plaintiff to dismiss without a waiver of claims by the underling defendant. Those facts, while possibly constituting negligence on the part of the attorneys, were insufficient to support a finding of malice (*182 Cal. App. 4th 204, 225-227)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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14-147 California Points & Authorities § 147.39

§ 147.39 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Malicious Prosecution Action--By Defendant--Unclean Hands Doctrine Applicable

[1] FORM

[*Caption. See § 147.34*].

THE DEFENSE OF UNCLEAN HANDS, IF PROVEN, WILL BAR PROSECUTION OF A MALICIOUS PROSECUTION ACTION.

A. Unclean Hands. Under the doctrine of unclean hands, a party is barred from relief in a malicious prosecution action if he or she has engaged in unconscionable conduct with respect to the underlying action (*DeRosa v. Transamerica Title Ins. Co. (1989) 213 Cal. App. 3d 1390, 1395, 1397, 262 Cal. Rptr. 370* ; *Pond v. Insurance Co. of N. Am. (1984) 151 Cal. App. 3d 280, 292, 198 Cal. Rptr. 517*).

[*Optional*] **B. Conduct Supporting Defense Need Not Relate Directly to Decision to File Underlying Action.** In applying the equitable doctrine of "unclean hands" to a malicious prosecution action, the conduct supporting this defense need not relate directly to the defendant's decision to file the underlying action (*Kendall-Jackson Winery, Ltd. v. Superior Court (1999) 76 Cal. App. 4th 970, 984-987, 90 Cal. Rptr. 2d 743*).

[2] Comments

[a] Use of Form

This form may be submitted by a defendant in a malicious prosecution action in support of a motion for summary judgment if defendant's affidavits establish the applicability of the unclean hands doctrine.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach declarations that support the motion [*Code Civ. Proc. § 437c(b)*].

[b] Related Memoranda

For memoranda relating to summary judgment generally, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Unclean Hands

In ***DeRosa v. Transamerica Title Ins. Co.*** *(1989) 213 Cal. App. 3d 1390, 262 Cal. Rptr. 370* , plaintiff, who had prevailed in a fraud action brought by defendants, brought an action against defendants for malicious prosecution. The court granted defendants' motion for summary judgment based on the affirmative defense of unclean hands. In support of their motion, defendants presented evidence showing that plaintiff acted fraudulently in the business dealings that were the subject of the underlying action. In response, plaintiff offered his own declaration denying any fraudulent intent. The trial court, noting it would have found plaintiff guilty of fraud had it sat as the trier of fact in the underlying action, held that plaintiff was guilty of unclean hands and granted the summary judgment motion. Plaintiff appealed.

The court of appeal affirmed. The court noted that the unclean hands defense bars a party from relief if the party has engaged in any unconscientious conduct directly related to the transaction or matter before the court (*213 Cal. App. 3d 1390, 1395)* . The court found that uncontroverted evidence indicated that plaintiff acted unconscientiously in the underlying action; consequently the unclean hands doctrine barred plaintiff's action (*213 Cal. App. 3d 1390, 1396-1397)* .

The facts and procedural background of ***Pond v. Insurance Co. of North America*** *(1984) 151 Cal. App. 3d 280, 198 Cal. Rptr. 517* , are discussed in *§ 147.34[3][b]*. In *Pond*, the court of appeal upheld a determination by the trial court that plaintiff was barred from his suit by the equitable doctrine of unclean hands in that he knowingly failed to disclose critical evidence in the underlying action that would have had a significant effect on the settlement of underlying action (*151 Cal. App. 3d 280, 292)* . The court noted that, under the doctrine of unclean hands, whenever a party who, as actor, seeks to set judicial machinery in motion and obtain some remedy, has violated conscience, good faith or other equitable principle in his or her prior conduct, then the court will refuse to interfere on his or her behalf to acknowledge his or her right, or to afford him or her any remedy. The rule, stated the court, is qualified by the requirement that the party against whom the doctrine is sought to be invoked directly "infected" the actual cause of action before the court, and is not merely guilty of unrelated improper past conduct. The court concluded that plaintiff's activities in the underlying indemnity suit related directly to the malicious prosecution action before the court because the suit was the entire basis of plaintiff's malicious prosecution claim (*151 Cal. App. 3d 280, 290-291)* .

[b] Conduct Supporting Defense Need Not Relate Directly to Decision to File Underlying Action

In ***Kendall-Jackson Winery, Ltd. v. Superior Court*** *(1999) 76 Cal. App. 4th 970, 90 Cal. Rptr. 2d 743* , Gallo Winery filed an action for malicious prosecution against a competitor, Kendall-Jackson Winery, based on an underlying action brought and prosecuted unsuccessfully against Gallo by Kendall-Jackson for trademark infringement, trade dress violations, and unfair business practices. The underlying action was based on allegations that Gallo's Turning Leaf wine label and overall appearance mimicked one of Kendall-Jackson's top-selling premium wines, as well as allegations of unfair marketing practices in retail displays. In filing the malicious prosecution action, Gallo alleged that Kendall-Jackson's action had been brought without probable cause and for the improper purpose of harassing Gallo. Among the defenses raised by Kendall-Jackson in the malicious prosecution action was a claim that Gallo's action was barred by the doctrine of unclean hands. The claim of unclean hands was based on allegations that Gallo used its influence with retailers to influence retailer shelf schematics and other merchandising activity, and that Gallo used its own employees to move Kendall-Jackson's products at stores, all of which was designed to create favorable store placement for Gallo's similarly packaged but cheaper wines. Gallo moved for summary adjudication of the defense, admitting for these purposes that the actions took place, but arguing that the conduct, of which Kendall-Jackson was

unaware when it brought the underlying action, was not directly related to its malicious prosecution action because the conduct had no effect on Kendall-Jackson's decision to file the underlying action. The trial court agreed, granting the motion for summary adjudication because all of the evidence supporting the defense consisted of documents generated after the underlying action was filed. Kendall-Jackson filed a petition for writ of mandate.

The court of appeal issued the writ of mandate ordering the trial court to vacate its order granting the summary adjudication, holding that in applying the equitable doctrine of unclean hands to a malicious prosecution action, the conduct supporting the defense must bear a direct relationship to the claim, but that conduct need not relate directly to the defendant's decision to file the underlying action (*76 Cal. App. 4th 970, 987)* . The court noted the equitable nature of the defense and concluded that any evidence of the plaintiff's unclean hands either relating to the transaction before the court or affecting the equitable relationship between the litigants in the matter before the court should be available to enable the court to effect a fair result in the litigation (*76 Cal. App. 4th 970, 985)* .The court also concluded that the conduct supporting the defense violated the letter and spirit of the Alcoholic Beverage Control Act (*76 Cal. App. 4th 970, 983)* . Because the underlying lawsuit was primarily about Gallo's use of allegedly unfair marketing strategies to capitalize on Kendall-Jackson's success in selling premium wines, the court concluded that a jury could find that the plaintiff's wrongful conduct was directly related to the underlying litigation, which was the matter at issue in the malicious prosecution litigation, and that the conduct described in support of the defense affected the equitable relationship between the parties (*76 Cal. App. 4th 970, 987-988)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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California Points & Authorities

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 147 MALICIOUS PROSECUTION AND ABUSE OF PROCESS
PART II. FORMS
A. Malicious Prosecution

14-147 California Points & Authorities § 147.40

§ 147.40 Opposing Demurrer to Complaint [Code Civ. Proc. §§ 430.10(e), 430.30(a)] for Malicious Prosecution--Dismissal of Prior Action as Favorable Termination if It Indicates Innocence or Lack of Merit

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM IN OPPOSITION TO DEMUR-
_____ [*name*],	)	RER TO COMPLAINT
Defendant.	)	[*Code Civ. Proc. §§ 430.10(e), 430.30(a)*]
	)	
	)	

_____

PLAINTIFF'S ALLEGATIONS THAT THE ACTION ON WHICH THE COMPLAINT FOR MALICIOUS PROSECUTION IS BASED WAS DISMISSED, AND THE REASON THEREFORE, ARE SUFFICIENT TO ALLEGE FAVORABLE TERMINATION BECAUSE THE REASONS FOR THE DISMISSAL INDICATE _____ [PLAINTIFF'S INNOCENCE *or* LACK OF MERIT] IN THE UNDERLYING ACTION.

[*EITHER*]

A. Dismissal of Criminal Action as Sufficient. Where the action on which a complaint for malicious prosecution is based is dismissed, such dismissal is a favorable termination of the action if the reasons for the dismissal indicate the

innocence in the underlying action of the plaintiff in the malicious prosecution action (*Jaffe v. Stone (1941) 18 Cal. 2d 146, 149-152, 114 P.2d 335*).

[*OR*]

A. Dismissal of Civil Action as Sufficient. Where the action on which a complaint for malicious prosecution is based is dismissed, such dismissal is a favorable termination of the action if the reasons for the dismissal indicate that the underlying action lacked merit (*Minasian v. Sapse (1978) 80 Cal. App. 3d 823, 826, 145 Cal. Rptr. 829*).

[*Optional*] **B. Dismissal of Civil Action for Want of Prosecution as Sufficient.** Where the action on which the complaint is based is dismissed by the court for want of prosecution, the dismissal is a favorable termination because the failure to prosecute indicates lack of merit in the action (*Minasian v. Sapse (1978) 80 Cal. App. 3d 823, 825-829, 145 Cal. Rptr. 829*).

[*Optional*] **C. Dismissal of Criminal Action for Lack of Evidence as Sufficient.** If the criminal case on which the action for malicious prosecution is based is dismissed by the court for lack of evidence, the dismissal is sufficient to indicate a favorable termination of the underlying action (*Jaffe v. Stone (1941) 18 Cal. 2d 146, 149-152, 114 P.2d 335* ; *Jackson v. Beckham (1963) 217 Cal. App. 2d 264, 269-272, 31 Cal. Rptr. 739*).

[*Optional*] **D. Voluntary Dismissal of Civil Action as Sufficient.** If the action on which the action for malicious prosecution is based is voluntarily dismissed by the plaintiff therein, the dismissal is a favorable termination of the underlying action (*MacDonald v. Joslyn (1969) 275 Cal. App. 2d 282, 289, 79 Cal. Rptr. 707* ; *Kennedy v. Byrum (1962) 201 Cal. App. 2d 474, 477, 479-480, 20 Cal. Rptr. 98*).

[*Optional*] **E. Final Termination Does Not Have to Be Bar to Further Action.** The rule that there must have been a final termination of the action on which the malicious prosecution action is based does not mean that the termination must be such that it is a bar to any further action (*Jaffe v. Stone (1941) 18 Cal. 2d 146, 152-158, 114 P.2d 335* ; *Peebler v. Olds (1945) 71 Cal. App. 2d 382, 387-388, 162 P.2d 953*).

[*Optional*] **F. Favorable Termination May Occur by Reason of Appellate Decision.** An action is favorably terminated if the trial court grants summary judgment to the defendant based on the statute of limitations, a procedural ground not bearing on the merits, but the reviewing court then affirms the judgment on grounds the action lacks intrinsic merit as a matter of law (*Ray v. First Fed. Bank (1998) 61 Cal. App. 4th 315, 317, 71 Cal. Rptr. 2d 436*).

[*Optional*] **G. Dismissal of Civil Action as Discovery Sanction as Favorable Termination if Reflecting on Merits.** Favorable termination may be found if the court concludes that a plaintiff's refusal to comply with discovery orders, resulting in involuntary dismissal of the action, reflects a concession by the plaintiff that the lawsuit lacks merit (*Ross v. Kish (2006) 145 Cal. App. 4th 188, 200, 51 Cal. Rptr. 3d 484*).

[*Optional*] **H. Dismissal of Appeal With Settlement That Preserves Favorable Trial Court Judgment as Favorable Termination.** If the malicious prosecution plaintiff received a favorable judgment on the merits at trial in the underlying action, but the parties subsequently settled the action and dismissed all appeals without the malicious prosecution plaintiff giving up any portion of the favorable judgment, the postjudgment settlement constitutes a favorable termination of the underlying action for the malicious prosecution plaintiff (*Siebel v. Mittlesteadt (2007) 41 Cal. 4th 735, 743, 62 Cal. Rptr. 3d 155, 161 P.3d 527*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]

By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a demurrer to a complaint for malicious prosecution when the demurrer asserts that there were not adequate allegations of favorable termination of the underlying action but where the underlying action was dismissed under circumstances that showed its lack of merit (civil action) or the innocence of the person who was defendant in the underlying (criminal) action.

Optional Paragraphs B and D are for use if the underlying action was civil, and optional Paragraph C may be used in an appropriate situation involving an underlying criminal action. Optional Paragraph E may be appropriate if the underlying action was either civil or criminal. Optional Paragraph F may be appropriate if in the underlying action the trial court granted summary judgment to the defendant based on the statute of limitations, but a court of appeal then affirmed the judgment on the grounds the action lacked merit as a matter of law. Optional Paragraph G may be used if the underlying action was involuntarily dismissed as a discovery sanction for failing to comply with discovery orders, if the failure to comply reflects a concession that the underlying action lacked merit. Optional Paragraph H may be used if a trial court judgment was reached on the merits in favor of the malicious prosecution plaintiff in the underlying action, the parties appealed, and a subsequent settlement was reached that dismissed the appeals and left the judgment intact as it related to the malicious prosecution plaintiff.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, these points may be submitted in opposition to a demurrer supported by the points in *§ 147.20*.

[i] Related Uses

With appropriate modifications, these points may be used to oppose a motion for summary judgment based on lack of favorable termination.

[b] Related Pleading and Practice Forms

For a form of allegation of favorable termination, see (California Forms of Pleading and Practice), Ch. 357, *Malicious Prosecution and Abuse of Process* (Matthew Bender).

[3] Discussion of Authorities

[a] Dismissal of Criminal Action as Sufficient

In ***Jaffe v. Stone*** *(1941) 18 Cal. 2d 146, 114 P.2d 335* , the complaint for malicious prosecution alleged that defendants had caused the issuance of a complaint charging plaintiff with a felony and that the felony complaint was dismissed by the magistrate for lack of evidence. Defendants moved for and obtained a judgment on the pleadings on the basis that a cause of action was not stated. The Supreme Court reversed the judgment for defendants. It examined the question of when a dismissal is a favorable termination so as to support a motion for malicious prosecution. It held that a dismissal is sufficient if it indicates the innocence of the defendant and that a dismissal for lack of evidence is such a dismissal. It noted that dismissals on technical or procedural grounds or on grounds that do not indicate the innocence of the defendant are not favorable terminations (*18 Cal. 2d 146, 149-151)* .

[b] Dismissal of Civil Action as Sufficient

In ***Minasian v. Sapse*** *(1978) 80 Cal. App. 3d 823, 145 Cal. Rptr. 829* , plaintiff commenced an action for $300 for attorney's fees. Defendant cross complained for anxiety caused defendant's wife by plaintiff's process server. Defendant took no further action on the cross complaint, and it was dismissed for want of prosecution. Plaintiff then commenced an action for malicious prosecution based on the cross complaint. Defendant sought and obtained a judgment on the pleadings. The court of appeal reversed. It discussed the rules set forth in *Jaffe v. Stone (1941) 18 Cal. 2d 146, 114 P.2d 335* , as to the effect of dismissals. It concluded that a dismissal for want of prosecution was sufficient to establish favorable termination because it must be assumed that a person does not abandon a meritorious action by failure to prosecute. Therefore, a dismissal for want of prosecution indicates that the underlying action was without merit (*80 Cal. App. 3d 823, 825-829)* . The court noted that it might be possible for the defendant to establish that his or her failure to prosecute did not reflect on the merits of the action but that at the pleading stage it was sufficient for plaintiff to allege that the underlying action was dismissed for want of prosecution (*80 Cal. App. 3d 823, 827-828)* .

[c] Dismissal of Civil Action for Want of Prosecution as Sufficient

Minasian v. Sapse *(1978) 80 Cal. App. 3d 823, 145 Cal. Rptr. 829* , is discussed in *§ 147.40[3][b]*.

[d] Dismissal of Criminal Action for Lack of Evidence as Sufficient

Jaffe v. Stone *(1941) 18 Cal. 2d 146, 114 P.2d 335* , is discussed in *§§ 147.40[3][a]* and *147.40[3][f]*.

In ***Jackson v. Beckham*** *(1963) 217 Cal. App. 2d 264, 31 Cal. Rptr. 739* , plaintiff was charged by his employer with the theft of certain uniforms and equipment. Plaintiff was arrested and charged, but the case was then dismissed by the district attorney. Plaintiff commenced an action for malicious prosecution and received a verdict for damages in the amount of $6,500. Defendant appealed from the judgment, and the court of appeal upheld the judgment. It held that there was evidence that the dismissal by the district attorney was for lack of evidence and in the interests of justice, such a dismissal was sufficient as a favorable termination because it reflected on the lack of merit of the complaint. The court held that the jury could disregard contrary evidence that the dismissal was a result of the district attorney's laziness (*217 Cal. App. 2d 264, 269-270)* .

[e] Voluntary Dismissal of Civil Action as Sufficient

MacDonald v. Joslyn *(1969) 275 Cal. App. 2d 282, 79 Cal. Rptr. 707* , was an action for malicious prosecution based on a will contest. The contest was filed by one of the heirs and was eventually dismissed voluntarily by the heir. The executor of the estate sued the heir for the executor's personal damages from the malicious filing of the will contest. After a default judgment, the heir appealed. The court of appeal affirmed the judgment. It first held that the executor had standing to maintain the malicious prosecution action (*275 Cal. App. 2d 282, 287-288)* . It then examined the sufficiency of the complaint with regard to its allegations of favorable termination. It determined that the allegation that the will contest was voluntarily dismissed by the heir was sufficient. Such a dismissal is not on technical grounds and is a favorable termination even though made without prejudice (*275 Cal. App. 2d 282, 289)* . The court then found that there was sufficient evidence to support the judgment and the damages and affirmed the judgment (*275 Cal. App. 2d 282, 291-294)* .

In ***Kennedy v. Byrum*** *(1962) 201 Cal. App. 2d 474, 20 Cal. Rptr. 98* , plaintiff commenced an action alleging alteration of a conditional sales contract. Defendants cross complained for malicious prosecution. They alleged that plaintiff had previously commenced a similar action against them and then had voluntarily dismissed the action. There was a trial and a verdict against plaintiff and for cross complainants. Plaintiff appealed and the court of appeal upheld the verdicts. With regard to the issue of favorable termination, the court found that the voluntary dismissal of the plaintiff's first action was sufficient to establish favorable termination (*201 Cal. App. 2d 474, 479-480)* .

[f] Final Termination Does Not Have to Be Bar to Further Action

The facts and procedural background of ***Jaffe v. Stone*** *(1941) 18 Cal. 2d 146, 114 P.2d 335* , are discussed in *§ 147.40[3][a]*. The defendant in the malicious prosecution action contended that the dismissal for lack of evidence was not a favorable termination because the criminal charges could be refiled and thus the dismissal was not a final termination. The Supreme Court held that the final termination requirement is just that the proceeding at issue be finally terminated and does not require that the proceeding cannot be refiled. The Court noted that if the requirement were that the proceeding could not be refiled, a complaint for malicious prosecution could not be filed until the statute of limitations had run. Such a requirement would not be fair to persons charged where the proceedings were dismissed for lack of evidence (*18 Cal. 2d 146, 155-156)* .

In ***Peebler v. Olds*** *(1945) 71 Cal. App. 2d 382, 162 P.2d 953* , plaintiffs sued for malicious prosecution based on suits filed involving disputes over rights to a cemetery. All of the suits had terminated favorably to plaintiff when the malicious prosecution action was filed. However, an additional suit involving the same dispute was filed by defendants after the commencement of the malicious prosecution action. Plaintiffs were awarded judgment in the malicious prosecution action and defendants appealed. One of their contentions was based on the pendency of the additional action. The court of appeal held that the pendency of the second action did not bar the malicious prosecution action based on the first actions. It stated that if refiling of an unfounded action abated an action for malicious prosecution, the wrongful party might defeat such an action by filing the second action after the statute of limitations had run on the action for malicious prosecution (*71 Cal. App. 2d 382, 387-388)* .

[g] Favorable Termination May Occur by Reason of Appellate Decision

Ray v. First Fed. Bank *(1998) 61 Cal. App. 4th 315, 71 Cal. Rptr. 2d 436* ; involved three separate lawsuits. In the first a law firm served as outside counsel to a bank in an inverse condemnation lawsuit which the bank ultimately dismissed voluntarily. An individual who had acquired from the bank the property that had been the subject of the condemnation action sued the bank for breach of contract on account of the dismissal. In the second action the bank cross-complained against the law firm for malpractice. The firm moved for summary judgment on various grounds, including lack of duty and also the statute of limitations. The trial court granted the motion on the statute of limitations grounds. The bank appealed. The court of appeal affirmed, but not on the statute of limitations issue. Instead, the court held that the law firm had not, as a matter of law, breached any duty of care in following the bank's discretion to dismiss the inverse condemnation case.

Following the affirmance, the receiver of the law firm commenced a malicious prosecution lawsuit. Initially the malicious prosecution defendants obtained judgment on the pleadings, on the premise that the malpractice case had not terminated favorably to the law firm, because it had been decided on the basis of the statute of limitations. The receiver then filed a motion for new trial arguing that the court of appeal decision in the malpractice case had accomplished a favorable termination of it. The trial court agreed and reinstated his malicious prosecution case. The defendants in the malicious prosecution case appealed.

The court of appeal affirmed, and held that an action is favorably terminated if the trial court grants summary judgment to the defendant based on the statute of limitations, a procedural ground not bearing on the merits, but the reviewing court then affirms the judgment on grounds the action lacks intrinsic merit as a matter of law (*61 Cal. App. 4th 315, 317)* . The general rule is that a favorable termination must reflect on the malicious prosecution plaintiff's innocence of the misconduct charged. In this case the court of appeal's decision affirming the summary judgment in the malpractice case did reflect on the merits and on the law firm's innocence in the strongest possible way. The court of appeal in the malpractice case held that the charges and case were unfounded as a matter of law, because the law firm had violated no duty to the bank in dismissing the inverse condemnation action. The court ruled that not only was the decision favorable, it also accomplished the final termination of the case (*61 Cal. App. 4th 315, 319)* .

[h] Dismissal of Civil Action as Discovery Sanction as Favorable Termination if Reflecting on Merits

In *Ross v. Kish (2006) 145 Cal. App. 4th 188, 51 Cal. Rptr. 3d 484* , an attorney brought an action in small claims court against his former client for unpaid attorney fees following the attorney's representation of the client in the mediation of a real estate claim against the client. In response to the small claims action, the former client sued the attorney for breach of contract and legal malpractice. In that suit, the former client alleged that the attorney had orally told the client that the mediation representation would cost him no more than $5,000, although he had already paid $12,000. The client also alleged that the attorney committed malpractice by failing to file a mediation brief, failing to retain experts in time for the mediation, and failing to seek a defense under the client's homeowner's policy. The attorney dismissed his small claims action and filed a cross-complaint for the unpaid fees in the client's lawsuit. The client refused the court's order to be deposed, allegedly on advice of out-of-state counsel, who was seeking to be admitted as counsel in the case. The court denied the requests for admission of the out-of-state counsel and ordered the client to appear for deposition immediately. The client failed to comply, and the attorney moved for dismissal as a discovery sanction. When the client failed to oppose the motion and failed to appear at the hearing on the motion, the court granted the motion for dismissal. The attorney then sued the former client for malicious prosecution and abuse of process. The client filed a motion to strike under the anti-SLAPP statute, *Code Civ. Proc. § 425.16*, which the trial court granted as to the abuse of process cause of action. When the court denied the motion to strike the malicious prosecution action, the former client appealed.

The court of appeal affirmed the denial of the motion to strike the malicious prosecution action. The former client argued that the attorney could not establish favorable termination of the underlying action because dismissal as a discovery sanction did not reflect on the merits of the action. The court disagreed, concluding that the evidence submitted by the attorney was sufficient to permit a reasonable inference that the breach of contract and malpractice allegations were groundless and that the client's failure to be deposed was a concession that the underlying action was groundless. The attorney presented evidence that he only agreed to represent the client in defending against the real estate claim, that the parties agreed that the cost to the client would be "$3,500 plus through mediation," and that the client himself had filed a claim with his homeowner's insurance, which was denied by the insurer. The attorney also presented evidence that he had hired three experts to evaluate the underlying real estate claim, that they prepared reports, and that the tactical decision was made not to use the experts because the attorney and client agreed that their conclusions would harm, rather than help, the client at the mediation. The attorney also explained that, while he did not file an optional mediation brief, he had made an oral presentation of his client's case to the mediator prior to the mediation, concluding that an oral presentation would be a better tactical move. Under these circumstances, the court held that it was reasonable to conclude that the client's refusal to submit to a deposition was a concession that the claims of breach of contract and malpractice lacked merit, and the dismissal of the underlying action had to be seen as a favorable termination on the merits in favor of the attorney (*145 Cal. App. 4th 188, 198-200)* .

[i] Dismissal of Appeal With Settlement That Preserves Favorable Trial Court Judgment as Favorable Termination

In *Siebel v. Mittlesteadt (2007) 41 Cal. 4th 735, 62 Cal. Rptr. 3d 155, 161 P.3d 527* , plaintiff, the chief executive officer of a company, brought a malicious prosecution action against the attorneys of a former employee. In the underlying action, the former employee had sued the company, as well as plaintiff in his individual capacity, for wrongful termination, gender discrimination, and failure to pay commissions and other compensation. The causes of action against plaintiff were disposed of by the trial court through either demurrer or summary adjudication in favor of plaintiff, although the case went to trial against the company and against plaintiff for fraud. The jury rejected all of the former employee's claims except the claim against the company for compensation owed, and also found for the company on a cross-complaint it brought against the employee. All parties appealed, but later agreed to settle the case and dismiss the appeals. Under the terms of the settlement, the company agreed to pay 86 percent of the damages and costs that she had been awarded at trial, and the employee agreed to pay plaintiff's court-awarded litigation costs. The settlement also specified that plaintiff and the company would release the employee from any further liability, but the

release specifically excluded the employee's attorneys. In conjunction with this exclusion, the settlement also specified that it did not modify the final termination of the action in favor of plaintiff for purposes of any subsequent action against the attorneys. Plaintiff then brought his malicious prosecution action against the employee's attorneys, alleging that they knew the claims filed against him were baseless when filed. The trial court granted summary judgment for the attorneys on the grounds that plaintiff could not show the underlying action was terminated in his favor. The court of appeal reversed, concluding that plaintiff had obtained a favorable termination.

The California Supreme Court affirmed the court of appeal, holding that the underlying action had been terminated in plaintiff's favor for purposes of pursuing a malicious prosecution action. The court noted that plaintiff had received a favorable termination on the merits at trial as to the claims brought against him individually. With appeals of the trial court judgment pending, the parties reached a settlement that did not amend the judgment on the merits as it related to plaintiff. The Court also noted that, although the dollar amount the former employee received from the company was compromised, that amount related to the claims brought against the company and not the individual claims asserted against plaintiff. Because plaintiff received a favorable judgment in the underlying action, and that part of the judgment was unaffected by the settlement, plaintiff could show that the underlying action had been terminated in his favor (*41 Cal. 4th 735, 743)* .

[4] Additional Authorities

[a] Dismissal of Criminal Action as Sufficient

In *Scannell v. County of Riverside (1984) 152 Cal. App. 3d 596, 199 Cal. Rptr. 644* , plaintiff sued public and private defendants attempting to state, inter alia, causes of action for malicious prosecution. The trial court sustained general demurrers without leave to amend, and plaintiff appealed the ensuing judgment of dismissal. The court of appeal affirmed in part, but reversed regarding the cause of action for malicious prosecution against the private defendant. In so reversing, the court held that a favorable termination of the underlying criminal action was sufficiently stated by the allegation that the action had been dismissed on the basis of a known prior grant of immunity to the accused (*152 Cal. App. 3d 596, 611-614)* .

[b] Dismissal of Civil Action as Sufficient

In *Loomis v. Murphy (1990) 217 Cal. App. 3d 589, 266 Cal. Rptr. 82* , the trial court, following its dismissal of an action in which defendants had cross complained, granted defendants' motion to amend their cross complaint to include a cause of action for malicious prosecution. The original plaintiff in the action moved successfully for judgment on the pleadings with respect to this cross complaint, citing the rule set forth in *Babb v. Superior Court (1971) 3 Cal. 3d 841, 846, 92 Cal. Rptr. 179, 479 P.2d 379* , prohibiting the filing of a cross complaint for malicious prosecution in the same action that defendant claims is being maliciously prosecuted. The court of appeal reversed, noting that the underlying action had been favorably terminated for purposes of the tort. The court held that the *Babb* rule prohibiting cross complaints does not apply when there has been a favorable termination (*217 Cal. App. 3d 589, 593-594)* .

In *Berman v. RCA Auto Corp. (1986) 177 Cal. App. 3d 321, 222 Cal. Rptr. 877* , the malicious prosecution plaintiff, an attorney, had been sued in the underlying action by an adversary party who alleged that statements made by the attorney in the course of trial proceedings were defamatory. The underlying action was dismissed on the ground that the statements were absolutely privileged under former Civ. Code § 47(2) [*now see Civ. Code § 47(b)*] and could not form the basis for the cause of action. The trial court in the malicious prosecution action granted the defendant's demurrer on the grounds that dismissal of the prior suit based on privilege did not constitute a favorable termination. On appeal by the plaintiff, the court of appeal reversed. The court first distinguished procedural and substantive defenses, noting that procedural defenses are designed to protect the integrity of the judicial system and do not absolutely shield a defendant from liability. A defense based on absolute privilege, on the other hand, creates an immunity and is a bar to liability designed to protect the rights of the individual speaker (*177 Cal. App. 3d 321, 324-325)* . The court therefore

concluded that the absolute privilege at issue was a substantive defense and held that dismissal of a suit on the ground that defendant's statement is privileged is a favorable termination for malicious prosecution purposes (*177 Cal. App. 3d 321, 325-326)* .

[c] Dismissal of Criminal Action for Lack of Evidence as Sufficient

In *Bulkley v. Klein (1962) 206 Cal. App. 2d 742, 23 Cal. Rptr. 855* , plaintiff sued for false imprisonment and malicious prosecution based on criminal charges filed against him by his landlord involving the alleged removal of the landlord's property from the premises. The criminal complaint had been dismissed for lack of evidence but the docket entry was later changed to a continuance because the complainant had failed to appear. The trial court found in favor of plaintiff in the malicious prosecution case and awarded him $1,000. Defendant appealed and the court of appeal affirmed. It first held that plaintiff had not established his cause of action for false imprisonment (*206 Cal. App. 2d 742, 746-748)* . The court then considered whether there was substantial evidence to support the finding of liability for malicious prosecution. Relying on *Jaffe v. Stone (1941) 18 Cal. 2d 146, 114 P.2d 335* [*see § 147.40[3][a]*], it held that dismissal of the prior criminal action for lack of evidence was sufficient to support the finding of favorable termination. It then held that the change in the docket entry to a continuance had been beyond the jurisdiction of the court and thus was a nullity (*206 Cal. App. 2d 742, 749-750)* .

[d] Final Termination Does Not Have to Be Bar to Further Action

In *Hurgren v. Union Mut. Life Ins. Co. (1904) 141 Cal. 585, 75 P. 168* , plaintiff sued for malicious prosecution. The trial court granted a nonsuit on the ground that it had not been shown that the underlying actions had been decided in plaintiff's favor on the merits. The Supreme Court reversed. It held that a favorable termination on the merits is not required and that it is sufficient to show that the underlying proceeding had been legally terminated. The fact that the legal termination is not a bar to another suit is not a defense; otherwise, a plaintiff could be harassed by a succession of suits, each of which was dismissed before reaching the merits, and have no remedy (*141 Cal. 585, 587-588)* .

[e] Dismissal of Civil Action as Discovery Sanction as Favorable Termination if Reflecting on Merits

In *Daniels v. Robbins (2010) 182 Cal. App. 4th 204, 105 Cal. Rptr. 3d 683* , plaintiff filed a malicious prosecution action against a man and his attorneys for a prior defamation lawsuit that they had brought against her. The defamation lawsuit had eventually been dismissed by the trial court as a sanction for failing to comply with discovery orders. The court of appeal held that this dismissal satisfied the favorable termination requirement for establishing her subsequent malicious prosecution action. The court held that dismissal following a terminating sanction granted for abuse of the discovery process may support a finding that the favorable termination element has been satisfied, if the record from the underlying action shows that the underlying plaintiff made no attempt during discovery to substantiate the allegations in the complaint and the court's dismissal of that action was justified by the plaintiff's lack of evidence. In the instant case, the plaintiff in the underlying defamation action did not provide any timely discovery responses and ignored repeated court orders to do so. The trial court in that action, when granting the terminating sanction on the eve of trial, noted that even if the discovery served by that plaintiff as a last-ditch effort to stave off sanctions were allowed at trial, he still would not have sufficient evidence to prove his defamation case. Under those circumstances, the court of appeal in the malicious prosecution action found that plaintiff had met the favorable termination requirement (*182 Cal. App. 4th 204, 218-219*). The court also held that the fact that the discovery abuses may have been the fault of the client rather than the attorneys does not matter for purposes of establishing the favorable termination element on the cause of action brought against the underlying attorneys (*182 Cal. App. 4th 204, 220-222)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 147 MALICIOUS PROSECUTION AND ABUSE OF PROCESS
PART II. FORMS
A. Malicious Prosecution

14-147 California Points & Authorities § 147.41

§ 147.41 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Malicious Prosecution--Action for Malicious Prosecution as Able to Be Based on Institution of Proceedings Other Than Civil or Criminal Complaints

[1] FORM

[*Caption. See § 147.40*].

THE COMPLAINT STATES A CAUSE OF ACTION BECAUSE AN ACTION FOR MALICIOUS PROSECUTION CAN BE BASED ON THE PROSECUTION OF _____ [A CROSS COMPLAINT *or* A WILL CONTEST *or* AN ADMINISTRATIVE PROCEEDING].

[*EITHER*]

A. Cross Complaint as Sufficient. A malicious prosecution action can be based on the prosecution of a cross complaint, even though the cross complaint is based on the same transaction as the complaint (*Bertero v. National Gen. Corp. (1974) 13 Cal. 3d 43, 50-53, 118 Cal. Rptr. 184, 529 P.2d 608*).

[*OR*]

A. Will Contest as Sufficient. A malicious prosecution action can be brought by an executor based on the prosecution of a will contest (*Crowley v. Katleman (1994) 8 Cal. 4th 666, 691-692, 34 Cal. Rptr. 2d 386, 881 P.2d 1083* ; *MacDonald v. Joslyn (1969) 275 Cal. App. 2d 282, 287-288, 79 Cal. Rptr. 707*).

[*OR*]

A. Administrative Proceeding as Sufficient. A malicious prosecution complaint can be based on the bringing of an

administrative proceeding against plaintiff (*Hardy v. Vial (1957) 48 Cal. 2d 577, 580-581, 311 P.2d 494*).

[*Optional*] **B. Cross-Complaint Filed During Marital Dissolution Action as Sufficient.** A malicious prosecution action may be based on a cross-complaint that is filed during a marital dissolution action, if that cross-complaint does not raise any family law issues such as marital status, child custody, or spousal support (*Nicholson v. Fazeli (2003) 113 Cal. App. 4th 1091, 1098-1099, 6 Cal. Rptr. 3d 881*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a demurrer to a complaint for malicious prosecution where the demurrer asserts that a malicious prosecution action cannot be based on the proceeding involved but where the proceeding was a cross complaint, a will contest, or an administrative proceeding.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, these points may be submitted in opposition to a demurrer supported by the points in *§ 147.22*.

[3] Discussion of Authorities

[a] Cross Complaint as Sufficient

In ***Bertero v. National Gen. Corp.*** *(1974) 13 Cal. 3d 43, 118 Cal. Rptr. 184, 529 P.2d 608* , after being forced out as president of defendant corporation, plaintiff was given an employment contract and stock options. Following a later dispute, defendant terminated all payments to plaintiff. Plaintiff sued for declaratory relief as to the validity of the contract and options. Defendant cross complained for salary that had already been paid to plaintiff. Plaintiff prevailed and the cross complaint was dismissed. Plaintiff then sued for malicious prosecution of the cross complaint and obtained a judgment for more than $1,000,000. Defendant appealed and the Supreme Court affirmed the judgment.

The Supreme Court held that an action for a malicious prosecution could be based on a cross complaint. It found that the malicious prosecution of a cross complaint caused the same harm as the malicious commencement of an action (*13 Cal. 3d 43, 51)* . It found that it was not significant that the cross complaint arose out of the same transaction as the complaint since it would still cause harm and expense (*13 Cal. 3d 43, 51)* . It rejected the claim that the cross complaint was merely defensive because it was an affirmative claim for damages, and stated that it was not recognizing a cause of action for malicious defense (*13 Cal. 3d 43, 52)* .

[b] Will Contest as Sufficient

The facts and procedural background of ***Crowley v. Katleman*** *(1994) 8 Cal. 4th 666, 34 Cal. Rptr. 2d 386, 881 P.2d 1083* , are discussed in *§ 147.45[3][a]*. In rejecting the argument that a malicious prosecution action should not be maintainable based on a will contest asserting multiple grounds, some of which are not supported by probable cause, the Court noted the authority holding that will contests are separate from the will probate actions, and concluded that the

policies underlying the malicious prosecution cause of action apply to will contests (*8 Cal. 4th 666, 691-692)* .

MacDonald v. Joslyn *(1969) 275 Cal. App. 2d 282, 79 Cal. Rptr. 707* , is discussed in *§ 147.40[3][e]*. The court of appeal held that an action for malicious prosecution can be based on the filing of a will contest. It held that the executor can file such an action to recover his or her damages for the malicious prosecution of the will contest because an executor is in the position of a defendant in such action (*275 Cal. App. 2d 282, 287-288)* . Former Prob. Code § 371 provided that on the trial of a will contest, the contestant is plaintiff and the petitioner is defendant (*275 Cal. App. 2d 282, 288 n.1*).

[c] Administrative Proceeding as Sufficient

In ***Hardy v. Vial*** *(1957) 48 Cal. 2d 577, 311 P.2d 494* , plaintiff was discharged from his position as a professor at a state college as a result of charges made by defendants. He then petitioned for and obtained reinstatement. He filed an action for malicious prosecution against defendants, most of whom were state employees. Their demurrer on the ground that the complaint failed to state a cause of action was sustained and plaintiff appealed the ensuing judgments. The Supreme Court first held that a malicious prosecution action can be based on the institution of administrative proceedings, adopting the rule set forth in the Restatement of Torts. It noted that a person can be damaged by the malicious prosecution of administrative proceedings in the same manner as by the malicious prosecution of civil or criminal proceedings. The court also held that its holding did not depend on the type of judicial review available from the administrative proceedings (*48 Cal. 2d 577, 580-581)* . The court then found that the state employees were immune and affirmed judgment as to them. The defendant who was not a state employee was not immune and thus the judgment as to him was reversed (*48 Cal. 2d 577, 583-584)* .

[d] Cross-Complaint Filed During Marital Dissolution Action as Sufficient

In ***Nicholson v. Fazeli*** *(2003) 113 Cal. App. 4th 1091, 6 Cal. Rptr. 3d 881* , a wife was engaged in a marital dissolution action against her husband. After dissolution was granted, the family law court retained jurisdiction to resolve issues involving property division, spousal support, and attorney's fees. The wife eventually filed an action against her husband's trust seeking declaratory relief and a constructive trust on assets she claimed were relevant to marital asset allocation and spousal support. The husband's two sons replaced the husband as trustees for purposes of defending the lawsuit. The trustees, allegedly prompted by the husband, filed a cross-complaint against the wife, seeking the return of a Jaguar automobile alleged to be trust property, or damages for its loss, as well as a constructive trust on 23 pieces of jewelry, including the wife's engagement ring, alleged to be trust assets. The trust eventually dismissed the cross-complaint, and subsequent arbitration resulted in a finding that the Jaguar and jewelry belonged to the wife, not the trust. The wife then filed a malicious prosecution action against her husband, his two sons in their capacity as trustees, and the sons' attorney for the cross-complaint, alleging lack of probable cause. The trial court sustained a demurrer for the defendants, and the plaintiff appealed.

The court of appeal reversed. The primary issue on appeal was whether a cross-complaint that originates in a marital dissolution action can be the basis for a malicious prosecution action. The court held that it can. The court reviewed earlier court opinions that had held that a malicious prosecution action cannot be based on meritless motions and orders to show cause arising from family law proceedings, in part due to the acrimonious nature of such proceedings, the difficulty of distinguishing truly malicious motions from ordinary ones, and a concern not to deter meritorious motions involving child custody (*113 Cal. App. 4th 1091, 1097)* . However, the court refused to extend the holding of those cases to otherwise ordinary civil actions or cross-actions that happen to originate in the course of family law proceedings. In the case before the court, the cross-complaint did not raise any family law issues such as child support, marital status, or spousal support. Although the characterization of the property in question as trust property might have affected the division of community property, the cross-complaint did not seek to have the property characterized as community or separate property, but rather as trust property. According to the court, if this ordinary trust action had been brought in ordinary civil court, there would be no question that it could be the basis for a malicious prosecution

action. The concerns expressed by the earlier court opinions were inapplicable, and the court concluded that the plaintiff could pursue her malicious prosecution action (*113 Cal. App. 4th 1091, 1098-1099)* .

[4] Additional Authorities

[a] Administrative Proceeding as Sufficient

In *Axline v. Saint John's Hosp. & Health Ctr. (1998) 63 Cal. App. 4th 907, 74 Cal. Rptr. 2d 385* , plaintiff physician sued defendant hospital following denial of his application to become a member of the medical staff, alleging several improprieties in the procedures followed in processing the application. More specifically, plaintiff asserted the hospital had violated its own bylaws and failed to provide an opportunity for plaintiff to address allegations brought against him. The trial court granted the hospital's demurrer on various grounds, holding in part that plaintiff had failed to allege facts sufficient to state a cause of action for malicious prosecution. The court of appeal reversed on various grounds, holding in part that a malicious prosecution action can be based on a denial of privileges that triggers a right to begin an administrative appeal process, even though the appeal proceeding is actually triggered by the malicious prosecution plaintiff. Thus, the court found that the letter denying staff privileges to the physician, which triggered the right to seek a formal appeal with the hospital, was sufficient to support a malicious prosecution action by the physician (*63 Cal. App. 4th 907, 916-917)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersTortsIntentional TortsMalicious ProsecutionGeneral OverviewTortsIntentional TortsMalicious ProsecutionDefensesTortsIntentional TortsMalicious ProsecutionElementsGeneral Overview

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14-147 California Points & Authorities § 147.42

§ 147.42 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Malicious Prosecution--Private Party Permitted to Sue for Malicious Prosecution Based on Underlying Action in Which Public Entity Was Also Defendant

[1] FORM

[*Caption. See § 147.40*].

THE COMPLAINT STATES A CAUSE OF ACTION BECAUSE A PRIVATE PARTY IS NOT BARRED FROM BRINGING AN ACTION FOR MALICIOUS PROSECUTION MERELY BECAUSE THE UNDERLYING ACTION WAS ALSO BROUGHT AGAINST A PUBLIC ENTITY.

Private Party May Sue Based on Underlying Action in Which Public Entity Was Also Defendant. A private party is not precluded from bringing a malicious prosecution action merely because the underlying lawsuit was also brought against a public entity (*Padres L.P. v. Henderson (2003) 114 Cal. App. 4th 495, 510, 8 Cal. Rptr. 3d 584*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a demurrer to a complaint for malicious prosecution if the demurrer asserts that a private party plaintiff is barred from suing for malicious prosecution because the underlying action was essentially an action against a public entity that is itself barred from suing for malicious prosecution.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

With appropriate modifications, these points may be used in another procedural context--for example, to oppose a motion for summary judgment or to oppose a special motion to strike under *Code Civ. Proc. § 425.16*.

[3] Discussion of Authorities

[a] Private Party May Sue Based on Underlying Action in Which Public Entity Was Also Defendant

In ***Padres L.P. v. Henderson*** *(2003) 114 Cal. App. 4th 495, 8 Cal. Rptr. 3d 584* , the plaintiff was a major league baseball team that brought a malicious prosecution action against an opponent of a ballpark construction project that was being developed by the team and the City of San Diego. The malicious prosecution action was based on a series of lawsuits that the opponent had brought challenging financial actions taken by the city in conjunction with the team to develop the project. The defendants in the underlying lawsuits filed by the project opponent included the city, the baseball team, and others. The opponent filed a special motion to strike the malicious prosecution action under *Code Civ. Proc. § 425.16*, the so-called anti-SLAPP statute, on the grounds that the opponent had an absolute right to file the underlying actions challenging the city's plans. The trial court denied the motion as it related to some of the underlying suits, and the project opponent appealed.

The court of appeal reversed in part and affirmed in part. The court rejected the opponent's claim that the underlying suits were absolutely privileged under the California Supreme Court's decision in *City of Long Beach v. Bozek (1982) 31 Cal. 3d 527, 183 Cal. Rptr. 86, 645 P.2d 137* [*see § 147.33[3][a]*]. The court of appeal concluded that nothing in *Bozek* prevents a private party from bringing a malicious prosecution action based on an underlying lawsuit that also happens to have been brought against a governmental entity, even though the public entity itself would be unable to bring a malicious prosecution action. The court concluded that parties with a unique and substantial interest in a project, who attempt to protect that interest by participating in a lawsuit seeking to invalidate governmental action, are entitled to seek redress for damages suffered as a result of the action, if they can establish that the underlying lawsuit was frivolous and brought with malice (*114 Cal. App. 4th 495, 510-513)* . The court then went on to analyze whether the baseball team had established a probability of success on the merits of its claims, as required to defeat the special motion to strike. The court concluded that the team had failed to make a prima facie showing that two of the project opponent's underlying suits were totally without merit, and therefore the trial court should have struck those two claims. However, the court also held that the team had presented sufficient evidence to establish a probability of success on a malicious prosecution claim based on the opponent's lawsuit seeking to invalidate a bond ordinance to be used to fund construction of the ballpark, and therefore the trial court properly denied the motion to strike on that claim (*114 Cal. App. 4th 495, 518-522)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersTortsIntentional TortsMalicious ProsecutionGeneral OverviewTortsIntentional TortsMalicious ProsecutionDefensesTortsIntentional TortsMalicious ProsecutionElementsGeneral Overview

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14-147 California Points & Authorities § 147.43

§ 147.43 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Malicious Prosecution--Defendant Public Employee Is Not Immune Because He or She Was Acting Outside the Scope of Employment

[1] FORM

[*Caption. See § 147.40*].

THE COMPLAINT STATES A CAUSE OF ACTION AGAINST THE PUBLIC EMPLOYEE FOR MALICIOUS PROSECUTION BECAUSE IT ALLEGES THAT THE EMPLOYEE WAS ACTING OUTSIDE THE SCOPE OF EMPLOYMENT AND THE EMPLOYEE THEREFORE WOULD NOT BE IMMUNE.

No Immunity When Acting Outside Scope of Employment. Under the terms of *Section 821.6 of the Government Code*, a public employee is only immune from liability for malicious prosecution when acting within the scope of his or her employment. Therefore, a public employee is not immune when acts constituting malicious prosecution were outside the scope of his or her employment (*Vivell v. City of Belmont (1969) 274 Cal. App. 2d 38, 40-41, 78 Cal. Rptr. 841*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a demurrer to a complaint for malicious prosecution when the demurrer asserts that the public employee is immune but the complaint alleges that the employee was acting outside the

scope of employment.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, these points may be submitted in opposition to a demurrer supported by the points in *§ 147.31*.

[i] Related Uses

With appropriate modifications, these points may be used to oppose a motion for summary judgment based on public employee immunity.

[3] Discussion of Authorities

[a] No Immunity When Acting Outside Scope of Employment

In ***Vivell v. City of Belmont*** *(1969) 274 Cal. App. 2d 38, 78 Cal. Rptr. 841* , a malicious prosecution action was brought against the city and one of its councilmen for instituting a misdemeanor action for failure to connect a sewer line. The opening statement at the trial of the malicious prosecution action stated that the councilman was involved in a dispute with plaintiff over the payment of a sewer assessment and that the councilman had made false statements to the authorities that had caused the misdemeanor complaint to be issued. The city moved for a nonsuit, which was granted. The court of appeal affirmed on the basis of the city's immunity under *Gov. Code § 821.6* which provides a public entity with absolute immunity from liability for malicious prosecution (*274 Cal. App. 2d 38, 40)* . The court stated in dictum, however, that the trial court's failure to grant the councilman's motion for nonsuit was proper because he was not acting within the scope of his duties as a city councilman when he sought private gain by urging prosecution by the city. A public employee's immunity under *Gov. Code § 821.6* from liability for malicious prosecution only applies to acts within the scope of employment (*274 Cal. App. 2d 38, 40-41)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersTortsIntentional TortsMalicious ProsecutionGeneral OverviewTortsIntentional TortsMalicious ProsecutionDefensesTortsIntentional TortsMalicious ProsecutionElementsGeneral Overview

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14-147 California Points & Authorities § 147.44

§ 147.44 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Malicious Prosecution--Action for Malicious Prosecution May Be Based on Partial Favorable Termination of Underlying Action

[1] FORM

[*Caption. See § 147.40*].

A CAUSE OF ACTION FOR MALICIOUS PROSECUTION CAN BE STATED WHEN THE PLAINTIFF OBTAINED A PARTIAL FAVORABLE TERMINATION OF THE UNDERLYING ACTION.

Partial Favorable Termination Is Sufficient Basis. A cause of action for malicious prosecution can be stated when the plaintiff obtained a partially favorable termination of a severable underlying action (*Albertson v. Raboff (1956) 46 Cal. 2d 375, 385, 295 P.2d 405* ; *Paramount Gen. Hosp. Co. v. Jay (1989) 213 Cal. App. 3d 360, 368-369, 261 Cal. Rptr. 723*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a demurrer to a complaint for malicious prosecution when the demurrer asserts that a malicious prosecution action cannot be based on a partially favorable termination of an underlying action.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, these points may be used to oppose a motion for summary judgment [*see Code Civ. Proc. § 437c*] on the basis that a partially favorable termination will support an action for malicious prosecution.

[3] Discussion of Authorities

[a] Partial Favorable Termination Is Sufficient Basis

In ***Albertson v. Raboff*** *(1956) 46 Cal. 2d 375, 295 P.2d 405* , the plaintiff alleged that defendant, in prior litigation, knowingly and maliciously asserted false claims to her real property. The defendant had previously filed an action against the plaintiff for money damages, and also asserted a claim to plaintiff's real property on a theory of fraudulent conveyance. The defendant prevailed in this underlying action only concerning the claim for damages. The trial court sustained defendant's objection to the introduction of evidence on the ground that the complaint did not state a cause of action, and entered a judgment of dismissal. Plaintiff appealed.

The Supreme Court reversed the judgment, finding that the complaint stated a cause of action for malicious prosecution. It held that the damage and real property claims were severable, and found that the complaint stated a cause of action for malicious prosecution based on the claim of fraudulent conveyance, despite the merit of the claim on which the defendant had prevailed (*46 Cal. 2d 375, 385)* .

In ***Paramount Gen. Hosp. Co. v. Jay*** *(1989) 213 Cal. App. 3d 360, 261 Cal. Rptr. 723* , plaintiffs appealed an order of dismissal of their malicious prosecution complaint against defendant. The underlying action alleged multiple causes of action; plaintiff prevailed on some of these causes, but not on all of them. Defendant demurred solely on the ground that plaintiff did not allege a favorable termination of the underlying action. The trial court sustained the demurrer to the original complaint without leave to amend. Plaintiffs appealed.

The court of appeal reversed, holding that a malicious prosecution action may be brought following a partial favorable termination of a severable underlying action (*213 Cal. App. 3d 360, 368-369, 372)* . The court noted that the claims in the instant case appeared to be severable and that, at minimum, the question of severability would require factual determinations that could not be made at the demurrer stage (*213 Cal. App. 3d 360, 370)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersTortsIntentional TortsMalicious ProsecutionGeneral OverviewTortsIntentional TortsMalicious ProsecutionDefensesTortsIntentional TortsMalicious ProsecutionElementsGeneral OverviewTortsIntentional TortsMalicious ProsecutionElementsFavorable Termination

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14-147 California Points & Authorities § 147.45

§ 147.45 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Malicious Prosecution--Cause of Action Can Be Based on Allegations That Any Ground of Underlying Action Was Asserted Without Probable Cause Notwithstanding Probable Cause for Other Grounds Asserted in That Action

[1] FORM

[*Caption. See § 147.40*].

A CAUSE OF ACTION FOR MALICIOUS PROSECUTION CAN BE STATED BASED ON ALLEGATIONS THAT ANY GROUND ASSERTED IN AN ACTION CHARGING MULTIPLE GROUNDS OF LIABILITY WAS ASSERTED WITH MALICE AND WITHOUT PROBABLE CAUSE, EVEN IF OTHER GROUNDS IN THAT ACTION WERE ASSERTED WITH PROBABLE CAUSE.

Cause of Action Can Be Based on One Ground Asserted in Underlying Action. A malicious prosecution cause of action can be based on one ground asserted in a prior action with malice and without probable cause, even if one or more other grounds asserted in that action were supported by probable cause (*Crowley v. Katleman (1994) 8 Cal. 4th 666, 695, 34 Cal. Rptr. 2d 386, 881 P.2d 1083* ; *Bertero v. National Gen. Corp. (1974) 13 Cal. 3d 43, 56-57, 118 Cal. Rptr. 184, 529 P.2d 608*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a demurrer to a complaint for malicious prosecution, when the demurrer asserts that the complaint does not state a malicious prosecution cause of action because the complaint does not allege that all grounds asserted in the prior action were made with malice and without probable cause. The basis of opposition is that the assertion of any ground in the prior action without probable cause and with malice is sufficient to support a cause of action [*Crowley v. Katleman (1994) 8 Cal. 4th 666, 695, 34 Cal. Rptr. 2d 386, 881 P.2d 1083* ; *Bertero v. National Gen. Corp. (1974) 13 Cal. 3d 43, 56-57, 118 Cal. Rptr. 184, 529 P.2d 608]* .

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should refer to the specific allegations of the complaint concerning the existence of malice and lack of probable cause in the assertion of a specific ground in the prior action.

[3] Discussion of Authorities

[a] Cause of Action Can Be Based on One Ground Asserted in Underlying Action

In ***Crowley v. Katleman*** *(1994) 8 Cal. 4th 666, 34 Cal. Rptr. 2d 386, 881 P.2d 1083* , the prior action was a will contest instituted by defendant, the wife of a decedent who had executed a will leaving the bulk of his estate to plaintiff. In the will contest, defendant alleged six separate grounds for invalidating the will; plaintiff prevailed in that action, and filed suit for malicious prosecution. In the malicious prosecution action, plaintiff did not allege that the will contest allegation regarding undue influence lacked probable cause; defendant demurred to the complaint, arguing that the complaint's failure to allege that all of the grounds asserted in the prior action were without probable cause precluded the cause of action. The trial court sustained the demurrer and dismissed the action, but the court of appeal reversed, holding that *Bertero v. National Gen. Corp. (1974) 13 Cal. 3d 43, 56-57, 118 Cal. Rptr. 184, 529 P.2d 608* , permitted a cause of action to be stated if any of the grounds asserted in the prior action were asserted with malice and without probable cause. The Supreme Court granted review, and affirmed the judgment of the court of appeal.

The Court stated that the issue before it was whether the complaint properly pleaded the element of probable cause: whether a malicious prosecution action for bringing a will contest on multiple grounds may be maintained when the plaintiff does not allege that *all* the grounds asserted in the contest lacked probable cause (*8 Cal. 4th 666, 676)* . The issue had been resolved in the affirmative in *Bertero v. National Gen. Corp. (1974) 13 Cal. 3d 43, 56-57, 118 Cal. Rptr. 184, 529 P.2d 608* , so the Court addressed the reasons advanced by defendant for refusing to follow that decision. The Court rejected the proffered reasons, concluding that a ground asserted in litigation with malice and without probable cause should continue to be redressable in a malicious prosecution action (*8 Cal. 4th 666, 694-695)* .

The facts and procedural background of ***Bertero v. National Gen. Corp.*** *(1974) 13 Cal. 3d 43, 118 Cal. Rptr. 184, 529 P.2d 608* , are discussed in *§ 147.41[3][a]*. The Court rejected the defendant's assertion that the test for a malicious prosecution cause of action should be whether defendant had reasonable grounds to seek the relief sought in the prior action, not whether defendant had reasonable grounds for asserting each of the theories contained in that action (*13 Cal. 3d 43, 57)* . Instead, the Court held that a plaintiff acting in good faith may safely sue on alternative theories after full disclosure to counsel when he or she possesses a reasonable belief in *each* of those theories. If the original pleading advances a theory that subsequent research proves to be untenable the pleading may be amended; but a party is not permitted to pursue shotgun tactics by proceeding on counts and theories that they know or should know to be groundless (*13 Cal. 3d 43, 57)* .

[4] Additional Authorities

[a] Cause of Action Can Be Based on One Ground Asserted in Underlying Action

In *Videotape Plus, Inc. v. Lyons (2001) 89 Cal. App. 4th 156, 107 Cal. Rptr. 2d 1* , the plaintiffs in the underlying

action, a videotaping company and its owner, brought suit against a rival company and its owner for allegedly conspiring with one of the plaintiffs' employees to purchase videotapes stolen from the plaintiffs' warehouse. The underlying complaint alleged causes of action for conversion, fraud, and negligence. The underlying negligence claim was eventually dismissed, and the trial court granted summary judgment for the defendants on the fraud and conversion claims. However, the court of appeal reversed summary judgment on the conversion claim and remanded. On remand, the trial court issued a terminating sanction against the plaintiff in the underlying action for repeated discovery abuses. The underlying defendants then brought a malicious prosecution action alleging that the underlying plaintiff had lacked probable cause for the fraud and negligence claims. The trial court granted judgment on the pleadings, finding that probable cause existed to bring the underlying conversion claim and that although the fraud and negligence actions were superfluous, because they added nothing to the conversion claim, reasonable attorneys always plead alternative theories to avoid malpractice claims. The court of appeal reversed. The court held that it was settled that probable cause must support each underlying cause of action in order to defeat a malicious prosecution action. The malicious prosecution plaintiffs adequately alleged that no probable cause existed to bring the fraud or negligence claims. They had alleged that the negligence claim was asserted solely to trigger insurance coverage and that the fraud claim was asserted without knowing of any misrepresentation or duty to disclose on the part of the underlying defendants. Therefore, the trial court erred in refusing to allow the plaintiffs to proceed on malicious prosecution claims as to those underlying causes of action (*89 Cal. App. 4th 156, 161-163)* .

The action underlying the malicious prosecution action in *Mabie v. Hyatt (1998) 61 Cal. App. 4th 581, 71 Cal. Rptr. 2d 657* , contained two claims. The first claim sought cancellation of a note and deed of trust. This claim was arguable both as to the facts and the law, and hence was supported by probable cause. The second claim accused defendants of fraud, conspiracy and malice and sought punitive damages. This second claim had no evidentiary support whatsoever. The plaintiff and her attorneys, admitted never having any evidence to support these claims. Nevertheless, as defendants in the malicious prosecution action, they moved for summary judgment, claiming that they had probable cause for the entire action. The trial court granted summary judgment for defendants in the malicious prosecution action. The appellate court reversed, holding that the malicious prosecution of the fraud, conspiracy, malice and punitive damage claims was actionable even if probable cause was present to contest the validity of the deed of trust (*61 Cal. App. 4th 581, 597)* . The rule, derived from *Crowley v. Katleman (1994) 8 Cal. 4th 666, 695, 34 Cal. Rptr. 2d 386, 881 P.2d 1083* , is that each claim prosecuted must be supported by probable cause. Because the record clearly established that the plaintiff in the underlying action lacked probable cause to support the fraud, conspiracy, malice and punitive damage claims, the successful defendant in that action was entitled to sue for the malicious prosecution of that claim (*61 Cal. App. 4th 581, 597)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersTortsIntentional TortsMalicious ProsecutionGeneral OverviewTortsIntentional TortsMalicious ProsecutionDefensesTortsIntentional TortsMalicious ProsecutionElementsGeneral OverviewTortsIntentional TortsMalicious ProsecutionElementsProbable CauseGeneral Overview

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14-147 California Points & Authorities § 147.46

§ 147.46 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Malicious Prosecution Action--Reliance on Attorney's Advice Not Established

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM IN OPPOSITION TO MOTION
_____ [*name*],	)	FOR SUMMARY JUDGMENT
Defendant.	)	[*Code Civ. Proc. § 437c*]
	)	
	)	

_____

THE MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE THERE IS A TRIABLE ISSUE OF FACT AS TO WHETHER DEFENDANT MADE A GOOD FAITH DISCLOSURE OF ALL FACTS TO HIS/HER ATTORNEY AND BELIEVED IN THE FACTS DISCLOSED.

A. Rules Governing Summary Judgment Procedure. It is proper for a court to grant a motion for summary judgment only if the affidavits supporting the motion establish every element necessary to sustain a judgment in favor of the moving party and the opposing party has not presented any facts which give rise to a triable issue. In ruling on the motion, the moving party's affidavits are strictly construed, and doubts as to the propriety of granting the motion should be resolved in favor of the opposing party (*Corwin v. Los Angeles Newspaper Serv. Bureau, Inc. (1971) 4 Cal. 3d 842, 851 n.6, 851-852, 94 Cal. Rptr. 785, 484 P.2d 953*). The court may not properly grant summary judgment based

on inferences reasonably deducible from the papers submitted, if such inferences are contradicted by other inferences which raise a triable issue of fact (*Hepp v. Lockheed-Cal. Co. (1978) 86 Cal. App. 3d 714, 717-718, 150 Cal. Rptr. 408*).

[*EITHER*]

B. Failure to Make Fair Disclosure of All Facts. A defendant cannot rely on the defense of advice of an attorney if he or she did not fairly disclose all the facts within his or her knowledge to the attorney (*Kincaid v. Sears, Roebuck & Co. (1968) 259 Cal. App. 2d 733, 743, 66 Cal. Rptr. 915* ; *Albertson v. Raboff (1960) 185 Cal. App. 2d 372, 386-387, 8 Cal. Rptr. 398*).

[*AND/OR*]

B. Lack of Good Faith. A defendant cannot rely on the defense of advice of an attorney if he or she did not act in good faith in seeking counsel's advice and sought the advice as a mere cloak to protect himself or herself from a suit for malicious prosecution (*Bertero v. National Gen. Corp. (1974) 13 Cal. 3d 43, 53-54, 118 Cal. Rptr. 184, 529 P.2d 608* ; *Klotz v. Alexander (1962) 203 Cal. App. 2d 238, 243, 21 Cal. Rptr. 305*).

[*AND/OR*]

B. No Belief in Guilt. A defendant cannot rely on the defense of advice of an attorney if the defendant did not believe in plaintiff's guilt or liability when the attorney was consulted (*Weber v. Leuschner (1966) 240 Cal. App. 2d 829, 838, 50 Cal. Rptr. 86*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion for summary judgment made by defendant based on advice of counsel where defendant did not fairly relate all the facts to the attorney in good faith.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations which support the memorandum (*Code Civ. Proc. § 437c*).

[b] Related Memoranda

In an appropriate case, these points may be submitted in opposition to the points in *§ 147.37*, which is a memorandum supporting a motion for summary judgment based on good faith reliance on the advice of an attorney.

[3] Discussion of Authorities

[a] Rules Governing Summary Judgment Procedure

Plaintiffs in ***Corwin v. Los Angeles Newspaper Serv. Bureau, Inc.*** *(1971) 4 Cal. 3d 842, 94 Cal. Rptr. 785, 484 P.2d 953* , filed an action against defendants for violations of *Bus. & Prof. Code §§ 16720, 16726* (prohibited restraints on trade under Cartwright Act). The trial court granted defendants' motion for summary judgment and plaintiffs appealed from the judgment entered in favor of defendants. The Supreme Court concluded that the trial court had erroneously granted the summary judgment and reversed the judgment. In reviewing the trial court's action, the Court commented that summary judgment is a drastic procedure to be used with caution so that it does not become a substitute for the open trial method of determining facts (*4 Cal. 3d 842, 851-852)* .

Hepp v. Lockheed-Cal. Co. *(1978) 86 Cal. App. 3d 714, 150 Cal. Rptr. 408* , was an action for breach of contract and fraud. The trial court granted summary judgment for defendant, and the court of appeal reversed the judgment of dismissal. The court of appeal reviewed the rules for granting summary judgment. It relied on *Code Civ. Proc. § 437c* in stating that summary judgment may not be granted on the basis of inferences which are contradicted by other inferences which raise a triable issue of fact (*86 Cal. App. 3d 714, 717-718)* .

[b] Failure to Make Fair Disclosure of All Facts

In ***Kincaid v. Sears, Roebuck & Co.*** *(1968) 259 Cal. App. 2d 733, 66 Cal. Rptr. 915* , plaintiff was charged by his employer with petty theft for installing a company part in his own washing machine, which he had sold to undercover agents for the company. He was acquitted at trial and filed an action for malicious prosecution. After a jury verdict for plaintiff, the court granted defendant's motion for a new trial but denied its motion for a judgment notwithstanding the verdict. Both sides appealed. The court of appeal affirmed the granting of a motion for a new trial, finding there was a proper basis in the insufficiency of the evidence on lack of probable cause (*259 Cal. App. 2d 733, 741-742)* . The court also affirmed the denial of a motion for a judgment notwithstanding the verdict. It found that there was also evidence based on plaintiff's statements that he intended to pay for the timer that there was lack of probable cause. With regard to defendant's argument that it fully disclosed all the facts to the district attorney, the court held that unless the information given to the prosecuting officer is complete and fair, the advice may not be relied on to establish probable cause. The court found that there was some evidence that all of plaintiff's statements were not disclosed by the company to the district attorney (*259 Cal. App. 2d 733, 743)* .

In ***Albertson v. Raboff*** *(1960) 185 Cal. App. 2d 372, 8 Cal. Rptr. 398* , the malicious prosecution action was based on a prior action to set aside a conveyance on the basis that it was in fraud of creditors and a lis pendens. The trial court found for plaintiff and defendant appealed on the basis that the evidence did not support the trial court's findings. The court of appeal affirmed. It held that reliance on the advice of counsel was a valid defense, but that to rely on the defense, the defendant had to establish full, good faith disclosure of all the facts to the attorney. The court then found that there was substantial evidence in support of the trial court's finding that all of the facts were not disclosed. The evidence revealed that defendant had distorted the facts as to plaintiff's indebtedness and misrepresented facts about the extent of plaintiff's liabilities (*185 Cal. App. 2d 372, 386-387)* .

[c] Lack of Good Faith

The facts of ***Bertero v. National Gen. Corp.*** *(1974) 13 Cal. 3d 43, 118 Cal. Rptr. 184, 529 P.2d 608* , is discussed in *§ 147.41[3][a]*. After finding that it is proper to base an action for malicious prosecution on a cross complaint (*13 Cal. 3d 43, 50-53)* , the Court considered the defense of reliance on the advice of counsel and held that it depends on full disclosure of all the facts and good faith. It then found that there was substantial evidence of bad faith on the part of defendants. One of the individual defendants had stated that he was going "all the way" to get plaintiff, and the actions terminating the employment agreement and stock options were taken without any substantial legal basis. Also, one of the attorneys for defendants had written a letter in which he stated that he had argued a weak point on an earlier appeal in the case not because he thought he could win but because he wanted to show "what a bastard" plaintiff was (*13 Cal.*

3d 43, 53-54) . Finally, the Court considered damages and upheld the award with one small reduction (*13 Cal. 3d 43, 59-67)* .

In ***Klotz v. Alexander*** *(1962) 203 Cal. App. 2d 238, 21 Cal. Rptr. 305* , as a joke and for an alleged wager, plaintiff performed certain "lewd acts" in the back of a store in which he was employed. Plaintiff later left his employment voluntarily but filed claims for wages due him and for unemployment insurance. Thereafter, the defendant employer had plaintiff charged with indecent exposure. After two days of trial to a jury, the court dismissed the complaint. The malicious prosecution action followed and plaintiff received a judgment for $10,000. Defendant appealed and the court of appeal affirmed the judgment. The court concluded that there was evidence that defendant did not act in good faith in making the criminal complaint. The court held that where the de fense of advice of counsel is raised, defendant must establish that he or she consulted the attorney in good faith (*203 Cal. App. 2d 238, 243)* . The court then found that all of the facts had not been given to the district attorney although they might have been given to the police. Thus, the court concluded that there was sufficient evidence to support the jury's implied finding that defendant did not provide full and fair disclosure and that the attorney's advice was not sought in good faith (*203 Cal. App. 2d 238, 245)* .

[d] No Belief in Guilt

In ***Weber v. Leuschner*** *(1966) 240 Cal. App. 2d 829, 50 Cal. Rptr. 86* , plaintiff stored some peaches in defendant's warehouse. After a dispute over the condition of the fruit, plaintiff stopped payment on a check he had given to defendant. Defendant then caused a criminal complaint to be issued charging plaintiff with uttering a check without sufficient funds. The complaint was later dismissed for lack of evidence and plaintiff brought an action for malicious prosecution. After a jury verdict for plaintiff, defendant appealed. The court of appeal first found that there was ample evidence to support all the required elements of malicious prosecution (*240 Cal. App. 2d 829, 836-837)* . It then discussed the defense of advice of counsel and found that there was ample evidence that not all the facts had been given to the attorney. It also held that the jury might also have found that defendant did not believe that plaintiff was guilty when he made the criminal complaint and that such a finding would be fatal to the defense of advice of counsel (*240 Cal. App. 2d 829, 838)* .

[4] Additional Authorities

[a] Failure to Make Fair Disclosure of All Facts

MacDonald v. Joslyn (1969) 275 Cal. App. 2d 282, 79 Cal. Rptr. 707 , is discussed in *§ 147.40[3][e]*. The court of appeal held that defendant could not rely on advice of counsel because the record did not show that any of defendant's three attorneys advised him to bring the will contest. The court also held that the defense of advice of counsel requires full disclosure of all the facts to the attorney and that there was no evidence of such full disclosure (*275 Cal. App. 2d 282, 292)* .

Jackson v. Beckham (1963) 217 Cal. App. 2d 264, 31 Cal. Rptr. 739 , is discussed in *§ 147.40[4][c]*. The court held that reliance on advice of counsel was a complete defense but that to rely on the defense, defendant has to establish full disclosure of all the facts to the attorney. The court held that such full disclosure was a jury issue and upheld the jury finding for plaintiff (*217 Cal. App. 2d 264, 271-272)* .

The facts and holding of *Kennedy v. Byrum (1962) 201 Cal. App. 2d 474, 20 Cal. Rptr. 98* , are discussed in *§ 147.40[3][e]*. The court of appeal found that the trial court had discovered that defendant had known that the contract he claimed was altered was actually the one he had signed. Therefore, he could not rely on advice of counsel because he obviously had not told his attorney that he had no actual basis for the action against plaintiff (*201 Cal. App. 2d 474, 481-482)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewTortsIntentional TortsMalicious ProsecutionGeneral OverviewTortsIntentional TortsMalicious ProsecutionDefensesTortsIntentional TortsMalicious ProsecutionElementsGeneral Overview

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14-147 California Points & Authorities § 147.47

§ 147.47 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Malicious Prosecution Action--Judicial Arbitration Award as Sufficient Basis for Action If Award Indicates Absence of Misconduct and Lack of Merit

[1] FORM

[*Caption. See § 147.46*].

THE MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE A FINAL ARBITRATION AWARD FOR PLAINTIFF IS A SUFFICIENT BASIS FOR A MALICIOUS PROSECUTION ACTION IF THE AWARD INDICATES THAT PLAINTIFF WAS NOT GUILTY OF MISCONDUCT AND THAT THE PRIOR ACTION HAD NO MERIT.

A. Rules Governing Summary Judgment Procedure. [*See § 147.46, Paragraph A*].

B. Judicial Arbitration Award as Sufficient Basis for Action. A malicious prosecution action can be based on a civil action that was resolved through judicial arbitration (*Stanley v. Superior Court (1982) 130 Cal. App. 3d 460, 468, 181 Cal. Rptr. 878*).

C. Final Decision by Arbitrator as Favorable Termination. An arbitrator's award denying defendant's claim in the action on which the malicious prosecution complaint is based, which became final after defendant failed to exercise his or her right to reject the award and request a trial de novo, is a favorable termination for plaintiff if the award reflects a finding that plaintiff was not guilty of misconduct and if defendant's failure to request trial de novo reflects his or her belief that the action was without merit (*Stanley v. Superior Court (1982) 130 Cal. App. 3d 460, 465-466, 181 Cal. Rptr. 878*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion for summary judgment by defendant in an action for malicious prosecution when defendant asserts either that a malicious prosecution action cannot be based on an action resolved by judicial arbitration or that the arbitration award did not constitute a favorable termination of the prior proceedings. This form may be used when the arbitration award in the prior proceedings was made and became final under circumstances indicating that the proceedings lacked merit.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. When appropriate, such argument should include contentions that the arbitrator's award reflects a finding that plaintiff was not guilty of misconduct or that defendant had no reason for failing to request a trial de novo in the prior action after the award was made, other than that the action was meritless.

[c] Related Uses

With appropriate modifications, these points may be used to oppose a demurrer to a complaint for malicious prosecution asserting that a final judicial arbitration decision is not a sufficient basis for a malicious prosecution action.

[3] Discussion of Authorities

[a] Judicial Arbitration Award as Sufficient Basis for Action

In ***Stanley v. Superior Court*** *(1982) 130 Cal. App. 3d 460, 181 Cal. Rptr. 878* , plaintiff, a corporation, had been sued by a party represented by defendant. The action was submitted to statutory judicial arbitration at the request of defendant and resulted in an arbitrator's award determining that defendant take nothing. Defendant did not exercise his statutory right to reject the arbitration award and reprosecute the action in a trial de novo, and judgment was entered against him. Plaintiff then sued defendant for malicious prosecution. Defendant's motion for summary judgment was denied by the trial court, and defendant petitioned the court of appeal for a writ of mandate directing the trial court to grant the motion.

The court of appeal denied the writ. The court stated that a judicial arbitration is not a qualitatively different proceeding from a normal civil action but is merely a different sort of termination for such an action (*130 Cal. App. 3d 460, 467)* . Since a defendant may sustain the same sorts of damages from having to defend a civil action that terminates in a judicial arbitration as he or she may sustain from having to defend a civil action that terminates in a trial, the court held that there is no policy justification for barring an action for malicious prosecution when the action terminates in arbitration (*130 Cal. App. 3d 460, 468-469)* . The court stated that a judicial arbitration is distinguishable from a small claims court action, which may not be the basis of an action for malicious prosecution (*130 Cal. App. 3d 460, 468)* . The court also stated that barring actions for malicious prosecution based on actions pursued by means of judicial arbitration would create the following anomalies: (1) it would put a plaintiff who had maliciously brought a groundless action in a better position if he or she pursued that action to an unfavorable arbitration award rather than voluntarily dismissing it as soon as it appeared that the action would lose; (2) it would force a defendant who had gotten a favorable arbitration award to reject the award and seek a trial de novo in order to preserve his or her right to bring a malicious prosecution action; and (3) it would create an escape hatch for plaintiffs who filed groundless actions in all cases when the action is subject to mandatory judicial arbitration (*130 Cal. App. 3d 460, 471-472)* .

[b] Final Decision by Arbitrator as Favorable Termination

The case of ***Stanley v. Superior Court*** *(1982) 130 Cal. App. 3d 460, 181 Cal. Rptr. 878* , is discussed in *§ 147.47[3][a]*. In that case, defendant asserted in support of his motion for summary judgment that the arbitrator's award should not be construed as a finding in favor of plaintiff because it merely reflected defendant's inability to prove damages and not a finding that plaintiff was not guilty of misconduct. Defendant further asserted that his failure to request a trial de novo should not be construed as a belief that prior action lacked merit, since defendant had discovered that plaintiff was a shell corporation without assets and had therefore determined that further prosecution was not worthwhile. In upholding the order denying summary judgment, the court of appeal held that these assertions merely raised a factual dispute regarding the reasons for the termination of the action (*130 Cal. App. 3d 460, 466)* . The court stated that the arbitration award may or may not be a favorable termination depending on the result of the factual dispute at trial (*130 Cal. App. 3d 460, 465)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewTortsIntentional TortsMalicious ProsecutionGeneral OverviewTortsIntentional TortsMalicious ProsecutionDefensesTortsIntentional TortsMalicious ProsecutionElementsGeneral Overview

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14-147 California Points & Authorities § 147.48

§ 147.48 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Malicious Prosecution Action--Underlying Judgment Reached Through Application of Parol Evidence Rule May Constitute Favorable Termination for Purposes of Bringing Malicious Prosecution Action

[1] FORM

[*Caption. See § 147.46*].

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE A MALICIOUS PROSECUTION ACTION MAY BE BASED ON AN UNDERLYING JUDGMENT THAT WAS REACHED AFTER APPLICATION OF THE PAROL EVIDENCE RULE.

Judgment Reached After Application of Parol Evidence Rule May Support Malicious Prosecution Action. Application of the parol evidence rule to exclude evidence of terms that vary, alter, or add to an integrated written agreement, leading to a judgment in favor of the party asserting the integrated written agreement, constitutes a favorable termination for purposes of a subsequent malicious prosecution action (*Casa Herrera, Inc. v. Beydoun (2004) 32 Cal. 4th 336, 343-345, 9 Cal. Rptr. 3d 97, 83 P.3d 497*).

[2] Comments

[a] Use of Form

This memorandum may be submitted by a plaintiff in opposition to a defendant's motion for summary judgment in a malicious prosecution action. The basis for the opposition is that an underlying action that is resolved favorably for the malicious prosecution plaintiff can constitute a favorable termination even though the parol evidence rule was used in the underlying action to prevent the malicious prosecution defendant from introducing evidence to dispute the terms of an integrated written agreement.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

With appropriate modifications, these points may be used in another procedural context--for example, to oppose a demurrer to the complaint or a motion for judgment on the pleadings.

[3] Discussion of Authorities

[a] Judgment Reached After Application of Parol Evidence Rule May Support Malicious Prosecution Action

In ***Casa Herrera, Inc. v. Beydoun*** *(2004) 32 Cal. 4th 336, 9 Cal. Rptr. 3d 97, 83 P.3d 497* , the plaintiff was a manufacturer of tortilla production equipment that brought a malicious prosecution action against a tortilla baking company and against the banks and a banker that had enforced a security interest in equipment sold by the plaintiff to the tortilla baking company. The malicious prosecution action was based on an underlying action brought against the equipment manufacturer by the baking company in which the baking company alleged that the manufacturer promised orally that the purchased equipment would produce 1,500 dozen 16-ounce tortillas per hour even though the manufacturer knew that the equipment would not produce at that rate. However, the parties had signed a written sales agreement in which the manufacturer promised that the equipment would produce 1,500 10-ounce tortillas per hour. The court of appeal in the underlying action affirmed a directed verdict for the equipment manufacturer, concluding that in light of the integrated written sales contract, the parol evidence rule precluded the baking company from attempting to show that the manufacturer promised that the equipment would produce 1,500 dozen 16-ounce tortillas per hour. The plaintiff then filed an action against the defendants that included causes of action for malicious prosecution. The trial court granted judgment on the pleadings in the malicious prosecution actions, holding that under *Hall v. Harker (1999) 69 Cal. App. 4th 836, 82 Cal. Rptr. 2d 44* , a judgment based on the parol evidence rule does not constitute a favorable termination for purposes of a subsequent malicious prosecution action. The court of appeal reversed, rejecting the conclusion of the court of appeal in *Hall*.

The California Supreme Court affirmed the judgment of the court of appeal, concluding that termination of a breach of contract and fraud action based on application of the parol evidence rule satisfies the favorable termination requirement for purposes of a malicious prosecution action. The Court noted that under the parol evidence rule, no oral or written extrinsic evidence may be introduced to vary, alter, or add to the terms of an integrated written instrument. However, the Court also noted that the parol evidence rule is a rule of substantive law, even though it results in the exclusion of evidence. Under the rule, the act of embodying the complete terms of an agreement in an integrated writing has the effect of establishing the writing as the contract of the parties as a matter of substantive law. Therefore, in applying the parol evidence rule, the court of appeal in the underlying action held that the written instrument was the contract of the parties and refused to consider evidence to the contrary because that evidence was irrelevant as a matter of law (*32 Cal. 4th 336, 343-344)* . The court in the underlying action then concluded that under the written agreement, the manufacturer did not breach the contract or commit fraud. As such, according to the Supreme Court, the underlying court of appeal necessarily resolved the underlying action on its merits. Therefore, the underlying judgment constituted a favorable termination for the manufacturer sufficient to support a malicious prosecution action (*32 Cal. 4th 336, 344-345)* . The Supreme Court rejected the holding in *Hall v. Harker* to the extent it was inconsistent with its decision (*32 Cal. 4th 336, 349)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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14-147 California Points & Authorities § 147.49

§ 147.49 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Malicious Prosecution Action--Denial of Motions for Nonsuit and Summary Judgment or Motion to Strike Does Not Establish Existence of Probable Cause

[1] FORM

[*Caption. See § 147.46*].

THE MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE DENIAL OF _____ [MOTIONS FOR NONSUIT OR SUMMARY JUDGMENT *or* A MOTION TO STRIKE UNDER CODE OF CIVIL PROCEDURE SECTION 425.16] MADE BY THE PRESENT PLAINTIFF AS DEFENDANT IN THE PRIOR ACTION _____ [ARE *or* IS] NOT SUFFICIENT TO ESTABLISH AS A MATTER OF LAW THAT THE PRESENT DEFENDANTS HAD PROBABLE CAUSE TO BRING THE PRIOR ACTION.

A. Rules Governing Summary Judgment Procedure. [*See § 147.46, Paragraph A*].

B. Denial of Nonsuit and Summary Judgment Motions Do Not Show Probable Cause. The fact that motions for summary judgment and nonsuit made by the malicious prosecution plaintiff in defending the prior underlying action had been denied in the prior action is not sufficient to show as a matter of law that the present defendants had probable cause to bring the prior action (*Slaney v. Ranger Ins. Co. (2004) 115 Cal. App. 4th 306, 319-321, 8 Cal. Rptr. 3d 915* ; *Lucchesi v. Giannini & Uniack (1984) 158 Cal. App. 3d 777, 785, 205 Cal. Rptr. 62*).

[*Optional*] C. **Denial of Anti-SLAPP Motion Does Not Show Probable Cause.** Denial of a motion to strike brought under *Code Civ. Proc. § 425.16* cannot be used to support a finding that the underlying action was brought with probable cause (*Hutton v. Hafif (2007) 150 Cal. App. 4th 527, 548-550, 59 Cal. Rptr. 3d 109* ; *see Code Civ. Proc. § 425.16(b)(3)*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion for summary judgment by defendant in an action for malicious prosecution when defendant asserts that probable cause for bringing the prior action is established by the fact that motions for nonsuit and summary judgment, or a motion to strike under *Code Civ. Proc. § 425.16*, made by the present plaintiff in defending the prior action, were denied by the trial court in the prior action.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Denial of Nonsuit and Summary Judgment Motions Do Not Show Probable Cause

In ***Slaney v. Ranger Ins. Co.*** *(2004) 115 Cal. App. 4th 306, 8 Cal. Rptr. 3d 915* , the plaintiff was the former owner of an aircraft that sustained extensive damage on landing. The current owners asked the plaintiff for a repair estimate, because the plaintiff still possessed the design drawings and jigs for the aircraft. The insurer company providing coverage for the current owners thought that the plaintiff's repair estimate was too high, and that the plaintiff and the current owners were fraudulently trying to force a higher payout by the insurer. The insurer denied the current owners' claim, and the current owners filed a suit for bad faith against the insurer. The insurer cross-complained against the plaintiff for conspiracy to defraud. The plaintiff filed a motion for summary judgment on the conspiracy claim, which was denied. After further discovery, the plaintiff again filed for summary judgment on the grounds of lack of evidence to support a conspiracy claim, and the motion was granted, albeit by a different judge. The action for bad faith then went to trial, and the current owners were awarded compensatory and punitive damages. In the judgment, the trial court also dismissed causes of action in the cross-complaint, specifically finding that the conspiracy action was without any basis in law or fact. The plaintiff then brought an action for malicious prosecution against the insurer and its attorneys. The defendants filed a motion to strike the complaint under the anti-SLAPP statute, *Code Civ. Proc. § 425.16*, but the motion was denied on the grounds that the plaintiff had established a probability of success on the malicious prosecution cause of action.

The court of appeal affirmed the denial of the motion to strike. The court rejected the defendants' argument that the initial denial of the plaintiff's summary judgment motion in the underlying cross-action established probable cause to bring that action as a matter of law. The court noted that the only argument made by the defendants supporting probable cause for the cross-complaint was the initial denial of summary judgment. The court found that the subsequent granting of summary judgment, combined with findings made at the trial of the bad faith claim against the insurer, were sufficient to support a finding that the insurer lacked probable cause to file the conspiracy cross-complaint. The insurer had denied the underlying insurance claim on the grounds of an alleged conspiracy to defraud, but the jury in that trial had found that the insurer had denied the claim in bad faith and with malice, implicitly determining that the conspiracy to defraud theory had itself been fraudulently made and prosecuted in bad faith. The court of appeal concluded that under those circumstances, the initial denial of the plaintiff's summary judgment motion, made when the factual evidence had not yet been developed, did not establish probable cause to file the cross-complaint, and the court affirmed the denial of the motion to strike the malicious prosecution claim (*115 Cal. App. 4th 306, 319-321)* .

Lucchesi v. Giannini & Uniack *(1984) 158 Cal. App. 3d 777, 205 Cal. Rptr. 62* , was an action for malicious

prosecution based on a prior unsuccessful action for fraud and undue influence. Although present plaintiff had prevailed in the prior action, the trial court in the prior action had denied a motion for nonsuit and a motion for summary judgment made by present plaintiff in defending the prior action. The trial court in the present action for malicious prosecution granted defendants' motion for summary judgment on the ground, among others, that denial of the motions for nonsuit and summary judgment in the prior action established as a matter of law that present defendants had probable cause for bringing the prior action.

The court of appeal reversed the trial court's order granting summary judgment. The court noted that a summary judgment proceeding falls short of being a determination on the merits and that even a minimal showing that there is any substantial evidence tending to prove all the controverted facts necessary to establish the plaintiff's case is sufficient to defeat a motion for nonsuit (*158 Cal. App. 3d 777, 787)* . The court held that since neither the denial of the motion for summary judgment nor the denial of the motion for nonsuit were a determination on the merits against the defendant in the prior proceedings (and plaintiff in the present proceedings), those rulings did not establish as a matter of law that probable cause existed for the prior lawsuit (*158 Cal. App. 3d 777, 788)* . The court distinguished cases holding that reasonable cause for bringing the prior action was established when plaintiffs in the prior action had secured a favorable verdict which was subsequently overturned [*see Cowles v. Carter (1981) 115 Cal. App. 3d 350, 171 Cal. Rptr. 269* ; *Gause v. McClelland (1951) 102 Cal. App. 2d 762, 764-765, 228 P.2d 91]* . The court stated that a verdict after a full adversary hearing is a determination on the merits, while proceedings on motion for summary judgment or nonsuit are not (*158 Cal. App. 3d 777, 786)* .

NOTE:

In a subsequent case [*Roberts v. Sentry Life Ins. (1999) 76 Cal. App. 4th 375, 384, 90 Cal. Rptr. 2d 408* ; *see § 147.34* [3][i], the court of appeal held that denial of a defendant's motion for summary judgment in the underlying civil action will normally be sufficient to establish probable cause for bringing the underlying action. Although stopping short of holding that the denial of a defendant's motion for summary judgment in the underlying action conclusively establishes probable cause, the court of appeal questioned the continued viability of that part of the holding in *Lucchesi v. Giannini & Uniack*, which was decided when probable cause included an element of subjective good faith, an element later eliminated by the California Supreme Court. As noted in *Roberts*, denial of summary judgment may show objective legal tenability, but does not address the plaintiff's subjective good faith. However, the subsequent court of appeal opinion in *Slaney v. Ranger Ins. Co.*, seems to confirm the continued viability of the general principle that denial of a defendant's motion for summary judgment does not necessarily conclusively establish probable cause as a matter of law, at least if later-discovered evidence suggests that the plaintiff may have been acting maliciously or in bad faith in bringing or prosecuting the action.

[b] Denial of Anti-SLAPP Motion Does Not Show Probable Cause

In *Hutton v. Hafif (2007) 150 Cal. App. 4th 527, 59 Cal. Rptr. 3d 109* , plaintiff brought a malicious prosecution action against an attorney based on the attorney's prior action brought against plaintiff and others for malicious prosecution, defamation, and interference. After a motion for summary judgment was denied by one judge, the underlying action was ultimately struck under *Code Civ. Proc. § 425.16*, the anti-SLAPP statute, by a different judge. Plaintiff's subsequent malicious prosecution action was also struck under *Code Civ. Proc. § 425.16*, and defendant attorney was awarded costs and attorney's fees. Plaintiff appealed the dismissal and fee award, based in part on the enactment in 2005 of *Code Civ. Proc. § 425.18*, the so-called SLAPPback statute.

The court of appeal reversed the award of attorney's fees, but otherwise affirmed. The court held that the plaintiff's malicious prosecution action was a SLAPPback suit under the definition provided in *Code Civ. Proc. § 425.18*, and the only attorney's fees allowed under that statute are provided to a prevailing plaintiff when the motion to strike is frivolous or intended to cause delay. Unlike under *Code Civ. Proc. § 425.16*, under *Code Civ. Proc. § 425.18(c)* and *(f)*, attorney's fees are not recoverable by a defendant who prevails on the motion to strike. Thus, the trial court erred in

awarding attorney's fees to the defendant (*150 Cal. App. 4th 527, 539-540)* . Contending that the trial court also erred in granting the motion to strike, plaintiff argued that the 2005 amendment to *Code Civ. Proc. § 425.16(b)(3)* overruled the holding in *Wilson v. Parker, Covert & Chidester (2002) 28 Cal. 4th 811* , under which denial of a motion for summary judgment or denial of a special motion to strike could be used to support a finding that probable cause existed for bringing the underlying action. After reviewing the legislative history of the 2005 amendment, the court concluded that the Legislature only overruled that portion of the *Wilson* decision that would allow a showing of probable cause based on denial of a special motion to strike. The rule that probable cause can be established by the denial of a motion for summary judgment in the underlying action was unaffected. Because a motion for summary judgment was denied in the underlying action, defendant could show probable cause for bringing that action and the trial court did not err in granting the special motion to strike the plaintiff's current malicious prosecution action, as she could not demonstrate a probability of success on the merits (*150 Cal. App. 4th 527, 546-550)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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14-147 California Points & Authorities § 147.50

§ 147.50 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Malicious Prosecution Action--Default Judgment Does Not Establish Probable Cause for Bringing Underlying Action

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE FACT THAT A DEFAULT JUDGMENT WAS INITIALLY GRANTED TO THE PRESENT DEFENDANT IN THE UNDERLYING ACTION DOES NOT ESTABLISH THAT THE PRESENT DEFENDANT HAD PROBABLE CAUSE TO BRING THAT UNDERLYING ACTION.

Default Judgment Does Not Establish Probable Cause. A default judgment in the underlying action does not establish probable cause for bringing that action because the trial court does not have the benefit of the presentation of evidence on the merits by both sides in the lawsuit (*Bergman v. Drum (2005) 129 Cal. App. 4th 11, 22, 28 Cal. Rptr. 3d 112*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a defendant's motion for summary judgment in a malicious prosecution action if the defendant's motion is based on the argument that probable cause for bringing the underlying action was established when the defendant was granted a default judgment in the underlying action.

This form may be combined with points pertaining to the specific procedural context in which these points are raised, such as in a motion for summary judgment. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form showing the relationship between the facts of the case and the point of law

stated. Thus, for example, counsel should include facts showing that a default judgment in the underlying action was entered against the plaintiff in the present malicious prosecution action after a default judgment proveup, and that the trial court in that underlying action did not have the benefit of evidence on the merits presented by both sides in the dispute.

[3] Discussion of Authorities

[a] Default Judgment Does Not Establish Probable Cause

In ***Bergman v. Drum*** *(2005) 129 Cal. App. 4th 11, 28 Cal. Rptr. 3d 112* , the plaintiff brought a malicious prosecution action against an attorney who had previously prosecuted an action against the plaintiff on behalf of an insurance company. The underlying action was an insurance subrogation action against the plaintiff and her daughter, stemming from an automobile accident involving a car driven by the daughter and another party who was insured by the insurance company. The attorney named the plaintiff as a defendant in the subrogation action because he suspected that she was the owner of the vehicle at the time of the accident, even though Department of Motor Vehicles (DMV) records indicated that the registered owner prior to the accident was the daughter's ex-husband. Even though the plaintiff had forwarded to the attorney copies of DMV printouts showing that she was not the registered owner of the vehicle at the time of the accident, the attorney continued to prosecute the action and obtained a default judgment against her. The plaintiff subsequently made a successful motion to set aside the default judgment. The attorney appealed this ruling and continued to pursue the action against the plaintiff, until the insurance company who had hired him instructed him to dismiss the plaintiff from the lawsuit with prejudice immediately. The plaintiff subsequently sued the attorney for malicious prosecution. The trial court denied the attorney's motion to strike the complaint under *Code Civ. Proc. § 425.16*, which was affirmed on appeal, but subsequently granted summary judgment for the defendant on the grounds that he had probable cause to sue the plaintiff in the underlying action. The plaintiff appealed.

The court of appeal reversed. The court first held that the trial court erred in granting summary judgment after the motion to strike had been denied, and upheld on appeal, because the two rulings were based on the same evidence, and the standard for denying a motion to strike was effectively the same as the standard for denying summary judgment. The law of the case in litigating the motion to strike had established that the plaintiff's evidence was sufficient to create a prima facie case for malicious prosecution that had a probability of success on the merits, and no new evidence had been presented on the motion for summary judgment to change that determination as a matter of law (*129 Cal. App. 4th 11, 18, 21)* . However, the earlier ruling on appeal did not address the issue of whether the initial default judgment obtained against the plaintiff in the underlying action established conclusively that the defendant had probable cause for prosecuting the action against the plaintiff. The court addressed that issue and held that it did not. The court reasoned that a default judgment does not establish probable cause for bringing that action because, unlike other rulings on the merits such as on a motion for summary judgment or a motion to strike under *Code Civ. Proc. § 425.16*, the trial court ruling on a motion for default judgment does not have the benefit of the presentation of evidence on the merits by both sides in the lawsuit. Without this adversarial element, a default judgment cannot establish probable cause (*129 Cal. App. 4th 11, 21-22)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewTortsIntentional TortsMalicious ProsecutionGeneral OverviewTortsIntentional TortsMalicious ProsecutionDefensesTortsIntentional TortsMalicious ProsecutionElementsGeneral Overview

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14-147 California Points & Authorities § 147.51

§ 147.51 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Malicious Prosecution Action--Attorney Had No Probable Cause to Institute Action

[1] FORM

[*Caption. See § 147.46*].

THE MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE A REASONABLE ATTORNEY WOULD NOT HAVE CONSIDERED THE MALICIOUS ACTION THAT WAS BROUGHT AS BEING TENABLE ON THE THEORY ADVANCED, AND DEFENDANT ATTORNEY THEREFORE HAD NO PROBABLE CAUSE TO INITIATE THE MALICIOUS ACTION AGAINST PLAINTIFF.

A. Attorney's Probable Cause. [*See § 147.34, Paragraph G*].

[*Optional*] **B. Probable-Cause Test Focuses Only on Theory Advanced in Action.** Probable cause to bring a civil action, or the lack thereof, must be determined with regard to the theory on which the allegedly malicious civil action was actually based. The test for malicious prosecution is not whether the defendant had reasonable grounds to seek some kind of relief in the original action, but whether he or she had reasonable grounds for asserting the theory for relief contained in the complaint and tried to the factfinder. Thus, even if the defendant had grounds for a suit against the plaintiff but failed to prosecute the suit on those grounds and instead prosecuted the suit on untenable grounds, that defendant may be found liable of malicious prosecution (*Williams v. Coombs (1986) 179 Cal. App. 3d 626, 644, 224 Cal. Rptr. 865*).

[*Optional*] **C. Legal Complexity Does Not Establish Probable Cause.** A lawyer is not immune from liability for malicious prosecution simply because the area of law involved in the underlying case was complex and no case law with similar facts established that the claim was untenable (*Franklin Mint Co. v. Manatt, Phelps & Phillips, LLP (2010) 184 Cal. App. 4th 313, 346, 109 Cal. Rptr. 3d 143*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion for summary judgment made by a defendant attorney who had instituted the malicious action against plaintiff, when a reasonable attorney would not have considered the action to be tenable on the theory advanced.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach declarations that set forth the relevant facts that oppose the granting of the motion, together with a separate statement that responds to each of the material facts contended by the moving party to be undisputed [*see Code Civ. Proc. § 437c(b)*].

[b] Related Memoranda

In an appropriate case, these points may be submitted in opposition to the points in *§ 147.34*.

[3] Discussion of Authorities

[a] Probable-Cause Test Focuses Only on Theory Advanced in Action

In ***Williams v. Coombs*** *(1986) 179 Cal. App. 3d 626, 224 Cal. Rptr. 865* , defendant attorney had brought a wrongful death action on behalf of a client against plaintiff. The wrongful death action was based on a fatal incident in which the decedent was brought to a hospital, where she made suicidal gestures with a revolver. Plaintiff, her personal physician, arranged for the decedent to be placed in a private room rather than a locked ward. That evening, decedent hanged herself. Decedent's family sought the advice of defendant attorney, who instituted the wrongful death action against plaintiff. The jury found for plaintiff, who then commenced a malicious prosecution action against defendant. Defendant moved for summary judgment, which was granted on the grounds that as a matter of law, defendant had acted with probable cause in instituting and prosecuting the wrongful death action. The court also granted summary judgment on a cause of action for intentional infliction of emotional distress. Plaintiff appealed.

The court of appeal reversed the judgment on the malicious prosecution cause of action and affirmed the judgment on the emotional distress cause of action. The court noted that defendant might have had a viable claim that plaintiff had committed malpractice on a negligence theory for advising that a suicidal patient be placed in an unattended room. However, that theory was not advanced in the complaint that was filed; rather, defendant claimed only that plaintiff had been statutorily negligent by violating some inapplicable section of the administrative code. The court held that the existence of some viable but unasserted claim was irrelevant to the question of probable cause to initiate and prosecute the action. Instead, probable cause to bring a civil action must be determined with regard to the theory on which the action was actually based. The test for malicious prosecution is not whether the defendant had reasonable grounds to seek some kind of relief in the original action, but whether he or she had reasonable grounds for asserting the theory for relief contained in the complaint and tried to the factfinder (*179 Cal. App. 3d 626, 644)* .

[b] Legal Complexity Does Not Establish Probable Cause

In ***Franklin Mint Co. v. Manatt, Phelps & Phillips, LLP*** *(2010) 184 Cal. App. 4th 313, 109 Cal. Rptr. 3d 143* , plaintiff company brought a malicious prosecution action against the attorneys who had earlier prosecuted trademark

dilution and false advertising claims against it after plaintiff had advertised and sold commemorative items and memorabilia following the death of Great Britain's Princess Diana. The attorneys in that underlying suit alleged on behalf of Princess Diana's Estate and the Diana, Princess of Wales Memorial Fund, a charitable fund established on her behalf, that plaintiff's use of Princess Diana's name and likeness on their products and advertising without authorization diluted the value of the Fund's own "mark" under federal trademark law. The attorneys also alleged under federal law that plaintiffs had carried out a large-scale program of deceptive advertising when it represented that the proceeds from the sale of certain items would be donated to "Diana, Princess of Wales' Charities," although no money from these sales had ever gone to the Memorial Fund. However, summary judgment was granted to the memorabilia company in the underlying action. On the trademark dilution claim, the district court concluded that the Fund was required to demonstrate that Diana, Princess of Wales had acquired secondary meaning as to charitable and humanitarian services, rather than primarily identifying the person, but the Fund could not make such a demonstration. As to the false advertising claim, the district court concluded that no false advertising had occurred, because evidence demonstrated that the amount collected from sales of the relevant memorabilia had in fact been given to charities supported by Princess Diana, albeit not to the Memorial Fund. Plaintiff thereafter filed its malicious prosecution action against the attorneys who brought those underlying claims. The trial court held that defendants had probable cause to bring the underlying causes of action and granted judgment for defendants. Plaintiff appealed.

The court of appeals reversed the judgment. After reviewing federal law governing trademark dilution, the court of appeals concluded that no reasonable attorney would argue that either "Diana, Princess of Wales" or Princess Diana's likeness had acquired a secondary meaning as an indicator of goods and services, in this case, the promotion of certain charities, that subordinated the primary identification of her as an individual (*184 Cal. App. 4th 313, 334-338)* . The court also rejected defendants' argument that the underlying claim was brought with probable cause because of the complexity of the issues and the lack of directly controlling authority. The court noted that a lawyer is not immune from liability for malicious prosecution simply because the area of law involved in the underlying case is complex and no case law with similar facts establishes that the claim is untenable. Rather, lawyers are charged with responsibility for acquiring a reasonable understanding of the law governing the claim to be alleged, even if achieving that understanding is more difficult in a complex area of law. The court also recognized that an attorney arguing for an extension, modification, or reversal of existing law cannot simply ignore fundamental legal principles on which that law is based and argue that the underlying claim was nonetheless objectively tenable. In the case before it, the court held that the attorneys' underlying trademark dilution claim lacked probable cause because they could never have met a clear and fundamental principle of trademark law, that is, the requirement of a showing that a descriptive mark must have acquired a secondary meaning that predominates over its descriptive meaning in the eyes of the public (*184 Cal. App. 4th 313, 346)* . The court also concluded that the underlying false advertising claim lacked probable cause because the facts did not support the allegations made by the attorneys in that claim (*184 Cal. App. 4th 313, 349-352)* .

[4] Additional Authorities

[a] Probable-Cause Test Focuses Only on Theory Advanced in Action

In *Kreeger v. Wanland (2006) 141 Cal. App. 4th 826, 46 Cal. Rptr. 3d 790* , an automobile accident resulted in a civil suit for negligence brought against one of the participants in the accident. In the complaint, plaintiff made multiple allegations that could have been the basis for liability, but the only claim pursued was a claim that one particular defendant was negligent in causing the accident. This suit ended in favor of the defendants. Defendants then filed a suit for malicious prosecution against the plaintiffs in the first suit, alleging a lack of probable cause for claiming that the particular defendant was negligent in causing the accident. The defendants in the malicious prosecution action filed a successful motion to strike the complaint under the anti-SLAPP statute, *Code Civ. Proc. § 425.16*. These defendants then retaliated with a malicious prosecution action of their own, claiming that there was no probable cause for the first malicious prosecution action. Defendants in this action filed a motion to strike this complaint under *Code Civ. Proc. § 425.16*, but the trial court denied the motion on the grounds that plaintiffs had demonstrated a probability of success on the merits. On appeal, defendants argued that they had probable cause for bringing their underlying malicious

prosecution action because plaintiffs in the original auto accident lawsuit lacked probable cause to support some of the allegations in the original complaint for that lawsuit. However, because they did not base their malicious prosecution action on the lack of probable cause to support those particular allegations, the court of appeal rejected that as probable cause for the first malicious prosecution action. Because probable cause existed for the claim upon which the original lawsuit was tried, and the plaintiffs in the first malicious prosecution action lacked probable cause to challenge that fact, the plaintiffs in the second malicious prosecution action had established a probability of prevailing on their cause of action (*141 Cal. App. 4th 826, 835-836)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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14-147 California Points & Authorities § 147.52

§ 147.52 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Malicious Prosecution Action--No Probable Cause to Institute Underlying Civil Action--Defendant Was on Notice of Lack of Factual Support for Fundamental Element of Claim

[1] FORM

[*Caption. See § 147.46.*]

THE MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE THE DEFENDANT WAS PUT ON NOTICE THAT A FUNDAMENTAL FACTUAL ELEMENT OF ITS UNDERLYING CASE WAS DISPUTED AND BECAUSE THE DEFENDANT DID NOT POSSESS EITHER EVIDENCE SUFFICIENT TO SUPPORT A FAVORABLE JUDGMENT ON THAT ELEMENT OR INFORMATION SUFFICIENT TO SUPPORT AN INFERENCE THAT SUCH EVIDENCE COULD BE OBTAINED.

Defendant Lacked Factual Support to Prosecute Underlying Action. If the defendant (the plaintiff in the underlying action) is put on notice that a fundamental factual element of its case is disputed, probable cause to prosecute the action is lacking if the defendant did not possess either evidence sufficient to support a favorable judgment on that element or information sufficient to support an inference that such evidence could be obtained (*Arcaro v. Silva & Silva Enters. Corp. (1999) 77 Cal. App. 4th 152, 158-159, 91 Cal. Rptr. 2d 433*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion for summary judgment by the defendant in a malicious prosecution action if the grounds for the opposition are that the defendant lacked probable cause to bring the underlying civil action because the defendant was on notice that a fundamental factual element of its case was disputed, but the defendant nevertheless prosecuted the case even without evidence sufficient to support a favorable judgment on that element or information sufficient to support an inference that such evidence could be obtained.

This form can be modified for use in another procedural context, such as for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law stated. Thus, counsel should describe those facts that demonstrate that the defendant knew that a fundamental factual element of its underlying claim had been disputed by the plaintiff and that defendant lacked evidence to support that element of its underlying claim and lacked information to support an inference that any such evidence could be obtained.

[3] Discussion of Authorities

[a] Defendant Lacked Factual Support to Prosecute Underlying Action

In ***Arcaro v. Silva & Silva Enters. Corp.*** *(1999) 77 Cal. App. 4th 152, 91 Cal. Rptr. 2d 433* , the plaintiff brought a malicious prosecution action against a debt collection agency for prosecuting an underlying debt collection action against the plaintiff. Before the defendant debt collection agency initiated its underlying action for debt collection, the plaintiff had informed one of its representatives that the signature on the relevant credit application and guarantee was not his, but had been forged. The plaintiff also explained to the original creditor that the credit application had most likely been filled out by another specified party who had at one time shared an office with the plaintiff and therefore would have had access to the information needed to fill out the application. However, other than verifying the plaintiff's social security number, hearing one reference by the alleged forger that the plaintiff was his "partner," and sending a demand letter for payment to the plaintiff that was not returned, the debt collection agency took no other steps to investigate the plaintiff's claim that his signature had been forged. Conversely, the plaintiff had additionally sent to the attorney for the collection agency ten signature samples that allegedly demonstrated that the signature on the credit guarantee was not his. Eventually, the debt collection action was dismissed by the collection agency, and the plaintiff later instituted the malicious prosecution action. That action was tried to the court, which ruled for the plaintiff and found that the signature on the credit application guarantee was a forgery and that the collection action was brought without probable cause. The collection agency appealed the conclusion that the action had been brought without probable cause.

The court of appeal affirmed the judgment. The court first noted that if the plaintiff had not denied the authenticity of his signature, the debt collection agency would have had probable cause to file the underlying collection action. However, the plaintiff had denied its authenticity, and the court concluded that in light of the steps the plaintiff took to disavow liability for the debt, the collection agency was on notice before it filed its collection action that the plaintiff's forgery claim was not a sham. Therefore, the collection agency would have been required to authenticate the plaintiff's signature to prevail at trial, but knew that it did not have the evidence to do so (*77 Cal. App. 4th 152, 157)* . The court held that if the defendant (the plaintiff in the underlying action) is put on notice that a fundamental factual element of its case is disputed, the defendant should not proceed in the absence of evidence sufficient to support a favorable judgment on that element or information sufficient to support an inference that such evidence can be obtained. Because the defendant lacked an objective, reasonable basis for believing that the plaintiff's signature was genuine, and lacked information that could lead to evidence proving that the signature was genuine, the defendant lacked probable cause to prosecute the collection action (*77 Cal. App. 4th 152, 158-159)* .

[4] Additional Authorities

[a] Defendant Lacked Factual Support to Prosecute Underlying Action

In *Citi-Wide Preferred Couriers, Inc. v. Golden Eagle Ins. Corp. (2003) 114 Cal. App. 4th 906, 8 Cal. Rptr. 3d 199* , the plaintiff was an employer that sued its workers' compensation insurance carrier for malicious prosecution, based on an underlying debt collection action in which the carrier sought to recover $7,900 in unpaid premiums that the employer

allegedly owed. During discovery in the underlying action, the carrier admitted that only about $1,900 was owed, but the carrier continued to seek to recover $7,900. When the employer appeared with attorneys ready to go to trial, the carrier admitted that the premiums were paid in full and dismissed the suit. Although the trial court dismissed the malicious prosecution action based on the employer's purported admission in the underlying action that it had owed about $1,500 in premiums, the court of appeal reversed. The court of appeal held that a malicious prosecution action may be prosecuted if the creditor in an underlying debt collection action seeks to recover much more than the creditor had probable cause to seek to recover from the debtor. The court also concluded that it was for the jury to decide what the carrier knew when it sought $7,900 in debt and that the trial court erred in dismissing the action (*114 Cal. App. 4th 906, 913-914)* .

In *Palmer v. Zaklama (2003) 109 Cal. App. 4th 1367, 1 Cal. Rptr. 3d 116* , the plaintiffs brought an action against the former owner of a house that the plaintiffs had purchased at a sheriff's sale. The plaintiffs' complaint, which included an action for malicious prosecution, was based on the defendant's filing several lawsuits against the plaintiffs, as well as recording notices of lis pendens against the purchased property, all of which prevented the plaintiffs from reselling the property when property values were higher. The malicious prosecution cause of action was based solely on an underlying civil rights action in which the defendant alleged that the plaintiffs were "in cahoots" with the property manager, his company, and the sheriff to conceal the fact that the plaintiffs were taking title to the property for the benefit of the property manager and his company. Because the property manager and his company were the judgment creditors to the debt that triggered the foreclosure, such a scheme, according to the defendant, was set up to avoid an exception to the rule of *Code Civ. Proc. § 701.680(a)*, which otherwise finalizes a sale of property to satisfy a judgment. However, the defendant admitted that he had no evidence to support his theory, which was based only on his suspicions. The court of appeal rejected the defendant's argument that he was merely acting on counsel's advice and affirmed a jury finding for the plaintiffs on the malicious prosecution claim. The court concluded that there was sufficient evidence for a jury to find that there was no probable cause to bring the civil rights action against the plaintiffs, in the absence of any evidence to support the claimed conspiracy (*109 Cal. App. 4th 1367, 1383-1384)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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14-147 California Points & Authorities § 147.53

§ 147.53 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Malicious Prosecution Action--Attorney Continued to Prosecute Underlying Action After Discovering Lack of Probable Cause

[1] FORM

[*Caption. See § 147.46.*]

THE MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE ALTHOUGH DEFENDANT MAY HAVE HAD PROBABLE CAUSE FOR INITIATING THE UNDERLYING ACTION AGAINST PLAINTIFF, DEFENDANT CONTINUED TO PROSECUTE THE UNDERLYING ACTION EVEN AFTER DISCOVERING THAT THE ACTION LACKED PROBABLE CAUSE.

A. Defendant Lacked Probable Cause to Continue Prosecuting Underlying Action. An attorney may be liable for malicious prosecution for continuing to prosecute a claim after the attorney discovers that the action in fact lacks probable cause, even if the attorney had probable cause to initiate the action (*Zamos v. Stroud (2004) 32 Cal. 4th 958, 970, 12 Cal. Rptr. 3d 54, 87 P.3d 802*).

[*Optional*] **B. Filing of Appeal is Continuation of Action.** A plaintiff's attorney may be liable for malicious prosecution for filing an appeal in a case after the attorney discovers that the action lacks probable cause (*Soukup v. Law Offices of Herbert Hafif (2006) 39 Cal. 4th 260, 297, 46 Cal. Rptr. 3d 638, 139 P.3d 30*).

[*Optional*] **C. Cocounsel Joining After Suit is Filed May Be Liable for Failing to Take Corrective Steps.** An attorney joining in as cocounsel for a plaintiff in a case that has already been filed may be held liable for malicious prosecution if failing to take corrective steps immediately after associating in as cocounsel to cease prosecution of claims that lack probable cause and have been brought maliciously (*see Sycamore Ridge Apartments LLC v. Naumann (2008) 157 Cal. App. 4th 1385, 1407-1411, 69 Cal. Rptr. 3d 561*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion for summary judgment made by an attorney who is a defendant in a malicious prosecution action, if the defendant continued to prosecute an underlying action against the plaintiff even after discovering that the action lacked probable cause. Support for this proposition was established by the California Supreme Court in *Zamos v. Stroud (2004) 32 Cal. 4th 958, 970, 12 Cal. Rptr. 3d 54, 87 P.3d 802* , which has been applied retroactively [*see Bergman v. Drum (2005) 129 Cal. App. 4th 11, 23-24, 28 Cal. Rptr. 3d 112]* .

This form may be modified for use in another procedural context, such as in opposition to a motion to strike brought under *Code Civ. Proc. § 425.16*.

[b] Argument

Counsel should insert argument in the form showing the relationship between the facts of the case and the point of law raised. Thus, counsel should include facts showing that the defendant, after initiating the underlying action, discovered facts establishing that the action in fact was not supported by probable cause.

[3] Discussion of Authorities

[a] Defendant Lacked Probable Cause to Continue Prosecuting Underlying Action

In ***Zamos v. Stroud*** *(2004) 32 Cal. 4th 958, 12 Cal. Rptr. 3d 54, 87 P.3d 802* , the plaintiffs were two attorneys who had previously represented a homeowner in a foreclosure action. On the advice of the plaintiffs, the homeowner had accepted a settlement against some of the defendants in the foreclosure action, in return for releasing all claims on the house. The terms of the settlement agreement were stated on the record before the court at two separate hearings. Two years later, the homeowner sued the plaintiffs for fraud and other related claims. The homeowner alleged that the plaintiffs had made representations to her to induce her to accept the settlement, including representations that they would have her house returned to her and would continue to represent her in the foreclosure action and another action, but that the plaintiffs never kept those promises. After the fraud action was filed, the plaintiffs sent transcripts of the foreclosure hearings to the homeowner's new attorneys, which showed, contrary to the homeowner's claims, that she was told and agreed on the record that she was releasing all claims to the house and that the plaintiffs would cease to represent her. Despite these transcripts, the homeowner and her attorneys refused to dismiss the fraud action, which went to trial and eventually failed when the trial court granted a motion for nonsuit. The plaintiffs then filed a malicious prosecution action against their former client, her attorneys in the fraud action, and two witnesses in that action. The attorneys and the witnesses filed a motion to strike the complaint against them pursuant to *Code Civ. Proc. § 425.16*, the so-called anti-SLAPP statute. The trial court granted the motion, but the court of appeal reversed as to the former client's attorneys, concluding that the plaintiffs had shown a probability of success on the merits as to those defendants because an attorney may be liable for malicious prosecution if the attorney continues to prosecute an action after discovery of facts showing that the lawsuit has no merit. The former client's attorneys appealed.

The California Supreme Court affirmed the court of appeal. The Court agreed that an attorney may be liable for malicious prosecution for continuing to prosecute a claim after the attorney discovers that the action in fact lacks probable cause, even if the attorney originally had probable cause to initiate the action (*32 Cal. 4th 958, 960)* . The Court noted that Restatement (Second) of Torts agreed with that conclusion, as did every other state that had decided the issue (*32 Cal. 4th 958, 967)* . The Court also noted that the principles underlying the tort of malicious prosecution supported its conclusion, because holding an attorney liable for the damages a party incurs as a result of an attorney prosecuting a civil claim after learning the claim has no merit will encourage the voluntary dismissal of meritless claims at the earliest stage possible. An attorney can avoid liability when learning that a claim lacks probable cause by dismissing the suit at that point, or by withdrawing as attorney in the lawsuit (*32 Cal. 4th 958, 969-970)* . The Court went on to find that the plaintiffs had presented evidence in opposition to the motion to strike that, if believed, was

sufficient to support a judgment on the malicious prosecution claim brought against the former client's attorneys. Therefore, the motion to strike should have been denied as to those defendants (*32 Cal. 4th 958, 973)* .

[b] Filing of Appeal is Continuation of Action

In *Soukup v. Law Offices of Herbert Hafif (2006) 39 Cal. 4th 260, 46 Cal. Rptr. 3d 638, 139 P.3d 30* , an employer and his attorneys filed a lawsuit against multiple former employees for breach of fiduciary duty, defamation, malicious prosecution, and tortious interference with business relationships. One of the defendant employees was successful on a motion to strike all causes of action brought against her under *Code Civ. Proc. § 425.16*, the anti-SLAPP statute. This employee then filed an action for malicious prosecution and abuse of process against her former employer and his attorneys. The employer and his attorneys filed a motion to strike of their own under *Code Civ. Proc. § 425.16*, but the trial court denied the motion. The court of appeal reversed, concluding that the anti-SLAPP statute applied and the plaintiff had failed to demonstrate a probability of success on the merits. Plaintiff appealed.

The California Supreme Court reversed the court of appeal. While the appeal was pending, the Legislature added *Code Civ. Proc. § 425.18* to govern SLAPPback suits, defined as actions for malicious prosecution or abuse of process arising from an underlying action that has been dismissed under the anti-SLAPP statute. Under *Code Civ. Proc. § 425.18(h)*, a SLAPPback suit is not subject to a motion to strike if the filing or maintaining of the underlying action is illegal as a matter of law. The Court held that *Code Civ. Proc. § 425.18* applied to the action, but that the defendant failed to show that the filing or maintaining of the underlying action was illegal as a matter of law (*39 Cal. 4th 260, 280-290)* . Thus, the plaintiff had to demonstrate a probability of success on the merits in order to defeat the motion to strike brought under *Code Civ. Proc. § 425.16*. The court held that plaintiff had met this burden. Among other arguments made, one of the attorney defendants argued that he could not be held liable for malicious prosecution because his role in the underlying action was limited to appellate counsel. The Court rejected this argument, noting that under the rationale of its earlier decision in *Zamos v. Stroud*, described under [a], *above*, the filing of an appeal is the "continuation of an action." Thus, a plaintiff's attorney who maintains an appeal after learning that the underlying action lacks probable cause may be held liable for malicious prosecution. The Court also noted evidence suggesting that the attorney's role was not limited to appellate counsel as he had claimed (*39 Cal. 4th 260, 296-297)* .

[c] Cocounsel Joining After Suit is Filed May Be Liable for Failing to Take Corrective Steps

In *Sycamore Ridge Apartments LLC v. Naumann (2008) 157 Cal. App. 4th 1385, 69 Cal. Rptr. 3d 561* , attorneys filed a suit in representation of multiple tenants and employees of an apartment owner, alleging multiple causes of action based on dismal living conditions at the apartment and resulting physical ailments, as well as employment-related torts such as wrongful termination. Unfortunately, the attorneys listed both tenants and employees as plaintiffs on all causes of action, even though some of the causes of action clearly had no application to all plaintiffs. After the suit had been filed, other attorneys joined as cocounsel for the limited purpose of assisting in prosecution of toxic mold claims. After one of the tenant plaintiffs dismissed herself from the suit, the apartment owner brought a malicious prosecution action against the original attorneys and their cocounsel, arguing that there was no basis for asserting many of the causes of action on behalf of the dismissed plaintiff. Defendant attorneys filed a motion to strike the malicious prosecution action under *Code Civ. Proc. § 425.16*, the anti-SLAPP statute. The trial court denied the motion to strike as to the original attorneys, but granted the motion as to the cocounsel who joined after suit was filed. Both the apartment owners and the attorneys who filed the underlying action appealed.

The court of appeal affirmed the denial of the motion to strike as to the attorneys who filed the underlying action, and reversed the granting of the motion as to their cocounsel. The court held that the apartment owner had demonstrated a sufficient probability of success on the merits to withstand the motion to strike, even as applied to cocounsel, at least for any damage sustained during the time that cocounsel was associated with the suit and failed to take corrective steps. While stopping short of stating that the landowner should win at trial on the merits of the malicious prosecution claims (*157 Cal. App. 4th 1385, 1392 n.1*), the court noted that cocounsel joining after a suit is filed should be familiar with the

client's claims, and whether or not probable cause exists for bringing or sustaining such claims, before agreeing to join. By associating into the case as cocounsel, those attorneys became the proponents of all of the plaintiffs' claims, including those that were obviously untenable. However, there was no evidence that cocounsel took immediate steps to dismiss the meritless claims. The court similarly concluded that malice could be inferred on the part of cocounsel if they knew of the relevant facts and failed to take immediate steps to dismiss this plaintiff, or if they were not aware of the relevant facts but indifferently failed to adequately familiarize themselves with the case before associating in as cocounsel (*157 Cal. App. 4th 1385, 1407-1411)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewTortsIntentional TortsMalicious ProsecutionGeneral OverviewTortsIntentional TortsMalicious ProsecutionDefensesTortsIntentional TortsMalicious ProsecutionElementsGeneral OverviewTortsIntentional TortsMalicious ProsecutionElementsProbable CauseGeneral Overview

California Points & Authorities

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 147 MALICIOUS PROSECUTION AND ABUSE OF PROCESS
PART II. FORMS
A. Malicious Prosecution

14-147 California Points & Authorities §§ 147.54-147.69

[Reserved]

§§ 147.54[Reserved]

California Points & Authorities

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 147 MALICIOUS PROSECUTION AND ABUSE OF PROCESS
PART II. FORMS
B. Abuse Of Process

14-147 California Points & Authorities § 147.70

§ 147.70 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] for Abuse of Process--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--No Improper Use of Process Alleged

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM IN SUPPORT OF DEMURRER
_____ [*name*],	)	TO COMPLAINT
Plaintiff,	)	[*Code Civ. Proc. §§ 430.10(e), 430.30(a)*]
vs.	)	[Limited Civil Case]
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION FOR ABUSE OF PROCESS IN THAT IT FAILS TO INDICATE THAT THE PROCESS WAS USED FOR AN IMPROPER PURPOSE.

A. Objection by Demurrer. [*See § 147.20, Paragraph A*].

B. Improper Use Requirement. One of the required elements of the tort of abuse of process is a use of the process in a wrongful manner, that is in a manner not proper in the regular conduct of the proceedings (*Seidner v. 1551 Greenfield*

Owners Ass'n (1980) 108 Cal. App. 3d 895, 903, 166 Cal. Rptr. 803 ; *Ion Equip. Corp. v. Nelson (1980) 110 Cal. App. 3d 868, 876, 168 Cal. Rptr. 361*).

C. Bad Motive or Malice Insufficient. Unless process is used for something more than a proper use with a bad motive or malice, a cause of action for abuse of process does not lie (*Golden v. Dungan*

(1971) 20 Cal. App. 3d 295, 302, 97 Cal. Rptr. 577 ; *Pimentel v. Houk (1951) 101 Cal. App. 2d 884, 887, 226 P.2d 739*).

[*Optional*] **D. Exercise of Right to Appeal Not Sufficient.** A demurrer to a cause of action for abuse of process is proper when defendant has done nothing more than exercise his or her right to appeal (*Coleman v. Gulf Ins. Group (1985) 41 Cal. 3d 782, 792-793, 226 Cal. Rptr. 90, 718 P.2d 77* ; *Tellefsen v. Key Sys. Transit Lines (1961) 198 Cal. App. 2d 611, 613, 17 Cal. Rptr. 919*).

[*Optional*] **E. Proper Use of Attachment Not Sufficient.** A demurrer to a cause of action for abuse of process is proper when defendant has used a writ of attachment for a proper purpose in the regular conduct of the proceeding (*Coy v. Advance Automatic Sales Co. (1964) 228 Cal. App. 2d 313, 318-320, 39 Cal. Rptr. 476* ; *Pimentel v. Houk (1951) 101 Cal. App. 2d 884, 886, 226 P.2d 739*).

[*Optional*] **F. Proper Examination of Judgment Debtor Not Sufficient.** A demurrer to a cause of action for abuse of process is proper when a judgment creditor's acts in examining a judgment debtor are within the legitimate scope of inquiry during supplementary proceedings brought in aid of execution (*Kyne v. Eustice (1963) 215 Cal. App. 2d 627, 632-634, 30 Cal. Rptr. 391*).

[*Optional*] **G. Mere Filing of _____ [Complaint** *or* **Cross Complaint] Not Sufficient.** A demurrer to a cause of action for abuse of process is proper when defendant has done nothing more than file a _____ [complaint *or* cross complaint] and the process has not been misused (*Seidner v. 1551 Greenfield Owners Ass'n (1980) 108 Cal. App. 3d 895, 903-905, 166 Cal. Rptr. 803* ; *Muller v. Muller (1962) 206 Cal. App. 2d 731, 733, 23 Cal. Rptr. 900*).

[*Optional*] **H. Proper Use of Summons Not Sufficient.** A demurrer to a cause of action for abuse of process is proper when the complaint does not allege that a summons was used for any purpose other than that for which it is intended to be used (*Christensen v. Younger (1975) 47 Cal. App. 3d 613, 617-620, 120 Cal. Rptr. 923*).

[*Optional*] **I. Application for Receiver Not Sufficient.** A demurrer to a cause of action for abuse of process is proper when the complaint only alleges that defendant requested the appointment of a receiver (*Spira v. Superior Court (1974) 41 Cal. App. 3d 536, 539-542, 116 Cal. Rptr. 93*).

[*Optional*] **J. Levy of Writ of Execution Not Sufficient.** The levy of a writ of execution to enforce a judgment is a proper use of process and thus not the basis for an action for abuse of process, even though plaintiff alleges that defendant was aware that the debt underlying the judgment had been settled (*Lacy v. Laurentide Fin. Corp. (1972) 28 Cal. App. 3d 251, 255-256, 104 Cal. Rptr. 547*).

[*Optional*] **K. Continued Pursuit of Meritless Litigation for Improper Collateral Purpose Not Actionable.** Continuing to pursue litigation that has been determined to be meritless, such as through the filing of an amended complaint or a motion for attorney's fees, is not actionable as an abuse of process (*Ramona Unified Sch. Dist. v. Tsiknas (2005) 135 Cal. App. 4th 510, 521, 37 Cal. Rptr. 3d 381*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a general demurrer to a complaint in an action for abuse of process when no improper use of the process has been alleged.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For a form of general demurrer based on the fact that no improper use of process has been alleged, see California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process* (Matthew Bender).

[3] Discussion of Authorities

[a] Improper Use Requirement

In ***Seidner v. 1551 Greenfield Owners Ass'n*** *(1980) 108 Cal. App. 3d 895, 166 Cal. Rptr. 803* , a homeowner's association filed an action against the developer of its condominiums for breach of implied warranty. The developer cross complained for abuse of process. After demurrers were sustained to the cross complaint and it was dismissed, cross complainant appealed. The court of appeal affirmed. It held that the elements of the tort of abuse of process are an ulterior motive in using the process and use of the process in an improper manner (*108 Cal. App. 3d 895, 903)* . It then held that the mere filing of a lawsuit is not sufficient as the basis of an action for abuse of process because there was no authority that held that filing a lawsuit was abuse of process absent some further action of abuse by defendant (*108 Cal. App. 3d 895, 903-904)* .

Ion Equip. Corp. v. Nelson *(1980) 110 Cal. App. 3d 868, 168 Cal. Rptr. 361* , involved a cause of action for abuse of process based on causing service of a writ of execution while enforcement of the judgment was stayed. Defendant's motion for judgment on the pleadings was based on failure to state a cause of action, and plaintiff appealed. The court of appeal affirmed. It held that the essential elements of a cause of action for abuse of process are an ulterior motive and a willful act in the use of the process not proper in the regular conduct of the proceedings (*110 Cal. App. 3d 868, 876)* . The court then held that plaintiff had not adequately pleaded an ulterior motive or wilful misuse of process (*110 Cal. App. 3d 868, 876)* .

[b] Bad Motive or Malice Insufficient

The facts of ***Golden v. Dungan*** *(1971) 20 Cal. App. 3d 295, 97 Cal. Rptr. 577* , are discussed in *§ 147.71[3][a]*. The court of appeal stated that an evil motive in serving process does not make the service of process actionable (*20 Cal. App. 3d 295, 301-302)* .

The facts and procedural background of ***Pimentel v. Houk*** *(1951) 101 Cal. App. 2d 884, 226 P.2d 739* , are discussed in *§ 147.70[3][d]*. The court of appeal stated that if a party uses process for the use for which it was intended, he or she is ordinarily not liable, notwithstanding a vicious or vindictive motive. There is no abuse of process if it is used for its proper purpose even though malice is present (*101 Cal. App. 2d 884, 886)* .

[c] Exercise of Right to Appeal Not Sufficient

In ***Coleman v. Gulf Ins. Group*** *(1985) 41 Cal. 3d 782, 226 Cal. Rptr. 90, 718 P.2d 77* , a plaintiff alleged that an insurer filed a meritless appeal for the dual purpose of delaying the case and coercing the plaintiff to settle. Plaintiff did settle for less than the amount of the judgment while the appeal was pending. Later, the plaintiff brought suit asserting various causes of action including abuse of process. The trial court sustained the insurer's demurrer without leave to amend and dismissed the action. On appeal, the court held that the abuse of process action could not lie because a showing of an improper motive in appealing is not sufficient. Rather, a showing of improper use of process must also be made. The court cited *Tellefsen v. Key Sys. Transit Lines (1961) 198 Cal. App. 2d 611, 613, 17 Cal. Rptr. 919* , stating that that case had correctly held that the taking of a frivolous appeal is not enough to constitute an abuse of process (*41 Cal. 3d 782, 792)* .

In ***Tellefsen v. Key Sys. Transit Lines*** *(1961) 198 Cal. App. 2d 611, 17 Cal. Rptr. 919* , the court of appeal affirmed a judgment for defendant after the trial court sustained a demurrer to a complaint for abuse of process. Plaintiff had alleged that defendant had maliciously and frivolously taken an appeal from a judgment for money damages in a previous action in order to take advantage of plaintiff's need, as well as to set an example for other litigants and thus obtain cheap settlements. The court of appeal stated that even though abuse of process could be applied to the appellate process, the defendant did nothing more than exercise its right to appeal, although with an alleged malicious intent (*198 Cal. App. 2d 611, 613)* . Plaintiff did not allege any other action besides the taking of the appeal, and an improper motive in obtaining the process is not enough to afford ground for an action for abuse of process if the process were regularly issued (*198 Cal. App. 2d 611, 613)* . Moreover, merely taking a frivolous appeal is not enough to constitute an abuse of process since there was no allegation of any act of the defendant in using the appeal for other than its proper purpose (*198 Cal. App. 2d 611, 615)* .

[d] Proper Use of Attachment Not Sufficient

In ***Coy v. Advance Automatic Sales Co.*** *(1964) 228 Cal. App. 2d 313, 39 Cal. Rptr. 476* , the complaint alleged that defendants had brought an action against plaintiff for an amount greatly in excess of the amount in dispute, caused a writ of attachment to issue and be enforced, and tried to steal plaintiff's vending machine business after the machines were attached. After a verdict for plaintiff, the trial court granted a motion for a new trial. Plaintiff appealed and the trial court affirmed. It held that the complaint and the proof at trial did not establish that plaintiff had a cause of action for abuse of process. The attachment was obtained for a proper purpose and defendant's alleged bad motive was not sufficient to constitute abuse of process (*228 Cal. App. 2d 313, 318-319)* . The court held that if plaintiff could establish that defendant actually had sued for more than was in dispute and caused the attachment, plaintiff would have a cause of action for malicious prosecution, but that plaintiff had not alleged the elements necessary for malicious prosecution (*228 Cal. App. 2d 313, 318-319)* .

In ***Pimentel v. Houk*** *(1951) 101 Cal. App. 2d 884, 226 P.2d 739* , plaintiff had sued defendant for the collection of two promissory notes and had levied a writ of attachment against defendant's farming equipment. Defendant cross complained on the theory that the attachment was not issued for the purpose of collecting the alleged debt sued upon but for the purpose of destroying defendant financially. The trial court sustained a demurrer to the cross complaint and entered a judgment dismissing it.

The court of appeal affirmed and stated that plaintiff had used the writ of attachment for a proper purpose in the regular conduct of the proceeding (*101 Cal. App. 2d 884, 886)* . Defendant did not allege that the attachment covered property exempt from execution, that it covered an excessive amount of defendant's property, that the debt alleged to be owed by defendant was otherwise secured, or that defendant requested that the levy be made on other property. Hence, on the face of the record, plaintiff was fully within his rights in causing the writ of attachment to be issued and served; the fact that he may have had an ulterior motive of destroying defendant financially did not render the use of the writ improper in the regular conduct of the proceeding (*101 Cal. App. 2d 884, 886)* . Even if plaintiff had attached the property

without malice, the effect would have been the same (*101 Cal. App. 2d 884, 886)* .

[e] Proper Examination of Judgment Debtor Not Sufficient

In ***Kyne v. Eustice*** *(1963) 215 Cal. App. 2d 627, 30 Cal. Rptr. 391* , the court of appeal affirmed a judgment of dismissal after the trial court had sustained a demurrer to a complaint for abuse of process. Plaintiff alleged that defendant's use of the procedure provided by former Code Civ. Proc. § 714 [*now see Code Civ. Proc. § 708.110*] by which the judgment creditor may require the judgment debtor to appear and answer questions concerning his or her property before a judge or referee was improper. Specifically, plaintiff alleged that she was questioned concerning the names of her customers and told that they would be telephoned. The court of appeal held that the questions were proper and that the customers could be telephoned. Therefore, the complaint did not state a cause of action for abuse of process because the defendant had used the examination procedure properly and had asked proper questions (*215 Cal. App. 2d 627, 632-635)* .

[f] Mere Filing of Complaint or Cross Complaint Not Sufficient

Seidner v. 1551 Greenfield Owners Ass'n *(1980) 108 Cal. App. 3d 895, 166 Cal. Rptr. 803* , is discussed under *§ 147.70[3][a]*.

In ***Muller v. Muller*** *(1962) 206 Cal. App. 2d 731, 23 Cal. Rptr. 900* , plaintiff had brought an action to quiet title to real property. Defendant cross complained for an injunction and for damages for abuse of process, and the trial court sustained a demurrer to the cross complaint and dismissed it. The court of appeal affirmed, stating that defendant's allegations that the quiet title action had been brought for the primary purpose of harassing him and causing him financial loss were not sufficient to state a cause of action since there must be some misuse of the process beyond its proper scope (*206 Cal. App. 2d 731, 733)* .

[g] Proper Use of Summons Not Sufficient

In ***Christensen v. Younger*** *(1975) 47 Cal. App. 3d 613, 120 Cal. Rptr. 923* , plaintiff was an attorney who sued the State Director of Health Care Services and the Attorney General for abuse of process. The defendants had brought suit against the plaintiff and his client for reimbursement of Medi-Cal benefits received by the client as a result of an automobile accident, and the plaintiff alleged that the suit had been maintained to force him to pay over money which was received by him for attorney's fees from the settlement of the client's cause of action. The court of appeal affirmed a judgment dismissing the cause of action. It stated that plaintiff had failed to allege that the summons was used for any purpose other than that for which a summons is intended (*47 Cal. App. 3d 613, 617-620)* .

[h] Application for Receiver Not Sufficient

In ***Spira v. Superior Court*** *(1974) 41 Cal. App. 3d 536, 116 Cal. Rptr. 93* , plaintiffs alleged that they had entered into a written agreement of partnership with defendant, but that three years after the execution of the written agreement, defendant took sole control of the business and sequestered its assets. Plaintiffs sought a declaration of rights and an accounting from defendant, and they also requested the appointment of a receiver. The trial court denied the application for a receiver. The defendant then cross complained for damages for abuse of process based on plaintiffs' application for the appointment of a receiver. Plaintiffs' demurrer to the cross complaint was overruled, but the court of appeal issued a writ of mandate directing the trial court to vacate its order overruling the demurrer and to enter an order sustaining the demurrer. The court stated that the defendant had made no showing that the receivership sought by plaintiffs was not proper in the regular conduct of the proceeding. It did state, however, that after the termination of the action, it might be possible for either plaintiffs or defendant to complain for malicious prosecution if there had been malice and no probable cause in the filing of either the complaint or cross complaint (*41 Cal. App. 3d 536, 540-542)* .

[i] Levy of Writ of Execution Not Sufficient

In ***Lacy v. Laurentide Fin. Corp.*** *(1972) 28 Cal. App. 3d 251, 104 Cal. Rptr. 547* , plaintiff's complaint alleged that defendant had damaged plaintiff by causing a writ of execution to be levied on plaintiff's automobile, even though defendant knew that the debt underlying the judgment had been paid. A summary judgment was entered in favor of defendant and plaintiff appealed. The court of appeal held that a cause of action was not stated for abuse of process because there was no allegation that the writ of execution was used for an improper purpose or for an improper motive (*28 Cal. App. 3d 251, 255)* . The court did hold, however, that plaintiff had stated a cause of action for extrinsic fraud and reversed the judgment (*28 Cal. App. 3d 251, 255-260)* .

[j] Continued Pursuit of Meritless Litigation for Improper Collateral Purpose Not Actionable

In ***Ramona Unified Sch. Dist. v. Tsiknas*** *(2005) 135 Cal. App. 4th 510, 37 Cal. Rptr. 3d 381* , a school district sought to construct a new school and, in the course of approving the project, issued a mitigated negative declaration pursuant to the California Environmental Quality Act (CEQA). The district subsequently proposed an alteration to the project (switching from a septic sewer system to city sewer), but concluded that the change was not significant enough to warrant further environmental impact documentation. A neighborhood group filed a writ petition challenging this decision, followed by a first amended petition, but the court ruled in favor of the district on the grounds that the claims were time-barred and, in any event, the district admitted that it was no longer planning to switch the plans. The group then filed a second amended petition. The district successfully demurred to this petition. Although the petition had been dismissed, the local group sought attorney's fees under the private attorney general doctrine, arguing that their petition had been effective in causing the district to abandon its changes without complying with the CEQA process. The court denied the motion for fees. The district then sued the group and its attorney for abuse of process and barratry, based on its filing of the second amended petition and motion for attorney's fees. The district argued that these actions constituted the continued pursuit of clearly meritless litigation for the improper purpose of trying to get the district abandon the project or change its location. The group filed a successful motion to strike the district's complaint under the anti-SLAPP statute, *Code Civ. Proc. § 425.16*. The district appealed.

The court of appeal affirmed. The court concluded that the initiation of a lawsuit, even if for an improper purpose, does not support a claim for abuse of process, even though it could expose the party to liability for malicious prosecution. As an extension of this principle, the court held that continued pursuit of meritless litigation for an improper collateral purpose is also insufficient to support a cause of action for abuse of process. Noting that earlier case law had established that the filing of a frivolous appeal was insufficient to support an abuse of process claim, the court concluded that the fact that a plaintiff chooses to file an amended complaint, rather than appeal an adverse decision rendered against a prior complaint, does not render the action subject to an abuse of process claim, even if the amended complaint is frivolous (*135 Cal. App. 4th 510, 521*). The court recognized that the gravamen of the district's complaint was really that of a malicious prosecution claim, but that the district was precluded from asserting such a claim because government entities are barred from bringing malicious prosecution claims against former plaintiffs (*135 Cal. App. 4th 510, 522*).

[4] Additional Authorities

[a] Improper Use Requirement

Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc. (1986) 42 Cal. 3d 1157, 232 Cal. Rptr. 567, 728 P.2d 1202 , was an action by a residential developer against an adjoining homeowner and his attorney for abuse of process based on the homeowner's having filed an administrative mandate proceeding under the California Environmental Quality Act [*Pub. Res. Code § 21000 et seq.*], which challenged the sufficiency of the environmental impact report relied on by the city in approving plaintiff's proposed subdivision. Plaintiff alleged that the defendants instituted the environmental proceeding and continued to prosecute it for the purpose of coercing a monetary settlement rather than to further environmental matters and that defendants had offered to dismiss the proceeding in return for plaintiff's payment of money or conveyance to him of a designated lot. In affirming a summary judgment for the

defendants, the Supreme Court said that the two fundamental elements of the tort of abuse of process are (1) an ulterior purpose and (2) a willful act in the use of the process not proper in the regular conduct of the proceeding (*42 Cal. 3d 1157, 1168)* . The Court held that while a defendant's act of improperly instituting or maintaining an action may, in an appropriate case, give rise to a cause of action for malicious prosecution, the mere filing or maintenance of a lawsuit, even for an improper purpose, is not a proper basis for an abuse of process action (*42 Cal. 3d 1157, 1169)* . The Court explained that if the filing of an action for an improper "ulterior" purpose were itself sufficient to give rise to an abuse of process action, the "lack-of-probable cause" element of the malicious prosecution tort would be completely negated and that even if an individual could demonstrate that he or she had reasonable cause to believe that the initial lawsuit had merit when the action was filed, he or she would still face potential liability under an abuse of process theory (*42 Cal. 3d 1157, 1169-1170)* . Because the lack-of-probable-cause requirement in the malicious prosecution tort plays a crucial role in protecting the right to seek judicial relief, this element may not be circumvented through expansion of the abuse of process tort to encompass the alleged improper filing of a lawsuit (*42 Cal. 3d 1157, 1170)* .

In *Susan S. v. Israels (1997) 55 Cal. App. 4th 1290, 67 Cal. Rptr. 2d 42* , a defense attorney represented a client charged with the sexual battery of plaintiff. In the course of that representation the defense attorney served a subpoena duces tecum for the plaintiff's mental health records on a mental health treatment facility. The facility mistakenly sent plaintiff's records directly to the defense attorney instead of the trial court and the attorney, knowing the private and confidential nature of the documents, read them, transmitted them to the defense psychiatrist and used them in cross-examining plaintiff. Plaintiff sued the attorney and his client for among other things, abuse of process. The trial court sustained defendants' demurrer to the complaint with leave to amend. Plaintiff elected not to amend her complaint and her action was dismissed. Plaintiff appealed the judgment of dismissal. The court of appeal affirmed, holding that plaintiff's complaint failed to state a cause of action for abuse of process. Specifically, the court found that plaintiff failed to allege that the defense attorney used the subpoena process in a wrongful manner. It reasoned that there was nothing improper about subpoenaing plaintiff's mental health records, and that the defense attorney did not direct the facility to send the records to him instead of the trial court, they were sent by mistake. The court acknowledged that in this case the ordinary procedure for discovering the mental health records of a prosecuting witness was not followed, but ruled that failure to follow these procedures did not by itself give rise to an action for abuse of process (*55 Cal. App. 4th 1290, 1303)* .

[b] Bad Motive or Malice Insufficient

The facts and procedural background of *Friedman v. Stadum (1985) 171 Cal. App. 3d 775, 217 Cal. Rptr. 585* , are discussed in *§ 147.20[3][h]*. The court of appeal held that a plaintiff in a civil malicious prosecution action must establish that the underlying proceeding terminated in his or her favor (*171 Cal. App. 3d 775, 778)* . The court also held that to state a cause of action for abuse of process, a plaintiff must allege a willful act in the use of the process not proper in the regular conduct of the proceeding. Thus, in holding that the trial court properly sustained defendant's demurrer, the court of appeal noted that plaintiff did not specifically allege a willful misuse of process. The fact that plaintiff alleged malice and intent to harm in his malicious prosecution cause of action did not satisfy the element of willful misuse of an abuse of process action (*171 Cal. App. 3d 775, 779)* .

[c] Mere Filing of Complaint or Cross Complaint Not Sufficient

The facts and procedural background of *Drasin v. Jacoby & Meyers (1984) 150 Cal. App. 3d 481, 197 Cal. Rptr. 768* , are discussed in *§ 147.20[3][i]*. The attorney filing the complaint for malicious prosecution argued on appeal that he should have been allowed to amend his complaint to allege abuse of process. The court of appeal rejected the argument, finding that the party being sued for malicious prosecution had merely filed a complaint for malpractice. The court held that the mere filing of a complaint, even in combination with a desire to coerce a settlement, cannot constitute an abuse of process (*150 Cal. App. 3d 481, 485)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsGeneral OverviewTortsIntentional TortsAbuse of ProcessGeneral OverviewTortsIntentional TortsAbuse of ProcessDefensesTortsIntentional TortsAbuse of ProcessElementsTortsIntentional TortsAbuse of ProcessRemedies

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CHAPTER 147 MALICIOUS PROSECUTION AND ABUSE OF PROCESS
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14-147 California Points & Authorities § 147.71

§ 147.71 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] for Abuse of Process--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Insufficient Allegation of Ulterior Motive to Obtain Collateral Advantage

[1] FORM

[*Caption. See § 147.70*].

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION FOR ABUSE OF PROCESS BECAUSE IT FAILS TO ADEQUATELY ALLEGE THAT PLAINTIFF USED THE PROCESS WITH AN ULTERIOR MOTIVE TO OBTAIN A COLLATERAL ADVANTAGE.

A. Objection by Demurrer. [*See § 147.20, Paragraph A*].

B. Ulterior Motive to Obtain Collateral Advantage Required. A cause of action for abuse of process is not stated where the complaint does not allege that the plaintiff had an ulterior motive in using the process to obtain a collateral advantage (*Ion Equip. Corp. v. Nelson (1980) 110 Cal. App. 3d 868, 876, 168 Cal. Rptr. 361* ; *Golden v. Dungan (1971) 20 Cal. App. 3d 295, 301-302, 97 Cal. Rptr. 577*).

C. Bad Motive or Malice Insufficient. [*See § 147.70, Paragraph C*].

[*Optional*] **D. Manner of Service Not Collateral Advantage.** A demurrer to a cause of action for abuse of process is proper where the action complains only of the manner of service of process rather than the fact that process was misused to obtain a collateral advantage over plaintiff. The harassing way in which process is served is not a collateral advantage (*Golden v. Dungan (1971) 20 Cal. App. 3d 295, 301-302, 97 Cal. Rptr. 577*).

E. Humiliation, Embarrassment and Intimidation Insufficient. Mere vexation or harassment are not objectives sufficient to give rise to the tort of abuse of process (*Susan S. v. Israels (1997) 55 Cal. App. 4th 1290, 1303, 67 Cal. Rptr. 2d 42*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a general demurrer to a complaint in an action for abuse of process which does not contain sufficient allegations of using the process with an ulterior motive to obtain collateral advantage.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Ulterior Motive to Obtain Collateral Advantage Required

In ***Ion Equip. Corp. v. Nelson*** *(1980) 110 Cal. App. 3d 868, 168 Cal. Rptr. 361* , defendant in the abuse of process action had obtained a judgment against plaintiff in the abuse of process action. Plaintiff appealed the underlying action and obtained a stay of judgment. The court of appeal dismissed the appeal, but before its remittitur was entered, defendant caused a writ of execution to be served on plaintiff. Thereafter, plaintiff sued for abuse of process resulting from having the writ served before the dismissal of the appeal was final. Defendant was granted judgment on the pleadings. Plaintiff appealed and the court of appeal affirmed. It held that an abuse of process complaint required an allegation of an ulterior motive in use of the process to obtain a benefit extraneous or a result not within the legitimate scope of the process (*110 Cal. App. 3d 868, 876)* . It found that the only motive for defendant's use of the writ of execution was to enforce its judgment, which is the purpose of the writ. The fact that the issuance of the writ was improper was not sufficient to establish an ulterior motive (*110 Cal. App. 3d 868, 876, 877)* .

In ***Golden v. Dungan*** *(1971) 20 Cal. App. 3d 295, 97 Cal. Rptr. 577* , defendants, in a prior action, allegedly served process on plaintiffs at midnight in a loud and boisterous manner awakening plaintiffs and the neighborhood. Plaintiffs, husband and wife, filed separate complaints alleging causes of action based on abuse of process and the intentional infliction of emotional distress. The trial court sustained defendants' demurrer to the complaints, and the court of appeal affirmed with regard to the abuse of process cause of action. It stated that the basis of the complaint was neither the defendants' acts in filing an action and in securing a summons since it was the manner of service, nor the fact of service itself, which was the basis of plaintiffs' attempt to state a cause of action (*20 Cal. App. 3d 295, 301)* . It is only where process is used to obtain a collateral advantage that an action for abuse of process will lie; the harassment from the way in which process is served is not the type of collateral advantage which is generally recognized as a purpose for which the process was designed. Thus, the complaint did not state a cause of action for abuse of process (20 Cal. App. 3d 295, 302). The court did conclude that the plaintiffs had stated a cause of action for intentional infliction of emotional distress and reversed as to that cause of action (20 Cal. App. 3d 295, 302-311).

[b] Manner of Service Not Collateral Advantage

Golden v. Dungan *(1971) 20 Cal. App. 3d 295, 97 Cal. Rptr. 577* , is discussed in *§ 147.71[4][a]*.

[c] Humiliation, Embarrassment and Intimidation Insufficient

In ***Susan S. v. Israels*** *(1997) 55 Cal. App. 4th 1290, 67 Cal. Rptr. 2d 42* , a defense attorney represented a client

charged with the sexual battery of plaintiff. In the course of that representation the defense attorney served a subpoena duces tecum for the plaintiff's mental health records on a mental health treatment facility. The facility mistakenly sent plaintiff's records directly to the defense attorney instead of the trial court and the attorney, knowing the private and confidential nature of the documents, read them, transmitted them to the defense psychiatrist and used them in cross-examining plaintiff. Plaintiff sued the attorney and his client for among other things, abuse of process. The trial court sustained defendants' demurrer to the complaint with leave to amend. Plaintiff elected not to amend her complaint and her action was dismissed. Plaintiff appealed the judgment of dismissal.

The court of appeal affirmed, holding that plaintiff's complaint failed to state a cause of action for abuse of process. Specifically, the court found that the complaint did not allege facts showing defendants acted with an ulterior motive in serving the subpoena for plaintiff's mental health records. The complaint alleged that the purpose and motivation in subpoenaing the records of plaintiff was to intimidate, embarrass and humiliate plaintiff. The court ruled that according to the holding in *Abraham v. Lancaster Cmty. Hosp. (1990) 217 Cal. App. 3d 796, 826, 266 Cal. Rptr. 360* , mere vexation or harassment are not objectives sufficient to give rise to the tort of abuse of process. Moreover, there is no tort where, as here, process is used properly albeit with a bad motive (*55 Cal. App. 4th 1290, 1303)* .

[4] Additional Authorities

[a] Ulterior Motive to Obtain Collateral Advantage Required

Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc. (1986) 42 Cal. 3d 1157, 232 Cal. Rptr. 567, 728 P.2d 1202 , is discussed in *§ 147.70[3][a]*.

[b] Manner of Service Not Collateral Advantage

In *Slaughter v. Legal Process & Courier Serv. (1984) 162 Cal. App. 3d 1236, 209 Cal. Rptr. 189* , plaintiff sued the process server that had falsely alleged personal service of plaintiff in a wrongful detainer action. The court of appeal, relying on *Golden v. Dungan (1971) 20 Cal. App. 3d 295, 97 Cal. Rptr. 577* [*see § 147.71[4][a]*], found that no collateral advantage was shown, because it was the manner of service rather than the fact of service itself which was the subject of the complaint. If, because of the manner of service, an actionable wrong arose, it must be attributed to the acts and omissions attendant on the attempted service, and it does not relate to the process itself. The court concluded that plaintiff challenged the propriety of the method of service, and not the reasons for which he was being served, and did not establish a basis for the collateral advantage required for an abuse of process cause of action (*162 Cal. App. 3d 1236, 1247-1248)* .

NOTE:

In *Kappel v. Bartlett (1988) 200 Cal. App. 3d 1457, 246 Cal. Rptr. 815* , the court of appeal held that a defendant's knowingly false declaration of service could support an action by the unserved party for abuse of process. *Kappel* involved facts somewhat similar to those in *Slaughter*, but in *Kappel*, an invalid execution on plaintiff's property resulted from the defendant's false declaration of service. The trial court in *Kappel* granted defendant's demurrer to the plaintiff's abuse of process action without leave to amend, but the court of appeal reversed. Following *Tranchina v. Arcinas (1947) 78 Cal. App. 2d 522, 526, 178 P.2d 65* , the court of appeal held that it is not necessary to plead actual malice or a collateral illegal objective, but that malice may be inferred from willful abuse of the process. Plaintiff alleged in the pleadings that the defendant's false declaration of service was executed with knowledge that it was false; the court concluded that this allegation was sufficient to satisfy the "ulterior motive" element of the tort [*Kappel v. Bartlett (1988) 200 Cal. App. 3d 1457, 1463-1467, 246 Cal. Rptr. 815]* .

Legal Topics:

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

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsTortsIntentional TortsAbuse of ProcessGeneral OverviewTortsIntentional TortsAbuse of ProcessDefensesTortsIntentional TortsAbuse of ProcessElements

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CHAPTER 147 MALICIOUS PROSECUTION AND ABUSE OF PROCESS
PART II. FORMS
B. Abuse Of Process

14-147 California Points & Authorities § 147.72

§ 147.72 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] for Abuse of Process--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--No Allegation of Action Taken Pursuant to Judicial Authority

[1] FORM

[*Caption. See § 147.70*].

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION FOR ABUSE OF PROCESS IN THAT IT FAILS TO INDICATE THAT ANY ACTION WAS TAKEN PURSUANT TO JUDICIAL AUTHORITY.

A. Objection to Demurrer. [*See § 147.20, Paragraph A*].

B. No Judicial Authority. The tort of abuse of process lies only where there has been a misuse of the power of the court. It does not lie when defendant has taken no action pursuant to the authority of a court, either directly or by ancillary proceedings (*Adams v. Superior Court (1992) 3 Cal. Rptr. 2d 49* ; *Meadows v. Bakersfield Sav. & Loan Ass'n (1967) 250 Cal. App. 2d 749, 753, 59 Cal. Rptr. 34*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a general demurrer to a complaint in an action for abuse of process when the complaint does not allege that the defendant has taken action pursuant to judicial authority.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Form

For a form of demurrer based on the fact that no action taken pursuant to judicial authority has been alleged, see California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process* (Matthew Bender).

[3] Discussion of Authorities

[a] No Judicial Authority

The facts and procedural background of ***Adams v. Superior Court*** *(1992) 2 Cal. App. 4th 521, 3 Cal. Rptr. 2d 49* , are discussed in *§§ 147.22[3][a]* and *147.26[3][a]*. Defendant attorneys, who represented clients with whom real party was involved in litigation surrounding a real estate transaction, filed unsuccessful motions for reconsideration of orders granting plaintiff's motions in other courts to reduce or expunge her prior felony convictions. In her complaint, real party contended that defendants' action constituted, among other things, abuse of process, because they wanted to preserve her convictions to impeach her testimony in the lawsuit against their clients. The trial court overruled defendants' demurrer to this cause of action, and defendants sought a writ of mandate in the court of appeal to compel the trial court to sustain the demurrer.

The court of appeal issued the writ. In so doing, the court noted that, in an abuse of process action, the act complained of must involve the use of process. Process, in turn, is action taken pursuant to judicial authority, rather than action taken without reference to the power of the court (*2 Cal. App. 4th 521, 530)* . In the instant case, defendants' motions did not result in the issuance of any process that was then abused. They produced no act of judicial authority, and no writ or order that was then misused. Therefore, their actions fell short of the required use of process. The court further held that the fact that defendants were deemed to lack standing by one of the courts in which they filed the motion was insufficient to overcome the absence of process. The court reasoned that any abuse arising when persons without standing intervene in lawsuits is well within the scope of a court's power to control (*2 Cal. App. 4th 521, 530)* .

In ***Meadows v. Bakersfield Sav. & Loan Ass'n*** *(1967) 250 Cal. App. 2d 749, 59 Cal. Rptr. 34* , the court of appeal was confronted with the question of whether or not recording a notice of default and publishing a notice of trustee's sale pursuant to the terms of a deed of trust constitutes process in the sense that the term "abuse of process" is used. The court determined that it does not and therefore affirmed a judgment of nonsuit for defendant. The court stated that the essence of the tort of abuse of process lies in the misuse of the power of the court; it is an act done in the name of the court and under its authority for the purpose of perpetrating an injustice. Thus, since defendant took no action pursuant to the authority of the court, directly or by ancillary proceedings, no judicial process was abused (*250 Cal. App. 2d 749, 753)* .

[4] Additional Authorities

[a] No Judicial Authority

In *Carney v. Rotkin, Schmerin & McIntyre (1988) 206 Cal. App. 3d 1513, 254 Cal. Rptr. 478* , plaintiff, a judgment debtor, brought an action for abuse of process against defendants, who had been employed to collect plaintiff's debt. After plaintiff failed to appear at a judgment debtor examination requested by defendants, defendants falsely informed plaintiff that there was a bench warrant out for her arrest that would remain in effect until she paid defendants $1,000 on her debt. The court of appeal found that plaintiff's complaint failed to allege a cause of action for abuse of process. In making their false statements concerning the nonexistent bench warrant, defendants did not take any action pursuant to the authority of the court; thus, they did not abuse any judicial process (*206 Cal. App. 3d 1513, 1526)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsTortsIntentional TortsAbuse of ProcessGeneral OverviewTortsIntentional TortsAbuse of ProcessDefensesTortsIntentional TortsAbuse of ProcessElements

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14-147 California Points & Authorities § 147.73

§ 147.73 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] for Abuse of Process--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Bar of Statute of Limitations

[1] FORM

[*Caption. See § 147.70*].

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION FOR ABUSE OF PROCESS IN THAT IT SHOWS ON ITS FACE THAT IT IS BARRED BY THE STATUTE OF LIMITATIONS.

A. Objection by Demurrer. [*See § 147.20, Paragraph A*].

B. Failure to State Cause of Action. [*See § 147.30, Paragraph B*].

C. Statute of Limitations. An action for the injury to one person caused by the wrongful act or neglect of another must be commenced within two years (one year, prior to 2003) after the date of the injury (*Code Civ. Proc. § 335.1*; *see* former Code Civ. Proc. § 340(3)). *Code of Civil Procedure Section 335.1* applies to actions for abuse of process, and a demurrer is properly sustained if it is shown on the face of the complaint that the action was commenced more than two years (one year, prior to 2003) after the wrong is alleged to have occurred (*see Thornton v. Rhoden (1966) 245 Cal. App. 2d 80, 95, 53 Cal. Rptr. 706* ; *McFaddin v. H.S. Crocker Co. (1963) 219 Cal. App. 2d 585, 590-591, 33 Cal. Rptr. 389*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a general demurrer to a complaint in an action for abuse of process when the action is barred by the two-year period of limitations contained in *Code Civ. Proc. § 335.1* (*see* former Code Civ. Proc. § 340(3) (one-year period of limitations, prior to 2003); *see also California Forms of Pleading and Practice, Ch. 345, Limitation of Actions, § 345.14*).

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For a form of demurrer based on the fact that the action is barred on its face by the statute of limitations, see California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process* (Matthew Bender). For a form of demurrer for use generally in asserting the bar of the statute of limitations, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* (Matthew Bender).

[3] Discussion of Authorities

[a] Statute of Limitations

In ***Thornton v. Rhoden*** *(1966) 245 Cal. App. 2d 80, 53 Cal. Rptr. 706* , the court of appeal affirmed the granting of defendants' motion for summary judgment in an abuse of process action based on the giving of a notice that a deposition would be taken. The court held summary judgment was correctly granted because the one-year bar of former Code Civ. Proc. § 340(3) [*now see Code Civ. Proc. § 335.1* (two-year statute of limitations beginning in 2003)] is the relevant period of limitation for actions involving abuse of process and the action was commenced more than one year after any of the actions that could have given rise to liability took place (*245 Cal. App. 2d 80, 95)* .

In ***McFaddin v. H.S. Crocker Co.*** *(1963) 219 Cal. App. 2d 585, 33 Cal. Rptr. 389* , defendants objected to the introduction of any evidence by plaintiff on the ground that the complaint failed to state facts sufficient to constitute a cause of action. The trial judge dismissed plaintiff's second cause of action for abuse of process on the ground that it was barred by former Code Civ. Proc. § 340(3) [*now see Code Civ. Proc. § 335.1* (two-year statute of limitations beginning in 2003)]. The court of appeal affirmed since the wrong was alleged to have occurred nearly three years prior to the commencement of the action (*219 Cal. App. 2d 585, 590-591)* .

[4] Additional Authorities

[a] Statute of Limitations

In *Simons v. Edouarde (1950) 98 Cal. App. 2d 826, 221 P.2d 203* , the court of appeal affirmed the trial court's judgment of dismissal after the sustaining of defendants' demurrer to the complaint on the ground that it was barred by former Code Civ. Proc. § 340(3) [*now see Code Civ. Proc. § 335.1* (two-year statute of limitations beginning in 2003)]. The court stated that former Code Civ. Proc. § 340(3) embraces all infringements of personal rights as opposed to property rights. Hence, since an action for abuse of process falls within a statute of limitations which covers injuries done to the person, the one-year period of limitation of former Code Civ. Proc. § 340(3) [*now see Code Civ. Proc. § 335.1* (two-year statute of limitations beginning in 2003)] is the applicable period of limitation and barred plaintiff's action which had been filed nearly two years after the alleged wrongful act had occurred (*98 Cal. App. 2d 826, 828)* .

Legal Topics:

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

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsTortsIntentional TortsAbuse of ProcessGeneral OverviewTortsIntentional TortsAbuse of ProcessDefensesTortsIntentional TortsAbuse of ProcessElements

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14-147 California Points & Authorities § 147.74

§ 147.74 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] for Abuse of Process--Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Absolute Privilege of Publication in Judicial Proceeding [Civ. Code § 47(b)] Applicable

[1] FORM

[*Caption. See § 147.70*].

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION FOR ABUSE OF PROCESS BECAUSE IT APPEARS ON ITS FACE THAT THE ABSOLUTE PRIVILEGE OF PUBLICATION IN A JUDICIAL ACTION IS APPLICABLE.

A. Objection by Demurrer. [*See § 147.20, Paragraph A*].

B. Privilege for Publication in Judicial Proceeding Applicable. A complaint for abuse of process fails to state a cause of action when it shows on its face that it is based on a publication which is absolutely privileged under *Civil Code Section 47(b)* because it was made in the course of a judicial proceeding (*see Umansky v. Urquhart (1978) 84 Cal. App. 3d 368, 371-372, 148 Cal. Rptr. 547* ; *Twyford v. Twyford (1976) 63 Cal. App. 3d 916, 924-926, 134 Cal. Rptr. 145*).

[*Optional*] **C. Publication Outside Courtroom.** The privilege for publication in a judicial proceeding attaches to a publication made outside a courtroom since many portions of a judicial proceeding occur outside of open court (*Asia Inv. Co. v. Borowski (1982) 133 Cal. App. 3d 832, 842-843, 184 Cal. Rptr. 317*).

[*Optional*] **D. Publication Need Not Be Relevant or Material in Technical Sense.** The absolute privilege of *Civil Code Section 47(b)* may attach even though the publication was not relevant or material in the technical sense to any issue, as long as it has some connection to the proceeding; any doubt in this regard must be resolved in favor of a finding of privilege (*Adams v. Superior Court (1992) 2 Cal. App. 4th 521, 529, 3 Cal. Rptr. 2d 49* ; *Profile Structures, Inc. v. Long Beach Bldg. Material Co. (1986) 181 Cal. App. 3d 437, 442, 226 Cal. Rptr. 192*).

[*Optional*] **E. Judicial Enforcement Efforts Fall Within Scope of Litigation Privilege.** If the gravamen of the action is a communicative act, the litigation privilege extends to noncommunicative acts that are necessarily related to the communicative conduct, including acts necessary to enforce a judgment (*Rusheen v. Cohen (2006) 37 Cal. 4th 1048, 1065, 39 Cal. Rptr. 3d 516, 128 P.3d 713* ; *see also* (*Brown v. Kennard (2001) 94 Cal. App. 4th 40, 47-51, 113 Cal. Rptr. 2d 891*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a general demurrer to a complaint for malicious prosecution when the demurrer asserts that the complaint fails to state a cause of action because it shows on its face that its basis is a publication in a judicial proceeding that is absolutely privileged under *Civ. Code § 47(b).*

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should show that the filing of pleadings in a wrongful death action seeking punitive damages is a publication in a judicial proceeding and absolutely privileged under *Civ. Code § 47(b)* [*Umansky v. Urquhart (1978) 84 Cal. App. 3d 368, 371-372, 148 Cal. Rptr. 547* ; *see § 147.74[3][a]*].

[c] Opposing Memoranda

The points in *§ 147.77* may be used in an appropriate case to oppose a demurrer supported by this memorandum.

[d] Related Pleading and Practice Forms

For a form of affirmative defense based on the absolute privilege for publications in judicial proceedings of Civ. Code § 47(b), see California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process* (Matthew Bender), and for a general discussion of the absolute privilege for publications made in judicial proceedings, see California Forms of Pleading and Practice, Ch. 340, *Libel and Slander* (Matthew Bender).

[3] Discussion of Authorities

[a] Privilege for Publication in Judicial Proceeding Applicable

In ***Umansky v. Urquhart*** *(1978) 84 Cal. App. 3d 368, 148 Cal. Rptr. 547* , a doctor was sued in a wrongful death action. One of the causes of action sought punitive damages even though punitive damages are not proper in a wrongful death action. After the cause of action seeking punitive damages was deleted by stipulation, the doctor sued the attorneys for plaintiffs in the wrongful death action for abuse of process in bringing the cause of action for punitive damages. Defendants filed a demurrer and a motion for judgment on the pleadings and the abuse of process action was dismissed. Plaintiffs appealed and the court of appeal affirmed the judgment of dismissal.

The court stated that the filing of a complaint can be considered "process" for the purposes of an action for abuse of

process (*84 Cal. App. 3d 368, 371)* . It then found, however, that the pleading of the cause of action for punitive damages in the original action was published in a judicial proceeding and thus absolutely privileged under former Civ. Code § 47(2) [*now see Civ. Code § 47(b)*]. Former Civ. Code § 47(2) applies to abuse of process and the pleading therefore could not serve as the basis for the tort of abuse of process (*84 Cal. App. 3d 368, 370, 371)* . The privilege applies when (1) the publication was made in a judicial proceeding, (2) it had some connection or logical relation to the action, (3) it was made to achieve the objects of the litigation, and (4) it involved litigants or other participants authorized by law (*84 Cal. App. 3d 368, 371)* . The court held that the cause of action was filed to achieve the objects of litigation even though it was barred by former Code Civ. Proc. § 377 [*now see Code Civ. Proc. § 377.60 et seq.*], the wrongful death statute, because defendants had the right to make the argument that the statute was unconstitutional; the privilege of former Civ. Code § 47(2) should protect such efforts (*84 Cal. App. 3d 368, 372)* .

The facts and holding in ***Twyford v. Twyford*** *(1976) 63 Cal. App. 3d 916, 134 Cal. Rptr. 145* , are discussed in *§ 147.22[3][d]*. In ruling that a cause of action was not stated for abuse of process, the court of appeal held that the service of a request for admission was absolutely privileged as a publication in a judicial proceeding under former Civ. Code § 47(2) [*now see Civ. Code § 47(b)*]. The court then held that the publication of the request for admission with regard to forgery of an endorsement on an income tax refund check met the requirement that the publication was made to achieve the objectives of the litigation because the request was pertinent to the dissolution litigation in that it was connected to the issue of the husband's ability to pay (*63 Cal. App. 3d 916, 924-925)* .

[b] Publication Outside Courtroom

The facts and procedural background of ***Asia Inv. Co. v. Borowski*** *(1982) 133 Cal. App. 3d 832, 184 Cal. Rptr. 317* , are discussed in *§ 147.20[3][n]*. The court of appeal affirmed the trial court's granting of summary judgment in plaintiff's action for malicious prosecution and abuse of process. Plaintiff had alleged that certain statements made to its legal representatives at a settlement conference involving a separate action between the same parties was an abuse of process in that defendant in that action had threatened to use a petition for writ of mandate that defendant had filed as a device to force plaintiff to settle. The court held that the privilege of publication in a judicial proceeding attaches to a publication made outside a courtroom and observed that many portions of a judicial proceeding occur outside of open court. Citing prior California law, the court noted that there was an element of coercion in every lawsuit, but that nonetheless, the statement was essentially a settlement proposal. As such, the court remarked, it was made to achieve a settlement, which the courts have long favored. Moreover, it is necessary to protect attorneys during the course of representation of their clients and to promote free access to the courts. The court concluded that the language was part of the adversary system and to be anticipated in the course of heated battle between adverse parties; consequently, the statement was within the privilege of former Civ. Code § 47(2) [*now see Civ. Code § 47(b)*], and accordingly, plaintiff could not state a cause of action for abuse of process (*133 Cal. App. 3d 832, 842-843)* .

NOTE:

The Supreme Court in *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc. (1986) 42 Cal. 3d 1157, 232 Cal. Rptr. 567, 728 P.2d 1202* , granted hearing in that case to resolve an apparent conflict between the court of appeal decision in *Oren* and the court of appeal decision in *Asia Inv. Co. v. Borowski (1982) 133 Cal. App. 3d 832, 184 Cal. Rptr. 317* . The court of appeal in the *Oren* case, in discussing former Civ. Code § 47(2) [*now see Civ. Code § 47(b)*], concluded that when the publication itself is alleged to be the tortious conduct, the privilege in former Civ. Code § 47(2) creates a "transactional immunity," but when the alleged tortious conduct is something other than the publication itself, then the publication may be used as evidence bearing on the tortious nature of that conduct; that is, former Civ. Code § 47(2) does not provide an immunity from "use" of the publication. The court of appeal further suggested that to the extent the *Asia Investment* decision had reached a contrary conclusion, that decision should not be followed.

Although the Supreme Court in *Oren* affirmed a summary judgment for the defendants on the ground

the complaint did not state a cause of action for abuse of process [*see § 147.70* [3][a], the Court said that the privileges of former Civ. Code § 42 [*now see Fam. Code § 6601*], unlike evidentiary privileges that function by the exclusion of evidence, operate as limitations on liability and that thus, while former Civ. Code § 47(2) [*now see Civ. Code § 47(b)*] bars certain tort causes of action that are predicated on a judicial statement or publication itself, the section does not create an evidentiary privilege for these statements. Accordingly, when allegations of misconduct properly put an individual's intent at issue in a civil action, statements made during the course of a judicial proceeding may be used for evidentiary purposes in determining whether the individual acted with the requisite intent. Plaintiff in *Oren* had contended that the tortious conduct was the defendants' filing and continued pursuance of an administrative mandate proceeding under the California Environmental Quality Act (*Pub. Res. Code § 21000 et seq.*) and that the "ulterior" purpose was to extort a monetary settlement from plaintiff as revealed by statements made in the course of settlement negotiations. The Supreme Court said that if this conduct could properly support a cause of action for abuse of process (which the court concluded it could not), former Civ. Code § 47(2) would not preclude plaintiff from making evidentiary use of defendants' statements during settlement negotiations to prove the intent with which defendants' conduct was undertaken. Although the Court appeared to follow the statements made in the court of appeal decision in that case, it also said that because former Civ. Code § 47(2) does not preclude the evidentiary use of the statements made during negotiation, the Court did not reach plaintiff's broader claim that former Civ. Code § 47(2) is entirely inapplicable in the abuse of process context. In this regard, the Court noted that plaintiff, with some persuasive force, suggested that a number of past cases that have upheld the propriety of abuse of process actions on the basis of unauthorized conduct in a judicial proceeding could not have been decided as they were if the absolute privilege of former Civ. Code § 47(2) were applicable in the abuse of process context [*Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc. (1986) 42 Cal. 3d 1157, 1167-1168, 232 Cal. Rptr. 567, 728 P.2d 1202]* .

[c] Publication Need Not Be Relevant or Material in Technical Sense

The facts and procedural background of ***Adams v. Superior Court*** *(1992) 2 Cal. App. 4th 521, 3 Cal. Rptr. 2d 49* , are discussed in *§§ 147.22[3][a]* and *147.26[3][a]*. Defendant attorneys, who represented clients with whom real party was involved in litigation alleging fraud in a real estate transaction, filed unsuccessful motions for reconsideration of orders granting plaintiff's motions in other courts to reduce or expunge her prior felony convictions. The motion filed in one of those courts was denied on the ground that defendants lacked standing to file it. In her complaint, real party contended that defendants' action constituted, among other things, abuse of process, because they wanted to preserve her convictions to impeach her testimony in the lawsuit against their clients. The trial court overruled defendants' demurrer to this cause of action, and defendants sought a writ of mandate in the court of appeal to compel the trial court to sustain the demurrer.

The trial court issued the writ. The court first held the motions filed by defendants were protected by judicial privilege under *Civ. Code § 47(b)* (*2 Cal. App. 4th 521, 528-529)* . The court noted that the privilege is not restricted to the actual parties to a lawsuit, but need merely be connected or related to the proceedings. The court reasoned that defendants' motions were related to the proceedings, since there was clearly some relationship between the evidence of fraudulent behavior that defendants attempted to present to the criminal courts and the proceedings in progress there for reduction or expungement of criminal convictions. The latter proceedings were addressed to the court's discretion and therefore depended on a showing of good behavior since the conviction. An attempt to demonstrate that the convicted person's behavior had not been good was therefore rationally connected to the proceedings (*2 Cal. App. 4th 521, 529)* . The court then held defendants' lack of standing did not destroy the claim of privilege. In the first place, the lack of standing did not constitute such a lack of connection with the lawsuit as to render the reconsideration motions tortious. In the second place, the privilege applies to publications in connected proceedings, such as in the reduction/expungement proceedings and the underlying civil suit in the instant case, to protect the rights of litigants and interested parties to communicate with the court (*2 Cal. App. 4th 521, 529-530)* .

In ***Profile Structures, Inc. v. Long Beach Bldg. Material Co.*** *(1986) 181 Cal. App. 3d 437, 226 Cal. Rptr. 192* , defendant was granted a temporary protective order under *Code Civ. Proc. § 486.050* that prohibited the plaintiff from transferring certain funds. Although the order was personal to the plaintiff, the defendant did not serve the order on the plaintiff, but instead served it on two outside parties who owed money to the plaintiff. When the outside parties wrongfully withheld the funds from plaintiff, plaintiff brought an action seeking damages for abuse of process against defendant. The action was dismissed by the trial court on the ground that the service of the order on the outside parties was absolutely privileged under former Civ. Code § 47(2) [*now see Civ. Code § 47(b)*].

The court of appeal affirmed. It initially noted that the absolute privilege of former Civ. Code § 47(2) [*now see Civ. Code § 47(b)*] attaches if the publication (1) was made in a judicial proceeding, (2) had some connection or logical relation to the action, (3) was made to achieve the objects of the litigation, and (4) involved litigants or other participants authorized by law (*181 Cal. App. 3d 437, 441-442)* . The court then rejected plaintiff's contention that the publication of the order had no logical relationship to the underlying action and was not made to achieve the objects of the litigation. It held that the absolute privilege of former Civ. Code § 47(2) may attach even though the publication was not pertinent, relevant, or material in the technical sense to any issue, as long as it has some connection to the proceeding. The court then held that any doubt in this regard must be resolved in favor of finding of privilege, and that the privilege will be denied only when the matter is so palpably irrelevant to the subject matter of the controversy that no reasonable person can doubt its irrelevancy and impropriety (*181 Cal. App. 3d 437, 442-443)* . Applying these rules to the case at bar, the court found that the publication of the order to the plaintiff's debtors could not be said to have no logical relation to the underlying action, and that the privilege applied (*181 Cal. App. 3d 437, 443)* .

[d] Judicial Enforcement Efforts Fall Within Scope of Litigation Privilege

In ***Rusheen v. Cohen*** *(2006) 37 Cal. 4th 1048, 39 Cal. Rptr. 3d 516, 128 P.3d 713* , a judgment debtor filed a cross-complaint for abuse of process against the attorney of the party who had gained a default judgment against the judgment debtor. According to the debtor, in order to obtain the default judgment, the attorney had submitted declarations of service that falsely stated that the debtor had been properly served in the action. The abuse of process action was based on the attorney's role in subsequently obtaining a writ of execution and levying on the judgment debtor's property. The trial court granted the attorney's motion to strike the cross-complaint under *Code Civ. Proc. § 425.16*, concluding that the attorney's conduct was protected by the litigation privilege of *Civ. Code § 47(b)* and that the debtor could not prevail on the cross-complaint. The court of appeal reversed, concluding that the act of executing on the writ to enforce the judgment was noncommunicative conduct that was not protected by the privilege.

The California Supreme Court reversed the court of appeal. The Court held that the litigation privilege may be used as a defense to an abuse of process claim that is based on actions taken to enforce a judgment. Specifically, the Court held that if the gravamen of the action is a communicative act, the litigation privilege extends to noncommunicative acts that are necessarily related to the communicative conduct, including acts necessary to enforce a judgment (*37 Cal. 4th 1048, 1065*). In this particular case, the Court held that the gravamen of the action was the filing of declarations of service in order to obtain a default judgment, and that this was privileged communicative conduct. Although the declarations were alleged to have been false, because the gravamen of the action was based on this privileged communicative conduct, subsequent noncommunicative conduct taken to enforce the default judgment, which included application for a writ of execution and the act of levying on property, was also privileged and could not support an abuse of process claim (*37 Cal. 4th 1048, 1065*). The Court noted that although extending the litigation privilege has the effect of limiting these types of abuse of process claims, an aggrieved party has other remedies that do not involve another round of litigation. These remedies could include moving to set aside the judgment, posting an undertaking or seeking a writ of supersedeas to counter enforcement efforts, or filing a claim of exemption from execution of the judgment (*37 Cal. 4th 1048, 1064*). In reaching its decision, the Court specifically disapproved *Drum v. Bleau, Fox & Assocs. (2003) 107 Cal. App. 4th 1009, 132 Cal. Rptr. 2d 602* , to the extent that it was inconsistent with the Court's opinion (*37 Cal. 4th 1048, 1065*).

In ***Brown v. Kennard*** *(2001) 94 Cal. App. 4th 40, 113 Cal. Rptr. 2d 891* , the plaintiff filed an action for abuse of process against an attorney who sought to enforce a money judgment by levying on the plaintiff's deposit account pursuant to a writ of execution. The underlying judgment was entered against a third party in an action to which the plaintiff was not a party and in which the defendant had represented the judgment creditor. In the abuse of process action, the plaintiff alleged that the defendant abused process by causing a wrongful writ to be levied on the plaintiff's categorically exempt funds, which consisted of Social Security retirement benefits and personal retirement benefits, and refusing to release the levy after being given notice of the exempt status of the funds. The plaintiff also claimed that the purported money judgment was void because it was an order granting only partial summary judgment and that in any event, the plaintiff was not a party to the underlying litigation. The defendant demurred to the abuse of process action, claiming that the plaintiff failed to state a cause of action because issuance of a writ of execution is absolutely privileged under *Civ. Code § 47(b)* and that the communicative act of causing the writ to be issued occurred during a judicial proceeding. The trial court sustained the demurrer, and the plaintiff appealed.

The court of appeal affirmed. The court noted that although California has recognized that an action for abuse of process may lie if a wrongful levy is executed on exempt property, courts have applied the litigation privilege to protect against such actions in the judgment enforcement context, at least if successive seizures of exempt property are not involved. The court noted earlier opinions that had concluded that actions to enforce a judgment were the type of conduct permitted by law in the course of a judicial proceeding, and were logically and legally related to the litigation objective--that is, the collection of a judgment. Moreover, at least one opinion had concluded that for policy reasons, even an otherwise qualifying fraudulent act is privileged under *Civ. Code § 47(b)* (*94 Cal. App. 4th 40, 47-48)* . Agreeing that enforcement proceedings are an extension of the judicial process and related to the realization of a litigation objective, the court in this case held that the privilege was a defense to the abuse of process action because the defendant had employed a court-sanctioned procedure to obtain a writ of execution on a judgment, levied on that writ within the confines of the judicial procedure, and used the writ for its designed purpose (*94 Cal. App. 4th 40, 49)* . The court also concluded that the privilege extended to the act of carrying out the directive of the writ, and not merely to the act of applying for the writ, because holding otherwise would effectively strip the privilege of its purpose (*94 Cal. App. 4th 40, 50)* .

[4] Additional Authorities

[a] Privilege for Publication in Judicial Proceeding Applicable

Carden v. Getzoff (1987) 190 Cal. App. 3d 907, 235 Cal. Rptr. 698 , involved an action for abuse of process, intentional infliction of emotional distress, and negligent infliction of emotional distress by an anesthesiologist who claimed that defendant had manufactured false evidence as an expert accounting witness for the anesthesiologist's former wife in a marital dissolution action. The court of appeal affirmed the trial court's sustaining of defendant's demurrer without leave to amend on the ground that the publications made in both the document prepared by defendant for use at the settlement agreement negotiations and in the testimony of defendant at the dissolution proceedings were covered by the absolute privilege of former Civ. Code § 47(2) [*now see Civ. Code § 47(b)*] (*190 Cal. App. 3d 907, 913)* .

Thornton v. Rhoden (1966) 245 Cal. App. 2d 80, 53 Cal. Rptr. 706 , is discussed in *§ 147.73[3][a]*. In holding that a cause of action for abuse of process was not stated, the court of appeal held that the contents of a deposition are privileged as published in a judicial action and cannot be the basis of a cause of action (*245 Cal. App. 2d 80, 99)* .

[b] Publication Need Not Be Relevant or Material in Technical Sense

Loomis v. Superior Court (1987) 195 Cal. App. 3d 1026, 241 Cal. Rptr. 236 , was an action for abuse of process. The plaintiff, an attorney, had been suspended by the State Bar. During the period of suspension, a motion was filed in an

action on behalf of a client represented by plaintiff. Defendant then filed a motion to strike the motion on the ground that the client could not be represented by a suspended attorney and attached public records from the State Bar disciplinary proceeding in support of this motion. Plaintiff brought this subsequent action for abuse of process and intentional infliction of emotional distress. The trial court denied defendant's motion for summary judgment based on the privilege under former Civ. Code § 47(2) [*now see Civ. Code § 47(b)*], but the court of appeal, on defendant's petition for a writ of mandate, directed entry of judgment for defendant. The court stated that the privilege applies to any publication made in a judicial proceeding, so long as it had some logical relation to the action, was made to achieve the objectives of the litigation, and involved litigants or other participants authorized by law. The privilege is denied only to a publication so palpably irrelevant to the matter in controversy as to leave no reasonable doubt of its irrelevancy or impropriety. The court concluded that the privilege applied to the undisputed facts; the motion to strike, although unsuccessful, was not palpably improper, nor was its supporting documentation palpably irrelevant (*195 Cal. App. 3d 1026, 1029-1030)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsTortsIntentional TortsAbuse of ProcessGeneral OverviewTortsIntentional TortsAbuse of ProcessDefensesTortsIntentional TortsAbuse of ProcessElements

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 147 MALICIOUS PROSECUTION AND ABUSE OF PROCESS
PART II. FORMS
B. Abuse Of Process

14-147 California Points & Authorities § 147.75

§ 147.75 Supporting Motion for New Trial [Code Civ. Proc. § 657(6)] by Defendant--Insufficiency of Evidence to Justify Finding of Ulterior Motive

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF MOTION FOR
Plaintiff,	)	NEW TRIAL
vs.	)	[*Code Civ. Proc. § 657(6)*]
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

DEFENDANT'S MOTION FOR A NEW TRIAL SHOULD BE GRANTED BECAUSE THERE WAS INSUFFICIENT EVIDENCE PRESENTED TO SUPPORT A FINDING THAT DEFENDANT HAD AN ULTERIOR MOTIVE.

A. Motion for New Trial. On the application of the party aggrieved, the _____ [verdict *or* decision] may be vacated, in whole or in part, and a new trial may be granted, on all or some of the issues, on the ground that the evidence is insufficient to justify the _____ [verdict *or* decision], if substantial rights of the aggrieved

party are materially affected thereby (*Code Civ. Proc. § 657*).

B. Insufficient Evidence of Ulterior Motive. Where there is no direct evidence that plaintiff had an ulterior motive in using process, the trial court did not abuse its discretion in granting a motion for a new trial (*Fairfield v. Hamilton (1962) 206 Cal. App. 2d 594, 604, 24 Cal. Rptr. 73*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted by a defendant in support of a motion for a new trial where the evidence is not sufficient to support a verdict that defendant misused the process of the court in an abuse of process action.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion and forms related to a motion for a new trial, see California Forms of Pleading and Practice Ch. 371, *Motions After Trial* .

[c] Related Memoranda

For a form of memoranda in support of a motion for a new trial, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] Insufficient Evidence of Ulterior Motive

In ***Fairfield v. Hamilton*** *(1962) 206 Cal. App. 2d 594, 24 Cal. Rptr. 73* , the cause of action for abuse of process was based on defendant's filing of numerous actions against plaintiff. After a verdict for plaintiff, the trial court granted a motion for new trial, and the court of appeal affirmed. It held that there was conflicting evidence as to whether defendant had an ulterior motive in instituting the complained of proceedings. The court noted that in spite of evidence of defendant's enmity toward plaintiff, it reasonably could be inferred from the circumstances either (1) that he acted with legitimate motives or (2) that he committed no improper acts in the use of the legal processes in the regular course of the proceedings when he prosecuted the actions. Since there was no direct evidence that defendant ever offered to desist in his various actions if plaintiff changed his position in regard to defendant's claims regarding property in a related bankruptcy proceeding, the court of appeal could not say that the trial court abused its discretion in granting defendant's motion for a new trial (*206 Cal. App. 2d 594, 603-604)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New

TrialsTortsIntentional TortsAbuse of ProcessGeneral OverviewTortsIntentional TortsAbuse of ProcessDefensesTortsIntentional TortsAbuse of ProcessElements

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 147 MALICIOUS PROSECUTION AND ABUSE OF PROCESS
PART II. FORMS
B. Abuse Of Process

14-147 California Points & Authorities § 147.76

§ 147.76 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] for Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)] for Abuse of Process--Complaint Sufficiently Alleges Facts Constituting Improper Use of Process

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN OPPOSITION TO DEMUR-
Plaintiff,	)	RER
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THE DEMURRER SHOULD BE OVERRULED BECAUSE THE ALLEGATIONS OF THE COMPLAINT SHOW THAT DEFENDANT USED THE PROCESS FOR AN IMPROPER PURPOSE.

A. Abuse of Process. One who uses legal process, whether criminal or civil, against another to accomplish a purpose for which it is not designed is liable to the other for the pecuniary loss caused thereby (*Spellens v. Spellens (1957) 49 Cal. 2d 210, 317 P.2d 613*).

B. Improper Purpose. The improper purpose on which abuse of process is based usually takes the form of coercion to

obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money by the use of the process as a threat or a club (*Templeton Feed & Grain v. Ralston Purina Co. (1968) 69 Cal. 2d 461, 466, 72 Cal. Rptr. 344, 446 P.2d 152* ; *Spellens v. Spellens (1957) 49 Cal. 2d 210, 232, 317 P.2d 613*).

C. Broad Interpretation of Process. The term "process" in the tort abuse of process is not limited to the strict sense of the term and has been interpreted broadly to encompass the entire range of procedures incident to litigation (*Barquis v. Merchants Collection Assn. (1972) 7 Cal. 3d 94, 104 n.4, 101 Cal. Rptr. 745, 496 P.2d 817*).

[*Optional*] **D. Filing Complaint for Improper Purpose.** An action for abuse of process can be based on allegations that a complaint was filed for an improper purpose (*Barquis v. Merchants Collection Assn. (1972) 7 Cal. 3d 94, 103, 101 Cal. Rptr. 745, 496 P.2d 817* ; *Templeton Feed & Grain v. Ralston Purina Co. (1968) 69 Cal. 2d 461, 466, 72 Cal. Rptr. 344, 446 P.2d 152*).

[*Optional*] **E. Excessive Attachment.** An action for abuse of process can be based on allegations that defendant attached assets greatly in excess of his or her claim (*White Lighting Co. v. Wolfson (1968) 68 Cal. 2d 336, 347, 66 Cal. Rptr. 697, 438 P.2d 345*).

[*Optional*] **F. Improper Use of Provisional Remedy of Claim and Delivery.** An action for abuse of process can be based on allegations that the provisional remedy of claim and delivery has been used for an improper purpose (*see Templeton Feed & Grain v. Ralston Purina Co. (1968) 69 Cal. 2d 461, 466, 72 Cal. Rptr. 344, 446 P.2d 152* ; *Spellens v. Spellens (1957) 49 Cal. 2d 210, 229-232, 317 P.2d 613*).

[*Optional*] **G. Garnishment on Exempt Property.** An action for abuse of process can be based on allegations that plaintiff garnished wages that he or she knew were exempt from execution for the improper purpose of forcing plaintiff to pay the judgment from exempt property (*Czap v. Credit Bureau of Santa Clara Valley (1970) 7 Cal. App. 3d 1, 5-7, 86 Cal. Rptr. 417* ; *Arc Inv. Co. v. Tiffith (1958) 164 Cal. App. 2d Supp. 853, 856, 330 P.2d 305*).

[*Optional*] **H. Improper Use of Interrogatory.** An action for abuse of process can be based on allegations that an interrogatory served as a discovery procedure was used for an improper purpose (*Younger v. Solomon (1974) 38 Cal. App. 3d 289, 296-297, 113 Cal. Rptr. 113*).

[*Optional*] **I. Notice of Deposition for Improper Purpose.** An action for abuse of process can be based on allegations that a notice of deposition was used for an improper purpose (*Thornton v. Rhoden (1966) 245 Cal. App. 2d 80, 94-95, 53 Cal. Rptr. 706*).

[*Optional*] **J. Improper Use of Contempt Order.** An action for abuse of process can be based on allegations that contempt orders were obtained and served on plaintiff for an improper purpose (*Clark Equip. Co. v. Wheat (1979) 92 Cal. App. 3d 503, 524-527, 154 Cal. Rptr. 874*).

[*Optional*] **K. Improperly Obtaining Judgment and Levying Execution on Self.** An action for abuse of process can be based on allegations that the defendant conspired to obtain a judgment and levied execution on himself or herself to defeat plantiff's rights (*Weisenburg v. Molina (1976) 58 Cal. App. 3d 478, 486-490, 129 Cal. Rptr. 813*).

[*Optional*] **L. Improper Use of Appellate Process.** An action for abuse of process can be based on allegations that the appellate process has been used for an improper purpose (*see Tellefsen v. Key Sys. Transit Lines (1961) 198 Cal. App. 2d 611, 613, 17 Cal. Rptr. 919* (dictum)).

[*Optional*] **M. Improper Use of Writ of Execution.** An action for abuse of process can be based on allegations that, despite an existing stay of execution, a writ of execution was used to levy on property for an improper purpose, such as

making it more difficult financially for the judgment debtor to prosecute an appeal (*Drum v. Bleau, Fox & Assocs. (2003) 107 Cal. App. 4th 1009, 1019-1020, 132 Cal. Rptr. 2d 602*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a general demurrer to a complaint for abuse of process where the demurrer asserts that the complaint fails to allege an improper purpose in the use of the process but plaintiff contends that the complaint alleges that process was used improperly.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Abuse of Process

Spellens v. Spellens *(1957) 49 Cal. 2d 210, 317 P.2d 613* , is discussed in *§ 147.76[3][f]*. The Supreme Court adopted the definition of abuse of process which is set forth in the Restatement of Torts. That definition is that one who uses legal process, whether criminal or civil, against another to accomplish a purpose for which it is not designed is liable to the other for the pecuniary loss caused thereby (*49 Cal. 2d 210, 231)* .

[b] Improper Purpose

Templeton Feed & Grain v. Ralston Purina Co. *(1968) 69 Cal. 2d 461, 72 Cal. Rptr. 344, 446 P.2d 152* and ***Spellens v. Spellens*** *(1957) 49 Cal. 2d 210, 317 P.2d 613* , are discussed in *§ 147.76[3][f]*. In both cases, the Supreme Court stated that the improper purpose required for abuse of process usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of process as a threat or club (*69 Cal. 2d 461, 466* ; *49 Cal. 2d 210, 232)* .

[c] Broad Interpretation of Process

Barquis v. Merchants Collection Assn. *(1972) 7 Cal. 3d 94, 101 Cal. Rptr. 745, 496 P.2d 817* , is discussed in *§ 147.76[3][d]*. In that case, the Supreme Court stated that the term "process" as used in the tort of abuse of process has never been limited to the strict sense of the term; instead, it has been interpreted broadly to encompass the entire range of procedures incident to litigation. This broad reach of the abuse of process tort can be explained historically, since the tort evolved as catch-all category to cover improper uses of the judicial machinery that did not fit within the earlier established, but narrowly circumscribed, action of malicious prosecution (*7 Cal. 3d 94, 104 n.4*).

[d] Filing Complaint for Improper Purpose

In ***Barquis v. Merchants Collection Assn.*** *(1972) 7 Cal. 3d 94, 101 Cal. Rptr. 745, 496 P.2d 817* , plaintiffs alleged that defendant collection agency had knowingly and wilfully filed actions in improper counties, pursuant to statutorily

inadequate complaints, for the purpose of impairing its adversaries' ability to defend and with the intent and effect of obtaining an increased number of default judgments. They sought injunctive relief and a nullification of past judgments, but the trial court sustained a demurrer to the complaint. The Supreme Court reversed. It held that the complaint had sufficiently alleged that defendant's conduct amounted to a tortious abuse of process which could be enjoined since alternative legal remedies were inadequate to protect the interests of the plaintiffs (*7 Cal. 3d 94, 103-108)* . It held, however, that the prior judgments were not void and could not be collaterally attacked. Therefore, it sustained the demurrer as to cause of action seeking nullification of past judgments (*7 Cal. 3d 94, 114-122)* .

[e] Excessive Attachment

In ***White Lighting Co. v. Wolfson*** *(1968) 68 Cal. 2d 336, 66 Cal. Rptr. 697, 438 P.2d 345* , plaintiff had sued defendant for money due and owing. Defendant denied the indebtedness and filed a cross complaint which included a count for abuse of process arising out of an attachment well in excess of plaintiff's claim. The trial court sustained a demurrer to this count for failure to state a cause of action as well as to the other counts of the cross complaint. The Supreme Court reversed. It held that a claim based on excessive attachment constitutes a cause of action for abuse of process rather than for malicious prosecution and such a claim may be brought in the action in which the attachment issued (*68 Cal. 2d 336, 347)* .

[f] Improper Use of Provisional Remedy of Claim and Delivery

In ***Templeton Feed & Grain v. Ralston Purina Co.*** *(1968) 69 Cal. 2d 461, 72 Cal. Rptr. 344, 446 P.2d 152* , plaintiff alleged that defendant was liable for damages for abuse of process because it had filed a claim and delivery action for possession of property which had been secured by a chattel mortgage and had caused the property to be provisionally seized. The jury awarded damages to plaintiff, and defendant appealed on the basis that there was not sufficient evidence to support the jury's verdict. The Supreme Court rejected the contention and held that there was substantial evidence from which the jury properly could have found that defendant, in procuring the seizure, knew or should have known that it was not entitled to possession of the property and that defendant had seized the property in order to force plaintiff to discharge the debt owed to defendant by another person (*69 Cal. 2d 461, 466)* .

In ***Spellens v. Spellens*** *(1957) 49 Cal. 2d 210, 317 P.2d 613* , plaintiff had commenced an action to have her Mexican marriage to defendant declared valid and sought separate maintenance. After this action was at issue and the property rights of the parties were involved, the husband brought an action against the wife to recover possession of personal property. The wife cross complained for abuse of process in the use of the provisional remedy of claim and delivery by her husband in the action for possession. The trial court determined that the husband had maliciously commenced the action knowing that the issues of the right to the property were involved in the main action and caused a claim and delivery writ to issue and be served; it awarded compensatory and punitive damages. The Supreme Court affirmed. It stated that the service of the writ, by which an automobile was seized and other property of the wife interfered with, was plainly done for the ulterior purpose of making things difficult for her so that she would drop her main action. Thus, it was like a threat, not really to obtain possession of the property which the husband claimed as his own, but to coerce the wife with regard to the main action (*49 Cal. 2d 210, 230)* . Therefore, the husband's actions with an improper purpose constituted abuse of process (*49 Cal. 2d 210, 229-232)* .

[g] Garnishment on Exempt Property

In ***Czap v. Credit Bureau of Santa Clara Valley*** *(1970) 7 Cal. App. 3d 1, 86 Cal. Rptr. 417* , plaintiff had sued for damages for abuse of process and for an injunction against a credit bureau. Plaintiff alleged that (1) the bureau had been repeatedly garnishing her wages in execution of a judgment for attorney's fees incurred earlier in a divorce action, (2) the bureau knew that most of her wages were exempt from execution, and (3) the repeated attempts to garnish her wages would jeopardize her employment and thereby had the purpose of forcing her to pay the judgment out of exempt wages in order to avoid the loss of her employment. The trial court sustained a demurrer to the complaint and denied the

application for a preliminary injunction. The court of appeal overruled the order denying the preliminary injunction and the judgment of dismissal. It held that the plaintiff had stated a cause of action for abuse of process based on the allegations that defendant knowingly garnished exempt wages for the improper purpose of jeopardizing plaintiff's employment to force her to pay the judgment from exempt wages, and therefore the trial court should reconsider the plaintiff's application for a preliminary injunction (*7 Cal. App. 3d 1, 5-7)* .

In ***Arc Inv. Co. v. Tiffith*** *(1958) 164 Cal. App. 2d Supp. 853, 330 P.2d 305* , a municipal court granted claims of exemption filed by a judgment debtor and restrained further levies on the debtor's personal earnings unless a court order was obtained first. The appellate division of the superior court affirmed the order. The court noted that successive seizures of exempt property, such as the earnings of a debtor, may give rise to an action for abuse of process and that a wrongful use made of process rightfully issued may constitute an abuse of process. Since abuse of process is a contempt of court, and since a municipal court has the inherent power to prevent abuses in the use of its process, the municipal court had jurisdiction to issue the order restraining the judgment creditor from garnishing the debtor's wages (*164 Cal. App. 2d Supp. 853, 856, 857*).

[h] Improper Use of Interrogatory

In ***Younger v. Solomon*** *(1974) 38 Cal. App. 3d 289, 113 Cal. Rptr. 113* , the trial court had dismissed a cross complaint for abuse of process after granting a motion for summary judgment by plaintiff. The abuse of process cross complaint was based on an alleged improper use of a written interrogatory in the discovery process, allegedly used to disclose and publish material calculated to injure the defendant's reputation as an attorney and to expedite his demise as a practicing lawyer.

The court of appeal reversed the judgment and the dismissal of the cross complaint. It stated that written interrogatories authorized by *Code Civ. Proc. § 2030.010 et seq.* come within the range of procedures incident to litigation and, thus, the use of an interrogatory constitutes the use of process. In addition, it could be inferred that there was an abuse of the process in that the interrogatory had the purpose of publishing the fact that a confidential complaint against defendant had been filed with the State Bar by 10 attorneys in the county charging him with professional misconduct; publishing this fact could be inferred to have been done to damage appellant's reputation as a lawyer and thereby unfairly eliminate or impede his activities as a competitor in the practice of law (*38 Cal. App. 3d 289, 297-298)* . This case is also discussed in *§ 147.77[3][a]*.

[i] Notice of Deposition for Improper Purpose

In ***Thornton v. Rhoden*** *(1966) 245 Cal. App. 2d 80, 53 Cal. Rptr. 706* , the court of appeal affirmed the granting of defendants' motion for summary judgment in an abuse of process action based on the giving of a notice that a deposition would be taken. The court noted in dictum that in a proper case an abuse of the powers which a litigant derives from the taking of a deposition on proper notice would give such a notice the status of process for the purpose of the tort abuse of process and that taking a deposition for the purpose of publishing defamatory matters might be an abuse of process. However, the action in question was barred by the statute of limitations (*245 Cal. App. 2d 80, 94-95)* .

[j] Improper Use of Contempt Order

In ***Clark Equip. Co. v. Wheat*** *(1979) 92 Cal. App. 3d 503, 154 Cal. Rptr. 874* , the cross complaint for abuse of process was based on plaintiff obtaining contempt orders against cross complainant in an action for possession of machinery. Cross complainant pleaded and proved that the contempt orders for failure to turn over certain machinery were obtained when plaintiff had knowledge that cross complainant did not have possession of the machinery. After a jury verdict for cross complainant, plaintiff appealed. The court of appeal affirmed. It held that there was evidence on which the jury could find that the contempt orders were obtained for an improper purpose and thus were an abuse of process (*92 Cal. App. 3d 503, 524-527)* .

NOTE:

In *Green v. Uccelli (1989) 207 Cal. App. 3d 1112, 1125, 255 Cal. Rptr. 315* , the court of appeal expressly held that "filing orders to show cause seeking to enforce prior court orders in a [marital] dissolution action cannot constitute a basis for independent actions for abuse of process." The court in *Green* did not distinguish, or even mention, *Clark Equipment*. The effect of *Green* on the general validity of *Clark Equipment* is therefore unclear. When the defendant's improper use of process took place in connection with a marital dissolution action, counsel should use *Clark Equipment* with caution.

[k] Improperly Obtaining Judgment and Levying Execution on Self

In ***Weisenburg v. Molina*** *(1976) 58 Cal. App. 3d 478, 129 Cal. Rptr. 813* , plaintiff was a judgment creditor of defendant and was attempting to enforce the judgment by levying on defendant's wages. Defendant prepared and filed an action against himself based on a note to a relative on which he was liable but which was not yet due. He then prepared a stipulated judgment in favor of the relative and had the judgment executed on himself in an attempt to protect himself from plaintiff's levies of execution. The jury entered a verdict for abuse of process and defendant appealed. The court of appeal affirmed. It held that there was ample evidence on which to base the judgment for abuse of process which resulted from defendant's improperly having the judgment entered and executed on himself to defeat plaintiff's rights (*58 Cal. App. 3d 478, 487-489)* .

[l] Improper Use of Appellate Process

Tellefsen v. Key Sys. Transit Lines *(1961) 198 Cal. App. 2d 611, 17 Cal. Rptr. 919* , is discussed in *§ 147.70[3][c]*. The court of appeal stated in dictum that abuse of process could be based on improper use of the appellate process in an appropriate case. However, under the relevant facts involved, defendant had done nothing more than exercise its right to appeal (*198 Cal. App. 2d 611, 613)* .

[m] Improper Use of Writ of Execution

Drum v. Bleau, Fox & Assocs. *(2003) 107 Cal. App. 4th 1009, 132 Cal. Rptr. 2d 602* , is discussed in *§ 147.77[3][b]*. In holding that the plaintiff had demonstrated a probability of prevailing on his abuse of process claim sufficient to withstand a special motion to strike under *Code Civ. Proc. § 425.16*, the court of appeal concluded that the act of levying a writ of execution when enforcement of the judgment had been stayed, the stay had been announced in open court in a defendant's presence, and a minute order had memorialized the stay, established a prima facie case of willful acts in the improper use of process (*107 Cal. App. 4th 1009, 1019)* . The court also held that the plaintiff's allegations concerning the defendants' ulterior motive of making it financially more difficult for him to prosecute an appeal were sufficient allegations to withstand a motion to strike (*107 Cal. App. 4th 1009, 1020)* .

[4] Additional Authorities

[a] Improper Purpose

In *Booker v. Rountree (2007) 155 Cal. App. 4th 1366, 66 Cal. Rptr. 3d 733* , a civil rights action was filed against the owner of property that was the site of a restaurant. The lawsuit alleged that there was no parking space set aside for disabled patrons in front of the restaurant and that the counter in the restaurant was to high to be reached from a wheelchair. After that suit had been filed, a second suit making the same allegations was filed by the same attorney representing a different plaintiff. However, the attorney waited two and a half months after filing the second action before serving the defendant with notice of that lawsuit. Without knowledge of the second suit, the property owner settled the first lawsuit by agreeing to pay $3,500 to the attorney and $2,500 to the plaintiff. After being served in the second action, the property owner cross-complained in that lawsuit for abuse of process, alleging that plaintiff in the second suit intentionally delayed service of process with the ulterior motive of obtaining a larger settlement than would be obtained had defendant known of the second claim when settling the first. The trial court refused plaintiff's motion to

strike the cross-complaint under the anti-SLAPP statute, *Code Civ. Proc. § 425.16*, and the court of appeal affirmed. The court of appeal concluded that the evidence, if believed, was sufficient to establish an abuse of process. The cross-complaint alleged that the second plaintiff, acting through his attorney, knowingly delayed serving his complaint until an identical lawsuit filed by the same attorney was settled. The evidence supported an inference that the purpose of the delay was to obtain a higher settlement than would have been achieved if the property owner was confronted with both lawsuits together. The court concluded that this evidence was sufficient to support a finding that process was used in a manner that was not proper in the regular course of prosecuting a lawsuit and was done with an ulterior motive (*155 Cal. App. 4th 1366, 1372)* .

[b] Filing Complaint for Improper Purpose

In *Yu v. Signet Bank/Va. (1999) 69 Cal. App. 4th 1377, 82 Cal. Rptr. 2d 304* , plaintiffs were California consumers who, after accepting preapproved credit cards issued by Virginia banks, had eventually accumulated delinquent accounts. The complaint included allegations of abuse of process based on the collection practices used by the banks, which included filing suit in Virginia against those California debtors who did not formerly request a change in jurisdiction in order to obtain default judgments that could then be used to support wage garnishments against the debtors. Summary judgment was granted for the defendant banks. The court of appeal reversed. The court found, first, that the default judgments obtained in Virginia were void because the Virginia courts did not have personal jurisdiction over the California consumers, and that the jurisdiction question could be raised in California because it was not litigated in Virginia (*69 Cal. App. 4th 1377, 1384-1388)* . The Court, relying on *Barquis v. Merchants Collection Assn. (1972) 7 Cal. 3d 94, 101 Cal. Rptr. 745, 496 P.2d 817* , then held that an abuse of process action could be based on the intentional filing of the collection suits in Virginia against California credit card holders with knowledge of an inadequate basis for the assertion of personal jurisdiction in Virginia and in hopes of obtaining default judgments that could be used to support improper garnishment orders and settlement leverage (*69 Cal. App. 4th 1377, 1389-1390)* .

[c] Improper Use of Interrogatory

Twyford v. Twyford (1976) 63 Cal. App. 3d 916, 134 Cal. Rptr. 145 , is discussed in *§§ 147.22[3][d]* and *147.74[3][a]*. In ruling that a cause of action for abuse of process was not stated, the court held in dicta that an action for abuse of process could be based on abuse of the discovery device of requests for admissions (*63 Cal. App. 3d 916, 923)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsTortsIntentional TortsAbuse of ProcessGeneral OverviewTortsIntentional TortsAbuse of ProcessDefensesTortsIntentional TortsAbuse of ProcessElements

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Volume 14 Chapters 140-149 LANDLORD & TENANT---to---MALICIOUS PROSECUTION
CHAPTER 147 MALICIOUS PROSECUTION AND ABUSE OF PROCESS
PART II. FORMS
B. Abuse Of Process

14-147 California Points & Authorities § 147.77

§ 147.77 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.30(a)] for Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)] for Abuse of Process--Absolute Privilege of Publication in Judicial Proceeding [Civ. Code § 47(b)] Inapplicable

[1] FORM

[*Caption. See § 147.76*].

THE DEMURRER SHOULD BE OVERRULED BECAUSE THE ALLEGATIONS IN THE COMPLAINT DO NOT ALLEGE CONDUCT THAT IS PRIVILEGED UNDER THE JUDICIAL PRIVILEGE OF *CIVIL CODE SECTION 47(b)*.

Publication Not Related to Proceeding. A complaint states a cause of action for abuse of process when it is based on a publication made in a judicial proceeding if the publication is not related to the proceeding and was made for another purpose (*Younger v. Solomon (1974) 38 Cal. App. 3d 289, 300-302, 113 Cal. Rptr. 113*).

[*Optional*] B. **Non-Communicative Conduct Not Protected by Judicial Privilege.** The judicial privilege of *Civil Code Section 47(b)* does not protect conduct that is non-communicative in nature (*Booker v. Rountree (2007) 155 Cal. App. 4th 1366, 1373, 66 Cal. Rptr. 3d 733*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a demurrer to a complaint for abuse of process where the demurrer asserts that the conduct on which the action is based is absolutely privileged as published in a judicial proceeding.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, these points may be submitted in opposition to a demurrer supported by the points in *§ 147.74*.

[3] Discussion of Authorities

[a] Publication Not Related to Proceeding

Younger v. Solomon *(1974) 38 Cal. App. 3d 289, 113 Cal. Rptr. 113* , is discussed in *§ 147.76[3][h]*. In response to the contention that the publication of the complaint to the State Bar as part of the interrogatories was privileged as a publication in a judicial proceeding under former Civ. Code § 47(2) [*see now Civ. Code § 47(b)*], the court of appeal held that the privilege only applies when the publication has some reference to the subject matter of the pending litigation (*38 Cal. App. 3d 289, 300-301)* . It then held that the publication of the fact that a complaint has been made to the State Bar about plaintiff had no relation to the complaint in the action, which was based on intentional infliction of emotional distress for ambulance chasing operations, insofar as the complaint to the bar was not related to the events at issue (*38 Cal. App. 3d 289, 300-302)* . It concluded that the privilege was thus not applicable and a cause of action was stated (*38 Cal. App. 3d 289, 301-302)* .

[b] Non-Communicative Conduct Not Protected by Judicial Privilege

The factual and procedural background of *Booker v. Rountree (2007) 155 Cal. App. 4th 1366, 66 Cal. Rptr. 3d 733* , is described in § 147.76[4][a]. Plaintiff argued that the abuse of process cross-complaint must fail because the underlying conduct was protected by the judicial privilege of *Civ. Code § 47(b)*. The court of appeal disagreed. The court concluded that the gravamen of the cross-complaint was the failure to serve the underlying action until a prior suit had settled. As that delay involved no statements, representations, or any assertive conduct that was a speech substitute, there was no communicative conduct involved in that delay. The court held that such passive inaction was not protected by the judicial privilege (*155 Cal. App. 4th 1366, 1373)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsTortsIntentional TortsAbuse of ProcessGeneral OverviewTortsIntentional TortsAbuse of ProcessDefensesTortsIntentional TortsAbuse of ProcessElements

California Points & Authorities

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Chapters 148RESERVED

California Points & Authorities

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
CHAPTER 150 MANDATE AND PROHIBITION

15-150 California Points & Authorities 150.syn

§ 150.syn Synopsis to Chapter 150: MANDATE AND PROHIBITION

§ 150.01 Scope of Chapter

§ 150.02 Governing Law

§ 150.03 Function and Scope of Prerogative Writs

§ 150.04 Mandate and Prohibition Compared

§ 150.05 Administrative Mandate Distinguished

§ 150.06 Lack of Adequate Legal Remedy Requirement

§ 150.07 Mislabeled and Alternative Petitions

§ 150.08 Use of Points and Authorities to Support or Oppose Writ Petition

[1] In Appellate Court

[2] In Superior Court

§ 150.09 Using the Forms in This Chapter

[1] In Support of Writ Petition

[2] Opposition to Petition

§ 150.10 Related Pleading and Practice Chapters

§ 150.11 Related Points and Authorities Chapters

§§ 150.12-150.29 [Reserved]

§ 150.30 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Skeletal Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Establishing Elements Essential to Issuance of Writ of Mandate

[c] Related Pleading and Practice Forms

[d] Opposing Memoranda

§ 150.31 Supporting Contention That Writ of Mandate Is Necessary to Compel Action by Lower Court--Duty of Court to Assume Jurisdiction

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Duty of Lower Court to Assume Jurisdiction

[b] Duty of Lower Court to Hear and Determine Merits of Matters Within Its Jurisdiction

[4] Additional Authorities

[a] Duty of Lower Court to Hear and Determine Merits of Matters Within Its Jurisdiction

§ 150.32 Supporting Contention That Writ of Mandate Is Necessary to Compel Action by Lower Court--Duty of Court to Exercise Discretion

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Duty of Lower Court to Exercise Its Discretion

[4] Additional Authorities

[a] Duty of Lower Court to Exercise Its Discretion

§ 150.33 Supporting Contention That Writ of Mandate Is Necessary to Compel Action by Lower Court--Duty of Court to Exercise Discretion in Particular Manner

[1] FORM

[2] Comments

[a] Use of Form

[b] Compelling Trial Court to Correct Abuse of Discretion

[c] Writ of Prohibition Compared

[d] Related Pleading and Practice Forms

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Trial Court Can Exercise Discretion in Only One Way

[b] Trial Court Abused Its Discretion

[4] Additional Authorities

[a] Trial Court Can Exercise Discretion in Only One Way

§ 150.34 Supporting Contention That Writ of Mandate Is Necessary to Compel Action by Lower Court--Duty of Court to Recall and Quash Writ of Execution

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Quashing Writ of Execution

§ 150.35 Supporting Contention That Writ of Mandate Is Necessary to Compel Action by Lower Court--Duty of Court to Prepare Settled Statement for Record on Appeal

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Duty to Settle Statement on Appeal

§ 150.36 Supporting Contention That Writ of Mandate Is Necessary to Compel Action by Lower Court--Duty of Court to Initiate Contempt Proceedings for Disobedience of Court Order

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Contempt Proceedings

§ 150.37 Supporting Contention That Writ of Mandate Is Necessary to Compel Action by Court Clerk--Duty of Clerk to Enter Default Judgment [Code Civ. Proc. § 585(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Entry of Default Judgment

[4] Additional Authorities

[a] Entry of Default

§ 150.38 Supporting Contention That Writ of Mandate Is Necessary to Compel Action by Court Clerk--Duty of Clerk to Issue Writ of Execution

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Writ of Execution

§ 150.39 Supporting Contention That Writ of Mandate Is Necessary to Compel Action by Public Entity or Official--Duty of Public Entity or Official to Perform Mandatory Ministerial Act

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Performance of Ministerial Duty

[b] Ministerial Act Defined

[c] Duty Imposed by Statute

[d] Agency Rules

[e] Charter-Prescribed Duties

[f] Building Permit

[g] Elections

[h] Initiatives

[i] Forfeiture of Property

[4] Additional Authorities

[a] Agency Rules

[b] Building Permit

[c] Elections

[d] Initiative

§ 150.40 Supporting Contention That Writ of Mandate Is Necessary to Compel Action by Public Entity or Official--Duty of Public Entity or Official to Instate Petitioner to Office or Employment

[1] FORM

[2] Comments

[a] Use of Form

[b] Administrative Mandamus Compared

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Instatement to Office

[b] Instatement to Employment

§ 150.41 Supporting Contention That Writ of Mandate Is Necessary to Compel Action by Public Entity or Official--Duty of Public Entity or Official to Refrain From Performing Ministerial Act in Unlawful Manner

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Restraining Unlawful Act

[4] Additional Authorities

[a] Restraining Unlawful Act

§ 150.42 Supporting Contention That Writ of Mandate Is Necessary to Compel Action by Public Entity or Official--Duty of Public Entity or Official to Exercise Discretion

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Exercise of Discretion

[4] Additional Authorities

[a] Exercise of Discretion

§ 150.43 Supporting Contention That Writ of Mandate Is Necessary to Compel Action by Public Entity or Official--Duty of Public Entity or Official to Exercise Discretion in Particular Manner

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Abuse of Discretion

[b] Exercise of Discretion in Particular Manner

[c] Failure to Exercise Discretion After Reasonable Time

[4] Additional Authorities

[a] Abuse of Discretion

§ 150.44 Supporting Contention That Writ of Mandate Is Necessary to Compel Action by Private Organization

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

[3] Discussion of Authorities

[a] Arbitrary Refusal to Act

[b] Reinstatement to Membership

[c] Admission to Membership

[d] Enforcing Right of Stockholder

[e] Membership in Labor Union

[f] Failure to Follow Prescribed Procedures

[4] Additional Authorities

[a] Enforcing Right of Corporate Shareholder

[b] Membership in Labor Union

§ 150.45 Supporting Contention That Writ of Mandate Is Necessary to Compel Action by Lower Court--Direct Appeal Is Inadequate Legal Remedy

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Mandate Proper When Direct Appeal Is Inadequate Legal Remedy

§ 150.46 Supporting Contention That Writ of Mandate Is Necessary to Compel Action by Lower Court--Court Violated Appellate Court's Instructions

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Mandate Proper When Lower Court Violated Appellate Court's Instructions

§ 150.47 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Skeletal Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Procedure for Opposing Petition

[c] Opposition to Petition

[d] Related Pleading and Practice Chapters

[3] Discussion of Authorities

[a] Objection by Demurrer

§ 150.48 Opposing Contention That Writ of Mandate Is Necessary to Compel Action by Lower Court--Court Did Not Abuse Its Discretion

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] No Abuse of Discretion

§ 150.49 Opposing Contention That Writ of Mandate Is Necessary to Compel Action by Public Entity or Officer--Act to Be Compelled Is Discretionary, Not Ministerial

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Act Within Discretion of Public Entity or Official

[b] Legislative Act

[4] Additional Authorities

[a] Act Within Discretion of Public Entity or Official Exercise of Discretion

[b] Legislative Act

§ 150.50 Opposing Contention That Writ of Mandate Is Necessary to Compel Action by Public Entity or Officer--Act to Be Compelled Is Future Act

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Future Acts

§ 150.51 Opposing Contention That Writ of Mandate Is Necessary to Compel Action by Public Entity or Officer--Act to Be Compelled Is Unlawful

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Performance of Unlawful Act May Not Be Compelled

[4] Additional Authorities

[a] Performance of Unlawful Act May Not Be Compelled

§ 150.52 Opposing Contention That Writ of Mandate Is Necessary to Compel Action by Public Entity or Officer--Petitioner Failed to Exhaust Administrative Remedies

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Failure to Exhaust Administrative Remedies

§§ 150.53-150.69 [Reserved]

§ 150.70 Supporting Petition for Writ of Prohibition [Code Civ. Proc. §§ 1102, 1103]--Skeletal Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Establishing Elements Essential to Issuance of Writ of Prohibition

[c] Writ of Prohibition Against Corporation, Board, or Person

[d] Related Pleading and Practice Forms

[e] Opposing Memoranda

§ 150.71 Supporting Contention That Writ of Prohibition Is Necessary to Arrest Action by Lower Court That Is Without or in Excess of Jurisdiction--Another Court Has Exclusive Jurisdiction

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Excess of Jurisdiction

[b] Another Court Has Exclusive Jurisdiction

[c] Administrative Agency Has Exclusive Jurisdiction

[4] Additional Authorities

[a] Another Court Has Exclusive Jurisdiction

[b] Administrative Agency Has Exclusive Jurisdiction

§ 150.72 Supporting Contention That Writ of Prohibition Is Necessary to Arrest Action by Lower Court That Is Without or in Excess of Jurisdiction--Court Action Contrary to Prescribed Procedure Is in Excess of Jurisdiction

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Action Contrary to Prescribed Procedure

§ 150.73 Supporting Contention That Writ of Prohibition Is Necessary to Arrest Action by Lower Court That Is Without or in Excess of Jurisdiction--Court Refuses to Follow Stare Decisis

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Refusal to Follow Stare Decisis

§ 150.74 Supporting Contention That Writ of Prohibition Is Necessary to Arrest Action by Lower Court That Is Without or in Excess of Jurisdiction--Court Enforced Statute or Ordinance Unconstitutional on Its Face

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Enforcement of Unconstitutional Statute or Ordinance

[4] Additional Authorities

[a] Enforcement of Unconstitutional Statute or Ordinance

§ 150.75 Supporting Contention That Writ of Prohibition Is Necessary to Arrest Action by Lower Court That Is Without or in Excess of Jurisdiction--Court Improperly Granted or Denied Jury Trial

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Improper Grant of Jury Trial

[b] Improper Denial of Jury Trial

[4] Additional Authorities

[a] Improper Denial of Jury Trial

§ 150.76 Supporting Contention That Writ of Prohibition Is Necessary to Arrest Action by Lower Court That Is Without or in Excess of Jurisdiction--Court Enjoined Enactment or Enforcement of Valid Statute or Ordinance

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Injunction Against Valid Statute or Ordinance

§ 150.77 Supporting Contention That Writ of Prohibition Is Necessary to Arrest Action by Lower Court That Is Without or in Excess of Jurisdiction--Court Issued Unconstitutional Preliminary Injunction

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Unconstitutional Injunction

§ 150.78 Opposing Petition for Writ of Prohibition [Code Civ. Proc. §§ 1102, 1103]--Skeletal Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Procedure for Opposing Petition

[c] Opposition to Petition

[d] Related Pleading and Practice Chapters

§ 150.79 Opposing Contention That Writ of Prohibition Is Necessary to Arrest Action by Lower Court That Is Without or in Excess of Jurisdiction--Act Is Not Judicial

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Judicial Action Requirement

[b] Ministerial Act Not Subject to Prohibition

[c] Act of Arbitrator

[d] Act of Administrative Agency

[4] Additional Authorities

[a] Judicial Action Requirement

§ 150.80 Opposing Contention That Writ of Prohibition Is Necessary to Arrest Action by Lower Court That Is Without or in Excess of Jurisdiction--Mere Error Is Not Excess of Jurisdiction

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Mere Error Not Sufficient

[4] Additional Authorities

[a] Mere Error Not Sufficient

§ 150.81 Opposing Contention That Writ of Prohibition Is Necessary to Arrest Action by Lower Court That Is Without or in Excess of Jurisdiction--Judicial Act Has Been Completed

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Judicial Action Completed

[b] Prohibition Not Proper After Final Judgment

§ 150.82 Opposing Contention That Writ of Prohibition Is Necessary to Arrest Action by Lower Court That Is Without or in Excess of Jurisdiction--Act Is Not Threatened

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Action Not Threatened

§ 150.83 Opposing Contention That Writ of Prohibition Is Necessary to Arrest Action by Lower Court That Is Without or in Excess of Jurisdiction--Jurisdictional Determination Depends on Unresolved Question of Fact

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Factual Issue to Be Decided

[4] Additional Authorities

[a] Factual Issue to Be Decided

§§ 150.84-150.119 [Reserved]

§ 150.120 Supporting Contention That Appropriate Writ May Be Issued When Petition Seeks Both Mandate and Prohibition

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Court Should Issue Writ That Is Justified by Allegations in Petition

[4] Additional Authorities

[a] Court Should Issue Writ That Is Justified by Allegations in Petition

§ 150.121 Supporting Contention That Issuance of Peremptory Writ in First Instance Is Justified

[1] FORM

[2] Comments

[a] Use of Form

[b] Peremptory Writ in First Instance Defined

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Issuance of Peremptory Writ in First Instance

[b] Trial Court Provided Notice and Opportunity to Be Heard in Response to Suggestive Palma Notice

§§ 150.122-150.139 [Reserved]

§ 150.140 Supporting Contention That Petitioner Is Beneficially Interested--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Petitioner Need Not Be Party to Lower Court Proceeding

[b] Special Interest or Right

[c] Enforcement of Public Duty

[4] Additional Authorities

[a] Petitioner Need Not Be Party to Lower Court Proceeding

[b] Special Interest or Right

[c] Enforcement of Public Duty

§ 150.141 Supporting Contention That Petitioner Is Beneficially Interested--Petitioner Is Taxpayer in Matter Relating to Taxation

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Status of Taxpayer in Matter Related to Taxation

§ 150.142 Supporting Contention That Petitioner Is Beneficially Interested--Petitioner May Suffer Harm From Environmental Effects of Challenged Action

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Environmental Harm

§ 150.143 Supporting Contention That Petitioner Is Beneficially Interested--Petitioner Is Organization With Beneficially Interested Members

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Representations by Organization With Beneficially Interested Members

[4] Additional Authorities

[a] Representation by Organization With Beneficially Interested Members

§ 150.144 Opposing Contention That Petitioner Is Beneficially Interested--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] No Beneficial Interest

[4] Additional Authorities

[a] No Beneficial Interest

§§ 150.145-150.159 [Reserved]

§ 150.160 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Discretionary Determination

§ 150.161 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--Public Interest Requires Prompt Resolution

[1] FORM

[2] Comments

[a] Use of Form

[b] Original Filing in Appellate Court

[c] Related Pleading and Practice Forms

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Public Interest Requires Prompt Resolution

[b] Original Jurisdiction of Appellate Court

[c] Public Entity Immunity Is Matter of Public Interest

[d] Legal Existence of Public Corporation Is Matter of Public Interest

[e] Right to Exercise Power of Eminent Domain Is Matter of Public Interest

[f] Enforcement of Law Is Matter of Public Interest

[g] Certification of Class is Matter of Public Interest

[4] Additional Authorities

[a] Public Interest Requires Prompt Resolution

[b] Public Entity Immunity as Matter of Public Interest

§ 150.162 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--Question Is One of First Impression and of General Importance to Bench and Bar

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Issues Presented of First Impression and of General Importance

§ 150.163 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--Similar Lawsuits Are Pending and No Case Law Exists on Issue Presented by Petitioner

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Similar Lawsuits Pending

§ 150.164 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--Petitioner Cannot Bring Action Against Respondent

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] No Grounds for Action Against Respondent

[b] Availability of Declaratory Relief Not Determinative

§ 150.165 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--Appeal Is Inadequate Remedy to Protect Petitioner's Substantial Rights--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Appeal Is Inadequate Remedy

[b] Prejudice From Delay

[c] Review by Extraordinary Writ May Be Proper When It Will Not Halt Ordinary Progress of Action

[4] Additional Authorities

[a] Prejudice From Delay

§ 150.166 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--Appeal Is Inadequate Remedy to Protect Petitioner's Substantial Rights--Review of Order Denying Leave to Amend or File Pleading

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] No Opportunity to Plead Cause of Action or Defense

[b] Amendment of Complaint

[c] Filing of Cross Complaint

[d] Amendment of Answer

[4] Additional Authorities

[a] Amendment of Complaint

§ 150.167 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--Appeal Is Inadequate Remedy to Protect Petitioner's Substantial Rights--Review of Order Granting Motion to Strike

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Motion to Strike

[b] Absolute Defense

[c] Entire Answer Stricken

[4] Additional Authorities

[a] Motion to Strike

§ 150.168 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--Appeal Is Inadequate Remedy to Protect Petitioner's Substantial Rights--Review of Order Denying Motion to Strike--Claim for Unobtainable Relief

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Motion to Strike Claim for Unobtainable Relief

§ 150.169 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of

Law--Appeal Is Inadequate Remedy to Protect Petitioner's Substantial Rights--Review of Order Sustaining or Overruling Demurrer

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Demurrer Sustained

[b] Demurrer Overruled

[4] Additional Authorities

[a] Demurrer Sustained

[b] Demurrer Overruled

§ 150.170 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--Appeal Is Inadequate Remedy to Protect Petitioner's Substantial Rights--Review of Order Denying Motion to Quash Service for Lack of Personal Jurisdiction or to Stay or Dismiss Action on Ground of Inconvenient Forum or to Dismiss for Delay in Prosecution [Code Civ. Proc. § 418.10(a), (c)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Time to File Petition

[c] Related Pleading and Practice Forms

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Writ of Mandate Authorized

§ 150.171 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--Appeal Is Inadequate Remedy to Protect Petitioner's Substantial Rights--Review of Superior Court Order Determining Venue [Code Civ. Proc. § 400]

[1] FORM

[2] Comments

[a] Use of Form

[b] Time to File Petition

[c] Related Pleading and Practice Forms

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Writ of Mandate Authorized

§ 150.172 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--Appeal Is Inadequate Remedy to Protect Petitioner's Substantial Rights--Review of Order Consolidating Actions

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Consolidation of Actions

§ 150.173 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--Appeal Is Inadequate Remedy to Protect Petitioner's Substantial Rights--Review of Order Denying Class Certification

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Order Is Not Appealable

[b] Inordinate Expense of Trial

§ 150.174 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of

Law--Appeal Is Inadequate Remedy to Protect Petitioner's Substantial Rights--Review of Order Granting Preliminary Injunction

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Exercise of Petitioner's Rights Enjoined

[4] Additional Authorities

[a] Exercise of Petitioner's Rights Enjoined

§ 150.175 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--Appeal Is Inadequate Remedy to Protect Petitioner's Substantial Rights--Review of Order Granting Partial Summary Judgment or Summary Adjudication of Issues [Code Civ. Proc. § 437c(m)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Time for Filing Petition

[c] Related Pleading and Practice Forms

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Substantial Portion of Case Will Not Be Tried on Merits

[b] Partial Summary Judgment on Issue of Damages

[c] Summary Judgment Against One Party Only

§ 150.176 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--Appeal Is Inadequate Remedy to Protect Petitioner's Substantial Rights--Review of Order Denying Summary Judgment or Summary Adjudication of Issues [Code Civ. Proc. § 437c(m)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Time for Filing Petition

[c] Related Pleading and Practice Forms

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Denial of Summary Adjudication

[b] Denial of Summary Judgment

[c] Liberal Use of Writs

[d] Long and Expensive Trial

§ 150.177 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--Appeal Is Inadequate Remedy to Protect Petitioner's Substantial Rights--Review of Order Denying Relief From Waiver of Jury Trial

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Review of Denial of Waiver of Jury Trial

§ 150.178 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--Appeal Is Inadequate Remedy to Protect Petitioner's Substantial Rights--Review of Order Denying Dismissal for Delay in Prosecution

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Denial of Motion to Dismiss for Delay in Prosecution

[b] Failure to Serve and Return Summons

[c] Failure to Bring Case to Trial

[d] Failure to Bring Case to Trial After Remand

§ 150.179 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--Appeal Is Inadequate Remedy to Protect Petitioner's Substantial Rights--Review of Erroneous Refusal to Enter or Erroneous Entry of Default Judgment

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Refusal to Enter Default Judgment

[b] Entry of Default Judgment

§ 150.180 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--Appeal Is Inadequate Remedy to Protect Petitioner's Substantial Rights--Review of Order or Judgment When Petitioner Cannot Post Stay Bond

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Petitioner Cannot Post Stay Bond

[4] Additional Authorities

[a] Petitioner Cannot Post Stay Bond

§ 150.181 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of

Law--Appeal Is Inadequate Remedy to Protect Petitioner's Substantial Rights--Review of Order Expunging Lis Pendens [Code Civ. Proc. § 405.39]

[1] FORM

[2] Comments

[a] Use of Form

[b] Time to File Petition

[c] Related Pleading and Practice Forms

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Writ of Mandate Authorized

§ 150.182 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--Appeal Is Inadequate Remedy to Protect Petitioner's Substantial Rights--Review of Order in Coordination Proceeding [Code Civ. Proc. § 404.6]

[1] FORM

[2] Comments

[a] Use of Form

[b] Time to File Petition

[c] Related Pleading and Practice Forms

[d] Opposing Memoranda

§ 150.183 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--Appeal Is Inadequate Remedy to Protect Petitioner's Substantial Rights--Review of Order in Probate Proceeding

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Order in Probate Proceeding

§ 150.184 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--Appeal Is Inadequate Remedy to Protect Petitioner's Substantial Rights--Review of Order Denying Discovery

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Order Denying Discovery

§ 150.185 Opposing Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--Petitioner's Right to Appeal Is Adequate Remedy

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Doubts Resolved in Favor of Denial

[b] Direct Appeal

[c] Enforcement of Judgment or Order Has Been Stayed and Supersedeas Available

[d] Factors for Consideration When Petitioner Can Appeal From Eventual Judgment

[e] Time and Expense of Appeal

[4] Additional Authorities

[a] Direct Appeal

[b] Time and Expense of Appeal

[c] Factors for Consideration When Petitioner Can Appeal From Eventual Judgment

§ 150.186 Opposing Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--Petitioner's Right to Petition for Writ in Lower Court Is Adequate Remedy

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Failure to Seek Writ in Lower Court

[4] Additional Authorities

[a] Failure to Seek Writ in Lower Court

§§ 150.187-150.199 [Reserved]

§ 150.200 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] or Prohibition [Code Civ. Proc. §§ 1102, 1103]--Petitioner Failed to Request Action or Raise Objection in Lower Court

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Relief Not Requested Below

[b] Relief Requested But Court Has Not Ruled

[c] Petitioner Could Have Intervened

[4] Additional Authorities

[a] Relief Not Requested Below

§ 150.201 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] or Prohibition [Code Civ. Proc. §§ 1102, 1103]--Petitioner Is Guilty of Laches

[1] FORM

[2] Comments

[a] Use of Form

[b] Establishing the Defense of Laches

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Laches

§ 150.202 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] or Prohibition [Code Civ. Proc. §§ 1102, 1103]--Petitioner Is Guilty of Unclean Hands

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Unclean Hands

§ 150.203 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] or Prohibition [Code Civ. Proc. §§ 1102, 1103]--Ruling on Prior Petition Is Res Judicata

[1] FORM

[2] Comments

[a] Use of Form

[b] Summary Denial of Prior Petition Bars Relief

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Prior Denial Is Res Judicata

§ 150.204 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] or Prohibition [Code Civ. Proc. §§ 1102, 1103]--Petition Raises Issue That Is Moot

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Mootness

[b] Compliance With Alternative Writ

[c] Useful Purpose Not Served

§ 150.205 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] or Prohibition [Code Civ. Proc. §§ 1102, 1103]--Lapse of Statute of Limitations or Statutory Period for Filing Petition

[1] FORM

[2] Comments

[a] Use of Form

[b] Lapse of Statute of Limitations

[c] Lapse of Express Statutory Period for Filing Petition

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Lapse of Statute of Limitations

[b] Applicable Limitation Period

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15-150 California Points & Authorities § 150.01

§ 150.01 Scope of Chapter

This chapter includes forms of memoranda for use in supporting [*see §§ 150.30*-150.46] and opposing [*see §§ 150.47*-150.152] petitions for writs of mandate. It also includes memoranda for use in supporting [*see §§ 150.70*-150.77] and opposing [*see §§ 150.78*-15.83] petitions for writs of prohibition. The chapter also includes forms of memoranda relating to issues that are common to both writs, which may be used to support [*see §§ 150.120*, *150.121*, *150.140*-150.143, *150.160*-150.184] and oppose [*see §§ 150.144*, *150.185*, *150.186*, *150.200*-150.205] a petition for writ of mandate, prohibition, or both.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityAdequate Remedy at LawCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsProhibition

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15-150 California Points & Authorities § 150.02

§ 150.02 Governing Law

Proceedings for writ of mandate and writ of prohibition are governed generally by *Cal. Const., art. VI, § 10, Code Civ. Proc. §§ 1063, 1064, 1084*-1110b, and, in appellate courts, *Cal. Rules of Ct., Rules 8.485-8.493*. Local appellate or superior court rules may also affect writ proceedings [*see, e.g.*, Local Rules of the Courts of Appeal, First App. Dist. Policy Statement A; Los Angeles Co. Super. Ct. Rules, Rules 7.2(b)(7), 7.6, 7.7].

Except as otherwise provided in *Code Civ. Proc. §§ 1084-1110b*, the provisions of the Code of Civil Procedure governing civil actions generally (*Code Civ. Proc. § 307 et seq.*) apply to and constitute the rules of practice in mandate and prohibition proceedings [*Code Civ. Proc. § 1109*]. The provisions of *Code Civ. Proc. § 307 et seq.* relating to new trials and appeals also apply to mandate and prohibition proceedings, except to the extent that they are inconsistent with the provisions of *Code Civ. Proc. §§ 1084-1110b* [*Code Civ. Proc. § 1110*].

Similarly, the civil law and motion rules for trial courts, *Cal. Rules of 3.1100* et seq., apply to proceedings for a writ of mandate or prohibition in superior courts [*see Cal. Rules of Ct., Rules 3.1100, 3.1103(a)(2)*].

In addition, a number of statutes expressly authorize the use of extraordinary writs, usually mandate, to review certain types of orders or judgments [*see, e.g., Code Civ. Proc. §§ 418.10(c)* (denial of motion to quash service), 437c(m) (denial of summary judgment)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityAdequate Remedy at LawCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsProhibitionGovernmentsCourtsRule Application & Interpretation

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15-150 California Points & Authorities § 150.03

§ 150.03 Function and Scope of Prerogative Writs

Courts and commentators have characterized writs of mandate and prohibition as "prerogative writs" [*see, e.g., American Mut. Liab. Ins. Co. v. Superior Court (1974) 38 Cal. App. 3d 579, 588, 113 Cal. Rptr. 561]* , that is, a court order requiring the performance of a specified act, or giving authority to have it done, issued by the exercise of the extraordinary power of the court, on proper cause shown [Black's Law Dictionary (5th ed. 1979) at 1441, 1442].

Prerogative writs are utilized as a means for reviewing judicial, nonjudicial, and administrative rulings [*see Code Civ. Proc. §§ 1085, 1103*]. They are available only in extraordinary circumstances and courts are vested with discretion to accept or reject requests for them [*see American Mut. Liab. Ins. Co. v. Superior Court (1974) 38 Cal. App. 3d 579, 588-589, 113 Cal. Rptr. 561* ; *Renken v. Compton City School Dist. (1962) 207 Cal. App. 2d 106, 112, 24 Cal. Rptr. 347]* .

The three major prerogative writs available in California civil proceedings are:

> (1) Writs of mandate or mandamus, which may issue to compel performance of a ministerial act or mandatory duty when there is a clear legal right in the person seeking relief, a corresponding duty in the defendant, and a lack of any other adequate remedy [*see Code Civ. Proc. §§ 1085, 1086*];
>
> (2) Writs of prohibition, which may issue to prevent an inferior court or tribunal possessing judicial or quasi-judicial powers from exercising its jurisdiction in matters over which it lacks sufficient jurisdiction [*see Code Civ. Proc. §§ 1102, 1103*]; and
>
> (3) Writs of review (or certiorari), which may issue to review miscellaneous actions of inferior tribunals, boards, and officers exercising judicial functions when these bodies have exceeded their jurisdiction [*see Code Civ. Proc. §§ 1068, 1074*].

Of the three prerogative writs, writs of mandate and prohibition are by far the most commonly used in California civil proceedings. For discussion comparing these writs, see *§ 150.04*. For discussion and forms relating to the less commonly used writ of review, see Ch. 205, *Review (Certiorari), Writ of.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityAdequate Remedy at LawCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsProhibition

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15-150 California Points & Authorities § 150.04

§ 150.04 Mandate and Prohibition Compared

Mandate and prohibition are similar in several basic respects. Both remedies are prerogative writs [*see § 150.03*], issuable by any court (except a municipal or justice court) on the verified petition of the party beneficially interested when there is no plain, speedy, and adequate remedy in the ordinary course of law [*Code Civ. Proc. §§ 1085, 1086, 1103*]. The writs may be issued and directed to "an inferior tribunal, or to a corporation, board, or person" [*Code Civ. Proc. §§ 1085, 1103*]. To a large degree, the procedural requirements for the writs overlap [*see Code Civ. Proc § 1105*], and, in some cases, the writs can be used interchangeably [*see, e.g., Rio Del Mar. etc. Club v. Superior Court (1948) 84 Cal. App. 2d 214, 217, 190 P.2d 295* (mandamus or prohibition appropriate to secure meritorious dismissal denied by trial court)].

Mandate and prohibition differ in respect to what they can compel the ordered party (known as the "respondent") to do. Generally speaking, mandate is used to compel ministerial action, while prohibition is used to restrain or prevent judicial action. Mandate can compel a respondent to perform an act that the law specially enjoins, or compel the admission of a party to the use and enjoyment of a right or office to which he or she is entitled, and from which he or she is unlawfully precluded [*Code Civ. Proc. § 1085*]. Prohibition, on the other hand, can arrest the proceedings of a respondent (typically a court) exercising judicial functions when the proceedings are without or in excess of the respondent's jurisdiction [*Code Civ. Proc. § 1102*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityAdequate Remedy at LawCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsProhibition

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15-150 California Points & Authorities § 150.05

§ 150.05 Administrative Mandate Distinguished

The writ of administrative mandate is a specialized writ of mandate that is used to obtain review of administrative decisions [*Code Civ. Proc. § 1094.5(a)*]. The writ is only available when conditions specified in *Code Civ. Proc. § 1094.5* are met [*Keeler v. Superior Court (1956) 46 Cal. 2d 596, 599, 297 P.2d 967]* . That is, there must be a final decision by an administrative agency that has discretionary authority to make findings of fact and that was required by law to hold a hearing at which evidence was required by law to be compiled in support of the agency's findings of fact [*see Code Civ. Proc. § 1094.5(a)*; *Environmental Protection and Information Center v. California Department of Forestry and Fire Protection (2008) 44 Cal. 4th 459, 519-520, 80 Cal. Rptr. 3d 28, 187 P.3d 888* (findings required in administrative mandate but not traditional mandate); *O.W.L. Foundation v. City of Rohnert Park (2008) 168 Cal. App. 4th 568, 585, 86 Cal. Rptr. 3d 1* (traditional mandamus appropriate when city chose to hold public hearing although no hearing legally required); *Blue Cross of California v. State Department of Health Services (2007) 153 Cal. App. 4th 322, 329, 62 Cal. Rptr. 3d 772* ;]. Additionally, the petitioner for the writ must be beneficially interested in issuance of the writ and have no plain and speedy remedy in the ordinary course of law [*see Code Civ. Proc. § 1086*].

The choice of remedy between regular and administrative mandate depends to a large degree on whether the agency action is adjudicatory or legislative in nature [*Mileikowsky v. Tenet Healthsystem (2005) 128 Cal. App. 4th 531, 554-555, 27 Cal. Rptr. 3d 171* (writ of mandate proper to determine whether hearing officer had authority to suspend hearing as sanction); *Tielsch v. City of Anaheim (1984) 160 Cal. App. 3d 570, 574, 206 Cal. Rptr. 738* ; *Garrick Development Co. v. Hayward Unified School Dist. (1992) 3 Cal. App. 4th 320, 327-328, 4 Cal. Rptr. 2d 897]* . Generally speaking, a legislative action is the formulation of a rule to be applied to all future cases, while an adjudicatory action involves the actual application of such a rule to a specific set of existing facts [*Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 35 n.2, 112 Cal. Rptr. 805, 520 P.2d 29* ; *Tielsch v. City of Anaheim (1984) 160 Cal. App. 3d 570, 574, 206 Cal. Rptr. 738]* . If the statutory requirements for relief are otherwise met, acts by an administrative body that are of an adjudicatory nature typically are reviewable under administrative mandate, while acts by such a body that are of a legislative or quasi-legislative nature are reviewable under regular, or traditional, mandate [*see City of Arcadia v. State Water Res. Control Bd. (2006) 135 Cal. App. 4th 1392, 1408, 38 Cal. Rptr. 3d 373* ; *Western States Petroleum Assn. v. South Coast Air Quality Management Dist. (2006) 136 Cal. App. 4th 1012, 1018, 39 Cal. Rptr. 3d 354* ; *Carrancho v. California Air Resources Board (2003) 111 Cal. App. 4th 1255, 1265-1267, 4 Cal. Rptr. 3d 536* (variances in review authorized in traditional mandamus and

administrative mandate); *Langsam v. City of Sausalito (1987) 190 Cal. App. 3d 871, 879, 235 Cal. Rptr. 672* ; *Santa Ana Tustin Community Hospital v. Board of Supervisors (1982) 127 Cal. App. 3d 644, 653, 179 Cal. Rptr. 620]* .

Administrative mandate is not available if the underlying administrative order or decision did not result from a proceeding in which a hearing was required by law and at which evidence was required to be taken [*Taylor Bus Service, Inc. v. San Diego Bd. of Education (1987) 195 Cal. App. 3d 1331, 1339, 241 Cal. Rptr. 379]* .

For further discussion and forms relating to writs of administrative mandate, see Ch. 195, *Public Administrative Law* [*see also* California Forms of Pleading and Practice, Ch. 474C, *Procedures in Reviewing Agency Decisions* (Matthew Bender)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingRule Application & InterpretationGeneral OverviewCivil ProcedureEquityAdequate Remedy at LawCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsProhibition

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PART I. INTRODUCTION

15-150 California Points & Authorities § 150.06

§ 150.06 Lack of Adequate Legal Remedy Requirement

Perhaps the most significant burden on a petitioner for either a writ of mandate or a writ of prohibition is to show that he or she has no other plain, speedy, and adequate remedy in the ordinary course of law [*Code Civ. Proc. §§ 1086, 1103*; *Barratt American, Inc. v. City of Rancho Cucamonga (2005) 37 Cal. 4th 685, 705, 37 Cal. Rptr. 3d 149, 124 P.3d 719* ; *Phelan v. Superior Court (1950) 35 Cal. 2d 363, 366, 217 P.2d 951* ; *but see Smith v. Superior Court (1996) 41 Cal. App. 4th 1014, 1020-1022, 49 Cal. Rptr. 2d 20]* . The question of whether there is an adequate legal remedy is one of fact, depending on the circumstances of each particular case, and its determination is a matter largely within the sound discretion of the court [*Barnard v. Municipal Court (1956) 142 Cal. App. 2d 324, 327, 298 P.2d 679]* . The court's determination will not be disturbed on appeal from denial of the writ petition absent a showing of abuse of discretion [*see W.A. Rose Co. v. Municipal Court (1959) 176 Cal. App. 2d 67, 74, 1 Cal. Rptr. 49]* . Therefore, although *Code Civ. Proc. § 1086* provides that a writ of mandate "must be issued" in all cases when there no adequate remedy at law, a court in fact has broad discretion to grant or deny the writ because its determination on the issue of adequacy is discretionary. In practice, only a small fraction of writ petitions are granted [*see Omaha Indemnity Co. v. Superior Court (1989) 209 Cal. App. 3d 1266, 1271, 258 Cal. Rptr. 66* (90 percent of writ petitions are summarily denied)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityAdequate Remedy at LawCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsProhibition

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15-150 California Points & Authorities § 150.07

§ 150.07 Mislabeled and Alternative Petitions

Superior and appellate courts are authorized to grant extraordinary relief "in the nature of mandamus, certiorari, and prohibition" [*Cal. Const., art. VI, § 10*]. Under modern principles of pleading, neither a mislabeled petition nor a defective prayer bar the relief justified by proper allegations and proof [*Peck's Liquors, Inc. v. Superior Court (1963) 221 Cal. App. 2d 772, 775, 34 Cal. Rptr. 735]* . Should a party petition for the wrong writ, the reviewing court generally will treat the petition as one for the appropriate writ [*see, e.g.,* *Babb v. Superior Court (1971) 3 Cal. 3d 841, 850, 92 Cal. Rptr. 179, 479 P.2d 379* (petition for prohibition treated as petition for mandate); *Coelho v. State Personnel Bd. (1989) 209 Cal. App. 3d 968, 971, 257 Cal. Rptr. 557* (petition for administrative mandamus treated as petition for ordinary mandate); *County of Butte v. Superior Court (1985) 176 Cal. App. 3d 693, 696, 222 Cal. Rptr. 429* (petition for prohibition treated as petition for mandate); *see also § 150.120*].

On appeal from a judgment granting a petition for an extraordinary writ, the court of appeal may treat the case as an appeal from an injunction if the trial court effectively granted injunctive relief [*see, e.g.,* *Oberlander v. County of Contra Costa (1992) 11 Cal. App. 4th 535, 538, 15 Cal. Rptr. 2d 182* (in action for injunctive and declaratory relief and writ of mandate, trial court granted injunctive relief by writ of mandate)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityAdequate Remedy at LawCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsProhibition

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15-150 California Points & Authorities § 150.08

§ 150.08 Use of Points and Authorities to Support or Oppose Writ Petition

[1] In Appellate Court

A petition for a writ of mandate or prohibition filed in an appellate court must be accompanied by a supporting memorandum of [*Cal. Rules of Ct., Rule 8.486(a)*].

No statement in opposition to the petition is required unless requested by the court, but the respondent or any real party in interest may, separately or jointly, serve and file a memorandum in opposition, together with any statement of fact considered material and not included in the petition [*Cal. Rules of Ct., Rule 8.487(a)*].

[2] In Superior Court

Neither the Code of Civil Procedure nor the California Rules of Court expressly require that points and authorities be filed in support of a petition for a writ of mandate or prohibition in the superior court. Such a requirement may nevertheless be reasonably implied. The rules set out in *Cal. Rules of Ct., Rules 3.1100* et seq. apply in proceedings on application for a writ of mandate or prohibition [*see Cal. Rules of Ct., Rules 3.1100, 3.1103(a)(2)*]. *Cal. Rules of Ct., Rule 3.1113(a)* requires, in turn, that a notice of motion be supported by a memorandum. A petition for a writ of mandate or prohibiton may fairly be characterized as a motion, if not a notice of motion. The definitions of a motion and order in civil actions apply to similar acts in a proceeding for a writ of mandate or prohibition [*see Code Civ. Proc. § 1064*], and under *Code Civ. Proc. § 1003*, a motion is an application for order, which, in turn, is defined as any written direction by a court not included in a judgment [*see also Code Civ. Proc. §§ 1088, 1089, 1090, 1107* (referring to petition as "motion" or "application")]. Moreover, *Cal. Rules of Ct., Rule 3.1114*, designating which applications, motions, and petitions do *not* require memoranda, does not include a petition for writ of mandate or prohibition among its number [*see Cal. Rules of Ct., Rule 3.1114*].

The advisability of filing points and authorities to support a petition is buttressed not only by statutory language but also by practical considerations. A court may summarily deny an ex parte petition for an alternative writ when it appears from the face of the petition that an alternative writ will not be issued [*see Kingston v. Department of Motor Vehicles (1969) 271 Cal. App. 2d 549, 552, 76 Cal. Rptr. 614]* . Further, while a respondent has a right to file a memorandum in opposition to the petition [*Code Civ. Proc. § 1107*], a petitioner has no right to respond to the memorandum. Thus, it is

the practice of counsel in many counties throughout California to file points and authorities in support of petitions sought in the superior courts.

The respondent, real party in interest, or both, may serve and file points and authorities in opposition to the granting of any prerogative writ [*Code Civ. Proc. § 1107*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsProhibition

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15-150 California Points & Authorities § 150.09

§ 150.09 Using the Forms in This Chapter

[1] In Support of Writ Petition

Counsel should use the forms in this chapter to build a memorandum in support of a writ petition by first choosing either the skeletal form for mandate [*see § 150.30*] or for prohibition [*see § 150.70*]. Points and authorities should then be added to the skeletal form as necessary under the circumstances: points supporting elements unique to either mandate [*see §§ 150.31*-150.46] or prohibition [*see §§ 150.71*-150.77], general points [*see §§ 150.120*-150.121], points relating to the beneficial interest requirement [*see §§ 150.140*-150.143], and points relating to the lack of adequate legal remedy requirement [*see §§ 150.160*-150.184]. In some circumstances, issuance of both writs may be the only means to obtain complete relief [*see, e.g., W.A. Rose Co. v. Municipal Court (1959) 176 Cal. App. 2d 67, 75, 1 Cal. Rptr. 49* (writ of mandate ordering court clerk to enter default and writ of prohibition restraining court from proceeding with action)]. If counsel seeks both writs, he or she should combine the two skeletal forms and modify them accordingly. If counsel is unsure which writ provides the appropriate relief under the circumstances, use § 150.120 in requesting that the court issue the appropriate writ based on the facts pleaded in the writ petition [*see § 150.07*].

[2] Opposition to Petition

Counsel should use the forms in this chapter to build a memorandum opposing a writ petition by first choosing either the skeletal form for mandate [*see § 150.47*] or for prohibition [*see § 150.78*]. Points and authorities should then be added to the skeletal form as necessary under the circumstances: points opposing elements unique to either mandate [*see §§ 150.48*-150.52] or prohibition [*see §§ 150.79*-150.83], and points relating to issues common to both writs, such as the lack of petitioner's beneficial interest [*see § 150.144*], the existence of an adequate legal remedy [*see §§ 150.185*-150.186], and defenses common to both writs [*see §§ 150.200*-150.205].

For discussion of the procedure for filing opposition to a writ petition, either in the form of preliminary opposition under *Code Civ. Proc. § 1107* or in the form of a demurrer or answer or both under *Code Civ. Proc. § 1089*, see *§§ 150.47[2]* (mandate) and *150.78[2]* (prohibition).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsProhibition

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15-150 California Points & Authorities § 150.10

§ 150.10 Related Pleading and Practice Chapters

For a discussion, procedural guide, and forms for use in mandate and prohibition proceedings, see California Forms of Pleading and Practice, Ch. 358, *Mandate and Prohibition* (Matthew Bender).

For a discussion, procedural guide, and forms of petitions for judicial review of a final administrative order under administrative mandate [Code Civ. Proc. § 1094.5], see California Forms of Pleading and Practice, Ch. 474C, *Procedures in Reviewing Agency Decisions* (Matthew Bender).

For discussions, procedural guides, and forms for use in the related proceeding of certiorari, see California Forms of Pleading and Practice, Ch. 492, *Review (Certiorari), Writ of* (Matthew Bender).

For forms of petitions for writs of mandate for use in particular situations, see the following chapters in California Forms of Pleading and Practice:

- Ch. 3, *Abatement of Actions*.
- Ch. 4, *Abortion and Birth Control Methods*.
- Ch. 19, *Alcoholic Beverages: Civil Liability*.
- Ch. 61, *Associations and Clubs*.
- Ch. 110, *Churches and Religious Organizations*.
- Ch. 118, *Civil Service*.
- Ch. 120, *Class Actions*.
- Ch. 160, *Corporations*.

- Ch. 190, *Discovery: Scope, Regulation, and Timing*.
- Ch. 191, *Discovery: Privileges and Other Discovery Limitations*.
- Ch. 192, *Discovery: Sanctions for Discovery Misuse*.
- Ch. 193, *Discovery: Depositions*.
- Ch. 194, *Discovery: Interrogatories*.
- Ch. 195, *Discovery: Inspection of Tangible Evidence*.
- Ch. 196, *Discovery: Requests for Admissions*.
- Ch. 197, *Discovery: Physical and Mental Examinations*.
- Ch. 198, *Discovery: Exchange of Expert Witness Information*.
- Ch. 199, *Discovery: Preservation of Evidence*.
- Ch. 200, *Discovery: Review of Discovery Orders*.
- Ch. 243, *Elections*.
- Ch. 247, *Eminent Domain*.
- Ch. 302, *Initiative, Referendum, and Recall*.
- Ch. 414, *Physicians: Licensing and Discipline*.
- Ch. 415, *Physicians: Medical Malpractice*.
- Ch. 416, *Physicians: Membership on Hospital Staffs or in Professional Organizations*.
- Ch. 462, *Public Accountants*.
- Ch. 512, *Schools*.
- Ch. 518, *Service of Summons and Papers*.
- Ch. 579, *Zoning and Planning*.

For forms of petitions for writs of prohibition for use in particular situations, see the following chapters in California Forms of Pleading and Practice:

- Ch. 3, *Abatement of Actions*.
- Ch. 59, *Assemblies, Meetings, and Demonstrations*.

- Ch. 135, *Contempt*.
- Ch. 190, *Discovery: Scope, Regulation, and Timing*.
- Ch. 191, *Discovery: Privileges and Other Discovery Limitations*.
- Ch. 192, *Discovery: Sanctions for Discovery Misuse*.
- Ch. 193, *Discovery: Depositions*.
- Ch. 194, *Discovery: Interrogatories*.
- Ch. 195, *Discovery: Inspection of Tangible Evidence*.
- Ch. 196, *Discovery: Requests for Admissions*.
- Ch. 197, *Discovery: Physical and Mental Examinations*.
- Ch. 198, *Discovery: Exchange of Expert Witness Information*.
- Ch. 199, *Discovery: Preservation of Evidence*.
- Ch. 200, *Discovery: Review of Discovery Orders*.
- Ch. 317, *Judges*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewAdministrative RecordDisclosure & DiscoveryCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsProhibition

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15-150 California Points & Authorities § 150.11

§ 150.11 Related Points and Authorities Chapters

For memoranda for use in petitioning for a writ of mandate to compel proper payment of civil service salaries, certification of a civil service appointment, or administration of a civil service exam, see Ch. 36, *Civil Service* .

For memoranda for use in petitioning for writ review of discovery orders, see Ch. 89A, *Discovery: Review of Discovery Orders* .

For memoranda for use in petitioning for a writ of prohibition to restrain guardianship proceedings see Ch. 106, *Guardianship and Conservatorship* .

For memoranda for use in petitioning for review by writ of a ruling on a motion to disqualify a judge for cause under *Code Civ. Proc. § 170.3*, see Ch. 130, *Judges* . For memoranda for use in petitioning for review by writ of a ruling on a peremptory motion brought under *Code Civ. Proc. § 170.6*, see Ch. 130, *Judges* .

For memoranda for use in petitioning for writ review of an administrative adjudicatory order or decision under *Code Civ. Proc. § 1094.5* (administrative mandamus), see Ch. 195, *Public Administrative Law* and Ch. 36, *Civil Service* .

For memoranda for use in petitioning for review of mandate of employment decisions affecting teachers, see Ch. 211, *Schools: Certification, Dismissal, and Related Employment Issues* .

For memoranda for use in petitioning for writ review of an order disallowing a defense or postponing a trial date in an unlawful detainer action, see Ch. 236, *Unlawful Detainer* .

For a discussion of how to use the forms in this chapter to draft a complete memorandum, or a trial or appellate brief, and for an illustration of a completed memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

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

Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsProhibition

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15-150 California Points & Authorities §§ 150.12-150.29

[Reserved]

§§ 150.12[Reserved]

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PART II. FORMS
A. MANDATE

15-150 California Points & Authorities § 150.30

§ 150.30 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Skeletal Form

[1] FORM

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA,

[*or*]

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA,
_____ APPELLATE DISTRICT
[DIVISION _____]

[*or*]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	[CIVIL] NO. _____
vs.	)	MEMORANDUM IN SUPPORT OF PETITION
THE SUPERIOR COURT OF THE STATE OF	)	FOR WRIT OF MANDATE
CALIFORNIA, COUNTY OF	)	[*Code Civ. Proc. §§ 1085, 1086*(; *Cal. Rules of Ct.,*
_____,	)	*Rule 8.486*)]
[*or*]	)	Date: _____
_____ [*name of*	)	Time: _____

other inferior tribunal, corporation, board, or person]	)	Location: _____
Respondent,	)	[Judge: _____]
_____ [*name*],	)	Date Action Filed: _____
Real Party in Interest.	)	[Trial Date: _____]

_____

THIS COURT SHOULD ISSUE A WRIT OF MANDATE COMPELLING RESPONDENT TO _____ [*specify act*] BECAUSE RESPONDENT IS _____ [AN INFERIOR TRIBUNAL *or* CORPORATION *or* BOARD *or* PERSON] HAVING A DUTY TO SO ACT, AND PETITIONER IS BENEFICIALLY INTERESTED AND HAS NO PLAIN, SPEEDY, AND ADEQUATE REMEDY IN THE ORDINARY COURSE OF LAW.

When Writ of Mandate May Issue. A writ of mandate may issue from any court to any inferior tribunal, corporation, board, or person to compel the performance of an act that the law specifically enjoins as a duty from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled and from which the party is unlawfully precluded. The writ must be issued on the verified petition of the party beneficially interested, when there is no plain, speedy, and adequate remedy in the ordinary course of the law (*Code Civ. Proc. §§ 1085, 1086*).

[*Add specific points and authorities showing that the writ is necessary to compel the respondent to perform a duty or to admit petitioner to the use and enjoyment of a right or office to which the petitioner is entitled and from which he or she is unlawfully precluded by respondent. (If respondent is a lower court or court clerk, see §§ 150.31-150.38. If respondent is a public entity or official, see §§ 150.39-150.43. If respondent is a private organization, see § 150.44.*)]

[*Add specific points and authorities showing why petitioner's remedy at law is inadequate (see §§ 150.160-150.184).*]

[*Add specific points and authorities showing that petitioner has a beneficial interest in the proceedings (see §§ 150.140*-150.43)].

[*If the petition seeks a writ of mandate or, in the alternative, a writ of prohibition, add specific points and authorities showing that appropriate writ may be issued when petition seeks both writs (see § 150.120).*]

[*Add specific points and authorities showing that issuance of a peremptory writ in the first instance is justified, if appropriate (see § 150.121).*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing form is a skeletal memorandum in support of a petition for writ of mandate. It is designed to be combined with additional, more specific points and authorities showing why the court should exercise its discretion to issue a writ of mandate under the particular circumstances of the case [*see* discussion under *§ 150.30[2][b]*].

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

For discussion regarding supporting points and authorities generally, see *§ 150.08*.

[b] Establishing Elements Essential to Issuance of Writ of Mandate

The foregoing form sets out the general point of law that a writ of mandate may properly issue when the following conditions exist: (1) respondent is an inferior lower tribunal, corporation, board, or person; (2) respondent has a duty to perform the act sought to be compelled by the writ; (3) petitioner has a clear and beneficial right to performance of that act; and (4) petitioner has no plain, speedy, or adequate remedy in the ordinary course of law [*see Code Civ. Proc. §§ 1085, 1086*; *Payne v. Superior Court (1976) 17 Cal. 3d 908, 925, 132 Cal. Rptr. 405, 553 P.2d 565]* .

The bracketed instructions that follow the general point of law in the foregoing form indicate that additional paragraphs, taken from subsequent forms in this chapter, should be added showing the following elements: (1) the respondent's duty, as an inferior tribunal, public entity or official, or private organization, to do the act sought to be compelled by the writ; (2) the petitioner's beneficial interest in the performance of that act; and (3) the inadequacy of petitioner's remedy at law. Further bracketed instructions indicate that additional paragraphs taken from subsequent forms in this chapter should be added, if appropriate, to show the following: (1) the propriety of issuing the writ if the petition mistakenly seeks a writ of prohibition, or seeks the writs in the alternative; and (2) the propriety of issuing a peremptory writ in the first instance. Counsel should refer to the forms indicated in the bracketed instructions and choose the paragraphs that best fit the factual situation involved.

[c] Related Pleading and Practice Forms

For forms of petitions for writs of mandate, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender).

[d] Opposing Memoranda

The points and authorities set out in *§ 150.47* may be used in an appropriate case to oppose a petition for mandate that is supported by the foregoing points and authorities.

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PART II. FORMS
A. MANDATE

15-150 California Points & Authorities § 150.31

§ 150.31 Supporting Contention That Writ of Mandate Is Necessary to Compel Action by Lower Court--Duty of Court to Assume Jurisdiction

[1] FORM

[*The following should be combined, when appropriate, with a general form of memorandum supporting a petition for a writ of mandate (see, e.g., § 150.30).*]

A WRIT OF MANDATE SHOULD ISSUE TO COMPEL RESPONDENT COURT TO ASSUME OR EXERCISE JURISDICTION BECAUSE RESPONDENT HAS JURISDICTION BUT HAS REFUSED TO PROCEED ON THE GROUND OF LACK OF JURISDICTION.

A. Duty of Lower Court to Assume Jurisdiction. A writ of mandate is the proper remedy to compel a court to assume or exercise jurisdiction when it has jurisdiction and has refused to proceed on the ground of lack of jurisdiction (*Wisely v. Superior Court (1985) 175 Cal. App. 3d 267, 270, 220 Cal. Rptr. 893*).

B. Duty of Lower Court to Hear and Determine Merits of Matters Within Its Jurisdiction. A writ of mandate is the proper remedy to compel a court to hear and determine the merits of all matters properly before it within its jurisdiction, either when it refuses to proceed because it erroneously believes that it has no jurisdiction, or when it disposes of the matter on the sole ground that it has no jurisdiction (*Robinson v. Superior Court (1950) 35 Cal. 2d 379, 383-384, 218 P.2d 10*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that a writ of mandate is proper to compel a lower court to exercise its jurisdiction when the court has jurisdiction but has refused to proceed on the ground of lack of jurisdiction.

The foregoing points and authorities should be combined with a general memorandum supporting a petition for writ of mandate (*see § 150.30*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should discuss facts showing that the trial court has jurisdiction over the matter. For example, counsel could show that although an appeal has stayed trial court proceedings, the matters in issue are incidental aspects of the cause that are not within the scope of the reviewing court's exclusive jurisdiction [*see Wisely v. Superior Court (1985) 175 Cal. App. 3d 267, 269, 220 Cal. Rptr. 893]* .

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Duty of Lower Court to Assume Jurisdiction

In ***Wisely v. Superior Court*** *(1985) 175 Cal. App. 3d 267, 220 Cal. Rptr. 893* , a criminal defendant was found guilty in a death penalty case, and given a penalty advisory verdict of death. The trial court granted a new trial on the penalty phase, and the People appealed. Subsequently, the trial court granted the People's motion to quash petitioner's subpoenas duces tecum, and denied petitioner's motion to compel production of probation reports pursuant to *Penal Code § 1203.05*, on the ground that the superior court lacks jurisdiction to compel discovery while the appeal is pending. Defendant brought a petition for a writ of mandate to compel the trial court to hear the discovery motions on the merits.

The court of appeal issued a writ of mandate, directing the superior court to annul its orders regarding discovery (*175 Cal. App. 3d 267, 270)* . Even after an appellate court has obtained jurisdiction over a dispute, the trial judge retains certain powers over the parties and the incidental aspects of the cause that are not within the scope of the reviewing court's exclusive jurisdiction (*175 Cal. App. 3d 267, 269)* . Discovery proceedings sought preparatory to an anticipated new trial on the penalty phase constitute matters embraced in the action and not affected by the judgment or order, within the meaning of *Code Civ. Proc. § 916* (perfecting of appeal stays proceedings). A writ of mandate is the proper remedy to compel a court to assume or exercise jurisdiction when it has jurisdiction and has refused to proceed on the ground of lack of jurisdiction (*175 Cal. App. 3d 267, 270)* .

[b] Duty of Lower Court to Hear and Determine Merits of Matters Within Its Jurisdiction

In ***Robinson v. Superior Court*** *(1950) 35 Cal. 2d 379, 218 P.2d 10* , petitioners obtained an arbitration award after submitting a contract dispute to the Labor Commissioner for settlement. When petitioners moved for an order confirming the award, the court denied the motion on the ground that the statutory procedure for confirmation of arbitration awards did not apply to awards made by the Labor Commissioner. Petitioners then sought a writ of mandate to compel the trial court to take jurisdiction of the motion and to render a judgment either confirming, modifying, correcting, or vacating the award.

The court of appeal issued the writ, holding that the statutes applied to Labor Commissioner awards. In its discussion of the availability of mandate, the court applied the principle that a trial court is under a duty to hear and determine the merits of all matters properly before it that are within its jurisdiction. Mandate will issue to compel the performance of this duty, the court held, even when the trial court's refusal to pass on the merits is based on the considered but erroneous belief that it has no jurisdiction as a matter of law to grant the relief requested (*35 Cal. 2d 379, 383)* . The writ is available, the court held, whether the court merely refuses to proceed because of its erroneous belief that it has no jurisdiction or whether the court makes a ruling disposing of the matter on the sole ground that it has no jurisdiction (

35 Cal. 2d 379, 383-384) .

[4] Additional Authorities

[a] Duty of Lower Court to Hear and Determine Merits of Matters Within Its Jurisdiction

In *Elliott v. Superior Court (1968) 265 Cal. App. 2d 825, 71 Cal. Rptr. 807* , the superior court refused to hear and determine on the merits a motion and petition for instructions filed during the lifetime of the beneficiary of a testamentary trust under her husband's will and a petition for instructions filed after the beneficiary's death by the special administrator of her estate. The probate court erroneously believed that it lacked jurisdiction because of the death of the income beneficiary. The court of appeal determined that the court had jurisdiction and, applying the holding in *Robinson v. Superior Court (1950) 35 Cal. 2d 379, 218 P.2d 10* (*discussed under § 150.31[3][b]*) issued a writ of mandate compelling the probate court to hear and determine on the merits the two petitions and motion (*265 Cal. App. 2d 825, 830-831, 837)* .

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
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PART II. FORMS
A. MANDATE

15-150 California Points & Authorities § 150.32

§ 150.32 Supporting Contention That Writ of Mandate Is Necessary to Compel Action by Lower Court--Duty of Court to Exercise Discretion

[1] FORM

[*The following should be combined, when appropriate, with a general form of memorandum supporting a petition for a writ of mandate (see, e.g., § 150.30).*]

A WRIT OF MANDATE SHOULD ISSUE TO COMPEL RESPONDENT TO EXERCISE ITS DISCRETION TO DETERMINE WHETHER _____ [*specify determination, e.g.,* DEFENDANT IS ENTITLED TO RELIEF FROM THE DEFAULT JUDGMENT] BECAUSE RESPONDENT HAS REFUSED TO EXERCISE ITS DISCRETION IN THE ERRONEOUS BELIEF THAT IT HAS NO DISCRETION.

Duty of Lower Court to Exercise Its Discretion. A writ of mandate is the proper remedy to compel a court to exercise its discretion when the court has refused to exercise its discretion because of a mistaken belief that the court has no discretion (*Erlich v. Superior Court (1965) 63 Cal. 2d 551, 556, 47 Cal. Rptr. 473, 407 P.2d 649*).

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in support of the contention that a writ of mandate is proper to compel a lower court to exercise its discretion when it has failed to do so on the basis of a mistaken belief that it had no discretion.

The foregoing points and authorities should be combined with a general memorandum supporting a petition for writ of mandate (*see § 150.30*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Duty of Lower Court to Exercise Its Discretion

In ***Erlich v. Superior Court*** *(1965) 63 Cal. 2d 551, 47 Cal. Rptr. 473, 407 P.2d 649* , defendant successfully appealed an unfavorable judgment in a trade libel action and obtained a judgment that awarded him the costs of appeal. The action was remanded for retrial on the issue of damages. Plaintiff then moved to quash the writ of execution on defendant's costs judgment, contending that defendant was insolvent and would be unable to satisfy any judgment that plaintiff might win on retrial. The trial court denied the motion to quash as premature and plaintiff filed an independent action for an injunction against enforcement of the costs judgment. The court in the second action granted summary judgment for defendant, apparently on the ground that the issue had been decided against plaintiff in the earlier proceeding. In its order, the court stated that it had no discretion in the circumstances. Plaintiff petitioned for a writ of prohibition to restrain issuance of the writ of execution.

The Supreme Court issued a writ of mandate directing the court to consider, in accordance with the standards set out in the opinion, whether plaintiff was entitled to have collection of the costs judgment enjoined pending a determination of the trade libel action (*63 Cal. 2d 551, 558)* . In its discussion of the availability of mandate, the Court stated that the writ can issue when a trial court refuses to exercise its discretion because of a mistaken belief that it has no discretion. The trial court, the Court observed, expressly granted summary judgment on the erroneous basis that it had no discretion (*63 Cal. 2d 551, 556)* . The Court said that the action was not barred by the doctrine of res judicata and that the trial court should determine whether an injunction was warranted (*63 Cal. 2d 551, 556, 558)* .

[4] Additional Authorities

[a] Duty of Lower Court to Exercise Its Discretion

In *Payne v. Superior Court (1976) 17 Cal. 3d 908, 132 Cal. Rptr. 405, 553 P.2d 565* , petitioner had a default judgment entered against him because he was a prisoner, had no attorney, and could not participate in the suit. Petitioner moved to vacate the default judgment pursuant to *Code Civ. Proc. § 473*. The motion was denied and he petitioned for a writ of mandate.

The Supreme Court issued the writ, directing the trial court to vacate the judgment and appoint counsel for petitioner if the trial court determined that he was incarcerated and indigent (*17 Cal. 3d 908, 926-927)* . In its discussion of the availability of mandate, the Court observed that the trial court's denial of relief under *Code Civ. Proc. § 473* apparently was not an act of discretion but rather a refusal to exercise discretion. When the court was informed that the original judgment was taken against petitioner while he was unable to obtain an attorney or personally appear, the Court held, a duty arose to determine whether petitioner had been denied meaningful access to the courts. If the court ascertained that petitioner was indigent, it had no other course but to vacate the judgment. Failure to do so was grounds for a writ of mandate (*17 Cal. 3d 908, 926)* .

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15-150 California Points & Authorities § 150.33

§ 150.33 Supporting Contention That Writ of Mandate Is Necessary to Compel Action by Lower Court--Duty of Court to Exercise Discretion in Particular Manner

[1] FORM

[*The following should be combined, when appropriate, with a general form of memorandum supporting a petition for a writ of mandate (see, e.g., § 150.30).*]

A WRIT OF MANDATE SHOULD ISSUE TO COMPEL RESPONDENT TO _____ [*specify ruling, e.g.,* SUSTAIN DEFENDANT'S DEMURRER TO THE COMPLAINT] BECAUSE, UNDER THE FACTS, RESPONDENT'S DISCRETION CAN BE EXERCISED IN ONLY ONE WAY AND THE FAILURE TO SO EXERCISE IT CONSTITUTED AN ABUSE OF DISCRETION.

A. Trial Court Can Exercise Discretion in Only One Way. A writ of mandate may be used to direct the trial court to exercise its discretion in a particular manner when the relevant facts are undisputed and, under those facts, the court's discretion can be exercised in only one way (*Hurtado v. Superior Court (1974) 11 Cal. 3d 574, 579, 114 Cal. Rptr. 106, 522 P.2d 666*).

B. Trial Court Abused Its Discretion. If, on the basis of undisputed facts, it is clear that the trial court abused its discretion, a writ of mandate to compel the court to exercise its discretion in the proper way is appropriate (*Robbins v. Superior Court (1985) 38 Cal. 3d 199, 205, 211 Cal. Rptr. 398, 695 P.2d 695*).

C. Clear Legal Duty. When the trial court has a clear legal duty to grant certain relief, it is an abuse of discretion to refuse such relief, and mandate will lie to compel the performance of the clear legal duty (*San Diego Wholesale Credit Men's Assn. v. Superior Court (1973) 35 Cal. App. 3d 458, 464, 110 Cal. Rptr. 657*).

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in support of the contention that a writ of mandate is proper to compel a lower court to exercise its discretion in a particular way on the basis that to act in any other way constitutes an abuse of discretion.

The foregoing points and authorities should be combined with a general memorandum supporting a petition for writ of mandate (*see § 150.30*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should demonstrate that the facts of the case are undisputed, and that the applicable law dictates the outcome sought by counsel.

[b] Compelling Trial Court to Correct Abuse of Discretion

The foregoing points and authorities support the contention that mandate is an available remedy because the court has a legal duty to exercise its discretion in only one way [*see Hurtado v. Superior Court (1974) 11 Cal. 3d 574, 579, 114 Cal. Rptr. 106, 522 P.2d 666]* . When combined with a general memorandum supporting a petition for writ of mandate, it is designed to satisfy the requirement that the act sought to be compelled by the writ is one that the respondent court has a legal duty to perform [*see Code Civ. Proc. § 1085*]. As such, the foregoing contention is one of the most commonly used to demonstrate respondent's "legal duty" when the respondent is a lower court. It can be used in support of a challenge to many types of court orders, such as an order overruling a demurrer [*see Babb v. Superior Court (1971) 3 Cal. 3d 841, 850-851, 92 Cal. Rptr. 179, 479 P.2d 379]* , an order denying leave to amend a complaint [*see Daum v. Superior Court (1964) 228 Cal. App. 2d 283, 289, 39 Cal. Rptr. 443]* , or an order refusing to dismiss an action for delay in prosecution [*see Dresser v. Superior Court (1964) 231 Cal. App. 2d 68, 74, 41 Cal. Rptr. 473]* .

However, even if the lower court is required to exercise its discretion in a particular manner, the reviewing court may nevertheless deny relief on the ground that the petitioner has an adequate legal remedy in the ordinary course of law [*see Code Civ. Proc. § 1086*; *Babb v. Superior Court (1971) 3 Cal. 3d 841, 851, 92 Cal. Rptr. 179, 479 P.2d 379]* .

To qualify for extraordinary relief by writ of mandate, an abuse of discretion must, in effect, constitute one of the "extraordinary circumstances" in which a reviewing court will exercise *its* discretion to issue the writ. The Supreme Court in *Schweiger v. Superior Court (1970) 3 Cal. 3d 507, 517-518, 90 Cal. Rptr. 729, 476 P.2d 97* , stated that error alone, as distinguished from an abuse of discretion or other "extraordinary circumstance," does not merit relief by writ. However, when the trial court's ruling deprives petitioner of an opportunity to litigate fully the action on its merits, the ruling constitutes an abuse of discretion that may be remedied by mandate.

Therefore, counsel should demonstrate that the challenged ruling was an abuse of discretion not only in the sense that it establishes the trial court's legal duty to exercise its discretion in a particular manner, but also in the sense that the abuse of discretion constitutes an extraordinary circumstance that cannot be remedied in the ordinary course of law [*see also § 150.30[2][b]*].

[c] Writ of Prohibition Compared

A writ of prohibition is only available if the trial court acted without or in excess of its jurisdiction [*Code Civ. Proc. § 1102*]. Although the writ does not reach errors of law or fact, the meaning of "excess of jurisdiction" extends to any acts exceeding the court's power, whether that power is defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of stare decisis [*Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 287, 291, 109 P.2d 942]* . For a form in support of a writ of prohibition for use when a court has failed to follow stare decisis, see *§ 150.73*.

[d] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender).

[e] Opposing Memoranda

The points and authorities set out in *§ 150.48* may be used in an appropriate case to oppose a petition for mandate that is supported by the foregoing points and authorities.

[3] Discussion of Authorities

[a] Trial Court Can Exercise Discretion in Only One Way

In ***Hurtado v. Superior Court*** *(1974) 11 Cal. 3d 574, 114 Cal. Rptr. 106, 522 P.2d 666* , a wrongful death action, defendant moved for a separate trial of the issue of whether the measure of damages was to be applied according to the law of California, where the accident occurred, or the law of Mexico, where plaintiffs and the decedent resided. The superior court ruled that California law applied. Defendant then obtained a writ of mandate from the court of appeal, which directed the trial court to vacate its ruling and to issue a ruling that Mexican law applied. Plaintiffs petitioned for review.

The Supreme Court reversed and denied the writ, holding that the trial court correctly looked to California law because California was both the forum and an interested state (*11 Cal. 3d 574, 582)* . The Court applied the principle that, although mandate cannot be issued to control a court's discretion, in unusual circumstances the writ will lie when, under the facts, that discretion can be exercised in only one way. The facts had been stipulated to and were not in dispute. The sole issue was a question of law concerning which measure of damages should be applied. The trial court, the Court reiterated, is under a legal duty to apply the proper law and may be directed to perform that duty by writ of mandate (*11 Cal. 3d 574, 579)* .

[b] Trial Court Abused Its Discretion

In ***Robbins v. Superior Court*** *(1985) 38 Cal. 3d 199, 211 Cal. Rptr. 398, 695 P.2d 695* , plaintiffs brought an action challenging the county's policy of giving certain welfare recipients "in-kind" benefits, in the form of housing in an emergency shelter, in lieu of cash grants. When the trial court denied plaintiffs' motion for a preliminary injunction, plaintiffs petitioned the Supreme Court for a writ of mandate to compel the court to grant the injunction.

The Supreme Court issued the writ, holding that the test for issuance of a preliminary injunction was met by plaintiffs and, therefore, the trial court abused its discretion in refusing to grant the injunction (*38 Cal. 3d 199, 218)* . In holding that mandate was an available remedy, the Court applied the principle that, although mandate does not generally lie to control the exercise of judicial discretion, the writ will issue when, under the facts, that discretion can be exercised in only one way. If, on the basis of undisputed facts, the Court explained, it is clear that the trial court abused its discretion in failing to issue the preliminary injunction, a writ of mandate to compel issuance of the injunction was appropriate (*38 Cal. 3d 199, 205)* .

In ***San Diego Wholesale Credit Men's Assn. v. Superior Court*** *(1973) 35 Cal. App. 3d 458, 110 Cal. Rptr. 657* , a contract action, plaintiff applied for a prejudgment writ of attachment and, after a hearing, the application was denied. Plaintiff petitioned for a writ of mandate compelling the court to order the clerk to issue the writ of attachment.

The court of appeal issued the writ, holding that the evidence presented at the hearing was such that the court could not have found other than that statutory ground for issuance of an attachment existed, that the plaintiff had established the probably validity of the contract claim, and that there was no reasonable probability that a successful defense could be asserted (*35 Cal. App. 3d 458, 464, 465)* . In its discussion of the availability of mandate, the court applied the

principle that a trial court abuses its discretion when it has a clear legal duty to grant certain relief but refuses to do so, and mandate will lie to compel the performance of the clear legal duty (*35 Cal. App. 3d 458, 464)* .

[4] Additional Authorities

[a] Trial Court Can Exercise Discretion in Only One Way

In *Babb v. Superior Court (1971) 3 Cal. 3d 841, 92 Cal. Rptr. 179, 479 P.2d 379* , a medical malpractice action, defendant filed a cross-complaint seeking a declaratory judgment that, if the action terminated in defendant's favor, defendant was entitled to damages from plaintiff and her attorney for malicious prosecution. Plaintiff and her attorney demurred on the ground that the cross-action was premature because favorable termination is a precondition to an action for malicious prosecution. The trial court overruled the demurrer, relying on dictum in a case that appeared to authorize the granting of a declaratory judgment for malicious prosecution before the prior suit is terminated. Plaintiff and her attorney petitioned the Supreme Court for a writ of prohibition to prevent the court from proceeding with the cross-action.

The California Supreme Court issued a writ of mandate, disapproving the dictum and holding that a defendant cannot cross-complain for malicious prosecution in the main action, even if the cross-complaint is framed as a request for declaratory relief (*3 Cal. 3d 841, 846, 848, 850)* . In its discussion of the propriety of writ review, the Court applied the principle that in unusual circumstances the writ will lie when, under the facts, the court's discretion can be exercised in only one way. The Court concluded that the trial court had no discretion to overrule petitioner's demurrer because the cross-complaint was legally defective on its face. Consequently, the trial court was under a legal duty to sustain the demurrer and could be directed to do so by a writ of mandate (*3 Cal. 3d 841, 851)* .

In *Mannheim v. Superior Court (1970) 3 Cal. 3d 678, 91 Cal. Rptr. 585, 478 P.2d 17* , a decedent's heirs obtained a decree entitling them to one-half of the decedent's estate. Under the existing probate statutes, the other half would have escheated to the state. Former Prob. Code § 228 was then amended to prevent the escheat of property in such circumstances. The court of appeal denied the heirs' petition for a writ of mandate to compel the probate court to enter a supplemental order distributing to them the remaining half of the estate pursuant to the amended statute.

The Supreme Court issued the writ, holding that the amendment applied to estates not permanently escheated to the state on the amendment's effective date (*3 Cal. 3d 678, 687, 693)* . In its discussion of the availability of mandate, the court applied the principle that a court can be compelled to exercise its discretion in a particular manner in those rare instances when, under the facts, it can be legally exercised in but one way. The court determined that there was no dispute concerning the facts. The only issue was whether, as a matter of law, the amended statute controlled the right of succession (*3 Cal. 3d 678, 685)* . If it did, then the probate court was under a legal duty to apply them and could be directed to perform that duty by writ of mandate (*3 Cal. 3d 678, 685-686)* .

In *American Internat. Group, Inc. v. Superior Court (1991) 234 Cal. App. 3d 749, 285 Cal. Rptr. 765* , the court held that a federal preemption issue was properly decided by writ of mandate after the trial court sustained a judgment on the pleadings. It stated that although a trial court's refusal to sustain a demurrer or grant a judgment on the pleadings is normally reviewed under an abuse of discretion standard, when the issue is (1) tendered on undisputed facts, (2) significant, and (3) purely legal in nature, the appellate court may issue a writ of mandate after an independent review (*234 Cal. App. 3d 749, 755)* .

In *Glass v. Superior Court (1988) 204 Cal. App. 3d 1048, 251 Cal. Rptr. 690* , one party in a business tort action moved for an order to compel the deposition in California of the other party's corporate officers, who were out-of-state residents. The trial court ruled that Code Civ. Proc. § 2026 (out-of-state residents not required to attend deposition in California) controlled over Code Civ. Proc. § 2025(e)(3) (*Code Civ. Proc. § 2025.260* effective July 1, 2005) (distant depositions) and denied the motion. The court of appeal issued a writ of mandate, holding that Code Civ. Proc. §

2025(e)(3) (*Code Civ. Proc. § 2025.260* effective July 1, 2005) was the governing statute and directing the trial court to grant the discovery motion (*204 Cal. App. 3d 1048, 1052-1053)* . In its discussion of the availability of mandate, the court determined that the writ was appropriate because the trial court could exercise its discretion in only one way. Rather than remanding the matter for a hearing on the motion, the court reviewed the facts and concluded that the balance of the factors that must be balanced under Code Civ. Proc. § 2025(e)(3) (*Code Civ. Proc. § 2025.260* effective July 1, 2005) weighed conclusively in petitioner's favor (*204 Cal. App. 3d 1048, 1053)* .

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15-150 California Points & Authorities § 150.34

§ 150.34 Supporting Contention That Writ of Mandate Is Necessary to Compel Action by Lower Court--Duty of Court to Recall and Quash Writ of Execution

[1] FORM

[*The following should be combined, when appropriate, with a general form of memorandum supporting a petition for a writ of mandate (see, e.g., § 150.30).*]

A WRIT OF MANDATE SHOULD ISSUE TO COMPEL RESPONDENT TO RECALL AND QUASH THE WRIT OF EXECUTION BECAUSE THE WRIT WAS IMPROVIDENTLY ISSUED.

Quashing Writ of Execution. A writ of mandate is the proper remedy to compel a court to recall and quash a writ of execution that was improvidently issued (*Evans v. Superior Court (1942) 20 Cal. 2d 186, 188, 124 P.2d 820* ; *Hustead v. Superior Court (1969) 2 Cal. App. 3d 780, 792, 83 Cal. Rptr. 26*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that a writ of mandate is proper to compel a lower court to recall and quash a writ of execution that should not have been issued.

The foregoing points and authorities should be combined with a general memorandum supporting a petition for writ of mandate (*see § 150.30*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender). For discussion and forms involving writs of execution, see Ch. 254, *Executions and Enforcement of Judgments* in that publication.

[3] Discussion of Authorities

[a] Quashing Writ of Execution

In ***Evans v. Superior Court*** *(1942) 20 Cal. 2d 186, 124 P.2d 820* , plaintiffs obtained a judgment against a savings and loan association and a writ of execution issued. The State Building and Loan Commissioner, which had taken possession of the association's assets under a statutory procedure for liquidation, moved the court to recall and quash the writ of execution on the ground that the statutes entitled the Commissioner to liquidate the assets free of any judgment liens. The Supreme Court issued the writ, holding that the legislation withdrew from plaintiffs the right to a judgment lien and execution during the process of liquidation (*20 Cal. 2d 186, 190-191)* . In its discussion of the availability of mandate, the Court held that the court had a duty to recall the writ of execution if it was improvidently granted. If the Commissioner's taking of possession of assets was a part of the process of liquidation within the meaning of the legislation, the court could exercise its "jurisdiction" in but one way--by granting the motion to recall and quash the writ (*20 Cal. 2d 186, 188)* .

In ***Hustead v. Superior Court*** *(1969) 2 Cal. App. 3d 780, 83 Cal. Rptr. 26* , the wife in a divorce action obtained a garnishment order directing her husband's subtenant to pay the monthly rentals to the wife in order to satisfy a judgment for child and spousal support. The husband then assigned the lease to a third party, who demanded payment of rent. The subtenant paid the third party the rent and the wife subsequently obtained a writ of execution against the subtenant. When his motion to quash was denied, the subtenant sought a writ of mandate to compel the court to recall and quash the writ of execution. The court of appeal issued the writ, holding that once the lease was assigned, no rent was due to the husband and there was no longer any basis for the garnishment order (*2 Cal. App. 3d 780, 791-792, 793)* . In its discussion of the availability of mandate, the court held that any attempt to enforce payment by issuance of a writ of execution was unsupported. When these facts were brought to the court's attention, it had a duty to recall and quash the writ of execution (*2 Cal. App. 3d 780, 792)* .

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15-150 California Points & Authorities § 150.35

§ 150.35 Supporting Contention That Writ of Mandate Is Necessary to Compel Action by Lower Court--Duty of Court to Prepare Settled Statement for Record on Appeal

[1] FORM

[*The following should be combined, when appropriate, with a general form of memorandum supporting a petition for a writ of mandate (see, e.g., § 150.30).*]

A WRIT OF MANDATE SHOULD ISSUE TO COMPEL RESPONDENT TO SETTLE A STATEMENT ON APPEAL BECAUSE RESPONDENT HAS ARBITRARILY REFUSED TO DO SO.

Duty to Settle Statement on Appeal. A writ of mandate is the proper remedy to compel the settlement of a statement on appeal when a court has arbitrarily refused to settle the statement on appeal (*Western States Constr. Co. v. Municipal Ct. (1951) 38 Cal. 2d 146, 148-151, 238 P.2d 562*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that a writ of mandate is proper to compel a lower court to settle a statement on appeal when it has arbitrarily refused to do so.

The foregoing points and authorities should be combined with a general memorandum supporting a petition for writ of mandate (*see § 150.30*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender). For discussion and forms involving appeals generally, see Ch. 40, *Appeal: An Overview* .

[3] Discussion of Authorities

[a] Duty to Settle Statement on Appeal

In ***Western States Constr. Co. v. Municipal Ct.*** *(1951) 38 Cal. 2d 146, 238 P.2d 562* , a plaintiff obtained a judgment after a trial in the municipal court. When the defendant requested the court to settle the statement for appeal, the judge refused on the ground that plaintiff's principal trial attorney had died and could not propose amendments to the statement. Further, the judge could not remember all the proceedings. The superior court denied a petition for a writ of mandate and defendant appealed.

The Supreme Court reversed and directed the superior court to issue the writ, holding that the absence of proposed amendments, from whatever cause, did not relieve the trial judge of the duty to settle the proposed statement with such corrections and additions as might be necessary (*38 Cal. 2d 146, 151)* . Unless there is some justification, the Court held, a trial judge may not arbitrarily refuse to settle the statement (*38 Cal. 2d 146, 148-149)* .

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15-150 California Points & Authorities § 150.36

§ 150.36 Supporting Contention That Writ of Mandate Is Necessary to Compel Action by Lower Court--Duty of Court to Initiate Contempt Proceedings for Disobedience of Court Order

[1] FORM

[*The following should be combined, when appropriate, with a general form of memorandum supporting a petition for a writ of mandate (see, e.g., § 150.30).*]

A WRIT OF MANDATE SHOULD ISSUE TO COMPEL RESPONDENT TO ENTERTAIN CONTEMPT PROCEEDINGS BECAUSE RESPONDENT REFUSED TO ENFORCE A PLAIN PROVISION OF THE JUDGMENT.

Contempt Proceedings. Mandate is a proper remedy to compel the trial court to entertain contempt proceedings when the trial court has refused to enforce a plain provision of a judgment (*Butler v. Butler (1967) 255 Cal. App. 2d 132, 136, 62 Cal. Rptr. 825* (dictum)).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that a writ of mandate is proper to compel a lower court to entertain contempt proceedings.

The foregoing points and authorities should be combined with a general memorandum supporting a petition for writ of mandate (*see § 150.30*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender). For discussion and forms involving contempt proceedings generally, see Ch. 135, *Contempt* in that publication.

[3] Discussion of Authorities

[a] Contempt Proceedings

In ***Butler v. Butler*** *(1967) 255 Cal. App. 2d 132, 62 Cal. Rptr. 825* , a wife in a divorce proceeding obtained an order to show cause why the husband should not be held in contempt for failure to pay court-ordered support. The court dismissed the contempt proceedings on the ground that it lacked jurisdiction. On appeal, the court of appeal affirmed because the order dismissing the contempt proceedings was not an appealable order (*255 Cal. App. 2d 132, 136)* . However, the court recognized that a writ of mandate is the proper remedy when a trial court in effect refuses to enforce a plain provision of a judgment (*255 Cal. App. 2d 132, 136)* .

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
CHAPTER 150 MANDATE AND PROHIBITION
PART II. FORMS
A. MANDATE

15-150 California Points & Authorities § 150.37

§ 150.37 Supporting Contention That Writ of Mandate Is Necessary to Compel Action by Court Clerk--Duty of Clerk to Enter Default Judgment [Code Civ. Proc. § 585(a)]

[1] FORM

[*The following should be combined, when appropriate, with a general form of memorandum supporting a petition for a writ of mandate (see, e.g., § 150.30).*]

A WRIT OF MANDATE SHOULD ISSUE TO COMPEL RESPONDENT TO ENTER A DEFAULT JUDGMENT IN PETITIONER'S FAVOR BECAUSE DEFENDANT _____ [*name*] WAS SERVED WITH A SUMMONS BUT FAILED TO MAKE A TIMELY APPEARANCE IN THE ACTION.

Entry of Default Judgment. A writ of mandate is the proper remedy to compel a court clerk to enter a default judgment for the plaintiff, in an action arising on contract or judgment for the recovery of money or damages only, when the defendant was properly served but made no appearance within the required time (*Code Civ. Proc. § 585(a)*; *W.A. Rose Co. v. Municipal Court (1959) 176 Cal. App. 2d 67, 74, 1 Cal. Rptr. 49*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that a writ of mandate is proper to compel a lower court to enter a default and a default judgment under *Code Civ. Proc. § 585(a)*, which authorizes the clerk to enter a default judgment in an action arising on contract or judgment for the recovery of money or damages only.

The foregoing points and authorities should be combined with a general memorandum supporting a petition for writ of mandate (*see § 150.30*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the

points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender). For discussion and forms involving default proceedings generally, see Ch. 205, *Defaults and Default Judgments* in that publication.

[3] Discussion of Authorities

[a] Entry of Default Judgment

In ***W.A. Rose Co. v. Municipal Court*** *(1959) 176 Cal. App. 2d 67, 1 Cal. Rptr. 49* , a plaintiff in a municipal court action sought from the superior court a writ of mandate ordering the municipal court clerk to enter a default, as well as a writ of prohibition restraining the municipal court from proceeding with the action. The superior court issued the writs and the defendant, as real party in interest, appealed.

The court of appeal affirmed, holding that plaintiff was entitled to a default judgment and the writs were properly issued (*176 Cal. App. 2d 67, 71, 75)* . When plaintiff filed a request for a default, the time to appear had expired and defendant had not made an appearance in the action (*176 Cal. App. 2d 67, 70-71)* . The clerk should have entered it and, in so doing so, would have been performing a purely ministerial function (*176 Cal. App. 2d 67, 71)* .

Counsel should note that the court in *Rose* determined that the filing of a motion for change of venue did not constitute an appearance under the default statute, former Code Civ. Proc. § 585(1). However, *Code Civ. Proc. § 585(a)* now provides that a motion for change of venue is an appearance precluding a default [*see Code Civ. Proc. § 396b(a)*].

[4] Additional Authorities

[a] Entry of Default

In *Todd v. Everett (1966) 247 Cal. App. 2d 209, 55 Cal. Rptr. 382* , the court of appeal issued a writ of mandate directing the court clerk to enter a default judgment for petitioners (*247 Cal. App. 2d 209, 212)* . The court held that, once the clerk receives proof of service of the summons and sees no appearance on file, the clerk has a ministerial duty to enter the default (*247 Cal. App. 2d 209, 211)* .

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PART II. FORMS
A. MANDATE

15-150 California Points & Authorities § 150.38

§ 150.38 Supporting Contention That Writ of Mandate Is Necessary to Compel Action by Court Clerk--Duty of Clerk to Issue Writ of Execution

[1] FORM

[*The following should be combined, when appropriate, with a general form of memorandum supporting a petition for a writ of mandate (see, e.g., § 150.30).*]

A WRIT OF MANDATE SHOULD ISSUE TO COMPEL RESPONDENT TO ISSUE A WRIT OF EXECUTION BECAUSE PETITIONER HAS OBTAINED A VALID JUDGMENT.

Writ of Execution. A writ of mandate is the proper remedy to compel the court clerk to perform his or her duty to issue a writ of execution on a valid judgment (*Kahn v. Smith (1943) 23 Cal. 2d 12, 14, 142 P.2d 13*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that a writ of mandate is proper to compel a court clerk to issue a writ of execution.

The foregoing points and authorities should be combined with a general memorandum supporting a petition for writ of mandate (*see § 150.30*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate proceedings, see Ch. 358, *Mandate and Prohibition*

in California Forms of Pleading and Practice (Matthew Bender). For discussion and forms involving writs of execution, see Ch. 254, *Executions and Enforcement of Judgments* in that publication.

[3] Discussion of Authorities

[a] Writ of Execution

In ***Kahn v. Smith*** *(1943) 23 Cal. 2d 12, 142 P.2d 13* , the trial court granted defendants' motion for a new trial beyond the statutory time in which a new trial could be granted. Plaintiffs then sought a writ of execution on their judgment, but the court clerk refused to issue the writ. The Supreme Court issued a writ of mandate to compel the clerk to issue the writ of execution, holding that the order granting a new trial was invalid (*23 Cal. 2d 12, 14, 15)* . If the order was invalid, the Court explained, the clerk had a duty to issue the writ and mandate was the appropriate remedy to enforce the performance of that duty (*23 Cal. 2d 12, 14)* .

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15-150 California Points & Authorities § 150.39

§ 150.39 Supporting Contention That Writ of Mandate Is Necessary to Compel Action by Public Entity or Official--Duty of Public Entity or Official to Perform Mandatory Ministerial Act

[1] FORM

[*The following should be combined, when appropriate, with a general form of memorandum supporting a petition for a writ of mandate (see, e.g., § 150.30).*]

A WRIT OF MANDATE SHOULD ISSUE TO COMPEL RESPONDENT TO _____ [*set forth legal duty of public entity or official, e.g.,* ISSUE PETITIONER A RESIDENTIAL BUILDING PERMIT] BECAUSE THIS ACT IS MINISTERIAL, NOT DISCRETIONARY, AND _____ [*cite statute, ordinance, charter provision, agency rule, or other law*] CREATES A MANDATORY DUTY IN RESPONDENT TO PERFORM THE ACT.

A. Performance of Ministerial Duty. A writ of mandate will lie to compel the performance of a clear, present, and ministerial duty that the law specifically enjoins (*Code Civ. Proc. § 1085*; *City of Dinuba v. County of Tulare (2007) 41 Cal. 4th 859, 868, 62 Cal. Rptr. 3d 614, 161 P.3d 1168* ; *Santa Clara County Counsel Attys. Assn. v. Woodside (1994) 7 Cal. 4th 525, 539-540, 28 Cal. Rptr. 2d 617, 869 P.2d 1142* ; *County of Sacramento v. Hickman (1967) 66 Cal. 2d 841, 845, 59 Cal. Rptr. 609, 428 P.2d 593* ; *Syngenta Crop Protection, Inc. v. Helliker (2006) 138 Cal. App. 4th 1135, 1181-1182, 42 Cal. Rptr. 3d 191* ; *Elmore v. Imperial Irrigation Dist. (1984) 159 Cal. App. 3d 185, 193, 205 Cal. Rptr. 433*).

B. Ministerial Act Defined. An act required by law is ministerial in character when it does not involve the exercise of judgment and discretion; when an official is required and authorized to do a prescribed act on a prescribed contingency, his or her functions are ministerial only [*Glendale City Employees' Assn. Inc. v. City of Glendale (1975) 15 Cal. 3d 328, 344, 124 Cal. Rptr. 513, 540 P.2d 609* ; *Jackson v. Gourley (2003) 105 Cal. App. 4th 966, 970, 130 Cal. Rptr. 2d 72* (DMV acceptance of certificate of completion of driver's education course from correspondence school ministerial act)].

[*Optional*] **C. Duty Imposed by Statute.** A writ of mandate is proper to compel a public official to perform a ministerial act required by statute (*Morris v. Harper (2001) 94 Cal. App. 4th 52, 59-63, 114 Cal. Rptr. 2d 62*).

[*Optional*] **D. Agency Rules.** A writ of mandate is proper to compel a public agency to follow its own rules when it has a ministerial duty to do so (*Pozar v. Department of Transportation (1983) 145 Cal. App. 3d 269, 271, 193 Cal. Rptr. 202*).

[*Optional*] **E. Charter-Prescribed Duties.** A writ of mandate is proper to compel a city council or civil service board to perform its mandatory duties prescribed by the charter (*LePage v. City of Oakland (1970) 13 Cal. App. 3d. 689, 692, 91 Cal. Rptr. 806*).

[*Optional*] **F. Building Permit.** A writ of mandate is proper to compel a city official to issue a building permit when all of the legal requirements have been complied with by petitioner (*Palmer v. Fox (1953) 118 Cal. App. 2d 453, 456, 458, 258 P.2d 30*).

[*Optional*] **G. Elections.** A writ of mandate is proper to compel a public official to conduct an election according to law (*Wenke v. Hitchcock (1972) 6 Cal. 3d 746, 751, 100 Cal. Rptr. 290, 493 P.2d 1154* ; *Miller v. Greiner (1964) 60 Cal. 2d 827, 830, 36 Cal. Rptr. 737, 389 P.2d 129*).

[*Optional*] **H. Initiatives.** A writ of mandate is proper to compel a public official to place an initiative that complies with the formal requirements on the ballot, unless directed by a court to do otherwise after a compelling showing has been made that a proper case has been established for interfering with the initiative power (*Farley v. Healey (1967) 67 Cal. 2d 325, 327, 329, 62 Cal. Rptr. 26, 431 P.2d 650* ; *Gayle v. Hamm (1972) 25 Cal. App. 3d 250, 254-255, 101 Cal. Rptr. 628*).

[*Optional*] **I. Forfeiture of Property.** A writ of mandate is proper to compel a public official to follow statutory procedures for effecting a forfeiture of property. Thus, a writ may be issued to compel compliance with a statutory requirement that if a claim of interest is timely filed by a person who is notified of a pending administrative forfeiture, the official proposing to seize the property must commence a judicial forfeiture proceeding (*Nasir v. Sacramento County Off. of the Dist. Atty. (1992) 11 Cal. App. 4th 976, 990-995, 15 Cal. Rptr. 2d 694*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a writ of mandate is proper to compel a public entity or official to perform an act required by the law.

These points and authorities should be combined with a general memorandum supporting a petition for writ of mandate (*see § 150.30*).

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate proceedings, see California Forms of Pleading and Practice, Ch. 358, *Mandate and Prohibition* (Matthew Bender). For discussion relating to interpretation of statutes and ordinances, see California Forms of Pleading and Practice, Ch. 531, *Statutes and Ordinances* (Matthew Bender).

[c] Opposing Memoranda

The points and authorities set out in *§ 150.50* may be used in an appropriate case to oppose a petition for mandate that is supported by the foregoing points and authorities.

[3] Discussion of Authorities

[a] Performance of Ministerial Duty

In ***City of Dinuba v. County of Tulare*** *(2007) 41 Cal. 4th 859, 868, 62 Cal. Rptr. 3d 614, 161 P.3d 1168* , the defendant County of Tulare improperly computed the portion of tax revenue to which the plaintiff City of Dinuba Redevelopment Agency was statutorily entitled. The trial court held that the defendant was immune from suit, and the court of appeal reversed.

The California Supreme Court upheld that court of appeal's ruling that the defendant was not immune from suit. It also held that mandamus was available when one public entity sought to force another to release funds in accordance with a statutory duty [*41 Cal. 4th 859, 868]* . The Court held that any hardship caused by enforcing the defendant's duty should be taken up with the Legislature, rather than with the courts [*41 Cal. 4th 859, 869]* .

In ***Santa Clara County Counsel Attys. Assn. v. Woodside*** *(1994) 7 Cal. 4th 525, 28 Cal. Rptr. 2d 617, 869 P.2d 1142* , the attorneys in the office of county counsel brought a declaratory and injunctive relief action against the county because the county notified the attorneys they could not file a petition for a writ of mandate to enforce their bargaining rights. The trial court determined the attorneys were entitled to proceed against the county and enjoined the county from terminating the attorneys for seeking mandamus, but the court of appeal reversed.

The Supreme Court reversed, and remanded with directions to allow the filing for a writ of mandate. The Court held that, despite the attorneys' attorney-client relationship with the county, the attorneys could meet the requirements for obtaining a writ of mandate. In making this determination, the Supreme Court found the existence of the prerequisites of a clear, present and ministerial duty on the part of the county and a clear, present and beneficial right in the attorneys (*7 Cal. 4th 525, 539-541)* .

In ***County of Sacramento v. Hickman*** *(1967) 66 Cal. 2d 841, 59 Cal. Rptr. 609, 428 P.2d 593* , a county and several of its school districts sought a writ of mandate to compel the county assessor to comply with the state tax code, which required that property be assessed from between 20 to 25 percent of its full value. Respondent, who had announced a higher assessment, contended that the state law was unconstitutional. The Supreme Court issued the writ, upholding the constitutionality of the statute (*66 Cal. 2d 841, 854)* . In its discussion of the availability of mandate, the Court applied the principle that the writ lies to compel the performance of a clear, present, and ministerial duty that the law specially enjoins. There could be no doubt, the Court held, that respondent's duty to assess in accordance with the law was a mandatory one (*66 Cal. 2d 841, 845)* . The tax code required that property "shall be assessed" at a ratio between 20 and 25 percent. Therefore, the petitioners made out a prima facie case for a writ of mandate (*66 Cal. 2d 841, 846)* .

In ***Syngenta Crop Protection, Inc. v. Helliker*** *(2006) 138 Cal. App. 4th 1135, 42 Cal. Rptr. 3d 191* , Syngenta and another pesticide manufacturer submitted data to the state Department of Pesticide Regulation (the "Department") concerning the health effects and environmental impacts of the active ingredients in their pesticides in connection with their applications for pesticide registration. After the manufacturers obtained certificates of registration, the department took into account its evaluations of their data in considering applications by other manufacturers. Syngenta challenged the registrations of the other pesticides by filing a complaint and petition for writ of mandate seeking declaratory and injunctive relief and a writ of mandate. Syngenta alleged that in evaluating applications for registration, the Department considered data that Syngenta previously submitted to the Department, without its consent, in violation of former Food & Agric. Code § 12811.5. Syngenta alleged in its combined complaint and writ petition that applications for registration that the other manufacturer submitted to the Department were incomplete because they were not accompanied by all the

data required by law. Syngenta also alleged that the Department had a duty to refrain from considering data submitted by Syngenta in evaluating the applications by the other manufacturer, a duty to deny any incomplete applications, and a duty to refrain from renewing any registration that was improperly issued. Syngenta alleged that it had no other adequate remedy at law. The Department demurred on the grounds that a writ of mandate cannot compel the Department to exercise its discretion in a particular manner. The trial court sustained the Department's demurrer to Syngenta's application for writ of mandate on the bases that the Department had no ministerial duty to deny or cancel a registration, that Syngenta had no standing to enforce former Food & Agric. Code § 12811.5 in a mandate proceeding, and that an injunction was the appropriate remedy.

In the court of appeal, Syngenta contended it was entitled to a writ of mandate directing the Department to refrain from renewing any registrations issued in violation of former Food & Agric. Code § 12811.5 and to cancel any registrations issued in violation of that former section. Syngenta contended that the Department had a ministerial duty to refrain from using the data without its consent and had a ministerial duty to cancel any registration issued in violation of the former statute. The court concluded that Syngenta alleged facts sufficient to support the issuance of a writ of mandate (*138 Cal. App. 4th 1135, 1181-1182*). If the other manufacturer failed to submit all data required by law and the Department considered data previously submitted by Syngenta to fill the gaps, each resulting registration issued by the Department was a clear abuse of discretion (*138 Cal. App. 4th 1135, 1181-1182*). The only proper course of action in the event of an incomplete application that could be deemed complete only by reference to data previously submitted to the Department by another applicant who had not consented to the Department's current consideration of the data was for the Department to deny registration and cancel any registration issued in violation of former Food & Agric. Code § 12811.5 (*138 Cal. App. 4th 1135, 1182*). The court of appeal held that Syngenta had a beneficial interest in the enforcement of those duties, and sustaining the demurrers to Syngenta's count for a writ of mandate was error (*138 Cal. App. 4th 1135, 1180-1182*).

In ***Elmore v. Imperial Irrigation Dist.*** *(1984) 159 Cal. App. 3d 185, 205 Cal. Rptr. 433* , a farmer claimed that the Imperial Irrigation District had been wasteful in its water management practices, resulting in flooding of his land. He petitioned for a writ of mandate in the superior court, alleging that the district had violated its statutory duties. The court sustained a demurrer to the petition on the ground that it was overly broad and petitioner appealed.

The court of appeal reversed the order sustaining the demurrer and remanded the cause (*159 Cal. App. 3d 185, 199)* . The court stated that mandate will issue to compel performance of duties specifically imposed by law and to correct abuses of discretion. Citing *Code Civ. Proc. §§ 1085* and *1086*, the court held that to state a cause of action for a writ of mandamus the petition must plead facts showing: (1) respondent agency has a clear duty; (2) petitioner has a beneficial interest in respondent's performance of that duty; (3) respondent has the ability to perform the duty; (4) respondent has failed to perform the duty or has abused its discretion in performing the duty; and (5) petitioner has no other plain, speedy, or adequate remedy (*159 Cal. App. 3d 185, 193)* . The court found each factor to be satisfied in the case, and thus the petition alleged sufficient facts to state a cause of action (*159 Cal. App. 3d 185, 193-198)* .

[b] Ministerial Act Defined

In ***Glendale City Employees' Assn., Inc. v. City of Glendale*** *(1975) 15 Cal. 3d 328, 124 Cal. Rptr. 513, 540 P.2d 609* , a city employees' union brought an action to compel the city to compute employee salaries in accordance with a negotiated memorandum of understanding approved by the city council. The trial court found that the memorandum was binding, entered judgment for plaintiffs, and issued a writ of mandate to compel the computing and paying of the salaries as fixed by the judgment. The city appealed.

The Supreme Court reversed and remanded on the ground that the city officials who had the authority to compute and pay wages had not been joined in the proceeding (*15 Cal. 3d 328, 345)* . In concluding that mandate was otherwise an available remedy, the Court rejected the city's contention that the writ mandated the enactment of a new salary ordinance, a legislative act that cannot be compelled by mandate (*15 Cal. 3d 328, 343-344)* . The Court found that the

writ directed the nonlegislative and ministerial acts of computing and paying the salaries as fixed by the memorandum of understanding and the judgment. The critical question in determining if an act required by law is ministerial in character, the Court explained, is whether it involves the exercise of judgment and discretion. The council's approval of the memorandum of understanding was the legislative act that fixed employee salaries in accord with that understanding. The agreement, as interpreted by the court, admitted of no discretion (*15 Cal. 3d 328, 344)* . Therefore, the duty of officials to carry out the city's obligations was of a ministerial character and was properly compelled by mandate (*15 Cal. 3d 328, 344-345)* .

In ***Jackson v. Gourley*** *(2003) 105 Cal. App. 4th 966, 970, 130 Cal. Rptr. 2d 72* , a high school student brought an action to compel the Department of Motor Vehicles to accept the certificate of completion issued by a private high school upon the student's completion of its correspondence driver education course. The Department argued that the correspondence course did not satisfy the requirements of the Vehicle and Education Codes. Therefore, the Department argued that it could not accept the certificate of completion issued by the private high school. The trial court issued a writ of mandate to compel the Department to accept the certificate of completion. The Department appealed.

The court of appeal affirmed the issuance of the writ of mandate. It first determined that the Department's duty to accept the certificate of completion was a ministerial duty, one that a public officer is obligated to perform in a prescribed manner required by law when a given state of facts exists (*105 Cal. App. 4th 966, 970)* . The court concluded that neither the Vehicle Code nor the Education Code expressly or implicitly grant the Department any discretion to refuse certificates of completion for private school correspondence courses in driver education (*105 Cal. App. 4th 966, 978)* .

[c] Duty Imposed by Statute

In ***Morris v. Harper*** *(2001) 94 Cal. App. 4th 52, 114 Cal. Rptr. 2d 62* , a physician filed a petition for writ of mandate to compel the acting director of the California Youth Authority (CYA) to comply with a statute that required the CYA to obtain licenses for its correctional treatment centers. The trial court granted the petition and issued the writ.

The court of appeal affirmed. It concluded the petition was properly granted because the relevant statute imposed a legal duty on the acting director. The court rejected the acting director's argument that the petition was improperly granted because he was willing to comply with the statute without coercion. The acting director's delay in complying, however, justified the writ (*94 Cal. App. 4th 52, 59-61)* . Additionally, the acting director argued that he could not be compelled to comply with the statute because the ability to obtain the licenses depended on the approval and cooperation of third parties. The court determined that the acting director could be compelled to do his part to obtain the licenses regardless of whether third parties cooperated (*94 Cal. App. 4th 52, 61-62)* . Finally, the court rejected the argument that, because the CYA could run the correctional treatment centers without offering the services for which a license is required, forcing the CYA to obtain licenses was an impermissible attempt to control the discretion of a public officer. The court held that the writ was appropriately worded to require the CYA to comply with the licensing statute only if it chose to offer the services for which a license was needed (*94 Cal. App. 4th 52, 62-63)* .

[d] Agency Rules

In ***Pozar v. Department of Transportation*** *(1983) 145 Cal. App. 3d 269, 193 Cal. Rptr. 202* , a bid submitted by a contractor for a highway construction project contained a discrepancy between the proposed per-unit price for materials and the computed total price for the materials. The Department of Transportation determined that the entire bid was uncertain and decided to award the contract to another bidder. The contractor petitioned for a writ of mandate to compel the department to follow its published procedure, which requires that the per-item price will prevail in case of a discrepancy. The superior court denied the petition. The court of appeal granted the writ, holding that a court has the power to direct an agency to follow its own rules when it has a ministerial duty to do so (*145 Cal. App. 3d 269, 271-272)* . The department's own rules obligated it to accept the per-unit price in the absence of specified circumstances, none of which were present in petitioner's case (*145 Cal. App. 3d 269, 271)* .

[e] Charter-Prescribed Duties

In ***LePage v. City of Oakland*** *(1970) 13 Cal. App. 3d 689, 91 Cal. Rptr. 806* , a city police officer sought a declaratory judgment and a writ of mandate to compel the city to count all the time spent in work-incurred disability retirement status as a credit towards years of service retirement time. The trial court issued the writ. The court of appeal affirmed, holding that the trial court properly construed the applicable provisions of the city charter (*13 Cal. App. 3d 689, 696)* . In its discussion of the availability of mandate as a remedy, the court stated that the writ can be used to compel a city council or civil service board to perform its mandatory duties prescribed by the charter (*13 Cal. App. 3d 689, 692)* .

[f] Building Permit

In ***Palmer v. Fox*** *(1953) 118 Cal. App. 2d 453, 258 P.2d 30* , petitioners sought a building permit allowing them to construct a single-family residence on their property. The permit was denied because of racial restrictions in the deed and, after a trial, they obtained a writ of mandate compelling the responsible city official to issue the permit.

The court of appeal affirmed with certain modifications, holding that petitioners were entitled to have their plans processed and approved, contingent on their compliance with any new building code provisions enacted since the trial and contingent on approval by the city's independent art jury, which was not a party to the proceedings (*118 Cal. App. 2d 453, 456, 458-459)* . In its discussion of the availability of mandate, the court applied the principle that when an official is required and authorized to do a prescribed act on a prescribed contingency, his or her function is ministerial only and mandate may be issued to control the official's action on the happening of the contingency. The court found that issuance of the permit was merely the completion of the official's processing of petitioner's application and that the official would have no right to withhold the permit when petitioners complied with the prerequisites for its issuance (*118 Cal. App. 2d 453, 458)* .

[g] Elections

In ***Wenke v. Hitchcock*** *(1972) 6 Cal. 3d 746, 100 Cal. Rptr. 290, 493 P.2d 1154* , petitioner moved in anticipation of a redistricting plan that would take his residence out of the district in which he sought election. The Supreme Court exercised its original jurisdiction and issued a writ of mandate compelling a registrar of voters to issue nomination papers to petitioner (*6 Cal. 3d 746, 756)* . Voting registrars, the Court stated, are public officers with the ministerial duty of permitting qualified voters to register and mandate is the proper remedy to compel an officer to conduct an election according to law (*6 Cal. 3d 746, 751)* .

In ***Miller v. Greiner*** *(1964) 60 Cal. 2d 827, 36 Cal. Rptr. 737, 389 P.2d 129* , the Supreme Court exercised its original jurisdiction to prevent the holding of a special election to determine whether the city manager should be retained in office for the ensuing two years (*60 Cal. 2d 827, 833-834)* . The Court determined that such an election would violate the city charter requiring such an election to be held in odd-numbered years in conjunction with general municipal elections (*60 Cal. 2d 827, 831)* . It stated that a writ of mandate will issue to compel an officer to conduct an election according to the law (*60 Cal. 2d 827, 830)* .

[h] Initiatives

In ***Farley v. Healey*** *(1967) 67 Cal. 2d 325, 62 Cal. Rptr. 26, 431 P.2d 650* , petitioners who attempted to submit a measure to the voters sought a writ of mandate to compel public officials to determine the sufficiency of signatures to a petition to place an initiative measure on the ballot and, if determined to be sufficient, to place the proposed initiative on the ballot. The Supreme Court issued the writ, holding that the registrar of voters had exceeded his authority in undertaking to determine whether the proposed initiative was within the power of the electorate to adopt (*67 Cal. 2d 325, 327, 329)* . Given compliance with the formal requirements for submitting an initiative, the Court explained, the registrar must place it on the ballot unless he or she is directed to do otherwise by a court on a compelling showing that

the proper case has been established for interfering with the initiative power (*67 Cal. 2d 325, 327)* .

In ***Gayle v. Hamm*** *(1972) 25 Cal. App. 3d 250, 101 Cal. Rptr. 628* , petitioners obtained a writ of mandate commanding the county clerk to ascertain if petitioner's initiative petition had the requisite number of qualified signatures. The court of appeal affirmed the issuance of a writ of mandate, holding that the trial court properly refused to adjudicate the validity of the proposed measure prior to its submission to the electorate (*25 Cal. App. 3d 250, 258)* . The county clerk's duty in processing the initiative petition for the requisite number of signatures was ministerial, the court held. In addition, a court should not interfere with the right of people to propose legislation absent a compelling showing that the proposed ordinance would be invalid even if enacted (*25 Cal. App. 3d 250, 255)* .

[i] Forfeiture of Property

In ***Nasir v. Sacramento County Off. of the Dist. Atty.*** *(1992) 11 Cal. App. 4th 976, 15 Cal. Rptr. 2d 694* , the district attorney notified a vehicle owner that the vehicle was about to be subjected to administrative forfeiture on the ground of being used in connection with commission of a drug offense by the owner's son. The owner filed a claim to have the vehicle restored to him; however, the district attorney, viewing the claim as not timely filed, seized the vehicle. The owner petitioned for a writ of mandate to compel compliance with Gov. Code § 11488.4, which requires that if a claim is timely filed, the district attorney must commence a judicial forfeiture proceeding. The trial court denied the petition, and the court of appeal reversed with directions to issue a peremptory writ.

Preliminarily the court of appeal disposed of the issue of timeliness of the claim filing. Although the claim was filed one day late under the filing requirements stated in the district attorney's notice, the notice was deficient. The claim was filed within the period prescribed in connection with a required public notice, and the court of appeal concluded that the filing was timely (*11 Cal. App. 4th 976, 982-988)* . Having found the claim to have been timely, the court held that mandate was an appropriate remedy to compel the district attorney to perform the act enjoined on him by law, that is the commencement of a judicial forfeiture action (*11 Cal. App. 4th 976, 990)* . The district attorney also contended that issuing a writ would be fruitless because the vehicle had been sold. The court of appeal concluded that the vehicle owner was entitled to a hearing of his claim regardless of whether the vehicle could be restored to him, because the impossibility of restoring it to him was due entirely to the district attorney's precipitate seizure and disposition of it. If the owner prevailed in a judicial forfeiture proceeding, the trial court would be authorized to order the payment of compensation in lieu of restoration of the vehicle (*11 Cal. App. 4th 976, 990-995)* .

[4] Additional Authorities

[a] Agency Rules

In *Timmons v. McMahon (1991) 235 Cal. App. 3d 512, 518, 286 Cal. Rptr. 620* , a temporary guardian of two children brought an administrative mandamus action to obtain benefits under the Aid to Families With Dependent Children-Foster Care (AFDC-FC) program. The guardian also sought an ordinary writ of mandate to compel the director of the Department of Social Services to correct the department's eligibility policies so that temporary as well as permanent guardians could obtain AFDC-FC benefits. The department challenged the guardian on the ground that with respect to the ordinary mandate action she was not "beneficially interested" as required by *Code Civ. Proc. § 1085*. The court held that the "beneficial interest" requirement is satisfied when a public right is at stake and the relator is a citizen interested in having the laws executed and the duty in question enforced.

[b] Building Permit

In *Ellis v. City Council (1963) 222 Cal. App. 2d 490, 497, 35 Cal. Rptr. 317* , plaintiff obtained a writ of mandate to compel city officials to issue a building permit for construction of a swimming pool. After a subsequent trial on the issue of damages, however, the court granted a nonsuit, finding that the building inspector was not acting in a ministerial capacity in refusing to issue the permit and that plaintiff suffered no damages. The court of appeal reversed,

holding that the building inspector's refusal to issue petitioner a permit was an arbitrary refusal to perform a ministerial act (*222 Cal. App. 2d 490, 498, 501)* . The evidence established that petitioner had complied with all the legal requirements entitling her to issuance of the permit and, under *Palmer v. Fox (1953) 118 Cal. App. 2d 453, 258 P.2d 30* (discussed under § 150.139[3][f]), the official had no right to withhold the permit (*222 Cal. App. 2d 490, 497)* .

[c] Elections

In *Jolicoeur v. Mihaly (1971) 5 Cal. 3d 565, 96 Cal. Rptr. 697, 488 P.2d 1* , the Supreme Court exercised its original jurisdiction and issued a writ of mandate ordering respondent registrars of voters to permit minors over the age of 18 to register to vote in the same manner as adult registrants (*5 Cal. 3d 565, 582)* . The Court stated that a writ of mandate is the proper remedy for compelling an officer to conduct an election according to law (*5 Cal. 3d 565, 570 n.2*).

In *San Dieguito Union High School Dist. v. Rosander (1985) 171 Cal. App. 3d 968, 217 Cal. Rptr. 737* , the court of appeal denied a school district's petition for a writ of mandate to set aside a trial court judgment that ordered issuance of a writ of mandate directing cancellation of a scheduled election. The election concerned a proposed removal of part of a junior high school program from petitioner high school district to real party elementary school district (*171 Cal. App. 3d 968, 972)* . The court held that the writ sought by the high school district was the appropriate proceeding to compel the county superintendent of schools to follow *Educ. Code § 37085*, which authorizes an election that may result in the withdrawal of students from a high school district's junior high school system. The court agreed with the high school district that the proposed election was invalid because it limited the vote in the election to voters of the elementary school district, thus unconstitutionally disenfranchising the remaining voters of the high school district (*171 Cal. App. 3d 968, 972-973)* . The court then held that because a proceeding in mandate may be utilized to enforce the constitutional rights of equal protection, a school district that may be adversely affected by a school district reorganization plan and election has standing to seek a writ of mandate to set aside the plan and compel compliance with legislative requirements governing the election (*171 Cal. App. 3d 968, 973)* .

[d] Initiative

Brosnahan v. Eu (1982) 31 Cal. 3d 1, 181 Cal. Rptr. 100, 641 P.2d 200 , was a mandate-prohibition proceeding to prevent the Secretary of State from instituting measures preparatory to placing on the ballot an initiative measure relating to criminal justice and entitled "The Victims' *Bill of Rights*," after the superior court had issued a writ of mandate directing the Secretary of State to certify the initiative for the election and to take other steps required by law to place the measure before the voters. Petitioners asserted that the Secretary of State had failed to comply with certain statutory provisions regarding the number of valid signatures required to qualify the measure for the ballot and that the proposed measure was unconstitutional because it contained more than one subject and amounted to a revision of the constitution rather than an amendment [*see Cal. Const., art. II, § 8(d), art. XVIII, §§ 1*-3]. The Secretary of State had concluded, on the basis of random samplings, that the petitions contained 108.76 percent of the number of signatures required for a place on the ballot but that this was less than the 110 percent required by *Elec. Code § 3520(g)*. While the Supreme Court proceeding was pending, the Legislature passed, and the Governor signed, an urgency measure (Stats. 1982, ch. 102) that had the sole effect of qualifying the measure for the ballot. The Supreme Court, by a sharply divided vote, upheld the validity of the special legislation, concluded that the initiative measure should be placed on the ballot, vacated its stay of the superior court judgment granting the writ, and denied the peremptory writs of mandate and prohibition (*31 Cal. 3d 1, 4)* .

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15-150 California Points & Authorities § 150.40

§ 150.40 Supporting Contention That Writ of Mandate Is Necessary to Compel Action by Public Entity or Official--Duty of Public Entity or Official to Instate Petitioner to Office or Employment

[1] FORM

[*The following should be combined, when appropriate, with a general form of memorandum supporting a petition for a writ of mandate (see, e.g., § 150.30).*]

A WRIT OF MANDATE SHOULD ISSUE TO COMPEL RESPONDENT TO INSTATE PETITIONER TO _____ [*specify office or position to which petitioner is entitled*] BECAUSE _____ [*cite to constitutional provision, statute, ordinance, or other law*] CREATED A DUTY IN RESPONDENT TO INSTATE PETITIONER TO THAT RIGHT OR OFFICE.

[*EITHER*]

Instatement to Office. A writ of mandate is the proper remedy to compel the instatement of a person to a public office when the person has been unlawfully precluded from the office and his or her title to the office is only incidentally involved (*Code Civ. Proc. § 1085*; *Housing Authority v. City Council (1962) 208 Cal. App. 2d 599, 603, 609, 25 Cal. Rptr. 493* ; *see Lungren v. Deukmejian (1988) 45 Cal. 3d 727, 731-732, 248 Cal. Rptr. 115, 755 P.2d 299*).

[*OR*]

Instatement to Employment. Mandate is the proper remedy to instate a public employee to a position when the public employer has a clear, present, and ministerial duty under law to do so (*Code Civ. Proc. § 1085*; *Taylor v. Board of Trustees (1984) 36 Cal. 3d 500, 507, 204 Cal. Rptr. 711, 683 P.2d 710* ; *Norton v. San Bernardino City Unified School District (2008) 158 Cal. App. 4th 749, 756-762, 69 Cal. Rptr. 3d 917*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that a writ of mandate is proper to compel the instatement of a public official or a public employee to a position as required by law.

The foregoing points and authorities should be combined with a general memorandum supporting a petition for writ of mandate (*see § 150.30*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Administrative Mandamus Compared

The writ of administrative mandamus is available to review decisions resulting from administrative hearings held by either governmental or nongovernmental bodies [*Code Civ. Proc. § 1094.5(a)*; *Anton v. San Antonio Community Hosp. (1977) 19 Cal. 3d 802, 815-817, 140 Cal. Rptr. 442, 567 P.2d 1162]* . The scope of review is considerably broader than the review provided by ordinary mandate because *Code Civ. Proc. § 1094.5(b)* authorizes the reviewing court to determine whether the administrative decision is supported by the findings and whether the findings are supported by the evidence [*Code Civ. Proc. § 1094.5(b)*; *see Environmental Protection and Information Center v. California Department of Forestry and Fire Protection (2008) 44 Cal. 4th 459, 519-520, 80 Cal. Rptr. 3d 28, 187 P.3d 888* (findings required in administrative mandate but not traditional mandate)].

For forms relating to review under *Code Civ. Proc. § 1094.5* of public administrative proceedings generally, see Ch. 195, *Public Administrative Law* . For forms relating to review under *Code Civ. Proc. § 1094.5* of employment decisions affecting teachers, see Ch. 211, *Schools: Certification, Dismissal, and Related Employment Issues* . For forms relating to review under *Code Civ. Proc. § 1094.5* of employment decisions affecting civil service employees, see Ch. 36, *Civil Service* .

[c] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Instatement to Office

In ***Housing Authority v. City Council*** *(1962) 208 Cal. App. 2d 599, 25 Cal. Rptr. 493* , a city council held a hearing under a charter provision and then passed a resolution dismissing several housing commissioners for misconduct in office. The commissioners obtained a writ of mandate to compel a city council to reinstate them to their positions. The Supreme Court affirmed, holding that the lower court did not abuse its discretion (*208 Cal. App. 2d 599, 609)* . The Court also held that mandate was the proper procedure through which petitioners could seek reinstatement to their offices because the writ compels the admission of a party to a right or office to which he or she is entitled and was unlawfully precluded (*208 Cal. App. 2d 599, 603, 609)* . Ordinarily, quo warranto is the remedy for determining title to office, usually when more than one person is claiming the office. A mandate proceeding is proper, however, if the question of title is only incidental to the main question of whether petitioners were unlawfully precluded from the right or office (*208 Cal. App. 2d 599, 603)* . The city council was functioning under law to fulfill state purposes and so could be compelled by mandate to reinstate petitioners (*208 Cal. App. 2d 599, 605, 609)* .

In ***Lungren v. Deukmejian*** *(1988) 45 Cal. 3d 727, 248 Cal. Rptr. 115, 755 P.2d 299* , the governor nominated petitioner to fill the office of Treasurer when the sitting treasurer died. The Assembly voted to confirm the nomination

but the Senate voted to deny it. Although petitioner was a member of the United States Congress at the time, he sought a writ of mandate to enforce his right to assume the office of Treasurer, representing that he would resign his congressional seat if the court were to decide in his favor. The writ petitioner sought would compel the governor to issue him a commission and to compel various other public officials to allow him to assume office, contending that confirmation by one house was sufficient under the California Constitution.

The Supreme Court denied the petition, holding that the Constitution requires confirmation by both houses (*45 Cal. 3d 727, 743)* . In its discussion of the availability of mandate, the Court noted that petitioner did not have a present right to the remedy because he could not hold two offices at the same time; however, the court went on to consider the petition because of the public interest in resolving the dispute as soon as possible (*45 Cal. 3d 727, 732)* .

[b] Instatement to Employment

In ***Taylor v. Board of Trustees*** *(1984) 36 Cal. 3d 500, 204 Cal. Rptr. 711, 683 P.2d 710* , petitioner was a temporary teacher who was asked to fill the position of a permanent teacher on long-term leave. Because he taught for at least 75 percent of that school year and performed all the duties of a certificated teacher, petitioner became eligible under *Educ. Code § 44918* to be reemployed the following year for any vacant positions in which he was qualified to serve. The following year, the school district failed to give petitioner any preferential hiring right. Petitioner sought a writ of mandate to compel the school board to employ him as a probationary teacher and to pay him various back salary benefits to which the statute entitled him. The trial court denied the petition, finding that the statute did not apply to teachers hired to replace permanent teachers on leave.

The Supreme Court reversed and remanded, holding that the district had a statutory obligation to reemploy petitioner unless he lacked the appropriate qualifications (*36 Cal. 3d 500, 509)* . In its discussion of the availability of mandate, the Court concluded that the district had a clear, present, and ministerial duty under *Educ. Code § 44918* to reemploy petitioner. However, the Court found that the question of whether petitioner had a clear, present, and beneficial right to performance of that duty would turn on resolution of the question of whether he was qualified to serve (*36 Cal. 3d 500, 507)* .

In ***Norton v. San Bernardino City Unified School District*** *(2008) 158 Cal. App. 4th 749, 756-762, 69 Cal. Rptr. 3d 917* , the defendant school district had terminated the plaintiff's employment. The plaintiff appealed the defendant's decision to an administrative law judge, who ruled that the district should reinstate the plaintiff with his prior title and salary, but should suspend him for one month without pay. The district gave the plaintiff his prior title and backpay but did not give him his previous job duties. The plaintiff sought a writ of mandate to compel the defendant to give him his previous job duties. The trial court denied the petition.

The court of appeal first ruled that the challenged decision was subject to a writ of mandate under *Code Civ. Proc. § 1085* because the district's decision not to fully reinstate the plaintiff to his former duties and responsibilities was not reached following an evidentiary hearing (*158 Cal. App. 4th 749, 757)* . As to the merits, the district argued that it was required only to restore the plaintiff to his former position at his former salary, and the job duties were not relevant. The court of appeal disagreed and held that the district was expressly required to reinstate the plaintiff to his former duties and responsibilities. The court held that the personnel commission's decision did not vest the district with discretion to pick and choose which aspects of the plaintiff's former position it would restore (*158 Cal. App. 4th 749, 762)* .

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15-150 California Points & Authorities § 150.41

§ 150.41 Supporting Contention That Writ of Mandate Is Necessary to Compel Action by Public Entity or Official--Duty of Public Entity or Official to Refrain From Performing Ministerial Act in Unlawful Manner

[1] FORM

[*The following should be combined, when appropriate, with a general form of memorandum supporting a petition for a writ of mandate (see, e.g., § 150.30).*]

A WRIT OF MANDATE SHOULD ISSUE TO RESTRAIN RESPONDENT FROM _____ [*set forth act to be restrained*] BECAUSE _____ [*cite constitutional provision, statute, ordinance, charter provision, agency rule, or other law*] PROHIBITS RESPONDENT FROM PERFORMING RESPONDENT'S DUTY IN THAT MANNER.

Restraining Unlawful Act. A writ of mandate may issue to restrain a public official from the performance of his or her ministerial duty in an unlawful manner (*Planned Parenthood Affiliates v. Van de Kamp (1986) 181 Cal. App. 3d 245, 262-263, 226 Cal. Rptr. 361*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that a writ of mandate, known as "prohibitory mandate," is proper to restrain a public entity or official from performing a ministerial act in an unlawful manner.

The foregoing points and authorities should be combined with a general memorandum supporting a petition for writ of mandate (*see § 150.30*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Restraining Unlawful Act

In ***Planned Parenthood Affiliates v. Van de Kamp*** *(1986) 181 Cal. App. 3d 245, 226 Cal. Rptr. 361* , plaintiffs brought suit for a writ of mandate to enjoin the Attorney General from enforcing *Penal Code § 11165 et seq.*, the child abuse reporting law, in a specified manner. The Attorney General had previously issued an opinion interpreting the law, in conjunction with *Penal Code § 288*, as requiring a report of child abuse in all cases involving sexual activity of minors under the age of 14, including consensual sexual activity with other minors. Petitioners argued that enforcement of this interpretation was unlawful and should be enjoined by writ of mandate.

The court of appeal agreed and granted the writ. The court initially noted that just as the lawful exercise of a ministerial duty of a public official may be compelled by writ of mandate, the unlawful exercise of such a duty may be restrained by a writ of mandate (*181 Cal. App. 3d 245, 262)* . When a writ of mandate is employed to restrain a public official from performing a duty in an unlawful manner, it is known as a writ of prohibitory mandate (*181 Cal. App. 3d 245, 263)* . The court then found that the Attorney General's interpretation of the child abuse reporting act was erroneous and that the act did not require the reporting of consensual sexual activity of minors under the age of 14 with other minors. The court additionally held that such an interpretation would render the act in violation of the constitutional right to privacy of children under the age of 14 (*181 Cal. App. 3d 245, 276)* . It held that the writ should be granted because the Attorney General was enforcing or threatening to enforce the law in a manner not authorized by statute and in a manner that would violate the constitution (*181 Cal. App. 3d 245, 281-282)* . In so holding, the court recognized that while prohibitory mandate is usually reserved for fact patterns showing present action that is unlawful or a clear cut statutory duty that violates the constitution, when the interests at stake are significant, a writ may be used to prohibit the translation of an interpretation of the law into action (*181 Cal. App. 3d 245, 264)* .

[4] Additional Authorities

[a] Restraining Unlawful Act

In *Planned Parenthood Affiliates v. Swoap (1985) 173 Cal. App. 3d 1187, 219 Cal. Rptr. 664* , the court of appeal held that funding restrictions in § 33.35 of the Budget Act of 1985-1986, concerning family planning organizations that provide abortion-related services, violated the "single subject" provision of *Cal. Const., art. IV, § 9*. The court reasoned that § 33.35 improperly amended the Family Planning Act (*Welf. & Inst. Code §§ 14500-14508*) and did not simply clarify it. The court issued a peremptory writ of mandate, directing the secretary of the state heath and welfare department and other public officials to refrain from enforcing the unconstitutional provisions (*173 Cal. App. 3d 1187, 1201-1202)* .

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15-150 California Points & Authorities § 150.42

§ 150.42 Supporting Contention That Writ of Mandate Is Necessary to Compel Action by Public Entity or Official--Duty of Public Entity or Official to Exercise Discretion

[1] FORM

[*The following should be combined, when appropriate, with a general form of memorandum supporting a petition for a writ of mandate (see, e.g., § 150.30).*]

A WRIT OF MANDATE SHOULD ISSUE TO COMPEL RESPONDENT TO EXERCISE ITS DISCRETION TO DETERMINE WHETHER _____ [*specify determination, e.g.,* PETITIONER IS QUALIFIED FOR AN APPOINTMENT TO THE POSITION OF NOTARY PUBLIC] BECAUSE RESPONDENT HAS REFUSED TO EXERCISE ITS DISCRETION IN THE ERRONEOUS BELIEF THAT IT HAS NO DISCRETION.

Duty to Exercise Discretion. A writ of mandate is the proper remedy to compel a public officer to exercise discretion (*Ballard v. Anderson (1971) 4 Cal. 3d 873, 884-885, 95 Cal. Rptr. 1, 484 P.2d 1345*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that a writ of mandate is proper to compel a public entity or official to exercise its discretion when it has refused to do so.

The foregoing points and authorities should be combined with a general memorandum supporting a petition for writ of mandate (*see § 150.30*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Exercise of Discretion

In ***Ballard v. Anderson*** *(1971) 4 Cal. 3d 873, 95 Cal. Rptr. 1, 484 P.2d 1345* , a minor female sought a writ of mandate to compel the therapeutic abortion committee of a county hospital to consider on its merits her application for an abortion without the consent of her parents. The Supreme Court exercised its original jurisdiction and granted the writ as prayed, holding that a statute permitted minors to seek abortions without parental consent (*4 Cal. 3d 873, 884-885)* . In its discussion of the availability of mandate, the Court explained that the writ was proper because it did not compel the committee to authorize the abortion but only compelled the committee to exercise its discretion to approve or disapprove the application according to the relevant statutory criteria (*4 Cal. 3d 873, 884)* . Therefore, it applied the principle that mandate lies to command the exercise of discretion in order to compel some action upon the subject involved (*4 Cal. 3d 873, 885)* .

[4] Additional Authorities

[a] Exercise of Discretion

In *Hollman v. Warren (1948) 32 Cal. 2d 351, 196 P.2d 562* , petitioner applied to be a notary public. The Governor refused to act on the application in the belief that a statute prevented him from appointing any more notaries in the county. Petitioner sought a writ of mandate to compel the Governor to exercise discretion on the application. The Supreme Court granted the writ, holding that the statute limiting the number of notaries was invalid (*32 Cal. 2d 351, 359-360)* . The Court enunciated the principle that a writ of mandate will lie to command the exercise of discretion to compel some action on the subject involved (*32 Cal. 2d 351, 355)* .

In *Los Angeles County Employees Assn., Local 660 v. County of Los Angeles (1973) 33 Cal. App. 3d 1, 108 Cal. Rptr. 625* , two unions sought a writ of mandate to compel the county and its departments to undertake negotiations with the unions. The trial court issued the writ, and the court of appeal affirmed, holding that both state law and a local ordinance required negotiation (*33 Cal. App. 3d 1, 8)* . Mandate, the court held, was the proper method to compel the government officials to comply with both the state and local law because the duty to negotiate, by itself, is not a discretionary act. However, the writ could not compel them to reach a specified result (*33 Cal. App. 3d 1, 8)* .

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15-150 California Points & Authorities § 150.43

§ 150.43 Supporting Contention That Writ of Mandate Is Necessary to Compel Action by Public Entity or Official--Duty of Public Entity or Official to Exercise Discretion in Particular Manner

[1] FORM

[*The following should be combined, when appropriate, with a general form of memorandum supporting a petition for a writ of mandate (see, e.g., § 150.30).*]

A WRIT OF MANDATE SHOULD ISSUE TO COMPEL RESPONDENT TO _____ [*set forth legal duty of public entity of official, e.g.,* ASCERTAIN PREVAILING WAGES FOR COMPARABLE JOBS AND SET SALARIES IN ACCORDANCE WITH THOSE WAGES] BECAUSE RESPONDENT'S FAILURE TO DO SO CONSTITUTES AN ABUSE OF DISCRETION.

A. Abuse of Discretion. Mandate will lie if the action taken by a public entity or official is so palpably unreasonable and arbitrary as to indicate an abuse of discretion as a matter of law (*Sanders v. City of Los Angeles (1970) 3 Cal. 3d 252, 261, 90 Cal. Rptr. 169, 475 P.2d 201*).

B. Exercise of Discretion in Particular Manner. Mandate will lie to correct an abuse of discretion if the petitioner clearly establishes the right to have discretion exercised in a particular manner (*Protect the Historic Amador Waterways v. Amador Water Agency (2004) 116 Cal. App. 4th 1099, 1105-1106, 11 Cal. Rptr. 3d 104* ; *Coelho v. State Personnel Bd. (1989) 209 Cal. App. 3d 968, 971, 257 Cal. Rptr. 557*).

[*Optional*] **C. Failure to Exercise Discretion After Reasonable Time.** A court seeking to remedy a violation of law may require a particular remedy if the governmental entity fails to exercise its discretion after being given a reasonable opportunity to do so (*see* *Common Cause of California v. Board of Supervisors (1989) 49 Cal. 3d 432, 446, 261 Cal. Rtpr. 574, 777 P.2d 610*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that a writ of mandate is proper to compel a public entity or official to exercise its discretion in a particular way on the basis that the action it took was an abuse of discretion.

The foregoing points and authorities should be combined with a general memorandum supporting a petition for writ of mandate (*see § 150.30*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender).

[c] Opposing Memoranda

The points and authorities set out in *§ 150.51* may be used in an appropriate case to oppose a petition for mandate that is supported by the foregoing points and authorities.

[3] Discussion of Authorities

[a] Abuse of Discretion

In ***Sanders v. City of Los Angeles*** *(1970) 3 Cal. 3d 252, 90 Cal. Rptr. 169, 475 P.2d 201* , city employees obtained a writ of mandate directing the city to ascertain prevailing wages paid in private industry for comparable jobs and to pay the employees salaries that were at least equal to those wages, as required by the city charter. The writ provided that the city could use any appropriate administrative procedures to make the required ascertainment. On appeal from the trial court's enforcement order for payment of back wages, the court of appeal held that the city had failed to comply with the writ because the procedures it used to determine salaries were unreasonable and unfair. Mandate was proper, the court explained, when the action taken is so palpably unreasonable and arbitrary as to indicate an abuse of discretion as a matter of law (*3 Cal. 3d 252, 261)* .

[b] Exercise of Discretion in Particular Manner

In ***Protect the Historic Amador Waterways v. Amador Water Agency*** *(2004) 116 Cal. App. 4th 1099* , defendant Amador Water Agency (Agency) certified an environmental impact report (EIR) for a project that was to replace a canal with a pipeline. In the EIR, the Agency acknowledged that the pipeline would affect the flow of various streams in the area. Nonetheless, the Agency concluded that this reduction in stream-flow would not constitute a significant effect on the environment within the meaning of the California Environmental Quality Act (CEQA), *Pub. Res. Code § 21000 et seq.* Plaintiff Protect the Historic Amador Waterways filed a petition for writ of mandate, challenging the EIR on the ground the Agency abused its discretion by asserting the bare conclusion that modifying the flow of local creeks was not a significant adverse physical change to the existing environmental conditions. The trial court denied plaintiff's petition.

The court of appeal reversed, holding that the Agency abused its discretion. It held that abuse of discretion is shown if (1) the agency has not proceeded in a manner required by law, or (2) the agency's determination is not supported by substantial evidence (*116 Cal. App. 4th 1099, 1105)* . It held that if an agency fails to comply with the informational requirements of CEQA, the agency fails to proceed in "a manner required by law" and therefore abuses its discretion (*116 Cal. App. 4th 1099, 1105)* . The court of appeal concluded that the Agency abused its discretion because the EIR

did not contain a required statement indicating why the Agency determined that the reduction in the flow of local streams would not be significant. Nevertheless, the court noted that its conclusion did not mean the Agency must start the EIR process anew. Rather, prior to recertification, the Agency needed to correct the deficiency in the EIR (*116 Cal. App. 4th 1099, 1110-1113)* .

In ***Coelho v. State Personnel Bd.*** *(1989) 209 Cal. App. 3d 968, 257 Cal. Rptr. 557* , an employee of the Department of Fish and Game was suspended for four days after an administrative hearing on charges of failure of good behavior. A remedy under *Code Civ. Proc. § 1094.5* (administrative mandamus) was unavailable because the Department was not required to hold an evidentiary hearing to impose a suspension of five days or less. The employee sought a writ of mandate to review the administrative decision and the trial court sustained a demurrer on the ground of lack of jurisdiction. The court of appeal reversed, holding that traditional mandate will lie to correct an abuse of discretion when a petitioner clearly established the right to have discretion exercised in a particular manner (*209 Cal. App. 3d 968, 971)* .

[c] Failure to Exercise Discretion After Reasonable Time

In ***Common Cause v. Board of Supervisors*** *(1989) 49 Cal. 3d 432, 444, 261 Cal. Rtpr. 574, 777 P.2d 610* , a taxpayer and several organizations sought a preliminary injunction and writ of mandate requiring a county and its officials to deputize certain county employees as voting registars in order to comply with a statute that required counties to implement voter outreach to minority and low-income communities. The trial court granted the preliminary injunction and the court of appeal affirmed.

The Supreme Court reversed, holding that there was no possibility that plaintiffs could prevail on the merits because the applicable statute did not require deputization of county employees as a means to achieve the goal of maximizing voter registration (*49 Cal. 3d 432, 443)* . In its discussion of the availability of mandate, the Court concluded that, even if the present outreach program was inadequate to fulfill the statute's requirements, a writ of mandate could not require the county to take a particular course of action specifically committed to the county's discretion. The Court applied the principle that a court seeking to remedy a violation of law should not require a particular remedy unless (1) the governmental entity has no discretion to exercise, or (2) it fails to exercise that discretion after being given a reasonable opportunity to do so, and concluded that neither of the exceptions applied (*49 Cal. 3d 432, 446)* . The second exception was based on *Legislature v. Reinecke (1973) 10 Cal. 3d 396, 110 Cal. Rptr. 718, 516 P.2d 6* . In *Reinecke,* the state Legislature failed after the 1970 census to pass any reapportionment bill acceptable to the Governor. The Supreme Court adopted temporary apportionment plans for the 1972 elections pursuant to its duty to insure the electorate equal protection and the right to vote (*10 Cal. 3d 396, 399 n.1*). By the end of the 1972 legislative session, a reapportionment statute had still not been enacted. Therefore, the Court appointed Special Masters to hold public hearings and present their recommendation for a specific reapportionment plan. The Supreme Court adopted the plan but declined to issue an order to the Legislature, instead relying on the parties to accede to the holding (*10 Cal. 3d 396, 407)* .

[4] Additional Authorities

[a] Abuse of Discretion

In *Manjares v. Newton (1966) 64 Cal. 2d 365, 49 Cal. Rptr. 805, 411 P.2d 901* , the parents of school-age children obtained a writ of mandate directing the school board to provide transportation for their children after the board discontinued certain school bus routes for financial reasons. The Supreme Court affirmed, holding that there was no reasonable basis for the board's refusal to provide transportation (*64 Cal. 2d 365, 378)* . Although the state Education Code gave the board discretion to determine whether or not transportation should be provided, the Court explained that mandate will lie whenever an administrative board has abused its discretion (*64 Cal. 2d 365, 370)* . Under the circumstances, the court properly concluded that the transportation costs or the possibility that other families might

demand bus service did not provide a reasonable justification for the denial of transportation to children who have no other means to attend school (*64 Cal. 2d 365, 373-374)* .

In *Griffin v. Board of Supervisors (1963) 60 Cal. 2d 318, 33 Cal. Rptr. 101, 384 P.2d 421* , voters sought a writ of mandate to compel a county board of supervisors to reapportion supervisorial districts to make them more equal in population. One district containing 50 percent of the population had the same representation as a district containing less than two percent of the population. A state statute, which authorized but did not require county boards to reapportion districts, required that when districts were reapportioned, they should be made as nearly equal in population as possible. The court of appeal issued the writ, holding that the board was under a duty to redistrict the county (*60 Cal. 2d 318, 322)* . Even absent a statutory requirement, the court held, districts must be redistricted periodically to preserve the representative system of government. Although the statute gave the board some discretion in deciding whether redistricting has become necessary, the discretion was not unlimited, and when there were drastic deviations from equality of population, the refusal to redistrict was an abuse of discretion (*60 Cal. 2d 318, 322)* .

In *Walker v. County of Los Angeles (1961) 55 Cal. 2d 626, 12 Cal. Rptr. 671, 361 P.2d 247* , county employees obtained a writ of mandate directing the county board of supervisors to ascertain prevailing wages paid in private industry for comparable jobs and to pay the employees salaries that were at least equal to those wages, as required by the county charter. The Supreme Court affirmed the judgment in relevant part, holding that the board's enactment of a salary ordinance without making any determination of prevailing wages was so palpably unreasonable and arbitrary as to demonstrate an abuse of discretion as a matter of law. A writ of mandate was the proper remedy to compel the board to perform its mandatory duty under the charter (*55 Cal. 2d 626, 639)* .

In *Saleeby v. State Bar (1985) 39 Cal. 3d 547, 216 Cal. Rptr. 367, 702 P.2d 525* , petitioner's claim for reimbursement from the Client Security Fund [*see Bus. & Prof. Code § 6140.5*] was not granted in full by the State Bar. Petitioner sought review from the Supreme Court by traditional writ of mandate, essentially challenging the State Bar's rules governing Client Security Fund matters on the ground that they violated due process rights. The Supreme Court issued a peremptory writ of mandate, directing the State Bar to revise its rules to comport with an applicant's right to an opportunity to be heard and to have a statement of findings sufficient for meaningful review, and also directing the State Bar to reconsider its prohibition against compensation of an attorney who assists an applicant (*39 Cal. 3d 547, 575)* . Before reaching this decision on the merits, the Court held that traditional mandamus under *Code Civ. Proc. § 1085*, and not administrative mandamus under *Code Civ. Proc. § 1094.5*, was the appropriate method of review, because of the absence of a clear statutory requirement for a hearing on the claim or of a record sufficient for *Code Civ. Proc. § 1094.5* review, and because the writ petition to the Supreme Court was a fundamental challenge to the State Bar's adoption of the rules and thus was a challenge to the State Bar's quasi-legislative actions. The Court then held that while traditional mandamus does not lie to compel a particular method of exercising discretion, it does lie to correct an abuse of discretion or the actions of an administrative agency that exceed the agency's legal powers, such as the State Bar's asserted complete and limitless discretion to award or deny a claim from the fund arbitrarily (*39 Cal. 3d 547, 561-568)* .

In *Bright Development v. City of Tracy (1993) 20 Cal. App. 4th 783, 24 Cal. Rptr. 2d 618* , a developer sought mandate against a city challenging the city's requirement that the developer place off-site utilities underground. The trial court denied the petition. The court of appeal reversed. It found there was no policy existing at the time the developer applied to the city that supported such a requirement. The city, therefore, did not have the discretion to impose a requirement that developers place off-site utilities underground (*20 Cal. App. 4th 783, 800)* .

The facts and procedure of *Elmore v. Imperial Irrigation Dist. (1984) 159 Cal. App. 3d 185, 205 Cal. Rptr. 433* , are discussed in *§ 150.39[3][a]*. In holding that mandate could lie to compel an irrigation district to comply with its statutory duties, the court of appeal applied the principle that mandate will issue both to compel performance of duties specifically imposed by law and to correct abuses of discretion (*159 Cal. App. 3d 185, 193)* .

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A. MANDATE

15-150 California Points & Authorities § 150.44

§ 150.44 Supporting Contention That Writ of Mandate Is Necessary to Compel Action by Private Organization

[1] FORM

[*The following should be combined, when appropriate, with a general form of memorandum supporting a petition for a writ of mandate (see, e.g., § 150.30).*]

A WRIT OF MANDATE SHOULD ISSUE TO COMPEL RESPONDENT TO _____ [*set forth legal duty of private organization, e.g.,* REINSTATE PETITIONER AS A MEMBER] BECAUSE RESPONDENT'S FAILURE TO DO SO WAS ARBITRARY [AND, IN ADDITION, VIOLATED RESPONDENT'S OWN BY-LAWS].

A. Arbitrary Refusal to Act. Mandate will lie when a private organization's refusal to act is arbitrary and in violation of its own by-laws (*see Haller v. Burbank Community Hospital Foundation (1983) 149 Cal. App. 3d 650, 658-659, 197 Cal. Rptr. 45*).

[*Optional*] **B. Reinstatement to Membership.** A writ of mandate is the proper remedy to compel a private organization to reinstate a person to membership (*Taboada v. Sociedad Espanola etc. (1923) 191 Cal. 187, 194* ; *Bernstein v. Alameda etc. Med. Assn. (1956) 139 Cal. App. 2d 241, 254, 293 P.2d 862*).

[*Optional*] **C. Admission to Membership.** A writ of mandate is the proper remedy to compel a private organization to admit a person to membership (*see Lewin v. St. Joseph Hospital of Orange (1978) 82 Cal. App. 3d 368, 383, 146 Cal. Rptr. 892*).

[*Optional*] **D. Enforcing Rights of Corporate Shareholder.** A writ of mandate will lie to enforce a corporate shareholder's statutory rights (*Hobbs v. Tom Reed Gold Min. Co. (1913) 164 Cal. 497, 501-502, 129 P. 781* ; *Johnson v. Langdon (1902) 135 Cal. 624, 626-627, 67 P. 1050*).

[*Optional*] **E. Membership in Labor Union.** A writ of mandate will lie to compel the reinstatement or admission of a person to a labor union (*Cason v. Glass Bottle Blowers Asso. (1951) 37 Cal. 2d 134, 231 P.2d 6* (reinstatement);

Thorman v. Intl. Alliance etc. Employees (1958) 49 Cal. 2d 629, 634, 320 P.2d 494 (admission), *overruled on other grounds in Consolidated Theatres, Inc. v. Theatrical Stage Employees Union (1968) 69 Cal. 2d 713, 721 n.8, 73 Cal. Rptr. 213, 447 P.2d 325*).

[*Optional*] **F. Failure to Follow Prescribed Procedures.** A writ of mandate is appropriate because the organization failed to follow prescribed procedures (*Hard v. California State Employees Assn. (2002) 96 Cal. App. 4th 708, 711, 117 Cal. Rptr. 2d 615* ; *Lewin v. St. Joseph Hospital of Orange (1978) 82 Cal. App. 3d 368, 383, 146 Cal. Rptr. 892*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a writ of mandate is proper to compel a private organization to perform an act when its refusal to do so is arbitrary or resulted from a failure to follow its own by-laws. Optional paragraphs include points and authorities for use if petitioner has been improperly excluded, suspended, or expelled from a private organization, including a labor union, or if the organization has failed to follow presenters procedures, or if the petitioner is a stockholder who has been denied a plain right.

These points and authorities should be combined with a general memorandum supporting a petition for writ of mandate (*see § 150.30*).

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice, (Matthew Bender). For a form of petition for a writ of mandate to restore a purportedly expelled member of an unincorporated association to membership privileges, see Ch. 61, *Associations and Clubs* in that publication. For a discussion and forms related to the corporate rights of stockholders, see Ch. 160, *Corporations* in that publication.

[c] Related Memoranda

For memoranda relating to exclusion or expulsion from membership in associations or societies, see Ch. 22, *Associations and Clubs* in this publication. For memoranda relating to administrative mandate, see Ch. 195, *Public Administrative Law* .

[3] Discussion of Authorities

[a] Arbitrary Refusal to Act

In ***Haller v. Burbank Community Hospital Foundation*** *(1983) 149 Cal. App. 3d 650, 197 Cal. Rptr. 45* , a hospital took several disciplinary actions against petitioner, a surgeon, including the restriction of his staff privileges. Although the medical staff by-laws entitled petitioner to a hearing, no hearing was held before petitioner was informed of the restrictions. Petitioner sought a writ of administrative mandate for relief to compel the hospital to set aside its decision restricting his practice, among other relief. The superior court sustained a demurrer to that part of the petition addressing the restriction of privileges on the ground that administrative mandate was not a proper remedy and that the petition was barred by petitioner's failure to exhaust his administrative remedies. Petitioner appealed.

The court of appeal reversed, holding that the trial court should have treated the petition as one for a writ of ordinary

mandate and then issued a writ ordering the hospital to grant petitioner a hearing on the restrictions (*149 Cal. App. 3d 650, 655, 659)* . The court found that the by-laws entitled petitioner to a hearing (*149 Cal. App. 3d 650, 657)* . *Code Civ. Proc. § 1085*, the court stated, anticipates the arbitrary or improper refusal by an association to hold a hearing and authorizes resort to a writ of mandate to compel such a hearing (*149 Cal. App. 3d 650, 658)* . The court also held that the petition was not barred by a failure to exhaust administrative remedies because petitioner was not adequately informed of his right to appeal the restrictions and, even if he were adequately informed, pursuit of the remedies would have been futile (*149 Cal. App. 3d 650, 656-658)* .

[b] Reinstatement to Membership

In ***Taboada v. Sociedad Espanola etc.*** *(1923) 191 Cal. 187* , the Supreme Court held that petitioners were entitled to a writ of mandate restoring them to the privileges that they had enjoyed as members in good standing of a fraternal organization. The Court affirmed a judgment of a superior court granting the writ because it determined that petitioners had been illegally expelled from membership in the society (*191 Cal. 187, 193-194)* .

In ***Bernstein v. Alameda etc. Med. Assn.*** *(1956) 139 Cal. App. 2d 241, 293 P.2d 862* , petitioner, a physician, had been expelled from a local medical association on a finding that he was guilty of seven violations of the Principles of Medical Ethics of the American Medical Association. The state council reduced the charges to six. Petitioner sought a writ of mandate to compel the association to restore him to membership but the trial court denied the writ, although it eliminated three more of the charges against him. The court of appeal determined that another charge was not supported by the evidence and directed the trail court to order the state council to redetermine the penalty for petitioner in light of the fact that only two of the original seven charges remained. The court entertained no doubt, however, that mandate was the appropriate proceeding for the judicial consideration and determination of the issues presented (*139 Cal. App. 2d 241, 253-254)* .

[c] Admission to Membership

In ***Lewin v. St. Joseph Hospital of Orange*** *(1978) 82 Cal. App. 3d 368, 146 Cal. Rptr. 892* , the court of appeal held that a traditional writ of mandate pursuant to *Code Civ. Proc. § 1085* was the proper proceeding for seeking admission to defendant hospital's chronic renal hemodialysis facility (*82 Cal. App. 3d 368, 383-384)* .

[d] Enforcing Right of Stockholder

In ***Hobbs v. Tom Reed Gold Min. Co.*** *(1913) 164 Cal. 497, 129 P. 781* , a stockholder sought a writ of mandate to compel the board of directors of a corporation to allow him to inspect the operations of a mine owned by the corporation. The trial court sustained respondents' demurrer and the stockholder appealed the ensuing judgment. The Supreme Court reversed, holding that the corporation had a duty to permit the inspection, just as a corporation has a common-law duty to allow an inspection of its records (*164 Cal. 497, 501-502)* . The Court explained that if the right to inspect corporate property was given by statute, unless the statute imposes restrictions or limitations, the right was absolute and could be enforced by a writ of mandate, regardless of the purposes of motives of the stockholder or the existence of good cause. On the other hand, if the right to be enforced was a common-law right, the issuance of the writ was discretionary and the motives of petitioner could be questioned, and petitioner was required to show good cause for granting the relief (*164 Cal. 497, 502)* .

In ***Johnson v. Langdon*** *(1902) 135 Cal. 624, 67 P. 1050* , the Supreme Court held that a stockholder's statutory right to examine a corporation's books may be enforced by a writ of mandate. The Court also held that because the applicable statute was based on the principle that the shareholders have a right to be fully informed about the conditions of the corporation, a stockholder is not required to show any reason for the examination and may not be prevented from such an inspection with the defense that his or her motives are improper (*135 Cal. 624, 625-626)* .

[e] Membership in Labor Union

In ***Cason v. Glass Bottle Blowers Asso.*** *(1951) 37 Cal. 2d 134, 231 P.2d 6* , petitioner, president of a local union, was suspended by the national union because he allegedly refused to permit local members to work on several Sundays and on Monday in violation of the contract between the employer and the national union. The Supreme Court held that petitioner had been denied a fair hearing before the national union's grievance committee because he was not permitted either to hear the testimony of the only witness against him or to examine the file that the committee considered (*37 Cal. 2d 134, 144-145)* . Therefore, the Court issued a writ of mandate directing that either the petitioner be granted a full and fair hearing on the charges or that he be reinstated to membership (*37 Cal. 2d 134, 147)* .

In ***Thorman v. Intl. Alliance etc. Employees*** *(1958) 49 Cal. 2d 629, 634, 320 P.2d 494* , *overruled on other grounds, Consolidated Theatres, Inc. v. Theatrical Stage Employees Union (1968) 69 Cal. 2d 713, 721 n.8, 73 Cal. Rptr. 213, 447 P.2d 325* , a motion picture operator sought a writ of mandate to compel a local union to admit him to membership. The Supreme Court held that mandate was the proper remedy to compel his admission because the complaint did not raise an issue of whether petitioner's employment affected interstate commerce (*49 Cal. 2d 629, 634)* .

[f] Failure to Follow Prescribed Procedures

In ***Hard v. California State Employees Assn.*** *(2002) 96 Cal. App. 4th 708, 117 Cal. Rptr. 2d 615* , an employee organization petitioned for writ of mandate to prevent one of its divisions from incorporating and conducting business on its own. The trial court granted the petition. The court of appeal, however, reversed. The division argued it followed the prescribed procedures set forth in the Government Code when it conducted its election concerning whether it should incorporate. The court of appeal agreed. It found the election had not plainly contravened either the bylaws of the employee organization or the statutory authority (*96 Cal. App. 4th 708, 714-715)* .

In ***Lewin v. St. Joseph Hospital of Orange*** *(1978) 82 Cal. App. 3d 368, 146 Cal. Rptr. 892* , a private hospital decided to operate its renal hemodialysis facility on a closed-staff basis, meaning it would be operated exclusively by a group of doctors, excluding other qualified doctors from its operation. A qualified doctor who was not allowed to operate the renal hemodialysis facility petitioned for writ of mandate, and the trial court granted the petition, finding that, by law, the hospital was required to operate the facility on an open-staff basis. The court of appeal reversed, holding that the hospital did not act arbitrarily or fail to follow procedures and give notices required by law. Noting that courts may not substitute their own judgment, the court determined that the hospital's proceedings had been fair (*82 Cal. App. 3d 368, 387-391)* .

[4] Additional Authorities

[a] Enforcing Right of Corporate Shareholder

In *Miller v. Imperial Water Co. No. 8 (1909) 156 Cal. 27* , petitioner, a stockholder in a corporation organized to distribute water for irrigation to its members, sought a writ of mandate to compel the corporation to deliver water to him for the same price and on the same terms as it delivered water to other stockholders. The trial court sustained a demurrer to the petition on the ground that mandate does not lie to enforce contractual duties.

The Supreme Court overruled the demurrer, holding that the petition rested on a right based entirely on the petitioner's membership in the corporation (*156 Cal. 27, 29, 31)* . The denial of water to petitioner would deprive him of a right that would practically exclude him from all of the privileges and benefits of membership, the Court explained. Petitioner stated a cause of action for mandate, the Court held, because his right to obtain water was an inseparable adjunct of his membership in the corporation and the corporation had a plain duty to furnish the water (*156 Cal. 27, 29-30)* .

[b] Membership in Labor Union

In *Smetherham v. Laundry Workers' Union (1941) 44 Cal. App. 2d 131, 111 P.2d 948* , petitioner was expelled from membership in her union for a fight that she had with a co-worker. After appealing her expulsion to the international union, she filed a petition for a writ of mandate to compel her reinstatement. The superior court granted the petition on the ground that the executive board of the local union had no jurisdiction to expel her under the by-laws or constitution of the union. The court of appeal affirmed the judgment (*44 Cal. App. 2d 131, 139)* . It stated that mandate is proper to compel the reinstatement to membership of a person who has been illegally expelled from a duly organized association (*44 Cal. App. 2d 131, 135)* .

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15-150 California Points & Authorities § 150.45

§ 150.45 Supporting Contention That Writ of Mandate Is Necessary to Compel Action by Lower Court--Direct Appeal Is Inadequate Legal Remedy

[1] FORM

[*The following should be combined, when appropriate, with a general form of memorandum supporting a petition for a writ of mandate (see, e.g., § 150.30).*]

A WRIT OF MANDATE IS PROPER WHEN DIRECT APPEAL IS NOT AN ADEQUATE LEGAL REMEDY.

Mandate Proper When Direct Appeal Is Inadequate Legal Remedy. While a direct appeal is generally an adequate remedy at law, it must be both adequate and "speedy" (*see Code Civ. Proc. § 1086*). If direct appeal is not speedy, a writ of mandate may issue (*Kawasaki Motors Corp. v. Superior Court (2000) 85 Cal. App. 4th 200, 205-206, 101 Cal. Rptr. 2d 863*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a direct appeal is not an adequate legal remedy because it is not speedy. They should be combined with a general memorandum supporting a petition for writ of mandate [*see § 150.30*].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate proceedings, see California Forms of Pleading and Practice, Ch. 358, *Mandate and Prohibition* (Matthew Bender).

[3] Discussion of Authorities

[a] Mandate Proper When Direct Appeal Is Inadequate Legal Remedy

In ***Kawasaki Motors Corp. v. Superior Court*** *(2000) 85 Cal. App. 4th 200, 101 Cal. Rptr. 2d 863* , plaintiff entered into a dealer sales and service agreement with an automotive dealer. Plaintiff later terminated the agreement, alleging the defendant dealer had breached the contract. The defendant filed a protest with the New Motor Vehicle Board, which found that the contract termination was justified. The defendant then filed a petition for a writ of mandate in the superior court. Applying an independent judgment standard, the superior court granted the petition and issued a writ directing the New Motor Vehicle Board to vacate its decision and adopt a different decision. Plaintiff petitioned the court of appeal for a writ of mandate.

The court of appeal granted plaintiff's petition. Concluding that the trial court erroneously applied an independent judgment standard rather than a substantial evidence standard, the court of appeal issued a writ of mandate directing the superior court to vacate its decision and deny the defendant dealer's petition (*85 Cal. App. 4th 200, 203-206)* . In response to an argument by defendant that plaintiff's petition was improper in that a direct appeal was an adequate legal remedy, the court of appeal determined that it would be intolerable to force plaintiff to maintain its relationship with defendant, after the latter had breached its contract, for another two or more years, the time it would require to complete an appeal. Accordingly, it found that, pursuant to *Code Civ. Proc. § 1086*, the legal remedy was not sufficiently speedy and a writ could issue (*85 Cal. App. 4th 200, 205-206)* .

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15-150 California Points & Authorities § 150.46

§ 150.46 Supporting Contention That Writ of Mandate Is Necessary to Compel Action by Lower Court--Court Violated Appellate Court's Instructions

[1] FORM

[*The following should be combined, when appropriate, with a general form of memorandum supporting a petition for a writ of mandate (see, e.g., § 150.30).*]

A WRIT OF MANDATE IS PROPER WHEN THE LOWER COURT VIOLATED THE APPELLATE COURT'S INSTRUCTIONS.

Mandate Proper When Lower Court Violated Appellate Court's Instructions. When an appellate court's reversal is accompanied by directions requiring specific proceedings on remand, those directions are binding on the trial court and must be followed. Any material variance from the directions is unauthorized and void [*Butler v. Superior Court (2002) 104 Cal. App. 4th 979, 982, 128 Cal. Rptr. 2d 403* (decision directed trial court to enter new default judgment in accordance with evidence presented at default prove-up hearing, not reconsider prior rulings or allow trial)].

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a writ of mandate is proper on the ground that the lower court violated the instructions of the court of appeal. They should be combined with a general memorandum supporting a petition for writ of mandate (*see § 150.30*).

[b] Argument

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that the trial court's treatment of the case on remand diverged from the appellate court's instructions, to petitioner's detriment.

[c] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to prohibition proceedings, see California Forms of Pleading and Practice, Ch. 358, *Mandate and Prohibition* (Matthew Bender).

[3] Discussion of Authorities

[a] Mandate Proper When Lower Court Violated Appellate Court's Instructions

In ***Butler v. Superior Court*** *(2002) 104 Cal. App. 4th 979, 128 Cal. Rptr. 2d 403* , the lower court judgment awarded the tenant plaintiffs nominal damages on their personal injury claims against the landlord. The court of appeal had previously reversed that judgment and remanded it to the trial court. Despite the appellate court's specific directions, the trial court issued an order granting a motion for reconsideration of a ruling that was rendered before the judgment was issued.

The court of appeal held that the effect of the trial court's order was to allow further trial court proceedings that were contrary to the court's directions on remand. Because the trial court's order materially differed from the court of appeal's remand directions, it was unauthorized and void. Accordingly, the court of appeal issued a writ of mandate ordering the trial court to vacate its order granting reconsideration and compelling it to comply with the remand directions (*Butler v. Superior Court (2002) 104 Cal. App. 4th 979, 982)* .

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§ 150.47 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Skeletal Form

[1] FORM

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA,

[*or*]

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA,
_____ APPELLATE DISTRICT
[DIVISION _____]

[*or*]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Petitioner,	)	
vs.	)	[CIVIL] NO. _____
THE SUPERIOR COURT OF THE STATE OF	)	MEMORANDUM IN _____
CALIFORNIA, COUNTY OF	)	[PRELIMINARY OPPOSITION TO *or* SUPPORT
_____,	)	OF DEMURRER TO *or* SUPPORT OF ANSWER
[*or*]	)	TO] PETITION FOR WRIT OF MANDATE
_____ [*name of*	)	Date: _____
other inferior tribunal, corporation, board, or person]	)	Time: _____

Respondent,	)	Location: _____
_____ [*name*],	)	[Judge: _____]
Real Party in Interest.	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE PETITION FOR A WRIT OF MANDATE SHOULD BE DENIED BECAUSE _____ [*specify grounds for opposing petition, e.g.,* IT FAILS TO ALLEGE FACTS SUFFICIENT TO ESTABLISH THAT PETITIONER IS ENTITLED TO ISSUANCE OF THE WRIT].

[*EITHER*]

A. Preliminary Opposition to Petition for Writ of Mandate. Within ten days after the petition is filed, the respondent or any real party in interest, separately or jointly, may serve and file a preliminary opposition [*Code Civ. Proc. § 1107*; *Cal. Rules of Ct., Rule 8.487(a)* (reviewing courts)].

[*OR*]

A. Return by Demurrer, Verified Answer, or Both. A respondent, real party in interest, or both, may make a return to an alternative writ of mandate by demurrer, verified answer, or both (*see Code Civ. Proc. § 1089*; *Cal. Rules of Ct., Rule 8.487(b)* (reviewing courts)).

[*Optional*] **B. Objection by Demurrer.** A party may object by demurrer to a petition for mandate on the ground that it does not state facts sufficient to show a right to relief, when that ground for objection appears on the face of the petition [or from any matter of which the court is required to or may take judicial notice] (*see Code Civ. Proc. §§ 430.10(e), 430.30(a), 1109*). A showing on demurrer that the petition for writ does not state facts sufficient to justify relief is a complete answer to the petition, and a court on such showing is warranted in discharging the alternative writ or order to show cause and dismissing the proceeding (*StorMedia Inc. v. Superior Court (1999) 20 Cal. 4th 449, 455 n.7, 84 Cal. Rptr. 2d 843, 976 P.2d 214*).

[*Optional*] **C. Objection by Answer.** A party may object by answer to a petition for mandate when any ground for objection does not appear on the face of the petition (*see Code Civ. Proc. §§ 430.30(a), 1109*).

[*OR*]

A. Response When No Alternative Writ Is Sought. When a petition for writ of mandate is filed in a trial court and no alternative writ is sought, and when a record of the proceedings to be reviewed has been filed with the petition or when no record of a proceeding is required, a respondent may answer or otherwise respond within 30 days after service of the petition (*Code Civ. Proc. §§ 1088.5, 1089.5*).

[*CONTINUE*]

[*Add specific points and authorities in opposition to granting the petition for writ of mandate, when appropriate, showing that under the particular facts of the case, petitioner has not sufficiently established one or more elements that are necessary to justify a grant of relief by writ of mandate, e.g., that respondent lower court did not abuse its discretion (see § 150.48), that the act that the petition seeks to compel on the part of respondent public entity or official is discretionary, not ministerial (see § 150.49), that respondent has no present legal duty to perform the act that the petition seeks to compel (see §§ 150.50, 150.51), that petitioner has failed to exhaust administrative remedies (see § 150.52), that petitioner has no beneficial interest in the proceedings (see § 150.144), or that petitioner's remedy at law is adequate (see §§ 150.185, 150.186).*]

[*Add specific points and authorities in opposition to granting the petition for writ of mandate, when appropriate, showing one or more affirmative defenses to the granting of a writ of mandate (see §§ 150.200-150.205).*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Respondent _____ [*name*]

[2] Comments

[a] Use of Form

This form is a skeletal memorandum in opposition to a petition for writ of mandate. It sets out general points relating to the procedural context in which opposition to the petition may be raised [*see § 150.47[2][b]*]. It is designed to be combined with additional, more specific points and authorities showing why the court should exercise its discretion to deny issuance of a peremptory writ under the particular circumstances of the case [*see § 150.47[2][c]*].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, these points and authorities may be used to oppose a petition supported by the points and authorities set out in *§ 150.30*.

[b] Procedure for Opposing Petition

This form sets out three procedural contexts in which opposition to a petition for writ of mandate may be raised. First, a respondent or real party in interest may file a memorandum in opposition to a petition for writ of mandate within ten days after the petition is filed (first alternative Paragraph A) [*see Code Civ. Proc. § 1107*; *Cal. Rules of Ct., Rule 8.487(a)(1)* (reviewing courts)].

Second, a respondent or real party in interest may file a memorandum in support of his or her return to an alternative writ of mandate by demurrer, verified answer, or both (second alternative Paragraph A, Paragraphs B, C) [*see Code Civ. Proc. § 1089*; *Cal. Rules of Ct., Rule 8.487(b)* (reviewing courts)]. In superior courts, this return must be made on the date for return of the alternative writ or the date on which the petition is noticed for hearing. If the return is by demurrer alone, the court may allow an answer to be filed within such time as it may designate [*see Code Civ. Proc. § 1089*]. In reviewing courts, this return must be made within 30 days after the court issues the alternative writ or order to show cause or notifies the parties that it is considering issuing a peremptory writ in the first instance. If the return is by demurrer alone, and the demurrer is not sustained, the peremptory writ may issue without leave to answer [*Cal. Rules of Ct., Rule 8.490(h)*; *see Code Civ. Proc. § 1089* (provisions do not affect rules governing original writ proceedings in reviewing courts)].

Third, a respondent may file points and authorities in support of his or her answer or other response to petition for writ of mandate in which no alternative writ has been sought (third alternative Paragraph A) [*Code Civ. Proc. §§ 1088.5, 1089.5*]. In such a case, when a record of the proceedings to be reviewed has been filed with the petition or when no record of a proceeding is required, a respondent generally may answer or otherwise respond within 30 days after service of the petition [*Code Civ. Proc. § 1089.5*].

For discussion regarding opposing points and authorities generally, see *§ 150.08*.

[c] Opposition to Petition

The bracketed instructions that follow the general procedural points of law in the foregoing form indicate that additional paragraphs, taken from subsequent forms in this chapter, should be added to show that relief by writ of mandate is inappropriate under the particular circumstances of the case. Relief is inappropriate, for example, if the petitioner has not established one or more elements requisite for relief, such as his or her beneficial interest or the lack of an adequate remedy at law. Relief is also inappropriate if respondent or real party in interest can establish an affirmative defense. Counsel should refer to the forms indicated in the bracketed instructions and choose the paragraphs that best fit the factual situation involved.

[d] Related Pleading and Practice Chapters

For further discussion relating to opposition to a petition for writ of mandate, and forms of return by demurrer or answer, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Objection by Demurrer

In ***StorMedia Inc. v. Superior Court*** *(1999) 20 Cal. 4th 449, 84 Cal. Rptr. 2d 843, 976 P.2d 214* , plaintiffs filed a class action against defendant corporation and several of its officers, seeking damages for alleged violations of *Corp. Code § 25400(d)* (market manipulation). Plaintiffs, as a class, allegedly purchased stock of defendant corporation at time when the stock was artificially inflated due to false and misleading statements of defendants. The trial court overruled most of defendants' general demurrers to the complaint, and defendants petitioned the court of appeal for a writ of mandate directing that it set aside its orders overruling the demurrers, and to sustain the demurrers and dismiss the action instead (*20 Cal. 4th 449, 452-454)* .

The court of appeal, after soliciting opposition, summarily denied the petition. The Supreme Court subsequently granted the defendants' petition for review and issued an order to show cause why the relief sought in the writ petition should not be granted. Plaintiffs, as real parties in interest, filed with the Court a consolidated demurrer to the writ petition, as well as a return to the order to show cause (*20 Cal. 4th 449, 454)* . The Court, before ruling on the substantive merits of the petition, noted that the plaintiffs' demurrer was authorized by *Code Civ. Proc. § 1089*, and asserted that the writ petition failed to state a claim on which relief might be granted. The Court held that a showing on such general demurrer, that the petition does not state facts sufficient to justify relief, is a complete answer to an order to show cause, and a court on such showing is warranted in discharging the order and dismissing the proceeding. Moreover, the Court noted that when, as in this case, the demurrer is based on that ground, and the petition presents only issues of law, there is no need to consider the return and demurrer separately (*20 Cal. 4th 449, 455 n.7*). On consideration of the merits of the case, the Court affirmed the court of appeal's denial of the writ petition (*20 Cal. 4th 449, 463)* .

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15-150 California Points & Authorities § 150.48

§ 150.48 Opposing Contention That Writ of Mandate Is Necessary to Compel Action by Lower Court--Court Did Not Abuse Its Discretion

[1] FORM

[*The following should be combined, when appropriate, with a general form of memorandum opposing a petition for a writ of mandate (see, e.g., § 150.47).*]

A WRIT OF MANDATE SHOULD NOT ISSUE BECAUSE THE PETITION FAILS TO SHOW THAT RESPONDENT COURT ABUSED ITS DISCRETION.

No Abuse of Discretion. A writ of mandate will not issue if the challenged ruling was not an abuse of the court's discretion (*Coy v. Superior Court (1962) 58 Cal. 2d 210, 215-216, 23 Cal. Rptr. 393, 373 P.2d 457*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a writ of mandate is proper when the respondent is a lower court. The ground for opposition is that respondent's action does not constitute an abuse of discretion subject to correction by writ of mandate.

These points and authorities should be combined with a general memorandum opposing a petition for writ of mandate (*see § 150.47*).

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] No Abuse of Discretion

In ***Coy v. Superior Court*** *(1962) 58 Cal. 2d 210, 23 Cal. Rptr. 393, 373 P.2d 457* , plaintiff filed an action for abuse of process seeking special, general, and punitive damages. Five months before the date set for trial, he sought to amend the complaint for the sole purpose of adding an allegation of damages for mental suffering. The trial court denied the motion and plaintiff sought a writ of mandate for review of that order, as well as for review of a discovery order. The Supreme Court held, inter alia, that mandate did not lie to review the order denying the motion to amend. The Court explained that, although mandate may be used to compel a trial court to allow an amendment in some cases, the motion rests largely in the trial court's discretion. The plaintiff made no showing of abuse of discretion and, therefore, mandate did not lie (*58 Cal. 2d 210, 215-216)* .

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15-150 California Points & Authorities § 150.49

§ 150.49 Opposing Contention That Writ of Mandate Is Necessary to Compel Action by Public Entity or Officer--Act to Be Compelled Is Discretionary, Not Ministerial

[1] FORM

[*The following should be combined, when appropriate, with a general form of memorandum opposing a petition for a writ of mandate (see, e.g., § 150.47).*]

A WRIT OF MANDATE SHOULD NOT ISSUE BECAUSE THE ACT IT SEEKS TO COMPEL RESPONDENT TO PERFORM IS DISCRETIONARY, NOT MINISTERIAL.

A. Act Within Discretion of Public Entity or Official. A writ of mandate is not proper to control the exercise of discretion by an administrative board or a legislative body (*Faulkner v. Cal. Toll Bridge Authority (1953) 40 Cal. 2d 317, 326, 253 P.2d 659* ; *Shamsian v. Dep't of Conservation (2006) 136 Cal. App. 4th 621, 639-641, 39 Cal. Rptr. 3d 62* ; *Riggs v. City of Oxnard (1984) 154 Cal. App. 3d 526, 530, 201 Cal. Rptr. 291*).

[*Optional*] **B. Legislative Act.** A legislative or quasi-legislative decision of a public entity or official is entrusted solely to its discretion and cannot be compelled by mandate (*Common Cause v. Board of Supervisors (1989) 49 Cal. 3d 432, 443-445, 261 Cal. Rtpr. 574, 777 P.2d 610* ; *Coachella Valley Unified School Dist. v. State of California (2009) 176 Cal. App. 4th 93, 113-117, 98 Cal. Rptr. 3d 9* ; *County of San Diego v. State of California (2008) 164 Cal. App. 4th 580, 79 Cal. Rptr. 3d 489* ; *Carrancho v. California Air Resources Board (2003) 111 Cal. App. 4th 1255, 1265-1267, 4 Cal. Rptr. 3d 536* (differentiating between traditional mandamus and administrative mandate)).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to the contention that a writ of mandate is proper when the respondent is a public entity or official. The ground for opposition is that respondent's action was discretionary, not ministerial, and thus is not subject to correction by writ of mandate.

This form should be combined with a general memorandum opposing a petition for writ of mandate (*see § 150.47*).

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Act Within Discretion of Public Entity or Official

In ***Faulkner v. Cal. Toll Bridge Authority*** *(1953) 40 Cal. 2d 317, 253 P.2d 659* , petitioners sought to restrain the state Toll Bridge Authority from proceeding with construction and financing of a bridge and to grant them a hearing on the question of whether a bridge or an earth-fill type of crossing should be built. The trial court sustained a demurrer to the complaint and petitioner appealed. The Supreme Court affirmed, holding that the allegations of the petition related at most to the wisdom of the respondent's acts and fell short of showing any abuse of discretion (*40 Cal. 2d 317, 333-334)* . Petitioners failed to show that respondents had not performed any act specifically required by the relevant legislation. The writ was properly denied because a writ of mandate will not issue to control discretion within the area lawfully entrusted to an administrative body (*40 Cal. 2d 317, 326)* .

In ***Shamsian v. Dep't of Conservation*** *(2006) 136 Cal. App. 4th 621, 39 Cal. Rptr. 3d 62* , the plaintiff filed a petition for writ of mandate to compel the Department of Conservation to provide convenient, economical, and efficient beverage container redemption opportunities for California consumers as required by the California Beverage Container Recycling and Litter Reduction Act. The trial court held that the Act vested discretion in the Department to develop a recycling program consistent with legislative goals and there was no ministerial act that the plaintiff could compel.

On appeal, the court of appeal agreed. The court held that no duty arises under the act, and that the act is merely a general statement of legislative intent that does not impose any affirmative duty that would be enforceable through a writ of mandate (*136 Cal. App. 4th 621, 640-641*). In addition, the court held, the Department has discretion to exempt convenience zones from the certified recycling center or location requirement. The court held that a writ of mandate would not lie to control the Department's discretion as to establishing certified recycling centers or locations within convenience zones (*136 Cal. App. 4th 621, 640-641*).

In ***Riggs v. City of Oxnard*** *(1984) 154 Cal. App. 3d 526, 201 Cal. Rptr. 291* , petitioner, who owned a transmission shop, complained to the city that a neighboring transmission shop was operating in violation of an existing city zoning ordinance. The city had erroneously approved a zone clearance for the nonconforming shop, and the owners had quit their previous jobs and spent substantial sums of money to commence the new business. The city decided to defer prosecution of the nonconforming shopowners, who threatened to sue the city because of its mistake. The city and the shopowners entered into an agreement to defer prosecution pending a review by the city council and planning commission of a suggested amendment to the ordinance. Petitioner then sought a writ of mandate to compel the city to issue a criminal citation and order a civil injunction against the nonconforming shop. The superior court denied the writ and petitioner appealed.

The court of appeal affirmed, holding that the city did not abuse its discretion (*154 Cal. App. 3d 526, 531-532)* . In addressing petitioner's argument that a writ of mandate will lie when an individual taxpayer or property owner seeks to enforce a clear public duty, the court of appeal stated that the city had enforced the ordinance and that the means of

enforcing it was within the discretionary power of the city. A writ of mandate will not issue to compel that the city's discretionary power be exercised in a particular way. A court's function is to determine whether or not a municipal body has acted within the limits of its power and discretion; its function is not to challenge the municipality's power and wisdom (*154 Cal. App. 3d 526)* .

[b] Legislative Act

The facts and procedure in ***Common Cause v. Board of Supervisors*** *(1989) 49 Cal. 3d 432, 261 Cal. Rtpr. 574, 777 P.2d 610* , are discussed in *§ 150.43 [3][c]*. In its refusal to compel a county to deputize certain employees as voter registrars to implement a statutorily-mandated voter outreach program, the Court held that the statute made clear that the decision to adopt a deputization program rested in the discretion of the individual counties (*49 Cal. 3d 432, 444)* . Therefore, even if the county had a ministerial duty to implement the voter outreach program, the decision to do so by deputization was a quasi-legislative decision entrusted solely to local elected officials (*49 Cal. 3d 432, 445)* .

In ***Coachella Valley Unified School Dist. v. State of California*** *(2009) 176 Cal. App. 4th 93, 113-117, 98 Cal. Rptr. 3d 9* , various school districts petitioned for a writ of mandate requiring the State to abide by the federal No Child Left Behind Act (NCLBA) testing requirements. The plaintiffs argued that the defendant tested all children in English, including limited English proficient (LEP) students, thereby affecting the tests' validity and reliability. The plaintiffs argued that the State's testing procedures violated mandatory duties under the NCLBA and constituted an abuse of discretion. They alleged that the defendant violated mandatory duties to create and implement a testing and accountability system that complied with the NCLBA. The trial court held that the State's manner of conducting assessments under the NCLBA did not violate any ministerial duty created by the statute. The court reasoned that the NCLBA did not mandate a specific way to test English language learners. Instead, it specified the results that must ensue, *i.e.*, valid and reliable assessments. The trial court held that the State's tests did not constitute an abuse of discretion in that the process by which the tests were adopted was not arbitrary or capricious, unlawful, or procedurally unfair.

On appeal, the plaintiffs argued that the State's testing program violated mandatory duties under the NCLBA and constituted an abuse of discretion. The court of appeal first noted that mandate is available to compel the performance of a clear, present and ministerial duty on the part of the respondent where the petitioner has a beneficial right to performance of that duty. It observed that a ministerial act is one that a public functionary is required to perform in a prescribed manner in obedience to the mandate of legal authority, without regard to his or her own judgment or opinion concerning the propriety of such act (*176 Cal. App. 4th 93, 113)* . The court noted that the NCLBA did not require any specific method for testing students, only that the test results be valid and reliable. The court noted that the State proceeded in public and engaged in a deliberative, policymaking process to determine how LEP students should be tested for the NCLBA (*176 Cal. App. 4th 93, 116)* .

Nonetheless, the plaintiffs argued that the NCLBA imposed mandatory duties to assess LEP students in a valid and reliable manner and provide reasonable accommodations most likely to yield accurate data. Because these duties are mandatory, the plaintiffs argued, the State's function in carrying them out became ministerial, notwithstanding the exercise of discretion as to how to fulfill the mandate. The court of appeal disagreed, holding that the plaintiffs conflated the constraints the NCLBA impose on the State's discretion with the notion of ministerial duties. The plaintiffs' argument eliminated the distinction between ministerial and discretionary acts, and ignored the quasi-legislative nature of the State's actions. The court held that if the plaintiffs' argument were correct, the court would become the official second-guesser on the issue of how to assess LEP students under the NCLBA, the very thing the NCLBA conferred discretion on the State to do. The court held that the plaintiffs' position impinged on the separation of powers, impermissibly injecting the judiciary into the quasi-legislative functions lodged with the State (*176 Cal. App. 4th 93, 116-117)* .

In ***County of San Diego v. State of California*** *(2008) 164 Cal. App. 4th 580, 79 Cal. Rptr. 3d 489* various California

counties sued the defendant State of California seeking a writ of mandate for reimbursement under *Cal. Const., Art. XIII B, § 6* for the costs of providing state-mandated programs and services. The trial court granted the writ of mandate, noting however that compliance with the judgment rested solely in the Legislature's discretion. The defendant appealed, arguing that the writ of mandate was improper because it violated the separation of powers doctrine in that courts may not order the Legislature to appropriate funds or order the payment of funds the Legislature has not appropriated.

The court of appeal agreed. It held that mandate may not be used to order the Legislature to enact any specific legislation because, by so doing, the court would be exercising a legislative function (*164 Cal. App. 4th 580, 594)* . In response, the plaintiffs argued that once funds had been appropriated by legislative action, a court may order the State Controller to make appropriate expenditures from such funds. The court rejected that argument finding that the Legislature had not yet appropriated the required funds (*164 Cal. App. 4th 580, 595)* .

The court of appeal also held that the writ was unnecessary because the defendant was already required to reimburse the plaintiffs under *Gov. Code § 17617*. The writ gave the plaintiffs the right to reimbursement without giving them any additional benefit (*164 Cal. App. 4th 580, 596)* . The court of appeal held that the trial court acknowledged this by providing that compliance with the writ rested within the Legislature's discretion (*164 Cal. App. 4th 580, 596)* .

In ***Carrancho v. California Air Resources Board*** *(2003) 111 Cal. App. 4th 1255, 4 Cal. Rptr. 3d 536* , rice growers sought a writ of mandate to compel the California Air Resources Board and other agencies to develop a feasible, realistic implementation plan and schedule for achieving 50 percent diversion of rice straw left over after harvest or to advise the Legislature that they could not phase down the practice of burning the rice straw by so doing. The plaintiffs claimed the agencies' preparation, analysis, and progress reports were deficient. The trial court denied the writ of mandate.

On appeal, the plaintiffs argued that the agencies' actions were informal and not legislative, and that their ministerial duties were subject to control by mandate. The court of appeal disagreed. It held that the agencies' actions required discretion and therefore were not ministerial. The court held that although traditional mandamus may be used to compel an agency to exercise its discretion, the manner of exercising discretion is entitled to deference; hence, mandate may not be used to control the agency by forcing it to exercise its discretion in a particular manner or to reach a particular result (*111 Cal. App. 4th 1255, 1268)* . The court concluded that the agencies' developing the diversion plan and preparing the progress reports at issue were subject to the judicial-deference standard of review because the agencies' information gathering was a type of delegated legislative activity. Thus, although plaintiffs could compel the agencies to issue the statutorily required documents, because the manner of preparation and their contents were left to the agencies' discretion, review was limited to determining whether the agencies' findings, conclusions, and recommendations were arbitrary, capricious, or unsupported by substantial evidence (*111 Cal. App. 4th 1255, 1268-1269)* .

[4] Additional Authorities

[a] Act Within Discretion of Public Entity or Official Exercise of Discretion

In *Bowles v. Antonetti (1966) 241 Cal. App. 2d 283, 50 Cal. Rptr. 370* , petitioners obtained a writ of mandate to compel a city council to annul a resolution vacating a portion of a public street. The court of appeal reversed, holding that the writ was improper because it commanded the city council to perform legislative acts in a particular manner (*241 Cal. App. 2d 283, 287)* . In addition, the city council's finding that the affected portion of the street was not necessary for present or future public street purposes was not a bad-faith, arbitrary, or capricious action amounting to an abuse of discretion (*241 Cal. App. 2d 283, 288)* .

In *Monarch Cablevision, Inc. v. City Council (1966) 239 Cal. App. 2d 206, 48 Cal. Rptr. 550* , petitioner sought a writ of review and a writ of mandate to set aside a city council's grant of a television antenna system franchise to a competitor and to compel the city to grant the franchise to petitioner. The trial court dismissed the petition and

petitioner appealed. The court of appeal affirmed, holding that a writ of mandate would not issue to set aside a legislative act involving the exercise of discretion and to compel the performance of another legislative act also involving the exercise of discretion (*239 Cal. App. 2d 206, 211)* . In addition, the court held that the city council did not abuse its discretion (*239 Cal. App. 2d 206, 212)* .

In *US Ecology, Inc. v. State of California (2001) 92 Cal. App. 4th 113, 111 Cal. Rptr. 2d 689* , the petitioner, a company selected to develop and operate a low level radioactive waste facility for the state pursuant to a regional compact the state entered into with several other states, sued the state to compel performance after the company expended a significant amount of money preparing to undertake its duties. The company also sought a writ of mandate because the state had failed to acquire from the federal government a particular site for the facility. The trial court sustained the state's demurrer to the petition without leave to amend. The court of appeal affirmed. It determined that the state's legal duty under the regional compact was to develop a regional low level radioactive waste facility on a timely basis. The selection of a site, however, was a matter of discretion; therefore, even though the state had taken steps toward using the particular site for the facility, mandate did not lie to compel the state to obtain the site from the federal government because the state could still exercise its discretion and select a different site (*92 Cal. App. 4th 113, 137-139)* .

[b] Legislative Act

In *Hutchinson v. City of Sacramento (1993) 17 Cal. App. 4th 791, 796, 21 Cal. Rptr. 2d 779* , the petitioners sought mandate to compel the establishment of certain speed limits within the city limits. The court denied the petition. The court of appeal affirmed. It held petitioners were not entitled to mandate because the establishment of speed limits is a legislative act, not subject to mandate as a ministerial duty (*17 Cal. App. 4th 791, 796)* .

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15-150 California Points & Authorities § 150.50

§ 150.50 Opposing Contention That Writ of Mandate Is Necessary to Compel Action by Public Entity or Officer--Act to Be Compelled Is Future Act

[1] FORM

[*The following should be combined, when appropriate, with a general form of memorandum opposing a petition for a writ of mandate (see, e.g., § 150.47).*]

A WRIT OF MANDATE SHOULD NOT ISSUE BECAUSE THE RESPONDENT'S REFUSAL TO PERFORM IS ONLY ANTICIPATED AND SPECULATIVE.

Future Acts. A writ of mandate will not issue to compel the performance of future acts or when there is merely an anticipated or possible refusal to perform a future duty (*Diller v. Flynn (1964) 226 Cal. App. 2d 449, 453, 38 Cal. Rptr. 229* ; *Northridge etc. Water Dist. v. McDonell (1958) 158 Cal. App. 2d 123, 127-128, 322 P.2d 25*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a writ of mandate is proper when the respondent is a public entity or official. The ground for opposition is that respondent's duty to perform the act sought to be compelled is not a present duty.

These points and authorities should be combined with a general memorandum opposing a petition for writ of mandate (*see § 150.47*).

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Future Acts

In ***Diller v. Flynn*** *(1964) 226 Cal. App. 2d 449, 38 Cal. Rptr. 229* , petitioner, the director of a savings and loan association, obtained a writ of mandate compelling the association and its officers to allow him to inspect and copy from records of the association "at all reasonable times" and "so long as he is a director of said Association." The court of appeal affirmed, with the modification that the writ should be directed to only one present inspection by petitioner and not by its terms be extended to inspections that petitioner might request in the future. Writs of mandate, the court reasoned, do not issue to compel the performance of future acts or for the mere anticipated or possible refusal to perform a future duty. The association had not adopted a fixed policy and there was nothing to indicate that the association would not comply with the law established in the appeal (*226 Cal. App. 2d 449, 453)* .

In ***Northridge etc. Water Dist. v. McDonell*** *(1958) 158 Cal. App. 2d 123, 322 P.2d 25* , petitioner brought an original proceeding in the court of appeal to compel the secretary of a county water district to sign bonds for an improvement district within the water district. The court of appeal refused to issue a writ of mandate, holding that it had no original jurisdiction under *Code Civ. Proc. §§ 1138-1140,* which authorize submission of an agreed case (*158 Cal. App. 2d 123, 125)* . A writ of mandate, the court reasoned, will not be issued to compel performance of an act until there has been an actual, as distinguished from an anticipated, refusal (*158 Cal. App. 2d 123, 127)* . Similarly, mandate will not lie to compel the performance of future acts. The court observed that no reason had been given why the bonds, after they were authorized, had not been printed and presented to the secretary of the district for his signature (*158 Cal. App. 2d 123, 128)* . The court could not assume that when the secretary was presented with the bonds he would then refuse to sign them (*158 Cal. App. 2d 123, 129)* . Therefore, the court chose not to depart from the rule that courts will concern themselves only with issues that require a decision that can result in a binding judgment (*158 Cal. App. 2d 123, 129)* .

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15-150 California Points & Authorities § 150.51

§ 150.51 Opposing Contention That Writ of Mandate Is Necessary to Compel Action by Public Entity or Officer--Act to Be Compelled Is Unlawful

[1] FORM

[*The following should be combined, when appropriate, with a general form of memorandum opposing a petition for a writ of mandate (see, e.g., § 150.47).*]

A WRIT OF MANDATE SHOULD NOT ISSUE BECAUSE THE ACT IT SEEKS TO COMPEL RESPONDENT TO PERFORM IS UNLAWFUL.

Performance of Unlawful Act May Not Be Compelled. A writ of mandate is not proper when its issuance would encourage the accomplishment of an unlawful act or purpose (*Slater v. City Council (1965) 238 Cal. App. 2d 864, 868, 47 Cal. Rptr. 837* ; *Plum v. City of Healdsburg (1965) 237 Cal. App. 2d 308, 317, 46 Cal. Rptr. 827*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in opposition to the contention that a writ of mandate is proper when the respondent is a public entity or official. The ground for opposition is that the act sought to be compelled encourages an unlawful act or purpose.

The foregoing points and authorities should be combined with a general memorandum opposing a petition for writ of mandate (*see § 150.47*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Performance of Unlawful Act May Not Be Compelled

In ***Plum v. City of Healdsburg*** *(1965) 237 Cal. App. 2d 308, 46 Cal. Rptr. 827* , petitioners applied for a zoning permit to build a trailer camp on their property. The applicable ordinance permitted industrial uses and other uses which, in the opinion of the planning commission, were of a "similar nature." The city planning commission approved petitioner's application but the city council denied it on the ground that the trailer camp was not a similar use. The building inspector then refused to issue the permit, contending that the city council's determination on the issue of "similar" use overrode the decision of the planning commission. Petitioners obtained a writ of mandate directing the building inspector to issue a permit and respondents appealed.

The court of appeal reversed, holding that a trailer camp was not a "similar" use permitted by the ordinance (*237 Cal. App. 2d 308, 317-319)* . The inspector, the court held, could not be forced to do an act that the ordinance prohibited him from doing. Mandate will not lie, the court reasoned, to compel the performance of acts that are void, illegal, contrary to public policy, or that tend to aid an unlawful purpose (*237 Cal. App. 2d 308, 317)* . Because the planning commission's determination to permit the use was null and void, the inspector was justified in refusing to issue the permit (*237 Cal. App. 2d 308, 319)* .

In ***Slater v. City Council*** *(1965) 238 Cal. App. 2d 864, 47 Cal. Rptr. 837* , petitioners obtained a writ of mandate to compel a city council to grant them the right to subdivide their real property. An ordinance prohibiting that type of subdivision was enacted before entry of the judgment granting the writ. The court of appeal reversed, holding that petitioners were bound by the subsequently enacted ordinance (*238 Cal. App. 2d 864, 867)* . The court observed that a writ of mandate should not issue to compel an act that would tend to aid an unlawful purpose and that petitioners offered no equitable reason why they should be permitted to divide their property to the detriment of their neighbors (*238 Cal. App. 2d 864, 868)* .

[4] Additional Authorities

[a] Performance of Unlawful Act May Not Be Compelled

In *Pratt v. Adams (1964) 229 Cal. App. 2d 602, 40 Cal. Rptr. 505* , a group of landowners, who wished to avoid the requirements of state and local subdivision laws, filed a partition action and obtained a court order confirming the referee's plan for division of their property. When petitioners were unable to obtain permits to build residences on the property, they sought a writ of mandate to compel county officers to issue the permits. The trial court denied the petition and petitioners appealed. The court of appeal affirmed, holding that petitioners deliberately circumvented the subdivision laws and that, therefore, a writ of mandate would not issue to assist them in the fulfillment of their plan to accomplish an unlawful purpose (*229 Cal. App. 2d 602, 606)* .

In *Smith v. Kraintz (1962) 201 Cal. App. 2d 696, 20 Cal. Rptr. 471* , petitioner bought a parcel of real property on which he intended to erect a building. He applied for a building permit but failed to disclose the existence of an easement or right of way for the benefit of the public generally and a fire protection district in particular. The building permit was issued but it was later revoked because of the existence of the public easement. Petitioner sought a writ of mandate to compel the county building inspector to issue the permit, but the trial court denied the writ. The court of appealed affirmed, holding that there was in fact a public easement by implied dedication and that granting the permit would interfere with the public easement (*201 Cal. App. 2d 696, 701)* . Petitioner made a false representation in his application for a building permit, the court observed, and, furthermore, a writ of mandate ought not to be granted when

its enforcement would work an injustice or accomplish a legal wrong (*201 Cal. App. 2d 696, 699-700)* .

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
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A. MANDATE

15-150 California Points & Authorities § 150.52

§ 150.52 Opposing Contention That Writ of Mandate Is Necessary to Compel Action by Public Entity or Officer--Petitioner Failed to Exhaust Administrative Remedies

[1] FORM

[*The following should be combined, when appropriate, with a general form of memorandum opposing a petition for a writ of mandate (see, e.g., § 150.47).*]

A WRIT OF MANDATE SHOULD NOT ISSUE BECAUSE THE PETITIONER HAS FAILED TO EXHAUST HIS/HER/ITS ADMINISTRATIVE REMEDIES.

Failure to Exhaust Administrative Remedies. A writ of mandate will not be issued when petitioner has failed to exhaust available administrative remedies (*Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 292-293, 109 P.2d 942* ; *Alta Loma School Dist. v. San Bernardino County Com. on School Dist. Reorganization (1981) 124 Cal. App. 3d 542, 554, 177 Cal. Rptr. 506*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in opposition to the contention that a writ of mandate is proper when the respondent is a public entity or official. The ground for opposition is that petitioner failed to exhaust his or her administrative remedies before petitioning for the writ.

The foregoing points and authorities should be combined with a general memorandum opposing a petition for writ of mandate (*see § 150.47*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Failure to Exhaust Administrative Remedies

The facts and procedure in ***Abelleira v. District Court of Appeal*** *(1941) 17 Cal. 2d 280, 109 P.2d 942* , are discussed in *§ 150.71[3][a]*. In issuing a writ of prohibition to restrain the court of appeal from enforcing a writ of mandate, the Supreme Court held that the lower court had acted in excess of its jurisdiction when it interfered with administrative proceedings before they were final (*17 Cal. 2d 280, 305-306)* . A complete administrative procedure was available, including a hearing and two appeals, and there was nothing for any court to review until that procedure had been invoked (*17 Cal. 2d 280, 291)* . The rule, the Court reiterated, is that when an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act (*17 Cal. 2d 280, 292)* . It is not a matter of judicial discretion but a fundamental rule of procedure laid down by courts of last resort, followed under the doctrine of stare decisis, and binding on all courts (*17 Cal. 2d 280, 293)* .

In ***Alta Loma School Dist. v. San Bernardino County Com. on School Dist. Reorganization*** *(1981) 124 Cal. App. 3d 542, 177 Cal. Rptr. 506* , a county committee established to recommend a reorganization of a high school district approved a plan that would abolish several component school districts. The component school districts sought a writ of mandate to compel the committee to set aside its action and to prohibit the committee from sending its plan to the State Board of Education for approval. The trial court overruled the committee's demurrer to the petition and the committee appealed.

The court of appeal reversed, noting that the fact that the State Board of Education had the power to order any necessary modifications obviated the need for judicial review of the proposal's propriety. Stating that the rule requiring exhaustion is not discretionary, but a jurisdictional prerequisite to judicial review, the court held that plaintiffs were precluded from such review until they had pursued the administrative processes available with the board (*124 Cal. App. 3d 542, 554-556)* .

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15-150 California Points & Authorities §§ 150.53-150.69

[Reserved]

§§ 150.53[Reserved]

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B. PROHIBITION

15-150 California Points & Authorities § 150.70

§ 150.70 Supporting Petition for Writ of Prohibition [Code Civ. Proc. §§ 1102, 1103]--Skeletal Form

[1] FORM

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA,

[*or*]

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA,
_____ APPELLATE DISTRICT
[DIVISION _____]

[*or*]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	[CIVIL] NO. _____
Petitioner,	)	MEMORANDUM IN SUPPORT OF PETITION
vs.	)	FOR WRIT OF PROHIBITION
THE SUPERIOR COURT OF THE STATE OF	)	[*Code Civ. Proc. §§ 1102, 1103*(; *Cal. Rules of Ct.,*
CALIFORNIA, COUNTY OF	)	*Rule 8.486*)]
_____,	)	Date: _____
Respondent,	)	Time: _____

_____ [*name*],	)	Location: _____
Real Party in Interest.	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THIS COURT SHOULD ISSUE A WRIT OF PROHIBITION RESTRAINING RESPONDENT FROM _____ [*specify threatened judicial act*] BECAUSE RESPONDENT IS AN INFERIOR TRIBUNAL PROCEEDING WITHOUT OR IN EXCESS OF ITS JURISDICTION, AND PETITIONER IS BENEFICIALLY INTERESTED AND HAS NO ADEQUATE REMEDY AT LAW.

Writ of Prohibition. When there is not a plain, speedy, and adequate remedy in the ordinary course of the law, a writ of prohibition may be issued on the verified petition of the person beneficially interested, by any court to an inferior court, to arrest the proceedings of the tribunal when such proceedings are without or in excess of jurisdiction of the tribunal (*Code Civ. Proc. §§ 1102, 1103*).

[*Add specific points and authorities showing that respondent is a lower court or other tribunal that is threatening to act without or in excess of its jurisdiction (see §§ 150.71-150.77)*].

[*Add specific points and authorities showing why petitioner's remedy at law is inadequate (see §§ 150.160-150.184).*]

[*If petitioner is not a party in a lower court action, add specific points and authorities showing that petitioner has a beneficial interest in the proceedings (see § 150.140).*]

[*If the petition seeks a writ of prohibition or, in the alternative, a writ of mandate, add specific points and authorities showing that appropriate writ may be issued when petition seeks both writs (see § 150.120).*]

[*Add specific points and authorities showing that issuance of a peremptory writ in the first instance is justified, if appropriate (see § 150.121).*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

The foregoing form is a skeletal memorandum in support of a petition for writ of prohibition. It is designed to be combined with additional, more specific points and authorities showing why the court should exercise its discretion to issue a writ of prohibition under the particular circumstances of the case [*see § 150.70[2][b]*].

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

For discussion regarding supporting points and authorities generally, see *§ 150.08*.

[b] Establishing Elements Essential to Issuance of Writ of Prohibition

The foregoing form sets out the general point of law that a writ of prohibition may properly issue when the following conditions exist: (1) respondent threatens to perform a judicial act; (2) the act is without or in excess of respondent's jurisdiction; (3) there is no adequate remedy at law, and (4) petitioner has a beneficial interest in the proceedings [*Code Civ. Proc. §§ 1102, 1103*; *see Chodos v. Superior Court (1964) 226 Cal. App. 2d 703, 714, 38 Cal. Rptr. 301]* .

The bracketed instructions that follow the general point of law in the foregoing form indicate that additional paragraphs, taken from subsequent forms in this chapter should be added showing the following elements: (1) a lower court's threatened judicial act that is without or in excess of jurisdiction; (2) the petitioner's beneficial interest in restraining that act; and (3) the inadequacy of petitioner's remedy at law. Further bracketed instructions indicate that additional paragraphs, taken from subsequent forms in this chapter, should be added, if appropriate, to show the following: (1) the propriety of issuing the writ if the petition mistakenly seeks a writ of mandate, or seeks the writs in the alternative; and (2) the propriety of issuing a peremptory writ in the first instance. Counsel should refer to the forms indicated in the bracketed instructions and choose the paragraphs that best fit the factual situation involved.

[c] Writ of Prohibition Against Corporation, Board, or Person

The prohibition statutes authorize issuance of the writ to restrain a corporation, board, or person exercising judicial functions, as well as a court [*Code Civ. Proc. §§ 1102, 1103*]. Only a constitutional grant of judicial power, however, authorizes a corporation, board, or person to exercise judicial functions [*see Cal. Const., art. VI, § 1*; *Standard Oil Co. v. State Board of Equal. (1936) 6 Cal. 2d 557, 562-563, 59 P.2d 119]* . Most local and statewide administrative agencies, such as city councils, school boards, planning commissions, and civil service and merit systems boards, for example, have no constitutional authority to exercise judicial functions [*see Standard Oil Co. v. State Board of Equal. (1936) 6 Cal. 2d 557, 562-563, 59 P.2d 119* (state agencies); *Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 42-44, 46 n.1, 112 Cal. Rptr. 805, 520 P.2d 29* (local agencies); *but see Boren v. State Personnel Board (1951) 37 Cal. 2d 634, 637-638, 234 P.2d 981* (State Personnel Board derives judicial powers from constitution)]. Therefore, in most cases a writ of prohibition is used to review the judicial acts of a lower court.

[d] Related Pleading and Practice Forms

For further discussion and forms of petitions for writs of prohibition, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender).

[e] Opposing Memoranda

The points and authorities set out in *§ 150.78* may be used in an appropriate case to oppose a petition for prohibition that is supported by the foregoing points and authorities.

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15-150 California Points & Authorities § 150.71

§ 150.71 Supporting Contention That Writ of Prohibition Is Necessary to Arrest Action by Lower Court That Is Without or in Excess of Jurisdiction--Another Court Has Exclusive Jurisdiction

[1] FORM

[*The following should be combined, when appropriate, with a general form of memorandum supporting a petition for a writ of prohibition (see, e.g., § 150.70).*]

A WRIT OF PROHIBITION SHOULD ISSUE TO RESTRAIN RESPONDENT FROM PROCEEDING WITH THE ACTION BECAUSE ANOTHER COURT HAS EXCLUSIVE JURISDICTION.

A. Excess of Jurisdiction. Any acts that exceed the defined power of a court in any instance, whether that power is defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of stare decisis, are in excess of jurisdiction and may be restrained by prohibition (*Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 288-291, 109 P.2d 942* ; *Corona etc. Hosp. Dist. v. Superior Court (1964) 61 Cal. 2d 846, 852, 40 Cal. Rptr. 745, 395 P.2d 817*).

[*EITHER*]

B. Another Court Has Exclusive Jurisdiction. A court that is proceeding although another court has exclusive jurisdiction is acting in excess of its jurisdiction, and a writ of prohibition is proper to restrain it from proceeding (*Lawyers Title Ins. Corp. v. Superior Court (1984) 151 Cal. App. 3d 455, 460, 199 Cal. Rptr. 1*).

[*OR*]

B. Administrative Agency Has Exclusive Jurisdiction. A court that is proceeding although an administrative agency has exclusive jurisdiction is acting in excess of its jurisdiction, and a writ of prohibition is proper to restrain it from

proceeding (*Musicians Union, Local No. 6 v. Superior Court of Alameda County (1968) 69 Cal. 2d 695, 700, 73 Cal. Rptr. 201, 447 P.2d 313*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that a writ of prohibition is proper to restrain a lower court from acting without or in excess of jurisdiction, on the ground that another court or tribunal has exclusive jurisdiction over the proceeding.

The foregoing points and authorities should be combined with a general memorandum supporting a petition for writ of mandate (*see § 150.70*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to prohibition proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Excess of Jurisdiction

In ***Abelleira v. District Court of Appeal*** *(1941) 17 Cal. 2d 280, 109 P.2d 942* , longshoremen who were out of work made claims for unemployment benefits and an initial administrative determination was made that they were entitled to the benefits. Their former employers intervened in the administrative proceedings, contending that the longshoremen left work because of a labor dispute and so were not entitled to benefits. After a hearing, a referee affirmed the initial determination. Instead of taking a further administrative appeal to the California Employment Commission, the employers obtained a temporary restraining order from the court of appeal, as well as a writ of mandate directing the commission to withhold benefits as long as the asserted labor dispute was in progress. The employers then filed an appeal to the commission. While the appeal was pending, the longshoremen sought a writ of prohibition from the Supreme Court to restrain the court of appeal from enforcing its temporary restraining order and writ of mandate.

The Supreme Court issued the writ, holding that the court of appeal was without jurisdiction to issue the writ of mandate (*17 Cal. 2d 280, 305-306)* . The Court explained that, for the purposes of prohibition, jurisdiction has a broader meaning than merely whether the court has jurisdiction over the parties and the subject matter. A court acts in excess of jurisdiction when, although it has jurisdiction over the subject matter and the parties, it has no jurisdiction to act except in a particular manner, to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites (*17 Cal. 2d 280, 288)* . The Court gave a number of examples of excess of jurisdiction and then stated that any acts that exceed the defined power of a court in any instance, whether that power is defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of stare decisis, are in excess of jurisdiction and can be restrained by prohibition (*17 Cal. 2d 280, 291)* . The Court then concluded that the court of appeal acted in excess of jurisdiction when it interfered with administrative proceedings before they were final (*17 Cal. 2d 280, 305-306)* .

The facts and procedure in ***Corona etc. Hosp. Dist. v. Superior Court*** *(1964) 61 Cal. 2d 846, 40 Cal. Rptr. 745, 395 P.2d 817* , are discussed in *§ 150.161[3]*. In holding that the trial court acted in excess of jurisdiction, the Supreme Court followed the holding in *Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 109 P.2d 942 , above,* and

held that the concept of jurisdiction is wider than jurisdiction over the subject matter and parties. Lack of jurisdiction for prohibition purposes means want or excess of the power of the court to act (*61 Cal. 2d 846, 852)* .

[b] Another Court Has Exclusive Jurisdiction

In ***Lawyers Title Ins. Corp. v. Superior Court*** *(1984) 151 Cal. App. 3d 455, 199 Cal. Rptr. 1* , an action for damages, the trial court denied a motion for abatement made under *Code Civ. Proc. §§ 430.10(c)* and *597*, and the moving party sought review by petition for a writ of prohibition. In granting the writ, the court of appeal noted that it was undisputed that at the time the action for damages was filed another action for declaratory relief was pending and that both actions involved the same parties and arose out of the same transaction (*151 Cal. App. 3d 455, 458)* . The court held that when two superior courts have concurrent jurisdiction over the subject matter and the parties, the first court to assume jurisdiction has exclusive and continuing jurisdiction until such time as all necessarily related matters have been resolved, and that a writ of prohibition is an appropriate remedy when the second court refuses to recognize this exclusive jurisdiction (*151 Cal. App. 3d 455, 460)* .

[c] Administrative Agency Has Exclusive Jurisdiction

In ***Musicians Union, Local No. 6 v. Superior Court of Alameda County*** *(1968) 69 Cal. 2d 695, 73 Cal. Rptr. 201, 447 P.2d 313* , a baseball team owner and stadium operator brought an action to enjoin a musicians' union from picketing the stadium during games. The trial court issued a preliminary injunction and the union petitioned for a writ of prohibition to restrain all further proceedings, including enforcement of the injunction. The Supreme Court issued the writ, holding that under federal law the controversy was subject to the jurisdiction of the National Labor Relations Board and that real parties in interest failed to demonstrate that the board in its discretion would have failed to assert jurisdiction (*69 Cal. 2d 695, 700)* .

[4] Additional Authorities

[a] Another Court Has Exclusive Jurisdiction

In *Kresteller v. Superior Court (1967) 248 Cal. App. 2d 545, 56 Cal. Rptr. 771* , a wife obtained a divorce decree granting her custody of the children, but no child support. She later filed an independent action in another county for child support. Her former husband sought a writ of prohibition to prevent the second action from proceeding, and the court of appeal granted the writ. The court held that prohibition was proper, despite the fact that the husband was liable for child support, because the trial court that had granted the divorce decree had first assumed jurisdiction and retained exclusive jurisdiction over the issue of child support (*248 Cal. App. 2d 545, 549)* .

In *Loftis v. Superior Court (1962) 205 Cal. App. 2d 148, 23 Cal. Rptr. 125* , a wife instituted two divorce actions against her husband in two different superior courts. The court of appeal issued a writ of prohibition against the second proceeding on the basis that the court to first acquire jurisdiction had exclusive jurisdiction (*205 Cal. App. 2d 148, 148-149)* .

In *Cade v. Superior Court (1961) 191 Cal. App. 2d 554, 12 Cal. Rptr. 847* , the dispute involved the validity of notes and deeds of trust. Petitioners' action was filed in Los Angeles and summons was served. Thereafter, real parties in interest filed another action in another county. Petitioners sought a writ of prohibition to restrain the second court from proceeding. The court of appeal granted the writ. It held that the first court had assumed exclusive jurisdiction over the subject matter when the summons was served and that the threatened invasion of that jurisdiction presented a case for prohibition (*191 Cal. App. 2d 554, 559)* .

[b] Administrative Agency Has Exclusive Jurisdiction

In *State Comp. Ins. Fund v. Superior Court (1965) 237 Cal. App. 2d 416, 46 Cal. Rptr. 891* , an employee who was

injured on the job received a compensation award in proceedings before the Industrial Accident Commission. He then brought an action against the employer's compensation insurer, alleging that the insurer negligently failed to ascertain the safety of the employer's premises. The trial court overruled the employer's demurrer and the employer sought a writ of prohibition to restrain the court from proceeding with the action. The court of appeal granted the writ, holding that the Industrial Accident Commission had exclusive jurisdiction (*237 Cal. App. 2d 416, 418)* .

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15-150 California Points & Authorities § 150.72

§ 150.72 Supporting Contention That Writ of Prohibition Is Necessary to Arrest Action by Lower Court That Is Without or in Excess of Jurisdiction--Court Action Contrary to Prescribed Procedure Is in Excess of Jurisdiction

[1] FORM

[*The following should be combined, when appropriate, with a general form of memorandum supporting a petition for a writ of prohibition (see, e.g., § 150.70).*]

A WRIT OF PROHIBITION SHOULD ISSUE TO RESTRAIN RESPONDENT FROM _____ [*specify act to be restrained, e.g.,* PROCEEDING IN A CONTEMPT PROSECUTION AGAINST PETITIONER] BECAUSE THE COURT IS PROCEEDING IN A MANNER CONTRARY TO PRESCRIBED PROCEDURE.

A. Excess of Jurisdiction. [*See § 150.71, Paragraph A.*]

B. Action Contrary to Prescribed Procedure. When a lower court proceeds contrary to prescribed procedures, it is acting in excess of jurisdiction and a writ of prohibition to restrain it from doing so is proper (*Safer v. Superior Court (1975) 15 Cal. 3d 230, 242, 124 Cal. Rptr. 174, 540 P.2d 14*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that a writ of prohibition is proper to restrain a lower court from acting without or in excess of jurisdiction, on the ground that the court is acting contrary to a procedure prescribed by statute.

The foregoing points and authorities should be combined with a general memorandum supporting a petition for writ of mandate (*see § 150.70*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the

points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to prohibition proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Action Contrary to Prescribed Procedure

In ***Safer v. Superior Court*** *(1975) 15 Cal. 3d 230, 124 Cal. Rptr. 174, 540 P.2d 14* , petitioners were being criminally prosecuted for disobeying a court order in a picket situation. When they arrived for trial, they were served with orders to show cause in civil contempt proceedings by the district attorney, who dismissed the criminal charges. The evident purpose was to convert a misdemeanor trial, with a right to a jury trial, into a civil contempt proceeding with no such right. Petitioners demurred to the contempt proceedings, and the trial court overruled the demurrer. Petitioner then sought a writ of prohibition restraining the court from proceeding with the contempt proceedings.

The Supreme Court held that the district attorney did not have authority to prosecute the contempt in that manner (*15 Cal. 3d 230, 235-242)* . It stated that it is well settled that when a statute authorizes prescribed procedures and the court acts contrary to authority thus conferred, it has exceeded its jurisdiction. The Court relied on its earlier decision of *Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 109 P.2d 942* (discussed in *§ 150.71[3][a]*), which, while delineating the general rules for prohibition, had stated, in dicta, the rule about restraining action contrary to prescribed procedures (*15 Cal. 3d 230, 242)* . The Court held that the lower court was in excess of jurisdiction when it allowed the district attorney to prosecute the case contrary to the statutorily authorized procedure and in excess of his authority (*15 Cal. 3d 230, 242)* .

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15-150 California Points & Authorities § 150.73

§ 150.73 Supporting Contention That Writ of Prohibition Is Necessary to Arrest Action by Lower Court That Is Without or in Excess of Jurisdiction--Court Refuses to Follow Stare Decisis

[1] FORM

[*The following should be combined, when appropriate, with a general form of memorandum supporting a petition for a writ of prohibition (see, e.g., § 150.70).*]

A WRIT OF PROHIBITION SHOULD ISSUE TO RESTRAIN RESPONDENT FROM _____ [*specify act to be restrained, e.g.,* PROCEEDING WITH A NEW TRIAL] BECAUSE THAT ACT IS PROHIBITED BY _____ [*cite case*] AND, IN THREATENING TO SO ACT, THE COURT IS REFUSING TO FOLLOW STARE DECISIS.

A. Excess of Jurisdiction. [*See § 150.71, Paragraph A.*]

B. Refusal to Follow Stare Decisis. When a lower court refuses to apply a clear, binding precedent laid down by a higher court, it is acting in excess of jurisdiction and a writ of prohibition will issue to restrain it from acting contrary to stare decisis (*see Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal. 2d 450, 455-456, 20 Cal. Rptr. 321, 369 P.2d 937* (writ of review)).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that a writ of prohibition is proper to restrain a lower court from acting without or in excess of jurisdiction, on the ground that the court is acting contrary to case law when there is a clear and binding precedent applicable to the facts.

The foregoing points and authorities should be combined with a general memorandum supporting a petition for writ of mandate (*see § 150.70*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to prohibition proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Refusal to Follow Stare Decisis

In ***Auto Equity Sales, Inc. v. Superior Court*** *(1962) 57 Cal. 2d 450, 20 Cal. Rptr. 321, 369 P.2d 937* (writ of review), the appellate department of a superior court vacated a municipal court order for new trial. Only one appellate decision applied to the facts and the superior court recognized the decision but refused to follow it on the ground that it had been incorrectly decided. Moving parties then petitioned for a writ of review.

The Supreme Court held that the superior court had exceeded its jurisdiction. The writ of review, like the writ of prohibition, the Court recognized, can only be used to attack acts committed in excess of jurisdiction (*57 Cal. 2d 450, 454)* . The superior court refused to apply the one appellate decision that controlled the disposition of the case. Citing *Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 109 P.2d 942* (discussed in *§ 150.71[3][a]*), the Court held that failure to adhere to the principal of stare decisis amounted to a jurisdictional error (*57 Cal. 2d 450, 455)* . The Court noted, however, that there was only one controlling case to be applied. If there were conflicting cases from a higher court, it would not necessarily be an excess of jurisdiction for the inferior court to choose between them (*57 Cal. 2d 450, 456)* .

Note that, although the decision in *Auto Equity* involved a writ of review, such a writ is proper only when a court has exceeded its jurisdiction and there is no appeal [*see Code Civ. Proc. § 1068*]. The standard set out in *Abelleira* for a determination of whether there has been an excess of jurisdiction entitling petitioner to a writ of prohibition was also the standard used in *Auto Equity* to determine whether a writ of review should issue.

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15-150 California Points & Authorities § 150.74

§ 150.74 Supporting Contention That Writ of Prohibition Is Necessary to Arrest Action by Lower Court That Is Without or in Excess of Jurisdiction--Court Enforced Statute or Ordinance Unconstitutional on Its Face

[1] FORM

[*The following should be combined, when appropriate, with a general form of memorandum supporting a petition for a writ of prohibition (see, e.g., § 150.70).*]

A WRIT OF PROHIBITION SHOULD ISSUE TO RESTRAIN RESPONDENT FROM _____ [*specify act to be restrained, e.g.,* PROCEEDING IN THE CRIMINAL PROSECUTION AGAINST PETITIONER] BECAUSE THE COURT IS THREATENING TO ENFORCE _____ [*specify law, e.g.,* AN ORDINANCE] THAT IS UNCONSTITUTIONAL ON ITS FACE.

A. Excess of Jurisdiction. [*See § 150.71, Paragraph A.*]

B. Enforcement of Unconstitutional Statute or Ordinance. When a lower court is threatening to enforce a statute or ordinance that is unconstitutional on its face, it is acting in excess of its jurisdiction and a writ of prohibition is proper to restrain the court from enforcement (*Dulaney v. Municipal Court (1974) 11 Cal. 3d 77, 81-82, 112 Cal. Rptr. 777, 520 P.2d 1* ; *see* *Rescue Army v. Municipal Court (1946) 28 Cal. 2d 460, 462-465, 171 P.2d 8*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that a writ of prohibition is proper to restrain a lower court from acting without or in excess of jurisdiction, on the ground that the court is threatening to enforce a facially unconstitutional statute or ordinance.

The foregoing points and authorities should be combined with a general memorandum supporting a petition for writ of mandate (*see § 150.70*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to prohibition proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Enforcement of Unconstitutional Statute or Ordinance

In ***Dulaney v. Municipal Court*** *(1974) 11 Cal. 3d 77, 112 Cal. Rptr. 777, 520 P.2d 1* , petitioners were prosecuted in the municipal court for unlawfully affixing signs to utility poles without the requisite permit. They sought a writ of prohibition in the superior court on the ground that the statute was unconstitutional. The writ was denied in the superior court and petitioner filed a new petition in the Supreme Court.

The Supreme Court issued the writ, holding that the ordinance was unconstitutional (*11 Cal. 3d 77, 89)* . The Court stated that when a statute or ordinance sought to be enforced is alleged to be unconstitutional on its face, a petition for writ of prohibition is an appropriate method of seeking relief (*11 Cal. 3d 77, 81-82)* .

In ***Rescue Army v. Municipal Court*** *(1946) 28 Cal. 2d 460, 171 P.2d 8* , petitioners sought a writ of prohibition to restrain the trial court from enforcing an ordinance regulating the solicitation of contributions. The Supreme Court upheld that ordinance and denied writ relief but stated that a writ of prohibition was a proper method of testing the constitutionality of a statute because the invalidity of the legislation goes to the jurisdiction of the court. The concept of jurisdiction, the Court stated, is very broad in prohibition and certiorari proceedings. A writ may be granted when the court has no jurisdiction to act except in a certain manner because, for instance, it is enforcing an unconstitutional statute, even though it has jurisdiction in the fundamental sense over the subject matter and the parties. The lower court has jurisdiction to decide its own jurisdiction but, if it decides erroneously, the writ of prohibition is proper (*28 Cal. 2d 460, 463-464)* .

[4] Additional Authorities

[a] Enforcement of Unconstitutional Statute or Ordinance

In *Pryor v. Municipal Court (1979) 25 Cal. 3d 238, 158 Cal. Rptr. 330, 599 P.2d 636* , petitioner was being prosecuted for lewd behavior in a public place. After a mistrial, petitioner sought a writ of prohibition against a retrial on the ground that the statute was unconstitutionally vague. The Court denied the writ, holding that the statute could be given a constitutional construction (*25 Cal. 3d 238, 244, 258)* . The Court stated, however, that prohibition was a proper remedy because a court lacks jurisdiction to proceed to trial under a statute that is unconstitutional on its face (*25 Cal. 3d 238, 245)* .

In *Canon v. Justice Court (1964) 61 Cal. 2d 446, 39 Cal. Rptr. 228, 393 P.2d 428* , petitioner was charged with violating election laws by anonymously posting a handbill attacking a candidate. He demurred on *First Amendment* grounds, and when the demurrer was overruled, he petitioned for a writ of prohibition. The Supreme Court issued the writ, holding that the statute was discriminatory (*61 Cal. 2d 446, 461)* . The Court held that prohibition is a proper remedy when petitioner is contending that a statute is unconstitutional on its face (*61 Cal. 2d 446, 450)* .

The facts and procedural background in *Harden v. Superior Court (1955) 44 Cal. 2d 630, 284 P.2d 9* , are discussed in *§ 150.161[3][e]*. In holding that a city did not have the power to condemn land outside its borders, the Supreme Court

stated that the constitutionality of a statute may be tested by a writ of prohibition when the lower court has decided that it has jurisdiction and is proceeding to act (*44 Cal. 2d 630, 634)* .

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15-150 California Points & Authorities § 150.75

§ 150.75 Supporting Contention That Writ of Prohibition Is Necessary to Arrest Action by Lower Court That Is Without or in Excess of Jurisdiction--Court Improperly Granted or Denied Jury Trial

[1] FORM

[*The following should be combined, when appropriate, with a general form of memorandum supporting a petition for a writ of prohibition (see, e.g., § 150.70).*]

A WRIT OF PROHIBITION SHOULD ISSUE TO RESTRAIN RESPONDENT FROM TRYING THE ACTION _____ [BEFORE *or* WITHOUT] A JURY BECAUSE THE MOTION FOR JURY TRIAL WAS IMPROPERLY _____ [GRANTED *or* DENIED].

A. Excess of Jurisdiction. [*See § 150.71, Paragraph A.*]

[*EITHER*]

B. Improper Grant of Jury Trial. If a trial court grants a jury trial in a proceeding when there is no right to a jury trial, it is acting in excess of jurisdiction and a writ of prohibition is proper (*see Southern Pac. Transportation Co. v. Superior Court (1976) 58 Cal. App. 3d 433, 435, 129 Cal. Rptr. 912*).

[*OR*]

B. Improper Denial of Jury Trial. If a trial court improperly denies a party a jury trial, it is acting in excess of jurisdiction and a writ of prohibition is proper (*see Turlock Golf etc. Club v. Superior Court (1966) 240 Cal. App. 2d 693, 695, 50 Cal. Rptr. 70*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that a writ of prohibition is proper to restrain a lower court from acting without or in excess of jurisdiction, on the ground that the court is either trying a case before a jury when a motion for jury trial was improperly granted or trying the case without a jury when the motion was improperly denied.

The foregoing points and authorities should be combined with a general memorandum supporting a petition for writ of mandate (*see § 150.70*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to prohibition proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Improper Grant of Jury Trial

In ***Southern Pac. Transportation Co. v. Superior Court*** *(1976) 58 Cal. App. 3d 433, 129 Cal. Rptr. 912* , plaintiff brought an action under *Code Civ. Proc. § 871.1 et seq.*, the good-faith improver statutes. The trial court granted plaintiff's motion for a jury trial and defendant petitioned for a writ of prohibition. The court of appeal issued the writ, holding that the Legislature had not intended that there be a right to jury trial in an action brought under the statutes (*58 Cal. App. 3d 433, 438)* . The court stated that prohibition was the proper method of determining the issue of the right to jury trial (*58 Cal. App. 3d 433, 435)* . Although the court did not expressly hold that the trial court threatened to exceed its jurisdiction by granting a jury trial, this holding is implicit in its granting of the writ of prohibition because the writ lies only when the respondent threatens to act without or in excess of its jurisdiction [*see Code Civ. Proc. § 1102*].

[b] Improper Denial of Jury Trial

In ***Turlock Golf etc. Club v. Superior Court*** *(1966) 240 Cal. App. 2d 693, 50 Cal. Rptr. 70* , a local court rule required posting of jury fees for all members of the jury panel, rather than just for those selected. Petitioner refused to post the added fees, and the superior court held that the right to jury trial was waived. Petitioner applied for a writ of prohibition to restrain the superior court from refusing to allow a jury trial. The court of appeal issued the writ, holding that the additional fees were not authorized (*240 Cal. App. 2d 693, 701)* . The court stated that prohibition is a proper remedy to test the right to a jury trial and that the remedy of appeal was not adequate (*240 Cal. App. 2d 693, 695)* . Although the court did not expressly hold that the trial court threatened to exceed its jurisdiction by refusing to permit a jury trial, this holding is implicit in its granting of the writ of prohibition because the writ lies only when the respondent threatens to act without or in excess of its jurisdiction [*see Code Civ. Proc. § 1102*].

[4] Additional Authorities

[a] Improper Denial of Jury Trial

Le Jeune v. Superior Court (1963) 218 Cal. App. 2d 696, 32 Cal. Rptr. 390 , involved a petition for appointment of a conservator. The proposed conservatee resisted the petition and demanded a jury trial but his jury demand was denied. The court of appeal issued a writ of prohibition, stating that prohibition was a proper remedy to protect the proposed

conservatee's right to a jury trial (*218 Cal. App. 2d 696, 698)* .

In *Ford v. Superior Court (1959) 176 Cal. App. 2d 754, 1 Cal. Rptr. 559* , petitioners sued for rescission of a contract and demanded a jury trial. The trial court refused to grant a jury trial. The court of appeal issued a writ of prohibition, holding that the action was at law, that petitioners had a right to a jury trial, and that prohibition was proper to test the right to a jury trial (*176 Cal. App. 2d 754, 759)* .

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15-150 California Points & Authorities § 150.76

§ 150.76 Supporting Contention That Writ of Prohibition Is Necessary to Arrest Action by Lower Court That Is Without or in Excess of Jurisdiction--Court Enjoined Enactment or Enforcement of Valid Statute or Ordinance

[1] FORM

[*The following should be combined, when appropriate, with a general form of memorandum supporting a petition for a writ of prohibition (see, e.g., § 150.70).*]

A WRIT OF PROHIBITION SHOULD ISSUE TO RESTRAIN RESPONDENT FROM ENJOINING THE _____ [ENACTMENT *or* ENFORCEMENT] OF _____ [*cite to statute or ordinance*] BECAUSE THE _____ [STATUTE *or* ORDINANCE] IS LEGALLY VALID.

A. Excess of Jurisdiction. [*See § 150.71, Paragraph A.*]

B. Injunction Against Valid Statute. When a lower court has enjoined the enforcement or enactment of a valid statute or ordinance, it is acting in excess of its jurisdiction and a writ of prohibition is therefore proper (*City of Los Angeles v. Superior Court (1959) 51 Cal. 2d 423, 430, 333 P.2d 745*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that a writ of prohibition is proper to restrain a lower court from acting without or in excess of jurisdiction, on the ground that the court is enjoining the enactment or enforcement of a valid statute or ordinance.

The foregoing points and authorities should be combined with a general memorandum supporting a petition for writ of mandate (*see § 150.70*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the

points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to prohibition proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Injunction Against Valid Statute or Ordinance

In ***City of Los Angeles v. Superior Court*** *(1959) 51 Cal. 2d 423, 333 P.2d 745* , petitioners brought an action to challenge an ordinance, adopted by referendum, which provided for the sale of land by the city to the Los Angeles Dodgers baseball team to build Dodger Stadium. The superior court enjoined the city from proceeding under the ordinance. The city sought a writ of prohibition to restrain the superior court from enforcing the injunction.

The Supreme Court issued the writ, holding that the ordinance was valid (*51 Cal. 2d 423, 438)* . The Court also ruled that a lower court is acting in excess of jurisdiction when it enjoins the enactment or enforcement of a valid statute or ordinance, because the lower court lacks the power to grant such an injunction (*51 Cal. 2d 423, 429-430)* . The lack of jurisdiction is based on *Civ. Code § 3423(g)*, which provides that an injunction is not proper to prevent a legislative act by a municipal corporation, and by *Code Civ. Proc. § 526(b)(4)*, which provides that an injunction cannot be granted to prevent the execution of a public statute by officers of the law for the public benefit (*51 Cal. 2d 423, 430)* .

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15-150 California Points & Authorities § 150.77

§ 150.77 Supporting Contention That Writ of Prohibition Is Necessary to Arrest Action by Lower Court That Is Without or in Excess of Jurisdiction--Court Issued Unconstitutional Preliminary Injunction

[1] FORM

[*The following should be combined, when appropriate, with a general form of memorandum supporting a petition for a writ of prohibition (see, e.g., § 150.70).*]

A WRIT OF PROHIBITION SHOULD ISSUE TO RESTRAIN RESPONDENT FROM ENFORCING THE PRELIMINARY INJUNCTION BECAUSE THE INJUNCTION IS UNCONSTITUTIONAL.

A. Excess of Jurisdiction. [*See § 150.71, Paragraph A.*]

B. Unconstitutional Injunction. If a trial court issues a preliminary injunction that is unconstitutional, it is acting in excess of jurisdiction and a writ of prohibition is proper (*see United Farm Workers Organizing Committee v. Superior Court (1971) 4 Cal. 3d 556, 563 n.7, 94 Cal. Rptr. 263, 483 P.2d 1215*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that a writ of prohibition is proper to restrain a lower court from acting without or in excess of jurisdiction, on the ground that the court is enforcing an unconstitutional preliminary injunction.

The foregoing points and authorities should be combined with a general memorandum supporting a petition for writ of mandate (*see § 150.70*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to prohibition proceedings, see California Forms of Pleading and Practice, Ch. 358, *Mandate and Prohibition* (Matthew Bender).

[3] Discussion of Authorities

[a] Unconstitutional Injunction

In ***United Farm Workers Organizing Committee v. Superior Court*** *(1971) 4 Cal. 3d 556, 94 Cal. Rptr. 263, 483 P.2d 1215* , the superior court issued a preliminary injunction enjoining petitioners from, among other things, publicizing the fact of their labor dispute with the real party in interest and urging the public to boycott its products. Petitioners sought a writ of prohibition against the enforcement of the preliminary injunction. The Supreme Court issued the writ, holding that the injunction was overly broad (*4 Cal. 3d 556, 571-572)* . The Court stated that prohibition is an appropriate remedy to enjoin the enforcement of a preliminary injunction alleged to be unconstitutional (*4 Cal. 3d 556, 563 n.7*). Although the Court did not expressly hold that the trial court threatened to exceed its jurisdiction, this holding is implicit in its granting of the writ of prohibition because the writ lies only when the respondent threatens to act without or in excess of its jurisdiction [*see Code Civ. Proc. § 1102*].

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15-150 California Points & Authorities § 150.78

§ 150.78 Opposing Petition for Writ of Prohibition [Code Civ. Proc. §§ 1102, 1103]--Skeletal Form

[1] FORM

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA,
[*or*]

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA,
_____ APPELLATE DISTRICT
[DIVISION _____]

[*or*]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	[CIVIL] NO. _____
Petitioner,	)	MEMORANDUM IN _____
vs.	)	[PRELIMINARY OPPOSITION TO *or* SUPPORT
THE SUPERIOR COURT OF THE STATE OF	)	OF DEMURRER TO *or* SUPPORT OF ANSWER
CALIFORNIA, COUNTY OF	)	TO] PETITION FOR WRIT OF PROHIBITION
_____,	)	[*Code Civ. Proc. §§ 430.10(e), 1089, 1105*(; *Cal.*
Respondent,	)	*Rules of Ct., Rule 8.487*)]
_____ [*name*],	)	Date: _____
Real Party in Interest.	)	Time: _____

) Location: _____
[Judge: _____]
Date Action Filed: _____
[Trial Date: _____]

_____

THE PETITION FOR A WRIT OF PROHIBITION SHOULD NOT BE GRANTED BECAUSE _____ [*specify grounds for opposing petition, e.g.,* IT FAILS TO ALLEGE FACTS SUFFICIENT TO ESTABLISH THAT PETITIONER IS ENTITLED TO ISSUANCE OF THE WRIT].

[*EITHER*]

A. Preliminary Opposition to Petition for Writ of Prohibition. Within 10 days after service and filing of a petition for writ of prohibition, the real party in interest, the respondent, or both, may serve and file points and authorities in opposition to the petition (*Code Civ. Proc. § 1107*; *Cal. Rules of Ct., Rule 8.487(a)* (reviewing courts)).

[*OR*]

A. Return by Demurrer, Verified Answer, or Both. A respondent, real party in interest, or both, may make a return to an alternative writ of mandate by demurrer, verified answer, or both (*see Code Civ. Proc. §§ 1089, 1105*; *Cal. Rules of Ct., Rule 8.487(b)* (reviewing courts)).

[*Optional*] **B. Objection by Demurrer.** A party may object by demurrer to a petition for mandate on the ground that it does not state facts sufficient to show a right to relief, when that ground for objection appears on the face of the petition [or from any matter of which the court is required to or may take judicial notice] (*see Code Civ. Proc. §§ 430.10(e),* 430.30(a), *1109*).

[*Optional*] **C. Objection by Answer.** A party may object by answer to a petition for mandate when any ground for objection does not appear on the face of the petition (*see Code Civ. Proc. §§ 430.30(a), 1109*).

[*CONTINUE*]

[*Add specific points and authorities in opposition to granting the petition for writ of prohibition, when appropriate, showing that under the particular facts of the case, petitioner has not sufficiently established one or more elements that are necessary to justify a grant of relief by writ of prohibition, e.g., that respondent court's act is not a threatened judicial act in excess of jurisdiction (see §§ 150.79-150.82), that the jurisdictional issue depends on a question of fact (see § 150.83), that petitioner has no beneficial interest in the proceedings (see § 150.144), or that petitioner's remedy at law is adequate (see §§ 150.185, 150.186).*]

[*Add specific points and authorities in opposition to granting the petition for writ of prohibition, when appropriate, showing one or more affirmative defenses to the granting of a writ of prohibition (see §§ 150.200-150.204).*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form is a skeletal memorandum in opposition to a petition for writ of prohibition. It sets out general points relating to the procedural context in which opposition to the petition may be raised [*see § 150.78[2][b]*]. It is designed to be combined with additional, more specific points and authorities showing why the court should exercise its discretion to deny issuance of a peremptory writ under the particular circumstances of the case [*see § 150.78[2][c]*].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, these points and authorities may be used to oppose a petition supported by the points and authorities set out in *§ 150.70*.

[b] Procedure for Opposing Petition

This form sets out two procedural contexts in which opposition to a petition for writ of prohibition may be raised. First, within ten days after the petition for writ of prohibition is filed, the respondent or any real party in interest, separately or jointly, may serve and file a preliminary opposition (first alternative Paragraph A) [*see Code Civ. Proc. § 1107*; *Cal. Rules of Ct., Rule 8.487(a)* (reviewing courts)].

Second, a respondent or real party in interest may file points and authorities in support of his or her return to an alternative writ of prohibition by demurrer, verified answer, or both (second alternative Paragraph A, Paragraphs B, C) [*see Code Civ. Proc. § 1089* (general provisions applicable to return to writ of mandate), *1105* (providing that *Code Civ. Proc. §§ 1088-1097* also apply in proceedings for writ of prohibition); *Cal. Rules of Ct., Rule 8.487(b)* (reviewing courts)]. In superior courts, this return must be made on the date for return of the alternative writ or the date on which the petition is noticed for hearing. If the return is by demurrer alone, the court may allow an answer to be filed within such time as it may designate [*see Code Civ. Proc. § 1089*]. In reviewing courts, this return must be served and filed within 30 days after the court issues the alternative writ or order to show cause or notifies the parties that it is considering issuing a peremptory writ in the first instance. If the return is by demurrer alone, and the demurrer is not sustained, the peremptory writ may issue without leave to answer [*Cal. Rules of Ct., Rule 8.487(a)(4)*; *see Code Civ. Proc. § 1089* (provisions do not affect rules governing original writ proceedings in reviewing courts)].

For discussion regarding opposing points and authorities generally, see *§ 150.08*.

[c] Opposition to Petition

The bracketed instructions that follow the general procedural points of law in the form indicate that additional paragraphs, taken from subsequent forms in this chapter, should be added to show that relief by writ of prohibition is inappropriate under the particular circumstances of the case. Relief is inappropriate, for example, if the petitioner has not established one or more elements requisite for relief, such as his or her beneficial interest or the lack of an adequate remedy at law. Relief is also inappropriate if respondent or real party in interest can establish an affirmative defense. Counsel should refer to the forms indicated in the bracketed instructions and choose the paragraphs that best fit the factual situation involved.

[d] Related Pleading and Practice Chapters

For further discussion relating to opposition to a petition for writ of prohibition, and forms of return by demurrer or answer, see California Forms of Pleading and Practice, Ch. 358, *Mandate and Prohibition* (Matthew Bender).

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15-150 California Points & Authorities § 150.79

§ 150.79 Opposing Contention That Writ of Prohibition Is Necessary to Arrest Action by Lower Court That Is Without or in Excess of Jurisdiction--Act Is Not Judicial

[1] FORM

[*The following should be combined, when appropriate, with a general form of memorandum opposing a petition for a writ of prohibition (see, e.g., § 150.78).*]

A WRIT OF PROHIBITION SHOULD NOT ISSUE BECAUSE THE ACT PETITIONER SEEKS TO RESTRAIN IS NOT A JUDICIAL ACT.

A. Judicial Action Requirement. When the petitioner is seeking to restrain action that is nonjudicial, a writ of prohibition is not proper (*Aronoff v. Franchise Tax Board (1963) 60 Cal. 2d 177, 181-182, 32 Cal. Rptr. 1, 383 P.2d 409* ; *Water Users Assn. v. Board of Directors (1973) 34 Cal. App. 3d 131, 135, 109 Cal. Rptr. 592*).

[*Optional*] **B. Ministerial Act Not Subject to Prohibition.** A writ of prohibition is only proper to restrain judicial action; a ministerial act by a court cannot be restrained by a writ of prohibition (*Santini v. Justice's Court (1933) 218 Cal. 671, 671-672, 24 P.2d 761* ; *Donner Finance Co. v. Municipal Court (1938) 28 Cal. App. 2d 112, 114, 81 P.2d 1054*).

[*Optional*] **C. Act of Arbitrator.** Prohibition does not lie to restrain the acts of an arbitrator (*International Film Investors v. Arbitration Tribunal of Directors Guild (1984) 152 Cal. App. 3d 699, 704, 199 Cal. Rptr. 690*).

[*Optional*] **D. Act of Administrative Agency.** Prohibition does not lie to restrain the acts of state or local administrative agencies, unless they have an explicit constitutional grant of judicial power (*Aronoff v. Franchise Tax Board (1963) 60 Cal. 2d 177, 181-182, 32 Cal. Rptr. 1, 383 P.2d 409* ; *see Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 44, 112 Cal. Rptr. 805, 520 P.2d 29* (local agencies)).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in opposition to the contention that a writ of prohibition is proper. The ground for opposition is that respondent's action does not constitute a judicial act.

The foregoing points and authorities should be combined with a general memorandum opposing a petition for writ of prohibition (*see § 150.78*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to prohibition proceedings, see California Forms of Pleading and Practice, Ch. 358, *Mandate and Prohibition* (Matthew Bender).

[3] Discussion of Authorities

[a] Judicial Action Requirement

In ***Aronoff v. Franchise Tax Board*** *(1963) 60 Cal. 2d 177, 32 Cal. Rptr. 1, 383 P.2d 409* , petitioner sought a writ of prohibition to restrain the Franchise Tax Board from undertaking any further proceedings to collect their taxes. The Supreme Court denied the writ, holding that state agencies, such as the Franchise Tax Board, do not possess any judicial power and that a writ of prohibition was not proper because it challenges only judicial powers (*60 Cal. 2d 177, 181-182)* .

In ***Water Users Assn. v. Board of Directors*** *(1973) 34 Cal. App. 3d 131, 109 Cal. Rptr. 592* , landowners within an irrigation district sought a writ to restrain the levy and collection of assessments to pay bonds. As one basis for denying the writ, the court of appeal held that the imposition of bond service assessments was not a judicial function (*34 Cal. App. 3d 131, 135)* .

[b] Ministerial Act Not Subject to Prohibition

In ***Santini v. Justice's Court*** *(1933) 218 Cal. 671, 24 P.2d 761* , a writ of prohibition was sought to restrain a court from enforcing an allegedly improper judgment. The Supreme Court denied the writ, holding that prohibition was not proper to restrain a ministerial act such as the issuance of a writ of execution (*218 Cal. 671, 671-672)* .

In ***Donner Finance Co. v. Municipal Court*** *(1938) 28 Cal. App. 2d 112, 81 P.2d 1054* , petitioners' basic contention was that a judgment against them in municipal court was not proper because they had dismissed the complaint. Petitioners sought a writ of prohibition from the superior court restraining the municipal court from issuing a writ of execution. The superior court granted the petition. The court of appeal reversed, holding that the issuance of the writ of prohibition was improper because the municipal court's action in issuing a writ of execution was ministerial, not judicial (*28 Cal. App. 2d 112, 113-114)* .

[c] Act of Arbitrator

In ***International Film Investors v. Arbitration Tribunal of Directors Guild*** *(1984) 152 Cal. App. 3d 699, 199 Cal. Rptr. 690* , petitioner entered into a takeover agreement with a film production company and, when certain conditions occurred, took over production of a film. Subsequently, an employee of the production company filed an arbitration claim based on his employment contract. The production company requested that petitioner be added as a defendant in the arbitration on the ground that petitioner had exercised its takeover rights. Petitioner sought a writ of prohibition on

the ground that it was not a party to the employment agreement. The trial court denied the petition and petitioner appealed.

The court of appeal dismissed the appeal, holding that the order denying the writ of prohibition was tantamount to an order compelling arbitration, and so was not an appealable order (*152 Cal. App. 3d 699, 702, 706)* . In addition, the court held, prohibition was not petitioner's proper remedy. The writ can be used to restrain the enforcement of an order to arbitrate but does not lie to restrain the acts of an arbitrator because there was no judicial act to be restrained (*152 Cal. App. 3d 699, 704)* .

[d] Act of Administrative Agency

Aronoff v. Franchise Tax Board *(1963) 60 Cal. 2d 177, 32 Cal. Rptr. 1, 383 P.2d 409* , is discussed under *§ 150.79[3][a], [4][a]*.

In ***Strumsky v. San Diego County Employees Retirement Ass'n*** *(1974) 11 Cal. 3d 28, 112 Cal. Rptr. 805, 520 P.2d 29* , the widow of a county employee sought a writ of administrative mandate to review a county retirement board's decision to deny her service-connected death benefits. The Supreme Court reversed the judgment denying the writ, holding that a court must independently review the evidence in a writ proceeding under *Code Civ. Proc. § 1094.5* when the administrative agency's decision substantially affects a fundamental vested right (*11 Cal. 3d 28, 44)* . In its analysis, the Court recognized the established principle that judicial review is more limited in the case of agencies that have been granted judicial power by the Constitution: even though a vested right is involved, the agency's determination is entitled to the deference due a judicial decision (*11 Cal. 3d 28, 34-36)* . Case law also provided for more limited review in the case of local agencies, including both purely local agencies and state agencies of limited territorial jurisdiction (*11 Cal. 3d 28, 35)* . The Court concluded, however, that there was no basis for the local agency exception because judicial powers cannot be exercised by local agencies (*11 Cal. 3d 28, 44)* .

[4] Additional Authorities

[a] Judicial Action Requirement

In *Walsh v. Railroad Comm'n (1940) 16 Cal. 2d 691, 107 P.2d 611* , petitioners sought a writ of prohibition to restrain the city attorney from prosecuting them. The city attorney demurred, and the Supreme Court sustained the demurrer. It held that the petition did not allege facts sufficient to warrant the issuance of the writ because neither the city attorney's threat to prosecute, nor prosecution, was a judicial function and thus such action was not properly subject to a writ of prohibition (*16 Cal. 2d 691, 694)* .

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15-150 California Points & Authorities § 150.80

§ 150.80 Opposing Contention That Writ of Prohibition Is Necessary to Arrest Action by Lower Court That Is Without or in Excess of Jurisdiction--Mere Error Is Not Excess of Jurisdiction

[1] FORM

[*The following should be combined, when appropriate, with a general form of memorandum opposing a petition for a writ of prohibition (see, e.g., § 150.78).*]

A WRIT OF PROHIBITION SHOULD NOT ISSUE BECAUSE THE ACT PETITIONER SEEKS TO RESTRAIN IS MERE ERROR, NOT AN ACT IN EXCESS OF JURISDICTION.

Mere Error Not Sufficient. When the challenged action of the lower court is at the most mere error, a writ of prohibition is not proper because the lower court is not acting in excess of jurisdiction (*County of Santa Clara v. Superior Court (1971) 4 Cal. 3d 545, 549-551, 94 Cal. Rptr. 158, 483 P.2d 774* ; *Childress v. Municipal Court (1970) 8 Cal. App. 3d 611, 613, 87 Cal. Rptr. 383*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in opposition to the contention that a writ of prohibition is proper. The ground for opposition is that respondent's action is mere error and is not without or in excess of jurisdiction.

The foregoing points and authorities should be combined with a general memorandum opposing a petition for writ of prohibition (*see § 150.78*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to prohibition proceedings, see California Forms of Pleading and Practice, Ch. 358, *Mandate and Prohibition* (Matthew Bender).

[3] Discussion of Authorities

[a] Mere Error Not Sufficient

In ***County of Santa Clara v. Superior Court*** *(1971) 4 Cal. 3d 545, 94 Cal. Rptr. 158, 483 P.2d 774* , a tort action against a county, the superior court granted plaintiff's petition for relief from filing a late claim under the Tort Claims Act, *Gov. Code § 810 et seq.* The county petitioned for a writ of prohibition. The Supreme Court held that a writ of prohibition was not proper because the lower court's ruling, if wrong, was an error of law and did not involve its jurisdiction. Compliance with or relief from the tort claim requirements, the Court held, does not go to the jurisdiction of the court to act and therefore is not a basis for prohibition (*4 Cal. 3d 545, 549-550)* . The Court then held that the superior court did not abuse its discretion in granting the petition. It ruled on the issue because it had been fully briefed and refusal to rule would have resulted in unnecessary delay (*4 Cal. 3d 545, 551-552)* .

In ***Childress v. Municipal Court*** *(1970) 8 Cal. App. 3d 611, 87 Cal. Rptr. 383* , petitioner was being prosecuted for distribution of obscene films. The municipal court viewed the films and found them obscene. Petitioner petitioned the superior court for a writ of prohibition against the prosecution, which the court granted. The state appealed. The court of appeal held that prohibition was not proper because the municipal court had jurisdiction over the offense and its holding, if wrong, amounted only to an error of law and was not in excess of jurisdiction (*8 Cal. App. 3d 611, 613)* . The court noted that the petitioner was not claiming that the statute was unconstitutional and also noted that petitioner's rights of free expression had been protected (*8 Cal. App. 3d 611, 614-615)* .

[4] Additional Authorities

[a] Mere Error Not Sufficient

In *Howard Greer etc. Originals v. Superior Ct. (1948) 87 Cal. App. 2d 816, 197 P.2d 768* , defendant's default was entered and he moved to set it aside. The motion was denied and judgment was entered against him. Defendant then moved to set aside the judgment. Plaintiff petitioned the court of appeal for a writ of prohibition restraining the superior court from hearing the motion, on the ground that the decision on the motion to set aside the default was res judicata. The court of appeal denied the writ on the basis that a defense of res judicata did not go to the lower court's jurisdiction and that an error of law not involving a court's jurisdiction is not reviewable in prohibition proceedings (*87 Cal. App. 2d 816, 817)* .

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15-150 California Points & Authorities § 150.81

§ 150.81 Opposing Contention That Writ of Prohibition Is Necessary to Arrest Action by Lower Court That Is Without or in Excess of Jurisdiction--Judicial Act Has Been Completed

[1] FORM

[*The following should be combined, when appropriate, with a general form of memorandum opposing a petition for a writ of prohibition (see, e.g., § 150.78).*]

A WRIT OF PROHIBITION SHOULD NOT ISSUE BECAUSE THE ACT PETITIONER SEEKS TO RESTRAIN HAS ALREADY BEEN COMPLETED.

A. Judicial Action Completed. Prohibition is not proper to restrain judicial acts that are completed or final (*Melancon v. Superior Court (1954) 42 Cal. 2d 698, 704-705, 268 P.2d 1050* ; *Schoenfeldt v. Municipal Court (1960) 187 Cal. App. 2d 748, 749, 9 Cal. Rptr. 912*).

[*Optional*] **B. Prohibition Not Proper After Final Judgment.** A writ of prohibition does not lie after a final judgment has been entered when there are no further judicial acts to be performed (*Big Jim Mines, Inc. v. Superior Court (1937) 9 Cal. 2d 503, 504, 71 P.2d 67* ; *Crittenden v. Municipal Court (1963) 216 Cal. App. 2d 811, 812, 31 Cal. Rptr. 280*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in opposition to the contention that a writ of prohibition is proper. The ground for opposition is that respondent's action is not threatened but has already been completed.

The foregoing points and authorities should be combined with a general memorandum opposing a petition for writ of prohibition (*see § 150.78*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the

points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to prohibition proceedings, see California Forms of Pleading and Practice, Ch. 358, *Mandate and Prohibition* (Matthew Bender).

[3] Discussion of Authorities

[a] Judicial Action Completed

In ***Melancon v. Superior Court*** *(1954) 42 Cal. 2d 698, 268 P.2d 1050* , defendants in a shareholder's derivative suit made a motion to require plaintiff to furnish security. Plaintiff sought a writ of prohibition to prevent the trial court from considering the security issue, but the hearing was held and security ordered before the Supreme Court's alternative writ was served. The Court denied the peremptory writ, holding that a writ of prohibition ordinarily issues only to prevent future judicial acts rather than to undo acts already done and that appeal was an appropriate remedy (*42 Cal. 2d 698, 704-705, 708)* .

In ***Schoenfeldt v. Municipal Court*** *(1960) 187 Cal. App. 2d 748, 9 Cal. Rptr. 912* , petitioner was convicted of a misdemeanor and did not appeal. Instead, he sought a writ of prohibition in superior court against enforcement of the judgment on the basis that the statute involved was unconstitutional. The superior court denied the petition and petitioner appealed. The court of appeal granted respondent's motion to dismiss the appeal. It held that prohibition is a preventive, not a corrective, writ and cannot be used after judgment to take the place of appeal even if the basis of the petition is jurisdictional (*187 Cal. App. 2d 748, 750)* .

[b] Prohibition Not Proper After Final Judgment

In ***Big Jim Mines, Inc. v. Superior Court*** *(1937) 9 Cal. 2d 503, 71 P.2d 67* , certain shareholders obtained a judgment restraining a corporate assessment. The corporation petitioned for a writ of prohibition to restrain the court from making any further orders in the case. The Supreme Court denied the writ, holding that prohibition cannot be used to review proceedings already completed and, therefore, will not lie after judgment is entered when there are no further judicial acts to be performed (*9 Cal. 2d 503, 504)* .

In ***Crittenden v. Municipal Court*** *(1963) 216 Cal. App. 2d 811, 31 Cal. Rptr. 280* , petitioner sought a writ of prohibition to restrain the municipal court from trying him on three traffic tickets. The superior court denied the writ, the trial was held, and petitioner was convicted. Petitioner appealed the denial of the writ to the court of appeal. It held that prohibition is a preventive, not a corrective remedy, and that it was not proper after a final judgment when there are no further judicial acts to perform, even if the judgment was erroneous (*216 Cal. App. 2d 811, 812)* .

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15-150 California Points & Authorities § 150.82

§ 150.82 Opposing Contention That Writ of Prohibition Is Necessary to Arrest Action by Lower Court That Is Without or in Excess of Jurisdiction--Act Is Not Threatened

[1] FORM

[*The following should be combined, when appropriate, with a general form of memorandum opposing a petition for a writ of prohibition (see, e.g., § 150.78).*]

A WRIT OF PROHIBITION SHOULD NOT ISSUE BECAUSE THE COURT HAS NOT THREATENED TO PERFORM THE ACT PETITIONER SEEKS TO RESTRAIN.

Action Not Threatened. When the petitioner contends that certain action is beyond the jurisdiction of the lower court, but the lower court has not threatened to take such action, a writ of prohibition is not proper (*Chodos v. Superior Court (1964) 226 Cal. App. 2d 703, 714, 38 Cal. Rptr. 301*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in opposition to the contention that a writ of prohibition is proper. The ground for opposition is that respondent has not threatened to perform the act petitioner seeks to restrain.

The foregoing points and authorities should be combined with a general memorandum opposing a petition for writ of prohibition (*see § 150.78*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to prohibition proceedings, see California Forms of Pleading and Practice, Ch. 358, *Mandate and Prohibition* (Matthew Bender).

[3] Discussion of Authorities

[a] Action Not Threatened

In ***Chodos v. Superior Court*** *(1964) 226 Cal. App. 2d 703, 38 Cal. Rptr. 301* , the trial court granted a motion for new trial on the condition that defendants pay costs to plaintiffs. The costs were paid after the 60-day period for determination of the motion for new trial had expired. Plaintiff moved for a writ of execution on the basis that the granting of the motion for a new trial was no longer in effect because of the late deposit. The court denied the writ of execution. Plaintiffs sought a writ of prohibition to restrain the trial court from resetting the matter for a new trial.

The court of appeal denied the writ. One of the grounds for denial was that the record did not show that the trial court intended to set the matter for a new trial and that, therefore, the trial court had not threatened to perform any act in excess of its jurisdiction (*226 Cal. App. 2d 703, 714)* .

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15-150 California Points & Authorities § 150.83

§ 150.83 Opposing Contention That Writ of Prohibition Is Necessary to Arrest Action by Lower Court That Is Without or in Excess of Jurisdiction--Jurisdictional Determination Depends on Unresolved Question of Fact

[1] FORM

A WRIT OF PROHIBITION SHOULD NOT ISSUE BECAUSE THE JURISDICTIONAL ISSUE DEPENDS ON THE RESOLUTION OF A FACTUAL ISSUE THAT HAS NOT YET BEEN DECIDED.

[*The following should be combined, when appropriate, with a general form of memorandum opposing a petition for a writ of prohibition (see, e.g., § 150.78).*]

Factual Issue to Be Decided. When the jurisdiction of the trial court depends on a factual issue that it has not yet decided, a writ of prohibition is not proper (*Agricultural Prorate Com. v. Superior Ct. (1936) 5 Cal. 2d 550, 586, 55 P.2d 495* ; *see City of Los Angeles v. Superior Court (1959) 51 Cal. 2d 423, 430, 333 P.2d 745*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in opposition to the contention that a writ of prohibition is proper. The ground for opposition is that the jurisdictional issue depends on the resolution of a factual issue that has not yet been decided.

The foregoing points and authorities should be combined with a general memorandum opposing a petition for writ of prohibition (*see § 150.78*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to prohibition proceedings, see California Forms of Pleading and Practice, Ch. 358, *Mandate and Prohibition* (Matthew Bender).

[3] Discussion of Authorities

[a] Factual Issue to Be Decided

In ***Agricultural Prorate Com. v. Superior Ct.*** *(1936) 5 Cal. 2d 550, 55 P.2d 495* , the basic issue was the constitutionality of an agricultural regulatory act. The petition for writ of prohibition sought to restrain the trial court from enjoining the implementation of the act. As one basis for denial of the writ, the Supreme Court held that the contention that a district was not properly organized presented factual issues for the trial court and that, if the trial court found that the district was not properly organized, it could properly issue the injunction. Therefore, the writ was not issued because of the unresolved issues of fact (*5 Cal. 2d 550, 586-587)* .

The facts and procedure in ***City of Los Angeles v. Superior Court*** *(1959) 51 Cal. 2d 423, 333 P.2d 745* , are discussed in *§ 150.76[3][a]*. In dicta, the Supreme Court noted that prohibition is not proper when the propriety of the trial court's action depends on questions of fact. However, it found that neither party had pointed to any evidence that would present such a factual question (*51 Cal. 2d 423, 430)* . The Court then held that the writ would issue on substantive grounds (*51 Cal. 2d 423, 438)* .

[4] Additional Authorities

[a] Factual Issue to Be Decided

In *Brock v. Superior Court (1938) 11 Cal. 2d 682, 81 P.2d 931* , the superior court restrained the state agricultural board from enforcing the Milk Control Act. The director of the agency sought a writ of prohibition to restrain the trial court from enforcing the temporary restraining order. The Supreme Court followed its earlier holding in *Agricultural Prorate Com. v. Superior Ct. (1936) 5 Cal. 2d 550, 55 P.2d 495* , discussed under *§ 150.83[3][a]*, and held that the propriety of the trial court's action depended on factual issues that the trial court must decide. The Court then denied the writ (*11 Cal. 2d 682, 687-688)* .

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15-150 California Points & Authorities §§ 150.84-150.119

[Reserved]

§§ 150.84[Reserved]

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i. General Points

15-150 California Points & Authorities § 150.120

§ 150.120 Supporting Contention That Appropriate Writ May Be Issued When Petition Seeks Both Mandate and Prohibition

[1] FORM

[*The following should be combined, when appropriate, with a general form of memorandum supporting a petition for a writ of mandate (see, e.g., § 150.30), a petition for a writ of prohibition (see, e.g., § 150.70), or a petition that seeks both writs in the alternative.*]

THIS COURT SHOULD ISSUE THE APPROPRIATE EXTRAORDINARY WRIT JUSTIFIED BY THE ALLEGATIONS OF THE PETITION.

Court Should Issue Writ That Is Justified by Allegations in Petition. It is proper to pray for writ relief in the alternative; neither a mislabeled petition nor a defective prayer will bar the relief that is justified by proper allegations and proof (*Peck's Liquors, Inc. v. Superior Court (1963) 221 Cal. App. 2d 772, 775, 34 Cal. Rptr. 735*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that the court in which a petition for a prerogative writ has been filed should issue whatever writ is justified by the allegations of the petition, regardless of the fact that the petition prays for another type of writ, or that it prays for both mandate and prohibition in the alternative [*see also § 150.07*].

The foregoing points and authorities should be combined with a general memorandum supporting a petition for writ of mandate (*see § 150.30*) or a petition for a writ of prohibition (*see § 150.70*). Alternatively, counsel may wish to include the foregoing points and authorities in a memorandum that combines both § 150.30 and § 150.70 and supports a petition for either mandate or prohibition, as the court deems appropriate.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Court Should Issue Writ That Is Justified by Allegations in Petition

In ***Peck's Liquors, Inc. v. Superior Court*** *(1963) 221 Cal. App. 2d 772, 34 Cal. Rptr. 735* , plaintiff obtained from the superior court an order to compel after defendant refused to answer certain questions in a deposition. Defendant petitioned the court of appeal for "certiorari, prohibition, mandamus, or other appropriate writ" to restrain the superior court from enforcing the order to compel.

The court of appeal issued a writ of prohibition, holding that the privilege against self-incrimination applied and the witnesses could not be compelled to answer (*221 Cal. App. 2d 772, 785)* . In its discussion of the form of the writ petition, the court recognized that, when a pleader is in doubt about the type of writ he or she should seek, it is proper to state the prayer in the alternative form. As with pleading generally, the court explained, neither mislabeling nor a defective prayer will bar relief that is justified by proper allegations and proof (*221 Cal. App. 2d 772, 775)* .

[4] Additional Authorities

[a] Court Should Issue Writ That Is Justified by Allegations in Petition

The facts and procedure of *Babb v. Superior Court (1971) 3 Cal. 3d 841, 92 Cal. Rptr. 179, 479 P.2d 379* , are discussed in *§ 150.33[4][a]*. In that case, the Supreme Court treated a petition for prohibition as a petition for mandate and granted a writ of mandate (*3 Cal. 3d 841, 850)* .

The facts and procedure of *Coelho v. State Personnel Bd. (1989) 209 Cal. App. 3d 968, 257 Cal. Rptr. 557* , are discussed in *§ 150.43[3][b]*. In that case, the court of appeal treated a petition for administrative mandamus as a petition for ordinary mandate and granted a writ of mandate (*209 Cal. App. 3d 968, 971)* .

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15-150 California Points & Authorities § 150.121

§ 150.121 Supporting Contention That Issuance of Peremptory Writ in First Instance Is Justified

[1] FORM

[*The following should be combined, when appropriate, with a general form of memorandum supporting a petition for a writ of mandate (see, e.g., § 150.30) or a petition for a writ of prohibition (see, e.g., § 150.70).*]

THIS COURT SHOULD ISSUE A PEREMPTORY WRIT OF _____ [MANDATE *or* PROHIBITION] IN THE FIRST INSTANCE BECAUSE RESPONDENT AND REAL PARTY IN INTEREST HAVE BEEN GIVEN ADEQUATE NOTICE AND AN OPPORTUNITY TO BE HEARD, THE PETITION AND OPPOSING PAPERS ADEQUATELY ADDRESS THE ISSUES RAISED IN THE PROCEEDING, NO FACTUAL DISPUTE EXISTS, AND ADDITIONAL BRIEFING IS UNNECESSARY.

A. Issuance of Peremptory Writ in First Instance. A peremptory writ may be issued in the first instance when respondent and real party in interest have been served with notice 10 days beforehand and had an opportunity to file a response on the merits, the petition and opposing papers, if any, adequately address the issue raised by the petition, no factual dispute exists, and the additional briefing that would follow issuance of an alternative writ is unnecessary to disposition of the petition (*Palma v. U.S. Industrial Fasteners, Inc. (1984) 36 Cal. 3d 171, 176, 177-180, 203 Cal. Rptr. 626, 681 P.2d 893* ; *see also* *Lewis v. Superior Court (1999) 19 Cal. 4th 1232, 82 Cal. Rptr. 2d 85, 970 P.2d 872*).

[Optional] **B. Trial Court Provided Notice and Opportunity to Be Heard in Response to Suggestive *Palma* Notice.** If a trial court decides to enter a new ruling in response to a suggestive *Palma* notice, the court must inform the parties of its intent to do so and provide them with an opportunity to be heard (*Brown, Winfield & Canzoneri, Inc. v. Superior Court (2010) 47 Cal. 4th 1233, 1238-1250, 104 Cal. Rptr. 3d 145, 223 P.3d 15*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the court in which a petition for a writ of mandate or prohibition has been filed may issue a peremptory writ in the first instance.

These points and authorities should be combined with a general memorandum supporting a petition for writ of mandate (*see § 150.30*) or a petition for a writ of prohibition (*see § 150.70*).

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Peremptory Writ in First Instance Defined

A writ of mandate or prohibition may either be alternative or peremptory. An alternative writ commands the respondent to show cause why the respondent has not done an act or refrained from acting as requested in the writ petition [*see Code Civ. Proc. §§ 1087, 1089, 1105*]. The peremptory writ, if ultimately issued, actually commands the respondent to act or refrain from acting [*see Code Civ. Proc. §§ 1087, 1104*]. In lieu of issuing an alternative writ, the court may issue a peremptory writ in the first instance, thus dispensing with the need to await the filing of a return, oral argument, and the preparation of an appellate opinion [*see Code Civ. Proc. §§ 1088, 1105*].

When a petitioner intends to seek a peremptory writ in the first instance, he or she must provide at least 10 days notice to the respondent and real party in interest. With the notice, a copy of the petition must also be served [*see Code Civ. Proc. §§ 1088, 1105*; *Palma v. U.S. Industrial Fasteners, Inc. (1984) 36 Cal. 3d 171, 178-179, 203 Cal. Rptr. 626, 681 P.2d 893]* . It is not clear whether a petitioner satisfies the notice requirement by simply asking in the prayer of the petition for a peremptory writ in the first instance [*see City of Santa Cruz v. Superior Court (1987) 190 Cal. App. 3d 1669, 1675, 236 Cal. Rptr. 155* (notice apparently adequate when petition prayed for writ in first instance and real party in interest was served with petition and filed opposition)].

Courts of appeal may issue a "suggestive," "coercive," or "speaking" *Palma* notice. This is a notice that the court of appeal intends to issue a peremptory writ in the first instance granting the relief requested by the petitioner and suggesting that the trial court enter a new order. If a trial court decides to enter a new ruling in response to a suggestive *Palma* notice, the court must inform the parties of its intent to do so and provide them with an opportunity to be heard [*Brown, Winfield & Canzoneri, Inc. v. Superior Court (2010) 47 Cal. 4th 1233, 1238-1250, 104 Cal. Rptr. 3d 145, 223 P.3d 15]* . For further discussion of notice requirements, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender).

[c] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Issuance of Peremptory Writ in First Instance

In ***Palma v. U.S. Industrial Fasteners, Inc.*** *(1984) 36 Cal. 3d 171, 203 Cal. Rptr. 626, 681 P.2d 893* , defendants in a negligence action moved for summary judgment. The motion was denied and defendants petitioned the court of appeal for a writ of mandate to review the order. The prayer of the petition asked for issuance of an alternative writ and, after return, issuance of a peremptory writ commanding the superior court to set aside its order and enter a new order granting the motion. The court of appeal did not issue an alternative writ. Instead, 12 days after the petition was filed, the court issued a peremptory writ commanding the superior court to grant the summary judgment motion. The court complied with the writ and plaintiff appealed.

The Supreme Court reversed and directed the trial court to deny the summary judgment motions, holding that triable issues of fact existed (*36 Cal. 3d 171, 186)* . In its discussion of the propriety of issuing the peremptory writ, the Court recognized that *Code Civ. Proc. § 1088* authorizes a court of appeal to issue a peremptory writ in the first instance when the opposing parties have been served with "due notice" 10 days beforehand. Case law authorizes issuance of the writ in the first instance when it appears that the petition and opposing papers on file adequately address the issue raised by the petition, that no factual dispute exists, and that the additional briefing that would follow issuance of an alternative writ is unnecessary to disposition of the petition (*36 Cal. 3d 171, 178-179)* . The Court went on to hold, however, that "due notice" requires, at a minimum, that a peremptory writ of mandate or prohibition not issue in the first instance unless the respondent and real party in interest have received notice, from the petitioner or from the court, that the issuance of such a writ in the first instance is being sought or considered (*36 Cal. 3d 171, 176, 180)* . In addition, an appellate court, absent exceptional circumstances, should not issue a peremptory writ in the first instance unless the respondent and real party in interest have either filed a response on the merits or been given the opportunity to do so (*36 Cal. 3d 171, 176, 180)* .

In ***Lewis v. Superior Court*** *(1999) 19 Cal. 4th 1232, 82 Cal. Rptr. 2d 85, 970 P.2d 872* , the trial court denied defendant's motion for summary judgment in a personal injury action. Defendant petitioned the court of appeal for a writ of mandate. The court of appeal filed a document inviting the real party in interest to file a response and stating that "the court may issue a peremptory writ." Without issuing an alternative writ or order to show cause or hearing oral argument, the court of appeal issued an order directing issuance of a peremptory writ of mandate in the first instance instructing the trial court to set aside its denial of defendant's motion and to enter a new order granting the motion.

The Supreme Court affirmed. It determined that the court of appeal was not required to afford the parties an opportunity to orally argue the case before the court issued a peremptory writ in the first instance (*19 Cal. 4th 1232, 1243-1253)* . The Court also held that the court of appeal's three-page order was sufficient under *Cal. Const., art. VI, § 14*, which requires that decisions determining causes must be in writing with reasons stated. The Court reasoned that, although the order was more brief than most formal appellate opinions, it sufficiently described the general nature of the legal issue and responded to the parties' contentions (*19 Cal. 4th 1232, 1261-1264)* .

[b] Trial Court Provided Notice and Opportunity to Be Heard in Response to Suggestive *Palma* Notice

In ***Brown, Winfield & Canzoneri, Inc. v. Superior Court*** *(2010) 47 Cal. 4th 1233, 1238-1250, 104 Cal. Rptr. 3d 145, 223 P.3d 15* , the plaintiff brought a declaratory relief action against the defendant. The trial court stayed the action pending the resolution of an underlying case. Thereafter, the court lifted the stay before the underlying case was resolved. The defendant filed a petition for writ of mandate with the court of appeal requesting that the stay be reinstated. The court of appeal issued a "suggestive" *Palma* notice, stating that the court of appeal intended to issue a peremptory writ in the first instance granting the relief requested by the defendant and suggesting that the trial court enter a new order. The next day, the trial court issued an order that acknowledged the court of appeal's suggestive *Palma* notice, vacating its order lifting the stay, and reinstating the stay pending resolution of the underlying case. The plaintiff appealed, arguing that it was entitled to an opportunity to be heard before the trial court reinstated the stay.

The California Supreme Court first noted that a suggestive *Palma* notice was not an order, but was more like a tentative ruling [*47 Cal. 4th 1233, 1245-1246]* . The Court held that because a suggestive Palma notice is nonbinding, a trial court that acts in response to the notice acts on its own motion [*47 Cal. 4th 1233, 1250*]. Therefore, the Court held, before vacating, modifying, or otherwise reconsidering an interim ruling in response to a suggestive *Palma* notice, the trial court must inform the parties that it is considering taking such action and provide them with an opportunity to be heard [*47 Cal. 4th 1233, 1250*].

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[Reserved]

§§ 150.122[Reserved]

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ii. Beneficial Interest Requirement Action Relating Beneficial Interest Requirement

15-150 California Points & Authorities § 150.140

§ 150.140 Supporting Contention That Petitioner Is Beneficially Interested--General Form

[1] FORM

[*The following should be combined, when appropriate, with a general form of memorandum supporting a petition for a writ of mandate (see, e.g., § 150.30) or a petition for a writ of prohibition (see, e.g., § 150.70).*]

A WRIT OF _____ [MANDATE *or* PROHIBITION] SHOULD ISSUE BECAUSE _____ [PETITIONER HAS A SPECIAL INTEREST OR PARTICULAR RIGHT TO BE PRESERVED OR PROTECTED, INDEPENDENT FROM THAT HELD IN COMMON WITH THE PUBLIC AT LARGE *or* THE QUESTION RAISED BY THE PETITION IS ONE OF PUBLIC RIGHT AND THE OBJECT OF THE WRIT IS TO PROCURE THE ENFORCEMENT OF A PUBLIC DUTY].

[*EITHER*]

A. Beneficial Interest Requirement. A writ of mandate may issue on the verified petition of the party beneficially interested (*Code Civ. Proc. § 1086*).

[*OR*]

A. Beneficial Interest Requirement. A writ of prohibition may issue on the verified petition of the person beneficially interested (*Code Civ. Proc. § 1103*).

[*CONTINUE*]

[*Optional*] **B. Petitioner Need Not Be Party to Lower Court Proceeding.** Any party who is beneficially interested may seek writ relief and need not necessarily be a party to the action before the tribunal against whom the relief is sought (*Sonoma County Nuclear Free Zone, '86 v. Superior Court (1987) 189 Cal. App. 3d 167, 173 n.3, 234 Cal. Rptr. 357* (mandate); *Klose v. Superior Court (1950) 96 Cal. App. 2d 913, 916, 217 P.2d 97* (prohibition)).

[*EITHER*]

C. Special Interest or Right. A petitioner has a sufficient beneficial interest in issuance of a writ if he or she possesses some special interest to be subserved, or some particular right to be preserved or protected, independent from that held in common with the public at large (*California Association for Health Services at Home v. State Department of Health Services (2007) 148 Cal. App. 4th 696, 704-707, 56 Cal. Rptr. 3d 102* ; *Union Bank of California, N.A. v. Superior Court (2005) 130 Cal. App. 4th 378, 399, 29 Cal. Rptr. 3d 894* ; *Taschner v. City Council (1973) 31 Cal. App. 3d 48, 55-56, 107 Cal. Rptr. 214* , *overruled on other grounds,* *Associated Home Builders etc., Inc. v. City of Livermore (1976) 18 Cal. 3d 582, 596 n.14, 135 Cal. Rptr. 41, 557 P.2d 473*).

[*OR*]

C. Enforcement of Public Duty. A petitioner is not required to show any legal or special interest in the result when the question raised in the petition is one of public right and the object of the writ is to procure the enforcement of a public duty; it is sufficient that petitioner is interested as a citizen in having the laws executed and the respondent's duty enforced (*Environmental Protection and Information Center v. California Department of Forestry and Fire Protection (2008) 44 Cal. 4th 459, 479-480, 80 Cal. Rptr. 3d 28, 187 P.3d 888* ; *Common Cause v. Board of Supervisors (1989) 49 Cal. 3d 432, 439, 261 Cal. Rtpr. 574, 777 P.2d 610* ; *Marshall v. Pasadena Unified School District (2004) 119 Cal. App. 4th 1241, 1252, 15 Cal. Rptr. 3d 344]*).

[*Add additional, more specific points and authorities, as appropriate, relating to petitioner's particular beneficial interest (see, e.g., §§ 150.141 -150.143).*]

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the general contention that the petitioner for a writ of mandate or prohibition is entitled to the relief to the extent that he or she has a beneficial interest in the proceeding [*see Code Civ. Proc. §§ 1086, 1103*].

The foregoing points and authorities should be combined with more specific points and authorities relating to the petitioner's particular beneficial interest in the proceeding (*see §§ 150.141 -150.143*). The combined points and authorities relating to the beneficial interest requirement should then be combined, in turn, with a general memorandum supporting a petition for writ of mandate (*see § 150.30*) or a petition for a writ of prohibition (*see § 150.70*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender).

[c] Opposing Memoranda

The points and authorities set out in *§ 150.144* may be used in an appropriate case to oppose a petition for mandate or prohibition that is supported by the foregoing points and authorities.

[3] Discussion of Authorities

[a] Petitioner Need Not Be Party to Lower Court Proceeding

In ***Sonoma County Nuclear Free Zone, '86 v. Superior Court*** *(1987) 189 Cal. App. 3d 167, 234 Cal. Rptr. 357* , the proponents of a ballot initiative sought a writ of mandate to compel the trial court to set aside its writ directing the county clerk to accept for filing ballot arguments against the initiative that had been submitted after the filing deadline, set by the county clerk under *Elec. Code § 3784*, had expired. The proponents had not been named in the superior court writ proceeding as real parties in interest and had no notice of the hearing.

The court of appeal, after stating that the occurrence of the election prior to its resolution of the petition did not render the petition moot, reversed (*189 Cal. App. 3d 167, 171)* . The court said that any party with a sufficient beneficial interest in the subject of the proceedings may seek writ relief, and need not necessarily be a party to the action before the tribunal against whom the relief is sought. Whether the proponents had a beneficial interest sufficient to be petitioners in the proceeding dovetailed with the question of whether they had an interest directly affected by the proceedings sufficient to render them real parties in interest in the superior court writ proceeding (*189 Cal. App. 3d 167, 173 n.3*). The court concluded that the proponents were real parties in interest and should have been named as such in the superior court writ proceeding and that they had a sufficient beneficial interest to appear as petitioners in the proceeding before it because they had a special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large (*189 Cal. App. 3d 167, 174-175)* . The court further concluded that the trial court's issuance of the peremptory writ was beyond the pale of its authority because the proponents had no notice of the hearing on the petition (*189 Cal. App. 3d 167, 175-176)* .

In ***Klose v. Superior Court*** *(1950) 96 Cal. App. 2d 913, 217 P.2d 97* , a petition for a writ of mandate was filed in superior court to require a city council to vacate petitioner's seat on the council and call a special election. Petitioner sought prohibition against the court considering the mandate petition. The court of appeal held that petitioner was beneficially interested in the mandate proceeding, although not a party to it, because of his status as a taxpayer and as the person sought to be ousted from the city council (*96 Cal. App. 2d 913, 916)* . The court of appeal then issued a writ restraining the superior court from proceeding with the mandate proceedings (*96 Cal. App. 2d 913, 916-926)* .

[b] Special Interest or Right

In ***California Association for Health Services at Home v. State Department of Health Services*** *(2007) 148 Cal. App. 4th 696, 56 Cal. Rptr. 3d 102* , plaintiffs were a home health care provider, an association of home health care providers, and a disability rights advocacy group. They sought a writ of mandate against the State Department of Health Services, claiming it failed to comply with federal Medicaid and state Medi-Cal laws by refusing since 2000 to raise or review Medi-Cal reimbursement rates paid to the providers of home health care services. The trial court issued a writ of mandate requiring the Department to perform a review of reimbursement rates for 2005. The trial court denied plaintiffs' request for a writ to compel the Department to raise reimbursement rates for prior years. Plaintiffs appealed the trial court's denial of a writ to compel a review and an increase of rates for past years, and the Department cross-appealed the grant of the writ to compel a review of rates for 2005.

The court of appeal first looked at the plaintiffs' standing to seek a writ of mandate. The Department argued that the plaintiffs were not entitled to relief because there was no private right of action for the Department's failure to comply with the state plan or with federal law. The court of appeal rejected this argument, holding that the fact that the state

plan did not create an explicit private right of action for damages did not mean that it could not be the basis for a writ of mandate (*148 Cal. App. 4th 696, 705)* . The Department also argued the state plan was a contract between California and the federal government, but did not have the force of law, and that a writ of mandate could compel only the performance of an act specially enjoined by law. The court rejected this argument, holding that whether the state plan was a contract or a law, the Department was required by regulation to follow it (*148 Cal. App. 4th 696, 706)* . Finally, the court held that the plaintiffs, recipients and providers of Medi-Cal services, had a special interest over and above the public at large in ensuring that payment rates are sufficient to enlist enough providers so that care and services are available under the plan. Likewise, the providers had a direct monetary interest in ensuring that they were paid for their services (*148 Cal. App. 4th 696, 707)* .

In ***Union Bank of California, N.A. v. Superior Court*** *(2005) 130 Cal. App. 4th 378, 388, 29 Cal. Rptr. 3d 894* , investors alleged they were defrauded in Ponzi scheme disguised as a mortgage lending business. The investors sued the bank that opened and operated the bank account allegedly looted by the business for fraud, conspiracy, aiding and abetting, and negligent misrepresentation. The investors sought production of the bank's suspicious activity reports (SARs). These are reports that national banks are required to file with the federal government whenever they detect a known or suspected violation of federal law or a suspicious transaction related to money laundering. Under federal law, SAR's and their supporting documents are confidential and not subject to disclosure. Only the Office of the Comptroller of the Currency (OCC), the agency responsible for regulating national banks, has sole discretion whether to grant a request to review SAR's or their supporting documents.

In this case, the bank had an internal form called Form 244 to identify, register, and describe what might constitute suspicious activity. The investors sought production of any Form 244 related to the scheme, and the bank claimed they were privileged. According to the bank, the sole purpose of Form 244 was to aid the bank in complying with its obligations under federal law to report suspicious activity and file SAR's. The trial court ordered production of the Form 244's. The bank filed a petition for a writ of mandate.

Among other arguments, the investors argued that the bank lacked standing in the writ proceeding because it had no beneficial interest in the subject matter of the action. They argued that the OCC had the privilege, not the bank. The court of appeal rejected this argument. It held that although the OCC held the SAR privilege, the bank had an interest in protecting documents that were prepared with an understanding they would be maintained in confidence, particularly when the investors sought to predicate the bank's liability on those documents. Furthermore, the court held, the fact the bank was compelled by federal law to resist disclosure of documents covered by the SAR privilege gave it a sufficient beneficial interest in the subject matter of the action to enforce the privilege in a writ proceeding (*130 Cal. App. 4th 378, 399)* .

In ***Taschner v. City Council*** *(1973) 31 Cal. App. 3d 48, 107 Cal. Rptr. 214 , overruled on other grounds, Associated Home Builders etc., Inc. v. City of Livermore (1976) 18 Cal. 3d 582, 135 Cal. Rptr. 41, 557 P.2d 473* , petitioner, a property owner, sought a writ of mandate to challenge the constitutionality of an ordinance that limited the height of buildings. Respondent city council filed a general demurrer that was sustained without leave to amend.

The court of appeal reversed, holding that petitioner had standing to maintain the action. A private citizen may apply for a writ of mandate when he or she is a party beneficially interested. Such an interest exists when one has some special interest to be subserved or some particular right to be preserved or protected independent of that held in common with the public at large. In the instant case, petitioner was a property owner and his right to be free from height limitations in the development of his property constituted a sufficient special interest (*31 Cal. App. 3d 48, 55-56)* .

[c] Enforcement of Public Duty

In ***Environmental Protection and Information Center v. California Department of Forestry and Fire Protection*** *(2008) 44 Cal. 4th 459, 479-480, 80 Cal. Rptr. 3d 28, 187 P.3d 888* , the Pacific Lumber Company entered into an

agreement with state and federal governments regarding litigation arising from logging on Pacific Lumber's property in Humboldt County. The agreement provided that the state and federal governments would purchase a portion of Pacific Lumber's property for conservation purposes, and that Pacific Lumber could log the rest of its property, provided that it obtained regulatory approvals from state and federal agencies. Pacific Lumber obtained the approvals. Various environmental and labor groups, including the United Steelworkers Union (the Steelworkers), challenged the regulatory approvals. Pacific Lumber argued that the Steelworkers did not have standing to sue because the Steelworkers did not have a beneficial interest in the outcome of the case. The trial court held that the regulation of logging over 200,000 acres of highly valued timberland involved a public right and a public duty. Therefore, the Steelworkers need not show that they had any legal or special interest in the result, since they were citizens interested in having the laws executed and the duty in question enforced (*44 Cal. 4th 459, 479)* . Pacific Lumber argued that an exception to the citizen standing rule should be applied to labor unions, as had been applied to corporations pursuant to *Waste Management of Alameda County, Inc. v. County of Alameda (2000) 79 Cal. App. 4th 1223, 94 Cal. Rptr. 2d 740* .

Declining to rule on that issue, the California Supreme Court noted that the trial court found that the Steelworkers qualified as a citizen litigant under *Waste Management*. The Steelworkers had shown a continuing interest in and commitment to issues regarding sustainable economic development, environmental quality, and timber harvesting. The Court held that the Steelworkers had over 12,000 members in California with sufficient interest in the proper enforcement of timber harvest laws, that interested individuals would have trouble participating in the litigation, and that the Steelworkers' participation did not conflict with competing legislative policies. The Court concluded that substantial evidence supported the trial court's conclusion that the Steelworkers had standing to sue (*44 Cal. 4th 459, 480-481)* .

The facts and procedure of ***Common Cause v. Board of Supervisors*** *(1989) 49 Cal. 3d 432, 261 Cal. Rtpr. 574, 777 P.2d 610* , are discussed in *§ 150.43[3][c]*. In holding that a county, which was required by statute to increase minority and low-income voter registration, had no mandatory duty to use deputatization of certain voter registrars as a remedial device, the Court held that citizens of the county had standing to seek a writ of mandate compelling adoption of the deputization program. When the question is one of public right and the object of the mandate is to procure the enforcement of a public duty, the Court explained, the petitioner need not show that he or she has any legal or special interest in the result, because it is sufficient that he or she is interested as a citizen in having the laws executed and the duty in question enforced (*49 Cal. 3d 432, 439)* .

In ***Marshall v. Pasadena Unified School District*** *(2004) 119 Cal. App. 4th 1241, 1252, 15 Cal. Rptr. 3d 344* , a school district advertised for bids for a project to modernize a school. A contractor submitted a bid for the project, which was accepted. Later, the district terminated its contract with the contractor. Purportedly acting pursuant to an emergency resolution under *Pub. Cont. Code § 20113*, the district awarded a contract for completing the work to another company. The original contractor assigned its claim against the district to Marshall. Marshall had been the vice president of the contractor and was now the president of PW, a general contractor.

Marshall and PW filed a writ petition against the district arguing that no emergency had existed and the district had acted unlawfully when it awarded the contract to another company. Marshall and PW sought to preclude the district from making any payments to the new company and to require the district to advertise publicly for bids to complete the project and award the contract to the lowest responsible bidder. The trial court granted the writ petition, finding that no emergency had existed and ordering the district to advertise publicly for bids to complete the work. The district appealed.

In its appeal, the district argued that Marshall and PW lacked standing to file a petition for writ of mandate in that neither Marshall's status as a taxpayer, nor PW's possibility of bidding on a contract to complete the project, were sufficient to confer standing. The court of appeal disagreed. It held that while *Code Civ. Proc. § 1086* requires that a party be "beneficially interested" to maintain a writ petition (*119 Cal. App. 4th 1241, 1250)* , a citizen's action "is a long-established exception to the requirement of a personal beneficial interest" (*119 Cal. App. 4th 1241, 1252)* . The

court held that the exception applies if the question is one of public right and the object of the action is to enforce a public duty--in which case it is sufficient that the plaintiff be interested as a citizen in having the laws executed and the public duty enforced (*119 Cal. App. 4th 1241, 1252)* . The court held that judicial recognition of citizen standing is an exception to, rather than repudiation of, the usual requirement of a beneficial interest (*119 Cal. App. 4th 1241, 1252)* . The court held that Marshall and PW had standing as citizens in this case (*119 Cal. App. 4th 1241, 1252)* . The petition by Marshall and PW was not aimed merely at securing an opportunity for PW to bid on the completion contract. Their petition also sought to protect the public fisc by requiring the district to publicly advertise for bids to complete the work and to award a contract for the work to the lowest responsible bidder (*119 Cal. App. 4th 1241, 1252)* .

[4] Additional Authorities

[a] Petitioner Need Not Be Party to Lower Court Proceeding

In *Seven Up Bottling Co. v. Superior Court (1951) 107 Cal. App. 2d 75, 236 P.2d 623* , petitioner was served with a subpoena and a subpoena duces tecum in a divorce action between two other persons. Petitioner moved to quash the subpoenas on the ground that the underlying affidavit was insufficient. When the trial court denied the motion, petitioner sought a writ of prohibition to restrain the trial court from enforcing the subpoenas. Because petitioner had been served with the subpoenas, the court of appeal held that petitioner was beneficially interested (*107 Cal. App. 2d 75, 76-77)* .

In *Monterey Club v. Superior Court (1941) 48 Cal. App. 2d 131, 119 P.2d 349* , the district attorney sought to enjoin certain persons from operating poker parlors in Gardena. Petitioner, a nonprofit corporation that operated one such club but was not a party, petitioned for a writ of prohibition on the basis that the court did not have jurisdiction to issue the injunction. The court of appeal held that petitioner was beneficially interested because it operated one of the clubs whose operation was sought to be enjoined (*48 Cal. App. 2d 131, 143)* . The court then found that the injunction was in excess of jurisdiction and issued the writ (*48 Cal. App. 2d 131, 143-150)* .

[b] Special Interest or Right

The facts and procedure of *Sonoma County Nuclear Free Zone, '86 v. Superior Court (1987) 189 Cal. App. 3d 167, 234 Cal. Rptr. 357* , are discussed under *§ 150.140[3][a]*. The court of appeal held that proponents of a ballot initiative had a beneficial interest in mandate proceedings to review a court's order directing the county clerk to accept ballot arguments against the petitioners' initiative. The court concluded that the proponents had a sufficient beneficial interest to appear as petitioner in the proceeding before it because they had a special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large (*189 Cal. App. 3d 167, 174-175)* .

[c] Enforcement of Public Duty

In *Madera Community Hospital v. County of Madera (1984) 155 Cal. App. 3d 136, 201 Cal. Rptr. 768* , the appellate court overruled the trial court's denial of a writ of mandate to compel defendant to adopt standards for the medical aid and care of the indigent within the county due to lack of standing. In deciding that plaintiff had standing, the court of appeal reviewed the holdings of previous cases and found that the action plaintiff sought was a matter of public right and plaintiff came within the parameters of a citizen seeking to procure the enforcement of a public duty (*155 Cal. App. 3d 136, 141-146)* .

In *Santa Monica Mun. Employees Assn. v. City of Santa Monica (1987) 191 Cal. App. 3d 1538, 237 Cal. Rptr. 185* , the court of appeal upheld a trial court ruling granting a petition for writ of mandate to compel a city to comply with provisions of the city charter by filling all vacancies by promotion on competitive examinations unless there was approval by the personnel board of exceptional circumstances. The city argued that because neither the individual members or the association had shown any actual harm, the petition for writ of mandate should have been denied. The

appellate court held that while the harm to the members was potential rather than definite, when the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, it is sufficient that the petitioner is a citizen interested in having the laws executed and the duty enforced (*191 Cal. App. 3d 1538, 1548)* .

Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo (1985) 172 Cal. App. 3d 151, 217 Cal. Rptr. 893 , involved an action for writ of mandate by a citizens' group against a county board regarding the environmental impact of proposed construction, in which the court of appeal reversed the trial court's denial of relief to petitioner. Among other determinations, the court held that if a public right is involved, and the object of the writ of mandate is to procure enforcement of a public duty, the plaintiff is not required to have any legal or special interest in the results; it is sufficient that as a citizen, petitioner is interested in having the public duty enforced (*172 Cal. App. 3d 151, 158)* .

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ii. Beneficial Interest Requirement Action Relating Beneficial Interest Requirement

15-150 California Points & Authorities § 150.141

§ 150.141 Supporting Contention That Petitioner Is Beneficially Interested--Petitioner Is Taxpayer in Matter Relating to Taxation

[1] FORM

[*The following should be combined, when appropriate, with general points and authorities supporting the contention that petitioner is beneficially interested in the proceeding (see, e.g., § 150.140), and with a general memorandum supporting a petition for a writ of mandate (see, e.g., § 150.30) or a petition for a writ of prohibition (see, e.g., § 150.70).*]

PETITIONER IS BENEFICIALLY INTERESTED IN THE SUBJECT MATTER OF THIS PROCEEDING BECAUSE HE/SHE IS A TAXPAYER AND THE ACTION TO WHICH THE WRIT PERTAINS INVOLVES TAXATION.

Taxpayer Status. A petitioner has sufficient beneficial interest in issuance of a writ when the petitioner is a taxpayer and the action to which the writ pertains involves taxation (*Knoff v. City etc. of San Francisco (1969) 1 Cal. App. 3d 184, 198, 81 Cal. Rptr. 683* (mandate)).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that the petitioner has a beneficial interest in the proceeding for writ of mandate or prohibition because he or she is a taxpayer and the proceeding involves issues relating to taxation.

The foregoing points and authorities should be combined with general points and authorities relating to the petitioner's beneficial interest in the proceeding (*see § 150.140*), and, when appropriate, with additional, more specific points and authorities relating to his or her particular beneficial interest (*see §§ 150.142, 150.143*). The combined points and

authorities relating to the beneficial interest requirement should then be combined, in turn, with a general memorandum supporting a petition for a writ of mandate (*see § 150.30*) or a petition for a writ of prohibition (*see § 150.70*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender).

[c] Opposing Memoranda

The points and authorities set out in *§ 150.144* may be used in an appropriate case to oppose a petition for mandate or prohibition that is supported by the foregoing points and authorities.

[3] Discussion of Authorities

[a] Status of Taxpayer in Matter Related to Taxation

In ***Knoff v. City etc. of San Francisco*** *(1969) 1 Cal. App. 3d 184, 81 Cal. Rptr. 683* , four San Francisco taxpayers brought an action in the form of a taxpayers' suit against the city and county, its board of supervisors, and the county assessor to obtain a writ of mandate to require official action to address the situation brought about by a grand jury investigation and the subsequent indictment of the assessor. The trial court granted the writ of mandate substantially as prayed, and on appeal, the court of appeal affirmed. One of the arguments on appeal was whether petitioners had standing to seek mandamus in a taxpayers' suit. The trial court found that petitioners filed the action on their own behalf and on behalf of all other citizen-resident taxpayers of San Francisco to aid in the collection of taxes. The court of appeal held that this finding provided a proper basis for petitioners' standing to sue in mandamus and to do so in the form of a taxpayers' suit. Petitioners' status as San Francisco taxpayers made them beneficially interested parties who could maintain their action because its object was to compel the performance of public duties that the law specially enjoins (*1 Cal. App. 3d 184, 198)* .

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15-150 California Points & Authorities § 150.142

§ 150.142 Supporting Contention That Petitioner Is Beneficially Interested--Petitioner May Suffer Harm From Environmental Effects of Challenged Action

[1] FORM

[*The following should be combined, when appropriate, with general points and authorities supporting the contention that petitioner is beneficially interested in the proceeding (see, e.g., § 150.140), and with a general memorandum supporting a petition for a writ of mandate (see, e.g., § 150.30) or a petition for a writ of prohibition (see, e.g., § 150.70).*]

PETITIONER IS BENEFICIALLY INTERESTED IN THE SUBJECT MATTER OF THIS PROCEEDING BECAUSE PETITIONER MAY SUFFER HARM FROM THE ENVIRONMENTAL CONSEQUENCES OF THE CHALLENGED ACTION.

Environmental Harm. Allegations that petitioners will be harmed by the environmental consequences of the action challenged by the petition for a prerogative writ are sufficient to establish standing (*Bozung v. Local Agency Formation Com. (1975) 13 Cal. 3d 263, 272, 118 Cal. Rptr. 249, 529 P.2d 1017* (mandate)).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that the petitioner has a beneficial interest in the proceeding for writ of mandate or prohibition because he or she may suffer harm from the environmental consequences of the action challenged by the petition.

The foregoing points and authorities should be combined with general points and authorities relating to the petitioner's beneficial interest in the proceeding (*see § 150.140*), and, when appropriate, with additional, more specific points and authorities relating to his or her particular beneficial interest (*see §§ 150.141, 150.143*). The combined points and

authorities relating to the beneficial interest requirement should then be combined, in turn, with a general memorandum supporting a petition for a writ of mandate (*see § 150.30*) or a petition for a writ of prohibition (*see § 150.70*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender).

[c] Opposing Memoranda

The points and authorities set out in *§ 150.144* may be used in an appropriate case to oppose a petition for mandate or prohibition that is supported by the foregoing points and authorities.

[3] Discussion of Authorities

[a] Environmental Harm

In ***Bozung v. Local Agency Formation Com.*** *(1975) 13 Cal. 3d 263, 118 Cal. Rptr. 249, 529 P.2d 1017* , a number of county residents and taxpayers, together with a citizens' coalition, sought a writ of mandate and declaratory relief on the ground that the state Environmental Quality Act (*Pub. Res. Code § 21000 et seq.*) required a Local Agency Formation Commission to prepare and certify an environmental impact report before approving a city's annexation of property intended for future development. The trial court sustained the defendants' demurrers without leave to amend and plaintiffs appealed to the court of appeal, which reversed. Petitioners sought review from the Supreme Court.

The Supreme Court adopted the opinion of the court of appeal as its own opinion (*13 Cal. 3d 263, 267)* . One of the issues on appeal was whether the plaintiffs had the beneficial interest required to obtain a writ of mandate. The court of appeal found that they did, whether or not they lived in the annexing city or the area to be annexed. For some plaintiffs, including the citizens' coalition, an allegation that they would be harmed by the environmental effects of the challenged annexation was sufficient to withstand demurrer. Furthermore, the court held, plaintiffs had standing to procure the enforcement of a public duty (*13 Cal. 3d 263, 272)* .

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15-150 California Points & Authorities § 150.143

§ 150.143 Supporting Contention That Petitioner Is Beneficially Interested--Petitioner Is Organization With Beneficially Interested Members

[1] FORM

[*The following should be combined, when appropriate, with general points and authorities supporting the contention that petitioner is beneficially interested in the proceeding (see, e.g., § 150.140), and with a general memorandum supporting a petition for a writ of mandate (see, e.g., § 150.30) or a petition for a writ of prohibition (see, e.g., § 150.70).*]

PETITIONER IS BENEFICIALLY INTERESTED IN THE SUBJECT MATTER OF THIS PROCEEDING BECAUSE PETITIONER IS AN ORGANIZATION REPRESENTING INDIVIDUALS WHO ARE BENEFICIALLY INTERESTED.

Representation by Organization With Beneficially Interested Members. A petitioner has sufficient beneficial interest in issuance of a writ when the petitioner is an organization that represents members who have a beneficial interest in the action to which the writ pertains (*Residents of Beverly Glen, Inc. v. City of Los Angeles (1973) 34 Cal. App. 3d 117, 122-128, 109 Cal. Rptr. 724* (mandate)).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that the petitioner has a beneficial interest in the proceeding for writ of mandate or prohibition because petitioner is an organization representing members who have a beneficial interest in the proceedings.

The foregoing points and authorities should be combined with general points and authorities relating to the petitioner's beneficial interest in the proceeding (*see § 150.140*), and, when appropriate, with additional, more specific points and

authorities relating to his or her particular beneficial interest (*see §§ 150.141, 150.142*). The combined points and authorities relating to the beneficial interest requirement should then be combined, in turn, with a general memorandum supporting a petition for a writ of mandate (*see § 150.30*) or a petition for a writ of prohibition (*see § 150.70*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender).

[c] Opposing Memoranda

The points and authorities set out in *§ 150.144* may be used in an appropriate case to oppose a petition for mandate or prohibition that is supported by the foregoing points and authorities.

[3] Discussion of Authorities

[a] Representations by Organization With Beneficially Interested Members

In ***Residents of Beverly Glen, Inc. v. City of Los Angeles*** *(1973) 34 Cal. App. 3d 117, 109 Cal. Rptr. 724* , plaintiff, a nonprofit corporation composed of families living in a specified area, brought a declaratory relief and mandate action against the city of Los Angeles to set aside a conditional use permit that the city granted to a developer and to have a section of the city code declared unconstitutional. The trial court entered a summary judgment in favor of the defendants on the ground that plaintiff lacked standing to sue.

The court of appeal reversed, holding that plaintiff's allegations that it was a corporation whose members lived in the affected area and would suffer injury if the challenged project was allowed to proceed were sufficient to establish plaintiff's standing (*34 Cal. App. 3d 117, 121-122)* . The court noted that in recent years, there had been a marked accommodation of formerly strict procedural requirements of standing to sue when matters relating to social and economic realities of the present-day organization of society were concerned (*34 Cal. App. 3d 117, 122)* . One result of this accommodation is the principle that an organization, created for the purpose of representing its members who themselves have a beneficial interest in the subject matter, has standing to sue (*34 Cal. App. 3d 117, 124)* . After noting the rule that when the question is one of a public right and the object of mandamus is enforcement of a public duty, a petitioner need not show a legal or special interest in the result since the interest of a citizen in having the law executed and the duty in question enforced is sufficient, the court held that plaintiff had standing to seek redress for the injuries allegedly suffered by its members. It concluded that the trial court should turn its examination to the factual question of whether plaintiff does and can in fact adequately represent those it seeks to represent (*34 Cal. App. 3d 117, 127-129)* .

[4] Additional Authorities

[a] Representation by Organization With Beneficially Interested Members

In *Driving Sch. Ass'n of Cal. v. San Mateo Union High Sch. Dist. (1992) 11 Cal. App. 4th 1513, 14 Cal. Rptr. 2d 908* , the association petitioned for a writ of mandate to compel the school district to stop charging fees for high school students to take a 24-hour driver training course in the adult school operated by the district. The trial court sustained a demurrer to the petition without leave to amend, on the ground that the association lacked standing. The court of appeal reversed, concluding that the association had standing under the exception for an organization with beneficially interested members. Whether any of the members, which were private, for-profit driving schools, would have had

standing was open to question; however, the court applied the so-called public interest exception. The issue of whether the school district had authority to charge the fees was an issue affecting the public interest and concerning the performance of a public duty. Any citizen is beneficially interested in such an issue and so has standing to petition for an extraordinary writ to bring the issue before a court. Moreover, the association was evidently the only person with sufficient interest and resources to bring that issue before a court, since none of the students would have been likely to test the district's fee policy in court (*11 Cal. App. 4th 1513, 1517-1519)* .

In *International Union of United Auto. etc. Workers v. Department of Human Resources Dev. (1976) 58 Cal. App. 3d 924, 130 Cal. Rptr. 368* , a group of employees and the union to which they belonged petitioned for a writ of mandate to compel the respondent Department of Human Resources Development to review decisions of the State Unemployment Insurance Appeals Board, which had denied the employees' claims for unemployment insurance benefits, and questioned the constitutionality of enforcement of the Unemployment Insurance Code. The trial court denied the petition, and the court of appeal affirmed. One of the issues on appeal was whether petitioner union had standing to seek a writ of mandate. Respondents relied on *Parker v. Bowron (1953) 40 Cal. 2d 344, 254 P.2d 6* (discussed in *§ 150.144[3][a]*), which held that an unincorporated association did not have a beneficial interest in the issuance of a writ of mandate affecting its employees when, if the writ issued, only a small proportion of the members would benefit, and if the writ were denied, the association would not suffer any detriment (*58 Cal. App. 3d 924, 934)* . The court of appeal remarked that *Parker* was both distinguishable and repudiated by subsequent cases. The current law is that a labor union is entitled to represent its members in an action that is inseparably founded upon its members' employment. That the union had standing would not change the result, however, because the union had failed to state a cause of action (*58 Cal. App. 3d 924, 935)* .

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15-150 California Points & Authorities § 150.144

§ 150.144 Opposing Contention That Petitioner Is Beneficially Interested--General Form

[1] FORM

[*The following should be combined, when appropriate, with a general form of memorandum opposing a petition for a writ of mandate (see, e.g., § 150.47) or a petition for a writ of prohibition (see, e.g., § 150.78).*]

A WRIT OF _____ [MANDATE *or* PROHIBITION] SHOULD NOT ISSUE BECAUSE THE PETITION FAILS TO SHOW THAT ANY BENEFIT COULD ACCRUE TO PETITIONER IF THE WRIT WERE ISSUED OR THAT PETITIONER WOULD SUFFER ANY DETRIMENT IF THE WRIT WERE DENIED.

A. Beneficial Interest Requirement. [*See § 150.140, Paragraphs A.*]

B. No Beneficial Interest. A writ should not issue when there is no indication that any benefit could accrue to petitioner if the writ were issued or that petitioner would suffer any detriment if it were denied (*Parker v. Bowron (1953) 40 Cal. 2d 344, 351-352, 254 P.2d 6* (mandate); *Regency Outdoor Advertising, Inc. v. City of West Hollywood (2007) 153 Cal. App. 4th 825, 829-830, 63 Cal. Rptr. 3d 287*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a writ of mandate or prohibition is proper. The ground for opposition is that the petitioner is not beneficially interested in the proceeding.

These points and authorities should be combined with a general memorandum opposing a petition for a writ of mandate (*see § 150.47*) or a petition for a writ of prohibition (*see § 150.78*).

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law

stated.

In an appropriate case, these points and authorities may be used to oppose the contention supported by the points and authorities set out in *§§ 150.140*-150.143.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] No Beneficial Interest

In ***Parker v. Bowron*** *(1953) 40 Cal. 2d 344, 254 P.2d 6* , a labor council and one of its officers, acting on behalf of its affiliated unions and their members, sought a writ of mandate to compel city officials to fix city salaries at an amount at least equal to the prevailing scale for similar employment in private industry. The trial court denied the writ, and petitioners appealed.

The Supreme Court affirmed, holding that neither the officer nor the council had standing to sue (*40 Cal. 2d 344, 357)* . It explained that the officer had alleged no facts to show that he had any right or interest in the action since he did not plead that he was an employee of the city or even that he was a resident or taxpayer of the city. There is no indication that any benefit could accrue to him if the writ were issued or that he would suffer any detriment if it were denied (*40 Cal. 2d 344, 351-352)* . The Court also reasoned that the council had alleged no facts that would show any right or interest of the unions in the action, which would show that any benefit, except possibly an incidental one of satisfying a very small proportion of their members, would accrue if the writ were granted, or which would show that any detriment would be suffered if it were denied (*40 Cal. 2d 344, 354)* .

Counsel should note that the *Parker* decision followed, in part, from the then-existing rule that an unincorporated association may not sue or be sued as an entity but that such action must be taken by or against the individual members [*see Fuller v. San Bernardino Valley (1966) 242 Cal. App. 2d 52, 59, 51 Cal. Rptr. 120]* . Therefore, *Parker* has been criticized in subsequent cases [*see International Union of United Auto. etc. Workers v. Department of Human Resources Dev. (1976) 58 Cal. App. 3d 924, 935, 130 Cal. Rptr. 368* , discussed in *§ 150.143[4][a]*].

In ***Regency Outdoor Advertising, Inc. v. City of West Hollywood*** *(2007) 153 Cal. App. 4th 825, 829-830, 63 Cal. Rptr. 3d 287* , the plaintiff billboard company filed a petition for writ of mandate requiring the defendant city to invalidate the city's zoning amendment because the city did not review the amendment's environmental effects pursuant to the California Environmental Quality Act (CEQA). The trial court held that the plaintiff was seeking a writ of mandate in order to pursue its commercial interests against competitors. The court therefore dismissed the petition and entered judgment for the defendant.

The court of appeal affirmed. It held that standing to petition for a writ of mandate ordinarily requires the petitioner to have a beneficial interest in the writ's issuance [*153 Cal. App. 4th 825, 829]* . This means that the petitioner have some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large [*153 Cal. App. 4th 825, 829]* . The court concluded that the plaintiff's commercial and competitive interests were not within the zone of interests CEQA was intended to preserve or protect and could not serve as a beneficial interest for purposes of the standing requirement [*153 Cal. App. 4th 825, 829-830]* .

[4] Additional Authorities

[a] No Beneficial Interest

In *Savient Pharmaceuticals, Inc. v. Department of Health (2007) 146 Cal. App. 4th 1457, 1465, 53 Cal. Rptr. 3d 689* , a pharmaceutical company manufactured a drug used to treat HIV-related illnesses. The Department, through its contractor, delisted the drug from the formulary for some purposes because cheaper drugs were available. The pharmaceutical company filed a petition for writ of mandate to invalidate the delisting and to nullify the contract between the Department and its contractor on the ground that the Department improperly delegated management to the contractor. The trial court denied the petition.

The court of appeal upheld the denial. The court held that the pharmaceutical company lacked standing to assert its claim of improper delegation to the contractor because the contractor did not make the delisting decision. The Department delisted the drug. Nothing the contractor did as a result of the contract damaged the manufacturer. Because the contract did not specially aggrieve the manufacturer, the court held, it lacked standing to attack the contract. Thus, the pharmaceutical company was not beneficially interested within the meaning of *Code Civ. Proc. § 1086* in the contractor's authority and did not have standing to petition for writ of mandate [*146 Cal. App. 4th 1457, 1465]* .

State Water Res. Control Bd. Cases (2006) 136 Cal. App. 4th 674, 39 Cal. Rptr. 3d 189 , involved coordinated water rights proceedings in which various State Water Resources Control Board decisions were challenged. The court of appeal held that a party is not aggrieved by an error that injures only nonappealing coparties. The court held that the guiding principle is one often encountered in daily life: "no harm, no foul" (*136 Cal. App. 4th 674*). The same reasoning applies with equal force to a party claiming to be aggrieved by a water rights decision by the State Water Resources Control Board. Thus, the question was whether the rights or interests of certain parties suffered an immediate, pecuniary, and substantial injury because of the Board's decision to include the encroachment lands within the authorized place of use in the Bureau's permits subject to a mitigation requirement. The party could not identify any such injury, other than uncertainty about the future. The court held that this uncertainty was merely speculation, and was not an identifiable injury (*136 Cal. App. 4th 674*).

In *Sacramento County Fire Protection Dist. v. Sacramento County Assessment Appeals Bd. II (1999) 75 Cal. App. 4th 327, 89 Cal. Rptr. 2d 215* , the superior court dismissed a petition for writ of mandate filed by a fire district in which the fire district sought to challenge the valuation of certain property by the county assessor. The court concluded the fire district did not have standing.

The court of appeal affirmed. It found the fire district was not beneficially interested because the district has no special interest to be served or particular right to be preserved or protected over and above the interest held in common by the public, even though the district would lose some of its tax funding because of the decrease in property valuation (*75 Cal. App. 4th 327, 332-333)* . The court also held that the public interest exception to the beneficial interest requirement did not apply because the policy underlying the public interest exception is outweighed by a competing consideration--namely, the risk of chaos in allowing all public entities that rely on taxation for funding to challenge property valuations (*75 Cal. App. 4th 327, 334)* . Because the fire district is not an agency charged with enforcing the taxation statutes, it has no standing to challenge the assessor's decision concerning the valuation of property (*75 Cal. App. 4th 327, 335-336)* .

In *Municipal Court v. Superior Court (Gonzalez) (1993) 5 Cal. 4th 1126, 22 Cal. Rptr. 2d 504, 857 P.2d 325* , the Supreme Court affirmed the court of appeal's denial of a mandate petition by a municipal court against a superior court. The superior court had granted a habeas corpus writ for real party in interest following a probable cause hearing by a commissioner assigned by the municipal court. The Court stated that it is the parties in the underlying proceeding, not the courts whose rulings are challenged, that have a beneficial interest in the case's outcome. The role of the respondent court is that of a neutral party. This is true even when the subject matter of the mandamus proceeding is a ruling that significantly affects the operations of the petitioning court (*5 Cal. 4th 1126, 1129)* . The Court rejected the municipal court's request that the reviewing court adopt a "common-sense" approach in assessing its beneficial interest in obtaining an appellate ruling on the propriety of its use of court commissioners. There is no public duty to use court

commissioners to make probable cause determinations, and no public right would be enforced if the municipal court prevailed at the mandamus proceeding. The Court declined to address the merits of the petition. In general, California courts have no power in mandamus or otherwise to render advisory opinions or give declaratory relief (*5 Cal. 4th 1126, 1132)* .

In *Carsten v. Psychology Examining Com. (1980) 27 Cal. 3d 793, 166 Cal. Rptr. 844, 614 P.2d 276* , a member of a state psychology examining board filed a petition for a writ of mandate to challenge the legality of actions taken by the board. Petitioner sought to compel the board to comply with *Bus. & Prof. Code § 2942*, which permitted licensing of applicants who achieved a passing grade of 75 percent on their licensing examinations. The board had instead adopted the national mean for its passing score, thereby allowing the licensing of applicants with scores as low as 67.5 percent. The trial court denied the petition and dismissed the case.

The Supreme Court affirmed, holding that petitioner lacked standing because she was not beneficially interested in the proceeding under *Code Civ. Proc. § 1086*, which generally requires that petitioner have some special interest to be served or some particular right to be preserved or protected, over and above the interest held in common with the public at large (*27 Cal. 3d 793, 796)* . The Court reasoned that petitioner was neither seeking a license nor in danger of losing one and, therefore, was not adversely affected by the board's action (*27 Cal. 3d 793, 797)* . The Court also held that petitioner did not have standing as a citizen taxpayer because it was as a board member that she acquired knowledge of the events on which she based the lawsuit and the suit was brought in her capacity as a board member (*27 Cal. 3d 793, 799)* .

In *De La Cuesta v. Superior Court (1984) 152 Cal. App. 3d 945, 200 Cal. Rptr. 1* , the court of appeal held that petitioners were not entitled to a writ of mandate to compel the trial court to grant their motion for attorney's fees *Civ. Code § 1717* (action on contract), because petitioners had misconceived their proper remedy, and their motion, even if granted, could not afford them the relief they sought. Thus, petitioners lacked the beneficial interest requisite to issuance of the writ (*152 Cal. App. 3d 945, 950)* .

In *Grant v. Board of Medical Examiners (1965) 232 Cal. App. 2d 820, 43 Cal. Rptr. 270* , petitioner sought a writ of mandate to compel the Board of Medical Examiners to set aside its decision in a disciplinary proceeding. The trial court denied the writ. The court of appeal affirmed, holding that the administrative action was actually favorable to petitioner because the board's decision had dismissed both the accusation and the proceedings against petitioner. Because a party not aggrieved is a party not beneficially interested, petitioner had no beneficial interest in the proceeding and the writ was properly denied (*232 Cal. App. 2d 820, 827-829)* .

In *Funeral Dirs. Assn. v. Bd. of Funeral Dirs. (1944) 67 Cal. App. 2d 311, 154 P.2d 39* , an incorporated nonprofit association composed of funeral directors and embalmers sought a writ of mandate to annul an order of the State Board of Funeral Directors, which had placed a licensee on probation for one year. The trial court sustained demurrers to the petition on the ground that petitioner was not a party who was beneficially interested. The court of appeal affirmed, holding that a trade association is not a party beneficially interested in a proceeding between a state board and a licensee of such a board (*67 Cal. App. 2d 311, 313)* .

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[Reserved]

§§ 150.145[Reserved]

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iii. Lack of Adequate Legal Remedy Requirement

15-150 California Points & Authorities § 150.160

§ 150.160 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--General Form

[1] FORM

[*The following should be combined, when appropriate, with a general form of memorandum supporting a petition for a writ of mandate (see, e.g., § 150.30) or a petition for a writ of prohibition (see, e.g., § 150.70).*]

A WRIT OF _____ [MANDATE *or* PROHIBITION] SHOULD ISSUE BECAUSE PETITIONER HAS NO ADEQUATE REMEDY IN THE ORDINARY COURSE OF LAW.

[*EITHER*]

A. Inadequate Remedy Requirement. A writ of mandate must be issued in all cases when there is not a plain, speedy, and adequate remedy, in the ordinary course of law (*Code Civ. Proc. § 1086*).

[*OR*]

A. Inadequate Remedy Requirement. A writ of prohibition may be issued in all cases when there is not a plain, speedy, and adequate remedy, in the ordinary course of law (*Code Civ. Proc. § 1103*).

[*CONTINUE*]

B. Discretionary Determination. The adequacy of other remedies is a factual question whose determination lies largely in the discretion of the court considering the writ petition (*W.A. Rose Co. v. Municipal Court (1959) 176 Cal.*

App. 2d 67, 74, 1 Cal. Rptr. 49).

[*Add additional, more specific points and authorities, as appropriate, relating to the particular circumstances supporting the contention that petitioner has no plain, speedy, or adequate remedy in the ordinary course of law (see, e.g., §§ 150.161-150.182).*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the general contention that the petitioner for a writ of mandate or prohibition is entitled to relief to the extent that he or she has no plain, speedy, or adequate remedy in the ordinary course of law [*see Code Civ. Proc. §§ 1086, 1103*].

These points and authorities should be combined with more specific points and authorities relating to the particular circumstances that show why there is no other plain, speedy, or adequate legal remedy (*see §§ 150.161*-150.182). It is, in fact, crucial that the foregoing general contention be buttressed by more specific points and authorities that relate to the particular circumstances of the case, because the most significant burden on a petitioner for either a writ of mandate or a writ of prohibition is to show that he or she has no other plain, speedy, and adequate remedy in the ordinary course of law [*Code Civ. Proc. §§ 1086, 1103*; *Phelan v. Superior Court (1950) 35 Cal. 2d 363, 366, 217 P.2d 951* ; for further discussion, *see § 150.06*].

The combined points and authorities relating to the lack of adequate legal remedy requirement should then be combined, in turn, with a general memorandum supporting a petition for a writ of mandate (*see § 150.30*) or a petition for a writ of prohibition (*see § 150.70*).

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender).

[c] Opposing Memoranda

The points and authorities set out in *§§ 150.185* and *150.186* may be used in an appropriate case to oppose a petition for mandate or prohibition that is supported by these points and authorities.

[3] Discussion of Authorities

[a] Discretionary Determination

In ***W.A. Rose Co. v. Municipal Court*** *(1959) 176 Cal. App. 2d 67, 1 Cal. Rptr. 49* , a plaintiff in a municipal court action sought from the superior court a writ of mandate ordering the municipal court clerk to enter a default, as well as a writ of prohibition restraining the municipal court from proceeding with the action. The superior court issued the writs and the defendant, as real party in interest, appealed.

The court of appeal affirmed, holding that plaintiff was entitled to a default judgment and the writs were properly issued (*176 Cal. App. 2d 67, 73, 75)* . The issuance of mandate and the issuance of prohibition, the court stated, depend on the absence of another adequate remedy (*176 Cal. App. 2d 67, 75)* . The adequacy of other remedies is a factual question

whose determination lies largely in the discretion of the trial court. Because the municipal court was proceeding with the action in spite of the fact that the court lost jurisdiction when it improperly denied plaintiff default and judgment, the superior court could have determined that any appeal remedy was not a speedy or an adequate one (*176 Cal. App. 2d 67, 74)* .

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15-150 California Points & Authorities § 150.161

§ 150.161 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--Public Interest Requires Prompt Resolution

[1] FORM

[*The following should be combined, when appropriate, with general points and authorities supporting the contention that petitioner lacks a plain, speedy, and adequate remedy in the ordinary course of law (see, e.g., § 150.160), and with a general memorandum supporting a petition for a writ of mandate (see, e.g., § 150.30) or a petition for a writ of prohibition (see, e.g., § 150.70).*]

PETITIONER'S REMEDY AT LAW IS INADEQUATE BECAUSE THE PUBLIC INTEREST REQUIRES A PROMPT RESOLUTION OF THE SUBJECT OF THE PETITION.

A. Public Interest Requires Prompt Resolution. When the issue presented by a petition for a writ of mandate or prohibition is a matter of public interest, the public welfare requires a prompt resolution of the issue and petitioner's remedy in the ordinary course of law is not adequate (*Brown v. Superior Court (1971) 5 Cal. 3d 509, 515, 96 Cal. Rptr. 584, 487 P.2d 1224* (mandate); *Corona etc. Hosp. Dist. v. Superior Court (1964) 61 Cal. 2d 846, 854, 40 Cal. Rptr. 745, 395 P.2d 817* (prohibition); *Johnson v. City and County of San Francisco (2006) 137 Cal. App. 4th 7, 19, 40 Cal. Rptr. 3d 8* (mandate); *San Bernardino Associated Gov'ts v. Superior Court (2006) 135 Cal. App. 4th 1106, 1113, 38 Cal. Rptr. 3d 293* (mandate)).

[*Optional*] **B. Original Jurisdiction of Appellate Court.** An appellate court will exercise its original jurisdiction in the first instance when the issues presented are of great public importance and must be resolved promptly (*Wenke v. Hitchcock (1972) 6 Cal. 3d 746, 750, 100 Cal. Rptr. 290, 493 P.2d 1154* (original filing in Supreme Court); *Aden v. Younger (1976) 57 Cal. App. 3d 662, 670, 129 Cal. Rptr. 535* (original filing in court of appeal)).

[*Optional*] **C. Public Entity Immunity Is Matter of Public Interest.** The issue of whether a public entity or employee is immune from suit is of great public importance and should be resolved promptly by writ review (*County of Santa*

Barbara v. Superior Court (1971) 15 Cal. App. 3d 751, 754, 93 Cal. Rptr. 406).

[*Optional*] **D. Legal Existence of Public Corporation Is Matter of Public Interest.** The issue of whether a public corporation legally exists and operates is of great public importance and should be resolved promptly by writ review (*Corona etc. Hosp. Dist. v. Superior Court (1964) 61 Cal. 2d 846, 853-854, 40 Cal. Rptr. 745, 395 P.2d 817*).

[*Optional*] **E. Right to Exercise Power of Eminent Domain Is Matter of Public Interest.** The issue of whether a public entity has the right to exercise the power of eminent domain is of great public importance and should be resolved promptly by writ review (*Harden v. Superior Court (1955) 44 Cal. 2d 630, 635-636, 284 P.2d 9*).

[*Optional*] **F. Enforcement of Law Is Matter of Public Interest.** The issue of whether a court has the jurisdiction to enjoin enforcement of a law is of great public importance and should be resolved promptly by writ review (*City of Santa Monica v. Superior Court (1964) 231 Cal. App. 2d 223, 225, 41 Cal. Rptr. 824*).

[*Optional*] **G. Certification of Class is Matter of Public Interest.** The issue of whether a class may be certified to pursue a claim for violating the Unfair Competition Law (UCL), *Bus. & Prof. Code § 17200 et seq.* is of great public importance and must be resolved promptly [*Corbett v. Superior Court (2002) 101 Cal. App. 4th 649, 657, 125 Cal. Rptr. 2d 46]* .

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the petitioner lacks a plain, speedy, and adequate remedy in the ordinary course of law, because the petition involves a matter of public interest that requires prompt resolution.

These points and authorities should be combined with general points and authorities relating to the lack of adequate legal remedy requirement (*see § 150.160*), and, when appropriate, with additional, more specific points and authorities relating to this requirement (*see §§ 150.163*-150.182). The combined points and authorities relating to the lack of adequate legal remedy requirement should then be combined, in turn, with a general memorandum supporting a petition for a writ of mandate (*see § 150.30*) or a petition for a writ of prohibition (*see § 150.70*).

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Original Filing in Appellate Court

Optional Paragraph B of this form is for use when the petition is filed in a court of appeal or in the California Supreme Court without first seeking the writ in a lower court. In such a case, if the petition could have been filed in a lower court in the first instance, petitioner must set forth the circumstances which, in his or her opinion, render it proper that the writ should issue originally from the reviewing court [*Cal. Rules of Ct., Rule 8.490(b)*].

[c] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender).

[d] Opposing Memoranda

The memorandum set out in *§§ 150.185* and *150.186* may be used in an appropriate case to oppose a petition for

mandate or prohibition that is supported by these points and authorities.

[3] Discussion of Authorities

[a] Public Interest Requires Prompt Resolution

In ***Brown v. Superior Court*** *(1971) 5 Cal. 3d 509, 96 Cal. Rptr. 584, 487 P.2d 1224* , the Secretary of State brought an action to impose civil penalties for violations of an election campaign statute. The trial court sustained defendant's demurrer on the ground that the statute was unconstitutional and dismissed the action. The Secretary petitioned for a writ of mandate to compel the superior court to vacate the dismissal and proceed with the action.

The Supreme Court held that the statute was constitutional and issued the writ (*5 Cal. 3d 509, 524)* . The Court found that petitioner's remedy at law, an appeal from dismissal of the action, was inadequate because the public welfare required a prompt resolution of the issue of the statute's constitutionality (*5 Cal. 3d 509, 515)* .

In ***Corona etc. Hosp. Dist. v. Superior Court*** *(1964) 61 Cal. 2d 846, 40 Cal. Rptr. 745, 395 P.2d 817* , a taxpayer brought an action challenging the validity of a sale-leaseback method of financing a community hospital. The hospital district contended that the trial court was proceeding in excess of its jurisdiction and petitioned for a writ of prohibition.

The Supreme Court held that prohibition was proper, stating that the public interest in resolution of the issue of the validity of the statute and hospital district made the remedy of appeal inadequate (*61 Cal. 2d 846, 853-854)* . The court noted that there was a substantial need for the hospital, and that the people had voted to form the district and build the hospital. Thus, the public interest required a prompt resolution of the issue of the validity of the district, which could not be obtained by an appeal from the final judgment (*61 Cal. 2d 846, 853-854)* . The court also noted that petitioners were not dilatory and that the urgency was caused by the fact that the action challenging the validity was filed on the last possible date, at which time the statutory authorization was about to expire (*61 Cal. 2d 846, 854)* .

In *Johnson v. City and County of San Francisco (2006) 137 Cal. App. 4th 7, 40 Cal. Rptr. 3d 8* , the Small Property Owners of San Francisco, Inc. (SPOSF) filed a complaint for a writ of mandate challenging a San Francisco Administrative Code section that requires landlords who seek eviction under the state Ellis Act to pay their tenants' relocation costs. Under the Code, landlords are required to notify their tenants about their right to receive payment and the amount of payment which the landlord believes to be due. The SPOSF argued that the belief requirement in the Code is facially invalid because it is not authorized by the state Ellis Act. The City opposed the petition, arguing that writ relief was not appropriate and that the belief requirement was not preempted. The trial court denied the petition for a writ of mandate, finding that the Ellis Act did not preempt the belief requirement. The trial court found that writ relief was not appropriate because (1) disputes were unlikely to arise in the future because it is easy to comply with the belief requirement, and (2) owners may adjudicate any disputes that do arise in the course of unlawful detainer proceedings.

The court of appeals disagreed that landlords have an adequate remedy at law because they may adjudicate the validity of their termination notices in individual unlawful detainer actions (*137 Cal. App. 4th 7, 19*). To require each landlord to litigate the issue separately could lead to inconsistent rulings by different trial court judges (*137 Cal. App. 4th 7, 19*). The court held that issuing a writ of mandate prevents piecemeal litigation regarding the belief requirement (*137 Cal. App. 4th 7, 19*).

In ***San Bernardino Associated Governments v. Superior Court*** *(2006) 135 Cal. App. 4th 1106, 38 Cal. Rptr. 3d 293* , the Sierra Club filed a petition for writ of mandate, injunctive relief, and declaratory relief seeking to compel the San Bernardino County Board of Supervisors (Board) to conduct an environmental review before placing a sales tax measure on the November 4, 2004, ballot. Alternatively, if the sales tax measure was passed by the voters, the Sierra Club sought a writ of mandate to prevent the measure's implementation. The Board filed a demurrer to the petition, which the trial court overruled. The Board sought a writ of mandate ordering the trial court to reverse its decision and

sustain the demurrer.

The court of appeal held that it had discretion to review the overruling of the demurrer in a writ proceeding. The court held that discretionary writ review of an order overruling a demurrer is appropriate when the issue is a matter of public importance and requires immediate resolution (*135 Cal. App. 4th 1106, 1113*). Here, the issue was a matter of public importance because the sales tax was expected to raise approximately $6 billion between 2010 and 2040. Revenues from the sales tax would be used to widen and improve highways and freeways; improve freeway interchanges; improve local streets and roads; expand transit for seniors and disabled riders; and expand Metrolink commuter rail. These projects and services were of considerable benefit to the public (*135 Cal. App. 4th 1106, 1113*). The court found further that the "legislative findings and declarations" provision in the Local Transportation Authority and Improvement Act provided that local highway and transportation improvements and services are an immediate high priority and are a matter of statewide concern (*135 Cal. App. 4th 1106, 1113*). Based on these factors, the court held that writ review by the court was permissible and appropriate (*135 Cal. App. 4th 1106, 1113*).

[b] Original Jurisdiction of Appellate Court

In ***Wenke v. Hitchcock*** *(1972) 6 Cal. 3d 746, 100 Cal. Rptr. 290, 493 P.2d 1154* , petitioner intended to be a candidate for a seat on the county board of supervisors. In anticipation of a redistricting plan that would remove his residence from the district in which he sought election, petitioner had moved his residence. When the registrar of voters refused to accept petitioner's nomination papers, petitioner sought a writ of mandate in the Supreme Court.

The Supreme Court accepted jurisdiction, holding that the case came within the rule that the Court will exercise jurisdiction when the issues are of great public importance and must be resolved promptly. The Court reasoned that petitioner's nomination papers had to be filed within a month after the writ proceedings were initiated. In addition, lower courts were unlikely to grant relief because of a longstanding California Supreme Court case that appeared to be unfavorable to petitioner. If the issues were to be resolved in time, the Court concluded, jurisdiction must be exercised (*6 Cal. 3d 746, 750-751)* .

In ***Aden v. Younger*** *(1976) 57 Cal. App. 3d 662, 129 Cal. Rptr. 535* , mental patients and doctors sought a writ of mandate in the court of appeal to prohibit enforcement of state legislation that made the requirements for obtaining patients' consent to electroshock treatments much stricter. The Supreme Court accepted jurisdiction, holding that the case came within the rule that a reviewing court will take original jurisdiction when the issues are of great public import and there is a necessity for prompt resolution of those issues. The constitutionality of a state-wide law was challenged, the Court reasoned, and the rights of mental patients were dramatically affected by delaying a dispositive decision of the legislation's constitutionality (*57 Cal. App. 3d 662, 670)* .

[c] Public Entity Immunity Is Matter of Public Interest

In ***County of Santa Barbara v. Superior Court*** *(1971) 15 Cal. App. 3d 751, 93 Cal. Rptr. 406* , plaintiffs brought a wrongful death action against a city, which had released a prisoner who later killed plaintiffs' father. The city demurred based on its statutory immunities. The trial court overruled the demurrer and the city petitioned for a writ of prohibition.

The court of appeal issued the writ, holding that the city was immune (*15 Cal. App. 3d 751, 755-758)* . The court noted that ordinarily the overruling of a demurrer is reviewable on appeal and not by prohibition. However, relying on *People v. Superior Court (1947) 29 Cal. 2d 754, 178 P.2d 1* , it held that prohibition is a proper remedy when the sole basis of the demurrer is sovereign immunity, which is a jurisdictional question, because the public importance of the question is sufficient to require that the issue be speedily determined (*15 Cal. App. 3d 751, 754-755)* .

[d] Legal Existence of Public Corporation Is Matter of Public Interest

The facts and procedure of ***Corona etc. Hosp. Dist. v. Superior Court*** *(1964) 61 Cal. 2d 846, 40 Cal. Rptr. 745, 395 P.2d 817* , are discussed under *§ 150.161[3][a]*. In that case, the Supreme Court held that the public interest in resolution of the issue of the validity of a statute and hospital district made the remedy of appeal inadequate (*61 Cal. 2d 846, 853-854)* . The court noted that there was a substantial need for the hospital, and that the people had voted to form the district and build the hospital. Thus, the public interest required a prompt resolution of the issue of the validity of the district, which could not be obtained by an appeal from the final judgment (*61 Cal. 2d 846, 853-854)* .

[e] Right to Exercise Power of Eminent Domain Is Matter of Public Interest

In ***Harden v. Superior Court*** *(1955) 44 Cal. 2d 630, 284 P.2d 9* , a city brought a condemnation action and the owner demurred on the basis that the city could not condemn land out of the city limits. The trial court overruled the demurrer and the owners petitioned for a writ of prohibition. The court of appeal granted the writ, holding that the city was not authorized to condemn the land. The court found that petitioner's remedy of appeal was inadequate and not speedy because a failure of justice would occur in a matter of public importance by a wrongful exercise of jurisdiction (*44 Cal. 2d 630, 634-636)* .

[f] Enforcement of Law Is Matter of Public Interest

In ***City of Santa Monica v. Superior Court*** *(1964) 231 Cal. App. 2d 223, 41 Cal. Rptr. 824* , plaintiffs obtained a preliminary injunction restraining the city from enforcing a gambling ordinance. The city sought a writ of prohibition on the basis that the injunction was beyond the court's jurisdiction. The court of appeal upheld that ordinance and issued the writ (*231 Cal. App. 2d 223, 225-227)* . The court found that the remedy of appeal was inadequate and that the public interest required a prompt resolution of the issue of the validity of the ordinance because, pending the appeal, the city would be restrained from enforcing ordinances whose validity had not yet been determined (*231 Cal. App. 2d 223, 225)* .

[g] Certification of Class is Matter of Public Interest

In ***Corbett v. Superior Court*** *(2002) 101 Cal. App. 4th 649, 125 Cal. Rptr. 2d 46* , plaintiff sought class certification to file a claim against a bank and a car dealership for violating the Unfair Competition Law (UCL), *Bus. & Prof. Code § 17200 et seq.*, with respect to automobile financing. The superior court denied class certification on the ground that the California Supreme Court, in *Kraus v. Trinity Management Services, Inc. (2000) 23 Cal. 4th 116, 138, 96 Cal. Rptr. 2d 485, 999 P.2d 718* , held that class actions and UCL claims were fundamentally incompatible when it concluded that *Bus. & Prof. Code § 17203* did not authorize orders for disgorgement into a fluid recovery fund.

The court of appeal did not agree that under *Kraus* class actions and UCL claims are mutually exclusive. The court of appeal held that UCL claims and class actions are not mutually exclusive as a matter of law. The court based its holding on the fact that refusing to ever permit a liquid recovery in a UCL claim would thwart the purpose of the UCL because it would permit defendants to keep a portion of their illicit profits (*101 Cal. App. 4th 649, 667)* .

[4] Additional Authorities

[a] Public Interest Requires Prompt Resolution

In *City of Glendale v. Superior Court (1993) 18 Cal. App. 4th 1768, 23 Cal. Rptr. 2d 305* , the plaintiff lessee brought an action against the lessor municipality for breach of contract when the municipality attempted to exercise its right of eminent domain to cut short the plaintiff's lease term. The trial court bifurcated the issue of whether contract damages or eminent domain damages applied and found the plaintiff was entitled to contract damages. The municipality filed a petition for a writ of mandate to compel the trial court to vacate its order. The court of appeal issued the writ. It found that, even though the issue arose from a preliminary determination which could be reviewed on appeal after final judgment, the legal remedy was inadequate because it would result in reversal after an expensive trial (*18 Cal. App.*

4th 1768, 1776) . The court also opined the general requirement of inadequacy of the legal remedy should be relaxed because the petition raised an issue of widespread public importance (*18 Cal. App. 4th 1768, 1776)* .

In *Los Angeles City Ethics Com. v. Superior Court (1992) 8 Cal. App. 4th 1287, 11 Cal. Rptr. 2d 150* , the superior court issued a permanent injunction barring the city ethics commission from participating or assisting in the district attorney's investigation of the city attorney's office. The commission sought review by both an appeal and a petition for an extraordinary writ. The court of appeal concluded that the issue of the commission's powers was an issue of widespread public interest that needed to be quickly determined. Therefore, the court held that review on an extraordinary writ was proper and that the commission's appeal would be considered as moot (*8 Cal. App. 4th 1287, 1298 n.13, 1299)* .

In *County of Santa Barbara v. Superior Court (1971) 15 Cal. App. 3d 751, 93 Cal. Rptr. 406* , plaintiffs brought a wrongful death action against a city, which had released a prisoner who later killed plaintiffs' father. The city demurred based on its statutory immunities. The trial court overruled the demurrer and the city petitioned for a writ of prohibition.

The court of appeal issued the writ, holding that the city was immune (*15 Cal. App. 3d 751, 755-758)* . The court noted that ordinarily the overruling of a demurrer is reviewable on appeal and not by prohibition. However, relying on *People v. Superior Court (1947) 29 Cal. 2d 754, 178 P.2d 1* , it held that prohibition is a proper remedy when the sole basis of the demurrer is sovereign immunity, which is a jurisdictional question, because the public importance of the question is sufficient to require that the issue be speedily determined (*15 Cal. App. 3d 751, 754-755)* .

The facts and procedure of *Babb v. Superior Court (1971) 3 Cal. 3d 841, 92 Cal. Rptr. 179, 479 P.2d 379* , are discussed in *§ 150.33[4][a]*. In issuing a writ of mandate directing the trial court to sustain a demurrer to a cross-complaint, the Court noted that the trial court's ruling that a malicious prosecution action was not premature had the potential to throw open the courtroom doors to malicious prosecution actions. Therefore, the Court issued a writ of mandate under the recognized exception for cases that have such a significant legal impact that the Court feels compelled to intervene (*3 Cal. 3d 841, 851)* .

In *California League of Senior Citizens, Inc. v. Brian (1973) 35 Cal. App. 3d 443, 110 Cal. Rptr. 809* , petitioner sought a writ restraining an agency from implementing certain welfare regulations, which petitioners contended conflicted with state law. The court of appeal held that the regulations were invalid and issued the writ (*35 Cal. App. 3d 443, 457)* . The court, relying on *County of Sacramento v. Hickman (1967) 66 Cal. 2d 841, 59 Cal. Rptr. 609, 428 P.2d 593* , found that extraordinary relief in the nature of mandate is a proper remedy when the issues are of great public importance and must be resolved promptly (*35 Cal. App. 3d 443, 448)* .

[b] Public Entity Immunity as Matter of Public Interest

In *People v. Superior Court (1947) 29 Cal. 2d 754, 178 P.2d 1* , the State of California demurred in a personal injury action on the basis of sovereign immunity. When the demurrer was overruled, the State petitioned for a writ of prohibition. The Supreme Court held that sovereign immunity was not applicable and denied the writ (*29 Cal. 2d 754, 757-763)* . However, the Court found that the remedy by appeal was inadequate because of the importance of the issue, which required a speedy resolution (*29 Cal. 2d 754, 756)* .

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15-150 California Points & Authorities § 150.162

§ 150.162 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--Question Is One of First Impression and of General Importance to Bench and Bar

[1] FORM

[*The following should be combined, when appropriate, with general points and authorities supporting the contention that petitioner lacks a plain, speedy, and adequate remedy in the ordinary course of law (see, e.g., § 150.160), and with a general memorandum supporting a petition for a writ of mandate (see, e.g., § 150.30) or a petition for a writ of prohibition (see, e.g., § 150.70).*]

PETITIONER'S REMEDY AT LAW IS INADEQUATE BECAUSE THE ISSUES PRESENTED ARE OF FIRST IMPRESSION AND OF GENERAL IMPORTANCE TO BENCH AND BAR.

Issues Presented of First Impression and of General Importance. An extraordinary writ is a proper remedy to review a trial court's ruling when the issues presented are of first impression and of general importance to the bench and bar, and general guidelines can be laid down for future cases (*City of Garden Grove v. Superior Court (2007) 157 Cal. App. 4th 355, 68 Cal. Rptr. 3d 656* ; *Toshiba America Electronics Components, Inc. v. Superior Court (2004) 124 Cal. App. 4th 762, 767-768, 21 Cal. Rptr. 3d 532* ; *Simon v. Superior Court (1992) 4 Cal. App. 4th 63, 68, 5 Cal. Rptr. 2d 428*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that the petitioner lacks a plain, speedy, and adequate remedy in the ordinary course of law, because the petition seeks review of a trial court's ruling when the issues presented are of first impression and of general importance to the bench and bar so that general guidelines can be laid down for future cases.

The foregoing points and authorities should be combined with general points and authorities relating to the lack of adequate remedy requirement (*see § 150.160*), and, when appropriate, with additional, more specific points and authorities relating to this requirement (*see §§ 150.161*-150.163, *150.164*-150.182). The combined points and authorities relating to the lack of adequate legal remedy requirement should be combined, in turn, with a general memorandum supporting a petition for a writ of mandate (*see § 150.30*) or a petition for a writ of prohibition (*see § 150.70*).

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should set forth reasons why the issues presented are important to the bench and bar.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender).

[c] Opposing Memoranda

The points and authorities set out in *§§ 150.185* and *150.186* may be used to oppose the petition for mandate or prohibition that is supported by the foregoing points and authorities.

[3] Discussion of Authorities

[a] Issues Presented of First Impression and of General Importance

In ***City of Garden Grove v. Superior Court*** *(2007) 157 Cal. App. 4th 355, 68 Cal. Rptr. 3d 656* , a driver was arrested for possession of marijuana during a traffic stop in Garden Grove. The Garden Grove prosecutor dismissed the possession charges when the driver presented a physician's statement authorizing the driver to use cannabis as medicine for a medical condition. However, the prosecutor opposed the driver's request to have the marijuana returned to him. The trial court held that because the marijuana was not illegally possessed the police department was required to return it to the driver. The City of Garden Grove petitioned for a writ of mandate and/or prohibition directing the trial court to vacate its order and enter a new one denying the driver's motion for return of property. The City argued that it had standing to challenge the trial court's order because it had a special interest in keeping marijuana off the streets and its police officers may be criminally liable if they returned the driver's marijuana to him.

The court of appeal held that while the City did not have standing in the traditional sense, public policy considerations dictated that it afford the City standing in order to resolve the important and widespread issue presented in the case. The court noted that the case involved important issues related to California's medical marijuana laws, and that if the City prevailed, the police could thwart the objectives of the laws by withholding marijuana they have seized from qualified patients, even when the patient is no longer subject to state criminal prosecution. The court held that whether that was a necessary consequence of federal drug policy was a question of first impression and one that is of considerable importance to those who rely on cannabis for medicinal purposes (*157 Cal. App. 4th 355, 370*). The court further held that standing was necessary because the case implicated constitutional concerns respecting the relationship between state and federal law. The court held that standing is also favored if an interested party may otherwise find it difficult or impossible to challenge the decision at issue, and here the City would likely not be able to obtain judicial review of the trial court's order unless it is afforded standing in this proceeding (*157 Cal. App. 4th 355, 371*).

In ***Toshiba America Electronics Components, Inc. v. Superior Court*** *(2004) 124 Cal. App. 4th 762, 767-768, 21 Cal. Rptr. 3d 532* , the parties disagreed about whether the demanding party or the responding party should pay the cost (possibly as much as $1.9 million) for recovering usable information from the responding party's computer backup tapes for purposes of a Code Civ. Proc. § 2031 production demand. The trial court held that the responding party had to bear

these costs.

The responding party filed a petition for a writ of mandate and requested a stay of the trial court's order. The court of appeal held that, although it rarely reviews discovery orders in petitions for an extraordinary writ, it is appropriate to do so if review is necessary to answer a question of first impression of general importance to the trial courts and the legal profession (*124 Cal. App. 4th 762, 767)* . The court noted that California courts have not ruled upon the question of which party should pay when it is necessary to translate electronic data compilations to obtain usable information responsive to a discovery request. The court held that the question is bound to arise with increasing frequency. Given that the cost of translating such material can be exorbitant, the question of who should bear the cost raises practical concerns as well as policy issues. The court held that these issues were sufficiently novel and important to justify review by extraordinary writ (*124 Cal. App. 4th 762, 767)* .

In ***Simon v. Superior Court*** *(1992) 4 Cal. App. 4th 63, 68, 5 Cal. Rptr. 2d 428* , the plaintiff bank held two promissory notes executed by the defendants as security for a loan. Both notes were secured by the same real property. After the defendants defaulted on the senior note, the bank effected a nonjudicial foreclosure. The bank then sued on the amount claimed due on the junior note although the junior lien had been exhausted by the foreclosure of the senior note. The bank also sought accrued penalties, interest, and attorney's fees. In response, the defendants raised various affirmative defenses, including provisions of the antideficiency statute. The bank then filed an amended complaint, asserting four causes of action: (1) a claim of money on a written instrument, (2) a deficiency judgment, (3) fraud, and (4) negligent misrepresentation in the inducement of the loan. Defendants demurred to, and sought summary adjudication of, the first two causes of action on the grounds that they were barred by the three-month statute of limitation of *Code Civ. Proc. § 580a*. The trial court overruled defendants' demurrer and denied the motion for summary adjudication on the ground that the limitation period was not applicable. Defendants then sought a writ of mandate from the court of appeal.

Although the parties addressed themselves to the limitation issue, the court of appeal requested briefing and argument on the issue whether the bank could receive a deficiency judgment after exhausting the security under the senior lien. The court granted the writ holding that the bank's action for a deficiency judgment was barred by the antideficiency statute [*see Code Civ. Proc. § 580d*]. The court also held that review by writ of mandate was appropriate because intervention by an appellate court may be required to review questions of first impression and general importance to the bench and bar where general guidelines can be laid down for future cases. In such cases, the statutory requirement of inadequacy of appellate remedy may be relaxed in favor of immediate review of a question of statewide importance so that lower decisions in other cases will be uniform (*4 Cal. App. 4th 63, 68)* .

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15-150 California Points & Authorities § 150.163

§ 150.163 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--Similar Lawsuits Are Pending and No Case Law Exists on Issue Presented by Petitioner

[1] FORM

[*The following should be combined, when appropriate, with general points and authorities supporting the contention that petitioner lacks a plain, speedy, and adequate remedy in the ordinary course of law (see, e.g., § 150.160), and with a general memorandum supporting a petition for a writ of mandate (see, e.g., § 150.30) or a petition for a writ of prohibition (see, e.g., § 150.70).*]

PETITIONER'S REMEDY AT LAW IS INADEQUATE BECAUSE SIMILAR LAWSUITS ARE PENDING AND NO CASE LAW EXISTS ON THE ISSUE PRESENTED BY PETITIONER.

Similar Lawsuits Pending. An extraordinary writ is a proper remedy to review a trial court's ruling when similar lawsuits are pending and when no case law on the issues argued exists for the trial courts' guidance (*California Highway Patrol v. Superior Court (2006) 135 Cal. App. 4th 488, 496, 38 Cal. Rptr. 3d 16* ; *State of California ex rel. Dept. of Rehabilitation v. Superior Court (1982) 137 Cal. App. 3d 282, 285, 187 Cal. Rptr. 1*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that the petitioner lacks a plain, speedy, and adequate remedy in the ordinary course of law, because the petition seeks review of a trial court's ruling when similar lawsuits are pending and no case law exists on the issue or issues presented by the writ petition.

The foregoing points and authorities should be combined with general points and authorities relating to the lack of adequate legal remedy requirement (*see § 150.160*), and, when appropriate, with additional, more specific points and authorities relating to this requirement (*see §§ 150.161, 150.164 -150.182*). The combined points and authorities

relating to the lack of adequate legal remedy requirement should then be combined, in turn, with a general memorandum supporting a petition for a writ of mandate (*see § 150.30*) or a petition for a writ of prohibition (*see § 150.70*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated. For example, counsel should identify other similar lawsuits that are pending and demonstrate that no case law exists to guide the trial court on the issues that are the subject of the writ petition.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender).

[c] Opposing Memoranda

The points and authorities set out in *§§ 150.185* and *150.186* may be used in an appropriate case to oppose a petition for mandate or prohibition that is supported by the foregoing points and authorities.

[3] Discussion of Authorities

[a] Similar Lawsuits Pending

In ***California Highway Patrol v. Superior Court*** *(2006) 135 Cal. App. 4th 488, 38 Cal. Rptr. 3d 16* , the California Highway Patrol (CHP) responded to an accident caused by a driver driving under the influence of alcohol. The CHP billed the driver for its costs in responding to the accident. The driver paid part of the billed amount and disputed the remainder in a class action filed against the CHP. In response to the driver's summary judgment motion, the trial court ruled that the CHP could recover some of its costs but was not entitled to recover its law enforcement expenses such as performing a field sobriety test and making an arrest. The CHP filed a petition for a writ of mandate challenging the trial court's order.

The court of appeal noted the pendency of many similar cases pending in California. The court held that, ordinarily, an appeal after trial presents an adequate remedy at law for a party aggrieved by an order granting summary adjudication (*135 Cal. App. 4th 488, 496*). Here, however, interlocutory writ review was appropriate because the petition raised an issue of first impression that was of widespread interest, as the multiplicity of similar lawsuits confirmed (*135 Cal. App. 4th 488, 496*). The court held that judicial economy was best served by an early appellate resolution of the issue (*135 Cal. App. 4th 488, 496*).

In ***State of California ex rel. Dept. of Rehabilitation v. Superior Court*** *(1982) 137 Cal. App. 3d 282, 187 Cal. Rptr. 1* , a physically handicapped person sued a restaurant for failure to provide restroom facilities and an access ramp for the handicapped. The restaurant settled this action but cross-complained for indemnity against the architects of the building, the contractor, and the city, alleging negligent failure to advise the restaurant management of handicap accessibility requirements. The complaint also alleged that the city was under a duty to prevent construction of buildings that failed to meet the requirements. The city answered and cross-complained against the state and the Attorney General, alleging that the Department of Rehabilitation and the Attorney General knew that the city was not exacting compliance with the access requirements in issuing building permits and failed to advise the city to refuse to issue those building permits. The department and the Attorney General answered and moved for judgment on the pleadings. The trial court denied the motion, and the moving parties petitioned for a writ of mandate to direct the trial court to enter judgment in their favor.

The court of appeal issued the writ, holding that the department had no duty to inform city officials of the provisions requiring compliance and that the Attorney General was immune from liability for failure to enforce the law (*137 Cal. App. 3d 282, 285-287)* . The court held that review by extraordinary writ was appropriate because similar lawsuits were

pending and no case law existed on the argued issues for the trial courts' guidance (*137 Cal. App. 3d 282, 285)* .

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15-150 California Points & Authorities § 150.164

§ 150.164 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--Petitioner Cannot Bring Action Against Respondent

[1] FORM

[*The following should be combined, when appropriate, with general points and authorities supporting the contention that petitioner lacks a plain, speedy, and adequate remedy in the ordinary course of law (see, e.g., § 150.160), and with a general memorandum supporting a petition for a writ of mandate (see, e.g., § 150.30) or a petition for a writ of prohibition (see, e.g., § 150.70).*]

PETITIONER'S REMEDY AT LAW IS INADEQUATE BECAUSE PETITIONER HAS NO CAUSE OF ACTION AGAINST RESPONDENT.

A. No Grounds for Action Against Respondent. A petitioner has no adequate remedy at law when no grounds exist for an action against respondent (*Candid Enterprises, Inc. v. Grossmont Union High School Dist. (1985) 39 Cal. 3d 878, 885 n.3, 218 Cal. Rptr. 303, 705 P.2d 876*).

[*Optional*] **B. Availability of Declaratory Relief Not Determinative.** The fact that an action for declaratory relief lies does not prevent the use of mandate (*Glendale City Employees' Assn., Inc. v. City of Glendale (1975) 15 Cal. 3d 328, 343 n.20, 124 Cal. Rptr. 513, 540 P.2d 609*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that the petitioner lacks a plain, speedy, and adequate remedy in the ordinary course of law, because there is no grounds for an action against respondent.

The foregoing points and authorities should be combined with general points and authorities relating to the lack of adequate legal remedy requirement (*see § 150.160*), and, when appropriate, with additional, more specific points and authorities relating to this requirement (*see §§ 150.161, 150.163, 150.165*-150.182). The combined points and authorities relating to the lack of adequate legal remedy requirement should then be combined, in turn, with a general memorandum supporting a petition for a writ of mandate (*see § 150.30*) or a petition for a writ of prohibition (*see § 150.70*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] No Grounds for Action Against Respondent

In ***Candid Enterprises, Inc. v. Grossmont Union High School Dist.*** *(1985) 39 Cal. 3d 878, 218 Cal. Rptr. 303, 705 P.2d 876* , respondent, a high school district, entered into an agreement with petitioner's predecessor in interest, a real estate developer who planned to build a condominium project. The developer agreed to pay certain "school-impact fees," which had been established to ensure that new developments financed any increased need for school facilities that was attributable to those developments. In exchange, the district issued to the county a "school-availability letter," attesting that adequate school facilities could be provided. Under county law, issuance of such a letter was a prerequisite to approval of any proposed development. By the time petitioner sought building permits for the condominium project, enrollment in the school district had declined and the district was no longer entering into agreements for collection of school-impact fees. Petitioner paid the fees under protest and then, by letter, unsuccessfully sought a refund from the district. Petitioner then met with the district's governing board, which also refused to refund the fees or cancel the agreement. Finally, petitioner filed for a writ of mandate against the district and its governing board. The trial court overruled respondents' demurrer and ordered that mandate issue. Respondents appealed.

The California Supreme Court reversed on the substantive ground that the imposition of school impact fees did not violate petitioner's right to equal protection and was not preempted by state law (*39 Cal. 3d 878, 885)* . However, the Court also held that the demurrer was properly overruled because a writ of mandate was available as a potential remedy. The Court reasoned that petitioner had no plain, speedy, and adequate remedy in the ordinary course of law. An action on the contract for refund of fees paid, as well as release from payment of the remainder, was inadequate because there were no grounds on which to allege a breach or to seek rescission. No statutory action for a refund then existed. Petitioner had no grounds to file for a writ of administrative mandate under *Code Civ. Proc. § 1094.5* because the governing board was not required by law to grant petitioner a hearing on the request for a refund. Finally, the Court observed, an action for declaratory relief was inappropriate because petitioner was attacking the county law as applied. The Court cited for this principle *Mobil Oil Corp. v. Superior Court (1976) 59 Cal. App. 3d 293, 307, 130 Cal. Rptr. 814* , in which the court of appeal held that a challenge to an act as applied by an administrative board is a challenge to an administrative action, and therefore is properly brought under *Code Civ. Proc. § 1094.5* rather than by means of an action for declaratory relief (*39 Cal. 3d 878, 885 n.3*).

[b] Availability of Declaratory Relief Not Determinative

The facts and procedure in ***Glendale City Employees' Assn., Inc. v. City of Glendale*** *(1975) 15 Cal. 3d 328, 124 Cal. Rptr. 513, 540 P.2d 609* , are discussed in *§ 150.39[3][b]*. The Supreme Court upheld the trial court's determination that mandate was available because plaintiffs had no adequate remedy at law. An action for breach of contract was not

adequate because payment of plaintiffs' wages required the cooperation of certain city officials (*15 Cal. 3d 328, 343)* . The Court also noted that plaintiffs had sought declaratory relief in their action and had established a controversy sufficient to justify that remedy. However, the Court held, the fact that an action in declaratory relief lies does not prevent the use of mandate (*15 Cal. 3d 328, 343 n.20*).

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15-150 California Points & Authorities § 150.165

§ 150.165 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--Appeal Is Inadequate Remedy to Protect Petitioner's Substantial Rights--General Form

[1] FORM

[*The following should be combined, when appropriate, with general points and authorities supporting the contention that petitioner lacks a plain, speedy, and adequate remedy in the ordinary course of law (see, e.g., § 150.160), and with a general memorandum supporting a petition for a writ of mandate (see, e.g., § 150.30) or a petition for a writ of prohibition (see, e.g., § 150.70).*]

PETITIONER'S REMEDY AT LAW IS INADEQUATE BECAUSE PETITIONER HAS NO RIGHT TO AN IMMEDIATE REVIEW BY APPEAL AND, UNDER THE CIRCUMSTANCES OF THIS CASE, THE RIGHT TO APPEAL A LATER JUDGMENT DOES NOT AFFORD PETITIONER AN ADEQUATE REMEDY.

A. No Direct Appeal. The order challenged by petitioner is not appealable (*see Code Civ. Proc. § 904.1*).

[*AND*]

B. Appeal Is Inadequate Remedy. Petitioner's right to an appeal from an eventual judgment is an inadequate remedy when the circumstances of the case, including the expense of proceeding with trial, the prejudice resulting from delay, the inordinate pretrial expenses, and the possibility that the asserted error might infect the trial and might not be corrected in a lower tribunal before or during trial weigh in favor of granting petitioner immediate relief (*Vineyard Springs Estates, LLC v. Superior Court (2004) 120 Cal. App. 4th 633, 643, 15 Cal. Rptr. 3d 587* ; *Hogya v. Superior Court (1977) 75 Cal. App. 3d 122, 128, 142 Cal. Rptr. 325*).

[*Optional*] **C. Prejudice From Delay.** Petitioner's remedy by appeal from an eventual judgment is inadequate when, by the time an appeal is heard, a favorable decision will no longer protect petitioner's rights (*Corona etc. Hosp. Dist. v.*

Superior Court (1964) 61 Cal. 2d 846, 850-852, 40 Cal. Rptr. 745, 395 P.2d 817 ; *Tracy Educators Ass'n v. Superior Court (2002) 96 Cal. App. 4th 530, 534, 116 Cal. Rptr. 2d 916* ; *Running Fence Corp. v. Superior Court (1975) 51 Cal. App. 3d 400, 412-413, 124 Cal. Rptr. 339*).

[*Optional*] **D. Review by Extraordinary Writ May Be Proper When It Will Not Halt Ordinary Progress of Action.** Review by petition for an extraordinary writ is proper in some instances even though the petitioner may have a clear remedy by appeal, when the writ review does not halt the ordinary pre-judgment processing of the case. [Thus, if the case has already reached judgment and has been through the appeal process once, and has been apparently resolved except for narrow issues to be resolved by the trial court on remand, the appellate court may properly consider a writ petition for review of the trial court's ruling on that issue when it appears that the ruling was in error. The court of appeal should use of the writ review procedure to resolve promptly a "dangling issue" in such a case]. (*Science Applications Internat. Corp. v. Superior Court (1995) 39 Cal. App. 4th 1095, 1100, 1102, 46 Cal. Rptr. 2d 332*).

[*Add additional, more specific points and authorities, as appropriate, relating to the inadequacy of the remedy of appeal under the particular circumstances of the case (see, e.g., §§ 150.166-150.182).*]

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that the petitioner lacks a plain, speedy, and adequate remedy in the ordinary course of law, because the petitioner's remedy by appeal is inadequate.

This form should be combined with general points and authorities relating to the lack of adequate legal remedy requirement (*see § 150.160*), and with more specific points and authorities relating the inadequacy of the remedy of appeal (*see §§ 150.166*-150.182). It should also be combined, when appropriate, with other specific points and authorities relating to the lack of adequate legal requirement (*see §§ 150.161*-150.164). The combined points and authorities relating to the lack of adequate legal remedy requirement should then be combined, in turn, with a general memorandum supporting a petition for a writ of mandate (*see § 150.30*) or a petition for a writ of prohibition (*see § 150.70*).

Counsel should insert argument within this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* , in California Forms of Pleading and Practice (Matthew Bender). For discussion, forms, and a procedural guide relating to appeals generally, see Ch. 40, *Appeal: An Overview* .

[c] Related Memoranda

For memoranda for use in mandate and prohibition proceedings to review discovery orders, see Ch. 89A, *Discovery: Review of Discovery Orders* .

[d] Opposing Memoranda

The points and authorities set out in *§ 150.185* may be used in an appropriate case to oppose a petition for mandate that is supported by this form.

[3] Discussion of Authorities

[a] Appeal Is Inadequate Remedy

In ***Vineyard Springs Estates, LLC v. Superior Court*** *(2004) 120 Cal. App. 4th 633, 643, 15 Cal. Rptr. 3d 587* , Wyatt filed an action for premises liability and negligence against Vineyard, the owner of a shopping center, after Wyatt had been assaulted at the shopping center. Vineyard moved for summary judgment, asserting that Wyatt could not establish a triable issue of material fact as to duty, breach, or causation, because Vineyard had had no knowledge of prior similar crimes occurring at the shopping center. In her opposition to the motion, Wyatt included declarations from her attorney and others suggesting that Vineyard had had constructive knowledge of prior similar incidents. Vineyard objected to the declarations on several grounds, including lack of foundation, inadmissible hearsay, and lack of authentication.

The trial court tentatively denied Vineyard's summary judgment motion, finding a triable issue of fact as to Vineyard's constructive notice of prior similar incidents. The tentative ruling did not mention Vineyard's evidentiary objections. At the hearing on the motion, Vineyard's counsel repeatedly pointed out the trial court's failure to rule on the objections and requested a ruling. The court promised at three different times during the hearing that it would provide one. Vineyard's counsel argued the merits of the objections. She also asserted that if the objections were valid, all of Wyatt's evidence was inadmissible, mandating summary judgment for Vineyard.

The trial court ultimately denied Vineyard's motion for summary judgment, and failed to rule on or mention Vineyard's evidentiary objections to Wyatt's evidence.

Vineyard petitioned the court of appeals for a writ of mandate, requesting a peremptory writ directing the trial court to rule on the evidentiary objections. The court of appeal held that *Code Civ. Proc. § 437c* requires trial courts to weigh and rule on evidentiary objections in connection with summary judgment motions. Section 437c(g) provides that the trial court's "order shall specifically refer to the evidence proffered in support of, and if applicable in opposition to, the motion which indicates that no triable issue exists" (*120 Cal. App. 4th 633, 642)* . The court held that, if a trial court fails to rule on summary judgment evidentiary objections, the objections are ordinarily deemed waived on appeal, and the appellate court will consider the objected-to evidence in reviewing the ruling on the motion. Thus, the court held, Vineyard had no plain, speedy, and adequate remedy in the ordinary course of law, because it was headed for trial (*120 Cal. App. 4th 633, 643)* . The court issued a writ commanding the trial court to vacate its order denying summary judgment, rule on all evidentiary objections, and reconsider the summary judgment motion in light of its rulings on the evidentiary objections (*120 Cal. App. 4th 633, 643)* .

In ***Hogya v. Superior Court*** *(1977) 75 Cal. App. 3d 122, 142 Cal. Rptr. 325* , petitioner brought a class action under the Consumer Legal Remedies Act (*Civ. Code § 1750 et seq.*) against various meat sellers for fraud in labeling. Although the trial court concluded that all of the statutory criteria were met, it refused to certify the class based on other considerations. Petitioner sought writ of mandate to compel the trial court to grant his motion for class certification. The court of appeal granted the writ, holding that the statutory criteria were exclusive and the trial court had a duty to certify the class (*75 Cal. App. 3d 122, 140)* . In its discussion of the availability of writ review, the Court reviewed the factors that must be considered in evaluating the adequacy of the appellate remedy. These include, but are not limited to, the expense of proceeding with trial, prejudice resulting from delay, inordinate pretrial expenses, the possibility that the asserted error might not infect the trial, and the possibility the asserted error might be corrected in a lower tribunal before or during trial (*75 Cal. App. 3d 122, 128)* . The court found that there was no reasonable likelihood that any single member of the class could recover more than $10 (*75 Cal. App. 3d 122, 130-131)* . Therefore, the court concluded, the expense of proceeding through trial was grossly disproportionate to the damages petitioner could expect to recover in his individual capacity and appeal from final judgment was not a practical remedy (*75 Cal. App. 3d 122, 131)* .

[b] Prejudice From Delay

The facts and procedure of ***Corona etc. Hosp. Dist. v. Superior Court*** *(1964) 61 Cal. 2d 846, 40 Cal. Rptr. 745, 395*

P.2d 817 , are discussed in *§ 150.161[3][a]*. The Supreme Court concluded that the hospital district did not have an adequate remedy at law because the time required for appeal would mean that the district would lose its construction contract, its site, the benefit of the statute being challenged, and money. The Supreme Court acknowledged that generally the fact that prohibition was not as expeditious as appeal was not sufficient. It held, however, that when an appeal would not only be inexpeditious but would be totally ineffective in protecting petitioner's rights, the only adequate remedy is prohibition (*61 Cal. 2d 846, 850-852)* .

In ***Tracy Educators Assn. v. Superior Court*** *(2002) 96 Cal. App. 4th 530, 116 Cal. Rptr. 2d 916* , the school district rejected a teacher's request for a half-time leave of absence to fulfill her duties as president of a teachers' association. The association filed a petition for writ of mandate in the trial court to compel the district to grant the request. The trial court denied the petition. Instead of appealing, the association filed a petition for writ of mandate in the court of appeal. The court of appeal held that mandamus was appropriate because, by the time an appeal could be resolved, the teacher's two-year term as association president would have expired. Hence, appeal was not an adequate remedy (*96 Cal. App. 4th 530, 534)* .

In ***Running Fence Corp. v. Superior Court*** *(1975) 51 Cal. App. 3d 400, 124 Cal. Rptr. 339* , an artist obtained a use permit to construct and display his running fence, a 24-mile long art project, in Marin and Sonoma counties. A group organized to stop the art project successfully petitioned for a writ of mandate to direct the county board of supervisors to set aside its approval of the project on the basis that an environmental impact report was required. The artist then sought a writ of prohibition to restrain the trial court from taking any further proceedings in the action.

The court of appeal issued the writ, holding that the trial court exceeded its jurisdiction because the requirements of the state Environmental Quality Act (*Pub. Res. Code § 21050 et seq.*) were met (*51 Cal. App. 3d 400, 431-433)* . The Court also determined that the remedy of appeal was not adequate because the time required for appeal would mean that the project could not be undertaken. The permits would expire, easements to use the land would expire, the weather would turn rainy, and various other additional expenses would occur (*51 Cal. App. 3d 400, 409-413)* .

[c] Review by Extraordinary Writ May Be Proper When It Will Not Halt Ordinary Progress of Action

In ***Science Applications Internat. Corp. v. Superior Court*** *(1995) 39 Cal. App. 4th 1095, 46 Cal. Rptr. 2d 332* , a party filed a petition for writ of mandate requesting immediate review of the trial court's ruling on the assessment of costs, as litigation expenses, of "high-powered computer support akin to paralegal services or document retrieval." There had been an appeal from the underlying judgment, and the court of appeal had remanded the case to the trial court solely to determine the issue of costs.

The court of appeal issued a writ, directing the superior court to vacate its ruling. In so acting, the appellate court addressed the propriety of determining the petition for the writ on its merits, despite the existence of a clear remedy by appeal. The "clear remedy" rule reflects a general policy not to interfere in the ordinary progress of an action toward judgment by limiting immediate, intermediate review of issues that may ultimately by reviewed on appeal of the entire judgment. The court reasoned that this policy did not apply to the writ petition at issue, because the parties had already had their full "day in court," and they had already "stood in line" through one complete turn in appeal process. There were other special reasons for allowing immediate review by writ. While the case had originally presented multiple and difficult issues, the remaining issue sent to the trial court for resolution on remand was narrow. Moreover, the issue had already been briefed once and, to some extent, considered by the appellate court. The court stated that when a piece of litigation has "once journeyed the full and tiresome path of appellate review," gaining apparent resolution with the exception of only one post-appellate trial court ruling, a petition for writ of mandate to review that ruling should be determined on the merits when it appears the ruling is erroneous. The court of appeal should not avoid using the writ process when it may it to resolve a final, "dangling issue" promptly (*39 Cal. App. 4th 1095, 1100-1102)* .

[4] Additional Authorities

[a] Prejudice From Delay

In *Housing Authority v. Superior Court (1950) 35 Cal. 2d 550, 219 P.2d 457* , a city had a commitment for federal money to construct low-income housing. Citizens obtained sufficient signatures on a referendum against the project but the city clerk refused to file the referendum on the ground that it was not proper because the city's action was administrative while the power of referendum only applies to legislative acts. The citizens then sued to enjoin the project. The housing authority petitioned for a writ of prohibition against the superior court's assumption of jurisdiction over the suit. The Supreme Court held that the Housing Authority's remedy of appeal was inadequate because the federal funds would be lost during the time required for appeal. It then held that the referendum was not proper and issued the writ (*35 Cal. 2d 550, 556-559)* .

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iii. Lack of Adequate Legal Remedy Requirement

15-150 California Points & Authorities § 150.166

§ 150.166 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--Appeal Is Inadequate Remedy to Protect Petitioner's Substantial Rights--Review of Order Denying Leave to Amend or File Pleading

[1] FORM

[*The following should be combined, when appropriate, with general points and authorities supporting the contention that petitioner lacks a plain, speedy, and adequate remedy in the ordinary course of law (see, e.g., § 150.160), with general points and authorities supporting the contention that appeal is not an adequate remedy (see, e.g., § 150.165), and with a general memorandum supporting a petition for a writ of mandate (see, e.g., § 150.30) or a petition for a writ of prohibition (see, e.g., § 150.70).*]

APPEAL IS NOT AN ADEQUATE REMEDY BECAUSE THE COURT'S ORDER DENYING PETITIONER LEAVE TO _____ [AMEND *or* FILE] HIS/HER PLEADING HAS DEPRIVED PETITIONER OF THE OPPORTUNITY TO PLEAD A _____ [CAUSE OF ACTION *or* DEFENSE].

A. No Opportunity to Plead Cause of Action or Defense. When it appears that the trial court has made a ruling that deprives a party of the opportunity to plead his or her cause of action or defense, relief by mandate may be appropriate to prevent a needless and expensive trial and reversal (*Holtz v. Superior Court (1970) 3 Cal. 3d 296, 301 n.4, 90 Cal. Rptr. 345, 475 P.2d 441* ; *Tate v. Superior Court (1963) 213 Cal. App. 2d 238, 251, 28 Cal. Rptr. 548*).

[*EITHER*]

B. Amendment of Complaint. A writ of mandate will lie to compel the trial court to permit an amendment of a complaint when the court's refusal to permit the amendment deprives petitioner of the opportunity to plead his or her cause of action (*Daum v. Superior Court (1964) 228 Cal. App. 2d 283, 289, 39 Cal. Rptr. 443*).

[*OR*]

B. Filing of Cross-Complaint. A writ of mandate will lie to compel the trial court to permit the filing of a cross-complaint when the court's refusal to accept the cross-complaint was an abuse of discretion (*Foot's Transfer & Storage Co. v. Superior Court (1980) 114 Cal. App. 3d 897, 901-902, 171 Cal. Rptr. 1*).

[*OR*]

B. Amendment of Answer. A writ of mandate will lie to compel the trial court to allow an amendment to an answer when the court's refusal to permit the amendment deprives petitioner of the opportunity to plead his or her defense to the action (*Tate v. Superior Court (1963) 213 Cal. App. 2d 238, 251, 28 Cal. Rptr. 548*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that the petitioner lacks a plain, speedy, and adequate remedy in the ordinary course of law, because the petitioner's remedy by appeal is inadequate. The specific ground for the contention is that appeal is an inadequate remedy to review a denial of a motion for leave to amend a pleading or file a cross-complaint.

The foregoing points and authorities should be combined with general points and authorities relating to the lack of adequate legal remedy requirement (*see § 150.160*), with general points and authorities relating to the inadequacy of the remedy of appeal (*see § 150.165*), and, if appropriate, with other specific points and authorities relating to the inadequacy of the remedy of appeal (*see §§ 150.167 -150.182*). They should also be combined, when appropriate, with other specific points and authorities relating to the lack of adequate legal requirement (*see §§ 150.161 -150.164*). The combined points and authorities relating to the lack of adequate legal remedy requirement should then be combined, in turn, with a general memorandum supporting a petition for a writ of mandate (*see § 150.30*) or a petition for a writ of prohibition (*see § 150.70*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender).

[c] Opposing Memoranda

The points and authorities set out in *§ 150.185* may be used in an appropriate case to oppose a petition for mandate that is supported by the foregoing points and authorities.

[3] Discussion of Authorities

[a] No Opportunity to Plead Cause of Action or Defense

In ***Holtz v. Superior Court*** *(1970) 3 Cal. 3d 296, 90 Cal. Rptr. 345, 475 P.2d 441* , plaintiffs brought an action alleging that their land and buildings were damaged by excavation done by the city in connection with subway

construction. The complaint contained a strict liability count, based on a theory of inverse condemnation, and a count for negligence. The city moved to strike those allegations of the complaint alleging damage to the buildings, relying on *Civ. Code § 832*, which absolves an excavator from liability to a neighbor under certain conditions. The trial court determined that the statute did not absolve a negligent excavator and denied the motion to strike with respect to the second count. The court granted the motion, however, with respect to the strict liability count. Plaintiffs sought a writ of mandate to compel the trial court to reinstate the stricken allegations.

The Supreme Court granted the writ, holding that general inverse condemnation principles made the city strictly liable for any damage (*3 Cal. 3d 296, 311)* . In its discussion of the adequacy of plaintiffs' appellate remedy, the Court applied the principle that, when it appears that the trial court has made a ruling that deprives a party of the opportunity to plead his or her cause of action or defense, relief by mandate may be appropriate to prevent a needless and expensive trial and reversal. Most of plaintiffs' injury involved damage to their buildings. Therefore, striking the allegations of those damages was, for all practical purposes, substantially equivalent to striking the entire inverse condemnation cause of action. Under those circumstances, plaintiffs could properly seek relief through a writ of mandate (*3 Cal. 3d 296, 301 n.4*).

In ***Tate v. Superior Court*** *(1963) 213 Cal. App. 2d 238, 28 Cal. Rptr. 548* , plaintiff brought an action against defendants for injuries he suffered on the job. Plaintiff's employer and the employer's worker's compensation carrier were not parties to the action. One defendant amended his answer to allege the employer's contributory negligence and to request that payments plaintiff had already received from the insurance carrier be setoff against any damages award. The trial court sustained plaintiff's demurrer to the amendment to the answer. The remaining defendants moved to amend their answers and were denied. Defendants then sought a writ of mandate to compel the trial court to allow the affirmative defenses.

The court of appeal granted the writ, holding that a third-party tortfeasor can invoke the concurrent negligence of the employer in an action brought by the employee (*213 Cal. App. 2d 238, 245-246, 251)* . In its discussion of the propriety of the writ, the court observed that the motions for leave to amend were supported by an ample showing of good cause (*213 Cal. App. 2d 238, 249)* . In addition, there was no reason to believe that allowing the amendments would either add to the complexity of the trial or delay it significantly (*213 Cal. App. 2d 238, 250)* . When it appears that the trial court has made a ruling that deprives a party of the opportunity to plead a cause of action or defense, the court stated, relief by mandate may be appropriate to prevent a needless and expensive trial and reversal (*213 Cal. App. 2d 238, 251)* .

[b] Amendment of Complaint

In ***Daum v. Superior Court*** *(1964) 228 Cal. App. 2d 283, 39 Cal. Rptr. 443* , the trial court sustained defendants' demurrer to a contract action on the ground that conditions precedent in the contract had not occurred. Plaintiff moved for leave to amend the complaint to allege defendants' anticipatory breach. When the motion was denied, plaintiff sought a writ of mandate ordering the court to permit filing of the amended complaint.

The court of appeal issued the writ, holding that the amended complaint pleaded the necessary elements of an anticipatory breach (*228 Cal. App. 2d 283, 288, 290)* . In its discussion of the availability of the writ, the court recognized that it is error to refuse permission to amend when the motion is timely made and when granting the motion will not prejudice the opposing party. When, in addition, the refusal results in a party being deprived of the right to assert a meritorious cause of action or a meritorious defense, it it not only error but an abuse of discretion and mandate will lie (*228 Cal. App. 2d 283, 286, 289)* .

[c] Filing of Cross Complaint

In ***Foot's Transfer & Storage Co. v. Superior Court*** *(1980) 114 Cal. App. 3d 897, 171 Cal. Rptr. 1* , petitioner was the

defendant in an action for damages for breach of contract. After a default was taken against petitioner and then vacated, petitioner filed an answer, which did not contain any affirmative defenses or counterclaims. After petitioner made numerous unsuccessful requests that plaintiff stipulate to the filing of a cross-complaint, and nearly two years after petitioner had been served with the complaint, petitioner moved for leave to file a cross-complaint under *Code Civ. Proc. § 426.50*. The motion was denied and petitioner sought a writ of mandate to compel the trial court to grant the motion.

The court of appeal granted the writ, holding that the evidence to support the trial court's denial of the motion was insufficient as a matter of law (*114 Cal. App. 3d 897, 904)* . The court recognized that mandate will issue when the trial court abuses its discretion (*114 Cal. App. 3d 897, 902)* . The court held that the trial court, in denying the motion, made an implied finding of bad faith on the part of petitioner that was not supported by petitioner's delay in seeking leave to file the cross-complaint (*114 Cal. App. 3d 897, 902-903)* .

[d] Amendment of Answer

The facts and procedure of ***Tate v. Superior Court*** *(1963) 213 Cal. App. 2d 238, 28 Cal. Rptr. 548* , are discussed under *§ 150.166[3][a]*. In issuing a writ of mandate to compel the trial court to permit defendants to amend their answers to raise a defense, the court of appeal held that the motions for leave to amend were supported by an ample showing of good cause (*213 Cal. App. 2d 238, 249)* . In addition, there was no reason to believe that allowing the amendments would either add to the complexity of the trial or delay it significantly (*213 Cal. App. 2d 238, 250)* .

[4] Additional Authorities

[a] Amendment of Complaint

In *Peterson v. Superior Court (1982) 31 Cal. 3d 147, 181 Cal. Rptr. 784, 642 P.2d 1305* , a passenger brought a personal injury action against a driver who was allegedly intoxicated at the time of an accident. Plaintiff moved for leave to file an amended complaint to allege facts justifying an award of punitive damages. The trial court denied the motion on the ground that *Taylor v. Superior Court (1979) 24 Cal. 3d 890, 157 Cal. Rptr. 693, 598 P.2d 854* , which authorized such damages, was not retroactive. Plaintiff then sought a writ of mandate to compel the trial court to grant leave to amend the complaint.

The Supreme Court issued the writ, holding that *Taylor* was retroactive (*31 Cal. 3d 147, 150, 152-158, 164)* . In its discussion of the availability of mandate, the Court stated that the writ will lie when it appears that the trial court has deprived a party of an opportunity to plead his or her cause of action or defense, and when extraordinary relief may prevent a needless and expensive trial and reversal. The Court concluded that such a combination of circumstances existed in petitioner's case (*31 Cal. 3d 147, 164)* .

In *Landis v. Superior Court (1965) 232 Cal. App. 2d 548, 42 Cal. Rptr. 893* , the court of appeal held that the trial court had abused its discretion in refusing to permit petitioner to amend his complaint (*232 Cal. App. 2d 548, 557)* . The amendment sufficiently stated a cause of action for reformation and breach of contract, and did not raise a disfavored plea, contradict a material admission in the original pleading, or change the basic cause of action (*232 Cal. App. 2d 548, 556)* . Moreover, the only apparent hardship to the defendants was that they would have to defend. In light of these circumstances, the court of appeal issued a writ of mandate directing the respondent court to permit the filing of petitioner's amended complaint (*232 Cal. App. 2d 548, 557)* .

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15-150 California Points & Authorities § 150.167

§ 150.167 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--Appeal Is Inadequate Remedy to Protect Petitioner's Substantial Rights--Review of Order Granting Motion to Strike

[1] FORM

[*The following should be combined, when appropriate, with general points and authorities supporting the contention that petitioner lacks a plain, speedy, and adequate remedy in the ordinary course of law (see, e.g., § 150.160), with general points and authorities supporting the contention that appeal is not an adequate remedy (see, e.g., § 150.165), and with a general memorandum supporting a petition for a writ of mandate (see, e.g., § 150.30) or a petition for a writ of prohibition (see, e.g., § 150.70).*]

APPEAL IS NOT AN ADEQUATE REMEDY BECAUSE THE COURT'S ORDER TO STRIKE PETITIONER'S _____ [*specify pleading or part of pleading, e.g.,* FOURTH AFFIRMATIVE DEFENSE] DEPRIVES PETITIONER OF THE OPPORTUNITY TO PLEAD A _____ [CAUSE OF ACTION *or* DEFENSE].

A. No Opportunity to Plead Cause of Action or Defense. [*See § 150.166, Paragraph A.*]

B. Motion to Strike. A writ of mandate will lie to review an order granting a motion to strike when the order deprives petitioner of the opportunity to plead his or her cause of action or defense (*Holtz v. Superior Court (1970) 3 Cal. 3d 296, 301 n.4, 90 Cal. Rptr. 345, 475 P.2d 441* ; *Perkins v. Superior Court (1981) 117 Cal. App. 3d 1, 5, 172 Cal. Rptr. 427*).

[*Optional*] **C. Absolute Defense Stricken.** Petitioner's right to appeal an adverse judgment is not adequate when the court has stricken a defense that, if proven, constitutes a complete bar to the action (*Carter v. Superior Court (1956) 142 Cal. App. 2d 350, 359, 298 P.2d 598*).

[*Optional*] **D. Entire Answer Stricken.** Petitioner's right to appeal an adverse judgment is not an adequate remedy when the court has stricken the entire answer (*Mediterranean Exports, Inc. v. Superior Court (1981) 119 Cal. App. 3d 605, 618, 174 Cal. Rptr. 169*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that the petitioner lacks a plain, speedy, and adequate remedy in the ordinary course of law, because the petitioner's remedy by appeal is inadequate. The specific ground for the contention is that appeal is an inadequate remedy to review the grant of a motion to strike a complete defense or answer.

The foregoing points and authorities should be combined with general points and authorities relating to the lack of adequate legal remedy requirement (*see § 150.160*), with general points and authorities relating to the inadequacy of the remedy of appeal (*see § 150.165*), and, if appropriate, with other specific points and authorities relating to the inadequacy of the remedy of appeal (*see §§ 150.166, 150.169*-150.182). They should also be combined, when appropriate, with other specific points and authorities relating to the lack of adequate legal requirement (*see §§ 150.161*-150.164). The combined points and authorities relating to the lack of adequate legal remedy requirement should then be combined, in turn, with a general memorandum supporting a petition for writ of mandate (*see § 150.30*) or a petition for a writ of prohibition (*see § 150.70*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender).

[c] Opposing Memoranda

The points and authorities set out in *§ 150.185* may be used in an appropriate case to oppose a petition for mandate that is supported by the foregoing points and authorities.

[3] Discussion of Authorities

[a] Motion to Strike

The facts and procedure in ***Holtz v. Superior Court*** *(1970) 3 Cal. 3d 296, 90 Cal. Rptr. 345, 475 P.2d 441* , are discussed in *§ 150.166[3][a]*. The Supreme Court issued a writ of mandate to compel the trial court to reinstate damages allegations that had been stricken, holding that the writ was proper because the order to strike had deprived plaintiff of the opportunity to plead his cause of action or defense (*3 Cal. 3d 296, 301 n.4*).

In ***Perkins v. Superior Court*** *(1981) 117 Cal. App. 3d 1, 172 Cal. Rptr. 427* , plaintiff sued defendant for invasion of privacy and interference with business. Defendant moved to strike the phrase "wrongfully and intentionally," and the word "retaliation" from the complaint, arguing that the phrase and the word were mere legal conclusions. Defendant also moved to strike all references to punitive damages. Defendant's motion was granted, and plaintiff sought a writ of mandate in the court of appeal.

In issuing the writ, the court of appeal held that mandate is proper when a trial court has deprived a party of the

opportunity to plead his or her action, and when extraordinary relief at the pleading stage could prevent reversal or retrial (*117 Cal. App. 3d 1, 5)* . The court also held that the language in question, when taken in context rather than in isolation, sufficiently described ultimate facts constituting a cause of action for punitive damages, especially in view of the fact that the distinction between ultimate facts and legal conclusions is not a clear one (*117 Cal. App. 3d 1, 6-7)* . Therefore, the trial court had abused its discretion in granting the motion to strike (*117 Cal. App. 3d 1, 7)* .

[b] Absolute Defense

In ***Carter v. Superior Court*** *(1956) 142 Cal. App. 2d 350, 298 P.2d 598* , plaintiff filed an action against his employer for injuries incurred on the job. In the answer, the employer alleged that plaintiff had filed the claim with the Industrial Accident Commission and entered into an agreement of compromise and release with the employer and the employer's compensation carrier and that, furthermore, the Commission now had exclusive jurisdiction of the dispute. The trial court granted plaintiff's motion to strike the defense from the answer and the employer sought a writ of prohibition to restrain the court from further proceedings or a writ of mandate to compel the court to reinstate the employer's defense.

The court of appeal granted the writ of mandate, holding that the facts pleaded in the proposed defense were sufficient, if proven, to bar the action (*142 Cal. App. 2d 350, 356)* . In its discussion of the availability of mandate, the court held that an appeal from an adverse judgment was not an adequate remedy because the defense, if sustained by proof, would terminate the action without any trial of the issues tendered by the complaint. Defendant had a right to assert his meritorious defenses (*142 Cal. App. 2d 350, 359)* .

[c] Entire Answer Stricken

In ***Mediterranean Exports, Inc. v. Superior Court*** *(1981) 119 Cal. App. 3d 605, 174 Cal. Rptr. 169* , plaintiff brought an action for breach of a commercial lease against a foreign corporation allegedly doing business in California. Plaintiff moved for an order to strike defendant's answer and cross-complaint on the ground of lack of capacity, alleging that defendant was unqualified to do business in the state and had forfeited its ability to defend by failure to pay state corporate taxes. The court granted the motion and defendant sought a writ of mandate to reinstate the answer and cross-complaint.

The court of appeal issued the writ, holding that there was a triable issue of fact concerning whether defendant was actually doing business in California and on the issue of whether defendant had pay its taxes (*119 Cal. App. 3d 605, 617-618, 619)* . In its discussion of the adequacy of an appellate remedy, the court held that the "final judgment" from which defendant might appeal would necessarily be a default judgment because the court order struck its answer in the action. The erroneous order therefore deprived defendant of the right to defend the action, as well as the right to sue on the cross-complaint, and extraordinary relief was called for (*119 Cal. App. 3d 605, 618)* .

[4] Additional Authorities

[a] Motion to Strike

In *Brandt v. Superior Court (1985) 37 Cal. 3d 813, 210 Cal. Rptr. 211, 693 P.2d 796* , plaintiff brought an action against an insurer for breach of the covenant of good faith and fair dealing, based on the insurer's refusal to pay benefits allegedly due under plaintiff's policy. The trial court granted defendant's motion to strike the portion of the complaint that sought attorney's fees as damages incurred in compelling payment, including fees for bringing a breach of contract action against the insurer. Plaintiff filed mandate proceedings. Noting its reluctance to exercise its discretion to review rulings at the pleading stage, the Supreme Court held that in this case extraordinary relief was appropriate because the issue was of widespread interest, the courts of appeal were in conflict, and the trial court's ruling effectively deprived plaintiff of the opportunity to present a substantial portion of his cause of action (*37 Cal. 3d 813, 816)* . The Court issued a peremptory writ of mandate, commanding the trial court to vacate its order striking portions of the complaint (*37 Cal. 3d 813, 820)* .

In *Courtesy Ambulance Service v. Superior Court (1992) 8 Cal. App. 4th 1504, 11 Cal. Rptr. 2d 161* , the trial court granted a defense motion to strike a claim for punitive damages, and the plaintiff petitioned for an extraordinary writ. The court of appeal stated the governing rule thus: "where a ruling on the pleadings deprives a party of a *substantial part of its claim*, and where a significant issue of law is involved, extraordinary review is appropriate" (*8 Cal. App. 4th 1504, 1510)* . The court then proceeded to consider the merits of the petition. Implicitly the court equated striking a claim for punitive damages with depriving the plaintiff of an opportunity to plead a cause of action.

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15-150 California Points & Authorities § 150.168

§ 150.168 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--Appeal Is Inadequate Remedy to Protect Petitioner's Substantial Rights--Review of Order Denying Motion to Strike--Claim for Unobtainable Relief

[1] FORM

[*The following should be combined, when appropriate, with general points and authorities supporting the contention that petitioner lacks a plain, speedy, and adequate remedy in the ordinary course of law (see, e.g., § 150.160), with general points and authorities supporting the contention that appeal is not an adequate remedy (see, e.g., § 150.165), and with a general memorandum supporting a petition for a writ of mandate (see, e.g., § 150.30) or a petition for a writ of prohibition (see, e.g., § 150.70).*]

APPEAL IS NOT AN ADEQUATE REMEDY, BECAUSE THE COURT'S ORDER DENYING PETITIONER'S MOTION TO STRIKE _____ [*specify pleading or part of pleading, e.g.,* PLAINTIFF'S ALLEGATIONS AND CLAIMS RESPECTING DAMAGES FOR EMOTIONAL DISTRESS AND PUNITIVE DAMAGES] WILL FORCE PETITIONER TO CONDUCT DISCOVERY, PROCEED TO TRIAL, AND PRESENT AND RESIST EVIDENCE, ON ISSUES RAISED IN THE CHALLENGED _____ [*e.g.,* COUNTS OF THE COMPLAINT], EVEN THOUGH THE RELIEF SOUGHT CANNOT BE OBTAINED AS A MATTER OF LAW.

Motion to Strike Claim for Unobtainable Relief. A writ of mandate may be issued to vacate an order denying a motion to strike claims for relief that cannot be obtained as a matter of law, since the delay and expense of a trial make the remedy of appeal inadequate (*Smith v. Superior Court (1992) 10 Cal. App. 4th 1033, 1036-1037, 13 Cal. Rptr. 2d 133*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that the petitioner lacks a plain, speedy, and adequate remedy in the ordinary course of law because the petitioner's remedy by appeal is inadequate. The specific ground for the contention is that appeal is an inadequate remedy to review the denial of a motion to strike a pleading or portions of a pleading asserting a claim to relief that cannot be obtained as a matter of law.

The foregoing points and authorities should be combined with general points and authorities relating to the lack of adequate legal remedy requirement [*see § 150.160*], with general points and authorities relating to the inadequacy of the remedy of appeal [*see § 150.165*], and, if appropriate, with other specific points and authorities relating to the inadequacy of the remedy of appeal [*see §§ 150.166, 150.169*-150.182]. They should also be combined, when appropriate, with other specific points and authorities relating to the lack of adequate legal remedy requirement [*see §§ 150.161*-150.164]. The combined points and authorities relating to the lack of adequate legal remedy requirement should then be combined, in turn, with a general memorandum supporting a petition for writ of mandate [*see § 150.30*] or a petition for a writ of prohibition [*see § 150.70*].

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender).

[c] Opposing Memoranda

The points and authorities set out in *§ 150.185* may be used in an appropriate case to oppose a petition for mandate that is supported by the foregoing points and authorities.

[3] Discussion of Authorities

[a] Motion to Strike Claim for Unobtainable Relief

In ***Smith v. Superior Court*** *(1992) 10 Cal. App. 4th 1033, 13 Cal. Rptr. 2d 133* , the plaintiff sued her attorneys for malpractice and asserted claims for damages for emotional distress and punitive damages (in addition to ordinary damages). The defendants moved to strike those claims, and the trial court denied the motion. The defendants petitioned for a writ of mandate.

The court of appeal granted the defendants' petition, directing the trial court to vacate the order of denial and to grant the motion to strike. The court held that relief by mandate was appropriate in the case, pointing to two grounds. First, the court noted that appeal would not be an adequate remedy in this case because "the petitioners will be required to conduct further discovery on plaintiff's emotional distress claim, and trial will be extended by the introduction of evidence on that issue. Trial could also be lengthened by holding a bifurcated proceeding on plaintiff's punitive damage claim, with petitioners obligated to produce evidence concerning their financial condition" (*10 Cal. App. 4th 1033, 1037)* . Second, the court noted that the petition should be heard in this case because the underlying question, whether the plaintiff could recover emotional distress damages in a negligence action involving only economic injury, was an issue of great public importance requiring immediate resolution (*10 Cal. App. 4th 1033, 1037)* . The court went on to hold that neither the claim for emotional-distress damages nor the claim for punitive damages could be asserted, as a matter of law (*10 Cal. App. 4th 1033, 1037-1042)* .

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15-150 California Points & Authorities § 150.169

§ 150.169 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--Appeal Is Inadequate Remedy to Protect Petitioner's Substantial Rights--Review of Order Sustaining or Overruling Demurrer

[1] FORM

[*The following should be combined, when appropriate, with general points and authorities supporting the contention that petitioner lacks a plain, speedy, and adequate remedy in the ordinary course of law (see, e.g., § 150.160), with general points and authorities supporting the contention that appeal is not an adequate remedy (see, e.g., § 150.165), and with a general memorandum supporting a petition for a writ of mandate (see, e.g., § 150.30) or a petition for a writ of prohibition (see, e.g., § 150.70).*]

APPEAL IS NOT AN ADEQUATE REMEDY BECAUSE THE COURT'S ORDER _____ [SUSTAINING THE DEMURRER WITHOUT LEAVE TO AMEND *or* OVERRULING PETITIONER'S DEMURRER] DEPRIVES PETITIONER OF THE OPPORTUNITY TO PLEAD A _____ [CAUSE OF ACTION *or* DEFENSE].

A. No Opportunity to Plead Cause of Action or Defense. [*See § 150.166, Paragraph A.*]

[*EITHER*]

B. Demurrer Sustained. A writ of mandate will lie to review an order sustaining a demurrer to a complaint when the order deprives petitioner of the opportunity to plead his or her cause of action (*Taylor v. Superior Court (1979) 24 Cal. 3d 890, 894, 157 Cal. Rptr. 693, 598 P.2d 854* ; *Pfleger v. Superior Court (1985) 172 Cal. App. 3d 421, 425, 218 Cal. Rptr. 371*).

[*OR*]

B. Demurrer Overruled. A writ of prohibition will lie to review an order overruling a demurrer to a complaint when petitioner will be subjected to the expense of an unnecessary trial if the court continues to proceed in excess of its jurisdiction (*Harden v. Superior Court (1955) 44 Cal. 2d 630, 635-636, 284 P.2d 9* ; *Grange Debris Box. & Wrecking Co. v. Superior Court (1993) 16 Cal. App. 4th 1349, 1360, 20 Cal. Rptr. 2d 515*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that the petitioner lacks a plain, speedy, and adequate remedy in the ordinary course of law, because the petitioner's remedy by appeal is inadequate. The specific ground for the contention is that appeal is an inadequate remedy to review an order sustaining or overruling a demurrer.

The foregoing points and authorities should be combined with general points and authorities relating to the lack of adequate legal remedy requirement (*see § 150.160*), with general points and authorities relating to the inadequacy of the remedy of appeal (*see § 150.165*), and, if appropriate, with other specific points and authorities relating to the inadequacy of the remedy of appeal (*see §§ 150.166, 150.167, 150.170*-150.182). They should also be combined, when appropriate, with other specific points and authorities relating to the lack of adequate legal requirement (*see §§ 150.161*-150.164). The combined points and authorities relating to the lack of adequate legal remedy requirement should then be combined, in turn, with a general memorandum supporting a petition for a writ of mandate (*see § 150.30*) or a petition for a writ of prohibition (*see § 150.70*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender).

[c] Opposing Memoranda

The points and authorities set out in *§ 150.185* may be used in an appropriate case to oppose a petition for mandate that is supported by the foregoing points and authorities.

[3] Discussion of Authorities

[a] Demurrer Sustained

In ***Taylor v. Superior Court*** *(1979) 24 Cal. 3d 890, 157 Cal. Rptr. 693, 598 P.2d 854* , plaintiff brought an action for injuries suffered in a collision with defendant when defendant was allegedly drunk. Defendant demurred to the complaint insofar as it sought punitive damages, contending that punitive damages could not be assessed against a negligent driver. The trial court sustained the demurrer and plaintiff sought a writ of mandate directing the court to overrule the demurrer.

The Supreme Court issued the writ, holding that punitive damages were recoverable against drunk drivers (*24 Cal. 3d 890, 897, 900)* . The Court acknowledged that mandate will lie when it appears that the trial court has deprived a party of an opportunity to plead his or her cause of action or defense and when extraordinary relief may prevent a needless

and expensive trial and reversal. In petitioner's case, such a combination of circumstances was presented (*24 Cal. 3d 890, 894)* .

In ***Pfleger v. Superior Court*** *(1985) 172 Cal. App. 3d 421, 218 Cal. Rptr. 371* , the court of appeal consolidated for review three cases in which petitioners brought causes of actions for negligence, implied warranty, strict liability, fraud, nuisance, and inverse condemnation against real parties city, county, and land developers. The actions arose out of mud slides and flooding that occurred during a severe winter storm and allegedly damaged the real property of petitioners, who were owners and occupants of single-family dwellings. The nuisance causes of action alleged that real parties, owners of real property located uphill from petitioners' homes, had maintained their property in a dangerous condition, and had failed to design or construct drainage or slide control facilities for their property adequate to divert and drain hillside waters and prevent future flooding of and mud slides onto petitioners' properties. Real parties city, county, and land developers demurred to the nuisance causes of action on the ground that a cause of action for nuisance cannot be stated against a public entity when it is predicated on a hazard that could be the basis of a cause of action for a dangerous condition of public property under *Gov. Code § 835*. The trial court entered orders sustaining the demurrers without leave to amend the complaints. Petitioners then sought writs of mandate in the court of appeal to compel the trial court to vacate its orders.

The court of appeal issued an alternative writ to the trial court (*172 Cal. App. 3d 421, 424)* . The court held that the demurrers were erroneously sustained, and directed the issuance of peremptory writs to the trial court, directing it to set aside the orders sustaining the demurrers and to enter new and different orders overruling those demurrers (*172 Cal. App. 3d 421, 432)* . The court found it appropriate to inquire into the propriety of the trial court's rulings. The court held that a writ of mandate may issue, in the discretion of the appellate court, when it appears that the trial court, by sustaining a demurrer without leave to amend, has deprived a party of an opportunity to plead a cause of action (*172 Cal. App. 3d 421, 425)* .

[b] Demurrer Overruled

In ***Harden v. Superior Court*** *(1955) 44 Cal. 2d 630, 284 P.2d 9* , a city brought a condemnation action and the owner demurred on the basis that the city could not condemn land out of the city limits. The trial court overruled the demurrer and the owners petitioned for a writ of prohibition.

The court of appeal issued the writ, holding that the city was not authorized to condemn the land (*44 Cal. 2d 630, 639-642)* . In its discussion of the availability of the writ, the court held that the petitioner's remedy at law was inadequate. The order overruling the demurrer could not be appealed, and therefore, if the lower court was acting in excess of jurisdiction, petitioner would be subjected to the expense of an unnecessary trial (*44 Cal. 2d 630, 635-636)* .

In ***Grange Debris Box. & Wrecking Co.*** *v. Superior Court (1993) 16 Cal. App. 4th 1349, 20 Cal. Rptr. 2d 515* , a building owner brought an action against an oil company for contamination of soil. The oil company cross complained against the city who had purchased the site for redevelopment and agreed to hold the oil company harmless for any damage to the property. The city cross complained against cross defendant contractor for indemnity based on negligent excavation of the site and removal of underground tanks. Cross defendant demurred to the cross complaint on the ground that the 10-year statute of limitations set forth in *Code Civ. Proc. § 337.15(a)* and *(c)* had expired. The city argued that since it was barred from asserting the same statute of limitations against the oil company by *Code Civ. Proc. § 337.15(e)*, then cross defendant should be barred from asserting the period against the city. The trial court overruled the demurrer, and cross defendant petitioned for a writ of mandate.

The court of appeal granted the petition, ordering that a writ of mandate be issued directing the trial court to vacate its order overruling the demurrer, and to enter a new order sustaining the demurrer. The appellate court found that the 10-year statute of limitations did bar the city's cross complaint against the contractor for indemnity, even though the city was prevented from asserting the statute of limitations against the oil company (*16 Cal. App. 4th 1349, 1354-1357)* .

Although reviewing courts are generally reluctant to issue writs at the pleading stage, they may be persuaded to do so if the error is clear and substantially prejudices the petitioner. The appellate court found that intervention in the case at hand would probably avoid a lengthy and unnecessary proceeding to determine defendant contractor's fault and appeal from any judgment against that defendant. The appellate court did allow the trial court to exercise its discretion in determining whether to grant the city leave to amend its cross complaint (*16 Cal. App. 4th 1349, 1360)* .

[4] Additional Authorities

[a] Demurrer Sustained

In *Wallis v. Superior Court (1984) 160 Cal. App. 3d 1109, 207 Cal. Rptr. 123* , the trial court granted plaintiff partial summary judgment on a cause of action for breach of contract, sustained defendant's demurrers without leave to amend to plaintiff's causes of action for bad-faith breach of the implied covenant of good faith and fair dealing and intentional infliction of emotional distress, and sustained defendant's demurrer with leave to amend to plaintiff's cause of action for breach of fiduciary duty. Plaintiff sought a writ of mandate to compel the trial court to vacate its order sustaining defendant's demurrers. The court of appeal held that writ review was proper in this instance because, first, plaintiff could not appeal at this point because of the one final judgment rule and, second, to refuse consideration of the petition would result in piecemeal disposition of the case (*160 Cal. App. 3d 1109, 1114 n.1*).

In *Pearce v. Superior Court (1983) 149 Cal. App. 3d 1058, 197 Cal. Rptr. 238* , the trial court sustained defendants' demurrers without leave to amend in a shareholder's derivative action on the basis of plaintiff's lack of standing to sue. Plaintiff petitioned for an alternative writ of mandate ordering the trial court to vacate the order sustaining the demurrers. The court of appeal granted the writ, finding that plaintiff did have standing and that mandate was a proper remedy (*149 Cal. App. 3d 1058, 1061, 1068)* .

In *Spira v. Superior Court (1974) 41 Cal. App. 3d 536, 116 Cal. Rptr. 93* , plaintiffs brought an action seeking a declaration of rights, an accounting, and appointment of a receiver on the ground that defendant took sole control of business and sequestered its assets in violation of a written partnership agreement. Defendant filed a cross complaint for damages for abuse of process. The trial court overruled plaintiff's demurrer to the cross complaint. The court of appeal issued a writ of mandate, holding that the cross complaint sounded in malicious prosecution and not abuse of process and that, therefore, the demurrer should have been sustained (*41 Cal. App. 3d 536, 542)* .

Counsel should note that the Supreme Court in *Babb v. Superior Court (1971) 3 Cal. 3d 841, 92 Cal. Rptr. 179, 479 P.2d 379* (discussed under *150.169[4][b]*) held that a cross complaint for malicious prosecution will not lie in the same action alleged to be maliciously prosecuted (*3 Cal. 3d 841, 846, 848)* .

In *Trindade v. Superior Court (1973) 29 Cal. App. 3d 857, 106 Cal. Rptr. 48* , a personal injury action, the trial court sustained plaintiff's demurrer to defendant's cross complaint on the ground that it had been filed more than one year after the cause of action arose and, therefore, was barred by the one-year statute of limitations prescribed by former Code Civ. Proc. § 340(3) (*now see Code Civ. Proc. § 335.1*). The court of appeal issued a writ of mandate commanding the trial court to overrule the demurrer, holding that the cross complaint was timely because it was not barred at the time the complaint was filed (*29 Cal. App. 3d 857, 860-861)* .

[b] Demurrer Overruled

The facts and procedure in *Babb v. Superior Court (1971) 3 Cal. 3d 841, 92 Cal. Rptr. 179, 479 P.2d 379* , are discussed in *§ 150.33[4][a]*. In issuing a writ of mandate directing the trial court to sustain plaintiff's demurrer to a cross complaint for malicious prosecution, the Court determined, without explaining why, that plaintiff's remedy at law was inadequate (*3 Cal. 3d 841, 851)* .

In *State of California v. Superior Court (2001) 87 Cal. App. 4th 1409, 105 Cal. Rptr. 2d 499* , the plaintiffs, real parties in interest, sued the state; they alleged various tort causes of action resulting from the death of their decedent, who had been piloting an airplane to fight a fire when the airplane crashed. The state demurred to the complaint, asserting immunity under *Gov. Code § 850.4*. The trial court sustained the demurrer as to some causes of action but overruled it as to others, thus allowing the case to go to trial. The state petitioned for a writ of mandate to compel the trial court to sustain the demurrer as to all causes of action. The court of appeal noted that an appellate court rarely reviews pleading issues by extraordinary writ, especially when the trial court has overruled the demurrer. Nonetheless, the court determined that the petition's immunity claims raised an issue of significance, justifying review by extraordinary writ (*87 Cal. App. 4th 1409, 1412)* .

In *City of Ontario v. Superior Court (1993) 12 Cal. App. 4th 894, 16 Cal. Rptr. 2d 32* , the state sued the City of Ontario on a claim for equitable indemnity. The city demurred on the ground that the action was barred because the state had not filed a timely claim under the Government Tort Claims Act, and the state responded that it was not subject to the claim-filing requirement of that act. After the trial court overruled the demurrer, the city petitioned for a writ of mandate to compel the trial court to sustain the demurrer without leave to amend. The court of appeal, noting that the case presented an issue of first impression, granted the petition after analyzing the claim-filing requirement. Preliminarily the court rejected the state's argument that a mandate proceeding was inappropriate. The court concluded that "the issue is one of substantial legal importance. If the City's position is correct, the entire case will be disposed of without the expense and delay of trial. In the circumstances, the availability of an eventual remedy by appeal from an unfavorable judgment is not adequate" (*12 Cal. App. 4th 894, 898)* .

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15-150 California Points & Authorities § 150.170

§ 150.170 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--Appeal Is Inadequate Remedy to Protect Petitioner's Substantial Rights--Review of Order Denying Motion to Quash Service for Lack of Personal Jurisdiction or to Stay or Dismiss Action on Ground of Inconvenient Forum or to Dismiss for Delay in Prosecution [Code Civ. Proc. § 418.10(a), (c)]

[1] FORM

[*The following should be combined, when appropriate, with general points and authorities supporting the contention that petitioner lacks a plain, speedy, and adequate remedy in the ordinary course of law (see, e.g., § 150.160), with general points and authorities supporting the contention that appeal is not an adequate remedy (see, e.g., § 150.165), and with a general memorandum supporting a petition for a writ of mandate (see, e.g., § 150.30) or a petition for a writ of prohibition (see, e.g., § 150.70).*]

A WRIT OF MANDATE IS THE PROPER REMEDY TO COMPEL THE TRIAL COURT TO GRANT PETITIONER'S MOTION TO _____ [QUASH SERVICE OF THE SUMMONS *or* STAY OR DISMISS THE ACTION BECAUSE OF AN INCONVENIENT FORUM].

Writ of Mandate Authorized. When a superior court erroneously denies a *Code of Civil Procedure Section 418.10* motion _____ [to quash service of the summons for lack of jurisdiction *or* to stay or dismiss the action on the ground of inconvenient forum *or* to dismiss the action for delay in prosecution under *Code of Civil Procedure Section 583.110 et seq. or any combination thereof*], a writ of mandate is the appropriate remedy to review the erroneous ruling (*Code Civ. Proc. § 418.10(a), (c)*; *see Northern Natural Gas Co. v. Superior Court (1976) 64 Cal. App. 3d 983, 995, 134 Cal. Rptr. 850*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that the petitioner lacks a plain,

speedy, and adequate remedy in the ordinary course of law, because the petitioner's remedy by appeal is inadequate. The specific ground for the contention is that a writ of mandate is expressly authorized to review an order denying a *Code Civ. Proc. § 418.10* motion to quash service of summons for lack of jurisdiction or to stay or dismiss an action on the ground of inconvenient forum or to dismiss an action for delay in prosecution under *Code Civ. Proc. § 583.110 et seq.* [*Code Civ. Proc. § 418.10(a), (c)*].

This form is for use only when one or more of these motions is brought pursuant to Section 418.10, that is, when the defendant has not made a general appearance and before the defendant's time to plead has expired [*see Code Civ. Proc. § 418.10(c)*; *see also Code Civ. Proc. § 410.30(b)* (Section 418.10 not applicable to motion to stay or dismiss for inconvenient forum after defendant has made general appearance)]. If the motion was not made pursuant to Section 418.10, mandate is still the appropriate remedy, but under general principles relating to mandate rather than by express statutory authorization [*see McDonough Power Equipment Co. v. Superior Court (1972) 8 Cal. 3d 527, 530, 105 Cal. Rptr. 330, 503 P.2d 1338* (prior law; involuntary dismissal for delay in prosecution)]. For a form supporting a review of an order denying a motion to dismiss for delay in prosecution under *Code Civ. Proc. § 583.110 et seq.*, when the motion was made not made in the time frame of a Section 418.10 motion, see *§ 150.178*.

The foregoing points and authorities should be combined with general points and authorities relating to the lack of adequate legal remedy requirement (*see § 150.160*). They may also be combined with general points and authorities relating to the inadequacy of the remedy of appeal (*see § 150.165*), and, if appropriate, with other specific points and authorities relating to the inadequacy of the remedy of appeal (*see §§ 150.166*-150.169, *150.171*-150.182), or with other specific points and authorities relating to the lack of adequate legal requirement (*see §§ 150.161*-150.164). The combined points and authorities relating to the lack of adequate legal remedy requirement should then be combined, in turn, with a general memorandum supporting a petition for a writ of mandate (*see § 150.30*) or a petition for a writ of prohibition (*see § 150.70*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Time to File Petition

Petitioner must file the petition for writ of mandate within 10 days after service of notice of entry of order denying the motion, or within any further time not exceeding 20 days that the trial court may for good cause allow [*Code Civ. Proc. § 418.10(c)*]. In addition, the petition must be filed before petitioner files any pleading in the action [*Code Civ. Proc. § 418.10(c)*]. If petitioner files an answer before filing the writ petition, then he or she submits to the jurisdiction of the court [*Code Civ. Proc. § 418.10(c)*; *Neihaus v. Superior Court (1977) 69 Cal. App. 3d 340, 345, 346 n.1, 137 Cal. Rptr. 905]* .

[c] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender). For discussion, forms, and a procedural guide relating to motions to quash service of summons or to stay or dismiss an action on the ground of inconvenient forum, see Ch. 518, *Service of Summons and Papers* in that publication.

[d] Opposing Memoranda

The points and authorities set out in *§ 150.205* may be used in an appropriate case to oppose a petition for mandate that is supported by the foregoing points and authorities.

[3] Discussion of Authorities

[a] Writ of Mandate Authorized

In ***Northern Natural Gas Co. v. Superior Court*** *(1976) 64 Cal. App. 3d 983, 134 Cal. Rptr. 850* , defendant filed motions to quash service of summons on the ground that it was a foreign corporation not engaged in business in California. The trial court denied the motion and defendant sought relief through mandate.

The court of appeal issued a writ of mandate directing the court to grant the motion to quash, holding that defendant was not she jurisdiction of the California courts (*64 Cal. App. 3d 983, 991)* . When a trial court erroneously denies a motion to quash service on grounds of lack of personal jurisdiction, the court held, mandate is the appropriate remedy to review the erroneous ruling (*64 Cal. App. 3d 983, 995)* .

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15-150 California Points & Authorities § 150.171

§ 150.171 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--Appeal Is Inadequate Remedy to Protect Petitioner's Substantial Rights--Review of Superior Court Order Determining Venue [Code Civ. Proc. § 400]

[1] FORM

[*The following should be combined, when appropriate, with general points and authorities supporting the contention that petitioner lacks a plain, speedy, and adequate remedy in the ordinary course of law (see, e.g., § 150.160), with general points and authorities supporting the contention that appeal is not an adequate remedy (see, e.g., § 150.165), and with a general memorandum supporting a petition for a writ of mandate (see, e.g., § 150.30) or a petition for a writ of prohibition (see, e.g., § 150.70).*]

A WRIT OF MANDATE IS THE PROPER REMEDY TO COMPEL A SUPERIOR COURT TO _____ [GRANT *or* DENY] PETITIONER'S MOTION FOR CHANGE OF VENUE.

Writ of Mandate Authorized. When an order is made by a superior court granting or denying a motion for change of venue, a writ of mandate is the appropriate remedy to review the ruling (*Code Civ. Proc. § 400*; *see Hamilton v. Superior Court (1974) 37 Cal. App. 3d 418, 425, 112 Cal. Rptr. 450*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that the petitioner lacks a plain, speedy, and adequate remedy in the ordinary course of law, because the petitioner's remedy by appeal is inadequate. The specific ground for the contention is that a writ of mandate is expressly authorized to review an order granting or denying a motion for change of venue [*Code Civ. Proc. § 400*].

The foregoing points and authorities should be combined with general points and authorities relating to the lack of

adequate legal remedy requirement (*see § 150.160*). They may also be combined with general points and authorities relating to the inadequacy of the remedy of appeal (*see § 150.165*), and, if appropriate, with other specific points and authorities relating to the inadequacy of the remedy of appeal (*see §§ 150.166*-150.170, *150.172*-150.182), and with other specific points and authorities relating to the lack of adequate legal requirement (*see §§ 150.161*-150.164). The combined points and authorities relating to the lack of adequate legal remedy requirement should then be combined, in turn, with a general memorandum supporting a petition for writ of mandate (*see § 150.30*) or a petition for a writ of prohibition (*see § 150.70*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Time to File Petition

Petitioner must file the petition for writ of mandate within 20 days after service of notice of entry of the order granting or denying the motion. The superior court may, for good cause, and prior to the expiration of the initial 20-day period, extend the time for one additional period not to exceed 10 days [*Code Civ. Proc. § 400*].

[c] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender). For discussion, forms, and a procedural guide relating to venue, see Ch. 571, *Venue* in that publication.

[d] Opposing Memoranda

The points and authorities set out in *§ 150.205* may be used in an appropriate case to oppose a petition for mandate that is supported by the foregoing points and authorities.

[3] Discussion of Authorities

[a] Writ of Mandate Authorized

In ***Hamilton v. Superior Court*** *(1974) 37 Cal. App. 3d 418, 112 Cal. Rptr. 450* , petitioner filed an action against her former husband, who resided out of state, to establish a judgment for divorce and obtain custody and support orders. On its own motion, the trial court transferred the action to the neighboring county, where petitioner resided. Petitioner sought a writ of mandate to review the ruling.

The court of appeal issued the writ, directing the court to transfer the action back to the county in which it was filed (*37 Cal. App. 3d 418, 425)* . The court held that petitioner was entitled to bring suit in any county in California (*37 Cal. App. 3d 418, 422)* . Furthermore, there was no motion or sufficient showing made, as required by *Code Civ. Proc. § 397*, that authorized the court to change the place of trial (*37 Cal. App. 3d 418, 425)* .

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15-150 California Points & Authorities § 150.172

§ 150.172 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--Appeal Is Inadequate Remedy to Protect Petitioner's Substantial Rights--Review of Order Consolidating Actions

[1] FORM

[*The following should be combined, when appropriate, with general points and authorities supporting the contention that petitioner lacks a plain, speedy, and adequate remedy in the ordinary course of law (see, e.g., § 150.160), with general points and authorities supporting the contention that appeal is not an adequate remedy (see, e.g., § 150.165), and with a general memorandum supporting a petition for a writ of mandate (see, e.g., § 150.30) or a petition for a writ of prohibition (see, e.g., § 150.70).*]

A WRIT OF MANDATE IS THE PROPER REMEDY TO COMPEL A SUPERIOR COURT TO SEVER AN ACTION FOR TRIAL.

Consolidation of Actions. Mandate will lie to compel a court to sever actions for trial when the court abused its discretion in consolidating the actions (*State Farm etc. Ins. Co. v. Superior Court (1956) 47 Cal. 2d 428, 432, 304 P.2d 13*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that the petitioner lacks a plain, speedy, and adequate remedy in the ordinary course of law, because the petitioner's remedy by appeal is inadequate. The specific ground for the contention is that appeal is an inadequate remedy to review an order granting a motion for consolidation. The foregoing form may also be adapted for use when the court has denied a motion for severance of the action for trial.

The foregoing points and authorities should be combined with general points and authorities relating to the lack of adequate legal remedy requirement (*see § 150.160*), with general points and authorities relating to the inadequacy of the remedy of appeal (*see § 150.165*), and, if appropriate, with other specific points and authorities relating to the inadequacy of the remedy of appeal (*see §§ 150.166*-150.171, *150.173*-150.182). They may also be combined, when appropriate, with other specific points and authorities relating to the lack of adequate legal requirement (*see §§ 150.161*-150.164). The combined points and authorities relating to the lack of adequate legal remedy requirement should then be combined, in turn, with a general memorandum supporting a petition for a writ of mandate (*see § 150.30*) or a petition for a writ of prohibition (*see § 150.70*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender). For discussion, forms, and a procedural guide relating to severance of actions, see Ch. 125, *Consolidation, Severance, and Coordination of Actions* in that publication.

[3] Discussion of Authorities

[a] Consolidation of Actions

In ***State Farm etc. Ins. Co. v. Superior Court*** *(1956) 47 Cal. 2d 428, 304 P.2d 13* , petitioner, an insurance company, brought an action for declaratory relief to determine whether its policy covered an automobile collision between its insured and a third party. While the action was pending, several persons filed personal injury actions against petitioner's insured. The third parties successfully moved to consolidate all the actions. Petitioner sought a writ of mandate to compel the court to sever the declaratory relief action from the other actions.

The court of appeal issued the writ, holding that the trial court abused its discretion in ordering the consolidation (*47 Cal. 2d 428, 430, 433)* . The consolidation, the court reasoned, resulted in prejudice to the petitioner and former Code Civ. Proc. § 1048 only authorized consolidation when it could be done without prejudice to a substantial right (*47 Cal. 2d 428, 430)* .

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15-150 California Points & Authorities § 150.173

§ 150.173 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--Appeal Is Inadequate Remedy to Protect Petitioner's Substantial Rights--Review of Order Denying Class Certification

[1] FORM

[*The following should be combined, when appropriate, with general points and authorities supporting the contention that petitioner lacks a plain, speedy, and adequate remedy in the ordinary course of law (see, e.g., § 150.160), with general points and authorities supporting the contention that appeal is not an adequate remedy (see, e.g., § 150.165), and with a general memorandum supporting a petition for a writ of mandate (see, e.g., § 150.30) or a petition for a writ of prohibition (see, e.g., § 150.70).*]

APPEAL IS NOT AN ADEQUATE REMEDY BECAUSE PETITIONER HAS NO RIGHT TO A DIRECT APPEAL AND THE EXPENSE OF PROCEEDING THROUGH A TRIAL IS GROSSLY DISPROPORTIONATE TO THE DAMAGES PETITIONER CAN EXPECT TO RECOVER IN HIS OR HER INDIVIDUAL CAPACITY.

A. Order Is Not Appealable. There is no right to direct appeal of an order denying class certification when the order fails to dispose of the entire action (*General Motors Corp. v. Superior Court (1988) 199 Cal. App. 3d 247, 250-252, 244 Cal. Rptr. 776* ; *Rosack v. Volvo of America Corp. (1982) 131 Cal. App. 3d 741, 749, 182 Cal. Rptr. 800* ; *Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 806-807, 94 Cal. Rptr. 796, 484 P.2d 964*).

B. Inordinate Expense of Trial. Review of a denial of class certification on appeal from an adverse judgment is inadequate when the expense of proceeding through a trial is grossly disproportionate to the damages petitioner can expect to recover in his or her individual capacity (*Hogya v. Superior Court (1977) 75 Cal. App. 3d 122, 130-131, 142 Cal. Rptr. 325*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that the petitioner lacks a plain, speedy, and adequate remedy in the ordinary course of law, because the petitioner's remedy by appeal is inadequate. The specific ground for the contention is that appeal is an inadequate remedy to review an order denying class certification.

The foregoing points and authorities should be combined with general points and authorities relating to the lack of adequate legal remedy requirement (*see § 150.160*), with general points and authorities relating to the inadequacy of the remedy of appeal (*see § 150.165*), and, if appropriate, with other specific points and authorities relating to the inadequacy of the remedy of appeal (*see §§ 150.166*-150.172, *150.174*-150.182). They may also be combined, when appropriate, with other specific points and authorities relating to the lack of adequate legal requirement (*see §§ 150.161*-150.164). The combined points and authorities relating to the lack of adequate legal remedy requirement should then be combined, in turn, with a general memorandum supporting a petition for writ of mandate (*see § 150.30*) or a petition for a writ of prohibition (*see § 150.70*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated. For example, counsel should demonstrate that there was no reasonable likelihood that any single member of the class could recover more than an amount of damages that would be grossly disproportionate to the expense of proceeding through a trial [*see Hogya v. Superior Court (1977) 75 Cal. App. 3d 122, 130-131, 142 Cal. Rptr. 325]* .

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender). For discussion, forms, and a procedural guide relating to class actions, see Ch. 120, *Class Actions* in that publication.

[3] Discussion of Authorities

[a] Order Is Not Appealable

In ***General Motors Corp. v. Superior Court*** *(1988) 199 Cal. App. 3d 247, 244 Cal. Rptr. 776* , plaintiffs in a consumer action against an automobile manufacturer and its dealers moved to certify a national class of all purchasers of the allegedly defective model of automobile. The trial court certified the class on a statewide basis only. Plaintiffs sought a writ of mandate to review the order and also took a precautionary appeal from the order.

The court of appeal denied the writ in an unpublished portion of its opinion. In its discussion of the availability of mandate, however, the court held that there was no appeal from the order. An appeal would violate the "final judgment rule" set forth in *Code Civ. Proc. §§ 904.1* because the denial of nationwide certification did not have a "death knell" effect of making further proceedings in the action impractical. The statewide class certified by the trial court, the court observed, consisted of 21,000 members. Therefore, the court applied *Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 94 Cal. Rptr. 796, 484 P.2d 964* , discussed *below*, and held there was no appeal from the certification order (*199 Cal. App. 3d 247, 250-251)* .

In ***Rosack v. Volvo of America Corp.*** *(1982) 131 Cal. App. 3d 741, 182 Cal. Rptr. 800* , plaintiff brought an antitrust action against an automobile manufacturer and its dealers on behalf of herself and a class of automobile consumers. The trial court denied certification of the class and entered an order dismissing the class action. On appeal, the court of appeal held that an appeal from the intermediate order on class certification would violate the "final judgment" rule unless the order disposes of the entire action. A party seeking earlier appellate review, the court held, must rely on a writ of mandate (*131 Cal. App. 3d 741, 749)* . In order to reach the merits, however, the court treated the appeal as a

petition for writ of mandate and granted the writ to compel the court to grant class certification (*131 Cal. App. 3d 741, 750, 763)* .

In ***Vasquez v. Superior Court*** *(1971) 4 Cal. 3d 800, 94 Cal. Rptr. 796, 484 P.2d 964* , plaintiffs brought an action against a seller and finance company on behalf of themselves and a class of consumers who bought merchandise under fraudulent installment contracts. Defendants' demurrers were sustained on the ground that plaintiffs failed to state a class action for fraud. Plaintiffs sought a writ of mandate to compel the trial court to allow them to try the fraud action as a class action.

The Supreme Court granted the writ (*4 Cal. 3d 800, 825)* . In its discussion of the adequacy of plaintiffs' appellate remedy, the Court held that plaintiffs had no appeal from the order dismissing their first cause of action as a class action because an appeal would violate the rule that an appeal may be taken only from a final judgment (*4 Cal. 3d 800, 806)* . When all the causes of action set forth in the complaint have a single object, an appeal will not be permitted from a judgment disposing of only one count of the complaint (*4 Cal. 3d 800, 806-807)* . Because the certification order barred a substantial portion of their cause from being heard on the merits, the mandate petition deserved consideration (*4 Cal. 3d 800, 807)* .

Note that the court of appeal in *Clothesrigger, Inc. v. GTE Corp. (1987) 191 Cal. App. 3d 605, 609-611, 236 Cal. Rptr. 605* , accepted an appeal from an order denying certification to a nationwide class and reversed the trial court, without discussing whether such an order was appealable.

[b] Inordinate Expense of Trial

The facts and procedure of ***Hogya v. Superior Court*** *(1977) 75 Cal. App. 3d 122, 142 Cal. Rptr. 325* , is discussed in *§ 150.165[3][a]*. In issuing a writ to compel the trial court to grant plaintiff's motion for class certification, the court of appeal held that petitioner's remedy by appeal was inadequate because the expense of proceeding through trial was grossly disproportionate to the damages petitioner could expect to recover in his individual capacity (*75 Cal. App. 3d 122, 130-131)* .

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15-150 California Points & Authorities § 150.174

§ 150.174 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--Appeal Is Inadequate Remedy to Protect Petitioner's Substantial Rights--Review of Order Granting Preliminary Injunction

[1] FORM

[*The following should be combined, when appropriate, with general points and authorities supporting the contention that petitioner lacks a plain, speedy, and adequate remedy in the ordinary course of law (see, e.g., § 150.160), with general points and authorities supporting the contention that appeal is not an adequate remedy (see, e.g., § 150.165), and with a general memorandum supporting a petition for a writ of mandate (see, e.g., § 150.30) or a petition for a writ of prohibition (see, e.g., § 150.70).*]

APPEAL IS NOT AN ADEQUATE REMEDY BECAUSE THE PRELIMINARY INJUNCTION PREVENTS PETITIONER FROM EXERCISING HIS/HER/ITS LAWFUL RIGHTS DURING THE TIME NECESSARY FOR AN APPEAL.

Exercise of Petitioner's Rights Enjoined. An appeal pursuant to *Code of Civil Procedure Section 904.1* from the granting of a preliminary injunction is not an adequate or speedy remedy when the injunction prevents petitioner from exercising its lawful rights during the time necessary for the appeal (*County of Butte v. Superior Court (1985) 176 Cal. App. 3d 693, 697, 222 Cal. Rptr. 429* ; *United Farm Workers etc. Committee v. Superior Court (1967) 254 Cal. App. 2d 768, 769, 62 Cal. Rptr. 567*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the petitioner lacks a plain, speedy, and adequate remedy in the ordinary course of law, because the petitioner's remedy by appeal is inadequate. The specific ground for the contention is that appeal is an inadequate remedy to review an order granting a preliminary injunction

under the circumstances.

These points and authorities should be combined with general points and authorities relating to the lack of adequate legal remedy requirement (*see § 150.160*), with general points and authorities relating to the inadequacy of the remedy of appeal (*see § 150.165*), and, if appropriate, with other specific points and authorities relating to the inadequacy of the remedy of appeal (*see §§ 150.166*-150.173, *150.175*-150.182). They may also be combined, when appropriate, with other specific points and authorities relating to the lack of adequate legal requirement (*see §§ 150.161*-150.164). The combined points and authorities relating to the lack of adequate legal remedy requirement should then be combined, in turn, with a general memorandum supporting a petition for a writ of mandate (*see § 150.30*) or a petition for a writ of prohibition (*see § 150.70*).

NOTE:
If this form is combined with the points and authorities set out in *§ 150.165*, then Paragraph A of that form should be deleted, because the granting of a preliminary injunction is immediately appealable under *Code Civ. Proc. § 904.1(a)(6)*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender). For discussion, forms, and a procedural guide relating to class actions, see Ch. 120, *Class Actions* in that publication.

[c] Opposing Memoranda

The points and authorities set out in *§ 150.185* may be used in an appropriate case to oppose a petition for mandate that is supported by these points and authorities.

[3] Discussion of Authorities

[a] Exercise of Petitioner's Rights Enjoined

In ***County of Butte v. Superior Court*** *(1985) 176 Cal. App. 3d 693, 222 Cal. Rptr. 429* , a county sheriff, two citizens, and members of the sheriff's department filed for a writ of mandate to compel the county board of supervisors to rescind layoffs and demotions and to provide necessary funding to guarantee continued employment of all employees. The superior court granted a preliminary injunction barring the board from proceeding with the layoffs, demotions, and budget cuts. The board filed a petition for a writ of prohibition.

The court of appeal, treating the petition as one for a writ of mandate, held that although an order granting or denying a preliminary injunction is specifically made appealable by *Code Civ. Proc. § 904.1*, mandate is available to review orders relating to preliminary injunctions when the remedy at law is not plain, speedy, and adequate. The court held that, in this case, the delay inherent in the appeals process made an appeal inadequate because of the effect of the superior court decision on the board's budgeting process and the interest of the parties and the public in a prompt resolution of the immediate dispute (*176 Cal. App. 3d 693, 697)* .

In ***United Farm Workers etc. Committee v. Superior Court*** *(1967) 254 Cal. App. 2d 768, 62 Cal. Rptr. 567* , the trial court granted a preliminary injunction against a farm workers' union in an action brought by a farm owner. The injunction prohibited various union organizing and picketing activities, including the use of bullhorns. The union sought a writ of prohibition, contending that the absolute ban on the use of bullhorns was a violation of its rights of free speech.

The court of appeal issued the writ, holding that the ban was unconstitutional (*254 Cal. App. 2d 768, 772-777)* . In its discussion of the adequacy of the union's appellate remedy, the court held that appeal was not adequate or speedy because during the time necessary for appeal, the harvest season would be over and therefore the union was entitled to a speedy determination of its constitutional rights by the petition for a writ of prohibition (*254 Cal. App. 2d 768, 769)* .

[4] Additional Authorities

[a] Exercise of Petitioner's Rights Enjoined

In *Evans v. Superior Court (1939) 14 Cal. 2d 563, 96 P.2d 107* , a state regulatory commission took possession of a lending institution on the ground that it was impairing its assets. When litigation was commenced between the agency and lending institution, a committee of investors in the lending institution obtained a preliminary injunction enjoining the agency from spending any of the institution's money to hire special counsel. The agency sought a writ of prohibition preventing enforcement of the injunction. The Supreme Court issued the writ, holding that the agency's remedy at law of appeal from the injunction was inadequate because of the exigencies of the situation, in which the agency needed special counsel to handle the litigation involving the institution (*14 Cal. 2d 563, 579-581)* .

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15-150 California Points & Authorities § 150.175

§ 150.175 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--Appeal Is Inadequate Remedy to Protect Petitioner's Substantial Rights--Review of Order Granting Partial Summary Judgment or Summary Adjudication of Issues [Code Civ. Proc. § 437c(m)]

[1] FORM

[*The following should be combined, when appropriate, with general points and authorities supporting the contention that petitioner lacks a plain, speedy, and adequate remedy in the ordinary course of law (see, e.g., § 150.160), with general points and authorities supporting the contention that appeal is not an adequate remedy (see, e.g., § 150.165), and with a general memorandum supporting a petition for a writ of mandate (see, e.g., § 150.30) or a petition for a writ of prohibition (see, e.g., § 150.70).*]

A PEREMPTORY WRIT IS PROPER TO REVIEW ANY ORDER UNDER CODE OF CIVIL PROCEDURE SECTION 437c OTHER THAN AN ORDER FOR ENTRY OF SUMMARY JUDGMENT, INCLUDING AN ORDER GRANTING PARTIAL SUMMARY JUDGMENT OR SUMMARY ADJUDICATION OF ISSUES.

A. Peremptory Writ Authorized. On entry of any order under *Section 437c of the Code of Civil Procedure*, other than an order for entry of summary judgment, a party may petition an appropriate reviewing court for a peremptory writ (*Code Civ. Proc. § 437c(m)*).

[*Optional*] **B. Substantial Portion of Case Will Not Be Tried on Merits.** When an order granting partial summary judgment bars a substantial portion of petitioner's case from being tried on the merits, petitioner's appellate remedy is not adequate (*Bundren v. Superior Court (1983) 145 Cal. App. 3d 784, 787 n.1, 193 Cal. Rptr. 671*).

[*Optional*] **C. Partial Summary Judgment on Issue of Damages.** A writ of mandate is the proper remedy when a court has erroneously granted a motion for partial summary judgment on the issue of damages (*see Field Research Corp. v. Superior Court (1969) 71 Cal. 2d 110, 111, 77 Cal. Rptr. 243, 453 P.2d 747* ; *Mason v. Superior Court (1985) 163 Cal. App. 3d 989, 994, 210 Cal. Rptr. 63*).

[*Optional*] **D. Summary Judgment Against One Party Only.** When summary judgment has been entered against only one defendant, an appeal is not an adequate remedy when the case will go on without a substantial portion being heard on the merits (*Bodenhamer v. Superior Court (1986) 178 Cal. App. 3d 180, 183 n.3, 223 Cal. Rptr. 486*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the petitioner lacks a plain, speedy, and adequate remedy in the ordinary course of law, because the petitioner's remedy by appeal is inadequate. The specific ground for the contention is that a peremptory writ is expressly authorized to review an order granting partial summary judgment or summary adjudication of issues [*see Code Civ. Proc. § 437c(m)*].

These points and authorities should be combined with general points and authorities relating to the lack of adequate legal remedy requirement (*see § 150.160*). They may also be combined with general points and authorities relating to the inadequacy of the remedy of appeal (*see § 150.165*), and, if appropriate, with other specific points and authorities relating to the inadequacy of the remedy of appeal (*see §§ 150.166*-150.174, *150.176*-150.182), and with other specific points and authorities relating to the lack of adequate legal requirement (*see §§ 150.161*-150.164). The combined points and authorities relating to the lack of adequate legal remedy requirement should then be combined, in turn, with a general memorandum supporting a petition for writ of mandate (*see § 150.30*) or a petition for a writ of prohibition (*see § 150.70*).

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Time for Filing Petition

A petition for a peremptory writ under *Code Civ. Proc. § 437c(m)* must be filed within 20 days after service on the petitioner of a written notice of entry of the order. If the notice is served by mail, this period is increased by five days if the place of address in within California, by 10 days if it is outside California but within the United States, and by 20 days if it is outside the United States. The period is increased by two days if the notice is served by fax, Express Mail, or other overnight delivery method. The superior court may, for good cause, and prior to the expiration of the initial period, extend the time for filing for a period not exceeding 10 days [*Code Civ. Proc. § 437c(m)*].

[c] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender). For discussion, forms, and a procedural guide relating to summary judgment, see Ch. 537, *Summary Judgment* in that publication.

[d] Opposing Memoranda

The points and authorities set out in *§ 150.205* may be used in an appropriate case to oppose a petition for mandate that is supported by these points and authorities.

[3] Discussion of Authorities

[a] Substantial Portion of Case Will Not Be Tried on Merits

In ***Bundren v. Superior Court*** *(1983) 145 Cal. App. 3d 784, 193 Cal. Rptr. 671* , plaintiff brought an action against a

hospital for negligent and intentional infliction of emotional distress based on the hospital's debt collection practices. The remaining four causes of action in the complaint sought recovery from her insurance carrier. The trial court granted defendant's motion for partial summary judgment and dismissed plaintiff's cause of action for intentional infliction of emotional distress. Plaintiff sought a writ of mandate to compel the court to vacate the partial summary judgment order.

The court of appeal issued the writ, holding that a triable issue of fact existed (*145 Cal. App. 3d 784, 787)* . In its discussion of the adequacy of plaintiff's appellate remedy, the court observed that, because five of her six causes of action remained pending, there was no final judgment from which to appeal. A petition for writ of mandate was properly entertained because the trial court's order barred a substantial portion of plaintiff's case from being tried on the merits (*145 Cal. App. 3d 784, 787 n.1*).

[b] Partial Summary Judgment on Issue of Damages

In ***Field Research Corp. v. Superior Court*** *(1969) 71 Cal. 2d 110, 77 Cal. Rptr. 243, 453 P.2d 747* , the trial court in a defamation action granted defendant's motion for partial summary judgment with regard to the issue of general and exemplary damages. The Supreme Court held that the court's order was erroneous and issued a writ of mandate directing the court to deny defendant's motion (*71 Cal. 2d 110, 116)* .

In ***Mason v. Superior Court*** *(1985) 163 Cal. App. 3d 989, 210 Cal. Rptr. 63* , plaintiffs brought an action seeking cancellation of a deed to real property, quiet title, ejectment, and declaratory relief in their first count, and damages in their second count. Plaintiff then recorded and filed a lis pendens. Defendants moved for summary judgment and/or adjudication of issues. The trial court granted defendants' motion for summary judgment on the first count only. Plaintiffs filed a petition for a writ of mandate, alleging that the order granting the summary judgment was erroneous. The court of appeal, in issuing the writ, noted that a writ of mandate is the appropriate means for reviewing and correcting an erroneous partial summary judgment because the judgment is not itself an appealable order (*163 Cal. App. 3d 989, 993-994)* .

[c] Summary Judgment Against One Party Only

In ***Bodenhamer v. Superior Court*** *(1986) 178 Cal. App. 3d 180, 223 Cal. Rptr. 486* , two owners of a jewelry business filed insurance claims for losses in a burglary. When disputes arose over the amount of the claims, the owners brought an action for fraud and violations of *Ins. Code § 790.03(h)* (unfair settlement practices) against the insurer and the company it had hired to adjust the claims. The adjustor moved for summary judgment on the ground that *Ins. Code § 790.03(h)* did not apply to independent insurance adjustors. The trial court granted summary judgment in favor of the adjustor and against one of the plaintiffs. The orders left the other plaintiff with a cause of action against the insurer and its agents for fraud. Plaintiffs sought a writ of mandate directing the trial court to vacate the order.

The court of appeal issued the writ, holding that the statute applied to independent claims adjustors (*178 Cal. App. 3d 180, 184-185)* . The Court also held that appeal of the summary judgment against one plaintiff, though available immediately, was not an adequate remedy because the case would go on without a substantial portion being heard on the merits (*178 Cal. App. 3d 180, 183 n.3*).

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15-150 California Points & Authorities § 150.176

§ 150.176 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--Appeal Is Inadequate Remedy to Protect Petitioner's Substantial Rights--Review of Order Denying Summary Judgment or Summary Adjudication of Issues [Code Civ. Proc. § 437c(m)]

[1] FORM

[*The following should be combined, when appropriate, with general points and authorities supporting the contention that petitioner lacks a plain, speedy, and adequate remedy in the ordinary course of law (see, e.g., § 150.160), with general points and authorities supporting the contention that appeal is not an adequate remedy (see, e.g., § 150.164), and with a general memorandum supporting a petition for a writ of mandate (see, e.g., § 150.30) or a petition for a writ of prohibition (see, e.g., § 150.70).*]

A PEREMPTORY WRIT IS PROPER TO REVIEW ANY ORDER UNDER CODE OF CIVIL PROCEDURE SECTION 437c OTHER THAN AN ORDER FOR ENTRY OF SUMMARY JUDGMENT, INCLUDING AN ORDER DENYING SUMMARY JUDGMENT OR SUMMARY ADJUDICATION OF ISSUES.

A. Peremptory Writ Authorized. On entry of any order under *Section 437c of the Code of Civil Procedure*, other than an order for entry of summary judgment, a party may petition an appropriate reviewing court for a peremptory writ (*Code Civ. Proc. § 437c(m)*).

[*EITHER*]

B. Denial of Motion for Summary Adjudication. A writ of mandate is the proper remedy when a court has erroneously denied a motion for summary adjudication of issues (*Knowles v. Superior Court (2004) 118 Cal. App. 4th 1290, 1294-1295, 13 Cal. Rptr. 3d 700* ; *Leyva v. Superior Court (1985) 164 Cal. App. 3d 462, 468 n.1, 210 Cal. Rptr. 545*).

[*OR*]

B. Denial of Summary Judgment. A writ of mandate will issue to compel a trial court to grant summary judgment in petitioner's favor when denial of petitioner's motion for summary judgment was an abuse of discretion; there has been an abuse of discretion when affidavits in support of the motion were sufficient to sustain summary judgment in petitioner's favor and when the opponent did not by counteraffidavit show facts sufficient to present a triable issue of fact (*Roman Catholic Archbishop v. Superior Court (1971) 15 Cal. App. 3d 405, 410-412, 93 Cal. Rptr. 338*).

C. Liberal Use of Writs. When there is no triable issue of fact and the court denies a motion for summary judgment, the ruling is automatically an abuse of discretion; under these circumstances, a more liberal use of the extraordinary writs is proper to avoid an unnecessary trial (*Whitney's at the Beach v. Superior Court (1970) 3 Cal. App. 3d 258, 266, 83 Cal. Rptr. 237* (mandate)).

[*Optional*] **D. Long and Expensive Jury Trial.** A writ of mandate should issue to review denial of petitioner's motion for summary judgment when denial of the writ petition would otherwise subject petitioner to a long and expensive jury trial (*Sierra Breeze v. Superior Court (1978) 86 Cal. App. 3d 102, 104 n.2, 149 Cal. Rptr. 914* (mandate); *Bricklayers & Masons Union No. 1 v. Superior Court of Kings County (1963) 216 Cal. App. 2d 578, 581-582, 31 Cal. Rptr. 115* (prohibition)).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the petitioner lacks a plain, speedy, and adequate remedy in the ordinary course of law, because the petitioner's remedy by appeal is inadequate. The specific ground for the contention is that a peremptory writ is expressly authorized to review an order denying summary judgment or summary adjudication of issues [*Code Civ. Proc. § 437c(m)*].

These points and authorities should be combined with general points and authorities relating to the lack of adequate legal remedy requirement (*see § 150.160*). They may also be combined with general points and authorities relating to the inadequacy of the remedy of appeal (*see § 150.165*), and, if appropriate, with other specific points and authorities relating to the inadequacy of the remedy of appeal (*see §§ 150.166*-150.175, *150.177*-150.182), and with other specific points and authorities relating to the lack of adequate legal requirement (*see §§ 150.161*-150.164). The combined points and authorities relating to the lack of adequate legal remedy requirement should then be combined, in turn, with a general memorandum supporting a petition for writ of mandate (*see § 150.30*) or a petition for a writ of prohibition (*see § 150.70*).

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Time for Filing Petition

A petition for a peremptory writ under *Code Civ. Proc. § 437c(m)* must be filed within 20 days after service on the petitioner of a written notice of entry of the order. If the notice is served by mail, this period is increased by five days if the place of address in within California, by 10 days if it is outside California but within the United States, and by 20 days if it is outside the United States. The period is increased by two days if the notice is served by fax, Express Mail, or other overnight delivery method. The superior court may, for good cause, and prior to the expiration of the initial period, extend the time for filing for a period not exceeding 10 days [*Code Civ. Proc. § 437c(m)*].

[c] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender). For discussion, forms, and a procedural guide relating to summary judgment, see Ch. 537, *Summary Judgment* in that publication.

[d] Opposing Memoranda

The points and authorities set out in *§ 150.205* may be used in an appropriate case to oppose a petition for mandate that is supported by these points and authorities.

[3] Discussion of Authorities

[a] Denial of Summary Adjudication

In ***Knowles v. Superior Court*** *(2004) 118 Cal. App. 4th 1290, 13 Cal. Rptr. 3d 700* , plaintiffs were a decedent's family who sued the decedent's doctor for medical malpractice. The doctor filed a motion for summary adjudication or summary judgment, arguing that the family's claims were barred by the statute of limitations. The doctor also argued that one son's wrongful death action failed because the son suffered from a head injury and was therefore not aware the father was dead. The trial court denied the doctor's motion. The doctor then filed a petition for writ relief.

Before reviewing the merits of the doctor's motion, the court of appeal held that an order denying a motion for summary judgment may be reviewed by way of a petition for a writ of mandate. If the trial court's denial of a motion for summary judgment will result in a trial on nonactionable claims, a writ of mandate will issue (*118 Cal. App. 4th 1290, 1294-1295)* . The court of appeal granted the writ in part because the family filed their complaints more than one year after they discovered their claims. The court of appeal denied the writ in part, holding that the doctor did not make a prima facie showing that the decedent's mentally incompetent son could not establish wrongful death damages (*118 Cal. App. 4th 1290, 1301-1302)* .

In ***Leyva v. Superior Court*** *(1985) 164 Cal. App. 3d 462, 210 Cal. Rptr. 545* , plaintiffs in a securities fraud case moved for summary adjudication, arguing that the instruments sold to them by defendant constituted "securities" within the statutory meaning of the term. The court denied the motion and plaintiffs petitioned for mandate.

The court of appeal denied the writ on the ground that plaintiffs failed to demonstrate sufficient facts in favor of their motion for summary adjudication (*164 Cal. App. 3d 462, 475)* . The court, however, rejected defendants' contention that the writ should be denied on the procedural ground that petitioners failed to demonstrate the absence of an adequate remedy at law (*164 Cal. App. 3d 462, 467)* .

[b] Denial of Summary Judgment

In ***Roman Catholic Archbishop v. Superior Court*** *(1971) 15 Cal. App. 3d 405, 93 Cal. Rptr. 338* , plaintiff brought an action for damages allegedly sustained from a breach of an agreement with a monastery in Switzerland, naming as defendant the local Archbishop on the theory that the Archbishop was the alter ego of the monastery. The trial court denied defendant's motion for summary judgment and defendant sought a writ of mandate to compel the court to grant the motion. The court of appeal issued the writ, holding that the writ should be granted when the affidavits in support of the moving party are sufficient to sustain a judgment in his or her favor, when the opposing party does not by counteraffidavit show facts sufficient to present a triable issue of fact (*15 Cal. App. 3d 405, 410)* . Because the affidavits of the Archbishop demonstrated that the real party in interest could not meet the requirements of the alter ego theory, the court held that summary judgment was appropriate and that the trial court abused its discretion in refusing to grant the motion (*15 Cal. App. 3d 405, 411-412)* .

[c] Liberal Use of Writs

In ***Whitney's at the Beach v. Superior Court*** *(1970) 3 Cal. App. 3d 258, 83 Cal. Rptr. 237* , plaintiff brought an action against defendant for negligent maintenance of a skating rink. Defendant moved for a summary judgment on the basis that it never had used, maintained, or assumed any responsibility for the maintenance of the ice rink. The motion was denied and defendant petitioned for a writ of mandate.

The court of appeal issued the writ, holding that it was an abuse of discretion not to grant the motion for summary judgment because there was no factual issue present with regard to defendant's ownership, possession, or control of the premises (*3 Cal. App. 3d 258, 270-272)* . The court set out the principles to be applied in determining whether writ review from a denial of summary judgment is proper: (1) if the proceedings reveal that there is a triable issue of fact, the motion must be denied; (2) if the trial court errs and grants the motion on an erroneous finding that there is no such issue, an appeal lies from the ensuing judgment; and (3) if there is no triable issue and the court errs in denying the motion, the ruling is an error in law and automatically is an abuse of discretion. Under these circumstances, the court stated, the more liberal use of the extraordinary writs may be proper. In doubtful cases, the appellate court may exercise its discretion and entertain the writ so as to avoid unnecessary proceedings. The court warned, however, that doubts should be resolved in favor of denial of review (*3 Cal. App. 3d 258, 266)* .

[d] Long and Expensive Trial

In ***Sierra Breeze v. Superior Court*** *(1978) 86 Cal. App. 3d 102, 149 Cal. Rptr. 914* , defendant, a newspaper, moved for summary judgment in a libel action and the motion was denied. The court of appeal issued a peremptory writ of mandate directing the trial court to grant the motion, holding that the allegedly defamatory article merely expressed an opinion (*86 Cal. App. 3d 102, 104, 108)* . The court acknowledged that the writ is a proper remedy when the affidavits in support of the moving party are sufficient to sustain a judgment in that party's favor, and when the opposing party does not by counteraffidavit show facts sufficient to present a triable issue of fact. In its discussion of the adequacy of petitioner's appellate remedy, the court only noted that, in issuing an alternative writ of mandate, the court necessarily determined there was no other adequate remedy. The court also observed, however, that petitioner alleged that he had no other plain, speedy, and adequate remedy in the ordinary course of the law in that denial of his petition would subject him to a long jury trial with attendant expenses (*86 Cal. App. 3d 102, 104 n.2*).

In ***Bricklayers & Masons Union No. 1 v. Superior Court of Kings County*** *(1963) 216 Cal. App. 2d 578, 31 Cal. Rptr. 115* , the defendant union was sued by a contractor for intentional interference with contractual relations. The union moved for a summary judgment on the basis that acts complained of were protected or prohibited by the National Labor Relations Act and that, therefore, exclusive jurisdiction rested in the National Labor Relations Board. The summary judgment was denied and the union petitioned for a writ of prohibition. The court of appeal determined that the union's remedy of appeal was neither adequate nor speedy because the union could not appeal the denial of the motion for summary judgment. Therefore, if the jurisdictional issue were not reviewed by the petition for the writ, the union would have to proceed to a possibly unnecessary trial if it later prevailed on the jurisdictional issue (*216 Cal. App. 2d 578, 582)* . The court then held that the NLRB had exclusive jurisdiction and issued the writ (*216 Cal. App. 2d 578, 584-588)* .

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iii. Lack of Adequate Legal Remedy Requirement

15-150 California Points & Authorities § 150.177

§ 150.177 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--Appeal Is Inadequate Remedy to Protect Petitioner's Substantial Rights--Review of Order Denying Relief From Waiver of Jury Trial

[1] FORM

[*The following should be combined, when appropriate, with general points and authorities supporting the contention that petitioner lacks a plain, speedy, and adequate remedy in the ordinary course of law (see, e.g., § 150.160), with general points and authorities supporting the contention that appeal is not an adequate remedy (see, e.g., § 150.165), and with a general memorandum supporting a petition for a writ of mandate (see, e.g., § 150.30) or a petition for a writ of prohibition (see, e.g., § 150.70).*]

APPEAL IS NOT AN ADEQUATE REMEDY BECAUSE IT WILL BE DIFFICULT AFTER A TRIAL FOR PETITIONER TO ESTABLISH THAT HE/SHE/IT WAS PREJUDICED BY THE COURT'S ORDER DENYING RELIEF FROM THE WAIVER OF A JURY TRIAL, AND A TRIAL WOULD BE INEFFICIENT AND TIME CONSUMING.

Review of Denial of Waiver of Jury Trial. A writ of mandate is a proper remedy to review a trial court's order denying a plaintiff's motion for relief from waiver of a jury trial, because, after a court trial, it would be difficult for plaintiff to establish that he or she was prejudiced by denial of a jury trial, and even if he or she could establish prejudice, such a procedure would be inefficient and time consuming (*Byram v. Superior Court (1977) 74 Cal. App. 3d 648, 654, 141 Cal. Rptr. 604*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that the petitioner lacks a plain, speedy, and adequate remedy in the ordinary course of law, because the petitioner's remedy by appeal is inadequate.

The specific ground for the contention is that appeal is an inadequate remedy to review an order denying a plaintiff's motion for relief from his or her waiver of a jury trial.

The foregoing points and authorities should be combined with general points and authorities relating to the lack of adequate legal remedy requirement (*see § 150.160*), with general points and authorities relating to the inadequacy of the remedy of appeal (*see § 150.165*), and, if appropriate, with other specific points and authorities relating to the inadequacy of the remedy of appeal (*see §§ 150.166*-150.176, *150.178*-150.182). They may also be combined, when appropriate, with other specific points and authorities relating to the lack of adequate legal requirement (*see §§ 150.161*-150.164). The combined points and authorities relating to the lack of adequate legal remedy requirement should then be combined, in turn, with a general memorandum supporting a petition for a writ of mandate (*see § 150.30*) or a petition for a writ of prohibition (*see § 150.70*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender). For discussion, forms, and a procedural guide relating to jury trials, see Ch. 326A, *Jury Verdicts* , in that publication.

[c] Opposing Memoranda

The points and authorities set out in *§ 150.185* may be used in an appropriate case to oppose a petition for mandate that is supported by the foregoing points and authorities.

[3] Discussion of Authorities

[a] Review of Denial of Waiver of Jury Trial

In ***Byram v. Superior Court*** *(1977) 74 Cal. App. 3d 648, 141 Cal. Rptr. 604* , plaintiff in a personal injury action requested a jury trial throughout the proceedings but received notice, 10 days before trial, that jury fees had not been deposited 14 days in advance. Plaintiff immediately filed a motion for relief from the waiver. Defendants presented no evidence that they would be prejudiced by allowing a jury trial, but the court denied the motion. Plaintiff then petitioned for a writ of mandate or prohibition.

The court of appeal issued a writ of mandate directing the court to vacate its order, holding that the court abused its discretion (*74 Cal. App. 3d 648, 654-655)* . The court noted that right to trial by jury is a basic and fundamental part of the system of jurisprudence. Mandate was the proper remedy, the court held, because, after a court trial, it would be difficult for petitioner to establish that he was prejudiced by denial of a jury trial. In addition, even if he could establish such prejudice, such a procedure would be inefficient and time consuming (*74 Cal. App. 3d 648, 654)* .

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15-150 California Points & Authorities § 150.178

§ 150.178 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--Appeal Is Inadequate Remedy to Protect Petitioner's Substantial Rights--Review of Order Denying Dismissal for Delay in Prosecution

[1] FORM

[*The following should be combined, when appropriate, with general points and authorities supporting the contention that petitioner lacks a plain, speedy, and adequate remedy in the ordinary course of law (see, e.g., § 150.160), with general points and authorities supporting the contention that appeal is not an adequate remedy (see, e.g., § 150.165), and with a general memorandum supporting a petition for a writ of mandate (see, e.g., § 150.30) or a petition for a writ of prohibition (see, e.g., § 150.70).*]

APPEAL IS NOT A SPEEDY OR ADEQUATE REMEDY TO REVIEW AN ORDER DENYING DISMISSAL FOR PLAINTIFF'S DELAY IN PROSECUTION, BECAUSE IT REQUIRES DEFENDANT FIRST TO SUBMIT TO AN UNWARRANTED TRIAL OF THE ACTION AND THEN APPEAL FROM AN ADVERSE JUDGMENT.

A. Denial of Motion to Dismiss for Delay in Prosecution. A writ of mandate is proper to review a trial court's order denying a motion for dismissal for delay in prosecution, because requiring petitioner to submit to an unwarranted trial of the case, and then appeal from an adverse judgment, would not afford speedy or adequate relief (*Tomales Bay etc. Corp. v. Superior Court (1950) 35 Cal. 2d 389, 392, 217 P.2d 968*).

[*EITHER*]

B. Failure to Serve and Return Summons. A writ of mandate is proper to compel a dismissal of an action when the plaintiff has failed to serve the summons within the three-year period prescribed by *Section 583.210(a) of the Code of Civil Procedure*, or has failed to file the proof of service of the summons within 60 days thereafter as prescribed by *Section 583.210(b) of the Code of Civil Procedure*, and the trial court has refused a motion on that ground (*see Coates*

Capitol Corp. v. Superior Court (1967) 251 Cal. App. 2d 125, 126-127, 59 Cal. Rptr. 231 ; *Dresser v. Superior Court (1964) 231 Cal. App. 2d 68, 74, 41 Cal. Rptr. 473*).

[*OR*]

B. Failure to Bring Case to Trial. A writ of mandate is proper to compel a trial court to dismiss an action when there has been a failure to bring the action to trial within the five-year period prescribed by *Section 583.310 of the Code of Civil Procedure* (*see* *J.C. Penney Co. v. Superior Court (1959) 52 Cal. 2d 666, 669, 343 P.2d 919*).

[*OR*]

B. Failure to Bring Case to Trial After Remand. A writ of mandate is proper to compel a trial court to dismiss an action under *Sections 583.320(a)(3) of the Code of Civil Procedure* when there has been a failure to bring the action to trial within three years of the filing of a remittitur when an appeal has been taken, the judgment reversed, and the cause remanded for a new trial (*see* *McDonough Power Equipment Co. v. Superior Court (1972) 8 Cal. 3d 527, 530-531, 105 Cal. Rptr. 330, 503 P.2d 1338*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that the petitioner lacks a plain, speedy, and adequate remedy in the ordinary course of law, because the petitioner's remedy by appeal is inadequate. The specific ground for the contention is that appeal is an inadequate remedy to review the denial of a motion for mandatory dismissal of an action for delay in prosecution.

The foregoing points and authorities should be combined with general points and authorities relating to the lack of adequate legal remedy requirement (*see § 150.160*), with general points and authorities relating to the inadequacy of the remedy of appeal (*see § 150.165*), and, if appropriate, with other specific points and authorities relating to the inadequacy of the remedy of appeal (*see §§ 150.166*-150.177, *150.179*-150.182). They may also be combined, when appropriate, with other specific points and authorities relating to the lack of adequate legal requirement (*see §§ 150.161*-150.164). The combined points and authorities relating to the lack of adequate legal remedy requirement should then be combined, in turn, with a general memorandum supporting a petition for a writ of mandate (*see § 150.30*) or a petition for a writ of prohibition (*see § 150.70*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender). For discussion, forms, and a procedural guide relating to involuntary dismissal for delay in prosecution, see Ch. 212, *Dismissal* in that publication.

[3] Discussion of Authorities

[a] Denial of Motion to Dismiss for Delay in Prosecution

In ***Tomales Bay etc. Corp. v. Superior Court*** *(1950) 35 Cal. 2d 389, 217 P.2d 968* , plaintiff brought an action against

California Employment Stabilization Commission and the Commission cross-complained against plaintiff. The main complaint was dismissed for delay in prosecution and the cross-action went to trial, resulting in judgment for plaintiff. The Commission obtained an order for new trial and plaintiff subsequently moved to dismiss the Commission's action against him for failure to bring it to trial within five years after plaintiff originally filed his action. The motion was denied because trial had been commenced within five years after the Commission filed its cross-complaint in the original action. Plaintiff petitioned for a writ of prohibition to prevent the court from proceeding with the trial.

The Supreme Court held that the cross-complaint was not subject to dismissal and denied the petition (*35 Cal. 2d 389, 393-394)* . In its discussion of the adequacy of petitioner's appellate remedy, however, the Court ruled that the order was not appealable and that to compel petitioner to submit to an unwarranted retrial of the case, and then appeal from an adverse judgment, would not afford speedy or adequate relief (*35 Cal. 2d 389, 392)* .

[b] Failure to Serve and Return Summons

In ***Coates Capitol Corp. v. Superior Court*** *(1967) 251 Cal. App. 2d 125, 59 Cal. Rptr. 231* , petitioner was a defendant in a wrongful death action that alleged that decedent died from a gunshot wound inflicted by an employee of petitioner. Three years after the complaint was filed, defendant moved for an order dismissing the action on the ground that summons had not been served and a return had not been made within three years after commencement of the action as required by former Code Civ. Proc. § 581a (*now see Code Civ. Proc. §§ 583.210, 583.250*). Plaintiff opposed the motion on the ground that defendant, a domestic corporation, had concealed itself from the commencement of the action and, thus, that service of process could not be completed. The trial court denied defendant's motion, and defendant then petitioned the court of appeal for a writ of mandate compelling the court to dismiss the action against it. The court of appeal held that a domestic corporation cannot secrete itself within the meaning of former Code Civ. Proc. § 581a (*now see Code Civ. Proc. §§ 583.210, 583.250*) (*251 Cal. App. 2d 125, 129)* . Therefore, the court granted the writ of mandate (*251 Cal. App. 2d 125, 130)* .

Dresser v. Superior Court *(1964) 231 Cal. App. 2d 68, 41 Cal. Rptr. 473* , was an eminent domain action in which summons had not been served on petitioners within the three-year period required by former Code Civ. Proc. § 581a (*now see Code Civ. Proc. §§ 583.210, 583.250*) and the parties had filed no stipulation in writing extending the statutory period. In issuing a writ of mandate commanding the trial court to set aside the judgment of condemnation and dismiss the action, the court of appeal stated that former Code Civ. Proc. § 581a (*now see Code Civ. Proc. §§ 583.210, 583.250*) is mandatory and jurisdictional. Thus, as to any action falling within the former code section, the court has power to act only by ordering a dismissal (*231 Cal. App. 2d 68, 73-74)* .

[c] Failure to Bring Case to Trial

In ***J.C. Penney Co. v. Superior Court*** *(1959) 52 Cal. 2d 666, 343 P.2d 919* , the trial court denied defendant's motion to dismiss the action for failure to bring the case to trial. The Defendant petitioned for a writ of mandate or prohibition. The Supreme Court issued a writ of prohibition, holding that the stipulation signed by the parties was not sufficient to extend the five-year statutory time limit (*52 Cal. 2d 666, 669-671)* . The court stated that a writ of mandate is an appropriate remedy to compel dismissal of an action after the time prescribed by former Code Civ. Proc. § 583 (*now see Code Civ. Proc. §§ 583.310, 583.360*) has expired (*52 Cal. 2d 666, 669)* .

[d] Failure to Bring Case to Trial After Remand

In ***McDonough Power Equipment Co. v. Superior Court*** *(1972) 8 Cal. 3d 527, 105 Cal. Rptr. 330, 503 P.2d 1338* , after a remittitur was filed in the trial court, a continuance resulted in the action not being brought to trial within the three-year period prescribed by former Code Civ. Proc. § 583(b) [*now see Code Civ. Proc. § 583.320(a)(3)*]. Defendant moved for dismissal and sought a writ of mandate to review the trial court's denial of the motion.

The Supreme Court issued the writ (*8 Cal. 3d 527, 534)* . It held that when a judgment of dismissal based on a demurrer is reversed and remanded for a new trial by an appellate court, plaintiff must, under former Code Civ. Proc. § 583(b) (*now see Code Civ. Proc. § 583.320(a)(3)*), bring the action to trial within three years after the filing of the remittitur in the trial court (*8 Cal. 3d 527, 532)* .

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15-150 California Points & Authorities § 150.179

§ 150.179 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--Appeal Is Inadequate Remedy to Protect Petitioner's Substantial Rights--Review of Erroneous Refusal to Enter or Erroneous Entry of Default Judgment

[1] FORM

[*The following should be combined, when appropriate, with general points and authorities supporting the contention that petitioner lacks a plain, speedy, and adequate remedy in the ordinary course of law (see, e.g., § 150.160), with general points and authorities supporting the contention that appeal is not an adequate remedy (see, e.g., § 150.165), and with a general memorandum supporting a petition for a writ of mandate (see, e.g., § 150.30) or a petition for a writ of prohibition (see, e.g., § 150.70).*]

APPEAL IS NOT AN ADEQUATE REMEDY TO REVIEW A TRIAL COURT'S _____ [REFUSAL TO ENTER *or* ENTRY OF] A DEFAULT JUDGMENT BECAUSE THE COURT LACKS JURISDICTION TO PROCEED WITH THE ACTION.

[*EITHER*]

Refusal to Enter Default Judgment. When petitioner's request for default judgment has been improperly refused, the trial court's jurisdiction is lost and so any appellate remedy is not speedy or adequate (*W.A. Rose Co. v. Municipal Court (1959) 176 Cal. App. 2d 67, 74, 1 Cal. Rptr. 49*).

[*OR*]

Entry of Default Judgment. When the court does not have personal jurisdiction over petitioner, the remedy of appeal from a default judgment is not an adequate remedy because the act of appealing will amount to a general appearance

and waiver of petitioner's claim of lack of jurisdiction (*Jardine v. Superior Court (1931) 213 Cal. 301, 304-305, 2 P.2d 756* ; *Bakersfield Hacienda, Inc. v. Superior Court (1962) 199 Cal. App. 2d 798, 802-803, 18 Cal. Rptr. 812*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that the petitioner lacks a plain, speedy, and adequate remedy in the ordinary course of law, because the petitioner's remedy by appeal is inadequate. The specific ground for the contention is that appeal is an inadequate remedy to review either the trial court's refusal to enter a default judgment, because the court does not have jurisdiction to proceed, or the trial court's entry of default judgment, because it lacks personal jurisdiction over the defendant.

The foregoing points and authorities should be combined with general points and authorities relating to the lack of adequate legal remedy requirement (*see § 150.160*), with general points and authorities relating to the inadequacy of the remedy of appeal (*see § 150.165*), and, if appropriate, with other specific points and authorities relating to the inadequacy of the remedy of appeal (*see §§ 150.166*-150.178, *150.180*-150.182). They may also be combined, when appropriate, with other specific points and authorities relating to the lack of adequate legal requirement (*see §§ 150.161*-150.164). The combined points and authorities relating to the lack of adequate legal remedy requirement should then be combined, in turn, with a general memorandum supporting a petition for a writ of mandate (*see § 150.30*) or a petition for a writ of prohibition (*see § 150.70*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender). For discussion, forms, and a procedural guide relating to defaults, see Ch. 205, *Defaults and Default Judgments* in that publication.

[3] Discussion of Authorities

[a] Refusal to Enter Default Judgment

The facts and procedure in ***W.A. Rose Co. v. Municipal Court*** *(1959) 176 Cal. App. 2d 67, 1 Cal. Rptr. 49* , are discussed in *§ 150.37[3][a]*. In affirming a superior court judgment that directed the municipal court to enter default for plaintiff, the court of appeal noted that the adequacy of other remedies is a factual question whose determination lies largely in the discretion of the court that issued the writs. The standard of review requires affirmance, absent a showing of abuse of discretion. The court concluded that the superior court could have, and undoubtedly did, determine that any appeal remedy was not speedy or adequate because the municipal court was proceeding with the action in spite of the fact that it lost jurisdiction when the plaintiff was improperly denied default and judgment (*176 Cal. App. 2d 67, 74)* .

[b] Entry of Default Judgment

In ***Jardine v. Superior Court*** *(1931) 213 Cal. 301, 2 P.2d 756* , one defendant in a stockholders' suit claimed that the court did not obtain jurisdiction over it and petitioned for a writ of prohibition. The Supreme Court denied the writ, holding that jurisdiction was properly obtained over petitioner (*213 Cal. 301, 321)* . In its discussion of the adequacy of another remedy, the Court held that appeal after a default judgment was not an adequate remedy because appealing would amount to a general appearance that would waive the jurisdictional issue. The petitioner should not have to choose between allowing the action to go by default and then appealing on the jurisdictional issue, which would result

in the loss of the right to contest on the merits, or appearing to defend the case on the merits, which would waive the jurisdictional issue (*213 Cal. 301, 304)* . The Court also noted that a decision on the jurisdictional issue in petitioner's favor would save the delay and expense of a trial (*213 Cal. 301, 304-305)* .

In ***Bakersfield Hacienda, Inc. v. Superior Court*** *(1962) 199 Cal. App. 2d 798, 18 Cal. Rptr. 812* , plaintiff attempted to obtain jurisdiction over petitioner corporation by obtaining an order for substituted service on the Secretary of State. After a default was entered against petitioner, it petitioned for a writ of prohibition. The court of appeal issued the writ, holding that the substituted service was not proper (*199 Cal. App. 2d 798, 804-805)* . In its discussion of the adequacy of another remedy, the court held that appeal from the default was not an adequate remedy because it would amount to a general appearance and waive the jurisdictional issue (*199 Cal. App. 2d 798, 802-803)* .

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15-150 California Points & Authorities § 150.180

§ 150.180 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--Appeal Is Inadequate Remedy to Protect Petitioner's Substantial Rights--Review of Order or Judgment When Petitioner Cannot Post Stay Bond

[1] FORM

[*The following should be combined, when appropriate, with general points and authorities supporting the contention that petitioner lacks a plain, speedy, and adequate remedy in the ordinary course of law (see, e.g., § 150.160), with general points and authorities supporting the contention that appeal is not an adequate remedy (see, e.g., § 150.165), and with a general memorandum supporting a petition for a writ of mandate (see, e.g., § 150.30) or a petition for a writ of prohibition (see, e.g., § 150.70).*]

APPEAL IS NOT AN ADEQUATE REMEDY BECAUSE PETITIONER CANNOT AFFORD TO POST THE BOND REQUIRED TO STAY THE JUDGMENT ON APPEAL.

Petitioner Cannot Post Stay Bond. The remedy of appeal from an appealable order or judgment is inadequate when a stay bond is required and petitioner cannot afford to post the amount of the bond (*United Farm Workers Organizing Committee v. Superior Court (1971) 4 Cal. 3d 556, 563 n.7, 94 Cal. Rptr. 263, 483 P.2d 1215* ; *Woods-Drury, Inc. v. Superior Court (1936) 18 Cal. App. 2d 340, 349-350, 63 P.2d 1184*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that the petitioner lacks a plain, speedy, and adequate remedy in the ordinary course of law, because the petitioner's remedy by appeal is inadequate. The specific ground for the contention is that appeal is an inadequate remedy when appellant is required to post a bond to stay the judgment pending appeal, but cannot afford to do so.

The foregoing points and authorities should be combined with general points and authorities relating to the lack of adequate legal remedy requirement (*see § 150.160*), with general points and authorities relating to the inadequacy of the remedy of appeal (*see § 150.165*), and, if appropriate, with other specific points and authorities relating to the inadequacy of the remedy of appeal (*see §§ 150.166*-150.179, *150.181*-150.182). They may also be combined, when appropriate, with other specific points and authorities relating to the lack of adequate legal requirement (*see §§ 150.161*-150.164). The combined points and authorities relating to the lack of adequate legal remedy requirement should then be combined, in turn, with a general memorandum supporting a petition for a writ of mandate (*see § 150.30*) or a petition for a writ of prohibition (*see § 150.70*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Petitioner Cannot Post Stay Bond

In ***United Farm Workers Organizing Committee v. Superior Court*** *(1971) 4 Cal. 3d 556, 94 Cal. Rptr. 263, 483 P.2d 1215* , the superior court issued a preliminary injunction enjoining petitioners from, among other things, urging the public to boycott the products of the real party in interest. Petitioners sought a writ of prohibition against enforcement of the injunction.

The Supreme Court issued the writ, holding that the injunction was overly broad (*4 Cal. 3d 556, 571-572)* . The Court also held that petitioner's remedy of appeal was inadequate when its unchallenged assertion was that it was unable to post a stay bond in the amount required by the trial court (*4 Cal. 3d 556, 563 n.7*).

In ***Woods-Drury, Inc. v. Superior Court*** *(1936) 18 Cal. App. 2d 340, 63 P.2d 1184* , plaintiff commenced an unlawful detainer proceeding against petitioner. Before judgment was final, plaintiff commenced two further unlawful detainer actions against petitioner on which trials were held. Petitioner petitioned for a writ of prohibition on the theory that the second two proceedings were in excess of jurisdiction while the first proceeding was not final. In issuing a writ of prohibition, the court of appeal held that appeal was an inadequate remedy because posting bonds in order to stay the judgments on appeal would be a tremendous burden on petitioner (*18 Cal. App. 2d 340, 349-350)* .

[4] Additional Authorities

[a] Petitioner Cannot Post Stay Bond

Rondos v. Superior Court (1957) 151 Cal. App. 2d 190, 311 P.2d 113 , was an action for breach of a contract to sell a bar and form a partnership. A receiver was appointed to run petitioner's business. Petitioner sought a writ of prohibition on the basis that the court did not have jurisdiction to appoint a receiver. The court of appeal held that the remedy of appeal from the order appointing a receiver was inadequate because of the hazards of having a receiver run a bar and because petitioner was unable to post a stay bond in his appeal (*151 Cal. App. 2d 190, 193-194)* . The court then held that the lower court did not have jurisdiction to appoint a receiver and ordered issuance of the writ (*151 Cal. App. 2d 190, 194-195)* .

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15-150 California Points & Authorities § 150.181

§ 150.181 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--Appeal Is Inadequate Remedy to Protect Petitioner's Substantial Rights--Review of Order Expunging Lis Pendens [Code Civ. Proc. § 405.39]

[1] FORM

[*The following should be combined, when appropriate, with general points and authorities supporting the contention that petitioner lacks a plain, speedy, and adequate remedy in the ordinary course of law (see, e.g., § 150.160), with general points and authorities supporting the contention that appeal is not an adequate remedy (see, e.g., § 150.165), and with a general memorandum supporting a petition for a writ of mandate (see, e.g., § 150.30) or a petition for a writ of prohibition (see, e.g., § 150.70).*]

A WRIT OF MANDATE IS THE PROPER REMEDY TO REVIEW AN ORDER GRANTING OR DENYING A MOTION TO EXPUNGE A LIS PENDENS.

Writ of Mandate Authorized. A writ of mandate is the appropriate remedy to review an order granting or denying a motion to expunge a notice of pendency of action made pursuant to *Code of Civil Procedure Section 405.30 et seq.* (*Code Civ. Proc. § 405.39*; *Amalgamated Bank v. Superior Court (2007) 149 Cal. App. 4th 1003, 1015-1017, 57 Cal. Rptr. 3d 686* ; *Mix v. Superior Court (2004) 124 Cal. App. 4th 987, 996-997, 21 Cal. Rptr. 3d 826* (appellate court can issue stay order when it receives writ petition to review motion to expunge lis pendens); *see Howard S. Wright Construction Co. v. Superior Court (2003) 106 Cal. App. 4th 314, 317, 130 Cal. Rptr. 2d 641* (court looks at whether notice of nonresponsibility insulates property from lien)).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that the petitioner lacks a plain, speedy, and adequate remedy in the ordinary course of law, because the petitioner's remedy by appeal is inadequate.

The specific ground for the contention is that a writ of mandate is expressly authorized to review an order granting or denying a motion to expunge a notice of lis pendens [*Code Civ. Proc. § 405.39*].

The foregoing points and authorities should be combined with general points and authorities relating to the lack of adequate legal remedy requirement (*see § 150.160*). They may also be combined with general points and authorities relating to the inadequacy of the remedy of appeal (*see § 150.165*), and, if appropriate, with other specific points and authorities relating to the inadequacy of the remedy of appeal (*see §§ 150.166*-150.180, *150.182*), and with other specific points and authorities relating to the lack of adequate legal requirement (*see §§ 150.161*-150.164). The combined points and authorities relating to the lack of adequate legal remedy requirement should then be combined, in turn, with a general memorandum supporting a petition for a writ of mandate (*see § 150.30*) or a petition for a writ of prohibition (*see § 150.70*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Time to File Petition

Petitioner must file and serve the petition for writ of mandate within 20 days of being served with written notice of the order granting or denying the motion to expunge a lis pendens. The court that issued the order may, prior to the expiration of the initial 20-day period, extend the time for one additional period not to exceed 10 days [*Code Civ. Proc. § 405.39*].

[c] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender). For discussion, forms, and a procedural guide relating to lis pendens, see California Forms of Pleading and Practice, Ch. 348, *Lis Pendens* .

[d] Opposing Memoranda

The points and authorities set out in *§ 150.205* may be used in an appropriate case to oppose a petition for mandate that is supported by the foregoing points and authorities.

[3] Discussion of Authorities

[a] Writ of Mandate Authorized

In ***Amalgamated Bank v. Superior Court*** *(2007) 149 Cal. App. 4th 1003, 1015-1017, 57 Cal. Rptr. 3d 686* , a purchaser bought a real estate parcel at a foreclosure sale for $2,000. Creditors with a security interest in the property filed an action to set aside the judicial foreclosure sale and recorded a notice of lis pendens on the property. The trial court granted summary judgment in favor of the purchaser. The creditors filed a notice of appeal. Several months later, the purchaser moved to expunge the lis pendens. The trial judge granted the motion. The creditors filed a petition for writ of mandate to challenge the trial court's order granting the purchaser's motion to expunge the lis pendens.

The court of appeal addressed the issue of what an appellate court should do about an order expunging a lis pendens when a real property claimant is appealing from an adverse judgment in the trial court and files a writ petition asking the court to stay the expungement until the appeal is decided. The court noted that the 1992 amendments to the lis pendens law place the burden on the party filing a lis pendens to show the "probable validity" of his or her real property claim before trial, but do not state what standard the trial court should apply when facing a motion to expunge the lis pendens after the claimant suffers an adverse judgment (*149 Cal. App. 4th 1003, 1008*). The court held that on a motion to expunge a lis pendens after judgment against the claimant and while an appeal is pending, the trial court must

grant the motion unless it finds it more likely than not that the appellate court will reverse the judgment (*149 Cal. App. 4th 1003, 1015)* . The court held that in deciding a writ petition under *Code of Civ. Proc. § 405.39* after judgment and pending appeal, an appellate court must assess whether the underlying real property claim has "probable validity" as that term is used in *Code of Civ. Proc. § 405.3*, i.e., whether it is more likely than not the real property claim will prevail at the end of the appellate process (*149 Cal. App. 4th 1003, 1016-1017)* .

In ***Mix v. Superior Court*** *(2004) 124 Cal. App. 4th 987, 996-997, 21 Cal. Rptr. 3d 826* , real property owners agreed to sell their condominium to buyers. However, the sellers' real estate agent, not the sellers themselves, signed the sales agreement. While the escrow was pending, the sellers sought to withdraw from the transaction, claiming the sale was improper because they did not actually sign the sales agreement. The buyers filed a complaint for breach of contract and recorded a lis pendens on the property. The trial court ruled in the sellers' favor on the contract claim, but denied the sellers' motion to expunge the lis pendens because the time for the buyers to appeal had not yet expired. The sellers filed a writ petition with the appellate court seeking to have the lis pendens expunged.

The court of appeal issued a peremptory writ of mandate directing the trial court to vacate the order denying the sellers' motion to expunge and to enter a new order granting the motion. The court held that *Code Civ. Proc. § 405.32* required a trial court to expunge a lis pendens if the claimant was unsuccessful at trial, unless the trial court was willing to find that its own decision was likely to be reversed on appeal (*124 Cal. App. 4th 987, 995-996)* . The court noted that decisions on motions to expunge lis pendens are expressly not appealable, and that appellate courts only reach them via petitions for writ of mandate (*124 Cal. App. 4th 987, 996)* . Thus, the court held, courts of appeal have the power to issue stay orders when they receive such petitions (*124 Cal. App. 4th 987, 996)* . The court held that the stay is an important safety valve when a trial court's ruling to expunge a stay appears to be a miscarriage of justice, and the appellate court is willing to predict, at the start of the appellate process, that it will ultimately reverse the ruling (*124 Cal. App. 4th 987, 997)* .

In ***Howard S. Wright Construction Co. v. Superior Court*** *(2003) 106 Cal. App. 4th 314, 130 Cal. Rptr. 2d 641* , plaintiff in an action on a construction contract filed a mechanic's lien and a lis pendens against property owned by defendant. Defendant moved to expunge the lis pendens on the ground that the defendant performed the work pursuant to a contract between plaintiff and the lessee of the property and that defendant had previously recorded a notice of nonresponsibility. Plaintiff relied upon the "participating owner" doctrine, which makes the property owner subject to a mechanic's lien, despite a notice of nonresponsibility, if the owner participates in the contract to make the improvements. However, the trial court concluded that plaintiff failed to prove the defendant's participation in the lessee's improvements, and the court granted the motion to expunge the lis pendens. Plaintiff petitioned for a writ of mandate directing the trial court to vacate its order.

The court of appeal granted the writ, holding that an order expunging a notice of lis pendens is not appealable, but it may be reviewed on a petition for writ of mandate. On the other hand, the court held that the grant of a motion to remove a mechanic's lien is essentially a judgment on the underlying foreclosure action that no lien exists; that judgment is a final, appealable judgment for which writ relief would ordinarily be denied (*106 Cal. App. 4th 314, 317*).

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15-150 California Points & Authorities § 150.182

§ 150.182 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--Appeal Is Inadequate Remedy to Protect Petitioner's Substantial Rights--Review of Order in Coordination Proceeding [Code Civ. Proc. § 404.6]

[1] FORM

[*The following should be combined, when appropriate, with general points and authorities supporting the contention that petitioner lacks a plain, speedy, and adequate remedy in the ordinary course of law (see, e.g., § 150.160), with general points and authorities supporting the contention that appeal is not an adequate remedy (see, e.g., § 150.165), and with a general memorandum supporting a petition for a writ of mandate (see, e.g., § 150.30) or a petition for a writ of prohibition (see, e.g., § 150.70).*]

A WRIT OF MANDATE IS THE PROPER REMEDY TO REVIEW AN ORDER RELATING TO COORDINATION OF PROCEEDINGS.

Writ of Mandate Authorized. A writ of mandate is the appropriate remedy to review an order made under *Code of Civil Procedure Sections 404 through 404.9* (coordination proceedings) (*Code Civ. Proc. § 404.6*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the petitioner lacks a plain, speedy, and adequate remedy in the ordinary course of law, because the petitioner's remedy by appeal is inadequate. The specific ground for the contention is that a writ of mandate is expressly authorized to review an order relating to the coordination of proceedings under *Code Civ. Proc. §§ 404-404.9* [*Code Civ. Proc. § 404.6*].

These points and authorities should be combined with general points and authorities relating to the lack of adequate legal remedy requirement [*see § 150.160*]. They may also be combined with general points and authorities relating to

the inadequacy of the remedy of appeal [*see § 150.165*], and, if appropriate, with other specific points and authorities relating to the inadequacy of the remedy of appeal [*see §§ 150.166*-150.181], and with other specific points and authorities relating to the lack of adequate legal requirement [*see §§ 150.161*-150.164]. The combined points and authorities relating to the lack of adequate legal remedy requirement should then be combined, in turn, with a general memorandum supporting a petition for a writ of mandate [*see § 150.30*] or a petition for a writ of prohibition [*see § 150.70*].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Time to File Petition

Petitioner must file the petition for writ of mandate within 20 days after service of notice of entry of the order. The superior court may, for good cause, and prior to the expiration of the initial 20-day period, extend the time for one additional period not to exceed 10 days [*Code Civ. Proc. § 404.6*].

[c] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* , in California Forms of Pleading and Practice (Matthew Bender). For discussion, forms, and a procedural guide relating to coordination proceedings, see Ch. 125, *Consolidation, Severance, and Coordination of Actions* , in that publication.

[d] Opposing Memoranda

The points and authorities set out in *§ 150.205* may be used in an appropriate case to oppose a petition for mandate that is supported by the foregoing points and authorities.

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15-150 California Points & Authorities § 150.183

§ 150.183 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--Appeal Is Inadequate Remedy to Protect Petitioner's Substantial Rights--Review of Order in Probate Proceeding

[1] FORM

[*The following should be combined, when appropriate, with general points and authorities supporting the contention that petitioner lacks a plain, speedy, and adequate remedy in the ordinary course of law (see, e.g., § 150.160), with general points and authorities supporting the contention that appeal is not an adequate remedy (see, e.g., § 150.165), and with a general memorandum supporting a petition for a writ of mandate (see, e.g., § 150.30) or a petition for a writ of prohibition (see, e.g., § 150.70).*]

APPEAL OF THE COURT'S ORDER _____ [*describe order, e.g.,* DETERMINING THAT PETITIONER'S FILING OF A CREDITOR'S CLAIM WOULD BE A "CONTEST" AS THAT TERM IS USED IN THE WILL'S NO-CONTEST CLAUSE] IS NOT AN ADEQUATE REMEDY, BECAUSE [THE ORDER IS NOT A DIRECTLY APPEALABLE ORDER, AND] THE DELAY INHERENT IN AN APPEAL WOULD HAMPER THE TIMELY AND ORDERLY ADMINISTRATION OF THE ESTATE[, AND THE PETITION FOR THE WRIT PRESENTS AN IMPORTANT ISSUE].

Order in Probate Proceeding. Appeal is not an adequate remedy to review an order in a probate proceeding, even if the order is directly appealable, when the delay inherent in an appeal would hamper the timely and orderly administration of the estate, particularly if the petition for the writ presents an important issue (*Varney v. Superior Court (1992) 10 Cal. App. 4th 1092, 1098, 12 Cal. Rptr. 2d 865*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that the petitioner lacks a plain,

speedy, and adequate remedy in the ordinary course of law, because the petitioner's remedy by appeal is inadequate. The specific ground for the contention is that the delay inherent in an appeal would hamper the timely and orderly administration of a decedent's estate (and, if appropriate, that the petition for the writ presents an important issue).

The foregoing points and authorities should be combined with general points and authorities relating to the lack of adequate legal remedy requirement [*see § 150.160*], with general points and authorities relating to the inadequacy of the remedy of appeal [*see § 150.165*], and, if appropriate, with other specific points and authorities relating to the inadequacy of the remedy of appeal [*see §§ 150.166*, *150.169*-150.182]. They should also be combined, when appropriate, with other specific points and authorities relating to the lack of adequate legal remedy requirement [*see §§ 150.161*-150.164]. The combined points and authorities relating to the lack of adequate legal remedy requirement should then be combined, in turn, with a general memorandum supporting a petition for writ of mandate [*see § 150.30*] or a petition for a writ of prohibition [*see § 150.70*].

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender).

[c] Opposing Memoranda

The points and authorities set out in *§ 150.185* may be used in an appropriate case to oppose a petition for mandate that is supported by the foregoing points and authorities.

[3] Discussion of Authorities

[a] Order in Probate Proceeding

In ***Varney v. Superior Court*** *(1992) 10 Cal. App. 4th 1092, 12 Cal. Rptr. 2d 865* , the probate court determined, in a special statutory proceeding [*see Prob. Code § 21310 et seq.*], that a will beneficiary's filing of a claim as a creditor and filing of a petition for conveyance of estate property would constitute a "contest" as that term was used in the will's no-contest clause. The beneficiary sought review on a petition for a writ of mandate.

The court of appeal observed that, although the probate court's order was not one of the kinds of orders made directly appealable by statute [*see* former Prob. Code § 7240 (*now see Prob. Code § 1300 et seq.*)], it was not necessary to determine whether the order was appealable. The policy reason for limiting direct appeals from orders in probate matters is to prevent delay in the distribution of estates. The court concluded that the policy would be served in this case by hearing the petition for the writ, "even if the superior court's order is appealable, given the short filing period requirements [for creditors' claims] in probate matters, the need for timely and orderly administration of estates, and the importance of the issues presented in this case" (*10 Cal. App. 4th 1092, 1098)* . The important issue was whether the court of appeal may extend the time for filing a creditor's claim, in order to permit meaningful review of the probate court's interpretation of a forfeiture clause (the no-contest clause) in a will. The court concluded that it had the authority to do that (*10 Cal. App. 4th 1092, 1098-1102)* .

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15-150 California Points & Authorities § 150.184

§ 150.184 Supporting Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--Appeal Is Inadequate Remedy to Protect Petitioner's Substantial Rights--Review of Order Denying Discovery

[1] FORM

[*The following should be combined, when appropriate, with general points and authorities supporting the contention that petitioner lacks a plain, speedy, and adequate remedy in the ordinary course of law (see, e.g., § 150.160), with general points and authorities supporting the contention that appeal is not an adequate remedy (see, e.g., § 150.165), and with a general memorandum supporting a petition for a writ of mandate (see, e.g., § 150.30) or a petition for a writ of prohibition (see, e.g., § 150.70).*]

APPEAL OF THE COURT'S ORDER _____ [*describe order, e.g.,* DENYING THE PETITIONER DISCOVERY TO WHICH THE PETITIONER IS ENTITLED] IS NOT AN ADEQUATE REMEDY, BECAUSE [*state reason, e.g.,* THE ORDER IS NOT A DIRECTLY APPEALABLE ORDER, AND THE PETITIONER WOULD BE REQUIRED TO GO TO TRIAL WITHOUT THE BENEFIT OF THE DISCOVERY].

Order Denying Discovery. Appeal is not an adequate remedy to review an order denying discovery to which the petitioner is entitled, particularly if the petitioner presents a significant issue of first impression (*Leake v. Superior Court (2001) 87 Cal. App. 4th 675, 677, 104 Cal. Rptr. 2d 767*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that the petitioner lacks a plain, speedy, and adequate remedy in the ordinary course of law, because the petitioner's remedy by appeal is inadequate. The specific ground for the contention is that the order denying discovery prevents the petitioner from obtaining discovery to which he may be entitled (and, if appropriate, that the petition raises a significant issue of first impression).

This form should be combined with the form for general points and authorities relating to the lack of adequate legal remedy requirement [*see § 150.160*], with general points and authorities relating to the inadequacy of the remedy of appeal [*see § 150.165*], and, if appropriate, with other specific points and authorities relating to the inadequacy of the remedy of appeal [*see §§ 150.166*, *150.169*-150.182]. When appropriate, it should be combined, with other specific points and authorities relating to the lack of adequate legal remedy requirement [*see §§ 150.161*-150.164]. The combined points and authorities relating to the lack of adequate legal remedy requirement should then be combined, with a general memorandum supporting a petition for writ of mandate [*see § 150.30*] or a petition for a writ of prohibition [*see § 150.70*].

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender).

[c] Opposing Memoranda

The points and authorities set out in *§ 150.185* may be used in an appropriate case to oppose a petition for mandate that is supported by these points and authorities.

[3] Discussion of Authorities

[a] Order Denying Discovery

In ***Leake v. Superior Court*** *(2001) 87 Cal. App. 4th 675, 104 Cal. Rptr. 2d 767* , the People commenced proceedings for commitment of the petitioner pursuant to the Sexually Violent Predator Act (*Welf. & Inst. Code § 6600 et seq.*). The petitioner moved the trial court for an order requiring exchange of expert witness information. However, when the People sought a protective order, the trial court ruled that civil discovery is not applicable to proceedings pursuant to the Sexually Violent Predator Act. The petitioner sought a writ of mandate to compel the trial court to grant his discovery motion.

Initially, the court of appeal observed that appellate courts usually do not provide extraordinary relief concerning pretrial discovery orders. Nonetheless, it determined that such relief was justified for two reasons. First, the petitioner identified a significant issue of first impression--that is, whether civil discovery applies to proceedings pursuant to the Sexually Violent Predator Act. And second, the effect of the trial court's protective order was to deny the petitioner discovery to which he may have been entitled. Accordingly, the court granted the petition, finding civil discovery applies to proceedings pursuant to the Sexually Violent Predator Act (*87 Cal. App. 4th 675, 677)* .

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15-150 California Points & Authorities § 150.185

§ 150.185 Opposing Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--Petitioner's Right to Appeal Is Adequate Remedy

[1] FORM

[*The following should be combined, when appropriate, with a general form of memorandum opposing a petition for a writ of mandate (see, e.g., § 150.47) or a petition for a writ of prohibition (see, e.g., § 150.78).*]

A WRIT OF _____ [MANDATE *or* PROHIBITION] SHOULD NOT ISSUE BECAUSE THE PETITIONER HAS AN ADEQUATE REMEDY BY _____ [IMMEDIATE APPEAL *or* APPEAL FROM AN EVENTUAL FINAL JUDGMENT, IF THAT JUDGMENT IS ADVERSE TO PETITIONER].

A. Doubts Resolved in Favor of Denial. Doubts as to whether writ relief is warranted should be resolved in favor of denial of review (*see Whitney's at the Beach v. Superior Court (1970) 3 Cal. App. 3d 258, 266, 83 Cal. Rptr. 237*).

[*EITHER*]

B. Direct Appeal. The order challenged by petitioner is directly appealable and so petitioner has an adequate remedy in the ordinary course of the law (*Phelan v. Superior Court (1950) 35 Cal. 2d 363, 370, 217 P.2d 951* ; *Augustyn v. Superior Court (1986) 186 Cal. App. 3d 1221, 1225, 231 Cal. Rptr. 298* ; *see Code Civ. Proc. § 904.1*).

[*Optional*] **C. Enforcement of Judgment or Order Has Been Stayed and Supersedeas Available.** An appeal is an adequate remedy when the enforcement of the judgment or order has been stayed and a writ of supersedeas is available if the trial court undertakes enforcement of the judgment while the appeal is pending (*McAneny v. Superior Court (1906) 150 Cal. 6, 9, 87 P. 1020* ; *Moon v. Superior Court (1943) 59 Cal. App. 2d 447, 450, 139 P.2d 84*).

[*OR*]

B. Factors for Consideration When Petitioner Can Appeal From Eventual Judgment. A writ petition should be denied when (1) granting the petition would encourage piecemeal litigation and foster the delay of a trial, vex the litigants and the trial court with multiple proceedings, and add to the delay of judgment appeals pending in the appellate court, particularly when consideration of writ will neither save time nor aid in the resolution of the lawsuit; or (2) the purported error may be cured prior to trial, have little or no effect on the outcome of the trial, or be properly considered on appeal (*see Omaha Indemnity Co. v. Superior Court (1989) 209 Cal. App. 3d 1266, 1272-1273, 258 Cal. Rptr. 66*).

C. Time and Expense of Appeal. A petitioner's remedy of appeal from a judgment or order is not inadequate merely because the appeal will cost more and take longer than the writ proceeding (*Jollie v. Superior Court (1951) 38 Cal. 2d 52, 56, 237 P.2d 641* ; *Mitchell v. Superior Court (1950) 98 Cal. App. 2d 304, 219 P.2d 861* ; *see Omaha Indemnity Co. v. Superior Court (1989) 209 Cal. App. 3d 1266, 1269, 258 Cal. Rptr. 66*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in opposition to the contention that a writ of mandate or prohibition is proper. The ground for opposition is that petitioner has a plain, speedy, and adequate remedy in the ordinary course of law by way of appeal.

The foregoing points and authorities should be combined with a general memorandum opposing a petition for a writ of mandate (*see § 150.47*) or a petition for a writ of prohibition (*see § 150.78*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, the foregoing points and authorities may be used to oppose the contentions supported by the points and authorities set out in *§§ 150.165*-150.182.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Doubts Resolved in Favor of Denial

The facts and procedure in ***Whitney's at the Beach v. Superior Court*** *(1970) 3 Cal. App. 3d 258, 83 Cal. Rptr. 237* , are discussed in *§ 150.176[3][c]*. In its discussion of the principles governing writ review of an order denying summary judgment, the court of appeal stated that doubt about whether relief is warranted should be resolved in favor of denial of review (*3 Cal. App. 3d 258, 266)* .

[b] Direct Appeal

In ***Phelan v. Superior Court*** *(1950) 35 Cal. 2d 363, 217 P.2d 951* , plaintiff recovered a judgment and defendant made a motion for new trial. The trial court denied the motion but reduced the amount of the judgment. After the time for appeal from the order had expired, plaintiff sought a writ of mandate to compel the court to strike that portion of the order that reduced the judgment.

The Supreme Court denied the writ on the ground that petitioner had failed to request the lower court to act (*35 Cal. 2d 363, 372-375)* . The Court also held the order was appealable and the right to appeal afforded petitioner a plain, speedy, and adequate remedy (*35 Cal. 2d 363, 370-372)* . The court reasoned that when there is a right to an immediate review by appeal, that remedy is almost as speedy as a writ proceeding and should be considered adequate unless petitioner can show some reason why it is rendered inadequate by the particular circumstances of the case. Although petitioner alleged that he had no other adequate remedy and that he would suffer great and irreparable harm unless the writ issued, these bare allegations, without supporting facts, were not sufficient to sustain the burden of showing the appellate remedy was inadequate (*35 Cal. 2d 363, 370)* . Furthermore, petitioner was in no position to claim that the remedy of immediate review by appeal was less expeditious than mandate because he waited until his time to appeal lapsed and then applied for the writ, without any excuse for his failure to file an appeal (*35 Cal. 2d 363, 370-371)* .

In ***Augustyn v. Superior Court*** *(1986) 186 Cal. App. 3d 1221, 231 Cal. Rptr. 298* , petitioner was one of thousands of investors who were defrauded in a statewide investment scheme perpetrated by a licensed real estate broker and the broker's employees, some of whom also had real estate licenses. The defrauded investors had recourse to a recovery fund that was established by the state Real Estate Commissioner to compensate victims of real estate fraud. However, there was not enough money in the fund to pay all the defrauded investors their full damages. Therefore, the Commissioner brought an action under *Bus. & Prof. Code § 10470 et seq.* (Recovery Act) to consolidate all claims arising from the investment scheme, including those claims based on dealings with employees who were separately licensed, so that payments could be prorated and then equitably distributed among all claimants. The trial court construed the Recovery Act to permit only one recovery when only one license was necessary to complete the transaction. Therefore, the court granted the request for consolidation and issued a declaratory judgment ruling that any investor defrauded by one of the separately licensed agents could make only one claim against the fund, against the account of the licensed broker who employed the agents. Petitioner, who had dealt with a separately licensed agent, sought a writ of mandate contending that he was entitled to more than one recovery against the fund.

The court of appeal denied the petition, holding that preliminary review by extraordinary writ was inappropriate (*186 Cal. App. 3d 1221, 1225, 1229)* . The court reasoned that the declaratory relief ruling was a final judgment between the Commissioner and particular applicants and, therefore, petitioner had an adequate remedy in the form of a prompt appeal. Furthermore, the court explained, an appeal was the preferred remedy in petitioner's case because considering a writ petition by one individual claimant would leave the claims of other investors for piecemeal determination. Finally, the court appeared to give weight to the fact that there was no obvious or manifest abuse of discretion in the trial court's ruling that all claimants were entitled to only one recovery. The ruling was supported by the decisions cited and petitioner could cite no contrary authority directly construing the applicable statutes (*186 Cal. App. 3d 1221, 1225)* .

[c] Enforcement of Judgment or Order Has Been Stayed and Supersedeas Available

In general, the perfection of an appeal stays proceedings in the trial court [*Code Civ. Proc. § 916(a)*]. However, certain judgments are not automatically stayed by appeal [*see Code Civ. Proc. §§ 917.1-917.9*].

In ***McAneny v. Superior Court*** *(1906) 150 Cal. 6, 87 P. 1020* , the trial court appointed a receiver in a divorce proceeding to take control of a spouse's property to enforce its judgment. Petitioner appealed the judgment and stayed further proceedings by a stay bond. Petitioner then sought a writ of prohibition on the basis that the appointment of a receiver was in excess of jurisdiction. The Supreme Court denied the writ (*150 Cal. 6, 10)* . In its discussion of the adequacy of other remedies, the Court held that an appeal was an adequate remedy because an appeal stayed the enforcement of the judgment and a writ of supersedeas was available to restrain the trial court if it attempted to proceed to enforce the judgment (*150 Cal. 6, 9-10)* . The Court noted that petitioner contended that the remedy by appeal was not adequate because of the amount of the stay bond, that the respondent denied the allegation, and that the court was unable to rule on this contention because the case was submitted without a trial (*150 Cal. 6, 10)* .

In ***Moon v. Superior Court*** *(1943) 59 Cal. App. 2d 447, 139 P.2d 84* , petitioner appealed an unfavorable custody order. The trial court made an order purportedly staying the enforcement of the custody order but later discontinued the stay and ordered petitioner to deliver custody to respondent. Petitioner applied for a writ of prohibition. The court of appeal denied the writ, holding that the appeal automatically stayed enforcement of the judgment and that the trial court's attempt to discontinue the stay could be overturned by a writ of supersedeas (*59 Cal. App. 2d 447, 449-450)* . Therefore, petitioner's remedy by appeal was adequate (*59 Cal. App. 2d 447, 450)* .

Counsel should note that a custody order is no longer automatically stayed by appeal [*see Code Civ. Proc. § 917.7*].

[d] Factors for Consideration When Petitioner Can Appeal From Eventual Judgment

In ***Omaha Indemnity Co. v. Superior Court*** *(1989) 209 Cal. App. 3d 1266, 258 Cal. Rptr. 66* , plaintiffs brought an action against their tenants for property damages and included a claim for declaratory relief against the tenant's insurer. The trial court denied the insurer's motion to sever the declaratory relief action. The insurer petitioned for a writ of mandate and the court of appeal summarily denied the writ. The Supreme Court granted a petition for review and retransferred the case with direction to issue an alternative writ.

In its decision granting the peremptory writ of mandate, the court of appeal set out its reason for its summary denial--the record was incomplete--and set out, for the guidance of practitioners, the principles that appear to govern appellate courts' decisions to summarily deny a writ petition. The court noted that the large number of rejections of writ petitions demonstrates that courts will not use their scarce resources to second-guess every ruling and order of the trial court, particularly when to do so would save neither time nor aid in the resolution of a lawsuit. Reviewing courts take a strict view of the extraordinary nature of the writs lest they run the risk of encouraging piecemeal litigation and fostering the delay of trials, vexing the litigants and trial courts with multiple proceedings, and adding to the delay of judgment appeals pending in the appellate court (*209 Cal. App. 3d 1266, 1272)* . Further, some issues may diminish in importance as a case proceeds towards trial and petitioners seeking extraordinary writs do not always consider that a purported error of a trial judge may be cured prior to trial, have little or no effect on the outcome of the trial, or be properly considered on appeal (*209 Cal. App. 3d 1266, 1273)* .

[e] Time and Expense of Appeal

The facts and procedure in ***Omaha Indemnity Co. v. Superior Court*** *(1989) 209 Cal. App. 3d 1266, 258 Cal. Rptr. 66* , are discussed under *§ 150.185[3][d]*. The court of appeal recognized that error by the trial judge does not of itself insure that a writ petition will be granted because a remedy will not be deemed inadequate merely because additional time and effort would be consumed by its being pursued through the ordinary course of the law (*209 Cal. App. 3d 1266, 1269)* .

In ***Jollie v. Superior Court*** *(1951) 38 Cal. 2d 52, 237 P.2d 641* , the writ of prohibition was sought on the ground that indispensable parties had not been joined and therefore that the court was acting in excess of jurisdiction. The court of appeal found that the remedy of appeal by one party was not inadequate merely because it would entail a large expenditure of time and money (*38 Cal. 2d 52, 56)* . It then found that certain parties were not indispensable and denied the writ (*38 Cal. 2d 52, 57-59)* .

In ***Mitchell v. Superior Court*** *(1950) 98 Cal. App. 2d 304, 219 P.2d 861* , petitioner sought a writ of prohibition from the action of a trial court in a partition action. The court of appeal held that the writ should be denied because the petitioner's remedy of appeal was not inadequate merely because an appeal would take time and cost money (*98 Cal. App. 2d 304, 305)* .

[4] Additional Authorities

[a] Direct Appeal

In *Conway v. Municipal Court (1980) 107 Cal. App. 3d 1009, 166 Cal. Rptr. 246* , petitioner was a defendant in a municipal court action. Petitioner failed to appear on the date of trial and a default judgment was entered in the plaintiff's favor. Petitioner then moved to set aside the judgment. When the motion was denied, petitioner made a motion for reconsideration, which the municipal court also denied. Subsequently, petitioner filed a petition for writ of mandate directing the municipal court to set aside the default judgment. A week after filing the petition, petitioner also filed an appeal from the denial of the motion for reconsideration. By the time the appellate department of the superior court heard the writ petition, petitioner was in default with respect to his appeal because no clerk's transcript had been prepared. The appellate department issued the writ of mandate and plaintiff appealed. The court of appeal reversed, holding that a writ of mandate was not available because his direct right of appeal from the order denying his motion to set aside the default judgment constituted a plain, speedy, and adequate remedy at law (*107 Cal. App. 3d 1009, 1014)* .

[b] Time and Expense of Appeal

In *Brock v. Superior Court (1947) 29 Cal. 2d 629, 177 P.2d 273* , petitioner sought a writ of prohibition on the basis that a motion for change of venue should have been granted. In denying the writ, the Supreme Court held that the remedy of appeal was not inadequate merely because appeal is not as expeditious as prohibition (*29 Cal. 2d 629, 638-639)* .

[c] Factors for Consideration When Petitioner Can Appeal From Eventual Judgment

In *Nguyen v. Superior Court (2007) 150 Cal. App. 4th 1006* , a losing candidate filed an election contest in the trial court. When the trial court rejected his challenge, he filed a petition for writ of mandate. The court of appeal denied the petition, holding that the candidate had an adequate remedy at law. The statute at issue, *Elec. Code § 16900*, provided that any party aggrieved by a court judgment in an election contest may appeal to the court of appeal, and that the person declared elected by the superior court is entitled to the office in like manner as if no appeal had been taken. In addition, the court noted that *Code of Civ. Proc. § 44* provides that courts of appeal give preference to appeals in election contests.

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15-150 California Points & Authorities § 150.186

§ 150.186 Opposing Contention That There Is No Plain, Speedy, and Adequate Remedy in Ordinary Course of Law--Petitioner's Right to Petition for Writ in Lower Court Is Adequate Remedy

[1] FORM

[*The following should be combined, when appropriate, with a general form of memorandum opposing a petition for a writ of mandate (see, e.g., § 150.47) or a petition for a writ of prohibition (see, e.g., § 150.78).*]

THE PETITION SHOULD NOT BE GRANTED BECAUSE PETITIONER FAILED TO SEEK THE WRIT IN A LOWER COURT.

Failure to Seek Writ in Lower Court. An appellate court should not issue a writ in an original proceeding when petitioner could have petitioned a lower court for issuance of the writ and no exceptional circumstances are present (*County of Los Angeles v. Nesvig (1965) 231 Cal. App. 2d 600, 602-603, 41 Cal. Rptr. 916*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in opposition to the contention that a writ of mandate or prohibition is proper. The ground for opposition is that petitioner did not first seek extraordinary relief in a lower court.

The foregoing points and authorities should be combined with a general memorandum opposing a petition for a writ of mandate (*see § 150.47*) or a petition for a writ of prohibition (*see § 150.78*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, the foregoing points and authorities may be used to oppose the contentions supported by the

points and authorities set out in *§ 150.161*.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Failure to Seek Writ in Lower Court

In ***Los Angeles County v. Nesvig*** *(1965) 231 Cal. App. 2d 600, 41 Cal. Rptr. 916* , a county approved a lease-leaseback scheme to finance the construction of a new museum. Two nonprofit corporations, one which contracted to operate the proposed museum and one which hoped to get the lease and build the museum, sought a writ of mandate in the court of appeal to compel the clerk of the board of supervisors to invite bids on the lease, as was required by statute. Petitioners contended that the suit raised an important question of whether the statute applied to the construction of nonmandatory public facilities and, in addition, that a speedy decision was essential because county property was lying idle with no return of revenue. The court of appeal denied the writ, holding that no exceptional circumstances were shown to justify an exercise of original jurisdiction (*231 Cal. App. 2d 600, 602-603)* . It is not the policy of the appellate court, the court explained, to entertain original proceedings when such proceedings could as well have been instituted in the superior court (*231 Cal. App. 2d 600, 601)* . Although an exercise of original jurisdiction would be appropriate if construction was already underway, if a substantial part of the project were in operation, and if tenants were awaiting completion, these circumstances were not present in petitioners' case (*231 Cal. App. 2d 600, 602)* .

[4] Additional Authorities

[a] Failure to Seek Writ in Lower Court

In *Bonelli v. Flournoy (1967) 250 Cal. App. 2d 495, 58 Cal. Rptr. 535* , petitioner, a former member of the state tax board, sought a writ of mandate in the court of appeal to compel the State Controller to pay him his retirement pension. The Controller had impounded the pension on the ground that petitioner illegally solicited and kept funds as a member of the tax board and that the amount he owed the state, though still undetermined, was greater than the amount due on his pension. The Controller had also filed suit against petitioner to recover the diverted funds but was unable to effect service because petitioner had fled the country. The court of appeal denied the writ, holding that the facts did not furnish a sufficient reason to excuse petitioners from applying to the superior court for relief. Furthermore, the court observed, petitioner seemed to be trying to get a strategic advantage over the position he would be in were he to file a cross-complaint in the Controller's action or initiate a suit in superior court (*250 Cal. App. 2d 495, 500)* .

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[Reserved]

§§ 150.187[Reserved]

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15-150 California Points & Authorities § 150.200

§ 150.200 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] or Prohibition [Code Civ. Proc. §§ 1102, 1103]--Petitioner Failed to Request Action or Raise Objection in Lower Court

[1] FORM

[*The following should be combined, when appropriate, with a general form of memorandum opposing a petition for a writ of mandate (see, e.g., § 150.47) or a petition for a writ of prohibition (see, e.g., § 150.78).*]

A WRIT OF _____ [MANDATE *or* PROHIBITION] SHOULD NOT ISSUE BECAUSE PETITIONER FAILED TO REQUEST THE LOWER COURT TO _____ [PERFORM THE ACT TO BE COMPELLED BY THE WRIT *or* OBJECT TO THE ACT TO BE RESTRAINED BY THE WRIT].

A. Relief Not Requested Below. Before seeking writ review, petitioner should first request the lower court to act, unless it appears that the demand would have been futile; it is assumed that any valid objection properly brought to the attention of that court will prevail (*Phelan v. Superior Court (1950) 35 Cal. 2d 363, 372, 217 P.2d 951* (mandate); *Citizens Utilities Co. v. Superior Court (1963) 59 Cal. 2d 805, 814, 31 Cal. Rptr. 316, 382 P.2d 356* (prohibition)).

[*Optional*] **B. Relief Requested But Court Below Has Not Ruled.** When an objection was raised in the court below and that court has not yet ruled on the issue, a writ should not be issued because it will not be presumed that the lower court will rule incorrectly (*American Society of Composers, Authors & Publishers v. Superior Court (1962) 207 Cal. App. 2d 676, 686, 24 Cal. Rptr. 772* (prohibition)).

[*Optional*] **C. Petitioner Could Have Intervened.** When petitioner is not a party to an action, a writ should not issue if petitioner could have moved to intervene in the action and then raised an objection in the lower court (*MacFarland v. Superior Court (1934) 3 Cal. App. 2d 173, 176, 38 P.2d 800* (prohibition)).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in opposition to a writ of mandate or prohibition. The ground for opposition is that petitioner failed to request the lower court to perform an act, if seeking mandate, or failed to request the lower court to refrain from performing an act, if seeking prohibition.

The foregoing points and authorities should be combined with a general memorandum opposing a petition for a writ of mandate (*see § 150.47*) or a petition for a writ of prohibition (*see § 150.78*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Relief Not Requested Below

The facts and procedure of ***Phelan v. Superior Court*** *(1950) 35 Cal. 2d 363, 217 P.2d 951* , are discussed in *§ 150.185[3][b]*. In that case, the Supreme Court denied a petition for writ of mandate on the ground that petitioner failed to make a motion to vacate a challenged order. Instead, petitioner waited until after the time for appeal had passed and then filed a writ petition, without ever having presented the matter to the trial court. Before seeking mandate in an appellate court to compel action by a trial court, the Court held, a party should first request the lower court to act. If such a request has not been made, the writ ordinarily will not issue unless it appears that the demand would have been futile (*35 Cal. 2d 363, 372)* .

In ***Citizens Utilities Co. v. Superior Court*** *(1963) 59 Cal. 2d 805, 814, 31 Cal. Rptr. 316, 382 P.2d 356* , petitioner, a public utility, sought a writ of prohibition to restrain the superior court from trying an eminent domain action, contending that the court did not have jurisdiction to proceed. The Supreme Court held that the writ should not issue because the petitioner had not properly raised the issue with the trial court, and, if the issue had been properly raised, the trial court could have devised a procedure to protect petitioner's rights. The Court noted that petitioner's failure to raise the issue below caused extended and unwarranted litigation (*59 Cal. 2d 805, 814)* .

[b] Relief Requested But Court Has Not Ruled

In ***American Society of Composers, Authors & Publishers v. Superior Court*** *(1962) 207 Cal. App. 2d 676, 24 Cal. Rptr. 772* , petitioner was a society of composers that was being sued by one of its former members. The society moved for summary judgment on the ground that the superior court did not have jurisdiction because plaintiff had not exhausted his remedies under the society's rules. The trial court denied the motion for summary judgment, and petitioner sought a writ of prohibition to restrain the superior court from proceeding with the action.

The court of appeal held that a writ of prohibition was not proper when the lower court had not yet decided the jurisdictional issue and that the lower court had not so decided because the ruling on the summary judgment was only that there was a factual dispute and not a ruling that the court had jurisdiction. The court of appeal stated that it would not anticipate that the superior court would incorrectly decide the jurisdictional issue (*207 Cal. App. 2d 676, 686)* . The court of appeal then found that petitioner claimed that its affidavits established as a matter of law that the action should be dismissed for lack of jurisdiction. Therefore, the court of appeal considered the merits and found that the affidavits did not establish lack of jurisdiction as a matter of law. It denied the writ (*207 Cal. App. 2d 676, 691)* .

[c] Petitioner Could Have Intervened

MacFarland v. Superior Court *(1934) 3 Cal. App. 2d 173, 38 P.2d 800* , arose from an unlawful detainer action in which a writ of possession was obtained. Petitioner, who was not a party to the unlawful detainer action, took possession of the premises, claiming rights as an assignee for creditors of the defendant in the unlawful detainer action. The plaintiff in the unlawful detainer action instituted an action for a writ of mandate against the sheriff to compel him to execute the writ of possession. Petitioner sought a writ of prohibition against the mandate action on the basis that it was in excess of jurisdiction. The court of appeal held that petitioner should have made its claim of lack of jurisdiction to respondent superior court by intervening in the proceeding for mandate. Since it had not done so, the writ of prohibition was denied (*3 Cal. App. 2d 173, 175-176)* .

[4] Additional Authorities

[a] Relief Not Requested Below

In *Sayegh v. Superior Court (1955) 44 Cal. 2d 814, 285 P.2d 267* , petitioner applied for a family allowance during probate of her deceased husband's will, which omitted any provision for her. Although she had signed a prenuptial agreement waiving all interest in the decedent's estate, the trial court found that the agreement was obtained by duress, fraud, and undue influence and granted her the family allowance. The heirs named in decedent's will later commenced a proceeding to determine heirship under the terms of the will. Petitioner requested the probate judge to terminate the heirship proceeding on the ground that the order for family allowance was a final judgment binding on all parties interested in the estate. The judge refused to rule on the issue and set the case for trial, and petitioner sought a writ of prohibition. The Supreme Court denied the writ, holding that the petition was premature because prohibition ordinarily will not be granted until an objection to jurisdiction has been made and overruled in the lower court. The trial court's refusal to rule on the res judicata effect of the order for family allowance, the Court concluded, did not constitute a decision on the issue (*44 Cal. 2d 814, 815-816)* .

In *Schaeffer v. Municipal Court (1968) 260 Cal. App. 2d 819, 67 Cal. Rptr. 479* , petitioner was charged in municipal court with drunk driving. He petitioned the superior court for a writ of prohibition on the ground that police procedures requiring him to choose a chemical test for blood alcohol without first consulting an attorney prevented him from having chemical tests of alcohol content available for trial. The superior court issued the writ and the People appealed. The court of appeal discharged the writ, holding that it was improperly issued because the petitioner had not established that he had raised the issue in the municipal court by moving to suppress evidence or by any other remedy, thus giving the lower court the opportunity to rule correctly on the issue (*260 Cal. App. 2d 819, 823-824)* .

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15-150 California Points & Authorities § 150.201

§ 150.201 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] or Prohibition [Code Civ. Proc. §§ 1102, 1103]--Petitioner Is Guilty of Laches

[1] FORM

[*The following should be combined, when appropriate, with a general form of memorandum opposing a petition for a writ of mandate (see, e.g., § 150.47) or a petition for a writ of prohibition (see, e.g., § 150.78).*]

A WRIT OF _____ [MANDATE *or* PROHIBITION] SHOULD NOT ISSUE BECAUSE PETITIONER IS GUILTY OF LACHES.

Laches. When there has been an unreasonable delay in the filing of the writ petition and respondent or real party in interest has suffered prejudice as a result of the delay, petitioner is guilty of laches and a writ of should not issue (*see Conti v. Board of Civil Service Commissioners (1969) 1 Cal. 3d 351, 359-360, 82 Cal. Rptr. 337, 461 P.2d 617* ; *Lewis v. Superior Court (1968) 261 Cal. App. 2d 736, 740-741, 68 Cal. Rptr. 631*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in opposition to a writ of mandate or prohibition. The ground for opposition is that the defense of laches bars relief under the circumstances of the case.

The foregoing points and authorities should be combined with a general memorandum opposing a petition for writ of mandate (*see § 150.47*) or a petition for a writ of prohibition (*see § 150.78*). In an appropriate case, the foregoing form may also be combined with points and authorities opposing the petition on the ground that an applicable statute of limitations has lapsed (*see § 150.205*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the

points of law stated. For example, in addition to showing that petitioner could have reasonably sought writ relief sooner, counsel should demonstrate the actual prejudice that respondent or real party in interest suffered as a result of petitioner's delay [*see § 150.201[2][b]*].

[b] Establishing the Defense of Laches

The defense of laches requires unreasonable delay in bringing suit, plus either acquiescence in the act about which petitioner complains or prejudice to the respondent resulting from the delay. Prejudice is never presumed but must be affirmatively demonstrated [*Miller v. Eisenhower Medical Center (1980) 27 Cal. 3d 614, 624, 166 Cal. Rptr. 826, 614 P.2d 258* (finding no laches even though petition for writ of mandate filed one year and 17 days after receiving notice of challenged action)].

[c] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Laches

In ***Conti v. Board of Civil Service Commissioners*** *(1969) 1 Cal. 3d 351, 82 Cal. Rptr. 337, 461 P.2d 617* , a city employee who was discharged appealed to a civil service board, which upheld the discharge. Petitioner filed a petition for writ of mandate six months later but the matter lay dormant because a draft of an alternative writ did not accompany the petition. Petitioner's counsel discovered the omission and set the case for hearing on a date 10 months and 25 days after receiving notice of the board's decision. The superior court issued a writ of mandate compelling petitioner's reinstatement, finding that there was no validity in the defense of laches because the ten-month delay in filing the petition was excusable and inadvertent and because respondents suffered no prejudice from the delay. Respondents appealed.

The Supreme Court reversed and remanded the cause for further proceedings, holding that there was no evidence to sustain the court's finding that the delay was excusable or that respondents suffered no prejudice from the delay (*1 Cal. 3d 351, 357-358)* . The defense of laches, the Court recognized, requires unreasonable delay plus either acquiescence in the act about which petitioner complains or prejudice to the respondent resulting from the delay (*1 Cal. 3d 351, 359)* . Prejudice cannot be presumed, the Court held, because it is one of the required elements of the defense (*1 Cal. 3d 351, 360-362)* .

In ***Lewis v. Superior Court*** *(1968) 261 Cal. App. 2d 736, 68 Cal. Rptr. 631* , the trial court ordered plaintiff to join parties to the action as indispensable parties and vacated the trial date. When plaintiff moved to set the case for trial, the court denied the motion because the parties had not yet been joined. Eight months later, plaintiff moved again to set the case for trial and the motion was denied. Plaintiff then sought a writ of mandate to compel the trial court to set the action for trial.

The court of appeal denied the writ, holding that petitioner was guilty of laches. Petitioner made no showing to justify the delay in seeking relief from the trial court's first denial of the motion to set, which might have been challenged promptly by a mandate proceeding (*261 Cal. App. 2d 736, 741)* .

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15-150 California Points & Authorities § 150.202

§ 150.202 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] or Prohibition [Code Civ. Proc. §§ 1102, 1103]--Petitioner Is Guilty of Unclean Hands

[1] FORM

[*The following should be combined, when appropriate, with a general form of memorandum opposing a petition for a writ of mandate (see, e.g., § 150.47) or a petition for a writ of prohibition (see, e.g., § 150.78).*]

A WRIT OF _____ [MANDATE *or* PROHIBITION] SHOULD NOT ISSUE BECAUSE PETITIONER IS GUILTY OF UNCLEAN HANDS.

Unclean Hands. When a petitioner for a prerogative writ has unclean hands, a writ should not issue (*Crestlawn Memorial Park Asso. v. Sobieski (1962) 210 Cal. App. 2d 43, 51, 26 Cal. Rptr. 421* (mandate)).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in opposition to a writ of mandate or prohibition. The ground for opposition is that the defense of unclean hands bars relief under the circumstances of the case.

The foregoing points and authorities should be combined with a general memorandum opposing a petition for a writ of mandate (*see § 150.47*) or a petition for a writ of prohibition (*see § 150.78*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Unclean Hands

In ***Crestlawn Memorial Park Asso. v. Sobieski*** *(1962) 210 Cal. App. 2d 43, 26 Cal. Rptr. 421* , the Commission of Corporations amended a permit to issue corporate stock after a substantial portion of the stock had been sold and issued pursuant to the permit. Petitioners, whose voting shares were reduced by the amendment, sought a writ of mandate to compel the Commission to set aside its decision to amend the permit. The trial court denied the writ on the grounds that the original permit was issued as a result of petitioners' nondisclosures and would not have been issued had the Commissioner known the facts concerning the motives and intentions of petitioners and the group of stockholders associated with them. The court of appeal affirmed, holding in relevant part that a proceeding for a writ of mandate is an equitable proceeding in which the doctrine of unclean hands applies. The writ was properly denied, the court concluded, because the trial court found that petitioners participated in a conspiracy and that each of them sought the aid of the court with "unclean hands" because they were unjust, unfair, and inequitable in their acts and dealings (*210 Cal. App. 2d 43, 51)* .

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15-150 California Points & Authorities § 150.203

§ 150.203 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] or Prohibition [Code Civ. Proc. §§ 1102, 1103]--Ruling on Prior Petition Is Res Judicata

[1] FORM

[*The following should be combined, when appropriate, with a general form of memorandum opposing a petition for a writ of mandate (see, e.g., § 150.47) or a petition for a writ of prohibition (see, e.g., § 150.78).*]

THE COURT SHOULD DECLINE TO ISSUE THE REQUESTED WRIT OF _____ [MANDATE *or* PROHIBITION] BECAUSE A PRIOR ALTERNATIVE WRIT WAS ISSUED AND THAT HOLDING IS RES JUDICATA IN THIS PROCEEDING.

Prior Denial Is Res Judicata. When the petitioner has previously sought a prerogative writ and the court issued an alternative writ, the prior holding is res judicata and precludes granting a writ on a second application for the same purpose involving the same parties and the same facts (*Overstreet v. County of Butte (1962) 57 Cal. 2d 504, 506, 20 Cal. Rptr. 631, 370 P.2d 335* ; *Kowis v. Howard (1992) 3 Cal. 4th 888, 894-895, 12 Cal. Rptr. 2d 728, 838 P.2d 250* (decided under "law of the case" doctrine); *Carretti v. Italpast (2002) 101 Cal. App. 4th 1236, 1242, 125 Cal. Rptr. 2d 126* (without written decision, denial of writ petition does not constitute decision on merits with res judicata effect)).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in opposition to a writ of mandate or prohibition. The ground for opposition is that the relief is barred by res judicata.

The foregoing points and authorities should be combined with a general memorandum opposing a petition for a writ of mandate (*see § 150.47*) or a petition for a writ of prohibition (*see § 150.78*).

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Summary Denial of Prior Petition Bars Relief

A summary denial of a writ of mandate or prohibition, without an opinion, is not res judicata [*Kowis v. Howard (1992) 3 Cal. 4th 888, 894-895, 12 Cal. Rptr. 2d 728, 838 P.2d 250]* .

[c] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Prior Denial Is Res Judicata

In ***Overstreet v. County of Butte*** *(1962) 57 Cal. 2d 504, 20 Cal. Rptr. 631, 370 P.2d 335* , plaintiff brought a wrongful death action against a county and the county's demurrer, based on sovereign immunity, was overruled. The county petitioned for a writ of prohibition and the court of appeal issued the writ, directing the superior court to dismiss the action. Plaintiff then appealed the dismissal, contending that there had been an intervening change in the law governing sovereign immunity. The Supreme Court affirmed the dismissal, holding that res judicata applied (*57 Cal. 2d 504, 507)* . When a proceeding in prohibition is determined on the merits and becomes final, the Court explained, the judgment is res judicata in later special proceedings involving the same parties and the same set of facts (*57 Cal. 2d 504, 506)* .

In ***Kowis v. Howard*** *(1992) 3 Cal. 4th 888, 894-895, 12 Cal. Rptr. 2d 728, 838 P.2d 250* , the trial court denied defendant's motion for relief from a discovery order. The defendant filed a writ of mandate contending that the trial court erred in denying his motion for relief. The court of appeal summarily denied the petition. After trial and verdict, the defendant appealed again contending that the trial court abused its discretion in denying his motion for relief. The court of appeal held that the earlier summary denial of the petition for the writ of mandate was "clearly on the merits" and found itself precluded from reconsidering the issue by the doctrine of law of the case. The Supreme Court granted review on the question whether the court of appeal erred in applying the law of the case doctrine after summary denial of the writ of mandate (*3 Cal. 4th 888, 892)* .

The Supreme Court reversed the court of appeal and remanded with instruction to consider the issue on the merits. It held that a summary denial of a writ of mandate does not establish law of the case whether the denial is intended to be on the merits or for some other reason (*3 Cal. 4th 888, 899)* . The Court's analysis of the law of the case doctrine applies equally to situations involving the res judicata effect of a ruling.

In ***Carretti v. Italpast*** *(2002) 101 Cal. App. 4th 1236, 125 Cal. Rptr. 2d 126* , a cross-defendant filed a motion to quash service of the summons upon it based on lack of personal jurisdiction. When the trial court denied the motion, the cross-defendant filed a petition for a writ of mandate. The court of appeal ordered the issuance of an alternative writ of mandate directing the trial court to either vacate its order denying the motion to quash or show cause why a peremptory writ of mandate should not be issued. In response, the trial court vacated its order and granted the motion to quash. The court of appeal then discharged the alternative writ and denied for mootness the petition for a writ of mandate.

The cross-complainant filed a notice of appeal from the order granting the motion to quash. The cross-complainant argued that the court of appeal was not precluded from reversing the trial court's order by virtue of the fact that it previously issued an alternative writ and later summarily denied the writ petition. The court of appeal agreed, holding that merely because a court has denied a petition for writ of mandate, it has not necessarily made a decision on the

merits having res judicata effect. The proper rule is that unless a written opinion follows the issuance of an alternative writ, the denial of a writ petition does not have issue-preclusive effect (*101 Cal. App. 4th 1236, 1242)* .

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15-150 California Points & Authorities § 150.204

§ 150.204 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] or Prohibition [Code Civ. Proc. §§ 1102, 1103]--Petition Raises Issue That Is Moot

[1] FORM

[*The following should be combined, when appropriate, with a general form of memorandum opposing a petition for a writ of mandate (see, e.g., § 150.47) or a petition for a writ of prohibition (see, e.g., § 150.78).*]

A WRIT OF _____ [MANDATE *or* PROHIBITION] SHOULD NOT ISSUE BECAUSE THE ISSUE IT RAISES IS MOOT.

A. Mootness. A writ will not issue when the question presented is moot (*Environmental Coalition of Orange County, Inc. v. Local Agency Formation Com. (1980) 110 Cal. App. 3d 164, 170-171, 167 Cal. Rptr. 735* (mandate); *Genser v. McElvy (1969) 276 Cal. App. 2d 709, 711-712, 82 Cal. Rptr. 521* (mandate); *Pacific Gas & Elec. Co. v. Superior Court (1938) 10 Cal. 2d 545, 546, 76 P.2d 108* (prohibition); *Campbell v. Superior Court (1932) 126 Cal. App 652, 653, 14 P.2d 925* (prohibition)).

[*Optional*] **B. Compliance With Alternative Writ.** A writ will not issue when respondent has complied with petitioner's demands after issuance of an alternative writ (*see* *Bruce v. Gregory (1967) 65 Cal. 2d 666, 671, 56 Cal. Rptr. 265, 423 P.2d 193*).

C. Useful Purpose Not Served. A writ will not issue when issuance of the writ would be useless, unenforceable, or unavailing (*Genser v. McElvy (1969) 276 Cal. App. 2d 709, 711, 82 Cal. Rptr. 521* ; *Zagoren v. Hall (1932) 122 Cal. App 460, 462, 10 P.2d 202*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a writ of mandate or prohibition. The ground for opposition is that the issue raised by the petition is moot, and issuance of the writ would therefore be useless or unenforceable.

These points and authorities should be combined with a general memorandum opposing a petition for a writ of mandate (*see § 150.47*) or a petition for a writ of prohibition (*see § 150.78*).

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Mootness

In ***Environmental Coalition of Orange County, Inc. v. Local Agency Formation Com.*** *(1980) 110 Cal. App. 3d 164, 167 Cal. Rptr. 735* , petitioner appealed the denial of a writ of mandate to compel a local agency to annul its current environmental impact report and to prepare a new, more comprehensive report on a proposed annexation area to the city. Petitioner failed, however, to name the city as a defendant, to notify it of the petition, and to enjoin it from proceeding with the annexation. Therefore, the annexation had been completed before the hearing on the writ.

The court of appeal held that the previously justiciable controversy was moot (*110 Cal. App. 3d 164, 170-171)* . It also noted that a judgment in the case could not annul annexation because the court had no personal jurisdiction over the city, which was not a party to the action. Therefore, the court dismissed the appeal on its own motion (*110 Cal. App. 3d 164, 173)* .

In ***Genser v. McElvy*** *(1969) 276 Cal. App. 2d 709, 82 Cal. Rptr. 521* , the State Architect approved a change order that substituted plastic pipe for metal pipe in the construction of a school. Petitioners, contending that use of the plastic pipe was unsafe and violated the Education Code, sought a writ of mandate to compel the State Architect to revoke the change order. The trial court denied the writ, and the court of appeal affirmed on the ground that the proceeding was moot (*276 Cal. App. 2d 709, 711)* . It explained that issuance of the writ would be ineffectual because the plastic pipe had already been installed and encased in the walls and floors of the school (*276 Cal. App. 2d 709, 712)* .

In ***Pacific Gas & Elec. Co. v. Superior Court*** *(1938) 10 Cal. 2d 545, 76 P.2d 108* , petitioners appealed a verdict against them and then sought a writ of prohibition because they were not sure whether appeal or prohibition would secure the appropriate relief. The appeal and the petition for a writ were heard together. The holding on the appeal was such that the issues raised on the writ of prohibition were not applicable and the Supreme Court dismissed the petition as moot (*10 Cal. 2d 545, 546)* .

In ***Campbell v. Superior Court*** *(1932) 126 Cal. App 652, 14 P.2d 925* , the petition for a writ of prohibition was an attempt to restrain the actions of the superior court in entertaining an election challenge. However, pending the decision on prohibition, a recount showed clearly that petitioner had lost the election and made the issue raised in the petition for prohibition moot. Therefore, the court of appeal denied the writ (*126 Cal. App 652, 653-654)* .

[b] Compliance With Alternative Writ

In ***Bruce v. Gregory*** *(1967) 65 Cal. 2d 666, 56 Cal. Rptr. 265, 423 P.2d 193* , petitioner was a citizen and taxpayer

who sought to compel a tax collector to make certain tax records regularly available for inspection. The trial judge denied the petition after the tax collector promulgated amended regulations allowing access to the records. The Supreme Court affirmed, holding that the amended regulations were valid (*65 Cal. 2d 666, 678-679)* . The Court also held that the trial court properly considered the amended regulations because the court is required to apprise itself of facts that arise after pleading that render the dispute moot or make the remedy useless (*65 Cal. 2d 666, 671, 673)* . If a respondent has complied with the petitioner's demands after issuance of the alternative writ, the Court stated, the writ has accomplished the purpose of the proceedings and the petition should be dismissed as moot (*65 Cal. 2d 666, 671)* .

[c] Useful Purpose Not Served

The facts and procedure in ***Genser v. McElvy*** *(1969) 276 Cal. App. 2d 709, 82 Cal. Rptr. 521* , are discussed under *§ 150.204[3][a]*. In affirming denial of a writ of mandate on the ground that the proceeding was moot, the court of appeal stated that the writ will not be issued when it would be useless, unenforceable, or unavailing (*276 Cal. App. 2d 709, 711)* .

In ***Zagoren v. Hall*** *(1932) 122 Cal. App 460, 10 P.2d 202* , petitioner was an attorney who sought a writ of mandate to compel the county clerk to issue a writ of execution to satisfy an order for the payment of attorney's fees that had been granted for his services in behalf of an estate. The court of appeal refused to issue the writ because there was no property in the estate against which the writ of execution could be levied. The court stated that a writ of mandate will not be issued when it would be useless, unenforceable, or unavailing (*122 Cal. App 460, 462)* .

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15-150 California Points & Authorities § 150.205

§ 150.205 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] or Prohibition [Code Civ. Proc. §§ 1102, 1103]--Lapse of Statute of Limitations or Statutory Period for Filing Petition

[1] FORM

[*The following should be combined, when appropriate, with a general form of memorandum opposing a petition for a writ of mandate (see, e.g., § 150.47) or a petition for a writ of prohibition (see, e.g., § 150.78).*]

A WRIT OF MANDATE SHOULD NOT ISSUE BECAUSE THE APPLICABLE _____ [STATUTE OF LIMITATIONS *or* TIME PERIOD FOR FILING THE PETITION] HAS EXPIRED.

[*EITHER*]

A. Lapse of Statute of Limitations. A proceeding for a writ of mandate is barred if it is not commenced within the period prescribed by the applicable statute of limitations (*Barlow v. City Council of Inglewood (1948) 32 Cal. 2d 688, 697, 197 P.2d 721*).

B. Applicable Limitation Period. The appropriate limitation period in a proceeding for a writ of mandate depends on what right is involved and begins to run when the right first accrues (*Barlow v. City Council of Inglewood (1948) 32 Cal. 2d 688, 693, 697, 197 P.2d 721* ; *Union Paving Co. v. City Council (1961) 189 Cal. App. 2d 440, 442-443, 11 Cal. Rptr. 351*).

[*OR*]

A. Lapse of Time Period for Filing Petition. The petitioner is not authorized to seek review of the challenged order by petition for writ of mandate, because he/she did not file the petition within the express time limits for seeking such

review (*see* [*specify applicable statutory time period, e.g., Code Civ. Proc. § 400*]).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a writ of mandate on the ground that the petition is barred by the lapse of the applicable statute of limitations, or that it was not filed within the applicable statutory time period [*see, e.g., Code Civ. Proc. § 400* (petition to review order granting or denying motion to change venue is generally required to be filed within 20 days after service of notice of order)].

These points and authorities should be combined with a general memorandum opposing a petition for writ of mandate (*see § 150.47*). In an appropriate case, the foregoing form may also be combined with points and authorities opposing the petition on the ground that the defense of laches also applies (*see § 150.201*).

Generally, the defense of laches or lapse of an applicable statute of limitation period has not arisen in proceedings for a writ of prohibition, because these are usually promptly initiated in view of the requirement that the writ issue only to arrest a threatened but uncompleted judicial action. In an appropriate case, however, this form may be adapted for use in such a proceeding.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Lapse of Statute of Limitations

There is no general statutory time limit on the application for writs [*see State v. Superior Court of San Mateo County (1968) 263 Cal. App. 2d 396, 399, 69 Cal. Rptr. 683]* . Some courts have held that, if a petition for writ of mandate filed in an appellate court seeks review of a trial court ruling, and there is no other statutory time limit, the petition may be denied as untimely if it is not filed within the 60-day period normally applicable to filing notice of appeal [*see Popelka, Allard, McCowan & Jones v. Superior Court (1980) 107 Cal. App. 3d 496, 499, 165 Cal. Rptr. 748* (noting that court has discretion to deny petition on this basis regardless of actual prejudice)]. In addition, petitions for writ of mandate have been held to be subject to the statute of limitations, the applicable period being determined by the nature of the right asserted in the petition [*see Allen v. Humboldt County Bd. of Supervisors (1963) 220 Cal. App. 2d 877, 884, 34 Cal. Rptr. 232]* . The applicable limitation period begins to run when the petitioner's right first accrues [*Monroe v. Trustees of the California State Colleges (1971) 6 Cal. 3d 399, 405, 99 Cal. Rptr. 129, 491 P.2d 1105* ; *Barlow v. City Council of Inglewood (1948) 32 Cal. 2d 688, 697, 197 P.2d 721]* .

Laches may be a proper ground for denying relief in a writ proceeding, even when, in a mandate proceeding, the applicable statute of limitations has been satisfied [*Ragan v. City of Hawthorne (1989) 212 Cal. App. 3d. 1361, 1368, 261 Cal. Rptr. 219* (mandate proceeding); *State v. Superior Court of San Mateo County (1968) 263 Cal. App. 2d 396, 399, 69 Cal. Rptr. 683* (holding that laches had not been established in prohibition proceeding); *see § 150.201*].

[c] Lapse of Express Statutory Period for Filing Petition

In a number of instances, parties are specifically authorized by statute to seek review of a nonfinal court order by means of a petition for writ of mandate [*see, e.g., Fam. Code § 7123(a)* (right of minor to petition for writ of mandate to review denial of petition for declaration of emancipation); *Code Civ. Proc. §§ 170.3(d)* (petition for writ of mandate to review determination of question of disqualification of judge); *400* (petition for writ of mandate to review order granting or denying change in venue), *404.6* (petition for writ of mandate to review order relating to motion for coordination of actions), *405.39* (petition for writ of mandate to review order granting or denying motion to expunge lis pendens); *437c(m)* (petition for "peremptory writ" to review nonappealable order relating to motion for summary

judgment) *877.6(e)* (petition for writ of mandate to review order on motion to determine good-faith settlement); *see also Code Civ. Proc. § 1245.255(a)(1)* (right to petition for writ of mandate to review resolution of necessity prior to commencement of eminent domain proceeding)]. These statutory provisions generally impose time limitations as well as other procedural requirements in obtaining the writ [*see, e.g., Code Civ. Proc. §§ 170.3(d)* (requiring party to file petition for writ of mandate within 10 days after notice to parties of decision relating to disqualification of judge), *400* (generally requiring party to file petition within 20 days after service of notice of order relating to motion to change venue), *437c(l)* (generally requiring party to file petition within 20 days after service of notice of entry of order relating to summary judgment)].

In such a case, if a petition for writ of mandate has not been filed within the applicable statutory time period, the foregoing form may be adapted to oppose the petition on that ground. Thus the foregoing form, as adapted, may be used to oppose a petition for writ of mandate that is supported by the points and authorities set out in *§§ 150.170*, *150.171*, *150.175*, *150.176*, *150.181*, and *150.182*.

[d] Related Pleading and Practice Forms

For discussion, forms, and a procedural guide relating to mandate proceedings, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender). For discussion relating to various statutes of limitations, see Ch. 345, *Limitation of Actions* in that publication.

[3] Discussion of Authorities

[a] Lapse of Statute of Limitations

In ***Barlow v. City Council of Inglewood*** *(1948) 32 Cal. 2d 688, 197 P.2d 721* , petitioner sought a writ of mandate to compel a city council and city officials to transfer unencumbered surplus monies in the general fund into a bond redemption fund in order that petitioner could be paid principal and interest on certain improvement bonds he owned. The trial court sustained a demurrer to the petition and entered a dismissal. Petitioner then obtained an order setting aside the judgment and granting leave to file an amended petition. Respondents appealed.

The Supreme Court reversed the order and affirmed the judgment of dismissal, holding that petitioner's causes of action for mandate were barred by limitations statutes (*32 Cal. 2d 688, 693, 697-698)* . The Court reasoned that an action on the bonds was subject to the four-year limitations period prescribed by *Code Civ. Proc. § 337* for an action on a written instrument. The bonds held by petitioner matured more than 10 years before the action was commenced and so the action was barred (*32 Cal. 2d 688, 693-694)* . A proceeding for a writ of mandate is barred, the Court explained, if it is not commenced within the period prescribed by the limitations statutes and that the limitation period begins to run when the right first accrues. Furthermore, petitioner failed to allege facts excusing the delay in seeking the writ of mandate (*32 Cal. 2d 688, 697)* .

[b] Applicable Limitation Period

Barlow v. City Council of Inglewood *(1948) 32 Cal. 2d 688, 197 P.2d 721* , is discussed under *§ 150.205[3][a]*.

In ***Union Paving Co. v. City Council*** *(1961) 189 Cal. App. 2d 440, 11 Cal. Rptr. 351* , petitioner completed street improvements under contract with a city. The city engineer filed an assessment so that bonds could be issued to cover the sums due for petitioner's work. The city council objected to the assessment, contending that petitioner's work was deficient. Four years later, petitioner asked the city council to confirm the assessment and issue bonds but the city council refused on the ground that the statute of limitations had run on confirmation. After another four years passed, petitioner unsuccessfully demanded that the city council issue a reassessment and then sought a writ of mandate to compel the city council to act. The trial court denied the writ and petitioner appealed.

The court of appeal affirmed, holding that the action was barred by the statute of limitations (*189 Cal. App. 2d 440, 442-443)* . The applicable statute commenced to run when petitioner could have made a demand for a reassessment and petitioner's delay of four years in making the demand did not postpone the running of the statute (*189 Cal. App. 2d 440, 442)* . If the proceeding were deemed an action on a liability created by statute, the proceeding had to be commenced within three years under former Code Civ. Proc. § 338(1) (*see now Code Civ. Proc. § 338(a)*). It if were deemed an action on a written contract under *Code Civ. Proc. § 337* or an action for relief not otherwise provided for under *Code Civ. Proc. § 343*, then it was necessary for the proceeding to have been commenced within four years. The court pointed out that under any of the limitations periods the proceeding was commenced too late (*189 Cal. App. 2d 440, 443)* .

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Special Alert--Ch. 152 Special Alert to Chapter 152, Mechanics' Liens

15-152SA California Points & Authorities Scope

Scope

Proposed Revision of California Mechanics' Lien Law

In 1999, the California Law Revision Commission was asked to undertake a study of the law governing mechanics' liens and associated construction remedies in California. The resulting recommendation, which includes proposed legislation, was sent to the governor and the legislature in February 2008 [*see* http://www.clrc.ca.gov/pub/Printed Reports/REC H821.pdf]. The recommendation provided the basis for SB 1691, which was introduced during the 2007-2008 session, passed both the assembly and senate but was vetoed by the governor as not being of sufficiently high priority. The legislation has been resurrected in the 2009-2010 session as SB 189, which, as of December 2009, is under consideration by the Senate Committee on the Judiciary. In its current form, SB 189 closely tracks the Commission's proposed legislation, and if enacted, would be operative January 1, 2011. Provided the legislation is enacted, it will be fully incorporated into this chapter in a future release.

Significant changes to current mechanics' lien law that would be made by the proposed legislation include the following:

1. Reorganization. The proposed legislation relocates the provisions of the mechanics' lien law relating to private works of improvement to the end of the Civil Code, beginning with Section 8000. This avoids the confusion of using old Civil Code section numbers for new and different provisions, and allows for future expansion without resorting to decimal section numbering.

The proposed legislation also relocates the statutes governing public work construction remedies, such as the stop notice and payment bond. The public work provisions would be moved into the Public Contract Code, beginning with Section 41010. This is intended to solve the problems created by multiple sets of corresponding but dissimilar provisions for public and private works.

2. Terminology. The proposed legislation cleans up and systematizes the statutory definitions to provide more consistent usage throughout the mechanics' lien law.

3. Standardization of notice provisions. The current mechanics' lien law provides for many types of notice, including preliminary notice, stop notice, notice of overdue laborer compensation, notice of non-responsibility, notice to principal and surety, stop work notice, notice of completion, and notice of cessation. Each notice is subject to unique provisions governing content, service, and proof of service. The proposed legislation standardizes these notice provisions to provide consistency throughout the range of remedies [*see* proposed Civ. Code §§ 8100-8118]. For example, the legislation prescribes standard content applicable to all notices [*see* proposed Civ. Code § 8102; proposed Pub. Con. Code § 42120]. It replaces the individual variants in existing law applicable to one type of notice or another by establishing a general procedure for giving notice to be applied throughout the mechanics lien law [*see Code Civ. Proc. § 415.20*]. It also standardizes the proof of mailing and proof of delivery provisions and adds a provision for proof of electronic notice [*see* proposed Civ. Code § 8118; proposed Pub. Con. Code § 42190].

4. Preliminary notice. Although the proposed legislation retains most of the substance of the preliminary notice provisions of existing law, the existing provisions are broken into smaller, more comprehensible pieces, streamlines and simplifies their wording, and clarifies the language of the notice [*compare Civ. Code §§ 3097, 3098 with* proposed Civ. Code §§ 8200-8214].

The proposed legislation eliminates the existing provision that seems to both require a direct contractor to give preliminary notice to the construction lender and exempts the contractor from having to do so [*see Civ. Code § 3097(b)*]. Under the proposed legislation, the contractor is required to give the lender preliminary notice [*see* proposed Civ. Code § 8200].

5. Notice of claim of lien. Existing law does not require a lien claimant to notify the owner when a claim of lien is recorded, nor does it require the county recorder to do so except in certain counties, on request. Recognizing that the constitutionality and fairness of the mechanics' lien law would be enhanced if the lien claimant were required to notify the owner on recording a claim of lien, the proposed legislation imposes a recording requirement [*see* proposed Civ. Code §§ 8418, 8420].

6. Lis pendens requirement. The proposed legislation requires that a claimant who commences an action to enforce a lien claim record a lis pendens disclosing the enforcement action within 110 days of recording the lien claim. Failure to do so results in expiration of the claim, rather than having to wait a year or more [*see* proposed Civ. Code § 8460(a)].

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
CHAPTER 152 MECHANICS' LIENS

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Uses

[d] Related Pleading and Practice Chapters

[e] Opposing Points and Authorities

[3] Discussion of Authorities

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[1] FORM

[2] Comments

[a] Use of Form

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[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Contractor Defined

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[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Estoppel as Basis for Noncontracting Owner's Responsibility

[4] Additional Authorities

[a] Estoppel as Basis for Noncontracting Owner's Responsibility

§ 152.24 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] to Foreclose Mechanics' Lien--Failure to Allege Substantial Compliance With Requirements Relating to Contents of Claim of Lien--Failure to Name Person by Whom Employed or to Whom Labor or Materials Furnished [Civ. Code § 3084(a)(4)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Essential Allegation

[b] Failure to Name Person to Whom Materials Furnished

[c] Correction by Averment in Complaint

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[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[b] Related Pleading and Practice Forms

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Essential Allegation

[b] Defective Claim of Lien

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[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Essential Allegation

[b] Time for Claimants Other Than Original Contractor to Record Lien

[c] Separate Contract for Site Improvement

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[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[b] Related Pleading and Practice Forms

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] General Rule of Priority

[b] Priority Entitles Defendant to Judgment in His or Her Favor

[c] Priority Dependent on Commencement of Work

[d] Obligatory Payments from Secured Lender

[e] Commencement of Separate Site Improvement Work

[4] Additional Authorities

[a] Priority Dependent on Commencement of Work

[b] Commencement of Separate Site Improvement Work

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[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Waiver of Lien by Claimant.

[b] Release of Lien

[c] Abandonment of Lien Claim

[d] Partial Waiver of Lien

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[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[b] Related Pleading and Practice Forms

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Determination of Indispensability

[b] Effect of Failure to Join

[c] Junior Encumbrancer as Indispensable Party

§ 152.30 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Failure to Show Substantial Compliance With Requirements Relating to Claim of Lien--Insufficient Description of Site [Civ. Code § 3084(a)(5)]

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[b] Related Pleading and Practice Forms

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Essential Allegation

[b] Defective Claim of Lien

[c] Reference to Preliminary Notice

[4] Additional Authorities

[a] Defective Claim of Lien

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[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Summary Judgment for Landowner

[b] Dismissal of Noncontracting Defendant Owner

§ 152.32 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Posting and Recording of Notice of Nonresponsibility by Noncontracting Owner Within Statutory Time Period

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Posting and Recording Notice of Nonresponsibility

[b] Failure to Verify Notice Not Fatal

[4] Additional Authorities

[a] Posting and Recording Notice of Nonresponsibility

[b] Failure to Verify Notice

§ 152.33 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Noncontracting Owner's Nonresponsibility for and Lack of Knowledge of Construction of Work of Improvement

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Lack of Knowledge of Improvement

§ 152.34 Supporting Motion for Judgment on the Pleadings [Code Civ. Proc. § 438]--By Defendant--Failure to Bring Mechanics' Lien Foreclosure Action Within Statutory Time Period [Civ. Code § 3144]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Objection by Motion for Judgment on the Pleadings

[b] Sufficiency of Pleadings

[c] Statute of Limitations

[d] Limitations on Mechanics' Lien Foreclosure Action

[e] Proper Court

[f] Extension of Credit by Mutual Agreement

[4] Additional Authorities

[a] Limitation on Mechanics' Lien Foreclosure Action

[b] Proper Court

§ 152.35 Supporting Motion for New Trial [Code Civ. Proc. § 657] in Mechanics' Lien Foreclosure Action--By Defendant--Insufficient Evidence of Chattels Installed Becoming Fixtures

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[b] Related Pleading and Practice Forms

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Attachment of Chattels to Realty

[b] Burden of Proof

[c] Factors Used in Determining Whether Chattel Is Fixture

[d] Intent as Objectively Determined if Rights of Third Person Involved

[4] Additional Authorities

[a] Factors Used in Determining Whether Chattel Is Fixture

§ 152.36 Supporting Motion for New Trial [Code Civ. Proc. § 657] in Mechanics' Lien Foreclosure Action--By Defendant--Insufficient Evidence That Labor Performed Resulted in Permanent Improvement

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[b] Related Pleading and Practice Forms

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Permanency of Improvement as Essential

[b] Preparation of Land for Agricultural Purposes

[c] Segregation of Amounts Claimed for Permanent Improvements

[4] Additional Authorities

[a] Permanency of Improvement as Essential

§ 152.37 Supporting Motion to Remove Lien Based on Defendant's Payment of Full Contract Price

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Removal of Lien

§ 152.38 Supporting Motion to Consolidate--By Lien Claimant [Civ. Code Section 3149]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Consolidation of Actions to Foreclose Mechanics' Liens

[b] Allegations of Various Complaints Taken Together

§ 152.39 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] to Foreclose Mechanics' Lien--Person Under Direct Contract With Owner Not Required to Give Preliminary Notice

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Lien Claimant's Direct Contract With Owner-Lessor

[b] Lien Claimant's Direct Contract With Owner's Agent

[c] Owner's Actual Notice of Lien Claimant's Identity and Express Promise to Pay

§ 152.40 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] to Foreclose Mechanics' Lien--Materialman's Complaint Not Required to Allege Furnishing of Materials in Precise Terms of Statute

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Alleging Statutory Requirements

[b] Materials Installed But Removed

[4] Additional Authorities

[a] Materials Installed But Removed

§ 152.41 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] to Foreclose Mechanics' Lien--Plaintiff Exempted From Licensing Requirements as Employee [Bus. & Prof. Code § 7053], Materialman [Bus. & Prof. Code § 7052], or Manufacturer [Bus. & Prof. Code § 7045]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Furnisher of Finished Products or Articles

[b] Issue of Fact

[c] Independent Contractor and Employee Distinguished

[d] Contractors' State License Law and Mechanics' Lien Law Distinguished

[e] Employees of Unlicensed Contractor

[f] Furnishing Materials as Supplier and Installing as Employee

§ 152.42 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] to Foreclose Mechanics' Lien--Plaintiff Has Substantially Complied With Statutory Licensing Requirements [Bus. & Prof. Code § 7031(e), (f)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Substantial Compliance Doctrine

§ 152.43 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] to Foreclose Mechanics' Lien--Requirement That Claim of Lien Contain Name of Person by Whom Claimant Was Employed, or to Whom

Plaintiff Furnished Labor, Services, Equipment, or Materials Met if Statutory Objective Achieved

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Requirements Met if Statutory Purpose Achieved

[b] Reference to Preliminary Notice

§ 152.44 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] to Foreclose Mechanics' Lien--Lien Claimant Not Required to State Name of Owner or Reputed Owner if Not Known [Civ. Code § 3084(a)(2)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Name of Owner Not Required if Not Known

[b] Name of Reputed Owner

§ 152.45 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] to Foreclose Mechanics' Lien--Notice of Completion Ineffective to Shorten Prescribed Statutory Period Within Which Claim of Lien Must Be Recorded

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Completion Defined

[b] Premature Recording of Notice of Completion

[c] Completion as Question of Fact

[d] Occupancy and Use

[e] Subject to Acceptance

[f] Laches

[g] Original Contractor

§ 152.46 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--Failure to Bring Action to Foreclose Within Statutory Time Limit Does Not Preclude Timely Recording of Second Lien and Bringing Action Thereon

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Action Based on Second Claim of Lien Is Proper

§ 152.47 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--Release of Expired, Unsatisfied Lien Does Not Preclude Timely Recording of Second Lien and Bringing of Related Action

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Release of Expired Claim of Lien Does Not Preclude Timely Recording of Second Notice of Lien and Filing of Related Action

[b] Release Does Not Extinguish Lien When Release Does Not State That Claim Has Been Fully Satisfied

§ 152.48 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--Plaintiff's Mechanics' Lien Has Priority Over Lien or Charge of Defendant's Encumbrance

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Optional Advances From Secured Lender

[b] Commencement of Improvement as Question of Fact

[c] Priority of Mechanics' Liens for Labor or Materials Furnished After Encumbrance Recorded.

[d] Priority of Mechanics' Liens for Work Performed After Deed Recorded

§ 152.49 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--Person Having Interest in Property Sought to be Foreclosed Is Not Indispensable Party

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Notice of Pendency of Foreclosure Action

[b] Binding Decree of Foreclosure

[c] Notice of Mechanics' Lien Rights

§ 152.50 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--In Action to Foreclose Mechanics' Lien--Claim of Lien Contains Sufficient Description of Site, Is not Fraudulent, and Does Not Mislead Third Persons

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Sufficiency of Description of Property

[b] Disregard of Errors in Description of Property

[c] Sufficiency of Description as Question of Fact

[d] Extrinsic Evidence to Determine Sufficiency

§ 152.51 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--Notice of Nonresponsibility Ineffective to Insulate Owner's Property From Mechanics' Liens

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Strict Construction of Statutory Nonresponsibility Requirements

[b] Ineffective Posting and Recording of Notice of Nonresponsibility

[c] Proof of Posting Within Statutory Time Period

[d] Owner as Agent of Contractor

[e] Constructive Knowledge of Improvement

[f] Commencement of Improvement

[g] Commencement of Improvement as Question of Fact

[h] Lesee as Agent of Owner

[4] Additional Authorities

[a] Commencement of Improvement

§ 152.52 Opposing Motion for Summary Judgment--In Action to Foreclose Mechanics' Lien--"Pay If Paid" Provision in Subcontract Is Unenforceable

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] "Pay if Paid" Provision in Subcontract Is Unenforceable

§ 152.53 Opposing Motion for New Trial [Code Civ. Proc. § 657] in Action to Foreclose Mechanics' Lien--Evidence Sufficient to Show That Chattels Installed Were Fixtures

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Vendee or Mortgagee as Favored by Fixture Rules

[b] Fixture Rules Not Determined by Landlord-Tenant Rules

[c] Conditional Sales Contract as Not Determinative

[d] Right of Vendor to Mechanics' Lien

§ 152.54 Opposing Motion for New Trial [Code Civ. Proc. § 657] in Mechanics' Lien Foreclosure Action--Evidence Sufficient to Show That Labor Performed Resulted in Permanent Improvement

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Preliminary Engineering Work

[b] Preparing Land for Agricultural Purposes

[c] Landscaping and Maintenance

§ 152.55 Supporting Contention That Service of Process on Trustee of Deed of Trust Does Not Constitute Service of Process on Beneficiaries [Civ. Code § 2937.7]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Service of Process on Trustee Only Is Not Effective Service on Beneficiaries in Action to Foreclose Mechanics' Lien

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CHAPTER 152 MECHANICS' LIENS
PART I. INTRODUCTION

15-152 California Points & Authorities § 152.01

§ 152.01 Scope of Chapter

This chapter includes memoranda of points and authorities for use in supporting [*see §§ 152.20*-152.26] and opposing [*see §§ 152.39*-152.45] a demurrer to a complaint to foreclose a mechanics' lien, supporting [*see §§ 152.27*-152.33] and opposing [*see §§ 152.46*-152.51] a motion for summary judgment, and supporting [*see §§ 152.35, 152.36*] and opposing [*see §§ 152.53, 152.54*] a motion for a new trial in an action to foreclose a mechanics' lien. It also includes a supporting memorandum for a defendant's motion for a judgment on the pleadings [*see § 152.34*], a defendant's motion to remove a mechanics' lien [*see § 152.37*], a motion to consolidate by lien claimant [*see § 152.38*], and a memorandum supporting the contention that service of process on the trustee of a deed of trust does not constitute service of process on the beneficiaries [*see § 152.55*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedureSummary JudgmentMotions for Summary JudgmentWritten MotionsCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsReal Property LawNonmortgage LiensMechanics' Liens

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PART I. INTRODUCTION

15-152 California Points & Authorities § 152.02

§ 152.02 Governing Statutes

The statutes governing actions to enforce mechanics' liens are set forth in *Civ. Code §§ 3109 through 3154*. The definitions of terms used in these code provisions are set forth in *Civ. Code §§ 3082 through 3106*.

Under the principle of sovereign immunity, mechanics' liens may not be asserted on government projects. The only remedies available on public works are stop notices [*Civ. Code §§ 3179-3214*] and actions on public works payment bonds [*Civ. Code §§ 3247-3252*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedureSummary JudgmentMotions for Summary JudgmentWritten MotionsReal Property LawNonmortgage LiensMechanics' Liens

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15-152 California Points & Authorities § 152.03

§ 152.03 Format Requirements and Page Limitations

For coverage of the page limitations and other basic format requirements applicable to memoranda of points and authorities, see Ch. 1, *Writing Legal Memoranda and Briefs* .

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PART I. INTRODUCTION

15-152 California Points & Authorities § 152.04

§ 152.04 Related Pleading and Practice Chapters

For a discussion and forms of complaints, allegations and affirmative defenses involving mechanics' liens and various notices which may be required or used by a mechanics' lien claimant or an owner under the mechanics' lien law, see California Forms of Pleading and Practice, Ch. 361, *Mechanics' Liens* (Matthew Bender).

For discussion and forms for use in particular cases involving mechanics' liens, see the following chapters:

- Ch. 104, *Building Contracts*.
- Ch. 140, *Contracts*.
- Ch. 342, *Liens and Wage Preferences*.
- Ch. 345, *Limitation of Actions*.
- Ch. 348, *Lis Pendens*.
- Ch. 481, *Public Works*.
- Ch. 536, *Subrogation*.
- Ch. 538, *Suretyship, Bonds, and Undertakings*.
- Ch. 555, *Trust Deeds and Real Property Mortgages*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil

ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticePleadingsComplaintsRequirementsCivil ProceduresSummary JudgmentMotions for Summary JudgmentWritten MotionsReal Property LawNonmortgage LiensMechanics' Liens

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15-152 California Points & Authorities § 152.05

§ 152.05 Additional Coverage

For a detailed discussion of mechanics' lien law, see California Real Estate Law & Practice, Chs. 450-453 (Matthew Bender).

For sample mechanics' lien, stop notice, and payment bond forms, see California Legal Forms, Ch. 31, *Mechanics' Liens* (Matthew Bender).

For illustrative interrogatories that may be used in actions involving mechanics' liens, see Bender's Forms Of Discovery, Volume 6, *Mechanics' Liens* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesFormReal Property LawNonmortgage LiensGeneral OverviewReal Property LawNonmortgage LiensMechanics' Liens

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15-152 California Points & Authorities §§ 152.06-152.19

[Reserved]

§§ 152.06[Reserved]

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CHAPTER 152 MECHANICS' LIENS
PART II. FORMS

15-152 California Points & Authorities § 152.20

§ 152.20 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] to Foreclose Mechanics' Lien--Failure to Allege Preliminary 20-Day Notice (Private Work) Given [Civ. Code §§ 3097, 3114]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN SUPPORT OF DEMURRER TO COM-
vs.	)	PLAINT
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT FAILS TO ALLEGE THAT A REQUIRED *CIVIL CODE SECTION 3097* PRELIMINARY 20-DAY NOTICE (PRIVATE WORK) WAS GIVEN.

A. Objection by Demurrer. *Code of Civil Procedure Section 430.30(a)* allows a defendant to demur to the complaint when any ground for objection appears on the face of the complaint. A defendant may demur on the ground that the complaint does not state facts sufficient to constitute a cause of action (*Code Civ. Proc. § 430.10(e)*).

B. Failure to State Cause of Action. A complaint to foreclose a mechanics' lien that fails to allege that the plaintiff gave a preliminary 20-day notice (private work) when required by *Civil Code Section 3097* fails to state a cause of

action (*see Borchers Bros. v. Buckeye Incubator Co. (1963) 59 Cal. 2d 234, 240, 28 Cal. Rptr. 697, 379 P.2d 1*).

C. Enforcement of Claim of Lien. *Civil Code Section 3114* allows a claimant to enforce a mechanics' lien only if the claimant has given a preliminary 20-day notice (private work) as required by *Civil Code Section 3097* and has made the requisite proof of service (*Civ. Code § 3097.1*).

[*EITHER*]

D. When Preliminary Notice Must Be Given to Owner and Original Contractor. Except one under direct contract with the owner or one performing actual labor for wages, as described in *Civil Code Section 3089(a)*, or a person or entity to whom a portion of a laborer's compensation is paid as described in *Civil Code Section 3089(b)*, every person who furnishes labor, service, equipment, or material for which a mechanics' lien otherwise can be claimed, must give the owner or reputed owner, and the original contractor or reputed contractor, a written preliminary notice no later than 20 days after the claimant has first furnished labor, service, equipment, or materials to the jobsite (*Civ. Code § 3097*).

[*OR*]

D. When Preliminary Notice Must Be Given to Construction Lender. Except the contractor, or one performing actual labor for wages, as described in *Civil Code Section 3089(a)*, or a person or entity to whom a portion of a laborer's compensation is paid as described in *Civil Code Section 3089(b)*, all persons, including persons who have a direct contract with the owner, who furnish labor, service, equipment, or material for which a mechanics' lien otherwise can be claimed, must give the construction lender, if any, or reputed construction lender, if any, a written preliminary notice no later than 20 days after the claimant has first furnished labor, service, equipment, or materials to the jobsite (*Civ. Code § 3097*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a demurrer when the demurrer asserts that the complaint fails to state facts sufficient to constitute a cause of action in that it appears on the face of the complaint that the plaintiff has failed to plead that he or she gave defendant a preliminary 20-day notice as required by *Civ. Code § 3097*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel

should refer to the lack of allegations in the complaint establishing that the plaintiff gave defendant a preliminary 20-day notice. Counsel can then argue that the complaint is subject to demurrer based on the authorities set forth above and discussed below.

[c] Related Uses

With appropriate modifications, this form may be used to support a demurrer when it appears on the face of the complaint that (1) a lien is claimed for labor, services, equipment, or materials furnished more than 20 days before a preliminary 20-day notice (private work) was served on the defendant for the labor, services, equipment, or materials [*see Civ. Code § 3097(c), (d)*], or (2) service of the notice was done in an improper manner [*see Civ. Code §§ 3097(f)* (manner of service of notice), *3097.1* (proof of service), *3114* (proof of service as prerequisite to enforcement of lien)] *IGA Aluminum Products, Inc. v. Manufacturers Bank (1982) 130 Cal. App. 3d 699, 181 Cal. Rptr. 859* is very much on point in the latter instance. In that case, the court granted defendant's motion for summary judgment when the plaintiff had sent his preliminary notice by regular first class mail instead of by first class registered or certified mail as required by *Civ. Code § 3097(f).*

This form may also be modified and used to support a demurrer to a complaint to enforce a stop notice claim, based on the failure of the stop notice claimant to give a preliminary 20-day notice (private work) when required by *Civ. Code § 3097* [*see Civ. Code § 3160* (service of stop notice as ineffective if preliminary notice not given when required)].

[d] Related Pleading and Practice Chapters

For a form of demurrer, together with a discussion of demurrers, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender).

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities set out in *§ 152.39* may be used in opposition to the demurrer supported by this form.

[3] Discussion of Authorities

[a] Failure to State Cause of Action

In ***Borchers Bros. v. Buckeye Incubator Co.*** *(1963) 59 Cal. 2d 234, 28 Cal. Rptr. 697, 379 P.2d 1* , the court sustained a general demurrer to the complaint on the grounds that it failed to allege that plaintiff had given a preliminary notice required by former Code Civ. Proc. § 1193 [*now see Civ. Code § 3097*]. The sole contention on appeal was the constitutionality of Section 1193. In holding that former Section 1193 was constitutional, the Supreme Court affirmed the trial court's order dismissing the plaintiff's complaint based on its failure to state a cause of action (*59 Cal. 2d 234, 240)* .

Former Code Civ. Proc. § 1193 required a preliminary notice to be given not later than 15 days prior to the filing of a claim of lien, unlike its successor *Civ. Code § 3097,* which requires a preliminary notice to be given within 20 days after a lien claimant has furnished labor, materials, services, or equipment [*see Civ. Code § 3097(c), (d)*]. However, the purpose of the preliminary 20-day notice remains the same, which is apprising the owner, the construction lender, and the original contractor of potential mechanics' liens claims [*see Borchers Bros. v. Buckeye Incubator Co. (1963) 59 Cal. 2d 234, 240, 28 Cal. Rptr. 697, 379 P.2d 1* ; *51 Ops. Cal. Atty. Gen. 65, 69 (1968)]* .

[b] Enforcement of Claim of Lien

Serving a preliminary notice is a fairly routine task that should be automatically calendared for every construction job.

Some claimants balk at this, believing it may indicate a lack of trust, but the better practice is to always serve a preliminary notice, rather than risk losing a lien claim.

[c] When Preliminary Notice Must Be Given to Owner and Original Contractor

As indicated in this form, ***Civ. Code § 3097*** refers to *Civ. Code § 3089(a)* and *(b)*. *Civ. Code § 3089(a)* defines "laborer" to mean any person who, acting as an employee, performs labor upon or bestows skill or other necessary services on any work of improvement. Under *Civ. Code § 3089(b)*, "laborer" also includes any person or entity, including an express trust fund described in *Civ. Code § 3111*, to whom a portion of the compensation of a laborer as defined in *Civ. Code § 3089(a)* (*see above*) is paid by agreement with that laborer or the collective bargaining agent of that laborer.

[4] Additional Authorities

[a] Failure to State Cause of Action

Windsor Mills v. Richard B. Smith, Inc. (1969) 272 Cal. App. 2d 336, 77 Cal. Rptr. 300 , involved an action to foreclose a mechanics' lien. The plaintiff alleged in his third amended complaint that he gave actual and constructive notice to defendants of his intention to file a mechanics' lien, but did not otherwise allege that he gave a preliminary notice. Defendant filed a demurrer based on plaintiff's failure to allege delivery of a written preliminary notice under former Code Civ. Proc. § 1193 [*now see Civ. Code § 3097*] (*272 Cal. App. 2d 336, 337-338)* . On appeal from a judgment of dismissal, the court held that an oral preliminary notice was insufficient, and affirmed the trial court's dismissal of the complaint based on its failure to state a cause of action (*272 Cal. App. 2d 336, 343)* .

[b] When Preliminary Notice Must Be Given to Construction Lender

In *Romak Iron Works v. Prudential Ins. Co. of America (1980) 104 Cal. App. 3d 767, 163 Cal. Rptr. 869* , plaintiff was a subcontractor on a private construction project. Plaintiff gave a 20-day notice to the owner and inquired if there was a construction lender. It was informed that there was no construction lender, which was not true. Several months after it performed the work, it learned of the existence of the construction lender. Plaintiff then gave a 20-day notice to, and served a stop notice, on the lender. When suit was filed to enforce the stop notice, the construction lender moved for summary judgment on the basis of the failure to give notice. The summary judgment was granted.

The court of appeal affirmed. It held that lack of actual knowledge of the construction lender was not an excuse under the statute because the subcontractor could have learned of the lender from the deed of trust or addressed the stop notice to "construction lender" at the job site. It also held that service of the notice on the owner was not sufficient for service on the lender (*104 Cal. App. 3d 767, 773-778)* .

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CHAPTER 152 MECHANICS' LIENS
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15-152 California Points & Authorities § 152.21

§ 152.21 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] to Foreclose Mechanics' Lien--Failure to Allege That Materials Furnished Were Intended to Be and Actually Were Used in Work of Improvement

[1] FORM

[*Caption. See § 152.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT FAILS TO ALLEGE THAT THE MATERIALS FURNISHED BY THE PLAINTIFF WERE INTENDED TO BE AND WERE ACTUALLY USED IN THE WORK OF IMPROVEMENT.

A. Objection by Demurrer. [*See § 152.20, Paragraph A.*]

B. Materials Contributed to Work of Improvement. Only persons and laborers of every class who have furnished materials or leasing equipment to be used or consumed in, or who have furnished appliances, teams, or power that has contributed to, a work of improvement are entitled to a mechanics' lien on the property on which they have bestowed labor or furnished materials, appliances, or leased equipment (*Civ. Code § 3110*).

C. Alleging That Materials Were Furnished For and Used in Improvement. A complaint to foreclose a mechanics' lien for materials furnished to a work of improvement must contain substantial allegations to the effect that the materials were furnished for and to be used in, and that they were used in, the work of improvement (*Ensele v. Jolley (1922) 188 Cal. 297, 300, 204 P. 1085*).

[*Optional*] **D. Materials Must Have Been Used in Improvement.** A person who has furnished materials for use in a work of improvement has no right to a mechanics' lien unless those materials were actually used in some part of the improvement, even when the failure to use the materials was caused by the owner abandoning a portion of the original contract (*California Portland Cement Co. v. Wentworth Hotel Co. (1911) 16 Cal. App. 692, 701-702, 118 P. 103*). Further, proof of delivery of materials to the building site does not create a presumption of their use in the improvement so as to sustain a mechanics' lien; the materialman must prove that the materials were actually used in the building (

Consolidated Electrical Distributors, Inc. v. Kirkham, Chaon & Kirkham, Inc. (1971) 18 Cal. App. 3d 54, 95 Cal. Rptr. 673).

[*Optional*] **E. Intent to Use Materials in Particular Improvement.** In a suit to foreclose a materialman's lien, the plaintiff must not only allege and prove that the materials were actually used and consumed in the construction, alteration, addition, or repair of the building, but must also allege and prove that the material was furnished by the materialman expressly for that particular building (*W.P. Fuller & Co. v. Fleisher (1923) 63 Cal. App. 78, 218 P. 53*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a demurrer to a complaint to foreclose a mechanics' lien for materials furnished to a work of improvement when the lien claimant has failed to allege facts showing that the materials were furnished for and actually used, consumed in, or contributed to, the improvement.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should refer to the lack of allegations in the complaint establishing that materials furnished by the claimant were actually used, consumed in, or contributed to, the improvement. If the complaint includes specific allegations that affirmatively reveal that the materials were not used in the improvement or were not furnished expressly for that particular improvement, counsel should refer to these allegations. Counsel can then argue that the complaint is subject to demurrer based on the authorities set forth above and discussed below.

[c] Related Uses

With appropriate modifications, this form may be used to support a motion for summary judgment to a lien foreclosure complaint based on the plaintiff's failure to demonstrate that the materials furnished for a work of improvement were actually used, consumed in, or contributed to, the improvement.

[d] Related Pleading and Practice Chapters

For a form of demurrer, together with a discussion of demurrers, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender).

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities set out in *§ 152.40* may be used in opposition to the demurrer supported by this form.

[3] Discussion of Authorities

[a] Alleging that Materials Were Furnished for and Used in Improvement

In ***Ensele v. Jolley*** *(1922) 188 Cal. 297, 204 P. 1085* , the defendant appealed from a judgment in the plaintiff's favor in an action to foreclose a materialman's lien. The plaintiff was the proprietor of a lumber business. His complaint alleged (among other things) that he had furnished to the defendant under an oral agreement certain building materials for a barn and dwelling house on the defendant's premises. Although the defendant did not demur to plaintiff's complaint, he urged on appeal that the complaint did not state facts sufficient to constitute a cause of action.

The Supreme Court affirmed the lower court's decision, finding the complaint to be sufficient when read as a whole. The Court noted that there is no question that in order to entitle a materialman to a lien against the owner of a structure, the materials must have been furnished to be used in, and must also have been used in, the structure. Further, the complaint must contain allegations to this effect (*188 Cal. 297, 302-303)* .

[b] Materials Must Have Been Used in Improvement

California Portland Cement Co. v. Wentworth Hotel Co. *(1911) 16 Cal. App. 692, 118 P. 103* , involved consolidated mechanics' lien foreclosure actions by various claimants who had furnished labor and materials for use in the construction of a large hotel. Certain plaintiffs were awarded liens for materials that were not actually included in the hotel because they were unused at the time construction ceased. The trial court found in each of these cases that the material was furnished for use in the hotel and was necessary to its completion as originally designed. However, the building was not constructed as originally designed because the owner decided to stop construction and to accept what had been completed as the final structure.

The court of appeal reversed the lower court's decision regarding the liens for unused materials. Unswayed by the argument that some of the materials were specially manufactured for use in the building, the court held that the vendors of the materials were charged with knowing that they had no lien until their property had become merged into the structure (*16 Cal. App. 692, 712-713)* .

[c] Intent to Use Materials in Particular Improvement

In ***W.P. Fuller & Co. v. Fleisher*** *(1923) 63 Cal. App. 78, 218 P. 53* , defendants successfully appealed an adverse judgment in plaintiff's mechanics' lien action for materials used in the construction of an office building. Defendants contended there was no evidence to support the trial court's finding that the materials were furnished by the plaintiff to be used in this particular office building. The court of appeal, interpreting former Code Civ. Proc. § 1183 [*now see Civ. Code § 3110*], agreed and held that in a suit to enforce a materialman's lien, the plaintiff must not only allege and prove that the material was actually used or consumed in the construction, alteration, addition to, or repair of the building, but must also allege and prove that the materials were furnished by the materialman expressly for that particular building (*63 Cal. App. 78, 79-80)* .

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15-152 California Points & Authorities § 152.22

§ 152.22 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] to Foreclose Mechanics' Lien--Failure to Allege That Plaintiff-Contractor Was Duly Licensed [Bus. & Prof. Code § 7031]

[1] FORM

[*Caption. See § 152.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION BECAUSE IT FAILS TO ALLEGE THAT THE PLAINTIFF WAS DULY LICENSED AS A CONTRACTOR AT ALL TIMES DURING THE PERFORMANCE OF THE CONTRACT.

A. Objection by Demurrer. [*See § 152.20, Paragraph A.*]

B. Contractor Defined. For purposes of the Contractors' State License Law, the term "contractor" is synonymous with the term "builder." "Contractor" means any person who undertakes to, or offers to undertake to, or purports to have the capacity to undertake to, or submits a bid to, or does himself or herself, or by or through others, construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, parking facility, railroad, excavation or other structure, project, development or improvement, or to do any part of the foregoing, including the erection of scaffolding or other structures or works in connection with the foregoing, or the cleaning of grounds or structures in connection with the foregoing, or the preparation and removal of roadway construction zones, lane closures, flagging, or traffic diversions, or the installation, repair, maintenance, or calibration of monitoring equipment for underground storage tanks, and whether or not the performance of this work involves the addition to or fabrication into any structure, project, development, or improvement described above of any material or article of merchandise. Further, "contractor" specifically includes subcontractors and specialty contractors (*Bus. & Prof. Code § 7026*).

C. Alleging and Proving Existence of License. No person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action in any court of this State for the collection of compensation for the performance of any act or contract for which a license is required by the Contractors' State License Law without alleging and proving that he or she was a duly licensed contractor at all times during the performance of the act or

contract, except that this prohibition shall not apply to contractors who are each individually licensed under the Contractors' State License Law but who fail to comply with *Business and Professions Code Section 7029* (license for joint venture) (*Bus. & Prof. Code § 7031(a)*; *see Vallejo Development Co. v. Beck Development Co. (1994) 24 Cal. App. 4th 929, 29 Cal. Rptr. 2d 669*).

D. Licensing Requirements in Mechanics' Lien Foreclosure Action. An action to foreclose a mechanics' lien is an action within the meaning of *Business and Professions Code Section 7031*, which provides that no action may be brought or maintained by a contractor unless the contractor alleges that he or she is licensed (*Lewis & Queen v. N.M. Ball Sons (1957) 48 Cal. 2d 141, 154, 308 P.2d 713*).

E. Failure to State Cause of Action. If there is no allegation in a contractor's complaint to foreclose a mechanics' lien that the plaintiff was a licensed contractor, it is clear that the pleading does not state a cause of action (*Albaugh v. Moss Constr. Co. (1954) 125 Cal. App. 2d 126, 130, 269 P.2d 936*).

F. Burden of Proof. The explicit language of *Business and Professions Code Section 7031* requires one to plead and prove licensed contractor status in order to bring or maintain an action. The existence of this language renders inapplicable *Evidence Code Section 520*, which provides that the party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue.

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be used to support a general demurrer to a complaint to foreclose a mechanics' lien when the demurrer asserts that the complaint fails to state facts sufficient to constitute a cause of action in that it appears on the face of the complaint that the plaintiff mechanics' lien claimant was not duly licensed at all times during the performance of his or her contract.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

With appropriate modifications, this memorandum of points and authorities may be used in support of a motion for summary judgment in an action to foreclose a mechanics' lien. This form may also be used in support of a demurrer to a complaint, or a motion for summary judgment in an action to enforce a stop notice [*see Lewis & Queen v. N.M. Ball Sons (1957) 48 Cal. 2d 141, 154, 308 P.2d 713* (actions on stop notice bonds for public works or improvements)].

[b] Related Pleading and Practice Forms

For a form of demurrer, together with a discussion of demurrers, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). See also the discussion of licenses in California Forms of Pleading and Practice, Ch. 104, *Building Contracts* (Matthew Bender).

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities set out in *§ 152.41* or *§ 152.42* may be used in opposition to the demurrer supported by this form.

[3] Discussion of Authorities

[a] Contractor Defined

In *Vallejo Development Co. v. Beck Development Co. (1994) 24 Cal. App. 4th 929, 29 Cal. Rptr. 2d 669* , plaintiff development company sold residentially-zoned parcels to "merchant builders" who were to complete and sell individual homes. Under the purchase agreements, plaintiff was solely responsible for construction of infrastructure improvements. Plaintiff did not have a contractor's license. After various parties brought an action against plaintiff for failure to complete the infrastructure, plaintiff recorded mechanics' liens and filed actions to foreclose on the mechanics' liens. The trial court ruled that plaintiff could not state a cause of action for compensation because it was not a licensed contractor, and sustained the defendants' demurrers without leave to amend. Plaintiff then filed motions for reconsideration and proposed second amended complaints. The trial court reaffirmed its prior orders, ruled that the proposed second amended complaints had no effect on the license requirement, and entered judgment against plaintiff, dismissing all of its complaints.

The court of appeal affirmed. It reviewed the language of *Bus. & Prof. Code § 7031*, and noted that *Bus. & Prof. Code § 7056* provides that a general engineering contractor's license is required for fixed works requiring specialized engineering knowledge and skill, including the construction of streets. The court held that it was clear that plaintiff had agreed to do work for which a license was required (*24 Cal. App. 4th 929, 937-938, 944)* .

The court found that plaintiff was acting in the capacity of a contractor when it agreed to be responsible for and undertook to complete the infrastructure. Even if plaintiff only provided administrative and oversight functions, it was acting as a contractor. People who enter into construction contracts must be licensed even when they do not do the actual work. Plaintiff argued that "master developers" should not be subject to licensing requirements, but the court found that the Legislature intended that the entity with ultimate responsibility for the construction work must be licensed. The court declined to find any exemption for master developers from the licensing requirement. It also found that plaintiff's involvement as an unlicensed contractor was not incidental to the overall transaction between the parties; the construction of $40 million of improvements was not incidental to the contract (*24 Cal. App. 4th 929, 944)* .

[b] Licensing Requirements in Mechanics' Lien Foreclosure Action

In ***Lewis & Queen v. N.M. Ball Sons*** *(1957) 48 Cal. 2d 141, 308 P.2d 713* , the plaintiff, engaging in the contracting business as a partnership, brought an action to recover against sureties on labor and material bonds and a stop notice bond posted by the defendant pursuant to *Civ. Code § 3196* (release bond for stop notice on public works of improvement), all in connection with contracts entered into by plaintiff for construction work on the Hollywood Parkway. One partner had an individual contractor's license, the other did not, and the partnership had no license. The trial court found for defendants based on the facts that plaintiff agreed to act and had acted as a contractor within the meaning of *Bus. & Prof. Code § 7026* (contractor defined), and because it had done so without the license required by *Bus. & Prof. Code § 7028*.

The Supreme Court affirmed. Given the fact that the Court had previously held that an action to enforce an arbitration award is an action within the meaning of § 7031, as is an action to foreclose on a mechanics' lien, the Court decided that

plaintiff was barred by § 7031 from maintaining any action for compensation on the bonds. The Court noted that the importance of deterring unlicensed persons from engaging in the contracting business outweighs any harshness between the parties, and that this deterrence can best be realized by denying violators the right to maintain any action for compensation in the courts (*48 Cal. 2d 141, 150)* .

Under some circumstances, alleging facts that, if proved, would establish substantial compliance with the license requirement of *Bus. & Prof. Code § 7031* may be sufficient to withstand demurrer [*see Bus. & Prof. Code § 7031(e), (f)*; *see also § 152.42[3][a]*].

[c] Failure to State Cause of Action

In ***Albaugh v. Moss Constr. Co.*** *(1954) 125 Cal. App. 2d 126, 269 P.2d 936* , the trial court found for defendants in a mechanics' lien action when it was stipulated that neither the plaintiff nor his partner were licensed as contractors at any time during performance of the contract. The court of appeal affirmed, stating that because there was no allegation in the complaint that the partners were licensed contractors, it was clear that the complaint did not state a cause of action. The court noted that the partners' failure to obtain a contractor's license before they "embarked upon their venture" with defendants rendered their contract illegal (*125 Cal. App. 2d 126, 130-132)* .

[d] Burden of Proof

Fillmore v. Irvine *(1983) 146 Cal. App. 3d 649, 194 Cal. Rptr. 319* (opinion certified for partial publication), involved an action by a drywall finisher to foreclose a mechanics' lien. Defendants contended that plaintiff was a contractor without a valid contractor's license, but the trial court, relying on *Lab. Code § 2750.5* (discussed *below*), found that plaintiff was an employee exempt from the license requirement [*see Bus. & Prof. Code § 7053*] and rendered judgment in his favor.

The court of appeal reversed the trial court's decision. The court examined *Lab. Code § 2750.5*, which creates a rebuttable presumption, affecting the burden of proof, that a worker who performs services requiring a contractor's license is an employee. The court found that if § 2750.5 were applied to determinations under *Bus. & Prof. Code §§ 7031* and *7053*, every unlicensed person working on a job would be characterized as an employee, and that this result would repeal by implication the ban in § 7031 on recovery by an unlicensed contractor. Noting that there is a presumption against repeals by implication, the court ruled that § 2750.5 is not applicable to determinations under §§ 7031 and 7053 (*146 Cal. App. 3d 649, 657)* .

The court also considered plaintiff's argument that if he was not an employee, he was an unlicensed contractor, that contracting without a license is a misdemeanor, and that defendants should have the burden of proving that he was an unlicensed contractor pursuant to *Evid. Code § 520*. Section 520 provides that a party claiming that a person is guilty of a crime or wrongdoing has the burden of proof on that issue. The court noted, however, that *Evid. Code § 300* provides that the Evidence Code is inapplicable when "otherwise provided by statute." Because the explicit language of *Bus. & Prof. Code § 7031* requires one to plead and provide licensed contractor status in order to bring or maintain an action, the burden of proof in contractor licensing cases is "otherwise provided by statute." Consequently, § 520 was inapplicable (*146 Cal. App. 3d 649, 661-662)* .

[4] Additional Authorities

[a] Licensing Requirements in Mechanics' Lien Foreclosure Action

See the discussion of *Albaugh v. Moss Constr. Co. (1954) 125 Cal. App. 2d 126, 269 P.2d 936* , in § 152.22[3][c].

Licensed contractors should beware of dealing with unlicensed subcontractors. In *Holm v. Bramwell (1937) 20 Cal. App. 2d 332, 67 P.2d 114* , the court of appeal modified a judgment foreclosing a mechanics' lien to secure payment of

money due the plaintiff, who was a licensed building contractor. The trial court had disallowed the plaintiff's claim to the extent of an amount he voluntarily paid a subcontractor who was not licensed. The court directed the trial court to ascertain the amount of interest due according to the findings and to allow that sum as part of the judgment. As modified, the appellate court affirmed, stating that the plaintiff's contract with the unlicensed subcontractor was illegal and void and that the court properly disallowed amounts paid to the subcontractor. The court added that a mechanics' lien may not be founded on an illegal contract procured contrary to law (*20 Cal. App. 2d 332, 336-337)* .

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15-152 California Points & Authorities § 152.23

§ 152.23 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] to Foreclose Mechanics' Lien--Failure to Allege That Noncontracting Owner Had Knowledge of Improvement and Did Not Record and Post Notice of Nonresponsibility

[1] FORM

[*Caption. See § 152.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT FAILS TO ALLEGE THAT THE NONCONTRACTING OWNER HAD KNOWLEDGE OF THE WORK OF IMPROVEMENT AND DID NOT POST AND RECORD A NOTICE OF NONRESPONSIBILITY PURSUANT TO *CIVIL CODE SECTION 3094*.

A. Objection by Demurrer. [*See § 152.20, Paragraph A.*]

B. Estoppel as Basis for Noncontracting Owner's Responsibility. Former Code of Civil Procedure Section 1183.1 (*now see Civ. Code § 3129*), providing that a noncontracting owner's property is subject to mechanics' liens for any work that is performed with the knowledge of the owner unless the owner posts and records a notice of nonresponsibility, rests on the doctrine of estoppel (*Frank Pisano & Associates v. Taggart (1972) 29 Cal. App. 3d 1, 18, 105 Cal. Rptr. 414*).

C. Pleading Elements of Estoppel. When estoppel is an element of a mechanics' lien foreclosure action, it must be especially pleaded in the complaint with sufficient accuracy to disclose the facts relied on, and plaintiff must prove all the essential elements constituting it (*Frank Pisano & Associates v. Taggart (1972) 29 Cal. App. 3d 1, 18, 105 Cal. Rptr. 414*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points of authorities may be submitted in support of a demurrer to a complaint to foreclose a mechanics' lien against the property of a noncontracting owner if the complaint fails to allege that the noncontracting owner had knowledge of the work of improvement and did not post and record a notice of nonresponsibility pursuant to *Civ. Code § 3094*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Estoppel as Basis for Noncontracting Owner's Responsibility

Frank Pisano & Associates v. Taggart *(1972) 29 Cal. App. 3d 1, 105 Cal. Rptr. 414* , involved an action to foreclose mechanics' liens against a noncontracting owner's property for services rendered in connection with the subdivision of the property. While there was evidence that the owner had knowledge of the services being rendered by the plaintiffs, there was no allegation in their complaint or proof by the plaintiffs that the owner had not filed a notice of nonresponsibility pursuant to former Code Civ. Proc. § 1183.1(b) [*now see Civ. Code §§ 3094, 3129*]. The court of appeal reversed the trial court's denial of a judgment of foreclosure of the noncontracting owner's property based on its finding that the person with whom the plaintiffs contracted was an agent of the owner [*see § 152.51[3][d]*]. However, the court held that no claim of lien attached by reason of the owner's failure to file a notice of nonresponsibility since former § 1183.1(b) [*now see Civ. Code §§ 3094, 3129*] rested on the doctrine of estoppel. When estoppel is an element of the action, it must be especially pleaded in the complaint with sufficient accuracy to disclose the facts relied on and the plaintiff must prove all of the essential elements constituting it. The plaintiffs failed to meet either of these requirements in their action (*29 Cal. App. 3d 1, 26-27)* .

[4] Additional Authorities

[a] Estoppel as Basis for Noncontracting Owner's Responsibility

In *John R. Gentle & Co. v. Britton (1910) 158 Cal. 328, 111 P. 9* , the plaintiff alleged and proved that the defendant noncontracting owner had knowledge of the improvements to which the plaintiff furnished materials and labor and failed to post and record within the statutory time period set forth in former Code of Civil Procedure Section 1192 [*now see Civ. Code § 3094*] a notice of nonresponsibility. In holding that there was substantial evidence to support these findings, the Supreme Court commented that former Section 1192 [*now see Civ. Code § 3129*] rested on the doctrine of estoppel. When the owner of real property procured the property's improvement and received the benefit of another's labor or materials, the owner was deemed to have created an equitable lien on the premises to secure the payment of the value of the labor and materials (*158 Cal. 328, 332)* .

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15-152 California Points & Authorities § 152.24

§ 152.24 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] to Foreclose Mechanics' Lien--Failure to Allege Substantial Compliance With Requirements Relating to Contents of Claim of Lien--Failure to Name Person by Whom Employed or to Whom Labor or Materials Furnished [Civ. Code § 3084(a)(4)]

[1] FORM

[*Caption. See § 152.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT FAILS TO ALLEGE FACTS SHOWING THAT THE CLAIM OF LIEN CONTAINS THE NAME OF THE PERSON BY WHOM THE CLAIMANT WAS EMPLOYED OR TO WHOM HE OR SHE FURNISHED LABOR OR MATERIALS.

A. Objection by Demurrer. [*See § 152.20, Paragraph A.*]

B. Contents of Claim of Lien. A claim of lien must contain the name of the person by whom the claimant was employed or to whom he or she furnished the labor, services, equipment, or materials (*Civ. Code § 3084(a)(4)*).

C. Essential Allegation. A complaint to foreclose a mechanic's lien must show a substantial compliance with *Civil Code Section 3084* as to the contents of the claim of lien (*Clements v. T.R. Bechtel Co. (1954) 43 Cal. 2d 227, 238, 273 P.2d 5*).

D. Failure to Name Person to Whom Materials Furnished. When a claim of lien, filed by one claiming to have furnished materials that were used in a building or structure, does not state the name of the person to whom the materials were furnished, it cannot be the basis for the enforcement of a mechanics' lien on the premises (*Hogan v. Bigler (1908) 8 Cal. App. 71, 96 P. 97*).

[*Optional*] **E. Correction by Averment in Complaint.** The failure to name the person to whom the plaintiff furnished his or her materials in the plaintiff's claim of lien is a defect that cannot be aided by the averment in the complaint to foreclose the mechanics' lien, since a claim of lien filed for record must be complete in itself at that time in order to

authorize its enforcement, and is not capable of being amended or reformed (*Madera Flume & Trading Co. v. Kendall (1898) 120 Cal. 182, 183, 52 P. 304*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a demurrer to a complaint to foreclose a mechanics' lien when the plaintiff's complaint fails to name the person by whom the plaintiff was employed or to whom he or she furnished the labor, services, equipment, or materials.

Paragraphs D and E should be used with caution, since, in *Cargill v. Achziger (1958) 165 Cal. App. 2d 220, 224, 331 P.2d 774* , the court stated that the rule as to the effect of a variance between the claim of lien and the proof has been considerably relaxed from the harsh rule laid down in early decisions. The variance interpreted by the court was between the claim of lien, which stated that the plaintiff as the original contractor furnished labor and materials, and proof that the plaintiff was actually an employee. In discussing the modern rule, the court noted that in order to bar recovery the variance must be material. Similarly, in *Barrett-Hicks Co. v. Glas (1910) 14 Cal. App. 289, 299, 111 P. 760* , the court set forth the following test as to the sufficiency of the claim: whether the notice so far departs from the terms and conditions of the contract as to render it misleading to the injury of the owner. If it does, the variance is fatal.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For a form of demurrer, together with a discussion of demurrers, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender).

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities set out in *§ 152.43* may be used in opposition to the demurrer supported by this memorandum of points and authorities.

[3] Discussion of Authorities

[a] Essential Allegation

In ***Clements v. T.R. Bechtel Co.*** *(1954) 43 Cal. 2d 227, 238, 273 P.2d 5* , the plaintiffs appealed from a judgment entered upon an order sustaining the defendants' demurrer to a complaint to foreclose mechanics' liens for work, labor, and furnished materials required for road paving and construction. The demurrer was based in part on the ground that

the plaintiffs failed to set forth the lien claim contents, thus failing to comply with former Code of Civil Procedure Section 1187 [*now see Civ. Code § 3084*]. The Supreme Court reversed, holding that when the complaint alleged the substance of the information required to be contained in the claim of lien, and alleges that the claim of lien contains a description of the type of work done, a statement of the demand after deduction of all just credits and offsets, the names of the owners, the type of materials furnished, the names of the person by whom the plaintiffs were employed, and a sufficient description of the property sought to be charged, the complaint was sufficient. The Court stated, however, that a complaint to foreclose a mechanics' lien must substantially comply with former Section 1187 as to the contents of the lien claim (*43 Cal. 2d 227, 238)* .

[b] Failure to Name Person to Whom Materials Furnished

The court in ***Hogan v. Bigler*** *(1908) 8 Cal. App. 71, 96 P. 97* , reversed plaintiff's judgment foreclosing a materialman's lien on the grounds that the claims of lien stated that the materials used in the structure were furnished to one person, when the lower court found that the materials were actually furnished to someone else. The appellate court, interpreting former Code of Civil Procedure Section 1187 [*now see Civ. Code § 3084*] noted in strong language that "[w]e have no power to dispense with the plain requirements of the statute. The legislature saw fit to require that the claim should state the name of the person to whom the materials were furnished. The claim in this case does not do so; hence it cannot be the basis for the enforcement of a lien" (*8 Cal. App. 71, 72)* .

[c] Correction by Averment in Complaint

In ***Madera Flume & Trading Co. v. Kendall*** *(1898) 120 Cal. 182, 183-184, 52 P. 304* , the defendant appealed from a judgment in favor of the plaintiff in an action to foreclose a mechanics' lien and from an order denying a new trial, contending that the lien claim was defective in that the plaintiff did not state the name of the person to whom he furnished the materials. The Supreme Court agreed and reversed the trial court. The Court stated that the failure to name the person to whom the plaintiff furnished his materials rendered the claim of lien defective, a defect that could not be aided by averring in the complaint that in fact they were furnished to the defendant. The Court stated that a lien claim must be complete in itself at the time of filing in order to authorize its enforcement, and is not capable of being amended or reformed. The Court added that the right to enforce a mechanics' lien depends on compliance with the requirements of former Code of Civil Procedure Section 1187 [*now see Civ. Code § 3084*], and, unless the claim contains the statements required by this code provision, the claimant is not entitled to his or her lien (*120 Cal. 182, 183-184)* .

California Points & Authorities

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
CHAPTER 152 MECHANICS' LIENS
PART II. FORMS

15-152 California Points & Authorities § 152.25

§ 152.25 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] to Foreclose Mechanics' Lien--Failure to Allege Substantial Compliance With Requirements Relating to Contents of Lien--No Allegation That Claim Contained Name of Owner or Reputed Owner [Civ. Code § 3084(a)(2)]

[1] FORM

[*Caption. See § 152.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT FAILS TO ALLEGE FACTS SHOWING THAT THE CLAIM OF LIEN CONTAINS THE NAME OF THE OWNER OR REPUTED OWNER.

A. Objection by Demurrer. [*See § 152.20, Paragraph A.*]

B. Name of Owner or Reputed Owner. A claim of lien must contain the name of the owner or reputed owner, if known, of the property sought to be charged with a mechanics' lien (*Civ. Code § 3084(a)(2)*).

C. Essential Allegation. A complaint to foreclose a mechanics' lien must show substantial compliance with *Civil Code Section 3084* as to the contents of the claim of lien, including a showing that the claim of lien contains the name of the owner or reputed owner (*Clements v. T.R. Bechtel Co. (1954) 43 Cal. 2d 227, 238, 273 P.2d 5*).

[*Optional*] **D. Defective Claim of Lien.** Statutory requirement that a claim of lien must contain the name of the owner or reputed owner of the property is imperative and must be complied with to perfect the lien, when the owner or reputed owner is known to the claimant (*Diamond Match Co. v. Sanitary Fruit Co. (1925) 70 Cal. App. 695, 234 P. 322* ; *see H & L Supply, Inc. v. Ewing (1967) 253 Cal. App. 2d 283, 285, 61 Cal. Rptr. 289* .

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a demurrer to a complaint to foreclose a mechanics' lien when the complaint fails to allege a substantial compliance with the requirements relating to the contents of a claim of lien in that the claim fails to name the owner or reputed owner of the property.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

With appropriate modifications, this form may be used to support a motion for summary judgment based on the failure to include in the claim of lien recorded by the plaintiff the name of the owner or reputed owner of the property sought to be charged with a mechanics' lien.

[b] Related Pleading and Practice Forms

For a form of demurrer, together with a discussion of demurrers, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender).

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities set out in *§ 152.44* may be used in opposition to the demurrer supported by this memorandum of points and authorities.

[3] Discussion of Authorities

[a] Essential Allegation

The facts and procedural background of ***Clements v. T.R. Bechtel Co.*** *(1954) 43 Cal. 2d 227, 273 P.2d 5* , are discussed in *§ 152.24*. The Supreme Court in this case stated that a complaint to foreclose a mechanics' lien must substantially comply with former Code of Civil Procedure Section 1187 as to the contents of the claim. Among other things, the complaint must, either by direct allegation, or by an attached copy of the claim of lien, show that the claim of lien contains the name of the owner or reputed owner of the property, if known, and a sufficient description of the property, and that it is duly verified (*43 Cal. 2d 227, 238)* .

[b] Defective Claim of Lien

In ***Diamond Match Co. v. Sanitary Match Fruit Co.*** *(1925) 70 Cal. App. 695, 234 P. 322* , the plaintiff appealed from an order granting a judgment of nonsuit based on the fact that the lien claim omitted the name of the owner or reputed owner of the property. Apparently the owner made a clerical mistake by inserting its own name instead of the defendant's as owner of the property. Plaintiff unsuccessfully tried to argue that the case should fall within the exception of former Code of Civil Procedure Section 1203 (*now see Civil Code Section 3261*), which provided that mistakes in the lien claim did not invalidate it unless made with the intent to defraud. The court was not persuaded by this argument,

noting that the errors enumerated by Section 1203 did not include errors in stating the name of the owner. The court noted that each county recorder must keep an index of lien claim notices, which includes an index of parties against whom the lien is claimed. It is important that these indexes be accurate; the filing of the claim in the recorder's office is intended to protect the owner of the property against double payment to the contractor. The lien claim index would be of little efficacy if the provision regarding the statement of the owner's name in the notice of the lien claim was held not to be a material requirement. The court concluded by stating that, for these reasons, "the requirement that the claim of lien shall contain the name of the owner or the reputed owner of the property is imperative, and must be complied with, where such owner is known to the claimant, to perfect the lien" (*70 Cal. App. 695, 702)* .

In *H & L Supply, Inc. v. Ewing (1967) 253 Cal. App. 2d 283, 61 Cal. Rptr. 289* , the plaintiff appealed from a judgment entered following the granting of a motion for nonsuit in his action to foreclose a mechanics' lien for air conditioning and heating equipment furnished to a subcontractor on a project consisting of the erection of a building on property owned by the defendants. The president and sole stockholder of the plaintiff corporation prepared a preliminary notice that he directed an employee to serve on the defendants. The motion for nonsuit was based on the insufficiency of the description of the property contained in the lien claim, as no street number was given, and it was difficult to determine what part of the 160 acres was being liened without knowing the name of the owner, which the plaintiff failed to insert in the claim.

The court of appeal affirmed the trial court, holding that the information omitted in the claim of lien must be included if the claim of lien is to be properly indexed by the county recorder, and that the recording of documents without indexing would defeat the purpose of recording. It was this rationale that defeated the plaintiff's contention that *Civil Code Section 3261*--which provides that an error in the description of the property does not invalidate the lien if it is not fraudulent or does not put subsequent owners on notice of the lien--evidenced a legislative intent to disregard those errors that do not prejudice the owner or third persons. The court noted that the Legislature did not include an error in the owner's name in *Civil Code Section 3261* because the name of the property owner is necessary for proper indexing of the property. The Court also rejected plaintiff's argument that the *Diamond Match* case is no longer controlling because service of a pre-lien notice can give notice of the owner of the property, stating that the pre-lien notice is not designed to supplant a recorded claim of lien. However, the court noted that the plaintiff's argument would be more persuasive were it mounted on the framework of estoppel, that is, on a showing that the owner in this case had actual notice through the preliminary notice (*253 Cal. App. 2d 283, 286-287)* .

California Points & Authorities

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15-152 California Points & Authorities § 152.26

§ 152.26 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] to foreclose Mechanics' Lien--Failure to Allege That Claim of Lien Was Recorded Within Prescribed Period [Civ. Code §§ 3115-3117]

[1] FORM

[*Caption. See § 152.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT FAILS TO ALLEGE FACTS SHOWING THAT THE CLAIM OF LIEN WAS RECORDED WITHIN THE PRESCRIBED STATUTORY PERIODS.

A. Objection by Demurrer. [*See § 152.20, Paragraph A.*]

B. Essential Allegation. In an action to foreclose a mechanics' lien, the plaintiff must plead and prove facts showing the plaintiff's substantial compliance with the statutory requirements relative to the filing of his or her claim of lien, including the fact that the claim of lien was filed within the prescribed period (*M. Arthur Gensler, Jr., & Associates, Inc. v. Larry Barrett, Inc. (1972) 7 Cal. 3d 695, 703, 103 Cal. Rptr. 247, 499 P.2d 503* (dictum)).

[*EITHER*]

C. Time for Original Contractor to Record Lien. Each original contractor, in order to enforce a lien, must record his or her claim of lien after he or she completes his or her contract and before the expiration of (a) 90 days after the completion of the work of improvement as defined in *Civil Code Section 3106* if no notice of completion or cessation has been recorded, or (b) 60 days after recordation of a notice of completion or notice of cessation (*Civ. Code § 3115*).

[*OR*]

C. Time for Claimants Other Than Original Contractor to Record Lien. Each claimant other than an original contractor, in order to enforce a lien, must record his or her claim of lien after he or she has ceased furnishing labor, services, equipment or materials, and before the expiration of (a) 90 days after completion of the work of improvement if no notice of completion or cessation has been recorded, or (b) 30 days after recordation of a notice of completion or notice of cessation (*Civ. Code § 3116*; *see Fontana Paving, Inc. v. Hedley Brothers, Inc. (1995) 38 Cal. App. 4th 146, 156, 45 Cal. Rptr. 2d 295* ; *Insul-Acoustics, Inc. v. Lee (1982) 136 Cal. App. 3d 552, 186 Cal. Rptr. 324*).

[*OR*]

C. Time to Record When Multiple Original Contracts. When the work of improvement is not made pursuant to one original contract for the work of improvement but is made in whole or in part pursuant to two or more original contracts, each covering a particular portion of the work of improvement, and the owner has, within 10 days after completion of any such contract for a particular portion of the work of improvement, recorded a notice of completion, notwithstanding *Civil Code Sections 3115* and *3116*, the original contractor under the contract covered by the notice must, within 60 days after recording the notice, and any claimant under the contract other than the original contractor must, within 30 days after the recording of the notice of completion, record his or her claim of lien (*Civ. Code § 3117*).

[*Optional*] **D. Time to Record When Multiple Residential Units.** When a work of improvement consists of the construction of two or more separate residential units, each such unit is considered a separate work of improvement. The time for recording claims of lien against each such unit commences to run on the completion of each unit (*Civ. Code § 3131*).

[*Optional*] **E. Separate Contract for Site Improvement.** If a site improvement is provided for in a contract separate from any contract for the erection of residential units or other structures, the site improvement is considered a separate work of improvement (*Civ. Code § 3135*; *Lambert Steel Co. v. Heller Financial, Inc. (1993) 16 Cal. App. 4th 1034, 1042-1043, 20 Cal. Rptr. 2d 453*), and the time to record a claim of lien for work performed or materials furnished under such a separate contract is separate from the time to record claims of lien for work performed or materials furnished under the contract for the erection of the residential units or other structures (*see Howard A. Deason & Co. v. Costa Tierra, Ltd. (1969) 2 Cal. App. 3d 742, 752-755, 83 Cal. Rptr. 105*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a demurrer to a complaint to foreclose a mechanics' lien when the complaint fails to allege facts showing that the claim of lien was recorded within the appropriate periods prescribed in *Civ. Code §§ 3115-3117*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, this memorandum of points and authorities may be used in support of a motion for summary judgment based on the plaintiff's failure to record his or her claim of lien within the appropriate periods prescribed in *Civ. Code §§ 3115-3117*.

[c] Related Pleading and Practice Forms

For forms of notices of completion and cessation, and a form of affirmative defense based on the recordation of a notice of completion, see California Forms of Pleading and Practice, Ch. 361, *Mechanics' Liens* (Matthew Bender).

[3] Discussion of Authorities

[a] Essential Allegation

In ***M. Arthur Gensler, Jr., & Associates, Inc. v. Larry Barrett, Inc.*** *(1972) 7 Cal. 3d 695, 103 Cal. Rptr. 247, 499 P.2d 503* , the Supreme Court held that lien claims were timely filed under former Code Civ. Proc. § 1193.1(d)(3) when (1) they were filed more than 90 days but less than 150 days from the last date on which the work was done on the contract, (2) no notice of completion was filed, (3) the work was not substantially completed, and (4) the owner's occupancy did not establish constructive completion (*7 Cal. 3d 695, 706)* . The Court stated as dictum that in a mechanics' lien foreclosure action the plaintiff must plead and prove facts showing substantial compliance with the statutory requirements relative to the filing of his or her claim of lien, including the fact that the claim of lien was filed within the prescribed period (*7 Cal. 3d 695, 703)* .

[b] Time for Claimants Other Than Original Contractor to Record Lien

In ***Fontana Paving, Inc. v. Hedley Brothers, Inc.*** *(1995) 38 Cal. App. 4th 146, 45 Cal. Rptr. 2d 295* , a materialman supplied asphaltic concrete materials to a paving subcontractor and then brought a mechanics' lien foreclosure action seeking to recover the unpaid balance on its materials contract. The trial court granted judgment for the materialman based on a finding that, though the plaintiff's lien was filed more than 90 days after the work of improvement was completed, it was timely filed when it was filed 30 days before the defendant filed a notice of completion.

The court of appeal reversed. The court noted that *Civ. Code § 3116* specifies two alternative time periods for filing liens by claimants other than original contractors: (1) within 90 days after completion if no notice of completion or cessation has been recorded, or (2) within 30 days after recordation of a notice of completion or cessation. The court agreed with the trial court's finding that the plaintiff's lien claim was untimely under the first time period because it was recorded more than 90 days after completion of the work of improvement (*38 Cal. App. 4th 146, 154)* . However, the court of appeal disagreed with the trial court's finding that the notice of completion, which was recorded almost six months after completion of the work, was valid and thereby opened a new 30-day period under *Civ. Code § 3116* for filing liens. The appellate court found that, because the notice of completion was not recorded within 10 days after completion of the work of improvement, it was invalid under *Civ. Code § 3093*, which sets forth the requirements for a valid notice of completion. Because the notice of completion was invalid, it had no effect on the 90-day lien filing period of *Civ. Code § 3116*, which had expired by the time the plaintiff's claim of lien was filed (*38 Cal. App. 4th 146, 154-156)* .

In ***Insul-Acoustics, Inc. v. Lee*** *(1982) 136 Cal. App. 3d 552, 186 Cal. Rptr. 324* , a subcontractor performed work on a tenant's store in a shopping mall, and then brought a mechanics' lien foreclosure action against the tenant. The trial court granted summary judgment for the defendant on the ground that the plaintiff's claim was not timely recorded as required

by *Civ. Code § 3116*.

The court of appeal affirmed. The court held that the subcontractor's lien was not enforceable because it was not filed within 90 days of the completion of the work of improvement. The court rejected the plaintiff's contention that its lien was timely recorded because the "work of improvement" included not only the work on the defendant's store but also work that was later performed at other stores in the mall pursuant to separate subcontracts between the plaintiff and the general contractor. Because each job at each store was the subject of a separate contract between plaintiff and the general contractor, and between the general contractor and the individual tenant involved, each job was a separate work of improvement. There was no basis for holding the separate improvements to be an "an entire structure or scheme of improvement as a whole" (which is part of the definition of a "work of improvement" under *Civ. Code § 3106*). The "work of improvement as a whole" was the fixturization of defendant's shop. Defendant had no legal responsibility for, or connection with, the improvements ordered by the other tenants in the mall for their own shops (*136 Cal. App. 3d 552, 555)* .

[c] Separate Contract for Site Improvement

In ***Lambert Steel Co., Inc. v. Heller Financial, Inc.*** *(1993) 16 Cal. App. 4th 1034, 20 Cal. Rptr. 2d 453* , a property owner obtained a loan, secured by a deed of trust, to construct a retail and office complex. The deed of trust was recorded after the performance of preliminary demolition and site cleanup work. Thereafter, four contractors performed their respective contracts and recorded mechanics' liens. Before the completion of construction, the owner defaulted on the loan, and the four contractors filed complaints seeking to foreclose on their mechanics' liens. They asserted that their mechanics' liens had priority over the construction deed of trust. The trial court awarded damages to three of the four contractors against the owner, but found that the deed of trust had priority over the mechanics' liens, which it discharged. As to the fourth contractor, the trial court entered judgment in favor of the holder of the secured note, after discharging this contractor's mechanics' lien on the ground that the contractor failed to give the required 20-day preliminary notice.

The court of appeal affirmed, holding that the mechanics' liens were not entitled to priority over the construction deed of trust. The court acknowledged that *Civ. Code § 3134* provides that a mechanics' lien has priority over other liens or other encumbrances that attach after the commencement of the work of improvement. It also noted, however, that *Civ. Code § 3135* provides that if a site improvement is provided for in a separate contract from any contract governing the erection of residential units or other structures, then the site improvement will be considered a separate work of improvement. Although preliminary demolition and site cleanup work were performed before the recordation of the trust deed, this work was performed under contracts that were separate from the contract to build the structures. Consequently, that work was not the commencement of the work of improvement for purposes of Section 3134 (*16 Cal. App. 4th 1034, 1038-1039)* . The court also noted that Section 3135 is not limited to residential structures, and does not violate public policy (*16 Cal. App. 4th 1034, 1040-1043)* .

In ***Howard A. Deason & Co. v. Costa Tierra, Ltd.*** *(1969) 2 Cal. App. 3d 742, 83 Cal. Rptr. 105* , the defendants appealed from a judgment decreeing the foreclosure of the plaintiffs' mechanics' liens for work performed in connection with the construction of several apartments consisting of multiple units in a subdivided tract. The court of appeal reversed, holding in part that the trial court had failed to make certain necessary findings. Two of these findings dealt with work performed by two plaintiffs, consisting in one case of labor and materials furnished for the installation of streets, curbs, gutters, and sidewalks in the tract, which was performed under a separate contract from the contract for the erection of the apartments, and in the second case of labor and materials furnished for the installation of yard lights, and other work intended primarily for landscaping (*2 Cal. App. 3d 742, 752-753)* .

The court took judicial notice that this latter work was work of the character referred to in former Code Civ. Proc. § 1184.1 [*now see Civ. Code § 3114*], that is, site improvement work, and therefore, could be deemed work performed under a separate contract, as this work was also performed under a separate contract, and, as such, was a separate work

of improvement (*2 Cal. App. 3d 742, 755)* . The defendants had recorded a notice of completion, which could only be effective if in each case the trial court had made a finding of exactly when the work under each of these contracts had actually been completed. The trial court had mistakenly concluded that the notice was premature in any case because the whole project could not be considered completed until the city in which the improvement work was taking place had accepted the work [*see Civ. Code § 3086*]. The court held elsewhere that the trial court was in error in this respect and directed the court to determine the date that each contract was completed in order to determine the date of completion and whether the liens had been timely filed (*2 Cal. App. 3d 742, 760)* .

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15-152 California Points & Authorities § 152.27

§ 152.27 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Lien or Charge of Defendant's Encumbrance Has Priority Over Plaintiff's Lien

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____ _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORIT-
vs.	)	IES IN SUPPORT OF MOTION FOR SUMMARY
_____ [*name*],	)	JUDGMENT
Defendant.	)	Date: _____
	)	Time: _____
	)	Dept.: _____
		Trial Date: None Set

_____

THE COURT SHOULD GRANT DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE _____ [LIEN *or* CHARGE] OF DEFENDANT'S _____ [TRUST DEED *or* MORTGAGE *or other encumbrance*] HAS PRIORITY OVER PLAINTIFF'S CLAIMED MECHANICS' LIEN.

A. Summary Judgment. A defendant may move for summary judgment in any action or proceeding if it is contended that the action has no merit. The motion must be granted if all of the papers submitted show that there is no triable issue as to any material fact and that defendant is entitled to a judgment as a matter of law (*Code Civ. Proc. § 437c(a), (c)*).

B. General Rule of Priority. The general rule that liens have priority according to the time of their creation as prescribed in *Civil Code Section 2897* governs in fixing priorities under the mechanics' lien law (*Tracy Price Associates v. Hebard (1968) 266 Cal. App. 2d 778, 787, 72 Cal. Rptr. 600*).

[*EITHER*]

C. Priority of Encumbrance on Work of Improvement. Any lien, mortgage, deed of trust, or other encumbrance on a work of improvement and its construction site is preferred to any mechanics' lien that is claimed for labor or materials furnished to the improvement if (1) the lien, mortgage, deed of trust, or other encumbrance attaches, or is recorded, prior to the commencement of the work of improvement, or (2) the lien claimant had notice of the lien, mortgage, deed of trust, or other encumbrance prior to the commencement of the work of improvement (*Civ. Code § 3134*).

[*OR*]

C. Priority of Encumbrance on Site Improvement. A mortgage, deed of trust, or other encumbrance is preferred to any mechanics' lien that is claimed for labor or materials furnished to the site improvement if (1) the mortgage, deed of trust, or other encumbrance attaches, or is recorded, prior to the commencement of the site improvement work, or (2) the lien claimant had notice of the mortgage, deed of trust, or other encumbrance prior to the commencement of the site improvement work (*Civ. Code § 3137*).

[*OR*]

C. Priority of Encumbrance Financing Site Improvements. Any mortgage, deed of trust, or other encumbrance recorded before the commencement of site improvement work that was given for the sole or primary purpose of financing the site improvements, and whose loan proceeds are, in good faith, placed in the control of the lender under a binding agreement with the borrower to the effect that the proceeds are to be applied to the payment of claims of claimants and that no portion of the proceeds will be paid to the borrower in the absence of satisfactory evidence that all the claims have been paid or that the time for recording claims of liens has expired and no such claims have been recorded, is preferred to any mechanics' lien claimed for labor or materials furnished to the site improvement (*Civ. Code § 3137*).

D. Priority Entitles Defendant to Judgment in His or Her Favor. The determination that the charge or lien of a trust deed, mortgage, or other encumbrance is entitled to priority over a plaintiff's mechanics' lien entitles the defendant to a judgment in his or her favor in a mechanics' lien foreclosure action (*see Barr Lumber Co. v. Shaffer (1951) 108 Cal. App. 2d 14, 16-24, 238 P.2d 99*).

[*EITHER*]

E. Priority Dependent on Commencement of Work. No mechanics' lien attaches, and, hence, no priority may be asserted for that lien, unless and until construction commences by the doing of actual visible work on the land or the delivery of construction materials (*Walker v. Lytton Sav. & Loan Ass'n (1970) 2 Cal. 3d 152, 156-157, 84 Cal. Rptr. 521, 465 P.2d 497* ; *D'Orsay Int'l Partners v. Superior Court (2004) 123 Cal. App. 4th 836, 842, 20 Cal. Rptr. 3d 399*).

[*OR*]

E. Priority of Encumbrance Over Site Improvement Lien if Payment Bond Recorded. The holder of any mortgage or deed of trust that is subordinate to a mechanics' lien claimed for labor or materials furnished to a work of

improvement pursuant to *Civil Code Section 3134* who has procured a payment bond as defined in *Civil Code Section 3096* that is in an amount not less than 75 percent of the principal amount of the mortgage or deed of trust, that refers to the mortgage or deed of trust, and that is recorded in the office of the county recorder in the county where the site is located, has his or her mortgage or deed of trust preferred to all liens for labor, services, equipment, or materials furnished after the recording (*Civ. Code § 3138*).

[*OR*]

E. Priority of Encumbrance Over Work of Improvement Lien if Payment Bond Recorded. A holder of any mortgage or deed of trust that is subordinate to a mechanics' lien claimed for labor or materials furnished to a site improvement pursuant to *Civil Code Section 3137*, who procures a payment bond as defined in *Civil Code Section 3096*, in an amount not less than 50 percent of the principal amount of the mortgage or deed of trust, and who records the payment bond in the office of the county recorder in the county where the site is located before completion of the work of improvement, has his or her mortgage or deed of trust preferred to all site improvement liens (*Civ. Code § 3139*).

[*OR*]

E. Obligatory Payments From Secured Lender. When a mortgage or deed of trust securing a construction loan has been recorded prior to the commencement of work or the furnishing of materials, but no advancements of loan proceeds is made until after work has commenced or materials have been furnished, the lien of the mortgage or deed of trust is prior and superior to the mechanics' lien claims when the making of the advances is obligatory on the part of the mortgagee or the beneficiary (*Smith v. Anglo-California Trust Co. (1928) 205 Cal. 496, 500, 271 P. 898*).

[*Optional*] **F. Commencement of Separate Site Improvement Work.** A site improvement provided for in a separate contract from any contract regarding the erection of residential units or other structures is a separate work of improvement, and its commencement does not constitute a commencement of the work of improvement consisting of any residential unit or other structure (*Civ. Code § 3135*; *see Lambert Steel Co. v. Heller Financial, Inc. (1993) 16 Cal. App. 4th 1034, 20 Cal. Rptr. 2d 453*).

[*Optional*] **G. Advances Used in Payment of Claims of Liens.** A mortgage or deed of trust that would be prior to any mechanics' lien to the extent of obligatory advances made thereunder in accordance with the commitment of the lender, is also prior to the mechanics' lien as to any other advances secured by the mortgage or deed of trust that are used in payment of any claim of lien that is recorded at the date or dates of the other advances and thereafter in payment of costs of the work of improvement. This priority will not exceed the original commitment of the lender as shown in the mortgage or deed of trust (*Civ. Code § 3136*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for summary judgment when a defendant who is joined in a mechanics' lien foreclosure action has, under the priority rules set forth in *Civ. Code §§ 3134* (liens claimed on works of improvements), *3137* (site improvement liens), or *3138* and *3139* (payment bonds by junior holders of mortgages or deeds of trust), a charge or lien of a deed of trust, mortgage, or other encumbrance on real property that is senior or prior to the claimed mechanics' lien.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law raised. In addition, counsel should attach affidavits or declarations that support the motion, as well as a separate statement of undisputed material facts [*Code Civ. Proc. § 437c*].

[i] Related Uses

With appropriate modifications, this form may be used to support a demurrer to a mechanics' lien foreclosure complaint when it appears on the face of the complaint that the charge or lien of the mortgage, trust deed, or other encumbrance of the defendant is entitled to priority over the plaintiff's mechanics' lien as a matter of law.

[b] Related Pleading and Practice Forms

For a form of affirmative defense to a mechanics' lien foreclosure action based on the priority of the lien of a senior trust deed holder, see California Forms of Pleading and Practice , Ch. 361, *Mechanics' Liens* (Matthew Bender). For a form of notice of motion for summary judgment, together with a discussion of summary judgments, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities set out in *§ 152.48* may be used in opposition to the motion supported by this memorandum of points and authorities.

[3] Discussion of Authorities

[a] General Rule of Priority

In ***Tracy Price Associates v. Hebard*** *(1968) 266 Cal. App. 2d 778, 72 Cal. Rptr. 600* , the plaintiff brought a mechanics' lien foreclosure action for architectural services rendered in connection with prospective improvements on real property. Each defendant claimed some interest in property, and the plaintiff alleged that the defendants' interests were junior to its mechanics' lien. One defendant was a purchaser of the property at a trustees' sale following the foreclosure on a trust deed. The trust deed was recorded after the plaintiff commenced the preparation of plans. A second defendant held an attachment lien on the property following a judgment in an unrelated civil action against the defendant who formerly owned the property and contracted for the plaintiff's services. Although the prospective improvements were never commenced, surveying work had been done, which involved the placing of permanent monuments and the setting of temporary grade stakes on the property. Judgment was for the plaintiff, the trial court finding that the plaintiff had an interest in the property superior to that of the other claimants. The defendants appealed. The court of appeal affirmed that portion of the judgment decreeing that the lien on the excess proceeds of the foreclosure sale was prior and superior to any other party's interest or right in, or claim to, these proceeds, and reversed as to the remainder of the judgment (*266 Cal. App. 2d 778, 788)* .

[b] Priority Entitles Defendant to Judgment in His or Her Favor

In ***Barr Lumber Co. v. Shaffer*** *(1951) 108 Cal. App. 2d 14, 238 P.2d 99* , the trial court sustained a general demurrer

to a complaint to foreclose a mechanics' lien for materials furnished and used in the construction of a home. The demurrers were filed by defendants who claimed superior interest in the property on which the construction was taking place, and were based on the fact that the priority of the defendants' interests appeared on the face of the plaintiff's complaint. The trial court entered judgment in favor of the defendants, and the plaintiff appealed.

The court of appeal affirmed, holding that the charge or lien of a trust deed, mortgage, or other encumbrance that has priority over a mechanics' lien has priority over the lien in all respects, including the improvement to which the plaintiff furnished materials. Therefore, since the interests of these defendants were not subject to the mechanics' lien, the demurrers to the plaintiff's complaint were properly sustained (*108 Cal. App. 2d 14, 23)* .

[c] Priority Dependent on Commencement of Work

Walker v. Lytton Sav. & Loan Ass'n *(1970) 2 Cal. 3d 152, 84 Cal. Rptr. 521, 465 P.2d 497* , involved a mechanics' lien foreclosure action in which a deed of trust, which was given to the defendant savings and loan to secure a construction loan, was recorded after plaintiff architects had prepared plans and specifications for a proposed construction, but before any actual physical construction had begun. The trial court held that plaintiffs' mechanics' lien had priority over the deed of trust and the defendant appealed.

The Supreme Court reversed the trial court's holding, stating that the general rule is that a mechanics' lien does not attach unless and until construction has been undertaken by the doing of actual visible work on the land or the delivery of construction materials to the site. The Court went on to state that when only plans and specifications have been prepared in anticipation of the erection of a building, this preparation work does not entitle the plaintiffs to a mechanics' lien that would have priority over the recorded deed of trust lien (*2 Cal. 3d 152, 158)* .

In ***D'Orsay Int'l Partners v. Superior Court*** *(2004) 123 Cal. App. 4th 836, 20 Cal. Rptr. 3d 399* , the court of appeal granted a developer's petition for writ of mandate seeking an order directing that the trial court release a mechanic's lien outright without the posting of a bond. The court held that a contractor who performed design and planning services for the project, on which construction never commenced, could not rely on the principles underlying the design professional's lien [*Civ. Code § 3081.1 et seq.* (providing lien remedy for design professionals when no actual construction of planned work of improvement is commenced before recordation of notice of lien)] to file a mechanic's lien (*123 Cal. App. 4th 836, 841)* . Since the contractor attempted to file a mechanic's lien rather than a design professional's lien, the court did not decide whether a contractor performing design services or employing design professionals may assert a design professionals' lien (*123 Cal. App. 4th 836, 841)* .

[d] Obligatory Payments from Secured Lender

In ***Smith v. Anglo-California Trust Co.*** *(1928) 205 Cal. 496, 271 P. 898* , an administrator of an estate brought an action against a securities company. The company had made a construction loan secured by a deed of trust to property owned by the estate, and the administrator sought to recover from the company the balance of funds remaining undisbursed in a construction loan held by the company. On motion of the defendant company, the trial court made an order bringing into the action as parties defendant several mechanics' lien claimants who furnished labor and materials to a work of improvement funded by the construction loan. In declaring that the plaintiff was entitled to judgment against the company in the amount of the undisbursed loan proceeds, the trial court also held the deed of trust of the company to be a first charge or lien on the real property and superior to the adverse claims of all the other defendants, including the mechanics' lien claimants.

On claimants' appeal, the Supreme Court affirmed the trial court's decree of priority. Although advances from the construction loan were made after the work of improvement had commenced, the Court stated that the general rule was that when a mortgage or deed of trust has been recorded before the commencement of work or the furnishing of materials, but no advances are made under the loan until after work has commenced or materials have been furnished,

the lien of the mortgage or deed of trust is prior and superior to the mechanics' lien claims when the making of the advances is obligatory on the part of the mortgagee or the beneficiary (*205 Cal. 496, 500-501)* . The Court explained that the mortgage or deed of trust, as against subsequent mechanics' lien claimants, becomes a lien for the whole sum advanced from the time of its execution and recordation, and not for each separate amount advanced from the time of the advancement, although the right to enforce the collection of the advancement can only arise on the date each advancement is to be made (*205 Cal. 496, 500)* .

[e] Commencement of Separate Site Improvement Work

The facts and procedural background of ***Lambert Steel Co. v. Heller Financial, Inc.*** *(1993) 16 Cal. App. 4th 1034, 20 Cal. Rptr. 2d 453* , are discussed in *§ 152.26* under Separate Contract for Site Improvement. The Court of Appeal held that the mechanics' liens were not entitled to priority over the construction deed of trust. The court acknowledged that *Civ. Code § 3134* provides that a mechanics' lien has priority over other liens or other encumbrances that attach after the commencement of the work of improvement. It also noted, however, that *Civ. Code § 3135* provides that if a site improvement is provided for in a separate contract from any contract governing the erection of residential units or other structures, then the site improvement will be considered a separate work of improvement. Although preliminary demolition and site cleanup work were performed before the recordation of the trust deed, this work was performed under contracts that were separate from the contract to build the structures. Consequently, that work was not the commencement of the work of improvement for purposes of *Civ. Code § 3134* (*16 Cal. App. 4th 1034, 1038-1039)* .

The appellate court also found that § 3135 is not unfair or against public policy, and that it creates stability and predictability in the construction field. Construction lenders are not required to review the preexisting contracts between the owner and subcontractors to determine whether the contracts were for site improvement, because this procedure would have a negative effect on the approval of construction loans. Moreover, the current system, which requires the lender to inspect the site for visible signs of work before recording its lien and disbursing the funds, is not unfair to any of the subcontractors who come after the deed of trust is filed. Those subcontractors would know of the construction loan and expect to be junior to it at all times (*16 Cal. App. 4th 1034, 1043)* .

[4] Additional Authorities

[a] Priority Dependent on Commencement of Work

The facts and procedural background of *Tracy Price Associates v. Hebard (1968) 266 Cal. App. 2d 778, 72 Cal. Rptr. 600* , are discussed in *§ 152.27[3][a]*. In *Tracy,* the Court of Appeal, after setting forth the general rule of priority, stated that regardless of whether the former owner who had contracted for the plaintiff's services was at fault in failing to commence construction of the work of improvement, that fault could not be attributed to the defendant purchaser or the holder of the attachment lien. As to these defendants, the condition precedent to the plaintiff's claim of priority was the commencement of construction. The court also held that the defendants' priority could not be defeated on the grounds of estoppel or waiver by the defendants' mere knowledge that the owner planned to construct improvements on the land and that if he did an architect would have had a potential lien (*266 Cal. App. 2d 778, 787)* .

The facts and procedural background of *Lambert Steel Co. v. Heller Financial, Inc. (1993) 16 Cal. App. 4th 1034, 20 Cal. Rptr. 2d 453* , are discussed in *§ 152.27[3][e]*. In *Lambert,* the court held that temporary fencing is not an improvement at all, since it is erected solely for security and liability purposes, and not to improve the property. Temporary fencing is personal property that can be removed by its owner and used again. Because it is temporary and will be removed, it cannot be considered to be the construction or alteration of, an addition to, or repair, in whole or in part, of any fence pursuant to *Civ. Code § 3106* (definition of "work of improvement"). Therefore, installing a temporary construction fence does not commence the work of improvement under *Civ. Code § 3134* (*16 Cal. App. 4th 1034, 1043)* .

[b] Commencement of Separate Site Improvement Work

The facts and procedural background of *Tracy Price Associates v. Hebard (1968) 266 Cal. App. 2d 778, 72 Cal. Rptr. 600* , are discussed in *§ 152.27[3][a]*. In *Tracy,* the plaintiff contended on the defendants' appeal that the work of improvement had commenced, that work being the surveying work that had been done under a separate contract with the former owner in preparation of the improvements to be constructed based on the plaintiff's architectural designs. The court rejected this contention, holding that the plaintiff could not ride on the coattails of the surveyor (*266 Cal. App. 2d 778, 784)* . Although the court stated that the surveyor's work was lienable work under former Code Civ. Proc. § 1188.1 [*now see Civ. Code § 3134*], its work could not be deemed commencement of the work of improvement insofar as the plaintiff was concerned, since it was preliminary subdivision work of the character described in former Code Civ. Proc. § 1184.1 [*now see Civ. Code § 3135*]. That is, the work was provided for in a contract separate from a contract with respect to the erection of a residential unit or other structure and, hence, was a separate work of improvement. Its commencement did not constitute commencement of the improvements that the plaintiffs had prepared architectural plans for (*266 Cal. App. 2d 778, 784-785)* .

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
CHAPTER 152 MECHANICS' LIENS
PART II. FORMS

15-152 California Points & Authorities § 152.28

§ 152.28 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Lien Claim Has Been Waived, Released, or Abandoned

[1] FORM

[*Caption. See § 152.27.*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE PLAINTIFF HAS _____ [WAIVED *or* RELEASED *or* ABANDONED] HIS/HER LIEN.

[*EITHER*]

A. Waiver of Lien by Claimant. A mechanics' lien may be waived by the claimant, and the waiver does not require a formal contract, but may be inferred from the circumstances and conduct of the parties (*Cornell v. Sennes (1971) 18 Cal. App. 3d 126, 134, 95 Cal. Rptr. 728* ; *see Santa Clara Land Title Co. v. Nowack & Associates, Inc. (1991) 226 Cal. App. 3d 1558, 1568, 277 Cal. Rptr. 497*).

[*OR*]

A. Release of Lien. The clear implication of *Civil Code Section 3262*, which limits the ability of the original contractor to waive or impair the claims and liens of other persons, is that the contractor may waive or release his or her own claim, when doing so does not affect or impair the claims or liens of other laborers or subcontractors. Such a waiver releases the claim of lien and the claimant's inchoate personal right to a lien that attached when the work began (*Santa Clara Land Title Co. v. Nowack & Associates, Inc. (1991) 226 Cal. App. 3d 1558, 1568, 277 Cal. Rptr. 497*).

[*OR*]

A. Abandonment of Lien Claim. A right to a mechanics' lien is abandoned if the lien claimant specifically agrees to take stock in lieu of monetary payment for his or her services (*Reaves v. Fremont Valley Development Corp. (1964) 229 Cal. App. 2d 13, 24 39 Cal. Rptr. 783*).

[*Optional*] **B. Reasserting Title to Materials Waives Lien.** Reasserting title to materials for which a mechanics' lien is claimed and selling the materials to another person constitute a waiver of the lien (*Cornell v. Sennes (1971) 18 Cal. App. 3d 126, 134*).

[*Optional*] **C. Partial Waiver of Lien.** A contractor may limit his or her right to claim a lien upon an entire tract of land by his or her waiver of the lien upon a portion of the tract (*A.A. Baxter Corp. v. Home Owners and Lenders (1970) 7 Cal. App. 3d 725, 732, 86 Cal. Rptr. 854*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted by a defendant in a mechanics' lien foreclosure action in support of a motion for summary judgment when the plaintiff has waived, released, or abandoned his or her right to a lien.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations that support the motion, as well as a separate statement of undisputed material facts [*Code Civ. Proc. § 437c(b)*].

[b] Related Pleading and Practice Forms

For a notice of motion of summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender).

[3] Discussion of Authorities

[a] Waiver of Lien by Claimant.

Cornell v. Sennes *(1971) 18 Cal. App. 3d 126, 95 Cal. Rptr. 728* involved plaintiff's installation of air conditioning equipment pursuant to a conditional sales contract between the plaintiff and a tenant of the owners. The owners knew of the installation but did not file a notice of nonresponsibility. After filing the mechanics' lien action, plaintiff removed the equipment without the owner's consent, sold it to a third person, and credited the defendants with the amount received. The trial court entered judgment for plaintiffs.

The Court of Appeal reversed the judgment, holding that plaintiff had waived his right to a mechanics' lien as a matter of law by removing the equipment. The court noted that a mechanics' lien may be waived by the claimant, and that the waiver does not require a formal contract, but may be inferred from the circumstances and the conduct of the parties. The court also stated that one who furnishes materials or machinery for improvements on land retains title until the materials or machinery are paid for, and that this fact does not ordinarily deprive him or her of the right to a mechanics' lien. However, reasserting title to the materials and selling them to another person constitutes a waiver of the lien (*18 Cal. App. 3d 126, 134)* .

The court then found that the plaintiff would be entitled to a mechanics' lien only if it the air conditioning equipment had become affixed to the realty. Although under the conditional sales contract the equipment remained personalty, the court noted that it was not legally inconsistent for the equipment to be considered as a fixture as to the defendant-owners, who were not parties to the contract and had no knowledge of it. As to the defendant-owners, plaintiff recognized this principle and elected to treat the equipment as affixed. Plaintiff then, without the defendants' consent, entered the premises, repossessed the equipment, and sold it to a third person. Under these circumstances, the plaintiff, as to the defendant-owners, voluntarily elected to treat the equipment as personalty. Consequently, as a matter of law, the plaintiff waived his right to a mechanic's lien against the property (*18 Cal. App. 3d 126, 134-135)* .

The facts and procedural background of ***Santa Clara Land Title Co. v. Nowack & Associates, Inc.*** *(1991) 226 Cal. App. 3d 1558, 277 Cal. Rptr. 497* , are discussed in *§ 152.28[3][b]*. The court in that case noted that *Civil Code Section 3262*, by limiting the ability of an original contractor to waive or impair the claims and liens of other persons, clearly implies that the contractor may waive or release his or her own claim (*226 Cal. App. 3d 1558, 1568-1569)* .

[b] Release of Lien

In ***Santa Clara Land Title Co. v. Nowack & Associates, Inc.*** *(1991) 226 Cal. App. 3d 1558, 277 Cal. Rptr. 497* , a title company commenced proceedings against a mechanics' lien claimant to quiet title to property owned by the title company, and the defendant filed a cross-complaint seeking enforcement of a judgment of foreclosure of its mechanics' lien. The defendant had performed engineering services for the plaintiff's predecessors in interest and had recorded mechanics' liens on two occasions. However, the defendant had also executed a lien release so that one of the predecessors could obtain financing. The defendant continued to perform engineering services and recorded a new lien claim, but this recordation did not occur until after the newest owner had defaulted and the lender had foreclosed. The plaintiff subsequently acquired the property from the lender by grant deed. The trial court granted summary judgment for plaintiff on the complaint and the cross-complaint.

The Court of Appeal affirmed, holding that the release of lien executed by the defendant released both its claim of lien and its inchoate personal right to a lien that attached when its work began. The court ruled that *Civil Code Section 3154* (governing petitions to release liens) did not invalidate the release. There was no reason for the lender to utilize the Section 3154 procedure; indeed, it could not do so because the claimant had executed a release. The court also held that *Civil Code Section 3262* did not invalidate the release. Section 3262 limits the ability of the owner or original contractor to waive, affect, or impair the claims and liens of other persons. According to the court, the clear implication of this statute is that the contractor may waive or release his or her own claim (*226 Cal. App. 3d 1558, 1568-1569)* .

[c] Abandonment of Lien Claim

In ***Reaves v. Fremont Valley Development Corp.*** *(1964) 229 Cal. App. 2d 13, 39 Cal. Rptr. 783* , defendants appealed from a judgment foreclosing mechanics' liens against their property. The plaintiffs had been hired by defendants to make surveys and do engineering work for several subdivisions. Plaintiffs were not paid for their services, but agreed in writing to accept 36,000 shares of stock in defendants' corporation in lieu of monetary payment for their services. The defendants argued that this constituted an accord and satisfaction for the debt.

The appellate court agreed, reversing the judgment of the trial court and holding that plaintiffs had abandoned their right to a lien claim by agreeing to accept the stock. As no sum was due the plaintiffs for their work, they had no right to file mechanics' liens (*229 Cal. App. 2d 13, 24)* .

[d] Partial Waiver of Lien

In ***A.A. Baxter Corp. v. Home Owners and Lenders*** *(1970) 7 Cal. App. 3d 725, 86 Cal. Rptr. 854* , plaintiff was a grading and excavating contractor whose president and sole stockholder was a limited partner in a firm that was a developer of a housing tract. Pursuant to a special permit from the city, plaintiff completed two contracts with the developer for excavating, grading, and storm drain construction on the entire tract, which was developed into a three-unit subdivision. Work under the special permit was accepted by the city engineer, a necessary step in final filing and approval of the subdivision maps. A balance was still owing plaintiff at the time, but no mechanics' lien was filed, because this would have precluded the recording of the subdivision maps. Plaintiff's claim of lien was thus not filed until after the defendant lenders made loans and the defendant homeowners had purchased lots in unit 3. The lien was filed only against unit 3 of the subdivision and lands not within the subdivisions; it omitted properties in units 1 and 2. Defendants claimed that the lien was ineffective because it was not filed within the time prescribed by law, that plaintiff attempted to place the burden of payment for the work on the entire tract on one unit, that plaintiff was estopped to assert the lien, and that plaintiff was guilty of laches. The trial court granted plaintiff a personal judgment against the developer, but denied foreclosure of the mechanics' lien.

The Court of Appeal affirmed, holding that plaintiff could not claim a lien on a part of the tract when the work done by him was on the entire tract. The object of the lien was the entire tract of land, and not a part of the tract. Thus, the contractor's right to claim a lien upon the entire tract could be limited by his waiver of the lien upon a portion of the tract. The application of equitable principles dictated this result. When work is performed on an entire tract, there is a difference between limiting the enforcement of the contractor's lien to a part of the tract and permitting him or her to claim a lien only on a part of the tract, particularly when, as was the case here, the owners of the part of the tract on which the contractor claimed the lien became owners only after the work was completed and before the contractor's claim was filed. When defendant homeowners and lenders made their purchases and loans, they were entitled to rely on the assumption that any claim of lien by a contractor for grading the entire tract of land would be upon the entire tract, would not be limited to lots in unit 3, and, in any event, would not subject their property to more than a proportionate share of the amount of the contractor's claimed lien (*7 Cal. App. 3d 725, 732-733)* .

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
CHAPTER 152 MECHANICS' LIENS
PART II. FORMS

15-152 California Points & Authorities § 152.29

§ 152.29 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Failure to Join Indispensable Parties Having or Claiming Interest in Property Sought to Be Foreclosed Within 90 Days of Recorded Claim of Lien

[1] FORM

[*Caption. See § 152.27.*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE PLAINTIFF HAS FAILED TO JOIN, WITHIN THE 90-DAY PERIOD PRESCRIBED IN *CIVIL CODE SECTION 3144* FOR FORECLOSURE OF MECHANICS' LIENS, DEFENDANTS WHO ARE INDISPENSABLE PARTIES HAVING AN INTEREST IN THE PROPERTY SOUGHT TO BE FORECLOSED.

A. Summary Judgment. [*See § 152.27, Paragraph A.*]

B. Compulsory Joinder of Parties. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in his or her absence may (i) as a practical matter impair or impede his or her ability to protect the interest, or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his or her claimed interest (*Code Civ. Proc. § 389(a)*).

C. Determination of Indispensability. Persons who have acquired interests in property against which a mechanics' lien is sought before the mechanics' lien foreclosure action was commenced, or after the action was commenced if they had no notice of the action, are indispensable parties who must be joined in the foreclosure action (*Packard-Bell Electronics Corp. v. Theseus, Inc. (1966) 244 Cal. App. 2d 355, 358-361, 53 Cal. Rptr. 300*).

D. Effect of Failure to Join. A mechanics' lien claimant's failure to name as defendants persons who have an interest

in the property sought to be foreclosed, and are adjudged to be indispensable parties to the action within the 90-day period for commencing a foreclosure action provided for in *Civil Code Section 3144* entitles the defendant to the foreclosure action to a judgment in his or her favor (*see Frank Pisano & Associates v. Taggart (1972) 29 Cal. App. 3d 1, 23-24, 105 Cal. Rptr. 414* ; *Riley v. Peters (1961) 194 Cal. App. 2d 296, 298, 300, 15 Cal. Rptr. 41*).

[*Optional*] **E. Junior Encumbrancer as Indispensable Party.** A junior encumbrancer is entitled to dispute, and has an interest in contesting, the amount, the validity, and the priority of the lien claimed for labor and material, and must be accorded this opportunity within the time provided by *Civil Code Section 3144* (*Riley v. Peters (1961) 194 Cal. App. 2d 296, 298, 300, 15 Cal. Rptr. 41*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for summary judgment by the defendant in a mechanics' lien foreclosure action when the lien claimant has failed to join an indispensable party as a defendant to the action and the 90-day period for commencement of the foreclosure action prescribed by *Civil Code Section 3144* has passed.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations that support the motion, as well as a separate statement of undisputed material facts [*Code Civ. Proc. § 437c*].

[i] Related Uses

With appropriate modifications, this form may be used to support a demurrer to a complaint to foreclose a mechanics' lien when it appears on the face of the complaint, or from matters of which a court must take judicial notice, that plaintiff failed to join an indispensable party who claims an interest in the property sought to be foreclosed [*see Code Civ. Proc. § 430.10(d)* (objection to complaint for defect or disjoinder of parties)].

[b] Related Pleading and Practice Forms

For a form of notice of motion for summary judgment, together with a discussion of summary judgments, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities set out in *§ 152.49* may be used in opposition to the motion supported by this form.

[3] Discussion of Authorities

[a] Determination of Indispensability

In ***Packard-Bell Electronics Corp. v. Theseus, Inc.*** *(1966) 244 Cal. App. 2d 355, 358-361, 53 Cal. Rptr. 300* , the plaintiff appealed from those portions of a judgment denying foreclosure on 42 out of 44 lots against which he sought to enforce his mechanics' lien. The plaintiff had recorded his lien claim against all 44 lots, had timely filed a foreclosure action, and two months thereafter had filed a notice of lis pendens. The court denied foreclosure of (1) lots that had been sold by the defendant-owner before suit was filed but within 90 days of the recordation of the lien, (2) lots that were sold more than 90 days after plaintiff commenced his suit but before the lis pendens had been recorded, and (3) lots that were sold before the claim of lien had been recorded. None of the lot buyers were joined in the action.

The court of appeal reversed the judgment only with respect to those lots that had been purchased after the suit was filed and prior to the date when the lis pendens was recorded. Regarding those lots as to which the trial court denied foreclosure, the appellate court affirmed and held that foreclosure could not be ordered without giving the owners of those lots, who were indispensable parties, an opportunity to contest the amount, validity, and priority of the claimed lien. As to those lots that had been purchased after suit was filed and prior to the filing of the lis pendens, the trial court erred in denying a decree of foreclosure, since if those owners had actual knowledge of the pending foreclosure suit at the time they acquired title to the property, they would be bound by the decree of foreclosure (*244 Cal. App. 2d 355, 358-364)* .

[b] Effect of Failure to Join

In ***Frank Pisano & Associates v. Taggart*** *(1972) 29 Cal. App. 3d 1, 105 Cal. Rptr. 414* , the appellate court affirmed the trial court's finding that a mechanics' lien was not enforceable against a husband and wife who held property as tenants in common when no notice of the lien was given to the wife and she was not a party to the foreclosure action, and when neither the claim of lien nor the complaint to foreclose affirmatively stated that the lien was only in respect to the interest of the husband. Because under *Civil Code Section 3144* a lien does not bind any property for more than 90 days after the lien has been filed unless foreclosure proceedings are commenced in a proper court, the court found that the lien as to the property portion held by the tenants in common had expired, and the plaintiffs had no valid lien against their property (*29 Cal. App. 3d 1, 22-24)* .

Riley v. Peters *(1961) 194 Cal. App. 2d 296, 15 Cal. Rptr. 41* , was an appeal from a judgment quieting title to real property. The single question on appeal was whether the appellants, holders of mechanics' liens on the property, who had failed in their lien foreclosure actions to join as parties the trustee under a deed of trust or the subsequent owners under that deed, could prevail over those owners after the expiration of the statutory period for foreclosure of the liens. The trustee and subsequent owners brought the action against persons who had obtained lien foreclosure judgments on property to which they supplied labor and materials prior to the deed of trust recordation date. The court of appeal affirmed the trial court's judgment for the plaintiffs. Even though the mechanics' liens were entitled to priority over the deed of trust because the work of improvement had commenced before the deed of trust had been recorded, the commencement of the foreclosure action against the owner only, and not also against the trustee or the subsequent trust deed holders was not effective to preserve the lien. The court held that a junior encumbrancer is entitled to dispute and has an interest in contesting the amount, the validity, and the priority of the lien claimed for labor and material, and must be accorded this opportunity within the statutory time frame, while the evidence on which the lien claim rests is sufficiently recent (*194 Cal. App. 2d 296, 298-300)* .

[c] Junior Encumbrancer as Indispensable Party

See the discussion of ***Riley v. Peters*** *(1961) 194 Cal. App. 2d 296, 15 Cal. Rptr. 41* , in *§ 152.29[3][b]*.

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15-152 California Points & Authorities § 152.30

§ 152.30 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Failure to Show Substantial Compliance With Requirements Relating to Claim of Lien--Insufficient Description of Site [Civ. Code § 3084(a)(5)]

[1] FORM

[*Caption. See § 152.27.*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE SITE DESCRIPTION IN THE LIEN CLAIM IS INSUFFICIENT FOR IDENTIFICATION.

A. Summary Judgment. [*See § 152.27, Paragraph A.*]

B. Description of Site. A claim of lien must contain a site description that is sufficient for identification (*Civ. Code § 3084*).

[*Optional*] **C. Essential Allegation.** A complaint to foreclose a mechanics' lien must show substantial compliance with *Civil Code Section 3084*, including that the lien claim contains a sufficient description of the property (*Clements v. T.R. Bechtel Co. (1954) 43 Cal. 2d 227, 238, 273 P.2d 5*).

[*Optional*] **D. Defective Claim of Lien.** A lien claim is insufficient when there is no description in the claim sufficient to identify the property on which the work was actually done with reasonable certainty to the exclusion of other premises (*Credit Bureau of San Diego v. Williams (1957) 153 Cal. App. 2d 834, 835-836, 315 P.2d 355*).

[*Optional*] **E. Reference to Preliminary Notice.** A lien claim that is defective because the description of the property sought to be charged with a mechanics' lien is indefinite and the owner's name is not included cannot be cured by reference to the preliminary 20-day notice (private work), if the owner had no actual notice of the facts omitted in the lien through the preliminary notice (*H & L Supply, Inc. v. Ewing (1967) 253 Cal. App. 2d 283, 286-287, 61 Cal. Rptr. 289*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for summary judgment in a mechanics' lien foreclosure action when plaintiff's claim of lien contains an insufficient site description.

Counsel should include in this form argument showing the relationship between the facts of the case and the points of law raised. In addition, counsel should attach affidavits or declarations that support the motion, as well as a separate statement of undisputed material facts [*Code Civ. Proc. § 437c*].

[i] Related Uses

This form may be used in support of a demurrer to a complaint to foreclose a mechanics' lien based on plaintiff failure to include a sufficient site description in the lien claim.

[b] Related Pleading and Practice Forms

For a form of notice of motion for summary judgment, together with a discussion of same, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities set out in *§ 152.50* may be used in opposition to the motion supported by this form.

[3] Discussion of Authorities

[a] Essential Allegation

The facts and procedural background of ***Clements v. T.R. Bechtel Co.*** *(1954) 43 Cal. 2d 227, 273 P.2d 5* are discussed in *§ 152.24[3][a]*. The Supreme Court in *Clements* stated that a lien foreclosure complaint must show a substantial compliance with former Code of Civil Procedure Section 1187 [*now see Civ. Code § 3084*] as to the contents of the claim. Among other things, the Court stated, it must, either by direct allegation, or by an attached copy of the claim of lien, show (1) that the claim of lien contains the name of the owner or reputed owner of the property, if known, and a sufficient description of the property, and (2) that it is duly verified (*43 Cal. 2d 227, 238)* .

[b] Defective Claim of Lien

In ***Credit Bureau of San Diego, Inc. v. Williams*** *(1957) 153 Cal. App. 2d 834, 835-836, 315 P.2d 355* , plaintiff brought an action to foreclose its mechanics' lien upon defendant's property in San Diego. Although the plaintiff's claim of lien described the property as "2152 California Street, San Diego, California, which premises claimant is informed and believes to be described as Lot 5, block 227," there were no houses on the 2100 block of California Street, and no number 2152. The trial court found this description so insufficient as to amount to no description at all, and rendered judgment for defendant on the mechanics' lien, a decision which the appellate court affirmed (*153 Cal. App. 2d 834, 837)* .

[c] Reference to Preliminary Notice

In ***H & L Supply, Inc. v. Ewing*** *(1967) 253 Cal. App. 2d 283, 61 Cal. Rptr. 289* , the plaintiff in a mechanics' lien foreclosure action appealed from a judgment entered following the granting of a motion for nonsuit based on an insufficient property description. The president of the plaintiff corporation prepared a preliminary notice that described the property to be liened as "Ptn. of NE 1/4 of Section 3, 30-27, as per Map recorded in Book 3752 at Page 485 of Hall of Records of Kern County, California." No street number was given, and it was difficult to determine what part of the 160 acres was being liened without knowing the name of the owner, which plaintiff failed to insert in the claim. The plaintiff argued that the lien claim was not defective because he had given the owner a preliminary notice that put him on notice of the information omitted in the lien claim (*253 Cal. App. 2d 283, 285)* .

The court rejected plaintiff's argument, stating the lien claim is not designed to supplant a recorded claim of lien, but to alert the owner to the circumstances and that a lien is imminent. The court held that the mechanics' lien statutes enacted at the time the prelien notice, former Civil Procedure Section 1193.1 [*now see Civ. Code § 3097*] was added did not dispense with or mollify the requirements of former Code of Civil Procedure Section 1193.1(j) [*now see Civ. Code § 3094*], relating to the filing of the lien claim. The court noted, however, that the plaintiff's argument would have been more persuasive if it had been mounted on the framework of an estoppel, that is, if it had been shown that the owner had actual notice of the facts through the preliminary notice (*253 Cal. App. 2d 283, 287)* .

[4] Additional Authorities

[a] Defective Claim of Lien

The court in *Borello v. Eichler Homes, Inc. (1963) 221 Cal. App. 2d 487, 490-496, 34 Cal. Rptr. 648* , set forth a test for the sufficiency of the property description. In this action to foreclose a mechanics' lien, plaintiffs furnished and operated excavating and grading equipment used in the subdivision of property owned by defendant Eichler. In their lien claim, plaintiffs described the property simply as "Unit 3 and Unit 4, Terra Linda, San Rafael." Although there were four subdivisions in this area -- Terra Linda, Terra Linda Valley, Terra Linda Oaks and Terra Linda Gardens -- there was no evidence that at the crucial time Eichler owned any units 3 and 4 in any of the four subdivisions except Terra Linda Valley. Furthermore, Eichler admitted at trial that it knew that plaintiffs were working on the Terra Linda Valley units. Thus, the appellate court distinguished this situation from cases involving property descriptions that were entirely erroneous or unambiguously erroneous, rather than merely defective or vague, and therefore did not constitute descriptions at all.

The appellate court held that a property description in a mechanics' lien claim will generally be sufficient if it will enable a party familiar with the locality to identify the property with reasonable certainty to the exclusion of others (*221 Cal. App. 2d 487, 492-493)* . Extrinsic evidence may be admitted to determine the sufficiency of a vague or inaccurate description, and errors may be disregarded if the identification of the property is otherwise sufficient, provided there is no fraud and no one is misled by the description (*221 Cal. App. 2d 487, 493)* .

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15-152 California Points & Authorities § 152.31

§ 152.31 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] and Dismissal of Noncontracting Defendant Landowner--Recording of Bond for Release of Mechanics' Lien [Civ. Code § 3143]

[1] FORM

[*Caption. See § 152.27.*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION FOR SUMMARY JUDGMENT FOR DEFENDANT AND FOR DISMISSAL OF DEFENDANT AS A NONCONTRACTING LANDOWNER BECAUSE A *CIVIL CODE SECTION 3143* LIEN RELEASE BOND HAS BEEN RECORDED.

A. Summary Judgment. [*See § 152.27, Paragraph A.*]

B. Release Bond. If the owner of property, or the owner of any interest in property, sought to be charged with a claim of lien, or any original contractor or subcontractor disputes the correctness or validity of any claim of lien, he or she may record a surety bond in the office of the county recorder in which the claim of lien was recorded. The bond may be recorded either before or after the commencement of an action to enforce the claim of lien, with a penal sum equal to one and one-half times the amount of the claim or one and one-half times the amount allocated in the claim of lien to the real property sought to be released. The bond must be conditioned for the payment of any sum that the claimant may recover on the claim together with his or her costs of suit in the action, if he or she recovers therein (*Civ. Code § 3143*).

C. Effect of Recording Release Bond. On the recording of a bond as prescribed in *Civil Code Section 3143,* the real property is released from the lien and from any action brought to foreclose the lien (*Civ. Code § 3143*).

D. Summary Judgment for Landowner. Summary judgment for a defendant landowner should be granted in a mechanics' lien foreclosure action if a *Civil Code Section 3143* lien release bond has been recorded either before or after the commencement of the action (*Frank Curran Lumber Co. v. Eleven Co. (1969) 271 Cal. App. 2d 175, 182184, 76 Cal. Rptr. 753*).

E. Dismissal of Noncontracting Defendant Owner. If the plaintiff claiming a mechanics' lien on the defendant's property did not contract directly with defendant and a Section 3143 lien release bond has been recorded, it is proper on the granting of summary judgment to dismiss the action as to that owner (*Frank Curran Lbr. Co. v. Eleven Co. (1969) 271 Cal. App. 2d 175, 184-185, 76 Cal. Rptr. 753*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for summary judgment and the dismissal of a mechanics' lien claimant action by a defendant landowner, if a *Civil Code Section 3143* lien release bond has been recorded and the defendant had no personal contract with claimant.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations that support the memorandum, as well as a separate statement of undisputed material facts [*Code Civ. Proc. § 437c*].

[3] Discussion of Authorities

[a] Summary Judgment for Landowner

In ***Frank Curran Lbr. Co. v. Eleven Co.*** *(1969) 271 Cal. App. 2d 175, 76 Cal. Rptr. 753* , the trial court granted a motion for summary judgment by a defendant landowner in an action to foreclose a subcontractor's mechanics' lien action. The motion was based on affidavits and declarations demonstrating that the original contractor for the improvement had recorded a lien release bond as prescribed in former Code of Civil Procedure Section 1193.2 [*now see Civ. Code § 3143*].

The court of appeal affirmed the trial court's judgment. In response to the plaintiff's argument that such a bond violated *Section 15 of Article XX of the California Constitution*, which grants a mechanics' lien for labor and materials bestowed on property, the court stated that the Legislature is empowered to balance the interests of the lien claimant and the property owner, and to adopt legislation that will relieve the owner of the burden of the lien and at the same time afford the claimant reasonable assurance that his or her claim, if valid, will be paid in full. The Legislature effected this by former Section 1193.2, which both allowed the owner to remove the encumbrance on the property and provided (under the terms of the statutory bond) ample guarantee of payment to the claimant (*271 Cal. App. 2d 175, 182-184)* .

[b] Dismissal of Noncontracting Defendant Owner

The facts and procedural background of ***Frank Curran Lumber Company v. Eleven Co.*** *(1969) 271 Cal. App. 2d 175, 76 Cal. Rptr. 753* are discussed in *§ 152.31[3][a]*. In that case, the trial court on granting summary judgment ordered the dismissal of the action as to the defendant landowner who had no direct contract with the plaintiff. In affirming this

portion of the judgment, the court of appeal stated that because the effect of the recording of the lien release bond was to free the real property from the effect of the lien claim and any action brought to foreclose the lien, and because no personal judgment could be rendered against the landowner due to lack of privity, it was proper on the grant of a summary judgment to dismiss the action as to that defendant only (*271 Cal. App. 2d 175, 185)* .

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15-152 California Points & Authorities § 152.32

§ 152.32 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Posting and Recording of Notice of Nonresponsibility by Noncontracting Owner Within Statutory Time Period

[1] FORM

[*Caption. See § 152.27.*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE DEFENDANT, A NONCONTRACTING OWNER, HAS NOT CAUSED THE CONSTRUCTION OF A WORK OF IMPROVEMENT AND HAS POSTED AND RECORDED A *CIVIL CODE SECTION 3094* NOTICE OF NONRESPONSIBILITY.

A. Summary Judgment. [*See § 152.27, Paragraph A.*]

B. Noncontracting Owner's Responsibility for Improvement. Every work of improvement constructed on any land, and all work or labor performed or materials furnished in connection with that work with the knowledge of the owner or of any person having or claiming any estate in the land, is deemed to have been constructed, performed, or furnished at the instance of the owner or person having or claiming an estate. The interest of the owner or person having or claiming an estate is subject to any recorded mechanics' lien unless the owner or person having or claiming an estate posts and records a notice of nonresponsibility pursuant to *Civil Code Section 3094* (*Civ. Code §§ 3094, 3129*).

C. Posting and Recording Notice of Nonresponsibility. A person who owns or claims an interest in property on which a work of improvement is being constructed and who has not caused this construction effectively insulates his or her property from mechanics' liens by posting a notice of nonresponsibility in some conspicuous place on the construction site and recording the notice within 10 days after the person obtained knowledge of the improvement (*Civ. Code § 3094*; *Frank Curran Lbr. Co. v. Eleven Co. (1969) 271 Cal. App. 2d 175, 185-186, 76 Cal. Rptr. 753*).

[*Optional*] **D. Failure to Verify Notice Not Fatal.** Failure to verify the notice of nonresponsibility is not fatal when the parties are equally blameless, no prejudice arises from the lack of verification, and the landowner is not unjustly

enriched (*Baker v. Hubbard (1980) 101 Cal. App. 3d 226, 234, 161 Cal. Rptr. 551*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for summary judgment in an action to foreclose a mechanics' lien by a defendant who did not contract for or otherwise cause the construction work taking place on property in which he or she claims or has an interest, and who within 10 days after having obtained knowledge of the improvement posted and recorded a notice of nonresponsibility pursuant to *Civil Code Section 3094*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations that support the motion, as well as a separate statement of undisputed material facts [*Code Civ. Proc. § 437c*].

[b] Related Pleading and Practice Forms

For a form of an affirmative defense based on the defendant's posting and recording a notice on nonresponsibility, see California Forms of Pleading and Practice, Ch. 361, *Mechanics' Liens* (Matthew Bender). For a form of notice of motion for summary judgment, together with a discussion of same, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities set out in *§ 152.51* may be used in opposition to the motion supported by this memorandum of points and authorities.

[3] Discussion of Authorities

[a] Posting and Recording Notice of Nonresponsibility

The facts and procedural background of ***Frank Curran Lbr. Co. v. Eleven Co.*** *(1969) 271 Cal. App. 2d 175, 76 Cal. Rptr. 753* are discussed in *§ 152.31[3][a]*. The court of appeal in that case rejected the plaintiff's contention that the noncontracting defendant landowner could not avail himself of benefits of the release bond because of the landowner's failure to post and record a notice of nonresponsibility pursuant to former Code of Civil Procedure Section 1183.1(b) [*now see Civ. Code § 3094*]. The court held that former Section 1183.1(b) gave a landowner the right to insulate his or her property from the effect of the mechanics' or materialman's claim of lien for materials or labor furnished under a contract with someone holding less than a fee title to the property, provided that the landowner posted and recorded a notice of the nonresponsibility within 10 days after having obtained knowledge of the construction of a work of improvement (*271 Cal. App. 2d 175, 185-186)* .

[b] Failure to Verify Notice Not Fatal

In ***Baker v. Hubbard*** *(1980) 101 Cal. App. 3d 226, 161 Cal. Rptr. 551* , a landlord was held not liable on a mechanics' lien when he had posted a notice of nonresponsibility, even though the notice was not verified as required by statute. The court of appeal held lack of verification was not fatal when neither party was at fault, the landlord would not be unjustly enriched, and no prejudice arose from the lack of verification. The court also held that the landlord was not liable as a participant in the construction with the tenant when the landlord had not required the improvements, authorized the improvements, or agreed to pay for any of the improvements (*101 Cal. App. 3d 226, 234-235)* .

[4] Additional Authorities

[a] Posting and Recording Notice of Nonresponsibility

Baker v. Hubbard (1980) 101 Cal. App. 3d 226, 161 Cal. Rptr. 551 , is discussed in *§ 152.32[3][b]*.

[b] Failure to Verify Notice

In *Los Banos Gravel Co. v. Freeman (1976) 58 Cal. App. 3d 785, 794-797, 130 Cal. Rptr. 180* , the court held that both the posted and filed notices must be verified, and that the statute must be strictly construed to require this dual verification (*58 Cal. App. 3d 785, 800)* . The *Los Banos* case may be distinguished from the *Baker* case in that in *Baker*, the owner's lease compelled the lessee to substantially enhance the value of his real property or be in default of its terms. In such a case, the owner is deemed to be a participant with his or her lessee in contracts designed to make those improvements, and a mechanics' lien will attach to the owner's interest whether or not a notice is filed.

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15-152 California Points & Authorities § 152.33

§ 152.33 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Noncontracting Owner's Nonresponsibility for and Lack of Knowledge of Construction of Work of Improvement

[1] FORM

[*Caption. See § 152.27.*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE DEFENDANT IS A NONCONTRACTING OWNER DEFENDANT WHO HAS NOT CAUSED THE CONSTRUCTION OF A WORK OF IMPROVEMENT AND HAD NO KNOWLEDGE OF THE CONSTRUCTION.

A. Summary Judgment. [*See § 152.32, Paragraph A.*]

B. Noncontracting Owner's Responsibility for Improvement. [*See § 152.32, Paragraph B.*]

C. Lack of Knowledge of Improvement. When the noncontracting defendant landowner has no knowledge of the construction of a work of improvement taking place on his/her property, and has otherwise not caused the construction, no mechanics' lien against the property is created for labor or materials furnished to the improvement (*P.W. Wood, Inc. v. Blalack (1927) 86 Cal. App. 572, 576, 261 P. 737* (decided under former Code Civ. Proc. § 1183; *now see Civ. Code §§ 3094, 3110, 3129*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for summary judgment in a mechanics' lien foreclosure action by a defendant who (1) did not contract for or otherwise cause the construction of a work of improvement taking place on his or her property, and (2) had no knowledge of the construction.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations that support the motion, as well as a separate statement of undisputed material facts [*Code Civ. Proc. § 437c*].

[3] Discussion of Authorities

[a] Lack of Knowledge of Improvement

P.W. Wood, Inc. v. Blalack *(1927) 86 Cal. App. 572, 261 P. 737* , involved a mechanics' lien foreclosure action on the property of a noncontracting lessor landowner for the unpaid price of repair work done at the request of the lessee. The trial court's judgment for the plaintiff was reversed by the court of appeal. The court held that because the defendant had no knowledge of the repair work being done and no evidence was produced that an agency relationship existed between the lessee and lessor, no lien could be created under former Code of Civil Procedure Section 1183 [*now see Civ. Code § 3110*], for there was no one acting under the authority of the owner who could bind the owner. The court also noted that since the defendant had no knowledge of the repair work, he was not required to and in fact was in no position to disclaim responsibility for the work as provided by former Code of Civil Procedure Section 1192 [*now see Civ. Code §§ 3094, 3129*] (*86 Cal. App. 572, 576)* .

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15-152 California Points & Authorities § 152.34

§ 152.34 Supporting Motion for Judgment on the Pleadings [Code Civ. Proc. § 438]--By Defendant--Failure to Bring Mechanics' Lien Foreclosure Action Within Statutory Time Period [Civ. Code § 3144]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORIT-
vs.	)	IES IN SUPPORT OF MOTION FOR JUDGMENT
_____ [*name*],	)	ON THE PLEADINGS
Defendant.	)	Date: _____
	)	Time: _____
	)	Dept: _____
		Trial Date: None Set

_____

THE COURT SHOULD GRANT DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS BECAUSE IT APPEARS ON THE FACE OF THE COMPLAINT THAT PLAINTIFF'S MECHANICS' LIEN FORECLOSURE ACTION WAS NOT BROUGHT WITHIN THE TIME PERIOD PRESCRIBED BY *CIVIL CODE SECTION 3144*.

A. Objection by Motion for Judgment on the Pleadings. A defendant may move for judgment on the pleadings when the complaint does not state facts sufficient to constitute a cause of action against the defendant (*Code Civ. Proc. § 438(c)(1)(B)*).

B. Sufficiency of Pleadings. A judgment on the pleadings is reviewed the same as a judgment of dismissal entered following the sustaining of a general demurrer, the question being whether a cause of action has been stated (*Gill v. Curtis Pub. Co. (1952) 38 Cal2d 273, 275, 239 P2d 630*).

C. Statute of Limitations. When it appears from the face of the complaint that an action is barred by the statute of limitations, that defense may be raised by a motion for judgment on the pleadings (*Wrightson v. Dougherty (1936) 5 Cal. 2d 257, 261-265, 54 P.2d 13*).

D. Limitations on Mechanics' Lien Foreclosure Action. No mechanics' lien binds any property for more than 90 days after the recording of the mechanics' claim of lien, unless within that time an action to foreclose the lien is commenced in a proper court (*Civ. Code § 3144*). Thus, a recorded mechanics' lien becomes a nullity when no action to foreclose it is commenced within 90 days (*West Coast Development v. Reed (1992) 2 Cal. App. 4th 693, 700, 3 Cal. Rptr. 2d 790*).

[*Optional*] **E. Proper Court.** If a mechanics' lien foreclosure action is commenced in an improper court, that is, a court of a county or a judicial district other than the county or judicial district in which the land sought to be foreclosed is located, the subsequent transfer of the action to a proper court after expiration of the 90-day period comes too late, and the action is barred by *Civil Code Section 3144* (*L.A.M. Constr. v. Kriz (1993) 14 Cal. App. 4th Supp. 1, 18 Cal. Rptr. 2d 304* ; *Halbert's Lumber, Inc. v. Burdett (1988) 202 Cal. App. 3d Supp. 14, 18-19, 249 Cal. Rptr. 285* ; *States Shingle Co. v. Kaufman (1964) 227 Cal. App. 2d 830, 835, 39 Cal. Rptr. 196*).

[*Optional*] **F. Extension of Credit by Mutual Agreement.** The giving of credit pursuant to *Civil Code Section 3144*, whereby the lien claimant's time within which to commence the mechanics' lien foreclosure action is extended for 90 days after the expiration of the credit, must be by mutual agreement and an averment of agreement is essential in a complaint that alleges such an extension of credit (*Richards v. Hillside Dev. Co. (1960) 177 Cal. App. 2d 776, 780, 2 Cal. Rptr. 693*).

[*Optional*] **G. Rights of Bona Fide Purchasers.** As against any purchaser or encumbrancer for value and in good faith whose rights are acquired subsequent to the expiration of the 90-day period following the recording of the claim of lien, no giving of credit or extension of the lien or of the time to enforce the same is effective unless evidenced by a notice of agreement recorded in the office of the county recorder prior to the acquisition of the rights of the purchaser or encumbrancer (*Civ. Code § 3145*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for judgment on the pleadings when it appears on the face of the complaint to foreclose a mechanics' lien that the action is being commenced after the 90-day period specified for foreclosure actions in *Civil Code Section 3144*. Such a defect should appear on the face of the complaint because, while the limitations period itself generally is not considered as part of the substantive right of the mechanics' lien claimant to foreclose his or her lien [*Petersen v. W.T. Grant Co. (1974) 41 Cal. App. 3d 217,*

220-223, 115 Cal. Rptr. 874] and hence need not be pleaded, it is an essential allegation of a complaint to foreclose that the plaintiff's claim of lien was recorded within the period specified in *Civil Code Sections 3115-3117* [*see M. Arthur Gensler, Jr., & Associates, Inc. v. Larry Barrett, Inc. (1972) 7 Cal. 3d 695, 703, 103 Cal. Rptr. 247, 499 P.2d 503]* , and *Civil Code Section 3144* requires that the lien be foreclosed within 90 days of the date that the claim of lien was recorded.

Optional Paragraph G is for use by a defendant in a foreclosure action when the complaint shows on its face the failure to file the action within the 90-day period, and contains no allegation that an agreement to extend credit, which would extend the time period within which the claim may be foreclosed an additional 90 days after the expiration of the credit [*see Civ. Code § 3144*], or an agreement to waive the 90-day period, was recorded before the acquisition of the defendant's right in the property in question as prescribed in *Civil Code Section 3145*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

With appropriate modifications, these points and authorities may be used to support either a demurrer to a mechanics' lien foreclosure complaint or a motion for summary judgment based on the action being barred by the *Civ. Code § 3144* limitations period.

[b] Related Pleading and Practice Forms

For a form of notice and discussion of motion for judgment on the pleadings, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender).

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities set out in *§ 152.46* may be used in opposition to the motion supported by this form.

[3] Discussion of Authorities

[a] Objection by Motion for Judgment on the Pleadings

Code Civ. Proc. § 438, enacted in 1993, codifies the procedures governing motions for judgment on the pleadings. The motion may be directed either at the entire complaint or at any cause of action in it [*Code Civ. Proc. § 438(c)(2)*]. The motion may be made only after the defendant has filed his or her answer and the time to demur to the complaint has expired [*Code Civ. Proc. § 438(f)(2)*]. If there is a material change in applicable case law or statute, the motion may be made even though a demurrer was overruled on the same grounds as is the basis for the motion for judgment on the pleadings [*Code Civ. Proc. § 438(g)(1)*].

Under *Code Civ. Proc. § 438(e)*, unless the court permits otherwise, a motion for judgment on the pleadings may not be made after entry of a pretrial conference order under *Code Civ. Proc. § 575*, or within 30 days of the day initially set for trial, whichever is later.

[b] Sufficiency of Pleadings

In ***Gill v. Curtis Pub. Co.*** *(1952) 38 Cal. 2d 273, 239 P.2d 630* , the Supreme Court reversed a judgment on the pleadings for the defendants. The Court stated that on review the case would be treated the same as would be a judgment of dismissal entered following the sustaining of a general demurrer, that the allegations in the plaintiffs' complaint must be taken as true, and that the question is whether a cause of action has been stated (*38 Cal. 2d 273, 275)* .

[c] Statute of Limitations

In ***Wrightson v. Dougherty*** *(1936) 5 Cal. 2d 257, 54 P.2d 13* , counsel for the defendants in a replevin action and action to quiet title moved the court for a nonsuit, and for judgment on the pleadings on the ground that it affirmatively appeared from plaintiff's opening statement and on the face of plaintiff's complaint that the causes of action were barred by the statute of limitations. The trial court granted the motions and the Supreme Court affirmed. While the Court did not specifically approve the raising of the question of the statute of limitations by way of a motion for a judgment on the pleadings, the Court did hold that because it appeared that the complaint stated no facts that would take the causes of action out of the bar of the statute, the motion for judgment on the pleadings was properly granted (*5 Cal. 2d 257, 261-265)* .

[d] Limitations on Mechanics' Lien Foreclosure Action

In ***West Coast Development v. Reed*** *(1992) 2 Cal. App. 4th 693, 700, 3 Cal. Rptr. 2nd 790* , a real estate partnership dismissed its action against a small businessman engaged in the sale and installation of shingle roofs. The businessman then sought sanctions for a frivolous action. Although the appellate court remanded the action because the trial court failed to state in its order the grounds for sanctions, the court held that the partnership's action in continuing the lawsuit after the mechanics' lien had been released indicated bad faith. The court noted that the lien had become a nullity because no action to foreclose had been commenced within 90 days.

[e] Proper Court

In ***L.A.M. Constr. v. Kriz*** *(1993) 14 Cal. App. 4th Supp. 1, 18 Cal. Rptr. 2d 304* , plaintiff timely filed a mechanics' lien foreclosure action in superior court. At a status conference nine months after the lien was recorded, the superior court transferred the action to municipal court because plaintiff's lien claim fell below the superior court jurisdictional minimum. The defendants then moved for summary judgment, arguing that the lien was void because the action had not been transferred to a "proper court" within the 90-day period prescribed by *Civ. Code § 3144*. The trial court granted the motion.

The appellate court reversed, holding that the fact that the case was transferred from the superior court of the county in which the property was located to the municipal court in that county more than 90 days after the action was filed did not affect plaintiff's right to foreclose on its lien. After a discussion of preceding case law, including *States Shingle Co. v. Kaufman (1964) 227 Cal. App. 2d 830, 39 Cal. Rptr. 196* (discussed *above*), the court concluded that a "proper court" includes all courts within the judicial district and county where the property is located. In reaching its decision, the court noted that States Shingle and its line of cases involved territorial jurisdiction, while this case involved subject matter jurisdiction. According to the court, subject matter jurisdiction, which gives rise to either superior court or municipal/justice court jurisdiction, is much more flexible. Thus, "[w]hile the property remains in the same district and county, the proper court for subject matter jurisdiction may vary even if the face amount of the lien suggests the proper court because, for example, part of the lien has been paid, or a cause of action to foreclose a small lien is joined with a very substantial claim based on fraud, or for other reasons" (*14 Cal. App. 4th Supp. 1, 5*).

Halbert's Lumber, Inc. v. Burdett *(1988) 202 Cal. App. 3d Supp. 14, 249 Cal. Rptr. 285* , involved a materialman's action to foreclose a mechanics' lien on defendant's personal residence. Plaintiff filed his complaint in the municipal court of the proper county but in the wrong judicial district, one in which neither the real property nor any portion of it was located, and did not transfer the action to the proper judicial district until well after the expiration of the 90-day period to file. Defendant's demurrer to the complaint on the grounds that it was not timely filed was sustained without leave to amend, and the action was dismissed. Plaintiff appealed, and the appellate department of the superior court affirmed the order of dismissal, holding that the transfer of the action to the proper court did not relate back to the initial filing of the complaint, even though the action had been filed in the proper county. The court rejected plaintiff's reliance on *Division of Labor Law Enforcement v. Egnew Invest., Inc. (1966) 247 Cal. App. 2d Supp. 863, 865, 55 Cal. Rptr.*

767 , which held that *Code Civ. Proc. § 396* (which allows the transfer of an action to a court that has subject matter jurisdiction to relate back to the date of the initial filing in an improper court) was applicable to a case in which an action is brought in the wrong judicial district but the right county. Noting that *Egnew,* a superior court appellate department case, was based on former Code Civ. Proc. § 1198.1, which was repealed when *Civ. Code § 3144* was enacted, the court held that it was instead bound by *Douglas v. Donner Pines, Inc. (1977) 73 Cal. App. 3d 268, 140 Cal. Rptr. 839* . That case postdated *Egnew,* and its reasoning in interpreting a "proper court" was based on the analysis of the precise purpose of *Code Civ. Proc. § 392* (*202 Cal. App. 3d Supp. 14, 18-19*).

States Shingle Co. v. Kaufman *(1964) 227 Cal. App. 2d 830, 39 Cal. Rptr. 196* , involved a mechanics' lien foreclosure action for materials supplied to a general contractor for use in construction on defendant's property. The suit was filed in a county where no part of defendant's property was located, and which was therefore an improper court for the purposes of *Civ. Code § 3144*. Eleven months after the suit was filed the action was transferred to the superior court of the county in which the property was located. Defendants filed an answer, raising the special defense that the action had not been timely filed. A judgment of foreclosure was then entered. The court of appeal reversed, holding that § 3144 barred the action because the foreclosure action was not commenced in or transferred to a proper court within 90 days after filing of the lien claim. The court stated that in the light of the precise language of *Civ. Code § 3144,* the apparent statutory objective is to unbind the property at the end of 90 days, permitting owners, buyers, encumbrancers, and title insurance companies to deal freely with the property in reliance on the expiration of the limitation period (*227 Cal. App. 2d 830, 834)* . The court noted that these persons should not have to face the burden of examining court filings in all 57 California counties (*227 Cal. App. 2d 830, 835)* .

[f] Extension of Credit by Mutual Agreement

In ***Richards v. Hillside Dev. Co.*** *(1960) 177 Cal. App. 2d 776, 2 Cal. Rptr. 693* , the trial court sustained a demurrer without leave to amend to the plaintiffs' first amended complaint for foreclosure of a mechanics' lien. The demurrer was based on the fact that the complaint showed on its face that former Code Civ. Proc. § 1198.1 [*now see Civ. Code § 3144*] barred the action. Within the statutory time period prescribed by *Civ. Code §§ 3115-3117,* the plaintiffs had recorded their claims of lien for labor and materials furnished to the defendant. Before 90 days had elapsed the plaintiffs recorded a notice extending credit to the defendants. This notice and a second notice extending credit that was recorded did not bear the defendant's signature. In the foreclosure complaint, the plaintiffs failed to allege any mutual agreement for either extension.

The court of appeal reversed the trial court, finding error in not allowing the plaintiffs to amend their complaint to show the requisite mutual agreement (*177 Cal. App. 2d 776, 779)* . However, the court did agree that in a complaint to foreclose a mechanics' lien that alleges that an extension of credit was given, the complaint must aver that the extension of credit was mutually agreed upon (*177 Cal. App. 2d 776, 780)* .

[4] Additional Authorities

[a] Limitation on Mechanics' Lien Foreclosure Action

In *Sawyer Nurseries v. Galardi (1986) 181 Cal. App. 3d 663, 226 Cal. Rptr. 502* , the bankruptcy court's approval of a claim by a creditor who latter asserted a mechanics' lien claim after release of the property from the bankruptcy court's jurisdiction did not absolve the creditor from the statutory 90-day foreclosure action requirement, even though other creditors had failed to object to the claim in bankruptcy court.

In *Automatic Sprinkler Corporation v. Southern California Edison Co. (1989) 216 Cal. App. 3d 627, 266 Cal. Rptr. 662* , a subcontractor filed suit to enforce his lien against a utility company. The Court of Appeal affirmed the trial court's granting of the utility company's motion for summary judgment, holding in pertinent part that the subcontractor's action to enforce its mechanics' lien was barred because it was not commenced in or transferred to the proper court

within 90 days after the lien was recorded, as required by *Civ. Code § 3144*. The court noted in footnote 4 of its opinion that it is significant that the Legislature added subdivision (b) to § 3144, specifying that when there is a failure to timely commence an action to foreclose the lien, the lien shall automatically be null and void and of no further effect. The court stated that the language makes it clear that the statute is not merely a statute of limitations, and that a failure to timely commence the action terminates the substantive right to a lien (*216 Cal. App. 3d 627, 635)* .

[b] Proper Court

In *Douglas v. Donner Pines (1977) 73 Cal. App. 3d 268, 140 Cal. Rptr. 839* , plaintiff filed a complaint (against a named defendant and fictitious defendants) in the Superior Court of Santa Clara County to foreclose mechanics' liens on property located in Nevada County. Plaintiff was awarded liens against the two properties and also an order severing the action as to the fictitious defendants. After plaintiff filed an amended complaint against those defendants, the action was transferred to Nevada County. There, the trial court sustained defendants' demurrer and dismissed the complaint for failure to file it in "a proper court" within 90 days after recordation of the lien claim. The Court of Appeal affirmed, holding that the Santa Clara County Superior Court was not a "proper court" in which to commence the action to foreclose mechanics' liens against property located in Nevada County. The court rejected plaintiff's argument that the repeal of *Cal. Const., art. VI, § 5*, which provided that all actions to enforce liens on real property had to be commenced in the county of the property's situs, had the effect of altering the rule that a mechanics' lien foreclosure suit must be commenced in a proper court. The court held that the repeal meant only that commencing the action in a county in which the real property is located is now a rule of venue and no longer a jurisdictional requirement (*73 Cal. App. 3d 268, 271-272)* .

The facts and procedural background of *Automatic Sprinkler Corporation v. Southern California Edison Co. (1989) 216 Cal. App. 3d 627, 266 Cal. Rptr. 662* , are discussed in *§ 152.34[4][a]*. In that case, the court held that a lien became null and void when an action to foreclose a mechanics' lien was filed in the wrong county and was not transferred to the proper court within 90 days after the lien was recorded (*216 Cal. App. 3d 627, 635)* .

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
CHAPTER 152 MECHANICS' LIENS
PART II. FORMS

15-152 California Points & Authorities § 152.35

§ 152.35 Supporting Motion for New Trial [Code Civ. Proc. § 657] in Mechanics' Lien Foreclosure Action--By Defendant--Insufficient Evidence of Chattels Installed Becoming Fixtures

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORIT-
vs.	)	IES IN SUPPORT OF MOTION FOR NEW TRIAL
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Dept.: _____
	)	Trial Date: _____

_____

THE COURT SHOULD GRANT DEFENDANT'S MOTION FOR A NEW TRIAL BECAUSE PLAINTIFF'S EVIDENCE IS INSUFFICIENT TO PROVE THAT THE INSTALLATION OF A CHATTEL, IN CONNECTION WITH WHICH PLAINTIFF FURNISHED LABOR AND MATERIALS, CAUSED THE CHATTEL TO BECOME A FIXTURE ATTACHED TO THE REALTY.

A. Motion for New Trial. On the application of an aggrieved party, the _____ [*either* verdict *or* decision] may be vacated, in whole or in part, and a new trial may be granted, on all or some of the issues, on the ground that the evidence is insufficient to justify the _____ [*either* verdict *or* decision], substantial rights of the aggrieved party have been materially affected thereby (*Code Civ. Proc. § 657*).

B. Attachment of Chattels to Realty. Real property is subject to a mechanics' lien for materials installed on the property only if the chattels installed become fixtures attached to the realty (*R. Barcroft & Sons Co. v. Cullen (1933)*

217 Cal. 708, 711-712, 20 P.2d 665).

C. Burden of Proof. A mechanics' lien claimant has the burden of proving that items that it claims are subject to mechanics' lien are fixtures or works of improvement (*Energrey Enterprises v. Oak Creek Energy Systems (1990) 119 B.R. 739*).

D. Factors Used in Determining Whether Chattel Is Fixture. The following main factors are considered in determining whether materials installed on real property become affixed to the realty: (1) physical annexation; (2) adaptation to use with the real property; and (3) intention to annex to the realty. Of these, the intention of the parties is the most significant factor. Other factors include the relationship of the claiming parties, the relative difficulty of removal, the nature of the article annexed, and whether the fact of annexation is open and apparent (*Cornell v. Sennes (1971) 18 Cal. App. 3d 126, 132, 95 Cal. Rptr. 728*).

[*Optional*] **E. Intent as Objectively Determined if Rights of Third Person Involved.** When the rights of a person unconnected with the transaction are concerned, and the person is without actual or constructive notice of the intent of the parties responsible for annexing the personalty to the realty, the question of intent in affixing the chattel to the realty is not so much the intent of the parties to the transaction as it is the apparent intent as it would reasonably appear to that third person (*Kruse Metals Mfg. Co. v. Utility Trailer Mfg. Co. (1962) 206 Cal. App. 2d 176, 183, 23 Cal. Rptr. 514*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for a new trial based on the insufficiency of the plaintiff's evidence to prove that the installation of a chattel, in connection with which the plaintiff furnished labor and materials, caused the chattel to become a fixture attached to the realty.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

With appropriate modifications, these points and authorities may be used to support a motion for summary judgment based on affidavits and declarations showing that an installed chattel in connection with which the plaintiff furnished labor and materials is not a fixture annexed to the realty.

[b] Related Pleading and Practice Forms

For a form of notice of intention to move for new trial, together with a discussion of motions for new trials, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities set out in *§ 152.53* may be used in opposition to the motion supported by this memorandum of points and authorities.

[3] Discussion of Authorities

[a] Attachment of Chattels to Realty

In ***R. Barcroft & Sons Co. v. Cullen*** *(1933) 217 Cal. 708, 20 P.2d 665* , the defendant appealed from a judgment foreclosing the plaintiff's mechanics' lien. The trial court imposed the lien on certain buildings located on the property, as well as on the real estate itself. The sole contention on the appeal was that the buildings were appellant's personal property and thus were not subject to the plaintiff's lien. The defendant lessee, acting pursuant to the power granted in his lease with the defendant lessor (neither the lessee nor lessor appealed from the judgment), caused a structure standing on the leased premises to be torn down, and entered into two conditional sales contracts with the appellant for the purchase of a steel service station with canopy and a steel comfort station. The contracts provided that the properties would not be attached to the realty and would not become a fixture or part of the real estate. Thereafter, the defendant lessee entered into a contract with the plaintiff for the furnishing of labor and materials necessary for the plumbing and wiring of the gasoline and comfort stations. The plaintiff was not paid for the labor and materials, and took all the necessary steps to perfect and foreclose its mechanics' lien (*217 Cal. 708, 709-710)* .

On appeal, defendant contended that, by virtue of the conditional sales contracts and the fact that the buildings were removable, the buildings remained personal property (*217 Cal. 708, 710)* . The Supreme Court disagreed and affirmed the trial court's judgment. While the Court nowhere explicitly held that in order for the plaintiff's lien to attach to the chattel and the surrounding realty, the chattel must have become a fixture, the issue of the case was whether the chattel did become a fixture, and the basic assumption of the Court was that if it did not, it would not have been subject to the plaintiff's lien (*217 Cal. 708, 711-716)* .

[b] Burden of Proof

In ***Energrey Enterprises v. Oak Creek Energy Systems*** *(1990) 119 B.R. 739* , a mechanics' lien claimant asserted a lien on wind towers erected on Chapter 11 debtor's property. The Bankruptcy Court entered judgment for debtor, and claimant appealed. The District Court held that the evidence supported the trial judge's determination that the towers, motors, machinery, turbines, and other related articles of wind towers were not "fixtures," but that the foundations of the wind towers were fixtures, to which the mechanics' lien could attach. The court held that the claimant had the burden of proving that items which it claimed were subject to a mechanics' lien were fixtures or works of improvement (*119 B.R. 739, 746-747)* .

[c] Factors Used in Determining Whether Chattel Is Fixture

Cornell v. Sennes *(1971) 18 Cal. App. 3d 126, 95 Cal. Rptr. 728* , involved an action to foreclose a mechanics' lien for labor and materials furnished in connection with the installation of supplementary air conditioning units. The noncontracting defendant owners had leased their restaurant property. Plaintiff had installed the equipment pursuant to a conditional sales contract with the defendants' lessee. In installing the units, modifications were required in the existing air conditioning system, but the units were not attached to the building because they rested on the roof by their own weight. No other evidence of attachment was produced at trial. Defendants were aware of the improvements being made but did not file a notice of nonresponsibility. The lessee vacated the premises, leaving a portion of the purchase price unpaid, and the plaintiff thereafter foreclosed his mechanics' lien. After commencement of the action, plaintiff removed the equipment, sold it to a third person, and credited defendants with the amount received. After a nonjury trial, the trial court entered judgment against the defendants, thereby establishing a lien on their property although it never found that the units were fixtures. The defendants appealed, contending that the plaintiff's repossession constituted a conversion of

the defendant's property, that the repossession changed the character of the units from realty to personalty, and, in the alternative, that the units had never become affixed to the realty.

The Court of Appeal reversed, holding, inter alia, that reversal was required because of the trial court's failure to make a finding whether the units had become fixtures. Such a finding was essential to awarding the plaintiff a mechanics' lien, and to determining whether his subsequent actions constituted a conversion of the units and a waiver of his lien. To assist the trial court in determining whether the units had become fixtures, the court listed the factors set forth in Paragraph C of this form (*18 Cal. App. 3d 126, 132)* . The court did not take into consideration the rule stated in *R. Barcroft & Sons Co. v. Cullen (1933) 217 Cal. 708, 20 P.2d 665* , that the rules governing fixture law between vendor-vendee, or mortgagor-mortgagee, and not those rules governing the subject between landlord and tenant, are applied in determining whether a chattel has become a fixture. The court apparently felt that under modern theories, a broader factor analysis should be used in deciding this issue.

[d] Intent as Objectively Determined if Rights of Third Person Involved

In ***Kruse Metals Mfg. Co. v. Utility Trailer Mfg. Co.*** *(1962) 206 Cal. App. 2d 176, 23 Cal. Rptr. 514* , plaintiff fabricated and installed a bag house, which is a piece of equipment designed to filter sand and dust, and a blower system in a shed situated on the defendant's property. The bag house and blower were equally adaptable to use outdoors and inside the shed, and could easily be removed without injury to the property. Defendant contended, and the trial court agreed, that the bag house and blower system were not affixed to the land and had not become a part of it, and, therefore, that no lien could be claimed for plaintiff's labor and materials. The equipment had not been ordered by the owner, but by his sublessee, who covered the equipment with a chattel mortgage on the day of its installation. Plaintiff was aware of the mortgage.

The court of appeal affirmed the trial court's judgment. The court discussed various factors to be considered in determining whether the equipment had become fixtures and noted that, as a general rule, the intent of the parties is a controlling criterion in ascertaining whether property is permanently attached. In this particular case, moreover, the question of intent was one of objective rather than subjective intent, because the intent of the parties refers to those immediate parties to the transaction such as mortgagor and mortgagee, vendor and vendee, and their successors in interest. However, when the rights of a person who is unconnected with the transaction are concerned, and the person is without actual or constructive notice concerning the intent of the parties responsible for annexing the personalty to the realty, as was the case with the defendant owner, the question is not so much the intent of the parties as the apparent intent as it would reasonably appear to such a third person (*206 Cal. App. 2d 176, 183)* .

[4] Additional Authorities

[a] Factors Used in Determining Whether Chattel Is Fixture

Allstate Insurance Company v. County of Los Angeles (1984) 161 Cal. App. 3d 877, 207 Cal. Rptr. 888 , involved two separate appeals consolidated for decision, in which plaintiffs sought refunds of property taxes paid under protest. The issue was whether certain office computer systems should be classified as realty or as personalty for the purposes of property taxation. In determining that the particular computers were and remained personalty, the court used a fixtures analysis. The court noted that the three-pronged test to be applied in determining whether the systems were fixtures was as follows: (1) the manner of their annexations to the realty; (2) their adaptability to the use and purpose of the realty, and (3) the intentions of the parties making the annexations. The court further noted that in making the determination, the element of intent is regarded as a crucial and overriding factor, with the remaining criteria considered only as subsidiary ingredients relevant to the determination of intent (*161 Cal. App. 3d 877, 885-886)* .

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§ 152.36 Supporting Motion for New Trial [Code Civ. Proc. § 657] in Mechanics' Lien Foreclosure Action--By Defendant--Insufficient Evidence That Labor Performed Resulted in Permanent Improvement

[1] FORM

[*Caption. See § 152.35.*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION FOR A NEW TRIAL BECAUSE PLAINTIFF'S EVIDENCE IS INSUFFICIENT TO PROVE THAT PLAINTIFF'S LABOR RESULTED IN A PERMANENT IMPROVEMENT TO THE REALTY.

A. Motion for New Trial. [*See § 152.35, Paragraph A.*]

B. Permanency of Improvement as Essential. Real property is subject to a mechanics' lien for labor and materials furnished only if the labor performed resulted in a permanent improvement to the realty (*Ogden v. Byington (1926) 198 Cal. 151, 156, 244 P. 332*).

[*Optional*] **C. Preparation of Land for Agricultural Purposes.** The plowing or breaking of land used or to be used for agricultural purposes does not entitle a person to a mechanics' lien for the work performed, whether or not the plowing or breaking of land was the initial work of that character done on the land (*Young v. Shriver (1922) 56 Cal. App. 653, 655, 206 P. 99*).

[*Optional*] **D. Segregation of Amounts Claimed for Permanent Improvements.** A person may not claim a mechanics' lien for labor and materials furnished if a portion of the work performed did not permanently improve the property and if there is no evidence to show which portion of the work went to the permanent improvement (*Gross v. Hazeltine (1930) 107 Cal. App. 446, 455, 290 P. 673*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for a new trial in a mechanics' lien foreclosure action when there is insufficient evidence to prove that the plaintiff's work permanently improved the property subject to the plaintiff's claim of mechanics' lien.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

With appropriate modifications, this form may be used to support a motion for summary judgment or a general demurrer in a mechanics' lien foreclosure action when the plaintiff's work did not permanently improve the property.

[b] Related Pleading and Practice Forms

For a form of notice of intention to move for a new trial, together with a discussion of motions for new trial, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities set out in *§ 152.54* may be used in opposition to the motion supported by this memorandum of points and authorities.

[3] Discussion of Authorities

[a] Permanency of Improvement as Essential

Ogden v. Byington *(1926) 198 Cal. 151, 244 P. 332* , involved an appeal by the plaintiff from an adverse judgment in a mechanics' lien foreclosure action. The defendant lessors leased property to the defendant lessee for the purpose of growing rice and other grain. The lessee then contracted with the plaintiff for the furnishing of agricultural equipment and labor for use in connection with the construction of irrigation ditches and levees. In holding for the defendants, the trial court found that no structure or improvement of any kind had been constructed or erected on the land, and that no value had been added to the land.

The Supreme Court affirmed. In response to the plaintiff's contention that the work done and materials furnished fell within former Code of Civil Procedure Sections 1183 (works of improvement; *now see Civ. Code § 3106*) and 1191 (site improvements; *now see Civ. Code § 3102*), the Court stated that the character of the work done and materials and supplies furnished did not have the structural character or permanency required to bring it within these code provisions. The Court stated that an essential characteristic of labor or materials furnished to real property, for which a lien is sought to be established, is that of permanence (*198 Cal. 151, 156)* .

[b] Preparation of Land for Agricultural Purposes

Young v. Shriver *(1922) 56 Cal. App. 653, 206 P. 99* , involved a mechanics' lien foreclosure action for the performance of labor consisting of plowing several tracts of land that had been in a wild and uncultivated state. The trial court sustained a demurrer to the complaint, and the plaintiff appealed from the judgment entered on the order sustaining the demurrer.

The court of appeal affirmed, holding that a lien was not available for the plowing or breaking of lands used or to be used for agricultural purposes, whether or not the work was the initial work of that character done upon the lands. The court stated that neither the constitutional provisions for a mechanics' lien [*Cal. Const., Art. XX, § 15*; *now see Cal. Const., Art. XIV, Sec. 3*] nor former Code of Civil Procedure Section 1191 (site improvement; *now see Civ. Code § 3102*) contemplates lien claims for agricultural work of this nature. If these liens were allowed, annually cultivated agricultural lands could be subject to innumerable encumbrances for work that was not of a permanent nature (*56 Cal. App. 653, 654)* .

[c] Segregation of Amounts Claimed for Permanent Improvements

Gross v. Hazeltine *(1930) 107 Cal. App. 446, 290 P. 673* , involved a plaintiff lessee's action to establish a mechanics' lien for materials and labor furnished in improving defendant lessor's real property. The lease provided that the lessee was to prepare the land to produce the best crops, to plant the crops as he deemed best, and to care for and harvest them. After the plaintiff performed the work he claimed a lien for the full amount of the work. The trial court held that the plaintiff had a lien on the land, and the defendants appealed.

The court of appeal reversed the trial court's judgment, in part because the plaintiff failed to show how much he spent for the portion of the work that constituted a permanent improvement. It was apparent to the court that only a portion of the work performed by the plaintiff, and agreed upon by the defendants, was a permanent improvement. The plaintiff's failure to apportion the amount in his claim of lien required the judgment to be reversed, and the trial court was directed to enter judgment in the defendants' favor (*107 Cal. App. 446, 455-456)* .

[4] Additional Authorities

[a] Permanency of Improvement as Essential

The facts and procedural background of *Lambert Steel Co., Inc. v. Heller Financial, Inc. (1993) 16 Cal. App. 4th 1034, 20 Cal. Rptr. 2d 453* , are discussed in *§ 152.26[3][c]*. The court in *Lambert* held that temporary construction fencing was not an improvement, as it was erected solely for security and liability purposes, and not to improve the property. The fencing was personal property that could be removed by the owner and used again and again. Because it was temporary and would be removed, it could not be considered to be the construction or alteration of, an addition to, or repair, in whole or in part, of any fence pursuant to *Civil Code Section 3106* ("work of improvement" defined) (*16 Cal. App. 4th 1034, 1043)* .

In *United Rentals Northwest, Inc. v. Snider Lumber Products, Inc. (2009) 174 Cal. App. 4th 1479, 95 Cal. Rptr. 3d 471* , the court of appeal recognized that a work of improvement must result in a permanent improvement to give rise to a mechanic's lien. However, in that case the improvement consisted of the removal of wood drying kilns that were 68 and 120 feet long, made of steel frame and bolted to concrete slabs. The court of appeal concluded that the permanency requirement cannot have much significance when the improvement is the removal or demolition of a building. There is no requirement in the statute that the land remain vacant permanently after the removal or demolition. Logically, the permanency doctrine must be satisfied in such a context by the fact that the removed or demolished building is removed or demolished [*174 Cal. App. 4th 1479, 1484-1485*].

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PART II. FORMS

15-152 California Points & Authorities § 152.37

§ 152.37 Supporting Motion to Remove Lien Based on Defendant's Payment of Full Contract Price

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION TO
vs.	)	REMOVE LIEN
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Dept: _____
	)	Trial Date: _____

_____

THE COURT SHOULD GRANT DEFENDANT'S MOTION TO REMOVE THE LIEN BECAUSE DEFENDANT HAS PAID THE FULL CONTRACT PRICE.

Removal of Lien. A property owner may move to remove a mechanics' lien on the grounds that he or she has paid the full contract price to the contractor (*Lambert v. Superior Court (1991) 228 Cal. App. 3d 383, 279 Cal. Rptr. 32*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion to remove a mechanics' lien when the owner has already paid the full contract price.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Removal of Lien

In ***Lambert v. Superior Court*** *(1991) 228 Cal. App. 3d 383, 279 Cal. Rptr. 32* , the owners hired a contractor to make major alterations to their home. Two years and several change orders later, the owners discharged the contractor and hired another contractor to finish the work. In October of 1990, the contractor recorded a mechanics' lien against the property, then immediately filed a complaint for damages for breach of contract and to foreclose the mechanics' lien. In December of 1990, the court granted the contractor's unopposed request to stay proceedings on the complaint pending termination of the arbitration prescribed by the contract. While the stay request was pending, the owners filed a motion to remove the mechanics' lien on the ground that they had paid the contractor more than $361,000, well over the contract price. After hearing, the lower court denied the motion on the grounds that the owners had not availed themselves of the statutory remedy for disputing the lien (i.e., a surety's release bond under *Civil Code Section 3143*). The owners then petitioned for writ relief.

The Court of Appeal issued a writ of mandate directing the trial court to vacate its order denying the owners' motion to remove the mechanics' lien and to reconsider the motion in light of the views expressed in the opinion. The court ruled that the owners' motion was not improper. If a claimant has not yet imposed a lien or, having imposed it, has not yet sued to foreclose it, the owner's speediest remedy is through proceedings for injunctive or declaratory relief. When the claimant has already brought an action to foreclose a lien, however, the owner may more easily file a motion in the pending action. According to the court, if the claimant may use a mechanics' lien to protect the eventual award of an arbitrator, it follows from due process considerations that an owner may ask the court to remove an improper lien while arbitration is pending. The court noted that the owners correctly asserted that a *Civil Code Section 3143* release bond may not be available to an individual owner, who will usually be required to post liquid collateral in the amount of the bond, and held that such a release bond is not the exclusive means of removing a mechanics' lien. The court, in quoting *Connolly Development, Inc. v. Superior Court (1976) 17 Cal. 3d 803, 132 Cal. Rptr. 477, 553 P.2d 637* , stated that "the recording of a mechanics' lien deprives the landowner of a significant property interest, and thus constitutes a 'taking' within the meaning of the federal and state due process clauses." Due process would not be provided if a claimant's unjustified lien or a lien of an unjustified amount could be removed only by pledging collateral in excess of the amount claimed (*228 Cal. App. 3d 383, 386)* .

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15-152 California Points & Authorities § 152.38

§ 152.38 Supporting Motion to Consolidate--By Lien Claimant [Civ. Code Section 3149]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORIT-
vs.	)	IES IN SUPPORT OF MOTION TO CONSOLID-
_____ [*name*],	)	ATE
Defendant.	)	Date: _____
	)	Time: _____
	)	Dept: _____
		Trial Date: _____

_____

THE COURT SHOULD GRANT DEFENDANT'S MOTION TO CONSOLIDATE BECAUSE ANY NUMBER OF PERSONS CLAIMING LIENS ON THE SAME PROPERTY MAY JOIN IN THE SAME ACTION.

A. Authority to Consolidate. When actions involving a common question of law or fact are pending before the court, it may order all the actions consolidated (*Code Civ. Proc. § 1048(a)*).

B. Consolidation of Actions to Foreclose Mechanics' Liens. Any number of persons claiming liens on the same property may join in the same action to foreclose their liens, and when separate actions are commenced the court may consolidate them (*Civ. Code § 3149*; *Schulte v. Buben (1932) 215 Cal. 172, 8 P.2d 843*).

C. Allegations of Various Complaints Taken Together. When actions have been consolidated for trial, allegations of various complaints may be taken together and treated as one pleading, and allegations in one complaint can be taken to

remedy defects or omissions in another (*Tyler v. J.I. Metrovich Bldg. Co. (1920) 47 Cal. App. 59, 190 P. 208*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted by a lien claimant in support of a motion to consolidate when there are several lien claimants on the same property. In large multiparty construction cases, the benefits of consolidation in order to avoid duplication of time and effort during discovery and at trial are obvious.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

With appropriate modifications, this form points and authorities may be used by a lien claimant as the basis of an evidentiary motion at trial to remedy defects in the claimant's pleadings by referencing pleadings of other lien claimants in the consolidated action.

[b] Related Pleading and Practice Forms

For a discussion and examples of consolidation motions in general, see California Forms of Pleading and Practice, Ch. 125, *Consolidation, Severance, and Coordination of Actions* (Matthew Bender).

[3] Discussion of Authorities

[a] Consolidation of Actions to Foreclose Mechanics' Liens

In ***Schulte v. Buben*** *(1932) 215 Cal. 172, 8 P.2d 843* , the plaintiff appealed from a judgment of dismissal entered upon the sustaining of a demurrer to plaintiff's third amended complaint to foreclose on its mechanics' lien. In holding that the plaintiff contractor had stated a cause of action for foreclosure of the lien and reversing lower court's decision, the Supreme Court noted that the mechanics' lien law "is of an equitable nature and should be so construed as to permit the determination of all controversies arising thereunder, where possible, in a single proceeding, thus preventing a multiplicity of suits" (*215 Cal. 172, 174)* .

[b] Allegations of Various Complaints Taken Together

In ***Tyler v. J.I. Metrovich Bldg. Co.*** *(1920) 47 Cal. App. 59, 190 P. 208* , landowners appealed from a judgment in favor of the plaintiffs in three consolidated mechanics' lien cases. After the actions were consolidated for trial, a stipulation was made that certain allegations of the complaints were true and that a bond in proper form was filed, but it was left open to the court to determine whether the bond was sufficient. This was the sole issue on appeal.

Two of the three mechanics' lien claimant plaintiffs alleged that a bond was duly executed and filed with the county recorder. The appellate court held that because the actions were consolidated for trial, the allegations of the various complaints could be taken together and treated as one pleading, with the allegations in one complaint remedying the defects in another (*47 Cal. App. 59, 61-62)* .

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15-152 California Points & Authorities § 152.39

§ 152.39 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] to Foreclose Mechanics' Lien--Person Under Direct Contract With Owner Not Required to Give Preliminary Notice

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORIT-
vs.	)	IES IN OPPOSITION TO DEMURRER TO COM-
_____ [*name*],	)	PLAINT
Defendant.	)	Date: _____
	)	Time: _____
	)	Dept: _____
		Trial Date: _____

_____

THE COURT SHOULD OVERRULE DEFENDANT'S GENERAL DEMURRER BECAUSE PLAINTIFF, AS A LIEN CLAIMANT UNDER DIRECT CONTRACT WITH DEFENDANT, IS NOT REQUIRED TO GIVE A PRELIMINARY 20-DAY NOTICE (PRIVATE WORK).

A. Claimant Under Direct Contract Not Required to Give Preliminary Notice. A person who furnishes labor, service, equipment, or material for which a lien otherwise can be claimed and who is under direct contract need not give the owner or reputed owner a *Civil Code Section 3097* preliminary notice in order to have a valid lien claim (*Civ. Code § 3097*).

[*Optional*] **B. Lien Claimant's Direct Contract With Owner-Lessor.** If a mechanics' lien claimant contracts directly with a lessee for labor or materials to be furnished to a work of improvement located on the leased property, and the

lessor knows of the construction and fails to record and post a notice of nonresponsibility pursuant to *Civil Code Section 3094*, then the lien claimant has a direct contract with the lessor for the purposes of *Civil Code Section 3097* (*M. Arthur Gensler, Jr., & Associates, Inc. v. Larry Barrett, Inc. (1972) 7 Cal. 3d 695, 707-708, 103 Cal. Rptr. 247, 499 P.2d 503*).

[*Optional*] **C. Lien Claimant's Direct Contract With Owner's Agent.** When the lien claimant contracts directly with an agent of the owner, the owner is considered to be under direct contract with the claimant and is not entitled to a preliminary 20-day notice (private work) (*Frank Pisano & Associates v. Taggart (1972) 29 Cal. App. 3d 1, 17, 105 Cal. Rptr. 414*).

[*Optional*] **D. Owner's Actual Notice of Lien Claimant's Identity and Express Promise to Pay.** When an owner has actual notice of a lien claimant's identity and expressly promises to pay, and the lien claimant makes deliveries in reliance on that promise, the lien claimant is relieved of the obligation to show strict compliance with *Civil Code Section 3097* requirements (*Truestone, Inc. v. Simi West Industrial Park II (1984) 163 Cal. App. 3d 715, 722-723, 209 Cal. Rptr. 757*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a demurrer to a complaint to foreclose a mechanics' lien based on the plaintiff's failure to allege service of a preliminary 20-day notice (private work), if the plaintiff has contracted directly with the owner, or with a person deemed to the agent of the owner, for the furnishing of labor or materials to a work of improvement.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, this form may be used in opposition to a demurrer supported by the points and authorities set out in *§ 152.20*.

[3] Discussion of Authorities

[a] Lien Claimant's Direct Contract With Owner-Lessor

M. Arthur Gensler, Jr., & Associates, Inc. v. Larry Barrett, Inc. *(1972) 7 Cal. 3d 695, 103 Cal. Rptr. 247, 499 P.2d 503* , involved an action to foreclose mechanics' liens brought by lien claimants for (1) the performance of architectural and design services in connection with remodeling work, and (2) the performance of the remodeling work itself. The action was brought against both the lessee's and lessor's interest in the real property on which the remodeling work was being done. The contracts for the services and work were with the lessee. In giving the plaintiffs a judgment of

foreclosure of their liens, the trial court found that the lessor at all times during the remodeling knew of the work being performed on his property, and had not posted or recorded a notice of nonresponsibility. The court further found that the plaintiffs had a direct contract with the lessor for the purposes of former Code of Civil Procedure Section 1193(a) (preliminary 20-day notice [private work]) [*now see Civ. Code § 3097*]; thus, the plaintiffs were not required to give the lessor a preliminary notice in order to enforce their lien claim against him.

In affirming the judgment, the Supreme Court held that under former Code of Civil Procedure Section 1183.1(b) [*now see Civ. Code § 3129*] the noncontracting owner is placed in the position of a party to the contract by the conclusive presumption that the work was done at his or her instance and request. This presumption arises after the owner has obtained knowledge of the work being done on his or her property. Thus, if a lien claimant contracts directly with the lessee, and the lessor knows of the construction and fails to record and post a notice of nonresponsibility, that lien claimant has a direct contract with the owner for the purposes of giving a preliminary notice. Because the plaintiffs had such a direct contract, no preliminary notice was required to be given to the lessor (*7 Cal. 3d 695, 707)* .

[b] Lien Claimant's Direct Contract With Owner's Agent

Frank Pisano & Associates v. Taggart *(1972) 29 Cal. App. 3d 1, 105 Cal. Rptr. 414* , involved a mechanics' lien foreclosure action for services rendered incident to the subdivision of certain property. No preliminary notice was given to the owner of the property, but one was given to the owner's husband, who had contracted for the services rendered. The trial court denied judgment of foreclosure based in part on the plaintiffs' failure to give the proper preliminary notice, which negated any lien that the plaintiffs could claim against the property.

The court of appeal reversed this portion of the judgment, noting that the owner was aware of the agreement with the plaintiffs, that she had approved of her husband's action, and that she had acted to facilitate the progress of the subdivision plan. Based on the principle that the actual authority of the agent may be implied from the conduct of the parties, the court held that because the plaintiffs had contracted with the agent of the owner, the contract in contemplation of law was deemed the contract of the owner. Because the owner was deemed to have contracted directly with the plaintiffs, the court held she was not entitled to a preliminary notice [decided under former Code Civ. Proc. § 1193(a); *now see Civ. Code § 3097(a)*] (*29 Cal. App. 3d 1, 14-16)* .

[c] Owner's Actual Notice of Lien Claimant's Identity and Express Promise to Pay

In ***Truestone, Inc. v. Simi West Industrial Park II*** *(1984) 163 Cal. App. 3d 715, 209 Cal. Rptr. 757* , a materials supplier sought to recover the cost of materials delivered to a contractor and used in construction on real property owned by the defendant. The supplier joined an action for breach of contract against the contractor with a mechanics' lien foreclosure action against the defendant owner. The trial court granted the owner's motion for summary judgment and dismissed the complaint as to it.

The Court of Appeal reversed, holding that although the plaintiff had failed to comply with the requirement of *Civil Code Section 3097* that a preliminary notice given by mail be sent by registered or certified mail, the plaintiff had alleged that defendant had actual knowledge of his identity and later expressly promised to pay him for all past and future deliveries of materials. If these allegations were true they would relieve plaintiff of the obligation to show strict compliance with the statutory notice requirement. The court also noted that evidence of a defendant's promise to pay is admissible in a lien foreclosure action, which may be amended to show the existence of an express contract. Furthermore, Section 3097 provides an exception to the notice requirement for one under direct contract with the owner. The policy of the law favors protection of laborers and materialmen, and an exception to the statutory notice requirement precludes the defeat of the lien on meaningless technicalities when a materialman is known to the owner and makes deliveries in reliance on the owner's promise to pay. In these circumstances, the property owner is not prejudiced by lack of notice (*163 Cal. App. 3d 715, 722-723)* .

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15-152 California Points & Authorities § 152.40

§ 152.40 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] to Foreclose Mechanics' Lien--Materialman's Complaint Not Required to Allege Furnishing of Materials in Precise Terms of Statute

[1] FORM

[*Caption. See § 152.39.*]

THE COURT SHOULD OVERRULE DEFENDANT'S GENERAL DEMURRER BECAUSE A MECHANICS' LIEN COMPLAINT FOR MATERIALS FURNISHED FOR AND ACTUALLY USED IN A WORK OF IMPROVEMENT NEED NOT ALLEGE THE SATISFACTION OF THE ESSENTIAL REQUIREMENTS OF *CIVIL CODE SECTION 3110* IN THE PRECISE LANGUAGE OF THE STATUTE.

A. Alleging Statutory Requirements. While plaintiff's complaint to foreclose a mechanics' lien for materials furnished to a work of improvement must allege that the materials were furnished for and to be used in, and that they were actually used in, the improvements in question, the complaint need not aver the satisfaction of these requirements in the precise terms or language of the statute (*Ensele v. Jolley (1922) 188 Cal. 297, 300, 204 P. 1085* ; *see California Portland Cement Co. v. Wentworth Hotel Co. (1911) 16 Cal. App. 692, 704, 118 P. 103*).

[*Optional*] **B. Materials Installed But Removed.** The fact that the owner of a work of improvement rendered installed materials useless by removing them from the improvement does not defeat the rights of an innocent materialman who had no knowledge or notice of defective workmanship in the installation of the materials (*Johnson v. Smith (1929) 97 Cal. App 752, 757, 276 P. 146*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be used to oppose a demurrer to a mechanics' lien foreclosure complaint based on the plaintiff's failure to allege that the materials furnished to a work of improvement were intended to be and actually were used in the improvement, when the complaint alleges facts showing that these requirements were met. Paragraph B of the form may be used when the materials furnished were removed after installation and were not used in the finished work of improvement.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, this form may be used in opposition to a demurrer supported by the points and authorities set out in *§ 152.21*.

[3] Discussion of Authorities

[a] Alleging Statutory Requirements

Ensele v. Jolley *(1922) 188 Cal. 297, 204 P. 1085* , involved defendant's appeal from a judgment in the plaintiff's favor in a mechanic's lien foreclosure action. The plaintiff's complaint alleged that as the owner of a lumber business he had furnished building materials to the defendant for the erection of a barn and completion of a dwelling on the premises. The plaintiff alleged the completion of the building, the value of the materials furnished, and the failure of the defendant to pay, and made other essential allegations to show he was entitled to foreclose his mechanics' lien. Although the defendant did not demur to plaintiff's complaint, the defendant urged on appeal that the complaint did not state facts sufficient to constitute a cause of action.

The Supreme Court agreed that in order to entitle a materialman to a lien against the owner of premises on which a structure has been erected, the materials must not only have been furnished to be used in the structure but must also have been actually used in it. The Court held that it is well settled that the complaint must contain substantial allegations to the effect that the materials were furnished for and to be used in, and that they were used in, the buildings in question. However, while these essential requirements of former Code of Civil Procedure Section 1183 [*now see Civ. Code § 3110*] must be alleged in the plaintiff's complaint, it is not necessary that the complaint aver their existence in the precise terms or language of the statute. The complaint is sufficient if, from reading it as a whole, it can be fairly deduced that the plaintiff conformed to the statute's requirements in the respect that the materials under the agreement with the defendant were to be furnished for the designated structure, and that the materials were actually used in the construction of the structure (*188 Cal. 297, 300)* .

The facts and procedural background of ***California Portland Cement Co. v. Wentworth Hotel Co.*** *(1911) 16 Cal. App. 692, 118 P. 103* are discussed in *§ 152.21[3][b]*. The court in that case held that the mechanics' lien law should be liberally construed to effect its object, and that its notice requirements should emphasize substance over form (*16 Cal. App. 692, 704)* .

[b] Materials Installed But Removed

In ***Johnson v. Smith*** *(1929) 97 Cal. App. 752, 276 P. 146* , defendants appealed from a judgment rendered against

them in a mechanics' lien foreclosure action. The plaintiff furnished hardwood flooring intended for a residence that was being constructed by a contractor for the defendants. The contract for furnishing the flooring and laying it in the building was sublet to a third person, who purchased the flooring from the plaintiff. Because the flooring was poorly laid, defendant's architect ordered nearly all of it torn out, and other flooring laid in its place. Defendants contended on appeal that because the furnished materials were not finally used by them in the building's construction, plaintiff was not entitled to maintain a lien on the premises.

The court of appeal rejected the above contention and affirmed the judgment of the trial court, holding that a materialman is not required to ascertain whether material ordered by a building contractor conforms to the requirements of the agreement between the contractor and the owner. The court explained that the materialman's contractual relations are solely with the contractor dealing with the materialman, and that the materialman simply furnishes material as directed by the party with whom he or she contracts. In this case the problem with the flooring was due entirely to the manner in which it was laid, something the plaintiff had no part of. Therefore, the fact that by the owner's act the materials furnished may have been rendered useless did not defeat the rights of an innocent materialman, who had no knowledge or notice of defective or poor workmanship in the installation of the materials (*97 Cal. App. 752, 757)* .

[4] Additional Authorities

[a] Materials Installed But Removed

Pacific Sash & Door Co. v. Bumiller (1912) 162 Cal. 664, 124 P. 230 , involved an appeal from an order denying the defendant's motion for a new trial following a judgment for the plaintiffs in a mechanics' lien foreclosure action. The defendants had offered to prove at trial that, after alterations had been made for which certain lien claimants had furnished labor and materials, the structures composing them were all removed from the building prior to the filing of any liens against it. The trial court refused to allow this evidence.

The Supreme Court affirmed the trial court, holding that since it appeared that the structures containing the alterations were used for some time before they were actually removed, this was enough to sustain the trial court's ruling. The Court added that it knew of no statute or decision declaring that the removal of an alteration to a building after it is completed and used destroys the lien that former Code Civ. Proc. § 1183 [*now see Civ. Code § 3110*] gives to persons furnishing materials or labor for the alteration, even if the removal is made before the filing of the lien. The Court held that if the materials are actually used in and the work is actually done on the alteration, the change made is of such a character as to come within the terms of former Code Civ. Proc. § 1183 giving a lien for alterations on a building, and the work is completed and put to use as altered, the lien cannot be defeated by a subsequent removal of that portion of the building comprising the alterations and restoration of the building to its original state (*162 Cal. 664, 666)* .

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15-152 California Points & Authorities § 152.41

§ 152.41 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] to Foreclose Mechanics' Lien--Plaintiff Exempted From Licensing Requirements as Employee [Bus. & Prof. Code § 7053], Materialman [Bus. & Prof. Code § 7052], or Manufacturer [Bus. & Prof. Code § 7045]

[1] FORM

[*Caption. See § 152.39.*]

THE COURT SHOULD OVERRULE DEFENDANT'S GENERAL DEMURRER BECAUSE THE LICENSING REGULATIONS DO NOT APPLY TO A PERSON WHO _____ [*either* PERFORMS SERVICES AS AN EMPLOYEE WITH WAGES AS HIS/HER SOLE COMPENSATION *or* ONLY FURNISHES MATERIALS OR SUPPLIES *or* SELLS OR INSTALLS FINISHED PRODUCTS OR ARTICLES OF MERCHANDISE THAT DO NOT BECOME A FIXED PART OF THE STRUCTURE].

[*EITHER*]

A. Employee With Wages as Sole Compensation. The Contractors' State License Law does not apply to any person who engages in the activities regulated in *Bus. & Prof. Code §§ 7000 through 7145.5* as an employee who receives wages as his or her sole compensation, does not customarily engage in an independently established business, and does not have the right to control or discretion as to the manner of performance so as to determine the final results of the work performed (*Bus. & Prof. Code § 7053*).

[*OR*]

A. Furnisher of Materials or Supplies. The Contractors' State License Law does not apply to a materialman or manufacturer furnishing any finished products, materials, or articles of merchandise who does not install or contract for the installation of the items or, except as provided in *Bus. & Prof. Code §§ 7150 through 7161*, to any person who only

furnishes materials or supplies without fabricating them into, or consuming them in the performance of, the work of the contractor (*Bus. & Prof. Code §§ 7045, 7052*).

[*OR*]

A. Furnisher of Finished Products or Articles. The Contractors' State License Law does not apply to the sale or installation of any finished products or articles of merchandise that do not become a fixed part of the structure (*Bus. & Prof. Code §§ 7045*; *Pickens v. American Mortgage Exchange (1969) 269 Cal. App. 2d 299, 305, 74 Cal. Rptr. 788*).

[*Optional*] **B. Issue of Fact.** The question of whether the plaintiff was functioning as an unlicensed contractor or merely as an employee hired by the defendants to supply material and act as an employee is essentially a question of fact (*Vaughn v. De Kreek (1969) 2 Cal. App. 3d 671, 677, 83 Cal. Rptr. 144* ; *see also* *Borello v. Eichler Homes, Inc. (1963) 221 Cal. App. 2d 487, 497-498, 34 Cal. Rptr. 648*).

[*Optional*] **C. Independent Contractor and Employee Distinguished.** The determination of whether the status of an employee or that of an independent contractor exists is governed primarily by the right of control that rests in the employer, rather than by his or her actual exercise of control. When no express agreement is shown as to the claimed employer's right to control the mode and manner of doing the work, the existence or nonexistence of the right must be determined by reasonable inferences drawn from the circumstances shown (*Vaughn v. De Kreek (1969) 2 Cal. App. 3d 671, 677, 83 Cal. Rptr. 144*).

[*Optional*] **D. Contractors' State License Law and Mechanics' Lien Law Distinguished.** A subcontractor may be entitled to the benefits under the Mechanics' Lien Law (which has given the term "subcontractor" a broad definition in order to provide financial security for suppliers who do no installation work themselves, but whose custom-made products have little economic value except as part of the building for which they were designed) and, at the same time, be excluded from the requirements of the Contractors' State License Law (which is designed to protect the public from incompetent and unreliable contractors) if the subcontractor does not himself or herself fabricate or consume his or her materials in the work of the general contractor (*Steinbrenner v. J.A. Waterbury Constr. Co. (1963) 212 Cal. App. 2d 661, 666, 28 Cal. Rptr. 204*).

[*Optional*] **E. Employees of Unlicensed Contractor.** *Business and Professions Code Section 7031*, which bars an action to recover compensation by one who does not allege and prove that he or she was a duly licensed contractor, does not prevent a mechanics' lien enforcement action by employees of an unlicensed contractor (*Johnson v. Silver (1958) 161 Cal. App. 2d Supp 853, 855-56, 327 P.2d 245*).

[*Optional*] **F. Furnishing Materials as Supplier and Installing as Employee.** There is nothing in the Contractors' State License Law that precludes one from furnishing materials as a supplier and then installing them as an employee, thereby coming within the exemptions of *Business and Professions Code Sections 7052* and *7053* (*Cargill v. Achziger (1958) 165 Cal. App. 2d 220, 223, 331 P.2d 774*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be used to oppose a demurrer to a complaint to foreclose a mechanics' lien based on the complaint's failure to allege that the plaintiff was duly licensed at all times during the performance of his or her contract, when the complaint alleges sufficient facts to show that plaintiff is exempt from the licensing regulations.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, this form may be used in opposition to a demurrer supported by the points and authorities set out in *§ 152.22*.

[3] Discussion of Authorities

[a] Furnisher of Finished Products or Articles

In ***Pickens v. American Mortgage Exchange*** *(1969) 269 Cal. App. 2d 299, 74 Cal. Rptr. 788* , plaintiffs filed a complaint for money damages and to foreclose their mechanics' lien. The lower court granted defendant's summary judgment motion based on the fact that plaintiffs were not licensed contractors. The appellate court reversed the summary judgment, finding that there were triable issues of fact as to whether the furniture and fixtures supplied by plaintiffs to defendants fell within the exception of *Bus. & Prof. Code § 7045*, which provides that the licensing requirements do not apply to the sale or installation of any finished products or articles of merchandise that do not become a fixed part of the structure (p. 705).

[b] Issue of Fact

In ***Vaughn v. De Kreek*** *(1969) 2 Cal. App. 3d 671, 83 Cal. Rptr. 144* , the plaintiff, who had no contractor's license, contracted with the defendants, who were homeowners, to landscape their yard. After the plaintiff performed and the defendants refused to pay, the plaintiff recorded a mechanics' lien for the labor and materials furnished for the work. The defendants contended that plaintiff had acted as an unlicensed contractor and, therefore, was barred from recovery by *Bus. & Prof. Code § 7031*. The plaintiff argued that he had merely furnished the materials as a supplier, and had installed them as the defendants' employee. The court of appeal affirmed a jury verdict for the defendants, stating that the question of whether the plaintiff was functioning as an unlicensed contractor or merely as an employee hired by the defendants to supply materials and act as an employee, was essentially a question of fact for the jury (*2 Cal. App. 3d 671, 677)* .

The facts and procedural background of ***Borello v. Eichler Homes, Inc.*** *(1963) 221 Cal. App. 2d 487, 498, 34 Cal. Rptr. 648* , are discussed in *§ 152.30[4][a]*. The plaintiffs in that case were employees of defendant subcontractor and furnished and operated excavating and grading equipment used by the subcontractors. The plaintiffs were not licensed contractors. In their action to foreclose their mechanics' lien, the appellate court found ample evidence to support the trial court's finding that they had acted as employees with wages as their sole compensation and not as contractors, including the following facts: (1) the defendant employed the plaintiffs as equipment operators and paid them by the hour; (2) the plaintiffs rented equipment pursuant to arrangements with the defendant's foreman and billed the defendant monthly for the rental charges; and (3) the plaintiffs took orders from the defendant's foreman and had no discretion as to how to perform their work (*221 Cal. App. 2d 487, 498)* .

[c] Independent Contractor and Employee Distinguished

The facts and procedural background of ***Vaughn v. De Kreek*** *(1969) 2 Cal. App. 3d 671, 83 Cal. Rptr. 144* , are discussed in *§ 152.41[3][b]*. The court in that case considered whether the plaintiff was an independent contractor or an employee of the defendant. The court stated that this determination is governed primarily by the right of control that rests in the employer, rather than in the employer's actual exercise of control. When no express agreement is shown regarding the claimed employee's rights to control the mode and manner of doing the work, the existence or nonexistence of the right must be determined by reasonable inferences drawn from the circumstances shown, and is a question of fact for the jury. The court stated that the jury could have reasonably inferred that the plaintiff was an independent contractor from evidence indicating that the manner and mode of the work, and even the selection of some of the plants and the direction of the workmen, was left to the plaintiff (*2 Cal. App. 3d 671, 677)* .

[d] Contractors' State License Law and Mechanics' Lien Law Distinguished

In ***Steinbrenner v. J.A. Waterbury Constr. Co.*** *(1963) 212 Cal. App. 2d 661, 28 Cal. Rptr. 204* , the plaintiff brought an action pursuant to former Code Civ. Proc. §§ 1190.1 and 1192.1 [*now see Civ. Code § 3196*] against a defendant and his surety for the price of millwork and cabinets furnished to the defendant as a general contractor. The trial court found that the plaintiff had only "furnished materials and supplies" within the meaning of *Bus. & Prof. Code § 7052*, that he was a materialman and not a contractor, and therefore that he did not need a license. The millwork the plaintiff agreed to furnish was all fabricated at his plant and delivered to the construction site for installation by the defendant's employees.

The court of appeal affirmed. In response to the defendant's contention that the mechanics' lien law rule of *Theisen v. County of Los Angeles (1960) 54 Cal. 2d 170, 5 Cal. Rptr. 161, 352 P.2d 529* , applied (that is, the plaintiff was considered a subcontractor because he performed a substantial specified portion of the construction that was the subject of the general contract, and did so pursuant to the plans and specifications by which the original contractor was bound), the court noted that the term "subcontractor" was given a broad interpretation in *Theisen*. This is consistent with the mechanics' lien law's purpose to provide financial security for suppliers who do no installation work themselves, but whose custom-made products have little economic value except as part of the building for which they were designed. On the other hand, the purpose of the Contractors' State License Law is to protect the public from incompetent and unreliable contractors. Therefore, the court stated, while *Theisen* presented an interesting analogy, *Bus. & Prof. Code § 7052*, which distinctly excludes suppliers who do not themselves fabricate or consume their materials in the work of the general contractor, was controlling (*212 Cal. App. 2d 661, 664-666)* .

[e] Employees of Unlicensed Contractor

Johnson v. Silver *(1958) 161 Cal. App. 2d Supp 853, 327 P.2d 245* , involved an appeal from judgments for the plaintiffs in two consolidated mechanics' liens actions. The defendant owner had hired the defendant original contractor to excavate property for an apartment building. The contractor, who was not licensed, hired the plaintiffs to haul away dirt after the contractor excavated the property. The defendants contended that the plaintiffs were barred from recovery by the fact that the contractor was unlicensed.

The court of appeal affirmed the trial court's judgment, stating that the Contractors' State License Law was enacted for the safety and protection of the public against imposition by persons inexperienced in contracting work, and for the prevention of fraudulent acts by contractors resulting in a loss to subcontractors, materialmen, employees (as was the case here), and owners of structures. Because the plaintiffs were in a class of those for whose protection the law was enacted, they were removed from the imputation of *in pari delicto*, and, thus, entitled to enforce a mechanics' lien action for recovery of what was justly due them (*161 Cal. App. 2d Supp 853, 855-856*).

[f] Furnishing Materials as Supplier and Installing as Employee

In ***Cargill v. Achziger*** *(1958) 165 Cal. App. 2d 220, 331 P.2d 774* , the defendants appealed from a judgment foreclosing plaintiff's mechanics' lien. Plaintiff brought the action for labor and materials furnished to the defendants and used in grading and paving a parking lot and driveway on the defendants' property, and in oiling a driveway, hauling trash, and blading grass. The plaintiff had told one defendant before he performed any work that he was not a contractor and would have to take the work on a labor and materials basis. It was also the plaintiff's understanding that he could have been fired at will. The defendants contended that since the plaintiff did not come within *Bus. & Prof. Code § 7052* (applying to materialmen) or 7053 (applying to employees), he must have been required to hold a contractor's license in order to recover.

The court of appeal affirmed the trial court. After setting forth the substance of *Bus. & Prof. Code §§ 7052* and *7053* [*see* Paragraph A of this form], the court stated that there is nothing in the Contractors' State License Law that precludes one from furnishing materials as a supplier and then installing them as an employee (*165 Cal. App. 2d 220, 223)* .

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15-152 California Points & Authorities § 152.42

§ 152.42 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] to Foreclose Mechanics' Lien--Plaintiff Has Substantially Complied With Statutory Licensing Requirements [Bus. & Prof. Code § 7031(e), (f)]

[1] FORM

[*Caption. See § 152.39.*]

THE COURT SHOULD OVERRULE DEFENDANT'S GENERAL DEMURRER BECAUSE PLAINTIFF HAS SUBSTANTIALLY COMPLIED WITH THE LICENSING REQUIREMENTS OF BUSINESS AND PROFESSIONS CODE SECTION 7031.

A. Substantial Compliance Doctrine. The court may determine that there has been substantial compliance with licensure requirements under *Business and Professions Code Section 7031* if it is shown at an evidentiary hearing that the person who engaged in the business or acted in the capacity of a contractor (1) had been duly licensed as a contractor in California prior to the performance of the act or contract, (2) acted reasonably and in good faith to maintain proper licensure, and (3) did not know or reasonably should not have known that he or she was not duly licensed (*Bus. & Prof. Code § 7031(e), (f)*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be used to oppose a demurrer to a complaint to foreclose a mechanics' lien based on the complaint's failure to allege that the plaintiff was duly licensed at all times during the performance of his or her contract, when the complaint alleges sufficient facts to show that plaintiff has substantially complied with the licensing requirements set forth in *Bus. & Prof. Code § 7031*. For coverage of the evolution of the substantial compliance doctrine, see *§ 152.42[3][a]*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, this form may be used in opposition to a demurrer supported by the points and authorities set out in *§ 152.22*.

[3] Discussion of Authorities

[a] Substantial Compliance Doctrine

The substantial compliance doctrine ameliorates the harshness of the basic licensing requirement of *Bus. & Prof. Code § 7031*. Under that requirement, no person engaged in the business or acting in the capacity of a contractor may bring or maintain any action, or recover in law or equity in any action, in any California court for the collection of compensation for the performance of any act or contract for which a license is required by the Contractors' State License Law [*Bus. & Prof. Code § 7000 et seq.*] without alleging that he or she was a duly licensed contractor at all times during the performance of that act or contract. This prohibition applies regardless of the merits of the cause of action [*Bus. & Prof. Code § 7031(a)* (statute also sets forth an exemption for contractors who are each individually licensed but who fail to comply with joint venture licensing provisions when applicable)]. The substantial compliance doctrine provides an exception to this prohibition by permitting the recovery of compensation by unlicensed contractors under limited circumstances.

This form reflects the current version of the substantial compliance doctrine, which is set forth in *Bus. & Prof. Code § 7031(e), (f)* [*see* Stats., 1994, ch. 550 (most recent amendments to doctrine)]. This version applies to virtually all contracts entered into on or after January 1, 1992, and to all actions or arbitrations arising from such a contract, with the following exceptions [*Bus. & Prof. Code § 7031(f)*]:

- Any legal action or arbitration commenced before January 1, 1995, regardless of the date on which the parties entered into the contract; or

- Any legal action or arbitration commenced on or after January 1, 1995, if the action or arbitration was initially commenced before that date, and was subsequently dismissed.

From 1990 through 1991, there was no doctrine of substantial compliance in California [*see Hydrotech Systems, Ltd. v. Oasis Waterpark (1991) 52 Cal. 3d 988, 996 n. 5, 277 Cal. Rptr. 517, 803 P.2d 370]* . Prior to 1990, only a judicial doctrine of substantial compliance existed in California [*see Latipac, Inc. v. Superior Court (1966) 64 Cal. 2d 278, 281-282, 49 Cal. Rptr. 676, 411 P.2d 564* ; *G.E. Hetrick & Associates, Inc. v. Summit Construction & Maintenance Co. (1992) 11 Cal. App. 4th 318, 329, 13 Cal. Rptr. 2d 803]* .

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15-152 California Points & Authorities § 152.43

§ 152.43 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] to Foreclose Mechanics' Lien--Requirement That Claim of Lien Contain Name of Person by Whom Claimant Was Employed, or to Whom Plaintiff Furnished Labor, Services, Equipment, or Materials Met if Statutory Objective Achieved

[1] FORM

[*Caption. See § 152.39.*]

THE COURT SHOULD OVERRULE DEFENDANT'S GENERAL DEMURRER BECAUSE THE OBJECTIVE OF REQUIRING A CLAIM OF LIEN TO CONTAIN THE NAME OF THE PERSON BY WHOM THE PLAINTIFF WAS EMPLOYED OR TO WHOM THE PLAINTIFF FURNISHED LABOR, SERVICES, EQUIPMENT, OR MATERIALS IS MET IF THE OWNER IS ABLE TO ASCERTAIN THE TRUTH OF THE CLAIM AND TO PROTECT HIMSELF OR HERSELF AGAINST DOUBLE PAYMENT.

A. Requirements Met if Statutory Purpose Achieved. If the purpose of the requirement of *Civil Code Section 3084(a)(4)* is achieved, that is, that the owner is given an opportunity to ascertain the truth of the claim and to protect himself or herself against double payment, and no one is prejudiced, technical requirements do not stand in the way of achieving the purpose of the mechanics' lien law (*Wand Corp. v. San Gabriel Valley Lbr. Co. (1965) 236 Cal. App. 2d 855, 861, 46 Cal. Rptr. 486*).

[*Optional*] **B. Reference to Preliminary Notice.** When the preliminary 20-day notice (private work) under *Civil Code Section 3097* correctly designates the party who should also be named under *Civil Code Section 3084(a)(4)*, the failure of the recorded claim of lien to designate that party is not necessarily fatal to the enforcement of the mechanics' lien if the lien claim is not fraudulent and does not mislead the owner or innocent third persons (*Wand Corp. v. San Gabriel Valley Lbr. Co. (1965) 236 Cal. App. 2d 855, 862, 46 Cal. Rptr. 486*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be used to oppose a demurrer to a complaint to foreclose a mechanics' lien that is based on the plaintiff's failure to include in his or her lien claim the name of the person by whom the plaintiff was employed or to whom the plaintiff furnished the labor, services, equipment, or materials, when the complaint alleges facts showing that the objective of *Civ. Code § 3084(a)(4)* was achieved.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, these points and authorities may be used in opposition to a demurrer supported by the points and authorities set out in *§ 152.24*.

[3] Discussion of Authorities

[a] Requirements Met if Statutory Purpose Achieved

In ***Wand Corp. v. San Gabriel Valley Lbr. Co.*** *(1965) 236 Cal. App. 2d 855, 46 Cal. Rptr. 486* , the trial court granted the defendant a summary judgment in plaintiff's lien foreclosure action. The basis for the decision was the fact that the claim of lien did not comply with former Code Civ. Proc. § 1193.1(j)(4) [*now see Civ. Code § 3084(a)(4)*], in that the lien did not contain the name of the person by whom the plaintiff was employed or to whom he furnished the materials, which was in this case the original contractor. The plaintiff had in fact inserted on the line of a printed form a claim of lien, where the plaintiff should have written in the name of the original contractor, the word "claimant." Thus, according to the claim of lien, the plaintiff appeared to have made a contract with himself. This defect had already been admitted in the plaintiff's complaint, which failed to allege that the lien claim contained the statement required by former § 1193.1(j)(4). Defendant's answer admitted that before the claim of lien was recorded, the defendant received a preliminary notice that did contain the correct name of the person to whom the plaintiff furnished the materials.

The court of appeal reversed the trial court and held that mere proof of the mistake did not mean that the plaintiff could not prevail, and that defendant would have to prove that he was actually prejudiced by the mistake, or that the plaintiff's mistake was made with the intent to defraud. The court noted that the purpose of requiring the claimant to reveal the identity of the person to whom he or she furnished materials is to give the owner an opportunity to ascertain the truth of the claim and to protect himself or herself against double payment as best he or she can. After reviewing several cases, the court concluded that if there is a unifying thread that explains most of them, it was that when the purpose of former Code of Civil Procedure Section 1193(j)(4) is achieved and no one is prejudiced, technical requirements should not stand in the way of achieving the purpose of the mechanics' lien law. Because the preliminary notice contained the correct name of the person to whom the plaintiff furnished materials, the court held that when the preliminary notice does so correctly designate the name to be included in the claim of lien, and when the claim of lien that is recorded is not fraudulent and does not mislead third persons, the failure of the lien claim to contain that name is not necessarily fatal to the enforcement of the lien (*236 Cal. App. 2d 855, 861)* .

[b] Reference to Preliminary Notice

Wand Corp. v. San Gabriel Valley Lbr. Co. *(1965) 236 Cal. App. 2d 855, 46 Cal. Rptr. 486* , is discussed in *§ 152.43[3][a]*.

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15-152 California Points & Authorities § 152.44

§ 152.44 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] to Foreclose Mechanics' Lien--Lien Claimant Not Required to State Name of Owner or Reputed Owner if Not Known [Civ. Code § 3084(a)(2)]

[1] FORM

[*Caption. See § 152.39.*]

THE COURT SHOULD OVERRULE DEFENDANT'S GENERAL DEMURRER BECAUSE PLAINTIFF IS NOT REQUIRED TO STATE THE NAME OF THE OWNER OR THE REPUTED OWNER IN HIS/HER CLAIM OF LIEN IF THIS NAME IS NOT KNOWN.

A. Name of Owner Not Required if Not Known. *Civil Code Section 3084(a)(2)* requires the lien claimant to insert the name of the owner or reputed owner in the lien claim only when it is known to the lien claimant; and the failure to include the name presumes that the claimant does not know the name (*Allen v. Wilson (1918) 178 Cal. 674, 678, 174 P. 661*).

[*Optional*] **B. Name of Reputed Owner.** As indicated by the language of *Civil Code Section 3084(a)(2)*, it is sufficient to give only the name of the reputed owner, and, if an individual does so in good faith, the individual does not lose his or her lien when he or she subsequently determines that some other individual is the actual owner (*Frank Pisano & Associates v. Taggart (1972) 29 Cal. App. 3d 1, 19, 105 Cal. Rptr. 414*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be used to oppose a demurrer to a complaint to foreclose a mechanics' lien, based on the plaintiff's failure to include in the recorded lien claim the name of the owner or reputed owner of the property sought to be charged with the mechanics' lien, when the lien claimant did not know the name of the owner or reputed owner.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, these points and authorities may be used in opposition to a demurrer supported by the points and authorities set out in *§ 152.25*.

[3] Discussion of Authorities

[a] Name of Owner Not Required if Not Known

In ***Allen v. Wilson*** *(1918) 178 Cal. 674, 174 P. 661* , the defendant appealed from a judgment decreeing the foreclosure of a mechanics' lien against a lot owned by the defendant. The defendant contended on appeal that the plaintiff's lien claim was invalid in that it did not name anyone as the owner or reputed owner of the property.

The court of appeal rejected this contention and affirmed the trial court. The court noted that there did not appear to be any evidence that the plaintiff knew the name of the owner when he filed the lien claim, and held that former Code of Civil Procedure Section 1187 [*now see Civ. Code § 3084*] only requires the lien claimant to insert the name of the owner or reputed owner in his or her claim of lien when he or she knows the name. The court stated that if the name is not known, the claim filed is sufficient if it is silent on the subject. When it is silent on the subject, the name of the owner or reputed owner is presumably not within the knowledge of the claimant (*178 Cal. 674, 678)* .

[b] Name of Reputed Owner

In ***Frank Pisano & Associates v. Taggart*** *(1972) 29 Cal. App. 3d 1, 105 Cal. Rptr. 414* , the plaintiffs appealed from a judgment denying them the right to foreclose their mechanics' lien, and the cross complainants appealed from a judgment denying them monetary damages on their cross complaint. The defendants in the mechanics' lien foreclosure action sought to sustain the judgment on the ground (among others) that the lien claim failed to name the owners of the property at the time it was recorded. The claim of lien in fact named the former owner.

The court of appeal reversed a portion of the judgment and affirmed all other portions. With respect to the alleged defective claim of lien, the court held that the failure to name the actual owners of the property in the plaintiffs' claim of lien was not fatal to their cause of action. The court held that it is sufficient to give only the name of the reputed owner. The court noted that if this is done in good faith, the claimant does not lose his or her lien if he or she subsequently determines that some other individual is the actual owner. Because one of the reputed owners in this case had made certain representations to one of the plaintiffs, indicating he was the owner, the court found that the plaintiffs had acted reasonably in naming him as the owner (*29 Cal. App. 3d 1, 18-19)* .

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15-152 California Points & Authorities § 152.45

§ 152.45 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] to Foreclose Mechanics' Lien--Notice of Completion Ineffective to Shorten Prescribed Statutory Period Within Which Claim of Lien Must Be Recorded

[1] FORM

[*Caption. See § 152.39.*]

THE COURT SHOULD OVERRULE DEFENDANT'S GENERAL DEMURRER BECAUSE A NOTICE OF COMPLETION IS INEFFECTIVE TO SHORTEN THE PRESCRIBED STATUTORY PERIOD WITHIN WHICH A CLAIM OF LIEN MUST BE RECORDED IF IT IS RECORDED BEFORE COMPLETION OF THE WORK OF IMPROVEMENT.

A. Completion Defined. In the case of any work of improvement other than a public work, completion means actual completion of the work of improvement. Any of the following shall be deemed equivalent to a completion: an occupation or use of the work of improvement by the owner or the owner's agent, accompanied by a cessation of labor on the work of improvement; an acceptance by the owner or the owner's agent of the work of improvement; after commencement of the work of improvement, a cessation of labor thereon for a continuous period of 60 days, or a cessation of labor thereon for a continuous period of 30 days or more if the owner files for record a notice of cessation; or an acceptance by a public entity when the work of improvement is subject to such an acceptance (*Civ. Code § 3086*). A contract is complete for purposes of commencing the recordation period under *Civ. Code § 3115* when all work under the contract has been performed, excused, or otherwise discharged (*Howard S. Wright Construction Co. v. BBIC Investors (2006) 136 Cal. App. 4th 228, 241, 38 Cal. Rptr. 3d 769*).

B. Recording of Notice of Completion. A notice of completion must be recorded in the office of the county recorder of the county in which the site is located, within 10 days after completion of the work of improvement (*Civ. Code § 3093*).

C. Premature Recording of Notice of Completion. A notice of completion recorded by the owner before actual completion of the work of improvement is premature and does not limit the time within which claims of lien must be

recorded (*Scott, Blake & Wynne v. Summit Ridge Estates, Inc. (1967) 251 Cal. App. 2d 347, 357, 59 Cal. Rptr. 587*).

[*Optional*] **D. Completion as Question of Fact.** The determination of the date of completion of a work of improvement is a question of fact (*Scott, Blake & Wynne v. Summit Ridge Estates, Inc. (1967) 251 Cal. App. 2d 347, 357, 59 Cal. Rptr. 587*).

[*Optional*] **E. Occupancy and Use.** When an occupancy or use of a work of improvement by the owner or the owner's agent coexists with the performance of the labor by the lien claimant or is consistent with further work by the claimant, the so-called occupancy has indicated not a constructive completion but only a cessation of labor, which must continue for 60 days before the 90-day period during which the lien must be filed commences, if no notice of completion was recorded (*M. Arthur Gensler, Jr., & Associates, Inc. v. Larry Barrett, Inc. (1972) 7 Cal. 3d 695, 706, 103 Cal. Rptr. 247, 499 P.2d 503*).

[*Optional*] **F. Subject to Acceptance.** The phrase, "subject to acceptance," as set forth in *Civil Code Section 3086*, is not to be equated with inspection and approval or the issuance of certificates of occupancy under building regulations, but must find its base in some legislative enactment by the public authority. Thus, whether a project is subject to acceptance does not depend on whether the contractor had complied with all requirements necessary to approval and acceptance of the project, nor upon acceptance itself, but rather on whether the improvement was required to be accepted by a public authority pursuant to a legislative act (*A.J. Raisch Paving Co. v. Mountain View Sav. & Loan Assn. (1972) 28 Cal. App. 3d 832, 836, 105 Cal. Rptr. 96*).

[*Optional*] **G. Laches.** The doctrine of laches entitles a court to consider a delay in recording a claim of lien as a reason for denying equitable relief to foreclose a mechanics' lien, such as when a plaintiff used the delay to advance its financial interests and that of its president and sole shareholder at the expense of defendant homeowners and lenders (*A.A. Baxter Corp. v. Home Owners & Lenders (1970) 7 Cal. App. 3d 725, 735, 86 Cal. Rptr. 854*).

[*Optional*] **H. Original Contractor.** An original contractor is any contractor who has a direct contractual relationship with the owner (*Civ. Code § 3095*). Thus, one who is normally considered a subcontractor and has a contract with the owner's lessee is an original contractor for the purpose of recording his or her claim of lien, and has 60 days to file the claim (rather than 30 days as does a subcontractor) (*Benson Elec. Co. v. Hale Bros. Assoc., Inc. (1966) 246 Cal. App. 2d 686, 689-692, 55 Cal. Rptr. 73*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a demurrer to a complaint to foreclose a mechanics' lien based on the plaintiff's failure to allege facts showing that the claim of lien was timely recorded, when the notice of completion, which was recorded in order to shorten the time period within which the claim of lien must be

recorded, was recorded prematurely.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Completion Defined

In ***Howard S. Wright Construction Co. v. BBIC Investors*** *(2006) 136 Cal. App. 4th 228, 38 Cal. Rptr. 3d 769* , the owner informed the contractor that it was experiencing financial difficulties and would not be paying the contractor any more money. The court of appeal held that the contractor's recording of a mechanic's lien was not premature, because its contract was "completed" within the meaning of *Civ. Code § 3115* on the anticipatory breach of the other contracting party (*136 Cal. App. 4th 228, 241-242)* . The court concluded that a contract is complete for purposes of commencing the recordation period under § 3115 when all work under the contract has been performed, excused, or otherwise discharged (*136 Cal. App. 4th 228, 241)* .

[b] Premature Recording of Notice of Completion

In ***Scott, Blake & Wynne v. Summit Ridge Estates, Inc.*** *(1967) 251 Cal. App. 2d 347, 59 Cal. Rptr. 587* , the defendants appealed from a judgment decreeing the foreclosure of plaintiff's mechanics' lien for surveying and engineering services rendered in connection with subdivision work. The trial court had found that the plaintiff did not complete his services under his contract until March 31, 1961. Notices of completion were recorded by defendants on January 5 and February 21, 1961, and were intended to pertain to work performed by the plaintiff in connection with the laying of sewers, storm drains, and underground utilities in the tract in question. The defendants contended on appeal, among other contentions, that the plaintiff's claim of lien was not timely filed by reason of the notices of completion recorded by the defendants.

The Court of Appeal affirmed. It held that a notice of completion, if filed by the owner before actual completion of the work of improvement, is premature and does not limit the time within which claims of lien must be filed. Moreover, the date of completion of a work of improvement is a question of fact. Here, there was sufficient evidence to sustain the trial court's judgment, because the services plaintiff performed after the defendant had recorded his notices of completion were basic to the "scheme of improvement," as those terms are used to describe a work of improvement under former Code of Civil Procedure Section 1182(b) [*now see Civ. Code § 3106*]. Therefore, the court concluded that the work of improvement was not completed until the plaintiff had completed his services under his contract (*251 Cal. App. 2d 347, 357)* .

[c] Completion as Question of Fact

Scott, Blake & Wynne v. Summit Ridge Estates, Inc. *(1967) 251 Cal. App. 2d 347, 59 Cal. Rptr. 587* , is discussed in *§ 152.45[3][a]*.

[d] Occupancy and Use

M. Arthur Gensler, Jr. & Associates, Inc. v. Larry Barrett, Inc. *(1972) 7 Cal. 3d 695, 103 Cal. Rptr. 247, 499 P.2d 503* , involved a mechanics' lien foreclosure action filed by an architectural firm and a general contractor for services performed by them in remodeling the defendant's building at the request of his lessee. The trial court gave judgment for the plaintiffs and the defendants appealed.

The Supreme Court affirmed. The original contract between the lessee and plaintiffs specified a ceiling price for the work to be done. The lessee encountered financial difficulty while the work was in progress and attempted to obtain

additional financing without success. The lessee was unable to pay the architects anything and to continue to pay the contractor. Work was discontinued, and the plaintiffs then recorded their lien claims within 150 days of the date of discontinuance, but after the expiration of 90 days.

The defendants contended on appeal that the recordation had come too late because the date of discontinuance was the date of completion and the plaintiffs had only 90 days from that date to record their claim of lien. The Court responded by holding that in a lien foreclosure action, the plaintiff must plead and prove facts showing his or her substantial compliance with the statutory claim filing requirements, including the fact that the claim of lien was filed within the prescribed period. The Court also stated that this period depends on a construction of the pertinent statutes, and is a matter of law that may be independently determined on appeal. The Court noted that, under former Code of Civil Procedure Section 1193.1(d)(3) [*now see Civ. Code § 3086*], a completion is deemed equivalent to a cessation of labor on a work of improvement for a continuous period of 60 days. Under former Code of Civil Procedure Section 1193.1(d)(1), a completion is also deemed equivalent to the occupation or use of a work of improvement by the owner or the owner's agent (which the lessee had been in this case), accompanied by a cessation of labor on the work of improvement. Thus, the question became what constitutes "occupancy and use." The Court stated that it was reasonable to conclude, as the trial court did, that occupancy equals completion of the job only if it does not coexist with the labor throughout, or is somehow inconsistent with further work by the mechanic. The Court found that in those cases where the occupancy does coexist with the performance of labor, or is consistent with further work by the laborer (such as in this case, where the lessee promised to recommence work), the so-called occupancy has not indicated a constructive completion; there has only been a cessation of labor, which must continue for 60 days before the 90-day period of former Code of Civil Procedure Section 1193.1(c) [*now see Civ. Code §§ 3315, 3116*] commences. Therefore, the Court concluded that the plaintiffs had 150 days to record their claims of lien (*7 Cal. 3d 695, 703-706)* .

[e] Subject to Acceptance

In ***A.J. Raisch Paving Co. v. Mountain View Sav. & Loan Assn.*** *(1972) 28 Cal. App. 3d 832, 105 Cal. Rptr. 96* , the defendant savings and loan appealed from the trial court's judgment of foreclosure of the plaintiff's mechanics' lien on a tentative subdivision tract in the City of Newark. The defendant contended on appeal that the plaintiff's lien claim was not timely filed, because the plaintiff had mistakenly assumed that the subdivision work was subject to acceptance by the city. The defendant argued that it was not subject to acceptance because the tentative subdivision map had not been submitted to the city council for final approval. Further, the necessary permits had not been obtained, and the requirements applicable prior to the recordation of the final map (as set forth in the Subdivision Map Act and applicable city ordinance) had not been performed.

The court of appeal rejected the defendant's argument and affirmed the trial court. It pointed out that the plaintiff had correctly relied on *Howard A. Deason & Co. v. Costa Tierra, Ltd. (1969) 2 Cal. App. 3d 742, 83 Cal. Rptr. 105* , in which the court had held that the phrase "subject to acceptance" as set forth in former Code of Civil Procedure Section 1191.1(e) [*now see Civ. Code § 3086*] is not to be equated with inspection and approval or the issuance of certificates of occupancy under building regulations, but must find its base in some legislative enactment by the public authority. The question of whether a project is "subject to acceptance" does not depend on the contractor's compliance with all the requirements necessary to approval and acceptance of the project, or on acceptance itself, but rather on whether the improvement was required to be accepted by a public authority pursuant to a legislative act. The city ordinance, as interpreted by the court, clearly called for acceptance of the improvement by the city council, and because the ordinance met the requirements set forth in the *Deason* case, the plaintiff's lien claim was timely filed (*28 Cal. App. 3d 832, 836-837)* .

[f] Laches

In ***A.A. Baxter Corp. v. Home Owners & Lenders*** *(1970) 7 Cal. App. 3d 725, 86 Cal. Rptr. 854* , a grading and excavating contractor was denied foreclosure of his mechanics' lien for work in grading and preparing land for

subdivision before a subdivision map was accepted by the county or recorded. The plaintiff had delayed in filing his lien claim until lots in the subdivision had been sold to homeowners and construction loans for the erection of homes on the lots so sold had been recorded. The court of appeal affirmed, holding that the contractor's claim was barred by laches, and rejecting his contention that the laches doctrine is not applicable to a timely recorded lien claim. The court noted that the contractor was a limited partner in the subdivision development firm for which he had done the work, knew prior to filing his claim of lien that the development firm was financially insecure, and that his contract for the work provided for payment in cash every two weeks. Thus, if the plaintiff had insisted on payment as provided by his contract, and on nonpayment had asserted his claim of lien, the subdivision map would not have been accepted by the city, the lots in the subdivision would not have been subjects for sale, the defendant homeowners would not have purchased and improved those lots, and defendant lenders would not have loaned money on them. Because the purpose of the mechanics' lien statute is the protection of property owners as well as lien claimants, the plaintiff's course of conduct was inequitable and justified denial of relief (*7 Cal. App. 3d 725, 734-735)* .

[g] Original Contractor

In ***Benson Elec. Co. v. Hale Bros. Assoc., Inc.*** *(1966) 246 Cal. App. 2d 686, 55 Cal. Rptr. 73* , defendants appealed from a judgment of the trial court foreclosing a mechanics' lien. Plaintiff installed an electrical system in a bowling alley at the request of defendant's lessee. The owner filed a notice of completion, and, within 60 days of the date of recordation, plaintiff recorded his claim of lien. Defendant contended that this came too late because plaintiff had only 30 days to record his claim of lien, the time period specified in former Code of Civil Procedure Section 1193.1 [*now see Civ. Code § 3116*] for recording claims of lien by lien claimants other than original contractors. Thus, the question was whether one who contracts directly with a lessee who is in command of construction is an original contractor within the meaning of former Code of Civil Procedure Section 1193.1(c) [*now see Civ. Code § 3115*], which provides for the longer period within which to record a claim of lien. The court noted former Code of Civil Procedure Section 1193.1(b) [*now see Civ. Code § 3095*], which provides that an original contractor is any contractor who has a direct contractual relationship with the owner, and stated that no one could contend that if plaintiff had a direct contract with the owner he could not be considered an original contractor, even though he would normally be considered a subcontractor. The fact that plaintiff had contracted with the owner's lessee rather than the owner did not change the situation (*246 Cal. App. 2d 686, 691-692)* .

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15-152 California Points & Authorities § 152.46

§ 152.46 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--Failure to Bring Action to Foreclose Within Statutory Time Limit Does Not Preclude Timely Recording of Second Lien and Bringing Action Thereon

[1] FORM

[*Caption. See § 152.48.*]

THE COURT SHOULD DENY DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE PLAINTIFF'S FAILURE TO FILE AN ACTION WITHIN 90 DAYS OF RECORDING THE NOTICE OF LIEN DOES NOT PRECLUDE THE TIMELY RECORDING OF A SECOND NOTICE OF LIEN AND THE FILING OF AN ACTION THEREON.

Action Based on Second Claim of Lien Is Proper. A plaintiff's failure to file an action to foreclose a mechanics' lien within 90 days of recording the claim of lien does not preclude the timely recording of a second claim of lien and bringing an action within 90 days of the recording of the second claim (*Coast Central Credit Union v. Superior Court (1989) 209 Cal. App. 3d 703, 708-711, 257 Cal. Rptr. 468*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for summary judgment based on the failure to file an action to foreclose a mechanics' lien within 90 days of the recording of the first claim of lien, when a second timely lien was recorded and the action was filed within 90 days of the second claim of lien.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should include facts showing that second lien and the action based on it were timely.

[3] Discussion of Authorities

[a] Action Based on Second Claim of Lien Is Proper

In ***Coast Central Credit Union v. Superior Court*** *(1989) 209 Cal. App. 3d 703, 257 Cal. Rptr. 468* , plaintiff timely recorded a claim of mechanics' lien but did not bring an action to foreclose within the 90 days required by *Civ. Code § 3144*. Plaintiff then recorded a second claim of lien, which was timely because the notice of completion had not yet been filed. Plaintiff brought an action based on the second claim of lien within the required 90 days of its recording. Defendant moved for summary judgment on the basis that the failure to bring a timely action on the first claim of lien forever barred an action to foreclose the mechanics' lien. The trial court denied the motion, and defendant petitioned for a writ of mandate.

The court of appeal denied the petition, holding that a claimant has a constitutional inchoate personal right to a mechanics' lien. Recording a timely claim transforms the inchoate right to a tangible lien on the property. *Civ. Code § 3144* provides that failure to commence a timely action to foreclose the lien makes it automatically null and void. However, only the tangible lien is extinguished and the inchoate right to a lien remains. It may thus be perfected by timely recording a second claim of lien (*209 Cal. App. 3d 703, 708-711)* .

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15-152 California Points & Authorities § 152.47

§ 152.47 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--Release of Expired, Unsatisfied Lien Does Not Preclude Timely Recording of Second Lien and Bringing of Related Action

[1] FORM

[*Caption. See § 152.48.*]

THE COURT SHOULD DENY DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE RELEASE OF PLAINTIFF'S EXPIRED CLAIM OF LIEN DOES NOT STATE THAT THE CLAIM HAS BEEN FULLY SATISFIED AND THEREFORE DOES NOT PRECLUDE THE TIMELY RECORDING OF A SECOND NOTICE OF LIEN AND THE FILING OF AN ACTION THEREON.

A. Release of Expired Claim of Lien Does Not Preclude Timely Recording of Second Notice of Lien and Filing of Related Action. Either a voluntary release of a null and void lien, or a decree ordering the release of such a lien, has no effect on the validity of any subsequently recorded lien, and therefore does not preclude the timely recording of a second claim of lien and the bringing of an action within 90 days of the recording of the second claim (*Solit v. Tokai Bank (1999) 68 Cal. App. 4th 1435, 1444, 81 Cal. Rptr. 2d 243*).

B. Release Does Not Extinguish Lien When Release Does Not State That Claim Has Been Fully Satisfied. Only when a release states that the claim of lien has been fully satisfied is the claimant's inchoate right to a lien extinguished (*Solit v. Tokai Bank (1999) 68 Cal. App. 4th 1435, 1444, 81 Cal. Rptr. 2d 243* ; *Koudmani v. Ogle Enterprises, Inc. (1996) 47 Cal. App. 4th 1650, 1658-1659, 55 Cal. Rptr. 2d 330*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for summary judgment based on the release of a null and void lien, when (1) the release did not expressly state that the claim was satisfied, and (2) a second timely lien was recorded and the action was filed within 90 days of the second claim of lien.

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should include facts indicating that the release did not expressly state that the claim was satisfied and showing that the second lien and the related action were timely.

In an appropriate case, this form of points and authorities may be used to oppose the points and authorities set out in *§ 152.28*.

[3] Discussion of Authorities

[a] Release of Expired Claim of Lien Does Not Preclude Timely Recording of Second Notice of Lien and Filing of Related Action

In ***Solit v. Tokai Bank*** *(1999) 68 Cal. App. 4th 1435, 1444, 81 Cal. Rptr. 2d 243* , the claimant failed to commence an action to foreclose a mechanics' lien within 90 days after it was recorded, so the lien became void and unenforceable pursuant to *Civ. Code § 3144*. The property owners demanded that the claimant remove the cloud on title caused by the expired claim of lien, and threatened to petition under *Civ. Code § 3154* for an order releasing the lien and an award of attorney's fees if the claimant did not release the lien voluntarily. The claimant executed and recorded a release of lien. The claimant received no compensation for causing the lien to be released, nor did the release indicate that the obligation on which the lien was based had been satisfied. Thereafter, the property owners filed an action against the claimant for breach of contract and other causes of action. The claimant recorded a new claim of lien and cross-complained against the property owners and others, including in the cross-complaint a cause of action to foreclose the mechanics' lien. On the plaintiffs' motion for summary adjudication, the trial court ruled as a matter of law that the claimant's release of the first lien extinguished all of its lien rights against the property, thus making any subsequent liens unenforceable. The court found that the parties intended the release of the first lien to have the same effect as a decree under *Civ. Code § 3154*, and noted that the effect of such a decree would be to preclude the foreclosure of a new claim of lien.

The court of appeal reversed the judgment. According to the court, if an owner has used the procedure available under *Civ. Code § 3154* to obtain a recordable decree so that record title may be made to reflect that a specific lien has, by operation of *Civ. Code § 3144*, automatically become "null and void and of no further force and effect," this does not prevent either the owner or the claimant from taking further proceedings to resolve any disputed issues between them. The only further proceeding that is specifically mentioned as being barred once a decree is obtained is "an action foreclosing such lien" (*68 Cal. App. 4th 1435, 1443* , citing *Civ. Code § 3154(g)*). The court stated that the only logical conclusion to be drawn from this statutory scheme is that once a timely-recorded lien becomes null and void because the claimant did not commence an action to enforce it, the lien can be removed as a cloud upon title either by the claimant's voluntary recordation of a release of the lien, or by court decree pursuant to *Civ. Code § 3154*. But either method only goes to the removal of a particular lien as a cloud on title, and nothing in the statutory scheme indicates that either method has any effect on whether the claimant can record a subsequent lien on the property, which, if it is timely recorded, can be enforced within 90 days after the recordation even though based on the same work performed or

materials supplied that served as the basis for the prior lien. Thus, either a voluntary release of a null and void lien, or a decree ordering the release of such a lien, has no effect on the validity of any subsequently recorded lien. The validity of the subsequent lien must be determined on its own merits (*68 Cal. App. 4th 1435, 1443-1444)* .

In so holding, the court of appeal disapproved its prior decision in *Maris Management Corp. v. Assured Drywall & Textures (1984) 152 Cal. App. 3d 268, 273-275, 199 Cal. Rptr. 309* that once a decree releasing the property has been granted, the lien is extinguished, and there is no lien on which to base a new claim (*68 Cal. App. 4th 1435, 1445-1446)* .

[b] Release Does Not Extinguish Lien When Release Does Not State That Claim Has Been Fully Satisfied

The facts and procedural history of ***Solit v. Tokai Bank*** *(1999) 68 Cal. App. 4th 1435, 81 Cal. Rptr. 2d 243* are discussed in *§ 152.47[3][a]*. The court of appeal noted that its holding in that case was consistent with the result reached by a number of other courts, including the court of appeal in *Koudmani v. Ogle Enterprises, Inc. (1996) 47 Cal. App. 4th 1650, 55 Cal. Rptr. 2d 330* (*68 Cal. App. 4th 1435, 1444)* , which is discussed below.

In ***Koudmani v. Ogle Enterprises, Inc.*** *(1996) 47 Cal. App. 4th 1650, 55 Cal. Rptr. 2d 330* , a mechanics' lien claimant executed a release of its first claim of lien for materials after the 90-day period to commence an action to foreclose that lien had expired. The claimant thereafter timely recorded a second claim of lien with respect to the same materials. The trial court granted the property owner's petition to release the property from the second claim of lien.

The court of appeal reversed, holding that because the release of the first lien did not clearly state that the claimant's claim for materials was satisfied, but only stated that the lien was "hereby satisfied or otherwise released and discharged," the release did not extinguish the claimant's constitutional inchoate right to a mechanics' lien as a remedy for obtaining the unpaid claim. The court held that only when a release states that the claim of lien has been fully satisfied is the claimant's inchoate right to a lien extinguished, because then the underlying obligation has been paid according to the express terms of the release (*47 Cal. App. 4th 1650, 1658-1659)* .

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15-152 California Points & Authorities § 152.48

§ 152.48 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--Plaintiff's Mechanics' Lien Has Priority Over Lien or Charge of Defendant's Encumbrance

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____ _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORIT-
vs.	)	IES IN OPPOSITION TO MOTION FOR SUM-
_____ [*name*],	)	MARY JUDGMENT
Defendant.	)	Date: _____
	)	Time: _____
	)	Dept: _____
		Trial Date: _____

_____

THE COURT SHOULD DENY DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE PLAINTIFF'S MECHANICS' LIEN HAS PRIORITY OVER THE LIEN OR CHARGE OF THE DEFENDANT'S ENCUMBRANCE.

[*EITHER*]

A. Priority of Mechanics' Liens. Mechanics' liens (other than with respect to site improvements) are preferred to any lien, mortgage, deed of trust, or other encumbrance on the work of improvement and the site, that attaches subsequent to the commencement of the work of improvement, and also to any lien, mortgage, deed of trust, or other encumbrance of which the claimant had no notice and which was unrecorded at the time of the commencement of the work of

improvement (*Civ. Code § 3134*).

[*OR*]

A. Priority of Mechanics' Liens. A mechanics' lien that is claimed for labor or materials furnished to a site improvement is preferred to the following:

(a) Any mortgage, deed of trust, or other encumbrance that attaches subsequent to the commencement of the site improvement of work;

(b) Any mortgage, deed of trust, or other encumbrance of which the claimant had no notice and that was unrecorded at the time of the commencement of such site improvement; and

(c) Any mortgage, deed of trust, or other encumbrance recorded before the commencement of the site improvement work that was given for the sole or primary purpose of financing the site improvements, unless the loan proceeds are, in good faith, placed in the control of the lender under a binding agreement with the borrower to the effect that the proceeds are to be applied to the payment of claims of claimants and that no portion of the proceeds will be paid to the borrower in the absence of satisfactory evidence that all the claims have been paid or that the time for recording claims of liens has expired and no such claims have been recorded [*Civ. Code § 3137*].

[*Optional*] **B. Optional Advances From Secured Lender.** If a lender with actual knowledge of a junior mechanics' lien makes advances under a senior lien that the lender could not be compelled to make, the advances are optional and, therefore, subordinate to the junior lien if the advances are not used (1) in payment of any mechanics' liens recorded at the time of the advances, and (2) thereafter in payment of the costs of improvements on the property as provided in *Civil Code Section 3136* (*Turner v. Lytton Sav. & Loan Ass'n (1966) 242 Cal. App. 2d 457, 459, 51 Cal. Rptr. 552*).

[*Optional*] **C. Commencement of Improvement as Question of Fact.** Whether an improvement has commenced so as to trigger the time period for the filing of a notice of nonresponsibility is a question of fact (*Arthur B. Siri, Inc. v. Bridges (1961) 189 Cal. App. 2d 599, 601, 11 Cal. Rptr. 322*).

[*Optional*] **D. Priority of Mechanics' Liens for Labor or Materials Furnished After Encumbrance Recorded.** Lien claimants performing labor and furnishing materials under a contract between the owner and contractor are entitled to a lien that relates back to the time of commencement of work on the building, so as to take priority over a mortgage recorded subsequent thereto (*see* *Simons Brick Co. v. Hetzel (1925) 72 Cal. App. 1, 9, 236 P. 357*).

[*Optional*] **E. Priority of Mechanics' Liens for Work Performed After Deed Recorded.** When the plaintiff's work is part of the same general improvement commenced before a deed of trust was recorded, plaintiff's mechanics' lien claim has priority over the deed of trust, even though the deed of trust was recorded before the plaintiff commenced work (*Westfour Corp. v. California First Bank (1992) 3 Cal. App. 4th 1554, 5 Cal. Rptr. 2d 394*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for summary judgment in an action to foreclose a mechanics' lien when the defendant contends that the lien or charge of his or her encumbrance has priority over the mechanics' lien claimed in the foreclosure action.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations that support the motion, as well as a separate statement in response to the moving party's statement of undisputed material facts [*Code Civ. Proc. § 437c*].

In an appropriate case, these points and authorities may be used in opposition to a motion supported by the points and authorities set out in *§ 152.27*.

[3] Discussion of Authorities

[a] Optional Advances From Secured Lender

Turner v. Lytton Sav. & Loan Ass'n *(1966) 242 Cal. App. 2d 457, 51 Cal. Rptr. 552* , involved a declaratory relief action brought by the holder of a second deed of trust, which was obtained as security for the purchase price of unimproved real property, against the holder of a first deed of trust on the same property, which was obtained to secure a construction loan with the plaintiffs' vendees for the construction of a dwelling on the property. Under the loan agreement the vendees agreed that on the happening of certain conditions, the defendant could declare a default and discontinue further payments from the loan fund. These conditions apparently occurred and the defendant declared a default but continued making payments. The plaintiffs, the holders of the second deed of trust, complained that these latter payments were optional under the loan agreement and, therefore, the first deed of trust had lost its priority as against the second deed of trust to the extent of the further payments. The trial court held that the second deed of trust was junior to the entire amount of the defendant's first deed of trust.

The Court of Appeal affirmed, sustaining the judgment on a 1957 addition to the mechanics' lien law, former Code of Civil Procedure Section 1181.1 [*now see Civ. Code § 3136*]. Under this statute, if the other advances were used in the payment of any mechanics' liens recorded at the time of the advances, and, thereafter, in the payment of the costs of improvements on the property, the second trust deed would retain its priority. Because the trial court had expressly found that all of the loan proceeds were used for the construction of the dwelling pursuant to the terms of the loan agreement, the court concluded that the disbursement made after the declaration of default was entitled to the same priority under its deed of trust as that enjoyed by the disbursements made before the declaration (*242 Cal. App. 2d 457, 459-460)* .

[b] Commencement of Improvement as Question of Fact

Arthur B. Siri, Inc. v. Bridges *(1961) 189 Cal. App. 2d 599, 11 Cal. Rptr. 322* , involved a mechanics' lien foreclosure action against both the interests of the vendor and vendee in real property on which the plaintiff had done clearing and grading work at the request of the vendees. The trial court gave judgment for plaintiff, and the defendant vendor appealed.

The court of appeal affirmed. The principal question before the court was whether the vendor's notice of nonresponsibility had been given before any construction had taken place on the property. The trial court determined that the notice had been filed before the commencement of the work of improvement. The court of appeal held that

since this finding was supported by substantial evidence, the trial court had not abused its discretion (*189 Cal. App. 2d 599, 601-602)* .

[c] Priority of Mechanics' Liens for Labor or Materials Furnished After Encumbrance Recorded.

Simons Brick Co. v. Hetzel *(1925) 72 Cal. App. 1, 236 P. 357* , involved an appeal from a judgment in favor of mechanics' lien claimants who had furnished labor and materials after the defendant had recorded his mortgage. On appeal, defendant contended his mortgage lien was superior and prior to the plaintiff's liens, even though the work in connection with which the mechanics' liens were claimed had commenced before the mortgage had been recorded.

The court of appeal affirmed the trial court's judgment, holding that the plaintiffs were entitled to liens for their labor and materials furnished under a contract between the owner and contractor. Because the contract was valid, plaintiffs' liens under the rule of priority set forth in former Code of Civil Procedure Section 1186 [*now see Civ. Code § 3134*] related back to the commencement of the work, and so were prior to the defendant's mortgage (*72 Cal. App. 1, 5-6)* .

[d] Priority of Mechanics' Liens for Work Performed After Deed Recorded

Westfour Corporation v. California First Bank *(1992) 3 Cal. App. 4th 1554, 5 Cal. Rptr. 2d 394* , involved a contractor's action against a construction lender to foreclose on mechanics' liens. The trial court granted judgment for the lender, finding that the complaint was barred by the 90-day statute of limitations prescribed by *Civil Code Section 3144*, because when the contractor filed the complaint, it knew of the lender's existence and probable position as the lender, but nevertheless named the lender as a "Doe" defendant.

The Court of Appeal reversed, holding that the relevant inquiry was whether the contractor knew of the lender's actual interest in the property at the time it filed the complaint, not merely whether it was aware of the lender's existence. The court noted that *Civil Code Section 3134* provides that a mechanics' lien has priority over a previously recorded deed of trust only if the lien relates to work commenced before the deed of trust was recorded, and ruled that the contractor's liens had priority under § 3134 because the contractor's work was part of the work that the former general contractor had commenced before the deed of trust was recorded. The court made its ruling despite the fact that the deed of trust was recorded almost two years before the contractor commenced its portion of work on the project. The court found substantial evidence to support its finding, including the fact that the lender's own witnesses admitted that tenant improvements were part of the original project and that the lender did not consider the project complete until the tenant improvement work was finished (*3 Cal. App. 4th 1554, 1562-1563)* .

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15-152 California Points & Authorities § 152.49

§ 152.49 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--Person Having Interest in Property Sought to be Foreclosed Is Not Indispensable Party

[1] FORM

[*Caption. See § 152.48.*]

THE COURT SHOULD DENY DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE A PERSON WITH AN INTEREST IN THE PROPERTY SOUGHT TO BE FORECLOSED IN THE PLAINTIFF'S MECHANICS' LIEN ACTION IS NOT AN INDISPENSABLE PARTY TO THIS ACTION IF HE OR SHE HAD ACTUAL OR CONSTRUCTIVE NOTICE OF THE PENDENCY OF THE ACTION.

A. Notice of Pendency of Foreclosure Action. Persons having an interest in property that is the subject of a lien claim in an mechanics' lien foreclosure action are not indispensable parties to the action if they had actual knowledge, or constructive knowledge imparted by a recorded lis pendens pursuant to *Civil Code Section 3146*, of the pendency of the action (*Packard-Bell Electronics Corp. v. Theseus, Inc. (1966) 244 Cal. App. 2d 355, 363-364, 53 Cal. Rptr. 300*).

[*Optional*] **B. Binding Decree of Foreclosure.** Any person who acquired his or her interest in property subject to a mechanics' lien after the action to foreclose the lien commenced may be bound by a decree of foreclosure, even though he or she is not a party to the action, if he or she acquired the interest with knowledge of the pendency of the action (*Packard-Bell Electronics Corp. v. Theseus, Inc. (1966) 244 Cal. App. 2d 355, 364, 53 Cal. Rptr. 300*).

[*Optional*] **C. Notice of Mechanics' Lien Rights.** A person who holds a junior encumbrance on property subject to a mechanics' claim of lien, and who had prior notice of those mechanics' lien rights, is not an indispensable party to the foreclosure action, and is bound by any decree of foreclosure the claimant may obtain in the foreclosure action (*Dockrey v. Gray (1959) 172 Cal. App. 2d 388, 390, 392, 341 P.2d 746*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for summary judgment by the defendant in a mechanics' lien foreclosure action when the motion was based on the failure to join, within the 90-day period prescribed by *Civil Code Section 3144* for commencement of a mechanics' lien foreclosure action, a person who has an interest in the property subject to the plaintiff's claim of lien and who had actual or constructive notice of the pendency of the action.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations that support the motion, as well as a separate statement in response to the moving party's statement of undisputed material facts [*Code Civ. Proc. § 437c*].

In an appropriate case, this form may be used in opposition to a motion supported by the points and authorities set out in *§ 152.29*.

[3] Discussion of Authorities

[a] Notice of Pendency of Foreclosure Action

In ***Packard-Bell Electronics Corp. v. Theseus, Inc.*** *(1966) 244 Cal. App. 2d 355, 53 Cal. Rptr. 300* , the plaintiff in an action to foreclose a mechanics' lien appealed from those portions of a judgment of foreclosure denying foreclosure on 42 out of 44 lots against which he sought to enforce his mechanic's lien. The plaintiff had duly recorded his claim of lien against the 44 lots and had filed a foreclosure action within the required 90-day statutory period. Two months after the filing of the action, plaintiff filed a notice of lis pendens pursuant to former Code of Civil Procedure Section 1198.2 [*now see Civ. Code § 3146*]. The court denied foreclosure of lots that had been sold by the defendant owner before suit was filed but within 90 days of the recordation of the lien, of lots that were sold more than 90 days after plaintiff commenced his suit but before the lis pendens had been recorded, and of lots that were sold before the claim of lien had been recorded. No lot buyers were joined in the action.

The Court of Appeal reversed the judgment only with respect to those lots that had been purchased after suit was filed and prior to the date when the lis pendens was recorded. Regarding the other lots (i.e., the lots on which the denial of foreclosure was affirmed), the appellate court held that the trial court could not order foreclosure without giving the lot owners an opportunity to contest the claimed liens. They were indispensable parties because they could in no respect be bound by a decree for the sale of the property. As to these owners, the mechanics' lien had expired because suit against them was not filed in the applicable 90-day period; consequently, the court concluded that it was not required to determine the priority situation that would have existed had they been joined in the action. Regarding those lots that had been purchased after suit was filed and prior to the filing of the lis pendens, the trial court erred in denying a decree of foreclosure. If those purchasers had actual knowledge of the pending foreclosure suit at the time they acquired title to the property, they would be bound by the decree of foreclosure. Those purchasers, therefore, were not indispensable parties to the action, and the court concluded that the plaintiff could establish in a subsequent action brought to try title, that some or all of the purchasers had acquired title with actual knowledge of the foreclosure suit (*244 Cal. App. 2d*

355, 363-364) .

[b] Binding Decree of Foreclosure

See the discussion of ***Packard-Bell Electronics Corp. v. Theseus, Inc.*** *(1966) 244 Cal. App. 2d 355, 53 Cal. Rptr. 300* , in *§ 152.49[3][a]*.

[c] Notice of Mechanics' Lien Rights

Dockrey v. Gray *(1959) 172 Cal. App. 2d 388, 341 P.2d 746* , involved an appeal from a judgment for plaintiff in an action by a mechanics' lien holder to reach the surplus after sale of the property to which the lien attached. The sale was made pursuant to a power of sale under a prior deed of trust. The trust deed was security for a construction loan and had priority over the mechanics' lien. This priority had been lost for the amount of certain voluntary advances made by the holder of the trust deed out of the construction loan fund after the commencement of construction and with actual notice of the plaintiff's mechanics' lien rights [*see Turner v. Lytton Sav. & Loan Ass'n (1966) 242 Cal. App. 2d 457, 51 Cal. Rptr. 552]* . Hence, the mechanics' lien holder who had foreclosed his lien would appear to be entitled to the excess of the proceeds from the trustee's sale of the property, because the trust deed holder had lost his rights to that excess. However, the trust deed holder contended that, because he had never been joined in the mechanics' lien foreclosure action, he was not bound by the foreclosure decree in the plaintiff's action. The court of appeal disagreed with the trust deed holder and affirmed the trial court (*172 Cal. App. 2d 388, 390-392)* .

Dockery has been distinguished in later cases dealing with joinder of indispensable parties on the basis that it was expressly found in *Dockery, above,* that the trust deed holder had notice of the plaintiff's mechanics' lien rights [*see Packard-Bell Electronics Corp. v. Theseus, Inc. (1966) 244 Cal. App. 2d 355, 53 Cal. Rptr. 300* ; *Riley v. Peters (1961) 194 Cal. App. 2d 296, 15 Cal. Rptr. 41]* . Moreover, the court in *Packard-Bell Electronics Corp.,* discussed in *§ 152.49[3][a]* stated that it is only during the pendency of a mechanics' lien foreclosure action that notice may affect a person having an interest in the property subject to the claim of lien; notice before the commencement of the action does not affect even a junior encumbrancer's rights in the property (*244 Cal. App. 2d 355, 360-361)* .

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
CHAPTER 152 MECHANICS' LIENS
PART II. FORMS

15-152 California Points & Authorities § 152.50

§ 152.50 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--In Action to Foreclose Mechanics' Lien--Claim of Lien Contains Sufficient Description of Site, Is not Fraudulent, and Does Not Mislead Third Persons

[1] FORM

[*Caption. See § 152.48.*]

THE COURT SHOULD DENY DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE A CLAIM OF LIEN CONTAINS A DESCRIPTION OF THE SITE SUFFICIENT FOR IDENTIFICATION IF IT ENABLES IDENTIFICATION OF THE PROPERTY WITH REASONABLE CERTAINTY TO THE EXCLUSION OF OTHERS, IS NOT FRAUDULENT, AND DOES NOT MISLEAD THIRD PERSONS.

A. Sufficiency of Description of Property. The description of property sought to be charged with a mechanics' lien is sufficient if it allows a party familiar with the locality to identify the property with reasonable certainty to the exclusion of others (*Howard A. Deason & Co. v. Costa Tierra, Ltd. (1969) 2 Cal. App. 3d 742, 754, 83 Cal. Rptr. 105*).

B. Errors in Description of Property. No mistake or error in the description of the property against which a mechanics' lien is recorded invalidates the lien unless the court finds that the mistake or error was made with an intent to defraud, or that an innocent third party without direct or constructive notice has, since the claim was recorded, become a bona fide owner of the property, and that the claim of lien was so deficient that it did not put the party on further inquiry (*Civ. Code § 3261*).

C. Disregard of Errors in Description of Property. Errors in the description of property subject to a mechanics' lien may be disregarded if the property identification of the property is otherwise sufficient, and if the claim of lien that is recorded is not fraudulent and does not mislead the owner or innocent third persons (*Howard A. Deason & Co. v. Costa Tierra, Ltd. (1969) 2 Cal. App. 3d 742, 754, 83 Cal. Rptr. 105*).

[*Optional*] **D. Sufficiency of Description as Question of Fact.** Whether the description of property to be charged with

a mechanics' lien is sufficient for identification is a question of fact to be determined by the jury or court from a consideration of the circumstances of the particular case (*Borello v. Eichler Homes, Inc. (1963) 221 Cal. App. 2d 487, 494, 34 Cal. Rptr. 648*).

[*Optional*] **E. Extrinsic Evidence to Determine Sufficiency.** Extrinsic evidence is admissible for the purpose of determining the sufficiency of a description that is vague or inaccurate, and the description of the property may be found sufficient when the property is clearly identifiable from the extrinsic facts (*Borello v. Eichler Homes, Inc. (1963) 221 Cal. App. 2d 487, 493, 34 Cal. Rptr. 648*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for summary judgment based on the failure to include in the recorded lien claim a site description that is sufficient for identification, when the identification, though vague or ambiguous, did not mislead the owner or third persons, and was not fraudulent.

Counsel should include in this form argument showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations that support the motion, as well as a separate statement in response to the moving party's statement of undisputed material facts [*Code Civ. Proc. § 437c*].

In an appropriate case, these points and authorities may be used in opposition to a motion supported by the points and authorities set out in *§ 152.30*.

[3] Discussion of Authorities

[a] Sufficiency of Description of Property

In ***Howard A. Deason & Co. v. Costa Tierra, Ltd.*** *(1969) 2 Cal. App. 3d 742, 83 Cal. Rptr. 105* , the defendants appealed from a judgment decreeing the foreclosure of the plaintiffs' mechanics' liens for work performed in connection with the construction of several apartments consisting of separate multiple units in a subdivided tract. The defendants contended on appeal (among other contentions) that one plaintiff's liens were defective because of the erroneous property description in the lien claims. The deficiency was predicated on the absence of the words "northwest quarter" in the claim of lien. However, the plaintiffs' amended lien added the words, "commonly known as Palo Fierro Estates," and the trial court found this description sufficient for identification, and that no defendant was mislead or prejudiced by any deficiency.

The court of appeal affirmed the trial court. The court stated that, as a general rule, the description of property sought to be charged with a lien will be deemed sufficient if it enables a party familiar with the locality to identify it with reasonable certainty to the exclusion of others. Thus, errors in the description may be disregarded if the identification of

the property is otherwise sufficient, and when the recorded lien claim is not fraudulent and does not mislead the owner or innocent third person. As authority, the court cited former Code of Civil Procedure Section 1196.1 [*now see Civ. Code § 3261*] (*2 Cal. App. 3d 742, 754)* .

[b] Disregard of Errors in Description of Property

Howard A. Deason & Co. v. Costa Tierra, Ltd. *(1969) 2 Cal. App. 3d 742, 83 Cal. Rptr. 105* , is discussed in *§ 152.50[3][a]*.

[c] Sufficiency of Description as Question of Fact

The facts and procedural background of ***Borello v. Eichler Homes, Inc.*** *(1963) 221 Cal. App. 2d 487, 34 Cal. Rptr. 648* are discussed in *§ 152.30[4][a]*. The court in *Borello* stated the general rule that a property description is sufficient if it will enable a party familiar with the locality to identify the property with reasonable certainty to the exclusion of others. Errors in the description may be disregarded if the identification is otherwise sufficient, provided there is no fraud and no one is misled by the description (*221 Cal. App. 2d 487, 492)* . The court also held that extrinsic evidence is admissible for the purpose of determining the sufficiency of a description that is vague or inaccurate, and the property description may be deemed sufficient when the property is clearly identifiable from such extrinsic facts (*221 Cal. App. 2d 487, 493)* . The court distinguished those cases holding that an insufficient property description involving property descriptions that were entirely erroneous or unambiguously erroneous, rather than merely defective or vague, and therefore did not constitute descriptions at all. Finally, the court noted that whether the description of the property sought to be charged is sufficient for identification is a question of fact to be determined by the jury or court from a consideration of the circumstances of the particular case (*221 Cal. App. 2d 487, 493-494)* .

[d] Extrinsic Evidence to Determine Sufficiency

Borello v. Eichler Homes, Inc. *(1963) 221 Cal. App. 2d 487, 34 Cal. Rptr. 648* , is discussed in *§ 152.50[3][c]*.

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15-152 California Points & Authorities § 152.51

§ 152.51 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--Notice of Nonresponsibility Ineffective to Insulate Owner's Property From Mechanics' Liens

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORIT-
vs.	)	IES IN OPPOSITION TO MOTION FOR SUM-
_____ [*name*],	)	MARY JUDGMENT
Defendant.	)	Date: _____
	)	Time: _____
	)	Dept: _____
		Trial Date: _____

_____

THE COURT SHOULD DENY DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE DEFENDANT'S NOTICE OF NONRESPONSIBILITY IS INEFFECTIVE TO INSULATE HIS/HER PROPERTY FROM MECHANICS' LIENS.

A. Strict Construction of Statutory Nonresponsibility Requirements. *Civil Code Sections 3094* and *3129*, permitting an owner to relieve himself or herself from lien liability for improvements on his or her property, are strictly construed, and the owner must show that he or she has fully complied with all of the requirements of these sections (*Oil Tool Exch., Inc. v. Hasson (1935) 4 Cal. App. 2d 544, 547, 41 P.2d 211*).

[*EITHER*]

B. Ineffective Posting and Recording of Notice of Nonresponsibility. A notice of nonresponsibility is ineffective for any purpose if the person owning or claiming an interest in property on which a work of improvement is being constructed has not posted and recorded the notice pursuant to *Civil Code Section 3094* within 10 days after obtaining knowledge of the improvement (*Civ. Code § 3094*; *Hayward Lbr. & Inv. Co. v. Orondo Mines (1939) 34 Cal. App. 2d 697, 699-700, 94 P.2d 380*).

[*OR*]

B. Proof of Posting Within Statutory Time Period. To avail himself or herself of the benefits of the notice of nonresponsibility, an owner must prove that his or her written notice was posted in some conspicuous place on the construction site within 10 days after obtaining knowledge of the construction (*Oil Tool Exch., Inc. v. Hasson (1935) 4 Cal. App. 2d 544, 547, 41 P.2d 211*).

[*OR*]

B. Owner as Agent of Contractor. An owner acting through his or her agent in causing the construction of improvements against which mechanics' liens are claimed is not entitled to relieve his or her property from the liens by posting and recording a notice of nonresponsibility (*Ott Hardware Co. v. Yost (1945) 69 Cal. App. 2d 593, 601, 159 P.2d 663*).

[*Optional*] **C. Constructive Knowledge of Improvement.** If the owner who posted and recorded a *Civil Code Section 3094* notice of nonresponsibility had constructive knowledge of the improvement (that is, knowledge that would put a prudent person on inquiry regarding whether the improvement had commenced) for more than 10 days before the posting and recording, the notice is ineffective to relieve the owner from responsibility for mechanics' liens claimed in connection with the improvement (*Hayward Lbr. & Inv. Co. v. Orondo Mines (1939) 34 Cal. App. 2d 697, 703, 94 P.2d 380*).

[*Optional*] **D. Commencement of Improvement.** A notice of nonresponsibility is ineffective for any purpose if it is posted and recorded before the commencement of the work of improvement, that is, before there is work and labor on the ground, the effects of which are apparent--easily seen by everybody (*English v. Olympic Auditorium, Inc. (1933) 217 Cal. 631, 636-637, 20 P.2d 946*).

[*Optional*] **E. Commencement of Improvement as Question of Fact.** Whether a notice of nonresponsibility has been posted and recorded within 10 days of commencement of the work of improvement pursuant to *Civil Code Section 3094* is a question of fact (*English v. Olympic Auditorium, Inc. (1933) 217 Cal. 631, 637, 20 P.2d 946* .

[*Optional*] **F. Lessee as Agent of Owner.** A lessee is an agent of the owner/lessor for the purpose of rendering the owner's interest in the leased property subject to mechanics' liens if under the terms of the lease the lessee is obligated, as a condition or covenant of the lease, to make the improvements in connection with which the liens are claimed (*Ott Hardware Co. v. Yost (1945) 69 Cal. App. 2d 593, 599, 159 P.2d 663* ; *Howard S. Wright Construction Co. v. Superior Court (2003) 106 Cal. App. 4th 314, 321, 130 Cal. Rptr. 2d 641*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for summary judgment based on the posting and recording by the noncontracting defendant owner of a notice of nonresponsibility, when the notice was, in fact, ineffective to insulate the owner's interest.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations that support the motion, as well as a separate statement in response to the moving party's statement of undisputed material facts [*Code Civ. Proc. § 437c*].

In an appropriate case, these points and authorities may be used in opposition to a motion supported by the points and authorities set out in *§ 152.32*.

[3] Discussion of Authorities

[a] Strict Construction of Statutory Nonresponsibility Requirements

Oil Tool Exch., Inc. v. Hasson *(1935) 4 Cal. App. 2d 544, 41 P.2d 211* , involved an action to foreclose a mechanics' lien against both the lessor and lessees of certain real property. The lien was based on the unpaid rental price of drilling equipment furnished to the lessee for oil wells to be drilled on the property. The trial court denied a judgment of a mechanics' lien on the lessor's interest based on the fact that the lessor had posted and recorded a notice of nonresponsibility. The only evidence of the notice received at trial was a recorded copy of the notice, with an attached verification and an affidavit of posting.

The court of appeal reversed the trial court, holding that a strict construction of former Code Civ. Proc. § 1192 [*now see Civ. Code §§ 3094, 3129*], whereby an owner may relieve himself or herself from lien liability for improvements on his or her property, necessarily follows the adopted rule of liberal construction of former Code Civ. Proc. § 1183 [*now see Civ. Code § 3110*], which bestows a lien for labor and materials furnished to a work of improvement. Because the owner failed to prove that the written notice was posted in some conspicuous place on the property within 10 days after he obtained knowledge of the construction, the notice was ineffective to relieve him of the claimed mechanics' lien (*4 Cal. App. 2d 544, 547)* .

[b] Ineffective Posting and Recording of Notice of Nonresponsibility

In ***Hayward Lumber & Inv. Co. v. Orondo Mines*** *(1939) 34 Cal. App. 2d 697, 94 P.2d 380* , the court of appeal affirmed the trial court's judgment declaring a mechanics' lien on a noncontracting lessor's interest in certain real property for materials furnished by the plaintiff lien claimant at the request of the lessee. The principal defense relied on by the defendant lessor was that she had posted and recorded, in due time and in proper manner, a notice of nonresponsibility sufficient in form and substance. The court found that this defense was defective because she had constructive knowledge of the lessee's improvement work for more than 10 days prior to the date on which she actually did post and record the notice. The court held that the notice would have been a bar to the enforcement of the lien on her property only if the posting and recording had been timely; because they were not timely, the notice was ineffective for any purpose (*34 Cal. App. 2d 697, 699-700)* .

[c] Proof of Posting Within Statutory Time Period

Oil Tool Exch., Inc. v. Hasson *(1935) 4 Cal. App. 2d 544, 41 P.2d 211* , is discussed in *§ 152.51[3][a]*.

[d] Owner as Agent of Contractor

Ott Hardware Co. v. Yost *(1945) 69 Cal. App. 2d 593, 159 P.2d 663* , involved an action to foreclose mechanics' liens against both the interests of the lessor and lessee in real property. The plaintiffs had furnished labor and materials for remodeling work being done by the lessees. The lessors had posted and recorded a notice of nonresponsibility at a time when the remodeling work was being contemplated. Although the trial court made no specific finding that the notice was effective to relieve the lessor's interest, it gave judgment to the plaintiffs for a lien on the whole of the building and on no part of the surrounding property. The lessors appealed, contending that on filing a notice of nonresponsibility the entire property is exempted from all mechanics' liens. The court of appeal found it unnecessary to address the lessor's contention because it held that by the terms of the lease, the lessees were the statutory agents of the lessors for the purpose of filing a notice of responsibility. The court held that a participating owner, even though acting through his or her agent, is not entitled to relieve his or her property from mechanics' liens by filing a notice of nonresponsibility (*69 Cal. App. 2d 593, 601)* .

[e] Constructive Knowledge of Improvement

In ***Hayward Lbr. & Inv. Co. v. Orondo Mines*** *(1939) 34 Cal. App. 2d 697, 94 P.2d 380* , discussed in *§ 152.51[3][b]*, the court of appeal held, quoting the language of *Harmon Lbr. Co. v. Brown (1913) 165 Cal. 193, 131 P. 368* that the knowledge that subjects the noncontracting owner to liability for mechanics' liens is not just actual knowledge; constructive knowledge, i.e., notice of circumstances that would put a prudent person on inquiry as to the fact in question, is equally potent to bind the owner. The court found this knowledge in the fact that the lease provided for extensive work to be done on the property by the lessee. The lessor's husband was employed by the lessee, and was doing work on the property that would immediately suggest to a prudent person that the work being done was the same work agreed on in the lease (*34 Cal. App. 2d 697, 703)* .

[f] Commencement of Improvement

In ***English v. Olympic Auditorium, Inc.*** *(1933) 217 Cal. 631, 20 P.2d 946* , the Supreme Court affirmed the trial court's judgment that gave the plaintiff lien claimants mechanics' liens on the work of improvement but not on the surrounding property. In holding that the digging of a test hole and the delivery of lumber to the construction site constituted the commencement of the improvement, thereby making the owners-lessors, notice of nonresponsibility effective to insulate their interests from the mechanics' liens, the Court stated the general rule that a notice of nonresponsibility, which was posted before the commencement of a work of improvement, is ineffective for any purpose. The Court further held that commencement of work means some work and labor on the ground, the effects of which are apparent--easily seen by everybody (*217 Cal. 631, 637)* .

[g] Commencement of Improvement as Question of Fact

English v. Olympic Auditorium, Inc. *(1933) 217 Cal. 631, 20 P.2d 946* , is discussed in *§ 152.51[3][f]*.

[h] Lesee as Agent of Owner

In ***Ott Hardware Co. v. Yost*** *(1945) 69 Cal. App. 2d 593, 159 P.2d 663* , discussed in *§ 152.51[3][d]*, in finding that the lessors' notice of nonresponsibility was ineffective to insulate their interest from the claimed mechanics' liens, because of the statutory agency relationship of the lessors and lessees as shown by the terms of the lease, the court of appeal considered the general American rule that, if the lease obligated the lessee to make improvements on the leased property, regardless of other factors, the lessee is an agent of the lessor for the purpose of rendering the whole of the

leased property subject to mechanics' liens. Although not rejecting this rule, the court stated that under the terms of the lease before it, when the lessee is obligated as a condition or covenant of the lease to make the improvements, and when a breach of the condition or covenant returns the property to the owner, and the owner promises to repay to the lessee the estimate cost of a major portion of the improvements out of future rents, the lessee is the statutory agent of the lessor for the purpose of the construction of the improvement (*69 Cal. App. 2d 593, 597-601)* .

Howard S. Wright Construction Co. v. Superior Court *(2003) 106 Cal. App. 4th 314, 130 Cal. Rptr. 2d 641* , concerned the lease of a warehouse to a telecommunications company. A supplement to the lease identified alterations that were required to establish the building as a "point of presence" on the lessee's fiber optics network. The telecommunications company subsequently declared bankruptcy. A contractor who had worked on the building filed an action to foreclose its mechanic's lien and also recorded a lis pendens. The court of appeal reversed orders of the trial court granting the property owner's motion to remove the lien and expunge the lis pendens. The court held the contractor was likely to succeed in its claim that the landlord was a "participating owner" and therefore the lien attached to the entire property (*106 Cal. App. 4th 314, 326)* . The fact that the contractor never viewed the tenant as the agent for the landlord was irrelevant, because the tenant becomes the agent of the landlord "by implication of law" when the lease requires the tenant to make improvements (*106 Cal. App. 4th 314, 325)* . The fact that the lease did not require specific improvements was not determinative. The question was whether the improvements were a practical necessity for the contemplated use of the premises, and the evidence supported the contractor's claim that renovating the premises was required to allow the tenant to conduct its fiber optics business and to allow the landlord to obtain the agreed-on rent (*106 Cal. App. 4th 314, 326)* . The absence of any cost-sharing or profit-sharing arrangement between the landlord and tenant also was not determinative. The financial entanglement existed in a different form in that the landlord stood to benefit from the higher rent made possible by the improvements (*106 Cal. App. 4th 314, 326)* .

[4] Additional Authorities

[a] Commencement of Improvement

Arthur B. Siri, Inc. v. Bridges (1961) 189 Cal. App. 2d 599, 11 Cal. Rptr. 322 , involved an action to foreclose mechanics' liens against both the vendor's and vendee's interests in real property on which the plaintiff lien claimant had done clearing and grading work at the request of the vendees. Under the land purchase contract the vendees were to subdivide the property, and on the completion of each subdivided lot, the vendor was to execute a grant deed for each lot. On learning of timber clearing operations taking place on the property, the vendor posted and recorded a notice of nonresponsibility. Subsequently, the plaintiff entered into his grading and clearing contract with the vendees. In affirming the trial court's judgment that the plaintiff had a lien on the whole of the subdivided land, the court of appeal held that a notice of nonresponsibility is premature and ineffective to relieve an owner from liability for mechanics' liens claimed for a work of improvement constructed on his or her property, if the owner posted and recorded a notice of nonresponsibility based on knowledge of the intended construction of the improvement rather than actual construction. Because the object of the notice is to bring home to those who are expending labor or materials on an improvement that the owner of the land will not be responsible for the labor or materials, and because the question of the commencement of the improvement is one of fact, the trial court, the court of appeal stated, did not abuse its discretion in determining that the logging operation was not an act that necessarily brought home to an observer that this was the commencement of the improvement of the land for subdivision purposes (*189 Cal. App. 2d 599, 601-602)* .

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§ 152.52 Opposing Motion for Summary Judgment--In Action to Foreclose Mechanics' Lien--"Pay If Paid" Provision in Subcontract Is Unenforceable

[1] FORM

[*Caption. See § 152.48.*]

THE COURT SHOULD DENY DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE IT IS BASED ON AN UNENFORCEABLE "PAY IF PAID" PROVISION IN DEFENDANT'S SUBCONTRACT WITH PLAINTIFF.

"Pay If Paid" Provision Is Unenforceable. A provision in a contract between a general contractor and a subcontractor, whereby payment by the owner to the general contractor is a condition precedent to the general contractor's obligation to pay the subcontractor for work the subcontractor has performed, is contrary to public policy and therefore unenforceable because it effects an impermissible indirect waiver or forfeiture of the subcontractor's constitutionally-protected mechanics' lien rights in the event of nonpayment by the owner. Because it is unenforceable, a pay if paid provision in a subcontract does not insulate a general contractor from its contractual obligation to pay its subcontractors for work performed (*Wm. R. Clarke Corp. v. Safeco Ins. Co. of America (1997) 15 Cal. 4th 882, 896-897, 64 Cal. Rptr. 2d 578, 938 P.2d 372*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to a motion for summary judgment when the motion is based on the existence of a "pay if paid" provision in the contract between a plaintiff subcontractor and a defendant general contractor that purports to condition the defendant's obligation to pay the plaintiff for work performed on the project owner's payment to the defendant.

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should discuss the facts showing that the contractual provision on which the motion for summary judgment is based is a pay if paid provision. In addition, counsel should attach affidavits or declarations that support the motion, as well as a separate statement in response to the moving party's statement of undisputed material facts [*Code Civ. Proc. § 437c*].

[3] Discussion of Authorities

[a] "Pay if Paid" Provision in Subcontract Is Unenforceable

In ***Wm. R. Clarke Corp. v. Safeco Ins. Co. of America*** *(1997) 15 Cal. 4th 882, 64 Cal. Rptr. 2d 578, 938 P.2d 372* , the owner of a commercial building entered into a contract with a general contractor to rehabilitate the building. The general contractor in turn entered into subcontracts for the project. The subcontracts contained a "pay if paid" provision making payment by the owner to the general contractor a condition precedent to the general contractor's obligation to pay the subcontractors. The subcontracts also contained an addendum reiterating the pay if paid provision yet purporting to preserve the subcontractors' mechanics' lien rights and making them the sole remedy if the owner failed to pay the subcontractors. The general contractor obtained a labor and material payment bond from a surety. After substantial work had been completed on the project, the owner stopped making payments to the general contractor, who then declined to pay the subcontractors. The subcontractors recorded mechanics' liens and filed actions against the surety seeking recovery under the payment bond. The trial court entered judgment for the subcontractors and the Court of Appeal affirmed.

The California Supreme Court affirmed the Court of Appeal. The surety contended that its obligation under the payment bond never matured because the liability of a surety on a private works payment bond is no greater than that of its principal, and the principal in this case never incurred any obligation to pay because a condition precedent to its payment obligation--payment by the owner--never occurred. In rejecting this argument, the Supreme Court noted that mechanics' liens are remedial legislation to be liberally construed in order to protect laborers and materialmen. By law, a subcontractor may not waive its mechanics' lien rights except in connection with a payment or a promise of payment, and a conditional release is effective only if the claimant is actually paid [*Civ. Code § 3262*]. A waiver and release of mechanics' lien rights is null, void, and unenforceable unless it follows substantially the form of one of the statutory lien waivers set forth in *Civ. Code § 3262(d)* (*15 Cal. 4th 882, 889)* . The surety contended that a pay if paid provision set forth in a construction subcontract does not violate this statutory anti-waiver provision because, under *Civ. Code § 3140*, which limits a subcontractor's recovery on a mechanics' lien claim to the amount that is due under the terms of the subcontract, mechanics' lien rights are available only to subcontractors whose payment rights have vested under the terms of their contracts. Absent such a contractual right, a subcontractor has no mechanics' lien remedy to enforce. The Supreme Court acknowledged that, strictly speaking, a pay if paid provision does not take the form of a mechanics' lien waiver. However, the court found that such a provision is in substance a waiver of mechanics' lien rights because it has the same practical effect. If the owner has become insolvent, it may never make another payment to the general contractor, the subcontractor's right to receive payment has been indefinitely postponed, and the subcontractor has effectively waived its mechanics' lien rights (*15 Cal. 4th 882, 890)* . Thus, the Court held that a pay if paid provision whereby payment by the owner to the general contractor is a condition precedent to the general contractor's obligation

to pay the subcontractor for work the subcontractor has performed, is contrary to public policy and therefore unenforceable because it effects an impermissible indirect waiver or forfeiture of the subcontractor's constitutionally-protected mechanics' lien rights in the event of nonpayment by the owner. Because it is unenforceable, a pay if paid provision in a subcontract does not insulate either general contractors or their payment bond sureties from their contractual obligations to pay subcontractors for work performed (*15 Cal. 4th 882, 890, 896-897)* .

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15-152 California Points & Authorities § 152.53

§ 152.53 Opposing Motion for New Trial [Code Civ. Proc. § 657] in Action to Foreclose Mechanics' Lien--Evidence Sufficient to Show That Chattels Installed Were Fixtures

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR NEW TRIAL
vs.	)	
_____ [*name*],	)	
Defendant.	)	Date: _____
	)	Time: _____
	)	Dept: _____
		Trial Date: _____

_____

THE COURT SHOULD DENY DEFENDANT'S MOTION FOR A NEW TRIAL BECAUSE THERE IS SUFFICIENT EVIDENCE TO SHOW THAT THE INSTALLATION OF A CHATTEL, IN CONNECTION WITH WHICH PLAINTIFF FURNISHED LABOR AND MATERIALS, CAUSED THE CHATTEL TO BECOME A FIXTURE ATTACHED TO THE REALTY.

A. Vendee or Mortgagee as Favored by Fixture Rules. As between the vendor and vendee or the mortgagor and mortgagee, the rule in reference to fixtures is construed most strongly in favor of the vendee or mortgagee (*R. Barcroft & Sons Co. v. Cullen (1933) 217 Cal. 708, 711, 20 P.2d 665*).

[*Optional*] **B. Fixture Rules Not Determined by Landlord-Tenant Rules.** Whether or not a disputed item attached to real estate is personalty or realty, for purposes of determining if the real property on which the item has been installed is

subject to a mechanics' lien, the rules governing the subject between vendor-vendee, or mortgagor-mortgagee, are applicable, rather than those that govern the subject as between landlord and tenant (*R. Barcroft & Sons Co. v. Cullen (1933) 217 Cal. 708, 714, 20 P.2d 665*).

[*Optional*] **C. Conditional Sales Contract as Not Determinative.** As between the buyer and conditional seller, goods conditionally sold may be treated as personal property with title remaining in the seller. However, as to third persons without notice, the goods may still be considered part of the land or building, thus permitting a mechanics' lien claimant to claim a lien on the goods and land of which they are a part (*R. Barcroft & Sons Co. v. Cullen (1933) 217 Cal. 708, 713-714, 20 P.2d 665*).

[*Optional*] **D. Right of Vendor to Mechanics' Lien.** The retention of title per se does not deprive a conditional vendor of an affixed chattel to a mechanics' lien as against an owner of the realty who had notice of the improvement (*Cornell v. Sennes (1971) 18 Cal. App. 3d 126, 133, 95 Cal. Rptr. 728*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for a new trial when the motion is based on the insufficiency of the plaintiff's evidence to prove that a chattel that had been installed, and in connection with which the plaintiff furnished labor and materials, became a fixture attached to the realty. The issue may be framed in terms of a claimant's claim of lien on an annexed chattel for labor and materials furnished in connection with the chattel's installation (as was the case in *R. Barcroft & Sons Co. v. Cullen (1933) 217 Cal. 708, 20 P.2d 665*), or on the realty on which the annexed chattel is located (as was the case in *Cornell v. Sennes (1971) 18 Cal. App. 3d 126, 95 Cal. Rptr. 728*). Paragraphs A and B are included in this form to show that, regardless of how the issue is framed, the factors to be applied in deciding whether the chattel is a fixture are to be construed most strongly in favor of the lien claimant, who is in a position comparable to that of a mortgagee and vendee under the rule of *R. Barcroft & Sons Co. v. Cullen (1933) 217 Cal. 708, 714, 20 P.2d 665* .

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, these points and authorities may be used in opposition to a motion supported by the points and authorities set out in *§ 152.32*.

[3] Discussion of Authorities

[a] Vendee or Mortgagee as Favored by Fixture Rules

The facts and procedural background of ***R. Barcroft & Sons Co. v. Cullen*** *(1933) 217 Cal. 708, 20 P.2d 665* , are

discussed in *§ 152.35[3][a]*. In his appeal, the appellant contended that, by virtue of the conditional sales contracts and the fact that the buildings were removable, the buildings remained personalty. The Supreme Court disagreed and affirmed the trial court's judgment, holding that the buildings were fixtures attached to the realty and, as such, were subject to the mechanics' lien. The Court reviewed those factors used in determining whether a chattel has become a fixture, and noted that one factor used is the relationship of the parties. Thus, the Court stated, as between a vendor and vendee, or mortgagor and mortgagee, the rule in reference to fixtures is construed most strongly in favor of the vendee or mortgagee, but as between landlord and tenant, the rule has been modified in reference to articles annexed for purposes of trade. Keeping these general principles in mind, the Court then determined that the conditional sales contract between the lessee and appellant, under which the property was treated as personalty with title remaining in the seller, did not in any way affect the rights of the plaintiff lien claimant to claim a lien on the premises, because the plaintiff had been without knowledge, actual or constructive, of the sales contract. Finally, the Court determined that the test to be applied in determining whether an article has become annexed to the realty is the rules governing the subject between vendor-vendee, or mortgagor-mortgagee, thereby favoring the lien claimant's position, rather than the rules governing the subject between landlord and tenant (*217 Cal. 708, 714-715)* . It should be noted that the *Barcroft* case was decided prior to those cases that developed a more comprehensive factor analysis in deciding the question of whether a chattel remained personalty or had become annexed to the realty [*see Cornell v. Sennes (1971) 18 Cal. App. 3d 126, 132, 95 Cal. Rptr. 728* ; *see also Standard Oil Co. v. State Bd. of Equalization (1965) 232 Cal. App. 2d 91, 42 Cal. Rptr. 543]* .

[b] Fixture Rules Not Determined by Landlord-Tenant Rules

See the discussion of ***R. Barcroft & Sons Co. v. Cullen*** *(1933) 217 Cal. 708, 20 P.2d 665* , in *§ 152.53[3][a]*.

[c] Conditional Sales Contract as Not Determinative

See the discussion of ***R. Barcroft & Sons Co. v. Cullen*** *(1933) 217 Cal. 708, 20 P.2d 665* , in *§ 152.35[3][c]*.

[d] Right of Vendor to Mechanics' Lien

The facts and procedural background of ***Cornell v. Sennes*** *(1971) 18 Cal. App. 3d 126, 95 Cal. Rptr. 728* , are discussed in *§ 152.32*, under Discussion of Authorities, Factors Used in Determining Whether Chattel is Fixture. The court of appeal stated the rule that real property is subject to a mechanics' lien for labor and materials only if the chattels installed became fixtures attached to the realty, and held that the trial court had erred in failing to find whether the units had become fixtures, because such a finding was essential to awarding the plaintiff a mechanics' lien, and to determine whether his subsequent actions constituted a conversion of the units and a waiver of his lien. For the assistance of the trial court, the court discussed some of the factors to be considered in determining whether the units had become fixtures. The court noted that some evidence of one factor, the intention of the parties, was contained in the plaintiff's conditional sales contract, in which the units were treated as personalty with title in the plaintiff. However, the court continued that it saw no reason why the retention of the title per se should deprive a conditional vendor of an affixed chattel to a mechanics' lien, and that it was only one of the factors to be considered by the trial court in making its determination as to whether the chattel became a fixture. The court stressed, however, that it was dealing not with a right to a lien as against subsequent purchasers, mortgagees, or other encumbrancers without notice, but, rather, with a right to a lien against the owner of the realty who had notice of an improvement and failed to file a notice of nonresponsibility. Finally, the court held that, while the plaintiff could, consistent with his rights under the sales contract, treat the units as fixtures, if, in fact, the trial court decided they were fixtures, his subsequent removal of the fixtures constituted an election to treat them as personalty and a waiver of his mechanics' lin rights (*18 Cal. App. 3d 126, 133-134)* .

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15-152 California Points & Authorities § 152.54

§ 152.54 Opposing Motion for New Trial [Code Civ. Proc. § 657] in Mechanics' Lien Foreclosure Action--Evidence Sufficient to Show That Labor Performed Resulted in Permanent Improvement

[1] FORM

[*Caption. See § 152.53.*]

THE COURT SHOULD DENY DEFENDANT'S MOTION FOR A NEW TRIAL BECAUSE THERE IS SUFFICIENT EVIDENCE TO SHOW THAT PLAINTIFF'S LABOR RESULTED IN A PERMANENT IMPROVEMENT TO THE REALTY.

[*EITHER*]

A. Work of Improvement. Except as otherwise provided in *Civil Code Sections 3082 through 3267*, a work of improvement means the entire structure or scheme of improvement. It includes, but is not restricted to, the construction, alteration, addition to, or repair, in whole or in part, of any building, wharf, bridge, ditch, flume, aqueduct, well, tunnel, fence, machinery, railroad, or road, the seeding, sodding, or planting of any lot or tract of land for landscaping purposes, the filling, leveling, or grading of any lot or tract of land, the demolition of buildings, and the removal of buildings (*Civ. Code § 3106*).

[*OR*]

A. Site Improvement. Site improvement means the demolishing or removing of improvements, trees, or other vegetation located on the site, or drilling test holes or the grading, filing, or otherwise improving of any lot or tract of land or the street, highway, or sidewalk in front of or adjoining any lot or tract of land, or constructing or installing sewers or other public utilities, or constructing any areas, vaults, cellars, or rooms under sidewalks or making any improvements on them (*Civ. Code § 3102*).

[*Optional*] **B. Preliminary Engineering Work.** The setting of permanent monuments in the ground for the purpose of land subdivision, following extensive engineering services, is an "improvement" under *Civil Code Section 3106*, and satisfies the requirement that, for a claimant to be entitled to a lien, the improvement must be of a permanent character (*Nolte v. Smith (1961) 189 Cal. App. 2d 140, 148-150, 11 Cal. Rptr. 261*).

[*Optional*] **C. Preparing Land for Agricultural Purposes.** Grading and leveling land to change the surface of the ground so that it can be irrigated for farming is a permanent improvement of the land for purposes of a mechanics' lien claim (*Thomas v. Gismegian (1923) 191 Cal. 497, 497-498, 216 P. 601*).

[*Optional*] **D. Landscaping and Maintenance.** Landscaping, and any maintenance that is necessary to insure that the planting is well established on the ground, is a work of improvement giving rise to a lien (*Howard A. Deason & Co. v. Costa Tierra, Ltd. (1969) 2 Cal. App. 3d 742, 753, 83 Cal. Rptr. 105*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for a new trial in a mechanics' lien foreclosure action when the action is based on the insufficiency of the plaintiff's evidence to prove that the plaintiff's labor resulted in a permanent improvement of the realty.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, this form may be used in opposition to a motion supported by the points and authorities set out in *§ 152.36*.

[3] Discussion of Authorities

[a] Preliminary Engineering Work

Nolte v. Smith *(1961) 189 Cal. App. 2d 140, 148-150, 11 Cal. Rptr. 261* , involved an appeal by the defendants in a mechanics' lien foreclosure action brought for engineering services rendered in connection with a land subdivision project. The trial court found that the plaintiff had been employed to perform the engineering services necessary to subdivide the property into residential lots; that he had performed all the terms of the contract; that his services had consisted of surveying, preparing a subdivision map for recording, and constructing and erecting permanent markers and monuments on the property; and that the defendants were the owners of the property, had known of the plaintiff's work, and had failed to post and record a notice of nonresponsibility, thereby making them responsible for the plaintiff's work. On appeal, defendants contended that plaintiff was not entitled to a lien, as there was insufficient evidence to

show that the plaintiff's services had been used in a work of improvement of a permanent character.

The court of appeal affirmed the trial court's judgment, and in response to this particular contention, found that the improvement in question was permanent. The court stated that the setting of permanent monuments in the ground, following extensive engineering services, was an improvement, an integral and essential part of the scheme of improvement as those terms are used in former Code of Civil Procedure Section 1182 (works of improvement) [*now see Civ. Code § 3106*], and satisfied the requirement that the improvement be of a permanent character (*189 Cal. App. 2d 140, 148-150)* .

[b] Preparing Land for Agricultural Purposes

In ***Thomas v. Gismegian*** *(1923) 191 Cal. 497, 216 P. 601* , the plaintiffs recovered a judgment in the trial court for the foreclosure of a mechanics' lien for the grading of a tract of land belonging to the defendant. The court of appeal affirmed the trial court's judgment, stating that the grading and leveling performed by the plaintiff, changing the surface of the ground so that it could be irrigated, was a permanent improvement on the land. The Court distinguished the case of *Young v. Shriver (1922) 56 Cal. App. 653, 206 P. 99* , by a finding that the leveling of the land, as done here, was in the nature of a permanent improvement, while the plowing and leveling essential to the raising of annual crops, as was the case in *Shriver,* was not work of a permanent character, because it did not contribute to the permanent value of the land (*191 Cal. 497, 497-498)* .

[c] Landscaping and Maintenance

In ***Howard A. Deason & Co. v. Costa Tierra, Ltd.*** *(1969) 2 Cal. App. 3d 742, 83 Cal. Rptr. 105* , the defendants appealed from a judgment decreeing the foreclosure of plaintiffs' mechanics' liens for work performed in connection with the construction of apartments consisting of multiple units in a subdivided tract. One issue raised on appeal by the defendant owners and construction lender was a plaintiff's claim of mechanics' lien for landscaping and landscaping maintenance. The defendants conceded that this plaintiff had a basic right to a mechanics' lien on his landscaping contract, since such work is explicitly lienable under former Code of Civil Procedure Section 1182 (works of improvement) [*now see Civ. Code § 3106*], but contended that the plaintiff could claim no lien for maintenance work performed later. The trial court made no finding as to how much of the work performed by the plaintiff was of a permanent nature. The court of appeal reversed, instructing the trial court to make a finding on this issue. The court held that plaintiff could claim a lien only for the portion of the work that was of a permanent nature, because permanency of improvement is an essential characteristic of work giving rise to a lien. For the trial court's assistance, the court stated that landscaping, and any maintenance that is necessary to insure that the planting of a lawn and shrubs by the plaintiff is well established on the ground, is a work of improvement, but that if it appeared that the plaintiff's work consisted of mowing and watering the lawn and shrubs, as alleged by the defendants, then the lien for that work would have been improperly granted (*2 Cal. App. 3d 742, 753-754)* .

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§ 152.55 Supporting Contention That Service of Process on Trustee of Deed of Trust Does Not Constitute Service of Process on Beneficiaries [Civ. Code § 2937.7]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

SERVICE OF PROCESS ON THE TRUSTEE OF A DEED OF TRUST IN AN ACTION TO FORECLOSE A MECHANICS' LIEN DOES NOT CONSTITUTE SERVICE ON THE BENEFICIARIES OF THE DEED OF TRUST AND THEY ARE NOT BOUND BY THE JUDGMENT.

Service of Process on Trustee Only Is Not Effective Service on Beneficiaries in Action to Foreclose Mechanics' Lien. Service of process on the trustee of a deed of trust in an action to foreclose a mechanics' lien does not constitute service of process on the beneficiaries of the deed of trust, and thus the beneficiaries are not bound by the judgment if they were not served (*Civ. Code § 2937.7*; *Monterey S.P. Partnership v. W.L. Bangham, Inc. (1989) 49 Cal. 3d 454, 459-463, 261 Cal. Rptr. 587, 777 P.2d 623*).

[2] Comments

[a] Use of Form

This points and authorities may be submitted in support of the contention that service of process on the trustee of a deed of trust does not constitute service of process on the beneficiaries of the deed of trust.

This points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive contention. For example, a beneficiary could use this contention in a quiet title action to quiet title to property that had been sold after a default judgment in a mechanics' lien action in which the trustee but not the beneficiaries had been served [*see, e.g., Monterey S.P. Partnership v. W.L. Bangham, Inc. (1989) 49 Cal. 3d 454, 459-463, 261 Cal. Rptr. 587, 777 P.2d 623]* .

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law

stated. Thus, counsel should include a description of the failure to serve the beneficiaries.

[3] Discussion of Authorities

[a] Service of Process on Trustee Only Is Not Effective Service on Beneficiaries in Action to Foreclose Mechanics' Lien

Civil Code Section 2937.7 provides that service on the trustee does not impose any obligation to notify the beneficiaries. This section was apparently enacted in response to the court of appeal decision that was ultimately reversed by the Supreme Court in ***Monterey S.P. Partnership v. W.L. Bangham, Inc.*** *(1989) 49 Cal. 3d 454, 261 Cal. Rptr. 587, 777 P.2d 623* .

Monterey S.P. Partnership was a quiet title action by the ultimate owner of property purchased from the beneficiaries of a deed of trust to quiet title to property that was sold to a mechanics' lien claimant. The claimant obtained a default judgment in the mechanics' lien action after service of process on the trustee, but not on the beneficiaries, of a deed of trust. The judgment quieted title in plaintiff. The claimant appealed, and the court of appeal reversed the finding of the trial court. Plaintiff sought review by the Supreme Court.

The Supreme Court reversed the court of appeal opinion. The Court held that persons who are not made parties by service of process to a mechanics' lien action are not bound by the judgment. It held that a trustee under a deed of trust does not have a duty under the deed of trust to defend the interests of the beneficiaries, and that the trustee is not the trustee of an express trust. Therefore, former Civil Code Section 369, which authorized the trustee of an express trust to defend an action on behalf of the beneficiaries, was not applicable, and service on the trustee was not service on the beneficiaries. Because the beneficiaries were not served, they were not bound by the judgment, and the ultimate owner who purchased from the beneficiaries owned the property free and clear of the mechanics' lien and default judgment (*49 Cal. 3d 454, 459-463)* .

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§ 153.syn Synopsis to Chapter 153: MENTAL SUFFERING AND EMOTIONAL DISTRESS

§ 153.01 Scope of Chapter

§ 153.02 Page Limits on Points and Authorities

§ 153.03 Related Pleading and Practice Chapters

§ 153.04 Related Points and Authorities Chapters

§§ 153.05-153.19 [Reserved]

§ 153.20 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Intentional Infliction of Mental Distress--Failure to Allege Outrageous Conduct

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Outrageous Conduct as Element of Prima Facie Case

[b] Failure to Allege Outrageous Conduct

[c] Trivialities as Insufficient

[4] Additional Authorities

[a] Failure to Allege Outrageous Conduct

[b] Trivialities as Insufficient

§ 153.21 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Intentional Infliction of Mental Distress--Complaint Does Not Allege That Defendant Intended to Cause Plaintiff Distress or That Plaintiff Was Present When Defendant Acted With Reckless Disregard of Plaintiff's Interests

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Intent as Element of Prima Facie Case

[b] Conduct Must Be Directed at Plaintiff or Occur in Presence of Plaintiff of Whom Defendant Is Aware

[4] Additional Authorities

[a] Conduct Must Be Directed at Plaintiff or Occur in Presence of Plaintiff of Whom Defendant Is Aware

§ 153.22 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Intentional Infliction of Emotional Distress--No Cause of Action for Emotional Distress on Facts Already Shown Not to Support Action for Defamation

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] No Independent Cause of Action for Intentional Infliction of Emotional Distress

§ 153.23 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Intentional Infliction of Mental Distress--No Cause of Action for Refusal to Allow Child Visitation

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] No Tort Cause of Action for Refusal to Allow Child Visitation

§ 153.24 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Intentional Infliction of Emotional Distress--No Cause of Action for Seduction [Civ. Code § 43.5(c)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] No Cause of Action for Intentional Infliction of Emotional Distress Based on Seduction of Person Over Age of Legal Consent

§ 153.25 Supporting Motion for New Trial [Code Civ. Proc. § 657] in Action for Intentional Infliction of Mental Distress--By Defendant--Insufficient Evidence of Causation

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Motion for New Trial

[b] Causation as Element of Cause of Action

[c] Proximate Cause as Question of Law in First Instance

[d] Judgment for Plaintiff as Erroneous Where Causation Not Proved

[e] Cause of Psychopathic Condition

[f] Rejection of Opinion Unsupported by Reason

§ 153.26 Supporting Motion for New Trial [Code Civ. Proc. § 657] in Action for Intentional Infliction of Mental Distress--By Defendant--Insufficient Evidence of Severe Emotional Distress

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Severe Emotional Distress as Element of Cause of Action

[b] Emotional Distress as Required to Be of Substantial Quantity or Enduring Quality

[c] Possibility of Finding Emotional Distress as Duty of Court

[4] Additional Authorities

[a] Severe Emotional Distress as Element of Cause of Action

[b] Emotional Distress as Required to Be of Substantial Quantity or Enduring Quality

§ 153.27 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action for Intentional Infliction of Mental Distress--By Defendant--Defendant's Conduct Privileged

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Conduct as Required to Be Unprivileged

[b] Assertion of Legal Rights

[c] Defamation Privileges as Applicable

[d] Filing of Complaint as Privileged

[e] Statements Made in Course of Judicial Proceeding

[f] Communications Preliminary to Proposed Judicial Proceeding

[g] Defamation Privileges Under Federal Constitution Apply

[4] Additional Authorities

[a] Defamation Privileges as Applicable

[b] Filing of Complaint as Privileged

[c] Statements Made in Course of Judicial Proceeding

§ 153.28 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action for Intentional Infliction of Mental Distress--By Defendant--Good-Faith Reliance on Advice of Informed Counsel Is Complete Defense

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Good-Faith Reliance on Advice of Informed Counsel as Complete Defense

§ 153.29 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action for Intentional Infliction of Emotional Distress--By Defendant--Federal Preemption of State Law Claim [29 U.S.C.S. § 185(a)]--Employment Relationship Governed by Collective Bargaining Agreement

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Federal Preemption of State-Law Claim

[b] Construction of Collective Bargaining Agreement

[c] Exceptions of Farmer v. Carpenters Not Applicable in Cases Under Section 301

[4] Additional Authorities

[a] Construction of Collective Bargaining Agreement

[b] Exceptions of Farmer v. Carpenters Not Applicable in Cases Under Section 301

§ 153.30 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action for Emotional Distress-By Defendant-Claims Against Airlines Stemming from Negligent Rendition of Service and Conduct of Flight Crew Preempted by Airline Deregulation Act [49 U.S.C.S. § 41713(b)(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Federal Preemption of Service Related State-Law Claims

§ 153.31 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Negligent Infliction of Mental Distress to Bystander--Injury to Third Party--Defendant Not Liable to Injured Party

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Absence of Primary Liability

[b] Adjudicated Fault Required

§ 153.32 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Negligent Infliction of Mental Distress to Bystander--Injury to Third Party--Plaintiff Not Relative of Injured Party Residing in Same Household

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Family Relationship Required for Recovery

[b] In-Laws Not Proper Plaintiffs

[c] Residence in Same Household Must Be for Substantial Period of Time

[d] Nonrelated Bystander Not Proper Plaintiff

§ 153.33 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Negligent Infliction of Mental Distress--Injury to Third Party--Plaintiff Not Contemporaneously Aware of Injury

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Failure to Observe Injury

[b] Event Required to Be Subject of Sensory Perception

[c] No Recovery for Medical Malpractice Not Perceived as Causing Harm When Conduct Occurred

[d] Contemporaneous Awareness of Injury Must Be Reasonably Certain

[4] Additional Authorities

[a] Failure to Observe Injury

[b] Event Required to Be Subject of Sensory Perception

§ 153.34 Supporting Contention That Plaintiff May Not Recover for Emotional Distress Damages Based on Attorney Malpractice Resulting Only in Economic Loss

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] No Recovery for Emotional Distress Damages When Attorney Malpractice Results in Only Economic Loss

§ 153.35 Supporting Contention That Plaintiff May Not Recover Emotional Distress Damages for Negligent Breach of Home Construction Contract Resulting Only in Economic Injury

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] No Recovery for Emotional Distress for Negligent Breach of Home Construction Contract

§ 153.36 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Negligent Infliction of Mental Distress--No Recovery for Damage to Property Without Preexisting Relationship Between Parties or Intentional Tort by Defendant

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Recovery Solely for Property Damage Requires Preexisting Relationship Between Parties or Intentional Tort by Defendant

[4] Additional Authorities

[a] Recovery Solely for Property Damage Requires Preexisting Relationship Between Parties or Intentional Tort by Defendant

§ 153.37 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Negligent Infliction of Mental Distress--Injury to Third Party--Plaintiff Not Direct Victim Because No Duty Owed

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Foreseeability Alone Is Insufficient to Impose Duty

[b] Failure to Show That Defendant's Negligence Was Directed at Plaintiff

[c] Family Relationship Alone Is Insufficient to Impose Duty

[d] No Duty Owed to Non-Using Buyer of Defective Product to Prevent Emotional Distress

[4] Additional Authorities

[a] Foreseeability Alone Is Insufficient to Impose Duty

[b] Failure to Show That Defendant's Negligence Was Directed at Plaintiff

§ 153.38 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action to Recover Damages for Emotional Distress Caused by Fear of Future Life-Threatening Disease Due to Exposure to the Disease--By Defendant--Absent Physical Injury or Illness, Plaintiff's Failure to Establish Likelihood of Disease Precludes Recovery for Fear of Disease

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Emotional Distress Damages Caused by Fear of Future Cancer Absent Present Physical Injury or Illness Recoverable Only if Plaintiff Establishes That Future Cancer Is More Likely Than Not

[4] Additional Authorities

[a] Emotional Distress Damages Caused by Fear of Disease Absent Present Physical Injury or Illness Recoverable Only if Plaintiff Establishes That Future Disease Is More Likely Than Not

§ 153.39 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Negligent Infliction of Mental Distress--Plaintiff Seeking Mental Distress Damages for Fear of Own Safety Must Establish That Defendant Owed Plaintiff Legal Duty of Care

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Plaintiff Seeking Mental Distress Damages for Fear of Own Safety Must Establish That Defendant Owed Plaintiff Legal Duty of Care

§ 153.40 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Intentional Infliction of Mental Distress--Sufficient Allegation That Defendant's Conduct Was Outrageous

[1] FORM

[2] Comments

[a] Use of Form

[b] Exclusive Remedy of Workers' Compensation

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Jury Question Where Reasonable Persons Differ

[b] Relationship of Parties

[c] Abuse of Authority

[d] Abuse of Trust

[e] Relationship of Insurer-Insured

[f] Relationship of Landlord-Tenant

[g] Relationship of Employer-Employee

[h] Special Susceptibility to Emotional Distress

[i] Insulting Language With Aggravated Circumstances

[j] Words That Result in Physical Injury

[k] Intentional or Unreasonable Acts Likely to Cause Illness

[l] Verbal Threats and Intimidation

[4] Additional Authorities

[a] Jury Question Where Reasonable Persons Differ

[b] Relationship of Parties

[c] Abuse of Authority

[d] Relationship of Insurer-Insured

[e] Relationship of Landlord-Tenant

[f] Relationship of Employer-Employee

[g] Special Susceptibility to Emotional Distress

[h] Words That Result in Physical Injury

§ 153.41 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Intentional Infliction of Mental Distress--Sufficient Allegation of Intent

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Allegation of Intent to Cause Emotional Distress as Sufficient

§ 153.42 Opposing Motion for New Trial [Code Civ. Proc. § 657] in Action for Intentional Infliction of Mental Distress--Evidence Sufficient to Show Causation

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Causation as Question of Fact When Conflicting Inferences Can Be Drawn

[4] Additional Authorities

[a] Causation as Question of Fact When Conflicting Inferences Can Be Drawn

§ 153.43 Opposing Motion for New Trial [Code Civ. Proc. § 657] in Action for Intentional Infliction of Mental Distress--Evidence Sufficient to Show Severe Emotional Distress

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Highly Unpleasant Mental Reaction as Satisfying Requirement of Emotional Distress

[b] Duration of Distress as Factor in Determining Severity

[4] Additional Authorities

[a] Highly Unpleasant Mental Reaction as Satisfying Requirement of Emotional Distress

§ 153.44 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action for Intentional Infliction of Mental Distress--Assertion of Legal Right in Outrageous Manner or in Bad Faith as Unprivileged

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Assertion of Right in Outrageous Manner

[b] Bad Faith in Asserting Legal Right

[4] Additional Authorities

[a] Assertion of Right in Outrageous Manner

§ 153.45 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Negligent Infliction of Emotional Distress to Bystander Observing Injury to Third Person--Family Relationship to Victim

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Related California Torts Discussion

[3] Discussion of Authorities

[a] Family Members Beyond Child-Parent Relationship May Recover

§ 153.46 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Negligent Infliction of Emotional Distress to Bystander Observing Injury to Third Person--Sufficient Contemporaneous Observance

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Visual Perception of Impact Not Required

[b] Plaintiff Is Not Required to Comprehend Defendant's Negligence

[c] Injury Resulting From Sudden Occurrence Not Required

[d] Plaintiff's Voluntary Presence Does Not Preclude Recovery

[4] Additional Authorities

[a] Visual Perception of Impact Not Required

[b] Injury Resulting From Sudden Occurrence Not Required

§ 153.47 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Negligent Infliction of Emotional Distress--Sufficient Guarantee of Genuineness of Claim for Serious Mental Distress

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Physical Injury Is Not Required to Recover for Negligent Infliction of Serious Emotional Distress

[b] Guarantee of Genuineness of Claim Is Found in General Standard of Proof

[c] Allegation of Defendant's Conduct Causing Foreseeable Injury Is Sufficient

[d] Emotional Distress Damages Are Recoverable If Action Based on Contract for Comfort, Happiness, or Personal Welfare

[e] Substantial Damage Is Sufficient Guaranty

[f] Outrageous Conduct Is Not Required

[4] Additional Authorities

[a] Physical Injury Is Not Required to Recover for Negligent Infliction of Serious Emotional Distress

[b] Emotional Distress Damages Are Recoverable If Action Based on Contract for Comfort, Happiness, or Personal Welfare

§ 153.48 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Negligent Infliction of Emotional Distress--Injuries Were Foreseeable Consequence of Defendant's Conduct and Resulting Intervening Cause

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Related California Torts Discussion

[3] Discussion of Authorities

[a] Injury Was Foreseeable Consequence of Defendant's Conduct and Resulting Intervention by Another

§ 153.49 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Negligent Infliction of Emotional Distress--Injury to Third Party--Plaintiff as Direct Victim

[1] FORM

[2] Comments

[a] Use of Form

[b] Limitations on Direct-Victim Theory of Liability

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Limitations Applicable to Bystanders Inapplicable to Direct Victims

[b] Direct-Victim Theory Based on Duty

[4] Additional Authorities

[a] Limitations Applicable to Bystanders Inapplicable to Direct Victims

[b] Direct-Victim Theory Based on Duty

§ 153.50 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Negligent Infliction of Mental Distress--Injury to Third Party--Sufficient Contemporaneous Observance

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Necessity of Showing Plaintiff Was Percipient Witness

[b] Plaintiff Is Not Required to Comprehend Defendant's Negligence

[c] Injury Resulting From Sudden Occurrence Not Required

[d] Plaintiff's Voluntary Presence Does Not Preclude Recovery

[4] Additional Authorities

[a] Necessity of Showing Plaintiff Was Percipient Witness

§ 153.51 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action for Negligent Infliction of Emotional Distress--Injury to Third Party--Triable Issue of Fact Exists Regarding Whether Defendant Owed Duty Directly to Plaintiff, Based on Physician-Patient Relationship or on Duty to Plaintiff Assumed by Defendant

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Defendant May Owe Plaintiff Duty of Care Arising Out of Special Relationship or Assumed Duty

§ 153.52 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action to Recover Damages for Emotional Distress Caused by Fear of Future Cancer Due to Exposure to Carcinogen--Likelihood of Cancer Not Required to Recover Emotional Distress Damages Caused by Fear of Cancer Because Defendant's Conduct in Causing Plaintiff's Exposure Constituted Oppression, Fraud, or Malice

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Defendant's Oppressive, Fraudulent, or Malicious Conduct in Exposing Plaintiff to Carcinogen Makes Proof of Likelihood of Cancer Unnecessary to Support Recovery for Fear of Cancer

California Points & Authorities

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
CHAPTER 153 MENTAL SUFFERING AND EMOTIONAL DISTRESS
PART I. INTRODUCTION

15-153 California Points & Authorities § 153.01

§ 153.01 Scope of Chapter

This chapter contains memoranda of points and authorities for use in supporting [*see §§ 153.20*-153.24] and opposing [*see §§ 153.40, 153.41*] demurrers to complaints for the intentional infliction of mental distress and supporting [*see §§ 153.25, 153.26*] and opposing [*see §§ 153.42, 153.43*] a motion for trial in such an action, as well as supporting [*see §§ 153.27*-153.30] and opposing [*see §§ 153.44, 153.51*-153.52] a motion for summary judgment. It also contains memoranda for use in supporting [*see §§ 153.31*-153.37] and opposing [*see §§ 153.45*-153.51] demurrers to complaints for the negligent infliction of mental distress.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedureSummary JudgmentMotions for Summary JudgmentWritten MotionsTortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral OverviewTortsIntentional TortsIntentional Infliction of Emotional DistressGeneral OverviewTortsNegligenceActionsNegligent Infliction of Emotional DistressGeneral Overview

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PART I. INTRODUCTION

15-153 California Points & Authorities § 153.02

§ 153.02 Page Limits on Points and Authorities

Generally, a supporting or opposing memorandum of points and authorities must not exceed 15 pages in length or, in the case of a motion for summary judgment or summary adjudication, 20 pages in length. A reply or closing memorandum may not exceed 10 pages in length [*see Cal. Rules of Ct., Rule 3.1113(d)*]. Any party desiring to file a longer memorandum must obtain leave of court [*see Cal. Rules of Ct., Rule 3.1113(e)*]. For further discussion of the page limitations under *Cal. Rules of Ct., Rule 3.1113*, and of other basic format requirements of memoranda of points and authorities, see *Ch. 1, Writing Legal Memoranda and Briefs § 1.05*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticePleadingsAmended PleadingsLeave of CourtCivil ProceduresSummary JudgmentMotions for Summary JudgmentWritten MotionsCivil ProceduresSummary JudgmentSupporting MaterialsMemoranda of Law

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15-153 California Points & Authorities § 153.03

§ 153.03 Related Pleading and Practice Chapters

For a discussion and forms of complaints and affirmative defenses involving mental suffering and emotional distress, see California Forms of Pleading and Practice, Ch. 362, *Mental Suffering and Emotional Distress* (Matthew Bender).

For discussion and forms for use in particular cases involving mental suffering and emotional distress, see the following chapters in California Forms of Pleading and Practice (Matthew Bender):

- Ch. 58, *Assault and Battery* .
- Ch. 109, *Carriers* .
- Ch. 177, *Damages* .
- Ch. 180, *Dead Bodies and Cemeteries*
- Ch. 308, *Insurance* .
- Ch. 380, *Negligence* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of CourtCivil ProcedureSummary JudgmentMotions for Summary JudgmentWritten MotionsTortsIntentional TortsIntentional Infliction of Emotional DistressGeneral Overview

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15-153 California Points & Authorities § 153.04

§ 153.04 Related Points and Authorities Chapters

A related memorandum of points and authorities that may be useful in a case involving the bad faith of an insurer may be found in Ch. 120, *Insurance* . For a discussion of how to use the forms in this chapter to draft a memorandum of points or authorities or a trial or appellate brief, and for a sample of a complete memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresSummary JudgmentMotions for Summary JudgmentWritten MotionsInsurance LawBad Faith & Extracontractual LiabilityGeneral Overview

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15-153 California Points & Authorities §§ 153.05-153.19

[Reserved]

§§ 153.05[Reserved]

California Points & Authorities

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PART II. FORMS

15-153 California Points & Authorities § 153.20

§ 153.20 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Intentional Infliction of Mental Distress--Failure to Allege Outrageous Conduct

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORIT-
vs.	)	IES IN SUPPORT OF DEMURRER TO COM-
_____ [*name(s)*],	)	PLAINT
Defendant(s).	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Dept.: _____
		Trial Date: None

_____

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION BECAUSE IT FAILS TO ALLEGE FACTS SHOWING OUTRAGEOUS CONDUCT BY THE DEFENDANT.

A. Objection by Demurrer. The party against whom a complaint has been filed may object by demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action (*Code Civ. Proc. § 430.10(e)*) when the ground for the objection to the complaint appears on the face thereof [or from any matter of which the court is required to or may take judicial notice] (*Code Civ. Proc. § 430.30(a)*).

B. Outrageous Conduct as Element of Prima Facie Case. Outrageous conduct by the defendant is an element of a prima facie case for the tort of intentional infliction of emotional distress (*Slaughter v. Legal Process & Courier Serv.*

(1984) 162 Cal. App. 3d 1236, 1248, 209 Cal. Rptr. 189 ; *Fletcher v. Western Nat'l Life Ins. Co. (1970) 10 Cal. App. 3d 376, 394, 89 Cal. Rptr. 78*).

C. Failure to Allege Outrageous Conduct. A complaint for intentional infliction of mental distress fails to state a cause of action when it fails to allege facts showing that the defendant's conduct was outrageous or has gone beyond all reasonable bounds of decency (*Slaughter v. Legal Process & Courier Serv. (1984) 162 Cal. App. 3d 1236, 1248, 209 Cal. Rptr. 189* ; *Agostini v. Strycula (1965) 231 Cal. App. 2d 804, 808, 42 Cal. Rptr. 314*).

[*Optional*] **D. Trivialities as Insufficient.** Liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities that are not extreme or outrageous, even where a special relationship exists (*Golden v. Dungan (1971) 20 Cal. App. 3d 295, 303 n.5, 304, 97 Cal. Rptr. 577* (dictum)).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a general demurrer to a complaint for intentional infliction of mental distress where the demurrer asserts that the complaint fails to state facts sufficient to constitute a cause of action in that it appears on the face thereof, or from any matter of which the court is required to or may take judicial notice, that the plaintiff has failed to allege outrageous conduct by the defendant.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Points and Authorities

In an appropriate case, the points and authorities in *§ 153.40* may be used in opposition to the demurrer supported by this memorandum of points and authorities.

[3] Discussion of Authorities

[a] Outrageous Conduct as Element of Prima Facie Case

In ***Slaughter v. Legal Process & Courier Serv.*** *(1984) 162 Cal. App. 3d 1236, 209 Cal. Rptr. 189* , plaintiff's landlord filed a complaint in unlawful detainer against plaintiff and hired defendant to serve process. Defendant signed a sworn affidavit of service stating that he had personally served plaintiff, although plaintiff had been out of town on the date defendant said he was served. After a default judgment was entered against him, plaintiff filed a motion to set it aside. At the hearing on the motion defendant testified that service was proper and identified as the person served an individual who was sitting next to plaintiff's attorney. The individual was not plaintiff, and testified that he had never been served by defendant. The default judgment was set aside. Plaintiff filed a complaint alleging several causes of

action against several defendants, among them intentional infliction of mental distress. The trial court granted defendants' motion for summary judgment, and plaintiff appealed.

The court of appeal affirmed the summary judgment in the intentional infliction of mental distress action. The court said that an action in intentional infliction of mental distress is predicated on a showing of extreme and outrageous conduct by the defendant, intended to cause extreme mental suffering. The court said that defendant's actions did not as a matter of law constitute the kind of extreme and outrageous conduct on which liability may be based (*162 Cal. App. 3d 1236, 1248)* .

In ***Fletcher v. Western Nat'l Life Ins. Co.*** *(1970) 10 Cal. App. 3d 376, 89 Cal. Rptr. 78* , the plaintiff sought damages for intentional infliction of emotional distress, as well as declaratory relief of his right to monthly payments and damages for fraud. The defendant insurance company stipulated to judgment for declaratory relief and the court granted the defendants' motions for nonsuit with respect to the cause of action for fraud in the inducement. On the cause of action for intentional infliction of emotional distress the jury returned a verdict in favor of the plaintiff, awarding compensatory and punitive damages against the defendant insurance company and its claims supervisor, Amason. Defendants moved for judgment notwithstanding the verdict and for a new trial. The motions for judgment notwithstanding the verdict were denied, as was defendant Amason's motion for new trial. After the plaintiff accepted a remission of the punitive damage award against the insurance company, its motion for new trial was denied. Defendants appealed from the judgment, as modified, and from the order denying their motions for judgment notwithstanding the verdict.

The plaintiff had purchased a disability insurance policy from the defendant insurance company which provided for payments of $150 per month to plaintiff should he become totally disabled. Payments were limited to a maximum period of two years in the event of sickness and 30 years in the event of injury. The plaintiff thereafter had an accident at work which caused various injuries, and was eventually terminated by his employer. There was virtually unanimous agreement by the physicians connected with the case that the plaintiff was disabled because of an injury to his back resulting from the accident and the defendant insurance company had knowledge of almost all of the doctors' reports. More than a year after the accident, defendant Amason concluded that the claim should be paid under the sickness provision of the policy which exposed the company to liability for only two years. The plaintiff was informed of this. Then the defendants informed the plaintiff that they regarded his condition as one of a congenital nature, and contested the validity of the policy because the plaintiff had not informed them of any such defect. After plaintiff retained an attorney, the defendant company dropped the contest and resumed some payments. The court of appeal affirmed the judgment, holding that the plaintiff had stated a case for emotional infliction of mental distress. The court listed the elements of a prima facie case, one of which was the requirement of outrageous conduct by the defendant. The defendants conceded, however, that their conduct was outrageous, but contended on appeal that their conduct was privileged, that the plaintiff's emotional distress was not of sufficient severity, and that the plaintiff's distress was not caused by the defendants' conduct. The court disagreed and found that the defendants, without probable cause for believing that the plaintiff had made an intentional material misrepresentation or that his disability was due to anything other than his injury n the job, embarked on a concerted curse of conduct to induce the plaintiff to surrender his insurance policy or enter into a disadvantageous settlement of a nonexistent dispute by means of false and threatening letters and the employment of economic pressure based on his disabled condition, exacerbated by the insurer's malicious and bad faith refusal to pay plaintiff's legitimate claim.

[b] Failure to Allege Outrageous Conduct

The facts and procedural background of *Slaughter v. Legal Process & Courier Serv. (1984) 162 Cal. App. 3d 1236, 209 Cal. Rptr. 189* , are discussed in *§ 153.20[3][a]*. The court of appeal affirmed the trial court's summary judgment in the intentional infliction of mental distress action. The court defined the elements of an action in intentional infliction of mental distress and then distinguished the facts of this from those in *Golden v. Dungan (1971) 20 Cal. App. 3d 295, 97 Cal. Rptr. 577* , another case involving an improper service. In that case, the defendant interfered with the residents'

rights to privacy and peaceful occupancy of the premises; the action was extreme and clearly implied the intent to inflict emotional distress existed. The court said that defendant's actions in this case did not permit the inference that he acted with the requisite intent to inflict emotional distress. Nor did his actions as a matter of law constitute the kind of extreme and outrageous conduct which resulted in liability (*162 Cal. App. 3d 1236, 1248)* .

In ***Agostini v. Strycula*** *(1965) 231 Cal. App. 2d 804, 42 Cal. Rptr. 314* , the plaintiff was a dismissed city employee who brought an action against other city employees for alleged interference with civil service contract relations and intentional infliction of emotional distress. A judgment of dismissal was entered after a demurrer to the complaint was sustained without leave to amend. The plaintiff had been employed as a group supervisor at the Youth Guidance Center. He was suspended from his duties on a charge of insubordination growing out of the alleged infliction of corporal punishment on a child under his care. A hearing was held at which the plaintiff appeared and was represented by counsel. Defendants, other than the defendant hearing officer, testified at the hearing that the plaintiff had used corporal punishment as discipline in violation of standing rules and instructions. He was found guilty and dismissed. It was the testimony at this hearing that was the basis for plaintiff's action for intentional infliction of emotional distress. The court of appeal affirmed the trial court's judgment of dismissal, holding, in part, that no facts showing extreme and outrageous conduct could be pleaded. Such conduct is required before liability arises.

[c] Trivialities as Insufficient

In ***Golden v. Dungan*** *(1971) 20 Cal. App. 3d 295, 97 Cal. Rptr. 577* , the plaintiffs, husband and wife, filed separate actions against common defendants. Each alleged a cause of action for intentional infliction of emotional distress. The trial court sustained the defendants' demurrers to these causes of action. The conduct on which the complaints were based consisted of the actions of the defendants' agent in pounding on the front door of the plaintiffs' home at night when the house was darkened in an attempt to serve process on the plaintiff husband. The house had a functioning doorbell but the agent did not use this. No other attempt at service had been made and the defendants had no reason to believe service of process could not be made at a reasonable time and in a reasonable manner. The loud pounding awakened the plaintiffs and their family and the neighborhood. The court of appeal reversed, holding that each plaintiff had alleged a cause of action to recover for the intentional infliction of emotional distress. One of the points on appeal was whether unnecessary pounding on the front door of a darkened house at midnight in a loud and boisterous manner, which awakened not only the occupants but also the neighborhood, could be considered extreme and outrageous conduct. The court noted that liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. However, where reasonable men may differ, it is for the jury, subject to the control of the court, to determine whether the conduct in a particular case has been sufficiently extreme and outrageous to result in liability. Thus, the judgments of dismissal were improper and the trial court was instructed to overrule the demurrers.

[4] Additional Authorities

[a] Failure to Allege Outrageous Conduct

In *Hughes v. Pair (2009) 46 Cal. 4th 1035, 95 Cal. Rptr. 3d 636, 209 P.3d 963* , one of three trustees for a $350 million trust suggested during a telephone conversation with plaintiff, the trust beneficiary's mother, that he would be amenable to voting for a sizable trust disbursement requested by her if she would engage in sexual relations with him. At a museum exhibit later that same night, he told her in person that he would "get [her] on [her] knees eventually" and that he was "going to fuck [her] one way or another." Based on these comments, she sued him for statutory sexual harassment under *Civ. Code § 51.9* and for intentional infliction of emotional distress. In rejecting plaintiff's intentional infliction of emotional distress claim, the California Supreme Court concluded, without substantial analysis, that, viewed in the context of plaintiff's previous and protracted legal battles with the trustees over allocation of the trust assets, the defendant's inappropriate comments made on that one day fell far short of conduct that is so outrageous that it "exceeds all bounds of that usually tolerated in a civilized community" (*46 Cal. 4th 1035, 1051)* .

In McMahon v. Craig (2009) 176 Cal. App. 4th 1502, ___ Cal. Rptr. 3d ___, plaintiff was the owner of a Maltese show dog that suffered from respiratory distress. When the dog was five years old, plaintiff took her to a veterinarian for surgery on her throat. Although the dog was not supposed to eat anything for 24 hours after the surgery, the veterinarian instructed an assistant to administer a mixture of water and baby food to the dog only two hours after surgery. The dog aspirated on the mixture and died a day and a half later while still under the veterinarian's care. There was also evidence that the dog had not been provided appropriate antibiotics, oxygen, glucose, and other supportive care after the surgery. Plaintiff sued the veterinarian for intentional and negligent infliction of emotional distress. The court of appeal held that although a pet owner may be emotionally involved in the pet's health and especially susceptible to emotional distress should the pet die, a veterinarian's medical care is directed solely at the pet and malpractice by a veterinarian will not support recovery by the pet owner for intentional infliction of emotional distress (*176 Cal. App. 4th 1502, 1516-1517)* . In addition, the court also concluded that efforts on the part of the veterinarian to cover up the fact that the death of the pet may have been caused by malpractice were not outrageous enough to support a cause of action for intentional infliction of emotional distress, at least when the fact that the pet has died while undergoing treatment had not been concealed from the pet owner. Plaintiff had alleged that, in the days following the surgery, the veterinarian had denied that the dog had ingested any food after the surgery, had wrongfully stated that the dog had been under constant post-operative care and never left alone, and had falsified the dog's medical records to support those claims (*176 Cal. App. 4th 1502, 1517)* .

In *Mintz v. Blue Cross of California (2009) 172 Cal. App. 4th 1594, 92 Cal. Rptr. 3d 422* , plaintiff was denied coverage for an experimental cancer treatment by the third-party administrator for plaintiff's health insurance plan. The administrator advised plaintiff of the right to internal review of that decision, but failed to notify of the right to request an independent external review as required by statute. In addition, the health plan itself stated that a member would be advised of the right to external review when the denial of services triggered such a right. Plaintiff sued the third-party administrator for intentional interference with contract, reckless infliction of emotional distress, and negligence. The trial court sustained defendant's demurrer on all causes of action, and the court of appeal affirmed as to the interference with contract and infliction of emotional distress causes of action, but reversed on the negligence cause of action. As to the infliction of emotional distress cause of action, the court of appeal held that the health plan administrator's denial of coverage for treatment it deemed to be investigational or experimental, along with a failure to advise the insured of the right to seek independent external review of that decision, did not constitute outrageous conduct that would support an action for intentional infliction of emotional distress (*172 Cal. App. 4th 1594, 1609)* .

In *Unterberger v. Red Bull North America, Inc. (2008) 162 Cal. App. 4th 414, 75 Cal. Rptr. 3d 368* , plaintiff for four years was the distributor on specified Caribbean islands of a canned energy drink manufactured by defendant. Two years after North American operations were shifted from the European division that had originally dealt with plaintiff to a newly-created North American division, the drink manufacturer ended its distributorship relationship with plaintiff. Plaintiff sued for breach of contract, fraud, and intentional infliction of emotional distress. The trial court granted nonsuit in favor of defendant manufacturer on the contract claim, finding that there was no agreement that the relationship could only be ended for good cause, and granted summary adjudication on the fraud and emotional distress claims. The court of appeal affirmed. As to the intentional infliction of emotional distress claim, the court of appeal agreed with the trial court that, as a matter of law, termination of the distributorship arrangement was not the type of outrageous conduct required to state a cause of action for intentional infliction of emotional distress (*162 Cal. App. 4th 414, 423)* .

In *Coleman v. Republic Indem. Ins. Co. (2005) 132 Cal. App. 4th 403, 33 Cal. Rptr. 3d 744* , the plaintiffs were involved in a car accident caused by another party. The plaintiffs' insurer was a subsidiary of the insurer of the other party. The plaintiffs filed a claim with the other party's insurer, and that insurer's adjuster told them that the claim was "straightforward," that the claim would be settled despite the applicable statute of limitations, and that they did not need an attorney. After the limitations period expired, the plaintiffs were told that the claim was denied and that the limitations period had expired. The plaintiffs then sued both insurers, who shared management and a common claims processing office, alleging breach of the duty of good faith and fair dealing, negligent infliction of emotional distress,

and intentional infliction of emotional distress. The trial court sustained the insurers' demurrers, and the court of appeal affirmed. The court held that under established law, as a third party to the tortfeasor's insurance contract, the plaintiffs could not sue for breach of the duty of good faith and fair dealing. Assuming that the alter ego doctrine applied to the relationship between the two insurers, the fact that the plaintiffs shared the same insurer as the tortfeasor did not change the result that they were not owed a duty of care as third-party claimants under the tortfeasor's policy (*132 Cal. App. 4th 403, 409-415)* . Because no duty of care was owed to them, the plaintiffs could not state a cause of action for negligent infliction of emotional distress (*132 Cal. App. 4th 403, 415-416)* . The court then noted that prior cases had established that the delay or denial of an insurance claim is not sufficiently outrageous to state a cause of action for intentional infliction of emotional distress. Under those authorities, the insurer's actions in misleading the plaintiffs as to the applicable limitations period and directly advising them that they would not need an attorney were not so outrageous as to support a cause of action for intentional infliction of emotional distress (*132 Cal. App. 4th 403, 416-417)* .

In *Ross v. Creel Printing & Publ'g Co. (2002) 100 Cal. App. 4th 736, 122 Cal. Rptr. 2d 787* , the plaintiff brought an action for intentional infliction of emotional distress against a publishing company and its attorneys, based on a letter sent to the plaintiff by the attorneys threatening the filing of criminal charges if the plaintiff did not make good on checks that had been sent to the publishing company by the plaintiff, but had been returned unpaid by the bank. The plaintiff alleged in his suit that the letter threatening criminal action caused him severe emotional distress, that the defendants knew this would happen, and that because the threat of criminal action to obtain an advantage in a civil action violated the California Rules of Professional Conduct, this conduct was sufficiently outrageous to support his cause of action. The trial court sustained the defendants' demurrer without leave to amend, and the court of appeal affirmed. The plaintiff had relied on earlier authority from the court of appeal in *Kinnamon v. Staitman & Snyder (1977) 66 Cal. App. 3d 893, 136 Cal. Rptr. 321* , which held that the violation of a professional rule of conduct was sufficient to find the conduct outrageous. However, the court of appeal rejected the analysis from this earlier case. The rules of professional conduct themselves now provide, in Rule 1-100, that a violation does not create a new civil cause of action. Therefore, a violation, in and of itself, does not necessarily constitute outrageous conduct sufficient to support an action for intentional infliction of emotional distress. Because the plaintiff's only basis for claiming that the letter constituted outrageous conduct was an allegation that it violated a rule of professional conduct, the plaintiff failed to allege outrageous conduct or demonstrate that he could amend the complaint to do so (*100 Cal. App. 4th 736, 745-749)* .

In *Kraslawsky v. Upper Deck Co. (1997) 56 Cal. App. 4th 179, 65 Cal. Rptr. 2d 297* , plaintiff, who was terminated after refusing to take a urinalysis drug/alcohol test under defendants' reasonable cause drug testing program, sued for intentional infliction of emotional distress. The trial court granted summary judgment in favor of defendant and plaintiff appealed. The court of appeal affirmed, stating that defendant presented evidence that its conduct was not outrageous and that plaintiff failed to proffer contrary evidence (*56 Cal. App. 4th 179, 182)* . Plaintiff's claim was based on defendants' request that she take a urinalysis test, involving a testing procedure that plaintiff admitted she did not find overly intrusive. The court found that even assuming the facts as were stated in plaintiff's declaration and that there was no individualized suspicion for the drug test, plaintiff could not establish that defendants' conduct went beyond all bounds of decency (*56 Cal. App. 4th 179, 194)* .

In *Trerice v. Blue Cross of Cal. (1989) 209 Cal. App. 3d 878, 257 Cal. Rptr. 338* , the plaintiff's allegations of her employer's outrageous conduct consisted of the following: (1) pursuant to a reduction in work force, presenting her with a termination package, which she accepted; (2) withdrawing the package the following day and telling her that she was still employed; (3) seven days later, telling her that her position would, in fact, be eliminated, effective in 30 days; (4) providing her with a termination package that was less advantageous that the one that had previously been offered; (5) during the final 30 days, assigning her to tasks that were menial compared to her prior responsibilities. The court of appeal upheld summary judgment for the defendant on these facts. Although the court agreed that the alleged conduct was less than exemplary, the court concluded that, as a matter of law, it did not qualify as the kind of outrageous conduct necessary to support an action for intentional infliction of emotional distress (*209 Cal. App. 3d 878, 883-884)* .

In *Pitman v. City of Oakland (1988) 197 Cal. App. 3d 1037, 243 Cal. Rptr. 306* , an employee of a police agency was dismissed due to information disseminated by the California Highway Patrol concerning the employee's arrest and conviction for illegal possession and use of drugs and alcohol. The employee filed an action against its employer, alleging four causes of action, including intentional infliction of emotional distress. The court of appeal affirmed the trial court's sustaining of a demurrer to the complaint, holding that mere allegations of severe emotional distress, without facts indicating the nature or extent of any mental suffering resulting from alleged outrageous conduct, failed to state a cause of action for intentional infliction of emotional distress (*197 Cal. App. 3d 1037, 1047*).

In *Cornblith v. First Maint. Supply Co. (1968) 268 Cal. App. 2d 564, 74 Cal. Rptr. 216* , the defendant's demurrer to an action based on intentional infliction of emotional distress, was sustained without leave to amend when the plaintiff indicated to the court that he was unable to more strongly plead a cause of action, and a judgment of dismissal was entered. The plaintiff alleged that he was employed by the defendant company and that the defendant officer was one of its officers. The officer refused to permit a fellow employee to service the plaintiff's accounts while the plaintiff was recovering from an accident, admonished another salesman not to give plaintiff any help, and informed other employees not to follow the customary procedure of taking phone orders from plaintiff, thereby requiring the plaintiff to mail or personally bring in his orders. The complaint alleged that the officer's acts were inflicted with malice and with the intent to injure him mentally and emotionally and that, as a consequence of the acts, plaintiff suffered humiliation and severe emotional distress. The court of appeal affirmed, holding that the trial court was correct in concluding that the complaint failed to state a cause of action. The court noted that intentional infliction of emotional distress, without physical trauma, can be a ground of liability only when the defendant's conduct is outrageous or has gone beyond all reasonable bounds of decency. The defendant officer was entitled to direct the job activities of plaintiff and his fellow salesmen, and to determine office procedure.

NOTE:

Although *Cornblith* mentions the requirement of outrageous conduct in the absence of physical trauma, later cases (in which outrageous conduct was found) have not drawn such a distinction, and have cited with approval the Restatement (Second) of Torts, which requires outrageous conduct in any intentional infliction of mental distress case [*see, e.g.,* *Golden v. Dungan (1971) 20 Cal. App. 3d 295, 302-304, 97 Cal. Rptr. 577]*

In *Scott v. McDonnell Douglas Corp. (1974) 37 Cal. App. 3d 277, 112 Cal. Rptr. 609* , one of the causes of action alleged by the plaintiff was for mental suffering and emotional distress. The trial court sustained without leave to amend a demurrer to such cause of action for failure to state a cause of action. The court of appeal affirmed, holding that under the facts of the case, the conduct charged was not sufficiently outrageous as a matter of law to support an action for intentional infliction of emotional distress.

[b] Trivialities as Insufficient

In *Cochran v. Cochran (1998) 65 Cal. App. 4th 488, 76 Cal. Rptr. 2d 540* , defendant, knowing that his former live-in girlfriend and her daughter would hear, had left a message on his son's answering machine that defendant was delivering a ticket for the daughter on an airliner that had recently suffered a well-publicized crash. The former girlfriend and her daughter sued for intentional infliction of emotional distress, alleging that they took the threat seriously because they knew defendant was angry over revelations they had made on television about their former relationships, and also alleging that defendant had made thinly-veiled threats in the past to cause them problems. The court, in sustaining a demurrer for defendant, held that the message, made in the course of a feud following the break-up of an intimate relationship, was not an actionable death threat. Rather, the court viewed the message as precisely the type of insult, indignity, threat, annoyance, petty oppression, or other triviality that were not deemed actionable under the tort (*65 Cal. App. 4th 488, 498)* .

In *Yurick v. Superior Court (1989) 209 Cal. App. 3d 1116, 257 Cal. Rptr. 665* , the plaintiff's employment supervisor

was alleged to have made comments to the effect that plaintiff was senile and a liar because she was over 40 years old. In finding this conduct insufficiently outrageous as a matter of law, the court stated that ordinarily, a defendant is not liable for mere insult, indignity, annoyance, or even threats if the case is lacking in other circumstances of aggravation. The law has not progressed to the point where there is a remedy in the form of tort damages for all intended mental disturbance. Liabilities cannot be extended to every trivial indignity. Accordingly, there is no recovery for profanity, obscenity, or abuse, without circumstances of aggravation, or for insults, indignities or threats that are considered to amount to nothing more than mere annoyances (*209 Cal. App. 3d 1116, 1128)* .

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15-153 California Points & Authorities § 153.21

§ 153.21 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Intentional Infliction of Mental Distress--Complaint Does Not Allege That Defendant Intended to Cause Plaintiff Distress or That Plaintiff Was Present When Defendant Acted With Reckless Disregard of Plaintiff's Interests

[1] FORM

[*Caption. See § 153.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT FAILS TO ALLEGE FACTS SHOWING THAT DEFENDANT EITHER DIRECTED EGREGIOUS CONDUCT TOWARD PLAINTIFF WITH THE INTENT TO CAUSE PLAINTIFF EMOTIONAL DISTRESS, OR ACTED WITH CONSCIOUS DISREGARD OF PLAINTIFF'S INTERESTS WHILE PLAINTIFF WAS PRESENT AND DEFENDANT WAS AWARE OF PLAINTIFF'S PRESENCE.

A. Objection by Demurrer. [*See § 153.20, Paragraph A.*]

B. Intent or Reckless Disregard Is Element of Prima Facie Case. The defendant's intention of causing, or reckless disregard of the probability of causing, emotional distress is an element of a prima facie case for the tort of intentional infliction of emotional distress (*Fletcher v. Western Nat'l Life Ins. Co. (1970) 10 Cal. App. 3d 376, 394, 89 Cal. Rptr. 78*).

C. Conduct Must Be Directed at Plaintiff or Occur in Presence of Plaintiff of Whom Defendant Is Aware. Conduct that is intentional or in reckless disregard of plaintiff's interest and outrageous is not sufficient to impose liability for intentional infliction of emotional distress; the conduct must either be directed at plaintiff, or occur in the presence of a plaintiff of whom the defendant is aware (*Potter v. Firestone Tire & Rubber Co. (1993) 6 Cal. 4th 965, 1002, 25 Cal. Rptr. 2d 550, 863 P.2d 795* ; *Christensen v. Superior Court (1991) 54 Cal. 3d 868, 903, 2 Cal. Rptr. 2d 79, 820 P.2d 181*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a general demurrer to a complaint for intentional infliction of mental distress where the demurrer asserts that the complaint fails to state facts sufficient to constitute a cause of action in that it appears on the face thereof, or from any matter of which the court is required to or may take judicial notice, that the plaintiff has failed to allege that the defendant either directed the outrageous conduct toward the plaintiff, or acted in the presence of a plaintiff of whom the defendant was aware.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts that tend to show that the allegedly outrageous conduct that is the basis of the cause of action was neither directed toward plaintiff nor occurred in plaintiff's presence, of which defendant was aware.

[c] Related Points and Authorities

In an appropriate case, the points and authorities in *§ 153.41* may be used in opposition to the demurrer supported by these points and authorities.

[3] Discussion of Authorities

[a] Intent as Element of Prima Facie Case

The factual background of *Fletcher v. Western Nat'l Life Ins. Co. (1970) 10 Cal. App. 3d 376, 89 Cal. Rptr. 78* , is discussed in *§ 153.20[3][a]*. In discussing the defendants' contention on appeal that the plaintiff had failed to prove facts constituting a prima facie case of intentional infliction of emotional distress, the court of appeal listed as a second element of the tort the requirement of the defendant's intention of causing or reckless disregard of the probability of causing emotional distress. In reviewing defendants' arguments concerning this portion of their appeal, the court noted that they conceded that the evidence was sufficient to support the jury's implied finding of the requisite intent or recklessness.

[b] Conduct Must Be Directed at Plaintiff or Occur in Presence of Plaintiff of Whom Defendant Is Aware

The facts and procedural background of ***Potter v. Firestone Tire & Rubber Co.*** *(1993) 6 Cal. 4th 965, 25 Cal. Rptr. 2d 550, 863 P.2d 795* , are discussed in *§ 153.38[3][a]*. The trial court had found the defendant liable for intentional infliction of emotional distress based on its finding that the disposal of liquid toxic wastes (that eventually leached into the groundwater and contaminated plaintiffs' wells) into a landfill in violation of both the rules of the landfill and company policies, in order to reduce costs, was extreme and outrageous conduct, and that defendant "had to realize" that the eventual discovery of the toxic contamination by those drinking the contaminated water would almost certainly

result in their suffering severe emotional distress. The Court found this finding ambiguous, in that it could be interpreted two ways: as a finding that defendant actually knew of the particular plaintiffs and their consumption of the water, and sent wastes to the landfill despite a realization that plaintiffs would almost certainly suffer emotional distress on their discovery of the facts; or as a finding that defendant had to have realized that its misconduct was almost certain to cause emotional distress to any person who might foreseeably consume the water and subsequently discover the facts (*6 Cal. 4th 965, 1002-1003*). The Court held that liability would not exist in the second interpretation because knowledge of the particular plaintiffs is lacking. Because *Christensen v. Superior Court (1991) 54 Cal. 3d 868, 903, 2 Cal. Rptr. 2d 79, 820 P.2d 181* , requires that liability be imposed only on a defendant whose conduct is directed at the plaintiff, or occurs in the presence of a plaintiff of whom the defendant is aware, and it was not clear whether the trial court's finding met this requirement, the cause of action was remanded (*6 Cal. 4th 965, 1003*).

Christensen v. Superior Court *(1991) 54 Cal. 3d 868, 2 Cal. Rptr. 2d 79, 820 P.2d 181* , was an action brought as a class action by relatives and designated representatives of decedents whose remains were allegedly mishandled by defendants. The complaint alleged that defendants had contracted to perform cremations with dignity, but had instead sold body parts and dental gold to other defendants, and sought to recover damages on various theories, including intentional infliction of emotional distress. On review of the trial court's ruling of standing to sue made in a coordination proceeding, the court of appeal treated the ruling as one in the nature of a demurrer, and held that, assuming for the purposes of the motion that the allegations of the complaint were true, the family members and close friends of the decedents could recover damages for intentional infliction of emotional distress because the mishandling of the remains was intentional and outrageous. The Supreme Court reversed (*54 Cal. 3d 868, 902)* .

The Court noted the following elements of the tort of intentional infliction of emotional distress: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct (*54 Cal. 3d 868, 903*). The Court stated that it is not enough that the conduct be intentional and outrageous. It must be conduct directed at plaintiff, or occur in the presence of a plaintiff of whom defendant is aware (*54 Cal. 3d 868, 903*). This requirement is a factor that distinguishes intentional infliction of emotional distress from the negligent infliction of emotional distress (*54 Cal. 3d 868, 904)* . The presence of the plaintiff at the time the outrageous conduct committed with reckless disregard of the plaintiff's interests occurs is recognized as the element establishing a higher degree of culpability, and is therefore necessary to establish the cause of action (*54 Cal. 3d 868, 906)* .

[4] Additional Authorities

[a] Conduct Must Be Directed at Plaintiff or Occur in Presence of Plaintiff of Whom Defendant Is Aware

In Sabow v. United States (9th Cir. 1996) 93 F.3d 1445 , the family of a deceased Marine Corps Colonel sued the federal government for intentional infliction of emotional distress. Plaintiffs contended that the military failed to properly investigate the Colonel's death, negligently handled his remains, and unreasonably questioned decedent's wife shortly after she had discovered her husband's body. The district court dismissed the emotional distress count for failure to state a claim. The Ninth Circuit Court of Appeals affirmed the district court's judgment as to the emotional distress count. The court held that neither the alleged failure to follow investigative guidelines nor the alleged handling of decedent's remains was conduct directed at the plaintiffs, or that occurred in the presence of plaintiffs of whom the defendant was aware. In addition, the court ruled that while the decision to question decedent's wife on the morning she found her husband, did not constitute the defendant officers' finest hour, it was not conduct was so extreme and outrageous as to be actionable under California law (93 F.3d 1445, 1455) .

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15-153 California Points & Authorities § 153.22

§ 153.22 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Intentional Infliction of Emotional Distress--No Cause of Action for Emotional Distress on Facts Already Shown Not to Support Action for Defamation

[1] FORM

[*Caption. See § 153.20.*]

THE DEMURRER TO THE COMPLAINT SHOULD BE GRANTED BECAUSE THE FACTS ALLEGED BY PLAINTIFF HAVE BEEN SHOWN TO NOT SUPPORT A CAUSE OF ACTION FOR DEFAMATION, AND THUS WILL NOT STATE AN INDEPENDENT CAUSE OF ACTION FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

No Independent Cause of Action for Intentional Infliction of Emotional Distress. There is no independent cause of action for intentional infliction of emotional distress based on the same acts which would not support a defamation action (*Flynn v. Higham (1983) 149 Cal. App. 3d 677, 682, 197 Cal. Rptr. 145*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a general demurrer to a complaint for intentional infliction of emotional distress when the basis of the complaint is an allegedly defamatory publication by defendants, which failed to support a cause of action for defamation.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Points and Authorities

For forms of points and authorities supporting and opposing contentions regarding defamation, see Ch. 142, *Libel and Slander* (*Defamation*).

[3] Discussion of Authorities

[a] No Independent Cause of Action for Intentional Infliction of Emotional Distress

In ***Flynn v. Higham*** *(1983) 149 Cal. App. 3d 677, 197 Cal. Rptr. 145* , plaintiffs brought an action for defamation, intentional infliction of emotional distress, and invasion of privacy, based on the publication of a book purporting to describe details of the life of plaintiff's deceased father. Defendants filed a demurrer for failure to state a cause of action on all three counts. The trial court sustained the demurrer with leave to amend. When plaintiffs failed to amend the demurrer within the allowed time period, the trial court entered judgment for defendants. Plaintiffs appealed from the judgment.

The court of appeal affirmed the judgment. The court held that there is no cause of action for defamation of a deceased person (*149 Cal. App. 3d 677, 680)* . The court then held that an independent cause of action for intentional infliction of emotional distress cannot be maintained based on the same facts that were insufficient to support a cause of action for defamation (*149 Cal. App. 3d 677, 681)* . The court stated that to allow a cause of action for intentional infliction of emotional distress under these circumstances would be to permit plaintiffs to do indirectly what they could not do directly, and would render meaningless any defense of truth or privilege regarding defamation (*149 Cal. App. 3d 677, 682)* .

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15-153 California Points & Authorities § 153.23

§ 153.23 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Intentional Infliction of Mental Distress--No Cause of Action for Refusal to Allow Child Visitation

[1] FORM

[*Caption. See § 153.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION BECAUSE PLAINTIFF CANNOT BRING A TORT CAUSE OF ACTION FOR REFUSAL TO ALLOW CHILD VISITATION IN CALIFORNIA, AND PLAINTIFF'S EXCLUSIVE REMEDY LIES UNDER THE FAMILY LAW ACT.

A. Objection by Demurrer. [*See § 153.20, Paragraph A.*]

B. No Tort Cause of Action for Refusal to Allow Child Visitation. No tort cause of action exists in California for intentional infliction of emotional distress against a former spouse who has custody of a child for refusal to allow court-ordered visitation of the child by the other former spouse. Instead, the noncustodial spouse's exclusive remedy lies under the Family Law Act, which would be undermined if the courts were to recognize a damages cause of action under these circumstances (*In re Marriage of Segel (1986) 179 Cal. App. 3d 602, 607-609, 224 Cal. Rptr. 591*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a general demurrer to a complaint for intentional infliction of mental distress that is brought against a custodial former spouse who has refused to allow the noncustodial spouse visitation with their child.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For further discussion and related forms, see California Forms of Pleading and Practice, Ch. 220, *Dissolution of Marriage and Related Proceedings* , and Ch. 362, *Mental Suffering and Emotional Distress* (Matthew Bender).

[3] Discussion of Authorities

[a] No Tort Cause of Action for Refusal to Allow Child Visitation

In ***In re Marriage of Segel*** *(1986) 179 Cal. App. 3d 602, 224 Cal. Rptr. 591* , a judgment of dissolution of marriage had been granted to plaintiff wife and defendant husband. When defendant husband later initiated proceedings to modify his spousal support to plaintiff wife, the parties renegotiated the terms of the marital settlement agreement and agreed to transfer physical custody of their child from plaintiff wife to defendant husband. Thereafter, defendant husband refused to allow plaintiff wife to visit the child. Plaintiff wife then initiated an action against defendant husband, the fourth cause of action of which was for damages from intentional infliction of emotional distress for defendant husband's refusal to allow child visitation. The trial court sustained a demurrer to the fourth cause of action, and plaintiff wife appealed.

The court of appeal affirmed, holding that no tort cause of action could be brought for failure to allow child visitation. The court first held that the cause of action, although termed one for intentional infliction of emotional distress, was actually for loss of filial consortium, which has not been recognized as a basis for a cause of action in California (*179 Cal. App. 3d 602, 607-608)* . Further, the court held that the exclusive remedy of a spouse to enforce her right to visitation with her child lies under the former Family Law Act (former Civ. Code §§ 4000-5317 (*now see* Family Code)), and that judicial recognition of a cause of action for loss of filial consortium would create an unwarranted remedy of monetary damages and should be rejected because it would undermine the purposes of the Act, which is designed to regulate and supervise the care, custody, and financial support of minor children whose parents are the subject of dissolution proceedings (*179 Cal. App. 3d 602, 608-609)* .

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15-153 California Points & Authorities § 153.24

§ 153.24 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Intentional Infliction of Emotional Distress--No Cause of Action for Seduction [Civ. Code § 43.5(c)]

[1] FORM

[*Caption. See § 153.20.*]

DEFENDANT'S DEMURRER TO THE COMPLAINT FOR DAMAGES FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS SHOULD BE SUSTAINED BECAUSE THE ACTION IS BASED ON DEFENDANT'S ALLEGED SEDUCTION OF PLAINTIFF AND THE CAUSE OF ACTION FOR SEDUCTION OF PERSONS OVER THE AGE OF LEGAL CONSENT HAS BEEN ABOLISHED.

A. Action for Seduction Abolished. No cause of action arises for seduction of a person over the age of legal consent (*Civ. Code § 43.5(c)*).

B. No Cause of Action for Intentional Infliction of Emotional Distress Based on Seduction of Person Over Age of Legal Consent. Because the action for seduction of a person over the age of legal consent has been abolished by *Section 43.5(c) of the Civil Code*, a complaint for damages for intentional infliction of emotional distress resulting from defendant's alleged seduction of plaintiff, who at all times was over the age of legal consent, fails to state facts sufficient to constitute a cause of action (*Atienza v. Taub (1987) 194 Cal. App. 3d 388, 394, 239 Cal. Rptr. 454*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a general demurrer to a complaint for damages for intentional infliction of emotional distress when the act complained of is the alleged seduction of a person who was over the age of legal consent.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] No Cause of Action for Intentional Infliction of Emotional Distress Based on Seduction of Person Over Age of Legal Consent

Atienza v. Taub *(1987) 194 Cal. App. 3d 388, 239 Cal. Rptr. 454* , was an action by a former patient against a physician for damages for medical malpractice and intentional infliction of emotional distress arising out of sexual relations she allegedly was induced to engage in with the physician during the course of her treatment. Plaintiff alleged she went to defendant for treatment for phlebitis allegedly sustained as the result of an industrial injury and that during the course of the treatment defendant seduced her into having sexual relations and an affair. She alleged that by initiating a sexual relationship with her while she was under his care, defendant failed to adequately care for and treat her by abusing her psychologically while purportedly treating her physically. She also alleged in the emotional distress cause of action that defendant's conduct constituted a conscious and reckless disregard for the risk to her health and well-being, entitling her to punitive damages. The trial court sustained defendant's demurrer to the complaint on the professional negligence cause of action, and overruled the demurrer to the emotional distress cause of action. Defendant secured the issuance of an alternative writ of mandate pursuant to which the trial court vacated its earlier order to the extent it overruled the demurrer and ordered the demurrer sustained without leave to amend. The court then dismissed the action.

The court of appeal first affirmed the judgment of dismissal for defendant on the cause of action for medical malpractice on the ground the complaint did not allege that the defendant physician engaged in sexual relations with the plaintiff on the pretext that they were a necessary part of her treatment; the court concluded that the sexual relations were outside the patient-physician relationship (*194 Cal. App. 3d 388, 391-394)* . The court then affirmed the dismissal of the cause of action for intentional infliction of emotional distress on the ground the core of the action was an allegation of seduction and that an action for seduction of a person over the age of legal consent has been abolished by *Civ. Code § 43.5(c)* (*194 Cal. App. 3d 388, 394)* . The court said that the complaint alleged an action for seduction rather than malpractice and that such an action, standing alone, is barred by *Civ. Code § 43.5* (*194 Cal. App. 3d 388, 394-395)* .

In ***Richelle L. v. Roman Catholic Archbishop*** *(2003) 106 Cal. App. 4th 257, 130 Cal. Rptr. 2d 601* , which does not specifically discuss the requirements of a cause of action for intentional or negligent infliction of emotional distress, the court of appeal held that a member of the clergy may be subject to tort liability for sexually inappropriate conduct with a consenting adult parishioner, under the theory that the conduct has breached a fiduciary duty arising out of a confidential relation, if the alleged injurious conduct was not dictated by a sincerely held religious belief or carried out in accordance with established beliefs and practices of the religion to which the pastor belongs and if no other reason prevents the issues from being framed for the trier of fact in secular rather than sectarian terms (*106 Cal. App. 4th 257, 279)* . However, the court rejected the plaintiff's claim for two reasons. First, the plaintiff failed to allege that the misconduct occurred while the pastor was providing counseling services to the plaintiff (*106 Cal. App. 4th 257, 280)* . Second, the plaintiff alleged that the depth of her religious faith rendered her especially vulnerable to the pastor's

advances, which the court concluded was fatal to her tort claims, because such a claim cannot be adjudicated without reference to the nature of plaintiff's religious beliefs and the doctrines of the church (*106 Cal. App. 4th 257, 280-281)* .

In ***McDaniel v. Gile*** *(1991) 230 Cal. App. 3d 363, 281 Cal. Rptr. 242* , a client sought damages for intentional infliction of emotional distress from her attorney on the ground that he had abandoned her dissolution case because she would not submit to his sexual demands. The trial court granted summary adjudication of issues against the client, finding in part that the action was barred by *Civ. Code § 43.5*.

The court of appeal reversed, finding sufficient allegations of outrageous conduct. The court found that *Atienza* did not preclude the claim. The client did not have sexual relations with the attorney, and thus was not seeking damages for seduction, but rather was seeking damages for what amounted to sexual harassment (*230 Cal. App. 3d 363, 374)* . The court found both that the attorney had abused a special relationship with the client, and that the client was peculiarly susceptible to emotional distress because of her pending marital dissolution (*230 Cal. App. 3d 363, 373)* .

NOTE:

The court's language and analysis in *McDaniel v. Gile* suggests that not all cases of emotional distress arising from consensual sexual intercourse between adults can be dismissed as disguised actions for seduction. The court noted that the outdated action for seduction protected a young, inexperienced woman from older men's sexual advances, and required that she be chaste and virtuous at the time of seduction [*McDaniel v. Gile (1991) 230 Cal. App. 3d 363, 374, 281 Cal. Rptr. 242]* . That situation is very different from the abuse of a fiduciary relationship by demanding and having sexual intercourse with someone who is particularly susceptible to emotional distress. Such conduct might be considered outrageous enough to state a cause of action for intentional infliction of emotional distress, rather than merely the basis of a claim for damages for seduction that is barred by *Civ. Code § 43.5*. Also, *Civ. Code § 43.93* creates a cause of action against a psychotherapist, permitting recovery of damages caused by sexual contact with the psychotherapist under specified conditions.

California Points & Authorities

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
CHAPTER 153 MENTAL SUFFERING AND EMOTIONAL DISTRESS
PART II. FORMS

15-153 California Points & Authorities § 153.25

§ 153.25 Supporting Motion for New Trial [Code Civ. Proc. § 657] in Action for Intentional Infliction of Mental Distress--By Defendant--Insufficient Evidence of Causation

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN SUPPORT OF MOTION FOR NEW TRIAL
vs.	)	[*Code Civ. Proc. § 657*]
_____ [*name(s)*],	)	Date: _____
Defendant(s).	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

GRANTING A MOTION FOR A NEW TRIAL IS PROPER BECAUSE PLAINTIFF'S EVIDENCE IS INSUFFICIENT TO PROVE THAT DEFENDANT'S CONDUCT CAUSED THE EMOTIONAL DISTRESS.

A. Motion for New Trial. On the application of the party aggrieved, the _____ [verdict *or* decision] may be vacated, in whole or in part, and a new trial may be granted, on all or some of the issues, on the ground that the evidence is insufficient to justify the _____ [verdict *or* decision], if substantial rights of the aggrieved party are materially affected thereby (*Code Civ. Proc. § 657*).

B. Causation as Element of Cause of Action. Actual and proximate causation of the plaintiff's emotional distress by

the defendant's outrageous conduct is an element of a cause of action for intentional infliction of emotional distress (*Fletcher v. Western Nat'l Life Ins. Co. (1970) 10 Cal. App. 3d 376, 394, 89 Cal. Rptr. 78* (dictum)).

C. Proximate Cause as Question of Law in First Instance. Proximate cause is legal cause, as distinguished from actual cause, and is always, in the first instance, a question of law (*Golden v. Dungan (1971) 20 Cal. App. 3d 295, 311, 97 Cal. Rptr. 577*).

D. Judgment for Plaintiff as Erroneous Where Causation Not Proved. Where the evidence is not sufficient to establish that the defendant's misconduct was the cause of the plaintiff's emotional distress or mental state, a judgment for the plaintiff is erroneous (*Spackman v. Good (1966) 245 Cal. App. 2d 518, 534-535, 54 Cal. Rptr. 78*).

[*Optional*] **E. Cause of Psychopathic Condition.** Particular inquiry should be directed to the sufficiency of proof of the cause of a psychopathic condition where the only evidence on the issue is the conflicting opinions of experts (*Spackman v. Good (1966) 245 Cal. App. 2d 518, 533, 54 Cal. Rptr. 78*).

[*Optional*] **F. Rejection of Opinion Unsupported by Reason.** An expert opinion not supported by reason or contrary to reason in the light of a scrutinizing analysis to ascertain the presence or absence of supportive facts, should be rejected as a matter of law (*Spackman v. Good (1966) 245 Cal. App. 2d 518, 533, 54 Cal. Rptr. 78*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for a new trial in an action for intentional infliction of mental distress that resulted in a judgment in favor of the plaintiff. The ground of the motion would be that evidence that the defendant's conduct caused the plaintiff's emotional distress was insufficient to support the verdict or decision [*see Code Civ. Proc. § 657(6)*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications these points and authorities may be used to support a motion for summary judgment by a defendant in an intentional infliction of mental distress action.

[c] Related Pleading and Practice Forms

For a form of notice of intention to move for a new trial, and a form of order granting such a motion, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[d] Related Points and Authorities

In an appropriate case, the points and authorities in *§ 153.42* may be used in opposition to the motion supported by this memorandum of points and authorities.

[3] Discussion of Authorities

[a] Motion for New Trial

Insufficiency of evidence to justify a verdict or other decision is a ground for granting a new trial [*Code Civ. Proc. § 657(6)*]. Accordingly, if a court or jury in an intentional infliction of mental distress action finds that a defendant's conduct caused the plaintiff's emotional distress, and the evidence is insufficient to establish the element of causation, a motion for new trial on the ground of insufficiency of the evidence would be appropriate.

A party seeking a new trial must file a notice of intention to move for a new trial [*Code Civ. Proc. § 659*] supported by a memorandum of points and authorities [*Cal. Rules of Ct., Rule 3.1600*], and a motion on the ground of insufficiency of the evidence to justify the verdict or other decision must be made on the minutes of the court [*Code Civ. Proc. § 658*]. Where the motion is made on the minutes, reference may be made to any depositions or documentary evidence offered at trial, and to the court reporter's report of the proceedings or any certified transcript of the report [*Code Civ. Proc. § 660*]. For more complete analysis of motions for new trial, see Ch. 155, *Motions After Trial* .

[b] Causation as Element of Cause of Action

The factual background of ***Fletcher v. Western Nat'l Life Ins. Co.*** *(1970) 10 Cal. App. 3d 376, 89 Cal. Rptr. 78* , is discussed in *§ 153.20[3][a]*. In discussing the defendants' contention on appeal that the plaintiff had failed to prove facts constituting a prima facie case of intentional infliction of emotion distress, the court of appeal listed as an element of the tort the requirement of actual and proximate causation of the emotional distress by the defendants' outrageous conduct. The defendants claimed on appeal that, whatever emotional distress the plaintiff may have suffered, it was not caused by their conduct, but, rather by the plaintiff's unfortunate economic situation. The court noted that the premise of their claim was that the theory of the plaintiff's pleadings was confined to two letters which defendants had written to plaintiff and in which they stated their intention to discontinue further payments under the insurance policy because of the plaintiff's material misrepresentation concerning his alleged congenital defect. The defendants were, thus, claiming that these letters constituted the instrumentality of the tort and that, therefore, their conduct constituted a breach of contract and did not give rise to a cause of action sounding in tort. The court held, however, that the plaintiff had tried his case without objection on the theory that the defendants' entire course of conduct was the instrumentality of the tort. More important, the court rejected the claim that the defendants' conduct was not tortious by stating that the implied in law duty of good faith and fair dealing imposes on a disability insurer a duty not to threaten to withhold or actually withhold payments, maliciously and without probable cause, for the purpose of injuring its insured by depriving him or her of the benefits of the policy. The court further stated that the relationship of the parties is significant in determining wether the violation of this duty may be the basis for an action for damages for the intentional infliction of emotional distress and found that, where as here the defendant offers services of a quasi-public nature and has implied in law duties towards those persons for whom the services are offered arising out of the vulnerability of those persons to oppressive economic tactics, the liability of a defendant such as the defendants in this case cannot be limited to breach of contract, but, in addition, extends to damages a plaintiff may have suffered for severe emotional distress.

[c] Proximate Cause as Question of Law in First Instance

In ***Golden v. Dungan*** *(1971) 20 Cal. App. 3d 295, 97 Cal. Rptr. 577* , the plaintiffs, husband and wife, filed separate actions against common defendants. Each alleged a cause of action for intentional infliction of emotional distress. The trial court sustained the defendants' demurrers to these causes of action. The conduct on which the complaints were based consisted of the actions of the defendants' agent in pounding on the front door of the plaintiffs' home at night

when the house was darkened in an attempt to serve process on the plaintiff husband. The house had a functioning doorbell but the agent did not use this. No other attempt at service had been made and the defendants had no reason to believe service of process could not be made at a reasonable time and in a reasonable manner. The loud pounding awakened the plaintiffs and their family and the neighborhood. The court of appeal reversed, holding that each plaintiff had alleged a cause of action to recover for the intentional infliction of emotional distress. The court noted that proximate cause is a question of law in the first instance. But it becomes a question of fact when conflicting inferences or conclusions can be drawn from the evidence.

[d] Judgment for Plaintiff as Erroneous Where Causation Not Proved

In ***Spackman v. Good*** *(1966) 245 Cal. App. 2d 518, 54 Cal. Rptr. 78* , a guardian brought an action on behalf of two minors to recover damages for willfully injurious misconduct causing the minors emotional and mental distress and disturbance. Judgment was entered for plaintiffs. The defendant appealed from an order denying his motion for judgment notwithstanding the verdict and from the judgment awarding damages. The plaintiff minors lived with the defendant and his wife and their mother for a one or two month period during their parents' divorce proceedings. The evidence on the issue of the defendant's misconduct showed discussions of topics involving sex in the minors' presence, furnishing liquor to the minors, and allowing the minor girl to spend the night with a boy and go to a drinking party. The court of appeal reversed with instructions to enter judgment in favor of defendant. One of the grounds for reversal was that the evidence was not sufficient to establish that the defendant's misconduct was the cause of plaintiffs' mental state. The court noted the reluctance to impose liability because of problems of proof inherent in the issue of causation incident to recovery for psychopathic or psychoneural disorders. While such difficulties do not bar recovery in such cases, the complexity of the issue of causation in actions seeking recovery for mental or emotional distress or disturbance should be recognized. Particular inquiry should be directed to the sufficiency of proof of the cause of a condition where, as in the case at hand, the only evidence on the issue is the conflicting opinions of experts. The issue must be decided on a case-to-case basis. In determining whether an expert opinion is legally sufficient proof of the cause of a psychopathic condition, the court must subject the evidence to a scrutinizing analysis to ascertain the presence or absence of supportive factors. An opinion not supported by reason or contrary to reason in light of such an analysis, should be rejected as a matter of law. In this case, the hypothetical questions used to develop the experts' opinions on the issue of causation included unproven acts of misconduct by the defendant and failed to include other pertinent causative factors, such as the plaintiff's parents' domestic disputes climaxing in divorce and custody proceedings. The court concluded that the expert opinions on the issue of causation lacked that degree of probative force essential to legal proof.

[e] Cause of Psychopathic Condition

Spackman v. Good *(1966) 245 Cal. App. 2d 518, 54 Cal. Rptr. 78* , is discussed in *§ 153.25[3][d]*.

[f] Rejection of Opinion Unsupported by Reason

Spackman v. Good *(1966) 245 Cal. App. 2d 518, 54 Cal. Rptr. 78* , is discussed in *§ 153.25[3][d]*.

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15-153 California Points & Authorities § 153.26

§ 153.26 Supporting Motion for New Trial [Code Civ. Proc. § 657] in Action for Intentional Infliction of Mental Distress--By Defendant--Insufficient Evidence of Severe Emotional Distress

[1] FORM

[*Caption. See § 153.25.*]

GRANTING A MOTION FOR A NEW TRIAL IS PROPER WHERE THE PLAINTIFF'S EVIDENCE IS INSUFFICIENT TO PROVE THAT THE PLAINTIFF SUFFERED SEVERE OR EXTREME EMOTIONAL DISTRESS AS A RESULT OF THE DEFENDANT'S CONDUCT.

A. Motion for New Trial. [*See § 153.25, Paragraph A.*]

B. Severe Emotional Distress as Element of Cause of Action. The plaintiff's suffering of severe or extreme emotional distress is an element of a prima facie case for the tort of intentional infliction of emotional distress (*Fletcher v. Western Nat'l Life Ins. Co. (1970) 10 Cal. App. 3d 376, 394, 89 Cal. Rptr. 78*).

C. Emotional Distress as Required to Be of Substantial Quantity or Enduring Quality. Severe emotional distress means emotional distress of such substantial quantity or enduring quality that no reasonable person in a civilized society should be expected to endure it (*Fletcher v. Western Nat'l Life Ins. Co. (1970) 10 Cal. App. 3d 376, 397, 89 Cal. Rptr. 78*).

D. Possibility of Finding Emotional Distress as Duty of Court. It is for the court to determine whether on the evidence severe emotional distress can be found, [while it is for the jury to determine whether on the evidence it has in fact existed] (*Fletcher v. Western Nat'l Life Ins. Co. (1970) 10 Cal. App. 3d 376, 397, 89 Cal. Rptr. 78*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for a new trial in an action for intentional infliction of emotional distress which resulted in a judgment in favor of the plaintiff. The ground of the motion would be that the evidence that the plaintiff suffered severe or extreme emotional distress was insufficient to support the verdict or decision [see *Code Civ. Proc. § 657(6)*].

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications these points and authorities may be used to support a motion for summary judgment by a defendant in an intentional infliction of emotional distress action. However, it should be noted that, where a plaintiff adequately alleges facts showing that the plaintiff suffered severe emotional distress, such as by alleging that plaintiff became frightened, upset, nervous, and humiliated, and suffered extreme mental suffering and duress, the determination of the court as to whether on the evidence severe emotional distress can be found is a question which cannot be resolved in the pleading stage [*Golden v. Dungan (1971) 20 Cal. App. 3d 295, 311, 97 Cal. Rptr. 577]* and which normally will only be resolved after the court in a trial on the merits has heard all the evidence relating to the emotional distress suffered by the plaintiff.

[c] Related Pleading and Practice Forms

For a form of notice of intention to move for a new trial, and a form of order granting such a motion, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[d] Related Points and Authorities

In an appropriate case, the point and authorities in *§ 153.43* may be used in opposition to the motion supported by this memorandum of points and authorities.

[3] Discussion of Authorities

[a] Severe Emotional Distress as Element of Cause of Action

The factual background of ***Fletcher v. Western Nat'l Life Ins. Co.*** *(1970) 10 Cal. App. 3d 376, 89 Cal. Rptr. 78* , is discussed in *§ 153.20[3][a]*. In discussing the defendants' contention on appeal that the plaintiff had failed to prove facts constituting a prima facie case of intentional infliction of emotional distress, the court of appeal listed as an element of the tort the requirement that plaintiff suffer severe or extreme emotional distress. The defendants contended on appeal that there was no evidence that the plaintiff had suffered emotional distress of sufficient severity to establish the tort by arguing that the testimony established at most that the plaintiff was only mildly upset by the defendants' conduct. In rejecting the defendants' contention, the court noted that no case had adequately defined the term "severe."

Relying on Restatement (Second) of Torts § 46, comment j, the court found that "severe" means substantial or enduring, as distinguished from trivial or transitory, and that, therefore, severe emotional distress means emotional distress of such substantial quantity or enduring quality that no reasonable person in a civilized society should be expected to endure it. The court added that it is for the court to determine whether on the evidence severe emotional distress can be found, and that it was for the jury to determine whether on the evidence it has in fact existed. In affirming the trial court's judgment, the court concluded that there was sufficient evidence from which emotional distress of the requisite severity could be found and that there also was substantial evidence to support the jury's determination that it in fact existed. The court noted in this respect that, although the plaintiff did not suffer any traumatic emotional distress, the evidence was sufficient to show that the plaintiff had suffered severe emotional distress by suffering grief, humiliation, embarrassment, chagrin, disappointment, and worry.

[b] Emotional Distress as Required to Be of Substantial Quantity or Enduring Quality

Fletcher v. Western Nat'l Life Ins. Co. *(1970) 10 Cal. App. 3d 376, 89 Cal. Rptr. 78* , is discussed in *§ 153.26[3][a]*.

[c] Possibility of Finding Emotional Distress as Duty of Court

Fletcher v. Western Nat'l Life Ins. Co. *(1970) 10 Cal. App. 3d 376, 89 Cal. Rptr. 78* , is discussed in *§ 153.26[3][a]*.

[4] Additional Authorities

[a] Severe Emotional Distress as Element of Cause of Action

In *Pitman v. City of Oakland (1988) 197 Cal. App. 3d 1037, 243 Cal. Rptr. 306* , an employee of a police agency was dismissed due to information disseminated by the California Highway Patrol concerning the employee's arrest and conviction for illegal possession and use of drugs and alcohol. The employee filed an action against the agency, alleging four causes of action, including intentional infliction of emotional distress. The court of appeal affirmed the trial court's sustaining of a demurrer to the complaint, holding that mere allegations of severe emotional distress, without facts indicating the nature or extent of any mental suffering resulting from alleged outrageous conduct, failed to state a cause of action for intentional infliction of emotional distress (*197 Cal. App. 3d 1037, 1047)* .

[b] Emotional Distress as Required to Be of Substantial Quantity or Enduring Quality

Schild v. Rubin (1991) 232 Cal. App. 3d 755, 283 Cal. Rptr. 533 , involved an action under *Code Civ. Proc. § 527.6* for an injunction prohibiting harassment, defined to include conduct that would cause a reasonable person to suffer "substantial emotional distress" [*see Code Civ. Proc. § 527.6(b)*]. The conduct complained of involved playing basketball on the neighboring property at reasonable times of the day for less than 30 minutes at a time and no more than five times per week. In rejecting the injunction, the court of appeal analogized to the tort of intentional infliction of emotional distress, for purposes of which "severe emotional distress" means highly unpleasant mental suffering or anguish from socially unacceptable conduct that entails such intense, enduring, and nontrivial emotional distress that no reasonable person in a civilized society should be expected to endure it (*232 Cal. App. 3d 755, 762-763)* .

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15-153 California Points & Authorities § 153.27

§ 153.27 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action for Intentional Infliction of Mental Distress--By Defendant--Defendant's Conduct Privileged

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*(*s*)],	)	IES IN SUPPORT OF MOTION FOR SUMMARY
Defendant(s).	)	JUDGMENT
	)	[*Code Civ. Proc. § 437c*]
	)	

_____

SUMMARY JUDGMENT FOR DEFENDANT IS PROPER WHERE THE DEFENDANT'S CONDUCT WAS PRIVILEGED.

A. Summary Judgment. A defendant may move for summary judgment in any action or proceeding if it is contended that the action has no merit. Such motion must be granted if all of the papers submitted show that there is no triable issue as to any material fact and that defendant is entitled to judgment as a matter of law (*Code Civ. Proc. § 437c*).

B. Conduct as Required to Be Unprivileged. To impose liability on the theory of intentional infliction of emotional distress it must appear that the defendant's conduct was unprivileged (*Kachig v. Boothe (1971) 22 Cal. App. 3d 626, 641, 99 Cal. Rptr. 393*).

[*EITHER*]

C. Assertion of Legal Rights. A person is privileged to assert his legal rights even though it is substantially certain that in so doing emotional distress will be caused if done in a permissible way and with a good-faith belief in the existence of the rights asserted (*see Girard v. Ball (1981) 125 Cal. App. 3d 772, 786-787, 178 Cal. Rptr. 406* ; *Fletcher v. Western Nat'l Life Ins. Co. (1970) 10 Cal. App. 3d 376, 395, 89 Cal. Rptr. 78* (dictum)).

[*OR*]

C. Defamation Privileges as Applicable. A cause of action for intentional infliction of emotional distress which is based on the defamatory nature of a particular communication, that is itself privileged under the defamation laws, is not permitted (*Lerette v. Dean Witter Org., Inc. (1976) 60 Cal. App. 3d 573, 579, 131 Cal. Rptr. 592*).

[*CONTINUE*]

[*Optional*] **D. Filing of Complaint as Privileged.** The filing of a lawsuit is a publication in the course of a judicial proceeding, which is absolutely privileged under Section 47, subdivision b, of the Civil Code. This privilege not only defeats a claim for defamation, but also for intentional infliction of emotional distress (*Williams v. Coombs (1986) 179 Cal. App. 3d 626, 639, 645, 224 Cal. Rptr. 865*).

[*Optional*] **E. Statements Made in Course of Judicial Proceeding.** A privilege, analogous to that described in *Section 47(b) of the Civil Code*, protects witnesses in an official proceeding from liability for claimed intentional infliction of emotional distress as a result of statements made by them in the course of the proceeding (*Agostini v. Strycula (1965) 231 Cal. App. 2d 804, 808, 42 Cal. Rptr. 314*).

[*Optional*] **F. Communications Preliminary to Proposed Judicial Proceeding.** The absolute privilege contained in *Section 47(b) of the Civil Code* for a publication made in any judicial proceeding extends to communications preliminary to a proposed judicial proceeding and operates to prevent a suit for intentional infliction of emotional distress based on those communications (*Lerette v. Dean Witter Org., Inc. (1976) 60 Cal. App. 3d 573, 576-578, 579, 131 Cal. Rptr. 592*).

[*Optional*] **G. Defamation Privileges Under Federal Constitution Apply.** Constitutional privileges arising under the *First Amendment* apply to actions for intentional infliction of emotional distress (*Hustler Magazine v. Falwell (1988) 485 U.S. 46, 50, 108 S. Ct. 876, 99 L. Ed. 2d 41*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for summary judgment when the motion asserts that defendant is entitled to a judgment as a matter of law since the defendant's conduct was privileged either because he or she was asserting a legal right or because a privilege analogous to that in defamation actions existed.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations which support the motion [*Code Civ. Proc. § 437c*].

[b] Related Uses

With appropriate modifications these points and authorities may be used to support a demurrer to a complaint for intentional infliction of mental distress when the privilege appears on the face of the complaint. In a case in which a qualified privilege appears on the face of the complaint, a plaintiff must allege specific facts showing malice in defeating the privilege, rather than conclusory facts [*see Vescovo v. New Way Enters., Ltd. (1976) 60 Cal. App. 3d 582, 589, 130 Cal. Rptr. 86]* . However, facts showing that a privilege exists must appear on the face of the complaint or else the complaint is not subject to demurrer [*Vescovo v. New Way Enters., Ltd. (1976) 60 Cal. App. 3d 582, 589, 130 Cal. Rptr. 86* (newspaper advertisement gave rise to cause of action for intentional infliction of emotional distress; because asserted fact that defendants received written request for advertisement, which would indicate qualified privilege for communications among interested parties, was outside complaint, plaintiffs need not allege specific facts showing malice)].

[c] Related Points and Authorities

In an appropriate case, the points and authorities in *see § 153.44* may be used in opposition to the motion supported by these memorandum of points and authorities.

For forms of memoranda supporting demurrers and motions for summary judgment by defendants in actions for defamation on the ground that the defendants were absolutely or qualifiedly privileged to publish the defamatory publications, see Ch. 142, *Libel and Slander (Defamation)*.

[3] Discussion of Authorities

[a] Conduct as Required to Be Unprivileged

In ***Kachig v. Boothe*** *(1971) 22 Cal. App. 3d 626, 99 Cal. Rptr. 393* , the plaintiffs brought an action for fraud, malicious prosecution, and intentional infliction of emotional distress. The trial court granted the defendants' motions for judgment on the pleadings and judgment for defendants was entered. The basis for the action concerned a letter that had been introduced as evidence in a prior trial in which the plaintiffs had been defendants. The plaintiffs ascertained after a prolonged investigation following the conclusion of that trial that the letter was a false document manufactured at the suggestion of one of the defendants and that the testimony of the other defendants concerning this document was perjured. The court of appeal reluctantly affirmed the judgment. In discussing the cause of action for intentional infliction of mental distress the court noted that to impose liability on that theory it must appear that the defendant's conduct was unprivileged. The court stated that the privileges recognized in connection with the tort of intentional infliction of emotional distress are similar to those recognized in defamation actions. Former Civ. Code § 47(2) [*now see Civ. Code § 47(b)*] provides that a publication made in the course of a judicial proceeding is absolutely privileged. This privilege is accorded not only to parties but to witnesses, even when their testimony is allegedly perjured and malicious (*22 Cal. App. 3d 626, 641)* . Thus, the plaintiffs were not entitled to relief.

[b] Assertion of Legal Rights

In ***Girard v. Ball*** *(1981) 125 Cal. App. 3d 772, 178 Cal. Rptr. 406* , an action against an electrical contractor by a real estate developer for intentional infliction of emotional distress arising from a dispute over amounts due pursuant to a contract between the parties, defendant moved for summary judgment. The trial court granted the motion, and the court of appeal affirmed the decision.

The court of appeal first noted that defendant's demands for certain charges were based on a valid contract and were made in good faith. The court stated that an action for intentional infliction of emotional distress exists only when the defendant's conduct was not privileged and that a good-faith assertion of an economic interest is privileged conduct and cannot give rise to an action for intentional infliction of emotional distress. Such a privilege can be vitiated by outrageous conduct, but the evidence demonstrated that defendant had made his demands in conformance with common business practice and had not acted unreasonably (*125 Cal. App. 3d 772, 786-787)* . Since no evidence controverted these findings, the trial court had properly granted defendant's motion for summary judgment based on the privilege of assertion of a legal right (*125 Cal. App. 3d 772, 787)* .

The factual background of ***Fletcher v. Western Nat'l Life Ins. Co.*** *(1970) 10 Cal. App. 3d 376, 89 Cal. Rptr. 78* , is discussed in *§ 153.20[3][a]*. The defendants urged on appeal that, notwithstanding the outrageous nature of their conduct, no liability could be predicated on a communication from one contracting party to another relating to the resolution of a dispute over their contract. The court acknowledged that an insurance company is privileged, in pursuing its own economic interest, to assert in a permissible way its legal rights and to communicate its position in good faith to its insured even though it is substantially certain that in so doing emotional distress will be caused. However, the court stated that this exercise of the privilege to assert one's legal rights must be done in a permissible way with a good-faith belief in the existence of the rights asserted. Thus, one who, in exercising such a privilege, acts in an outrageous manner may be held liable for intentional infliction of emotional distress. The court concluded this portion of its opinion by finding that the defendants had abused their privilege by having had no probable cause to believe that the plaintiff had made a misrepresentation of a material fact, and that, even if it could be said that they had asserted their legal rights in good faith, they were not privileged to do so in an outrageous manner (*10 Cal. App. 3d 376, 395)* .

[c] Defamation Privileges as Applicable

In ***Lerette v. Dean Witter Org., Inc.*** *(1976) 60 Cal. App. 3d 573, 131 Cal. Rptr. 592* , plaintiff alleged in his complaint that defendant Debow, as assistant general counsel for defendant Dean Witter, sent a letter to the chairman of the board of a particular bank in which he accused plaintiff, who was president of the board, of misrepresenting the financial condition of a person to whom Dean Witter subsequently extended credit and who thereafter defaulted on his obligation, that the letter also stated that unless a settlement could be reached, Dean Witter planned to sue plaintiff and the bank for violation of security laws and for fraud and misrepresentations, and that this letter was sent with the intention to, and did, defame plaintiff and inflict significant mental distress on him. Defendants demurred generally to the complaint which was sustained without leave to amend. From an entry of a judgment of dismissal, plaintiff appealed. The court of appeal affirmed.

The questions on appeal were (1) whether former Civ. Code § 47(2) [*now see Civ. Code § 47(b)*], which defines a privileged publication as any one made in a judicial proceeding, conferred an absolute privilege on defendants to publish the subject letter, and (2) whether the privilege operates to prevent a suit for intentional infliction of emotional distress based on the same publication. Plaintiff contended on appeal that former Civ. Code § 47(2) [*now see Civ. Code § 47(b)*] was inapplicable both because the letter was not sent in any judicial proceeding actually underway, and because defendant Dubow was not counsel for Dean Witter in the judicial proceeding referred to in the letter. The court, however, found that the privilege to defame in the course of judicial proceedings is not limited to statements made during trial but can extend, notwithstanding the phrasing of the statute, to communications preliminary to a proposed judicial proceeding. Thus, the court held that the demand letter sent by defendant Dubow was fully privileged under former Civ. Code § 47(2) [*now see Civ. Code § 47(b)*] as preliminary to a judicial proceeding. The court, in addition, found that former Civ. Code § 47(2) [*now see Civ. Code § 47(b)*] extended to communications of any attorney retained

by a client expecting to be a party to threatened litigation so long as the attorney has been employed by the client with reference to the impending judicial proceeding or controversy underlying it. Thus, the court held that defendant Dubow was participating counsel at the time he composed and sent the letter.

Examining the cause of action for intentional infliction of emotional distress, the court held that the privilege which protected defendants from liability for defamation protected them from liability for intentional infliction of emotional distress. The court stated that to proceed with this cause of action would substantially defeat the purpose of the privilege, exalt a judicially derived cause of action above the clear legislative intent, and operate as a severe deterrent to communications otherwise protected. Thus, no such cause of action, based on the defamatory nature of a communication which is itself privileged under the defamation law, could be permitted (*60 Cal. App. 3d 573, 579)* .

[d] Filing of Complaint as Privileged

In ***Williams v. Coombs*** *(1986) 179 Cal. App. 3d 626, 224 Cal. Rptr. 865* , defendant attorney had brought a wrongful death action on behalf of a client against plaintiff. The wrongful death action was based on the fatal incident in which the decedent had been brought to a hospital and made suicidal gestures with a revolver. Plaintiff, her personal physician, arranged for the decedent to be placed in a private room rather than a locked ward. That evening, decedent hanged herself. Decedent's family sought the advice of defendant, who instituted the wrongful death action against plaintiff. The jury found for plaintiff, who then commenced an action against defendant for malicious prosecution and intentional infliction of emotional distress from the filing of the wrongful death action. Defendant moved for summary judgment, which was granted on both causes of action. Plaintiff appealed.

The court of appeal reversed as to the malicious prosecution cause of action, but affirmed as to the emotional distress cause of action. The court held that the filing of a complaint is absolutely privileged under former Civ. Code § 47(2) [*now see Civ. Code § 47(b)*], and that privilege applies to defeat a claim for intentional infliction of emotional distress from the filing of a complaint. Thus, plaintiff could not claim intentional infliction of emotional distress from the filing of a malicious complaint (*179 Cal. App. 3d 626, 645-646)* .

[e] Statements Made in Course of Judicial Proceeding

The factual background of ***Agostini v. Strycula*** *(1965) 231 Cal. App. 2d 804, 42 Cal. Rptr. 314* , is discussed in *§ 153.20[3][b]*. In affirming the trial court's dismissal of plaintiff's action for interference with civil service contract relations and intentional infliction of emotional distress, the court, in addition to holding that defendant's conduct was not outrageous, held that the statements complained of were made in the course of an official proceeding, and privilege, analogous to that described in former Civ. Code § 47(2) [*now see Civ. Code § 47(b)* (statements made in official proceeding authorized by law as privileged], protected the defendants from liability for intentional infliction of emotional distress. The court stated that when called as witnesses the defendants were under a duty to state fully and fairly such facts as were within their knowledge bearing on the subject under investigation, and that, although the action was not one for defamation, the privilege contained in former Civ. Code § 47(2) [*now see Civ. Code § 47(b)*] extended to plaintiff's action.

[f] Communications Preliminary to Proposed Judicial Proceeding

Lerette v. Dean Witter Org., Inc. *(1976) 60 Cal. App. 3d 573, 131 Cal. Rptr. 592* , is discussed in *§ 153.27[3][c]*.

[g] Defamation Privileges Under Federal Constitution Apply

In ***Hustler Magazine v. Falwell*** *(1988) 485 U.S. 46, 108 S. Ct. 876, 99 L. Ed. 2d 41* , plaintiff, a public figure, brought an action against a magazine publisher for defamation and intentional infliction of emotional distress based on a "gross" and "patently offensive" parody of the plaintiff that was published in defendant's magazine. At trial, plaintiff prevailed on the claim for intentional distress but lost on the claim for defamation because the parody in question did not contain

a false statement of fact. The court of appeals affirmed.

The United States Supreme Court reversed. Narrowly construed, the Court's decision held that public figures and officials may not recover for the tort of intentional infliction of emotional distress by reasons of the publications such as the one in issue in the case at bar without showing that the publication contains a false statement of fact made with "actual malice." Broadly construed, the *Falwell* decision supports the proposition that the constitutional protections designed to give breathing space to the free flow of ideas and opinions apply to actions for intentional infliction of emotional distress, at least in the instance when such claims are based on statements published by a media defendant (*485 U.S. 46, 49-56)* .

[4] Additional Authorities

[a] Defamation Privileges as Applicable

In *Komarova v. National Credit Acceptance, Inc. (2009) 175 Cal. App. 4th 324, 95 Cal. Rptr. 3d 880* , plaintiff was the target of persistent, harassing credit card debt collection efforts on the part of a debt collection agency. Without plaintiff's participation, the collection agency filed for and received an arbitration award confirming the debt. However, despite having a similar name, plaintiff was not the person who actually owed the debt. Plaintiff then filed a suit against the debt collectors for intentional infliction of emotional distress and violations of the Rosenthal Fair Debt Collection Practices Act, *Civ. Code § 1788 et seq.* Although plaintiff was awarded compensatory and punitive damages at trial on both causes of action, the court of appeal reversed the damage award on the intentional infliction of emotional distress cause of action. The court held that the defendant had a complete defense based on the litigation privilege of *Civ. Code § 47(b)*. The court noted that the fact that plaintiff was not a party to the underlying arbitration proceedings did not prevent defendant from asserting the litigation privilege as a defense (*175 Cal. App. 4th 324, 341)* .

In *Wallin v. Vienna Sausage Mfg. Co. (1984) 156 Cal. App. 3d 1051, 203 Cal. Rptr. 375* , the court of appeal affirmed a summary judgment for defendant in an action for slander and intentional infliction of emotional distress based on statements made in a grievance hearing. The court noted that the absolute privilege of former Civ. Code § 47(2) [*now see Civ. Code § 47(b)*] applies to statements made during a grievance procedure hearing that is reviewable by mandate (*156 Cal. App. 3d 1051, 1056)* , and that the privilege also necessarily precludes a cause of action for intentional infliction of emotional distress (*156 Cal. App. 3d 1051, 1057)* .

[b] Filing of Complaint as Privileged

In *Cantu v. Resolution Trust Corp. (1992) 4 Cal. App. 4th 857, 6 Cal. Rptr. 2d 151* , the sole basis for the plaintiff's alleged cause of action for intentional infliction of emotional distress was the defendants' initiation of legal action and the filing of supporting declarations. The court of appeal found the action barred by the privilege of *Civ. Code § 47(b)*, stating that the improper filing of a lawsuit may be redressed only in a cause of action for malicious prosecution (*4 Cal. App. 4th 857, 888-889)* .

[c] Statements Made in Course of Judicial Proceeding

In *Ribas v. Clark (1985) 38 Cal. 3d 355, 212 Cal. Rptr. 143, 696 P.2d 637* , plaintiff and his former wife appeared at a dissolution arbitration proceeding in which defendant testified as to the substance of a telephone conversation between plaintiff and plaintiff's former wife, on which he had eavesdropped. Plaintiff filed an action against defendant seeking damages for violations of criminal statutes prohibiting eavesdropping, as well as for common-law invasion of privacy, intentional infliction of emotional distress, and the related tort of "outrage." The trial court sustained a demurrer to the amended complaint without leave to amend. The Supreme Court reversed the judgment with directions to allow plaintiff to amend his complaint for a possible cause of action based on criminal statutes prohibiting violations of privacy, but also held that the causes of action in common law were barred by the privilege accorded to statements made in judicial proceedings under former Civ. Code § 47(2) (now *Civ. Code § 47(b)*) (*38 Cal. 3d 355, 364)* .

Carden v. Getzoff (1987) 190 Cal. App. 3d 907, 235 Cal. Rptr. 698 , involved an action for abuse of process, intentional infliction of emotional distress, and negligent infliction of emotional distress by a physician who claimed that defendant had manufactured false evidence as an expert accounting witness for the physician's former wife in a marital dissolution action. The court of appeal affirmed the trial court's sustaining of defendant's demurrer without leave to amend on the ground that the publications made in both the document prepared by defendant for use at the settlement agreement negotiations and in the testimony of defendant at the dissolution proceedings were covered by the absolute privilege of former Civ. Code § 47(2) (now *Civ. Code § 47(b)*) (*190 Cal. App. 3d 907, 913)* .

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
CHAPTER 153 MENTAL SUFFERING AND EMOTIONAL DISTRESS
PART II. FORMS

15-153 California Points & Authorities § 153.28

§ 153.28 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action for Intentional Infliction of Mental Distress--By Defendant--Good-Faith Reliance on Advice of Informed Counsel Is Complete Defense

[1] FORM

[*Caption. See § 153.27.*]

SUMMARY JUDGMENT FOR DEFENDANT IS PROPER BECAUSE DEFENDANT'S CONDUCT WAS UNDERTAKEN IN GOOD-FAITH RELIANCE ON ADVICE OF INFORMED COUNSEL.

A. Summary Judgment. [*See § 153.27, Paragraph A.*]

B. Good-Faith Reliance on Advice of Informed Counsel as Complete Defense. As a matter of law, it is a complete defense to a claim of extreme and outrageous conduct when the evidence shows (1) the defendant acted on the opinion and advice of counsel; (2) counsel's advice was based on full disclosure of all facts by defendant, or the advice was initiated by counsel based on counsel's familiarity with the case; and (3) the defendant's reliance on the advice of counsel was in good faith (*Melorich Builders, Inc. v. Superior Court (1984) 160 Cal. App. 3d 931, 937, 207 Cal. Rptr. 47*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for summary judgment when the motion asserts that defendant is entitled to a judgment as a matter of law because the declarations or other evidence in support of the motion establish that the conduct claimed to be outrageous was undertaken by defendant in good-faith reliance on the advice of informed counsel.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should refer to facts supporting the good faith of defendant's reliance on the advice of counsel, as well as the facts tending to show that counsel was informed of the facts surrounding the advised conduct. In addition, counsel should attach affidavits, declarations, or other papers that support the motion. The supporting papers must include a separate statement of material facts that the moving party contends are undisputed, along with supporting evidence for each fact [*Code Civ. Proc. § 437c(b)*].

[3] Discussion of Authorities

[a] Good-Faith Reliance on Advice of Informed Counsel as Complete Defense

In ***Melorich Builders, Inc. v. Superior Court*** *(1984) 160 Cal. App. 3d 931, 207 Cal. Rptr. 47* , the conduct claimed to be outrageous was the filing of an unbonded stop notice by Melorich as general contractor in the course of litigation between the parties. Melorich moved for summary judgment, the uncontroverted declarations of its president, secretary, and attorney establishing that: (1) they were not familiar with the legalities of stop notices; (2) they did not know a general contractor could not utilize a stop notice to collect funds; (3) the stop notice was filed to protect their interest in funds held by the construction lender; (4) the stop notice was filed on the advice of their attorney; (5) the attorney's recommendation to file the stop notice was not based on information supplied by officers of Melorich; (6) the attorney was familiar with the facts surrounding the litigation; (7) the stop notice was in effect for 23 days; and (8) when advised a stop notice was not available to Melorich, the attorney withdrew the stop notice. The trial court denied the motion for summary judgment, stating that there was a controverted issue of material fact regarding whether or not the filing of the stop notice was privileged. However, the court did not address the second issue raised by the motion, that Melorich's conduct was not outrageous.

The court of appeal issued a writ of mandate directing the trial court to vacate its order denying summary judgment and to enter an order granting Melorich summary judgment as to the intentional infliction of emotional distress cause of action. Applying the standards set forth in *Bertero v. National General Corp.* [*Bertero v. National Gen. Corp. (1974) 13 Cal. 3d 43, 53-53, 118 Cal. Rptr. 184]* , a malicious prosecution action, the court determined that as a matter of law, conduct is not outrageous, and thus cannot be the basis of an action for intentional infliction of emotional distress, when the evidence shows that: (1) the defendant acted on the opinion and advice of counsel; (2) counsel's advice was based on full disclosure of all facts by defendant or the advice was initiated by counsel based on counsel's familiarity with the case; and (3) the defendant's reliance on the advice of counsel was in good faith (*160 Cal. App. 3d 931, 937)* .

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
CHAPTER 153 MENTAL SUFFERING AND EMOTIONAL DISTRESS
PART II. FORMS

15-153 California Points & Authorities § 153.29

§ 153.29 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action for Intentional Infliction of Emotional Distress--By Defendant--Federal Preemption of State Law Claim [29 U.S.C.S. § 185(a)]--Employment Relationship Governed by Collective Bargaining Agreement

[1] FORM

[*Caption. See § 153.27.*]

SUMMARY JUDGMENT FOR DEFENDANT IS PROPER BECAUSE PLAINTIFF'S CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS IS PREEMPTED BY SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT IN THAT RESOLUTION OF PLAINTIFF'S STATE LAW CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS IS SUBSTANTIALLY DEPENDENT ON ANALYSIS OF THE TERMS AND CONDITIONS OF THE COLLECTIVE BARGAINING AGREEMENT THAT GOVERNS PLAINTIFF'S EMPLOYMENT.

A. Summary Judgment. [*See § 153.27, Paragraph A.*]

B. Federal Preemption of State-Law Claim. A state-law claim for intentional infliction of emotional distress by an employee whose terms and conditions of employment are governed by a collective bargaining agreement is generally preempted by federal labor law (*Friday v. Hughes Aircraft Co. (1986) 188 Cal. App. 3d 117, 125, 236 Cal. Rptr. 291*).

C. Construction of Collective Bargaining Agreement. State claims are preempted by *Section 301 of the Labor* Management Relations Act [*29 U.S.C.S. § 185(a)*] if the claim requires the interpretation of a collective bargaining agreement (*Newberry v. Pacific Racing Ass'n (9th Cir. 1988) 854 F.2d 1142, 1146* ; *see Tellez v. Pacific Gas & Elec. Co., Inc. (9th Cir. 1987) 817 F.2d 536, 539)* .

[*Optional*] **D. Exceptions of *Farmer v. Carpenters* Not Applicable in Cases Under Section 301.** The exceptions to preemption of a state court action for intentional infliction of emotional distress allowed by the United States Supreme

Court in *Farmer v. Carpenters* are not applicable in a case under *Section 301 of the Labor* Management Relations Act (*Vincent v. Trend W. Technical Corp. (9th Cir. 1987) 828 F.2d 563, 567-568* ; *see Farmer v. Carpenters (1977) 430 U.S. 290, 302, 97 S. Ct. 1056, 51 L. Ed. 2d 338*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for summary judgment by a defendant employer in an action by a former employee for damages based on alleged intentional infliction of emotional distress if the terms and conditions of plaintiff's employment are governed by a collective bargaining agreement.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations that support the motion, and a separate statement of the facts that the party contends are undisputed [*Code Civ. Proc. § 437c(b)*].

[b] Related Pleading and Practice Forms

For a form of notice of motion for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender). For discussion and forms regarding intentional infliction of emotional distress, see California Forms of Pleading and Practice, Ch. 362, *Mental Suffering and Emotional Distress* (Matthew Bender).

[c] Related Points and Authorities

For discussion and forms relating to a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Federal Preemption of State-Law Claim

In ***Friday v. Hughes Aircraft Co.*** *(1986) 188 Cal. App. 3d 117, 236 Cal. Rptr. 291* , an employee of an aircraft manufacturing company, though not a union member, was a member of the bargaining unit and thus bound by the terms and conditions of the collective bargaining agreement. The employee brought an action against his employer for wrongful termination of employment and intentional infliction of emotional distress. The trial court granted summary judgment in favor of the employer on the grounds of federal preemption and collateral estoppel.

Without ruling on the collateral estoppel issue, the court of appeal affirmed, holding, in part, that both causes of action were preempted by *Section 301 of the Labor* Management Relations Act [*29 U.S.C.S. § 185(a)*] (*188 Cal. App. 3d 117, 123, 125)* . The court stated that the facts underlying plaintiff's emotional distress claim consisted solely of complaints

about matters covered under the collective bargaining agreement, such as safety, unfair work assignments, work restrictions, and denials of promotion and overtime. Because plaintiff's tort claim was inextricably intertwined with considerations of the labor contract, it was preempted by federal labor law (*188 Cal. App. 3d 117, 125)* .

[b] Construction of Collective Bargaining Agreement

In ***Newberry v. Pacific Racing Ass'n*** *(9th Cir. 1988) 854 F.2d 1142* , plaintiff was discharged from her employment after an investigation into her alleged misappropriation of funds. She challenged the dismissal under the provisions of a collective bargaining agreement and won reinstatement but not back pay. She then sued in a California court under various tort theories, including wrongful discharge and intentional infliction of emotional distress. The defendant employer removed the case to the federal district court. That court then granted the employer's motion for summary judgment, ruling that the state-law claim for intentional infliction of emotional distress was preempted by *Section 301 of the Labor* Management Relations Act of 1947 [*29 U.S.C.S. § 185*].

On appeal, the Ninth Circuit Court of Appeals affirmed. The court noted two United States Supreme Court opinions that dealt with the preemption of state-law claims under Section 301. In *Lingle v. Norge Division, Magic Chef (1988) 486 U.S. 399, 405-406, 108 S. Ct. 1877, 100 L. Ed. 2d 410* , the Court held that an application of state law is preempted by Section 301 only if the application requires the interpretation of a collective bargaining agreement. Accordingly, the key to determining the scope of Section 301 preemption is whether the claim can be resolved only by referring to the terms of the bargaining agreement. The Ninth Circuit considered *Lingle* to be an application of the Supreme Court's prior decision in *Allis-Chalmers Corp. v. Lueck (1985) 471 U.S. 202, 220, 105 S. Ct. 1904, 85 L. Ed. 2d 206* , in which the Court held that a state-law claim is preempted if resolution is "substantially dependent" on analysis of the terms of an agreement made between the parties in a labor contract.

Applying the Supreme Court tests to the facts, the Ninth Circuit found that the allegations of intentional infliction of emotional distress arose out of the discharge and the defendants' conduct in leading up to it. A determination of the validity of the emotional-distress claim would require consideration whether the discharge was justified under the terms of the collective bargaining agreement. Therefore, the court held that the claim was preempted under *Lingle* and *Allis-Chalmers* (*854 F.2d 1142, 1149-1150)* .

In ***Tellez v. Pacific Gas & Elec. Co., Inc.*** *(9th Cir. 1987) 817 F.2d 536* , the Ninth Circuit refused to find preemption under *Section 301 of the Labor* Management Relations Act. The plaintiff sued his employer for intentional infliction of emotional distress based on the dissemination of a letter of suspension to members of the employer's management. The collective bargaining agreement made no provision for such an act, and its grievance mechanism was not equipped to redress it. Accordingly, the court said that examination or interpretation of the agreement would not help to resolve the claim, and there was no preemption (*817 F.2d 536, 539)* .

[c] Exceptions of *Farmer v. Carpenters* Not Applicable in Cases Under Section 301

In ***Farmer v. Carpenters*** *(1977) 430 U.S. 290, 97 S. Ct. 1056, 51 L. Ed. 2d 338* , the plaintiff brought an action for intentional infliction of emotional distress under California law against his own labor union and union officials for alleged outrageous acts committed in discriminating against him in making hiring-hall job assignments because of his inter-union political activities. The United States Supreme Court noted that state-law claims may be preempted under Sections 7 and 8 of the National Labor Relations Act [*29 U.S.C.S. §§ 157, 158*] (*430 U.S. 290, 296)* . However, the Court stated that no provision of the National Labor Relations Act protects the outrageous conduct alleged in the complaint (*430 U.S. 290, 301)* , and held that there is no preemption if it is possible for the state court to consider the outrageousness of the conduct without resolving the underlying labor dispute regarding discriminatory treatment (*430 U.S. 290, 304-305)* . Thus, the alleged union discrimination itself, or threats of discrimination, cannot constitute the outrageous conduct on which the action is based. It is essential that the tort action be either (1) unrelated to employment discrimination, or (2) a function of the particularly abusive manner in which the discrimination is accomplished or

threatened rather than a function of the actual or threatened discrimination itself (*430 U.S. 290, 305)* .

NOTE:

After *Farmer v. Carpenters,* the Ninth Circuit Court of Appeals initially applied its two-part test not only to cases under the National Labor Relations Act but also to cases under *Section 301 of the Labor* Management Relations Act [*see Olguin v. Inspiration Consol. Copper Co. (9th Cir. 1984) 740 F.2d 1468, 1475-1476* ; *Garibaldi v. Lucky Food Stores, Inc. (9th Cir. 1984) 726 F.2d 1367, 1372-1375]* . However, in a case that did not involve a claim for intentional infliction of emotional distress, the Ninth Circuit limited *Farmer v. Carpenters* to cases under the National Labor Relations Act [*Vincent v. Trend W. Technical Corp. (9th Cir. 1987) 828 F.2d 563]* . The court viewed the United States Supreme Court opinion in *Allis-Chalmers Corp. v. Lueck* [*Allis-Chalmers Corp. v. Lueck (1985) 471 U.S. 202, 105 S. Ct. 1904, 85 L. Ed. 2d 206]* as establishing a different test for cases under Section 301. The Ninth Circuit did not discuss this test nor set forth any significant analysis for its determination. It simply remanded the case for reconsideration in light of *Allis-Chalmers* [*Vincent v. Trend W. Technical Corp. (9th Cir. 1987) 828 F.2d 563, 565-566]* .

Allis-Chalmers was a bad-faith insurance case involving a disability plan included in a collective bargaining agreement. The Supreme Court held that Section 301 preempts all state-law torts claims against employers by employees covered by a collective bargaining agreement unless the state's tort law confers nonnegotiable state-law rights on employers and employees independent of any right established by contract [*Allis-Chalmers Corp. v. Lueck (1985) 471 U.S. 202, 213, 105 S. Ct. 1904, 85 L. Ed. 2d 206]* . Because entitlement under the plan was created by the collective bargaining agreement, the action was preempted [*Allis-Chalmers Corp. v. Lueck (1985) 471 U.S. 202, 218, 105 S. Ct. 1904, 85 L. Ed. 2d 206]* . The Court neither harmonized nor distinguished the tests of *Farmer v. Carpenters.* The second prong of the *Farmer* test, relating to the "particularly abusive manner," seems unique to the tort of intentional infliction of emotional distress, which was not at issue in *Allis-Chalmers*.

[4] Additional Authorities

[a] Construction of Collective Bargaining Agreement

In *Soldinger v. Northwest Airlines (1996) 51 Cal. App. 4th 345, 58 Cal. Rptr. 2d 747* , plaintiff, a Jewish airline employee, sued her employer for intentional infliction of emotional distress. Plaintiff alleged that defendant knew of the significance of Passover to her, but refused to allow her to observe the holiday in accordance with her religious beliefs, insisting she work on the holiday, and terminating her employment when she refused to do so, even though they found a replacement for her and despite its knowledge that the airlines did not punish similar behavior by Christians. The trial court granted summary judgment in defendant's favor on the ground that the Railway Labor Act required that the claim be resolved in accordance with a collective bargaining agreement (CBA). The court of appeal reversed, stating that where factual questions about an employer's conduct do not involve interpreting the CBA, an action for intentional infliction of emotional distress is not preempted (*51 Cal. App. 4th 345, 377)* . Since the factual dispute involved the employer's motives for denying plaintiff's request to allow her to observe Passover, it did not involve an interpretation of the CBA. The court thus concluded that plaintiff's cause of action for intentional infliction of emotional distress was not preempted (*51 Cal. App. 4th 345, 379-380)* .

In *Moreau v. San Diego Transit Corp. (1989) 210 Cal. App. 3d 614, 258 Cal. Rptr. 647* , plaintiff, who was an employee covered by a collective bargaining agreement (CBA), resigned under pressure after being arrested for selling drugs to a police undercover informant who had been placed on the employer's night maintenance crew. Plaintiff did not challenge the employer's actions through the union grievance procedures. Plaintiff was acquitted in a criminal trial in which plaintiff had raised an entrapment defense. He then sought reinstatement and back wages from the employer. When the employer refused, he sued for wrongful discharge and intentional and negligent infliction of emotional

distress in state court under state law (*210 Cal. App. 3d 614, 618-619)* .

In affirming summary judgment for the employer, the court of appeal characterized the issue as whether an employer may participate in a law enforcement procedure that ultimately results in an employee being entrapped, and then terminate the employee because of conduct resulting from the entrapment. With regard to intentional infliction of emotional distress, the issue was whether the employer's participation in plaintiff's entrapment and its discharge of him based on the entrapment exceeded all bounds of decency, or instead constituted reasonable actions that fell within the "just cause for discharge or discipline" required by the CBA. The court held that the issues could not be resolved without deciding whether the parties to the CBA, in requiring just cause for discharge, intended to encompass discharge or discipline arising from entrapment designed to control drug use in the work place. Because resort to interpretation of the CBA was required, the state-law causes of action were preempted (*210 Cal. App. 3d 614, 624-625)* .

[b] Exceptions of *Farmer v. Carpenters* Not Applicable in Cases Under Section 301

The facts of *Newberry v. Pacific Racing Ass'n (9th Cir. 1988) 854 F.2d 1142* , are discussed in *§ 153.29[3][b]*. The plaintiff contended that the defendant employer's conduct was so outrageous as to qualify for the exception to exemption under *Farmer v. Carpenters.* The Ninth Circuit reviewed all of its preemption decisions after *Farmer.* It ended the discussion by reaffirming its holding that the exceptions to preemption set forth in that case do not apply to cases against employers under *Section 301 of the Labor* Management Relations Act [*29 U.S.C.S. § 185*], including actions for intentional infliction of emotional distress (*854 F.2d 1142, 1148-1149)* . The court added no analysis concerning its conclusion that this result was compelled by *Allis-Chalmers.*

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
CHAPTER 153 MENTAL SUFFERING AND EMOTIONAL DISTRESS
PART II. FORMS

15-153 California Points & Authorities § 153.30

§ 153.30 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action for Emotional Distress-By Defendant-Claims Against Airlines Stemming from Negligent Rendition of Service and Conduct of Flight Crew Preempted by Airline Deregulation Act [49 U.S.C.S. § 41713(b)(1)]

[1] FORM

[*Caption. See § 153.27.*]

THE COURT SHOULD GRANT SUMMARY JUDGMENT FOR DEFENDANT BECAUSE PLAINTIFF'S CLAIM FOR EMOTIONAL DISTRESS STEMS FROM THE NEGLIGENT RENDITION OF SERVICE AND CONDUCT OF THE FLIGHT CREW AND IS THEREFORE PREEMPTED BY SECTION 105 OF THE AIRLINE DEREGULATION ACT.

A. Summary Judgment. [*See § 153.27, Paragraph A.*]

B. Federal Preemption of Service Related State-Law Claims. Emotional injury claims against an airlines stemming from the negligent rendition of service and conduct of the flight crew are preempted by § 105 of the Federal Aviation Act, *49 U.S.C.S. § 41713(b)(1)*, commonly referred to as the Airline Deregulation Act (ADA) (*Gee v. Southwest Airlines (9th Circuit 1997) 110 F.3d 1400, 1406, 1407)* .

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for summary judgment by a defendant airlines in an action by a passenger for damages based on emotional distress if the claims stem from the negligent rendition of service and conduct of the flight crew.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should provide facts showing that plaintiff's claim for emotional distress stems from the negligent rendition of service and conduct of the flight crew (for example, rude treatment by a flight attendant), and should then argue that it is therefore preempted by Section 105 of the Airline Deregulation Act.

[c] Related Pleading and Practice Forms

For a form of notice of motion for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

For discussion relating to emotional distress claims, see California Forms of Pleading and Practice, Ch. 362, *Mental Suffering and Emotional Distress* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities relating to preemption of former employee's state law emotional distress claim, under *Section 301 of the Labor* Management Relations Act, see *§ 153.29*.

[3] Discussion of Authorities

[a] Federal Preemption of Service Related State-Law Claims

In ***Gee v. Southwest Airlines*** *(9th Circuit 1997) 110 F.3d 1400* , a consolidated action, plaintiff Gee, an Asian-American airline passenger sued Southwest Airline for a variety of tort actions, including intentional and negligent infliction of emotional distress stemming from an incident that occurred on a flight where plaintiff was seated behind a noisy wedding party. During the flight plaintiff complained to a flight attendant and asked the attendant not to serve the group any more alcohol because they appeared to be intoxicated. Nevertheless, the attendant served one beer a piece to three members of the group. Plaintiff claimed that after her complaint, the wedding party harassed her with racial slurs, pantomimed cocking and shooting a gun at plaintiff and her companions, and threatened to "get them" upon landing. Plaintiff sued in state court and defendant airlines removed the case to federal court on diversity grounds. The district court granted defendants motion for summary judgment on the grounds that the claims were preempted by Section 105 of the Federal Aviation Act, [*49 U.S.C.S. § 41713(b)(1)*], commonly referred to as the Airline Deregulation Act (ADA).

Plaintiff Rowley, a paralyzed passenger, filed suit for the intentional and negligent infliction of emotional distress she suffered when defendant airlines failed to provide a narrow wheel chair to assist her in moving from the door of the plane to her seat. The airlines also failed to have plaintiff's motorized scooter meet her at the door of the plane as requested. The district court also granted defendant airlines motion for summary judgment, finding the claims expressly preempted by the ADA. Both plaintiffs appealed.

The Ninth Circuit affirmed, holding that emotional injury claims against an airlines related to the negligent rendition of

service and conduct of the flight crew are preempted by the ADA (*110 F.3d 1400, 1406)* . While finding its analysis outdated, the court based its decision on an earlier Ninth Circuit case, *Harris v. American Airlines (9th Circuit 1997) 55 F.3d 1472* , in which the court held that an African-American woman's claims for emotional distress based on a drunk passenger's racial slurs, and the airlines negligence in continuing to serve the inebriated passenger who was harassing her, were service-related and therefore preempted by Section 105 of the ADA. The Ninth Circuit in the instant case first found that because plaintiff Gee's claims were virtually identical to those in *Harris* those claims were also preempted. The court then found that plaintiff Rowley's claim was preempted because it was grounded on the conduct of flight crew members who failed to provide assistance with her disability, conduct which was determined in *Harris* to be "related to" service under the ADA. The court concluded by stating that while the ADA preempts service-related emotional distress claims, safety related personal injury or death claims concerning airline operations or maintenance are not preempted by the ADA. And a claim that may be fairly characterized as relating both to service and operations should not be preempted (*110 F.3d 1400, 1406, 1407)* .

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CHAPTER 153 MENTAL SUFFERING AND EMOTIONAL DISTRESS
PART II. FORMS

15-153 California Points & Authorities § 153.31

§ 153.31 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Negligent Infliction of Mental Distress to Bystander--Injury to Third Party--Defendant Not Liable to Injured Party

[1] FORM

[*Caption. See § 153.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT FAILS TO ALLEGE FACTS SHOWING BREACH OF DUTY TO THE THIRD PARTY.

A. Objection by Demurrer. [*See § 153.20, Paragraph A.*]

B. Absence of Primary Liability. In the absence of the primary liability of the defendant for the injury to the third party, there is no ground for an independent and secondary liability for claims for injuries by those who suffer mental distress from witnessing the injury (*Dillon v. Legg (1968) 68 Cal. 2d 728, 733, 69 Cal. Rptr. 72, 441 P.2d 912* (dictum)).

C. Adjudicated Fault Required. The basis for claims for mental suffering resulting from witnessing injury to a third party must be the adjudicated liability and fault of the defendant in causing that injury (*Dillon v. Legg (1968) 68 Cal. 2d 728, 733, 69 Cal. Rptr. 72, 441 P.2d 912* (dictum)).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a demurrer to a complaint for negligent infliction of mental distress based on witnessing injury to a third party. This form asserts that the complaint fails to allege sufficient facts to support an award of damages for mental suffering to the bystander plaintiff in that it appears on the face of the complaint, or from matter of which the court is required to or may take judicial notice, that the defendant has no liability to the injured person.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should specify the facts showing that the defendant has no liability to the injured person, and the source of those facts, referring either to the complaint or to a source from which the court may take judicial notice.

[3] Discussion of Authorities

[a] Absence of Primary Liability

In ***Dillon v. Legg*** *(1968) 68 Cal. 2d 728, 69 Cal. Rptr. 72, 441 P.2d 912* , the plaintiff brought an action to recover for damages for emotional trauma and physical injury suffered from witnessing the infliction of injury to her child due to the negligence of the defendant. The trial court sustained a motion for judgment on the pleadings because the plaintiff mother was not within the zone of danger. The plaintiff's daughter was killed when struck by the defendant's car while she was crossing the road. The mother witnessed the collision and alleged great emotional disturbance and shock and injury to her nervous system. The Supreme Court reversed, holding the complaint stated a cause of action as to the mother, even though she was not within the zone of danger. In dicta, the Court noted that the defendant interposed the defense that the contributory negligence of the mother, sister, and child, which at the time would have been a complete bar to recovery, contributed to the accident. If any such defense is sustained and defendant found not liable for the death of the child, the mother or sister should not recover for the emotional trauma which they allegedly suffered. In the absence of the primary liability of the tortfeasor for the death of the child, there is no ground for an independent and secondary liability for claims for injuries by third parties. The basis for such claims must be the adjudicated liability and fault of defendant; that liability and fault must be the foundation for the tortfeasor's duty of due care to third parties who, as a consequence of the negligence, sustain emotional trauma.

[b] Adjudicated Fault Required

Dillon v. Legg *(1968) 68 Cal. 2d 728, 69 Cal. Rptr. 72, 441 P.2d 912* , is discussed in *§ 153.31[3][b]*.

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15-153 California Points & Authorities § 153.32

§ 153.32 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Negligent Infliction of Mental Distress to Bystander--Injury to Third Party--Plaintiff Not Relative of Injured Party Residing in Same Household

[1] FORM

[*Caption. See § 153.20.*]

THE COMPLAINT OF PLAINTIFF _____ [*name of bystander*] FAILS TO STATE FACTS SUFFICIENT TO SUPPORT A RECOVERY OF DAMAGES FOR MENTAL SUFFERING IN THAT IT FAILS TO ALLEGE THAT PLAINTIFF IS EITHER A RELATIVE RESIDING IN THE SAME HOUSEHOLD AS _____ [*name of injured party*] OR A MEMBER OF THE IMMEDIATE FAMILY OF _____ [*name of injured party*], SUCH AS A PARENT, SIBLING, CHILD, OR GRANDPARENT.

A. Family Relationship Required for Recovery. Absent exceptional circumstances, recovery for negligent infliction of emotional distress to a bystander should be limited to plaintiffs who are relatives residing in the same household as the victim, or who are parents, siblings, children, and grandparents of the victim (*Thing v. La Chusa (1989) 48 Cal. 3d 644, 668 fn. 10, 257 Cal. Rptr. 865, 771 P.2d 814* ; *Elden v. Sheldon (1988) 46 Cal. 3d 267, 250 Cal. Rptr. 254, 758 P.2d 582*).

[*Optional*] **B. In-Laws Not Proper Plaintiffs.** Absent exceptional circumstances or residence in the same household, only members of the immediate family may recover for negligent infliction of emotional distress to a bystander, and in-laws are not included even if a close, loving relationship with the injured person is demonstrated (*Moon v. Guardian Postacute Servs., Inc. (2002) 95 Cal. App. 4th 1005, 1011-1013, 116 Cal. Rptr. 2d 218*).

[*Optional*] **C. Residence in Same Household Must Be For Substantial Period of Time.** Meeting the requirement of residence in the same household requires residence for a substantial period of time, and an allegation that the injured person and the plaintiff resided in the same household for an undisclosed period of time is insufficient (*Moon v. Guardian Postacute Servs., Inc. (2002) 95 Cal. App. 4th 1005, 1012-1013, 116 Cal. Rptr. 2d 218*).

[*Optional*] **D. Nonrelated Bystander Not Proper Plaintiff.** A bystander who is not actually related to the injured person, such as by blood or marriage, cannot recover for negligent infliction of emotional distress regardless of how close the relationship between the persons may be (*Rodriguez v. Kirchhoefel (2005) 128 Cal. App. 4th 427, 433, 26 Cal. Rptr. 3d 891*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a demurrer to a complaint for negligent infliction of mental distress based on witnessing injury to a third party. This form asserts that the complaint fails to allege sufficient facts to support an award of damages for mental suffering to the bystander plaintiff in that it neither appears on the face of the complaint nor from any matter of which the court is required to or may take judicial notice that plaintiff is a member of the victim's immediate family or a close relative residing in the same household. For a form of memorandum of points and authorities supporting a demurrer to a complaint for negligent infliction of mental distress involving injury to a third person if there was no allegation that plaintiff witnessed the infliction of the injury, see *§ 153.33*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Family Relationship Required for Recovery

The factual background of ***Thing v. La Chusa*** *(1989) 48 Cal. 3d 644, 257 Cal. Rptr. 865, 771 P.2d 814* , is discussed in *§ 153.33[3][a]*. In setting limitations on the recovery of damages for emotional distress to bystanders, the California Supreme Court concluded that a plaintiff who may recover damages for emotional distress caused by observing the negligently inflicted injury of a third person must be closely related to the injured victim. In a footnote, the Court stated that in most cases, no justification exists for permitting recovery by persons who are only distantly related to the injury victim. Absent exceptional circumstances, recovery should be limited to relatives residing in the same household, or to parents, siblings, children, and grandparents of the victim (*48 Cal. 3d 644, 668, n.10*).

In ***Elden v. Sheldon*** *(1988) 46 Cal. 3d 267, 250 Cal. Rptr. 254, 758 P.2d 582* , plaintiff brought an action for negligent infliction of emotional distress and loss of consortium arising from an automobile accident in which defendants were allegedly negligent. In the accident, plaintiff was a passenger and suffered serious injuries; the driver, plaintiff's cohabitant, was killed. In his complaint, plaintiff alleged that his relationship with the decedent was "stable and significant and parallel to a marital relationship." The trial court sustained defendants' demurrer to the counts for negligent infliction of emotional distress and loss of consortium on the ground that the lack of a legal marriage precluded the action, and plaintiff appealed. The California Supreme Court affirmed.

The Court noted the three-part test set forth in *Dillon v. Legg (1968) 68 Cal. 2d 728, 740-741, 69 Cal. Rptr. 72, 441 P.2d 912* , and also noted that under the third prong of the test (whether the plaintiff and the victim were closely related), recovery has been denied to cousins and "best friends" (*46 Cal. 3d 267, 271)* . The Court then discussed the holdings in *Ledger v. Tippitt (1985) 164 Cal. App. 3d 625, 210 Cal. Rptr. 814* , and *Mobaldi v. Regents of Univ. of Cal. (1976) 55 Cal. App. 3d 573, 127 Cal. Rptr. 720* , in which an unmarried cohabitant and the foster parent of an infant, respectively, were permitted to recover because of evidence of a close relationship. Although the Court agreed that emotional distress on the part of an unmarried cohabitant may be categorized as "foreseeable," the Court cited policy considerations weighing against sanctioning a cause of action irrespective of the foreseeability of injury (*46 Cal. 3d 267, 273-274)* . The state's interest in promoting the marriage relationship (*46 Cal. 3d 267, 274-275)* , the difficult burden placed on courts if the emotional attachments of the parties and the "stability" of the relationship are factual issues (*46 Cal. 3d 267, 275-276)* , and the need to limit the number of persons to whom a negligent defendant owes a duty of care (*46 Cal. 3d 267, 276)* were all cited by the Court as supporting the conclusion that the cause of action for negligent infliction of emotional distress should be limited to the immediate family of the injured person (*46 Cal. 3d 267, 276-277*). The Court also emphasized the need to draw a "bright line" that would exclude de facto siblings, parents, grandparents, or children, as well as unmarried cohabitants (*46 Cal. 3d 267, 277)* .

[b] In-Laws Not Proper Plaintiffs

In ***Moon v. Guardian Postacute Servs., Inc.*** *(2002) 95 Cal. App. 4th 1005, 116 Cal. Rptr. 2d 218* , a son-in-law was included as a plaintiff in an action against the nursing facility where his mother-in-law died. The plaintiff sought to recover for negligent infliction of emotional distress based on his personal observation of the effects of the defendant's alleged abuse of his mother-in-law before she died, which included observation that she had become malnourished and dehydrated, had lost significant weight, had become immobile and bedridden, had contracted an infection, and had become incontinent. He had also observed her lying in bed with infected wounds and blisters on her feet. The son-in-law alleged facts showing that he had a close, loving relationship with his mother-in-law and that she had lived in his household on and off since he had been married to her daughter, a period spanning approximately thirty years. However, the defendant successfully demurred to the plaintiff's cause of action after the plaintiff was unable, despite repeated amendments, to allege any exceptional circumstances that would justify allowing an in-law to recover for negligent infliction of emotional distress as a bystander. The plaintiff appealed.

The court of appeal affirmed. The court reviewed the requirements for recovery for negligent infliction of emotional distress caused by witnessing an injury to another, including the requirement that the plaintiff and the injured person be closely related. The court noted that *Thing v. La Chusa (1989) 48 Cal. 3d 644, 257 Cal. Rptr. 865, 771 P.2d 814* [*see § 153.32[3][a]*], limited recovery, absent exceptional circumstances, to relatives residing in the same household, or to parents, siblings, children, or grandparents. Although acknowledging that this standard does not limit recovery only to blood relatives, the court interpreted the California Supreme Court's language to mean that absent exceptional circumstances or residence in the same household, only members of the injured person's immediate family may recover for negligent infliction of emotional distress to a bystander (*95 Cal. App. 4th 1005, 1011)* . The court of appeal concluded that in-laws are not included even if a close, loving relationship with the injured person is demonstrated (*95 Cal. App. 4th 1005, 1011-1013)* . The court was wary of placing too great a burden on trial courts by requiring that they consider whether in-laws have emotional attachments equal to those between parents and children or siblings (*95 Cal. App. 4th 1005, 1012)* .

[c] Residence in Same Household Must Be for Substantial Period of Time

The factual and procedural background of ***Moon v. Guardian Postacute Servs., Inc.*** *(2002) 95 Cal. App. 4th 1005, 116 Cal. Rptr. 2d 218* , is discussed in *§ 153.32[3][b]*. The court of appeal noted that the discussion in *Thing v. La Chusa* does not clarify whether a plaintiff seeking to establish standing on the basis of residence in the same household must show that the injured person was residing in the same household as the plaintiff at the time of the injury, or

whether it was sufficient that the residence have been shared for some minimum period of time. Assuming without deciding that the injured person need not have been residing in the same household as the plaintiff at the actual time of injury, the court held that meeting the requirement of residence in the same household requires, at a minimum, that the plaintiff plead residence in the same household for a substantial period of time. Although the court declined to specify what might meet this requirement, the plaintiff in this particular case had alleged only that his mother-in-law had resided in his household for "a period of time" immediately before she was placed in the nursing facility where her injuries allegedly occurred, and the court concluded that this was an insufficient allegation to meet the requirement (*95 Cal. App. 4th 1005, 1012-1013)* .

[d] Nonrelated Bystander Not Proper Plaintiff

In ***Rodriguez v. Kirchhoefel*** *(2005) 128 Cal. App. 4th 427, 26 Cal. Rptr. 3d 891* , the plaintiff witnessed the death of her friend, who was struck and killed by a car while she was crossing a street in a pedestrian crosswalk. The plaintiff sued the driver of the car for negligent infliction of emotional distress. The defendant moved for summary judgment on the grounds that the plaintiff could not recover as a witness because she was not actually related to the decedent. The trial court agreed and granted the motion, and the plaintiff appealed.

The court of appeal affirmed. After reviewing relevant case law dealing with the requirements for recovery of emotional distress damages by a witness to an injury to another, the court agreed with the defendant that standing to recover was limited to those who were actually related to the person who suffered the physical injury. Although the plaintiff acknowledged that she was not actually related to the decedent, she argued that their relationship had been similar to that of sisters and noted that she had been living with the decedent and her family for two to three years at the time of the accident. The court concluded, however, that this was insufficient. Prior Supreme Court precedent had made clear that recovery was extended only to persons closely related by blood or marriage. No recovery was allowed in the absence of such actual family relationship, regardless of how close the parties may otherwise have been (*128 Cal. App. 4th 427, 432-433)* .

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15-153 California Points & Authorities § 153.33

§ 153.33 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Negligent Infliction of Mental Distress--Injury to Third Party--Plaintiff Not Contemporaneously Aware of Injury

[1] FORM

[*Caption. See § 153.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE FACTS SUFFICIENT TO SUPPORT A RECOVERY OF DAMAGES FOR MENTAL SUFFERING IN THAT IT FAILS TO ALLEGE FACTS SHOWING THAT PLAINTIFF WAS CONTEMPORANEOUSLY AWARE OF THE INJURY TO THE THIRD PARTY.

A. Objection by Demurrer. [*See § 153.20, Paragraph A.*]

B. Failure to Observe Injury. A plaintiff may recover damages for emotional distress caused by observing the negligently inflicted injury of a third person only if he or she is present at the scene of the injury-producing event at the time it occurs, and is then aware that it is causing injury to the victim (*Thing v. La Chusa (1989) 48 Cal. 3d 644, 667-668, 257 Cal. Rptr. 865, 771 P.2d 814* ; *Ebarb v. Woodbridge Park Assn. (1985) 164 Cal. App. 3d 781, 784-786, 210 Cal. Rptr. 751* ; *Deboe v. Horn (1971) 16 Cal. App. 3d 221, 223-224, 94 Cal. Rptr. 77*).

[*Optional*] **C. Event Required to Be Subject of Sensory Perception.** The plaintiff must have been a percipient witness to the injury to the third party, and plaintiff's perceptions must have been sensory (*Ebarb v. Woodbridge Park Assn. (1985) 164 Cal. App. 3d 781, 785, 210 Cal. Rptr. 751* ; *Jansen v. Children's Hosp. Med. Ctr. (1973) 31 Cal. App. 3d 22, 24, 106 Cal. Rptr. 883*).

[*Optional*] **D. No Recovery for Medical Malpractice Not Perceived as Causing Harm When Conduct Occurred.** Because a plaintiff must have a contemporaneous understanding that the conduct that is being observed is conduct that is actually causing harm, bystanders in medical malpractice cases cannot sue for negligent infliction of emotional distress based on unperceived medical errors hidden within a course of treatment (*Bird v. Saenz (2002) 28 Cal. 4th 910, 921, 123 Cal. Rptr. 2d 465, 51 P.3d 324*).

[*Optional*] **E. Contemporaneous Awareness of Injury Must Be Reasonably Certain.** Plaintiff's contemporaneous awareness of injury must be reasonably certain and a mere belief that it is more likely than not that a close relative has suffered an injury is not enough to support recovery as a bystander (*Ra v. Superior Court (2007) 154 Cal. App. 4th 142, 150-151, 64 Cal. Rptr. 3d 539*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a demurrer to a complaint for negligent infliction of mental distress based on witnessing injury to a third party. This form memorandum asserts that the complaint fails to allege sufficient facts to support an award of damages for mental suffering to the bystander plaintiff in that it neither appears on the face of the complaint nor from any matter of which the court is required to or may take judicial notice that plaintiff observed the injury to the third party.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities in *§ 153.46* may be used in opposition to the motion supported by this memorandum of points and authorities.

[3] Discussion of Authorities

[a] Failure to Observe Injury

In ***Thing v. La Chusa*** *(1989) 48 Cal. 3d 644, 257 Cal. Rptr. 865, 771 P.2d 814* , the plaintiff was near the scene of a traffic accident but neither saw nor heard the accident. She became aware that her son had been injured in the accident when told by a daughter that her son had been hit by a car. She rushed to the scene, where she saw her child, whom she believed to be dead, lying bloody and unconscious in the roadway. The mother sued the parties whose alleged negligence caused the accident for damages for mental suffering.

The trial court granted summary judgment on the ground that the mother could not prevail, because she did not contemporaneously and sensorily perceive the accident. Although the court of appeal reversed, the California Supreme Court agreed with the trial court.

The Court reviewed numerous negligent infliction of emotional distress cases, including the landmark case of *Dillon v. Legg (1968) 68 Cal. 2d 728, 69 Cal. Rptr. 72, 441 P.2d 912* , in which the Court had held that the right to recover for

negligent infliction of emotional distress was to be determined under the neutral principles of foreseeability and proximate cause that generally govern tort law. Under *Dillon,* foreseeability was to be determined with reference to certain guidelines, one of which was that the shock must have resulted from a sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. After *Dillon,* courts viewed the guidelines as flexible, and sometimes allowed damages for shock received soon after the injury-producing event by one who was not actually present at the exact moment when the event occurred [*see, e.g., Archibald v. Braverman (1969) 275 Cal. App. 2d 253, 256* (facts similar to *Thing,* involving arrival within moments after injury)].

In *Thing,* the Court concluded that over 20 years of experience with determining foreseeability under *Dillon* had failed to produce consistent and just results. Greater certainty and a more reasonable limit on the exposure to liability for negligent conduct required that a more definite standard than mere foreseeability under the *Dillon* guidelines was required. The Court therefore limited the right to recover to plaintiffs who personally and contemporaneously perceive the injury-producing event and its traumatic consequences (*48 Cal. 3d 644, 667-668)* .

In ***Ebarb v. Woodbridge Park Assn.*** *(1985) 164 Cal. App. 3d 781, 210 Cal. Rptr. 751* , the sister of a boy who drowned in a spa/jacuzzi at their condominium complex sued various parties for negligent infliction of emotional distress based on her alleged close proximity to the jacuzzi and witnessing of all or part of the drowning and the removal of the boy's body from the jacuzzi. In fact, plaintiff had been down the street playing with a friend when the accident occurred. As she was walking home, she saw a fire truck approaching the complex. On arriving at the complex, a woman asked for the boy's father. At that time, plaintiff could see the pool area and knew something was wrong, but she could not see the spa itself. The woman took plaintiff to her apartment, and kept her there. Plaintiff said she knew by the way the woman was acting that her brother was dead. About 10 minutes later, plaintiff went to get the mail and was stopped by a nurse. She asked the nurse if her brother was dead, and the nurse said yes. Fifteen to twenty minutes later, plaintiff managed to elude the nurse and go to the top of the stairs where she saw the boy's body floating in the spa and a man attempting to pull him up. Later, after the spa had been drained and her mother and father arrived, plaintiff accompanied them to the spa and saw the boy's body in the bottom of the spa, his arm still encased in the drain pipe that trapped him. The defendant condominium association moved for and was granted summary judgment on the ground that plaintiff's shock was not the result of sensory and contemporaneous observance of the accident. Plaintiff appealed.

The court of appeal affirmed. Plaintiff's knowledge that her brother was dead from the manner in which the woman prevented her from going to the pool was not the type of perception that allows recovery, but only an example of learning of the accident from others (*164 Cal. App. 3d 781, 785)* .

[b] Event Required to Be Subject of Sensory Perception

Ebarb v. Woodbridge Park Assn. *(1985) 164 Cal. App. 3d 781, 210 Cal. Rptr. 751* , is discussed in *§ 153.33[3][a]*.

In ***Jansen v. Children's Hosp. Med. Ctr.*** *(1973) 31 Cal. App. 3d 22, 106 Cal. Rptr. 883* , the plaintiff brought an action for the wrongful death of her five-year-old daughter allegedly resulting from the malpractice of a hospital. The plaintiff included a count for emotional trauma and resulting physical injury caused to herself by witnessing the progressive decline and ultimate death of her daughter in the hospital. The hospital's demurrer to this count was sustained without leave to amend, and the count was dismissed. The complaint alleged that the daughter had been admitted to the hospital suffering from an unspecified ailment, that the hospital negligently diagnosed and treated her, and that the child died as a result. The mother accompanied her daughter to the hospital and stayed with her for extended periods of time during her hospitalization and witnessed her death. The court of appeal affirmed. The requirements that the plaintiff be located near the scene of the accident and that the shock result from the sensory and contemporaneous observance of the accident emphasize the need that the event causing injury to the third party must itself be one that can be the subject of sensory perception. The fact that the result is visible is not determinative. In this case, the failure to diagnose was not an event that could be perceived by a lay person.

NOTE:

The California Supreme Court has rejected language in *Jansen* that required that the injury-causing event be the result of a sudden occurrence [*Ochoa v. Superior Court (1985) 39 Cal. 3d 159, 168, 216 Cal. Rptr. 661, 703 P.2d 1* ; *see § 153.46[3][c]*]. The Court held that observed conduct constituting neglect of a person's medical needs is sufficient. In so holding, the Court distinguished the facts in *Jansen*, accepting that in that case the plaintiff had not perceived the defendant's conduct--that is, the misdiagnosis *Ochoa v. Superior Court (1985) 39 Cal. 3d 159, 169-170, 216 Cal. Rptr. 661, 703 P.2d 1* ; *see § 153.46[3][c]*].

[c] No Recovery for Medical Malpractice Not Perceived as Causing Harm When Conduct Occurred

In ***Bird v. Saenz*** *(2002) 28 Cal. 4th 910, 123 Cal. Rptr. 2d 465, 51 P.3d 324* , the plaintiffs brought an action for negligent infliction of emotional distress against physicians attending their mother's surgery. The plaintiffs were at the hospital while their mother was undergoing surgery, although they were not in the operating room to observe the surgery, during which an artery was transected. However, they did hear a call over the hospital loudspeaker for a thoracic surgeon, they were provided reports from medical staff that there had been complications and that their mother may have suffered a nicked artery or vein and may have suffered a stroke, and they saw their mother, discolored and in obvious distress, being rushed through the hallway while surrounded by numerous medical personnel. Eventually, emergency surgery stopped their mother's internal bleeding. Although the plaintiffs admitted that they were not present when their mother's artery was transected, they argued that the relevant injury-producing event included the defendants' failure to diagnose and treat the damaged artery immediately, and that the events they witnessed in the hallway were a part of that failure and could support recovery for negligent infliction of emotional distress. The defendants successfully moved for summary judgment, but the court of appeal reversed, finding a triable issue of fact as to whether the plaintiffs were present at the time of the injury-producing event and knew at that time that it was causing injury to their mother. The defendants appealed.

The Supreme Court reversed the court of appeal. After reviewing relevant case law dealing with a bystander's cause of action for negligent infliction of emotional distress, the Court noted that although a plaintiff need not contemporaneously understand that a defendant's conduct constitutes legal negligence, the plaintiff must have a contemporaneous understanding that the conduct that is being observed is conduct that is actually causing harm. The Court rejected the implication found in *Mobaldi v. Regents of Univ. of Cal. (1976) 55 Cal. App. 3d 573, 127 Cal. Rptr. 720* , that all that is required is that the plaintiff observe the results of the infliction of harm, directly and contemporaneously. Instead, the Court concluded that in the context of medical malpractice cases, bystanders cannot sue for negligent infliction of emotional distress based on unperceived medical errors hidden within a course of treatment (*28 Cal. 4th 910, 920-921)* . In this case, the plaintiffs could not show that they were aware, when they witnessed their distressed mother being rushed through the hallways, that the physicians had committed medical malpractice by failing to make a proper diagnosis or were failing to administer appropriate treatment for their mother's condition. In other words, although they witnessed their mother's distress, they were not contemporaneously aware that the physicians were causing the injury through conduct that the plaintiffs were observing (*28 Cal. 4th 910, 921-922)* . The Court recognized that most misdiagnoses, unsuccessful treatments, or treatments that turn out to be inappropriate only in retrospect will not be contemporaneously observable by a lay person, and thus will usually be insufficient to support a bystander claim for negligent infliction of emotional distress. However, the Court stopped short of saying that medical malpractice could never support such a claim, noting that in some extreme situations even a lay person may contemporaneously perceive that incorrect treatment is causing an injury, such as when a family member observes a surgeon amputate the wrong limb of a patient (*28 Cal. 4th 910, 918, 920-921)* .

[d] Contemporaneous Awareness of Injury Must Be Reasonably Certain

In *Ra v. Superior Court (2007) 154 Cal. App. 4th 142, 64 Cal. Rptr. 3d 539* , plaintiff sued a store after her husband was injured by a falling sign. While shopping at the store with her husband, plaintiff heard a loud bang emanating from

the nearby area of the store where she knew her husband to be, feared that her husband had been injured, turned and saw her husband with his hand to his head, bending at the knees, in apparent pain. She did not immediately see the sign that had fallen laying on the floor. Plaintiff sought to recover for negligent infliction of emotional distress as a bystander with contemporaneous awareness of the injury caused to her husband. Plaintiff stated in her discovery responses and declaration that while she did not absolutely know that her husband had been injured when she heard the noise, she believed it more likely than not. The trial court granted summary adjudication in favor of defendant on this cause of action on the basis that this evidence established that plaintiff had not contemporaneously perceived the injury to her husband. Plaintiff filed a petition for writ of mandate.

The court of appeal denied the writ petition. The court held that a plaintiff's contemporaneous awareness of injury must be reasonably certain and a mere belief that it is more likely than not that a close relative has suffered an injury is not enough to support recovery as a bystander. The court noted that it is the emotionally traumatic effect of perceiving the infliction of serious injury on a close relative that is actionable in a bystander suit, rather than observation of the immediate aftermath or consequences of the injury-producing event. The court also noted that a contemporaneous fear of possible injury to another is insufficient to support recovery. In the instant case, plaintiff was not reasonably certain that her husband was being injured when she heard the loud noise, she merely feared that it was more likely than not, and as such, the court concluded that plaintiff could not recover as a bystander (*154 Cal. App. 4th 142, 150-153)* .

[4] Additional Authorities

[a] Failure to Observe Injury

In *Fluharty v. Fluharty (1997) 59 Cal. App. 4th 484, 69 Cal. Rptr. 2d 244* , a son sued his father for emotional distress occasioned by his father's attempted suicide. Immediately after murdering plaintiff's mother, the father telephoned the son, told him what he had done, and advised him that he intended to take his own life. Plaintiff and his wife immediately drove to the father's home where he found his father with a shotgun pointed at his chin. He pleaded with him not to shoot himself and wrestled for control of the gun when it discharged, very slightly injuring plaintiff's wife. Plaintiff sought to recover for negligent infliction of emotional distress on the theory that he was a bystander to the shotgun blast that injured his wife. Plaintiff testified that he immediately became aware the blast hit the truck behind which his wife was standing, that after his father was subdued he looked to see if his wife was okay and could not find her. Plaintiff ran around asking if anyone had seen her and was then told that she had been seen walking to a neighbor's house. He testified that the first time he learned his wife had been injured was two hours after the incident. The trial court rejected plaintiff's claim and the court of appeal affirmed. The critical fact precluding this claim was that while plaintiff may have feared for his wife's safety, he was unaware of her injury at the time it occurred (*59 Cal. App. 4th 484, 494*).

In *Evan F. v. Hughson United Methodist Church (1992) 8 Cal. App. 4th 828, 10 Cal. Rptr. 2d 748* , a 6-year-old girl and her 13-year-old brother sued a church and its parent organization, seeking to recover damages on theories including negligent infliction of emotional distress. The plaintiffs alleged that the church pastor had sexually molested the boy who, in turn, molested his sister. The trial court granted the defendants' summary judgment motion, and the court of appeal affirmed. The court of appeal relied on *Thing v. La Chusa (1989) 48 Cal. 3d 644, 257 Cal. Rptr. 865, 771 P.2d 814* , and *Golstein v. Superior Court (1990) 223 Cal. App. 3d 1415, 1427, 273 Cal. Rptr. 270* , for the proposition that, in order to recover on a bystander theory, plaintiff must have been present at the scene of the injury-producing event at the time it occurs, and must also have been aware at that time that it was causing injury to the victim (*8 Cal. App. 4th 828, 838-839)* . Because the sister could not allege that she was present at the scene when the pastor (or the church or the parent organization) injured her brother, or that she was then aware that the actions of the pastor (or the church or the parent organization) caused injury to her brother, the court held that she had not stated a cause of action (*8 Cal. App. 4th 828, 839)* .

The court of appeal further held that the sister did not have an independent cause of action for negligent infliction of

emotional distress based on the direct-victim theory set forth in *Molien v. Kaiser Found. Hosps. (1980) 27 Cal. 3d 916, 923, 167 Cal. Rptr. 831, 616 P.2d 813* [*see § 153.49[3][a]*], and *Marlene F. v. Affiliated Psychiatric Med. Clinic, Inc. (1989) 48 Cal. 3d 583, 590, 257 Cal. Rptr. 98, 770 P.2d 278* [*see § 153.49[3][b]*], because she did not establish an independent, preexisting relationship with the pastor that would have imposed a duty of care toward her (*8 Cal. App. 4th 828, 840)* .

In *Breazeal v. Henry Mayo Newhall Memorial Hospital (1991) 234 Cal. App. 3d 1329, 286 Cal. Rptr. 207* , the plaintiff sought damages as a bystander for emotional distress suffered because of allegedly negligent medical treatment rendered to her son in a hospital emergency room. It was alleged only that the plaintiff saw the doctor bent over the child, and that there was blood on both of them. The court of appeal found that no evidence established that the mother witnessed an event that caused injury to her son or that she contemporaneously was aware that any such event was causing him injury (*234 Cal. App. 3d 1329, 1342)* .

In *Fife v. Astenius (1991) 232 Cal. App. 3d 1090, 284 Cal. Rptr. 16* , the plaintiffs heard the sound of vehicle impact, then ran outside to discover that a family member had been injured in the accident. The court held that even if the plaintiffs might be considered to be present at event (through sound rather than sight), they did not contemporaneously perceive it because they were unaware at that time that the victim was involved (*232 Cal. App. 3d 1090, 1092-1093)* .

In *Scherr v. Las Vegas Hilton (1985) 168 Cal. App. 3d 908, 214 Cal. Rptr. 393* , a woman viewed a "live" television broadcast of a fire at defendant's hotel, at which her husband was a guest who sustained injuries as a result of the fire. The coverage did not, however, portray her husband's injuries in the fire. The trial court sustained defendant's demurrer to the wife's cause of action for negligent infliction of emotional distress because her pleading did not specify how and when she discovered her husband's condition. The court of appeal affirmed, holding that, although plaintiff might have concluded from the broadcast that her husband was in danger, she did not witness his injuries as they were being inflicted, and therefore could not plead that she suffered shock therefrom (*168 Cal. App. 3d 908, 910)* .

In *Madigan v. City of Santa Ana (1983) 145 Cal. App. 3d 607, 193 Cal. Rptr. 593* , the parent and stepparent of two children killed in an auto collision with defendant brought an action for negligent infliction of emotional distress. On the basis of the fact that the plaintiffs had not arrived at the scene until 15 minutes after the accident, the trial court granted defendant's demurrer. On appeal, the court upheld the ruling, finding that the sensory and contemporaneous observance of the accident required for recovery was absent in the present case (*145 Cal. App. 3d 607, 610)* .

[b] Event Required to Be Subject of Sensory Perception

In *Budavari v. Barry (1986) 176 Cal. App. 3d 849, 222 Cal. Rptr. 446* , plaintiff brought an action for negligent infliction of emotional distress and loss of consortium after her husband died of cancer. The action was based on the defendants' (a hospital and physicians) failure to inform her husband of a lesion on his lung or to investigate it further while the cancer was in an early, curable stage. The trial court dismissed the action after sustaining defendants' demurrer. In affirming the dismissal, the court of appeal discussed cases involving bystander witnesses to damaging negligent events, as well as cases brought by direct victims of negligence [*see §§ 153.37* and *153.49*], noting that plaintiff did not fit within either category. The court said that plaintiff was not a percipient witness to defendants' negligence, because the failure to detect cancer or to follow up on X-ray findings was not an event that could be witnessed (*176 Cal. App. 3d 849, 852-853)* .

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PART II. FORMS

15-153 California Points & Authorities § 153.34

§ 153.34 Supporting Contention That Plaintiff May Not Recover for Emotional Distress Damages Based on Attorney Malpractice Resulting Only in Economic Loss

[1] FORM

[*The following may be included in a memorandum or points and authorities, or in a trial or appellate brief.*]

A CLIENT MAY NOT RECOVER EMOTIONAL DISTRESS DAMAGES FOR ATTORNEY MALPRACTICE CAUSING ONLY ECONOMIC LOSS.

No Recovery for Emotional Distress Damages When Attorney Malpractice Results in Only Economic Loss. Emotional distress damages are not recoverable in an attorney malpractice action alleging only economic loss regardless of whether the malpractice occurred in the context of litigation or tax advice (*Camenisch v. Superior Court (1996) 44 Cal. App. 4th 1689, 1691, 52 Cal. Rptr. 2d 450*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a defendant's contention in a legal malpractice action that a plaintiff may not recover emotional distress damages where the malpractice leads only to economic loss.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that plaintiff may not recover emotional distress damages.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence of the type of loss sustained by plaintiff [*see Camenisch v. Superior Court (1996) 44 Cal. App. 4th 1689, 1693, 52 Cal. Rptr. 2d 450]* .

[3] Discussion of Authorities

[a] No Recovery for Emotional Distress Damages When Attorney Malpractice Results in Only Economic Loss

In ***Camenisch v. Superior Court*** *(1996) 44 Cal. App. 4th 1689, 52 Cal. Rptr. 2d 450* , a client brought an action for negligent infliction of emotional distress and legal malpractice against an attorney. Plaintiff had hired defendant to prepare trust and estate documents, including a life insurance trust in favor of his daughters, and informed defendant that he wanted to ensure financial security for his wife and daughters and that he did not want the proceeds to become a taxable part of his estate. Defendant prepared the life insurance trust, and assured plaintiff that the proceeds would not be taxed. When plaintiff discovered that the trust was incorrectly formed and estate taxes would result he sued for emotional distress damages. Defendant demurred, but the trial court overruled the demurrer.

The court of appeal disagreed, and issued a writ of mandate to strike all allegations directed toward emotional distress. The court held that the law does not recognize a protectable interest in freedom from the emotional distress involved in paying taxes, even if the taxes might have been avoided by skilled legal advice and drafting. Therefore, a lawyer may not be held liable for the emotional distress of a client who learns that the attorney's negligence may have thwarted the client's tax avoidance goal. The fact that the alleged negligence did not take place in a litigation context did not defeat the general rule that emotional distress damages are not recoverable for attorney malpractice when the malpractice leads only to economic loss (*44 Cal. App. 4th 1689, 1691)* .

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PART II. FORMS

15-153 California Points & Authorities § 153.35

§ 153.35 Supporting Contention That Plaintiff May Not Recover Emotional Distress Damages for Negligent Breach of Home Construction Contract Resulting Only in Economic Injury

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

A PLAINTIFF MAY NOT RECOVER EMOTIONAL DISTRESS DAMAGES FOR NEGLIGENT BREACH OF A HOME CONSTRUCTION CONTRACT IF THE ONLY INJURY IS ECONOMIC INJURY AND PROPERTY DAMAGE AND IF THE CONTRACTOR BREACHED NO DUTY THAT WAS INDEPENDENT OF THE CONTRACT.

No Recovery for Emotional Distress for Negligent Breach of Home Construction Contract. Even if it is foreseeable that breach of a contract to build a house would result in emotional distress to homeowners, homeowners are not entitled to recover emotional distress damages for negligent performance of the contract if the only injury caused is economic injury and if the contractor breached no duty that was independent of the contract (*Erlich v. Menezes (1999) 21 Cal. 4th 543, 552-557, 87 Cal. Rptr. 2d 886, 981 P.2d 978*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a defendant's contention that emotional distress damages may not be recovered merely because the defendant negligently breached a contract with the plaintiff to build a house, if the only injury sustained by the plaintiff is economic injury or property damage and if the defendant breached no duty that was independent of the contract.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the plaintiff may not recover emotional distress damages.

[b] Argument

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should discuss evidence showing that the breach of contract was merely negligent, that the only injury proximately caused by the breach was economic injury, and that the defendant violated no legal duty that was independent of the contract.

[3] Discussion of Authorities

[a] No Recovery for Emotional Distress for Negligent Breach of Home Construction Contract

In ***Erlich v. Menezes*** *(1999) 21 Cal. 4th 543, 87 Cal. Rptr. 2d 886, 981 P.2d 978* , the plaintiffs, a married couple, contracted with the defendant for construction of their "dreamhouse" on an ocean-view lot. Shortly after moving into the house, however, the house suffered very extensive leaks during heavy rainfall, with significant structural damage caused by the saturation. The defendant's efforts to fix these problems were ineffectual, and inspections by another contractor and a structural engineer revealed serious construction errors involving the roof, exterior stucco, windows, waterproofing, and even the home's structural components. The plaintiffs brought suit against the defendant, alleging breach of contract, fraud, negligent misrepresentation, and negligent construction. Among the plaintiffs' allegations were a claim that they suffered emotional distress caused by both the defective condition of the house and the defendant's invasive and unsuccessful repair attempts. The husband at one point had to be taken away in an ambulance due to a heart condition brought on, in part, by excessive stress, including the stress suffered on learning the full extent of the problems with the house. The wife alleged stress caused by fear that the house would collapse in an earthquake, as well as fear for her daughter's safety. At trial, the defendant prevailed on the claims for fraud and negligent misrepresentation, although the plaintiffs prevailed on the breach of contract action and the defendant was found to have negligently constructed the house. In addition to the costs of repair, the jury awarded damages for emotional distress and for the husband's physical pain and suffering and lost earnings, and the defendant appealed. In a split decision, the court of appeal affirmed the judgment, including the award of damages for emotional distress. The defendant appealed the award of emotional distress damages.

The Supreme Court reversed, holding that because the defendant's negligence directly caused only economic injury and property damage and because the defendant had breached no duty independent of the contract, the plaintiffs were not entitled to recover for emotional distress based on breach of a contract to build a house. The Court began by noting the distinction between tort damages and contract damages and the limitation generally imposed on contract damages to those within the contemplation of the parties at the time the contract was made (*21 Cal. 4th 543, 550-551)* . The Court then noted that although breach of a contractual duty may support an action in tort, a breach of contract is tortious only if the breach also violates a duty independent of the contract that arises from principles of tort law (*21 Cal. 4th 543, 551-552)* . However, the Court rejected the plaintiffs' claim that tort recovery for mental distress is appropriate if mental distress is a foreseeable result of the negligent breach of a standard commercial contract, because foreseeability alone does not support imposition of a tort duty (*21 Cal. 4th 543, 552)* . The Court noted that, outside of the insurance context, a tortious breach of contract may generally be found if (1) the breach is accompanied by a common law tort such as fraud or conversion, (2) the means used to breach the contract are tortious by use of deceit or undue coercion, or (3) one party intentionally breaches the contract, intending or knowing that such a breach will cause severe, unmitigable harm in the form of mental anguish, personal hardship, or substantial consequential damages (*21 Cal. 4th 543, 553-554)* . Partly to promote the interests of stability in commercial affairs, the Court concluded that a breach of a commercial contract that is merely negligent, as was the breach involved in this case, could not support the recovery of tort damages for emotional distress (*21 Cal. 4th 543, 554)* .

The Supreme Court went on to note that even if the defendant's negligence violated a duty independent of the contract, the plaintiffs would not be entitled to emotional distress damages under the facts of the case. The Court noted the absence of case law allowing recovery for emotional distress arising solely from property damage and stressed that a contractual relationship, without more, is insufficient to support an award of damages for emotional distress if the

negligent conduct resulted only in economic injury to the plaintiff (*21 Cal. 4th 543, 554-555)* . Noting that policy concerns had been used to deny emotional distress damages in other cases involving injury to economic interests, the Court concluded that policy concerns supported a similar limit on recovery if the negligence concerns the construction of a home (*21 Cal. 4th 543, 555-557)* . The Court also rejected the argument that the husband's heart condition was directly caused by the negligent construction, concluding instead that although the heart condition may have resulted from the emotional distress, the stress itself derived from an inherently economic concern (*21 Cal. 4th 543, 557-558)* .

Finally, the Court went on to hold that damages for emotional distress could not be recovered as consequential damages on the action brought on the contract itself. Noting that damages for emotional distress are generally not recoverable in an action for breach of an ordinary commercial contract, the Court concluded that the balance of policy considerations, including the impact on stability and predictability in commercial affairs, cautioned against allowing emotional distress damages for negligent breach of a construction contract (*21 Cal. 4th 543, 558-561)* .

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15-153 California Points & Authorities § 153.36

§ 153.36 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Negligent Infliction of Mental Distress--No Recovery for Damage to Property Without Preexisting Relationship Between Parties or Intentional Tort by Defendant

[1] FORM

[*Caption. See § 153.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT FAILS TO ALLEGE FACTS SHOWING A DUTY OF CARE EXISTED ON DEFENDANT'S PART BY VIRTUE OF A PREEXISTING RELATIONSHIP BETWEEN THE PARTIES OR THAT THE DAMAGE AROSE OUT OF AN INTENTIONAL TORT.

A. Objection by Demurrer. [*See § 153.20, Paragraph A.*]

B. Recovery Solely for Property Damage Requires Preexisting Relationship Between Parties or Intentional Tort by Defendant. To maintain reasonable limits on the remoteness of a defendant's liability, recovery for emotional distress arising out of loss of property is limited to cases in which there was a preexisting relationship between the parties creating a duty of care or to cases in which damages arose out of an intentional tort (*Cooper v. Superior Court (1984) 153 Cal. App. 3d 1008, 1012-1013, 200 Cal. Rptr. 746*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a demurrer to a complaint for negligent infliction of mental distress based solely on damage to property, when the complaint fails to state facts sufficient to constitute a cause of action in that it appears on the face of the complaint, or from any matter of which the court is required to or may take judicial notice, that the plaintiff has failed to allege facts showing a preexisting relationship between the parties giving rise to a duty of care by defendant or that defendant committed an intentional tort.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, in an appropriate case, counsel might point out that the damage to plaintiff's property was caused by machinery used on nearby property, and that no relationship existed between plaintiff and defendant before that time [*see, e.g., Cooper v. Superior Court (1984) 153 Cal. App. 3d 1008, 1012-1013, 200 Cal. Rptr. 746]* .

[3] Discussion of Authorities

[a] Recovery Solely for Property Damage Requires Preexisting Relationship Between Parties or Intentional Tort by Defendant

Cooper v. Superior Court *(1984) 153 Cal. App. 3d 1008, 200 Cal. Rptr. 746* , involved an action for negligent infliction of mental distress caused by a tractor that ran into plaintiff's home when it was negligently allowed to roll away from the place it was parked. Plaintiff was not home at the time of the incident and did not observe the accident. Plaintiff's home, swimming pool, and grounds were damaged, and she and her family moved to a hotel until repairs were made. In addition to recovery of damages for property loss, plaintiff sought damages for emotional distress arising out of the accident. Plaintiff claimed that she felt insecure, that she suffered headaches and intestinal disorders, that she sought psychology therapy, and that she continued to be affected emotionally and physically by the accident. Defendants' motion for summary adjudication of the emotional distress claim, on the ground that plaintiff could not state a cause of action for emotional distress arising from damage to her property, was granted by the trial court. The court of appeal issued an alternative writ of mandate on the issue of emotional distress, staying a planned arbitration hearing pending its decision.

The court of appeal denied the writ of mandate and dissolved the stay. The court held that plaintiff had not made the requisite minimum showing of a preexisting relationship between the parties or of an intentional tort by the defendant. The court stated that no California case has allowed recovery for emotional distress arising solely out of property damage without this minimal showing (*153 Cal. App. 3d 1008, 1012)* . Although courts have expanded the scope of the tort of negligent infliction of emotional distress, reasonable limitations on the extent and remoteness of a defendant's liability must be maintained. The court added that emotional distress arising out of loss of property evokes a sentimental loss, but stated that recovery is limited to cases when, at a minimum, the required preexisting relationship or intentional tort is shown (*153 Cal. App. 3d 1008, 1013)* .

NOTE:

In *Molien v. Kaiser Foundation Hospitals*, the California Supreme Court abolished physical impact or injury as a requirement for recovery of damages for emotional distress suffered because of negligent conduct [*Molien v. Kaiser Found. Hosps. (1980) 27 Cal. 3d 916, 924-931, 167 Cal. Rptr. 831, 616 P.2d 813* ; *see § 153.49*]. In *Cooper*, the court viewed the question as whether *Molien* should be extended to redress emotional distress resulting solely from negligent injury to property (*27 Cal. 3d 916, 1012)* . Although *Molien* was a medical malpractice case that did not involve property damage, there is nothing in the opinion that suggests that the abolition of the physical-impact-or-injury requirement would not

apply to property damage cases. However, in *Erlich v. Menezes*, a case involving the negligent breach of a commercial contract to build a home, the California Supreme Court reiterated that emotional distress damages are generally unavailable in cases in which the only injury is injury to economic or property interests, at least if the conduct is merely negligent [*Erlich v. Menezes (1999) 21 Cal. 4th 543, 554-558, 87 Cal. Rptr. 2d 886, 981 P.2d 978* ; *see § 153.35*]. The Supreme Court in *Erlich* recognized decisions such as *Molien*, but noted that those cases permitted emotional distress damages without personal injury only if the claim involved mental anguish stemming from a personal undertaking the traumatic results of which were unavoidable, as in *Molien*, or if the express object of a breached contract was the mental and emotional well-being of one of the contracting parties [*Erlich v. Menezes (1999) 21 Cal. 4th 543, 559, 87 Cal. Rptr. 2d 886, 981 P.2d 978* ; *see § 153.35*] .

[4] Additional Authorities

[a] Recovery Solely for Property Damage Requires Preexisting Relationship Between Parties or Intentional Tort by Defendant

In *Lubner v. City of Los Angeles (1996) 45 Cal. App. 4th 525, 53 Cal. Rptr. 2d 24* , a city trash truck parked at the top of a hill rolled down and crashed into plaintiffs' home damaging the house, two cars and their artwork, which included paintings, drawing, prints and posters. Plaintiffs filed a negligence action against the City of Los Angeles for property damages as well as emotional distress due to the loss of the artwork. The trial court ruled that emotional distress damages were not permitted in property damage cases. The court of appeal affirmed, stating that because the artwork was property, recovery for emotional distress would be permitted only if there was a preexisting relationship between the parties or an intentional tort (*45 Cal. App. 4th 525, 532)* . The court looked at the factors in this case and found that the moral blame on the defendant city was only that which attended ordinary negligence. Nothing in the record indicated bad faith or reckless indifference to the plaintiffs' emotional tranquility. The court concluded that on balance, the factors did not favor permitting the emotional distress damages (*45 Cal. App. 4th 525, 534)* .

Sher v. Leiderman (1986) 181 Cal. App. 3d 867, 226 Cal. Rptr. 698 , was an action by plaintiffs for damages caused when the trees of their neighbors, the defendants, grew to a point where they prevented the sunlight from reaching plaintiff's house, thus causing a reduction in the value of the house and emotional distress on the part of the plaintiffs. Plaintiffs brought suit for negligent infliction of emotional distress as well as for nuisance. The trial court found for defendants on these issues, and the court of appeal affirmed. Regarding the cause of action for negligent infliction of emotional distress, the court held that plaintiffs could not recover damages for emotional distress based on damage to property in the absence of some preexisting relationship or an intentional tort. Noting that the type of preexisting relationships on which such damages may be based generally involves a contractual or trust relationship, the court held that the mere ownership of adjoining lots and a long history as neighbors was not the type of relationship that would give rise to a heightened duty of care sufficient to support an emotional-distress award based on damage to property (*181 Cal. App. 3d 867, 884-885)* . The court considered plaintiffs' attempt to recover on a theory of negligent infliction of emotional distress after determining that they were unable to state a cause of action for nuisance (*181 Cal. App. 3d 867, 883)* .

NOTE:

Emotional distress damages are recoverable in a cause of action for nuisance [*see Smith v. County of Los Angeles (1989) 214 Cal. App. 3d 266, 287-288, 262 Cal. Rptr. 754]* .

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15-153 California Points & Authorities § 153.37

§ 153.37 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Negligent Infliction of Mental Distress--Injury to Third Party--Plaintiff Not Direct Victim Because No Duty Owed

[1] FORM

[*Caption. See § 153.20.*]

THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION FOR NEGLIGENT INFLICTION OF MENTAL DISTRESS BASED ON INJURY TO A THIRD PARTY WITH PLAINTIFF AS A DIRECT VICTIM BECAUSE IT FAILS TO ALLEGE FACTS SHOWING THAT PLAINTIFF WAS A DIRECT VICTIM OF THE ASSERTEDLY NEGLIGENT ACT.

A. Foreseeability Alone Is Insufficient to Impose Duty. In order for a plaintiff to recover damages for emotional distress arising from negligently caused injury to another as a direct victim of the negligent conduct, there must be a duty between the tortfeasor and the plaintiff based on more than mere foreseeability that the conduct would cause the distress (*Huggins v. Longs Drug Stores Cal., Inc. (1993) 6 Cal. 4th 124, 130, 24 Cal. Rptr. 2d 587, 862 P.2d 148* ; *Holliday v. Jones (1989) 215 Cal. App. 3d 102, 106-112, 264 Cal. Rptr. 448*).

B. Failure to Show That Defendant's Negligence Was Directed at Plaintiff. Failure to allege facts showing that defendant's negligence was directed at plaintiff precludes a cause of action for negligent infliction of mental distress alleging plaintiff as a direct victim of defendant's negligence based on injury to a third party (*Ochoa v. Superior Court (1985) 39 Cal. 3d 159, 172, 216 Cal. Rptr. 661, 703 P.2d 1* ; *Goodwin v. Reilley (1985) 176 Cal. App. 3d 86, 95, 221 Cal. Rptr. 374*).

C. Family Relationship Alone Is Insufficient to Impose Duty. Family relationship alone is not a sufficient basis for imposing a duty of care to refrain from negligently causing emotional distress (*Fluharty v. Fluharty (1997) 59 Cal. App. 4th 484, 496, 69 Cal. Rptr. 2d 244*).

[*Optional*] **D. No Duty Owed to Non-Using Buyer of Defective Product to Prevent Emotional Distress.** A

manufacturer does not owe a duty of care to prevent causing emotional distress to the buyer of a defective product, if that buyer is not the party using the product at the time of the injury and if that buyer does not witness the injury-causing event (*Gu v. BMW of N. Am., LLC (2005) 132 Cal. App. 4th 195, 210, 33 Cal. Rptr. 3d 617*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a demurrer to a complaint that alleges that plaintiff is a direct victim of negligent conduct and suffered emotional distress because of injury to a third party caused by the same conduct, pursuant to the holding in *Molien v. Kaiser Found. Hosps. (1980) 27 Cal. 3d 916, 923, 167 Cal. Rptr. 831, 616 P.2d 813* [*see § 153.49[3][a]*]. The ground for the demurrer is that the complaint fails to allege facts showing that plaintiff is a direct victim of defendant's negligence [*see Ochoa v. Superior Court (1985) 39 Cal. 3d 159, 172, 216 Cal. Rptr. 661, 703 P.2d 1]* .

These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should discuss facts showing that the defendant did not owe a duty to plaintiff as a direct victim of the asserted negligence [*see Molien v. Kaiser Found. Hosps. (1980) 27 Cal. 3d 916, 923, 167 Cal. Rptr. 831, 616 P.2d 813]* .

[b] Related Pleading and Practice Forms

For discussion and forms relating to mental suffering, see California Forms of Pleading and Practice, Ch. 362, *Mental Suffering and Emotional Distress* (Matthew Bender). For forms relating to demurrers generally, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender).

[c] Related Points and Authorities

For points and authorities for use regarding demurrers to complaints, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[d] Opposing Points and Authorities

In an appropriate case, the points and authorities in *§ 153.49* may be used to oppose these points and authorities.

[3] Discussion of Authorities

[a] Foreseeability Alone Is Insufficient to Impose Duty

In ***Huggins v. Longs Drug Stores Cal., Inc.*** *(1993) 6 Cal. 4th 124, 24 Cal. Rptr. 2d 587, 862 P.2d 148* , a pharmacist employed by defendant mislabeled the instructions on a prescription for plaintiffs' infant son, directing a dosage five times greater than that actually called for by the treating physician. The son was injured as a result of the overdosage, and plaintiffs sued defendant to recover damages for the emotional distress they allegedly suffered at the realization that they had contributed to their son's condition. The trial court granted defendant's motion for summary judgment, on the ground that plaintiffs could not recover based on a "direct victim" theory because defendant's only duty of care was to the child, not to plaintiffs. Plaintiffs appealed and the court of appeal reversed, holding that a pharmacist has a duty to a patient's parent or other closely-related caregiver who administers the medication as prescribed, if the pharmacist knew or should have known that the medication was for an infant or other helpless patient. The California Supreme Court agreed to review this holding, and reversed the judgment of the court of appeal (*6 Cal. 4th 124, 133)* .

The Court stated that, despite the broad language in *Molien v. Kaiser Found. Hosps. (1980) 27 Cal. 3d 916, 923, 167 Cal. Rptr. 831, 616 P.2d 813* [*see § 153.49[3][a]*], the foreseeability that a person may suffer emotional distress as a result of defendant's negligence is not sufficient to impose liability; the defendant must have assumed a duty to the plaintiff directly (*6 Cal. 4th 124, 130)* . In the context of medical care, the Court read cases that had imposed direct-victim liability as involving cases in which the plaintiff was a patient of the defendant, with the status as patient the basis for imposing a duty of care toward the plaintiff (*6 Cal. 4th 124, 130-132)* . The Court held that the professional duties of pharmacists are no different than the duties of other medical professionals who provide services to children, and are owed to the patient himself or herself only. A pharmacist is not responsible for the emotional well-being of a patient's parents (*6 Cal. 4th 124, 132-133)* .

The Court also rejected plaintiffs' claim that liability could be based on their (unwitting) participation in administering the improper dosage that injured their child. Although emotional distress resulting from that participation is foreseeable, the Court held that this foreseeability did not warrant the creation of a new right of recovery for intangible injury, given the "inevitable" enlargement of potential liability for all providers of medical goods and services obtained by parents for their children and the concomitant increase in medical malpractice insurance costs (*6 Cal. 4th 124, 133)* .

In ***Holliday v. Jones*** *(1989) 215 Cal. App. 3d 102, 264 Cal. Rptr. 448* , children of a victim of legal malpractice were awarded damages for emotional distress suffered because of the attorney's negligence in representing their father in a homicide defense. As a result of the professional negligence, the father was imprisoned for a significant period of time until the conviction was overturned on appeal on the ground of attorney incompetence. On retrial, he was acquitted.

In the civil malpractice action, the court of appeal reversed the award of damages for the emotional distress of the children. The court readily acknowledged that the children had suffered actual and foreseeable emotional distress as a result of the attorney's negligence (*215 Cal. App. 3d 102, 106)* . It further acknowledged that under *Molien v. Kaiser Found. Hosps. (1980) 27 Cal. 3d 916, 923, 167 Cal. Rptr. 831, 616 P.2d 813* [*see § 153.49[3][a]*], foreseeability of the distress alone might be sufficient to permit one to recover for the negligent caused injury of another (*215 Cal. App. 3d 102, 111)* .

However, the court held that foreseeability is not the only consideration in light of subsequent California Supreme Court decisions, particularly *Marlene F. v. Affiliated Psychiatric Med. Clinic, Inc. (1989) 48 Cal. 3d 583, 588, 257 Cal. Rptr. 98, 770 P.2d 278* [*see § 153.49[3][b]*]. In *Marlene F.*, the California Supreme Court allowed two mothers of children who had been molested by a counselor to recover damages for their emotional distress under a negligence cause of action. The counselor had been treating the parents and children together in family therapy. However, the Court stressed that negligently causing emotional distress is not an independent tort, but simply the tort of negligence, in which all of the elements, including duty, must be present. Duty must be based on more than the mere foreseeability that the conduct will cause the distress. The duty must be assumed by the defendant or imposed on the defendant as a matter of law, or arise out of a relationship between the defendant and the plaintiff. In *Marlene F.*, the duty arose from the therapist-patient relationship between the mothers and the therapist.

The court found that the Supreme Court had made a policy determination that costs associated with attempting to compensate intangible losses are socially significant and cannot be ignored. Because no recovery is allowed in California for a child's loss of parental consortium [*Borer v. American Airlines, Inc. (1977) 19 Cal. 3d 441, 138 Cal. Rptr. 302, 563 P.2d 858]* , the same recovery cannot be sanctioned through a claim for negligent infliction of emotional distress (*215 Cal. App. 3d 102, 111)* . The court attempted to synthesize the cases as allowing recovery for negligently inflicted emotional distress if: (1) there is a special relationship between the parties (*Marlene F.*); (2) the plaintiff is a direct object of some aspect of the defendant's conduct (*Molien*); (3) the plaintiff is a percipient witness to the results of the defendant's negligent act [*see §§ 153.31*-153.33, *153.45*, *153.46*]; or (4) there is a loss of spousal consortium [*see Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal. 3d 382, 115 Cal. Rptr. 765, 525 P.2d 669]* (*215 Cal. App. 3d 102, 111)* .

[b] Failure to Show That Defendant's Negligence Was Directed at Plaintiff

The facts and procedural background of ***Ochoa v. Superior Court*** *(1985) 39 Cal. 3d 159, 216 Cal. Rptr. 661, 703 P.2d 1* , are discussed in *§ 153.50[3][c]*. The Supreme Court held that plaintiffs had not stated a cause of action as direct victims of defendant's negligence. While plaintiff was a foreseeable plaintiff to whom the defendants owed a duty of care pursuant to *Dillon*, the duty owed was owed to plaintiff as a percipient witness, not as a direct victim of negligence (*39 Cal. 3d 159, 172-173)* .

In ***Goodwin v. Reilley*** *(1985) 176 Cal. App. 3d 86, 221 Cal. Rptr. 374* , parents of a son who was injured by a drunk driver brought an action against the driver to seek damages for causes of action in negligence and strict liability, including negligent infliction of emotional distress, as direct victims of the driver's negligence. Plaintiffs' son was struck and seriously injured when defendant's motorcycle crossed the center line and collided with the son's motorcycle. Plaintiffs did not observe the occurrence, but visited their son the next day in the hospital, at which time they were allegedly put in fear of his imminent death. Defendant was subsequently convicted of operating a motor vehicle under the influence of alcohol, in violation of *Veh. Code § 23153(a), (b)*. The trial court sustained defendant's demurrer to the complaint without leave to amend, and dismissed the action. Plaintiffs appealed.

The court of appeal affirmed, holding that plaintiffs were not direct victims of defendant's negligence (*176 Cal. App. 3d 86, 94-95)* . The court rejected plaintiffs' contention that the complaint established a cause of action under the guidelines of *Molien v. Kaiser Found. Hosps. (1980) 27 Cal. 3d 916, 923, 167 Cal. Rptr. 831, 616 P.2d 813* [*see § 153.49[3][a]*], on the theory that the legislative intent in enacting *Veh. Code §§ 23152* and *23153* (driving under the influence) was to deter drunk driving and to prevent the kinds of harm that drunk driving is likely to cause. There was no support for plaintiffs' assertion that the legislative purpose in enacting those sections was to protect the next-of-kin of an intoxicated motorist's victim from emotional distress (*176 Cal. App. 3d 86, 95)* .

[c] Family Relationship Alone Is Insufficient to Impose Duty

In ***Fluharty v. Fluharty*** *(1997) 59 Cal. App. 4th 484, 69 Cal. Rptr. 2d 244* , a son sued his father for emotional distress occasioned by his father's attempted suicide. Immediately after murdering plaintiff's mother, the father telephoned the son, told him what he had done, and advised him that he intended to take his own life. Plaintiff and his wife immediately drove to the father's home where he found his father with a shotgun pointed at his chin. He pleaded with him not to shoot himself and wrestled for control of the gun when it discharged, very slightly injuring plaintiff's wife. Plaintiff sought to recover for negligent infliction of emotional distress on the theory that he was a direct victim. He argued that his father's conduct, including killing plaintiff's mother, inviting plaintiff to view the scene, attempting to kill himself in plaintiff's presence, struggling over the shotgun, and discharging it was sufficiently outrageous to support this claim. The trial court denied recovery under this theory and the court of appeal affirmed.

The determinative issue for the court was whether the father owed his son a duty of care under the circumstances, and

the following factors were relevant to this question: the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct and the policy of preventing future harm. Although the infliction of emotional distress might have been foreseeable under the bizarre circumstances of this case, the court ruled that foreseeability alone was insufficient to impose a duty on the father because the other relevant policy factors did not support it (*59 Cal. App. 4th 484, 495)* . The court determined that the connection between defendant's conduct and the claimed injury was suspect in a family setting where emotional pain was an inherent staple of the parent-child relationship. Because the law imposed no criminal sanction for intentional acts of self-destruction, recognition of a duty under these circumstances would be tantamount to imposing a duty on parents generally to refrain from conduct which would cause emotional distress to their adult children. According to the court, family relationship alone was not a sufficient basis for imposing a duty of care to refrain from negligently causing emotional distress. It explained that plaintiff came to the scene of his father's attempted suicide knowing full well his father's intentions, perhaps hoping to avert an even greater catastrophe than had already befallen the family. His involvement in these events did not constitute him a victim, direct or otherwise, of his father's conduct (*59 Cal. App. 4th 484, 496)* .

[d] No Duty Owed to Non-Using Buyer of Defective Product to Prevent Emotional Distress

In ***Gu v. BMW of N. Am., LLC*** *(2005) 132 Cal. App. 4th 195, 33 Cal. Rptr. 3d 617* , the plaintiff was the owner of a vehicle purchased from the defendant. The plaintiff loaned the vehicle to her sister, and while driving the vehicle with their parents as passengers, the plaintiff's sister lost control of the vehicle and crashed into a pole and a tree. The sister died from the injuries she sustained, and the parents were injured. The plaintiff brought a cause of action against the defendant for negligent infliction of emotional distress, even though she was not in the vehicle at the time of the accident and did not witness the accident. The plaintiff based her cause of action on allegations that she purchased the vehicle because of representations about the vehicle's safety, that the defendant had a duty to her to market and sell a vehicle that provided adequate safety to the buyer and other foreseeable users, and that it was foreseeable that the purchaser of the vehicle would suffer emotional injury if the vehicle killed a member of the purchaser's family. The plaintiff contended that she could recover emotional distress damages as a direct victim of the defendant's alleged negligence in manufacturing, designing, and selling a defective vehicle. The trial court disagreed, sustaining a demurrer for the defendant, and the plaintiff appealed.

The court of appeal affirmed. The court noted that the plaintiff could not recover for emotional distress under a bystander theory because it was undisputed that she did not witness the accident. Therefore, the issue was whether she could state facts sufficient to recover emotional distress damages as a direct victim of the defendant's alleged negligence (*132 Cal. App. 4th 195, 204-205)* . The court concluded that she could not. The court rejected the plaintiff's contention that as a purchaser of the car, she stood in a special relationship with the defendant sufficient to impose a duty of care to prevent her emotional distress. Instead, the defendant's duty to exercise reasonable care extended only to persons using the car as intended and to other persons within the range of potential danger from the vehicle (*132 Cal. App. 4th 195, 206)* . Moreover, the purchase agreement in and of itself could not support recovery of emotional distress damages because the emotional well-being of the buyer was not an express object of the contract (*132 Cal. App. 4th 195, 206-207)* . Finally, the court rejected the contention that under the facts of the case, a duty of care could be imposed on public policy grounds. The court examined the claim under the traditional *Rowland* factors and concluded that these factors weighed against imposing a duty of care. Although the court recognized the foreseeability of the injury and the certainty of harm, the court concluded that those factors were outweighed by the lack of moral blame, the lack of a need to impose additional incentives to prevent the selling of defective products beyond those already created by products liability law, and the costs associated with exposing manufacturers to additional liability for emotional distress suffered by owners of a product who were not using the product or even in the area when the product caused an injury to another (*132 Cal. App. 4th 195, 208-210)* .

[4] Additional Authorities

[a] Foreseeability Alone Is Insufficient to Impose Duty

In *Melican v. Regents of University of California (2007) 151 Cal. App. 4th 168, 59 Cal. Rptr. 3d 672* , plaintiffs were the family members of a decedent whose remains were bequeathed to a university's willed body program (WBP) to be used for medical research. Plaintiffs alleged that defendants could be held liable for returning the decedent's cremated remains commingled with the cremated remains of another person. The court of appeal held that while a mortuary or crematorium may be liable for emotional distress for negligent mishandling of a corpse, a research institution that obtains willed bodies for medical dissection, research, and teaching purposes, and does not purport to provide funeral-related services, does not owe the same duties to the family members of donated corpses (*151 Cal. App. 4th 168, 179)* . In addition, the court noted that the university contractually agreed only to dispose of the decedent's remains in accordance with state law, and thus had no duty to return any remains to the decedent's family. While the defendant university may have voluntarily undertaken to do so, the court concluded that such a voluntary undertaking would not support the imposition of liability even if the remains returned had been commingled with the remains of another corpse. The fact that it was foreseeable that the plaintiffs might have suffered emotional distress from receiving commingled remains was an insufficient basis for imposing liability on defendants, as bodies donated to the WBP were routinely subjected to treatment that could cause foreseeable emotional distress to family members (*151 Cal. App. 4th 168, 180-181)* .

In *Ess v. Eskaton Props., Inc. (2002) 97 Cal. App. 4th 120, 118 Cal. Rptr. 2d 240* , the plaintiff was the sister of a woman who was diagnosed with Alzheimer's disease and then was placed in a skilled nursing facility for full-time care. While in the facility, the woman was sexually assaulted by an intruder. The plaintiff then sued the facility, seeking to recover for the emotional distress caused to her upon learning of the assault on her sister. The court of appeal agreed with the trial court that the plaintiff could not recover for her emotional distress. In rejecting the plaintiff's claim that she could recover as a direct victim of the facility's negligence, the court of appeal noted that the facility undertook to provide care to the sister, not to the plaintiff. Even though the plaintiff had previously provided care for her sister and the facility knew that injury to the sister would probably cause distress to the plaintiff, and even though the plaintiff would incidentally benefit from the facility's provision of care to her sister, this was insufficient to impose a duty of care on the facility owed directly to the plaintiff (*97 Cal. App. 4th 120, 128-129)* .

In *Klein v. Children's Hosp. Med. Ctr. (1996) 46 Cal. App. 4th 889, 54 Cal. Rptr. 2d 34* , plaintiffs brought an action for negligent infliction of emotional distress based on an misdiagnosis of their daughter. Defendants misdiagnosed the daughter as suffering from a deadly form of bone cancer. As a result of this alleged negligence, plaintiffs gave authorization for unnecessary treatment, and suffered emotional distress. The trial court sustained defendants' demurrer, and the court of appeal affirmed. Plaintiffs contended that they were direct victims of the misdiagnosis. The court agreed that it was clearly foreseeable that parents would suffer emotional distress under such circumstances, but stated that foreseeability has a minor role in the full tort analysis of duty, breach of duty, causation and damages (*46 Cal. App. 4th 889, 895)* . The court referred to *Huggins v. Longs Drug Stores Cal., Inc. (1993) 6 Cal. 4th 124, 24 Cal. Rptr. 2d 587, 862 P.2d 148* , for the rule that the existence of a contract between a parent and a medical caregiver to provide medical treatment for a child is not in itself sufficient to impose on the caregiver a duty of care owed to the parent (*46 Cal. App. 4th 889, 896)* . Concluding that, as in *Huggins,* the parents' distress was caused not by apprehension of their own health, but by that of their child, the court affirmed the judgment for defendant (*46 Cal. App. 4th 889, 899)* .

In *Jacoves v. United Merch. Corp. (1992) 9 Cal. App. 4th 88, 11 Cal. Rptr. 2d 468* , the parents of an adult psychiatric patient who committed suicide sued the sporting goods store in which the patient purchased the rifle he used against himself, seeking to recover damages for theories including negligent infliction of emotional distress. Plaintiffs alleged that the store had negligently sold the rifle and ammunition to their son. The trial court granted, and the court of appeal affirmed, summary judgment in favor of the store.

The court of appeal relied on the rule set forth in *Molien v. Kaiser Found. Hosps. (1980) 27 Cal. 3d 916, 923, 167*

Cal. Rptr. 831, 616 P.2d 813 [*see § 153.49[3][a]*], that a plaintiff who suffers emotional distress without accompanying physical injury may recover for negligent infliction of emotional distress if the defendant owed the plaintiff a direct duty. However, the plaintiffs here did not establish the required duty. The defendant was a store that sold firearms, the son was an adult, and the plaintiffs had no contact with the store (*9 Cal. App. 4th 88, 119)* .

In *Burger v. Pond (1990) 224 Cal. App. 3d 597, 273 Cal. Rptr. 709* , plaintiff sought to recover damages for emotional distress allegedly caused by an attorney's negligent provision of legal services to her husband in the handling of his divorce from his first wife. The attempted dissolution was set aside due to a jurisdictional error after the husband-client had remarried plaintiff and they had a child together. Plaintiff argued that she had stated a cause of action because the attorney was aware of the husband-client's intentions to remarry and have a child, and it was, therefore, foreseeable that plaintiff would be emotionally distressed due to the negligence. The court rejected the argument, finding that foreseeability is not a substitute for legal duty. Nothing established a special relationship between the attorney and plaintiff sufficient to impose on the attorney any duty toward her (*224 Cal. App. 3d 597, 606-607)* .

In *Khan v. Shiley Inc. (1990) 217 Cal. App. 3d 848, 266 Cal. Rptr. 106* , defendant had manufactured a heart valve that was surgically implanted in plaintiff. The valve subsequently had a high incidence of malfunction; was found by the Food and Drug Administration to have the potential to cause serious adverse health consequences, including death; and was subsequently recalled (*217 Cal. App. 3d 848, 853 n.7*). Plaintiff sued for negligent infliction of emotional distress, based on her knowledge that her valve might malfunction at any time.

The court of appeal affirmed the demurrer based on *Marlene F. v. Affiliated Psychiatric Med. Clinic, Inc. (1989) 48 Cal. 3d 583, 588, 257 Cal. Rptr. 98, 770 P.2d 278* , specifically its language on the limits of duty. The court rejected the view that the plaintiff was a direct victim, stating that in the absence of product malfunction, the plaintiff cannot establish that defendants breached any duty owed to her (*217 Cal. App. 3d 848, 856)* . The court held that product malfunction is an essential element of a cause of action under any product liability theory (*217 Cal. App. 3d 848, 854-855, 857)* . The fact that the distress might easily be characterized as a foreseeable result of the negligence was apparently of no import.

[b] Failure to Show That Defendant's Negligence Was Directed at Plaintiff

In McMahon v. Craig (2009) 176 Cal. App. 4th 1502, ___ Cal. Rptr. 3d ___, plaintiff was the owner of a Maltese show dog that suffered from respiratory distress. When the dog was five years old, plaintiff took her to a veterinarian for surgery on her throat. Although the dog was not supposed to eat anything for 24 hours after the surgery, the veterinarian instructed an assistant to administer a mixture of water and baby food to the dog only two hours after surgery. The dog aspirated on the mixture and died a day and a half later while still under the veterinarian's care. There was also evidence that the dog had not been provided appropriate antibiotics, oxygen, glucose, and other supportive care after the surgery. Plaintiff sued the veterinarian for intentional and negligent infliction of emotional distress. The court of appeal held that defendant did not owe a duty directly to plaintiff not to cause her emotional distress. The court concluded that although a veterinarian is hired by the owner of a pet and the pet owner may be emotionally involved in the pet's health, a veterinarian's medical care is directed solely at the pet. Thus, malpractice by a veterinarian does not directly harm the pet owner and will not support recovery by the pet owner for negligent infliction of emotional distress, at least when the plaintiff was not present at the scene when the injury-producing event occurred. The court noted that a person cannot recover for negligent infliction of emotional distress when he or she is not present at the scene when a family member suffers injury from a physician's malpractice, and it would be anomalous to allow such a recovery when a person's pet is injured through similar conduct (*176 Cal. App. 4th 1502, 1510-1515)* .

In *Steven F. v. Anaheim Union High Sch. Dist. (2003) 112 Cal. App. 4th 904, 6 Cal. Rptr. 3d 105* , the plaintiffs were the parents of a female high school student who engaged in a sexual relationship with a teacher. The court of appeal held that the school district was not liable for the emotional distress caused to the parents when the parents discovered, prior to the school district doing so, that their daughter had engaged in the sexual relationship. The student had gone to

great lengths to conceal the relationship from her family and friends, there was no evidence that the district or any teacher or supervisory employee had knowledge of the sexual relationship, and there was nothing to warn the district of a propensity on the part of the teacher to engage in such a relationship with a student. Under those circumstances, even assuming for the sake of argument that the district may have been negligent in supervising the teacher, there was no conduct by school officials that was aimed at the parents that would support holding the school district liable for the parents' emotional distress (*112 Cal. App. 4th 904, 906, 910, 914-915)* .

In *Evan F. v. Hughson United Methodist Church (1992) 8 Cal. App. 4th 828, 10 Cal. Rptr. 2d 748* , a 6-year-old girl and her 13-year-old brother sued a church and its parent organization, seeking to recover damages on theories including negligent infliction of emotional distress. The plaintiffs alleged that a pastor of the church had sexually molested the boy who, in turn, molested his sister. The trial court granted summary judgment in favor of the church and the parent organization. The court of appeal affirmed.

The court of appeal relied on *Thing v. La Chusa (1989) 48 Cal. 3d 644, 257 Cal. Rptr. 865, 771 P.2d 814* , and *Golstein v. Superior Court (1990) 223 Cal. App. 3d 1415, 1427, 273 Cal. Rptr. 270* , for the proposition that, in order to recover on a bystander theory, plaintiff must have been present at the scene of the injury-producing event at the time it occurs, and must also have been aware at that time that it was causing injury to the victim (*8 Cal. App. 4th 828, 838-839)* . Because the sister could not allege that she was present at the scene when the pastor (or the church or the parent organization) injured her brother, or that she was then aware that the actions of the pastor (or the church or the parent organization) caused injury to her brother, the court held that she had not stated a cause of action (*8 Cal. App. 4th 828, 839)* .

The court of appeal further held that the sister did not have an independent cause of action for negligent infliction of emotional distress based on the direct-victim theory set forth in *Molien v. Kaiser Found. Hosps. (1980) 27 Cal. 3d 916, 923, 167 Cal. Rptr. 831, 616 P.2d 813* [*see § 153.49[3][a]*], and *Marlene F. v. Affiliated Psychiatric Med. Clinic, Inc. (1989) 48 Cal. 3d 583, 590, 257 Cal. Rptr. 98, 770 P.2d 278* [*see § 153.49[3][b]*], because she did not have an independent, preexisting relationship with the pastor that would have imposed a duty of care toward her (*8 Cal. App. 4th 828, 840)* . The sister's only relationship with the pastor was telling him on three or four occasions that her brothers did things that she did not like, such as pulling her hair or calling her a brat. *Marlene F.* requires a more serious relationship than this. Furthermore, the pastor's conduct, unlike the therapist's conduct in *Marlene F.*, was not directed at the sister (*8 Cal. App. 4th 828, 840)* .

Schwarz v. Regents of Univ of Cal. (1990) 226 Cal. App. 3d 149, 276 Cal. Rptr. 470 , is discussed in *§ 153.37[4][b]*. A father sought to recover damages for emotional distress that he allegedly incurred due to the negligent treatment of his son in psychotherapy. The court rejected the claim, holding that if negligence is alleged to have occurred during the medical treatment of the child, the defendant's conduct is directed solely at the child, the intended third-party beneficiary of the contract, and not at the parent who enters into the contract solely as a surrogate for the minor child (who could otherwise disaffirm the contract). The contract is not, in itself, sufficient to impose a duty of care on the medical professional toward the parent. The court approved *Martinez v. County of Los Angeles (1986) 186 Cal. App. 3d 884, 893, 231 Cal. Rptr. 96* , and rejected *Newton v. Kaiser Found. Hosps. (1986) 184 Cal. App. 3d 386, 228 Cal. Rptr. 890*) (*226 Cal. App. 3d 149, 168)* .

In *Anderson v. Northrop Corp. (1988) 203 Cal. App. 3d 772, 250 Cal. Rptr. 189* , the wife of a terminated employee sued the employer for negligent infliction of emotional distress, alleging that she was a direct victim of the employer's conduct that constituted the alleged wrongful termination of her husband. The court of appeal noted, in rejecting the claim, that although the employer might well have anticipated that the wife would suffer mental distress, it did nothing to include her within the scope of its allegedly improper actions. Although foreseeability of harm is considered by courts in determining whether or not to impose a legal duty, it must be linked with tortious conduct directed toward the plaintiff for liability to result (*203 Cal. App. 3d 772, 777)* . The court considered it to be a contortion of the "direct victim" logic to characterize any of the employer's acts as directed toward the employee's spouse (*203 Cal. App. 3d*

772, 778) .

In *Martinez v. County of Los Angeles (1986) 186 Cal. App. 3d 884, 231 Cal. Rptr. 96* , plaintiffs, parents of a child who was born with brain damage, brought an action for negligent infliction of emotional distress against defendant physicians. Defendants had been responsible for the prenatal care of the mother and the delivery of the child. Plaintiffs alleged that as a result of defendants' negligence, they suffered damages from restructuring their lives to take care of the child. The court of appeal affirmed the trial court's dismissal of the action, noting that the parents had failed to allege conduct by the physicians directed to the parents that elicited serious emotional response (*186 Cal. App. 3d 884, 893)* .

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
CHAPTER 153 MENTAL SUFFERING AND EMOTIONAL DISTRESS
PART II. FORMS

15-153 California Points & Authorities § 153.38

§ 153.38 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action to Recover Damages for Emotional Distress Caused by Fear of Future Life-Threatening Disease Due to Exposure to the Disease--By Defendant--Absent Physical Injury or Illness, Plaintiff's Failure to Establish Likelihood of Disease Precludes Recovery for Fear of Disease

[1] FORM

[*Caption. See § 153.20.*]

BECAUSE PLAINTIFF HAS ALLEGED NO PRESENT PHYSICAL INJURY OR ILLNESS CAUSE BY THE EXPOSURE TO _____ [THE CARCINOGENIC SUBSTANCE *or* AIDS *or other life-threatening disease*], AND HAS NOT SHOWN THAT IT IS MORE LIKELY THAN NOT THAT HE/SHE WILL DEVELOP [THE DISEASE] AS A RESULT OF THE EXPOSURE, DAMAGES FOR THE EMOTIONAL DISTRESS RESULTING FROM THE FEAR OF DISEASE CANNOT BE RECOVERED.

Emotional Distress Damages Caused by Fear of Disease Absent Present Physical Injury or Illness Recoverable Only if Plaintiff Establishes That Future Disease Is More Likely Than Not. As a matter of public policy, emotional distress damages caused by the fear of life-threatening disease that is not probable is generally not compensable in a negligence action in which the plaintiff has not suffered any physical injury or illness as a result of the exposure to the disease or a substance causing the disease (*Potter v. Firestone Tire & Rubber Co. (1993) 6 Cal. 4th 965, 990, 25 Cal. Rptr. 2d 550, 863 P.2d 795*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a motion for summary judgment that asserts that a cause of action seeking to recover damages for emotional distress, caused by plaintiff's fear of developing cancer as a result of defendant's negligence in exposing plaintiff to a carcinogenic or toxic substance without any present physical injury or illness, is precluded because plaintiff has not established that it is more likely than not that he or she will develop the feared cancer as a result of the exposure [*Potter v. Firestone Tire & Rubber Co. (1993) 6 Cal. 4th 965, 997, 25 Cal. Rptr. 2d 550, 863 P.2d 795]* .

The "more likely than not" standard does not apply if the plaintiff pleads and proves that the defendant's conduct in causing the exposure amounts to "oppression, fraud, or malice" as defined in *Civ. Code § 3294* [*Potter v. Firestone Tire & Rubber Co. (1993) 6 Cal. 4th 965, 997-1000, 25 Cal. Rptr. 2d 550, 863 P.2d 795]* . For a form of points and authorities regarding this exception, see *§ 153.52*.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing that plaintiff has not established that it is more likely than not that he or she will develop cancer as a result of the exposure.

[3] Discussion of Authorities

[a] Emotional Distress Damages Caused by Fear of Future Cancer Absent Present Physical Injury or Illness Recoverable Only if Plaintiff Establishes That Future Cancer Is More Likely Than Not

In ***Potter v. Firestone Tire & Rubber Co.*** *(1993) 6 Cal. 4th 965, 25 Cal. Rptr. 2d 550, 863 P.2d 795* , four landowners who lived adjacent to a landfill brought actions against Firestone Tire and Rubber Co. (Firestone) for damages and declaratory relief, alleging that Firestone had dumped large quantities of liquid waste (including various types of toxins and solvents) at the landfill over a period of years between 1967 and 1980, despite the landfill's prohibition against the dumping of toxic substances and liquids. By May 1977 Firestone also promulgated policies setting forth the proper methods of disposing of toxins and liquids, but despite initially complying with those policies, the cost of compliance led a manager to resume dumping the liquids at the landfill.

In 1984, plaintiffs discovered that toxic chemicals had contaminated their water wells; some of the chemicals are known carcinogens and others are strongly suspected to be carcinogenic. They filed suit against Firestone in 1985, alleging causes of action for negligence, negligent and intentional infliction of emotional distress, and strict liability/ultrahazardous activity. The trial court, sitting without a jury, found for plaintiffs on all of these theories, and entered judgment for plaintiffs. In its findings of fact, the court found that Firestone's waste disposal practices between 1967 and 1974 were negligent because of the dumping despite knowledge that the landfill prohibited the disposal of liquid wastes, and because a minimal inquiry would have disclosed the danger to groundwater and the potential for contaminating wells that was caused by the practices. The court also found that the post-1977 disposal, in violation of its own policy, was extreme and outrageous conduct that constituted intentional infliction of emotional distress.

The trial court awarded plaintiffs damages for the fear of cancer and the emotional distress that resulted from that fear, based on its conclusion that plaintiffs had established that they had an increased chance of contracting cancer in the future. The court also awarded plaintiffs damages representing the present value of the costs of future periodic medical monitoring to detect the onset of disease at the earliest possible time. The court also awarded damages for plaintiffs'

psychiatric illness and the treatment of that illness, and damages for the general disruption of plaintiffs' lives and the invasion of their privacy. Finally, the court awarded punitive damages in the amount of $2.6 million, on the ground that Firestone's post-1977 dumping was conducted with conscious disregard of the rights and safety of others.

The court of appeal affirmed the judgment with the exception of the award for future medical monitoring, which it reversed on the ground that plaintiffs had not established that cancer was reasonably certain to occur. The Supreme Court granted review, and reversed the judgment of the court of appeal to the extent that it affirmed the award of punitive damages and the award for plaintiffs' fear of cancer, and reversed the award for future medical monitoring. The Court remanded the cause to the court of appeal, permitting remand to the trial court for retrial.

The Court rejected Firestone's contention that damages for emotional distress can be recovered only if plaintiff has suffered a physical injury, noting that the physical injury requirement was rejected in favor of the requirement that a claim of mental distress in the absence of physical injury be supported by some guarantee of genuineness in the circumstances of the case (*6 Cal. 4th 965, 987-988)* . However, the Court rejected the court of appeal's standard for determining whether emotional distress damages based on a fear of cancer are available. The court of appeal required that the fear of cancer be objectively reasonable, that the trier of fact consider evidence regarding the likelihood that cancer will occur (permitting the trier of fact to conclude that a fear of a remote cancer is not reasonable), and that the fear is genuine. The Court held that although the plaintiff is required to establish the reasonableness of his or her fear of cancer, the mere fact of an exposure or a significant increase in the risk of cancer is not sufficient to establish reasonableness (*6 Cal. 4th 965, 988-990)* .

The Court held that a carcinogenic or other toxic ingestion or exposure, without more, does not provide a basis for fearing future physical injury or illness that the law is prepared to recognize as reasonable. Even a plaintiff's knowledge that his or her risk of cancer has been significantly increased by a toxic exposure, without requiring any further showing of the actual likelihood of the feared cancer due to the exposure, provides no protection against unreasonable claims based on wholly speculative fears (*6 Cal. 4th 965, 990-997)* . Thus, the Court concluded that the proper rule is that emotional distress caused by the fear of a cancer that is not probable should generally not be compensable in a negligence action. In the absence of a present physical injury or illness, damages for fear of cancer may be recovered only if the plaintiff pleads and proves that (1) as a result of the defendant's negligent breach of a duty owed to the plaintiff, the plaintiff is exposed to a toxic substance that threatens cancer; and (2) the plaintiff's fear stems from a knowledge, corroborated by reliable medical or scientific opinion, that it is more likely than not that the plaintiff will develop the cancer in the future due to the toxic exposure. Under this rule, the plaintiff must do more than simply establish knowledge of a toxic ingestion or exposure and a significant increased risk of cancer. The plaintiff must further show that based on reliable medical or scientific opinion, the plaintiff harbors a serious fear that the toxic ingestion or exposure was of such magnitude and proportion as to likely result in the feared cancer (*6 Cal. 4th 965, 997)* .

[4] Additional Authorities

[a] Emotional Distress Damages Caused by Fear of Disease Absent Present Physical Injury or Illness Recoverable Only if Plaintiff Establishes That Future Disease Is More Likely Than Not

In *Macy's Cal., Inc. v. Superior Court (1995) 41 Cal. App. 4th 744, 48 Cal. Rptr. 2d 496* , plaintiff brought an action against Macy's for emotional distress damages after she pricked her finger on a hypodermic needle in the pocket of a jacket that had been returned to Macy's by another customer. Plaintiff's emotional distress was based on her fear that she had contracted AIDS or another serious or lethal disease. Plaintiff admitted that she did not test positive for the HIV virus, and would stand only a 1 in 200,000 chance of contracting the virus from the needle if it was contaminated. Macy's moved for summary adjudication on the issue of emotional distress damages. The trial court denied this motion, stating that plaintiff could recover because she was within the area of physical risk and actually sustained a physical impact. The court of appeal noted that the policy considerations involved in imposing liability for emotional distress

damages for fear of contracting a life-threatening disease were discussed in *Potter v. Firestone Tire & Rubber Co. (1993) 6 Cal. 4th 965, 990, 25 Cal. Rptr. 2d 550, 863 P.2d 795* . Under *Potter,* a plaintiff must show that it is more likely than not that the plaintiff will develop the life-threatening disease in order to recover. The court stated that the issue left open by *Potter* was what degree of physical injury is required for parasitic recovery of emotional distress damages for fear of disease (*41 Cal. App. 4th 744, 752)* . The court disagreed with the trial court reasoning, holding that the issue was not whether the plaintiff was in the area of physical risk or sustained a physical impact, but rather whether the plaintiff sustained physical injury, meaning detrimental change to the body (*41 Cal. App. 4th 744, 757)* . The court ruled that Macy's had the burden of proof on its motion, and that it satisfied this burden by presenting evidence that plaintiff did not test positive for HIV. Since plaintiff could meet neither the *Potter* "more likely than not" test, nor the requirement of a physical injury for purposes of parasitic recovery of emotional distress damages, Macy's was entitled to summary adjudication. The court thus issued a peremptory writ directing the trial court to vacate its order denying summary adjudication and to enter a new order granting the motion.

California Points & Authorities

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
CHAPTER 153 MENTAL SUFFERING AND EMOTIONAL DISTRESS
PART II. FORMS

15-153 California Points & Authorities § 153.39

§ 153.39 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Negligent Infliction of Mental Distress--Plaintiff Seeking Mental Distress Damages for Fear of Own Safety Must Establish That Defendant Owed Plaintiff Legal Duty of Care

[1] FORM

[*Caption. See § 153.20.*]

PLAINTIFF IS NOT ENTITLED TO RECOVER DAMAGES FOR NEGLIGENTLY INFLICTED EMOTIONAL DISTRESS STEMMING FROM PLAINTIFF'S FEAR FOR HIS/HER OWN SAFETY BECAUSE PLAINTIFF HAS FAILED TO SHOW THAT DEFENDANT OWED PLAINTIFF A LEGAL DUTY TO AVOID CAUSING PLAINTIFF TO EXPERIENCE EMOTIONAL DISTRESS UNDER THE FACTUAL CIRCUMSTANCES OF THE CASE.

Plaintiff Seeking Mental Distress Damages for Fear of Own Safety Must Establish That Defendant Owed Plaintiff Legal Duty of Care. The negligent infliction of emotional distress is simply one application of the tort of negligence, and to recover for the negligent infliction of the emotional distress caused when fearing for one's own safety, as in all negligence cases, the plaintiff must show that the defendant owed the plaintiff a legal duty of care under the particular facts of the case (*Lawson v. Management Activities, Inc. (1999) 69 Cal. App. 4th 652, 657, 81 Cal. Rptr. 2d 745*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a demurrer to a complaint that alleges that plaintiff can recover for the negligent infliction of emotional distress suffered when defendant's actions caused plaintiff to fear for his or her own safety. The grounds for the demurrer are that plaintiff has failed to show that defendant owed plaintiff a legal duty of care to avoid causing this emotional distress.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should discuss facts showing that the defendant did not owe a legal duty of care to plaintiff under the traditional factors set out in *Rowland v. Christian (1968) 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561* . Those factors include the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff has been injured, the connection between the defendant's conduct and the injury suffered, the moral blame attached to defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant, and the consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved [*Lawson v. Management Activities, Inc. (1999) 69 Cal. App. 4th 652, 657, 81 Cal. Rptr. 2d 745]* .

[3] Discussion of Authorities

[a] Plaintiff Seeking Mental Distress Damages for Fear of Own Safety Must Establish That Defendant Owed Plaintiff Legal Duty of Care

In ***Lawson v. Management Activities, Inc.*** *(1999) 69 Cal. App. 4th 652, 81 Cal. Rptr. 2d 745* , plaintiffs were a group of employees at a car dealership who watched a corporate jet crash nearby. Plaintiffs filed an action to recover from the owners and operators of the jet for the "serious, substantial, and enduring mental anguish" they suffered when they momentarily feared that the jet would crash into them or that they would suffer injury from the resulting explosion. The trial court sustained defendant's demurrer without leave to amend. Plaintiffs appealed.

The court of appeal affirmed. Declining to pigeonhole the case as either one for "bystander" liability or "direct victim" liability, as court opinions have tended to do with cases involving the negligent infliction of emotional distress, the court of appeal stressed that negligent infliction of emotional distress is not a separate tort from negligence, but simply one application of negligence principles. Thus, in order to state a claim for negligently inflicted emotional distress, plaintiffs must establish the traditional negligence elements of duty, breach, damages, and causation. In order to establish that a legal duty of care was owed to plaintiffs under the circumstances, a court must analyze the particular facts of the case under the factors traditionally used to determine whether a duty of care existed. Those factors include the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff has been injured, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant, and the consequences to the community of imposing a duty to exercise care with resulting liability for breach, as well as the availability, cost, and prevalence of insurance for the risk involved (*69 Cal. App. 4th 652, 656-657)* .

Applying those factors to the factual circumstances of a plane crash, the court held that the operator of an airline did not have a legal duty to avoid the infliction of emotional trauma on physically untouched spectators of a plane crash, even those spectators who momentarily reasonably feared for their own safety. The court concluded that, while foreseeability and the closeness of the connection between the defendant's conduct and the injury suffered might support the imposition of liability, the other factors, including the relative lack of moral blame and the lack of need for additional incentive to prevent plane crashes, weighed heavily against imposing a duty of care (*69 Cal. App. 4th 652, 657-660)* .

The court, disagreeing with the Ninth Circuit's holding in *In re Air Crash Disaster Near Cerritos, Cal. (9th Cir. 1992) 973 F.2d 1490* , rejected the broad proposition that California law allows recovery for emotional distress whenever one reasonably fears for one's own safety because of the negligence of another, regardless of the factual context (*69 Cal. App. 4th 652, 660-661)* . The court also distinguished earlier cases that had established a rule permitting recovery for emotional distress stemming from fear for one's own safety triggered in a bystander by a negligent automobile driver. The court noted that, unlike the constant concern with the safety of bystanders that may be associated with ground travel, the safety of bystanders in air travel is usually irrelevant and only arises when a crash is about to occur (*69 Cal. App. 4th 652, 667-668)* .

California Points & Authorities

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
CHAPTER 153 MENTAL SUFFERING AND EMOTIONAL DISTRESS
PART II. FORMS

15-153 California Points & Authorities § 153.40

§ 153.40 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Intentional Infliction of Mental Distress--Sufficient Allegation That Defendant's Conduct Was Outrageous

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN SUPPORT OF DEMURRER TO COM-
vs.	)	PLAINT
_____ [*name(s)*],	)	[*Code Civ. Proc. § 430.10(e)*]
Defendant(s).	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

AN ALLEGATION OF OUTRAGEOUS CONDUCT IS SUFFICIENT TO WITHSTAND A DEMURRER IF REASONABLE PERSONS MIGHT DIFFER AS TO WHETHER THE CONDUCT WAS SUFFICIENTLY EXTREME AND OUTRAGEOUS.

A. Jury Question Where Reasonable Persons Differ. Where reasonable persons might differ, it is for the jury to determine whether the conduct was sufficiently extreme and outrageous to result in liability for the intentional infliction

of mental distress (*Molko v. Holy Spirit Assn. (1988) 46 Cal. 3d 1092, 1123, 252 Cal. Rptr. 122, 762 P.2d 46* ; *Golden v. Dungan (1971) 20 Cal. App. 3d 295, 308-309, 97 Cal. Rptr. 577*).

[*Optional*] **B. Relationship of Parties.** The relationship between the parties is significant in determining whether the conduct was outrageous (*Alcorn v. Anbro Eng'g, Inc. (1970) 2 Cal. 3d 493, 498, 86 Cal. Rptr. 88, 468 P.2d 216*).

[*Optional*] **C. Abuse of Authority.** The extreme and outrageous character of the conduct may arise from an abuse of a position or a relation which gives actual or apparent authority or power to affect the interests of the plaintiff, as in the case of police officers, school authorities, and collecting creditors (*Golden v. Dungan (1971) 20 Cal. App. 3d 295, 303 n.5, 97 Cal. Rptr. 577*).

[*Optional*] **D. Abuse of Trust.** Those in a relation or position that gives them power to damage another's interest may act outrageously when they breach the trust of those whose lives they promised to make more meaningful. For example, a religious organization that misrepresented and concealed its identity in order to induce unsuspecting outsiders into a highly structured environment where they were subjected, without their knowledge or consent, to coercive persuasion, may have acted outrageously (*Molko v. Holy Spirit Assn. (1988) 46 Cal. 3d 1092, 1122, 252 Cal. Rptr. 122, 762 P.2d 46*).

[*Optional*] **E. Relationship of Insurer-Insured.** An insurer has a special relationship to its insured and has special implied-in-law duties toward the insured that must be considered in determining whether conduct is sufficiently outrageous to impose liability (*Fletcher v. Western Nat'l Life Ins. Co. (1970) 10 Cal. App. 3d 376, 403-404, 89 Cal. Rptr. 78*).

[*Optional*] **F. Relationship of Landlord-Tenant.** A landlord has a special relationship with his/her tenant that must be considered in determining whether conduct is sufficiently outrageous to impose liability (*see* *Aweeka v. Bonds (1971) 20 Cal. App. 3d 278, 281-282, 97 Cal. Rptr. 650*).

[*Optional*] **G. Relationship of Employer-Employee.** An employee is entitled to a greater degree of protection from insult and outrage by his/her employer than if he/she were a stranger (*Alcorn v. Anbro Eng'g, Inc. (1970) 2 Cal. 3d 493, 498, 86 Cal. Rptr. 88, 468 P.2d 216*).

[*Optional*] **H. Special Susceptibility to Emotional Distress.** A defendant's awareness of a plaintiff's special susceptibility to emotional distress is significant in determining whether the conduct was outrageous (*Alcorn v. Anbro Eng'g, Inc. (1970) 2 Cal. 3d 493, 498, 86 Cal. Rptr. 88, 468 P.2d 216*).

[*Optional*] **I. Insulting Language With Aggravated Circumstances.** Aggravated circumstances can make mere insulting language a sufficient basis for a cause of action (*Alcorn v. Anbro Eng'g, Inc. (1970) 2 Cal. 3d 493, 499, 86 Cal. Rptr. 88, 468 P.2d 216*).

[*Optional*] **J. Words That Result in Physical Injury.** Where mere words, oral or written, result in physical injury to another, they are actionable under the tort of intentional infliction of emotional distress as long as the act is intentional, it is unreasonable, and the actor should recognize it as likely to result in illness (*Bowden v. Spiegel, Inc. (1950) 96 Cal. App. 2d 793, 794-795, 216 P.2d 571*).

[*Optional*] **K. Intentional or Unreasonable Acts Likely to Cause Illness.** Behavior may be considered outrageous if a defendant acts intentionally or unreasonably with the recognition that the acts are likely to result in illness through mental distress (*Newby v. Alto Riviera Apartments (1976) 60 Cal. App. 3d 288, 297, 131 Cal. Rptr. 547*).

[*Optional*] **L. Verbal Threats and Intimidation.** Verbal threats and intimidation made in the course of an investigation, which are designed to prevent plaintiff from "going public" with concerns about the investigation,

constitute a sufficient allegation of extreme and outrageous conduct (Sabow v. United States (9th Cir. 1996) 93 F.3d 1445, 1456) .

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a demurrer to a complaint for intentional infliction of mental distress where the demurrer asserts that the complaint fails to allege facts showing that the defendant's conduct was outrageous but where the facts are such that reasonable persons could differ on the question.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the point of law raised.

[b] Exclusive Remedy of Workers' Compensation

The exclusive remedy provisions of the workers' compensation law [*Lab. Code §§ 3601, 3602*] bar actions for intentional infliction of emotional distress arising from an employee-employer relationship [*see § 153.40[1*], Optional Paragraph G] if the misconduct attributed to the employer involves actions that are a normal part of the employment relationship, such as demotions, promotions, criticism of work practices, and frictions in negotiations regarding grievances [*see Cole v. Fair Oaks Fire Prot. Dist. (1987) 43 Cal. 3d 148, 160, 233 Cal. Rptr. 308, 729 P.2d 743]* . For further discussion of this issue, see Ch. 239, *Workers' Compensation Exclusive Remedy Doctrine* .

[c] Related Points and Authorities

In an appropriate case, these points and authorities may be used in opposition to a demurrer supported by the points and authorities in *§ 153.20*.

[3] Discussion of Authorities

[a] Jury Question Where Reasonable Persons Differ

In ***Golden v. Dungan*** *(1971) 20 Cal. App. 3d 295, 97 Cal. Rptr. 577* , plaintiffs, husband and wife, filed separate actions against common defendants. Each alleged a cause of action for intentional infliction of emotional distress. The trial court sustained defendants' demurrers to these causes of action. The conduct on which the complaints were based consisted of the action of the defendants' agent in pounding on the front door of plaintiffs' home at night when the house was darkened in an attempt to serve process on plaintiff husband. The house had a functioning doorbell but the agent did not use this. No other attempt at service had been made and defendants had no reason to believe service of process could not be made at a reasonable time and in a reasonable manner. The loud pounding awakened plaintiffs and their family and the neighborhood. The court of appeal reversed, holding that each plaintiff had alleged a cause of action to

recover for the intentional infliction of emotional distress. One of the points on appeal was whether unnecessary pounding on the front door of a darkened house at midnight in a loud and boisterous manner, which awakened not only the occupants but also the neighborhood, could be considered extreme and outrageous conduct. The court noted that liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. However, where reasonable persons may differ, it is for the jury, subject to the control of the court, to determine whether the conduct in a particular case has been sufficiently extreme and outrageous to result in liability. Thus, the judgments of dismissal were improper and the trial court was instructed to overrule the demurrers.

[b] Relationship of Parties

In ***Alcorn v. Anbro Eng'g, Inc.*** *(1970) 2 Cal. 3d 493, 86 Cal. Rptr. 88, 468 P.2d 216* , plaintiff brought an action for damages based on the intentional infliction of emotional distress and violation of the Unruh Civil Rights Act. The trial court entered an order of dismissal after defendants' demurrer to the third amended complaint was sustained without leave to amend. Plaintiff was a black, employed as a truck driver by defendant corporation. Plaintiff, in his capacity as shop steward for the Teamster's Union, informed his foreman, another defendant, that plaintiff had advised another employee that he should not drive a certain truck to the job site since that employee was not a teamster. Plaintiff's remarks to the foreman were not rude, insubordinate, or otherwise violative of plaintiff's duties as an employee. The foreman shouted at plaintiff in a rude, violent, and insolent manner, calling him a "nigger," and telling him to get his pay check since he was fired. Plaintiff reported the incident to the corporation's secretary, another defendant, who ratified and confirmed the foreman's acts, including plaintiff's discharge, on behalf of the corporation and the other defendants. As a result of the incident, plaintiff allegedly suffered humiliation, mental anguish, and emotional and physical distress. He was sick and ill for several weeks thereafter, was unable to work, and sustained shock, nausea, and insomnia. Plaintiff alleged that the foreman's conduct was intentional and malicious, and that the secretary's conduct was done intentionally or with a wanton and reckless disregard of the consequences to plaintiff. Plaintiff also alleged that blacks are particularly susceptible to emotional and physical distress from conduct such as committed by defendants. At the time of the action, plaintiff was reinstated in his job through grievance and arbitration procedures and had received back pay. The Supreme Court held that plaintiff had leaded a situation in which reasonable persons might differ regarding defendants' liability and that the order of dismissal should, therefore, be reversed as to the cause of action for intentional infliction of mental distress. The court noted that defendants stood in a position or relation of authority over plaintiff. The cases and commentators have emphasized the significance of the relationship between the parties in determining whether liability should be im posed. Plaintiff's status as an employee should entitle him to a greater degree of protection from insult and outrage than if he were a stranger to defendants.

[c] Abuse of Authority

The factual background of ***Golden v. Dungan*** *(1971) 20 Cal. App. 3d 295, 97 Cal. Rptr. 577* , is discussed in *§ 153.40[3][a]*. Defendants argued that there was no special relationship between the parties that was abused. Plaintiffs, however, did not accede to the proposition that the relationship of defendants to plaintiff husband was immaterial. The conduct was the result of actions designed and intended by those claiming damages from plaintiff husband in a lawsuit, and the immediate actor was proceeding under color of process issued in that lawsuit. Plaintiffs cited *Bowden v. Spiegel, Inc. (1950) 96 Cal. App. 2d 793, 216 P.2d 571* , in which the malicious conduct of an agent of a creditor was held to spell out a cause of action. The court noted the position of the Restatement (Second) of Torts that the extreme and outrageous character of conduct may arise from an abuse of a position or a relation with the plaintiff, which gives the defendant actual or apparent authority over the plaintiff, or power to affect his or her interest. As examples, police officers, school authorities, and collecting creditors have been held liable for extreme abuse of their position.

[d] Abuse of Trust

In ***Molko v. Holy Spirit Assn.*** *(1988) 46 Cal. 3d 1092, 252 Cal. Rptr. 122, 762 P.2d 46* , plaintiffs, former members of defendant Unification Church, had initially been recruited by specific members of defendant through invitations to

socialize and then to visit a farm for relaxation. Both plaintiffs repeatedly asked whether the group had any religious affiliation and were told no. While at the farm plaintiffs led strictly regimented and isolated lives, and were strongly discouraged from leaving. After some time, plaintiffs were informed that the group was part of the Unification Church. Plaintiffs remained with the group and became members of defendant. Later plaintiffs were on separate occasions forcibly abducted from a public street by third parties and deprogrammed. Plaintiffs then filed an action against defendant, alleging they had been fraudulently induced to join defendant through a variety of deceptive tactics on the part of some of its members. Each plaintiff asserted several causes of action, among them intentional infliction of emotional distress. The trial court granted summary judgment for defendant on all causes of action. Plaintiffs appealed. The court of appeal affirmed the summary judgment. Plaintiffs petitioned the State Supreme Court for review.

The California Supreme Court reversed the summary judgment for intentional infliction of emotional distress. Plaintiffs contended that the misrepresentation and concealment of defendant's identity for the purpose of inducing them to submit unknowingly to coercive persuasion was actionable as intentional infliction of emotional distress (*46 Cal. 3d 1092, 1120)* . The Court found that the imposition of tort liability against defendant church is constitutionally permissible in that it does not interfere with the free exercise of religion [*see* Ch. 105, *Fraud and Deceit*]. However, the Court specifically distinguished defendant's threats of divine retribution if plaintiffs left the church as protected religious speech that could not form the basis of a claim for intentional infliction of mental distress (*46 Cal. 3d 1092, 1120)* . The Court rejected defendant's contention that the misrepresentations were privileged under former Civ. Code § 47(3) [*now see Civ. Code § 47(c)*] as communications without malice, to an interested person by an interested person, because the communications were not from one interested party to another. The Court also rejected defendant's attempt to characterize one plaintiff's harms as self-inflicted. That plaintiff had sold flowers on the streets for 17 hours a day for 19 consecutive days. The Court said plaintiff's statement reflected not consent, but mere submission (*46 Cal. 3d 1092, 1121)* . The Court observed that defendant did not attempt to negate (1) its intention to cause, or its reckless disregard of the probability of causing, emotional distress, (2) plaintiffs' severe emotional suffering, or (3) its conduct's actual and proximate causation of that suffering. It said that to be entitled to summary judgment defendant must conclusively negate at least one necessary element of the cause of action, and therefore, defendant had to establish as a matter of law that its conduct was not extreme and outrageous in the sense required to support an action for emotional distress (*46 Cal. 3d 1092, 1121-1122)* . The Court explained that conduct is extreme and outrageous when it exceeds all bounds usually tolerated by a decent society, and is of a nature that is especially calculated to cause, and does cause, mental distress. Liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. Behavior may be outrageous if a defendant (1) abuses a relation or position that gives him or her power to damage the plaintiff's interest, (2) knows the plaintiff is susceptible to injuries through mental distress, or (3) acts intentionally or unreasonably with the recognition that the acts are likely to result in illness through mental distress. The Court rejected both of defendant's arguments why its conduct was not, as a matter of law, extreme and outrageous. First, the Court noted that fraud, even though purportedly religiously motivated, is actionable conduct. Thus, defendant's contention that its actions were nothing more than intensive religious practice differing only in degree, not in kind, from those of many other religious groups was not convincing. Second, the Court said that the harmful behavior defendant argued was self-inflicted occurred after plaintiff had formally joined defendant, and had no bearing on whether its original fraudulent inducement into an atmosphere of coercive persuasion is extreme and outrageous. The Court noted that defendant's continued deceptions could be seen as conduct breaching plaintiffs' trust in the integrity of those who were promising to make their lives more meaningful. So viewed, defendant's actions might constitute an abuse of a relation or position that gives it power to damage plaintiffs' interest (*46 Cal. 3d 1092, 1122)* . The Court explained that when reasonable persons differ, it is for the jury, subject to the control of the court, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability. Since reasonable persons could differ ere, a question of fact remains regarding whether defendant's conduct was outrageous (*46 Cal. 3d 1092, 1123)* .

[e] Relationship of Insurer-Insured

The factual background of ***Fletcher v. Western Nat'l Life Ins. Co.*** *(1970) 10 Cal. App. 3d 376, 89 Cal. Rptr. 78* , is

discussed in *§ 153.20[3][a]*. In affirming the judgment and holding that plaintiff had stated a case for emotional infliction of mental distress, the court noted that cases and commentators have emphasized the significance of the relationship between the parties in determining whether liability should be imposed. The court added that the special obligation of public utilities and other enterprises affected with the public interest is also considered significant in the imposition of liability on such defendants even in the absence of outrageous conduct, and reasoned that such an imposition of liability was based on a policy of encouraging fair treatment of the public whom the enterprises serve. The court found that both of these considerations were pertinent in the case before it. The insurance business is governmentally regulated to a substantial degree and is, thus, affected with a public interest and offers services of a quasi-public nature. In addition, an insurer has a special relationship to its insured and has special implied-in-law duties toward the insured. In observing that this special relationship and these special duties take cognizance both of the great disparity in the economic situations and bargaining abilities of the insurer and the insured and of the fact that an insured does not contract to obtain a commercial advantage but to protect himself or herself from the risks of accidental loss, the court found that the considerations noted above were particularly cogent in disability insurance since the very risks insured against presuppose that if and when a claim is made, the insured will be disabled and in strait financial circumstance, and, therefore, particularly vulnerable to oppressive tactics on the part of an economically powerful entity.

[f] Relationship of Landlord-Tenant

In ***Aweeka v. Bonds*** *(1971) 20 Cal. App. 3d 278, 97 Cal. Rptr. 650* , the tenant plaintiffs attempted to state a cause of action for intentional infliction of mental distress, among others. The trial court sustained without leave to amend the landlords' demurrer to their amended complaint and entered a judgment of dismissal. Plaintiffs had notified defendants of the need for repairs in their apartment on numerous occasions and the defendants repeatedly refused to repair any of the conditions. Plaintiffs indicated their intention to exercise the right to repair and deduct under *Civ. Code §§ 1941* and *1942*. Defendants then almost doubled the amount of rent that constituted an actual eviction since plaintiffs were unable to pay the increased rental. The court of appeal held that the complaint alleged a cause of action for intentional infliction of mental distress. The court cited *Richardson v. Pridmore (1950) 97 Cal. App. 2d 124, 217 P.2d 113* , which stated that an eviction could be unlawful and actionable even though not accompanied with threat, violence, or abusive language. The court also pointed out that *Alcorn v. Anbro Eng'g, Inc. (1970) 2 Cal. 3d 493, 86 Cal. Rptr. 88, 468 P.2d 216* , had stressed the significance of the relationship between the parties in determining whether liability should be imposed and that the authorities indicate that landlords have been held liable for abuse of their position.

[g] Relationship of Employer-Employee

Alcorn v. Anbro Eng'g, Inc. *(1970) 2 Cal. 3d 493, 86 Cal. Rptr. 88, 468 P.2d 216* , is discussed in *§ 153.40[3][b]*.

[h] Special Susceptibility to Emotional Distress

The factual background of ***Alcorn v. Anbro Eng'g, Inc.*** *(1970) 2 Cal. 3d 493, 86 Cal. Rptr. 88, 468 P.2d 216* , is discussed in *§ 153.40[3][b]*. According to plaintiff, defendants were aware of his particular susceptibility to emotional distress. Such susceptibility has often been mentioned as significant in determining liability. Blacks may be particularly susceptible to severe emotional distress from discriminatory conduct or the use of racial epithets. Plaintiff's own susceptibility to racial slurs and other discriminatory conduct is a question for the trier of fact, and cannot be determined on demurrer.

[i] Insulting Language With Aggravated Circumstances

Alcorn v. Anbro Eng'g, Inc. *(1970) 2 Cal. 3d 493, 498, 86 Cal. Rptr. 88, 468 P.2d 216* , is discussed in *§ 153.40[3][b]*.

[j] Words That Result in Physical Injury

In ***Bowden v. Spiegel, Inc.*** *(1950) 96 Cal. App. 2d 793, 216 P.2d 571* , plaintiff brought an action for personal injuries based on the intentional infliction of mental distress. The trial court sustained a demurrer to the first amended complaint without leave to amend and entered judgment for defendant. Defendant corporation operated several retail stores. Defendant First Doe as agent of the corporate defendant telephoned the home of a neighbor of plaintiff at 11:00 P.M. and asked for her. The neighbor asked if it was an emergency and the agent replied that it was. The neighbor walked down the street to plaintiff's home and told her there was an emergency telephone call for her. When the plaintiff reached the telephone the agent asked her to bear up as what he was going to tell her was going to be a shock. He then proceeded to demand payment of a bill and threatened to take her into court unless she came into the store the next morning at ten. The entire neighbor family listened to plaintiff's end of the conversation. Plaintiff did not owe the company any money. As a result of this action, plaintiff became ill. On appeal, the court of appeal reversed with directions to overrule the demurrer. The court noted that given the elements that the act is intentional, that it is unreasonable, and that the actor should recognize it as likely to result in illness, the modern cases recognize that mere words, oral or written, which result in physical injury to another are actionable. Once the wrongful quality is established, it does not matter whether the conduct consisted of acts alone, or of acts accompanied by words, or of mere spoken words alone. The nature of the wrongful conduct that induces physical harm through its effect on the mind and nervous system is generally immaterial.

[k] Intentional or Unreasonable Acts Likely to Cause Illness

Newby v. Alto Riviera Apartments *(1976) 60 Cal. App. 3d 288, 131 Cal. Rptr. 547* , was an action for declaratory relief, an injunction, and damages in connection with alleged threats by defendants to evict plaintiff from her apartment. Plaintiff and other tenants organized a tenants' meeting after defendants had announced a rent increase. Defendants attended the meeting after receiving a petition which had been signed by plaintiff and other tenants requesting their presence. At this meeting, one defendant called plaintiff a troublemaker, accused her of upsetting the other tenants, and then gave her a three-day eviction notice. When plaintiff refused to vacate, a second defendant stated that the situation would be dealt with as it was dealt with down south, and, thereafter, plaintiff received a 30-day eviction notice. However, at the time of trial, plaintiff was still occupying her apartment. After plaintiff presented evidence at trial on her causes of action, one of which included damages for intentional infliction of mental distress, defendant moved for a judgment of nonsuit on the jury causes of action and a judgment under *Code Civ. Proc. § 631.8* on the other causes of action. The trial court granted both motions, and from the entry of judgment on all causes of action in favor of defendants, plaintiff appealed. The court of appeal reversed as to the causes of action for intentional infliction of emotional distress and in all other respects affirmed. The court of appeal held that with respect to this cause of action, plaintiff had presented substantial evidence that defendants' actions were outrageous and caused plaintiff to suffer fear, worry, anxiety, and sleeplessness. The court stated that, with respect to the sufficiency of the evidence concerning defendants' outrageous conduct, although earlier decisions and the Restatement of Torts emphasized the need to look for more in the way of outrage as a guarantee that he claims were genuine when bodily harm did not accompany the emotional distress, latter decisions have permitted pleading and proof of less outrageous conduct [*see Golden v. Dungan (1971) 20 Cal. App. 3d 295, 97 Cal. Rptr. 577* ; *see also § 153.40[3][a]*]. The court found that the modern rule is that there is liability for conduct exceeding all bounds usually tolerated by a decent society, of a nature which is especially calculated to cause and does cause mental distress. Relying on the Restatement (Second) of Torts, the court stated that behavior may be considered outrageous if a defendant abuses a relation or position that gives him or her power to damage the plaintiff's interest or acts intentionally or unreasonably with the recognition that the acts are likely to result in illness through mental distress. The court found substantial evidence in the entire course of defendants' conduct that defendants' behavior was outrageous in that they acted knowingly and unreasonably with the intention to inflict emotional distress and abused the special relationship between landlords and tenants.

[l] Verbal Threats and Intimidation

In **Sabow v. United States** (9th Cir. 1996) 93 F.3d 1445 , the family of a deceased Marine Corps Colonel sued the

federal government for intentional infliction of emotional distress. Plaintiffs alleged that at a meeting held six weeks after the Colonel's death, a senior military investigator "continually, repeatedly and adamantly stated that decedent had killed himself due to serious allegations of misconduct against him," referred to decedent as a "crook and felon who had committed serious violations of the Uniform Code of Military Justice," and became furious and began screaming at plaintiffs in response to their questions regarding the investigation. The district court dismissed the emotional distress count for failure to state a claim.

The Ninth Circuit Court of Appeal reversed, holding that the allegations, if true, described extreme and outrageous conduct directed at plaintiffs and comprised a claim for intentional infliction under California law. The court found the conduct particularly outrageous given that it allegedly was designed to prevent plaintiffs from going public with their concerns about the investigation. Similarly, the court determined that the senior officer's use of illegitimate means (instructing military personnel to investigate ways in which plaintiff's medical license could be revoked) to fulfill impermissible ends (to silence plaintiff's criticism and prevent further inquiries about the military's investigation), also supported a claim for intentional infliction of emotional distress (93 F.3d 1445, 1456) .

[4] Additional Authorities

[a] Jury Question Where Reasonable Persons Differ

The factual background of *Alcorn v. Anbro Eng'g, Inc. (1970) 2 Cal. 3d 493, 86 Cal. Rptr. 88, 468 P.2d 216* , is discussed in *§ 153.40[3][b]*. The court noted that plaintiff at least pleaded a situation in which reasonable persons might differ regarding defendants' liability. Thus, the order of dismissal was reversed as to the cause of action for intentional infliction of mental distress.

In *Cross v. Bonded Adjustment Bureau (1996) 48 Cal. App. 4th 266, 55 Cal. Rptr. 2d 801* , plaintiff sued a collection agency for causing plaintiff to lose a lien priority on the property of a judgment debtor. Defendant filed a demurrer to the cause of action for intentional infliction of emotional distress, contending that its conduct was not outrageous. The trial court sustained the demurrer, and plaintiff appealed. The court of appeal reversed noting that where reasonable persons may differ, it is for the jury to determine whether the conduct has been sufficiently extreme and outrageous to result in liability. Finding that the parties were in a fiduciary relationship, so that defendant was in a position of power to adversely affect plaintiff's interests, the court concluded that reasonable minds could differ as to whether defendant's conduct was sufficiently extreme and outrageous (*48 Cal. App. 4th 266, 284)* .

[b] Relationship of Parties

In *Cross v. Bonded Adjustment Bureau (1996) 48 Cal. App. 4th 266, 55 Cal. Rptr. 2d 801* , plaintiff sued a collection agency for intentional infliction of emotional distress, for causing plaintiff to lose a lien priority on the property of a judgment debtor. Plaintiff had hired defendant to collect on a judgment, and defendant had failed to record a certified copy of a renewal application in the county where the judgment debtor's property was located. Defendant filed a demurrer, contending that there was no fiduciary relationship between the parties, and that its conduct was not outrageous. The trial court sustained the demurrer. The court of appeal reversed, initially noting that the relationship between a collection agency and a judgment creditor is fiduciary in nature (*48 Cal. App. 4th 266, 276)* . The court then stated that the outrageous character of conduct may arise from an abuse by a party in a position to have actual or apparent authority over another. Given the fiduciary nature of the parties' relationship, the court concluded that it could not say that plaintiff failed to allege outrageous conduct as a matter of law (*48 Cal. App. 4th 266, 283)* .

[c] Abuse of Authority

In *Wallis v. Superior Court (1984) 160 Cal. App. 3d 1109, 207 Cal. Rptr. 123* , plaintiff, a former employee of real party in interest, defendant furniture manufacturing corporation, brought an action against defendant for intentional infliction of emotional distress. Plaintiff alleged that, at age 55, he was permanently laid off by defendant, ineligible for

receipt of his accrued pension benefits until age 65, and lacking in work skills outside furniture manufacture. Prior to his layoff, plaintiff entered into a written agreement with defendant whereby defendant agreed to pay plaintiff a specified sum monthly until plaintiff reached age 65, in return for plaintiff's promise not to compete with defendant's business. Defendant subsequently terminated the payments. The court of appeal held that plaintiff had alleged facts sufficient to show outrageous conduct since plaintiff alleged that defendant intentionally abused its position of financial control over him by terminating the payments without good reason, lied about its reasons for doing so, knew of plaintiff's vulnerable employment and economic position, and intended to cause him harm, as a result of which he suffered emotional distress (*160 Cal. App. 3d 1109, 1120)* .

[d] Relationship of Insurer-Insured

In *Hailey v. California Physicians' Service (2007) 158 Cal. App. 4th 452* , plaintiffs sued their health insurer for intentional infliction of emotional distress, breach of contract, and bad faith after the insurer sought to rescind the policy after one of the plaintiffs suffered severe injuries in an automobile accident. Although the insurer learned of alleged misrepresentations in the original insurance application in February 2001, the insurer did not notify plaintiffs that they were rescinding the policy because of these alleged misrepresentations until June 1, 2001. In the interim, the automobile accident occurred on March 19, 2001, and the insurer had authorized health care providers to provide surgery and other treatment in an amount exceeding $450,000. The trial court sustained defendant's demurrer to the cause of action for intentional infliction of emotional distress, but the court of appeal concluded that plaintiffs had adequately stated a claim and reversed. The court noted that, while the health insurance company may have been within its rights to seek rescission of the policy based on alleged misrepresentations in the policy application, the insurance company acted in an outrageous manner if it obtained the knowledge necessary to justify rescission but waited until after the insured had suffered a serious injury requiring substantial medical treatment before seeking to rescind. By waiting until an injury is sustained, the insurer not only risked liability for bad faith, but sought rescission at a time when the insured was known to be peculiarly susceptible to emotional distress (*158 Cal. App. 4th 452, 475-476)* .

[e] Relationship of Landlord-Tenant

In *Stoiber v. Honeychuck (1980) 101 Cal. App. 3d 903, 162 Cal. Rptr. 194* , the court of appeal overruled a demurrer in favor of defendant landlord, holding in part that the availability of a remedy for breach of the implied warranty of habitability does not preclude a tenant from suing a landlord in a situation where the landlord's conduct was extreme and outrageous, resulting in severe emotional distress. Where the landlord allegedly refused to correct defective and unsafe conditions, it cannot be said as a matter of law that the tenant has not stated a cause of action for intentional infliction of emotional distress (*101 Cal. App. 3d 903, 922)* .

Newby v. Alto Riviera Apartments (1976) 60 Cal. App. 3d 288, 131 Cal. Rptr. 547 , is discussed in *§ 153.40[3][k]*.

[f] Relationship of Employer-Employee

In *Prevost v. First W. Bank (1987) 193 Cal. App. 3d 1492, 239 Cal. Rptr. 161* , plaintiff, a bank employee, alleged that he was wrongfully and in bad faith terminated from his employment because he supported the losing party in an internal power struggle. He also alleged that he was libeled by a communication made by the employer-bank to its bonding company in which it was alleged that the employee might have committed a crime. Plaintiff also included causes of action for intentional and negligent infliction of emotional distress. In reversing summary judgment for the bank on the infliction of emotional distress causes of action, the court of appeal noted the rule that conduct may be considered outrageous if a defendant abuses a position that gives it the power to damage plaintiff's interest (*193 Cal. App. 3d 1492, 1503-1504)* .

NOTE:

Although the court in *Prevost* did not distinguish among defendant's alleged acts so as to indicate exactly what behavior might be considered to be outrageous, its decision may, by implication, stand for

the proposition that a bad-faith wrongful termination of an employment contract constitutes an outrageous act sufficient to state a cause of action for intentional infliction of emotional distress because of the potentially coercive employment relationship.

In *Lagies v. Copley (1980) 110 Cal. App. 3d 958, 168 Cal. Rptr. 368* , plaintiff, a newspaper reporter, brought an action for damages against defendants, his employer and certain coemployees, alleging, in part, a conspiracy to intentionally inflict emotional distress on plaintiff. Plaintiff had alleged that defendants, standing in a position of authority over him, and for the purpose of causing him to suffer such distress, had intentionally humiliated plaintiff, refused to print his stories, singled him out for denial of merit raises, demoted him, blackballed him (thus precluding other employment), and published plaintiff's confidential sources (thus destroying his credibility as an investigative reporter), all without just cause or provocation. The trial court entered a judgment of dismissal after sustaining a demurrer to this cause of action. The court of appeal reversed. After reviewing prior California cases, including *Alcorn v. Anbro Eng'g, Inc. (1970) 2 Cal. 3d 493, 498, 86 Cal. Rptr. 88, 468 P.2d 216* [*see § 153.40[3][b]*], the court concluded that plaintiff had alleged facts and circumstances that reasonably could lead the trier of fact to conclude that defendants' conduct was extreme and outrageous, having a severe and traumatic effect on plaintiff's emotional tranquility. The court noted that plaintiff's pleadings had charged more than mere insulting language or supervision of job activities; an abuse of the employer-employee relationship with intent to damage plaintiff was the ultimate fact pleaded. The court held that these aggravated circumstances alleged by plaintiff were sufficient to uphold his complaint as against defendants' general demurrer (*110 Cal. App. 3d 958, 974)* .

[g] Special Susceptibility to Emotional Distress

In *KOVR-TV v. Superior Court (1995) 31 Cal. App. 4th 1023, 37 Cal. Rptr. 2d 431* , three children sued a television reporter and the station that employed him, for intentional infliction of emotional distress. Plaintiffs' complaint alleged that, with knowledge that no adult was present and with the camera rolling, the reporter interrogated the children about the murder of two children who lived next door by their mother. At the time, the children were unaware of the deaths of their friends and neighbors. The complaint alleged that the reporter informed the children that the mother had killed her children and then herself, "conveying this information in such a manner as to cause the children emotional distress so that their visible emotional distress would be demonstrative to the TV audience." Defendants moved for summary judgment, arguing as a matter of law that the conduct of the interview, and particularly the manner of informing the children of the tragic deaths of the neighbors, were not such extreme and outrageous acts as would support liability for intentional infliction of emotional distress. The trial court denied the summary judgment motion, stating that whether or not defendant's conduct was extreme and outrageous was a triable issue of fact, and that the videotape indicated a triable controversy existed. Defendants sought a writ of mandate directing the superior court to vacate its denial of their motion for summary judgment and to grant the motion.

The court of appeal ruled that the trial court properly denied defendant's motion (*31 Cal. App. 4th 1023, 1026)* . The court focused on the issues of whether the defendant's conduct was extreme and outrageous, and whether defendant had either the intention of causing, or reckless disregard of the probability of causing, emotional distress. To be outrageous, conduct must be so extreme as to exceed all bounds of that usually tolerated in a civilized community. According to the court, the videotaped interview revealed an uninvited, intrusive encounter by adult strangers with children of tender years not in a public place, but in their home. A jury could conclude these facts revealed an alarming absence of sensitivity and civility (*31 Cal. App. 4th 1023, 1030)* . The court further concluded that a jury could find that a television reporter who attempts deliberately to manipulate the emotions of young children for some perceived journalistic advantage has engaged in conduct so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency. Given that possible interpretation, defendants failed to negative the existence of a material triable issue of fact with regard to plaintiffs' allegations of extreme and outrageous conduct. The court was unpersuaded by defendant's argument regarding the fact that they did not ultimately broadcast the interview. Although the record did not reveal why the interview was not broadcast, the court determined that no reason would negative the childrens' allegations that defendant's conduct was extreme and outrageous (*31 Cal. App. 4th 1023, 1031)* .

In *Katsaris v. Cook (1986) 180 Cal. App. 3d 256, 225 Cal. Rptr. 531* , plaintiff's dogs were shot without his knowledge by the defendant neighbors' employee for allegedly disturbing livestock on the property. For 10 days, plaintiff attempted to find the dogs and asked defendants several times if they had seen them or knew where the dogs were. When plaintiff finally found the dogs after 10 days and discovered what had happened, he brought actions for damages, negligence, and intentional infliction of emotional distress against defendants. The trial court granted defendants' motion for judgment, holding that *Food & Agric. Code § 31103,* which provides that dogs entering property where livestock are confined may be killed, precluded recovery on all three claims. The court of appeal affirmed the judgment on the damages and negligence claims but reversed on the emotional distress claim. The court held that plaintiff could bring an action based on the neighbor's denial of any knowledge of the dogs and on plaintiff's special susceptibility to emotional distress and anxiety caused by not knowing what had happened to his dogs and where they were (*180 Cal. App. 3d 256, 267-269)* .

The factual background of *Golden v. Dungan (1971) 20 Cal. App. 3d 295, 97 Cal. Rptr. 577* , is discussed in *§ 153.40[3][a]*. The court cited the Restatement (Second) of Torts, which provided that the extreme and outrageous character of conduct may arise from the knowledge that plaintiff is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity. Where there is such knowledge, conduct that would otherwise not be outrageous may become so.

[h] Words That Result in Physical Injury

Golden v. Dungan (1971) 20 Cal. App. 3d 295, 97 Cal. Rptr. 577 , is discussed in *§ 153.40[3][a]*.

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
CHAPTER 153 MENTAL SUFFERING AND EMOTIONAL DISTRESS
PART II. FORMS

15-153 California Points & Authorities § 153.41

§ 153.41 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Intentional Infliction of Mental Distress--Sufficient Allegation of Intent

[1] FORM

[*Caption. See § 153.40.*]

AN ALLEGATION THAT THE CONDUCT OF DEFENDANT WHICH CAUSED PLAINTIFF SEVERE EMOTIONAL DISTRESS WAS DONE WITH THE INTENT TO CAUSE SUCH HARM TO PLAINTIFF IS A SUFFICIENT ALLEGATION OF INTENTIONAL CONDUCT.

Allegation of Intent to Cause Emotional Distress as Sufficient. A complaint for intentional infliction of emotional distress which is otherwise sufficient need not allege that the defendant knew or should have known of the plaintiff's existence and knew that his/her conduct would cause emotional harm to the plaintiff in order sufficiently to allege intentional conduct on the part of defendant. It is sufficient to allege that the act was done with the intent to cause emotional harm to plaintiff (*Vescovo v. New Way Enters., Ltd. (1976) 60 Cal. App. 3d 582, 588, 130 Cal. Rptr. 86*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a demurrer to a complaint for intentional infliction of mental distress where the demurrer asserts that the complaint fails to allege facts showing that the defendant intended to cause the plaintiff emotional distress but where the complaint alleges that the act or conduct in question was done with the intent to cause such distress.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

In an appropriate case these points and authorities may be used in opposition to a demurrer supported by the points and authorities in *§ 153.21*.

[3] Discussion of Authorities

[a] Allegation of Intent to Cause Emotional Distress as Sufficient

Vescovo v. New Way Enters., Ltd. *(1976) 60 Cal. App. 3d 582, 130 Cal. Rptr. 86* , involved an advertisement placed in defendant newspaper which gave plaintiffs' address, and stated in essence that plaintiff wife was available for sexual activity. In their complaint, plaintiffs alleged that neither the wife nor anyone acting on her behalf gave permission to defendants to publish the advertisement. Following the appearance of the advertisement, the wife received numerous letters soliciting her to perform immoral and criminal acts, over 100 persons wrongfully entered on plaintiffs' property creating disturbances and using lewd and threatening language, and over 150 motor vehicles cruised by plaintiffs' house creating a number of disturbances. Plaintiffs set forth 10 causes of action, one of which was for the intentional infliction of emotional distress to plaintiff daughter. The allegations concerning this cause of action were that defendants published the advertisement with intent to injure, disgrace, and cause great mental distress and anguish to the daughter. Defendants demurred to this cause of action, as well as to certain other causes of action alleged in the complaint. The trial court sustained the demurrers without leave to amend, and, on entry of a judgment of dismissal, plaintiffs appealed. Plaintiffs contended that, with respect to their cause of action for intentional infliction of emotional distress, they had sufficiently alleged intentional conduct on defendants' part. Defendants argued, however, that there must be a direct allegation that they were aware of the daughter's existence or should have recognized a danger of harm to her from the conduct toward the wife. The court of appeal agreed with plaintiffs and reversed the judgment of dismissal as to this cause of action. The court stated that, although it would have been preferable for plaintiffs to allege in the manner for which defendants had argued, it was sufficient to allege that the act was done with the intent to case emotional harm to the daughter since it was not the function of the court at this stage of the action to determine whether plaintiffs would be able to prove that defendants acted intentionally toward the daughter.

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PART II. FORMS

15-153 California Points & Authorities § 153.42

§ 153.42 Opposing Motion for New Trial [Code Civ. Proc. § 657] in Action for Intentional Infliction of Mental Distress--Evidence Sufficient to Show Causation

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR NEW TRIAL
_____ [*name*(*s*)],	)	
Defendant(s).	)	
	)	[*Code Civ. Proc. § 657*]
	)	

_____

DEFENDANT'S MOTION FOR A NEW TRIAL SHOULD BE DENIED BECAUSE THE EVIDENCE WAS SUFFICIENT TO PROVE CAUSATION.

A. Conditions for New Trial for Insufficiency of Evidence. A new trial should not be granted on the ground of insufficiency of the evidence to justify the _____ [verdict *or* decision] where after weighing the evidence the court is not convinced from the entire record, including reasonable inferences therefrom, that the _____ [court *or* jury] clearly should have reached a different _____ [verdict *or* decision] (*Code Civ. Proc. § 657*).

B. Causation as Question of Fact When Conflicting Inferences Can Be Drawn. Proximate cause becomes a question of fact when conflicting inferences or conclusions can be drawn from the evidence within the area of

proximate cause as legally defined (*Tate v. Canonica (1960) 180 Cal. App. 2d 898, 901, 5 Cal. Rptr. 28*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for new trial in an action for intentional infliction of mental distress where the motion is based on insufficient evidence of causation.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of his case and the points of law stated.

In an appropriate case, these points and authorities may be used in opposition to a motion supported by the points and authorities in *§ 153.25*.

[3] Discussion of Authorities

[a] Causation as Question of Fact When Conflicting Inferences Can Be Drawn

In ***Tate v. Canonica*** *(1960) 180 Cal. App. 2d 898, 5 Cal. Rptr. 28* , the plaintiffs were the widow and children of a person who had been subjected to threats and accusations for the purpose of harassing, embarrassing, and humiliating him. They brought an action for wrongful death resulting from the intentional infliction of mental distress. The trial court entered a judgment against the plaintiffs after an order sustaining a demurrer to their complaint without leave to amend. The court of appeal noted that the complaint was uncertain and ambiguous and thereby subject to a special demurrer but stated that the question was whether the complaint stated or could state a cause of action. The acts complained of were not done for the purpose of causing the deceased to commit suicide but it was alleged that they were done intentionally to cause him emotional distress and caused him to become physically and mentally disturbed, as a result of which the deceased took his life. The court noted that proximate cause is legal cause, as distinguished from the layman's notion of actual cause, and is always, in the first instance, a question of law. It becomes a question of fact when conflicting inferences or conclusions can be drawn from the evidence within the area of proximate cause as legally defined. Although earlier cases gave some support to the position that suicide is an independent intervening cause, thus breaking the chain of legal causation, the court held that in a case where the defendant intended, by his conduct, to cause serious mental distress or serious physical suffering, and does so, and such mental distress is shown by the evidence to be a substantial factor in bringing about a suicide, a cause of action for wrongful death results, whether the suicide was committed in a state of insanity, or in response to an irresistible impulse, or not. If the mental distress was caused by the negligence of a defendant, then the defendant can avoid liability if the decedent could, in spite of his mental illness, have decided against suicide and refrained from killing himself.

[4] Additional Authorities

[a] Causation as Question of Fact When Conflicting Inferences Can Be Drawn

In *Golden v. Dungan (1971) 20 Cal. App. 3d 295, 97 Cal. Rptr. 577* , the plaintiffs, husband and wife, filed separate actions against common defendants. Each alleged a cause of action for intentional infliction of emotional distress. The trial court sustained the defendants' demurrers to these causes of action. The conduct on which the complaints were based consisted of the actions of the defendants' agent in pounding on the front door of the plaintiffs' home at night when the house was darkened in an attempt to serve process on the plaintiff husband. The house had a functioning doorbell but the agent did not use this. No other attempt at service had been made and the defendants had no reason to believe service of process could not be made at a reasonable time and in a reasonable manner. The loud pounding awakened the plaintiffs and their family and the neighborhood. The court of appeal reversed, holding that each plaintiff had alleged a cause of action to recover for the intentional infliction of emotional distress. The court noted that proximate cause is a question of law in the first instance. But it becomes a question of fact when conflicting inferences or conclusions can be drawn from the evidence.

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15-153 California Points & Authorities § 153.43

§ 153.43 Opposing Motion for New Trial [Code Civ. Proc. § 657] in Action for Intentional Infliction of Mental Distress--Evidence Sufficient to Show Severe Emotional Distress

[1] FORM

[*Caption. See § 153.41.*]

DEFENDANT'S MOTION FOR NEW TRIAL SHOULD BE DENIED BECAUSE THE EVIDENCE WAS SUFFICIENT TO PROVE THAT PLAINTIFF SUFFERED SEVERE EMOTIONAL DISTRESS.

A. Conditions for New Trial for Insufficiency of Evidence. [*See § 153.42, Paragraph A.*]

B. Highly Unpleasant Mental Reaction as Satisfying Requirement of Emotional Distress. The requirement that the plaintiff suffer severe or extreme emotional distress in order to make out a prima facie case for the tort of intentional infliction of emotional distress is satisfied where evidence is presented showing that the plaintiff's emotional distress consisted of any highly unpleasant mental reaction, such as fright, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, or worry (*Fletcher v. Western Nat'l Life Ins. Co. (1970) 10 Cal. App. 3d 376, 397, 89 Cal. Rptr. 78*).

[*Optional*] **C. Duration of Distress as Factor in Determining Severity.** The duration of the emotional distress of the plaintiff is one of the factors to be considered in determining the severity of the distress (*Fletcher v. Western Nat'l Life Ins. Co. (1970) 10 Cal. App. 3d 376, 398, 89 Cal. Rptr. 78*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for new trial in an action for intentional infliction of mental distress where the motion is based on insufficient evidence that plaintiff suffered severe emotional distress.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

In an appropriate case these points and authorities may be used in opposition to a motion supported by the points and authorities in *§ 153.26*.

[3] Discussion of Authorities

[a] Highly Unpleasant Mental Reaction as Satisfying Requirement of Emotional Distress

The factual background of ***Fletcher v. Western Nat'l Life Ins. Co.*** *(1970) 10 Cal. App. 3d 376, 89 Cal. Rptr. 78* , is discussed in *§ 153.20[3][a]*. On appeal, the defendants contended that there was no evidence that the plaintiff had suffered emotional distress of sufficient severity to establish the tort of intentional infliction of emotional distress. They argued that the testimony established at most that the plaintiff was only mildly upset by the defendants' conduct. The court rejected the defendants' contention and found that there was sufficient evidence that the plaintiff suffered severe emotional distress. Noting that the judge and jury were in a better position to judge the severity of plaintiff's emotional distress, the court found that, although the evidence did not indicate that plaintiff had suffered any traumatic emotional distress of the character of shock, horror, or nausea, it did indicate, however, that plaintiff suffered the requisite emotional distress since such distress may consist of any highly unpleasant mental reaction such as fright, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, or worry. The evidence in this respect showed that plaintiff was frightened, worried, and upset by defendants' false charges against him, by their demand for repayment of a substantial sum of money impliedly threatening legal action against him, and by the notification that the monthly payments were being discontinued. As a result of these communications, plaintiff became worried about losing his home and about his family lacking food and clothing. This anxiety was inferrably substantial, especially in view of plaintiff's disabled and impecunious condition, which was known to defendants when they acted. The court added that, in addition, the duration of the emotional distress is one of the factors to be considered in determining its severity, and that the jury could reasonably infer that plaintiff's worry persisted for the duration of defendants' recalcitrance.

[b] Duration of Distress as Factor in Determining Severity

Fletcher v. Western Nat'l Life Ins. Co. *(1970) 10 Cal. App. 3d 376, 89 Cal. Rptr. 78* , is discussed in *§ 153.43[3][a]*.

[4] Additional Authorities

[a] Highly Unpleasant Mental Reaction as Satisfying Requirement of Emotional Distress

The factual background of *Newby v. Alto Riviera Apartments (1976) 60 Cal. App. 3d 288, 131 Cal. Rptr. 547* , is discussed in *§ 153.40[3][k]*. In concluding that the issue of intentional infliction of emotional distress should have gone to the jury, the court of appeal considered the evidence that plaintiff had suffered severe emotional distress. Noting the

requisite distress needed to satisfy the requirement of severe emotional distress set forth in *Fletcher*, the court commented that the recent trend has been to require less severe distress in pleadings and proof than is required in the Restatement (Second) of Torts. The court found that plaintiff had presented evidence that she was afraid that defendants would remove her and her belongings from her apartment, that she would be locked out, that she was unable to sleep after defendants told her that she would be "handled the way they do down south," and that another witness had testified that plaintiff told her in a quavering voice that she was alone and afraid. The court concluded that, based on this evidence, the jury could find that plaintiff had suffered severe emotional distress.

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
CHAPTER 153 MENTAL SUFFERING AND EMOTIONAL DISTRESS
PART II. FORMS

15-153 California Points & Authorities § 153.44

§ 153.44 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action for Intentional Infliction of Mental Distress--Assertion of Legal Right in Outrageous Manner or in Bad Faith as Unprivileged

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO._____
vs.	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name(s)*],	)	IES IN OPPOSITION TO MOTION FOR SUM-
Defendant(s).	)	MARY JUDGMENT
	)	[*Code Civ. Proc. § 437c*]
	)	

_____

THE ASSERTION OF A LEGAL RIGHT IS NOT PRIVILEGED IF _____ [THE ONE ASSERTING THE RIGHT ACTS IN AN OUTRAGEOUS MANNER *or* THE ALLEGED RIGHT IS ASSERTED IN BAD FAITH].

[*EITHER*]

Assertion of Right in Outrageous Manner. One who, in exercising the privilege of asserting his/her own legal rights, acts in an outrageous manner may be held liable for intentional infliction of emotional distress (*Symonds v. Mercury Sav. & Loan Assn. (1990) 225 Cal. App. 3d 1458, 1469, 275 Cal. Rptr. 871* ; *Fletcher v. Western Nat'l Life Ins. Co. (1970) 10 Cal. App. 3d 376, 395, 89 Cal. Rptr. 78*).

[*OR*]

Bad Faith in Asserting Legal Right. One who, in exercising the privilege of asserting his/her own legal rights, acts in bad faith and in the absence of a valid dispute may be held liable for intentional infliction of emotional distress (*Fletcher v. Western Nat'l Life Ins. Co. (1970) 10 Cal. App. 3d 376, 395-396, 89 Cal. Rptr. 78*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for summary judgment that asserts that the defendant was privileged in asserting his legal rights. The plaintiff's assertion is that the privilege does not apply because the defendant acted outrageously or in bad faith.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should relate the facts tending to show that the defendant's conduct was outrageous or was undertaken in bad faith. In addition, counsel should attach affidavits or declarations that support the memorandum [*Code Civ. Proc. § 437c(b)*].

In an appropriate case, these points and authorities may be used in opposition to a motion supported by the points and authorities in *§ 153.27*.

[b] Related Points and Authorities

For other memoranda of points and authorities opposing demurrers or motions for summary judgment supported by memoranda asserting the existence of an absolute or qualified privilege, see Ch. 142, *Libel and Slander (Defamation)*.

[3] Discussion of Authorities

[a] Assertion of Right in Outrageous Manner

In ***Symonds v. Mercury Sav. & Loan Assn.*** *(1990) 225 Cal. App. 3d 1458, 275 Cal. Rptr. 871* , plaintiff and defendant financial institution (Mercury) became embroiled in a dispute over a dishonored check. Plaintiff had deposited a third-party check for a substantial sum of money in her account. Mercury provisionally credited plaintiff's account, but failed to properly process and present the check for payment in a timely manner. By the time that it was presented, there were insufficient funds in the maker's account to cover the check, although sufficient funds had existed for 44 days. Mercury then charged back plaintiff's account, froze all of her other accounts at Mercury, and demanded that she sign a promissory note for the amount previously credited on account of the dishonored check. Mercury's branch manager repeatedly called plaintiff to demand that she sign the note. Plaintiff then obtained counsel, who instructed the manager

to direct all further communication to him. Nevertheless, the manager continued to call plaintiff every day until the action was initiated.

On appeal from the trial court's granting of demurrer for Mercury, the court held the allegations to be sufficient to constitute outrageous conduct and reversed. The court found that in the area of collection practices, California recognizes that a creditor has a qualified privilege to protect its economic interest. However, the privilege may be lost if the creditor uses outrageous and unreasonable means in seeking payment. In determining whether the conduct is sufficiently outrageous or unreasonable to become actionable, the court emphasized that rude or insolent behavior, standing alone, is not sufficient to make the creditor liable. However, the conduct may rise to the requisite level of outrageousness if the creditor knows the debtor is susceptible to emotional distress because of the debtor's physical or mental condition (*225 Cal. App. 3d 1458, 1469)* .

Here, the manager knew that plaintiff was elderly and that the charge back placed her in a difficult financial position. Further, she was told that plaintiff's health had suffered because of the loss of the money, yet she continued to call plaintiff to pressure her into signing a promissory note. Finally, the manager continued to place these threatening calls even though she had been directed to speak only with plaintiff's attorney. Under these facts, the court held that a jury might reasonably find that Mercury's conduct was outrageous (*225 Cal. App. 3d 1458, 1469)* .

The factual background of ***Fletcher v. Western Nat'l Life Ins. Co.*** *(1970) 10 Cal. App. 3d 376, 89 Cal. Rptr. 78* , is discussed in *§ 153.20[3][a]*. In affirming the judgment of the trial court and holding that the plaintiff had stated a case for intentional infliction of emotional distress, the court held that any privilege which the defendants may have had in asserting their legal rights could not bar the plaintiff's recovery. The defendants had urged that, notwithstanding the conceded outrageous nature of their conduct, no liability could be predicated on a communication from one contracting party to another relating to the resolution of a dispute over their contract. The court acknowledged that an insurance company is privileged, in pursuing its own economic interest, to assert in a permissible way its legal rights and to communicate its position in good faith to its insured even though it is substantially certain that in so doing, emotional distress will be caused. However, the court stated that this exercise of the privilege to assert one's legal rights must be done in a permissible way and with a good-faith belief in the existence of the rights asserted. Thus, one who, in exercising the privilege, acts in an outrageous manner may be held liable for intentional infliction of emotional distress.

After concluding that, even if it could be said that the defendants were asserting their legal rights in good faith, they were not privileged to do so in an outrageous manner, the court added that the evidence viewed most favorably to the plaintiff indicated that there was no probable cause to believe that the plaintiff had made a misrepresentation of material fact or that his disability was due to anything other than his injury. Thus, there was not a good-faith dispute concerning the liability under the policy. The court stated in this respect that a settlement implies the existence of a good-faith dispute, and that there is no public policy in favor of an attempt to coerce settlement of a nonexistent dispute by outrageous means.

[b] Bad Faith in Asserting Legal Right

Fletcher v. Western Nat'l Life Ins. Co. *(1970) 10 Cal. App. 3d 376, 89 Cal. Rptr. 78* , is discussed in *§ 153.44[3][a]*.

[4] Additional Authorities

[a] Assertion of Right in Outrageous Manner

The factual background of *Newby v. Alto Riviera Apartments (1976) 60 Cal. App. 3d 288, 131 Cal. Rptr. 547* , is discussed in *§ 153.40[3][k]*. In holding that plaintiff had presented substantial evidence that defendants behavior was outrageous in that they had acted knowingly and unreasonably with the intention to inflict mental distress and had abused the special relationship between landlords and tenants, the court added that defendants' conduct was not

privileged. The court stated with respect to defendants' conduct, that one who exercises the privilege of asserting his or her own economic interests in an outrageous manner may be held liable for intentional infliction of emotional distress.

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15-153 California Points & Authorities § 153.45

§ 153.45 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Negligent Infliction of Emotional Distress to Bystander Observing Injury to Third Person--Family Relationship to Victim

[1] FORM

[*Caption. See § 153.40.*]

DEFENDANT'S DEMURRER SHOULD BE OVERRULED BECAUSE PLAINTIFF IS WITHIN THE CLASS OF PERSONS TO WHOM DEFENDANT OWED A DUTY IN THAT PLAINTIFF IS THE _____ [*specify relationship, e.g.,* SPOUSE] OF THE THIRD-PERSON VICTIM OF DEFENDANT'S NEGLIGENT CONDUCT.

Family Members Beyond Child-Parent Relationship May Recover. Family members who may suffer actionable emotional harm by viewing injury to a relative extends beyond parents and children to other relatives who are part of the same household unit as the victim, if a sufficient emotional attachment has developed between plaintiff and victim (*Thing v. La Chusa (1989) 48 Cal. 3d 644, 667-668, 668 n.10, 257 Cal. Rptr. 865, 771 P.2d 814* ; *Kriventsov v. San Rafael Taxicabs, Inc., (1986) 186 Cal. App. 3d 1445, 1447-1450, 229 Cal. Rptr. 768*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be used in opposition to a demurrer to a complaint for negligent infliction of mental distress and physical injury based on the viewing of an injury to a third party, if the demurrer states that plaintiff has failed to allege a duty to plaintiff, but the complaint alleges a close family relationship between plaintiff and the victim.

These points and authorities may be combined with those in § 153.47 if counsel wishes to contend that the complaint sufficiently states the genuineness of a claim of serious mental distress, for example, if counsel wishes to contend that physical injury need not be alleged.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. If the relationship between plaintiff and the victim is in issue, counsel should describe the relationship, and if it is not one of parent-child, siblings, or grandparent-grandchild, counsel should emphasize that the plaintiff and the injured person are related and reside in the same household [*see Thing v. La Chusa (1989) 48 Cal. 3d 644, 668 n.10, 257 Cal. Rptr. 865, 771 P.2d 814* ; *Kriventsov v. San Rafael Taxicabs, Inc. (1986) 186 Cal. App. 3d 1445, 1447-1450, 229 Cal. Rptr. 768* (uncle and nephew)].

[b] Related Pleading and Practice Forms

For discussion and forms relating to mental suffering, see California Forms of Pleading and Practice, Ch. 362, *Mental Suffering and Emotional Distress* (Matthew Bender). For forms relating to demurrers generally, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender).

[c] Related Points and Authorities

For points and authorities designed for use in opposition to those set forth in this form, see *§ 153.32*. For points and authorities for use regarding demurrers to complaints, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[d] Related California Torts Discussion

For discussion of negligent infliction of emotional distress, see California Torts, Ch. 5, *Negligent Infliction of Emotional Distress* (Matthew Bender).

[3] Discussion of Authorities

[a] Family Members Beyond Child-Parent Relationship May Recover

The factual background of ***Thing v. La Chusa*** *(1989) 48 Cal. 3d 644, 257 Cal. Rptr. 865, 771 P.2d 814* , is discussed in *§ 153.33[3][a]*. In setting limitations on the recovery of damages for emotional distress to bystanders, the California Supreme Court concluded that a plaintiff who may recover damages for emotional distress caused by observing the negligently inflicted injury of a third person must be closely related to the injured victim. In a footnote, the Court stated that in most cases, no justification exists for permitting recovery by persons who are only distantly related to the injury victim. Absent exceptional circumstances, recovery should be limited to relatives residing in the same household, or to parents, siblings, children, and grandparents of the victim (*48 Cal. 3d 644, 668 n.10*).

In ***Kriventsov v. San Rafael Taxicabs, Inc.*** *(1986) 186 Cal. App. 3d 1445, 229 Cal. Rptr. 768* , the victim's uncle, who lived with and had developed a strong emotional relationship with the victim, observed his hit-and-run death by defendant, and filed an action for negligent infliction of emotional (and physical) harm resulting from the observation. Plaintiff alleged that his relationship with his nephew was analogous to that between a parent and child. The trial court

sustained a demurrer without leave to amend, and dismissed the complaint on the ground that the relationship between plaintiff and the victim was not sufficiently close to establish a duty between the defendant and plaintiff. Plaintiff appealed.

The court of appeal reversed. The membership of many family units extends beyond parents and children to grandparents, stepparents, aunts, and uncles. In the case of a child victim, all close family members may be expected to have assumed responsibilities for child-rearing and to have acquired attendant emotional relationships with children that normally accompany those circumstances (*186 Cal. App. 3d 1445, 1449-1450)* .

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15-153 California Points & Authorities § 153.46

§ 153.46 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Negligent Infliction of Emotional Distress to Bystander Observing Injury to Third Person--Sufficient Contemporaneous Observance

[1] FORM

[*Caption. See § 153.40.*]

THE REQUIREMENT OF SENSORY AND CONTEMPORANEOUS OBSERVANCE OF THE ACCIDENT DOES NOT REQUIRE A VISUAL PERCEPTION OF THE IMPACT CAUSING THE DEATH OR INJURY IF PLAINTIFF HAS OTHERWISE ALLEGED FACTS SHOWING HE/SHE WAS A PERCIPIENT WITNESS TO THE ACCIDENT.

A. Visual Perception of Impact Not Required. The requirement of sensory and contemporaneous observance of the injury to the third person does not require a visual perception of the impact causing the death or injury. It is sufficient if plaintiff shows that he or she was otherwise a percipient witness of the accident (*Krouse v. Graham (1977) 19 Cal. 3d 59, 76, 137 Cal. Rptr. 863, 562 P.2d 1022*).

[*Optional*] **B. Plaintiff Is Not Required to Comprehend Defendant's Negligence.** The fact that plaintiff was unaware that defendant's conduct that inflicted the injury to the third person was negligent is not significant in determining whether plaintiff's emotional distress resulted from a direct emotional impact from the sensory and contemporaneous observance of the accident (*Mobaldi v. Regents of Univ. of Cal. (1976) 55 Cal. App. 3d 573, 583, 127 Cal. Rptr. 720*).

[*Optional*] **C. Injury Resulting From Sudden Occurrence Not Required.** An injury need not have been the result of a brief and sudden occurrence viewed contemporaneously by the plaintiff. All that is required is observation of the defendant's conduct and the injury and contemporaneous awareness that the defendant's conduct or lack thereof is causing harm (*Ochoa v. Superior Court (1985) 39 Cal. 3d 159, 167-170, 216 Cal. Rptr. 661, 703 P.2d 1*).

[*Optional*] **D. Plaintiff's Voluntary Presence Does Not Preclude Recovery.** Recovery is not precluded because a plaintiff is voluntarily at the scene of a traumatic event (*Ochoa v. Superior Court (1985) 39 Cal. 3d 159, 171, 216*

Cal. Rptr. 661, 703 P.2d 1).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a demurrer to a complaint for negligent infliction of mental distress based on witnessing injury to a third party. This form asserts that the complaint alleges sufficient facts to support an award of damages for mental suffering to the bystander plaintiff in that it contains sufficient allegations of contemporaneous observance of the injury-producing event.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

In an appropriate case these points and authorities may be used in opposition to a demurrer supported by the points and authorities in *§ 153.33*.

[3] Discussion of Authorities

[a] Visual Perception of Impact Not Required

Krouse v. Graham *(1977) 19 Cal. 3d 59, 137 Cal. Rptr. 863, 562 P.2d 1022* , involved an action brought by plaintiff husband for damages for the emotional suffering caused when defendant struck plaintiff's parked car, killing plaintiff's wife. The accident occurred while plaintiff was sitting in the driver's seat and his wife and a friend were closing the rear door of the car. Defendant rear-ended the car, pinning plaintiff's wife under the car. Although plaintiff did not see his wife struck and did not know the extent of her injuries, he had fully perceived the fact that she had been struck, since he knew her position an instant before the impact, observed defendant's vehicle approaching, and realized that the car must have struck her. The jury returned a special verdict for plaintiff, awarding damages for the resulting emotional suffering. On appeal, defendant argued for reversal because plaintiff admitted that he neither actually saw his wife being struck by defendant's car nor did he immediately observe the effect of the impact on her. In holding that this verdict must be set aside on other grounds, the Court noted one factor as stated in *Dillon v. Legg (1968) 68 Cal. 2d 728, 740, 69 Cal. Rptr. 72, 441 P.2d 912* , to be considered in determining whether a defendant owes a duty of due care with respect to the possible emotional suffering a plaintiff may have as a result of witnessing an injury to a third person, which is whether the shock the plaintiff suffered resulted from a direct emotional impact on the plaintiff from the sensory and contemporaneous observance of the accident. The Court stated that this requirement does not demand a visual perception of the impact causing the death or injury, and found that under the circumstances of the case, plaintiff was a percipient witness to the impact causing his wife's injuries.

NOTE:

For a plaintiff to recover damages for emotional distress caused by observing the negligently inflicted

injury of a third person, he or she must have been present at the scene of the injury-producing event at the time when it occurred, and must have been then aware that injury was being caused. The California Supreme Court has stated that this factor was present in each of its prior decisions upholding recovery for negligent infliction of emotional distress, thus reaffirming its holding in *Krouse* [*Thing v. La Chusa (1989) 48 Cal. 3d 644, 668, 257 Cal. Rptr. 865, 771 P.2d 814]*

[b] Plaintiff Is Not Required to Comprehend Defendant's Negligence

In ***Mobaldi v. Regents of Univ. of Cal.*** *(1976) 55 Cal. App. 3d 573, 127 Cal. Rptr. 720* , defendants demurred to plaintiff's complaint, which attempted to allege in part a cause of action for negligent infliction of emotional distress. After the demurrer was filed, both parties filed declarations of fact, which were considered by the trial court in determining whether the complaint could state a cause of action. The allegations of the complaint and the declarations of fact showed that plaintiff, Mrs. Ramsburg, had acted as a foster parent for plaintiff Mobaldi who had been born with a defect that was thought likely to result in the child's early death. The child, who had become completely integrated into the family of the Ramsburgs, had corrective surgery, which was considered to have greatly improved the child's health. Thereafter, Mrs. Ramsburg had taken the child to defendant hospital for certain tests related to the defect. Because he was afraid to be alone, the child was held by Mrs. Ramsburg while he was given an injection of glucose solution that was 10 times the strength of what it should have been. After this injection, and while plaintiff physicians were out of the room and Mrs. Ramsburg still held him, the child went into convulsions, became comatose, and suffered severe irreversible brain damage. Because of her presence and the damage to the child, Mrs. Ramsburg suffered physical injury that resulted from severe emotional distress in witnessing the destruction of the child. However, it was apparent that Mrs. Ramsburg was unaware that it was the defendants' negligence that caused the injuries to the child. For that reason as well as the lack of a family tie to the child [*see § 153.32*], the trial court sustained the demurrer without leave to amend and entered judgment for defendants. Plaintiffs appealed and the court of appeal reversed. The court stated, with respect to Mrs. Ramsburg's lack of understanding of defendants' negligence, the requirement of sensory and contemporaneous observance of the accident, involved the test of foreseeability and that foreseeability depends on what the emotionally traumatized plaintiff observes. The court further stated that it is observation of consequences of the negligent act and not observation of the act itself that is likely to cause trauma so severe as to result in physical injury. Thus, the court held that so long as the plaintiff's observation of the results of the defendants' infliction of harm on another was direct and contemporaneous, there was no significance in the plaintiff's lack of awareness that the defendants' conduct inflicting the injury was negligent. The court expressly disapproved gratuitous dictum in *Hair v. Monterey County (1975) 45 Cal. App. 3d 538, 544, 119 Cal. Rptr. 639* , requiring that the tortious event be susceptible of understanding observance by the plaintiff. The court stated that the requirement as stated in *Jansen v. Children's Hosp. Med. Ctr. (1973) 31 Cal. App. 3d 22, 24, 106 Cal. Rptr. 883* , that the event causing the injury is one that can be the subject of sensory perception, is sufficient to avoid potentially infinite liability. The additional requirement of understanding observance is not necessary because that requirement would limit liability and loss shift only fortuitously, and thus, would possess no rational relationship to the reasons for the *Dillon* requirement.

NOTE:

Mobaldi was disapproved on other grounds in *Elden v. Sheldon (1988) 46 Cal. 3d 267, 277, 250 Cal. Rptr. 254, 758 P.2d 582* . However, its holding that the plaintiff is not required to be contemporaneously aware that the defendant's act is negligent, was expressly adopted by the California Supreme Court in *Ochoa v. Superior Court (1985) 39 Cal. 3d 159, 170, 216 Cal. Rptr. 661, 703 P.2d 1* [*see § 153.46[3][c]*].

Subsequently, however, the Supreme Court has cautioned that although a plaintiff need not contemporaneously understand that the defendant's conduct is negligent, the plaintiff must have a contemporaneous understanding that the conduct that is being observed is conduct that is actually causing harm [*Bird v. Saenz (2002) 28 Cal. 4th 910, 920, 123 Cal. Rptr. 2d 465, 51 P.3d 324* (rejecting holding of *Mobaldi v. Regents of Univ. of Cal. (1976) 55 Cal. App. 3d 573, 127 Cal. Rptr.*

720)]. Therefore, in the context of medical malpractice cases, bystanders cannot sue for negligent infliction of emotional distress based on unperceived medical errors hidden within a course of treatment [*Bird v. Saenz (2002) 28 Cal. 4th 910, 921, 123 Cal. Rptr. 2d 465, 51 P.3d 324]* . Most misdiagnoses, unsuccessful treatments, or treatments that turn out to be inappropriate only in retrospect will not be contemporaneously observable by a lay person, and thus will usually be insufficient to support a bystander claim for negligent infliction of emotional distress. However, under some extreme situations, even a lay person may contemporaneously perceive that incorrect medical treatment is causing an injury, such as when a family member observes a surgeon amputate the wrong limb of a patient [*Bird v. Saenz (2002) 28 Cal. 4th 910, 918, 920-921, 123 Cal. Rptr. 2d 465, 51 P.3d 324]* .

[c] Injury Resulting From Sudden Occurrence Not Required

In ***Ochoa v. Superior Court*** *(1985) 39 Cal. 3d 159, 216 Cal. Rptr. 661, 703 P.2d 1* , decedent, plaintiffs' son, became ill when he was in the custody of a county juvenile hall. Plaintiffs visited decedent while he was at the infirmary, and observed that he was very ill and in severe pain. Plaintiff mother expressed her concern to the juvenile hall authorities, who attempted to reassure her about decedent's condition. When plaintiff mother thereafter visited decedent, his condition had worsened. She became very distressed and concerned, and requested that decedent be allowed to see the family physician. Her request was refused, and she was sent to one of the defendants, who again reassured her and stated that the decedent had to remain in the infirmary. Each of plaintiff mother's subsequent repeated requests to defendant, various nurses, and other doctors that she be allowed to take decedent to her private physician were refused. Finally, the son died, and plaintiffs sued. One of the causes of action set forth in plaintiffs' complaint was for negligent infliction of emotional distress. Defendants demurred to that cause of action, among others, and the trial court sustained the demurrers without leave to amend. Plaintiffs sought a writ of mandate to compel the court to set aside the demurrer.

The Supreme Court granted the writ, and enumerating the guidelines set out in *Dillon v. Legg (1968) 68 Cal. 2d 728, 740-741, 69 Cal. Rptr. 72, 441 P.2d 912* , held that the decedent's injury need not have been the result of a brief and sudden occurrence viewed contemporaneously by plaintiff mother (*39 Cal. 3d 159, 167-168)* . The Court disapproved *Justus v. Atchison (1977) 19 Cal. 3d 564, 139 Cal. Rptr. 97, 565 P.2d 122* , to the extent that it implicitly approved the sudden occurrence requirement, stating that it is an unwarranted restriction on the *Dillon* guidelines (*39 Cal. 3d 159, 168)* . The Court held that if there is observation of the defendant's conduct and the injury, and contemporaneous awareness that the defendant's conduct or lack thereof is causing harm, recovery is permitted (*39 Cal. 3d 159, 170)* .

[d] Plaintiff's Voluntary Presence Does Not Preclude Recovery

The facts and procedural background of ***Ochoa v. Superior Court*** *(1985) 39 Cal. 3d 159, 216 Cal. Rptr. 661, 703 P.2d 1* , are discussed in *§ 153.46[3][c]*. The Supreme Court held that the decedent's injury need not have been the result of a brief and sudden occurrence viewed contemporaneously by plaintiff mother (*39 Cal. 3d 159, 167-168)* . Defendants suggested that plaintiffs should not receive the benefit of the rule set out in *Dillon v. Legg (1968) 68 Cal. 2d 728, 740-741, 69 Cal. Rptr. 72, 441 P.2d 912* [*see § 153.31[3][b]*], because they were voluntarily present at a location where distressing incidents were likely to occur. The Court noted that *Justus v. Atchison (1977) 19 Cal. 3d 564, 139 Cal. Rptr. 97, 565 P.2d 122* , implied the rule that recovery by a plaintiff voluntarily at the scene of a traumatic event may be precluded. However, the Court held that such a requirement undercuts the very foundation on which the *Dillon* case rested because a distinction between the voluntary and involuntary presence of a close relative of the injured or dead person appears to relieve the defendant of liability for the very risk that should have been foreseen. Thus, the Court disapproved *Justus* to the extent that it makes a contrary suggestion (*39 Cal. 3d 159, 171)* .

[4] Additional Authorities

[a] Visual Perception of Impact Not Required

In *Wilks v. Hom (1992) 2 Cal. App. 4th 1264, 3 Cal. Rptr. 2d 803* , a mother was in her trailer when leaking gas ignited

in an explosion. Two of her young children were also in the trailer, although in different rooms and outside of the mother's line of vision. The court, relying on *Krouse v. Graham,* found sufficient presence and contemporaneous observation of injury. Like the husband in *Krouse,* the mother was physically present at the scene and then fully aware of the peril that confronted her children (*2 Cal. App. 4th 1264, 1271)* . The court noted that this formulation of the rule does not require that the plaintiff have visually perceived the injury, and that the California Supreme Court opinion in *Thing v. La Chusa (1989) 48 Cal. 3d 644, 257 Cal. Rptr. 865, 771 P.2d 814* , did not disapprove *Krouse* on this point (*2 Cal. App. 4th 1264, 1271)* .

In *Ausin v. Regents of Univ. of Cal. (1979) 89 Cal. App. 3d 354, 152 Cal. Rptr. 420* , the court of appeal reversed the order of the trial court granting summary judgment on plaintiff's cause of action to recover damages for emotional distress resulting from the death of plaintiff's unborn child. The court distinguished *Justus v. Atchison (1977) 19 Cal. 3d 564, 585, 139 Cal. Rptr. 97, 565 P.2d 122* , in which the plaintiff only alleged that he was in the delivery room and the Supreme Court concluded that he did not and could not have seen any negligent acts. In this case, the plaintiff alleged that he learned of death by his own observation of the cessation of life in the fetus and that his shock and distress were occasioned by that sensory and contemporaneous realization of the death.

[b] Injury Resulting From Sudden Occurrence Not Required

In *Ortiz v. HPM Corp. (1991) 234 Cal. App. 3d 178, 285 Cal. Rptr. 728* , a husband and wife were both employed at the same location. The wife discovered her husband trapped inside of a molding machine while the machine was still running. The husband's skin was discolored, his body was limp, and blood was flowing from his left arm. The wife was the individual who summoned help to extract the husband from the machine.

The court relied on *Ochoa* in finding sufficient presence at the injury-producing event and contemporaneous awareness of injury. As in *Ochoa,* the injury-producing event continued for a period of time, and the wife personally observed it while it was still occurring. It was not necessary that she observe the husband becoming entrapped in the machine (*234 Cal. App. 3d 178, 183-186)* .

California Points & Authorities

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
CHAPTER 153 MENTAL SUFFERING AND EMOTIONAL DISTRESS
PART II. FORMS

15-153 California Points & Authorities § 153.47

§ 153.47 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Negligent Infliction of Emotional Distress--Sufficient Guarantee of Genuineness of Claim for Serious Mental Distress

[1] FORM

[*Caption. See § 153.40.*]

A CAUSE OF ACTION FOR NEGLIGENT INFLICTION OF SERIOUS MENTAL DISTRESS IS NOT DEFICIENT IF FACTS ARE ALLEGED SHOWING A SUFFICIENT GUARANTEE OF GENUINENESS IN THE MENTAL DISTRESS CLAIM.

A. Physical Injury Is Not Required to Recover for Negligent Infliction of Serious Emotional Distress. A cause of action may be stated for the negligent infliction of serious emotional distress without any allegation of physical injury (*Molien v. Kaiser Found. Hosps. (1980) 27 Cal. 3d 916, 928, 930, 167 Cal. Rptr. 831, 616 P.2d 813*).

B. Guarantee of Genuineness of Claim Is Found in General Standard of Proof. The function formerly served by the requirement of a physical injury, to guarantee the genuineness of claims, is now served by the general standard of proof required to support a claim of mental distress in the circumstances of the case and is a matter of proof to be presented to the trier of fact (*Molien v. Kaiser Found. Hosps. (1980) 27 Cal. 3d 916, 930, 167 Cal. Rptr. 831, 616 P.2d 813*).

[*Optional*] **C. Allegation of Defendant's Conduct Causing Foreseeable Injury Is Sufficient.** Allegations of objectively verifiable conduct by the defendants that foreseeably elicited serious emotional responses in the plaintiff serve as a measure of the validity of plaintiff's claim for emotional distress and state a cause of action (*Molien v. Kaiser Found. Hosps. (1980) 27 Cal. 3d 916, 930, 931, 167 Cal. Rptr. 831, 616 P.2d 813*).

[*Optional*] **D. Emotional Distress Damages Are Recoverable If Action Based on Contract for Comfort, Happiness, or Personal Welfare.** A plaintiff may recover damages for the unintentional infliction of emotional distress if the defendant has tortiously breached a duty arising out of a contract that is designed to protect plaintiff from injury to

the peace of mind and if the terms of the contract relate to matters that concern directly the comfort, happiness, or personal welfare of the plaintiff (*Truestone, Inc. v. Travelers Ins. Co. (1976) 55 Cal. App. 3d 165, 170-171, 127 Cal. Rptr. 386*).

[*Optional*] **E. Substantial Damage Is Sufficient Guarantee.** A sufficient guarantee of genuineness exists and a court may thus adjudicate a negligence claim for mental distress if the facts show that the plaintiff has suffered substantial damage apart from the alleged emotional injury (*Jarchow v. Transamerica Title Ins. Co. (1975) 48 Cal. App. 3d 917, 937, 122 Cal. Rptr. 470*).

[*Optional*] **F. Outrageous Conduct Is Not Required.** A defendant's conduct need not be outrageous; the strongest assurance of the validity of a claim is the link between the tortious conduct and the emotional injury (*Mercado v. Leong (1996) 43 Cal. App. 4th 317, 326, 50 Cal. Rptr. 2d 569*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to a demurrer to a complaint for the negligent infliction of serious mental distress if the demurrer asserts that the complaint failed to allege facts showing a sufficient guaranty of genuineness to permit the court to adjudicate the mental distress claim.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Physical Injury Is Not Required to Recover for Negligent Infliction of Serious Emotional Distress

Molien v. Kaiser Found. Hosps. *(1980) 27 Cal. 3d 916, 167 Cal. Rptr. 831, 616 P.2d 813* , involved an amended complaint for damages for negligently inflicted emotional distress unaccompanied by physical injury. Plaintiff appealed from a judgment entered after a demurrer to the complaint was sustained. Plaintiff had alleged that he and his wife were members of defendant hospital's health plan, and that when his wife went to Kaiser for a routine physical examination, she was negligently examined and tested and informed by defendant physician that she had infectious syphilis, which was in fact false. Defendants knew plaintiff would learn of the diagnosis because they instructed his wife to so advise him. Thereafter, plaintiff had to undergo tests which revealed that he did not have syphilis. Nonetheless, his wife became upset and suspicious that plaintiff had engaged in extramarital activities, and the resulting tension and hostility caused the marriage to break up. Plaintiff further alleged that defendants knew or should have known that their diagnosis that his wife had and that he might have syphilis would cause him emotional distress, and that in fact he suffered extreme emotional distress and incurred medical expenses for counseling in an effort to save the marriage.

The Supreme Court reversed, recognizing negligent infliction of serious emotional distress as a tort independent of other injury. The Court noted that the primary justification for the physical injury requirement is to guard against false claims, but that this function is served by other guarantees in some instances, such as where substantial damages other than physical injury suffered by plaintiff serve to guarantee the genuineness of a claim for intentional infliction of emotional distress. The Court condemned the physical injury requirement as allowing emotional distress damages where the distress is accompanied by the most trivial physical injury, while mechanically precluding recovery on potentially valid claims. The Court further criticized the rule because it encourages extravagant pleading and distorted testimony, and because the distinction between physical and emotional injury is unclear. The Court thus rejected the physical injury requirement holding that, where the proof is not of a medically significant nature, the genuineness of the claim is guaranteed by the general standard of proof necessary to sustain a claim of serious emotional distress in the circumstances of the case. The Court quoted a standard adopted by the Hawaii Supreme Court: "serious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case."

[b] Guarantee of Genuineness of Claim Is Found in General Standard of Proof

Molien v. Kaiser Found. Hosps. *(1980) 27 Cal. 3d 916, 167 Cal. Rptr. 831, 616 P.2d 813* , is discussed in *§ 153.47[3][a]*.

[c] Allegation of Defendant's Conduct Causing Foreseeable Injury Is Sufficient

The factual background of ***Molien v. Kaiser Found. Hosps.*** *(1980) 27 Cal. 3d 916, 167 Cal. Rptr. 831, 616 P.2d 813* , is discussed in *§ 153.47[3][a]*. The Court noted that defendants' negligent examination of plaintiff's wife and ensuing conduct were objectively verifiable actions which foreseeably elicited serious emotional responses in plaintiff and thus served as a measure of the validity of plaintiff's mental distress claim.

[d] Emotional Distress Damages Are Recoverable If Action Based on Contract for Comfort, Happiness, or Personal Welfare

Truestone, Inc. v. Travelers Ins. Co. *(1976) 55 Cal. App. 3d 165, 127 Cal. Rptr. 386* , was an appeal from a judgment dismissing on demurrer some, but not all, of the causes of action asserted by multiple plaintiffs against multiple defendants. All of plaintiffs' causes of action arose out of the defendants' failure to settle a claim under a policy of liability insurance issued to plaintiff corporation within the limits of the policy. Plaintiff's fourth cause of action alleged that plaintiff corporation was closely held, that the failure to settle was intentional and reckless and resulted in damages consisting of severe mental and emotional distress to plaintiff shareholders, that plaintiff shareholders also suffered from damages to their share because the eventual payment by the corporation of the amount required to settle the claim reduced the value of their stock, and that the conduct of defendants in refusing to settle was willful and malicious.

In stating that the hurdle for plaintiffs' recovery for injury to their peace of mind was the general rule that damages for unintentional infliction of emotional distress are not recoverable in the absence of other damage to person or property to which they are related, the court found that plaintiffs' action presented the unique situation of emotional distress incident to and accompanied by injury to property where there is a bar to recovery for the property damage based on the rule that the diminution in the value of their shares was incidental to the injury to their corporation. However, neither reason for the bar--that the injury is deemed to be that of the separate corporate entity and that otherwise, each stockholder could independently sue on the same cause of action--was pertinent to the right of an insured shareholder who personally contracts to achieve peace of mind through indemnity to his or her wholly owned corporation to recover for emotional distress incident to the improper conduct of the insurer in destroying that peace of mind. Quoting from *Windeler v. Scheers Jewelers (1970) 8 Cal. App. 3d 844, 851, 88 Cal. Rptr. 39* , the court added that, whenever the terms of a contract relate to matters which concern directly the comfort, happiness, or personal welfare of one of the parties, he or she may recover damages for physical suffering or illness proximately caused by its breach.

[e] Substantial Damage Is Sufficient Guaranty

Jarchow v. Transamerica Title Ins. Co. *(1975) 48 Cal. App. 3d 917, 122 Cal. Rptr. 470* , involved an amended supplemental complaint filed by plaintiffs in their action to quiet title and for damages for breach of contract and negligence against defendant title company. In this supplemental complaint, plaintiffs sought additional general damages and punitive damages against the title company based in part on negligent infliction of emotional distress. This claim for mental distress arose out of the refusal of the title company to take any action after plaintiffs had requested the title company to eliminate an easement claimed by a neighbor over plaintiffs' land, which easement was mentioned neither in a preliminary title report nor in a title insurance policy issued by the title company. The company had taken the position that it had no obligation to plaintiffs under the title policy since the neighbor's deed had been excluded from coverage--a position subsequently determined to be untenable since the easement had not been mentioned in the exclusionary provisions of the policy. At a jury trial on their supplemental complaint, plaintiffs testified in effect that they were worried, upset, and shocked over the company's failure to sue the neighbor or otherwise eliminate the easement and cover the consequent payment of attorney's fees in their action to quiet title and for breach of contract and negligence. In addition, a court appointed psychiatrist testified in effect that plaintiff's symptoms of emotional distress were directly attributable to the litigation and the company's failure to clear title. The jury returned a verdict in favor of plaintiffs for $200,000, and defendants appealed.

The court of appeal affirmed. Defendants argued on appeal in part that the supplemental complaint failed to state legally sufficient facts to set forth a cause of action for negligent infliction of emotional distress, and that, therefore, their motion for judgment on the pleadings should have been granted. Specifically they argued that damages for emotional distress are not awarded in a negligence action unless the distress resulted directly from, or manifested itself in, physical "impact or injury." The court rejected defendants' argument. The court reviewed the reasons for the rule: (1) that emotional distress without injury is too trivial; (2) that courts would otherwise be inundated with fraudulent claims; (3) that otherwise speculative judgments would be imposed on defendants; and (4) that the causal link between a defendant's negligence and a plaintiff's emotional distress would be too attenuated. The court rejected each of these reasons. It stated that: (1) mental trauma can be just as debilitating as physical paralysis; (2) that the problem of fraudulent claims both is as great under the "impact or injury" rule, since the slightest physical injury is sufficient to satisfy the rule, and would not justify eliminating an entire class of claims; and (3) there is as great a problem of speculative judgments in cases involving physical injuries as there is in cases involving emotional stress only.

In rejecting the reason involving the problem of establishing a causal link between negligence and emotional distress, the court noted that courts generally are concerned with this problem because of the unlimited and undeserved liability which might result from the extension of independent protection to mental equilibrium and with the fact that there is no guarantee of genuineness, that is, no adequate proof, of the mental distress claim. Relying particularly on *Crisci v. Security Ins. Co. (1967) 66 Cal. 2d 425, 58 Cal. Rptr. 13, 426 P.2d 173* , the court articulated, however, a more precise rule than the "impact or injury" rule in order to solve the problem that is raised by fraudulent claims for mental distress. The court examined the *Crisci* opinion and stated that in determining whether a plaintiff had suffered an empirically verifiable injury, a court should determine whether the plaintiff had suffered a detriment whose impact was readily observable and identifiable--that is, an injury that could not be as easily fabricated as mental distress and the proof of which could be drawn from sources other than the plaintiff's own mouth. The court concluded that the "impact or injury" rule thus is no longer strictly applied, and that courts may adjudicate negligence claims for mental distress if sufficient guaranties of genuineness are found in the facts of the case--such as, if the plaintiff had suffered substantial damage apart from the alleged emotional injury. The court added that substantial damage need not be compensable since imposition of a requirement of compensability would add little to the guaranty of genuineness; rather, interference with one's legally protected interests is sufficient damage to satisfy the test set forth in *Crisci.* The court found that plaintiffs had suffered substantial financial and property damage consisting of $170 for loss of use of the property and $7,100 for attorney's fees spent in their action to quiet title and for damages for breach of contract and negligence.

The court noted in a footnote that the Supreme Court had not yet permitted recovery for negligently inflicted emotional

distress if the mental injury was the only damage caused by the defendant's wrongful conduct. The court added that, although endorsement of such an action would seem to be the logical end product of the decisional trends, it would not set forth such a rule since the case before it involved substantial financial injury and the resolution of the case thus could be based on the specific standard articulated in *Crisci*, that is, a claim that results in substantial damages apart from the emotional distress.

[f] Outrageous Conduct Is Not Required

In ***Mercado v. Leong*** *(1996) 43 Cal. App. 4th 317, 50 Cal. Rptr. 2d 569* , plaintiff sought damages for negligent infliction of emotional distress from a physician for negligence in the delivery of her child which resulted in permanent nerve damage for the child. In a special verdict, the jury found that the defendant was negligent, but that his conduct was not outrageous. Defendant moved for judgment notwithstanding the verdict on the basis that under *Bro v. Glaser (1994) 22 Cal. App. 4th 1398, 27 Cal. Rptr. 2d 894* , a finding of outrageous conduct on the part of the defendant is required in order to award damages for negligent infliction of emotional distress. Concluding that it was bound by *Bro*, the trial court granted the motion and entered judgment in favor of defendant.

On appeal, plaintiff contended that recovery was governed by *Burgess v. Superior Court (1992) 2 Cal. 4th 1064, 9 Cal. Rptr. 2d 615, 831 P.2d 1197* , rather than *Bro.* The court of appeal agreed with plaintiff. In determining liability for negligent infliction of emotional distress to a direct victim, the *Burgess* court identified a list of policy considerations: the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury, the moral blame, the policy of preventing future harm, and the extent of the burden on the defendant and the consequences to the community of imposing a duty (*43 Cal. App. 4th 317, 322-323)* . The court concluded that the *Bro* test of outrageousness strayed from the guidelines established by the Supreme Court in *Burgess,* and declined to apply it (*43 Cal. App. 4th 317, 327)* . The judgment for defendant was thus reversed, and the trial court directed to enter judgment in plaintiff's favor.

[4] Additional Authorities

[a] Physical Injury Is Not Required to Recover for Negligent Infliction of Serious Emotional Distress

In *Slaughter v. Legal Process & Courier Serv. (1984) 162 Cal. App. 3d 1236, 209 Cal. Rptr. 189* , defendant process server signed a sworn affidavit of service stating that he had personally served plaintiff, who was in fact out of town on the date specified. The court of appeal reversed the summary judgment that the trial court granted to defendant on the negligent infliction of mental distress cause of action. In its discussion, the court addressed the aspect of physical injury in an action for negligent infliction of mental distress. Plaintiff had testified that he suffered no impact or physical injury. Citing authority, the court said that physical injury is no longer a prerequisite to recovery for emotional distress. The attempted distinction between physical and psychological injury, formerly required, merely clouds the issue. The essential question is one of proof; whether the plaintiff has suffered a serious and compensable injury should not turn on this artificial and often arbitrary classification scheme (*162 Cal. App. 3d 1236, 1251)* .

[b] Emotional Distress Damages Are Recoverable If Action Based on Contract for Comfort, Happiness, or Personal Welfare

In *Quesada v. Oak Hill Improvement Co. (1989) 213 Cal. App. 3d 596, 261 Cal. Rptr. 769* , a sister and a niece of a decedent sued a county and a cemetery for damages for emotional distress suffered on account of the defendants' having presented for viewing and interred the wrong body, despite their protestations of error. Defendants' demurrer on the ground that plaintiffs were neither parties to a burial contract nor persons having the legal duty to dispose of a deceased's body under *Health & Safety Code § 7100* was granted. (The widow's separate claim arising from the same negligent acts was settled.)

The court of appeal reversed, rejecting the view that limitations on the defendants' duty could be found either in contract

or in the Health and Safety Code. Instead, the court adopted the general view of *Molien v. Kaiser Found. Hosps. (1980) 27 Cal. 3d 916, 167 Cal. Rptr. 831, 616 P.2d 813* [*see § 153.47[3][a]*], that a duty is owed to foreseeable direct victims of negligent conduct. The court found that close friends and relatives of a deceased are obvious and foreseeable victims of the negligent handling of a corpse (*213 Cal. App. 3d 596, 602-606)* .

However, the court also adopted limitations on this pure foreseeability analysis, reflecting the California Supreme Court's rejection of broad potential liability for emotional distress resulting from negligence [*see Thing v. La Chusa (1989) 48 Cal. 3d 644, 664, 257 Cal. Rptr. 865, 771 P.2d 814* ; *Marlene F. v. Affiliated Psychiatric Med. Clinic, Inc. (1989) 48 Cal. 3d 583, 589-590, 257 Cal. Rptr. 98, 770 P.2d 278* ; *Elden v. Sheldon (1988) 46 Cal. 3d 267, 274, 250 Cal. Rptr. 254, 758 P.2d 582]* . In determining the proper limitations, the court analogized the effect of the negligent handling of a corpse to percipient witness cases [*see §§ 153.31*-153.33, *153.45, 153.46*], and adopted the limitations of the Supreme Court applicable to those cases, holding that only persons closely related to the decedent may recover [*see Thing v. La Chusa (1989) 48 Cal. 3d 644, 668 n.10, 257 Cal. Rptr. 865, 771 P.2d 814* ; *see also § 153.32[3][a]*] (*213 Cal. App. 3d 596, 607-610)* . Close relatives include relatives residing in the same household, or parents, siblings, children, and grandparents of the victim. Exceptional circumstances may enlarge the group to include other relatives [*see Thing v. La Chusa (1989) 48 Cal. 3d 644, 668 n.10, 257 Cal. Rptr. 865, 771 P.2d 814, 261 Cal. Rptr. 769*]. The court held that the sister was clearly owed a duty and entitled to recover and also reversed as to the niece, allowing her the opportunity to prove that special circumstances might bring her within the group (*213 Cal. App. 3d 596, 610)* .

Allen v. Jones (1980) 104 Cal. App. 3d 207, 163 Cal. Rptr. 445 , involved plaintiff's second amended complaint for damages for negligent performance of a contract. The only damages sought under the negligence cause of action were for emotional distress. Plaintiff appealed from a judgment entered after a demurrer to the second amended complaint was sustained. Plaintiff's second amended complaint alleged that he was the brother and nearest living relative of Ralph Allen and that on his brother's death plaintiff entered into an oral contract with the defendant mortuary for the cremation and shipment of his brother's remains to Illinois. Plaintiff alleged that as a result of defendant's negligence in packaging the remains, they were lost, causing plaintiff great nervous shock, mental anguish and humiliation. On appeal, the primary question was whether the action could be maintained because the only damage alleged was mental suffering. The court of appeal reversed the dismissal.

The court first recognized that severe mental distress was a foreseeable result of breach of the contract, notwithstanding the general rule that damages for mental suffering are not recoverable in an action for breach of contract. However, the court refused to base its decision on contract, stating that it is not clear whether mental distress without physical illness can ever support an action for breach of contract. (In this regard, it is noteworthy that *Allen* was decided prior to *Molien v. Kaiser Found. Hosps. (1980) 27 Cal. 3d 916, 167 Cal. Rptr. 831, 616 P.2d 813* [*see § 153.47[3][a]*].) The court then found that plaintiff pleaded an action in negligence as well as contract by alleging that the remains were lost due to defendant's negligent preparation of them for shipment, and held that damages for emotional distress are recoverable in tort for a mortuary's negligent mishandling of a corpse even though the plaintiff suffers no physical injury. The court reasoned that the psychological devastation likely to result from a mortuary's mistake requires that mortuaries be held to a high standard of care, and that the nature of the wrongful conduct necessarily present in such a case provides a sufficient guarantee of the genuineness of the claim of mental distress.

In *Windeler v. Scheers Jewelers (1970) 8 Cal. App. 3d 844, 88 Cal. Rptr. 39* , defendant appealed from a judgment entered on a jury verdict awarding plaintiff $4,000 damages for personal injuries and $1,436 for property loss damage resulting from the failure of defendant to return six rings which plaintiff had entrusted to defendant for the purpose of having the stones in the rings removed and reset in a new ring. Plaintiff's complaint alleged in part that she suffered emotional and physical injury which resulted from the negligence of defendant in failing properly to care for the rings. With regard to this injury, plaintiff had testified that she had informed defendant at the time she entrusted the rings to him that the rings had a sentimental value and were cherished mementos, and that when she was told the rings were lost, she suffered terrible headaches, loss of sleep, and general nervousness; that she was forced to remain off work for three days; and that her physician prescribed a tranquilizer. Following entry of judgment, defendant moved for a new trial,

alleging in part that the verdict was contrary to law. The court of appeal affirmed the judgment of the trial court. The primary question on appeal was whether plaintiff could recover for her mental suffering and emotional distress. After determining that the nature of the relationship which existed between plaintiff and defendant was one of bailment, and outlining some of the features of that relationship, the court determined that the bailment was a contract, which the jury had found that defendant had negligently breached. Thus, the question became whether mental suffering and emotional distress are elements of actual damages for breach of such a contract. The court noted the general rule that the damages which may be recovered for breach of contract are those damages which may reasonably be supposed to have been within the contemplation of the parties at the time of the making of the contract and that would be the probable result of the breach. The court further noted that within the ambit of this rule there has evolved the rule that, if a person contracts to do a particular thing, and the failure to perform may result in physical suffering or illness on the part of the other contracting party, that person is presumed to have contracted with reference to the payment of damages for the injury or illness if damages accrue by reason of a breach of the contract on his or her part. In applying this rule, the court found that both parties knew of the special circumstance concerning the sentimental value of the rings, and that, because the contract was one whose terms related to matters directly concerning the happiness and comfort of plaintiff, and were such as to move her affection and tender feelings, the jury was entitled to include as damages the damage for plaintiff's physical suffering and emotional distress.

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15-153 California Points & Authorities § 153.48

§ 153.48 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Negligent Infliction of Emotional Distress--Injuries Were Foreseeable Consequence of Defendant's Conduct and Resulting Intervening Cause

[1] FORM

[*Caption. See § 153.40.*]

DEFENDANT'S DEMURRER SHOULD BE OVERRULED BECAUSE THE COMPLAINT ALLEGES THAT DEFENDANT OWED A DUTY OF CARE TO PLAINTIFF AND BREACHED THAT DUTY BY _____ [*specify breach, e.g.,* MISTAKENLY HAVING PLAINTIFF ARRESTED], AND PLAINTIFF'S INJURIES WERE THE FORESEEABLE CONSEQUENCE OF DEFENDANT'S CONDUCT AND THE RESULTING INTERVENING CAUSE.

Injury Was Foreseeable Consequence of Defendant's Conduct and Resulting Intervention by Another. A defendant is liable for negligent infliction of emotional distress even though plaintiff's injuries were brought about by an intervening cause of independent origin if the intervening cause was foreseeable by defendant or, if not foreseeable, if it caused injury of a type that was foreseeable (*Pool v. City of Oakland (1986) 42 Cal. 3d 1051, 1063-1065, 232 Cal. Rptr. 528, 728 P.2d 1163*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be used in opposition to a demurrer to a complaint for negligent infliction of mental distress and physical injury if defendant contends that plaintiff's injuries resulted from an unforeseeable superseding cause. The ground for opposition is that the intervening cause was foreseeable, or it caused injury of a type that was foreseeable.

These points and authorities may be combined with those in *§ 153.47* if counsel wishes to contend that the complaint sufficiently states the genuineness of a claim of serious mental distress, for example, if counsel wishes to contend that physical injury need not be alleged.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion and forms relating to mental suffering, see California Forms of Pleading and Practice, Ch. 362, *Mental Suffering and Emotional Distress* (Matthew Bender). For forms relating to demurrers generally, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender).

[c] Related Points and Authorities

For points and authorities for use regarding demurrers to complaints, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[d] Related California Torts Discussion

For discussion of negligent infliction of emotional distress, see California Torts, Ch. 5, *Negligent Infliction of Emotional Distress* (Matthew Bender).

[3] Discussion of Authorities

[a] Injury Was Foreseeable Consequence of Defendant's Conduct and Resulting Intervention by Another

In ***Pool v. City of Oakland*** *(1986) 42 Cal. 3d 1051, 232 Cal. Rptr. 528, 728 P.2d 1163* , plaintiff brought suit against defendant storeowner after defendant summoned the police in the erroneous and unsupported belief that plaintiff was attempting to pass counterfeit currency. The suit included a cause of action for negligent infliction of emotional distress based on damages plaintiff suffered as a result of the treatment he received at the hands of the police, including a false arrest. Plaintiff prevailed at trial, and defendant moved for judgment notwithstanding the verdict or a new trial. The motions were denied, and defendant appealed.

The Supreme Court affirmed, upholding the liability of the storeowner for negligently causing plaintiff emotional distress. The Court found that defendant breached a duty of care in negligently summoning the police (*42 Cal. 3d 1051, 1060-1063)* . The Court further rejected defendant storeowner's argument that plaintiff's injuries were the result of an unforeseeable superseding cause. The Court stated that a defendant is liable for injuries brought about by an intervening cause of independent origin if the intervening cause was foreseeable by defendant or, if not foreseeable, if it caused injury of a type that was foreseeable. The Court found that the harm to plaintiff was foreseeable, since being arrested by the police is a foreseeable consequence of reporting a transaction as illegal. Since the injuries were foreseeable, the acts of the police officers, even if wrongful, did not relieve defendant storeowner of liability (*42 Cal.*

3d 1051, 1063-1065) .

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15-153 California Points & Authorities § 153.49

§ 153.49 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Negligent Infliction of Emotional Distress--Injury to Third Party--Plaintiff as Direct Victim

[1] FORM

[*Caption. See § 153.40.*]

PLAINTIFF NEED NOT ALLEGE CONTEMPORANEOUS PERCEPTION OF INJURY TO A THIRD PARTY BECAUSE HE/SHE IS A DIRECT VICTIM OF DEFENDANT'S TORTIOUS CONDUCT, RATHER THAN A BYSTANDER.

A. Limitations Applicable to Bystanders Inapplicable to Direct Victims. The requirement of contemporaneous perception of injury to a third party does not apply if the plaintiff is a direct victim of the defendant's tortious conduct in that defendant's negligence was directed to plaintiff (*Molien v. Kaiser Found. Hosps. (1980) 27 Cal. 3d 916, 923, 167 Cal. Rptr. 831, 616 P.2d 813*).

B. Direct-Victim Theory Based on Duty. Damages for emotional distress are recoverable in a negligence action by a person if they result from a breach of a duty owed to that person that is assumed by the defendant or imposed on the defendant as a matter of law, or that arises out of a relationship between that person and the defendant (*Marlene F. v. Affiliated Psychiatric Med. Clinic, Inc. (1989) 48 Cal. 3d 583, 590, 257 Cal. Rptr. 98, 770 P.2d 278*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a demurrer to a complaint for negligent infliction of mental distress based on an injury to a third party if the demurrer asserts that the complaint fails to state a cause of action in that it fails to allege facts showing that the emotional distress suffered by plaintiff was caused by plaintiff's contemporaneous perception of injury or accident to a third party [*see Molien v. Kaiser Found. Hosps. (1980) 27 Cal. 3d 916, 923, 167 Cal. Rptr. 831, 616 P.2d 813* ; *Andalon v. Superior Court (1984) 162 Cal. App. 3d 600, 611, 208 Cal. Rptr. 899]* .

These points and authorities may be combined with those in *§ 153.47* if counsel wishes to contend that the complaint sufficiently states the genuineness of a claim of serious mental distress.

These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should discuss facts showing that plaintiff was a direct victim of defendant's tortious conduct, in that the defendant owed a duty directly to the plaintiff, independent of the duty owed to the person who was otherwise injured.

[b] Limitations on Direct-Victim Theory of Liability

The California Supreme Court has held that a finding that a defendant owed a duty to the victim must be based on more than mere foreseeability of distress [*see Marlene F. v. Affiliated Psychiatric Med. Clinic, Inc. (1989) 48 Cal. 3d 583, 589-590, 257 Cal. Rptr. 98, 770 P.2d 278* ; *Ochoa v. Superior Court (1985) 39 Cal. 3d 159, 172-173, 216 Cal. Rptr. 661, 703 P.2d 1* ; *see generally § 153.37*]. Cases decided before this limitation should be considered questionable to the extent that the cases relied primarily on foreseeability of harm to find that a duty to the plaintiff existed [*see Marlene F. v. Affiliated Psychiatric Med. Clinic, Inc. (1989) 48 Cal. 3d 583, 589-590, 257 Cal. Rptr. 98, 770 P.2d 278* ; *Ochoa v. Superior Court (1985) 39 Cal. 3d 159, 172-173, 216 Cal. Rptr. 661, 703 P.2d 1* (both cases rejected contention that foreseeability of distress was sufficient to impose duty); *see also Schwarz v. Regents of Univ. of Cal. (1990) 226 Cal. App. 3d 149, 163-168, 276 Cal. Rptr. 470* (discussing viability of older cases)]. However, counsel may wish to argue that the particular factual situation in his or her case relies on factors other than foreseeability to support the conclusion that the defendant owed a duty to plaintiff. For complete discussion of the potential scope of the direct-victim theory, see Levy, Golden & Sacks, California Torts, Ch. 5, *Negligent Infliction of Emotional Distress* (Matthew Bender).

[c] Related Pleading and Practice Forms

For discussion and forms relating to mental suffering, see California Forms of Pleading and Practice, Ch. 362, *Mental Suffering and Emotional Distress* (Matthew Bender). For forms relating to demurrers generally, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender).

[d] Related Points and Authorities

For points and authorities designed for use in opposition to those set forth in this form, see *§ 153.37*. For points and authorities for use regarding demurrers to complaints, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Limitations Applicable to Bystanders Inapplicable to Direct Victims

The facts and procedural background of ***Molien v. Kaiser Found. Hosps.*** *(1980) 27 Cal. 3d 916, 167 Cal. Rptr. 831, 616 P.2d 813* , are discussed in *§ 153.47[3][a]*. The Court rejected the physical-injury requirement in a cause of action for negligent infliction of serious emotional distress, holding that when the proof is not of a medically significant nature, the genuineness of the claim is guaranteed by the general standard of proof necessary to sustain a claim for that cause of action in the circumstances of the case. The Court also held plaintiff to be a direct victim of the physician's negligent misdiagnosis. The case was factually dissimilar to the bystander scenario of *Dillon v. Legg (1968) 68 Cal. 2d 728, 69 Cal. Rptr. 72, 441 P.2d 912* . Therefore, plaintiff need not have been present when the physician announced the erroneous diagnosis to plaintiff's wife in order to state a cause of action for negligent infliction of emotional distress against the physician. The Court reiterated and relied on its explicit statement in *Dillon* that an obligation hinging on foreseeability must necessarily be adjudicated only on a case-by-case basis. The risk of harm to plaintiff's husband was reasonably foreseeable to defendant. It was easily predictable that an erroneous diagnosis of syphilis and its probable source would produce both marital discord between plaintiff and his spouse and resultant emotional distress to plaintiff. Because the disease is normally transmitted only by sexual relations, it was rational to anticipate that both spouses would experience anxiety, suspicion, and hostility when confronted with what they had every reason to believe was reliable medical evidence of a particularly noxious infidelity. Under these circumstances, the Court held that defendant physician owed plaintiff a duty to exercise due care in diagnosing the physical condition of plaintiff's wife (*27 Cal. 3d 916, 923)* .

[b] Direct-Victim Theory Based on Duty

In ***Marlene F. v. Affiliated Psychiatric Med. Clinic Inc.*** *(1989) 48 Cal. 3d 583, 257 Cal. Rptr. 98, 770 P.2d 278* , the California Supreme Court reaffirmed the direct-victim theory of recovery as set forth in *Molien* [*Molien v. Kaiser Found. Hosps. (1980) 27 Cal. 3d 916, 167 Cal. Rptr. 831, 616 P.2d 813* ; *see § 153.49[3][a]*], but retreated significantly from a possible reading that foreseeability, standing alone, could be sufficient to make one a direct victim of another's negligence for the purpose of recovering damages for emotional distress only.

Marlene F. involved the claim of two mothers for damages for negligently inflicted emotional distress arising from the sexual molestation of their sons by a therapist with whom the mothers and sons were being treated in family counseling. Four justices upheld the allegations of the complaint as supported by *Molien*'s direct-victim theory. However, the lead opinion construed *Molien* as not creating a cause of action for negligent infliction of emotional distress based solely on the foreseeability that serious emotional distress might result from the defendant's conduct. The Court noted as an example that it is plainly foreseeable that close family members of a patient would suffer severe emotional distress if told that the patient had been diagnosed as suffering from a terminal illness. However, without more, the patient's physician would not be liable for that distress, whether or not the diagnosis was erroneous (*48 Cal. 3d 583, 589-590)* . Rather, damages for severe emotional distress are recoverable in a negligence action when they result from the breach of a duty owed the plaintiff that is assumed by the defendant or imposed on the defendant as a matter of law, or that arises out of a relationship between the two (*48 Cal. 3d 583, 590)* . The Court then reaffirmed that *Molien* involved such a duty and was correctly decided. The duty that made the mothers direct victims in *Marlene F.* arose from the fact that the mothers, as well as the sons, were the patients of the therapist and therefore were owed a duty by the therapist (*48 Cal. 3d 583, 590-591)* .

Three justices, concurring in the result, indicated that *Molien* should have no application beyond its facts. However, these justices concurred in the result because they viewed the allegations as sufficient to plead a professional negligence cause of action (*48 Cal. 3d 583, 599-601)* .

[4] Additional Authorities

[a] Limitations Applicable to Bystanders Inapplicable to Direct Victims

In *Long v. PKS, Inc. (1993) 12 Cal. App. 4th 1293, 16 Cal. Rptr. 2d 103* , plaintiff brought an action for damages after she was injured in a traffic accident and her foster daughter was killed in the same accident. The plaintiff sought recovery for her own injuries. In addition, she sought, and the jury awarded her, damages for the emotional distress she suffered from witnessing her foster daughter's injury and death. The defendants appealed, and the court of appeal affirmed, this aspect of the award.

The trial court properly instructed the jury that it could award damages for the emotional distress that the plaintiff suffered as the result of witnessing her foster daughter's injury and death. The limitations on recovery for emotional distress suffered by a bystander who witnesses injury to another did not apply to plaintiff, who was a direct victim of the defendant's negligence, suffering physical injuries herself. Therefore, she was entitled to recover all reasonably foreseeable damages, including damages for her emotional distress in witnessing the death of her foster daughter (*12 Cal. App. 4th 1293, 1298)* .

[b] Direct-Victim Theory Based on Duty

In *Wooden v. Raveling (1998) 61 Cal. App. 4th 1035, 71 Cal. Rptr. 2d 891* , plaintiff property owner sued defendant car driver for negligent infliction of emotional distress on a direct victim theory. The lawsuit was based on the following set of alleged facts: plaintiff was standing on her property when defendant drove his car in a negligent manner on the adjoining street; defendant's car collided with a second car; the collision caused defendant's car to be propelled, at high speed, onto plaintiff's property so that it appeared that defendant's car would strike plaintiff. Plaintiff alleged that although the car did not strike her, she was placed in fear of being severely injured or killed by it and that she suffered great mental pain and suffering as a result. The trial court sustained defendant's demurrer without leave to amend based on the opinion in *Bro v. Glaser (1994) 22 Cal. App. 4th 1398, 27 Cal. Rptr. 2d 894* . *Bro* proclaimed a two-pronged test which *Bro* stated should be applied in all nonimpact, noninjury, nonbystander negligent infliction of emotional distress (NIED) cases: preexisting relationship plus outrageous conduct.

The court of appeal reversed, holding that while the result in *Bro* seemed correct in view of the particular facts of that case, the two-pronged test it announced was hopelessly inconsistent with the great weight of other authority, including several Supreme Court cases (*61 Cal. App. 4th 1035, 1037)* . The court stated that none of the controlling Supreme Court precedents, *Potter v. Firestone & Rubber Co. (1993) 6 Cal. 4th 965, 25 Cal. Rptr. 2d 550, 863 P.2d 795* , *Burgess v. Superior Court (1992) 2 Cal. 4th 1064, 9 Cal. Rptr. 2d 615, 831 P.2d 1197* , *Marlene F. v. Affiliated Psychiatric Med. Clinic, Inc. (1989) 48 Cal. 3d 583, 257 Cal. Rptr. 98, 770 P.2d 278* , suggested an outrageous conduct component for an NIED claim; instead they treat an NIED claim as simply a species of negligence in which damages caused by a breach of duty are compensable. Nor did any of these Supreme Court precedents limit direct victim NIED recovery to instances of preexisting relationship; instead they list three possible origins for the necessary duty: duty imposed by law, duty assumed by defendant, or preexisting relationship between defendant and plaintiff (*61 Cal. App. 4th 1035, 1042)* .

In *Zavala v. Arce (1997) 58 Cal. App. 4th 915, 68 Cal. Rptr. 2d 571* , plaintiff appealed from a summary judgment in favor of her former obstetrician, in her damage action arising out of the in utero death of her baby almost three weeks after the delivery due date. She contended that the trial court erred in ruling as a matter of law she had not stated, and could not state a claim for direct victim emotional distress damages The court of appeal concluded that plaintiff's complaint was sufficient to constitute a professional negligence cause of action under which emotional distress damages were recoverable based on a direct victim theory. Because the professional malpractice alleged, if proved by a preponderance of the evidence, would constitute a breach of a duty of care owed to the mother as well as her post-term fetus, the court held that the mother stated a claim for recovery of direct victim emotional distress damages resulting from the breach of the duty. For public policy reasons, however, plaintiff's recoverable damages did not include emotional distress damages resulting from the loss of her child's affection, society, companionship and love, or other similar loss of filial consortium (*58 Cal. App. 4th 915, 920)* .

Phyllis P. v. Superior Court (1986) 183 Cal. App. 3d 1193, 228 Cal. Rptr. 776 , was a mandate proceeding arising out of an action against a school district and school authorities by a mother for damages for negligent and intentional infliction of emotional distress resulting from the sexual assault and rape of her eight-year-old daughter by a fellow pupil who had previously engaged in several incidents of sexual molestation against the daughter, both on and off school grounds. The school authorities had been informed of these prior incidents but had failed to notify the mother of them. The mother alleged that had she been informed of the earlier sexual assaults, she could have taken precautionary measures to prevent the rape that ultimately occurred and that, as a result of the defendants' failure to notify her, she suffered severe emotional distress because of both the rape and her having had to observe the subsequent physiological and psychological deterioration of her daughter. The trial court sustained a demurrer to the complaint without leave to amend and dismissed the action. Plaintiff petitioned for a writ of mandate to compel its reinstatement. In directing that the writ issue, the court of appeal held that: (1) a special relationship existed between the defendants and the mother; (2) the defendants had a duty to notify the mother on learning of the first series of sexual assaults on the daughter; (3) the injuries to the mother from their failure to inform her were foreseeable; and (4) the mother's cause of action was properly based on her status as a direct victim of defendants' negligence, rather than on the injuries to the daughter (*183 Cal. App. 3d 1193, 1196-1197)* .

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
CHAPTER 153 MENTAL SUFFERING AND EMOTIONAL DISTRESS
PART II. FORMS

15-153 California Points & Authorities § 153.50

§ 153.50 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] for Negligent Infliction of Mental Distress--Injury to Third Party--Sufficient Contemporaneous Observance

[1] FORM

[*Caption. See § 153.40.*]

THE REQUIREMENT OF SENSORY AND CONTEMPORANEOUS OBSERVANCE OF THE ACCIDENT DOES NOT REQUIRE A VISUAL PERCEPTION OF THE IMPACT CAUSING THE DEATH OR INJURY IF PLAINTIFF HAS OTHERWISE ALLEGED FACTS SHOWING HE/SHE WAS A PERCIPIENT WITNESS TO THE ACCIDENT.

A. Necessity of Showing Plaintiff Was Percipient Witness. The requirement of sensory and contemporaneous observance of the injury to the third person does not require a visual perception of the impact causing the death or injury. It is sufficient if plaintiff shows that he or she was otherwise a percipient witness of the accident (*Krouse v. Graham (1977) 19 Cal. 3d 59, 76, 137 Cal. Rptr. 863, 562 P.2d 1022*).

[*Optional*] **B. Plaintiff Is Not Required to Comprehend Defendant's Negligence.** The fact that plaintiff was unaware that defendant's conduct which inflicted the injury to the third person was negligent is not significant in determining whether plaintiff's emotional distress resulted from a direct emotional impact from the sensory and contemporaneous observance of the accident (*Mobaldi v. Regents of Univ. of Cal. (1976) 55 Cal. App. 3d 573, 583, 127 Cal. Rptr. 720*).

[*Optional*] **C. Injury Resulting From Sudden Occurrence Not Required.** An injury need not have been the result of a brief and sudden occurrence viewed contemporaneously by the plaintiff. All that is required is observation of the defendant's conduct and the injury and contemporaneous awareness that the defendant's conduct or lack thereof is causing harm (*Ochoa v. Superior Court (1985) 39 Cal. 3d 159, 167-170, 216 Cal. Rptr. 661, 703 P.2d 1*).

[*Optional*] **D. Plaintiff's Voluntary Presence Does Not Preclude Recovery.** Recovery is not precluded because is plaintiff is voluntarily at the scene of a traumatic event (*Ochoa v. Superior Court (1985) 39 Cal. 3d 159, 171, 216*

Cal. Rptr. 661, 703 P.2d 1).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a demurrer to a complaint for negligent infliction of mental distress based on witnessing injury to a third party. This form asserts that the complaint alleges sufficient facts to support an award of damages for mental suffering to the bystander plaintiff in that it contains sufficient allegations of contemporaneous observance of the injury-producing event.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

In an appropriate case these points and authorities may be used in opposition to a demurrer supported by the points and authorities in *§ 153.33*.

[3] Discussion of Authorities

[a] Necessity of Showing Plaintiff Was Percipient Witness

Krouse v. Graham *(1977) 19 Cal. 3d 59, 137 Cal. Rptr. 863, 562 P.2d 1022* , involved an action brought by plaintiff husband for damages for the emotional suffering caused when defendant struck plaintiff's parked car, killing plaintiff's wife. The accident occurred while plaintiff was sitting in the driver's seat and his wife and a friend were closing the rear door of the car. Defendant rear-ended the car, pinning plaintiff's wife under the car. Although plaintiff did not see his wife struck and did not know the extent of her injuries, he had fully perceived the fact that she had been struck, since he knew her position an instant before the impact, observed defendant's vehicle approaching, and realized that the car must have struck her. The jury returned a special verdict for plaintiff, awarding damages for the resulting emotional suffering. On appeal, defendant argued for reversal because plaintiff admitted that he neither actually saw his wife being struck by defendant's car nor did he immediately observe the effect of the impact on her. In holding that this verdict must be set aside on other grounds, the Court noted one factor as stated in *Dillon v. Legg (1968) 68 Cal. 2d 728, 740, 69 Cal. Rptr. 72, 441 P.2d 912* , to be considered in determining whether a defendant owes a duty of due care with respect to the possible emotional suffering a plaintiff may have as a result of witnessing an injury to a third person, which is whether the shock the plaintiff suffered resulted from a direct emotional impact on the plaintiff from the sensory and contemporaneous observance of the accident. The Court stated that this requirement does not demand a visual perception of the impact causing the death or injury, and found that under the circumstances of the case, plaintiff was a percipient witness to the impact causing his wife's injuries.

NOTE:

For a plaintiff to recover damages for emotional distress caused by observing the negligently inflicted

injury of a third person, he or she must have been present at the scene of the injury-producing event at the time when it occurred, and must have been then aware that injury was being caused. The California Supreme Court has stated that this factor was present in each of its prior decisions upholding recovery for negligent infliction of emotional distress, thus reaffirming its holding in *Krouse* [*Thing v. La Chusa (1989) 48 Cal. 3d 644, 668, 257 Cal. Rptr. 865, 771 P.2d 814]* .

[b] Plaintiff Is Not Required to Comprehend Defendant's Negligence

In ***Mobaldi v. Regents of Univ. of Cal.*** *(1976) 55 Cal. App. 3d 573, 127 Cal. Rptr. 720* , defendants demurred to plaintiff's complaint which attempted to allege in part a cause of action for negligent infliction of emotional distress. After the demurrer was filed, both parties filed declarations of fact which were considered by the trial court in determining whether the complaint was amenable to state a cause of action. The allegations of the complaint and the declarations of fact showed that plaintiff, Mrs. Ramsburg, had acted as a foster parent for plaintiff Mobaldi who had been born with a defect which was thought likely to result in the child's early death. The child, who had become completely integrated into the family of the Ramsburgs, had corrective surgery which was considered to have greatly improved the child's health. Thereafter, Mrs. Ramsburg had taken the child to defendant hospital for certain tests related to the defect. Because he was afraid to be alone, the child was held by Mrs. Ramsburg while he was given an injection of glucose solution which was 10 times the strength of what it should have been. After this injection, and while plaintiff physicians were out of the room and Mrs. Ramsburg still held him, the child went into convulsions, became comatose, and suffered severe irreversible brain damage. Because of her presence and the damage to the child, Mrs. Ramsburg suffered physical injury which resulted from severe emotional distress in witnessing the destruction of the child. However, it was apparent that Mrs. Ramsburg was unaware that it was the defendants' negligence which caused the injuries to the child. For that reason as well as the lack of a family tie to the child [*see § 153.32*], the trial court sustained the demurrer without leave to amend and entered judgment for defendants. Plaintiffs appealed and the court of appeal reversed. The court stated, with respect to Mrs. Ramsburg's lack of understanding of defendants' negligence, the requirement of sensory and contemporaneous observance of the accident, involved the test of foreseeability and that foreseeability depends on what the emotionally traumatized plaintiff observes. The court further stated that it is observation of consequences of the negligent act and not observation of the act itself which is likely to cause trauma so severe as to result in physical injury. Thus, the court held that so long as the plaintiff's observation of the results of the defendants' infliction of harm on another was direct and contemporaneous, there was no significance in the plaintiff's lack of awareness that the defendants' conduct inflicting the injury was negligent. The court expressly disapproved gratuitous dictum in *Hair v. Monterey County (1975) 45 Cal. App. 3d 538, 544, 119 Cal. Rptr. 639* , requiring that the tortious event be susceptible of understanding observance by the plaintiff. The court stated that the requirement as stated in *Jansen v. Children's Hosp. Med. Ctr. (1973) 31 Cal. App. 3d 22, 24, 106 Cal. Rptr. 883* , that the event causing the injury is one which can be the subject of sensory perception is sufficient to avoid potentially infinite liability. The additional requirement of understanding observance is not necessary since that requirement would limit liability and loss shift only fortuitously, and thus, would possess no rational relationship to the reasons for the *Dillon* requirement.

[c] Injury Resulting From Sudden Occurrence Not Required

In ***Ochoa v. Superior Court*** *(1985) 39 Cal. 3d 159, 216 Cal. Rptr. 661, 703 P.2d 1* , decedent, plaintiffs' son, became ill when he was in the custody of a county juvenile hall. Plaintiffs visited decedent while he was at the infirmary, and observed that he was very ill and in severe pain. Plaintiff mother expressed her concern to the juvenile hall authorities, who attempted to reassure her about decedent's condition. When plaintiff mother thereafter visited decedent, his condition had worsened. She became very distressed and concerned, and requested that decedent be allowed to see the family physician. Her request was refused, and she was sent to one of the defendants, who again reassured her and stated that the decedent had to remain in the infirmary. Each of plaintiff mother's subsequent repeated requests to defendant, various nurses, and other doctors that she be allowed to take decedent, various nurses, and other doctors that she be allowed to take decedent to her private physician were refused. Finally, decedent died, and plaintiffs sued. One of the causes of action set forth in plaintiffs' complaint was for negligent infliction of emotional distress. Defendants

demurred to that cause of action among others, and the trial court sustained the demurrers without leave to amend. Plaintiffs sought a writ of mandate to compel the court to set aside the demurrer.

The Supreme Court granted the writ, and enumerating the guidelines set out in *Dillon v. Legg (1968) 68 Cal. 2d 728, 740-741, 69 Cal. Rptr. 72, 441 P.2d 912* , held that the decedent's injury need not have been the result of a brief and sudden occurrence viewed contemporaneously by plaintiff mother (*39 Cal. 3d 159, 167-168)* . The Court disapproved *Justus v. Atchison (1977) 19 Cal. 3d 564, 139 Cal. Rptr. 97, 565 P.2d 122* , to the extent that it implicitly approved the sudden occurrence requirement, stating that it is an unwarranted restriction on the *Dillon* guidelines (*39 Cal. 3d 159, 168)* . The Court held that if there is observation of the defendant's conduct and the injury, and contemporaneous awareness that the defendant's conduct or lack thereof is causing harm, recovery is permitted (*39 Cal. 3d 159, 170)* .

[d] Plaintiff's Voluntary Presence Does Not Preclude Recovery

The facts and procedural background of ***Ochoa v. Superior Court*** *(1985) 39 Cal. 3d 159, 216 Cal. Rptr. 661, 703 P.2d 1* , are discussed in *§ 153.50[3][c]*. The Supreme Court held that the decedent's injury need not have been the result of a brief and sudden occurrence viewed contemporaneously by plaintiff mother (*39 Cal. 3d 159, 167-168)* . Defendants suggested that plaintiffs should not receive the benefit of the rule set out in *Dillon v. Legg (1968) 68 Cal. 2d 728, 740-741, 69 Cal. Rptr. 72, 441 P.2d 912* [*see § 153.31[3][b]*], because they were voluntarily present at a location where distressing incidents were likely to occur. The Court noted that *Justus v. Atchison (1977) 19 Cal. 3d 564, 139 Cal. Rptr. 97, 565 P.2d 122* , implied the rule that recovery by a plaintiff voluntarily at the scene of a traumatic event may be precluded. However, the Court held that such a requirement undercuts the very foundation on which the *Dillon* case rested because a distinction between the voluntary and involuntary presence of a close relative of the injured or dead person appears to relieve the defendant of liability for the very risk which should have been foreseen. Thus, the Court disapproved *Justus* to the extent that it makes a contrary suggestion (*39 Cal. 3d 159, 171)* .

[4] Additional Authorities

[a] Necessity of Showing Plaintiff Was Percipient Witness

In *Ausin v. Regents of Univ. of Cal. (1979) 89 Cal. App. 3d 354, 152 Cal. Rptr. 420* , the court of appeal reversed the order of the trial court granting summary judgment on plaintiff's cause of action to recover damages for emotional distress resulting from the death of plaintiff's unborn child. The court distinguished *Justus v. Atchison (1977) 19 Cal. 3d 564, 585, 139 Cal. Rptr. 97, 565 P.2d 122* , where the plaintiff only alleged that he was in the delivery room and the Supreme Court concluded that he did not and could not have seen any negligent acts. In this case, the plaintiff alleged that he learned of death by his own observation of the cessation of life in the fetus and that his shock and distress were occasioned by that sensory and contemporaneous realization of the death.

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CHAPTER 153 MENTAL SUFFERING AND EMOTIONAL DISTRESS
PART II. FORMS

15-153 California Points & Authorities § 153.51

§ 153.51 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action for Negligent Infliction of Emotional Distress--Injury to Third Party--Triable Issue of Fact Exists Regarding Whether Defendant Owed Duty Directly to Plaintiff, Based on Physician-Patient Relationship or on Duty to Plaintiff Assumed by Defendant

[1] FORM

[*Caption. See § 153.44.*]

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE A TRIABLE ISSUE OF FACT EXISTS REGARDING WHETHER DEFENDANT OWED A DUTY DIRECTLY TO PLAINTIFF, BASED ON A PHYSICIAN-PATIENT RELATIONSHIP OR ON AN ASSUMED DUTY BASED ON DEFENDANT'S UTILIZATION OF PLAINTIFF AS INSTRUMENTALITY OF TREATMENT OF THE INJURED PERSON, THE BREACH OF WHICH WOULD SUPPORT A CAUSE OF ACTION FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS.

A. Summary Judgment Is Proper Only if There Are No Triable Issues as to Any Material Fact. A motion for summary judgment may be granted only if there is no triable issues as to any issue of material fact (*Code Civ. Proc. § 437c(c)*).

B. Defendant May Owe Plaintiff Duty of Care Arising Out of Special Relationship or Assumed Duty. A hospital or doctor may be liable for emotional distress resulting from an injury to another if the conduct breaches a duty owed directly to the person who suffers the distress. Such a duty may arise from a physician-patient relationship between plaintiff and defendant, or may be assumed by the hospital or doctor. An assumed duty may arise from the utilization of plaintiff as an active instrumentality in the treatment of the third person (*Jacoves v. United Merch. Corp. (1992) 9 Cal. App. 4th 88, 109-111, 11 Cal. Rptr. 2d 468*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for summary judgment that asserts that the plaintiff has not stated a cause of action, because the defendant owed no direct duty of care to plaintiff. The basis for the opposition to the motion is that a triable issue of fact exists regarding whether a direct duty was either created by a physician-patient relationship between plaintiff and defendant, or assumed by defendant's utilization of plaintiff as an active instrumentality in the treatment of another.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should emphasize those facts tending to show that defendant had a physician-patient relationship with plaintiff, not merely with the injured person, or that defendant made plaintiff an active instrumentality of the treatment of the injured person. In addition, counsel should attach affidavits or declarations that support the memorandum [*Code Civ. Proc. § 437c(b)*].

For memoranda of points and authorities regarding summary judgment motions generally, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Defendant May Owe Plaintiff Duty of Care Arising Out of Special Relationship or Assumed Duty

In ***Jacoves v. United Merch. Corp.*** *(1992) 9 Cal. App. 4th 88, 11 Cal. Rptr. 2d 468* , parents sued a psychiatric hospital where their suicidal son was treated, alleging that they suffered emotional distress damages as a result of defendants' negligent treatment of their son. The complaint alleged that, during defendants' treatment of their son, the hospital required them to contract with the hospital for the son's care, even though the son was then an adult. The parents also alleged that the doctors who treated their son had involved them in their son's treatment (for instance, in family therapy sessions). The trial court granted the hospital's motion for summary judgment, and plaintiffs appealed.

The court of appeal reversed, holding that the defendants' summary judgment motion had not negated the complaint's factual allegations that could support a finding that the defendants had owed a duty of care directly to plaintiffs (*9 Cal. App. 4th 88, 110)* . The court rejected defendants' contention, based on *Schwarz v. Regents of Univ. of Cal. (1990) 226 Cal. App. 3d 149, 276 Cal. Rptr. 470* [*see § 153.37[4][b]*], that a contract between a caregiver and a parent for the treatment of a child does not create a duty toward the parent. The court of appeal found that the case before it was distinguishable from *Schwarz* because of the allegations that plaintiffs' participation in their son's treatment was much greater than that of the plaintiff in *Schwarz* (*9 Cal. App. 4th 88, 109-110)* . The court found that the facts before it more closely resembled the facts that supported the finding that a direct duty based on a physician-patient relationship existed in *Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc. (1989) 48 Cal. 3d 583, 590, 257 Cal. Rptr. 98, 770 P.2d 278* [*see § 153.49[3][b]*].

The court also held that a triable issue of fact existed concerning whether defendants assumed a duty toward plaintiffs by their conduct in involving plaintiffs in the treatment of their son. The court likened the allegations in the complaint to those in *Molien v. Kaiser Found. Hosps. (1980) 27 Cal. 3d 916, 923, 167 Cal. Rptr. 831, 616 P.2d 813* [*see § 153.49[3][a]*], in which the California Supreme Court held that a doctor had assumed a duty to a patient's husband by directing that the patient tell the husband of a diagnosis (which turned out to be inaccurate) that the patient had a sexually transmitted disease. The court held that an assumed duty similar to the one found in *Molien* could arise from the utilization of the parents as active instrumentalities in a patient's treatment (*9 Cal. App. 4th 88, 109)* .

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PART II. FORMS

15-153 California Points & Authorities § 153.52

§ 153.52 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action to Recover Damages for Emotional Distress Caused by Fear of Future Cancer Due to Exposure to Carcinogen--Likelihood of Cancer Not Required to Recover Emotional Distress Damages Caused by Fear of Cancer Because Defendant's Conduct in Causing Plaintiff's Exposure Constituted Oppression, Fraud, or Malice

[1] FORM

[*Caption. See § 153.44.*]

PLAINTIFF IS NOT REQUIRED TO ESTABLISH THAT CANCER IS MORE LIKELY THAN NOT TO RESULT FROM HIS/HER EXPOSURE TO [CARCINOGENIC *or* TOXIC] SUBSTANCES CAUSED BY DEFENDANT IN ORDER TO RECOVER EMOTIONAL DISTRESS DAMAGES CAUSED BY FEAR OF CANCER, BECAUSE DEFENDANT'S CONDUCT CONSTITUTED [OPPRESSION *or* FRAUD *or* MALICE] AS DEFINED IN *CIVIL CODE SECTION 3294*, REQUIRING PLAINTIFF TO ESTABLISH ONLY AN ACTUAL RISK OF CANCER THAT IS SIGNIFICANT.

Defendant's Oppressive, Fraudulent, or Malicious Conduct in Exposing Plaintiff to Carcinogen Makes Proof of Likelihood of Cancer Unnecessary to Support Recovery for Fear of Cancer. If defendant's conduct in exposing plaintiff to a toxic substance constitutes oppression, fraud, or malice under *Civil Code Section 3294*, plaintiff need not establish that cancer is likely in order to recover emotional distress damages for fear of cancer; an actual risk of cancer that is significant can support recovery of those damages (*Potter v. Firestone Tire & Rubber Co. (1993) 6 Cal. 4th 965, 999-1000, 25 Cal. Rptr. 2d 550, 863 P.2d 795*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion for summary judgment that asserts that plaintiff did not suffer any present physical injury or illness from his or her exposure to a toxic substance and has not shown that he or she is more likely than not to develop cancer, and therefore is precluded from recovering emotional distress damages for fear of cancer. The ground of opposition is that plaintiff can establish that defendant's conduct constituted oppression, fraud, or malice under *Civ. Code § 3294*, making the "more likely than not" threshold inapplicable [*Potter v. Firestone Tire & Rubber Co. (1993) 6 Cal. 4th 965, 999-1000, 25 Cal. Rptr. 2d 550, 863 P.2d 795]* .

In an appropriate case, these points and authorities may be submitted in opposition to the motion supported by the points and authorities in *§ 153.38*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts supporting the contention that defendant's conduct constitutes oppression, fraud, or malice under *Civ. Code § 3294*. In addition, even if oppression, fraud, or malice can be established, counsel must be prepared to show that plaintiff's actual risk of cancer is significant in order to recover [*Potter v. Firestone Tire & Rubber Co. (1993) 6 Cal. 4th 965, 999, 25 Cal. Rptr. 2d 550, 863 P.2d 795]* .

[3] Discussion of Authorities

[a] Defendant's Oppressive, Fraudulent, or Malicious Conduct in Exposing Plaintiff to Carcinogen Makes Proof of Likelihood of Cancer Unnecessary to Support Recovery for Fear of Cancer

The facts and procedural background of ***Potter v. Firestone Tire & Rubber Co.*** *(1993) 6 Cal. 4th 965, 25 Cal. Rptr. 2d 550, 863 P.2d 795* , are discussed in *§ 153.38[3][a]*. The Court held that generally, emotional distress damages based on a fear of cancer may be recovered absent present physical injury or illness only on a showing that the feared cancer will more likely than not occur. However, the Court also held that a plaintiff need not meet this standard if the plaintiff pleads and proves that the defendant's conduct in causing the exposure amounts to "oppression, fraud, or malice" as defined in *Civ. Code § 3294*. Once the plaintiff has made this showing, the plaintiff must still demonstrate that his or her fear of cancer is reasonable, genuine, and serious in order to recover damages. The mere ingestion of a carcinogen, or even a significant increase in the risk of cancer, is insufficient; the plaintiff must show that his or her actual risk of cancer is "significant" before recovery will be allowed (*6 Cal. 4th 965, 999-1000)* .

California Points & Authorities

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
Chapter 154 RESERVED

15-154 California Points & Authorities Chapter 154

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California Points & Authorities

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
CHAPTER 155 MOTIONS AFTER TRIAL

15-155 California Points & Authorities 155.syn

§ 155.syn Synopsis to Chapter 155: MOTIONS AFTER TRIAL

§ 155.01 Scope of Chapter

§ 155.02 Governing Law

[1] Motions for Judgment Notwithstanding the Verdict (JNOV)

[2] Motions for New Trial

[3] Motions to Vacate Judgment and Enter Another Judgment

§ 155.03 How to Use the Forms in This Chapter

[1] Page Limits on Points and Authorities

[2] Using the Forms to Build a Draft Memorandum

§ 155.04 Memoranda Supporting or Opposing Post Trial Motions

§ 155.05 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

[2] Related Points And Authorities Chapters

§§ 155.06-155.09 [Reserved]

§ 155.10 Supporting Motion for Judgment Notwithstanding the Verdict [Code Civ. Proc. § 629]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Grounds Same as For Directed Verdict

[b] Lack of Substantial Conflict in Evidence

[c] Lack of Substantial Evidence to Support Verdict

[d] No Evidence of Sufficient Substantiality to Support Verdict in Plaintiff's Favor

[e] Plaintiff's Failure to Prove Essential Element of Cause of Action

[f] Evidence Dictates Determination in Plaintiff's Favor

[g] No Substantial Support Given to Defense of Defendant

[h] Inherently Incredible Evidence Ignored

[4] Additional Authorities

[a] Lack of Substantial Evidence to Support Verdict

[b] Plaintiff's Failure to Prove Essential Element of Cause of Action

[c] Evidence Dictates Determination in Plaintiff's Favor

§§ 155.11-155.29 [Reserved]

§ 155.30 Opposing Motion for Judgment Notwithstanding the Verdict [Code Civ. Proc. § 629]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Substantial Evidence Supports Verdict

[b] Power of Trial Court

[c] Reasonable Inference Supports Verdict

[d] Substantial Conflict in Evidence

[e] Evidence Presents Question for Jury's Determination

[4] Additional Authorities

[a] Substantial Evidence Supports Verdict

[b] Power of Trial Court

[c] Substantial Conflict in Evidence

[d] Evidence Presents Question for Jury's Determination

§§ 155.31-155.49 [Reserved]

§ 155.50 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Irregularity in Court Proceedings [Code Civ. Proc. § 657(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Supporting Declarations or Affidavits Required

[d] Related Pleading and Practice Forms

[e] Related Memoranda

[f] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Departure by Court From Due and Orderly Method

[b] Court's Prejudgment of Case Before Hearing

[c] Court's Prejudicial Expression and Action Against Use of Particular Witness

[d] Court's Invasion of Province of Jury and Influence on Verdict

[e] Failure to Give 15 Days' Notice of Trial

[f] Objection by Aggrieved Party and Admonishing Instruction by Court Unnecessary

[g] Assignment by Court of Irregularity as Error Unnecessary

[4] Additional Authorities

[a] Departure by Court From Due and Orderly Method

[b] Court's Prejudgment of Case Before Hearing

[c] Court's Invasion of Province of Jury and Influence on Verdict

[d] Failure to Give 15 Days' Notice of Trial

[e] Objection by Aggrieved Party and Admonishing Instruction by Court Unnecessary

§§ 155.51-155.54 [Reserved]

§ 155.55 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Court Order or Abuse of Discretion Prevented Fair Trial [Code Civ. Proc. § 657(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] New Trial on Ground of Order of Court or Abuse of Discretion Preventing Fair Trial

[b] Order Preventing Reliance on Favorable Presumption

[c] Denial of Continuance to Produce Material Evidence

[4] Additional Authorities

[a] Denial of Continuance to Produce Material Evidence

§§ 155.56-155.59 [Reserved]

§ 155.60 Opposing Motion for New Trial [Code Civ. Proc. § 659]--No Irregularity in Court Proceedings Sufficient to Require New Trial [Code Civ. Proc. § 657(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] No New Trial for Harmless Error

[b] Judge's Personal Habits, Conduct, or Statements

[c] Decided Cases Not Controlling Precedents in New Situation

[d] Judge's Expression of Disagreement With Policy of Statute

[e] Judge's Encouragement of Settlement of Litigated Cases

[f] Judge's Expression of Tentative Views of Case

[g] Judge's Expression of Doubt Concerning Credibility of Witness

[h] Judge's Expression of Opinion on Question of Law or Interpretation of Statute

[i] Judge's Questioning of Witness

[j] Judge's Bias or Prejudice Not Irregularity

[k] Lack of Objection to Improper Statement

[4] Additional Authorities

[a] No New Trial for Harmless Error

[b] Judge's Personal Habits, Conduct, or Statements

[c] Judge's Encouragement of Settlement of Litigated Cases

[d] Judge's Expression of Tentative Views of Case

[e] Judge's Expression of Doubt Concerning Credibility of Witness

[f] Judge's Questioning of Witness

[g] Lack of Objection to Improper Statement

§§ 155.61-155.64 [Reserved]

§ 155.65 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Court Order or Abuse of Discretion Did Not Prevent Fair Trial [Code Civ. Proc. § 657(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] No New Trial If No Prejudice to Jury and Evidence Supports Verdict

[b] Indiscreet Order of Court

[c] Denial of Continuance to Produce Material Party-Witness

[d] Refusal of Leave to Amend Answer

§§ 155.66-155.69 [Reserved]

§ 155.70 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Irregularity in Jury Proceedings [Code Civ. Proc. § 657(1)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Supporting Declarations or Affidavits Required

[d] "No Knowledge" Requirement

[e] Irregularity of Jury Proceedings Versus Jury Misconduct

[f] Related Pleading and Practice Forms

[g] Related Memoranda

[h] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Evidence Admissible to Show Misconduct

[b] Use of Affidavit to Show Statements or Objective Facts

[c] No-Knowledge Requirement

[4] Additional Authorities

[a] Use of Affidavit to Show Statements or Objective Facts

§ 155.71 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Irregularity in Jury Proceedings [Code Civ. Proc. § 657(1)]--Concealment of Juror Bias During Voir Dire

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Constitutional Right to Unbiased Jury

[b] Juror's Concealment of Bias on Voir Dire

[4] Additional Authorities

[a] Juror's Concealment of Bias on Voir Dire

§ 155.72 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Irregularity in Jury Proceedings [Code Civ. Proc. § 657(1)]--Mental Incompetency of Juror

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Constitutional Right to Mentally Competent Jury

[b] Mental Incompetence of Juror

§§ 155.73-155.79 [Reserved]

§ 155.80 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Juror Misconduct [Code Civ. Proc. § 657(2)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Supporting Declarations or Affidavits Required

[d] Jury Misconduct Versus Irregularity of Jury Proceedings

[e] Burden of Proof

[f] Related Pleading and Practice Forms

[g] Opposing Points and Authorities

[3] Discussion of Authorities

[a] New Trial if Prejudice Results From Misconduct

[b] Presumption of Prejudice

[4] Additional Authorities

[a] New Trial if Prejudice Results From Misconduct

§ 155.81 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Juror Misconduct [Code Civ. Proc. § 657(2)]--Presumption of Prejudice Not Rebutted

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Test for Determining Prejudice

[b] Factors for Determining Whether Presumption Is Rebutted

[c] Test for Determining Prejudice

§ 155.82 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Juror Misconduct [Code Civ. Proc. § 657(2)]--Improper Communications, Discussions, Statements of Opinion

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] New Trial for Jurors' Improper Discussion of Case Before Submission

[b] Discussion of Case Outside Court

[c] Prejudgment of Case Prior to Court's Instruction

[d] Jury Entertained by Party or Counsel

[e] Communication Between Juror and Witness

[f] Erroneous Statement of Law Made by Juror to Fellow Jurors

[4] Additional Authorities

[a] Discussion of Case Outside Court

§ 155.83 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Juror Misconduct [Code Civ. Proc. § 657(2)]--Improper Reception of Evidence

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] New Trial for Improper Reception of Evidence

[b] Experiments by Jurors, Viewing of Premises, Examination of Exhibits Not in Evidence

[c] Experiment by Juror

[d] Unauthorized View of Premises

[e] Examination of Exhibits Not in Evidence

[f] Reliance by Juror on Outside Expert

[4] Additional Authorities

[a] New Trial for Improper Reception of Evidence

§ 155.84 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Juror Misconduct [Code Civ. Proc. § 657(2)]--Arrival at Verdict by Chance

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] New Trial for Chance Verdict

[b] Hazard, Risk, or Result of Uncertain Conditions

[c] Quotient Verdict

[4] Additional Authorities

[a] Quotient Verdict

§ 155.85 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Juror Misconduct [Code Civ. Proc. § 657(2)]--Reference to Dictionary to Define Term in Instruction

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Juror Reference to Dictionary Is Misconduct

§§ 155.86-155.99 [Reserved]

§ 155.100 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Irregularity in Jury Proceedings [Code Civ. Proc. § 657(1)]--Moving Party Has Not Shown Lack of Prior Knowledge of Alleged Irregularity

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Affirmative Showing of Lack of Prior Knowledge of Misconduct

[4] Additional Authorities

[a] Affirmative Showing of Lack of Prior Knowledge of Misconduct

§ 155.101 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Irregularity in Jury Proceedings [Code Civ. Proc. § 657(1)]--Moving Party Has Not Shown Alleged Concealment of Bias Was Prejudicial

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Showing of Prejudice Required

[b] Proof by Preponderance of Evidence

[c] Juror Must Be Subject to Challenge for Cause

[d] Jurors as Unable to Deny Prejudicial Influence in Declaration

[4] Additional Authorities

[a] Showing of Prejudice Required

[b] Juror Must Be Subject to Challenge for Cause

§ 155.102 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Irregularity in Jury Proceedings [Code Civ. Proc. § 657(1)]-- Moving Party Waived Objection by Failing to Interrogate Juror Fully During Voir Dire

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Waiver of Objection If Counsel Fails to Interrogate Juror Fully on Voir Dire

[4] Additional Authorities

[a] Waiver of Objection If Counsel Fails to Interrogate Juror Fully on Voir Dire

§ 155.103 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Irregularity in Jury Proceedings [Code Civ. Proc. § 657(1)]--Moving Party Failed to Show Juror Was Mentally Incompetent During Trial

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Preponderance of Evidence Required

§§ 155.104-155.109 [Reserved]

§ 155.110 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Juror Misconduct [Code Civ. Proc. § 657(2)]--Alleged Misconduct Not Prejudicial

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Denial of Motion if No Showing of Prejudice

[b] Misconduct of Trifling Nature

[c] Improper Discussion, Communication, or Statement of Opinion

[d] Discussion of Case Before Final Submission to Jury

[e] Comments by Juror on Evidence

[f] Communication Between Juror and Counsel

[g] Communication Between Juror and Witness

[h] Improper Reception of Evidence

[I] Unauthorized View of the Premises

[j] Examination of Exhibits Not in Evidence

[k] Reliance by Juror on Outside Expert

[l] Inattentive Juror

[4] Additional Authorities

[a] Misconduct of Trifling Nature

[b] Discussion of Case Before Final Submission to Jury

[c] Communication Between Juror and Witness

[d] Improper Reception of Evidence

[e] Unauthorized View of Premises

[f] Examination of Exhibits Not in Evidence

[g] Reliance by Juror on Outside Expert

§ 155.111 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Juror Misconduct [Code Civ. Proc. § 657(2)]--Failure of Moving Party to Comply With No-Knowledge Requirement

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] No-Knowledge Requirement

§ 155.112 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Juror Misconduct [Code Civ. Proc. §

657(2)]--Failure of Moving Party to Object at Trial

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Waiver of Right to Complain

[4] Additional Authorities

[a] Waiver of Right to Complain

§ 155.113 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Juror Misconduct [Code Civ. Proc. § 657(2)]--Moving Party's Declarations or Affidavits Not Supported by Competent Evidence

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Incompetent Evidence

[b] Hearsay

[c] Evidence of Mental Processes of Jurors

[d] "Mental Processes" Include Misunderstanding of Law

[4] Additional Authorities

[a] Evidence of Mental Processes of Jurors

§ 155.114 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Juror Misconduct [Code Civ. Proc. § 657(2)]--Juror's Experiment Was Within Lines of Evidence Offered at Trial

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Experiment by Juror

[4] Additional Authorities

[a] Experiment by Juror

§ 155.115 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Juror Misconduct [Code Civ. Proc. § 657(2)]--Verdict Was Not Obtained by Chance

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Verdict Not Chance Verdict

[b] Jury Votes on Two Known Sums and Agrees to Accept One

[c] Subsequent Discussion of Quotient Verdict

[4] Additional Authorities

[a] Subsequent Discussion of Quotient Verdict

§ 155.116 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Juror Misconduct [Code Civ. Proc. § 657(2)]--Moving Party Has No Right to Compel Jurors to Discuss Issues

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Moving Party Has No Right to Compel Jurors to Discuss Issues

§§ 155.117-155.129 [Reserved]

§ 155.130 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Irregularity of Proceedings Due to Adverse Party [Code Civ. Proc. § 657(1)]--Misconduct of Adverse Party

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Supporting Declarations or Affidavits Required

[d] Related Pleading and Practice Forms

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Overt Acts of Adverse Party

[b] Admonishing Instruction Not Obviating Prejudicial Effect

[c] One Party Misled by Act of Other

[d] Prevention of Full Presentation of Evidence

[e] Witness Induced to Give False Evidence

[f] Intentional Misconduct of Party in Courtroom

[4] Additional Authorities

[a] Admonishing Instruction Not Obviating Prejudicial Effect

§ 155.131 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Irregularity of Proceedings Due to Adverse Party [Code Civ. Proc. § 657(1)]--Misconduct of Counsel--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Influence on Jury's Verdict

[b] Improper Argument by Counsel

§ 155.132 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Irregularity of Proceedings Due to Adverse Party [Code Civ. Proc. § 657(1)]--Misconduct of Counsel--Improper Appeal to Prejudice or Sympathy of Jury

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Appeal to Sympathy or Prejudice of Jury

[b] Improper Comments Concerning Relative Wealth of Litigants

[4] Additional Authorities

[a] Improper Comments Concerning Relative Wealth of Litigants

§ 155.133 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Irregularity of Proceedings Due to Adverse Party [Code Civ. Proc. § 657(1)]--Misconduct of Counsel--Personal Attack on Character or Motives of Counsel, Party, or Witness

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Personal Attacks on Character or Motives of Adverse Party, Counsel, or Witness

§ 155.134 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Irregularity of Proceedings Due to Adverse Party [Code Civ. Proc. § 657(1)]--Misconduct of Counsel--Urging Facts Not in Evidence, Insinuation of Matters Not Supported by Evidence, or Attempt to Introduce Inadmissible Objects Into Evidence

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Counsel's Suggestion of Matters Other Than by Legitimate Introduction Into Evidence

[b] Assuming Facts Not in Evidence During Argument

[c] Insinuation of Untrue Matters or Inadmissible Evidence on Cross Examination

[d] Use of Object Not Admissible as Evidence

[4] Additional Authorities

[a] Assuming Facts Not in Evidence During Argument

[b] Insinuation of Untrue Matters or Inadmissible Evidence on Cross Examination

§ 155.135 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Irregularity of Proceedings Due to Adverse Party [Code Civ. Proc. § 657(1)]--Misconduct of Counsel--False Accusation of Suppression of Evidence

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Accusation of Suppression of Evidence

[4] Additional Authorities

[a] Accusation of Suppression of Evidence

§ 155.136 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Irregularity of Proceedings Due to Adverse Party [Code Civ. Proc. § 657(1)]--Misconduct of Counsel--Reference to Insurance Before Jury

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Reference to Insurance During Trial

[b] Fact of Insurance Injected to Show Defendant Well Insured

[c] Plaintiff Already Compensated by Insurance

[d] Plaintiff Shows That One Defendant Not Well Insured

[e] Plaintiff's Insurance Company Real Party in Interest

[f] Questions About Insurance on Voir Dire

[4] Additional Authorities

[a] Fact of Insurance Injected to Show Defendant Well Insured

§ 155.137 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Irregularity of Proceedings Due to Adverse

Party [Code Civ. Proc. § 657(1)]--Misconduct of Counsel--Reference to Own Client's Perjury and Collusion

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Reference to Own Client's Perjury and Collusion With Other Party

§§ 155.138-155.149 [Reserved]

§ 155.150 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Irregularity of Proceedings Due to Adverse Party [Code Civ. Proc. § 657(1)]--Alleged Misconduct of Party or Counsel Not Prejudicial

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] No Prejudice Resulting From Alleged Misconduct

[b] Court Must View Overall Record

[c] Remarks Made by Party

[d] Conduct of Party in Courtroom

[e] Counsel's Statements Were Vigorous Argument

[f] Assuming Language Was Misconduct, No Prejudice to Opposing Party

[g] Mention of Financial Condition Not Prejudicial

[h] Reference During Argument to Existence of Facts Not Proven During Trial

[i] Reference to Extraneous Matters During Argument

[j] Insinuation of Untrue or Inadmissible Matters on Cross Examination

[k] Counsel's Attempt to Place Inadmissible Physical Evidence Before Jury

[4] Additional Authorities

[a] No Prejudice Resulting from Alleged Misconduct

[b] Remarks Made by Party

[c] Conduct of Party in Courtroom

[d] Assuming Language Was Misconduct, No Prejudice to Opposing Party

[e] Reference During Argument to Existence of Facts Not Proven During Trial

[f] Insinuation of Untrue or Inadmissible Matters on Cross Examination

§ 155.151 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Irregularity of Proceedings Due to Adverse Party [Code Civ. Proc. § 657(1)]--Misconduct Cured by Timely Objection and Admonition

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Casual Statement Cured by Court's Action

[b] Impropriety Correctable Except in Extreme Cases

[4] Additional Authorities

[a] Casual Statement Cured by Court's Action

§ 155.152 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Irregularity of Proceedings Due to Adverse Party [Code Civ. Proc. § 657(1)]--Waiver for Failure to Make Timely Objection to Misconduct

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Failure of Moving Party to Make Timely Objection

[4] Additional Authorities

[a] Failure of Moving Party to Make Timely Objection

§ 155.153 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Irregularity of Proceedings Due to Adverse Party [Code Civ. Proc. § 657(1)]--Reference to Insurance Not Prejudicial

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] No Prejudice to Opposing Party

[b] Court Must View Overall Record

[c] Reference to Insurance During Voir Dire

[4] Additional Authorities

[a] No Prejudice to Opposing Party

[b] Reference to Insurance During Voir Dire

§ 155.154 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Irregularity of Proceedings Due to Adverse Party [Code Civ. Proc. § 657(1)]--Reference to Insurance Was Relevant to Material Issue

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Relevance to Issue in Case

[b] Facts Tending to Show Interest, Bias, or Motive

§§ 155.155-155.169 [Reserved]

§ 155.170 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Accident or Surprise [Code Civ. Proc. § 657(3)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Supporting Declarations or Affidavits Required

[d] Related Pleading and Practice Forms

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Accident and Surprise Defined

[b] Different Result Probable on Retrial

[c] Exercise of Ordinary Prudence to Guard Against Surprise or Accident

[d] Failure to Seek Continuance or Ask for Relief at Time of Surprise

[e] Raising New Material Issue by Adverse Party

[f] Raising New Material Issue by Court at Close of Trial

[g] Testimony by Own Witness Contrary to Anticipated Testimony

[h] Abandonment of Case by Counsel Without Notice

[i] Presentation by Adverse Party of Unknown and Nondiscoverable Material Evidence

[4] Additional Authorities

[a] Failure to Seek Continuance or Ask for Relief at Time of Surprise

[b] Testimony by Own Witness Contrary to Anticipated Testimony

§§ 155.171-155.179 [Reserved]

§ 155.180 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Accident or Surprise [Code Civ. Proc. § 657(3)]--Moving Party Failed to Exercise Ordinary Prudence

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Court's Suspicion of Ground

[b] Failure to Exercise Ordinary Prudence

[c] Testimony by Witness Contrary to Anticipated Testimony

[d] Absence of Material Witness

[4] Additional Authorities

[a] Failure to Exercise Ordinary Prudence

[b] Testimony by Witness Contrary to Anticipated Testimony

§ 155.181 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Accident or Surprise [Code Civ. Proc. § 657(3)]--Moving Party Failed to Show Different Result Probable on Retrial

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Failure to Show Different Result Probable on Retrial

[4] Additional Authorities

[a] Failure to Show Different Result Probable on Retrial

§ 155.182 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Accident or Surprise [Code Civ. Proc. § 657(3)]--Moving Party Waives Ground if No Action Was Taken at Trial

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Waiver of Ground If No Immediate Action

[4] Additional Authorities

[a] Waiver of Ground If No Immediate Action

§§ 155.183-155.189 [Reserved]

§ 155.190 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Newly Discovered Evidence [Code Civ. Proc. § 657(4)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Supporting Declarations or Affidavits Required

[d] Related Pleading and Practice Forms

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Requirements for Granting of Motion

[b] Newly Discovered Evidence

[c] Reasonable Diligence

[d] Materiality

[e] Cumulative Evidence Showing Different Result Probable

[f] Failure to Move for Continuance

[g] Newly Discovered Witness

[4] Additional Authorities

[a] Reasonable Diligence

[b] Cumulative Evidence Showing Different Result Probable

[c] Failure to Move for Continuance

[d] Newly Discovered Witness

§§ 155.191-155.199 [Reserved]

§ 155.200 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Newly Discovered Evidence [Code Civ. Proc. § 657(4)]--Evidence Not Newly Discovered

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Requirements for Granting of Motion

[b] Distrust and Disfavor of Courts

[c] Evidence Not Newly Discovered

[4] Additional Authorities

[a] Requirements for Granting of Motion

[b] Distrust and Disfavor of Courts

[c] Evidence Not Newly Discovered

§ 155.201 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Newly Discovered Evidence [Code Civ. Proc. § 657(4)]--Inadequate Showing of Reasonable Diligence

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Inadequate Showing of Reasonable Diligence

[b] Failure to Move for Continuance

[4] Additional Authorities

[a] Inadequate Showing of Reasonable Diligence

[b] Failure to Move for Continuance

§ 155.202 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Newly Discovered Evidence [Code Civ. Proc. § 657(4)]--Different Result Not Probable on Retrial

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Different Result Not Probable

[b] Impeachment of Witness

[c] Evidence Merely Cumulative

[d] Evidence Speculative and Arguably Remote

[4] Additional Authorities

[a] Different Result Not Probable

[b] Impeachment of Witness

[c] Evidence Merely Cumulative

§§ 155.203-155.209 [Reserved]

§ 155.210 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Insufficiency of Evidence to Justify Verdict or Decision [Code Civ. Proc. § 657(5)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Judge or Jury Clearly Should Have Reached Different Decision or Verdict

[b] Judge Required to Weigh Evidence

[c] Duty to Grant New Trial If Verdict or Decision Against Weight of Evidence

[d] Court Not Bound by Prior Rulings on Questions of Law or Prior View of Evidence

[e] Judge Not Bound by Conflicts in Evidence

[f] Judge's Duty to Set Aside Verdict If Unjust

[g] Unreliable but Substantial Evidence Supports Verdict

[4] Additional Authorities

[a] Judge or Jury Clearly Should Have Reached Different Decision or Verdict

[b] Judge Required to Weigh Evidence

[c] Judge Not Bound by Conflicts in Evidence

§§ 155.211-155.219 [Reserved]

§ 155.220 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Insufficiency of Evidence to Justify Verdict or Decision [Code Civ. Proc. § 657(5)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[3] Discussion of Authorities

[a] New Trial Precluded Unless Court Convinced That Court or Jury Clearly Should Have Reached Different Result

[b] Evidence Sufficient to Justify Verdict or Decision

[c] Denial of Motion When Judge Would Have Ruled Differently If Deciding Case

[4] Additional Authorities

[a] Evidence Sufficient to Justify Verdict or Decision

[b] Denial of Motion When Judge Would Have Ruled Differently If Deciding Case

§§ 155.221-155.229 [Reserved]

§ 155.230 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Verdict or Decision Is Against the Law [Code Civ. Proc. § 657(6)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Points and Authorities

§ 155.231 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Verdict or Decision Is Against the Law [Code Civ. Proc. § 657(6)]--General Verdict Unsupported by Substantial Evidence

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] General Verdict Unsupported by Any Substantial Evidence

[4] Additional Authorities

[a] General Verdict Unsupported by Any Substantial Evidence

§ 155.232 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Verdict or Decision Is Against the Law [Code Civ. Proc. § 657(6)]--Verdict Contrary to Correct Jury Instructions

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Verdict Contrary to Correct Jury Instructions

§ 155.233 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Verdict or Decision Is Against the Law [Code Civ. Proc. § 657(6)]--Inconsistent Verdict

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Inconsistent Verdicts

[b] No Waiver of Defective Verdict

[c] Inconsistent Damage Awards

[4] Additional Authorities

[a] Inconsistent Verdicts

[b] No Waiver of Defective Verdict

§ 155.234 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Verdict or Decision Is Against the Law [Code Civ. Proc. § 657(6)]--Decision Against Law

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Decision Against Law

[b] Failure to Resolve Specified Controverted Issue

[c] Inconsistent, Ambiguous, and Uncertain Statement of Decision

[d] Evidence Insufficient as Matter of Law and Without Conflict on Any Material Point

[e] Moving Party May Raise New Legal Theory

§§ 155.235-155.239 [Reserved]

§ 155.240 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Verdict or Decision Is Against the Law [Code Civ. Proc. § 657(6)]--Evidence Is Not Without Conflict on All Material Points

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Evidence Must Be Without Conflict on All Material Points

[b] "Against Law" Does Not Allow Weighing of Evidence

[4] Additional Authorities

[a] Evidence Must Be Without Conflict on All Material Points

§ 155.241 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Verdict or Decision Is Against the Law [Code Civ. Proc. § 657(6)]--Verdict Not Contrary to Correct Jury Instruction

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Verdict Not Contrary to Correct Instruction

[b] Special Verdict Form Need Not Repeat Detail of Instruction

[c] Verdict Contrary to Incorrect Instruction

[4] Additional Authorities

[a] Verdict Contrary to Incorrect Instruction

§§ 155.242-155.249 [Reserved]

§ 155.250 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Error of Law [Code Civ. Proc. § 657(7)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Error Must Be Prejudicial

[4] Additional Authorities

[a] Error Must Be Prejudicial

§ 155.251 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Error of Law [Code Civ. Proc. § 657(7)]--Erroneous Admission or Exclusion of Evidence

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Erroneous Admission of Evidence

[b] Erroneous Exclusion of Evidence

[c] Discretion of Trial Judge

[4] Additional Authorities

[a] Erroneous Admission of Evidence

[b] Erroneous Exclusion of Evidence

§ 155.252 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Error of Law [Code Civ. Proc. § 657(7)]--Erroneous or Misleading Jury Instructions

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Erroneous or Misleading Jury Instruction Is Error in Law

[b] Erroneous Instruction Deemed Excepted To

[c] Determination of Error May Require Examination of Evidence

[d] Order Granting New Trial Affirmed If Challenged Instruction Erroneous in Any Degree

[e] Instructions Overemphasizing One Side of Case

[f] Incorrect or Incomplete Statement of Law

[g] Instruction on Inapplicable Doctrine

[h] Failure to Give Certain Instructions

[i] Correct but Misleading Instructions

[j] Conflicting and Misleading Instructions

[4] Additional Authorities

[a] Order Granting New Trial Affirmed If Challenged Instruction Erroneous in Any Degree

[b] Incorrect or Incomplete Statement of Law

[c] Instruction on Inapplicable Doctrine

[d] Failure to Give Certain Instructions

§ 155.253 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Error of Law [Code Civ. Proc. §

657(7)]--Erroneous Denial of Jury Trial

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Erroneous Denial of Jury Trial Is Error in Law

[b] Denial of Jury Trial as Miscarriage of Justice

[c] Denial of Jury Trial Deemed Objected To

[4] Additional Authorities

[a] Erroneous Denial of Jury Trial Is Error in Law

[b] Denial of Jury Trial as Miscarriage of Justice

§ 155.254 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Error of Law [Code Civ. Proc. § 657(7)]--Improper Granting of Nonsuit

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Improper Granting of Nonsuit Is Error in Law

[b] Court's Dismissal of Action After Erroneously Compelling Election

[4] Additional Authorities

[a] Improper Granting of Nonsuit Is Error in Law

§ 155.255 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Error of Law [Code Civ. Proc. § 657(7)]--Improper Denial of Motion for Directed Verdict

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Improper Denial of Motion for Directed Verdict Is Error in Law

§§ 155.256-155.269 [Reserved]

§ 155.270 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Error of Law [Code Civ. Proc. § 657(7)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] No Error in Law Occurring at Trial

[b] Error Must Be Prejudicial

[c] Admission of Irrelevant Evidence

[d] Exclusion of Evidence

[e] Erroneous or Misleading Jury Instructions

[f] Failure to Object to Erroneous Admission of Evidence

[g] Denial of Jury Trial After Waiver

[4] Additional Authorities

[a] Error Must Be Prejudicial

[b] Admission of Irrelevant Evidence

[c] Exclusion of Evidence

[d] Erroneous or Misleading Jury Instructions

§§ 155.271-155.289 [Reserved]

§ 155.290 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Action Has Not Reached Final Judgment on All Causes

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Order Granting New Trial as to Certain Issues Before Final Determination of All Issues Is Premature and Ineffectual

§§ 155.291-155.299 [Reserved]

§ 155.300 Supporting Appeal From Order Granting New Trial [Code Civ. Proc. § 659]--Trial Court Failed to Specify Grounds or Reasons for Order [Code Civ. Proc. § 657]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Specification of Grounds

[b] Specification of Reasons

[c] Oral Pronouncement of Reasons Inadequate

[d] Reference to Transcription of Oral Statement of Reasons Inadequate

[4] Additional Authorities

[a] Specification of Reasons

§ 155.301 Supporting Appeal From Order Granting New Trial [Code Civ. Proc. § 659]--Order Based on Harmless Error

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Grounds for Affirming Order

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Prejudice Is Required

[4] Additional Authorities

[a] Prejudice Is Required

§§ 155.302-155.309 [Reserved]

§ 155.310 Opposing Appeal From Order Granting New Trial [Code Civ. Proc. § 659]--Reasonable Finder of Fact Could Find in Favor of Moving Party on Trial Court's Theory

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Abuse of Discretion Standard of Review Applicable on Appeal From Order Granting New Trial

§§ 155.311-155.319 [Reserved]

§ 155.320 Supporting Motion to Set Aside and Vacate Judgment and Enter Another Judgment [Code Civ. Proc. §§ 663, 663a]--Incorrect or Erroneous Legal Bases for Court Decision [Code Civ. Proc. § 663(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Statement of Decision

[d] Related Pleading and Practice Forms

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Incorrect Legal Conclusion or Erroneous Judgment on Facts

[b] Legal Conclusion Contrary to Express Statutory Provision

[c] Legal Conclusions Inconsistent With Uncontroverted Facts

[d] Court Wrongly Considers Element as Part of Settled Legal Doctrine

[e] Moving Party May Raise New Legal Theory

§ 155.321 Supporting Motion to Set Aside and Vacate Judgment and Enter Another Judgment [Code Civ. Proc. §§ 663, 663a]--Judgment Inconsistent With Special Verdict of Jury [Code Civ. Proc. § 663(2)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Points and Authorities

§§ 155.322-155.329 [Reserved]

§ 155.330 Opposing Motion to Set Aside and Vacate Judgment and Enter Another Judgment [Code Civ. Proc. §§

663, 663a]--Legal Bases Consistent With Facts Found by Court

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Statement of Decision

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Judgment Consistent With Facts

[b] Motion Improper to Challenge Factual Bases for Decision

§ 155.331 Opposing Motion to Set Aside and Vacate Judgment and Enter Another Judgment [Code Civ. Proc. §§ 663, 663a]--Judgment Consistent With Special Verdict

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

§ 155.332 Opposing Motion to Set Aside and Vacate Judgment and Enter Another Judgment [Code Civ. Proc. §§ 663, 663a]--Motion Not Applicable to Interlocutory Judgment

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Motion Improper to Set Aside Interlocutory Judgment

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15-155 California Points & Authorities § 155.01

§ 155.01 Scope of Chapter

This chapter contains points and authorities for use in memoranda relating to post trial motions for judgment notwithstanding the verdict (JNOV) (*§ 155.10* et seq.), motions for new trial (*§ 155.50* et seq.), and motions to set aside and vacate a judgment and enter another and different judgment (*§ 155.320* et seq.).

This chapter does not contain include points and authorities supporting or opposing a motion for new trial on the ground of excessive or inadequate damages [*see Code Civ. Proc. § 657(5)*]. For these, see Ch. 64, *Damages: Tort* , and Ch. 65, *Damages: Contract* .

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15-155 California Points & Authorities § 155.02

§ 155.02 Governing Law

[1] Motions for Judgment Notwithstanding the Verdict (JNOV)

Motions for judgment notwithstanding the verdict, also known as motion JNOV, are governed by *Code Civ. Proc. § 629*. Time for serving and filing the motion is governed by *Code Civ. Proc. § 659*. *Code Civ. Proc. § 664* governs the entry of judgment when a motion for judgment notwithstanding the verdict is pending.

Code Civ. Proc. §§ 904.1(a)(4) and *904.2(e)* govern appeals from orders denying the motion. When the parties consent, *Gov. Code § 69741.1* allows the motion to be heard anywhere in the state by the judge who presided at trial.

Cal. Rules of Ct., Rules 8.108(d) and *8.752* govern the filing of an appeal after an order denying the motion.

[2] Motions for New Trial

Motions for new trial are governed by *Code Civ. Proc. §§ 655-663.2* and *914*. A new trial is defined in *Code Civ. Proc. § 656*. Grounds on which the motion may be granted are set forth in *Code Civ. Proc. § 657*.

The time limits for serving and filing the notice of intention to move for a new trial are set out in *Code Civ. Proc. § 659*. *Code Civ. Proc. §§ 660-662* govern the hearing and disposition of the motion, and *Code Civ. Proc. §§ 904.1(a)(4)* and *904.2(e)* cover appeals from orders granting the motion.

Cal. Rules of Ct., Rule 3.1600, governs the notice of intention to move for a new trial. *Cal. Rules of Ct., Rules 8.108(b)* and *8.752(a)*, cover extension of time to appeal when notice of intention to move for new trial is filed. A new motion for trial following a bifurcated trial is governed by *Cal. Rules of Ct., Rule 3.1591*.

[3] Motions to Vacate Judgment and Enter Another Judgment

Motions to set aside and vacate a judgment and to enter another and different judgment are governed by *Code Civ. Proc. §§ 663* and *663a*. The grounds on which the motion may be made are contained in *Code Civ. Proc. § 663(1), (2)*. The contents of the motion and the time within which the motion must be filed are governed by *Code Civ. Proc. § 663a*.

The hearing of a motion to set aside and vacate a judgment and to enter another and different judgment is governed by *Cal. Rules of Ct., Rule 3.1602*.

Extensions of time to appeal from a judgment when notice of intention to move to vacate a judgment and enter another and different judgment are governed by *Cal. Rules of Ct., Rules 8.104(b)* and *8.752(b)*.

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15-155 California Points & Authorities § 155.03

§ 155.03 How to Use the Forms in This Chapter

[1] Page Limits on Points and Authorities

One of the more significant drafting requirements to keep in mind are page limits: supporting and opposing memoranda of points and authorities must not exceed 15 pages, or 20 pages in summary judgment or summary adjudication proceeding. A reply or closing memorandum may not exceed 10 pages. Exhibits, declarations, attachments, a table of contents, a table of authorities, and the proof of service are excluded from these page limits [*Cal. Rules of Ct., Rule 3.1113(d)*]. Any party must obtain leave of court to file a longer memorandum [*see Cal. Rules of Ct., Rule 3.1113(e)*]. These and other drafting requirements are discussed in further detail in Ch. 1, *Writing Legal Memoranda and Briefs* .

[2] Using the Forms to Build a Draft Memorandum

Most of the forms included in this chapter are designed to be combined with other points and authorities to form a complete memorandum. For example, in Part II, Subpart B, the forms relating to motions for a new trial include "general" forms supporting or opposing a motion for new trial based on one of the statutory grounds. More specific points and authorities relate to individual issues or factual variations within one of these statutory grounds, and are designed to be combined, when appropriate, with the relevant general form. Thus, one of the general forms may be used alone, in the absence of either more specific issues or fact variations or another general ground. The more specific forms, however, are not intended for use alone, but must be combined with the relevant general form to create a more complete memorandum.

For discussion on how to select and use the forms in the publication generally, in order to build a draft memorandum and complete the draft, with detailed discussion of all drafting requirements and strategic or stylistic considerations, see Ch. 1, *Writing Legal Memoranda and Briefs* . For a skeletal form for memorandumfor use in creating a properly formatted outline in which to compile relevant forms from this publication, see also Ch. 1, *Writing Legal Memoranda and Briefs* .

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15-155 California Points & Authorities § 155.04

§ 155.04 Memoranda Supporting or Opposing Post Trial Motions

With respect to motions for new trial, the moving party must serve and file a memorandum in support of the motion within 10 days after filing the notice of intention to move for a new trial. Within 10 days thereafter, the opposing party may serve and file a corresponding memorandum in reply [*Cal. Rules of Ct., Rule 3.1600(a)*]. If the moving party does not serve and file the prescribed memorandum, the court may deny the motion without a hearing on the merits [*Cal. Rules of Ct., Rule 3.1600(b)*]. The trial court has discretion to deny the motion without considering it based on the moving party's failure to timely file the memorandum [*see In re Marriage of Steiner (2004) 117 Cal. App. 4th 519, 529, 11 Cal. Rptr. 3d 671* (in marital dissolution action, trial court did not abuse its discretion by denying wife's motion for new trial as untimely, where wife failed to comply with 10-day requirement under former Cal. Rules of Ct., Rule 236.5) (*now see Cal. Rules of Ct., Rule 3.1600*)].

When a motion for judgment notwithstanding the verdict is combined with a motion for new trial, the points and authorities for each should be filed separately. If combined, the memorandum should clearly indicate in the caption that it supports both motions. If this is not done, the court may strike the motion for new trial on the ground that there is no memorandum of points and authorities filed supporting it [*Clay v. Lagiss (1956) 143 Cal. App. 2d 441, 450, 299 P.2d 1025]* .

California Points & Authorities

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
CHAPTER 155 MOTIONS AFTER TRIAL
PART I. INTRODUCTION

15-155 California Points & Authorities § 155.05

§ 155.05 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

For discussion, procedural checklists, and forms for use involving these post trial motions, see Ch. 371, *Motions After Trial* in California Forms of Pleading and Practice (Matthew Bender). For a discussion of noticed motions generally, see California Forms of Pleading and Practice, Ch. 372, *Motions and Orders* .

[2] Related Points And Authorities Chapters

For memoranda of points and authorities relating to a motion for new trial on the ground of excessive or inadequate damages, see Ch. 64, *Damages: Tort* , and Ch. 65, *Damages: Contract* . For memoranda relating to motions for new trial in contract actions, see Ch. 50, *Contracts* .

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
CHAPTER 155 MOTIONS AFTER TRIAL
PART I. INTRODUCTION

15-155 California Points & Authorities §§ 155.06-155.09

[Reserved]

§§ 155.06[Reserved]

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
CHAPTER 155 MOTIONS AFTER TRIAL
PART II. FORMS
A. Motions for Judgment Notwithstanding the Verdict

15-155 California Points & Authorities § 155.10

§ 155.10 Supporting Motion for Judgment Notwithstanding the Verdict [Code Civ. Proc. § 629]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF MOTION FOR
Plaintiff,	)	JUDGMENT NOTWITHSTANDING THE VER-
vs.	)	DICT
_____ [*name*],	)	[Telephone Appearance]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

THE MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT SHOULD BE GRANTED BECAUSE A MOTION FOR DIRECTED VERDICT SHOULD HAVE BEEN GRANTED HAD A PREVIOUS MOTION BEEN MADE AND BECAUSE THERE IS NO SUBSTANTIAL EVIDENCE OR REASONABLE INFERENCES DRAWN THEREFROM TO SUPPORT A VERDICT IN THE PREVAILING PARTY'S FAVOR.

A. Judgment Notwithstanding the Verdict. Before the expiration of its power to rule on a motion for new trial, the court, on motion of a party against whom a verdict has been rendered, must render judgment in favor of an aggrieved party notwithstanding the verdict whenever a motion for directed verdict for the aggrieved party should have been

granted had a previous motion been made (*Code Civ. Proc. § 629*).

B. Grounds Same as for Directed Verdict. The grounds for granting a judgment notwithstanding the verdict are the same as for granting a motion for directed verdict (*see Trammell v. Western Union Tel. Co. (1976) 57 Cal. App. 3d 538, 556, 129 Cal. Rptr. 361*).

C. Lack of Substantial Conflict in Evidence. The primary requirement for the granting of the motion is that there is no substantial conflict in the evidence (*Robinson v. North American Life & Cas. Co. (1963) 215 Cal. App. 2d 111, 118, 30 Cal. Rptr. 57*).

D. Lack of Substantial Evidence to Support Verdict. The court will grant a motion for judgment notwithstanding the verdict only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence or reasonable inference drawn therefrom to support the verdict (*Hauter v. Zogarts (1975) 14 Cal. 3d 104, 110, 120 Cal. Rptr. 681, 534 P.2d 377*).

[*EITHER, if motion by defendant when no evidence of sufficient substantiality to support plaintiff's verdict*]

E. No Evidence of Sufficient Substantiality to Support Verdict in Plaintiff's Favor. Defendant's motion for judgment notwithstanding the verdict is granted when and only when, disregarding conflicting evidence on behalf of defendants and giving plaintiff's evidence all the value to which it is legally entitled, and indulging in every legitimate inference which may be drawn from that evidence, no evidence of sufficient substantiality supports a verdict in plaintiff's favor (*Reynolds v. Willson (1958) 51 Cal. 2d 94, 99, 331 P.2d 48* ; *Hamakawa v. Crescent Wharf etc. Co. (1935) 4 Cal. 2d 499, 501, 50 P.2d 803*).

[*OR, if motion by defendant when plaintiff failed to prove essential element of his or her cause of action*]

E. Plaintiff's Failure to Prove Essential Element of Cause of Action. A motion by defendant for judgment notwithstanding the verdict for plaintiff will be granted when plaintiff has failed to prove an element essential to his or her cause of action (*Kerby v. Elk Grove Union H.S. Dist. (1934) 1 Cal. App. 2d 246, 36 P.2d 431*).

[*OR, if motion by plaintiff when evidence dictates determination in plaintiff's favor*]

E. Evidence Dictates Determination in Plaintiff's Favor. Plaintiff's motion for judgment notwithstanding the verdict will be granted if the evidence, as a matter of law, dictates a determination of all the issues in the case in his or her favor (*see Jach v. Edson (1967) 255 Cal. App. 2d 96, 99, 62 Cal. Rptr. 925*).

[*OR, if motion by plaintiff when no substantial support given to defense of defendant*]

E. No Substantial Support Given to Defense of Defendant. The court may grant plaintiff's motion for judgment notwithstanding the verdict, if, on the whole evidence, the cause of action alleged in the complaint is supported, and no substantial support is given to the defense alleged by defendant (*Gordon v. Strawther Enterprises, Inc. (1969) 273 Cal. App. 2d 504, 515, 78 Cal. Rptr. 417*).

[*CONTINUE*]

[*Optional*] **F. Inherently Incredible Evidence Ignored.** In ruling an a motion for judgment notwithstanding the verdict, the court may disregard evidence in support of the verdict if that evidence is inherently incredible (*Foggy v. Ralph F. Clark & Associates, Inc. (1987) 192 Cal. App. 3d 1204, 1215, 238 Cal. Rptr. 130*).

[*Add further points and authorities, as appropriate, setting out substantive law pertaining to cause of action or defense to show why motion should be granted.*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for judgment notwithstanding the verdict under *Code Civ. Proc. § 629*.

The filing of a notice of appeal from the judgment does not deprive the trial court of jurisdiction to grant a judgment notwithstanding the verdict [*Foggy v. Ralph F. Clark & Associates, Inc. (1987) 192 Cal. App. 3d 1204, 1210-1213, 238 Cal. Rptr. 130* (rejecting contrary holding in *Weisenburg v. Molina (1976) 58 Cal. App. 3d 478, 486, 129 Cal. Rptr. 813*)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. In particular, counsel should show the propriety of granting the judgment notwithstanding the verdict in light of the substantive issues involved in the particular cause of action or defense. For instance, in a negligence action, counsel might argue that the court should grant the motion because the record is devoid of any evidence from which the jury could reasonably find negligence on the part of the moving party [*see* *Scott v. Fuller Co. (1940) 41 Cal. App. 2d 501, 507, 107 P.2d 55]* . Similarly, in the contest of a will on the ground of undue influence, counsel might argue that the evidence for the contestant goes no further than perhaps to justify the suspicion of undue influence, but it has no substantial force as evidence that the suspicion is well-founded [*see* *Estate of Leahy (1936) 5 Cal. 2d 301, 306, 54 P.2d 704]* .

Counsel should cite case authority relevant to the particular cause of action or defense to support his or her contentions. Care should be taken to differentiate between cases that deal with defendant's motions and those that deal with plaintiff's motions, since the standards for granting the motions differ depending on whether plaintiff or defendant is the moving party.

[c] Related Pleading and Practice Forms

For a form of a notice of motion and order relating to a motion for judgment notwithstanding the verdict pursuant to Code Civ. Proc. § 629, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[d] Opposing Points and Authorities

The points and authorities set out in *§ 155.30* may be used in an appropriate case to oppose a motion for judgment notwithstanding the verdict supported by this memorandum.

[3] Discussion of Authorities

[a] Grounds Same as For Directed Verdict

Trammell v. Western Union Tel. Co. *(1976) 57 Cal. App. 3d 538, 129 Cal. Rptr. 361* , was an action in which an addressee of a telegram sued the telegraph company for negligence in the nondelivery of a telegram intended to inform the addressee to return to work. The telegram had allegedly been delivered to the wrong person, causing plaintiff to be terminated by his employer. Plaintiff further alleged that defendant was motivated by malice and oppression in misrepresenting to plaintiff's former employer that the telegram had been properly delivered. The jury found for plaintiff, awarding him compensatory damages of $13,500 and punitive damages of $50,000. The court then granted defendant's motion for judgment notwithstanding the verdict on the issue of punitive damages with an alternative order granting a new trial on the ground of insufficiency of the evidence to support the verdict. The court denied defendant's motion for judgment notwithstanding the verdict on the issue of compensatory damages. Plaintiff appealed the judgment notwithstanding the verdict and the alternative order granting a new trial. Defendant appealed from the judgment as originally entered relating to punitive damages and from the portion of the judgment awarding compensatory damages in excess of $500.

The court of appeal affirmed the judgment notwithstanding the verdict on the issue of punitive damages, but reversed the judgment for compensatory damages to the extent of recovery above $500 (*57 Cal. App. 3d 538, 558)* . Noting that a judgment notwithstanding the verdict should be granted only if a motion for directed verdict should have been granted, the court stated that the record failed to show substantial evidence that Western Union's employees acted with either malice or oppression in not providing information to correct or show the mistake at an earlier date (*57 Cal. App. 3d 538, 556-558)* . The court explained that a directed verdict or judgment notwithstanding the verdict may be sustained on appeal only when it can be said as a matter of law that no other reasonable conclusion is legally deducible from the evidence and that any other holding would be so lacking in evidentiary support that the reviewing court would be compelled to reverse it or the trial court would be required to set it aside as a matter of law (*57 Cal. App. 3d 538, 556-557)* .

[b] Lack of Substantial Conflict in Evidence

Robinson v. North American Life & Cas. Co. *(1963) 215 Cal. App. 2d 111, 30 Cal. Rptr. 57* , was an action brought by decedent's widow to determine whether or not the decedent had coverage under a group life insurance policy issued by defendant. The policy only covered those who were actively at work on the effective date of the policy. For those who were not actively at work on that date, coverage became effective on the date of return to active work. After trial by jury, plaintiff was denied recovery. The court also denied her motion for judgment notwithstanding the verdict and in the alternative for a new trial. She appealed from the denial of the motion.

The court of appeal stated that the cardinal requirement for the granting of a motion for judgment notwithstanding the verdict is that there is no substantial conflict in the evidence. However, in this case, a substantial conflict in the evidence existed as to whether or not the decedent had returned to active work after the effective date of the policy. Therefore, the court held that the trial court's denial of the motion was proper (*215 Cal. App. 2d 111, 118)* .

[c] Lack of Substantial Evidence to Support Verdict

Hauter v. Zogarts *(1975) 14 Cal. 3d 104, 120 Cal. Rptr. 681, 534 P.2d 377* , concerned a products liability action on three theories of liability: misrepresentation, breach of express and implied warranty, and strict liability in tort based on

defective design of defendant's product, a golf ball driving device. While using the device, plaintiff was seriously injured when a golf ball struck him in the left temple. After the jury found for defendant, the trial court granted plaintiff's motion for judgment notwithstanding the verdict. Defendant appealed, claiming that substantial evidence supported the jury's verdict.

The Supreme Court affirmed the judgment notwithstanding the verdict. It held that the motion for judgment notwithstanding the verdict may properly be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence to support the verdict (*14 Cal. 3d 104, 110)* . The Court noted, however, that even though it was bound to view the evidence in the light most favorable to the party securing the verdict, its review of the record disclosed no evidence nor any reasonable inference therefrom that supported the jury's verdict (*14 Cal. 3d 104, 111)* . The evidence led the Court to a contrary conclusion--that the plaintiff should recover as a matter of law under each cause of action (*14 Cal. 3d 104, 111)* . The Court then remanded the case for an ascertainment of damages (*14 Cal. 3d 104, 121)* .

[d] No Evidence of Sufficient Substantiality to Support Verdict in Plaintiff's Favor

Reynolds v. Willson *(1958) 51 Cal. 2d 94, 331 P.2d 48* , involved an action for personal injuries to a child who, while trespassing on defendant's land, fell into defendant's partially filled swimming pool. Plaintiff suffered considerable brain damage. Through his father as guardian ad litem, plaintiff sued defendant for damages and obtained a jury verdict in the sum of $50,000. Defendant's motion for judgment notwithstanding the verdict was denied.

The Supreme Court affirmed the order denying the motion for judgment notwithstanding the verdict, noting that defendant's motion can be granted only when, disregarding conflicting evidence on behalf of the defendants and giving to plaintiff's evidence all the value to which it is legally entitled, and indulging in every legitimate inference which may be drawn from that evidence, no evidence of sufficient substantiality supports a verdict in plaintiff's favor (*51 Cal. 2d 94, 99)* . After reviewing the record, the Court concluded that there was sufficiently substantial evidence to support the verdict on the theories of liability raised by plaintiff (*51 Cal. 2d 94, 106)* . The elements of the attractive nuisance doctrine and the trap theory had been present (*51 Cal. 2d 94, 100-101)* . The Court then affirmed the order denying the motion (*51 Cal. 2d 94, 106)* .

Hamakawa v. Crescent Wharf etc. Co. *(1935) 4 Cal. 2d 499, 50 P.2d 803* , was an action for personal injuries sustained by plaintiff while he was about to board a freighter docked at a municipal pier. Defendant, a stevedoring company, was loading cargo when an empty loading sling caused a bale of paper to fall onto plaintiff. The jury awarded damages to plaintiff. Defendant's motion for judgment notwithstanding the verdict was denied, and it appealed.

The Supreme Court held that a judgment notwithstanding the verdict was proper and reversed the lower court's order. The Court stated that if the court had granted the motion for a directed verdict, defendant is entitled to a judgment notwithstanding the verdict. The Court said that the trial court should have granted a directed verdict for the defendant if, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in plaintiff's favor. The Court concluded that defendant owed plaintiff no legal duty except to refrain from inflicting any willful or wanton injury and to conduct its activities with reasonable care for his safety after it knew or should have known of plaintiff's presence (*4 Cal. 2d 499, 501)* . Since plaintiff was a trespasser and defendant had no reason to expect plaintiff to be on the premises, the Court held that plaintiff was not entitled to recover as a matter of law (*4 Cal. 2d 499, 503)* . It then reversed the lower court's order denying defendant's motion for judgment notwithstanding the verdict for plaintiff (*4 Cal. 2d 499, 504)* .

[e] Plaintiff's Failure to Prove Essential Element of Cause of Action

Kerby v. Elk Grove Union H.S. Dist. *(1934) 1 Cal. App. 2d 246, 36 P.2d 431* , was an action for damages for death of

a high school student hit by a basketball during physical education class. The suit was based on the alleged negligence of the instructor in failing to adequately supervise the game. After a verdict was rendered for plaintiff, the trial court granted judgment for defendant, notwithstanding the verdict.

The court of appeal affirmed the judgment notwithstanding the verdict, stating that the rule regarding the consideration of the evidence authorizing the rendering of a judgment notwithstanding the verdict is exactly the same as that which applies to a motion for nonsuit (*1 Cal. App. 2d 246, 250)* . A nonsuit may be granted for failure of the defendant to prove a sufficient cause only when there is no substantial evidence to support some essential issue on which plaintiff's right to recover judgment depends (*1 Cal. App. 2d 246, 250)* . Since the student had a chronic aneurism that the instructor did not know he possessed, the court held that the instructor was not negligent in allowing the student to participate in the game (*1 Cal. App. 2d 246, 252)* . There was no evidence that the instructor omitted to perform any duty at the time of the accident. Therefore, the judgment notwithstanding the verdict was proper (*1 Cal. App. 2d 246, 253)* .

[f] Evidence Dictates Determination in Plaintiff's Favor

Jach v. Edson *(1967) 255 Cal. App. 2d 96, 62 Cal. Rptr. 925* , was an action in which plaintiff was injured in a scuffle with defendant that occurred in a high school gymnasium. The action was based on negligence and assault and battery. A jury trial resulted in a verdict for defendant. The court granted plaintiff's motion for judgment notwithstanding the verdict on the issue of liability and granted plaintiff's motion for a new trial on the issue of damages. Defendant appealed.

The court of appeal dismissed the appeal from the judgment notwithstanding the verdict since the order granting the motion was not a judgment, and therefore, was not appealable (*255 Cal. App. 2d 96, 98)* . However, since a court can consider the propriety of an order for judgment notwithstanding the verdict prior to the entry of judgment, the court considered the validity of the order. The court noted that the trial court may enter judgment notwithstanding the verdict in favor of the plaintiff if the evidence, as a matter of law, dictates a determination of all the issues in the case in his or her favor. However, a trial court has no authority to enter multiple final judgments determining multiple issues between the same parties to an action (*255 Cal. App. 2d 96, 99)* . Therefore, it was error for the trial court to enter a judgment notwithstanding the verdict on the issue of liability and a new trial on the issues of damages (*255 Cal. App. 2d 96, 100)* .

It should be noted however, that the court of appeal in *Gordon v. Strawther Enterprises, Inc. (1969) 273 Cal. App. 2d 504, 78 Cal. Rptr. 417* (discussed in [g], *below*), held that the trial court properly granted a motion for judgment notwithstanding the verdict on the issue of liability and a motion for new trial on the issue of damages (*273 Cal. App. 2d 504, 517-518)* .

[g] No Substantial Support Given to Defense of Defendant

Gordon v. Strawther Enterprises, Inc. *(1969) 273 Cal. App. 2d 504, 78 Cal. Rptr. 417* , involved an action for injuries resulting to a child who fell into the swimming pool of an apartment complex. Plaintiff sued the corporation, Strawther Enterprises, Inc., the legal owner of the apartment complex, and Big North Enterprises, Inc., which had entered into an agreement to purchase the complex at the time of the accident and was the equitable owner in possession and control of the complex. The jury rendered a verdict for $500,000 in favor of plaintiff against Strawther, but rendered a verdict that plaintiff take nothing as against defendant Big North. The trial court granted a new trial to plaintiff as against Big North on both the issues of liability and damages and granted a new trial to Strawther on the question of damages. The court denied plaintiff's motion for judgment notwithstanding the verdict as against Big North. All parties appealed.

The court of appeal reversed the denial of the judgment notwithstanding the verdict in favor of Big North and remanded

the case with instructions to the trial court to render judgment in favor of plaintiff, leaving the issue of damages to be determined on retrial (*273 Cal. App. 2d 504, 519)* . In reversing the denial of judgment notwithstanding the verdict, the court stated that plaintiff's motion may be granted if, on the whole evidence, the cause of action alleged in the complaint is supported, and no substantial support is given to the defense alleged by the defendant. The court noted that it was clear from all the evidence in the case that Big North's act or omission was a proximate cause of plaintiff's injuries since Big North was in possession and control of the premises and failed to secure the gate to the pool, thus violating a city ordinance (*273 Cal. App. 2d 504, 515)* . The court also held that the granting of the motion for judgment notwithstanding the verdict on the issue of liability and the granting of a new trial on the issue of damages was within the discretion of the trial court (*273 Cal. App. 2d 504, 517-518)* .

It should be noted however, that the court of appeal in *Jach v. Edson (1967) 255 Cal. App. 2d 96, 62 Cal. Rptr. 925* (discussed in [f], *above*), held that it was error for the trial court to enter a judgment notwithstanding the verdict on the issue of liability and an order granting a new trial on the issue of damages (*255 Cal. App. 2d 96, 99)* .

[h] Inherently Incredible Evidence Ignored

Foggy v. Ralph F. Clark & Associates, Inc. *(1987) 192 Cal. App. 3d 1204, 238 Cal. Rptr. 130* , was an action by a husband and wife against a real estate corporation engaged in the business of real estate appraisal and two of its employees for damages for negligence and fraud in appraising real property to be used as security for the repayment of a loan to be made by plaintiffs to the property owner, and which was made on the basis of the appraisal. The jury returned a verdict for plaintiffs against the corporation only. The trial court, having determined that the testimony of a particular witness in support of the verdict on the issue of damages did not constitute substantial evidence and was inherently incredible, granted defendant's motion for judgment notwithstanding the verdict on the ground there was no substantial evidence that plaintiffs had suffered any damage. The court also granted in part and denied in part a motion for new trial. Judgment was entered for defendant corporation notwithstanding the verdict for plaintiffs, and plaintiffs appealed.

Although the court of appeal reversed the judgment notwithstanding the verdict and affirmed the order granting a new trial, it upheld the propriety of the trial court's determination that the testimony of the witness on the issue of damages was inherently incredible. The court said: (1) to be substantial the evidence supporting the verdict must be of ponderable legal significance; (2) the term "substantial" evidence is not synonymous with "any" evidence; (3) the evidence must be reasonable in nature, credible, and of solid value; and (4) in ruling on a motion for judgment notwithstanding the verdict, the trial court may disregard evidence in support of the verdict if that evidence is "inherently incredible" (*192 Cal. App. 3d 1204, 1214-1215)* .

[4] Additional Authorities

[a] Lack of Substantial Evidence to Support Verdict

In *Viner v. Sweet (2004) 117 Cal. App. 4th 1218, 12 Cal. Rptr. 3d 533* , a legal malpractice action based on attorneys' negligently negotiating and drafting agreements for the sale of plaintiffs' ownership interest in a company they had founded and termination of their employment with the company, the trial court erred in denying the attorneys' motion for judgment notwithstanding verdict. As to the attorney's malpractice regarding the scope of the nonsolicitation, noncompetition and indemnity clauses and the absence of provisions for attorney's fees and for retention of their rights to stock dividends, plaintiffs presented no evidence at all, substantial or otherwise, indicating that but for attorney's negligence, it was more likely than not they would have obtained more favorable result in their negotiations (*117 Cal. App. 4th 1218, 1226-1233)* .

Clark v. Bellefonte Insurance Co. (1980) 113 Cal. App. 3d 326, 169 Cal. Rptr. 832 , involved an action by the owner of an automobile polishing company against his insurer involving claims connected with the theft of two automobiles.

The court of appeal reversed the trial court's denial of the defendant's motion for judgment notwithstanding the verdict for the insured since there was no substantial evidence that the failure to reimburse the plaintiff was a breach of contract (*113 Cal. App. 3d 326, 335)* .

Van Den Eikhof v. Hocker (1978) 87 Cal. App. 3d 900, 151 Cal. Rptr. 456 , was a personal injury action against a father whose daughter negligently drove his business car while on a personal trip. The court of appeal reversed the order denying defendants' motion for judgment notwithstanding the verdict insofar as the order applied to the father (*87 Cal. App. 3d 900, 906)* . It stated that no substantial evidence existed to support the special finding of the jury that, at the time of the accident, the daughter was the agent of her father and acting within the scope of her authority (*87 Cal. App. 3d 900, 902)* .

In *Washer v. Bank of America (1948) 87 Cal. App. 2d 501, 197 P.2d 202* , plaintiff, a former bank employee, sued Bank of America for libel and slander allegedly resulting from a press release issued by the bank's personnel director and vice-president. The release charged that plaintiff had falsified an expense account and was guilty of flagrant insubordination. The court affirmed judgment for defendants notwithstanding the verdict, stating that it was proper to grant the motion reasonable minds could draw but one inference and that inference pointed inevitably to the falsification of the expense account and the truth of the charge of insubordination (*87 Cal. App. 2d 501, 507)* .

Estate of Smethurst (1936) 15 Cal. App. 2d 322, 59 P.2d 830 , involved the contest of a will on the grounds that the testator was incapable of making a will due to intoxication. The court of appeal affirmed judgment for the proponents of the will notwithstanding the verdict, stating that the fact that the testator may have been under the influence of alcohol at the time he made his will did not invalidate the instrument unless he had no independent comprehension of what he was doing at the time (*15 Cal. App. 2d 322, 331)* . Since contestants failed to submit evidence on that issue, judgment for the proponents notwithstanding the verdict was proper (*15 Cal. App. 2d 322, 336)* .

[b] Plaintiff's Failure to Prove Essential Element of Cause of Action

Estate of Leahy (1936) 5 Cal. 2d 301, 54 P.2d 704 , was a contest of a will on the ground of undue influence. Judgment for the proponents of the will notwithstanding the verdict was affirmed. The court of appeal stated that the evidence for the contestant went no further than perhaps to justify the suspicion of undue influence and had no substantial force as evidence that the suspicion was well-founded (*5 Cal. 2d 301, 306)* . The court concluded that the trial court did not err in granting the motion for judgment notwithstanding the verdict (*5 Cal. 2d 301, 306)* .

In *Sukoff v. Lemkin (1988) 202 Cal. App. 3d 740, 249 Cal. Rptr. 42* , the court of appeal held that a trial court improperly denied a defendant's motion for judgment notwithstanding the verdict in a legal malpractice action. The action arose out of legal representation during marital dissolution proceedings. The court found that the evidence was insufficient, as a matter of law, to support the verdict, which awarded $90,000 in compensatory damages to the plaintiff. The plaintiff failed to establish that the defendant was negligent, that his conduct was the proximate cause of the alleged damages, or that the plaintiff actually suffered damages. The court stated that the purpose of a motion for judgment notwithstanding the verdict is not to afford a review of the jury's deliberation but to prevent a miscarriage of justice in those cases in which the verdict rendered is without foundation. The scope of appellate review is to determine whether there is any substantial evidence, contradicted or not, supporting the jury's conclusions. While the denial of such a motion largely rests within the trial judge's discretion, the denial in this case was in error because the plaintiff failed to establish the necessary elements of her cause of action (*202 Cal. App. 3d 740, 743-744)* .

In *Institute of Veterinary Pathology, Inc. v. California Health Laboratories, Inc. (1981) 116 Cal. App. 3d 111, 172 Cal. Rptr. 74* , plaintiff brought an action for damages based on intentional interference with prospective business advantage against a parent corporation and two subsidiaries. The trial court directed a verdict for the parent on the issue of punitive damages and later granted its motion for judgment notwithstanding the verdict on the issue of compensatory damages. The court of appeal affirmed, stating that there was insufficient evidence to support a verdict in plaintiff's

favor for compensatory damages, since plaintiff failed under both the alter ego and agency principles to establish the parent's responsibility for the conduct of its subsidiaries (*116 Cal. App. 3d 111, 121)* .

In *Rollenhagen v. City of Orange (1981) 116 Cal. App. 3d 414, 172 Cal. Rptr. 49* , plaintiff, a self-employed auto mechanic, brought a defamation action against a broadcasting company and a former customer who gave a television interview in which she stated that she had been victimized by plaintiff. The court of appeal affirmed judgment for defendants notwithstanding the verdict, stating that absent evidence of malice, the privilege of fair comment governed, and defendants were entitled to judgment as a matter of law (*116 Cal. App. 3d 414, 428-429)* .

In *Borba v. Thomas (1977) 70 Cal. App. 3d 144, 138 Cal. Rptr. 565* , the purchaser of excess lands in a water district brought an action for fraud against the seller who stated that Bureau of Reclamation approval of the purchase price would be no problem. The court of appeal affirmed judgment for defendant notwithstanding the verdict, noting that, as a matter of law, defendant had made no misrepresentation of fact, but had made a nonactionable expression of opinion, and if a misrepresentation had been made, plaintiff was not justified in relying on it (*70 Cal. App. 3d 144, 155)* .

Brock v. Southern Pacific Co. (1948) 86 Cal. App. 2d 182, 195 P.2d 66 , was an action for malicious prosecution of civil proceedings brought by defendants to establish plaintiff's insanity. The court of appeal affirmed the granting of the motion for judgment notwithstanding the verdict as to defendants Southern Pacific Company and the Board of Trustees of Stanford University (*86 Cal. App. 2d 182, 190)* . Plaintiff's evidence failed to prove that the Southern Pacific Company doctors had instigated the institution of commitment proceedings or that the Stanford Hospital doctor, in recommending plaintiff's commitment, had acted without probable cause to believe plaintiff was mentally ill (*86 Cal. App. 2d 182, 190-199)* .

In *McKellar v. Pendergast (1945) 68 Cal. App. 2d 485, 156 P.2d 950* , plaintiff sought to recover damages from the manager of her apartment building for personal injuries received when she slipped on an oily substance on the lobby floor. She maintained that defendant's agent, a janitor, was negligent in disposing garbage from individual apartments. The court of appeal affirmed judgment for defendants, notwithstanding the verdict for plaintiff, stating that plaintiff failed to prove the existence of every essential fact on which she relied, in that she failed to prove the causal connection between the alleged negligence and the resulting injury (*68 Cal. App. 2d 485, 489)* .

Scott v. Fuller Co. (1940) 41 Cal. App. 2d 501, 107 P.2d 55 , was an action by a subcontractor's employee for personal injuries sustained when he fell from a joist set up by the general contractor as part of a form for pouring concrete and not as a scaffold. The court of appeal affirmed judgment for defendants notwithstanding the verdict for plaintiff, stating that the record was devoid of any evidence from which the jury could reasonably find negligence on the part of respondents (*41 Cal. App. 2d 501, 507)* . If there was any breach of duty toward the appellant, the court stated that it was on the part of appellant's employer, the subcontractor, in failing to furnish appellant with equipment essential to safe working conditions (*41 Cal. App. 2d 501, 507)* .

[c] Evidence Dictates Determination in Plaintiff's Favor

Doyle v. McPherson (1939) 36 Cal. App. 2d 81, 97 P.2d 249 , involved an action to recover the balance due on a stock brokerage account. The court of appeal affirmed judgment for plaintiffs, notwithstanding the verdict, finding that plaintiffs had proved by substantial evidence the allegations of their complaint and that defendant had failed to offer evidence to prove his special defenses of the statute of limitations and damages by way of counterclaim (*36 Cal. App. 2d 81, 84-85)* .

California Points & Authorities

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
CHAPTER 155 MOTIONS AFTER TRIAL
PART II. FORMS
A. Motions for Judgment Notwithstanding the Verdict

15-155 California Points & Authorities §§ 155.11-155.29

[Reserved]

§§ 155.11[Reserved]

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
CHAPTER 155 MOTIONS AFTER TRIAL
PART II. FORMS
A. Motions for Judgment Notwithstanding the Verdict

15-155 California Points & Authorities § 155.30

§ 155.30 Opposing Motion for Judgment Notwithstanding the Verdict [Code Civ. Proc. § 629]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*], Plaintiff,	)	IES IN OPPOSITION TO MOTION FOR JUDG-
vs.	)	MENT NOTWITHSTANDING THE VERDICT
_____ [*name*], Defendant.	)	[Telephone Appearance]
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT SHOULD BE DENIED BECAUSE SUBSTANTIAL EVIDENCE, VIEWED IN THE LIGHT MOST FAVORABLE TO THE PREVAILING PARTY, SUPPORTS THE VERDICT.

A. Substantial Evidence Supports Verdict. A motion for judgment notwithstanding the verdict of a jury should be denied if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is substantial evidence to support the verdict (*Sweatman v. Department of Veterans Affairs (2001) 25 Cal. 4th 62, 68, 104 Cal. Rptr. 2d 602, 18 P.3d 29* ; *Clemmer v. Hartford Insurance Co. (1978) 22 Cal. 3d 865, 878, 151 Cal. Rptr.*

285, 587 P.2d 1098 ; *Brandenburg v. Pac. Gas & Elec. Co. (1946) 28 Cal. 2d 282, 284, 169 P.2d 909*).

B. Power of Trial Court. In ruling on a motion for judgment notwithstanding the verdict, the court cannot weigh the evidence or judge the credibility of witnesses, but must accept the evidence tending to support the verdict as true, unless such evidence is inherently incredible on its face (*Begnal v. Canfield & Associates, Inc. (2000) 78 Cal. App. 4th 66, 72, 92 Cal. Rptr. 2d 611* ; *Hale v. Farmers Ins. Exch. (1974) 42 Cal. App. 3d 681, 690, 117 Cal. Rptr. 146* ; *see also Sprigg v. Garcin (1980) 105 Cal. App. 3d 869, 873, 164 Cal. Rptr. 677*).

[*EITHER*]

C. Reasonable Inference Supports Verdict. The motion for judgment notwithstanding the verdict will be denied if any reasonable inferences drawn from the evidence support the verdict (*McFarland v. Voorheis-Trindle Co. (1959) 52 Cal. 2d 698, 706, 343 P.2d 923* ; *Gray v. Southern Pacific Co. (1944) 23 Cal. 2d 632, 645-646, 145 P.2d 561*).

[*AND/OR*]

D. Substantial Conflict in Evidence. A motion for judgment notwithstanding the verdict will denied if there is a substantial conflict on a material issue in the evidence (*Robinson v. North American Life & Cas. Co. (1963) 215 Cal. App. 2d 111, 118, 30 Cal. Rptr. 57*).

[*AND/OR*]

E. Evidence Presents Question for Jury's Determination. A judgment notwithstanding the verdict should be denied where the evidence presents a question for the jury's determination (*Meyser v. American Bldg. Maintenance, Inc. (1978) 85 Cal. App. 3d 933, 939-940, 149 Cal. Rptr. 808*).

[*Add further points and authorities setting out substantive law pertaining to cause of action or defense to show why motion should be denied.*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for judgment notwithstanding the verdict under *Code Civ. Proc. § 629*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. In particular, counsel should add further points and authorities showing the propriety of denying the motion in light of the substantive issues raised at trial. For instance, in a personal injury action based on negligence in which plaintiff has recovered damages and defendants have moved for judgment notwithstanding the verdict, plaintiff's counsel should demonstrate that there was a sufficient showing from which the jury could have reasonably concluded that defendants' actions constituted negligence. In preparing these points and authorities, counsel may consult the substantive chapters contained in this publication and in California Forms of Pleading and Practice (Matthew Bender).

[c] Related Pleading and Practice Forms

For a form for an order denying a motion for judgment notwithstanding the verdict, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[d] Opposing Points and Authorities

The form may be used to oppose a motion for judgment notwithstanding the verdict supported by the points and authorities set out in *§ 155.10*.

[3] Discussion of Authorities

[a] Substantial Evidence Supports Verdict

In ***Sweatman v. Department of Veterans Affairs*** *(2001) 25 Cal. 4th 62, 68, 104 Cal. Rptr. 2d 602, 18 P.3d 29* , a veteran sued the Department of Veterans Affairs for breach of contract after the Department denied his claim for disability benefits for bipolar manic-depressive disorder because of misrepresentations in his application for coverage under the Cal-Vet home protection plan, including omission of his prior hospitalization for depression. At trial, the jury returned a special verdict finding that the Department did not breach its contract with the veteran. The trial court denied the veteran's motion for judgment notwithstanding the verdict, which contended that the home protection plan constituted insurance subject to the mandatory provisions of the Insurance Code, including the requirement that disability insurance include an incontestability clause, stating that the legal basis supporting the jury's verdict was the law governing contracts, rescission, and false representation, impliedly rejecting the claim that the plan constituted insurance (*25 Cal. 4th 62, 67)* .

The California Supreme Court affirmed. The Court held that a motion for judgment notwithstanding the verdict may be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence in support (*25 Cal. 4th 62, 68)* . The veteran did not dispute that there was substantial evidence that his application for coverage under the plan did not disclose his history of depression and that the master agreement excluded coverage for preexisting conditions and permitted rescission for misstatements in the application. Further, the jury was not asked to resolve factual questions bearing on the question whether the plan constituted insurance nor did the parties offer conflicting evidence on that point, so that the question before the Court was one of law, to be addressed under a de novo standard of review. The Court then found that disability coverage under the Cal-Vet home protection plan is not disability insurance subject to the provisions of the Insurance Code generally governing such policies (*25 Cal. 4th 62, 73)* .

Clemmer v. Hartford Insurance Co. *(1978) 22 Cal. 3d 865, 151 Cal. Rptr. 285, 587 P.2d 1098* , was an action brought by a widow and the minor son of the deceased to recover from the slayer's insurance company the amount of a wrongful death judgment obtained against the slayer. The slayer had previously been convicted of second-degree murder. The insurance company defended on the ground that the death arose from the slayer's willful act for which the insurer was not liable under a policy exclusion and *Ins. Code § 533*. Following a jury verdict, the trial court entered judgment against the defendant insurer, but it subsequently granted defendant insurer's motion for a new trial on the

issue of whether the death was caused by a willful act. Plaintiffs appealed from the order granting a limited new trial. Defendant appealed from that portion of the judgment that was not affected by the order granting a limited new trial and also from the orders of the court denying its motions for judgment notwithstanding the verdict, to set aside and vacate the judgment and enter a new and different judgment, and for a new trial. Defendant also filed a protective cross appeal from the whole of the judgment pursuant to former Cal. Rules of Ct., Rule 3(c) [*now see Cal. Rules of Ct., Rule 8.108(d)*].

Since the denial of a motion to set aside and vacate and the denial of a motion for new trial are nonappealable orders, the Supreme Court dismissed defendant's appeal insofar as it purported to be from these orders. The Court held that the denial of the motion for judgment notwithstanding the verdict was proper, stating that if the evidence is conflicting or if several reasonable inferences may be drawn, the motion for judgment notwithstanding the verdict should be denied (*22 Cal. 3d 865, 877-878)* . A motion for judgment notwithstanding the verdict of a jury may properly be granted only if it appears from the evidence viewed in the light most favorable to the party securing the verdict that there is no substantial evidence to support the verdict. If there is any substantial evidence, or reasonable inferences to be drawn therefrom, in support of the verdict, the motion should be denied.

Although defendant contended that there was no substantial evidence to support the verdict since the testimony of plaintiffs' expert witness was rendered absurd by certain internal inconsistencies, the Court held that these inconsistencies did not require that the testimony be disregarded in its entirety nor did they mean that the testimony was necessarily insufficient to support the verdict. The trier of fact must consider internal inconsistencies, resolve them if possible, and determine what weight to give the testimony (*22 Cal. 3d 865, 878)* . Since the trial court, in considering this testimony, decided that the evidence did not as a matter of law compel the conclusion that the slayer was in possession of his mental faculties at the time of the murder, the Court held that the trial court properly denied defendant's motion for judgment notwithstanding the verdict (*22 Cal. 3d 865, 877-878)* .

Brandenburg v. Pac. Gas & Elec. Co. *(1946) 28 Cal. 2d 282, 169 P.2d 909* , was an action for personal injuries sustained by plaintiff who was hit by a turning streetcarthat overlapped the safety zone. After judgment for plaintiff, the trial court granted defendant's motion for judgment notwithstanding the verdict.

The Supreme Court reversed the judgment notwithstanding the verdict, holding that a motion for judgment notwithstanding the verdict of a jury may properly be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence, or reasonable inferences to be drawn therefrom, in support of the verdict. If there is any substantial evidence, or reasonable inferences to be drawn therefrom, in support of the verdict, the motion should be denied (*28 Cal. 2d 282, 284)* . Since it was apparent to defendant that persons alighting in the safety zone would relax their vigilance, the motorman had a duty to give warning that the rear of the car would protrude into the safety zone even if the zone was maintained by the city and not the carrier. There was also a duty of the company to instruct the motorman to give this warning (*28 Cal. 2d 282, 286)* . The Court held thatplaintiff was also not contributorily negligent since he had no reason to believe that the safety zone would be within the area of overswing (*28 Cal. 2d 282, 287)* . Since there was ample evidence to support the verdict, the Court reversed the lower court's granting of judgment for defendant notwithstanding the verdict and directed the lower court to enter judgment in accordance with the jury's verdict (*28 Cal. 2d 282, 288)* .

[b] Power of Trial Court

In ***Begnal v. Canfield & Associates, Inc.*** *(2000) 78 Cal. App. 4th 66, 92 Cal. Rptr. 2d 611* , a former employee sued her former employer, alleging that her employment was terminated based on her age in violation of the Fair Employment and Housing Act (*Gov. Code § 12900 et seq.*). The former employer had taken over the functions of the department at the hospital at which the former employee worked and terminated her employment allegedly for "job abandonment," making discriminatory comments, and failure to perform newly imposed duties. The former employee testified that she did perform the duties. Further, her employment was terminated only 8 days after she had received a

performance rating of "good" or "very good" in all categories. Finally, another employee testified that she had made the racially discriminatory comment. The jury found that the former employer had terminated the former employee based on her age. The former employer moved for judgment notwithstanding the verdict on the ground that the former employee was replaced by a person older than her, and therefore as a matter of law could not have been terminated because of her age. The trial court granted the motion.

The court of appeal reversed and remanded with directions to enter a new judgment in the former employee's favor in accordance with the jury verdict, stating that the trial may grant judgment notwithstanding the verdict only if the verdict is not supported by substantial evidence, and that the court may not weigh evidence, draw inferences contrary to the verdict, or assess the credibility of witnesses. The appellate court may uphold an order granting judgment notwithstanding the verdict only if, reviewing all the evidence in the light most favorable to the party in whose favor the verdict was entered, resolving all conflicts, and drawing all inferences in that party's favor, and deferring to the implicit credibility determinations of the trier of fact, there is no substantial evidence to support the jury verdict. In this case, the court held that evidence that an employee is replaced by an older person who is also within the protected class does not preclude any inference that the employee was terminated based on age if the employee presents other evidence to support an inference of discrimination (*78 Cal. App. 4th 66, 73-76)* . The court found that evidence that the former employee was replaced by an older person weighed against the inference that she was terminated based on her age, but did not conclusively establish the absence of age discrimination so as to preclude the jury from drawing other inferences. Further, the former employee presented the jury with substantial evidence that the stated reasons for her termination were false or pretextual and that the decision was based on age. The court thus concluded that the jury verdict was supported by substantial evidence (*78 Cal. App. 4th 66, 76-78)* .

Hale v. Farmers Ins. Exch. *(1974) 42 Cal. App. 3d 681, 117 Cal. Rptr. 146* , involved an action against an insurance company and its employees in which plaintiff alleged bad-faith refusal to pay medical benefits under his automobile insurance policy. The jury awarded damages against the insurer for breach of contract, compensatory damages against all defendants for bad faith, and punitive damages against the insurance company and its employees. The trial court granted defendant insurance company's motion for judgment notwithstanding the verdict on the issue of punitive damages, but denied the motion of the individual defendants.

The court of appeal reversed the granting of the motion, stating that the trial court may not weigh the evidence or judge the credibility of witnesses, but must accept the evidence tending to support the verdict as true, unless it is inherently incredible on its face. The order may be granted only when, disregarding conflicting evidence and indulging in every legitimate inference which may be drawn from plaintiff's evidence, there is no evidence sufficiently substantial to support the verdict. The court stated that the denial of the individual employees' motion for judgment notwithstanding the verdict reflected the trial court's concurrence in the original verdict since it was clear that the trial court had found that the evidence established oppression or malice. The court of appeal held that since an employer is not responsible for punitive damages when he or she neither directed nor ratified the employee's action, the propriety of granting the insurance company's motion for judgment notwithstanding the verdict had to be resolved by a determination of whether or not there was any substantial evidence to sustain a finding of knowledge, authorization, or ratification on the part of the company for the acts of the individual employees (*42 Cal. App. 3d 681, 690)* . Since the court found evidence from which the jury could have inferred either authorization or ratification of the acts of the employees, it reversed the judgment notwithstanding the verdict (*42 Cal. App. 3d 681, 692)* .

Sprigg v. Garcin *(1980) 105 Cal. App. 3d 869, 164 Cal. Rptr. 677* , was an action for legal malpractice against a law firm that originally represented plaintiff in a lawsuit against the lessee of plaintiff's warehouse. After plaintiff substituted attorneys and later settled the action for $25,000, plaintiff filed the professional negligence action against his original attorneys. After trial, the jury returned a verdict for plaintiff in the amount of $34,640.31. The trial court granted defendants' motion for new trial, but denied their motion for judgment notwithstanding the verdict. From these orders, the parties appealed.

The court of appeal reversed and ordered that judgment notwithstanding the verdict be entered for the defendants. The court noted that the trial judge's power to grant a judgment notwithstanding the verdict is identical to his or her power to grant a directed verdict. The trial judge cannot weigh the evidence or judge the credibility of witnesses. The court stated that if the evidence is conflicting or several reasonable inferences may be drawn, the motion for judgment notwithstanding the verdict should be denied. It added that a motion for judgment notwithstanding the verdict may be properly granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence to support the verdict. If there is any substantial evidence or reasonable inferences to be drawn therefrom, in support of the verdict, the motion should be denied (*105 Cal. App. 3d 869, 873)* . However, the court's review of the record indicated that no evidence or reasonable inference therefrom was offered from which the jury could properly find that the defendants' activities proximately caused injury to the plaintiff even though there was evidence from which defendants' negligence could be inferred (*105 Cal. App. 3d 869, 874)* . Therefore, the court reversed the trial court's denial of defendants' motion for judgment notwithstanding the verdict and also reversed the order granting a new trial (*105 Cal. App. 3d 869, 875)* .

[c] Reasonable Inference Supports Verdict

In ***McFarland v. Voorheis-Trindle Co.*** *(1959) 52 Cal. 2d 698, 343 P.2d 923* , a bulldozer operator brought an action against a landowner for personal injuries sustained in clearing the landowner's property. After verdict for plaintiff, the trial court granted judgment for defendants notwithstanding the verdict on the ground that plaintiff was a special employee as a matter of law and plaintiff's sole remedy was workers' compensation.

The Supreme Court reversed the motion for judgment notwithstanding the verdict, stating that the motion may be granted when and only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff (*52 Cal. 2d 698, 703)* . Since the evidence most favorable to the verdict supported the inference that the operator was not a special employee of the landowner, the trial court erred in granting judgment notwithstanding the verdict (*52 Cal. 2d 698, 706)* .

Gray v. Southern Pacific Co. *(1944) 23 Cal. 2d 632, 145 P.2d 561* , was an action under the Federal Employers' Liability Act (*45 U.S.C. §§ 51-59*) for the wrongful death of a brakeman due to the alleged negligent operation of the train by defendant. After judgment for plaintiff, the trial court granted defendant's motion for judgment notwithstanding the verdict.

The Supreme Court reversed the granting of the motion, stating that the inference drawn by the jury that defendant negligently caused the fatal accident was supported by the evidence. The Court stated that it is not the function of the court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. The jury, and not the court, is the fact-finding body; it weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusions as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers the most reasonable. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable. Therefore, the Court reversed the judgment notwithstanding the verdict (*23 Cal. 2d 632, 646)* .

[d] Substantial Conflict in Evidence

The factual and procedural background of ***Robinson v. North American Life & Cas. Co.*** *(1963) 215 Cal. App. 2d 111, 30 Cal. Rptr. 57* , is discussed in *§ 155.10[3][b]*. In the *Robinson* case, the court of appeal held that the cardinal

requirement for the granting of the motion for judgment notwithstanding the verdict is a lack of substantial conflict in the evidence. This requirement was not met in the case. Since there were substantial conflicts in the evidence, the trial court's denial of the motion for judgment notwithstanding the verdict was correct (*215 Cal. App. 2d 111, 118)* .

[e] Evidence Presents Question for Jury's Determination

Meyser v. American Bldg. Maintenance, Inc. *(1978) 85 Cal. App. 3d 933, 149 Cal. Rptr. 808* , was an action by the lessor-owners of commercial property and their tenant against a building maintenance company for damages caused by fire. The trial was bifurcated pursuant to *Code Civ. Proc. § 598*. At the conclusion of plaintiff's case in the liability phase of the trial, defendant's motion for nonsuit was denied. The jury later returned a verdict for plaintiff. Before the damages trial and after the entry of the verdict, defendant moved for judgment notwithstanding the verdict and a new trial. The motion for judgment notwithstanding the verdict was granted, and the new trial motion was denied.

The court of appeal reversed the judgment notwithstanding the verdict, holding that the trial court had no jurisdiction to enter it after the liability phase of a bifurcated trial (*85 Cal. App. 3d 933, 937)* . The motion for judgment notwithstanding the verdict cannot be made until the jury has returned verdicts on both liability and damages (*85 Cal. App. 3d 933, 937)* . Furthermore, the court held that if the evidence in a case is such that different conclusions can be rationally drawn, the case presented is one for a jury and a judgment notwithstanding the verdict is improper (*85 Cal. App. 3d 933, 938-940)* . Thus, even though defendant's motion for judgment notwithstanding the verdict should not have been granted because the testimony of plaintiff's expert witness, a fire chief, was internally inconsistent regarding the cause of the fire, it was not so inherently weak that it was insufficient to uphold the verdict. The conflict in the evidence was sufficient to present a question for the jury even though it existed in the testimony of a single witness (*85 Cal. App. 3d 933, 940)* .

[4] Additional Authorities

[a] Substantial Evidence Supports Verdict

Reuther v. Viall (1965) 62 Cal. 2d 470, 42 Cal. Rptr. 456, 398 P.2d 792 , was a personal injury action in which plaintiffs recovered judgment on a special jury verdict finding willful misconduct by defendant automobile driver. The court of appeal stated that since there was a sufficient showing from which the jury could reasonably conclude that defendant's actions constituted willful misconduct, the trial court's order denying defendant's motion for judgment notwithstanding the verdict was proper (*62 Cal. 2d 470, 472)* .

Hergenrether v. East (1964) 61 Cal. 2d 440, 39 Cal. Rptr. 4, 393 P.2d 164 , was an action for personal injuries sustained in an automobile accident resulting from the negligent operation of defendants' vehicle by an unapprehended and unidentified thief. Since there was substantial evidence that justified the imposition of liability on defendants, the court of appeal reversed the lower court's granting of defendants' motion for judgment notwithstanding the verdict for plaintiffs (*61 Cal. 2d 440, 445)* .

In *Tan Jay Internat., Ltd. v. Canadian Indemnity Co. (1988) 198 Cal. App. 3d 695, 243 Cal. Rptr. 907* , an action by an insured against its insurer based on the insurer's refusal to defend and settle a third-party suit, the court of appeal affirmed the trial court's denial of the insurer's motion for judgment notwithstanding the verdict with regard to one of the plaintiffs. The court noted that the insurer did little to refute the existence of substantial evidence supporting its breach of duty, and held that if there is any substantial evidence, or reasonable inferences to be drawn from it, in support of the verdict, the motion should be denied (*198 Cal. App. 3d 695, 703)* .

The factual background of *Foggy v. Ralph F. Clark & Associates, Inc. (1987) 192 Cal. App. 3d 1204, 238 Cal. Rptr. 130* , is discussed in *§ 155.10[3][h]*. In reversing a judgment for defendant notwithstanding the verdict for plaintiffs, the court said that it is well established that a motion for judgment notwithstanding the verdict of a jury may properly be

granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence to support the verdict and that, if there is any substantial evidence, or reasonable inferences to be drawn from the evidence, in support of the verdict, the motion should be denied (*192 Cal. App. 3d 1204, 1213)* .

Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 , was an action for personal injuries sustained when a Ford Pinto was rear-ended by a car proceeding in the same direction. After verdict for plaintiff, the trial court denied defendant's motion for judgment notwithstanding the verdict on the issue of punitive damages. The court of appeal affirmed the denial, stating that there was substantial evidence from which the jury could reasonably find corporate malice on the part of defendant (*119 Cal. App. 3d 757, 814)* .

Musgrove v. Ambrose Properties (1978) 87 Cal. App. 3d 44, 150 Cal. Rptr. 722 , involved an action in which plaintiff sued a shopping center for personal injuries suffered when she was struck by a bicycle that a young boy rode on the premises. The court of appeal reversed judgment for defendant notwithstanding the verdict, stating that the evidence supported a verdict in favor of the plaintiff since it sustained a finding that the chance of the accident was foreseeable, that defendant breached its duty of care to plaintiff, and that the breach was a proximate cause of plaintiff's injury (*87 Cal. App. 3d 44, 53)* .

Hozz v. Felder (1959) 167 Cal. App. 2d 197, 334 P.2d 159 , was an action to recover the value of merchandise allegedly sold by plaintiffs to defendants on an open-book account. Since it was apparent from the evidence presented that the jury could have returned various verdicts, all supported by substantial evidence, the court of appeal reversed the lower court's granting of plaintiffs' motion for judgment notwithstanding the verdict (*167 Cal. App. 2d 197, 200)* .

[b] Power of Trial Court

Quintal v. Laurel Grove Hospital (1964) 62 Cal. 2d 154, 41 Cal. Rptr. 577, 397 P.2d 161 , was a medical malpractice action based on a six-year-old boy's permanent brain injury suffered as a result of cardiac arrest during the administration of an anesthetic. After verdict for plaintiff, the trial court granted defendants' motion for judgment notwithstanding the verdict. The Supreme Court reversed, stating that the trial court is not permitted to weigh the evidence, and since the evidence was sufficient to go to the jury of the issue of negligence, the granting of the motion was improper (*62 Cal. 2d 154, 159-163)* .

Knight v. Contracting Engineers Co. (1961) 194 Cal. App. 2d 435, 15 Cal. Rptr. 194 , was an action by a roofing subcontractor's employee against the general contractor for personal injuries. After verdict for plaintiff, the trial court granted defendant's motion for judgment notwithstanding the verdict. The court of appeal affirmed the granting of the motion, stating that the court may not consider the credibility of witnesses, but must give the plaintiff's evidence its full legal value and must draw all legitimate inferences from that evidence (*194 Cal. App. 2d 435, 442)* .

[c] Substantial Conflict in Evidence

In *Castro v. State of California (1981) 114 Cal. App. 3d 503, 170 Cal. Rptr. 734* , an employee of a construction company engaged by the state sued the state for injuries suffered when another employee backed his truck into plaintiff. After judgment for plaintiff based on the jury's special verdict finding that the state should have recognized that the work done by the contractor would create a peculiar risk of harm without special precautions, the trial court granted defendant's motion for judgment notwithstanding the verdict. The court of appeal reversed the judgment notwithstanding the verdict, holding that there was sufficient evidence to support the jury's finding and that the existence of conflicting evidence made it inappropriate to grant the motion (*114 Cal. App. 3d 503, 512-513)* .

McCown v. Spencer (1970) 8 Cal. App. 3d 216, 87 Cal. Rptr. 213 , was an action by plaintiff for damages for breach of an escrow agreement. After verdict for plaintiff, the trial court granted defendant's motion for judgment

notwithstanding the verdict. The court of appeal reversed, stating that a basic requirement for sustaining a judgment notwithstanding the verdict is that no substantial conflict exists in the evidence. The granting of the motion was improper, since the evidence was in conflict on the points foundational to the trial court's rulings (*8 Cal. App. 3d 216, 226)* .

Spillman v. City etc. of San Francisco (1967) 252 Cal. App. 2d 782, 60 Cal. Rptr. 809 , was an action for personal injuries sustained in an automobile collision. Since the jury found that plaintiff sustained no damages as a result of defendants' negligence, it entered a verdict in favor of plaintiff on the issue of liability and in favor of defendants on the issue of damages. After the trial court granted plaintiff's motion for judgment notwithstanding the verdict and fixed plaintiff's damages at $10,000, the court of appeal reversed, stating that since there was a considerable conflict in the evidence regarding the amount of damages sustained by plaintiff, the trial court abused its discretion in granting the motion and usurped defendants' right to trial by jury in assessing plaintiff's damages (*252 Cal. App. 2d 782, 786-787)* .

[d] Evidence Presents Question for Jury's Determination

Beck v. San Francisco etc. Sch. Dist. (1964) 225 Cal. App. 2d 503, 37 Cal. Rptr. 471 , was a student's action for personal injury against the school district based on its alleged failure to adequately supervise school activities. The trial court's denial of defendant's motion for judgment notwithstanding the verdict was affirmed since although the district argued that the proximate cause of the action was not lack of supervision but an intervening wrong, the causal relationship between lack of supervision and injury was a factual determination for the jury (*225 Cal. App. 2d 503, 508-509)* .

In *Urland v. French (1956) 141 Cal. App. 2d 278, 296 P.2d 568* , plaintiff sought to recover damages for personal injuries sustained in an automobile accident. After verdict for plaintiff, the trial court granted judgment for defendant notwithstanding the verdict. The court of appeal held that it was reversible error to grant defendant's motion because the question of negligence and proximate cause was one for the jury's determination, and there was substantial evidence, considered in the light most favorable to plaintiff, on which the jury could have concluded that defendant was negligent and that the negligence proximately caused the accident (*141 Cal. App. 2d 278, 284-285)* .

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[Reserved]

§§ 155.31[Reserved]

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CHAPTER 155 MOTIONS AFTER TRIAL
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B. Motions for New Trial
1. Irregularity in Court Proceedings or Court Action Preventing Fair Trial

15-155 California Points & Authorities § 155.50

§ 155.50 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Irregularity in Court Proceedings [Code Civ. Proc. § 657(1)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*], Plaintiff,	)	IES IN SUPPORT OF MOTION FOR NEW TRIAL
vs.	)	[Telephone Appearance]
_____ [*name*], Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

A MOTION FOR NEW TRIAL SHOULD BE GRANTED BECAUSE THERE WAS AN IRREGULARITY IN THE PROCEEDINGS OF THE COURT THAT PREVENTED THE _____ [PLAINTIFF *or* DEFENDANT] FROM HAVING A FAIR TRIAL AND THAT MATERIALLY AFFECTED HIS/HER/ITS SUBSTANTIAL RIGHTS.

A. New Trial on Ground of Irregularity in Court Proceedings. On the application of the party aggrieved, the verdict or decision may be vacated, in whole or in part, and a new trial may be granted, on all or some of the issues, on the

ground of irregularity in the proceedings of the court by which either party is prevented from having a fair trial if substantial rights of the aggrieved party are materially affected thereby (*Code Civ. Proc. § 657(1)*).

B. Departure by Court From Due and Orderly Method. An irregularity in the proceedings of the court is any departure by the court from the due and orderly method of disposition of an action by which the substantial rights of a party are materially affected (*Gay v. Torrance (1904) 145 Cal. 144, 149, 78 P. 540*).

[*Optional*] **C. Court's Prejudgment of Case Before Hearing.** A new trial may be granted on the ground of irregularity in the proceedings of the court when the trial judge has prejudged a case before the introduction of all evidence by either party (*Webber v. Webber (1948) 33 Cal. 2d 153, 156-158, 199 P.2d 934* ; *McVey v. McVey (1955) 132 Cal. App. 2d 120, 122-125, 281 P.2d 898*).

[*Optional*] **D. Court's Prejudicial Expression and Action Against Use of Particular Witness.** An expression of prejudice by the court against the use of a particular witness, notwithstanding the competency of his or her testimony, with such prejudice being reflected in the action of the court against the aggrieved party, is an irregularity preventing the aggrieved party from having a fair trial and materially affecting his or her substantial rights (*Pratt v. Pratt (1903) 141 Cal. 247, 250-252, 74 P. 742*).

[*Optional*] **E. Court's Invasion of Province of Jury and Influence on Verdict.** When the court attempts to invade the province of the jury and the verdict appears to have been influenced by the court's misconduct, a new trial may be granted on the ground of irregularity in the proceedings of the court preventing the aggrieved party from having a fair trial and materially affecting his or her substantial rights (*Crowe v. Sacks (1955) 44 Cal. 2d 590, 598, 283 P.2d 689* ; *Cook v. Los Angeles Ry. Corp. (1939) 13 Cal. 2d 591, 593-594, 91 P.2d 118*).

[*Optional*] **F. Failure to Give 15 Days' Notice of Trial.** Failure to give the aggrieved party 15 days' notice of the time set for trial as required by *Code Civ. Proc. § 594(a)* is an irregularity in the proceedings of the court preventing the aggrieved party from having a fair trial and materially affecting his or her substantial rights (*Gordon v. Gordon (1956) 145 Cal. App. 2d 231, 233-234, 302 P.2d 355* (decided under former Code Civ. Proc. § 594(1), which required five days' notice)).

[*Optional*] **G. Objection by Aggrieved Party and Admonishing Instruction by Court Unnecessary.** If an admonition of the judge to the jury to disregard his or her misconduct would not remove its prejudicial effect, it is not a prerequisite that the aggrieved party have objected and made the request that the jury be instructed to disregard it (*Etzel v. Rosenbloom (1948) 83 Cal. App. 2d 758, 762, 189 P.2d 848* ; *see Ward v. De Martini (1930) 108 Cal. App 745, 751, 292 P. 192*).

[*Optional*] **H. Assignment by Court of Irregularity as Error Unnecessary.** An assignment of judicial misconduct as error is unnecessary if it is evident from the attitude of the trial judge, as shown by the record, that any assignment of misconduct would be disregarded and counsel, by making the assignment, would bring further attack on himself or herself (*People v. Mahoney (1927) 201 Cal. 618, 622, 258 P. 607*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for new trial on the ground of irregularity in the proceedings of the court [*Code Civ. Proc. § 657(1)*]. In addition to Paragraphs A and B, any combination of the optional Paragraphs C--H may be used if applicable to the facts of the case.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. In particular, counsel should set out the actions of the court, show how these actions were a departure from the due and orderly method of disposition of an action, and explain how the moving party was prevented from having a fair trial because of these actions [*see Gay v. Torrance (1904) 145 Cal. 144, 149, 78 P. 540]* . If the trial judge has made statements during trial that indicate, for example, a prejudgment of the case, counsel may want to refer to and attach pertinent portions of the reporter's transcript, if any, to this memorandum [*see Webber v. Webber (1948) 33 Cal. 2d 153, 156-157, 199 P.2d 934]* .

[c] Supporting Declarations or Affidavits Required

A motion for new trial made on the ground of irregularity in the proceedings of the court must be supported by declarations or affidavits [*Code Civ. Proc. § 658*; *see Code Civ. Proc. § 2015.5*].

[d] Related Pleading and Practice Forms

For a form of notice of intention to move for a new trial and a declaration to be submitted in support of the motion on the grounds of irregularity in the proceedings of the court [Code Civ. Proc. § 657(1)], see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[e] Related Memoranda

The points and authorities set out in *§ 155.55* may be combined in an appropriate case with those in this form.

[f] Opposing Points and Authorities

The points and authorities set out in *§ 155.60* or *§ 155.65* may be used in an appropriate case to oppose a motion for new trial supported by this memorandum.

[3] Discussion of Authorities

[a] Departure by Court From Due and Orderly Method

Gay v. Torrance *(1904) 145 Cal. 144, 78 P. 540* , was a divorce action in which defendant husband was granted an interlocutory judgment on his cross complaint against petitioner, his wife. Subsequently, petitioner wife moved for a new trial on the ground of irregularity in the proceedings of the court [*Code Civ. Proc. § 657(1)*] based on alleged misconduct of the trial judge. The trial court, on motion of defendant husband, made an order striking petitioner's affidavits on the ground that one was based solely on information and belief and that all affidavits contained immaterial, impertinent, and scandalous charges against the judge who heard the case. Petitioner asked for a writ of mandate commanding the judge to certify a bill of exceptions containing the stricken affidavits to be used on appeal from the order striking the affidavits. She also sought a writ of prohibition restraining the judge from hearing the motion for new trial pending the hearing of the appeal from the order striking the affidavits. An alternative writ was issued requiring the

judge to certify the bill of exceptions containing the affidavits or show cause why he had not done so.

The Supreme Court discharged the alternative writ of mandate and denied the application for a peremptory writ of mandate because it found that the affidavits only contained information and belief and embodied no competent or proper evidence (*145 Cal. 144, 151-154)* . However, the Court stated that personal misconduct of a judge who has under advisement a case tried in his or her court can be an irregularity in the proceedings of the court for which a new trial may be granted under *Code Civ. Proc. 657(1)* (*145 Cal. 144, 148)* . The language of the statute is sufficiently broad to include any departure by the court from the due and orderly method of disposition of an action by which the substantial rights of a party have been materially affected, where such departure is not evidenced by a ruling or order that may be the subject of an exception (*145 Cal. 144, 149-150)* . The Court stated that personal habits, conduct, deportment, or statements of the judge that have no relation to or effect on the disposition of the case are not the proper subject of complaint on a motion for new trial (*145 Cal. 144, 150)* . The question is whether the acts were of a nature and done under such circumstances as to afford reasonable grounds for the conclusion that the defeated party has not had a fair and impartial trial (*145 Cal. 144, 150)* .

[b] Court's Prejudgment of Case Before Hearing

Webber v. Webber *(1948) 33 Cal. 2d 153, 199 P.2d 934* , was a divorce action in which plaintiff was awarded an interlocutory decree of divorce, custody of her son, and one half of the community property. However, she was denied any right of support before the trial judge had heard her testimony regarding her condition or need. The Supreme Court reversed the interlocutory judgment of divorce on the ground of irregularity in the proceedings of the court [*Code Civ. Proc. § 657(1)*] based on the court's prejudgment of the case before the aggrieved party had an opportunity to present her evidence (*33 Cal. 2d 153, 156-158)* . The Court stated that it was apparent that she did not have a fair trial by reason of the trial judge's preconceived and declared aversion to spousal support (*33 Cal. 2d 153, 157)* . The Court also noted that plaintiff's lack of affidavits in support of her motion for new trial did not prevent her from raising the alleged misconduct of the trial judge on appeal since she relied wholly on facts appearing on the face of the record (*33 Cal. 2d 153, 163-164)* . Even though motions based on the first four grounds of *Code Civ. Proc. § 657* are required to be supported by affidavit [*Code Civ. Proc. § 658*], the Court held that if the moving party relies wholly on facts appearing on the face of the record, the reason for the rule requiring affidavits is no longer valid and the rule is inapplicable (*33 Cal. 2d 153, 164)* . Accordingly, the court ordered a new trial (*33 Cal. 2d 153, 165)* .

In ***McVey v. McVey*** *(1955) 132 Cal. App. 2d 120, 281 P.2d 898* , plaintiff wife filed an action for separate maintenance and defendant husband cross complained for divorce. Before the trial judge had heard any evidence, he stated in chambers to the parties and their attorneys that a husband and wife who were separated without the possibility of reconciliation should be divorced and that separate maintenance was socially and morally undesirable. After introduction of plaintiff's evidence, the trial judge, in chambers, also stated this viewpoint to counsel for both parties. Before hearing defendant's testimony, the judge also encouraged plaintiff to change her prayer to request a divorce, indicating that he might be persuaded by defendant's testimony to grant him a divorce, deny her alimony, and award her less than half of the property. After plaintiff was denied a decree of separate maintenance and defendant was granted an interlocutory decree of divorce, plaintiff moved for new trial on the ground of irregularity in the proceedings of the court [*Code Civ. Proc. § 657(1)*] based on the judge's alleged preconceived and declared aversion to an action for separate maintenance. Her motion was denied.

The court of appeal reversed the interlocutory decree, stating that a judge should not prejudge the issues but should keep an open mind until all the evidence is presented (*132 Cal. App. 2d 120, 123)* . When a trial judge sits as a trier of facts he takes the place of a jury, and his conduct is subject to the same rules, one of which is that before the case is submitted to him, he should not form or express an opinion thereon (*132 Cal. App. 2d 120, 123)* . The court stated that it was apparent that plaintiff did not receive a fair trial by reason of the preconceived and declared aversion of the trial judge to an action for separate maintenance (*132 Cal. App. 2d 120, 124)* . The record shows that plaintiff established a strong case for separate maintenance, and defendant a weak case for divorce (*132 Cal. App. 2d 120, 125)* . The court

stated that it appeared from what the judge said after plaintiff had made her proof that he had made up his mind not to award her separate maintenance (*132 Cal. App. 2d 120, 125)* . The trial judge's conduct, which indicated his unsympathetic attitude toward the litigation, did not accord with recognized principles of judicial behavior and were not consistent with the presentation of a case in an atmosphere of fairness and impartiality (*132 Cal. App. 2d 120, 125)* .

[c] Court's Prejudicial Expression and Action Against Use of Particular Witness

In ***Pratt v. Pratt*** *(1903) 141 Cal. 247, 74 P. 742* , plaintiff wife sought an accounting from defendant husband regarding the disposition of separate property derived from her mother's estate. Plaintiff wife claimed that defendant had purchased certain property with her separate funds. Defendant husband did not refer to the purchase, but claimed that he had given the rents to his wife. During trial, the judge interrupted the examination of plaintiff's and defendant's daughter, who was giving competent testimony in favor of defendant. The judge intimated that the failure to withdraw the daughter as a witness would seriously prejudice defendant's case, since a child put on the witness stand to dispute a parent was shocking and revolting. After judgment for plaintiff, defendant moved for a new trial on the grounds of irregularity in the proceedings of the court [*Code Civ. Proc. § 657(1)*]. The motion was denied.

The Supreme Court reversed the judgment, stating that the action of the judge was an irregularity in the proceedings of the court. The testimony of the daughter was competent and proper, and therefore the judge had no right to permit it to arouse in his mind a prejudice against the father. The court also had no right, by an expression of such prejudice and its threatened results, to drive the party to withdraw testimony against which no legal objection existed. Extreme prejudice to defendant was shown by an examination of the findings, which were against him in every particular to which the proposed testimony of the daughter was directed. The trial of a case should not only be fair in fact, but it should also appear to be fair. If the contrary appears, it shocks the judicial instinct to allow the judgment to stand (*141 Cal. 247, 252)* .

[d] Court's Invasion of Province of Jury and Influence on Verdict

In ***Crowe v. Sacks*** *(1955) 44 Cal. 2d 590, 283 P.2d 689* , plaintiffs brought an action for personal injuries suffered in an automobile collision with defendant. After the jury had rendered a verdict for plaintiffs, the judge sent the jury back for further deliberation, stating that he found the verdict grossly inadequate. The jury later returned a verdict for plaintiffs for a substantially higher sum. Defendant's motion for a new trial, based on the judge's conduct, was denied. Defendant appealed the judgment.

The Supreme Court reversed judgment for plaintiffs, stating that the trial court had invaded the province of the jury when it attempted to influence the amount of damages awarded. The higher sum reached on redeliberation was a clear indication that the jury was thus influenced in reaching its final verdict (*44 Cal. 2d 590, 598)* . Any action of the judge in the correction of verdicts should be taken with caution. The judge must not throw the weight of his or her influence into the deliberations of the jury as to matters exclusively within its province. If the jury allows damages so grossly inadequate as to show that it must have disregarded the evidence and the instructions of the court, it should be returned for further deliberation under proper instruction (*44 Cal. 2d 590, 598)* .

In ***Cook v. Los Angeles Ry. Corp.*** *(1939) 13 Cal. 2d 591, 91 P.2d 118* , plaintiff brought an action for personal injuries allegedly suffered as a result of the negligent operation of a streetcar owned by defendant. After slightly less than two hours of deliberation, the jury returned to the courtroom after the foreman requested a rereading of the instructions. The judge then remarked that he did not believe that the plaintiff was entitled to recover and that the jury should not take more than 10 minutes to state that conclusion in a verdict. Approximately 10 minutes later, the jury rendered a verdict in favor of defendant. Plaintiff appealed both the judgment and an order that struck from the file affidavits presented by her in support of a motion for new trial.

The Supreme Court reversed the judgment, stating that considering all the circumstances shown, the trial judge's

remarks unquestionably prejudiced the plaintiff's right to a fair trial and invaded the province of the jury (*13 Cal. 2d 591, 595)* . The exclusive right to agree or disagree rests with the jury; the judge may not tell them that they must agree nor may he harry their deliberations with coercive threats or disparaging remarks (*13 Cal. 2d 591, 594)* . The Court stated that the remarks may have also been suggestive and misleading (*13 Cal. 2d 591, 595)* . While the words do not, on their face, appear to show any bias in favor of defendant, other factors that are not disclosed by the record, such as the tone or inflection with which the comments were delivered, or the attitude of the court during the trial of the case, may well have imparted such an impression to the jurors (*13 Cal. 2d 591, 595)* .

[e] Failure to Give 15 Days' Notice of Trial

Gordon v. Gordon *(1956) 145 Cal. App. 2d 231, 302 P.2d 355* , was a divorce action in which plaintiff was not given adequate notice of trial under former Code Civ. Proc. § 594(1) [*now see Code Civ. Proc. § 594(a)*]. When plaintiff failed to appear for trial, the court heard evidence on defendant's cross complaint and, at the conclusion of the testimony, granted him an interlocutory decree of divorce, all the community property, and custody of their two-year-old child. Plaintiff's motion for new trial, on the ground that she was not served with written notice of trial, was granted.

The court of appeal affirmed the order, stating that the failure to give notice of trial was a proper ground for the granting of a new trial under *Code Civ. Proc. § 657(1)* on the theory of error in law or irregularity in the proceedings of the court (*145 Cal. App. 2d 231, 233)* . *Code Civ. Proc. § 594* requires service of notice of trial and, when the adverse party fails to appear, proof of service. Compliance with the section is mandatory (*145 Cal. App. 2d 231, 233)* . The court deemed the appeal from the order frivolous and assessed a penalty against defendant (*145 Cal. App. 2d 231, 235)* .

[f] Objection by Aggrieved Party and Admonishing Instruction by Court Unnecessary

Etzel v. Rosenbloom *(1948) 83 Cal. App. 2d 758, 189 P.2d 848* , was an action for personal injuries arising from an automobile accident. During trial, the judge made many comments that indicated that he believed that one defendant was not telling the truth and that defense counsel was trying to keep the facts from being presented to the jury. Defendants did not object to the remarks during trial. After the jury rendered a verdict for plaintiff, defendants appealed.

The court of appeal reversed the judgment, stating that the judge's conduct constituted prejudicial error that deprived defendants of a fair and impartial trial by jury (*83 Cal. App. 2d 758, 762-765)* . The court added that the general rule is that unless the harmful result of the trial judge's misconduct cannot be obviated by an appropriate instruction, error cannot be predicated thereon in the absence of an assignment of such misconduct as error and a request to the trial court to instruct the jury to disregard it. However, in cases in which an admonition of the judge to the jury to disregard the misconduct would not remove the prejudicial effect of the misconduct, it is not a prerequisite to the urging of such error on appeal for the appellant to have objected thereto and made a request that the jury be instructed to disregard it. In this case, the court stated that it was evident that an objection to the misconduct and an admonition by the court to the jury to disregard it would have been ineffectual and would have accentuated the error rather than have removed it. Hence, the court felt that this case was an exception to the general rule and that it was not necessary for defendants to have objected to the judge's misconduct and to have requested that he admonish the jury to disregard it (*83 Cal. App. 2d 758, 762)* .

Although this case did not involve a motion for new trial, the rule regarding objection and an admonishing instruction appears to be the general rule when moving for a new trial based on irregularity in the proceedings of the court [*see Ward v. De Martini (1930) 108 Cal. App 745, 751, 292 P. 192]* .

In ***Ward v. De Martini*** *(1930) 108 Cal. App 745, 292 P. 192* , plaintiff recovered damages for personal injuries alleged to have been maliciously inflicted by defendant. Defendant's motion for new trial, based on several grounds, including prejudicial remarks by the judge, was denied. Although the court of appeal affirmed the judgment, it stated that courts'

oral statements to the jury that the witness is a person of respectability had, in several cases, been held as error (*108 Cal. App 745, 750-751)* . However, it was also the duty of the defendant to promptly call attention to the impropriety of the remarks to give the court an opportunity to prevent any prejudicial effect on the jury by means of a proper instruction (*108 Cal. App 745, 751)* . If the admonition of the judge to the jury to disregard the misconduct would not remove its prejudicial effect, the aggrieved party need not have objected and requested that the jury be instructed to disregard the impropriety. In this case, the court felt that a court's instruction to the jury may have obviated any prejudicial effect (*108 Cal. App 745, 751)* . Nevertheless, notwithstanding the error or misconduct, it felt that the jury's verdict was fully sustained by the evidence and the judge's misconduct resulted in no miscarriage of justice requiring a reversal of the judgment (*108 Cal. App 745, 751-752)* .

[g] Assignment by Court of Irregularity as Error Unnecessary

In ***People v. Mahoney*** *(1927) 201 Cal. 618, 258 P. 607* , defendant, a contractor, was convicted of manslaughter in connection with the faulty construction of a grandstand that collapsed and killed several spectators. During the trial, the judge made frequent disparaging remarks to defendant's counsel and witnesses. Defendant's motion for new trial, based on the alleged misconduct of the judge and the alleged erroneous admission of certain evidence, was denied.

The Supreme Court reversed the conviction and ordered a new trial on the basis of the judge's misconduct (*201 Cal. 618, 627)* . The Court recognized the rule that effort had to be made at trial to correct and undo that harm caused by the judge's conduct; however, it was evident from the attitude of the trial judge that any assignment of misconduct would have been disregarded and counsel, by making an assignment, would have brought himself under further judicial attack (*201 Cal. 618, 622)* . The Court held that when the trial court persists in making discourteous and disparaging remarks to defendant's counsel and witnesses, and utters frequent comment from which the jury may plainly perceive that the judge does not believe the witnesses, a new trial is necessary (*201 Cal. 618, 627)* .

It appears that the rule of *People v. Mahoney (1927) 201 Cal. 618, 258 P. 607* , a criminal case, may be used as authority when moving for a new trial in a civil action under *Code Civ. Proc. §§ 657* and *659* [*see Ward v. De Martini (1930) 108 Cal. App 745, 751, 292 P. 192* (citing *People v. Mahoney*)].

[4] Additional Authorities

[a] Departure by Court From Due and Orderly Method

Jacoby v. Feldman (1978) 81 Cal. App. 3d 432, 146 Cal. Rptr. 334 , was an action for declaratory relief brought by the surviving partners seeking interpretation of an amended partnership agreement. After judgment for defendant that dissolved the partnership, the trial court denied plaintiffs' motion for new trial that was made on the ground of irregularity in the proceedings of the court. Although the court of appeal affirmed the denial, it stated that the language of *Code Civ. Proc. § 657(1)* is sufficiently broad to include any departure by the court from the due and orderly method of disposition of an action by which the substantial rights of a party have been materially affected (*81 Cal. App. 3d 432, 446)* .

[b] Court's Prejudgment of Case Before Hearing

Rosenfield v. Vosper (1941) 45 Cal. App. 2d 365, 114 P.2d 29 , was an action for the reasonable value of legal services in which the court of appeal reversed a judgment for plaintiff on the ground of irregularity in the proceedings of the court [*Code Civ. Proc. § 657(1)*] based on the court's prejudgment of the case (*45 Cal. App. 2d 365, 372)* . The trial judge had suggested a settlement of $7,500 before plaintiff had finished his testimony and before defendants had presented any testimony as to an alleged accord and satisfaction (*45 Cal. App. 2d 365, 371-372)* . The trial judge had the duty to refrain from forming an opinion until the case was finally submitted to him (*45 Cal. App. 2d 365, 372)* .

[c] Court's Invasion of Province of Jury and Influence on Verdict

In *Delzell v. Day (1950) 36 Cal. 2d 349, 223 P.2d 625* , the Supreme Court reversed judgments for defendants against two plaintiffs and in favor of a third plaintiff in a personal injury action on the ground of irregularity in the proceedings of the court [*Code Civ. Proc. § 657(1)*]. Numerous comments and remarks by the trial judge during the examination of jurors and witnesses, taken as a whole, had prejudiced the appellants' case (*36 Cal. 2d 349, 351)* . The Court ordered a new trial, since in the absence of the comments complained of, a different verdict would not have been improbable (*36 Cal. 2d 349, 351-352)* .

Shippy v. Peninsula Rapid Transit Co. (1925) 197 Cal. 290, 240 P. 785 , was a personal injury action in which the Supreme Court affirmed the trial court's order granting a new trial under *Code Civ. Proc. § 657(1)* on the ground of irregularity in the proceedings of the court (*197 Cal. 290, 296)* . During trial and after the conclusion of the taking of evidence, the court asked the jury if it was prepared to pass upon the issues in the case without argument of counsel or instruction by the court on the law of the case (*197 Cal. 290, 294-295)* . This amounted to a requirement of the jurors that they evince a fixed state of mind that they were not entitled to hold at that stage of the proceedings (*197 Cal. 290, 295)* .

In *People v. Burns (1952) 109 Cal. App. 2d 524, 241 P.2d 308* , the court of appeal reversed a conviction of second-degree murder on the ground of irregularity in the proceedings of the court based on the trial judge's exhibition of hostility toward defense counsel. When the district attorney had not objected to certain testimony, the court would interrupt defendant's examination or cross examination of a witness and rule that the subject was not admissible. While the judge admonished the jury that it was the sole judge of the evidence and that it must draw no conclusion as to guilt or innocence based on the court's remarks, these admonitions did not overcome the judge's evident attitude throughout the trial (*109 Cal. App. 2d 524, 542)* .

Langdon v. Superior Court (1923) 65 Cal. App 41, 223 P. 72 , was an action for damages arising from an automobile collision. After the jury had rendered a compromise verdict for one dollar, the trial court directed the jury to return a verdict for $248.32, the stipulated amount expended for repairs. Judgment was entered on the verdict and a new trial was denied (*65 Cal. App 41, 42)* . The court of appeal issued a writ of certiorari annulling the verdict for plaintiff, since it determined that the functions of the jury in determining the facts were usurped by the judge (*65 Cal. App 41, 43)* . The court's thinly veiled threats and intimidation of the jury coerced it into returning a verdict on which it otherwise would not have agreed (*65 Cal. App 41, 43)* .

[d] Failure to Give 15 Days' Notice of Trial

Simon v. Tomasini (1950) 97 Cal. App. 2d 115, 217 P.2d 488 , was an action for attorney's fees and expenses which was kept on the ready calendar for almost two years pursuant to an agreement between the parties. When the case was assigned for trial, plaintiff failed to give defendant adequate notice under *Code Civ. Proc. § 594*, and defendant did not appear. The court of appeal affirmed the trial court's order granting a new trial, stating that lack of notice, as required by law, constituted an irregularity in the proceedings of the court for which a new trial should be granted (*97 Cal. App. 2d 115, 123)* .

[e] Objection by Aggrieved Party and Admonishing Instruction by Court Unnecessary

The factual and procedural background of *Delzell v. Day (1950) 36 Cal. 2d 349, 223 P.2d 625* , is discussed in [c], *above*. In that case, plaintiffs appealed from a judgment for defendants, contending that the judge was guilty of prejudicial misconduct. The Supreme Court stated that although a request for an instruction, in addition to an assignment of error, generally is necessary as the basis for an appeal on the ground of misconduct of counsel, there is no such requirement when it is charged that the appellant's rights were prejudiced by the improper action of the trial judge. A request for an instruction would in all probability have made a bad matter worse. The remarks would probably have been repeated with emphasis, and counsel would have found himself or herself in a position anything but pleasant or

secure (*36 Cal. 2d 349, 351)* .

California Points & Authorities

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
CHAPTER 155 MOTIONS AFTER TRIAL
PART II. FORMS
B. Motions for New Trial
1. Irregularity in Court Proceedings or Court Action Preventing Fair Trial

15-155 California Points & Authorities §§ 155.51-155.54

[Reserved]

§§ 155.51[Reserved]

California Points & Authorities

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
CHAPTER 155 MOTIONS AFTER TRIAL
PART II. FORMS
B. Motions for New Trial
1. Irregularity in Court Proceedings or Court Action Preventing Fair Trial

15-155 California Points & Authorities § 155.55

§ 155.55 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Court Order or Abuse of Discretion Prevented Fair Trial [Code Civ. Proc. § 657(1)]

[1] FORM

[*Caption. See § 155.50[1].*]

A NEW TRIAL SHOULD BE GRANTED SINCE THERE WAS AN _____ [ORDER OF THE COURT *and/or* ABUSE OF DISCRETION] THAT PREVENTED _____ [PLAINTIFF *or* DEFENDANT] FROM HAVING A FAIR TRIAL AND THAT MATERIALLY AFFECTED HIS/HER/ITS SUBSTANTIAL RIGHTS.

A. New Trial on Ground of Order of Court or Abuse of Discretion Preventing Fair Trial. On application of the party aggrieved, the verdict or decision may be vacated, in whole or in part, and a new trial may be granted, on all or some of the issues, on the ground that there was an order of the court or abuse of discretion by which either party was prevented from having a fair trial, if substantial rights of the aggrieved party are materially affected thereby (*Code Civ. Proc. § 657(1)*; *Hays v. Viscome (1953) 122 Cal. App. 2d 135, 137-140, 264 P.2d 173*).

[*Optional*] **B. Order Preventing Reliance on Favorable Presumption.** An order of the court that precludes the aggrieved party from relying on a favorable presumption because of admissible but improperly excluded evidence, and that thereby prevents him or her from having a fair trial, may be grounds for the granting of a new trial (*Hays v. Viscome (1953) 122 Cal. App. 2d 135, 137-140, 264 P.2d 173*).

[*Optional*] **C. Denial of Continuance to Produce Material Evidence.** If the aggrieved party desires a continuance for the purpose of producing material evidence that has just come to his or her attention and the court abuses its discretion by denying a continuance, a new trial my be granted (*see Hays v. Viscome (1953) 122 Cal. App. 2d 135, 140-141, 264 P.2d 173* ; *see also Murr v. Murr (1948) 87 Cal. App. 2d 511, 521-522, 197 P.2d 369*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for new trial on the ground that there was an order of the court or abuse of discretion that prevented a party from having a fair trial [*Code Civ. Proc. § 657(1)*].

Note that an order of the court that may be asserted as erroneous under *Code Civ. Proc. § 657(1)* may also be asserted under *Code Civ. Proc. § 657(7)* as an error in law occurring at trial [*see § 155.250* et seq.]. Counsel may desire to raise the claimed error as grounds for new trial under both provisions.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should show how the order or abuse of discretion prevented the moving party from having a fair trial and materially affected the moving party's substantial rights. If the motion is based on a court order, counsel may desire to include a copy of the order after obtaining one from the court clerk.

A motion for new trial based on this ground must be supported by declarations or affidavits [*Code Civ. Proc. § 658*; *see Code Civ. Proc. § 2015.5*].

[c] Related Pleading and Practice Forms

For a form of notice of intention to move for a new trial and a declaration to be submitted in support of the motion on the grounds of court order or abuse of discretion preventing a fair trial [Code Civ. Proc. § 657(1)], see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[d] Related Memoranda

The points and authorities set out in *§ 155.50* may be combined in an appropriate case with those in this form.

[e] Opposing Points and Authorities

The points and authorities set out in *§ 155.60* or *§ 155.65* may be used in an appropriate case to oppose a motion for new trial supported by this memorandum.

[3] Discussion of Authorities

[a] New Trial on Ground of Order of Court or Abuse of Discretion Preventing Fair Trial

In ***Hays v. Viscome*** *(1953) 122 Cal. App. 2d 135, 264 P.2d 173* , plaintiff brought a personal injury action against

defendants for injuries suffered in an automobile accident. Before commencement of trial and at defendants' request, plaintiff submitted to two physical examinations by two different doctors. However, at trial, defendants failed to call one of the doctors as a witness. Since it was presumed that the doctor's testimony was adverse to defendants, plaintiff's attorney requested a continuance to give him an opportunity to bring the doctor to testify. Plaintiff's counsel explained that he was surprised by defendants' failure to call the doctor and he had not placed the doctor under subpoena because he had not anticipated that it would be necessary to call him as plaintiff's witness. The court refused the continuance because it felt that there were too many cases pending and it could not permit delay. It stated that plaintiff should have already had the doctor under subpoena. After judgment for plaintiff in the sum of $700, she moved for a new trial. When the motion was denied, she appealed the judgment.

The court of appeal reversed the judgment and ordered a retrial, stating that it was an abuse of discretion for the court to refuse the continuance. The fact that there were other cases awaiting trial did not warrant the denial of the continuance in light of the possibly vital nature of the doctor's testimony (*122 Cal. App. 2d 135, 140)* . The court added that plaintiff's counsel could not have known much earlier that he would have to call the doctor as a witness. Therefore, he could not have had the doctor under subpoena. The matter arose as soon as defendants had rested their case, and it was not until then that plaintiff's counsel knew that defendants would not call the doctor. Guided by its own judgment and experience, the court held that plaintiff's case was prejudiced for no good reason by denial of her request for a short continuance (*122 Cal. App. 2d 135, 140-141)* .

[b] Order Preventing Reliance on Favorable Presumption

The factual and procedural background of ***Hays v. Viscome*** *(1953) 122 Cal. App. 2d 135, 264 P.2d 173* , is discussed in [a], *above*. After defendants failed to call a certain doctor as a witness, plaintiff moved for a continuance so that she could bring him in to testify. The court refused to grant the motion for a continuance, and the jury rendered a small award of damages to plaintiff in light of the severity of the injuries claimed. Plaintiff's motion for a new trial was denied, and she appealed the judgment.

The court of appeal reversed the judgment and granted a retrial, stating that the general rule was that willfully suppressed evidence will be presumed adverse to the party that suppressed it, citing former Code Civ. Proc. §§ 1963(6), 2061(6), 2061(7) [*now see Evid. Code § 413*]. In this case, defendants requested that plaintiff submit to an examination by two doctors, and they failed to call one of the doctors to testify at trial. However, the trial court improperly instructed the jury on the presumption and the jury failed to take the presumption into consideration. The court stated that the critical question in the case was whether plaintiff had suffered an injury that resulted in nerve pressure. Had the significance of the failure to call the doctor been explained to the jury, the conclusion as to the extent of plaintiff's injuries might have been altogether different. The court noted that the small verdict manifested that the jury disbelieved that plaintiff's injuries were serious. It added that plaintiff should have been permitted the full benefit of the rule of evidence which was excluded from the jury's consideration by the court's ruling (*122 Cal. App. 2d 135, 139-140)* . Because of the prejudicial effect of the trial court's ruling, the court of appeal reversed the judgment and granted plaintiff a new trial (*122 Cal. App. 2d 135, 143)* .

[c] Denial of Continuance to Produce Material Evidence

The factual and procedural background of ***Hays v. Viscome*** *(1953) 122 Cal. App. 2d 135, 264 P.2d 173* , is discussed in [a], *above*. After defendants failed to call a certain doctor as a witness, plaintiff moved for a continuance so that she could bring him in to testify. The court refused to grant the motion, and the jury rendered a small award of damages in light of the severity of injuries claimed by plaintiff. Plaintiff's motion for a new trial was denied, and she appealed the judgment.

The court of appeal reversed the judgment and granted a retrial, stating that the court abused its discretion in refusing to grant the continuance. The court said that the trial judge stated no sound reason for denying the continuance, and the

appellate court could discover none. Plaintiff's attorneys were not negligent in failing to anticipate that defendants would not call the doctor as a witness. They acted promptly and their request for a continuance was reasonable. Guided by the dictates of its own judgment, the court stated that plaintiff's case was prejudiced for no good reason by denial of her request of a short continuance. Accordingly, the court reversed the judgment and granted a new trial (*122 Cal. App. 2d 135, 140-143)* .

In ***Murr v. Murr*** *(1948) 87 Cal. App. 2d 511, 197 P.2d 369* , plaintiff brought an action for divorce on the ground of extreme cruelty, specifying that defendant wife gave birth to an illegitimate child. After defendant had rested her case, plaintiff's counsel moved for a continuance since he desired to recall a doctor in rebuttal and that particular doctor was not present at the time. Plaintiff's counsel stated that he did not ask the doctor to return, when the doctor was present in court, since he did not have knowledge at that time of the facts he desired to present. The court denied the motion for a continuance. After an interlocutory decree of divorce was granted to defendant on her cross complaint, plaintiff moved for a new trial. When the motion was denied, plaintiff appealed the judgment, contending that the trial judge had abused his discretion in denying plaintiff's motions for a new trial and for a continuance.

The court of appeal reversed the judgment and remanded the cause for a new trial, because it found that the trial judge abused his discretion in denying plaintiff's motion for a continuance. It stated that the trial judge should have granted the continuance because of the nature of the proposed evidence. The testimony of the doctor was material in that, if true, it would have indicated that defendant was pregnant in June before plaintiff returned home in July. Since the court felt that plaintiff's case had been prejudicially affected by the denial of the continuance, it remanded the case for a new trial (*87 Cal. App. 2d 511, 521-522)* .

[4] Additional Authorities

[a] Denial of Continuance to Produce Material Evidence

In *Henderson v. Drake (1953) 118 Cal. App. 2d 777, 258 P.2d 879* , the court of appeal affirmed the granting of plaintiff's motion for a new trial on the grounds of insufficiency of the evidence [*Code Civ. Proc. § 657(6)*] and the court's improper denial of a motion for continuance [*Code Civ. Proc. § 657(1)*]. Before trial, the lower court denied plaintiff's motion for a continuance so that plaintiff could be present to testify at trial. The court of appeal stated that even though the granting or denial of the continuance was probably within the discretion of the court, it was entirely proper for the court, in light of later developments in the case, to decide that it had abused its discretion in denying the motion for a continuance and to grant a new trial (*118 Cal. App. 2d 777, 782-783)* .

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California Points & Authorities

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
CHAPTER 155 MOTIONS AFTER TRIAL
PART II. FORMS
B. Motions for New Trial
1. Irregularity in Court Proceedings or Court Action Preventing Fair Trial

15-155 California Points & Authorities §§ 155.56-155.59

[Reserved]

§§ 155.56[Reserved]

California Points & Authorities

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
CHAPTER 155 MOTIONS AFTER TRIAL
PART II. FORMS
B. Motions for New Trial
1. Irregularity in Court Proceedings or Court Action Preventing Fair Trial

15-155 California Points & Authorities § 155.60

§ 155.60 Opposing Motion for New Trial [Code Civ. Proc. § 659]--No Irregularity in Court Proceedings Sufficient to Require New Trial [Code Civ. Proc. § 657(1)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*], Plaintiff,	)	IES IN OPPOSITION TO MOTION FOR NEW TRI-
vs.	)	AL
_____ [*name*], Defendant.	)	[Telephone Appearance]
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE MOTION FOR NEW TRIAL SHOULD BE DENIED BECAUSE THERE WAS NO IRREGULARITY IN THE PROCEEDINGS OF THE COURT THAT PREVENTED _____ [PLAINTIFF *or* DEFENDANT] FROM HAVING A FAIR TRIAL AND THAT MATERIALLY AFFECTED HIS/HER/ITS SUBSTANTIAL RIGHTS.

A. No New Trial for Harmless Error. The trial court is bound by the rule of *Article VI, Section 13, of the California Constitution* that prejudicial error is a basis for granting a new trial, but the court has no discretion to grant a new trial

for harmless error (*Osborne v. Cal-Am Financial Corp. (1978) 80 Cal. App. 3d 259, 265-266, 145 Cal. Rptr. 584*).

B. Judge's Personal Habits, Conduct, or Statements. Personal habits, conduct, deportment, or statements of the judge that have no relation to or effect on the disposition of the case are not an irregularity in the proceedings of the court for which a new trial may be granted under *Section 657(1) of the Code of Civil Procedure* (*Gay v. Torrance (1904) 145 Cal. 144, 150, 78 P. 540*).

C. Decided Cases Not Controlling Precedents in New Situation. Decided cases in which trial judges have been found guilty of misconduct are not controlling precedents in a new situation in which new factual questions are presented (*Weil v. Weil (1951) 37 Cal. 2d 770, 786, 236 P.2d 159* ; *Gardner v. Mobil Oil Co. (1963) 217 Cal. App. 2d 220, 225-226, 31 Cal. Rptr. 731*).

[*Optional*] **D. Judge's Expression of Disagreement With Policy of Statute.** It is not an irregularity in the proceedings of the court for which a new trial may be granted under *Section 657(1) of the Code of Civil Procedure* if the court expresses to the parties its disagreement with the policy of a statute and what the policy should be if its disagreement does not lead the court to disregard the statute (*Weil v. Weil (1951) 37 Cal. 2d 770, 776, 236 P.2d 159*).

[*Optional*] **E. Judge's Encouragement of Settlement of Litigated Cases.** A trial judge, within proper bounds, may encourage the settlement of litigated cases, and such encouragement is not an irregularity in the proceedings of the court for which a new trial may be granted under *Section 657(1) of the Code of Civil Procedure* (*Schrader Iron Works, Inc. v. Lee (1972) 26 Cal. App. 3d 621, 639-640, 103 Cal. Rptr. 106* ; *Gardner v. Mobil Oil Co. (1963) 217 Cal. App. 2d 220, 224-226, 31 Cal. Rptr. 731*).

[*Optional*] **F. Judge's Expression of Tentative Views of Case.** The judge's expression of tentative views of the case to respective counsel during the course of trial so that counsel may be advised of what course to take is not a prejudgment of the case for which a new trial may be granted when the views are expressly subject to modification in the event that later evidence should require it (*Gardner v. Mobil Oil Co. (1963) 217 Cal. App. 2d 220, 222, 225-226, 31 Cal. Rptr. 731*).

[*Optional*] **G. Judge's Expression of Doubt Concerning Credibility of Witness.** In a nonjury trial, the trial judge's expression of doubt concerning the credibility of a trial witness, if made after the evidence has been presented, is not an irregularity in the proceedings of the court for which a new trial may be granted if it is apparent from a reading of the entire record that both sides received a fair trial (*see* *Jaffe v. Vitz (1948) 84 Cal. App. 2d 810, 813-814, 191 P.2d 802* ; *see also* *Schrader Iron Works, Inc. v. Lee (1972) 26 Cal. App. 3d 621, 640-641, 103 Cal. Rptr. 106*).

[*Optional*] **H. Judge's Expression of Opinion on Question of Law or Interpretation of Statute.** The court's remarks before the introduction of evidence by either party are not an irregularity in the proceedings of the court for which a new trial may be granted under *Section 657(1) of the Code of Civil Procedure* when the court merely expressed an opinion on a question of law and the interpretation of a statute and the moving party was permitted to present his/her case fully without any hindrance or restraint on the part of the court (*Schrader Iron Works, Inc. v. Lee (1972) 26 Cal. App. 3d 621, 638-639, 103 Cal. Rptr. 106*).

[*Optional*] **I. Judge's Questioning of Witness.** The trial judge is entitled to question a witness in order to ascertain the truth and it is not error for him or her to do so when the party claiming error cannot point out the error or the prejudicial effect (*Schrader Iron Works, Inc. v. Lee (1972) 26 Cal. App. 3d 621, 640, 103 Cal. Rptr. 106*).

[*Optional*] **J. Judge's Bias or Prejudice Not Irregularity.** Bias or prejudice is not an irregularity, but a condition of mind that may only be challenged by moving for disqualification pursuant to *Sections 170 through 170.5 of the Code of Civil Procedure.* If the aggrieved party did not urge disqualification at the time the judge made his or her comments, the party is deemed to have waived objection and cannot raise the issue for the first time on motion for new trial (

Develop-Amatic Engineering v. Republic Mortgage Co. (1970) 12 Cal. App. 3d 143, 150, 91 Cal. Rptr. 193).

[*Optional*] **K. Lack of Objection to Improper Statement.** The moving party has a duty to call attention to the impropriety of the court's remarks in order to give the court an opportunity to prevent, by proper instruction, any prejudicial effect on the jury; when there is a failure to do so, the claim of misconduct will not be considered if any harmful effect on the jury could have been removed by instructing it to disregard the remarks (*Ward v. De Martini (1930) 108 Cal. App 745, 751, 292 P. 192*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for new trial on the ground of irregularity in the proceedings of the court [*Code Civ. Proc. § 657(1)*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. In particular, counsel should set out the alleged irregularity and show that it did not prevent the moving party from having a fair trial. This might include argument that the judge's actions did not constitute misconduct. For example, if a judge expresses disagreement with the policy of a statute during trial, counsel should show that despite his or her comments, the judge tried the case according to the law, and hence there was no misconduct [*see Weil v. Weil (1951) 37 Cal. 2d 770, 776, 236 P.2d 159]* . In addition, counsel might argue that even though the trial judge's conduct may constitute error, the error was not prejudicial and not a basis for granting a new trial [*see Osborne v. Cal-Am Financial Corp. (1978) 80 Cal. App. 3d 259, 265-266, 145 Cal. Rptr. 584]* .

[c] Related Pleading and Practice Forms

For forms relating to a motion for new trial and an order denying the motion, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[d] Related Memoranda

The points and authorities set out in *§ 155.55* may be combined in an appropriate case with those in this form.

[e] Opposing Points and Authorities

In an appropriate case, this form may be used to oppose a motion for new trial supported by the points and authorities set out in *§ 155.50* or *§ 155.55*.

[3] Discussion of Authorities

[a] No New Trial for Harmless Error

In ***Osborne v. Cal-Am Financial Corp.*** *(1978) 80 Cal. App. 3d 259, 145 Cal. Rptr. 584* , plaintiff seller brought an action for damages against a buyer for breach of a contract to purchase real property. After the jury returned a verdict for the buyer, the trial court granted the seller's motion for a new trial on the ground that the court had abused its discretion by admonishing plaintiff and counsel in front of the jury and by refusing to allow plaintiff on rebuttal to call an expert witness to testify to the fair market value of the real property at the time of the breach. The court of appeal reversed the order granting a new trial, stating that the trial court is bound by the rule of *Cal. Const., art. VI, § 13*, which states that prejudicial error is the basis for a new trial and there is no discretion to grant a new trial for harmless error. In this case, the trial judge appeared to state that he did not think that his conduct could have been prejudicial, but he granted a new trial, because he believed that the grant was required as a matter of form to foster the appearance of justice. On examining the merits of the case, the court decided that the order was unsound, since it was clear that prejudicial error did not occur (*80 Cal. App. 3d 259, 266-267)* . The grant of a new trial for harmless error violates the constitutional provision and wastes judicial time and resources to no purpose (*80 Cal. App. 3d 259, 266)* .

[b] Judge's Personal Habits, Conduct, or Statements

The factual and procedural background of ***Gay v. Torrance*** *(1904) 145 Cal. 144, 78 P. 540* is discussed in *§ 155.50[3][a]*. The Supreme Court stated that personal misconduct of a judge who has under advisement a case tried in his or her court can be an irregularity in the proceedings of the court for which a new trial may be granted under *Code Civ. Proc. § 657(1)* (*145 Cal. 144, 148-149)* . The language of the statute is sufficiently broad to include any departure by the court from the due and orderly method of disposition of an action by which the substantial rights of a party have been materially affected, where such departure is not evidenced by a ruling or order that may be the subject of an exception (*145 Cal. 144, 149-150)* . The Court stated, however, that the personal habits, conduct, deportment, or statements of the judge that have no relation to or effect on the disposition of the case are not the proper subject of complaint on motion for new trial. The question is whether the acts were of a nature and done under such circumstances as to afford reasonable grounds for the conclusion that the defeated party has not had a fair and impartial trial (*145 Cal. 144, 150)* .

[c] Decided Cases Not Controlling Precedents in New Situation

In ***Weil v. Weil*** *(1951) 37 Cal. 2d 770, 236 P.2d 159* , plaintiff husband brought an action for divorce and defendant wife cross complained for separate maintenance. During trial, the judge stated to counsel at the bench and in chambers that he did not believe in separate maintenance for short marriages and that unless there was additional evidence that he had not heard, he would not award separate maintenance. He also stated that if defendant amended her cross complaint to ask for divorce, he was disposed to granting one. At the conclusion of trial, defendant amended her cross complaint to pray for divorce. A divorce was granted to defendant, and a property settlement was made. After the decree was entered, defendant refused to comply with its provisions. She discharged her attorney and moved for new trial on the ground that the trial judge was guilty of misconduct in coercing her to amend her prayer and consent to the judgment. Her motion was denied.

The Supreme Court affirmed the judgment granting defendant a divorce on the amended cross complaint, stating that each of the cited cases in which trial judges have been found guilty of misconduct has been substantially different from the others. None of them can be a controlling precedent in a new situation in which new factual questions are presented. Differences in the nature of the litigation, the particular comments or conduct of the trial judge, the scope and reliability of affidavits by parties and attorneys, and the state of the evidence at the trial make it essential that each case turn on its own facts (*37 Cal. 2d 770, 786)* .

In ***Gardner v. Mobil Oil Co.*** *(1963) 217 Cal. App. 2d 220, 31 Cal. Rptr. 731* , plaintiffs lessors brought an action to reform a written lease agreement and to recover damages from defendant lessee for the breach of the agreement as

reformed. After judgment for defendant, plaintiffs moved for a new trial on the ground that there were irregularities in the proceedings of the court by which they were prevented from having a fair trial [*Code Civ. Proc. § 657(1)*]. The plaintiffs claimed that the trial judge formed an opinion on the merits of the case before they had completed presentation of their evidence and that he also expressed this opinion to respective counsel, urging them to make a settlement. Their motion was denied.

The court of appeal affirmed judgment for defendant, concluding that the record did not present a situation in which the trial judge was guilty of misconduct that required the granting of a new trial (*217 Cal. App. 2d 220, 226)* . Each of the cases that plaintiffs cited in which trial judges had been found guilty of misconduct differed substantially from the others; none of them can be a controlling precedent in a new situation in which new factual questions are presented. Each case must turn on its own facts because of differences in the nature of the litigation, the particular comments or conduct of the trial judge, the scope or reliability of affidavits, and the state of the evidence (*217 Cal. App. 2d 220, 225-226)* .

[d] Judge's Expression of Disagreement With Policy of Statute

The factual and procedural background of ***Weil v. Weil*** *(1951) 37 Cal. 2d 770, 236 P.2d 159* , is discussed in [c], *above*. After defendant's motion for new trial on the grounds of irregularity in the proceedings of the court [*Code Civ. Proc. § 657(1)*] based on the judge's alleged misconduct was denied, she appealed the judgment.

The Supreme Court affirmed the judgment granting defendant a divorce on the amended cross complaint, stating that the judge's statement that he did not believe in separate maintenance for short marriages did not evidence an unwillingness to try defendant's case according to law. A judge is not required to approve every statute or precedent by which his decision is governed. A judge who disagrees with the policy of a statute is not necessarily disqualified from hearing a case in which that statute must be applied. In the present case, the judge's opposition to separate maintenance was a personal opinion concerning the wisdom of the legislation. The judge stated that his mind was still open on this issue and that he did not believe that separate maintenance should be granted unless there was additional evidence that he had not heard. Had he regarded length of marriage as a controlling circumstance, additional evidence would have made no difference to him. Therefore, the judge was not guilty of misconduct in thus expressing to the parties what he believed the law should be (*37 Cal. 2d 770, 776)* .

[e] Judge's Encouragement of Settlement of Litigated Cases

Schrader Iron Works, Inc. v. Lee *(1972) 26 Cal. App. 3d 621, 103 Cal. Rptr. 106* , was an action brought by plaintiff to foreclose a mechanic's lien against the property owner with whom plaintiff had contracted, the present owners of the property who had purchased it from the prior owner, and the assignees of a second deed of trust from the prior owner. After judgment was rendered for plaintiff against all defendants, defendants moved for a new trial on the grounds of irregularity in the proceedings of the court [*Code Civ. Proc. § 657(1)*]. The motion was based on conduct of the trial judge that allegedly prevented defendants from having a fair trial.

The court of appeal modified the judgment to provide liability only against the prior owner who had contracted with the plaintiff and affirmed the original judgment with the modification (*26 Cal. App. 3d 621, 642)* . The court rejected defendants' contention that the trial judge committed certain irregularities that prevented them from having a fair trial. Although defendants contended that the judge exerted pressure on defendants to settle the case in the amount offered by plaintiff, the claim of coercion was without substance. The judge's statement that he thought counsel for plaintiff offered a fair figure was made in the light of the court's belief that defendants' defense, based on lack of prelien notice, was not valid. When the offer was unequivocally rejected, the judge proceeded with trial (*26 Cal. App. 3d 621, 639)* . According to the record, there was nothing more than a sincere effort on the part of the judge to settle a case which, as it then appeared to him, was one that called for settlement. The trial judge's ultimate decision was one that he was obliged to render under the law and was not one that could be said to be the result of pique because the settlement had been

rejected (*26 Cal. App. 3d 621, 639-640)* .

The factual and procedural background of ***Gardner v. Mobil Oil Co.*** *(1963) 217 Cal. App. 2d 220, 31 Cal. Rptr. 731* , is discussed in [c], *above*. After judgment for defendant, plaintiffs moved for new trial on the ground of irregularities in the proceedings of the court [*Code Civ. Proc. § 657(1)*]. Plaintiffs claimed that the trial judge had formed an opinion on the merits of the case before plaintiffs had completed the presentation of their evidence and had expressed his opinion to respective counsel, urging them to make a settlement. Plaintiffs' motion was denied, and they appealed the judgment.

The court of appeal affirmed judgment for defendant, stating that the rule is well established that, within proper bounds, a trial judge should encourage the settlement of litigated cases. The trial judge's comment that he was interested in knowing whether a settlement could be made and his indication that he thought a figure of less than $1,000 was appropriate was not more than a comment that the judge felt might be considered in a settlement discussion. It merely represented an observation based upon what had transpired up to that point in the case. It did not indicate that the judge had closed his mind on the issue of damages or that he would not award damages if the law and the evidence required him to do so (*217 Cal. App. 2d 220, 223-224)* . The court distinguished the instant case from *Rosenfield v. Vosper (1941) 45 Cal. App. 2d 365, 114 P.2d 29* (discussed in *§ 155.50[4][b]*), in which the judge urged defendant's counsel to settle for $7,500 before defendants had presented any evidence. In the case at bar, the remarks of the court were made after plaintiffs had been conducting their case for three days and had not yet produced sufficient evidence to establish a prima facie case (*217 Cal. App. 2d 220, 225)* . Considering the court's frame of mind at the conference, his remarks became less significant, since if plaintiffs were not going to be able to prove a prima facie case or damages as a result of breach, there would be no point in defendant offering a settlement of any substantial amount (*217 Cal. App. 2d 220, 225)* .

[f] Judge's Expression of Tentative Views of Case

The factual and procedural background of ***Gardner v. Mobil Oil Co.*** *(1963) 217 Cal. App. 2d 220, 31 Cal. Rptr. 731* , is discussed in [c] and [e], *above*. On motion for new trial, plaintiffs claimed that the trial judge was guilty of prejudicial misconduct when he stated in chambers that he was interested in knowing whether a settlement could be made and was thinking of a figure less than $1,000. After denial of plaintiffs' motion, they appealed the judgment.

The court of appeal affirmed judgment for defendant, stating that the comments of the trial judge were made without bias or prejudice toward either party. The comments were made with a desire to give counsel for the respective parties an expression of the conclusions of the trial judge up to the moment so that counsel could be advised of what course to take (*217 Cal. App. 2d 220, 226)* . The judge's remarks represented an observation based upon what had transpired up to that point in the case. They did not indicate that he had closed his mind on the issue of damages or that he would not award damages if the law and evidence required him to do so (*217 Cal. App. 2d 220, 224)* .

[g] Judge's Expression of Doubt Concerning Credibility of Witness

In ***Jaffe v. Vitz*** *(1948) 84 Cal. App. 2d 810, 191 P.2d 802* , plaintiff brought an action on a written contract for services rendered in connection with the purchase of real property. As the trial neared completion, the trial judge remarked sharply on defendant's lack of credibility as a witness. Defendant appealed the judgment for plaintiff, charging that the trial judge was guilty of prejudicial misconduct and that a new trial should be granted.

The court of appeal affirmed the judgment for plaintiff, stating that it was apparent from the entire record that both parties received a fair trial. There was no intimation that the judge prejudged the case. In fact, the remarks of the court for which complaint was made had been uttered either after the case had closed or at the end of trial, and the witness in question had already been thoroughly impeached by an entirely disinterested witness. The judge had the right to announce the mental processes by which he determined the credibility of the witnesses and by which he arrived at his conclusions. A new trial cannot be demanded on the ground that the judge in exercising this right may have exceeded

the bounds of propriety (*84 Cal. App. 2d 810, 814)* .

The factual and procedural background of ***Schrader Iron Works, Inc. v. Lee*** *(1972) 26 Cal. App. 3d 621, 103 Cal. Rptr. 106* , is discussed in [e], *above*. The court of appeal rejected defendants' contention that the trial judge committed certain irregularities that prevented them from having a fair trial [*Code Civ. Proc. § 657(1)*]. One irregularity that defendants asserted was that the trial judge expressed a doubt concerning the credibility of Chinese witnesses. In a colloquy between the court and counsel at the time findings were being settled, defense counsel asserted that it was apparent that two Chinese witnesses had not lied, and the trial judge stated that he did not know whether they had lied or not. The judge related a previous experience when a Chinese witness testified that he did not understand English and later turned out to be a university graduate who was articulate in English. The judge added, however, that he should not judge individuals by past experience. Although the court of appeal stated that it would have been better to have left these remarks unsaid, it was apparent from the other remarks of the trial judge that he was not motivated by past experience in judging the credibility of the Chinese witnesses in the case at bar (*26 Cal. App. 3d 621, 640-641)* .

[h] Judge's Expression of Opinion on Question of Law or Interpretation of Statute

The factual and procedural background of ***Schrader Iron Works, Inc. v. Lee*** *(1972) 26 Cal. App. 3d 621, 103 Cal. Rptr. 106* , is discussed in [e], *above*. The court of appeal rejected defendants' contention that the trial judge committed certain irregularities that prevented them from having a fair trial [*Code Civ. Proc. § 657(1)*]. Defendants contended that the trial court prejudged the case in favor of plaintiff before the introduction of any evidence by either party (*26 Cal. App. 3d 621, 638-639)* . Defendants' declaration asserted that after hearing opening statements, the trial judge stated that defendants did not have a defense, that he thought title companies should pay claims like this one, that he referred to title companies as the "Supreme Court of Montgomery Street," and that he used this expression several times in a manner indicating hostility to title companies. The counterdeclaration stated that the colloquy between court and counsel revolved around whether plaintiff was required to give prelien notice and that the trial judge stated in effect that although he was not prejudging the case, he felt that there was no merit in the defense of lack of prelien notice to the buyer of the property. The court of appeal said that it was apparent that the trial judge was merely expressing an opinion on a question of law and the interpretation of a statute, an interpretation with which the court agreed. The trial record revealed that the defendants were permitted at trial to present their defenses, both legal and factual, without any hindrance or restraint on the part of the court. Therefore, this was not grounds for a new trial pursuant to *Code Civ. Proc. § 657(1)* (*26 Cal. App. 3d 621, 638-639)* .

[i] Judge's Questioning of Witness

The factual and procedural background of ***Schrader Iron Works, Inc. v. Lee*** *(1972) 26 Cal. App. 3d 621, 103 Cal. Rptr. 106* , is discussed in [e], *above*. The court of appeal rejected defendants' contention that the trial judge committed certain irregularities that prevented them from having a fair trial [*Code Civ. Proc. § 657(1)*]. Defendants claimed that the trial court demonstrated hostility toward the defense in connection with the testimony of a witness. Defendants' declaration stated that the judge took over the examination of the witness concerning the purchase contract of the real property before the witness had been permitted to testify concerning that matter on direct examination. During this questioning, the court allegedly used leading questions to elicit confused testimony contrary to the face of the document. The court of appeal stated that the statements made in the declaration were essentially conclusionary and were not evidentiary. The court pointed out that a trial judge is permitted to question a witness in order to ascertain the truth and that it is not error for him or her to do so unless the party claiming error can point out such error, as well as its prejudicial effect (*26 Cal. App. 3d 621, 640)* .

[j] Judge's Bias or Prejudice Not Irregularity

In ***Develop-Amatic Engineering v. Republic Mortgage Co.*** *(1970) 12 Cal. App. 3d 143, 91 Cal. Rptr. 193* , a corporation brought an action against several defendants for declaratory relief, an accounting, and an injunction in an

effort to have a deed absolute in form to be declared a mortgage in fact and to quiet title to a parcel of land. After closing arguments, the trial judge remarked that he found the value estimates of the property adduced during trial difficult to believe. The court ordered that plaintiff take nothing by its complaint. Plaintiff moved for new trial on the ground of irregularity in the proceedings of the court [*Code Civ. Proc. § 657(1)*], contending that the trial judge's judgment was based on bias and prejudice as defined by former Code Civ. Proc. § 170(5) (*now see Code Civ. Proc. § 170.1(a)(6)*), which provides for the disqualification of a judge by reason of bias or prejudice. Plaintiff did not move to disqualify the judge during the action and urged bias or prejudice for the first time on its motion for a new trial. After its motion was denied, it appealed the judgment.

The court of appeal affirmed the judgment, stating that plaintiff should have moved to disqualify the judge as provided by former Code Civ. Proc. § 170(5) (*now see Code Civ. Proc. §§ 170.1(a)(6), 170.3(c)*) when the judge made the comments in question. The disqualification of a judge as provided in former Code Civ. Proc. § 170(5) (*now see Code Civ. Proc. §§ 170.1(a)(6), 170.3(c)*) must be asserted at the earliest practicable opportunity, otherwise it is deemed waived. Since plaintiff failed to do so, he waived any claimed grounds of disqualification, since he could not gamble on a favorable judgment and then move for disqualification on receiving an adverse judgment. The court also observed that the question of bias or prejudice cannot be raised for the first time on a motion for a new trial. Bias or prejudice is not an irregularity but a condition of mind that may only be taken advantage of by the method prescribed in former Code Civ. Proc. § 170 (*now see Code Civ. Proc. §§ 170-170.5*). However, evidence of the trial judge's conduct during the trial may be shown as evidence of irregularities preventing a fair trial. An irregularity is an overt act of the judge that prevents the complaining party from having a fair trial (*12 Cal. App. 3d 143, 150)* . However, plaintiff's declaration in support of its motion for a new trial did not show any irregularities in the conduct of the court. In the court's findings, the trial judge accepted the valuation placed on the property by a witness for defendant. Accordingly, the court of appeal presumed that plaintiff was attempting to impeach the trial court's findings by using remarks the trial court made from the bench. The plaintiff could not do this, since the findings superseded any opinion the judge may have expressed (*12 Cal. App. 3d 143, 151)* .

[k] Lack of Objection to Improper Statement

The factual and procedural background of ***Ward v. De Martini*** *(1930) 108 Cal. App. 745, 292 P. 192* , is discussed in *§ 155.50[3][f]*. The court of appeal affirmed the judgment, stating that it was the duty of the defendant promptly to call attention to the impropriety of the remarks in order to give the court an opportunity to prevent any prejudicial effect on the jury by means of a proper instruction. When there is a failure to do so, the claim of misconduct will not be considered on appeal unless the conduct complained of was such that a harmful result could not be obviated by an instruction. In this case, the court could not say that any harmful effect upon the jury could not have been removed by instructing them to disregard the remarks. In fact, the trial court instructed the jury that questions of fact were solely for the jury's consideration, and that the court had no right to suggest, and did not suggest, what facts had been established in the case (*108 Cal. App. 745, 751)* . After examining the entire case, the court was satisfied that the verdict was fully sustained by the evidence and that no miscarriage of justice occurred (*108 Cal. App. 745, 750-752)* .

[4] Additional Authorities

[a] No New Trial for Harmless Error

In *Mosesian v. Pennwalt Corp. (1987) 191 Cal. App. 3d 851, 236 Cal. Rptr. 778* , the trial court granted plaintiff's motion for new trial on the ground that prejudicial hearsay statements were admitted into evidence, and defendants appealed. The court of appeal reversed, holding, inter alia, that even if admission of the disputed statements constituted error, the error was harmless in light of the substantial evidence supporting the judgment and the mitigating admonishments given to the jury (*191 Cal. App. 3d 851, 867)* . The court therefore adhered to the holding in *Osborne v. Cal-Am Financial Corp. (1978) 80 Cal. App. 3d 259, 265-266, 145 Cal. Rptr. 584* (*see* [3][a], *above*), stating that granting a new trial motion on harmless error violates *Cal. Const., Art. VI, § 13*, and rejected the holding of *Richard v.*

Scott (1978) 79 Cal. App. 3d 57, 65, 144 Cal. Rptr. 672 , stating that the party prevailing on the motion for new trial is not required to demonstrate that prejudice resulted from the error for which a new trial was granted (*191 Cal. App. 3d 851, 858-860)* .

[b] Judge's Personal Habits, Conduct, or Statements

In *Lowe v. Massachusetts Mut. Life Ins. Co. (1976) 54 Cal. App. 3d 718, 127 Cal. Rptr. 23* , the court of appeal affirmed a judgment against the plaintiff assignees of a loan applicant for the return of a deposit retained by an insurance company on failure to close the loan. The court held that the trial court did not abuse its discretion in denying plaintiff's motion for a new trial on the ground of irregularity in the proceedings of the court [*Code Civ. Proc. § 657(1)*] based on the court's remarks. The court noted that personal habits, conduct, deportment, or statements of the judge that have no relation to or effect on the disposition of the case are not the proper subject of complaint on a motion for new trial (*54 Cal. App. 3d 718, 740)* .

[c] Judge's Encouragement of Settlement of Litigated Cases

In *Chalfin v. Chalfin (1953) 121 Cal. App. 2d 229, 263 P.2d 16* , the court of appeal affirmed a judgment of divorce that distributed the property of the parties. Plaintiff wife maintained that she had been coerced by the court into accepting a property settlement. However, the court of appeal stated that the position assumed by the judge did not deprive her of her day in court, since the court never forbade her from introducing pertinent and competent evidence (*121 Cal. App. 2d 229, 236)* . The trial court also repeatedly insisted that plaintiff not make a property settlement unless she chose to do so of her own free will (*121 Cal. App. 2d 229, 235)* .

[d] Judge's Expression of Tentative Views of Case

Hansen v. Hansen (1965) 233 Cal. App. 2d 575, 43 Cal. Rptr. 729 , was a divorce action in which plaintiff wife was granted an interlocutory decree of divorce. Plaintiff appealed from the judgment on the ground that the trial judge manifested such prejudice that it was impossible for her to receive a fair and impartial trial on the merits. The court of appeal affirmed the judgment in part and reversed it in part, but held that the conduct of the judge did not constitute prejudicial misconduct. The court noted that it has the right, if not the duty, to give the parties its tentative conclusions as the case unfolds, or to give an expression of its conclusions up to the moment, in order that counsel may be advised what course to take (*233 Cal. App. 2d 575, 585)* .

[e] Judge's Expression of Doubt Concerning Credibility of Witness

In *Smith v. Coleman (1941) 46 Cal. App. 2d 507, 116 P.2d 133* , the court of appeal affirmed a judgment against defendant physicians in a medical malpractice action. At the conclusion of a nonjury trial, the trial judge referred to defendants as "butchers and bunglers," suggested that they were committing perjury or were suffering from a loss of memory, and stated that an expert witness was endeavoring to cover up for his professional colleagues (*46 Cal. App. 2d 507, 513-514)* . The court of appeal stated that the trial judge had a right to announce the mental processes by which he determined the credibility of the witnesses and by which he arrived at his conclusions. It added that a new trial cannot be demanded in a nonjury trial on the ground that the judge in exercising this right may have exceeded the bounds of propriety (*46 Cal. App. 2d 507, 514)* .

[f] Judge's Questioning of Witness

Toriyama v. Putnam (1933) 134 Cal. App. 201, 25 P.2d 34 , was an action for wrongful death resulting from an automobile accident in which defendant passed plaintiff's car and plaintiff's car ran off the road. After the jury returned a verdict for defendant, plaintiff's motion for new trial on the ground of irregularity in the proceedings of the court [*Code Civ. Proc. § 657(1)*] and newly discovered evidence [*Code Civ. Proc. § 657(4)*] was denied. Plaintiff's charge of prejudicial misconduct was based on the fact that the judge asked several questions of plaintiff's witness regarding the

location of bamboo plants on the left running board of plaintiff's car. The court of appeal affirmed the judgment, stating that prejudicial misconduct could not be predicated on the judge's questions, since he desired to clear up uncertainty in the testimony concerning a material point and testimony relating to the condition of the car and plaintiff's load had been previously offered by both sides without objection (*134 Cal. App. 201, 204-205)* .

[g] Lack of Objection to Improper Statement

In *Woods v. Pacific Greyhound Lines (1949) 91 Cal. App. 2d 572, 205 P.2d 738* , the court of appeal affirmed judgment for defendant bus company in a personal injury action. The court held that the trial court did not abuse its discretion in denying plaintiffs' motion for new trial based on the remarks of the trial judge [*Code Civ. Proc. § 657(1)*] and jury misconduct [*Code Civ. Proc. § 657(2)*]. It is not improper for a trial judge, in passing on the competency of evidence to which an objection has been made, to give his reasons for the ruling, provided that the remarks are not expressed in language or manner that is prejudicial. Furthermore, plaintiffs waived their objection to the alleged prejudicial nature of the court's statement of its reason for sustaining the objection to the question propounded by their failure to assign it as prejudicial error or to ask the court to instruct the jury to disregard it (*91 Cal. App. 2d 572, 575)* .

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15-155 California Points & Authorities §§ 155.61-155.64

[Reserved]

§§ 155.61[Reserved]

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15-155 California Points & Authorities § 155.65

§ 155.65 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Court Order or Abuse of Discretion Did Not Prevent Fair Trial [Code Civ. Proc. § 657(1)]

[1] FORM

[*Caption. See § 155.60[1].*]

A NEW TRIAL SHOULD NOT BE GRANTED SINCE THE _____ [ORDER OF THE COURT *and/or* ALLEGED ABUSE OF DISCRETION] DID NOT PREVENT _____ [PLAINTIFF *or* DEFENDANT] FROM HAVING A FAIR TRIAL AND DID NOT MATERIALLY AFFECT HIS/HER/ITS SUBSTANTIAL RIGHTS.

A. No New Trial If No Prejudice to Jury and Evidence Supports Verdict. A new trial will not be granted for an order of the court or abuse of discretion if there is no evidence that it prejudiced the jury and if the evidence in the case is sufficient to sustain the verdict (*Sheehan v. Hammond (1905) 2 Cal. App. 371, 375, 84 P. 340*).

[*Optional*] **B. Indiscreet Order of Court.** An indiscreet order of the court made during trial, but after the retirement of the jury, is not grounds for granting a new trial when it is shown that none of the jurors had knowledge of the order until after the rendition of the verdict (*Sheehan v. Hammond (1905) 2 Cal. App. 371, 375-376, 84 P. 340*).

[*Optional*] **C. Denial of Continuance to Produce Material Party-Witness.** A new trial will not be granted if the denial of a motion for continuance was within the discretion of the trial court (*see Henderson v. Drake (1953) 118 Cal. App. 2d 777, 782, 258 P.2d 879*).

[*Optional*] **D. Refusal of Leave to Amend Answer.** A new trial will not be granted for refusal to allow defendant leave to amend his or her answer if the alleged abuse of discretion was entirely within the discretion of the trial court (*Cook v. Suburban Realty Co. (1912) 20 Cal. App. 538, 541-542, 129 P. 801*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for new trial on the ground that there was a court order or abuse of discretion that prevented the moving party from having a fair trial [*Code Civ. Proc. § 657(1)*]. It generally opposes a motion for new trial that is supported by the points and authorities set out in *§ 155.55*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. In particular, counsel should show how the moving party was not prejudiced by the order of the court or the alleged abuse of discretion. If the motion is based on a court order, counsel may desire to include a copy of the order after obtaining one from the court clerk.

[c] Related Pleading and Practice Forms

For a notice of intention to move for a new trial as well as an order denying the motion, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[3] Discussion of Authorities

[a] No New Trial If No Prejudice to Jury and Evidence Supports Verdict

In ***Sheehan v. Hammond*** *(1905) 2 Cal. App. 371, 84 P. 340* , plaintiff employee brought an action for personal injuries claimed to have resulted from defendant employer's negligence in furnishing unsafe appliances for plaintiff to use in the course of employment. During trial, a witness for defendant testified during cross examination that he had given false testimony at the direction of defendant. After the case had been submitted to the jury, the court made an order that recited that the witness's testimony was "a tissue of falsehoods" and that the record had shown that he had been suborned to testify as he did by the defendant. The court further committed defendant to the custody of the sheriff and set his bail at $2,000. After the jury rendered a verdict in favor of plaintiff, defendant moved for a new trial on several grounds, including an order of the court preventing a fair trial [*Code Civ. Proc. § 657(1)*]. When the motion was denied, defendant appealed the judgment.

The court of appeal affirmed the judgment, finding that the trial court's denial of defendant's motion for a new trial was proper. The court stated that the order of the court, under the circumstances disclosed by the record, was not a ground for granting a new trial. If the jury had known of the order, the order would have seriously injured defendant. However, the order was not made in the presence or hearing of the jury. The bailiff who had charge of the jury had sworn that the jury had no knowledge of the order until after the verdict had been rendered. The court stated that it could not set aside the verdict because the court made an order of which the jury was ignorant (*2 Cal. App. 371, 375)* . Furthermore, the evidence was sufficient to sustain the verdict. There was evidence showing that the appliance was defective and that plaintiff was not warned of the danger (*2 Cal. App. 371, 375-376)* . Since no prejudice resulted to the jury and the

evidence supported the verdict, the court affirmed the judgment and the order denying a new trial (*2 Cal. App. 371, 375-377)* .

[b] Indiscreet Order of Court

The factual and procedural background of ***Sheehan v. Hammond*** *(1905) 2 Cal. App. 371, 84 P. 340* , is discussed in [a], *above*. After the case had been submitted to the jury, the court made an order that stated that a witness's testimony was a "tissue of falsehoods" and that the record had shown that he had been suborned by defendant to perjure himself. The court committed defendant to the custody of the sheriff and set his bail at $2,000. After the jury rendered a verdict in favor of plaintiff, defendant moved for a new trial on several grounds, including an order of court preventing a fair trial [*Code Civ. Proc. § 657(1)*]. When defendant's motion was denied, he appealed the judgment.

The court of appeal affirmed the judgment, noting that the trial court's denial of defendant's motion for a new trial was proper. The court stated that the court order regarding the witness's testimony was indiscreet and made without the mature and careful deliberation that should characterize all judicial action. Nevertheless, the circumstances of the record did not justify the granting of a new trial. The order was not made until after the jury had retired. The bailiff who had charge of the jury had sworn that they had no knowledge of the order until after the verdict had been rendered and the jury had been discharged. The court added that it cannot set aside a verdict because the court, after the jury retired, made an order of which the jury was ignorant. Furthermore, the evidence in the case sufficiently supported the verdict. Since there was no showing that the jury had been prejudiced by the order in question and the evidence supported the verdict, the court affirmed the denial of defendant's motion for a new trial (*2 Cal. App. 371, 375-376)* .

[c] Denial of Continuance to Produce Material Party-Witness

In ***Henderson v. Drake*** *(1953) 118 Cal. App. 2d 777, 258 P.2d 879* , plaintiff brought an action on a draft payable to him and for the enforcement of a Mexican judgment obtained on the draft. Defendant had executed the draft in Mexico as payment to plaintiff for legal services. Before trial, plaintiff's counsel moved for a continuance on the ground that it was imperative for plaintiff, who was then in Mexico, to be present at trial. Counsel had thought that plaintiff would not have to be present at trial until defendant amended her cross complaint to allege that plaintiff had conspired with a third party to defraud defendant. The trial court denied the motion for a continuance and ordered the case to trial the next day. After judgment for defendant, the trial court granted plaintiff's motion for a new trial on the basis of insufficiency of the evidence [*Code Civ. Proc. § 657(6)*] and improper denial of a motion for a continuance [*Code Civ. Proc. § 657(1)*]. Defendant appealed the order.

Even though the court of appeal affirmed the order, it stated that it was quite apparent that the granting or denial of this continuance was probably within the discretion of the trial court and that a ruling either way on the motion probably would not be disturbed on appeal. It was equally apparent, the court added, that on the motion for new trial, after the court had presumably discovered how imperative plaintiff's presence was for the presentation of his case, it had decided that it had abused its discretion in denying the motion and concluded that the motion should have been granted (*118 Cal. App. 2d 777, 782-783)* . No reason appeared why the trial court, on the motion for new trial, cannot change its mind as to the weight of certain facts on which discretionary action was predicated. The court added that the ground of improper denial of the continuance was sufficient to support the trial court's order granting a new trial and that the order granting the new trial should therefore be affirmed (*118 Cal. App. 2d 777, 783)* .

[d] Refusal of Leave to Amend Answer

Cook v. Suburban Realty Co. *(1912) 20 Cal. App. 538, 129 P. 801* , was an action to recover damages for injuries alleged to have been inflicted on the real property of plaintiff by defendant's wrongful acts. Defendant allegedly filled a natural drain that carried water from plaintiff's property and a large portion of plaintiff's land had, on numerous occasions, been submerged. After verdict for plaintiff, defendant moved for a new trial, claiming that the court

prejudicially erred when it refused to allow defendant to amend his answer. When the motion was denied, defendant appealed the judgment.

The court of appeal dismissed the appeal and affirmed the order denying a new trial. It noted that *Code Civ. Proc. § 657(1)* specifies four separate and distinct grounds on which a motion for a new trial may be made, and the last of these grounds is any order of the court or abuse of discretion by which either party was prevented from having a fair trial. The court stated that the action of a trial court in refusing a party leave to amend a pleading can only be reviewed on a motion for new trial, and in that case, the notice of intention must set forth the ground enumerated above. Since the motion at bar did not set forth this ground, the court stated that the alleged abuse of discretion could not be reviewed (*20 Cal. App. 538, 542)* . However, the court added, assuming that the notice of intention were properly filed and served, the refusal of the amendment was a matter entirely within the discretion of the court. Even though the trial courts should generally allow great liberality in the matter of amendments to pleadings, the circumstances of the case disclosed that the court's denial of the proposed amendment was not an abuse of discretion. In this case, defendant, by his answer, virtually admitted a material allegation of the complaint and had allowed the admission to stand for nearly a year before attempting to controvert it (*20 Cal. App. 538, 541-542)* .

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[Reserved]

§§ 155.66[Reserved]

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15-155 California Points & Authorities § 155.70

§ 155.70 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Irregularity in Jury Proceedings [Code Civ. Proc. § 657(1)]--General Form

[1] FORM

[*Caption. See § 155.50[1].*]

A NEW TRIAL SHOULD BE GRANTED BECAUSE THERE WAS AN IRREGULARITY IN THE PROCEEDINGS OF THE JURY THAT PREVENTED _____ [PLAINTIFF *or* DEFENDANT] FROM HAVING A FAIR TRIAL AND THAT MATERIALLY AFFECTED HIS/HER/ITS SUBSTANTIAL RIGHTS.

A. New Trial on the Ground of Irregularity in the Proceedings of the Jury. On application of the party aggrieved, the verdict or decision may be vacated, in whole or in part, and a new trial may be granted, on all or some of the issues, on the ground of irregularity in the proceedings of the jury by which either party was prevented from having a fair trial, if substantial rights of the aggrieved party are materially affected thereby (*Code Civ. Proc. § 657(1)*).

B. Evidence Admissible to Show Misconduct. Upon an inquiry as to the validity of the verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined (*Evid. Code § 1150(a)*; *see Hasson v. Ford Motor Co. (1982) 32 Cal. 3d 388, 414-415, 185 Cal. Rptr. 654, 650 P.2d 1171*).

C. Use of Affidavit to Show Statements or Objective Facts. Affidavits of jurors may be received to show statements or other objective facts that were likely to have influenced the verdict improperly and entitle the moving party to a new trial (*People v. Hutchinson (1969) 71 Cal. 2d 342, 350, 78 Cal. Rptr. 196, 455 P.2d 132*).

D. No-Knowledge Requirement. A new trial is properly granted on the ground of irregularity in the proceedings of the jury or juror misconduct if a party and his or her counsel were unaware of the misconduct until after the verdict was

returned (*Weathers v. Kaiser Foundation Hospitals (1971) 5 Cal. 3d 98, 103, 95 Cal. Rptr. 516, 485 P.2d 1132*).

[*Add additional points and authorities, if appropriate, supporting the contention that there was an irregularity in the proceedings of the jury (see, e.g., § 155.71 et seq.).*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for new trial on the ground of irregularity in the proceedings of the jury [*Code Civ. Proc. § 657(1)*]. This form is a general one that should be used in combination with more specific forms of points and authorities relating to particular issues or fact situations [*see § 155.71* et seq.].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. In particular, counsel should set out the alleged irregularity and show how it prevented the moving party from having a fair trial and materially affected the moving party's substantial rights.

[c] Supporting Declarations or Affidavits Required

A motion for new trial made on the ground of irregularity in the proceedings of the jury must be supported by declarations or affidavits [*Code Civ. Proc. § 658*; *see Code Civ. Proc. § 2015.5*]. Counsel may include declarations from the offending juror or other jurors showing, for example, that certain conduct occurred. This declaration should contain evidence of objective facts and not mental processes by which the jurors reached their verdict [*see Evid. Code § 1150*; *see also People v. Hutchinson (1969) 71 Cal. 2d 342, 350, 78 Cal. Rptr. 196, 455 P.2d 132]* . It must be based on personal knowledge and cannot contain hearsay [*Weathers v. Kaiser Foundation Hospitals (1971) 5 Cal. 3d 98, 105, 95 Cal. Rptr. 516, 485 P.2d 1132]* . If a juror's out-of-court statements are offered to show that the statements were made and are evidence of the bias of the speaker, they are not hearsay, since they are not offered to prove the truth of the matter stated [*see Weathers v. Kaiser Foundation Hospitals (1971) 5 Cal. 3d 98, 109-110, 95 Cal. Rptr. 516, 485 P.2d 1132]* .

[d] "No Knowledge" Requirement

A party relying on the ground of jury irregularities must support his or her motion for new trial with a declaration or affidavit showing that neither counsel nor the moving party had knowledge of the facts constituting the irregularity until the rendition of the verdict [*Weathers v. Kaiser Foundation Hospitals (1971) 5 Cal. 3d 98, 103, 95 Cal. Rptr. 516, 485 P.2d 1132]* . For a form of "no knowledge" declaration, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[e] Irregularity of Jury Proceedings Versus Jury Misconduct

The definition of irregularity in the proceedings of the jury as a ground for new trial [*Code Civ. Proc. § 657(1)*] is unclear in light of the subsequent provision that enumerates jury misconduct as a separate ground for new trial [*see Code Civ. Proc. § 657(2)*; *see also Gray v. Robinson (1939) 33 Cal. App. 2d 177, 182, 91 P.2d 194]* . Consequently the ground of jury irregularity has been used primarily to challenge proceedings other than misconduct, such as matters relating to the formation of the jury [*see, e.g., People ex rel. Dept. Pub. Wks. v. Curtis (1967) 255 Cal. App. 2d 378, 388-389, 63 Cal. Rptr. 138* (concealment of bias on voir dire); *Church v. Capital Freight Lines (1956) 141 Cal. App. 2d 246, 248, 296 P.2d 563* (competency of juror)].

[f] Related Pleading and Practice Forms

For a form of notice of intention to move for a new trial on the ground of irregularity in the proceedings of the jury and a related form of supporting declaration, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender). For a form of notice of intention to move for a new trial on the separate ground of jury misconduct, see Ch. 326A, *Jury Verdicts* in that publication.

[g] Related Memoranda

For more specific points and authorities based on the same ground, that of irregularity of the proceedings of the jury, see *§ 155.71* et seq. For points and authorities on the closely related ground of jury misconduct, see *§ 155.80* et seq.

[h] Opposing Points and Authorities

In an appropriate case, the points and authorities set out in *§ 155.100* et seq. may be used to oppose those set out in this form.

[3] Discussion of Authorities

[a] Evidence Admissible to Show Misconduct

The factual and procedural background of ***Hasson v. Ford Motor Co.*** *(1982) 32 Cal. 3d 388, 185 Cal. Rptr. 654, 650 P.2d 1171* , is discussed in *§ 155.110[3][b]*. The *Hasson* decision involved a products liability action in which the court of appeal overturned a judgment for plaintiffs on the sole ground of juror misconduct. The Supreme Court affirmed the trial court judgment. The Court found that defendant had made a prima facie showing of improper conduct by certain jurors in that some jurors had engaged in distracting activities during the presentation of evidence at trial. It held that plaintiffs could not rely on jurors' counterdeclarations to rebut the inference that some jurors were inattentive during trial, because these counterdeclarations relate to the subjective mental processes of the jurors and are inadmissible under *Evid. Code § 1150(a)* (*32 Cal. 3d 388, 414-415)* . Nevertheless, the Court affirmed the trial court judgment because defendant failed to show it was prejudiced by the jurors' inattentiveness (*32 Cal. 3d 388, 414-417)* .

[b] Use of Affidavit to Show Statements or Objective Facts

In ***People v. Hutchinson*** *(1969) 71 Cal. 2d 342, 78 Cal. Rptr. 196, 455 P.2d 132* , defendant was found guilty of possession of marijuana. His motion for new trial, based on the misconduct of the bailiff while the jury deliberated, was denied. On appeal, defendant contended that the trial court erred in refusing to consider the affidavit of a juror when it ruled on the motion for new trial. The court of appeal vacated the order denying new trial with directions to the trial court to determine the motion in accordance with its opinion (*71 Cal. 2d 342, 351)* . Although the general rule was that a jury could not impeach its own verdict except to prove certain judicially or statutorily recognized exceptions, the Legislature, in enacting *Evid. Code § 1150(a)*, permitted a juror to impeach a verdict by proof of overt acts, but not by proof of subjective reasoning processes of individual jurors (*71 Cal. 2d 342, 349)* . The bailiff's remarks and the tone

of their delivery constituted statements and conduct that were likely to have influenced the verdict (*71 Cal. 2d 342, 351)* . Admission of the jurors' affidavits within the limits set by *Evid. Code § 1150* protects the stability of verdicts and allows proof by the best evidence of misconduct on the part of either jurors or third parties that should be exposed and upon which no verdict should be based. Admission of this evidence on a motion for new trial would not present a breach in the postverdict privacy of jury deliberations. It would merely ensure that evidence of misconduct will be available to courts, freeing them to determine the substantive questions of whether the particular misconduct is a recognized ground for new trial and whether it has prejudiced the losing party (*71 Cal. 2d 342, 350)* .

[c] No-Knowledge Requirement

Weathers v. Kaiser Foundation Hospitals *(1971) 5 Cal. 3d 98, 95 Cal. Rptr. 516, 485 P.2d 1132* , was an action for wrongful death due to medical malpractice brought by a widow and her two children. After judgment for defendants, plaintiffs' motion for a new trial, based on the ground of irregularity in the proceedings of the jury [*Code Civ. Proc. § 657(1)*] and misconduct of the jury [*Code Civ. Proc. § 657(2)*] was granted. Defendants appealed the order, challenging the sufficiency of plaintiffs' declarations. Defendants contended that plaintiffs' motion for new trial was fatally defective because it was not supported by separate declarations by plaintiffs as well as by their counsel that indicated their respective lack of knowledge of the alleged jury irregularities prior to the rendition of the verdict.

The Supreme Court affirmed the order, stating that a litigant seeking a new trial on the ground of juror improprieties must present affidavits showing that neither he or she and counsel were aware of the misbehavior until after the verdict was returned. The rationale for the requirement was to prevent a party from withholding knowledge of jury improprieties until after an unfavorable verdict. Although in this case only the attorney submitted a declaration and the parties did not, the Court held that the attorney's declaration substantially complied with the "no-knowledge" rule. In the declaration, the attorney unequivocally stated that both plaintiffs and their attorneys lacked prior knowledge of the jury misconduct raised in the motion for new trial. The Court concluded that although the filing of separate affidavits was preferable, the failure of plaintiffs to do so was not fatal error (*5 Cal. 3d 98, 103-105)* . After examining the record, the Court upheld the order on the basis of several jurors' concealment of bias on voir dire (*5 Cal. 3d 98, 110-111)* .

[4] Additional Authorities

[a] Use of Affidavit to Show Statements or Objective Facts

Clemens v. Regents of University of California (1970) 8 Cal. App. 3d 1, 87 Cal. Rptr. 108 , was a medical malpractice action in which plaintiff, on a motion for new trial, sought to introduce affidavits of jurors to show that a juror concealed a bias on voir dire. The trial court rejected the offer on the ground that statements made during trial did not show that the juror was biased at the time of his voir dire examination. The court of appeal stated that jurors are competent witnesses to prove objective facts to impeach a verdict under *Evid. Code § 1150* and that the affidavits in question contained competent evidence as defined by *People v. Hutchinson (1969) 71 Cal. 2d 342, 351, 78 Cal. Rptr. 196, 455 P.2d 132* (discussed in [3][b], *above*). The increased scope of consideration to be given juror affidavits as mandated by *Hutchinson* would require a determination not only of the issue of the juror's allegedly concealed bias but also of his or her possible misconduct while serving on the jury (*8 Cal. App. 3d 1, 19)* .

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15-155 California Points & Authorities § 155.71

§ 155.71 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Irregularity in Jury Proceedings [Code Civ. Proc. § 657(1)]--Concealment of Juror Bias During Voir Dire

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities supporting a motion for new trial on the ground of irregularity in the proceedings of the jury (see, e.g., § 155.70).*]

A NEW TRIAL SHOULD BE GRANTED ON THE GROUND OF IRREGULARITY IN THE PROCEEDINGS OF THE JURY BECAUSE A JUROR CONCEALED A BIAS ON VOIR DIRE THAT PREVENTED _____ [HIM *or* HER] FROM ACTING IMPARTIALLY AT TRIAL, THUS DEPRIVING _____ [PLAINTIFF *or* DEFENDANT] FROM HAVING A FAIR TRIAL AND MATERIALLY AFFECTING HIS/HER/ITS SUBSTANTIAL RIGHTS.

A. Constitutional Right to Unbiased Jury. The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the California Constitution (*Weathers v. Kaiser Foundation Hospitals (1971) 5 Cal. 3d 98, 110, 95 Cal. Rptr. 516, 485 P.2d 1132*).

B. Juror's Concealment of Bias on Voir Dire. Concealment by a juror during voir dire examination of a state of mind that would prevent his or her acting impartially is misconduct constituting irregularity for which a new trial may be granted. Such concealment need not be intentional (*People ex rel. Dept. Pub. Wks. v. Curtis (1967) 255 Cal. App. 2d 378, 388-389, 63 Cal. Rptr. 138* ; *Shipley v. Permanente Hospital (1954) 127 Cal. App. 2d 417, 423-424, 274 P.2d 53*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for new trial on the ground of

irregularity in the proceedings of the jury [*Code Civ. Proc. § 657(1)*] based on a juror's concealment of bias on voir dire. It does not provide a complete form, but is designed to be combined with a general form of points and authorities in support of a motion for new trial on the ground of irregularity in the proceedings of the jury [*see § 155.70*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. In particular, counsel should set out the conduct of the juror that showed the concealment of bias on voir dire and show how this bias prevented the moving party from having a fair trial. For example, if a juror made certain statements during deliberations that indicated that he or she was biased against plaintiff, counsel should include declarations from the offending juror or other jurors to show which statements were made. Counsel should then argue that the statements were evidence of a bias that prevented this juror from acting impartially [*see Weathers v. Kaiser Foundation Hospitals (1971) 5 Cal. 3d 98, 106-111, 95 Cal. Rptr. 516, 485 P.2d 1132]* . For further discussion of this declaration, see *§ 155.70[2][c]*.

[c] Related Pleading and Practice Forms

For a form of notice of intention to move for a new trial and other supporting papers, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[d] Opposing Points and Authorities

The points and authorities set out in *§ 155.101* and *§ 155.102* may be used in an appropriate case to oppose a motion for new trial supported by this memorandum.

[3] Discussion of Authorities

[a] Constitutional Right to Unbiased Jury

The factual and procedural background of ***Weathers v. Kaiser Foundation Hospitals*** *(1971) 5 Cal. 3d 98, 95 Cal. Rptr. 516, 485 P.2d 1132* , is discussed in *§ 155.70[3][c]*. The Supreme Court affirmed an order granting plaintiffs' motion for new trial on the ground of irregularity in the proceedings of the jury [*Code Civ. Proc. § 657(1)*] and misconduct of the jury [Code *Civ. Proc. § 657(2)*]. The Court stated that the right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the California Constitution. In this case, the Court upheld the order on the basis that a juror concealed a bias on voir dire. Since the verdict was nine to three, the Court stated that the disqualification for bias of any one of the majority jurors could have resulted in a different verdict. Therefore, the Court concluded that the order granting the new trial was sufficiently supported by competent evidence (*5 Cal. 3d 98, 110)* .

[b] Juror's Concealment of Bias on Voir Dire

In ***People ex rel. Dept. Pub. Wks. v. Curtis*** *(1967) 255 Cal. App. 2d 378, 63 Cal. Rptr. 138* , defendant condemnees appealed from a judgment awarding them payment for property taken for highway purposes and for severance damages to the remaining property. During the voir dire examination of the jury, a prospective juror, who later became foreman, did not disclose that he was attending weekly classes in real estate appraisal even though he was asked if he had any connection, direct or indirect, with real estate valuation or appraisal or had any preconceived ideas on the subject. The trial court denied defendants' motion for new trial on the ground of irregularity in the proceedings of the jury [*Code Civ. Proc. § 657(1)*], and they appealed the judgment.

The court of appeal reversed the judgment, stating that concealment by a juror during voir dire examination of a state of mind that would prevent his or her acting impartially is misconduct constituting an irregularity for which a new trial may be granted. Concealment need not be intentional (*255 Cal. App. 2d 378, 388-389)* . Information that the jury

foreman received in his real estate class about the qualifications of real estate appraisers tended to prejudice his judgment of the case. The questions propounded to him on voir dire fairly called for disclosure of this prejudice (*255 Cal. App. 2d 378, 389)* . During deliberations at a point when the jury was deadlocked, the foreman told the jury that one of the state's appraisers had higher qualifications than one of appellants' appraisers (*255 Cal. App. 2d 378, 390)* . The prejudicial effect of the misconduct was apparent, since the amount of the verdict indicated rejection of appellant's appraisal testimony in favor of a value much closer to the one fixed by the state's appraisers (*255 Cal. App. 2d 378, 391)* .

In ***Shipley v. Permanente Hospital*** *(1954) 127 Cal. App. 2d 417, 274 P.2d 53* , plaintiffs brought a medical malpractice action for negligent diagnosis of a back injury. After judgment for defendants, plaintiffs were granted a new trial. Plaintiffs' motion was based on the grounds of irregularity in the proceedings of the jury and adverse party [*Code Civ. Proc. § 657(1)*], misconduct of the jury [*Code Civ. Proc. § 657(2)*], accident and surprise [*Code Civ. Proc. § 657(3)*], and error in law [*Code Civ. Proc. § 657(7)*]. The hearing of the motion was concerned mainly with the alleged sympathy of some jurors with the doctors charged with malpractice, which contradicted those jurors' answers on voir dire, and the trial judge indicated that he considered this to be the main point.

The court of appeal affirmed the order, stating that the impaneling of a juror who is subject to challenge for cause in consequence of untrue answers that concealed the ground of challenge is certainly an irregularity (*127 Cal. App. 2d 417, 424)* . The affidavits of the jurors that stated that the prejudiced frame of mind existed from the outset of the trial were conclusional and without evidentiary value. However, the trial judge in his or her wide discretion could infer the earlier existence of the prejudice from the utterances in the jury room (*127 Cal. App. 2d 417, 424-425)* . No circumstances were shown or urged that made it probable that the prejudice had developed during the trial. Since the prejudice did not relate to a specific person involved in the trial but was generally in favor of all physicians charged with malpractice, the probability was that the prejudice existed longer than the few days of trial (*127 Cal. App. 2d 417, 425)* .

Shipley v. Permanente Hospital was disapproved on other grounds by the Supreme Court in *Kollert v. Cundiff (1958) 50 Cal. 2d 768, 773, 329 P.2d 897* , which in turn was overruled on other grounds by *People v. Hutchinson (1969) 71 Cal. 2d 342, 351, 78 Cal. Rptr. 196, 455 P.2d 132* [*see Weathers v. Kaiser Foundation Hospitals (1971) 5 Cal. 3d 98, 110, 95 Cal. Rptr. 516, 485 P.2d 1132]* .

[4] Additional Authorities

[a] Juror's Concealment of Bias on Voir Dire

In *Tapia v. Barker (1984) 160 Cal. App. 3d 761, 206 Cal. Rptr. 803* , the court of appeal reversed the trial court's denial of plaintiff's motion for new trial on the grounds of jury misconduct and irregularity in the proceedings of the jury [*see Code Civ. Proc. § 657(1), (2)*]. The court of appeal noted that the jurors concealed bias during voir dire when none of them had answered affirmatively when asked if they would be reluctant to award damages for pain and suffering or if the plaintiff's Mexican background would affect their ability to be fair and impartial. The court of appeal found that the jurors' declarations showed that several jurors stated during deliberations that they did not believe that a dollar amount could be put on pain and suffering and made remarks indicating that they were racially prejudiced against the plaintiff (*160 Cal. App. 3d 761, 765-767)* .

In *Smith v. Covell (1980) 100 Cal. App. 3d 947, 161 Cal. Rptr. 377* , the court of appeal reversed the trial court's denial of a motion for new trial, stating that improper communications by a juror evidenced a concealment of bias on voir dire and constituted misconduct as shown by jurors' affidavits. The juror had made no affirmative answer to a question whether or not there was anything about a lawsuit to recover damages for personal injuries that would interfere with the juror's ability to give both sides a fair trial, but during jury deliberations, the juror told fellow jurors that he was against people suing one another and that high verdicts in cases like this one caused high insurance rates (*100 Cal. App. 3d*

947, 954-955) .

Clemens v. Regents of University of California (1971) 20 Cal. App. 3d 356, 97 Cal. Rptr. 589 , was a medical malpractice action in which the court of appeal reversed the trial court's judgment for defendant. The court held that plaintiff was denied a fair trial by the undisclosed bias of a juror and that plaintiff's motion for new trial should have been granted (*20 Cal. App. 3d 356, 366-367)* . On voir dire, when asked the nature of his profession, a juror did not indicate that he was a dentist. Affidavits and declarations of other jurors contained statements attributing substantial bias and prejudice of the juror against persons, including plaintiff, who would prosecute a medical malpractice action, as well as evidence of prejudgment of the case (*20 Cal. App. 3d 356, 362-363)* .

In *Pollock v. Standard Oil Co. (1967) 256 Cal. App. 2d 307, 64 Cal. Rptr. 66* , the court of appeal affirmed an order vacating an order that denied a new trial. The effect of the order was to require a new trial of the case. The court stated that the rule is clear that a juror's intentional concealment, on voir dire, of a state of mind that would prevent his acting impartially constitutes an irregularity for which a new trial may be granted (*256 Cal. App. 2d 307, 309)* .

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15-155 California Points & Authorities § 155.72

§ 155.72 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Irregularity in Jury Proceedings [Code Civ. Proc. § 657(1)]--Mental Incompetency of Juror

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities supporting a motion for new trial on the ground of irregularity in the proceedings of the jury (see, e.g., § 155.70).*]

A NEW TRIAL SHOULD BE GRANTED ON THE GROUND OF IRREGULARITY IN THE PROCEEDINGS OF THE JURY BECAUSE A JUROR WAS MENTALLY INCOMPETENT DURING TRIAL, THUS PREVENTING _____ [PLAINTIFF *or* DEFENDANT] FROM HAVING A FAIR TRIAL AND MATERIALLY AFFECTING HIS/HER/ITS SUBSTANTIAL RIGHTS.

A. Constitutional Right to Mentally Competent Jury. The right to a trial before mentally competent jurors is as fundamental as the right to trial before unbiased and unprejudiced jurors which courts have held to be an inseparable and inalienable part of the right to trial by jury guaranteed by the California Constitution (*Church v. Capital Freight Lines (1956) 141 Cal. App. 2d 246, 248, 296 P.2d 563*).

B. Mental Incompetence of Juror. Mental incompetence of a juror at the time of trial may be an irregularity for which a new trial may be granted (*see Church v. Capital Freight Lines (1956) 141 Cal. App. 2d 246, 248-250, 296 P.2d 563*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for new trial on the ground of irregularity in the proceedings of the jury [*Code Civ. Proc. § 657(1)*] based on a juror's mental incompetence during trial. It does not provide a complete form, but is designed to be combined with a general form of points and authorities

in support of a motion for new trial on the ground of irregularity in the proceedings of the jury [*see § 155.70*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. In particular, counsel should show that the juror was mentally incompetent at the time of trial, that this fact could not be discovered on voir dire examination of that juror, and that the juror's mental incompetence prevented the moving party from having a fair trial. For discussion of the requirement that the facts be established by supporting declarations or affidavits, see *§ 155.70[2][c]*.

[c] Related Pleading and Practice Forms

For a form of notice of intention to move for a new trial and other supporting papers, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[d] Opposing Points and Authorities

The points and authorities set out in *§ 155.103* may be used in an appropriate case to oppose a notice of intention to move for a new trial supported by this memorandum.

[3] Discussion of Authorities

[a] Constitutional Right to Mentally Competent Jury

Church v. Capital Freight Lines *(1956) 141 Cal. App. 2d 246, 296 P.2d 563* , was an action for personal injuries in which a jury verdict was rendered in favor of defendant. No ruling was made on plaintiffs' motion for a new trial, and it was deemed denied by operation of law [*see Code Civ. Proc. § 660*]. On appeal, plaintiffs contended that they were denied their right to trial by 12 competent persons, since the foreman of the jury was mentally incompetent at the time of trial. Eleven days after trial, the juror's wife filed a petition to have him declared mentally ill and later had him committed to a state hospital. Although the court of appeal affirmed the judgment, it stated that there can be no question that the right to trial before mentally competent jurors is as fundamental as the right to trial before unbiased and unprejudiced jurors which the courts have held to be an inseparable and inalienable part of the right to trial by jury guaranteed by the California Constitution. The Legislature has determined by statute who are competent [former Code Civ. Proc. § 198 (*now see Code Civ. Proc. § 203*)] and who are not competent to act as jurors [former Code Civ. Proc. § 199 (*now see Code Civ. Proc. § 203*)]. By such provision, a person who is not in possession of his natural faculties may be disqualified to act as a juror (*141 Cal. App. 2d 246, 248)* . However, in this case, the affidavits in support of and in opposition to the motion were conflicting, and although a different conclusion by the trial court would have been equally well founded, the trial court did not abuse its discretion in denying the motion for new trial (*141 Cal. App. 2d 246, 250)* .

[b] Mental Incompetence of Juror

The factual and procedural background of ***Church v. Capital Freight Lines*** *(1956) 141 Cal. App. 2d 246, 296 P.2d 563* , is discussed in [a], *above*. Plaintiff moved for a new trial on the grounds of the alleged mental incompetence of the jury foreman at the time of trial. After trial, the juror's wife filed a petition to have him declared mentally ill and had him committed to a state mental hospital. Although the court of appeal affirmed the denial of the motion, it recognized that the incompetency of a juror may be a basis for granting a new trial (*141 Cal. App. 2d 246, 248-251)* . It noted that possession of one's natural faculties would not necessarily be disclosed under ordinary questioning on voir dire. Therefore, contrary to defendant's argument, the very nature of the affliction would preclude the application of any rule predicated upon the intentional or unintentional failure to disclose one's disqualification on voir dire (*141 Cal. App. 2d 246, 248)* .

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[Reserved]

§§ 155.73[Reserved]

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15-155 California Points & Authorities § 155.80

§ 155.80 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Juror Misconduct [Code Civ. Proc. § 657(2)]--General Form

[1] FORM

[*Caption. See § 155.50[1].*]

THE MOTION FOR NEW TRIAL SHOULD BE GRANTED BECAUSE THERE WAS JURY MISCONDUCT THAT MATERIALLY AFFECTED THE SUBSTANTIAL RIGHTS OF _____ [PLAINTIFF *or* DEFENDANT].

A. New Trial on Ground of Jury Misconduct. On application of the party aggrieved, the verdict or decision may be vacated, in whole or in part, and a new trial may be granted, on all or some of the issues, on the ground of misconduct of the jury, if the substantial rights of the aggrieved party are materially affected thereby (*Code Civ. Proc. § 657(2)*).

B. Evidence Admissible to Show Misconduct. [*See § 155.70[1], Paragraph B.*]

C. New Trial if Prejudice Results From Misconduct. A new trial may be granted on the ground of jury misconduct if the misconduct results in prejudice to the opposing party's case (*Smith v. Covell (1980) 100 Cal. App. 3d 947, 953-954, 161 Cal. Rptr. 377*).

D. Presumption of Prejudice. Once juror misconduct is established, a presumption of prejudice arises. The presumption may be rebutted only by an affirmative evidentiary showing that prejudice does not exist (*Glage v. Hawes Firearms Co. (1990) 226 Cal. App. 3d 314, 321, 276 Cal. Rptr. 430* ; *Smith v. Covell (1980) 100 Cal. App. 3d 947, 953-954, 161 Cal. Rptr. 377*).

E. No-Knowledge Requirement. [*§ 155.70[1], Paragraph D.*]

[*Optional*] **F. Affidavit of Juror to Show Inducement to Assent to Verdict or Finding by Resort to Chance.**

Whenever one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a result to a determination of chance, such misconduct may be proved by the affidavit of jurors (*Code Civ. Proc. § 657(2)*).

[*Optional*] **G. Use of Affidavit to Show Statements or Objective Facts.** [*See § 155.70[1], Paragraph C.*]

[*Add further points and authorities, if appropriate, relating to the specific fact situation in question (see, e.g., § 155.80 et seq.).*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for new trial on the ground of jury misconduct [*Code Civ. Proc. § 657(2)*]. It is a general form that should be used in conjunction with points and authorities relating to the specific fact situation [*see, e.g., § 155.81* et seq.].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should include a discussion of the nature of the jury misconduct and how it deprived the moving party of a fair trial and materially affected the moving party's substantial rights.

[c] Supporting Declarations or Affidavits Required

A motion for new trial made on this ground must be supported by declarations or affidavits [*Code Civ. Proc. § 658*; *see Code Civ. Proc. § 2015.5*].

[d] Jury Misconduct Versus Irregularity of Jury Proceedings

Irregularities in the formation of the jury, such as a juror's concealment of a bias on voir dire or the mental incompetency of a juror, are generally challenged under *Code Civ. Proc. § 657(1)* as an irregularity in the proceedings of the jury [*see, e.g., People ex rel. Dept. Pub. Wks. v. Curtis (1967) 255 Cal. App. 2d 378, 388-389, 63 Cal. Rptr. 138* (concealment of bias on voir dire); *Church v. Capital Freight Lines (1956) 141 Cal. App. 2d 246, 248, 296 P.2d 563* (mental competency of juror); *see also § 155.70* et seq. (supporting motion for new trial on ground of irregularity in proceedings of jury)]. However, the definition of irregularity in the proceedings of the jury is unclear in light of the ground of jury misconduct as a basis for new trial [*see Gray v. Robinson (1939) 33 Cal. App. 2d 177, 182, 91 P.2d 194]* . Therefore, counsel may desire to make the motion on both grounds, even if the alleged misconduct does not occur during jury formation and clearly seems to be jury misconduct under *Code Civ. Proc. § 657(2)* [*see also* discussion in *§ 155.70[2][e]*].

[e] Burden of Proof

The initial burden of proof is on the party supporting a new trial. The party must establish that misconduct occurred. Once juror misconduct is established, a presumption of prejudice arises that must be rebutted [*Glage v. Hawes Firearms Co. (1990) 226 Cal. App. 3d 314, 321, 276 Cal. Rptr. 430* ; *Smith v. Covell (1980) 100 Cal. App. 3d 947, 953-954, 161 Cal. Rptr. 377]* . For a memorandum of points and authorities contending that the opposing party has failed to rebut the presumption of prejudice, see *§ 155.81*.

[f] Related Pleading and Practice Forms

For a notice of intention to move for a new trial on the ground of jury misconduct, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* , and Ch. 326A, *Jury Verdicts* (Matthew Bender).

[g] Opposing Points and Authorities

The points and authorities set out in *§ 155.110* et seq. may be used in an appropriate case to oppose a motion for a new trial supported by this memorandum.

[3] Discussion of Authorities

[a] New Trial if Prejudice Results From Misconduct

The factual and procedural background of ***Smith v. Covell*** *(1980) 100 Cal. App. 3d 947, 161 Cal. Rptr. 377* , is discussed in *§ 155.83[3][a]*. During trial, the jury foreman told other jurors about his back problem in discussing one plaintiff's alleged back injuries. After the jury awarded a small amount of damages in light of the injuries claimed, plaintiffs moved for a new trial on the basis of jury misconduct [*Code Civ. Proc. § 657(2)*]. When the motion was denied, plaintiffs appealed the judgment.

The court of appeal reversed, stating that the juror's misconduct resulted in prejudice to plaintiff's cause. The court explained that in communicating his evidence to the jurors, the foreman precluded the plaintiffs from testing it or making an answer and thus deprived plaintiffs of due process of law (*100 Cal. App. 3d 947, 954)* . Jurors cannot, without violation of their oath, receive or communicate information to fellow jurors from sources outside the evidence in the case (*100 Cal. App. 3d 947, 952)* . The foreman's statement supported defense doctors' conclusions that the automobile accident did not cause plaintiff's lower back injury.

The jury's small award of damages in light of the severity of the injuries claimed indicated a reasonable probability of actual harm to plaintiff's case. Accordingly, the court reversed the judgment (*100 Cal. App. 3d 947, 953-954)* .

[b] Presumption of Prejudice

In ***Glage v. Hawes Firearms Co.*** *(1990) 226 Cal. App. 3d 314, 276 Cal. Rptr. 430* , plaintiffs sued defendant firearms distributor for injuries caused by a revolver that unexpectedly discharged during a hunting trip while being carried in a holster. The jury returned a verdict in favor of plaintiffs, and defendant appealed from the judgment. Defendant claimed that the trial court erred in denying its motion for new trial based on juror misconduct. Defendant also contended that two of the jurors committed misconduct in looking up the dictionary definition of "preponderance" and discussing it with the other jurors.

The court of appeal reversed. The court stated that once juror misconduct is established, a presumption of prejudice arises. Citing *Hasson v. Ford Motor Co. (1982) 32 Cal. 3d 388, 185 Cal. Rptr. 654, 650 P.2d 1171* (discussed in *§ 155.110[3][b]*), the court stated that the presumption developed in criminal cases, but that civil litigants also have a constitutionally protected right to the complete consideration of their case by an impartial panel of jurors (*226 Cal.*

App. 3d 314, 322 n.4). The presumption may be rebutted only by an affirmative evidentiary showing that prejudice does not exist or by a reviewing court's examination of the actual harm to the complaining party resulting from misconduct (*226 Cal. App. 3d 314, 321)* . After reviewing the record, the court stated that there was a substantial likelihood that the jury was improperly influenced by the extraneous dictionary definition to the defendant's detriment (*226 Cal. App. 3d 314, 326)* .

The factual and procedural background of ***Smith v. Covell*** *(1980) 100 Cal. App. 3d 947, 161 Cal. Rptr. 377* , is discussed in *§ 155.83[3][a]* and in [a], *above*. The court of appeal stated that a presumption of prejudice arises from any juror misconduct and that presumption may be rebutted by proof that no prejudice actually resulted. In this case, the presumption of harm was unrebutted (*100 Cal. App. 3d 947, 953-954)* . Moreover, the court's analysis of the facts of the case demonstrated a reasonable probability of actual harm from the jury foreman's interjection of information from a source outside the evidence in the case (*100 Cal. App. 3d 947, 954)* . Therefore, the court reversed the judgment and order denying plaintiff's motion for a new trial on the basis of jury misconduct under *Code Civ. Proc. § 657(2)* (*100 Cal. App. 3d 947, 960)* .

[4] Additional Authorities

[a] New Trial if Prejudice Results From Misconduct

In *Tapia v. Barker (1984) 160 Cal. App. 3d 761, 206 Cal. Rptr. 803* , the court of appeal reversed the trial court's denial of plaintiff's motion for new trial on the grounds of jury misconduct and irregularity in the proceedings of the jury [*see Code Civ. Proc. § 657(1), (2)*]. The court of appeal noted that the jurors had concealed bias during voir dire, that they had discussed collateral sources of income and high insurance rates during deliberations, and had made racially prejudiced statements against the plaintiff. The court found that the jury misconduct during deliberations resulted in an unfair trial (*160 Cal. App. 3d 761, 765-767)* .

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15-155 California Points & Authorities § 155.81

§ 155.81 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Juror Misconduct [Code Civ. Proc. § 657(2)]--Presumption of Prejudice Not Rebutted

[1] FORM

[*The following may submitted in a supplemental memorandum or reply brief, or may be combined with a general form of memorandum of points and authorities supporting a motion for new trial on the ground of jury misconduct (see § 155.80).*]

THE MOTION FOR NEW TRIAL SHOULD BE GRANTED BECAUSE THE OPPOSING PARTY HAS FAILED TO REBUT THE PRESUMPTION OF JURY MISCONDUCT.

A. Presumption of Prejudice. [*See § 155.80[1], Paragraph D.*]

B. Test for Determining Prejudice. The standard to be applied in civil cases is whether there is a substantial likelihood that enough jurors were impermissibly influenced by misconduct to have affected the verdict to the detriment of the complaining party. If so, there is reasonable probability of actual harm to the complaining party resulting from the misconduct and the presumption of prejudice is not rebutted (*Glage v. Hawes Firearms Co. (1990) 226 Cal. App. 3d 314, 322-323, 276 Cal. Rptr. 430*).

C. Factors for Determining Whether Presumption Is Rebutted. Some of the factors to be considered when determining whether the presumption of prejudice is rebutted are the strength of the evidence that misconduct occurred, the nature and seriousness of the misconduct, and the probability that actual prejudice may have ensued (*Glage v. Hawes Firearms Co. (1990) 226 Cal. App. 3d 314, 323, 276 Cal. Rptr. 430*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for new trial on the ground of jury misconduct [*Code Civ. Proc. § 657(2)*] on the basis that the opposing party has failed to rebut the presumption of prejudice resulting from the misconduct.

Once it is established that misconduct was committed, a presumption of prejudice arises and the burden shifts to the opposing party to rebut the presumption by proving that prejudice does not exist [*Glage v. Hawes Firearms Co. (1990) 226 Cal. App. 3d 314, 321, 276 Cal. Rptr. 430]* . Thus, these points and authorities would normally be used in a supplemental memorandum or reply brief submitted in response to an opposing memorandum that has failed to rebut the presumption of prejudice.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case.

[c] Related Pleading and Practice Forms

For a form of notice of intention to move for a new trial and other supporting papers, see California Forms of Pleading and Practice Ch. 371, *Motions After Trial* (Matthew Bender).

[3] Discussion of Authorities

[a] Test for Determining Prejudice

The facts and procedural background of ***Glage v. Hawes Firearms Co.*** *(1990) 226 Cal. App. 3d 314, 276 Cal. Rptr. 430* , is discussed in *§ 155.80[3][b]*. In *Glage,* the court of appeal reversed the trial court's judgment and order denying new trial. After referring to the standard in criminal cases, the court stated that when it finds a substantial likelihood that enough jurors were impermissibly influenced by misconduct to have affected the verdict to the detriment of the complaining party, there is a reasonable probability of harm to the complaining party resulting from the misconduct (*226 Cal. App. 3d 314, 322)* . Under such circumstances, the presumption of prejudice is not rebutted (*226 Cal. App. 3d 314, 323)* .

The court gave some examples illustrating that the number of tainted jurors needed to justify a new trial will vary since unanimity is not required in civil cases. For example, when a jury renders a unanimous verdict against the complaining party, evidence of only one impermissibly tainted juror does not compel reversal because the remaining untainted jurors were sufficiently numerous to render a proper and fair verdict, and the record conclusively rebuts the presumption of prejudice. However, evidence of only one tainted juror would not necessarily rebut the presumption when the jury's verdict is nine to three, unless that juror voted for the complaining party (*226 Cal. App. 3d 314, 323 n.5*).

[b] Factors for Determining Whether Presumption Is Rebutted

The facts and procedural background of ***Glage v. Hawes Firearms Co.*** *(1990) 226 Cal. App. 3d 314, 276 Cal. Rptr. 430* , are discussed in *§ 155.80[3][b]*. In *Glage,* the court cited *Hasson v. Ford Motor Co. (1982) 32 Cal. 3d 388, 417, 185 Cal. Rptr. 654, 650 P.2d 1171* (discussed in *§ 155.110[3][b]*), to state that some of the factors to be considered when determining whether the presumption of prejudice is rebutted are the strength of the evidence that misconduct occurred, the nature and seriousness of the misconduct, and the probability that actual prejudice may have ensued (*226 Cal. App. 3d 314, 324)* .

[c] Test for Determining Prejudice

In *Province v. Center for Women's Health & Family Birth (1993) 20 Cal. App. 4th 1673, 25 Cal. Rptr. 2d 667* , a juror read a newspaper article that discussed the case and a previous trial in the case that had resulted in a hung jury. The

juror had told several other jurors about the article. After returning the verdict, juror declarations established the misconduct. The court of appeal reversed the judgment, holding that a new trial was warranted. Prejudice was presumed from the misconduct, and that prejudice was not rebutted because the misconduct was serious, the final tally of the vote was nine to three, and a previous trial had resulted in a hung jury, indicating that a different result might have occurred had there not been the misconduct (*20 Cal. App. 4th 1673, 1678-1680)* .

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
CHAPTER 155 MOTIONS AFTER TRIAL
PART II. FORMS
B. Motions for New Trial
2. Irregularity in Jury Proceedings or Juror Misconduct

15-155 California Points & Authorities § 155.82

§ 155.82 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Juror Misconduct [Code Civ. Proc. § 657(2)]--Improper Communications, Discussions, Statements of Opinion

[1] FORM

[*This form should be combined with a general form of memorandum supporting a motion for new trial on the ground of jury misconduct (see § 155.80).*]

THE MOTION FOR NEW TRIAL SHOULD BE GRANTED ON THE GROUND OF JURY MISCONDUCT BECAUSE A JUROR IMPROPERLY COMMUNICATED OR DISCUSSED MATTERS PERTAINING TO THE CASE DURING TRIAL, THUS PREVENTING _____ [PLAINTIFF *or* DEFENDANT] FROM HAVING A FAIR TRIAL AND MATERIALLY AFFECTING HIS/HER/ITS SUBSTANTIAL RIGHTS.

A. New Trial for Jurors' Improper Discussion of Case Before Submission. It is improper for jurors to discuss a case before its submission to them and a new trial may be granted if the improper discussion has resulted in prejudice to the moving party (*see Monaghan v. Rolling Mill Co. (1889) 81 Cal. 190, 194, 22 P. 590* ; *see also City of Pleasant Hill v. First Baptist Church (1969) 1 Cal. App. 3d 384, 431-432, 82 Cal. Rptr. 1*).

[*Optional*] **B. Discussion of Case Outside Court.** It is misconduct if a juror discusses a matter under investigation outside the court, and a new trial may be granted if this discussion improperly influences the verdict (*see People v. Cissna (2010) 182 Cal. App. 4th 475, 486-493, ___ Cal. Rptr. 3d ___* ; *People v. Southern Cal. Edison Co. (1976) 56 Cal. App. 3d 593, 598-599, 128 Cal. Rptr. 697*).

[*Optional*] **C. Prejudgment of Case Before Court's Instruction.** A new trial may be granted for misconduct of the jury if a juror expresses an opinion that shows prejudgment of the case before the jury has been instructed by the court (*Deward v. Clough (1966) 245 Cal. App. 2d 439, 442-444, 54 Cal. Rptr. 68*).

[*Optional*] **D. Jury Entertained by Party or Counsel.** During the trial, if the jury has been treated, fed, or entertained

by the successful party or his or her counsel, or at the expense of either, a new trial will, in nearly all cases, be granted (*Wright v. Eastlick (1899) 125 Cal. 517, 520, 58 P. 87*).

[*Optional*] **E. Communication Between Juror and Witness.** Communication between a witness and a juror may be a ground for granting a new trial if there is a showing that the juror was influenced by the communication to the prejudice of one of the parties to the action (*see City of Pleasant Hill v. First Baptist Church (1969) 1 Cal. App. 3d 384, 428, 82 Cal. Rptr. 1*).

[*Optional*] **F. Erroneous Statement of Law Made by Juror to Fellow Jurors.** Juror misconduct occurs when a juror communicates an erroneous statement of law to other members of the jury (*Young v. Brunicardi (1986) 187 Cal. App. 3d 1344, 1349-1350, 232 Cal. Rptr. 588*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for new trial on the ground of jury misconduct [*Code Civ. Proc. § 657(2)*] on the basis of a juror's improper communications, discussions, or statements of opinion. It does not provide a complete form, but is designed to be combined with a general form of points and authorities in support of a motion for new trial on the basis of jury misconduct [*see § 155.80*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should discuss the nature of the jury misconduct and how it deprived the moving party of a fair trial and materially affected the moving party's substantial rights.

A motion for new trial made on this ground must be supported by declarations or affidavits [*Code Civ. Proc. § 658*; *see Code Civ. Proc. § 2015.5*].

[c] Related Pleading and Practice Forms

For a form of notice of intention to move for a new trial on the ground of jury misconduct [Code Civ. Proc. § 657(2)], see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* and Ch. 326A, *Jury Verdicts* (Matthew Bender).

[d] Opposing Points and Authorities

The points and authorities set out in *§ 155.110* et seq. may be used in an appropriate case to oppose a motion for a new trial supported by this memorandum.

[3] Discussion of Authorities

[a] New Trial for Jurors' Improper Discussion of Case Before Submission

Monaghan v. Rolling Mill Co. *(1889) 81 Cal. 190, 22 P. 590* , was an action for personal injuries caused by defendant's allegedly negligent maintenance of machinery. During trial, one juror discussed the case with the other jurors, stating that "if the hook at the top of the suspended rod had been entirely closed or lashed, the accident could not have happened." After a verdict was rendered for plaintiff, defendant moved for a new trial. When the motion was denied, he appealed.

The Supreme Court stated that it is improper for jurors to talk with each other about a case before it is finally submitted. However, it affirmed the judgment and felt that the order denying the new trial was proper because the juror stated a self-evident fact that could not have improperly influenced the verdict. Moreover, the Court noted that defendant knew of the occurrence when it happened, yet made no objection, and the Court felt that he could not remain quiet, take the chance of a favorable verdict, and raise the point for the first time on a motion for new trial (*81 Cal. 190, 194)* .

The factual and procedural background of ***City of Pleasant Hill v. First Baptist Church*** *(1969) 1 Cal. App. 3d 384, 82 Cal. Rptr. 1* , is discussed in [e], *below*. During trial, one juror alleged that four named jurors were discussing the case during trial, two of them on many occasions. Although the court of appeal affirmed judgment for defendant and felt that the order denying plaintiff's motion for a new trial was proper, it stated that it is improper for jurors to discuss a case before its submission to them. The court noted that the allegedly offending jurors offered subscribed allegations to the effect that they did not discuss the case except in the jury room (*1 Cal. App. 3d 384, 429)* . Because the lower court found that the misconduct was not prejudicial, the court of appeal decided that denial of the motion should not be set aside unless there was no evidence to sustain it (*1 Cal. App. 3d 384, 430)* . After examining the record, the court held that the trial court was warranted in finding that no prejudice ensued (*1 Cal. App. 3d 384, 431)* .

[b] Discussion of Case Outside Court

In ***People v. Cissna*** *(2010) 182 Cal. App. 4th 475, 486-493, ___ Cal. Rptr. 3d ___* , a juror on a criminal case spoke to a friend about the case every day of the trial. The juror and his friend submitted declarations stating that every day they discussed the evidence presented that day, the victim's possible motives for falsely accusing the defendant, and whether the defendant would testify. On learning of these communications, the defendant filed a motion for a new trial. The prosecutor agreed the juror's conduct constituted misconduct and created a presumption of prejudice, but argued the presumption of prejudice had been rebutted. The trial court agreed and denied the new trial motion.

On appeal, the court reiterated that to challenge the validity of a verdict based on juror misconduct, a defendant may present evidence of overt acts or statements that are objectively ascertainable by sight, hearing, or the other senses [*182 Cal. App. 4th 475, 486]* . The court held that when the record shows there was juror misconduct, the defendant is afforded the benefit of a rebuttable presumption of prejudice [*182 Cal. App. 4th 475, 487]* . The court held that juror bias does not require that a juror's animosity towards the defendant; juror bias exists if there is a substantial likelihood that a juror's verdict was based on an improper outside influence, rather than on the evidence and instructions presented at trial, and the nature of the influence was detrimental to the defendant [*182 Cal. App. 4th 475, 487]* . On these facts, the court held that the juror misconduct was both pervasive (occurring every day of the trial) and substantive (involving deliberative discussions about the merits of the case) [*182 Cal. App. 4th 475, 489]* .

In addition, the court held that the juror's failure to comply with the trial court's admonitions not to discuss the case cast doubt on his willingness to follow the court's other instructions [*182 Cal. App. 4th 475, 489-490]* . The court held the defendant was further prejudiced in that the juror's friend acted as a 13th juror who had not been through voir dire, had not been sworn to follow the law, and had not heard all the evidence. Further, the court held that the juror's discussion of defendant's decision not to testify carried a high potential of prejudice to the defense [*182 Cal. App. 4th 475, 481-492]* .

In ***People v. Southern Cal. Edison Co.*** *(1976) 56 Cal. App. 3d 593, 128 Cal. Rptr. 697* , the state brought an action against a power company for fire suppression expenses pursuant to *Health & Safety Code §§ 13007-13009*. In fighting a fire allegedly caused by the contact of defendant's 12,000-volt power line with an oak tree, the state incurred substantial expenses and sought reimbursement from defendant. During the course of trial, a juror went to the store where he was employed to finish some work. The juror talked to a power company employee who happened to be there and asked him whether or not a limb could catch fire when it came in contact with a powerline. The power company employee answered affirmatively. During jury deliberations, the juror orally communicated this information to the other jurors. After a verdict was rendered for plaintiff, defendant moved for a new trial on the sole ground of jury misconduct [*Code*

Civ. Proc. § 657(2)]. When defendant's motion was granted, plaintiff appealed the order and defendant filed a timely protective cross appeal from the judgment.

Although the court of appeal reversed the order granting defendant a new trial, it stated that the facts of the case were patently adequate to support the trial court's order granting a new trial on the ground of jury misconduct [*Code Civ. Proc. § 657(2)*]. However, the defendant's declaration was technically insufficient since it failed to show that the party and counsel were not aware of the misconduct until after the verdict was returned. Counsel's declaration only showed that he lacked knowledge of the misconduct; absence of knowledge on the part of the party was not established. Therefore, the court reversed the order granting defendant's motion for a new trial (*56 Cal. App. 3d 593, 598-602)* .

[c] Prejudgment of Case Prior to Court's Instruction

In ***Deward v. Clough*** *(1966) 245 Cal. App. 2d 439, 54 Cal. Rptr. 68* , plaintiff brought an action for personal injuries resulting from a collision of his motorcycle with defendant's car. During the morning recess of the last day of trial, several jurors came out of the courtroom and headed for the jury room, but found the door to the jury room locked. One juror said, "I don't see why they don't open up the jury room now. We could bring in a verdict already." After verdict for defendant, plaintiff moved for a new trial on the basis of misconduct of the jury [*Code Civ. Proc. § 657(2)*]. When the motion was denied, plaintiff appealed the judgment.

The court of appeal reversed the judgment, stating that since the misconduct was clearly proved and resulted in an unfair trial, the trial court's denial of plaintiff's motion for a new trial was reversible error (*245 Cal. App. 2d 439, 441-442)* . The court stated that the timing of the incident was significant. It occurred after all of the evidence had been introduced and after plaintiff's attorney had completed his opening argument. However, defendant had not made her argument, and the jury had not yet been instructed. The court characterized the incident as misconduct that was serious, especially in light of the fact that the juror had made up his mind before hearing all of the arguments or any of the court's instructions (*245 Cal. App. 2d 439, 443-444)* . Furthermore, on voir dire, the juror stated that he would keep an open mind until he heard all of the evidence and the law. The jurors had also been admonished by the court that it was their duty not to form or express an opinion on any subject of the trial until the case had finally been submitted to them. The court stated that the juror failed to keep his promises that he would keep an open mind and had also failed to heed the court's admonitions. Absent any counteraffidavit from the juror, the court accepted the fact that the juror had prejudged the case (*245 Cal. App. 2d 439, 444)* . Accordingly, the court reversed the judgment and ordered a retrial of the case (*245 Cal. App. 2d 439, 453)* .

[d] Jury Entertained by Party or Counsel

Wright v. Eastlick *(1899) 125 Cal. 517, 58 P. 87* , was an action involving a dispute over the borderline dividing two mining claims. During trial, two jurors went drinking with defendants. After a verdict was rendered for defendants, plaintiffs moved for a new trial on the ground of jury misconduct. When the motion was denied, plaintiffs appealed the judgment.

The Supreme Court reversed the judgment noting that the order denying a new trial was proper. The Court stated that if the jury has been treated, fed, or entertained by the successful party or his or her counsel, or at the expense of either, a new trial will, in nearly all cases, be granted (*125 Cal. 517, 520)* . The Court added that this rule is deemed indispensably necessary to preserve the integrity of juries and is a rule of public policy that will be enforced without reference to the question of whether or not the verdict was correct (*125 Cal. 517, 520-521)* . Even though defendants contended that such drinking and carousing was a custom among miners in the mining district, the Court stated that miners must realize the obligations of their oath and their duty as good citizens, and act accordingly. Furthermore, the Court stated that the verdict in the case was by the bare constitutional number required of nine to three and the result might have been different if the misconduct did not occur. Therefore, the Court concluded that on this showing, the lower court should have granted a new trial (*125 Cal. 517, 519-521)* .

[e] Communication Between Juror and Witness

In ***City of Pleasant Hill v. First Baptist Church*** *(1969) 1 Cal. App. 3d 384, 82 Cal. Rptr. 1* , plaintiff city brought an action against a church to condemn certain church lands. During trial, a juror had a conversation with an appraisal witness for the church. The juror had admitted on voir dire that he had bought a home from the witness 18 years before. After judgment for defendant church, plaintiff moved for a new trial on several grounds including misconduct of the jury [*Code Civ. Proc. § 657(2)*]. When the motion was denied, plaintiff appealed the judgment.

Although the court of appeal affirmed the judgment, it stated that communication between a witness and a juror is not a ground for granting a new trial in the absence of a showing that the juror was influenced by the communication to the prejudice of one of the parties to the action. Here, the judge had interviewed the juror in chambers after the conversation, and the juror had assured him that the conversation was purely social and that there had been no discussion of the pending case. Even though the court found no prejudice in this case, the court indicated that a new trial might be proper in a situation in which a party was prejudiced (*1 Cal. App. 3d 384, 427-428)* .

[f] Erroneous Statement of Law Made by Juror to Fellow Jurors

In ***Young v. Brunicardi*** *(1986) 187 Cal. App. 3d 1344, 232 Cal. Rptr. 588* , plaintiff brought suit for personal injury arising out of an automobile accident. The jury returned a special verdict that defendant was not negligent in causing the accident. During jury deliberations, a juror who was a retired police officer stated to the other jury members that defendant was not negligent if he was not cited for a Vehicle Code violation as a consequence of the accident. This juror also stated that plaintiff must have had something to hide because the police report of the accident was not brought into evidence. Plaintiff brought a motion for a new trial citing jury misconduct based on jurors' affidavits of the statements made by the retired police officer. The trial court denied the motion.

The court of appeal reversed. Initially, the court noted that once juror misconduct is established, a presumption of prejudice will arise, but that the presumption is not conclusive and may be rebutted by an affirmative evidentiary showing that the prejudice does not exist or by a reviewing court's finding, after an examination of the entire record, that there was no reasonable probability of actual harm to the complaining party resulting from the misconduct (*187 Cal. App. 3d 1344, 1348)* . The court then found juror misconduct based on the fact that the retired officer violated his duty to follow the law according to the court's jury instructions by describing his own experiences as a police officer on a question of law, and by instructing the jury that defendant was not negligent if he was not cited as a result of the accident. The court further found that defendant did not rebut the presumption of prejudice, and that there was a reasonable probability that plaintiff suffered harm as a result of the juror's misconduct given the nine to three jury verdict and in light of the fact that other jurors had apparently followed the erroneous statement of law made by the retired officer (*187 Cal. App. 3d 1344, 1351-1352)* .

[4] Additional Authorities

[a] Discussion of Case Outside Court

People v. Pierce (1979) 24 Cal. 3d 199, 155 Cal. Rptr. 657, 595 P.2d 91 , was a second-degree murder action in which the Supreme Court reversed the conviction of defendant on the basis of prejudicial jury misconduct. After adjournment, the jury foreman approached his neighbor, one of the first police officers to arrive at the scene of the crime, and asked him questions about the evidence presented in the case. The Supreme Court stated that the juror's misconduct resulted in a presumption of prejudice and since the prosecution did not rebut that presumption, defendant was entitled to a new trial (*24 Cal. 3d 199, 206-209)* .

Although this case was a criminal proceeding decided under a criminal new trials statute, *Penal Code § 1181(3),* it has been cited in civil cases decided under *Code Civ. Proc. § 657(2)* [*see, e.g., Wagner v. Doulton (1980) 112 Cal. App. 3d*

945, 950, 169 Cal. Rptr. 550] . Furthermore, the presumption of prejudice raised by jury misconduct has also been applied in civil cases [*see, e.g., Smith v. Covell (1980) 100 Cal. App. 3d 947, 953-954, 161 Cal. Rptr. 377]* .

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
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15-155 California Points & Authorities § 155.83

§ 155.83 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Juror Misconduct [Code Civ. Proc. § 657(2)]--Improper Reception of Evidence

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities supporting a motion for new trial on the ground of jury misconduct (see § 155.80).*]

A NEW TRIAL SHOULD BE GRANTED ON THE GROUND OF JURY MISCONDUCT SINCE A JUROR IMPROPERLY RECEIVED EVIDENCE DURING TRIAL, THUS PREVENTING _____ [PLAINTIFF *or* DEFENDANT] FROM HAVING A FAIR TRIAL AND MATERIALLY AFFECTING HIS/HER/ITS SUBSTANTIAL RIGHTS.

A. New Trial for Improper Reception of Evidence. A new trial may be granted for misconduct of the jury if a juror receives evidence on the subject of litigation from sources outside of court and the improper reception of evidence results in prejudice to the moving party (*Smith v. Covell (1980) 100 Cal. App. 3d 947, 952-953, 161 Cal. Rptr. 377*).

[*Optional*] **B. Experiment by Juror, Viewing of Premises, Examination of Exhibits Not in Evidence.** Certain experiments by jurors, the viewing of the premises, and the examination of exhibits not in evidence but acquired by the jurors have been held to be the equivalent of taking evidence outside of court and will require a new trial (*Walter v. Ayvazian (1933) 134 Cal. App. 360, 364, 25 P.2d 526*).

[*Optional*] **C. Experiment by Juror.** A new trial may be granted if a juror conducts experiments that put him or her in possession of evidence not offered at trial and that evidence is prejudicial to the moving party's case (*see Higgins v. L.A. Gas & Electric Co. (1911) 159 Cal. 651, 657, 115 P. 313* ; *see also Wagner v. Doulton (1980) 112 Cal. App. 3d 945, 950, 169 Cal. Rptr. 550*).

[*Optional*] **D. Unauthorized View of Premises.** A new trial may be granted for an unauthorized view of the premises if

the juror has made observations or measurements that indicate that he or she has received evidence outside of court (*see Woebbe v. Sperry (1941) 48 Cal. App. 2d 340, 344, 119 P.2d 743*).

[*Optional*] **E. Examination of Exhibits Not in Evidence.** A new trial may be granted if a juror examines an exhibit prior to its introduction in evidence if the examination consists of taking evidence along new lines that the opposing party had no opportunity to explain or refute (*Tunmore v. McLeish (1919) 45 Cal. App. 266, 268, 187 P. 443*).

[*Optional*] **F. Reliance by Juror on Outside Expert.** A new trial may be granted when a juror solicits an opinion from an outside expert source on a question that is material to the principal issue, is submitted to the jury for its determination, and on which qualified experts in the case have differed (*Walter v. Ayvazian (1933) 134 Cal. App. 360, 364, 25 P.2d 526*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for new trial on the ground of jury misconduct [*Code Civ. Proc. § 657(2)*] on the basis of a juror's improper reception of evidence. It does not provide a complete form, but is designed to be combined with a general form of points and authorities in support of a motion for new trial on the basis of jury misconduct [*see § 155.80*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should include a discussion of the nature of the juror's improper reception of evidence, showing how it deprived the moving party of a fair trial and materially affected the moving party's substantial rights.

A motion for new trial made on this ground must be supported by declarations or affidavits [*Code Civ. Proc. § 658*; *see Code Civ. Proc. § 2015.5*].

[c] Related Pleading and Practice Forms

For a notice of intention to move for a new trial on the ground of jury misconduct, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* and Ch. 326A, *Jury Verdicts* (Matthew Bender).

[d] Opposing Points and Authorities

The points and authorities set out in *§ 155.112* may be used in an appropriate case to oppose a motion for a new trial supported by this memorandum.

[3] Discussion of Authorities

[a] New Trial for Improper Reception of Evidence

In ***Smith v. Covell*** *(1980) 100 Cal. App. 3d 947, 161 Cal. Rptr. 377* , plaintiffs, husband and wife, brought an action for back injuries allegedly sustained by wife as a result of an automobile accident and for loss of consortium suffered by her husband. During jury deliberation, the foreman of the jury told other jurors about his back condition when discussing whether or not plaintiff should have complained of back pain immediately after the accident. The juror stated that when his back "went out" it "hurt right away," but that he could still go to work. Since defendant had conceded liability and the absence of any contributory negligence, the trial was solely on the issue of damages. After the jury returned a verdict in favor of plaintiff wife in the amount of $10,000 and a verdict of zero as to plaintiff husband,

plaintiffs moved for a new trial on the basis of alleged jury misconduct [*Code Civ. Proc. § 657(2)*] and on several alleged instances of misconduct of counsel [*Code Civ. Proc. § 657(1)*]. When the motion was denied, plaintiffs appealed the judgment.

The court of appeal reversed the judgment and granted plaintiffs a new trial, stating that jurors cannot, without violation of their oath, receive or communicate information to fellow jurors from sources outside the evidence in the case. The jury foreman's statement interjected improper evidence at the most critical point in the case. An analysis of the facts of the case demonstrated a reasonable probability of actual harm. The jury's verdict, when viewed in light of the evidence most favorable to it, gave no award, or only a token award for the wife's general damages. No award was made to the husband, even though the evidence of his loss of consortium was uncontradicted. Had the juror's communication been revealed in open court, evidence could possibly have been introduced to distinguish the injuries. By communicating his evidence to the jurors outside the court, the foreman precluded plaintiffs from testing it or making an answer and thus deprived plaintiff of due process of law (*100 Cal. App. 3d 947, 952-954)* .

[b] Experiments by Jurors, Viewing of Premises, Examination of Exhibits Not in Evidence

In ***Walter v. Ayvazian*** *(1933) 134 Cal. App. 360, 25 P.2d 526* , plaintiff husband brought an action for damages allegedly caused by defendant's negligent operation of an automobile. The accident allegedly caused kidney injuries to plaintiff's wife who later died from the injuries. During the jury's deliberation, one juror telephoned her family doctor to ask about a symptom of decedent's kidney condition. After verdict was rendered for plaintiff, defendant moved for a new trial. When the motion was denied, defendant appealed the judgment.

The court of appeal reversed the judgment on the basis of prejudicial jury misconduct, stating that it is a fundamental rule that all evidence must be taken in open court, and that each party to the controversy must have knowledge of that evidence in order to meet and answer it. The court said that certain experiments by jurors, viewing of premises, and examination of exhibits not in evidence but acquired by the jurors, have been held to be the equivalent of taking evidence outside of court. The court noted that this deprives a party of his or her constitutional right to have knowledge of and to meet and answer the evidence and, therefore, requires the granting of a new trial (*134 Cal. App. 360, 364)* . Since the juror had greater confidence in the opinion of her family doctor than in the opinions of the doctors produced at trial, the court could not say that the verdict was not influenced by outside evidence (*134 Cal. App. 360, 364-365)* . Furthermore, the expert witnesses disagreed on the issue at trial, and this issue had been submitted to the jury as a question of fact on which to base its verdict (*134 Cal. App. 360, 364)* .

[c] Experiment by Juror

In ***Higgins v. L.A. Gas & Electric Co.*** *(1911) 159 Cal. 651, 115 P. 313* , plaintiff landlord brought an action against defendant gas company for damages caused to plaintiff's building by a gas explosion. Plaintiff claimed that the explosion was caused by a spark from a flashlight used by defendant's employee to investigate a gas leak. Defendant contended that the explosion was caused by a flame from an oil stove and that plaintiff's tenant was negligent in not having extinguished the flame after defendant's employee demanded that he do so. Although the original flashlight was lost in the explosion, a similar light was given to the jury to use in its deliberations. After verdict was rendered for plaintiff, defendant moved for a new trial on the basis of the jury's allegedly prejudicial use of the flashlight in its deliberation. When the motion was granted, plaintiff appealed the order.

Although the Supreme Court reversed the order because it found that defendant was not prejudiced by the jury's use of the flashlight, it stated that the fundamental rule is that all evidence must be taken in open court and that each party to a controversy must have knowledge of, and thus to have the opportunity to meet and answer, any evidence brought against that party. This rule, the Court said, governs the use of exhibits by the jurors. They may use the exhibit according to its nature to aid in weighing the evidence that has been given and in reaching a conclusion on a controverted matter. They may carry out experiments within the lines of offered evidence, but if their experiments

invade new fields and their verdict is influenced by discoveries from these experiments, then the jury has taken evidence without the knowledge of either party, evidence that the injured party could not meet, answer, or explain (*159 Cal. 651, 656-657)* . However, even though the trial judge felt that he had committed an error in allowing the jury to experiment with the exhibit without limiting the scope of its experiments by proper instruction, the Supreme Court found that defendant could not have been injured by the improper experiment. Even if the explosion were caused by the tenant's oil stove, plaintiff's action could not be defeated by proof of the tenant's contributory negligence. Thus, if it were established that the concurrent negligence of the gas company and the tenant united to produce the injury to the property, the landlord would have recourse against the gas company and/or tenant. Therefore, the Court stated that the finding that the spark from the flashlight caused the explosion, even if erroneous or erroneously arrived at, could not have caused injury to defendant, and a new trial was not necessary (*159 Cal. 651, 660-661, 663)* .

Note that an order denying a motion for new trial is no longer appealable [*see Code Civ. Proc. §§ 904.1(a)(4), 904.2(e)*]. If a party attempts to appeal from an order denying a new trial, the reviewing court will dismiss the appeal [*see Wilson v. Kopp (1952) 114 Cal. App. 2d 198, 199-200, 210, 250 P.2d 166]* . A party must appeal the judgment, and if he or she raises the issue on appeal, the appellate court, when reviewing the judgment, will assess the propriety of the trial court's ruling on the motion for new trial [*see Wilson v. Kopp (1952) 114 Cal. App. 2d 198, 199-200, 210, 250 P.2d 166]* .

In ***Wagner v. Doulton*** *(1980) 112 Cal. App. 3d 945, 169 Cal. Rptr. 550* , plaintiff brought an action for personal injuries sustained in a collision between his motorcycle and defendants' automobile. During the jury's deliberation, a juror, who was also an engineer, prepared a scale map of the accident location. After verdict for defendants, plaintiff moved for a new trial on the basis of the juror's presentation of extrajudicial evidence during jury deliberations. When the motion was denied, plaintiff appealed the judgment.

Although the court of appeal affirmed judgment, noting that the denial of the motion for new trial was proper, it restated the basic rule that jurors may not receive evidence out of court and may not conduct experiments that put them in possession of evidence not offered at trial. However, the juror's affidavit revealed that he had prepared the map in the jury room using evidence obtained at trial. The court stated that the diagram the juror prepared was a pictorial representation of his idea of the testimony he heard during trial. The fact that the juror was an engineer and was perhaps more skillful at drawing diagrams made no difference since each juror's discussion of the case is necessarily tinged or affected by his or her own viewpoint or experience. Therefore, the court held that it was not misconduct for a juror to make a diagram based solely on the evidence received in court. Accordingly, the court affirmed the judgment (*112 Cal. App. 3d 945, 950-951)* .

[d] Unauthorized View of Premises

In ***Woebbe v. Sperry*** *(1941) 48 Cal. App. 2d 340, 119 P.2d 743* , plaintiff passenger brought an action for personal injuries suffered in an automobile accident that occurred when the driver of the car attempted to turn left and was struck by an oncoming car driven by one of defendants. Before trial, a juror repeatedly passed through the intersection where the accident occurred as he drove between his place of business and his home. During trial, he continued to travel the same path. After judgment for defendants, plaintiff moved for a new trial based on the juror's misconduct in viewing the scene. When the motion was denied, plaintiff appealed the judgment.

The court of appeal affirmed the judgment since there was no evidence that indicated that the juror had received evidence outside of court. If there were evidence that the juror had stopped at the intersection and made observations and measurements, the court indicated that a new trial may have been necessary. In this case, however, the juror's affidavit gave no indication that he received, directly or indirectly, any evidence during his view of the scene (*48 Cal. App. 2d 340, 344)* .

[e] Examination of Exhibits Not in Evidence

In ***Tunmore v. McLeish*** *(1919) 45 Cal. App. 266, 187 P. 443* , plaintiff brought an action for personal injuries suffered when plaintiff's motorcycle collided with defendant's car. During a recess from trial and before the motorcycle was introduced into evidence, two jurors carefully examined the motorcycle and discussed whether or not plaintiff's wife could see the speedometer from where she was sitting on the rear seat at the time of the accident. Subsequent affidavits by plaintiff and plaintiff's wife showed that the speedometer had slipped from its original location because of the impact of the collision. No evidence was introduced at trial regarding the position of the speedometer prior to the collision. After the jury rendered a verdict for defendant, plaintiff moved for a new trial on several grounds including misconduct of the jurors in examining the motorcycle out of court. When the motion was granted, defendant appealed.

The court of appeal affirmed, stating that the jurors' examination of the motorcycle was not only the taking of evidence outside of court without the knowledge of the parties, but was also the taking of evidence along new lines which the plaintiff had no opportunity to explain or refute. The fundamental rule, the court explained, was that all evidence must be taken in open court so that each party will have knowledge of and have the opportunity to meet and answer any evidence brought against that party. The court stated that this fundamental rule governs the use of exhibits by the jury. Jurors may use exhibits to aid them in weighing the evidence and may carry out experiments within the lines of offered evidence, but if their experiments invade new fields and their verdict is influenced by discoveries from such experiments, then they have impermissibly taken evidence outside of court without the knowledge of either party. Furthermore, in this case, the court found an added irregularity since the exhibit was examined before it was introduced in evidence. Because of the prejudicial nature of the jury's misconduct, the court affirmed the order granting plaintiff a new trial (*45 Cal. App. 266, 268-269)* .

[f] Reliance by Juror on Outside Expert

The factual and procedural background of ***Walter v. Ayvazian*** *(1933) 134 Cal. App. 360, 25 P.2d 526* , is discussed in [b], *above*. During the jury's deliberation, a juror telephoned her family doctor to ask about a symptom that the decedent allegedly suffered as a result of an automobile accident with defendant. After verdict was rendered for plaintiff, defendant moved for a new trial. When the motion was denied, defendant appealed the judgment.

The court of appeal reversed the judgment on the basis of prejudicial jury misconduct, stating that the juror's consultation with the doctor consisted of evidence taken outside of court that would require a new trial. The use of the expert opinion could not withstand that degree of scrutiny as to fairness that guaranteed the rendition of a just verdict, uninfluenced by outside evidence. Since the juror had greater confidence in the opinion of her family doctor than in the opinions of the doctors produced at trial, the court could not say that the verdict was not influenced by the outside evidence. Furthermore, the opinion of the doctor was direct evidence on a material question of the case. This material question had been submitted to the jury for its determination as a question of fact on which to base its verdict and on which expert witnesses at trial had differed (*134 Cal. App. 360, 364-365)* .

[4] Additional Authorities

[a] New Trial for Improper Reception of Evidence

In *Province v. Center for Women's Health & Family Birth (1993) 20 Cal. App. 4th 1673, 25 Cal. Rptr. 2d 667* , a juror read a newspaper article that discussed the case and a previous trial in the case that had resulted in a hung jury. The juror had told several other jurors about the article. After returning the verdict, juror declarations established the misconduct. The court of appeal reversed the judgment, holding that a new trial was warranted. Prejudice was presumed from the misconduct, and that prejudice was not rebutted because the misconduct was serious, the final tally of the vote was nine to three, and a previous trial had resulted in a hung jury, indicating that a different result might have occurred had there not been the misconduct (*20 Cal. App. 4th 1673, 1678-1680)* .

People ex rel. Dept. Pub. Wks. v. Curtis (1967) 255 Cal. App. 2d 378, 63 Cal. Rptr. 138 , was a condemnation action in which the court of appeal reversed a judgment for defendants and awarded defendants a new trial on the basis of misconduct and irregularity in the proceedings of the jury [*Code Civ. Proc. §§ 657(1), 657(2)*]. On voir dire examination, a juror concealed the fact that he was attending real estate appraisal classes, and during the jury's deliberation, he referred to information learned in the classes when discussing the qualifications of appraisers produced at trial. The court stated that the juror's misconduct in imparting information received out of court prejudiced the outcome of the case and that the trial court abused its discretion in denying defendants' motion for a new trial (*255 Cal. App. 2d 378, 386-392)* .

Smoketree-Lake Murray, Ltd. v. Mills Concrete Construction Co. (1991) 234 Cal. App. 3d 1724, 286 Cal. Rptr. 435 , involved a cross complaint by a developer against various subcontractors for indemnification for damages resulting from defects in the construction of a condominium complex. The developer moved for new trial based on juror misconduct, contending that one of the jurors committed prejudicial misconduct by performing an experiment on pouring concrete. The juror used a small box, filled with kitty litter, and some crayons to demonstrate how concrete was poured. In conducting the demonstration, the juror explained that she knew about concrete construction practice from discussion with her family. She also told the jury how inconsistencies in the sand, on top of which the concrete is placed, can be caused by footprints of people walking back and forth across the building pad before the concrete is poured. The court concluded from these facts that the demonstration constituted misconduct because it brought new evidence into the deliberations (*234 Cal. App. 3d 1724, 1749)* .

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15-155 California Points & Authorities § 155.84

§ 155.84 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Juror Misconduct [Code Civ. Proc. § 657(2)]--Arrival at Verdict by Chance

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities supporting a motion for new trial on the ground of jury misconduct (see § 155.80).*]

THE MOTION FOR NEW TRIAL SHOULD BE GRANTED BECAUSE THE JURORS ARRIVED AT A VERDICT BY CHANCE, THUS PREVENTING _____ [PLAINTIFF *or* DEFENDANT] FROM HAVING A FAIR TRIAL AND MATERIALLY AFFECTING HIS/HER/ITS SUBSTANTIAL RIGHTS.

A. New Trial for Chance Verdict. The jury's arrival at a verdict by chance is misconduct for which a new trial may be granted (*Dixon v. Pluns (1893) 98 Cal. 384, 385, 33 P. 268* ; *see* *Buhl v. Wood Truck Lines (1944) 62 Cal. App. 2d 542, 544, 144 P.2d 847*).

B. Hazard, Risk, or Result of Uncertain Conditions. Chance may be defined as hazard, risk, or the result or issue of uncertain and unknown conditions or forces (*Dixon v. Pluns (1893) 98 Cal. 384, 387, 33 P. 268* ; *see* *Mirabito v. San Francisco Dairy Co. (1934) 1 Cal. 2d 400, 404, 35 P.2d 513*).

[*Optional*] **C. Quotient Verdict.** An agreement to vote for an amount calculated by averaging sums favored by the individual jurors, without further deliberation, is a verdict arrived at by chance, and such a verdict constitutes jury misconduct for which a new trial may be granted (*Buhl v. Wood Truck Lines (1944) 62 Cal. App. 2d 542, 544-546, 144 P.2d 847*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for new trial on the ground of jury misconduct [*Code Civ. Proc. § 657(2)*] on the basis of the jury's rendition of a verdict obtained by chance. It does not provide a complete form, but is designed to be combined with a general form of points and authorities in support of a motion for new trial on the basis of jury misconduct [*see § 155.80*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should show how the verdict was reached by chance and how this deprived the moving party of a fair trial and materially affected the moving party's substantial rights.

A motion for new trial made on this ground must be supported by declarations or affidavits [*Code Civ. Proc. § 658*; *see Code Civ. Proc. § 2015.5*]. Counsel may also submit an affidavit or declaration of any one of the jurors to show that the verdict was reached by chance [*see Code Civ. Proc. § 657(2)*].

[c] Related Pleading and Practice Forms

For a notice of intention to move for a new trial on the ground of jury misconduct, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* , and Ch. 326A, *Jury Verdicts* (Matthew Bender).

[d] Opposing Points and Authorities

The points and authorities set out in *§ 155.115* may be used in an appropriate case to oppose a motion for new trial supported by this memorandum.

[3] Discussion of Authorities

[a] New Trial for Chance Verdict

In ***Dixon v. Pluns*** *(1893) 98 Cal. 384, 33 P. 268* , plaintiff brought a personal injury action against defendant for injuries suffered when struck by a chisel that fell from a scaffolding. During the jury's deliberations, each juror agreed to write on a piece of paper what he or she thought the amount of the verdict should be. The sums were added together and divided by 12, and the result was rendered as the verdict. Defendant moved for a new trial. When the motion was denied, defendant appealed.

The Supreme Court reversed the order denying a new trial and remanded the cause for further proceedings on the motion for new trial, finding that the verdict was obtained by a resort to chance (*98 Cal. 384, 387-389)* . The Court stated that the arrival at a verdict by chance is misconduct that could be shown by the affidavits of jurors (*98 Cal. 384, 385)* . The Court added that in arriving at the verdict in the manner here practiced, the chance of the respective parties, plaintiff and defendant, to secure the verdict is entirely dependent on the sum total of the estimates made by the various jurors, and that sum total is as uncertain and unknown to the jurors as the casting of a die is to a gamester (*98 Cal. 384, 387)* .

Buhl v. Wood Truck Lines *(1944) 62 Cal. App. 2d 542, 144 P.2d 847* , was an action for damages brought by plaintiffs against a trucking company. During the jury's deliberation, each juror wrote down the amount that he or she favored as a verdict, and this sum was divided by 12. After a verdict was rendered for plaintiffs, defendant moved for a new trial on the ground of misconduct of the jury. When the motion was granted, plaintiffs appealed the order.

The court of appeal affirmed the order, stating that an agreement to vote for an amount calculated by averaging the sums favored by the individual juror is a verdict arrived at by chance. Chance verdicts constitute misconduct for which a new trial may be granted. However, the court said that the jury may calculate an average amount as a basis for discussion if

there is a later consideration of the amount and a vote on it, even if the jury agrees on the original amount. Affidavits submitted by the jurors were conflicting regarding whether the verdict was fixed by averaging the different amounts or whether after discussion and subsequent voting, a different sum was arrived at. Since the affidavits did in fact create a conflict, the court decided not to disturb the order made by the trial court. Accordingly, it affirmed the order (*62 Cal. App. 2d 542, 544-546)* .

[b] Hazard, Risk, or Result of Uncertain Conditions

The factual and procedural background of ***Dixon v. Pluns*** *(1893) 98 Cal. 384, 33 P. 268* , is discussed in [a], *above*. In that case, the Supreme Court reversed an order denying defendant a new trial and remanded the case since it found that the verdict was obtained by a resort to chance (*98 Cal. 384, 387-389)* . The Court stated that chance may be defined to be hazard, risk, or the result or issue of uncertain and unknown conditions or forces, and that the facts of the case clearly brought it within this definition (*98 Cal. 384, 387)* .

Mirabito v. San Francisco Dairy Co. *(1934) 1 Cal. 2d 400, 35 P.2d 513* , was an action for damages for personal injuries suffered by plaintiff. While deliberating, the jurors could not decide on the amount of damages to award plaintiff. Hence, they decided to vote on two known figures and agreed to accept the figure that received a majority of votes as its unanimous verdict. When the sum of $5,000 received the most votes, the jurors accepted it without further discussion. After this verdict was rendered for plaintiff, defendants moved for a new trial on several grounds, including misconduct on the part of the jurors in resorting to a chance verdict. When the court denied the motion, defendants appealed the judgment.

The Supreme Court stated that chance is commonly understood to imply an absence of explainable or controllable causation and has, moreover, been defined as hazard, risk, or the result of uncertain or unknown conditions or forces. The Court noted, however, that each juror accepted one of the two known figures as his or her first choice and, by way of compromise and for the sake of coming to an agreement, agreed to accept the other as a verdict if it should be the first choice of the majority. The Court felt that there was no operation of any unknown force or unexplainable cause in the jury's verdict, but the verdict was an exercise of judgment of each juror. Therefore, the Court affirmed the judgment for plaintiff (*98 Cal. 384)* .

[c] Quotient Verdict

The factual and procedural background of ***Buhl v. Wood Truck Lines*** *(1944) 62 Cal. App. 2d 542, 144 P.2d 847* , is discussed in [a], *above*. The court of appeal affirmed an order granting defendants a new trial in an action in which each juror wrote down the amount that he or she favored as a verdict, and the sum was divided by 12. The court stated that an agreement to vote for an amount calculated by averaging the sums favored by the individual jurors is a verdict arrived at by chance (*62 Cal. App. 2d 542, 544)* . In this case, the jurors' affidavits conflicted as to whether the amount of the verdict was fixed by averaging the different amounts, or whether, after discussion and subsequent vote, a different sum was arrived at (*62 Cal. App. 2d 542, 545)* . Since the court of appeal concluded that the affidavits did conflict, it decided not to disturb the finding of the lower court that a new trial was necessary (*62 Cal. App. 2d 542, 545-546)* .

[4] Additional Authorities

[a] Quotient Verdict

Ham v. County of Los Angeles (1920) 46 Cal. App. 148, 189 P. 462 , was an action for wrongful death in which the court of appeal affirmed an order granting a new trial made on several grounds, including misconduct of the jury [*Code Civ. Proc. § 657(2)*]. The jury reached its verdict by averaging the sums favored by the individual jury members. The court stated that it was obviously a chance verdict that made a new trial imperative (*46 Cal. App. 148, 152-153)* .

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15-155 California Points & Authorities § 155.85

§ 155.85 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Juror Misconduct [Code Civ. Proc. § 657(2)]--Reference to Dictionary to Define Term in Instruction

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities supporting a motion for new trial on the ground of jury misconduct (see § 155.80).*]

THE MOTION FOR NEW TRIAL SHOULD BE GRANTED ON THE GROUND OF JURY MISCONDUCT BECAUSE _____ [A JUROR HAS *or* JURORS HAVE] REFERRED TO A DICTIONARY TO DEFINE A TERM USED IN THE INSTRUCTION.

Juror Reference to Dictionary Is Misconduct. It is well established that a juror's reference to a dictionary for the definition of a term used in an instruction constitutes misconduct (*Glage v. Hawes Firearms Co. (1990) 226 Cal. App. 3d 314, 323, 276 Cal. Rptr. 430*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for new trial on the ground of jury misconduct [*Code Civ. Proc. § 657(2)*], on the basis of a juror's reference to a dictionary for the definition of a term given in the instruction to the jury.

Once it is established that misconduct was committed, a presumption of prejudice arises and the burden shifts to the opposing party to rebut the presumption [*Glage v. Hawes Firearms Co. (1990) 226 Cal. App. 3d 314, 323, 276 Cal. Rptr. 430* ; *see § 155.81*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should identify facts showing that a juror or jurors consulted a dictionary for the meaning of a term used in the instruction.

[c] Related Pleading and Practice Forms

For a notice of intention to move for a new trial on the ground of jury misconduct, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* , and Ch. 326A, *Jury Verdicts* (Matthew Bender).

[d] Opposing Points and Authorities

In an appropriate case, the points and authorities set out in *§ 155.110* et seq. may be used to oppose the motion supported by the foregoing points and authorities.

[3] Discussion of Authorities

[a] Juror Reference to Dictionary Is Misconduct

The facts and procedural background of ***Glage v. Hawes Firearms Co.*** *(1990) 226 Cal. App. 3d 314, 276 Cal. Rptr. 430* , are discussed in *§ 155.80[3][b]*. In *Glage*, the court reversed the trial court's judgment and order denying new trial. Among the contentions on appeal was the charge that two of the jurors committed misconduct in looking up the dictionary definition of "preponderance" and discussing it with the other jurors (*226 Cal. App. 3d 314, 320)* . The court stated that it is well established that a juror's reference to a dictionary for the definition of a term used in an instruction constitutes misconduct. The court quoted from the explanation in *People v. Karis (1988) 46 Cal. 3d 612, 642, 250 Cal. Rptr. 659, 758 P.2d 1189* , that use of a dictionary to obtain further understanding of the court's instructions poses a risk that the jury will misunderstand the meaning of terms that have a technical or unique usage in the law (note, however, that *Karis* found no basis for prejudice in the jury's consideration of the dictionary definition of "mitigating"). Further, the jury in *Glage* was specifically instructed not to consult reference works for additional information [*see* California Jury Instructions--Civil *BAJI No. 1.00.5* (7th ed. 1986)], and the plaintiff conceded that the jurors committed misconduct by looking up the definition of "preponderance" and discussing it with all the jurors (*226 Cal. App. 3d 314, 323)* .

The issue before the court then became whether the presumption of prejudice from the misconduct had been rebutted (*226 Cal. App. 3d 314, 323* ; *see § 155.81*). The court determined that in light of the restricted legal meaning of "preponderance of the evidence," the broader scope of the common definition of "preponderance" stated in dictionaries and the jury's duty to use the former and not the latter, the juror misconduct created a clear and substantial risk that the jury might apply the burden of proof in a mechanical, quantitative way rather than to properly determine which evidence was most convincing. Thus, the court held that the record amply supported a finding of a substantial likelihood that the jury was improperly influenced by the extraneous dictionary definition (*226 Cal. App. 3d 314, 326)* .

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[Reserved]

§§ 155.86[Reserved]

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15-155 California Points & Authorities § 155.100

§ 155.100 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Irregularity in Jury Proceedings [Code Civ. Proc. § 657(1)]--Moving Party Has Not Shown Lack of Prior Knowledge of Alleged Irregularity

[1] FORM

[*Caption. See § 155.60[1].*]

THE MOTION FOR NEW TRIAL SHOULD NOT BE GRANTED, BECAUSE _____ [PLAINTIFF *or* DEFENDANT] HAS FAILED TO AFFIRMATIVELY SHOW THAT _____ [HE/SHE/IT *and/or* HIS/HER/ITS COUNSEL] HAD NO KNOWLEDGE OF THE ALLEGED JURY IRREGULARITY BEFORE THE RENDITION OF THE VERDICT, AND THE FAILURE TO MAKE THIS SHOWING IS FATAL TO THE MOTION.

Affirmative Showing of Lack of Prior Knowledge of Misconduct. A party moving for a new trial under *Section 657(1) of the Code of Civil Procedure* on the ground of irregularity in the proceedings of the jury must affirmatively show that neither he or she nor his or her counsel knew of the facts constituting the claimed misconduct before the rendition of the verdict; absence of this showing is fatal to the motion (*see Forman v. Alexander's Markets (1956) 138 Cal. App. 2d 671, 674-675, 292 P.2d 257* ; *see also Weathers v. Kaiser Foundation Hospitals (1971) 5 Cal. 3d 98, 103, 95 Cal. Rptr. 516, 485 P.2d 1132*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for new trial on the ground of irregularity in the proceedings of the jury [*Code Civ. Proc. § 657(1)*] based on the moving party's failure to show no prior knowledge of the irregularity. In an appropriate case, this form may be used to oppose a motion for new trial supported by the points and authorities set out in *§ 155.70* et seq.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. In particular, counsel should show how the moving party has failed to affirmatively show that he or she and his or her counsel were unaware of the facts constituting the alleged irregularity until after the verdict was rendered. Counsel may submit declarations of those parties who had personal knowledge that either the moving party or counsel knew of the alleged irregularity during trial [*see Lindemann v. San Joaquin Cotton Oil Co. (1936) 5 Cal. 2d 480, 495-496, 55 P.2d 870]* .

[c] Related Pleading and Practice Forms

For forms relating to new trial motion proceedings, including an order denying the motion and declarations that may be modified for use as opposing declarations, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[3] Discussion of Authorities

[a] Affirmative Showing of Lack of Prior Knowledge of Misconduct

Forman v. Alexander's Markets *(1956) 138 Cal. App. 2d 671, 292 P.2d 257* , was an action for personal injuries in which verdict was rendered for defendants. Plaintiffs' motion for new trial, based on a juror's allegedly concealed bias on voir dire, was denied, and plaintiff appealed the judgment. The court of appeal affirmed the judgment, noting that a motion for a new trial may be granted on the ground that a juror made untrue answers to questions asked on voir dire if it appears that the moving party was not aware of the falsity at the time of the completion of the impanelment of the jury and did not discover that fact during the trial and before rendition of the verdict (*138 Cal. App. 2d 671, 674)* . In the case at bar, neither plaintiffs nor their attorney submitted any affidavits. Plaintiffs failed to affirmatively show in support of their motion for a new trial that both they and their counsel were ignorant of the facts constituting the claimed misconduct prior to the rendition of the verdict. The absence of such a showing in support of the motion for a new trial was fatal (*138 Cal. App. 2d 671, 674-675)* . The court quoted *Sherwin v. Southern Pacific Co. (1914) 168 Cal. 722, 726, 145 P. 92* , which stated that if the moving party or its attorneys had discovered these facts at any time during the trial it would have been their duty, if they desired to take advantage thereof, to apply to the court for leave to reopen the examination of the jurors, elicit the facts, and offer a challenge to the juror guilty of misconduct.

In failing to show that they did not acquire such knowledge during the course of the trial after the jury was sworn, the moving party failed to present sufficient ground for new trial on that cause (*138 Cal. App. 2d 671, 675)* .

The factual and procedural background of ***Weathers v. Kaiser Foundation Hospitals*** *(1971) 5 Cal. 3d 98, 95 Cal. Rptr. 516, 485 P.2d 1132* , is discussed in *§ 155.70[3][c]*. Plaintiffs' motion for a new trial on the ground of irregularity in the proceedings of the jury [*Code Civ. Proc. § 657(1)*] and jury misconduct [*Code Civ. Proc. § 657(2)*] was granted, and defendant appealed the order, claiming that plaintiffs' motion was fatally defective because it failed to include supporting declarations by both plaintiffs and their counsel to show their lack of knowledge of the juror improprieties prior to the rendition of the verdict.

Although the Supreme Court affirmed the order, it reiterated the basic rule that a litigant seeking a new trial on the ground of juror improprieties must present affidavits that neither he or she nor counsel were aware of the misbehavior until after the verdict was returned. The purpose of the rule is to prevent a party who has learned of some jury misconduct during the course of the proceedings from gambling on the outcome of trial while secretly preserving the error to be raised on a motion for new trial in the event of an unfavorable verdict. When at any time during trial a party or counsel becomes aware of facts constituting misconduct or irregularity in the proceedings of the jury, he or she must promptly bring such matters to the attention of the court, if an objection is desired. Otherwise, the point will be waived as a ground for a motion for new trial (*5 Cal. 3d 98, 103)* . In this case, the declaration submitted by plaintiffs' attorney substantially complied with the requirement that plaintiffs and their counsel lack prior knowledge of any jury misconduct. In counsel's declaration he unequivocally stated that both plaintiffs and their attorneys lacked prior knowledge of the jury misconduct raised in the motion for new trial. Although the filing of separate declarations by counsel and client was undoubtedly far preferable, the failure of plaintiffs to do so was not fatal error (*5 Cal. 3d 98, 105)* .

[4] Additional Authorities

[a] Affirmative Showing of Lack of Prior Knowledge of Misconduct

In *Lindemann v. San Joaquin Cotton Oil Co. (1936) 5 Cal. 2d 480, 55 P.2d 870* , the trial court properly denied defendants' motion for new trial on the ground of irregularity in the proceedings of the jury [*Code Civ. Proc. § 657(1)*] based on a juror's alleged concealment, on voir dire, of her friendship with plaintiff and his wife. Affidavits of plaintiff's wife and defendant's counsel showed that counsel knew of the facts during trial. The Supreme Court stated that it is improper to permit a party knowing of misconduct to withhold action and gamble on the outcome of trial before making a complaint (*5 Cal. 2d 480, 495-496)* .

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15-155 California Points & Authorities § 155.101

§ 155.101 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Irregularity in Jury Proceedings [Code Civ. Proc. § 657(1)]--Moving Party Has Not Shown Alleged Concealment of Bias Was Prejudicial

[1] FORM

[*Caption. See § 155.60[1].*]

THE MOTION FOR NEW TRIAL SHOULD NOT BE GRANTED ON THE GROUND OF IRREGULARITY IN THE PROCEEDINGS OF THE JURY, BECAUSE _____ [PLAINTIFF *or* DEFENDANT] HAS FAILED TO SHOW THAT THE JUROR'S ALLEGED CONCEALMENT OF BIAS ON VOIR DIRE WAS PREJUDICIAL TO HIS/HER/ITS CASE; THUS _____ [PLAINTIFF *or* DEFENDANT] WAS NOT PREVENTED FROM HAVING A FAIR TRIAL AND HIS/HER/ITS SUBSTANTIAL RIGHTS WERE NOT MATERIALLY AFFECTED.

A. Showing of Prejudice Required. In the absence of a showing of prejudice from an alleged irregularity in impaneling a juror with concealed bias or prejudice, a motion for new trial is properly denied (*see City of Pleasant Hill v. First Baptist Church (1969) 1 Cal. App. 3d 384, 432-433, 82 Cal. Rptr. 1* ; *see also West v. Reigal (1962) 208 Cal. App. 2d 638, 642-643, 25 Cal. Rptr. 288*).

B. Proof by Preponderance of Evidence. An order granting a new trial based on a juror's alleged concealment of bias on voir dire must be supported by a preponderance of the evidence to show that the statements were actually made by the juror and that the juror was, because of a general bias against the party, irrevocably committed to voting against that party regardless of the facts that might emerge at trial. An order for a new trial based on insufficient evidence is an abuse of discretion (*Johns v. City of Los Angeles (1978) 78 Cal. App. 3d 983, 990-996, 144 Cal. Rptr. 629*).

C. Juror Must Be Subject to Challenge for Cause. A motion for new trial on the ground of irregularity in the proceedings of the jury based on a juror's concealment of bias on voir dire is properly denied in the absence of an adequate showing that the juror was subject to challenge for cause as a consequence of untrue answers (*Castro v. Fowler Equipment Co. (1965) 233 Cal. App. 2d 416, 423-424, 43 Cal. Rptr. 589*).

[*Optional*] **D. Jurors as Unable to Deny Prejudicial Influence in Declaration.** Jurors' declarations to the effect that their subjective reasoning processes were not affected by the conduct of the allegedly offending juror should not be considered in ruling on the motion for new trial, because jurors cannot deny the prejudicial influence on their minds of knowledge acquired by misconduct (*see Evid. Code § 1150*; *City of Pleasant Hill v. First Baptist Church (1969) 1 Cal. App. 3d 384, 433, 82 Cal. Rptr. 1*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for new trial on the ground of irregularity in the proceedings of the jury [*Code Civ. Proc. § 657(1)*] based on a juror's alleged concealment of bias on voir dire. This form may be used to oppose a motion for new trial supported by the points and authorities set out in *§ 155.71*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. In particular, counsel should argue that the moving party failed to affirmatively show that he or she was prejudiced by the juror's alleged bias. Counsel may include declarations from the allegedly offending juror stating that he or she was not prejudiced against the moving party's case either at the outset of trial or during the conduct of trial, and also never said anything to that effect [*see West v. Reigal (1962) 208 Cal. App. 2d 638, 640-641, 25 Cal. Rptr. 288]* . Counsel may also include declarations from any person with personal knowledge that a juror's biased statements were not made [*see West v. Reigal (1962) 208 Cal. App. 2d 638, 641, 25 Cal. Rptr. 288* (declaration from defendant's attorney)] or declarations from other jurors stating that the allegedly biased juror deliberated in a fair and impartial manner without attempting to dominate or influence the other jurors in an improper manner [*see West v. Reigal (1962) 208 Cal. App. 2d 638, 643, 25 Cal. Rptr. 288]* .

[c] Related Pleading and Practice Forms

For forms relating to new trial motion proceedings, including an order denying the motion and declarations that may be modified for use as opposing declarations, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[3] Discussion of Authorities

[a] Showing of Prejudice Required

In ***City of Pleasant Hill v. First Baptist Church*** *(1969) 1 Cal. App. 3d 384, 82 Cal. Rptr. 1* , a city brought an action to condemn certain lands that belonged to a church. The primary issue at trial was whether or not the church had suffered

severance damages. After judgment for defendant church, plaintiff moved for a new trial on several grounds, including irregularity in the proceedings of the jury [*Code Civ. Proc. § 657(1)*]. Plaintiff alleged that juror Steede had expressed the opinion that cities should not have the right to condemn property and that he concealed this bias on voir dire examination. Plaintiff also contended that juror McClarinon concealed her prior knowledge that the church was engaged in beneficial youth work. Plaintiff's motion for a new trial was denied, and it appealed the judgment.

The court of appeal affirmed the judgment, finding that the jurors' alleged concealment did not constitute a sufficient basis for the granting of a new trial (*1 Cal. App. 3d 384, 433)* . The declaration of the accused jurors provided ample support for the finding that neither juror was prejudiced against the city prior to his or her selection as a juror (*1 Cal. App. 3d 384, 432)* . It was questionable whether the statements attributed to juror McClarinon evidenced a demonstrated concealment of a prejudiced mind (*1 Cal. App. 3d 384, 432-433)* . Furthermore, juror Steede's vote was not needed for the verdict. Under these circumstances, it has been held that no prejudice requiring a new trial is demonstrated by showing the misconduct of a single juror. Nevertheless, if juror Steede's alleged prejudice was communicated to and acted upon by other jurors, it could require a new trial. However, the city failed to show that any juror was influenced by juror Steede's opinion, and therefore the granting of a new trial was not necessary (*1 Cal. App. 3d 384, 433)* .

West v. Reigal *(1962) 208 Cal. App. 2d 638, 25 Cal. Rptr. 288* , was an action for personal injuries in which plaintiffs' motion for a new trial, based on a juror's allegedly concealed bias on voir dire, was denied. On voir dire examination, the juror stated that he felt that he could be a fair juror, that he had no prejudice against plaintiffs as a class, that they had a right to come into court and have their cases determined by a jury, and that he would decide the case entirely on the basis of the evidence and the law.

The court of appeal affirmed judgment for defendant, stating that assuming that the juror was prejudiced against plaintiff as claimed, it still remained the burden of plaintiff to affirmatively show that prejudice resulted therefrom. In this case, the jury voted 10 to two in favor of the defendant. The uncontradicted affidavit of another juror showed that the deliberations of the jury were confined to the evidence and the law as given to it by the court's instructions. There was no showing that the allegedly biased juror attempted to dominate the other jurors or in any way influence them in an improper manner. Since nine votes would secure a verdict for defendant, even if the biased juror had voted the other way, the verdict would still be for defendant. Since there was nothing to indicate that plaintiff's rights to a fair trial were prejudiced, the court of appeal did not disturb the trial court's ruling (*208 Cal. App. 2d 638, 643-644)* .

[b] Proof by Preponderance of Evidence

Johns v. City of Los Angeles *(1978) 78 Cal. App. 3d 983, 144 Cal. Rptr. 629* , was a wrongful death action in which verdict was rendered for defendants. Plaintiffs moved for a new trial on several grounds, including irregularity in the proceedings of the jury [*Code Civ. Proc. § 657(1)*] based on two jurors' concealment of bias on voir dire and on the ground of insufficiency of the evidence [*Code Civ. Proc. § 657(6)*]. Both instances of misconduct rested on the affidavit of a single, although different, juror. However, the instances were refuted by the affidavits of all the other jurors. The trial judge granted the motion for new trial.

The court of appeal reversed the order, holding that it was arbitrary and an abuse of discretion (*78 Cal. App. 3d 983, 999)* . A trial judge may accept the testimony of one witness as against that of opposing witnesses, but does not have the same unfettered right to accept the untested averments in one affidavit as against 11 to the contrary (*78 Cal. App. 3d 983, 993)* . Plaintiffs on a motion for new trial had the burden of proving by a preponderance of evidence that the controverted statements of the jurors were made and that the jurors who had made them had in fact committed perjury on voir dire (*78 Cal. App. 3d 983, 991)* . It was then necessary for the trial judge, before granting the motion, to find that the juror was, because of a general bias against plaintiffs, irrevocably committed to voting against plaintiffs regardless of the facts that might emerge at trial (*78 Cal. App. 3d 983, 996)* . The court concluded that there was insufficient evidence in the record to support a finding that either of the jurors made the contested statements or that they harbored a bias against plaintiffs' cause which they concealed on voir dire (*78 Cal. App. 3d 983, 996, 998)* .

[c] Juror Must Be Subject to Challenge for Cause

Castro v. Fowler Equipment Co. *(1965) 233 Cal. App. 2d 416, 43 Cal. Rptr. 589* , was an employee's action against a third-party tortfeasor for personal injuries sustained in plaintiffs' employment. After judgment for plaintiff, defendant moved for a new trial based on a juror's false answer given on voir dire examination [*Code Civ. Proc. § 657(1)*]. After the motion was denied, defendant appealed the judgment and also sought review of the order denying the motion for a new trial.

The court of appeal affirmed the judgment, stating that the moving party must show that the questioned juror had a biased or prejudiced state of mind towards the defendant and that a challenge for cause would have been granted (*233 Cal. App. 2d 416, 423-424)* . In this case, the juror was asked if any member of her family had been injured in an accident, to which she replied negatively. After trial, appellant hired a professional investigator who found that the juror's husband had filed a claim with an insurance company for personal injuries arising out of an automobile accident. However, the juror's declaration showed that she did not recall the specific question relating to injuries suffered by an immediate member of her family. She averred that her husband had been in an accident and at a later date had seen a doctor, but she did not know that it was in connection with the accident. She also did not know that he had retained an attorney or had filed a claim. She further stated that her husband owned a vending machine company, had 20 vehicles, drove constantly, and did not discuss business matters with her (*233 Cal. App. 2d 416, 423)* .

Note that a subsequent court of appeal decision has held that concealment of bias by a juror during voir dire examination need not be willful in order for a new trial to be granted [*see People ex rel. Dept. Pub. Wks. v. Curtis (1967) 255 Cal. App. 2d 378, 388-389, 63 Cal. Rptr. 138* , discussed in *§ 155.71[3][b]*].

[d] Jurors as Unable to Deny Prejudicial Influence in Declaration

The factual and procedural background of ***City of Pleasant Hill v. First Baptist Church*** *(1969) 1 Cal. App. 3d 384, 82 Cal. Rptr. 1* , is discussed in [a], *above*. The court of appeal affirmed the judgment and order denying plaintiff's motion for a new trial, stating that the court under prior law refused to consider the affidavits of the prevailing jurors to show that the misconduct did not result in their receiving improper information [*see Kritzer v. Citron (1950) 101 Cal. App. 2d 33, 36-37, 224 P.2d 808]* . In *Kimic v. San Jose-Los Gatos etc. Ry. Co. (1909) 156 Cal. 379, 388-389, 104 P. 986* , the Court stated that it is thoroughly settled that jurors cannot be heard to deny the prejudicial influence on their minds of knowledge acquired by misconduct. In this case, the court of appeal stated that this ruling prohibiting evidence of a juror's subjective state is retained by *Evid. Code § 1150*, which provides that no evidence is admissible to show the effect of such statement, conduct, condition, or event on a juror either in influencing him or her to assent to or dissent from the verdict or concerning the mental processes by which it was determined. Here, some of the jurors' declarations contained statements that their subjective reasoning processes were not affected by anything said or done by the allegedly biased juror. The court explained that even if these statements were stricken, plaintiff had still failed to show that the jury was influenced by the statements of the biased juror. Therefore, the court affirmed the order denying the motion (*1 Cal. App. 3d 384, 433)* .

[4] Additional Authorities

[a] Showing of Prejudice Required

Brickell v. Wittmar (1959) 175 Cal. App. 2d 190, 345 P.2d 494 , was a personal injury action in which plaintiff's motion for new trial on the ground that one of the jurors concealed his prejudice on voir dire was denied. On voir dire examination, the juror stated that he was not prejudiced against anyone bringing a personal injury action in which the amount of damages sought was $15,000-$25,000. However, during jury deliberations, the juror remarked that actions in which high verdicts are awarded make everyone's insurance premiums increase. The court of appeal affirmed the judgment, since the question of damages was never considered by the jury and there was no affirmative showing that

the juror's statements caused prejudice sufficient to warrant a reversal (*175 Cal. App. 2d 190 196)* .

[b] Juror Must Be Subject to Challenge for Cause

The facts and procedural background of *Hasson v. Ford Motor Co. (1982) 32 Cal. 3d 388, 185 Cal. Rptr. 654, 650 P.2d 1171* , are discussed in *§ 155.110[3][b]*. The Supreme Court affirmed the trial court judgment, which was entered after the denial of defendant's motion for a new trial based on alleged juror misconduct. The Court found that retrial was not necessary due to the concealment of bias against defendant by two jurors when questioned on voir dire, because the incidents only involved failure to respond affirmatively to generalized inquiries asked of a group of jurors. The Court held that this failure did not amount to concealment of bias, and defendant did not present evidence of actual bias other than silence on voir dire (*32 Cal. 3d 388, 408)* .

Dunford v. General Water Heater Corp. (1957) 150 Cal. App. 2d 260, 309 P.2d 958 , was a personal injury action in which the court of appeal affirmed the judgment for defendants and the denial of plaintiffs' motion for new trial based, in part, on a juror's allegedly false answers given on voir dire. Although plaintiffs maintained that the juror gave untrue answers and that truthful answers would have given rise to a successful challenge for cause, plaintiffs failed to make an adequate showing when they failed to supply the court with a record of the voir dire proceedings or sufficient affidavits (*150 Cal. App. 2d 260, 264-265)* .

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15-155 California Points & Authorities § 155.102

§ 155.102 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Irregularity in Jury Proceedings [Code Civ. Proc. § 657(1)]-- Moving Party Waived Objection by Failing to Interrogate Juror Fully During Voir Dire

[1] FORM

[*Caption. See § 155.60[1].*]

THE MOTION FOR NEW TRIAL SHOULD NOT BE GRANTED ON THE GROUND OF IRREGULARITY IN THE PROCEEDINGS OF THE JURY BECAUSE COUNSEL FOR THE MOVING PARTY FAILED TO FULLY INTERROGATE THE JUROR ON VOIR DIRE ON THOSE MATTERS THAT MAY HAVE EXPOSED THE ALLEGED BIAS; THUS, THE MOVING PARTY HAS WAIVED ANY OBJECTION TO THE JUROR'S POSSIBLE PREJUDICE.

Waiver of Objection If Counsel Fails to Interrogate Juror Fully on Voir Dire. Affidavits that purport to show a juror's alleged bias but that show prejudice on matters that a juror could have been but was not interrogated about do not furnish grounds for granting a new trial; failure of counsel to interrogate fully waives any disqualification that might have developed (*Davilla v. Liberty Life Ins. Co. (1931) 114 Cal. App. 308, 312, 299 P. 831*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for new trial on the ground of irregularity in the proceedings of the jury [*Code Civ. Proc. § 657(1)*] based on a juror's alleged concealment of bias on voir dire. This form may be used to oppose a motion for new trial supported by the points and authorities set out in *§ 155.71*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. In particular, counsel should argue that the juror did not answer untruthfully or conceal any bias on voir dire, and assuming that the moving party's declarations showed that the juror might have been prejudiced, the prejudice concerned matters that the juror could have been but was not interrogated about [*see Davilla v. Liberty Life Ins. Co. (1931) 114 Cal. App. 308, 312, 299 P. 831]* .

[c] Related Pleading and Practice Forms

For forms relating to new trial motion proceedings, including an order denying the motion and declarations that may be modified for use as opposing declarations, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[3] Discussion of Authorities

[a] Waiver of Objection If Counsel Fails to Interrogate Juror Fully on Voir Dire

In ***Davilla v. Liberty Life Ins. Co.*** *(1931) 114 Cal. App. 308, 299 P. 831* , plaintiff beneficiary received a verdict holding the insurer liable in the amount of the policy for her husband's death. The defendant insurance company's motion for a new trial was dismissed for failure to state whether the motion would be made on affidavits or the minutes of the court or both [*see Code Civ. Proc. § 659*]. The court of appeal affirmed, stating that, assuming the question of the juror's prejudice was properly presented, the affidavits did not disclose that the juror, on voir dire examination, answered untruthfully or concealed any prejudice (*114 Cal. App. 308, 311-312)* . Even assuming that such prejudice was shown, it appeared that the prejudice concerned matters in which she could have been interrogated but was not. A juror is not required to volunteer information. Failure of counsel to more fully interrogate waived any disqualification that might have developed (*114 Cal. App. 308, 312)* .

Although defendant's motion for a new trial was denied in this case because it failed to state whether the motion would be based on affidavits or the minutes of the court or both, the Supreme Court has held that if the notice of motion states the grounds on which it will be made, the court abuses its discretion if it denies the motion for a failure to state the nature of the supporting documents [*see Nichols v. Hast (1965) 62 Cal. 2d 598, 601, 43 Cal. Rptr. 641, 400 P.2d 753]* .

[4] Additional Authorities

[a] Waiver of Objection If Counsel Fails to Interrogate Juror Fully on Voir Dire

Jutzi v. County of Los Angeles (1987) 196 Cal. App. 3d 637, 242 Cal. Rptr. 74 , was an action against defendant county for alleged medical malpractice involving the Los Angeles County U.S.C. Medical Center (County Hospital) in rendering emergency medical services to plaintiff for a broken ankle, which allegedly caused gangrene and resulted in the amputation of plaintiff's leg. In response to a general question directed by the trial judge to the entire jury panel, a juror revealed that she had been a patient at County Hospital some 18 or 19 years before during one of her pregnancies, but her experience would not affect her ability to render a fair and impartial verdict. Plaintiff's counsel chose not to

examine the juror on this subject. The juror later stated to fellow jurors that she had been a patient of the center some 17 times and they always treated her well. Judgment was for the defendant. Plaintiff's motion for new trial on the ground of juror misconduct was denied, and plaintiff appealed.

The court of appeal affirmed. With respect to the asserted juror misconduct, the court said that although one of the statements that the juror may have made would indicate a bias in favor of County Hospital, there was no evidence that she intentionally concealed such a bias on voir dire, that, on the contrary, she willingly revealed her experience as a patient in response to the general question directed to the entire panel (*196 Cal. App. 3d 637, 654-655)* . The court said that it must be assumed that follow-up questions from counsel further probing the juror's feelings as a result of her experience as a patient would have been answered with the same candor with which she responded to the general question (*196 Cal. App. 3d 637, 655)* . Declining to follow the rule promulgated in *People v. Diaz (1984) 152 Cal. App. 3d 926, 932, 200 Cal. Rptr. 77* , that even an inadvertent failure to reveal "a strong potential of juror bias" constitutes misconduct, the court said it was clear that where a juror intentionally lies on voir dire, such an act constitutes misconduct, but that to find misconduct where "concealment" is unintentional and the result of misunderstanding or forgetfulness is clearly excessive (*196 Cal. App. 3d 637, 655)* . The court explained that the juror had made no attempt to conceal her past involvement with County Hospital and said that once her experience was revealed it was the function of plaintiff's attorney to explore the subject if he wished to decide for himself whether a potential for juror bias existed (*196 Cal. App. 3d 637, 655)* . The court concluded that there was no misconduct on the part of the juror with respect to the voir dire (*196 Cal. App. 3d 637, 655)* .

Pollind v. Polich (1947) 78 Cal. App. 2d 87, 177 P.2d 63 , was an action for personal injuries in which plaintiff's motion for a new trial, on the ground that a juror concealed a bias on voir dire, was denied. The court of appeal held that it was not error to deny plaintiff's motion when the juror was not questioned regarding a possible prejudice against young drivers or his knowledge of the intersection where the accident occurred. If the plaintiff feared that the jurors might be prejudiced against the driving of automobiles by young boys, the jurors should have been questioned on that point (*78 Cal. App. 2d 87, 92)* .

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15-155 California Points & Authorities § 155.103

§ 155.103 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Irregularity in Jury Proceedings [Code Civ. Proc. § 657(1)]--Moving Party Failed to Show Juror Was Mentally Incompetent During Trial

[1] FORM

[*Caption. See § 155.60[1].*]

A NEW TRIAL SHOULD NOT BE GRANTED ON THE GROUND OF IRREGULARITY IN THE PROCEEDINGS OF THE JURY, BECAUSE THE MOVING PARTY HAS FAILED TO SHOW THAT A JUROR WAS INCOMPETENT AT THE TIME OF TRIAL.

Preponderance of Evidence Required. Mental incompetence of a juror is not a basis for granting a new trial if it cannot be shown by a preponderance of evidence that the juror was insane at the time of trial (*Church v. Capital Freight Lines (1956) 141 Cal. App. 2d 246, 248, 296 P.2d 563*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for new trial on the ground of irregularity in the proceedings of the jury [*Code Civ. Proc. § 657(1)*] based on a juror's mental incompetency during trial. This form may be used in an appropriate case to oppose a motion for new trial supported by the points and authorities set out in *§ 155.72*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. In particular, counsel should argue that the moving party has failed to show by a preponderance of evidence that the juror was incompetent during trial. Counsel may also argue that the juror's alleged incompetency has not been shown to have been prejudicial to the moving party's case.

[c] Related Pleading and Practice Forms

For forms relating to new trial motion proceedings, including an order denying the motion and declarations that may be modified for use as opposing declarations, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[3] Discussion of Authorities

[a] Preponderance of Evidence Required

The factual and procedural background of ***Church v. Capital Freight Lines*** *(1956) 141 Cal. App. 2d 246, 296 P.2d 563* , is discussed in *§ 155.72[3][a]*. The court of appeal affirmed the denial of plaintiffs' motion for new trial, stating that the presumption is always that a person is sane and that, therefore, plaintiffs had the burden of proving, by a preponderance of evidence, that the juror was insane at the time of trial. The fact that the juror was insane subsequent to trial may have some evidentiary effect but will not create or carry a presumption of the past existence of such insanity (*141 Cal. App. 2d 246, 248)* . In view of the conflicting evidence presented by affidavit, the court of appeal stated that although a different conclusion by the trial court would have been equally well founded, the trial judge did not abuse his discretion in following the conclusion of defendants' doctors rather than the evidence produced by plaintiffs (*141 Cal. App. 2d 246, 250)* .

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[Reserved]

§§ 155.104[Reserved]

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15-155 California Points & Authorities § 155.110

§ 155.110 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Juror Misconduct [Code Civ. Proc. § 657(2)]--Alleged Misconduct Not Prejudicial

[1] FORM

[*Caption. See § 155.60[1].*]

THE MOTION FOR NEW TRIAL SHOULD NOT BE GRANTED BECAUSE THE ALLEGED MISCONDUCT OF THE JURY DID NOT PREVENT _____ [PLAINTIFF *or* DEFENDANT] FROM HAVING A FAIR TRIAL AND DID NOT MATERIALLY AFFECT HIS/HER/ITS SUBSTANTIAL RIGHTS.

A. Denial of Motion if No Showing of Prejudice. A motion for a new trial on the ground of jury misconduct is properly denied if the moving party fails to show that he or she has suffered prejudice by reason of the juror's misconduct (*Elsworth v. Beech Aircraft Corp. (1984) 37 Cal. 3d 540, 556-558, 208 Cal. Rptr. 874, 691 P.2d 630* ; *Kritzer v. Citron (1950) 101 Cal. App. 2d 33, 37, 224 P.2d 808*).

B. Misconduct of Trifling Nature. A new trial will not be granted for misconduct of the jury if the misconduct was of such a trifling nature that it could not have been prejudicial to the moving party, and when it appears that the fairness of trial was not affected by the impropriety (*Hasson v. Ford Motor Co. (1982) 32 Cal. 3d 388, 417-418, 185 Cal. Rptr. 654, 650 P.2d 1171* ; *Siemsen v. Oakland, S. L., & H. E. Railway (1901) 134 Cal. 494, 498, 66 P. 672* ; *see Elsworth v. Beech Aircraft Corp. (1984) 37 Cal. 3d 540, 556-558, 208 Cal. Rptr. 874, 691 P.2d 630*).

[*Optional*] **C. Improper Discussion, Communication, or Statement of Opinion.** A new trial will not be granted for a juror's improper discussion, communication, or statement of opinion if no prejudice to the moving party has resulted from the misconduct (*City of Pleasant Hill v. First Baptist Church (1969) 1 Cal. App. 3d 384, 426-431, 82 Cal. Rptr. 1*).

[*Optional*] **D. Discussion of Case Before Final Submission to Jury.** If jurors have improperly discussed the case before its final submission, and no prejudice to the substantial rights of a party has resulted, a new trial will not be

granted (*City of Pleasant Hill v. First Baptist Church (1969) 1 Cal. App. 3d 384, 428-430, 82 Cal. Rptr. 1* ; *Williams v. Layne (1942) 53 Cal. App. 2d 81, 86, 127 P.2d 582*).

[*Optional*] **E. Comments by Juror on Evidence.** When a juror, while in the jury box, comments on an introduced piece of evidence at trial, a new trial will not be granted if the remarks were vague and the moving party suffered no prejudice from the remarks (*Sepulveda v. Ishimaru (1957) 149 Cal. App. 2d 543, 547, 308 P.2d 809*).

[*Optional*] **F. Communication Between Juror and Counsel.** The mere fact that a few words were spoken between an attorney and a member of the jury does not, in itself, constitute prejudicial misconduct for which a new trial will be granted (*Dimmick v. Alvarez (1961) 196 Cal. App. 2d 211, 217, 16 Cal. Rptr. 308*).

[*Optional*] **G. Communication Between Juror and Witness.** Mere communication between a juror and a witness in a civil action is not a ground for setting aside the verdict or granting a new trial in the absence of a showing that the juror was influenced by the communication to the prejudice of one of the parties to the action (*City of Pleasant Hill v. First Baptist Church (1969) 1 Cal. App. 3d 384, 427-428, 82 Cal. Rptr. 1*).

[*Optional*] **H. Improper Reception of Evidence.** A new trial will not be granted for jury misconduct when a juror has improperly received evidence at trial if the improper reception of evidence did not result in prejudice to the moving party (*Anderson v. Pacific Tank Lines (1942) 52 Cal. App. 2d 244, 249, 126 P.2d 153*).

[*Optional*] **I. Unauthorized View of Premises.** A new trial will not be granted if a juror has made an unauthorized view of the premises if no prejudice to the moving party has resulted from the juror's inspection (*Higgins v. L.A. Gas & Electric Co. (1911) 159 Cal. 651, 661-663, 115 P. 313* ; *see Maffeo v. Holmes (1941) 47 Cal. App. 2d 292, 296, 117 P.2d 948*).

[*Optional*] **J. Examination of Exhibits Not in Evidence.** A new trial will not be granted if a juror examines an exhibit that is not in evidence if no prejudice has resulted from the juror's misconduct (*Anderson v. Pacific Tank Lines (1942) 52 Cal. App. 2d 244, 249, 126 P.2d 153*).

[*Optional*] **K. Reliance by Juror on Outside Expert.** A new trial will not be granted when a juror consults with an outside expert concerning an issue pertinent to the litigation if the information did not result in prejudice to the moving party (*Kritzer v. Citron (1950) 101 Cal. App. 2d 33, 36-37, 224 P.2d 808*).

[*Optional*] **L. Inattentive Jurors.** A new trial will not be granted when a juror is inattentive while evidence is being presented at trial if no prejudice has resulted from the juror's misconduct (*Hasson v. Ford Motor Co. (1982) 32 Cal. 3d 388, 417, 185 Cal. Rptr. 654, 650 P.2d 1171*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for new trial on the ground of jury misconduct [*Code Civ. Proc. § 657(2)*]. It may, in an appropriate case, be submitted in opposition to a motion for new trial supported by the points and authorities set out in *§ 155.80* et seq.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should include a discussion of the nature of the alleged jury misconduct, showing how it did not deprive the moving party of a fair trial and did not materially affect the moving party's substantial rights.

[c] Related Pleading and Practice Forms

For a notice of intention to move for a new trial as well as an order denying the motion, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender). For discussion and forms relating to new trial proceedings based on jury misconduct, see also Ch. 326A, *Jury Verdicts* in that publication.

[3] Discussion of Authorities

[a] Denial of Motion if No Showing of Prejudice

Elsworth v. Beech Aircraft Corp. *(1984) 37 Cal. 3d 540, 208 Cal. Rptr. 874, 691 P.2d 630* , was a wrongful death action based on strict liability and negligence arising out of an air crash. The jury returned a general verdict against defendant aircraft manufacturer, but two jurors voted in favor of defendant. During a recess in the trial, and before the jury began deliberations, a television program aired, criticizing the safety record of aircraft such as that at issue in the trial and mentioning defendant-manufacturer. Subsequent to return of the verdict, a juror who had voted in defendant's favor signed a declaration stating that two jurors had indicated they had seen the program. No counteraffidavits were filed. Defendant moved for a new trial, claiming this event amounted to jury misconduct raising a presumption of prejudice. After viewing a videotape of the program and a transcript of the videotape, the trial court denied defendant's motion.

On appeal, the Supreme Court affirmed, finding that any misconduct was not of such a character as was likely to have influenced the verdict improperly (*37 Cal. 3d 540, 558)* . The Court held that even if the jurors committed misconduct by watching the program and a presumption of prejudice arose, the presumption was rebutted (*37 Cal. 3d 540, 557)* . Citing *Hasson v. Ford Motor Co. (1982) 32 Cal. 3d 388, 185 Cal. Rptr. 654, 650 P.2d 1171* (discussed in [b], *below*), the Court stated that the test is whether there is a reasonable probability of actual harm to the complaining party resulting from the misconduct. Some of the factors to be considered in applying the test are the strength of the evidence that misconduct occurred, the nature and seriousness of the misconduct, and the probability that actual prejudice may have ensued (*37 Cal. 3d 540, 557)* . Applying the test, the Court found that the evidence of misconduct was not convincing, because the declarant was uncertain of the identity of one of the jurors who allegedly viewed the program. There was no indication that either juror saw the whole program, and the declaration lacked specificity regarding the actual statements of the two jurors and the circumstances under which they were made (*37 Cal. 3d 540, 557-558)* . The Court also found that the misconduct, if it occurred, was not serious in the sense of revealing a deliberate act by the two jurors in violating the trial court's instruction to confine their consideration of the case to evidence heard in court. Finally, the Court found it highly unlikely that the jurors were prejudiced by viewing the program. It noted that the two jurors' statements that they had viewed the program were not made in the jury room, the broadcast did not refer to either the type of aircraft or the accident at issue in the case, and the transcript of the television program left the Court unable to conclude whether it favored plaintiffs' theory of design defect or defendant's theory of pilot error Cal. 3d 540, 558).

In ***Kritzer v. Citron*** *(1950) 101 Cal. App. 2d 33, 224 P.2d 808* , plaintiffs brought an action against defendants for damages resulting from an allegedly unauthorized operation on one plaintiff, following delivery of her third child.

During trial, a juror contacted her own doctor and asked him questions relating to the proper practice in performing the operation in question. After judgment for defendants, plaintiffs' motion for a new trial was granted. Defendants appealed the order granting plaintiffs a new trial, and plaintiffs appealed the judgment for defendants.

The court of appeal reversed the order for a new trial and affirmed the judgment, stating that it was incumbent on plaintiffs to prove that they were deprived of a fair trial, and since they failed to show that they suffered prejudice by reason of the juror's misconduct, the order granting the motion for a new trial had to be reversed. In this case, while the juror did attempt to acquire pertinent information from a learned source outside of court, plaintiffs did not show that she imparted any of the information to her fellow jurors. Furthermore, the juror accused of misconduct did not vote on the verdict, but abstained from voting. Since nine jurors may determine the factual matters submitted to a jury, and 10 voted for defendants, the court found that the verdict was not tainted by the offending juror. Therefore, the court reversed the order granting a new trial (*101 Cal. App. 2d 33, 36-37)* .

[b] Misconduct of Trifling Nature

The facts and procedural background of *Elsworth v. Beech Aircraft Corp. (1984) 37 Cal. 3d 540, 208 Cal. Rptr. 874, 691 P.2d 630* , are discussed in [a], *above*. In affirming judgment after denial of defendant's motion for new trial, the Supreme Court found that any presumption of prejudice raised by claimed jury misconduct was rebutted. It found that the fact that two jurors, sitting on a wrongful death case arising out of an airplane crash, viewed a television program criticizing aircraft safety records, did not constitute serious misconduct in the sense of revealing a deliberate act by jurors in violation of the trial court's instructions to confine their consideration of the case to the evidence they heard in court (*37 Cal. 3d 540, 558)* .

In ***Hasson v. Ford Motor Co.*** *(1982) 32 Cal. 3d 388, 185 Cal. Rptr. 654, 650 P.2d 1171* , plaintiffs sued defendant, an automobile manufacturer, on theories of strict liability and negligence for damages incurred when the brakes on plaintiffs' automobile failed. The jury found defendant to be negligent and strictly liable. Defendant moved for a new trial on numerous grounds, including several varieties of jury misconduct. One form of jury misconduct claimed by defendant was inattentiveness at trial. Defendant presented juror declarations stating that one juror was reading a novel during trial while other jurors worked crossword puzzles. Counterdeclarations were submitted denying inattentiveness. The trial court rejected all grounds for a new trial, and judgment was entered for plaintiffs but in a reduced amount. The court of appeal overturned the judgment and ordered a new trial on the ground of juror misconduct. Defendant appealed the judgment to the Supreme Court, and plaintiffs cross appealed the trial court order reducing the amount of their compensatory award.

The Supreme Court affirmed the trial court judgment. The Court stated that a jury's failure to pay attention to the evidence presented at trial is a form of misconduct that will justify the granting of a new trial if shown to be prejudicial to the losing party (*32 Cal. 3d 388, 411)* . The Court held that the trial court improperly considered juror counterdeclarations that only proved the subjective mental processes of the jurors, and thus defendant's juror declarations remained unrebutted (*32 Cal. 3d 388, 414-415)* . However, a new trial is required only if it is established that defendant was somehow prejudiced by the jurors' inattentiveness. Prejudice exists if, in the absence of proven misconduct, it is reasonably probable that a result more favorable to the complaining party would have been achieved. The Court stated that based on the facts of the case, there was but the flimsiest evidence of actual prejudice (*32 Cal. 3d 388, 415)* . Even if one accepted defendant's argument that prejudice should be presumed in civil cases from juror misconduct, the Court stated, such a presumption may be rebutted by an affirmative evidentiary showing that prejudice does not exist or by a reviewing court's examination of the entire record to determine whether or not there is a reasonable probability of actual harm to the complaining party resulting from the misconduct. Some factors to be considered when determining if the presumption is rebutted are the strength of the evidence that misconduct occurred, the nature and seriousness of the misconduct, and the probability that actual prejudice may have ensued (*32 Cal. 3d 388, 416-417)* . The Court stated that the jurors in the case engaged in essentially neutral, albeit distracting, activities at unspecified times during the presentation of evidence. There was overwhelming proof of liability against defendant and

no substantial likelihood that actual prejudice may have resulted from the jurors' activities. It was not clear what type of evidence was being presented while misconduct occurred or even which side' case was being presented. In conclusion, the Court held that the showing of misconduct was rebutted by an examination of the record, which revealed no substantial likelihood that defendant was given anything less than a full and fair consideration of its case by an impartial jury (*32 Cal. 3d 388, 417)* .

In ***Siemsen v. Oakland, S. L., & H. E. Railway*** *(1901) 134 Cal. 494, 66 P. 672* , plaintiff brought an action to recover damages for personal injuries sustained when he was thrown by one of defendant's electric streetcars. It was alleged that during trial, a juror visited the scene of the accident and made an examination of the track and rails. After judgment for plaintiff, defendant moved for a new trial on several grounds, including misconduct of the jury [*Code Civ. Proc. § 657(2)*]. When the motion was granted, plaintiff appealed the order.

The Supreme Court reversed the order, stating that while the exercise of a liberal discretion in the granting of new trials is recognized, it does not follow that an order must always be upheld when an examination of the record discloses that the misconduct was of such trifling nature that it could not have been prejudicial to the moving party. When it appears that the fairness of the trial has not been affected by such impropriety, the verdict will not be disturbed. The Court noted that if the location or its condition had an essential bearing on the controversy, it may well be that a verdict should be set aside on proof that a juror improperly acquired knowledge of the location or its condition by visiting the scene. In this case, however, the place of the accident was not disputed, nor was it charged that the car left the track because of defective rails. The complaint alleged that the car was negligently maintained, operated, and managed so that while moving at great and unlawful speed, the car ran off the track. Defendant answered that the accident was caused by a latent defect in a wheel that could not, by the exercise of due care, have been discovered. After considering a juror's affidavit, the Court felt that the evidence presented therein was insufficient to justify the granting of a new trial. Therefore, the Court reversed the order granting defendant a new trial (*134 Cal. 494, 498-499)* .

[c] Improper Discussion, Communication, or Statement of Opinion

The factual and procedural background of ***City of Pleasant Hill v. First Baptist Church*** *(1969) 1 Cal. App. 3d 384, 82 Cal. Rptr. 1* , is discussed in *§ 155.82[3][e]*. In that case, several instances of juror misconduct were alleged by plaintiff, including a juror's improper conversation with a witness, the jurors' improper discussion of the case among themselves during trial, and the jurors' formation and expression of opinions on the merits of the case before it was submitted to them. After judgment for defendant church, plaintiff moved for a new trial on several grounds, including misconduct of the jury [*Code Civ. Proc. § 657(2)*]. When the motion was denied, plaintiff appealed the judgment.

The court of appeal affirmed the judgment, stating that a new trial will not be granted for misconduct if it is so trifling that it could not have been prejudicial to the moving party, and when it appears that the fairness of the trial has not been affected by the impropriety. In this case, the trial court had all the evidence before it and was in the best position to evaluate the prejudicial effect of the alleged misconduct. This finding of no prejudice, the court explained, should not be set aside unless there is no evidence to sustain it. The court of appeal then concluded that the findings of the trial court should govern. Therefore, it affirmed the judgment and order denying a new trial (*1 Cal. App. 3d 384, 429-430)* .

Note that an order denying a motion for new trial is no longer appealable [*see Code Civ. Proc. §§ 904.1(a)(4), 904.2(e)*]. If a party attempts to appeal from an order denying a new trial, the reviewing court will dismiss the appeal [*see Wilson v. Kopp (1952) 114 Cal. App. 2d 198, 199-200, 210, 250 P.2d 166]* . A party must appeal the judgment, and if he or she raises the issue on appeal, the appellate court, when reviewing the judgment, will assess the propriety of the trial court's ruling on the motion for new trial [*see Wilson v. Kopp (1952) 114 Cal. App. 2d 198, 199-200, 210, 250 P.2d 166]* .

[d] Discussion of Case Before Final Submission to Jury

The factual and procedural background of ***City of Pleasant Hill v. First Baptist Church*** *(1969) 1 Cal. App. 3d 384, 82 Cal. Rptr. 1* , is discussed in *§ 155.82[3][e]* and in [c], *above*. In that case, several instances of juror misconduct were alleged by plaintiff, including the discussion of the case by four named jurors during trial. After judgment was rendered for defendant church, plaintiff moved for a new trial on several grounds, including misconduct of the jury [*Code Civ. Proc. § 657(2)*]. When the motion was denied, plaintiff appealed the judgment.

The court of appeal affirmed the judgment, stating that it is improper for jurors to discuss a case prior to its submission to them. Insofar as any juror formed and expressed an opinion prior to the submission of the case, the juror violated the prescribed protocol for performance of his or her duties. However, the affidavits of the jurors were in conflict regarding whether or not the jurors had discussed the case except in the jury room. Because of this conflict, the court of appeal stated that the weight and sufficiency of the affidavits and the credence to be given to them was for the trial court to determine (*1 Cal. App. 3d 384, 429)* . Since the trial court determined that the alleged misconduct did not prejudice plaintiff, the court of appeal upheld the trial court's findings and affirmed the judgment and order denying a new trial (*1 Cal. App. 3d 384, 430)* .

In ***Williams v. Layne*** *(1942) 53 Cal. App. 2d 81, 127 P.2d 582* , plaintiff brought an action for personal injuries suffered when her car collided with defendants' parked truck. During a court recess, several jury members conversed with the court reporter and the bailiff. After verdict was rendered for plaintiff, defendants moved for a new trial on the ground of jury misconduct [*Code Civ. Proc. § 657(2)*]. When the motion was denied, defendants appealed the judgment.

The court of appeal affirmed the judgment because the only testimony concerning the conversation was given by the court reporter and the bailiff in chambers soon after the conversation took place, and both testified positively that no reference whatsoever was made to the present case or to any of the facts involved. The court stated that even when it is shown that jurors have improperly talked to each other about the case before its final submission, a new trial is not justified unless it appears that prejudice to the substantial rights of a party resultedtherefrom. Since no reference was made in the conversation to the present case, the court concluded that no prejudice resulted. Therefore, the court affirmed the judgment for plaintiff and the order denying defendants' motion for a new trial (*53 Cal. App. 2d 81, 86)* .

[e] Comments by Juror on Evidence

In ***Sepulveda v. Ishimaru*** *(1957) 149 Cal. App. 2d 543, 308 P.2d 809* , plaintiffs brought an action for personal injuries sustained in an automobile accident. During trial, when plaintiffs' attorney placed a bumper on the counsel table, he heard a juror say, "He can sell that for a fee." After verdict was rendered for defendants, plaintiffs moved for a new trial on the ground of misconduct of the jury [*Code Civ. Proc. § 657(2)*]. When the motion was denied, plaintiffs appealed the judgment.

The court of appeal affirmed the judgment, stating that the possible prejudicial character and influence on the jurors of the very vague remark were primarily matters of fact for the trial court. The order denying the new trial decided by implication that the verdict was not materially affected by the matter complained of and that the plaintiffs suffered no prejudice through it. Furthermore, counsel for plaintiffs did not bring the matter to the attention of the court. When knowledge of the objectionable fact is obtained in time to apply to the court to remedy or correct it, a party may not sit by in silence, taking chances of a favorable verdict, and complain after a hostile verdict is rendered. That party will have waived his or her right to complain. Because of the lack of prejudice and counsel's failure to immediately raise the issue at trial, the court of appeal affirmed the denial of plaintiffs' motion for a new trial (*149 Cal. App. 2d 543, 547)* .

[f] Communication Between Juror and Counsel

In ***Dimmick v. Alvarez*** *(1961) 196 Cal. App. 2d 211, 16 Cal. Rptr. 308* , plaintiffs brought an action for personal injuries and property damage against defendants. After the case was submitted to the jury, plaintiffs' attorney informed the court that during recess he had observed conversations between members of the jury and counsel for defendants.

Counsel for defendant explained that the juror had asked him if he could ask a question and that he told the juror that it was not a good idea in light of the court's admonition. When defendant's counsel suggested that the jurors involved be questioned, plaintiffs' attorney indicated that he was only stating the matter for the record. After a verdict was rendered for plaintiffs, plaintiffs moved for a new trial on several grounds, including misconduct of the jury. When the motion was denied, plaintiffs appealed the judgment.

The court of appeal affirmed the judgment, stating that the mere fact that a few words were spoken between an attorney and a member of the jury does not in itself amount to prejudicial misconduct. In this case, the juror wanted to ask a question of defense counsel, but never asked the intended question. Furthermore, plaintiffs' counsel failed to object to the conversation and waited until after the case had been submitted to the jury to call it to the attention of the court. By failing to object and by failing to ask for a mistrial at the time the fact of the conversation came to his attention, plaintiffs' counsel waived any right he might have had for a new trial or reversal of the judgment on that ground (*196 Cal. App. 2d 211, 217)* .

[g] Communication Between Juror and Witness

The factual and procedural background of ***City of Pleasant Hill v. First Baptist Church*** *(1969) 1 Cal. App. 3d 384, 82 Cal. Rptr. 1* , is discussed in *§ 155.82[3][e]* and in [c] and [d], *above*. In that case, several instances of juror misconduct were alleged by plaintiff, including improper communication between a witness and a juror. After judgment was rendered for defendant church, plaintiff moved for a new trial on several grounds, including misconduct of the jury [*Code Civ. Proc. § 657(2)*]. When the motion was denied, plaintiff appealed the judgment.

The court of appeal affirmed the judgment, stating that it is generally held that a mere communication between a witness and a juror in a civil action is not a ground for setting aside the verdict or granting a new trial in the absence of a showing that the juror was influenced by such communication to the prejudice of one of the parties to the action. When misconduct of a juror is urged, prejudice from that misconduct must be shown. The court added that the trial court passed on the matter and that by its denial of the motion for a new trial, the trial court had determined that the alleged misconduct of the juror was not prejudicial. The court concluded that since there was no showing of abuse of discretion, the trial court's decision would not be disturbed on appeal (*1 Cal. App. 3d 384, 427-428)* .

[h] Improper Reception of Evidence

In ***Anderson v. Pacific Tank Lines*** *(1942) 52 Cal. App. 2d 244, 126 P.2d 153* , plaintiff brought an action for personal injuries suffered in a truck accident. During trial, a juror inspected plaintiff's truck to learn about the condition of the brakes. After verdict was rendered for plaintiff, defendants moved for judgment notwithstanding the verdict and for a new trial on the ground of jury misconduct. When both motions were denied, defendants appealed the judgment and the order denying the motion for judgment notwithstanding the verdict. Defendants also maintained that the lower court should have granted their motion for new trial.

The court of appeal affirmed the judgment and order denying the motion for judgment notwithstanding the verdict, stating that when misconduct of a juror is urged, prejudice from that misconduct must be shown. In this case, there was no showing of prejudice to defendants resulting from the misconduct of the juror. There was no showing of what information, if any, the juror obtained, or what effect, if any, the inspection of the truck had on the verdict. The record showedthat 11 jurors voted for the verdict that was returned in favor of plaintiff, and one voted against it. The court stated that it may be that the juror who inspected the truck was the one who voted against the return of the verdict. However, the court stated that it could not assume prejudice and in the absence of a showing of prejudice, it could not regard the misconduct of the juror as prejudicial (*52 Cal. App. 2d 244, 249)* .

[I] Unauthorized View of the Premises

The factual and procedural background of ***Higgins v. L.A. Gas & Electric Co.*** *(1911) 159 Cal. 651, 115 P. 313* , is discussed in *§ 155.83[3][c]* and in *§ 155.114[3][a]*. During trial, the sheriff in charge of the jury led the jurors past plaintiff's damaged building while conducting them to lunch. After judgment for plaintiff, defendant's motion for new trial was granted on the ground that the court erred in sending the jury to the consultation room with a specific piece of demonstrative evidence. Plaintiff appealed the order granting defendant a new trial. Defendant maintained that the use of this demonstrative evidence by the jury was prejudicial and that the trial court also erred in allowing the jurors to view the scene of the property damage.

The Supreme Court reversed the order, stating that the use of the demonstrative evidence did not prejudice defendant and that the jurors were not conducted past the building for the purpose of inspection. It did not appear that the jurors knew that they were passing the building or that their attention was directed to it. The building itself had been so repaired at the time and the circumstance was of so trifling a character, that even if the case had been criminal, it would not be a ground for disturbing the verdict. In a criminal case, the court noted that a mere casual visit of the jury to the res gestae, as where the jury walked by the scene while taking exercise under the custody of an officer, is not a ground for setting aside the verdict. It added that the rule should be no more rigid in a civil case (*159 Cal. 651, 661-662)* . Therefore, the Court reversed the order granting defendant a new trial (*159 Cal. 651, 663)* .

In ***Maffeo v. Holmes*** *(1941) 47 Cal. App. 2d 292, 117 P.2d 948* , plaintiff brought an action for wrongful death of her minor child due to defendant's alleged negligent operation of an automobile. During trial, two jurors visited the scene of the accident. One juror drove along the street at the same time of day that the accident occurred. Another juror visited the scene and made observations concerning the lighting conditions and the position of the boy's body with reference to the crosswalk. After judgment for defendant, plaintiff moved for a new trial on the ground of jury misconduct [*Code Civ. Proc. § 657(2)*] and irregularity in the proceedings of the jury [*Code Civ. Proc. § 657(1)*]. When the motion was denied, plaintiff appealed the judgment.

The court of appeal affirmed the judgment because plaintiff submitted improper affidavits to impeach the jury's verdict. However, the court also stated that it was not shown that the jurors' misconduct substantially prejudiced plaintiff's rights. By denying the motion, the court stated, the trial court implied that no prejudice was suffered. Accordingly, the court affirmed judgment for defendant (*47 Cal. App. 2d 292, 295-296)* .

Note that in a later case, the Supreme Court held that affidavits of jurors may be received to show statements or other objective facts that were likely to have influenced the verdict and that entitled the moving party to a new trial [*People v. Hutchinson (1969) 71 Cal. 2d 342, 78 Cal. Rptr. 196, 455 P.2d 132* ; *see also Evid. Code § 1150(a)*].

[j] Examination of Exhibits Not in Evidence

The factual and procedural background of ***Anderson v. Pacific Tank Lines*** *(1942) 52 Cal. App. 2d 244, 126 P.2d 153* , is discussed in [h], *above*. During trial, a juror inspected plaintiff's truck to learn about the condition of the brakes. After verdict was rendered for plaintiff, defendants moved for judgment notwithstanding the verdict and a new trial. When both motions were denied, defendants appealed the judgment and the order denying judgment notwithstanding the verdict.

The court of appeal affirmed the judgment and the order denying the motion for judgment notwithstanding the verdict, stating that there was no showing of prejudice to defendants resulting from the juror's misconduct. There was no showing of what information, if any, the juror obtained, or what effect, if any, the inspection of the truck had on the verdict. The record showed that 11 jurors voted for the verdict that was returned for plaintiff, and one voted against it. The court stated that it may be that the juror who inspected the truck was the one who voted against the return of the verdict. However, the court said that it could not assume prejudice, and in the absence of a showing of prejudice, it could not regard the misconduct of the juror as prejudicial (*52 Cal. App. 2d 244, 249)* .

[k] Reliance by Juror on Outside Expert

The factual and procedural background of ***Kritzer v. Citron*** *(1950) 101 Cal. App. 2d 33, 224 P.2d 808* , is discussed in [a], *above*. During trial, a juror contacted her personal doctor and asked him questions relating to a surgical procedure at issue during trial. After a verdict was rendered for defendants, plaintiffs' motion for a new trial on the ground of jury misconduct was granted. Defendants appealed the order; plaintiffs appealed the judgment.

The court of appeal reversed the order and affirmed the judgment, stating that it is misconduct for a juror to discuss the matter under investigation outside of court or to receive information on the subject of the litigation except in open court and in the manner provided by law. Such misconduct, unless shown by theprevailing party to have been harmless, will invalidate the verdict. The court found, however, that no prejudice was caused by the conduct of the juror in this case. While she did attempt to acquire pertinent information from a learned source, it was not shown that she imparted any of the information to her fellow jurors. Moreover, she abstained from voting and 10 jurors voted for defendants. Since nine jurors may determine the factual matters submitted to a jury and 10 voted for the defendants the court felt that the verdict was not affected by the juror's misconduct either by her conversation or her vote. Since it was incumbent on plaintiffs to prove, and since they failed to show that they suffered prejudice by reason of the juror's misconduct, the court of appeal reversed the order granting a new trial (*101 Cal. App. 2d 33, 36-37)* .

[l] Inattentive Juror

Hasson v. Ford Motor Co. *(1982) 32 Cal. 3d 388, 185 Cal. Rptr. 654, 650 P.2d 1171* , is discussed in [b], *above*.

[4] Additional Authorities

[a] Misconduct of Trifling Nature

In *Locksley v. Ungureanu (1986) 178 Cal. App. 3d 457, 223 Cal. Rptr. 737* , plaintiff, a pedestrian, was walking across a street at an intersection when he was struck by a vehicle driven by defendant. A jury found that defendant was not negligent, and plaintiff moved for a new trial on the ground of juror misconduct. Plaintiff's claim was based on the fact that a juror experimented by driving with one eye shut because defendant had only one good eye. The trial court denied plaintiff's motion, and the court of appeal affirmed. The court held that even if the juror's experiment was misconduct, not every minor infraction of the rules by juror mandates a new trial. If the conduct is of such a nonprobative nature that it could not, in the nature of things, have prevented a party from having a fair trial, the verdict should not be set aside. The court held that the trial court's finding that the experiment could not have prejudicially effected the outcome of the case was not an abuse of discretion (*178 Cal. App. 3d 457, 461-462)* .

In *Akers v. Kelley Company Inc. (1985) 173 Cal. App. 3d 633, 219 Cal. Rptr. 513* , defendant moved to overturn the verdict of the jury based on the affidavit of one of the jurors suggesting various forms of jury misconduct. The appellate court affirmed the trial court's denial of defendant's motions. The court initially noted that not every insignificant infringement of the rules calls for a new trial (*173 Cal. App. 3d 633, 656)* . The court then held that the juror's affidavit was insufficient evidence of misconduct since elements relied on as constituting misconduct, such as statements made, conduct, conditions, or events, must be objectively ascertainable and subject to corroboration, and the juror's affidavit consisted mainly of conjecture and incompetent evidence (*173 Cal. App. 3d 633, 656-659)* .

The factual and procedural background of *City of Pleasant Hill v. First Baptist Church (1969) 1 Cal. App. 3d 384, 82 Cal. Rptr. 1* , is discussed in *§ 155.82[3][e]* and in [c], *above*. In affirming the judgment granted after denial of plaintiff's motion for a new trial, the court of appeal stated that a new trial will not be granted for misconduct of the jury if it is so trifling that it could not have been prejudicial to the moving party and when it appeared that the fairness of the trial had not been affected by the impropriety (*1 Cal. App. 3d 384, 430)* .

[b] Discussion of Case Before Final Submission to Jury

Wilson v. California Cab Co. (1932) 125 Cal. App. 383, 13 P.2d 758 , was an action for wrongful death in which the court of appeal affirmed judgment for plaintiff, noting that an order denying defendants' motion for a new trial on the ground of jury misconduct was proper [*Code Civ. Proc. § 657(2)*]. During a five-minute recess from trial, after all the evidence had been introduced and both parties had rested, several jurors were observed to have been talking while pointing to a map of the accident scene that had been properly admitted in evidence. The court of appeal stated that assuming that this conduct was a technical violation of the court's instruction to the jury not to discuss the case until it was finally submitted to them, the conduct had not been shown to have been prejudicial to defendants. Therefore, the court affirmed the judgment (*125 Cal. App. 383, 386)* .

[c] Communication Between Juror and Witness

The factual and procedural background of *Los Angeles Co. F.C. Dist. v. Abbot (1938) 24 Cal. App. 2d 728, 76 P.2d 188* , is discussed in [g], *below*. During the progress of trial, a juror asked a witness, the city engineer, questions concerning the deposits of sand, rock, and gravel on certain land. The court stated that although the conduct of the juror was reprehensible, it tended to aid rather than to militate against plaintiff. Thus, the court affirmed the judgment, noting that the denial of plaintiff's motion for a new trial was proper (*24 Cal. App. 2d 728, 741)* .

[d] Improper Reception of Evidence

The factual and procedural background of *Hasson v. Ford Motor Co. (1982) 32 Cal. 3d 388, 185 Cal. Rptr. 654, 650 P.2d 1171* , is discussed in [b], *above*. The Supreme Court affirmed the trial court judgment, which was entered after the denial of defendant's motion for a new trial based on alleged juror misconduct. The Court rejected defendant's argument that a juror's paralegal studies during trial amounted to improper reception of evidence concerning the subject of the trial. The Court held that a juror's inadvertent attendance of a single class during which the subject of an arguably related piece of litigation was mentioned did not constitute misconduct [*32 Cal. 3d 388, 409*].

[e] Unauthorized View of Premises

Siemsen v. Oakland, S. L., & H. E. Railway (1901) 134 Cal. 494, 66 P. 672 , was a personal injury action in which the Supreme Court reversed an order granting defendant a new trial on the ground of jury misconduct. During trial, a juror allegedly inspected the scene of the accident. However, the Court stated that an examination of the record disclosed that the misconduct was of such a trifling nature that it could not have been prejudicial to the moving party. Since the Court felt that the fairness of the trial was in no way affected by the juror's conduct, it reversed the order granting a new trial (*134 Cal. 494, 498)* .

An order denying a motion for new trial is no longer appealable [*see Code Civ. Proc. §§ 904.1(a)(4), 904.2(e)*]. If a party attempts to appeal from an order denying a new trial, the reviewing court will dismiss the appeal [*see Wilson v. Kopp (1952) 114 Cal. App. 2d 198, 199-200, 210, 250 P.2d 166]* . A party must appeal the judgment, and if he or she raises the issue on appeal, the appellate court, when reviewing the judgment, will assess the propriety of the trial court's ruling on the motion for new trial [*see Wilson v. Kopp (1952) 114 Cal. App. 2d 198, 199-200, 210, 250 P.2d 166]* .

The factual and procedural background of *Woebbe v. Sperry (1941) 48 Cal. App. 2d 340, 119 P.2d 743* , is discussed in *§ 155.83[3][d]*. The court of appeal affirmed the judgment, noting that order denying plaintiff's motion for a new trial was proper because even though the juror repeatedly drove through the intersection where the accident had occurred, there was no indication that he had received evidence outside of court during the view of the scene. The juror did not stop at the intersection or make any observations or measurements (*48 Cal. App. 2d 340, 344)* .

[f] Examination of Exhibits Not in Evidence

Kimic v. San Jose-Los Gatos etc. Ry. Co. (1909) 156 Cal. 379, 104 P. 986 , was a personal injury action in which the

Supreme Court affirmed judgment for plaintiff, noting that an order denying defendant's motion for a new trial was proper. While the jurors visited the scene of the accident under a court order, they examined the railroad car's brakes, even though the quality of the brakes was not at issue in the litigation. Since the evidence received out of court was immaterial to any real issue in the case, the Court stated that it could not see how the examination of the brake and its mechanism was a matter of any importance or that it could have been prejudicial to defendant (*156 Cal. 379, 398-399)* .

Watson v. Los Angeles Transit Lines (1958) 157 Cal. App. 2d 112, 320 P.2d 890 , was a personal injury action in which the court of appeal affirmed judgment for defendants, noting that the order denying plaintiff's motion for a new trial was proper. During the jury's deliberation, one juror read the dictionary definitions of "negligent" and "prudent" to the other jurors. The court stated, however, that no prejudice had resulted to plaintiff by reason of the juror's conduct. Accordingly, it affirmed the judgment (*157 Cal. App. 2d 112, 116)* .

[g] Reliance by Juror on Outside Expert

Los Angeles Co. F.C. Dist. v. Abbot (1938) 24 Cal. App. 2d 728, 76 P.2d 188 , was an eminent domain proceeding in which the court of appeal affirmed judgment for defendants, noting that an order denying plaintiff's motion for a new trial was proper. During the progress of trial, a juror asked a witness, the city engineer, questions concerning the deposits of sand, rock, and gravel on certain land. The court stated that although the conduct of the juror was reprehensible, it tended to aid rather than to militate against plaintiff. Thus, the court affirmed the denial of plaintiff's motion for a new trial (*24 Cal. App. 2d 728, 741)* .

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CHAPTER 155 MOTIONS AFTER TRIAL
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15-155 California Points & Authorities § 155.111

§ 155.111 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Juror Misconduct [Code Civ. Proc. § 657(2)]--Failure of Moving Party to Comply With No-Knowledge Requirement

[1] FORM

[*Caption. See § 155.60[1].*]

THE MOTION FOR NEW TRIAL SHOULD BE DENIED BECAUSE _____ [PLAINTIFF *or* DEFENDANT] FAILED TO SHOW THAT BOTH _____ [HE *or* SHE] AND COUNSEL WERE NOT AWARE OF THE ALLEGED MISCONDUCT UNTIL AFTER THE VERDICT WAS RETURNED.

No-Knowledge Requirement. A litigant seeking a new trial on the ground of juror improprieties must present affidavits showing that neither the party nor his or her attorney were aware of the misbehavior until after the verdict was returned, and if the party does not comply with this requirement, the motion for a new trial is properly denied (*People v. Southern Cal. Edison Co. (1976) 56 Cal. App. 3d 593, 598-600, 128 Cal. Rptr. 697*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for new trial on the ground of jury misconduct [*Code Civ. Proc. § 657(2)*]. It may be submitted in opposition to a motion for new trial that is supported by the points and authorities set out in *§ 155.80* et seq.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should show how the moving party's affidavits or declarations failed to show that both the moving party and his or her counsel were unaware of the misconduct until after the verdict was rendered. Although the filing of separate affidavits or declarations by counsel and client is preferable, the moving party's failure to do so will not be fatal to his or her motion [*see Weathers v. Kaiser Foundation Hospitals (1971) 5 Cal. 3d 98, 105, 95 Cal. Rptr. 516, 485 P.2d 1132]* .

[c] Related Pleading and Practice Forms

For a notice of intention to move for a new trial as well as an order denying the motion, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender). For additional discussion and forms relating to new trial proceedings based on jury misconduct, see Ch. 326A, *Jury Verdicts* in that publication.

[3] Discussion of Authorities

[a] No-Knowledge Requirement

The factual and procedural background of ***People v. Southern Cal. Edison Co.*** *(1976) 56 Cal. App. 3d 593, 128 Cal. Rptr. 697* , is discussed in *§ 155.82[3][b]*. After a verdict was rendered for plaintiff, defendant moved for a new trial on the sole ground of jury misconduct [*Code Civ. Proc. § 657(2)*]. When defendant's motion was granted, plaintiff appealed the order and defendant filed a timely protective cross appeal from the judgment.

The court of appeal reversed the order granting defendant a new trial, stating that defendant's declaration was technically insufficient because it failed to show that the party and counsel were unaware of the misconduct until after the verdict was returned. The court stated that uninterrupted case authority since *Sherwin v. Southern Pacific Co. (1914) 168 Cal. 722, 145 P. 92* , imposes the inflexible requirement that a litigant seeking a new trial on the ground of juror improprieties present affidavits showing that neither he or she nor his or her attorney was aware of the misbehavior until after the verdict was returned. Applying these principles to the facts, the court concluded that the declaration submitted by defendant's attorney established by inference that the attorney did not know of the misconduct until after the verdict was rendered. The requirement that a declaration establish an absence of knowledge on the part of the client remained unsatisfied. Even though the declaration, if technically sufficient, would have made a patently adequate showing to support the trial court's order granting a new trial, the court could not extend counsel's declaration to include his or her client. Therefore, the court reversed the order granting the motion for a new trial (*56 Cal. App. 3d 593, 598-600)* .

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15-155 California Points & Authorities § 155.112

§ 155.112 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Juror Misconduct [Code Civ. Proc. § 657(2)]--Failure of Moving Party to Object at Trial

[1] FORM

[*Caption. See § 155.60[1].*]

THE MOTION FOR NEW TRIAL SHOULD NOT BE GRANTED BECAUSE _____ [_____ (PLAINTIFF *or* DEFENDANT) *and/or* _____ (PLAINTIFF'S COUNSEL *or* DEFENDANT'S COUNSEL)] HAD KNOWLEDGE OF THE ALLEGED MISCONDUCT DURING TRIAL BUT FAILED TO BRING IT TO THE ATTENTION OF THE COURT TO REMEDY OR CORRECT IT; THUS, THE _____ [PLAINTIFF *or* DEFENDANT] WAIVED HIS/HER/ITS RIGHT TO COMPLAIN OF THE MISCONDUCT.

Waiver of Right to Complain. If counsel or the moving party had knowledge of the alleged misconduct during trial but failed to bring it to the attention of the court to remedy or to correct it, the moving party will have waived his or her right to complain of the misconduct on a motion for a new trial (*Sepulveda v. Ishimaru (1957) 149 Cal. App. 2d 543, 547, 308 P.2d 809*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for new trial on the ground of jury misconduct [*Code Civ. Proc. § 657(2)*]. It may, in an appropriate case, be submitted in opposition to a motion for new trial supported by the points and authorities set out in *§ 155.80* et seq.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should discuss how the moving party or his or her counsel gained knowledge of the alleged misconduct during trial and should argue that the moving party's failure to object constituted a waiver of his or her right to complain on a later motion for new trial.

[c] Related Pleading and Practice Forms

For a notice of intention to move for a new trial on the ground of jury misconduct, see California Forms of Pleading and Practice, Ch. 326A, *Jury Verdicts* (Matthew Bender). For a discussion of new trials generally and an order denying the motion, see Ch. 371, *Motions After Trial* in that publication.

[3] Discussion of Authorities

[a] Waiver of Right to Complain

The factual and procedural background of ***Sepulveda v. Ishimaru*** *(1957) 149 Cal. App. 2d 543, 308 P.2d 809* , is discussed in *§ 155.110[3][e]*. After verdict was rendered for defendants, plaintiffs moved for a new trial on the ground of misconduct of the jury [*Code Civ. Proc. § 657(2)*]. When the motion was denied, plaintiffs appealed the judgment.

The court of appeal affirmed the judgment, stating that when knowledge of the objectionable fact is obtained in time to apply to the court to remedy or correct it, a party may not sit by in silence, taking chances of a favorable verdict, and be heard to complain after a hostile verdict. He or she will have waived the right to complain. In this case, counsel heard the alleged improper comments by the juror, but counsel did not move for a mistrial or bring the matter to the attention of the court. The possible prejudicial character and influence over the jury of the very vague remark made by a fellow juror were primarily matters of fact for the trial court to determine. The order denying the new trial decided by implication that the verdict was not materially affected by the matter complained of and that appellants suffered no prejudice through it. Accordingly, the court affirmed the judgment (*149 Cal. App. 2d 543, 547)* .

[4] Additional Authorities

[a] Waiver of Right to Complain

Newton v. Thomas (1955) 137 Cal. App. 2d 748, 291 P.2d 503 , was a wrongful death action in which the court of appeal affirmed judgment for plaintiffs and an order denying defendants' motion for judgment notwithstanding the verdict. The court also noted that a new trial was not necessary even though the jury had inadvertently been given certain papers that were not exhibits in evidence. After the jury deliberated for 20-25 minutes, defense counsel became aware that the jurors had these papers in their possession, yet he failed to call the situation to the attention of the court. The court stated that the rule is that when knowledge of the irregularity is made known in time for the court to remedy or correct it, a party may not sit by in silence, taking chances of a favorable verdict, and after a hostile verdict, for the first time, be heard to complain (*137 Cal. App. 2d 748, 769)* .

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15-155 California Points & Authorities § 155.113

§ 155.113 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Juror Misconduct [Code Civ. Proc. § 657(2)]--Moving Party's Declarations or Affidavits Not Supported by Competent Evidence

[1] FORM

[*Caption. See § 155.60[1].*]

THE COURT SHOULD DENY THE MOTION FOR NEW TRIAL BECAUSE _____ [PLAINTIFF'S *or* DEFENDANT'S] _____ [DECLARATIONS *or* AFFIDAVITS] ARE PRIMARILY SUPPORTED BY INCOMPETENT EVIDENCE THAT SHOULD NOT BE CONSIDERED.

A. Incompetent Evidence. Incompetent evidence contained in the moving party's affidavits or declarations supporting his or her motion for new trial should not be considered by the trial court in ruling on the motion (*see Weathers v. Kaiser Foundation Hospitals (1971) 5 Cal. 3d 98, 105, 95 Cal. Rptr. 516, 485 P.2d 1132*).

[*Optional*] **B. Hearsay.** Evidence presented by affidavit or declaration in connection with a motion for new trial, like oral testimony at trial, must be given from personal knowledge and cannot contain hearsay (*Weathers v. Kaiser Foundation Hospitals (1971) 5 Cal. 3d 98, 105, 95 Cal. Rptr. 516, 485 P.2d 1132* ; *Burns v. 20th Century Ins. Co. (1992) 9 Cal. App. 4th 1666, 1670, 1672, 12 Cal. Rptr. 2d 462*).

[*Optional*] **C. Evidence of Mental Processes of Jurors.** A new trial will not be granted on the ground of jury misconduct if the moving party's motion is supported by affidavits or declarations that are based on inadmissible evidence of the mental processes of jurors (*see Evid. Code § 1150(a)*; *Aronowicz v. Nalley's, Inc. (1972) 30 Cal. App. 3d 27, 41, 106 Cal. Rptr. 424*).

[*Optional*] **D. "Mental Processes" Include Misunderstanding of Law.** Juror declarations are inadmissible when they at most suggest deliberative error in the jury's collective mental process; that is, confusion, misunderstanding, and misinterpretation of the law (*Bell v. Bayerische Motoren Werke Aktiengesellschaft (2010) 181 Cal. App. 4th 1108, 1124-1126, 105 Cal. Rptr. 3d 485* ; *Mesecher v. County of San Diego (1992) 9 Cal. App. 4th 1677, 1683, 12 Cal. Rptr.*

2d 279).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion for new trial on the ground of on the ground of jury misconduct [*Code Civ. Proc. § 657(2)*]. It may, in an appropriate case, be submitted in opposition to a motion for new trial supported by the memorandum set out in *§ 155.80* et seq.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should discuss the substantive law of evidence to show that the moving party's affidavits or declarations contain incompetent evidence that should not be considered by the court. Counsel may also desire to argue that the admissible evidence contained in the moving party's affidavits or declarations is either insufficient to show the alleged misconduct or to show that the moving party was prevented from having a fair trial.

[c] Related Pleading and Practice Forms

For a notice of intention to move for a new trial on the ground of jury misconduct, see California Forms of Pleading and Practice, Ch. 326A, *Jury Verdicts* (Matthew Bender). For a discussion of new trials generally and an order denying the motion, see Ch. 371, *Motions After Trial* , in that publication.

[3] Discussion of Authorities

[a] Incompetent Evidence

The factual and procedural background of ***Weathers v. Kaiser Foundation Hospitals*** *(1971) 5 Cal. 3d 98, 95 Cal. Rptr. 516, 485 P.2d 1132* , is discussed in *§ 155.70[3][c]*. Although the Supreme Court affirmed an order granting plaintiffs' motion for a new trial on the grounds of irregularity in the proceedings of the jury [*Code Civ. Proc. § 657(1)*] and jury misconduct [*Code Civ. Proc. § 657(2)*], it indicated that certain types of evidence contained in jurors' declarations were not admissible. The Court noted that hearsay evidence, if contained in a juror's declaration, is inadmissible (*5 Cal. 3d 98, 105)* . The Court also indicated that only overt acts of jurors, as opposed to mental processes, may be shown by a juror's declaration under *Evid. Code § 1150(a)* (*5 Cal. 3d 98, 111)* .

[b] Hearsay

The factual and procedural background of ***Weathers v. Kaiser Foundation Hospitals*** *(1971) 5 Cal. 3d 98, 95 Cal. Rptr. 516, 485 P.2d 1132* , is discussed in *§ 155.70[3][c]*, and in [a], *above*. Although the Supreme Court affirmed an order granting plaintiffs' motion for a new trial on the grounds of irregularity in the proceedings of the jury [*Code Civ.*

Proc. § 657(1)] and jury misconduct [*Code Civ. Proc. § 657(2)*], it stated that evidence presented by affidavit in connection with a motion for new trial, like oral testimony at trial, must be given from personal knowledge and cannot contain hearsay (*5 Cal. 3d 98, 105)* . The Court stated, however, that since the trial court did not grant defendants' motion to strike certain portions from the juror's affidavit, it impliedly determined that the testimony was not hearsay. The Court added that it could not say that the lower court's conclusion was erroneous (*5 Cal. 3d 98, 106)* .

In ***Burns v. 20th Century Ins. Co.*** *(1992) 9 Cal. App. 4th 1666, 12 Cal. Rptr. 2d 462* , after trial in her action against her insurance company for bad faith, the plaintiff moved for a new trial based on juror misconduct. In support of the motion, the plaintiff submitted two declarations from her attorney's investigator purporting to recount his conversations with two jurors following the verdict. The declaration stated that the jurors informed him that they were insured by the defendant insurer and that they had never received treatment such as that described in the plaintiff's case. The trial court denied the motion and the plaintiff's appeal followed.

The court of appeal affirmed the judgment. The court cited the statutory rule that on an inquiry as to a verdict's validity, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, in or out the jury room, of such a character as is likely to have influenced the verdict improperly [*Evid. Code § 1150(a)*]. Further, under *Evid. Code § 1200*, except as provided by law, hearsay is inadmissible. The court stated that the only evidence the plaintiff submitted in support of her new trial motion consisted of the declarations from her attorney's investigator concerning the purported statements and thoughts of two jurors during their deliberations. The declarations, observed the court, were inadmissible hearsay (*9 Cal. App. 4th 1666, 1670)* . The court held that the trial court did not abuse its discretion in denying the plaintiff's new trial motion. In so deciding, the court cited the Supreme Court's statement in *People v. Williams (1988) 45 Cal. 3d 1268, 1318, 248 Cal. Rptr. 834, 756 P.2d 221* , that the determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears (*9 Cal. App. 4th 1666, 1672)* .

[c] Evidence of Mental Processes of Jurors

In ***Aronowicz v. Nalley's, Inc.*** *(1972) 30 Cal. App. 3d 27, 106 Cal. Rptr. 424* , plaintiffs brought an action based on breach of contract and alternatively on the doctrine of promissory estoppel. After verdict was rendered for plaintiffs, defendant moved for a new trial on several grounds, including jury misconduct [*Code Civ. Proc. § 657(2)*]. Defendant alleged that the jury reached its verdict by chance and submitted defense counsel's declaration reciting a conversation that counsel had with a juror immediately after the verdict. The juror told counsel that the million dollar verdict was based on the assumption that there were about 100 shareholders in plaintiffs' corporation and one million dollars seemed about right for that number of shareholders. The juror further said that if the jury had known there were fewer shareholders, the verdict would have been less. When defendant's motion was granted, plaintiffs appealed the order.

The court of appeal reversed the order and affirmed judgment for plaintiffs, stating that so far as the matter set out in counsel's declaration is intended to show the mental processes by which the verdict was reached, the declaration is inadmissible under *Evid. Code § 1150*. The court added that counsel's declaration contained the rankest kind of hearsay and that the matter recited did not show that the verdict was reached by chance. After considering other potential grounds for a new trial, the court reversed the order (*30 Cal. App. 3d 27, 41)* .

[d] "Mental Processes" Include Misunderstanding of Law

Bell v. Bayerische Motoren Werke Aktiengesellschaft *(2010) 181 Cal. App. 4th 1108, 1124-1126, 105 Cal. Rptr. 3d 485* , involved a car accident. The injured driver sued the manufacturer of the car for negligence and products liability. The special verdict included questions regarding "potential risk." The jurors submitted questions to the court regarding the meaning of "potential risk." After deliberating with the parties' counsel, the court submitted an answer to the jurors that it was unable to answer the question as phrased. The jury did not rephrase the question. After the jury found for the defendant, the plaintiff moved for a new trial. The plaintiff submitted declarations from jurors stating that they did not

understand what was meant by "potential risk." The trial court held that it committed prejudicial error by not answering the jurors' questions, and granted the motion for new trial.

The court of appeal disagreed. It held that juror declarations are admissible to the extent that they describe overt acts constituting jury misconduct, but they are inadmissible to the extent that they describe the effect of any event on a juror's subjective reasoning process (*181 Cal. App. 4th 1108, 1124-1125)* . Therefore, the court held, the declarations were inadmissible to the extent they described the jurors' understanding of the instructions (*181 Cal. App. 4th 1108, 1125)* .

In ***Mesecher v. County of San Diego*** *(1992) 9 Cal. App. 4th 1677, 12 Cal. Rptr. 2d 279* , the plaintiff brought an action against a county and deputy sheriff for battery and violation of her civil rights when the defendant deputy sheriff allegedly twisted her arm behind her back, administered a "compliance hold," and forced her to the ground. The incident occurred when the plaintiff did not present satisfactory identification as she attempted to leave a prison after a video arraignment with her client. At trial, the jury awarded the plaintiff damages for the tortious conduct and the county moved for new trial and/or judgment notwithstanding the verdict. The trial court denied the county's motion, and the defendants appealed from the judgment entered on the jury's verdict.

The court of appeal affirmed. The county contended that because of juror misconduct, the trial court was required to grant its new trial motion on the battery cause of action. Specifically, the county submitted declarations by six jurors in support of its motion stating that during the deliberations they, and other jurors, defined a "battery" as contact that is intentional *or* unlawful *or* harmful *or* offensive. This definition conflicted with the court's instruction which provided that a battery is any intentional, unlawful *and* harmful or offensive contact by one person with the person of another (*9 Cal. App. 4th 1677, 1682-1683)* . The court stated that although jurors may testify to overt acts, that is, statements, conduct, conditions, or events open to sight, hearing, and the other senses and thus subject to corroboration, they may not testify to the subjective reasoning processes of the individual juror. Likewise, stated the court, evidence about a jury's subjective collective mental process purporting to show how the verdict was reached is inadmissible to impeach a jury verdict. Thus, juror declarations are inadmissible when they at most suggest deliberative error in the jury's collective mental process; that is, confusion, misunderstanding, and misinterpretation of the law (*9 Cal. App. 4th 1677, 1683)* . The county attempted to avoid the impact of these rules by focusing on the fact that several of the jurors communicated their misunderstanding of the instructions during deliberations. However, the subjective quality of one juror's reasoning is not purged by the fact that another juror heard and remembers the verbalization of that reasoning. To hold otherwise would destroy the rule that clearly prohibits the upsetting of a jury verdict by assailing these subjective mental processes. It would also restrict the free exchange of ideas during the jury's deliberations (*9 Cal. App. 4th 1677, 1683-1684)* .

[4] Additional Authorities

[a] Evidence of Mental Processes of Jurors

Worden v. Gentry (1975) 50 Cal. App. 3d 600, 123 Cal. Rptr. 496 , was an action for personal injuries in which the court of appeal reversed plaintiff's motion for a new trial that was made on several grounds, including misconduct of the jury. The court stated that the declaration of counsel filed with the motion was merely hearsay as to the jurors' alleged prejudice based on feelings against police officers, and the lower court properly concluded that it was an impermissible attempt to impeach the jury's verdict and mental processes; thus, the declaration could not be considered in support of the motion for new trial (*50 Cal. App. 3d 600, 606-607)* .

Cove, Inc. v. Mora (1985) 172 Cal. App. 3d 97, 218 Cal. Rptr. 7 , was an action concerning the breach of a lease and related matters. The court of appeal reversed an order granting a new trial to defendants that was based on declarations by jurors stating that the jury had rewarded compensatory damages on a nonexistent legal theory. The court held that the declarations were insufficient to impeach the verdict because they concerned the jurors' beliefs and intents at the time

they rendered the verdict, and were not based on improper influences open to sight, hearing, and the other senses subject to corroboration (*172 Cal. App. 3d 97, 100-103)* .

In *Maple v. Cincinnati, Inc. (1985) 163 Cal. App. 3d 387, 209 Cal. Rptr. 451* , the court of appeal reversed the trial court's granting of plaintiff's motion for new trial on the ground of jury misconduct after verdict for defendant in a personal injury action. The court of appeal reasoned that the trial court erred in considering the jurors' oral testimony, because an application for a new trial must be on the basis of affidavits or declarations [*see Code Civ. Proc. § 657(2)*] (*163 Cal. App. 3d 387, 392)* . The court further held that the decision was improperly based on the trial judge's subjective determination that the jurors failed to correctly analyze the case, rather than on objective evidence of a verdict arrived at by lot or chance (*163 Cal. App. 3d 387, 393-394)* .

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15-155 California Points & Authorities § 155.114

§ 155.114 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Juror Misconduct [Code Civ. Proc. § 657(2)]--Juror's Experiment Was Within Lines of Evidence Offered at Trial

[1] FORM

[*Caption. See § 155.60[1].*]

THE COURT SHOULD DENY THE MOTION FOR NEW TRIAL BECAUSE THE JUROR'S EXPERIMENT WAS WITHIN THE LINES OF EVIDENCE OFFERED AT TRIAL AND WAS CONSISTENT WITH THE EVIDENCE PRESENTED THEREIN; THUS, _____ [PLAINTIFF *or* DEFENDANT] WAS NOT DEPRIVED OF A FAIR TRIAL AND HIS/HER/ITS SUBSTANTIAL RIGHTS WERE NOT MATERIALLY AFFECTED.

Experiment by Juror. A new trial will not be granted if a juror carries out experiments within the lines of evidence offered at trial if the experiment is consistent with the evidence presented therein (*Higgins v. L.A. Gas & Electric Co. (1911) 159 Cal. 651, 657, 115 P. 313* ; *Wagner v. Doulton (1980) 112 Cal. App. 3d 945, 950, 169 Cal. Rptr. 550*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for new trial on the ground of jury misconduct [*Code Civ. Proc. § 657(2)*] based on a juror's conduct in carrying out experiments to test certain evidence offered at trial. This form may, in an appropriate case, be submitted in opposition to a motion for new trial supported by the points and authorities set out in *§ 155.83*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should discuss the nature of the juror's experiment, showing that it was within the lines of the evidence offered at trial and was consistent with that evidence. Counsel should also argue that the moving party was not deprived of a fair trial and that his or her substantial rights were not materially affected by the juror's experiment.

[c] Related Pleading and Practice Forms

For a form of notice of intention to move for a new trial and other supporting papers, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[3] Discussion of Authorities

[a] Experiment by Juror

The factual and procedural background of ***Higgins v. L.A. Gas & Electric Co.*** *(1911) 159 Cal. 651, 115 P. 313* , is discussed in *§ 155.83[3][c]*. During deliberation, the jury was allowed to examine a flashlight that was similar to the one lost in a gas explosion allegedly caused by defendant gas company's negligence. After verdict was rendered for plaintiff, defendant moved for a new trial on the basis of the jury's allegedly prejudicial use of the flashlight in its deliberation. When the motion was granted, plaintiff appealed the order.

The Supreme Court reversed the order because it found that defendant was not prejudiced by the jury's use of the flashlight. The Court stated that the fundamental rule is that all evidence must be taken in open court and that each party to a controversy must have knowledge of, and thus be enabled to meet and answer, any evidence brought against that party. Jurors may use exhibits to aid in weighing the evidence that has been given and in reaching a conclusion on a controverted matter. They may carry out experiments within the lines of offered evidence. However, if these experiments invade new fields and influence the jury's verdict, then the jury has taken evidence without the knowledge of either party, evidence that the injured party could not meet, answer, or explain (*159 Cal. 651, 656-657)* . In this case, though the trial judge concluded that he had committed an error in allowing the jury to experiment with the exhibit without limiting the scope of its experiments by proper instruction, the Supreme Court found that the defendant could not have been injured by the improper experiment. Even if the explosion were caused by the tenant's oil stove, the landlord plaintiff's action could not be defeated by the tenant's contributory negligence. Thus, if it were established that the concurrent negligence of the gas company and the tenant united to produce the injury to the property, the landlord would have recourse against the gas company or tenant. Therefore, the Court stated that the finding that the spark from the flashlight caused the explosion, even if erroneous, or erroneously arrived at, could not have worked injury to the defendant, and a new trial was not necessary (*159 Cal. 651, 660-661)* .

The factual and procedural background of ***Wagner v. Doulton*** *(1980) 112 Cal. App. 3d 945, 169 Cal. Rptr. 550* , is discussed in *§ 155.83[3][c]*. During the jury's deliberations, a juror, who was also an engineer, prepared a scale map of the accident location. After verdict for defendants, plaintiff moved for a new trial on the basis of the juror's presentation of extrajudicial evidence during jury deliberations. When the motion was denied, plaintiff appealed the judgment.

The court of appeal affirmed the judgment, noting that the denial of the motion was proper. The court stated that it was not misconduct for a juror to make a diagram that was based solely on the evidence received in court. It restated the

basic rule that jurors may not receive evidence out of court and may not conduct experiments that put them in possession of evidence not offered at trial. However, the juror's affidavit revealed that he had prepared the map in the jury room using evidence obtained at trial. The court stated that the diagram that the juror prepared was a pictorial representation of his idea of the testimony he heard during trial. The fact that the juror was an engineer and was perhaps more skillful at drawing diagrams made no difference since each juror's discussion of the case is necessarily tinged or affected by his or her own viewpoint or experience. Accordingly, the court affirmed the judgment (*112 Cal. App. 3d 945, 950-951)* .

[4] Additional Authorities

[a] Experiment by Juror

The facts and procedural background of *Locksley v. Ungureanu (1986) 178 Cal. App. 3d 457, 223 Cal. Rptr. 737* , are discussed in *§ 155.110[4][a]*. The court of appeal affirmed the trial court's denial of plaintiff's motion for a new trial on the ground of juror misconduct. Plaintiff based his motion on the fact that a juror experimented by driving with one eye shut because defendant had only one good eye. The court held that it was not at all clear that the juror's actions were an impermissible experiment, and thus misconduct, as the actions did not invade a new field. They were merely an experiment on an issue within the evidence, to wit, the ability of a one-eyed individual to drive (*178 Cal. App. 3d 457, 461)* .

In *People v. Phillips (1981) 122 Cal. App. 3d 69, 175 Cal. Rptr. 703* , defendant was convicted of murdering one of her two adopted children and willfully endangering the life and health of the other. Defendant allegedly poisoned her children with sodium bicarbonate in their formula. The court of appeal affirmed the judgment, noting the propriety of an order denying defendant a new trial on the ground that a juror had engaged in misconduct by conducting an at-home experiment involving the solubility of sodium bicarbonate in water. The court stated that defendant was not adversely affected by the experiment since the experiment was consistent with evidence presented at trial, related to a matter of fairly common knowledge, and was tangential rather than critical to the case (*122 Cal. App. 3d 69, 80-81)* .

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15-155 California Points & Authorities § 155.115

§ 155.115 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Juror Misconduct [Code Civ. Proc. § 657(2)]--Verdict Was Not Obtained by Chance

[1] FORM

[*Caption. See § 155.60[1].*]

THE MOTION FOR NEW TRIAL SHOULD NOT BE GRANTED BECAUSE THE JURY'S VERDICT IS NOT A CHANCE VERDICT.

A. Verdict Not Chance Verdict. A verdict that is reached without the operation of any unknown force or unexplainable cause, but which required the exercise of the judgment of each juror, is not a chance verdict, even though some jurors may have reached a decision by methods other than weighing the evidence and may have based considerations on other than his or her opinion of the proper amount of damages to be awarded (*Mirabito v. San Francisco Dairy Co. (1934) 1 Cal. 2d 400, 404, 35 P.2d 513*).

[*Optional*] **B. Jury Votes on Two Known Sums and Agrees to Accept One.** A jury verdict that is reached by the jurors voting on two known sums, while agreeing to accept the sum that receives the most votes, is not a chance verdict for which a new trial may be granted (*Mirabito v. San Francisco Dairy Co. (1934) 1 Cal. 2d 400, 404, 35 P.2d 513*).

[*Optional*] **C. Subsequent Discussion of Quotient Verdict.** A quotient verdict, obtained by taking the average of sums voted by the jurors, does not constitute a chance verdict if the jurors adopted the sum after subsequent discussion and were not bound to accept the sum without further consideration (*Bardessono v. Michels (1970) 3 Cal. 3d 780, 795, 91 Cal. Rptr. 760, 478 P.2d 480* ; *City of Pleasant Hill v. First Baptist Church (1969) 1 Cal. App. 3d 384, 434-435, 82 Cal. Rptr. 1*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for new trial on the ground of jury misconduct [*Code Civ. Proc. § 657(2)*] on the basis of the jury's rendition of a verdict allegedly obtained by chance. This form may, in an appropriate case, be submitted in opposition to a motion for new trial supported by the points and authorities set out in *§ 155.84*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should include a discussion of the manner in which the jury reached its verdict to show that the verdict rendered was not reached by chance. Counsel may desire to include affidavits or declarations of jurors to show, for example, that the jurors discussed the verdict and were not bound to accept the sum without further consideration. The affidavits of declarations may include evidence of overt acts of the jurors and cannot discuss the mental processes by which the jurors reached their verdict [*see Evid. Code § 1150(a)*].

[c] Related Pleading and Practice Forms

For a form of notice of intention to move for a new trial and other supporting papers, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[3] Discussion of Authorities

[a] Verdict Not Chance Verdict

The factual and procedural background of ***Mirabito v. San Francisco Dairy Co.*** *(1934) 1 Cal. 2d 400, 35 P.2d 513* , is discussed in *§ 155.84[3][b]*. In that case, the Supreme Court affirmed judgment for plaintiff, noting that the order denying defendants' motion for a new trial was proper. During deliberations, the jury voted on two known sums and agreed to accept the figure that received the majority of votes as its verdict. The Court felt that this manner of arriving at a verdict involved no operation of any unknown force or unexplainable cause, but required an exercise of the judgment of each juror. The Court stated that each juror, by an act of conscious volition, participated in the determination of the amount of the verdict even though he or she may have reached a decision by other methods than weighing the evidence and may have based his or her judgment on considerations other than an opinion of the proper amount of damages to be awarded. The Court held that the jury's manner of arriving at the verdict did not involve a resort to the determination of chance (*1 Cal. 2d 400, 404)* .

[b] Jury Votes on Two Known Sums and Agrees to Accept One

The factual and procedural background of ***Mirabito v. San Francisco Dairy Co.*** *(1934) 1 Cal. 2d 400, 35 P.2d 513* , is discussed in *§ 155.84[3][b]* and in [a], *above*. While deliberating, the jurors could not decide on the amount of damages to award plaintiff in a personal injury action. Therefore, they decided to vote on two known sums and agreed to accept the sum that received a majority of votes as its unanimous verdict. When the sum of $5,000 received the most votes, the

jurors accepted it without further discussion. The Supreme Court affirmed judgment for plaintiff and an order denying defendants' motion for a new trial made on several grounds, including jury misconduct [*Code Civ. Proc. § 657(2)*]. The Court stated that the manner of arriving at a verdict involved no operation of any unknown force or unexplainable cause, but required an exercise of the judgment of each juror. Hence, the Court concluded that the verdict was not a chance verdict (*1 Cal. 2d 400, 404)* .

[c] Subsequent Discussion of Quotient Verdict

In ***Bardessono v. Michels*** *(1970) 3 Cal. 3d 780, 91 Cal. Rptr. 760, 478 P.2d 480* , plaintiff brought a medical malpractice action against an orthopedic surgeon. After verdict for plaintiff, defendant moved for a new trial on the ground of jury misconduct [*Code Civ. Proc. § 657(2)*]. Defendant alleged that the jury had arrived at its verdict by adding to a total sum the damages favored by each of the 12 jurors and then dividing that total sum by 12 to reach a final decision. Plaintiff, however, produced the testimony of two jurors indicating that the jurors had not agreed that they would be bound by the figure arrived at by this quotient method, and that the jurors later revised the quotient figure and ultimately agreed on the revised damages. When defendant's motion for a new trial was denied, she appealed the judgment.

The Supreme Court affirmed the judgment, noting that the order denying the motion for a new trial was proper. The Court stated that a quotient verdict does not necessarily constitute a chance verdict, provided that the average sum which is thus procured is not adopted without subsequent consideration or balloting by the jurors. If, after a quotient figure is obtained, the jurors discuss and ballot on the adoption or rejection of that sum, it is conclusive evidence that they were not bound by a previous agreement to accept it without further consideration. The Court stated that the foregoing rule applied to this case and that it would not disturb the findings of the trial court in the absence of a clear abuse of discretion. The Court felt that the trial judge was familiar with the evidence, witnesses, and proceedings and was in the best position to determine whether, in view of all the circumstances, justice demanded a retrial. Since the Court did not find any abuse of discretion, it upheld the trial court's denial of the motion for new trial (*3 Cal. 3d 780, 794-796)* .

The factual and procedural background of ***City of Pleasant Hill v. First Baptist Church*** *(1969) 1 Cal. App. 3d 384, 82 Cal. Rptr. 1* , is discussed in *§ 155.82[3][e]*. After judgment for defendant church in an eminent domain action, plaintiff city moved for a new trial on several grounds, including jury misconduct [*Code Civ. Proc. § 657(2)*]. The affidavit of one juror indicated that in determining severance damages, the jurors pooled or averaged their respective opinions as to value, and pursuant to prior agreement, they returned that sum as compensation for the damages to the remaining property. On the other hand, 11 jurors averred that there was no agreement that the jurors would be bound by the figure arrived at after adding the figures and dividing by 12, and that they voted on the figure later. When plaintiff's motion for a new trial was denied, it appealed the judgment.

The court of appeal affirmed the judgment, stating that the situation was governed by the rule of *Balkwill v. City of Stockton (1942) 50 Cal. App. 2d 661, 670-672, 123 P.2d 596* . In *Balkwill*, the court stated that a quotient verdict does not necessarily constitute a chance verdict, provided that the average sum which is procured is not adopted without subsequent consideration or balloting by the jurors. If, after a quotient figure is obtained, the jurors discuss and ballot on the adoption or rejection of the sum, it is conclusive evidence that they were not bound by previous agreement to accept it without further consideration. In the *Pleasant Hill* case, the court of appeal felt that the trial court's determination that the facts lay within this rule was binding on it, and it therefore upheld the trial court's denial of the motion for new trial (*1 Cal. App. 3d 384, 434-435)* .

[4] Additional Authorities

[a] Subsequent Discussion of Quotient Verdict

Will v. Southern Pacific Co. (1941) 18 Cal. 2d 468, 116 P.2d 44 , was a wrongful death action in which the Supreme Court reversed an order granting defendant's motion for a new trial on the ground of jury misconduct [*Code Civ. Proc. § 657(2)*]. After averaging the amount that each juror submitted as proper damages, the jurors discussed the average amount in detail. The Court stated that it was not improper for jurors to calculate an average amount as a basis for discussion if there is a later consideration of the amount and a vote on it. Since the jurors discussed the average amount at length and the amount awarded was $1,000 less than the final average computed, the Court reversed the order granting a new trial (*18 Cal. 2d 468, 477-478)* .

Diamond Springs Lime Co. v. American River Constructors (1971) 16 Cal. App. 3d 581, 94 Cal. Rptr. 200 , was a negligence action in which the court of appeal affirmed judgment for plaintiff against one defendant and the denial of that defendant's motion for a new trial on the ground of jury misconduct [*Code Civ. Proc. § 657(2)*]. In reaching a damages award, the jurors averaged an amount that each juror submitted on paper. However, their affidavits were in conflict on whether or not they had agreed to be bound in advance by this figure. The court of appeal stated that a quotient verdict does not necessarily constitute a chance verdict, provided that the average sum which is procured is not adopted without subsequent consideration or balloting by the jurors. The court of appeal declined to disturb the trial court's determination that the jurors had not agreed to be bound by the quotient amount (*16 Cal. App. 3d 581, 605)* .

Glass v. Gulf Oil Corp. (1970) 12 Cal. App. 3d 412, 96 Cal. Rptr. 902 , was a slander of title action in which the court of appeal affirmed judgment for plaintiffs, noting that an order denying defendants' motion for new trial on grounds including irregularity in the proceedings of the jury [*Code Civ. Proc. § 657(1)*] and misconduct of the jury [*Code Civ. Proc. § 657(2)*] was proper. Three jurors averred that in determining the amount of punitive damages, each juror gave a figure and the sum of the figures was divided by 12. The average came to $6,300 and was rounded off to $6,500. The court stated that it is not improper for jurors to calculate an average amount as a basis for discussion if there is a later consideration of the amount and a vote on it. Since the court found evidence of a discussion after the averaging had been done, it agreed with the lower court's denial of the motion (*12 Cal. App. 3d 412, 435-436)*

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15-155 California Points & Authorities § 155.116

§ 155.116 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Juror Misconduct [Code Civ. Proc. § 657(2)]--Moving Party Has No Right to Compel Jurors to Discuss Issues

[1] FORM

[*Caption. See § 155.60[1].*]

THE MOTION FOR NEW TRIAL SHOULD NOT BE GRANTED, EVEN THOUGH THE JURY DID NOT DISCUSS THE _____ [ISSUES *or* ISSUE OF _____ (*identify specific issue moving party contends was decided without discussion during deliberations*)] BECAUSE _____ [*identify party, e.g.,* PLAINTIFF] HAS NO RIGHT TO COMPEL JURORS TO DISCUSS ISSUES WHICH THEY HAVE CHOSEN TO DECIDE WITHOUT DISCUSSION.

Moving Party Has No Right to Compel Jurors to Discuss Issues. A party's constitutional right to have his or her case decided by a jury does not include the right to compel jurors to discuss issues which they have chosen to decide without discussion (*Vomaska v. City of San Diego (1997) 55 Cal. App. 4th 905, 911, 64 Cal. Rptr. 2d. 492*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for new trial on the ground of jury misconduct [*Code Civ. Proc. § 657(2)*] on the basis of the jury's rendition of a verdict allegedly rendered because of improper communications, by failing to discuss an issue during deliberations. This issue may arise when the jury has returned with what may be considered a quick verdict.

This form may, in an appropriate case, be submitted in opposition to a motion for new trial supported by the points and authorities set out in *§ 155.82*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should show that the lack of discussion by the jury was a result of the jury's choice not to discuss the issue.

If appropriate, counsel may point to the absence of facts in the moving papers showing that the jury did not have an opportunity to view any specific evidence before retiring for deliberations, or of any overt conduct or statements showing jurors failed to properly perform their duties to pay attention during trial and consider all the evidence presented or that any jurors were compelled to render a vote before they were ready to do so [*see Vomaska v. City of San Diego (1997) 55 Cal. App. 4th 905, 911, 64 Cal. Rptr. 2d. 492* , discussed in [3][a], *below*].

Counsel may desire to include affidavits or declarations of jurors to show, for example, that the jurors discussed the verdict and were not bound to accept, without further consideration, the sum prayed for by the moving party. The affidavits of declarations may include evidence of overt acts of the jurors and cannot discuss the mental processes by which the jurors reached their verdict [*see Evid. Code § 1150(a)*].

[3] Discussion of Authorities

[a] Moving Party Has No Right to Compel Jurors to Discuss Issues

Vomaska v. City of San Diego *(1997) 55 Cal. App. 4th 905, 64 Cal. Rptr. 2d. 492* , involved an action for personal injuries against a city defendant. The trial court rendered a judgment in favor of the city after a jury verdict finding no dangerous condition on public property where the plaintiff was seriously injured. The plaintiff filed a motion for a new trial, supported by five juror declarations, showing that the bailiff was informed that the jury had reached a verdict after retiring to the jury deliberation room for about 10 to 15 minutes. At the time of the announcement, exhibits had not yet been brought into the jury room. After the jury selected a foreperson, the foreperson suggested everyone write their vote on separate pieces of paper as to the first question asking whether the public property was in a dangerous condition. After adding up the votes, the foreperson announced there were 10 "no" votes and 2 "yes" votes; he then said "that's it;" and without further discussion, he filled out and signed the special verdict form. The jurors did not discuss their individual views before the special verdict form was filled out and signed.

At trial, the jury was given BAJI instruction 15.30, telling them, "[e]ach of you must decide the case for yourself, but should do so only after considering the views of each juror." The motion for new trial was denied and the plaintiff appealed from the judgment, arguing that the judgment should be reversed because, among other contentions, the jury failed to deliberate an issue they were bound to consider.

The court of appeal affirmed the judgment. The court stated that discussion of the case, as instructed by the BAJI instructions, would be the preferred procedure so as to ensure the jury carefully considered the evidence and its possible varying interpretations. The court was not persuaded, however, that a party's constitutional right to have his or case decided by a jury includes the right to compel jurors to discuss issues which they have chosen to decide without

discussion (*55 Cal. App. 4th 905, 911)* . The court observed that the jurors took a straw vote to see how they each viewed the issue, and when that vote revealed 10 jurors were in agreement, they decided to render a verdict rather than discuss the issue further. The court concluded that this procedure is a type of "deliberations," in that each juror, having considered the evidence and arguments independently, is setting forth his or her opinion, albeit without accompanying reasons or explanations (*55 Cal. App. 4th 905, 912)* . The court quoted from an opinion of another state: "While the verdict should be the result of sound judgment, dispassionate consideration, and conscientious reflection, and the jury should, if necessary, deliberate patiently and long on the issues which have been submitted to them, yet, where the law does not positively prescribe the length of time a jury shall consider their verdict, they may render a valid verdict without retiring, or on very brief deliberation after retiring, although the trial court may, in its discretion, cause the jury to reconsider the case if their decision is so hasty as to indicate a flippant disregard of their duties." The court concluded that the affidavits on their face did not show a flippant disregard, and the trial court apparently had not observed any such disregard (*55 Cal. App. 4th 905, 913)* .

The court noted that this is not a case in which the jury does choose to discuss a case, in which situation each juror must have the opportunity to participate equally in all discussions in order to satisfy the constitutional right to trial by jury. Regarding the contention that the verdict was rendered before the exhibits, including photographs of the accident scene, were delivered to the jury room, the court cited the fact that the jury visited the scene of the accident themselves, and thus had ample opportunity to consider the import of the photographs. In addition, no argument was made that the jury did not have an opportunity to view any specific pertinent exhibit prior to retiring for deliberations. Nor was there any indication of any overt conduct or statements showing jurors failed properly to perform their duties to pay attention during trial and consider all the evidence presented or that any jurors were compelled to render a vote before they were ready to do so. The jurors were polled in open court as to their individual votes, and all answered without equivocation (*55 Cal. App. 4th 905, 912)* .

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[Reserved]

§§ 155.117[Reserved]

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15-155 California Points & Authorities § 155.130

§ 155.130 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Irregularity of Proceedings Due to Adverse Party [Code Civ. Proc. § 657(1)]--Misconduct of Adverse Party

[1] FORM

[*Caption. See § 155.50[1].*]

A NEW TRIAL SHOULD BE GRANTED BECAUSE THERE WAS AN IRREGULARITY IN THE PROCEEDINGS OF THE ADVERSE PARTY, CONSISTING OF THAT PARTY'S MISCONDUCT, THAT PREVENTED _____ [PLAINTIFF *or* DEFENDANT] FROM HAVING A FAIR TRIAL AND THAT MATERIALLY AFFECTED HIS/HER/ITS SUBSTANTIAL RIGHTS.

A. New Trial on Ground of Irregularity in Proceedings of Adverse Party. On the application of the party aggrieved, the verdict or decision may be vacated, in whole or in part, and a new trial may be granted, on all or some of the issues, on the ground of irregularity in the proceedings of the adverse party by which either party is prevented from having a fair trial if substantial rights of the aggrieved party are materially affected thereby (*Code Civ. Proc. § 657(1)*).

B. Overt Acts of Adverse Party. An overt act of the adverse party, violating the right to a fair and impartial trial and amounting to misconduct, may be regarded as an irregularity for which a new trial may be granted (*see Gray v. Robinson (1939) 33 Cal. App. 2d 177, 182, 91 P.2d 194*).

[*Optional*] **C. Admonishing Instruction Not Obviating Prejudicial Effect.** The court may grant a new trial for irregularity in the proceedings of the adverse party although the jury was admonished to disregard the irregularity, if it appears that the admonition did not obviate the prejudicial effect (*Baroni v. Rosenberg (1930) 209 Cal. 4, 6-7, 284 P. 1111*).

[*Optional*] **D. One Party Misled by Act of Other.** Whenever one party is misled to his or her prejudice by the act of the other, justice demands that a new trial be granted (*Pinkham & McDonough v. McFarland & Elrod (1855) 5 Cal. 137*).

[*Optional*] **E. Prevention of Full Presentation of Evidence.** Any misconduct of a party to an action that prevents full presentation to the court or jury of evidence material to the other party's cause, thus preventing a fair trial, is an irregularity for which a new trial may be granted (*Piercy v. Piercy (1906) 149 Cal. 163, 166, 86 P. 507*).

[*Optional*] **F. Witness Induced to Give False Evidence.** When an adverse party has induced a witness to give false evidence on matters material to the case, thereby preventing a fair trial, a new trial should be granted (*Smith v. Mitchell (1923) 64 Cal. App. 463, 469, 221 P. 964*).

[*Optional*] **G. Intentional Misconduct of Party in Courtroom.** Intentional misconduct of a party in the courtroom, such as a simulated fainting spell or collapse, that has aroused the sympathy of the jury and influenced the verdict may be an irregularity in the proceedings of the adverse party for which a new trial may be granted (*see Fonts v. Southern Pacific Co. (1916) 30 Cal. App. 633, 637-638, 159 P. 215*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for new trial on the ground of irregularity in the proceedings of the adverse party [*Code Civ. Proc. § 657(1)*] based on a party's misconduct.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should include a discussion of the nature of the opposing party's misconduct, showing how it deprived the moving party of a fair trial and materially affected the moving party's substantial rights.

[c] Supporting Declarations or Affidavits Required

A motion for new trial made on the ground of irregularity in the proceedings of the adverse party must be supported by declarations or affidavits [*Code Civ. Proc. § 658*; *see Code Civ. Proc. § 2015.5*].

[d] Related Pleading and Practice Forms

For a form of notice of intention to move for a new trial and a declaration to be submitted in support of the motion on the ground of irregularity in the proceedings of the court, jury, or adverse party [Code Civ. Proc. § 657(1)], see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[e] Opposing Points and Authorities

The points and authorities set out in *§ 155.150* et seq. may be used in an appropriate case to oppose a motion for a new

trial supported by this memorandum.

[3] Discussion of Authorities

[a] Overt Acts of Adverse Party

In ***Gray v. Robinson*** *(1939) 33 Cal. App. 2d 177, 91 P.2d 194* , plaintiffs brought a personal injury action for damages resulting from an automobile accident. After judgment for plaintiffs, defendants were granted a new trial on the basis of misconduct of the jury and irregularity in the proceedings by which defendants were prevented from having a fair trial. The court of appeal affirmed the order, stating that there was no evidence that the trial court abused its discretion in granting the motion for a new trial (*33 Cal. App. 2d 177, 185)* . It defined an irregularity as an overt act of the trial court, jury, or adverse party, violating the right to a fair and impartial trial and amounting to misconduct (*33 Cal. App. 2d 177, 182)* . The court felt that the injection by plaintiffs' counsel of the fact that defendants carried liability insurance, coupled with the concealed bias of a juror on voir dire, may have resulted in prejudice to the rights of the defendants. Therefore, the granting of defendants' motion for a new trial was proper (*33 Cal. App. 2d 177, 182-185)* .

[b] Admonishing Instruction Not Obviating Prejudicial Effect

In ***Baroni v. Rosenberg*** *(1930) 209 Cal. 4, 284 P. 1111* , plaintiff brought a personal injury action for injuries sustained when he was struck by defendant's dump truck. During trial, defendant's counsel falsely stated that plaintiff was to receive Workers' Compensation for the rest of his life. After verdict for defendant, plaintiff's motion for new trial was granted.

The Supreme Court affirmed the order on the basis of counsel's prejudicial misconduct (*209 Cal. 4, 5-7)* . Although the court admonished the jury to disregard counsel's remarks, the harm was done and the court had no power to wipe away the false concept of the situation imprinted on the minds of the members of the jury. The remark was properly assigned as misconduct and, despite the admonition, was still prejudicial (*209 Cal. 4, 6)* . The absolutely erroneous statement that plaintiff would get compensation as long as he lived was flatly made by defendant's counsel and correct information regarding the method of rating disabilities was not and could not be given to the jury (*209 Cal. 4, 6-7)* . The Court stated that there was ample justification for the exercise of the trial court's discretion in granting a new trial (*209 Cal. 4, 7)* .

[c] One Party Misled by Act of Other

In ***Pinkham & McDonough v. McFarland & Elrod*** *(1855) 5 Cal. 137* , defendants were sued as the makers of two promissory notes. The notes were regularly endorsed to plaintiffs. Defendants' answer admitted the genuineness and execution of the notes but alleged that plaintiffs were not the legal holders of the notes. At trial, plaintiffs offered the notes and rested. Defendants moved for a nonsuit on the ground that plaintiffs had not proved the genuineness of the endorsements. The trial court granted the nonsuit. On appeal, the Supreme Court granted a new trial, stating that the plaintiffs had been misled by the acts of the defendants and that justice required that a new trial should be granted (*5 Cal. 137, 138)* . The endorsements of the notes were not denied with sufficient certainty by defendants' answers. If defendants intended to deny the genuineness of the endorsements, they should have objected to the introduction of the notes in evidence (*5 Cal. 137, 137-138)* .

[d] Prevention of Full Presentation of Evidence

In ***Piercy v. Piercy*** *(1906) 149 Cal. 163, 86 P. 507* , plaintiff brought an action to set aside a deed purporting to convey real property from her to defendant. Plaintiff alleged that the deed had been obtained from her by defendant by means of undue influence and ignorance on her part as to the contents of the deed. After judgment for defendant, plaintiff moved for a new trial on the basis of irregularities in the proceedings of the adverse party [*Code Civ. Proc. § 657(1)*]. Plaintiff alleged that through the wrongful procurement of defendant, the case was tried as a mere formal matter without any full

presentation of plaintiff's case, since those representing her at trial, a guardian ad litem and his attorney, had the understanding that the transaction between the parties was entirely regular and valid and that the real object of the trial was to dispose of any question of the validity of the deed and to confirm title in defendant. The motion for new trial was granted, and defendant appealed the order.

The Supreme Court affirmed the granting of the order, stating that any misconduct of a party to an action that prevents a full presentation to the court or jury of evidence material to the other party's cause is an irregularity for which a new trial may be granted (*149 Cal. 163, 166)* . The direct effect of the irregularity was that certain material evidence in support of plaintiff's claim was not presented. The trial court, having heard and seen the witnesses at trial and having knowledge of the circumstances of the case, is in a better position than the appellate court to determine the effect of the irregularity on the result of the trial. However, the Court felt that there was sufficient evidence to justify the finding of misconduct on the part of the defendant. Although the Court felt that it was true that there was a conflict in the evidence, the Supreme Court cannot interfere with the trial court's determination when there is substantial evidence to support the conclusion reached (*149 Cal. 163, 166)* .

[e] Witness Induced to Give False Evidence

In ***Smith v. Mitchell*** *(1923) 64 Cal. App. 463, 221 P. 964* , plaintiff sued to recover damages for the alienation of his wife's affections by defendant. During trial, plaintiff's wife was the most important witness for defendant. She denied the material parts of her husband's testimony and testified that defendant had in no manner influenced her conduct toward her husband or caused her to lose affection for him. After verdict for defendant, plaintiff's motion for a new trial on the ground of irregularity in the proceedings of the adverse party and error in law was granted. The court of appeal affirmed the order on the ground of defendant's misconduct. Plaintiff's wife stated in an affidavit that she was induced by defendant to testify falsely. She revealed that at the time of trial she was under defendant's dominion and influence to such an extent that by reason of his persuasion, promises, and influence she testified falsely regarding facts material to the case (*64 Cal. App. 463, 465)* . When a party to an action induces a witness to give perjured testimony in matters material to the case, he or she thereby prevents the other party from having a fair trial. The uncontradicted evidence presented at the hearing of the motion for a new trial entitled plaintiff to a retrial (*64 Cal. App. 463, 469)* .

[f] Intentional Misconduct of Party in Courtroom

In ***Fonts v. Southern Pacific Co.*** *(1916) 30 Cal. App. 633, 159 P. 215* , plaintiff brought an action for personal injuries sustained while in the employment of defendant. During trial, plaintiff, while on the witness stand, lost consciousness and fell from his chair. After judgment for plaintiff, defendant moved for a new trial, contending that the fainting episode excited the sympathy of the jury and influenced their verdict. However, the defendant's motion was denied.

The court of appeal affirmed the judgment and order, stating that it did not feel that the jury's verdict was influenced by plaintiff's conduct. The presumption is that the jury regarded its oath and determined the cause according to the law and the evidence. The granting of a new trial in consequence of the unavoidable illness of the plaintiff, sudden though it be and in the presence of the jury, would certainly be something novel in the history of judicial proceedings. However, the court noted that if there had been simulation on the part of the plaintiff or other intentional misconduct, the case would be obviously different (*30 Cal. App. 633, 638)* .

[4] Additional Authorities

[a] Admonishing Instruction Not Obviating Prejudicial Effect

The factual and procedural background of *Hoffman v. Brandt (1966) 65 Cal. 2d 549, 55 Cal. Rptr. 417, 421 P.2d 425* , is discussed in *§ 155.132[3][a], [b]*. The Supreme Court reversed the judgment for defendant and ordered a new trial on the basis of defense counsel's misconduct. Even though the plaintiff objected to the prejudicial statement made by defense counsel, the court stated that the trial court's equivocal admonition did not cure the error (*65 Cal. 2d 549, 553)*

.

The factual and procedural background of *Seimon v. Southern Pac. Transportation Co. (1977) 67 Cal. App. 3d 600, 136 Cal. Rptr. 787* , is discussed in *§ 155.132[3][b]*. The court of appeal affirmed defendant's order granting a partial new trial on the issue of damages on the basis of prejudicial misconduct by plaintiff's counsel. The fact that counsel for respondent failed to take timely exception to the prejudicial remarks is not to be considered in determining whether the trial court has abused its discretion in granting a new trial. To hold otherwise would mean that the trial court, by reason of the action of the parties, would be powerless to correct an obvious miscarriage of justice (*67 Cal. App. 3d 600, 604-605)* .

The factual and procedural background of *Love v. Wolf (1964) 226 Cal. App. 2d 378, 38 Cal. Rptr. 183* , is discussed in *§ 155.133[3][a]*. The court of appeal reversed judgment for plaintiff in a malpractice action and ordered a new trial even though defendant did not always object to counsel's misconduct or ask that the jury be admonished. It stated that multiple objections have a tendency to alienate a jury's goodwill. Error may be cured by admonishing the jury when the error is isolated and unemphasized, but an attempt to rectify repeated and resounding misconduct is "like trying to unring a bell" (*226 Cal. App. 2d 378, 392)* .

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
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B. Motions for New Trial
3. Misconduct of Adverse Party or Counsel

15-155 California Points & Authorities § 155.131

§ 155.131 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Irregularity of Proceedings Due to Adverse Party [Code Civ. Proc. § 657(1)]--Misconduct of Counsel--General Form

[1] FORM

[*Caption. See § 155.60[1].*]

A NEW TRIAL SHOULD BE GRANTED BECAUSE THERE WAS AN IRREGULARITY IN THE PROCEEDINGS OF THE ADVERSE PARTY, CONSISTING OF COUNSEL'S MISCONDUCT, THAT PREVENTED _____ [PLAINTIFF *or* DEFENDANT] FROM HAVING A FAIR TRIAL AND THAT MATERIALLY AFFECTED HIS/HER/ITS SUBSTANTIAL RIGHTS.

A. New Trial on Ground of Irregularity in Proceedings of Adverse Party. [*See § 155.130[1], Paragraph A.*]

B. Overt Acts of Adverse Party. [*See § 155.130[1], Paragraph B.*]

C. Influence on Jury's Verdict. Misconduct of counsel results in a miscarriage of justice for which a new trial may be granted when it fairly appears, all of the evidence considered, that the irregularities complained of, in all probability, largely influenced the jury in arriving at its verdict (*Cote v. Rogers (1962) 201 Cal. App. 2d 138, 144, 19 Cal. Rptr. 767*).

[*Optional*] **D. Admonishing Instruction Not Obviating Prejudicial Effect.** [*See § 155.130[1], Paragraph C.*]

[*Add additional points and authorities, if appropriate, supporting the contention that there was an irregularity in the proceedings of the adverse party consisting of counsel's misconduct (see, e.g., § 155.132 et seq.).*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for new trial on the ground of irregularity in the proceedings of the adverse party [*Code Civ. Proc. § 657(1)*] based on the misconduct of opposing counsel. It is a general form that may be used alone or in conjunction with forms containing points and authorities relating to specific factual situations [*see, e.g., § 155.132* et seq.].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should include a discussion of the nature of opposing counsel's misconduct, showing how it deprived the moving party of a fair trial and materially affected the moving party's substantial rights.

A motion for new trial made on this ground must be supported by declarations or affidavits [*Code Civ. Proc. § 658*; *see Code Civ. Proc. § 2015.5*].

[c] Related Pleading and Practice Forms

For a form of notice of intention to move for a new trial and a declaration to be submitted in support of the motion on the ground of irregularity in the proceedings of the court, jury, or adverse party [Code Civ. Proc. § 657(1)], see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[d] Opposing Points and Authorities

The points and authorities set out in *§ 155.150* et seq. may be used in an appropriate case to oppose a motion for a new trial supported by this memorandum.

[3] Discussion of Authorities

[a] Influence on Jury's Verdict

The factual and procedural background of ***Cote v. Rogers*** *(1962) 201 Cal. App. 2d 138, 19 Cal. Rptr. 767* , is discussed in *§ 155.134[3][d]*. The case involved defense counsel's alleged misconduct in using an inadmissible magazine article during trial of a wrongful death action. After judgment for defendants, plaintiff's motion for a new trial was denied. The court of appeal reversed the judgment and order denying a new trial, stating that misconduct of counsel results in a miscarriage of justice that furnishes ground for reversal when it fairly appears, from all of the evidence considered, that the irregularities complained of, in all probability, largely influenced the jury in arriving at its verdict (*201 Cal. App. 2d 138, 144)* . In this case, the court felt that counsel's conduct warranted a new trial. The court stated that defense counsel might just as well have prepared a handbill containing the inadmissible evidence and taken it around to the homes of the jurors (*201 Cal. App. 2d 138, 145)* .

[b] Improper Argument by Counsel

The factual and procedural background of ***Love v. Wolf*** *(1964) 226 Cal. App. 2d 378, 38 Cal. Rptr. 183* , is discussed in *§ 155.133[3][a]*. The case involved alleged misconduct of plaintiff's counsel in vilifying defendant's counsel, in referring to defendant corporation's wealth, and in asking questions on cross examination that were designed to introduce matters that were not in evidence. The court of appeal reversed judgment for plaintiff and ordered a new trial on the basis of counsel's misconduct. The court stated that aggressive advocacy is not only proper, but desirable, and that long trials that are vigorously prosecuted and defended sometimes cause frayed tempers that lead to intemperate outbursts. However, in this case, counsel's conduct went beyond the limit. The misconduct here was intentional, blatant, and continuous from opening statement, throughout the trial, to closing argument (*226 Cal. App. 2d 378, 393)* . It was committed by a seasoned and experienced trial lawyer, and the record left no doubt that it was carefully contrived and calculated to produce a result (*226 Cal. App. 2d 378, 393-394)* . That sought-for result was to arouse and inflame the jury so that it would render a large verdict. The court noted that the verdict was an unusually large one. It was satisfied that the conduct was prejudicial and that justice miscarried (*226 Cal. App. 2d 378, 394)* .

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15-155 California Points & Authorities § 155.132

§ 155.132 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Irregularity of Proceedings Due to Adverse Party [Code Civ. Proc. § 657(1)]--Misconduct of Counsel--Improper Appeal to Prejudice or Sympathy of Jury

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities supporting a motion for new trial on the ground of irregularity in the proceedings of the adverse party's counsel (see § 155.131).*]

A NEW TRIAL SHOULD BE GRANTED SINCE OPPOSING COUNSEL MADE AN APPEAL TO THE SYMPATHY OR PREJUDICE OF THE JURY THAT PREVENTED _____ [PLAINTIFF *or* DEFENDANT] FROM HAVING A FAIR TRIAL AND THAT MATERIALLY AFFECTED HIS/HER/ITS SUBSTANTIAL RIGHTS.

A. Appeal to Sympathy or Prejudice of Jury. An appeal by opposing counsel to the sympathy or prejudices of the jury that is irrelevant to the issues of the case and that is calculated to produce a certain result, with that result being achieved, is an irregularity in the proceedings of the adverse party for which a new trial may be granted (*Hoffman v. Brandt (1966) 65 Cal. 2d 549, 552-553, 55 Cal. Rptr. 417, 421 P.2d 425* ; *Deibler v. Wright (1931) 119 Cal. App. 277, 282-283, 6 P.2d 344*).

[*Optional*] **B. Improper Comments Concerning Relative Wealth of Litigants.** A deliberate attempt by counsel to appeal to the social or economic prejudices of the jury, including the wealth or poverty of the litigants, is misconduct warranting a new trial when the asserted wealth or poverty is not relevant to the issues of the case (*Hoffman v. Brandt (1966) 65 Cal. 2d 549, 552-553, 55 Cal. Rptr. 417, 421 P.2d 425* ; *Seimon v. Southern Pac. Transportation Co. (1977) 67 Cal. App. 3d 600, 606, 136 Cal. Rptr. 787*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for new trial on the ground of irregularity in the proceedings of the adverse party [*Code Civ. Proc. § 657(1)*] on the basis of counsel's improper appeal to the prejudice or sympathy of the jury. It does not provide a complete form, but is designed to be combined with a general form of points and authorities in support of a motion for new trial on the basis of misconduct of counsel [*see § 155.131*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should discuss the improper appeal to the prejudice or sympathy of the jury and how it deprived the moving party of a fair trial and materially affected the moving party's substantial rights. Counsel may refer to a reporter's transcript of the proceedings, and if used, counsel should attach relevant portions of the transcript to this memorandum.

A motion for new trial made on this ground must be supported by declarations or affidavits [*Code Civ. Proc. § 658*; *see Code Civ. Proc. § 2015.5*].

[c] Related Pleading and Practice Forms

For a form of notice of intention to move for a new trial and a declaration to be submitted in support of the motion on the ground of irregularity in the proceedings of the court, jury, or adverse party [*Code Civ. Proc. § 657(1)*], see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[d] Opposing Points and Authorities

The points and authorities set out in *§ 155.150* et seq. may be used in an appropriate case to oppose a motion for a new trial supported by this memorandum.

[3] Discussion of Authorities

[a] Appeal to Sympathy or Prejudice of Jury

In ***Hoffman v. Brandt*** *(1966) 65 Cal. 2d 549, 55 Cal. Rptr. 417, 421 P.2d 425* , plaintiff, a 20-year-old woman, brought an action for personal injuries and property damage resulting from an automobile collision with defendant, a 69-year-old retired machinist. During closing argument, defendant's counsel commented on the age disparity, stating that a judgment for plaintiff would put defendant in Laguna Honda Home, a city and county home for the indigent. After verdict for defendant, plaintiff moved for a new trial, claiming that defense counsel's statement constituted misconduct because it was based on matters not supported by the evidence, it was an appeal to sympathy and prejudice, and it implied that there was no liability insurance when there actually was. The motion was denied.

On appeal, the Supreme Court reversed the judgment, stating that the argument was clearly erroneous (*65 Cal. 2d 549, 552)* . The possibility, even if true, that a judgment for plaintiff would mean that defendant would have to go to the Laguna Honda Home, had no relevance to the issues of the case, and the argument of defense counsel was clearly a transparent attempt to appeal to the sympathies of the jury on the basis of the claimed lack of wealth of the defendant. As such, it was clearly misconduct (*65 Cal. 2d 549, 553)* .

In ***Deibler v. Wright*** *(1931) 119 Cal. App. 277, 6 P.2d 344* , plaintiff sued through her guardian for damages resulting from an automobile collision. During trial, plaintiff's counsel questioned plaintiff's father regarding a military medical examination in which he was suspected of having tuberculosis on the theory that plaintiff's injury might make her less likely to resist the disease if she had been exposed to the disease in her home. Counsel further stated that plaintiff had been harassed for the greater part of an afternoon in the taking of a deposition and was in bed for two weeks afterwards. After judgment for plaintiff, defendant appealed, claiming that the verdict was excessive because of the misconduct of

plaintiff's counsel and because of error in jury instructions which allowed the jury to consider a preexisting ailment of plaintiff in awarding damages.

The court of appeal reversed the judgment and granted a new trial on the basis of the misconduct of plaintiff's attorney. The court stated that in view of the expert evidence that plaintiff had not been afflicted with tuberculosis since her return home, the inquiry relating to prior home conditions had no bearing on the case. It was apparent that the inquiry was solely for the purpose of enlisting the sympathy of the jurors toward plaintiff and her father because of his "World War" services (*119 Cal. App. 277, 283)* . Counsel's statement regarding plaintiff's harassment in the taking of a deposition was unsupported by any evidence. Counsel admitted that it was unsupported and although the court admonished the jury to disregard the remarks, the error was not cured by the admonition (*119 Cal. App. 277, 282-283)* . Since the damages awarded were far in excess of what ordinarily might be expected for the injury, the court found that the misconduct prejudiced defendant (*119 Cal. App. 277, 283)* .

[b] Improper Comments Concerning Relative Wealth of Litigants

The factual and procedural background of ***Hoffman v. Brandt*** *(1966) 65 Cal. 2d 549, 55 Cal. Rptr. 417, 421 P.2d 425* , is discussed in [a], *above*. During closing argument, defendant's counsel commented on the age disparity between plaintiff and his client, stating that a judgment for plaintiff would put defendant in Laguna Honda Home, a city and county home for the indigent. After plaintiff's motion for new trial was denied, the Supreme Court reversed the judgment in favor of defendant, stating that defense counsel's argument was clearly erroneous (*65 Cal. 2d 549, 552)* . Justice is to be accorded to rich and poor alike, and a deliberate attempt by counsel to appeal to the social or economic prejudices of the jury, including the wealth or poverty of the litigants, is misconduct when the asserted wealth or poverty is not relevant to the issues of the case (*65 Cal. 2d 549, 552-553)* . The questions of liability and the amount of damages, if any, in the ordinary personal injury case are to be determined without regard to the defendant's ability to pay any judgment rendered against him or her (*65 Cal. 2d 549, 554)* . The argument of defense counsel was clearly a transparent attempt to appeal to the sympathies of the jury on the basis of the claimed lack of wealth of the defendant (*65 Cal. 2d 549, 553)* .

Seimon v. Southern Pac. Transportation Co. *(1977) 67 Cal. App. 3d 600, 136 Cal. Rptr. 787* , was an action against a railroad for personal injuries suffered by plaintiff when his truck was struck by a train. During closing argument, plaintiff's counsel attempted to portray himself and his client as financial underdogs, or as "little guys" against the wealthy "big guy" railroad corporation. After the jury returned a special verdict finding both parties negligent and allowing a 50 percent recovery to plaintiff, defendant moved for a new trial alleging misconduct by plaintiff's counsel and excessive damages. The motion for new trial was granted as to the issue of damages after plaintiff refused to agree to remittitur, and plaintiff appealed.

The court of appeal affirmed the granting of the new trial, stating that counsel's remarks were clearly improper. The court quoted *Hoffman v. Brandt (1966) 65 Cal. 2d 549, 552-553, 55 Cal. Rptr. 417, 421 P.2d 425* , discussed *above*, which said that justice is to be accorded to rich and poor alike, and a deliberate attempt by counsel to appeal to social or economic prejudices of the jury, including the wealth or poverty of the litigants, is misconduct when the asserted wealth or poverty is not relevant to the issues of the case. The questions of liability and the amount of damages in the ordinary personal injury case are to be determined without regard to the existing financial status of the plaintiff or plaintiff's counsel, or the ability of defendant to pay any judgment that might be rendered against him or her. The court stated that the improper comments may have caused the jury to render an inflated verdict. Even though the error did not seem too serious from the court's vantage point, it gave weight to the expressed opinion of the trial judge that the error resulted in a verdict of passion or prejudice (*67 Cal. App. 3d 600, 606)* .

[4] Additional Authorities

[a] Improper Comments Concerning Relative Wealth of Litigants

Smith v. Covell (1980) 100 Cal. App. 3d 947, 161 Cal. Rptr. 377 , was an action for personal injuries sustained by a wife and for loss of consortium suffered by her husband. The trial concerned solely the issue of damages because defendant conceded liability and the absence of contributory negligence. After the jury awarded plaintiff wife $10,000, but did not award any damages to plaintiff husband, plaintiffs moved for a new trial, and on its denial, they appealed the judgment. The court of appeal reversed the judgment on several grounds, including defense counsel's misconduct in suggesting that plaintiffs were wealthy. Though plaintiffs' objections were sustained, the jurors asserted that they were impressed with the idea that plaintiffs "already had a lot of money" and "didn't need any more" (*100 Cal. App. 3d 947, 960)* .

Weaver v. Shell Oil Co. of California (1933) 129 Cal. App. 232, 18 P.2d 736 , was an action for wrongful death in which verdict was rendered for plaintiffs. The court of appeal affirmed the trial court's order granting defendant's motion for a new trial on the basis of improper statements made by plaintiffs' counsel. During closing argument, counsel stated that someone must take care of decedent's widow and her four children and that the defendant, Shell Company, is a great big, rich corporation that has millions and can afford to take care of them (*129 Cal. App. 232, 234)* .

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15-155 California Points & Authorities § 155.133

§ 155.133 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Irregularity of Proceedings Due to Adverse Party [Code Civ. Proc. § 657(1)]--Misconduct of Counsel--Personal Attack on Character or Motives of Counsel, Party, or Witness

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities supporting a motion for new trial on the ground of irregularity in the proceedings of the adverse party's counsel (see § 155.131).*]

A NEW TRIAL SHOULD BE GRANTED BECAUSE OPPOSING COUNSEL MADE PERSONAL ATTACKS ON THE CHARACTER OR MOTIVES OF _____ [*specify person, e.g.,* PLAINTIFF *or* DEFENDANT *and/or* COUNSEL *and/or* A WITNESS] THAT WERE UNSUPPORTED BY THE EVIDENCE AND THAT PREVENTED _____ [PLAINTIFF *or* DEFENDANT] FROM HAVING A FAIR TRIAL AND THAT MATERIALLY AFFECTED HIS/HER/ITS SUBSTANTIAL RIGHTS.

Personal Attacks on Character or Motives of Adverse Party, Counsel, or Witness. Personal attacks on the character or motives of the adverse party, counsel, or witnesses, unsupported by the evidence and calculated to inflame the jury, with that result being achieved, are an irregularity for which a new trial may be granted (*see Simmons v. Southern Pac. Transportation Co. (1976) 62 Cal. App. 3d 341, 351-355, 133 Cal. Rptr. 42* ; *Love v. Wolf (1964) 226 Cal. App. 2d 378, 391-392, 38 Cal. Rptr. 183*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for new trial on the ground of irregularity in the proceedings of the adverse party [*Code Civ. Proc. § 657(1)*] based on opposing counsel's personal attacks on the character or motives of the moving party, his or her counsel, or witnesses. It does not provide a complete form, but is designed to be combined with a general form of points and authorities in support of a motion for new trial

on the basis of counsel's misconduct [*see § 155.131*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should discuss the derogatory characterizations or remarks, showing how they were calculated to inflame the jury, and how an unfavorable trial result was produced by these remarks. If appropriate, counsel may refer to a reporter's transcript of the proceedings, and if used, counsel should attach relevant portions of the transcript to this memorandum.

A motion for new trial made on this ground must be supported by declarations or affidavits [*Code Civ. Proc. § 658*; *see Code Civ. Proc. § 2015.5*].

[c] Related Pleading and Practice Forms

For a form of notice of intention to move for a new trial and a declaration to be submitted in support of the motion on the ground of irregularity in the proceedings of the court, jury, or adverse party [Code Civ. Proc. § 657(1)], see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[d] Opposing Points and Authorities

The points and authorities set out in *§ 155.150* et seq. may be used in an appropriate case to oppose a motion for a new trial supported by this memorandum.

[3] Discussion of Authorities

[a] Personal Attacks on Character or Motives of Adverse Party, Counsel, or Witness

Simmons v. Southern Pac. Transportation Co. *(1976) 62 Cal. App. 3d 341, 133 Cal. Rptr. 42* , was an action for damages against a railroad company following an accident in which one plaintiff and another plaintiff's decedent were struck by a train. After verdict for plaintiffs, defendant's motion for a new trial was denied. Defendant appealed the judgment. The court of appeal reversed the judgment on the basis of prejudicial misconduct by plaintiffs' counsel. A study of the record showed that from the very beginning of trial, plaintiffs' counsel embarked on a campaign of hate, vilification, and subterfuge for the sole purpose of prejudicing the jury against defendant Southern Pacific and its employees (*62 Cal. App. 3d 341, 351)* . Plaintiffs' counsel engaged in numerous instances of misconduct, including statements that the workers of Southern Pacific would perjure, cheat, lie, and steal. Counsel emphasized the wealth of the railroad company, insinuated that the company had tampered with a crucial file, produced a whiskey bottle with a faked evidence tag when questioning defendant's witness, and questioned witnesses on immaterial or purported facts. The court stated that the ultimate determination of the issue of alleged misconduct depriving a party of a fair trial rests on the court's view of the overall record, taking into account such factors as the nature and seriousness of the remarks and misconduct, the general atmosphere, including the judge's control of the trial, the likelihood of prejudicing the jury, and the efficacy of objection or admonition under all the circumstances (*62 Cal. App. 3d 341, 351)* . Even though some of the instances were of minor importance, in their totality, together with the totally irrelevant testimony of one witness, they made it impossible for Southern Pacific to have a fair trial (*62 Cal. App. 3d 341, 355)* . The court's admonitions, when given, were mostly inadequate. Even though objections were not always made, the record showed that further objections would have overemphasized the objectionable material and would have alienated the jury, who, because of plaintiffs' counsel's conduct, was unfavorably disposed against defendant (*62 Cal. App. 3d 341, 355)* .

Love v. Wolf *(1964) 226 Cal. App. 2d 378, 38 Cal. Rptr. 183* , was a medical malpractice and negligence action against a treating physician and a drug company, Parke-Davis. Following a substantial verdict against defendants, they appealed primarily on the ground that plaintiff's attorney was guilty of outrageous misconduct. The court of appeal reversed the judgment and ordered a new trial, concluding that counsel had been guilty of prejudicial, egregious

misconduct from the opening day of trial until its conclusion (*226 Cal. App. 2d 378, 393)* . Plaintiff's counsel continually vilified defendant's counsel by calling him "an idiot," "a smart guy," and a "laughing hyena." He characterized defense objections as "asinine" and "hogwash" and accused defense counsel of suborning perjury. He frequently told defense counsel to "shut up" (*226 Cal. App. 2d 378, 391)* . He also made references to Parke-Davis' earnings, false references to profits on those earnings, and repeatedly used "Do you know that" type questions that were designed not to obtain information or test adverse testimony but to afford him a device by which his own unsworn statements could reach the ears of the jury and be accepted by it as proof (*226 Cal. App. 2d 378, 390)* . The court stated that the record left no doubt that the conduct was carefully contrived and calculated to arouse and inflame the jury to render a large verdict. The verdict was an unusually large one (*226 Cal. App. 2d 378, 394)* . Although the court found that there was substantial, but conflicting, evidence of negligence on the part of the doctor, the court felt that both defendants were denied a fair trial because of counsel's misconduct (*226 Cal. App. 2d 378, 392-393)* . Even though it could not be stated with certainty that the misconduct changed the result of the case, a litigant who had engaged in misconduct is not entitled to the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted on his opponent. The court was satisfied that counsel's behavior was prejudicial and that justice miscarried. Accordingly, it reversed the judgment and remanded the case for new trial (*226 Cal. App. 2d 378, 394)* .

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15-155 California Points & Authorities § 155.134

§ 155.134 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Irregularity of Proceedings Due to Adverse Party [Code Civ. Proc. § 657(1)]--Misconduct of Counsel--Urging Facts Not in Evidence, Insinuation of Matters Not Supported by Evidence, or Attempt to Introduce Inadmissible Objects Into Evidence

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities supporting a motion for new trial on the ground of irregularity in the proceedings of the adverse party's counsel (see § 155.131).*]

A NEW TRIAL SHOULD BE GRANTED BECAUSE OPPOSING COUNSEL _____ [URGED FACTS THAT WERE NOT IN EVIDENCE *and/or* INSINUATED MATTERS THAT WERE NOT SUPPORTED BY THE EVIDENCE *and/or* ATTEMPTED TO INTRODUCE INADMISSIBLE PHYSICAL OBJECTS INTO EVIDENCE], THUS PREJUDICING THE JURY AND PREVENTING _____ [PLAINTIFF *or* DEFENDANT] FROM HAVING A FAIR TRIAL AND MATERIALLY AFFECTING HIS/HER/ITS SUBSTANTIAL RIGHTS.

A. Counsel's Suggestion of Matters Other Than by Legitimate Introduction Into Evidence. Counsel's attempts to suggest matters of an evidentiary nature to a jury other than by the legitimate introduction into evidence, whether by questions on cross examination, argument, or other means, is misconduct for which a new trial may be granted (*Smith v. Covell (1980) 100 Cal. App. 3d 947, 960, 161 Cal. Rptr. 377*).

[*EITHER, if improper statements made during counsel's argument*]

B. Assuming Facts Not in Evidence During Argument. Argument by counsel that assumes facts that are not in evidence, or that are known to be unsupported by any factual basis and invite the jury to speculate on unsupported inferences, is an irregularity in the proceedings of the adverse party for which a new trial may be granted (*Malkasian v. Irwin (1964) 61 Cal. 2d 738, 745-748, 40 Cal. Rptr. 78, 394 P.2d 822*).

[*AND/OR, if improper statements made during counsel's cross examination of witness*]

B. Insinuation of Untrue Matters or Inadmissible Evidence on Cross Examination. On cross examination, when counsel insinuates as fact, matters which he or she knows are not fact or cannot be put into evidence, counsel may be guilty of prejudicial misconduct constituting an irregularity in the proceedings of the adverse party (*Smith v. Covell (1980) 100 Cal. App. 3d 947, 957-960, 161 Cal. Rptr. 377*).

[*AND/OR when counsel uses objects that are not admissible as evidence*]

B. Use of Object Not Admissible as Evidence. Attempts by counsel to place inadmissible physical evidence before the jury in an effort to influence the jury in reaching its verdict and that has influenced the jury, may be an irregularity in the proceedings of the adverse party for which a new trial may be granted (*Cote v. Rogers (1962) 201 Cal. App. 2d 138, 140-146, 19 Cal. Rptr. 767*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for new trial on the ground of irregularity in the proceedings of the adverse party [*Code Civ. Proc. § 657(1)*] based on opposing counsel's improper urging of facts not in evidence, insinuation of matters not supported by the evidence, or attempt to introduce inadmissible physical objects into evidence.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should discuss the improper conduct of opposing counsel and show how this conduct deprived the moving party of a fair trial and materially affected the substantial rights of the moving party. Counsel may refer to a reporter's transcript of the proceedings, and if used, counsel should attach relevant portions of the transcript to this memorandum.

A motion for new trial made on this ground must be supported by declarations or affidavits [*Code Civ. Proc. § 658*; *see Code Civ. Proc. § 2015.5*].

[c] Related Pleading and Practice Forms

For a notice of intention to move for a new trial and a declaration to be submitted in support of the motion on the ground of irregularity in the proceedings of the court, jury, or adverse party [Code Civ. Proc. § 657(1)], see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[d] Opposing Points and Authorities

The points and authorities set out in *§ 155.150* et seq. may be used in an appropriate case to oppose a motion for a new trial supported by this memorandum.

[3] Discussion of Authorities

[a] Counsel's Suggestion of Matters Other Than by Legitimate Introduction Into Evidence

Smith v. Covell *(1980) 100 Cal. App. 3d 947, 161 Cal. Rptr. 377* , was an action for personal injuries suffered by a wife and loss of consortium suffered by her husband. Defendant conceded liability and the absence of contributory negligence, and the trial was solely on the issue of damages. During his opening statement, counsel stated that plaintiff wife went to a psychiatrist who said that her pain was purely psychological and that she had an antagonism toward her husband that made her desire to punish him. Plaintiff had consulted a psychiatrist and a psychologist; however, the balance of counsel's statement was pure speculation. Counsel also stated that plaintiff's psychologist did not want her as a patient anymore. The doctor, however, left his practice for military services and had referred her to a neurologist. After the jury awarded $10,000 to the wife, but awarded no damages to the husband, plaintiffs moved for a new trial. When their motion was denied, they appealed the judgment.

The court of appeal reversed the judgment on several grounds, including defense counsel's misconduct. During opening statement and cross examination, counsel insinuated as fact matters that he knew were not fact or could not be put into evidence (*100 Cal. App. 3d 947, 957)* . The court stated that counsel, in opening statements, should not include testimony that he or she knows will not be received and state that testimony for the purpose of prejudicing the jury. When prejudice results from such improper statements, a new trial should be awarded (*100 Cal. App. 3d 947, 958-959)* . During cross examination, counsel asked plaintiff wife questions that asked for patent hearsay evidence that did not come within any cited exception to the hearsay rule. The court stated that California courts have repeatedly held that attempts to suggest matters of an evidentiary nature to a jury other than by legitimate introduction into evidence constitute misconduct. This applies to questions on cross examination, argument, or any other means (*100 Cal. App. 3d 947, 960)* .

[b] Assuming Facts Not in Evidence During Argument

In ***Malkasian v. Irwin*** *(1964) 61 Cal. 2d 738, 40 Cal. Rptr. 78, 394 P.2d 822* , plaintiff brought an action for wrongful death of her son. During closing argument, counsel for defendant gave several possible scenarios for the accident, all unsupported by, or contrary to, the evidence. Counsel suggested that decedent drove off the highway, returned, hit the truck-trailer in the rear, then bounced into the south lane. There was damage, however, only on one side of the trailer and witnesses, prior to and at the time of the accident, stated that the decedent was traveling south the whole time in the southbound lane of highway. Following verdict for defendant, plaintiff moved for a new trial. When the motion was granted, defendant appealed.

The Supreme Court affirmed the order on the basis of defense counsel's improper argument to the jury. The Court stated that there was no factual foundation for any of counsel's speculations, assumptions, or inferences. He was not simply arguing that the cause of the accident was unknown. He was arguing that defendant ran into the trailer because of any one of the suggested reasons and that the jury could speculate as to which one was true (*61 Cal. 2d 738, 746)* . There can be no doubt that to argue facts not justified by the record, and to suggest that the jury could speculate, was misconduct. While counsel may indulge in all fair arguments in favor of his or her client's case, he or she may not assume facts not in evidence or invite the jury to speculate as to unsupported inferences. The trial court has broad discretion in considering motions for new trial. Here, the Court definitely determined that there had been a miscarriage of justice (*61 Cal. 2d 738, 747)* .

Note that the Court in *Malkasian* held that the party that prevailed in a motion for new trial in the trial court is not required to demonstrate that prejudice resulted from the error for which a new trial was granted. For discussion of subsequent conflicting decisions that extended or explained that holding, see *§ 155.251[3][a]*.

[c] Insinuation of Untrue Matters or Inadmissible Evidence on Cross Examination

The factual and procedural background of ***Smith v. Covell*** *(1980) 100 Cal. App. 3d 947, 161 Cal. Rptr. 377* , is discussed in [a], *above*. When plaintiffs' motion for new trial was denied, they appealed the judgment.

The court of appeal reversed the judgment on several grounds, including defense counsel's prejudicial misconduct during cross examination when he insinuated that certain matters were fact although he knew that these matters were not fact or could not be put into evidence. During cross examination, counsel asked plaintiff if her doctor or any other doctor had told her that her injury was a means of getting attention or of demonstrating dependence or hostility, thus suggesting that a qualified doctor had formed an opinion that her symptoms were purely psychological. However, no evidence was later offered to support these insinuations. Defense counsel's medical witnesses gave no testimony that the pain was in plaintiff's mind or that she had an antagonism toward her husband and that this was her way of punishing him as defense counsel had falsely alleged during his opening statement (*100 Cal. App. 3d 947, 957-958)* . The court noted that California courts have repeatedly held attempts to suggest matters of an evidentiary nature to a jury other than by legitimate introduction into evidence to be misconduct. This applies to questions on cross examination, argument, or any other means (*100 Cal. App. 3d 947, 959-960)* .

[d] Use of Object Not Admissible as Evidence

Cote v. Rogers *(1962) 201 Cal. App. 2d 138, 19 Cal. Rptr. 767* , was an action for wrongful death arising from a truck collision. During trial, defense counsel sought to place a California Highway Patrol magazine article before the jury. The article carried pictures of the accident and stated that the cause of the accident was improper care of loose equipment in the cab of the truck that prevented decedent from braking. After the court rejected the admission of the article as hearsay, counsel had the article published in a local newspaper and broadcast over a local radio station. Counsel referred to the article during cross examination and carried it in his hand during trial. After judgment for defendants, plaintiff's motion for a new trial, based on the alleged misconduct of counsel, was denied.

The court of appeal reversed the judgment and order denying a new trial, stating that defense counsel knew that the article was not admissible in evidence and that his continuing reference to it, while holding a copy of the magazine in his hand, was calculated solely to impress the jury that a statement of a highly respected law enforcement agency was being withheld from it because of some obscure, highly technical rule of evidence. While none of the jurors admitted to having read the newspaper story, the court stated that a juror who had done so would be extremely reluctant to publicly admit it (*201 Cal. App. 2d 138, 144)* . The court also felt that it would be extremely naive to conclude that the jury neither saw nor read the article which appeared in the local newspaper. If a newspaper read by jurors contains matters in connection with the subject of the trial that would be likely to influence the jurors in the performance of their duties, a presumption of improper influence arises and a new trial will be granted, without requiring the offended party to show that harm was in fact done to his cause (*201 Cal. App. 2d 138, 145)* .

[4] Additional Authorities

[a] Assuming Facts Not in Evidence During Argument

City of Los Angeles v. Decker (1977) 18 Cal. 3d 860, 135 Cal. Rptr. 647, 558 P.2d 545 , was an eminent domain proceeding involving property condemned for airport expansion. Defendant maintained that the highest and best use for her property was as an airport parking lot. Following a jury determination of the value of the land based on its use as a residence, defendant property owner's motion for new trial was denied. The Supreme Court reversed, holding that the city attorney committed misconduct that warranted a new trial when he argued that there was no need for airport parking when he knew of the city's determination that there was such a need and that defendant's property was suitable to fill it (*18 Cal. 3d 860, 870-871)* .

Kenworthy v. State of California (1965) 236 Cal. App. 2d 378, 46 Cal. Rptr. 396 , was an action by a contractor for loss of profits allegedly due to the state's breach of a construction and lease contract. After judgment for plaintiffs, defendant's motion for new trial was denied. The court of appeal reversed, finding no substantial evidence to support the verdict and prejudicial misconduct of plaintiffs' counsel (*236 Cal. App. 2d 378, 380)* . During trial, counsel engaged in numerous instances of misconduct, including improper attempts to introduce irrelevant evidence in the jury's presence,

unproven suggestions of bribery of state officials, unfounded accusations of suppression of evidence by the state, gratuitous remarks made in front of the jury, and arguments replete with insinuations, none of which had any support in the record (*236 Cal. App. 2d 378, 396-401)* .

[b] Insinuation of Untrue Matters or Inadmissible Evidence on Cross Examination

The factual and procedural background of *Simmons v. Southern Pac. Transportation Co. (1976) 62 Cal. App. 3d 341, 133 Cal. Rptr. 42* , is discussed in *§ 155.133[3][a]*. The court of appeal reversed the judgment on the basis of prejudicial misconduct by plaintiffs' counsel. Counsel engaged in many instances of misconduct, including the frequent placing of immaterial or purported facts before the jury by asking witnesses questions prefaced by "Isn't it true that" or "Did you know that" (*62 Cal. App. 3d 341, 354)* .

Dastagir v. Dastagir (1952) 109 Cal. App. 2d 809, 241 P.2d 656 , was a paternity suit instituted by the mother of an infant daughter against defendant. After judgment for defendant, the court of appeal reversed, granting a new trial on the basis of defense counsel's misconduct. During cross examination of plaintiff, counsel sought to intimate that plaintiff had engaged in illicit relations with men other than defendant at a time prior to the date the child must have been conceived. The court stated that while wide latitude should be given in cross examination, counsel should not be allowed to assume facts not in evidence and state as positive assertions facts which, if true, would be detrimental to the opposing party's case and of such a nature as to inflame and prejudice the minds of the jurors (*109 Cal. App. 2d 809, 818)* .

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
CHAPTER 155 MOTIONS AFTER TRIAL
PART II. FORMS
B. Motions for New Trial
3. Misconduct of Adverse Party or Counsel

15-155 California Points & Authorities § 155.135

§ 155.135 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Irregularity of Proceedings Due to Adverse Party [Code Civ. Proc. § 657(1)]--Misconduct of Counsel--False Accusation of Suppression of Evidence

[1] FORM

[*This form should be combined with a general form of memorandum of points and authorities supporting a motion for new trial on the ground of irregularity in the proceedings of the adverse party's counsel (see § 155.131).*]

A NEW TRIAL SHOULD BE GRANTED BECAUSE _____ [PLAINTIFF'S *or* DEFENDANT'S] COUNSEL DELIBERATELY ACCUSED AND INSINUATED THAT COUNSEL FOR _____ [PLAINTIFF *or* DEFENDANT] WILLFULLY SUPPRESSED EVIDENCE, THEREBY PREJUDICING THE JURY AND DEPRIVING _____ [PLAINTIFF *or* DEFENDANT] OF A FAIR TRIAL AND MATERIALLY AFFECTING HIS/HER/ITS SUBSTANTIAL RIGHTS.

Accusation of Suppression of Evidence. Counsel's deliberate accusation and insinuation that opposing counsel has willfully suppressed evidence that has created a prejudice in the mind of the jury may be an irregularity in the proceedings of the adverse party for which a new trial may be granted (*Keena v. United Railroads (1925) 197 Cal. 148, 156-160, 239 P. 1061*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for new trial on the ground of irregularity in the proceedings of the adverse party [*Code Civ. Proc. § 657(1)*] on the basis of counsel's accusation that opposing counsel has suppressed evidence. It does not provide a complete form, but is designed to be combined with a general form of points and authorities in support of a motion for new trial on the basis of misconduct of counsel [*see § 155.131*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should discuss the nature of opposing counsel's accusation of suppression of evidence and show how it deprived the moving party of a fair trial and materially affected the moving party's substantial rights. Counsel may refer to a reporter's transcript, and if used, counsel should attach relevant portions of the transcript to this memorandum.

A motion for new trial made on this ground must be supported by declarations or affidavits [*Code Civ. Proc. § 658*; *see Code Civ. Proc. § 2015.5*].

[c] Related Pleading and Practice Forms

For a notice of intention to move for a new trial and a declaration to be submitted in support of the motion on the ground of irregularity in the proceedings of the court, jury, or adverse party [Code Civ. Proc. § 657(1)], see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[d] Opposing Points and Authorities

The points and authorities set out in *§ 155.150* et seq. may be used in an appropriate case to oppose a motion for a new trial supported by this memorandum.

[3] Discussion of Authorities

[a] Accusation of Suppression of Evidence

Keena v. United Railroads *(1925) 197 Cal. 148, 239 P. 1061* , was an action for wrongful death of an infant due to a cable car accident. At the close of plaintiff's case, defendant called two witnesses and then rested its case without calling the gripman who had operated the cable car at the time of the accident. In the presence of the jury, plaintiff's counsel repeatedly asked defendant's counsel about the whereabouts of the gripman and if he intended to call him as a witness. Plaintiff's counsel then called defense counsel as a witness and pursued the inquiry while repeatedly charging that defense counsel was guilty of willful suppression of the evidence in failing to call the gripman. After judgment for plaintiff, defendant appealed.

The Supreme Court reversed judgment for plaintiff, stating that the misconduct of the attorney for plaintiff prejudicially and materially affected the substantial rights of defendant and prevented it from having a fair trial (*197 Cal. 148, 160)* . The Court stated that failure to call a witness does not amount to willful suppression of evidence (*197 Cal. 148, 158)* . Quoting the dissenting opinion in *LaFargue v. United R. of San Francisco (1920) 183 Cal. 720, 728, 192 P. 538* , the Court stated that an entirely false quantity was injected into the case by plaintiff's counsel, over repeated admonitions of the court, and the false quantity was of a character so prejudicial to the defendant as to have prevented the jury from considering the case fairly on its own merits (*197 Cal. 148, 159)* . In this case, the Court noted that the misconduct was not induced by possible emotion of the attorney or untoward thoughtlessness, but was the result of premeditation and deliberation (*197 Cal. 148, 159)* . It did not consist of a single utterance of a charge, but embraced repetition and included hints, suggestions, and insinuations to such an extent that there was no possibility that counsel's meaning could have been misinterpreted or misunderstood by the jury (*197 Cal. 148, 159)* . The purpose of the accusation was to bolster a weak case by creating a prejudice against defendant in the minds of the members of the jury (*197 Cal. 148, 159-160)* . The Court concluded that the misconduct of plaintiff's attorney prejudicially and materially affected the substantial rights of defendant and prevented it from having a fair trial (*197 Cal. 148, 160)* .

[4] Additional Authorities

[a] Accusation of Suppression of Evidence

Kenworthy v. State of California (1965) 236 Cal. App. 2d 378, 46 Cal. Rptr. 396 , was an action by a contractor for loss of profits allegedly due to the state's breach of a construction and lease contract. After judgment for plaintiffs, defendant's motion for a new trial was denied. The court of appeal reversed, finding no substantial evidence to support the verdict and prejudicial misconduct of plaintiffs' counsel. During trial, counsel engaged in numerous instances of misconduct, including unfounded accusations of suppression of evidence by the state (*236 Cal. App. 2d 378, 398)* .

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
CHAPTER 155 MOTIONS AFTER TRIAL
PART II. FORMS
B. Motions for New Trial
3. Misconduct of Adverse Party or Counsel

15-155 California Points & Authorities § 155.136

§ 155.136 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Irregularity of Proceedings Due to Adverse Party [Code Civ. Proc. § 657(1)]--Misconduct of Counsel--Reference to Insurance Before Jury

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities supporting a motion for new trial on the ground of irregularity in the proceedings of the adverse party's counsel (see § 155.131).*]

THE MOTION FOR NEW TRIAL SHOULD BE GRANTED BECAUSE OPPOSING COUNSEL REFERRED TO _____ [PLAINTIFF'S *or* DEFENDANT'S] INSURANCE DURING TRIAL AND THE REFERENCE PREJUDICED THE JURY, THUS PREVENTING _____ [PLAINTIFF *or* DEFENDANT] FROM HAVING A FAIR TRIAL AND MATERIALLY AFFECTING HIS/HER/ITS SUBSTANTIAL RIGHTS.

A. Reference to Insurance During Trial. If opposing counsel refers to a party's insurance during trial and this reference prejudices the jury, a new trial may be granted on the ground of irregularity in the proceedings of the adverse party based on counsel's misconduct (*see Self v. General Motors Corp. (1974) 42 Cal. App. 3d 1, 12-14, 116 Cal. Rptr. 575*).

[*Optional*] **B. Fact of Insurance Injected to Show Defendant Well Insured.** In a personal injury action, the prejudicial injection by opposing counsel of the fact of liability insurance to show that defendant is well insured and able to respond in damages is an irregularity in the proceedings of the adverse party for which a new trial may be granted (*see Roche v. Llewellyn Iron Works Co. (1903) 140 Cal. 563, 574-577, 74 P. 147*).

[*Optional*] **C. Plaintiff Already Compensated by Insurance.** Defense counsel's attempt to prove, in the presence of the jury, that plaintiff carried insurance policies that have already compensated him or her for damages, is an irregularity in the proceedings of the adverse party for which a new trial may be granted (*Loggie v. Interstate Transit Co. (1930) 108 Cal. App. 165, 168-169, 291 P. 618*).

[*Optional*] **D. Plaintiff Shows That One Defendant Not Well Insured.** In a personal injury action, the action of plaintiff's counsel in showing that one defendant is not well insured so that the jury will find a codefendant liable is an irregularity in the proceedings of the adverse party for which a new trial may be granted (*Self v. General Motors Corp. (1974) 42 Cal. App. 3d 1, 12-14, 116 Cal. Rptr. 575*).

[*Optional*] **E. Plaintiff's Insurance Company Real Party in Interest.** Defense counsel's attempt to show that an insurance company is the real party in interest behind plaintiff's case may be prejudicial misconduct of counsel for which a new trial may be granted (*Mangino v. Bonslett (1930) 109 Cal. App. 205, 208-212, 292 P. 1006*).

[*Optional*] **F. Questions About Insurance on Voir Dire.** When an insurance company is not a party to an action, it is improper for counsel to question prospective jurors on voir dire about ownership of stock or other financial interests in insurance companies, and when the error results in prejudice, a new trial may be granted (*Scally v. Pacific Gas & Electric Co. (1972) 23 Cal. App. 3d 806, 813-814, 100 Cal. Rptr. 501*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for new trial on the ground of irregularity in the proceedings of the adverse party [*Code Civ. Proc. § 657(1)*] based on opposing counsel's misconduct in referring to insurance during trial. It does not provide a complete form, but is designed to be combined with a general form of points and authorities in support of a motion for new trial on the ground of irregularity in the proceedings of the adverse party based on counsel's misconduct [*see § 155.131*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should show how opposing counsel's reference to insurance deprived the moving party of a fair trial and materially affected the moving party's substantial rights. This argument may refer to a reporter's transcript, and if used, relevant portions should be attached to this memorandum.

A motion for new trial made on this ground must be supported by declarations or affidavits [*Code Civ. Proc. § 658*; *see Code Civ. Proc. § 2015.5*].

[c] Related Pleading and Practice Forms

For a notice of intention to move for a new trial and a declaration to be submitted in support of the motion on the ground of irregularity in the proceedings of the court, jury, or adverse party [Code Civ. Proc. § 657(1)], see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[d] Opposing Points and Authorities

The points and authorities set out in *§ 155.150* et seq., and particularly those set out in *§ 155.153*, may be used in an appropriate case to oppose a motion for a new trial supported by this memorandum.

[3] Discussion of Authorities

[a] Reference to Insurance During Trial

The factual and procedural background of ***Self v. General Motors Corp.*** *(1974) 42 Cal. App. 3d 1, 116 Cal. Rptr. 575* , is discussed in [d], *below*. The court of appeal affirmed orders denying defendant's motion for judgment

notwithstanding the verdict, but granted defendant's motion for new trial on several grounds, including opposing counsel's misconduct in referring to one codefendant's limited amount of insurance during trial. The court stated that the reference to insurance was clearly prejudicial in light of the amount of damages claimed by plaintiff and references of plaintiff's counsel during trial to the other defendant's wealth and profits (*42 Cal. App. 3d 1, 13-14)* .

[b] Fact of Insurance Injected to Show Defendant Well Insured

In ***Roche v. Llewellyn Iron Works Co.*** *(1903) 140 Cal. 563, 74 P. 147* , plaintiff brought an action to recover damages for personal injuries alleged to have been sustained by reason of the negligence of his employer, a corporation. During trial, plaintiff's counsel asked the corporation president if the company was insured by a named insurer and if the defense counsel was defending the action on behalf of the insurer at the request of defendant company. After defendant's objections to these questions were overruled, the company president answered affirmatively. After verdict for plaintiff, defendant moved for a new trial, and the motion was denied.

The Supreme Court reversed the judgment and order denying a new trial, stating that it was prejudicial error to permit evidence showing that defendant was being defended by an insurance company at defendant's request. The evidence that defendant objected to showed that the claim was well founded, that the defendant did in fact have a policy covering its employees, that the insurance company admitted its liability thereon, and that if plaintiff recovered judgment, the defendant would not be injured thereby, but that the loss would fall on the insurance company (*140 Cal. 563, 577)* . The evidence also did not tend to prove or disprove any of the issues in the case (*140 Cal. 563, 576-577)* . Accordingly, a new trial was ordered (*140 Cal. 563, 577)* .

[c] Plaintiff Already Compensated by Insurance

In ***Loggie v. Interstate Transit Co.*** *(1930) 108 Cal. App. 165, 291 P. 618* , plaintiff brought an action for personal injuries and property damage allegedly caused by the negligence of defendant. During trial, defense counsel attempted to show that plaintiff carried accident and collision insurance and that the insurance company had already compensated plaintiff for damages to his automobile. When the jury returned a verdict for defendant, plaintiff moved for a new trial on the ground of irregularity in the proceedings of the adverse party based on counsel's misconduct. The motion was granted and defendant appealed.

The court of appeal affirmed the order granting a new trial, stating that counsel's reference was prejudicial (*108 Cal. App. 165, 168-170)* . It added that the first thought of the juror, unfamiliar with legal principles, was that plaintiff had probably received full compensation for his loss and was not entitled to a second recovery (*108 Cal. App. 165, 168-169)* . The court noted that counsel should not be permitted to obtain verdicts by other than fair presentations of causes on the facts and legitimate argument based on these facts, and when verdicts are otherwise obtained, they should promptly be set aside by the trial court (*108 Cal. App. 165, 170)* .

[d] Plaintiff Shows That One Defendant Not Well Insured

In ***Self v. General Motors Corp.*** *(1974) 42 Cal. App. 3d 1, 116 Cal. Rptr. 575* , plaintiff brought a personal injury action against the manufacturer of the car in which she was a passenger and the driver of the car that struck it in the rear. After verdict for plaintiff, the trial court granted defendant manufacturer's motion for new trial on the basis of a juror's concealment of certain facts on voir dire and because of the conduct of plaintiff's attorney in bringing to the jury's attention the limited amount of defendant driver's insurance coverage. The court also denied defendant manufacturer's motion for judgment notwithstanding the verdict.

The court of appeal affirmed the orders denying the judgment notwithstanding the verdict and granting a new trial, stating that the reference to defendant driver's insurance coverage was clearly prejudicial to the manufacturer in light of the damages claimed by the plaintiff and references of plaintiff's counsel during trial to defendant manufacturer's wealth

and profits (*42 Cal. App. 3d 1, 13-14)* . The vice in the misconduct lay not in the familiar "injection of the subject of insurance into the case" to show that defendant was well insured and well able to respond in damages, but to show the contrary--that he was not adequately insured or otherwise financially responsible. The purpose of this was to impress upon the jury that one of two concurrent or successive tortfeasors was unable to respond in damages in an amount in excess of $25,000. Therefore, the jury must find against the other tortfeasor in order to satisfy the judgment for the very substantial damages warranted by the evidence. The prejudicial effect of the misconduct was compounded by counsel's persistent and ill-advised references during trial to General Motors' wealth and profits and the magnitude of its operations. Repeated references to a litigant's wealth or poverty amount to prejudicial misconduct. The court stated that the trial court was in the best position to assess the impact of counsel's misconduct on the jury and that it agreed with the trial court's decision to grant a new trial (*42 Cal. App. 3d 1, 14)* .

[e] Plaintiff's Insurance Company Real Party in Interest

In ***Mangino v. Bonslett*** *(1930) 109 Cal. App. 205, 292 P. 1006* , plaintiffs brought an action for personal injuries resulting from an automobile accident. Throughout the entire trial and during closing argument, defense counsel attempted to convey to the jury that an insurance company was the real party in interest behind plaintiffs' case. After judgment for defendant, plaintiffs' motion for a new trial was granted. Plaintiffs predicated their motion on practically all of the grounds in *Code Civ. Proc. § 657*, but cited the alleged prejudicial misconduct of defense counsel as the main specification of error.

The court of appeal affirmed the order granting a new trial, stating that the record was replete with prejudicial remarks by defendant's counsel during his closing argument (*109 Cal. App. 205, 208)* . These remarks were not warranted by any phase of the testimony and could have had but one purpose, that is to prejudice the minds of the jury against plaintiffs' case. The court stated that there was no evidence in the record that plaintiffs were insured or that an insurance company was the real party in interest in plaintiffs' case. Nor did the court's repeated admonition to the jury to disregard the remarks of counsel cure the prejudicial effect of the remarks. The court was satisfied that the remarks were of such a character, and the purpose of their injection into the case so apparent, that they could not have been completely obliterated from the minds of the jury by any admonition that the court gave or could have given (*109 Cal. App. 205, 212)* . The court of appeal affirmed the order granting a new trial, stating that it was of the opinion that the trial court exercised its discretion wisely in granting plaintiffs a new trial (*109 Cal. App. 205, 213)* .

[f] Questions About Insurance on Voir Dire

In ***Scally v. Pacific Gas & Electric Co.*** *(1972) 23 Cal. App. 3d 806, 100 Cal. Rptr. 501* , plaintiffs brought an action for property damage allegedly caused by defendant power company's negligence. During voir dire, defense counsel asked a juror if he owned stock in any of several named insurance companies. When the juror stated that his car was insured with Farmers Insurance, counsel responded that Farmers was not involved in this action but Fireman's Fund was involved. Plaintiffs objected, and the court gave a curative instruction and admonished the jury. After verdict for defendant, plaintiffs moved for a new trial on several grounds including misconduct of defendant's attorney. When the motion was denied, plaintiffs appealed the judgment.

The court of appeal affirmed the judgment since it found that no prejudice resulted from the attorney's conduct. The court noted that *Evid. Code § 1155* codifies the long-established rule that evidence that a party is insured is inadmissible to prove that party's negligence. Notwithstanding the logic of this rule, however, the court said that a totally illogical and unnecessary circumvention was engrafted by case law whereby under the guise of voir dire, counsel may, in good faith, ask prospective jurors whether they are interested in a particular insurance company so long as the question does not unnecessarily convey the impression that defendant is in fact insured. The court stated that to suggest that such a question can be asked without telling the jury that a party is in fact insured is naivete of the highest order. It added that lawsuits are not games and the appellate courts should not be distributors of toys with which counsel can play. Furthermore, the court said that any judge or lawyer who has observed or participated in jury voir dire knows that such

questions are asked for one purpose only--to convey the impression that a party is insured (*23 Cal. App. 3d 806, 813)* . The court stated that when an insurance company is not a party, it is improper to ask prospective jurors any questions about ownership of stock or other financial interest in insurance companies (*23 Cal. App. 3d 806, 814)* . In this case, however, counsel acted in good faith and his single act of misconduct was not repeated. Furthermore, the trial judge's curative instructions and the jury's verdict showed that there was no prejudicial effect on the jury (*23 Cal. App. 3d 806, 814-815)* . Thus, the court affirmed the order denying plaintiffs' motion for a new trial (*23 Cal. App. 3d 806, 821)* .

[4] Additional Authorities

[a] Fact of Insurance Injected to Show Defendant Well Insured

Schlenker v. Egloff (1933) 133 Cal. App. 393, 24 P.2d 224 , was an action for wrongful death in which the court of appeal reversed a judgment for plaintiff on the basis of prejudicial misconduct of plaintiff's counsel. During trial, plaintiff's counsel stated that defendant had told a police officer at the scene that she was insured and that her insurance company would pay for all the damages. The court found, however, that the statement was not an admission against interest since counsel referred to it for the sole purpose of impressing the fact of insurance and creating a prejudice in the minds of the jury members (*133 Cal. App. 393, 399-402)* .

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
CHAPTER 155 MOTIONS AFTER TRIAL
PART II. FORMS
B. Motions for New Trial
3. Misconduct of Adverse Party or Counsel

15-155 California Points & Authorities § 155.137

§ 155.137 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Irregularity of Proceedings Due to Adverse Party [Code Civ. Proc. § 657(1)]--Misconduct of Counsel--Reference to Own Client's Perjury and Collusion

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities supporting a motion for new trial on the grounds of irregularity in the proceedings of the adverse party's counsel (see § 155.131).*]

THE MOTION FOR NEW TRIAL SHOULD BE GRANTED BECAUSE OPPOSING COUNSEL RAISED THE ISSUE OF HIS/HER OWN CLIENT'S PERJURY AND COLLUSION WITH _____ [PLAINTIFF *or* DEFENDANT], THUS PREJUDICING THE JURY AND PREVENTING _____ [PLAINTIFF *or* DEFENDANT] FROM HAVING A FAIR TRIAL AND MATERIALLY AFFECTING HIS/HER/ITS SUBSTANTIAL RIGHTS.

Reference to Own Client's Perjury and Collusion With Other Party. When counsel for one party interjects the issue of that party's perjury and collusion with the other party, thus acting adversely to his or her own client's interest, it is an abuse of discretion to deny the other party's motion for new trial on the grounds of irregularity (*Price v. Giles (1987) 196 Cal. App. 3d 1469, 1473-1474, 242 Cal. Rptr. 559*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for a new trial on the ground of irregularity in the proceedings by the adverse party [*Code Civ. Proc. § 657(1)*], specifically, opposing counsel's misconduct in referring during trial to the possibility of his or her client's perjury and collusion with the opposing party. It does not provide a complete form but is designed to be combined with a general form of points and authorities in support of a motion for new trial on the ground of irregularity in the proceedings by the adverse party because of counsel's misconduct [*see § 155.131*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should show how adverse counsel's reference to the possibility of his or her own client's perjury and collusion with the moving party deprived the moving party of a fair trial and materially affected his or her substantial rights. This argument may refer to a reporter's transcript, and, if used, relevant portions should be attached to this memorandum.

A motion for new trial made on this ground must be supported by declarations or affidavits [*Code Civ. Proc. § 658*; *see Code Civ. Proc. § 2015.5*].

[c] Related Pleading and Practice Forms

For a notice of intention to move for a new trial and a declaration to be submitted in support of the motion on the ground of irregularity in the proceedings of the court, jury, or adverse party [Code Civ. Proc. § 657(1)], see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[d] Opposing Points and Authorities

The points and authorities set out in *§ 155.150* et seq. may be used in an appropriate case to oppose a motion for a new trial supported by this memorandum.

[3] Discussion of Authorities

[a] Reference to Own Client's Perjury and Collusion With Other Party

In ***Price v. Giles*** *(1987) 196 Cal. App. 3d 1469, 242 Cal. Rptr. 559* , plaintiff brought an action for personal injuries against the owner of a pick-up truck in which she was a passenger. There was conflicting evidence at trial regarding whether plaintiff or defendant had been driving the truck at the time of the accident. During trial, defense counsel repeatedly questioned the veracity of his client's testimony and stated to the jury that he himself did not believe his client. He also intimated that plaintiff and defendant had some sort of personal interest in each other. The jury returned a verdict in favor of defendant and specifically found that he was not negligent. Plaintiff moved for a new trial on the grounds of irregularity in the proceedings, surprise, and insufficiency of the evidence under *Code Civ. Proc. § 657(1), (3)*, and *(6)*, respectively. The trial court denied the motion, and plaintiff appealed.

The court of appeal reversed. The court relied on *Pennix v. Winton (1943) 61 Cal. App. 2d 761, 766, 143 P.2d 940* , a case involving a defense counsel retained by an insurance company to represent the insured as defendant. In that case, defense counsel attempted to impeach the insured by attacking the veracity of both plaintiff and defendant. The court noted that in the case at bar, while it may have appeared that defense counsel acted in his client's interest when he stated that he did not believe his client's testimony that he was driving, counsel was, in fact, impugning his client's integrity by making it appear that he had committed perjury or conspiracy. The court concluded that once defense counsel had indicated to the jury that defendant was not credible, it was impossible for plaintiff to receive a fair trial. A jury is unlikely to believe a party whom his or her own counsel disbelieves, even if that party is in fact telling the truth. This action by defense counsel warranted reversal under *Pennix* (*196 Cal. App. 3d 1469, 1473)* . The court thus found that it was an abuse of discretion on the trial court's part to deny plaintiff's motion for a new trial on the ground of irregularity in the proceedings (*196 Cal. App. 3d 1469, 1474)* .

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15-155 California Points & Authorities §§ 155.138-155.149

[Reserved]

§§ 155.138[Reserved]

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B. Motions for New Trial
3. Misconduct of Adverse Party or Counsel

15-155 California Points & Authorities § 155.150

§ 155.150 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Irregularity of Proceedings Due to Adverse Party [Code Civ. Proc. § 657(1)]--Alleged Misconduct of Party or Counsel Not Prejudicial

[1] FORM

[*Caption. See § 155.60[1].*]

THE MOTION FOR NEW TRIAL SHOULD NOT BE GRANTED ON THE GROUND OF IRREGULARITY IN THE PROCEEDINGS OF THE ADVERSE PARTY, BECAUSE THE ALLEGED MISCONDUCT OF _____ [PLAINTIFF *or* DEFENDANT *or* COUNSEL FOR _____ (PLAINTIFF *or* DEFENDANT)] DID NOT PREVENT THE MOVING PARTY FROM HAVING A FAIR TRIAL AND DID NOT MATERIALLY AFFECT HIS/HER/ITS SUBSTANTIAL RIGHTS.

A. No Prejudice Error Resulting From Alleged Misconduct. A new trial will not be granted for irregularity in the proceedings of the adverse party if no prejudice has resulted from the alleged misconduct of a party or a party's counsel (*Robinson v. Western States Gas etc. Co. (1920) 184 Cal. 401, 407, 194 P. 39* ; *People ex rel. Dept. Pub. Wks. v. Hunt (1969) 2 Cal. App. 3d 158, 172, 82 Cal. Rptr. 546* ; *Winningar v. Bales (1961) 194 Cal. App. 2d 273, 281-282, 14 Cal. Rptr. 908*).

B. Court Must View Overall Record. Each case must ultimately rest on the court's view of the overall record, taking into account such factors as the nature and seriousness of the remarks and misconduct, the general atmosphere, including the judge's control of the trial, the likelihood of prejudicing the jury, and the efficacy of objection or admonition under all the circumstances (*Sabella v. Southern Pac. Co. (1969) 70 Cal. 2d 311, 321, 74 Cal. Rptr. 534, 449 P.2d 750*).

[*Optional*] **C. Remarks Made by Party.** A new trial will not be granted for a party's remarks allegedly made for the purpose of influencing the jury if the evidence fails to show that the remarks were communicated to the juror, or, if communicated, the record shows that no prejudice resulted (*Bramble v. McEwan (1940) 40 Cal. App. 2d 400, 415-416, 104 P.2d 1054*).

[*Optional*] **D. Conduct of Party in Courtroom.** A new trial will not be granted for the conduct of a party in the courtroom, such as a fainting spell or collapse, if there is insufficient evidence to show that the occurrence was simulated (*see Wright v. Southern Counties Gas Co. (1929) 102 Cal. App. 656, 668, 283 P. 823*).

[*Optional*] **E. Counsel's Statements Were Vigorous Argument.** A new trial will not be granted on the basis of opposing counsel's comments on a party, counsel, or witness if the remarks were part of a vigorous and effective argument of counsel and if no prejudice has resulted to the opposing party (*Henninger v. Southern Pacific Co. (1967) 250 Cal. App. 2d 872, 881, 59 Cal. Rptr. 76*).

[*Optional*] **F. Assuming Language Was Misconduct, No Prejudice to Opposing Party.** Assuming that counsel's strong language in referring to a party, counsel, or witness was misconduct, if in light of the evidence and verdict reached, it does not appear that the conduct was prejudicial to the opposing party, the granting of a new trial is improper (*Deevy v. Tassi (1942) 21 Cal. 2d 109, 130 P.2d 389*).

[*Optional*] **G. Mention of Financial Condition Not Prejudicial.** Although the mention of the financial condition of a party is improper and should not be made, a new trial will not be granted when counsel's conduct did not result in prejudice to the opposing party (*Drotleff v. Renshaw (1949) 34 Cal. 2d 176, 180, 208 P.2d 969* ; *Shabshin v. Pacifici (1961) 196 Cal. App. 2d 192, 200, 16 Cal. Rptr. 440*).

[*Optional*] **H. Reference During Argument to Existence of Facts Not Proven During Trial.** If counsel, in his or her opening argument, makes reference to the existence of facts that counsel is prepared to prove but later does not attempt to prove and allegedly knew at the time that the facts could not be proven, this reference is not grounds for granting a new trial if the conduct resulted in no serious prejudice to the opposing party (*Mudrick v. Market Street Ry. Co. (1938) 11 Cal. 2d 724, 737-738, 81 P.2d 950*).

[*Optional*] **I. Reference to Extraneous Matters During Argument.** Although counsel's reference to extraneous matters during argument may be misconduct, if it is not prejudicial to the opposing party, a new trial is not proper (*Woebbe v. Sperry (1941) 48 Cal. App. 2d 340, 344, 119 P.2d 743*).

[*Optional*] **J. Insinuation of Untrue or Inadmissible Matters on Cross Examination.** During cross examination, counsel's insinuation of matters that are not factually true or are inadmissible as evidence is not a basis for granting a new trial if the statements are not prejudicial to the opposing party's case (*Bell v. Bayerische Motoren Werke Aktiengesellschaft (2010) 181 Cal. App. 4th 1108, 1122-1123, 105 Cal. Rptr. 3d 485* ; *People ex rel. Dept. Public Works v. Auburn Ski Club (1966) 241 Cal. App. 2d 781, 787-789, 50 Cal. Rptr. 859*).

[*Optional*] **K. Counsel's Attempt to Place Inadmissible Physical Evidence Before Jury.** If the complaining party is not prevented from having a fair trial, counsel's attempt to place certain inadmissible physical evidence before the jury is not grounds for granting a new trial (*Robinson v. Western States Gas etc. Co. (1920) 184 Cal. 401, 407, 194 P. 39*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion for new trial on the ground of irregularity in the proceedings of the adverse party [*Code Civ. Proc. § 657(1)*] based on the misconduct of a party or a party's counsel. In an appropriate case, this memorandum may be submitted in opposition to a motion for new trial supported by the points and authorities set out in *§ 155.130* et seq.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should include a discussion of the alleged misconduct, showing that the moving party was not prejudiced by it and that his or her substantial rights were not materially affected. Counsel may desire to refer to a reporter's transcript of the proceedings, and if used, he or she should attach relevant portions of the transcript to this memorandum.

[c] Related Pleading and Practice Forms

For a notice of intention to move for a new trial as well as an order denying the motion, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[3] Discussion of Authorities

[a] No Prejudice Resulting From Alleged Misconduct

In ***Robinson v. Western States Gas etc. Co.*** *(1920) 184 Cal. 401, 194 P. 39* , plaintiffs brought an action for wrongful death allegedly caused by defendant's negligence. During trial, plaintiffs' attorney, when offering papers in evidence, attempted to read the contents of incompetent documents in the presence of the jury. After judgment for plaintiffs, defendant's motion for a new trial was denied, and defendant appealed the judgment. The Supreme Court affirmed the judgment, stating that misconduct is not cause for reversal or a new trial unless it has the effect of preventing the complaining party from having a fair trial. The Court stated the ruling rejecting the evidence together with the court's instruction to the jury lessened the injurious effect of the misconduct so that it could not be deemed sufficient to justify a reversal of the case (*184 Cal. 401, 407)* .

People ex rel. Dept. Pub. Wks. v. Hunt *(1969) 2 Cal. App. 3d 158, 82 Cal. Rptr. 546* , was a condemnation action in which the condemnees were granted a new trial after a judgment was entered on a verdict that awarded them $35,000 for the property taken. The order granting the new trial failed to state the grounds on which it was granted. The state, as condemnor, appealed the order.

On appeal, when no grounds are specified in the order, the movant must advance any grounds on which the order must be upheld (*2 Cal. App. 3d 158, 162)* . Condemnees claimed that there was an irregularity in the proceedings of the adverse party [*Code Civ. Proc. § 657(1)*] and accident or surprise [*Code Civ. Proc. § 657(3)*] since they expected the condemnor's witness to testify that the property was worth more than the value he gave at trial. In a telephone conversation, the state's counsel allegedly told counsel for condemnees that the state's appraisal would be very close to the staff appraisal. Therefore, condemnees' attorney did not subpoena the staff appraiser since it was his practice to do so only if the state's appraisal was sufficiently below the staff value. Counsel claimed that opposing counsel was guilty of intentionally deceiving him, thereby violating ethical standards, as well as constituting grounds for a new trial.

The court of appeal reversed the order granting a new trial, stating that it was questionable whether the irregularity or accident or surprise of which the condemnees complained, materially affected their substantial rights. The reason for this was that the jury returned a verdict which was equal to or in excess of the appraisal that the condemnees alleged

they were precluded from producing. It has been aptly stated that the trial court, no less than an appellate court, is expressly enjoined by *Cal. Const., Art. VI, § 13* from granting a new trial for errors unless they are prejudicial, and that if it clearly appears that such errors could not have affected the result of the trial, the court is bound to deny the motion (*2 Cal. App. 3d 158, 172)* . Furthermore, the court held that the record had shown that condemnor's counsel did not intentionally deceive opposing counsel and that there was no cognizable accident or surprise (*2 Cal. App. 3d 158, 162, 166-172)* . Thus, the order granting a new trial was reversed (*2 Cal. App. 3d 158, 172)* .

In ***Winningar v. Bales*** *(1961) 194 Cal. App. 2d 273, 14 Cal. Rptr. 908* , plaintiff brought an action for personal injuries arising out of an automobile accident. Before the opening of court on the second day of trial, a spectator asked the defendant, in the presence of about half the impaneled jurors, if he was covered by insurance. He replied negatively. After verdict for defendant, plaintiff's motion for a new trial on the basis of alleged prejudice of a juror and defendant's remark was denied.

The court of appeal affirmed the judgment, since defendant's remarks did not appear to have prejudiced the jury in favor of defendant. While a party should not discuss the question of insurance in the presence of any juror, it cannot be said that defendant's statement influenced the verdict. Although the spectator and one juror said that the statement was made in the presence of the jury, no other juror claimed to have heard it. In fact, eight jurors denied hearing it (*194 Cal. App. 2d 273, 281)* . The court cited *Bramble v. McEwan (1940) 40 Cal. App. 2d 400, 104 P.2d 1054* , in which the respondent allegedly made remarks to the mother and sister of a juror for the purpose of influencing the juror. While the evidence failed to show that the remarks were communicated to the juror, the court said, in effect, that even if they were communicated, the juror voted for the other party, and hence there could be no prejudice (*194 Cal. App. 2d 273, 281-282)* .

[b] Court Must View Overall Record

In ***Sabella v. Southern Pac. Co.*** *(1969) 70 Cal. 2d 311, 74 Cal. Rptr. 534, 449 P.2d 750* , plaintiff brought an action under the Federal Employers' Liability Act [*45 U.S.C. § 51*] for personal injuries sustained in the course of his employment. During trial, plaintiff's counsel made statements that disparaged defendant by repeatedly referring to defendant as "inhuman" and "heartless," and as a "cheapskate" who cast plaintiff on the "human trash pile" and who attempted to put up a smokescreen by perjury and deceit. Counsel also made reference to the disparity in wealth between defendant and plaintiff. After verdict for plaintiff, defendant moved for a new trial on several grounds including the misconduct of plaintiff's attorney. A new trial was denied, however, on the condition that plaintiff consent to a reduction of the verdict. Plaintiff agreed, and defendant appealed the judgment.

The Supreme Court affirmed the judgment even though it found counsel's conduct to be improper and possibly prejudicial (*70 Cal. 2d 311, 318)* . In the absence of a timely objection, the offended party is deemed to have waived the claim of error through his participation in the atmosphere which produced the claim of prejudice. In this case, defendant remained silent as to all but one line of argument, and as to the latter, he objected, but failed to request an admonition of the jury to disregard the remarks (*70 Cal. 2d 311, 319)* . However, the Court emphasized that its conclusions should in no way be interpreted as condoning the deplorable conduct of plaintiff's counsel. Each case must ultimately rest on the court's view of the overall record, taking into account such factors as the nature and seriousness of the remarks and misconduct, the general atmosphere, including the judge's control of the trial, the likelihood of prejudicing the jury, and the efficacy of objection or admonition under all the circumstances (*70 Cal. 2d 311, 320-321)* .

[c] Remarks Made by Party

In ***Bramble v. McEwan*** *(1940) 40 Cal. App. 2d 400, 104 P.2d 1054* , plaintiffs brought an action to recover damages for the death of their daughter in an automobile accident. Outside the courtroom, defendant allegedly told the mother and sister of one of the jurors that the deceased looked as though she were pregnant and that she ran around with service

men. He also allegedly stated that her funeral bill was excessive for people on the WPA, a government work program. After judgment for defendant, plaintiff's motion for a new trial, based on defendant's remarks, was denied.

The court of appeal affirmed the judgment, since there was an absence of proof that the jury heard the conversation. The witnesses testified that they had not told the juror of the conversation until after the rendition of the verdict (*40 Cal. App. 2d 400, 415)* . The court stated that even if the juror were informed of this conversation before the verdict was returned, she was one of three who voted for the plaintiffs. Hence, there was no prejudice as shown by the record, and the motion for a new trial was properly denied (*40 Cal. App. 2d 400, 416)* .

[d] Conduct of Party in Courtroom

In ***Wright v. Southern Counties Gas Co.*** *(1929) 102 Cal. App. 656, 283 P. 823* , plaintiff brought an action against a gas company and a building owner to recover for personal injuries suffered in a gas explosion. During trial, plaintiff collapsed on the witness stand during the course of his cross examination. After verdict was rendered against defendant building owner, his motion for a new trial, based on the alleged misconduct of plaintiff, was denied.

The court of appeal affirmed the judgment (*102 Cal. App. 656, 668)* . Conflicting affidavits were submitted to the court on the question of whether or not the collapse was actual or simulated. Since the trial court observed the occurrence, it had a basis for its ruling that the court of appeal did not have. Nevertheless, on the basis of the affidavits, the court of appeal found that the trial court did not abuse its discretion in denying the motion (*102 Cal. App. 656, 668)* .

[e] Counsel's Statements Were Vigorous Argument

In ***Henninger v. Southern Pacific Co.*** *(1967) 250 Cal. App. 2d 872, 59 Cal. Rptr. 76* , plaintiff brought an action to recover damages for personal injuries sustained in the course of his employment. Plaintiff, a conductor brakeman, lost both legs as a result of a train accident. During trial, plaintiff's counsel asserted that defendant's counsel was insincere in pretending not to understand the present value of money. He argued that defense counsel's purpose was to "save the railroad every bit of money that has already been set aside, mind you, as a deductible expense of doing business." He characterized defense counsel's suggestion of a verdict for a particular amount as "ridiculous" and labeled his efforts as "an attempt to short change a cripple." Defendant's motion for a new trial based, in part, on plaintiff's counsel's allegedly prejudicial misconduct, was denied. Defendant appealed the judgment.

The court of appeal affirmed the judgment, stating that the record left no doubt that counsel's argument was vigorous and effective, but it did not amount to prejudicial misconduct for which a new trial should be granted. The court concluded that the judge who presided at trial was in a far better position to evaluate the effect of the disputed argument. The judge's determination of the issue will not be set aside unless it is unquestionably wrong (*250 Cal. App. 2d 872, 881)* . Here, the court could not say that the trial judge was unquestionably wrong or wrong at all. Furthermore, defendant failed to object to plaintiff's counsel's argument or to request that the jury be admonished to disregard it. The court stated that it is clear that when no claim of misconduct is made in the trial court, complaint cannot be made for the first time on appeal (*250 Cal. App. 2d 872, 882)* .

[f] Assuming Language Was Misconduct, No Prejudice to Opposing Party

In ***Deevy v. Tassi*** *(1942) 21 Cal. 2d 109, 130 P.2d 389* , plaintiffs brought an action for assault and battery against two defendants who allegedly injured plaintiffs when they sought to repossess plaintiffs' cattle. Plaintiffs were in default under the terms of a chattel mortgage on the cattle. During trial, plaintiffs' counsel referred to defendants as desperadoes, racketeers, cowpunchers, cattle gangsters, and drunken brutes. After each plaintiff was awarded compensatory and punitive damages against both defendants, defendants moved for a new trial. The motion, based in part on plaintiffs' counsel's alleged misconduct, was denied. Defendants appealed the judgment.

The Supreme Court found nothing in the record that justified the granting of a new trial, but modified the judgment by striking the award of punitive damages as against one defendant (*21 Cal. 2d 109)* . The Court stated that it did not appear that the jurors were incited to passion or prejudice by counsel's remarks. The language was strong, but so was the evidence. Furthermore, assuming that the use of such language in the heat of a trial was misconduct, the Court said that it did not appear, in the light of the evidence and the verdicts reached, that such misconduct was prejudicial (*21 Cal. 2d 109)* .

[g] Mention of Financial Condition Not Prejudicial

The factual and procedural background of ***Drotleff v. Renshaw*** *(1949) 34 Cal. 2d 176, 208 P.2d 969* , is discussed in *§ 155.151[3][a]*. The Supreme Court affirmed judgment for plaintiff, stating that the conduct of plaintiff's attorney in referring to the plaintiff's financial condition did not operate to defendants' prejudice. The reference was a casual one, with no effort at repetition to aggravate the effect, and the trial court acted promptly to correct the impropriety and remove any effect it might otherwise have had (*34 Cal. 2d 176, 180)* . Under the circumstances, it could not be said that the reference in question contributed to the amount of the verdict, and that the trial court's timely action was ineffectual in curing the impropriety (*34 Cal. 2d 176, 181)* .

In ***Shabshin v. Pacifici*** *(1961) 196 Cal. App. 2d 192, 16 Cal. Rptr. 440* , plaintiff brought an action for personal injuries against the owner and the manufacturer of a gas stove. During trial, one defendant's counsel referred to the other defendant's financial condition. However, opposing counsel objected, and the court admonished the jury to disregard the reference. After judgment for defendant, plaintiff moved for a new trial on the basis of prejudicial misconduct of one defendant's counsel. The motion was denied, and plaintiff appealed the judgment.

The court of appeal affirmed judgment for defendants since it found that the remark had done no damage to plaintiff's case. Under the circumstances, the court could not say that the reference in question contributed to the amount of the verdict and that the trial court's timely action was ineffectual in curing the impropriety. Considering the record, the apparent personal conflict existing among counsel, the nature of the remark and that it was a casual one, the time it was made during the argument, the trial judge's immediate instruction to the jury, and that it was never referred to or repeated, the court found that no prejudice had resulted (*196 Cal. App. 2d 192, 200)* .

[h] Reference During Argument to Existence of Facts Not Proven During Trial

In ***Mudrick v. Market Street Ry. Co.*** *(1938) 11 Cal. 2d 724, 81 P.2d 950* , plaintiff brought an action for personal injuries against defendant, a railway company. During his opening statement, plaintiff's counsel represented that plaintiff was prepared to prove certain facts. These facts concerned defendant's allegedly old and obsolete equipment, defendant's understaffing of its cars at the time and place of the accident, and defendant's failure to maintain proper guards to prevent a passenger thrown from a car from going under the wheels. After judgment for plaintiff, defendant moved for a new trial on several grounds, including prejudicial misconduct of plaintiff's attorney. When the motion was denied, defendant appealed the judgment.

The Supreme Court affirmed the judgment, since the remarks resulted in no serious prejudice to defendant. The Court noted that the trial court had instructed the jury that there was no evidence that the equipment of the corporation's car was not of standard kind and character (*11 Cal. 2d 724, 738)* . While the practice indulged in by plaintiff's counsel has frequently been condemned by the courts, it has also been held that unless prejudice has resulted, a new trial will not be awarded (*11 Cal. 2d 724, 737)* . While the Court was not willing to place its stamp of approval on the conduct, it was also not prepared to say that defendant was prejudiced by counsel's remarks (*11 Cal. 2d 724, 738)* .

[i] Reference to Extraneous Matters During Argument

In ***Woebbe v. Sperry*** *(1941) 48 Cal. App. 2d 340, 119 P.2d 743* , plaintiff brought an action against defendants for personal injuries sustained in an automobile accident. During argument, while defendants' counsel discussed testimony given by a police officer, counsel referred to a police scandal. After judgment for defendants, plaintiff moved for a new trial on several grounds, including the allegedly prejudicial misconduct of defendants' attorney. When the motion was denied, plaintiff appealed the judgment.

The court of appeal affirmed the judgment, conceding that although the conduct may have been error, it is patent that the misconduct was not prejudicial. The court noted that plaintiff's counsel had promptly objected to the argument and that the trial court told the jury that police scandals had nothing to do with the case. Furthermore, since the trial court was not asked to admonish the jury to disregard the statements, the alleged misconduct may not be urged for the first time on appeal (*48 Cal. App. 2d 340, 344)* .

[j] Insinuation of Untrue or Inadmissible Matters on Cross Examination

Bell v. Bayerische Motoren Werke Aktiengesellschaft *(2010) 181 Cal. App. 4th 1108, 1122-1123, 105 Cal. Rptr. 3d 485* , involved a car accident. The injured driver sued the manufacturer of the car for negligence and products liability. When the defendant's counsel cross-examined a witness to the accident, counsel asked the witness if the witness had asked the plaintiff whether the plaintiff had insurance. On the plaintiff's objection, the trial judge instructed the jury to disregard the question. The plaintiff moved for a mistrial based on the question, and the trial court denied the motion.

The court of appeal agreed. The court first noted that attorney misconduct can justify a new trial only if it is reasonably probable that the moving party would have obtained a more favorable result absent the misconduct (*181 Cal. App. 4th 1108, 1123)* . It then noted that under *Evid. Code § 1155*, evidence that a person was insured against liability for another person's injury is inadmissible to prove negligence or other wrongdoing, and that evidence suggesting that the plaintiff was insured could cause the jury to believe that the plaintiff would be compensated by insurance, which could cause the jury to find no liability more readily or to award lower damages (*181 Cal. App. 4th 1108, 1123)* . Nonetheless, the court held that it is common knowledge today that most drivers in California carry automobile insurance protecting them from liability. The court held that the mention of the plaintiff's insurance in an action against an automobile manufacturer for products liability was unlikely to cause the jury to conclude either that the plaintiff would be fully compensated by insurance or that the defendant should be relieved of liability. In addition, the court held that the trial court instructed the jury not to consider the insurance, and that such admonitions are ordinarily effective except in cases of extreme misconduct (*181 Cal. App. 4th 1108, 1123)* .

People ex rel. Dept. Public Works v. Auburn Ski Club *(1966) 241 Cal. App. 2d 781, 50 Cal. Rptr. 859* , was a condemnation action brought by the state, which had acquired land for freeway purposes, against defendant condemnees. During trial, defendants' attorney frequently made attempts to suggest facts that could not be introduced as evidence or that were not supported by the evidence when he used the "do you know that" technique in asking questions during cross examination. Counsel used this phrase to inject his unsworn statements into trial. After defendants were awarded a judgment, the state moved for a new trial on the ground of counsel's allegedly prejudicial misconduct. When the motion was denied, the state appealed the judgment.

The court of appeal affirmed the judgment, stating that the jury was not seriously affected by counsel's overzealous advocacy. It stated that the trial judge kept control of the proceedings; objections were promptly ruled on and the jury was at no time permitted to forget that the statements of counsel were not to be considered by it (*241 Cal. App. 2d 781, 791)* . The court noted that the use of the phrase, "do you know that," does not automatically make a question improper. Counsel frequently used the phrase to state a commonly known fact or readily verifiable matter (*241 Cal. App. 2d 781, 789)* . The court added that it is only in extreme cases that the court, when acting promptly, cannot correct the impropriety of the act of counsel and remove any effect that his or her remarks would otherwise have. Regardless of the antagonism between the attorneys, the court did not believe that it was likely to have had any effect on the jury except to compel boredom (*241 Cal. App. 2d 781, 792)* .

[k] Counsel's Attempt to Place Inadmissible Physical Evidence Before Jury

In ***Robinson v. Western States Gas etc. Co.*** *(1920) 184 Cal. 401, 194 P. 39* , plaintiffs brought an action for decedent's wrongful death that was allegedly caused by defendant power company's negligence. During trial, plaintiffs' attorney proceeded to read a document that was hearsay and incompetent. Although the court failed to promptly prevent him from doing so, it rejected the evidence pursuant to an objection by opposing counsel. After judgment for plaintiffs, defendant moved for a new trial on several grounds, including prejudicial misconduct of plaintiffs' attorney. When the motion was denied, defendant appealed the judgment.

The Supreme Court affirmed the judgment, stating that the ruling rejecting the evidence and the court's further instruction to the jury, taken together, lessened the injurious effect of the misconduct so that it could not be deemed to justify a reversal of the case. Misconduct is not cause for reversal or a new trial unless it has the effect of preventing the complaining party from having a fair trial. The Court stated that the other assignments of misconduct were too trivial to be worthy of discussion. Hence, it affirmed the judgment (*184 Cal. 401, 407)* .

[4] Additional Authorities

[a] No Prejudice Resulting from Alleged Misconduct

The court of appeal in *Da Silva v. Pacific King, Inc. (1987) 195 Cal. App. 3d 1, 240 Cal. Rptr. 395* , affirmed a judgment for an injured seaman. Plaintiff claimed that defense counsel acted improperly in displaying to the jury medical records that disclosed plaintiff's application for social security benefits. Plaintiff's counsel refused a curative instruction, but moved for a new trial. The trial court denied the motion, holding that there was no prejudice by defense counsel's reference to a collateral source of compensation. The court of appeal agreed that there was no prejudice, noting that damages appeared to have been calculated without deduction for the collateral source and that plaintiff failed to ask for a curative instruction (*195 Cal. App. 3d 1, 9-10)* .

The factual and procedural background of *Jackson v. Barnett (1958) 160 Cal. App. 2d 167, 324 P.2d 643* , is discussed in *§ 155.152[3][a]*. The court of appeal affirmed the denial of plaintiff's motion for a new trial based on defendant's alleged misconduct. The court stated that it affirmatively appeared that the jurors did not participate in the allegedly prejudicial conversation or consider it as having any effect on them (*160 Cal. App. 2d 167, 172)* .

The factual and procedural background of *Fonts v. Southern Pacific Co. (1916) 30 Cal. App. 633, 159 P. 215* , is discussed in *§ 155.130[3][f]*. The court of appeal affirmed judgment for plaintiff and an order denying defendant's motion for new trial on the basis of plaintiff's fainting spell while on the witness stand. The court stated that it did not feel that the jury's verdict was influenced by plaintiff's conduct. The presumption is that the jury members regarded their oaths and determined the case according to law and evidence (*30 Cal. App. 633, 638)* .

[b] Remarks Made by Party

The factual and procedural background of *Winningar v. Bales (1961) 194 Cal. App. 2d 273, 14 Cal. Rptr. 908* , is discussed inn [3][a], *above*. The court of appeal affirmed the judgment and order denying plaintiff's motion for a new trial because defendant's remarks did not appear to have prejudiced the jury. Although a spectator and one juror said that the statement was made in the presence of the jury, no other juror claimed to have heard it. In fact, eight jurors denied hearing it (*194 Cal. App. 2d 273, 281)* .

The factual and procedural background of *Jackson v. Barnett (1958) 160 Cal. App. 2d 167, 324 P.2d 643* , is discussed in *§ 155.152[3][a]*. The court of appeal affirmed the denial of plaintiff's motion for new trial based on defendant's allegedly prejudicial statements to the jury. After the judge left the courtroom with respective counsel to discuss a matter, defendant remained on the witness stand and remarked to the jury,"I guess they want to talk about something

they don't want us to hear," and the jury laughed. The court affirmed the denial of the motion because it appeared that the remark did not prejudice the jury and because plaintiff did not call the remark to the attention of the court until after the return of a verdict (*160 Cal. App. 2d 167, 171-172)* .

[c] Conduct of Party in Courtroom

The factual and procedural background of *Fonts v. Southern Pacific Co. (1916) 30 Cal. App. 633, 159 P. 215* , is discussed in *§ 155.130[3][f]*. The court of appeal affirmed judgment for plaintiff an order denying defendant's motion for a new trial. During trial, plaintiff fainted while on the witness stand. However, since there was no evidence of simulation or other intentional misconduct, the court held that a new trial was not proper because of the unavoidable illness of the plaintiff (*30 Cal. App. 633, 638)* .

[d] Assuming Language Was Misconduct, No Prejudice to Opposing Party

In *Curcio v. Svanevik (1984) 155 Cal. App. 3d 955, 202 Cal. Rptr. 499* , plaintiff sought to recover for injuries sustained in a vehicle collision. The jury found for plaintiff, and defendant moved for a new trial based on alleged instances of misconduct by plaintiff's counsel. These instances included reference to plaintiff's receiving a Purple Heart, reference to the relative financial status of the parties, insinuation that the defendant was suppressing evidence, and the implication that defendant had filed its general denial in bad faith (*155 Cal. App. 3d 955, 961)* . The trial court denied the motion. Defendant appealed, and the court of appeal affirmed. The court held that, assuming arguendo that the misconduct occurred as claimed, the court did not believe that a different or more favorable verdict would have resulted in its absence (*155 Cal. App. 3d 955, 966)* .

In *Mize v. Atchison, T. & S.F. Ry. Co. (1975) 46 Cal. App. 3d 436, 120 Cal. Rptr. 787* , the court of appeal affirmed judgment for plaintiff and the denial of defendants' motion for new trial in a wrongful death action. The court upheld the trial court's determination that no prejudice resulted from plaintiff's counsel's conduct in asking decedent's ex-wife if she suffered a nervous breakdown following decedent's death and if her present husband was in good health. Nothing had been brought to the court's attention to indicate any play for sympathy because of Mrs. Jones's condition (*46 Cal. App. 3d 436, 451-452)* .

Jonte v. Key System (1949) 89 Cal. App. 2d 654, 201 P.2d 562 , was a personal injury action against a transportation company in which the court of appeal affirmed judgment for plaintiff and an order denying defendant's motion for a new trial. During trial, counsel stated that defendant was accustomed to trying to "beat" claims of its patrons by such means as subjecting them to the expense of lawsuits, influencing witnesses, confusing evidence, and using political influence. Although the court concluded that counsel's statements constituted misconduct, the court's admonition to the jury to disregard the statements cured the error and the denial of the motion for new trial was proper (*89 Cal. App. 2d 654, 659-660)* .

McCabe v. Cheseldine (1931) 117 Cal. App. 526, 4 P.2d 282 , was an action for personal injuries in which the court of appeal affirmed judgment for plaintiff and an order denying defendant's motion for a new trial. During his argument to the jury, plaintiff's counsel referred to defendant as a "potential murderer." The court stated that assuming that the expression had no place in the case, it did not result in a miscarriage of justice and that a new trial was not necessary (*117 Cal. App. 526, 527)* .

Porter v. Granich (1934) 136 Cal. App. 523, 29 P.2d 220 , was a false imprisonment action in which the court of appeal affirmed judgment for plaintiff and an order denying a motion for new trial. During trial, plaintiff's counsel habitually mispronounced defendant's name, Granich, and referred to his client as an "American boy" in an effort to prejudice the jury against a man with a foreign name. The court stated that the trial court was in a better position to pass on this point than it was and that the lower court's decision did not appear to be an abuse of discretion (*136 Cal. App. 523, 531)* .

Aydlott v. Key System Transit Co. (1930) 104 Cal. App. 621, 286 P. 456 , was a personal injury action in which the court of appeal affirmed judgment for plaintiff and an order denying defendant's motion for a new trial. During trial, plaintiff's counsel stated that since plaintiff could no longer work, she could not help her husband pay for their home and they had to move to a house over a garage. Counsel also stated that plaintiff was in danger of becoming a public charge. Although the court stated that remarks that attempt to unjustly enlist the jury's sympathies and prejudices are always improper and should be avoided, it decided that the trial judge's decision to deny the motion was proper since the verdict did not appear to have been influenced by misconduct of counsel (*104 Cal. App. 621, 628-629)* .

[e] Reference During Argument to Existence of Facts Not Proven During Trial

Rather v. City & County of San Francisco (1947) 81 Cal. App. 2d 625, 184 P.2d 727 , was a personal injury action in which the court of appeal affirmed judgment for defendants and an order denying plaintiff's motion for a new trial. During trial, defendants' counsel repeatedly told the jury that he had an eyewitness to the accident, but he never produced this witness. The court of appeal stated that the trial court was in a better position to decide whether or not the situation worked to the prejudice of plaintiff, and since the trial court decided that no prejudice resulted, its denial of the motion was upheld (*81 Cal. App. 2d 625, 637-639)* .

[f] Insinuation of Untrue or Inadmissible Matters on Cross Examination

Liberty Bank v. Nonnenmann (1929) 96 Cal. App. 478, 274 P. 568 , was an action on two promissory notes executed by defendants in which the court of appeal affirmed judgment for defendant and an order denying plaintiff's motion for a new trial. During his cross examination of a witness, defense counsel repeatedly referred to a verdict in another case, in which judgment had been reversed, with the innuendo that another jury had found plaintiff guilty of fraud. The court stated that the evidence so amply supported the verdict for defendants that the same result would have been reached even if counsel had not made reference to the other verdict (*96 Cal. App. 478, 487-488)* .

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
CHAPTER 155 MOTIONS AFTER TRIAL
PART II. FORMS
B. Motions for New Trial
3. Misconduct of Adverse Party or Counsel

15-155 California Points & Authorities § 155.151

§ 155.151 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Irregularity of Proceedings Due to Adverse Party [Code Civ. Proc. § 657(1)]--Misconduct Cured by Timely Objection and Admonition

[1] FORM

[*Caption. See § 155.60[1].*]

THE MOTION FOR NEW TRIAL SHOULD NOT BE GRANTED ON THE GROUND OF IRREGULARITY IN THE PROCEEDINGS OF THE ADVERSE PARTY BECAUSE COUNSEL'S ALLEGED MISCONDUCT WAS CURED BY A TIMELY OBJECTION AND ADMONITION, THUS _____ [PLAINTIFF *or* DEFENDANT] WAS NOT PREVENTED FROM HAVING A FAIR TRIAL AND HIS/HER/ITS SUBSTANTIAL RIGHTS WERE NOT MATERIALLY AFFECTED.

A. Casual Statement Cured by Court's Action. A new trial will not be granted if counsel's allegedly prejudicial statement was a casual one with no effort at repetition to aggravate the effect and if the trial court acted promptly to correct the impropriety by directing the jury to disregard the statement and by reprimanding counsel (*Drotleff v. Renshaw (1949) 34 Cal. 2d 176, 180, 208 P.2d 969*).

B. Impropriety Correctable Except in Extreme Cases. It is only in extreme cases that the court, when acting promptly, and speaking clearly and directly on the subject, cannot, by instructing the jury to disregard such matters, correct the impropriety of the act of counsel and remove the effect his or her conduct or remarks would otherwise have (*Dominguez v. Pantalone (1989) 212 Cal. App. 3d 201, 211-212, 260 Cal. Rptr. 431*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for new trial on the ground of irregularity in the proceedings of the adverse party [*Code Civ. Proc. § 657(1)*] based on the misconduct of a party or a party's counsel. In an appropriate case, this memorandum may be submitted in opposition to a motion for new trial supported by the points and authorities set out in *§ 155.130* et seq.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should discuss the inconsequential nature of the alleged misconduct and show that the moving party was not deprived of a fair trial because of the court's admonition to the jury and reprimand of the adverse party or adverse party's counsel.

[c] Related Pleading and Practice Forms

For a notice of intention to move for a new trial as well as an order denying the motion, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[3] Discussion of Authorities

[a] Casual Statement Cured by Court's Action

In ***Drotleff v. Renshaw*** *(1949) 34 Cal. 2d 176, 208 P.2d 969* , plaintiff brought an action for personal injuries suffered in an automobile collision. During closing argument, plaintiff's attorney informed the jury that he did not bring a certain doctor to testify in the case because plaintiff could not afford the expense. After judgment for plaintiff, defendants moved for a new trial on the basis of prejudicial misconduct of plaintiff's attorney. The motion was denied, and defendants appealed the judgment.

The Supreme Court affirmed the judgment, stating that the conduct of plaintiff's attorney did not operate to prejudice against defendants in relation to the fixing of the amount of the verdict. Other physicians testified sufficiently to establish by a preponderance of the evidence that the particular injuries to plaintiff had occurred. Even though the reference to plaintiff's financial condition was improper and should not have been made, the reference was a casual one, with no effort at repetition to aggravate the effect. The trial court acted promptly to correct the impropriety and remove any effect it otherwise might have had, not only in directing the jury to disregard the objectionable statement, but in reprimanding plaintiff's attorney with an admonition to confine his remarks to the evidence in the case. Under these circumstances, the Court could not say that the reference in question contributed to the amount of the verdict. Moreover, the alleged consequences of the cited reference were fully but unavailingly argued before the trial court as grounds for a new trial. There appeared to be no reason to disturb the trial court's conclusion on these points (*34 Cal. 2d 176, 180-181)* .

[b] Impropriety Correctable Except in Extreme Cases

Dominguez v. Pantalone *(1989) 212 Cal. App. 3d 201, 260 Cal. Rptr. 431* , was a personal injury action based on a collision between plaintiff's motorcycle and defendant's automobile. During trial, plaintiff's counsel repeatedly sought to introduce improper evidence of a police officer's opinion of the fault of the accident, and defendant's counsel objected.

The jury found in favor of plaintiff and judgment was entered against defendant. Defendant thereafter moved for new trial on the ground that misconduct of plaintiff's attorney resulted in prejudice because defendant was unable to cross-examine the officer on the subject of the opinion, thus depriving defendant of a fair trial. The trial court denied the motion and defendant appealed.

The court of appeal affirmed judgment. The court stated that plaintiff's attorney's attempts to find other theories of relevancy or admissibility of the officer's opinion did not overstep the permissible line of proper lawyering conduct. The court also concluded that even were the acts to constitute misconduct, they would not be prejudicial, because it was a lengthy trial, aggressively litigated on both sides, with many witnesses and with frequent objections being made on both sides; the officer's opinion was not a major theme of the trial; the trial court maintained firm control of the proceedings, which resulted in an impartial and dignified atmosphere; and the admonitions given to the jury were sufficient to remove any impropriety and prejudice which could have resulted from the attorney's conduct. The court also quoted *Tingley v. Times Mirror (1907) 151 Cal. 1, 23, 89 P. 1097* , stating that it is only in extreme cases that the court, when acting promptly and speaking clearly and directly on the subject, cannot, by instructing the jury to disregard such matters, correct the impropriety of the act of counsel and remove any effect his conduct or remarks would otherwise have (*212 Cal. App. 3d 201, 213-214)* .

[4] Additional Authorities

[a] Casual Statement Cured by Court's Action

The factual and procedural background of *Curcio v. Svanevik (1984) 155 Cal. App. 3d 955, 202 Cal. Rptr. 499* , is discussed in *§ 155.150[4][d]*. In affirming, the court of appeal held that any possible prejudice resulting from a reference by plaintiff's counsel during direct examination to plaintiff's receipt of a Purple Heart in Vietnam was surely cured by the trial court's admonition to the jury that they were not to consider as evidence any statements of counsel (*155 Cal. App. 3d 955, 962-963)* .

Hart v. Wielt (1970) 4 Cal. App. 3d 224, 84 Cal. Rptr. 220 , the court of appeal affirmed the denial of defendant's motion for new trial based on argument of plaintiff's counsel in which he stated that plaintiff was a burden on taxpayers and subject to charity because of her personal injuries. Even though the references to charity were improper, the trial court admonished the jury to decide the case on facts and law, not on appeals to emotion. The court felt that this admonition cured the error and that no prejudice resulted from the improper conduct (*4 Cal. App. 3d 224, 234-235)* .

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B. Motions for New Trial
3. Misconduct of Adverse Party or Counsel

15-155 California Points & Authorities § 155.152

§ 155.152 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Irregularity of Proceedings Due to Adverse Party [Code Civ. Proc. § 657(1)]--Waiver for Failure to Make Timely Objection to Misconduct

[1] FORM

[*Caption. See § 155.60[1].*]

THE MOTION FOR NEW TRIAL SHOULD NOT BE GRANTED ON THE GROUND OF IRREGULARITY IN THE PROCEEDINGS OF THE ADVERSE PARTY, BECAUSE THE MOVING PARTY FAILED TO MAKE A TIMELY OBJECTION TO _____ [PLAINTIFF'S *or* DEFENDANT'S] ALLEGED MISCONDUCT DURING TRIAL AND HE/SHE/IT CANNOT RAISE THE IRREGULARITY FOR THE FIRST TIME ON A MOTION FOR NEW TRIAL.

Failure of Moving Party to Make Timely Objection. A motion for new trial, based on the misconduct of a party or a party's counsel, will be denied if a timely and proper objection is not made at trial, since a party cannot await the outcome of the case and raise the irregularity for the first time on a motion for new trial (*Sabella v. Southern Pac. Co. (1969) 70 Cal. 2d 311, 319-320, 74 Cal. Rptr. 534, 449 P.2d 750* ; *Horn v. Atchison, T. & S. F. R. Co. (1964) 61 Cal. 2d 602, 609-611, 39 Cal. Rptr. 721, 394 P.2d 561* ; *Jackson v. Barnett (1958) 160 Cal. App. 2d 167, 171-172, 324 P.2d 643*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for new trial on the ground of irregularity in the proceedings of the adverse party [*Code Civ. Proc. § 657(1)*] based on the misconduct of a party or a party's counsel. In an appropriate case, this memorandum may be submitted in opposition to a motion for new trial supported by the points and authorities set out in *§ 155.130* et seq.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. In particular, counsel should show that the moving party, knowing of the alleged misconduct, failed to make a timely objection to it. Counsel may also argue that the moving party should not be allowed to raise the question for the first time on motion for new trial after awaiting the outcome of trial and receiving an unfavorable verdict [*see Jackson v. Barnett (1958) 160 Cal. App. 2d 167, 172, 324 P.2d 643]* .

[c] Related Pleading and Practice Forms

For a notice of intention to move for a new trial as well as an order denying the motion, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[3] Discussion of Authorities

[a] Failure of Moving Party to Make Timely Objection

The factual and procedural background of ***Sabella v. Southern Pac. Co.*** *(1969) 70 Cal. 2d 311, 74 Cal. Rptr. 534, 449 P.2d 750* , is discussed in *§ 155.150[3][b]*.

The Supreme Court affirmed judgment for plaintiff even though it concluded that plaintiff's counsel was guilty of deplorable misconduct which might have been prejudicial (*70 Cal. 2d 311, 318)* . During trial, defendant did not object to the allegedly prejudicial remarks except on one occasion. When defendant did object, he failed to request an admonition of the jury to disregard the remarks. The Court stated that in the absence of a timely objection, the offended party is deemed to have waived the claim of error through his or her participation in the atmosphere which produced the claim of prejudice (*70 Cal. 2d 311, 319)* . It is only in extreme cases that the court, when acting promptly and speaking clearly and directly on the subject, cannot, by instructing the jury to disregard such matters, correct the impropriety of the act of counsel and remove any effect his or her conduct or remarks would otherwise have (*70 Cal. 2d 311, 318)* . Since defendant remained silent as to all but one line of argument, the Court concluded that defendant must be denied relief (*70 Cal. 2d 311, 319)* .

In ***Horn v. Atchison, T. & S. F. R. Co.*** *(1964) 61 Cal. 2d 602, 39 Cal. Rptr. 721, 394 P.2d 561* , plaintiff brought an action under the Federal Employers' Liability Act [*45 U.S.C. § 51*] and the Safety Appliance Act [*45 U.S.C. § 2*] for personal injuries suffered while working as an employee of defendant railroad company. During trial, plaintiff's counsel made frequent abusive remarks directed at defendant and its witnesses. Counsel also asked the jury members to fix damages as if they or a loved one were the injured party. Counsel for defendant did not object to the claimed instances of misconduct during trial. At the conclusion of opposing counsel's closing argument, defendant's counsel moved for a mistrial. The motion was denied. The trial court also denied defendant's motion for a new trial, which was made on numerous grounds, including misconduct of plaintiff's counsel.

The Supreme Court affirmed judgment for plaintiff, stating that defendant waived its right to complain by its failure to make timely objections (*61 Cal. 2d 602, 609-610)* . In the absence of a timely objection, the offended party is deemed

to have waived the claim of error through his or her participation in the atmosphere which produced the claim of prejudice. The purpose of the rule requiring the making of timely objections is remedial in nature, and seeks to give the court the opportunity to admonish the jury, instruct counsel, and forestall the accumulation of prejudice by repeating improprieties, thus avoiding the necessity of a retrial. It is only in extreme cases that the court, when acting promptly and speaking clearly and directly on the subject, cannot, by instructing the jury to disregard such matters, correct the impropriety of the act of counsel and remove any effect his or her conduct or remarks would otherwise have. In this case, the Court stated that misconduct of plaintiff's counsel could have been obviated by timely objections and instructions. An attack on the instances of misconduct at the onset, together with proper instruction from the court to both the jury and counsel, would not only have removed the effect of the initial improprieties, but would also have forestalled the commission of subsequent acts of misconduct (*61 Cal. 2d 602, 610-611)* .

In ***Jackson v. Barnett*** *(1958) 160 Cal. App. 2d 167, 324 P.2d 643* , plaintiff brought an action for personal injuries suffered in a fall from the balcony of defendant's store. During trial, the judge left the courtroom to discuss an objection in chambers with counsel for the respective parties. Defendant remained on the witness stand and allegedly remarked, "I guess they want to talk about something they don't want us to hear," and the jury laughed. After verdict was rendered for defendant, plaintiff moved for a new trial on the basis of defendant's misconduct. The motion was denied.

The court of appeal affirmed the judgment and the denial of the motion, since the claimed error was not called to the attention of the court until after the return of a verdict and on a motion for new trial. Plaintiff's wife noticed the irregularity, but no action was taken by plaintiff or his counsel. The court indicated that the trial court was justified in denying the motion on this ground. Furthermore, although the remark should not have been made, it was probably true. It also affirmatively appeared that the jurors did not participate in the conversation or consider it as having any effect on them (*160 Cal. App. 2d 167, 172)* .

[4] Additional Authorities

[a] Failure of Moving Party to Make Timely Objection

The factual and procedural background of *Curcio v. Svanevik (1984) 155 Cal. App. 3d 955, 202 Cal. Rptr. 499* , is discussed in *§ 155.150[4][d]*. In affirming, the court of appeal held that defendant had waived its claim of misconduct based on the reference of plaintiff's counsel during trial to the relative wealth of defendant, because the record failed to disclose a timely and proper objection and a request that the jury be admonished (*155 Cal. App. 3d 955, 963)* .

Hansen v. Warco Steel Corp. (1965) 237 Cal. App. 2d 870, 47 Cal. Rptr. 428 , was a personal injury action in which the court of appeal affirmed judgment for plaintiff and the denial of plaintiff's motion for a new trial based on the allegedly prejudicial misconduct of defendant's counsel. The court stated that counsel was guilty of serious misconduct in arguing the importance of an excluded document and in asking the jury to draw an inference because plaintiff's attorney had made an objection that the court had sustained. Because plaintiff did not object or request that the jury be admonished, however, he waived the claim of error and could not demand a retrial after hearing a disappointing verdict (*237 Cal. App. 2d 870, 878-879)* .

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15-155 California Points & Authorities § 155.153

§ 155.153 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Irregularity of Proceedings Due to Adverse Party [Code Civ. Proc. § 657(1)]--Reference to Insurance Not Prejudicial

[1] FORM

[*Caption. See § 155.60[1].*]

THE MOTION FOR NEW TRIAL SHOULD NOT BE GRANTED BECAUSE COUNSEL'S REFERENCE TO THE FACT OF LIABILITY INSURANCE DID NOT PREVENT _____ [PLAINTIFF *or* DEFENDANT] FROM HAVING A FAIR TRIAL AND DID NOT MATERIALLY AFFECT HIS/HER/ITS SUBSTANTIAL RIGHTS.

A. No Prejudice to Opposing Party. In a personal injury action, a new trial will not be granted because of a reference to insurance if the reference caused no prejudice to the opposing party (*Hatfield v. Levy Brothers (1941) 18 Cal. 2d 798, 813-814, 117 P.2d 841* ; *Hart v. Wielt (1970) 4 Cal. App. 3d 224, 230-233, 84 Cal. Rptr. 220*).

B. Court Must View Overall Record. In a closely balanced case, whether counsel's reference to insurance constitutes prejudicial misconduct that cannot be cured by the court's admonition is determined by the court's view of the overall record, taking into account the nature and seriousness of the remarks, the good faith of counsel, whether the misconduct consisted of a single utterance or repeated persistent reiteration thereof, the judge's control of the trial, and the probable likelihood of prejudicing the jury (*Neumann v. Bishop (1976) 59 Cal. App. 3d 451, 473, 130 Cal. Rptr. 786*).

[*Optional*] **C. Reference to Insurance During Voir Dire.** In a personal injury action, counsel may, in good faith, ask prospective jurors whether they are interested in a particular insurance company so long as the question does not unnecessarily convey the impression that a party is in fact insured (*Hart v. Wielt (1970) 4 Cal. App. 3d 224, 230, 84 Cal. Rptr. 220*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for new trial on the ground of irregularity in the proceedings of the adverse party [*Code Civ. Proc. § 657(1)*] based on opposing counsel's alleged misconduct in injecting the fact of liability insurance into trial. It generally opposes a motion for new trial supported by the points and authorities contained in *§ 155.136*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should show the inconsequential nature of the reference to insurance and how this reference did not deprive the moving party of a fair trial.

[c] Related Pleading and Practice Forms

For a notice of intention to move for a new trial as well as an order denying the motion, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[3] Discussion of Authorities

[a] No Prejudice to Opposing Party

In ***Hatfield v. Levy Brothers*** *(1941) 18 Cal. 2d 798, 117 P.2d 841* , plaintiffs, husband and wife, brought an action for personal injuries sustained when one plaintiff fell inside defendants' store. While cross examining a witness during trial, plaintiffs' counsel asked about a conversation that occurred immediately after the accident. In that conversation, the witness related that she told plaintiff that the store was insured. After the witness was excused, defendants moved for a mistrial. The court denied the motion, but instructed the jury that insurance was not involved in the case. After verdict for plaintiffs, defendants moved for a new trial on the basis of opposing counsel's misconduct. When the motion was denied, defendants appealed the judgment.

The Supreme Court affirmed, stating that it did not believe that defendants could claim prejudice in view of all the circumstances. No objection was made by defendants until the witness had left the stand. Defendants never made a motion to strike and never asked the court to instruct the jury to disregard the references. Furthermore, there was nothing in cross examination of plaintiff's counsel that indicated a design and intent to inject insurance into the case and thereby influence the jury. Since the witness was defendants' and not plaintiffs', it cannot be presumed that plaintiffs' counsel knew what the answer would be, as might be the case if plaintiffs or one of their witnesses were testifying. Under the circumstances, the Court stated that it was not inclined to disturb the trial court's denial of the motion (*18 Cal. 2d 798, 813-814)* .

In ***Hart v. Wielt*** *(1970) 4 Cal. App. 3d 224, 84 Cal. Rptr. 220* , plaintiff brought an action for personal injuries sustained in an automobile accident. During voir dire examination of a prospective juror, plaintiff's counsel asked if he or any member of his family were employed by or owned stock in State Farm Insurance Company. During trial, counsel

asked plaintiff several questions about medical bills and examinations and plaintiff's answers contained references to State Farm. When plaintiff's counsel cross examined defendants' private investigator, it was revealed that the private investigator had previously worked at State Farm. After judgment for plaintiff, defendants' motion for a new trial made on several grounds, including misconduct of plaintiff's counsel, was denied. Defendants appealed the judgment.

The court of appeal affirmed the judgment, concluding that there was no prejudicial error in the repeated references to insurance. Although the court said that it was aware of the thin line that exists in this area, it felt that the line had not been crossed. Furthermore, the court stated that the trial court impliedly found no misconduct, or at least no prejudice, when ruling on the motion for new trial. A trial judge is in a better position than an appellate court to determine whether a verdict resulted wholly, or in part, from the asserted misconduct of counsel and the court's conclusion in the matter will not be disturbed unless, under all the circumstances, it is plainly wrong. Since the decision of the trial court did not appear to be plainly wrong, the court upheld the denial of defendant's motion (*4 Cal. App. 3d 224, 232-233)* .

[b] Court Must View Overall Record

In ***Neumann v. Bishop*** *(1976) 59 Cal. App. 3d 451, 130 Cal. Rptr. 786* , plaintiff brought an action for personal injuries sustained in an automobile accident. During trial, plaintiff's attorney referred to defendant as "defense interests," a term that allegedly was an improper reference to insurance. After judgment for plaintiff, defendant's motion for a new trial on several grounds, including misconduct of plaintiff's counsel, was denied, and defendant appealed the judgment. The court of appeal affirmed, stating that, in a closely balanced case, whether counsel's improper reference to insurance constitutes misconduct that cannot be cured by the court's admonition is determined by the court's view of the overall record, taking into account, inter alia, the nature and seriousness of the remarks, the good faith of counsel, whether the misconduct consisted of a single utterance or repeated, persistent reiteration thereof, the judge's control of the trial, and the probable likelihood of prejudicing the jury. In this case, counsel's references were ambiguous at best and suffered from a lack of objection. The court stated that if defense counsel felt that the issue of insurance had been improperly interjected into the case, he should have asked for an admonishing instruction to be given to the jury. The court conceded that such an instruction might "blow smoldering coals into a blazing fire of speculation," but if defense counsel thought that such speculation would occur anyway, he should have asked for an instruction. Since the court felt that there was no demonstrable prejudicial misconduct in hinting at the existence of insurance, it affirmed the denial of defendant's motion for a new trial (*59 Cal. App. 3d 451, 473)* .

[c] Reference to Insurance During Voir Dire

The factual and procedural background of ***Hart v. Wielt*** *(1970) 4 Cal. App. 3d 224, 84 Cal. Rptr. 220* , is discussed in [a], *above*. During voir dire examination of prospective jurors, plaintiff's counsel asked if he or any member of his family were employed by or owned stock in the State Farm Insurance Company. Counsel for defendants made no timely objection and did not request that the jury be admonished. After judgment for plaintiff, defendants' motion for a new trial made on several grounds, including plaintiff's counsel's misconduct, was denied. Defendants appealed the judgment.

The court of appeal affirmed the judgment, stating that in a personal injury action, counsel may, in good faith, ask prospective jurors whether they are interested in a particular insurance company so long as the question does not unnecessarily convey the impression that defendant is in fact insured. The court stated that it found no evidence of bad faith in this case, and even though plaintiff's counsel referred to insurance at other times during trial, the court stated that it found no prejudicial error (*4 Cal. App. 3d 224, 230)* . Accordingly, the court upheld the trial court's denial of the motion.

The decision in *Hart v. Wielt* was sharply criticized by the court of appeal in another case, *Scally v. Pacific Gas & Electric Co. (1972) 23 Cal. App. 3d 806, 100 Cal. Rptr. 501* . In the *Scally* case, the court stated that to suggest that such a question can be asked without telling the jury that a party is in fact insured is naivete of the highest order. Any lawyer

or judge who has observed or participated in jury voir dire knows that such questions are asked for one purpose only--to convey the impression that a party is insured (*23 Cal. App. 3d 806, 813)* . For further discussion of the *Scally* case, see *§ 155.136[3][f]*.

[4] Additional Authorities

[a] No Prejudice to Opposing Party

Rocray v. Pasadena City Lines, Inc. (1958) 159 Cal. App. 2d 265, 323 P.2d 772 , was a personal injury action in which the court of appeal affirmed judgment for plaintiff and an order denying defendant transit company's motion for a new trial. Defendant claimed that plaintiff's counsel prejudicially and unnecessarily made references to insurance when counsel repeatedly referred to defendant's claims manager. However, the court of appeal felt that no prejudice resulted from counsel's conduct and it upheld the denial of the motion (*159 Cal. App. 2d 265, 271-275)* .

Covely v. C.A.B. Construction Co. (1952) 110 Cal. App. 2d 30, 242 P.2d 87 , was a wrongful death action against a construction company in which the court of appeal affirmed judgment for defendants and the denial of plaintiffs' motion for a new trial. Plaintiffs claimed that defense counsel improperly brought the subject of insurance into the case when he stated in his argument to the jury that the accident was an industrial accident for which the law provides workers' compensation. However, the court of appeal agreed with the trial court's determination that no prejudice had resulted, and it decided not to disturb the trial court's denial of plaintiffs' motion (*110 Cal. App. 2d 30, 35-36)* .

Adams v. Southern Pacific Co. (1947) 82 Cal. App. 2d 560, 186 P.2d 729 , was a personal injury action against a railroad company in which the court of appeal affirmed judgment for defendants and an order denying plaintiffs' motion for a new trial. Plaintiffs claimed that defendants' attorney was guilty of prejudicial misconduct in questioning witnesses on cross examination with respect to compensation insurance which was carried by plaintiffs' employer and in referring to that insurance in his argument to the jury. However, the court concluded that defense attorney's conduct resulted in no prejudice to plaintiffs, since the existence of compensation insurance was shown with the express consent of plaintiffs' counsel, and plaintiffs may not complain of evidence that was adduced with their consent (*82 Cal. App. 2d 560, 564)* .

[b] Reference to Insurance During Voir Dire

Shriver v. Silva (1944) 65 Cal. App. 2d 753, 151 P.2d 528 , was a personal injury action in which the court of appeal affirmed judgment for plaintiffs and upheld an order denying defendants' motion for a new trial. Defendants claimed that plaintiffs' counsel was guilty of prejudicially injecting the fact of insurance into the case during voir dire examination of the jury. However, the court of appeal stated that counsel may, in good faith, ask a prospective juror whether he or she is interested in any insurance company as long as the questions do not convey the impression that defendant is in fact insured. In this case, the court said that it was doubtful whether the question asked by plaintiffs' counsel contained any implication that defendants were insured, and if it did convey that impression, the statement by defense attorney and by the trial court that no insurance company was involved in the action negated any prejudicial effect (*65 Cal. App. 2d 753, 762)* .

Jones v. Bayley (1942) 49 Cal. App. 2d 647, 122 P.2d 293 , was a personal injury action in which the court of appeal affirmed judgment for plaintiffs and the denial of defendants' motion for a new trial. Defendants claimed that plaintiffs' counsel prejudicially and unnecessarily brought the matter of insurance before the jury during voir dire examination. However, the court stated that counsel may, in good faith, ask whether a prospective juror is interested in insurance as long as the questions do not unnecessarily convey the impression that a party is in fact insured. Since the court found that no prejudice resulted from counsel's conduct, it upheld the denial of defendants' motion (*49 Cal. App. 2d 647, 658-659)* .

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15-155 California Points & Authorities § 155.154

§ 155.154 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Irregularity of Proceedings Due to Adverse Party [Code Civ. Proc. § 657(1)]--Reference to Insurance Was Relevant to Material Issue

[1] FORM

[*Caption. See § 155.60[1].*]

THE MOTION FOR NEW TRIAL SHOULD NOT BE GRANTED ON THE GROUND OF IRREGULARITY IN THE PROCEEDINGS OF THE ADVERSE PARTY BECAUSE COUNSEL'S REFERENCE TO INSURANCE WAS RELEVANT TO A MATERIAL ISSUE IN THE CASE, THUS _____ [PLAINTIFF *or* DEFENDANT] WAS NOT DEPRIVED OF A FAIR TRIAL AND HIS/HER/ITS SUBSTANTIAL RIGHTS WERE NOT MATERIALLY AFFECTED.

A. Relevance to Issue in Case. In a personal injury action, counsel may refer to the existence of insurance if it is relevant to a material issue in the case (*Huber v. Henry J. Kaiser Co. (1945) 71 Cal. App. 2d 278, 285, 162 P.2d 693* ; *Brown v. McCuan (1942) 56 Cal. App. 2d 35, 40, 132 P.2d 838*).

[*Optional*] **B. Facts Tending to Show Interest, Bias, or Motive.** Facts tending to show interest, bias, or motive on the part of a witness may always be brought out on cross examination, even though it may thereby be disclosed that a party was protected by insurance (*Hart v. Wielt (1970) 4 Cal. App. 3d 224, 231, 84 Cal. Rptr. 220*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for new trial on the ground of irregularity in the proceedings of the adverse party [*Code Civ. Proc.§ 657(1)*] based on opposing counsel's reference to insurance during trial. It generally opposes a motion for new trial that is supported by the points and authorities set out in *§ 155.136*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should show how the reference to insurance was relevant to the case and how the reference did not prevent the moving party from having a fair trial.

[c] Related Pleading and Practice Forms

For a notice of intention to move for a new trial as well as an order denying the motion, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[3] Discussion of Authorities

[a] Relevance to Issue in Case

In ***Huber v. Henry J. Kaiser Co.*** *(1945) 71 Cal. App. 2d 278, 162 P.2d 693* , plaintiff brought an action against a third party to recover damages for personal injuries suffered in the course of his employment. His employer had already paid compensation and plaintiff, through his attorney, filed a notice of lien in the case for compensation for benefits his employee had paid plaintiff. During defense counsel's argument, he made reference to the compensation insurance. The court instructed the jury that it was not to consider the fact of compensation insurance in determining the amount damages to be awarded plaintiff, if damages were to be awarded. After judgment was rendered for defendants, plaintiff moved for a new trial on the basis of prejudicial misconduct of defendants' attorney. When the motion was denied, plaintiff appealed the judgment.

The court of appeal affirmed the judgment, stating that when the existence of compensation insurance is relevant to a material issue, it may be discussed in argument and considered by the jury. Here, the existence of insurance was a fact of record that could not be kept from the jury. Furthermore, the jury had been properly instructed on its lack of relevance to the issue of damages. The court of appeal stated that when the case comes to it after the trial judge has denied a new trial, the judgment must be affirmed unless there is no reasonable basis for his or her finding. Since the court felt that there had been a reasonable basis for the trial judge's finding, it did not disturb the denial of the motion (*71 Cal. App. 2d 278, 285-286)* .

In ***Brown v. McCuan*** *(1942) 56 Cal. App. 2d 35, 132 P.2d 838* , plaintiff brought an action for personal injuries sustained in an automobile accident. During trial, defendant's counsel asked the doctor, who testified to the nature of plaintiff's injury, who had referred plaintiff to him. The doctor answered that the insurance company had done so. During counsel's final argument, he again referred to the insurance company in order to cast doubt on the integrity of plaintiff's witnesses. After judgment for defendant, plaintiff moved for a new trial on the basis of defendant's counsel's misconduct. When the motion was denied, plaintiff appealed the judgment.

The court of appeal affirmed, stating that there is nothing to prevent a prejudicial fact such as the existence of insurance

from going before the jury as long as it is relevant to an issue in the case. Here the jury might have found the testimony of the doctor to have been biased by reason of his connection with the insurance company. The evidence objected to was admissible to prove that theory. Furthermore, plaintiff himself put the fact that an insurance company was involved in the case before the jury. He introduced exhibits for medical expenses that were all addressed to the insurance carrier, attempted to impeach one of defendant's witnesses with a written statement given to an insurance investigator, and also made references to insurance during his final argument. Since the trial court had found that no prejudice had existed in the case, the court of appeal upheld the determination (*56 Cal. App. 2d 35, 40-41)* . The court stated that it could not assume that the jury denied plaintiff any recovery because it believed that he might get compensation from another source. It was more reasonable, the court maintained, to assume that the verdict followed the evidence on the issues of the case (*56 Cal. App. 2d 35, 41-42)* .

[b] Facts Tending to Show Interest, Bias, or Motive

The factual and procedural background of ***Hart v. Wielt*** *(1970) 4 Cal. App. 3d 224, 84 Cal. Rptr. 220* , is discussed in *§ 155.153[3][a]*. During the cross examination of defendants' private investigator by plaintiff's counsel, it was revealed that the private investigator had previously worked for State Farm Insurance Company. Plaintiff's counsel added that defendants' counsel was the attorney for State Farm. He also made other references to insurance during the trial and had made such references during the voir dire examination of prospective jurors. After judgment for plaintiff, defendants' motion for a new trial, made on several grounds, including the misconduct of plaintiff's counsel, was denied. Defendants appealed the judgment.

The court of appeal affirmed the judgment, stating that in a personal injury action, counsel may, in good faith, ask prospective jurors whether they are interested in a particular insurance company so long as the question does not unnecessarily convey the impression that the defendant is insured. The court concluded that there was no evidence of bad faith in this case (*4 Cal. App. 3d 224, 230)* . Furthermore, quoting *Moniz v. Bettencourt (1938) 24 Cal. App. 2d 718, 76 P.2d 535* , the court said that facts tending to show interest, bias, or motive on the part of a witness may always be brought out on cross examination, even though it may thereby be disclosed that defendant was protected by insurance (*4 Cal. App. 3d 224, 231)* . In Hart, the court of appeal noted that the trial court had denied defendant's motion for a new trial and for judgment notwithstanding the verdict. The court of appeal stated that the lower court impliedly found no misconduct, or at least no prejudice when ruling on these motions (*4 Cal. App. 3d 224, 233)* . During trial, defense counsel immediately objected to the misconduct of counsel and the lower court admonished the jury that the case was to be decided on facts and law, not on "emotional feelings" (*4 Cal. App. 3d 224, 234)* . After examining the entire record, the court of appeal found that there was no prejudicial error and affirmed the judgment (*4 Cal. App. 3d 224, 236)* .

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[Reserved]

§§ 155.155[Reserved]

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4. Accident or Surprise

15-155 California Points & Authorities § 155.170

§ 155.170 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Accident or Surprise [Code Civ. Proc. § 657(3)]

[1] FORM

[*Caption. See § 155.50[1].*]

A NEW TRIAL SHOULD BE GRANTED BECAUSE A(N) _____ [ACCIDENT *and/or* SURPRISE] OCCURRED AT TRIAL THAT MATERIALLY AFFECTED _____ [PLAINTIFF'S *or* DEFENDANT'S] SUBSTANTIAL RIGHTS, AGAINST WHICH ORDINARY PRUDENCE COULD NOT HAVE GUARDED.

A. New Trial on Ground of Accident or Surprise. On application of the party aggrieved, the verdict or decision may be vacated, in whole or in part, and a new trial may be granted, on all or some of the issues, on the ground of accident or surprise, against which ordinary prudence could not have guarded, if substantial rights of the aggrieved party are materially affected thereby (*Code Civ. Proc. § 657(3)*).

B. Accident and Surprise Defined. The terms, accident and surprise, although not strictly synonymous, have substantially the same meaning, as each is used to denote some condition or situation in which a party to a cause is unexpectedly placed, to his or her injury, without any default or negligence of his or her own and which ordinary prudence could not have guarded against (*Kauffman v. De Mutiis (1948) 31 Cal. 2d 429, 432, 189 P.2d 271*).

C. Different Result Probable on Retrial. A new trial may be granted on the ground of accident or surprise if the aggrieved party shows that in the event of a new trial, a different result would be reached that will be favorable to that party (*Whitfield v. Debrincat (1937) 18 Cal. App. 2d 730, 738, 64 P.2d 960*).

D. Exercise of Ordinary Prudence to Guard Against Surprise or Accident. A new trial may be granted if the aggrieved party has exercised ordinary prudence to guard against the surprise or accident (*Whitfield v. Debrincat (1937) 18 Cal. App. 2d 730, 739-740, 64 P.2d 960*).

[*Optional*] **E. Failure to Seek Continuance or Ask for Relief at Time of Surprise.** A new trial may be granted even though the aggrieved party has failed to seek a continuance or to ask for relief at the time of the accident or surprise, if no practicable steps that counsel could have taken would have effaced the disastrous effect of the accident or surprise (*see Whitfield v. Debrincat (1937) 18 Cal. App. 2d 730, 737, 64 P.2d 960*).

[*Optional*] **F. Raising New Material Issue by Adverse Party.** A new trial may be granted on the ground of accident or surprise if, during the trial, the adverse party raises a new issue that did not appear in the pleadings and that is supported by testimony contrary to what was anticipated (*Blankman v. Parsons (1925) 73 Cal. App. 218, 224-225, 238 P. 728*).

[*Optional*] **G. Raising New Material Issue by Court at Close of Trial.** A new trial may be granted on the ground of accident or surprise if the court, at the close of trial, raises a new material issue not raised by the pleadings (*Lavely v. Nonemaker (1931) 212 Cal. 380, 386-387, 298 P. 976*).

[*Optional*] **H. Testimony by Own Witness Contrary to Anticipated Testimony.** If a party has used reasonable diligence to ascertain what his or her witness will testify, has reasonable grounds to believe that the witness will testify to a certain state of facts, relies on the witness to do so, but the witness does not do so at trial and the case is lost in consequence, a new trial may be granted on the ground of accident or surprise (*Whitfield v. Debrincat (1937) 18 Cal. App. 2d 730, 736, 64 P.2d 960*).

[*Optional*] **I. Abandonment of Case by Counsel Without Notice.** The complete abandonment of the case of the aggrieved party by his or her counsel without any notice or ground for anticipating the abandonment is an accident or surprise for which a new trial may be granted (*Peoples F. & T. Co. v. Phoenix Assur. Co. (1930) 104 Cal. App. 334, 336-337, 285 P. 857*).

[*Optional*] **J. Presentation by Adverse Party of Unknown and Nondiscoverable Material Evidence.** The presentation by the adverse party during trial of unknown and nondiscoverable material evidence is an accident or surprise for which a new trial may be granted (*Delmas v. Martin (1870) 39 Cal. 555, 556-557)* .
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for new trial on the ground of accident or surprise, which ordinary prudence could not have guarded against [*Code Civ. Proc. § 657(3)*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. In particular, counsel should show how the accident or surprise could not have been guarded against with the use of ordinary prudence and

how the moving party was prevented from having a fair trial.

[c] Supporting Declarations or Affidavits Required

A motion for new trial made on the ground of accident or surprise must be supported by declarations or affidavits [*Code Civ. Proc. § 658*; *see Code Civ. Proc. § 2015.5*].

[d] Related Pleading and Practice Forms

For a form of notice of intention to move for a new trial on the ground of accident or surprise [Code Civ. Proc. § 657(3)], see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[e] Opposing Points and Authorities

The points and authorities set out in *§ 155.180* et seq. may be used in an appropriate case to oppose a motion for a new trial supported by this memorandum.

[3] Discussion of Authorities

[a] Accident and Surprise Defined

In ***Kauffman v. De Mutiis*** *(1948) 31 Cal. 2d 429, 189 P.2d 271* , plaintiffs brought an action for damages due to personal injuries suffered in an automobile collision. During trial, an eyewitness, subpoenaed by plaintiffs, failed to appear. Plaintiffs had planned to use him as a rebuttal witness. After verdict was rendered for defendant, plaintiffs moved for a new trial on the sole ground of accident or surprise which ordinary prudence could not have guarded against [*Code Civ. Proc. § 657(3)*]. When the motion was granted, defendant appealed the order.

Although the Supreme Court reversed the order, it defined the terms "accident" and "surprise," stating that although not strictly synonymous, the terms have substantially the same meaning, as each is used to denote some condition or situation in which a party to a cause is unexpectedly placed, to his or her injury, without any default or negligence of his or her own, and against which ordinary prudence could not have guarded. However, when a situation arises that might constitute legal surprise, counsel cannot speculate on a favorable verdict. He or she must act at the earliest possible time for the right to a new trial on the ground of surprise. This right is waived if, when the surprise is discovered, it is not made known to the court, and no motion is made for a mistrial or continuance of the cause. In this case, since the litigant did not take prompt action when confronted by the absence of a material witness, the Court held that the trial court's granting of the motion was improper and it reversed the order granting a new trial (*31 Cal. 2d 429, 432-434)* .

[b] Different Result Probable on Retrial

In ***Whitfield v. Debrincat*** *(1937) 18 Cal. App. 2d 730, 64 P.2d 960* , plaintiff brought an action for personal injuries against defendant. During trial, one of defendant's witnesses testified that a mark on the highway was of recent occurrence. Defendant expected the witness to testify that it was an old mark in order to show that it was made by defendant's car and that the car was on the proper side of the highway. After verdict was rendered for plaintiff, defendant moved for a new trial on the ground of surprise occurring at trial [*Code Civ. Proc. § 657(3)*]. When the motion was granted, plaintiff appealed the order.

The court of appeal affirmed the order even though plaintiff had contended that the showing of surprise was insufficient since it was not shown that a different result was probable in the event of a new trial. The court stated that the lower court apparently believed that a different result might have been reached and that this conclusion was not wholly unfounded. In a new trial, the witness would testify as he originally stated to the attorney. Even if the witness were not called as a witness in a new trial, the court said that defendant's case would be in much better shape than it was when

the witness testified against him. Although the court admitted that the witness's testimony regarding the age of the mark was a mere conclusion and would be inadmissible as evidence, the court stated that on a new trial, if objection were made, the witness could testify to the physical condition of the mark and leave it for the jury to conclude what its age might be. While the rule is that one seeking relief on the ground of surprise must show what case he or she could establish in the event of a new trial and that a different result favorable to him or her would be reached, it cannot be said in this case that the lower court manifestly abused its discretion in holding that such a showing was made. Accordingly, the court affirmed the order (*18 Cal. App. 2d 730, 738-739)* .

[c] Exercise of Ordinary Prudence to Guard Against Surprise or Accident

The factual and procedural background of ***Whitfield v. Debrincat*** *(1937) 18 Cal. App. 2d 730, 64 P.2d 960* , is discussed in [b], *above*. During trial, the testimony of a defense witness differed from the statement that he made originally to defense counsel. When defendant's motion for a new trial on the ground of surprise was granted, plaintiff appealed the order.

The court of appeal affirmed the order, even though the plaintiff maintained that defendant failed to explain why he did not exercise ordinary prudence in guarding against any surprise occurring at trial. The court stated that neither ordinary nor extraordinary prudence could have guarded against the witness's change in testimony without warning. According to affidavits on which the lower court based its action, counsel had interviewed the witness before he came into court. There was nothing from this interview or during any time prior to the delivery of the changed testimony that gave defense counsel any intimation that the witness would testify differently than he previously related. The witness claimed that he became confused on the witness stand, but whether this claim was true or not, the court stated that the net result was testimony that defendant neither expected nor could have reasonably anticipated. The court said that defendant need only show that the reason for the change is not chargeable to himself or herself, and having done so, defendant need not go further in this regard. Since defendant did show that he was in no way responsible or prepared for the actions of the witness, the court concluded that the motion for a new trial was properly granted (*18 Cal. App. 2d 730, 739-740)* .

[d] Failure to Seek Continuance or Ask for Relief at Time of Surprise

The factual and procedural background of ***Whitfield v. Debrincat*** *(1937) 18 Cal. App. 2d 730, 64 P.2d 960* , is discussed in [b], *above*. During trial, the testimony of a defense witness differed from the statement that he originally made to defense counsel. When defendant's motion for a new trial on the ground of accident or surprise was granted, plaintiff appealed the order.

The court of appeal affirmed the order even though defendant failed to take immediate action at trial by moving for a continuance or by introducing new testimony. The court stated that the general rule was that a party surprised at trial must apply for relief at the earliest practicable moment, and in such method as to produce the least vexation, expense, and delay. A party will not be allowed to speculate on the chances of a favorable decision on other points, and if an unfavorable result is produced, that party cannot fall back on a motion for new trial on the ground of surprise (*18 Cal. App. 2d 730, 735)* . In this case, however, the lower court held that there was nothing that counsel could have done that would have adequately met the situation. The lower court evidently felt, from its familiarity with the case, that the witness's testimony created an effect that nothing could obviate. The court of appeal noted that a continuance would probably have been futile under the circumstances and an attempt at impeachment might only have made matters worse. Furthermore, the court of appeal conceded that the trial judge was in a better position to determine whether there were any practicable steps that counsel should reasonably have been required to take at trial that would have effaced the disastrous effect of the testimony. Hence, the court of appeal concluded that it could not be said, from a complete examination of the entire record, that the lower court's conclusion was unwarranted. Therefore, the court affirmed the order (*18 Cal. App. 2d 730, 737)* .

[e] Raising New Material Issue by Adverse Party

In ***Blankman v. Parsons*** *(1925) 73 Cal. App. 218, 238 P. 728* , plaintiff brought an action against an administrator of decedent's estate to recover money allegedly loaned to the decedent. The administrator filed a cross complaint against plaintiff. During trial, defendant's counsel introduced testimony that various payments had been made to plaintiff by decedent pursuant to a grubstake agreement. However, there was nothing in defendant's cross complaint to give warning to plaintiff, who at the time of trial was in Alaska, that defendant would introduce testimony concerning the grubstake agreement. After judgment was rendered against plaintiff, plaintiff moved for a new trial on the ground of accident or surprise [*Code Civ. Proc. § 657(3)*]. When the motion was denied, plaintiff appealed the judgment.

The court of appeal reversed the judgment with instructions to the trial court to grant plaintiff and cross defendant a new trial (*73 Cal. App. 218, 225)* . The court stated that there was nothing in the pleadings that would have given warning to plaintiff or counsel that the testimony would be introduced, and if it came as a surprise to plaintiff's counsel, justice and equity demanded that the plaintiff be given an opportunity to put forth the claim. The peculiar circumstances of this case, the plaintiff being in Alaska and the other party to the transaction being dead, coupled with the fact that much of the testimony introduced on behalf of defendant was hearsay, required a little more leniency to enable the parties to have the case decided on the merits (*73 Cal. App. 218, 223)* . The court concluded that the situation was squarely within the new trial provisions of *Code Civ. Proc. § 657(3)*, on the ground of accident or surprise, and *Code Civ. Proc. § 657(4)*, on the ground of newly discovered evidence, and that plaintiff was entitled to a new trial (*73 Cal. App. 218, 225)* .

[f] Raising New Material Issue by Court at Close of Trial

In ***Lavely v. Nonemaker*** *(1931) 212 Cal. 380, 298 P. 976* , plaintiff father brought an action to cancel a deed on the ground of fraud and undue influence against defendant daughter. Although the pleadings in the case did not raise the issue of delivery of the deed, the trial court questioned plaintiff concerning the circumstances surrounding the execution of the deed. The court found the allegations of fraud and undue influence to be untrue, and also found that there had been no valid delivery of the deed. At the conclusion of the trial, the court permitted plaintiff to amend his complaint to conform to the proof and to allege that there was no delivery of the deed. After judgment for plaintiff, defendant moved for a new trial specifying, among other grounds, that it was error to allow the amendment after the evidence had been closed, and asserting surprise which ordinary prudence could not have guarded against [*Code Civ. Proc. § 657(3)*]. When the motion was denied, defendant appealed the judgment.

The Supreme Court reversed the judgment, stating that defendant's motion for a new trial on the ground of surprise should have been granted in order that she might be afforded the opportunity to meet this new issue so unconsciously injected into the case by the queries of the court (*212 Cal. 380, 387)* . The Court said that amendments of pleadings to conform to the proof should not be allowed when they raise new issues not included in the original pleadings and on which the adverse party had no opportunity to defend (*212 Cal. 380, 385)* . The record failed to disclose that defendant was given an opportunity, either on the trial of the cause or at any subsequent time, to meet or rebut this new issue aimed at the validity of the deed under which she claimed title. Accordingly, the Court reversed the judgment (*212 Cal. 380, 386-388)* .

[g] Testimony by Own Witness Contrary to Anticipated Testimony

The factual and procedural background of ***Whitfield v. Debrincat*** *(1937) 18 Cal. App. 2d 730, 64 P.2d 960* , is discussed in [b], *above*. During trial, defendant's witness testified differently from what was expected by defendant's attorney. After verdict was rendered for plaintiff, defendant's motion for a new trial on the ground of accident or surprise was granted, and plaintiff appealed the order.

The court of appeal affirmed the order, stating that if a party has used reasonable diligence to ascertain what his or her witness will testify to, has reasonable grounds to believe that the witness will testify to a certain state of facts, relies on

his or her doing so, but the witness does not do so and the case is lost in consequence, a new trial will be granted (*18 Cal. App. 2d 730, 736)* . In this case, defense counsel interviewed the witness before trial and anticipated that the witness would testify that a mark on the highway was an old mark in order to show that it was made by defendant's car. However, the witness testified that the mark was of recent occurrence. The court stated that there were other cases to the effect that the mere fact that the witness of a party swears contrary to the party's expectation does not furnish adequate ground for granting a new trial, but all cases agree that if the witness suddenly changes front, by collusion with the party against whom he or she is called, or fails to testify in accordance with previous assurances, by reason of any fact or occurrence for which neither the witness nor the party calling the witness is in any measure responsible, a new trial will be granted as a matter of right (*18 Cal. App. 2d 730, 734-735)* . After examining the record in the case, the court was convinced that the lower court did not abuse its discretion in granting a new trial. Accordingly, the court affirmed the order (*18 Cal. App. 2d 730, 740)* .

[h] Abandonment of Case by Counsel Without Notice

Peoples F. & T. Co. v. Phoenix Assur. Co. *(1930) 104 Cal. App. 334, 285 P. 857* , was an action in which defendants' attorneys abandoned their case without notice to defendants who lacked knowledge that their attorneys of record were not looking after their interests. After judgment for plaintiff, defendants were granted a new trial on the ground of accident or surprise [*Code Civ. Proc. § 657(3)*]. Plaintiff appealed the order.

The court of appeal affirmed the order granting a new trial, stating that the attorneys' conduct was a complete abandonment of the case and was an accident and surprise that defendants could not, in the exercise of ordinary prudence, have guarded against. Affidavits filed in support of the motion indicated that defendants had retained attorneys of established reputation to represent them. These attorneys had a conference with defendants' agents, had advised defendants of a good and valid defense to the action, and had filed an answer to the complaint. The notice of the time set for trial was served on the attorneys, but they failed to appear at trial, and failed to notify defendants of the date of trial, so that defendants had no notice or knowledge of the trial until long after the rendition and entry of judgment against them. The court stated that a client has a right to assume and rely on his or her attorneys of record to make the necessary appearances for the protection of that party's rights. If the attorneys abandon the client's interests without notice or any ground for anticipating the abandonment, the abandonment will constitute accident or surprise for which a new trial will be granted (*104 Cal. App. 334, 336-337)* . Therefore, the court affirmed the lower court's granting of defendants' motion for a new trial (*104 Cal. App. 334, 340)* .

[i] Presentation by Adverse Party of Unknown and Nondiscoverable Material Evidence

In ***Delmas v. Martin*** *(1870) 39 Cal. 555* , plaintiff brought an action to recover certain land that plaintiff claimed had been conveyed to him by deed. During trial, plaintiff introduced an unrecorded deed that conveyed the land to plaintiff a few days prior to trial. After a verdict was rendered for plaintiff, defendants moved for a new trial on several grounds, including the ground of accident and surprise [*Code Civ. Proc. § 657(3)*]. Defendants claimed that they had been surprised by the production of the deed to plaintiff at trial and were unable to call a certain rebuttal witness who lived a considerable distance from the place of trial. When defendants' motion was denied, they appealed the judgment.

The Supreme Court reversed the judgment and ordered a new trial, stating that surprise was sufficiently established and a new trial should have been granted on that ground. Defendants had no reason to infer that the grantor would have made this conveyance to plaintiff. Furthermore, the Court found that defendants were not guilty of laches and rejected plaintiff's contention that defendants had not come to trial prepared with adequate proof of title, since the deed was not recorded but produced at trial from the custody of plaintiff (*39 Cal. 555, 556-557)* . Even though defendants did not move for a continuance at trial, the Court relaxed the general rule that a party surprised at trial must apply for relief at the earliest practicable moment. In this case, the deed presented by plaintiff was the last evidence offered at trial, and the trial court immediately proceeded to charge the jury. The Court stated that it perceived nothing in the record to justify the belief that defendants and their counsel did not act in good faith in omitting to apply for a continuance, and it

was satisfied that defendants were surprised within the meaning of the statute. Therefore, the Court reversed the judgment and ordered a new trial (*39 Cal. 555, 557-558)* .

[4] Additional Authorities

[a] Failure to Seek Continuance or Ask for Relief at Time of Surprise

The factual and procedural background of *Delmas v. Martin (1870) 39 Cal. 555* , is discussed in [I], *above*. Even though defendants did not move for a continuance when surprised at trial, under the circumstances of the case, the Supreme Court relaxed the general rule that a party surprised at trial must apply for relief at the earliest practicable moment. The Court stated that it perceived nothing in the record to justify the belief that defendants did not act in good faith and that it was satisfied that defendants were surprised within the meaning of the statute (*39 Cal. 555, 557-558)* .

[b] Testimony by Own Witness Contrary to Anticipated Testimony

Rodriguez v. Comstock (1864) 24 Cal. 85 , was an action for ejectment in which the Supreme Court reversed judgment for plaintiffs and ordered a new trial for defendants. During trial, defendants were surprised by the testimony of their own witness who testified differently from how he previously stated that he would testify. The Court stated that if a witness suddenly changes his testimony, by collusion with the party against whom he is called, or fails to testify in accordance with his or her previous assurances, by reason of any fact or occurrence for which neither the party calling the witness nor the witness is responsible, a new trial will be granted as a matter of right (*24 Cal. 85, 89)* .

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15-155 California Points & Authorities §§ 155.171-155.179

[Reserved]

§§ 155.171[Reserved]

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15-155 California Points & Authorities § 155.180

§ 155.180 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Accident or Surprise [Code Civ. Proc. § 657(3)]--Moving Party Failed to Exercise Ordinary Prudence

[1] FORM

[*Caption. See § 155.60[1].*]

THE MOTION FOR NEW TRIAL SHOULD BE DENIED BECAUSE _____ [PLAINTIFF *or* DEFENDANT] FAILED TO EXERCISE ORDINARY PRUDENCE TO GUARD AGAINST THE ACCIDENT OR SURPRISE AT TRIAL.

A. Court's Suspicion of Ground. The courts have traditionally looked on the granting of a new trial on the ground of accident or surprise with suspicion, and a motion on this ground is seldom successful (*Fletcher v. Pierceall (1956) 146 Cal. App. 2d 859, 866, 304 P.2d 770*).

B. Failure to Exercise Ordinary Prudence. A new trial will not be granted on the ground of accident or surprise if ordinary prudence could have guarded against and prevented the surprise and the moving party was negligent under the circumstances (*see* *Wade v. De Bernardi (1970) 4 Cal. App. 3d 967, 971-972, 84 Cal. Rptr. 817*).

[*Optional*] **C. Testimony by Witness Contrary to Anticipated Testimony.** While a trial court may grant a motion for a new trial on the ground of accident or surprise when it appears that a party is misled by a witness as to the evidence expected from that party, or is unexpectedly presented with claimed perjured testimony, the court is not compelled to grant the motion when the evidence related to an issue that is obviously within the issues to be tried (*Wilson v. Kopp (1952) 114 Cal. App. 2d 198, 206, 250 P.2d 166*).

[*Optional*] **D. Absence of Material Witness.** The absence of a material witness does not warrant the granting of a new trial on the ground of surprise, since the parties are bound to use reasonable diligence in endeavoring to procure the attendance of witnesses, and, in the case of their nonappearance, to move for a continuance (*see* *Kauffman v. De Mutiis (1948) 31 Cal. 2d 429, 432-433, 189 P.2d 271* ; *Baker v. Berreman (1943) 61 Cal. App. 2d 235, 237-238, 142 P.2d*

448).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for new trial on the ground of accident or surprise [*Code Civ. Proc. § 657(3)*]. It may, in an appropriate case, be submitted in opposition to a motion for new trial supported by the points and authorities set out in *§ 155.170*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should include a discussion of how the accident or surprise could have been guarded against if the moving party had used ordinary prudence.

[c] Related Pleading and Practice Forms

For a notice of intention to move for a new trial as well as an order denying the motion, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[3] Discussion of Authorities

[a] Court's Suspicion of Ground

In ***Fletcher v. Pierceall*** *(1956) 146 Cal. App. 2d 859, 304 P.2d 770* , plaintiff brought an action to recover damages for personal injuries sustained when the car in which plaintiff was riding as a guest was hit from the rear by a car driven by defendant. During trial, a witness for defendant testified that there were certain signs posted on the freeway where the accident occurred. After the witness had testified, however, he discovered that the area was not signposted on the day of the accident. After verdict was rendered for defendant, plaintiff moved for a new trial on the grounds of surprise and newly discovered evidence. When the motion was denied, plaintiff appealed the judgment.

The court of appeal affirmed, stating that from a very early date the courts have held that surprise, as a ground for a motion for a new trial, should be looked on with suspicion [relying on *Schellhous v. Ball (1866) 29 Cal. 605]* . A motion on this ground is seldom successful because the moving party must make a showing of injury, a showing of diligence, and a showing that he or she did not unduly delay in seeking redress. In this case, the court stated that plaintiff did not exercise reasonable diligence that would require a reversal of the order denying a new trial. Reasonable diligence would seem to have required that the attorney, before trial, should have investigated whether the highway was or was not signposted. Thus, the court affirmed the judgment (*146 Cal. App. 2d 859, 865-867)* .

[b] Failure to Exercise Ordinary Prudence

In ***Wade v. De Bernardi*** *(1970) 4 Cal. App. 3d 967, 84 Cal. Rptr. 817* , plaintiffs brought an action for wrongful death and personal injuries arising out of an automobile accident with defendants. Defendants filed a cross complaint. During trial, plaintiffs' expert testified adversely regarding the speed of the two vehicles at the time of the accident. After a verdict was rendered for defendants on the complaint, and in favor of plaintiffs on the cross complaint, plaintiffs' motion for a new trial on the ground of accident or surprise was granted [*Code Civ. Proc. § 657(3)*]. Defendants appealed from the order.

The court of appeal reversed the order, stating that surprise as a ground for a new trial denotes some condition or situation in which a party to an action is unexpectedly placed to his or her detriment. The condition or situation must have been such that ordinary prudence on the part of the person claiming surprise could not have guarded against and prevented it. Such party must not have been negligent in the circumstances. In this case, the court stated that the plaintiffs failed to exercise due diligence to protect themselves against potentially adverse testimony from the expert witness. The declarations in support of and in opposition to the granting of the motions showed that the witness was employed by the plaintiffs on May 14, 1968, to give expert testimony at trial on July 31, 1968. No reports were rendered by the witness, nor was contact made with him, until the afternoon of the last day of trial, at which time a brief oral interview was accomplished. No estimate of the speed of plaintiffs' vehicle was ever solicited prior to trial. There was no evidence in the record to suggest that plaintiffs sought a pretrial interview with their other expert, an officer of the highway patrol, who they then declared had evidence favorable to them on this issue. Since it was apparent to the court that the plaintiffs had no justification whatsoever for expecting favorable testimony from the expert witness, the court reversed the order granting plaintiffs a new trial (*4 Cal. App. 3d 967, 971-972)* .

[c] Testimony by Witness Contrary to Anticipated Testimony

In ***Wilson v. Kopp*** *(1952) 114 Cal. App. 2d 198, 250 P.2d 166* , plaintiff brought an action for personal injuries suffered when he allegedly slipped on defendants' cafe floor. Defendants claimed that plaintiff's injury was caused when the screwdriver he was using slipped upward into his eye. During trial, defendants produced a screwdriver that allegedly was not the screwdriver that plaintiff had used at the time of the accident. After a verdict was rendered for defendants, plaintiff moved for a new trial on the grounds of newly discovered evidence [*Code Civ. Proc. § 657(4)*] and accident or surprise [*Code Civ. Proc. § 657(3)*]. Plaintiff's counsel claimed that he learned of the testimony of additional witnesses after trial and that he did not know of the existence of the screwdriver. When the motion was denied, plaintiff appealed the judgment.

The court of appeal affirmed judgment for defendants, stating that while a trial court may grant a motion for a new trial on the ground of accident and surprise when it appears that a party is misled by a witness as to the evidence expected from him or her, or is unexpectedly presented with claimed perjured testimony, the court is not compelled to grant the motion when the evidence relates to an issue that is obviously within the issues to be tried. The surprise must be the result of some fact or circumstance occurring at trial that could not reasonably have been anticipated and is of such importance or magnitude in its influence on the result at trial as to have produced injury or damage to the rights of the moving party (*114 Cal. App. 2d 198, 206)* . The court stated that the mere giving of testimony contrary to the interests of a party, or even the fact that false testimony has thus been given, although wholly unexpected by that party, will not always operate as a predicate for the awarding of a new trial on that issue (*114 Cal. App. 2d 198, 206-207)* . In examining the facts of this case, the court stated that it is not certain that the proffered testimony would be of such a nature that, if accepted, a different result would have been reached by the jury. Furthermore, the plaintiff did not claim at trial that he was surprised by the production of the screwdriver, nor did he request a continuance to secure opposing evidence. Under these circumstances, the court stated that the trial court did not abuse its discretion in denying the motion for a new trial (*114 Cal. App. 2d 198, 207)* .

[d] Absence of Material Witness

The factual and procedural background of ***Kauffman v. De Mutiis*** *(1948) 31 Cal. 2d 429, 189 P.2d 271* , is discussed in *§ 155.170[3][a]*. The Supreme Court reversed an order granting plaintiffs a new trial, stating that when a situation arises that might constitute legal surprise, counsel must act at the earliest possible moment, since the right to a new trial on the ground of surprise is waived if, when the surprise is discovered, it is not made known to the court, and no motion is made for a mistrial or continuance of the cause. Although plaintiffs conceded that a litigant must take prompt action when he or she is confronted by the absence of a material witness, the Court disagreed with their contention that they were excused from asking for a continuance because they did not have time for deliberation as to the effect of not calling the witness. In this case, the Court said that plaintiffs and their counsel knew that the witness would not be able to attend before they commenced the presentation of rebuttal evidence. Defendant's attorney suggested a continuance so that the witness might testify, but opposing counsel stated that he did not intend to have the case continued and that if anything went wrong he would move for a new trial. The Court held that this amounted to an express statement that counsel intended to speculate on a favorable verdict. The Court felt that plaintiffs were disappointed rather than surprised. Accordingly, the Court reversed the order granting a new trial (*31 Cal. 2d 429, 432-434)* .

In ***Baker v. Berreman*** *(1943) 61 Cal. App. 2d 235, 142 P.2d 448* , plaintiffs brought an action for wrongful death caused by an automobile accident. An eyewitness to the accident agreed to testify at trial; however, two days prior to trial, he informed plaintiffs that he could not appear at trial because he had been inducted into the army and the outbreak of war made it impossible for him to attend. After judgment for defendants, plaintiffs moved for a new trial on several grounds, including the ground of accident or surprise [*Code Civ. Proc. § 657(3)*]. When the motion was granted, defendants appealed the order.

The court of appeal reversed the order, stating that the absence of a witness does not warrant the granting of a new trial on the ground of surprise, since the parties are bound to use reasonable diligence in endeavoring to procure the attendance of witnesses, and, in the case of their nonappearance, to move for a continuance. The court stated that here the record shows that the witness had never been subpoenaed, nor had any attempt been made to take his deposition, although up to two days prior to the trial plaintiffs were given ample opportunity to do so. Furthermore, two days prior to the commencement of trial, the witness notified plaintiffs that he would not be able to attend, and plaintiffs did not request a continuance, nor did they at any time intimate to the court or opposing counsel that they had suffered any accident or surprise because of the absence of any witness (*61 Cal. App. 2d 235, 237-238)* . Since there was a lack of diligence in failing to procure the deposition of the witness, and a failure to bring the matter to the attention of the court, the court concluded that the lower court's order granting plaintiffs a new trial was not sustainable (*61 Cal. App. 2d 235, 240-246)* .

[4] Additional Authorities

[a] Failure to Exercise Ordinary Prudence

In *In re Marriage of Liu (1987) 197 Cal. App. 3d 143, 242 Cal. Rptr. 649* , the court of appeal held that a wife's motion for a new trial in an annulment action was properly denied. In considering the merits of her motion, it held that she could not obtain a new trial on the ground of accident or surprise that ordinary prudence would not have guarded against. She claimed that the negligence of her own attorney created an accident or surprise that she could not have guarded against because of her limited knowledge of English and lack of familiarity with American culture. However, it is established that trial counsel's negligence is not a ground on which a new trial may be granted (*197 Cal. App. 3d 143, 154-155)* .

The factual and procedural background of *Fletcher v. Pierceall (1956) 146 Cal. App. 2d 859, 304 P.2d 770* , is discussed in [3][a], *above*. The court of appeal affirmed judgment for defendant, finding that the trial court's denial of plaintiff's motion for a new trial was proper. The court stated that plaintiff did not sufficiently exercise reasonable diligence in the case. Reasonable diligence would have required plaintiff's attorney to make an investigation of whether or not the highway was signposted at the time of the accident so that plaintiff would not have been surprised by the

witness's testimony (*146 Cal. App. 2d 859, 865-867)* .

The factual and procedural background of *Baker v. Berreman (1943) 61 Cal. App. 2d 235, 142 P.2d 448* , is discussed in [3][d], *above*. The court of appeal reversed an order granting plaintiffs a new trial on the ground of accident or surprise. Although one of plaintiffs' material witnesses failed to appear at trial, the court stated that there was a lack of diligence in failing to procure the testimony of the witness. In this case, plaintiffs knew for two and one-half months before trial that the witness had been inducted into the army and might be transferred at any time. Plaintiffs failed, however, to procure the deposition of the witness. Therefore, the court reversed the order (*61 Cal. App. 2d 235, 239-240)* .

[b] Testimony by Witness Contrary to Anticipated Testimony

Rudin v. Luman (1921) 53 Cal. App. 212, 199 P. 874 , was an action to recover the rental value of property in which the court of appeal affirmed judgment for plaintiffs, finding that an order denying defendant's motion for a new trial was proper. During trial, one of plaintiffs' witnesses testified differently from what was expected. The court stated that the mere giving of testimony contrary to the interests of the party, or even the fact that false testimony has been given, will not always operate as a predicate for awarding a new trial. Furthermore, no grounds exist for the granting of a new trial on the basis of surprise when the alleged surprise is clearly within the issues presented by the pleadings (*53 Cal. App. 212, 220-221)* .

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15-155 California Points & Authorities § 155.181

§ 155.181 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Accident or Surprise [Code Civ. Proc. § 657(3)]--Moving Party Failed to Show Different Result Probable on Retrial

[1] FORM

[*Caption. See § 155.60[1].*]

THE MOTION FOR NEW TRIAL SHOULD NOT BE GRANTED BECAUSE _____ [PLAINTIFF *or* DEFENDANT] HAS FAILED TO SHOW THAT THERE IS OTHER EVIDENCE THAT COULD PRODUCE A DIFFERENT RESULT ON RETRIAL.

A. Court's Suspicion of Ground. [*See § 155.180[1], Paragraph A.*]

B. Failure to Show Different Result Probable on Retrial. A new trial will not be granted on the ground of accident or surprise if the moving party has failed to show that there is other evidence that could produce a different result on retrial. (*Wade v. De Bernardi (1970) 4 Cal. App. 3d 967, 972, 84 Cal. Rptr. 817*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for new trial on the ground of accident or surprise [*Code Civ. Proc. § 657(3)*]. It may, in an appropriate case, be submitted in opposition to a motion for new trial supported by the points and authorities set out in *§ 155.170*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should discuss how the moving party has failed to show that there is other evidence that could produce a different result of retrial.

[c] Related Pleading and Practice Forms

For a notice of intention to move for a new trial as well as an order denying the motion, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[3] Discussion of Authorities

[a] Failure to Show Different Result Probable on Retrial

The factual and procedural background of ***Wade v. De Bernardi*** *(1970) 4 Cal. App. 3d 967, 84 Cal. Rptr. 817* , is discussed in *§ 155.180[3][b]*. After plaintiffs' motion for a new trial was granted on the ground of accident or surprise [*Code Civ. Proc. § 657(3)*], defendants appealed the order.

The court of appeal reversed the order, stating that even if the surprise was in no way attributable to plaintiffs' lack of diligence in investigation, it afforded no grounds for granting plaintiffs a new trial because there was no showing that plaintiffs will have other evidence that could produce a different result on retrial. Although plaintiffs indicated that, on retrial, they planned to introduce the testimony of a highway patrol officer regarding the speed of plaintiffs' car, they made no effort to demonstrate that they had other evidence on the speed of the defendant's car or that their expert witness would change his adverse testimony. The court said that even assuming that plaintiffs will merely delete the testimony of the expert witness on this point at the new trial, the court did not believe that it was reasonably possible that a different result would be forthcoming. Plaintiffs had not shown that this testimony was a material influence on the jury. They made no effort to show that the testimony substantially affected the jurors and, therefore, that a different verdict could reasonably be expected if this testimony were omitted. Under these circumstances, the court concluded that the surprise was not a sufficient basis for granting a new trial (*4 Cal. App. 3d 967, 972-973)* .

[4] Additional Authorities

[a] Failure to Show Different Result Probable on Retrial

Wilson v. Kopp (1952) 114 Cal. App. 2d 198, 250 P.2d 166 , was an action for personal injuries in which the court of appeal affirmed judgment for defendants, noting that the order denying plaintiff's motion for a new trial was proper. Plaintiff's attorney averred that he did not learn of the identity or testimony of three witnesses until after the date of trial and that he did not know of the existence of a certain item produced in evidence until after defendants had produced it at trial. The court stated that it was not certain that the proffered evidence was of such a nature that, if accepted, a different result would have been reached by the jury. Thus, the court affirmed the judgment (*114 Cal. App. 2d 198, 207)* .

McNary v. Hanley (1933) 131 Cal. App. 188, 20 P.2d 966 , was an action for personal injuries in which the court of appeal affirmed judgment for plaintiff, noting that the order denying defendant's motion for a new trial on the ground of accident or surprise was proper. During trial, certain witnesses testified contrary to their written statements made prior

to trial. The court stated that defendant must show facts that establish that he can produce a different result on retrial. Since the witnesses were confronted with their inconsistent statement while on the witness stand and the jury weighed the worth of their testimony in light of these inconsistencies, there was no showing that a new trial would change the result in the case. Therefore, the court affirmed the judgment for plaintiff (*131 Cal. App. 188, 190)* .

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15-155 California Points & Authorities § 155.182

§ 155.182 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Accident or Surprise [Code Civ. Proc. § 657(3)]--Moving Party Waives Ground if No Action Was Taken at Trial

[1] FORM

[*Caption. See § 155.60[1].*]

THE MOTION FOR NEW TRIAL SHOULD NOT BE GRANTED BECAUSE _____ [PLAINTIFF *or* DEFENDANT] FAILED TO TAKE ACTION AT TRIAL WHEN THE ACCIDENT OR SURPRISE WAS DISCOVERED; HENCE, HE/SHE/IT HAS WAIVED THE GROUND ON A SUBSEQUENT MOTION FOR NEW TRIAL.

A. Court's Suspicion of Ground. [*See § 155.180[1], Paragraph A.*]

B. Waiver of Ground If No Immediate Action. When a situation arises that might constitute legal surprise, counsel cannot speculate on a favorable verdict, but must act at the earliest possible moment, since the right to a new trial on the ground of surprise is waived if, when the surprise is discovered, it is not made known to the court, and no motion is made for a mistrial or a continuance of the cause (*Kauffman v. De Mutiis (1948) 31 Cal. 2d 429, 432, 189 P.2d 271*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for new trial on the ground of accident or surprise [*Code Civ. Proc. § 657(3)*]. It may, in an appropriate case, be submitted in opposition to a motion for new trial supported by the points and authorities set out in *§ 155.170*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should include a discussion of the moving party's failure to take action during trial when the accident or surprise was discovered and should argue that this failure to take action constituted a waiver of the ground.

[c] Related Pleading and Practice Forms

For a notice of intention to move for a new trial as well as an order denying the motion, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[3] Discussion of Authorities

[a] Waiver of Ground If No Immediate Action

The factual and procedural background of ***Kauffman v. De Mutiis*** *(1948) 31 Cal. 2d 429, 189 P.2d 271* , is discussed in *§ 155.170[3][a]*. The Supreme Court reversed an order granting plaintiffs a new trial, stating that when a situation arises that might constitute legal surprise, counsel cannot speculate on a favorable verdict. He or she must act at the earliest possible time because the right to a new trial on the ground of surprise is waived if, when the surprise is discovered, it is not made known to the court, and no motion is made for a mistrial or continuance of the cause. In this case, since the litigant did not take prompt action when confronted by the absence of a material witness, the Court held that the trial court's granting of the motion was improper, and it reversed the order granting the new trial (*31 Cal. 2d 429, 432-434)* .

[4] Additional Authorities

[a] Waiver of Ground If No Immediate Action

McCown v. Spencer (1970) 8 Cal. App. 3d 216, 87 Cal. Rptr. 213 , was an action for breach of an escrow agreement in which the court of appeal reversed a judgment for defendants notwithstanding the verdict and an order granting defendants a new trial in the alternative. When a situation arose that might have constituted legal surprise, defendants' counsel did not claim surprise and move for a continuance, ask to reopen the case and produce further evidence, or move for a mistrial. The court stated that the right to a new trial on the ground of surprise is waived if, when the surprise is discovered, it is not made known to the court and no motion for a mistrial or continuance is made. Since there was no timely claim of surprise in this case, the court held that the granting of a new trial on this ground was error (*8 Cal. App. 3d 216, 228)* .

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[Reserved]

§§ 155.183[Reserved]

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15-155 California Points & Authorities § 155.190

§ 155.190 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Newly Discovered Evidence [Code Civ. Proc. § 657(4)]

[1] FORM

[*Caption. See § 155.50[1].*]

A NEW TRIAL SHOULD BE GRANTED BECAUSE THERE IS NEWLY DISCOVERED EVIDENCE THAT IS MATERIAL FOR _____ [PLAINTIFF *or* DEFENDANT], WHICH HE/SHE/IT COULD NOT, WITH REASONABLE DILIGENCE, HAVE PRODUCED AT TRIAL; THUS, THE SUBSTANTIAL RIGHTS OF _____ [PLAINTIFF *or* DEFENDANT] HAVE BEEN MATERIALLY AFFECTED.

A. New Trial on Ground of Newly Discovered Evidence. On application of the party aggrieved, the verdict or decision may be vacated, in whole or in part, and a new trial may be granted, on all or some of the issues, on the ground of newly discovered evidence, material for the party making the application, which he or she could not, with reasonable diligence, have discovered and produced at trial, if substantial rights of the aggrieved party are materially affected thereby (*Code Civ. Proc. § 657(4)*).

B. Requirements for Granting of Motion. In order for a trial court to grant a new trial on the ground of newly discovered evidence, it must satisfactorily appear that reasonable diligence was used to discover and produce the evidence at trial; that the newly discovered evidence is not merely cumulative; and that it may be reasonably inferred that the result of the trial would have been different if the newly discovered evidence had been presented at trial (*Cahill v. E.B. & A.L. Stone Co. (1914) 167 Cal. 126, 133, 138 P. 712* ; *see Schultz v. Mathias (1970) 3 Cal. App. 3d 904, 909-910, 83 Cal. Rptr. 888*).

C. Newly Discovered Evidence. Evidence is newly discovered if it was not available at the time of trial and could not have been discovered with reasonable diligence (*see Andersen v. Howland (1970) 3 Cal. App. 3d 380, 384, 83 Cal. Rptr. 308* ; *Dasso v. Bradbury (1940) 39 Cal. App. 2d 712, 717, 104 P.2d 128*).

D. Reasonable Diligence. Reasonable diligence is exercised when the moving party has made every reasonable effort to produce the new evidence before the case was submitted to the jury and no grounds for estoppel appear (*Celli v. French (1951) 107 Cal. App. 2d 599, 603, 237 P.2d 536*).

E. Materiality. A new trial is proper on the ground of newly discovered evidence if the evidence is material to the issues and of so important a character as to render a different result probable on retrial (*Oberlander v. Fixen & Co. (1900) 129 Cal. 690, 691, 62 P. 254* ; *Brannock v. Bromley (1939) 30 Cal. App. 2d 516, 520, 86 P.2d 1062*).

[*Optional*] **F. Cumulative Evidence Showing Different Result Probable.** Even if the newly discovered evidence is cumulative, a new trial may be granted if that evidence renders a different result probable on retrial (*Cahill v. E.B. & A.L. Stone Co. (1914) 167 Cal. 126, 135, 138 P. 712*).

[*Optional*] **G. Failure to Move for Continuance.** When the moving party does not know the nature or materiality of the newly discovered evidence, and the procurement of a continuance would have been impossible, it is not a lack of due diligence to fail to ask for a continuance (*Andersen v. Howland (1970) 3 Cal. App. 3d 380, 383, 83 Cal. Rptr. 308*).

[*Optional*] **H. Newly Discovered Witness.** A new trial may be granted on the ground of newly discovered evidence when the moving party, after resting his or her case, discovers a new witness whose testimony may clarify the situation and might affect the outcome of the case (*see* *Celli v. French (1951) 107 Cal. App. 2d 599, 602, 237 P.2d 536*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for new trial on the ground of newly discovered evidence, material for the party making the application, which he or she could not, with reasonable diligence, have discovered and produced at trial [*Code Civ. Proc. § 657(4)*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. In particular, counsel should show that the evidence is newly discovered, that reasonable diligence has been exercised in its discovery and production, and that the evidence is material to the moving party's case [*see* *Schultz v. Mathias (1970) 3 Cal. App. 3d 904, 909-910, 83 Cal. Rptr. 888]* .

[c] Supporting Declarations or Affidavits Required

A motion for new trial made on the ground of newly discovered evidence must be supported by declarations or affidavits [*Code Civ. Proc. § 658*; *see Code Civ. Proc. § 2015.5*]. In order to sufficiently show that the moving party exercised reasonable diligence, the affidavit or declaration should specifically enumerate facts that show the steps taken

by the moving party or counsel to find the newly discovered evidence in time for trial [*see Brannock v. Bromley (1939) 30 Cal. App. 2d 516, 522, 86 P.2d 1062]* .

[d] Related Pleading and Practice Forms

For a form of notice of intention to move for a new trial on the ground of newly discovered evidence [Code Civ. Proc. § 657(4)], see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[e] Opposing Points and Authorities

The points and authorities set out in *§ 155.200* et seq. may be used in an appropriate case to oppose a motion for a new trial supported by this memorandum.

[3] Discussion of Authorities

[a] Requirements for Granting of Motion

In ***Cahill v. E.B. & A.L. Stone Co.*** *(1914) 167 Cal. 126, 138 P. 712* , plaintiff brought an action for personal injuries suffered when his foot was caught under the wheels of a railroad car. A demurrer to the complaint was sustained, but on appeal the judgment was reversed, and the case was then set for trial seven years after the accident had occurred. Defendant, relying on the assurance of counsel that the judgment would be affirmed on appeal, made no attempt to preserve evidence, but routinely destroyed the old records containing the names of the employees present at the time and place of the accident. At trial, defendant could only ascertain the names of two employees, but it later learned of other employees who could give material testimony. After verdict was rendered for plaintiff, defendant's motion for a new trial was granted on the ground of newly discovered evidence.

The Supreme Court affirmed the order, stating that in order for a trial court to grant a new trial on the ground of newly discovered evidence, it must satisfactorily appear, among other things, that reasonable diligence was used to discover and produce the evidence at the former trial; that the newly discovered evidence was not merely cumulative; and that it may be reasonably inferred that the result of the trial would have been different if the newly discovered evidence had been presented at trial (*167 Cal. 126, 133)* . The Court found that the defendant exercised reasonable diligence in the discovery and the production of the evidence, since it appeared that representatives of the defendant were working to secure the evidence on its behalf for several weeks prior to trial and that there was no source of information that indicated the identity of the newly discovered witnesses (*167 Cal. 126, 134)* . Furthermore, the Court chose not to disturb the trial court's determination that even though the evidence may have been cumulative, it might have produced a different result had it been introduced at trial (*167 Cal. 126, 135)* . Accordingly, the Court affirmed the order granting a new trial (*167 Cal. 126, 141)* .

In ***Schultz v. Mathias*** *(1970) 3 Cal. App. 3d 904, 83 Cal. Rptr. 888* , plaintiffs brought an action for wrongful death of their son in an automobile accident with defendant. On July 20, 1965, plaintiffs received a letter from a Mr. Andrus in which he stated that he and his wife arrived on the scene and heard defendant say "he didn't know what had happened but thought the other car swerved in front of him, although he couldn't say for sure." On February 2, 1968, plaintiffs' attorney attempted to have Andrus served with a subpoena for attendance in court on February 5; on February 5, counsel was informed that Andrus had moved and could not be located; on February 7, an investigator reported that Andrus had been located, but by that time the case had gone to the jury. After verdict was rendered for defendant, plaintiffs moved for a new trial on several grounds, including newly discovered evidence and insufficiency of the evidence to support the verdict. When the motion was granted on both grounds, defendant appealed the order granting the new trial.

Although the court of appeal reversed the order granting the motion, it reiterated the essential elements that must be established for the granting of a new trial on the ground of newly discovered evidence. These elements are that the

evidence must be newly discovered, that reasonable diligence has been exercised in its discovery and production, and that the evidence is material to the movant's case. In this case, the court felt that the declaration by plaintiffs' counsel was fatally deficient in material respects. The evidence was not newly discovered since the plaintiffs had the letter from Andrus two and one-half years before trial, there was no showing of due diligence in the production of the evidence, and the evidence was not shown to have been material to the movants' case. Accordingly, the court reversed the order (*3 Cal. App. 3d 904, 910)* .

[b] Newly Discovered Evidence

In ***Andersen v. Howland*** *(1970) 3 Cal. App. 3d 380, 83 Cal. Rptr. 308* , plaintiff brought an action for personal injuries sustained when her car was struck from behind by defendant's car. During trial, plaintiff's treating doctor testified regarding the whiplash injury to her neck. A radiologist, who had not yet testified, discovered a previously undiagnosed fracture of plaintiff's cervical vertebra. However, the radiologist did not testify regarding the existence of the fracture at trial. Plaintiff's treating physician had left the jurisdiction and could not be immediately brought back to court to testify concerning the significance of the discovery. After verdict was rendered for plaintiff in the amount of $2,800, plaintiff was denied a new trial on the ground of newly discovered evidence, and she appealed the judgment.

The court of appeal reversed the judgment, stating that the evidence was newly discovered within the meaning of *Code Civ. Proc. § 657(4)*. The court said that the new evidence was not the discovery of the fracture by the radiologist; it was the later-developed opinion of the treating physician that further painful and disabling arthritis would be suffered. The opinion of a qualified expert was itself evidence, though it was partly based on other evidence such as x-ray pictures already put before the jury. The new opinion was highly material evidence; it did not exist at the time of trial, but was newly discovered when it was communicated to counsel after the treating physician had completed a reexamination of plaintiff. Furthermore, the court deferred to the trial court's finding that plaintiff was not guilty of a lack of due diligence in the case. Accordingly, the court reversed the judgment (*3 Cal. App. 3d 380, 384-385)* .

In ***Dasso v. Bradbury*** *(1940) 39 Cal. App. 2d 712, 104 P.2d 128* , plaintiffs brought an action for personal injuries suffered when an automobile that one plaintiff was driving was struck by an automobile owned by defendants but operated by their chauffeur. At the time of the accident, neither defendant was riding in the car, and defendants denied that the chauffeur was acting within the scope and course of his employment and authority. After judgment was rendered for defendants, plaintiffs moved for a new trial on several grounds, including the ground of newly discovered evidence. Plaintiffs claimed that they had located a witness who had new evidence showing that defendant told her chauffeur to get gasoline when the accident occurred. When the motion was granted, defendants appealed the order, contending that plaintiffs failed to show that the evidence was newly discovered and that it could not with reasonable diligence have been discovered and produced at trial.

The court of appeal affirmed the order, holding that the evidence was newly discovered and that plaintiffs had exercised reasonable effort to discover and produce it at trial. The court stated that a party who relies on the ground of newly discovered evidence must have made a reasonable effort to produce all the evidence at trial, and that party will not be allowed a new trial for the purpose of introducing evidence known and obtainable at trial, or which would have been known if he or she simply had exercised reasonable effort to discover and present it. In this case, the court felt that plaintiffs did not lack diligence in attempting to produce the evidence at trial. Accordingly, the court affirmed the order (*39 Cal. App. 2d 712, 717-718)* .

[c] Reasonable Diligence

In ***Celli v. French*** *(1951) 107 Cal. App. 2d 599, 237 P.2d 536* , plaintiff brought an action for personal injuries when he was struck by defendant's automobile. The main question at trial was whether or not defendant had been traveling on the wrong side of the street. None of plaintiff's witnesses were able to testify to this matter. After verdict was rendered in favor of the defendant, plaintiff moved for a new trial on the ground of newly discovered evidence. Plaintiff claimed

that he had discovered a new witness that could clarify this situation. When the motion was granted, defendant appealed the order.

The court of appeal affirmed the order, stating that every reasonable effort was made to produce the new evidence before the case was submitted to the jury and no grounds for estoppel appeared. Plaintiff's counsel made a considerable effort for several months to discover any witnesses who might know facts material to the case by interviewing all of the neighbors near the scene of the accident. He had gone twice to the house sometimes occupied by the new witness, finding it closed and unoccupied, and no one had told him that the witness was present at the scene of the accident. There was no evidence of anything that could reasonably be expected to have indicated to the plaintiff that this new witness had been present at the scene, or that she knew of any facts that were material to the action that was pending. Furthermore, plaintiff was not estopped from seeking a new trial since he did not request a continuance. He acted as soon as the new evidence became known and before the close of trial, trying to have the case reopened and offering to pay the expense of bringing defendant back from Oregon. When his requests were denied, he made a timely motion for a new trial. Accordingly, the court held that the lower court did not abuse its discretion in making the order (*107 Cal. App. 2d 599, 603)* .

[d] Materiality

In ***Oberlander v. Fixen & Co.*** *(1900) 129 Cal. 690, 62 P. 254* , plaintiff brought an action for personal injuries suffered when she fell down a staircase leading to defendant's storeroom. After judgment was rendered for plaintiff, defendant was granted a new trial on the ground of newly discovered evidence. Plaintiff appealed the order, claiming, in part, that defendant lacked diligence in preparing for trial, and that the newly discovered evidence was merely cumulative.

The Supreme Court affirmed the order, stating that the newly discovered evidence had to be material for the party making the application, or it must materially affect the substantial rights of the moving party. The Court said that this requisite seemed to imply that the newly discovered evidence should be of such a character as to render a different result probable on a new trial. A new trial should not be granted when the evidence is merely cumulative unless it is clear that such evidence would change the result. In this case, the Court felt that the trial judge could best determine whether or not the evidence, although possibly cumulative, was sufficiently strong to render a different result possible (*129 Cal. 690, 691-692)* . A trial judge's discretion will not be interfered with except in cases of manifest abuse. Since the trial judge determined that the evidence was of a character that would probably affect the result on a new trial and the Court was not convinced to a certainty that such a determination was wrong, the Court did not disturb the finding (*129 Cal. 690, 691-692)* .

In ***Brannock v. Bromley*** *(1939) 30 Cal. App. 2d 516, 86 P.2d 1062* , plaintiffs, husband and wife, brought an action against defendants for personal injuries arising out of an automobile accident in which wife, a pedestrian, was admittedly struck by an automobile driven by one defendant. The jury returned a verdict in favor of defendants since it found that both plaintiffs and defendants were guilty of negligence. Plaintiffs moved for a new trial on the ground of newly discovered evidence, and in support of the motion, they filed an affidavit of an eyewitness who stated that defendants' car was traveling no less than 45 miles per hour and that the car swerved off the highway and struck plaintiff wife even though she had already crossed the road. When plaintiffs' motion was granted, defendants appealed the order, claiming that the newly discovered evidence was cumulative and that there was no reasonable probability that the result of a retrial would be different.

The court of appeal affirmed the order, stating that the newly discovered evidence must be material to the issues and of so important a character as to satisfy the court that it may reasonably be inferred that the verdict would have been different if the newly discovered evidence had been introduced at the former trial. In this case, there was no direct evidence regarding the speed of defendant's automobile. The newly discovered evidence showed the speed of the automobile to have been excessive, and this affected the issue of contributory negligence of plaintiff. If the jury should

find that the car was actually going 45 miles per hour, it might reasonably find that plaintiff could have crossed in safety. Furthermore, the newly discovered witness was the only disinterested witness to the accident. Since there was a doubt as to whether or not the evidence was cumulative, the court of appeal decided to defer to the finding of the trial court unless there had been a manifest abuse of discretion. Since no abuse of discretion appeared, the court decided not to interfere (*30 Cal. App. 2d 516, 520-521)* . After examining the record, the court also held that plaintiffs showed due diligence in seeking to produce the testimony at trial, and it accordingly affirmed the order (*30 Cal. App. 2d 516, 521-524)* .

[e] Cumulative Evidence Showing Different Result Probable

The factual and procedural background of ***Cahill v. E.B. & A.L. Stone Co.*** *(1914) 167 Cal. 126, 138 P. 712* , is discussed in [a], *above*. The Supreme Court affirmed an order granting defendant a new trial on the ground of newly discovered evidence, stating that even if the newly discovered evidence is merely cumulative, the court is not precluded from granting a new trial. When the newly discovered evidence is cumulative, the question before the trial court is whether the newly discovered evidence would probably have produced a different result if it had been presented at trial. The determination of that question is peculiarly within the province of the trial court, and its discretion will not be reviewed except for manifest abuse. In this case, the trial court determined that if the newly discovered evidence had been presented to the jury, they may have rendered a different result, and the court of appeal chose not to disturb that determination (*167 Cal. 126, 135)* . After the court concluded that defendant did not lack due diligence in seeking to produce this information at trial, it affirmed the order granting the motion (*167 Cal. 126, 135-141)* .

[f] Failure to Move for Continuance

The factual and procedural background of ***Andersen v. Howland*** *(1970) 3 Cal. App. 3d 380, 83 Cal. Rptr. 308* , is discussed in [b], *above*. After verdict was returned for plaintiff in the amount of $2,800, plaintiff was denied a new trial on the ground of newly discovered evidence, and she appealed the judgment. Plaintiff claimed that a newly formed expert opinion was sufficient to support an order granting a new trial.

The court of appeal reversed the judgment, stating that the evidence was newly discovered within the meaning of the statute [*Code Civ. Proc. § 657(4)*]. On appeal, defendant contended that plaintiff was not diligent since she failed to ask for a continuance at trial. The court acknowledged that when a party knows of an important witness and the materiality of his or her testimony, but is unable to produce the witness at trial, due diligence normally requires the party to move for a continuance. His or her failure to seek a continuance justifies the denial of a subsequent motion for new trial on the ground of newly discovered evidence. In this case, however, the newly discovered evidence did not exist at the time of trial, and the facts that indicated that newly discovered evidence might be forthcoming did not permit counsel to show the nature or materiality of the evidence, so that counsel could have successfully moved for a continuance (*3 Cal. App. 3d 380, 383-384)* . In denying the motion in the trial court, the judge expressly stated his determination that there was no lack of diligence in the case, but he felt that a change of professional opinion after the date of trial is not a ground for new trial. The court of appeal, on the other hand, felt that a newly formed expert opinion was sufficient to support an order granting a new trial as a matter of law. Because it noted that there was no lack of due diligence in the case, the court of appeal reversed the judgment (*3 Cal. App. 3d 380, 384-385)* .

[g] Newly Discovered Witness

The factual and procedural background of ***Celli v. French*** *(1951) 107 Cal. App. 2d 599, 237 P.2d 536* , is discussed in [c], *above*. The court of appeal affirmed an order granting plaintiff a new trial on the ground of newly discovered evidence. The court stated that the newly discovered witness could offer evidence that would naturally clarify a puzzling situation and might well affect the result of trial. The new witness viewed a very material element of the situation from a different angle than that of any of the other witnesses. The court stated that it appeared, without dispute, that the identity of this new witness, and the fact that she had been present and seen certain things, was not known to

plaintiff or counsel until after the taking of evidence was completed. The court concluded that the evidence in question was sufficient to constitute newly discovered evidence within the meaning of the established rules (*107 Cal. App. 2d 599, 602)* . Accordingly, the court affirmed the order granting plaintiff a new trial (*107 Cal. App. 2d 599, 603)* .

[4] Additional Authorities

[a] Reasonable Diligence

The factual and procedural background of *Brannock v. Bromley (1939) 30 Cal. App. 2d 516, 86 P.2d 1062* , is discussed in [3][d], *above*. The court of appeal affirmed an order granting plaintiffs' motion for a new trial, stating that there was a sufficient showing of diligence under the circumstances. Plaintiffs diligently searched for witnesses who might have seen the accident in question, and it was not until after trial that a witness informed plaintiffs that he had seen the accident. The court added that although there is no hard-and-fast rule to the effect that each step taken by the moving party in searching for witnesses must be detailed in a meticulous manner, it is the better practice to specifically enumerate such facts (*30 Cal. App. 2d 516, 522)* .

[b] Cumulative Evidence Showing Different Result Probable

The factual and procedural background of *Brannock v. Bromley (1939) 30 Cal. App. 2d 516, 86 P.2d 1062* , is discussed in [3][d] and in [a], *above*. The court of appeal affirmed an order granting plaintiffs' motion for a new trial, stating that the newly discovered evidence must be material to the issues, and of so important a character as to satisfy the court that it may reasonably be inferred that the verdict would have been different if the newly discovered evidence had been introduced at trial. However, the court added that a new trial should not be refused for the reason that the evidence is cumulative, if the cumulation is sufficiently strong to render a different result probable (*30 Cal. App. 2d 516, 520)* .

[c] Failure to Move for Continuance

MacKenzie v. Angle (1947) 82 Cal. App. 2d 254, 186 P.2d 30 , was an action for damages for personal injuries in which the court of appeal affirmed an order granting plaintiff a new trial on the ground of newly discovered evidence. During the trial, plaintiff failed to move for a continuance in order to produce a certain witness. The court stated that the lower court did not abuse its discretion in granting plaintiff a new trial because the trial court was in the best position to determine whether it would have granted a continuance, if requested, in light of the fact that plaintiff did not know the exact nature of the witness's testimony, may not have been able to show that he could produce the witness at a subsequent time, and could not have offered any statement as to the witness's testimony to which defendant would have stipulated (*82 Cal. App. 2d 254, 262)* .

[d] Newly Discovered Witness

The factual and procedural background of *MacKenzie v. Angle (1947) 82 Cal. App. 2d 254, 186 P.2d 30* , is discussed in [c], *above*. The court of appeal affirmed an order granting plaintiff a new trial on the ground of newly discovered evidence since plaintiff discovered after trial a material witness who saw the accident in question. The court concluded that the materiality of the witness's testimony was not known to plaintiff or his attorneys. Though it was believed that the witness would be able to shed light on the situation, it was not known how he would testify until after trial (*82 Cal. App. 2d 254, 259)* .

The factual and procedural background of *Brannock v. Bromley (1939) 30 Cal. App. 2d 516, 86 P.2d 1062* , is discussed in [3][d], *above*. The court of appeal affirmed an order granting plaintiffs' motion for a new trial since plaintiffs discovered an additional witness who would be the only disinterested witness to the accident in question. This additional witness, discovered after trial, also would be able to offer testimony regarding the speed of defendant's vehicle when it struck plaintiff. Since there was a question as to whether or not this newly discovered evidence would

render a different result probable on retrial, the court of appeal decided to defer to the finding of the trial court, and it affirmed the granting of the motion (*30 Cal. App. 2d 516, 521)* .

Laverne v. Dold (1936) 17 Cal. App. 2d 180, 61 P.2d 497 , was a personal injury action in which the court of appeal affirmed an order granting plaintiff a new trial on the grounds of insufficiency of the evidence and newly discovered evidence. After trial, a new witness was discovered who claimed to have seen the automobile accident from a different angle than the other witnesses, and who would have testified to the position of the cars and the speed of each. After examining the affidavits in support of the motion, the court concluded that the evidence of the missing witness justified the granting of a new trial (*17 Cal. App. 2d 180, 183-184)* .

California Points & Authorities

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
CHAPTER 155 MOTIONS AFTER TRIAL
PART II. FORMS
B. Motions for New Trial
5. Newly Discovered Evidence

15-155 California Points & Authorities §§ 155.191-155.199

[Reserved]

§§ 155.191[Reserved]

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
CHAPTER 155 MOTIONS AFTER TRIAL
PART II. FORMS
B. Motions for New Trial
5. Newly Discovered Evidence

15-155 California Points & Authorities § 155.200

§ 155.200 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Newly Discovered Evidence [Code Civ. Proc. § 657(4)]--Evidence Not Newly Discovered

[1] FORM

[*Caption. See § 155.60[1].*]

THE MOTION FOR NEW TRIAL SHOULD NOT BE GRANTED BECAUSE THE EVIDENCE CLAIMED TO HAVE BEEN NEWLY DISCOVERED WAS KNOWN TO _____ [PLAINTIFF *or* DEFENDANT] _____ [BEFORE TRIAL *and/or* AT THE TIME OF TRIAL].

A. Requirements for Granting of Motion. The court should not grant a motion for new trial on the ground of newly discovered evidence unless the moving party establishes (1) that the evidence is newly discovered, (2) that reasonable diligence has been exercised in its discovery and production, and (3) that the evidence is material to the moving party's case (*Wood v. Jamison (2008) 167 Cal. App. 4th 156, 161, 83 Cal. Rptr. 3d 877* ; *Schultz v. Mathias (1970) 3 Cal. App. 3d 904, 909-910, 83 Cal. Rptr. 888*).

B. Distrust and Disfavor of Courts. The claim of newly discovered evidence as a ground for new trial is uniformly looked on by the courts with distrust and disfavor; public policy requires a litigant to exhaust every reasonable effort to produce at trial all existing evidence in his or her behalf (*Estate of Shepard (1963) 221 Cal. App. 2d 70, 76, 34 Cal. Rptr. 212*).

C. Evidence Not Newly Discovered. A new trial will not be granted on the ground of newly discovered evidence if the evidence claimed to have been newly discovered is known to the moving party before or at the time of trial (*Broads v. Mead and Cook (1911) 159 Cal. 765, 768, 116 P. 46* ; *Hayutin v. Weintraub (1962) 207 Cal. App. 2d 497, 512, 24 Cal. Rptr. 761*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion for new trial on the ground of newly discovered evidence [*Code Civ. Proc. § 657(4)*]. In an appropriate case, it may be submitted in opposition to a motion for a new trial supported by the points and authorities set out in *§ 155.190*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should include a discussion of the moving party's knowledge of the evidence either before or during trial to show that the evidence was not newly discovered.

[c] Related Pleading and Practice Forms

For a notice of intention to move for a new trial as well as an order denying the motion, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[3] Discussion of Authorities

[a] Requirements for Granting of Motion

Wood v. Jamison *(2008) 167 Cal. App. 4th 156, 161, 83 Cal. Rptr. 3d 877* , involved legal malpractice and breach of fiduciary duty claims arising from a questionable investment deal where the attorney seemingly represented the plaintiff and the other parties. The losing defendant sought a new trial based on an alleged newly discovered contract between the parties disclosing to the plaintiff that the defendant did not represent her and that she agreed to have independent counsel review the deal. The defendant claimed he received a copy of the agreement in the mail, approximately seven months after trial, from an anonymous source. The trial court denied the motion, stating that the agreement was not material to the case.

The court of appeal refused to make an independent determination as to whether the newly discovered contract was material. The court of appeal held that it need not make an independent determination as to materiality after a bench trial. Unlike a jury trial, a bench trial involves no conjecture as to what the trier of fact may find material [*167 Cal. App. 4th 156, 161*]. As to the merits of the defendant's argument, the court of appeal held that the new evidence was not compelling. It came from an unknown source and there was no evidence as to the circumstances of its making. There was no showing the plaintiff had received any legal advice about conflict of interest. In addition, the court held that the defendant's actions belied the statements in the agreement that he did not represent the plaintiff [*167 Cal. App. 4th 156, 161*].

The factual and procedural background of ***Schultz v. Mathias*** *(1970) 3 Cal. App. 3d 904, 83 Cal. Rptr. 888* , is discussed in *§ 155.190[3][a]*. The court of appeal reversed the order granting plaintiffs a new trial on the grounds of newly discovered evidence [*Code Civ. Proc. § 657(4)*] and insufficiency of the evidence [*Code Civ. Proc. § 657(6)*]. It stated that the essential elements that must be established for the granting of a new trial on the ground of newly

discovered evidence are (1) that the evidence is newly discovered (2) that reasonable diligence has been exercised in its discovery and production and (3) that the evidence is material to the movant's case (*3 Cal. App. 3d 904, 909-910)* . In this case, the court stated that the evidence was not newly discovered since the plaintiffs had a letter from the newly discovered witness more than two and one-half years prior to trial, that there was no showing of due diligence in the production of the evidence, and that the evidence was not shown to have been material to the movants' case. Accordingly, the court reversed the order (*3 Cal. App. 3d 904, 910)* .

[b] Distrust and Disfavor of Courts

In ***Estate of Shepard*** *(1963) 221 Cal. App. 2d 70, 34 Cal. Rptr. 212* , plaintiffs brought an action to determine if they were the granddaughters and pretermitted heirs of the deceased. After the trial court found against plaintiffs, they moved for a new trial on the ground of newly discovered evidence. Plaintiffs claimed that they had found two new witnesses that would testify to the fact that the decedent had been married to a Carl Baddaky and had given birth to plaintiffs' mother. When the motion was denied by operation of law, plaintiffs appealed the judgment.

The court of appeal affirmed the judgment, stating that the claim of newly discovered evidence is uniformly looked on by the courts with distrust and disfavor. It is said that public policy requires a litigant to exhaust every reasonable effort to produce at trial all existing evidence in his or her behalf (*221 Cal. App. 2d 70, 76)* . In this case, although the court conceded that the newly discovered evidence might produce a different result on retrial, plaintiffs did not show that they exercised reasonable diligence in discovering and producing this evidence at trial. Accordingly, the court affirmed the judgment (*221 Cal. App. 2d 70, 76-80)* .

[c] Evidence Not Newly Discovered

In ***Broads v. Mead and Cook*** *(1911) 159 Cal. 765, 116 P. 46* , plaintiff brought an action for damages and to enjoin defendants from maintaining advertising signs on plaintiff's upper-story wall space. Defendants claimed that there was an oral agreement between themselves and the original lessee and assignor of plaintiff that gave defendants the privilege of placing their signs on the upper walls. After judgment was entered for plaintiff, defendants moved for a new trial on the ground of newly discovered evidence. Defendants claimed that they had located the original lessee who would testify that the oral agreement had been made as claimed. When the motion was denied, defendants appealed the judgment.

The Supreme Court modified the judgment as to the amount of damages and affirmed the judgment as modified, noting that the lower court's order denying the motion for new trial was proper. The Court stated that defendants' affidavit showed that they knew, prior to trial, that the witness would testify in the manner claimed. Hence, it was not strictly newly discovered evidence. The Court added that it was not shown or claimed that any application was made to postpone the trial to give an opportunity to discover the witness and secure his attendance or deposition. Therefore, the Court held that a new trial was properly denied (*159 Cal. 765, 768)* .

In ***Hayutin v. Weintraub*** *(1962) 207 Cal. App. 2d 497, 24 Cal. Rptr. 761* , plaintiff brought an action for equitable cancellation of an agreement in which plaintiff and defendant participated in a private auction of their shares of corporate stock. Defendant cross complained for specific performance. Plaintiff and defendant, each 50 percent owners of the capital stock, agreed that they would bid for each other's stock in the corporation. Plaintiff claimed that the parties agreed to deliver letters to each other setting forth all the assets, activities, potential deals, and negotiations of the corporation so that the parties could evaluate the worth of the company. Defendant outbid plaintiff at the auction and was declared to be the buyer. After trial, the court awarded defendant specific performance on his cross complaint. Plaintiff moved for a new trial on the ground of newly discovered evidence, claiming that defendant failed to disclose prior to the date of the auction that a wholly owned subsidiary of the corporation had acquired a valuable asset. When the motion was denied, plaintiff appealed the judgment.

The court of appeal affirmed the judgment, stating that this was not newly discovered evidence for purposes of a motion for a new trial. The court said that evidence within the knowledge of the moving party before the action was begun, while the case was pending, or which under the circumstances must have been known to the moving party at the trial, or by the use of reasonable diligence might have been known and produced at trial, may not be regarded as newly discovered. In this case, plaintiff's counsel averred this alleged concealment in a proposed amendment to the complaint and insisted on proving it at trial. Counsel's proposal to amend the complaint grew out of his examination of the depositions. Since the court did not feel that the evidence was newly discovered, it stated that there was no error in the ruling on the motion for new trial (*207 Cal. App. 2d 497, 512-513)* .

[4] Additional Authorities

[a] Requirements for Granting of Motion

White v. Dorfman (1981) 116 Cal. App. 3d 892, 172 Cal. Rptr. 326 , was an action concerning the violation by defendants of certain restrictive covenants on real property in which the court of appeal affirmed judgment for defendants and an order denying plaintiffs' motion for a new trial. Plaintiffs sought to introduce the testimony of a newly discovered witness who offered a definition of certain terms in the declaration of restrictions. The court stated that the essential elements that must be established by plaintiffs are: (1) that the evidence is newly discovered, (2) that reasonable diligence has been exercised in its discovery and production, and (3) that the evidence is material to the movant's case. Since the court felt that the newly discovered evidence was cumulative to the testimony of a witness produced at trial and was also probably immaterial and irrelevant, it affirmed the denial of the motion (*116 Cal. App. 3d 892, 899-900)* .

[b] Distrust and Disfavor of Courts

Hicks v. Ocean Shore Railroad, Inc. (1941) 18 Cal. 2d 773, 117 P.2d 850 , was a personal injury action in which the Supreme Court affirmed judgment for plaintiff, noting that an order denying defendants' motion for a new trial was proper. The Court stated that newly discovered evidence is regarded with suspicion and disfavor and that there was no abuse in discretion by the trial court in denying the motion (*18 Cal. 2d 773, 789)* .

Horowitz v. Noble (1978) 79 Cal. App. 3d 120, 144 Cal. Rptr. 710 , involved an action for declaratory relief of rights under an easement by implication in which the court of appeal affirmed judgment for plaintiffs, noting that an order denying defendants' motion for a new trial on the ground of newly discovered evidence was proper. The court stated that ordinarily newly discovered evidence is looked on with suspicion and disfavor. Since the trial court found that the newly discovered evidence would not have changed the result of trial, the court of appeal upheld the denial of the motion (*79 Cal. App. 3d 120, 138)* .

[c] Evidence Not Newly Discovered

The factual and procedural background of *Scanlan v. San Francisco etc. Ry. Co. (1900) 128 Cal. 586, 61 P. 271* , is discussed in *§ 155.201[3][b]*. The Supreme Court affirmed the judgment for plaintiff, noting that an order denying defendant a new trial was proper. It stated that the testimony, urged as newly discovered evidence, was in no sense newly discovered. Defendant's engineers had knowledge through their attorney of the materiality of the witness's testimony, and took certain steps to procure his attendance at trial, but did not discover him until after trial. The Court concluded that since defendant knew the importance of this witness's testimony, defendant should have moved for a continuance (*128 Cal. 586, 589)* .

Rosenfeld, Meyer & Susman v. Cohen (1987) 191 Cal. App. 3d 1035, 237 Cal. Rptr. 14 , was an appeal considering three judgments in three separate actions between former partners after dissolution of their partnership. Some of the partners continued most of the business in a new partnership. One of the matters involved an accounting by the continuing partners in which they were required to segregate receipts from ongoing clients between receipts

representing payments of fees earned by the dissolved partnership and receipts relating to matters handled by the new partnership. Because they had failed to keep records that showed segregation, all receipts that could not be properly allocated were treated as receipts of the dissolved partnership. Before judgment was entered, but after the trial court announced its tentative decision, the continuing partners moved to reopen to present new evidence that their accountant's declaration said could be developed by questioning clients. The court of appeal affirmed the denial of the motion to reopen, saying that denial is proper when failure to present evidence earlier is neither inadvertent nor excusable but a knowing and informed choice of trial tactic (*191 Cal. App. 3d 1035, 1052-1053)* .

In *Hartford Acc. & Indem., Co. v. Goossen (1978) 84 Cal. App. 3d 649, 148 Cal. Rptr. 784* , plaintiff insurance company brought an action for declaratory relief against a claimant of uninsured motorist coverage, and the court of appeal affirmed judgment for plaintiff, noting that an order denying defendant's motion for a new trial on the ground of newly discovered evidence was proper. The court stated that the additional facts did not support a motion for a new trial because they were not newly discovered, since they were known to defendant from the time of the accident (*84 Cal. App. 3d 649, 653)* .

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
CHAPTER 155 MOTIONS AFTER TRIAL
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5. Newly Discovered Evidence

15-155 California Points & Authorities § 155.201

§ 155.201 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Newly Discovered Evidence [Code Civ. Proc. § 657(4)]--Inadequate Showing of Reasonable Diligence

[1] FORM

[*Caption. See § 155.60[1].*]

THE MOTION FOR NEW TRIAL SHOULD NOT BE GRANTED BECAUSE _____ [PLAINTIFF *or* DEFENDANT] HAS FAILED TO SHOW THAT THE EVIDENCE, WITH REASONABLE DILIGENCE, COULD NOT HAVE BEEN DISCOVERED AND PRODUCED AT TRIAL.

A. Requirements for Granting of Motion. [*See § 155.200[1], Paragraph A.*]

B. Distrust and Disfavor of Courts. [*See § 155.200[1], Paragraph B.*]

C. Inadequate Showing of Reasonable Diligence. A new trial on the ground of newly discovered evidence will be granted only if the affidavit in support thereof recites facts showing that the evidence, with reasonable diligence, could not have been discovered and produced at trial (*Fomco, Inc. v. Joe Maggio, Inc. (1961) 55 Cal. 2d 162, 165, 10 Cal. Rptr. 462, 358 P.2d 918*).

[*Optional*] **D. Failure to Move for Continuance.** If the existence and materiality of evidence is known, but cannot be located, the party desiring to produce it must seek a continuance for the purpose of locating and producing the evidence; failure to do so prevents a subsequent successful motion for a new trial based on newly discovered evidence (*Scanlan v. San Francisco etc. Ry. Co. (1900) 128 Cal. 586, 589, 61 P. 271* ; *Estate of Shepard (1963) 221 Cal. App. 2d 70, 77, 34 Cal. Rptr. 212*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for new trial on the ground of newly discovered evidence [*Code Civ. Proc. § 657(4)*]. In an appropriate case, it may be submitted in opposition to a motion for a new trial supported by the points and authorities set out in *§ 155.190*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should discuss how the moving party's affidavits or declarations do not recite facts sufficient to show that the moving party exercised reasonable diligence in attempting to produce the evidence at trial.

[c] Related Pleading and Practice Forms

For a notice of intention to move for a new trial as well as an order denying the motion, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[3] Discussion of Authorities

[a] Inadequate Showing of Reasonable Diligence

In ***Fomco, Inc. v. Joe Maggio, Inc.*** *(1961) 55 Cal. 2d 162, 10 Cal. Rptr. 462, 358 P.2d 918* , plaintiff brought an action to recover damages for breach of a contract for the sale of carrot crops. After judgment was entered for plaintiff, defendants moved for a new trial on the ground of newly discovered evidence. Defendants claimed that they had recently discovered that plaintiff could not recover because it was not licensed as a dealer or cash buyer as required by the Agricultural Code. When the motion was denied, defendants appealed the judgment.

The Supreme Court affirmed the judgment, stating that a new trial on the ground of newly discovered evidence will be granted only when the affidavit in support thereof recites facts showing that the evidence could not, with reasonable diligence, have been discovered and produced at trial (*55 Cal. 2d 162, 165)* . In this case, the Court said that there was no showing of diligence on the part of defendants before trial. In fact, none could have been made since the fact was a matter of public record open to defendants' discovery at any time on inquiry or examination of the records. The Court added that none of the decided cases hold that after a judgment has been entered without any evidence having been introduced establishing illegality, a court must grant a motion for a new trial on the ground of newly discovered evidence of illegality even though the moving party has failed to show the exercise of diligence. Accordingly, the Court affirmed the judgment for plaintiff (*55 Cal. 2d 162, 166)* .

[b] Failure to Move for Continuance

In ***Scanlan v. San Francisco etc. Ry. Co.*** *(1900) 128 Cal. 586, 61 P. 271* , plaintiff contractor brought an action to recover the contract price for the construction of a railway embankment. Payment for the embankment was to be based on the cubic contents of the embankment. At trial, plaintiff called an engineer who testified on the measurements of the

embankment and its cubic contents. After judgment was rendered for plaintiff, based on the computation of plaintiff's engineer, defendant moved for a new trial on the ground of newly discovered evidence. When the motion was denied, defendant appealed the judgment and order denying a new trial.

The Supreme Court affirmed the judgment, stating that the trial court did not err in refusing defendant a new trial on the ground of newly discovered evidence. Although defendant sought to produce an engineer who had made a survey of the embankment, had left defendant's employ, and had been discovered too late to be produced at trial, the Court stated that since defendant had known of the importance of this witness's testimony, defendant should have moved for a continuance. In failing to do so, defendant entered on the trial at its peril. Thus, the Court affirmed the judgment and order denying a new trial (*128 Cal. 586, 589)* .

Note that, while the defendant in *Scanlan* appealed an order denying a new trial, such orders are no longer appealable [*see Code Civ. Proc. §§ 904.1(a)(4), 904.2(e)*].

The factual and procedural background of ***Estate of Shepard*** *(1963) 221 Cal. App. 2d 70, 34 Cal. Rptr. 212* , is discussed in *§ 155.200[3][b]*. When the plaintiffs' motion for a new trial was denied by operation of law, they appealed the judgment.

The court of appeal affirmed the judgment, stating that if the existence of a witness and the materiality of his or her testimony is known prior to trial, a failure to seek a continuance in order to determine the witness's whereabouts and to obtain his or her testimony prevents a subsequent successful motion for a new trial based on that testimony (*221 Cal. App. 2d 70, 77)* . In this case, the court felt that the plaintiffs did not exercise reasonable diligence in discovering and producing the newly discovered evidence at trial. After an adverse judgment was rendered against plaintiffs, they ran newspaper ads in Hawaii to find out if there were any witnesses still living there who might remember the deceased's relationship with Carl Baddaky. Plaintiffs discovered that the decedent may have lived in Hawaii when defense counsel showed plaintiffs' counsel certain newspaper clippings and photographs of the decedent prior to trial. However, plaintiffs failed to seek a continuance to enable them to investigate any leads that may have arisen from the clippings. They did not take the deposition of defendant, the husband of the deceased, who had possession of these items, nor did they avail themselves of any discovery proceedings which almost certainly would have led to the earlier discovery of the evidence. The court concluded that such a total lack of diligence prevented reliance on evidence allegedly derived from the newspaper clipping and photographs, particularly when no continuance was sought even when the existence of the items became known. Accordingly, the court affirmed the judgment (*221 Cal. App. 2d 70, 80)* .

[4] Additional Authorities

[a] Inadequate Showing of Reasonable Diligence

In *In re Marriage of Liu (1987) 197 Cal. App. 3d 143, 242 Cal. Rptr. 649* , the court of appeal held that a wife's motion for a new trial in an annulment action was properly denied. In considering the merits of her motion, it held that she could not obtain a new trial on the ground of newly discovered evidence because she failed to show that the evidence could not have been produced at trial with reasonable diligence. In making a motion for new trial on this ground, the party seeking relief has the burden to prove that he or she exercised reasonable diligence to discover and produce the evidence at trial. If this showing is not made, the motion must be denied. A general averment of diligence is insufficient;the moving party must state the particular acts or circumstances that establish diligence (*197 Cal. App. 3d 143, 153-154)* .

National Elevator Services, Inc. v. Department of Industrial Relations (1982) 136 Cal. App. 3d 131, 186 Cal. Rptr. 165 , involved a petition by an elevator inspection company for a writ of mandate to command defendant to issue annual elevator permits based on plaintiff's inspections. The petition was granted and defendant appealed from the denial of its motion for new trial based on newly discovered evidence. The court of appeal stated that the proponent of a

motion for new trial based on newly discovered evidence must show that reasonable diligence has been exercised in its discovery and production (*136 Cal. App. 3d 131, 137)* . The court found that defendant had failed to make a satisfactory showing that it had been diligent in producing new evidence (*136 Cal. App. 3d 131, 138)* . For that and other reasons, the court held that the motion for new trial was properly denied (*136 Cal. App. 3d 131, 137, 138)* .

Bostard v. Bostard (1968) 258 Cal. App. 2d 793, 66 Cal. Rptr. 348 , was an action for divorce in which the court of appeal affirmed the granting of an interlocutory decree of divorce to each party, noting that an order denying plaintiff's motion for a new trial was proper. The court stated that a new trial on the ground of newly discovered evidence will be granted only when the affidavit in support of the motion recites facts showing that the evidence could not, with reasonable diligence, have been discovered and produced at trial (*258 Cal. App. 2d 793, 797)* . The court felt that plaintiff's failure to discover the information was inexcusable and showed a complete lack of diligence. The court added that a litigant is required to exhaust diligent and reasonable effort to produce at trial all existing evidence in his or her behalf (*258 Cal. App. 2d 793, 798)* .

The factual and procedural background of *Estate of Shepard (1963) 221 Cal. App. 2d 70, 34 Cal. Rptr. 212* , is discussed in *§ 155.200[3][b]* and in [3][b], *above*. The court stated that parties should use a high degree of diligence in discovering and presenting at trial all the evidence of which the cause is to be determined. Since the court did not feel that plaintiffs exercised reasonable diligence in the case, it affirmed the judgment, finding that an order denying plaintiffs' motion for a new trial on the ground of newly discovered evidence did not constitute reversible error (*221 Cal. App. 2d 70, 79-80)* .

[b] Failure to Move for Continuance

Baron v. Sanger Motor Sales (1967) 249 Cal. App. 2d 846, 57 Cal. Rptr. 896 , is also discussed in *§ 155.202[4][b]*. The court of appeal reversed an order granting plaintiff's motion for a new trial, stating that plaintiff failed to act with reasonable diligence and that she waived her right to request a new trial on the ground of newly discovered evidence. The court explained that plaintiff failed to advise the court of her surprise at the testimony of a witness and also failed to ask the court for a reasonable continuance time and time again. Furthermore, the newly discovered evidence related to standard automobile painting practices which could have been obtained with minimal effort (*249 Cal. App. 2d 846, 861)* .

Griffeth v. Fehsel (1943) 61 Cal. App. 2d 600, 143 P.2d 522 , was an action to determine whether or not a joint venture was terminated by mutual consent of the parties. The court of appeal affirmed judgment for defendants, noting that an order denying plaintiff a new trial was proper. The court stated that plaintiff failed to make a sufficient showing of diligence in support of the motion. The court said that when plaintiff could not contact his corroborating witnesses, he should have moved for a continuance at the commencement of trial or for a reopening of the case prior to rendition of judgment (*61 Cal. App. 2d 600, 607)* .

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15-155 California Points & Authorities § 155.202

§ 155.202 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Newly Discovered Evidence [Code Civ. Proc. § 657(4)]--Different Result Not Probable on Retrial

[1] FORM

[*Caption. See § 155.60[1].*]

THE MOTION FOR NEW TRIAL SHOULD NOT BE GRANTED BECAUSE IT IS NOT PROBABLE THAT THE ADDITIONAL NEWLY DISCOVERED EVIDENCE WOULD PRODUCE A DIFFERENT RESULT ON RETRIAL.

A. Requirements for Granting of Motion. [*See § 155.200[1], Paragraph A.*]

B. Distrust and Disfavor of Courts. [*See § 155.200[1], Paragraph B.*]

C. Different Result Not Probable. A motion for a new trial on the ground of newly discovered evidence is properly denied when, in the opinion of the trial court, it is not probable that the additional evidence would have produced a different result (*Atkinson v. Western D. Syndicate (1915) 170 Cal. 511, 512, 150 P. 363* ; *Wood v. Jamison (2008) 167 Cal. App. 4th 156, 161, 83 Cal. Rptr. 3d 877*).

[*Optional*] **D. Impeachment of Witness.** Newly discovered evidence that is merely designed to contradict a witness is not of a character to warrant a new trial if the evidence is not material in the sense that its use would make a different result probable on retrial (*see* *Waer v. Waer (1922) 189 Cal. 178, 181, 207 P. 891* ; *Lubeck v. Lopes (1967) 254 Cal. App. 2d 63, 68, 62 Cal. Rptr. 36*).

[*Optional*] **E. Evidence Merely Cumulative.** A motion for new trial on the ground of newly discovered evidence is properly denied if it is shown that the newly discovered evidence is merely cumulative and entirely consistent with the testimony given at trial (*Kircher v. Atchison, T. & S. F. R. Co. (1948) 32 Cal. 2d 176, 187, 195 P.2d 427*).

[*Optional*] **F. Evidence Speculative and Arguably Remote.** A new trial willnot be granted on the ground of newly

discovered evidence if the evidence is speculative and arguably remote; the evidence must be specific, and if it is not, a new trial will be denied (*Cansdale v. Board of Administration (1976) 59 Cal. App. 3d 656, 667, 130 Cal. Rptr. 880*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion for new trial on the ground of newly discovered evidence [*Code Civ. Proc. § 657(4)*]. In an appropriate case, it may be submitted in opposition to a motion for a new trial supported by the points and authorities set out in *§ 155.190*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should include a discussion of the newly discovered evidence and how it is not probable that this additional evidence would produce a different result on retrial.

[c] Related Pleading and Practice Forms

For a notice of intention to move for a new trial as well as an order denying the motion, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[3] Discussion of Authorities

[a] Different Result Not Probable

In ***Atkinson v. Western D. Syndicate*** *(1915) 170 Cal. 511, 150 P. 363* , plaintiff judgment creditor brought an action to set aside a conveyance by the defendant judgment debtors on the ground of fraud. After judgment was entered for defendants, plaintiff moved for a new trial on the ground of newly discovered evidence. When the motion was denied, plaintiff appealed the order.

The Supreme Court affirmed the order, stating that a motion for a new trial on the ground of newly discovered evidence is properly denied when, in the opinion of the trial court, it is not probable that the additional evidence would have produced a different result. Although plaintiff desired to introduce evidence that defendant was insolvent at the time of the transfer, the issue of insolvency was not essential to the support of the judgment in favor of defendants. The Supreme Court stated that the trial court may well have concluded that, regardless of any evidence on the question of solvency, the same conclusions regarding intent and consideration would have been reached. After examining the record, the Supreme Court decided that the lower court was justified in denying a new trial (*170 Cal. 511, 512)* .

Note that although plaintiff in *Atkinson* appealed an order denying a new trial in this case, such orders are no longer appealable. Only orders granting a new trial are appealable [*Code Civ. Proc. §§ 904.1(a)(4), 904.2(e)*]. An order

denying a new trial is reviewable on appeal from the judgment; an appeal from an order denying a new trial will be dismissed [*Hayutin v. Weintraub (1962) 207 Cal. App. 2d 497, 514, 24 Cal. Rptr. 761]* .

The factual and procedural background of ***Wood v. Jamison*** *(2008) 167 Cal. App. 4th 156, 161, 83 Cal. Rptr. 3d 877* , is discussed in *§ 155.190[3][a]*. The case involved legal malpractice and breach of fiduciary duty claims arising from a questionable investment deal where the attorney seemingly represented the plaintiff and the other parties. The losing defendant sought a new trial based on an alleged newly discovered contract between the parties disclosing to the plaintiff that the defendant did not represent her and that she agreed to have independent counsel review the deal. The defendant claimed he received a copy of the agreement in the mail, approximately seven months after trial, from an anonymous source. The trial court denied the motion, stating that the agreement was not material to the case. The court of appeal refused to make an independent determination as to whether the newly discovered contract was material. The court of appeal held that it need not make an independent determination as to materiality after a bench trial. Unlike a jury trial, a bench trial involves no conjecture as to what the trier of fact may find material (*167 Cal. App. 4th 156, 161*).

[b] Impeachment of Witness

In ***Waer v. Waer*** *(1922) 189 Cal. 178, 207 P. 891* , plaintiff brought an action to quiet title to certain real property. Plaintiff claimed that he had made and signed a deed, but that he never delivered it to defendants. Defendants, he contended, stole the deed and recorded it without his knowledge and consent. After judgment was entered for plaintiff, defendants moved for a new trial on the ground of newly discovered evidence. Defendants presented the affidavit of a newly discovered witness who related a conversation with plaintiff concerning the loss of the deed in which plaintiff said that four or five days after the deed was executed, he discovered that the deed was missing. At trial, however, plaintiff stated that he had made the deed on May 10 and did not discover the loss of the deed until December. When the motion was denied, defendants appealed the judgment.

The Supreme Court affirmed the judgment, stating that newly discovered evidence which is merely designed to contradict a witness is not of a character to warrant a new trial. Since the affidavit purported to narrate a statement that contradicted something that plaintiff had testified to at trial, it was impeaching in character and did not constitute grounds for reversal of the order. Moreover, the affidavit in question purported to embody evidence which, if produced at trial, would have had no probative force against the testimony of plaintiff concerning nondelivery of the deed. The newly discovered evidence was in harmony with and corroborative of plaintiff's testimony that the deed had been stolen from him. Therefore, the Court concluded that the affidavit in question, was valueless as support for the motion for a new trial, and accordingly, the Court affirmed judgment for plaintiff (*189 Cal. 178, 181-182)* .

In ***Lubeck v. Lopes*** *(1967) 254 Cal. App. 2d 63, 62 Cal. Rptr. 36* , plaintiff brought an action for personal injuries sustained in an automobile collision. During trial, defendant was asked if he had any trouble with his eyesight. He answered that he did not. Following this response, he was asked when he had last had an eye examination and who his eye doctor was. He then stated that his eye doctor was Dr. Magginis. After a verdict was rendered for defendants, plaintiff was granted a new trial on the ground of newly discovered evidence. Defendants appealed the order, and plaintiff appealed the judgment.

The court of appeal reversed the order granting a new trial and affirmed the judgment. Even though plaintiff discovered evidence that a Dr. Magginis had never been listed in state licensing records, had not been listed as the owner of a city business license, had not been listed in the telephone or police directory, and was generally unknown among local optometrists; the court stated that newly discovered evidence to impeach or discredit a witness, even when discovered shortly after trial and made the basis of a motion for a new trial, is not sufficient to require granting of a new trial. In this case, the court stated that the evidence could not be characterized as material in the sense that its use by way of impeachment on retrial would make a different result probable. The newly discovered evidence did not in any way controvert evidence presented during trial concerning the actual condition of defendant's eyesight. Furthermore,

defendant's eyesight did not appear to have been a material issue in the trial, and the name of the doctor who had examined defendant's eyes was clearly a collateral matter (*254 Cal. App. 2d 63, 68-69)* . Moreover, the court noted that defendant's testimony concerning the doctor was already uncertain and confused, so that it can hardly be said that the newly discovered evidence would have a significant effect on attacking defendant's credibility on retrial. The court concluded that the newly discovered evidence only served to impeach defendant's testimony on an immaterial fact of the case (*254 Cal. App. 2d 63, 69-70)* . After examining the entire record, the court reversed the order (*254 Cal. App. 2d 63, 70-76)* .

[c] Evidence Merely Cumulative

In ***Kircher v. Atchison, T. & S. F. R. Co.*** *(1948) 32 Cal. 2d 176, 195 P.2d 427* , plaintiff brought an action for personal injuries. Plaintiff claimed that he tripped in a depression in the pavement, hit his head, was rendered unconscious, and rolled under the train which then ran over his hand. After judgment was entered for plaintiff, defendant moved for a new trial on the ground of newly discovered evidence. When the motion was denied, defendant appealed the judgment.

The Supreme Court affirmed the judgment, stating that a motion for new trial is properly denied if it is shown that the newly discovered evidence is to be used for impeachment purposes, or if it is merely cumulative. In this case, the alleged new evidence consisted of hospital records, plaintiff's military record, and an affidavit by plaintiff setting forth facts relating to the injury. Defendant sought to introduce the hospital records to refute plaintiff's testimony that he had suffered a blow on his head at the time of the accident. Plaintiff's counsel's counteraffidavit stated that the records were merely cumulative and entirely consistent with the testimony given at the trial. The trial court apparently agreed with this contention, and the Supreme Court stated that unless there is a clear showing of an abuse of discretion, the trial court's denial of the motion will not be interfered with by an appellate court. Since the Supreme Court found no abuse of discretion in the trial court's ruling, it affirmed the judgment (*32 Cal. 2d 176, 187-188)* .

Note that the Supreme Court has held in another case that a court is not precluded from granting a new trial if the newly discovered evidence is cumulative but would produce a different result on retrial [*see Cahill v. E.B. & A.L. Stone Co. (1914) 167 Cal. 126, 135, 138 P. 712* ; *see also § 155.190[3][e]*]. It appears, however, that the cumulative evidence in *Kircher v. Atchison, T. & S. F. R. Co. (1948) 32 Cal. 2d 176, 195 P.2d 427* , was entirely consistent with the evidence produced at trial and hence, a different result would not be probable if the evidence were introduced on retrial [*see Kircher v. Atchison, T & S. F. R. Co. (1948) 32 Cal. 2d 176, 187-188, 195 P.2d 427]* . Thus, while these cases appear to conflict, they may be reconciled.

[d] Evidence Speculative and Arguably Remote

In ***Cansdale v. Board of Administration*** *(1976) 59 Cal. App. 3d 656, 130 Cal. Rptr. 880* , plaintiff highway patrol officer sought a writ of mandate to set aside a decision of the Board of Administration that cancelled his disability retirement benefits. When the petition was denied, plaintiff filed a notice of motion to reopen the case on the basis of newly discovered evidence. This motion was also denied. Plaintiff then filed a notice of intention to move for a new trial on the ground of newly discovered evidence. When the motion was denied, plaintiff appealed the judgment denying the writ and also purported to appeal the order denying the motion for a new trial.

The court of appeal affirmed the judgment, stating that the newly discovered evidence must be material in the sense that it is likely to produce a different result. In this case, plaintiff sought to introduce the opinion of a doctor who had diagnosed a current back injury of plaintiff. Plaintiff alleged that current diagnosis represented an independent objective finding of disability and had this evidence been presented to the board's doctor, he would have changed his evaluation to agree with the doctors who stated that plaintiff could not perform the duties of a highway patrolman. However, the court concluded that the newly discovered evidence was speculative and arguably remote. In order to grant a new trial on the ground of newly discovered evidence, the court explained, the evidence must be specific, and if it is not, a new trial

cannot be granted. Since all presumptions are in favor of the order made by the trial court, a reviewing court will not interfere unless a clear abuse of discretion is shown. Since plaintiff did not prove a clear abuse of discretion, the court affirmed the judgment and dismissed plaintiff's attempted appeal from the order denying his motion for a new trial (*59 Cal. App. 3d 656, 667-668)* .

[4] Additional Authorities

[a] Different Result Not Probable

The facts and procedural background of *National Elevator Services, Inc. v. Department of Industrial Relations (1982) 136 Cal. App. 3d 131, 186 Cal. Rptr. 165* , are discussed in *§ 155.201[4][a]*. In *National Elevator*, the court of appeal stated that the proponent of a motion for new trial based on newly discovered evidence must show that the evidence is likely to produce a different result at trial (*136 Cal. App. 3d 131, 137)* . The court found that the proffered evidence would not produce a different result because it was cumulative and did not address a fundamental issue in the case (*136 Cal. App. 3d 131, 138-139)* . For that and other reasons, the court held that the motion for new trial was properly denied (*136 Cal. App. 3d 131, 137, 138)* .

Carpenter v. Kilgour (1965) 236 Cal. App. 2d 651, 46 Cal. Rptr. 115 , was an action to foreclose a chattel mortgage on a house in which the court of appeal affirmed judgment for defendants, noting that an order denying plaintiffs' motion for a new trial was proper. The court stated that it was well settled that the evidence produced in support of a motion for new trial on the ground of newly discovered evidence must be material to the moving party's case in that it is likely that the evidence will produce a different decision. Since the evidence presented by plaintiffs was clearly irrelevant to the issue of failure of consideration that was actually before the court, the court stated that the trial court did not err in denying plaintiffs' motion (*236 Cal. App. 2d 651, 658)* .

[b] Impeachment of Witness

Baron v. Sanger Motor Sales (1967) 249 Cal. App. 2d 846, 57 Cal. Rptr. 896 , was an action for personal injuries in which the court of appeal reversed an order granting plaintiff's motion for a new trial with directions to enter a judgment on the verdict in favor of defendant. The court stated that the newly discovered evidence would be cumulative of the testimony already given at trial by a witness, and if not cumulative, it would be given primarily for impeachment purposes. The court added that it is generally held that a new trial is not compelled by newly discovered evidence that is offered for impeachment purposes only (*249 Cal. App. 2d 846, 859)* .

[c] Evidence Merely Cumulative

Kyle v. Stone (1965) 234 Cal. App. 2d 286, 44 Cal. Rptr. 390 , was an action for personal injuries in which the court of appeal affirmed judgment for defendants noting that an order denying plaintiffs' motion for a new trial on the ground of newly discovered evidence was proper. The court stated that when the motion for a new trial is based on newly discovered evidence, it must appear that the evidence is not cumulative (*234 Cal. App. 2d 286, 294)* . In this case, the court concluded that the proffered testimony was cumulative in nature and similar to testimony introduced by plaintiffs at trial. It did not appear that the case should or would have resulted differently had the evidence been received (*234 Cal. App. 2d 286, 293-294)* .

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CHAPTER 155 MOTIONS AFTER TRIAL
PART II. FORMS
B. Motions for New Trial
5. Newly Discovered Evidence

15-155 California Points & Authorities §§ 155.203-155.209

[Reserved]

§§ 155.203[Reserved]

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6. Insufficiency of Evidence to Justify Verdict or Decision

15-155 California Points & Authorities § 155.210

§ 155.210 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Insufficiency of Evidence to Justify Verdict or Decision [Code Civ. Proc. § 657(5)]

[1] FORM

[*Caption. See § 155.50[1].*]

THE MOTION FOR NEW TRIAL SHOULD BE GRANTED BECAUSE THE EVIDENCE IS INSUFFICIENT TO JUSTIFY THE _____ [VERDICT *or* DECISION] AND SUBSTANTIAL RIGHTS OF _____ [PLAINTIFF *or* DEFENDANT] WERE MATERIALLY AFFECTED THEREBY.

A. New Trial on Ground of Insufficiency of Evidence. On application of the party aggrieved, the verdict or decision may be vacated, in whole or in part, and a new trial may be granted, on all or some of the issues, on the ground of insufficiency of the evidence to justify the verdict or decision if substantial rights of the aggrieved party are materially affected thereby (*Code Civ. Proc. § 657(6)*).

B. Judge or Jury Clearly Should Have Reached Different Decision or Verdict. A motion for new trial on the ground of insufficiency of the evidence is properly granted if, after weighing the evidence and reasonable conferences, the court is convinced that it or the jury clearly should have reached a different verdict or decision (*Code Civ. Proc. § 657*; *Russell v. Nelson (1969) 1 Cal. App. 3d 919, 922, 82 Cal. Rptr. 221*).

C. Judge Required to Weigh Evidence. In passing on a motion for new trial on the ground of insufficiency of the evidence, the trial judge is required to weigh the evidence and in so doing he or she may disbelieve witnesses and draw inferences contrary to those supporting the verdict (*see Mercer v. Perez (1968) 68 Cal. 2d 104, 112, 436 P.2d 315* ; *Dietrich v. Litton Industries, Inc. (1970) 12 Cal. App. 3d 704, 707, 717, 90 Cal. Rptr. 856*).

D. Duty to Grant New Trial If Verdict or Decision Against Weight of Evidence. On a motion for a new trial on the ground of insufficiency of the evidence, the judge must weigh and consider the evidence of both parties; if he or she is convinced that the verdict is clearly against the weight of the evidence, it is the judge's duty to grant a new trial even

though there are conflicts in the evidence (*Lucas v. Hesperia Golf & Country Club (1967) 255 Cal. App. 2d 241, 253, 63 Cal. Rptr. 189*).

[*Optional*] **E. Court Not Bound by Prior Rulings on Questions of Law or Prior View of Evidence.** In granting a new trial on the ground of insufficiency of the evidence, the court is not bound by its prior rulings on questions of law or its prior view of the evidence (*Yarrow v. State of California (1960) 53 Cal. 2d 427, 437, 2 Cal. Rptr. 137, 348 P.2d 687*).

[*Optional*] **F. Judge Not Bound by Conflicts in Evidence.** A judge is not bound by a conflict in the evidence when ruling on a motion for a new trial; rather, he or she must reweigh the evidence, the inferences therefrom, and the credibility of witnesses in determining whether the jury clearly should have reached a different verdict (*Lippold v. Hart (1969) 274 Cal. App. 2d 24, 25, 78 Cal. Rptr. 833*).

[*Optional*] **G. Judge's Duty to Set Aside Verdict If Unjust.** It is the trial judge's duty to set aside the jury's verdict whenever his or her conscience is impressed with the injustice thereof (*Moore v. City & County of San Francisco (1970) 5 Cal. App. 3d 728, 738, 85 Cal. Rptr. 281*).

[*Optional*] **H. Unreliable but Substantial Evidence Supports Verdict.** If, in the opinion of the court, the evidence is unreliable, it is the court's duty to grant a new trial and it may grant a new trial even when there is substantial evidence to sustain the verdict if it believes that the evidence preponderates against the verdict (*see* *Moore v. City & County of San Francisco (1970) 5 Cal. App. 3d 728, 738, 85 Cal. Rptr. 281*).

[*Add further points and authorities, if appropriate, discussing the substantive law pertaining to the particular cause of action or defense.*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for a new trial on the ground of insufficiency of the evidence to justify the verdict or other decision [*Code Civ. Proc. § 657(6)*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. In particular, counsel should show how the evidence was insufficient to support the verdict or other decision, and how the court may be convinced from the entire record, including reasonable inferences, that it or the jury clearly should have reached a different verdict or decision [*see Code Civ. Proc. § 657(6)*].

Counsel should add further points and authorities that set forth the substantive law pertaining to the particular cause of

action or defense. For example, in a personal injury action in which plaintiff moves for a new trial on the ground that the evidence is insufficient to support a verdict for defendant, plaintiff should discuss the substantive law of negligence in order to argue that the evidence clearly showed defendant's negligence and plaintiff's lack of contributory negligence [*see Russell v. Nelson (1969) 1 Cal. App. 3d 919, 922-923, 82 Cal. Rptr. 221]* . Similarly, in a libel action in which defendant moves for a new trial on the ground that the evidence is insufficient to support plaintiff's verdict, defendant should discuss the substantive law of libel in order to argue, for example, that the defense of truth has been established by a preponderance of evidence [*see Dietrich v. Litton Industries, Inc. (1970) 12 Cal. App. 3d 704, 717, 90 Cal. Rptr. 856]* . When preparing these substantive points and authorities, counsel may consult the substantive chapters contained in this publication and in California Forms of Pleading and Practice (Matthew Bender).

[c] Related Pleading and Practice Forms

For a form of notice of intention to move for a new trial on the ground of insufficiency of the evidence [Code Civ. Proc. § 657(6)], see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[d] Related Memoranda

The grounds of insufficiency of evidence [*Code Civ. Proc. § 657(6)*] and excessive or inadequate damages [*Code Civ. Proc. § 657(5)*] are frequently combined. For memoranda of points and authorities supporting a motion for new trial on the ground of excessive or inadequate damages, see Ch. 64, *Damages: Tort* , and Ch. 65, *Damages: Contract* in this publication.

[e] Opposing Points and Authorities

The points and authorities set out in *§ 155.220* may be used in an appropriate case to oppose a motion for a new trial supported by this memorandum.

[3] Discussion of Authorities

[a] Judge or Jury Clearly Should Have Reached Different Decision or Verdict

In ***Russell v. Nelson*** *(1969) 1 Cal. App. 3d 919, 82 Cal. Rptr. 221* , plaintiff brought an action for personal injuries suffered when defendant's car struck him as he walked across the street. After the jury rendered a verdict for defendant, plaintiff moved for a new trial on several grounds, including insufficiency of the evidence to justify the verdict. When the motion was granted on that ground, defendant appealed the order.

The court of appeal affirmed the order, stating that the record supported the trial court's determination that, after weighing the evidence, the jury clearly should have reached a different verdict. The facts of the case showed substantial support for the reasons specified in the order granting the motion. The court of appeal added that the trial court could well have concluded that the accident resulted from defendant's negligent inattention to his driving, that plaintiff acted with reasonable caution under the circumstances, and that his conduct did not proximately contribute to the accident (*1 Cal. App. 3d 919, 922-923)* . After concluding that the preparation of the order by an attorney was harmless error, the court affirmed the order (*1 Cal. App. 3d 919, 923-924)* .

[b] Judge Required to Weigh Evidence

In ***Mercer v. Perez*** *(1968) 68 Cal. 2d 104, 436 P.2d 315* , plaintiffs brought a personal injury action against defendants. After the jury returned a verdict for defendants, plaintiffs moved for a judgment notwithstanding the verdict and, in the alternative, for a new trial on the ground of insufficiency of the evidence to justify the verdict. The trial court denied the motion for judgment notwithstanding the verdict, but granted the motion for a new trial. Defendants appealed from the order, and plaintiffs cross appealed from the judgment.

The Supreme Court reversed the order granting a new trial because the order failed to specify the trial court's reasons for granting the motion. The Court, however, stated that the trial judge has traditionally broad powers in passing of a motion for new trial on the ground of insufficiency of the evidence. This motion is addressed to the judge's sound discretion; he or she is vested with the authority, for example, to disbelieve witnesses, reweigh the evidence, and draw reasonable inferences therefrom contrary to those of the trier of fact (*68 Cal. 2d 104, 112)* . In this case, the order stated the ground on which the motion was granted, but wholly failed to specify the court's reasons for doing so. Since the 1965 amendments to *Code Civ. Proc. § 657* specifically provided that the court must specify the grounds and the reasons for granting a new trial on each ground stated, the order in this case was insufficient, and the Court thus reversed it (*68 Cal. 2d 104, 108)* .

In ***Dietrich v. Litton Industries, Inc.*** *(1970) 12 Cal. App. 3d 704, 90 Cal. Rptr. 856* , plaintiff brought an action for libel against a company and its president and vice-president. After the jury rendered a verdict for plaintiff, the court granted defendants' motion for judgment notwithstanding the verdict and also ordering a new trial if the judgment should be reversed on appeal. Plaintiff appealed the judgment notwithstanding the verdict and the order granting a new trial; defendants brought a precautionary cross appeal from the judgment on the verdict.

The court of appeal reversed the judgment notwithstanding the verdict and affirmed the order granting a new trial. The court stated that in passing on a motion for a new trial made on the ground of insufficiency of the evidence, the trial judge is required to weigh the evidence and in so doing he or she may disbelieve witnesses and draw inferences contrary to those supporting the verdict. When the motion is granted on this ground, the appellate court may reverse only when, as a matter of law, there is no substantial evidence to support a contrary judgment. In this case, the order granting a new trial specifically stated the portions of the evidence that the trial judge found credible and the inferences he or she drew therefrom to reach a conclusion that the weight of the evidence was contrary to the jury's verdict. Once the trial judge determined that the defense of truth had been established by a preponderance of the evidence, the order granting a new trial necessarily followed. The court stated that since the order was adequately supported on the ground of insufficiency of the evidence, it was unnecessary to discuss any other grounds on which it was granted (*12 Cal. App. 3d 704, 717)* .

[c] Duty to Grant New Trial If Verdict or Decision Against Weight of Evidence

In ***Lucas v. Hesperia Golf & Country Club*** *(1967) 255 Cal. App. 2d 241, 63 Cal. Rptr. 189* , plaintiffs brought an action for wrongful death of a 14-year-old boy who died by drowning in a swimming pool maintained by defendants. The jury returned a verdict in favor of plaintiffs, but the trial court granted defendants' motion for judgment notwithstanding the verdict and alternatively ordered a new trial on the ground of insufficiency of the evidence to support the verdict. Plaintiffs appealed from the judgment and order granting a new trial.

The court of appeal reversed the judgment for defendants notwithstanding the verdict, but affirmed the order granting a new trial. The court stated that on a motion for a new trial, the judge must weigh and consider the evidence of both parties. If he or she is convinced that the verdict is clearly against the weight of the evidence, it is the judge's duty to grant a new trial even though there may be conflicts in the evidence. In view of the evidence on some of the crucial issues in the case, the court said that there was no abuse of discretion in granting defendant's motion for a new trial. Accordingly, the court affirmed the order (*255 Cal. App. 2d 241, 253-254)* .

[d] Court Not Bound by Prior Rulings on Questions of Law or Prior View of Evidence

In ***Yarrow v. State of California*** *(1960) 53 Cal. 2d 427, 2 Cal. Rptr. 137, 348 P.2d 687* , plaintiffs brought an action for personal injuries sustained in an automobile accident. After the jury rendered a verdict for plaintiffs, defendant moved for a new trial on all statutory grounds including insufficiency of the evidence and that the verdict was against law. Defendant also moved for a judgment notwithstanding the verdict. The court granted the motion for a new trial on the ground of insufficiency of the evidence to justify the verdict but denied the motion for judgment notwithstanding the

verdict. Plaintiffs appealed the order.

The Supreme Court affirmed the order, stating that in granting a new trial, the trial court is not bound by its prior rulings on questions of law or its prior view of the evidence. In denying the motion for judgment notwithstanding the verdict and granting the motion for a new trial on the ground of insufficiency of the evidence, the trial court held that the state was not protected by sovereign immunity from a judgment, but that the record did not contain sufficient evidence to make the state liable to these plaintiffs. Although the reasons given in the order appeared to be contradictory to the portion of the order denying the motion for judgment notwithstanding the verdict, the plain unequivocal language of the order stated that the motion was denied and the motion for a new trial granted. Since an order is measured by its terms and not by any reasons the court may give for it, the Court affirmed the order granting defendant a new trial (*53 Cal. 2d 427, 437-443)* .

[e] Judge Not Bound by Conflicts in Evidence

In ***Lippold v. Hart*** *(1969) 274 Cal. App. 2d 24, 78 Cal. Rptr. 833* , plaintiffs brought an action to recover for personal injuries and property damage suffered in an automobile collision. After the jury returned a verdict for defendant, plaintiffs' motion for a new trial was denied. Plaintiffs appealed the judgment.

The court of appeal reversed the judgment, stating that a judge is not bound by a conflict in the evidence when ruling on a motion for a new trial; rather, he or she must reweigh the evidence, the inferences therefrom, and the credibility of the witnesses in determining whether the jury clearly should have reached a different verdict. In this case, the comments that the trial judge made at the hearing on the motion for a new trial indicated that he misconceived his function at the hearing. His comments suggested that he thought that he was bound to uphold the jury verdict since the evidence was conflicting. The court of appeal added that if the comments of the trial judge indicated that the judge misconceived his duty at the hearing on the motion, an appellate court will not blindly affirm the judgment because there is some evidence to support it. Such an approach would let the form control the substance. The court of appeal found that the trial judge properly made an independent evaluation of the evidence, but erroneously failed to base his decision on the motion for new trial on that evaluation. Accordingly, the court reversed the judgment (*274 Cal. App. 2d 24, 25-27)* .

[f] Judge's Duty to Set Aside Verdict If Unjust

In ***Moore v. City & County of San Francisco*** *(1970) 5 Cal. App. 3d 728, 85 Cal. Rptr. 281* , plaintiff brought an action for false arrest and imprisonment against the city and county and the arresting officers. After the jury rendered a verdict for all defendants, plaintiff moved for judgment notwithstanding the verdict and for a new trial. The court granted plaintiff a limited judgment notwithstanding the verdict and, in the alternative, granted a new trial on the ground of insufficiency of the evidence and verdict against the law. Defendant appealed the order.

The court of appeal reversed the judgment notwithstanding the verdict and affirmed the order granting a new trial. Since the trial court's order was granted solely on the issue of false imprisonment, the court of appeal extended the order to the entire judgment. The court stated that it is the trial judge's duty to set aside the jury's verdict whenever his or her conscience is impressed with the injustice thereof. The trial court concluded that plaintiff's detention constituted false imprisonment. The court is authorized to determine the effect of the evidence contrary to the determination of the jury (*5 Cal. App. 3d 728, 738-739)* . Since the court held that the issues of false arrest and imprisonment embraced a single tort, it extended the order granting a new trial to the entire cause and affirmed the lower court's granting of the motion (*5 Cal. App. 3d 728, 740-741)* .

[g] Unreliable but Substantial Evidence Supports Verdict

The factual and procedural background of ***Moore v. City & County of San Francisco*** *(1970) 5 Cal. App. 3d 728, 85 Cal. Rptr. 281* , is discussed in [f], *above*. In affirming an alternative order granting plaintiff a new trial on the grounds

of insufficiency of the evidence and verdict against law, the court of appeal stated that it is the duty of the trial court to grant a new trial if he or she believes that the evidence is unreliable. It added that the trial court has the power to grant a new trial even though the evidence might justify a verdict. In this case, the trial court conceded that the jury's findings were not clearly in error. However, the facts of the case showed that the police officers did not act reasonably since the evidence was undisputed that the bail was placed five or six hours prior to the time plaintiff was released. Even though the jury concluded that defendants did not falsely imprison plaintiff, the trial court felt that plaintiff was falsely imprisoned by defendants. The court of appeal stated that if there is any evidence that would uphold and substantiate a verdict for the moving party, if the jury had decided for her, the trial court is justified in ordering a new trial (*5 Cal. App. 3d 728, 738-739)* . Since the court concluded that such evidence existed, it affirmed the order granting a new trial (*5 Cal. App. 3d 728, 739-740)* .

[4] Additional Authorities

[a] Judge or Jury Clearly Should Have Reached Different Decision or Verdict

Matlock v. Farmers Mercantile Co. (1968) 258 Cal. App. 2d 362, 65 Cal. Rptr. 723 , was an action for personal injuries in which the court of appeal affirmed an order granting plaintiffs a new trial on the ground of insufficiency of the evidence. After reviewing the evidence, the court concluded that the jury clearly should have reached a contrary verdict. It stated that the statutory standard of *Code Civ. Proc. § 657* had been met and that the lower court did not abuse its discretion in granting a new trial (*258 Cal. App. 2d 362, 366)* .

[b] Judge Required to Weigh Evidence

The factual and procedural background of *Yarrow v. State of California (1960) 53 Cal. 2d 427, 2 Cal. Rptr. 137, 348 P.2d 687* , is discussed in [3][d], *above*. The Supreme Court affirmed an order granting defendant a new trial on the ground of insufficiency of the evidence. It stated that in considering the sufficiency of the evidence on the hearing of a motion for a new trial, the trial court may judge the credibility of witnesses, determine the probative force of the testimony, weigh the evidence, and draw reasonable inferences therefrom opposed to those drawn by the trier of fact (*53 Cal. 2d 427, 434)* .

Widener v. Pacific Gas & Electric Co. (1977) 75 Cal. App. 3d 415, 142 Cal. Rptr. 304 , was a libel action in which the court of appeal reversed an order granting defendant a judgment notwithstanding the verdict and affirmed an alternate order granting defendant a new trial on the grounds of insufficiency of the evidence and excessive damages. The court stated that in passing on a motion for a new trial made on the ground of insufficiency of the evidence, the trial judge is required to weigh the evidence and in so doing he or she may disbelieve witnesses and draw inferences contrary to those supporting the verdict (*75 Cal. App. 3d 415, 440)* . After examining the record, the court concluded that the trial court did not abuse its discretion in granting the motion (*75 Cal. App. 3d 415, 438-440)* .

[c] Judge Not Bound by Conflicts in Evidence

Ballard v. Pacific Greyhound Lines (1946) 28 Cal. 2d 357, 170 P.2d 465 , was an action for personal injuries in which the Supreme Court affirmed an order granting defendant a new trial, stating that the trial court in considering a motion for new trial is not bound by a conflict in the evidence and has not abused its discretion when there is any evidence that would support a judgment in favor of the moving party (*28 Cal. 2d 357, 358-359)* . After examining the entire record, the court concluded that the trial court did not abuse its discretion in granting the motion (*28 Cal. 2d 357, 359-362)* .

Candido v. Huitt (1984) 151 Cal. App. 3d 918, 199 Cal. Rptr. 41 , was a negligence action in which the court of appeal affirmed an order granting defendant's motion for a new trial on the ground of insufficiency of the evidence. In its order the trial court said that there was not sufficient evidence in the record to support the jury's finding that plaintiff's negligence was not a proximate cause of the damage alleged by the plaintiff. The appellate court found that this statement was a sufficient explanation of the reason for the order. It also noted that a new trial may be granted even

if there is sufficient evidence to sustain the verdict on appeal, as long as the court determines that the weight of the evidence is against the verdict (*151 Cal. App. 3d 918, 923)* .

Martinez v. Harris (1969) 273 Cal. App. 2d 385, 78 Cal. Rptr. 325 , was a personal injury action in which the court of appeal affirmed an order granting defendant's motion for a new trial on the ground of insufficiency of the evidence. The court stated that the trial court, in considering a motion for new trial, is not bound by a conflict in the evidence and has not abused its discretion when there is any evidence which would support a judgment in favor of the moving party (*273 Cal. App. 2d 385, 397)* . The court concluded that there was evidence that would support a judgment in favor of the moving party, and it accordingly affirmed the order (*273 Cal. App. 2d 385, 398-399)* .

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[Reserved]

§§ 155.211[Reserved]

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15-155 California Points & Authorities § 155.220

§ 155.220 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Insufficiency of Evidence to Justify Verdict or Decision [Code Civ. Proc. § 657(5)]

[1] FORM

[*Caption. See § 155.60[1].*]

THE MOTION FOR NEW TRIAL SHOULD NOT BE GRANTED FOR INSUFFICIENCY OF THE EVIDENCE TO JUSTIFY THE _____ [VERDICT *or* DECISION] BECAUSE SUBSTANTIAL RIGHTS OF _____ [PLAINTIFF *or* DEFENDANT] WERE NOT MATERIALLY AFFECTED THEREBY, AND THE _____ [JURY *or* COURT] SHOULD NOT CLEARLY HAVE REACHED A DIFFERENT _____ [VERDICT *or* DECISION].

A. New Trial Precluded Unless Court Convinced That Court or Jury Clearly Should Have Reached Different Result. A new trial must not be granted on the ground of insufficiency of the evidence to justify the verdict or decision unless, after weighing the evidence, the court is convinced from the entire record, including reasonable inferences therefrom, that the jury or court clearly should have reached a different verdict or decision (*Code Civ. Proc. § 657*; *Charles D. Warner & Sons, Inc. v. Seilon, Inc. (1974) 37 Cal. App. 3d 612, 616-617, 112 Cal. Rptr. 425*).

B. Evidence Sufficient to Justify Verdict or Decision. In considering a motion for a new trial, the judge has an affirmative duty to make an independent appraisal of the evidence and to grant the motion when a preponderance of the evidence is opposed to the findings of the jury; however, the motion is properly denied if the judge concludes that the evidence is sufficient to justify the verdict (*see Byrne v. City and County of San Francisco (1980) 113 Cal. App. 3d 731, 739-742, 170 Cal. Rptr. 302*).

[*Optional*] **C. Denial of Motion When Judge Would Have Ruled Differently If Deciding Case.** A motion for new trial on the ground of insufficiency of the evidence may be denied, even though the judge felt that he or she would have ruled differently if deciding the case, when the judge does not conclude that the jury clearly should have reached a different verdict (*County of Riverside v. Loma Linda University (1981) 118 Cal. App. 3d 300, 322, 173 Cal. Rptr. 371*

).

[*Add further points and authorities, if appropriate, discussing the substantive law pertaining to the particular cause of action or defense.*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for new trial on the ground of insufficiency of the evidence to justify the verdict or other decision [*Code Civ. Proc. § 657(6)*]. In an appropriate case, the points and authorities set out in this form may be submitted in opposition to a motion for new trial supported by the points and authorities set out in *§ 155.210*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. In particular, counsel should show how the evidence was sufficient to support the verdict or other decision, and how the court or the jury should not clearly have reached a different verdict or decision [*see Code Civ. Proc. § 657*; *see also Charles D. Warner & Sons, Inc. v. Seilon, Inc. (1974) 37 Cal. App. 3d 612, 616-617, 112 Cal. Rptr. 425]* .

Counsel should add further points and authorities that set forth the substantive law pertaining to the particular cause of action or defense. For example, in a personal injury action in which plaintiff moves for a new trial on the ground that the evidence is insufficient to support the verdict for defendant, defendant should discuss the substantive law of negligence in order to argue that there was sufficient evidence from which the jury could conclude that defendant was not guilty of negligence that proximately caused plaintiff's injuries [*see Byrne v. City and County of San Francisco (1980) 113 Cal. App. 3d 731, 742, 170 Cal. Rptr. 302]* . When preparing these substantive points and authorities, counsel may consult the substantive chapters contained in this publication and in California Forms of Pleading and Practice (Matthew Bender).

[c] Related Pleading and Practice Forms

For a notice of intention to move for a new trial as well as an order denying the motion, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[d] Related Memoranda

The grounds of insufficiency of evidence [*Code Civ. Proc. § 657(6)*] and excessive or inadequate damages [*Code Civ. Proc. § 657(5)*] are frequently combined. For memoranda of points and authorities opposing a motion for new trial on the ground of excessive or inadequate damages, see Ch. 64, *Damages: Tort* , and Ch. 65, *Damages: Contract* in this publication.

[3] Discussion of Authorities

[a] New Trial Precluded Unless Court Convinced That Court or Jury Clearly Should Have Reached Different Result

In ***Charles D. Warner & Sons, Inc. v. Seilon, Inc****. (1974) 37 Cal. App. 3d 612, 112 Cal. Rptr. 425* , plaintiff corporation brought an action against two rubber companies and the dealer for damages when one of the corporation's trucks was completely destroyed by the blowout of a defective tire. After the jury returned verdicts against all three defendants, the two rubber companies moved for a new trial on the grounds of excessive damages and insufficiency of the evidence to justify the verdict [*Code Civ. Proc. § 657(5), (6)*]. The court denied the motion, and defendants appealed the judgment.

The court of appeal affirmed the judgment, stating that the trial judge satisfied the duty imposed on him in ruling on the motion. He weighed the evidence and exercised independent judgment as to whether the verdict was in error or against the fair preponderance of the evidence (*37 Cal. App. 3d 612, 617)* . However, in the memorandum of decision on the motion for new trial, the judge stated that it was not clear that the jury should have reached a different verdict; reasonable minds might differ with respect to the weight given to the testimony of the witnesses and the opinions expressed (*37 Cal. App. 3d 612, 616-617)* . In reviewing the trial court's exercise of discretion, the court of appeal stated that it does not weigh the evidence, but determines whether or not there is any substantial evidence that will support the conclusion reached by the jury. Since there was clear evidence to support the jury's findings, the court concluded that the verdict must stand. Therefore, it held that the denial of the motion was proper (*37 Cal. App. 3d 612, 617)* .

[b] Evidence Sufficient to Justify Verdict or Decision

In ***Byrne v. City and County of San Francisco*** *(1980) 113 Cal. App. 3d 731, 170 Cal. Rptr. 302* , plaintiff brought an action for personal injuries suffered when she was struck by motor vehicles of two defendants while crossing an intersection in a marked crosswalk. Judgment for defendants was entered on a special jury finding that the evidence did not establish negligence on the part of any defendant that amounted to a proximate cause of plaintiff's injuries. Plaintiff moved for a new trial on the ground that the evidence was insufficient to justify the verdict. She claimed that defendants were guilty of negligence per se since she was in the crosswalk when she was struck. The court denied the motion, and plaintiff appealed the judgment.

The court of appeal affirmed the judgment for defendants, stating that in considering a motion for a new trial, the trial court has an affirmative duty to make an independent appraisal of the evidence and to grant the motion when the preponderance of the evidence is opposed to the findings of the jury (*113 Cal. App. 3d 731, 739)* . In this case, however, there was sufficient evidence from which the judge and the jury could conclude that there had been no negligence that was the proximate cause of the injuries incurred by plaintiff (*113 Cal. App. 3d 731, 742)* . The record showed that the defendants had met the burden necessary to excuse the technical violation of the pedestrian's right-of-way statute [Veh. Code § 29150]. The view of the defendant who first struck plaintiff was obscured by a stopped bus at the crosswalk; the view of the second defendant was obstructed by the other defendant. Also, it appeared from the record that each defendant responded to the possibility of a pedestrian in the crosswalk by easing off the accelerator and by proceeding when the crosswalk was apparently clear (*113 Cal. App. 3d 731, 741)* . Furthermore, plaintiff did not exercise her statutory and case law duty of care in crossing the street since she was familiar with the intersection and aware of the danger but did not take any precaution before stepping from behind the bus. Therefore, the court concluded that the record did not establish an abuse of discretion by the trial court in denying plaintiff's motion for a new trial since sufficient evidence supported the verdict. The court then affirmed the judgment (*113 Cal. App. 3d 731, 741-742)* .

[c] Denial of Motion When Judge Would Have Ruled Differently If Deciding Case

In ***County of Riverside v. Loma Linda University*** *(1981) 118 Cal. App. 3d 300, 173 Cal. Rptr. 371* , plaintiff county brought an action for indemnification against a medical school for the monetary value of a settlement of a medical malpractice action. The medical school was affiliated with the county hospital, and the doctors involved in the medical malpractice suit were residents under a joint residency program between the university and the county hospital. However, the university was not named as a defendant in the medical malpractice action. Following the settlement of that action, the county brought this action for indemnity against the university. The jury returned a special verdict in favor of the county on two theories: (1) that the university and the county were joint venturers, and (2) that the two entities were joint tortfeasors with fault apportioned equally. Defendant university moved for a new trial on the ground of insufficiency of the evidence to justify the verdict. When its motion was denied, defendant university appealed the judgment.

The court of appeal affirmed the judgment, even though the judge had told the jurors before he discharged them that he disagreed with their conclusion, and if deciding the case, he would have exonerated the university. He added, however, that there was sufficient evidentiary basis for the jury's determination. The court of appeal stated that a motion for a new trial should not be granted for insufficiency of the evidence unless the court is convinced from the entire record that the jury clearly should have rendered a different verdict. Here, the judge did not say that he thought that the jury clearly should have reached a different verdict. The court of appeal concluded that the fact that the judge stated that he would have ruled differently did not indicate an abuse of discretion. Accordingly, it affirmed the judgment (*118 Cal. App. 3d 300, 322-323)* .

[4] Additional Authorities

[a] Evidence Sufficient to Justify Verdict or Decision

Stevens v. Roman Catholic Bishop of Fresno (1975) 49 Cal. App. 3d 877, 123 Cal. Rptr. 171 , was a wrongful death action in which the court of appeal affirmed judgment for plaintiffs finding that the denial of defendant's motion for a new trial on the ground of insufficiency of the evidence was proper. The plaintiffs sued the driver of the car, who was a missionary from France, as well as the Roman Catholic Bishop of Fresno, a corporation, on the basis of an alleged principal-agent relationship. The court of appeal concluded that there was sufficient evidence to support the jury's finding that the missionary was acting within the scope of his agency at the time of the accident and that the trial court's denial of the motion was proper (*49 Cal. App. 3d 877, 889)* .

Windeler v. Scheers Jewelers (1970) 8 Cal. App. 3d 844, 88 Cal. Rptr. 39 , was an action for personal injuries and property loss in which the court of appeal affirmed judgment for plaintiff finding that the denial of defendant's motion for a new trial on several grounds including insufficiency of the evidence was proper. The court stated that it could perceive no abuse of discretion in the trial court's denial of defendant's motion, nor could it conclude that the evidence was insufficient to sustain the verdict. There was substantial evidence as to defendant's negligence, as to plaintiff's physical and mental suffering, and as to the property damage sustained by her (*8 Cal. App. 3d 844, 852-853)* .

Whyatt v. Kukura (1958) 157 Cal. App. 2d 803, 321 P.2d 860 , was a personal injury action in which the court of appeal affirmed judgment for plaintiff, finding that an order denying her motion for a new trial on the ground of insufficiency of the evidence to justify the verdict was proper. Plaintiff felt that the damages awarded at trial were grossly inadequate. The court of appeal examined expert testimony concerning plaintiff's preexisting injuries and concluded that the evidence was sufficient to support the verdict and judgment. The court stated that the evidence was such that the jury might reasonably have believed that plaintiff's physical disabilities were chargeable largely to preexisting causes (*157 Cal. App. 2d 803, 804-805)* .

[b] Denial of Motion When Judge Would Have Ruled Differently If Deciding Case

In *Dominguez v. Pantalone (1989) 212 Cal. App. 3d 201, 260 Cal. Rptr. 431* (discussed in *§ 155.151[3][b]*), the court of appeal rejected appellant's claim that the trial court erroneously denied a motion for new trial on the ground of insufficiency of evidence. The appellate court stated that, even though trial court judge independently weighed the evidence and concluded that the jury clearly should have reached a different result, the judge also impliedly found that there was sufficient credible evidence to support the verdict, and that the jury was reasonable in believing the witnesses it apparently had believed in reaching its verdict. The trial court properly recognized that it could not grant the motion for new trial simply because it would have found differently than the jury (*212 Cal. App. 3d 201, 216)* .

Causey v. Cornelius (1958) 164 Cal. App. 2d 269, 330 P.2d 468 , was a personal injury action in which the court of appeal affirmed judgment for plaintiff and reversed an order granting defendants a new trial on the ground of irregularity in the proceedings of the adverse party [*Code Civ. Proc. § 657(1)*]. The trial court had also denied defendants' motion for a new trial on the ground of insufficiency of the evidence. The court of appeal stated that on this ground the motion was properly denied. The judge should give due respect to the verdict of the jury and may sometimes properly deny a new trial in cases when if submitted to him or her without a jury, the judge might have made a different decision. The judge must clearly be satisfied that the verdict is wrong; otherwise, he or she should let it stand (*164 Cal. App. 2d 269, 284)* .

Although *Causey v. Cornelius (1958) 164 Cal. App. 2d 269, 330 P.2d 468* , was decided prior to the 1965 amendment of *Code Civ. Proc. § 657* [*see* Stats. 1965, ch 1749], it has been cited with approval in *County of Riverside v. Loma Linda University (1981) 118 Cal. App. 3d 300, 322, 173 Cal. Rptr. 371* [*see* [3][c], *above*].

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6. Insufficiency of Evidence to Justify Verdict or Decision

15-155 California Points & Authorities §§ 155.221-155.229

[Reserved]

§§ 155.221[Reserved]

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15-155 California Points & Authorities § 155.230

§ 155.230 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Verdict or Decision Is Against the Law [Code Civ. Proc. § 657(6)]--General Form

[1] FORM

[*Caption. See § 155.50[1].*]

THE MOTION FOR NEW TRIAL SHOULD BE GRANTED BECAUSE THE _____ [VERDICT *or* DECISION] IS AGAINST LAW, AND THE SUBSTANTIAL RIGHTS OF _____ [PLAINTIFF *or* DEFENDANT] WERE MATERIALLY AFFECTED THEREBY.

New Trial on Ground of Verdict or Other Decision Against Law. On application of the party aggrieved, the verdict or decision may be vacated, in whole or in part, and a new trial may be granted, on all or some of the issues, on the ground that the verdict or other decision is against law, if substantial rights of the aggrieved party are materially affected thereby (*Code Civ. Proc. § 657(6)*).

[*Add further points and authorities, if appropriate, relating to particular fact situation to show that verdict or decision is against law (see, e.g., §§ 155.230 -155.234).*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for new trial on the ground that the verdict or decision is against law [*Code Civ. Proc. § 657(6)*]. It is a general form that should be used in conjunction with more specific points and authorities [*see, e.g., § 155.231* et seq.].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should include a discussion of the verdict or decision, showing how it is against law and how it materially affected the moving party's substantial rights.

In a general sense, a verdict or decision is against law if there is any ground whatsoever for granting a new trial. However, the application of this ground has been limited to those factual situations that are not covered by the other subdivisions of *Code Civ. Proc. § 657*. Furthermore, although the grounds of insufficiency of the evidence and verdict or decision against law are contained in the same subdivision of *Code Civ. Proc. § 657*, they are entirely distinct grounds for a new trial motion. They are stated in the disjunctive and are alternatives [*see Renfer v. Skaggs (1950) 96 Cal. App. 2d 380, 382-383, 215 P.2d 487* (difference between decision against law and insufficiency of evidence to justify decision); *see also Kaiser Cement & Gypsum Corp. v. Allis-Chalmers Mfg. Co. (1973) 35 Cal. App. 3d 948, 958, 111 Cal. Rptr. 210* (difference between verdict against law and insufficiency of evidence to justify verdict)].

[c] Related Pleading and Practice Forms

For a form of notice of intention to move for a new trial on the ground of verdict or decision against law [Code Civ. Proc. § 657(6)] and other related forms, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[d] Opposing Points and Authorities

The points and authorities set out in *§ 155.240* et seq. may be used in an appropriate case to oppose a motion for a new trial supported by this memorandum.

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15-155 California Points & Authorities § 155.231

§ 155.231 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Verdict or Decision Is Against the Law [Code Civ. Proc. § 657(6)]--General Verdict Unsupported by Substantial Evidence

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities in support of a motion for new trial on the grounds of verdict or decision against law (see § 155.230).*]

THE MOTION FOR NEW TRIAL SHOULD BE GRANTED BECAUSE THE VERDICT IS AGAINST LAW IN THAT IT IS UNSUPPORTED BY ANY SUBSTANTIAL EVIDENCE AND THE ENTIRE EVIDENCE WOULD JUSTIFY A DIRECTED VERDICT IN FAVOR OF _____ [PLAINTIFF *or* DEFENDANT].

General Verdict Unsupported by Any Substantial Evidence. When a general verdict is returned, it is against law when it is unsupported by any substantial evidence, that is, when the entire evidence would justify a directed verdict against the party in whose favor the verdict is returned (*see Kralyevich v. Magrini (1959) 172 Cal. App. 2d 784, 789, 342 P.2d 903*).

[*Add further points and authorities, if appropriate, discussing the substantive law pertaining to the particular cause of action or defense.*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for new trial on the ground that the verdict is against law [*Code Civ. Proc. § 657(6)*] because it is unsupported by substantial evidence. It does not provide a complete memorandum, but is designed to be combined with a general form of points and authorities in support of a motion for new trial on the grounds that the verdict or decision is against law [*see § 155.230*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should show that the verdict is against law because it is unsupported by any substantial evidence and that the evidence justifies a directed verdict in favor of the moving party. Counsel should add further points and authorities that set forth the substantive law pertaining to the particular cause of action or defense. For example, in a personal injury action in which plaintiff moves for a new trial on the ground that the verdict for defendant is against law, plaintiff should discuss the substantive law of negligence to show that the verdict is without any substantial evidentiary support [*see Kralyevich v. Magrini (1959) 172 Cal. App. 2d 784, 789, 342 P.2d 903]* . To aid in preparing these substantive points and authorities, counsel may consult the substantive chapters contained in this publication and in California Forms of Pleading and Practice (Matthew Bender).

[c] Related Pleading and Practice Forms

For a form of notice of intention to move for a new trial on the ground of verdict or decision against law [Code Civ. Proc. § 657(6)] and other related forms, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[d] Opposing Points and Authorities

The points and authorities set out in *§ 155.240* may be used in an appropriate case to oppose a motion for a new trial supported by this memorandum.

[3] Discussion of Authorities

[a] General Verdict Unsupported by Any Substantial Evidence

In ***Kralyevich v. Magrini*** *(1959) 172 Cal. App. 2d 784, 342 P.2d 903* , plaintiff brought an action for personal injuries against defendant. After the jury returned a verdict for plaintiff in the amount of $2,500, plaintiff moved for a new trial on the grounds of insufficiency of the evidence and verdict against law. The court granted the motion, stating that a new trial was granted on the question of damages. More than 10 days after the granting of the motion, and after defendant's notice of appeal had been filed, the court attempted to amend nunc pro tunc the previous order granting a new trial. The nunc pro tunc order was made on the ground of clerical error; it recited that the new trial was granted on the grounds of insufficiency of the evidence and that the verdict was against law.

The court of appeal held that the nunc pro tunc order was void and of no effect, and it considered the first order that did not specify grounds but stated that the new trial was granted as to the question of damages. The court noted that the notice of motion set forth the grounds of insufficiency of the evidence and verdict against law. It stated that when a general verdict is returned, it can be said to be against law only when it is unsupported by any substantial evidence, that is, when the entire evidence is such as would justify a directed verdict against the party in whose favor the verdict is returned. However, it explained that the words "against law" do not import a situation in which the court weighs conflicting evidence and merely finds a balance against the judgment. In this case, the court's order granting a new trial on damages only carried the inescapable inference that there was sufficient evidence to support the verdict, but that the amount of damages awarded was either too large or too small. The court concluded that this inference was irreconcilable with the ground of verdict against law since a verdict must be without any substantial evidentiary support (*172 Cal. App. 2d 784, 789)* . After reviewing the evidence on the issues of liability and damages, the court held that the issue of liability was never properly determined. Thus, it reversed the order granting a new trial on the issue of damages only. It remanded the cause to the trial court with directions to vacate the judgment and order a new trial on all issues (*172 Cal. App. 2d 784, 793)* .

[4] Additional Authorities

[a] General Verdict Unsupported by Any Substantial Evidence

Bray v. Rosen (1959) 167 Cal. App. 2d 680, 335 P.2d 137 , was an action for personal injuries in which the court of appeal reversed an order granting plaintiff a new trial. The court noted, however, that a verdict is against law when the evidence is insufficient in law and without conflict on any material point (*167 Cal. App. 2d 680, 683)* . In this case, the court found that there was conflicting evidence regarding the amount of damage sustained. Accordingly, it could not say that the verdict and judgment were against law (*167 Cal. App. 2d 680, 684)* .

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15-155 California Points & Authorities § 155.232

§ 155.232 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Verdict or Decision Is Against the Law [Code Civ. Proc. § 657(6)]--Verdict Contrary to Correct Jury Instructions

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities in support of a motion for new trial on the ground of verdict or decision against law (see § 155.230).*]

THE MOTION FOR NEW TRIAL SHOULD BE GRANTED BECAUSE THE JURY'S VERDICT IS CONTRARY TO CORRECT JURY INSTRUCTIONS.

Verdict Contrary to Correct Jury Instructions. A new trial may be granted on the ground of verdict against law if the verdict is contrary to correct jury instructions (*see Manufacturers' F. Corp. v. Pacific W. Radio (1933) 130 Cal. App. 239, 243, 19 P.2d 1013*).

[*Add further points and authorities, if appropriate, discussing the substantive law pertaining to the particular cause of action or defense.*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for new trial on the ground that the verdict is against law [*Code Civ. Proc. § 657(6)*] because it is contrary to correct jury instructions. It does not provide a complete memorandum, but is designed to be combined with a general form of points and authorities in support of a motion for new trial on the grounds that the verdict or decision is against law [*see § 155.230*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should show that the jury instructions are correct and that the jury's verdict is contrary to these instructions. If, however, the jury instructions are incorrect and the verdict is in disregard of them, a new trial is improper [*see Rystrom v. Sutter Butte Canal Co. (1925) 72 Cal. App. 518, 523-524, 249 P. 53]* .

Counsel may also include a discussion of the substantive law pertaining to the particular cause of action or defense in order to show that the jury instructions are a correct statement of law [*see Rystrom v. Sutter Butte Canal Co. (1925) 72 Cal. App. 518, 521, 249 P. 53]* . To aid in preparing these substantive points and authorities, counsel may consult the substantive chapters contained in this publication and in California Forms of Pleading and Practice (Matthew Bender).

[c] Related Pleading and Practice Forms

For a form of notice of intention to move for a new trial on the ground of verdict or decision against law [Code Civ. Proc. § 657(6)] and other related forms, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[d] Opposing Memoranda

The points and authorities set out in *§ 155.240* may be used in an appropriate case to oppose a motion for a new trial supported by this memorandum.

[3] Discussion of Authorities

[a] Verdict Contrary to Correct Jury Instructions

In ***Manufacturers' F. Corp. v. Pacific W. Radio*** *(1933) 130 Cal. App. 239, 19 P.2d 1013* , plaintiff transferee filed two actions against defendant, one based on trade acceptances, and the other on an unpaid balance due on an open book account. Defendant counterclaimed against plaintiff's transferor, Fried-Eisemann Radio Corp. The jury returned a verdict in the first action in favor of plaintiff; in the second action, it returned a verdict for defendant in the amount of the unpaid balance on the open book account. Both plaintiff and defendant moved for new trials. Both motions were granted. Plaintiff appealed from the order entered in the first action; defendant appealed from the order entered in the second.

The court of appeal affirmed plaintiff's order on the ground that there was an error of law and affirmed defendant's order on the ground that the verdict was against law. The court stated that defendant's demands against the transferor could not be made the basis for an affirmative liability on the part of plaintiff, and the verdict in that respect was contrary to the instructions of the court. Consequently, the court concluded that it was a verdict against law and might be set aside on a motion for a new trial (*130 Cal. App. 239, 243)* .

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15-155 California Points & Authorities § 155.233

§ 155.233 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Verdict or Decision Is Against the Law [Code Civ. Proc. § 657(6)]--Inconsistent Verdict

[1] FORM

[*The following should be combined with a general form of memorandum in support of a motion for new trial on the ground of verdict or decision against law (see § 155.230).*]

THE MOTION FOR NEW TRIAL SHOULD BE GRANTED BECAUSE THE VERDICT IS AGAINST LAW IN THAT THE JURY HAS RENDERED VERDICTS THAT ARE BASED ON THE SAME SET OF FACTS, BUT THAT ARE FATALLY INCONSISTENT.

A. Inconsistent Verdicts. Verdicts are against law if the jury renders verdicts that are based on the same set of facts but that are fatally inconsistent, and a new trial may be granted (*Oxford v. Foster Wheeler LLC (2009) 177 Cal. App. 4th 700, 716, 99 Cal. Rptr. 3d 418* ; *Cavallaro v. Michelin Tire Corp. (1979) 96 Cal. App. 3d 95, 101, 157 Cal. Rptr. 602* ; *Morris v. McCauley's Quality Transmission Service (1976) 60 Cal. App. 3d 964, 970-972, 132 Cal. Rptr. 37*).

[*Optional*] **B. No Waiver of Defective Verdict.** If the verdicts are held fatally inconsistent, the defect is not waived by the aggrieved party's failure to call it to the attention of the trial court prior to discharging the jury (*Morris v. McCauley's Quality Transmission Service (1976) 60 Cal. App. 3d 964, 972, 132 Cal. Rptr. 37*).

[*Optional*] **C. Inconsistent Damage Awards.** A new trial may be granted on the basis of inconsistent verdicts if the jury renders an award of punitive damages without awarding compensatory damages (*Haydel v. Morton (1935) 8 Cal. App. 2d 730, 736, 48 P.2d 709*).

[*Add further memoranda, if appropriate, discussing the substantive law pertaining to particular cause of action or defense.*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for new trial on the ground that the verdict is against law [*Code Civ. Proc. § 657(6)*] because the jury has rendered inconsistent verdicts. It does not provide a complete memorandum, but is designed to be combined with a general form of points and authorities in support of a motion for new trial on the ground that the verdict or decision is against law [*see § 155.230*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should show that the verdicts are inconsistent and are therefore against law. It may be necessary for counsel to include further points and authorities that discuss the substantive law pertaining to the particular cause of action or defense in order to show how the verdicts are inconsistent. For example, in a personal injury action against three defendants, the wholesaler, retailer, and manufacturer of a product, in which the jury exonerates the manufacturer and retailer, but finds the wholesaler liable, counsel for wholesaler may find it necessary to discuss the substantive law of products liability to show that the verdicts rendered are inconsistent [*see Cavallaro v. Michelin Tire Corp. (1979) 96 Cal. App. 3d 95, 101-103, 157 Cal. Rptr. 602]* . To aid in preparing these substantive points and authorities, counsel may consult the substantive chapters contained in this publication and in California Forms of Pleading and Practice (Matthew Bender).

[c] Related Pleading and Practice Forms

For a form of notice of intention to move for a new trial on the ground of verdict or decision against law [Code Civ. Proc. § 657(6)] and other related forms, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[d] Opposing Memoranda

The memorandum set out in *§ 155.240* may be used in an appropriate case to oppose a motion for a new trial supported by this memorandum.

[3] Discussion of Authorities

[a] Inconsistent Verdicts

In ***Oxford v. Foster Wheeler LLC*** *(2009) 177 Cal. App. 4th 700, 716, 99 Cal. Rptr. 3d 418* , an asbestos case, the jury used a special verdict form and found against the plaintiffs on their products liability claims for design defect and failure to warn, but found in favor of the plaintiffs on their negligence claim. The trial court held the verdicts were not inconsistent, reasoning that the jury could have found the defendant negligent in ways other than failing to warn or design defect.

On appeal, the court held that the verdicts were inconsistent, that a finding of negligent failure to warn is logically and legally inconsistent with the jury's finding on the plaintiffs' strict products liability failure to warn (*177 Cal. App. 4th 700, 720)* . The court held that inconsistent verdicts are against the law and the proper remedy is a new trial under *Code Civ. Proc. § 657(6)*. The court held that there was an irreconcilable inconsistency in the verdicts as to the defendant's liability, and therefore none of these verdicts may stand (*177 Cal. App. 4th 700, 721-722)* .

In ***Cavallaro v. Michelin Tire Corp.*** *(1979) 96 Cal. App. 3d 95, 157 Cal. Rptr. 602* , plaintiffs brought an action for wrongful death and personal injuries against an automobile manufacturer, the wholesaler of a tire, and the retailer of the tire. The jury returned verdicts exonerating the automobile manufacturer, but finding the wholesaler of the tire liable. No verdict was returned determining that the retailer had any liability. Defendant wholesaler moved for a new trial on several grounds, including the ground that the verdict was against law. Defendant claimed that the verdicts were

inconsistent since the liability of the wholesaler and retailer had to be identical because both were tire suppliers to the car. The court denied the motion, and defendant wholesaler appealed the judgment. Plaintiffs cross appealed.

The court of appeal reversed the judgment, concluding that the verdicts were fatally inconsistent and defendant wholesaler's motion for new trial should have been granted (*96 Cal. App. 3d 95, 99, 110)* . The court stated that inconsistent verdicts are against law and explained that the inconsistent verdict rule is based on the fundamental proposition that a factfinder may not make inconsistent determinations of fact based on the same evidence. In this case, it appeared that the jury's verdict exonerating the retailer was based on a determination that the tire in question was not defectively manufactured; whereas, the verdict against the wholesaler was based on a determination that the tire was defectively manufactured (*96 Cal. App. 3d 95, 101-103)* . After examining other issues raised on appeal, the court reversed the judgment (*96 Cal. App. 3d 95, 103-110)* .

In ***Morris v. McCauley's Quality Transmission Service*** *(1976) 60 Cal. App. 3d 964, 132 Cal. Rptr. 37* , a child brought an action, through her guardian ad litem, for personal injuries. The jury rendered verdicts for the guardian, but against the child. The trial court granted a new trial to the child on the ground that the verdicts were inconsistent and entered judgment for the guardian. Defendant appealed the order granting a new trial and the judgment for the guardian. The child appealed the portion of the order granting a new trial that failed to limit the new trial to the issue of damages, and also from an order granting certain costs to defendant.

The court of appeal affirmed the order for new trial, reversed the judgment for the guardian, and dismissed the child's appeal with regard to costs. The court agreed that the two verdicts were inconsistent. The verdict in favor of the guardian for the approximate amount of medical expenses incurred on behalf of the child necessarily implied that defendant was negligent, that the guardian was not negligent, and that the medical expenses were proximately caused and reasonably required by defendant's negligence. The verdict in favor of defendant against the child necessarily implied that defendant was not negligent, or that the child failed to establish any substantial damages proximately caused by defendant's negligence or both. The court explained that this inconsistency based on the same set of facts cannot be permitted to stand. It concluded that the verdicts were against law and therefore constituted proper grounds for a new trial (*60 Cal. App. 3d 964, 970)* .

[b] No Waiver of Defective Verdict

The factual and procedural background of ***Morris v. McCauley's Quality Transmission Service*** *(1976) 60 Cal. App. 3d 964, 132 Cal. Rptr. 37* , is discussed in [a], *above*. Defendant contended that plaintiffs waived the right to complain about the inconsistent verdicts when they opposed the resubmission of the case to the jury before the jury was discharged so that corrective action could be taken. Defendant relied on *Code Civ. Proc. § 619*, which gives the court power to require the jury to deliberate further when an informal or insufficient verdict has been returned, and on *Brown v. Regan (1938) 10 Cal. 2d 519, 75 P.2d 1063* , which held that a party waives the error if that party fails to request the correction of the verdict when it is rendered.

The court of appeal held that the issue was not waived by plaintiffs. It stated that the waiver rule set out in *Brown* is not automatic and that there are many exceptions to it. Other cases, it explained, have held that if the verdicts are fatally inconsistent, the defect is not waived by a failure to call it to the attention of the trial court prior to discharging the jury. Although in this case, plaintiffs' counsel actively opposed sending the case back, rather than merely failing to draw attention to the problem, defendant's counsel was also opposed to resubmitting the matter. Accordingly, the court held that the issue was not waived (*60 Cal. App. 3d 964, 972)* .

[c] Inconsistent Damage Awards

Haydel v. Morton *(1935) 8 Cal. App. 2d 730, 48 P.2d 709* , plaintiff brought an action based on three counts. The first count was based on alleged malicious prosecution. The second and third counts were based on alleged slander. The jury

returned three verdicts in favor of plaintiff. On the second and third counts, the jury assessed compensatory damages of zero and punitive damages of $10,000. Defendant's motion for a new trial was granted on the second and third counts because of the invalidity of the verdicts.

The court of appeal affirmed the order granting a new trial on the second and third counts. The court stated that the jury did not inadvertently omit to assess compensatory damages, but expressly found and determined that plaintiff had not suffered any actual damage. The court said that when a jury expressly finds that plaintiff has not suffered any damages, an award of punitive damages without a verdict for compensatory damages cannot be upheld. Therefore, the court affirmed the order granting a new trial (*8 Cal. App. 2d 730, 736-737)* .

[4] Additional Authorities

[a] Inconsistent Verdicts

In *Manor Investment Co. v. F. W. Woolworth, Inc. (1984) 159 Cal. App. 3d 586, 206 Cal. Rptr. 37* , the court of appeal modified the trial court's determination, holding that a new trial was required on both inconsistent verdicts rendered by a jury. The plaintiff had alleged a cause of action against one defendant for wrongful interference with a contract and another cause of action against all defendants for conspiracy to wrongfully interfere with the same contract. The jury found that the first defendant was not liable for wrongful interference, but that all defendants were liable for conspiracy to wrongfully interfere. The trial court granted a new trial on only the conspiracy cause of action on the ground of excessive damages. The court of appeal, however, concluded that the verdicts were inconsistent and set aside both verdicts, because both were equally against the law (*159 Cal. App. 3d 586, 596-597)* .

Campbell v. Zokelt (1969) 272 Cal. App. 2d 315, 77 Cal. Rptr. 561 , was an action in which plaintiff passenger sued the driver of her car and the driver of another car. Defendants also cross complained against each other for damages. The jury returned verdicts that found defendant driver of the other car negligent as to the plaintiff passenger, but not negligent as to the driver of plaintiff's car. The court of appeal affirmed the order granting plaintiff passenger and defendant driver of plaintiff's car a new trial. The court concluded that the verdicts were clearly inconsistent and could not stand, stating that a decision is against law when the findings are irreconcilable (*272 Cal. App. 2d 315, 318-320)* .

[b] No Waiver of Defective Verdict

The factual and procedural background of *Campbell v. Zokelt (1969) 272 Cal. App. 2d 315, 77 Cal. Rptr. 561* , is discussed in [a], *above*. The court of appeal affirmed an order granting plaintiff a new trial on the basis of inconsistent verdicts. The court also held that plaintiff passenger and defendant driver of plaintiff's car did not waive their right to complain of the inconsistent verdicts when they failed to object to the form of the verdict before the discharging of the jury. The court concluded that *Code Civ. Proc. § 619* provided that only informal or insufficient verdicts need be called to the attention of the court, and inconsistent verdicts were not covered by the statute (*272 Cal. App. 2d 315, 320)* .

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15-155 California Points & Authorities § 155.234

§ 155.234 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Verdict or Decision Is Against the Law [Code Civ. Proc. § 657(6)]--Decision Against Law

[1] FORM

[*The following should be combined with a general form of memorandum in support of a motion for new trial on the ground of verdict or decision against law (see § 155.230).*]

THE MOTION FOR NEW TRIAL SHOULD BE GRANTED BECAUSE THE DECISION IS AGAINST LAW IN THAT _____ [THE COURT FAILED TO FIND ON A MATERIAL ISSUE *or* THE STATEMENT OF DECISION IS IRRECONCILABLE *or* THE EVIDENCE IS INSUFFICIENT IN LAW AND WITHOUT CONFLICT ON ANY MATERIAL POINT].

A. Decision Against Law. A decision is against law only (1) when there is a failure to find on a material issue; (2) when the findings are irreconcilable; or (3) when the evidence is insufficient in law and without conflict on any material point (*see Kralyevich v. Magrini (1959) 172 Cal. App. 2d 784, 789, 342 P.2d 903* ; *see also Renfer v. Skaggs (1950) 96 Cal. App. 2d 380, 383, 215 P.2d 487*).

[*Optional*] **B. Failure to Resolve Specified Controverted Issue.** The court's failure to resolve a specified controverted issue in its statement of decision may be a basis for granting a new trial on the ground of decision against law if that failure materially affects the substantial rights of the aggrieved party (*see Code Civ. Proc. §§ 632, 634, 657*; *see also Renfer v. Skaggs (1950) 96 Cal. App. 2d 380, 383, 215 P.2d 487*).

[*Optional*] **C. Inconsistent, Ambiguous, and Uncertain Statement of Decision.** If the statement of decision is so inconsistent, ambiguous, and uncertain that it is incapable of being reconciled and it is impossible to tell how a specified controverted issue is determined, the decision may be against law and a new trial may be granted if the substantial rights of the aggrieved party are materially affected (*see Code Civ. Proc. §§ 632, 634, 657*; *see also Renfer v. Skaggs (1950) 96 Cal. App. 2d 380, 383, 215 P.2d 487*).

[*Optional*] **D. Evidence Insufficient as Matter of Law and Without Conflict on Any Material Point.** A decision may be against law if the evidence in the case is insufficient as a matter of law and without conflict on any material point (*In re Marriage of Beilock (1978) 81 Cal. App. 3d 713, 728, 146 Cal. Rptr. 675*).

[*Optional*] **E. Moving Party May Raise New Legal Theory.** *Section 657(6) of the Code of Civil Procedure* empowers a trial court to consider new legal challenges not previously raised before the verdict or judgment when the court is ruling on a motion for new trial (*Hoffman-Haag v. Transamerica Ins. Co. (1991) 1 Cal. App. 4th 10, 15-16, 1 Cal. Rptr. 2d 805*).

[*Add further memoranda, if appropriate, discussing the substantive law pertaining to the particular cause of action or defense*.]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for new trial on the ground that the decision is against the law [*Code Civ. Proc. § 657(6)*]. It does not provide a complete memorandum, but is designed to be combined with a general form in support of a motion for new trial on the ground that the verdict or decision is against law [*see § 155.230*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, depending on the facts of the case, counsel should include a discussion of either the nature of the court's failure to find on a material issue, the manner in which the statement of decision is irreconcilable, or the reasons that the evidence is insufficient in law and without conflict on any material point. It may be necessary for counsel to add further points and authorities that discuss the substantive law pertaining to the particular cause of action or defense. For example, in a case involving a marital settlement agreement in which a former wife moves for a new trial on the ground that her former husband's order quashing a writ is against law, counsel for the wife should discuss certain substantive principles of family law to establish that the order is against law and that the evidence is without conflict on any material point [*see In re Marriage of Beilock (1978) 81 Cal. App. 3d 713, 728, 146 Cal. Rptr. 675]* . To aid in preparing these substantive points and authorities, counsel may consult the substantive chapters contained in this publication and in California Forms of Pleading and Practice (Matthew Bender).

[c] Related Pleading and Practice Forms

For a form of notice of intention to move for a new trial on the ground of verdict or decision against law [Code Civ. Proc. § 657(6)] and other related forms, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[d] Opposing Memoranda

The memorandum set out in *§ 155.241* may be used in an appropriate case to oppose a motion for a new trial supported by this memorandum.

[3] Discussion of Authorities

[a] Decision Against Law

The factual and procedural background of ***Kralyevich v. Magrini*** *(1959) 172 Cal. App. 2d 784, 342 P.2d 903* , is discussed in *§ 155.231[3][a]*. The court of appeal reversed an order granting a new trial as to damages and remanded the cause to the trial court with instructions to vacate the judgment and order a new trial on all issues. The court noted that the plaintiff's motion for a new trial was based on insufficiency of the evidence and verdict against law. It stated that the latter ground is of very limited application, and that a decision can be said to be against law only: (1) when there is a failure to find on a material issue; (2) when the findings are irreconcilable; and (3) when the evidence is insufficient in law and without conflict on any material point (*172 Cal. App. 2d 784, 789)* . Although the court determined that the order granting the motion was not based on a verdict or decision against law, it concluded that the issue of liability in the case was never properly determined. Therefore, it reversed the order granting a new trial on the issue of damages only and concluded that a new trial on all issues was necessary (*172 Cal. App. 2d 784, 790-793)* .

In ***Renfer v. Skaggs*** *(1950) 96 Cal. App. 2d 380, 215 P.2d 487* , plaintiffs brought an action for recovery of money paid on the purchase price of property on the theory of inducement through false and fraudulent representations. Defendant filed a cross complaint for the recovery of the balance of the purchase price. The trial court found generally in accord with the allegations of the complaint and against the allegations of the cross complaint and rendered judgment for plaintiffs. Defendant's motion for a new trial was granted, and plaintiffs appealed the order. On appeal, defendant asserted that the order was based on the ground that the decision was against law.

Even though the court of appeal reversed the order, it stated that the phrase "against law" refers to a situation furnishing a reason for a reexamination of an issue of fact. If the court fails to find on material issues made by the pleadings--issues as to which a finding would have the effect to countervail or destroy the effect of the other findings--and as to which evidence was introduced, the decision is against law. If the findings are so inconsistent, ambiguous and uncertain that they are incapable of being reconciled and it is impossible to tell how a material issue is determined, the decision is against law. A decision is also against law if the evidence is insufficient in law and without conflict in any material point (*96 Cal. App. 2d 380, 383)* . In this case, the court concluded that the court did not fail to find on any issue of fact. The findings were consistent, unambiguous, and certain. Furthermore, the evidence was sufficient to support the findings. Therefore, the court held that the decision was not against law. Accordingly, it reversed the order (*96 Cal. App. 2d 380, 385-386)* .

In 1981, the Legislature amended *Code Civ. Proc. § 632*, eliminating findings of fact and conclusions of law and replacing them with a procedure for issuing a statement of decision. Cases such as this one, decided under the prior law, should be used with care.

[b] Failure to Resolve Specified Controverted Issue

The factual and procedural background of ***Renfer v. Skaggs*** *(1950) 96 Cal. App. 2d 380, 215 P.2d 487* , is discussed in [a], *above*. Even though the court of appeal reversed an order granting defendant a new trial, it stated that the phrase "against law" referred to a situation furnishing a reason for a reexamination of an issue of fact. If the court fails to find on material issues made by the pleadings--issues as to which a finding would have the effect to countervail or destroy the effect of other findings--and as to which evidence was introduced, the decision is against law. In such a case, the court said, a reexamination of the facts is necessary in order that the issues of fact may be determined (*96 Cal. App. 2d 380, 383)* .

In 1981, the Legislature amended *Code Civ. Proc. § 632*, eliminating findings of fact and conclusions of law and replacing them with a procedure for issuing a statement of decision. Now, a party must specify those controverted issues as to which that party is requesting the statement of decision [*see Code Civ. Proc. § 632*]. Even though this is so, it appears that the court may still fail to resolve a specified controverted issue in its statement of decision [*see Code Civ. Proc. §§ 632, 634*]. However, the court's mere failure to resolve a specified controverted issue does not seem to be grounds for the granting of a new trial unless that failure materially affects the substantial rights of the moving party [*see Code Civ. Proc. § 657*]. This may mean that the failure must involve an issue which, if determined, would

countervail or destroy the effect of the other determined issues [*see Renfer v. Skaggs (1950) 96 Cal. App. 2d 380, 383, 215 P.2d 487]* . In any event, cases such as this one, decided under the prior law, should be used with care.

[c] Inconsistent, Ambiguous, and Uncertain Statement of Decision

The factual and procedural background of ***Renfer v. Skaggs*** *(1950) 96 Cal. App. 2d 380, 215 P.2d 487* , is discussed in [a] and [b], *above*. Even though the court of appeal reversed an order granting defendant a new trial, it stated that if the findings are so inconsistent, ambiguous, and uncertain that they are incapable of being reconciled and it is impossible to tell how a material issue is determined, the decision is against law (*96 Cal. App. 2d 380, 383)* . In this case, the court concluded that the findings were consistent, unambiguous, and certain and, after examining the findings more closely, the court held that the decision was not against law (*96 Cal. App. 2d 380, 385-386)* .

In 1981, the Legislature amended *Code Civ. Proc. § 632*, replacing findings of fact and conclusions of law with statements of decision. However, it appears that the resulting statement of decision may be inconsistent, ambiguous, and uncertain, even though a party may file proposals as to the contents of the statement, and the other party may object to these proposed contents [*see Code Civ. Proc. § 634*; *Cal. Rules of Ct., Rule 3.1590(e), (f), (i)*]. However, the inconsistent, ambiguous, or uncertain statement of decision will probably not afford a ground for the granting of a new trial unless the substantial rights of the aggrieved party are materially affected [*see Code Civ. Proc. § 657*]. In any event, cases such as this one, decided under the prior law, should be used with care.

[d] Evidence Insufficient as Matter of Law and Without Conflict on Any Material Point

In re Marriage of Beilock *(1978) 81 Cal. App. 3d 713, 146 Cal. Rptr. 675* , was an action in which a former wife obtained a writ of execution and levy on her former husband's property for arrearages of child and spousal support payments. Her former husband then obtained an order quashing the writ, claiming that he had no obligation to pay support payments since his wife was living with another man and holding herself out to be his wife [*see* former Civ. Code § 4801.5 (replaced by *Fam. Code § 4323*)], and that although the marital settlement agreement provided for the support of a child until she reached 21, his daughter had become emancipated at age 17. The former wife then moved for a new trial on the grounds of insufficiency of the evidence and decision against law. The motion was granted, and the husband appealed the order.

The court of appeal affirmed the order on the ground that the decision was against law. The court stated that a decision is against the law if the evidence is insufficient in law and without conflict on any material point (*81 Cal. App. 3d 713, 728)* . In this case, the court noted that the husband's arrearages preceded the effective date of Civ. Code § 4801.5, providing for the termination of spousal support payments if a spouse is living with a person of the opposite sex and holding himself or herself as the spouse of the other person. Therefore, even if Civ. Code § 4801.5 could be applied, it could only justify termination of payments for two of the six years that the payments were due under the terms of the agreement (*81 Cal. App. 3d 713, 729-730*). Secondly, the court held that a child's emancipation did not automatically terminate the parent's obligation of support (*81 Cal. App. 3d 713, 730)* . Finally, the court of appeal concluded that the trial judge may have decided to exercise his or her discretion to quash the writ on the basis of equitable considerations, but later decided to change his or her mind on the matter. Although the court of appeal could not say categorically that the original choice was against the law, it declined to disturb the order granting a new trial since there was no showing that there was an abuse of discretion in the choice of the trial judge to change his or her mind. In other words, the court stated, the judge was within the bounds of permissible action to conclude that the original decision he or she had made was against the law (*81 Cal. App. 3d 713, 732-733)* . Accordingly, the court affirmed the order granting a new trial (*81 Cal. App. 3d 713, 733)* .

[e] Moving Party May Raise New Legal Theory

In ***Hoffman-Haag v. Transamerica Ins. Co.*** *(1991) 1 Cal. App. 4th 10, 1 Cal. Rptr. 2d 805* , parents of a child brought

an action against an owner of a day care home after the child died from injuries suffered when she fell down a set of stairs while at the day care facility. The day care owner's homeowner insurance carrier denied coverage of the parents' claim. The issue of coverage was tried by the trial court without a jury and the court entered judgment against the insurer. The insurer filed a motion for new trial. In its motion, the insurer relied for the first time on *Insur. Code § 676.1(c)* (it is against public policy for a residential property insurance policy to provide liability coverage for losses arising out of operation of a family day care home). The trial court vacated its earlier judgment and the parents appealed.

The court of appeal affirmed the trial court's order. On appeal, the parents contended that the insurer's tardy reliance on the Insurance Code section did not permit the trial court to grant a new trial or vacate its prior judgment, and, citing *Slemons v. Paterson (1939) 14 Cal. 2d 612, 615, 96 P.2d 125* , that a mistake of law will not support an order granting a new trial or an order vacating a judgment. The *Hoffman-Haag* court distinguished *Slemons*, recognizing that *Slemons* correctly held that, on a motion for new trial based on newly discovered evidence (*see Code Civ. Proc. § 657(4)*), mistake of law claimed to have been the cause for having failed to see earlier the relevance of the evidence is inadequate to support the motion. That restriction, however, the court concluded, does not apply to all the grounds on which a new trial may be made or a judgment vacated (*1 Cal. App. 4th 10, 14)* . Contrary to the parents' argument, legal challenges that may brought by way of *Code Civ. Proc. § 657(6)* and *Code Civ. Proc. § 663(1)* (motion to vacate), based on the ground that the decision is "against the law" are not limited to those raised before verdict or judgment (*1 Cal. App. 4th 10, 15)* . The court noted that on appeal a party may change the legal theory he or she relied on at trial, so long as the new theory presents a question of law to be applied to undisputed facts in the record. The court held that in ruling on a new trial motion, Sections 657 and 663 give a trial court no less power to consider new legal theories. Since the insurer could have argued on appeal that the Insurance Code, as applied to stipulated facts, barred coverage; there was no sound reason that prevented the insurer from making the same argument in its motion for new trial (*1 Cal. App. 4th 10, 16)* .

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[Reserved]

§§ 155.235[Reserved]

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15-155 California Points & Authorities § 155.240

§ 155.240 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Verdict or Decision Is Against the Law [Code Civ. Proc. § 657(6)]--Evidence Is Not Without Conflict on All Material Points

[1] FORM

[*Caption. See § 155.60[1].*]

THE MOTION FOR NEW TRIAL SHOULD NOT BE GRANTED BECAUSE THE _____ [VERDICT *or* DECISION] IS NOT AGAINST LAW IN THAT THE EVIDENCE IS NOT WITHOUT CONFLICT ON ALL MATERIAL POINTS.

A. Evidence Must Be Without Conflict on All Material Points. A jury's verdict is against law only if it is unsupported by any substantial evidence; that is, if the entire evidence was such as would justify a directed verdict against the parties in whose favor the verdict is returned. To put it another way, a verdict or decision can be said to be against law only if the evidence is insufficient in law and without conflict on any material point (*Sanchez-Corea v. Bank of America (1985) 38 Cal. 3d 892, 906, 215 Cal. Rptr. 679, 701 P.2d 826* ; *McCown v. Spencer (1970) 8 Cal. App. 3d 216, 229, 87 Cal. Rptr. 213*).

[*Optional*] **B. "Against Law" Does Not Allow Weighing of Evidence.** The words "against law" in *Section 657(6) of the Code of Civil Procedure* do not import a situation in which the court weighs the evidence and merely finds a balance against the verdict (*Sanchez-Corea v. Bank of America (1985) 38 Cal. 3d 892, 906, 215 Cal. Rptr. 679, 701 P.2d 826* ; *McCown v. Spencer (1970) 8 Cal. App. 3d 216, 229, 87 Cal. Rptr. 213*).

[*Add further points and authorities, if appropriate, discussing the substantive law pertaining to the particular cause of action or defense.*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for new trial on the ground that the verdict or decision is against law [*Code Civ. Proc. § 657(6)*] when the evidence is not without conflict on all material points. In an appropriate case, the points and authorities set out in this form may be submitted in opposition to a motion for new trial supported by the points and authorities set out in *§§ 155.230, 155.231,* and *155.234*.

Optional Paragraph B is for use in opposing the erroneous contention that a verdict is against law based on a weighing of the evidence. The argument may be used when, of course, the party supporting the motion for new trial would not otherwise prevail on the *Code Civ. Proc. § 657(6)* ground of insufficiency of the evidence [*see, e.g., Musgrove v. Ambrose Properties (1978) 87 Cal. App. 3d 44, 56, 150 Cal. Rptr. 722* (order granting new trial not sustainable under either grounds of sufficiency of evidence or verdict against law)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should include a discussion of the evidence in the case in order to show that there may be a conflict on a material point. Counsel should add additional points and authorities that discuss the substantive law pertaining to the particular cause of action or defense. For example, in a wrongful death action in which plaintiff moves for a new trial on the ground that the verdict for defendant is against law, defense counsel may find it necessary to discuss the substantive law of negligence in order to argue that there are conflicts in the evidence regarding whether or not defendant is negligent as a matter of law [*see Hilts v. County of Solano (1968) 265 Cal. App. 2d 161, 177-178, 71 Cal. Rptr. 275]* . To aid in preparing these substantive points and authorities, counsel may consult the substantive chapters contained in this publication and in California Forms of Pleading and Practice (Matthew Bender).

[c] Related Pleading and Practice Forms

For a notice of intention to move for a new trial as well as an order denying the motion, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[3] Discussion of Authorities

[a] Evidence Must Be Without Conflict on All Material Points

Sanchez-Corea v. Bank of America *(1985) 38 Cal. 3d 892, 215 Cal. Rptr. 679, 701 P.2d 826* , involved an action for damages in which plaintiffs were awarded a $2.1 million judgment against a defendant bank. The bank moved for a new trial and the trial court granted the motion. The plaintiffs appealed.

The Supreme Court reversed. The Court stated that the jury's verdict is "against law" only if it is unsupported by any substantial evidence, that is, if the entire evidence is such as would justify a directed verdict against the parties in whose favor the verdict was returned. The Court went on to say that the function of the trial court on a motion for a directed verdict is analogous to and practically the same as that of a reviewing court in determining, on appeal, whether there is

evidence in the record of sufficient substance to support the verdict (*38 Cal. 3d 892, 906)* . Accordingly, the Court examined the record to determine whether the verdict for the plaintiffs was, as a matter of law, unsupported by substantial evidence. In applying the established rule of appellate review, the Court concluded that the judgment entered on the jury verdict was supported by substantial evidence (*38 Cal. 3d 892, 907)* .

In ***McCown v. Spencer*** *(1970) 8 Cal. App. 3d 216, 87 Cal. Rptr. 213* , plaintiff purchaser brought an action against the defendant sellers for damages caused by the sellers' alleged breach of an escrow agreement. A verdict was rendered for plaintiff and, on defendants' motions, the court granted judgment for defendants notwithstanding the verdict and, alternately, ordered a new trial. The court's order granting the motion specified that it was granted on three grounds: insufficiency of the evidence, accident or surprise, and verdict against law. Plaintiff appealed from the judgment and from the order granting a new trial.

The court of appeal reversed both the judgment for defendants notwithstanding the verdict and the order granting defendants a new trial. The court stated that a verdict or decision can be said to be against law only when the evidence is insufficient in law and without conflict on any material point. In this case, the court of appeal noted that the trial court entertained an erroneous concept of the application of estoppel in this case. If the court had been correct in deciding that only conduct before a certain date could create an estoppel, then the granting of a new trial because the verdict was against law would have been proper in that there was no evidence of such conduct before that date. However, since an estoppel could have been based on acts occurring after that date and evidence of those acts was received, the court concluded that the verdict was not against law (*8 Cal. App. 3d 216, 228-230)* . After examining the granting of the motion on the other grounds, the court reversed the order granting defendants a new trial (*8 Cal. App. 3d 216, 230)* .

[b] "Against Law" Does Not Allow Weighing of Evidence

The facts and procedural background of ***Sanchez-Corea v. Bank of America*** *(1985) 38 Cal. 3d 892, 215 Cal. Rptr. 679, 701 P.2d 826* , are discussed in [a], *above*. In *Sanchez-Corea*, in which the Supreme Court reversed an order granting a new trial, the Court stated that the ground that the verdict "is against law" is separate and distinct from the other grounds listed in *Code Civ. Proc. § 657* and does not include any, or all, of those other separate and distinct grounds for new trial. The Court cited *Musgrove v. Ambrose Properties (1978) 87 Cal. App. 3d 44, 56, 150 Cal. Rptr. 722* for the proposition that in contrast to the grounds of insufficient evidence and excessive or inadequate damages, the phrase "against law" does not import a situation in which the court weighs the evidence and finds a balance against the verdict, as it does in considering the ground of insufficiency of evidence. The Court then considered the record on that theory and concluded that the judgment entered on the jury verdict was supported by substantial evidence (*38 Cal. 3d 892, 907)* .

The facts and procedural background of ***McCown v. Spencer*** *(1970) 8 Cal. App. 3d 216, 87 Cal. Rptr. 213* , are discussed in [a], *above*. In *McCown*, which reversed the trial court's order granting defendants a new trial, the court of appeal stated that the words "against law" do not import a situation in which the court weighs conflicting evidence and merely finds a balance against the judgment (*8 Cal. App. 3d 216, 228)* .

[4] Additional Authorities

[a] Evidence Must Be Without Conflict on All Material Points

Musgrove v. Ambrose Properties (1978) 87 Cal. App. 3d 44, 150 Cal. Rptr. 722 , was an action for personal injuries in which the court of appeal reversed a judgment for defendant notwithstanding the verdict and an order granting defendant a new trial on the grounds of insufficiency of the evidence and verdict against law. The court stated that the phrase "against law" does not import a situation in which the court weighs the evidence and finds a balance against the verdict; the granting of a new trial on that ground is authorized only when there is no substantial evidence to sustain the verdict. Since the evidence was sufficient to support a verdict for plaintiff, the court concluded that a new trial was

improperly granted on the ground that the verdict was against law (*87 Cal. App. 3d 44, 56)* .

S.F. Bay Area Rapid Transit Dist. v. McKeegan (1968) 265 Cal. App. 2d 263, 71 Cal. Rptr. 204 , was a condemnation action that apportioned an award between lessors and lessees. The court of appeal reversed an order granting a new trial to the lessors that was based on several grounds including verdict or decision against law. The court stated that the granting of a new trial on the ground that the verdict was against law is authorized when there is no substantial evidence to sustain the verdict. Since there was substantial evidence that supported the lessees' judgment, the court reversed the order (*265 Cal. App. 2d 263, 272-273)* .

Hilts v. County of Solano (1968) 265 Cal. App. 2d 161, 71 Cal. Rptr. 275 , was an action for wrongful death against the driver and owner of a truck and a county. The court of appeal reversed an order granting a new trial to the defendant owner. The court stated that a verdict is against law when the evidence is insufficient in law so that a directed verdict would have been proper for plaintiff. In this case, the court stated that the plaintiffs were not entitled to a directed verdict because the evidence conflicted as to whether the truck driver or decedent entered the intersection first and as to whether the truck driver was negligent in view of his speed and the limited visibility conditions at the intersection. While the court conceded that the driver of the truck exceeded the prima facie speed limit, this fact did not establish that he was negligent as a matter of law. Therefore, the court concluded that the order could not be sustained on the ground that the verdict was against the law (*265 Cal. App. 2d 161, 177-178)* .

Thompson v. Guyer-Hays (1962) 207 Cal. App. 2d 366, 24 Cal. Rptr. 461 , was an action for rescission of a contract for the sale of real property and for damages for fraudulent misrepresentation in which the court of appeal affirmed judgment for plaintiffs and reversed an order granting defendants' motion for a new trial on the ground that the decision was against law. The court of appeal stated that a decision is against law when the evidence is insufficient in law and without conflict on any material point; the words "against law" do not import a situation in which the court weighs conflicting evidence and merely finds a balance against the judgment. Since there was substantial evidence in this case to support the judgment, the court of appeal concluded that it was improper to grant the motion for new trial on the ground that the decision was against law (*207 Cal. App. 2d 366, 375)* .

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15-155 California Points & Authorities § 155.241

§ 155.241 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Verdict or Decision Is Against the Law [Code Civ. Proc. § 657(6)]--Verdict Not Contrary to Correct Jury Instruction

[1] FORM

[*Caption. See § 155.60[1].*]

THE MOTION FOR NEW TRIAL SHOULD NOT BE GRANTED BECAUSE THE VERDICT IS NOT AGAINST LAW IN THAT _____ [IT IS NOT CONTRARY TO A CORRECT JURY INSTRUCTION *and/or* IT IS CONTRARY TO AN INCORRECT JURY INSTRUCTION].

[*EITHER*]

A. Verdict Not Contrary to Correct Instruction. A verdict is against law when it is contrary to the instructions given to the jury, and that verdict is contrary to an instruction only when the evidence on a point covered by the instruction is without conflict and fails to show a set of facts that would warrant the verdict reached (*Kaiser Cement & Gypsum Corp. v. Allis-Chalmers Mfg. Co. (1973) 35 Cal. App. 3d 948, 958, 111 Cal. Rptr. 210* ; *Hawkinson v. Oesdean (1943) 61 Cal. App. 2d 712, 716, 143 P.2d 967*).

[*Optional*] **B. Special Verdict Form Need Not Repeat Detail of Instruction.** When the jury is provided with correct instructions, a detailed repetition of those instructions in the special verdict form is not essential (*Neal v. Montgomery Elevator Co. (1992) 7 Cal. App. 4th 1194, 1199, 9 Cal. Rptr. 2d 497*).

[*AND/OR*]

C. Verdict Contrary to Incorrect Instruction. A new trial will not be granted on the ground that the verdict is against law if the jury instructions were incorrect and the verdict rendered in disregard of them was proper (*Tousley v. Pacific*

Electric Ry. Co. (1913) 166 Cal. 457, 462, 137 P. 31 ; *Rystrom v. Sutter Butte Canal Co. (1925) 72 Cal. App. 518, 523, 249 P. 53*).

[*Add further points and authorities, if appropriate, discussing the substantive law pertaining to the particular cause of action or defense.*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for new trial on the ground that the verdict is against law [*Code Civ. Proc. § 657(6)*] when either the verdict is not contrary to correct jury instructions or the verdict is contrary to incorrect jury instructions. In an appropriate case, the points and authorities set out in this form may be submitted in opposition to a motion for new trial supported by the points and authorities set out in *§ 155.232*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should include a discussion of the nature of the verdict rendered and the instruction given in order to show that the verdict is not against law. It may be necessary for counsel to add further points and authorities discussing the substantive law pertaining to the particular cause of action or defense. For example, in a personal injury action in which defendant moves for a new trial on the ground that plaintiff's verdict is against law, plaintiff may discuss the substantive law of negligence to show that the jury instructions were erroneous statements of the law on contributory negligence, but that the jury reached a verdict that was in disregard of the instructions [*see Tousley v. Pacific Electric Ry. Co. (1913) 166 Cal. 457, 462-463, 137 P. 31]* . To aid in preparing these substantive points and authorities, counsel may consult the substantive chapters contained in this publication and in California Forms of Pleading and Practice (Matthew Bender).

[c] Related Pleading and Practice Forms

For a notice of intention to move for a new trial as well as an order denying the motion, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[3] Discussion of Authorities

[a] Verdict Not Contrary to Correct Instruction

In ***Kaiser Cement & Gypsum Corp. v. Allis-Chalmers Mfg. Co.*** *(1973) 35 Cal. App. 3d 948, 111 Cal. Rptr. 210* , plaintiff purchaser brought an action for breach of warranty and negligence against the manufacturer and seller of industrial electric motors. The jury rendered a verdict in favor of plaintiff on the breach of warranty cause of action. Defendant moved for a judgment notwithstanding the verdict and a new trial on the ground that the verdict was against

law. The court denied the motion for judgment notwithstanding the verdict, but granted the motion for a new trial. Plaintiff appealed the order granting a new trial; defendant appealed from the order denying its motion for judgment notwithstanding the verdict.

The court of appeal reversed the order granting defendant's motion for a new trial, stating that a verdict is against law when it is contrary to the instructions given the jury. However, that a verdict is against law or that it is not supported by the evidence are separate grounds for a new trial. An order granting a new trial on the ground that the verdict is against law cannot be stated by merely showing that the verdict is unsupported by the evidence. It is possible to determine whether a verdict is contrary to an instruction only when the evidence on a point covered by the instruction is without conflict and fails to show a set of facts, which, under the instruction, would warrant the verdict reached. However, the court explained that if the evidence on that point is conflicting but sufficient to support a finding of fact under which the instruction warrants the verdict, it must be presumed that the jury would make such a finding and hence its verdict is not contrary to the instruction and not against the law. In this case, the court found that the evidence was in conflict and sufficient to support the verdict. Therefore, it was not contrary to the instructions given to the jury and was not against law (*35 Cal. App. 3d 948, 958)* .

In ***Hawkinson v. Oesdean*** *(1943) 61 Cal. App. 2d 712, 143 P.2d 967* , plaintiff brought an action for personal injuries against defendant. After the jury rendered a verdict in favor of defendant, plaintiff moved for a new trial on the ground that the verdict was against law. The court granted the motion, and defendant appealed the order. On appeal, plaintiff claimed that the verdict was against law because the evidence was insufficient to justify the verdict.

The court of appeal reversed the order, stating that a verdict is against law when it is contrary to the instructions given to the jury. The court observed that no conflict was claimed or appeared between the verdict and the instructions. It explained that a verdict is not against law merely because the evidence is insufficient to justify it. Insufficiency of the evidence and verdict against law are two separate grounds for a new trial, and an order granting a new trial on the ground that the verdict is against law cannot be sustained by merely showing that it is unsupported by the evidence. The court added that it is possible to determine whether a verdict is contrary to an instruction only when the evidence on a point covered by the instruction is without conflict and fails to show a set of facts that under the instructions, would warrant the verdict reached. When the evidence on that point is conflicting, but sufficient to support a finding of fact that under the instruction, warrants the verdict, it must be presumed that the jury did make such a finding, and hence its verdict is not contrary to the instruction and not against law. Furthermore, the court added that the evidence was legally sufficient to justify the verdict, and after examining other possible grounds for the granting of the motion, the court concluded that the order should be reversed (*61 Cal. App. 2d 712, 717-720)* .

[b] Special Verdict Form Need Not Repeat Detail of Instruction

In ***Neal v. Montgomery Elevator Co.*** *(1992) 7 Cal. App. 4th 1194, 9 Cal. Rptr. 2d 497* , the plaintiff in a personal injury action moved for new trial on his cause of action for strict liability against the defendant manufacturer. The parties agreed to products liability jury instructions on burden of proof and defective design and on the special verdict form for negligence and products liability [*see BAJI No. 16.11* (7th ed. 1986)]. The trial court suggested that counsel could modify the form "if it needs to be modified" to conform with the leading case, but plaintiff's counsel declined to modify the form. The trial court subsequently granted the motion for new trial because the special verdict form had not been revised to comport with the applicable burden of proof. The defendant appealed from the order.

The court of appeal reversed and reinstated the original judgment. The court reviewed the law regarding the burden of proof applicable to products liability cases from *Bernal v. Richard Wolf Medical Instruments Corp. (1990) 221 Cal. App. 3d 1326, 1332, 272 Cal. Rptr. 41* , and concluded that the instructions correctly laid out each issue on which the plaintiff and defendant had the burden of proof. The special verdict form given to the jury, however, did not repeat the burden of proof instructions. The court stated that although *Bernal* used the same special verdict form and judgment for defendant was reversed, the jury's special verdict in that case quite likely resulted from the jury following the trial

court's instructions. Since the jury in the instant case was provided with correct instructions, the court saw no reason why the instructions had to be repeated in detail in the special verdict form (*7 Cal. App. 4th 1194, 1199)* . Thus, the court held that the special verdict form was correct and reversed (*7 Cal. App. 4th 1194, 1196)* .

[c] Verdict Contrary to Incorrect Instruction

In ***Tousley v. Pacific Electric Ry. Co.*** *(1913) 166 Cal. 457, 137 P. 31* , plaintiff brought an action for personal injuries against defendant. The jury rendered a verdict in favor of plaintiff, and defendant moved for a new trial. When its motion was denied, defendant appealed the judgment. Defendant claimed that the verdicts were against law since they were in violation of two instructions given to the jury on the question of contributory negligence.

The Supreme Court affirmed the judgment, stating that it was manifest from reading the instructions that they could, in no degree, have prejudiced defendant's case. The Court stated that while a jury should conform to the instructions of the court on matters of law, if it appears to the appellate tribunal that an instruction was erroneous, it will not disregard a verdict contrary to the erroneous instruction. The fact that the lower court erroneously instructed the jury to the contrary does not make the verdict against law (*166 Cal. 457, 462-463)* . Accordingly, the Court affirmed the order denying the new trial (*166 Cal. 457, 464)* .

In ***Rystrom v. Sutter Butte Canal Co.*** *(1925) 72 Cal. App. 518, 249 P. 53* , plaintiff brought an action to recover damages for loss of crops due to the alleged failure of defendant to furnish water for irrigation purposes. The jury rendered a verdict for plaintiff, and defendant moved for a new trial. When its motion was denied, defendant appealed the judgment on the basis of alleged erroneous jury instructions.

The court of appeal affirmed the judgment and found that defendant had not been prejudiced by the erroneous instruction since the jury did not follow the erroneous rule laid down by the court. The court stated that while the jury should conform to the instructions of the court on matters of law, if it appears to the appellate tribunal that an instruction was erroneous, it will not disregard a verdict contrary to such an erroneous instruction. The court stated that former Cal. Const., art. VI, § 41/2 [*now see Cal. Const., art. VI, § 13*] directs that no judgment should be set aside or new trial granted unless the court is of the opinion that the error complained of has resulted in a miscarriage of justice. The court concluded that the error in this case did not and could not have produced a miscarriage of justice. Accordingly, the court affirmed the judgment (*72 Cal. App. 518, 524)* .

[4] Additional Authorities

[a] Verdict Contrary to Incorrect Instruction

O'Neill v. Thomas Day Co. (1907) 152 Cal. 357, 92 P. 856 , was a personal injury action in which the Supreme Court affirmed judgment for plaintiff finding that an order denying defendant's motion for a new trial was proper. The lower court gave an erroneous instruction to the jury that enumerated certain facts and told the jury that if it found those facts to exist, then plaintiff was guilty of contributory negligence. Although those facts indisputably did exist, the jury found that plaintiff was not contributorily negligent. The Supreme Court stated that while the jury should conform to the instructions of the court on matters of law, if it appears to the appellate tribunal that an instruction was erroneous, it will not disregard a verdict contrary to erroneous instruction (*152 Cal. 357, 361)* . After examining other issues raised on appeal, the Court affirmed the judgment (*152 Cal. 357, 362-364)* .

S.F. Bay Area Rapid Transit Dist. v. McKeegan (1968) 265 Cal. App. 2d 263, 71 Cal. Rptr. 204 , was a condemnation action that apportioned the award between a lessor and lessee. The court of appeal reversed an order granting a new trial to the lessors that was based, in part, on an erroneous instruction that was given to the jury. The court stated that a new trial cannot be justified on an erroneous instruction that favored rather than prejudiced the movant and that the jury properly refused to apply (*265 Cal. App. 2d 263, 272)* .

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B. Motions for New Trial
7. Verdict or Decision Against Law

15-155 California Points & Authorities §§ 155.242-155.249

[Reserved]

§§ 155.242[Reserved]

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CHAPTER 155 MOTIONS AFTER TRIAL
PART II. FORMS
B. Motions for New Trial
8. Error of Law

15-155 California Points & Authorities § 155.250

§ 155.250 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Error of Law [Code Civ. Proc. § 657(7)]--General Form

[1] FORM

[*Caption. See § 155.50[1].*]

A NEW TRIAL SHOULD BE GRANTED BECAUSE THERE WAS AN ERROR IN LAW, OCCURRING AT THE TRIAL AND EXCEPTED TO BY _____ [PLAINTIFF *or* DEFENDANT], THAT MATERIALLY AFFECTED HIS/HER/ITS SUBSTANTIAL RIGHTS.

A. New Trial on Ground of Error in Law Occurring at Trial. On application of the party aggrieved, the verdict or decision may be vacated, in whole or in part, and a new trial may be granted, on all or some of the issues, on the ground of error in law occurring at the trial and excepted to by the party making the application, if substantial rights of the aggrieved party are materially affected thereby (*Code Civ. Proc. § 657(7)*).

B. Error Must Be Prejudicial. A court is expressly enjoined by *Article VI, Section 13, of the California Constitution* from granting a new trial for an error in law unless the error is prejudicial; however, if the error could possibly have been prejudicial, the court must consider its probable effect and decide the motion accordingly, and if it concludes that the error is prejudicial, a new trial is properly granted (*Brown v. George Pepperdine Foundation (1943) 23 Cal. 2d 256, 262, 143 P.2d 929*).

[*Add additional points and authorities, if appropriate, supporting the contention that there was an error in law (see, e.g., §§ 155.250 et seq.).*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for new trial on the ground of error in law occurring at trial [*Code Civ. Proc. § 657(7)*]. It is a general form that should be in conjunction with forms containing points and authorities relating to specific issues or fact situations [*see, e.g., § 155.251* et seq.].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should include a discussion of the nature of the error of law, showing that the moving party excepted to the error at trial. Counsel should also show how the error materially affected the moving party's substantial rights.

[c] Related Pleading and Practice Forms

For a form of notice of intention to move for a new trial on the ground of error in law [Code Civ. Proc. § 657(7)] and other related forms, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[d] Opposing Points and Authorities

The points and authorities set out in *§ 155.270* may be used in an appropriate case to oppose a motion for a new trial supported by this memorandum.

[3] Discussion of Authorities

[a] Error Must Be Prejudicial

In ***Brown v. George Pepperdine Foundation*** *(1943) 23 Cal. 2d 256, 143 P.2d 929* , plaintiffs brought an action for personal injuries against two defendants. The jury rendered a verdict for defendants, and the court granted plaintiffs' motion for a new trial on the basis of errors in law occurring in the jury instructions. One defendant appealed from the order granting a new trial.

The Supreme Court affirmed the order, stating that the trial court, no less than the appellate court, is expressly enjoined by former Cal. Const, art VI, § 41/2 [*now see Cal. Const., art. VI, § 13*], to deny a new trial for errors of law unless the errors were prejudicial. However, if the error could possibly have been prejudicial, the trial court must consider its probable effect and decide the motion accordingly. In this case, the trial court determined that the errors in the instructions prejudiced plaintiffs' case, and the Court could not say, in light of the record, that the trial court was in error. Accordingly, it affirmed the order (*23 Cal. 2d 256, 262)* .

[4] Additional Authorities

[a] Error Must Be Prejudicial

Los Angeles City High School Dist. v. Kita (1959) 169 Cal. App. 2d 655, 338 P.2d 60 , was an action in eminent domain in which the court of appeal affirmed an order granting plaintiff's motion for a new trial on the ground of error

in law. The court stated that if the error could possibly have been prejudicial, the trial court must consider its probable effect and decide the motion for a new trial accordingly (*169 Cal. App. 2d 655, 664)* . In this case, the lower court determined that it abused its discretion in permitting the admission of certain evidence and that such error prejudiced plaintiff's cause. The court of appeal stated that it could not conclude that the trial judge incorrectly granted a new trial. Accordingly, it affirmed the order (*169 Cal. App. 2d 655, 666)* .

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15-155 California Points & Authorities § 155.251

§ 155.251 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Error of Law [Code Civ. Proc. § 657(7)]--Erroneous Admission or Exclusion of Evidence

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities supporting a motion for new trial on the ground of error in law (see § 155.250).*]

A NEW TRIAL SHOULD BE GRANTED ON THE GROUND OF ERROR IN LAW, OCCURRING AT TRIAL AND EXCEPTED TO BY THE PARTY MAKING THE APPLICATION, BECAUSE THE COURT ERRONEOUSLY_____ [ADMITTED *and/or* EXCLUDED] EVIDENCE AT TRIAL, THUS MATERIALLY AFFECTING _____ [PLAINTIFF'S *or* DEFENDANT'S] SUBSTANTIAL RIGHTS.

[*EITHER*]

A. Erroneous Admission of Evidence. The trial court's erroneous ruling on the admission of certain evidence is an error in law for which a new trial may be granted if the evidence admitted is not sufficiently probative and results in prejudice to the aggrieved party (*see Richard v. Scott (1978) 79 Cal. App. 3d 57, 63-64, 144 Cal. Rptr. 672* ; *see also Holling v. Chandler (1966) 241 Cal. App. 2d 19, 23, 50 Cal. Rptr. 219*).

[*AND/OR*]

A. Erroneous Exclusion of Evidence. A new trial may be granted on the ground of error in law if the trial court erroneously excludes certain admissible evidence and that exclusion results in prejudice to the moving party (*see Burroughs v. Ben's Auto Park, Inc. (1945) 27 Cal. 2d 449, 456, 164 P.2d 897*).

B. Adverse Ruling on Evidence Deemed Excepted To. A court's ruling sustaining or overruling an objection to evidence is deemed excepted to without formal objection (*Code Civ. Proc. § 647*).

C. Discretion of Trial Judge. If an error of law has occurred in the admission or rejection of evidence, the trial judge may consider all the circumstances surrounding the ruling, including the weight that may be accorded to the questioned evidence, the attitude of the interrogator, and any other fact tending to show the importance of the admission or rejection of the evidence (*De Victoria v. Erickson (1948) 83 Cal. App. 2d 206, 208-209, 188 P.2d 276*).

[*Add further points and authorities discussing the substantive law of evidence in order to show that the evidentiary ruling was erroneous.*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for new trial on the ground occurring at trial and excepted to by the party making the application [*Code Civ. Proc. § 657(7)*] when the court has erroneously excluded or admitted evidence. It does not provide a complete form, but it is designed to be combined with a general form of points and authorities in support of a motion for new trial on the ground of error in law [*see § 155.250*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should show why the exclusion or admission of the evidence was erroneous and how it prevented the moving party from having a fair trial, materially affecting the substantial rights of the moving party. Counsel should also add further points and authorities relating to the rules of evidence in order to show that the ruling was erroneous. To aid in the preparation of these substantive points and authorities, counsel may consult the substantive chapters in this publication and in California Forms of Pleading and Practice (Matthew Bender), as well as the provisions of the California Evidence Code.

[c] Related Pleading and Practice Forms

For a form of notice of intention to move for a new trial on the ground of error in law [Code Civ. Proc. § 657(7)] and other related forms, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[d] Opposing Points and Authorities

The points and authorities set out in *§ 155.270* may be used in an appropriate case to oppose a motion for a new trial supported by this memorandum.

[3] Discussion of Authorities

[a] Erroneous Admission of Evidence

In ***Richard v. Scott*** *(1978) 79 Cal. App. 3d 57, 144 Cal. Rptr. 672* , plaintiff brought an action for personal injuries sustained in an automobile collision with one defendant. The jury found that plaintiff sustained damages in the sum of $6,000, but apportioned 50 percent fault to each party and rendered a verdict in favor of plaintiff for $3,000. Plaintiff's motion for a new trial was granted on the ground that the court erred in admitting the opinion of defendants' accident reconstruction expert that plaintiff was traveling in excess of the posted speed limit. Defendants appealed the order granting a new trial.

The court of appeal affirmed the order, noting that an erroneous evidentiary ruling may be an error of law for which a new trial may be granted (*79 Cal. App. 3d 57, 63 n.2*). The court said that the admissibility of the expert's opinion involved a mixed question of fact and law. The factual aspect of the question was whether or not there was evidentiary support for the assumptions made by the expert in formulating his or her opinion. An opinion based on surmise, guess, or conjecture has little evidentiary value (*79 Cal. App. 3d 57, 63)* . The court felt that the trial judge, having heard the evidence, was in a better position to determine whether the factual assumptions made by the expert were adequately supported by the evidence or whether they were based on conjecture. In this case, the record supported the trial judge's determination that many of the factual assumptions made by the expert in arriving at his or her opinion lacked sufficient evidentiary support. Therefore, the court of appeal found no abuse of discretion in granting the motion, and accordingly, it affirmed the order (*79 Cal. App. 3d 57, 64)* .

Note that the holding in *Richard* was rejected by another court of appeal for categorically holding that the prevailing moving party in a motion for new trial is not required to demonstrate that prejudice resulted from the error for which a new trial was granted (*Mosesian v. Pennwalt Corp. (1987) 191 Cal. App. 3d 851, 859, 236 Cal. Rptr. 778*). Although *Richard* cited *Malkasian v. Irwin (1964) 61 Cal. 2d 738, 747-749, 40 Cal. Rptr. 78, 394 P.2d 822* (discussed in *§ 155.134[3][b]*) for that holding, the court in *Mosesian* held that the *Richard* decision was overbroad in its statement that a litigant need not show that any prejudice resulted from an error, and that the *Richard* court's statement of the rule indulges the discretion of the trial court beyond the degree contemplated by the *Malkasian* court, which noted that the trial court found that a miscarriage of justice had occurred. The court in *Mosesian* held that granting a new trial motion when the error alleged is harmless violates *Cal. Const., art. VI, § 13*, which states that the standard for granting new trial motions is prejudicial error.

In ***Holling v. Chandler*** *(1966) 241 Cal. App. 2d 19, 50 Cal. Rptr. 219* , plaintiff brought an action for personal injuries sustained in an automobile collision with defendant. After the jury returned a verdict for defendant, the trial court granted plaintiff's motion for a new trial on the ground of error in law. The trial court stated that it had erroneously admitted experimental evidence for the limited purpose of impeaching plaintiff's expert witness and that it also failed to instruct the jury on the limited purpose for which the evidence was admitted. Defendant appealed the order.

The court of appeal affirmed the order, stating that testimony relating to the results of experiments concerning a disputed material fact should be admitted only if the conditions under which the experiments were made are substantially identical to those out of which the disputed fact arose, should be of the character which will clarify rather than confuse the issue at hand, and should not be admitted if it predominantly involves a consideration of collateral issues. In this case, the conditions at the time of the accident and those at the time of the experiment presented many variables. The evidence served to distract the attention of the jury by submitting a variety of collateral issues to it (*241 Cal. App. 2d 19, 24-25)* . Furthermore, the evidence was confusing and not dependable. Therefore, the court of appeal concluded that the lower court was justified in concluding that the evidence did not sufficiently establish the facts for which it was proffered, and that this error was compounded by the court's failure to give a limiting instruction. Accordingly, the court held that the order granting a new trial was not an abuse of discretion, and it affirmed the order (*241 Cal. App. 2d 19, 25-26)* .

[b] Erroneous Exclusion of Evidence

In ***Burroughs v. Ben's Auto Park, Inc.*** *(1945) 27 Cal. 2d 449, 164 P.2d 897* , plaintiff was injured at night when he fell into an areaway adjacent to a parking lot where he had left his automobile. He sued the lessee and operator of the parking lot, the owner and lessor of the parking lot, and the owners of the adjoining property on which the areaway was situated. The jury returned a verdict in favor of the owner and lessor and against the other defendants. The owners of the adjoining property were granted a new trial on the grounds of insufficiency of the evidence and error in law occurring at trial. Plaintiff appealed the judgment in favor of the owner and lessor and from the order granting the other defendants a new trial.

The court of appeal affirmed the order, stating that in granting a new trial on the ground of error in law, the trial court apparently concluded that it had erroneously refused the adjoining landowners' offer to prove that a retaining wall of the property was built by their predecessors in interest. One of plaintiff's contentions was that the adjoining landowners were under a duty not to maintain a dangerous condition adjacent to a public parking lot. However, the court noted that the rejected evidence was admissible to show who was responsible for creating and maintaining the dangerous condition (*27 Cal. 2d 449, 456)* . Therefore, the court concluded that the granting of the motion on this ground was proper. After examining the record, the court also determined that the motion was properly granted on the ground of insufficiency of the evidence. Hence, the court affirmed the order (*27 Cal. 2d 449, 455-456)* .

[c] Discretion of Trial Judge

In ***De Victoria v. Erickson*** *(1948) 83 Cal. App. 2d 206, 188 P.2d 276* , plaintiff brought an action for personal injuries against defendants. During cross examination, defense counsel attempted to lay a foundation for the impeachment of plaintiff's witness by implying that he had a witness who saw that a car, other than defendants', caused the accident. Defense counsel then offered a written statement, signed by the new witness, but written by another person, as impeaching evidence. However, the written statement was excluded from the record because defendants did not show the persons present or the circumstances surrounding the signing of the statement. Plaintiff then moved to strike the evidence previously claimed to be grounds for impeachment. The court failed to rule on the motion. After a verdict was rendered for defendants, plaintiff's motion for a new trial was granted. Defendants appealed the order.

The court of appeal affirmed the order, stating that if an error of law has occurred in the admission of evidence over the objections and failure of the court on proper motion to eliminate the evidence from consideration, the trial judge may consider all the circumstances surrounding the ruling of the court, including the weight that may be accorded to the questioned evidence, the attitude of the interrogator, and any other fact tending to show the importance of the admission or rejection of the evidence. The reviewing court, confined to the record on appeal, and without opportunity to precisely weigh the effect of the ruling on the triers of fact, is warranted in assuming that the action of the trial court in granting a new trial is an indication of the importance that the trial court placed on the questioned ruling and its influence in causing a miscarriage of justice (*83 Cal. App. 2d 206, 208-209)* . In this case, the court concluded that the order was properly granted, and, accordingly, it affirmed the order granting a new trial (*83 Cal. App. 2d 206, 208-210)* .

[4] Additional Authorities

[a] Erroneous Admission of Evidence

Post v. Camino Del Properties, Inc. (1959) 173 Cal. App. 2d 446, 343 P.2d 294 , was an action for personal injuries in which the court of appeal reversed judgment for defendant notwithstanding the verdict and affirmed an order granting defendant a new trial on the grounds of errors in law and insufficiency of the evidence. The court agreed that the evidence of previous accidents had been erroneously admitted since the evidence was indefinite and did not show similarities in conditions between the previous accidents and the one in question. Furthermore, the court felt that the error had been compounded by the lower court's failure to give a limiting instruction (*173 Cal. App. 2d 446, 453-454)* .

Savoia v. Moorehead (1948) 83 Cal. App. 2d 147, 188 P.2d 260 , was a personal injury action in which the court of appeal affirmed an order granting plaintiff a new trial on the ground of error in law. The lower court erroneously admitted evidence relating to the possibility of plaintiff's having received consideration for dismissing the action against some of the defendants. Since the admission of the evidence appeared to be prejudicial, and there was no manifest abuse of discretion in the trial court's action, the court of appeal affirmed the order (*83 Cal. App. 2d 147, 151-152)* .

[b] Erroneous Exclusion of Evidence

Stow v. Superior Court (1918) 178 Cal. 140, 172 P. 598 , was a breach of contract action in which the Supreme Court affirmed an order granting plaintiff a new trial on the ground of error in law occurring at trial. At trial, the judge

sustained defendant's objection to the introduction of any evidence by plaintiff on the ground that the complaint did not state facts sufficient to constitute a cause of action. The court then granted judgment for defendant on the pleadings. The Supreme Court stated that any erroneous ruling, by which a party is precluded from introducing evidence in support of his or her cause of action as set forth in the complaint for the defense, is an error of law occurring at trial (*178 Cal. 140, 143)* .

Scott v. Gallot (1943) 59 Cal. App. 2d 421, 138 P.2d 685 , was an action for personal injuries in which the court of appeal affirmed an order granting plaintiff a new trial on the ground of error in law. During trial, the court ordered that certain evidence be stricken and instructed the jury that it should not consider the evidence. However, the court of appeal stated that the evidence was relevant under the affirmative issue of contributory negligence raised by the answer to the complaint and that the trial court was therefore justified in granting a new trial (*59 Cal. App. 2d 421, 424-425)* .

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15-155 California Points & Authorities § 155.252

§ 155.252 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Error of Law [Code Civ. Proc. § 657(7)]--Erroneous or Misleading Jury Instructions

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities supporting a motion for new trial on the ground of error in law (see § 155.250).*]

A NEW TRIAL SHOULD BE GRANTED ON THE GROUND OF ERROR IN LAW, OCCURRING AT TRIAL AND EXCEPTED TO BY THE PARTY MAKING THE APPLICATION, BECAUSE THERE WERE _____ [ERRONEOUS *and/or* MISLEADING] JURY INSTRUCTIONS GIVEN AT TRIAL THAT MATERIALLY AFFECTED _____ [PLAINTIFF'S *or* DEFENDANT'S] SUBSTANTIAL RIGHTS.

A. Erroneous or Misleading Jury Instruction Is Error in Law. An erroneous or misleading jury instruction is an error in law for which a new trial may be granted (*see Mazzotta v. Los Angeles Ry. Corp. (1944) 25 Cal. 2d 165, 170, 153 P.2d 338* ; *Bruck v. Adams (1968) 259 Cal. App. 2d 585, 587, 66 Cal. Rptr. 395*).

B. Erroneous Instruction Deemed Excepted To. An erroneous instruction given by the court to the jury is considered excepted to as a matter of law (*see Code Civ. Proc. § 647*; *Stoneburner v. Richfield Oil Co. (1931) 118 Cal. App. 449, 453, 5 P.2d 436*).

C. Determination of Error May Require Examination of Evidence. An instruction should not be considered as merely an abstract statement of a principle of law, but must relate to and be measured by the circumstances of the case in which it is given; the question of whether or not there was any error frequently requires an examination of the evidence in the case (*Stoneburner v. Richfield Oil Co. (1931) 118 Cal. App. 449, 453, 5 P.2d 436*).

D. Order Granting New Trial Affirmed If Challenged Instruction Erroneous in Any Degree. An order granting a new trial for error in instructions will be affirmed if the challenged instruction was erroneous in any degree or even if it

is only fairly debatable that the instruction may have been misleading (*Shaw v. Pacific Greyhound Lines (1958) 50 Cal. 2d 153, 159, 323 P.2d 391*).

[*Optional*] **E. Instructions Overemphasizing One Side of Case.** Jury instructions that overly emphasize one side of a case and that result in substantial detriment to a party may be grounds for granting a new trial (*Smith v. Shankman (1962) 208 Cal. App. 2d 177, 187, 25 Cal. Rptr. 195*).

[*Optional*] **F. Incorrect or Incomplete Statement of Law.** A new trial may be granted on the ground of error in law occurring at trial when an instruction has been given that includes an incorrect or incomplete statement of law applicable to a material issue and the error was not cured by the charge as a whole or otherwise rendered harmless (*Brignoli v. Seaboard Transportation Co. (1947) 29 Cal. 2d 782, 790, 178 P.2d 445*).

[*Optional*] **G. Instruction on Inapplicable Doctrine.** A new trial may be granted on the ground of error in law if the court instructs the jury on a doctrine of law that is inapplicable to the evidence presented in the case (*see* *Herman v. Shandor (1970) 8 Cal. App. 3d 476, 483, 87 Cal. Rptr. 443*).

[*Optional*] **H. Failure to Give Certain Instructions.** Each party is entitled to have his or her theory of the case submitted to the jury in accordance with the pleadings and proof, and it is incumbent on the trial court to instruct on all vital issues involved; the failure of the court to instruct on a vital issue may be grounds for the granting of a motion for new trial (*Christian v. Bolls (1970) 7 Cal. App. 3d 408, 415-416, 86 Cal. Rptr. 545*).

[*Optional*] **I. Correct but Misleading Instructions.** The test of error in giving a correct instruction of law is whether or not it is misleading; if the instruction, correct as an abstract proposition, may have misled the jury, a new trial may be granted (*Strandt v. Cannon (1938) 29 Cal. App. 2d 509, 513, 85 P.2d 160*).

[*Optional*] **J. Conflicting and Misleading Instructions.** If the court gives conflicting instructions that contain inconsistent ideas that may have confused the jury, a new trial may be granted on the ground of errors in law occurring at trial (*Brown v. George Pepperdine Foundation (1943) 23 Cal. 2d 256, 262, 143 P.2d 929*).

[*Add further points and authorities, if appropriate, discussing the substantive law pertaining to the particular cause of action or defense in order to show that the jury instruction was erroneous.*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for new trial on the ground of error in law occurring at trial and excepted to by the party making the application [*Code Civ. Proc. § 657(7)*] when the court has given erroneous jury instructions. It does not provide a complete form, but is designed to be combined with a general form of points and authorities in support of the motion for new trial on the ground of error in law [*see § 155.250*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case Thus, counsel should discuss how the court's instructions were erroneous or misleading and how these instructions prevented the moving party from having a fair trial and materially affected the moving party's substantial rights. Counsel should also add further points and authorities discussing the substantive law pertaining to the particular cause of action or defense in order to show that the jury instruction was erroneous or misleading. For example, in a medical malpractice action in which plaintiff moves for a new trial on the ground that the court's jury instruction on plaintiff's burden of proof

constituted an error in law, plaintiff should discuss the substantive law regarding the standard of proof in civil cases in order to show that the instruction was erroneous and misleading [*see Bruck v. Adams (1968) 259 Cal. App. 2d 585, 587-588, 66 Cal. Rptr. 395]* .

[c] Related Pleading and Practice Forms

For a form of notice of intention to move for a new trial on the ground of error in law [Code Civ. Proc. § 657(7)] and other related forms, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[d] Opposing Points and Authorities

The points and authorities set out in *§ 155.270* may be used in an appropriate case to oppose a motion for a new trial supported by this memorandum.

[3] Discussion of Authorities

[a] Erroneous or Misleading Jury Instruction Is Error in Law

In ***Mazzotta v. Los Angeles Ry. Corp.*** *(1944) 25 Cal. 2d 165, 153 P.2d 338* , plaintiff bus passenger brought an action for personal injuries suffered as a result of a collision between an automobile driven by one defendant and a bus operated by a transit corporation, another defendant. After the jury returned a verdict for plaintiff, defendants moved for a new trial. Both motions were granted. The ruling in favor of defendant car driver was based on certain jury instructions that the court found to be erroneous. Plaintiff appealed the order granting a new trial to the automobile driver.

The Supreme Court affirmed the order, noting that the lower court's instruction included a formula and failed to contain all the elements essential to the cause of action. The Court stated that it has been held that such an instruction does not constitute prejudicial error when, considered in its entirety, it fully and fairly charges the jury with the law applicable to the case (*25 Cal. 2d 165, 170)* . However, the Court concluded that the trial judge was in a position to determine far more accurately the effect of the particular instruction on the jury (*25 Cal. 2d 165, 170-171)* . In view of the conflicting testimony concerning the accident, the Court stated that its conclusion that the defendant had been prejudiced by the instruction rested on sound grounds. Since there was no showing of any abuse of discretion, the Supreme Court affirmed the order (*25 Cal. 2d 165, 171)* .

In ***Bruck v. Adams*** *(1968) 259 Cal. App. 2d 585, 66 Cal. Rptr. 395* , plaintiff brought an action for medical malpractice against defendants. At the conclusion of trial, the court told the jury that plaintiff had the burden of proving his case by a preponderance of the evidence. Later, however, the court instructed the jury on the same subject and told it to use a reasonable certainty standard. After the jury returned a verdict in favor of defendants, plaintiff's motion for a new trial was granted. Defendants appealed the order.

The court of appeal affirmed the order, stating that *Code Civ. Proc. § 657(7)* provides for the granting of a new trial on the ground of error in law occurring at trial. An erroneous or misleading jury instruction is such an error (*259 Cal. App. 2d 585, 587)* . In this case, the court concluded that the second jury instruction was erroneous as a matter of law. In civil cases, the decision must be made according to a preponderance of evidence. However, the court explained that the burden of proof by "reasonable certainty" suggested a standard between preponderance of the evidence and beyond a reasonable doubt. Here, the effect of the instruction was to impose a standard of proof that plaintiff was not bound to meet (*259 Cal. App. 2d 585, 587-588)* . Since the court of appeal found no abuse of discretion in the granting of the motion, it affirmed the order granting a new trial (*259 Cal. App. 2d 585, 588-589)* .

[b] Erroneous Instruction Deemed Excepted To

In ***Stoneburner v. Richfield Oil Co.*** *(1931) 118 Cal. App. 449, 5 P.2d 436* , plaintiff brought an action for personal injuries suffered in an automobile collision with defendants. At the conclusion of trial, the court instructed the jury on the issue of contributory negligence. However, contributory negligence was neither raised by the pleadings nor presented by the evidence. After the jury returned verdicts in favor of all defendants, plaintiff's motion for a new trial was granted on the basis of erroneous jury instructions. Defendants appealed the order.

The court of appeal affirmed the order, stating that the giving of the instruction concerning contributory negligence was an error in law (*118 Cal. App. 449, 456)* . The court added that it is a well-settled rule of law in California that an erroneous instruction given by the court to the jury is an error of law that is considered excepted to as a matter of law (*118 Cal. App. 449, 453)* . In this case, the court noted that contributory negligence is an affirmative defense and should be affirmatively pleaded and proved. However, there was nothing in the record that indicated that contributory negligence was an issue in the case. The court concluded that the trial court did not abuse its discretion in granting plaintiff's motion, and accordingly it affirmed the order (*118 Cal. App. 449, 456-457)* .

Note that a party may not later object to a jury instruction if he or she has requested that instruction or a similar one [*see Davis v. Nelson (1963) 221 Cal. App. 2d 62, 65, 34 Cal. Rptr. 201]* .

[c] Determination of Error May Require Examination of Evidence

The factual and procedural background of ***Stoneburner v. Richfield Oil Co.*** *(1931) 118 Cal. App. 449, 5 P.2d 436* , is discussed in [b], *above*. In that case, the court noted that while an instruction gives the law of the case to the jury, its applicability, and often its correctness depends on the evidence in the case. An instruction should not be considered as merely an abstract statement of a principle of law; it must relate to and be measured by the circumstances of the case in which it was given. To determine the question of whether there was any error in giving an instruction frequently requires an examination of the evidence in the case (*118 Cal. App. 449, 453)* .

[d] Order Granting New Trial Affirmed If Challenged Instruction Erroneous in Any Degree

In ***Shaw v. Pacific Greyhound Lines*** *(1958) 50 Cal. 2d 153, 323 P.2d 391* , plaintiff brought an action for personal injuries allegedly due to the negligence of a bus driver. At the conclusion of trial, the court instructed the jury that the mere happening of an accident does not support an inference of negligence. However, there was evidence in the case that may have warranted the application of the doctrine of res ipsa loquitur, and thus, the instruction contained an idea that might be understood to be inconsistent with this doctrine. When the jury returned a verdict for defendant, plaintiff's motion for a new trial was granted. Defendant appealed the order.

The Supreme Court affirmed the order, noting that if the challenged instruction was erroneous in any degree, or even if it is only fairly debatable that the instruction may have been misleading, the broad discretion of the trial court may not be disturbed (*50 Cal. 2d 153, 159)* . The Court found that the lower court did not abuse its discretion in granting a new trial, even though it would have affirmed the judgment if the lower court had denied the motion (*50 Cal. 2d 153, 158-159)* . The Court stated that the determination of a motion for a new trial rests so completely within the lower court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears (*50 Cal. 2d 153, 159)* .

[e] Instructions Overemphasizing One Side of Case

In ***Smith v. Shankman*** *(1962) 208 Cal. App. 2d 177, 25 Cal. Rptr. 195* , plaintiffs brought an action to recover damages for wrongful death allegedly resulting from defendant's medical malpractice. At the conclusion of trial, the court gave jury instructions that repeatedly emphasized defendant's side of the case. After a verdict was returned for defendant, plaintiffs' motion for a new trial was denied. Plaintiffs appealed the judgment.

The court of appeal reversed the judgment on the basis of the cumulative effect of errors in the case (*208 Cal. App. 2d 177, 187)* . The court concluded that the instructions overly emphasized the defense side of the case. The court stated that although none of the instructions, standing alone, would appear to be prejudicially erroneous, the overall effect of these instructions tended to clothe the doctor in a cloak of legal immunity in the eyes of the jury. At the very least, the court said, the defense aspects of the case were given undue prominence. This practice is not to be commended and undoubtedly resulted in substantial detriment to plaintiffs. The court concluded that these erroneous jury instructions compounded by other errors in the case, such as the bailiff's misconduct, compelled a reversal (*208 Cal. App. 2d 177, 186-187)* .

[f] Incorrect or Incomplete Statement of Law

In ***Brignoli v. Seaboard Transportation Co.*** *(1947) 29 Cal. 2d 782, 178 P.2d 445* , plaintiffs brought an action to recover for trucking services rendered to defendants. Defendants admitted liability of $7,111 but cross complained against plaintiff for the loss of goods entrusted to plaintiffs. In answering the cross complaint, plaintiffs admitted that they had received the goods, but denied that they were acting as a common carrier, claiming that they were acting as private or contract carriers in the transaction. At the conclusion of trial, considerable emphasis was placed by the trial judge on the liability of different types of carriers; however, the judge did not adequately define these carriers. The jury returned a directed verdict in favor of plaintiffs on the complaint, and also found in favor of plaintiffs on the cross complaint. Defendants' motion for a new trial was granted, and plaintiffs appealed the order. Defendants cross appealed the judgment.

The Supreme Court affirmed the order, stating that a new trial may be granted on the ground of error in law occurring at trial when an instruction has been given that includes an incorrect or incomplete statement of the law applicable to a material issue, if the error was not cured by the charge as a whole or otherwise rendered harmless (*29 Cal. 2d 782, 790)* . The Court added that when it appears that an erroneous instruction confused or misled the jury, a new trial is justified. In this case, the characteristics of the relationship of a common carrier and that of a contract or private carrier were of vital importance. The Court felt that the instruction concerning a contract carrier was incomplete and therefore erroneous (*29 Cal. 2d 782, 791)* . Since the Court found no abuse of discretion in the trial court's granting of the motion, it affirmed the order (*29 Cal. 2d 782, 792)* .

[g] Instruction on Inapplicable Doctrine

In ***Herman v. Shandor*** *(1970) 8 Cal. App. 3d 476, 87 Cal. Rptr. 443* , plaintiff brought an action for personal injuries against defendant. After the jury returned a verdict for plaintiff, defendant moved for a new trial and for judgment notwithstanding the verdict. The court granted both motions, stating that the plaintiff was guilty of contributory negligence, and that error in law was committed by the court in instructing the jury on the doctrine of last clear chance. Plaintiff appealed the orders.

The court of appeal affirmed the order granting a new trial and dismissed the appeal from the order granting judgment notwithstanding the verdict. After examining the facts of the case, the court concluded that the requirements of the last clear chance doctrine were not present in the case (*8 Cal. App. 3d 476, 484-485)* . It stated that the instruction concerning last clear chance should not have been given (*8 Cal. App. 3d 476, 486)* . Therefore, the court found that the lower court did not abuse its discretion in granting a new trial on that issue, and accordingly it affirmed the order (*8 Cal. App. 3d 476, 486)* .

[h] Failure to Give Certain Instructions

In ***Christian v. Bolls*** *(1970) 7 Cal. App. 3d 408, 86 Cal. Rptr. 545* , plaintiff brought an action for personal injuries suffered in an automobile collision with defendant. During trial, plaintiff requested an instruction on the doctrine of last clear chance. The court refused to give an instruction of this doctrine, and also refused to give an instruction on joint or

common venture. The jury returned a verdict in favor of defendant. Plaintiff moved for a new trial, which was granted. Defendant appealed from the order granting a new trial.

The court of appeal affirmed the order, stating that each party is entitled to have his or her theory of the case submitted to the jury in accordance with the pleadings and proof, and it is incumbent on the trial court to instruct on all vital issues (*7 Cal. App. 3d 408, 415)* . It added that a reviewing court must review the evidence most favorable to the contention that the requested instruction is applicable since the parties are entitled to an instruction thereon if the evidence so viewed could establish the elements of the theory presented (*7 Cal. App. 3d 408, 415-416)* . In this case, the court concluded that the elements of the doctrine of last clear chance were applicable and that the trial court should have instructed on this doctrine (*7 Cal. App. 3d 408, 416)* . With regard to the other instructions, the court of appeal stated that it was well within the sound discretion of the lower court to determine whether or not these other instructions were necessary for the jury's complete understanding of the legal principles involved. However, the court could find no abuse of discretion on the part of the lower court in granting a motion for a new trial based on its own failure to give these additional refinements or explanatory instructions (*7 Cal. App. 3d 408, 417-418)* . The court of appeal concluded that the ruling of the trial court with regard to the instructions on last clear chance and joint venture were sufficient grounds for the granting of the motion. Therefore, it affirmed the order granting a new trial (*7 Cal. App. 3d 408, 418)* .

[i] Correct but Misleading Instructions

In ***Strandt v. Cannon*** *(1938) 29 Cal. App. 2d 509, 85 P.2d 160* , plaintiff passenger of a car with an unlicensed driver brought an action for personal injuries against defendant, the driver of the other car. At the conclusion of the trial, the court instructed the jury that the lack of a driver's license was prima facie evidence of a driver's incompetence and also instructed the jury on contributory negligence. When the jury returned a verdict in favor of defendant, plaintiff moved for a new trial. The court granted the motion since it felt that the two instructions, when given together to the jury, may have misled it into inferring that there was evidence of contributory negligence on the part of plaintiff. Defendant appealed the order.

The court of appeal affirmed the order, stating that the test of error in giving a correct instruction of law is whether or not it is misleading. If instructions, correct as abstract propositions, may have misled the jury, a new trial may be granted (*29 Cal. App. 2d 509, 513)* . In this case, the court noted that there was no evidence of contributory negligence on the part of plaintiff passenger. The negligence of the driver of the car cannot be imputed to the guest without evidence that showed that the guest exercised some control over the driver or possessed the power to supervise the manner in which the automobile should be operated (*29 Cal. App. 2d 509, 513-514)* . The court concluded that even though the instruction may have been correct as an abstract statement of law, it was inapplicable to the case (*29 Cal. App. 2d 509, 514)* . Furthermore, the court disagreed that the lack of a driver's license was prima facie evidence of incompetence (*29 Cal. App. 2d 509, 514-518)* . Since the court felt that one instruction was clearly erroneous and the other instruction was not applicable, it affirmed the lower court's granting of plaintiff's motion for a new trial (*29 Cal. App. 2d 509, 518)* .

[j] Conflicting and Misleading Instructions

In ***Brown v. George Pepperdine Foundation*** *(1943) 23 Cal. 2d 256, 143 P.2d 929* , plaintiffs brought an action for personal injuries suffered from a fall down an elevator shaft. At the conclusion of trial, the court gave several instructions that erroneously stated the law as well as two instructions that contained inconsistent ideas. When the jury rendered a verdict for defendants, plaintiffs moved for a new trial. The court granted the motion on the basis of errors in law occurring in the instructions. Defendants appealed the order.

The Supreme Court affirmed the order, stating that the two instructions given to the jury contained inconsistent ideas and that the jury may have been confused by them (*23 Cal. 2d 256, 261-262)* . Furthermore, the court, in attempting to correct its mistakes, told the jury to disregard certain instructions, then told the jury not to disregard a certain instruction

that was then reread. The Court felt that the lower court's determination that its actions confused and misled the jury was not an abuse of discretion, and accordingly the Court affirmed the order (*23 Cal. 2d 256, 262)* .

[4] Additional Authorities

[a] Order Granting New Trial Affirmed If Challenged Instruction Erroneous in Any Degree

The factual and procedural background of *Christian v. Bolls (1970) 7 Cal. App. 3d 408, 86 Cal. Rptr. 545* , is discussed in [3][h], *above*. In affirming plaintiff's motion for a new trial on the basis of the trial court's error in failing to give certain jury instructions, the court of appeal stated that if the challenged instruction was erroneous in any degree or even if it is only fairly debatable that such an instruction may have been misleading, the broad discretion of the trial court may not be disturbed (*7 Cal. App. 3d 408, 415)* .

[b] Incorrect or Incomplete Statement of Law

Pease v. Beech Aircraft Corp. (1974) 38 Cal. App. 3d 450, 113 Cal. Rptr. 416 , was an action arising out of an airplane crash in which the court of appeal affirmed an order granting a new trial on the issue of punitive damages on the ground that there had been an error in instructing the jury. The lower court, when instructing the jury on fraud, omitted the element of actual and justifiable reliance. The court of appeal stated that the lower court decided correctly that the omission made it necessary to grant a new trial as to punitive damages, and accordingly it affirmed the order (*38 Cal. App. 3d 450, 465, 474)* .

Scott v. Renz (1945) 67 Cal. App. 2d 428, 154 P.2d 738 , was a wrongful death action in which the court of appeal affirmed an order granting plaintiffs' motion for a new trial on the ground of errors in law occurring at trial. During trial, the court stated an incorrect principle of law when instructing the jury (*67 Cal. App. 2d 428, 437)* . The court of appeal stated that the lower court was in a better position to determine whether or not the incorrect instruction was prejudicial, and that there appeared to have been no abuse of discretion in granting the order (*67 Cal. App. 2d 428, 438)* .

[c] Instruction on Inapplicable Doctrine

The factual and procedural background of *Stoneburner v. Richfield Oil Co. (1931) 118 Cal. App. 449, 5 P.2d 436* , is discussed in [3][b], *above*. The court of appeal affirmed an order granting plaintiff's motion for a new trial based on erroneous jury instructions. The trial court had instructed the jury on contributory negligence when there was nothing in the record that indicated that it was an issue in the case. The court of appeal concluded that the instruction was sufficiently prejudicial and constituted an error in law (*118 Cal. App. 449, 456)* .

[d] Failure to Give Certain Instructions

Kimball v. Whetzel (1970) 10 Cal. App. 3d 836, 89 Cal. Rptr. 373 , was an action for personal injuries in which the court of appeal affirmed an order granting plaintiff's motion for a new trial on the ground of error in law. The trial court based its order on its failure to give an instruction indicating that a driver could give a signal either by hand or by use of a signal lamp or mechanical device. The jury was, in effect, instructed that plaintiff's failure to give a hand signal was negligence (*10 Cal. App. 3d 836, 841)* . The court of appeal found that the instruction was sufficiently misleading so that the trial court could have found that the instruction was improper, and it therefore affirmed the order (*10 Cal. App. 3d 836, 842)* .

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
CHAPTER 155 MOTIONS AFTER TRIAL
PART II. FORMS
B. Motions for New Trial
8. Error of Law

15-155 California Points & Authorities § 155.253

§ 155.253 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Error of Law [Code Civ. Proc. § 657(7)]--Erroneous Denial of Jury Trial

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities supporting a motion for new trial on the ground of error in law (see § 155.250).*]

A NEW TRIAL SHOULD BE GRANTED ON THE GROUND OF ERROR IN LAW, OCCURRING AT TRIAL AND EXCEPTED TO BY THE PARTY MAKING THE APPLICATION, BECAUSE THE COURT ERRONEOUSLY DENIED _____ [PLAINTIFF *or* DEFENDANT] A JURY TRIAL, THUS MATERIALLY AFFECTING HIS/HER/ITS SUBSTANTIAL RIGHTS.

A. Erroneous Denial of Jury Trial Is Error in Law. The court's erroneous denial of a jury trial to a party in an action triable by jury is an error in law for which a new trial may be granted (*see Hernandez v. Wilson (1961) 193 Cal. App. 2d 615, 619, 14 Cal. Rptr. 585* ; *see also Johnson v. Superior Court (1932) 121 Cal. App. 288, 292, 8 P.2d 1047*).

B. Denial of Jury Trial as Miscarriage of Justice. The court's denial of the right to a jury trial is a miscarriage of justice within the provisions of *Article VI, Section 13, of the California Constitution*, and a new trial may be granted thereon (*Hernandez v. Wilson (1961) 193 Cal. App. 2d 615, 619, 14 Cal. Rptr. 585*).

[*Optional*] **C. Denial of Jury Trial Deemed Objected To.** If the moving party has taken actions at trial that make his or her position known on the issue of the denial of the right to a jury, that party will have been deemed to have objected to the court's order denying a jury, and a new trial may be granted on the ground of error in law (*see Code Civ. Proc. § 647*; *Medeiros v. Medeiros (1960) 177 Cal. App. 2d 69, 73, 1 Cal. Rptr. 696*).

[*Add further points and authorities supporting the contention that the denial of a jury trial was erroneous.*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for new trial on the ground of error in law occurring at trial and excepted to by the party making the application [*Code Civ. Proc. § 657(7)*] when the court erroneously denied a jury trial to the aggrieved party. It does not provide a complete form, but is designed to be combined with a general form of points and authorities in support of a motion for new trial on the ground of error in law [*see § 155.250*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should discuss why the court's denial of a jury trial was erroneous, showing how it deprived the moving party of a fair trial and materially affected the moving party's substantial rights. Counsel should also add further points and authorities supporting the contention that the denial of a jury trial was erroneous.

[c] Related Pleading and Practice Forms

For a form of notice of intention to move for a new trial on the ground of error in law [Code Civ. Proc. § 657(7)] and other related forms, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender). For a discussion of when a jury trial is required, see Ch. 326A, *Jury Verdicts* in that publication.

[d] Opposing Points and Authorities

The points and authorities set out in *§ 155.270* may be used in an appropriate case to oppose a motion for a new trial supported by this memorandum.

[3] Discussion of Authorities

[a] Erroneous Denial of Jury Trial Is Error in Law

In ***Hernandez v. Wilson*** *(1961) 193 Cal. App. 2d 615, 14 Cal. Rptr. 585* , plaintiff waived the right to a jury trial in open court on the first day of trial. However, defendant desired a jury and the case proceeded to trial with a jury for three days. On the morning of the fourth day of trial, defendant's attorney stated that he was then waiving further trial by jury, but then plaintiff withdrew her previous waiver and demanded that the trial proceed and conclude as a jury trial. The court concluded that plaintiff had already waived her right to a jury, refused to permit further trial by jury, heard the conclusion of the case, and ordered judgment for defendant. Plaintiff moved for a new trial, and the court granted the motion on the ground that there was an error in law. Defendant appealed the order granting a new trial; plaintiff cross appealed from the judgment.

The court of appeal affirmed the order, stating that the judge's comments made at the granting of the motion indicated that he misapprehended his duty and power at the time the jury was dismissed. These remarks affirmatively showed that he did not deem a motion to be relieved of a waiver to be one requiring the exercise of discretion. With commendable frankness, he took proper action by granting the motion for new trial. Furthermore, the court noted that any doubt concerning the waiver of a jury trial should be resolved in favor of granting one. Accordingly, the court affirmed the order (*193 Cal. App. 2d 615, 619)* .

In ***Johnson v. Superior Court*** *(1932) 121 Cal. App. 288, 8 P.2d 1047* , the case came to trial with a jury present; however, defendant objected to a trial by jury, claiming that it had been waived by plaintiffs when they failed to request one at the time the action was first set for trial several months earlier. After argument, the court in effect sustained this objection and held that a jury trial had been waived. The trial proceeded before the court and without a jury. When judgment for defendant was ordered, plaintiffs moved for a new trial on several grounds including error in law. The trial

court granted the motion, stating that the plaintiffs had not waived a jury trial and that the court committed error in denying plaintiffs a trial by jury.

The court of appeal affirmed the order even though the court failed to specify the statutory ground on which the order was based. The court stated that the order was based on the ground that the previous action of the court in denying a jury trial was erroneous as a matter of law. After argument, the lower court in effect sustained defendant's objection and held that a jury trial had been waived. This ruling, the court explained, was one made during trial and, if erroneous, was an error of law occurring at trial. Since the lower court concluded that its action was an error in law, and the order did not appear to have been in excess of its jurisdiction, the court of appeal affirmed the order granting plaintiffs a new trial (*121 Cal. App. 288, 292-293)* .

[b] Denial of Jury Trial as Miscarriage of Justice

The factual and procedural background of ***Hernandez v. Wilson*** *(1961) 193 Cal. App. 2d 615, 14 Cal. Rptr. 585* , is discussed in [a], *above*. The court of appeal affirmed an order granting plaintiff a new trial on the ground that there had been an error in law when the court denied plaintiff a jury trial. The court stated that any doubt concerning the waiver of a jury trial should be resolved in favor of granting one. This is because the denial of the right to a trial by jury is a miscarriage of justice within the provisions of former Cal. Const, art VI, § 41/2 [*now see Cal. Const., art. VI, § 13*]. In this case, the court of appeal stated that the lower court took proper action in granting plaintiff's motion for a new trial because an error of law was involved. Accordingly, the court affirmed the order (*193 Cal. App. 2d 615, 618-619)* .

[c] Denial of Jury Trial Deemed Objected To

In ***Medeiros v. Medeiros*** *(1960) 177 Cal. App. 2d 69, 1 Cal. Rptr. 696* , plaintiff brought an action to quiet title to certain real and personal property. Prior to trial, plaintiff amended her complaint to allege that defendants were in possession of the property and were wrongfully withholding it. Thereafter, a memorandum to set the cause for trial was filed. Plaintiff requested a jury trial and filed a motion asking the court to determine and set forth the equitable and legal issues raised by the pleadings, so that she could know which issues were to be tried by the court and which by the jury. The court denied the demand for a jury trial and also denied the motion to determine the legal and equitable issues. The cause proceeded to trial without a jury and the court decided that plaintiff was to be denied relief. Plaintiff moved for a new trial, contending that the court erred in denying her a jury trial. The trial court granted the motion, and defendants appealed the order. Plaintiff cross appealed from the judgment.

The court of appeal affirmed the order, stating that plaintiff was entitled to a jury trial in this case because her action to quiet title was legal and not equitable. In this case, defendants contended that plaintiff failed to object or except to the order denying a jury trial and therefore the error could not constitute a ground for an order granting a new trial. However, the court of appeal stated that the argument was without merit. By the proceedings that plaintiff took, including timely demand, deposit of jury fees, and a motion for determination of the issue of her rights, she made fully known to the court her position on the issue of her right to a jury trial. Therefore, the order of denial is deemed to have been excepted to [*see Code Civ. Proc. § 647*]. The court thus concluded that the order granting plaintiff a new trial was proper (*177 Cal. App. 2d 69, 73-74)* .

[4] Additional Authorities

[a] Erroneous Denial of Jury Trial Is Error in Law

City of Redondo Beach v. Kumnick (1963) 216 Cal. App. 2d 830, 31 Cal. Rptr. 367 , was an eminent domain action in which the court of appeal reversed an interlocutory judgment of condemnation and concluded that the lower court erred in denying defendant's motion for a new trial based on the court's denial of a jury trial to plaintiff. The court stated that plaintiff's failure to post jury fees could not constitute a waiver and that the trial court erred in proceeding to trial without a jury (*216 Cal. App. 2d 830, 834)* . The court also noted that plaintiff's subsequent participation in the trial did

not constitute a waiver or estop him from asserting his right on appeal (*216 Cal. App. 2d 830, 835, 837)* .

The factual and procedural background of *Medeiros v. Medeiros (1960) 177 Cal. App. 2d 69, 1 Cal. Rptr. 696* , is discussed in [3][c], *above*. The court affirmed an order granting plaintiff a new trial on the basis of the lower court's erroneous denial of a jury trial. The court concluded that plaintiff was entitled to a trial by jury and that the trial court did not err in granting plaintiff's motion for a new trial (*177 Cal. App. 2d 69, 73)* .

Cowlin v. Pringle (1941) 46 Cal. App. 2d 472, 116 P.2d 109 , was a personal injury action in which the court of appeal reversed judgment for defendants and remanded the case for a new trial on the basis of the trial court's erroneous denial of a jury trial to plaintiff. The court found that plaintiff did not waive her right to a jury trial when she failed to deposit jury fees for the first day of trial since one defendant had already prepaid the fees and there was no reason why plaintiff should tender another fee for the same day of trial (*46 Cal. App. 2d 472, 475)* . The court concluded that the denial of a jury trial resulted in a miscarriage of justice and that a reversal of the judgment was required (*46 Cal. App. 2d 472, 476-477)* .

[b] Denial of Jury Trial as Miscarriage of Justice

City of Redondo Beach v. Kumnick (1963) 216 Cal. App. 2d 830, 31 Cal. Rptr. 367 , is discussed in [a], *above*. The court of appeal stated that the denial of the right to trial by jury to one justly entitled thereto amounts to a miscarriage of justice and that a reversal of the judgment is required (*216 Cal. App. 2d 830, 839)* .

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15-155 California Points & Authorities § 155.254

§ 155.254 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Error of Law [Code Civ. Proc. § 657(7)]--Improper Granting of Nonsuit

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities supporting a motion for new trial on the ground of error in law (see § 155.250).*]

A NEW TRIAL SHOULD BE GRANTED ON THE GROUND OF ERROR IN LAW, OCCURRING AT TRIAL AND EXCEPTED TO BY THE PARTY MAKING THE APPLICATION, BECAUSE THE COURT IMPROPERLY GRANTED _____ [PLAINTIFF'S *or* DEFENDANT'S] MOTION FOR A NONSUIT, THUS MATERIALLY AFFECTING HIS/HER/ITS SUBSTANTIAL RIGHTS.

A. Order Granting Nonsuit Deemed Excepted To. An order granting or denying a nonsuit is deemed excepted to without formal objection (*Code Civ. Proc. § 647*).

B. Improper Granting of Nonsuit Is Error in Law. The improper granting of a nonsuit is an error in law for which a new trial may be granted (*Castillo v. Warren (1941) 44 Cal. App. 2d 903, 907, 113 P.2d 232*).

[*Optional*] **C. Court's Dismissal of Action After Erroneously Compelling Election.** The action of a trial court in dismissing a cause of action after erroneously compelling a party to elect between two causes of action is, in effect, the improper granting of a nonsuit for which a new trial may be granted on the ground of error in law (*Horstman v. Krumgold (1942) 55 Cal. App. 2d 296, 298-299, 130 P.2d 721*).

[*Add further points and authorities discussing substantive merits of case to show reasons why granting of nonsuit was improper.*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for new trial on the ground of error in law occurring at trial and excepted to by the party making the application [*Code Civ. Proc. § 657(7)*] when the court has erroneously granted a nonsuit. It does not provide a complete form, but is designed to be combined with a general form of points and authorities in support of a motion for new trial on the ground of error in law [*see § 155.250*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should discuss the reasons why the court's granting of a nonsuit was erroneous, showing how it deprived the moving party of a fair trial and materially affected the moving party's substantial rights. Counsel should also add further points and authorities pertaining to the substantive merits of the case in order to show that the nonsuit was erroneously granted. For example, in a wrongful death action in which plaintiff moves for a new trial after the court has granted defendant's motion for a nonsuit based on plaintiff's failure to show his or her capacity to sue, plaintiff's counsel should discuss the substantive merits of the case in order to show that the nonsuit was erroneously granted [*see Castillo v. Warren (1941) 44 Cal. App. 2d 903, 909, 113 P.2d 232]* .

[c] Related Pleading and Practice Forms

For a form of notice of intention to move for a new trial on the ground of error in law [Code Civ. Proc. § 657(7)] and other related forms, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[d] Opposing Points and Authorities

The points and authorities set out in *§ 155.270* may be used in an appropriate case to oppose a motion for a new trial supported by this memorandum.

[3] Discussion of Authorities

[a] Improper Granting of Nonsuit Is Error in Law

In ***Castillo v. Warren*** *(1941) 44 Cal. App. 2d 903, 113 P.2d 232* , plaintiff administrator brought an action for wrongful death against a hospital and a doctor. After the close of plaintiff's case, the trial court granted defendants' motion for a nonsuit, and judgment was entered for defendants. Subsequently, the trial court granted plaintiff's motion for a new trial and defendants appealed the order.

The court of appeal affirmed the order, stating that the improper granting of a nonsuit is an error in law for which a new trial may be granted (*44 Cal. App. 2d 903, 907)* . The court noted that it was apparent from the record that the trial court granted the nonsuit on the sole ground that plaintiff had not shown a legal capacity to sue, and that on motion for new trial, the lower court believed that it had erroneously determined that question, as a matter of law (*44 Cal. App. 2d 903, 906)* . The court of appeal concluded that a defect in plaintiff's petition for letters of administration did not deprive him of the capacity to bring a suit on behalf of the estate that the represented (*44 Cal. App. 2d 903, 908-909)* . Hence, the lower court's conclusion that it had improperly granted a nonsuit was proper. Accordingly, the court affirmed the order granting a new trial (*44 Cal. App. 2d 903, 909)* .

[b] Court's Dismissal of Action After Erroneously Compelling Election

In ***Horstman v. Krumgold*** *(1942) 55 Cal. App. 2d 296, 130 P.2d 721* , plaintiff passenger brought an action against defendant driver in which the first cause of action was based on the theory that plaintiff was a passenger for compensation and the second cause of action was based on the theory that she was a guest. Defendant presented a

motion to the court to compel plaintiff to make an election between the first and second causes of action. The motion was granted, and plaintiff decided to proceed under the first cause of action. The court then granted defendant's motion to dismiss the second cause of action. When all the evidence had been presented, the court, on defendant's motion, directed the jury to return a verdict for defendant. Thereafter, the court granted plaintiff's motion for a new trial as to the second cause of action.

The court of appeal affirmed the order, stating that the trial court committed errors in law when it compelled plaintiff to elect between two causes of action and when it dismissed the second cause of action (*55 Cal. App. 2d 296, 298)* . A litigant who has stated the facts in different counts so as to meet any possible developments in the evidence may not be required to elect between the various causes of action presented either before the trial or at the close of the case (*55 Cal. App. 2d 296, 297)* . The court noted that an action of a court in improperly granting or refusing a nonsuit is also an error in law, whether made on the opening statement of counsel or after the close of the evidence (*55 Cal. App. 2d 296, 298-299)* . In this case, the court concluded that the lower court's action in dismissing the second cause was, in effect, the granting of a nonsuit, and was reviewable on a motion for a new trial (*55 Cal. App. 2d 296, 299)* . Since the court felt that the lower court did not abuse its discretion in granting a new trial, it affirmed the order (*55 Cal. App. 2d 296, 300)* .

[4] Additional Authorities

[a] Improper Granting of Nonsuit Is Error in Law

Carton Corporation v. Superior Court (1926) 76 Cal. App. 434, 244 P. 932 , was an action involving a petition for a writ of mandate directing the court to hear and determine a motion for new trial. At the conclusion of plaintiff's case, defendant's motion for a nonsuit was granted. Plaintiff served and filed a notice of intention to move for a new trial, but it was stricken from the files on defendant's motion. Even though the court of appeal denied the writ, it stated that a motion for new trial could properly be entertained in this case (*76 Cal. App. 434, 437)* . It added that the action of the court in improperly granting or denying a motion for nonsuit, whether made on the opening statement or after the close of evidence, is an error of law occurring at trial for which a new trial may be granted (*76 Cal. App. 434, 436)* .

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15-155 California Points & Authorities § 155.255

§ 155.255 Supporting Motion for New Trial [Code Civ. Proc. § 659]--Error of Law [Code Civ. Proc. § 657(7)]--Improper Denial of Motion for Directed Verdict

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities supporting a motion for new trial on the ground of error in law (see § 155.250).*]

A NEW TRIAL SHOULD BE GRANTED ON THE GROUND OF ERROR IN LAW, OCCURRING AT TRIAL AND EXCEPTED TO BY THE PARTY MAKING THE APPLICATION, BECAUSE THE COURT IMPROPERLY DENIED _____ [PLAINTIFF'S *or* DEFENDANT'S] MOTION FOR A DIRECTED VERDICT, THUS MATERIALLY AFFECTING HIS/HER/ITS SUBSTANTIAL RIGHTS.

Improper Denial of Motion for Directed Verdict Is Error in Law. The improper denial of a motion for a directed verdict constitutes an error in law occurring at trial that justifies the granting of a new trial by the trial court (*Steele v. Werner (1938) 28 Cal. App. 2d 554, 556, 83 P.2d 56*).

[*Add further points and authorities discussing substantive law pertaining to particular cause of action or defense in order to show why directed verdict should have been granted.*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for new trial on the ground of error in law occurring at trial and excepted to by the party making the application [*Code Civ. Proc. § 657(7)*] when the court has improperly denied a motion for a directed verdict. It does not provide a complete form, but is designed to be combined with a general form of points and authorities in support of a motion for new trial on the ground of error in law [*see § 155.250*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should discuss the standards for granting a motion for a directed verdict and show that the motion was improperly denied, thus depriving the moving party of a fair trial and materially affecting the moving party's substantial rights. Counsel should also add further points and authorities discussing the substantive law pertaining to the particular cause of action or defense in order to show that the motion for a directed verdict should have been granted.

Note that a motion for judgment notwithstanding the verdict may also be appropriate in this case, and counsel may desire to make a combined motion for new trial and for judgment notwithstanding the verdict. For a memorandum in support of a motion for judgment notwithstanding the verdict, see *§ 155.10* et seq.

[c] Related Pleading and Practice Forms

For a form of notice of intention to move for a new trial on the ground of error in law [Code Civ. Proc. § 657(7)] and other related forms, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender). For a discussion of motions for directed verdict, see Ch. 326A, *Jury Verdicts* in that publication.

[d] Opposing Points and Authorities

The points and authorities set out in *§ 155.270* may be used in an appropriate case to oppose a motion for a new trial supported by this memorandum.

[3] Discussion of Authorities

[a] Improper Denial of Motion for Directed Verdict Is Error in Law

In ***Steele v. Werner*** *(1938) 28 Cal. App. 2d 554, 83 P.2d 56* , plaintiff brought an action to recover damages for the alleged alienation of affection of her husband. During trial, defendant moved for a directed verdict when plaintiff rested her case and again when all the evidence, including defendant's, had been received. Both motions were denied. Defendant moved for a new trial on several grounds, including errors in law occurring at trial. The motion was granted, and plaintiff appealed the order.

The court of appeal affirmed the order, stating that it is well settled that the improper denial of a motion for a directed verdict constitutes an error in law occurring at trial that justifies the trial court in granting a new trial. The motion for a directed verdict may be granted when, disregarding conflicting evidence and giving to the evidence adduced on behalf of the plaintiff all of the value to which it is legally entitled, and indulging in every legitimate inference that may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were received (*28 Cal. App. 2d 554, 556)* . In this case, the court concluded that the record clearly demonstrated that plaintiff's husband's affections were never alienated to the extent of giving rise to an action for damages. The court felt that the motions for a directed verdict were improperly denied, and that the trial court was therefore justified in granting a new trial (*28 Cal. App. 2d 554, 560-561)* .

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[Reserved]

§§ 155.256[Reserved]

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15-155 California Points & Authorities § 155.270

§ 155.270 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Error of Law [Code Civ. Proc. § 657(7)]

[1] FORM

[*Caption. See § 155.60[1].*]

A NEW TRIAL SHOULD NOT BE GRANTED, BECAUSE THERE WAS NO ERROR IN LAW OCCURRING AT TRIAL THAT MATERIALLY AFFECTED _____ [PLAINTIFF'S *or* DEFENDANT'S] SUBSTANTIAL RIGHTS.

[*EITHER*]

A. No Error in Law Occurring at Trial. When no error in law has been committed, there is no basis for the court's exercise of discretion, and a new trial is properly denied (*Stoddard v. Rheem (1961) 192 Cal. App. 2d 49, 53, 13 Cal. Rptr. 496*).

[*AND/OR*]

B. Error Must Be Prejudicial. The trial court is expressly enjoined by *Article VI, Section 13, of the California Constitution* from granting a new trial for error in law unless such error is prejudicial; if it clearly appears that the error could not have affected the result of the trial, the court is bound to deny the motion (*Sparks v. Redinger (1955) 44 Cal. 2d 121, 125, 279 P.2d 971* ; *Bristow v. Ferguson (1981) 121 Cal. App. 3d 823, 826, 175 Cal. Rptr. 571*).

[*Optional*] **C. Admission of Irrelevant Evidence.** Admission of irrelevant evidence is not a ground for granting a new trial in the absence of a showing that the movant for a new trial was prejudiced by the evidence (*Townsend v. Gonzalez (1957) 150 Cal. App. 2d 241, 249-250, 309 P.2d 878*).

[*Optional*] **D. Exclusion of Evidence.** The court is not required to grant a new trial for alleged error in excluding certain evidence when it is extremely unlikely that a different result would have accrued from the admission of the evidence (*Dankert v. Lamb Finance Co. (1956) 146 Cal. App. 2d 499, 503, 304 P.2d 199*).

[*Optional*] **E. Erroneous or Misleading Jury Instructions.** A new trial will not be granted on the basis of erroneous or misleading jury instructions if the errors were not prejudicial and could not have affected the result of the trial (*Sparks v. Redinger (1955) 44 Cal. 2d 121, 123, 279 P.2d 971* ; *Bristow v. Ferguson (1981) 121 Cal. App. 3d 823, 829, 175 Cal. Rptr. 571*).

[*Optional*] **F. Failure to Object to Erroneous Admission of Evidence.** Failure to make a timely objection or motion to strike inadmissible evidence constitutes a waiver of the right to later complain of its erroneous admission into evidence (*Mosesian v. Pennwalt Corp. (1987) 191 Cal. App. 3d 851, 865, 236 Cal. Rptr. 778*).

[*Optional*] **G. Denial of Jury Trial After Waiver.** After a party has waived the right to a jury trial, the trial court may reject the request for a new jury trial, and may consider such factors as delay in rescheduling the trial for jury, lack of funds, timeliness of the request, prejudice to the litigants, prejudice to the court or its calendar, the reason for the demand, and whether the other parties to the action desire a jury trial (*Day v. Rosenthal (1985) 170 Cal. App. 3d 1125, 1176, 217 Cal. Rptr. 89*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for new trial on the ground of error in law occurring at trial and excepted to by the party making the application [*see Code Civ. Proc. § 657(7)*]. In an appropriate case, it may be submitted in opposition to a motion for new trial supported by the points and authorities set out in *§ 155.250* et seq.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should show that there was no error in law occurring at trial or that if error did occur, the error was not prejudicial to the moving party.

[c] Related Pleading and Practice Forms

For a notice of intention to move for a new trial as well as an order denying the motion, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[3] Discussion of Authorities

[a] No Error in Law Occurring at Trial

In ***Stoddard v. Rheem*** *(1961) 192 Cal. App. 2d 49, 13 Cal. Rptr. 496* , plaintiffs brought an action for wrongful death allegedly caused by the negligence of defendants in the operation of a gas-producing well. At the conclusion of trial, the court gave a certain jury instruction separately after it had given all other instructions. After the jury returned a verdict in favor of plaintiffs, defendants moved for a new trial, claiming that the manner of giving the instruction overly impressed it on the minds of the jury. The court granted the motion on the ground of error in law. Plaintiffs appealed the order; defendants appealed the judgment.

The court of appeal reversed the order, noting that the instruction was correct and proper and should have been given. The court stated that it was concerned with a pure question of law and found that there was no legal error. It added that when no error has been committed, there is no basis for the exercise of discretion. The inquiry as to whether or not instructions are erroneous presents purely a question of law, and if it appears that the trial court granted a new trial based on an erroneous concept of legal principles applicable to the cause, its order will be reversed (*192 Cal. App. 2d 49, 53)* . Since the court concluded that the instructions did not constitute an error in law, it reversed the order granting a new trial (*192 Cal. App. 2d 49, 53-54)* .

[b] Error Must Be Prejudicial

In ***Sparks v. Redinger*** *(1955) 44 Cal. 2d 121, 279 P.2d 971* , plaintiffs brought an action for personal injuries suffered in an automobile-tractor collision with defendants. At the conclusion of trial, the court failed to give a proposed instruction on last clear chance. When the jury returned a verdict for defendants, plaintiffs moved for a new trial. The court granted the motion on the sole ground that it erred in failing to give plaintiffs' proposed instruction. Defendants appealed the order.

The Supreme Court reversed the order, stating that the trial court is expressly enjoined by former Cal. Const, art VI, § 41/2 [*now see Cal. Const., art. VI, § 13*], from granting a new trial for error of law unless such error is prejudicial. If it clearly appears that the error could not have affected the result of the trial, the court is bound to deny the motion. Here, the Court stated that the record affirmatively showed that the proposed last clear chance instruction did not constitute prejudicial error, and the trial court erred in so holding. Accordingly, the Court held that the order granting plaintiffs a new trial had to be reversed (*44 Cal. 2d 121, 123)* .

In ***Bristow v. Ferguson*** *(1981) 121 Cal. App. 3d 823, 175 Cal. Rptr. 571* , plaintiff brought an action for fraud and conspiracy in his removal from a general partnership. At the conclusion of trial, the court instructed the jury on the required elements of conspiracy. After the jury rendered a verdict for defendants, plaintiff's motion for a new trial was granted on the basis of an erroneous or misleading instruction. Defendants appealed the order.

The court of appeal reversed the order, stating that the trial court is expressly enjoined by former Cal. Const, art VI, § 41/2 [*now see Cal. Const., art. VI, § 13*], from granting a new trial for error in law unless such error is prejudicial. If it clearly appears that the error could not have affected the result of the trial, the court is bound to deny the motion (*121 Cal. App. 3d 823, 826)* . In this case, the court of appeal concluded that the instruction was misleading and should not have been given; however, the parties potentially prejudiced by the instruction won the case. Since the error could not have affected the result of trial, the court reversed the order granting a new trial and directed the trial court to reinstate the judgment for defendants (*121 Cal. App. 3d 823, 829)* .

[c] Admission of Irrelevant Evidence

In ***Townsend v. Gonzalez*** *(1957) 150 Cal. App. 2d 241, 309 P.2d 878* , plaintiff brought an action for the balance due under a contract for the sale of beans. After the jury returned a verdict for plaintiff, defendants moved for a new trial on several grounds including errors in law occurring at trial. Defendants claimed that the court erred in admitting certain

irrelevant evidence. The court granted the motion, and plaintiff appealed the order.

The court of appeal reversed the order, stating that the admission of irrelevant evidence is not a ground for a new trial in the absence of a showing that the movant was prejudiced by the evidence (*150 Cal. App. 2d 241, 249-250)* . In this case, the court examined the facts established by the evidence and the testimony to which objection was made, and it concluded that the proof was clear that defendants received beans for which no payment was made (*150 Cal. App. 2d 241, 249-252)* . The court felt that it was inconceivable that the exclusion of the testimony would have resulted in a different judgment. Thus, the court reversed the order granting a new trial (*150 Cal. App. 2d 241, 252)* .

[d] Exclusion of Evidence

In ***Dankert v. Lamb Finance Co.*** *(1956) 146 Cal. App. 2d 499, 304 P.2d 199* , plaintiff brought an action on a promissory note against a finance company and its vice-president. Defendant vice-president defended on the theory that she signed only as an officer of the corporation and not in her individual capacity as a comaker and that she was therefore not personally liable. However, the court excluded certain evidence that it was the business custom of the finance company to require the signatures of two officers on all company obligations. When the court found in favor of plaintiff, defendants moved for a new trial on the grounds of newly discovered evidence and error in law. The court denied the motion, and defendants appealed the judgment.

The court of appeal affirmed the order, stating that the trial court is vested with considerable discretion in determining the relevancy of evidence and weighing that relevance against undue prolongation of the trial and the consideration of extraneous issues. In this case, admission of the proffered evidence would not have been error; however, the court was at liberty to rule that the inference that it raised was not worth the time expended. The court added that even if error were conceded, it was extremely unlikely that a different result would have accrued from the admission of the evidence. Several persons present at the execution of the note testified that defendant expressly stated her intent to be personally obligated on the instrument. Accordingly, the court concluded that the denial of the motion for new trial was proper, and it affirmed the judgment (*146 Cal. App. 2d 499, 503-504)* .

[e] Erroneous or Misleading Jury Instructions

The factual and procedural background of ***Sparks v. Redinger*** *(1955) 44 Cal. 2d 121, 279 P.2d 971* , is discussed in [b], *above*. The Supreme Court, reversing an order granting plaintiffs' motion for a new trial, stated that the lower court's alleged error in failing to give last clear chance instructions to the jury could not have been prejudicial (*44 Cal. 2d 121, 123)* . When a jury finds that defendant driver is not guilty of any negligence contributing to the accident, there is no place for the jury's application of last clear chance principles (*44 Cal. 2d 121, 124)* . Since the failure to give the proposed last clear chance instruction did not constitute prejudicial error, the Court reversed the orders granting plaintiff a new trial (*44 Cal. 2d 121, 123, 126)* .

The factual and procedural background of ***Bristow v. Ferguson*** *(1981) 121 Cal. App. 3d 823, 175 Cal. Rptr. 571* , is discussed in [b], *above*. The court of appeal reversed an order granting plaintiff's motion for a new trial even though it concluded that the instruction was misleading and should not have been given. The court stated that when an instructional error could not have misled the jury because it was inconsistent with the verdict, the trial judge's finding of prejudice cannot stand. Here, the court explained, the parties that were potentially prejudiced by the instruction won the case. Since the error clearly could not have affected the result of trial, the court reversed the order granting a new trial (*121 Cal. App. 3d 823, 829)* .

[f] Failure to Object to Erroneous Admission of Evidence

In ***Mosesian v. Pennwalt Corp.*** *(1987) 191 Cal. App. 3d 851, 236 Cal. Rptr. 778* , an action for damages resulting from crop losses allegedly caused by a chemical spray, defendants called an expert witness, who referred to opinions of

several other experts with whom he had consulted. Plaintiff objected with regard to one outside expert's opinion on the ground of hearsay, and defendant countered that the evidence was not offered for its truth, but rather to show how the witness arrived at his opinion. Plaintiff conceded that the substance of the conversation was admissible, but objected on the ground that the witness's answer on direct examination was not responsive. The trial court overruled the objection contingent on any future motion to strike. During testimony regarding further outside experts, the trial court admonished the jury to remember that the substance of the conversations were not being offered for their truth. Toward the end of the testimony, plaintiff unsuccessfully moved for a mistrial, asserting that the witness's reliance on numerous other opinions cast doubt on his expertise. Plaintiff successfully objected to the introduction of hearsay opinions, but only with respect to two of six outside experts. After jury verdict for defendants, plaintiff moved for a new trial, which the trial court granted on the ground that it erred in introducing out-of-court expert opinions into evidence. Defendants appealed.

The court of appeal reversed, holding, inter alia, that failure to make a timely objection or motion to strike inadmissible evidence constitutes a waiver of the right subsequently to complain of its erroneous admission. Procedurally, plaintiff should have moved to strike the witness's testimony instead of moving for mistrial. When there is no motion to strike an expert's answers to questions, a reviewing court cannot reach the claim of error. Plaintiff's initial accession to the admissibility of hearsay testimony, and later failure to object on the ground of hearsay until the motion for new trial, constituted a waiver of any objection to the hearsay. Due to plaintiff's waiver, there was no error at all, and absent any error, the motion for new trial could not be granted (*191 Cal. App. 3d 851, 865)* . However, even assuming that the introduction of hearsay was erroneous, the error was harmless in light of the substantial evidence supporting the judgment, and the admonitions to the jury (*191 Cal. App. 3d 851, 867)* . Harmless error does not justify the granting of a motion for new trial (*191 Cal. App. 3d 851, 866)* .

[g] Denial of Jury Trial After Waiver

In ***Day v. Rosenthal*** *(1985) 170 Cal. App. 3d 1125, 217 Cal. Rptr. 89* , the court of appeal affirmed a judgment for plaintiff for damages for attorney malpractice. Prior to trial, both parties waived their right to a jury trial. Defendant subsequently moved for a jury trial and the trial court rejected the motion. On appeal, the court held that the rejection was within the trial court's discretion and that the court, in determining the motion, could properly consider such factors as delay in rescheduling the trial for jury, lack of funds, timeliness of the request, prejudice to the litigants, prejudice to the court or its calendar, the reason for the demand, and whether the other parties to the action desire a jury trial (*170 Cal. App. 3d 1125, 1176)* .

[4] Additional Authorities

[a] Error Must Be Prejudicial

Osborne v. Cal-Am Financial Corp. (1978) 80 Cal. App. 3d 259, 145 Cal. Rptr. 584 , was an action for damages for defendant buyer's failure to purchase real property. The court of appeal granted plaintiff's motion for a new trial on several grounds, including errors in law occurring at trial. The court stated that the trial court is bound by the rule of *Cal. Const., art. VI, § 13*, that prejudicial error is the basis for a new trial, and that there is no discretion to grant a new trial for harmless error (*80 Cal. App. 3d 259, 265-266)* . Since the court determined that no prejudicial error occurred at trial, it reversed the order (*80 Cal. App. 3d 259, 266-268)* .

[b] Admission of Irrelevant Evidence

Keller v. Cleaver (1937) 20 Cal. App. 2d 364, 67 P.2d 131 , was an action involving support of a minor in which the court of appeal reversed an order granting plaintiff's motion for a new trial, made on several grounds, including error in law. Plaintiff claimed the court erred in sustaining and overruling objections to questions asked of witnesses and in denying motions to strike out portions of the answers to certain questions. However, the court of appeal concluded that most of the rulings were obviously correct, all related to matters that were largely immaterial, and no possible error

could have affected the result under all the evidence shown by the record (*20 Cal. App. 2d 364, 371-372)* .

[c] Exclusion of Evidence

Bush v. Lane (1956) 139 Cal. App. 2d 376, 293 P.2d 465 , was a conversion action in which the court of appeal affirmed judgment for defendants, finding that an order denying plaintiffs' motion for a new trial based on the lower court's exclusion of certain evidence was proper. The court of appeal stated that the evidence could in no way have affected the final outcome of the trial, and hence the trial court could not have erred in excluding it (*139 Cal. App. 2d 376, 378-379)* .

[d] Erroneous or Misleading Jury Instructions

In *Caldwell v. Paramount Unified Sch. Dist. (1995) 41 Cal. App. 4th 189, 48 Cal. Rptr. 2d 448* , plaintiff sued a school district for race and age discrimination. A jury returned a special verdict in favor of the district, and plaintiff moved for a new trial on the ground that the court had improperly instructed the jury on the plaintiff's burden of proof of age and race discrimination. The trial court granted the motion for new trial, and the court of appeal reversed, holding that the granting of a new trial was an abuse of discretion. The court stated that the instruction, which dealt with shifting burdens of proof, was an accurate statement of the law. More importantly, however, the jury did not address the question with which the challenged instruction dealt. On the special jury form, the jury determined that the defendant did not discriminate against the plaintiff. The form then instructed the jury to skip the question of whether plaintiff had made his prima facie showing, to that the challenged question never came into play in the deliberative process. Since the extraneous instruction could not have misled or confused the jury, the trial court abused its discretion in ordering a new trial (*41 Cal. App. 4th 189, 206)* . The court thus vacated the order granting a new trial.

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8. Error of Law

15-155 California Points & Authorities §§ 155.271-155.289

[Reserved]

§§ 155.271[Reserved]

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9. Final Judgment on All Causes

15-155 California Points & Authorities § 155.290

§ 155.290 Opposing Motion for New Trial [Code Civ. Proc. § 659]--Action Has Not Reached Final Judgment on All Causes

[1] FORM

[*Caption. See § 155.60[1].*]

A NEW TRIAL SHOULD NOT BE GRANTED AS TO SOME ISSUES BECAUSE, AS YET, THERE IS NO FINAL DETERMINATION OF ALL ISSUES IN THE ACTION.

Order Granting New Trial as to Certain Issues Before Final Determination of All Issues Is Premature and Ineffectual. The grant of a new trial as to certain issues in an action, before there has been a final determination of all the issues in the action, is premature and ineffectual (*Cobb v. University of So. California (1996) 45 Cal. App. 4th 1140, 1143-1144, 1146, 53 Cal. Rptr. 2d 71*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for new trial on the ground that not all the issues in the action have yet come to a final determination, and any order granting a new trial would therefore be ineffectual.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, if the action has two causes of action, and one has been determined by the court but another must still be submitted to a jury for verdict, Counsel should discuss this procedural status, showing clearly that no final determination of all causes has yet been reached. While *Code Civ. Proc. § 659* permits a party to file a notice of intention to move for a new trial before the entry of judgment, the statute clearly contemplates that a final determination of all the causes of action has been rendered, and a final judgment may timely be entered [*Cobb v. University of So. California (1996) 45 Cal. App. 4th 1140, 1143, 1146, 53 Cal. Rptr. 2d 71]* .

[c] Related Pleading and Practice Forms

For a notice of intention to move for a new trial as well as an order denying the motion, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[3] Discussion of Authorities

[a] Order Granting New Trial as to Certain Issues Before Final Determination of All Issues Is Premature and Ineffectual

In ***Cobb v. University of So. California*** *(1996) 45 Cal. App. 4th 1140, 53 Cal. Rptr. 2d 71* , plaintiff filed suit against defendant university alleging two causes of action, one for racial discrimination and one for breach of contract. After trial, the jury deadlocked on the discrimination claim, but reached a verdict for plaintiff on the breach of contract cause of action. The trial court ordered a mistrial on the discrimination claim, and set that matter for retrial. Later, the trial court granted motions by defendant for judgment notwithstanding the verdict and for a new trial on the breach of contract claim. Plaintiff appealed these orders granting these motions.

With regard to the appeal of the order for new trial, the court of appeal concluded that the order granting a new trial was not appealable, and dismissed the appeal (*45 Cal. App. 4th 1140, 1143-1145, 1146)* . One basis for this decision was that the order granting a new trial was ineffectual in that it was improperly made before a final determination of all the causes in the suit; therefore no appeal would lie from the order (*45 Cal. App. 4th 1140, 1146)* . The court reasoned that an order granting a new trial is appealable only because it contemplates a final judgment. noted that an order granting a new trial is generally appealable because the order contemplates a final judgment. While *Code Civ. Proc. § 659* permits a party to file a notice of intention to move for a new trial before the entry of judgment, the statute clearly contemplates that a final determination of all the causes of action has been rendered, and a final judgment may timely be entered. However, where some issues are to be tried by a jury and others by the court, the trial proceedings are premature when instituted after a verdict has been rendered but before determination of all issues in the case. Similarly, in this situation, due to the hung jury on the discrimination claim, there could be no final determination of plaintiff's action until retrial of that claim (*45 Cal. App. 4th 1140, 1143-1144)* . Any order purporting to grant a new trial as to certain issues, before there has been a final determination of all the issues in the lawsuit, is improperly premature and ineffectual (*45 Cal. App. 4th 1140, 1144, 1146)* .

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15-155 California Points & Authorities §§ 155.291-155.299

[Reserved]

§§ 155.291[Reserved]

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10. Appeal From Order Granting New Trial

15-155 California Points & Authorities § 155.300

§ 155.300 Supporting Appeal From Order Granting New Trial [Code Civ. Proc. § 659]--Trial Court Failed to Specify Grounds or Reasons for Order [Code Civ. Proc. § 657]

[1] FORM

[*The following may be used in appellate brief supporting relief from order for new trial.*]

THE TRIAL COURT'S ORDER GRANTING _____ [*identify party, e.g.,* PLAINTIFF]'S MOTION FOR A NEW TRIAL IS DEFECTIVE BECAUSE _____ [THE ORDER FAILS TO STATE THE GROUNDS FOR THE NEW TRIAL *and/or* THE ORDER FAILS TO CONTAIN A SPECIFICATION OF REASONS FOR GRANTING THE MOTION AND THE COURT FAILED TO FILE A SPECIFICATION OF REASONS WITHIN 10 DAYS AFTER THE FILING OF THE ORDER].

[*EITHER*]

A. Specification of Grounds. When a new trial is granted, on all or part of the issues, the court must specify the ground or grounds on which it is granted. Judicial failure to specify grounds renders the order defective (*Code Civ. Proc. § 657*; *Sanchez-Corea v. Bank of America (1985) 38 Cal. 3d 892, 899-900, 215 Cal. Rptr. 679, 701 P.2d 826*).

[*AND/OR*]

B. Specification of Reasons. When a new trial is granted, on all or part of the issues, the court must specify the court's reason or reasons for granting the new trial on each ground stated. If an order granting a motion for a new trial does not contain such specification of reasons, the court must, within 10 days after filing such order, prepare, sign, and file such specification of reasons in writing with the clerk. Any judicial attempt to file a written specification of reasons beyond the 10-day period is an act in excess of jurisdiction and is therefore a nullity (*Code Civ. Proc. § 657*; *La Manna v.*

Stewart (1975) 13 Cal. 3d 413, 418, 118 Cal. Rptr. 761, 530 P.2d 1073).

[*Optional*] **C. Oral Pronouncement of Reasons Inadequate.** A judge's oral statement of reasons cannot amount to compliance with *section 657 of the Code of Civil Procedure*, no matter how thoroughly the specification may have been prepared (*Code Civ. Proc. § 657*; *La Manna v. Stewart (1975) 13 Cal. 3d 413, 423, 118 Cal. Rptr. 761, 530 P.2d 1073*).

[*Optional*] **D. Reference to Transcription of Oral Statement of Reasons Inadequate.** A judge's incorporation by reference, in an order granting a new trial, of a transcript of an oral statement of reasons made by the judge at a earlier time does not amount to compliance with *section 657 of the Code of Civil Procedure* (*Code Civ. Proc. § 657*; *Steinhart v. South Coast Area Transit (1986) 183 Cal. App. 3d 770, 774, 228 Cal. Rptr. 283*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted as part of an appellant's opening brief, in support of an appeal from a trial court's order granting a motion for a new trial on the ground that the trial court failed to provide a statement of grounds or reasons [*Code Civ. Proc. § 657*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should show that the trial judge failed to include a statement of grounds in the order granting the motion for a new trial, or that the trial judge failed to file a statement of reasons within 10 days of such order.

[c] Related Pleading and Practice Forms

For discussion and forms relating generally to motion proceedings for new trial, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender). For discussion and forms relating to appeals, see Ch. 40, *Appeal: An Overview* et seq., in that publication.

[3] Discussion of Authorities

[a] Specification of Grounds

In ***Sanchez-Corea v. Bank of America*** *(1985) 38 Cal. 3d 892, 215 Cal. Rptr. 679, 701 P.2d 826* , the trial court entered a judgment in favor of plaintiffs. Defendant timely moved for a new trial, asserting six grounds for its motion. Exactly 60 days after notice of entry of judgment was mailed, the trial court granted defendant's motion for a new trial. The minute order entered by the clerk stated "Defendants [sic] motion for new trial is granted. Specifications to follow." No grounds for the new trial order were specified at that time. One week later, the trial court filed an Order Granting New trial vacating the judgment and granting defendant's motion. This second order explained that the sole ground for granting the motion was insufficiency of the evidence. Plaintiffs appealed, contending that the first order was defective for failure to state the ground on which the motion was made and that the second order was invalid because it was made after expiration of the 60-day period in which the court had jurisdiction to rule on the motion.

The Supreme Court reversed. The Court found that the absence of specification of grounds in the first order made it defective but not void under *Code Civ. Proc. § 657* (*38 Cal. 3d 892, 900)* . As to the second order, which was not filed until 67 days after notice of entry of judgment, the Court found that, to the extent it purported to rule on the motion and state insufficient evidence as the ground therefor, it was defective as in excess of the 60-day jurisdictional period (*38 Cal. 3d 892, 903)* . Addressing the issue of appellate review, the Court noted that *Code Civ. Proc. § 657* requires an

appellate court to affirm a new trial order if it should have been granted on any ground stated in the motion. However, an appellate court cannot affirm on grounds of sufficiency of the evidence or of inadequate or excessive damages unless such ground is stated in the new trial order. Limited to considering the first order (the second order having being deemed an act in excess of jurisdiction), the Court indicated that, since the order stated no grounds, the Court could not affirm the order on grounds of insufficiency of the evidence or excessive damages (*38 Cal. 3d 892, 905)* . The Court evaluated the other four grounds asserted by defendant, finding that these grounds did not warrant affirming the trial court's order granting a new trial (*38 Cal. 3d 892, 906-910)* .

[b] Specification of Reasons

In ***La Manna v. Stewart*** *(1975) 13 Cal. 3d 413, 118 Cal. Rptr. 761, 530 P.2d 1073* , plaintiff's motion for a new trial was granted by the trial court. In granting the motion, the court gave an oral statement of its reasons. The written minute order stated only that "Motion is granted. Verdict is vacated on all the issues. The court shall file its specifications and mail a copy [to] each counsel." The court did not timely file such a specification of reasons. Nearly two months after the first minute order was filed, the court filed a "nunc pro tunc minute order" purporting to amend the first minute order by adding thereto a verbatim description of the oral statement of reasons given on the prior date. Defendant appealed from the order granting plaintiff a new trial.

The Supreme Court reversed. *Code Civ. Proc. § 657* requires a court granting a motion for a new trial to set forth a specification of reasons, either in the order itself, or in a writing that is to be prepared, signed, and filed with the clerk within 10 days after filing the order. The Court noted that the first minute order contained no specification of the court's reasons for granting a new trial and that the only written specification of reasons in the case was filed not 10, but 57 days after the order granting a new trial. The Court concluded that since the trial court exceeded the 10-day period of *Code Civ. Proc. § 657* in declaring its reasons, the late specification of reasons was a nullity (*13 Cal. 3d 413, 418)* .

[c] Oral Pronouncement of Reasons Inadequate

The facts and procedural background of ***La Manna v. Stewart*** *(1975) 13 Cal. 3d 413, 118 Cal. Rptr. 761, 530 P.2d 1073* , are discussed in [b], *above*. The Supreme Court, reversing an order granting a plaintiff's motion for a new trial, rejected plaintiff's assertion that an oral statement of reasons given by a judge in open court substantially complies with the requirements of *Code Civ. Proc. § 657*. The Court observed that an oral recital, no matter how thoroughly it may have been prepared, cannot amount to compliance in any degree "substantial" or otherwise, with a statutory directive that such a statement be in writing (*13 Cal. 3d 413, 422)* .

[d] Reference to Transcription of Oral Statement of Reasons Inadequate

In ***Steinhart v. South Coast Area Transit*** *(1986) 183 Cal. App. 3d 770, 228 Cal. Rptr. 283* , plaintiff moved for a new trial after a defense verdict. At the hearing, the trial court orally granted plaintiff's motion. The court filed a minute order which referred to the trial court's oral statement, but contained no grounds or reasons for the granting of the motion. Several weeks later, the court filed a second order. This order stated a ground for granting the motion, and purported to incorporate by reference a transcript of the oral statements made at the earlier hearing.

The court of appeal reversed, concluding that both orders were fatally defective (*183 Cal. App. 3d 770, 772)* . The court noted that under *Code Civ. Proc. § 657*, a court granting a motion for a new trial must either specify the reason or reasons for granting the new trial in its order or file a separate specification of reasons within 10 days after filing the order (*183 Cal. App. 3d 770, 773)* . The court of appeal remarked that the trial court's reference, in its first order, to the trial court's oral statement was insufficient to comply with *Code Civ. Proc. § 657*, since *Code Civ. Proc. § 657* requires a written statement of reasons (*183 Cal. App. 3d 770, 773-774)* . Similarly, the trial court's reference, in the second order, to the transcript of the earlier hearing would be insufficient to turn an oral statement of reasons into a written one (*183 Cal. App. 3d 770, 774)* .

[4] Additional Authorities

[a] Specification of Reasons

In *Stewart v. Truck Ins. Exchange (1993) 17 Cal. App. 4th 468, 21 Cal. Rptr. 2d 338* , the trial judge granted a motion for new trial as to a portion of the compensatory damages, and a motion for new trial as to punitive damages. However, the trial court stated reason only with regard to the compensatory damages, and gave no reason for granting the motion as to punitive damages. The court of appeal reversed as to the new trial order on punitive damages, holding that the trial court failed to comply with *Code Civ. Proc. § 657* with respect to that order. The court rejected the argument that no separate reasons were required because the trial court had given reasons for granting the new trial on compensatory damages. Rather, the two motions were separate motions made by separate parties, and compliance with § 657 was not excused. The award of punitive damages was not so interwoven with a compensatory award as to make it unfair to have a retrial limited to compensatory damages. The jury never considered the issue of punitive damages, and its decision with regard to compensatory damages was not affected or impacted by the punitive damages issue (*17 Cal. App. 4th 468, 484-485)* .

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15-155 California Points & Authorities § 155.301

§ 155.301 Supporting Appeal From Order Granting New Trial [Code Civ. Proc. § 659]--Order Based on Harmless Error

[1] FORM

[*The following may be used in appellate brief supporting relief from order for new trial.*]

THE TRIAL COURT'S ORDER GRANTING _____ [*identify party, e.g.,* PLAINTIFF]'S MOTION FOR A NEW TRIAL SHOULD BE OVERTURNED BECAUSE THE ERROR ON WHICH IT IS BASED DID NOT PREJUDICE _____ [*identify party asserting error, e.g.,* PLAINTIFF].

Prejudice Is Required. A trial court has no discretion to grant a new trial for harmless error and, therefore, a new trial order is valid only if prejudicial error occurred at the trial (*Osborne v. Cal-Am Financial Corp. (1978) 80 Cal. App. 3d 259, 266, 145 Cal. Rptr. 584*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted as part of an appellant's opening brief, in support of an appeal from a trial court's order granting a motion for a new trial on the ground that no prejudicial error occurred at the first trial.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should set forth the specific grounds on which the trial judge based the new trial order and demonstrate how the error or errors relied on by the judge did not affect the outcome of the trial.

[c] Grounds for Affirming Order

On appeal from an order granting a new trial, the appellate court ordinarily must affirm the order if it should have been granted on any ground stated in the motion, whether or not specified in the trial court's order or specification of reasons [*see Code Civ. Proc. § 657*]. Therefore, in an appropriate case, counsel should address the other grounds for new trial that were raising by the opposing party in the motion but not specified in the order under review. An order cannot, however, be affirmed on the ground of insufficiency of evidence or excessive damages unless the ground is stated in the order. In addition, on appeal from an order based on insufficiency of the evidence or excessive damages, it is conclusively presumed that the order with regard to that ground was made only for the reasons specified in the order or specification of reasons and the order can be reversed with regard to that ground only if there is no substantial basis in the record for those reasons [*Code Civ. Proc. § 657*].

[d] Related Pleading and Practice Forms

For discussion and forms relating generally to motion proceedings for new trial, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender). For discussion and forms relating to appeals, see Ch. 40, *Appeal: An Overview* et seq., in that publication.

[3] Discussion of Authorities

[a] Prejudice Is Required

Osborne v. Cal-Am Financial Corp. *(1978) 80 Cal. App. 3d. 259, 145 Cal. Rptr. 584* , was an action brought by a seller for breach of a real estate contract. The jury returned a verdict for defendant, who had terminated the contract. The trial court granted plaintiff's motion for new trial on the ground that the court had admonished plaintiff and his counsel in front of the jury and had refused to allow plaintiff to call an expert witness on rebuttal to establish damages. In its memorandum opinion granting the new trial, the court indicated it was convinced beyond any reasonable doubt that plaintiff's case had no merit, that plaintiff's own conduct produced the court's admonitions, and that there was no excuse for not calling the expert witness during plaintiff's case in chief. Nevertheless, the court granted a new trial, stating that to ensure justice for all it must be afforded to "the worst." Defendant appealed.

The court of appeal reversed, holding that no prejudicial error occurred at the trial. The court held that, while all presumptions favor the order granting a new trial and such orders are rarely reversed, the trial court is bound by the rule of *Cal. Const., art. VI, § 13*, which dictates that prejudicial error is the basis for a new trial and that there is no discretion to grant a new trial for harmless error (*80 Cal. App. 3d. 259, 265-266)* . The trial court's apparent belief that a new trial was required as a matter of form to foster the appearance of justice, even in the absence of prejudicial conduct, was an unsound basis for the order (*80 Cal. App. 3d. 259, 266)* . The court went on to address plaintiff's contention that specific errors in law occurred at the trial, noting that *Code Civ. Proc. § 657* requires the appellate court to review all grounds raised by plaintiff in the motion for new trial, not only those specified by the court in its resulting order (*80 Cal. App. 3d. 259, 265)* . However, after reviewing the record, the court held that the trial court was correct in concluding, as a matter of law, that defendant's recision was timely and in instructing the jury to that effect (*80 Cal. App. 3d. 259, 267-268)* .

[4] Additional Authorities

[a] Prejudice Is Required

Mosesian v. Pennwalt Corp. (1987) 191 Cal. App. 3d 851, 236 Cal. Rptr. 778 , was a products liability case in which the jury returned a verdict for defendants. Plaintiff moved for a new trial on the ground that prejudicial hearsay statements from outside experts were admitted into evidence through the testimony of an expert witness for the defense. The trial court granted the motion, finding that it had erred in admitting the hearsay opinions, that the entire controversy revolved around an issue over which the experts had battled, and that it could not say that the jury was not prejudiced by

the hearsay. Defendant appealed. The court of appeal reversed, holding that plaintiff had waived any objection to the hearsay evidence by failing to make a timely objection on the correct ground (*191 Cal. App. 3d 851, 865)* . The court went on to hold that, even if the introduction of hearsay was erroneous, the error was not prejudicial. Mere error, the court held, is not enough to sustain a trial court's granting of a new trial motion. There has to be some finding by the trial court of prejudice or injustice to the party asserting the error. The error need not be substantial but must somehow work an injustice (*191 Cal. App. 3d 851, 866)* . In so holding, the court expressly followed *Osborne* and rejected the decision in *Richard v. Scott (1978) 79 Cal. App. 3d 57, 144 Cal. Rptr. 672* , in which the court held that the party prevailing on a motion for new trial was not required to demonstrate that prejudice resulted from the error for which a new trial was granted (*191 Cal. App. 3d 851, 859)* .

Garcia v. County of Los Angeles (1986) 177 Cal. App. 3d 633, 223 Cal. Rptr. 100 , was an action for battery and false imprisonment. The trial court involuntarily rested defendant's case after its last witness, who was not under subpoena, failed to appear. Defendant did not request a continuance or make an objection when the court had indicated its intention to proceed with the trial. After the jury returned a verdict for plaintiff, the trial court granted defendant's motion for new trial on the ground that there had been an irregularity in the proceedings (*see Code Civ. Proc. § 657(1)*) and plaintiff appealed. The court of appeal reversed on the ground that there was no irregularity on which the trial court could base its order (*177 Cal. App. 3d 633, 639-640)* . The court followed *Osborne* to hold that a new trial cannot be granted for harmless error (*177 Cal. App. 3d 633, 641)* . The court found that there would have been no good cause for the trial court to grant a continuance, given that the absent witness was neither under subpoena nor out of subpoena range, and that the testimony of the absent witness, if admitted, would have been cumulative (*177 Cal. App. 3d 633, 640)* . Even if there was an irregularity in the proceedings, the court held, defendant caused it and so can have no relief (*177 Cal. App. 3d 633, 641)* . The court concluded that any error committed that provided the basis for the trial court's order granting a new trial was harmless and not prejudicial (*177 Cal. App. 3d 633, 641)* .

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[Reserved]

§§ 155.302[Reserved]

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15-155 California Points & Authorities § 155.310

§ 155.310 Opposing Appeal From Order Granting New Trial [Code Civ. Proc. § 659]--Reasonable Finder of Fact Could Find in Favor of Moving Party on Trial Court's Theory

[1] FORM

[*The following may be used in appellate brief opposing relief from order for new trial.*]

THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN GRANTING THE ORDER FOR NEW TRIAL, AND ITS RULING MUST BE SUSTAINED ON APPEAL BECAUSE _____ [*identify opposing party, e.g.,* DEFENDANT] HAS NOT DEMONSTRATED THAT NO REASONABLE FINDER OF FACT COULD FIND FOR _____ [*identify moving party, e.g.,* PLAINTIFF] ON THE TRIAL COURT'S THEORY.

A. Statutory Rule of Review on Appeal From Order Granting New Trial. On appeal from an order granting a new trial, the appellate court generally is required to affirm the order if it should have been granted on any ground stated in the motion, whether or not specified in order or in the trial court's specification of reasons for the order (*Code Civ. Proc. § 657*). [The appellate court may, however, affirm an order granting a new trial either on the ground of the insufficiency of evidence to justify the verdict or other decision, or on the ground of excessive or inadequate damages, only if that ground is stated in the order (*Code Civ. Proc. § 657*)]. [In the case of an order granting a new trial on the ground of the insufficiency of the evidence to justify the verdict or other decision, or on the ground of excessive or inadequate damages, it is conclusively presumed on an appeal from that order that it was made, as to either of these grounds, only for those reasons specified in the order or in the trial court's specification of reasons. The appellate court may reverse an such an order, as to either of these grounds, only if there is no substantial basis in the record for any of the reasons thus specified (*Code Civ. Proc. § 657*)].

B. Abuse of Discretion Standard of Review Applicable on Appeal From Order Granting New Trial. A trial court's order granting a new trial under *Code of Civil Procedure Section 657* must be sustained on appeal unless the opposing party demonstrates that no reasonable finder of fact could have found for the moving party on the theory upon which the trial court based its order (*Lane v. Hughes Aircraft Co. (2000) 22 Cal. 4th 405, 409, 93 Cal. Rptr. 2d 60, 993 P.2d*

388 ; *see also* *Jiminez v. Sears, Roebuck & Co. (1971) 4 Cal. 3d 379, 387, 93 Cal. Rptr. 769, 482 P.2d 681*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted as part of a respondent's opposing brief opposing the reversal of a trial court order granting a motion for a new trial. The ground for the opposition is, under the applicable standard of appellate review, the order must be upheld on appeal unless the appellant demonstrates that no reasonable finder of fact could find in favor of the respondent on the theory adopted by the trial court as the basis for granting a new trial.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should set forth the theory on which the trial judge based its order, and argue how the appellant has failed to show, or how he or she cannot show, that no reasonable finder of fact could find in respondent's favor on that theory.

[c] Related Pleading and Practice Forms

For discussion and forms relating generally to motion proceedings for new trial, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender). For discussion and forms relating to appeals, see Ch. 40, *Appeal: An Overview* et seq., in that publication.

[3] Discussion of Authorities

[a] Abuse of Discretion Standard of Review Applicable on Appeal From Order Granting New Trial

In ***Lane v. Hughes Aircraft Co.*** *(2000) 22 Cal. 4th 405, 93 Cal. Rptr. 2d 60, 993 P.2d 388* , one plaintiff sued his employer for breach of contract, breach of the implied covenant of good faith and fair dealing, fraud, failure to promote due to race discrimination, and retaliation in violation of the Fair Employment and Housing Act (FEHA) [*Gov. Code § 12900 et seq.*]. A second plaintiff sued the same employer on similar causes of action, claiming demotion and constructive discharge for refusing to write a poor job evaluation of the first plaintiff. After trial, the jury returned verdicts for both plaintiffs, finding defendant employer breached its contracts with plaintiffs in that it terminated them without good cause, that it discriminated against the first plaintiff, that it retaliated against both plaintiffs for reporting the discrimination, and that it constructively discharged the second plaintiff. The jury also found that defendant was subject to punitive damages, awarding the first plaintiff approximately $46 million, and the second plaintiff $43 million, these awards including $40 million each in punitive damages (*22 Cal. 4th 405, 409-410*).

On defendant's motion, the trial court granted a judgment notwithstanding the verdict (JNOV) under *Code Civ. Proc. § 629*, concluding, among other things, that the record contained no substantial evidence to support the jury's findings as to termination of the first plaintiff or constructive discharge of the second, nor as to any discrimination or retaliation by the defendant. The court specified it was granting JNOV as to the damages for future wage loss because both plaintiffs rejected unconditional offers of reinstatement, and as to the punitive damages because there was no clear and convincing evidence of malice. Alternatively, the court granted a new trial under *Code Civ. Proc. § 657*, concluding that the record contained insufficient evidence of either discrimination or retaliation, as well as insufficient evidence to support the damage award. With respect to punitive damages, the court specifically found that passion and prejudice had motivated the jury, that the damages did not bear a reasonable relationship to Hughes's actions or plaintiffs' injuries, and that they were grossly disproportionate to the amount of actual damages (*22 Cal. 4th 405, 410-411*).

Plaintiffs' appeal followed. The court of appeal reversed the JNOV, finding sufficient evidence in the record to support the jury's verdict as to liability and compensatory damages, but found the punitive damages excessive, reducing the first

plaintiff's punitive damage award to $5 million, and the second plaintiff's punitive damage award to $2.8 million. The court of appeal also stated that it "need not consider the trial court's grant of a new trial on the bases of insufficiency of evidence and excessive compensatory damages, as we already analyzed the record with respect to the judgment notwithstanding the verdicts" (*22 Cal. 4th 405, 411*).

Defendant petitioned for review. It did not contest the court of appeal's reversal of the JNOV, but argued that the court of appeal had improperly reversed the order granting a new trial, in that it had applied the same standard in reviewing the new trial order as that which it had applied in reviewing the JNOV order. The Supreme Court granted review, initially remanding the case to the court of appeal to reconsider its decision in light of the "highly deferential" standard of review articulated in *Jones v. Citrus Motors Ontario, Inc. (1973) 8 Cal. 3d 706, 710-711, 106 Cal. Rptr. 28, 505 P.2d 220* and *Neal v. Farmers Ins. Exchange (1978) 21 Cal. 3d 910, 932-933, 148 Cal. Rptr. 389, 582 P.2d 980* . After the court of appeal reached the same decision as before, the Supreme Court granted review a second time and reversed the court of appeal's decision, remanding with instructions to affirm the trial court's order granting a new trial (*22 Cal. 4th 405, 411, 416*).

The Supreme Court stated that the standards for reviewing an order granting a new trial are well settled. After authorizing trial courts to grant a new trial on the grounds of excessive damages or insufficiency of the evidence, *Code Civ. Proc. § 657* provides as follows: "on appeal from an order granting a new trial upon the ground of the insufficiency of the evidence ... or upon the ground of excessive or inadequate damages, ... *such order shall be reversed as to such ground only if there is no substantial basis in the record for any of such reasons*" (*22 Cal. 4th 405, 411-412*). Thus, an order granting a new trial under *Code Civ. Proc. § 657* "must be sustained on appeal unless the opposing party demonstrates that no reasonable finder of fact could have found for the movant on [the trial court's] theory," and an "abuse of discretion cannot be found in cases in which the evidence is in conflict and a verdict for the moving party could have been reached ... " (quoting *Jones v. Citrus Motors Ontario, Inc. (1973) 8 Cal. 3d 706, 710, 711, 106 Cal. Rptr. 28, 505 P.2d 220*). In other words, when reviewing an order granting a new trial, the "presumption of correctness normally accorded on appeal to the jury's verdict is replaced by a presumption in favor of the [new trial] order" (quoting *Neal v. Farmers Ins. Exchange (1978) 21 Cal. 3d 910, 932, 148 Cal. Rptr. 389, 582 P.2d 980*) (*22 Cal. 4th 405, 412*).

The Court explained that this degree of deference was because the trial court, in ruling on a motion for new trial, sits as an independent trier of fact, and its factual determinations, as reflected in its order granting a new trial, are entitled to the same deference that an appellate court would ordinarily accord a jury's factual determinations. Because the trial court is in the best position to assess the reliability of a jury's verdict, the Legislature has granted them broad discretion to order new trials, the only relevant limitations on which are the requirement that trial courts state their reasons for granting a new trial, and the requirement that there must be some evidence in the record to support those reasons (*22 Cal. 4th 405, 412*).

In this case, the trial court granted a new trial on the basis of insufficient evidence and stated reasons in support. Specifically, the court found that plaintiffs had not established racial discrimination or retaliatory bias. These findings by the trial court undermined the essential assertions that form the basis of the jury's liability verdict, and therefore provided a sufficient basis for ordering a new trial as to liability (*22 Cal. 4th 405, 412*).

The Court rejected plaintiffs' argument that the trial court's specification of reasons were too summary and did not establish the requisite degree of deliberation. The specification of reasons, the Court observed, was not a mere a mere statement of ultimate facts, such as that Hughes did not discriminate or retaliate, but included findings that the first plaintiff's promotion history was comparable to that of whites, that the second defendant had not significantly supported the first plaintiff's discrimination complaints, and that defendant had a good faith business reason for its management assignments. Moreover, at the beginning of the order, where the trial court was addressing both the grant of a new trial and the JNOV, it found that defendant did not instruct or force the second defendant to fabricate a poor job evaluation of the first plaintiff, that defendant tried to find job opportunities for the second defendant, and that defendant's

managers did not refuse to meet with the second plaintiff after he complained of discrimination (*22 Cal. 4th 405, 412-413*).

The Court noted that the trial court's specification of reasons also clearly incorporated by reference a number of prior findings made with respect to the JNOV, including findings that defendant's failure to promote the first plaintiff was due to his performance and not his race, and that the first plaintiff's statistical evidence was flawed because it did not indicate the qualifications of employees who were passed over for promotion. The Court concluded that such cross-reference to findings located in a different part of the order was adequate to satisfy *Code Civ. Proc. § 657*. A court need not unnecessarily burden a new trial order by reiterating what it has already said at length with respect to another issue before it, so long as it makes clear to a reviewing court the basis for its decision (*22 Cal. 4th 405, 413*).

The Court noted that the trial court's order "described in detail" why the evidence was insufficient as to compensatory damages, giving several specific findings which undermined the evidentiary foundation of the compensatory damage award and therefore provided sufficient basis for ordering a new trial as to compensatory damages. With respect to punitive damages, the trial court noted that the award was "excessive" and disproportionate to Hughes's conduct and to the extent of plaintiffs' injury and compensatory damages (*22 Cal. 4th 405, 413-414*). The Court concluded that the record supported these findings, and emphasized again that, so long as the evidence in the record is in conflict and can support a verdict in favor of *either* party, a properly constructed new trial order is not subject to reversal on appeal. In this case, although the jury verdicts were in plaintiffs' favor, the evidence could have supported a jury verdict in defendant's favor on all causes of action (*22 Cal. 4th 405, 414*).

The Court similarly rejected plaintiffs' argument that the new trial order was invalid because it borrowed extensively from briefs filed by defendant. This argument is based on language in *Code Civ. Proc. § 657* that the court "shall not direct the attorney for a party to prepare either or both [the new trial] order and ... specification of reasons." The Court, giving this language a reasonable and practical construction, and bearing in mind its purposes, to promote judicial deliberation before judicial action and to make appellate review more manageable, concluded that, while *Code Civ. Proc. § 657* bars a trial court from imposing on counsel preparation of new trial orders, does not also bar the trial court from adopting material in a party's brief. The Court noted that if a trial court could not rely on reasons advanced in such briefs, their utility would be undermined and they would serve little purpose. In the Court's view, the critical factor is the reasoning process, not whose language is being employed. Thus, a trial court satisfies *Code Civ. Proc. § 657* if its new trial order indicates, as in this case, that it deliberated over the issues (*22 Cal. 4th 405, 415*).

The Court concluded by reaffirming the deferential standards of review articulated in *Neal v. Farmers Ins. Exchange (1978) 21 Cal. 3d 910, 932-933, 148 Cal. Rptr. 389, 582 P.2d 980* and *Jones v. Citrus Motors Ontario, Inc. (1973) 8 Cal. 3d 706, 710-711, 106 Cal. Rptr. 28, 505 P.2d 220* , and holding that the court of appeal erred in failing to apply these standards properly (*22 Cal. 4th 405, 416*).

Jiminez v. Sears, Roebuck & Co. *(1971) 4 Cal. 3d 379, 93 Cal. Rptr. 769, 482 P.2d 681* , was a products liability action in which the jury returned a verdict for defendants. The trial court gave jury instructions concerning strict liability but refused to give plaintiff's proposed instructions on negligence and res ipsa loquitur. The trial court subsequently granted plaintiff's motion for new trial on the ground that, under the pleadings and evidence, plaintiff was entitled to have the issues of negligence and res ipsa loquitur go to the jury. Defendant appealed.

The Supreme Court affirmed the order for new trial, holding that plaintiff was entitled to a new trial because, given the evidence introduced at trial, the jury could properly have found for plaintiff had the res ipsa loquitur instruction been given (*4 Cal. 3d 379, 386-387, 388)* . In its discussion of the standard for review of the trial court's order, the Court held that the determination of a motion for new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion appears, particularly when the discretion has been exercised in favor of awarding a new trial. An order granting a new trial will not be set aside as long as a reasonable or even fairly debatable justification under the law is shown for the order (*4 Cal. 3d 379, 387)* .

California Points & Authorities

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CHAPTER 155 MOTIONS AFTER TRIAL
PART II. FORMS
B. Motions for New Trial
10. Appeal From Order Granting New Trial

15-155 California Points & Authorities §§ 155.311-155.319

[Reserved]

§§ 155.311[Reserved]

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C. Motions to Set Aside and Vacate a Judgment and Enter Another and Different Judgment

15-155 California Points & Authorities § 155.320

§ 155.320 Supporting Motion to Set Aside and Vacate Judgment and Enter Another Judgment [Code Civ. Proc. §§ 663, 663a]--Incorrect or Erroneous Legal Bases for Court Decision [Code Civ. Proc. § 663(1)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*], Plaintiff,	)	IES IN SUPPORT OF MOTION TO SET ASIDE
vs.	)	AND VACATE JUDGMENT AND ENTER AN-
_____ [*name*], Defendant.	)	OTHER AND DIFFERENT JUDGMENT
	)	[Telephone Appearance]
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE _____ [JUDGMENT *or* DECREE] SHOULD BE SET ASIDE AND VACATED AND ANOTHER AND DIFFERENT JUDGMENT ENTERED BECAUSE THERE ARE INCORRECT OR ERRONEOUS LEGAL BASES FOR THE DECISION THAT ARE NOT CONSISTENT WITH OR NOT SUPPORTED BY THE FACTS, AND THAT MATERIALLY AFFECT THE SUBSTANTIAL RIGHTS OF _____ [PLAINTIFF *or* DEFENDANT], THUS ENTITLING HIM/HER/IT TO A DIFFERENT JUDGMENT.

A. Motion to Set Aside and Vacate and Enter Another and Different Judgment. On motion of the party aggrieved, a judgment or decree, when based on a decision by the court, may be set aside and vacated by the same court, and another and different judgment entered when there is an incorrect or erroneous legal basis for the decision, not consistent with or not supported by the facts, if substantial rights of the party are materially affected thereby, thus entitling the party to a different judgment, and in such case when the judgment is set aside, the statement of decision must be amended and corrected (*Code Civ. Proc. § 663(1)*).

B. Incorrect Legal Conclusion or Erroneous Judgment on Facts. The motion to set aside and vacate a judgment and enter another and different judgment may be made if the court draws an incorrect legal conclusion or renders an erroneous judgment on the facts found by it to exist (*Alameda v. Carleson (1971) 5 Cal. 3d 730, 738, 97 Cal. Rptr. 385, 488 P.2d 953* (decided before 1981 amendment of *Code Civ. Proc. § 663*).

[*Optional*] **C. Legal Conclusion Contrary to Express Statutory Provision.** The motion to set aside and vacate a judgment and enter another and different judgment may be granted if the court comes to a legal conclusion that is contrary to an express statutory provision (*see Gibson v. Hammang (1904) 145 Cal. 454, 456, 78 P. 953* (decided before 1981 amendment of *Code Civ. Proc. § 663*).

[*Optional*] **D. Legal Conclusions Inconsistent With Uncontroverted Facts.** The motion to set aside and vacate a judgment and enter another and different judgment may be granted if the court's legal conclusions are inconsistent with the uncontroverted facts of the case (*see Swanson v. Wheeler (1952) 112 Cal. App. 2d 43, 44-45, 245 P.2d 699* (decided before 1981 amendment of *Code Civ. Proc. § 663*).

[*Optional*] **E. Court Wrongly Considers Element as Part of Settled Legal Doctrine.** The motion to set aside and vacate a judgment and enter another and different judgment may be granted when the court considers a specific element to be part of a settled legal doctrine when, in fact, it is not (*see Crook v. Leinenweaver (1950) 100 Cal. App. 2d 790, 792-794, 224 P.2d 891* (decided before 1981 amendment of *Code Civ. Proc. § 663*).

[*Optional*] **F. Moving Party May Raise New Legal Theory.** *Section 663(1) of the Code of Civil Procedure* empowers a trial court to consider new legal challenges not previously raised before the verdict or judgment when the court is ruling on a motion to vacate (*Hoffman-Haag v. Transamerica Ins. Co. (1991) 1 Cal. App. 4th 10, 15-16, 1 Cal. Rptr. 2d 805*).

[*Add further points and authorities setting out substantive law pertaining to cause of action or defense to show why motion should be granted.*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion to set aside and vacate a judgment

and to enter another and different judgment [*Code Civ. Proc. §§ 663, 663a*]. It is to be used when there is a statement of decision by the court that contains legal bases that are not consistent with or not supported by the facts [*see Code Civ. Proc. § 663(1)*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. In particular, counsel should show how the court's legal bases for the decision are not consistent with or not supported by the facts found by the court. Counsel should also add further points and authorities that set out the substantive law pertaining to the particular cause of action or defense to show why the motion should be granted. For example, in an action involving a disputed boundary line in which the court has incorrectly concluded that a dispute is a necessary element of the agreed boundary line doctrine, counsel should discuss the elements of the doctrine to show how the court's legal conclusions were erroneous [*see Crook v. Leinenweaver (1950) 100 Cal. App. 2d 790, 794, 224 P.2d 891]* .

Counsel should cite relevant case authority supporting these substantive points of law. In preparing the memorandum, counsel may refer to the substantive chapters contained in this publication and in California Forms of Pleading and Practice (Matthew Bender).

[c] Statement of Decision

Note that the language of *Code Civ. Proc. § 663* was amended in 1981 to conform to the concurrent revision of *Code Civ. Proc. § 632*. *Code Civ. Proc. § 632*, as amended, has replaced findings of fact and conclusions of law with a statement of decision explaining the factual and legal basis for the court's decision on each of the principal controverted issues at trial, to be issued by the court when properly requested by any party appearing at trial.

Accordingly, *Code Civ. Proc. § 663* now refers to a judgment based on a decision by the court, rather than one based on findings of fact. This judgment may be vacated and a different judgment entered under *Code Civ. Proc. § 663(1)* when the legal basis for the decision is inconsistent with, or not supported by, the facts, and in such case, the statement of decision must be amended.

It appears that the changes in terminology only minimally affect the import of the statute. Therefore, case law interpreting the old version of *Code Civ. Proc. § 663*, which referred to "findings of fact" and "conclusions of law," are probably still persuasive, if not controlling, authority in interpreting the amended version of *Code Civ. Proc. § 663*. Care should be used, however, in relying on case law decided under the prior law.

[d] Related Pleading and Practice Forms

For a form of notice of intention to move to set aside and vacate a judgment and to enter another and different judgment, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender). For a discussion of the statement of decision generally, see Ch. 529, *Statement of Decision* in that publication.

[e] Opposing Points and Authorities

The points and authorities set out in *§ 155.330* et seq. may be used in an appropriate situation to oppose a motion that is supported by this memorandum.

[3] Discussion of Authorities

[a] Incorrect Legal Conclusion or Erroneous Judgment on Facts

Alameda v. Carleson *(1971) 5 Cal. 3d 730, 97 Cal. Rptr. 385, 488 P.2d 953* , was a consolidated action involving the

question of whether or not a state welfare program conformed to certain provisions of the Social Security Act [*42 U.S.C. § 602(a)*]. In one action, plaintiff counties brought an action for declaratory and injunctive relief against defendant Carleson, Director of the Department of Social Welfare. Since the effect of a judgment in the counties' favor would be to terminate welfare granted to certain recipients, California Welfare Rights Organization (hereafter referred to as CWRO) sought to intervene as parties in the action. The trial court denied intervention. Subsequently, the court entered its judgment declaring certain of Carleson's regulations invalid. CWRO filed a motion to vacate the judgment and renewed its application to intervene, but both motions were denied. CWRO then appealed the entire proceeding.

The Supreme Court stated that one who is legally aggrieved by a judgment may become a party of record and obtain a right to appeal by moving to vacate the judgment pursuant to *Code Civ. Proc. § 663* (*5 Cal. 3d 730, 736)* . The Court said that CWRO was legally aggrieved by the judgment because its rights or interests were injuriously affected by it (*5 Cal. 3d 730, 737)* . The Court also stated that *Code Civ. Proc. § 663* furnished sufficient statutory basis for CRWO's motion in the instant case. The section in part provides that a judgment may on motion be vacated for incorrect or erroneous conclusions of law not consistent with or not supported by the findings of fact. The Court stated that it interpreted the language to mean that the motion may be made whenever the trial judge draws an incorrect legal conclusion or renders an erroneous judgment on the facts found by it to exist. In this case, the Court noted that CWRO contended that the trial court incorrectly concluded on the basis of the findings of fact, which included applicable provisions of the Social Security Act, that existing regulations promulgated and interpreted by Carleson were incorrect. If the court's conclusion was indeed incorrect, the Court stated that the error could have been reviewed by a motion to vacate under *Code Civ. Proc. § 663*. The Court concluded, therefore, that CWRO became a party of record in the action, that it had standing to appeal from the judgment, and that the Supreme Court had jurisdiction to determine the substantive issues on appeal (*5 Cal. 3d 730, 738)* .

[b] Legal Conclusion Contrary to Express Statutory Provision

In ***Gibson v. Hammang*** *(1904) 145 Cal. 454, 78 P. 953* , plaintiffs brought an action to annul the deed to certain lands. The trial court decided in favor of plaintiffs, but it stated that plaintiffs were not entitled to reimbursement for costs. Plaintiffs moved to vacate the part of the judgment that disallowed costs and to enter judgment for costs under *Code Civ. Proc. § 663*.

The court of appeal remanded the case with directions to set aside that part of the judgment relating to costs, to correct the conclusions of law to conform to its opinion, and to amend the judgment by awarding costs to plaintiffs. The court noted that a statute expressly stated that the reimbursement of costs was not discretionary, but mandatory in actions for the recovery of real property. The court stated that the pleadings, findings, and judgment showed that the action involved the title to the land, and although plaintiffs recovered part of the land only, they were entitled to their costs as a matter of right (*145 Cal. 454, 456-457)* .

[c] Legal Conclusions Inconsistent With Uncontroverted Facts

In ***Swanson v. Wheeler*** *(1952) 112 Cal. App. 2d 43, 245 P.2d 699* , plaintiff brought an action to money due under an express oral agreement which became due on mutual cancellation of the agreement. The trial court found that there was an oral agreement between the parties; plaintiff was given the right to withdraw from the enterprise and if he did so, his down payment of $5,000 would be refunded; plaintiff withdrew; the agreement was terminated by mutual agreement; and defendant promised to refund plaintiff's money but did not do so. However, the court then determined that plaintiff was not entitled to $5,000 from defendant. Plaintiff moved under *Code Civ. Proc. § 663* to set aside and vacate the judgment and to enter another and different judgment that awarded him $5,000 plus interest. The motion was denied. Plaintiff appealed the judgment and order denying the motion to vacate.

The court of appeal reversed the judgment with directions to vacate the judgment and the conclusions and to make new conclusions of law that were consistent with its opinions, and to enter judgment in favor of plaintiff for $5,000 plus

interest. The court noted that the findings were all in favor of plaintiff and the conclusions and judgment were in favor of defendant for specific performance of the agreement. However, the factual findings clearly showed that plaintiff was entitled to judgment. The court added that although it is the policy to give findings a liberal construction in support of the judgment, even liberality has its limits, and the court may not, through purported construction, ignore clear and positive factual findings or supply those that are missing. The court stated that it could not understand why the previous motion was denied when it was clear that the judgment could not stand. Accordingly, the court remanded the case with directions (*112 Cal. App. 2d 43, 45-46)* .

[d] Court Wrongly Considers Element as Part of Settled Legal Doctrine

In ***Crook v. Leinenweaver*** *(1950) 100 Cal. App. 2d 790, 224 P.2d 891* , plaintiffs brought an action to establish a boundary line and compel the removal of certain structures. The trial court made findings favorable to defendants, but concluded that the facts required a judgment in favor of plaintiffs. Defendants moved to vacate the judgment under *Code Civ. Proc. §§ 663, 663a*. The court denied the motion, and defendants appealed the order.

The court of appeal reversed the order with directions to vacate the judgment and enter a judgment in favor of defendants (*100 Cal. App. 2d 790, 795)* . The lower court stated in its decision that there was no dispute between the parties such as to bring this case within the doctrine of an agreed boundary line (*100 Cal. App. 2d 790, 793-794)* . However, defendants contended that the essential elements of an agreed boundary line appeared from the facts of the case (*100 Cal. App. 2d 790, 792)* . The court stated that the doctrine of an agreed boundary line is well settled and that an actual dispute or argument is not necessary in such cases (*100 Cal. App. 2d 790, 792)* . The court stated that the lower court's conclusion was clearly erroneous because the matter of a dispute or argument was a false quantity. The conclusions drawn by the trial court were inconsistent with the facts found and not supported by those facts (*100 Cal. App. 2d 790, 794)* . It appeared to the court that the facts dictated a judgment for defendants, and accordingly the court reversed the order (*100 Cal. App. 2d 790, 794-795)* .

[e] Moving Party May Raise New Legal Theory

The facts and procedural background of ***Hoffman-Haag v. Transamerica Ins. Co.*** *(1991) 1 Cal. App. 4th 10, 1 Cal. Rptr. 2d 805* , are discussed in *§ 155.234[3][e]*. In *Hoffman-Haag,* the court of appeal considered the plaintiffs' contention that reliance by the defendant's insurer on an Insurance Code section for the first time on the insurer's motion for new trial and to vacate judgment is not permitted. The court held that legal challenges that may be brought by way of *Code Civ. Proc. § 663(1)* are not limited to those raised before verdict or judgment (*1 Cal. App. 4th 10, 15)* .

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15-155 California Points & Authorities § 155.321

§ 155.321 Supporting Motion to Set Aside and Vacate Judgment and Enter Another Judgment [Code Civ. Proc. §§ 663, 663a]--Judgment Inconsistent With Special Verdict of Jury [Code Civ. Proc. § 663(2)]

[1] FORM

[*Caption. See § 155.320.*]

THE _____ [JUDGMENT *or* DECREE] SHOULD BE SET ASIDE AND VACATED AND ANOTHER AND DIFFERENT JUDGMENT ENTERED BECAUSE THE _____ [JUDGMENT *or* DECREE] IS NOT CONSISTENT WITH OR NOT SUPPORTED BY THE SPECIAL VERDICT, THUS MATERIALLY AFFECTING THE SUBSTANTIAL RIGHTS OF _____ [PLAINTIFF *or* DEFENDANT] AND ENTITLING HIM/HER/IT TO A DIFFERENT JUDGMENT.

A. Motion to Set Aside and Vacate and Enter Another and Different Judgment. On motion of the party aggrieved, a judgment or decree, when based on the special verdict of the jury, may be set aside and vacated by the same court, and another and different judgment entered when the judgment or decree is not consistent with or not supported by the special verdict, if substantial rights of the party are materially affected thereby, thus entitling the party to a different judgment (*Code Civ. Proc. § 663*).

B. Motion Properly Granted If Judgment Not Consistent With or Supported by Special Verdict. A motion to set aside and vacate a judgment and to enter another and different judgment is properly granted when the judgment is not consistent with or not supported by the special verdict (*see Code Civ. Proc. § 663*).

[*Add further points and authorities, if appropriate, showing how court's judgment is incorrectly drawn from jury's factual conclusions.*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion to set aside and vacate a judgment and to enter another and different judgment [*Code Civ. Proc. §§ 663, 663a*] when there is a special verdict of the jury. A special verdict is one in which the jury finds the facts only, leaving judgment to the court. It must present conclusions of fact as established by the evidence rather than the evidence used to prove these facts. The conclusions of fact drawn by the jury must be presented in such a manner that nothing remains for the court to do but draw conclusions of law from them [*Code Civ. Proc. § 624*]. This form is to be used if the court's judgment is not consistent with or not supported by the special verdict [*see Code Civ. Proc. § 663(2)*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. In particular, counsel should show how the court's legal conclusions are incorrectly drawn from the jury's factual conclusions.

[c] Related Pleading and Practice Forms

For a form of notice of intention to move to set aside and vacate a judgment and to enter another and different judgment, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender). For a discussion of special verdicts generally, see Ch. 326A, *Jury Verdicts* in that publication.

[d] Opposing Points and Authorities

The points and authorities set out in *§ 155.331* and *§ 155.332* may be used in an appropriate situation to oppose a motion that is supported by this memorandum.

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15-155 California Points & Authorities §§ 155.322-155.329

[Reserved]

§§ 155.322[Reserved]

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15-155 California Points & Authorities § 155.330

§ 155.330 Opposing Motion to Set Aside and Vacate Judgment and Enter Another Judgment [Code Civ. Proc. §§ 663, 663a]--Legal Bases Consistent With Facts Found by Court

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*], Plaintiff,	)	IES IN OPPOSITION TO MOTION TO SET ASIDE
vs.	)	AND VACATE JUDGMENT AND ENTER AN-
_____ [*name*], Defendant.	)	OTHER AND DIFFERENT JUDGMENT
	)	[Telephone Appearance]
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE _____ [JUDGMENT *or* DECREE] SHOULD NOT BE SET ASIDE AND VACATED AND ANOTHER AND DIFFERENT JUDGMENT ENTERED BECAUSE THE LEGAL BASES FOR THE DECISION ARE CONSISTENT WITH AND SUPPORTED BY THE FACTS FOUND BY THE COURT, THUS THE SUBSTANTIAL RIGHTS OF _____ [PLAINTIFF *or* DEFENDANT] ARE NOT MATERIALLY AFFECTED AND HE/SHE/IT IS NOT ENTITLED TO A DIFFERENT JUDGMENT.

A. Judgment Consistent With Facts. If the judgment rendered in an action is the correct legal conclusion to be drawn from the facts found by the court, a motion to set aside and vacate a judgment and enter another and different judgment is properly denied (*see Dahlberg v. Girsch (1910) 157 Cal. 324, 326-327, 107 P. 616* ; *Brown v. Jones (1935) 11 Cal. App. 2d 30, 31, 52 P.2d 962* (both decided before 1981 amendment of *Code Civ. Proc. § 663*).

B. Motion Improper to Challenge Factual Bases for Decision. A motion to set aside and vacate a judgment and enter another and different judgment is a remedy to correct a court's incorrect or erroneous legal bases for the decision; it is not available to challenge the court's factual bases for the decision (*see Code Civ. Proc. § 663*; *see also Jones v. Clover (1937) 24 Cal. App. 2d 210, 211-212, 74 P.2d 517* (decided before 1981 amendment of *Code Civ. Proc. § 663*).

[*Add further points and authorities setting out substantive law pertaining to cause of action or defense to show why motion should be denied.*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion to set aside and vacate a judgment and to enter another and different judgment [*Code Civ. Proc. §§ 663, 663a*] when there is a statement of decision by the court [*see Code Civ. Proc. § 663(1)*]. It may be submitted in opposition to a motion supported by the points and authorities set out in *§ 155.320*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. In particular, counsel should show how the legal bases for the decision are consistent with or supported by the facts found by the court. Counsel should also add further points and authorities that set out the substantive law pertaining to the particular cause of action or defense to show why the motion should be denied. For example, in an action in which the moving party contends that the court's legal conclusions are contrary to an express statutory provision, counsel should set out the substantive law to demonstrate that the action does not come under the terms of the statute [*see Gibson v. Hammang (1904) 145 Cal. 454, 456, 78 P. 953]* .

Counsel should cite relevant case authority supporting these substantive points of law. In preparing the memorandum, counsel may refer to the substantive chapters contained in this publication and in California Forms of Pleading and Practice (Matthew Bender).

[c] Statement of Decision

Note that the language of *Code Civ. Proc. § 663* was amended in 1981 to conform to the concurrent revision of *Code Civ. Proc. § 632*. *Code Civ. Proc. § 632*, as amended, has replaced findings of fact and conclusions of law with a statement of decision explaining the factual and legal basis for the court's decision on each of the principal controverted

issues at trial, to be issued by the court when properly requested by any party appearing at trial.

Accordingly, *Code Civ. Proc. § 663* now refers to a judgment based on a decision by the court, rather than one based on findings of fact. This judgment may be vacated and a different judgment entered under *Code Civ. Proc. § 663(1)* when the legal basis for the decision is inconsistent with, or not supported by, the facts, and in such case, the statement of decision must be amended.

It appears that the changes in terminology only minimally affect the import of the statute. Therefore, case law interpreting the old version of *Code Civ. Proc. § 663*, which referred to "findings of fact" and "conclusions of law," are probably still persuasive, if not controlling, authority in interpreting the amended version of *Code Civ. Proc. § 663*. Care should be used, however, in relying on case law decided under the prior law.

[d] Related Pleading and Practice Forms

For a form of notice of intention to move to set aside and vacate a judgment and to enter another and different judgment, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender). For a discussion of the statement of decision generally, see Ch. 529, *Statement of Decision* in that publication.

[3] Discussion of Authorities

[a] Judgment Consistent With Facts

In ***Dahlberg v. Girsch*** *(1910) 157 Cal. 324, 107 P. 616* , plaintiff brought an action to recover money alleged to be due for services performed and materials furnished in the construction of a building for defendant. Plaintiff was awarded $3,492.81 by the court. Defendant then moved under *Code Civ. Proc. § 663* to vacate the judgment and enter a different judgment because of incorrect or erroneous conclusions of law not supported by the findings of fact. The court granted the order and judgment was given for plaintiff in the sum of $939.78. Plaintiff appealed the order and the judgment based on the order.

The Supreme Court reversed the order and the judgment, stating that so far as the original conclusions of law and judgment were against defendant, they were in accord with and compelled by the findings of fact. Even though the lower court found that plaintiff had willfully failed to complete the building's foundation to contract specifications, defendant could not urge that this willful failure barred a recovery on the contract because of the terms of the contract (*157 Cal. 324, 332)* . Under the terms of the contract, defendant completed the work, then charged the expense of completion to plaintiff. The trial court deducted the reasonable cost of defendant's labor from the contract price, leaving the sum of $3,492 that was originally awarded to plaintiff (*157 Cal. 324, 329-330)* . The Supreme Court held that this conclusion was not erroneous, and therefore it reversed the order vacating the original judgment (*157 Cal. 324, 332-333)* .

In ***Brown v. Jones*** *(1935) 11 Cal. App. 2d 30, 52 P.2d 962* , plaintiffs brought an action to quiet title to certain real property. Defendant cross complained, seeking to have his title quieted. The trial court found in favor of defendant, but ordered defendant to pay plaintiffs the amount of taxes on the property that plaintiffs had previously expended. Plaintiffs attempted to obtain an order based on *Code Civ. Proc. § 663* in order to set aside certain conclusions of law and enter another and different judgment. The motion was granted, and defendant appealed.

The court of appeal reversed the order, stating that the judgment and the conclusions of law were consistent with and supported by the findings of fact, and were not incorrect or erroneous. The court noted that plaintiffs, in moving for the order, desired to amend the judgment in order to provide that, unless the amount of taxes were paid within a certain time, plaintiffs would have judgment entered in their favor. However, the court of appeal stated that if the order appealed from had any effect, it would bring about a modification of the judgment, and that result may not be brought

about under the circumstances disclosed by the record (*11 Cal. App. 2d 30, 31)* .

[b] Motion Improper to Challenge Factual Bases for Decision

In ***Jones v. Clover*** *(1937) 24 Cal. App. 2d 210, 74 P.2d 517* , plaintiff brought an action to recover on certain promissory notes. After trial, the court entered its judgment for plaintiff. Defendant moved for a new trial and to set aside and vacate the judgment and enter another and different judgment. The court set aside and vacated the judgment and entered a new judgment in favor of plaintiff, awarding him a smaller amount of damages. The court made new findings and conclusions of law. Plaintiff then moved for a new trial. When the motion was denied by operation of law, plaintiff appealed the judgment.

The court of appeal reversed the judgment and remanded the case with instruction to the lower court to reenter the original judgment entered by the court. It stated that the lower court was not authorized to alter its findings under *Code Civ. Proc. §§ 663* and *663a*. Under those sections, the court may only correct erroneous conclusions of law. The court emphasized that the limits set by the sections cannot be transgressed (*24 Cal. App. 2d 210, 211)* . The statutes do not authorize an attack on the findings (*24 Cal. App. 2d 210, 211-212)* . The court added that *Code Civ. Proc. § 663* authorizes the substitution of the judgment that should have been given as a matter of law on the findings of fact in a case in which the judgment already given is an incorrect conclusion from such findings. In ruling on the motion, the court cannot change any finding of fact. The sole remedy in the trial court of a party who is aggrieved by any finding of fact is a motion for a new trial (*24 Cal. App. 2d 210, 211-213)* . Hence, the court held that the lower court's order was ineffectual for any purpose, because the court was limited to a substitution of judgment that should have been given as a matter of law on the findings of fact. Accordingly, the court reversed the judgment on which the appeal was taken (*24 Cal. App. 2d 210, 212)* .

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
CHAPTER 155 MOTIONS AFTER TRIAL
PART II. FORMS
C. Motions to Set Aside and Vacate a Judgment and Enter Another and Different Judgment

15-155 California Points & Authorities § 155.331

§ 155.331 Opposing Motion to Set Aside and Vacate Judgment and Enter Another Judgment [Code Civ. Proc. §§ 663, 663a]--Judgment Consistent With Special Verdict

[1] FORM

[*Caption. See § 155.330*].

THE_____ [JUDGMENT *or* DECREE] SHOULD NOT BE SET ASIDE AND VACATED AND ANOTHER AND DIFFERENT JUDGMENT ENTERED, BECAUSE THE _____ [JUDGMENT *or* DECREE] IS CONSISTENT WITH AND SUPPORTED BY THE SPECIAL VERDICT, THUS THE SUBSTANTIAL RIGHTS OF _____ [PLAINTIFF *or* DEFENDANT] ARE NOT MATERIALLY AFFECTED AND HE/SHE/IT IS NOT ENTITLED TO A DIFFERENT JUDGMENT.

Judgment Consistent With Special Verdict. A motion to set aside and vacate a judgment and enter another and different judgment will not be granted if the judgment or decree is consistent with the special verdict of the jury (*see Code Civ. Proc. § 663*).

[*Add further points and authorities, if appropriate, showing how the court's judgment is correctly drawn from the jury's factual conclusions.*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion to set aside and vacate a judgment and enter another and different judgment [*Code Civ. Proc. §§ 663, 663a*] when there is a special verdict of the jury. A special verdict is one in which the jury finds the facts only, leaving judgment to the court [*see Code Civ. Proc. § 624*]. The ground of opposition set out is that the court's judgment is consistent with the jury's special verdict [*see Code Civ. Proc. § 663(2)*]. This form may in an appropriate case be submitted in opposition to a motion supported by the points and authorities set out in *§ 155.321*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. In particular, counsel should show how the court's legal conclusions are correctly drawn from the jury's factual conclusions.

[c] Related Pleading and Practice Forms

For a form of notice of intention to move to set aside and vacate a judgment and to enter another and different judgment, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender). For a discussion of special verdicts generally, see Ch. 326A, *Jury Verdicts* in that publication.

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CHAPTER 155 MOTIONS AFTER TRIAL
PART II. FORMS
C. Motions to Set Aside and Vacate a Judgment and Enter Another and Different Judgment

15-155 California Points & Authorities § 155.332

§ 155.332 Opposing Motion to Set Aside and Vacate Judgment and Enter Another Judgment [Code Civ. Proc. §§ 663, 663a]--Motion Not Applicable to Interlocutory Judgment

[1] FORM

[*Caption. See § 155.330.*]

THE MOTION TO SET ASIDE AND VACATE THE _____ [JUDGMENT *or* DECREE] AND ENTER ANOTHER AND DIFFERENT JUDGMENT SHOULD NOT BE GRANTED, BECAUSE THE JUDGMENT INVOLVED IS INTERLOCUTORY.

Motion Improper to Set Aside Interlocutory Judgment. A motion to set aside and vacate a judgment and enter another and different judgment is not applicable to an interlocutory judgment, and if made to vacate an interlocutory judgment, it is properly denied (*see Remington v. Davis (1951) 108 Cal. App. 2d 251, 253, 238 P.2d 662*).

[*Add further points and authorities, as appropriate, supporting contention that judgment is interlocutory.*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion to set aside and vacate a judgment and enter another and different judgment [*Code Civ. Proc. §§ 663, 663a*]. It is to be used when the judgment rendered is interlocutory and not final. This memorandum may be submitted in opposition to a motion to set aside and vacate a judgment supported by the points and authorities set out in *§§ 155.320* and *155.321*.

As a general rule, if no issue is left for future consideration except the fact of compliance or noncompliance with the terms of a decree, the decree is final; whereas, if anything further in the nature of a judicial action on the part of the court is essential to the final determination of the rights of the parties, the decree is deemed interlocutory [*Woodman v. Ackerman (1967) 249 Cal. App. 2d 644, 650, 57 Cal. Rptr. 687]* .

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Counsel should also add further points and authorities showing that the judgment is interlocutory.

[c] Related Pleading and Practice Forms

For a form of notice of intention to move to set aside and vacate a judgment and to enter another and different judgment, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender). For a discussion of interlocutory judgments and a listing of those types of actions in which a statutory provision for an interlocutory judgment exists, see Ch. 318, *Judgments* in that publication.

[3] Discussion of Authorities

[a] Motion Improper to Set Aside Interlocutory Judgment

In ***Remington v. Davis*** *(1951) 108 Cal. App. 2d 251, 238 P.2d 662* , plaintiff brought an action to recover certain properties alleged to have been obtained by fraud. After trial, the court made findings of fact and conclusions of law and entered an interlocutory judgment decreeing that certain instruments be canceled and that certain properties be transferred to plaintiff. The judgment further decreed that jurisdiction be retained for the purpose of taking an accounting, ascertaining the credits allowable to defendants, and rendering a final judgment for the amount found due to plaintiff. Defendants moved to vacate and set aside this judgment and to enter another and different judgment that decreed that plaintiff's cause of action was barred by certain statutes of limitation and that quieted title in defendants to certain properties that defendants claimed. The motion was denied, and defendants appealed the order. Plaintiff moved to dismiss the appeal on the grounds that the order was not appealable, and that the appeal was frivolous and taken solely for delay.

The court of appeal, granting plaintiff's motion and dismissing defendants' appeal, stated that *Code Civ. Proc. §§ 663* and *663a* are not expressly made applicable to interlocutory judgments, and that there is nothing in the language of the statute to indicate that they were so intended. *Code Civ. Proc. § 663*, the court stated, provides for a motion to set aside a judgment and enter a different judgment based on the facts already found if there are improper conclusions of law that have been drawn from those facts. This situation involves questions of law only and strongly indicates that the judgment that must be changed is one that is final in nature and not one that leaves issues still to be determined. Furthermore, the court concluded that *Code Civ. Proc. § 663a* refers to a final judgment and was a further indication that the judgment referred to in *Code Civ. Proc. § 663* was a final judgment. Therefore, the court held that the interlocutory judgment was not appealable under *Code Civ. Proc. § 663a*, and accordingly the court granted plaintiff's motion and dismissed defendants' appeal (*108 Cal. App. 2d 251, 253)* .

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Chapters 156through 157 RESERVED

15-156 California Points & Authorities Chapters 156through 157

RESERVED

Chapters 156RESERVED

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CHAPTER 158 MOTIONS TO RECONSIDER AND RENEWED MOTIONS

15-158 California Points & Authorities 158.syn

§ 158.syn Synopsis to Chapter 158: MOTIONS TO RECONSIDER AND RENEWED MOTIONS

§ 158.01 Scope of Chapter

§ 158.02 Governing Law

§ 158.03 Page Limitation on Points and Authorities

§ 158.04 Motion to Reconsider

§ 158.05 Renewed Motion

§ 158.05A Motions Regulated by Code Civ. Proc. § 1008

§ 158.06 Sanctions

§ 158.07 Use of Case Law

§ 158.08 Motion to Reconsider and Renewed Motion Distinguished

§ 158.09 Order on Motion to Reconsider

§ 158.10 Mistitled Motion

§ 158.11 Time Limitations

§ 158.11A Appeal

§ 158.12 Related Pleading and Practice Chapters

§§ 158.13-158.29 [Reserved]

§ 158.30 Supporting Motion to Reconsider Prior Order [Code Civ. Proc. § 1008(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Ruling on Motion

[c] Opposing Points and Authorities

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Jurisdiction of Trial Court

[b] Statutory Authority for Motion to Reconsider

[c] Reconsideration of Order Granting Motion to Dismiss Action for Failure to Effect Service Within Two Years

[d] Motion to Reconsider Ruling on Demurrer

[4] Additional Authorities

[a] Statutory Authority for Motion to Reconsider

§ 158.31 Supporting Renewed Motion [Code Civ. Proc. § 1008(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Governing Statute

[b] Inapplicability of 10-Day Limitation Period

[c] Sufficiency of New Facts to Support Motion

[4] Additional Authorities

[a] Inapplicability of 10-Day Limitation Period

[b] Sufficiency of New Facts to Support Motion

§ 158.32 Opposing Motion to Reconsider--Statutory Requirements [Code Civ. Proc. § 1008(a)] Not Complied With

[1] FORM

[2] Comments

[a] Use of Form

[b] Jurisdictional Provisions of Statute

[c] New or Different Facts, Circumstances or Law

[3] Discussion of Authorities

[a] Not Based on New or Different Facts, Circumstances, or Law

[b] Adequate Explanation For Failure to Provide Evidence Earlier Lacking

[c] Adequate Explanation For Failure to Provide Different Law Earlier Lacking

[4] Additional Authorities

[a] Not Based on New or Different Facts, Circumstances, or Law

§ 158.33 Opposing Motion to Reconsider--Order Granted Judgment Which Has Been Entered

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Unavailability After Judgment of Motion to Reconsider Order Granting Judgment

§ 158.34 Opposing Renewed Motion--Prior Class Certification Motion Was Denied by Order Which Has Become Final

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Unavailability of Renewed Motion to Certify Class Action After Time to Appeal Has Expired

§ 158.35 Supporting Contention That Court Cannot Avoid Jurisdictional Limits of Code Civ. Proc. § 1008(e) by Ignoring Prior Order

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Code Civ. Proc. § 1008 Applies to Interim Orders and Is Jurisdictional

[b] Prior Order Cannot Be Ignored

§ 158.36 Supporting Ex Parte Motion to Revoke or Set Aside Order Obtained on Renewed Motion--Party Failed to Comply With Statutory Requirements [Code Civ. Proc. § 1008(a), (b), (d)].

[1] FORM

[2] Comments

[a] Use of Form

§ 158.37 Supporting Motion to Dismiss Appeal as Untimely [Cal. Rules of Ct., Rules 8.104, 8.108, 8.54, 8.705]--Order Denying Motion to Reconsider Appealable Order Based on Same Facts Is Nonappealable

[1] FORM

[2] Comments

[a] Use of Form

[b] Caption

[c] "Order" and "Judgment" Distinguished

[d] Time to Appeal and "Judgment" Defined

[e] Appealability of Orders on Motions for Reconsideration

[i] In General

[ii] When Original Order Is Not Appealable

[iii] When Original Order Is Appealable

[f] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Order Made After Judgment Is Appealable

[b] Order Denying Motion to Reconsider Appealable Order on Same Facts Is Nonappealable

§ 158.38 Supporting Motion to Dismiss Appeal as Untimely [Cal. Rules of Ct., Rules 8.104, 8.54, 8.705]--Appeal From Original Appealable Order After Denial of Motion for Reconsideration Is Untimely When Not Filed Within Extended Times Specified in Cal. Rules of Ct., Rule 8.108

[1] FORM

[2] Comments

[a] Use of Form

[b] When Motion to Reconsider Extends Time to Appeal

[3] Discussion of Authorities

[a] Entry of Judgment in Superior Court

[b] Appeal From Original Order Is Untimely

§ 158.39 Supporting Motion to Dismiss Appeal as Untimely [Cal. Rules of Ct., Rules 8.104, 8.54, 8.705]--Time to Appeal Is Not Extended Under Cal. Rules of Ct., Rules 8.104, 8.108 by Motion to Reconsider Order Granting Judgment Filed After Judgment Has Been Entered

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Motion to Reconsider After Entry of Judgment

[4] Additional Authorities

[a] Motion to Reconsider After Entry of Judgment

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15-158 California Points & Authorities § 158.01

§ 158.01 Scope of Chapter

This chapter discusses motions to reconsider and renewed motions and contains forms of memoranda of points and authorities for use in supporting [*see § 158.30*] and opposing [*see §§ 158.32, 158.33*] a motion to reconsider, supporting [*see § 158.31*] and opposing [*see § 158.34*] a renewed motion, supporting an ex parte motion to revoke an order made on a renewed motion without compliance with statutory requirements [*see § 158.36*], and supporting a motion to dismiss an appeal as untimely [*see §§ 158.37 -158.39*]. It also includes a form of contention to oppose any type of motion that does not expressly seek reconsideration but would implicitly result in the reconsideration of a prior motion [*see § 158.35*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & AmendCivil ProcedureAppealsMotions on Appeal

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15-158 California Points & Authorities § 158.02

§ 158.02 Governing Law

Motions to reconsider and renewed motions are governed by *Code Civ. Proc. § 1008*, case law, and local court rules.

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15-158 California Points & Authorities § 158.03

§ 158.03 Page Limitation on Points and Authorities

Generally, a memorandum of points and authorities must not exceed 15 pages in length, or, in the case of a motion for summary judgment or summary adjudication, 20 pages in length. A reply or closing memorandum may not exceed 10 pages in length [*Cal. Rules of Ct., Rule 3.1113(d)*]. Any party desiring to file a longer memorandum must obtain leave of court [*Cal. Rules of Ct., Rule 3.1113(d)*]. For further discussion of this and other basic requirements governing memoranda of points and authorities imposed under *Cal. Rules of Ct., Rule 3.1113* and local court rules, see *Ch. 1, Writing Legal Memoranda and Briefs, § 1.05*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of CourtCivil ProcedureSummary JudgmentSupporting MaterialsMemoranda of LawGovernmentsCourtsRule Application & Interpretation

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15-158 California Points & Authorities § 158.04

§ 158.04 Motion to Reconsider

Any party affected by an order made on application and refused in whole or in part, or granted, or granted conditionally, or on terms, may, within 10 days after service on the party of written notice of entry of the order and based on new or different facts, circumstances, or law, apply to the same judge who made the order to reconsider the matter and modify, amend, or revoke the prior order [*Code Civ. Proc. § 1008(a)*; *see § 158.30*]. *Code Civ. Proc. § 1008(a)* on its face authorizes a motion to reconsider [*see, e.g., Stephen v. Enterprise Rent-A-Car (1991) 235 Cal. App. 3d 806, 816, 1 Cal. Rptr. 2d 130* ; *Graham v. Hansen (1982) 128 Cal. App. 3d 965, 970, 180 Cal. Rptr. 604] . Code Civ. Proc. § 1008* applies to all applications for interim orders [*Code Civ. Proc. § 1008(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPleading & PracticeMotion PracticeSupporting MemorandaCivil ProceduresJudgmentsRelief From JudgmentMotions for New TrialsCivil ProceduresJudgmentsRelief From JudgmentMotions to Alter & Amend

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15-158 California Points & Authorities § 158.05

§ 158.05 Renewed Motion

Renewed motions are governed by *Code Civ. Proc. § 1008(b)* [*Stephen v. Enterprise Rent-A-Car (1991) 235 Cal. App. 3d 806, 816, 1 Cal. Rptr. 2d 130* ; *Graham v. Hansen (1982) 128 Cal. App. 3d 965, 971, 180 Cal. Rptr. 604]* . That statute provides that when the party who originally made an application for an order which was refused in whole or in part, or granted conditionally, or on terms, makes a subsequent application for the same order on new or different facts, circumstances, or law, it shall be shown by affidavit (or declaration under *Code Civ. Proc. § 2015.5*) what application was made before, when and to what judge, what order or decisions were made on it, and what new or different facts, circumstances, or law are claimed to be shown [*see § 158.31*]. For a failure to comply with this requirement, any order made on such subsequent application may be revoked or set aside on ex parte motion [*Code Civ. Proc. § 1008(b)*; *see § 158.36*]. This provision is substantially the same as former Code Civ. Proc. § 1008 [*see discussion under § 158.07*].

Code Civ. Proc. § 1008(b) does not on its face authorize the filing of a renewed motion; rather, it assumes that such motions supported by new facts are proper and merely imposes requirements on what must be shown and a penalty for failure to comply [*see Code Civ. Proc. § 1008(b), (d)*].

Code Civ. Proc. § 1008 applies to all applications for interim orders [*Code Civ. Proc. § 1008(g)*].

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15-158 California Points & Authorities § 158.05A

§ 158.05A Motions Regulated by Code Civ. Proc. § 1008

In *Standard Microsystems Corp v. Winbond Electronics Corp.*, the court opined that there is some question as to what characteristics bring a motion within one of the two classes regulated by *Code Civ. Proc. § 1008*, and stated that a number of decisions have implicitly refused to apply § 1008's own language, inferring a legislative desire that § 1008 be applied broadly to bar motions that may not fall within its terms [*Standard Microsystems Corp. v. Winbond Electronics Corp. (2009) 179 Cal. App. 4th 868, 886, 102 Cal. Rptr. 3d 140* (approach appears to rest on Legislature's declaration that *Code Civ. Proc. § 1008(e)* restricts court's "jurisdiction" over motions governed by it); *see Morite of California v. Superior Court (Grayson) (1993) 19 Cal. App. 4th 485, 23 Cal. Rptr. 2d 666* (reading § 1008 to prevent judge, to whom case had been assigned for eventual trial, from setting trial date in face of order by another judge staying action pending determination of related suit, making no attempt to apply statutory language to situation before it, and acknowledging that if "reconsideration" had been sought at all, it was only "by implication")]. Some courts have also referred to an uncodified declaration of intent, adopted with the 1992 amendments to § 1008, expressing the Legislature's wish to reduce the number of motions to reconsider and renewals of previous motions heard by judges in California [*Standard Microsystems Corp. v. Winbond Electronics Corp. (2009) 179 Cal. App. 4th 868, 886, 102 Cal. Rptr. 3d 140]* .

Section 1008 describes motions for reconsideration as "applications for reconsideration" of a court's orders [*Code Civ. Proc. § 1008(e)*]. A motion for reconsideration is thus one that explicitly directs the court's attention to a previous order and seeks to "modify, amend, or revoke" that order [*Code Civ. Proc. § 1008(a)*; *Standard Microsystems Corp. v. Winbond Electronics Corp. (2009) 179 Cal. App. 4th 868, 886-890, 102 Cal. Rptr. 3d 140* (case law used phrase "motion for reconsideration" when § 1008 was first amended in 1978 to describe motion explicitly asking court to "reconsider" order previously made, and to make different order in its place--in effect, to reverse itself)]. Consistent with this understanding, merely asking the court to grant relief that is inconsistent with a prior order, whether by the same or a different judge, is not a "motion for reconsideration." It may be barred by other, court-made rules of law, but it is not barred by *Code Civ. Proc. § 1008* [*Standard Microsystems Corp. v. Winbond Electronics Corp. (2009) 179 Cal. App. 4th 868, 886-891, 102 Cal. Rptr. 3d 140* (extent defendants' motion relied upon mandatory provisions of *Code Civ. Proc. § 473(b)*, it did not ask court to reconsider its previous order, and order was entirely correct when made; motion rested on entirely different legal theory, invoked different statutory ground, and relied in very substantial part on markedly different facts and was not described in or regulated by *Code Civ. Proc. § 1008(a)*)].

Section 1008(b) governs a second application for "the same order" the court has already declined to make [*Standard Microsystems Corp. v. Winbond Electronics Corp. (2009) 179 Cal. App. 4th 868, 891, 102 Cal. Rptr. 3d 140]* . An "order" is a "direction of a court or judge, made or entered in writing, and not included in a judgment" [*Code Civ. Proc. § 1003*]. It would appear that two motions seek the "same order" when they ask the court to issue the same "direction," however, insofar as two motion rest on entirely distinct factual and legal predicates, there is a latent ambiguity in the phrase "same order" as used to define sweep of § 1008(b) [*Standard Microsystems Corp. v. Winbond Electronics Corp. (2009) 179 Cal. App. 4th 868, 891, 102 Cal. Rptr. 3d 140]* . For example, a defendant moves to dismiss on the ground that the plaintiff failed to serve and return summons within three years [*Code Civ. Proc. §§ 583.250(a)(2), 583.210(a)*], and the trial court denies the motion, but the plaintiff sits on his hands for another three years. Section 1008 will not bar a second motion to dismiss asserting the plaintiff's failure to bring the matter to trial within five years [*Code Civ. Proc. §§ 583.360(a), 583.310*; *Standard Microsystems Corp. v. Winbond Electronics Corp. (2009) 179 Cal. App. 4th 868, 891-892, 102 Cal. Rptr. 3d 140]* , even though the second motion seeks "the same order" as the first, a directive that the complaint be dismissed, falling within its scope of renewed motions based on "new or different facts, circumstances, or law." In *Standard Microsystems Corp. v. Winbond Electronics Corp.*, the court that opined that this problem illustrates one of the central defects in section 1008 as presently drawn: It attempts to prescribe a simple categorical rule to govern a subject whose nuance and complexity make it eminently better suited to the evolutionary, incremental processes of common law adjudication, or at least to the close and sustained attention of experts. The court then assumed without deciding that defendants' second motion, which was a motion for relief from a default judgment on the ground of defective service, sought the "same order" in part as the first, which was a motion for mandatory relief from default based on attorney fault, and determined the effect the overlap should have. The court emphatically rejected the proposition that a motion seeking a previously denied order in addition to newly requested relief was thereby entirely barred. Assuming the second motion was a renewal of the first motion insofar as it sought relief from the underlying default, the court concluded that it was not barred by that fact, in whole or part, because the relief thus sought was ancillary to, and would be necessary to carry into effect, the order vacating the judgment, which was subject to no such constraint [*Standard Microsystems Corp. v. Winbond Electronics Corp. (2009) 179 Cal. App. 4th 868, 891-893, 102 Cal. Rptr. 3d 140]* . Further, because defendants had made the required prima facie showing for mandatory relief under *Code Civ. Proc. § 473(b)* by submitting the affidavit of their original attorney detailing the erroneous opinions, advice, and fundamental procedural misconceptions and missteps of their previous attorney that produced the original default, as well as the ensuing judgment, insofar as a conflict actually existed between *Code Civ. Proc. §§ 473(b)* and *1008*, it had to be resolved in favor of allowing relief under § 473(b), not denying it under § 1008 [*Standard Microsystems Corp. v. Winbond Electronics Corp. (2009) 179 Cal. App. 4th 868, 893-896, 102 Cal. Rptr. 3d 140]* .

In *D.R.S. Trading Co., Inc. v. Barnes*, as in *Standard Microsystems Corp. v. Winbond Electronics Corp.*, the court set out as its task to harmonize *Code of Civil Procedure Sections 1008* and *473(b)* [*D.R.S. Trading Co., Inc. v. Barnes (2009) 180 Cal. App. 4th 815, 817, 103 Cal. Rptr. 3d 329]* . In *D.R.S. Trading Co.*, the trial court vacated a default and judgment entered against defendants, despite plaintiff's contention that the trial court had no jurisdiction to reconsider its order denying defendants relief from default because *Code Civ. Proc. § 1008* authorizes reconsideration only before final judgment was entered and while the case was still pending in the trial court. The Court of Appeal found that the trial court had the power to reconsider an order it was specifically authorized to make, in the first instance, after entry of the judgment under *Code Civ. Proc. § 473(b)*, and that the existence of a judgment did not preclude the court from reconsideration of a motion it was explicitly empowered to consider after judgment. *Code of Civil Procedure Section 473(b)* specifically authorized the court to grant defendants relief from the judgment taken against them if it was the result of mistake, inadvertence, surprise or excusable neglect for up to six months after entry of that judgment. The existence of the judgment itself was no bar to relief; it was, in fact, a prerequisite. Nothing in the language of *Code Civ. Proc. § 1008* limited the court's reconsideration authority to pretrial, *i.e.*, "interim," orders. To the contrary, § 1008(e) specifies that it "applies to all applications to reconsider any order of a judge or court, or for the renewal of a previous motion, whether the order deciding the previous matter or motion is interim or final" [*D.R.S. Trading Co., Inc. v. Barnes (2009) 180 Cal. App. 4th 815, 819-820, 103 Cal. Rptr. 3d 329]* . The court found that § 1008 allows the trial

court to reconsider interim orders that might later be incorporated into the judgment and orders made after the judgment, as long it does so in accordance with the requirements of the statute [*D.R.S. Trading Co., Inc. v. Barnes (2009) 180 Cal. App. 4th 815, 821, 103 Cal. Rptr. 3d 329]* .

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15-158 California Points & Authorities § 158.06

§ 158.06 Sanctions

A violation of *Code Civ. Proc. § 1008* may be punished as a contempt, and an order made contrary to it may be revoked by the judge or commissioner who made it, or vacated by a judge of the court in which the action or proceeding is pending [*Code Civ. Proc. § 1008(d)*; *see Lucas v. Santa Maria Public Airport Dist. (1995) 39 Cal. App. 4th 1017, 1028, 46 Cal. Rptr. 2d 177* (order imposing sanctions reversed for insufficient findings even though motion for reconsideration improperly relied on matters that could have been previously presented)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions to Alter & AmendCivil ProcedureSanctionsBaseless FilingsFrivolous LawsuitsCivil ProcedureSanctionsContemptCivil ContemptCivil ProcedureSanctionsContemptCriminal Contempt

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15-158 California Points & Authorities § 158.07

§ 158.07 Use of Case Law

Case law must be used with caution because there have been significant changes in *Code Civ. Proc. § 1008* over the years. The present version of the statute was enacted in 1978 and amended by Stats. 1992, ch. 460, operative January 1, 1993, and by Stats 1998, ch. 200, § 2, operative January 1, 1999. It relates to two distinct remedies, a motion to reconsider, which was formerly governed by case law, and a renewed motion [*Stephen v. Enterprise Rent-A-Car (1991) 235 Cal. App. 3d 806, 816, 1 Cal. Rptr. 2d 130* ; *Rains v. Superior Court (1984) 150 Cal. App. 3d 933, 943-944, 198 Cal. Rptr. 249* (construing the 1978 version of the statute)]. The 1978 version of *Code Civ. Proc. § 1008(a)* (*discussed under § 158.04*) broadened the case law by permitting any party affected by the proceeding to file a motion for reconsideration; under former case law, the motion normally could be made only by the original moving party [*see Stephen v. Enterprise Rent-A-Car (1991) 235 Cal. App. 3d 806, 816, 1 Cal. Rptr. 2d 130* ; *George Ball Pacific, Inc. v. Coldwell Banker & Co. (1981) 117 Cal. App. 3d 248, 253, 172 Cal. Rptr. 597]* . In former Code Civ. Proc. § 1008(b) (*discussed under § 158.05*), the Legislature left the prior law virtually unchanged with respect to subsequent applications by the moving party for the same order.

In 1992, the Legislature further amended *Code Civ. Proc. § 1008*, and, among other things, explicitly limited jurisdiction to reconsider orders, whether interim or final, to the provisions of *Code Civ. Proc. § 1008* [*Code Civ. Proc. § 1008(e)* (implicitly overturning holdings of contrary cases; *see, e.g., Ziller Electronics Lab GMBH v. Superior Court (1988) 206 Cal. App. 3d 1222, 1231, 254 Cal. Rptr. 410* (motion to reconsider may not be subject to 10-day limit of Section 1008(a) if made under court's inherent jurisdiction))]. The current statute also explicitly limits jurisdiction with regard to renewals of previous motions, whether the order deciding the previous motion is interim or final, to the provisions of *Code Civ. Proc. § 1008* [*Code Civ. Proc. § 1008(e)*].

The current statute also permits the court to reconsider on its own motion a prior order it entered and enter a different order any time it determines that there has been a change of law, not including a later enacted statute without retroactive application, that warrants reconsideration of the prior order [*Code Civ. Proc. § 1008(c)*; *see Code Civ. Proc. § 1008(f)*].

In 1998, subsection (g) was added to the current statute. It provides that *Code Civ. Proc. § 1008* applies to all applications for interim orders [*Code Civ. Proc. § 1008(g)*].

In 2005, the California Supreme Court held that *Code Civ. Proc. § 1008* prohibits a party from making a renewed motion not based on new facts or law, but § 1008 does not limit a court's ability to reconsider its prior orders on its own motion [*Le Francois v. Goel (2005) 35 Cal. 4th 1094, 1096-1097, 29 Cal. Rptr. 3d 249* , discussed in *§ 158.32[3][a]*]. The court reviewed the case to resolve a split of authority in the courts of appeal as to when a trial court has inherent power to reconsider prior interim orders. The court concluded that the Legislature intended to preclude parties from bringing repetitive motions not based on new facts or law, and that this was a permissible exercise of the Legislature's authority. However, the court held that there was no indication the Legislature intended to hinder the courts' ability to act. Rather, it merely wished to protect the courts from the parties' repetitive motions. Therefore, the court ruled that *Code Civ. Proc. § 1008* does not preclude the court from reconsidering its own prior interim orders on its own motion [*Le Francois v. Goel (2005) 35 Cal. 4th 1094, 1106, 29 Cal. Rptr. 3d 249]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPleading & PracticeMotion PracticeSupporting MemorandaCivil ProceduresPleading & PracticeMotion PracticeTime LimitationsCivil ProceduresJudgmentsRelief From JudgmentMotions to Alter & AmendCivil ProceduresJudgmentsRelief From JudgmentMotions to Vacate

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15-158 California Points & Authorities § 158.08

§ 158.08 Motion to Reconsider and Renewed Motion Distinguished

Code of Civil Procedure Section 1008 creates two distinct subclasses of repetitive motions: Applications (motions) for reconsideration, and renewals of previous motions [*Standard Microsystems Corp. v. Winbond Electronics Corp. (2009) 179 Cal. App. 4th 868, 885, 102 Cal. Rptr. 3d 140]* . Motions for reconsideration are regulated by *Code Civ. Proc. § 1008(a)*, which requires the following:

- The motion be filed "within 10 days after service upon the party of written notice of entry of the order" of which reconsideration is sought.

- The motion be supported by new or additional facts, circumstances or law.

- The motion be accompanied by an affidavit detailing the circumstances of the first motion and the respects in which the new motion differs from it.

Renewed motions are governed by *Code Civ. Proc. § 1008(b)*, which echoes the latter two requirements, but does not impose a time limit [*see Code Civ. Proc. § 1008(b)*; *Standard Microsystems Corp. v. Winbond Electronics Corp. (2009) 179 Cal. App. 4th 868, 885, 102 Cal. Rptr. 3d 140* ; *Graham v. Hansen (1982) 128 Cal. App. 3d 965, 970-971, 180 Cal. Rptr. 604]* .

A "motion to reconsider" seeks to reopen consideration of a previous motion that the court either granted in whole, in part, or on conditions, or denied. It may be brought by any party; it is not limited to the original moving party [*see Code Civ. Proc. § 1008(a)*].

A "renewed motion" may be brought only by the party who made the prior motion which was denied in whole or in part, or granted conditionally or on terms. It is normally based on new or different facts, circumstances, or law, but seeks the same relief sought by the prior motion [*see Code Civ. Proc. § 1008(b)*].

Notwithstanding the distinction between the two kinds of motion, the term "motion to reconsider" is often applied mistakenly to both kind of motions [*see, e.g.,* *Stewart v. Superior Court (1985) 163 Cal. App. 3d 915, 916, 209 Cal.*

Rptr. 870 (court describing motion under *Code Civ. Proc. § 1008(b)*, which governs renewed motions, as motion for reconsideration); *Graham v. Hansen (1982) 128 Cal. App. 3d 965, 969-970, 180 Cal. Rptr. 604* (renewed motion entitled motion for reconsideration)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & AmendCivil ProcedureJudgmentsRelief From JudgmentMotions to Vacate

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15-158 California Points & Authorities § 158.09

§ 158.09 Order on Motion to Reconsider

Care should be taken to distinguish a court's decision for or against reconsideration from its decision after reconsideration. If a litigant seeks reconsideration of an order denying a motion, such as a motion to intervene, the trial court may sometimes enter an order "denying reconsideration" when it is plain from the record that the first motion was denied without prejudice and the second ruling was intended to be a ruling on the merits of the motion for intervention rather than simply a denial of reconsideration [*Blue Mountain Development Co. v. Carville (1982) 132 Cal. App. 3d 1005, 1011, 183 Cal. Rptr. 594* (prior law; disapproved on another point in *Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1607-1608 n.5, 275 Cal. Rptr. 887* , discussed in §§ 158.33[3][a], 158.39[3][a])].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPleading & PracticeMotion PracticeSupporting MemorandaCivil ProceduresPartiesInterventionMotions to IntervenеCivil ProceduresJudgmentsRelief From JudgmentMotions for New TrialsCivil ProceduresJudgmentsRelief From JudgmentMotions to Alter & Amend

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15-158 California Points & Authorities § 158.10

§ 158.10 Mistitled Motion

An otherwise sufficient motion improperly entitled as one for reconsideration made after judgment which is actually a motion for some other authorized form of judicial relief may be treated by the trial court for what it actually is [*see, e.g., City of Los Angeles v. Gleneagle Dev. Co. (1976) 62 Cal. App. 3d 543, 553-554, 133 Cal. Rptr. 212* (decided prior to the enactment of the 1978 version of *Code Civ. Proc. § 1008*)]. Thus, in *City of Los Angeles*, a motion, filed pursuant to *Code Civ. Proc. § 473*, to reconsider an order dismissing the action for want of prosecution (which order, when signed by the court and filed, constitutes the judgment [*see Code Civ. Proc. § 581d*]) was treated as a motion for relief under *Code Civ. Proc. § 473(b)*, based on mistake, inadvertence, surprise, or excusable neglect [*City of Los Angeles v. Gleneagle Dev. Co. (1976) 62 Cal. App. 3d 543, 552-554, 133 Cal. Rptr. 212]* . In addition, an appellate court in unusual circumstances may apparently do likewise [*see Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1608, 275 Cal. Rptr. 887* (prior law; treating motion for reconsideration as motion for new trial in accordance with prior decisions that it was overruling, but adding that, generally, appellate courts should not construe a motion expressly identified as being a particular motion to be an entirely different motion when it was not so treated in the trial court)].

However, a party may not circumvent the jurisdictional prerequisites to a motion for reconsideration under *Code Civ. Proc. § 1008*, by mistitling the motion as a motion for relief under *Code Civ. Proc. § 473* [*see Gilberd v. AC Transit (1995) 32 Cal. App. 4th 1494, 1501, 38 Cal. Rptr. 2d 626]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPleading & PracticeMotion PracticeSupporting MemorandaCivil ProceduresJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProceduresJudgmentsRelief From JudgmentMotions to Alter & Amend

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15-158 California Points & Authorities § 158.11

§ 158.11 Time Limitations

Code Civ. Proc. § 1008(a) imposes a limit of 10 days after service on the party of written notice of entry of the order in which to file a motion to reconsider; it does not, however, set a time limit for ruling on the motion. *Code Civ. Proc. § 1008(b)* sets no time limit on either the making of a renewed motion or for ruling on it.

Nevertheless, time limits may be imposed because of the nature of the order sought on the motion to reconsider or renewed motion. For example, the Court of Appeal of the First Appellate District, Division Two, citing cases, has pointed out that a timely motion to reconsider an appealable order granting a new trial, in order to be consistent with the jurisdictional 60-day limit for acting on new trial motions [*see Code Civ. Proc. § 660*], must be ruled on within that 60 days or is deemed denied by operation of law, and that, by parallel reasoning, an order denying a timely motion to reconsider an appealable dismissal order must be entered within the jurisdictional 60 days following entry of judgment or it will not extend the time under *Cal. Rules of Ct., Rule 8.108*, in which to file a notice of appeal from the dismissal order [*Stephen v. Enterprise Rent-A-Car (1991) 235 Cal. App. 3d 806, 818, 1 Cal. Rptr. 2d 130* (discussed in *§ 158.34[3*])]. (To the extent *Stephen* suggests that a motion to reconsider a properly entered written order of dismissal, which constitutes the judgment [*see Code Civ. Proc. § 581d*], is permissible, it is inconsistent with the holding in *Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 275 Cal. Rptr. 887* , that a court cannot reconsider an order granting a judgment after the judgment has been entered and that judicial error may be corrected only through certain limited procedures such as motions for new trial and motions to vacate the judgment [*Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1606, 275 Cal. Rptr. 887* (prior law); *see Ramon v. Aerospace Corp. (1996) 50 Cal. App. 4th 1233, 1236-1238, 58 Cal. Rptr. 2d 217* (following *Passavanti*, both cases discussed in §§ 158.33[3][a], 158.39[3][a])]).

The *Stephen* court further pointed out that if jurisdictional considerations compel implying time limits on motions under *Code Civ. Proc. § 1008(a)*, they must in some cases also limit *Code Civ. Proc. § 1008(b)*. Thus, for example, an open ended time for "renewed" motions is incompatible with California law deeming death-knell class certification denials final and binding when not timely appealed. The onus is thus on a plaintiff to bring such a motion within whatever time limit [*Cal. Rules of Ct., Rule 8.104*] applies for fixing the finality of the order [*Stephen v. Enterprise Rent-A-Car (1991) 235 Cal. App. 3d 806, 818, 1 Cal. Rptr. 2d 130* (discussed in *§ 158.34[3]*)].

Once a trial court has entered judgment, the court lacks jurisdiction to grant a motion for reconsideration even if the

motion was brought before the judgment was entered and is still pending at the time of entry of judgment [*APRI Ins. Co. v. Superior Court (1999) 76 Cal. App. 4th 176, 180-182, 90 Cal. Rptr. 2d 171]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensionsCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend

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15-158 California Points & Authorities § 158.11A

§ 158.11A Appeal

An order denying a motion for reconsideration pursuant to *Code Civ. Proc. § 1008(a)* is not appealable [*Annette F. v. Sharon S. (2005) 130 Cal. App. 4th 1448, 1459, 30 Cal.Rptr.3d 914* ; *Rojes v. Riverside General Hospital (1988) 203 Cal. App. 3d 1151, 1161, 250 Cal. Rptr. 435* , *overruled on another ground in Passavanti v. Williams (1990) 225 Cal. App.3d 1602, 1607, 275 Cal. Rptr. 887* ; *but see Blue Mountain Development Co. v. Carville (1982) 132 Cal. App. 3d 1005, 1010-1011, 183 Cal. Rptr. 594* (order denying motion for reconsideration appealable when order on original motion appealable and motion for reconsideration based on facts new or different from those contained in original motion); *Santee v. Santa Clara County Office of Education (1990) 220 Cal. App. 3d 702, 710, 269 Cal. Rptr. 605* (order denying motion for reconsideration which raises new facts is appealable)].

An order denying a renewed motion pursuant to *Code Civ. Proc. § 1008(b)* is not appealable [*Tate v. Wilburn (2010) 184 Cal. App. 4th 150, 159-161, 109 Cal. Rptr. 3d 18]* .

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15-158 California Points & Authorities § 158.12

§ 158.12 Related Pleading and Practice Chapters

For discussion and forms of ex parte motions, see California Forms of Pleading and Practice, Ch. 372, *Motions and Orders* (Matthew Bender).

For discussion and forms of notices of motion to reconsider and notices of renewed motions, see California Forms of Pleading and Practice, Ch. 374, *Motions to Reconsider and Renewed Motions* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend

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15-158 California Points & Authorities §§ 158.13-158.29

[Reserved]

§§ 158.13[Reserved]

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15-158 California Points & Authorities § 158.30

§ 158.30 Supporting Motion to Reconsider Prior Order [Code Civ. Proc. § 1008(a)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR RECONSIDERATION OF ORDER _____ [*e.g.,* DENYING] MOTION
vs.	)	_____ [FOR *or* TO]
_____ [*name*],	)	_____ [*specify*]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge:_____]
	)	Date Action Filed: _____
	)	Discovery Cut-Off: _____
	)	Motion Cut-Off: _____
	)	[Trial Date: _____]

_____

THE MOTION BY _____ [*specify party, e.g.,* PLAINTIFF] FOR RECONSIDERATION OF THE ORDER MADE HEREIN ON _____ [*date*] BY THE HONORABLE _____ [*name of judge*] _____ [DENYING IN _____ (WHOLE *or* PART) *or* GRANTING *or* GRANTING _____ (CONDITIONALLY *or* ON TERMS)] THE MOTION OF _____ [*specify party, e.g.,* DEFENDANT] FOR _____ [*specify relief sought by prior*

motion] SHOULD BE GRANTED AND, ON RECONSIDERATION, THE ORDER SHOULD BE _____ [*specify, e.g.,* AMENDED TO PROVIDE THAT _____ (*specify*)] FOR THE REASON(S) THAT _____ [*specify*].

A. Jurisdiction of Trial Court. A decision on a motion is not res judicata, and a trial court has jurisdiction to reconsider a prior ruling or to entertain a renewal of a previous motion (*Curtin v. Koskey (1991) 231 Cal. App. 3d 873, 876, 282 Cal. Rptr. 706*).

B. Statutory Authority for Motion to Reconsider. Any party affected by an order made on application and refused in whole or in part, or granted, or granted conditionally, or on terms, may, within 10 days after service upon the party of written notice of entry of the order and based on new or different facts, circumstances, or law, make application to the same judge who made the order to reconsider the matter and modify, amend, or revoke the prior order (*Code Civ. Proc. § 1008(a)*; *see also Graham v. Hansen (1982) 128 Cal. App. 3d 965, 970, 180 Cal. Rptr. 604* .

C. Statute Applies to All Applications For Interim Orders. *Code Civ. Proc. § 1008* applies to all applications for interim orders (*Code Civ. Proc. § 1008(g)*).

[*Optional*] **D. Reconsideration of Order Granting Motion to Dismiss Action for Failure to Effect Service Within Two Years.** An order granting a motion for discretionary dismissal of an action for failure to serve process within two years after the action was commenced is subject to reconsideration on motion (*Ladd v. Dart Equipment Corp. (1991) 230 Cal. App. 3d 1088, 1092, 1104-1107, 281 Cal. Rptr. 813*).

[*Optional*] **E. Motion to Reconsider Ruling on Demurrer.** A demurrer is "an application for an order" within the meaning of *Code of Civil Procedure Section 1008(a)* and will support an application to reconsider an order sustaining a demurrer without leave to amend (*Rains v. Superior Court (1984) 150 Cal. App. 3d 933, 943, 198 Cal. Rptr. 249* ; *see also Careau & Co. v. Security Business Credit, Inc. (1990) 222 Cal. App. 3d 1371, 1386, 272 Cal. Rptr. 387*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion to reconsider a prior order denying in whole or in part, or granting, or granting conditionally, or on terms, a motion [*see Code Civ. Proc. § 1008(a)*] or an order sustaining or overruling a demurrer. Optional Paragraph D should be included when the motion to be reconsidered is one dismissing the action under *Code Civ. Proc. § 583.420(a)(1)*. Paragraph E is for inclusion when the motion seeks reconsideration of the court's ruling on a demurrer. Any of the points and authorities set out in the optional paragraphs may, instead of being presented in the supporting memorandum of points and authorities, be included in a memorandum of points and authorities in reply to the opposing party's memorandum of points and authorities raising the issues [*see § 158.32*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Ruling on Motion

An order denying a motion for reconsideration is interpreted as a determination that the application for reconsideration does not meet the requirements of *Code Civ. Proc. § 1008(a)*. If the requirements have been met to the satisfaction of the court but the court is not persuaded the earlier ruling was erroneous, the proper course is to grant reconsideration and to reaffirm the earlier ruling [*Corns v. Miller (1986) 181 Cal. App. 3d 195, 226 Cal. Rptr. 247]* .

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 158.32, 158.33* may be used to oppose this memorandum of points and authorities.

[d] Related Pleading and Practice Forms

For discussion and a form of notice of motion for reconsideration, see California Forms of Pleading and Practice, Ch. 372, *Motions and Orders* (Matthew Bender).

[3] Discussion of Authorities

[a] Jurisdiction of Trial Court

Curtin v. Koskey *(1991) 231 Cal. App. 3d 873, 282 Cal. Rptr. 706* , was an action for damages for breach of contract and fraud by the purchasers of a used mobilehome against the sellers and the sellers' real estate agent. The mandatory dismissal statute for failure to bring the action to trial within five years [*see Code Civ. Proc. §§ 583.310, 583.360*] was about to expire. Plaintiffs' original attorney had withdrawn from the case, and plaintiffs had experienced difficulty in finding another attorney. The new attorney promptly moved the trial court for a preferential trial date, which was granted. The same day defendants filed a motion to dismiss for failure to bring the action to trial within three years [*see Code Civ. Proc. §§ 583.410, 583.420(a)(2)(A)*], now two years [*see Code Civ. Proc. §§ 583.410, 583.410(a)(2)(B)*]. Six weeks later another judge heard and granted the motion to dismiss and vacated the trial date. Plaintiff appealed from the subsequent judgment of dismissal.

The court of appeal reversed. The court indicated that the issue presented was whether the second judge was empowered to issue a ruling contrary to the first judge. Determining this issue required reconciliation of two established rules: (1) a decision on a motion is not res judicata, and the trial court has jurisdiction to reconsider a prior ruling or to entertain a renewal of a previous motion; and (2) one trial court judge may not reconsider and overrule a ruling of another judge (*231 Cal. App. 3d 873, 876-877)* . The court explained that the conflicting principles were reconciled in *Ziller Electronics Lab GMBH v. Superior Court (1988) 206 Cal. App. 3d 1222, 1232, 254 Cal. Rptr. 410* , which concluded that on a renewed motion or motion for reconsideration, the second judge must direct the moving party to the first judge and that only if the first judge is unavailable may the second judge hear the reconsideration motion (*231 Cal. App. 3d 873, 877)* . The court said that the considerations in a motion for preferential trial setting are the same as the considerations in a motion to dismiss, both of which are addressed to the discretion of the trial court and governed by the factors set forth in Cal. Rules of Ct., Rule 373(e) [*now see* Cal. Rules of Ct., Rule 3.1342] (*231 Cal. App. 3d 873, 877)* . Unable to discern in the record on appeal the basis for the first judge's ruling, that is whether the issue of plaintiff's diligence in prosecuting their action was left to be decided later in a motion to dismiss, the court of appeal reversed the dismissal with directions to the trial court to refer the subsequent motion to dismiss to the first judge who had granted the preferential trial setting (*231 Cal. App. 3d 873, 877-878)* .

[b] Statutory Authority for Motion to Reconsider

The procedural background of ***Graham v. Hansen*** *(1982) 128 Cal. App. 3d 965, 180 Cal. Rptr. 604* (construing the 1978 version of the statute), is discussed in *§ 158.31[3][a]*. In affirming the summary judgment, the appellate court said that then newly enacted *Code Civ. Proc. § 1008* contains provisions relating both to motions for reconsideration and for

subsequent applications for the same order, and that former Code Civ. Proc. § 1008(a) now permits any affected party to seek reconsideration of a court's order, regardless of how the court ruled on the motion, provided the motion is based on an alleged "different" set of facts and is made within 10 days of knowledge of the court's order (*128 Cal. App. 3d 965, 970)* .

[c] Reconsideration of Order Granting Motion to Dismiss Action for Failure to Effect Service Within Two Years

Ladd v. Dart Equipment Corp. *(1991) 230 Cal. App. 3d 1088, 281 Cal. Rptr. 813* , was an action filed on November 21, 1986, by an injured employee against his employer and two of the employer's closely related but legally separate business entities for damages for injuries resulting from a work-related accident. Two of the defendants were not served with the summons and complaint until April 13, 1989, nearly 29 months after the action was filed. The third defendant was not served until June 14, 1989, nearly 31 months after the filing. On July 7, 1989, plaintiff voluntarily dismissed the complaint as to his employer. The remaining defendants moved to dismiss the action for failure to serve the summons and complaint within two years after the action was commenced [*see Code Civ. Proc. § 583.420(a)(1)*]. The motion was granted on October 10, 1989. Plaintiff's subsequent motion for reconsideration, filed on October 20, 1989, was also granted. On reconsideration, the trial court again ordered the action dismissed, feeling it was bound by a prior court of appeal decision to do so. Plaintiff appealed. The court of appeal concluded that the trial court acted within its discretion in granting the original dismissal motion and in granting the reconsideration request, and affirmed those orders (*230 Cal. App. 3d 1088, 1091-1092, 1095)* . However, the appellate court reversed the second dismissal order on the ground the trial court failed to exercise its discretion in ruling on the dismissal motion after granting reconsideration (*230 Cal. App. 3d 1088, 1092, 1104-1107)* .

Note that the appellate court's decision does not clearly show whether a judgment of dismissal had been entered on the motion to dismiss when the motion to reconsider was filed; that is, whether the court's order granting the motion to dismiss was in writing (as opposed to a minute order), signed, and filed before the motion to reconsider was filed. *Code Civ. Proc. § 581d* provides that all dismissals ordered by the court shall be in the form of a written order signed by the court and filed in the action, and such orders when so filed shall constitute judgments and be effective for all purposes, and the clerk shall note those judgments in the register of actions in the case. If the trial court in *Ladd* followed this procedure, then it would appear that the judgment of dismissal had been entered before the motion to reconsider was filed. If this is so, then the appellate court's holding that the motion to reconsider was properly granted would appear to be contrary to the holding of the *Fourth Appellate District, Division Two, in Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 275 Cal. Rptr. 887* , which was not discussed in *Ladd*. The *Ladd* court did cite for another point *Blue Mountain Development Co. v. Carville (1982) 132 Cal. App. 3d 1005, 1013, 183 Cal. Rptr. 594* (*230 Cal. App. 3d 1088, 1102)* , which also was decided by the the Fourth Appellate District, Division Two, and which was disapproved in part in *Passavanti* (*Passavanti* is discussed in *§§ 158.33[3][a], 158.37[2], 158.39[3][a]*).

[d] Motion to Reconsider Ruling on Demurrer

Rains v. Superior Court *(1984) 150 Cal. App. 3d 933, 198 Cal. Rptr. 249* , was a mandate proceeding arising out of an action for battery occurring as an aspect of an in-patient psychiatric treatment program in which plaintiffs participated and consented to defendants using physical violence on them as a therapeutic measure. The trial court (1) sustained defendants' demurrer without leave to amend; (2) denied plaintiffs' motions for new trial and for reconsideration and for leave to file a proposed amended complaint; and (3) imposed monetary sanctions against plaintiffs and their attorney for bringing (a) a reconsideration motion without alleging a new and different state of facts as required by former Code Civ. Proc. § 1008(a), and *(b)* a wholly inappropriate motion for new trial. In granting the writ, the reviewing court pointed out, with respect to the motion for reconsideration, that under *Code Civ. Proc. § 1003*, an application for an order is a motion, and held that a demurrer, which is a pleading (*Code Civ. Proc. § 422.10*), is also an application for an order within the meaning of *Code Civ. Proc. § 1008(a)* and will support an application to reconsider the matter when supported by a proposed pleading containing new allegations not previously included by the

pleader (*150 Cal. App. 3d 933, 943)* .

Careau & Co. v. Security Business Credit, Inc. *(1990) 222 Cal. App. 3d 1371, 272 Cal. Rptr. 387* , involved consolidated actions arising out of a dispute as to whether the bank defendants had made a binding commitment to provide debt financing to the plaintiffs for a leveraged buyout, and whether the plaintiffs justifiably relied on it. The court sustained without leave to amend defendants' demurrers to 16 of the 22 causes of action alleged in the consolidated complaints. Plaintiffs moved for reconsideration of the "without leave to amend" portion of the order, submitting with their motion proposed second amended complaints for both of the actions. The court denied the motion on the ground no "new" facts were presented. The court further granted defendants' subsequent motion for judgment on the pleadings as to five additional counts. Plaintiffs voluntarily dismissed without prejudice the remaining count, and appealed from the subsequent judgment.

The court of appeal, citing *Rains v. Superior Court (1984) 150 Cal. App. 3d 933, 943-944, 198 Cal. Rptr. 249* (discussed *above*), said plaintiffs were entitled to submit proposed second amended complaints by way of a motion for reconsideration, and that if those amended complaints stated any causes of action the trial court was obligated to (1) vacate its order which had sustained the demurrers without leave to amend and (2) make a different order granting plaintiffs leave to file an amended complaint, which would include the causes of action which the trial court, in deciding the merits of the motion for reconsideration, determined were valid (*222 Cal. App. 3d 1371, 1386)* . The court noted that the trial court denied the motion for reconsideration because "there were no new facts." The appellate court said that this was not correct, that former Code Civ. Proc. § 1008(a) does not require that a motion to reconsider be based on "new facts," but only that the motion be based on an alleged different state of facts than the original motion, and that the trial court should have specifically examined the proposed pleadings attached to the reconsideration motion to determine whether the added allegations were sufficient to state one or more valid causes of action (*222 Cal. App. 3d 1371, 1387, n.9*). The court examined the proposed amended complaints and held that the trial court should have overruled the demurrers as to two causes of action and granted plaintiffs the right to amend as to certain other causes of action, and reversed the dismissal orders to that extent, affirming them in all other respects (*222 Cal. App. 3d 1371, 1379, 1388-1405)* .

[4] Additional Authorities

[a] Statutory Authority for Motion to Reconsider

In *Glade v. Glade (1995) 38 Cal. App. 4th 1441, 45 Cal. Rptr. 2d 695* , plaintiff, the trustee of a revocable family trust, obtained a summary judgment in a foreclosure action against defendant after defendant had obtained an order from a family law court which had consolidated the foreclosure action with a marital dissolution action and had stayed the foreclosure action. However, the trial court for the foreclosure action did not receive notice of the stay, and entered the summary judgment. Later, the trial court for the foreclosure action then denied defendant's motion for reconsideration for the stated reason that the stay was ineffective because the courts were of equal jurisdiction.

The court of appeal concluded that the family law court had priority of jurisdiction, and addressed the issue of whether the motion for reconsideration should have been granted. The court noted the requirement that the party seeking reconsideration must provide not just new evidence or different facts, but a satisfactory explanation for the failure to produce it at an earlier time (*38 Cal. App. 4th 1441, 1457)* . The record indicated that the family law court's stay order was issued just two days before the summary judgment motion was set to be heard. The attorneys for both parties tried unsuccessfully to contact the trial court to inform the court of the stay prior to the hearing although the plaintiff's attorney was taking the position that the order was invalid. However, when defendant's attorney arrived five minutes late for the summary judgment hearing, apparently due to construction work which concealed the courthouse as he drove past, plaintiff's attorney failed to inform the court of the stay order. When defendant's attorney's presence was called to the court's attention as the matter was being submitted, the trial court did not permit him to speak. The court concluded that on these facts there was a reasonable and credible explanation for defendant's failure to apprise the trial

court of the stay order (*38 Cal. App. 4th 1441, 1457)* .

California Points & Authorities

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
CHAPTER 158 MOTIONS TO RECONSIDER AND RENEWED MOTIONS
PART II. FORMS

15-158 California Points & Authorities § 158.31

§ 158.31 Supporting Renewed Motion [Code Civ. Proc. § 1008(b)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM IN SUPPORT OF MOTION
	)	_____ [TO *or* FOR]
_____ [*name*],	)	_____ [*specify*]
Plaintiff,	)	[*Code Civ. Proc. § 1008(b)*;
vs.	)	*Cal. Rules of Ct., Rule 3.1113*]
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Judge: _____
	)	Location: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

THIS RENEWED MOTION SHOULD BE GRANTED BECAUSE A RENEWED MOTION BASED ON NEW OR DIFFERENT FACTS, CIRCUMSTANCES, OR LAW IS AUTHORIZED BY STATUTE, AND THE NEW FACTS SET FORTH IN THE _____ [AFFIDAVIT *or* DECLARATION UNDER PENALTY OF PERJURY] ATTACHED TO THE NOTICE OF MOTION SHOW THAT THE MOTION _____ [*specify, e.g.,* FOR SUMMARY JUDGMENT] SHOULD BE GRANTED ON THE GROUND(S) THAT

_____ [*specify, e.g.,* THERE IS NO MERIT TO THE ACTION] FOR THE REASON THAT _____ [*specify, e.g.,* THE ACTION IS BARRED BY THE STATUTE OF LIMITATIONS].

A. Jurisdiction of Trial Court. [*See § 158.30, Paragraph A.*]

B. Governing Statute. Renewed motions are governed by *Code of Civil Procedure Section 1008(b)* (*Graham v. Hansen (1982) 128 Cal. App. 3d 965, 970-971, 180 Cal. Rptr. 604*).

C. Statute Applies to All Applications For Interim Orders. [*See § 158.30, Paragraph C.*]

D. Statutory Requirements. When the party who originally made an application for an order which was refused in whole or in part, or granted conditionally or on terms, makes a subsequent application for the same order on new or different facts, circumstances, or law, it shall be shown by affidavit (or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]) what application was made before, when and to what judge, what order or decisions were made thereon, and what new or different facts, circumstances, or law, are claimed to be shown (*Code Civ. Proc. § 1008(b)*).

[*Optional*] **E. Inapplicability of 10-Day Limitation Period.** The provision in *Code of Civil Procedure Section 1008(a)* requiring that a motion for reconsideration be made within 10 days after service upon the party of written notice of entry of the order does not apply to a renewed motion under *Code of Civil Procedure Section 1008(b),* which is not subject to any time limitation (*Monsan Homes, Inc. v. Pogrebneak (1989) 210 Cal. App. 3d 826, 831, 258 Cal. Rptr. 676* (prior law; criticized on another point in *Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1608 n.5, 275 Cal. Rptr. 887*); *Graham v. Hansen (1982) 128 Cal. App. 3d 965, 970-971, 180 Cal. Rptr. 604*).

[*Optional*] **F. Sufficiency of New Facts to Support Motion.** Whether the "new" facts alleged on a renewal motion are sufficient to satisfy the requirements of *Code of Civil Procedure Section 1008(b)* is a question confided to the sound discretion of the trial court, the exercise of which the appellate court will not interfere with absent an obvious showing of abuse (*Graham v. Hansen (1982) 128 Cal. App. 3d 965, 971, 180 Cal. Rptr. 604* (prior law)).

[*Add points and authorities establishing the ground for the particular substantive order sought.*]

Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities is for use in support of a renewed motion. The facts required to be shown by affidavit (Paragraph D) should be set forth in the affidavit, or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*], accompanying the notice of motion. Optional Paragraph E should be included if more than 10 days have elapsed between the time the moving party was served with written notice of entry of the original order and the date the renewed motion is filed. Optional Paragraph F should be included if counsel anticipates that opposing counsel will challenge the sufficiency of the new or different facts, circumstances, or law; however, to avoid focusing opposing counsel's attention on the sufficiency of the new or different facts, circumstances, or law, counsel may wish to omit the point here and include it in a reply memorandum of points and authorities after the issue has first been raised by opposing counsel.

Additional points and authorities should be included to establish the ground for the order sought. For points and authorities that may be incorporated in the form, see the specific chapter in this set. For example, for points and authorities supporting a motion for summary judgment, see Ch. 221, *Summary Judgments* .

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 158.34* may be used to oppose the points and authorities set out in this form.

[c] Related Pleading and Practice Forms

For a form of notice of renewed motion, see Ch. 372, *Motions and Orders* , Pt. II, in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Governing Statute

Graham v. Hansen *(1982) 128 Cal. App. 3d 965, 180 Cal. Rptr. 604* , was a medical malpractice action in which the trial court originally denied defendants' motion for summary judgment on the ground the action was barred by the statute of limitations, but granted defendants' renewed motion for summary judgment made about a year later on the same ground. Plaintiff contended the second motion was untimely because it was not made within 10 days after defendants received notice that their first motion had been denied, as required by former Code Civ. Proc. § 1008(a). In affirming the summary judgment for defendants, the court of appeal said a renewed motion is not governed by *Code Civ. Proc. § 1008(a)*, but that the statutory provisions relating to motions for renewal (i.e., subsequent applications for the same order) are found in *Code Civ. Proc. § 1008(b)* (*128 Cal. App. 3d 965, 969-970)* .

[b] Inapplicability of 10-Day Limitation Period

Monsan Homes, Inc. v. Pogrebneak *(1989) 210 Cal. App. 3d 826, 258 Cal. Rptr. 676 (Sixth Appellate District)* , was an appeal from a denial of relief from a default and default judgment. The court of appeal affirmed. Defendant had also filed a motion asking the appellate court to take evidence and to make factual determinations contrary to those made by the trial court, as authorized by *Code Civ. Proc. § 909*, based on new evidence presented to the appellate court. The appellate court ordered that the motion be considered with the appeal (*210 Cal. App. 3d 826, 829)* , but concluded that relief could not be granted under *Code Civ. Proc. § 909* (*210 Cal. App. 3d 826, 830-831)* . The court then considered whether to treat the motion as a petition for writ of error *coram vobis*, but rejected this remedy on the ground that plaintiff had a remedy under *Code Civ. Proc. § 1008(b)*. The court pointed out that former Code Civ. Proc. § 1008(b) provides for renewal of an earlier motion based on "new facts," and, citing *Graham v. Hansen (1982) 128 Cal. App. 3d 965, 180 Cal. Rptr. 604* , added that the motion is not subject to the 10-day limitation governing applications under *Code Civ. Proc. § 1008(a)* (*210 Cal. App. 3d 826, 831)* .

Note that in *Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1608 n.5, 275 Cal. Rptr. 887* (discussed in *§§ 158.33[3][a], 158.39[3][a]*), the Court of Appeal of the Fourth Appellate District, Division Two, disagreed with *Monsan* to the extent *Monsan* apparently approved of "postjudgment motions for reconsideration" of a judgment.

The procedural background of ***Graham v. Hansen*** *(1982) 128 Cal. App. 3d 965, 180 Cal. Rptr. 604* , is *discussed under § 158.31[3][a]*. Plaintiff contended the second motion was untimely because it was not made within 10 days after

defendants received notice that their first motion had been denied. In rejecting this argument and affirming the summary judgment for defendants, the court of appeal said that *Code Civ. Proc. § 1008(b)* contains no requirement that a motion for renewal be made within the 10-day time period as required for motions for reconsideration under *Code Civ. Proc. § 1008(a)* (*128 Cal. App. 3d 965, 970)* . The court explained that in *Code Civ. Proc. § 1008(b)*, the Legislature left the prior law [former Code Civ. Proc. § 1008, repealed by Stats. 1978, ch. 631, operative January 1, 1979] virtually unchanged with respect to subsequent applications by the moving party for the same order, that the 1978 version of *Code Civ. Proc. § 1008(b)*, as did its predecessor section, applies to renewals based on "new" facts and imposes no time limitations on such motions, and that the appellate court had found nothing in the legislative history to indicate any such limitation was intended (*128 Cal. App. 3d 965, 970-971)* . The court said that to place a time limitation on motions for renewal would produce a result inimical to the efficient administration of justice, and that, when "new" facts come to the attention of the moving party sufficient to justify renewal of a motion previously made, it would be nonsensical to disallow the later motion simply because discovery of the "new" facts was not made within the 10 day limit of § 1008(a). Trial courts should be allowed to review, reweigh, and modify an order when new facts are presented which demonstrate the need to do so. To apply a time limitation beyond which the court lacks power to so act would needlessly burden the courts and the litigants with plenary trials that were otherwise capable of summary resolution. The court said it could not conceive that the Legislature intended such a result and that it was apparent to it that the 10-day limitations period for motions for reconsideration based on "different" facts [*Code Civ. Proc. § 1008(a)*] describes a remedy wholly discrete from the motion for renewal based on "new" facts long provided by statute and presently found in the then recently enacted *Code Civ. Proc. § 1008(b)* (*128 Cal. App. 3d 965, 971)* .

[c] Sufficiency of New Facts to Support Motion

The procedural background of ***Graham v. Hansen*** *(1982) 128 Cal. App. 3d 965, 180 Cal. Rptr. 604* , is *discussed under § 158.31[3][a]*. In response to plaintiff's argument that the claimed "new" facts (plaintiff's answer to an interrogatory and a declaration by plaintiff's counsel) were insufficient to support a motion for renewal, the appellate court, in affirming the summary judgment for defendants, said that whether the "new" facts alleged on a motion for renewal are sufficient to satisfy the requirements of *Code Civ. Proc. § 1008(b)* is a question confided to the sound discretion of the trial court, the exercise of which the appellate court would not interfere with absent an obvious showing of abuse, and that the record manifested no such abuse (*128 Cal. App. 3d 965, 971)* . Turning to the merits of the trial court's ruling under review, the appellate court was satisfied that the trial court correctly determined that the action was barred by the statute of limitations as a matter of law (*128 Cal. App. 3d 965, 971)* .

[4] Additional Authorities

[a] Inapplicability of 10-Day Limitation Period

The facts and procedural background of *Stephen v. Enterprise Rent-A-Car (1991) 235 Cal. App. 3d 806, 1 Cal. Rptr. 2d 130* , are discussed in *§ 158.34[3]*. In discussing *Code Civ. Proc. § 1008(b)*, the appellate court said that the Legislature left the prior law [former Code Civ. Proc. § 1008] virtually unchanged with respect to subsequent applications by the moving party for the same order. As its predecessor section, *Code Civ. Proc. § 1008(b)* applies to renewals based on "new" facts and imposes no time limitations on such motions (*235 Cal. App. 3d 806, 816)* .

[b] Sufficiency of New Facts to Support Motion

In *Mink v. Superior Court (1992) 2 Cal. App. 4th 1338, 4 Cal. Rptr. 2d 195* , plaintiffs sued a residential property developer, who filed a motion for summary adjudication on the ground that the 10-year statute of limitations ran on January 17, 1987, three days before the complaint was filed. After the motion was granted, plaintiffs' attorney discovered January 17, 1987, was a Saturday, and the following Monday was a court holiday in celebration of Martin Luther King, Jr.'s birthday. Thus, the last day to file suit was Tuesday, January 20, 1987, the day the complaint was filed (*2 Cal. App. 4th 1338, 1341)* . The court of appeals held that the trial court abused its discretion in denying the motion to reconsider. The appellate court found that the new facts presented were sufficient to require reconsideration of the

summary adjudication ruling. The court assumed defendant's counsel had brought the summary adjudication motion in good faith and had inadvertently overlooked the weekend and court holiday. Thus, defendant was in no position to argue that the same mistake, when made by his adversary, was inexcusable (*2 Cal. App. 4th 1338, 1343)* .

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
CHAPTER 158 MOTIONS TO RECONSIDER AND RENEWED MOTIONS
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15-158 California Points & Authorities § 158.32

§ 158.32 Opposing Motion to Reconsider--Statutory Requirements [Code Civ. Proc. § 1008(a)] Not Complied With

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR RECONSIDERATION OF ORDER
vs.	)	_____ [*e.g.*, DENYING] MOTION
_____ [*name*],	)	_____ [FOR *or* TO]
Defendant.	)	_____ [*specify motion*]
	)	Date: _____
	)	Time: _____
	)	Dept.: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

THE MOTION FOR RECONSIDERATION SHOULD BE DENIED BECAUSE THE STATUTORY REQUIREMENTS HAVE NOT BEEN MET, IN THAT THE _____ [MOVING PARTY IS NOT AFFECTED BY THE PRIOR ORDER *or* MOTION IS NOT TIMELY *or* MOTION IS NOT BASED ON NEW OR DIFFERENT FACTS, CIRCUMSTANCES, OR LAW *or all or any combination of these*].

[*EITHER*]

A. Moving Party Not Affected by Prior Order. Only a party affected by an order refusing in whole or in part, or granting, or granting on condition an application for an order may seek reconsideration of the order (*Code Civ. Proc. § 1008(a)*).

[*AND/OR*]

B. Motion to Reconsider Is Not Timely. A motion for reconsideration must be made within 10 days after the party is served with written notice of entry of the order (*Code Civ. Proc. § 1008(a)*).

[*AND/OR*]

C. Not Based on New or Different Facts, Circumstances, or Law. A motion for reconsideration is authorized only when the motion is based on new or different facts, circumstances, or law (*Code Civ. Proc. § 1008(a)*; *Le Francois v. Goel (2005) 35 Cal. 4th 1094, 1096-1097, 29 Cal. Rptr. 3d 249* ; *Nieto v. Blue Shield of California Life & Health Ins. Co. (2010) 181 Cal. App. 4th 60, 71-74, 103 Cal. Rptr. 3d 906* ; *McPherson v. City of Manhattan Beach (2000) 78 Cal. App. 4th 1252, 1265, 93 Cal. Rptr. 2d 725* ; *Gilberd v. AC Transit (1995) 32 Cal. App. 4th 1494, 1500-1501, 38 Cal. Rptr. 2d 626*).

[*Optional*] **D. Adequate Explanation For Failure to Provide Evidence Earlier Lacking.** The party moving for reconsideration on the basis of new or different facts must make a threshold showing of diligence which requires a satisfactory explanation for failing to provide the evidence earlier (*McPherson v. City of Manhattan Beach (2000) 78 Cal. App. 4th 1252, 1265, 93 Cal. Rptr. 2d 725* ; *Garcia v. Hejmadi (1997) 58 Cal. App. 4th 674, 688-691, 68 Cal. Rptr. 2d 228*).

[*Optional*] **E. Adequate Explanation For Failure to Provide Different Law Earlier Lacking.** The party moving for reconsideration on the basis of different law must make the same showing of diligence required of those seeking reconsideration on the basis of different facts, i.e., provide a satisfactory explanation for failure to present this information earlier (*Baldwin v. Home Savings of America (1997) 59 Cal. App. 4th 1192, 1193, 1198-1200, 69 Cal. Rptr. 2d 592*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities are for use in opposition to a motion to reconsider when the moving party has failed to comply with the requirements of *Code Civ. Proc. § 1008(a), set out in § 158.30*, Paragraph B.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law

stated.

In an appropriate case, these points and authorities may be used to oppose a motion supported by the points and authorities *set out in § 158.30*.

[b] Jurisdictional Provisions of Statute

Under former case law, the requirements of *Code Civ. Proc. § 1008(a)* did not apply to motions to reconsider interim orders. In 1992, the Legislature amended *Code Civ. Proc. § 1008*, and, among other things, explicitly overturned case law which had found that the section did not apply to interim orders [Stats. 1992, ch. 460, § 1(b)-(d)]. One court has stated that it could comfortably assume that the substitute language "new or different facts, circumstances, or law," was designed to approve generally, the case law relaxation of what constitutes new or different facts justifying reconsideration. This does not mean, however, that all facts not previously presented to a court now suffice [*Garcia v. Hejmadi (1997) 58 Cal. App. 4th 674, 690, 68 Cal. Rptr. 2d 228]* . In any event, a showing must be made that there is a satisfactory explanation for failing to provide the evidence earlier [*Garcia v. Hejmadi (1997) 58 Cal. App. 4th 674, 689-690, 68 Cal. Rptr. 2d 228* (case discussed in *§ 158.32[3*][b])]. Similarly, when the basis for the motion is "different law," a showing must be made that there is a satisfactory explanation for failing to provide this information earlier [*Baldwin v. Home Savings of America (1997) 59 Cal. App. 4th 1192, 1193, 1198-1200, 69 Cal. Rptr. 2d 592* (case discussed in *§ 158.32[3*][c])].

The current statute also curtails the availability of reconsideration by explicitly limiting jurisdiction to reconsider to the procedures set forth in *Code Civ. Proc. § 1008* [*Code Civ. Proc. § 1008(e)* (overturning holding of *Ziller Electronics Lab GMBH v. Superior Court (1988) 206 Cal. App. 3d 1222, 1231, 254 Cal. Rptr. 410*)]. However, the California Supreme Court has interpreted *Code Civ. Proc. § 1008(e)* as only limiting the parties' ability to file motions to reconsider and not the court's authority to reconsider interim rulings on its own motion [*Le Francois v. Goel (2005) 35 Cal. 4th 1094, 1096-1097, 29 Cal. Rptr. 3d 249]* .

[c] New or Different Facts, Circumstances or Law

The 1992 amendment of *Code Civ. Proc. § 1008(a)* changes the basis for a motion to reconsider from "an alleged different state of facts" to "new or different facts, circumstances, or law." Since the terms "new" and "different" presumably have unique meanings, a reconsideration motion may be based on material that is either new (or newly discovered) or different (but previously known). Under former Section 1008(a), it was unclear whether "different" facts were required to be "new" or "newly discovered" [*see* *Blue Mountain Development Co. v. Carville (1982) 132 Cal. App. 3d 1005, 1014, 183 Cal. Rptr. 594* (prior law; requiring newly discovered evidence and satisfactory explanation for failure to produce earlier); *but see* *Rains v. Superior Court (1984) 150 Cal. App. 3d 933, 944, 198 Cal. Rptr. 249* (prior law; in contrast to renewed motions, no requirement that "alleged different state of facts" supporting reconsideration motion be "new" or newly discovered)].

In 1998, the Legislature again amended *Code Civ. Proc. § 1008* to add subsection (g) which explicitly provides that *Code Civ. Proc. § 1008* applies to all applications for interim orders [Stats 1998, ch 200, § 2].

[3] Discussion of Authorities

[a] Not Based on New or Different Facts, Circumstances, or Law

In ***Le Francois v. Goel*** *(2005) 35 Cal. 4th 1094, 29 Cal. Rptr. 3d 249* , plaintiffs sued their former employer and three of its officers for misrepresentation. Defendants moved for summary judgment, and the trial court denied the motion. Over a year later, defendants filed a second motion for summary judgment based on the same grounds as the first motion. Plaintiffs opposed the motion, both on the same grounds as they had opposed the first motion, and on the ground that the motion violated the provisions of *Code Civ. Proc. § 437c(f)(2)*. A different judge heard the second

motion and granted it.

Plaintiffs appealed, and the court of appeal affirmed the judgment, holding that the trial court had inherent power to rule on the second motion despite the fact that it was not based upon new facts or law, as both *Code Civ. Proc. § 437c(f)(2)* and *Code Civ. Proc. § 1008* require. The California Supreme Court granted review to address a split in the courts of appeal regarding the interpretation of *Code Civ. Proc. § 1008(e)* and to decide whether the trial court had authority to consider and grant the second summary judgment motion.

One line of appellate court cases had held that *Code Civ. Proc. § 1008(e)* only limits the parties' ability to bring motions to consider and does not limit the court's power to reconsider its rulings [*see, e.g.*, *Darling, Hall & Rae v. Kritt (1999) 75 Cal. App. 4th 1148, 1156-1157, 89 Cal. Rptr. 2d 676* ; *Schachter v. Citigroup, Inc. (2005) 126 Cal. App. 4th 726, 738, 23 Cal. Rptr. 3d 920* ; *Kerns v. CSE Ins. Group (2003) 106 Cal. App. 4th 368, 388-390, 130 Cal. Rptr. 2d 754]* . A second line of cases held that a trial court has the power to reconsider its prior rulings regardless of whether the reconsideration is on its own motion or on the motion of a party [*see, e.g.*, *Scott Co. v. U.S. Fid. & Guar. Ins. Co. (2003) 107 Cal. App. 4th 197, 206-212, 132 Cal. Rptr. 2d 89* (disapproved by *Le Francois v. Goel (2005) 35 Cal. 4th 1094, 1107 n.5, 29 Cal. Rptr. 3d 249*); *Wozniak v. Lucutz (2002) 102 Cal. App. 4th 1031, 1041-1042, 126 Cal. Rptr. 2d 310* (disapproved by *Le Francois v. Goel (2005) 35 Cal. 4th 1094, 1107 n.5, 29 Cal. Rptr. 3d 249*); *Remsen v. Lavacot (2001) 87 Cal. App. 4th 421, 427, 104 Cal. Rptr. 2d 612* (disapproved by *Le Francois v. Goel (2005) 35 Cal. 4th 1094, 1107 n.5, 29 Cal. Rptr. 3d 249*)]. The court examined separation of powers principles in the context of legislative restrictions on judicial functions and concluded that "the Legislature may adopt reasonable regulations affecting a court's inherent powers or functions, so long as the legislation does not defeat or materially impair a court's exercise of its constitutional power or the fulfillment of its constitutional function" (*35 Cal. 4th 1094, 1103 n.3* , quoting *Superior Court v. County of Mendocino (1996)13 Cal. 4th 45, 58-59, 51 Cal. Rptr. 2d 837*).

The court concluded that *Code Civ. Proc. § 1008*'s limitation on the parties' ability to file repetitive motions was clearly within the Legislature's authority and did not defeat or materially impair the courts' functions (*35 Cal. 4th 1094, 1104)* . However, the court interpreted the statute as placing no restrictions on a court's ability to reconsider its rulings on its own motion. The court noted that *Code Civ. Proc. § 1008(e)* speaks only of the court's reconsideration of a party's motion and does not speak to the court's ability to act on its own. The court saw nothing in the legislative history indicating that the legislature intended to hinder the courts' ability to act. Rather, the legislature wished to protect the courts from repetitive motions (*35 Cal. 4th 1094, 1106)* . Therefore, the court held that *Code Civ. Proc. § 1008* limits the parties' ability to file repetitive motions but does not limit the court's ability, on its own motion, to reconsider its prior interim orders so it may correct its own errors (*35 Cal. 4th 1094, 1107)* .

The court cautioned that any action to reconsider a prior order must formally begin with the court on its own motion. A party may not file a motion with procedural significance unless the requirements of *Code Civ. Proc. § 1008* are met. The court suggested that if a court wants to reconsider a ruling on its own motion, it should inform the parties of its concern, solicit briefing, and hold a hearing (*35 Cal. 4th 1094, 1108)* .

In ***Nieto v. Blue Shield of California Life & Health Ins. Co.*** *(2010) 181 Cal. App. 4th 60, 103 Cal. Rptr. 3d 906* , plaintiff failed to disclose information about her medical condition and treatment on a health insurance application she submitted to defendant. She filed an action against defendant after it rescinded her insurance policy, asserting claims for breach of contract, breach of the implied covenant of good faith and fair dealing, declaratory relief and violation of *Bus. & Prof. Code § 17200*. She alleged that the rescission of her policy constituted unlawful postclaims underwriting in violation of *Ins. Code § 10384* and was an unreasonable use of her insurance application in violation of *Ins. Code § 10381.5*. Defendant answered and cross-complained, seeking a declaratory judgment that it rightfully rescinded the insurance contract, thereby precluding plaintiff from maintaining her action on the ground that plaintiff made material false representations and omitted material facts in her application concerning her medical condition and history and that it would not have issued the policy had she provided complete and accurate information. The trial court granted defendant's motion for summary judgment on the complaint and cross-complaint, on the ground that defendant had no

duty to further investigate plaintiff's medical history because her application did not provide notice of any concerns; however, the trial court vacated its own order on the basis of new case law, reconsidered its prior order and denied it without prejudice. The trial court denied defendant's renewed motion for summary judgment on the ground that, although, even given recent authority, an insurer retains the right to rescind an insurance policy due to the insured's fraud, defendant's separate statement failed to establish that the material facts were undisputed with respect to each element of fraud. The trial court granted defendant's subsequent motion for summary judgment, ruling that it was entitled to rescission as a matter of law in view of the undisputed evidence that plaintiff made material misrepresentations and omissions regarding her medical history (*Imperial Merchant Servs., Inc. v. Hunt (2009) 47 Cal. 4th 381, 393, 97 Cal. Rptr. 3d 464, 212 P.3d 736* .

The Court of Appeal affirmed. With regard to plaintiff's challenge that the summary judgment motion was improperly refiled in violation of *Code Civ. Proc. § 437c(f)(2)*, even disregarding that defendant's motion for summary judgment fell outside the scope of *Code Civ. Proc. § 437c(f)(2)*, because the prior motion was one for summary judgment rather than summary adjudication, the trial court properly exercised its discretion in determining that this provision did not bar summary judgment because the operative motion addressed an issue not raised by the prior motion. In its order denying the prior motion the trial court expressly stated that the motion's failure to address the elements of fraud was the basis for its denial. The operative summary judgment motion addressed this previously omitted issue, asserting that defendant was entitled to judgment because plaintiff committed fraud on the application and specifically identified the elements of fraud established by the undisputed evidence. The trial court had no reason to reach the question of whether the operative summary judgment motion relied on the same facts and law presented in the prior motion because the motion targeted an issue, plaintiff's fraud, not previously asserted. Even assuming that the operative summary judgment motion did not assert a new issue, the court nevertheless concluded that the trial court had inherent authority to reconsider sua sponte its prior order denying defendant's second motion for summary judgment, citing *Le Francois v. Goel (2005) 35 Cal. 4th 1094, 1096-1097, 1105, 29 Cal. Rptr. 3d 249, 112 P.3d 636* , in which the California Supreme Court concluded a trial court has the authority to reconsider sua sponte an earlier interim ruling on a motion for summary judgment even though the moving party may not have asserted any new issues or newly discovered facts or law that would support the filing of a second or renewed motion for summary judgment pursuant to *Code Civ. Proc. § 437c(f)(2)* or *1008*. The record supported the conclusion that the trial court effectively sua sponte reconsidered its prior order denying defendant's second motion for summary judgment. In the prior order, the trial court indicated that it would consider whether defendant was entitled to summary judgment on the ground that the undisputed evidence satisfied the elements of fraud. It characterized defendant's second summary judgment motion as seeking adjudication on the theory that plaintiff's concealment of material information entitled defendant to rescind coverage and found that theory insufficient. Though the trial court observed that the unstated inferences from the evidence identified in the separate statement might support the existence of fraud, the trial court believed that each of the elements of fraud (as enumerated in CACI No. 1900) had to be set forth explicitly in the separate statement and defendant's separate statement was insufficient to support summary judgment or summary adjudication. At the time it denied the second summary judgment motion, the trial court had already determined that it would reconsider its order if defendant could demonstrate that there was no triable issue of fact as to each element of fraud. That reconsideration may have been prompted by a motion filed in violation of § 437c(f)(2) did not alter the trial court's inherent authority to reconsider its prior order denying summary judgment (*181 Cal. App. 4th 60, 71-74)* .

McPherson v. City of Manhattan Beach *(2000) 78 Cal. App. 4th 1252, 93 Cal. Rptr. 2d 725* , involved an action for a writ of mandate against the City of Manhattan Beach to compel it to rescind a land use permit granted to a developer allowing construction exceeding the city's legislated height limitations. In 1990, the city approved the developer's application for a vesting tentative parcel map and a corresponding use permit for its planned condominium project. The project then stalled due to the developer's inaction. During this time, in 1991, new municipal code provisions took effect, lowering the maximum height limitations that applied to the project. The final parcel map was not recorded until 1996, and the city granted the developer a new conditional use permit in 1997.

The plaintiff sought a writ of mandate compelling the city to rescind the 1997 permit because the project would violate

the municipal code's height limitations. The defendants city and developer argued that the right to proceed with the project vested prior to the change in height limitations. The plaintiff countered with section 11.24.020 of the city's municipal code, which provided that the failure to record a parcel map within thirty-six months of approval or conditional approval shall terminate all proceedings. The defendants argued that section 11.24.020 was preempted by California's Subdivision Map Act ("the Act"). The trial court rejected the defendants' preemption argument and granted the plaintiff's petition. The defendants brought a motion for reconsideration, attaching as "new evidence" a declaration from a city planning employee stating that the city had interpreted section 11.24.020 to be preempted by the Act. The trial court denied the motion for reconsideration, and the defendants appealed.

The court of appeal, in affirming, noted that to merit reconsideration a party must give a satisfactory reason why it was unable to present its "new" evidence at the original hearing. The court rejected the appellants' claim that they had been unable to present evidence of their interpretation of section 11.24.020 because it was not part of the administrative record before the trial court. The court of appeal reasoned that the plaintiff had raised the issue of untimely recording and expiration of the tentative parcel map throughout the administrative proceedings. The court also noted that section 11.24.020 had figured prominently in the trial court briefs and hearing, and that the appellants had waited until after the trial court ruled to submit the declaration regarding its interpretation of 11.24.020 and the Act. Thus, the city employee's declaration could not qualify as "new" evidence (*78 Cal. App. 4th 1252, 1265-1266)* .

Gilberd v. AC Transit *(1995) 32 Cal. App. 4th 1494, 38 Cal. Rptr. 2d 626* , involved a personal injury action against a public transit agency under the Tort Claims Act, *Gov. Code § 810 et seq.* Plaintiff presented a claim, which named both the county and the transit agency, to the county but not to the agency. The county denied the claim and the plaintiff filed a complaint naming both the county and the agency. The county then informed plaintiff that it had no liability and that the transit agency was a separate public entity. The plaintiff then presented a petition to file a late claim against the agency, which the agency denied.

Following a motion for summary judgment filed by both the county and the agency, the plaintiff filed a petition, pursuant to *Gov. Code § 946.6* for relief from the claim filing requirements and a motion for leave to file an amended complaint alleging facts supporting the petition. The petition was based on counsel's inability to locate the County's Roster of Public Agencies, notwithstanding repeated inquiries to the County Clerk on the subject and subsequent reliance on the clerk's advice that a claim against defendant agency should be presented to the County Clerk in triplicate on a form provided by the County Clerk.

The trial court granted plaintiff's motions and dismissed the summary judgment motion as moot. Defendant agency filed a notice of motion for reconsideration of all of the court's rulings and, alternatively, requested a new trial or relief from the rulings under *Code Civ. Proc. § 473* on the ground that defendant's counsel's error in failing to comply with a local rule by neglecting to timely call the trial court to schedule a hearing on the tentative rulings in plaintiff's favor was due to mistake, inadvertence, and excusable neglect, and filed a demurrer to the first amended complaint, incorporating its arguments from its summary judgment motion. The trial court granted the motion for reconsideration, vacated its order granting relief pursuant to *Gov. Code § 946.6*, denied plaintiff's petition under *Gov. Code § 946.6*, sustained the demurrer without leave to amend, and entered a judgment of dismissal.

The court of appeal reversed, finding that the exclusive avenue for reconsideration of the trial court's orders was under *Code Civ. Proc. § 1008* and that the provisions of Section 1008 are jurisdictional (*32 Cal. App. 4th 1494, 1498-1499)* . The court stated that according to the plain language of the statute a court acts in excess of its jurisdiction when it grants a motion to reconsider that is not based on "new or different facts, circumstances, or law." The court rejected as utterly specious defendant's contention that the trial court misinterpreted California law in its initial decision that therefore defendant relied on "different" law when it reiterated its prior reasoning and authorities. The court also rejected the argument that defense counsel's failure to request oral argument constituted a new fact or circumstance sufficient to comply with the statute. It noted that issues collateral to the merits of the initial motion, such as a failure to request oral argument, do not constitute a new or different facts or circumstances (*32 Cal. App. 4th 1494, 1500)* .

The court further rejected defendant's contention that relief was appropriately ordered under *Code Civ. Proc. § 473*, since it was used in this instance as a means of circumventing the jurisdictional requirements for a motion for reconsideration (*32 Cal. App. 4th 1494, 1501)* . Furthermore, the court rejected defendant's meritless that the trial court's ruling could be appropriate as a motion for new trial (*32 Cal. App. 4th 1494, 1501-1502)* .

[b] Adequate Explanation For Failure to Provide Evidence Earlier Lacking

McPherson v. City of Manhattan Beach *(2000) 78 Cal. App. 4th 1252, 93 Cal. Rptr. 2d 725* , is *discussed under § 158.32[3][a]*.

In ***Garcia v. Hejmadi*** *(1997) 58 Cal. App. 4th 674, 68 Cal. Rptr. 2d 228* , about 10 months before trial defendants moved for summary judgment or summary adjudication and the matter was assigned to a judge who issued a tentative ruling to grant the motion on November 4, but was unavailable the next morning when the matter was to be argued. Plaintiff declined to stipulate to a commissioner presiding in the judge's place and the matter was assigned to another judge for review and decision. On November 12, reacting to the first judge's tentative ruling, plaintiff filed a supplemental brief in opposition to summary judgment providing further argument and cited, as creating triable issues, the first paragraph of plaintiff previously filed declaration with plaintiff's original opposition and second, a new declaration by plaintiff further elaborating on the subject. Meanwhile, the second judge had on November 10 signed an order granting summary judgment and finding, as had the first judge, no triable issue and the judge's order was filed on November 16. On November 29, plaintiff filed a motion to reconsider and revoke the summary judgment under *Code Civ. Proc. § 1008(a)* and/or set it aside under *Code Civ. Proc. § 473* as taken through mistake, inadvertence or excusable neglect. The second judge heard the motion and acknowledging the two grounds for relief ruled only on one granting plaintiff relief under *Code Civ. Proc. § 473*. Thereafter, the matter was tried resulting in judgment in favor of the plaintiff. Defendants appealed (*58 Cal. App.4th 674, 678-679)* .

The court of appeal reversed. The defendants claimed that the pretrial grant of summary judgment in their favor was vacated without jurisdiction, thus nullifying the subsequent trial. The court found the jurisdictional point dispositive (*58 Cal. App.4th 674, 679)* . First the court addressed the issue of the superior court's discretion under *Code Civ. Proc. § 473* to vacate the summary judgment. The court concluded that the trial abused its discretion in vacating summary judgment under *Code Civ. Proc. § 473*. The type of mistake, inadvertence, surprise or excusable neglect that might have permitted the original order to have been vacated was simply not present in the record (*58 Cal. App.4th 674, 685)* . Next the court considered whether the ruling could be affirmed by resort to *Code Civ. Proc. § 1008*. Plaintiff had argued in plaintiff's motion that while *Code Civ. Proc. § 1008*'s former call for a "different state of facts" had been judicially construed as requiring both newly discovered evidence and an explanation for not producing it earlier, the 1992 amendment to *Code Civ. Proc. § 1008(a)* requiring "new and different facts, circumstance, or law" signaled legislative conformance with certain cases that had construed "different" as not necessarily requiring "newly discovered facts." Thus, plaintiff reasoned any fact not previously "presented" to a court now qualified as "different" (if not "new") facts or circumstances justifying reconsideration (*58 Cal. App. 4th 674, 688)* . The court rejected this argument concluding that the amendment's reference to "new or different" facts did not make the section's prerequisites less restrictive. Plaintiff's argument, if accepted, would effectively eviscerate the threshold showing of diligence which has long required an explanation of why the "newly discovered" matter ws not presented earlier. Plaintiff would have the court say this requirement is met merely by anything not previously "presented" to the court. This miserable result would be to defeat the Legislature's stated goal of reducing the number of reconsideration motions and would remove all incentive for parties to efficiently marshall their evidence (*58 Cal. App. 4th 674, 689)* . Moreover, the court noted that it could comfortably assume that the substitute language "new or different facts, circumstances, or law," was designed to approve generally, the case law relaxation of what constitutes new or different facts justifying reconsideration. This does not mean, however, that all facts not previously presented to a court now suffice; nor does it mean the Legislature dispensed with the court-declared need to show a satisfactory explanation for failing to provide the evidence earlier, which can only be described as a strict requirement of diligence (*58 Cal. App. 4th 674, 690)* . Under the circumstances

of the case, plaintiff's showing failed to satisfy *Code Civ. Proc. § 1008* as a matter of law. The information consisting of plaintiff's own declared knowledge was always in plaintiff's possession, and no satisfactory explanation appeared for not bring it out earlier. Similarly, the tardy supplemental brief filed on November 12, between the order's signing and filing, contained none of the claimed different facts later submitted with the motions for relief, and absolutely no explanation for this was offered (*58 Cal. App. 4th 674, 690-691)* . The court concluded that the superior court lacked jurisdiction to reconsider the grant of summary judgment, enter a new order and proceed with trial, and remanded the case back to the superior court to consider solely an issue of attorney fees under an earlier settlement agreement (*58 Cal. App.4th 674, 692)* .

[c] Adequate Explanation For Failure to Provide Different Law Earlier Lacking

In ***Baldwin v. Home Savings of America*** *(1997) 59 Cal. App. 4th 1192, 69 Cal. Rptr. 2d 592* , a jury awarded plaintiffs compensatory damages. Plaintiffs thereafter moved for attorney fees and costs and defendant filed a motion to tax costs. Ultimately, plaintiffs were awarded attorney fees and defendant filed a motion for reconsideration pursuant to *Code Civ. Proc. § 1008* and to vacated the judgment as it relates to attorney fees pursuant to *Code Civ. Proc. § 663*. The court granted the motion for reconsideration and vacated the judgment as to the award of attorney fees. An appeal followed.

The court of appeal reversed. The court noted that defendant's motion for reconsideration was accompanied by an affidavit of its counsel which declared that a case cited in it was not considered at the initial hearing and provided the "new or different law" that justifies reconsideration. The declaration explained that at the initial hearing defendant believed that the more relevant issue was plaintiff's tort recovery as opposed to recovery under contract. The court based its award of attorney fees on reciprocity under *Civ. Code § 1717*. In considering further options following the initial hearing to tax costs, the cited case was found. Since it appeared relevant to the facts of the case, defendant requested that it be considered in connection with the motion for reconsideration (*59 Cal. App. 4th 1192, 1196)* . The court concluded, however, that the cited case clearly does not provide the "new" law that authorizes trial court reconsideration of a prior order, because the opinion issued in 1994 and could therefore have been provided prior to its ruling on the motion for attorney fees. On the other hand, the opinion does present "law," or at least a legal principle, different from that originally produced defendant when it opposed plaintiffs' motion for attorney fees (*59 Cal. App. 4th 1192, 1196)* . Although, the fact that defendant presented "different law" in support of it motion for reconsideration does not mean the motion fully complied with all applicable requirements, however, as there remains the question whether defendant also had to provide a satisfactory explanation for its failure to present this information earlier (*59 Cal. App. 4th 1192, 1197-1198)* . The court answered this in the affirmative holding that parties applying for reconsideration must make that same showing of diligence required of those seeking reconsideration on the basis of "different facts" (*59 Cal. App. 4th 1192, 1193, 1200)* . Moreover, the prevailing view is that *Code Civ. Proc. § 1008* now imposes a jurisdictional constraint. If a trial court has no jurisdiction to reconsider a prior order on the basis of "different facts" in the absence of a satisfactory explanation for the failure to present them earlier, it cannot have jurisdiction to reconsider on the basis of "different law" absent the same showing of diligence, because there is no basis for any distinction either in the statute or in reason (*59 Cal. App. 4th 1192, 1200)* . Absolutely no showing of diligence was made in the case as counsel made no effort to explain whatsoever the failure to previously present the case, then two years old, or the principle for which it stands, as an alternative basis for denial of plaintiffs' motion for attorney fees (*59 Cal. App. 4th 1192, 1200-1201)* . It should be noted that the court in discussing its holding, that the diligence requirement applicable to motions to reconsider on the basis of different facts is also applicable to motions to reconsider on the basis of different law, pointed out that the court was not unmindful of the awkward consequences likely to flow from its holding, which in some instances will bar trial judges from correcting rulings belatedly shwn to be erroneous. Judicial inefficiencies may also result from the need for an appeal that would not have been required if correction could have been made by a trial court willing to do so. These problems do not stem from the holding, however, but from the 1992 amendment to § 1008. Given the jurisdictional nature of the present statute, the answer, if there is one, must come from the Legislature ((*59 Cal. App. 4th 1192, 1200 n.10*).

[4] Additional Authorities

[a] Not Based on New or Different Facts, Circumstances, or Law

In *Pazderka v. Caballeros Dimas Alang, Inc. (1998) 62 Cal. App. 4th 658, 670, 73 Cal. Rptr. 2d 242* , defendant made a *Code Civ. Proc. § 998* offer which was accepted by plaintiffs. Plaintiffs presented the signed agreement to the superior court clerk who entered judgment pursuant to *Code Civ. Proc. § 998*. Thereafter plaintiffs successfully moved for an award of attorneys' fees. Defendant filed a motion, which among other things, requested reconsideration of the award of attorneys' fees. The trial court granted reconsideration, vacated the judgment and the plaintiffs appealed (*62 Cal. App. 4th 658, 662-663)* . The court of appeal reversed. In so doing the court noted that a court acts in excess of jurisdiction when it grants a motion to reconsider that is not based on new or different facts, circumstances, or law. The possible "new facts" offered were presented in defendant counsel's declaration wherein counsel stated that counsel mistakenly believed the section 998 offer included the issues of attorneys' fees and costs. The court held that this statement did not disclose new facts, but merely asserted counsel's mistake. A mistake based on ignorance of the law or imprecision in drafting the offer is not a proper basis for reconsideration (*62 Cal. App. 4th 658, 670)* .

See *Baldwin v. Home Savings of America (1997) 59 Cal. App. 4th 1192, 69 Cal. Rptr. 2d 592* , discussed in *§ 158.32[3][c]*.

See *Garcia v. Hejmadi (1997) 58 Cal. App. 4th 674, 685-691, 68 Cal. Rptr. 2d 228* , discussed in *§ 158.32[3][b]*.

In *Lucas v. Santa Maria Public Airport Dist. (1995) 39 Cal. App. 4th 1017, 46 Cal. Rptr. 2d 177* , plaintiff alleged that an Airport District violated law and the public trust by entering into a multiyear employment contract with its general manager. The trial court granted the District s demurrer and denied plaintiff s motion for reconsideration. In affirming the denial of the motion for reconsideration, the court of appeal noted that a motion for reconsideration must be based on new or different facts, circumstances or law. Since the only significant statements relied on by plaintiff in his declaration in support of the motion were dated prior to the filing of his original complaint, and there was no explanation as to why he had not brought the matter to the attention of the trial court earlier, the trial court did not abuse its discretion in denying the motion (*39 Cal. App. 4th 1017, 1027-1028)* .

California Points & Authorities

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
CHAPTER 158 MOTIONS TO RECONSIDER AND RENEWED MOTIONS
PART II. FORMS

15-158 California Points & Authorities § 158.33

§ 158.33 Opposing Motion to Reconsider--Order Granted Judgment Which Has Been Entered

[1] FORM

[*Caption. See § 158.32.*]

THE MOTION TO RECONSIDER THE ORDER OF THIS COURT GRANTING _____ [*specify, e.g.,* DEFENDANT'S MOTION FOR SUMMARY JUDGMENT] MADE AND ENTERED ON _____ [*date*] SHOULD BE DENIED BECAUSE THE JUDGMENT IN THIS ACTION HAS ALREADY BEEN ENTERED.

Unavailability After Judgment of Motion to Reconsider Order Granting Judgment. Although a court may reconsider its order granting or denying a motion and may even reconsider or alter its judgment so long as judgment has not yet been entered, once judgment has been entered, the court may not reconsider it and loses its unrestricted power to change the judgment. The court may correct judicial error only through certain limited procedures such as motions for new trial and motions to vacate the judgment (*Ramon v. Aerospace Corp. (1996) 50 Cal. App. 4th 1233, 1236-1238, 58 Cal. Rptr. 2d 217 (Second App. Dist., Div. Three) Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1606, 275 Cal. Rptr. 887 (Fourth App. Dist., Div. Two))* . [Once a trial court has entered judgment, the court is without jurisdiction to grant a motion for reconsideration even if the motion was brought before the judgment was entered and is still pending at the time of entry of judgment (*APRI Ins. Co. v. Superior Court (1999) 76 Cal. App. 4th 176, 180-182, 90 Cal. Rptr. 2d 171 (Second Dist., Div. Four))]* .
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion to reconsider an order granting a motion for judgment, or an order that is in effect a judgment, for example, an order dismissing an action [*see Code Civ. Proc. § 581d*], when the judgment has already been entered. The form is based on the holding in *Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 275 Cal. Rptr. 887 (Fourth App. Dist., Div. Two)* , which overruled or disapproved certain of its prior decisions and criticized decisions of other courts of appeal which stated or suggested a contrary rule. For a listing of these cases, see *§ 158.39[3][a]*. Some cases handed down after *Passavanti* continue to cite cases overruled or disapproved by Passavanti and do not cite or discuss *Passavanti* [*see, e.g., Ladd v. Dart Equipment Corp. 230 Cal. App. 3d 1088, 1102, 281 Cal. Rptr. 813* , discussed in *§ 158.30[3][c]*]. For a case raising, but not deciding, the issue of whether *Passavanti* applies to renewed motions, see *Stephen v. Enterprise Rent-A-Car (1991) 235 Cal. App. 3d 806, 817 n.6, 1 Cal. Rptr. 2d 130* , discussed in *§ 158.34[3]*.

The optional language in the form is for use when a judgment has been entered before the court has ruled on the motion.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the point of law stated.

Counsel should also request the court to take judicial notice under *Evid. Code § 452(d)* of the appropriate papers and entries in its file and records [*see Evid. Code § 453*].

In an appropriate case, the points and authorities set out in this form may be used to oppose a motion supported by the points and authorities *set out in § 158.30*.

[3] Discussion of Authorities

[a] Unavailability After Judgment of Motion to Reconsider Order Granting Judgment

In ***Ramon v. Aerospace Corp.*** *(1996) 50 Cal. App. 4th 1233, 58 Cal. Rptr. 2d 217 (Second App. Dist., Div. Three)* , the trial court granted defendant's motion for summary judgment on March 22, 1993. A notice of ruling was filed on March 26, 1993. Plaintiff moved for reconsideration pursuant to *Code Civ. Proc. § 1008* on April 5, 1993, but the trial court did not rule on the motion. Judgment was entered and filed on April 29, 1993, and plaintiff refiled plaintiff's motion for reconsideration on May 21, 1993. Notice of entry of judgment was filed and served on June 10, 1993, and on July 20, 1993, the trial court granted plaintiff's motion for reconsideration, but on reconsideration reaffirmed the grant of summary judgment. Plaintiff filed a notice of appeal on September 16, 1993.

The court of appeal dismissed the appeal because the requirements for appellate jurisdiction had not been satisfied. The court held that plaintiff's notice of appeal was not timely filed pursuant to former Cal. Rules of Ct., Rule 2 (now *Rule 8.104*). After entry of judgment, a motion for reconsideration pursuant to *Code Civ. Proc. § 1008* does not extend the time in which to file a notice of appeal under Cal. Rules of Ct., Rule 2 (*50 Cal. App. 4th 1233, 1235)* . Thus, plaintiff's motion for reconsideration filed after entry of judgment and the trial court's ruling on July 20, 1993, on that motion had no effect on the time period for filing a notice of appeal under Rule 2. The reason for this is that a trial court has no further power to rule on a motion for reconsideration after entry of judgment (*50 Cal. App. 4th 1233, 1236)* .

The court also pointed out that the entry of judgment had other effects. With regard to the April 5 motion for reconsideration that was never ruled on, entry of judgment had the effect of denying that motion by implication. Furthermore, after entry of judgment, plaintiff should have abandoned the invalid motion for reconsideration filed thereafter and attacked the judgment in one of three ways, *i.e.*, by a motion for new trial, by a motion to vacate, or by filing a timely notice of appeal (*50 Cal. App. 4th 1233, 1238)* .

The court further held that although entry of judgment has the above legal effects, service of notice of entry of judgment on June 10, 1993, established the crucial date for determining if plaintiff's appeal was timely filed, *i.e.*, service of notice of entry of judgment triggered the 60-day limitation period in which a notice of appeal must be filed under Cal. Rules of Ct., Rule 2(a) (*50 Cal. App. 4th 1233, 1238-1239)* . Plaintiff's notice of appeal was not filed within 60 days of June 10, 1993 (*50 Cal. App. 4th 1233, 1239)* .

In reaching the conclusion that a motion for reconsideration filed after entry of judgment can have no effect on the period in which to file a notice of appeal, the court of appeal rejected the argument that the grant of reconsideration was a new judgment that commenced the time period specified in former Cal. Rules of Ct., Rule 2(a) (now *Rule 8.104(a)*) and rejected that portion of *Fryer v. Kaiser Foundation Health Plan (1963) 221 Cal. App. 2d 674, 676-677, 34 Cal. Rptr. 688* , that so held (*50 Cal. App. 4th 1233, 1238 n.4*).

In ***Passavanti v. Williams*** *(1990) 225 Cal. App. 3d 1602, 275 Cal. Rptr. 887 (Fourth App. Dist., Div. Two)* , the trial court granted defendant's third motion for summary judgment on June 14, 1989; the judge signed the order granting the motion for summary judgment and judgment on June 19, 1989; and on the same day the order was entered and filed. A conformed copy of the order and judgment was served on plaintiff on June 22, 1989. On July 5, 1989, plaintiff filed a motion for reconsideration of the order granting the motion ("Notice of Motion and Motion for an Order Revoking Order Granting Defendant's Third Motion for Summary Judgment Made Pursuant to *CCP Section 1008*"). The motion for reconsideration was denied on August 16, 1989. On August 29, 1989, more than 60 days after service of the conformed copy of the judgment but within 30 days after the court denied the motion for reconsideration, plaintiff filed a notice of appeal from the judgment entered on June 19, 1989 [*see* Cal. Rules of Ct., Rule 2, *set out in § 158.38*, first alternative Paragraph A]. Although the court of appeal treated the motion to reconsider as a motion for new trial or to vacate the judgment and reversed the judgment on the merits, it held that a trial court may reconsider its order granting or denying a motion and may even reconsider or alter its judgment so long as judgment has not yet been entered, but that once judgment has been entered, the court may not reconsider it and loses its unrestricted power to change the judgment. It may correct judicial error only through certain limited procedures such as motions for new trial and motions to vacate the judgment (*225 Cal. App. 3d 1602, 1606)* .

For further discussion of *Passavanti* and a listing of the cases it overruled, disapproved, or criticized, see *§ 158.39[3][a]*.

In ***APRI Ins. Co. v. Superior Court*** *(1999) 76 Cal. App. 4th 176, 90 Cal. Rptr. 2d 171* , the trial court granted defendant's motion to quash and defendant lodged a proposed order granting the motion for signature by the court. Plaintiff then filed a motion for reconsideration. Thereafter the court signed and entered the order granting the motion to quash and dismissing defendant from the action, and defendant served and filed a notice of entry of the order. Defendant thereafter filed opposition to plaintiff's motion to reconsider. The court granted the reconsideration motion, vacated and set aside its order quashing service of summons and dismissing all claims against defendant, and denied the motion to quash. Defendant filed a petition for a writ of mandate.

The court of appeal granted the petition for mandate directing the trial court to vacate its order granting the motion for reconsideration and denying the motion to quash (*76 Cal. App. 4th 176, 186)* . Initially, the court noted that under *Code Civ. Proc. § 581d* a written order of dismissal is a judgment. The trial court failed to observe the critical distinction between an order of dismissal, which is a judgment, and other orders (*76 Cal. App. 4th 176, 181)* . Rejecting plaintiff's argument that there was no judgement entered in the register of action, and hence there was no judgment within the meaning of *Code Civ. Proc. 581d*, the court noted that the "Civil Register Report" for the case reflected entry of the order which satisfied the requirement of *Code Civ. Proc. § 581d* (*76 Cal. App. 4th 176, 181)* . The court held that once a trial court has entered a judgment it is without power to grant reconsideration. Thus, a court is without jurisdiction to grant a motion for reconsideration even if the motion was brought before judgment was entered and is still pending at the time of entry of judgment (*76 Cal. App. 4th 176, 180-182)* . Furthermore, the court rejected plaintiff's argument that the trial court could have treated plaintiff's motion for reconsideration as a motion to

vacate or for a new trial, agreeing with the reasoning of *Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1610, 275 Cal. Rptr. 887* so as not to construe the motion for reconsideration as something that it was not (*76 Cal. App. 4th 176, 182-184)* .

California Points & Authorities

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
CHAPTER 158 MOTIONS TO RECONSIDER AND RENEWED MOTIONS
PART II. FORMS

15-158 California Points & Authorities § 158.34

§ 158.34 Opposing Renewed Motion--Prior Class Certification Motion Was Denied by Order Which Has Become Final

[1] FORM

[*Caption. See § 158.32*]

THE RENEWED MOTION FOR CLASS CERTIFICATION SHOULD BE DENIED BECAUSE THE ORDER DENYING THE ORIGINAL MOTION WAS NOT APPEALED AND HAS BECOME FINAL.

Unavailability of Renewed Motion to Certify Class Action After Time to Appeal Has Expired. An order denying a motion for class certification is an appealable order and is not subject to renewal after the time to appeal has expired (*Stephen v. Enterprise Rent-A-Car (1991) 235 Cal. App. 3d 806, 811-812, 1 Cal. Rptr. 2d 130*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted in opposition to a renewed motion to certify an action as a class action, when the order denying the first motion was not appealed and has become final.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the point of law stated.

Counsel should also request the court to take judicial notice under *Evid. Code § 452(d)* of the appropriate papers and entries in its file and records [*see Evid. Code § 453*].

In an appropriate case the foregoing points and authorities may be used to oppose a motion supported by the points and authorities *set out in § 158.31*.

[3] Discussion of Authorities

[a] Unavailability of Renewed Motion to Certify Class Action After Time to Appeal Has Expired

Stephen v. Enterprise Rent-A-Car *(1991) 235 Cal. App. 3d 806, 1 Cal. Rptr. 2d 130* , was an action brought by an individual as a purported class action seeking relief against defendant, on various theories, for alleged unconscionably high rates charged by defendant for a risk-allocation option called collision damage waiver in its rental contracts. Plaintiff's motion for class certification in March 1989 was ordered off calendar for failure to comply with local rules. Plaintiff filed a second motion in September 1989 after intervening discovery, and the motion, after hearing, was denied on the merits by minute order on January 11, 1990. A formal, signed order was filed January 23, 1990. Notice of entry of the order was mailed on January 24th. Plaintiff did not appeal, and the order became final on March 26, 1990. On July 7, 1990, plaintiff filed a "Renewed Motion for Class Certification" pursuant to *Code Civ. Proc. § 1008(b)* on the basis of new facts. The motion was denied as untimely, and plaintiff appealed, contending that, although the prior order denying certification was final, a renewed motion was authorized (1) on new evidence (*Code Civ. Proc. § 1008(b)*) regardless of the lapse of time, and (2) under class action policy assertedly allowing successive certification motions to be brought up until the time of final judgment.

The court of appeal affirmed, holding first that no policy in the law allowed plaintiff to renew a class certification motion which had been denied on the merits by a final, appealable order (*235 Cal. App. 3d 806, 811)* . The court acknowledged that an order denying class certification does not finally dispose of an action since it leaves it intact as to the individual plaintiff, but the order is appealable because it effectively terminates the entire action as to the class, in legal effect being tantamount to a dismissal of the action as to all members of the class other than plaintiff. The appeal is allowed, as a matter of state law policy, because the order has the death knell effect of making further proceedings in the action impractical. Because California allows direct appeals of death-knell orders, a plaintiff who fails to appeal from one loses forever the right to attack it. The order becomes final and binding (*235 Cal. App. 3d 806, 811)* . The court said the order denying the certification motion was a death knell order precluding maintenance of a class action on any cause of action, it was on the merits, was never appealed, and became final (*235 Cal. App. 3d 806, 812)* . The court acknowledged that the rule in federal courts is different (*235 Cal. App. 3d 806, 811-812, 814)* and that it is different in California courts when the motion to certify is granted; in this latter event successive motions based on new evidence to decertify the action are allowed (*235 Cal. App. 3d 806, 812-813)* . The court concluded that, because no appeal was taken from the order denying certification, the ruling became final and binding; the court said that state law policy did not allow plaintiff a "renewed" opportunity to seek certification (*235 Cal. App. 3d 806, 816)* .

Note that the court, for the sake of discussion, assumed that a renewed motion could be brought. The court pointed out that the Court of the Appeal of the Fourth Appellate District, Division Two, in *Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 175 Cal. Rptr. 887* (discussed in *§ 158.33[3][a], 158.39[3][a]*), had recently disapproved several of its own and other published opinions to the extent they held or implied that *Code Civ. Proc. § 1008* authorizes motions to reconsider entered "judgments" as opposed to mere "orders." *Passavanti* reasoned that true "judgments" may be attacked for judicial error only by prescribed procedures such as motions for new trial or to vacate once they are signed and entered; and held that a postjudgment motion for reconsideration does not lie. The court said that, using this analysis, defendant urged it to hold that a death-knell "order" is in effect a "judgment" and that, since plaintiff's motion under *Code Civ. Proc. § 1008* came long after an entry of judgment, the motion was improper. Plaintiff countered that the *Passavanti* rationale only applies to motions to "reconsider" brought under *Code Civ. Proc. § 1008(a)* because a motion under *Code Civ. Proc. § 1008(b)* involves a completely new application for relief, not an attack on the prior

order. The *Stephen* court found it unnecessary to resolve the issue, because even if plaintiff were correct, his motion was late because it came after the earlier order (or judgment) was final, and held that this was a sufficient basis for affirmation (*235 Cal. App. 3d 806, 817 n.6*).

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15-158 California Points & Authorities § 158.35

§ 158.35 Supporting Contention That Court Cannot Avoid Jurisdictional Limits of Code Civ. Proc. § 1008(e) by Ignoring Prior Order

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

CODE OF CIVIL PROCEDURE SECTION 1008 PLACES JURISDICTIONAL LIMITATIONS ON MOTIONS TO RECONSIDER AND ON RENEWED MOTIONS. THE COURT CANNOT AVOID THE REQUIREMENTS OF SECTION 1008 BY IGNORING A PRIOR ORDER AND GRANTING A MOTION THAT IMPLICITLY MODIFIES, AMENDS, OR REVOKES THAT ORDER.

A. *Code Civ. Proc. § 1008* Applies to Interim Orders and Is Jurisdictional. *Code of Civil Procedure Section 1008* is the exclusive means for modifying, amending, or revoking an order. That limitation is expressly jurisdictional and applies to interim orders (*Code Civ. Proc. §§ 1008(e), (g)*; *Morite of California v. Superior Court (1993) 19 Cal. App. 4th 485, 490-492, 23 Cal. Rptr. 2d 666*).

B. Prior Order Cannot Be Ignored. If courts may simply ignore interim orders instead of modifying, amending, or revoking them after due consideration, then the procedural, substantive, and jurisdictional requirements of *Code of Civil Procedure Section 1008* are meaningless. A court cannot avoid the jurisdictional limits of Section 1008 by consciously ignoring a prior order and implicitly revoking it by a later order (*Morite of California v. Superior Court (1993) 19 Cal. App. 4th 485, 492-493, 23 Cal. Rptr. 2d 666*).

[2] Comments

[a] Use of Form

This form of contention may be used in a memorandum of points and authorities to oppose a motion, that, although not made as a motion to reconsider or as a renewed motion, will implicitly have that effect. It may also be used in proceedings to review an order granting such a motion.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Specifically, counsel should show how the motion being opposed will of necessity implicitly modify or revoke the earlier order.

[3] Discussion of Authorities

[a] Code Civ. Proc. § 1008 Applies to Interim Orders and Is Jurisdictional

In ***Morite of California v. Superior Court*** *(1993) 19 Cal. App. 4th 485, 23 Cal. Rptr. 2d 666* , a judge in 1991 ordered trial of a declaratory relief action stayed pending disposition of a related case. In 1993, the case was assigned as a directly calendared matter to another judge, who ordered a status conference. In a footnote to the status conference questionnaire, the plaintiff stated that it believed the stay should be lifted to allow a motion for summary judgment. The defendant objected to plaintiff's use of a footnote to raise the issue rather than a motion for reconsideration. At the status conference the judge stated that the court was not reconsidering any prior motions, but was managing its own calendar, and set the matter for trial. Defendants petitioned for writ relief.

The court of appeal issued a peremptory writ of mandate directing the court to vacate the order setting the matter for trial. In deciding to issue the writ, the court first held that *Code Civ. Proc. § 1008* governs motions for reconsideration and under Section 1008(e) is the exclusive means for modifying, amending or revoking interim orders (*19 Cal. App. 4th 485, 490)* . The court found that the trial court proceedings had failed to comply with the requirements of Section 1008 (*19 Cal. App. 4th 485, 492)* . The court also found that the court's refusal to recognize that its ruling amounted to a reconsideration of the stay order deprived the petitioners of a meaningful opportunity to argue the provisions of Section 1008 or to argue that the stay order should not be modified, amended, or revoked expressly or by implication (*19 Cal. App. 4th 485, 492)* .

[b] Prior Order Cannot Be Ignored

The facts and procedural background of ***Morite of California v. Superior Court*** *(1993) 19 Cal. App. 4th 485, 23 Cal. Rptr. 2d 666* , are discussed under *Code Civ. Proc. § 1008*. In issuing the writ, the court held that a court could not circumvent the jurisdictional limits of *Code Civ. Proc. § 1008(e)* by consciously ignoring the stay order that had been entered by a different judge of the same court. Even though the judge stated that he was not reconsidering the prior order, and the order setting for trial did not specifically lift the stay, it by implication had the same effect (*19 Cal. App. 4th 485, 492)* . Allowing courts so to ignore interim orders rather than modifying, amending, or revoking them after due consideration would render the jurisdictional requirements of Section 1008 meaningless and would undermine the Legislature's intent that courts should not modify, amend, or revoke prior orders without due reconsideration (*19 Cal. App. 4th 485, 492-493)* . The court also noted that the order undermined the general rule that one judge of a trial court may not reconsider an interim ruling of another (*19 Cal. App. 4th 485, 493)* .

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§ 158.36 Supporting Ex Parte Motion to Revoke or Set Aside Order Obtained on Renewed Motion--Party Failed to Comply With Statutory Requirements [Code Civ. Proc. § 1008(a), (b), (d)].

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM IN SUPPORT OF EX PARTE
_____ [*name*],	)	MOTION FOR ORDER SETTING ASIDE ORDER
Defendant.	)	OF THIS COURT _____
	)	[*specify order, e.g.,*
	)	GRANTING DEFENDANT'S RENEWED MO-
		TION FOR SUMMARY JUDGMENT] MADE AND
		ENTERED ON
		_____ [*date*].

_____

THE EX PARTE MOTION OF _____ [*party, e.g.,* PLAINTIFF], _____ [*name*], FOR AN ORDER REVOKING THE ORDER OF THIS COURT MADE ON _____ [*date*] GRANTING THE RENEWED MOTION OF _____ [*party, e.g.,* DEFENDANT] FOR _____ [*specify, e.g.,* SUMMARY JUDGMENT] SHOULD BE GRANTED BECAUSE _____ [*party, e.g.,* DEFENDANT] FAILED TO COMPLY WITH THE REQUIREMENTS OF CODE OF CIVIL PROCEDURE SECTION _____ [1008(a) *or* 1008(b) *or both*], IN THAT _____ [*party, e.g.,* DEFENDANT] FAILED TO SHOW BY AFFIDAVIT OR DECLARATION [OR OTHERWISE] WHAT APPLICATION WAS PREVIOUSLY MADE FOR THE SAME ORDER, WHEN IT WAS MADE AND TO WHAT JUDGE, WHAT ORDER OR DECISIONS WERE MADE ON IT, AND WHAT NEW OR DIFFERENT FACTS, CIRCUMSTANCES, OR LAW WERE CLAIMED TO BE SHOWN.

[*EITHER, relating to order on motion to reconsider*]

A. Requirements of Motion to Reconsider. When the party who originally made an application for an order which was refused in whole or in part, or granted conditionally or on terms, makes an application within 10 days after service upon the party of written notice of entry of the order and based on new or different facts, circumstances, or law, to reconsider the matter and modify, amend, or revoke the prior order, it shall be shown by affidavit what application was made before, when and to what judge, what order or decisions were made thereon, and what new or different facts, circumstances, or law are claimed to be shown (*Code Civ. Proc. § 1008(a)*).

[*OR, relating to order on renewed motion*]

A. Requirements of Renewed Motion. When the party who originally made an application for an order which was refused in whole or in part, or granted conditionally or on terms, makes a subsequent application for the same order on new or different facts, circumstances, or law, it shall be shown by affidavit what application was made before, when and to what judge, what order or decisions were made thereon, and what new or different facts, circumstances, or law are claimed to be shown (*Code Civ. Proc. § 1008(b)*).

[*CONTINUE*]

B. Order Obtained by Noncompliance With Foregoing Requirements Is Subject to Revocation. For a failure to comply with the above requirement, any order made on such subsequent application may be revoked or set aside on ex parte motion (*Code Civ. Proc. § 1008(b), (d)*).

[*Optional*] **C. Penalty for Violating *Code of Civil Procedure Section 1008*.** A violation of *Code of Civil Procedure Section 1008* may be punished as a contempt and with sanctions as allowed by *Code of Civil Procedure Section 128.7*; and an order made contrary thereto may be revoked by the judge or commissioner who made it, or vacated by a judge of the court in which the action or proceeding is pending (*Code Civ. Proc. § 1008(d)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of an ex parte motion to revoke an order granting a renewed motion by a party who failed to comply with the requirements of *Code Civ. Proc. § 1008(a)* or *(b)*.

The penalty provisions in *Code Civ. Proc. § 1008(b)* and *(d)* (Paragraphs B and C, respectively) are permissive and not mandatory. Hence, in the ex parte motion, the moving party should aver any facts that would show that the party's failure to comply with the statute was prejudicial to the party seeking revocation or sanctions, or to the court [*see Moore v. Moore (1955) 133 Cal. App. 2d 56, 60-61, 283 P.2d 338* (construing identical provisions in former Code Civ.

Proc. § 1008)].

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15-158 California Points & Authorities § 158.37

§ 158.37 Supporting Motion to Dismiss Appeal as Untimely [Cal. Rules of Ct., Rules 8.104, 8.108, 8.54, 8.705]--Order Denying Motion to Reconsider Appealable Order Based on Same Facts Is Nonappealable

[1] FORM

[*Caption. See § 158.36.*]

THIS MOTION TO DISMISS THE APPEAL FROM THE ORDER OF THE _____ [*e.g.,* SUPERIOR] COURT OF _____ [*county*] DENYING THE MOTION OF _____ [*party, e.g.,* PLAINTIFF] TO RECONSIDER ITS ORDER _____ [*specify, e.g.,* TAXING COSTS] SHOULD BE GRANTED BECAUSE AN ORDER DENYING A MOTION TO RECONSIDER AN APPEALABLE ORDER BASED ON THE SAME FACTS IS NONAPPEALABLE; ANY APPEAL MUST BE TAKEN FROM THE ORIGINAL ORDER, AND THE TIME TO APPEAL FROM THE ORIGINAL ORDER HEREIN INVOLVED HAS EXPIRED.

A. Order Made After Judgment Is Appealable. _____ [*Cite statutory and/or case authority, as appropriate, authorizing appeal from original order, e.g.,* In other than a limited civil case, an appeal may be taken to the court of appeal from an order made after an appealable judgment (*Code Civ. Proc. § 904.1(a)(2), or* In a limited civil case, an appeal may be taken to the appellate division of the superior court from an order made after an appealable judgment (*Code Civ. Proc. § 904.2(b)*)]. An order denying a motion to tax costs, made after the judgment has been entered, is appealable (*Gill v. Hughes (1991) 227 Cal. App. 3d 1299, 1310, 278 Cal. Rptr. 306*)].

B. Order Denying Motion to Reconsider Appealable Order on Same Facts Is Nonappealable. An order denying a motion for reconsideration of an appealable order based on exactly the same factual showing as was offered in support of the original motion is nonappealable. Any appeal would have to be taken from the original order (*Gill v. Hughes (1991) 227 Cal. App. 3d 1299, 1310, 278 Cal. Rptr. 306*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be included in a memorandum submitted in support of a formal written motion to dismiss an appeal from an order denying a motion to reconsider a prior appealable order based on the same facts as the original motion.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Caption

A memorandum in support of a motion to dismiss an appeal will not normally have a separate caption. The fact that points and authorities are included in the papers filed will normally appear from the caption of the Motion to Dismiss. With respect to appeals to the superior court, local court rules should be checked for any requirements that might be imposed by the specific court to which the appeal is taken. For further discussion of format of papers, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[c] "Order" and "Judgment" Distinguished

Orders may be made before trial, during trial, after trial, or after entry of a final judgment. An order is any "direction of a court or judge, made or entered in writing, and not included in a judgment"; an application for an order is a motion [*Code Civ. Proc. § 1003*]. Notwithstanding use of the word "direction" in the foregoing statutory definition, not every order need include a direction to do anything but may, for example, simply deny a motion and yet be an appealable order [*see Code Civ. Proc. §§ 904.1(a)(2), (4)-(6), 904.2(b), (c), (e)-(g)*; *see also Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1605 n.3, 275 Cal. Rptr. 887]* .

A judgment, on the other hand, is the final determination of the rights of the parties in an action or proceeding [*Code Civ. Proc. §§ 577, 1064*]. While there may be numerous orders made throughout an action or proceeding, there is only one judgment [*Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1605, 275 Cal. Rptr. 887]* .

However, some determinations, although characterized as orders, are in effect final judgments for purposes of appeal, and orders of dismissal, when properly signed and filed, are considered judgments under *Code Civ. Proc. § 581d*. Moreover, judgments are sometimes mislabeled as orders. Nevertheless, a judgment, no matter how designated, is the final determination of the rights of the parties in an action, and an order that acts as the final determination in the action is the judgment [*Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1606, 275 Cal. Rptr. 887]* .

[d] Time to Appeal and "Judgment" Defined

The time for filing a notice of appeal from a superior court judgment or appealable order is set forth in *Cal. Rules of Ct., Rule 8.104* [*see § 158.38*, first alternative Paragraph A]. The term "judgment," as used in the rule, is defined in *Cal. Rules of Ct., Rule 8.10(4)* as including any judgment, order, or decree from which an appeal lies. The term "judgment" is likewise defined as including any judgment, order, or decree from which an appeal lies [*Cal. Rules of Ct., Rule 8.765(7)*].

[e] Appealability of Orders on Motions for Reconsideration

[i] In General

Most orders are not appealable [*see Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1606, 275 Cal. Rptr. 887]* . Appealable orders in civil actions and proceedings generally [*see Code Civ. Proc. § 904*] are listed in *Code Civ. Proc. §§ 904.1* (other than a limited civil case) and 904.2 (limited civil case). These statutes do not specifically list an order granting or denying a motion to reconsider as an appealable order.

[ii] When Original Order Is Not Appealable

All courts seem to agree that an order denying reconsideration is not appealable if the original ruling is not final and appealable in its own right. For example, in *Blue Mountain Development Co. v. Carville (1982) 132 Cal. App. 3d 1005, 1010, 183 Cal. Rptr. 594* (prior law; disapproved on another point in *Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1607-1608 n.5, 275 Cal. Rptr. 887* , discussed in *§ 158.39[3][a]*), the court of appeal, citing *Litvinuk v. Litvinuk (1945) 27 Cal. 2d 38, 43-44, 162 P.2d 8* , said that an appeal may not be taken from a nonappealable order by the device of moving to vacate the order and appealing from a ruling denying the motion [*see also Rogers v. Silverman (1989) 216 Cal. App. 3d 1114, 1127, 265 Cal. Rptr. 286* ; *Jade K. v. Viguri (1989) 210 Cal. App. 3d 1459, 1466, 258 Cal. Rptr. 907* (criticized on another ground in *Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1607 n.5, 275 Cal. Rptr. 887* , discussed in *§ 158.39[3*][a])].

[iii] When Original Order Is Appealable

The courts of appeal seem divided as to whether the denial of a motion to reconsider an appealable order is appealable.

In *Rojes Riverside General Hospital (1988) 203 Cal. App. 3d 1151, 250 Cal. Rptr. 435* (overruled on another point in *Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1607, 275 Cal. Rptr. 887* , discussed in *§ 158.39[3][a]*, the Court of Appeal of the Fourth Appellate District, Division Two, held that the denial of a motion for reconsideration, whether based on the same facts or new facts, is nonappealable. *Rojes* rejected the earlier ruling in *Blue Mountain* (*discussed under § 158.37[2][e][ii]*), to the extent *Blue Mountain* held that an order for reconsideration may be treated as an order made after judgment and, thus, an appealable order, if the original ruling is an appealable order and if the motion for reconsideration is based on new and different facts [*Rojes Riverside General Hospital (1988) 203 Cal. App. 3d 1151, 1160, 250 Cal. Rptr. 435* (overruled on another point in *Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1607, 275 Cal. Rptr. 887]* . *Rojes* has been followed by the Court of Appeal of the First Appellate District, Division Four [*see In re Jeffrey P. (1990) 218 Cal. App. 3d 1548, 1550 n.2, 267 Cal. Rptr. 764* (stating that an order denying a motion for reconsideration is not an appealable order, and holding denial of a motion for reconsideration of a juvenile court's dependency order was not appealable)]; and the Court of Appeal of the First Appellate District, Division Three [*see Estate of Simoncini (1991) 229 Cal. App. 3d 881, 891, 280 Cal. Rptr. 393* (stating that orders denying reconsideration are not generally appealable, and holding meritless appellant's contention that the probate court erred in denying her application for reconsideration of the preliminary distribution decree because her application purportedly met the requirements of *Code Civ. Proc. § 1008*, dealing with applications for reconsideration based on an allegedly different state of facts)].

In *Santee v. Santa Clara County Office of Education (1990) 220 Cal. App. 3d 702, 710, 269 Cal. Rptr. 605* , the Court of Appeal of the Sixth Appellate District held that an order denying a motion for reconsideration of an order denying a petition for relief from the claim presentation requirements of the Tort Claims Act [*Gov. Code § 900 et seq.*] is an appealable order if the motion raised new facts. Note, however, that, because the order denying a petition for relief is in effect a judgment, a motion to reconsider it would not be proper under the holding in *Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1607-1608, 275 Cal. Rptr. 887* (discussed in *§ 158.33[3][a]*). Conversely, in *Gill v. Hughes (1991) 227 Cal. App. 3d 1299, 1310, 278 Cal. Rptr. 306* (discussed in *§ 158.37[3][b]*), the Court of Appeal of the Fifth Appellate District held that the denial of a motion for reconsideration based on exactly the same factual showing as was offered in support of the original motion is not appealable. At page 1310 n.3, the court acknowledged the conflict

between *Santee* and *Rojes*.

[f] Related Pleading and Practice Forms

For a form of motion to dismiss an appeal in an unlimited civil case, see Ch. 48, *Appeal: Abandonment, Dismissal, and Stipulated Reversal* , in California Forms of Pleading and Practice (Matthew Bender). For a form of motion to dismiss an appeal in a limited civil case to the superior court appellate division, see Ch. 345A, *Limited Civil Cases* , in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Order Made After Judgment Is Appealable

The facts and procedural background of ***Gill v. Hughes*** *(1991) 227 Cal. App. 3d 1299, 278 Cal. Rptr. 306* , are *discussed under § 158.37[3][b]*. In affirming the summary judgment for defendants, the court of appeal said that an order denying a motion to tax costs, made after the judgment has been entered, is appealable (*227 Cal. App. 3d 1299, 1310)* .

[b] Order Denying Motion to Reconsider Appealable Order on Same Facts Is Nonappealable

In ***Gill v. Hughes*** *(1991) 227 Cal. App. 3d 1299, 278 Cal. Rptr. 306* , a physician who had been denied full surgical staff privileges at a hospital in administrative proceedings sought writ review of the denial. He appealed for denial of the writ. While the appeal was pending, he filed a complaint for damages for alleged violation of his constitutional rights, violations of California's antitrust statute (Cartwright Act), interference with existing business relations, interference with prospective business advantage, intentional and negligent infliction of emotional distress, and slander per se. The trial court sustained defendants' demurrer to the first three causes of action and stayed those causes of action on the ground they were based on the same subject matter as the relief sought in the writ proceeding which was then pending on appeal. After the appellate court affirmed the trial court's denial of the writ petition, the trial court granted summary judgment to the defendants on the remaining causes of action. Defendants submitted memoranda of costs requesting attorney fees on the civil rights causes of action; plaintiff moved to tax costs, and the motion was denied on December 16, 1988. Plaintiff filed a motion for reconsideration of the order on December 22, 1988. The judgment awarding attorney's fees and costs was entered on December 27, 1988. The hearing on the motion for reconsideration was held on January 30, 1989, but the court did not rule on the motion until April 26, 1989. The court granted plaintiff's motion at that time and ordered defendants to resubmit their itemized statements of attorney fees. On June 14, 1989, the court denied the motion for reconsideration. In addition to appealing from the judgment, plaintiff also appealed from the order denying the motion for reconsideration and order denying motion to tax costs on July 13, 1989.

Among other things, plaintiff argued that the June 14 order awarding attorney's fees should be reversed. The court of appeal rejected the argument on the ground that the June 14 order denied the motion for reconsideration and that the order awarding attorney fees was entered on December 27, 1988. The court said that an order denying a motion to tax costs, made after the judgment has been entered, is appealable and that when, as in the case before it, the motion for reconsideration of an appealable order is based on exactly the same factual showing as was offered in support of the original motion, the order denying the motion for reconsideration is not appealable (*227 Cal. App. 3d 1299, 1310)* . Thus, plaintiff could not appeal from the order of June 14, 1989, denying his motion for reconsideration. Rather the appeal had to be taken from the order entered December 27, 1988 (*227 Cal. App. 3d 1299, 1310-1311)* .

California Points & Authorities

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
CHAPTER 158 MOTIONS TO RECONSIDER AND RENEWED MOTIONS
PART II. FORMS

15-158 California Points & Authorities § 158.38

§ 158.38 Supporting Motion to Dismiss Appeal as Untimely [Cal. Rules of Ct., Rules 8.104, 8.54, 8.705]--Appeal From Original Appealable Order After Denial of Motion for Reconsideration Is Untimely When Not Filed Within Extended Times Specified in Cal. Rules of Ct., Rule 8.108

[1] FORM

[*Caption. See § 158.36.*]

THE MOTION OF _____ [*party, e.g.,* DEFENDANT] TO DISMISS THE APPEAL FROM THE ORIGINAL APPEALABLE ORDER OF THE _____ [*e.g.,* SUPERIOR] COURT OF _____ [*county*] _____ [*specify, e.g.,* DENYING] THE MOTION OF _____ [*party, e.g.,* PLAINTIFF] TO _____ [*specify, e.g.,* TAX COSTS] AFTER DENYING THE MOTION OF _____ [*party, e.g.,* PLAINTIFF] FOR RECONSIDERATION SHOULD BE GRANTED BECAUSE THE APPEAL WAS UNTIMELY FILED.

[*EITHER*]

A. Time to Appeal From Superior Court Other Than In Limited Civil Case. In an appeal, other than in a limited civil case, except as otherwise provided by *Code of Civil Procedure Section 870* or other statute or *California Rules of Court, Rule 8.108* (relating to extension of time to appeal), a notice of appeal shall be filed on or before the earliest of the following dates: (1) 60 days after the date of mailing by the clerk of the court of a document entitled "notice of entry" of judgment or appealable order; (2) 60 days after the date of service of a document entitled "notice of entry" of judgment or appealable order by any party on the party filing the notice of appeal, or by the party filing the notice of appeal, or (3) 180 days after the date of entry of the judgment. For the purposes of this provision, a file-stamped copy of the judgment or appealable order may be used in place of the document entitled "notice of entry" (*Code Civ. Proc. § 904.1(a)*; *Cal. Rules of Ct., Rule 8.104(a)*).

[*OR*]

A. Time to Appeal From Superior Court Limited Civil Case. Although *California Rules of Court, Rules 8.750, 8.751* dealing with the filing of a notice of appeal concerning a municipal court case are silent concerning a superior court limited civil case, because *Code of Civil Procedure Section 904.2* provides that an appeal in a limited civil case is to the appellate division of the superior court, the time limits for filing a notice of appeal in *California Rules of Court, Rule 8.751(a)* should also apply to an appeal concerning a superior court limited civil case. Thus, except as otherwise specifically provided by law, a notice of appeal shall be filed within 30 days after the date of mailing notice of entry of judgment by the clerk of the court pursuant to *Code of Civil Procedure Section 664.5*, or within 30 days after the date of service of written notice of entry of judgment by any party on the party filing the notice of appeal, or within 90 days after the date of entry of the judgment, whichever is earliest, unless the time is extended by *California Rules of Court, Rule 8.752* (relating to motions for new trial, motions to vacate, and cross appeals) (*Cal. Rules of Ct., Rule 8.751(a)*).

[*EITHER*]

B. Entry of Judgment in Superior Court. The date of entry of a judgment is the date of its entry in the judgment book, or in a county following the procedure specified in *Code of Civil Procedure Section 668.5* (relating to date of entry in counties in which clerk places individual judgments in file of actions and either a microfilm copy is made, or judgment is entered in register of actions, or judgment is entered in court's electronic data-processing system) in lieu of maintaining a judgment book, the date of filing the judgment with the clerk pursuant to that section (*Cal. Rules of Ct., Rule 8.104(d)(1)*). In a county following *Code of Civil Procedure Section 668.5*, Rule 8.104(d)(1) requires only that the judgment be signed by the judge and file stamped by the clerk; it does not require entry of the judgment in the register of actions or entry of the judgment in the court's electronic data-processing system, or microfilming the judgment (*Ten Eyck v. Industrial Forklifts Co. (1989) 216 Cal. App. 3d 540, 544-545, 265 Cal. Rptr. 29*).

[*OR*]

B. Entry of Order in Superior Court. The date of entry of an appealable order which is entered in the minutes is the date of its entry in the permanent minutes, unless such minute order as entered expressly directs that a written order be prepared, signed, and filed, in which case the date of entry is the date of filing of the signed order (*Cal. Rules of Ct., Rule 8.104(d)(2)*). The date of entry of an appealable order which is not entered in the minutes is the date of filing of the order signed by the court (*Cal. Rules of Ct., Rule 8.104(d)(3)*).

[*OR*]

B. Entry of Decree of Distribution in Probate Proceeding. The date of entry of a decree of distribution in a probate proceeding is the date of its entry at length in the judgment book or other permanent record of the court (*Cal. Rules of Ct., Rule 8.104(d)(4)*).

[*CONTINUE*]

C. Appeal From Original Order Is Untimely. Although a motion to reconsider under *Code of Civil Procedure Section 1008(a)* is treated for purposes of *California Rules of Court, Rule 8.108* (relating to extension of time to appeal) in the same manner as a motion for new trial or a motion to vacate, that is, it extends the time to appeal from the original order, the appeal is untimely if not filed within the extended period (*Gill v. Hughes (1991) 227 Cal. App. 3d 1299, 1311-1312, 278 Cal. Rptr. 306*). [This rule should also apply to *California Rules of Court, Rule 8.752* with regard to a _____ (superior court limited civil case *or* municipal court case)].
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be included in a memorandum submitted in support of a formal written motion to dismiss an appeal from an original appealable order taken after a motion for reconsideration was denied when the appeal was not filed within the time authorized under *Cal. Rules of Ct., Rules 8.108* or *8.752*. With regard to the date of entry of a judgment or order discussed in paragraph B, however, neither *Cal. Rules of Ct., Rule 8.104* nor *Cal. Rules of Ct., Rule 8.751* have as of yet been amended to explicitly address this point with regard to a superior court limited civil case. For the absence of a caption from the form, the distinction between orders and judgments, the time to appeal, and appealable orders, see discussion in *§ 158.37[2]*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] When Motion to Reconsider Extends Time to Appeal

The California Rules of Court provide for an extension of time to appeal from the judgment (*defined in § 158.37[2][d]*) after denial of a motion for new trial or motion to vacate [*Cal. Rules of Ct., Rules 8.108(b), (c)* and *8.752(a), (b)*].

Although a motion to reconsider is not expressly listed in *Cal. Rules of Ct., Rule 8.108* or *8.752*, as a motion that extends the time to appeal from an appealable order, it has been held that a motion for reconsideration of an appealable order is treated in the same manner as a motion for new trial or motion to vacate, for purposes of Rule 8.108. Thus, subject to the qualifications stated in that rule, the timely filing of a motion to reconsider would normally extend the time for filing a notice of appeal from the original appealable order until 30 days after entry of the order denying reconsideration [*Blue Mountain Development Co. v. Carville (1982) 132 Cal. App. 3d 1005, 1009-1010, 183 Cal. Rptr. 594* (Fourth Appellate District, Division Two) (disapproved on another point in *Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1607-1608 n.5, 275 Cal. Rptr. 887 (Fourth Appellate District, Division Two)* , discussed in *§ 158.39[3][a]*].

However, this rule applies only to appealable orders that are not judgments and not to appealable orders that are in effect judgments [*Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1605, 275 Cal. Rptr. 887]* . While a motion for reconsideration of an appealable order will extend the time to file a notice of appeal from the appealable order, a motion for reconsideration filed after judgment has been entered will not extend the time to appeal from the judgment [*Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1605-1608, 275 Cal. Rptr. 887* ; *see § 158.39*].

Thus, to determine whether the time for appeal is extended by a motion to reconsider, orders must first of all be distinguished from judgments [*see* discussion in *§ 158.37[2*][c], and, second, it must be determined whether the order for which reconsideration is sought is appealable [*see Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1605, 275 Cal. Rptr. 887]* ; discussion in *§ 158.37[2][e]*.

[3] Discussion of Authorities

[a] Entry of Judgment in Superior Court

Ten Eyck v. Industrial Forklifts Co. *(1989) 216 Cal. App. 3d 540, 265 Cal. Rptr. 29* , was an action for personal injuries in which the defendant's motion for summary judgment was granted on October 28, 1988. The judgment was signed by the court and file stamped on November 2, 1988. Defendant served plaintiff with a notice of entry of judgment on November 8, 1988. On November 7, 1988, plaintiff filed a motion for reconsideration of the order granting summary judgment, which was not heard or ruled on until January 6, 1989, on which date the court affirmed the order granting summary judgment. The 60-day period within which to appeal expired January 9, 1989. On January 10, 1989, plaintiff appealed from the October 28th minute order granting summary judgment. The judgment was entered in the register of actions on September 8, 1989. The court of appeal rejected plaintiff's argument that because the judgment was not entered in the register of actions until September 1989, the November 8, 1988 notice of entry of judgment was ineffectual for purposes of Cal. Rules of Ct., Rule 2, and dismissed the appeal. The court pointed out that Cal. Rules of Ct., Rule 2(b)(1) [*see now Cal. Rules of Ct., Rule 8.104(d)(1)*] requires only that the judgment be signed by the judge and file stamped by the clerk, and does not require that the judgment be entered in the register of actions (*216 Cal. App. 3d 540, 544)* . The court held that the use of the word "filing" by *Code Civ. Proc. 668.5* and Cal. Rules of Ct., Rule 2(b) [*see now Cal. Rules of Ct., Rule 8.104(d)*] does not include or require entry of the judgment in the register of actions or entry of the judgment in the court's electronic data-processing system, or microfilming the judgment and, hence, the fact that judgment was not entered in the register of actions until September 1989 is of no consequence to the issue of the timeliness of the appeal (*216 Cal. App. 3d 540, 545)* .

[b] Appeal From Original Order Is Untimely

The facts and procedural background of ***Gill v. Hughes*** *(1991) 227 Cal. App. 3d 1299, 278 Cal. Rptr. 306* , are discussed in *§ 158.37[3][b]*. In affirming the judgment, the court of appeal said that Cal. Rules of Ct., Rule 2(a) (now see) *8.104(a)* requires that the notice of appeal be filed within 60 days of the mailing of the notice of entry of judgment or appealable order except as otherwise provided by statute or by Cal. Rules of Ct., Rule 3 (now see) *8.108* (relating to extension of time to appeal), and that because the notice of entry of the order was mailed January 9, 1989, to be timely, the notice of appeal must come within Cal. Rules of Ct., Rule 3 (now see) *8.108* (*227 Cal. App. 3d 1299, 1311)* . The court said that this rule applies when a party seeks postjudgment relief in the trial court. Cal. Rules of Ct., Rule 3(a) (now see) *8.108(a)* pertains to a new trial motion and states that when such a motion is filed and denied, the time for filing the notice of appeal from the judgment is extended for all parties until 30 days after entry of the order denying the motion or denial thereof by operation of law, but in no event may such notice of appeal be filed later than 180 days after the date of entry of the judgment whether or not the motion for new trial has been determined. Cal. Rules of Ct., Rule 3(b) (now see 8.108(b)) applies to motions to vacate and again extends the time for filing the notice of appeal until the earliest of 30 days after entry of the order denying the motion to vacate; or 90 days after filing the first notice of intention to move to vacate the judgment; or 180 days after entry of the judgment (*227 Cal. App. 3d 1299, 1311)* . The court, quoting *Blue Mountain Development Co. v. Carville (1982) 132 Cal. App. 3d 1005, 1009, 183 Cal. Rptr. 594* (disappoved on another point in *Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1607-1608 n.5, 275 Cal. Rptr. 887* , discussed in *§ 158.33[3][a], 158.39[3][a]*), said that a motion for reconsideration under *Code Civ. Proc. § 1008(a)* is treated for purposes of Cal. Rules of Ct., Rule 3 (now see 8.108) in the same manner as a motion for a new trial or a motion to vacate (*227 Cal. App. 3d 1299, 1311)* . Although the court found it unclear from prior case law which of the two rules applies, it held that the time limits of either rule precluded the appeal (*227 Cal. App. 3d 1299, 1311)* . The court pointed out that in *Miller v. United Services Automobile Assn. (1989) 213 Cal. App. 3d 222, 226, 261 Cal. Rptr. 515* , the court held that *Code Civ. Proc. § 660*, which denies a new trial motion by operation of law 60 days after the notice of entry of judgment, applies to a motion for reconsideration, and said that thus, the 30-day appeal extension following denial of the motion plus the 60 days for denial of the motion by operation of law indicates the maximum extension of time to appeal under Cal. Rules of Ct., Rule 3(a) (now see *8.108(a)*) is 90 days after notice of entry of judgment (*227 Cal. App. 3d 1299, 1311)* . The court pointed out that in the present case the order awarding attorney fees was entered December 27, 1988, and notice of entry of the order was mailed on January 9, 1989. Under *Code Civ. Proc. § 660*, the trial court lost the power to rule on plaintiff's motion for reconsideration 60 days after notice of entry of the order was mailed on January 9, 1989, i.e., March 10, 1989. The court did not make its first ruling until April 26, 1989. Since the court had already lost jurisdiction, this order was a nullity. Plaintiff's notice of appeal was due

30 days after March 10, i.e., April 9, 1989 (*227 Cal. App. 3d 1299, 1311-1312)* .

Similarly, Cal. Rules of Ct., Rule 3(b) (now see 8.108(b)) extends time for filing the notice of appeal only until 90 days after filing the first notice of intention to move to vacate the judgment. Plaintiff's motion for reconsideration was filed on December 22, 1988. Thus, the last day for filing the notice of appeal under this rule was March 22, 1989 (*227 Cal. App. 3d 1299, 1312)* .

The court added that, additionally, both Cal. Rules of Ct., Rules 3(a) (now see *8.108(a)*) and 3(b) provide an absolute outer limit for extensions. The notice of appeal cannot be filed later than 180 days after entry of judgment. Here, judgment was entered December 27, 1988. Thus, the notice of appeal could not be filed after June 25, 1989. Having been filed on July 13, 1989, the notice of appeal was untimely (*227 Cal. App. 3d 1299, 1311)* .

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Volume 15 Chapters 150-159 MANDATE & PROHIBITION---to---MOTIONS TO RECONSIDER
CHAPTER 158 MOTIONS TO RECONSIDER AND RENEWED MOTIONS
PART II. FORMS

15-158 California Points & Authorities § 158.39

§ 158.39 Supporting Motion to Dismiss Appeal as Untimely [Cal. Rules of Ct., Rules 8.104, 8.54, 8.705]--Time to Appeal Is Not Extended Under Cal. Rules of Ct., Rules 8.104, 8.108 by Motion to Reconsider Order Granting Judgment Filed After Judgment Has Been Entered

[1] FORM

[*Caption. See § 158.36.*]

THE MOTION TO DISMISS THE APPEAL SHOULD BE GRANTED BECAUSE THE APPEAL WAS NOT TIMELY FILED.

[*EITHER*]

A. Time to Appeal From Superior Court In Limited Civil Case. [*See § 158.38, first alternative Paragraph A.*]

B. Entry of Judgment, Order, or Decree in Superior Court. [*See § 158.38, first, second, or third alternative Paragraph B.*]

[*OR*]

A. Time to Appeal From Superior Court Limited Civil Case. [*See § 158.38, second alternative Paragraph A.*]

[*CONTINUE*]

C. Motion to Reconsider After Entry of Judgment. A motion to reconsider an order granting a judgment after the judgment has been entered does not extend the time to appeal under *Cal. Rules of Ct., Rules 8.104, 8.108* or *8.752* (*see Ramon v. Aerospace Corp. (1996) 50 Cal. App. 4th 1233, 1235-1238, 58 Cal. Rptr. 2d 217 (Second App. Dist., Div. Three)* ; *Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1607-1608, 275 Cal. Rptr. 887 (Fourth App. Dist., Div.*

Two) ; *see also* *Ten Eyck v. Industrial Forklifts Co. (1989) 216 Cal. App. 3d 540, 545, 265 Cal. Rptr. 29 (Second Appellate District, Division Three))* .
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum is for use in supporting a motion to dismiss an appeal from a judgment as untimely when the appeal was not filed within the periods specified in *Cal. Rules of Ct., Rule 8.104* or *8.751*. The point of the motion is that the motion to reconsider the granting of a judgment made after the judgment was entered was improper [*see § 158.33*] and did not extend the time to appeal from the judgment under *Cal. Rules of Ct., Rule 8.108* or *8.752* (discussed in *§ 158.38[2][b]*). For the distinction between judgments and orders, see discussion in *§ 158.37[2][c]*. For discussion of the absence of a caption to the form, see *§ 158.37[2][b]*.

With regard to the date of entry of a judgment or order, neither *Cal. Rules of Ct., Rule 8.104* nor *Cal. Rules of Ct., Rule 8.751* have as of yet been amended to explicitly address this point with regard to a superior court limited civil case. Counsel will have to determine the applicable rule concerning a superior court limited civil case.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For a form of motion to dismiss an appeal in an unlimited civil case, see California Forms of Pleading and Practice, Ch. 48, *Appeal: Abandonment, Dismissal, and Stipulated Reversal* (Matthew Bender). For a form of motion to dismiss an appeal in a limited civil case to the superior court appellate division, see Ch. 345A, *Limited Civil Cases* , in California Forms of Pleading and Practice.

[3] Discussion of Authorities

[a] Motion to Reconsider After Entry of Judgment

Ramon v. Aerospace Corp. *(1996) 50 Cal. App. 4th 1233, 58 Cal. Rptr. 2d 217 (Second App. Dist., Div. Three)* is discussed in *§ 158.33[3][a]*.

The facts and procedural background of ***Passavanti v. Williams*** *(1990) 225 Cal. App. 3d 1602, 275 Cal. Rptr. 887* , are discussed in *§ 158.33[3][a]*. The court of appeal held that a postjudgment motion for reconsideration will not extend the time to appeal from the judgment (*225 Cal. App. 3d 1602, 1607-1608)* . The court pointed out that in its prior decisions it had held that a motion for reconsideration of an appealable order would extend the time to file a notice of appeal from the order (citing *Rojes v. Riverside General Hospital (1988) 203 Cal. App. 3d 1151, 250 Cal. Rptr. 435 (Fourth App. Dist., Div. Two)* ; *Blue Mountain Development Co. v. Carville (1982) 132 Cal. App. 3d 1005, 183 Cal. Rptr. 594 (Fourth App. Dist., Div. Two)* ; and *Dockter v. City of Santa Ana (1968) 261 Cal. App. 2d 69, 67 Cal. Rptr. 686 (Fourth App. Dist., Div. Two)* (*225 Cal. App. 3d 1602, 1605*). The court explained that in reviewing these cases, it found they made no distinction between final orders, which are actually judgments, and orders which clearly are not judgments but

nonetheless are appealable. The court said that, on further consideration, it now recognized that, while *Blue Mountain* was correctly decided, *Rojes* and *Dockter* were incorrect to the extent that they suggested that a postjudgment motion for reconsideration will extend the time to file a notice of appeal (*225 Cal. App. 3d 1602, 1607-1608)* .

Thus, the court overruled *Dockter* and *Rojes* to the extent they held that a postjudgment motion for reconsideration will extend the time within which to file a notice of appeal from the judgment (*225 Cal. App. 3d 1602, 1607)* . The court noted that in *Blue Mountain Development Co. v. Carville (1982) 132 Cal. App. 3d 1005, 183 Cal. Rptr. 594* , it reaffirmed the rule that a valid motion for reconsideration brought under *Code Civ. Proc. § 1008(a)* is treated, for purposes of Cal. Rules of Ct., Rule 3, (now see Rule *8.108*) in the same manner as a motion for new trial or a motion to vacate, but disapproved language in that case that might be interpreted as approving the filing of postjudgment motions for reconsideration (*225 Cal. App. 3d 1602, 1607-1608 n.5*).

However, because of its prior decisions, the court felt compelled out of fairness to treat the motion for reconsideration in the case before it as a motion for new trial or a motion to vacate the judgment under Cal. Rules of Ct., Rule 3 (now see Rule *8.108*), and, accordingly, held that the filing of the motion extended the time to file the notice of appeal, that the notice of appeal was filed within 30 days after the court denied the motion for reconsideration, and that the appeal was therefore timely, and reversed the judgment on the merits (*225 Cal. App. 3d 1602, 1610-1611)* .

The *Passavanti* court criticized contrary language or holdings relating to postjudgment motions to reconsider in the following appellate cases: *Miller v. United States Automobile Assn. (1989) 213 Cal. App. 3d 222, 261 Cal. Rptr. 515 (Fourth App. Dist., Div. Three)* ; *Jade K. v. Viguri (1989) 210 Cal. App. 3d 1459, 1467, 258 Cal. Rptr. 907 (Fourth App. Dist., Div. One)* ; *Stratton v. First Nat. Life Ins. Co. (1989) 210 Cal. App. 3d 1071, 1082, 258 Cal. Rptr. 721 (Second App. Dist., Div. One)* ; and *Monsan Homes, Inc. v. Pogrebneak (1989) 210 Cal. App. 3d 826, 831, 258 Cal. Rptr. 676 (Sixth Appellate District)* (*225 Cal. App. 3d 1602, 1607-1608 n.5*).

The *Passavanti* court agreed with the statement in *Eddy v. Sharp (1988) 199 Cal. App. 3d 858, 863 n.3, 245 Cal. Rptr. 211 (Third App. Dist.)* that a motion for reconsideration may only be considered before the entry of judgment, but questioned the *Eddy* court's further statement that the court is free to consider a motion regardless of the label put on it by the moving party (suggesting a postjudgment motion) on the ground the opinion in *Eddy* does not state when the judgment was entered or when the order denying reconsideration was made (*225 Cal. App. 3d 1602, 1608-1609*). Moreover, the case cited by *Eddy* in support of the quoted statement, *Graham v. Hansen (1982) 128 Cal. App. 3d 965, 180 Cal. Rptr. 604 (Third App. Dist.)* , did not involve a motion for reconsideration made after entry of judgment, but, rather, a motion for reconsideration of the court's prior order denying a motion for summary judgment and for summary judgment, which the appellate court characterized as a renewed motion for summary judgment under *Code Civ. Proc. § 1008(b)*, which imposes no time limitation on when the motion must be made [*Graham v. Hansen (1982) 128 Cal. App. 3d 965, 970-971, 180 Cal. Rptr. 604* ; *see § 158.31*].

The procedural background of ***Ten Eyck v. Industrial Forklifts Co.*** *(1989) 216 Cal. App. 3d 540, 265 Cal. Rptr. 29* , is discussed in *§ 158.38[3][a]*. In affirming the summary judgment, the court of appeal said that the fact that plaintiff had filed a motion for reconsideration was of no consequence (*216 Cal. App. 3d 540, 545)* . Citing *Rojes v. Riverside General Hospital (1988) 203 Cal. App. 3d 1151, 1158-1160, 250 Cal. Rptr. 435* (overruled on another point in *Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1607, 275 Cal. Rptr. 887*), the court said that, under Cal. Rules of Ct., Rule 3, a valid motion for reconsideration, like a valid motion for new trial or a valid motion to vacate a judgment, will extend the time for filing a notice of appeal, but that plaintiff's motion for reconsideration did not have that effect because it was filed after the judgment was signed and was therefore invalid and did not extend the January 9th deadline for filing the notice of appeal. The court said that once plaintiff received the notice of entry of judgment, he should have abandoned the motion for reconsideration and filed a notice of appeal (*216 Cal. App. 3d 540, 545)* .

[4] Additional Authorities

[a] Motion to Reconsider After Entry of Judgment

In *Crotty v. Trader (1996) 50 Cal. App 4th 765, 57 Cal. Rptr. 2d 818* , in partially dismissing an appeal the court noted that a motion for reconsideration is not to be equated with a motion for a new trial. The court when deciding a motion for reconsideration, under *Code Civ. Proc. § 1008* has no authority to reanalyze or reevaluate facts or authority that has been presented in the earlier motion. Rather, the court may only grant reconsideration if the court is presented with new or different facts, circumstances, or law. On the other hand, the court on a motion for new trial does not examine new or different facts, but instead looks to determine if any error has been committed. Thus, the court held that Cal. Rules of Ct., Rule 3 (now see *Rule 8.108*) does not apply to a postjudgment motion for reconsideration (*50 Cal. App 4th 765, 771)* .

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
CHAPTER 160 MOTIONS TO STRIKE: PLEADINGS

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§ 160.syn Synopsis to Chapter 160: MOTIONS TO STRIKE: PLEADINGS

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§ 160.03 1982 Reorganization of Governing Statutes and Prior Case Law

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§§ 160.14-160.29 [Reserved]

§ 160.30 Supporting Motion to Strike Whole or Part of Pleading [Code Civ. Proc. § 435]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

[d] Opposing Memoranda

§ 160.31 Supporting Motion to Strike Whole or Part of Pleading [Code Civ. Proc. § 435]--Pleading Matter Not Filed or Drawn in Conformity With Law [Code Civ. Proc. § 436(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Pleadings Violating Specific Statutes, Rules, or Court Orders

[c] Opposing Memoranda

§ 160.32 Supporting Motion to Strike Whole or Part of Pleading [Code Civ. Proc. § 435]--Pleading Matter Not Filed or Drawn in Conformity With Law [Code Civ. Proc. § 436(b)]--Amended Pleading Not in Conformity With Court's Prior Ruling

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Pleading Not in Conformity With Court's Prior Ruling Subject to Motion to Strike

§ 160.33 Supporting Motion to Strike Whole or Part of Pleading [Code Civ. Proc. § 435]--Pleading Matter Not Filed or Drawn in Conformity With Law [Code Civ. Proc. § 436(b)]--Amended Pleading Without Permission of Court [Code Civ. Proc. §§ 472, 473(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Use of Pre-1982 Case Law

[c] Only Added Parties May Move to Strike Addition of Parties

[d] Related Memoranda

[3] Discussion of Authorities

[a] Amended Complaint Filed Without Permission Is Subject to Be Stricken

[b] Permission Is Required Unless Statute Provides for Amendment of Course

[c] Permission Required After Responsive Pleading Is Filed or Time for Filing Response Passes

[d] Amendment Adding New Parties Always Requires Permission

[e] Permission to Amend Does Not Authorize Addition of New Parties

[4] Additional Authorities

[a] Permission Required After Responsive Pleading Is Filed or Time for Filing Response Passes

§ 160.34 Supporting Motion to Strike Whole or Part of Pleading [Code Civ. Proc. § 435]--Pleading Matter Not Filed or Drawn in Conformity With Law [Code Civ. Proc. § 436(b)]--Pleading Filed by Stranger to Action [Code Civ. Proc. § 387]

[1] FORM

[2] Comments

[a] Use of Form

[b] Use of Pre-1982 Case Law

[c] Related Memoranda

[3] Discussion of Authorities

[a] Leave of Court Required for Intervention by Nonparty

[b] Pleading Filed Without Permission by Stranger to Action May Be Stricken

§ 160.35 Supporting Motion to Strike Whole or Part of Pleading [Code Civ. Proc. § 435]--Pleading Matter Not Filed or Drawn in Conformity With Law [Code Civ. Proc. § 436(b)]--Untimely Responsive Pleading [Code Civ. Proc. §§ 412.20(a)(3), 430.40, 432.10, 438(i)(1), 472a(b); Cal. Rules of Ct., Rule 3.1320(g)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Use of Pre-1982 Case Law

[c] Necessity of Moving to Strike Before Default Entered

[d] No Necessity of Moving to Strike in Case of Untimely Amended Complaint

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] An Untimely Responsive Pleading Filed Before Entry of Default May Be Stricken

[4] Additional Authorities

[a] An Untimely Responsive Pleading Filed Before Entry of Default May Be Stricken

§ 160.36 Supporting Motion to Strike Whole or Part of Pleading [Code Civ. Proc. § 435]--Pleading Matter Not Filed or Drawn in Conformity With Law [Code Civ. Proc. § 436(b)]--Unverified Answer to Verified Complaint [Code Civ. Proc. §§ 431.30(d), 446]

[1] FORM

[2] Comments

[a] Use of Form

[b] When Answer to Verified Complaint Must Be Verified

[c] Validity of Pre-1985 Case Law

[d] Necessity of Raising Objection

[e] Motion for Judgment on Pleadings as Alternative

[3] Discussion of Authorities

[a] An Unverified Answer to a Verified Complaint Is Subject to Be Stricken

[4] Additional Authorities

[a] An Unverified Answer to a Verified Complaint Is Subject to Motion to Strike

§ 160.37 Supporting Motion to Strike Whole or Part of Pleading [Code Civ. Proc. § 435]--Irremediable Failure to State Cause of Action [Code Civ. Proc. §§ 426, 431.10, 436]

[1] FORM

[2] Comments

[a] Use of Form

[b] Basis of Authority for Striking

[c] Related Memoranda

[3] Discussion of Authorities

[a] Allegations Which Cannot Be Rendered Sufficient to State Cause of Action May Be Stricken

[4] Additional Authorities

[a] Allegations That Cannot Be Rendered Sufficient to State Cause of Action May Be Stricken

§§ 160.38-160.40 [Reserved]

§ 160.41 Supporting Motion to Strike Whole or Part of Pleading [Code Civ. Proc. § 435]--Irrelevant Matter in Pleading [Code Civ. Proc. § 436(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Use of Pre-1982 Case Law

[c] Irrelevant Matter

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Allegation of Probative Facts Is Subject to Be Stricken

[4] Additional Authorities

[a] Allegation of Probative Facts Is Subject to Be Stricken

§ 160.42 Supporting Motion to Strike Whole or Part of Pleading [Code Civ. Proc. § 435]--False or Improper Pleading Matter [Code Civ. Proc. § 436(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Validity of Pre-1982 Case Law

[c] Sham Pleadings

[d] Defect Must Appear on Face of Pleading or From Matter Subject to Judicial Notice

[e] Matter Subject to Judicial Notice Must Be Identified

[3] Discussion of Authorities

[a] Inconsistency With Prior Pleadings May Show Matter in Pleading to Be False or Improper

[b] Denial on Information and Belief of Matters Within Defendants' Knowledge May Be Stricken

[c] Allegations Inconsistent With Unambiguous Instrument Incorporated Into Complaint May Be Stricken

[d] Allegations Requesting Improper Relief

[4] Additional Authorities

[a] Denial on Information and Belief of Matters Within Defendants' Knowledge May Be Stricken

§ 160.43 Supporting Motion to Strike [Code Civ. Proc. §§ 435, 436]--Improper Amended Pleading [Code Civ. Proc. §§ 472, 473(a)]--Amendment Fails to Correct Defect in Original Pleading

[1] FORM

[2] Comments

[a] Use of Form

[b] Sources of Court's Authority to Strike

[3] Discussion of Authorities

[a] Court Not Required to Tolerate Improper Amended Complaint

[b] Court May Strike Amended Pleading That Merely Repeats Original Pleading

[c] Amendment Cannot Revive Defective Complaint by Omitting Previously Sworn Facts

§§ 160.44-160.59 [Reserved]

§ 160.60 Opposing Motion to Strike Whole or Part of Pleading [Code Civ. Proc. § 435]--Speaking Motion Not Permitted [Code Civ. Proc. § 437]

[1] FORM

[2] Comments

[a] Use of Form

[b] Judicial Notice

[c] Validity of Pre-1982 Case Law

[d] Related Memoranda

[3] Discussion of Authorities

[a] Motion Relying on Extrinsic Evidence Is to Be Treated as Motion for Summary Judgment

[4] Additional Authorities

[a] Motion Relying on Extrinsic Evidence Is to Be Treated as Motion for Summary Judgment

§ 160.61 Opposing Motion to Strike Whole or Part of Pleading [Code Civ. Proc. § 435]--Motion Not Timely [Code Civ. Proc. § 435(b)(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Time to Respond to Pleadings

[c] No Time Limit on Court's Power to Strike

[3] Discussion of Authorities

[a] Motion to Strike Complaint After Answer Has Been Filed Is Improper

§ 160.62 Opposing Motion to Strike Whole or Part of Pleading [Code Civ. Proc. § 435]--Hearing Date Improperly Specified [Code Civ. Proc. §§ 435(b)(2), 1005]

[1] FORM

[2] Comments

[a] Use of Form

§ 160.63 Opposing Motion to Strike Whole or Part of Pleading [Code Civ. Proc. § 435]--Defect Can Be Corrected by Amendment

[1] FORM

[2] Comments

[a] Use of Form

[b] Validity of Pre-1982 Case Law

[c] Permission to Amend Pleading

[d] Related Memoranda

[3] Discussion of Authorities

[a] Striking Should Be Avoided When Defect May Be Corrected

[b] Court May Grant Leave to Verify Answer Rather Than Striking Answer

[4] Additional Authorities

[a] Court May Grant Leave to Verify Answer Rather Than Striking Answer

§ 160.64 Opposing Motion to Strike Whole or Part of Pleading [Code Civ. Proc. § 435]--Pleading Not Filed or Drawn in Conformity With Law [Code Civ. Proc. § 436(b)]--Amended Pleading Adding New Parties Without Leave--Only Added Parties May Move to Strike

[1] FORM

[2] Comments

[a] Use of Form

[b] Validity of Pre-1982 Case Law

[3] Discussion of Authorities

[a] Only Added Parties May Move to Strike Amended Pleading Adding New Parties Without Permission

§ 160.65 Opposing Motion to Strike Whole or Part of Pleading [Code Civ. Proc. § 435]--No Absolute Right to Have Untimely Responsive Pleading Stricken

[1] FORM

[2] Comments

[a] Use of Form

[b] Validity of Pre-1982 Case Law

[3] Discussion of Authorities

[a] Technically Late Pleading Should Not Be Stricken When There Was No Purposeful Delay or Prejudice

[b] Opposing Party Has No Absolute Right to Have Untimely Pleading Stricken

§ 160.66 Opposing Motion to Strike Whole or Part of Pleading [Code Civ. Proc. § 435]--Irrelevant Matter [Code Civ. Proc. §§ 431.10(b), (c), 436(a)]--Motion Too Broad

[1] FORM

[2] Comments

[a] Use of Form

[b] Validity of Pre-1982 Case Law

[3] Discussion of Authorities

[a] Motion Attacking Relevant Matter in Pleading Should Be Denied in Its Entirety

§ 160.67 Opposing Motion to Strike Whole or Part of Pleading [Code Civ. Proc. § 435]--Improper Amended Complaint [Code Civ. Proc. § 436]--Reasons Exist Why Earlier Pleading Should Not Bar Later Inconsistent Action

[1] FORM

[2] Comments

[a] Use of Form

[b] Validity of Pre-1982 Case Law

[3] Discussion of Authorities

[a] Rule Against Dropping Sworn Allegations Applies Only to Sham Amendments

[b] Allegations Incidental to Cause of Action May Be Withdrawn

[c] Necessary Allegation in an Original Complaint Should Not Bar Inconsistent Cause of Action Against Different Defendant

§ 160.68 Opposing Motion to Strike Whole or Part of Pleading [Code Civ. Proc. § 435]--Improper Amended Pleading [Code Civ. Proc. § 436]--Amended Complaint Stating Cause of Action Not Sham

[1] FORM

[2] Comments

[a] Use of Form

[b] Validity of Pre-1982 Case Law

[3] Discussion of Authorities

[a] Amended Pleading Stating Cause of Action Not Sham

§ 160.69 Opposing Motion to Strike Whole or Part of Pleading [Code Civ. Proc. § 435]--Amendment of Pleading to Bring in New Parties Allowed as Matter of Course Prior to Answer or Demurrer [Code Civ. Proc. § 472]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Amendment of Pleading to Bring in New Parties Is Allowed as Matter of Course Without Leave of Court If Made Prior to Filing of Answer or Demurrer

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
CHAPTER 160 MOTIONS TO STRIKE: PLEADINGS
PART I. INTRODUCTION

16-160 California Points & Authorities § 160.01

§ 160.01 Scope of Chapter

This chapter contains memoranda that may be submitted in civil actions to support or oppose motions to strike pleadings in whole or in part.

Forms supporting motions to strike include:

- A general form for use in supporting motions to strike [*see § 160.30*].
- Forms for use in supporting motions to strike pleading matter which was not filed or drawn in conformity with the laws of California [*see §§ 160.31, 160.32*].
- Forms setting out specific instances of failure to conform to the laws of California for which pleading matter may be stricken [*see §§ 160.33 -160.37*].
- Forms for use in a motion to strike pleading matter as irrelevant [*see § 160.41*] or as false or improper [*see § 160.42*].
- A form for use in supporting a motion to strike improper amended pleadings [*see § 160.43*].

Points and authorities opposing motions to strike in general and for specific reasons [*see §§ 160.60 -160.63*].

Points and authorities opposing motions to strike made on specific grounds [*see §§ 160.64 -160.68*].

Points and authorities opposing a special motion to strike a SLAPP suit [*see* §§ 160.70 -160.73].

This chapter does not contain forms or memoranda for use in support of or opposing SLAPP suits under *Code Civ. Proc. § 425.16 et seq.*, often known as a "special motion to strike." For discussion and forms relating to anti-SLAPP motions, see Ch. 161, *Motions to Strike: Anti -SLAPP*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeImmaterial MattersCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeIrrelevant Matters

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16-160 California Points & Authorities § 160.02

§ 160.02 Governing Law

Statutory authority and time limits for motions to strike are set out in *Code Civ. Proc. § 435*. Grounds for which pleading matter may be stricken are set out in *Code Civ. Proc. §§ 436* and *431.10(b), (c)*. Limits on the means by which grounds for striking pleading matter may be established are set out in *Code Civ. Proc. § 437*.

A special motion to strike causes of action brought to inhibit the right of people to exercise their constitutional rights of petition and free speech on matters of public interest (SLAPP suits) is authorized and governed by *Code Civ. Proc. § 425.16(b)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeImmaterial MattersCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeIrrelevant MattersCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeRedundant MattersCivil ProcedurePleading & PracticeMotion PracticeTime Limitations

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16-160 California Points & Authorities § 160.03

§ 160.03 1982 Reorganization of Governing Statutes and Prior Case Law

In 1982, the Legislature substantially reorganized the statutory law governing motions to strike. The primary effect of the 1982 statutory scheme appears to be to provide for explicit statutory authority for making motions to strike and for most, if not all, of the grounds on which pleading matter may be stricken [*see Code Civ. Proc. §§ 435, 436*]. The only provisions in the scheme that restrict either a party's right to move to strike or the court's power to strike pleading matter are the timeliness and hearing date provisions of *Code Civ. Proc. § 435* [*see §§ 160.61* (timeliness) and 160.62 (hearing date requirements)] and the prohibition of speaking motions to strike set out in *Code Civ. Proc. § 437* [*see § 160.60*]. There are no statutory provisions stating that the grounds for striking pleading matter set out in *Code Civ. Proc. § 436* or *Code Civ. Proc. § 431.10(b), (c)* are meant to be exclusive.

Because the 1982 statutory scheme does not restrict the grounds for which courts may strike pleading matter, with the exception of *Code Civ. Proc. § 437* (speaking motion not proper), most of the pre-1982 case law dealing with motions to strike appears to be still valid. When using pre-1982 cases, counsel should cite the case together with the statute that now provides the authority for striking the challenged pleading on the grounds urged.

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16-160 California Points & Authorities § 160.04

§ 160.04 Restricted Use of Motion in Limited Civil Cases

In limited civil cases, motions to strike are allowed only on the ground that the damages or relief sought are not supported by the allegations of the complaint [*Code Civ. Proc. §§ 91(a), 92(d)*; *see Code Civ. Proc. §§ 431.10(b)(3), 436(b)* (general authority for motion to strike on ground that relief sought not supported by allegations)].

Code Civ. Proc. § 435(a) provides that the term complaint includes a cross-complaint. *Code Civ. Proc. § 92(d)* only uses the term complaint. Although it is probable that *Code Civ. Proc. § 92(d)* may be read in light of the language of *Code Civ. Proc. § 435(a)* to permit motions to strike cross-complaints in limited civil cases, this is not clear from the language of the statute.

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16-160 California Points & Authorities § 160.05

§ 160.05 Court's Inherent Power to Strike

Prior to 1982, the courts of appeal had developed the doctrine that a court may strike pleading matter under the court's inherent power, by summary means, in order to prevent frustration, abuse, or disregard of court processes. This inherent power was explicitly recognized as being apart from statute [*Stafford v. Ballinger (1962) 199 Cal. App. 2d 289, 297, 18 Cal. Rptr. 568]* . It appears that the grounds on which the pre-1982 cases allowed the striking of pleading matter are now subsumed under the statement of grounds for striking such matter set out in *Code Civ. Proc. § 436*. Thus, it appears that it is no longer necessary to cite the inherent power of the court as authority for striking a pleading. However, the statutory scheme contains no provision restricting or abolishing the court's inherent power to strike pleading matter. Thus, if a case should arise in which grounds permitting the striking of pleading matter under an inherent powers theory are not authorized by statute, the court's inherent powers may probably still be used as good authority for striking.

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16-160 California Points & Authorities § 160.06

§ 160.06 Relationship to Demurrer

A motion to strike is generally used to reach defects in a pleading which are not subject to demurrer. Hence, a motion to strike does not lie to attack a complaint for insufficiency of allegations to justify relief, as that is a ground of general demurrer [*Pierson v. Sharp Memorial Hospital, Inc. (1989) 216 Cal. App. 3d 340, 342, 264 Cal. Rptr. 673]* .

The precise demarcation between the function of a motion to strike and of a demurrer is not clear in every case. It has been held that a motion to strike may not be used for purposes of a demurrer, and that for instance, matter may not be stricken on motion to strike for uncertainty [*Allerton v. King (1929) 96 Cal. App. 230, 234, 274 P. 90* ; *see § 160.66*].

In contrast, it has been noted that although a party may not demur to a portion of a cause of action, when a substantive defect is clear from the face of a complaint involving only a portion of a cause of action, that portion may be attacked by filing a motion to strike [*see PH II, Inc. v. Superior Court (1995) 33 Cal. App. 4th 1680, 1681, 1683, 40 Cal. Rptr. 2d 169]* . One practical difference between a motion to strike and a demurrer is that when a demurrer is sustained, leave to amend the defective pleading is deemed granted unless the court specifies otherwise, while there is no provision stating that leave to amend is deemed granted when a motion to strike is granted [*see Cal. Rules of Ct., Rule 3.1320(g)*]. It has been held that a motion to strike should not be granted when the purported defect in the challenged pleading can be corrected by amendment [*Allerton v. King (1929) 96 Cal. App. 230, 234, 274 P. 90* ; *see* § 160.50]. However, when a motion to strike is granted, the court may order that an amendment or amended pleading be filed on terms it deems proper [*Code Civ. Proc. § 472a(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeImmaterial MattersCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeIrrelevant MattersCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeRedundant Matters

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16-160 California Points & Authorities § 160.07

§ 160.07 Time Tolling Effect of Motion to Strike

The motion to strike is now statutorily recognized as a pleading. Filing of a notice of motion to strike has the same effect for default purposes when it is filed within the time for response to a pleading as an answer, demurrer, or other recognized pleading [*see Code Civ. Proc. § 585* (entry of default)]. Thus, if a party serves and files a notice of motion to strike without demurring to the complaint, the time to answer is extended and no default may be entered against that defendant while the motion to strike is pending [*see Code Civ. Proc. § 435(c)*]. However, after the motion has been heard, within the time specified by *Code Civ. Proc. § 1005(b)* [*see § 160.62*] and ruled on, the obligation to answer or otherwise respond may be partially reinstated. If the motion is denied, the party who made the motion must respond to the pleading within the time allowed by the court. *Code Civ. Proc. § 472a(d)* provides that the court must allow the party that is filing the motion to strike a complaint time to answer if the motion is denied. If the motion is granted, the moving party must still respond to any unstricken portions of the pleading within the time allowed by the court. Failure to respond in either of these cases may result in entry of default [*see Code Civ. Proc. §§ 585, 586* (default)].

The filing of a notice of motion to strike does not extend the time within which to demur [*Code Civ. Proc. §§ 435(d), 585(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeImmaterial MattersCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeRedundant MattersCivil ProceduresPleading & PracticeMotion PracticeTime LimitationsCivil ProceduresPleading & PracticePleadingsAnswersCivil ProceduresPleading & PracticePleadingsTime LimitationsGeneral Overview

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16-160 California Points & Authorities § 160.08

§ 160.08 Speaking Motion Not Proper

A motion to strike may not rely on extrinsic evidence [*see Code Civ. Proc. § 437(a)*]. For a full discussion of this restriction, see *§ 160.60*.

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16-160 California Points & Authorities § 160.09

§ 160.09 Time for Hearing

For a discussion concerning the time when a hearing on a motion to strike must be scheduled, see *§ 160.62*.

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16-160 California Points & Authorities § 160.10

§ 160.10 Trial Court Delay Reduction Act

Under the Trial Court Delay Reduction Act, courts have discretion to strike pleadings for noncompliance with program rules, if, after taking into account the effect of previous sanctions or previous lack of compliance in the case, it appears that less severe sanctions would not be effective [*Gov. Code § 68608(b)*; *see, e.g.,* Los Angeles Super. Ct. Rules, Rules 7.13, 8.0; *see also Code Civ. Proc. § 575.2*; *Cal. Rules of Ct., Rule 2.30*]. Counsel in cases governed by trial delay reduction programs should consult the local rules for specific provisions governing the striking of pleadings as a sanction.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeImmaterial MattersCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeRedundant MattersCivil ProcedureSanctionsGeneral OverviewCivil ProcedureSanctionsContemptCivil Contempt

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16-160 California Points & Authorities § 160.11

§ 160.11 Page Limits on Memoranda

Generally, a memorandum must not exceed 15 pages in length. A reply or closing memorandum may not exceed 10 pages in length [*Cal. Rules of Ct., Rule 3.1113(d)*]. Any party desiring to file a longer memorandum must obtain leave of court [*see Cal. Rules of Ct., Rule 3.1113(d)*]. For further discussion of the page limitations under *Cal. Rules of Ct., Rule 3.1113*, and of other basic format requirements of memoranda, see *Ch. 1, Writing Legal Memoranda and Briefs, § 1.01[4]*.

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16-160 California Points & Authorities § 160.12

§ 160.12 Related Pleading and Practice Chapters

For forms and a discussion relating to motions to strike, see Ch. 375, *Motions to Strike: Pleadings* in California Forms of Pleading and Practice. For forms and discussion relating to demurrers, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

For special motions to strike under the California anti-SLAPP statutes [*Code Civ. Proc. § 425.16 et seq.*], see Ch. 376, *Motions to Strike: Anti -SLAPP*.

For orders striking the whole or parts of pleadings as a sanction under *Code Civ. Proc. § 2023(b)(4)(A)* [*Code Civ. Proc. § 2023.030(d)(1)*] for failure to obey a discovery order, see Ch. 190, *Discovery: Scope, Regulation, and Timing* .

For forms and a discussion relating to motions for summary judgment, see Ch. 537, *Summary Judgment* in California Forms of Pleading and Practice.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeImmaterial MattersCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeRedundant MattersCivil ProceduresPretrial JudgmentsJudgment on the Pleadings

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16-160 California Points & Authorities § 160.13

§ 160.13 Related Points and Authorities Chapters

For memoranda supporting and opposing anti-SLAPP special motions to strike, see Ch. 161, *Motions to Strike: Anti -SLAPP*.

For memoranda supporting and opposing a demurrer, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For memoranda supporting and opposing motions for summary judgment, see Ch. 221, *Summary Judgments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeImmaterial MattersCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeRedundant MattersCivil ProcedurePretrial JudgmentsJudgment on the Pleadings

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16-160 California Points & Authorities §§ 160.14-160.29

[Reserved]

§§ 160.14[Reserved]

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PART II. FORMS
A. Supporting Motion to Strike

16-160 California Points & Authorities § 160.30

§ 160.30 Supporting Motion to Strike Whole or Part of Pleading [Code Civ. Proc. § 435]--General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF MOTION TO
Plaintiff,	)	STRIKE [WHOLE *or* PART OF]
vs.	)	_____ [*specify*
_____ [*name*],	)	*pleading, e.g.,* COMPLAINT]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE _____ [*specify pleading, e.g.,* COMPLAINT] IS SUBJECT TO A MOTION TO STRIKE THE WHOLE OR ANY PART THEREOF.

A. Timely Motion to Strike Is Proper. Any party, within the time allowed to respond to a pleading, may serve and file a notice of motion to strike the whole or any part thereof (*Code Civ. Proc. § 435(b)(1)*).

B. Pleadings Subject to Motion to Strike. The pleadings at which a motion to strike may be directed include demurrers, answers, complaints, and cross complaints (*see Code Civ. Proc. § 435(a)*).

[*Add points and authorities setting out specific grounds for striking pleading matter* (*see §§ 160.31 -160.43*)].
Dated: _____.

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion to strike the whole or any part of a complaint, cross complaint, answer, or demurrer. The foregoing sets out points of law establishing the statutory basis for bringing a motion to strike [*see Code Civ. Proc. § 435*]. Counsel should add points and authorities setting out specific grounds for a motion to strike, such as those *set out in §§ 160.31 -160.43*.

Counsel should insert facts and arguments into the foregoing form and any form that is used in combination with it to show the relationship between the facts of the case and the points of law stated.

The time restriction stated in Paragraph A does not apply if the motion to strike is made as part of a motion under *Code Civ. Proc. § 438(i)(1)(A)*, directed at a pleading filed after a motion for judgment on the pleadings was sustained with leave to amend [*Code Civ. Proc. § 435(b)(1), (e)*; *see also § 160.35* and Ch. 71, *Demurrers and Motions for Judgment on the Pleadings*].

[b] Related Pleading and Practice Forms

For forms and discussion relating to motions to strike, see Ch. 375, *Motions to Strike* in California Forms of Pleading and Practice. For forms and discussion relating to demurrers, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

For forms and discussion relating to motions for summary judgment, see Ch. 537, *Summary Judgment* in California Forms of Pleading and Practice.

[c] Related Memoranda

For memoranda supporting and opposing a demurrer, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For memoranda supporting and opposing motions for summary judgment, see Ch. 221, *Summary Judgments* .

[d] Opposing Memoranda

Memoranda in opposition to a motion to strike are *set out in §§ 160.60 -160.68*.

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16-160 California Points & Authorities § 160.31

§ 160.31 Supporting Motion to Strike Whole or Part of Pleading [Code Civ. Proc. § 435]--Pleading Matter Not Filed or Drawn in Conformity With Law [Code Civ. Proc. § 436(b)]

[1] FORM

[*This form should be used in combination with a general form of memorandum supporting a motion to strike (see § 160.30) and with appropriate memoranda setting out specific points in which the pleading to be wholly or partially stricken fails to conform with state law (see §§ 160.33 -160.37).*]

THE _____ [*specify pleading, e.g.,* COMPLAINT] SHOULD BE STRICKEN BECAUSE IT WAS NOT _____ [DRAWN *or* FILED] IN CONFORMITY WITH LAW.

Improperly Drawn or Filed Pleading Matter Subject to Motion to Strike. The court may, on a motion to strike pursuant to *Code of Civil Procedure Section 435* (statutory authority for motion to strike) or at any time in its discretion, strike any pleading or part thereof not drawn or filed in conformity with state law (*Code Civ. Proc. § 436(b)*).

[2] Comments

[a] Use of Form

This form may be used to support a motion to strike all or part of a pleading on the grounds that the matter to be stricken was not drawn or filed in conformity with California law [*see Code Civ. Proc. § 436(b)*]. This form sets out the statutory basis for the court's power to strike pleading matter that was not drawn or filed in conformity with California law. The form should be used in combination with a general form in support of a motion to strike [*see § 160.30*] and with points and authorities setting out specific points in which the matter to be stricken fails to conform with state law, such as those *set out in §§ 160.32 -160.37*.

Counsel should insert facts and arguments into this form and into any points and authorities used in combination with it, showing how the points of law stated relate to the facts of the case.

[b] Pleadings Violating Specific Statutes, Rules, or Court Orders

Code Civ. Proc. § 436(b) gives the court the explicit power to strike all or part of any pleading that violates any particular law governing the drawing or filing of pleadings. A rule of law which matter in a pleading violates would ordinarily be subject to judicial notice [*see Evid. Code §§ 451, 452, 453*]. Matter subject to judicial notice under *Evid. Code § 452* or *453* that is the basis for a motion to strike must be specified in the motion or in the accompanying points and authorities, except as the court may otherwise permit [*Code Civ. Proc. § 437(b)*]. In arguing that the pleading matter, which the motion to strike is directed against, violates a statutory rule of pleading or a rule of court, counsel should cite both *Code Civ. Proc. § 436(b)* and the specific statute or rule that the pleading matter violates. In arguing that the pleading matter violates a court order, counsel should cite *Code Civ. Proc. § 436(b)* and ask the court to take notice of the order that the matter violates, pursuant to *Evid. Code §§ 452, 453*; *see Evid. Code § 453* and *Cal. Rules of Ct., Rules 3.1113(m), 3.1306(c)* on procedure concerning requesting judicial notice]. Local rules concerning procedure for obtaining judicial notice of court files should also be consulted.

[c] Opposing Memoranda

Points and authorities in opposition to motions to strike, including motions to strike a pleading not filed or drawn in conformity with the laws of the state are *set out in §§ 160.60 -160.65*.

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16-160 California Points & Authorities § 160.32

§ 160.32 Supporting Motion to Strike Whole or Part of Pleading [Code Civ. Proc. § 435]--Pleading Matter Not Filed or Drawn in Conformity With Law [Code Civ. Proc. § 436(b)]--Amended Pleading Not in Conformity With Court's Prior Ruling

[1] FORM

[*This form should be combined with a general form of memorandum supporting a motion to strike setting out the statutory basis for making a motion to strike (see § 160.30) and a form of memorandum setting out the statutory basis for the court's power to strike pleading matter that was not drawn or filed in conformity with law (see § 160.31).*]

THE AMENDED _____ [*specify pleading, e.g.,* COMPLAINT] SHOULD BE STRICKEN BECAUSE IT WAS NOT FILED IN CONFORMITY WITH THE PRIOR RULING OF THE COURT.

Pleading Not in Conformity With Court's Prior Ruling Subject to Motion to Strike. A trial court has authority to strike a pleading that is not filed in conformity with its prior ruling (*Janis v. California State Lottery Com. (1998) 68 Cal. App. 4th 824, 829, 80 Cal. Rptr. 2d 549*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to strike an amended pleading that was not filed in conformity with the court's prior ruling. This form should be used in combination with a general form [*see § 160.30*] and a form setting out the point that pleading matter that was not drawn or filed in conformity with the laws of this state may be stricken [*see Code Civ. Proc. § 436(b)*; *see also § 160.31*].

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Pleading Not in Conformity With Court's Prior Ruling Subject to Motion to Strike

Janis v. California State Lottery Com. *(1998) 68 Cal. App. 4th 824, 80 Cal. Rptr. 2d 549* , involved a class action against the California State Lottery Commission (CSL) and GTECH Corporation (GTECH), seeking recovery of moneys lost by Keno players during the four years that CSL operated the lottery Keno game. Ultimately, GTECH filed a motion for summary judgment which was granted. In so doing, however, the court also granted plaintiff's request for leave to amend, noting that plaintiff was free to assert a new cause of action against GTECH, but cautioned plaintiff that plaintiff could not amend to add any new claim back in on any of the theories as to which summary judgment had been sustained. Plaintiff filed a first amended complaint reasserting the original causes of action and adding language to each concerning a violation of *Gov. Code §§ 8880.4(a)(2)* and *8880.63*. Thereafter, GTECH filed a motion to strike the allegations against it which was granted and judgment was entered. Plaintiff appealed (*68 Cal. App. 4th 824, 827-829)* .

The court of appeal affirmed. The court noted that the trial court has authority to strike sham pleadings, or those not in conformity with its prior ruling (*68 Cal. App. 4th 824, 829)* . Plaintiff's first amended complaint reasserted the original causes of action against GTECH and merely appended a sentence to each concerning the alleged violation of the Lottery Act. Thus, plaintiff failed to comply with the court's ruling. Consequently, the motion to strike was properly granted (*68 Cal. App. 4th 824, 829)* .

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A. Supporting Motion to Strike

16-160 California Points & Authorities § 160.33

§ 160.33 Supporting Motion to Strike Whole or Part of Pleading [Code Civ. Proc. § 435]--Pleading Matter Not Filed or Drawn in Conformity With Law [Code Civ. Proc. § 436(b)]--Amended Pleading Without Permission of Court [Code Civ. Proc. §§ 472, 473(a)]

[1] FORM

[*This form should be combined with a general form of memorandum supporting a motion to strike setting out the statutory basis for making a motion to strike (see § 160.30) and a form of memorandum setting out the statutory basis for the court's power to strike pleading matter that was not drawn or filed in conformity with law (see § 160.31).*]

THE AMENDED _____ [*specify pleading, e.g.,* COMPLAINT] SHOULD BE STRICKEN BECAUSE IT WAS FILED WITHOUT PERMISSION OF THE COURT WHEN SUCH PERMISSION WAS REQUIRED.

A. Amended Complaint Filed Without Permission Is Subject to Be Stricken. An amended complaint filed without permission, when such permission is required, may be stricken upon motion (*Stafford v. Ballinger (1962) 199 Cal. App. 2d 289, 297, 18 Cal. Rptr. 568* (case decided under *Code Civ. Proc. § 435,* which has been amended to authorize motions to strike pleadings in general and not merely complaints)).

[*Optional*] **B. Only One Timely Amendment of Course Is Provided for.** Any pleading may be amended once by the party of course, and without costs, at any time before the answer or demurrer is filed, or after demurrer before trial of the issue of law thereon (*Code Civ. Proc. § 472*).

[*Optional*] **C. Permission Is Required Unless Statute Provides for Amendment of Course.** Under the statutory provisions allowing amendments at the court's discretion, when the conditions for allowing an amendment of course are not satisfied, amendments must be sought by noticed motion for leave to amend, which should be supported by affidavits showing why leave should be granted (see *Code Civ. Proc. § 473(a)(1)*; *Loser v. E.R. Bacon Co. (1962) 201 Cal. App. 2d 387, 390, 20 Cal. Rptr. 221*).

[*Optional*] **D. Permission Required After Responsive Pleading Is Filed or Time for Filing Response Passes.** Once the response to a pleading has been filed, or the time within which a response may be filed has passed, the right to amend the pleading is gone, and any amendments require permission of the court sought by appropriate motion (*Tingley v. Times Mirror (1907) 151 Cal. 1, 11, 89 P. 1097* ; *Asia Investment Co. v. Borowski (1982) 133 Cal. App. 3d 832, 840, 184 Cal. Rptr. 317* ; *see Code Civ. Proc. §§ 472, 473(a)(1)*).

[*Optional*] **E. Amendment Adding New Parties Always Requires Permission.** The statutory right to amend a pleading once of course, which is set out in *Section 472 of the Code of Civil Procedure*, does not encompass the bringing in of new parties without permission of the court (*Taliaferro v. Davis (1963) 220 Cal. App. 2d 793, 795, 34 Cal. Rptr. 120*).

[*Optional*] **F. Permission to Amend Does Not Authorize Addition of New Parties.** An authorization to amend a complaint that does not specifically permit the addition of new parties applies only to the causes of action alleged against the parties already named and does not authorize the addition of new parties (*Taliaferro v. Davis (1963) 220 Cal. App. 2d 793, 794-795, 34 Cal. Rptr. 120* ; *see also Code Civ. Proc. § 473(a)(1)*; *see Phoenix of Hartford Ins. Companies v. Colony Kitchens (1976) 57 Cal. App. 3d 140, 147, 128 Cal. Rptr. 893*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to strike an amended pleading that was filed without leave of the court, or includes matter beyond the scope of the court's leave, in a case when leave to file an amended pleading is required. The form sets out the point that an amended pleading filed without leave of the court when leave is required is subject to a motion to strike. It also sets out the points that leave of the court is required to file more than one amended pleading and to file any amended pleading after the time to answer the original pleading has run. Finally, the form sets out the point that permission is always required for an amendment adding new parties, and that leave to amend a pleading does not entail permission to add new parties unless the leave explicitly so provides. This form should be used in combination with a general form [*see § 160.30*] and a form setting out the point that pleading matter that was not drawn or filed in conformity with the laws of this state may be stricken [*see § 160.31*].

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

[b] Use of Pre-1982 Case Law

The cases cited in this form were decided before the 1982 revision of the statutory scheme governing motions to strike. However, since none of the rules set out in these cases are inconsistent with the current statutory provisions, it appears that they are still good law. For discussion of the effect of the 1982 reorganization on prior case law, see *§ 160.03*.

[c] Only Added Parties May Move to Strike Addition of Parties

One court of appeal has held that a motion to strike a pleading on the ground that it adds new parties without leave of the court should be granted only in favor of those defendants that were added without leave and has declined to uphold such a motion in favor of defendants named in the original pleading [*People ex rel. Dept. Pub. Wks. v. Clausen (1967) 248 Cal. App. 2d 770, 782, 57 Cal. Rptr. 227* (cross complaint)].

[d] Related Memoranda

For forms relating to amended pleadings generally, see *Ch. 16, Amended and Supplemental Pleadings, § 16.30* et seq., in this set.

[3] Discussion of Authorities

[a] Amended Complaint Filed Without Permission Is Subject to Be Stricken

In ***Stafford v. Ballinger*** *(1962) 199 Cal. App. 2d 289, 18 Cal. Rptr. 568* , plaintiff sought to acquire title to certain real property either through a judgment quieting title or by a decree of specific performance. The trial court sustained the defendants' demurrers to the plaintiff's third amended complaint without leave to amend. The plaintiff nevertheless filed a fourth amended complaint. The defendants moved to strike the fourth amended complaint, and the trial court granted the motion. Plaintiff appealed.

The court of appeal upheld the trial court's order striking the fourth amended complaint. The court stated that an amended complaint filed without permission may be stricken on motion. The court stated that authority for striking such a pleading derived from *Code Civ. Proc. § 435*, which provided for motion to strike a complaint in whole or in part [*now see Code Civ. Proc. § 435* as amended, authorizing motions to strike pleadings in general; *see also Code Civ. Proc. § 436(b)* authorizing the striking of pleading not filed in conformity with law or order of the court], and from the inherent powers of the court to prevent frustration, abuse, or disregard of court processes (*199 Cal. App. 2d 289, 297)* .

[b] Permission Is Required Unless Statute Provides for Amendment of Course

Code Civ. Proc. § 473(a)(1) provides that the court may, in furtherance of justice, and on such terms as may be proper, (1) allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect and (2) in the court's discretion, allow an amendment to any pleading or proceeding in other particulars, after notice to the adverse party, on such terms as may be just. *Code Civ. Proc. § 473* appears to overlap partially with *Code Civ. Proc. § 472* (*see* Paragraph B, *above*) which provides for an amendment of pleading by the party of course if the conditions that it sets out are met. The apparent effect of these statutes taken together is that if the conditions of *Code Civ. Proc. § 472* are not met, an amended pleading must be filed pursuant to *Code Civ. Proc. § 473(a)(1)*. However, since *Code Civ. Proc. § 473(a)(1)* does not give the party a right to amend a pleading, but rather gives the court the power to permit such an amendment in its discretion, it appears that permission by the court is necessary to provide the statutory authorization to amend a pleading when *Code Civ. Proc. § 472* does not apply.

Loser v. E.R. Bacon Co. *(1962) 201 Cal. App. 2d 387, 20 Cal. Rptr. 221* , was an action for personal injuries sustained in an industrial workplace. Plaintiff sued defendants on the theory that defendants had supplied plaintiff's employer with a defective machine, thereby causing plaintiff's injuries. After plaintiff had filed one original and one amended complaint and defendants had answered, plaintiff filed a second amended complaint stating an additional cause of action based on breach of warranty. Plaintiff had sought no prior permission to file the second amended complaint. The trial court struck the second amended complaint without prejudice to defendants' existing rights to file another amended complaint if permission to do so were granted after proper notice.

The court of appeal upheld the trial court's striking of the complaint. The court noted that because plaintiff filed the amendment after defendants had filed the answer, the conditions of *Code Civ. Proc. § 472* for filing an amended complaint of course had not been met [*see discussion under § 160.33[3][c]*] and so applied *Code Civ. Proc. § 473* (*201 Cal. App. 2d 387, 389-390)* . The court held that under *Code Civ. Proc. § 473* amendments prior to trial ordinarily must be sought by noticed motion for leave to amend, which should be supported by appropriate affidavits explaining the purpose and need for the amendment and the reason for failure to raise the issues earlier. The court further held that the nature of the proposed amendment should be indicated by presenting the amendment itself to the court in the noticed motion (*201 Cal. App. 2d 387, 390)* . The court noted that the procedures for obtaining permission to file an amended complaint under *Code Civ. Proc. § 473* had not been followed in the case before it and stated that the court may by virtue of its inherent power to prevent abuse of its processes strike an amended complaint that has been filed in disregard of established procedural process (*201 Cal. App. 2d 387, 390)* .

The court held that the court could strike the pleading even though the motion to strike for failure to seek permission was brought by only one of the defendants. The court further held that the action of the trial court was not an abuse of discretion because the order to strike was made without prejudice to the rights of plaintiff to file another amended complaint if permission to do so were to be granted after proper notice (*201 Cal. App. 2d 387, 390)* . The court also rejected plaintiff's argument that prejudice must be shown before a court may strike a complaint (*201 Cal. App. 2d 387, 389)* .

This case was decided before the enactment of *Code Civ. Proc. § 436(b)*, which provides that a court may strike pleading matter that was not drawn or filed in conformity with the laws of this state or an order of the court. Since an amended pleading filed without permission when permission was required is not filed in conformity with Code Civ. Proc. *§ 473(a), Code Civ. Proc.* § 436(b) seems to provide explicit statutory authorization for the kind of strike order upheld by the court in this case. Counsel should therefore cite *Code Civ. Proc. §§ 436(b)* and *473(a)* along with this case.

[c] Permission Required After Responsive Pleading Is Filed or Time for Filing Response Passes

Tingley v. Times Mirror *(1907) 151 Cal. 1, 89 P. 1097* , involved an action for libel. Defendant filed an answer after a demurrer to the complaint had been overruled. Plaintiff filed no demurrer to the answer. On the day before the trial was to commence, defendant served on the plaintiff and filed an amended answer, which introduced additional pleas. At commencement of the trial, plaintiff moved to strike the amended complaint on the ground that it had been filed without leave of court or authority of law, and had changed issues raised in the action by introducing the new pleas. The trial court granted the motion. After commencement of trial, defendant moved the court for permission to file the amended answer that had previously been stricken and the trial court denied the motion. Defendant then eliminated certain pleas that had been added to the amended answer and filed the answer thus amended with the consent of plaintiff. Trial resulted in judgment for plaintiff. Defendant appealed, arguing, inter alia, that the court had erred in striking its amended answer and refusing permission to file the amended answer until the defendant had dropped certain pleas from it.

On appeal, the defendant argued that under *Code Civ. Proc. § 472*, it had an absolute right to amend its answer at any time before trial, since the plaintiff had not closed the time within which a pleading may be amended by filing a demurrer to the answer (*151 Cal. 1, 9)* . Plaintiff argued that *Code Civ. Proc. § 472* conferred a right only on the plaintiff to amend a complaint and did not extend to amendment of the answer (*151 Cal. 1, 9)* . The Supreme Court upheld the decision of the trial court to strike the amended answer, but did not accept either of the proffered interpretations of *Code Civ. Proc. § 472*. Rather, the Court held that under *Code Civ. Proc. § 472*, the right of a plaintiff to amend his or her complaint as a matter of course is extended only up to the time when defendant's answer is filed or, if defendant demurs, only while the issue of law raised by the demurrer is undetermined. Thus, the Court stated that plaintiff's right to amend under *Code Civ. Proc. § 472* is gone if defendant answers without demurring or if defendant's demurrer is overruled (*151 Cal. 1, 10-11)* . As to amendments by defendant, the Court held that under *Code Civ. Proc. § 472*, if plaintiff demurs to the answer, the right to amend can be exercised only during the time when the issues raised by the demurrer are undetermined. If plaintiff does not demur, the Court held that defendant's right to amend extends only up to the end of the time within which the demurrer might have been interposed (*151 Cal. 1, 11)* .

In supporting its conclusion, the Court stated that the obvious purpose of *Code Civ. Proc. § 472* is to aid and further the right of all parties to a litigation to amend all pleadings with a view of presenting for trial the real merits, assertive and defensive, of the controversy (*151 Cal. 1, 9)* . Thus, the Court stated that it would be unjust to read that statute in such a way as to confer a right to amend on either party that is not conferred on the other, or to work a hardship on either party, or to interfere with the progress of a trial after the issues of fact have been made. The Court held that therefore, while the right to amend is granted to both parties, it is limited to the time period within which either party may exercise it (*151 Cal. 1, 9-10)* .

Asia Investment Co. v. Borowski *(1982) 133 Cal. App. 3d 832, 184 Cal. Rptr. 317* , involved an action for malicious prosecution and interference with contract based on a prior action filed by the present defendants that had been dismissed for laches. This action was ultimately consolidated with other actions in a complex series of litigations. Defendants answered the malicious prosecution aspect of the action and subsequently moved for summary judgment, on the ground that dismissal of the prior action because of laches did not constitute a termination favorable to the present plaintiffs in the sense in which such a favorable termination is required in order to prosecute a malicious prosecution action. Plaintiff opposed the summary judgment motion and moved, inter alia, for leave to amend its complaint. The trial court granted defendants' summary judgment motion, and denied plaintiff's request for leave to amend. Plaintiff appealed, arguing, inter alia, that it should have been granted leave to amend since it had a right to amend its complaint as a matter of course, pursuant to *Code Civ. Proc. § 472*.

The court of appeal upheld the trial court's decision. With respect to the plaintiff's argument that it had a right to amend its complaint as a matter of course, the court stated the rule that the right of a plaintiff to amend his or her complaint under *Code Civ. Proc. § 472* is extended only up to the time that the defendant's answer is filed, and that once the answer is filed, plaintiff's right to amend as a matter of course is gone. In the case before it, the court noted that defendants had answered some time before plaintiff had filed its motion for leave to amend (*133 Cal. App. 3d 832, 840)* .

[d] Amendment Adding New Parties Always Requires Permission

In ***Taliaferro v. Davis*** *(1963) 220 Cal. App. 2d 793, 34 Cal. Rptr. 120* , a demurrer to plaintiff's original complaint was sustained and motions to strike several portions of the complaint were granted. Plaintiff was allowed to amend his complaint and subsequently filed an amended complaint bringing in an additional defendant. The new defendant thus brought in moved to have the amended complaint stricken insofar as it attempted to add her as a defendant. The trial court granted the motion to strike on the grounds that the complaint was filed without leave of the court. Plaintiff appealed this ruling.

The court of appeal upheld the trial court's striking of the amended complaint. The court held that the right to amend as a matter of course that is set out in *Code Civ. Proc. § 472* does not permit the bringing in of new parties (*220 Cal. App. 2d 793, 795)* . Rather, the court stated, the bringing in of new parties is dealt with by *Code Civ. Proc. § 473*, which requires express permission of the court (*220 Cal. App. 2d 793, 795)* .

[e] Permission to Amend Does Not Authorize Addition of New Parties

The facts and procedural background to ***Taliaferro v. Davis*** *(1963) 220 Cal. App. 2d 793, 34 Cal. Rptr. 120* , are *discussed under § 160.33[3][d]*. In that case, the demurrer of one of the defendants to the original complaint was sustained and the same defendant's motion to strike portions of the complaint was granted, the plaintiff being allowed to amend his complaint. An amended complaint was filed bringing in the present respondent as defendant. This defendant moved to strike the amended complaint insofar as it attempted to add her as a party defendant on the ground that it was filed without authority from the court. The trial court granted the motion and plaintiff appealed.

The court of appeal upheld the trial court's order granting the motion to strike. Plaintiff had argued that the permission to amend the original complaint, which the trial court had given on sustaining the originally named defendant's demurrer to the original complaint, authorized plaintiff to bring in an additional party in his amended complaint. The court labeled this argument a non sequitur. The court stated that the permission to amend granted by the court pertained only to the cause of action against the originally named defendant (*220 Cal. App. 2d 793, 794)* . In conclusion, the court stated that leave of court specifically to add new parties was required under *Code Civ. Proc. § 473* before new parties could properly be added (*220 Cal. App. 2d 793, 795)* .

Phoenix of Hartford Ins. Companies v. Colony Kitchens *(1976) 57 Cal. App. 3d 140, 128 Cal. Rptr. 893* , involved a personal injury action in which the original plaintiff alleged that he had sustained damages as a result of an automobile accident caused by negligence of defendant's servant. Defendant answered the original complaint and moved for judgment on the pleadings, asserting that the original complaint showed on its face that the action was barred by the statute of limitations. The trial court sustained the motion for judgment on the pleadings with leave to plaintiff to amend the complaint. Subsequently, an amended complaint was filed adding the original plaintiff's insurer, who had made payments to the original plaintiff under an uninsured motorist policy provision, as a party plaintiff suing by and through its assured, the original plaintiff. In the amended complaint the insurer sought to recover the money it had paid to the original defendant under the uninsured motorist's provision pursuant to *Ins. Code § 11580.2* (uninsured motorist insurer as subrogated to rights of insured against persons causing damage). The trial court entered judgment in favor of the plaintiffs, and defendant appealed.

The court of appeal reversed the trial court's decision, holding inter alia, that the insurer's action had been improperly joined to that of the original plaintiff. The court stated that the insured's cause of action as stated in the amended complaint was distinct from the original plaintiff's cause of action in that the insurer was seeking to enforce statutorily conferred subrogation rights, while the original plaintiff had been suing in common law tort. The court stated further that if the insurer's action could have been joined to that of the original plaintiff, the joinder might have been effected only on permission by the court to file an amendment pursuant to *Code Civ. Proc. § 473*, or to intervene pursuant to *Code Civ. Proc. § 387* (*57 Cal. App. 3d 140, 146)* . The court found such permission to be lacking, holding that the trial court's order that granted permission to amend the original complaint did not authorize an amendment to add a new cause of action on behalf of a new party (*57 Cal. App. 3d 140, 147)* .

The court stated that this was not a case in which a plaintiff in an original complaint amends the complaint so as to prosecute the action in a representative capacity, since the amendment did not state a cause of action under *Ins. Code § 11580.2* on behalf of the original defendant in any capacity, and *Ins. Code § 11580.2* did not authorize the original plaintiff to bring a suit under its terms on the insurer's behalf (*57 Cal. App. 3d 140, 147)* .

[4] Additional Authorities

[a] Permission Required After Responsive Pleading Is Filed or Time for Filing Response Passes

The facts and procedural background of *Loser v. E.R. Bacon Co. (1962) 201 Cal. App. 2d 387, 20 Cal. Rptr. 221* , are set out under § 160.33[3][b]. In that case, the court held that the right of a plaintiff to amend his or her complaint under the provisions of *Code Civ. Proc. § 472* (one timely amendment to pleading allowed as a matter of course) is extended only up to the time when the answer is filed (*201 Cal. App. 2d 387, 389)* . The court held that once the answer is filed, the plaintiff's right to amend as a matter of course is gone (*201 Cal. App. 2d 387, 389)* . Thus, the court applied *Code Civ. Proc. § 473* to the amended complaint filed by the plaintiff (*201 Cal. App. 2d 387, 389-390* ; *see discussion under § 160.33[3][b]*).

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
CHAPTER 160 MOTIONS TO STRIKE: PLEADINGS
PART II. FORMS
A. Supporting Motion to Strike

16-160 California Points & Authorities § 160.34

§ 160.34 Supporting Motion to Strike Whole or Part of Pleading [Code Civ. Proc. § 435]--Pleading Matter Not Filed or Drawn in Conformity With Law [Code Civ. Proc. § 436(b)]--Pleading Filed by Stranger to Action [Code Civ. Proc. § 387]

[1] FORM

[*This form should be used in combination with a general form of memorandum supporting a motion to strike (see § 160.30), and with a memorandum setting out the point that pleading matter may be stricken for failure to conform to state law (see § 160.31).*]

THE _____ [*specify pleading, e.g.,* COMPLAINT] FILED BY _____ [*name*] SHOULD BE STRICKEN BECAUSE HE/SHE/IT IS NOT A PARTY TO THIS ACTION AND HAS NOT BEEN GRANTED LEAVE TO INTERVENE.

A. Leave of Court Required for Intervention by Nonparty. An intervention takes place when a third person is permitted to become a party to an action between other persons and is made by complaint filed by leave of court (*Code Civ. Proc. § 387*; *see Mercantile T. Co. v. Stockton etc. Co. (1919) 44 Cal. App. 558, 186 P. 1049* (case decided under former Code Civ. Proc. § 24; *now see Code Civ. Proc. § 387*).

B. Pleading Filed Without Permission by Stranger to Action May Be Stricken. A pleading by means of which a person not named as a party defendant seeks to interject himself or herself into a case without leave of the court may be stricken (*Milstein v. Turner (1951) 107 Cal. App. 2d 184, 185, 236 P.2d 606*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to strike a pleading filed by a person who was not named as a party to the action and who has not obtained leave of the court to intervene in the action. This form sets out the points that leave of court is required for a nonparty to intervene in an action, and that a pleading filed by a nonparty without such

leave may be stricken. The form should be used in combination with a general form [*see § 160.30*] and a form setting out the point that pleading matter that was not drawn or filed in conformity with the laws of this state may be stricken [*see § 160.31*].

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

[b] Use of Pre-1982 Case Law

The cases cited in this form were decided before the 1982 revision of the statutory scheme governing motions to strike. However, since none of the rules set out in these cases are inconsistent with the current statutory provisions, it appears that they are still good law. For discussion of the effect of the 1982 reorganization on prior case law, see *§ 160.03*.

[c] Related Memoranda

For forms relating to intervention by third parties generally, see Ch. 124, *Intervention* .

[3] Discussion of Authorities

[a] Leave of Court Required for Intervention by Nonparty

Mercantile T. Co. v. Stockton etc. Co. *(1919) 44 Cal. App. 558, 186 P. 1049* , involved an action to foreclose on a mortgage. The complaint named a railroad company and several fictitious persons under the names of First Doe, Second Doe, etc. as defendants. The complaint alleged that the true names of the fictitious defendants were unknown to plaintiff and prayed that when their names were ascertained the complaint might be amended by inserting their true names in place of the fictitious names. Before the case came to trial, a person who had not been named in the complaint and had not been served with process filed a demurrer to the complaint, identifying himself as a stockholder in the named defendant corporation and alleging that he was in fact the unknown First Doe defendant named in the complaint. Plaintiff moved to strike the demurrer, and the trial court upheld the motion. The person who had filed the demurrer appealed.

The court of appeal upheld the striking of the demurrer. In support of its holding, the court, stated inter alia, that if the person who had filed the demurrer had in fact had an interest that he felt it was his duty to protect by becoming a party to the suit, he could have asked leave of the court to file a petition in intervention pursuant to former Code Civ. Proc. § 24 [*now see Code Civ. Proc. § 387*]. Citing extensively from an earlier case on the same point, the court stated that former Code Civ. Proc. § 24 [*now see Code Civ. Proc. § 387*] clearly provides that the court and not the intervener determines whether the intervener may come into the case. The court further stated that in order to come into a case, an intervener must obtain leave of the court to make a showing by complaint and must serve the complaint on the other parties, who may answer or demur (*44 Cal. App 558, 563)* .

[b] Pleading Filed Without Permission by Stranger to Action May Be Stricken

Milstein v. Turner *(1951) 107 Cal. App. 2d 184, 236 P.2d 606* , involved an action for ejectment. An action had originally been brought by plaintiff against one Turner Sr. to quiet title to a certain plot of land. The decree in that action adjudged that title to the land was vested absolutely in plaintiff with a right to immediate possession. Turner Sr. subsequently brought an action against plaintiff charging that any title that plaintiff had in the land was based on judgments obtained through fraud. This action was still undetermined at the time of the present action. The present action for possession of the premises and damages was brought by plaintiff against one Turner Jr., son of Turner Sr., and his wife, who were in actual possession of the land. Turner Jr. and his wife answered, alleging that since the action for fraud brought by Turner Sr. was still undetermined, plaintiff's title to the land was unclear. After the case had been tried and submitted to the court for decision, Turner Sr., who had not been named a party defendant in the ejectment

action, filed an answer, without leave of court and without notice to plaintiff. Plaintiff moved to strike this answer, and the trial court granted the motion. Turner Sr. thereupon appealed.

The court of appeal upheld the trial court's striking of the answer without referring to the facts on which Turner Sr. rested his appeal. The court stated that it was enough to say that, even if Turner Sr. had a most meritorious case against plaintiff, he was not entitled to inject that case into a case instituted by the plaintiff against other parties by the simple device of filing an answer to it. The court therefore concluded that the trial court's order striking Turner Sr.'s answer was correct (*107 Cal. App. 2d 184, 187)* .

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16-160 California Points & Authorities § 160.35

§ 160.35 Supporting Motion to Strike Whole or Part of Pleading [Code Civ. Proc. § 435]--Pleading Matter Not Filed or Drawn in Conformity With Law [Code Civ. Proc. § 436(b)]--Untimely Responsive Pleading [Code Civ. Proc. §§ 412.20(a)(3), 430.40, 432.10, 438(i)(1), 472a(b); Cal. Rules of Ct., Rule 3.1320(g)]

[1] FORM

[*This form should be used in combination with a general form of memorandum supporting a motion to strike (see § 160.30) and a form of memorandum setting out the point that pleading matter may be stricken for failure to conform to California law (see § 160.31).*]

THE _____ [*specify responsive pleading, e.g.,* ANSWER *or* DEMURRER] SHOULD BE STRICKEN BECAUSE IT WAS NOT FILED WITHIN THE TIME FOR FILING SUCH PLEADINGS.

A. An Untimely Responsive Pleading Filed Before Entry of Default May Be Stricken. Although the filing of an untimely responsive pleading before entry of default will prevent the default from being entered, the court may in its sound discretion grant a motion to strike such a pleading (*Buck v. Morrossis (1952) 114 Cal. App. 2d 461, 464-465, 250 P.2d 270*).

[*Optional*] **B. Time to Respond to Complaint Is 30 Days.** The summons served on a defendant must contain a direction that the defendant file or cause to be entered on the docket a pleading in response to the complaint within 30 days of service of the complaint (*Code Civ. Proc. § 412.20(a)(3)*; *see Code Civ. Proc. § 430.40(a)* (time to demur)).

[*Optional*] **C. Time to Respond to Cross Complaint Is 30 Days.** A party served with a cross complaint may within 30 days after service move, demur, or otherwise plead to the cross complaint in the same manner as to an original complaint (*Code Civ. Proc. § 432.10*).

[*Optional*] **D. Time to Answer or Amend After Demurrer.** If a demurrer is overruled, leave to answer within 10 days is deemed granted, unless the court orders otherwise on terms as may seem just (*Cal. Rules of Ct., Rule 3.1320(g)*; *see Code Civ. Proc. § 472a(b)* (terms of leave to answer after demurrer as set by court)).

[*Optional*] **E. Time to Demur to Answer Is 10 Days.** A party who has filed a complaint or cross complaint may, within 10 days after service of the answer to his or her pleading, demur to the answer (*Code Civ. Proc. § 430.40(b)*).

[*Optional*] **F. Failure to Timely File an Amended Pleading After Losing Motion for Judgment on the Pleadings.** The party against whom a *Code of Civil Procedure Section 438* motion for judgment on the pleadings is granted with leave to amend has 30 days to file an amended pleading (*Code Civ. Proc. § 438(h)(2)*). If the party fails to file an amended pleading within that time, or otherwise violates the court order granting the motion, the party that brought the motion for judgment on the pleadings must respond by bringing a motion to strike the amended pleading and for entry of judgment in its favor (*Code Civ. Proc. § 438 (i)(1)(A)*). The provision of *Code of Civil Procedure Section 435(b)(1),* limiting the time for motions to strike to the time allowed for responding to a pleading, does not apply when the motion to strike is being made as part of a motion pursuant to *Code of Civil Procedure Section 438(i)(1)(A)* (*Code Civ. Proc. § 435(b)(1), (e)*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to strike when the defendant has filed his or her pleading in response to the complaint or other pleading after the time allowed for such response, but before default was entered. This form sets out the point that late-filed responsive pleadings are subject to be stricken at the discretion of the court, and sets out the statutory response times for various responsive pleadings. The form should be used in combination with a general form, setting out the statutory basis for making a motion to strike [*see § 160.30*] and a form setting out the point that pleading matter that was not drawn or filed in conformity with the laws of this state may be stricken [*see § 160.31*].

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. In particular, counsel should cite the statute setting out the response time for the responsive pleading and show that the time had run before the responsive pleading was filed by calling the court's attention to the appropriate filing dates. Counsel should insert additional argument showing why the court, in its discretion, should strike the untimely pleading.

[b] Use of Pre-1982 Case Law

The cases cited in this form were decided before the 1982 revision of the statutory scheme governing motions to strike. However, since none of the rules set out in these cases are inconsistent with the current statutory provisions, it appears that they are still good law. For discussion of the effect of the 1982 reorganization on prior case law, see *§ 160.03*.

[c] Necessity of Moving to Strike Before Default Entered

A responsive pleading does not become a nullity because it was untimely filed, and it will serve to preclude the taking of default unless it is stricken. Thus, when the defendant files a responsive pleading late but before default has been entered, the plaintiff must move to strike the pleading and the motion must be granted before the plaintiff can proceed to obtain entry of default [*Goddard v. Pollock (1974) 37 Cal. App. 3d 137, 141-142, 112 Cal. Rptr. 215* (*see* discussion under § 160.35[4][a])].

It should be noted that in *Goddard,* plaintiffs had filed a motion to strike defendants' untimely responsive pleading after the trial court had erroneously directed entry of the default despite the fact that the pleading was on file before the default had been entered. The court of appeal did not consider this motion to strike in directing that the default be vacated, but stated that the case would have created no problem if the court had had an opportunity to consider the plaintiffs' motion to strike before entry of default had been directed. Thus, it is particularly important that counsel move to strike before attempting to obtain entry of default.

[d] No Necessity of Moving to Strike in Case of Untimely Amended Complaint

The proper procedure for the defendant to follow when a plaintiff untimely files an amended complaint after a demurrer has been sustained is to move to strike the complaint. After the complaint is stricken, the defendant may then move for dismissal under *Code Civ. Proc. § 581(f)(2)* [*Gitmed v. General Motors Corp. (1994) 26 Cal. App. 4th 824, 828, 31 Cal. Rptr. 2d 625]* .

[e] Opposing Memoranda

In an appropriate case, the points and authorities *set out in § 160.61* may be submitted in opposition to a motion to strike supported by this memorandum.

[3] Discussion of Authorities

[a] An Untimely Responsive Pleading Filed Before Entry of Default May Be Stricken

Buck v. Morrossis *(1952) 114 Cal. App. 2d 461, 250 P.2d 270* , involved an action for unlawful detainer and damages brought by plaintiffs as owners and lessors of certain business property against defendant as subtenant in possession of the property. The complaint alleged that defendant had refused to vacate the premises after the lease under which defendant had come into possession of the premises had expired, despite notice from plaintiffs that the lease would not be renewed after it expired. Defendant filed a general and special demurrer 14 days after he had been served with the complaint. Plaintiffs thereupon moved to strike the demurrer on the grounds that it was filed too late, and that it was sham and frivolous. The trial court granted the motion to strike without designating its reasons for so doing, and ordered that defendant's default be entered. The default judgment that was subsequently entered recited inter alia that the demurrer had been stricken for untimeliness. Defendant appealed.

The court of appeal upheld the striking of the demurrer. In framing its holding, the court assumed without deciding that the defendant can raise the question of whether the court had power to strike its demurrer after he had defaulted (*114 Cal. App. 2d 461, 464)* . The court also proceeded from the premise that the demurrer was clearly 11 days late, since the defendant in an unlawful detainer action must plead within three days after service of summons and the defendant in the present case had not filed its demurrer until 14 days after service of summons, and since defendant had conceded that the demurrer was not timely (*114 Cal. App. 2d 461, 464)* .

Preliminarily, the court stated that it is probably the law that a default cannot properly be entered if there is already a pleading on file before the entry of default is made, even if that pleading was untimely (*114 Cal. App. 2d 461, 464)* . With respect to the propriety of the court's order to strike the demurrer, the court restated at length the rule and discussion set out on the point by the court in *Cuddahy v. Gragg (1920) 46 Cal. App. 578, 580-581, 189 P. 721* . Citing *Cuddahy,* the court stated that it is proper practice for the plaintiff to move to strike a pleading that was filed late, but before entry of default, and that the trial court may very properly grant such a motion in the exercise of a sound discretion. The court further restated from *Cuddahy* the thesis that the plaintiff has no absolute right to have a pleading stricken from the files merely because it was not filed in time; and that on the other hand the defendant has no right to have his or her belated pleading remain in the files, since a defendant cannot as of right after the expiration of the time prescribed by statute (*114 Cal. App. 2d 461, 465)* . The court further stated that it would be a logical absurdity to hold that a defendant in an unlawful detainer proceeding, which under the law is entitled to priority and in which speedy determination is essential, could stall proceedings and engage in dilatory tactics by the simple device of filing a late demurrer (*114 Cal. App. 2d 461, 465)* .

The court dismissed defendant's argument that the court had no power to strike the demurrer as sham and frivolous, stating that it was because of its lateness and not because of its character as sham that the demurrer was stricken. Thus, the court noted that although the strike order itself had not stated a reason for striking the demurrer, the default

judgment had recited that the demurrer had been stricken on the grounds of untimeliness. The court stated furthermore that even if this judgment cannot be used to explain the order, the order standing alone would have to be upheld if it can be sustained on any of the grounds urged in the motion (*114 Cal. App. 2d 461, 465)* .

[4] Additional Authorities

[a] An Untimely Responsive Pleading Filed Before Entry of Default May Be Stricken

In *Goddard v. Pollock (1974) 37 Cal. App. 3d 137, 112 Cal. Rptr. 215* , plaintiffs alleged that they had purchased certain bonds from defendants that defendants had refused to redeem and on which defendants had refused to pay interest. After the time for a responsive pleading stated in the complaint had passed, defendants filed a motion to quash service. Plaintiffs' request to enter defendants' default was received after the motion to quash had been filed. The trial court subsequently ordered defendants' default to be entered and denied a motion by defendants to vacate the default. After the trial court had directed the entry of default, plaintiffs filed a motion to strike defendants' motion to quash. Defendants appealed the trial court's order denying the motion to vacate the default.

The court of appeal overturned the trial court's order. The court held that the notice of motion to quash had been in the files at the time when the request for entry of default was received by the clerk and that the presence of this motion in the files was sufficient to preclude entry of the default (*37 Cal. App. 3d 137, 141-143)* . The court cited *Buck v. Morrossis (1952) 114 Cal. App. 2d 461, 464-465, 250 P.2d 270* , for the rule that the proper procedure in a case in which an untimely pleading has been filed is for the plaintiff to move to strike the defendant's untimely pleading and if the court grants such relief, thereafter to proceed to obtain the entry of default (*37 Cal. App. 3d 137, 141)* . The court further stated that the case would have created no problem if plaintiffs had filed their motion to strike the defendants' motion to quash service before the court had directed the clerk to enter the default. However, the court noted that the plaintiffs did not file their motion to strike until 12 days after the court had directed entry of the default, and made no further comment as to whether the motion should or should not have been granted (*37 Cal. App. 3d 137, 141, 142)* .

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A. Supporting Motion to Strike

16-160 California Points & Authorities § 160.36

§ 160.36 Supporting Motion to Strike Whole or Part of Pleading [Code Civ. Proc. § 435]--Pleading Matter Not Filed or Drawn in Conformity With Law [Code Civ. Proc. § 436(b)]--Unverified Answer to Verified Complaint [Code Civ. Proc. §§ 431.30(d), 446]

[1] FORM

[*This form should be used in combination with a general form of memorandum supporting a motion to strike (see § 160.30), and a memorandum setting out the point that pleading matter not drawn or filed in conformity with California law may be stricken (see § 160.31).*]

AN UNVERIFIED ANSWER TO A VERIFIED COMPLAINT IS SUBJECT TO BE STRICKEN.

A. Answer to Verified Complaint Must Be Verified. When the complaint is verified, the answer must be verified, unless the complaint is subject to *Code of Civil Procedure Sections 90-100*, governing economic litigation in limited civil cases (*Code Civ. Proc. §§ 92(b), 446*). In addition, subject to the same exception, the answer to a verified complaint, must deny allegations positively or according to the information and belief of the defendant (*Code Civ. Proc. § 431.30(d)*). [Even if the complaint is subject to *Code of Civil Procedure Sections 90-100*, if the cause of action is a claim assigned to a third party for collection, the answer must deny allegations positively or according to the information and belief of the defendant (*Code Civ. Proc. § 431.30(d)*)].

B. An Unverified Answer to a Verified Complaint Is Subject to Motion to Strike. When verification of the complaint requires the defendant to file an verified answer, the defendant's unverified answer constitutes an admission of all material allegation in the verified complaint, and either an order granting a motion to strike the answer or an order granting a motion for judgment on the pleadings may properly be made by the court (*see Code Civ. Proc. § 431.30(d)*; *see also DeCamp v. First Kensington Corp. (1978) 83 Cal. App. 3d 268, 282-283, 147 Cal. Rptr. 869*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to strike an unverified answer to a verified complaint. The form sets out the point that an unverified answer to a verified complaint may be stricken, unless the complaint is subject to *Code Civ. Proc. § 90 et seq.* (economic litigation in limited civil cases) [*Code Civ. Proc. §§ 92(b), 446*]. Verification of the complaint also precludes a general denial, unless the compliant is subject to *Code of Civil Procedure Sections 90-100*. However, even if the complaint is subject to Sections 90-100, if the cause of action is a claim assigned to a third party for collection, general denial is precluded [*Code Civ. Proc. § 431.30(d)*]. The optional phrase in brackets at the end of Paragraph A, is for use in the latter situation.

The form should be used in combination with a general form setting out the statutory basis for making a motion to strike [*see § 160.30*] and a form setting out the point that pleading matter that was not drawn or filed in conformity with the laws of this state may be stricken [*see § 160.31*].

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

[b] When Answer to Verified Complaint Must Be Verified

The general rule of verification of pleadings is that when the complaint is verified, the answer must be verified [*see Code Civ. Proc. § 446*]. However, an answer to a complaint or cross complaint filed pursuant to economic litigation procedures in limited civil cases need not be verified, even if the complaint or cross complaint is verified [*Code Civ. Proc. § 92(b)*]. All limited civil cases are subject to the economic litigation provisions of *Code Civ. Proc. § 90 et seq.* except actions in small claims court, unlawful detainer, forcible detainer, and forcible entry [*Code Civ. Proc. § 91(b)*].

If the complaint is not verified or if it is subject to the economic litigation procedures, a general denial is sufficient, but only puts in issue the material allegations of the complaint. If the complaint is verified, the denial of the allegations must be made positively or according to the information and belief of the defendant, unless the complaint is subject to the economic litigation procedures. Even if the verified complaint is subject to the economic litigation procedures, if the cause of action is a claim assigned to a third party for collection, the answer must be made positively or according to the information and belief of the defendant [*Code Civ. Proc. § 431.30(d)*].

[c] Validity of Pre-1985 Case Law

DeCamp v. First Kensington Corp. (1978) 83 Cal. App. 3d 268, 147 Cal. Rptr. 869 , which is cited in Paragraph B of this form, was decided before the 1985 amendments to *Code Civ. Proc. § 431.30*, operative January 1, 1986. In addition, the action was decided before the 1982 revision of the statutory scheme governing motions to strike. Because the rule set out in *Decamp* is not inconsistent with the current statutory provisions, it appears that it is still good law. For discussion of the effect of the 1982 reorganization on prior case law, see *§ 160.03*.

[d] Necessity of Raising Objection

If there is a defect in the verification of the defendant's answer, the plaintiff must move in timely fashion, either to strike the answer or for judgment for want of an answer. If the plaintiff goes to trial on the merits without objecting to the verification defect he or she will be deemed to have waived all objections on the point [*McCullough v. Clark (1871) 41 Cal. 298, 302* ; *Zavala v. Board of Trustees (1993) 16 Cal. App. 4th 1755, 1761, 20 Cal. Rptr. 2d 768* ; *Ware v. Stafford (1962) 206 Cal. App. 2d 232, 237, 24 Cal. Rptr. 153]* .

[e] Motion for Judgment on Pleadings as Alternative

Under *Code Civ. Proc. § 446*, the filing of an unverified answer to a verified complaint constitutes an admission of all of the allegations of the complaint, unless the complaint is subject to *Code Civ. Proc. § 90 et seq.* (economic litigation in limited civil cases) [*see Code Civ. Proc. §§ 92(b), 446*]. Thus, a motion for judgment on the pleadings on the grounds

that the answer does not state a defense may be used as an alternative procedure to a motion to strike the answer when the answer is unverified and not within any statutory exception to *Code Civ. Proc. § 446* [*see Code Civ. Proc. § 431.30(d)*; *see also Hearst v. Hart (1900) 128 Cal. 327, 328, 60 P. 846* ; *DeCamp v. First Kensington Corp. (1978) 83 Cal. App. 3d 268, 282, 283, 147 Cal. Rptr. 869* (decided prior to 1985 amendment to *Code Civ. Proc. § 431.30(d)*)].

[3] Discussion of Authorities

[a] An Unverified Answer to a Verified Complaint Is Subject to Be Stricken

DeCamp v. First Kensington Corp. *(1978) 83 Cal. App. 3d 268, 147 Cal. Rptr. 869* , was an action for fraud. After defendants' demurrer was overruled, defendants filed an unverified answer to the complaint containing only a general denial. A statement was included in the answer asserting that to require defendants to verify their answer would violate defendants' right to protection from self-incrimination under the *Fifth* and *Fourteenth Amendments to the United States Constitution*. Plaintiff thereupon filed a motion to strike the answer or, alternatively, for judgment on the pleadings on the ground that the answer failed to comply with former Code Civ. Proc. §§ 431.30(d) (denials to verified complaint as required to be made positively or according to information and belief) and 446 (answer to verified complaint as required to be verified) and therefore constituted an admission of the allegations of the complaint. After continuing hearing on the motion several times due to the continuing absence of the personal defendant and all officers of the corporate defendant from the state, the court granted plaintiff's motion to strike the unverified answer and entered defendants' default. Defendants appealed.

The court of appeal upheld the trial court's decision. The court cited *Hearst v. Hart (1900) 128 Cal. 327, 328, 60 P. 846* , for the rule that when the defendant's answer is not properly verified the plaintiff should move in the trial court either to strike out the answer or for judgment for want of an answer (*83 Cal. App. 3d 268, 283)* .

Defendants had argued that the trial court should have granted them leave to amend by verifying the answer after ordering the answer stricken, relying on a rule that a party who has sustained an adverse judgment on the pleadings is entitled to the same opportunity to amend his or her pleading that such party would have had after normal ruling on a demurrer. The court acknowledged that this argument would have merit if the court's order were a judgment on the pleadings based on substantive insufficiency of the allegations. However, the court stated that the basis of the court's ruling was not substantive insufficiency, but rather the fact that the unverified complaint constituted an admission of all of the material allegations of the complaint (*83 Cal. App. 3d 268, 282)* . In support of this holding, the court cited *Hearst, above,* to the effect that there is no substantive difference between a judgment rendered on default for want of an answer, as was done after the answer was stricken in the present case, and a judgment rendered on an answer that under the Code of Civil Procedure admits all of the allegations of the complaint (*83 Cal. App. 3d 268, 283)* . The court concluded that while, as noted above, either an order striking the answer or a judgment on the pleadings would have been appropriate under the circumstances, neither type of order was equivalent to sustaining a demurrer under the circumstances of the case (*83 Cal. App. 3d 268, 282)* .

The court did, however, hold that the personal defendant should have the opportunity to add a verification by way of amendment for the separate reason that because the law had not yet been clarified on the point when the defendant had filed his answer, the defendant had reasonably feared that a verified answer might be used against him in criminal proceedings (*83 Cal. App. 3d 268, 283)* . The court stated that the corporate defendant had no right to add a verification on this ground, since as a corporation it had no self-incrimination privilege of its own and it had never had standing to assert the personal defendant's self-incrimination privilege on its own behalf (*83 Cal. App. 3d 268, 280, 282)* .

[4] Additional Authorities

[a] An Unverified Answer to a Verified Complaint Is Subject to Motion to Strike

Hearst v. Hart (1900) 128 Cal. 327, 60 P. 846 , was a suit on a promissory note in which defendant responded to the complaint with an unverified answer containing a general denial. Plaintiff moved for and the trial court granted judgment on the pleadings, from which defendant appealed.

The Supreme Court affirmed the judgment of the trial court. The Court stated in response to the defendant's argument that the proper procedure for plaintiff would have been to move to strike the answer that either a motion to strike or a motion for judgment on the pleadings on the ground that the answer set up no defense would have been proper (*128 Cal. 327, 328)* .

In *Zavala v. Board of Trustees (1993) 16 Cal. App. 4th 1755, 20 Cal. Rptr. 2d 768* , a medical malpractice action, the defendant filed an unverified answer to the complaint, which had been verified by the plaintiff's attorney. When the defendant moved for nonsuit after the plaintiff had presented her case, the plaintiff moved for judgment on the pleadings based on defendant's failure to verify the answer. On appeal, the court held that the plaintiff had waived the objection by proceeding to trial. The court noted that the proper objection where a party fails to verify a pleading is a motion to strike (*16 Cal. App. 4th 1755, 1761)* .

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
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16-160 California Points & Authorities § 160.37

§ 160.37 Supporting Motion to Strike Whole or Part of Pleading [Code Civ. Proc. § 435]--Irremediable Failure to State Cause of Action [Code Civ. Proc. §§ 426, 431.10, 436]

[1] FORM

[*This form should be used in combination with a general form of memorandum supporting a motion to strike (see § 160.30). This form may also be used in combination with a form of memorandum setting out the point that improper pleading matter may be stricken (see § 160.42), a form of memorandum setting out the point that irrelevant matter may be stricken from a pleading (see § 160.41) and a form of memorandum setting out the point that pleading matter may be stricken for failure to conform to the laws of California (see § 160.31).*]

THE COMPLAINT SHOULD BE STRICKEN BECAUSE IT IS EVIDENTLY UNABLE TO STATE A CAUSE OF ACTION.

A. Complaint Must State Facts Constituting Cause of Action. A complaint or cross complaint must contain a statement of facts constituting a cause of action in ordinary and concise language (*Code Civ. Proc. § 425.10(a)*).

B. Demand for Relief Not Supported by Allegations May Be Stricken. A demand for judgment requesting relief not supported by the allegations of the complaint or cross complaint is an immaterial allegation and may be stricken as irrelevant matter (*Code Civ. Proc. § 431.10(b)(3)*; *see Code Civ. Proc. §§ 431.10(c), 436(a)*).

C. Allegations That Cannot Be Rendered Sufficient to State Cause of Action May Be Stricken. Allegations that do not state a cause of action may be stricken from a pleading if it appears that amendments could not have corrected the defects of any part of the pleading and the party who filed the challenged pleading is not prejudiced by the order to strike (*Wilson v. Sharp (1954) 42 Cal. 2d 675, 677, 268 P.2d 1062* ; *see Hill v. Wrather (1958) 158 Cal. App. 2d 818, 823, 323 P.2d 567* (decided under former Code Civ. Proc. § 453; *now see Code Civ. Proc. § 436(a)*)).

[2] Comments

[a] Use of Form

This form should be used when the opposing party's complaint or cross complaint fails to state a cause of action, and it is evident that the complaint or cross complaint would not be able to state a cause of action even if it were amended. The form should be combined with § 160.30, which sets out the basic statutory authority for making a motion to strike. This form may also be combined with § 160.41, which sets out the statutory basis for the court's power to strike immaterial allegations from a pleading as irrelevant matter, and § 160.31, which sets out the statutory basis for the court's authority to wholly or partially strike a pleading that was not drawn in conformity with law.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated.

[b] Basis of Authority for Striking

Most of the pre-1982 cases upholding the striking of pleading allegations that irremediably fail to state a cause of action simply uphold such orders to strike without discussing the authority therefore [*see, e.g., Wilson v. Sharp (1954) 42 Cal. 2d 675, 677, 268 P.2d 1062* (discussed in *§ 160.37[4*][a])].

Since *Code Civ. Proc. § 425.10(a)* requires that a complaint state a cause of action, counsel might also urge that a complaint or cross complaint that irremediably fails to state a cause of action should be stricken under *Code Civ. Proc. § 436(b)* as being not in conformity with the laws of California.

[c] Related Memoranda

For memoranda and opposing a demurrer which asserts that a complaint fails to state a cause of action, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* in this set.

[3] Discussion of Authorities

[a] Allegations Which Cannot Be Rendered Sufficient to State Cause of Action May Be Stricken

Wilson v. Sharp *(1954) 42 Cal. 2d 675, 268 P.2d 1062* , involved an action by a taxpayer purporting to be acting on behalf of the county to recover salary alleged to have been illegally paid to one of the defendants, to enjoin future payment of such salary, and to obtain judgment declaring the rights and duties of the defendants. The complaint alleged that the defendant who had received the salary had been appointed to his position through an invalid promotional examination. An amended complaint filed by the plaintiff, inter alia, purported to state a cause of action against the county counsel of the county that had employed the defendant official for failure to act to recover the salary paid to the official before the statute of limitations for such recovery ran. The trial court granted a motion to strike this cause of action. This order removed the only cause of action alleged against the county counsel, thus rendering the order appealable (*42 Cal. 2d 675, 677)* . The plaintiff appealed.

The court of appeal upheld the trial court's order. The plaintiff had argued that *Gov. Code § 26525* (illegal payments by Board of Supervisors) required the county counsel to take action to recover salary paid illegally by the county to county officials (*42 Cal. 2d 675, 677-678)* . The court held, however, that *Gov. Code § 26525* did not create a cause of action for private persons against a county counsel who, in exercising his or her discretion, failed to take action to recover salaries that were purportedly illegally paid to county officials (*42 Cal. 2d 675, 678-679)* . The court held that it followed from this that the challenged allegations of the amended complaint failed to state a cause of action, and that the plaintiff was therefore not prejudiced by the order striking the allegation (*42 Cal. 2d 675, 679)* .

The court did not specify what it meant in holding that the plaintiff was not prejudiced by the order to strike the challenged allegations. However, at page 677, the court cited a series of cases in support of its holding in which the court had found the challenged pleading matter to have not only failed to state a cause of action as written, but to be

incapable of stating a cause of action even if amended [*see Barr Lbr. Co. v. Shaffer (1951) 108 Cal. App. 2d 14, 23, 238 P.2d 99]* .

The court also held that the objection that a complaint does not state a cause of action is not waived by a failure to demur, but may be raised at any time (*42 Cal. 2d 675, 677)* .

Hill v. Wrather *(1958) 158 Cal. App. 2d 818, 323 P.2d 567* , was an action on a promissory note arising out of a transaction involving transfer of interest in a television station. Defendants filed a cross complaint and a first amended answer alleging fraud on the part of plaintiff. The factual basis of defendants' fraud allegation was that plaintiff and one Alvarez, who held interest in the television station with plaintiff, had misrepresented the nature of their relationship, causing the defendants to believe that they were dealing at arms length with each other, when they were in fact either married or living as husband and wife. Defendants alleged that they had relied on their belief that plaintiff and Alvarez were dealing with each other at arms length in agreeing to purchase the plaintiff's interest in the television station and convey a portion of their interest in the station to Alvarez in return for her services in managing the station. The trial court granted a motion to strike the cross complaint and those portions of the first amended answer that set out the fraud allegations, and placed plaintiff's demurrer to the cross complaint off calendar. Judgment for plaintiff followed, and defendants appealed.

The court of appeal upheld the trial court's order to strike. The court cited language of former Code Civ. Proc. § 453 providing that irrelevant and redundant material may be stricken from a pleading as authority for striking the material in the present case [*now see Code Civ. Proc. § 436(a)* (irrelevant material as subject to be stricken)] (*158 Cal. App. 2d 818, 823)* . However, the court acknowledged that the rule that irrelevant and redundant material may be stricken from a pleading was qualified by the rule that a motion to strike cannot be made to serve the purposes of a special demurrer, and that when a motion to strike is so broad as to reach matters that are relevant it should be denied in its entirety. In this case in particular, the court noted that since the entire cross complaint was stricken and the demurrer to it was placed off calendar without ruling, the defendants were deprived of the right to amend if the pleading was faulty in any particular way that could have been corrected by amendment. Thus, the court indicated that the basic issues were whether the cross complaint stated a cause of action, and whether under the facts alleged an amendment might correct any defects in the pleading (*158 Cal. App. 2d 818, 823)* .

Applying the above-stated reasoning to the facts, the court stated that there was no allegation or suggestion that the concealed relationship caused the value of the stock purchased to be less than it would otherwise have been, or that Alvarez failed to carry out the services that she was expected to perform in managing the station (*158 Cal. App. 2d 818, 824-825)* . The court held that measured against the rules governing pleading of fraud, the cross complaint failed to state a cause of action in that its allegations failed to establish that the defendants had suffered any detriment as a result of the claimed fraud, and that it further appeared from the facts pleaded that the amendment could not serve to correct this defect (*158 Cal. App. 2d 818, 823)* .

[4] Additional Authorities

[a] Allegations That Cannot Be Rendered Sufficient to State Cause of Action May Be Stricken

In *Lodi v. Lodi (1985) 173 Cal. App. 3d 628, 219 Cal. Rptr. 116* , plaintiff filed a complaint against himself, in which he alleged that defendant was the beneficiary of a "charitable trust," the estate of which was to revert to plaintiff on notice. Plaintiff further alleged that he had given defendant written notice of termination of the trust, but defendant refused to relinquish control of the estate. Plaintiff sought to terminate all claims to his estate by defendant or any person claiming under him. Plaintiff served himself, as defendant, and mailed a complimentary copy of the complaint to the Internal Revenue Service. Defendant failed to file a timely answer, and plaintiff requested entry of a default judgment. The trial court denied this request and dismissed the complaint. Plaintiff appealed the dismissal, and the court of appeal affirmed (*173 Cal. App. 3d 628, 630, 632)* . The court held that the trial court was empowered to strike or

dismiss the complaint sua sponte under *Code Civ. Proc. § 436(b)*, because the complaint failed to state a cause of action under *Code Civ. Proc. § 425.10* and was therefore not drawn in conformity with the laws of the state. The court noted that there was no apparent prospect of saving the pleading by amendment (*173 Cal. App. 3d 628, 630-631)* .

Garza v. Kantor (1976) 54 Cal. App. 3d 1025, 127 Cal. Rptr. 164 , involved an action by several minor children for the loss of consortium of their father. The trial court entered a minute order striking plaintiffs' allegations as to loss of parental consortium from the first amended complaint, and plaintiffs appealed. The court of appeal upheld the order to strike for the stated reason that there was no cause of action for loss of parental consortium under California law, without comment on the propriety of striking pleading matter that thus fails to state a cause of action (*54 Cal. App. 3d 1025, 1027-1028)* .

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[Reserved]

§§ 160.38[Reserved]

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16-160 California Points & Authorities § 160.41

§ 160.41 Supporting Motion to Strike Whole or Part of Pleading [Code Civ. Proc. § 435]--Irrelevant Matter in Pleading [Code Civ. Proc. § 436(a)]

[1] FORM

[*This form should be used in combination with a general form of memorandum supporting a motion to strike, which sets out the statutory basis for making such a motion (see § 160.30).*]

THE COURT SHOULD STRIKE THE MATTER SPECIFIED IN THE NOTICE OF MOTION FROM THE _____ [*specify pleading, e.g.,* COMPLAINT] BECAUSE THAT MATTER IS IRRELEVANT TO THIS ACTION.

A. Irrelevant Matter May Be Stricken From Any Pleading. The court may on timely motion to strike by a party, or at any time in its discretion, strike from any pleading any irrelevant matter (*Code Civ. Proc. § 436(a)*).

[*Optional*] **B. Immaterial Allegation Is Subject to Be Stricken.** Immaterial allegation as defined by statute means irrelevant matter that is subject to be stricken (*Code Civ. Proc. §§ 431.10(c), 436(a)*).

[*Optional*] **C. Nonessential Allegation Is Subject to Be Stricken.** An allegation that is not essential to the statement of a claim or defense is an immaterial allegation that is subject to be stricken as irrelevant matter (*Code Civ. Proc. §§ 431.10(b)(1), (c), 436(a)*).

[*Optional*] **D. Allegation of Probative Facts Is Subject to Be Stricken.** Allegations of probative facts in a pleading are surplusage and may be stricken (*Dabney v. Key (1922) 57 Cal. App. 762, 763, 207 P. 921* ; *see Code Civ. Proc. §§ 431.10(b)(1), (c), 436(a)*).

[*Optional*] **E. Allegation Not Related to Claim or Defense Is Subject to Be Stricken.** An allegation that is not pertinent to or supported by an otherwise sufficient claim or defense is an immaterial allegation that is subject to be stricken as an irrelevant matter (*Code Civ. Proc. §§ 431.10(b)(2), (c), 436(a)*).

[*Optional*] **F. Unsupported Demand for Judgment Is Subject to Be Stricken.** A demand for judgment requesting relief not sup- ported by the allegations of the complaint or cross complaint is an immaterial allegation that is subject to be stricken as irrelevant matter (*Code Civ. Proc. §§ 431.10(b)(3), (c), 436(a)*).

[2] Comments

[a] Use of Form

This form of memorandum may be used together with a general form of memorandum, supporting a motion to strike when counsel wishes to move to strike irrelevant matter from a pleading. The foregoing sets out the basis for the court's power to strike irrelevant matter from any pleading, the point that an immaterial allegation constitutes irrelevant matter for purposes of a motion to strike, and the statutory definition of an immaterial allegation. Paragraph A may be cited in all cases in which matter is sought to be stricken from a pleading as irrelevant. If the matter to be stricken falls within one or more of the statutory definitions of an immaterial allegation, optional Paragraph B and any of the optional paragraphs following it that apply to the challenged pleading matter should also be cited. The foregoing also sets out the point that allegations of probative facts may be stricken as surplusage.

The foregoing should be used in combination with a general form setting out the statutory basis for making a motion to strike [*see § 160.30*].

Counsel should insert facts and arguments into this form and any form it is used in combination with, showing how the particular matter to be stricken is irrelevant to the questions at issue in the case, or how the matter to be stricken constitutes an immaterial allegation.

[b] Use of Pre-1982 Case Law

The current statutory scheme governing motions to strike [*Code Civ. Proc. §§ 431.10(b), (c), 435-437*] was enacted in 1982. However, prior to 1982, a number of cases had upheld the striking of irrelevant matter from pleadings. The statutory scheme has added to this body of case law the explicit statutory authorization to strike irrelevant matter [*see Code Civ. Proc. § 436(a)*] and an explicit definition of an immaterial allegation that may be stricken as irrelevant matter [*see Code Civ. Proc. §§ 431.10(b)* (definition of immaterial allegation), *431.10(c)* (immaterial allegation as irrelevant matter), 436(a) (irrelevant matter as subject to motion to strike)]. However, these provisions do not appear to restrict the types of pleading matter that may be stricken as irrelevant [*see discussion under § 160.41[2][c]*], nor are there any other provisions in the statutory scheme that set out such restrictions. Thus, the statute appears only to clarify and not to restrict the courts' power as it existed before 1982 to strike pleading matter as irrelevant. Pre-1982 case law on the striking of irrelevant matter from pleadings is therefore probably still good law.

Those cases dealing with pleading matter that is now covered by the statutory definition of immaterial pleadings should be cited together with *Code Civ. Proc. §§ 431.10(c)* and *436(a)* and with the paragraph or paragraphs of *Code Civ. Proc. § 431.10(b)* that apply to the pleading matter in question.

[c] Irrelevant Matter

Code Civ. Proc. § 431.10(c), which provides that an immaterial allegation as defined in *Code Civ. Proc. § 431.10(b)* constitutes irrelevant matter, contains no provision stating that only such an immaterial allegation may be deemed irrelevant matter. That an allegation may be material as defined in *Code Civ. Proc. § 431.10(a)*, but still subject to be stricken as irrelevant is suggested by a pre-1982 case that is probably still valid under the current statutory scheme. In that case the court upheld the striking from a complaint as irrelevant of certain allegations that stated no issue on which plaintiff could legally have tendered proof even though the striking of such allegation rendered the complaint subject to a general demurrer under applicable substantive law [*Kline v. San Francisco Unified School District (1940) 40 Cal.*

App. 2d 174, 178, 104 P.2d 661, 105 P.2d 362] . Thus, the definitions set out in *Code Civ. Proc. § 431.10(b)* do not appear to be exhaustive of the types of pleading matter that may be deemed to be irrelevant.

An overall definition of irrelevant matter, other than the one for immaterial allegations is not given in either the statutes or cases. However, the Supreme Court in an early case based its upholding of the striking of certain factual allegations from a complaint on the observation that the claim that the facts alleged had a bearing on the rights of the parties to the case was without foundation in law or reason [*People v. Hawley (1929) 207 Cal. 395, 407, 279 P. 136]* . This reasoning suggests a rule of thumb criterion for determining whether pleading matter is irrelevant that appears to be representative of the reasoning of subsequent cases.

The following are some of the circumstances in which irrelevant material has been held to be subject to be stricken. Allegations supporting a claim that the pleading party could not legally make have been held properly stricken [*see Doran v. Biscailuz (1954) 128 Cal. App. 2d 55, 61, 274 P.2d 691* (allegation of losing candidate as to own participation in election in case challenging winning candidate's eligibility when finding of winner's ineligibility would not have given loser right to take office); *Kline v. San Francisco Unified School District (1940) 40 Cal. App. 2d 174, 178, 104 P.2d 661, 105 P.2d 362* (allegation of timely letter to defendant's officer detailing injury when under law such letter is no substitute for required verified demand)]. Allegations that for one reason or another were deemed insufficient to support particular claims they were asserted to support have also been stricken as irrelevant [*see Enos v. Murtaugh (1941) 47 Cal. App. 2d 269, 274, 117 P.2d 905* (unembroidered allegation that land deed had mistakenly named wrong grantee as neither stating independent cause of action nor supporting claim of prescriptive title); *Woodson v. Winchester (1911) 16 Cal. App 472, 474, 117 P. 565* (allegations of misrepresentations designed to induce persons to move to California and to buy land in colony being offered for sale by seller, but not relating to specific land parcels bought by buyer as not satisfying fullness and particularity requirement for fraud claims)]. Finally, allegations of facts that in context of the general fact situation alleged would not have affected the rights of any of the parties have been held properly stricken [*see People v. Hawley (1929) 207 Cal. 395, 407, 279 P. 136* (allegations as to location of land in flood control district as irrelevant in abatement action); *McCarthy v. McColgan (1929) 99 Cal. App 492, 498-499, 278 P. 918* (allegation of forgery that would have affected only persons not arty to case as irrelevant)].

[d] Related Memoranda

For memoranda and opposing motions for summary judgment, see Ch. 221, *Summary Judgments* in this set.

[e] Opposing Memoranda

In an appropriate case, the points and authorities *set out in §§ 160.60 -160.63* and *160.66* may be submitted in opposition to a motion to strike supported by this memorandum.

[3] Discussion of Authorities

[a] Allegation of Probative Facts Is Subject to Be Stricken

Dabney v. Key *(1922) 57 Cal. App. 762, 207 P. 921* , involved an action to enforce a specific contract to lease certain lands for the purpose of developing oil wells. Plaintiffs filed an amended complaint and defendants interposed a demurrer and a motion to strike. The motion to strike was granted in part and denied in part, and the demurrer was sustained with leave to amend. One of the assignments of the motion to strike with respect to which the motion was granted was directed to language in an allegation that at the time of the execution of the agreement, plaintiff J.B. Dabney had paid a sum of money in consideration of the lease by and through one Clifford R. Dabney. Acting on the assignment in the motion to strike, the trial court struck out the words by and through Clifford R. Dabney. Plaintiffs did not amend their complaint, and judgment was awarded to defendants. Plaintiffs appealed from this judgment.

The court of appeal affirmed the judgment. With respect to the motion to strike, the court noted preliminarily that the

whole of the complaint clearly showed that it was plaintiffs' theory that if a lease were made, if would run to plaintiff J.B. Dabney and that the negotiations were carried out at least in part by one Clifford R. Dabney acting as agent for *J.B. Dabney (57 Cal. App. 762, 762)* . The court held that the clause in the complaint averring that plaintiffs' alleged payment to defendants in consideration of the lease was made "by and through Clifford R. Dabney" stated only a probative fact that was not necessary to the sufficiency of the pleading. Thus, the court concluded that the clause was properly stricken (*57 Cal. App. 762, 763)* .

[4] Additional Authorities

[a] Allegation of Probative Facts Is Subject to Be Stricken

Stafford v. Shultz (1954) 42 Cal. 2d 767, 270 P.2d 1 , involved a medical malpractice action alleging that injury to plaintiff resulted from the defendants' failure to properly care for the plaintiff's injured leg. Before trial, two of the defendants successfully demurred on the grounds that, inter alia, the complaint was uncertain in that it did not state in what respect defendants had been negligent in caring for plaintiff's leg. On appeal, the Supreme Court held it was not necessary to allege in what respect the treatment given the plaintiff might have been deficient as long as the allegations of the complaint charged the breach of a legal duty, proximate causation, and resulting damage (*42 Cal. 2d 767, 782)* . In concluding that defendants' demurrer should have been overruled, the Court stated that probative facts alleged in a pleading are surplusage and may be stricken out or disregarded (*42 Cal. 2d 767, 782)* .

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16-160 California Points & Authorities § 160.42

§ 160.42 Supporting Motion to Strike Whole or Part of Pleading [Code Civ. Proc. § 435]--False or Improper Pleading Matter [Code Civ. Proc. § 436(a)]

[1] FORM

[*This form of memorandum should be used in combination with a general form of memorandum supporting a motion to strike (see § 160.30).*]

THE MATTER IN THE _____ [*specify pleading, e.g.,* AMENDED COMPLAINT] SHOULD BE STRICKEN BECAUSE IT IS _____ [FALSE *and/or* IMPROPER].

A. Court May Strike False or Improper Matter. The court may, on timely motion to strike by any party, or at any time in its discretion, strike from any pleading any false or improper matter (*Code Civ. Proc. § 436(a)*).

[*Optional*] **B. Inconsistency With Prior Pleadings May Show Matter in Pleading to Be False or Improper.** Allegations in an amended pleading that contradict sworn allegations in earlier pleadings may show that the subsequent allegations are sham or filed in bad faith (*see Tostevin v. Douglas (1958) 160 Cal. App. 2d 321, 330, 331, 325 P.2d 130* ; *see also Evid. Code §§ 452(d), 453* (records of court subject to judicial notice)).

[*Optional*] **C. Denial on Information and Belief of Matters Within Defendants' Knowledge May Be Stricken.** If a matter alleged in a complaint is within the defendant's actual knowledge or by its nature is presumed to be within the defendant's actual knowledge, or the defendant has the means of ascertaining whether or not the matter is true, a denial on information and belief or for lack of either will be deemed sham and evasive and may be stricken out or disregarded (*Mulcahy v. Buckley (1893) 100 Cal. 484, 487-489, 35 P. 144* ; *Dobbins v. Hardister (1966) 242 Cal. App. 2d 787, 791, 51 Cal. Rptr. 866*).

[*Optional*] **D. Allegations Inconsistent With Unambiguous Instrument Incorporated Into Complaint May Be Stricken.** When a written instrument is unambiguous and incorporated by reference into the complaint, any allegations in the pleading inconsistent with the incorporated instrument may be stricken (*Nichols v. Canoga Industries (1978) 83*

Cal. App. 3d 956, 965, 148 Cal. Rptr. 459).

[*Optional*] **E. Allegations Requesting Improper Relief.** A motion to strike is an appropriate vehicle to attack allegations requesting improper relief (*Satz v. Superior Court (1990) 225 Cal. App. 3d 1525, 1533 n.9, 275 Cal. Rptr. 710* ; *Saberi v. Bakhtiari (1985) 169 Cal. App. 3d 509, 517, 215 Cal. Rptr. 359*).

[2] Comments

[a] Use of Form

This form of memorandum may be combined with a general form of memorandum, supporting a motion to strike [*see § 160.30*] when matter in an opposing party's pleading can be shown to be false or improper without resort to extrinsic evidence [*see discussion under § 160.42[2][d]*]. This form sets out the statutory basis for the court's power to strike false or improper matter from any pleading. This form also sets out the point that falseness of matter in a pleading other than the original complaint may be shown by comparing averments in the challenged pleading with sworn allegations in prior pleadings, which are subject to judicial notice, and the point that denial on information and belief of matters presumably within a defendant's knowledge or allegations inconsistent with an unambiguous instrument incorporated into a pleading are false or improper. The point set out in this form that an amended pleading may be shown by comparison with prior pleadings to be false or improper is often related to the points that an amended pleading has failed to amend a prior pleading that was found to be deficient, or that an amended pleading has attempted to withdraw a sworn allegation in a prior pleading [*see Kronsberg v. Milton J. Wershow Co. (1965) 238 Cal. App. 2d 170, 173, 47 Cal. Rptr. 592* ; *Tostevin v. Douglas (1958) 160 Cal. App. 2d 321, 327, 325 P.2d 130]* . Thus, when appropriate, this form may be used in combination with a form setting out the above stated points regarding amended pleadings [*see § 160.43*].

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated.

[b] Validity of Pre-1982 Case Law

For a full discussion of the effect of the 1982 statutory revision of the statutory law governing motions to strike, see *§ 160.42[2][c]*.

[c] Sham Pleadings

Both statutory law and case law in effect before 1982 permitted the striking of pleading matter as sham [*see* former Code Civ. Proc. § 453 (repealed by Stats. 1982, ch. 704, § 5); *Kronsberg v. Milton J. Wershow Co. (1965) 238 Cal. App. 2d 170, 173, 47 Cal. Rptr. 592]* . A sham pleading was traditionally defined as a pleading that is good on its face but false in fact and pleaded in bad faith [*see Gostorfs v. Taafe, McCahill & Co. (1861) 18 Cal. 385, 387-388]* . The 1982 revision of statutory law governing motions to strike deleted reference to sham pleadings, and no post 1982 cases have ruled on the point. However, it is probable that the types of pleadings and pleading matter that the pre-1982 cases held to be subject to striking as sham may now be stricken under the provisions of *Code Civ. Proc. § 436(a)*, authorizing the court to strike false or improper matter, provided that the sham character of the pleading matter can be shown without resort to extrinsic evidence [*see discussion under § 160.41[2][d]*]. If statutory law is no longer sufficient to provide authority for the striking of sham pleadings, such pleadings can still probably be stricken under the court's inherent power to prevent frustration, abuse, or disregard of their judicial processes, by summary means [*Tostevin v. Douglas (1958) 160 Cal. App. 2d 321, 330, 331, 325 P.2d 130]* . For discussion of the court's inherent power to summarily strike pleadings, see *§ 160.05*.

[d] Defect Must Appear on Face of Pleading or From Matter Subject to Judicial Notice

Code Civ. Proc. § 437(a), which was enacted in 1982, provides that the grounds for a motion to strike must appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice. Counsel should be aware that under *Code Civ. Proc. § 437(a)*, certain pre-1982 cases that upheld the striking of pleading matter as frivolous and sham based on affidavits or other extrinsic evidence are no longer good law. The restriction on motions to strike based on extrinsic evidence particularly affects motions to strike a party's original pleadings. By the nature of the concept, the character of a defect which, according to the traditional definition of a sham pleading, shows a pleading to be false in fact and pleaded in bad faith, though the pleading is good in form, is unlikely to appear on the face of the pleading [*see* discussion under *§ 160.41[2][c]*]. Unlike amended pleadings that may be shown to be false by comparison with prior pleadings [*see* Paragraph B, supra], original pleadings ordinarily have no judicially noticeable matter to which they may be compared to demonstrate their falsity. Thus, a challenge to matter in an original pleading on the ground that it is sham or frivolous cannot usually be made without resort to extrinsic evidence. Such a challenge should therefore be made by way of motion for summary judgment rather than motion to strike. For a full discussion of motions to strike that purport to rely on extrinsic evidence and the treatment given to such motions by the courts, see § 160.44.

For further discussion of the striking of improper amended pleadings as sham, see *§ 160.43*.

[e] Matter Subject to Judicial Notice Must Be Identified

Code Civ. Proc. § 437(b) provides that when a motion to strike is based on matter of which the court should take notice pursuant to *Evid. Code §§ 452* or *453*, such matter must be specified in the notice of motion, or in the supporting points and authorities, except as the court may otherwise permit. *Evid. Code § 452(e)* provides for judicial notice of the records of any court in the state [*see Evid. Code § 453* (permissive judicial notice provided for in *Evid. Code § 452* as becoming mandatory when conditions are met)]. Thus, a motion to strike relying on prior pleadings on record in the case should specify the pleadings relied on in the notice of motion or the accompanying points and authorities.

[3] Discussion of Authorities

[a] Inconsistency With Prior Pleadings May Show Matter in Pleading to Be False or Improper

Tostevin v. Douglas *(1958) 160 Cal. App. 2d 321, 325 P.2d 130* , involved an action for declaratory relief and accounting on an alleged oral, personal service contract. Plaintiff filed one original complaint and three amended complaints. Demurrers to the original, first, and second complaints were sustained with leave to amend. Leave to amend the second amended complaint was qualified by direction that any variation from the previous verified complaint in the allegations set out in the forthcoming amended complaint must be explained. Plaintiff filed a third amended complaint, which defendant moved to strike. The trial court granted the motion to strike, stating that the amended complaint had made no substantial amendment of and had given no explanations for changes from the former complaint. Plaintiff filed no further amendments, and the trial court entered a judgment of dismissal. Plaintiff appealed.

The court of appeal upheld the trial court's action. The court noted from the record that the complaints filed by plaintiff showed numerous changes in essential averments, including omissions, variations, and contradictions in material allegations relating to the services required to be performed by plaintiff under the contract, the termination date of the contract, and the date of defendant's repudiation of the contract, none of which were explained or accounted for by plaintiff (*160 Cal. App. 2d 321, 324)* . The court also noted that although entitled "Complaint for Declaratory Judgment and an Accounting," the complaint was really one to recover an amount due for breach of the terms of an oral agreement. The court stated that on the facts alleged no real cause of action for accounting appeared in any of the pleadings, and concluded that plaintiff's reason for filing an action for an accounting was that the statute of limitations had run on an action for breach of contract and plaintiff was attempting to seek refuge in the longer limitations period provided for accounting actions (*160 Cal. App. 2d 321, 328, 329)* .

Looking at the pattern of averments in the various complaints in detail, the court concluded that plaintiff was in essence attempting to correct fatal defects in the earlier complaints by avoiding the effect of the statute of frauds and the statute of limitations (*160 Cal. App. 2d 321, 327-330)* . However, the court held that the second and third amended complaints utterly failed to and could not under the sworn facts remedy the defects in the previous pleadings. The court stated that the later pleadings made no substantial amendments even though plaintiff was given substantial opportunity to clarify ambiguities, amend insufficiencies, eliminate surplusages and explain mistaken statements, and that plaintiff simply changed his story with regard to the terms and conditions of the oral agreement and the time of repudiation. The court stated that it could only conclude from this that the various changes made by plaintiff in his second and third amended complaints were the result of efforts to conform to a theory of recovery, rather than to the facts as they actually existed. The court held that the trial court has the right to strike pleadings of this kind from the files on the ground that it is frivolous and a sham under the courts' inherent power to prevent, by summary means, the frustration, abuse, or disregard of their processes (*160 Cal. App. 2d 321, 331)* .

[b] Denial on Information and Belief of Matters Within Defendants' Knowledge May Be Stricken

Mulcahy v. Buckley *(1893) 100 Cal. 484, 35 P. 144* , was an action to enforce a mechanic's lien. The complaint alleged, inter alia, that plaintiff had recorded a claim of lien in the recorder's office. In his answer, defendant stated that he had no information or belief on the subject sufficient to enable him to answer the allegation or any allegation contained in the paragraph in which the allegation was set out, and that he placed his denial of the allegations on this ground. After trying the case without a jury, the trial court disregarded this part of the answer and, holding that all material allegations of this paragraph of the complaint should be deemed admitted, entered judgment for plaintiff. Defendant appealed.

The Supreme Court upheld the trial court's action. The Court acknowledged that former Code Civ. Proc. § 437 [*now see Code Civ. Proc. § 431.30(e)*] provides that if the defendant has no information or belief on the subject to enable him or her to answer an allegation of the complaint, he or she may so state in the answer, and place the denial on that ground. However, the Court held that this provision did not give a defendant the right to answer an allegation on information and belief, or lack of these, when he or she may be presumed to know whether or not the allegation is true, or when he or she is aware that the means of ascertaining the truth of falsity of the allegation is available (*100 Cal. 484, 487)* . Citing a commentary on code pleading, the Court noted that because the obligation to verify implies the obligation to tell the truth, an answer based on a denial of information and belief when the fact charged is evidently within the defendant's knowledge is clearly false or evasive, and should be disregarded (*100 Cal. 484, 487-489)* .

The Court noted from the commentary that a fact is evidently within the defendant's knowledge so as to require a positive denial when it concerns an act done by the defendant himself or herself within the period of memory, or when the defendant has the means of information (*100 Cal. 484, 487)* . Along the lines of this rule, the Court cited out-of-state authority for the proposition that a party cannot plead ignorance of a public record to which he or she has access, and that affords all the means of information necessary to obtain positive knowledge of the fact (*100 Cal. 484, 488)* . In the present case, the Court noted that defendant knew at least that he could ascertain whether or not plaintiff had recorded his claim of lien, as alleged in the complaint, by examining a public record in the city and county in which the lots on which the lien is claimed were situated (*100 Cal. 484, 487)* . The Court limited its opinion to the circumstances and facts disclosed by the record before it (*100 Cal. 484, 489)* .

Dobbins v. Hardister *(1966) 242 Cal. App. 2d 787, 51 Cal. Rptr. 866* , was an action to recover the purchase price of certain goods that plaintiff alleged he had sold and delivered to defendant at defendant's special request and instance. Defendant answered, denying all of plaintiff's allegations on the basis of information and belief. Plaintiff demurred to the answer, arguing that the answer did not state a defense since a denial based on information and belief is not sufficient to controvert allegations of fact that are presumptively within the defendant's knowledge, as were the facts alleged by plaintiff in this case. The trial court overruled the demurrer. However, plaintiff subsequently moved for judgment on the pleadings on the same grounds, and the trial court sustained the motion. Defendant appealed from the

resulting judgment for plaintiff.

The court of appeal overturned the judgment in the lower court, holding that the trial court should have given defendant an opportunity to amend his answer so as to state positive denials before ruling on the motion for judgment on the pleadings (*242 Cal. App. 2d 787, 795-798)* . However, the court upheld the trial court's determination that the denials based on lack of information and belief stated in the original answer were insufficient.

The court cited an extensive series of cases, beginning with *Mulcahy v. Buckley (1893) 100 Cal. 484, 486-489, 35 P. 144* (discussed supra), for the rule that if the matter alleged by the plaintiff is within the defendant's actual knowledge or by its nature is presumed to be within his or her knowledge, or if the defendant has the means of ascertaining whether or not it is true, a denial on information or belief or lack of either will be deemed sham and evasive and may be stricken out or disregarded (*242 Cal. App. 2d 787, 791)* . Citing other authorities, the court held that the facts as to whether goods were sold and delivered by plaintiff to defendant and whether defendant made any payments to plaintiff for such goods are matters presumptively within defendant's knowledge. The court held further that if defendant were actually ignorant of the items of the account or of the payments, if any, for such items at the time when defendant was served by the complaint, it was defendant's duty to become informed before he filed his answer since these were material facts that he should have known (*242 Cal. App. 2d 787, 794)* . The court stated that it made no difference for the operation of this rule whether the facts alleged by plaintiff encompassed only a single sales transaction, or whether they encompassed multiple transactions, as in the present case (*242 Cal. App. 2d 787, 793)* .

The court stated that since the complaint was framed in the form of common counts, defendant was entitled to demand a bill of particulars under *Code Civ. Proc. § 454*, requiring plaintiff to furnish defendant with the details regarding the items charged against him (*242 Cal. App. 2d 787, 794)* . This, stated the court, clearly gave defendant access to a legal procedure that afforded him the means of obtaining positive knowledge of the facts charged in the complaint (*242 Cal. App. 2d 787, 795)* . In citing demand for a bill of particulars as a procedure available to defendant, the court acknowledged the theoretical possibility that the trial court might decline to extend defendant's time for answering so as to give defendant the time to demand a bill of particulars or that plaintiff might not return the bill within the time the court is empowered to extend the time to plead. If either of these circumstances should occur, the court stated that they should be averred in the answer, together with the other circumstances indicating actual ignorance of the facts that the defendant ought to know, in explanation of the defendant's inability to answer positively (*242 Cal. App. 2d 787, 795)* .

The court concluded that on remand defendant should be given the election of standing on his answer or amending it so as to state positive denials (*242 Cal. App. 2d 787, 797)* .

[c] Allegations Inconsistent With Unambiguous Instrument Incorporated Into Complaint May Be Stricken

Nichols v. Canoga Industries *(1978) 83 Cal. App. 3d 956, 148 Cal. Rptr. 459* , was an action on a contract wherein plaintiff agreed that he and the corporation of which he was sole shareholder would transfer substantially all assets of the corporation, subject to the corporation's liabilities, to defendant corporation in return for stock in defendant corporation. The written agreement stated in part that (1) in consideration of the transfer of the assets of plaintiff's corporation, defendant corporation would sell to plaintiff's corporation 20,000 shares of its own stock and (2) in the event that during a specified period the value of the 20,000 shares of stock thus transferred dropped below $20.00 per share, defendant corporation would issue up to 12,000 additional shares to plaintiff's corporation to make up the difference between the existing value of the 20,000 shares and the value of the shares at $20.00 per share. In addition, the agreement included a warranty of the defendant corporation's financial condition. Plaintiff incorporated the written agreement into his complaint by reference and alleged that he had carried out his part of the agreement, that a total of 32,000 shares of defendant's stock were finally transferred to his corporation, but that as of a specified date the 32,000 shares were worth only $100,000. Finally, plaintiff alleged that defendant had breached the warranties of its financial condition, damaging plaintiff in the amount of $300,000. Plaintiff's claim for damages rested on a paragraph in the complaint that alleged that defendant had agreed to pay the plaintiff $400,000 in the form of 20,000 shares of the

defendant's stock, to be supplemented with the additional transfer of up to 12,000 shares in the event of the fall in stock value as recited in the agreement.

Defendant demurred, raising the bar of the statute of limitations, and moved to strike the portion of the complaint alleging that the defendant had agreed to pay $400,000 in the form of its stock shares and the portion asking for damages. The trial court sustained the demurrer, granted the motion to strike, declared that its ruling on the demurrer compelled denial of leave to amend the complaint, and dismissed the action. Defendant appealed.

The court of appeal upheld the motion to strike but overturned the demurrer, holding for unrelated reasons that the action was not barred by the statute of limitations, and remanded the action to the trial court for further proceedings as set out *below*. The court held that when a written instrument is unambiguous and is incorporated into a complaint, any allegations in the pleadings inconsistent with the incorporated writing may be stricken (*83 Cal. App. 3d 956, 965)* . The court observed that while the complaint alleged an agreement calling for consideration of $400,000 payable in the form of stock, the agreement that the complaint incorporated by reference in facially unambiguous terms treated the $20.00 per share value of the stocks that made up the consideration merely as the standard by which shares of defendant in addition to the 20,000 contemplated by the agreement would be issued, while limiting the additional shares to 12,000 (*83 Cal. App. 3d 956, 965)* . The court stated that no facts were alleged establishing the ambiguity of the written instrument. As to the allegation of damages in the complaint, the court stated that it depended on the stricken allegation of the promise of $400,000 consideration and was therefore also properly stricken.

The court further stated, however, that conceivably facts may exist to establish ambiguity of the agreement within the definition of existing law (*83 Cal. App. 3d 956, 965-966*). Since the trial court's decision to refuse leave to amend was based on that court's holding that the action was barred by the statute of limitations, which holding the court of appeal overturned, the court ordered the case remanded to the trial court to permit plaintiff to amend his complaint if he can truthfully allege facts which establish that the additional 12,000 shares were not to be his exclusive compensation for diminution in value of the shares (*83 Cal. App. 3d 956, 966)* .

It should be noted that the case was decided before the 1982 enactment of the legislative scheme governing motions to strike, and the court did not cite any authority for striking the allegations, nor did the court state that allegations were properly stricken as sham, irrelevant, or for any other general grounds. It is probable, however, that allegations of the sort in issue could now be stricken as false matter under *Code Civ. Proc. § 436(a)*.

[d] Allegations Requesting Improper Relief

Satz v. Superior Court *(1990) 225 Cal. App. 3d 1525, 275 Cal. Rptr. 710* , was an action for defamation by persons who had previously been defendants in a child abuse prosecution. The defendants in the defamation action included a television newscaster who had reported on the earlier prosecution. The newscaster's motion to strike portions of the complaint based on broadcasts aired more than one year before the defamation action was filed on the ground they were barred by the statute of limitations [*Code Civ. Proc. § 340(3)*] was denied, and the newscaster petitioned the court of appeal for a writ of mandate. The court of appeal held that the newscaster was not a witness, within the meaning of *Civ. Code § 48.7*, which prevents a person charged with abuse from suing the child, parent, or any witness for defamation arising from statements made by the child, parent, or witness until after the criminal charges are resolved (*225 Cal. App. 3d 1525, 1527, 1532)* , and ordered issuance of the writ with directions to vacate the order denying the motion to strike and to grant it insofar as it was based on *Civ. Code § 48.7*. In so doing, the court cited *Saberi v. Bakhtiari (1985) 169 Cal. App. 3d 509, 517, 215 Cal. Rptr. 359* , discussed *below*, for the proposition that a motion to strike is an appropriate vehicle to attack allegations requesting improper relief (*225 Cal. App. 3d 1525, 1533 n.9*).

Saberi v. Bakhtiari *(1985) 169 Cal. App. 3d 509, 215 Cal. Rptr. 359* , was a proceeding in unlawful detainer in which a default judgment awarding plaintiff possession of commercial premises plus damages and costs was entered. Defendant appealed contending, among other things, that the complaint was jurisdictionally defective because it

combined a request for possession of the premises based on service of a 30-day notice to quit with a request for rent due prior to termination of the tenancy. Although the court of appeal reversed the judgment on other grounds, it rejected the jurisdiction argument, stating the inclusion in the complaint of an improper request for pretermination rent did not render the entire complaint invalid because an objection to the request could be made by a motion to strike the improper allegations or as a defense in the answer to the complaint (*169 Cal. App. 3d 509, 517)* .

[4] Additional Authorities

[a] Denial on Information and Belief of Matters Within Defendants' Knowledge May Be Stricken

Sociedade Do Espirito Santo v. Santa Clara Valley Bank (1914) 24 Cal. App. 592, 141 P. 1054 , involved an action to recover money that plaintiff alleged had been received by defendants for the use and benefit of plaintiff. One of the defendants answered, averring, inter alia, that he had no information or belief sufficient to enable him to answer the allegation that the plaintiff had demanded payment of the money before commencement of the action, and denying the allegation on the basis of this. On motion, the trial court struck this averment. On appeal, the court of appeal held that it was not error to strike the averment, since a defendant cannot deny knowledge of his or her own acts, or knowledge of his or her personal transactions. The court stated that with respect to allegations of such facts a positive answer is required (*24 Cal. App. 592, 594)* .

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
CHAPTER 160 MOTIONS TO STRIKE: PLEADINGS
PART II. FORMS
A. Supporting Motion to Strike

16-160 California Points & Authorities § 160.43

§ 160.43 Supporting Motion to Strike [Code Civ. Proc. §§ 435, 436]--Improper Amended Pleading [Code Civ. Proc. §§ 472, 473(a)]--Amendment Fails to Correct Defect in Original Pleading

[1] FORM

[*This form should be used in combination with a general form setting out the statutory basis for making a motion to strike (see § 160.30). When appropriate, this form may be used in combination with a form setting out the point that sham or frivolous pleadings may be stricken as false or improper matter (see § 160.42) or a form setting out the point that a pleading not filed or drawn in conformity with California law may be stricken (see § 160.31).*]

A. Court Not Required to Tolerate Improper Amended Complaint. A court is not required to tolerate a purported amended complaint that fails to amend the previous pleading, is not filed in good faith, is filed in disregard of established procedural requirements, or is otherwise violative of orderly judicial administration (*Kronsberg v. Milton J. Wershow Co. (1965) 238 Cal. App. 2d 170, 173, 47 Cal. Rptr. 592*).

[*Optional*] **B. Court May Strike Amended Pleading That Merely Repeats Original Pleading.** A pleading that in its essential averments repeats a pleading previously found to be insufficient is properly stricken (*Kronsberg v. Milton J. Wershow Co. (1965) 238 Cal. App. 2d 170, 174, 47 Cal. Rptr. 592*).

[*Optional*] **C. Amendment Cannot Revive Defective Complaint by Omitting Previously Sworn Facts.** A party may not withdraw facts once alleged under oath by simply filing an amended pleading eliminating such facts without explanation (*Tostevin v. Douglas (1958) 160 Cal. App. 2d 321, 327, 325 P.2d 130* (complaint); *see Silica Brick Co. v. Winsor (1915) 171 Cal. 18, 22, 151 P. 425* (answer)).

[2] Comments

[a] Use of Form

This form may be submitted in support of a motion to strike an amended pleading that either entirely fails to remedy a defect already found in a prior pleading, or that attempts to remedy the defect by omitting previously sworn allegations

of fact without explanation. This form sets out the points that a court need not tolerate a frivolous amended pleading, that an amended pleading that merely repeats the essential averments of the previous pleading may be stricken, and that facts sworn to in a prior pleading may not be withdrawn from consideration by omitting them from an amended pleading. The form should be used in combination with a general form setting out the statutory basis for making a motion to strike [*see § 160.30*]. When appropriate, this form may also be used in combination with a form, showing that pleading matter that is sham or frivolous may be stricken as false or improper matter [*see § 160.42*], and a form showing that pleading matter that is not filed or drawn in conformity with the laws of California may be stricken [*see § 160.31*].

Counsel should insert facts and arguments into this form, showing how the points of law stated relate to the facts of the case.

[b] Sources of Court's Authority to Strike

The cases upholding the striking of ineffective amended pleadings that were decided before the 1982 revision of the statutory law governing motions to strike [*see discussion under § 160.03*] have generally characterized such pleadings as sham or frivolous, or as being filed in bad faith [*see Kronsberg v. Milton J. Wershow Co. (1965) 238 Cal. App. 2d 170, 173, 47 Cal. Rptr. 592]* . Under the statutory scheme enacted in 1982, such pleadings may probably be stricken under *Code Civ. Proc. § 436(a)* (power of court to strike improper pleading matter). For a discussion of the law regarding sham pleadings or false or improper pleading matter, see *§ 160.42*.

Statutory authority for striking ineffective amended pleadings filed by leave of court may also be found under the provisions of *Code Civ. Proc. § 436(b)*, which authorizes the court to strike pleading matter that was not drawn or filed in conformity with the laws of California or of any order of the court. Thus, it may be said that when the court grants leave to amend an original pleading after it has been found to be defective, such leave should not be construed to authorize an amendment that merely repeats the previous defective pleading, is filed in bad faith or disregard of established procedural requirements, or is otherwise violative of orderly judicial administration. Thus, an amended pleading that shows any of these improprieties may be said to be out of conformity with the terms of the leave to amend and therefore subject to be stricken under *Code Civ. Proc. § 436(b)*. Furthermore, it may be said that since under *Code Civ. Proc. § 473(a)* it is only by leave of court that a party may amend a pleading after a demurrer has been ruled on, an amended pleading that is out of conformity with the leave to amend is also out of conformity with *Code Civ. Proc. § 473* [*see Code Civ. Proc. § 472* (right to amend as a matter of course only until demurrer tried)].

[3] Discussion of Authorities

[a] Court Not Required to Tolerate Improper Amended Complaint

Kronsberg v. Milton J. Wershow Co. *(1965) 238 Cal. App. 2d 170, 47 Cal. Rptr. 592* , involved a written agreement for sale at auction by defendant of certain property belonging originally to plaintiff. Plaintiff alleged that defendant had failed to sell the two major items included in the property as had been agreed and had failed to reconvey one of the items to plaintiff. Plaintiff filed numerous complaints and amended complaints, all of which were found to be deficient on demurrer or on motion to strike. After the trial court had sustained a demurrer to the second amended complaint it filed a seven page memorandum in support of its rulings. After the third complaint had been filed, the court sustained yet another demurrer, stating that its written views on the deficiencies in the earlier pleadings had still largely been disregarded. After a fourth amended complaint had been filed, defendant filed a motion to dismiss. The trial court, stating that its views on the deficiencies of the pleading had still been disregarded, treated the motion to dismiss as a motion to strike and ordered the pleading stricken, with leave to amend within 20 days. Plaintiff filed no amendment, and the trial court granted defendant's motion to dismiss. Plaintiff appealed.

The court of appeal upheld the action of the trial court. The court stated that if the rulings in which the trial court had

found the pleadings filed by plaintiff prior to the fourth and final amended complaint to be defective were correct, it cannot be doubted that the trial court had discretion to strike the fourth amended complaint on the ground that it was frivolous and sham. The court stated that the fundamental principle running through the prior case law on the subject is that the court is not required to tolerate a purported amended complaint that fails to amend the previous pleading, is not filed in good faith, is filed in disregard of established procedural requirements, or is otherwise violative of orderly judicial administration (*238 Cal. App. 2d 170, 173)* .

Reviewing the original complaint and the amendments following it, the court concluded that the trial court's rulings as to the pleadings preceding the fourth amended complaint had been correct.

[b] Court May Strike Amended Pleading That Merely Repeats Original Pleading

The facts and procedural background of ***Kronsberg v. Milton J. Wershow Co.*** *(1965) 238 Cal. App. 2d 170, 47 Cal. Rptr. 592* , are set out in the *discussion under § 160.43[3][a]*. In that case, the court of appeal, after discussing the facts alleged and causes of action averred in the pleading preceding the stricken fourth amended complaint, concluded that the fourth amended complaint failed, and in fact did not attempt, to remedy the defect in the pleading that preceded it. The court held that it is proper to strike such a pleading on the ground that it is in all its essential averments merely a repetition of a complaint previously found to be deficient (*238 Cal. App. 2d 170, 174)* .

[c] Amendment Cannot Revive Defective Complaint by Omitting Previously Sworn Facts

The facts and procedural background of ***Tostevin v. Douglas*** *(1958) 160 Cal. App. 2d 321, 325 P.2d 130* , are *set out in § 160.42[3][a]*. In that case, the court noted that throughout the various pleadings filed by plaintiff in an attempt to state a cause of action, numerous material facts alleged under oath had been withdrawn from consideration, entire allegations set out in earlier pleadings had been omitted from subsequent amendments, and variations and changes in essential allegations resulting in contradictions and ambiguity had been effected, all without any justification or explanation (*160 Cal. App. 2d 321, 326*). The court stated the well-settled rule that facts once alleged under oath cannot be withdrawn from consideration by merely filing an amended pleading eliminating them without explanation. The court further stated that a party should not be allowed to breathe life into a complaint by omitting facts, previously alleged in a verified pleading, which made it fatally defective (*160 Cal. App. 2d 321, 327)* .

Silica Brick Co. v. Winsor *(1915) 171 Cal. 18, 151 P. 425* , was an action to recover the amount of a subscription for capital stock. In his second amended answer, defendant admitted that he had executed the document by which he had subscribed for the capital stock, and that he had refused a demand for payment on the subscription. By way of excuse, defendant averred the existence of a complex agreement of stock exchanges, and alleged that an oral agreement to cancel the stock subscription had been part of this agreement. A resolution of the stockholders of the corporation that had issued the stock, which defendant averred embodied the agreement, was included in the answer. The trial court rejected defendant's second amended answer. Defendant filed a third amended answer, which omitted reference to the resolution, but averred that certain individual members of the corporation's board of directors had orally told defendant that he could rely on the corporation to carry out the understanding to surrender the stock subscription. The third amended complaint further averred that the corporation had never demanded payment on the subscription until a specified date and had treated the subscription as canceled and annulled until this date. The court also rejected this pleading. After judgment on the pleadings had been entered for plaintiff, defendant appealed.

The Supreme Court upheld the action of the trial court. Preliminarily, the Court held that the shareholder's agreement that had originally been included in defendant's answer represented a written executed agreement that was fundamental to the transaction on which defendant must stand or fall (*171 Cal. 18, 22)* . Since the resolution made no reference to an agreement to cancel defendant's stock subscription, the court held that it was fatal to defendant's defense (*171 Cal. 18, 20-21)* .

Regarding the third amended complaint, the Court held that the trial court was justified in refusing to file it, since the answer was sham and not made in good faith. The Court noted that wherever the third amended complaint deviated from its predecessor, it sought to aver conclusions instead of facts. The Court stated its view that defendant was trying to avoid the effect of the shareholders' resolution as a written executed agreement by omitting it from the third amended answer. Regarding this attempt to avoid the effect of the resolution, the Court held that defendant should not be permitted to allege, as ultimate facts, matters at variance with facts to which he had previously sworn. The Court held further that it could look to earlier pleadings to determine whether the one finally offered was sham (*171 Cal. 18, 23)* .

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[Reserved]

§§ 160.44[Reserved]

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B. Opposing Motion to Strike

16-160 California Points & Authorities § 160.60

§ 160.60 Opposing Motion to Strike Whole or Part of Pleading [Code Civ. Proc. § 435]--Speaking Motion Not Permitted [Code Civ. Proc. § 437]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORIT-
vs.	)	IES IN OPPOSITION TO
_____ [*name*],	)	MOTION TO STRIKE _____
Defendant.	)	[WHOLE *or* PART OF] _____
	)	[*specify pleading, e.g.,* COMPLAINT]
	)	[*Code Civ. Proc. § 435*]

_____

THE MOTION TO STRIKE SHOULD NOT BE GRANTED BECAUSE IT RELIES ON EXTRINSIC EVIDENCE TO ESTABLISH THE GROUNDS OF THE MOTION.

A. Grounds for Motion to Strike Cannot Be Established by Extrinsic Evidence. The grounds for a motion to strike must appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice (*Code Civ. Proc. § 437(a)*).

B. Matters Subject to Judicial Notice Must Be Specified. When the motion to strike is based on matter of which the court may take judicial notice pursuant to *Section 452* or *453 of the Evidence Code* (matters subject to permissive

judicial notice, or mandatory judicial notice if conditions are met), such matter must be specified in the notice of motion, or in the supporting points and authorities, except as the court may otherwise permit (*Code Civ. Proc. § 437(b)*).

C. Motion Relying on Extrinsic Evidence Is to Be Treated as Motion for Summary Judgment. Speaking motions relying on extrinsic evidence are governed by the procedure governing motions for summary judgments set out in *Code Civ. Proc. § 437c*, and such motions will be treated as motions for summary judgment even if labeled as motions to strike by the moving party (*Vesely v. Sager (1971) 5 Cal. 3d 153, 157, 167-169, 95 Cal. Rptr. 623, 486 P.2d 151* (specifically overruled on unrelated point by *Bus. & Prof. Code § 25602(b), (c)* and *Civ. Code § 1714(b), (c)*); *Mediterranean Exports, Inc. v. Superior Court (1981) 119 Cal. App. 3d 605, 615, 174 Cal. Rptr. 169* (both cases decided before enactment of *Code Civ. Proc. § 437*, as set out in Paragraph A., supra)).

Dated: _____.

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion to strike the whole or part of any pleading when the motion purports to rely on extrinsic evidence to establish the grounds for striking. The foregoing sets out the points that the grounds for striking a pleading upon a motion to strike must appear on the face of the challenged pleading or from matters of which the court may take judicial notice, and that a motion to strike that relies on extrinsic evidence in order to establish grounds for striking pleading matter will be treated as a motion for summary judgment. This form may be submitted in opposition to any speaking motion to strike, including, when appropriate, any motion to strike supported by the points and authorities memoranda in this chapter [*see §§ 160.30 -160.43*].

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Such facts and arguments should point out any extrinsic evidence of which the court cannot properly take judicial notice that was included with the motion to strike, and should show that the grounds for striking stated in the motion cannot be established without resort to such evidence. When appropriate, counsel may also insert argument, showing that matters that do not appear on the face of the challenged pleading, but on which the motion relies in purporting to establish grounds for striking, are not subject to judicial notice (*see discussion under § 160.60[2][b]*). Counsel should also be prepared to argue that the motion is insufficient as a motion for summary judgment as well as improper as a motion to strike. For forms opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[b] Judicial Notice

Those matters of which the court must in all cases take judicial notice are set out in *Evid. Code § 451*. Additional matters of which judicial notice may be taken are set out in *Code Civ. Proc. § 452*. The court may take judicial notice of the matters set out in *Code Civ. Proc. § 452* on its own initiative [*see Code Civ. Proc. § 452*]. The court must take notice of the matters set out in *Code Civ. Proc. § 452* if a party requests it and (1) gives each adverse party sufficient notice, through the pleading or otherwise, to enable such adverse party to prepare to meet the request and (2) furnishes the court with sufficient information to take judicial notice of the matter [*Code Civ. Proc. § 453*].

[c] Validity of Pre-1982 Case Law

The cases cited in this chapter were decided before the enactment of *Code Civ. Proc. § 437* in 1982. In enacting *Code Civ. Proc. § 437*, the Legislature essentially adopted the basic rule prohibiting speaking motions to strike that was set out in those cases. The corollary to the basic rule set out in *Vesely v. Sager (1971) 5 Cal. 3d 153, 157, 167-169, 95 Cal. Rptr. 623, 486 P.2d 151* (specifically overruled on unrelated point by *Bus. & Prof. Code § 25602(b), (c)* and *Civ. Code § 1714 (b), (c)*), and the cases following it that a speaking motion to strike shall be treated as a motion for summary judgment also still appears to be good law under *Code Civ. Proc. § 437*.

[d] Related Memoranda

For forms opposing and supporting a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Motion Relying on Extrinsic Evidence Is to Be Treated as Motion for Summary Judgment

Vesely v. Sager *(1971) 5 Cal. 3d 153, 95 Cal. Rptr. 623, 486 P.2d 151* (decided before the enactment of *Code Civ. Proc. § 437*, which is set out in Paragraph A, *above*), involved an action for personal injuries and property damage sustained in an automobile accident. The complaint alleged, inter alia, that defendant driver of the automobile stated to be responsible for the accident was driving the automobile with the consent, knowledge, and permission of the remaining defendants, that each defendant was the agent and employee of the other defendant, and that each of the defendants was at all times acting within the purpose and scope of this agency and employment. The only defendant involved in the present appeal moved to strike these allegations. In support of the motion to strike, the appealing defendant submitted his own declaration stating that the defendant driver and owner of the automobile were not in his employment on the date of the accident, and that the declarant had never had any ownership interest or other interest in the automobile. The trial court granted the motion to strike, sustained a demurrer interposed by the appealing defendant on an unrelated point without leave to amend, and dismissed the case as to the appealing defendant. Plaintiff appealed.

The Supreme Court reversed the action of the trial court in granting the motion to strike. The Court noted from the points and authorities submitted in support of the motion that the motion was intended as a speaking motion (defined as a motion supported by facts outside of the pleadings) addressed to the inherent right of a court to strike or dismiss a complaint when it is made to appear by extraneous evidence that the complaint is sham and based on false allegations (*5 Cal. 3d 153, 167)* . The Court then cited *Pianka v. State of California (1956) 46 Cal. 2d 208, 211, 293 P.2d 458* (*see § 160.60[4][a]*) in which it had earlier held that such nonstatutory speaking motions have been superseded by the procedure governing motions for summary judgment contained in *Code Civ. Proc. § 437c* (*5 Cal. 3d 153, 167-168)* . The Court disapproved a court of appeal case decided subsequently to *Pianka*, which had held that the Legislature's enactment of *Code Civ. Proc. § 435* (authorizing motions to strike; *see § 160.30* for present provisions of statute) had reaffirmed the right to make a speaking motion to strike. In disapproving that case, the Court stated that the legislative history of *Code Civ. Proc. § 435* indicated that this statute had been enacted merely to make the motion to strike a pleading, and to establish procedures for its use, so that it did not have the substantive effect of reinstating the speaking motion to strike (*5 Cal. 3d 153, 168-169)* . The Court concluded by stating that it would treat defendant's motion to strike as a motion for summary judgment (*5 Cal. 3d 153, 169)* .

Reviewing the motion under the standards for determining whether summary judgment should be granted, the Court concluded that the defendant's declaration was insufficient to warrant summary judgment, despite the fact that the plaintiff had not filed a counteraffidavit or declaration. The Court held that since the declaration had not negated the possibility that the driver of the car might have been acting in an agency relationship with the defendant, it did not meet the burden of establishing the facts of every element necessary to entitle the moving party to a judgment, as is required under summary judgment procedure (*5 Cal. 3d 153, 169-170)* .

It should be noted that the Legislature has subsequently enacted *Bus. & Prof. Code § 25602(b), (c)* and *Civ. Code § 1744(b), (c)*, which specifically overruled this case on an unrelated point, dealing with the liability of a commercial provider of alcoholic beverages for injuries caused to third persons.

Mediterranean Exports, Inc. v. Superior Court *(1981) 119 Cal. App. 3d 605, 174 Cal. Rptr. 169* (decided before the enactment of *Code Civ. Proc. § 437*, which is set out in Paragraph A, supra) involved an action for damages arising out of an alleged breach of a written lease. The real party in interest, a corporation that was the defendant in the underlying action, filed an answer and cross complaint. Plaintiff thereupon filed a motion to strike both of the real party's pleadings on the grounds that the real party was a foreign corporation doing intrastate business in California, which was delinquent in paying corporate franchise tax owed to the state, and had therefore forfeited its right to prosecute and defend actions in the state. Extensive declarations and other documents were filed on the motion by both parties, and further documents were requested by the trial court. The trial court subsequently granted the motion, and the real party in interest petitioned for writ of mandamus.

The court of appeal overturned the trial court's action in granting the motion to strike and ordered the real party's pleadings to be reinstated. Preliminarily, the court stated that under applicable statutes and case law a mandatory forfeiture of the right to defend or appeal an action in California, which would deprive the real party of the right to file the pleadings that it had attempted to file, is prescribed for foreign corporations doing intrastate business (*119 Cal. App. 3d 605, 614-615)* . Addressing plaintiff's motion to strike, the court noted that plaintiff had made its motion to strike under *Code Civ. Proc. § 435* and former Code Civ. Proc. § 453, which authorized the striking of cross complaints and sham and irrelevant answers (moving to strike both types of pleadings is now authorized by *Code Civ. Proc. § 435*, while striking pleadings on grounds substantively similar to those stated above is now authorized by *Code Civ. Proc. § 436*; *see § 160.30*). The court noted, however, that the extensive evidentiary showing on the motion made it a speaking motion. The court cited *Vesely v. Sager (1971) 5 Cal. 3d 153, 157, 167-169, 95 Cal. Rptr. 623, 486 P.2d 151* (discussed supra) for the rule that such a speaking motion to strike was not authorized by *Code Civ. Proc. §§ 435* and *453* and must therefore be treated by the court as if it were a motion for summary judgment (*119 Cal. App. 3d 605, 615)* .

Treating the motion as a motion for summary judgment, the court held that the evidence presented was not sufficient to sustain a judgment in favor of the plaintiff, and that the motion therefore failed under the applicable test for summary judgment (*119 Cal. App. 3d 605, 616)* . The court stated that the evidence failed to show that summary judgment was warranted for two reasons: (1) There remained at least a triable issue of fact as to whether the real party's activities in the state constituted intrastate business, and (2) the forfeiture prescribed by statute for failure to pay franchise tax owed takes effect only when the Franchise Tax Board transmits the name of the delinquent corporation to the Secretary of State, and the showing on the motion in the present case included uncontradicted evidence that this had not been done in the present case (*119 Cal. App. 3d 605, 615, 619)* .

Finally, the court held that mandamus was the proper procedure for real party to seek relief in the present case, since the forfeiture urged by the defendant would deprive the real party of the right to seek relief by appealing from the judgment, and in any event, the final judgment from which the real party might appeal would necessarily be a default judgment since the trial court's order had stricken both the answer and the cross complaint of the real party (*119 Cal. App. 3d 605, 618)* .

[4] Additional Authorities

[a] Motion Relying on Extrinsic Evidence Is to Be Treated as Motion for Summary Judgment

Pianka v. State of California (1956) 46 Cal. 2d 208, 293 P.2d 458 , involved an action against the National Guard for injuries sustained by a minor resulting from the explosion of a shell left on a firing ground after a public demonstration. Without answering, defendants filed a motion to dismiss. An affidavit supporting the motion stated facts indicating that

the public demonstration had been a proprietary activity of the state that is protected by the doctrine of sovereign immunity. The trial court granted the motion, and plaintiff appealed from the judgment of dismissal.

The Supreme Court reversed. The Court stated that although a speaking motion of the sort that defendants had filed had been permitted by the courts under certain circumstances, such speaking motions have been superseded by the procedure governing motions for summary judgment contained in *Code Civ. Proc. § 437c* (*46 Cal. 2d 208, 211)* . Thus, the Court stated that in the interest of orderly and efficient administration of justice, the litigant should be required to employ the statutory remedy set out in *Code Civ. Proc. § 437c*, and a speaking motion to dismiss should be treated as a motion for summary judgment in order to preserve the safeguard provided by the statute (*46 Cal. 2d 208, 212)* .

In *City and County of San Francisco v. Strahlendorf (1992) 7 Cal. App. 4th 1911, 9 Cal. Rptr. 2d 817* , plaintiff City filed a paternity suit against Strahlendorf, identified by a woman on public assistance as the father of her infant son. After filing an answer, Strahlendorf purported to challenge the complaint through a motion to strike. Despite the lack of timeliness of the motion, and the lack of grounds for the motion on the face of the pleading, the trial court relied on factual representations made by counsel for both parties, and granted the motion (*7 Cal. App. 4th 1911, 1913)* . The court of appeal declined to reverse on procedural grounds, instead treating the procedurally deficient motion to strike as a "speaking motion" supported by facts outside the pleading, and applied the standards for a motion for summary judgment. Under those standards, the court of appeal reversed the trial court's ruling on the merits (*7 Cal. App. 4th 1911, 1914)* .

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
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16-160 California Points & Authorities § 160.61

§ 160.61 Opposing Motion to Strike Whole or Part of Pleading [Code Civ. Proc. § 435]--Motion Not Timely [Code Civ. Proc. § 435(b)(1)]

[1] FORM

[*Caption. See § 160.60.*]

THE MOTION TO STRIKE SHOULD BE DENIED AS UNTIMELY BECAUSE IT WAS NOT FILED WITHIN THE TIME ALLOWED TO RESPOND TO THE _____ [*specify pleading, e.g.,* COMPLAINT].

A. Time Limit for Filing Motion to Strike. A notice of motion to strike must be filed within the time allowed to respond to the challenged pleading (*see Code Civ. Proc. § 435(b)(1)*).

[*Optional*] **B. Motion to Strike Complaint After Answer Has Been Filed Is Improper.** From the language of former Code of Civil Procedure Section 435 stating that the defendant, within the time required in the summons to answer, may serve and file a notice of motion to strike, and that if the defendant serves and files such a notice of motion without demurring, his time to answer the complaint shall be extended, it expressly appears that a defendant can move to strike a complaint only before he or she has answered it and not afterward (*Adohr Milk Farms, Inc. v. Love (1967) 255 Cal. App. 2d 366, 370-371, 63 Cal. Rptr. 123*). Substantially similar language is continued in Section 435 as amended by Stats. 1993, ch. 456, which provides that any party may serve and file the motion within the time allowed to respond to a pleading (*Code Civ. Proc. § 435(b)(1)* (also giving one exception)) and that the service and filing of the notice of motion to strike a complaint without demurring extends the time to answer (*Code Civ. Proc. § 435(c)*).
Dated: _____.

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

CAUTION:

The time restriction stated in Paragraph A of this form does not apply if the motion to strike is made as part of a motion under *Code Civ. Proc. § 438(i)(1)(A)*, directed at a pleading filed after a motion for judgment on the pleadings was sustained with leave to amend [*Code Civ. Proc. § 435(b)(1), (e)*; *see also § 160.35* and Ch. 71, *Demurrers and Motions for Judgment on the Pleadings*].

Counsel using this form must be aware of *Code Civ. Proc. § 436*, under which the court has discretion to strike matter without any time limit. For discussion, see *160.61[2][c]*.

[a] Use of Form

This form of memorandum may be used to oppose a motion to wholly or partially strike any pleading on any grounds if the motion was not timely. This form sets out the point that a motion to strike must be filed within the time allowed to respond to the challenged pleading. It also sets out the point that a defendant's motion to strike a complaint must be filed before filing the answer. Counsel should insert facts and arguments into this form showing how the points of law stated relate to the facts of the case.

[b] Time to Respond to Pleadings

The times within which responses to pleadings must be filed are set out in the Code of Civil Procedure as follows:

(1) Answer or demurrer to complaint--30 days [*see Code Civ. Proc. §§ 412.20(a)(3)* (response to complaint generally), 430.40(a) (demurrer)];

(2) Answer or demurrer to cross complaint--30 days [*Code Civ. Proc. § 432.10*];

(3) Answer to complaint or cross complaint if demurrer overruled--10 days or as otherwise determined by court [*see Code Civ. Proc. § 472a*; *Cal. Rules of Ct., Rule 3.1320(g)*]; and

(4) Demurrer to answer--10 days [*see Code Civ. Proc. § 431.50(b)*].

In determining whether a motion to strike is timely, counsel should determine which statute applies to the pleading that opposing counsel has moved to strike and then determine if the response time limit set out in that statute has been exceeded.

[c] No Time Limit on Court's Power to Strike

The time limits for moving to strike set out in *Code Civ. Proc. § 435(b)(1)* apply only to the making of the motion by a party. In contrast to Code Civ. Proc. *§ 435(b)(1), Code Civ. Proc.* § 436, which is the source of the court's power to strike pleading matter, states that the court may strike such matter on a motion made pursuant to *Code Civ. Proc. § 435* or at any time in its discretion. Since the court's power to strike at any time is given in the alternative to the power to strike on a motion made pursuant to *Code Civ. Proc. § 435* (setting forth time limits), it appears that the time limits governing a party's right to move to strike do not apply to the court's power to strike [*see Code Civ. Proc. § 436*]. It is not clear from the language of these two statutes whether the response time limit of *Code Civ. Proc. § 435(b)(1)* requires the court to deny an untimely motion to strike, or whether the broad language of *Code Civ. Proc. § 436* gives the court the power to strike pleading matter if it deems it proper to do so, even though the motion to strike was untimely.

It should be noted that *Code Civ. Proc. § 435* does not set up new and independent time limits for filing a motion to

strike, but rather makes those time limits that apply in general to pleadings responding to the challenged pleading applicable to motions to strike as well [*see Code Civ. Proc. § 435(b)(1)*]. The courts have read the statutory time limits applying to responsive pleadings such as answers and demurrers to mean that a party cannot as of right file such a pleading after the time has passed, but that the court may in its discretion allow such late filed pleadings to stand [*see § 160.35*]. Although there have been no cases on point, it is possible that in applying the statutory time limits for responsive pleadings generally to motions to strike, the courts will also apply the rule of discretion evolved by the courts to govern the consequences of violating those time limits.

[3] Discussion of Authorities

[a] Motion to Strike Complaint After Answer Has Been Filed Is Improper

Adohr Milk Farms, Inc. v. Love *(1967) 255 Cal. App. 2d 366, 63 Cal. Rptr. 123* , was an action by an employer to recover from its employee the amount of workers' compensation benefits paid to an employee for damages alleged to have been sustained through the negligence of the employee. The defendant employee answered, pleading as an affirmative defense that the statute of limitations on the action had run. Thereafter, defendant filed a notice of motion stating that she would move for dismissal of the action, or in the alternative that the complaint be stricken or for a judgment on the pleading, on the ground that the statute of limitations had run. The trial court granted the motion in an unsigned minute order without specifying the nature of the motion it was granting, and the plaintiff appealed.

The court of appeal reversed the trial court's minute order. Preliminarily, the court discussed the nature of the motion that was granted by the trial court's order. The court stated that neither an unsigned motion to dismiss nor a motion for judgment on the pleadings is appealable, and that the appeal would have to be dismissed if the trial court's order were to be treated as one granting either kind of motion (*255 Cal. App. 2d 366, 368, 369)* . However, the court stated that an order granting a motion to strike that would, as in the present case, operate to remove from the case the only cause of action alleged against defendant and leave no issues to be determined between the opposing parties is appealable (*255 Cal. App. 2d 366, 370)* . In order to be able to make its decision on the trial court's order, the court held that it was an order granting a motion to strike, and that defendant's motions to dismiss and for judgment on the pleading were still pending in the trial court (*255 Cal. App. 2d 366, 371, 372)* .

Regarding defendant's motion to strike, the court held that it appears expressly from the language of former Code Civ. Proc. § 435 (authorizing motion to strike complaint; *now see Code Civ. Proc. § 435*, authorizing motion to strike most pleadings) that a defendant may move to strike a complaint only before he or she has answered and not afterward (*255 Cal. App. 2d 366, 371)* . In coming to this conclusion, the court relied on language in former Code Civ. Proc. § 435 stating that (1) the defendant within the time required by the summons to answer may serve and file a notice of motion to strike [*now see Code Civ. Proc. § 435(b)(1)*, stating that any party within the time allowed to respond to a pleading may file and serve a notice of motion to strike], and (2) if the defendant files and serves a notice of motion to strike without demurring, his or her time to answer the complaint shall be extended [now contained, as amended to expand coverage of the statute to other parties moving to strike as well as defendant, in *Code Civ. Proc. § 435(c)*] (*255 Cal. App. 2d 366, 370-371)* .

The court held that since the defendant in the present case had already answered when she filed her motion, a motion to strike under *Code Civ. Proc. § 435* did not lie. Thus, the court concluded, the trial court's order, insofar as it purported to grant a motion to strike, was void (*255 Cal. App. 2d 366, 370)* .

For discussion of a possible limitation on the court's statement that an order striking a complaint is void when made on a motion to strike filed after the answer, see *§ 160.61[2]*.

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16-160 California Points & Authorities § 160.62

§ 160.62 Opposing Motion to Strike Whole or Part of Pleading [Code Civ. Proc. § 435]--Hearing Date Improperly Specified [Code Civ. Proc. §§ 435(b)(2), 1005]

[1] FORM

[*Caption. See § 160.60.*]

THE MOTION TO STRIKE SHOULD BE DENIED BECAUSE IT DID NOT SPECIFY A HEARING DATE WITHIN THE TIME REQUIRED BY STATUTE.

A. Notice of Motion to Strike Must Specify Hearing Date Within Statutory Time Limits. A notice of motion to strike the answer or the complaint, or a portion thereof, shall specify a hearing date in accordance with *Section 1005 of the Code of Civil Procedure* (*Code Civ. Proc. § 435(b)(2)*).

B. Statutory Time Limits. The notice of motion and supporting papers must be served and filed at least 16 court days before the time appointed for the hearing; if the notice is served by mail, the required 16-day period of notice before the time appointed for the hearing shall be increased by five days if the place of mailing and the place of address are within the State of California, 10 days if either the place of mailing or the place of address is outside the State of California but within the United States, and 20 days if either the place of mailing or the place of address is outside the United States, and if the notice is served by facsimile transmission, Express Mail, or another method of overnight delivery, the required 16-day period of notice before the time appointed for the hearing is increased by two court days (*Code Civ. Proc. § 1005(b)*).
Dated: _____.

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form of memorandum may be used to oppose a motion to wholly or partially strike any pleading on any grounds if the notice of motion did not specify a hearing date allowing the minimum amount of time from the time of service of the notice required by statute. This form sets out the minimum amounts of time within which a hearing may be set for notice not served by mail and for notices served by mail to various locations.

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should indicate the date and mode of service of the notice of motion, the place of address if service was by mail, and the amount of time allowed for between the date of service and the specified hearing date.

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16-160 California Points & Authorities § 160.63

§ 160.63 Opposing Motion to Strike Whole or Part of Pleading [Code Civ. Proc. § 435]--Defect Can Be Corrected by Amendment

[1] FORM

[*Caption. See § 160.60.*]

THE MOTION TO STRIKE SHOULD BE DENIED BECAUSE THE DEFECT IN THE _____ [*specify pleading, e.g.,* COMPLAINT] CAN BE CURED BY AMENDMENT, WAS NOT THE RESULT OF WILLFUL NEGLECT OR INEXCUSABLE CARELESSNESS BY _____ [*specify party opposing motion, e.g.,* PLAINTIFF], AND WILL NOT CAUSE IRREPARABLE HARM TO _____ [*specify moving party, e.g.,* DEFENDANT].

A. Striking Should Be Avoided When Defect May Be Corrected. To strike out a pleading that is susceptible to being amended by a statement of facts known to exist and that constitutes a cause of action is a harsh proceeding and should only be resorted to in cases of willful neglect, inexcusable carelessness, or irreparable injury to the opposing party (*Burns v. Scooffy (1893) 98 Cal. 271, 276, 33 P. 86* ; *Allerton v. King (1929) 96 Cal. App. 230, 234, 274 P. 90* ; *see Hopkins v. Hopkins (1953) 116 Cal. App. 2d 174, 179, 253 P.2d 723*).

[*Optional*] **B. Court May Grant Leave to Verify Answer Rather Than Striking Answer.** The court may overrule a motion to strike an answer as unverified and allow the defendant leave to verify the answer before trial unless this in some way takes the plaintiff by surprise (*Angier v. Masterson (1856) 6 Cal. 61, 62* ; *Jenssen v. R.K.O. Studios, Inc. (1937) 20 Cal. App. 2d 705, 707, 67 P.2d 757*).

[*Counsel should add a proposed amendment and argument showing how the proposed amendment would correct the purported defect in the challenged pleading matter as well as argument showing that neither inexcusable neglect in failing to correct the defect originally nor prejudice to the plaintiff would warrant granting the motion to strike despite the proffered amendment.*]
Dated: _____.

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion to strike all or part of a pleading when the defect in the pleading matter, if any, could be corrected by amendment. It sets out the point that when an amendment stating facts known to exist and constituting a cause of action could correct the defect in pleading matter, the matter should not be stricken unless the circumstances of the case show willful neglect or inexcusable carelessness by the party that filed the challenged pleading or irreparable harm to the opposing party. In an appropriate case, these points and authorities may be submitted in opposition to any of the arguments for motion to strike supported by the points and authorities *set out in §§ 160.30 -160.43*. The point set out in Paragraph B may be submitted in opposition to the arguments for a motion to strike *set out in § 160.37*.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

[b] Validity of Pre-1982 Case Law

The cases cited in this form were decided before the Legislature reorganized the law governing motions to strike in 1982. However, since none of the rules set out in these cases are inconsistent with any of the provisions of the 1982 legislative scheme, it appears that the cases are still good law [*see Code Civ. Proc. §§ 431.10, 435, 436, 437*]. For a further treatment of the continuing validity of pre-1982 case law, see the discussion in *§ 160.03*.

[c] Permission to Amend Pleading

In opposing the motion to strike, counsel may also move for permission to amend a challenged pleading. When appropriate, counsel may argue, as an alternative to arguing that the motion to strike should be denied, that if the motion is granted, leave to amend the defective pleading should be also granted [*Code Civ. Proc. § 472a(d)*; *see also Code Civ. Proc. § 473(a)*]. Although leave to amend is deemed granted when a demurrer is sustained unless the court states otherwise, there are no provisions that deem the granting of leave to amend when a motion to strike is granted [*see Cal. Rules of Ct., Rule 3.1320(g)*].

[d] Related Memoranda

For discussion and forms regarding amended pleadings, see Ch. 16, *Amended and Supplemental Pleadings* in this publication.

[3] Discussion of Authorities

[a] Striking Should Be Avoided When Defect May Be Corrected

In ***Burns v. Scooffy*** *(1893) 98 Cal. 271, 33 P. 86* , plaintiff filed an action to establish his right to purchase certain land from the state and to have similar applications by defendants to purchase the same land declared invalid. One of the defendants duly answered, setting out his own application to purchase the land in dispute, but failed to aver, as was required by applicable law to prevent the application from becoming void, that he had within six months of filing the

application demanded an approval of the application or an order of reference, or that an order of reference to a court had been had. Plaintiff moved to strike the answer. Defendant's counsel offered to file an amendment to the answer making the necessary averments on information and belief, or positively if given time to send the answer to defendant.

The Supreme Court reversed. The Court noted that the affidavits in support of the motion indicated that the omission of the allegations in question was probably an oversight on the part of the attorney who drew up the pleading. The Court held that to strike out a pleading that is susceptible of being amended by a statement of facts known to exist, and that constitutes a cause of action or defense to an action, is a harsh proceeding and should only be resorted to in extreme cases. The Court stated further that to refuse permission to answer with a valid defense in hand can only be justified in the face of facts showing willful neglect, inexcusable carelessness, or irreparable injury to the plaintiff (*98 Cal. 271, 276)* .

This case was decided before the rule stating that grounds for a motion to strike may not be shown by extrinsic evidence was set out [*see Code Civ. Proc. § 437(a)*]. Under current law, the case would have been treated as a motion for summary judgment [*see Vesely v. Sager (1971) 5 Cal. 3d 153, 157, 167-169, 95 Cal. Rptr. 623, 486 P.2d 151]* . However, it appears that the point that defective pleadings which can be made whole by amendment should not be stricken except in extreme cases is still valid.

The facts and procedural background of ***Allerton v. King*** *(1929) 96 Cal. App 230, 274 P. 90* , are *set out in § 160.66[3][a]*. In that case, the court of appeal noted that defendant's answer in an action on an indemnity bond, in a case involving certain disputed property, was inartfully drawn and perhaps uncertain, but that defendant's repeated averment that the property in question was worth no more than an amount that was considerably less than the amount prayed for by plaintiff made it clear that defendant was trying to raise the valid defense that plaintiff's recovery should be limited to the value of the disputed property (*96 Cal. App 230, 234)* . The court held that the proper procedure in the case would have been to file a special demurrer for uncertainty. In connection with this holding, the court cited *Burns v. Scooffy (1893) 98 Cal. 271, 276, 33 P. 86* (discussed *above*) and restated the rule set out in *Burns* that when an amendment stating a cause of action is known to be possible, a defective pleading should not be stricken except in extreme cases (*96 Cal. App 230, 234)* .

Hopkins v. Hopkins *(1953) 116 Cal. App. 2d 174, 253 P.2d 723* , involved an action on a marriage dissolution settlement. Plaintiff alleged a written agreement, incorporated into the judgment of dissolution, providing that defendant would make monthly support payments. The complaint included two counts alleging failure to make any payments. The first count alleged failure to make any payments on the judgment within the five-year period prior to the date on which plaintiff instituted the action. The second count alleged failure to make any payments on the judgment and contract since a date some 18 years prior to commencement of the action. Defendant answered, averring inter alia that the action was barred by laches and by the statute of limitations. Plaintiff did not interpose a demurrer, but moved to strike the averments as to laches and the statute of limitations. With respect to the statute of limitations, plaintiff argued that the plea was defective in that, while setting forth the code sections in which the applicable limitations were set out, it failed to specify the subsection relied on. After plaintiff made her motion, defendant requested permission to amend his answer so as to be able to specify the required subsections. The trial court granted the motions to strike with respect to both the plea of laches and the plea of the statute of limitations. With respect to the statute of limitations plea, however, the court stated that its ruling was without prejudice to defendant's right to renew his motion to amend the answer at the close of the trial. Defendant did so renew the motion, but the motion was denied by the trial court and judgment was entered for plaintiff. Defendant appealed.

The court of appeal reversed the judgment and remanded the case to the trial court with instructions that defendant be permitted to amend his answer in accordance with the court's opinion. Preliminarily, the court noted that defendant on appeal did not complain of the order striking the plea of laches and stated that this order was clearly correct, since the plea of laches does not lie in an action at law. The court further stated that the trial court's ruling with respect to the plea of limitations was correct as regarded plaintiff's first count, since the first count only sought to recover payments that

had accrued within the statutory limitations period.

Concerning the statute of limitations plea as to plaintiff's second count, the court conceded that under applicable law the defendant's answer was insufficient in that it failed to specify the particular subsections relied on, and that this insufficiency would have made the answer susceptible to a demurrer (*116 Cal. App. 2d 174, 177, 178)* . However, the court noted that the answer did allege facts showing that some portion of the claim at least was barred by limitation, and evidenced an intention to plead limitations (*116 Cal. App. 2d 174, 178-179)* . Thus, the court concluded that the answer was not so devoid of allegations of fact as to compel the court to say that it was a nullity or fatally defective in the absence of a demurrer (*116 Cal. App. 2d 174, 179)* .

The court further stated that even if it was in error in the reasoning set out above, it was an abuse of discretion for the trial court not to permit defendant to defend his answer so as to conform it to the applicable pleading requirements (*116 Cal. App. 2d 174, 179)* . In support of its holding the court noted that the proposed amendment would do no more than add the correct subsections for the statutes relied on in raising the bar of limitation. The court further observed that plaintiff's stating her single cause of action in two counts, one of which alleged only failure to pay during a period falling within the limitation period, indicated that plaintiff knew that she would be faced with the statute of limitations.

[b] Court May Grant Leave to Verify Answer Rather Than Striking Answer

Angier v. Masterson *(1856) 6 Cal. 61* , involved an action to foreclose on a mortgage. The complaint was verified but the answer was not. On the day of trial, plaintiff moved to strike the answer as unverified. The trial court overruled the motion and allowed defendants to verify the answer. After trial by jury, judgment was entered for defendants. Plaintiff appealed.

The Supreme Court upheld the action of the trial court in denying the motion to strike and allowing defendants to verify the answer. The Court stated that it was not error to allow defendant to verify his answer before trial, unless it in some way took plaintiff by surprise, and it was not shown that this was the case (*6 Cal. 61, 62)* .

In ***Jenssen v. R.K.O. Studios, Inc.*** *(1937) 20 Cal. App. 2d 705, 67 P.2d 757* , plaintiff's verified complaint alleged that defendants had unlawfully retained and used a literary composition of plaintiff's. At the opening of the trial and before any evidence was introduced, plaintiff moved for judgment on the pleadings on the ground that the verifications of the answers were insufficient in form. The trial court indicated that the motion for judgment would be denied without making a formal ruling on it, and allowed defendants until five o'clock of the following afternoon to file properly verified answers. Plaintiff asked for no postponement of the trial, and trial proceeded immediately. The amended answers were duly filed within the time allowed, without change from the original answers except in the form of the verification and an elaboration of some of the denials. Judgment was entered for defendants, and plaintiff appealed.

The court of appeal upheld the action of the trial court in allowing defendants to verify their answer by way of amendment. The court acknowledged that if the verifications in the original complaint were insufficient, there existed a failure to deny and which constituted an admission of the allegations of the complaint. However, the court stated that proper verification is not a jurisdictional requirement and that a failure to properly verify amounts to no more than a mere defect in the pleading, the right to object to which might have been waived (*20 Cal. App. 2d 705, 707)* . Since the court had jurisdiction to proceed, the court applied the basic rule that permitting or refusing amendments to pleadings is with in the sound discretion of the trial court, which should be exercised liberally, and will be overruled only for gross, clearly apparent abuse (*20 Cal. App. 2d 705, 707)* . The court cited *Angier v. Masterson (1856) 6 Cal. 61* (discussed *above*), for the rule that an amendment may be allowed at the time of trial in the absence of a showing of prejudice to the adverse party (*20 Cal. App. 2d 705, 707)* . The court added in pertinent dicta that in view of the fact that some 16 months had elapsed between the time of filing the original answers and the time that objection was first made as to their sufficiency, it would have been error had the trial court refused permission to amend (*20 Cal. App. 2d 705, 707)* . Finally, the court stated that since plaintiff had not shown that she had suffered prejudice from the trial court's action in

permitting the amendments, the trial court's action, if it had been erroneous, would have been harmless error (*20 Cal. App. 2d 705, 707)* .

[4] Additional Authorities

[a] Court May Grant Leave to Verify Answer Rather Than Striking Answer

Ware v. Stafford (1962) 206 Cal. App. 2d 232, 24 Cal. Rptr. 153 , involved an action to cancel an oil lease held by defendant on plaintiffs' land. After judgment had been rendered for plaintiffs and had been affirmed on appeal, defendant unsuccessfully moved the trial court to vacate the judgment, quash summons, and dismiss the action. Defendant then appealed the trial court's denial of the motion. The court of appeal upheld the trial court's action. Defendant had argued, inter alia, that the verification of the complaint had been made by a person not a party to the action and was therefore defective. The court held that the verification was not defective under the circumstances of the case, and that even if it were defective there is no authority for the position that a defective verification deprives the trial court of jurisdiction so as to render its judgment void (*206 Cal. App. 2d 232, 237)* . To illustrate the nonjurisdictional character of a defect in verification, the court cited *Jenssen v. R.K.O. Studios, Inc. (1937) 20 Cal. App. 2d 705, 707, 67 P.2d 757* (*discussed under § 160.63[3][b]*) for the rule that such a defect may be cured by amendment.

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16-160 California Points & Authorities § 160.64

§ 160.64 Opposing Motion to Strike Whole or Part of Pleading [Code Civ. Proc. § 435]--Pleading Not Filed or Drawn in Conformity With Law [Code Civ. Proc. § 436(b)]--Amended Pleading Adding New Parties Without Leave--Only Added Parties May Move to Strike

[1] FORM

[*Caption. See § 160.60.*]

THE MOTION TO STRIKE SHOULD BE DENIED WITH RESPECT TO _____ [*specify parties not added by challenged amended pleading*] BECAUSE ONLY PARTIES THAT WERE ADDED BY AN AMENDED PLEADING MAY MOVE TO STRIKE AN AMENDED PLEADING ON THE GROUND THAT THE PLEADING ADDS NEW PARTIES WITHOUT PERMISSION.

Only Added Parties May Move to Strike Amended Pleading Adding New Parties Without Permission. When an amended pleading is defective because new parties were added without permission of the court, only the added parties may move to strike the challenged pleading on this ground (*see People ex rel Dept. Pub. Wks. v. Clausen (1967) 248 Cal. App. 2d 770, 782 fn. 7, 57 Cal. Rptr. 227* (cross complaint).
Dated: _____.

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion to strike an amended pleading that added new parties without

permission of the court when the party that made the motion to strike was not one of the parties added by the challenged pleading. The foregoing sets out the point that a motion to strike on the above-stated grounds should be granted only in favor of those parties who were improperly named as new parties by the challenged pleading. In an appropriate case, this memorandum may be submitted in opposition to a motion to strike supported by the points and authorities *set out in § 160.42*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated.

[b] Validity of Pre-1982 Case Law

People ex rel Dept. Pub. Wks. v. Clausen (1967) 248 Cal. App. 2d 770, 782, 57 Cal. Rptr. 227 (cross complaint), which is the basis for this form, was decided before the Legislature reorganized the law governing motions to strike in 1982. However, since none of the rules set out in this case are inconsistent with any of the provisions of the 1982 legislative scheme, it appears that the cases are still good law [*see Code Civ. Proc. §§ 431.10, 435, 436, 437*]. For a further treatment of the continuing validity of pre-1982 case law, see the *discussion under § 160.03*.

[3] Discussion of Authorities

[a] Only Added Parties May Move to Strike Amended Pleading Adding New Parties Without Permission

People ex rel Dept. Pub. Wks. v. Clausen *(1967) 248 Cal. App. 2d 770, 57 Cal. Rptr. 227* , involved a condemnation action initiated against defendant by the State of California (hereinafter called State). Defendant answered and filed a cross complaint charging State with trespass, to which the trial court sustained State's demurrer with leave to amend. Subsequently, defendant, without obtaining further leave from the court, filed an amended cross complaint that named, inter alia, two corporations as additional cross defendants. State filed a demurrer and moved to strike the cross complaint. The trial court sustained the demurrer without leave to amend and in addition granted the motion to strike on the stated grounds that defendant had not obtained permission of the court either to file an amended cross complaint or to add new parties, and subsequently entered judgments of dismissal of the cross complaint in favor of State and in favor of the added corporate defendants. Defendant appealed.

The court of appeal reversed the order striking the amended cross complaint and judgment of dismissal as to State and upheld the order as to the corporate defendants who had been added by the cross complaint. The court noted that the trial court's granting of leave to amend the original cross complaint in conjunction with sustaining State's demurrer to the answer and cross complaint was sufficient to give defendant permission to amend the cross complaint (*248 Cal. App. 2d 770, 783)* . However, the court held that permission to file an amended cross complaint did not entitle permission to bring in new parties by means of the amended cross complaint, and that the amended cross complaint was therefore defective as against the corporate defendants brought in by the amended pleading (*248 Cal. App. 2d 770, 784-785*). As to the motion by State, however, the court stated in a footnote that the defect created by the addition of the new parties would support the granting of a motion to strike only in favor of the cross defendants who were named in the cross complaint as parties without leave of court and that State cannot, on the basis of this defect, obtain an order striking the amended cross complaint with respect to itself (*248 Cal. App. 2d 770, 782 fn. 7*).

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16-160 California Points & Authorities § 160.65

§ 160.65 Opposing Motion to Strike Whole or Part of Pleading [Code Civ. Proc. § 435]--No Absolute Right to Have Untimely Responsive Pleading Stricken

[1] FORM

[*Caption. See § 160.60.*]

THE PLAINTIFF HAS NO ABSOLUTE RIGHT TO HAVE A RESPONSIVE PLEADING STRICKEN MERELY BECAUSE IT WAS FILED LATE.

A. Technically Late Pleading Should Not Be Stricken When There Was No Purposeful Delay or Prejudice. When it cannot be said that the filing party was purposely dilatory and the opposing party suffered no prejudice from the delay, it would be unjust to deprive the filing party of its day in court by striking the pleading simply because of a minor delay in the filing of the pleading (*Amacorp Ind. Leasing Co. v. Robert C. Young Associates, Inc. (1965) 237 Cal. App. 2d 724, 730, 47 Cal. Rptr. 294*).

B. Opposing Party Has No Absolute Right to Have Untimely Pleading Stricken. When the late filing of a pleading is a mere irregularity, the striking of such a pleading is left to the discretion of the trial court and does not rest on any absolute right of the opposing party to have the pleading stricken (*Bowers v. Dickerson (1861) 18 Cal. 420, 421* ; *Tuck v. Thuesen (1970) 10 Cal. App. 3d 193, 196, 88 Cal. Rptr. 759* (disapproved on unrelated grounds in *Neel v. Magana, Olney, Levy, Cathcart & Gelfand (1971) 6 Cal. 3d 176, 190, 98 Cal. Rptr. 837, 491 P.2d 421*); *see Code Civ. Proc. § 436* (court as empowered to strike on terms it deems proper)).
Dated: _____.

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion to strike a responsive pleading on the ground that it was not timely filed. The form sets out the point that the opposing party has no absolute right to have a pleading stricken merely because it was untimely filed and that the court may at its discretion permit such a pleading to stand.

In an appropriate case, this memorandum may be submitted in opposition to a motion to strike supported by the points and authorities *set out in § 160.36*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss any facts making it appropriate for the court to permit the untimely pleading to stand, such as facts showing that the failure to file on time was a mere irregularity and that there was neither purposeful delay nor prejudice to the opposing party as a result of the delay.

[b] Validity of Pre-1982 Case Law

The cases cited in this form were decided before the Legislature reorganized the law governing motions to strike in 1982. However, since none of the rules set out in these cases are inconsistent with any of the provisions of the 1982 legislative scheme, it appears that the cases are still good law [*see Code Civ. Proc. §§ 431.10, 435, 436, 437*]. For a further treatment of the continuing validity of pre-1982 case law, see the *discussion under § 160.03*.

[3] Discussion of Authorities

[a] Technically Late Pleading Should Not Be Stricken When There Was No Purposeful Delay or Prejudice

Amacorp Ind. Leasing Co. v. Robert C. Young Associates, Inc. *(1965) 237 Cal. App. 2d 724, 47 Cal. Rptr. 294* , was an action for money alleged to be due on a lease contract. Defendant cross complained against plaintiff corporation and added a second corporation as a new cross defendant. The added cross defendant filed a general and special demurrer, which the trial court granted with leave to amend within 10 days. Subsequently, defendant received an extension of the time within which to amend. Defendant thereupon served an amended cross complaint on both the original plaintiff and the added cross defendant, but did not file it with the court. The amended cross complaint was in substance a repetition of the original cross complaint. The added cross defendant again demurred and additionally filed a motion to strike the cross complaint stating as grounds, inter alia, that it had not been timely filed. The original plaintiff answered the cross complaint. Defendant had still not filed the amended cross complaint on the day on which the added cross defendant's demurrer and motion to strike were heard. It was stipulated that the defendant could file the cross complaint on that day, which was a Friday. However, defendant did not actually file its amended cross complaint until the following Monday. The trial court subsequently sustained the demurrer without leave to amend, granted the motion to strike, and entered a judgment of dismissal in favor of the added cross defendant. Defendant appealed from this decision.

The court of appeal overturned the trial court's order to strike the amended complaint. The court acknowledged that there is no doubt that the trial court may in its sound discretion grant a motion to strike a pleading because it was not timely filed (*237 Cal. App. 2d 724, 730)* . However, the court stated that recent California cases upholding the striking of a pleading for untimely filing all involved aggravating circumstances. Thus, the court distinguished *Buck v. Morrossis (1952) 114 Cal. App. 2d 461, 464-465, 250 P.2d 270* (cited in § 160.35, supporting motion to strike untimely responsive pleading, for the rule that an untimely pleading may be stricken), as involving a purposely dilatory defendant. The court distinguished other cases as involving pleadings that were sham and frivolous as well as untimely (*237 Cal. App. 2d 724, 730)* .

With respect to the present case, the court stated that it could not be said that defendant had been purposely dilatory, nor

was the cross complaint sham and frivolous. The court also stated that the added cross defendant suffered no prejudice because of the delay. From these factors, the court concluded that it would be most unjust to prevent defendant from having its day in court because its amended cross complaint had, as appeared from the record, been filed one day beyond the date set. Thus, the court held that the trial court had erred in striking the cross complaint from the files (*237 Cal. App. 2d 724, 730)* .

The court also overturned the trial court's order sustaining the added cross defendant's demurrer to the cross complaint (*237 Cal. App. 2d 724, 727-729)* .

[b] Opposing Party Has No Absolute Right to Have Untimely Pleading Stricken

Bowers v. Dickerson *(1861) 18 Cal. 420* , was a suit on a promissory note. After the complaint was filed and the summons was served, defendant interposed a demurrer, which was overruled. Defendant answered on the same day on which the demurrer was overruled. It was subsequently established that summons had actually been served seven days earlier than the date that appeared on the return, so that both the demurrer and the answer were untimely. The return was corrected, and plaintiff moved to strike the demurrer and answer on the ground of untimely filing. Defendant thereupon, by leave of the court and over exception of plaintiff, produced witnesses to show that the error on the return was the fault of the sheriff, that defendant had supposed summons to be served on the erroneous date appearing on the original return, and that therefore defendant's failure to answer within the time required was due to mistake, surprise, or excusable neglect. The trial court overruled the motion to strike and subsequently entered judgment for defendant, the plaintiff failing to prosecute further. Plaintiff appealed.

The Supreme Court upheld the trial court's decision to overrule the motion to strike. The Court stated that defendant's filing the answer after time had expired without leave of the court was a mere irregularity, for which the answer might have been stricken out, but on account of which plaintiff was not entitled to have it stricken out, unless the court in exercise of its discretion deemed such to be proper. The Court stated further that the trial court had absolute power to either retain the answer or to permit another to be filed, or to pursue whatever course with respect to the striking or retaining of the answer that the justice of the case required (*18 Cal. 420, 421)* .

Tuck v. Thuesen *(1970) 10 Cal. App. 3d 193, 88 Cal. Rptr. 759* (disapproved on unrelated grounds in *Neel v. Magana, Olney, Levy, Cathcart & Gelfand (1971) 6 Cal. 3d 176, 190, 98 Cal. Rptr. 837, 491 P.2d 421*), was a malpractice action against an attorney. Plaintiff filed a complaint and one amended complaint. Defendant filed a demurrer to the amended complaint after the 10-day period for such filing had passed. The demurrer alleged that the statute of limitations had run on the action. Plaintiff moved to strike the demurrer. The trial court denied the motion to strike and sustained the demurrer without leave to amend. Plaintiff thereupon appealed.

The court of appeal upheld the decision of the trial court denying the motion to strike. The court cited *Bowers v. Dickerson (1861) 18 Cal. 420, 421* (discussed *above*), for the rule that there is no absolute right to have a pleading stricken for lack of timeliness when no question of jurisdiction is involved and when the late filing was a mere irregularity. The court further cited *Buck v. Morrossis (1952) 114 Cal. App. 2d 461, 464-465, 250 P.2d 270* (discussed in *§ 160.35[3][a]*), for the rule that the granting or denial of a motion to strike a pleading for untimely filing is a matter that lies within the discretion of the trial court (*10 Cal. App. 3d 193, 196)* . With respect to the present case, the court stated that defendant's late filing was a mere irregularity, and that there was nothing in the record to show that the trial court abused its discretion in denying the motion, particularly in view of the nature of the issue raised by the demurrer (*10 Cal. App. 3d 193, 196)* .

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16-160 California Points & Authorities § 160.66

§ 160.66 Opposing Motion to Strike Whole or Part of Pleading [Code Civ. Proc. § 435]--Irrelevant Matter [Code Civ. Proc. §§ 431.10(b), (c), 436(a)]--Motion Too Broad

[1] FORM

[*Caption. See § 160.60.*]

THE MOTION TO STRIKE SHOULD BE DENIED BECAUSE THE MOTION IS TOO BROAD IN THAT IT ATTACKS RELEVANT MATTER CONTAINED IN THE PLEADING.

Motion Attacking Relevant Matter in Pleading Should Be Denied in Its Entirety. A motion to strike cannot be made to serve the purposes of a special demurrer and should be stricken out in its entirety if it is so broad as to include relevant matters within the scope of its attack (*Triodyne Inc. v. Superior Court (1966) 240 Cal. App. 2d 536, 542, 49 Cal. Rptr. 717*); *Allerton v. King (1929) 96 Cal. App. 230, 234, 274 P. 90*).
Dated: _____.

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion to strike all or part of a pleading on the ground of irrelevance when the motion is so broadly framed as to challenge matter in the pleading that is relevant as well as matter that may be irrelevant. It sets out the point that a motion to strike that includes relevant matter in a pleading within the scope of its attack should be denied in its entirety, regardless of whether some of the matter challenged in a pleading might be

stricken as irrelevant. In an appropriate case, these points and authorities may be submitted in opposition to a motion to strike supported by the points and authorities *set out in § 160.41*.

When appropriate, counsel may use this form to support an argument offered as an alternative to a basic argument that none of the matter being attacked by the motion to strike is irrelevant.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

[b] Validity of Pre-1982 Case Law

The cases cited in this form were decided before the Legislature reorganized the law governing motions to strike in 1982. However, since none of the rules set out in these cases are inconsistent with any of the provisions of the 1982 legislative scheme, it appears that the cases are still good law [*see Code Civ. Proc. §§ 431.10, 435, 436, 437*]. For discussion of the continuing validity of pre-1982 case law, see *§ 160.03*.

[3] Discussion of Authorities

[a] Motion Attacking Relevant Matter in Pleading Should Be Denied in Its Entirety

Triodyne, Inc. v. Superior Court *(1966) 240 Cal. App. 2d 536, 49 Cal. Rptr. 717* , involved an action on a contract. Plaintiffs sued defendant for breach of contract, and defendant filed a cross complaint. In the fourth count of the cross complaint, defendant alleged that it had been induced to execute the contract by false representations made by plaintiffs. Plaintiffs demurred to the fourth count, arguing that under the law applicable to the case defendant was limited to out-of-pocket expenses as the measure of damages, and that the measure of damages alleged in the fourth count was improper. The trial court sustained the demurrer with leave to amend, and defendants filed an amended fourth count. Plaintiffs moved to strike this amended fourth count on the grounds of sham and irrelevance. The trial court granted the motion to strike, stating in its minute order that the amended fourth count was improperly using the loss of profit rule as the theory on which to base an evaluation to substantiate an out-of-pocket claim. Defendant filed a petition for writ of mandate.

The court of appeal reversed the determination of the trial court. The court acknowledged that it appeared from the record that defendant was mistaken or uncertain as to the proper measure of damages (*240 Cal. App. 2d 536, 541)* . However, the court went on to state that it is the general rule that when the facts stated in the complaint show that the plaintiff is entitled to some sort of damages, it is not a fatal error that the pleader has mistaken the rule by which such damages should be determined (*240 Cal. App. 2d 536, 541-542*). In light of this rule, the court stated that the fourth count was sufficient, at least in the absence of a special demurrer. The court stated the rule that a motion to strike cannot be made to serve the purposes of a general demurrer, and that when a motion to strike is so broad as to include relevant matters, the motion should be denied in its entirety (*240 Cal. App. 2d 536, 542)* .

Applying this rule to the motion to strike before it, the court held that insofar as it was made on the purported ground of irrelevance, the motion was not directed to any particular allegations and no showing of irrelevance was made. Thus, the court concluded that the motion must be considered as a motion to strike solely on the ground of sham. The court further concluded that the motion, considered as a motion to strike on the ground of sham, should not have been granted (*240 Cal. App. 2d 536, 542-543)* .

Allerton v. King *(1929) 96 Cal. App 230, 274 P. 90* , involved an action on a bond of indemnity. In that case, defendant had procured a writ of attachment against a certain steam shovel in a justice court action. Plaintiff presented a rival claim based on a promissory note for $6,500, with a chattel mortgage on the same property. On the demand of the constable, defendant gave a bond of indemnity as required by law with himself and two others as sureties. The owners

of the steam shovel defaulted in the justice court action, and the steam shovel was sold under execution of the resulting judgment for $550. Subsequently, plaintiff brought an action against the former owners of the steam shovel to foreclose her chattel mortgage, in which judgment was rendered for plaintiff, decreeing that the former owners and all persons claiming under them, including defendant who had intervened in the action, were barred from all interest in the property. When execution on this judgment was returned unsatisfied, plaintiff began the present action against the sureties on the bond of indemnity, including defendant. For undisclosed reasons, the sureties on the bond other than defendant did not further appear in the record. Defendant answered, and plaintiff moved to strike considerable portions of the answer. Plaintiff then demurred generally to the remainder of the answer, and the general demurrer was sustained. When defendant failed to amend his answer, default was entered, and judgment was rendered against defendant for $10,058.44 and costs. Defendant appealed from this judgment.

The court of appeal overturned the trial court's motion striking portions of defendant's answer. Preliminarily, the court stated that the measure of damages on the bond that was the basis of the action was the value of the steam shovel, and that when, as in the present case, the value of the property was less than the amount of the bond, this fact is properly raised as a defense (*96 Cal. App 230, 232, 233)* . The court noted further that defendant had clearly tried to make out this defense in his answer (*96 Cal. App 230, 233)* . However, the court noted that the answer was filled with recitals, legal conclusion, and other irrelevant matters and endeavored to relitigate the validity of the chattel mortgage. The court stated that most of this matter was properly stricken out (*96 Cal. App 230, 233)* . However, the court also noted that although defendant had failed to make a direct, positive allegation unconnected with irrelevant matter as to the value of the steam shovel when taken, his contention that the shovel was worth no more than $600 appears throughout the answer. The court held that it was error to strike out those contentions (*96 Cal. App 230, 233*). The court held further that since the motion was so broad as to include relevant matters it should have been denied in its entirety. The court added that a court should never strike out matter that will leave the complaint defective and thus lead to the dismissal of the action (*96 Cal. App 230, 234)* . Citing one of the averments in the answer in which defendant had stated the value of the steam shovel, the court stated that read in connection with the irrelevant matter that was averred along with the claim, the averment was at most uncertain, and therefore subject to a special demurrer. However, the court held that a motion to strike cannot be made to serve the purposes of a special demurrer. Finally, the court held that with the allegations as to the value of the shovel in the answer, the general demurrer should not have been sustained, since it was not the facts alleged in the answer, but only their statement, which were arguably insufficient (*96 Cal. App 230, 234-235)* .

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B. Opposing Motion to Strike

16-160 California Points & Authorities § 160.67

§ 160.67 Opposing Motion to Strike Whole or Part of Pleading [Code Civ. Proc. § 435]--Improper Amended Complaint [Code Civ. Proc. § 436]--Reasons Exist Why Earlier Pleading Should Not Bar Later Inconsistent Action

[1] FORM

[*Caption. See § 160.60.*]

THE MOTION TO STRIKE SHOULD BE DENIED BECAUSE A CAUSE OF ACTION STATED IN AN AMENDED PLEADING SHOULD NOT BE BARRED BY SWORN INCONSISTENT ALLEGATIONS IN A PRIOR PLEADING WHEN CIRCUMSTANCES SHOW THAT THE LATER PLEADING IS NOT SHAM AND THAT A CAUSE OF ACTION MAY BE STATED TRUTHFULLY.

A. Rule Against Dropping Sworn Allegations Applies Only to Sham Amendments. The rules that allegations of fact made under oath may not be dropped without adequate explanation merely to avoid their harmful effect to the pleader and that verified allegations in a prior pleading may be considered at a hearing of a challenge to a later pleading should be applied only when the challenged amended pleading is a sham and when it is apparent that no cause of action can be stated truthfully (*see McGee v. McNally (1981) 119 Cal. App. 3d 891, 896, 897, 174 Cal. Rptr. 253*).

[*Optional*] **B. Allegations Incidental to Cause of Action May Be Withdrawn.** When allegations in the original pleading are lightly traced, without reference to particulars or allegations of specific damages, while obvious emphasis is placed on other allegations, reasons for excluding the allegations are conceivable and the party should be permitted to withdraw them with a proper explanation (*McGee v. McNally (1981) 119 Cal. App. 3d 891, 896, 897, 174 Cal. Rptr. 253*).

[*Optional*] **C. Necessary Allegation in an Original Complaint Should Not Bar Inconsistent Cause of Action Against Different Defendant.** When the original complaint contained allegations that are required to state a cause of action against a party who has since been dropped from the suit, but that are inconsistent with a cause of action against the present party defendant, such allegations should not bar the cause of action against the present defendant (*Callahan v. City and County of San Francisco (1967) 249 Cal. App. 2d 696, 699-700, 57 Cal. Rptr. 639*).

Dated: _____.

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion to strike an amended pleading on the ground that it attempts without explanation to drop, or makes allegations inconsistent with, a sworn allegation in an earlier pleading. The foregoing sets out the point that the rules that a sworn allegation may not be dropped without explanation in order to avoid its harmful effects, and that such an earlier sworn allegation can be considered in ruling on a challenge to a later pleading, must be applied in light of their purpose of avoiding sham amended pleadings when it is clear that no cause of action can be truthfully stated. This form also sets out the points that a sworn allegation that is sketchily drawn and appears incidental to the main thrust of the damages alleged may be withdrawn on proper explanation, and that an earlier allegation that was necessary under the law to state a cause of action against a defendant who was subsequently dropped from the case should not bar an inconsistent cause of action stated in a later pleading. In an appropriate case, this memorandum may be submitted in opposition to a motion to strike matter from an amended pleading supported by the points and authorities *set out in § 160.43*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated.

[b] Validity of Pre-1982 Case Law

The cases cited in this form were decided before the Legislature reorganized the law governing motions to strike in 1982. However, since none of the rules set out in these cases are inconsistent with any of the provisions of the 1982 legislative scheme, it appears that the cases are still good law [*see Code Civ. Proc. §§ 431.10, 435, 436, 437*]. For a further treatment of the continuing validity of pre-1982 case law, see the *discussion under § 160.03*.

[3] Discussion of Authorities

[a] Rule Against Dropping Sworn Allegations Applies Only to Sham Amendments

McGee v. McNally *(1981) 119 Cal. App. 3d 891, 174 Cal. Rptr. 253* , involved an action for intentional infliction of emotional distress in which plaintiff alleged in effect that while employed by defendant hospital he was the victim of a campaign of harassment designed by his supervisors, who were also named as defendants, to deprive him of his job and replace him with a fellow worker. Defendants demurred, arguing that the exclusive remedy for these complaints lies with workers' compensation law. The trial court sustained the demurrer without leave to amend and plaintiff appealed.

The court of appeal upheld the demurrer but held that plaintiff should be granted leave to amend and remanded the case for further proceedings. Preliminarily, the court held that an action against an employer for intentional infliction of emotional distress is not barred by *Lab. Code §§ 3600* and 3601 (exclusivity of workers' compensation remedy) (*119 Cal. App. 3d 891, 896)* . The court agreed, however, with the defendant's argument that the complaint as written did not state a cause of action, since it alleged physical as well as emotional injuries (*119 Cal. App. 3d 891, 896)* . Nevertheless, the court held that plaintiff should be given permission to amend the complaint so as to exclude the allegations of physical injury (*119 Cal. App. 3d 891, 896)* . The court acknowledged the rule that verified allegations

may not be discarded without an adequate explanation and that the court may look to verified allegations in an earlier pleading in hearing the demurrer to a later pleading (*119 Cal. App. 3d 891, 896*). However, the court stated that the purpose of the rule is to prevent amended pleading that is only a sham when it is clear that no cause of action exists. In the present case, the court held that circumstances showed that this was not the case (*119 Cal. App. 3d 891, 896, 897)* .

[b] Allegations Incidental to Cause of Action May Be Withdrawn

The facts and procedural background of ***McGee v. McNally*** *(1981) 119 Cal. App. 3d 891, 174 Cal. Rptr. 253* , are set out under § 160.67[3][a]. In that case, the court noted that the allegations of physical damage were only lightly traced in the original pleading, without reference to particulars and without allegation of physical disability cognizable by the Workers' Compensation Act, while the obvious and repeated emphasis was placed on the aspects of humiliation and anguish and other forms of purely emotional trauma. Under these circumstances, the court stated, it was able to conceive of a number of reasons why the language regarding physical injury was included that would support its exclusion now without impugning the credibility of the plaintiff's cause of action (*119 Cal. App. 3d 891, 897)* .

[c] Necessary Allegation in an Original Complaint Should Not Bar Inconsistent Cause of Action Against Different Defendant

Callahan v. City and County of San Francisco *(1967) 249 Cal. App. 2d 696, 699-700, 57 Cal. Rptr. 639* , involved a personal injury action against the defendant city for negligent maintenance of a traffic intersection that was alleged to have resulted in a traffic accident causing injury to the plaintiff, who was a passenger in a car. The original complaint did not name the city as a defendant and stated a cause of action against the driver of the car, charging the driver and others with willful misconduct and with racing vehicles on the road. The city was first named as defendant in the first amended complaint which, like all subsequent amended complaints, omitted any allegations of willful misconduct or racing cars on the road. At some point, the driver of the car was dropped from the action as defendant. The city demurred to the third amended complaint on the ground that it stated no cause of action, and called on the court to view plaintiff's amended pleadings in light of the original verified complaint. The demurrer was sustained without leave to amend. Plaintiff appealed from the resulting judgment.

The court of appeal overturned the trial court's order sustaining the demurrer. The court recognized that plaintiff's allegation of willful misconduct against the driver might rule out her action against the city if it were taken as proven (*249 Cal. App. 2d 696, 700)* . The court also acknowledged the rule that allegations of fact, once made under oath, may not ordinarily be dropped without adequate explanation merely for the purpose of avoiding their harmful effect to the pleader, and that the verified allegations of an earlier pleading may be considered in ruling on a demurrer to a later pleading (*249 Cal. App. 2d 696, 699*). However, the court stated that the rule must be taken together with its purpose, which is to prevent amended pleading that is only a sham, when it is apparent that no cause of action can be stated truthfully (*249 Cal. App. 2d 696, 699)* .

In the present case, the court noted that the allegation of willful misconduct was not directed against the city, which was not even a party to the action when the original complaint was filed, but against a third party, and that under the law then applicable such an allegation was necessary in order to establish a cause of action against the driver of the car (*249 Cal. App. 2d 696, 699*). The court further stated that under then applicable law an allegation of willful misconduct on the part of the driver by the passenger in a car was but an allegation of a conclusion concerning the mental state of the driver and that in the present case it would never be known whether plaintiff would be able to prove her allegation (*249 Cal. App. 2d 696, 699, 700)* . The court held that to give the city the benefit at the pleading stage of assuming that such generic allegations against another party may be taken as proven would put plaintiff to a choice that the law did not intend to impose on her. Thus, the court noted, if plaintiff alleged willful misconduct on the part of the driver in order to state a cause of action against him she would run the risk of ruling out her action against the city, while if she failed to make this allegation she would have no cause of action against the driver (*249 Cal. App. 2d 696, 700)* .

With respect to plaintiff's original allegation that the driver had been racing with his car, the court held that since under the present structure of the case the allegation of willful misconduct was no longer relevant, such racing was best characterized as merely negligent (*249 Cal. App. 2d 696, 700, 701)* . The court held that concurrent negligence on the part of the driver would not necessarily absolve the city from liability (*249 Cal. App. 2d 696, 701)* . Thus, the court concluded that the allegations of plaintiff's earlier pleadings were not destructive of her cause of action against the city.

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
CHAPTER 160 MOTIONS TO STRIKE: PLEADINGS
PART II. FORMS
B. Opposing Motion to Strike

16-160 California Points & Authorities § 160.68

§ 160.68 Opposing Motion to Strike Whole or Part of Pleading [Code Civ. Proc. § 435]--Improper Amended Pleading [Code Civ. Proc. § 436]--Amended Complaint Stating Cause of Action Not Sham

[1] FORM

[*Caption. See § 160.60.*]

THE AMENDED COMPLAINT SHOULD NOT BE STRICKEN AS SHAM, EVEN THOUGH IT REPEATS THE SUBSTANCE OF THE PREVIOUS COMPLAINT, BECAUSE IT NEVERTHELESS STATES A CAUSE OF ACTION.

Amended Pleading Stating Cause of Action Not Sham. An amended pleading that states a cause of action is not sham, even if it is in substance a repetition of the original pleading that had been held insufficient (*Amacorp Ind. Leasing Co. v. Robert C. Young Associates, Inc. (1965) 237 Cal. App. 2d 724, 727, 729, 47 Cal. Rptr. 294*).
Dated: _____.

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion to strike an amended pleading on the ground that it fails to amend a pleading previously held to be insufficient when it can be shown that the amended pleading nevertheless states a cause of action. The foregoing sets out the point that an amended pleading that states a cause of action is not sham regardless of whether it amends a prior pleading that was held to be insufficient. The procedure of filing an amended pleading that

substantially restates a pleading previously held to be insufficient and arguing that it nevertheless states a cause of action may be used as a means of seeking reconsideration of a trial court order holding the original pleading insufficient.

In an appropriate case, this memorandum may be submitted in opposition to a motion to strike supported by the points and authorities *set out in § 160.43*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated.

[b] Validity of Pre-1982 Case Law

Amacorp Ind. Leasing Co. v. Robert C. Young Associates, Inc. (1965) 237 Cal. App. 2d 724, 727, 729, 47 Cal. Rptr. 294 , on which this form is based was decided before the Legislature reorganized the law governing motions to strike in 1982. However, since none of the rules set out in this case is inconsistent with any of the provisions of the 1982 legislative scheme, it appears that the case is still good law [*see Code Civ. Proc. §§ 431.10, 435, 436, 437*]. For a further treatment of the continuing validity of pre-1982 case law, see the *discussion under § 160.03*.

[3] Discussion of Authorities

[a] Amended Pleading Stating Cause of Action Not Sham

The facts and procedural background of ***Amacorp Ind. Leasing Co. v. Robert C. Young Associates, Inc.*** *(1965) 237 Cal. App. 2d 724, 47 Cal. Rptr. 294* , are *set out in § 160.65[3][a]*. In that case, the trial court sustained general and special demurrers to defendant's original cross complaint. Defendant thereupon filed an amended cross complaint that was in substance a repetition of the original cross complaint. The trial court sustained a general demurrer without leave to amend and simultaneously granted a motion to strike the cross complaint on the grounds that it was sham and untimely filed. The court of appeal stated that it was clear from reading the amended cross complaint that defendant was trying to state a cause of action for breach of warranty, and that facts establishing such a cause of action were inferrable from reading the cross complaint as a whole (*237 Cal. App. 2d 724, 728)* . The court concluded that the allegations of the cross complaint were sufficient as against a general demurrer to afford the defendant an opportunity to more fully explain the circumstances of the transaction alleged (*237 Cal. App. 2d 724, 729)* .

Regarding the motion to strike, the court stated that an amended pleading that states a cause of action is not sham, and reiterated that it had decided that the amended cross complaint in the present action did state a cause of action (*237 Cal. App. 2d 724, 729)* .

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
CHAPTER 160 MOTIONS TO STRIKE: PLEADINGS
PART II. FORMS
B. Opposing Motion to Strike

16-160 California Points & Authorities § 160.69

§ 160.69 Opposing Motion to Strike Whole or Part of Pleading [Code Civ. Proc. § 435]--Amendment of Pleading to Bring in New Parties Allowed as Matter of Course Prior to Answer or Demurrer [Code Civ. Proc. § 472]

[1] FORM

[*Caption. See § 160.60.*]

THE MOTION TO STRIKE SHOULD BE DENIED BECAUSE AN AMENDMENT OF A PLEADING TO BRING IN NEW PARTIES IS ALLOWED PURSUANT TO SECTION 472 OF THE CODE OF CIVIL PROCEDURE AS A MATTER OF COURSE WITHOUT LEAVE OF COURT IF IT IS MADE PRIOR TO THE FILING OF AN ANSWER OR DEMURRER BY ANY DEFENDANT.

Amendment of Pleading to Bring in New Parties Is Allowed as Matter of Course Without Leave of Court If Made Prior to Filing of Answer or Demurrer. A complaint may be amended pursuant to *Section 472 of the Code of Civil Procedure* to add new parties without leave of court before any defendant has filed an answer or demurrer, and permission to amend under *Section 473 of the Code of Civil Procedure* is not required under such circumstances (*Code Civ. Proc. § 472*; *Gross v. Department of Transportation (1986) 180 Cal. App. 3d 1102, 1104, 226 Cal. Rptr. 49*).
Dated: _____.

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a motion to strike an amended pleading on the ground that an amendment

adding new parties requires permission of the court. The form sets out the point that the motion to add a new party may be made as a matter of course without the necessity of the granting of leave by the court if no answer or demurrer has been filed by any defendant.

In an appropriate case, this memorandum may be submitted in opposition to the motion supported by the points and authorities *set out in § 160.33*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the fact that no answer or demurrer had been filed when the amendment of the pleading was made.

[3] Discussion of Authorities

[a] Amendment of Pleading to Bring in New Parties Is Allowed as Matter of Course Without Leave of Court If Made Prior to Filing of Answer or Demurrer

In ***Gross v. Department of Transportation*** *(1986) 180 Cal. App. 3d 1102, 226 Cal. Rptr. 49* , a minor sued several defendants for the wrongful death of her mother in a highway collision. She later added the Department of Transportation (Department) as a defendant because of the alleged defective design of the highway where the accident occurred. At the time plaintiff amended the complaint, none of the defendants named in the initial complaint had been served or appeared. The Department moved to strike the complaint insofar as it was named as defendant. The motion was granted on the ground that *Code Civ. Proc. § 473* requires leave of court prior to amending a complaint to add a party as a defendant. The action against the Department was dismissed, and plaintiff appealed.

The court of appeal reversed. The court stated that *Code Civ. Proc. § 473* was inapplicable in this situation. The court held that the applicable section is *Code Civ. Proc. § 472*, which allows amendment of a complaint to add new parties as a matter of course without leave of court before any defendant has filed an answer or demurrer (*180 Cal. App. 3d 1102, 1104-1105)* . The court stated that the language in *Taliaferro v. Davis (1963) 220 Cal. App. 2d 793, 795, 34 Cal. Rptr. 120* (for discussion of *Taliaferro, see § 160.33[3][d]*), stating that *Code Civ. Proc. § 473* is controlling with respect to all amendments adding parties, was merely dictum because in that case the amendment took place after the sustaining of a demurrer (*180 Cal. App. 3d 1102, 1106)* . The court stated that because *Code Civ. Proc. § 472* is a narrower provision than *Code Civ. Proc. § 473*, it takes precedence over *Code Civ. Proc. § 473* in *all* instances in which a plaintiff seeks to amend his or her complaint once prior to the filing of an answer or demurrer (*180 Cal. App. 3d 1102, 1107)* .

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
CHAPTER 161 MOTIONS TO STRIKE: ANTI-SLAPP

16-161 California Points & Authorities 161.syn

§ 161.syn Synopsis to Chapter 161: MOTIONS TO STRIKE: ANTI-SLAPP

§ 161.01 Scope of Chapter

§ 161.02 Governing Law

§ 161.03 Rationale for Special Motion to Strike and Subsequent Legislation

§ 161.04 Two-Part Test for Applicability of Statute

§ 161.05 Procedural Requirements for Special Motion to Strike

§ 161.06 Stay of Discovery Proceedings

§ 161.07 Attorney Fee Awards

§ 161.08 Related Pleading and Practice Chapters

§ 161.09 Related Points and Authorities Chapters

§§ 161.10-161.29 [Reserved]

§ 161.30 Supporting Special Motion to Strike Action Against Constitutionally Privileged Conduct (SLAPP Suit) [Code Civ. Proc. § 425.16(b)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Timing of Motion and Hearing

[c] Attorney's Fees and Costs

[d] Stay of Discovery

[e] Statutory Exceptions to Anti-SLAPP Motion

[f] Circumstances Under Which Statutory Exceptions Are Inapplicable

[g] Motion Not Available in Action Brought by Public Prosecutor

[h] Some Provisions of Code Civ. Proc. § 425.16 Are Inapplicable if Action is a "SLAPPback"

[i] Related Pleading and Practice Forms

[j] Opposing Memoranda

[3] Discussion of Authorities

[a] Defendant is Not Required to Demonstrate or Plead an Intent to Chill First Amendment Rights

[b] Plaintiff's Burden Arises After Defendant's Prima Facie Showing That Code of Civil Procedure Section 425.16 Applies

[c] Plaintiff Cannot Establish Probability of Prevailing on Claims Against Defendant

[d] Constitutional Protection Available for Speech Alleged to Constitute Intentional Interference With Prospective Economic Advantage

[e] Averments on Information and Belief Are Inadequate in Supporting Declaration

[f] Discovery Proceedings Are Stayed

[g] Code Civ. Proc. § 425.16 to Be Construed Broadly

[h] Petitions for Injunctive Relief From Harassment Are Subject to Anti-SLAPP Motion to Strike

[i] The Exemption to the Anti-SLAPP Law for Enforcement Actions Applies Only to Actions Brought by a Governmental Agency Aimed Generally at Public Protection

[j] "Mixed" Cause of Action Is Subject to Anti-SLAPP Statute Unless Protected Conduct Is Merely Incidental to Unprotected Conduct

[k] Protected Conduct Does Not Lose Its Protected Status Merely Because Plaintiff Alleges the Conduct is Unlawful or Unethical

[l] Appeal Upon Denial of Anti-SLAPP Motion Stays All Trial Court Proceedings Upon Affected Causes of Action

[4] Additional Authorities

[a] Plaintiff's Burden Arises After Defendants's Prima Facie Showing That Code of Civil Procedure Section 425.16

Applies

[b] Plaintiff Cannot Establish Probability of Prevailing on Claims Against Defendant

[c] Prevailing Defendant Is Entitled to Attorney's Fees and Costs

[d] Activity in Anticipation of Litigation

§ 161.31 Supporting Special Motion to Strike Action Against Constitutionally Privileged Conduct (SLAPP Suit) [Code Civ. Proc. § 425.16(b)]--Conduct or Speech in Connection With Official Proceedings [Code Civ. Proc. § 425.16(e)(1) and (2)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] No Separate Showing of Public Significance Required if Action Arises From Statements Made Before, or in Connection With Issue Under Consideration by, Official Proceeding

[b] Commercial Conduct and Speech Made in Connection with an Issue Of Public Concern Under Consideration By a Legislative Body are Subject to Protection Under Code Of Civil Procedure Section 425.16.

[c] Not All Speech By A Business Enterprise Constitutes "Commercial Speech"

[4] Additional Authorities

[a] No Separate Showing of Public Significance Required If Action Arises From Statements Made Before, or in Connection With Issue Under Consideration by, Official Proceeding

§ 161.32 Supporting Special Motion to Strike Action Against Constitutionally Privileged Conduct (SLAPP Suit) [Code Civ. Proc. § 425.16(b)]--Malicious Prosecution Action

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Malicious Prosecution Actions Are Subject to Anti-SLAPP Motion to Strike

§ 161.33 Supporting Special Motion to Strike Action Against Constitutionally Privileged Conduct (SLAPP Suit) [Code Civ. Proc. § 425.16(b)]--Statement or Writing Made in Public Forum or in Connection With an Issue of Public Interest [Code Civ. Proc. § 425.16(e)(3) and (4)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] The Conduct at Issue Concerned a Matter of Widespread Public Interest

[b] The Conduct at Issue Concerned an Issue of Interest to a Definable Portion of the Public and Occurred in the Context of an Ongoing Controversy, Dispute, or Discussion

[4] Additional Authorities

[a] The Conduct at Issue Concerned an Issue of Widespread Public Interest

§ 161.34 Supporting Special Motion to Strike Action Against Constitutionally Privileged Conduct (SLAPP Suit) [Code Civ. Proc. § 425.16(b)]--Governmental Entities and Their Employees, Like Private Parties, May Bring a Special Motion to Strike

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Code Civ. Proc. § 425.16 Applies to Governmental Entities, Their Employees, and Private Parties

[b] Public Employee's Comment on Issues of Public Interest Relating to Official Duties Is Protected

[c] Government Is Protected in Performing its Role in CEQA

[4] Additional Authorities

§ 161.35 Supporting Special Motion to Strike Action Against Constitutionally Privileged Conduct (SLAPP Suit)--Action Is Not Brought Solely in the Public Interest [Code Civ. Proc. § 425.17(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Reply to Opposing Memoranda

[3] Discussion of Authorities

[a] The Action, if Successful, Would Not Enforce an Important Right Affecting the Public Interest or Confer a Significant Benefit on the General Public or a Large Class of Persons

[b] Code Civ. Proc. § 425.17(b) Does Not Apply Where Plaintiff Is Not Seeking Relief Solely in the Public Interest

[c] Code Civ. Proc. § 425.17(b) Does Not Apply Because the Action Falls Within the Exception Enumerated in Code Civ. Proc. § 425.17(d)(2)

[4] Additional Authorities

[a] The Action, if Successful, Would Not Enforce an Important Right Affecting the Public Interest or Confer a Significant Benefit on the General Public or a Large Class of Persons

§ 161.36 Supporting Special Motion to Strike Action Against Constitutionally Privileged Conduct (SLAPP Suit) [Code Civ. Proc. § 425.17(c)]--Requirements of Code Civ. Proc. 425.17(c) Not Met

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Defendant Is Not Primarily in the Business of Selling or Leasing Goods and Services

[b] Defendant's Statement or Conduct Was Not a Representation of Fact

[c] The Statement or Conduct About Defendant's or a Competitor's Business Operations, Goods, or Services Was Not Made for the Purpose of Obtaining Approval for, Promoting, or Securing Sales of the Defendant's Goods or Services or Made in the Course of Delivering the Defendant's Goods or Services

[d] The Burden of Proving the Applicability of the Exception Set Forth in Code Civ. Proc. § 426.17(c)(1) Is On the Plaintiff

§§ 161.37-161.59 [Reserved]

§ 161.60 Opposing Special Motion to Strike Action Against Constitutionally Privileged Conduct (SLAPP Suit) [Code Civ. Proc. § 425.16(b)]--Grounds for Motion Lacking

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Defendant Bears Initial Burden to Make a Prima Facie Showing

[b] Defendant Must Show a Lawful Exercise of Constitutional Rights

[c] Anti-SLAPP Motion Must Be Denied if Plaintiff Demonstrates a Probability of Prevailing on the Claim

[d] Analysis of Plaintiff's Probability of Prevailing on Claim Must Include All Available Defenses

[e] Merely Having Some Connection With Official Proceedings Does Not Mean Anti-SLAPP Protections Apply

[f] Mere Acts of Governance Are Not Exercises of Free Speech or Petition

[g] Code Civ. Proc. § 425.17 Exceptions Apply Retroactively

[h] Plaintiff Opposing a Late Anti-SLAPP Motion Need Not Demonstrate Prejudice

[i] Defendants Who Represent Themselves in Litigation Are Not Entitled to Attorney Fees When Prevailing on an Anti-SLAPP Motion

[j] The Anti-SLAPP Statute Does Not Apply to Non-Judicial Proceedings

[k] A Plaintiff Prevailing on an Anti-SLAPP Motion Shall Be Awarded Costs and Attorney's Fees if the Court Finds the Motion Is Frivolous or Is Solely Intended to Cause Unnecessary Delay

[l] An Amorphous Public Interest Is Insufficient to Invoke the Anti-SLAPP Statute

[m] Code of Civil Procedure § 425.16 Only Applies When First Amendment Free Speech or Petition Rights Are At Stake

[4] Additional Authorities

§ 161.61 Opposing Special Motion to Strike Action Against Constitutionally Privileged Conduct (SLAPP Suit) [Code Civ. Proc. § 425.16(b)]--Action Brought Solely in the Public Interest [Code Civ. Proc. § 425.17(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Circumstances Under Which Statutory Exceptions Are Inapplicable

[c] Opposing Memoranda

§ 161.62 Opposing Special Motion to Strike Action Against Constitutionally Privileged Conduct (SLAPP Suit) [Code Civ. Proc. § 425.16(b)]--Action Brought Against a Person Primarily Engaged in the Business of Selling Goods or Services [Code Civ. Proc. § 425.17(c)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Exception Does Not Apply in Public Utilities Commission Proceedings

[c] Circumstances Under Which Statutory Exceptions Are Inapplicable

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Code Civ. Proc. § 425.17 is Constitutional and Not An Invalid Attempt to Regulation Speech Concerning Important Public Issues

[b] Code Civ. Proc. § 425.17 Applies Retroactively

[c] The Action Arises Out of Commercial Speech and Conduct and Is Therefore Exempt From Anti-SLAPP Scrutiny

§ 161.63 Opposing Special Motion to Strike Against Constitutionally Privileged Conduct (SLAPP Suit) [Code Civ. Proc. § 425.16(b)]--Action Is a SLAPPback [Code Civ. Proc. § 425.18]

[1] FORM

[2] Comments

[a] Use of Form

[b] Special Provisions Applicable to SLAPPbacks

[c] Section Does Not Apply to SLAPPback Filed by Public Entity

[d] Exception For Prior Cause of Action Which Was Illegal

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Plaintiff's Complaint Qualifies as a SLAPPback

[b] Defendant May Not Recover Attorney's Fees

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
CHAPTER 161 MOTIONS TO STRIKE: ANTI-SLAPP
PART I. INTRODUCTION

16-161 California Points & Authorities § 161.01

§ 161.01 Scope of Chapter

This chapter contains memoranda that may be submitted in civil actions to support or oppose special motions to strike under the Anti-SLAPP statutes found in *Code Civ. Proc. § 425.16 et seq.*, in whole or in part.

Forms supporting Anti-SLAPP motions to strike include:

- A general form to support a special motion to strike a cause of action against constitutionally privileged conduct (i.e., a SLAPP suit) [*see § 161.30*].

- A form to support a special motion to strike a cause of action arising out of or in connection with an official proceeding [*see § 161.31*].

- A form to support a special motion to strike a malicious prosecution action [*see § 161.32*].

- A form to support a special motion to strike a cause of action arising out of a statement or writing made in a public forum or in connection with a public issue [*see § 161.33*].

- A form to support a special motion to strike brought by a governmental entity or its employee [*see § 161.34*].

- Forms to support a special motion to strike where the plaintiff or cross-complainant alleges the action falls within the exceptions to the Anti-SLAPP statute found in *Code Civ. Proc. § 425.17* [*see §§ 161.35 -161.36*].

Points and authorities opposing a special motion to strike a SLAPP suit include:

- A general form opposing a special motion to strike a cause of action against constitutionally privileged conduct because the grounds for the motion are lacking one or more essential elements [*see § 161.60*].

- A form opposing a special motion to strike a cause of action arising out of or in connection with an official proceeding because the action is brought solely in the public interest under the exception of *Code Civ. Proc. § 425.17(b)* [*see § 161.61*].

- A form opposing a special motion to strike because the action is brought against a person primarily engaged in the business of selling goods or services as defined by *Code Civ. Proc. § 425.17(c)* [*see § 161.62*].

- A form opposing a special motion to strike a cause because the action is a SLAPPback as defined by *Code Civ. Proc. § 425.18* [*see § 161.63*].

California Points & Authorities

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16-161 California Points & Authorities § 161.02

§ 161.02 Governing Law

A special motion to strike causes of action brought to inhibit the right of people to exercise their constitutional rights of petition and free speech on matters of public interest (SLAPP suits) is authorized and governed by *Code Civ. Proc. § 425.16(b)*.

The legislature has also created exceptions to the Anti-SLAPP statute for actions brought solely in the public interest and certain causes of action brought against a person primarily engaged in the business of selling or leasing goods or services. These exceptions are found in *Code Civ. Proc. § 425.17*.

A "SLAPPback," which is a cause of action for malicious prosecution arising out of a suit which was dismissed pursuant to the Anti-SLAPP statute, is defined and governed by *Code Civ. Proc. § 425.18*.

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16-161 California Points & Authorities § 161.03

§ 161.03 Rationale for Special Motion to Strike and Subsequent Legislation

The legislature passed the Anti-SLAPP legislation in 1992 in response to what it noted was a "distributing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances" [*Code Civ. Proc. § 425.16(a)*]. The statute's enactment created a new type of motion to strike, referred to as a "special motion to strike." In 2003, the legislature enacted *Code Civ. Proc. § 425.17*, creating exceptions to the Anti-SLAPP statute in response to an abuse of the Anti-SLAPP law. Finally, in 2005, the legislature passed the "SLAPPback" legislation now found in *Code Civ. Proc. § 425.18*. This section addresses motions to strike in malicious prosecution actions arising out of actions dismissed pursuant to the Anti-SLAPP statute.

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16-161 California Points & Authorities § 161.04

§ 161.04 Two-Part Test for Applicability of Statute

The Anti-SLAPP statute contains two "prongs": the first prong tests whether the action is a SLAPP suit and the second determines whether the action may survive despite its SLAPP character because plaintiff or cross-complainant has established a probability of prevailing on the merits of the action. As used in *Code Civ. Proc. § 425.16*, an act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue includes:

(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law;

(2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law;

(3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest;

(4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

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16-161 California Points & Authorities § 161.05

§ 161.05 Procedural Requirements for Special Motion to Strike

A special motion to strike may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time on terms the court deems proper. The motion must be scheduled by the clerk of the court for a hearing not more than 30 days after service unless the docket conditions of the court require a later hearing [*Code Civ. Proc. § 425.16(f)*].

Any party who files a special motion to strike, and any party that files opposition to a special motion to strike must, promptly on so filing, transmit to the Judicial Council, by e-mail or fax, a copy of the endorsed-filed caption page of the motion or opposition, a copy of any related notice of appeal or petition for a writ and a conformed copy of any order issued pursuant to the statute [*Code Civ. Proc. § 425.16(j)(1)*].

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16-161 California Points & Authorities § 161.06

§ 161.06 Stay of Discovery Proceedings

The filing of a special motion to strike automatically stays all discovery proceedings, including pending discovery motions [*Code Civ. Proc. § 425.16(g)*]. Discovery is stayed until notice of entry of the order ruling on the Anti-SLAPP motion, except on noticed motion and for good cause shown. The discovery stay does not apply to SLAPPback actions [*Code Civ. Proc. § 425.18(c)*].

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16-161 California Points & Authorities § 161.07

§ 161.07 Attorney Fee Awards

A prevailing defendant on a special motion to strike is entitled to recover his or her attorney's fees and costs [*Code Civ. Proc. § 425.16(c)*]. There are limited exceptions for certain Government Code actions [*Code Civ. Proc. § 425.16(c)(2)*]. A prevailing plaintiff may recover fees if the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay [*Code Civ. Proc. § 425.16(c)(1)*].

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16-161 California Points & Authorities § 161.08

§ 161.08 Related Pleading and Practice Chapters

For analyses and forms relating to Anti-SLAPP special motions to strike, see California Forms of Pleading and Practice, Ch. 376, *Motions to Strike: Anti -SLAPP*.

For analyses and forms relating to motions to strike pleadings, see California Forms of Pleading and Practice, Ch. 375, *Motions to Strike: Pleadings* .

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16-161 California Points & Authorities § 161.09

§ 161.09 Related Points and Authorities Chapters

For memoranda supporting and opposing motions to strike pleadings, see Ch. 375, *Motions to Strike: Pleadings* .

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[Reserved]

§§ 161.10[Reserved]

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PART II. FORMS
A. Supporting Special Motion to Strike

16-161 California Points & Authorities § 161.30

§ 161.30 Supporting Special Motion to Strike Action Against Constitutionally Privileged Conduct (SLAPP Suit) [Code Civ. Proc. § 425.16(b)]--General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF SPECIAL MO-
Plaintiff,	)	TION TO STRIKE PURSUANT TO CODE CIV.
vs.	)	PROC. § 425.16
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

THE COURT SHOULD STRIKE _____ [*specify the matter identified in the notice of motion, e.g.,* THE COMPLAINT FOR INTERFERENCE WITH CONTRACTUAL AND PROSPECTIVE ECONOMIC RELATIONS] BECAUSE DEFENDANT'S CONSTITUTIONAL RIGHT[S] OF _____ [*specify, e.g.,* PETITION AND FREE SPEECH] WILL BE CHILLED IF IT IS ALLOWED TO STAND AND PLAINTIFF IS ALLOWED TO CONTINUE PROSECUTING IT.

A. Action Against Constitutionally Privileged Conduct Is Subject to Special Motion to Strike. A cause of action against a person arising from any act of that person in furtherance of the person's constitutional right of petition or free speech in connection with a public issue is subject to a special motion to strike unless plaintiff establishes that there is a probability that plaintiff will prevail on the claim (*Code Civ. Proc. § 425.16(b)*). *Code of Civil Procedure § 425.16* is to

be construed broadly (*Code Civ. Proc. § 425.16(a)*).

B. Act in Furtherance of a Person's Constitutional Right of Petition or Free Speech in Connection with a Public Issue Defined. As used in *Section 425.16 of the Code of Civil Procedure*, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest (*Code Civ. Proc. § 425.16(e)*).

C. Defendant is Not Required to Demonstrate or Plead an Intent to Chill *First Amendment* Rights. *Code of Civil Procedure § 425.16* contains no requirement that a defendant show that the plaintiff brought the lawsuit with an intent to chill defendant's rights, nor does the statue require an intent-to-chill pleading or proof requirement (*Equilon Enterprises, LLC v. Consumer Cause, Inc. (2002) 29 Cal. 4th 53, 60, 124 Cal. Rptr. 2d 507* ; *City of Cotati v. Cashman (2002) 29 Cal. 4th 69, 75, 124 Cal. Rptr. 2d 519* ; *Navellier v. Sletten (2002) 29 Cal. 4th 82, 88, 124 Cal. Rptr. 2d 530*).

[*Optional*] **D. Plaintiff's Burden Arises After Defendant's Prima Facie Showing That *Code of Civil Procedure Section 425.16* Applies.** To prevail on a special motion to strike under *Code of Civil Procedure Section 425.16*, defendant must make a threshold showing that plaintiff's suit arises from defendant's acts in furtherance of his or her rights of petition and free speech under the United States or California Constitution in connection with a public issue. Once the defendant has made such a showing, the burden shifts to the plaintiff to establish a probability that he/she/it will prevail on the claim (*Equilon Enterprises, LLC v. Consumer Cause, Inc. (2002) 29 Cal. 4th 53, 60, 124 Cal. Rptr. 2d 507* ; *City of Cotati v. Cashman (2002) 29 Cal. 4th 69, 75* ; *Navellier v. Sletten (2002) 29 Cal. 4th 82, 88, 124 Cal. Rptr. 2d 530* ; *Seltzer v. Barnes (2010) 182 Cal. App. 4th 953* ; *Stewart v. Rolling Stone LLC (2010) 181 Cal. App. 4th 664, 677-692, 105 Cal. Rptr. 3d 98* ; *Fox Searchlight Pictures v. Paladino (2001) 89 Cal. App. 4th 294, 307, 106 Cal. Rptr. 2d 906* ; *Dixon v. Superior Court (1994) 30 Cal. App. 4th 733, 742, 36 Cal. Rptr. 2d 687* ; *Wilcox v. Superior Court (1994) 27 Cal. App. 4th 809, 820, 33 Cal. Rptr. 2d 446*). Defendant has clearly met his/her/its burden in that _____ [*tie facts in with one or more of the four Code Civ. Proc. § 425.16(e) definitions of acts in furtherance of a person's rights of petition and free speech under the United States or California Constitution in connection with a public issue*].

[*Optional*] **E. Plaintiff Cannot Establish Probability of Prevailing on Claims Against Defendant.** To establish a probability of success on the merits, the plaintiff must make a prima facie showing of facts that would, if proved at trial, support a judgment in plaintiff's favor (*Taus v. Loftus (2007) 40 Cal. 4th 683, 742, 54 Cal. Rptr. 3d 775, 151 P.3d 1185* ; *Mendoza v. ADP Screening & Selection Services, Inc. (2010) 182 Cal. App. 4th 1644, 1655-1659, 107 Cal. Rptr. 3d 294* ; *Dixon v. Superior Court (1994) 30 Cal. App. 4th 733, 744, 36 Cal. Rptr. 2d 687* ; *Wilcox v. Superior Court (1994) 27 Cal. App. 4th 809, 824, 33 Cal. Rptr. 2d 446*).

[*Optional*] **F. Constitutional Protection Available for Speech Alleged to Constitute Intentional Interference with Prospective Economic Advantage.** The *First Amendment to the United States Constitution* protects speech consisting either of true facts or opinions that are alleged to constitute intentional interference with prospective economic advantage (*Hofmann Co. v. E.I. Du Pont de Nemours and Co. (1988) 202 Cal. App. 3d 390, 402-403, 248 Cal. Rptr. 384* ; accord, *Paradise Hills Associates v. Procel (1991) 235 Cal. App. 3d 1528, 1542-1545, 1 Cal. Rptr. 2d 514*).

[*Optional*] **G. Averments on Information and Belief Are Inadequate in Supporting Declaration.** An averment on information and belief is inadmissible at trial, and thus cannot show a probability of prevailing on a claim (*Evans v.*

Unkow (1995) 38 Cal. App. 4th 1490, 1498, 45 Cal. Rptr. 2d 624).

[*Optional*] **H. Timely Motion to Strike Is Proper.** The special motion to strike may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper (*Code Civ. Proc. § 425.16(f)*).

[*Optional*] **I. Prevailing Defendant Is Entitled to Attorney's Fees and Costs.** A defendant prevailing on a special motion to strike is entitled to recover his or her attorney's fees and costs (*Code Civ. Proc. § 425.16(c)*).

[*Optional*] **J. Discovery Proceedings Are Stayed.** All discovery proceedings are stayed upon the filing of a notice of special motion to strike, including discovery motions pending at the time the special motion to strike was filed (*Code Civ. Proc. § 425.16(g)*; *Britts v. Superior Court (2006) 145 Cal. App. 4th 1112, 1127, 52 Cal. Rptr. 3d 185*).

[*Optional*] **K. *Code Civ. Proc. § 425.16* to Be Construed Broadly.** In *Section 425.16(a) of the Code of Civil Procedure* the Legislature has declared that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, the section shall be construed broadly (*Code Civ. Proc. § 425.16(a)*; last sentence added by Stats. 1997, ch. 271 § 1). The 1997 amendment to Section 425.16 mandates a broad construction of that section (*Kibler v. Northern Inyo County Local Hospital Dist. (2006) 39 Cal. 4th 192, 199, 46 Cal. Rptr. 3d 41, 138 P.3d 193* ; *Briggs v. Eden Council for Hope and Opportunity (1999) 19 Cal. 4th 1106, 1119-1121, 81 Cal. Rptr. 2d 471, 969 P.2d 564*).

[*Optional*] **L. Petitions for Injunctive Relief From Harassment Are Subject to Anti-SLAPP Motion to Strike.** The Legislature specifically exempted some forms of legal proceedings from the purview of *Code of Civil Procedure Section 425.16*, but *Code Civ. Proc. § 527.6* petitions for injunctive relief from harassment were not among them, and the Legislature did not intend to except *Code Civ. Proc. § 527.6* petitions from the Anti-SLAPP statute (*Thomas v. Quintero (2005) 126 Cal. App. 4th 635, 24 Cal. Rptr. 3d 619* ; *City of Los Angeles v. Animal Defense League (2006) 135 Cal. App. 4th 606, 37 Cal. Rptr. 3d 632*).

[*Optional*] **M. The Exemption to the Anti-SLAPP Law for Enforcement Actions Applies Only to Actions Brought by a Governmental Agency Aimed Generally at Public Protection.** The exception to the Anti-SLAPP statute found in *Code Civ. Proc. § 425.16(d)* does not apply to a petition for a workplace violence restraining order designed to protect only the city's employees and not the public at large (*City of Los Angeles v. Animal Defense League (2006) 135 Cal. App. 4th 606, 618, 37 Cal. Rptr. 3d 632*).

[*Optional*] **N. "Mixed" Cause of Action Is Subject to Anti-SLAPP Statute Unless Protected Conduct Is Merely Incidental to Unprotected Conduct.** Where a cause of action alleges both protected and unprotected activity, the cause of action is subject to *Code Civ. Proc. § 425.16* unless the protected conduct is merely incidental to the unprotected conduct (*Salma v. Capon (2008) 161 Cal. App. 4th 1275, 1287, 74 Cal. Rptr. 3d 873* ; *Gallanis-Politis v. Medina (2007) 152 Cal. App. 4th 600, 614* ; *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP (2005) 133 Cal. App. 4th 658, 672, 35 Cal. Rptr. 3d 31* ; *Fox Searchlight Pictures, Inc. v. Paladino (2001) 89 Cal. App. 4th 294, 308, 106 Cal. Rptr. 2d 906*).

[*Optional*] **O. Protected Conduct Does Not Lose Its Protected Status Merely Because Plaintiff Alleges the Conduct is Unlawful or Unethical.** The exception to the Anti-SLAPP statute for illegal conduct only applies if a defendant concedes, or the evidence conclusively establishes, that the assertedly protected activity was illegal as a matter of law (*Kemps v. Beshwate (2009) 180 Cal. App. 4th 1012, 1017-1018, 103 Cal. Rptr. 3d 480* ; *Cabral v. Martins (2009) 177 Cal. App. 4th 471, 482, 99 Cal. Rptr. 3d 394*).

[*Optional*] **P. Appeal Upon Denial of Anti-SLAPP Motion Stays All Trial Court Proceedings Upon Affected Causes of Action.** Trial court proceedings on the merits following an appeal from the denial of an Anti-SLAPP motion

under *Code of Civil Procedure Section 425.16* are embraced in or affected by that appeal. Such proceedings are therefore stayed under *Code of Civil Procedure Section 916(a)* (*Varian Medical Systems, Inc. v. Delfino (2005) 35 Cal. 4th 180, 191, 25 Cal. Rptr. 3d 298*).
Dated: _____.

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a special motion to strike the whole or any part of a complaint or cross complaint setting forth a cause of action against a person arising from any act of that person in furtherance of the person's constitutionally protected right of petition or free speech in connection with a public issue [*Code Civ. Proc. § 425.16(b)*]. That is, this motion provides a procedure to cut off strategic lawsuits against public participation, commonly known as SLAPP suits.

Depending on the circumstances, the language in the parentheticals in optional point D, and optional point F, may be more appropriate to be included in a defendant reply memorandum.

Counsel should insert facts and argument in the form to show the relationship between the facts of the case and the points of law stated.

[b] Timing of Motion and Hearing

In contrast to the usual form of motion to strike matters from a complaint or cross complaint [see *Code Civ. Proc. § 435(b)(1)* (notice of motion must be filed within time allowed to file response to pleading)], the special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms the court deems proper [*Code Civ. Proc. § 425.16(f)*]. One court has held that the 60-day requirement in *Code Civ. Proc. § 425.16(f)* for filing an Anti-SLAPP motion runs from the service of the complaint or an amended complaint, and if the amended complaint is served by mail, defendant has an extra 5 days in which to file the motion [*Lam v. Ngo (2001) 91 Cal. App. 4th 832, 840-842, 111 Cal. Rptr. 2d 582]* .

The motion must be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing [*Code Civ. Proc. § 425.16(f)*]. The Legislature amended *Code Civ. Proc. § 425.16(f)* in 2005 to specifically overrule decisions denying special motions to strike based on the fact that counsel had scheduled the hearing more than 30 days after service of the motion [see, e.g., *Decker v. U.D. Registry, Inc. (2003) 105 Cal. App. 4th 1382, 129 Cal. Rptr. 2d 892* and *Fair Political Practices Commission v. American Civil Rights Coalition, Inc. (2004) 121 Cal. App. 4th 1171, 18 Cal. Rptr. 3d 157]* .

[c] Attorney's Fees and Costs

Code Civ. Proc. § 425.16(c) expressly authorizes a defendant who prevails on a special motion to strike to recover attorney's fees and costs. Effective January 1, 2010, this entitlement to fees is subject to limited exceptions if plaintiff's cause of action is brought pursuant to *Gov. Code § 6259* (verified petition alleging public records improperly withheld from member of public), *Gov. Code §§ 11130* or *11130.3* (involving meeting provisions of the legislative body of a local agency or a state body) or *Gov. Code §§ 54960* or *54960.1* (actions to obtain a judicial determination that an

action taken by a legislative body of a local agency or a state body is null and void) [*Code Civ. Proc. § 425.16(c)*]. Nothing in *Code Civ. Proc. § 425.16(c)* shall be construed to prevent a prevailing defendant from recovering attorney's fees and costs in the above actions if the actions are clearly frivolous, pursuant to those sections of the Government Code. Conversely, if the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court is required to award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to *Code Civ. Proc. § 128.5* [*Code Civ. Proc. § 425.16(c)*].

Code Civ. Proc. § 128.5 applies only to actions filed before 1995. *Code Civ. Proc. § 128.7* provides for sanctions with regard to complaints filed on or after January 1, 1995 and with regard to pleadings and other papers filed in those matters. Although *Code Civ. Proc. § 425.16* refers expressly only to *Code Civ. Proc. § 128.5*, *Code Civ. Proc. § 128.7* by its own terms applies to all papers presented to the court. For points and authorities pertaining to sanctions under *Code Civ. Proc. § 128.7*, see Ch. 207, Sanctions. For further discussion of *Code Civ. Proc. §§ 128.5*, *128.6*, and *128.7*, see California Forms of Pleading and Practice, Ch. 510, *Sanctions* (Matthew Bender).

When a plaintiff voluntarily dismisses an alleged SLAPP suit while a motion to strike is pending under *Code Civ. Proc. § 425.16*, one court has held that the trial court has discretion to determine whether the defendant is the prevailing party for purposes of attorney's fees under *Code Civ. Proc. § 425.16(c)* [*Coltrain v. Shewalter (1998) 66 Cal. App. 4th 94, 107, 77 Cal. Rptr. 2d 600 (Fourth Dist., Div. Two; voluntary dismissal without prejudice)]* . Another court has held that a defendant who voluntarily dismisses, with or without prejudice, after filing a *Code Civ. Proc. § 425.16* motion to strike, is nevertheless entitled to have the merits of the motion heard as a predicate to a determination of the defendant's motion for attorney's fees and costs under *Code Civ. Proc. § 425.16(c)* [*Liu v. Moore (1999) 69 Cal. App. 4th 745, 751, 81 Cal. Rptr. 2d 807* (Second Dist., Div. Three; disagreed with Coltrain reasoning); but see *Law Offices of Andrew L. Ellis v. Yang (2009) 178 Cal. App. 4th 869, 100 Cal. Rptr. 3d 771* (court held trial court had no jurisdiction to entertain Anti-SLAPP motion to strike where plaintiff dismissed the action without prejudice the day before the scheduled hearing; court retained limited jurisdiction only to award costs and statutory attorney fees); see also *Chambers v. Miller (2006) 140 Cal. App. 4th 821, 826, 44 Cal. Rptr. 3d 777* (defendants were not entitled to have merits of Anti-SLAPP motion heard for purposes of determining their entitlement to attorney fees in case where plaintiff dismissed her claims against defendants before defendants filed Anti-SLAPP motion)]. Similarly, an appellate court upheld a trial court's award of attorney fees under the Anti-SLAPP statute in a case in which the court had granted defendants' motion for judgment on the pleadings but also granted defendant's Anti-SLAPP motion and awarded fees accordingly as an "alternative ruling" [*ARP Pharmacy Services, Inc. v. Gallagher Bassett Services, Inc. (2006) 138 Cal. App. 4th 1307, 1323, 42 Cal. Rptr. 3d 256* (court "reluctantly" upheld award of attorney fees)]. Moreover, it has been held that *Code Civ. Proc. § 128.7* is not a viable alternative to the attorney's fees and costs relief afforded by *Code Civ. Proc. § 425.16* when there has been a voluntary dismissal while a Section 425.16 motion to strike is pending [*Liu v. Moore (1999) 69 Cal. App. 4th 745, 750-751, 81 Cal. Rptr. 2d 807* (also discussing relationship of *Code Civ. Proc. §§ 425.16, 1032* and *1033.5(a)(10)(B)*)]. However, where plaintiffs voluntarily dismiss their action before defendants file their Anti-SLAPP motion, defendants are not entitled to attorney fees (*S.B. Beach Properties v. Berti (2006) 39 Cal. 4th 374, 383, 46 Cal. Rptr. 3d 380*).

Even if the special motion to strike is granted only as to some claims, the partially successful defendant is entitled to attorney's fees. The lack of success on other claims is relevant to the amount of, but not the right to, fees. However, only those attorney fees and costs related to the special motion to strike, not the entire action, may be recovered under *Code Civ. Proc. § 425.16(c)* [*Jackson v. Yarbray (2009) 179 Cal. App. 4th 75, 92, 101 Cal. Rptr. 3d 303]* .

In awarding fees, the trial court is not constrained by the amount sought by the successful moving parties, but is obligated to award reasonable attorney's fees that adequately compensate them for the expense of responding to a baseless lawsuit [*Jackson v. Yarbray (2009) 179 Cal. App. 4th 75, 92, 101 Cal. Rptr. 3d 303]* . The fees awarded should include services for all proceedings, including discovery initiated by the opposing party pursuant to § 425.16(g), directly related to the special motion to strike [*Jackson v. Yarbray (2009) 179 Cal. App. 4th 75, 92, 101 Cal. Rptr. 3d 303]* .

In determining the fee award pursuant to § 425.16, the court may utilize the lodestar method addressed in *Serrano v. Priest (1977) 20 Cal. 3d 25, 141 Cal. Rptr. 315, 569 P.2d 1303* , and in appropriate cases may include a fee enhancement for the purpose of compensating the attorney for contingent risk, exceptional skill or other factors [*Jackson v. Yarbray (2009) 179 Cal. App. 4th 75, 93, 101 Cal. Rptr. 3d 303]* .

Once the court has decided the amount of attorney's fees that adequately compensates the defendants in the underlying lawsuit for their efforts in moving to strike the complaint under § 425.16, relitigation of that specific issue--that is, the reasonable value of that portion of the total attorney's fees incurred in the underlying action that relate to the successful special motion to strike--in a subsequent malicious prosecution action will usually be precluded by the doctrine of collateral estoppel (or "issue preclusion") [*Jackson v. Yarbray (2009) 179 Cal. App. 4th 75, 93-95, 101 Cal. Rptr. 3d 303]* .

[d] Stay of Discovery

All discovery proceedings are stayed upon the filing of a notice of special motion to strike until notice of entry of the order ruling on the motion, unless the court, on noticed motion and for good cause shown, orders that specified discovery be conducted notwithstanding the statutory stay [*Code Civ. Proc. § 425.16(g)*]. This includes discovery motions already pending at the time the special motion to strike is filed [*Britts v. Superior Court (2006) 145 Cal. App. 4th 1112, 1127, 52 Cal. Rptr. 3d 185]* .

[e] Statutory Exceptions to Anti-SLAPP Motion

There are exceptions to the Anti-SLAPP motion to strike that make it unavailable in certain circumstances defined by statute [*Code Civ. Proc. § 425.17*]. The special motion to strike procedure of *Code Civ. Proc. § 425.16* does not apply to any action brought solely in the public interest or on behalf of the general public provided that all of the following conditions exist [*Code Civ. Proc. § 425.17(b)*]:

- The plaintiff does not seek any relief greater than or different from the relief sought for the general public or a class of which the plaintiff is a member. Claims for attorney's fees, costs, or other penalties do not count as seeking "greater" or "different" relief.

- The action, if successful, would enforce an important right affecting the public interest, and would confer a significant benefit, whether pecuniary or nonpecuniary, on the general public or a large class of persons.

- Private enforcement is necessary and places a disproportionate financial burden on the plaintiff in relation to the plaintiff's stake in the matter.

In addition, the special motion to strike procedure of *Code Civ. Proc. § 425.16* does not apply to any action brought against a person primarily engaged in the business of selling or leasing goods or services, including, but not limited to, insurance, securities, or financial instruments, arising from any statement or conduct by that person. Both of the following conditions must exist [*Code Civ. Proc. § 425.17(c)*]:

- The statement or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services, or the statement or conduct was made in the course of delivering the person's goods or services.

- The intended audience is an actual or potential buyer or customer, or a person likely to repeat the

statement to, or otherwise influence, an actual or potential buyer or customer, or the statement or conduct arose out of or within the context of a regulatory approval process, proceeding or investigation not withstanding that the conduct or statement concerns an important public issue.

- The exception found in this provision does not apply where the statement or conduct was made by a telephone corporation in the course of a proceeding before the California Public Utilities Commission and is the subject of a lawsuit brought by a competitor.

[f] Circumstances Under Which Statutory Exceptions Are Inapplicable

There are circumstances when the foregoing statutory prohibitions against bringing a special motion to strike do not apply. An Anti-SLAPP motion is permitted as an exception to the foregoing prohibitions as follows [*Code Civ. Proc. § 425.17(d)*]:

- The Anti-SLAPP motion can be employed against claims arising from gathering, receiving or processing information for communication to the publisher, editor, reporter or other person connected or employed upon a newspaper, magazine or other periodical publication, press association or wire service, or a person engaged in the dissemination of ideas or expression in any book or academic journal [*Code Civ. Proc. § 425.17(d)(1)*].

- The Anti-SLAPP motion can be employed against claims against any person or entity based upon the creation, dissemination, exhibition, advertisement or other promotion of any dramatic, literary, musical, political or artistic work [*Code Civ. Proc. § 425.17(d)(2)*].

- The Anti-SLAPP motion can be employed against claims against any non-profit organization that receives more than 50 percent of its annual revenue from federal, state, or local government grants, awards, programs, or reimbursements for services rendered [*Code Civ. Proc. § 425.17(d)(3)*].

[g] Motion Not Available in Action Brought by Public Prosecutor

The Anti-SLAPP motion to strike is not available to defendants in any enforcement action brought in the name of the people of the State of California by the Attorney General, a district attorney, or a city attorney acting as a public prosecutor [*Code Civ. Proc. § 425.16(d)*]. This provision does not violate the *equal protection clause of the constitution* [*People v. Health Laboratories of North America, Inc. (2001) 87 Cal. App. 4th 442, 451, 104 Cal. Rptr. 2d 618]* .

[h] Some Provisions of Code Civ. Proc. § 425.16 Are Inapplicable if Action is a "SLAPPback"

In 2005, the Legislature added *Code Civ. Proc. § 425.18* in order to provide different rules for a special motions to strike a "SLAPPback." The statute defines "SLAPPback" as any cause of action for malicious prosecution or abuse of process arising from the filing or maintenance of a prior cause of action that has been dismissed pursuant to a special motion to strike under *Code Civ. Proc. § 425.16* [*Code Civ. Proc. § 425.18*]. For further discussion, see *§ 161.63*.

[i] Related Pleading and Practice Forms

For forms and discussion relating to the special motion to strike, see California Forms of Pleading and Practice, Ch. 376, *Motions to Strike: Anti -SLAPP*, and Ch. 565, *Unfair Competition*, § 565.130 et seq. (Matthew Bender).

[j] Opposing Memoranda

The contentions *set out in §§ 161.60 -161.63* may be used in opposition to the points and authorities in this form.

[3] Discussion of Authorities

[a] Defendant is Not Required to Demonstrate or Plead an Intent to Chill First Amendment Rights

Equilon Enterprises, LLC v. Consumer Cause, Inc. *(2002) 29 Cal. 4th 53, 124 Cal. Rptr. 2d 507* resolved a split in the California Courts of Appeal over whether a defendant who moves under the SLAPP statute must, in order to prevail, demonstrate that the cause of action was brought with the intent of chilling the defendant's exercise of constitutional speech or petition rights. In Equilon, defendant Consumer Cause, Inc. served on Shell Pipe Line Corporation and Texaco, Inc., predecessors in interest to Equilon Enterprises, LLC, a notice of intent to sue arising out of Equilon's alleged violations of Proposition 65. Equilon then filed a lawsuit for declaratory and injunctive relief claiming the notice did not comply with the California Code of Regulations. Consumer Cause responded by moving under the Anti-SLAPP statute to strike Equilon's complaint. The trial court granted the motion and the Court of Appeal affirmed. The Supreme Court agreed to hear the case and noted that the courts of appeal had divided over the issue of "intent to chill."

The court began by explaining that the plain language of *Code Civ. Proc. § 425.16* contains no requirement that a defendant show plaintiff brought the lawsuit with an intent to chill defendant's rights. The court, quoting *Fox Searchlight Pictures, Inc. v. Paladino (2001) 89 Cal. App. 4th 294, 307, 106 Cal. Rptr. 2d 906* stated that "'[t]he legislative concern,' rather, 'is that the cause of action arise from an act in furtherance of the constitutional right to petition or free speech'" (*29 Cal. 4th 53, 59*). The court then examined legislative intent in attempting to determine whether an intent-to-chill requirement would be appropriate. The court concluded that the legislature's objective was to ensure that public participation not be chilled, and imposing an intent-to-chill proof requirement would undermine that objective (*29 Cal. 4th 53, 60)* .

The court concluded by summarizing the court's task in deciding the outcome of an Anti-SLAPP motion to strike. First, the court should decide whether the defendant has made a "threshold showing" that the challenged cause of action is one arising from protected activity. The defendant must prove that the act or acts of which plaintiff complains were taken "'in furtherance of [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue'" (*29 Cal. 4th 53, 58* , quoting *Code Civ. Proc. § 425.16(b)(1)*). If the court finds the defendant has made this showing, it is then to determine whether plaintiff has demonstrated a probability of prevailing on the claim. Based on the above standards, the California Supreme Court affirmed the Court of Appeal's decision in the Equilon case (*29 Cal. 4th 53, 68)* .

The Equilon case has two companion cases, one of which is ***City of Cotati v. Cashman*** *(2002) 29 Cal. 4th 69, 124 Cal. Rptr. 2d 519* . In *Cotati*, the California Supreme Court reiterated that the Anti-SLAPP statute in *Code Civ. Proc. § 425.16* does not contain an intent-to-chill pleading or proof requirement. The Cotati court also explained that the Anti-SLAPP statute's requirement that the cause of action be one "arising from" protected activity is not synonymous with "in response to" protected activity. In Cotati, plaintiff City of Cotati adopted a mobile home park rent stabilization program, and subsequent owners of mobile home parks sued the City in federal court. City then sued the owners in state court, outlining a cause of action for declaratory relief. The owners responded to the state court lawsuit with a SLAPP motion to strike, alleging that the City's state court action arose from the owners' filing of their earlier federal action. The court held that simply because City filed its state court action after owners had filed their federal lawsuit did not mean the state court action was "arising from" the federal court action within the meaning of the Anti-SLAPP statute. The court pointed out that to construe "arising from" as meaning "in response to" would in effect render all cross-actions potential SLAPPs (*29 Cal. 4th 69, 77-78)* . The court held that City's state court cause of action arose from the actual controversy giving rise to both the federal and state actions--the City's rent stabilization program--and not the owners' federal lawsuit. Therefore, City's state court action was not subject to a special motion to strike (*29 Cal. 4th 69, 80-81)* .

Equilon's other companion case is ***Navellier v. Sletten*** *(2002) 29 Cal. 4th 82, 124 Cal. Rptr. 2d 530* . In *Navellier*, plaintiffs had organized an investment company and defendant Sletten was an independent trustee of the fund. Years

later, Sletten and the other trustees terminated Navallier's management contract for the fund. Plaintiffs then sued Sletten and the other trustees in federal court claiming that the trustees had breached fiduciary duties to the fund. After plaintiffs filed the federal suit, the parties came to an agreement whereby plaintiffs would return as investment advisor to the fund. As a part of this agreement, Sletten signed a general release of all claims. Thereafter, plaintiffs filed an amended complaint in federal court and Sletten filed counterclaims. Defendants won the jury trial in the federal case, and plaintiffs appealed. The Ninth Circuit Court of Appeals affirmed the judgment. A few days before plaintiffs noticed their federal appeal, they filed a state action alleging that Sletten had committed fraud in misrepresenting his intention to be bound by the release. Defendant Sletten responded by filing a motion to strike under the Anti-SLAPP statute. The trial court denied the motion and the Court of Appeal affirmed, citing the intent-to-chill requirement.

The California Supreme Court began to stating that the Court of Appeal had erred in ruling that the case turned on whether plaintiffs subjectively intended to chill Sletton's speech. The court noted that they had discussed this issue at length in companion case Equilon (*29 Cal. 4th 82, 88)* . The court also reiterated its Cotati holding, stating that the mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for purposes of the Anti-SLAPP statute (*29 Cal. 4th 82, 89-95)* . But for the federal lawsuit, the court reasoned, plaintiffs' present claims would have no basis; therefore, the action fell squarely within the "arising from" prong of the Anti-SLAPP statute. The court reversed the Court of Appeal's holding and remanded the case to the appellate court for a determination on the second prong of the Anti-SLAPP test, whether the plaintiffs have established a probability of prevailing (*29 Cal. 4th 82, 95-96)* .

On remand, the appellate court held that plaintiffs had not established a probability of prevailing on their fraud or breach of contract causes of action. Plaintiffs' claims did not have the minimal merit required to survive the SLAPP motion, and therefore the motion to strike was granted [*Navellier v. Sletten (2003) 106 Cal. App. 4th 763, 767, 131 Cal. Rptr. 2d 201]* .

[b] Plaintiff's Burden Arises After Defendant's Prima Facie Showing That Code of Civil Procedure Section 425.16 Applies

The facts and holdings of ***Equilon Enterprises, LLC v. Consumer Cause, Inc.*** *(2002) 29 Cal. 4th 53, 124 Cal. Rptr. 2d 507* , ***City of Cotati v. Cashman*** *(2002) 29 Cal. 4th 69, 75, 124 Cal. Rptr. 2d 519* , and ***Navellier v. Sletten*** *(2002) 29 Cal. 4th 82, 88, 124 Cal. Rptr. 2d 530*) are discussed in *§ 161.30[3][a]*.

In ***Seltzer v. Barnes*** *(2010) 182 Cal. App. 4th 953* , an attorney who owned a condominium unit in a condominium development sued the homeowners association and a management company hired by the association, seeking to enjoin a range of alleged unlawful conduct on the part of the development's management. The association filed a cross-complaint alleging claims based on the attorney damaging and destroying trees without the association's permission and claims arising from her failure to pay assessments. The attorney tendered the cross-complaint to the provider of her homeowner insurance policies, which retained a law firm to provide advice concerning coverage for the cross-complaint under the attorney's insurance policies. Through one attorney, the insurer informed the attorney it would defend her against the cross-complaint, subject to a reservation of rights to deny coverage. The insurer took the position that the assessment claims in the cross-complaint were not covered under her policies. The insurer retained another law firm as her defense counsel. The first attorney hired by the insurer negotiated a settlement of the trespass claims with counsel for the association. The settlement did not encompass the assessment claims. The insurer and the association signed a settlement and release agreement, and the association filed a request for dismissal in accordance with the agreement, which was entered the same day. The attorney who owned the condominium unit filed a complaint against the association, the management company, her insurer, the attorney who negotiation the settlement, and the association's counsel, alleging that the insurer and the other defendants colluded to defraud the attorney, defeat her coverage under her insurance policies, and convert the proceeds of her insurance policies to the association. In particular, following secret negotiations, the insurer and the association entered into an agreement to dismiss the claims the insurer considered covered under her insurance policies, to justify the insurer's denial of a defense on the remainder

of the cross-complaint and to provide the association with funds to continue its litigation against her. The attorney who owned the condominium alleged causes of action against the attorney who negotiated the settlement for fraud and intentional infliction of emotional distress, principally based on his participation in the negotiations that resulted in the partial settlement in the earlier Action. The attorney who negotiated the settlement filed a demurrer and, pursuant to *Code Civ. Proc. § 425.16*, a special motion to strike the claims against him. His declaration, with attachments, detailed the negotiations resulting in the partial settlement of the cross-complaint in the earlier action. Specifically, pursuant to *Code Civ. Proc. § 998*, the association offered to settle the cross-complaint in its entirety in exchange for a specified sum and a commitment by the condominium owner to execute a hold harmless agreement and waiver of responsibility for maintenance by the association. The insurer, through the attorney who negotiated the settlement counteroffered to pay the association a smaller sum in exchange for dismissal of the cross-complaint. The association accepted the insurer's offer to settle the entire cross-complaint. However, the attorney who negotiated the settlement informed the association's counsel that the insurer could not agree to any settlement that would waive the condominium owner's right to seek her attorney's fees and costs from the association. The association offered to settle only the covered claims in the cross-complaint, preserving her right to pursue her attorney's fees and costs from the association on the remaining claims. The attorney who negotiated the settlement sent her a letter summarizing the ongoing settlement discussions and asking for her preference among three options: (1) Settlement of the entire cross-complaint, (2) settlement of the trespass claims alone, or (3) withdrawal of her insurance claim. In response, she impliedly rejected all three options and effectively insisted that the matter continue to be litigated at the insurer's expense. The insurer and the association entered into the partial settlement agreement, which preserved her right to seek attorney's fees and costs from the association on the remaining claims. The trial court denied the motion to strike (*182 Cal. App. 4th 953, 958-960)* .

The Court of Appeal reversed. The court held that settlement negotiations were an exercise of the right to petition and statements made as part of the negotiations were in connection with the underlying lawsuit for purposes of *Code Civ. Proc. § 425.16(e)(2)*. The condominium owner's claim was based on the attorney's communication of an offer to settle and the content of the offer (*182 Cal. App. 4th 953, 963-964)* . Although the condominium owner's contentions raised questions about the propriety of how the settlement negotiations were conducted, the attorney was not obligated to show his actions were constitutionally protected as a matter of law (*182 Cal. App. 4th 953, 964)* . The attorney's intent was a disputed factual issue, and he submitted evidence that the ultimate settlement was preceded by disclosure to the condominium owner and an opportunity for her to express her preference regarding options to settle the cross-complaint. Moreover, he averred in his declaration that he never misrepresented facts to her, concealed any evidence from her, or intended to cause her any emotional distress (*182 Cal. App. 4th 953, 964-966)* . The settlement did not violate *Pen. Code § 550(a)(1)*, which prohibits presentation of any false or fraudulent claim for the payment of a loss or injury, including payment of a loss or injury under a contract of insurance. The negotiations were also not unlawful under *Civ. Code § 2860(f)* (*182 Cal. App. 4th 953, 966-967)* . Even if *Civ. Code § 2860* was applicable, the insurer had, as a general matter, the right to settle covered claims in the cross-complaint (*182 Cal. App. 4th 953, 967)* . Finally, because the *Civ. Code § 47* litigation privilege applied as a matter of law, the condominium owner could not demonstrate a probability of prevailing on her causes of action against coverage counsel (*182 Cal. App. 4th 953, 969-972)* .

In ***Stewart v. Rolling Stone LLC*** *(2010) 181 Cal. App. 4th 664, 105 Cal. Rptr. 3d 98* , plaintiffs, indie rock musicians, sued the publishers of a magazine for unauthorized use of name in violation of *Civ. Code § 3344*, unauthorized use of name for commercial advantage (right of publicity), and unfair business practice in violation of *Bus. & Prof. Code § 17200 et seq.*, based on an editorial feature that appeared in an issue of the magazine. The gravamen of the complaint was that defendants and a tobacco company used the artist names of plaintiffs knowingly and deliberately for the commercial purpose of advertising cigarettes without their prior authorization. The trial court denied defendants' motion to strike pursuant to section 425.16. In their moving papers, defendants argued that all three causes of action were subject to § 426.16, because they arose from alleged conduct involving the magazine's exercise of its free speech rights about a matter of public interest, and that plaintiffs would be unlikely to prevail on the merits of their claims, primarily because the editorial feature represented non-commercial speech, which was absolutely protected by the *First Amendment*, and because the bands' names were not used for a commercial purpose. The trial court based its denial on

the ground that a trier of fact could conclude the editorial feature had been transformed into commercial speech by virtue of having become inextricably entwined with a surrounding cigarette advertisement (*181 Cal. App. 4th 664, 670-674)* .

The Court of Appeal reversed. The court held first that the feature was protected under § 425.16, because the act from which the complaint arose constituted conduct in furtherance of defendants' right of free speech in connection with a public issue or an issue of public interest. The court found that the feature was a statement or other conduct is made in connection with a public issue or an issue of public interest [*Code Civ. Proc. § 425.16(e)(4)*], concerning a topic of widespread public interest and contributing in some manner to a public discussion of the topic if the statement or conduct. The feature concerned an extremely popular genre of music and was a creatively crafted, whimsical editorial commentary on the many bands whose musical works have contributed to the development of the genre (*181 Cal. App. 4th 664, 677-679)* . Further, plaintiffs did not make a showing of probability of prevailing on the merits because, assuming the feature was commercial speech, even commercial speech was entitled to a measure of *First Amendment* protection. However, the speech was not commercial as a matter of law, and because plaintiffs did not demonstrate that defendants acted with actual malice, constitutional principles of freedom of speech and the press required that the lawsuit be dismissed (*181 Cal. App. 4th 664, 679-692)* .

In ***Fox Searchlight Pictures v. Paladino*** *(2001) 89 Cal. App. 4th 294, 307, 106 Cal. Rptr. 2d 906* , on learning that its former in-house counsel planned to sue for wrongful termination, the corporation sued the former counsel for disclosing confidential information. The defendant filed an Anti-SLAPP motion to strike. In opposition to defendant's SLAPP motion to strike and in support of its own disqualification motions, plaintiff corporation submitted documents under seal which purported to establish certain information contained in defendant's complaint for wrongful termination was privileged or confidential. The court reviewed the sealed documents in ruling on the SLAPP motion and denied the defendant's motion (*89 Cal. App. 4th 294, 299-300)* .

The court of appeal reversed, holding that the only thing defendant need establish in bringing an Anti-SLAPP motion to strike is that the challenged lawsuit arose from an act on the part of the defendant in furtherance of defendant's right of petition or free speech. From that fact the court may presume that the purpose of the action was to chill the defendant's exercise of *First Amendment* rights. Plaintiff corporation argued that the motion should be denied because defendant did not show that the complaint was intended to chill defendant's *first amendment* right to petition for the redress of grievances through litigation. No mention is made in the controlling statute regarding proof of the plaintiff's motives or intent, and the court refused to impose a burden on the party seeking protection from the SLAPP statute of proving the plaintiff was motivated by an improper purpose. The intent and purpose of the lawsuit may be addressed by the plaintiff when it attempts to establish its ability to prevail on the merits (*89 Cal. App. 4th 294, 306-307)* .

In ***Dixon v. Superior Court*** *(1994) 30 Cal. App. 4th 733, 36 Cal. Rptr. 2d 687* , a firm that had performed archaeological tests on a site on the campus of California State University at Long Beach, believed by many Native American Indians to be an ancient village, brought an action for intentional and negligent interference with contractual relations and prospective economic advantage, libel, slander, and trade libel against a professor who opposed development on the site through a letter-writing campaign. Defendant professor allegedly wrote the letters for the sole purpose of participating in the California Environmental Quality Act (CEQA) public comment and review process by informing university officials about the cultural, historical, and archaeological significance of the site and potential environmental effects that further excavation and commercial development would cause. Defendant filed a motion to strike the complaint pursuant to *Code Civ. Proc. § 425.16*, which the trial court denied (*30 Cal. App. 4th 733, 740)* .

The court of appeal issued a peremptory writ of mandate directing the trial court to vacate its order denying the motion to strike and to enter a new order granting the motion and dismissing the complaint (*30 Cal. App. 4th 733, 746)* . It described SLAPP (strategic lawsuits against public participation) suits as generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them for doing so. It then applied the rule set forth in *Wilcox v. Superior Court (1994) 27 Cal. App. 4th 809, 820, 33 Cal. Rptr. 2d 446*

(discussed below), that the party moving to strike a complaint under *Code Civ. Proc. § 425.16* has the burden of making a prima facie showing that the lawsuit arises from an act of defendant in furtherance of defendant's right of petition or free speech under the United States or California Constitution in connection with a public issue (*30 Cal. App. 4th 733, 741-742)* . It noted that the dispute in this case was whether the professor's allegedly tortious statements were made in connection with the CEQA proceedings. The court rejected the plaintiff's argument that the defendant's statements were not made in connection with the CEQA proceedings and concluded that the professor had made a prima facie showing under *Code Civ. Proc. § 425.16* (*30 Cal. App. 4th 733, 742-744)* . The court went on to hold that the plaintiff failed to establish a probability of success on its complaint and ordered the trial court to grant defendant's motion to strike the complaint (*30 Cal. App. 4th 733, 744-746)* .

In ***Wilcox v. Superior Court*** *(1994) 27 Cal. App. 4th 809, 33 Cal. Rptr. 2d 446* , certified shorthand reporters brought suit against a certified shorthand reporters' alliance, alleging that "direct contracting," as practiced by defendants, constituted an unfair business practice, intentional interference with plaintiffs' prospective economic advantages, and interference with existing contracts. Defendants filed a cross complaint against plaintiffs, and other individuals, for defamation and conspiracy to unlawfully restrain trade through a boycott of defendants' reporting services. Wilcox, one of the cross defendants, filed a motion to strike the cross complaint against her based on *Code Civ. Proc. § 425.16*, the Anti-SLAPP suit statute. The trial court denied the motion, and Wilcox filed a petition for writ of mandate (*27 Cal. App. 4th 809, 814-815)* .

The court of appeal issued a peremptory writ directing the lower court to vacate its order and to enter a new order striking the cross-complaint in its entirety as to *Wilcox (27 Cal. App. 4th 809, 830-831)* . The court noted that although the statute clearly places the burden on the plaintiff or cross complainant to establish a probability of prevailing on the claim, the burden does not arise unless the claim falls within the ambit of the statute. The court observed that the statute is unclear as to whether the moving party bears the burden of establishing the action arose out of acts in furtherance of his or her *First Amendment* rights in connection with a public issue or whether the plaintiff bears the burden of showing its claim does not arise out of such acts by the defendant. The court concluded that it was not only logical but fundamentally fair that, before putting the plaintiff to the burden of establishing probability of success on the merits, the defendant be required to show that imposing that burden was justified by the nature of the plaintiff's complaint (*27 Cal. App. 4th 809, 819)* . It then held that *Code Civ. Proc. § 425.16(b)*, requires the defendant to make a prima facie showing the plaintiff's suit arises from an act of defendant in furtherance of defendant's right of petition or free speech under the United States or California Constitution in connection with a public issue. The defendant may meet this burden by showing that the act that forms the basis for the plaintiff's cause of action was a written or oral statement made before a legislative, executive, or judicial proceeding; a statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body; or a statement made in a place open to the public or a public forum in connection with an issue of public interest, citing *Code Civ. Proc. § 425.16(e)*. The court also made clear that the definition of an "act in furtherance of" a person's *First Amendment* rights is not limited to oral and written statements (*27 Cal. App. 4th 809, 820-821)* .

The court rejected the cross complainants' contention that defendant had failed to show the acts alleged in the cross complaint were done in connection with the consideration of direct contracting by any legislative, executive, or judicial body, and that there was no rational connection between legislative, administrative and judicial challenges to direct contracting and defendant's alleged defamatory statement and conspiracy to injure the cross-complainants' businesses. It noted that this argument highlights the reason for the Anti-SLAPP suit legislation since in a SLAPP complaint, the defendant's acts in petitioning the government are made to appear as defamation, restraint of trade, and the like. The court stated that for this reason, the Legislature specifically provided in subdivision (b) to *Code Civ. Proc. § 425.16* that "the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based." It then found that Wilcox's alleged defamatory statements were clearly made in connection with the underlying judicial challenge to direct contracting and that the alleged economic boycott of cross-complainants' businesses was arguably protected by the petition clause of the *First Amendment* (*27 Cal. App. 4th 809, 821-822)* . The court went on to hold that the cross complainants had failed to establish a probability of success on the merits of the

cross complaint and ordered the trial court to grant Wilcox's motion to strike the cross complaint (*27 Cal. App. 4th 809, 823-829)* .

[c] Plaintiff Cannot Establish Probability of Prevailing on Claims Against Defendant

In ***Taus v. Loftus*** *(2007) 40 Cal. 4th 683, 54 Cal. Rptr. 3d 775, 151 P.3d 1185* , plaintiff sued the authors and publishers of two different articles that appeared in The Skeptical Inquirer, a magazine published by the Committee for the Scientific Investigation of Claims of the Paranormal. The articles had been published in response to an earlier article in Child Maltreatment, a scientific journal. The Child Maltreatment article presented the case history of a girl who had been sexually abused as a young child and later allegedly spontaneously remembered previously unrecallable memories of that abuse. The girl, whom the article referred to as Jane Doe, was plaintiff. The two Skeptical Inquirer articles called into question the findings of the Child Treatment article and provided details about Jane Doe's history that were not included in the original article (which was written with Jane's permission). Shortly after the articles were published, plaintiff sued defendants for negligent infliction of emotional distress, invasion of privacy, fraud, and defamation. In response, defendants filed a motion to strike under *Code Civ. Proc. § 425.16*.

The trial court denied the motion as to the negligence infliction of emotional distress and invasion of privacy claims. As to the other two claims, the court granted the motion as to one defendant and denied it as to the other named defendant. Defendants appealed the denials; plaintiff did not appeal the portions of the ruling granting defendants' motion. The court of appeals found that the two articles forming the basis of the lawsuit called into question the validity of the original Jane Doe article, which was part of an ongoing controversy in academic and clinical psychology circles regarding abuse and repressed memory. Thus, the conduct at issue fit squarely within *Code of Civ. Proc. § 425.16(e)(3)* and *(4)*. As to the second prong of the Anti-SLAPP test, probability of success on the merits, the court of appeals concluded that plaintiff was only able to show a probability of success on the merits with respect to a cause of action for improper disclosure of private facts based on the disclosure, while speaking at a conference, of plaintiff's military position and based on the disclosure of plaintiff's initials during a deposition in an unrelated case, one cause of action for improper intrusion into private matters, based on misrepresentations to plaintiff's foster mother and based on a search of juvenile court files, and a cause of action for defamation based again on the disclosure of plaintiff's military position (*40 Cal. 4th 683, 711)* . Defendants again appealed, and the California Supreme Court granted review.

The court agreed that the conduct from which plaintiff's causes of action arose was clearly in furtherance of defendants' right of free speech in connection with a public issue. At the time of the conduct, there was a substantial controversy in the mental health field regarding suppressed memories of abuse. The burden therefore shifted to plaintiff to show a probability of prevailing on her claims. The court explained that plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited. ... In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant; though the court does not weigh the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim" (*40 Cal. 4th 683, 713-714* , quoting *Wilson v. Parker, Covert & Chidester (2002) 28 Cal. 4th 811, 821, 123 Cal. Rptr. 2d 19, 50 P.3d 733*). The court noted that since plaintiff had not appealed, the only causes of action before it were the four claims on which the court of appeal had ruled that plaintiff established a prima facie case.

On appeal, the California Supreme Court held that plaintiff was only able to establish a prima facie case on one cause of action: defendant's alleged misrepresentation of his relationship with the author of the initial article in order to obtain information from plaintiff's foster mother. After discussing the elements of the tort of public disclosure of private facts, the court concluded that because the facts disclosed regarding plaintiff's military service were newsworthy, they could not properly be the subject of such a cause of action. Additionally, the disclosure of plaintiff's initials during a deposition could not support such a cause of action because the deposition took place after plaintiff filed her complaint in the instant case, and plaintiff had disclosed her full name when she filed her complaint. The court further held that

because defendants made the allegedly defamatory statements at a professional conference, the statements were protected by the common-interest privilege of *Civ. Code § 47(c)(1)* and therefore could not form the basis for a defamation cause of action. The court then examined plaintiff's cause of action for intrusion into private matters based on defendants' review of allegedly confidential court records and concluded that the evidence showed defendants only reviewed court files that were a matter of public record and not confidential at all (*40 Cal. 4th 683, 726)* .

Finally, the court turned to plaintiff's cause of action for improper intrusion into private matters based on defendants' misrepresentations in order to obtain personal information from plaintiff's foster mother. The court found that, based on evidence submitted by plaintiff, defendant was seeking to obtain personal information from plaintiff's foster mother and this information was of the type as to which a person would have a reasonable expectation of privacy. If defendant obtained this private information by misrepresenting herself to plaintiff's foster mother, a jury could reasonably find that defendant violated plaintiff's reasonable expectation of privacy in a highly offensive manner and therefore plaintiff did establish a prima facie case on this cause of action (*40 Cal. 4th 683, 742)* .

The facts and procedural background of ***Mendoza v. ADP Screening & Selection Services, Inc.*** *(2010) 182 Cal. App. 4th 1644, 107 Cal. Rptr. 3d 294* , are set forth in § 160.40A[3][c], *below*. The Court of Appeal agreed with the trial court that plaintiff could not prevail on his cause of action for violation of *Pen. Code § 290.46* as a matter of law because defendant had not "used" information disclosed on the Megan's Law Website (MLW) in a manner contemplated by the provisions prohibiting disclosure of information found on the MLW for employment purposes. The Legislature recognized a distinction between the "use" of sex offender information, and the "reproducing" or "republishing" of such information, and, in creating statutory liability for the "use" of the information disclosed on the MLW, the Legislature did not intend to extend liability to persons, including businesses, who merely reproduce or republish the information, without actually acting on the information. Plaintiff's cause of action, if any, lay against his prospective employer. Further, as a matter of law, plaintiff could not show a probability of prevailing on second cause of action for an alleged violation of *Civ. Code § 1786.20(c)*, prohibiting an investigative consumer reporting agency from inquiring for the purpose of preparing an investigative consumer report on a consumer for employment purposes if the inquiry by an employer or prospective employer of the consumer would violate federal or state equal employment opportunity law or regulation. The prohibition against the use of information disclosed on the MLW did not mean that registered sex offenders were a protected class for purposes of housing discrimination under the California Fair Employment and Housing Act (*Gov. Code § 12900 et seq.*; 89 Ops. Cal. Atty. Gen. 85 (2006)), and the court saw no reason to come to a different conclusion in the employment discrimination context (*182 Cal. App. 4th 1644, 1655-1659)* .

The facts and procedural background of ***Dixon v. Superior Court*** *(1994) 30 Cal. App. 4th 733, 36 Cal. Rptr. 2d 687* , are *discussed under § 161.30[3][b]*. In that case, the plaintiff contended that its evidence submitted in opposition to the motion demonstrated that the defendant-professor's statements were made with actual malice and with knowledge of their falsity or with reckless disregard for their truth. It argued that since defendant was not entitled to *First Amendment* protection, it had established a probability of prevailing at trial. The court of appeal disagreed. It found that where there is a statutory invitation for public participation and comment, such as existed here with the California Environmental Quality Act (CEQA) public comment period, any inquiry into the motives behind such statements or comments is barred. Since there was no dispute that the defendant's statements were made in response to a matter of public concern, the statements were entitled to absolute immunity, and plaintiff could not establish a probability of prevailing at trial (*30 Cal. App. 4th 733, 745)* .

The court also rejected plaintiff's constitutional challenge to *Code Civ. Proc. § 425.16* on the grounds that it violates the right to due process by requiring a plaintiff to establish probability of success without the opportunity to conduct discovery. Although it did not directly address the issue of the statute's constitutionality, the court found that in this case, discovery would not have benefitted plaintiff's case since defendant's motivation behind his statements was irrelevant (*30 Cal. App. 4th 733, 746*). It further found that in ruling on the motion, the court does not weigh the evidence but accepts as true all evidence favorable to the plaintiff, thus rejecting plaintiff's contention that the statute

violated its rights to trial by jury (*30 Cal. App. 4th 733, 746*).

The facts and procedural background of ***Wilcox v. Superior Court*** *(1994) 27 Cal. App. 4th 809, 33 Cal. Rptr. 2d 446* , are *discussed under § 161.30[3][b]*.

The court determined what the Legislature meant by requiring the plaintiff to establish a probability that the plaintiff will prevail on the claim in *Code Civ. Proc. § 425.16(b)*, by examining the legislative purpose behind the statute as well as the constitutional rights of the plaintiff to due process and a jury trial. It noted that the statute was intended to provide a fast and inexpensive unmasking and dismissal of SLAPP suits. It stated that to satisfy due process, the burden placed on plaintiff must be compatible with the early stage at which the motion is brought and the limited opportunity to conduct discovery and to preserve the right to a jury trial. The court cannot weigh the evidence (*27 Cal. App. 4th 809, 823)* .

The court then adopted the standard for establishing a substantial or reasonable probability of success enunciated in *Hung v. Wang (1992) 8 Cal. App. 4th 908, 931, 11 Cal. Rptr. 2d 113* , which held that the plaintiff must demonstrate the complaint is legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited. If either requirement is not met, the motion to strike must be granted; if both are satisfied, it must be denied (*27 Cal. App. 4th 809, 823-824)* . Applying this standard, the court found that cross complainants failed to establish a probability of prevailing on the defamation claim, since the defendant would have a qualified privilege defense, or on the conspiracy claim since cross complainants failed to submit legally sufficient evidence that defendant had concurred with anyone in a tortious scheme to injure them (*27 Cal. App. 4th 809, 826-828)* .

[d] Constitutional Protection Available for Speech Alleged to Constitute Intentional Interference With Prospective Economic Advantage

In ***Hofmann Co. v. E.I. Du Pont de Nemours and Co.*** *(1988) 202 Cal. App. 3d 390, 248 Cal. Rptr. 384* , two plant managers of the defendant toxic chemical plant made statements that appeared in a front-page news story criticizing a housing development proposed to be constructed next to the plant. The developer brought an action against the chemical company and the plant managers alleging that the employees' comments constituted false statements of fact actionable as trade libel and as intentional interference with prospective economic advantage (*202 Cal. App. 3d 390, 395-396)* . The trial court sustained defendants' demurrers to the two causes of action without leave to amend.

The court of appeal affirmed, holding that the statements were either assertions of true facts or ambiguous opinions, and thus not actionable as trade libel (*202 Cal. App. 3d 390, 401)* . The court further held that the statements, which involved a matter of public concern, were constitutionally protected (*202 Cal. App. 3d 390, 407-408)* .

In ***Paradise Hills Associates v. Procel*** *(1991) 235 Cal. App. 3d 1528, 1 Cal. Rptr. 2d 514* , plaintiff was the owner and developer of a residential subdivision. Defendant and her husband, who purchased a house from plaintiff, asserted numerous construction defects and breaches of contract. Defendant posted signs on her house to call attention to her dispute with plaintiff, spoke to newspaper reporters about her house, distributed leaflets in front of plaintiff's model home, spoke to prospective customers, urging them not to buy from plaintiff, and displayed large signs that disparaged plaintiff. Plaintiff obtained a preliminary injunction restricting defendant from the above and other activities. Defendant appealed the denial of her application for an extraordinary writ reversing the injunction (*235 Cal. App. 3d 1528, 1534-1536*).

The court of appeal reversed the order granting the preliminary injunction. The court found that the injunctive relief granted was overbroad to the extent it restricted protected speech, such as truthful information and honestly held opinions, and activity, such as peaceful picketing (*235 Cal. App. 3d 1528, 1545-1546)* .

[e] Averments on Information and Belief Are Inadequate in Supporting Declaration

In ***Evans v. Unkow*** *(1995) 38 Cal. App. 4th 1490, 45 Cal. Rptr. 2d 624* , plaintiff had been recalled from political office in a recall election. He then brought an action for defamation against 10 defendants who had initiated the recall drive. The defendants filed a SLAPP motion to strike. In opposing the motion, plaintiff submitted a declaration alleging on the basis of information and belief that a political adversarial relationship between himself and the individual who was the main source of information for defendants was a matter of common knowledge. The trial court granted the motion to strike, and also said that it had not considered substantial portions of plaintiff's declaration which were argument and mere opinion.

The court of appeal agreed with the trial court, noting initially that in opposing the motion to strike plaintiff had the burden of establishing a "probability" that he would prevail, so that he had to present evidence showing he would establish a prima facie case at trial (*38 Cal. App. 4th 1490, 1496)* . The court agreed that if defendants were relying solely on a source known to be hostile toward the plaintiff, that would support a finding or reason to doubt the source's veracity. However, it concluded that plaintiff failed to establish that the defendants knew of such hostility. Plaintiff's sole assertion on this point was his averment, on information and belief that the "adversarial relationship" between the two was a matter of common knowledge. However, an averment on information and belief is inadequate to show a probability that the plaintiff will prevail on the claim sufficient to satisfy *Code Civ. Proc. § 425.16(b).* An assessment of the probability of prevailing on the claim looks to trial, and the evidence that will be presented at that time. Such evidence must be admissible, and the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter. Therefore, an averment on information and belief is inadmissible at trial, and thus cannot show a probability of prevailing on the claim (*38 Cal. App. 4th 1490, 1497-1498)* . The court thus affirmed the judgment of dismissal.

[f] Discovery Proceedings Are Stayed

In ***Britts v. Superior Court*** *(2006) 145 Cal. App. 4th 1112, 52 Cal. Rptr. 3d 185* , petitioners did not file opposition to a discovery motion but instead filed an Anti-SLAPP motion on the day the opposition was due. The Anti-SLAPP motion was still pending in another department of the superior court when the discovery motion was later heard, when the order was subsequently entered, and on the date petitioners were to comply with the order by providing discovery responses and paying sanctions 20 days later. At issue was whether the stay on "all discovery proceedings" [*Code Civ. Proc., § 425.16(g)*] imposed upon the filing of an anti-SLAPP motion extended to discovery motions.

The court held that the language of the statute had to be read to mean that discovery motions, including those that were pending, were also stayed upon the filing of an anti-SLAPP motion. Accordingly, the trial court erred not only in proceeding with the hearing on the creditor's discovery motion while petitioners' second anti-SLAPP motion was pending, but also in issuing its order compelling their compliance with discovery requests, imposing monetary sanctions against them, and finding a waiver of their objections. The court issued a peremptory writ of mandate directing the trial court to vacate its discovery order, to schedule a new hearing on the creditor's motion to compel and for discovery sanctions with a briefing schedule that allowed petitioners a reasonable time to file opposition to the motion on its merits, and to consider the motion anew in accordance with the views expressed in the court's opinion (*145 Cal. App. 4th 1112, 1125-1130)*

[g] Code Civ. Proc. § 425.16 to Be Construed Broadly

In ***Kibler v. Northern Inyo County Local Hospital Dist.*** *(2006) 39 Cal. 4th 192, 46 Cal. Rptr. 3d 41, 138 P.3d 193* , plaintiff Dr. George Kibler had been a physician at defendant hospital since the 1970's. In 2001, the hospital brought a lawsuit against Dr. Kibler seeking an injunction against workplace violence after hostile encounters between Dr. Kibler and other hospital employees. The hospital's peer review committee subsequently suspended Dr. Kibler from its staff. Shortly thereafter, Dr. Kibler and the hospital came to a written agreement under which Dr. Kibler's privileges were

reinstated in exchange for Dr. Kibler's agreement to refrain from hostile, violent, intimidating, or demeaning conduct. Several months later, Dr. Kibler filed a lawsuit against the hospital, alleging causes of action for defamation, abuse of process, and interference with his practice of medicine. The hospital filed an Anti-SLAPP motion, contending that the lawsuit arose out of the hospital's peer review proceeding, which was an "official proceeding" within the meaning of the Anti-SLAPP statute. The trial court agreed, and dismissed Dr. Kibler's lawsuit. The court of appeal affirmed, the California Supreme Court granted Dr. Kibler's petition for review to decide whether a hospital peer review proceeding is an "official proceeding authorized by law" under the statute (*39 Cal. 4th 192, 195)* .

The Supreme Court affirmed, noting at the outset that the phrase "official proceeding authorized by law" appears in both *Code Civ. Proc. § 425.16(e)(1)* and *(2)*. The trial court found that the lawsuit arose out of oral or written statements or writings made in connection with the peer review proceedings. Therefore, the court only addressed whether the lawsuit targeted conduct protected under *Code Civ. Proc. § 425.16(e)(2)*. The court then acknowledged that the Legislature explicitly intended for the Anti-SLAPP statute to be broadly construed (*39 Cal. 4th 192, 199)* . Because the hospital peer review proceedings are governed by a comprehensive scheme set forth in the Business and Professions Code, the proceedings qualify as an "official proceeding authorized by law." Moreover, a hospital's peer review decisions are subject to judicial review by administrative mandate and therefore are quasi-judicial in nature. Because Dr. Kibler's lawsuit was aimed at statements or writings made in connection with the hospital's peer review proceedings, the Supreme Court affirmed the dismissal of Dr. Kibler's lawsuit (*39 Cal. 4th 192, 203)* .

The facts and procedural background of ***Briggs v. Eden Council for Hope and Opportunity*** *(1999) 19 Cal. 4th 1106, 81 Cal. Rptr. 2d 471, 969 P.2d 564* , are *discussed under § 161.31[3][a]*. In Briggs, the court noted the 1997 legislative amendment to *Code Civ. Proc. § 425.16* mandates a broad construction of that section (*19 Cal. 4th 1106, 1120)* and disapproved of several cases that narrowly construed the scope of *Code Civ. Proc. § 425.16* (*see 19 Cal. 4th 1106, 1114, 1120-1121, 1123 n.10*).

[h] Petitions for Injunctive Relief From Harassment Are Subject to Anti-SLAPP Motion to Strike

In ***Thomas v. Quintero*** *(2005) 126 Cal. App. 4th 635, 24 Cal. Rptr. 3d 619* , plaintiff filed a *Code Civ. Proc. § 527.6* petition for injunction prohibiting harassment against defendant, alleging that defendant appeared at plaintiff's church and harassed members of the congregation with the purpose of embarrassing plaintiff. Shortly after plaintiff filed the petition, the court granted a TRO and set a hearing date for the injunction petition, which was later continued. Defendant then filed an Anti-SLAPP motion, which the trial court judge denied. At the hearing, the trial court judge ruled that the Anti-SLAPP statute did not apply to proceedings under *Code Civ. Proc. § 527.6*. The judge's reasons were as follows: 1) a petition under *Code Civ. Proc. § 527.6* is not a "cause of action" under the Anti-SLAPP statute; 2) the application of the Anti-SLAPP statute to such proceedings would undermine the speed with which the proceedings were meant to be conducted; and 3) the provisions allowing for discovery in connection with the Anti-SLAPP motion were counter to the purpose of *Code Civ. Proc. § 527.6* (*126 Cal. App. 4th 635, 646)* . Defendant appealed the Anti-SLAPP ruling, and the court of appeals reversed.

The appellate court pointed out that no court had previously decide the question of whether a *Code Civ. Proc. § 527.6* petition is subject to the Anti-SLAPP statute. The court noted that the Anti-SLAPP statute uses the term "cause of action" interchangeably with the terms "claim," "complaint," and "action," and defines "complaint" to specifically include a "petition." Furthermore, the Legislature specifically exempted some forms of legal proceedings from the purview of the statute, but *Code Civ. Proc. § 527.6* petitions were not among them, suggesting the Legislature did not intend to except *Code Civ. Proc. § 527.6* petitions from the Anti-SLAPP statute. The court also pointed to other Anti-SLAPP cases involving claims for injunctive relief filed under different procedural statutes. The court similarly dismissed the trial court's concerns about the timing of the harassment petition proceedings, stating that, if granted, a TRO can remain in effect during the pendency of the Anti-SLAPP motion and that the harassment statute allows for continuances. As for the trial court's concerns about discovery, the court stated that the norm would be for both the Anti-SLAPP hearing and the hearing on the petition to take place without discovery, so there was no apparent conflict.

However, the court held that an Anti-SLAPP motion cannot be filed in response to the TRO procedure set forth in *Code Civ. Proc. § 527.6(c)*, as a request for a TRO is simply an "application" and not a "cause of action" (*126 Cal. App. 4th 635, 652*). The appellate court reversed the trial court's decision and granted defendant's Anti-SLAPP motion, holding that defendant's conduct arose out of protected activities and plaintiff had no likelihood of prevailing on the merits (*126 Cal. App. 4th 635, 664*).

In ***City of Los Angeles v. Animal Defense League*** *(2006) 135 Cal. App. 4th 606, 37 Cal. Rptr. 3d 632* , the city of Los Angeles filed petitions under *Code Civ. Proc. § 527.8* seeking workplace violence protective orders on behalf of two of its employees against an animal rights activist and the Animal Defense League. The city filed its petitions following a demonstration at one of the employee's homes. The trial court granted temporary restraining orders and set the matters for hearing, and defendants filed Anti-SLAPP motions in response. The court denied the Anti-SLAPP motions, holding the petitions fell within the Anti-SLAPP statute exemption found in *Code Civ. Proc. § 425.16(d)* and therefore were not subject to Anti-SLAPP scrutiny. Defendants appealed, and the court of appeals reversed.

The court of appeals began by pointing out that petitions under *Code Civ. Proc. § 527.8* are subject to the Anti-SLAPP statute. Such petitions are substantially similar to petitions for civil harassment restraining orders, which have been held subject to Anti-SLAPP scrutiny under *Thomas v. Quintero (2005) 126 Cal. App. 4th 635, 645, 24 Cal. Rptr. 3d 619* . The court then addressed the issue of whether such petitions were "enforcement action[s] brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor" under *Code Civ. Proc. § 425.16(d)*. The city argued the petitions were enforcement actions because the conduct targeted was a crime. The court noted that *Code Civ. Proc. § 425.16(d)* does apply to both criminal prosecutions and civil enforcement actions, and that actions brought in the name of a city or county itself rather than in the name of the "people of California" could still qualify under the exemption. However, the exemption only applies to actions brought by a governmental agency to enforce laws aimed generally at public protection. The city's petitions in this case were not aimed at public protection, but rather were tools to ensure a safe workplace for the city's employees. Additionally, the city was not acting in its capacity as "public prosecutor" when it filed the petitions; it was acting as an "employer" (*135 Cal. App. 4th 606, 619)* .

After holding that the petitions were not exempted from Anti-SLAPP scrutiny under *Code Civ. Proc. § 425.16(d)*, the court addressed the merits of the motion. Demonstrations targeting government policy constitute a classic exercise of the constitutional rights of free speech and petition in connection with a public issue, within the meaning of *Code Civ. Proc. § 425.16(e)(4)*. Because the city failed to show a probability of prevailing on its claims, the court granted defendants' Anti-SLAPP motions (*135 Cal. App. 4th 606, 627)* .

[i] The Exemption to the Anti-SLAPP Law for Enforcement Actions Applies Only to Actions Brought by a Governmental Agency Aimed Generally at Public Protection

In ***City of Los Angeles v. Animal Defense League*** *(2006) 135 Cal. App. 4th 606, 37 Cal. Rptr. 3d 632* , the city of Los Angeles filed petitions under *Code Civ. Proc. § 527.8* seeking workplace violence protective orders on behalf of two of its employees against an animal rights activist and the Animal Defense League. The city filed its petitions following a demonstration at one of the employee's homes. The trial court granted temporary restraining orders and set the matters for hearing, and defendants filed Anti-SLAPP motions in response. The court denied the Anti-SLAPP motions, holding the petitions fell within the Anti-SLAPP statute exemption found in *Code Civ. Proc. § 425.16(d)* and therefore were not subject to Anti-SLAPP scrutiny. Defendants appealed, and the court of appeals reversed.

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prosecutor" under *Code Civ. Proc. § 425.16(d)*. The city argued the petitions were enforcement actions because the conduct targeted was a crime. The court noted that *Code Civ. Proc. § 425.16(d)* does apply to both criminal prosecutions and civil enforcement actions, and that actions brought in the name of a city or county itself rather than in the name of the "people of California" could still qualify under the exemption. However, the exemption only applies to actions brought by a governmental agency to enforce laws aimed generally at public protection. The city's petitions in this case were not aimed at public protection, but rather were tools to ensure a safe workplace for the city's employees. Additionally, the city was not acting in its capacity as "public prosecutor" when it filed the petitions; it was acting as an "employer" (*135 Cal. App. 4th 606, 619)* .

After holding that the petitions were not exempted from Anti-SLAPP scrutiny under *Code Civ. Proc. § 425.16(d)*, the court addressed the merits of the motion. Demonstrations targeting government policy constitute a classic exercise of the constitutional rights of free speech and petition in connection with a public issue, within the meaning of *Code Civ. Proc. § 425.16(e)(4)*. Because the city failed to show a probability of prevailing on its claims, the court granted defendants' Anti-SLAPP motions (*135 Cal. App. 4th 606, 627)* .

[j] "Mixed" Cause of Action Is Subject to Anti-SLAPP Statute Unless Protected Conduct Is Merely Incidental to Unprotected Conduct

Salma v. Capon *(2008) 161 Cal. App. 4th 1275, 1287, 74 Cal. Rptr. 3d 873* involved an Anti-SLAPP motion to strike defendant's cross-complaint against plaintiff where Capon sued Salma for rescission and violations of the Home Equity Sales Contracts Act, alleging that he sold his home for far less than it was worth due to duress. Salma cross-complained for conversion and intentional interference with prospective economic advantage, among other causes of action. Capon filed an Anti-SLAPP motion as to those two causes of action in the cross-complaint. After Capon filed the Anti-SLAPP motion but before the trial court ruled on the motion, Salma filed an amended cross-complaint, revising the two causes of action subject to the Anti-SLAPP motion. The court granted Capon's motion to strike the conversion claim and denied his motion as to the interference with economic advantage claim. The court also ruled that because Salma's conversion claim as stated in the amended cross-complaint was different from the first, the motion to strike did not apply to the amended cross-complaint and the conversion claim could proceed. Capon appealed.

The court of appeals reversed, striking both causes of action under the Anti-SLAPP statute. The court found that the conduct underlying the interference with economic advantage claim was Capon's filing of the notice of rescission, filing and recorded a notice of lis pendens, naming Salma's lenders as defendants in his complaint, contacting the police department where the property was located, and trespassing on the property. Filing the notice of lis pendens and naming defendants in the complaint were clearly protected activities under *Code Civ. Proc. § 425.16(e)(1)*. Filing the notice of rescission was also protected as a legal prerequisite to filing the rescission action. The cross-complaint also contained allegations of unprotected activity, such as Capon's trespassing onto the property after he had sold it. However, the protected conduct was not merely incidental to the unprotected conduct. In fact, the court held that the allegations of protected conduct "represent the bulk of the allegations underlying the cause of action." Because Salma was unable to demonstrate a probability of success on the merits, the court dismissed both causes of action. The court of appeals also held that a plaintiff or cross-complainant may not amend his complaint or cross-complaint prior to the court's ruling on an Anti-SLAPP motion. The trial court should have stricken, without analysis, the amended causes of action (*161 Cal. App. 4th 1275, 1290-1293)* .

In ***Gallanis-Politis v. Medina*** *(2007) 152 Cal. App. 4th 600* , plaintiff sued her employer and one of the employer's directors for Fair Employment and Housing Act and civil rights violations arising out of her employment. Plaintiff alleged, among other claims, that male and Latino co-workers had received a pay increase due to their bilingual status and she did not. Plaintiff later amended her complaint to add two additional supervisors and to state causes of action for race discrimination, harassment and retaliation. Many of the allegations of the amended complaint arose out of alleged retaliation after plaintiff filed her original complaint. The two supervisors filed a special motion to strike plaintiff's complaint, asserting the complaint arose out of oral and/or written statements made by them in connection with the

investigation of an issue pending before the court: whether or not plaintiff was entitled to bilingual pay. The trial court denied defendants' special motion to strike, ruling that because the action arose out of both protected and nonprotected activity, the complaint was not subject to a special motion to strike and, additionally, that plaintiff showed a reasonable probability of prevailing. Defendants appealed.

The court of appeals reversed. The court held that defendants had made the necessary threshold showing that plaintiff's retaliation claim arose from activity protected under *Code Civ. Proc. § 425.16(e)(2)*, which protects "any written or oral statement or writing made in connection with an issue under consideration or review by a ... judicial body ... ." The basis for the retaliation claim was the investigation regarding whether or not plaintiff was entitled to bilingual pay. This investigation arose out of plaintiff's initial complaint against her employer. The retaliation claim also alleged some acts on defendants' part which did not constitute protected activity, such as restricting plaintiff's job duties and requiring plaintiff to reinitiate the bilingual bonus paperwork. Plaintiff argued that because the majority of the conduct alleged was not protected, the action was not subject to a special motion to strike. The court disagreed, citing case law stating that a cause of action is subject to *Code Civ. Proc. § 425.16* "unless the protected conduct is merely incidental to the unprotected conduct" (*152 Cal. App. 4th 600, 614)* . In this particular case, the allegations regarding the investigation were "at the heart of" the retaliation claim and were not merely incidental to the nonprotected conduct. In contrast, the nonprotected actions were extraneous to the primary allegations, which arose from protected conduct. Plaintiff also failed to show a probability of prevailing on her retaliation claim, and therefore defendants' special motion to strike was granted (*152 Cal. App. 4th 600, 619)* .

Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP *(2005) 133 Cal. App. 4th 658, 35 Cal. Rptr. 3d 31* involved an action arising from a Ponzi scheme. Defendant, a law firm that represented the scheme's architect, was sued by plaintiffs, investors, and a bankruptcy trustee for the law firm's corporate clients. The action alleged professional malpractice and aiding and abetting a breach of fiduciary duty. The firm's clients included an individual who planned the scheme, funding entities that were used in the scheme, and a management corporation for the entities. The action against the firm was based in part on its allegedly conflicted representation of the clients in an action by the Securities and Exchange Commission (SEC). The trial court denied the law firm's motion to strike under *Code Civ. Proc. § 425.16*.

The appellate court reversed the decision noting that the some of the claims were based on the firm's protected activity in that litigation. Therefore, it was proper to apply § 425.16, the anti-Strategic Lawsuit Against Public Participation (Anti-SLAPP) statute, even though some of the allegations did not concern protected activity. The protected conduct included petitioning activities, such as opposing the SEC's efforts to obtain restraining orders, and litigation tactics, such as refusing to allow the individual client to testify and threatening to put the funding entities into bankruptcy if the SEC persisted in seeking testimony (*133 Cal. App. 4th 658, 672)* .

The facts and holding of ***Fox Searchlight Pictures, Inc. v. Paladino*** *(2001) 89 Cal. App. 4th 294, 308, 106 Cal. Rptr. 2d 906* are discussed in *§ 161.30[3][b]*.

[k] Protected Conduct Does Not Lose Its Protected Status Merely Because Plaintiff Alleges the Conduct is Unlawful or Unethical

In ***Kemps v. Beshwate*** *(2009) 180 Cal. App. 4th 1012, 103 Cal. Rptr. 3d 480* , a subpoenaed witness in a prior criminal case sued the attorney and investigators for the criminal defendant for abuse of process and other torts, based on her arrest for failing to appear. The trial court granted defendants' special motion to strike under *Code Civ. Proc., § 425.16*. Plaintiff appealed, contending that defendants' conduct in filing a false proof of service and declaration to obtain the bench warrant that resulted in plaintiff's arrest was illegal conduct as a matter of law and that, accordingly, defendants were not entitled to invoke the special motion procedure (*180 Cal. App. 4th 1012, 1015-1016)* .

The Court of Appeal affirmed, rejecting plaintiff's characterization of defendants' conduct. If plaintiff's version of the

events leading up to her testimony at the criminal trial was correct, it could be that some portion of the conduct of the various defendants was illegal. Defendants' version of events, to the contrary, established, at most, innocent confusion concerning the individual to whom some of them had spoken--that is, they may have wrongly assumed they were speaking to plaintiff--and attachment of incorrect documents to the declaration in support of the application for warrant. As plaintiff acknowledged in her trial testimony, she had received several subpoenas for the criminal trial; defendants could have innocently attached the wrong one to the declaration. Defendants categorically denied any illegal conduct, and the evidence was in conflict concerning the events in question. While it was not impossible that a finder of fact could resolve all of the conflicts in the evidence in favor of plaintiff and conclude as a matter of fact that some portion, possibly all, of defendants' conduct was illegal, the state of the evidence did not establish that the conduct was illegal as a matter of law. Accordingly, the trial court correctly concluded defendants made the threshold showing that plaintiff's causes of action arose from their exercise of constitutionally protected conduct in a judicial proceeding (*180 Cal. App. 4th 1012, 1017-1018)* .

In ***Cabral v. Martins*** *(2009) 177 Cal. App. 4th 471, 99 Cal. Rptr. 3d 394* , plaintiff brought a series of actions against her ex-husband and his two siblings to attempt to collect unpaid child support. In this particular action, plaintiff sued her ex-husband, his two siblings and several attorneys who had represented the other defendant parties. One of the attorneys had revised the ex-husband's mother's estate plan in a manner that disinherited the ex-husband. The other attorneys represented the defendant parties in probate court proceedings and/or had defended the ex-husband and his siblings in actions brought by plaintiff to collect child support. As to the attorney defendants, plaintiff alleged that they violated a statute authorizing treble damages against those who assist a child support obligor in avoiding payment of child support. Defendants filed an Anti-SLAPP motion to strike, and the trial court granted the motion. Plaintiff appealed.

Because plaintiff had settled with the non-attorney defendants while the appeal was pending, the court of appeals addressed only the attorney defendants' motion to strike, and affirmed. The court found the action did arise out of defendants' activities in revising the mother's estate plan, putting the estate plan through probate proceedings and defending the parties in actions brought by plaintiff. The court then looked to whether this activity was protected, and found it was. The second and third activities were clearly protected under *Code Civ. Proc. § 425.16(e)(1)* and *(2)*. Under the pertinent case law, all communicative acts performed by attorneys in representative of their clients in a judicial proceeding are protected (*see, e.g.,* *Rusheen v. Cohen (2006) 37 Cal. 4th 1048, 39 Cal. Rptr. 3d 516, 128 P.3d 713*). Plaintiff then alleged the activity was not protected because it violated the child support evasion laws, under case law such as *Flatley v. Mauro (2006) 39 Cal. 4th 299, 46 Cal. Rptr. 3d 606, 139 P.3d 2* (holding conduct illegal as a matter of law is not subject to protection under the Anti-SLAPP statute). The court distinguished these cases, in which the evidence had clearly shown the defendants engaged in illegal conduct. In the instant case, the defendant attorneys' conduct was neither inherently criminal nor outside the scope of routine legal services. The exception for illegal conduct only applies if a defendant concedes, or the evidence conclusively establishes, that the assertedly protected activity was illegal as a matter of law (*177 Cal. App. 4th 471, 482)* . Because plaintiff could not show a probability of prevailing on the merits, the trial court's ruling was affirmed (*177 Cal. App. 4th 471, 490)* .

[l] Appeal Upon Denial of Anti-SLAPP Motion Stays All Trial Court Proceedings Upon Affected Causes of Action

In ***Varian Medical Systems, Inc. v. Delfino*** *(2005) 35 Cal. 4th 180, 25 Cal. Rptr. 3d 298* , the California Supreme Court addressed the issue of whether an appeal from the denial of an Anti-SLAPP motion effects an automatic stay of the trial court proceedings and concluded that it does. The case involved two disgruntled former employees of plaintiff Varian, which was a medical products manufacturing company. Defendant former employees, one of whom was fired and one of whom resigned in sympathy, posted derogatory messages about the company on the Internet. In response, plaintiff filed suit against defendants, alleging seven causes of action arising out of the internet postings. Each defendant then filed a special motion to strike under *Code Civ. Proc. § 425.16*, each of which was denied by the trial court. Defendants appealed the trial court's rulings and sought to stay the proceedings pending the appeal, both by way of ex parte application with the trial court and by petition for writ of supersedeas with the court of appeal. Both courts

rejected defendants' attempts to stay the proceedings. After a trial, the jury found in favor of plaintiff, awarding both compensatory and punitive damages totaling $775,000. Defendants appealed the judgment and the Court of Appeal affirmed, holding that the court had the discretion to grant a stay but was not required to do so.

The California Supreme Court granted review solely on the issue of whether defendants' appeals from the rulings on the Anti-SLAPP motions effected an automatic stay of the trial court proceedings, and held that they did (*35 Cal. 4th 180, 191)* . The Court noted that under *Code Civ. Proc. § 916(a)*, the perfecting of an appeal stays trial court proceedings "upon the matters embraced therein or affected thereby." Put another way, stated the Court, the issue was whether post order proceedings would have any "effect on the 'effectiveness' of the appeal" (*35 Cal. 4th 180, 189* , quoting *In re Marriage of Horowitz (1984) 159 Cal. App. 3d 377, 381, 205 Cal. Rptr. 880*). The Court concluded that because the reversal on appeal of a denial of a special motion to strike results in a dismissal of a cause of action on the merits, continuing with such a proceeding pending an appeal is irreconcilable with a judgment for plaintiff on the merits (*35 Cal. 4th 180, 190)* . The very purpose of the Anti-SLAPP statute, noted the Court, is that litigants have a right not to be dragged through the courts for exercising their constitutional rights. The Court also examined legislative history and determined that the Legislature intended that the perfecting of an appeal from the denial of an Anti-SLAPP motion would stay further trial court proceedings on the merits. Because the matter should have been stayed upon defendants' appeal of the Anti-SLAPP ruling, the trial court lacked subject matter jurisdiction and the judgment was void. The Court therefore remanded the case for a new trial (*35 Cal. 4th 180, 201)* .

[4] Additional Authorities

[a] Plaintiff's Burden Arises After Defendants's Prima Facie Showing That Code of Civil Procedure Section 425.16 Applies

In *Fontani v. Wells Fargo Investments, LLC (2005) 129 Cal. App. 4th 719, 28 Cal. Rptr. 3d 833* plaintiff sued his former employer, Wells Fargo. His claims included a contention that defendant defamed him and interfered with his prospective business advantage in submitting a Form U-5 to the National Association of Securities Dealers (NASD) describing the reasons for his termination. Defendant moved to strike the defamation and interference with business advantage claim under the Anti-SLAPP statute. The trial court denied the special motion to strike, and defendant appealed. On appeal, Wells Fargo contended that the U-5 form was made in connection with an official proceeding within the meaning of *Code Civ. Proc. § 425.16(e)(1)*. The court agreed, holding that the NASD is an official body for purposes of *Code Civ. Proc. § 425.16(e)(1)* and that the U-5 form was a communication before an official proceeding. The NASD exercises governmental power because it is the primary regulatory body for the broker-dealer industry and acts as a regulatory surrogate for the Securities and Exchange Commission. The fact that it is not publicly funded was not dispositive of its status as "official." NASD is exactly the type of body before which communication is routinely protected by the Anti-SLAPP law, the court stated. Therefore, the communication was protected under *Code Civ. Proc. § 425.16(e)(1)*. Moreover, the communication independently qualified for Anti-SLAPP protection under *Code Civ. Proc. § 425.16(e)(4)* because it was in connection with an issue of public interest. The statement made to the NASD concerned conduct capable of affecting a large number of investors. Because plaintiff could not show a probability of prevailing on his defamation and interference with prospective advantage claims, the court of appeals reversed the trial court's ruling and granted defendant's Anti-SLAPP motion.

Conroy v. Spitzer (1999) 70 Cal. App. 4th 1446, 83 Cal. Rptr. 2d 443 , involved an action for libel, slander per se, intentional infliction of emotional distress and negligent infliction of emotional distress brought by plaintiff against a political rival in 1996 elections for the Orange County Board of Supervisors. The trial court granted defendants' motion to strike under *Code Civ. Proc. § 425.16*. In affirming, the court of appeal noted that once defendant showed that his statements were acts in furtherance of his right of free speech and made in connection with a public issue, plaintiff, to defeat defendant's motion, had the burden of showing a probability of prevailing on his defamation claim which he failed to do (*70 Cal. App. 4th 1446, 1450-1454)* .

Monterey Plaza Hotel v. Hotel Employees & Restaurant Employees (1999) 69 Cal. App. 4th 1057, 82 Cal. Rptr. 2d 10 , involved a defamation action brought by plaintiff against a labor union and its research analyst based on a statement made by the analyst during a television newscast concerning plaintiff's firing of two of employees. The trial court granted defendants' motion to strike under *Code Civ. Proc. § 425.16*. In affirming, the court of appeal noted the defendants carried the initial burden of establishing a prima facie showing that plaintiff's complaint arose from defendants' free speech activity. The burden then shifted to plaintiff to establish a probability that the plaintiff would prevail on the claim of defamation, i.e., make a prima facie showing of facts that would, if proved at trial, support a judgment in plaintiff's favor (*69 Cal. App. 4th 1057, 1063-1064)* . Plaintiff failed to make such a prima facie showing supporting its defamation claim (*69 Cal. App. 4th 1057, 1064-1066)* .

In *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman (1996) 47 Cal. App. 4th 777, 54 Cal. Rptr. 2d 830* , a law firm sent letters to various individuals in preparation of a lawsuit in which it stated that its client had been damaged by business activities of the plaintiff. Plaintiff then filed an action against the law firm for libel and interference with economic relationship. The law firm moved to strike the complaint as a SLAPP suit. The trial court granted the motion and dismissed the complaint. On appeal, plaintiff argued that its action did not fall within the statutory definition of a SLAPP suit because neither of its causes of actions related to a statement made before a legislative, executive, or judicial proceeding, or made in a place open to the public or in a public forum. However, the court of appeal held that the fact that the communication was made to other private citizens rather than to an official agency does not exclude it from the shelter of the Anti-SLAPP suit statute. The court also stated that the constitutional right to petition, which includes the act of filing litigation, covers communications preparatory to or in anticipation of the bringing of an action (*47 Cal. App. 4th 777, 784)* . Concluding that the trial court correctly applied *Code Civ. Proc. § 425.16*, the court affirmed the judgment of dismissal.

In *Averill v. Superior Court (1996) 42 Cal. App. 4th 1170, 50 Cal. Rptr. 2d 62* , plaintiff, a company developing a plan for a housing shelter for battered women, filed an action for slander against an opponent of the shelter project based on comments the defendant had made to co-employees. Defendant filed a motion to strike pursuant to *Code Civ. Proc. § 425.16*. Plaintiff argued that the action did not fall within the scope of the SLAPP statute because the allegedly slanderous comments were not made in public. The trial court denied the motion and defendant filed a petition for writ of mandate. The plaintiff's argument was founded on *Code Civ. Proc. § 425.16(e)*, which states that the SLAPP statutes protects an act in furtherance of a person's *First Amendment* rights, including any written or oral statement or writing made in a place open to the public or a public forum. However, the court of appeal held that even if the defendant's statements were not expressly covered under subdivision (e) of the statute, the categories there are not all inclusive because the acts identified there are preceded by the word "includes." The court concluded that it could not say that the Legislature intended to exclude private conversations from protection since the list of covered activities does not act to eliminate such conversations from protection (*42 Cal. App. 4th 1170, 1175)* . The Court thus issued a peremptory writ of mandate directing the trial court to vacate its order denying the motion to strike the complaint, and to enter a new order granting the motion.

In *Church of Scientology v. Wollersheim (1996) 42 Cal. App. 4th 628, 49 Cal. Rptr. 2d 620* , a church filed an action to set aside a judgment the defendant had obtained against the church on the basis of newly discovered evidence. The trial court granted a defense motion to dismiss the complaint pursuant to *Code Civ. Proc. § 425.16*. On appeal the church contended that the trial court erred because its action to set aside the judgment was not a SLAPP suit. The court of appeal agreed with the trial court. The court reasoned that *Code Civ. Proc. § 425.16* applies to a cause of action against a person arising from any act of that person in furtherance of the person's right to petition in connection with a public issue, and that the right of access to the courts is an aspect of the *First Amendment* right to petition the government for redress of grievances. Furthermore, the church's lawsuit was consistent with a pattern of employing every means to frustrate or undermine the defendant's attempts to petition, and the court held that when one party to a lawsuit uses the litigation process to bludgeon the opponent into submission then those actions must be closely scrutinized for constitutional implications (*42 Cal. App. 4th 628, 649)* . The court thus affirmed the judgment of dismissal.

In *Robertson v. Rodriguez (1995) 36 Cal. App. 4th 347, 42 Cal. Rptr. 2d 464* , the plaintiff appealed from a judgment striking the plaintiff's complaint and dismissing the action pursuant to *Code Civ. Proc. § 425.16*. The court of appeal affirmed. The court held that *Code Civ. Proc. § 425.16* applies to causes of action that accrued before that statute's effective date. Thus, the court rejected the plaintiff's contention that the statute was inapplicable to the plaintiff's libel claim because the cause of action arose in October, 1992, the complaint was filed in November, 1992, and the statute became effective January 1, 1995 (*36 Cal. App. 4th 347, 356)* .

Ludwig v. Superior Court (1995) 37 Cal. App. 4th 8, 43 Cal. Rptr. 2d 350 , involved a defendant that wished to build a discount mall in a city and had taken at least preliminary steps to do so. The plaintiff, another city, desired to have such a mall built in its city. Because of the geographic proximity of locations and their situation along the same transportation corridor, however, it would be economically advantageous for either mall not to face competition from the other. Plaintiff alleged causes of action for interference with contractual relations, interference with prospective advantage, and unfair competition (*37 Cal. App. 4th 8, 11)* . The crux of plaintiff's case was that, based on self interest, the defendant was behind, encouraged and instigated various third parties to oppose the development in plaintiff city by appearances at public meetings and filing two lawsuits (*37 Cal. App. 4th 8, 12-13, 18)* . The trial court denied the defendant's special motion to strike under *Code Civ. Proc. § 425.16* and the defendant sought a writ of mandate to compel the trial court to grant the motion (*37 Cal. App. 4th 8, 11)* . The court of appeal issued a peremptory writ holding that the plaintiff failed to show a probability of success on the merits within the scope of *Code Civ. Proc. § 425.16* (*37 Cal. App. 4th 8, 11, 30)* . Initially, the court noted that Section 425.16 is appropriately applied to litigation involving defendant's conduct that was directed to obtaining a financial advantage. On the face of the matter, the defendant's activities qualified under *Code Civ. Proc. § 425.16* in that development of the city's mall with potential environmental effects such as increased traffic and impaction on natural drainage, was clearly a matter of public interest (*37 Cal. App. 4th 8, 15)* . The court also rejected plaintiff's arguments that the defendant could not claim the protection of the statute because he did not personally perform any of the challenged acts, citing *Pacific Gas & Electric Co. v. Bear Stearns & Co. (1990) 50 Cal. 3d 1118, 1135-1136, 270 Cal. Rptr. 1* (*37 Cal. App. 4th 8, 17)* . Therefore, as a threshold matter, the plaintiff was seeking to hold the defendant liable for the exercise of rights protected by Section 425.16 (*37 Cal. App. 4th 8, 18)* . The court also rejected the plaintiff's argument that the defendant could not shelter under Section 425.16 because the statute only protects communicative conduct and that the plaintiff sought to hold the defendant liable for noncommunicative conduct. Rather, the court concluded that the defendant's activities in recruiting and encouraging the defendant's agents were communicative (*37 Cal. App. 4th 8, 18-20)* .

[b] Plaintiff Cannot Establish Probability of Prevailing on Claims Against Defendant

In *Kemps v. Beshwate (2009) 180 Cal. App. 4th 1012, 103 Cal. Rptr. 3d 480* , a subpoenaed witness in a prior criminal case sued the attorney and investigators for the criminal defendant for abuse of process and other torts, based on her arrest for failing to appear. The trial court granted defendants' special motion to strike under *Code Civ. Proc., § 425.16*. The Court of Appeal affirmed, holding that the tort claims were barred by the litigation privilege [*Civ. Code § 47(b)*], so that plaintiff failed to demonstrate the probability of prevailing in the tort action (*180 Cal. App. 4th 1012, 1018-1019)* .

In *Tutor-Saliba Corp. v. Herrera (2006) 136 Cal. App. 4th 604, 39 Cal. Rptr. 3d 21* , plaintiff, a contractor who had done work for the city of San Francisco, sued defendant, a city attorney, for defamation based upon comments the city attorney had made about plaintiff in a speech before the Chinese-American Democratic Club. The comments concerned ongoing litigation between plaintiff and the city. Both parties acknowledged that the case fell within the ambit of the Anti-SLAPP statute; the issue was whether plaintiff could establish a probability of prevailing on his claim. Because defendant's statements fell within the official duty privilege of *Civil Code § 47(a)*, plaintiff could not establish a probability of prevailing (*136 Cal. App. 4th 604, 619)* .

The background of *Conroy v. Spitzer (1999) 70 Cal. App. 4th 1446, 83 Cal. Rptr. 2d 443* is *discussed under § 161.30[4][a]*. In concluding that the plaintiff failed to show a probability of prevailing on the defamation action, the court noted that to establish a probability of prevailing on a defamation claim, a plaintiff has to make a prima facie

showing of facts which would, if credited, support a judgment in plaintiff's favor. As a public official, plaintiff could not recover damages for defendant's statements about plaintiff's fitness for office unless plaintiff proved by clear and convincing evidence that the statements were made with actual malice, i.e., with knowledge that they were false or with reckless disregard of whether they were false or not. The factual statements made during the campaign by the defendant were true or based on reliable evidence (i.e., an Assembly investigation report and reprimand letter, newspaper articles and plaintiff's own statements) and thus defendant did not make them with actual malice. Moreover, defendant's expressions of personal opinion about plaintiff's fitness for office are not actionable (*70 Cal. App. 4th 1446, 1451-1452)* .

The background of *Monterey Plaza Hotel v. Hotel Employees & Restaurant Employees (1999) 69 Cal. App. 4th 1057, 82 Cal. Rptr. 2d 10* , is *discussed under § 161.30[4][a]*. In concluding that the plaintiff failed to make a prima facie showing in its pleadings and supporting declarations to support its defamation claim, the court of appeal, quoting from *Gregory v. McDonnell Douglas Corp. (1976) 17 Cal. 3d. 596, 600, 131 Cal. Rptr. 641, 552 P.2d 425* , noted that California courts early extended constitutional protection to statements relating to labor disputes provided they are not made maliciously. Similarly, the United States Supreme Court in *Linn v. United Plant Guard Workers (1966) 383 U.S. 53, 86 S. Ct. 657, 15 L. Ed. 2d 582* applied the standard of *New York Times Co. v. Sullivan (1964) 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686* , formulated to protect statements made regarding public officials, to statements issued during labor controversies. This standard requires a determination of whether a statement was made with knowledge that it was false or with reckless disregard whether or not the statement was false (*69 Cal. App. 4th 1057, 1064-1066)* .

In *Beilenson v. Superior Court (1996) 44 Cal. App. 4th 944, 52 Cal. Rptr. 2d 357* , plaintiff, a defeated candidate for political office, sued his political opponent for libel based on a campaign mailer which stated that plaintiff "ripped off" California taxpayers because he maintained a private law practice on the side while he was on the public payroll. Defendant brought a SLAPP motion to dismiss the action. The trial court denied the motion, finding that plaintiff met his burden of proof that there was a "possibility" that he would prevail. Defendant sought relief by way of extraordinary writ. The parties subsequently settled the dispute, but the court of appeal issued a decision because of the importance of the issues. The court initially held that the term "rip off" is hyperbole that is common in political debates, and was not defamatory. The court then noted that plaintiff established that there was nothing illegal or unethical in keeping his law practice while in the employ of the state. However, the court reasoned that a citizen could possess the belief that doing so violated a higher code of ethical precepts. The court held that the accusation that plaintiff committed a breach of ethics was a statement of opinion entitled to the protection of the *First Amendment* (*44 Cal. App. 4th 944, 951-952)* . Concluding that plaintiff did not establish the probability that he would prevail, the court dismissed the petition as moot.

In *Matson v. Dvorak (1995) 40 Cal. App. 4th 539, 46 Cal. Rptr. 2d 880* , plaintiff sued the primary contributor to a group which had opposed plaintiff in his campaign for a political office, alleging libel and invasion of privacy based on the contents of a campaign flyer. The defendant moved to strike the complaint, and the trial court granted the motion. On appeal, plaintiff contented that he had made a sufficient prima facie showing of libel. However, plaintiff did not allege that defendant participated in preparing the mailing, knew of its contents, or knew that the charges in the mailer were false. The court of appeal concluded that one whose only contribution to a political campaign is financial, and is not involved in the preparation of campaign literature, cannot be subjected to liability in a defamation action for statements contained in that literature (*40 Cal. App. 4th 539, 549)* .

In *Lafayette Morehouse, Inc. v. Chronicle Publishing Co. (1995) 37 Cal. App. 4th 855, 44 Cal. Rptr. 2d 46* , a university filed a libel complaint against a newspaper for publishing articles which described the school as a "sensuality school" and stating that it offered a "unique course in carnal knowledge." The trial court granted the newspaper's SLAPP motion to strike the cause of action. The court of appeal affirmed, rejecting plaintiff's contention that it had established a probability that it would prevail. The court stated that plaintiff failed to identify what evidence was sufficient to meet the requirements of *Code Civ. Proc. § 425.16*, and that its briefs did not even include a statement of facts. Furthermore, the court found all of plaintiff's examples of alleged libel to be statements which were either true or to be statements not capable of being proven true or false (*37 Cal. App. 4th 855, 868-869)* .

In *Robertson v. Rodriguez (1995) 36 Cal. App. 4th 347, 42 Cal. Rptr. 2d 464* , the plaintiff appealed from a judgment striking plaintiff's complaint and dismissing the action pursuant to *Code Civ. Proc. § 425.16*. The court of appeal affirmed the judgment. The plaintiff was a city council person as were the defendants. The defendants were the proponents of a recall petition against the plaintiff. Plaintiff brought a libel action against the defendants alleging that the defendants made several libelous statements, but plaintiff's brief only challenged the trial court's ruling concerning an alleged libelous statement contained in a recall mailer. The court of appeal concluded that a plaintiff may withstand a motion to strike by demonstrating sufficient facts to establish a prima facie case (*36 Cal. App. 4th 347, 352, 357)* . An analysis of the pleadings and affidavits pursuant to the applicable standard disclosed that the trial court correctly concluded that the plaintiff could not establish a probability of prevailing on the plaintiff's libel claim, given the requirement of showing actual malice (*36 Cal. App. 4th 347, 357-358)* . The plaintiff did not make an adequate prima facie showing of actual malice, and thus, the plaintiff failed to establish a probability of prevailing on the claim (*36 Cal. App. 4th 347, 357-359)* .

The facts and procedural background of *Ludwig v. Superior Court (1995) 37 Cal. App. 4th 8, 43 Cal. Rptr. 2d 350* , are *discussed under § 161.30[4][a]*. In Ludwig, the court of appeal issued a peremptory writ, holding that the plaintiff failed to show a probability of success on the merits within the scope of *Code Civ. Proc. § 425.16*, and therefore the trial court had erred in denying the defendant's motion to strike (*37 Cal. App. 4th 8, 11, 30)* . The court noted that Section 425.16 does not bar lawsuits against persons who are involved in matters of public interest. Rather it merely requires that the plaintiff show that there is a probability that the claim asserted will be successful (*37 Cal. App. 4th 8, 20)* . Thus, assuming the section applies, the plaintiff had the burden of establishing probability of success on the merits. In this regard, the court followed *College Hospital, Inc. v. Superior Court (1994) 8 Cal. 4th 704, 34 Cal. Rptr. 2d 898* (construing *Code Civ. Proc. § 425.13*, which requires the plaintiff to establish a substantial probability of prevailing on a punitive damage claim against health care providers before the claim can be made) to hold that the court should not weigh the evidence in making an assessment of the claim. Rather, the determination should be based on whether the evidence introduced either negates or fails to reveal the actual existence of a triable claim. The showing must be made on competent admissible evidence within the declarant's personal knowledge, similar to the standard applied to evidentiary showings on summary judgment motions (*Code Civ. Proc. § 437c(b), (d)*) (*37 Cal. App. 4th 8, 15)* . The court rejected the plaintiff's argument that the standard is too high in the context of Section 425.16, which requires the motion to be made within 60 days of service of the complaint, when the plaintiff has only had a limited opportunity to conduct discovery (*37 Cal. App. 4th 8, 16)* . The court then recognized the principle that generally those that petition the government are immune from liability, and that this principle applies to commercial speech and competitive activity, and even anticompetitive activity. The court then determined that the plaintiff failed to show a probability of proving that portion of its claims based on appearances at public meetings because it failed to show that the concerns expressed were without merit, as would be required to prevail (*37 Cal. App. 4th 8, 21-23)* . Similarly, with regard to the filing of the two earlier lawsuits that were subsequently settled, the court noted that the plaintiff had to allege that the litigation was brought without probable cause and that it was concluded in the plaintiff's favor (*37 Cal. App. 4th 8, 21-25)* . The court concluded that the plaintiff failed to do so and could not do so because the dismissal of the earlier lawsuits resulted from a settlement that did not reflect on the merits (*37 Cal. App. 4th 8, 27-29)* .

[c] Prevailing Defendant Is Entitled to Attorney's Fees and Costs

In *Ketchum v. Moses (2001) 24 Cal. 4th 1122, 104 Cal. Rptr. 2d 377* , the defendant sought mandatory attorney fees after he prevailed on a motion strike allegations in a SLAPP action under *Code Civ. Proc. § 425.16*. The trial court awarded attorney fees to the defendant's counsel, using a lodestar amount of approximately $70,000 and then applying a fee enhancement of 2.0 to that figure based on contingent risk and the exceptional quality of the legal services provided, for a total of approximately $140,000. The court later awarded supplemental attorney fees and costs of approximately $112,000. The court of appeal reversed the trial court's judgment, concluding that the trial court lacked authority to apply a fee enhancement to the lodestar figure. The Supreme Court reversed the court of appeal decision and remanded the case for recalculation of the attorney fee award. The court noted that the fee-shifting provision encourages private

representation in SLAPP cases, including situations where the defendant is unable to afford fees or the lack of potential monetary damages precludes a standard contingency fee arrangement (*24 Cal. 4th 1122, 1237)* . The court held that by its terms, *Code Civ. Proc. § 425.16* permitted the use of the lodestar adjustment method whereby the lodestar is the number of hours reasonably expended multiplied by the reasonable hourly rate, and that figure may be adjusted based on consideration of factors specific to the case, in order to fix the fee at the market rate for legal services provided. (*24 Cal. 4th 1122, 1136)* . The court noted that where the Legislature has determined that that lodestar adjustment approach is not appropriate, it has expressly so stated in a particular statutory provision; thus where the Anti-SLAPP provisions referred to attorney fees and costs without indicating any restrictions on how they are to be calculated, the Legislature presumably intended courts to use the prevailing lodestar method (*24 Cal. 4th 1122, 1135-1136)* . The Supreme Court held that the court of appeal erred in concluding that the trial court lacked authority to award a fee enhancement under *Code Civ. Proc. § 425.16* (*24 Cal. 4th 1122, 1136)* . The court rejected the contentions that permitting a fee enhancement for contingency cases under *Code Civ. Proc. § 425.16* would (1) encourage unmeritorious claims; (2) permit attorneys to pool the risk in contingency cases and thus, in effect, receive payment for cases in which their clients did not prevail; or (3) inevitably result in unfair double counting or a windfall to attorneys representing SLAPP defendants (*24 Cal. 4th 1122, 1137-1138)* . Noting that the trial court is not required to include a fee enhancement to the basic lodestar figure for contingent risk, exceptional skill or other factors, but retains discretion to do so, the Supreme Court remanded the case as to the amount of the fee enhancement (*24 Cal. 4th 1122, 1138, 1142)* . The court found that it was improper to impose an enhancement for contingent risk as to the attorney fees on fees accrued after the motion to strike was granted. The court also remanded on the issue of whether the enhancement factor for exceptional representation had been improperly double counted. Lastly, the court directed that any disapproval on the part of the trial court as to the plaintiff's litigation strategy (to keep the defendant in court) could not be a basis of imposing an enhancement for contingent risk or quality of representation merely for the purpose of punishing the plaintiff (*24 Cal. 4th 1122, 1142)* .

In *Christian Research Institute v. Alnor (2008) 165 Cal. App. 4th 1315, 81 Cal. Rptr. 3d 866* , the court of appeals previously overturned the trial court's denial of defendant's Anti-SLAPP motion to strike. Defendant then filed a motion to recover his costs and attorney fees, submitting documents to support his claim that his attorneys worked 638.6 hours on the motion and ensuing appeal. The trial court found that the claimed amount (over $250,000) was excessive and awarded defendant $21,300 in attorney fees as a "reasonable" amount. Defendant appealed the trial court's determination. The court of appeals affirmed. The court explained that a moving defendant bears the burden of documenting the appropriate hours expended and hourly rates. The award should include compensation for all hours reasonably spent. The California Supreme Court has held that the trial court has broad discretion to adjust a fee downward or deny an unreasonable fee. As such, the court of appeals reviews the trial court's attorney fee award under an abuse of discretion standard. In this case, defendant failed to establish that the trial court abused its discretion. The court used the lodestar method, which is the number of hours reasonable spent multiplied by the prevailing hourly rate in the community. The trial court reasonably found that counsel had inflated the fee claim by including entries devoted to matters other than the motion to strike, seeking to recover the fees for all work done on the case. The motion involved little to no time spent on discovery, and the documents defendant provided to counsel were not voluminous. The motion was not complicated. For all of those reasons, the trial court did not abuse its discretion in its award of attorney fees (*165 Cal. App. 4th 1315, 1330)* .

Melbostad v. Fisher (2008) 165 Cal. App. 4th 987, 81 Cal. Rptr. 3d 354 was an action alleging violations of San Francisco's campaign finance laws. In response, defendant filed an Anti-SLAPP motion to strike, and the trial court granted defendant's motion and stated that defendant was entitled to attorney fees. Plaintiff filed a motion for reconsideration, which the court granted, but the court again granted defendant's motion. Plaintiff did not appeal the order granting the motion. Several months later, defendant filed a motion for attorney fees pursuant to *Code Civ. Proc. § 425.16(c)*. After plaintiff sought to conduct discovery in connection with that motion, defendant filed a motion for protective order, which the court granted. The court also granted defendant's request for attorney fees and subsequently entered judgment. Plaintiff filed a notice of appeal from that judgment. On appeal, plaintiff conceded that because he did not appeal from the court's Anti-SLAPP ruling in a timely manner, the court was precluded from reviewing that

ruling. However, the court of appeals addressed whether plaintiff's appeal from the award of attorney fees was timely. The court noted that a party prevailing on an Anti-SLAPP motion may seek attorney fees along with the motion to strike, by subsequent noticed motion or as part of a cost memorandum at the conclusion of the litigation. The court acknowledged that whether an order granting attorney fees to a defendant prevailing on Anti-SLAPP motion is independently appealable is an unresolved question. However, the court stated that the court's original order granting the Anti-SLAPP motion was a written order of dismissal of the entire action, and therefore constituted a judgment. Plaintiff therefore should have appealed the attorney fee award within 60 days of the original Anti-SLAPP ruling (*165 Cal. App. 4th 987, 997)* .

In *Mann v. Quality Old Time Service, Inc. (2006) 139 Cal. App. 4th 328, 42 Cal. Rptr. 3d 607* , plaintiff Water Systems Support, Inc. (WSSI) sued two former contractors for violating confidentiality agreements and making false statements. Defendants filed an Anti-SLAPP motion as to four of 13 causes of action, and the trial court denied the motion. Defendants appealed, and the court of appeals reversed the trial court's holding as to plaintiffs' trade libel claim (*see* *Mann v. Quality Old Time Service, Inc. (2004) 120 Cal. App. 4th 90, 15 Cal. Rptr. 3d 215*). On remand, the trial court awarded defendants $57,000 in attorney fees as well as $1,906 in costs under *Code Civ. Proc. § 425.16(c)*. The court of appeal held that while the trial court was correct in determining that defendants were prevailing parties, the court should have reduced the amount of the fee award to reflect defendants' partial success on the motion. The court stated that a defendant need not be successful in striking every claim in order to be considered a prevailing party; rather, a "party who partially prevails on an Anti-SLAPP motion must generally be considered a prevailing party unless the results of the motion were so insignificant that the party did not achieve any practical benefit from bringing the motion" (*139 Cal. App. 4th 328, 340)* . In this case, the results were significant in that defendants eliminated plaintiffs' trade libel cause of action, which was distinct from the defamation cause of action, and therefore narrowed the scope of the lawsuit. The court then considered the amount of the award. The trial court had reduced defendants' claimed fees by $7,065. Defendants' argument the reduction was inappropriate because the facts and law involved in the trade libel claim were identical to the facts and law in their unsuccessful claims and that it was impossible to apportion the fees. The court of appeals disagreed, holding that a defendant is not entitled, as a matter of right, to his or her entire attorney fees incurred on successful and unsuccessful claims merely because the work on the claims was overlapping. The court set forth the following procedure: the court should first determine the lodestar amount for the hours expended on the successful claims, and, if the work on the successful and unsuccessful claims was overlapping, the court should then look at the defendant's relative success in achieving his or her objective and reduce the amount accordingly (*139 Cal. App. 4th 328, 345)* . In this particular case, the court held a reduction of 50% of the claim fees was appropriate, taking into account (*139 Cal. App. 4th 328, 346)* .

Premier Medical Management Systems, Inc. v. California Ins. Guarantee (2008) 163 Cal. App. 4th 550, 77 Cal. Rptr. 3d 695 involves a lawsuit filed by a group of physicians against various worker's compensation insurers, employers and other entities alleging the defendants conspired to contest, delay and avoid payment of the physicians' bills for treating worker's compensation patients. The parties litigated and appealed defendants' Anti-SLAPP motion, and on appeal the court reversed the trial court's denial of the motion and awarded the moving defendants their fees and costs on appeal. The subject of this appeal was the amount of fees the court had awarded under *Code Civ. Proc. § 425.16(c)*. The court noted that an award of attorney fees is mandatory in favor of a successful defendant on an Anti-SLAPP motion. Review of such an award is subject to an abuse of discretion standard. On appeal, plaintiffs asserted that the fees were "grossly excessive, unnecessary, duplicative, and an unreasonable number of claimed work hours" (*163 Cal. App. 4th 550, 558)* . However, plaintiffs filed no declarations and submitted no evidence in support of their contentions regarding the fees, instead simply claiming the fees were excessive and citing *Maughan v. Google Technology, Inc. (2006) 143 Cal. App. 4th 1242, 49 Cal. Rptr. 3d 861* , in which the court of appeals upheld a trial judge's reduction of claims fees in connection with an Anti-SLAPP motion. The court stated that in Maughan and in the instant case, courts of appeal are reluctant to substitute their judgment for that of the trial judge, who is familiar with the issues raised. The court emphasized that a party challenging the amount of an attorney fee award must bear the burden of pointing to the specific items challenged, with a sufficient argument and citations to the evidence. In this case, plaintiffs did not do so and the attorney fee award was affirmed (*163 Cal. App. 4th 550, 555)* .

In *Endres v. Moran (2006) 135 Cal. App. 4th 952, 37 Cal. Rptr. 3d 786* , defendants appealed from the trial court's denial of attorney fees under *Code Civ. Proc. § 425.16(c)* after defendants were successful in striking one of eight causes of action plaintiffs had brought against them. The court of appeals upheld the trial court's denial of attorney fees, stating that defendants sought to strike the entire complaint but instead obtained "only the most illusory victory" and did not change the factual allegations of the complaint or plaintiffs' possible recovery by striking plaintiffs' civil conspiracy cause of action (*135 Cal. App. 4th 952, 954)* .

The background of *Conroy v. Spitzer (1999) 70 Cal. App. 4th 1446, 83 Cal. Rptr. 2d 443* is *discussed under § 161.30[4][a]*. In affirming the trial court's granting of defendants' motion to strike under *Code Civ. Proc. § 425.16*, the court of appeal noted that Section 425.16(c) authorizes an award of attorney fees and costs to the prevailing party. Further, the right of a prevailing defendant to recover attorney fees and costs adequately compensates the defendant for the expense of responding to a baseless lawsuit (*70 Cal. App. 4th 1446, 1454-1455)* .

In *Robertson v. Rodriguez (1995) 36 Cal. App. 4th 347, 42 Cal. Rptr. 2d 464* , the plaintiff appealed from a judgment striking plaintiff's complaint, dismissing the action pursuant to *Code Civ. Proc. § 425.16*, and awarding the defendants a certain amount of attorney fees. The defendants also appealed the award of attorney fees contending that they were entitled to a larger amount. The court of appeal affirmed. The court held that Section 425.16 limits a prevailing party's recovery to reasonable attorneys fees, irrespective of whether the prevailing party is the plaintiff or the defendant (*36 Cal. App. 4th 347, 360-361)* . The defendants contended that the trial court erred in awarding only $15,000 rather than their incurred attorney fees and costs of $23,847. The court concluded that the trial court was not bound by the amount sought by the defendants and had discretion to award them a lesser sum. The defendants failed to show that the trial court abused its discretion and thus the attorney fees award had to be upheld (*36 Cal. App. 4th 347, 362)* .

[d] Activity in Anticipation of Litigation

Feldman v. 1100 Park Lane Associates (2008) 160 Cal. App. 4th 1467, 74 Cal. Rptr. 3d 1 was a landlord-tenant dispute. 1100 Park Lane filed an unlawful detainer action against the Feldmans after serving them with a three-day notice to quit. The unlawful detainer action alleged that the Feldmans were unauthorized subtenants. The Feldmans in turn filed a cross-complaint against 1100 Park Lane for retaliatory eviction, negligence, negligent misrepresentation, breach of the implied covenant of quiet enjoyment, wrongful eviction, breach of contract, and unfair business practices. 1100 Park Lane responded with an Anti-SLAPP motion, arguing the cross-complaint arose from protected activity on its part. The trial court found that all causes of action did arise from protected activity, but that the Feldmans demonstrated a probability of prevailing on all but one cause of action. Both parties appealed. On appeal, the court agreed that all causes of action arose from protected activity. Filing a lawsuit such as the unlawful detainer suit is indisputably protected activity within the meaning of the Anti-SLAPP statute. Because service of the three-day notice to quit was a legally required prerequisite to the unlawful detainer action, it also constituted protected activity. The court stated that just as communications in anticipation of litigation are protected under the litigation privilege, such statements or actions are also protected by *Code Civ. Proc. § 425.16*. Other statements by cross-defendants threatening unlawful detainer, made in anticipation of litigation and forming the basis for the cross-complaint, were also protected under the statute. The court held that all causes of action with the exception of the negligent misrepresentation action were based on 1100 Park Lane's protected activity in filing the unlawful detainer suit, serving the three-day notice, and communications made threatening the unlawful detainer suit (*160 Cal. App. 4th 1467, 1478-1491)* .

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
CHAPTER 161 MOTIONS TO STRIKE: ANTI-SLAPP
PART II. FORMS
A. Supporting Special Motion to Strike

16-161 California Points & Authorities § 161.31

§ 161.31 Supporting Special Motion to Strike Action Against Constitutionally Privileged Conduct (SLAPP Suit) [Code Civ. Proc. § 425.16(b)]--Conduct or Speech in Connection With Official Proceedings [Code Civ. Proc. § 425.16(e)(1) and (2)]

[1] FORM

[*This form should be combined with a general form of memorandum supporting a special motion to strike setting out the statutory basis for a special motion to strike (see § 161.30).*]

THE COURT SHOULD STRIKE _____ [*specify the matter identified in the notice of motion, e.g.,* THE COMPLAINT FOR INTERFERENCE WITH CONTRACTUAL AND PROSPECTIVE ECONOMIC RELATIONS] BECAUSE DEFENDANT'S CONSTITUTIONAL RIGHT[S] OF _____ [*specify, e.g.,* PETITION AND FREE SPEECH] WILL BE CHILLED IF IT IS ALLOWED TO STAND AND PLAINTIFF IS ALLOWED TO CONTINUE PROSECUTING IT, AND THE CONDUCT OR SPEECH THAT IS THE SUBJECT OF THE SUIT WAS PART OF AN OFFICIAL PROCEEDING.

A. No Separate Showing of Public Significance Required if Action Arises From Statements Made Before, or in Connection With Issue Under Consideration by, Official Proceeding. A defendant moving to strike a cause of action arising from a statement made before, or in connection with an issue under consideration by, a legally authorized official proceeding need not separately demonstrate that the statement concerned an issue of public significance (*Briggs v. Eden Council for Hope and Opportunity (1999) 19 Cal. 4th 1106, 1123, 81 Cal. Rptr. 2d 471, 969 P.2d 564* ; *Miller v. Filter (2007) 150 Cal. App. 4th 652, 662-671, 58 Cal. Rptr. 3d 671*).

B. Commercial Conduct and Speech Made In Connection With an Issue of Public Concern Under Consideration by a Legislative Body Are Subject to Protection Under *Code of Civil Procedure Section 425.16*. Commercial conduct and speech made in connection with an issue of public concern under consideration by a legislative body are subject to protection under *Code of Civil Procedure Section 425.16*. *Code of Civil Procedure Section 425.16* is to be broadly construed to be applicable to any statement, writing or conduct made in connection with an issue of public concern which is under consideration or review by a legislative body or which is made in preparation for such review (

Midland Pacific Building Corp. v. King (2007) 157 Cal. App. 4th 264, 272, 68 Cal. Rptr. 3d 499 ; *Mission Oaks Ranch, Ltd. v. County of Santa Barbara (1998) 65 Cal. App. 4th 713, 728, 77 Cal. Rptr. 2d 1* (disapproved on other grounds in *Briggs v. Eden Council for Hope and Opportunity (1999) 19 Cal. 4th 1106, 1123 n.10, 81 Cal. Rptr. 2d 471, 969 P.2d 564*).

[*Optional*] **C. Not All Speech By A Business Enterprise Constitutes "Commercial Speech."** Not all speech by a business enterprise constitutes "commercial speech." Business-entity speakers have a *First Amendment* right to express themselves on social and political issues (*Mendoza v. ADP Screening & Selection Services, Inc. (2010) 182 Cal. App. 4th 1644, 1652-1653, 107 Cal. Rptr. 3d 294* ; *see, e.g.,* *First National Bank of Boston v. Bellotti (1978) 435 U.S. 765, 98 S. Ct. 1407, 55 L.Ed.2d 707*). Speech does not lose its constitutional protection because it is undertaken for profit, and the fact that a party seeks to make a profit from its speech is not constitutionally significant (*Mendoza v. ADP Screening & Selection Services, Inc. (2010) 182 Cal. App. 4th 1644, 1653, 107 Cal. Rptr. 3d 294* ; *see* *Guglielmi v. Spelling-Goldberg Productions (1979) 25 Cal. 3d 860, 868, 160 Cal. Rptr. 352, 603 P.2d 454*).

[2] Comments

[a] Use of Form

This form, combined with the appropriate points and authorities contained in § 161.30, may be submitted in support of a special motion to strike the whole or any part of a complaint or cross-complaint setting forth a cause of action arguably arising out of (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; or (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law.

[3] Discussion of Authorities

[a] No Separate Showing of Public Significance Required if Action Arises From Statements Made Before, or in Connection With Issue Under Consideration by, Official Proceeding

Plaintiffs in ***Briggs v. Eden Council for Hope and Opportunity*** *(1999) 19 Cal. 4th 1106, 81 Cal. Rptr. 2d 471, 969 P.2d 564* , owned residential rental properties. The defendant (ECHO) was a nonprofit corporation, partly funded by city and county grants, that counseled tenants and mediated landlord-tenant disputes. ECHO provided assistance to tenants of the plaintiffs in filing a discrimination complaint with the Department of Housing and Development and in prosecuting a small claims suit against the plaintiffs. Plaintiffs, alleging that ECHO employees referred to one of them as racist and that ECHO directors had discussed whether one of the plaintiffs was mentally unbalanced, brought suit for defamation and intentional and negligent infliction of emotional distress. ECHO filed a special motion to strike the complaint pursuant to the Anti-SLAPP statute. The trial court granted the motion and dismissed the complaint. On plaintiff's appeal, the court of appeal reversed, and the Supreme Court granted ECHO's petition for review.

The Supreme Court reversed the court of appeal. The Court recognized that the courts of appeal were split on the question whether a defendant moving to strike a cause of action arising from a statement made before, or in connection with an issue under consideration by, a legally authorized official proceeding must separately demonstrate that the statement concerned an issue of public significance (*19 Cal. 4th 1106, 1113)* . Analyzing the statutory language and the Legislature's 1997 amendment of *Code Civ. Proc. § 425.16,* which expressly rejected the narrow view, the court held that a defendant need not separately demonstrate that the statement concerned an issue of public significance in that situation (*19 Cal. 4th 1106, 1113-1121)* . To the extent they hold to the contrary, the Court disapproved *Linsco/Private Ledger, Inc. v. Investors Arbitration Services, Inc. (1996) 50 Cal. App. 4th 1633, 1639-1640, 58 Cal. Rptr. 2d 613* , *Ericsson GE Mobile Communications, Inc. v. C.S.I. Telecommunications Engineers (1996) 49 Cal. App. 4th 1591, 57 Cal. Rptr. 2d 491* , *Zhao v. Wong (1996) 48 Cal. App. 4th 1114, 55 Cal. Rptr. 2d 909* , and *Mission Oaks Ranch, Ltd. v. County of Santa Barbara (1998) 65 Cal. App. 4th 713, 77 Cal. Rptr. 2d 1* (*19 Cal. 4th 1106, 1123 n.10*

).

Because in the case before it, the plaintiffs' causes of action all arose from ECHO's statements or writings made in connection with issues under consideration or review by official bodies (HUD or the courts), it was not necessary to consider whether ECHO's statements in fact concerned issues of public significance (*19 Cal. 4th 1106, 1115)* .

Miller v. Filter *(2007) 150 Cal. App. 4th 652, 58 Cal. Rptr. 3d 671* arose out of a statutorily-sanctioned contractual agreement authorizing attorneys from the California District Attorneys Association (CDAA) to prosecute a Sierra County mine and mine owner for safety violations resulting in a death on behalf of the District Attorney of Sierra County. Following dismissal of the criminal charges, the mine and mine owner sued the CDAA and its employees for malicious prosecution, intentional interference with economic advantage, intentional and negligent infliction of emotional distress, and negligent employment and supervision. The CDAA filed a special motion to strike, contending the action arose from constitutionally protected activity and that plaintiffs could not show a probability of success because, as prosecutors, the CDAA employees were entitled to immunity. The trial court denied the motion, holding the CDAA employees' were not entitled to protection under the Anti-SLAPP statute.

The court of appeal reversed the trial court's decision. Plaintiffs contended that defendants were not entitled to the protections of the Anti-SLAPP statute because the Sierra County attorney had failed to file the CDAA attorneys' appointments with the county clerk, as required by the statute authorizing the prosecution. Therefore, plaintiffs reasoned, the prosecution of the mine and mine owner was illegal as a matter of law and not entitled to Anti-SLAPP protection. The court of appeals disagreed, stating that defendants' actions as district attorneys prosecuting the mine and mine owner was not the type of conduct that was undeserving of Anti-SLAPP protection simply because the Sierra County attorney had not complied with a "ministerial" duty (*150 Cal. App. 4th 652, 662)* . Defendants' actions in filing a criminal action against the mine and mine owner and presenting evidence to the grand jury were within the scope of *Code Civ. Proc. § 425.16(e)* as statements or writings made in official proceedings or in connection with issues under consideration or review by judicial bodies or proceedings. The filing and maintenance of litigation is protected activity under the Anti-SLAPP statute, and because defendants were entitled to immunity, plaintiffs could not show a probability of success on the merits (*150 Cal. App. 4th 652, 666, 671)* .

[b] Commercial Conduct and Speech Made in Connection with an Issue Of Public Concern Under Consideration By a Legislative Body are Subject to Protection Under Code Of Civil Procedure Section 425.16.

In ***Midland Pacific Building Corp. v. King*** *(2007) 157 Cal. App. 4th 264, 68 Cal. Rptr. 3d 499* , defendants, the Kings, owned 27 acres of property in San Luis Obispo County and entered into a contract with plaintiff, Midland, for the sale of that property. As a part of the contract, the Kings agreed to obtain city approval of a specific plan and vesting tentative tract map at their own expense. Escrow was not to close until the Kings had obtained all approvals necessary for the construction of a subdivision in substantial conformance with the draft specific plan and draft vesting tentative tract map. Several years later, Midland sued the Kings for breach of contract and fraud, based on the fact that the Kings attempted to obtain approval for a high density tract map rather than the map initially agreed upon. In response, the Kings filed a special motion to strike, arguing the action arose from their presentation of the high density map to the city and therefore their acts constituted statements made before a legislative body or in an official proceeding, or in connection with an issue under consideration by such a body, within the meaning of *Code Civ. Proc. § 425.16(e)(1)* and *(2)*. The trial court denied the motion, holding the statute was not intended to protect "purely business transactions" (*157 Cal. App. 4th 264, 272)* .

The court of appeals reversed, stating that *Navellier v. Sletten (2002) 29 Cal. 4th 82* stated the Anti-SLAPP statute does not categorically exclude any particular type of action and that the focus on the statute is the activity giving rise to the action, not the form of the plaintiff's cause of action (*157 Cal. App. 4th 264, 272*). The breach of contract action was clearly based on the Kings' submission of the map to the City Planning Commission and therefore the acts were in the course of an official proceeding. Because plaintiff was able to show a probability of prevailing, however, the court

of appeals affirmed the trial court's ruling (*157 Cal. App. 4th 264, 275)* .

In ***Mission Oaks Ranch, Ltd. v. County of Santa Barbara*** *(1998) 65 Cal. App. 4th 713, 77 Cal. Rptr. 2d 1* , a developer, who was disgruntled with the findings of a draft environmental impact report (DEIR) prepared by a consultant the county had hired to evaluate the developer's proposed project, hired its own consultant who prepared and submitted a report that contradicted the DEIR. The county's final environmental impact report (FEIR) adhered to the DEIR, and the county's planning commission recommended denial of the project. The board of supervisors, after holding four hearings, denied the project proposal and adopted findings and conclusions in support of its decision. Ultimately, the developer sued the county, the county's consultant, and others over the denial of project approval. Except for a Williamson Act (*Gov. Code § 51200 et seq.*) claim concerning agricultural preserves, the trial court sustained defendants' demurrers without leave to amend and granted the consultants' special motion to strike pursuant to *Code Civ. Proc. § 425.16*. Plaintiff then dismissed the Williamson Act claim, and the trial court entered judgment in favor of the defendants. Pursuant to stipulation of the parties, the court awarded attorney's fees and costs to the individual defendants, but denied attorney fees to the County. Plaintiff appealed, and the defendant county cross-appealed regarding attorney's fees (*65 Cal. App. 4th 713, 718-720)* .

The court of appeal affirmed the judgment in all respects except the denial of attorney's fees and costs to the county and remanded the cause to the trial court to determine and award reasonable attorney's fees to the county at trial and on appeal (*65 Cal. App. 4th 713, 730-731*). Initially the court held that administrative mandamus is the exclusive means by which to attack compliance with the California Environmental Quality Act, and that plaintiff could not sue the county for damages for failure to prepare a proper EIR. Moreover, the action against the county was untimely (*65 Cal. App. 4th 713, 722*). Furthermore, the county owed no duty to provide an EIR acceptable to the plaintiff (*65 Cal. App. 4th 713, 723-724)* . The court then disposed of other claims against the consultants concluding under the facts that the consultant defendants could not be held liable for negligence and that plaintiff's allegations did not support a claim for misrepresentation or a conspiracy to commit tortious conduct (*65 Cal. App. 4th 713, 724-727)* . Moreover, plaintiff's tort claims could not be prosecuted because the privilege of *Civ. Code § 47* applies to the preparation and certification of an EIR (*65 Cal. App. 4th 713, 726-727)* .

Regarding the special motion to strike under *Code Civ. Proc. § 425.16*, the court noted that *Code Civ. Proc. § 425.16* applies to the defendants. The court rejected plaintiff's argument that because it sued the consultant for conduct as a paid environmental consultant SLAPP does not apply. Commercial conduct and speech made in connection with an issue of public concern under consideration by a legislature body are subject to SLAPP. *Code Civ. Proc. § 425.16* is to be broadly construed to be applicable to any statement, writing or conduct made in connection with an issue of public concern which is under consideration or review by a legislative body or which is made in preparation for such review (*65 Cal. App. 4th 713, 727-728)* . The court also rejected plaintiff's argument that the instant situation was akin to the one presented in *Ericsson GE Mobile Communications, Inc. v. C.S.I. Telecommunications Engineers (1996) 49 Cal. App. 4th 1591, 57 Cal. Rptr. 2d 491* , which simply involved two companies competing for a contract to provide a product in the absence of public participation or concern. The instant case differed from Ericsson in that the contracts before it directly concerned the preparation of an environmental impact report for required public hearings concerning the potential development of projects. Ericsson merely involved private concerns regarding the sale of a telecommunications system without public hearings or interest (*65 Cal. App. 4th 713, 728-729)* .

In the instant case, defendants met their burden of proof to establish a prima facie case showing that SLAPP applies to the facts alleged, and the burden to establish the probability of success on the merits of its allegations shifted to the plaintiff. Plaintiff did not and could not bear its burden to show the probability of success on the merits of the causes of action it alleged. Plaintiff sought to coerce the county and the consultants to change their views on its development proposal. SLAPP is designed to quickly put an end to suits such as this one (*65 Cal. App. 4th 713, 729)* .

Mission Oaks has been disapproved by ***Briggs v. Eden Council for Hope and Opportunity*** *(1999) 19 Cal. 4th 1106, 1123 n.10, 81 Cal. Rptr. 2d 471, 969 P.2d 564* , to the extent it may suggest that a defendant moving to strike a cause of

action arising from a statement made before, or in connection with an issue under consideration by, a legally authorized official proceeding (*Code Civ. Proc. § 425.16(e)(1), (2)*) must separately demonstrate that the statement concerned an issue of public interest.

[c] Not All Speech By A Business Enterprise Constitutes "Commercial Speech"

The facts and procedural background of ***Mendoza v. ADP Screening & Selection Services, Inc.*** *(2010) 182 Cal. App. 4th 1644, 107 Cal. Rptr. 3d 294* , are set forth in § 160.40A[3][c], *below*. The plaintiff alleged that defendant company's accessing of the Megan's Law Website (MLW), compiling information disclosed on the MLW, and providing the information for a fee to plaintiff's prospective employer, a client, as a result of which plaintiff was allegedly not hired, was not protected activity within the meaning of the anti-SLAPP statute. The Court of Appeals agreed with the trial court that defendant made its requisite prima facie showing that, in publishing information disclosed on the MLW, it engaged in constitutionally protected speech on a subject of public interest. The court found first that, as a foundational, broad-based proposition, providing employment-screening reports is a constitutionally founded, protected activity within the meaning of the anti-SLAPP statute. Defendant's conduct was not illegal or criminal under *Pen. Code § 290.46(j)*, providing that, if a person used information disclosed on the MLW to commit another crime, the punishment for the other crime was increased, because § 290.46(j) was essentially an enhancement statute and did not define a substantive crime, and there was no other language in the MLW statute providing that a violation of any other part of § 290.46 was a misdemeanor or a felony. Thus, defendant's underlying conduct involved speech activity in furtherance of its *First Amendment* rights, and defendant did not concede that its underlying conduct was criminal, nor did the evidence conclusively establish that its conduct was criminal (*182 Cal. App. 4th 1644, 1653-1655)* .

[4] Additional Authorities

[a] No Separate Showing of Public Significance Required If Action Arises From Statements Made Before, or in Connection With Issue Under Consideration by, Official Proceeding

Dible v. Haight Ashbury Free Clinics (2008) 170 Cal. App. 4th 843, 88 Cal. Rptr. 3d 464 was a defamation action brought by plaintiff after the termination of her employment from the defendant organization. Plaintiff, who was a social worker in jail psychiatric services, was terminated after one of the inmates she worked with committed suicide. Plaintiff alleged that she was told her negligence resulted in the inmate's death, and that statements to this effect were made to the Employment Development Department in connection with her unemployment insurance claim. Plaintiff's first amended complaint alleged causes of action for wrongful termination, declaratory relief, defamation, interference with business opportunity and unfair business practices. Following defendant's demurrer, the only cause of action remaining was for defamation. Defendant filed an Anti-SLAPP motion to the defamation complaint, and the trial court granted the motion. Plaintiff appealed. The court of appeals affirmed. Because the allegedly defamatory statements were made in the court of the unemployment insurance investigation, they qualified as part of an "official proceeding" within the meaning of the Anti-SLAPP statute. The court also found that plaintiff could not establish a probability of success on her defamation claim (*170 Cal. App. 4th 843, 855)* .

In *Sipple v. Foundation for Nat. Progress (1999) 71 Cal. App. 4th 226, 83 Cal. Rptr. 2d 677* , plaintiff, a nationally known political consultant, brought an action for libel, intentional interference with contract, and intentional interference with prospective economic advantage concerning an article that focused on a custody dispute between the plaintiff and his first wife. The trial court granted defendants' motion to strike under *Code Civ. Proc. § 425.16*. In affirming, the court of appeal noted with regard to *Code Civ. Proc. § 425.16(e)(1)* and *(2)* that in crafting the statute, the Legislature equated public issue with the authorized official proceeding to which it connects. Thus, in making a motion to strike, a defendant need not demonstrate the existence of a public issue for purposes of *Code Civ. Proc. § 425.16(e)(1)* and *(2)* (*71 Cal. App. 4th 226, 237)* . The court concluded that the custody dispute came within *Code Civ. Proc. § 425.16(e)(1)* as a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, and hence the article insofar as it discussed statements made during the deposition, or at the hearing at the custody

trial, fell within the ambit of subsection (e)(1) and defendants did not need to separately show that these statements concerned an issue of public interest (*71 Cal. App. 4th 226, 237-238)* . The plaintiff also contended that wife-beating allegations gathered from interviews that were not part of the custody hearing fell within *Code Civ. Proc. § 425.16(e)(3)* and that the article should not be privileged because wife-beating is not an issue of public interest. The court rejected this argument noting that domestic violence is an extremely important public issue (*71 Cal. App. 4th 226, 238)* .

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
CHAPTER 161 MOTIONS TO STRIKE: ANTI-SLAPP
PART II. FORMS
A. Supporting Special Motion to Strike

16-161 California Points & Authorities § 161.32

§ 161.32 Supporting Special Motion to Strike Action Against Constitutionally Privileged Conduct (SLAPP Suit) [Code Civ. Proc. § 425.16(b)]--Malicious Prosecution Action

[1] FORM

[*This form should be combined with a general form of memorandum of points and authorities supporting a special motion to strike setting out the statutory basis for a special motion to strike (see § 161.30).*]

THE COURT SHOULD STRIKE _____ [*specify the matter identified in the notice of motion, e.g.*, THE COMPLAINT FOR INTERFERENCE WITH CONTRACTUAL AND PROSPECTIVE ECONOMIC RELATIONS] BECAUSE DEFENDANT'S CONSTITUTIONAL RIGHT[S] OF _____ [*specify, e.g.*, PETITION AND FREE SPEECH] WILL BE CHILLED IF IT IS ALLOWED TO STAND AND PLAINTIFF IS ALLOWED TO CONTINUE PROSECUTING IT, AND THE MALICIOUS PROSECUTION ACTION THAT FILED IS SUBJECT TO THE ANTI-SLAPP MOTION TO STRIKE.

A. Malicious Prosecution Actions Are Subject to Anti-SLAPP Motion to Strike. *Code of Civil Procedure Section 425.16* is not ambiguous with respect to whether its protection of "any act" furthering protected rights encompasses suing for malicious prosecution, and nothing in the statute itself categorically excludes any particular type of action from its operation (*Jarrow Formulas, Inc. v. LaMarche (2003) 31 Cal. 4th 728, 735, 3 Cal. Rptr. 3d 636, 74 P.3d 737*). The Anti-SLAPP motion to strike will assess whether the termination of the prior action was in one party's favor (*StaffPro, Inc. v. Elite Show Services, Inc. (2006) 136 Cal. App. 4th 1392, 1401-1402, 39 Cal. Rptr. 3d 682*). The Anti-SLAPP motion to strike also will assess the probability of the plaintiff prevailing on the claim of malicious prosecution, i.e. the initial action was brought without probable cause and was initiated with malice (*Paiva v. Nichols (2008) 168 Cal. App. 4th 1007, 1018, 85 Cal. Rptr. 3d 838*).

[2] Comments

[a] Use of Form

This form, combined with the appropriate points and authorities contained in § 161.30, may be submitted in support of a

special motion to strike the whole or any part of a complaint or cross-complaint stating a cause of action for malicious prosecution.

[3] Discussion of Authorities

[a] Malicious Prosecution Actions Are Subject to Anti-SLAPP Motion to Strike

In ***Jarrow Formulas, Inc. v. LaMarche*** *(2003) 31 Cal. 4th 728, 3 Cal. Rptr. 3d 636, 74 P.3d 737* , plaintiff Jarrow Formulas hired defendant LaMarche to design labels for its products. A dispute arose over the ownership of some artwork, and Jarrow Formulas sued LaMarche for rescission and fraud. LaMarche cross-complained for slander and interference with economic advantage. Jarrow obtained summary judgment and dismissal of the cross-complaint, but LaMarche prevailed on the original complaint. Jarrow then filed a malicious prosecution action against LaMarche, claiming LaMarche and her attorney Brutzkus had filed the cross-complaint maliciously and without probable cause. LaMarche and Brutzkus moved to strike the malicious prosecution claim pursuant to the Anti-SLAPP statute. The trial court denied the motion, ruling that malicious prosecution actions are not subject to Anti-SLAPP scrutiny. Defendants appealed. The court of appeal reversed, holding that plaintiff's malicious prosecution action arose from acts in furtherance of LaMarche's and Brutzkus's free speech and petition rights and that Jarrow did not meet its burden of establishing a probability of success on the merits. The Supreme Court granted review to address the issue of whether a malicious prosecution action is subject to the Anti-SLAPP statute.

The Supreme Court noted that resolution of an Anti-SLAPP motion requires the court to first decide whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity, meaning in furtherance of the defendant's right of petition or free speech under the U.S. or California Constitution in connection with a public issue. If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim (*31 Cal. 4th 728, 733)* . The trial court had decided defendants did not meet their burden on the "arising from" prong and did not reach the second prong. The appellate court reversed on this prong and found in favor of defendants on the second prong as well. In its review of the appellate court's decision regarding the first prong, the Supreme Court stated that under the plain language interpretation embraced in cases such as *Briggs v. Eden Council for Hope & Opportunity (1999) 19 Cal. 4th 1106, 81 Cal. Rptr. 2d 471, 969 P.2d 564* and *Navellier v. Sletten (2002) 29 Cal. 4th 82, 124 Cal. Rptr. 2d 530, 52 P.3d 703* , malicious prosecution actions clearly fall within the purview of *Code Civ. Proc. § 425.16* (*31 Cal. 4th 728, 733-744)* . However, plaintiff argued there was no evidence the Legislature intended for the Anti-SLAPP statute to apply to malicious prosecution claims. The court rejected this contention, noting that the Legislature made its intentions clear by the plain language of the statute and by its command that "this section shall be construed broadly" (*31 Cal. 4th 728, 735*). Furthermore, the Legislature specifically excluded certain actions and it chose not to exclude malicious prosecution actions. For these and other reasons, the California Supreme Court declined to create a categorical exemption from the Anti-SLAPP statute for malicious prosecution actions (*31 Cal. 4th 728, 741*).

The court then ruled on the second prong of the Anti-SLAPP test, the probability of prevailing. Plaintiffs argued that a summary judgment in their favor in the underlying matter was sufficient to meet the burden under the second prong of the Anti-SLAPP test in the malicious prosecution matter. In other words, they argued that the fact that defendants' lawsuit had been resolved on summary judgment was sufficient to meet their burden to show a probability of prevailing on their malicious prosecution claim. The court disagreed, stating that summary judgment on the underlying claim does not establish a lack of probable cause as a matter of law. A loss on summary judgment does not necessarily establish that an action lacked probably cause when filed. Additionally, a summary judgment for the defense does not establish the malice element of the malicious prosecution tort. The court thus affirmed the appellate court's judgment that plaintiffs did not meet their burden on the probability of prevailing prong (*31 Cal. 4th 728, 743)* .

In ***StaffPro, Inc. v. Elite Show Services, Inc.*** *(2006) 136 Cal. App. 4th 1392, 39 Cal. Rptr. 3d 682* , Elite had sued StaffPro, one its competitors, alleging three causes of action related to unlawful business practices. Elite dismissed the

third cause of action before trial, and the action went to trial on the first and second cause of action. The court granted judgment on the second cause of action pursuant to *Code Civ. Proc. § 631.8*. At the end of trial, the court granted relief to Elite on the first cause of action. StaffPro then sued Elite for malicious prosecution, and Elite filed an Anti-SLAPP motion in response. The trial court granted Elite's motion.

On appeal, the issue was whether StaffPro could show a probability of prevailing on its malicious prosecution claim. The court of appeals agreed that StaffPro could not carry its burden with respect to the "favorable termination" element of the malicious prosecution cause of action. Because the court's order in the first action required StaffPro to take a number of remedial actions, it was of no consequence that the court's order was more favorable to StaffPro than StaffPro's previous settlement offer had been. StaffPro therefore failed to show a probability of success on its malicious prosecution claim (*136 Cal. App. 4th 1392, 1401-1402)* .

In ***Paiva v. Nichols*** *(2008) 168 Cal. App. 4th 1007, 85 Cal. Rptr. 3d 838* , plaintiff homeowner brought a malicious prosecution claim against defendants, his neighbors and their lawyer, based on a prior trespass suit that was ultimately unsuccessful, despite the grant of a preliminary injunction. The trial court denied defendants' motions to strike under *Code Civ. Proc., § 425.16*. The appellate court reversed the order denying defendants' Anti-SLAPP motions and remanded the matter for the trial court to enter an order granting the motions to strike, and to conduct proceedings as appropriate to determine costs and reasonable attorney fees, including attorney fees on appeal, to be awarded to defendants. The appellate court held that defendants' underlying trespass suit was unquestionably protected activity under the Anti-SLAPP statute and that plaintiff failed to meet his burden of showing a probability that he would prevail in his malicious prosecution action. Although defendants did not prevail at trial, their trespass suit was a claim that succeeded at a hearing on the merits for purposes of establishing probable because they were granted a preliminary injunction. The preliminary injunction conclusively established probable cause to initiate the prior suit, irrespective of the fact that the order for the preliminary injunction never became legally effective because of defendants' failure to post a bond. The court also found that there was no basis for concluding that the injunction was procured through fraud. Finally, plaintiff failed to demonstrate that new facts or new law arose after the trespass suit was initiated but before it was concluded that would have indicated to defendants that their suit was without merit; accordingly, there was no basis for the contention that the prior suit, although initiated with probable cause, was later maintained without probable cause (*168 Cal. App. 4th 1007, 1017-1038)* .

California Points & Authorities

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
CHAPTER 161 MOTIONS TO STRIKE: ANTI-SLAPP
PART II. FORMS
A. Supporting Special Motion to Strike

16-161 California Points & Authorities § 161.33

§ 161.33 Supporting Special Motion to Strike Action Against Constitutionally Privileged Conduct (SLAPP Suit) [Code Civ. Proc. § 425.16(b)]--Statement or Writing Made in Public Forum or in Connection With an Issue of Public Interest [Code Civ. Proc. § 425.16(e)(3) and (4)]

[1] FORM

[*This form should be combined with a general form of memorandum of points and authorities supporting a special motion to strike setting out the statutory basis for a special motion to strike (see § 161.30).*]

THE COURT SHOULD STRIKE _____ [*specify the matter identified in the notice of motion, e.g.,* THE COMPLAINT FOR INTERFERENCE WITH CONTRACTUAL AND PROSPECTIVE ECONOMIC RELATIONS] BECAUSE DEFENDANT'S CONSTITUTIONAL RIGHT[S] OF _____ [*specify, e.g.,* PETITION AND FREE SPEECH] WILL BE CHILLED IF IT IS ALLOWED TO STAND AND PLAINTIFF IS ALLOWED TO CONTINUE PROSECUTING IT, AND STATEMENTS OR WRITINGS THAT ARE THE SUBJECT OF THE SUIT WERE MADE IN A PUBLIC FORUM AND/OR WERE IN CONNECTION WITH AN ISSUE OF PUBLIC INTEREST.

A. The Conduct at Issue Concerned a Matter of Widespread Public Interest. *Code Civ. Proc. § 425.16(e)(4)* includes the conduct of private persons and entities when the subject is a matter of widespread public interest (*Nygard, Inc. v. Uusi-Kerttula (2007) 159 Cal. App. 4th 1027, 1042, 72 Cal. Rptr. 3d 210* ; *McGarry v. University of San Diego (2007) 154 Cal. App. 4th 97, 110, 64 Cal. Rptr. 3d 467* ; *Morrow v. Los Angeles Unified School Dist. (2007) 149 Cal. App. 4th 1424, 1436-1437, 57 Cal. Rptr. 3d 885* ; *Integrated Healthcare Holdings, Inc. v. Fitzgibbons (2006) 140 Cal. App. 4th 515, 523, 44 Cal. Rptr. 3d 517*).

B. The Conduct at Issue Concerned an Issue of Interest to a Definable Portion of the Public and Occurred in the Context of an Ongoing Controversy, Dispute, or Discussion. The public interest requirement of *Code Civ. Proc. § 425.16(e)(4)* is satisfied when the conduct at issue concerns an issue of interest to a limited, but definable portion of the public and the activity occurs in the context of an ongoing controversy, dispute, or discussion (*Hailstone v. Martinez (2008) 169 Cal. App. 4th 728, 736-739, 87 Cal. Rptr. 3d 347* ; *Ruiz v. Harbor View Community Association (2005)*

134 Cal. App. 4th 1456, 1468, 37 Cal. Rptr. 3d 133).

[2] Comments

[a] Use of Form

This form, combined with the appropriate points and authorities contained in § 161.30, may be submitted in support of a special motion to strike the whole or any part of a complaint or cross-complaint setting forth a cause of action arising out of (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

[3] Discussion of Authorities

[a] The Conduct at Issue Concerned a Matter of Widespread Public Interest

In ***Nygard, Inc. v. Uusi-Kerttula*** *(2007) 159 Cal. App. 4th 1027, 72 Cal. Rptr. 3d 210* , the defendant ended his employment with plaintiff company in 2005. After terminating his employment with the company, defendant gave an interview to a magazine about his former working conditions, painting the employer in an unflattering light. The company filed a suit against defendant, the magazine, and the publisher for breach of contract, breach of the implied covenant of good faith and fair dealing, intentional interference with contract, breach of the duty of loyalty, and defamation. All defendants filed Anti-SLAPP motions, claiming that the magazine article addressed an issue of public interest. The court granted the motion on the basis that the company's founder, Peter Nygard, was an internationally known public figure and therefore the activity giving rise to the lawsuit fell within *Code Civ. Proc. § 425.16(e)(3)*. Additionally, plaintiff failed to demonstrate a probability of prevailing on its claims.

The court of appeals affirmed. The court agreed that the magazine article at issue in the case fell within the ambit of *Code Civ. Proc. § 425.16(e)(3)*. The court noted that courts of appeal have disagreed as to whether a newspaper is a public forum within the meaning of the statute. In *Lafayette Morehouse, Inc. v. Chronicle Publishing Co. (1995) 37 Cal. App. 4th 855, 44 Cal. Rptr. 2d 46* , the court held a newspaper was not a public forum because members of the public cannot freely publish their opinions in a newspaper. By contract, in *Damon v. Ocean Hills Journalism Club (2000) 85 Cal. App. 4th 468, 102 Cal. Rptr. 2d 205* , the court held that the homeowners' association newsletter was a public forum because it was "a vehicle for communicating a message about public matters." The Nygard court concluded that magazines and newspapers are public for a. The statute provides that the statement may be made in a "place open to the public" or a public forum, suggesting the two are not one and the same. Therefore, a newspaper need not be open to the public to be considered a public forum. With regard to the "issue of public interest," plaintiff contended that "celebrity gossip" was excluded by the Anti-SLAPP statute. The court disagreed, noting that the Anti-SLAPP statute is mandated to be broadly interpreted and defining an issue of public interest as "any issue in which the public is interested." The fact that there is extensive interest in Peter Nygard among the Finnish public was sufficient to render the magazine article an issue of public interest (*159 Cal. App. 4th 1027, 1042)* .

The libel and slander lawsuit in ***McGarry v. University of San Diego*** *(2007) 154 Cal. App. 4th 97, 64 Cal. Rptr. 3d 467* arose out of the university's termination of plaintiff McGarry as head football coach. Plaintiff's defamation claims arose out of a newspaper article reporting on the reasons for plaintiff's termination as well as statements made during a meeting with the parents of football players after the termination. Defendants filed a special motion to strike the defamation action, arguing the action arose from protected conduct in connection with an issue of public interest (*Code Civ. Proc. § 425.16(e)(4)*). The trial court agreed, and granted defendant's motion.

The court of appeal affirmed. The reason for plaintiff's termination was an issue of importance to a substantial segment of the public in San Diego. Citing *Terry v. Davis Community Church (2005) 131 Cal. App. 4th 1534, 33 Cal. Rptr. 3d 145* that *Code Civ. Proc. § 425.16* does not provide a definition for "an issue of public interest," the court adopted a few

guiding principles may be derived from decisional authorities. First, "public interest" does not equate with mere curiosity. Second, a matter of public interest should be something of concern to a substantial number of people. Thus, a matter of concern to the speaker and a relatively small, specific audience is not a matter of public interest. Third, there should be some degree of closeness between the challenged statements and the asserted public interest; the assertion of a broad and amorphous public interest is not sufficient. Fourth, the focus of the speaker's conduct should be the public interest rather than a mere effort "to gather ammunition for another round of [private] controversy". Finally, "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." A person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people (*154 Cal. App. 4th 97, 110)* . The appellate court concluded the coach was a public figure in San Diego, and his termination was a matter of widespread public interest because his termination was of concern to a substantial number of people, and it is difficult to imagine a greater "closeness" between the topic of the public interest (the termination) and the challenged statements (the reasons for the termination). Indeed, the focus of the speakers' statements were to respond to the public interest "rather than a mere effort 'to gather ammunition for another round of [private] controversy.' " Additionally, the defendants did not by their conduct create a defense by thrusting the couch into the public eye; his role as head coach of a local university's football team already made him a public figure, and his employment termination was already a topic of widespread public interest (*154 Cal. App. 4th 97, 110-111)* .

In ***Morrow v. Los Angeles Unified School Dist.*** *(2007) 149 Cal. App. 4th 1424, 57 Cal. Rptr. 3d 885* , a high school principal sued the school district, its superintendent, and a local superintendent for invasion of privacy and defamation as a result of comments the superintendents made to the media about the principal's inability to competently handle various violent incidents on campus. The superintendent had told the Los Angeles Times that the district planned to replace the principal based on a need for stronger leadership and that the principal's handling of the violence had accelerated the decision to replace him. In response to the principal's lawsuit, defendants filed an Anti-SLAPP motion, and the trial court granted the motion. Plaintiff appealed.

The court of appeals affirmed. On appeal, plaintiff claimed the information divulged to the Los Angeles Times regarding the school violence and his handling of it were private personnel details. The court disagreed, stating that the school violence incidents were matters of public interest, and that the article only mentioned personnel issues to the extent they were relevant to the broader issue of the school violence. The Times had run approximately seven articles regarding the incidents, and the subject was a matter of city-wide concern. Therefore, defendants' conduct in speaking to the press was entitled to the protection of *Code Civ. Proc. § 425.16* (*149 Cal. App. 4th 1424, 1436-1437)* .

Integrated Healthcare Holdings, Inc. v. Fitzgibbons *(2006) 140 Cal. App. 4th 515, 44 Cal. Rptr. 3d 517* was a lawsuit for defamation, intentional and negligent interference with a contractual relationship, breach of contract, breach of the duty of good faith and fair dealing, and unfair competition based on an e-mail message that defendant sent. The controversy arose out of plaintiff's purchase of four Orange County hospitals. Both the county and the California Senate had held public hearings regarding plaintiff's proposed acquisition of the hospitals due to concerns about plaintiff's financial health. Defendant was a doctor at one of the four hospitals. Following plaintiff's purchase of the hospitals, which included an agreement that the medical staff at defendant's hospital would express public support for plaintiff's acquisition of the hospitals, one of plaintiff's lenders served plaintiff with a notice of default and this was reported in the Orange County Register. Defendant then sent an e-mail to medical executive committee members at his hospital expressing concern about plaintiff's financial status and the threat of bankruptcy. Plaintiff sued defendant based on this e-mail message. In return, defendant filed an Anti-SLAPP motion. The trial court denied the motion, and defendant appealed (*140 Cal. App. 4th 515, 521)* .

The court of appeal reversed, holding that defendant met his burden of demonstrating that the e-mail concerned an issue of public interest within the meaning of *Code Civ. Proc. § 425.16(e)*. The court noted that plaintiff's acquisition of the hospitals was the subject of public hearings by both the county and the State Senate and had been discussed in numerous newspaper articles. The court stated that the phrase " 'issue of public interest' has been broadly construed by courts to include not only governmental matters, but also private conduct that impacts a broad segment of society and/or

that affects a community in a manner similar to that of a governmental entity" (*140 Cal. App. 4th 515, 523* , quoting *Damon v. Ocean Hills Journalism Club (2000) 85 Cal. App. 4th 468, 479, 102 Cal. Rptr. 2d 205*). The court explained that when an issue is not a matter of widespread public interest, but rather is of interest to a limited, but definable portion of the public, the activity must occur in the context of an ongoing controversy, dispute or discussion under the standard set forth in *Du Charme v. International Brotherhood of Electrical Workers (2003) 110 Cal. App. 4th 107, 1 Cal. Rptr. 3d 501* and *Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO (2003) 105 Cal. App. 4th 913, 130 Cal. Rptr. 2d 81* . In this case, the financial survival of four hospitals within the county was a matter of widespread public interest, and therefore no ongoing controversy was required. Because plaintiff was unable to establish a probability of prevailing on any of its claims, defendant's motion was granted (*140 Cal. App. 4th 515, 534)* .

[b] The Conduct at Issue Concerned an Issue of Interest to a Definable Portion of the Public and Occurred in the Context of an Ongoing Controversy, Dispute, or Discussion

In ***Hailstone v. Martinez*** *(2008) 169 Cal. App. 4th 728, 87 Cal. Rptr. 3d 347* , plaintiff was a senior business agent for a local Teamsters union. In 2007, defendant Martinez, the union's secretary-treasurer, suspended plaintiff for allegedly receiving both mileage reimbursement and a gas allowance and therefore "double-dipping" into union funds. Martinez sent plaintiff a letter notifying him of this suspension and copied the letter to other union and management individuals. Plaintiff was subsequently terminated and filed the instant defamation lawsuit against Martinez and two other local union employees. Defendants responded by filing an Anti-SLAPP motion to strike, asserting the alleged defamatory statements concerned an issue of public interest. The trial court denied defendants' motion on the basis that the statements did not concern a public issue or an issue of public interest.

The court of appeals reversed the trial court's ruling on the Anti-SLAPP statute, but nevertheless determined that plaintiff was able to show the required degree of merit to proceed with his complaint. The court noted that while the statute does not specifically define "issue of public interest," the courts have provided some guiding principles. The court summarized that in each case where it was determined that a public issue existed, the subject statements either concerned a person or entity in the public eye, conduct that could directly affect a large number of people or a topic of widespread, public interest (*169 Cal. App. 4th 728, 736-737* , quoting *Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO (2003) 105 Cal. App. 4th 913, 924, 130 Cal. Rptr. 2d 81*). The court found that in this case, the issue was of interest to a limited but definable portion of the public; a narrow segment of society (the local union, which had more than 10,000 members). Moreover, because plaintiff's ties with the union had not been completely severed when the statements were made, the activity did take place in the context of an "ongoing controversy, dispute or discussion," as required by the courts in cases such as *Du Charme v. International Brotherhood of Electrical Workers (2003) 110 Cal. App. 4th 107, 115, 1 Cal. Rptr. 3d 501* . Because plaintiff was able to demonstrate that his claim had at least minimal merit, the order denying the motion to strike was affirmed (*169 Cal. App. 4th 728, 743)* .

In ***Ruiz v. Harbor View Community Association*** *(2005) 134 Cal. App. 4th 1456, 37 Cal. Rptr. 3d 133* , plaintiffs sued their community association after the association denied plaintiffs' plans to rebuild their house. Plaintiffs' house was on one of 523 lots governed by the association. One of the nine causes of action was for libel and arose out of a dispute regarding the association's rejection of plaintiffs' plans. Following the rejection of the plans, plaintiff (Mr. Ruiz) attended an architectural committee meeting and a board meeting and subsequently prepared a letter to the committee and the board disputing their decision. In response, the association's attorney sent a letter to plaintiff stating, among other things, that it was reprehensible that plaintiff, as a licensed attorney, "undertook to negotiate, monitor, observe, harangue, cajole and intimidate laypersons ... " Plaintiff responded to this letter and several letters went back and forth. Several months after the initial letter, the association's attorney sent another letter to plaintiff with sharp wording. Plaintiff's cause of action for libel arose out of these two letters sent by the attorney. Defendant moved to strike the libel cause of action under the Anti-SLAPP statute. The trial court denied the motion, ruling that the two letters did not fit within the ambit of *Code Civ. Proc. § 425.16*. Defendant appealed (*134 Cal. App. 4th 1456, 1465)* .

The court of appeals reversed, holding that the two letters fell within *Code Civ. Proc. § 425.16(e)(4)*. Courts had previously ruled that the Anti-SLAPP statute protects private communications regarding public issues (*see, e.g., Averill v. Superior Court (1996) 42 Cal. App. 4th 1170, 1175, 50 Cal. Rptr. 2d 62*). Conduct involving issues of interest to a limited but definable portion of the public can still be the subject of a SLAPP suit when it occurs "in the context of an ongoing controversy, dispute or discussion, such that it warrants protection by a statute that embodies the public policy of encouraging participation in matters of public significance" (*134 Cal. App. 4th 1456, 1468* , quoting *Du Charme v. International Brotherhood of Electrical Workers (2003) 110 Cal. App. 4th 107, 119, 1 Cal. Rptr. 3d 501*). The court found that when defendant's attorney wrote the two letters, plaintiffs and defendant were involved in ongoing disputes over approval of plaintiffs' plans. Moreover, the dispute was of interest to the residents of over 523 lots, which was a large enough group to satisfy the "limited but definable portion of the public" requirement. Because plaintiff failed to meet his burden of establishing a probability of prevailing on the libel claim, the court granted the motion to strike (*134 Cal. App. 4th 1456, 1475)* .

[4] Additional Authorities

[a] The Conduct at Issue Concerned an Issue of Widespread Public Interest

Plaintiff in *Hall v. Time Warner, Inc. (2007) 153 Cal. App. 4th 1337, 63 Cal. Rptr. 3d 798* was the housekeeper of the late famous actor Marlon Brando. After Brando's death, it came to light that Hall was named as a beneficiary in Brando's living trust. A reporter visited Hall and interviewed her about Brando and his will, and portions of the interview were televised. Plaintiff sued the producers of the television show for trespass, intrusion upon seclusion, public disclosure of private facts, intentional infliction of emotional distress, and elder abuse. Defendant filed an Anti-SLAPP motion, and the trial court denied the motion, finding the complaint did not arise from an act in furtherance of the defendants' right of petition or speech in connection with a public issue. The court of appeals reversed. The court held that the terms of Brando's will and trust were an issue of widespread public interest. Newspapers and other publications had published the details of Brando's will and there was some controversy over the fact that Brando specifically did not provide for one of his adopted daughters or the offspring of his predeceased daughter in his will. The court held that the public's fascination with Brando made his decisions concerning his will an issue of public interest. Therefore, on remand, the trial court was required to determine whether Hall could show a probability of prevailing on her complaint (*153 Cal. App. 4th 1337, 1347-1348)* .

In *Ampex Corp. v. Cargle (2005) 128 Cal. App. 4th 1569, 27 Cal. Rptr. 3d 863* , plaintiffs sued an anonymous poster on an Internet message board for defamation. It turned out that the anonymous poster was a former employee of one of plaintiffs' wholly owned subsidiaries. The issue was whether defendant's postings on the message board were made in a public forum in connection with an issue of public interest. The court held that they were. A message board is a public forum since the term "public forum" includes forms of public communication other than those in a physical setting. Web sites that are accessible to any member of the public, free of charge, are public forums for purposes of the Anti-SLAPP statute. Additionally, the postings were in connection with an issue of public interest because Ampex is a publicly traded company with a large number of investors and it had promoted itself by means of press releases. Because Ampex did not demonstrate a probability of prevailing on its defamation claim, defendant prevailed and was entitled to attorney fees (*128 Cal. App. 4th 1569, 1580)* .

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
CHAPTER 161 MOTIONS TO STRIKE: ANTI-SLAPP
PART II. FORMS
A. Supporting Special Motion to Strike

16-161 California Points & Authorities § 161.34

§ 161.34 Supporting Special Motion to Strike Action Against Constitutionally Privileged Conduct (SLAPP Suit) [Code Civ. Proc. § 425.16(b)]--Governmental Entities and Their Employees, Like Private Parties, May Bring a Special Motion to Strike

[1] FORM

[*This form should be used in combination with the form of memorandum supporting a special motion to strike action against constitutionally privileged conduct (see § 161.30)*].

WHEN A GOVERNMENTAL ENTITY AND ITS EMPLOYEES ARE SUED AS A RESULT OF WRITTEN AND VERBAL COMMENTS ON ISSUES OF PUBLIC INTEREST RELATING TO THEIR OFFICIAL DUTIES, BOTH MAY SPECIFICALLY MOVE TO STRIKE UNDER CODE OF CIVIL PROCEDURE SECTION 425.16.

A. *Code Civ. Proc. § 425.16* Applies to Governmental Entities, Their Employees, and Private Parties. Public entities are "persons" for the purpose of the SLAPP statute. The Anti-SLAPP suit statute is designed to protect the speech interests of private citizens, the public, and governmental speakers (*Vargas v. City of Salinas (2009) 46 Cal. 4th 1, 19, 92 Cal. Rptr. 3d 286, 205 P.3d 207* ; *Mission Oaks Ranch, Ltd. v. County of Santa Barbara (1998) 65 Cal. App. 4th 713, 730, 77 Cal. Rptr. 2d 1* (disapproved on other grounds in *Briggs v. Eden Council for Hope and Opportunity (1999) 19 Cal. 4th 1106, 1123 n.10, 81 Cal. Rptr. 2d 471, 969 P.2d 564* ; *Bradbury v. Superior Court (1996) 49 Cal. App. 4th 1108, 1113, 1117, 57 Cal. Rptr. 2d 207*).

B. Public Employee's Comment on Issues of Public Interest Relating to Official Duties Is Protected. The word "person" as used in *Code of Civil Procedure Section 425.16*. includes a governmental entity, and extends to public employees who issue reports and comment on issues of public interest relating to their official duties. If a governmental entity and public employee are sued as a result of written and verbal comments on issues of public interest relating to the employee's official duties, both may move to specially strike under *Code of Civil Procedure Section 425.16*. (*Bradbury v. Superior Court (1996) 49 Cal. App. 4th 1108, 1113-1117, 57 Cal. Rptr. 2d 207*).

[*Optional*] **C. Government Is Protected in Performing its Role in CEQA.** Government has a legitimate, independent,

statutory role to play in the consideration of environmental impact reports and the approval of development proposals. As such, it should be protected in performing its role on matters of public interest, including purported inadequate performance of its role under the *California Environmental Quality Act (Mission Oaks Ranch, Ltd. v. County of Santa Barbara (1998) 65 Cal. App. 4th 713, 730, 77 Cal. Rptr. 2d 1* (disapproved on other grounds in *Briggs v. Eden Council for Hope and Opportunity (1999) 19 Cal. 4th 1106, 1123 n.10, 81 Cal. Rptr. 2d 471, 969 P.2d 564*)).

[2] Comments

[a] Use of Form

This form, combined with the appropriate points and authorities contained in § 161.30, may be submitted in support of a special motion to strike the whole or any part of a complaint or cross-complaint setting forth a cause of action against a public entity and its employees arising from any of their acts in furtherance of their constitutionally protected right to petition or free speech in connection with a public issue [*Code Civ. Proc. § 425.16(b)*; for further discussion, *see § 161.30[2]*].

[3] Discussion of Authorities

[a] Code Civ. Proc. § 425.16 Applies to Governmental Entities, Their Employees, and Private Parties

Vargas v. City of Salinas *(2009) 46 Cal. 4th 1, 92 Cal. Rptr. 3d 286, 205 P.3d 207* arose out of a local ballot measure proposing the repeat of a utility users tax. Proponents of the measure sued the city, claiming the city and its officials had engaged in unlawful campaign activities intending to influence the voters against the ballot measure. After defendants succeeded on a motion for judgment on the pleadings and plaintiffs filed a supplemental complaint, defendants filed an Anti-SLAPP motion as to the supplemental complaint. The trial court granted the motion, and plaintiffs appealed. The court of appeal affirmed, and the California Supreme Court granted review.

Although the court primarily granted review to address issues related to plaintiffs' claim on the merits, on appeal plaintiffs argued that defendant city was not entitled to the protections of the Anti-SLAPP statute. Plaintiffs argued that the communications in question were those of a governmental entity and not a private individual or organization, and therefore the statute did not apply. Although the courts of appeal had uniformly held that government entities could invoke the protections of the statute, plaintiffs contended those cases were wrongly decided. The California Supreme Court disagreed, holding that the Anti-SLAPP statute clearly applies to statements and writings of government entities and public officials on matters of public interest that would fall within the statute's protections if they were made by a private individual or entity. *Code Civ. Proc. § 425.16(e)* defines "act in furtherance of a person's right of petition or free speech" very broadly and does not draw any distinction between conduct by a private individual or entity and a government entity or public official. Additionally, the legislature removed any ambiguity in the original statute by expressly recognizing that public entities may bring "SLAPPback" actions. Therefore, the court found that defendants had met their burden of demonstrating that plaintiffs' complaint arose from protected activity. Because plaintiffs failed to meet their burden of demonstrating a probability of prevailing on the merits, the lower courts properly granted the Anti-SLAPP motion (*46 Cal. 4th 1, 40)* .

The facts and procedural background of ***Mission Oaks Ranch, Ltd. v. County of Santa Barbara*** *(1998) 65 Cal. App. 4th 713, 77 Cal. Rptr. 2d 1* , are discussed in *§ 161.30[3][f]*. Although the trial court, ruled in the County's favor on the *Code Civ. Proc. § 425.16* motion, it denied attorney fees to the County by ruling that the county was not a "person" for purposes of SLAPP, and because the County did not prevail on the Williamson Act claim. On County's cross-appeal regarding attorney's fees, the court held that public entities are "persons" for the purpose of the SLAPP statute. The Anti-SLAPP suit statute is designed to protect the speech interests of private citizens, the public, and governmental speakers. In particular the court recognized the government's legitimate role in considering environmental impact reports and development proposals (*65 Cal. App. 4th 713, 730)* . That the demurrers were not sustained on one of the eight causes of action, the Williamson Act cause, did not preclude an award of attorney's fees and costs. The trial court

did not believe it had merit, but simply did not have the agricultural contract before it, and plaintiff voluntarily dismissed that cause of action (*65 Cal. App. 4th 713, 730)* .

In ***Bradbury v. Superior Court*** *(1996) 49 Cal. App. 4th 1108, 57 Cal. Rptr. 2d 207* , a Los Angeles County Deputy Sheriff shot and killed an individual during a search of the individual's residence. A search warrant had been issued. The incident was highly publicized and resulted in a federal civil rights action against the Los Angeles County Sheriff, the deputy county sheriff who killed the individual, and others. The district attorney conducted an investigation, and then issued a report that exculpated the deputy sheriff from criminal liability. However, the report questioned the veracity of the search warrant affidavit suggesting that the county deputy sheriff's primary motivation was to seize property as part of a drug forfeiture. The report in part stated that the county deputy sheriff had obtained a search warrant unsupported by probable cause, and that the search warrant became the individual's death warrant (*49 Cal. App. 4th 1108, 1112)* . The sheriff conducted his own investigation, exculpating the county deputy sheriff, and reached a conclusion contrary to that of the district attorney. (In the court of appeal's view, however, there was no need to resolve this dispute, and none was attempted, in that a theoretical resolution of this dispute was irrelevant to the *first amendment* issues presented (*49 Cal. App. 4th 1108, 1112)* .) Thereafter, the deputy county sheriff brought suit against the county, the district attorney, several assistant district attorneys, and a district attorney investigator, alleging several causes of action including defamation, intentional infliction of emotional distress, and violation of federal civil rights. The complaint alleged that the defendants defamed the plaintiff in the report, and in subsequent media interviews, including an appearance on the television show "20/20." The defendants successfully demurred to some of the causes of action, but when their demurrers were overruled as to other causes of action they filed a petition for writ of mandate challenging the court's ruling on the demurrer. While the writ proceeding was pending, the defendants brought a special motion to dismiss pursuant to *Code Civ. Proc. § 425.16*. The trial court denied the motion on the ground that *Code Civ. Proc. § 425.16* does not protect a governmental entity or its representative on the theory that a governmental entity and its representatives have no *First Amendment* rights (*49 Cal. App. 4th 1108, 1113-1114)* .

The court of appeal issued an alternative writ, stayed the trial court proceedings, consolidated both writ proceedings (*49 Cal. App. 4th 1108, 1113*), and thereafter issued a peremptory writ of mandate directing the trial court to vacate its order and enter a new order granting the motion to dismiss, and denied the petition for writ of mandate challenging the orders on the demurrer as moot (*49 Cal. App. 4th 1108, 1119*). The court held that the trial court erred in finding that *Code Civ. Proc. § 425.16*, the Anti-SLAPP suit statute, did not apply to governmental comment on a matter of public interest (*49 Cal. App. 4th 1108, 1116)* . A governmental entity and its representatives have *First Amendment* rights (*49 Cal. App. 4th 1108, 1114-1115)* . *First amendment* principles applied in this case because the investigation, report, and utterances made thereafter involved a matter of public interest (*49 Cal. App. 4th 1108, 1116)* . The word "person" as used in *Code Civ. Proc. § 425.16* includes a governmental entity, and extends to public employees who issue reports and comment on issues of public interest relating to their official duties (*49 Cal. App. 4th 1108, 1115)* . If a governmental entity and public employee are sued as a result of written and verbal comments on issues of public interest relating to the employee's official duties, both may move to specially strike under *Code Civ. Proc. § 425.16* (*49 Cal. App. 4th 1108, 1115)* . With regard to the burden of proof, the court noted that the defendants made a prima facie showing that the report and media statements related to an official investigation, were made in a public forum, and involved an issue of public interest. Private conversations concerning the report were also protected under the Anti-SLAPP statute. Moreover, the request that the Los Angeles County and other law enforcement agencies investigate the matter was in furtherance of the right to petition the government for grievances. The defendants also submitted declarations establishing their good faith belief in the accuracy of the report and media statements (*49 Cal. App. 4th 1108, 1117)* . The burden shifted to the plaintiff to show that he met the test enunciated in *New York Times Co. v. Sullivan (1964) 376 U.S. 254, 279-280, 84 S. Ct. 710, 11 L. Ed. 2d 686* , and that he would probably prevail at the trial. The plaintiff had to show by competent evidence that the defendants made the statements with actual malice, i.e., knowing they were false or making them with a reckless disregard of the truth. The plaintiff failed to do this in that no evidence was offered in the opposition papers on this issue (*49 Cal. App. 4th 1108, 1117)* .

[b] Public Employee's Comment on Issues of Public Interest Relating to Official Duties Is Protected

Bradbury v. Superior Court *(1996) 49 Cal. App. 4th 1108, 57 Cal. Rptr. 2d 207* , is *discussed under § 161.34[3][a]*.

[c] Government Is Protected in Performing its Role in CEQA

Mission Oaks Ranch, Ltd. v. County of Santa Barbara *(1998) 65 Cal. App. 4th 713, 77 Cal. Rptr. 2d 1* , is *discussed under § 161.34[3][a]*.

[4] Additional Authorities

In *Santa Barbara County Coalition Against Automobile Subsidies v. Santa Barbara County Association of Governments (2008) 167 Cal. App. 4th 1229, 84 Cal. Rptr. 3d 714* , plaintiff sued defendant for injunctive and declaratory relief based on its opposition to a ballot measure imposing a sales tax increase to fund transportation costs. In response, defendant filed an Anti-SLAPP motion. In response to the motion, plaintiff argued that defendant, as a government agency, had no free speech rights. The trial court granted the defendant's motion, and plaintiff appealed. The court of appeals affirmed. Government agencies and their representatives have *First Amendment* rights and are protected under *Code Civ. Proc. § 425.16(b)*. Defendant's statements forming the basis of the complaint were made in the course of official proceedings, and plaintiff could not show a probability of prevailing (*167 Cal. App. 4th 1229, 1237-1238)* .

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California Points & Authorities

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
CHAPTER 161 MOTIONS TO STRIKE: ANTI-SLAPP
PART II. FORMS
A. Supporting Special Motion to Strike

16-161 California Points & Authorities § 161.35

§ 161.35 Supporting Special Motion to Strike Action Against Constitutionally Privileged Conduct (SLAPP Suit)--Action Is Not Brought Solely in the Public Interest [Code Civ. Proc. § 425.17(b)]

[1] FORM

[*This form should be used in combination with the form of memorandum supporting a special motion to strike against constitutionally privileged conduct (see § 161.30)*].

THE SPECIAL MOTION TO STRIKE SHOULD BE GRANTED BECAUSE PLAINTIFF DID NOT BRING THE ACTION SOLELY IN THE PUBLIC INTEREST OR ON BEHALF OF THE GENERAL PUBLIC PURSUANT TO THE REQUIREMENTS OF CODE OF CIVIL PROCEDURE SECTION 425.17(b).

A. Plaintiff Seeks Relief That Is [Greater Than *or* Different From] the Relief Sought For the [General Public *or* Class]. The first prong of the Anti-SLAPP statute exception set forth in *Code of Civil Procedure Section 425.17(b)* is not met if the plaintiff seeks relief that is greater than or different from the relief sought for the general public or a class of which plaintiff is a member. A claim for attorney's fees, costs, or penalties does not constitute greater or different relief for purposes of this subdivision (*Code Civ. Proc. § 425.17(b)*).

B. The Action, if Successful, Would Not Enforce an Important Right Affecting the Public Interest or Confer a Significant Benefit on the General Public or a Large Class of Persons. Even if a lawsuit's success might affect a large class of persons, the action does not meet this element unless the benefit it confers is legally significant (*Blanchard v. DIRECTV, Inc. (2004) 123 Cal. App. 4th 903, 916-917)* .

C. Private Enforcement Is Unnecessary in This Instance or Private Enforcement Does Not Place a Disproportionate Financial Burden on the Plaintiff in Relation to the Plaintiff's Stake in the Matter Because the Claim Is Entirely Personal to Plaintiffs. To meet this element, a plaintiff's objective in the litigation must go beyond those things that concretely affect that plaintiff to affect the general public. A claim that is entirely personal to plaintiffs does not qualify (*Blanchard v. DIRECTV, Inc. (2004) 123 Cal. App. 4th 903, 916, 20 Cal. Rptr. 3d 385*).

D. *Code Civ. Proc. § 425.17(b)* Does Not Apply Where Plaintiff Is Not Seeking Relief Solely in the Public Interest. *Code Civ. Proc. § 425.17(b)*'s exception only applies to actions brought "solely in the public interest." The exception bars a litigant seeking any personal relief from relying on the exception (Club Members for an *Honest Election v. Sierra Club (2008) 45 Cal. 4th 309, 316-317, 86 Cal. Rptr. 3d 288, 196 P.3d 1094* ; *Ingels v. Westwood One Broadcasting Services, Inc. (2005) 129 Cal. App. 4th 1050, 1067, 28 Cal. Rptr. 3d 933*).

E. *Code Civ. Proc. § 425.17(b)* Does Not Apply Because the Action Falls Within the Exception Enumerated in *Code Civ. Proc. § 425.17(d)(2)*. *Code Civ. Proc. § 425.17(b)* does not apply to any action against any person or entity based upon the creation, dissemination, exhibition, advertisement, or other similar promotion of any dramatic, literary, musical, political, or artistic work, including, but not limited to, a motion picture or television program, or an article published in a newspaper or magazine of general circulation (*Major v. Silna (2006) 134 Cal. App. 4th 1485, 1497, 36 Cal. Rptr. 3d 875*).

[2] Comments

[a] Use of Form

This form, combined with the appropriate points and authorities contained in § 161.30, may be submitted in support of a special motion to strike the whole or any part of a complaint or cross-complaint setting forth a cause of action alleged to be solely in the public interest or on behalf of the general public within the meaning of *Code Civ. Proc. § 425.17(b)*. For further discussion, see *§ 161.30[2]*. For discussion of requirements for exception to Anti-SLAPP statute set forth in *Code Civ. Proc. § 425.17(b)*, see *§ 161.61*.

Code Civ. Proc. § 425.17 does not apply to any of the following:

1. Any person enumerated in *Cal. Const. Art. I, § 2(b)* or *Evid. Code § 1070*, or any person engaged in the dissemination of ideas or expression in any book or academic journal, while engaged in the gathering, receiving, or processing of information for communication to the public [*Code Civ. Proc. § 425.17(d)(1)*].

2. Any action against any person or entity based upon the creation, dissemination, exhibition, advertisement, or other similar promotion of any dramatic, literary, musical, political, or artistic work, including, but not limited to, a motion picture or television program, or an article published in a newspaper or magazine of general circulation [*Code Civ. Proc. § 425.17(d)(2)*].

3. Any nonprofit organization that receives more than 50 percent of its annual revenues from federal, state, or local government grants, awards, programs, or reimbursements for services rendered [*Code Civ. Proc. § 425.17(d)(3)*].

[b] Reply to Opposing Memoranda

In an appropriate case, this form may also be used in a reply to an opposition to a special motion to strike alleging the action was brought solely in the public interest (*see* § 161.71).

[3] Discussion of Authorities

[a] The Action, if Successful, Would Not Enforce an Important Right Affecting the Public Interest or Confer a Significant Benefit on the General Public or a Large Class of Persons

In ***Blanchard v. DIRECTV, Inc.*** *(2004) 123 Cal. App. 4th 903, 20 Cal. Rptr. 3d 385* , plaintiffs were recipients of demand letters from DIRECTV, a satellite television company. DIRECTV sent out the letters in an effort to persuade the recipients to stop using decryption devices that enabled the users to steal DIRECTV's programming. The letters explained that the use of the devices in question was illegal and offered the recipients a way to resolve the matter before

DIRECTV filed suit in federal court. DIRECTV did eventually file suit in federal court against approximately 600 purchasers of the devices (*123 Cal. App. 4th 903, 910*). Plaintiffs in the instant action alleged three causes of action against DIRECTV in state court: 1) violation of the Unfair Competition Law (*Bus. & Prof. Code § 17200*), 2) interference with civil rights (*Civ. Code § 52.1,* and *3*) extortion and duress (*123 Cal. App. 4th 903, 911)* .

In response, DIRECTV filed a special motion to strike pursuant to *Code Civ. Proc. § 425.16*, the Anti-SLAPP statute. DIRECTV claimed that the demand letter was an exercise of DIRECTV's constitutional right to seek redress of grievances. DIRECTV further claimed that plaintiffs could not show a reasonable probability of success on the merits because the demand letters were protected by the litigation privilege of *Civ. Code § 47*. Plaintiffs opposed the Anti-SLAPP motion solely on the basis that they could show a reasonable probability of success on the merits. Plaintiffs did not assert the exception stated in *Code Civ. Proc. § 425.17(b)* because that statute had not yet taken effect (*123 Cal. App. 4th 903, 912)* .

The trial court granted DIRECTV's Anti-SLAPP motion, finding that the demand letters constituted communications in furtherance of DIRECTV's right of petition under both the United States and California Constitutions. The court further found that the letters were protected by the litigation privilege and therefore plaintiffs could not show a probability that they would prevail on their claims (*123 Cal. App. 4th 903, 912)* .

On appeal, the court considered not only the second prong of the Anti-SLAPP statute but also the newly enacted exception to the Anti-SLAPP motion set forth in *Code Civ. Proc. § 425.17(b)*. Previous courts had already settled the fact that the statute could be applied to orders entered before its effective date because the statute constitutes a change in procedure only (*123 Cal. App. 4th 903, 912)* . The court noted that in order to take advantage of the exception of *Code Civ. Proc. § 425.17(b)*, the action must meet all three of its elements. (For discussion of *Code Civ. Proc. § 425.17(b), see* § 161.71). In this case, the court found that the action did not meet the second or third element of the exception, and therefore was subject to an Anti-SLAPP motion (*123 Cal. App. 4th 903, 915)* . The action did not meet the second element because the claim, if successful, would not "enforce an important right affecting the public interest." The court found there was no public interest principle vindicated by an action seeking to prohibit DIRECTV from sending demand letters to specific customers. The court contrasted the action with a hypothetical action seeking to enjoin demand letters in general and noted that regardless of the instant action, demand letters would remain a standard practice in the legal community (*123 Cal. App. 4th 903, 915*). The court made certain to point out that even if the action could be seen as affecting a large class of persons, the benefit it would confer--no longer subjecting people to the demand letters--would not be legally significant (*123 Cal. App. 4th 903, 916-917*).

Furthermore, the court held the third element of the exception was not met because the claim was entirely personal to plaintiffs. In order to meet the third element, the court held, the plaintiffs' objective must "transcend" their own interests and affect the general public (*123 Cal. App. 4th 903, 916)* . The plaintiffs' personal stake in this instance far outweighed any effect the action could have on the greater public.

After finding that the plaintiffs could not take advantage of the newly acted exception to the Anti-SLAPP statute, the court went on to affirm the trial court's ruling on the merits of the Anti-SLAPP motion based on the litigation privilege and affirmed the judgment (*123 Cal. App. 4th 903, 922)* .

[b] Code Civ. Proc. § 425.17(b) Does Not Apply Where Plaintiff Is Not Seeking Relief Solely in the Public Interest

Club Members for an Honest Election v. Sierra Club *(2008) 45 Cal. 4th 309, 86 Cal. Rptr. 3d 288, 196 P.3d 1094* had a complex procedural history. The litigation arose out of a rift in the Sierra Club's board of directors over the organization's policies. The board voted to disseminate an article to all chapter newsletters regarding low member participation and also directed that an urgent election notice be attached to the front of voting materials, warning members that outside groups may be attempting to intervene in the election. Plaintiff Club Members for an Honest

Election supported plaintiff Robert van de Hoek in the election. Plaintiffs' initial and first amended complaints sought injunctive relief, which was not granted. The election went forward and plaintiff van de Hoek was not elected to the board. Following the election, plaintiffs filed a second amended complaint alleging the following causes of action: 1) a challenge to the validity of the election under *Corp. Code § 5617*, 2) a petition for declaratory relief, 3) breach of fiduciary duty, and 4) violation of *Bus. & Prof. Code § 17200*. The complaint sought removal of five elected or appointed board members and the installation of van de Hoek and four other candidates who had not succeeded in the election.

Defendant moved to strike the second amended complaint based on the Anti-SLAPP statute. The court granted defendant's motion as to the third cause of action, holding that voting as a director was protected *First Amendment* activity. The court denied the remainder of the special motion to strike, but granted defendant's motion for summary judgment and dismissed the complaint in its entirety. The court awarded defendant fees and costs in the amount of $37,010.76 based on its partially successful Anti-SLAPP motion. Plaintiff Club Members appealed the Anti-SLAPP rulings and related fee and cost awards, and defendant appealed the partial denial of the Anti-SLAPP motion.

The court of appeal affirmed the trial court's ruling that plaintiffs' third cause of action for breach of fiduciary duty arose from protected activity and thus affirmed the trial court's ruling on the Anti-SLAPP motion. The court of appeal also held that the first, second and fourth causes of action were exempt from the Anti-SLAPP statute under *Code Civ. Proc. § 425.17(b)*'s public interest exception because the "principal thrust or gravamen" of the causes of action were consistent with a public interest action. Defendant appealed.

The California Supreme Court held that the court of appeal erred in applying the "principal thrust or gravamen" test in its analysis of the causes of action under *Code Civ. Proc. § 425.17(b)*. Under the plain meaning of the statute, the exception applies only to actions brought "solely in the public interest or on behalf of the general public." The court held the language is therefore "unambiguous and bars a litigant seeking 'any' personal relief from relying on the exception" (*45 Cal. 4th 309, 316-317)* . The court noted it was undisputed that portions of plaintiffs' prayer for relief sought a personal advantage, such as the request that the court order defendant to install van de Hoek to the board. The exception found in *Code Civ. Proc. § 425.17(b)* may not be analyzed cause of action by cause of action, but rather the action must be treated as a whole. The statutory exception clearly refers to an "action" as opposed to a "cause of action" (*45 Cal. 4th 309, 319-320)* .

In ***Ingels v. Westwood One Broadcasting Services, Inc.*** *(2005) 129 Cal. App. 4th 1050, 28 Cal. Rptr. 3d 933* , plaintiff was a caller attempting to participate in a call-in talk radio show. The screener on the show told plaintiff he was too old for the target audience of the show and when plaintiff objected, he was allowed on the air, where he voiced his displeasure at being a victim of age discrimination rather than comment on the topic the host was discussing. Plaintiff then sued the producers and talk show host for age discrimination under the Unruh Act and unfair competition. Defendants filed a special motion to strike, and the trial court granted the motion, finding that the action fell within the scope of the Anti-SLAPP statute and that plaintiff failed to show a probability of prevailing on the merits. Plaintiff appealed (*129 Cal. App. 4th 1050, 1055)* .

The court began by finding that defendants' actions in providing an open forum by means of a radio call-in show fit within the scope of *Code Civ. Proc. § 425.16(e)(4)*. The court then addressed plaintiff's contention that *Code Civ. Proc. § 425.17* applied to the case as an exception to application of the Anti-SLAPP statute. Specifically, subdivision (d) of the statute applied to preclude application of *Code Civ. Proc. § 425.17(b)*. The court noted that there were not yet any cases construing *Code Civ. Proc. § 425.17(b)*. The first condition of the exception requires that the plaintiff not seek relief greater than or different from the relief sought for the general public or a class of which the plaintiff is a member. Because plaintiff in this case sought recovery of damages personal to himself in alleging emotional upset and distress, his claim did not meet the first requirement. (*129 Cal. App. 4th 1050, 1067)* .

Additionally, plaintiff's claims were exempted from *Code Civ. Proc. § 425.17(b)* pursuant to *Code Civ. Proc. §*

425.17(d)(2). That subdivision excepts from *Code Civ. Proc. § 425.17* "[a]ny action against any person or entity based upon the creation, dissemination, exhibition, advertisement, or other similar promotion of any dramatic, literary, musical, political, or artistic work, including, but not limited to, a motion picture or television program, or an article published in a newspaper or magazine of general circulation." The Senate analysis of the bill specifically stated that the statute would exempt news media and other media defendants from the exception when the underlying act relates to news gathering and reporting to the public. The court found no reason to distinguish a radio show from other media organizations, and therefore subdivision (d)(2) applied. Because plaintiff could not demonstrate a probability of prevailing on his claims, the court of appeals affirmed the trial court's ruling (*129 Cal. App. 4th 1050, 1067-1068, 1074)* .

[c] Code Civ. Proc. § 425.17(b) Does Not Apply Because the Action Falls Within the Exception Enumerated in Code Civ. Proc. § 425.17(d)(2)

In ***Major v. Silna*** *(2006) 134 Cal. App. 4th 1485, 36 Cal. Rptr. 3d 875* , defendant Silna had mailed a letter to residents of the City of Malibu supporting various city council candidates. Plaintiff Major sued Silna for injunctive relief based on this mailing, alleging that Silna had violated provisions of Malibu's campaign finance law by spending more than $100 on the mailings. Major also sought a temporary restraining order. In response, Silna filed a motion under the Anti-SLAPP statute. Two days later, Major dismissed his action against Silna. Silna requested an award of attorney fees under the Anti-SLAPP statute, but the trial court held that the action fell within the exception to the law as codified in *Code Civ. Proc. § 425.17(b)*. Silna appealed.

The court of appeals held that Silna was entitled to attorney fees because the case fell within the exception to the "public interest" exception found in *Code Civ. Proc. § 425.17(d)(2)*. By its plain language, section 417(d)(2) exempts from the public interest exception "[a]ny action against a person ... based upon the ... dissemination ... or other similar promotion of any ... political ... work ... " (*134 Cal. App. 4th 1485, 1494)* . The court found that Silna's letters supporting candidates for city council were "political work" within the meaning of the statute and did not differ from any newspaper article or editorial circulated in Malibu. Additionally, in enacting *Code Civ. Proc. § 425.17(b)*, the Legislature sought to reaffirm free speech rights such as those exercised by Silna. Therefore, the action fell outside the "public interest" exception of *Code Civ. Proc. § 425.17(b)* and because Major could not show a probability of prevailing on the merits, Silna was entitled to attorney fees (*134 Cal. App. 4th 1485, 1503)* .

[4] Additional Authorities

[a] The Action, if Successful, Would Not Enforce an Important Right Affecting the Public Interest or Confer a Significant Benefit on the General Public or a Large Class of Persons

Holbrook v. City of Santa Monica (2006) 144 Cal. App. 4th 1242, 51 Cal. Rptr. 3d 181 involved a lawsuit by two members of the Santa Monica City Council against the city. The members claimed that the late-running council meetings violated the United States and California constitutions as well as the Brown Act and Cal-OSHA regulations. In response, the city filed a demurrer and an Anti-SLAPP motion. The trial court granted the city's motion, and plaintiffs appealed. The court of appeal affirmed. The city's actions arose from governmental speech and legislative action, which are protected activity within the meaning of the Anti-SLAPP statute. Plaintiffs claimed on appeal that *Code Civ. Proc. § 425.17(b)* applied to remove their lawsuit from the purview of the statute. The court disagreed, holding that the action was not brought in the public interest; rather it was brought because plaintiffs disliked working late into the night. Additionally, ending the meetings earlier would not confer a significant benefit on the general public or a large class of persons. Plaintiffs could not show a probability of success on the merits and therefore their case was dismissed (*144 Cal. App. 4th 1242, 1250)* .

California Points & Authorities

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
CHAPTER 161 MOTIONS TO STRIKE: ANTI-SLAPP
PART II. FORMS
A. Supporting Special Motion to Strike

16-161 California Points & Authorities § 161.36

§ 161.36 Supporting Special Motion to Strike Action Against Constitutionally Privileged Conduct (SLAPP Suit) [Code Civ. Proc. § 425.17(c)]--Requirements of Code Civ. Proc. 425.17(c) Not Met

[1] FORM

[*This form should be used in combination with the form of memorandum supporting a special motion to strike against constitutionally privileged conduct (see § 161.30)*].

THE SPECIAL MOTION TO STRIKE SHOULD BE GRANTED BECAUSE PLAINTIFF'S COMPLAINT ARISES OUT OF SPEECH THAT DOES NOT AMOUNT TO A REPRESENTATION OF FACT PURSUANT TO THE REQUIREMENTS OF CODE OF CIVIL PROCEDURE SECTION 425.17(c) *or* DEFENDANT IS NOT PRIMARILY ENGAGED IN THE BUSINESS OF SELLING OR LEASING GOODS AND SERVICES *or* THE INTENDED AUDIENCE OF THE SPEECH WAS NOT AN ACTUAL OR POTENTIAL BUYER OR CUSTOMER.

A. Defendant Is Not Primarily in the Business of Selling or Leasing Goods and Services. The Anti-SLAPP exception set forth in *Code Civ. Proc. § 425.17(c)* does not apply unless defendant is primarily in the business of selling or leasing goods and services (*Code Civ. Proc. § 425.17(c)*; *All One God Faith, Inc. v. Organic & Sustainable Industry Standards, Inc. (2010) 183 Cal. App. 4th 1186, 1211-1219, 107 Cal. Rptr. 3d 861* ; *Taheri Law Group v. Evans (2008) 160 Cal. App. 4th 482, 492, 72 Cal. Rptr. 3d 847*).

B. Defendant's Statement or Conduct Was Not a Representation of Fact. The first prong of the Anti-SLAPP statute exception set forth in *Code Civ. Proc. § 425.17(c)* is not met if defendant's statement or conduct does not consist of representations of fact about defendant's or a competitor's business operations, goods, or services, that was made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services, or the statement was made in the course of delivering goods or services (*Code Civ. Proc. § 425.17(c)(1)*; *Navarro v. IHOP Properties, Inc. (2005) 134 Cal. App. 4th 834, 36 Cal. Rptr. 3d 385*).

C. The Intended Audience of Defendant's Statement Was Not an Actual or Potential Buyer or Customer. The second prong of the Anti-SLAPP statute exception set forth in *Code Civ. Proc. § 425.17(c)* is not met unless the

intended audience of defendant's conduct or statement is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence an actual or potential buyer or customer (*Code Civ. Proc. § 425.17(c)(2)*).

D. The Statement or Conduct About Defendant's or a Competitor's Business Operations, Goods, or Services Was Not Made for the Purpose of Obtaining Approval for, Promoting, or Securing Sales of the Defendant's Goods or Services or Made in the Course of Delivering the Defendant's Goods or Services. Even if the challenged statement or conduct was a representation of fact, the Anti-SLAPP exception set forth in *Code Civ. Proc. § 425.17(c)* does not apply unless the statement or conduct was made for either the purpose of obtaining approval for, promoting, or securing sales of the defendant's goods or services or the statement was made in the course of delivering such goods or services (*Code Civ. Proc. § 425.17(c)*; *Simpson Strong-Tie Co., Inc. v. Gore (2010) 49 Cal. 4th 12, 22-26, 109 Cal. Rptr. 3d 329, 230 P.3d 1117* ; *Mendoza v. ADP Screening & Selection Services, Inc. (2010) 182 Cal. App. 4th 1644, 1652, 107 Cal. Rptr. 3d 294* ; *Contemporary Services Corp. v. Staff Pro Inc. (2007) 152 Cal. App. 4th 1043, 1053-1055, 61 Cal. Rptr. 3d 434* ; *Sunset Millennium Associates v. LHO Grafton Hotel (2006) 146 Cal. App. 4th 300, 312, 52 Cal. Rptr. 3d 828*).

E. The Burden of Proving the Applicability of the Exception Set Forth in Code Civ. Proc. § 426.17(c)(1) Is On the Plaintiff. The burden of proof as to the applicability of the commercial speech exemption, therefore, falls on the party seeking the benefit of it, *i.e.*, the plaintiff (*Simpson Strong-Tie Co., Inc. v. Gore (2010) 49 Cal. 4th 12, 22-26, 109 Cal. Rptr. 3d 329, 230 P.3d 1117*).

[2] Comments

[a] Use of Form

This form, combined with the appropriate points and authorities contained in § 161.30, may be submitted in support of a special motion to strike the whole or any part of a complaint or cross-complaint setting forth a cause of action alleged to have arisen out of the statement or conduct of a person primarily engaged in the sale or leasing of goods and services within the meaning of *Code Civ. Proc. § 425.17(c)*. For further discussion, see *§ 161.30*. For discussion of requirements for exception to Anti-SLAPP statute set forth in *Code Civ. Proc. § 425.17(c)*, see *§ 161.62*.

Code Civ. Proc. § 425.17 does not apply to any of the following:

- Any person enumerated in *Cal. Const. Art. I, § 2(b)* or *Evid. Code § 1070*, or any person engaged in the dissemination of ideas or expression in any book or academic journal, while engaged in the gathering, receiving, or processing of information for communication to the public [*Code Civ. Proc. § 425.17(d)(1)*].

- Any action against any person or entity based upon the creation, dissemination, exhibition, advertisement, or other similar promotion of any dramatic, literary, musical, political, or artistic work, including, but not limited to, a motion picture or television program, or an article published in a newspaper or magazine of general circulation [*Code Civ. Proc. § 425.17(d)(2)*].

- Any nonprofit organization that receives more than 50 percent of its annual revenues from federal, state, or local government grants, awards, programs, or reimbursements for services rendered [*Code Civ. Proc. § 425.17(d)(3)*].

[3] Discussion of Authorities

[a] Defendant Is Not Primarily in the Business of Selling or Leasing Goods and Services

In ***All One God Faith, Inc. v. Organic & Sustainable Industry Standards, Inc.*** *(2010) 183 Cal. App. 4th 1186, 107 Cal. Rptr. 3d 861* , a soap company sued a trade association, which was in the process of developing a standard to define "organic" differently than federal law and certifying members meeting the standard to advertise their products as organic. The soap company alleged that the certification would constitute unfair competition and misleading advertising. The trade association moved to strike the complaint claim against it pursuant to the anti-SLAPP statute, which the trial court denied on the ground that the alleged conduct of certifying did not constitute an "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" within the meaning of *Code Civ. Proc. § 425.16*. The trial court stated that its ruling was not based in any part upon *Code Civ. Proc. § 425.17*; defendant's alleged conduct did not fall under *Code Civ. Proc. § 425.17(c)*, because defendant, while a trade group consisting of, and acting on behalf of, its members who were in the business of selling goods, was not itself "a person primarily engaged in the business of selling or leasing goods or services," and the plain language of § 425.17(c) did not extend to trade associations not themselves engaged in the business of selling or leasing goods or services (*183 Cal. App. 4th 1186, 1191-1198)* .

The Court of Appeal affirmed. With regard to the applicability of *Code Civ. Proc. § 425.17(c)*, it was undisputed that the association's members were in the business of selling goods and the association, as a nonprofit trade association, acted on its members' behalf. However, the plain language of § 425.17(c) made clear that the exception did not apply here. For the exception to apply, the speaker must be a person primarily engaged in the business of selling or leasing goods or services. Further, the legislative history showed that the Legislature explicitly considered and rejected an exception that would have applied to an entity merely "involved in the stream of commerce" (*183 Cal. App. 4th 1186, 1211-1219)* .

Taheri Law Group v. Evans *(2008) 160 Cal. App. 4th 482, 72 Cal. Rptr. 3d 847* involved a dispute between attorneys over a client. Plaintiff Taheri sued attorney Evans for intentional interference with prospective economic advantage and intentional interference with business relations, alleging it had represented a client for 18 months when suddenly the client discharged Taheri and hired Evans. Evans filed an Anti-SLAPP motion in response to Taheri's complaint, asserting the complaint arose during pending litigation, which constituted protected activity under the statute. The trial court granted the Anti-SLAPP motion, holding the complaint did arise from protected activity, and Taheri could not establish a probability of prevailing on his claims. Taheri appealed, arguing first that his causes of action did not arise from protected activity, and second that lawsuit was subject to the commercial speech exception found in *Code Civ. Proc. § 425.17(c).*

The court of appeals disagreed with Taheri. Taheri had argued that the lawsuit arose from Evans' soliciting a client, not litigating on behalf of that client. The court found that the complaint arose from Evans' communications with his client regarding the litigation and Evans' efforts to enforce a settlement agreement on behalf of his client. With regard to the commercial speech exception, the court explained that the Anti-SLAPP statute does not apply to causes of action arising from specified claims against business entities involving commercial speech or conduct. Although a lawyer may be said to be in the business of providing services, the court declined to find that a cause of action arising from a lawyer's conduct in advising a client on pending litigation could fall within the exception to the Anti-SLAPP statute. The court noted the legislative history surrounding the exception to the statute showed that the legislature only intended to except purely commercial disputes from the Anti-SLAPP statute. A dispute involving a lawyer's advice, the court reasoned, was different than a purely commercial dispute. The court also feared that applying the exception to a case such as this one would thwart a client's fundamental access to the courts. The court made it clear that it was not exempting all lawyers' activities from the Anti-SLAPP exception; for example, lawyer advertising would constitute commercial speech. In this case, however, there was no such advertising or solicitation. Because Taheri could not demonstrate a probability of prevailing on his claims, the judgment was affirmed (*160 Cal. App. 4th 482, 492)* .

[b] Defendant's Statement or Conduct Was Not a Representation of Fact

In ***Navarro v. IHOP Properties, Inc.*** *(2005) 134 Cal. App. 4th 834, 36 Cal. Rptr. 3d 385* , plaintiff was a franchisee of

defendant IHOP. IHOP had filed an unlawful detainer action against Navarro, and that action ended in a stipulated judgment. Under the judgment, Navarro was to have until a certain date to sell the franchise to avoid execution of the judgment by IHOP. IHOP subsequently filed an application for writ of possession and Navarro filed an application for stay of enforcement of that writ. The application was denied, and IHOP pursued execution of the judgment. Navarro then filed the instant action against IHOP for breach of contract, breach of the implied covenant of good faith and fair dealing, and fraud. Navarro claimed that IHOP had deliberately refused to consider offers from potential franchise buyers in a timely manner so that it could execute the judgment against *Navarro (134 Cal. App. 4th 834, 838)* . IHOP filed a demurrer and a special motion to strike under *Code Civ. Proc. § 425.16*. The trial court found that *Code Civ. Proc. § 425.17* did not apply, denied the motion under *Code Civ. Proc. § 425.16* and sustained the demurrer with leave to amend. IHOP appealed from the portion of the ruling denying the special motion to strike (*134 Cal. App. 4th 834, 838)* .

The court of appeals agreed with the trial court that *Code Civ. Proc. § 425.17* did not apply in this case. The speech at issue was IHOP's allegedly false promise to process potential buyers of Navarro's franchise without undue delay. Navarro claimed this speech met the requirements of *Code Civ. Proc. § 425.17(c)(1)* and therefore the action was exempt from *Code Civ. Proc. § 425.16*. However, the court held that such a promise did not qualify as a representation of fact but was instead an agreement to take certain actions in the future. Additionally, the promise was not made in the course of delivering goods and services, but rather in the context of settling a dispute. Any promises or statements were made in the context of settling a dispute, not in the context of a commercial transaction. Therefore, *Code Civ. Proc. § 425.17* did not apply to this action (*134 Cal. App. 4th 834, 840-841)* . The court went on to find that IHOP's statements were made in the course of negotiating the stipulated judgment, and therefore warranted protection under the Anti-SLAPP statute. Because plaintiff could not show a probability of prevailing on the merits, IHOP's special motion to strike should have been granted (*134 Cal. App. 4th 834, 844-845)* .

[c] The Statement or Conduct About Defendant's or a Competitor's Business Operations, Goods, or Services Was Not Made for the Purpose of Obtaining Approval for, Promoting, or Securing Sales of the Defendant's Goods or Services or Made in the Course of Delivering the Defendant's Goods or Services

The facts and procedural background of ***Simpson Strong-Tie Co., Inc. v. Gore*** *(2010) 49 Cal. 4th 12, 109 Cal. Rptr. 3d 329, 230 P.3d 1117* , are set forth in [d], *below*. The California Supreme Court, in affirming the judgment of the Court of Appeals, which had affirmed the granting of a special motion to strike finding that the exception in Code Civ. Proc. § 426.17(c) did not apply, held Code Civ. Proc. § 426.17(c)(1) exempts a cause of action arising from a statement or conduct that consists of representations of fact about that person's or a competitor's business operations, goods, or services that was made either "for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services" or "in the course of delivering the person's goods or services" (*Code Civ. Proc. § 425.17(c)(1)*), rather than prescribing a "content exemption" and a "delivery exemption" with distinctly different elements, creating two independent and parallel theories of exemption from the anti-SLAPP law, as the Court of Appeal had held. Section 425.17(c) exempts from the anti-SLAPP law a cause of action arising from commercial speech the following when each of the following is true (*49 Cal. 4th 12, 26-30)* :

1. The cause of action is against a person primarily engaged in the business of selling or leasing goods or services.

2. The cause of action arises from a statement or conduct by that person consisting of representations of fact about that person's or a business competitor's business operations, goods, or services.

3. The statement or conduct was made either for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services or in the course of delivering the person's goods or services.

4. The intended audience for the statement or conduct meets the definition set forth in § 425.17(c)(2).

In *Simpson Strong-Tie Co.*, defendant did not dispute that he was in the business of selling legal services, plaintiff's causes of action arise from his advertisement, the purpose of the advertisement was to promote his legal services, or the advertisement was addressed to a qualifying audience under § 425.17(c)(2). However, the causes of action did not arise from representations of fact about defendant's business operations, goods, or services." They arose from allegedly false statements about plaintiff's products, falling squarely outside § 425.17(c)'s exemption for commercial speech. The commercial speech exemption applies only to a cause of action "arising from" a statement or conduct consisting of representations of fact about the person's or a business competitor's business operations, goods, or services (*49 Cal. 4th 12, 30-33)* .

In ***Mendoza v. ADP Screening & Selection Services, Inc.*** *(2010) 182 Cal. App. 4th 1644, 107 Cal. Rptr. 3d 294* , plaintiff filled out an application for employment. As part of defendant's pre-employment background check on him, defendant accessed the Megan's Law Website (MLW). Although plaintiff's complaint did not expressly allege whether information regarding plaintiff was disclosed on the MLW or that plaintiff's prospective employer decided not to hire him based on information disclosed on the MLW, those factual allegations were implicit. Defendant filed a special motion to strike the complaint pursuant to the anti-SLAPP statute, arguing that plaintiff's claims for violation of provisions relating to the MLW prohibiting the use of information disclosed on the MLW for purposes relating to employment, and that any use of information disclosed on the MLW for such a purpose makes the user liable for actual damages, and attorney's fees, exemplary damages, or a civil penalty (*Pen. Code, § 290.46*(*l*)(2)(E), (4)(A)) arose from the company's actions in furtherance of its constitutional free speech rights, *i.e.*, defendant had a constitutional free speech right to republish information on the MLW to its clients. Defendant essentially conceded that it accessed the MLW, compiled information disclosed on the MLW, and provided the information for a fee to plaintiff's prospective employer, a client. The trial court granted the motion on the ground that defendant's conduct arose in furtherance of its *First Amendment* rights of commercial speech on a matter of public interest, *i.e.*, the identities of registered sex offenders, and the commercial speech exemption to the anti-SLAPP statute (*see Code Civ. Proc. § 425.17(c)*) was inapplicable. The trial court also found plaintiff could not establish a probability that he would prevail since defendant was not his prospective employer and did not "use" the MLW in violation of *Pen. Code §§ 290.4* and *290.46*, but instead simply "disclosed" information it found on the Web site; that he would prevail on his counts for violations of *Civ. Code § 1786.20(c)* and *Pen. Code §§ 290.4* and *290.46*; or that he had good cause to conduct discovery to oppose the motion (*182 Cal. App. 4th 1644, 1648-1651)* .

The Court of Appeal affirmed. The court found that the plain language of *Code Civ. Proc. § 425.17(c)* did not apply, because the statements by defendant upon which plaintiff based his complaint were not made by defendant about its own business or about one of its business competitors, but about plaintiff's presence on the MLW. *Code Civ. Proc. § 425.17(c)* does not provide that every case arising from statements uttered by a commercial enterprise is exempted from the anti-SLAPP statute's purview (*182 Cal. App. 4th 1644, 1652)* .

Contemporary Services Corp. v. Staff Pro Inc. *(2007) 152 Cal. App. 4th 1043, 61 Cal. Rptr. 3d 434* involved a lawsuit between competitors in the event staffing and audience management services business. Initially, in 2001, Contemporary Services Corp. (CSC) sued Staff Pro and its president for violations of the Unfair Practices Act. In 2004, Staff Pro sued CSC for defamation and unfair competition, and CSC cross-complained, stating the same causes of action. During the 2004 action, the discovery referee found that CSC had conducted discovery in an unfair manner and sanctioned CSC. The court also imposed evidentiary sanctions against CSC for stealing a disc from Staff Pro. Eventually, Staff Pro dismissed its complaint in the 2004 action in order to focus its energies and resources on the 2001 action. In 2006, shortly before trial was scheduled to start, the president of Staff Pro sent an e-mail to its customers updating the customers on the status of the litigation. The e-mail detailed various allegations regarding CSC's conduct in the litigation and the sanctions levied against CSC by the court. Also in 2006, CSC dismissed its cross-complaint in the 2004 action and filed a new action against Staff Pro for malicious prosecution (based on the 2004 action), abuse of process, defamation, and interference with economic advantage. The defamation action was based on the e-mail the

Staff Pro president sent to its customers. In response to CSC's lawsuit, Staff Pro filed a special motion to strike. The court granted the motion, ruling that the statements and conduct forming the basis of the lawsuit were protected speech and plaintiffs failed to establish a probability of prevailing. Plaintiffs appealed.

The court of appeal affirmed. On appeal, plaintiffs argued that *Code Civ. Proc. § 425.17(c)* applied because their cause of action was brought against a person primarily engaged in the business of selling or leasing goods or services and the statements made fell within the exception to the Anti-SLAPP statute carved out by *Code Civ. Proc. § 425.17(c)*. The court agreed that Staff Pro was primarily engaged in the business of selling event staffing services. However, Staff Pro's actions in filing the underlying action did not constitute "representations of fact about [Staff Pro's] or a business competitor's business operations, goods or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, [Staff Pro's] goods or services" as required by the statute. Additionally, the e-mail in question did not contain statements regarding Staff Pro's or CSC's goods or services but rather provided a summary of what was happening in the litigation. Therefore, the commercial speech exception did not apply. Because plaintiffs could not show a probability of prevailing on any of their claims, the Anti-SLAPP motion was properly granted (*152 Cal. App. 4th 1043, 1053-1055)* .

In ***Sunset Millennium Associates v. LHO Grafton Hotel*** *(2006) 146 Cal. App. 4th 300, 52 Cal. Rptr. 3d 828* , plaintiff sued defendant for breach of contract and injunctive and declaratory relief based on a written agreement between the two parties not to challenge the expansion of the other party's hotels. Plaintiff alleged that defendant had objected to the city's approval of an environmental impact report relating to an expansion of plaintiff's hotel. Defendant filed an Anti-SLAPP motion, which the trial court granted. Plaintiff appealed.

On appeal, the issue was whether the action fell within the exception to the Anti-SLAPP statute stated in *Code Civ. Proc. § 425.17(c)*. The exception states that the Anti-SLAPP statute does not apply to a cause of action brought against a defendant primarily engaged in the business of selling or leasing goods or services, providing certain other circumstances exist. The challenged statement or conduct must be a representation of fact about defendant's or a business competitor's operations. In this case, defendant was in the business of selling or leasing goods or services, and the challenged conduct did consist of statements about plaintiff's business operations. However, the statements were not made for the purpose of "obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, [defendant's] goods or services"; rather, they were made during the environmental impact report approval process. The statements also were not made in the course of delivering defendant's goods or services. Because neither of these elements applied to the facts of the case, the exception did not apply (*146 Cal. App. 4th 300, 312)* .

[d] The Burden of Proving the Applicability of the Exception Set Forth in Code Civ. Proc. § 426.17(c)(1) Is On the Plaintiff

In ***Simpson Strong-Tie Co., Inc. v. Gore*** *(2010) 49 Cal. 4th 12, 109 Cal. Rptr. 3d 329, 230 P.3d 1117* , a corporation in the business of designing, manufacturing, and marketing building products, including metal connectors and other hardware for use in wood frame construction, which, at the recommendation of the United States Environmental Protection Agency, industry stopped selling lumber treated with chromium copper arsenate, due to health hazards posed by its arsenic content and substituted alternative lumber products, such as wood treated with alkaline copper quaternary and copper azole, which were "more corrosive" to galvanized steel products, which the corporation communicated to the building industry and to the public generally through its Web site, annual catalog, articles in engineering and building magazines, bulletins issued to the building industry, point-of-sale information, and annual report, sued a California attorney who had arranged for an advertisement to be placed in a newspaper to locate individuals who had purchased galvanized fasteners and connectors manufactured by plaintiff and two other companies, which together were responsible for most of the metal fasteners sold to consumers in California. In a letter sent before filing the complaint, counsel for plaintiff advised defendant that the advertisement falsely implied that plaintiff's galvanized screws failed to meet appropriate industry standards and that a valid claim could exist against plaintiff based upon negligence or product liability, demanded defendant cease publication of any further defamatory advertisements directed at plaintiff and

reserved plaintiff's right to recover against defendant for any costs or damages that might have already resulted from the advertisement or any similar publication. Defendant did not respond to the letter or to a subsequent letter indicating that defendant's failure to respond suggested the claims were without merit, and the newspaper advertisement was false, misleading, and defamatory, and that unless defendant could present specific evidence to support the charges, plaintiff intended to pursue its defamation claim against defendant's firm and vindicate its rights. Prior to filing the action, plaintiff retained an opinion survey firm to confirm that the advertisement had caused injury to plaintiff's reputation. The survey revealed that selected shoppers, after reading the advertisement, were significantly more likely to believe that plaintiff's galvanized screws were defective or of low quality and were significantly less likely to purchase galvanized screws manufactured by plaintiff. Plaintiff then filed the action for defamation, trade libel, false advertising, and unfair business practices, seeking compensatory and punitive damages as well as injunctive relief. Defendant moved to strike the complaint under *Code Civ. Proc. § 425.16*, and plaintiff invoked the exemption to the anti-SLAPP law for commercial speech under *Code Civ. Proc. § 425.17(c)*. The trial court granted the special motion to strike and entered a judgment of dismissal, finding defendant had made a threshold showing that the statements were made in furtherance of his right of petition or free speech on an issue of public interest, plaintiff had failed to demonstrate a probability of prevailing on the merits, and the commercial speech exemption did not apply because the advertisement made no statement about a business competitor's products or services. The Court of Appeal affirmed in a published opinion. The court first assigned the burden of persuasion with respect to the applicability of the section 425.17(c) exemption to plaintiff as the party invoking the exemption, disagreeing with *Brill Media Co., LLC v. TCW Group, Inc. (2005) 132 Cal. App. 4th 324, 33 Cal. Rptr. 3d 371* , which had assigned the burden to the defendant to establish that the cause of action is not exempt. The court next determined that while the advertisement was made for the purpose of promoting defendant's services as an attorney, plaintiff's causes of action did not arise from any representation of fact about defendant's or a competitor's services or business operations. Concluding that the anti-SLAPP statute applied and that plaintiff had failed to establish a probability of prevailing on any of its claims, the Court of Appeal affirmed the order granting the special motion to strike and the judgment of dismissal. The California Supreme Court granted review to address the conflict in the case law concerning the construction of the commercial speech exemption to the anti-SLAPP statute (*49 Cal. 4th 12, 17-21)* .

The California Supreme Court affirmed the judgment of the Court of Appeal. The Court held that although *Evid. Code § 500*, providing that, except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense the party is asserting, superseded former Evid. Code § 1981, which had provided that the burden of proof was on the party holding the affirmative of the issue, the change in wording did not upset the traditional rule of statutory construction that when a statute has exemptions, exceptions or matters that will avoid the statute, the burden is on the claimant to show that the claimant falls within that category. Because establishing the commercial speech exemption was essential to plaintiff's defense to the special motion to strike, *Evid. Code § 500* placed the burden of proof on plaintiff. Further, although the ordinary rules governing allocation of the burden of proof may be disregarded for policy reasons in exceptional circumstances, the reasons justifying a shift in the normal allocation of the burden of proof must be compelling, and plaintiff failed to identify any compelling justification. Plaintiff failed to explain how a plaintiff would be significantly disadvantaged in demonstrating that the statement or conduct underlying its cause of action consisted of representations of fact about the defendant's or a business competitor's business operations, goods, or services; that the defendant's statement or conduct was made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services or in the course of delivering the person's goods or services; or that the intended audience was an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer, as required by *Code Civ. Proc. § 425.17(c)(1), (2)*). Thus, the burden of proof as to the applicability of the commercial speech exemption falls on the party seeking the benefit of it, *i.e.*, the plaintiff (*49 Cal. 4th 12, 22-26)* .

California Points & Authorities

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CHAPTER 161 MOTIONS TO STRIKE: ANTI-SLAPP
PART II. FORMS
A. Supporting Special Motion to Strike

16-161 California Points & Authorities §§ 161.37-161.59

[Reserved]

§§ 161.37[Reserved]

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
CHAPTER 161 MOTIONS TO STRIKE: ANTI-SLAPP
PART II. FORMS
PART B. Opposing Special Motion to Strike

16-161 California Points & Authorities § 161.60

§ 161.60 Opposing Special Motion to Strike Action Against Constitutionally Privileged Conduct (SLAPP Suit) [Code Civ. Proc. § 425.16(b)]--Grounds for Motion Lacking

[1] FORM

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN OPPOSITION OF SPECIAL
Plaintiff,	)	MOTION TO STRIKE PURSUANT TO CODE CIV.
vs.	)	PROC. § 425.16
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

THE SPECIAL MOTION TO STRIKE SHOULD NOT BE GRANTED BECAUSE THE DEFENDANT'S ACTS WERE NOT IN FURTHERANCE OF DEFENDANT'S RIGHT OF _____ [PETITION *and/or* FREE SPEECH] IN CONNECTION WITH A PUBLIC ISSUE AS DEFINED IN CODE OF CIVIL PROCEDURE SECTION 425.16(e).

A. Defendant Bears Initial Burden to Make a Prima Facie Showing. A defendant who brings a special motion to strike under *Code Civ. Proc. § 425.16* bears the initial burden of making a prima facie showing that the plaintiff's cause of action arose from the defendant's acts in furtherance of the defendant's right of petition or free speech under the United States or California Constitution in connection with a public issue. A defendant's special motion to strike should be denied if the defendant fails to meet this initial prima facia showing (*Guessous v. Chrome Hearts, LLC (2009) 179*

Cal. App. 4th 1177, 102 Cal. Rptr. 3d 214 ; *Castillo v. Pacheco (2007) 150 Cal. App. 4th 242, 251, 58 Cal. Rptr. 3d 305* ; *Kurwa v. Harrington, Foxx, Dubrow & Canter, LLP (2007) 146 Cal. App. 4th 841, 849, 53 Cal. Rptr. 3d 256* ; *Dyer v. Childress (2007) 147 Cal. App. 4th 1273, 1283, 55 Cal. Rptr. 3d 544* ; *Consumer Justice Center v. Trimedica International, Inc. (2003) 107 Cal. App. 4th 595, 599-605, 132 Cal. Rptr. 2d 191*).

B. Defendant Must Show a Lawful Exercise of Constitutional Rights. Even if the acts alleged in the complaint are done in furtherance of the constitutional rights of free speech or petition for redress of grievances in connection with a public issue, if those acts are themselves illegal, defendant is not entitled to protection under *Code Civ. Proc. § 425.16* (*Flatley v. Mauro (2006) 39 Cal. 4th 299, 320, 46 Cal. Rptr. 3d 606* ; *Cohen v. Brown (2009) 173 Cal. App. 4th 302, 318, 93 Cal. Rptr. 3d 24* ; *Novartis Vaccines and Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc. (2006) 143 Cal. App. 4th 1284, 1296, 50 Cal. Rptr. 3d 27* ; *Paul for Council v. Hanyecz (2001) 85 Cal. App. 4th 1356, 1363-1367, 102 Cal. Rptr. 2d 864*).

C. Anti-SLAPP Motion Must Be Denied if Plaintiff Demonstrates a Probability of Prevailing on the Claim. Even if the initial burden is met that the plaintiff's cause of action arose from the defendant's acts in furtherance of the rights of petition or free speech, the Anti-SLAPP motion should be denied if the opposing party demonstrates the probability that the plaintiff will prevail on the claim; that is, the opposing party demonstrates that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited (*Zamos v. Stroud (2004) 32 Cal. 4th 958, 965, 12 Cal. Rptr. 3d 54, 87 P.3d 802* ; *Tichinin v. City of Morgan Hill (2009) 177 Cal. App. 4th 1049, 1062-1089, 99 Cal. Rptr. 3d 661* ; *Sycamore Ridge Apartments v. Naumann (2007) 157 Cal. App. 4th 1385, 1412, 69 Cal. Rptr. 3d 561*).

D. Analysis of Plaintiff's Probability of Prevailing on Claim Must Include All Available Defenses. When ruling on the second prong of an Anti-SLAPP motion, the court must take into account not only the substantive merits of plaintiffs' complaint, but also all available defenses (*Traditional Cat Assn., Inc. v. Gilbreath (2004) 118 Cal. App. 4th 392, 398, 13 Cal. Rptr. 3d 353*).

[*Optional*] **E. Merely Having Some Connection With Official Proceedings Does Not Mean Anti-SLAPP Protections Apply.** *Code of Civil Procedure Section 425.16* does not accord Anti-SLAPP protection to suits arising from any act having any connection, however remote, with an official proceeding; the statements or writings in question must occur in connection with an issue under consideration or review in the proceeding (*Hylton v. Frank E. Rogozienski, Inc. (2009) 177 Cal. App. 4th 1264, 1273, 99 Cal. Rptr. 3d 805* ; *United States Fire Ins. Co. v. Sheppard, Mullin, Richter & Hampton (2009) 171 Cal. App. 4th 1617, 1624-1629, 90 Cal. Rptr. 3d 669* ; *Wang v. Wal-Mart Real Estate Business Trust (2007) 153 Cal. App. 4th 790, 810-811, 63 Cal. Rptr. 3d 575* ; *Kolar v. Donahue, McIntosh & Hammerton (2006) 145 Cal. App. 4th 1532, 1540, 52 Cal. Rptr. 3d 712* ; *Blackburn v. Brady (2004) 116 Cal. App. 4th 670, 10 Cal. Rptr. 3d 696*). The scope of the protections afforded to litigation-related communications under the Anti-SLAPP statute and that afforded by the litigation privilege (*Civ. Code § 47*) are not identical, and to suggest that nearly any attempt at negotiation is covered by the privilege, especially when attorneys are involved, is unduly overbroad, and will not support a claim of official proceedings for purposes of applying the Anti-SLAPP statute (*Haneline Pacific Properties, LLC v. May (2008) 167 Cal. App. 4th 311, 319-320, 83 Cal. Rptr. 3d 919*).

[*Optional*] **F. Mere Acts of Governance Are Not Exercises of Free Speech or Petition.** Acts of governance mandated by law are not exercises of free speech or petition within the meaning of the Anti-SLAPP statute of *Code of Civil Procedure Section 425.16* (*San Ramon Valley Fire Protection Dist. v. Contra Costa County Employees' Retirement Assoc. (2004) 125 Cal. App. 4th 343, 354, 22 Cal. Rptr. 3d 724*).

[*Optional*] **G. *Code Civ. Proc. § 425.17* Applies Retroactively.** *Code of Civil Procedure Section 425.17* is properly characterized as a procedural statute applicable to pending actions, and the new statutory scheme may be applied to pending actions without triggering retrospectivity concerns (*Brenton v. Metabolife International, Inc. (2004) 116 Cal. App. 4th 679, 689-690, 10 Cal. Rptr. 3d 702*).

[*Optional*] **H. Plaintiff Opposing a Late Anti-SLAPP Motion Need Not Demonstrate Prejudice.** A plaintiff need not establish prejudice for a late-filed Anti-SLAPP motion (*Olsen v. Harbison (2005) 134 Cal. App. 4th 278, 286-287, 35 Cal. Rptr. 3d 909*).

[*Optional*] **I. Defendants Who Represent Themselves in Litigation Are Not Entitled to Attorney Fees When Prevailing on an Anti-SLAPP Motion.** A defendant who performs his or her own legal work is not entitled to recover attorney fees under *Code of Civil Procedure section 425.16(c)* (*Witte v. Kaufman (2006) 141 Cal. App. 4th 1201, 1213, 46 Cal. Rptr. 3d 845*).

[*Optional*] **J. The Anti-SLAPP Statute Does Not Apply to Non-Judicial Proceedings.** By its own terms, *Code of Civil Procedure section 425.16* only applies to court proceedings (*Garretson v. Post (2007) 156 Cal. App. 4th 1508, 1521, 68 Cal. Rptr. 3d 230* ; *Sheppard v. Lightpost Museum Fund (2006) 146 Cal. App. 4th 315, 323, 52 Cal. Rptr. 3d 821*). The Anti-SLAPP statute only applies to a "cause of action," which must be contained in a complaint, cross-complaint, petition or similar pleading initiating a judicial proceeding; and a request for a subpoena does not fit this requirement (Tendler v. www.jewishsurvivors.blogspot.com *(2008) 164 Cal. App. 4th 802, 807, 79 Cal. Rptr. 3d 407*). A lawsuit existing before the activity that is the subject of the Anti-SLAPP motion does not automatically make the activity part of a court proceeding (*McConnell v. Innovative Artists Talent and Literary Agency (2009) 175 Cal. App. 4th 169, 176, 96 Cal. Rptr. 3d 1*).

[*Optional*] **K. A Plaintiff Prevailing on an Anti-SLAPP Motion Shall Be Awarded Costs and Attorney's Fees if the Court Finds the Motion Is Frivolous or Is Solely Intended to Cause Unnecessary Delay.** *Code of Civil Procedure section 425.16(c)* authorizes an attorney's fee award to a plaintiff if the court finds defendant's Anti-SLAPP motion is frivolous (*Code Civ. Proc. § 425.16(c)*; *see* *Ketchum v. Moses (2001) 24 Cal. 4th 1122, 1131, 104 Cal. Rptr. 2d 377* ; *see also* *Premier Medical Management Systems, Inc. v. California Ins. Guarantee (2008) 163 Cal. App. 4th 550, 555, 77 Cal. Rptr. 3d 695*). A party prevailing on an Anti-SLAPP motion may seek an attorney fee award by three different avenues: as a part of the motion to strike itself, by a subsequent noticed motion, or as part of a cost memorandum at the conclusion of the litigation (Carpenter v. Jack In *The Box Corp. (2007) 151 Cal. App. 4th 454, 461, 59 Cal. Rptr. 3d 839*).

[*Optional*] **L. An Amorphous Public Interest Is Insufficient to Invoke the Anti-SLAPP Statute.** The fact that a broad and amorphous public interest can be connected to a specific dispute is not sufficient to meet the statutory requirements of *Code Civ. Proc. § 425.16* (*World Financial Group, Inc. v. HBW Ins. & Financial Services, Inc. (2009) 172 Cal. App. 4th 1561, 1573, 92 Cal. Rptr. 3d 227*).

[*Optional*] **M. *Code of Civil Procedure § 425.16* Only Applies When *First Amendment* Free Speech or Petition Rights Are At Stake.** *Code of Civil Procedure Section 425.16* does not come into play unless the right of free speech or the right to petition is involved. The cause of action itself must be based on the speech or petitioning activity. If neither of those rights is at stake, *Code Civ. Proc. § 425.16* is inapplicable, irrespective of whether the subject of the dispute may otherwise be a matter of public interest (*Graffiti Protective Coatings, Inc. v. City of Pico Rivera (2010) 181 Cal. App. 4th 1207, 104 Cal. Rptr. 3d 692* ; *Turner v. Vista Pointe Ridge Homeowners Assn. (2009) 180 Cal. App. 4th 676, 102 Cal. Rptr. 3d 750*).
Dated: _____.

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a defendant's special motion to strike under *Code Civ. Proc. § 425.16* when the grounds for the motion are lacking, that is, when the defendant's acts were not done "in furtherance of ... [the defendant's] right of petition or free speech under the United States or California Constitution in connection with a public issue," as that phrase is defined in *Code Civ. Proc. § 425.16(e)*.

Counsel should insert argument in the form, to show what element or elements of the definition is missing from the case. In doing so, counsel must be aware that under *Briggs v. Eden Council for Hope and Opportunity (1999) 19 Cal. 4th 1106, 81 Cal. Rptr. 2d 471, 969 P.2d 564* , cases that have narrowly construed the scope *Code Civ. Proc. § 425.16* have been disapproved. In Briggs the court held that under Section 425.16, a defendant moving to strike a cause of action arising from a statement made before, or in connection with an issue under consideration by, a legally authorized official proceeding need not separately demonstrate that the statement concerned an issue of public significance. To the extent they hold to the contrary, the Court disapproved *Linsco/Private Ledger, Inc. v. Investors Arbitration Services, Inc. (1996) 50 Cal. App. 4th 1633, 1639-1640, 58 Cal. Rptr. 2d 613* , *Ericsson GE Mobile Communications, Inc. v. C.S.I. Telecommunications Engineers (1996) 49 Cal. App. 4th 1591, 57 Cal. Rptr. 2d 491* , *Zhao v. Wong (1996) 48 Cal. App. 4th 1114, 55 Cal. Rptr. 2d 909* , and *Mission Oaks Ranch, Ltd. v. County of Santa Barbara (1998) 65 Cal. App. 4th 713, 77 Cal. Rptr. 2d 1* [*Briggs v. Eden Council for Hope and Opportunity (1999) 19 Cal. 4th 1106, 1123 n.10, 81 Cal. Rptr. 2d 471, 969 P.2d 564]* . The analysis should be based on each of the four independent clauses of *Code Civ. Proc. § 425.16(e)* [see *Briggs v. Eden Council for Hope and Opportunity (1999) 19 Cal. 4th 1106, 1117, 81 Cal. Rptr. 2d 471, 969 P.2d 564]* .

[b] Opposing Memoranda

In an appropriate case, this form may be used to oppose the memorandum *set out in § 161.30*.

[3] Discussion of Authorities

[a] Defendant Bears Initial Burden to Make a Prima Facie Showing

In ***Guessous v. Chrome Hearts, LLC*** *(2009) 179 Cal. App. 4th 1177, 102 Cal. Rptr. 3d 214* , a United States citizen living in California and a French limited liability company with its principal place of business in Paris, sued a Delaware limited liability company with its principal place of business in Los Angeles. Defendant had previously sued plaintiffs in federal court twice for trademark and copyright infringement with respect to jewelry offered for sale by one of the plaintiffs. As a result, defendant and the American plaintiff entered into a written settlement agreement containing a covenant that defendant would not sue plaintiff for trademark infringement, trade dress infringement, unfair competition, or similar or related claims whose gravamen was alleged consumer or buyer confusion or potential confusion, including any claim based on the alleged similarity between the overall look and feel of defendant's products and products designed, manufactured, or sold by the American plaintiff. The covenant applied worldwide to existing lines of clothing and jewelry manufactured and sold by the parties and to future products not yet designed, manufactured, or sold. After defendant opened its own boutique in Paris, it sued the French plaintiff in the Paris Court of First Instance (Tribunal de Grande Instance), alleging infringement of defendant's trademarks and seeking to enjoin that plaintiff from using these marks. The French court enjoined the French plaintiff from using defendant's marks. The French plaintiff appealed, and the Paris Court of Appeals (Cour d'appel de Paris) affirmed the lower court. The French plaintiff appealed to the French Supreme Court (Cour de Cassation), and filed a request for reappraisal in the Paris Court of Appeals. These appeals were still pending at the time of the trial court's ruling on the motion to strike at issue here. Defendant filed a second action against the French plaintiff in France, alleging infringement of its trademark, which was also still pending. Plaintiffs then filed suit in Los Angeles against defendant for breach of contract and declaratory relief, alleging that the filing of the French actions violated the covenant not to sue. They also sought to

permanently enjoin defendant from proceeding with the two trademark infringement actions being prosecuted in France, and from ever filing another lawsuit against plaintiffs anywhere in the world alleging trademark infringement, trade dress infringement, unfair competition, or any similar or related claim, with certain exceptions. In response, defendant filed a special motion to strike the complaint under the anti-SLAPP statute. The trial court ruled that the statute applied to plaintiffs' causes of action, but found that plaintiffs had established a prima facie case for their claims and denied the motion (*179 Cal. App. 4th 1177, 1180-1182)* .

The Court of Appeal reversed, holding that the anti-SLAPP statute did not apply to plaintiffs' claims. The court found that the express language of the anti-SLAPP statute limits motions to strike to causes of action arising from any act "in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue" (*Code Civ. Proc. § 425.16(b)(1)*), and it clearly limits the petitioning or free speech activity to that made pursuant to rights granted by the United States or California Constitutions, and neither Constitution grants a United States citizen the right to petition a foreign government. Plaintiffs' two causes of action were not subject to a special motion to strike under § 425.16, because the first cause of action for breach of contract arose from the lawsuits filed by defendant in France, and the second cause of action for declaratory relief also arose from the filing of the trademark infringement lawsuits in France. The trial court's contrary finding that § 425.16 applied to plaintiffs' declaratory relief claim focused on the requests for prospective declaratory and injunctive relief based on the viability of future actions defendant might file in the United States. However, there was no basis for a prospective grant of protection. Moreover, § 425.16 applies only to a cause of action, not to a remedy. Even if prospective relief could implicate the anti-SLAPP statute, when a cause of action alleges both protected and unprotected activity, a court must examine the cause of action to determine whether protected activity forms the "principal thrust or gravamen" of the claim. It was clear from plaintiffs' complaint that the gravamen of the declaratory relief claim was a request for a determination of the extent to which the covenant not to sue limited defendant's ability to proceed with the two trademark infringement lawsuits filed in France, which constituted the core of the declaratory relief claim and did not implicate conduct protected by the United States or California Constitutions. Plaintiffs' requests for a judicial determination concerning lawsuits filed elsewhere in the world (which therefore included the United States) and an injunction against future lawsuits violating the covenant not to sue were merely incidental to the core claim, and not sufficient to trigger § 425.16. Because the court concluded that defendant failed to meet its initial burden of demonstrating that plaintiffs' causes of action arose from an act in furtherance of the right of petition or free speech under the United States or California Constitutions, the burden never shifted to plaintiffs to demonstrate a probability of prevailing on their claims (*179 Cal. App. 4th 1177, 1184-1187)* .

In ***Castillo v. Pacheco*** *(2007) 150 Cal. App. 4th 242, 58 Cal. Rptr. 3d 305* , plaintiffs sued their neighbors for nuisance as a result of numerous ceremonial outdoor fires. In response, defendant neighbors filed an Anti-SLAPP motion, alleging the conduct complained of arose from their conduct in furtherance of their constitutional right of free speech of a religious nature. Defendants claimed the outdoor open fires were a part of a sacred Native American tribal ritual. The trial court denied the motion, holding that the creation of fires is not a constitutionally protected act of speech of petition. Defendants appealed.

The court of appeals affirmed, holding that a cause of action arising from an act in furtherance of a person's free exercise of religion is not subject to an Anti-SLAPP motion. The court noted that *Code Civ. Proc. § 425.16* mentions only two of the rights found in the *First Amendment*: the rights of speech and petition. Although the Legislature amended the statute to mandate a broad interpretation of *Code Civ. Proc. § 425.16*, the statute still does not "import wholesale the protections of the *First Amendment*" (*150 Cal. App. 4th 242, 252)* .

In ***Kurwa v. Harrington, Foxx, Dubrow & Canter, LLP*** *(2007) 146 Cal. App. 4th 841, 53 Cal. Rptr. 3d 256* , two ophthalmologists formed a corporation to enter into an agreement with an HMO to provide care for the HMO's patients. After a period of time, one of the doctors, Dr. Kislinger, wished to disassociate with Dr. Kurwa and consulted attorney Goldfarb. Goldfarb wrote a letter to the HMO on Dr. Kislinger's behalf, stating that Dr. Kurwa had had his medical license suspended (which was accurate) and that Goldfarb had formed a new medical corporation for Dr. Kislinger. The

letter requested that the HMO transfer its provider agreement to the new medical corporation. Based on this letter, the HMO did terminate the prior agreement and enter into a new agreement with Dr. Kislinger's new corporation. Dr. Kurwa filed suit against Dr. Kislinger, the HMO, Goldfarb, and Goldfarb's law firm, Harrington, Foxx, Dubrow & Canter, LLP. Harrington filed a special motion to strike, arguing that the sending of the letter to the HMO constituted protected activity within the meaning of *Code Civ. Proc. § 425.16(e)*. The trial court denied the motion, stating that Harrington had failed to establish that the mailing of the letter was protected activity. Harrington appealed.

The court of appeals affirmed, agreeing that writing and sending of the letter was not protected activity under the Anti-SLAPP statute. On appeal, Harrington claimed that the letter was sent in a "public forum," analogizing to cases holding that "speech by mail," such as the mailing of a campaign flyer, is a recognized public forum under the Anti-SLAPP statute. The court held that mailing a letter to the president of the HMO was not analogous to sending a campaign flyer to thousands of people, and that the letter was not sent in a public forum. Additionally, the contents of the letter were not a matter of public interest. In prior cases, courts have held that statements made regarding an issue of public interest to a limited but definable portion of the public in the context of an ongoing controversy are entitled to protection under the Anti-SLAPP statute (*see, e.g., Damon v. Ocean Hills Journalism Club (2000) 85 Cal. App. 4th 468, 102 Cal. Rptr. 2d 205* ; *Macias v. Hartwell (1997) 55 Cal. App. 4th 669, 64 Cal. Rptr. 2d 222*). Nor did the letter concern a matter of interest to the general public. Instead, the letter involved a private matter between the HMO and the two doctors. Therefore, defendant's Anti-SLAPP motion was denied (*146 Cal. App. 4th 841, 849)* .

Dyer v. Childress *(2007) 147 Cal. App. 4th 1273, 55 Cal. Rptr. 3d 544* was a defamation action arising out of the 1994 movie "Reality Bites." Plaintiff Troy Dyer attended film school with defendant Childress, who wrote the screenplay for Reality Bites. The main character in the movie is named Troy Dyer. The lawsuit followed the release of a Tenth Anniversary Edition DVD of the movie, and plaintiff claimed his career as a financial consultant had been negatively affected by association with the movie character. Defendants filed a special motion to strike, claiming the release of the DVD constituted protected activity because the issues addressed in the film were matters of widespread public interest. The trial court denied defendants' motion, and defendants appealed.

The court of appeals affirmed. Defendants contended that because the film Reality Bites addresses topics of broad public interest, the film involved the right of free speech in connection with a public issue or an issue of public importance. The court disagreed, stating that the specific dispute underlying the lawsuit was the alleged misuse of plaintiff's "persona." Because the portrayal of Troy Dyer in the movie is not itself an issue of public interest, the lawsuit was not subject to a special motion to strike regardless of the fact that the movie as a whole might concern issues of public interest (*147 Cal. App. 4th 1273, 1283)* .

In ***Consumer Justice Center v. Trimedica International, Inc.*** *(2003) 107 Cal. App. 4th 595, 132 Cal. Rptr. 2d 191* , plaintiffs sued Trimedica for false advertising, consumer fraud and related claims with respect to the product Grobust. Trimedica's literature states that Grobust is a pill that "offers a revolutionary breakthrough that provides a 100% natural alternative to breast implants." According to a "doctor" endorsing Grobust, "Claims of a breast enlargement of one half inch in 45 days have been substantiated." Trimedica filed a special motion to strike pursuant to *Code Civ. Proc. § 425.16* (the Anti-SLAPP statute), arguing the complaint constituted a SLAPP suit because the claims arose from acts in furtherance of Trimedica's rights to petition and to engage in free speech under the federal and California Constitutions. CJC countered by arguing the Anti-SLAPP statute was not intended to protect allegedly false commercial speech. The trial court denied the motion, stating that Trimedica's commercial speech regarding Grobust did not implicate a public issue within the meaning of the Anti-SLAPP statute.

On appeal, the court held defendants were unable to satisfy the first prong of the Anti-SLAPP statute because the commercial speech involved did not implicate a matter of public interest within the meaning of *Code Civ. Proc. § 425.16(e)*; defendant's claims of an "herbal product that provides a 100% natural alternative to breast implants" was commercial speech about the specific properties and efficacies of a particular product and not a matter of public interest; if the court were to find a matter of public interest in this case, nearly any product could claim its speech was about a

topic of public interest (*107 Cal. App. 4th 595, 600-602)* .

[b] Defendant Must Show a Lawful Exercise of Constitutional Rights

In ***Flatley v. Mauro*** *(2006) 39 Cal. 4th 299, 46 Cal. Rptr. 3d 606* , plaintiff was a well-known Irish dance performer who sued defendant, an attorney, for civil extortion, intentional infliction of emotional distress, and wrongful interference with economic advantage. The suit arose out of allegations that plaintiff had raped a woman named Tyna Marie Robertson in a hotel suite in Las Vegas. Plaintiff acknowledged the two had spent the night together, but contended all activities were consensual. Shortly after the encounter between plaintiff and Robertson, defendant Mauro sent plaintiff's attorney a letter making a claim for settlement and making various threats, including the filing of suit and press releases. Plaintiff's attorney called Mauro in response to the letter and Mauro gave the attorney a deadline within which to offer sufficient payment or else they would "go public." Plaintiff did not pay Robertson and Mauro, and Robertson both sued Flatley for battery and intentional infliction of emotional distress and appeared on television with defendant Mauro to describe the alleged rape. In response to plaintiff's lawsuit, defendant Mauro filed an Anti-SLAPP motion, contending that his letter to plaintiff's attorney was a prelitigation settlement offer which was protected by *Code Civ. Proc. § 425.16(e)(1)* and *(4)*. The trial court denied the Anti-SLAPP motion, holding that Mauro had not satisfied his burden of showing that his conduct was protected by the Anti-SLAPP statute. The court of appeal affirmed, holding that Mauro's conduct constituted extortion, and the Supreme Court granted Mauro's petition for review.

The Supreme Court affirmed as well, and in doing so addressed the issue of illegal conduct in connection with the Anti-SLAPP statute. The court noted that, in order to effectuate the Legislature's intent, it has thus far rejected attempts to read into the statute requirements not explicitly contained in the statute. The court discussed with approval *Paul for Council v. Hanyecz (2001) 85 Cal. App. 4th 1356, 102 Cal. Rptr. 2d 864* . In Paul, the appellate court held that the activity underlying the litigation--defendants' campaign money laundering--was not a valid activity undertaken in furtherance of defendants' constitutional right of free speech. In Paul, the defendants had conceded the illegal nature of their conduct and therefore there was no factual dispute in this regard. Illegal conduct, the appellate court held, does not fall within the purview of the Anti-SLAPP statute. The Supreme Court explicitly stated its agreement with the Paul rationale in stating that " ... section 425.16 cannot be invoked by a defendant whose assertedly protected activity is illegal as a matter of law and, for that reason, is not protected by constitutional guarantees of free speech and petition" (*39 Cal. 4th 299, 317)* . The question of whether defendant's conduct was illegal as a matter of law is a preliminary question, and is unrelated to the second prong of the Anti-SLAPP test. The court held that defendant Mauro's letter to plaintiff, along with his subsequent telephone calls, amounted to the crime of extortion as a matter of law. Mauro threatened to publicly accuse plaintiff of rape unless he paid Mauro and Robertson a sum of money. Therefore, Mauro's conduct was not entitled to Anti-SLAPP protection and the trial court properly denied Mauro's special motion to strike (*39 Cal. 4th 299, 333)* .

Cohen v. Brown *(2009) 173 Cal. App. 4th 302, 93 Cal. Rptr. 3d 24* originally arose out of a personal injury suit relating to an automobile accident. Defendant Brown, an attorney, filed suit against those at fault in the automobile accident on behalf of the injured party in the underlying accident. Defendant then asked plaintiff Cohen to associate in on behalf of the plaintiff to assist in the case, as Cohen was both a licensed attorney and physician. Cohen's complaint against Brown alleged, however, that Brown did not disclose that his license to practice law had been suspended. Cohen's complaint further alleged that Brown did not obtain the client's consent to the fee sharing arrangement that Cohen and Brown agreed upon, as required by State Bar rules. Cohen also contended that Brown misrepresented the extent of the work he had done on the case prior to Cohen's involvement. Cohen eventually withdrew, and Brown hired another attorney to associate in. The case eventually settled for $2 million. Brown then informed Cohen that he was not entitled to any portion of the attorney fees, as the client had never consented to any such arrangement. Brown told Cohen, in writing, that he would file a complaint with the State Bar if Cohen did not permit the entire amount of the attorney fees to go to Brown. Cohen responded that the attorney fee portion of the settlement should be kept in a joint account pending determination of the fee dispute, but Brown would not agree to that proposal. Brown then filed a false complaint with the State Bar against Cohen, in the client's name, and told Cohen that he should sign off on the

settlement check or else he would live to regret having a State Bar complaint pending against him.

Cohen then filed suit against Brown for intentional misrepresentation, breach of contract, conversion, extortion, unfair competition, unjust enrichment and intentional infliction of emotional distress. In response, Brown filed an Anti-SLAPP motion, alleging that his activities in helping his client file a State Bar complaint against Cohen constituted protected activity. The trial court denied the motion, finding that the filing of the State Bar complaint was illegal and therefore not protected activity. The court of appeals affirmed, stating that the California Supreme Court has held that extortion is not constitutionally protected speech. The record supported the trial court's conclusion that Brown's actions in filing the State Bar complaint constituted extortion. Therefore, the court did not need to reach the issue of whether Cohen showed a probability of prevailing on the merits (*173 Cal. App. 4th 302, 318)* .

Novartis Vaccines and Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc. *(2006) 143 Cal. App. 4th 1284, 50 Cal. Rptr. 3d 27* involved litigation between defendant Stop Huntingdon Animal Cruelty USA, Inc. (SHAC USA) and plaintiff Novartis, which used Huntingdon Life Sciences, a biomedical testing laboratory, in testing some of its products. Novartis filed suit against SHAC USA for injunctive relief, alleging that SHAC USA targeted Novartis employees by breaking windows at their homes, leaving excrement on their doorsteps, setting off piercing alarms in their front yards, threatening further attacks by posting web messages, and vandalizing their cars. In response, SHAC USA filed an Anti-SLAPP motion, claiming the activities complained of arose out of their constitutionally protected rights of petition and free speech in connection with a public issue. The trial court found that SHAC USA had not demonstrated that the conduct complained of arose from protected activities. The court therefore denied SHAC USA's motion, and SHAC USA appealed (*143 Cal. App. 4th 1284, 1295)* .

The court of appeal affirmed, holding that the gravamen of plaintiff's complaint was not speech, but rather acts of harassment, infliction of emotional distress, intrusion, and trespass. SHAC USA conceded that the acts complained of were unlawful and there was evidence that SHAC USA conspired with the demonstrators to commit the unlawful acts. The court, citing *Flatley v. Mauro (2006) 39 Cal. 4th 299* , stated that where the defendant concedes, or the evidence establishes, that the allegedly protected speech or activity was illegal as a matter of law, the defendant is not entitled to Anti-SLAPP protection. The trial court was therefore correcting in denying defendant's Anti-SLAPP motion (*143 Cal. App. 4th 1284, 1296*).

In ***Paul for Council v. Hanyecz*** *(2001) 85 Cal. App. 4th 1356, 102 Cal. Rptr. 2d 864* , a political candidate who unsuccessfully ran for city council filed an action against several defendants who had illegally laundered campaign contributions to plaintiff's opponent. The defendants filed an Anti-SLAPP motion to strike, arguing that their campaign activities were covered by *Code Civ. Proc. § 425.16*. The trial court ruled in favor of the defendants and dismissed the action after the plaintiff failed to establish a probability of success on his claims (*85 Cal. App. 4th 1356, 1359)* .

The court of appeal reversed the trial court's ruling and reinstated the action. The court concluded that the making of a political campaign contribution is a type of political speech, and "[a] contribution serves as a general expression of support for the candidate and his views ... ." However, the court next addressed *Code Civ. Proc. § 425.16(a)*, the preamble of that statute, which states that the statute was enacted to combat suits brought primarily to chill the valid exercise of a defendant's constitutional rights of speech and petition. The probability that the Legislature intended to give defendants protection from a lawsuit based on injuries they are alleged to have caused by their illegal campaign money laundering scheme "is as unlikely as the probability that such protection would exist for them if they injured plaintiff while robbing a bank to obtain the money for the campaign contributions or while hijacking a car to drive the campaign contributions to the post office for mailing." Under the facts demonstrated by this record, the court could not permit the defendants to wrap themselves in this vital legislation. While it is technically true that laundering campaign contributions is an act in furtherance of the giving of such contributions, that is, in furtherance of an act of free speech, the court rejected the notion that the statute exists to protect such illegal activity. Because the defendants did not show that plaintiff's suit was brought primarily to chill a valid exercise of their constitutional rights of free speech or petition for redress of grievances in connection with a public issue, plaintiff had no obligation to establish a probability that he

would prevail on his causes of action, and the trial court was therefore required to deny defendants' motion to strike plaintiff's causes of action (*85 Cal. App. 4th 1356, 1364-1367)* .

[c] Anti-SLAPP Motion Must Be Denied if Plaintiff Demonstrates a Probability of Prevailing on the Claim

In ***Zamos v. Stroud*** *(2004) 32 Cal. 4th 958, 12 Cal. Rptr. 3d 54, 87 P.3d 802* , the plaintiff brought a case for malicious prosecution. The question presented was whether an attorney could be held liable for malicious prosecution when he commenced a lawsuit properly but then continued to prosecute it after learning it was not supported by probable cause. The parties agree that plaintiffs' malicious prosecution action arises from acts in furtherance of defendants' right of petition or free speech. Thus, the issue is whether plaintiffs presented evidence in opposition to defendants' Anti-SLAPP motion that, if believed by the trier of fact, was sufficient to support a judgment in plaintiffs' favor. In opposition to defendants' motion, plaintiffs presented evidence that defendants were given transcripts shortly after the fraud lawsuit was filed that showed that defendants knew or should have known that the fraud lawsuit had no merit. Plaintiff presented evidence in support of the Anti-SLAPP motion to show that the facts available to Stroud at the time the lawsuit was filed were sufficient to support a cause of action for fraud. But in opposition to the motion, Zamos presented evidence that Stroud was given transcripts shortly after the fraud lawsuit was filed that, Zamos contends, show that Stroud knew or should have known that the fraud lawsuit had no merit. The trial court dismissed the malicious prosecution claim after granting defendants' motion to strike. The appellate court reversed, finding a likelihood of success on the plaintiff's claim.

In a case of first impression, the supreme court affirmed the decision of the court of appeal, finding that plaintiffs presented evidence in opposition to defendants' Anti-SLAPP motion that, if believed by the trier of fact, was sufficient to support a judgment in plaintiffs' favor. The court conclude an attorney may be held liable for malicious prosecution for continuing to prosecute a lawsuit discovered to lack probable cause (*32 Cal. 4th 958, 973)* .

In ***Tichinin v. City of Morgan Hill*** *(2009) 177 Cal. App. 4th 1049, 99 Cal. Rptr. 3d 661* , an attorney sued a city council under *42 U.S.C. § 1983*, after the council adopted a resolution condemning the attorney for hiring a private investigator to conduct surveillance of the city manager and then denying that he had done so, alleging the city unlawfully retaliated against him for exercising his constitutional rights. The city answered and filed an anti-SLAPP motion under *Code Civ. Proc. § 425.16* to strike the action. After a hearing, the trial court granted the anti-SLAPP motion, struck the amended complaint, awarded the city attorney's fees, and entered judgment (*177 Cal. App. 4th 1049, 1055-1060)* .

The Court of Appeal reversed, holding that the trial court erred in granting the motion. In conducting an independent review of the city's anti-SLAPP motion, the court articulated the two fundamental issues as whether the § 1983 action was based on activity by the city that qualified for protection under the anti-SLAPP statute; and if so, whether the attorney made a prima facie showing of facts that would support judgment in his favor (*177 Cal. App. 4th 1049, 1061)* . The attorney conceded that his action was based on acts by the City qualifying for protection under the anti-SLAPP statute, and the court agreed (*177 Cal. App. 4th 1049, 1061)* . The court then found, however, that the attorney showed a probability of prevailing on the merits of his § 1983 action by demonstrating that the complaint was both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff was credited. The city conceded that the acts underlying plaintiff's claims were performed under color of state law, and the court agreed. The court then found that he made a prima facie showing that he was engaged in conduct protected by the *First Amendment* of petitioning the government for redress and free speech, the city's actions would have deterred or chilled a person of ordinary firmness from engaging in that protected conduct, and the city's actions were motivated, at least in part, by his protected conduct; and the record did not conclusively establish any fact that would negate a requisite element of plaintiff's claims or preclude his success on the merits as a matter of law (*177 Cal. App. 4th 1049, 1062-1089)* .

Sycamore Ridge Apartments v. Naumann *(2007) 157 Cal. App. 4th 1385, 69 Cal. Rptr. 3d 561* was a lawsuit for

malicious prosecution brought by plaintiff Sycamore Ridge against a multitude of defendants. The malicious prosecution suit stemmed from a prior suit by a group of 45 plaintiffs who had lived and/or worked at plaintiff's apartment complex. The initial suit alleged that plaintiff had failed to maintain the apartments in a habitable condition and that plaintiff had engaged in unfair business practices with respect to its operation of the apartments. One of the defendants, Powell, developed poor health during the first suit and eventually dismissed her portion of the suit against the apartment complex owner with prejudice in exchange for a waiver of costs. Sycamore Ridge then filed a malicious prosecution suit against Powell and her attorneys. In response, defendants filed an Anti-SLAPP motion. The trial court denied the motion as to Powell and one set of attorneys, and granted the motion as to another set of attorneys. Both rulings were appealed.

The court of appeals reversed as to the Anti-SLAPP motion the trial court had granted, and affirmed as to the other ruling, finding that in both cases Sycamore Ridge had demonstrated a probability of prevailing on its malicious prosecution claim. Because filing a lawsuit constitutes an exercise of a party's right of petition, the malicious prosecution suit arose from protected activity within the meaning of the Anti-SLAPP statute. The question on appeal was whether Sycamore Ridge had demonstrated a probability of prevailing on its malicious prosecution claim. The court of appeals ruled that, as to both sets of defendants, it had. Sycamore Ridge was required to plead and prove that (1) the prior action was commenced by or at the direction of the defendant and was pursued to a termination in Sycamore Ridge's favor; (2) was brought without probable cause; and (3) was initiated with malice. The court held that voluntary dismissal is considered a favorable termination. Additionally, Powell's interrogatory responses established that she was not claiming to have suffered any personal injuries, property damage, or lost income, yet her attorneys continued to prosecute a lawsuit seeking such damages and even filed a statement of damages on Powell's behalf. Finally, there was evidence of malicious intent in that the defendants continued to prosecute Powell's suit although they were aware there was no factual basis for most of the claims. Sycamore Ridge therefore met its burden of establishing a probability of prevailing on its claim, and the trial court's ruling granting one of the Anti-SLAPP motions was reversed (*157 Cal. App. 4th 1385, 1412-1413)* .

[d] Analysis of Plaintiff's Probability of Prevailing on Claim Must Include All Available Defenses

In ***Traditional Cat Assn., Inc. v. Gilbreath (2004) 118 Cal. App. 4th 392, 13 Cal. Rptr. 3d 353*** , plaintiffs and defendants were all interested and involved in cat breeding. Initially, all parties were involved in an organization called Traditional Cat Association (TCA). When a dispute developed amongst the officers and directors of TCA, the president of TCA formed another organization called The Traditional Cat Association, Inc. (TTCA). TTCA then sued for TCA for various causes of action, including conversion, misappropriation of funds, copyright infringement, unfair competition, trademark, and trade secret infringement. In response to this lawsuit, one of the defendants started a website to track the status of the litigation. The website was very unflattering to the plaintiff, who had started TTCA. This led plaintiff and TTCA to file the instant action for defamation, unfair competition, and conversion. Defendants filed an Anti-SLAPP motion in response.

The trial court found that the statements on the website were made in furtherance of defendants' rights of petition and free speech within the meaning of *Code Civ. Proc. § 425.16(b)(1)*. However, the court denied the defendants' motion because it found plaintiffs had a probability of prevailing on the merits, despite a viable statute of limitations defense on defendants' part. The court of appeals reversed, holding that the court must take into account not only the substantive merits of plaintiffs' complaint, but also all available defenses, when ruling on the second prong of the Anti-SLAPP statute. An analysis of the timeliness of plaintiffs' complaint for defamation should have been taken into account in ruling on the Anti-SLAPP motion. Because the defamation cause of action was barred by the statute of limitations, defendants' Anti-SLAPP motion should have been granted (*118 Cal. App. 4th 392, 402)* .

[e] Merely Having Some Connection With Official Proceedings Does Not Mean Anti-SLAPP Protections Apply

Hylton v. Frank E. Rogozienski, Inc. *(2009) 177 Cal. App. 4th 1264, 99 Cal. Rptr. 3d 805* was an action by plaintiff against his former attorney. Defendant attorney represented plaintiff in a dispute with the software company plaintiff had founded. The software company, DivX, terminated plaintiff and failed to notify him that it was exercising its right to purchase unvested stock shares, as required by the founder stock purchase agreement between plaintiff and DivX. Defendant attorney advised plaintiff that he should file a wrongful termination suit and seek to confirm ownership of the stock at issue. The attorney induced plaintiff to sign a contingency agreement whereby defendant attorney would recover one-third of all money collected as a result of the suit, including one-third of the stock. Based on advice from the attorney, plaintiff settled his claims with DivX and defendant attorney received one-third of the stock, which had a value of $6 million. The instant action was an action by plaintiff against his former attorney for rescission of the contingency agreement, restitution of the stock shares, declaratory relief and breach of fiduciary duty. The complaint alleged that plaintiff's ownership of the stock was never in dispute and that the attorney had induced him to enter into an unconscionable fee agreement. In short, defendant attorney had schemed to recover an excessive fee by convincing plaintiff that legal action was necessary to recover the stock. In response to plaintiff's complaint, defendant filed an Anti-SLAPP motion, claiming the challenged conduct arose out of his protective activity in connection with his representation of plaintiff in the wrongful termination and stock recovery action. The trial court disagreed, denying his motion on the basis that plaintiff's complaint did not arise from protected activity.

The court of appeals affirmed. Under established case law, courts must examine the principal thrust or gravamen of the complaint to determine whether the Anti-SLAPP statute applies (*see, e.g.,* *Ramona Unified School Dist. v. Tsiknas (2005) 135 Cal. App. 4th 510, 37 Cal. Rptr. 3d 381*). The "core injury-producing conduct" must rest on protected speech or petitioning activity in order for the statute to apply (*Martinez v. Metabolife Internat., Inc. 113 Cal. App. 4th 181, 189, 6 Cal. Rptr. 3d 494 (2003)* . In this case, the gravamen of plaintiff's complaint was that defendant falsely advised him there was doubt about his entitlement to the stock and schemed to recover an excessive fee. Those activities were not protected under the Anti-SLAPP statute, and therefore the trial court was correct in denying defendant's motion (*177 Cal. App. 4th 1264, 1275)* .

In ***United States Fire Ins. Co. v. Sheppard, Mullin, Richter & Hampton*** *(2009) 171 Cal. App. 4th 1617, 90 Cal. Rptr. 3d 669* , defendant law firm represented plaintiff in asbestos litigation involving Kelly-Moore paint in 2001. Plaintiff alleged it had entrusted defendant with confidential information during the course of that litigation. In 2006, plaintiff was sued in litigation involving Plant Insulation Company, a defendant in additional asbestos litigation. Plant alleged that plaintiff owed it a duty to defend in the litigation. In the instant litigation, plaintiff alleged that defendant was representing asbestos creditors in the Plant litigation. Because of defendant's representation of plaintiff in the Kelly-Moore litigation, and the similarities regarding the insurance policy provisions involved in the two cases, plaintiff alleged defendant possessed confidential information giving rise to a conflict of interest. Plaintiff's complaint sought declaratory relief and a general request for damages resulting from the breach of the duties of loyalty and confidentiality. In response to the complaint, defendant filed an Anti-SLAPP motion, alleging its representation in the lawsuits was in furtherance of its rights of petition and free speech. The trial court agreed, finding the complaint implicated protected activity.

The court of appeals reversed. The court noted that recent case law has held that not all attorney conduct in connection with litigation and in connection with representing clients is protected by the Anti-SLAPP statute (*171 Cal. App. 4th 1617, 1624* ; citing *California Back Specialists Medical Group v. Rand (2008) 160 Cal. App. 4th 1032, 1035, 73 Cal. Rptr. 3d 268*). In the instant case, the event giving rise to the cause of action for breach of loyalty is the acceptance of employment by the adverse client. Thus, the "principal thrust" of the misconduct alleged in the complaint is defendant's acceptance of representation of the parties in the Plant litigation. Therefore, the protected litigation-related activities are only incidental to the principal thrust of the complaint (*171 Cal. App. 4th 1617, 1629)* .

Wang v. Wal-Mart Real Estate Business Trust *(2007) 153 Cal. App. 4th 790, 63 Cal. Rptr. 3d 575* arose out of a contract for the sale of two of plaintiffs' parcels of property to a company which eventually assigned the contract to defendant Wal-Mart. Plaintiffs retained two adjoining parcels for future development. The two Wal-Mart parcels were

separated by a street, Gannett Parkway, which the parties anticipated would have to be relocated so that the Wal-Mart parcels could be unified. This street created the access to the plaintiffs' remaining parcels. The end result was that instead of creating a street to replace Gannett Parkway, there was only an easement for emergency vehicles along with a truck alley. Plaintiffs claimed that as a result of now fronting a dead end, their property value was impaired. Plaintiffs filed suit against Wal-Mart for breach of contract, fraud, and conspiracy to defraud. In response, Wal-Mart filed a special motion to strike, contending that the action arose from constitutionally protected conduct. The trial court granted the motion, holding that each cause of action was based directly on Wal-Mart's permitting activity.

The court of appeals reversed. The court began by noting that the proper initial inquiry in an Anti-SLAPP motion is examining the principal thrust or gravamen of plaintiff's cause of action. The court stated that there is no bright line rule that all cases involving development and permitting applications necessarily involve the type of petitioning activity protected by the Anti-SLAPP statute. Although the challenged conduct on the part of Wal-Mart occurred in the course of the preparation of traffic studies and the submission of applications for permits to the city, the complaint was not based essentially on protected conduct. Wal-Mart's alleged improper conduct in implementing plans for the construction of its store did not arise from its petitioning activities in pursuing the permits, but rather from its conduct in executing its contract with the plaintiffs. The protected conduct in pursuing governmental approval was merely collateral to the activities which formed the gravamen of the complaint (*153 Cal. App. 4th 790, 810-811)* .

Kolar v. Donahue, McIntosh & Hammerton *(2006) 145 Cal. App. 4th 1532, 52 Cal. Rptr. 3d 712* was, in the words of the court of appeals, a "garden variety legal malpractice action." Plaintiffs sued defendants for legal malpractice based on the outcome of litigation defendants had brought on plaintiffs' behalf. Defendants filed an Anti-SLAPP motion, contending that their work on plaintiffs' behalf constituted protected activity within the meaning of *Code Civ. Proc. § 425.16(e)*. The trial court disagreed and denied defendants' motion. Defendants appealed.

The court of appeals affirmed, holding that a "garden variety legal malpractice action" does not fall within the purview of the Anti-SLAPP statute. Although courts have placed a wide variety of litigation-related activities within the scope of the statute, the actual claim in this case "arose from" the failure of defendants to provide competent legal representation, not defendants' petitioning activity. A malpractice suit does not have the effect of chilling petitioning activity (*145 Cal. App. 4th 1532, 1540)* .

In ***Blackburn v. Brady*** *(2004) 116 Cal. App. 4th 670, 10 Cal. Rptr. 3d 696* , plaintiff Blackburn sued defendant Brady for partition, an accounting, and fraud after Blackburn allegedly acquired ownership of a one-half interest of real property at a public Sheriff's auction in partial satisfaction of a money judgment against a man, Lanser, who had previously owned the subject real property as a tenant in common with Brady. The auction took place after Brady failed to pay Blackburn rents and profits generated by Lanser's share of a business co-owned by Brady and Lanser and from the four-unit subject rental property. As a part of the fraud cause of action, Blackburn alleged Brady's statements made at the auction were false and fraudulent. In response, Brady filed a demurrer and a motion to strike under the Anti-SLAPP law. Brady argued that his conduct arose from the exercise of his rights of petition and free speech in protecting his property interests and were ancillary to judicial proceedings between Blackburn and Lanser as well as the auction, which was an "official proceeding." The court overruled the demurrer and denied the Anti-SLAPP motion. Brady appealed.

On appeal, Brady argued that Blackburn's third cause of action for fraud was subject to the Anti-SLAPP law because it arose out of Brady's written bid or oral statements made at the auction. He argued the auction was an "official proceeding authorized by law" within the meaning of *Code Civ. Proc. § 425.16(e)(1)*. The court disagreed, stating that the fraud cause of action did not arise from an act of free speech or right of petition for the redress of a grievance, but rather only from Brady's actions affecting bidding at a court-ordered sale. The court held that the auction was a "purely business type event or transaction and ... not the type of protected activity contemplated under *Code Civ. Proc. § 425.16(e)*" (*116 Cal. App. 4th 670, 677)* .

The court also noted that the Anti-SLAPP statute requires that the statements or writings made at the official proceeding be "in connection with an issue under consideration or review." This was clearly not the case, the court pointed out, as the "ministerial event of a Sheriff's sale or auction simply does not concern an issue under review or determine some disputed matter as contemplated under the Anti-SLAPP law." (*116 Cal. App. 4th 670, 677)* .

Haneline Pacific Properties, LLC v. May *(2008) 167 Cal. App. 4th 311, 83 Cal. Rptr. 3d 919* involved real property in Laguna Beach owned, in part, by defendant May. The property was leased an operated as a hotel. In 2006, plaintiff received an offer from defendant's co-owner to purchase the co-owner's 50% share in the property, but the sale was not completed. Around the same time, defendant decided the rent was below market and sought to terminate the hotel's lease. Defendant also believed the co-owner was attempting to sell its share in the property for too little. Plaintiff sued the seller for breach of contract based on the incomplete sale. That suit settled, culminating in the sale of the half share of the property to plaintiff. Plaintiff then sued co-owner May for interference with contract and interference with prospective economic advantage. May filed an Anti-SLAPP motion to strike, arguing that the action alleged in the complaint was protected by the litigation privilege. The trial court granted defendant's motion and dismissed the complaint. Plaintiff appealed.

The court of appeals reversed, finding the complaint did not arise out of protected activity. Defendant's only argument on appeal was that the actions alleged in the complaint constituted activity protected by the litigation privilege. The court noted that while prelitigation communications can fall within the ambit of the Anti-SLAPP statute, the scope of the two statutes is not identical. The communications at issue were letters between defendant and the property's prior co-owner in which defendant tried to persuade the co-owner to agree to terminate the lease. The court found that the communications forming the gravamen of plaintiff's complaint did not fall within the litigation privilege. The tone of the communications was one of persuasion and desire to cooperate. The communications did not consist of threats to litigate or in serious consideration of litigation (*167 Cal. App. 4th 311, 319-320)* .

[f] Mere Acts of Governance Are Not Exercises of Free Speech or Petition

In ***San Ramon Valley Fire Protection Dist. v. Contra Costa County Employees' Retirement Assoc.*** *(2004) 125 Cal. App. 4th 343, 22 Cal. Rptr. 3d 724* , plaintiff fire protection district was a special district within Contra Costa County and within the purview of the county retirement system. Defendants were the retirement association's board of directors as well as the actual retirement association itself. The litigation arose out of the Board's decision that the District would have to pay $2.3 million in order to fund increased retirement benefits for the District's employees. The District then filed suit against the Board in the form of a petition for administrative mandamus and a complaint for declaratory relief. The Board responded by moving to strike the petition and complaint under the Anti-SLAPP statute, *Code Civ. Proc. § 425.16*. The trial court denied the motion.

The court of appeal affirmed, holding that plaintiff's cause of action did not arise from protected activity within the meaning of the statute. The court noted, quoting *City of Cotati v. Cashman (2002) 29 Cal. 4th 69* that the "mere fact an action was filed after protected activity took place does not mean it arose from that activity" (*125 Cal. App. 4th 343, 353-354*). The court went on to state that acts of governance mandated by law are not exercises of free speech or petition within the meaning of the Anti-SLAPP statute. The Board's decision to require the District to pay $2.3 million to the retirement association did not implicate the right to free speech or petition (*125 Cal. App. 4th 343, 355)* . The court gave a hypothetical example in contrast, explaining that if the Board had authorized its own participation in a campaign to amend state pension laws, such a vote might implicate the Board's right of free speech or petition (*125 Cal. App. 4th 343, 357)* .

[g] Code Civ. Proc. § 425.17 Exceptions Apply Retroactively

In ***Brenton v. Metabolife International, Inc.*** *(2004) 116 Cal. App. 4th 679, 10 Cal. Rptr. 3d 702* , a consumer alleged that she developed a mental illness as a result of consuming a defective dietary supplement produced by the

manufacturer. She also alleged false advertising and misbranding of the product. The manufacturer moved to strike the complaint under the Anti-SLAPP statute, contending that the complaint targeted its constitutionally protected commercial speech. The trial court denied the manufacturer's motion under the Anti-SLAPP statute, *Code Civ. Proc. § 425.16*, to strike plaintiff consumer's complaint alleging causes of action for product liability, negligence, breach of express and implied warranty, and fraud.

The court affirmed the denial of the motion, holding that because protected speech was not the gravamen or principal thrust of claims seeking recovery for personal injuries to a consumer caused by a defective product, such claims did not arise from protected activity within the meaning of *Code Civ. Proc. § 425.16(e)* (*116 Cal. App. 4th 679, 687)* .

The court also addressed the issue of retroactive application of *Code Civ. Proc. § 425.17*, enacted by the Legislature during the appeal. The appellate court held that *Code Civ. Proc. § 425.17(c)* removed remove the plaintiff's unfair practices claim (as well as her individual claims) from the types of claims against which an Anti-SLAPP motion can be filed. The manufacturer agreed that application of *Code Civ. Proc. § 425.17(c)* would be fatal to the motion to strike but asserted that the statute could not be applied retroactively and that the statute was unconstitutional. The court found that the presumption against retrospective construction does not apply to statutes relating merely to remedies and modes of procedure. Procedural changes "operate on existing causes of action and defenses, and it is a misnomer to designate them as having retrospective effect." In other words, procedural statutes may become operative only when and if the procedure or remedy is invoked, and if the trial postdates the enactment, the statute operates in the future regardless of the time of occurrence of the events giving rise to the cause of action. In such cases the statutory changes are said to apply not because they constitute an exception to the general rule of statutory construction, but because they are not in fact retrospective. There is then no problem as to whether the Legislature intended the changes to operate retroactively (*116 Cal. App. 4th 679, 689)* . *Code Civ. Proc. § 425.17* is properly characterized as a procedural statute applicable to pending actions. Where the Legislature has conferred a remedy and withdraws it by amendment or repeal of the remedial statute, the new statutory scheme may be applied to pending actions without triggering retrospectivity concerns (*116 Cal. App. 4th 679, 690)* .

[h] Plaintiff Opposing a Late Anti-SLAPP Motion Need Not Demonstrate Prejudice

In ***Olsen v. Harbison*** *(2005) 134 Cal. App. 4th 278, 35 Cal. Rptr. 3d 909* , plaintiff was an attorney who had associated defendant, another attorney, during a personal injury case under a fee splitting contract. The personal injury plaintiff then discharged plaintiff as counsel and when the case settled, defendant received the attorney fees. Plaintiff filed suit to recover a portion of the attorney fees. After lengthy law and motion proceedings, defendant filed an Anti-SLAPP motion. Plaintiff moved to strike the Anti-SLAPP motion on the ground that it could not be filed more than 60 days after service of the complaint without a court order. The court denied both motions, ruling that plaintiff could not file a motion to strike the Anti-SLAPP motion and that defendant's Anti-SLAPP motion, filed nine months after service of the second amended complaint, was not timely filed. Defendant appealed from the ruling, and plaintiff moved to dismiss the appeal as frivolous (*134 Cal. App. 4th 278, 283)* .

On appeal, defendant argued that *Code Civ. Proc. § 425.16(f)* contains no express requirement that defendant show good cause for filing a late Anti-SLAPP motion. Therefore, he reasoned, it was an abuse of discretion for a trial judge to deny a late Anti-SLAPP motion absent a showing of prejudice on plaintiff's part. The court disagreed, stating that the argument that a trial court has no discretion to deny hearing an unexcused, belated, but meritorious Anti-SLAPP motion absent a showing of prejudice to plaintiff is without merit. The statute expressly provides that a late Anti-SLAPP motion may not be filed unless the court exercises its discretion. Defendant's reading of the statute would mean that the trial court has no discretion to refuse to hear a late Anti-SLAPP motion unless plaintiff demonstrates prejudice. The appellate court found no support for such an interpretation of *Code Civ. Proc. § 425.16(f)* and the order denying defendant's untimely Anti-SLAPP motion was affirmed (*134 Cal. App. 4th 278, 286-287)* .

[i] Defendants Who Represent Themselves in Litigation Are Not Entitled to Attorney Fees When Prevailing

on an Anti-SLAPP Motion

Witte v. Kaufman *(2006) 141 Cal. App. 4th 1201, 46 Cal. Rptr. 3d 845* arose out of an action for dissolution of a partnership. Defendant Kaufman represented one partner, and the law firm of Knox, Lemmon & Anapolsky (KLA) represented the other. KLA ended up suing its client for nonpayment of fees, and plaintiff Witte represented the client in that action, which was arbitrated. The client eventually fired plaintiff. Plaintiff sued his client, attorney Kaufman, and KLA for breach of contract, interference with contract, and fraud. KLA and Kaufman filed Anti-SLAPP motions, which were granted, and both attorney defendants were awarded attorney fees. Plaintiff appealed the trial court's decision (*141 Cal. App. 4th 1201, 1207)* .

The court of appeal affirmed the trial court's decision on the merits of the Anti-SLAPP motion, but reversed the award of attorney fees. The court reasoned that an award of attorney fees under *Code Civ. Proc. § 425.16(c)* is intended to compensate a SLAPP defendant rather than to punish a SLAPP plaintiff. Because defendant KLA's own attorneys did all of the work involved in bringing the motion to strike, the firm was not entitled to attorney fees. Defendant Kaufman contended that he was entitled to fees because outside counsel helped him with his motion to strike. Because the court could not differentiate the time spent by Kaufman as opposed to his outside counsel, the court of appeals remanded the issue of Kaufman's attorney fees to the trial court for reconsideration (*141 Cal. App. 4th 1201, 1213)* .

[j] The Anti-SLAPP Statute Does Not Apply to Non-Judicial Proceedings

Garretson v. Post *(2007) 156 Cal. App. 4th 1508, 68 Cal. Rptr. 3d 230* arose out of nonjudicial foreclosure proceedings after plaintiff defaulted on a promissory note secured by a deed of trust on a property defendant sold plaintiff. Plaintiff paid the amount necessary to avoid foreclosure, then sued defendant for wrongful foreclosure. Defendant filed an Anti-SLAPP motion, asserting nonjudicial foreclosure is an official proceeding within the meaning of *Code Civ. Proc. § 425.16(e)(1)* and *(2)*. The trial court disagreed, and denied the motion. The court of appeal affirmed. Nonjudicial foreclosure proceedings are statutorily based and private in nature. Such proceedings are not linked to any governmental, administrative, or judicial proceedings or regulation and therefore such proceedings cannot form the basis for a SLAPP suit (*156 Cal. App. 4th 1508, 1521)* .

Sheppard v. Lightpost Museum Fund *(2006) 146 Cal. App. 4th 315, 52 Cal. Rptr. 3d 821* arose out of plaintiff's wrongful termination claim against defendants and defendants' breach of contract claim against plaintiff. Those matters went to binding nonjudicial arbitration and the arbitrator did not award any relief to either side. Subsequently, defendants requested that the arbitrator revisit his rulings because plaintiff had allegedly violated a confidentiality clause after the arbitration was concluded. In response, plaintiff filed a complaint against defendants in the superior court alleging tort causes of action and seeking a judicial termination that defendants' conduct was a violation of *Code Civ. Proc. § 425.16*. Shortly thereafter, plaintiff filed an Anti-SLAPP motion in the superior court, seeking to strike defendants' pending arbitration claim. Defendants responded that the superior court could not properly rule on the Anti-SLAPP motion defendants had not filed any causes of action in superior court. The trial court disagreed and granted plaintiff's motion in part. Defendants appealed.

The court of appeal reversed, holding that the Anti-SLAPP statute does not apply to claims pending in nonjudicial forums. The statute itself refers to "causes of action" stated in a "complaint," which includes a cross-complaint or petition. Furthermore, the statute requires a defendant to bring such a motion within a certain time period after "service of the complaint." In using language that applies exclusively to actions brought in court, the legislature limited the pleadings that are subject to an Anti-SLAPP motion to pleadings that are brought in court. Because plaintiff's Anti-SLAPP motion targeted only defendants' arbitration claims, the court erred in ruling on the motion (*146 Cal. App. 4th 315, 324)* .

In **Tendler v. www.jewishsurvivors.blogspot.com** *(2008) 164 Cal. App. 4th 802, 807, 79 Cal. Rptr. 3d 407* , appellant Tendler was a New York resident who obtained an order from an Ohio court providing his Ohio attorney with

subpoena to obtain IP addresses and other information from Google concerning individuals who had allegedly published defamatory statements about him on weblogs. After Google declined to respond to the subpoenas, the attorney filed a request in Santa Clara County Superior Court asking the court to issue a case number and endorse the subpoenas. The court assigned a case number to the matter. The targets of the subpoenas became aware of the proceedings and filed a motion to quash and an Anti-SLAPP motion. The trial court granted the Anti-SLAPP motion and awarded the subpoena targets their attorney fees. Tendler appealed.

The court of appeals reversed, holding that a request for a subpoena does not fall within the Anti-SLAPP statute. The statute uses the term "cause of action" and states that the cause of action must be contained in a complaint, cross-complaint, petition or similar pleading initiating a judicial proceeding. A request for a subpoena does not contain a cause of action or initiate a judicial proceeding, and therefore it is not subject to an Anti-SLAPP motion (*164 Cal. App. 4th 802, 807)* .

In ***McConnell v. Innovative Artists Talent and Literary Agency*** *(2009) 175 Cal. App. 4th 169, 96 Cal. Rptr. 3d 1* , plaintiffs were two talent agents employed by defendant. Plaintiffs filed lawsuits asserting that their employment contracts contained illegal provisions. Following the filing of the lawsuits, plaintiffs were told their job duties were modified and were escorted off the premises. Although they remained employees, plaintiffs were provided with a list of restrictions; for example, they were not permitted to enter the building without defendant's consent, use e-mail or communicate with other employees. Plaintiffs' attorney then notified defendant that plaintiffs had been constructively terminated, after which plaintiffs were terminated for cause. Plaintiffs then amended their complaint to allege causes of action for wrongful termination and retaliation. In response, defendant filed an Anti-SLAPP motion, claiming the new causes of action arose out of defendant's exercise of its free speech and petition rights. The trial court denied the motion, holding that the causes of action did not arise out of protected activity.

The court of appeals affirmed. The acts underlying plaintiffs' claims of retaliation and wrongful termination were defendant's "modification" of plaintiffs' employment, which precluded plaintiffs from performing their job duties. The court noted that the fact these modifications were reduced to writing did not convert the actions to protected activity. Additionally, the fact that plaintiffs' lawsuits pre-existed the employment modifications did not mean the modifications constituted a "writing made in connection with an issue under consideration or review by a judicial body" within the meaning of *Code Civ. Proc. § 425.16(e)(2)*. There was no connection between the modifications and the issue under review in the original lawsuit, as the modification was directed at preventing plaintiffs from taking clients with them when they left, not at establishing that plaintiffs were legally required to stay (*175 Cal. App. 4th 169, 176)* .

[k] A Plaintiff Prevailing on an Anti-SLAPP Motion Shall Be Awarded Costs and Attorney's Fees if the Court Finds the Motion Is Frivolous or Is Solely Intended to Cause Unnecessary Delay

In ***Ketchum v. Moses*** *(2001) 24 Cal. 4th 1122, 104 Cal. Rptr. 2d 377* , the defendant sought mandatory attorney fees after he prevailed on a motion strike allegations in a SLAPP action under *Code Civ. Proc. § 425.16*. The trial court awarded attorney fees to the defendant's counsel, using a lodestar amount of approximately $70,000 and then applying a fee enhancement of 2.0 to that figure based on contingent risk and the exceptional quality of the legal services provided, for a total of approximately $140,000. The court later awarded supplemental attorney fees and costs of approximately $112,000. The court of appeal reversed the trial court's judgment, concluding that the trial court lacked authority to apply a fee enhancement to the lodestar figure.

The Supreme Court reversed the court of appeal decision and remanded the case for recalculation of the attorney fee award. The court noted that the fee-shifting provision encourages private representation in SLAPP cases, including situations where the defendant is unable to afford fees or the lack of potential monetary damages precludes a standard contingency fee arrangement (*24 Cal. 4th 1122, 1237)* . The court held that by its terms, *Code Civ. Proc. § 425.16* permitted the use of the lodestar adjustment method whereby the lodestar is the number of hours reasonably expended multiplied by the reasonable hourly rate, and that figure may be adjusted based on consideration of factors specific to

the case, in order to fix the fee at the market rate for legal services provided (*24 Cal. 4th 1122, 1136)* . The court noted that where the Legislature has determined that that lodestar adjustment approach is not appropriate, it has expressly so stated in a particular statutory provision; thus where the Anti-SLAPP provisions referred to attorney fees and costs without indicating any restrictions on how they are to be calculated, the Legislature presumably intended courts to use the prevailing lodestar method (*24 Cal. 4th 1122, 1135-1136)* .

The Supreme Court held that the court of appeal erred in concluding that the trial court lacked authority to award a fee enhancement under *Code Civ. Proc. § 425.16* (*24 Cal. 4th 1122, 1136)* . The court rejected the contentions that permitting a fee enhancement for contingency cases under *Code Civ. Proc. § 425.16* would (1) encourage unmeritorious claims; (2) permit attorneys to pool the risk in contingency cases and thus, in effect, receive payment for cases in which their clients did not prevail; or (3) inevitably result in unfair double counting or a windfall to attorneys representing SLAPP defendants (*24 Cal. 4th 1122, 1137-1138)* . Noting that the trial court is not required to include a fee enhancement to the basic lodestar figure for contingent risk, exceptional skill or other factors, but retains discretion to do so, the Supreme Court remanded the case as to the amount of the fee enhancement (*24 Cal. 4th 1122, 1138, 1142)* . The court found that it was improper to impose an enhancement for contingent risk as to the attorney fees on fees accrued after the motion to strike was granted. The court also remanded on the issue of whether the enhancement factor for exceptional representation had been improperly double counted. Lastly, the court directed that any disapproval on the part of the trial court as to the plaintiff's litigation strategy (to keep the defendant in court) could not be a basis of imposing an enhancement for contingent risk or quality of representation merely for the purpose of punishing the plaintiff (*24 Cal. 4th 1122, 1142)* .

Premier Medical Management Systems, Inc. v. California Ins. Guarantee *(2008) 163 Cal. App. 4th 550, 77 Cal. Rptr. 3d 695* involves a lawsuit filed by a group of physicians against various worker's compensation insurers, employers and other entities alleging the defendants conspired to contest, delay and avoid payment of the physicians' bills for treating worker's compensation patients. The parties litigated and appealed defendants' Anti-SLAPP motion, and on appeal the court reversed the trial court's denial of the motion and awarded the moving defendants their fees and costs on appeal. The subject of this appeal was the amount of fees the court had awarded under *Code Civ. Proc. § 425.16(c)*. The court noted that an award of attorney fees is mandatory in favor of a successful defendant on an Anti-SLAPP motion. Review of such an award is subject to an abuse of discretion standard. On appeal, plaintiffs asserted that the fees were "grossly excessive, unnecessary, duplicative, and an unreasonable number of claimed work hours" (*163 Cal. App. 4th 550, 558)* . However, plaintiffs filed no declarations and submitted no evidence in support of their contentions regarding the fees, instead simply claiming the fees were excessive and citing *Maughan v. Google Technology, Inc. (2006) 143 Cal. App. 4th 1242, 49 Cal. Rptr. 3d 861* , in which the court of appeals upheld a trial judge's reduction of claims fees in connection with an Anti-SLAPP motion. The court stated that in Maughan and in the instant case, courts of appeal are reluctant to substitute their judgment for that of the trial judge, who is familiar with the issues raised. The court emphasized that a party challenging the amount of an attorney fee award must bear the burden of pointing to the specific items challenged, with a sufficient argument and citations to the evidence. In this case, plaintiffs did not do so and the attorney fee award was affirmed (*163 Cal. App. 4th 550, 555)* .

In **Carpenter v. Jack In** ***The Box Corp.*** *(2007) 151 Cal. App. 4th 454, 59 Cal. Rptr. 3d 839* , the trial court awarded attorney fees and costs to an employee under *Code Civ. Proc. § 425.16(c)* in the employee's action for wrongful termination and related causes of action. The employers filed a special motion to strike pursuant to *Code Civ. Proc. § 425.16*, claiming that the employee's causes of action arose from an investigation of suspected sexual harassment and that this investigation was a constitutionally protected activity. The trial court denied the motion, and the employers unsuccessfully appealed that order. Following issuance of the remittitur, and approximately two years after the denial of the special motion to strike, the employee sought statutory attorney fees and expenses pursuant to *Code Civ. Proc. § 425.16(c)*.

The Court of Appeal affirmed, holding that the time limits imposed by *Cal. Rules of Court, Rules 3.1702, 8.104* for filing a motion for attorney fees under *Code Civ. Proc. § 425.16(c)* do not commence to run until entry of judgment at

the conclusion of the litigation. Thus, the employee's motion was timely because it was filed before entry of judgment. The trial court's order imposing fees and costs included sufficient factual details under *Code Civ. Proc. § 128.5(c)*. Because unlawful workplace activity is not necessarily an issue of public interest, the trial court did not abuse its discretion in finding that the special motion to strike was frivolous (*151 Cal. App. 4th 454, 461)* .

[l] An Amorphous Public Interest Is Insufficient to Invoke the Anti-SLAPP Statute

In ***World Financial Group, Inc. v. HBW Ins. & Financial Services, Inc.*** *(2009) 172 Cal. App. 4th 1561, 92 Cal. Rptr. 3d 227* , plaintiff was a corporation providing insurance, financial and pension services. Defendants were plaintiff's major competitor and former employees of plaintiff who worked for defendant competitor. The suit arose out of non-competition agreements defendants signed in connection with their employment. Plaintiff's complaint alleged that defendants violated these agreements and stated causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, conversion, violation of the Uniform Trade Secrets Act, interference with economic advantage and unjust enrichment. Defendants filed an Anti-SLAPP motion, alleging that plaintiff's claims were based on their conduct in furtherance of the exercise of their right of free speech in connection with a public issue. They further alleged that the pursuit of lawful employment and workplace mobility were matters of public interest. The trial court denied the motion, finding that the challenged conduct did not fall within the ambit of the Anti-SLAPP motion, and defendants appealed.

The court of appeals affirmed. All of the conduct at issue was committed in the course of business and was directed at marketing the defendant business as superior. The court drew a distinction between specific issues of public interest and a "broad and amorphous public interest" such as that alleged in this case, citing such cases as *Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO (2003) 105 Cal. App. 4th 913, 130 Cal. Rptr. 2d 81* and *Consumer Justice Center v. Trimedica International, Inc. (2003) 107 Cal. App. 4th 595, 132 Cal. Rptr. 2d 191* . Although employee mobility and competition are, in the abstract, issues of public interest, the focus for purposes of the Anti-SLAPP statute must be "on the specific nature of the speech rather than the generalities that might be abstracted from it" (*172 Cal. App. 4th 1561, 1572*). The Anti-SLAPP statute only applies in situations where the statement or conduct at issue is about a person or entity in the public eye, has the potential to affect large numbers of people beyond the participants or involves a topic of widespread public interest (*172 Cal. App. 4th 1561, 1573)* .

[m] Code of Civil Procedure § 425.16 Only Applies When First Amendment Free Speech or Petition Rights Are At Stake

In ***Graffiti Protective Coatings, Inc. v. City of Pico Rivera*** *(2010) 181 Cal. App. 4th 1207, 104 Cal. Rptr. 3d 692* , through competitive bidding, plaintiff was awarded a municipal contract to maintain defendant city's bus stops. The city later terminated the contract as permitted, but, without inviting competitive bids, entered into a new contract with one of plaintiff's competitors. Plaintiff sued, seeking a writ of mandate and declaratory relief to invalidate the new contract and to compel the city to award the contract through competitive bidding. The city filed a special motion to strike under *Code Civ. Proc. § 425.16*, and the trial court granted the motion, reasoning that the maintenance of the city's bus stops was an issue of public interest and plaintiff was not likely to prevail on the merits of its claims (*181 Cal. App. 4th 1207, 1211-1214)* .

The Court of Appeal reversed, concluding that, even if plaintiff's claims involved a public issue, they are not based on any statement, writing, or conduct by the city in furtherance of its right of free speech or its right to petition the government for the redress of grievances. The court first recognized a distinction between speech or petitioning activity that serves solely as evidence in proving liability, which is not subject to the anti-SLAPP statute, and speech or petitioning activity that is the basis of liability, to which the anti-SLAPP statute applies. Assuming plaintiff's claims against the city involved a public issue, the city's petition and free speech rights were not implicated. Plaintiff's claims were not based on any communications between the city and others or on any petitioning activity by the city. Rather, the claims were based on competitive bidding laws found in the Public Contract Code and the city's municipal code. The

city's communications may be of evidentiary value in establishing that it violated the law, but liability was not based on the communications themselves. Thus, the claims were not subject to the anti-SLAPP statute, and plaintiff did not have to demonstrate a probability of prevailing on the merits at the pleading stage, risking the dismissal of its claims and the payment of the city's attorney fees. Had the court concluded otherwise, the anti-SLAPP statute would discourage attempts to compel public entities to comply with the law (*181 Cal. App. 4th 1207, 1214-1225)* .

In ***Turner v. Vista Pointe Ridge Homeowners Assn.*** *(2009) 180 Cal. App. 4th 676, 102 Cal. Rptr. 3d 750* , the owners of residential real property subject to conditions, covenants and restrictions sued their homeowners association. The owners had obtained association approval for an addition to their home and substantial outdoor improvements, including a casita, which could not exceed a specified height. According to their own admission, the owners increased the height without first obtaining a variance from the association. After a neighbor complained about the height of the casita, and purportedly threatened to sue the association because the casita constituted an unreasonable view obstruction, the association was reluctant to grant the variance, and was concerned about the attorney's fees it was incurring in addressing the compliance matter. In addition to the dispute concerning the height of the casita, there were issues about whether a number of other improvements the owners had constructed were approved by the association or in conformity with the association's architectural guidelines. The association ultimately levied a reimbursement assessment in connection with the disputed matters in administrative costs and attorney fees incurred in what the association deemed to be an enforcement matter. The association demanded the owners pay for the removal of a tree from the common area. The owners filed suit against the association, asserting causes of action for breach of contract; declaratory relief; nuisance; breach of the implied covenant of good faith and fair dealing; violation of *Civ. Code § 1378*, concerning homeowners association architectural review procedures; violation of *Bus. & Prof. Code § 17200,* pertaining to unfair business practices; and breach of fiduciary duty. The association filed a § 425.16 motion to strike the complaint, on the ground that each cause of action was based on its activities arising out of the controversy pertaining to the owners' architectural plans, which constituted protected conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest within the meaning of § 425.16(e)(4). The trial court granted the association's motion on the ground that each cause of action arose out of a dispute over the architectural guidelines and related to communications from the association pertaining to purported noncompliance with those guidelines, and that the dispute with the neighbor pertained to the same issues. The court held that the dispute, being one about architectural guidelines, was a public issue, and that the burden had shifted to the owners to present evidence establishing a probability that they would prevail on their claims, and that they had not met their burden (*180 Cal. App. 4th 676, 679-681)* .

The Court of Appeal reversed. The court held that § 425.16(e)(4) does not apply whenever the issue concerns the conduct of a homeowners association in discharging its architectural review obligations. The underlying litigation concerned a homeowners association, but it did not involve board elections, recall campaigns, or who should be the manager of the association; it pertained to the interaction between homeowners and a homeowners association with respect to the homeowners' desired improvements. The court found that there was no reason to believe that this was of interest to any homeowners other than the plaintiffs and the neighbor whose view may have been affected by the height of the casita. The association's actions that gave rise to the dispute, and upon which the causes of action were based, were not taken in furtherance of the right of free of speech or the right of petition. The fact that certain association demands were made in writing did not convert the association's acts in connection with CC&R's enforcement into acts in furtherance of the right of free speech (*180 Cal. App. 4th 676, 681-688)* .

[4] Additional Authorities

In *Scalzo v. Baker (2010) 185 Cal. App. 4th 91* , a brother and sister filed a complaint against another brother, his adult son, his attorney, the law firm representing the defendant-brother, a certified public accountant working for defendant-brother "in connection with a different litigation," and the accounting firm where the accountant was employed, alleging causes of action relating to defendant-brother's successful and unsuccessful efforts to obtain plaintiffs' American Express credit card statements and his dissemination of the statements to additional persons,

including his attorneys, accountants, family members and other unknown persons, causing damage to their credit and identity theft. As to defendant-brother, plaintiffs asserted causes of action for invasion of privacy, violation of the Gramm-Leach-Bliley Act (*15 U.S.C. § 6821 et seq.*), violation of the California Financial Information Privacy Act (*Fin. Code, § 4050 et seq.*), and injunctive relief. The cause of action for injunctive relief was asserted as to the attorney and accountant defendants as well. The attorney and accountant defendants filed a special motion to strike the cause of action for injunctive relief, arguing the complaint arose from their furtherance of constitutional rights, that plaintiff could not prevail on the claims and that defendants' conduct was absolutely privileged under *Civ. Code § 47(b)*. This was based on the fact that defendant-brother had filed a complaint seeking an accounting relating to funds generated from commercial property held in all three siblings' names, as to which defendant-brother sought information, including the American Express records, related to finding out what happened to funds generated from the properties. The accountant and his firm were retained as experts to review and analyze books, records and financial statements from the properties. The trial court granted the attorney and accountant defendants' special motion to strike and awarded attorney's fees. The defendant-brother and his son filed a special motion to strike, arguing that the complaint arose out of protected activity, that plaintiffs could not demonstrate a probability of prevailing on their claims and that defendant-brother's communications were absolutely privileged, because he contacted American Express to obtain account records for an account he had with his brother and sister, which was partially used to pay for expenses on rent-producing properties the three siblings co-owned, and the jointly owned property and the accounting for the real property was at issue in the case he filed. The trial court granted the brother-defendant's and his son's special motion to strike and awarded attorney's fees. The Court of Appeal reversed as to the defendant-brother and his son. The court found that plaintiffs presented sufficient to meet the burden of showing the probability of prevailing on their claims, and the claim that the litigation privilege precluded success on the merits could not stand. The court found that the litigation privilege did not protect illegal conduct resulting in damages unrelated to the use of the fruits of that conduct in litigation, because plaintiffs demonstrated damages separate from the litigation, so that the alleged wrongful, potentially criminal activity, was not immunized. Neither defendant-brother's assertion that his purpose in obtaining the documents from American Express was to obtain information for the litigation between the parties or that the damages asserted rested on the use of the documents in that litigation provided a basis for the absolute bar he asserted, because he told both American Express and the court below that he needed to obtain the documents to prepare his taxes, which had no relation to judicial proceedings, and because plaintiffs asserted damages arising from the act itself, as well as damages unrelated to the use of the documents in litigation, namely identity theft and damage to credit caused by the use and dissemination of the documents outside of litigation. However, as to the claim for injunctive relief asserted against defendant-brother, his son, and the attorneys and accountants, plaintiffs made no claim or factual showing, that defendants obtained the documents in violation of the law or used the documents in any manner outside of the litigation context, so that they demonstrated that the litigation privilege applied (*185 Cal. App. 4th 91, 97-102)* .

In *USA Waste of California, Inc. v. City of Irwindale (2010) 184 Cal. App. 4th 53, 108 Cal. Rptr. 3d 466*, a corporation filed a cross-complaint against a city, alleging causes of action for declaratory relief, breach of contract, and equitable estoppel. The trial court denied the city's special motion to strike the cross-complaint pursuant to the anti-SLAPP statute, on the ground that the gravamen of the causes of action alleged in the cross-complaint was the city's action in imposing its new guidelines and not the issuance of a notice of violation, and that the city had not met its burden of showing that the cross-complaint was based on the city's exercise of protected activity under the anti-SLAPP statute. The Court of Appeal affirmed. Even if the issuance of the notice of violation was protected speech within the meaning of the anti-SLAPP statute, the city's contention that the causes of action in the cross-complaint were based on protected speech failed because those causes of action were not based on the city's issuance of the notice of violation. The cross-complaint concerned a private matter between the corporation and the city that was not a public issue or of public interest. The cross-complaint did not concern the application of backfilling standards and the city's land use guidelines to landfill operations in the city generally, but, instead, concerned whether the city could use the guidelines to alter the backfilling standards for a particular landfill operation (184 Cal. App. 4th 53, 62-66).

The facts and procedural background of *All One God Faith, Inc. v. Organic and Sustainable Industry Standards, Inc. (2010) 183 Cal. App. 4th 1186, 107 Cal. Rptr. 3d 861* , are set forth I § 160.40A[3][a], *above* . The Court of Appeal

found that, while the act of formulating a proposed industry "organic" standard may have constituted protected activity, the certification of products plaintiff sought to enjoin was not, and that the certification activities did not constitute conduct in furtherance of the formulation of the standard (*183 Cal. App. 4th 1186, 1200-1205*). Further, the certification was commercial speech because it sought to promote its members' general business interest. The mere fact that a large number of people could be affected by advertising did not, standing alone, satisfy the public interest requirement. Certifying members to use its seal stating that the product was organic was not activity directed to public discussion of organic standards in general, but was only speech about the contents and quality of the product, which was not intertwined with speech about, or contributing to the debate on, the merits of a particular definition of "organic" (183 Cal. App. 4th 1186, 1205-1211).

In *D.C. v. R.R. (2010) 182 Cal. App. 4th 1190, 106 Cal. Rptr. 3d 399* , D.C., a student who attended a private educational institution and his parents filed an action against several other students and their parents, alleging violation of the hate crimes law (*Civ. Code § 51.7(a)*), defamation, and intentional infliction of emotional distress, based on threatening comments posted on the student's website by other students and their effect on plaintiffs. The trial court denied the anti-SLAPP motion of one student and his parents on the ground that the case did not involve a public issue. The Court of Appeal affirmed, concluding that defendants did not demonstrate that the posted comments were protected speech and, assuming the posting was a "joke" and thus constitutionally protected, it was not a statement made in connection with a "public issue" as that term is used in the anti-SLAPP statute (*182 Cal. App. 4th 1190, 1210-1231)* . The student had posted the following message: "Hey [plaintiff], I want to rip out your fucking heart and feed it to you. I heard your song while driving my kid to school and from that moment on I've ... wanted to kill you. If I ever see you I'm ... going to pound your head in with an ice pick. Fuck you, you dick-riding penis lover. I hope you burn in hell." The court found that the message was an unequivocal serious expression of intent to inflict bodily harm conveyed no less than three times. The content of the message and its transmission showed deliberation on the part of the author. Under the true threat analysis, because the threat conveyed a serious expression of an intent to inflict bodily harm at all or in any manner, it was not constitutionally protected. That students other than the author found the posts as a whole to be funny or amusing did not suggest how plaintiffs should have viewed the post in particular. A reasonable person would foresee that the post would be interpreted by student-plaintiff and his parents as a serious expression of an intent to inflict bodily harm. With regard to actual intent, on its face, the post did not support a finding of jocular intent. The tone was serious, not humorous. The message described violent conduct the author "wants" to commit, expressed the author's feelings of anger and hatred, and indicated the author will physically attack the recipient if he ever sees him. The content of the message showed it was written with deliberation. Thus, an intent to harm was evident. It was irrelevant, for *First Amendment* purposes, that defendant may not have intended to carry out his threat. Even assuming he believed that his message was humorous, he may still have intended it as a threat, and the actions taken by his parents in response to his message contradicted the assertion that he intended to play a mere joke as they terminated his access to the Internet, grounded him, prohibited his use of cell phones except for emergencies, took away his driving privileges, and had him evaluated by a psychiatrist to ensure his conduct was never repeated and the root cause, if any, was dealt with immediately. Thus, defendants failed to make a sufficient showing of protected speech under the subjective standard of the true threat analysis. Finally, the court concluded that the complaint did not involve a public issue, even though Web sites accessible to the public are "public forums" for purposes of the anti-SLAPP statute. Liability was premised on a Web site message from one teenager to another, which did not mention a public issue, but which combined a threat of bodily harm with derogatory language. Further, the public was not fascinated with the student-plaintiff, nor was there widespread public interest in his personal life, as there is no evidence that he was a nationally known singer or actor even under his pseudonym, even though he had a record album with a planned release date, had broadcast a song worldwide via satellite radio, had played the leading role in a feature film presented at an internationally acclaimed film festival, and had toured under the auspices of a nationally recognized radio network. However, there was no evidence that, as a student and under his real name, that he was known to the public or was in the public eye, and his use of a Web site in pursuing an entertainment career did not, ipso facto, put him in the public eye. Assuming the message was a joke, it did not implicate a public issue. Nor was the posted message analogous to a magazine article discussing a celebrity or to a television interview or radio show about a celebrity. Thus, the message did not concern a person in the public eye, conduct that could directly affect large numbers of people beyond the participants, or a topic of widespread

public interest.

In *Robles v. Chalilpoyil (2010) 181 Cal. App. 4th 566, 104 Cal. Rptr. 3d 628* , plaintiffs filed an action against their former attorneys and defendant, an expert witness, alleging negligence and conspiracy to commit fraud, arising from a wrongful death action by plaintiffs in which the former attorneys represented them and defendant served as an expert witness. Defendant moved to strike the complaint under *Code Civ. Proc. § 425.16* on the ground that the negligence cause of action was based on false testimony made in the context of a legal proceeding and therefore protected communication, and the conspiracy cause of action was based on a request soliciting the expert's agreement to allow his work product to be provided to the underlying defendants in the event of a settlement, which fell comfortably within the express terms of § 425.16(e)(2) as well as within the litigation privilege in *Civ. Code § 47(b)*. However, the trial court denied the motion, ruling that plaintiffs' complaint did not fall within the protection of either the litigation privilege or the anti-SLAPP statute. (*181 Cal. App. 4th 566, 570-572*). The Court of Appeal affirmed. In the first cause of action, defendant was accused of negligence by falsely testifying in his deposition and by failing to continue to act as an independent expert and/or disrupting the prosecution of the underlying case by entering into a business relationship, agreement, and/or proposal with defendants to design, develop and/or market a device or devices to improve the safety of the wheelchair in which plaintiffs' decedent was killed, while defendants were still obligated to act as the plaintiffs' expert in the underlying case. The court found that the conduct described in the negligence allegation and the cause of action for conspiracy to commit fraud did not fall into any of the four categories of section 425.16(e), and that § 425.16 does not shield statements made on behalf of a client who alleges negligence in the defendant's representation of the client or breach of the duty of loyalty. To the extent the conspiracy cause of action could have been said to have arisen from the right of free speech or petition, that right clearly was not being exercised in the litigation on plaintiff's behalf. Further, all communications protected by the litigation privilege were not within the ambit of § 425.16 (*181 Cal. App. 4th 566, 574-583*).

In *PrediWave Corp. v. Simpson Thacher & Bartlett LLP (2009) 179 Cal. App. 4th 1204, 102 Cal. Rptr. 3d 245* , plaintiff corporation sued defendant law firm and attorneys who had previously represented both the corporation and its former president and CEO, stating four causes of action: Breach of fiduciary duty, constructive fraud, legal malpractice, and violation of *Bus. & Prof. Code § 17200 et seq.* by defendant law firm, based on lawsuits brought against the corporation that resulted in judgment against it. Defendants successfully brought a special motion to strike under the anti-SLAPP statute based upon protected speech and petitioning activity in the underlying lawsuits (*179 Cal. App. 4th 1204, 1209-1217)* . The Court of Appeal reversed. The California Supreme Court had stated that a cause of action "arising from" defendant's litigation activity could appropriately be the subject of a § 425.16 motion to strike (*see Church of Scientology v. Wollersheim (1996) 42 Cal. App. 4th 628, 648, 49 Cal. Rptr. 2d 620 , disapproved on other grounds* in *Equilon Enterprises v. Consumer Cause, Inc. (2002) 29 Cal. 4th 53, 68 n.5, 124 Cal. Rptr. 2d 507, 52 P.3d 685*). Further, "any act" includes qualifying acts committed by attorneys in representing clients in litigation (*see, e.g., Chavez v. Mendoza (2001) 94 Cal. App. 4th 1083, 1086, 114 Cal. Rptr. 2d 825* ; *Dowling v. Zimmerman (2001) 85 Cal. App. 4th 1400, 1418-1420, 103 Cal. Rptr. 2d 174]* . However, it did not necessarily follow that § 425.16 applied when a client sued a former attorney for acts ostensibly done in furtherance of the client's rights. In this case, the principal thrust of plaintiff's causes of action was that defendants simultaneously represented both the corporation and its former CEO in matters in which they had an irreconcilable conflict of interest, which allegedly adversely affected defendants' choice of legal strategy and resulted in defendants' repeated failures to take action to safeguard the corporation against the former CEO's misconduct. Defendants' continuation of joint representation, their legal strategy and implementing noncommunicative conduct, and their alleged failures to act were not statements or writings within the meaning of § 425.16(e), and there was no showing that any of defendants' allegedly wrongful conduct, not consisting of statements or writings, occurred in connection with a public issue or an issue of public interest [*Code Civ. Proc. § 425.16(e)(4)*]. Thus, defendants did not satisfy their threshold burden of demonstrating that the principal thrust of any of the complaint's causes of action was activity protected by the anti-SLAPP statute (*179 Cal. App. 4th 1204, 1217-1229)* .

Delois v. Barrett Block Partners (2009) 177 Cal. App. 4th 940, 99 Cal. Rptr. 3d 609 was a landlord-tenant dispute in

which plaintiff was a longtime tenant in a work/live space located in a building owned by defendant. After about 10 years, the parties attempted to negotiate a new lease for the property and were unsuccessful. As a result, defendant served plaintiff with a three-day notice to quit but never filed an unlawful detainer action. Subsequently, the parties agreed on and executed a tenancy termination agreement, but plaintiff did not vacate the premises on the agreed-upon date or completely remove his belongings. As a result, defendants assessed plaintiff $15,000 and did not return his security deposit. Plaintiff's complaint in the instant action for declaratory relief, misrepresentation, breach of contract and other causes of action followed. In response, defendant filed an Anti-SLAPP motion, alleging the complaint arose out of its protected activity in entering into a settlement agreement to avoid litigation. The trial court granted the motion as to some causes of action, and both parties appealed. The court of appeals reversed the trial court's granting of the motion, finding that none of the causes of action arose from protected activity. The case law has established that when litigation is contemplated but never commenced, and the parties enter into an agreement to avoid litigation, a subsequent suit for breach of that agreement is not subject to the Anti-SLAPP statute. The court noted the limited application of the Anti-SLAPP statute to landlord tenant disputes in cases such as *Clark v. Mazgani (2009) 170 Cal. App. 4th 1281, 89 Cal. Rptr. 3d 24* and *Marlin v. Aimco Venezia, LLC (2007) 154 Cal. App. 4th 154, 64 Cal. Rptr. 3d 488* , both discussed below. The complaint in this action merely challenged defendant's conduct in allegedly breaching the tenancy termination agreement and in failing to return the deposit. Such activity is not protected under the Anti-SLAPP statute (*177 Cal. App. 4th 940, 954)* .

In *Clark v. Mazgani (2009) 170 Cal. App. 4th 1281, 89 Cal. Rptr. 3d 24* , defendant landlord had evicted plaintiff from her apartment, ostensibly so that defendant's daughter could move in. The Los Angeles Rent Stabilization Ordinance (RSO) permits eviction of a tenant from a rent-controlled apartment if the landlord intends to have an immediate family member occupy the unit. Subsequently, plaintiff filed an action against defendant for violation of the RSO, fraud and unfair business practices, alleging that defendant's daughter never moved in and that defendant never intended for her to move in. Defendant responded to the complaint by filing an Anti-SLAPP motion, contending the complaint arose out of communications made in the course of the eviction action. The trial court agreed, and granted the motion. Plaintiff appealed. The court of appeals reversed. The critical focus point of a SLAPP analysis is on the defendant's activity giving rise to the alleged liability. Although prosecution of an unlawful detainer action is protected activity, the complaint in this instance was premised on defendant's removal of the apartment and fraudulent eviction, as defendant's daughter never moved into the unit. Under prior cases such as *Marlin v. Aimco Venezia, LLC (2007) 154 Cal. App. 4th 154, 64 Cal. Rptr. 3d 488* (*see below*), terminating a tenancy or removing a property from the rental market are not protected activities (*170 Cal. App. 4th 1281, 1286-1287)* .

Platypus Wear, Inc. v. Goldberg (2008) 166 Cal. App. 4th 772, 83 Cal. Rptr. 3d 95 was a lawsuit in which plaintiff alleged defendant had illegitimately acted as its chief financial officer and member of its board of directors. More than two years after the filing of the complaint, defendant filed an ex parte application requesting that the court permit him to file a late Anti-SLAPP motion. The trial court granted defendant's request to file the Anti-SLAPP motion, but denied the motion. Both parties appealed: plaintiff argued the court abused its discretion in allowing defendant to file a late Anti-SLAPP motion, and defendant appealed the denial of his Anti-SLAPP motion. The court of appeals held the trial court had abused its discretion in allowing defendant to file the motion. By the time defendant filed his ex parte application, trial was only three months away and the parties had conducted significant discovery. One of the purposes of the Anti-SLAPP statute is to permit resolution of claims before the parties incur the expense of discovery. Although defendant argued his attempt to file an Anti-SLAPP motion served the purpose of promoting judicial economy by narrowing the issues, he could have accomplished the same goal with a motion for summary judgment. In short, defendant failed to point to anything in the case's procedural history that would justify such a late filing of an Anti-SLAPP motion (*166 Cal. App. 4th 772, 787)* .

Marlin v. Aimco Venezia, LLC (2007) 154 Cal. App. 4th 154 was a declaratory relief action filed by apartment complex tenants against their landlord. The landlords served an Ellis Act notice to vacate on the tenants stating they planned to remove the tenants' unit from the rental market. The tenants filed a declaratory relief action seeking a declaration of their rights under the Ellis Act. Defendant landlords filed an Anti-SLAPP motion, alleging the complaint

arose from their filing and serving the Ellis Act notices. The trial court granted the motion and dismissed the action. The court of appeals reversed, holding that the declaratory relief action arose from terminating plaintiffs' tenancy and removing the unit from the rental market, which was not protected activity. Although the filing and service of the Ellis Act notice may have been protected activity, it was not the basis of plaintiffs' cause of action (*154 Cal. App. 4th 154, 160-161*).

In *City of Riverside v. Stansbury (2007) 155 Cal. App. 4th 1582, 66 Cal. Rptr. 3d 862* , defendant Stansbury submitted a proposed ballot initiative to amend the city's charter with respect to eminent domain. The city responded by filing a lawsuit against defendant, seeking a declaration that the initiative was not a proper subject for a local initiative. Defendant filed an Anti-SLAPP motion, arguing that its conduct was protected under the *First Amendment*. The trial court granted the motion. The court of appeals reversed, noting that although the appeal was technically moot, it would rule on the issue as it was likely to recur. The court held that in filing the declaratory relief action, the city was simply asking for the court's guidance as to the constitutionality of the proposed initiative. In filing the lawsuit, the city did nothing to limit defendants' *First Amendment* rights (*155 Cal. App. 4th 1582, 1590-1591)* .

In *Olaes v. Nationwide Mutual Ins. Co. (2006) 135 Cal. App. 4th 1501, 38 Cal. Rptr. 3d 467* , plaintiff was a former employee of defendant Nationwide who was terminated following allegations of sexual harassment by fellow employees. Plaintiff Oales sued Nationwide for defamation, and Nationwide filed an Anti-SLAPP motion, claiming its sexual harassment investigation was an "official proceeding authorized by law" within the meaning of *Code Civ. Proc. § 425.16(e)(1)*. The court disagreed, holding the Legislature intended to protect speech in a government, rather than a private, forum (*135 Cal. App. 4th 1501, 1507)* . The investigation was not a quasi-governmental proceeding, but rather was "designed and instituted by a private company" (*135 Cal. App. 4th 1501, 1508)* . Finally, Nationwide's conduct did not concern a matter of public interest within the meaning of *Code Civ. Proc. § 425.16(e)(4)* because a private company's investigation regarding a small number of people did not rise to a public interest within the meaning of the statute (*135 Cal. App. 4th 1501, 1511)* .

In *Foundation of Taxpayer & Consumer Rights v. Garamendi (2005) 132 Cal. App. 4th 1375, 34 Cal. Rptr. 3d 368* , plaintiff Foundation filed a complaint against the State of California and Insurance Commissioner Garamendi to invalidate Senate Bill 841, alleging the bill was an unconstitutional amendment of Proposition 103. Although the complaint did not name Mercury Insurance as a defendant, it did reference Mercury in the allegations of the complaint. Mercury Insurance sought leave to intervene in the action and, at the same time, filed an application for an order shortening notice time to bring an Anti-SLAPP motion. The trial judge denied Mercury's motion for leave to intervene, and Mercury filed a petition for writ of mandate. The court of appeals granted the petition for writ of mandate. In the meantime, Mercury filed a notice of motion for leave to intervene and a combined motion to strike and Anti-SLAPP motion in the trial court. Plaintiffs ultimately stipulated to Mercury's intervention in the lawsuit. The trial court granted Mercury's motion to strike but denied its Anti-SLAPP motion, finding it frivolous. The trial court concluded that Mercury lacked standing to bring an Anti-SLAPP motion because Mercury was not named as a defendant and therefore the complaint did not allege any cause of action against Mercury, as required by the Anti-SLAPP statute. Because Mercury was not named as a defendant in the complaint, it could not satisfy its burden of showing an action was brought against it (*132 Cal. App. 4th 1375, 1392*).

In *Zhao v. Wong (1996) 48 Cal. App. 4th 1114, 55 Cal. Rptr. 2d 909* , the plaintiff sued for slander, alleging that defendant made statements to a reporter and to his father accusing the plaintiff of murder and forging a will. The reporter had interviewed defendant about the death and a will contest between plaintiff and defendant's father in which judgment in plaintiff's favor was pending appeal. The trial court granted defendant's motion to strike the complaint under *Code Civ. Proc. § 425.16* and entered a judgment of dismissal. The plaintiff appealed.

The court of appeal reversed. The court's narrow interpretation of *Code Civ. Proc. § 425.16(e)*, that concluded the Legislature intended the statute to be governed by the restricted scope of the statement of legislative purpose in *Code Civ. Proc. § 425.16(a)* (*48 Cal. App. 4th 1114, 1128-1129)* has been disapproved in *Briggs v. Eden Council for Hope*

and Opportunity (1999) 19 Cal. 4th 1106, 1123 n.10, 81 Cal. Rptr. 2d 471, 969 P.2d 564 . However, the Zhao court also made the point that *Wilcox v. Superior Court (1994) 27 Cal. App. 4th 809, 820, 33 Cal. Rptr. 2d 446* , established the principle that the moving party bears the initial burden of showing that the plaintiff's cause of action arises from an act of the defendant in furtherance of the defendant's right of petition or free speech under the United States or California Constitution in connection with a public issue (*48 Cal. App. 4th 1114, 1130-1131*). The court then reviewed the [then] three-part definition of subdivision (e) [prior to its amendment by 1997 Stats., ch. 271, § 1], and found that phrase (1) of subdivision (e) could not apply because communications at issue were not made before a legislative, executive, or judicial proceeding, or any other official proceeding. and that phrase (3) could not apply because the statements were not made in a place open to the public or a public forum, a private newspaper not being a public forum (*48 Cal. App. 4th 1114, 1131*). With regard to phrase (2), the court noted that it could not be seriously contended that every comment on a lawsuit involves a public issue and that although lawsuits may sometimes relate to a public issue, the mere fact that a lawsuit was pending has no significance in determining the existence of a public issue. Also, the question whether statements concern a matter of public interest cannot be determined on the basis of media coverage, notoriety, or potential newsworthiness (*48 Cal. App. 4th 1114, 1131)* . The existence of a public issue depends rather on whether the statements possessed the sort of relevance to self-government that places them in a specially protected category of *First Amendment* values. Though the unusual and intriguing circumstances surrounding the decedent's death and the discovery of a purported holographic will may have been newsworthy, they did not involve a public issue in the sense interpreted by the court (*48 Cal. App. 4th 1114, 1132)* . The court noted that under the broad interpretation of *Code Civ. Proc. § 425.16* advocated in *Averill v. Superior Court (1996) 42 Cal. App. 4th 1170, 50 Cal. Rptr. 2d 62* , the plaintiff's cause of action based on the press interview involving allegations of slander per se with tenuous and speculative links with the petition clause might perhaps be thought to come within the statute (*48 Cal. App. 4th 1114, 1132-1133)* . The Zhao court, however, read the statute as providing an extraordinary remedy for a narrowly defined category of litigation, and required the moving party to show facts from which the court could reasonably conclude that the statements at issue were made in the exercise of the right to participate freely in the public process without the threat of litigation (*48 Cal. App. 4th 1114, 1133)* . For a discussion of *Averill v. Superior Court (1996) 42 Cal. App. 4th 1170, 50 Cal. Rptr. 2d 62* , see § 161.38[3][b]. Other than in regard to the issue of burden of proof, counsel should use Zhao with caution, given the disapproval of its narrow reading of *Code Civ. Proc. § 425.16(a)* in *Briggs v. Eden Council for Hope and Opportunity (1999) 19 Cal. 4th 1106, 1123 n.10, 81 Cal. Rptr. 2d 471, 969 P.2d 564* .

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California Points & Authorities

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
CHAPTER 161 MOTIONS TO STRIKE: ANTI-SLAPP
PART II. FORMS
PART B. Opposing Special Motion to Strike

16-161 California Points & Authorities § 161.61

§ 161.61 Opposing Special Motion to Strike Action Against Constitutionally Privileged Conduct (SLAPP Suit) [Code Civ. Proc. § 425.16(b)]--Action Brought Solely in the Public Interest [Code Civ. Proc. § 425.17(b)]

[1] FORM

[*This form should be used in combination with the general form of memorandum opposing a special motion to strike (see § 161.60)*].

THE SPECIAL MOTION TO STRIKE SHOULD NOT BE GRANTED BECAUSE THE PLAINTIFF BROUGHT THE ACTION SOLELY _____ [IN THE PUBLIC INTEREST *or* ON BEHALF OF THE GENERAL PUBLIC] AND PLAINTIFF MEETS THE STATUTORY EXCEPTION REQUIREMENTS OF CODE OF CIVIL PROCEDURE § 425.17(b).

A. Plaintiff Brought the Action Solely in the Public Interest or on Behalf of the General Public. *Code Civ. Proc. § 425.16(b)* does not apply to any action brought solely in the public interest or on behalf of the general public as long as the following conditions are met (*Code Civ. Proc. § 425.17(b)*):

1. Plaintiff does not seek any relief greater than or different from _____ [the general public *or* the class of which plaintiff is a member] (*Code Civ. Proc. § 425.17(b)(1)*).

2. The action, if successful, would enforce an important right affecting the public interest, and would confer a significant benefit, whether pecuniary or nonpecuniary, on _____ [the general public *or* a large class of persons] (*Code Civ. Proc. § 425.17(b)(2)*).

3. Private enforcement is necessary and places a disproportionate financial burden on the plaintiff in relation to the plaintiff's stake in the matter (*Code Civ. Proc. § 425.17(b)(3)*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a defendant's special motion to strike under *Code Civ. Proc. § 425.16* when the plaintiff's action was brought solely in the public interest or on behalf of the general public [*Code Civ. Proc. § 425.17(b)*]. In 2003, the Legislature determined that there had been a "disturbing" abuse of California's Anti-SLAPP motion procedure [*Code Civ. Proc. § 425.17(a)*]. The Legislature enacted *Code Civ. Proc. § 425.17* to provide statutory exceptions to an Anti-SLAPP motion.

To meet this exception, plaintiff must show that all three of the conditions set forth in *Code Civ. Proc. § 425.17(b)* are met. Counsel should set forth argument in the form showing how the listed conditions are met.

[b] Circumstances Under Which Statutory Exceptions Are Inapplicable

There are circumstances when the foregoing statutory prohibition against bringing a special motion to strike does not apply. An Anti-SLAPP motion is permitted as an exception to the foregoing prohibition as follows [*Code Civ. Proc. § 425.17(d)*]:

- The Anti-SLAPP motion can be employed against claims arising from gathering, receiving or processing information for communication to the publisher, editor, reporter or other person connected or employed upon a newspaper, magazine or other periodical publication, press association or wire service, or a person engaged in the dissemination of ideas or expression in any book or academic journal [*Code Civ. Proc. § 425.17(d)(1)*].

- The Anti-SLAPP motion can be employed against claims against any person or entity based upon the creation, dissemination, exhibition, advertisement or other promotion of any dramatic, literary, musical, political or artistic work [*Code Civ. Proc. § 425.17(d)(2)*].

- The Anti-SLAPP motion can be employed against claims against any non-profit organization that receives more than 50% of its annual revenue from federal, state, or local government grants, awards, programs, or reimbursements for services rendered [*Code Civ. Proc. § 425.17(d)(3)*].

[c] Opposing Memoranda

In an appropriate case, this form may be used to oppose the memorandum *set out in § 161.30* or *161.34*.

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
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16-161 California Points & Authorities § 161.62

§ 161.62 Opposing Special Motion to Strike Action Against Constitutionally Privileged Conduct (SLAPP Suit) [Code Civ. Proc. § 425.16(b)]--Action Brought Against a Person Primarily Engaged in the Business of Selling Goods or Services [Code Civ. Proc. § 425.17(c)]

[1] FORM

[*This form should be used in combination with the general form of memorandum opposing a special motion to strike (see § 161.60)*].

THE SPECIAL MOTION TO STRIKE SHOULD NOT BE GRANTED BECAUSE THE PLAINTIFF BROUGHT THE ACTION AGAINST A PERSON PRIMARILY ENGAGED IN THE BUSINESS OF SELLING _____ [GOODS or SERVICES] AND PLAINTIFF MEETS THE STATUTORY EXCEPTION REQUIREMENTS OF CODE OF CIVIL PROCEDURE § 425.17(c).

A. Plaintiff Brought the Action Against a Person Primarily Engaged in the Business of Selling Goods or Services. *Code Civ. Proc. § 425.16(b)* does not apply to any action brought against a person primarily engaged in the business of selling goods or services if both of the following conditions are met (*Code Civ. Proc. § 425.17(c)*):

[*EITHER*]

1. The statement or conduct consists of representations of fact about that person's _____ [business operations *or* goods *or* services] that is made for the purpose of _____ [obtaining approval for *or* promoting *or* securing sales or leases of *or* commercial transactions in] the person's _____ [goods *or* services] (*Code Civ. Proc. § 425.17(c)(1)*).

[*OR*]

1. The statement or conduct was made in the course of delivering the person's _____ [goods *or* services] (*Code Civ. Proc. § 425.17(c)(1)*).

[*EITHER*]

2. The intended audience is _____ [an actual or potential buyer or customer *or* a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer] (*Code Civ. Proc. § 425.17(c)(2)*).

[OR]

2. The statement or conduct arose out of or within the context of a regulatory approval _____ [process *or* proceeding *or* investigation] not withstanding that the conduct or statement concerns an important public issue (*Code Civ. Proc. § 425.17(c)(2)*).

B. *Code Civ. Proc. § 425.17* is Constitutional and Not An Invalid Attempt to Regulation Speech Concerning Important Public Issues. *Code of Civil Procedure Section 425.17(c)* does not purport to regulate, restrict, condition or penalize a defendant's ability as a speaker freely to engage in commercial speech; it merely regulates or restricts the defendant's ability as a litigant to seek dismissal of certain lawsuits at a particular stage of the litigation (*Brenton v. Metabolife International, Inc. (2004) 116 Cal. App. 4th 679, 689-690, 10 Cal. Rptr. 3d 702* ; *Physicians Committee for Responsible Medicine v. Tyson Foods, Inc. (2004) 119 Cal. App. 4th 120, 130, 13 Cal. Rptr. 3d 926*).

[*Optional*] **C. *Code Civ. Proc. § 425.17* Applies Retroactively.** *Code of Civil Procedure Section 425.17* is properly characterized as a procedural statute applicable to pending actions, and the new statutory scheme may be applied to pending actions without triggering retroactivity concerns (*Brenton v. Metabolife International, Inc. (2004) 116 Cal. App. 4th 679, 689-690, 10 Cal. Rptr. 3d 702*).

[*Optional*] **D. The Action Arises Out of Commercial Speech and Conduct and Is Therefore Exempt From Anti-SLAPP Scrutiny.** Where defendants, as large financial management and services entities, are "primarily engaged in the business of selling ... goods or services, including, but not limited to ... securities, or financial instruments," and the challenged "statement or conduct was made in the course of delivering the person's goods or services" they are exempt from an Anti-SLAPP motion (*Brill Media Co. v. TCW Group, Inc. (2005) 132 Cal. App. 4th 324, 341-342, 33 Cal. Rptr. 3d 371 overruled on other grounds in Simpson Strong Tie, Inc. v. Gore (2010) 49 Cal. 4th 12, 109 Cal. Rptr. 3d 329, 230 P.3d 1117* (burden of proof on plaintiff).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a defendant's special motion to strike under *Code Civ. Proc. § 425.16* when the plaintiff's action was brought against a person primarily engaged in the business of selling goods or services [*Code Civ. Proc. § 425.17(c)*]. In 2003, the Legislature determined that there had been a "disturbing" abuse of California's Anti-SLAPP motion procedure [*Code Civ. Proc. § 425.17(a)*]. Consumer groups argued that large corporations were invoking the Anti-SLAPP statute to delay and discourage litigation against them. The Legislature enacted *Code Civ. Proc. § 425.17* to provide statutory exceptions to an Anti-SLAPP motion.

To meet this exception, plaintiff must show both of the conditions set forth in *Code Civ. Proc. § 425.17(c)* are met. Counsel should set forth argument in the form showing how the listed conditions are met.

[b] Exception Does Not Apply in Public Utilities Commission Proceedings

The exception to an Anti-SLAPP motion for actions brought against a person primarily engaged in the business of selling goods or services does not apply where the statement or conduct at issue was made by a telephone corporation in the course of a proceeding before the California Public Utilities Commission and is the subject of a lawsuit brought by a competitor [*Code Civ. Proc. § 425.17(c)(2)*].

[c] Circumstances Under Which Statutory Exceptions Are Inapplicable

There are circumstances when the foregoing statutory prohibition against bringing a special motion to strike does not apply. An Anti-SLAPP motion is permitted as an exception to the foregoing prohibition as follows [*Code Civ. Proc. § 425.17(d)*]:

- The Anti-SLAPP motion can be employed against claims arising from gathering, receiving or processing information for communication to the publisher, editor, reporter or other person connected or employed upon a newspaper, magazine or other periodical publication, press association or wire service, or a person engaged in the dissemination of ideas or expression in any book or academic journal [*Code Civ. Proc. § 425.17(d)(1)*].

- The Anti-SLAPP motion can be employed against claims against any person or entity based upon the creation, dissemination, exhibition, advertisement or other promotion of any dramatic, literary, musical, political or artistic work [*Code Civ. Proc. § 425.17(d)(2)*].

- The Anti-SLAPP motion can be employed against claims against any non-profit organization that receives more than 50% of its annual revenue from federal, state, or local government grants, awards, programs, or reimbursements for services rendered [*Code Civ. Proc. § 425.17(d)(3)*].

[d] Opposing Memoranda

In an appropriate case, this form may be used to oppose the memorandum *set out in § 161.30* or *161.34*.

[3] Discussion of Authorities

[a] Code Civ. Proc. § 425.17 is Constitutional and Not An Invalid Attempt to Regulation Speech Concerning Important Public Issues

In ***Brenton v. Metabolife International, Inc.*** *(2004) 116 Cal. App. 4th 679, 10 Cal. Rptr. 3d 702* , a consumer alleged that she developed a mental illness as a result of consuming a defective dietary supplement produced by the manufacturer. She also alleged false advertising and misbranding of the product. The manufacturer moved to strike the complaint under the Anti-SLAPP statute, contending that the complaint targeted its constitutionally protected commercial speech. The trial court denied the manufacturer's motion under the Anti-SLAPP statute, *Code Civ. Proc. § 425.16*, to strike plaintiff consumer's complaint alleging causes of action for product liability, negligence, breach of express and implied warranty, and fraud. On appeal, the defendant asserted *Code Civ. Proc. § 425.17*, enacted during the appeal, did not apply retroactively and that the statute was unconstitutional.

The appellate court held that *Code Civ. Proc. § 425.17* is constitutional because the statute does not purport to regulate, restrict, condition or penalize a defendant's ability as a speaker freely to engage in commercial speech; it merely regulates or restricts the defendant's ability as a litigant to seek dismissal of certain lawsuits at a particular stage of the litigation (*116 Cal. App. 4th 679, 692)* . The defendant was unable to support the contention that a defendant has a *First Amendment* right to specialized procedural remedies against a private lawsuit seeking to impose liability for unprotected commercial speech, and the court could not find any case law holding there is a constitutional imperative

that a legislature must make procedural screening devices available to preempt those private lawsuits (*116 Cal. App. 4th 679, 692)* .

In ***Physicians Committee for Responsible Medicine v. Tyson Foods, Inc.*** *(2004) 119 Cal. App. 4th 120, 13 Cal. Rptr. 3d 926* , the plaintiff, a nonprofit organization, alleged that defendant poultry producer made false and deceptive representations about chicken products that it sold to consumers in California. The complaint alleged that the poultry producer engaged in two advertising campaigns that disseminated false and deceptive statements about its products. The second campaign involved a representation that the products were a "natural" food. The poultry producer brought a motion to strike pursuant to *Code Civ. Proc. § 425.16*. The poultry producer attacked the complaint as alleging causes of action arising from the exercise of its right of free speech in connection with a public issue. The trial court granted the motion with respect to the causes of action involving the second campaign.

On appeal, the court held that the enactment of *Code Civ. Proc. § 425.17* during the pendency of the appeal operated as a repeal of the statutory authorization for the trial court's order and mandated reversal. The court stated that the suit against the poultry producer for deceptive advertising practices came squarely within *Code Civ. Proc. § 425.17(c)*. Additionally, the court stated that *Code Civ. Proc. § 425.17(c)* did not restrict or regulate speech by redefining the availability of a procedure for early adjudication of claims. Citing Brenton, above, the court upheld the constitutionality of the statute and further added that the legislative decision to provide a procedure for early adjudication of claims affecting *First Amendment* freedoms is analogous to a legislative decision restricted lobbying activities of organizations qualifying for tax exempt status. A legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny (*119 Cal. App. 4th 120, 130)* .

[b] Code Civ. Proc. § 425.17 Applies Retroactively

In ***Brenton v. Metabolife International, Inc.*** *(2004) 116 Cal. App. 4th 679, 10 Cal. Rptr. 3d 702* , a consumer alleged that she developed a mental illness as a result of consuming a defective dietary supplement produced by the manufacturer. She also alleged false advertising and misbranding of the product. The manufacturer moved to strike the complaint under the Anti-SLAPP statute, contending that the complaint targeted its constitutionally protected commercial speech. The trial court denied the manufacturer's motion under the Anti-SLAPP statute, *Code Civ. Proc. § 425.16*, to strike plaintiff consumer's complaint alleging causes of action for product liability, negligence, breach of express and implied warranty, and fraud.

The court affirmed the denial of the motion, holding that because protected speech was not the gravamen or principal thrust of claims seeking recovery for personal injuries to a consumer caused by a defective product, such claims did not arise from protected activity within the meaning of *Code Civ. Proc. § 425.16(e)* (*116 Cal. App. 4th 679, 687)* .

The court also addressed the issue of retroactive application of *Code Civ. Proc. § 425.17*, enacted by the Legislature during the appeal. The appellate court held that *Code Civ. Proc. § 425.17(c)* removed remove the plaintiff's unfair practices claim (as well as her individual claims) from the types of claims against which an Anti-SLAPP motion can be filed. The manufacturer agreed that application of *Code Civ. Proc. § 425.17(c)* would be fatal to the motion to strike but asserted that the statute could not be applied retroactively and that the statute was unconstitutional. The court found that the presumption against retrospective construction does not apply to statutes relating merely to remedies and modes of procedure. Procedural changes "operate on existing causes of action and defenses, and it is a misnomer to designate them as having retrospective effect." In other words, procedural statutes may become operative only when and if the procedure or remedy is invoked, and if the trial postdates the enactment, the statute operates in the future regardless of the time of occurrence of the events giving rise to the cause of action. In such cases the statutory changes are said to apply not because they constitute an exception to the general rule of statutory construction, but because they are not in fact retrospective. There is then no problem as to whether the Legislature intended the changes to operate retroactively (*116 Cal. App. 4th 679, 689)* . *Code Civ. Proc. § 425.17* is properly characterized as a procedural statute applicable to pending actions.

Where the Legislature has conferred a remedy and withdraws it by amendment or repeal of the remedial statute, the new statutory scheme may be applied to pending actions without triggering retroactivity concerns (*116 Cal. App. 4th 679, 690)* .

[c] The Action Arises Out of Commercial Speech and Conduct and Is Therefore Exempt From Anti-SLAPP Scrutiny

Plaintiffs in ***Brill Media Co. v. TCW Group, Inc.*** *(2005) 132 Cal. App. 4th 324, 33 Cal. Rptr. 3d 371* were 74 related entities consisting of radio stations and newspapers. In 1997, two of the plaintiffs issued $108 million worth of bonds, which the plaintiffs guaranteed with notes. One set of defendants was the owner of the bonds and the second set of defendants included companies related to the bondholders. Plaintiffs' amended complaint alleged that defendants had incentives to cause the default of and liquidate the Brill Media entities and, based on these allegations, they brought ten causes of action against defendants, including breach of contract, breach of confidentiality agreements, breach of the implied covenant of good faith and fair dealing, interference with trust indenture contract, intentional interference with contract, intentional interference with economic relations, negligence interference with contract and economic relations, and violations of Virginia statutes (*132 Cal. App. 4th 324, 337-338)* .

Defendants filed a special motion to strike and in support of that motion filed a judicial notice request regarding bankruptcy pleadings. After plaintiffs defaulted on the bonds, defendants filed an involuntary bankruptcy petition seeking to dissolve the Brill Media entities. Defendants' assertion was that their conduct, the filing of the bankruptcy petition, was protected by the right of petition. The court granted defendants' special motion to strike on that basis (*132 Cal. App. 4th 324, 340)* .

On appeal, plaintiffs contended that their suit was not subject to a special motion to strike due to the exception enumerated by *Code Civ. Proc. § 425.17(c)*. The court of appeals agreed. The court first addressed the burden of proof on a *Code Civ. Proc. § 425.17* determination and what documents a trial court may rely on in such a determination. The court noted that in determining whether a defendant sustains his initial burden of proof under the first prong of the Anti-SLAPP test, the court relies on both the pleadings and declarations. The issue of whether *Code Civ. Proc. § 425.17* applies, the court stated, is a first prong determination and therefore the defendant has the burden of proving that a *Code Civ. Proc. § 425.17* exception does not apply to any given case. In this particular instance, defendant did not submit any declarations, but rather relied solely on the pleadings in support of its special motion to strike. This finding of the burden being placed on the defendant was overturned and assigned to the plaintiff in *Simpson Strong Tie, Inc. v. Gore (2010) 49 Cal. 4th 12, 109 Cal. Rptr. 3d 329, 230 P.3d 1117* . See section 161.36.

The court then explained why the exception articulated in *Code Civ. Proc. § 425.17(c)* applied to this action. First, defendants, as large financial management and services entities, are "primarily engaged in the business of selling ... goods or services, including, but not limited to ... securities, or financial instruments" within the meaning of the statute. Second, the challenged "statement or conduct was made in the course of delivering the person's goods or services" in that it was part of an effort to secure control of the Brill Media entities and this was the type of business transaction ordinarily engaged in by defendants. Finally, the statements at issue were made to potential buyers of the radio stations or "actual or potential buyer[s] or customer[s]" within the meaning of *Code Civ. Proc. § 425.17(c)*. The fact that the potential buyers were potential buyers of plaintiff and not defendants did not matter for the purposes of the statute. Because the statements and conduct complained of arose out of commercial speech and conduct, they were exempt from Anti-SLAPP scrutiny (*132 Cal. App. 4th 324, 341-342)* .

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16-161 California Points & Authorities § 161.63

§ 161.63 Opposing Special Motion to Strike Against Constitutionally Privileged Conduct (SLAPP Suit) [Code Civ. Proc. § 425.16(b)]--Action Is a SLAPPback [Code Civ. Proc. § 425.18]

[1] FORM

[*This form should be used in combination with the general form of memorandum opposing a special motion to strike (see § 161.60)*].

THE SPECIAL MOTION TO STRIKE IS SUBJECT TO THE PROVISIONS OF CODE OF CIVIL PROCEDURE SECTION 425.18 BECAUSE PLAINTIFF'S ACTION IS A SLAPPBACK AND IS THEREFORE IS CONSISTENT WITH THE LEGISLATURE'S INTENT TO PROTECT THE VALID EXERCISE OF THE CONSTITUTIONAL RIGHTS OF FREE SPEECH AND PETITION

A. Plaintiff's Complaint Qualifies as a SLAPPback. The provisions of *Code Civ. Proc. § 425.18* apply to this motion because the complaint forming the basis for the special motion to strike is a cause of action for _____ [malicious prosecution *or* abuse of process] and it arises from the _____ [filing *or* maintenance] of a prior cause of action that was dismissed pursuant to a special motion to strike under *Code Civ. Proc. § 425.16* (*Soukup v. Law Offices of Herbert Hafif (2006) 39 Cal. 4th 260, 281, 46 Cal. Rptr. 3d 638*).

B. Defendant May Not Recover Attorney's Fees. A prevailing defendant may not recover attorney's fees under *Code Civ. Proc. § 425.16(c)* when the cause of action forming the basis for the special motion to strike is a SLAPPback (*Code Civ. Proc. § 425.18(c)*; *Hutton v. Hafif (2007) 150 Cal. App. 4th 527, 545, 59 Cal. Rptr. 3d 109*).

C. Discovery Is Not Stayed Upon the Filing of a Special Motion to Strike a SLAPPback. Defendant's filing of this special motion to strike does not operate to stay discovery because this action is a SLAPPback (*Code Civ. Proc. § 425.18(c)*).

[*Optional*] **D. The Special Motion to Strike Must Be Denied Because It Was Not Timely Filed.** A special motion to strike a SLAPPback must be filed _____ [within 120 days of the service of the complaint *or* within six

months of the service of the complaint at the court's discretion] unless there are extraordinary circumstances due to no fault of the defendant (*Code Civ. Proc. § 425.18(d)*).

[*Optional*] **E. Plaintiff Is Entitled to Attorney's Fees.** Defendant's special motion to strike is _____ [frivolous *or* solely intended to cause unnecessary delay] and therefore plaintiff is entitled to costs and reasonable attorney's fees pursuant to *Code Civ. Proc. § 128.5* (*Code Civ. Proc. § 425.18(f)*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a defendant's special motion to strike under *Code Civ. Proc. § 425.16* when the plaintiff's action qualifies as a "SLAPPback," defined as any cause of action for malicious prosecution or abuse of process arising from the filing or maintenance of a prior cause of action that has been dismissed pursuant to a special motion to strike under *Code Civ. Proc. § 425.16* [*Code Civ. Proc. § 425.18*]. In 2005, the Legislature found that a SLAPPback is distinguishable in character and origin from the ordinary malicious prosecution action and therefore should be treated differently with regard to SLAPP litigation [*Code Civ. Proc. § 425.18*].

[b] Special Provisions Applicable to SLAPPbacks

The following is a list of differences between an ordinary special motion to strike under *Code Civ. Proc. § 425.16* and a special motion to strike a SLAPPback [*Code Civ. Proc. § 425.18*]:

- A prevailing defendant may not recover his or her attorney's fees and costs [*Code Civ. Proc. § 425.18(c)*].

- The motion must be filed either 1) within 120 days of the service of the complaint, 2) at the court's discretion, within six months of the service of the complaint, or at the court's discretion, or 3) at the court's discretion, at any later time in extraordinary cases due to no fault of the defendant and upon written findings of the court stating the extraordinary case and circumstances [*Code Civ. Proc. § 425.18(d)(1)*].

- Discovery is not stayed upon the filing of a special motion to strike to which *Code Civ. Proc. § 425.18* applies [*Code Civ. Proc. § 425.18(c)*].

- An order granting or denying a special motion to strike to which *Code Civ. Proc. § 425.18* applies is not appealable; instead, it is reviewable by peremptory writ within 20 days after service of a written notice of entry of the order [*Code Civ. Proc. § 425.18(c), (g)*].

- A party opposing a special motion to strike a SLAPPback may file an ex parte application for a continuance to obtain necessary discovery and the court shall grant a reasonable continuance if it appears that facts essential to justify opposition may exist but cannot then be presented [*Code Civ. Proc. § 425.18(e)*].

[c] Section Does Not Apply to SLAPPback Filed by Public Entity

The special provisions of *Code Civ. Proc. § 425.18* do not apply to SLAPPbacks filed by public entities [*Code Civ. Proc. § 425.18(i)*].

[d] Exception For Prior Cause of Action Which Was Illegal

A special motion to strike may not be filed against a SLAPPback by a party whose filing or maintenance of the prior cause of action from which the SLAPPback arises was illegal as a matter of law [*Code Civ. Proc. § 425.18(h)*].

[e] Opposing Memoranda

In an appropriate case, this form may be used to oppose the memorandum; see *§§ 161.30, 161.34*.

[3] Discussion of Authorities

[a] Plaintiff's Complaint Qualifies as a SLAPPback

In ***Soukup v. Law Offices of Herbert Hafif*** *(2006) 39 Cal. 4th 260, 46 Cal. Rptr. 3d 638* , plaintiff was employed by defendant Law Offices of Herbert Hafif and participated in the firm's pension plan. In October 1992, the firm informed her and other employees that the plan was being terminated. Plaintiff and the firm's sole shareholder got into a dispute regarding the transfer of stock that comprised part of the pension assets. Six weeks after the dispute, plaintiff quit her job and she subsequently filed a federal court action for recovery of pension benefits. The action was eventually settled. In the meantime, defendant law firm was involved in various other litigation brought both by former employees and former clients (*39 Cal. 4th 260, 270-271)* .

As a result of plaintiff's federal suit against defendant, defendant filed a malicious prosecution claim ("the underlying action") against plaintiff and other former employees. In response, plaintiff filed a special motion to strike under the Anti-SLAPP statute, arguing that the malicious prosecution action was in retaliation for plaintiff's federal lawsuit. The trial court granted plaintiff's Anti-SLAPP motion, and the court of appeal affirmed in an unpublished opinion (*39 Cal. 4th 260, 269)* .

Plaintiff then filed her own malicious prosecution and abuse of process action against defendant law firm and other defendants, and in response, defendants filed an Anti-SLAPP motion claiming the underlying action arose from the valid exercise of their constitutionally protected right of petition. The trial court denied this motion. The court of appeal initially affirmed, then reversed its ruling based on the holding in *Jarrow Formulas, Inc. v. LaMarche (2003) 31 Cal. 4th 728, 3 Cal. Rptr. 3d 636* (holding malicious prosecution claims are not exempt from Anti-SLAPP scrutiny). Plaintiff appealed, and the Supreme Court granted her petition for review (*39 Cal. 4th 260, 269)* .

The Supreme Court began by noting that plaintiff's action was a SLAPPback, which is an " ... action, typically for malicious prosecution," filed by the target of a SLAPP suit against the SLAPP filer after the dismissal of the SLAPP suit as a result of the target's appropriate use of the SLAPP statute" (*39 Cal. 4th 260, 279-280* (quoting Assem. Com. On Judiciary, Rep. on Assem. Bill No. 1158)). The purpose of such an action is to seek compensation for damages beyond the attorney fees and costs awarded under the Anti-SLAPP statute. While plaintiff's action was pending, the Legislature enacted the so-called "SLAPPback statute," found at *Code Civ. Proc. § 425.18*. This statute sets forth different procedures for SLAPPbacks as opposed to typical SLAPPs. The Supreme Court held that as a procedure statute, the SLAPPback law applied retroactively to cases pending before its effective date. The SLAPPback statute treats SLAPPbacks differently from ordinary malicious prosecution actions in that it changes the procedures in order to "stack the procedural deck in favor of the SLAPPback plaintiff confronted with a special motion to strike" (*39 Cal. 4th 260, 282)* . The statute also exempts SLAPPbacks from Anti-SLAPP scrutiny in cases in which the filing or maintenance of the prior, underlying action was illegal as a matter of law (*Code Civ. Proc. § 425.18(h)*). In this case, plaintiff contended that defendant's underlying action violated state and federal labor laws. The court, after noting that a SLAPPback plaintiff has the burden of establishing that the underlying action was illegal as a matter of law, either because the defendant concedes the conduct was illegal or the illegality is conclusively established by the evidence, held that plaintiff's case did not fall within the SLAPPback exemption of *Code Civ. Proc. § 425.18(h)*. Plaintiff failed to show that defendant's malicious prosecution action was illegal as a matter of law because the statutes plaintiff relied on required plaintiff to be an employee and a beneficiary of the pension plan at the time of the filing of defendant's lawsuit

(*39 Cal. 4th 260, 288-290)* .

The court then moved on to the second prong of the Anti-SLAPP test: whether plaintiff showed a probability of prevailing on her malicious prosecution claim. Plaintiff was able to demonstrate a probability of showing that the prior action was commenced by the defendant, pursued to a legal termination favorable to plaintiff, brought without probable cause, and initiated with malice. Therefore, the Supreme Court reversed the court of appeal and defendant's Anti-SLAPP motion was denied (*39 Cal. 4th 260, 297)* .

[b] Defendant May Not Recover Attorney's Fees

Hutton v. Hafif *(2007) 150 Cal. App. 4th 527, 59 Cal. Rptr. 3d 109* originally arose out of defendant's and his law firm's representation of plaintiff in a discrimination suit in the early 1990's. Following the discrimination suit, plaintiff sued defendants for malpractice. The court ultimately dismissed the malpractice suit. Defendants then sued plaintiff for malicious prosecution, and the court dismissed that lawsuit under the Anti-SLAPP statute. Plaintiff then sued defendants for malicious prosecution as a result of the second lawsuit. In response, defendants filed an Anti-SLAPP motion, arguing they had had probable cause to file the second lawsuit. The trial court denied the motion, ruling that defendants had not had such probable cause. The court of appeals reversed, and remanded the case to the trial court, directing the trial court to grant the motion and award defendants their attorney's fees. Subsequently, the legislature enacted *Code Civ. Proc. § 425.18*, the SLAPPback statute, prompting plaintiff to request reconsideration of the order granting defendants' special motion to strike. The trial court denied plaintiff's motion, and she appealed.

On appeal, the court affirmed in part and reversed in part, holding that the action was indeed a SLAPPback subject to the rules of *Code Civ. Proc. § 425.18*. The parties all acknowledged that the SLAPPback statute applied retroactively to cases filed prior to its enactment. The court noted that the mandatory attorney's fee provision of *Code Civ. Proc. § 425.16(c)* is inapplicable to SLAPPback actions: a prevailing plaintiff is only entitled to fees if the court finds the special motion to strike is frivolous or solely intended to cause unnecessary delay. A prevailing defendant is not entitled to attorney's fees. Therefore, the court reversed the attorney's fee award (*150 Cal. App. 4th 527, 540)* .

Additionally, plaintiff argued that the provisions of *Code Civ. Proc. § 425.18(h)* applied because the filing or maintenance of defendants' prior action was illegal as a matter of law. The court stated that plaintiff had the burden of showing that the underlying malicious prosecution suit was illegal as a matter of law, either because defendant concedes the illegally or the illegality is "conclusively established by the evidence" (*150 Cal. App. 4th 527, 542)* . The plaintiff must also "identify with particularity the statute or statutes" violated and demonstrate the manner in which defendant violated the statute or statutes (*150 Cal. App. 4th 527, 542)* . In this case, plaintiff claimed defendants' prior action was illegal because it violated *B&P Code § 6094(a)*, which prohibits lawsuits based on communications with the State Bar. The court disagreed with plaintiff, holding that the prior action did not arise solely out of plaintiff's complaints to the State Bar. Rather, the lawsuit also arose out of other public statements not within the scope of *B&P Code § 6094(a)*. The court held that because a material part of the prior action was not illegal, *Code Civ. Proc. § 425.18(h)* did not apply (*150 Cal. App. 4th 527, 545)* .

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
CHAPTER 165 NEGLIGENCE

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[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

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[b] Plaintiff Sustained "Injury"

[c] Complaint Sufficiently Pleads Necessary Allegations

[4] Additional Authorities

[a] Elements of Actionable Negligence Are Present

[b] Complaint Sufficiently Pleads Necessary Allegations

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§ 165.20 Complaint Does Not Sufficiently Plead Actionable Negligence

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Elements of Actionable Negligence Are Not Present

[b] Plaintiff Has Not Sustained "Injury"

[c] Absence of Element Is Fatal to Recovery

[4] Additional Authorities

[a] Elements of Actionable Negligence Are Not Present

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§ 165.30 Defendant Owed Duty to Plaintiff

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

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[a] Existence and Breach of Duty

[b] Defendant Owed Duty to Plaintiff or to Class

[c] Duty Is Question of Law

[d] Policy Factors Considered in Scope of Duty Determination

[4] Additional Authorities

[a] Defendant Owed Duty to Plaintiff or to Class

[b] Policy Factors Considered in Scope of Duty Determination

§ 165.31 Defendant's Conduct Fell Below Applicable Standard of Care

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Defendant's Conduct Fell Below Common Law Standard of Care

[b] Defendant's Conduct Did Not Comport With Custom and Practice

[4] Additional Authorities

[a] Defendant's Conduct Fell Below Common Law Standard of Care

§ 165.32 Defendant Breached Duty Owed to Plaintiff

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

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[3] Discussion of Authorities

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§ 165.40 Defendant Not Liable for Nonfeasance Because No Duty Existed

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] No Liability for Failure to Act Unless Duty Exists

[b] Nonfeasance Versus Misfeasance

[4] Additional Authorities

[a] No Liability for Failure to Act Unless Duty Exists

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§ 165.50 Defendant's Conduct Created Foreseeable Risk of Harm

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Risk Was Foreseeable

[b] Foreseeability as Question of Law

[c] Foreseeability as Question of Fact

[4] Additional Authorities

[a] Risk Was Foreseeable

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§ 165.60 Defendant's Conduct Did Not Create Foreseeable Risk of Harm

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Risk Was Not Reasonably Foreseeable

[b] Public Policy Limits Liability

[4] Additional Authorities

[a] Risk Was Not Reasonably Foreseeable

[b] Public Policy Limits Liability

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§ 165.70 Presumptive Negligence Established Under Evidence Code § 669

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Presumption of Negligence Established

[b] Violation Was Proximate Cause of Plaintiff's Injury

[c] Harm to Plaintiff Was Type of Harm Statute Was Designed to Prevent

[d] Plaintiff Was Member of Protected Class

[e] Effect of Statutes That Do Not Provide for Civil Liability

[4] Additional Authorities

[a] Presumption of Negligence Established

[b] Harm to Plaintiff Was Type of Harm Statute Was Designed to Prevent

[c] Plaintiff Was Member of Protected Class

[d] Effect of Statutes That Do Not Provide for Civil Liability

§§ 165.71-165.79 [Reserved]

§ 165.80 Presumption of Negligence Not Established Under Evidence Code § 669

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Presumption of Negligence Not Established

[b] Insufficient Evidence of Violation

[c] Violation Was Not Proximate Cause of Injury

[d] Harm to Plaintiff Was Not Type of Harm Statute Was Designed to Prevent

[e] Plaintiff Was Not Member of Protected Class

[4] Additional Authorities

[a] Insufficient Evidence of Violation

[b] Harm to Plaintiff Was Not Type of Harm Statute Was Designed to Prevent

[c] Plaintiff Was Not Member of Protected Class

§ 165.81 Defendant Rebutted Presumption of Negligence Under Evidence Code § 669

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Defendant Acted Reasonably Under Circumstances

[4] Additional Authorities

[a] Defendant Acted Reasonably Under Circumstances

§ 165.82 Defendant's Compliance With Statute Met Standard of Care

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Statutory Compliance Met Standard of Care

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§ 165.90 Public Policy Precludes Imposition of Duty

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Public Policy Considerations Warrant Nonliability for Negligence

[4] Additional Authorities

[a] Public Policy Considerations Warrant Nonliability for Negligence

§ 165.91 Social Utility of Defendant's Conduct Militates Against Imposing Duty

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Social Utility of Defendant's Conduct

§§ 165.92-165.99 [Reserved]

§ 165.100 Defendant Breached Duty Arising From Contract

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Duty Created by Contract

[b] Liability to Persons Not In Privity

[4] Additional Authorities

[a] Duty Created by Contract

[b] Liability to Persons Not in Privity

§§ 165.101-165.109 [Reserved]

§ 165.110 Public Policy Precludes Imposition of Contractual Duty on Defendant Not in Privity

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Public Policy Precludes Imposition of Duty

[4] Additional Authorities

[a] Public Policy Precludes Imposition of Duty

§ 165.111 Defendant Did Not Breach Limited Contractual Duty to Party Not in Privity

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Duty Limited by Terms of Contract

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§ 165.120 Defendant Owed and Breached Duty to Child

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Greater Degree of Caution Necessary With Children

[b] Degree of Caution Increases With Immaturity of Child

[c] Known Characteristics of Child Are Factor in Breach Determination

[4] Additional Authorities

[a] Greater Degree of Caution Necessary With Children

§ 165.121 Duty Owed by Child--Adult Standard of Care Applies

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Child Engaged in Adult Activity Held to Adult Standard of Care

[b] Child Driving Car Held to Adult Standard

[c] Effect of Statutory Violation

[4] Additional Authorities

[a] Child Engaged in Adult Activity Held to Adult Standard of Care

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§ 165.130 Defendant Owed Plaintiff Duty to Control or Warn of Third Party's Dangerous Conduct Based on Existence of Special Relationship

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Special Relationship Imposed Duty to Control or Warn

[b] Relationship of Dependence Created Special Relationship

[c] Single Relationship Sufficient to Create Special Relationship

[4] Additional Authorities

[a] Special Relationship Imposed Duty to Control or Warn

[b] Relationship of Dependence Created Special Relationship

§ 165.131 Defendant's Duty to Control or Warn of Third Party's Dangerous Conduct Extended to Foreseeable Victims

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Duty Extends to Foreseeable Victims

§§ 165.132-165.139 [Reserved]

§ 165.140 Defendant Owed and Breached Duty to Rescuer

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Defendant Liable for Injuries Sustained by Necessary Rescuer

[4] Additional Authorities

[a] Defendant Liable for Injuries Sustained by Necessary Rescuer

§§ 165.141-165.149 [Reserved]

§ 165.150 Defendant Owed and Breached Voluntarily Assumed Duty

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Liability Based on Voluntary Assumption of Duty

[b] Services Necessary for Protection of Third Person

[4] Additional Authorities

[a] Liability Based on Voluntary Assumption of Duty

§§ 165.151-165.159 [Reserved]

§ 165.160 Defendant Owed and Breached Duty to Plaintiff Despite Sudden Onset of Mental Illness

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Sudden Mental Illness No Defense to Negligence

§§ 165.161-165.169 [Reserved]

§ 165.170 Defendant Owed and Breached Duty to Reveal Risk of HIV Infection

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Negligent Transmission of HIV

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§ 165.180 Duty Owed by Employer at Multi-Employer Worksite

[1] FORM

[2] Comments

[3] Discussion of Authorities

[a] Duty of Employer at Multi-Employer Sites to Report Hazards

§§ 165.181-165.189 [Reserved]

§ 165.190 Duty Owed by Child--Adult Standard of Care Does Not Apply

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Children Not Engaged in Adult Activities Held to Standard of Care Applicable to Children

§§ 165.191-165.199 [Reserved]

§ 165.200 Auditor Owes No Duty of Care to Persons Other Than Client

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Auditor's Duty Limited to Client

§§ 165.201-165.219 [Reserved]

§ 165.220 Gas Company's Limited Duty of Care to Gas Customer

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Limited Duty Based on Inherently Hazardous Substance

§§ 165.221-165.229 [Reserved]

§ 165.230 Defendant Owed Plaintiff No Duty to Control or Warn of Third Party's Dangerous Conduct Because No Special Relationship Existed

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] No Duty to Control or Warn Absent Special Relationship

[b] No Ability to Control Third Party

[c] No Actual Custodial Ability

[4] Additional Authorities

[a] No Duty to Control or Warn Absent Special Relationship

§ 165.231 Defendant Owed Plaintiff No Duty to Control or Warn of Third Party's Dangerous Conduct Because Defendant Had No Knowledge of Specific Risk to Foreseeable Victim

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] No Knowledge of Specific Risk to Foreseeable Victim

[b] Actual Knowledge of Risk Required

[4] Additional Authorities

[a] No Knowledge of Specific Risk to Foreseeable Victim

§ 165.232 Defendant Owed Plaintiff No Duty to Control or Warn of Third Party's Dangerous Conduct Because Risk Could Not Be Guarded Against by Warning Plaintiff

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Risk Could Not Be Guarded Against by Warning Potential Victim

§§ 165.233-165.239 [Reserved]

§ 165.240 Rescuer Not Liable for Act That Did Not Increase Risk of Harm to Plaintiff or Induce Plaintiff's Reliance

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] No Liability Unless Rescuer's Act Increased Risk of Harm or Induced Reliance

§ 165.241 Defendant Did Not Breach Duty to Plaintiff Because Voluntarily Assumed Duty Expired

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Duty of "Good Samaritan" Is Limited In Duration

§ 165.242 No Duty to Act Absent Special Relationship

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] No Liability for Failure to Act Unless Special Relationship Exists

[4] Additional Authorities

[a] No Liability for Failure to Act Unless Special Relationship Exists

§§ 165.243-165.249 [Reserved]

§ 165.250 Defendant Placed in Imminent Peril Did Not Breach Duty to Plaintiff

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Standard of Care in Situation of Imminent Peril

[4] Additional Authorities

[a] Standard of Care in Situation of Imminent Peril

§§ 165.251-165.259 [Reserved]

§ 165.260 Sufficient Causal Connection Exists Between Defendant's Actions and Plaintiff's Injuries

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Sufficient Causal Connection Between Defendant's Actions and Plaintiff's Damages

[b] Absolute Certainty Not Required

[4] Additional Authorities

[a] Sufficient Causal Connection Between Defendant's Actions and Plaintiff's Damages

[b] Absolute Certainty Not Required

§ 165.261 Defendant's Conduct Was Cause in Fact of Plaintiff's Injuries

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] "But For" Test Met

[b] Proximate Cause Includes Cause in Fact

§ 165.262 Defendant's Conduct Was Substantial Factor in Causing Plaintiff's Injuries

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Conduct Was Substantial Factor

[4] Additional Authorities

[a] Conduct Was Substantial Factor

§ 165.263 Defendant's Conduct Was Proximate Cause of Plaintiff's Injuries

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Proximate Cause Encompasses Legal Cause and Cause in Fact

[b] Proximate Cause Is Policy Determination

[c] Policy Considerations in Proximate Cause Determination

[d] No Intervening Cause

[4] Additional Authorities

[a] No Intervening Cause

§§ 165.264-165.269 [Reserved]

§ 165.270 Insufficient Causal Connection Between Defendant's Actions and Plaintiff's Injuries

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Insufficient Causal Connection Between Defendant's Actions and Plaintiff's Injuries

§ 165.271 Defendant's Conduct Was Not Cause in Fact of Plaintiff's Injuries

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Defendant's Conduct Not Cause in Fact of Harm

[b] "But for" Test Applicable to Actual Rather Than Proximate Cause

§ 165.272 Defendant's Conduct Was Not Proximate Cause of Plaintiff's Injuries

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Conduct Too Remote in Chain of Causation

[b] Intervening Cause

[c] Prior Proximate Cause Determinations Lack Precedential Value

[4] Additional Authorities

[a] Conduct Too Remote in Chain of Causation

[b] Prior Proximate Cause Determinations Lack Precedential Value

§ 165.273 Public Policy Militates Against Finding That Defendant's Conduct Was Proximate Cause

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Proximate Cause Finding Contravenes Public Policy

[4] Additional Authorities

[a] Policy Considerations in Proximate Cause Determination

§§ 165.274-165.279 [Reserved]

§ 165.280 Defendant's Concurrent Negligent Act Was Proximate Cause of Plaintiff's Injuries

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] One of Two Concurrent Acts May Be Proximate Cause of Injury

[b] Defendant's Conduct Alone Was Sufficient to Cause Injury

[4] Additional Authorities

[a] One of Two Concurrent Acts May Be Proximate Cause of Injury

[b] Defendant's Conduct Alone Was Sufficient to Cause Injury

§ 165.281 Defendant Liable Despite Failure to Anticipate Concurrent Act

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Failure to Anticipate Concurrent Act No Defense

[4] Additional Authorities

[a] Failure to Anticipate Concurrent Act No Defense

§ 165.282 Defendant Liable Despite Nonsimultaneous Nature of Act

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Simultaneous Negligent Acts Not Required

§ 165.283 Defendant Liable Despite Innocent Nature of Concurring Cause

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Concurring "Act of God" No Defense

[4] Additional Authorities

[a] Concurring "Act of God" No Defense

§ 165.284 Plaintiff Does Not Have Burden of Apportioning Damages Between Concurring Causes

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Plaintiff Not Required to Prove Apportionment

§§ 165.285-165.299 [Reserved]

§ 165.300 Defendant Is Liable Because Intervening Act or Harm to Plaintiff Was Foreseeable

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Foreseeability of Act or Injury Sufficient to Show Proximate Cause

[b] Risk of Harm Was Foreseeable

[c] Precise Harm Need Not Be Foreseen

[4] Additional Authorities

[a] Foreseeability of Act or Injury Sufficient to Show Proximate Cause

[b] Precise Harm Need Not Be Foreseen

§ 165.301 Intervening Act of Third Person Was Foreseeable

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Intervening Act of Third Person Was Foreseeable

[b] Foreseeability Is Question for Trier of Fact

[c] Intervening Act Not Highly Extraordinary Response to Situation

[d] Intervening Act May Be Innocent, Negligent, Intentionally Tortious, or Criminal

[4] Additional Authorities

[a] Intervening Act of Third Person Was Foreseeable

[b] Intervening Act Not Highly Extraordinary Response to Situation

[c] Intervening Act May Be Innocent, Negligent, Intentionally Tortious, or Criminal

§ 165.302 Intervening Force of Nature Was Foreseeable

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Foreseeable Intervening Forces of Nature

[4] Additional Authorities

[a] Foreseeable Intervening Forces of Nature

§ 165.303 Defendant Is Liable Despite Intervening Criminal Act

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Defendant's Conduct Created Opportunity for Intervening Criminal Act

[4] Additional Authorities

[a] Defendant's Conduct Created Opportunity for Intervening Criminal Act

§ 165.304 Defendant Is Liable Despite Third Party's Failure to Prevent Harm

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Risk of Injury Was Reasonably Foreseeable

[b] Failure to Prevent Harm Is Not Superseding Cause

[4] Additional Authorities

[a] Failure to Prevent Harm Is Not Superseding Cause

§§ 165.305-165.319 [Reserved]

§ 165.320 Defendant Is Not Liable Because Intervening Act Broke Chain of Causation

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Intervening Act Broke Chain of Causation

[4] Additional Authorities

[a] Intervening Act Broke Chain of Causation

§ 165.321 Intervening Act of Third Person Was Not Foreseeable

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Intervening Act of Third Person Was Not Foreseeable

[b] Two-Fold Test of Foreseeability

[4] Additional Authorities

[a] Intervening Act of Third Person Was Not Foreseeable

§ 165.322 Defendant Is Not Liable Because Superseding Criminal Act Was Cause of Plaintiff's Injuries

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Unforeseeable Criminal Acts Are Superseding Causes

§ 165.323 Defendant Is Not Liable Because Plaintiff's Injuries Were Result of Unanticipated and Unusual Natural Event

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Plaintiff's Injuries Caused by "Act of God"

§§ 165.324-165.329 [Reserved]

§ 165.330 Defendant Has Burden to Prove Defendant's Conduct Was Not Proximate Cause of Plaintiff's Injury

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Concurrent Negligence but Single Unidentified Cause

[b] Defendant's Statutory Violation Deprived Plaintiff of Means of Establishing Causation

[4] Additional Authorities

[a] Concurrent Negligence But Single Unidentified Cause

[b] Defendant's Statutory Violation Deprived Plaintiff of Means of Establishing Causation

§§ 165.331-165.339 [Reserved]

§ 165.340 Conditions for Application of Res Ipsa Loquitur Presumption Have Been Met

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Accident Was Probable Result of Negligence

[b] Conditions for Application of Doctrine Have Been Met

[c] Existence of Conditions Is Question of Fact Unless Facts Are Undisputed

[4] Additional Authorities

[a] Accident Was Probable Result of Negligence

[b] Conditions for Application of Doctrine Have Been Met

§ 165.341 Res Ipsa Loquitur Presumption Applies Because Accident Was Kind Not Ordinarily Occurring in

Absence of Negligence

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Determination of Whether Accident Is Kind Not Occurring in Absence of Negligence

§ 165.342 Res Ipsa Loquitur Presumption Applies Because Defendant Had Exclusive Control of Instrumentality Causing Accident

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Defendant Had Exclusive Control of Instrumentality Causing Accident

[b] Joint and Exclusive Control of Instrumentality by Multiple Defendants

[c] Doctrine Applies Despite Relinquishment of Control by Defendant

[4] Additional Authorities

[a] Defendant Had Exclusive Control of Instrumentality Causing Accident

[b] Doctrine Applies Despite Relinquishment of Control by Defendant

§ 165.343 Res Ipsa Loquitur Presumption Applies Because Plaintiff's Actions Did Not Contribute to Accident

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Plaintiff's Actions Did Not Contribute to Accident

§ 165.344 Due to Application of Res Ipsa Loquitur Presumption, Defendant Has Burden of Producing Evidence

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Application of Doctrine Shifts Burden of Producing Evidence to Defendant

§§ 165.345-165.359 [Reserved]

§ 165.360 Conditions for Application of Res Ipsa Loquitur Presumption Have Not Been Met

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Accident Was Not Probable Result of Negligence

[b] Accident Was Not Caused by Defendant

[4] Additional Authorities

[a] Accident Was Not Probable Result of Negligence

[b] Accident Was Not Caused by Defendant

§ 165.361 Res Ipsa Loquitur Presumption Does Not Apply Because Defendant Did Not Have Exclusive Control of Instrumentality Causing Accident

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] No Exclusive Control of Instrumentality by Defendant

[b] Instrumentality Mishandled or Condition Changed After Leaving Defendant's Possession

§ 165.362 Res Ipsa Loquitur Presumption Does Not Apply Because Plaintiff's Actions Contributed to Accident

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Plaintiff's Actions Contributed to Accident

§§ 165.363-165.369 [Reserved]

§ 165.370 Defendant Has Produced Sufficient Evidence to Rebut Res Ipsa Loquitur Presumption Under Evidence Code Section 646(b)

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Evidence Proved That Defendant Was Not Negligent or That Defendant's Negligence Was Not Proximate Cause of Occurrence

§ 165.371 Defendant's Rebuttal Nullifies Res Ipsa Loquitur Presumption

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Presumption Nullified and Burden of Producing Evidence Shifted Back to Plaintiff

§§ 165.372-165.379 [Reserved]

§ 165.380 Comparative Negligence Applies to Assess Liability in Proportion to Negligence

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Liability Assessed in Proportion to Negligence

[b] Proof That Plaintiff's Negligence Was Proximate Cause of Harm Warrants Application of Comparative Negligence

§§ 165.381-165.399 [Reserved]

§ 165.400 Primary Assumption of Risk Bars Recovery if Defendant Owed No Duty of Care to Plaintiff

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Primary Assumption of Risk Bars Recovery

[b] No Relationship With Plaintiff Creating Duty to Avoid Increasing Risks Inherent in Plaintiff's Activity

[4] Additional Authorities

[a] Primary Assumption of Risk Bars Recovery

[b] No Relationship With Plaintiff Creating Duty to Avoid Increasing Risks Inherent in Plaintiff's Activity

§ 165.401 Primary Assumption of Risk Bars Recovery by Plaintiff Injured by Coparticipant in Active Sport

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Defendant's Duty Is Merely to Avoid Intentional or Reckless Conduct

[b] Defendant's Conduct Within Range of Ordinary Activity of Sport

[c] Rule Applies to Student-Teacher Relationship

[d] Local Ordinance Does Not Impose Duty on Defendant That Abrogates Rule

[e] State Statute Does Not Impose Duty That Abrogates Rule

[f] Primary Assumption of Risk Protects Defendant Engaged in Different Activity Than Plaintiff

[g] Intentional Conduct Within Ordinary Range of Activity Not Actionable

[h] Primary Assumption of Risk Applies to Non-Contact Sports

[4] Additional Authorities

[a] Defendant's Conduct Within Range of Ordinary Activity of Sport

[b] Rule Applies to Student-Teacher Relationship

[c] State Statute Does Not Impose Duty That Abrogates Rule

§ 165.402 Plaintiff Expressly Assumed Risk

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Consensual Assumption of Risk Not Subsumed in Doctrine of Comparative Negligence

[b] Express Assumption of Risk

[4] Additional Authorities

[a] Express Assumption of Risk

§§ 165.403-165.409 [Reserved]

§ 165.410 Veterinarian Barred From Recovering for Animal Bite

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] No Liability to Veterinarians and Veterinary Assistants

[b] No Liability to Kennel Workers

§ 165.411 Tow Truck Driver Barred From Recovering for Injuries Due to Risk Necessitating Presence

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Motorist Owes No Duty to Tow Truck Driver to Keep Vehicle in Good Mechanical Condition

[b] Firefighter's Rule Applies to Private as Well as Public Safety Employees

§§ 165.412-165.419 [Reserved]

§ 165.420 Primary Assumption of Risk Does Not Bar Recovery if Imposition of Duty Would Not Fundamentally Alter Nature of Sporting Activity

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Duty of Care Would Not Fundamentally Alter Nature of Activity

[4] Additional Authorities

[a] Duty of Care Would Not Fundamentally Alter Nature of Activity

§ 165.421 Plaintiff's Express Assumption of Risk Does Not Extend to Defendant's Gross Negligence

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Clause Excusing Defendant From Liability for Negligence Inapplicable to Gross Negligence Claim

§§ 165.422-165.429 [Reserved]

§ 165.430 Firefighter's Rule Bars Recovery for Injuries Due to Risk Necessitating Presence

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] No Liability for Injury Due to Risk Necessitating Presence

[4] Additional Authorities

[a] No Liability for Injury Due to Risk Necessitating Presence

§ 165.431 Firefighter's Rule Bars Recovery for Injuries Due to Hazards Encountered by Chance While on Duty

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Hazard Encountered by Chance Not Independent Act of Misconduct

§ 165.432 Firefighter's Rule Bars Recovery For Negligence of Public Safety Personnel Employed by Different Public Safety Agency

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Firefighter's Rule Applicable to Negligence of Public Safety Personnel Employed by Different Public Agency While Responding to Same Public Hazard

[b] Statutory Exception to Firefighter's Rule Under Civ. Code § 1714.9(a)(1) Does Not Apply to Negligence of Public Safety Personnel Employed by Different Public Agency

[c] Common Law Exception to Firefighter's Rule for Independent Acts of Misconduct Does Not Apply to Negligence of Public Safety Personnel Employed by Different Public Entity

[4] Additional Authorities

[a] Statutory Exception to Firefighter's Rule Under Civ. Code § 1714.9(a)(1) Does Not Apply to Negligence of Public Safety Personnel Employed by Different Public Agency

§§ 165.433-165.449 [Reserved]

§ 165.450 Firefighter's Rule Does Not Bar Recovery for Injuries Caused by Independent Acts of Misconduct

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Plaintiff May Recover for Injuries Caused by Independent Acts of Misconduct

[4] Additional Authorities

[a] Plaintiff May Recover for Injuries Caused by Independent Acts of Misconduct

§ 165.451 Firefighter's Rule Does Not Bar Recovery Because Conduct Causing Injury Occurred After Firefighter's Presence Was Known to Defendant and Firefighter Had Undertaken Duties

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Conduct Causing Injury Occurred After Plaintiff Had Undertaken Duties

[4] Additional Authorities

[a] Conduct Causing Injury Occurred After Plaintiff's Presence Was Known to Defendant

§ 165.452 Firefighter's Rule Does Not Bar Recovery Because Conduct Causing Injury Violated Statute

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

§ 165.453 Firefighter's Rule Does Not Bar Recovery Because Conduct Causing Injury Was Intended to Injure Plaintiff

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

§ 165.454 Firefighter's Rule Does Not Bar Recovery Because Conduct Causing Injury Was Arson

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

§ 165.455 Firefighter's Rule Does Not Bar Recovery by Private Safety Employee for Injuries Caused by Negligent Third Party

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Private Safety Employee May Recover for Injuries Caused by Negligent Third Party

[4] Additional Authorities

[a] Private Safety Employee May Recover for Injuries Caused by Negligent Third Party

§§ 165.456-165.479 [Reserved]

§ 165.480 Under Civ. Code § 1431.2(a), Defendant Only Liable for Proportionate Share of Plaintiff's Noneconomic Damages Because Third Party Was Partially at Fault

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Defendant Severally Liable for Plaintiff's Noneconomic Damages

[b] Defendant Liable Only for Proportionate Share of Plaintiff's Noneconomic Damages

§ 165.481 Federal Communications Decency Act Immunizes Internet Site Operator From Liability When Third Party Sexually Assaults Minor After Communicating With and Meeting Victim Through Defendant's Site [47 U.S.C.S. § 230]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Communications Decency Act Immunizes Web Site Operators From Liability

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CHAPTER 165 NEGLIGENCE
PART I. INTRODUCTION

16-165 California Points & Authorities § 165.01

§ 165.01 Scope of Chapter

This chapter contains forms of points and authorities relating to a cause of action for negligence.

Part II, Subpart A, relating to elements of a cause of action for negligence generally, includes points and authorities regarding all the essential elements of negligence (§ 165.10 et seq.)

Part II, Subpart B, relating to duty, includes the following types of forms:

- Points and authorities regarding general rules of duty (§ 165.30 et seq.)
- Points and authorities regarding foreseeability (§ 165.50 et seq.)
- Points and authorities regarding breach of statutory duty (§ 165.70 et seq.)
- Points and authorities regarding public policy with respect to duty (§ 165.90 et seq.)
- Points and authorities regarding duty arising from contract (§ 165.100 et seq.)
- Points and authorities regarding duties owed to and by particular persons or entities (§ 165.120 et seq.)

Part II, Subpart C, relating to causation, includes the following types of forms:

- Points and authorities regarding general rules of causation (§ 165.260 et seq.)
- Points and authorities regarding concurrent causes (§ 165.280 et seq.)
- Points and authorities regarding intervening and superseding acts (§ 165.300 et seq.)

- Points and authorities regarding unidentified causation (§ 165.330 et seq.)

Part II, Subpart D, relating to proof by application of the doctrine of res ipsa loquitur, includes the following types of forms:

- Points and authorities regarding applicability of the doctrine (§ 165.340 et seq.)
- Points and authorities regarding inapplicability of the doctrine (§ 165.360 et seq.)
- Points and authorities regarding rebuttal of the presumption (§ 165.370 et seq.)

Part II, Subpart E, relating to defenses, includes the following types of forms:

- Points and authorities regarding comparative negligence (§ 165.380 et seq.)
- Points and authorities regarding assumption of the risk (§ 165.400 et seq.)
- Points and authorities regarding the firefighter's rule (§ 165.430 et seq.)
- Points and authorities regarding third party liability and apportionment of damages (§ 165.480)

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceActionsGeneral OverviewTortsNegligenceCausationProximate CauseIntervening CausationTortsNegligenceDefensesAssumption of RiskElements & NatureGeneral OverviewTortsNegligenceDutyForeseeability of InjuryTortsNegligenceProofElementsTortsNegligenceStandards of CareAppropriate StandardGeneral Overview

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16-165 California Points & Authorities § 165.02

§ 165.02 Governing Law

Negligence is governed generally by *Civ. Code § 1714*. The presumption of negligence based on violation of statute is governed by *Evid. Code § 669*. Comparative negligence is governed by *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226* . Assumption of the risk is governed by *Knight v. Jewett (1992) 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2, 834 P.2d 696* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceActionsGeneral OverviewTortsNegligenceDefensesComparative NegligenceGeneral OverviewTortsNegligenceDutyForeseeability of InjuryTortsNegligenceProofElementsTortsNegligenceProofViolations of LawStatutesTortsNegligenceStandards of CareAppropriate StandardGeneral Overview

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16-165 California Points & Authorities § 165.03

§ 165.03 How to Use the Forms in This Chapter

[1] Page Limits on Supporting and Opposing Memoranda

One of the more significant drafting requirements to keep in mind is page limits: supporting and opposing memoranda must not exceed 15 pages, or 20 pages in a summary judgment or summary adjudication proceeding. A reply or closing memorandum may not exceed 10 pages. Exhibits, declarations, attachments, a table of contents, a table of authorities, and the proof of service are excluded from these page limits. Any party must obtain leave of court to file a longer memorandum [*see Cal. Rules of Ct., Rule 3.1113(d), (e)*]. These and other drafting requirements are discussed in further detail in Ch. 1, *Writing Legal Memoranda and Briefs* .

[2] Using the Forms to Build a Draft Memorandum

The forms included in this chapter are designed to be combined with other points and authorities to form a complete memorandum. For a detailed discussion on how to select and use the forms in the publication to build a draft memorandum and complete the draft, with detailed discussion of all drafting requirements and strategic or stylistic considerations, see Ch. 1, *Writing Legal Memoranda and Briefs* . For a skeletal form of memorandum for use in creating a properly formatted outline in which to compile relevant forms from this publication, see also Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureSummary JudgmentSupporting MaterialsMemoranda of LawTortsNegligenceActionsGeneral Overview

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16-165 California Points & Authorities § 165.04

§ 165.04 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

For detailed legal background discussion, research guides, procedural checklists, and forms relating to negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender). For general allegations for use in pleading resulting detriment or damage, see *Ch. 177, Damages, § 177.40* et seq. For general allegations for use in pleading resulting emotional damages, Ch. 362, *Mental Suffering and Emotional Distress*.

Other related chapters in the publication regarding negligence in specific contexts include:

- Ch. 16, *Airplanes and Airports*.
- Ch. 19, *Alcoholic Beverages: Civil Liability*.
- Ch. 23, *Animals: Civil Liability*.
- Ch. 56, *Architects*, Part II.
- Ch. 76, *Attorney Professional Liability*.
- Ch. 82, *Automobiles: Causes of Action*.
- Ch. 181, *Death and Survival Actions*.
- Ch. 214, *Drugs and Pharmacists*.
- Ch. 244, *Elevators and Escalators*.
- Ch. 246, *Emergency Vehicles*.

- Ch. 248, *Employer's Liability for Employee's Torts*.
- Ch. 256, *Explosives*.
- Ch. 266, *Fences*.
- Ch. 267, *Fires*.
- Ch. 273, *Games, Sports, and Athletics*.
- Ch. 274, *Garages and Gas Stations*.
- Ch. 277, *Gas and Electricity*.
- Ch. 295, *Hospitals*.
- Ch. 297, *Hotels and Motels*.
- Ch. 300, *Indemnity and Contribution*.
- Ch. 304, *Insane and Other Incompetent Persons*, § 304.110 et seq.
- Ch. 334, *Landlord and Tenant: Claims for Damages*.
- Ch. 359, *Marriage*.
- Ch. 364, *Minors: Tort Actions*.
- Ch. 394, *Parent and Child*, Part I.
- Ch. 415, *Physicians: Medical Malpractice*.
- Ch. 421, *Premises Liability*.
- Ch. 427, *Principal and Agent*.
- Ch. 460, *Products Liability*.
- Ch. 464, *Public Entities and Officers: Tort Claims*.
- Ch. 465, *Public Entities and Officers: Civil Claims Arising From Criminal Actions*.
- Ch. 512, *Schools*, Part I.
- Ch. 522, *Ships and Shipping*.
- Ch. 525, *Slip and Fall*.
- Ch. 577, *Workers' Compensation*.

[2] Related Points and Authorities

- For negligence actions involving alcoholic beverages, see Ch. 15A, *Alcoholic Beverages: Civil Liability for Furnishing* .

- For negligence in the context of attorney malpractice, see Ch. 24A, *Attorneys at Law: Malpractice* ,.

- For negligence actions involving carriers, see Ch. 33, *Carriers* .

- For grounds for demurrers to complaints based on insufficiency of the element of damages, see Ch. 64, *Damages: Tort* .

- For a cause of action for wrongful death, see Ch. 66, *Death and Survival Actions* .

- For demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

- For actions excluded from the Workers' Compensation Act, see Ch. 239, *Worker's Compensation Exclusive Remedy Doctrine* .

- For negligence actions involving spouses, see Ch. 114, *Husband and Wife* .

- For indemnity and contribution, see Ch. 115, *Indemnity and Contribution* .

- For negligence actions involving insane or incompetent persons, see Ch. 117, *Insane and Incompetent Persons: Actions Involving Mental Patients* .

- For negligence actions involving insurance policies, see Ch. 120, *Insurance* .

- For negligence actions involving landlord and tenant disputes, see Ch. 141, *Landlord and Tenant* .

- For the defense of limitations of actions, see Ch. 143, *Limitation of Actions* .

- For negligent infliction of mental distress, see 153, *Mental Suffering and Emotional Distress*.

- For medical malpractice actions, see Ch. 175, *Physicians and Surgeons: Medical Malpractice* .

- For premises liability, see Ch. 178, *Premises Liability* .

- For vicarious liability of employers for the torts of employees based on the doctrine of respondeat superior, see Ch. 182, *Principal and Agent* .

- For products liability actions, see Ch. 190, *Products Liability* .

- For actions against public entities and employees, see Ch. 196, *Public Entities* .

- For negligence actions involving schools, see Ch. 210, *Schools: Actions by Students* .

Legal Topics:

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

TortsDamagesGeneral OverviewTortsNegligenceActionsGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityGeneral OverviewTortsPublic Entity LiabilityGeneral OverviewTortsTransportation TortsGeneral Overview

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16-165 California Points & Authorities §§ 165.05-165.09

[Reserved]

§§ 165.05[Reserved]

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PART II. FORMS
A. Elements of Action for Negligence

16-165 California Points & Authorities § 165.10

§ 165.10 Complaint Sufficiently Pleads Actionable Negligence

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

THE ESSENTIAL ELEMENTS OF ACTIONABLE NEGLIGENCE ARE PRESENT IN THIS ACTION BECAUSE DEFENDANT OWED A LEGAL DUTY OF CARE TO _____ [PLAINTIFF *or* THE CLASS IN WHICH PLAINTIFF WAS A MEMBER], DEFENDANT COMMITTED AN _____ [ACT *or* OMISSION] CONSTITUTING A BREACH OF THAT DUTY, DEFENDANT'S BREACH WAS A PROXIMATE OR LEGAL CAUSE OF THE RESULTING INJURY TO PLAINTIFF, AND PLAINTIFF SUFFERED DAMAGES FROM IT.

A. Elements of Actionable Negligence Are Present. The essential elements of actionable negligence include (1) a defendant's legal duty to use due care, (2) a breach of that duty, (3) the breach as the proximate or legal cause of a resulting injury, and (4) actual loss or damage resulting from that injury (*United States Liab. Ins. Co. v. Haidinger-Hayes, Inc. (1970) 1 Cal. 3d 586, 594, 83 Cal. Rptr. 418, 463 P.2d 770* ; *Koepke v. Loo (1993) 18 Cal. App. 4th 1444, 1448-1449, 23 Cal. Rptr. 2d 34*).

B. Plaintiff Sustained "Injury." The injury required as an element of actionable negligence means an act causing harm in the sense of detrimental physical changes to the body. A detrimental physical change is an actionable injury whether or not it causes emotional distress (*Duarte v. Zachariah (1994) 22 Cal. App. 4th 1652, 1661-1664, 28 Cal. Rptr. 2d 88*).

C. Complaint Sufficiently Pleads Necessary Allegations. For a complaint in negligence to succeed, there must be a duty requiring a certain standard of conduct, a failure to conform to that standard, a close causal connection between the conduct and the resulting injury, and actual damages (*Bojorquez v. House of Toys, Inc. (1976) 62 Cal. App. 3d 930, 933, 133 Cal. Rptr. 483*).

[2] Comments

[a] Use of Form

This form of points and authorities may be used to support the contention that all essential elements of actionable negligence are present in the plaintiff's case. This argument may arise in opposing a demurrer or in opposing a motion for summary judgment [*see, e.g., Beauchene v. Synanon Found., Inc. (1979) 88 Cal. App. 3d 342, 344, 151 Cal. Rptr. 796* (demurrer); *Bojorquez v. House of Toys, Inc. (1976) 62 Cal. App. 3d 930, 932, 133 Cal. Rptr. 483* (summary judgment)]. This form should be combined with any of the *forms in § 165.30 et seq., § 165.50* § 165.100 § 165.120 et seq., § 165.260 et seq., and § 165.340 et seq., that are applicable to the particular case.

Counsel should assert the existence of the following five separate elements essential to a tort cause of action, including an action based on negligence:

- Duty on the part of the defendant to use due care [*see Civ. Code §§ 1714(a), 3333*]. The design, distribution, or marketing of firearms and ammunition is not exempt from the duty to use ordinary care and the skill that is required [*Civ. Code § 1714(a)*].

- Breach of that duty [*see Civ. Code § 3333*].

- Detriment to the plaintiff (the plaintiff's loss or harm suffered in person or property) [*see Civ. Code §§ 3281, 3282, 3333*].

- The plaintiff's detriment as a proximate result of the defendant's breach of duty [*see Civ. Code §§ 3282, 3333*].

- Damages (the measure of the detriment in terms of money) [*see Civ. Code §§ 3281, 3282, 3333*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may refer to the complaint and enumerate each necessary element. Counsel should discuss facts showing that the essential elements of actionable negligence are present.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of complaint for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§ 165.30 et seq., § 165.260 et seq., and § 165.340* et seq.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in § 165.20, § 165.40, § 165.60, § 165.80 et seq., § 165.90 et seq., § 165.110 et seq., § 165.190 et seq., § 165.270 et seq., § 165.320, § 165.360 et seq., § 165.370 et seq., and § 165.380* et seq., may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Elements of Actionable Negligence Are Present

In ***United States Liab. Ins. Co. v. Haidinger-Hayes, Inc.*** *(1970) 1 Cal. 3d 586, 83 Cal. Rptr. 418, 463 P.2d 770* , an out-of-state liability insurer brought an action against Haidinger-Hayes, Inc., a corporation licensed as a California insurance agent, and V.M. Haidinger, the president and principal executive officer for the corporation. The plaintiff had previously entered into a general agency contract with the corporation under which the corporation had authority to solicit and underwrite proposals for insurance, to determine the premium rate, and to issue contracts of insurance. The negotiations for the policy in question were the responsibility of V.M. Haidinger. The plaintiff alleged, among other things, that the defendants had negligently computed the premium rate for an insured. The trial court found against both the defendants on the issue of negligence, assessing damages at the difference between the premiums received by the plaintiff and the amounts spent in the settlement of claims. The court reserved jurisdiction to amend the judgment to add the sum that the plaintiff became obligated to pay because of the defendants' open unsettled claims. The defendants appealed the judgment.

The Supreme Court reversed the judgment as to the individual defendant, V.M. Haidinger, and affirmed the judgment as to the corporate defendant, Haidinger-Hayes, Inc. The Court stated that actionable negligence involves a legal duty to use due care, a breach of such legal duty, and the breach as the proximate or legal cause of the resulting injury (*1 Cal. 3d 586, 594)* . It found that the corporation was in a fiduciary relationship with the plaintiff, that it negligently induced the plaintiff to assume coverage, and that it should be held liable for the losses suffered by the plaintiff. The Court further held that the individual defendant was not personally liable to the plaintiff, a third party, by reason of the negligent performance of his corporate duties (*1 Cal. 3d 586, 594-595)* . In addition, the Court found that the trial court properly measured the amount of damages and did not err in reserving jurisdiction to amend its judgment to include further damages (*1 Cal. 3d 586, 598-599)* .

In ***Koepke v. Loo*** *(1993) 18 Cal. App. 4th 1444, 23 Cal. Rptr. 2d 34* , the defendant was the employer and former lover of Logan, a man who later become romantically involved with the plaintiff. After the plaintiff terminated her relationship with Logan, he told the defendant that he intended to kill the plaintiff and later assaulted the plaintiff by holding a gun to her head. The defendant then convinced Logan to obtain treatment for his drinking and psychiatric problems, agreed to keep his gun, and locked the gun in a desk drawer. The defendant later called the plaintiff and told her that she no longer needed to worry because the defendant had Logan's gun. However, the defendant later returned the gun to Logan, because Logan appeared stable, but did not tell the plaintiff that Logan had the gun. Two days later, Logan shot and seriously wounded the plaintiff and then killed himself. The plaintiff brought a negligence action against the defendant, who moved for and was awarded summary judgment on the grounds that she had no legal duty of care toward the plaintiff. The plaintiff appealed.

The court of appeals affirmed. In determining that the defendant was not liable to the plaintiff for negligence because the defendant had no legal duty of care toward the plaintiff, the court held that the elements of a cause of action for negligence are (1) the existence of a duty toward another to take action to protect against risk; (2) failure to conform to a required standard of conduct in light of the duty imposed; (3) a reasonably close connection between the conduct and the resulting injury, commonly called "proximate cause"; and (4) actual loss or damage resulting from that injury (*18 Cal. App. 4th 1444, 1448-1449)* .

[b] Plaintiff Sustained "Injury"

In ***Duarte v. Zachariah*** *(1994) 22 Cal. App. 4th 1652, 28 Cal. Rptr. 2d 88* , a husband and wife brought a medical malpractice action against the wife's physician. The wife had had a mastectomy to remove a breast cancer, and the defendant recommended chemotherapy to destroy any tumor cells remaining in the wife's body. The defendant's nurse miscalculated the dosage of one of the chemotherapy drugs administered to the wife, and the defendant checked the

calculation, but failed to discover that it called for five times the appropriate amount. The wife consulted another physician, who determined that the overdose had damaged the wife's bone marrow, making it less capable of replacing blood platelets. Because of this condition, the wife was unable to resume chemotherapy. She subsequently developed cancer in her lung. At trial, the court granted the defendant's motion for nonsuit after both sides had rested, but before the case was submitted to the jury, finding that the plaintiffs had not shown that the defendant's negligence had caused the recurrence of the cancer because they had not proved that the cancer would not have recurred if the wife had been able to resume chemotherapy. The plaintiffs appealed.

The court of appeal reversed, holding that there was a triable issue of fact that should have been submitted to the jury--namely, whether the defendant's negligence was the cause of the impairment of the wife's bone marrow. The court noted that the injury required as an element of actionable negligence means an act causing harm in the sense of detrimental physical changes to the body. An invasion of the legally protected interest in bodily security that causes no detrimental change is not sufficient because it causes no harm and therefore no actual damage (*22 Cal. App. 4th 1652, 1661-1662)* . The court held that the impairment of the wife's bone marrow was a detrimental change in the physical condition of the wife's body because it was an appreciable functional impairment of her immune system. It was therefore an actionable injury for which damages are recoverable (*22 Cal. App. 4th 1652, 1663-1664)* . The court also rejected the defendant's argument that the nonsuit was proper because the plaintiffs presented no evidence that the bone marrow injury, as distinguished from the cancer recurrence, had caused them emotional distress. The court held that a physical injury may be actionable whether or not it gives rise to emotional distress. Furthermore, it was reasonable to infer that a person who has experienced a recurrence of cancer that cannot be treated because of a bone marrow impairment would suffer emotional distress because of the impairment (*22 Cal. App. 4th 1652, 1664)* .

[c] Complaint Sufficiently Pleads Necessary Allegations

Bojorquez v. House of Toys, Inc. *(1976) 62 Cal. App. 3d 930, 133 Cal. Rptr. 483* , was an action to recover for injuries suffered by a child when a slingshot purchased by another child was used to fire a projectile that hit her in the eye. The plaintiff brought the action against the retailer and wholesaler of the slingshot. The trial court granted summary judgment for the retailer and wholesaler, dismissing the complaint, and the plaintiff appealed the judgment.

The court of appeal affirmed the judgment, stating that for a complaint in negligence to succeed, there must be a duty requiring a certain standard of conduct, a failure to conform to that standard, a close causal connection between the conduct and the resulting injury, and actual damages (*62 Cal. App. 3d 930, 933)* . The court stated that it could not hold the retailer and distributor negligent for selling toy slingshots to the class of persons for whom they were intended--the young--because it could not ban the sale of toy slingshots by judicial fiat. It noted that this limitation is within the purview of the legislature rather than the judiciary. The court also held that the slingshot was not defective on the ground that it lacked a warning that it was dangerous. The court noted that a seller need not add a warning if the danger, or potentiality of danger, is generally known and recognized, and that the potential danger of a slingshot was generally known "[e]ver since David slew Goliath" (*62 Cal. App. 3d 930, 933-934)* .

[4] Additional Authorities

[a] Elements of Actionable Negligence Are Present

Robertson v. Wentz (1986) 187 Cal. App. 3d 1281, 232 Cal. Rptr. 634 , was a wrongful death action by the husband of a woman who had been shot and killed by the defendant's minor son in the course of a bookstore robbery. The plaintiff sought to impose liability on the defendant on both common law and statutory grounds [*see Civ. Code §§ 1714.1, 1714.3*]. In reversing the judgment of dismissal with respect to one of the statutory grounds of liability [*see Civ. Code § 1714.1*], but otherwise affirming it, the court of appeal held that the essential elements of a cause of action for negligence are: (1) the defendant's legal duty of care to the plaintiff; (2) the defendant's breach of duty by negligent act or omission; (3) injury to the plaintiff as the result of the breach; and (4) compensable damages (*187 Cal. App. 3d*

1281, 1287) .

In *Laabs v. Southern California Edison Co. (2009) 175 Cal. App. 4th 1260, 97 Cal. Rptr. 3d 241* , plaintiff sued a power company for injuries she sustained when the car in which she was a passenger was struck by another vehicle in an intersection, crossed two lanes of traffic, jumped the curb, and slid some distance before it struck defendant's light pole. Plaintiff argued that the placement of the pole only 18 inches from the curb created a dangerous condition, that defendant was responsible for placement and maintenance of the poles on its property, and that defendant could be held liable for negligently installing the pole too close to the curb. The trial court granted summary judgment for the power company, concluding that the power company owed no duty to plaintiff. The court of appeal reversed, however, concluding that on the current record, it could not be determined as a matter of law that the defendant owed no duty of care. Recognizing that a utility company can be held liable for the negligent placement of utility poles along a roadway, the court applied the *Rowland v. Christian* factors to evaluate whether a duty of care could be imposed under the circumstances. The court concluded that there were triable issues as to the foreseeability of the general character of the events that caused plaintiff's injury (*175 Cal. App. 4th 1260, 1273)* . As to the closeness of the connection between defendant's conduct and plaintiff's injury, the court concluded that there was an unresolved issue of fact as to whether the defendant power company exercised sufficient control over the placement of the light pole hit by plaintiff's vehicle to impose a duty on the power company to place the pole in such a way as to minimize the risk of injury caused by collisions (*175 Cal. App. 4th 1260, 1277)* . Briefly addressing the other *Rowland* factors, the court concluded that defendant failed to establish that requiring it to position the pole farther from the street would impose any meaningful additional burden; that the high degree of certainty of injury should a vehicle collide with a pole was undisputed; that the policy of preventing future harm would be furthered by placing poles farther from the roadway edge; that there would be no negative consequence to the community of imposing a duty on defendant; and that some moral blame may be attached in placing streetlights attached to concrete poles close to the street when, as in the present case, they could be placed up to 12 feet from the roadway (*175 Cal. App. 4th 1260, 1277-1278)* .

The facts and procedural background of *Valdez v. J.D. Diffenbaugh Co. (1975) 51 Cal. App. 3d 494, 124 Cal. Rptr. 467* , are discussed in *§ 165.30[3][b]*. In *Valdez,* the plaintiff, an employee of a pipe manufacturer, brought an action for personal injuries against the general contractor who built the plant in which the plaintiff was injured and against two suppliers of equipment involved in the plaintiff's injury. After the jury returned a verdict against all three firms, the trial court granted the suppliers' motions for a new trial. In affirming the judgment and orders, the court stated that actionable negligence consists of three elements: (1) a defendant's legal duty to use due care; (2) a breach of that duty; and (3) the breach as the proximate or legal cause of the plaintiff's resulting injury (*51 Cal. App. 3d 494, 504)* .

[b] Complaint Sufficiently Pleads Necessary Allegations

In *Fireman's Fund Ins. Co. v. Security Pac. Nat'l Bank (1978) 85 Cal. App. 3d 797, 149 Cal. Rptr. 883* , the plaintiff, an insurance company, brought an action for damages against an American bank that accepted a forged check for deposit. The check was drawn from a Puerto Rican bank account of the plaintiff's insured. The plaintiff alleged that the defendant was negligent and had breached certain warranties in the California Uniform Commercial Code. Although the court of appeal affirmed the dismissal of the plaintiff's complaint, having concluded that the plaintiff was suing the wrong party, it stated that a complaint for negligent injury to person or property must allege: (1) the defendant's legal duty of care toward the plaintiff; (2) the defendant's breach of duty or the negligent act or omission; (3) injury to the plaintiff as a result of the breach (proximate or legal cause); and (4) damage to the plaintiff (*85 Cal. App. 3d 797, 811-812)* .

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CHAPTER 165 NEGLIGENCE
PART II. FORMS
A. Elements of Action for Negligence

16-165 California Points & Authorities §§ 165.11-165.19

[Reserved]

§§ 165.11[Reserved]

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A. Elements of Action for Negligence

16-165 California Points & Authorities § 165.20

§ 165.20 Complaint Does Not Sufficiently Plead Actionable Negligence

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

THE ESSENTIAL ELEMENTS OF ACTIONABLE NEGLIGENCE ARE NOT PRESENT IN THIS ACTION BECAUSE _____ [DEFENDANT DID NOT OWE A LEGAL DUTY OF CARE TO _____ (PLAINTIFF *or* THE CLASS IN WHICH PLAINTIFF WAS A MEMBER) *and/or* DEFENDANT DID NOT COMMIT AN _____ (ACT *or* OMISSION) CONSTITUTING A BREACH OF THAT DUTY *and/or* DEFENDANT'S BREACH WAS NOT A PROXIMATE OR LEGAL CAUSE OF THE RESULTING INJURY TO PLAINTIFF *and/or* PLAINTIFF DID NOT SUFFER DAMAGES FROM DEFENDANT'S ALLEGEDLY NEGLIGENT CONDUCT].

A. Elements of Actionable Negligence Are Not Present. The essential elements of actionable negligence include: (1) a defendant's legal duty to use due care, (2) a breach of that duty, (3) the breach as the proximate or legal cause of the resulting injury, and (4) actual loss or damage resulting from that injury (*United States Liab. Ins. Co. v. Haidinger-Hayes, Inc. (1970) 1 Cal. 3d 586, 594, 83 Cal. Rptr. 418, 463 P.2d 770* ; *Koepke v. Loo (1993) 18 Cal. App. 4th 1444, 1448-1449, 23 Cal. Rptr. 2d 34*).

B. Plaintiff Has Not Sustained "Injury." The injury required as an element of actionable negligence means an act causing harm in the sense of detrimental physical changes to the body. An invasion of the legally protected interest in bodily security that causes no detrimental change is not sufficient because it causes no harm and therefore no actual damage (*Duarte v. Zachariah (1994) 22 Cal. App. 4th 1652, 1661-1663, 28 Cal. Rptr. 2d 88*).

C. Complaint Does Not Sufficiently Plead Necessary Allegations. [*See § 165.10, Paragraph C.*]

D. Absence of Element Is Fatal to Recovery. The complaint must disclose not only the essential elements of negligence, but also the evidence to support them, and the absence of proof of any of those elements is fatal to a

recovery (*Means v. Southern Cal. Ry. Co. (1904) 144 Cal. 473, 478, 77 P. 1001* ; *see* *Hutchison v. Southern Cal. First Nat'l Bank (1972) 27 Cal. App. 3d 572, 579-580, 103 Cal. Rptr. 816*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the essential elements of actionable negligence are not present in a case. This issue may arise on a demurrer or motion for summary judgment [*see, e.g., Hutchison v. Southern Cal. First Nat'l Bank (1972) 27 Cal. App. 3d 572, 578-579, 103 Cal. Rptr. 816* (demurrer)]. It should be combined with any of the *forms in § 165.40, § 165.60, § 165.80 et seq., § 165.90 et seq., § 165.110 et seq., § 165.190 et seq., § 165.270 et seq., § 165.320, § 165.360 et seq., § 165.370 et seq., and § 165.380* et seq., that are applicable to the particular case.

With respect to duty and proximate causation, see the *forms in §§ 165.30 et seq. and 165.260* et seq. For the need to plead the essential allegations, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may argue that one or more specific elements are not present in the opposing party's case and show how the facts of the case demonstrate this deficiency.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of answer to a complaint and notice of motion for summary adjudication with respect to negligence actions, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender). For legal background, research and procedural guides, and forms related to demurrers, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings, and Motions for Nonsuit and Judgment* . For legal background, research and procedural guides, and forms related to summary judgment, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* .

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§ 165.40, § 165.60, § 165.80 et seq., § 165.90 et seq., § 165.110* et seq., § 165.190 et seq., § 165.270 et seq., § 165.320, § 165.360 et seq., § 165.370 et seq., and § 165.380 et seq. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in § 165.10, § 165.30 et seq., § 165.260 et seq., and § 165.340* et seq., may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Elements of Actionable Negligence Are Not Present

The factual and procedural background of ***United States Liab. Ins. Co. v. Haidinger-Hayes, Inc.*** *(1970) 1 Cal. 3d 586, 83 Cal. Rptr. 418, 463 P.2d 770* , is discussed in *§ 165.10[3][a]*. In reversing the judgment as to an individual defendant, but affirming the judgment as to a corporate defendant, in a negligence action, the Supreme Court stated that actionable negligence involves a legal duty to use due care, a breach of such legal duty, and the breach as the proximate or legal cause of the resulting injury (*1 Cal. 3d 586, 594)* .

The factual and procedural background of ***Koepke v. Loo*** *(1993) 18 Cal. App. 4th 1444, 23 Cal. Rptr. 2d 34* , is discussed in *§ 165.10[3][a]*. In determining that the defendant was not liable to the plaintiff for negligence because the defendant had no legal duty of care toward the plaintiff, the court held that the elements of a cause of action for negligence are: (1) the existence of a duty toward another to take action to protect against risk; (2) failure to conform to a required standard of conduct in light of the duty imposed; (3) a reasonably close connection between the conduct and the resulting injury, commonly called "proximate cause"; and (4) actual loss or damage resulting from that injury (*18 Cal. App. 4th 1444, 1448-1449)* .

[b] Plaintiff Has Not Sustained "Injury"

Duarte v. Zachariah *(1994) 22 Cal. App. 4th 1652, 28 Cal. Rptr. 2d 88* , is discussed in *§ 165.10[3][b]*.

[c] Absence of Element Is Fatal to Recovery

In ***Means v. Southern Cal. Ry. Co.*** *(1904) 144 Cal. 473, 77 P. 1001* , the plaintiff went to the defendant's train depot to pick up a package delivered to the passenger building of the depot, but saw a man with whom he wished to talk near the freight house of the depot. Thinking that he would wait inside the freight house for this man, the plaintiff sat inside with his friends. While he was there, a tank containing sulphuric acid exploded in the defendant's train depot. At the close of the plaintiff's case, the court granted the defendant's motion for a nonsuit. The court denied the plaintiff's motion for a new trial, and the plaintiff appealed the order denying the motion.

The Supreme Court affirmed the lower court's order, stating that actionable negligence consisted of three elements: a duty or obligation that the defendant is under to protect the plaintiff from injury; a failure to discharge that duty; and injury resulting from the failure. The Court added that not only must the complaint disclose these essentials, but the evidence must support them, and the absence of proof on any of them is fatal to a recovery (*144 Cal. 473, 478)* . Although the Court found that the facts stated in the complaint met the essential requirements for stating a cause of action, the evidence adduced at trial did not accord with the allegations of the complaint. The evidence, the Court said, showed an entire absence of any duty resting on the defendant towards the plaintiff with reference to the plaintiff's safety on the premises where the accident occurred. Therefore, one of the essential requirements was absent (*144 Cal. 473, 478)* , and the Court held that the order denying the motion for new trial was proper (*144 Cal. 473, 479-483)* .

In ***Hutchison v. Southern Cal. First Nat'l Bank*** *(1972) 27 Cal. App. 3d 572, 103 Cal. Rptr. 816* , the plaintiffs, as pledgors of shares of corporate stock, brought an action for damages based on the defendant's allegedly negligent failure as pledgee to consent to certain transactions involving the shares. The trial court sustained the defendant's demurrer to the plaintiffs' second amended complaint without leave to amend and dismissed the action. The plaintiffs appealed the judgment.

The court of appeal affirmed, stating that basic to the statement of a cause of action for damages premised on wrongful or negligent conduct is a showing that the charged conduct caused the claimed damages (*27 Cal. App. 3d 572, 578)* . It noted that the plaintiffs failed to adequately allege the elements of causation and damages in any of their various causes of action, in that they failed to show that there was a chain of causation between the defendant's refusal to consent to a certain business transaction and their claimed damages (*27 Cal. App. 3d 572, 579)* . The court added that the inadequate allegation of causation between the defendant's conduct and the plaintiffs' claimed damages was a fatal

omission supporting the order sustaining the general demurrer (*27 Cal. App. 3d 572, 579-580)* . After discussing other reasons for sustaining the general demurrer without leave to amend, the court stated that the order sustaining the general demurrer without leave to amend was not error (*27 Cal. App. 3d 572, 585)* .

[4] Additional Authorities

[a] Elements of Actionable Negligence Are Not Present

Beauchene v. Synanon Found., Inc. (1979) 88 Cal. App. 3d 342, 151 Cal. Rptr. 796 , was an action for personal injuries against the defendant, a private rehabilitation program. A resident of the program who had "escaped" from the program had shot several people, including the plaintiff. In affirming the lower court's judgment of dismissal after it sustained the defendant's demurrer, the court of appeal noted that actionable negligence involves five elements: (1) the defendant's legal duty to use due care; (2) the defendant's breach of that duty; (3) the breach as the actual ("but for") cause of the plaintiff's injury; (4) the breach as the proximate or legal cause of the plaintiff's injury; and (5) damages to the plaintiff (*88 Cal. App. 3d 342, 346)* .

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16-165 California Points & Authorities §§ 165.21-165.29

[Reserved]

§§ 165.21[Reserved]

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B. Duty
1. General Rules

16-165 California Points & Authorities § 165.30

§ 165.30 Defendant Owed Duty to Plaintiff

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT OWED A DUTY OF DUE CARE TO _____ [PLAINTIFF *or* THE CLASS OF PERSONS IN WHICH PLAINTIFF IS A MEMBER].

A. Existence and Breach of Duty. A finding of negligence is based on two elements: (1) the existence of a duty to use care; and (2) a breach of that duty by the creation of an unreasonable risk of harm (*Raymond v. Paradise Unified Sch. Dist. (1963) 218 Cal. App. 2d 1, 6, 31 Cal. Rptr. 847*).

B. Defendant Owed Duty to Plaintiff or to Class. An indispensable prerequisite to the imposition of liability based on negligence is the existence of a duty of due care owed by the defendant to the person injured or to a class of persons of which the plaintiff is a member (*see Richards v. Stanley (1954) 43 Cal. 2d 60, 63, 271 P.2d 23* ; *Valdez v. J.D. Diffenbaugh Co. (1975) 51 Cal. App. 3d 494, 505, 124 Cal. Rptr. 467*).

C. Duty Is Question of Law. Duty is a question of law, decided by the court, not the jury (*Ballard v. Uribe (1986) 41 Cal. 3d 564, 572 n.6, 224 Cal. Rptr. 664, 715 P.2d 624*).

D. Policy Factors Considered in Scope of Duty Determination. The major policy factors that must be balanced in determining the scope of a particular defendant's duty of due care include: (1) the foreseeability of harm to the plaintiff; (2) the degree of certainty that the plaintiff suffered injury; (3) the closeness of connection between the defendant's act and the plaintiff's injury; (4) the moral blame attached to the defendant's conduct; (5) the policy of preventing future harm; (6) the extent of the defendant's burden and the consequences to the community of imposing a duty to exercise care with resulting liability for breach; and (7) the availability of insurance for the risk involved (*see Rowland v. Christian (1968) 69 Cal. 2d 108, 112-113, 70 Cal. Rptr. 97, 443 P.2d 561* ; *Valdez v. J.D. Diffenbaugh Co. (1975) 51*

Cal. App. 3d 494, 506, 124 Cal. Rptr. 467).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the defendant owed a duty of due care to the plaintiff in an action for negligence. This form should be combined with any of the *forms in § 165.50, § 165.70, § 165.100,* and *§ 165.120* et seq., that are applicable to the particular case.

This issue may arise in opposing a demurrer or motion for summary judgment [*see, e.g., J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 803, 157 Cal. Rptr. 407, 598 P.2d 60* (demurrer); *Harris v. De La Chapelle (1976) 55 Cal. App. 3d 644, 646, 127 Cal. Rptr. 695 , disapproved on other grounds, Sprecher v. Adamson Cos. (1981) 30 Cal. 3d 358, 178 Cal. Rptr. 783, 636 P.2d 1121* (summary judgment)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may argue that a duty was owed to this particular plaintiff, discuss how the risk to the plaintiff was foreseeable to the defendant, point out that various public policy reasons dictate that a duty be imposed, and argue that the defendant's act or omission was in breach of this duty.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of complaint for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender). For legal background, research and procedural guides, and forms related to demurrers, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For legal background, research and procedural guides, and forms related to summary judgment, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§ 165.50, § 165.70, § 165.100,* and *§ 165.120* et seq. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in § 165.40, § 165.60, § 165.80, § 165.90, § 165.110,* and *§ 165.190* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Existence and Breach of Duty

Raymond v. Paradise Unified Sch. Dist. *(1963) 218 Cal. App. 2d 1, 31 Cal. Rptr. 847* , was an action brought by an

elementary school student who was struck by a school bus in the area of a school bus stop. The jury found that: the bus driver was not negligent; the school district was not negligent in maintaining a place dangerous to children, but was negligent in failing to supervise the area; and the student was not contributorily negligent. The district appealed.

The court of appeal affirmed the judgment, stating that a finding of negligence turns on two elements: the existence of a duty to use care and a breach of that duty by the creation of an unreasonable risk of harm (*218 Cal. App. 2d 1, 6)* . The court noted that the school district is under no legal duty to supply transportation to its pupils. However, once it does so, it has a concomitant obligation to provide a reasonably safe system (*218 Cal. App. 2d 1, 9)* . In addition, the school district had knowledge of the presence of small children in the area that it had designated as a bus stop, and the amount of care due to children increases with their immaturity (*218 Cal. App. 2d 1, 10)* . The risks emanating from the conduct of the defendant's activity were greater at this particular location than at other locations. Additionally, the location was within the complete control of the defendant. Thus, the court held that as a matter of law, the defendant had a duty to provide adequate supervisory measures to protect children using the bus loading zone (*218 Cal. App. 2d 1, 10-11)* .

[b] Defendant Owed Duty to Plaintiff or to Class

In ***Richards v. Stanley*** *(1954) 43 Cal. 2d 60, 271 P.2d 23* , the plaintiff's motorcycle collided with an automobile. At the time of the collision, Mr. and Mrs. Stanley owned the car, but Rawlings, who had stolen the automobile, was driving. The complaint alleged that Mrs. Stanley had negligently left the car unattended, unlocked, and with the key in the ignition in violation of a municipal ordinance. The ordinance, however, expressly stated that it was not admissible as evidence in any civil action for theft of a motor vehicle and was not to have any other bearing in any civil action. The court overruled the Stanleys' general demurrer, and they answered, denying the complaint's allegations and alleging that the plaintiff had been contributorily negligent. At the start of the trial, the plaintiff offered the municipal ordinance as evidence. When the trial court excluded it, he sought to amend his complaint to state a cause of action for general negligence. The court then sustained the Stanleys' objection to the introduction of any evidence against them, on the ground that the complaint failed to state a cause of action, and granted their motion for nonsuit. The plaintiff appealed the judgment.

The Supreme Court affirmed the judgment, noting that a plaintiff may not recover damages based on the violation of a criminal statute or ordinance, unless he or she is one of the class of persons for whose benefit the statute or ordinance was enacted (*43 Cal. 2d 60, 62)* . Because the board of supervisors made clear that the ordinance was not enacted for the benefit of persons who might be injured by the operation of stolen automobiles, the Court found that the evidence was properly excluded as irrelevant (*43 Cal. 2d 60, 62-63)* . Nevertheless, the plaintiff contended that even if the ordinance were disregarded, his complaint would still state a cause of action for negligence. The Court, however, found that in the absence of a statute prohibiting the leaving of a key in a vehicle, the owner of an automobile had no duty to persons who may be injured by its use by a third person, absent facts putting the owner on notice that the third person is incompetent to handle the automobile. The Court stated that an indispensable factor to liability founded on negligence is the existence of a duty of care by the alleged wrongdoer to the person injured or to a class of which he or she is a member (*43 Cal. 2d 60, 63)* . The Court also rejected the contention that the defendant owed a duty to the plaintiff because both theft and negligent driving were foreseeable consequences of having left the key in the car (*43 Cal. 2d 60, 65)* .

In ***Valdez v. J.D. Diffenbaugh Co.*** *(1975) 51 Cal. App. 3d 494, 124 Cal. Rptr. 467* , the plaintiff, the employee of a pipe manufacturer, brought an action for personal injuries against the general contractor who built the plant in which the plaintiff was injured and two suppliers of equipment involved in the plaintiff's injury. The action was based on negligence and products liability. The plaintiff's employer's workers' compensation carrier intervened in the action to recover benefits it had paid to the injured plaintiff. Negligence was an issue as to the contractor, but not as to the two suppliers of the equipment. After the jury returned a verdict against all three defendants, the trial court granted the two suppliers' motions for a new trial. The contractor appealed from the judgment, and the workers' compensation carrier and the injured plaintiff appealed from the order granting the suppliers' motion for a new trial. The suppliers cross

appealed from the judgment as originally entered.

The court of appeal affirmed the judgment and orders. The contractor contended that it owed no legal duty of due care to the plaintiff and that even if a duty did exist, no act committed by it or any of its employees resulted in the plaintiff's injury. The court concluded, however, that the contractor's arguments were without merit (*51 Cal. App. 3d 494, 504)* . It stated that an indispensable prerequisite to the imposition of liability based on negligence is the existence of a duty of due care owed by the defendant to the person injured or to a class of persons of which the plaintiff is a member. Duty is, however, a rather ephemeral concept, which may be imposed by statute or the terms of contract, or may arise from the character of particular activities or from the nature of human society itself. Its ascertainment and definition in any specific factual context is an imprecise task at best. The essential question is whether or not the plaintiff's interests are entitled to legal protection against the defendant's conduct (*51 Cal. App. 3d 494, 504-505)* . The court examined various policy considerations in light of certain tasks improperly performed by the contractor's employees and concluded that the contractor owed a duty to the plaintiff (*51 Cal. App. 3d 494, 506-508)* . The court further found that the defendant's negligent acts were the proximate cause of the injury to the plaintiff (*51 Cal. App. 3d 494, 508-512)* .

[c] Duty Is Question of Law

In ***Ballard v. Uribe (1986)*** *41 Cal. 3d 564, 224 Cal. Rptr. 664, 715 P.2d 624* , the plaintiff, an employee of a general contractor constructing a freeway interchange, was injured while using a defective aerial "moonlight." The lift had been left at the construction site in the general contractor's fenced equipment yard by the defendant, a subcontractor, until its stabilizing cable, which was frayed and broken, could be repaired. The lift rested on a truck bed and consisted of a basket mounted on an extension or boom ladder. The basket had three sides but was open at the back to permit entry and exit. The stabilizing cable was connected to the ladder to keep the basket level as the ladder was raised or lowered. The general contractor's manager testified that the defendant had given permission for the general contractor to borrow or rent the lift if it was first repaired. The defendant acknowledged that his usual practice was to remove the keys to both the truck engine and lift engine before leaving the lift at a job site. Evidence showed that removal of keys, locking of control boxes, and posting of warning tags to prevent unauthorized use was customary in the construction industry. The defendant took none of these precautions. Before the lift was fully repaired, the plaintiff and another of the general contractor's employees, unaware of the defect, used the lift. The basket flipped, ejecting the plaintiff, who fell approximately 35 feet to the ground. The issues of liability and damages were separately tried. The defendant appealed judgment for the plaintiff, seeking to overturn the finding of liability on the basis of instructional error. The plaintiff cross appealed on the damages issue.

In affirming the judgment, the Supreme Court held that the defendant had not been prejudiced by the instructional error, but stated that the defendant correctly suggested that the trial court should have resolved the duty issue itself (*41 Cal. 3d 564, 572)* . The Court noted that the question of duty is decided by the court, not the jury (*41 Cal. 3d 564, 572 n.6*).

[d] Policy Factors Considered in Scope of Duty Determination

In ***Rowland v. Christian*** *(1968) 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561* , the plaintiff brought an action for damages for personal injuries caused by a defective bathroom faucet, which was located in an apartment occupied by the defendant. After summary judgment was granted for the defendant, the plaintiff appealed.

The Supreme Court reversed the judgment, and examined the principle of duty in an action involving negligence. Noting that California cases have stated that all persons are required to use ordinary care to prevent others from being injured as a result of their conduct, the Court stated that there are exceptions to this general principle. These exceptions are supported by public policy (*69 Cal. 2d 108, 112)* . The major policy considerations are: (1) the foreseeability of harm to the plaintiff; (2) the degree of certainty that the plaintiff suffered injury; (3) the closeness of the connection between the defendant's conduct and the injury suffered; (3) the moral blame attached to the defendant's conduct; (4) the policy of preventing future harm; (5) the extent of the burden to the defendant and consequences to the community of

imposing a duty to exercise care with resulting liability for breach; and (6) the availability, cost, and prevalence of insurance for the risk involved (*69 Cal. 2d 108, 112-113)* . A departure from this fundamental rule of liability has been accomplished by classifying the plaintiff as a trespasser, licensee, or invitee, and then by adopting special rules as to the duty owed by the occupier or possessor to each of these classifications (*69 Cal. 2d 108, 113)* . The Court, however, rejected these common law classifications, and approached the issue of duty of the occupier or possessor on the basis of ordinary principles of negligence (*69 Cal. 2d 108, 114-118)* . The Court further discussed the principles of premises liability and held that the summary judgment for the defendant was not supported by the record (*69 Cal. 2d 108, 118-120)* .

The factual and procedural background of ***Valdez v. J.D. Diffenbaugh Co.*** *(1975) 51 Cal. App. 3d 494, 124 Cal. Rptr. 467* , is discussed in *§ 165.30[3][b]*. In affirming a judgment against one defendant in an action involving negligence, the court of appeal examined various policy considerations to determine whether or not the defendant owed the plaintiff a duty of due care. The court listed six policy factors that must be balanced to determine the scope of a particular defendant's duty of due care: (1) the foreseeability of harm to the plaintiff; (2) the degree of certainty that the plaintiff suffered injury; (3) the closeness of connection between the defendant's act and the plaintiff's injury; (4) the moral blame attached to the defendant's conduct; (5) the policy of preventing future harm; and (6) the extent of the defendant's burden and the consequences to the community of imposing a duty and liability (*51 Cal. App. 3d 494, 506)* .

[4] Additional Authorities

[a] Defendant Owed Duty to Plaintiff or to Class

In *Juarez v. Boy Scouts of Am., Inc. (2000) 81 Cal. App. 4th 377, 97 Cal. Rptr. 2d 12* , an adult male sued the Boy Scouts of Am., Inc. (BSA) for damages arising from alleged sexual molestation by a scoutmaster that occurred when he was between 12 and 13 years old. The sexual acts were allegedly committed during officially sanctioned scouting events, but the plaintiff did not tell anyone until three years later. The scoutmaster was consequently prosecuted and sentenced to prison. The complaint alleged various forms of negligence. The defendants filed motions for summary judgment. In opposition, the plaintiff presented evidence that although BSA had a praiseworthy Youth Protection Program at the relevant time, it failed to take reasonable steps to assure that the information was likely to be communicated to the scouts, parents, or adult leaders of the plaintiff's troop. For example, the plaintiff was unaware that BSA rules prohibited the scoutmaster's taking the troop on overnight camping trips by himself and sleeping in the scouts' tent. The trial court granted summary judgment for the defendants and imposed evidentiary sanctions against the plaintiff, after determining that BSA had no prior information that would have put it on notice of the scoutmaster's propensity to molest children. The court of appeal affirmed in every respect except for summary judgment as to the cause of action based on the theory that BSA failed to take reasonable measures to protect the plaintiff from the molestation. Among other things, the court held that BSA owed a duty of care to have taken reasonable protective measures to protect the plaintiff from the risk of sexual abuse by adult volunteers involved in scouting programs, such as warning, training, or educating the plaintiff concerning how to avoid that risk. Of the factors set forth in *Rowland v. Christian (1968) 69 Cal. 2d 108, 113, 70 Cal. Rptr. 97, 443 P.2d 561* (discussed in *§ 165.30[3][d]*), only the lack of moral blame was determined in favor of BSA. The rest of the factors weighed unequivocally in favor of the plaintiff and the existence of a duty (*81 Cal. App. 4th 377, 409-410)* .

[b] Policy Factors Considered in Scope of Duty Determination

The facts and procedural background of *Ballard v. Uribe (1986) 41 Cal. 3d 564, 224 Cal. Rptr. 664, 715 P.2d 624* , are *discussed under § 165.30[3][c]*. In affirming the judgment, the Supreme Court stated the general rule in California that all persons have a duty to use ordinary care to prevent others being injured as the result of their conduct. It noted that a number of considerations have been taken into account by courts in various contexts to determine whether a departure from the general rule is appropriate (*41 Cal. 3d 564, 572 n.6*). Quoting *Rowland v. Christian (1968) 69 Cal. 2d 108, 113, 70 Cal. Rptr. 97, 443 P.2d 561* (discussed in *§ 165.30[3][d]*), the Court stated that the major

considerations are: (1) the foreseeability of harm to the plaintiff; (2) the degree of certainty that the plaintiff suffered injury; (3) the closeness of the connection between the defendant's conduct and the injury suffered; (4) the moral blame attached to the defendant's conduct; (5) the policy of preventing future harm; (6) the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach; (7) and the availability, cost, and prevalence of insurance for the risk involved (*41 Cal. 3d 564, 572-573 n.6*).

In *Catsouras v. Department of California Highway Patrol (2010) 181 Cal. App. 4th 856, 104 Cal. Rptr. 3d 352* , plaintiffs were the parents and siblings of an 18-year-old girl who died when she was decapitated in an automobile accident. Officers of the California Highway Patrol investigated the accident, took control of the accident scene and decedent's remains, and took photographs of both. After the photographs were transmitted to the CHP computer system, two officers e-mailed 9 gruesome photos of the decedent's remains to their friends and family members, allegedly as a Halloween prank. This initial dissemination by the officers, which served no official investigative or public interest purpose but was done from sheer morbidity or gossip, started a chain reaction that resulted in thousands of Internet sites picking up the images and some of the plaintiffs receiving personal e-mails from strangers taunting them with the gruesome photographs. Plaintiffs sued the Highway Patrol and the two officers for various causes of action, including invasion of privacy, negligence, and intentional infliction of emotional distress. The trial court sustained the officers' demurrer on all causes of action, but the court of appeal reversed. Although the court of appeal held that no special relationship was established between the CHP and the family members merely because of the CHP's conduct in taking control of the accident scene (*181 Cal. App. 4th 856, 877-881)* , the court went on to hold that a duty of care sufficient to support a negligence action could be established under the facts through application of the general factors articulated in *Rowland v. Christian*. Applying those factors to the facts of the case, the court concluded that it was foreseeable that gruesome photographs allegedly disseminated for shock value on Halloween would be forwarded to thousands of Internet users; that police officers upon whom the public relies to protect and serve could be assigned moral blame for violating the public policy protecting the emotional sensibilities of surviving family members; that imposing liability on defendants would not impose an intolerable burden on the CHP and its officers to control their future conduct; that the officers' conduct in initially transmitting the photographs to friends and family was sufficiently closely connected to the harm caused to the surviving family members to warrant the imposition of liability; and that imposition of liability on the CHP would help to ensure that the dissemination of such photos for no official reason would not occur in the future (*181 Cal. App. 4th 856, 881-886)* .

In *Laabs v. Southern California Edison Co. (2009) 175 Cal. App. 4th 1260, 97 Cal. Rptr. 3d 241* , plaintiff sued a power company for injuries she sustained when the car in which she was a passenger was struck by another vehicle in an intersection, crossed two lanes of traffic, jumped the curb, and slid some distance before it struck defendant's light pole. Plaintiff argued that the placement of the pole only 18 inches from the curb created a dangerous condition, that defendant was responsible for placement and maintenance of the poles on its property, and that defendant could be held liable for negligently installing the pole too close to the curb. The trial court granted summary judgment for the power company, concluding that the power company owed no duty to plaintiff. The court of appeal reversed, however, concluding that on the current record, it could not be determined as a matter of law that the defendant owed no duty of care. Recognizing that a utility company can be held liable for the negligent placement of utility poles along a roadway, the court applied the *Rowland v. Christian* factors to evaluate whether a duty of care could be imposed under the circumstances. The court concluded that there were triable issues as to the foreseeability of the general character of the events that caused plaintiff's injury (*175 Cal. App. 4th 1260, 1273)* . As to the closeness of the connection between defendant's conduct and plaintiff's injury, the court concluded that there was an unresolved issue of fact as to whether the defendant power company exercised sufficient control over the placement of the light pole hit by plaintiff's vehicle to impose a duty on the power company to place the pole in such a way as to minimize the risk of injury caused by collisions *(175 Cal. App. 4th 1260, 1277*). Briefly addressing the other *Rowland* factors, the court concluded that defendant failed to establish that requiring it to position the pole farther from the street would impose any meaningful additional burden; that the high degree of certainty of injury should a vehicle collide with a pole was undisputed; that the policy of preventing future harm would be furthered by placing poles farther from the roadway edge; that there would be no negative consequence to the community of imposing a duty on defendant; and that some moral blame may

be attached in placing streetlights attached to concrete poles close to the street when, as in the present case, they could be placed up to 12 feet from the roadway (*175 Cal. App. 4th 1260, 1277-1278)* .

The facts and procedural background of *Juarez v. Boy Scouts of Am., Inc. (2000) 81 Cal. App. 4th 377, 97 Cal. Rptr. 2d 12* , are discussed in *§ 165.30[3][c]*. With respect to the defendant's legal duty, the court cited *Rowland v. Christian (1968) 69 Cal. 2d 108, 113, 70 Cal. Rptr. 97, 443 P.2d 561* (discussed in *§ 165.30[3][d]*), noting that in determining whether a particular the defendant owed a tort duty to a given the plaintiff, the pertinent factors are: (1) the foreseeability of harm to the injured party; (2) the degree of certainty that the injured party suffered harm; (3) the closeness of the connection between the defendant's conduct and the injury suffered; (4) the moral blame attached to the defendant's conduct; (5) the policy of preventing future harm; (6) the extent of the burden to the defendant; and (7) the consequences to the community of imposing a duty to exercise care with resulting potential liability (*81 Cal. App. 4th 377, 401)* .

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
CHAPTER 165 NEGLIGENCE
PART II. FORMS
B. Duty
1. General Rules

16-165 California Points & Authorities § 165.31

§ 165.31 Defendant's Conduct Fell Below Applicable Standard of Care

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT'S CONDUCT WITH RESPECT TO _____ [*describe*] FELL BELOW THE STANDARD OF CARE APPLICABLE TO _____ [*describe*].

A. Defendant's Conduct Fell Below Statutory Standard of Care. Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by a want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury on himself or herself (*Civ. Code § 1714(a)*).

B. Defendant's Conduct Fell Below Common Law Standard of Care. All persons are required to use ordinary care to prevent others from being injured as the result of their conduct, and ordinary care is that degree of care that people of ordinarily prudent behavior can be reasonably expected to exercise under the circumstances of a given case (*Schwartz v. Helms Bakery Ltd. (1967) 67 Cal. 2d 232, 60 Cal. Rptr. 510, 430 P.2d 68*).

[*Optional*] **C. Defendant's Conduct Did Not Comport With Custom and Practice.** The standard of care required in a particular circumstance may be based on a statute or the custom and practice in the relevant community; although the custom in the community does not necessarily establish how a reasonable person must act, it is evidence to be considered in determining the proper standard of care (*Bullis v. Security Pac. Nat'l Bank (1978) 21 Cal. 3d 801, 809, 148 Cal. Rptr. 22, 582 P.2d 109*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the defendant's conduct did not comport with the applicable standard of care [*see Civ. Code § 1714(a)*; *Schwartz v. Helms Bakery Ltd. (1967) 67 Cal. 2d 232, 60 Cal. Rptr. 510, 430 P.2d 68]* . Optional Paragraph C may be submitted to assert that the defendant did not meet the standard of care based on the applicable custom and usage in the community. This form should be combined with any of the *forms in § 165.10* and *§ 165.32* that are applicable to the particular case.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may describe the defendant's conduct and compare it to the standard of care applicable to the circumstances of the case.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of complaint for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§ 165.10* and *§ 165.32*. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in § 165.20* and *§ 165.40* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Defendant's Conduct Fell Below Common Law Standard of Care

In ***Schwartz v. Helms Bakery Ltd.*** *(1967) 67 Cal. 2d 232, 243-244, 60 Cal. Rptr. 510, 430 P.2d 68* , the plaintiff, a four-year-old child, was struck by an automobile as he crossed the street to buy a doughnut from Taylor, the driver of a retail truck owned by Helms Bakery. Taylor had previously told the child that he would meet him up the street after the child had gone home to get some money. The trial court granted a motion for nonsuit, and the plaintiff appealed.

The Supreme Court reversed, holding that by undertaking to direct the child to an assigned rendezvous with the truck, the defendants, Taylor and Helms Bakery, assumed a duty to exercise due care for the child's safety (*67 Cal. 2d 232, 238)* . The Court noted that firmly rooted in the common law lies the concept that although one individual need do nothing to rescue another from peril not of that individual's own making, nevertheless, if that individual undertakes to do an act, he or she must do it with care. The Court stated that if a person enters on an affirmative course of conduct affecting the interests of another, he or she is regarded as assuming a duty to act and will be liable for negligent acts or omissions. In addition, the Court found that if the conduct of the actor has brought him or her into a human relationship with another, of such character that sound social policy requires some affirmative action or some precaution on his or her part to avoid harm, the duty to act or take precaution is imposed by law (*67 Cal. 2d 232, 238)* . If a person is under the special protection of another, the latter is bound to exercise reasonable care to prevent harm to him or her, and this duty may include protection from the dangerous conduct of third persons (*67 Cal. 2d 232, 238-239)* . With regard to the issue of the standard of care, the Court stated that when dealing with a young child, a person must exercise greater

caution than when dealing with an adult. Quoting its earlier opinion in *Hilyar v. Union Ice Co. (1955) 45 Cal. 2d 30, 36, 286 P.2d 21* , the Court noted that the presence of a child is in itself a warning requiring the exercise of care for the child's safety (*67 Cal. 2d 232, 240)* . In this case, Taylor was obliged to exercise greater caution regarding the child than he would have with respect to an adult. In discharging this duty of due care, he should have taken into consideration not merely the normal characteristics of four-year-old children, but his actual knowledge of he plaintiff's heedlessness of the hazards of traffic. The Court explained that Taylor acquired that knowledge before their first encounter when he saw the child dart across the street. The Court held that the lower court erroneously granted the motion for nonsuit. It should have left to the jury the question whether or not, in view of the reasonably foreseeable behavior of the child, the defendants exposed him to an unreasonable risk of harm (*67 Cal. 2d 232, 243-244)* . In addition, by undertaking to direct the child to an assigned rendezvous with the truck, the defendants assumed a duty to exercise due care for his safety (*67 Cal. 2d 232, 235-242)* .

[b] Defendant's Conduct Did Not Comport With Custom and Practice

In ***Bullis v. Security Pac. Nat'l Bank*** *(1978) 21 Cal. 3d 801, 148 Cal. Rptr. 22, 582 P.2d 109* , a coexecutor of an estate brought an action against a bank for improper withdrawal of funds by the other coexecutor. The bank failed to require the signatures of both coexecutors for withdrawal from an estate account. The coexecutor who withdrew the funds improperly invested it in a mining venture that later failed. At trial, the bank was found liable on three separate grounds for the loss, including the breach of its common law duty to use reasonable care in its conduct with its depositors. The bank appealed the judgment.

The Supreme Court affirmed, noting that the trial court's determination that the bank did not act in accordance with the applicable standard of care included implicit findings on the questions of causality, foreseeability, and reasonableness (*21 Cal. 3d 801, 808)* . The Court stated that the standard of care required in a particular circumstance may be based on a statute, such as *Evid. Code § 669*, or the custom and practice in the relevant community. Although the custom in the community does not necessarily establish how reasonable persons must act, it is evidence to be considered in determining the proper standard of care. The Court noted that evidence of the custom and practice in the banking industry showed that two signatures were generally required to withdraw funds. The bank's operations manual also required two signatures for withdrawal (*21 Cal. 3d 801, 809)* . This procedure was deviated from only if the bank's legal department had been consulted, but the legal department was not consulted in this case. In addition, the Court stated that former Prob. Code § 570 (*now see Prob. Code § 9630*) provided that one coexecutor may act only if the other coexecutor was absent from the state or legally disqualified from acting, and those circumstances did not exist in this case (*21 Cal. 3d 801, 810)* . Therefore, based on evidence of the banking industry's custom and the bank's own adopted procedures and practice, there was substantial evidence to support the trial court's finding that the bank's conduct fell below the standard of care owed to the estate (*21 Cal. 3d 801, 811)* .

[4] Additional Authorities

[a] Defendant's Conduct Fell Below Common Law Standard of Care

Robertson v. Wentz (1986) 187 Cal. App. 3d 1281, 232 Cal. Rptr. 634 , was a wrongful death action brought by the husband of a woman who had been shot and killed by the defendant's minor son in the course of a bookstore robbery. The defendant was allegedly liable on both common law and statutory grounds [*see Civ. Code §§ 1714.1, 1714.3*]. In reversing the judgment of dismissal with respect to one of the statutory grounds of liability [*see Civ. Code § 1714.1*], but otherwise affirming it, the court of appeal, quoting from *J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 803, 806, 157 Cal. Rptr. 407, 598 P.2d 60* , stated that whether a duty is owed is a short expression of the essential question whether the plaintiff's interests are entitled to legal protection against the defendant's conduct. Although the question of whether one owes a duty to another must be decided on a case-by-case basis, every case is governed by the rule of general application that all persons are required to use ordinary care to prevent others from being injured as the result of their conduct (*187 Cal. App. 3d 1281, 1287)* .

The factual and procedural background of *Rowland v. Christian (1968) 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561* , is discussed in *§ 165.30[3][d]*. In reversing a summary judgment granted for the defendant, the Supreme Court stated that *Civ. Code § 1714* provides that everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by a want of ordinary care or skill in the management of his or her property, except so far as the latter has, willfully or by want of ordinary care, brought the injury on himself or herself (*69 Cal. 2d 108, 111-112)* . This statute stated a civil law and not a common law principle. In addition, the Court noted that California cases have occasionally stated a similar view--that is, all persons are required to use ordinary care to prevent others from being injured as a result of their conduct (*69 Cal. 2d 108, 112)* .

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
CHAPTER 165 NEGLIGENCE
PART II. FORMS
B. Duty
1. General Rules

16-165 California Points & Authorities § 165.32

§ 165.32 Defendant Breached Duty Owed to Plaintiff

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT BREACHED HIS/HER/ITS DUTY OWED TO PLAINTIFF, IN THAT _____ [*describe*].

A. Existence and Breach of Duty. A finding of negligence is based on two elements: the existence of a duty to use care and a breach of that duty by the creation of an unreasonable risk of harm (*Raymond v. Paradise Unified Sch. Dist. (1963) 218 Cal. App. 2d 1, 6, 31 Cal. Rptr. 847*).

B. Determination of Breach. In determining whether or not the defendant breached a duty of care to the plaintiff, the trier of fact must balance the magnitude of the harm likely to result from the defendant's conduct against the social value of the interest that the defendant is seeking to advance and the ease with which the defendant could have taken precautions to avoid the risk of harm (*Musgrove v. Ambrose Props. (1978) 87 Cal. App. 3d 44, 53, 150 Cal. Rptr. 722*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the defendant breached a duty owed to the plaintiff. It should be combined with any of the *forms in § 165.10* and *§§ 165.30 -165.31* that are applicable to the particular case.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may discuss the magnitude of the harm likely to result from the defendant's conduct, as weighed against the social value of the interest that the defendant sought to advance, and argue that the harm outweighed the value of the defendant's interest.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of complaint for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§ 165.10* and *§§ 165.30 -165.31*. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in § 165.40* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Existence and Breach of Duty

The factual and procedural background of ***Raymond v. Paradise Unified Sch. Dist.*** *(1963) 218 Cal. App. 2d 1, 31 Cal. Rptr. 847* , is discussed § 165.30[3][a]. In an action for personal injuries suffered by an elementary school student who was struck by a school bus in the area of a school bus stop, the court of appeal stated that a finding of negligence turns on two elements: the existence of a duty to use care and a breach of that duty by the creation of an unreasonable risk of harm (*218 Cal. App. 2d 1, 6)* . The court noted that the school district is under no legal duty to supply transportation to its pupils. However, once it does so, it has a concomitant obligation to provide a reasonably safe system (*218 Cal. App. 2d 1, 9)* . In addition, the school district had knowledge of the presence of small children in the area that it had designated as a bus stop. The amount of care due to children increases with their immaturity (*218 Cal. App. 2d 1, 10)* . The risks emanating from the conduct of the defendant's activity were greater at this particular location than at other locations. Additionally, the location was within the complete control of the defendant. Therefore, the court held that as a matter of law, the defendant had a duty to provide adequate supervisory measures to protect children using the bus loading zone (*218 Cal. App. 2d 1, 10-11)* .

[b] Determination of Breach

In ***Musgrove v. Ambrose Props.*** *(1978) 87 Cal. App. 3d 44, 150 Cal. Rptr. 722* , the plaintiff was struck by a bicycle operated by a 14-year-old boy, on the premises of a shopping center owned by Ambrose Props.. The plaintiff was injured in the course and scope of her employment. A workers' compensation insurer, Unigard Insurance Group, intervened in the action seeking judgment against the boy and Ambrose Props. because Unigard had paid the plaintiff disability indemnity and medical benefits. The trial was bifurcated pursuant to stipulation, and the issue of liability was tried first. At the conclusion of the liability phase of the trial, the jury made certain special findings. Following trial on the issue of damages, the jury returned a verdict in favor of the plaintiff. The trial court granted judgment notwithstanding the verdict in favor of the defendant Ambrose Props. and also granted Ambrose Props.' motion for new

trial on the grounds of insufficiency of the evidence to support the verdict and that the verdict was against law [*see Code Civ. Proc. §§ 629, 657(6)*]. The plaintiff and Unigard appealed from the judgment and from the order granting a new trial. Ambrose Props. cross appealed from the judgment entered on the verdict, but its cross appeal was dismissed for failure to file a brief in support [*see Cal. Rules of Ct., Rule 8.220* (formerly Rule 17(a))].

The court of appeal reversed the judgment notwithstanding the verdict and the order granting a new trial. It stated that an owner of land held open to the public for business purposes is under a duty to take affirmative action to control the wrongful acts of a third person that threaten the safety of visitors to the premises if the owner has reasonable cause to anticipate such acts and the probability of injury resulting from them (*87 Cal. App. 3d 44, 51)* . The court noted that the determination of duty is basically a question of law and that foreseeability of the risk is of primary importance in establishing the element of duty. After examining the facts of the case, the court found that Ambrose Props. owed a duty to the plaintiff (*87 Cal. App. 3d 44, 52)* . The court noted that the elements of actionable negligence also include a breach of this duty and the breach as a proximate cause of the resulting injury. In determining whether or not the defendant breached a duty of care owed to the plaintiff, the magnitude of the harm likely to result from the defendant's conduct must be balanced against the social value of the interest that he or she is seeking to advance and the ease with which he or she may take precautions to avoid the risk of harm to the plaintiff. In this case, Ambrose Props. could have taken precautions to avoid or minimize the risk of a bicyclist striking a pedestrian, such as posting signs prohibiting bicycle riding on sidewalks or employing a guard to control bicycle riding in those areas. The court added that the jury could reasonably find that the risk of harm to a pedestrian struck by a bicycle outweighed both the social value of permitting bicyclists unrestricted access to all areas of the shopping center, and the burden imposed on Ambrose Props. in taking steps to prevent bicycle riding on sidewalks and passageways. Furthermore, evidence that Ambrose Props. did nothing to control bicycle riding in these areas supported the jury's implied finding that Ambrose Props. breached its duty of care to the plaintiff. There was also evidence that supported a finding that Ambrose Props.' failure to take any measures to control bicycle riding was the proximate cause of the plaintiff's injuries. The court held that if it were to give the evidence tending to support negligence all the value to which it is legally entitled, that evidence would support a verdict in favor of the plaintiff. Therefore, the trial court erroneously granted judgment for the defendant notwithstanding the verdict (*87 Cal. App. 3d 44, 53)* .

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CHAPTER 165 NEGLIGENCE
PART II. FORMS
B. Duty
1. General Rules

16-165 California Points & Authorities §§ 165.33-165.39

[Reserved]

§§ 165.33[Reserved]

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B. Duty
1. General Rules

16-165 California Points & Authorities § 165.40

§ 165.40 Defendant Not Liable for Nonfeasance Because No Duty Existed

[1] FORM

DEFENDANT IS NOT LIABLE TO PLAINTIFF FOR FAILING TO ACT BECAUSE DEFENDANT DID NOT HAVE A DUTY TO ACT UNDER THE CIRCUMSTANCES.

A. No Liability for Failure to Act Unless Duty Exists. Before any common law liability for failure to act may exist, there must have been a duty to act under the circumstances (*Bartlett v. State of Cal. (1956) 145 Cal. App. 2d 50, 56-57, 301 P.2d 985*).

B. Nonfeasance Versus Misfeasance. Misfeasance, or negligent action, exists if the defendant is responsible for making the plaintiff's position worse--that is, if the defendant has created a risk of harm to the plaintiff. Conversely, nonfeasance, or negligent inaction, exists if the defendant has failed to aid the plaintiff through beneficial intervention (*Weirum v. RKO Gen., Inc. (1975) 15 Cal. 3d 40, 48-49, 123 Cal. Rptr. 468, 539 P.2d 36*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the defendant did not owe a duty to take affirmative action to assist the plaintiff and to assert the difference between nonfeasance and misfeasance. It should be combined with the form *in § 165.20*, if applicable to the particular case.

This argument may arise in several procedural contexts. For example, the defendant might raise this argument in support of a motion for nonsuit, a demurrer, or a motion for summary judgment [*see, e.g.,* *Mikialian v. City of Los Angeles (1978) 79 Cal. App. 3d 150, 157, 144 Cal. Rptr. 794* (nonsuit); *Winkelman v. City of Sunnyvale (1976) 59 Cal. App. 3d 509, 510-511, 130 Cal. Rptr. 690* (demurrer); *Soldano v. O'Daniels (1983) 141 Cal. App. 3d 443, 446, 190 Cal. Rptr. 310* (summary judgment)].

In light of the decision in *Soldano v. O'Daniels (1983) 141 Cal. App. 3d 443, 190 Cal. Rptr. 310* , counsel should consider combining this form with § 165.60 to argue that the risk of harm to the plaintiff was not foreseeable or that other public policy reasons preclude the imposition of duty. In *Soldano,* the court of appeal found a duty on the part of the defendant, a business establishment, through its bartender to allow a "good Samaritan" to use its telephone to aid the plaintiff's decedent, who was subsequently shot outside the premises. The court stated that it could not find a special relationship between either the defendant and the plaintiff's decedent or between the defendant and the "good Samaritan." Nevertheless, after examining the defendant's allegedly negligent refusal in light of the public policy considerations set forth in *Rowland v. Christian (1968) 69 Cal. 2d 108, 113, 70 Cal. Rptr. 97, 443 P.2d 561* , the court imposed a duty on the defendant [*see Soldano v. O'Daniels (1983) 141 Cal. App. 3d 443, 449-451, 190 Cal. Rptr. 310]* .

However, the *Soldano* court stated that its decision did not impose a duty to require one to go to the aid of another. The defendant's bartender was not the "good Samaritan" intent on aiding the plaintiff's decedent. The third party who wanted to use the telephone was the "good Samaritan." The court explained that its decision was both "a slight departure" from the "morally questionable" rule of nonliability for inaction absent a special relationship as set forth in Restatement (Second) of Torts § 314, and a "logical extension" of Restatement (Second) of Torts § 327, which imposes liability for negligent interference with a third person, if the defendant knows that the third person is attempting to render necessary aid [*see Soldano v. O'Daniels (1983) 141 Cal. App. 3d 443, 453-455, 190 Cal. Rptr. 310]* . Thus, it is unclear whether the court in *Soldano* was characterizing the bartender's conduct as "nonfeasance" or "misfeasance." If the court considered the conduct to be nonfeasance, then the decision appears to abrogate the rule set forth in this form that there is no liability for nonfeasance in the absence of a special relationship. If, on the other hand, the court considered the conduct to be misfeasance in negligently preventing the "good Samaritan" from aiding another, then the decision is not really a departure from prior case law, because under prior law a special relationship was not necessary for the imposition of a duty in a case involving misfeasance [*see Weirum v. RKO Gen., Inc. (1975) 15 Cal. 3d 40, 48-49, 123 Cal. Rptr. 468, 539 P.2d 36]* .

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may argue that there was no duty on the part of the defendant to take affirmative action under the circumstances [*see Bartlett v. State of Cal. (1956) 145 Cal. App. 2d 50, 56-57, 301 P.2d 985]* . Counsel should set forth the factual situation of his or her action, showing how the defendant's failure to take affirmative action was nonfeasance as opposed to misfeasance [*see Weirum v. RKO Gen., Inc. (1975) 15 Cal. 3d 40, 48-49, 123 Cal. Rptr. 468, 539 P.2d 36]* .

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of answer to a complaint and notice of motion for summary adjudication with respect to negligence actions, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§ 165.20*. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in § 165.30* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] No Liability for Failure to Act Unless Duty Exists

In ***Bartlett v. State of Cal.*** *(1956) 145 Cal. App. 2d 50, 301 P.2d 985* , the plaintiffs brought an action against the state, a highway patrol commissioner, and a highway patrol captain for personal injuries allegedly suffered as a result of the highway patrol officers' failure to replace a missing stop sign at an intersection. The trial court granted the defendants' demurrer without leave to amend, and subsequently dismissed the action. The plaintiffs appealed.

The court of appeal affirmed, finding that the complaint failed to meet the pleading requirements of former Gov. Code § 1953 (now see *Gov. Code § 840*), which governs liability of public officers for damage or injury resulting from the defective or dangerous condition of public property. The court held that the plaintiffs failed to show that the defendants had the requisite authority and funds to restore the stop sign (*145 Cal. App. 2d 50, 55)* . Notwithstanding the requirements of former Gov. Code § 1953, the plaintiffs contended that their complaint stated a right to relief against the defendants as individuals for a breach of a general duty to exercise due care for the safety of others (*145 Cal. App. 2d 50, 56)* . The court noted, however, that the authorities cited by the plaintiffs in support of their contention did not deal with inaction of the defendants and that the plaintiffs' case involved an alleged negligent omission in the defendants' failure to replace a stop sign (*145 Cal. App. 2d 50, 56)* . Quoting Restatement (Second) of Torts § 314, the court stated that before any common law liability for failure to act may exist, there must have been a duty to act under the circumstances (*145 Cal. App. 2d 50, 56-57)* . To prevail in their claim against the defendants regardless of former Gov. Code § 1953, the plaintiffs had to assert a duty that was not dependent on the official status of the defendants as police officers. The plaintiffs failed in that respect, because they did not allege that the defendants undertook to maintain the stop signs or were negligent in their attempts to replace a stop sign (*145 Cal. App. 2d 50, 57)* .

[b] Nonfeasance Versus Misfeasance

The factual and procedural background of ***Weirum v. RKO Gen., Inc.*** *(1975) 15 Cal. 3d 40, 123 Cal. Rptr. 468, 539 P.2d 36* , is discussed in *§ 165.50[4][a]*. The Supreme Court affirmed judgment for the plaintiff in an action against a radio station. The plaintiff's decedent was killed in an automobile collision caused by teenagers racing to reach a peripatetic disc jockey giving away cash prizes. The defendant contended that it owed no duty to the plaintiff's decedent in the absence of a special relationship. The Court stated that this rule had no application if the plaintiff's complaint is grounded on an affirmative act of the defendant that created an undue risk of harm (*15 Cal. 3d 40, 48)* . The rule stated in Restatement (Second) of Torts § 315 is merely a refinement of the general principle embodied in Restatement (Second) of Torts § 314: one is not obligated to act as a "good Samaritan." This doctrine is rooted in the common law distinction between action and inaction, or misfeasance and nonfeasance. Misfeasance exists if the defendant is responsible for making the plaintiff's position worse--that is, if the defendant has created a risk. Conversely, nonfeasance exists if the defendant has failed to aid the plaintiff through beneficial intervention. The Court stated that as Restatement (Second) of Torts § 315 indicates, liability for nonfeasance is largely limited to those circumstances in which some special relationship can be established (*15 Cal. 3d 40, 48-49)* . On the other hand, if the act complained of is one of misfeasance, the question of duty is governed by the standards of ordinary care, such as foreseeability and other policy considerations. In this case, the Court found that the defendant was guilty of misfeasance. Liability was not predicated on the defendant's failure to intervene, but on its creation of an unreasonable risk of harm. Therefore, the Court concluded that the defendant's reliance on cases that involved the failure to prevent harm was misplaced (*15 Cal. 3d 40, 49)* .

[4] Additional Authorities

[a] No Liability for Failure to Act Unless Duty Exists

In *Williams v. Southern California Gas Co. (2009) 176 Cal. App. 4th 591, 98 Cal. Rptr. 3d 258* , a family renting an apartment sued the gas company for failing to take action to prevent plaintiffs from being exposed to an excessive amount of carbon monoxide emitted from a defective gas wall furnace. Plaintiffs alleged that the gas company owed a duty based on the fact that a company representative walked past the furnace on the way to inspecting a water heater in the apartment, and that walking past the heater, that representative should have noticed by the discoloration of the furnace that the furnace could have posed a danger to plaintiffs. However, the court of appeal held that the gas company owed no duty of care to act to protect the plaintiffs, even if the company representative had knowledge that the furnace posed a hazard. The court noted that the gas company had no responsibility for the wall furnace, which was an appliance the company neither installed nor inspected, nor did the company sell or lease it to the apartment owners. In addition, the court noted that the gas company never actually inspected the furnace to discover that it was defective. The mere fact that the company continued to supply gas to the apartment was not a basis for holding the company liable (*176 Cal. App. 4th 591, 603-604)* .

In *Burns v. Neiman Marcus Group, Inc. (2009) 173 Cal. App. 4th 479, 93 Cal. Rptr. 3d 130* , plaintiff's employee used checks from plaintiff's personal checking account to pay the employee's substantial credit card bill at a large merchant. This conduct went on for years, without plaintiff's knowledge. The employee always presented the checks for payment in person at the customer service center at one of the stores. The employee sometimes forged plaintiff's signature on the check, sometimes presented a check without signature, and sometimes used a check signed by plaintiff but intended for payment of plaintiff's business account. Moreover, the merchant apparently knew that the employee was making substantial purchases well beyond her ability to pay, based on her known annual salary, and even provided the employee with a personal shopper whose job it was to encourage the employee to continue making such purchases. Plaintiff sued the store for negligence, arguing that the store had a duty, under the facts of the case, to inquire from him as to the employee's authority to use the third-party checks to pay off her personal debt prior to the store accepting the checks for such payment. The trial court held that the merchant did not owe plaintiff a duty of care, and the court of appeal affirmed. Applying the standard factors of *Rowland v. Christian (1968) 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561* , the court held that a retailer merchant's acceptance of a third party check to pay another person's credit card account, without first inquiring from the drawer of the check as to the authority to do so, is not sufficiently likely to result in the kind or harm the plaintiff experienced such that liability should appropriately be imposed on the merchant. The court concluded, without substantial analysis, that the foreseeability of harm to plaintiff, the degree of certainty that plaintiff would suffer harm, and the connection between defendant's conduct and plaintiff's injury, all weighed against imposing a duty on the merchant. However, regardless of the foreseeability of the possibility of injury caused by the merchant's failure to inquire as to the employee's authority, the court also concluded that the other *Rowland* factors militated against the imposition of a duty to inquire. Specifically, the court concluded that the policy of preventing future harm and the burden to the defendant and consequences to the community weighed against imposing a duty. The court noted practical problems with imposing a duty of inquiry on a retail merchant before accepting a person's payment for goods and services. Assuming the retail merchant would have to make an independent inquiry from the drawer of the check, there might be a problem locating the drawer and there might be an issue as to what steps would have to be taken in order to constitute a reasonable inquiry. According to the court, this would impose a significant and unwarranted burden on retail merchants, one which would outweigh any resulting benefit obtained from detecting isolated incidents of embezzlement. The court also noted that the factor of moral blame weighed in favor of holding the embezzling employee liable, not the merchant (*173 Cal. App. 4th 479, 488-490)* .

In *Rodriguez v. Bank of the West (2008) 162 Cal. App. 4th 454, 75 Cal. Rptr. 3d 543* , plaintiff attorney sued two banks after the attorney's office manager had forged the attorney's signature, opened bank accounts in the attorney's name, deposited money that the attorney had received from clients, then stole the money from the accounts. The attorney argued that the banks owed him a duty of care that had been breached in that they failed to take steps to ascertain the office manager's authority to open the accounts in plaintiff's name, failed to require plaintiff's presence, signature, or consent when the accounts were opened, and allowed forged signatures to be used to cash checks drawn on

the accounts. The attorney further argued that the banks owed him a duty of care because he was a putative customer of the bank because the accounts were opened in his name, albeit without his authorization. The court of appeal affirmed demurrers granted in favor of the banks. The court noted that a bank's duty of care arises from the bank's contract with its customer and a bank owes no duty to a noncustomer. Because plaintiff did not consent to the creation of the accounts, and in fact did not even know of the existence of the accounts until the office manager's wrongful acts were discovered, the court concluded that plaintiff was not a customer of the banks, even if the accounts were opened in his name (*162 Cal. App. 4th 454, 460-461)* . Because plaintiff was not a customer, and plaintiff alleged no facts to suggest that the office manager acted in a manner that should have aroused the banks' suspicions, the court held that the banks owed no duty to plaintiff. Recognizing identity theft as a pervasive problem, the court concluded that a decision to shift the burden from the actual victim to a third party duped by the thief is a decision for the Legislature, not the judiciary (*162 Cal. App. 4th 454, 466)* .

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1. General Rules

16-165 California Points & Authorities §§ 165.41-165.49

[Reserved]

§§ 165.41[Reserved]

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2. Foreseeability

16-165 California Points & Authorities § 165.50

§ 165.50 Defendant's Conduct Created Foreseeable Risk of Harm

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT OWED A DUTY OF DUE CARE TO _____ [PLAINTIFF *or* THE CLASS OF PERSONS OF WHICH PLAINTIFF IS A MEMBER], AND DEFENDANT BREACHED THAT DUTY IN THAT HE/SHE/IT CREATED A FORESEEABLE AND UNREASONABLE RISK OF HARM.

A. Risk Was Foreseeable. In the absence of overriding policy considerations, foreseeability of the risk is of primary importance in establishing the element of duty, and the courts, on a case by case basis, must analyze all the circumstances to determine what the ordinary person under such circumstances should have reasonably foreseen (*Dillon v. Legg (1968) 68 Cal. 2d 728, 739, 741, 69 Cal. Rptr. 72, 441 P.2d 912*).

B. Foreseeability as Question of Law. Insofar as foreseeability is a consideration in determining whether the defendant owed a duty to the plaintiff, it is a question to be decided by the court and not the jury (*Ballard v. Uribe (1986) 41 Cal. 3d 564, 572-573 n.6, 224 Cal. Rptr. 664, 715 P.2d 624*).

C. Foreseeability as Question of Fact. Insofar as foreseeability is a consideration in determining whether the defendant was negligent--that is, breached his or her duty--and whether the breach, if any, was a proximate cause of the plaintiff's injury, it is a question of fact to be determined by the jury (*Ballard v. Uribe (1986) 41 Cal. 3d 564, 572-573 n.6, 224 Cal. Rptr. 664, 715 P.2d 624*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the defendant created a foreseeable

risk of harm. It should be combined with any of the *forms in §§ 165.30 et seq., 165.70 et seq., 165.100,* and *165.120* et seq., that are applicable to the particular case.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may describe the defendant's conduct and argue that it created a foreseeable risk of harm under the circumstances of the case.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of complaint for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§ 165.30 et seq., § 165.70 et seq., § 165.100,* and *§ 165.120* et seq. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in § 165.60* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Risk Was Foreseeable

In ***Dillon v. Legg*** *(1968) 68 Cal. 2d 728, 69 Cal. Rptr. 72, 441 P.2d 912* , the plaintiff and her daughter witnessed the death of the plaintiff's second child, who was hit by a car driven by the defendant. The plaintiff's first cause of action alleged that the defendant negligently operated his vehicle. Her second cause of action alleged that she personally witnessed the collision and, because of the defendant's negligence, she sustained great emotional disturbance and shock and injury to her nervous system. The plaintiff's third cause of action alleged that her daughter also suffered emotional trauma and physical injury from witnessing the accident. The defendant moved for judgment on the pleadings on the plaintiff's second and third causes of action. The court granted the motion as to the second cause, apparently finding that the plaintiff did not state a cause of action because she was not within the zone of danger. The trial court, however, denied the motion as to the third cause of action, finding that the plaintiff's daughter may have been within the zone of danger and feared for her own safety. The defendant later moved for summary judgment on the third cause of action, but the motion was denied. The plaintiff appealed the judgment dismissing her second cause of action.

The Supreme Court reversed the judgment, stating that duty in a negligence action is an expression of the sum total of those considerations of policy that lead the law to say that a particular plaintiff is entitled to protection (*68 Cal. 2d 728, 734)* . The Court rejected the notion that a court must deny recovery on a legitimate claim because other fraudulent claims may be encouraged (*68 Cal. 2d 728, 735-739)* . It noted that to limit the otherwise potentially infinite liability that would follow every negligent action, the law of torts holds the defendant responsible only for injuries that were reasonably foreseeable to the defendant at the time. The Court stated that in the absence of overriding policy considerations, foreseeability of the risk is of primary importance in establishing the element of duty. Citing *Palsgraf*

v. Long Island R.R. Co. (1928) 248 N.Y. 339, 344, 162 N.E. 99 , the Court added that the risk reasonably to be perceived defines the duty to be obeyed (*68 Cal. 2d 728, 739)* .

Because the chief element in determining whether or not the defendant owes a duty or an obligation to the plaintiff is the foreseeability of the risk, the Court stated that this factor will be of prime concern in every case. Although no immutable rule can establish the extent of that obligation for every circumstance in the future, the Court set forth guidelines to aid in the resolution of that issue (*68 Cal. 2d 728, 740)* . In determining whether or not the defendant should reasonably have foreseen the injury to the plaintiff, the court must take into account certain factors based on the facts of the case, including: (1) whether the plaintiff was located near the scene of the accident, as contrasted with one who was a distance away from it; (2) whether the shock resulted from a direct emotional impact on the plaintiff due to the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence; and (3) whether the plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship (*68 Cal. 2d 728, 740-741)* .

The evaluation of these factors will indicate the degree of foreseeability. In light of these factors, the court will determine whether the accident and harm were reasonably foreseeable. Reasonable foreseeability does not turn on whether or not the particular defendant as an individual would have, in actuality, foreseen the exact accident and loss. Instead, it contemplates that courts, on a case-to-case basis, analyzing all the circumstances, will decide what the ordinary person under such circumstances should reasonably have foreseen. The courts thus mark out the areas of liability, excluding the remote and unexpected. In this case, the Court held that the presence of the above-mentioned factors indicated that the plaintiff had alleged a sufficient prima facie case. The Court noted that a negligent driver who causes the death of a young child may reasonably expect that the mother will not be far distant and would, on witnessing the accident, suffer emotional trauma (*68 Cal. 2d 728, 741)* .

[b] Foreseeability as Question of Law

The facts and procedural background of ***Ballard v. Uribe*** *(1986) 41 Cal. 3d 564, 224 Cal. Rptr. 664, 715 P.2d 624* , are discussed in *§ 165.30[3][c]*. In affirming the judgment, the Supreme Court stated that some confusion has arisen over the respective roles played by the court and the jury in determining liability in cases involving injuries resulting from the unauthorized use of vehicles with keys left in them. The Court stated that the confusion may stem, at least in part, from the fact that the "foreseeability" concept plays a variety of roles in tort doctrine generally and that in some contexts foreseeability is a question of fact for the jury, whereas in other contexts it is part of the calculus to which a court looks in defining the boundaries of duty (*41 Cal. 3d 564, 572 n.6*).

After pointing out that the question of duty is decided by the court and not by the jury, the Court stated: (1) duty is not an immutable fact of nature, but only an expression of the sum total of those considerations of policy that lead the law to say that the particular the plaintiff is entitled to protection; (2) in California, the general rule is that all persons have a duty to use ordinary care to prevent others being injured as the result of their conduct; and (3) a number of considerations, including foreseeability of harm to the plaintiff, have been taken into account by courts in various contexts to determine whether a departure from the general rule is appropriate (*41 Cal. 3d 564, 572-573 n.6*). The foreseeability of a particular kind of harm plays a significant role in this calculus. However, the court's task in determining duty is not to decide whether a particular plaintiff's injury was reasonably foreseeable in light of a particular defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party (*41 Cal. 3d 564, 573 n.6*). That is, "foreseeability," insofar as it is an element in determining the duty issue, is for the trial court to decide and not the jury.

NOTE:

Notwithstanding the above, language to the contrary occurs in *Bigbee v. Pacific Tel. & Tel. Co. (1983) 34 Cal. 3d 49, 56, 192 Cal. Rptr. 857, 665 P.2d 947* , and *Weirum v. RKO Gen., Inc. (1975) 15 Cal. 3d*

40, 46, 123 Cal. Rptr. 468, 539 P.2d 36 , neither of which involved vehicles with keys left in them. Both opinions state in effect that "foreseeability" as it is involved in the determination of duty is a question of fact for the jury to determine, unless the undisputed facts permit no room for a reasonable difference of opinion, in which case it is a question of law.

[c] Foreseeability as Question of Fact

The facts and procedural background of ***Ballard v. Uribe*** *(1986) 41 Cal. 3d 564, 224 Cal. Rptr. 664, 715 P.2d 624* , are discussed in *§ 165.30[3][c]*. *Ballard* is also discussed in *§ 165.50[3][b]*. In affirming the judgment, the Supreme Court explained that the jury, by contrast, considers "foreseeability" in two more focused, fact-specific settings. First, the jury may consider the likelihood or foreseeability of injury in determining whether, in fact, a particular defendant's conduct was "negligent" in the first place. Second, foreseeability may be relevant to the jury's determination of whether the defendant's negligence was "a proximate or legal cause" of the plaintiff's injury (*41 Cal. 3d 564, 573 n.6*). That is, "foreseeability," insofar as it is an element in determining whether the defendant was negligent (breached his or her duty) or whether the breach was a proximate cause of the plaintiff's injuries, is for the jury to decide.

[4] Additional Authorities

[a] Risk Was Foreseeable

The facts and procedural background of *Juarez v. Boy Scouts of Am., Inc. (2000) 81 Cal. App. 4th 377, 97 Cal. Rptr. 2d 12* , are discussed in *§ 165.30[3][c]*. The court of appeal affirmed the trial court in every respect except for summary judgment as to the cause of action based on theory that the defendant failed to take reasonable measures to protect the plaintiff from molestation. With respect to the foreseeability factor, the court held that the injury was reasonably foreseeable (*81 Cal. App. 4th 377, 402-403)* .

The facts and procedural background of *Robertson v. Wentz (1986) 187 Cal. App. 3d 1281, 232 Cal. Rptr. 634* , are discussed in *§ 165.31[4][a]*. The court of appeal stated that the primary consideration in establishing the element of duty is the foreseeability of the risk--that is, as a general principle, a defendant owes a duty of care to all persons who are foreseeably endangered by his or her conduct, with respect to all risks that make the conduct unreasonably dangerous (*187 Cal. App. 3d 1281, 1288)* . The court added that foreseeability is a question of fact unless decisional law has established that there could be no foreseeability of the risk under the same or similar fact situations (*187 Cal. App. 3d 1281, 1288)* .

In *Weirum v. RKO Gen., Inc. (1975) 15 Cal. 3d 40, 123 Cal. Rptr. 468, 539 P.2d 36* , a rock radio station conducted a contest that rewarded the first contestant who located a peripatetic disc jockey. Two minors, driving in separate automobiles, attempted to follow the disc jockey's automobile. While pursuing the disc jockey at speeds approaching 80 miles per hour, one minor forced a car off the highway, killing its sole occupant. The decedent's surviving wife and child filed a suit for wrongful death against the two minors, the radio station, and the maker of the decedent's car. Prior to the commencement of trial, one minor settled for the limits of his insurance policy. At trial, the jury rendered a verdict against the radio station and the other minor, but found in favor of the maker of the decedent's car. The radio station appealed from the judgment and from an order denying its motion for judgment notwithstanding the verdict.

In affirming the judgment, the Supreme Court noted that foreseeability of the risk is a primary consideration in establishing the element of duty (*15 Cal. 3d 40, 46)* . The Court concluded that in this case, the record amply supported the finding of foreseeability, stating that it was foreseeable that the defendant's youthful listeners, finding that the prize had eluded them in one location, would race to arrive first at the next site and, in their haste, would disregard the demands of highway safety (*15 Cal. 3d 40, 46-47)* .

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CHAPTER 165 NEGLIGENCE
PART II. FORMS
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2. Foreseeability

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[Reserved]

§§ 165.51[Reserved]

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16-165 California Points & Authorities § 165.60

§ 165.60 Defendant's Conduct Did Not Create Foreseeable Risk of Harm

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT DID NOT CREATE A FORESEEABLE RISK OF HARM TO PLAINTIFF.

A. Risk Was Not Reasonably Foreseeable. The scope of the duty owed to the plaintiff is measured by the foreseeability of the risk and whether or not the danger created is sufficiently large to embrace the specific harm; thus, if there is no foreseeable risk of harm to the plaintiff, the defendant owed the plaintiff no duty of care (*Megeff v. Doland (1981) 123 Cal. App. 3d 251, 259-260, 176 Cal. Rptr. 467*).

[*Optional*] **B. Public Policy Limits Liability.** Social policy considerations, such as the social utility of the defendant's conduct and the consequences to the community of imposing a duty on the defendant, may limit liability even for foreseeable injury (*Parsons v. Crown Disposal Co. (1997) 15 Cal. 4th 456, 476, 63 Cal. Rptr. 2d 291, 936 P.2d 70*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the defendant's conduct did not create a foreseeable risk of harm. Optional Paragraph B may be submitted to assert the existence of policy considerations overriding the foreseeability factor. This form should be combined with the *form in § 165.20*, if applicable to the particular case.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may

describe the defendant's conduct and argue that it did not create a foreseeable risk of harm under the circumstances of the case.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of complaint for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§ 165.20*. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in § 165.50* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Risk Was Not Reasonably Foreseeable

In ***Megeff v. Doland*** *(1981) 123 Cal. App. 3d 251, 176 Cal. Rptr. 467* , the plaintiffs were stabbed by Charles Stevens, the 87-year-old husband of Thea Stevens. The plaintiffs brought an action for negligence against both Thea Stevens and Charlotte Doland, the adult daughter of Charles Stevens. They contended that the defendants voluntarily assumed custody and control over Charles Stevens after his release from the psychiatric wing of a hospital, knowing of his propensity for violence, and that the defendants negligently failed to exercise sufficient control over his conduct to prevent harm to third persons. The trial court granted judgment on the pleadings for the wife and granted the daughter's motion for summary judgment. The plaintiffs appealed.

The court of appeal affirmed both the judgment on the pleadings and the summary judgment. Quoting *Rowland v. Christian (1968) 69 Cal. 2d 108, 112, 70 Cal. Rptr. 97, 443 P.2d 561* (discussed in *§ 165.30[3][d]*), the court noted that whenever one person's failure to use ordinary care in his or her conduct would cause a danger of injury to the person or property of another, a duty arises to use ordinary care to avoid that danger. A departure from this principle involves the balancing of a number of policy factors, the most important of which is foreseeability. Ordinarily, one owes a duty to all persons who are foreseeably endangered by one's conduct, with respect to risks that make the conduct unreasonably dangerous (*123 Cal. App. 3d 251, 256)* . If the avoidance of foreseeable harm requires one to control the conduct of third persons, one must have knowledge of a specific risk to an identifiable and foreseeable victim (*123 Cal. App. 3d 251, 257)* . In this case, the court noted that there was nothing in the hospital reports to suggest a violent history or generalized violent behavior on the part of Charles Stevens (*123 Cal. App. 3d 251, 258)* . He had, however, become physically aggressive when the hospital staff refused to allow him to leave. The court decided that his wife's knowledge of his one incidence of aggressive behavior may have created a foreseeable risk that he might physically attack a person who confined him to a place other than his home. It did not, however, give her a basis for foreseeing that her husband would stab the plaintiffs, who were his landlords. Therefore, the court held that the judgment on the pleadings was properly granted (*123 Cal. App. 3d 251, 260)* . In addition, after examining the issues in the case, the court found that there were no triable issues of material fact as to duty and that summary judgment was properly granted (*123 Cal. App. 3d 251, 260-261)* .

[b] Public Policy Limits Liability

In ***Parsons v. Crown Disposal Co.*** *(1997) 15 Cal. 4th 456, 476, 63 Cal. Rptr. 2d 291, 936 P.2d 70* , the plaintiff, who was riding on a horse trail, was thrown from his horse after it was startled by loud noises from a nearby garbage truck that was operating in its normal manner. The plaintiff sought recovery for his injuries from the garbage company. The defendant filed a motion for summary judgment, asserting that it owed the plaintiff no duty to guard against the injuries complained of, citing in support the policy considerations in *Rowland v. Christian (1968) 69 Cal. 2d 108, 112-113, 70 Cal. Rptr. 97, 443 P.2d 561* (discussed in *§ 165.60[3][a]*). The trial court granted the defendant's motion, but the court of appeal reversed, concluding that the defendant owed and possibly breached a duty to use care not to frighten horses on the horse trail near where its truck had been operating.

The Supreme Court ruled that the court of appeal erred in reversing the trial court judgment in favor of the defendant. Specifically, it found that the foreseeability consideration in *Rowland* did not compel a conclusion that the defendant had a duty to guard against frightening the plaintiff's horse. The plaintiff had argued that because the defendant's employee knew that a bridle path abutted the garbage bin and that the collection procedure might frighten a horse, a jury reasonably might conclude that the plaintiff's injury was foreseeable. The court responded first by citing its decision in *Ballard v. Uribe (1986) 41 Cal. 3d 564, 572-573 n.6, 224 Cal. Rptr. 664, 715 P.2d 624* (discussed in *§ 165.50[3][b]*), which held that a court's task in determining duty is not to decide whether a particular plaintiff's injury was reasonably foreseeable in light of a particular defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed. The court stated that even assuming foreseeability was established, it would not treat the mere presence of such a finding standing alone as imposing a duty on the defendant. Policy considerations such as the social utility of the defendant's conduct and the consequences to the community of imposing a duty on the defendant to guard against frightening a horse overrode the foreseeability factor in this case (*15 Cal. 4th 456, 476)* .

[4] Additional Authorities

[a] Risk Was Not Reasonably Foreseeable

In *Victor v. Hedges (1999) 77 Cal. App. 4th 229, 91 Cal. Rptr. 2d 466* , the plaintiff was standing on a public sidewalk in front of an apartment building, talking to an acquaintance who was showing the plaintiff the compact disk player in his vehicle, which was parked on the sidewalk. An inattentive passing motorist lost control of his vehicle, which jumped the curb and struck the plaintiff. The plaintiff brought suit against her acquaintance and his employer, who owned the vehicle that was parked on the sidewalk, alleging both ordinary negligence and negligence per se. The plaintiff's claim for ordinary negligence was based on the fact that the acquaintance knew that the adjacent street was undergoing construction, causing traffic to be reduced to one lane and creating loose gravel and a bumpy road surface. According to the plaintiff, the acquaintance should have foreseen that these conditions created a likelihood that a passing motorist would lose control of his or her vehicle and drive onto the public sidewalk on which they were standing. Summary judgment was granted to the defendants, and the court of appeal affirmed. Addressing the plaintiff's claim for ordinary negligence, the court of appeal held that the facts alleged by the plaintiff did not raise a triable issue of fact as to whether the acquaintance's conduct was negligent towards the plaintiff. The court concluded that no reasonable person would conclude that the acquaintance's act of taking the plaintiff to the sidewalk subjected her to an unreasonable risk of harm. Although the plaintiff presented additional expert evidence that a traffic engineer could have shown that the overall conditions created a situation in which a vehicle on the road would drift toward the sidewalk, this expert knowledge could not be charged to the acquaintance, nor was there any evidence that the acquaintance was aware of any previous accidents at that site (*77 Cal. App. 4th 229, 243-244)* .

In *N.N.V. v. American Ass'n of Blood Banks (1999) 75 Cal. App. 4th 1358, 89 Cal. Rptr. 2d 885* , the plaintiff was a minor who underwent surgery for a heart condition shortly after birth in 1984. The surgery resulted in the plaintiff's contracting AIDS through a blood transfusion. The plaintiff eventually brought suit against the professional medical

association that voluntarily recommends standards for blood banks. The plaintiff argued that the association had been negligent in the months prior to the surgery, specifically for failing to recommend that blood banks (1) question donors about their sexual preferences and activities, (2) make available to recipients directed blood donations from family and friends, and (3) offer surrogate testing of the blood supply by screening for a hepatitis B antigen that was prevalent in the same populations that were at risk for AIDS. The defendant successfully moved for summary judgment, in part on the grounds that it owed no duty of care to the plaintiff. The court of appeal agreed. The court concluded that, in light of the knowledge and conflicting medical and scientific opinions available during the relevant period, it was not reasonably foreseeable then that any of those measures would have reduced the risk of AIDS contamination of the blood supply. The court noted that in 1983 and 1984, credible arguments had been made that (1) direct questioning of donors about their sexual history would likely be inaccurate and ineffective, (2) there was no evidence that directed donations would be any more effective in reducing the risk of AIDS transmission than the use of volunteer donors at blood banks, and (3) legitimate concerns had been raised that use of the hepatitis B antigen test could actually increase the risk of contaminated blood because the test did not screen out all infected blood and persons in high-risk categories would have an incentive to donate in order to have their blood tested (*75 Cal. App. 4th 1358, 1377-1380)* . In addition, policy concerns led the court to state more generally that, absent fraud or bad faith, a professional medical association should not face liability for making a choice among competing scientific and medical opinions if the medical and scientific community has reached no consensus on the proper approach to a medical situation (*75 Cal. App. 4th 1358, 1392)* .

In *Ludwig v. City of San Diego (1998) 65 Cal. App. 4th 1105, 76 Cal. Rptr. 2d 809* , the plaintiff, a foreman for a civil construction firm, filed an action for negligence against the defendants, a city and a traffic inspector employed by the city, for injuries sustained when an excavated trench collapsed on the plaintiff. The injuries were sustained the day after the inspector had refused the plaintiff permission to lay pipe and slurry in an open trench past the daily time period allowed in the traffic control plan and permit approved by the city. The plaintiff alleged that the inspector was negligent in delaying the work on the trench, that the inspector's refusal to allow late work the day before was motivated by the plaintiff's refusal to hire the inspector's son as a flagman, and that the delay in adding pipe and slurry to the trench caused the trench to weaken and collapse. The trial court granted summary judgment for the defendants on the grounds that the inspector owed no legal duty of care in the absence of evidence that the inspector knew or reasonably should have known that allowing the trench walls to dry overnight would render them unstable. The plaintiff appealed, arguing that the trial court erred in not considering factors other than foreseeability when determining whether a duty of care existed. The court of appeal affirmed.

The court held that although reasonable foreseeability of injury is only one factor to consider, it is essential to a finding that a duty of care existed. A finding that injury was not reasonably foreseeable precludes a finding that a legal duty existed, regardless of whether the other factors may weigh in favor of imposing a duty. The court agreed with the trial court that there was no evidence that the inspector knew or should have known of the danger created by failing to pour the slurry into the trench the day before the accident (*65 Cal. App. 4th 1105, 1111-1112)* . The court also rejected the plaintiff's argument that the moral blame of refusing to allow the work to continue, allegedly for the plaintiff's failure to hire the inspector's son, should be considered in determining whether a duty existed. The proper inquiry was whether the inspector reasonably should have known that his actions were creating a dangerous situation, and the relevant moral blame was the moral blame in knowingly creating a dangerous situation, not the moral blame that might attach to the inspector's motivation or the alleged ill-will he harbored toward the plaintiff (*65 Cal. App. 4th 1105, 1113-1114)* .

In *Wawanesa Mut. Ins. Co. v. Matlock (1997) 60 Cal. App. 4th 583, 70 Cal. Rptr. 2d 512* , a 17-year-old boy bought two packs of cigarettes from a gas station and gave one of the packs to his 15-year-old friend. The two smoked as they walked to a private storage facility where hundreds of telephone poles were stacked up high on the ground. They were joined by two younger boys, who walked with them on the poles. The 17-year-old teased the younger boys, who started to run. One of the younger boys ran into the 15-year-old, causing him to drop his cigarette down between the poles. This caused a fire and considerable property damage. The 15-year-old was insured by the plaintiff. The plaintiff paid damages to the pole company and two fire departments on behalf of its insured and filed suit against the defendants, the 17-year-old boy and his father, for contribution. Several theories of recovery were articulated, including negligence.

After a bench trial, the court awarded the plaintiff $44,500 against the defendants. The defendants appealed, arguing that there was no basis on which to hold them liable. The court of appeal agreed, holding that the connection between the 17-year-old's initial act of giving his 15-year-old friend a packet of cigarettes and the subsequent fire was too attenuated to show that the fire was reasonably within the scope of the risk created by the initial act (*60 Cal. App. 4th 583, 588)* . According to the court, someone who gives someone else a cigarette, even if that act is itself unlawful by virtue of the receiver's age, can hardly become an insurer of any property that the cigarette may by some happenstance ignite. There must be some reason to conclude that the act of giving the cigarette created a fire hazard, and in this case there was none (*60 Cal. App. 4th 583, 588)* .

In *Software Design & Application, Ltd. v. Hoefer & Arnett, Inc. (1996) 49 Cal. App. 4th 472, 56 Cal. Rptr. 2d 756* , the plaintiffs, who had lost assets to a financial consultant through a scheme involving a series of fictitious brokerage and bank accounts, sought to recover their money through a negligence action against the brokerage firms and banks. The trial court sustained demurrers and dismissed the action on the ground that the defendants did not owe the plaintiffs any duty of care. The court of appeal affirmed, stating that the primary flaw in the plaintiffs' negligence theory was that they were strangers to the contractual relationships between the defendants and the financial consultant (*49 Cal. App. 4th 472, 478)* . The plaintiffs claimed that the frequency of deposits and withdrawals from the accounts indicated illegal activity, but the court found no extraordinary facts that would give rise to liability to a noncustomer for mishandling the accounts (*49 Cal. App. 4th 472, 481)* . The plaintiffs also complained that the banks did not follow their own internal policies in opening the accounts, but the court reasoned that violation of a self-imposed rule does not create actionable negligence unless the plaintiff suffers the type of harm sought to be prevented by the rule and is a member of the class of people for whose protection the rule was promulgated (*49 Cal. App. 4th 472, 482)* .

In *Dutton v. City of Pacifica (1995) 35 Cal. App. 4th 1171, 41 Cal. Rptr. 2d 816* , the plaintiff sued a city and a police officer for injuries she received when the truck in which she was riding failed to negotiate a left turn. The plaintiff alleged that the police officer had ordered her to ride in the back of the truck after approaching her at a park and instructing her to leave because the park was closing and it was nearly the time when a curfew for minors began. The trial court granted summary judgment in favor of the defendants. The plaintiff appealed, contending that the officer owed her a duty of care because he took "affirmative action [that] contributed to, increased, or changed the risk [that] would have otherwise existed." The court of appeal upheld the summary judgment, reasoning that the possibility that the plaintiff would be injured in the truck was no more foreseeable than the possibility that she would be injured if the officer had allowed her to wait for another ride or to walk home alone. Noting that the accident did not occur until approximately one-half hour after the truck left the area, and that the plaintiff passed up two opportunities to get out of the truck, the court concluded that the connection between the officer's dispersal order and the plaintiff's injury was tenuous (*35 Cal. App. 4th 1171, 1176)* .

In *Butcher v. Gay (1994) 29 Cal. App. 4th 388, 34 Cal. Rptr. 2d 771* , the court of appeal affirmed summary judgment for the defendant in an action brought by the plaintiff, a visitor at the defendant's home, who claimed that she had contracted Lyme disease from ticks carried by the defendant's dog. The court held that the defendant's duty to exercise reasonable care to prevent foreseeable harm from his dog required knowledge, either actual or constructive, of the particular harm. Because the evidence presented showed that the defendant did not know, and could not reasonably be expected to have known, that ticks carrying the disease were present in the area, the defendant had no duty to warn the plaintiff not to allow the dog to sit on her lap (*29 Cal. App. 4th 388, 405-406)* .

In *Avis Rent a Car Sys., Inc. v. Superior Court (1993) 12 Cal. App. 4th 221, 15 Cal. Rptr. 2d 711* , the plaintiff sued the defendant, a car rental agency, after the plaintiff's car was hit broadside by a car that had been stolen from the defendant's airport lot. The collision occurred about a week after theft of the car, while the thief was driving it recklessly at high speed to get away from the police after shoplifting goods from a merchant. The plaintiff alleged that the defendant negligently left the stolen car unlocked in the low-security airport lot with the keys in the ignition switch and that theft of the car was foreseeable. The defendant moved for summary judgment. The trial court denied the motion, but the court of appeal issued an extraordinary writ directing the trial court to grant the motion. The court of appeal

reviewed the relevant California cases and concluded that they "have confirmed that, however foreseeable car theft and an accident by the thief may be, leaving an ordinary automobile unattended on the street [or in a low-security lot] with a key in the ignition does not create a duty to protect other motorists from the negligent driving of a thief" (*12 Cal. App. 4th 221, 233)* .

In *De Lima v. Magnesite Waterproofing & Refinishing (1987) 191 Cal. App. 3d 776, 236 Cal. Rptr. 519* , the plaintiff, who slipped and fell on stairs, brought a negligence action against the building owner, the original contractor who properly weatherproofed the stairs, and the second contractor who negligently resealed them. The trial court granted the original contractor's motion for nonsuit, and the court of appeal affirmed, holding that it was not reasonably foreseeable that persons using the stairs would slip because of a second contractor's failure to reseal them with the proper compound (*191 Cal. App. 3d 776, 782)* .

In *Kane v. Hartford Accident & Indem. Co. (1979) 98 Cal. App. 3d 350, 159 Cal. Rptr. 446* , the plaintiff was raped on hospital grounds by the employee of an independent contractor that provided cleaning services for the hospital. In an action for personal injuries against the hospital, the employee, the insurance company that bonded the employee, and the independent contractor, the court of appeal affirmed a judgment of nonsuit in favor of the insurance company. The court noted that the harm suffered by the plaintiff was not foreseeable. Because the insurance company owed no duty to the plaintiff, there could be no cause of action (*98 Cal. App. 3d 350, 362)* .

[b] Public Policy Limits Liability

In *Sakiyama v. AMF Bowling Ctrs., Inc. (2003) 110 Cal. App. 4th 398, 1 Cal. Rptr. 3d 762* , the plaintiffs were two teenagers who survived an auto accident after they had ingested the drug Ecstasy at a party, as well as the parents of two other teenagers who died in the same accident. The plaintiffs brought suit against the owner of a skating rink for allowing the rink to host an all-night "rave" party that the teenagers attended immediately prior to the accident. The plaintiffs argued that the defendant had a duty not to participate in the creation of a "rave," because the defendant should have known that the participants would ingest drugs at the party and that it was foreseeable that auto accidents could occur when the participants left the party. The court of appeal held that despite the foreseeability of potential injury to the partygoers, the defendant had no duty to prevent the teenagers from ingesting drugs at the party and then driving away (*110 Cal. App. 4th 398, 407-409)* . The court noted that the defendant did not supply the drugs used at the party, and in fact took numerous steps to prevent drug use. The defendant conducted two searches of party attendees before they entered the party, confiscated any drugs or drug paraphernalia found, and identified and ejected any drug dealers found. The court concluded that the injuries and deaths suffered by the teenagers were not closely connected to the defendant's conduct in renting out its facility, and that there was no moral blame attached to the defendant's conduct in renting out its facility for a party (*110 Cal. App. 4th 398, 409-410)* . The court questioned whether the policy of preventing future harm would be furthered by imposing a duty of care, especially in light of the defendant's conduct in trying to prevent drug use at the party. The court also rejected the argument that the defendant had a duty to take burdensome steps to make the party site a safe haven for the attendees, noting how impractical it would be to impose a duty on the defendant to remove all drugs from the party and monitor all intoxicated or fatigued attendees, who were free to leave the party at any time. The court also pointed out that any duty imposed would have to extend to any business that involves late-night activities and possible drug or alcohol use, which would have a drastic economic effect on those businesses and the surrounding communities (*110 Cal. App. 4th 398, 410-412)* .

In *Adams v. City of Fremont (1998) 68 Cal. App. 4th 243, 80 Cal. Rptr. 2d 196* , a decedent's surviving spouse and stepdaughter filed suit for wrongful death and negligent infliction of emotional distress against a city and a police officer for the city. The plaintiffs alleged that the police, under the supervision of the officer, had been negligent in dealing with a tense, emergency situation precipitated when decedent, despondent and under the influence of alcohol, threatened to kill himself with a firearm he was brandishing. The court of appeal reversed the judgment for the plaintiffs, holding that police officers responding to a crisis involving a person threatening suicide with a loaded firearm have no duty actionable in tort to prevent the threatened suicide from being carried out. The court determined that no

duty was owed under either the weighing of the *Rowland* factors or through application of the "special relationship" doctrine. Among the factors militating against imposition of a duty of care, the court stressed the paramount policy concerns for protecting the physical safety of police officers and other third parties that may be in the area, as well as the desire to avoid a rule that might inhibit police officers from being willing to render assistance to suicidal individuals in the first place (*68 Cal. App. 4th 243, 271-273, 276)* .

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16-165 California Points & Authorities § 165.70

§ 165.70 Presumptive Negligence Established Under Evidence Code § 669

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT OWED A DUTY TO PLAINTIFF AND BREACHED THAT DUTY BECAUSE (1) DEFENDANT VIOLATED A _____ [STATUTE *or* ORDINANCE *or* REGULATION] THAT SET FORTH THE STANDARD OF CONDUCT EXPECTED OF A REASONABLE PERSON UNDER THE CIRCUMSTANCES OF THIS CASE, (2) PLAINTIFF WAS A MEMBER OF THE CLASS FOR WHOSE BENEFIT THE _____ [STATUTE *or* ORDINANCE *or* REGULATION] WAS ENACTED, (3) THE ACCIDENT CAUSING THE INJURY WAS OF THE NATURE THAT THE _____ [STATUTE *or* ORDINANCE *or* REGULATION] WAS DESIGNED TO PREVENT, AND (4) THE VIOLATION WAS A PROXIMATE CAUSE OF PLAINTIFF'S INJURY.

A. Presumption of Negligence Established. If a legal duty to exercise due care exists, the failure of a person to exercise due care is presumed if (1) he or she violated a statute, ordinance, or regulation of a public entity; (2) the violation proximately caused death or injury to person or property; (3) the death or injury resulted from an occurrence of the nature that the statute, ordinance, or regulation was designed to prevent; and (4) the person suffering the death or the injury to his or her person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted (*Evid. Code § 669(a)(1)-(4)*; *Clemente v. State of California (1985) 40 Cal. 3d 202, 214-217, 219 Cal. Rptr. 445, 707 P.2d 818* ; *Peterson v. City of Long Beach (1979) 24 Cal. 3d 238, 242 n.1, 155 Cal. Rptr. 360, 594 P.2d 477*).

B. Violation Was Proximate Cause of Plaintiff's Injury. Although the proof of numerous statutory and regulatory safety violations establishes the defendant's negligence as a matter of law, this proof of negligence alone does not automatically establish liability. The plaintiff still bears the initial burden of showing that the defendant's negligence was a proximate cause of the injury. However, the breach of a statutory duty will often suffice to give rise to an

inference from which a jury may find that a given injury was the actual and proximate result of the violation (*Evid. Code § 669(a)(2)*; *Haft v. Lone Palm Hotel (1970) 3 Cal. 3d 756, 765, 91 Cal. Rptr. 745, 478 P.2d 465*).

C. Harm to Plaintiff Was Type of Harm Statute Was Designed to Prevent. Violation of a statute, ordinance, or regulation results in liability only if the harm that the violation causes resulted from an occurrence of the nature that the statute, ordinance, or regulation was designed to prevent (*Evid. Code § 669(a)(3)*; *see Nunneley v. Edgar Hotel (1950) 36 Cal. 2d 493, 497, 225 P.2d 497*).

D. Plaintiff Was Member of Protected Class. The plaintiff may recover for the violation of a statute, ordinance, or regulation of a public entity only if the plaintiff is one of the class of persons for whose protection the statute, ordinance, or regulation was adopted (*Evid. Code § 669(a)(4)*; *Porter v. Montgomery Ward & Co., Inc. (1957) 48 Cal. 2d 846, 848-849, 313 P.2d 854* ; *Newhall Land & Farming Co. v. Superior Court (1993) 19 Cal. App. 4th 334, 347-348, 23 Cal. Rptr. 2d 377*).

[*Optional*] **E. Effect of Statutes That Do Not Provide for Civil Liability.** A duty of care and the attendant standard of conduct required of a reasonable person may be found in a legislative enactment that does not provide for civil liability (*Derrick v. Ontario Cmty. Hosp. (1975) 47 Cal. App. 3d 145, 151, 120 Cal. Rptr. 566*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the defendant breached a legal duty to exercise due care owed to the plaintiff based on the defendant's violation of a statute, ordinance, or regulation [*see Evid. Code § 669(a)*]. Optional Paragraph E may be submitted if the statute, ordinance, or regulation, does not provide for civil liability. This form should be combined with § 165.10 if applicable to the particular case.

This issue may arise in several procedural contexts, including on appeal, reviewing the propriety of a jury instruction regarding the statutory violation, or in opposing a demurrer to the plaintiff's complaint [*see, e.g., Nunneley v. Edgar Hotel (1950) 36 Cal. 2d 493, 495-496, 225 P.2d 497* (jury instruction); *Derrick v. Ontario Cmty. Hosp. (1975) 47 Cal. App. 3d 145, 147-148, 120 Cal. Rptr. 566* (demurrer)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should discuss the violation of the statute by the defendant, the conduct that the statute was designed to prevent, the plaintiff's inclusion in a class the statute was designed to protect, and how the defendant's violation proximately caused injury to the plaintiff [*see Evid. Code § 669(a)*; *see also Peterson v. City of Long Beach (1979) 24 Cal. 3d 238, 242-247, 155 Cal. Rptr. 360, 594 P.2d 477]* .

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and a form of complaint with respect to negligence based on violation of statute, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§ 165.10*. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of

this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in § 165.80* et seq. may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Presumption of Negligence Established

In ***Clemente v. State of California*** *(1985) 40 Cal. 3d 202, 219 Cal. Rptr. 445, 707 P.2d 818* , the plaintiff was severely injured by a motorcycle while crossing the street. A highway patrol officer on his way to freeway patrol was notified of the accident, stopped, called an ambulance and the local police department, instructed the main witness and the motorcyclist to await the arrival of the police, and left without obtaining the name or license number of either the witness or the motorcyclist. Those individuals left before the police arrived. The plaintiff brought suit against the officer and the state for negligence when the motorcyclist was never apprehended. The trial court sustained the defendants' demurrer to the complaint. The court of appeal reversed and remanded, holding that the plaintiff could state a cause of action. The plaintiff amended his complaint accordingly, and after trial a judgment in the plaintiff's favor was entered. The defendants appealed.

The Supreme Court affirmed. Although the court of appeal decision had been disapproved in *Williams v. State of California (1983) 34 Cal. 3d 18, 28 n.9, 192 Cal. Rptr. 233, 664 P.2d 137* (discussed in *§ 165.242[3][a]*), the Court found that under the doctrine of the law of the case, this court of appeal opinion remained the law of the case (*40 Cal. 3d 202, 210-213)* . Regarding the effect of the procedures for accident investigation in creating a presumption of negligence, the case focused on a manual that was prepared for and used in conjunction with courses given at the police academy and was followed by most, if not all, police departments. It contained guidelines for accident investigations and stated that a patrol officer should impartially record facts in order to have a complete unbiased record should civil litigation occur. Citing *Peterson v. City of Long Beach (1979) 24 Cal. 3d 238, 155 Cal. Rptr. 360, 594 P.2d 477* , with approval, the Court noted that although the language of the manual left much to the discretion of the officer in determining what steps to take, it also identified the steps to be considered and the concerns that should motivate the officer in exercising that discretion. The Court stated that an officer who failed to exercise the discretion vested in him or her by ignoring some of the steps to be taken without considering them would be subject to disciplinary action, and the Court concluded that those regulations were not merely permissive (*40 Cal. 3d 202, 214-216)* .

In ***Peterson v. City of Long Beach*** *(1979) 24 Cal. 3d 238, 155 Cal. Rptr. 360, 594 P.2d 477* , a city police officer shot and killed a man who was running from his own apartment. The police officer was responding to a radio call erroneously reporting a burglary in progress at the apartment. The plaintiffs, the decedent's parents, brought an action for wrongful death against the city and the police officer. The trial court, ruling that the police officer's use of deadly force was justifiable, held in favor of the defendants. The plaintiffs appealed.

The Supreme Court reversed the judgment, stating that the failure of a person to exercise due care is presumed if he or she violated the regulation of a public entity (*24 Cal. 3d 238, 241-242)* . It noted that *Evid. Code § 669(a)(1)-(4)* provides that the failure of a person to exercise due care is presumed if: (1) he or she violated a statute, ordinance, or regulation of a public entity; (2) the violation proximately caused death or injury to person or property; (3) the death or injury resulted from an occurrence of the nature that the statute, ordinance, or regulation was designed to prevent; and (4) the person suffering the death or the injury to his or her person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted (*24 Cal. 3d 238, 242 n.1*). In this case, the Court noted that the city's Police Department manual contained regulations that specified the guidelines for the use of firearms by

police officers in apprehending suspects. It determined that these regulations were "regulations of a public entity" pursuant to *Evid. Code § 669(a)(1)* because the broad definition of a public entity includes every form of public authority. The Court stated that when the city manager and the police chief promulgated the regulations, they were acting as heads of a public entity (*24 Cal. 3d 238, 243-244)* . The Court further noted that the trial court found that when the police officer shot the plaintiffs' son, he failed to comply with the regulation (*24 Cal. 3d 238, 246)* . The Court held that the police officer's violation of the regulation raised a presumption of negligence and that once this presumption is raised, it may be rebutted by the defendants pursuant to *Evid. Code § 669(b)(1)*. The trial court, however, failed to inquire whether or not the defendants could rebut this presumption because it disregarded *Evid. Code § 669(a)*, which created this presumption. Therefore, the Court reversed the judgment for the defendants (*24 Cal. 3d 238, 246-247)* .

NOTE:

Because of the enactment of *Evid. Code § 669.1* in 1987, a rule, policy, manual, or guideline of state or local government setting forth standards of conduct or guidelines for its employees in the conduct of their public employment is not considered a statute, ordinance, or regulation of the public entity within the meaning of *Evid. Code § 669*, unless the rule, manual, policy, or guideline has been formally adopted as a statute, as an ordinance of a local government entity in California empowered to adopt ordinances, or as a regulation either by an agency of the state pursuant to the Administrative Procedure Act (*Gov. Code §§ 11340-11356*) or by an agency of the federal government pursuant to the federal Administrative Procedure Act (*5 U.S.C.S. §§ 500-596*) [*see Evid. Code § 669.1*]. *Evid. Code § 669.1*, however, affects only the application of the presumption of negligence set forth in *Evid. Code § 669*. It does not affect what evidence is admissible in a civil action. Furthermore, *Evid. Code § 669.1* applies only to those causes of action arising out of facts occurring after 1987, regardless of the date that the action is commenced or tried [*see Evid. Code § 669.1*].

[b] Violation Was Proximate Cause of Plaintiff's Injury

In ***Haft v. Lone Palm Hotel*** *(1970) 3 Cal. 3d 756, 765, 91 Cal. Rptr. 745, 478 P.2d 465* , a father and son drowned in the defendants' motel pool. The plaintiffs, the mother of the deceased child and her daughter, brought an action for wrongful death, raising numerous contentions, including that the defendants violated several statutes and administrative regulations in the maintenance of the swimming pool. The trial court entered judgment for the defendants, and the plaintiffs appealed.

The Supreme Court reversed and remanded the case for a new trial. The Court noted that no direct evidence revealed the manner in which the drownings occurred. However, the evidence did establish, without conflict, that the defendants had furnished the lounging space, wading pool, and swimming pool, but had failed to provide any safety measures required by law for a pool available for the use of the public (*3 Cal. 3d 756, 762-763)* . Therefore, the record showed that the defendants violated former Health & Safety Code § 24101.4 (now *Health & Safety Code § 116045*) because they had knowledge that no lifeguard was present at the pool, but failed to post a sign advising guests of that fact. In addition, the Court found several violations of administrative regulations. There were no markings on the edge of the pool that stated the depths of the water or indicated the break in the slope between the deep and the shallow portions of the pool, there was no sign that warned that children were not to use the pool without an adult in attendance, and there were no posted telephone numbers of rescue services, no posted artificial respiration procedures, and no 12-foot safety poles (*3 Cal. 3d 756, 763)* .

The Court stated that in failing to satisfy all of these mandatory safety requirements, which were clearly designed to protect the class of persons of which the decedents were members, the defendants were unquestionably negligent as a matter of law (*3 Cal. 3d 756, 763)* . Although the proof of the numerous statutory and regulatory safety violations established the defendants' negligence as a matter of law, this proof of negligence alone did not automatically establish liability. The plaintiffs still bore the initial burden of showing that the defendants' negligence was a proximate cause of

the deaths. The breach of a statutory duty will often suffice to give rise to an inference from which a jury may find that a given injury was the actual or proximate result of the violation. In this case, after the plaintiffs proved that the defendants failed to provide a lifeguard or to post a warning sign, the burden shifted to the defendants to show that the absence of a lifeguard did not cause the deaths. Because these respective burdens were unclear at the time of trial, the Court determined that justice would be best served by a remand of the cause for a new trial (*3 Cal. 3d 756, 765)* .

[c] Harm to Plaintiff Was Type of Harm Statute Was Designed to Prevent

In ***Nunneley v. Edgar Hotel*** *(1950) 36 Cal. 2d 493, 225 P.2d 497* , the plaintiff sat on a hotel parapet that was three inches lower than that required by statute and fell down a vent shaft opening onto the hotel's roof. The plaintiff brought an action against the owner and the manager of the hotel, contending that the defendants were negligent in not providing signs to warn of the danger, that there was inadequate lighting, and that the parapet near the vent shaft violated former Health & Safety Code § 16827. The jury returned a verdict for the plaintiff. After denial of the defendants' motion for a new trial, they appealed.

The Supreme Court noted that the plaintiff could not recover damages for violation of a statute unless: she is a member of a class of persons for whose benefit the statute was enacted; the accident was of the nature that the statute was designed to prevent; and the violation was the proximate cause of her injury (*36 Cal. 2d 493, 497)* . The Court stated that the statute was enacted for the protection of any person lawfully on or about the premises and that the plaintiff came within that category. The Court found, however, that the statute on which the plaintiff relied was not enacted for the purpose of protecting her from the type of hazard she encountered. The Court stated that the manifest intention of the legislature in specifying a minimum height of 30 inches for the parapet of every vent shaft in the roof of an apartment house or hotel was to protect persons lawfully on the premises from walking or stumbling into the opening. The Court did not believe that the legislation was designed to guard a person from the danger of falling into a shaft by reason of sitting on the parapet (*36 Cal. 2d 493, 498)* . Furthermore, that the parapet was three inches lower than that required by the statute was not the proximate cause of the plaintiff's injury (*36 Cal. 2d 493, 499)* . The Court held, however, that the instructions regarding the statutory violation did not result in a miscarriage of justice. The evidence was sufficient to establish liability on the part of the manager and the owner of the hotel on the principles of general negligence. Accordingly, the Court affirmed the judgment (*36 Cal. 2d 493, 501-502)* .

[d] Plaintiff Was Member of Protected Class

In ***Porter v. Montgomery Ward & Co., Inc.*** *(1957) 48 Cal. 2d 846, 313 P.2d 854* , the plaintiff fell on a stairway in the defendant's department store. It was established at trial that the stairway, which had no center hand rail, violated a safety order issued by the Division of Industrial Safety. The trial court admitted the safety order into evidence over the defendants' objection and also instructed the jury that if the defendants violated the safety order, they were presumptively negligent. The jury rendered a verdict for the plaintiffs, and the defendants appealed.

The Supreme Court affirmed. Even though the defendants contended that the safety order was not designed to protect the class of which the plaintiff was a member, the Court felt that the order was designed to protect members of the general public (*48 Cal. 2d 846, 848-849)* . Therefore, the trial court properly received the order into evidence and informed the jury that the violation by the defendant gave rise to a presumption of negligence that could be rebutted by evidence of justification or excuse (*48 Cal. 2d 846, 849)* .

In ***Newhall Land & Farming Co. v. Superior Court*** *(1993) 19 Cal. App. 4th 334, 23 Cal. Rptr. 2d 377* , the plaintiff, an agricultural company, brought an action against prior owners of the plaintiff's real property for having discharged onto the property hazardous waste, which continued to pollute the soil and the groundwater that the plaintiff used in its farming operations. The trial court sustained the defendants' demurrer to the plaintiff's complaint without leave to amend, and the plaintiff appealed.

The court of appeal reversed, holding that the plaintiff had stated a cause of action for negligence by alleging negligence per se based on statutory violations pursuant to *Evid. Code § 669* (*19 Cal. App. 4th 334, 347)* . The court found that the plaintiff, as a farming company, was one of the class of persons for whose protection *Health & Safety Code § 5411* and *Water Code § 13000 et seq.* were adopted. These provisions prohibit the discharge of waste that impairs or alters the quality of water for a variety of uses, including agriculture (*19 Cal. App. 4th 334, 348)* .

[e] Effect of Statutes That Do Not Provide for Civil Liability

In ***Derrick v. Ontario Cmty. Hosp.*** *(1975) 47 Cal. App. 3d 145, 120 Cal. Rptr. 566* , the plaintiff contracted a serious communicable disease from a child who had been released from a hospital. The plaintiff, through his guardian ad litem, brought the action against the hospital, the attending physician, the child, and the child's mother. He alleged that the defendants negligently failed to take proper precautions to stop the spread of the disease and negligently failed to comply with the requirements of former Health & Safety Code § 3125 (*now see Health & Safety Code § 120250*), which required reporting of communicable diseases to a health officer. The plaintiff further alleged that the defendants' failure to report the disease prevented the health officer from alerting the child, her mother, and the plaintiff of the presence and the contagiousness of the disease, and that this negligence proximately caused the plaintiff to contract the disease. The trial court sustained the hospital's demurrer to the plaintiff's complaint without leave to amend. The plaintiff appealed the resulting judgment of dismissal.

The court of appeal reversed, finding that the ambiguities and uncertainties presented by the complaint could be eliminated by further amendment (*47 Cal. App. 3d 145, 149)* . In addition, the court stated the issue as whether or not the allegations of the first amended complaint showed that the hospital owed any duty to the plaintiff and whether the breach of this duty proximately resulted in injury to the plaintiff (*47 Cal. App. 3d 145, 150)* . Quoting *Vesely v. Sager (1971) 5 Cal. 3d 153, 164, 95 Cal. Rptr. 623, 486 P.2d 151* , the court stated that a duty of care, and the attendant standard of conduct required of a reasonable person, may be found in a legislative enactment that does not provide for civil liability. A presumption of negligence arises from the violation of a statute that was enacted to protect a class of which the plaintiff is a member against the type of harm that the plaintiff suffered as a result of the violation of the statute (*47 Cal. App. 3d 145, 151)* . The language of former Health & Safety Code § 3125 (*now see Health & Safety Code § 120250*), containing the reporting requirements for communicable diseases to health officers, applies to hospitals, and former Health & Safety Code §§ 3110 and 3125 (*now see Health & Safety Code §§ 120175, 120250*) were enacted to protect the public against the spread of contagious diseases. In addition, the court held that former Health & Safety Code § 3125 (*now see Health & Safety Code § 120250*) imposed a duty on the hospital to report known infectious, contagious, or communicable diseases to the health officer (*47 Cal. App. 3d 145, 152)* . Even though the plaintiff's case still presented proximate cause problems, the court concluded that the judgment dismissing the hospital as a defendant must be reversed (*47 Cal. App. 3d 145, 151-152)* .

NOTE:

The holding in *Vesely v. Sager (1971) 5 Cal. 3d 153, 164-167, 95 Cal. Rptr. 623, 486 P.2d 151* , regarding liability for the furnishing of alcoholic beverages to an intoxicated person, has been abrogated by the 1978 enactment of *Civ. Code § 1714(b)*. It appears, however, that the statement quoted by the court in the *Derrick* case has not been abrogated by the passage of *Civ. Code § 1714(b)* [*see Civ. Code § 1714(b)*; *see also Stoiber v. Honeychuck (1980) 101 Cal. App. 3d 903, 923, 162 Cal. Rptr. 194]* .

[4] Additional Authorities

[a] Presumption of Negligence Established

NOTE:

The court of appeal held in a 2009 case that the amendments to the Child Abuse and Neglect Reporting Act, *Pen. Code § 11164 et seq.*, made in 2000 did not abrogate the holding reached by the Supreme Court in *Randi W. v. Muroc Joint Unified School Dist.*, thus reaffirming the principle that a school

> district that fails to report suspected sexual abuse committed by an employee cannot be held liable for abuse committed by that employee while working for a subsequent employer [*P.S. v. San Bernardino City Unified School Dist. (2009) 174 Cal. App. 4th 953, 964-965, 94 Cal. Rptr. 3d 788*].

The factual and procedural background of *Nunneley v. Edgar Hotel (1950) 36 Cal. 2d 493, 225 P.2d 497* , is discussed in *§ 165.70[3][c]*. In affirming judgment for the plaintiff, the Supreme Court stated that the plaintiff could not recover damages for violation of a statute unless she was one of a class of persons for whose benefit the statute was enacted, the accident was of the nature that the statute was designed to prevent, and the violation was the proximate cause of her injury (*36 Cal. 2d 493, 497)* .

In *California Serv. Station & Auto. Repair Ass'n v. American Home Assurance Co. (1998) 62 Cal. App. 4th 1166, 73 Cal. Rptr. 2d 182* , an industry association and two subsidiaries that represented gas stations, car washes, and garages brought an action against an insurance company that had agreed to provide dividend-paying liability and workers' compensation insurance coverage marketed by the plaintiffs to their members, alleging that the insurance company had failed to pay dividends when expected. In calculating that no dividends were due, the defendant used much higher loss development factors (LDFs) than the plaintiffs had expected based on representations made at the time of negotiations, although no formal disclosure of the LDFs to be used had been made during negotiations. *10 Cal. Code Reg. § 2505* requires insurers offering dividend-paying workers' compensation policies to provide purchasers with a dividend disclosure statement under most circumstances, although the defendant had not provided any statement to the plaintiffs. The plaintiffs alleged breach of contract, breach of the implied covenant of good faith and fair dealing, and negligence. The jury found for the defendant on the breach of contract action, but found for the plaintiffs on the other causes of action. The trial court, which had instructed the jury on both ordinary negligence and the presumption of negligence arising under *Evid. Code § 669*, granted the defendant's post-trial motion for j.n.o.v. and a new trial on the negligence cause of action. The plaintiffs appealed the order for j.n.o.v. and new trial. In affirming an order for j.n.o.v. and new trial granted for the defendant, the court of appeal explained that a statutory presumption of negligence only arises under *Evid. Code § 669* if there is an underlying cause of action for negligence. Assuming that a duty to exercise due care exists, the presumption of negligence may then be used to prove a breach of the applicable standard of due care. The court explained that it is the tort of negligence, and not the violation of the statute itself, that entitles a plaintiff to recover civil damages. Noting that the plaintiffs had not shown that they had a viable underlying negligence action, the court held that *Evid. Code § 669* could not be used to create a negligence duty of care that did not otherwise exist (*62 Cal. App. 4th 1166, 1177-1180)* . However, the issue of whether *Evid. Code § 669* can be used to create a legal duty of due care that does not otherwise exist, rather than merely create a presumption that an existing duty has been breached, has been the subject of disagreement among members of the Supreme Court, who have apparently not directly ruled on the issue (*see 62 Cal. App. 4th 1166, 1180)* .

[b] Harm to Plaintiff Was Type of Harm Statute Was Designed to Prevent

In *Klein v. BIA Hotel Corp. (1996) 41 Cal. App. 4th 1133, 49 Cal. Rptr. 2d 60* , the plaintiffs sued the defendant, a residential hotel, for the wrongful death of their mother, who committed suicide by jumping off the roof of the defendant's building. The plaintiffs alleged that the defendant was presumed to be negligent under *Evid. Code § 669*, based on regulations governing the physical setting of a residential care facility for the elderly. The defendant moved for summary judgment, claiming that decedent had a right to take her own life and that the defendant had no duty to prevent her from doing so. The trial court granted the summary judgment, and the plaintiffs appealed. After reviewing the relevant regulations, the court of appeal held that the defendant was required to monitor the decedent's health and well-being, to inform certain persons of changes in her condition, and to determine whether the facility would be able to continue to care for her because of those changes. These obligations imposed on the defendant were designed to prevent the decedent's mental and physical problems from going unnoticed and untreated, so that harm to the decedent could be avoided. The court concluded that the regulations were designed to protect residents of residential care facilities for the elderly from the type of harm that the decedent experienced. Concluding that the defendant had not rebutted the allegations of the plaintiffs complaint, the court reversed the grant of summary judgment and remanded the cause for

further proceedings (*41 Cal. App. 4th 1133, 1140-1141)* .

In *Galvez v. Frields (2001) 88 Cal. App. 4th 1410, 107 Cal. Rptr. 2d 50* , the plaintiff, who was born with serious birth defects, brought a wrongful life suit against his mother's physician for failing to advise and make reasonable efforts to ensure that the plaintiff's mother underwent alpha-fetoprotein (AFP) testing during pregnancy to check for neural tube defects in the plaintiff before he was born. At trial, although the trial court allowed expert testimony on the standard of care, the court refused to instruct the jury on the negligence per se doctrine and the duties as to AFP testing imposed on physicians by *17 Cal. Code Reg. § 6527*. After a split jury vote, judgment was entered in favor of the physician. The court of appeal reversed, holding that the trial court committed reversible error in refusing to instruct on negligence per se. The physician had argued at trial that *17 Cal. Code Reg. § 6527* was intended to protect only taxpayers who have to pay for the care of children born with neural tube defects, and on appeal the physician contended that the class of persons protected by the regulation was pregnant women. However, the court concluded that the regulation was designed to prevent the birth of children with neural tube defects, and that the plaintiff was a member of this protected class. Therefore, the regulation was applicable and the jury should have been given the opportunity to determine if the physician breached the standard of care created by the regulation (*88 Cal. App. 4th 1410, 1421-1424)* .

[c] Plaintiff Was Member of Protected Class

In *City of Los Angeles v. Shpegel-Dimsey, Inc. (1988) 198 Cal. App. 3d 1009, 244 Cal. Rptr. 507* , a city sued the defendant, a plastics company, to recover damages for injury to utility poles, conductors, and fixtures caused by a fire originating on the defendant's premises. The defendant had openly stored scrap plastics on its property in violation of the city's fire code, had been cited numerous times for the violations, and had failed to correct them. If it had corrected them, the fire would have been confined to a small area and would not have spread to city property. In reversing judgment for the defendant, the court of appeal held that the city fire code provision regarding proper storage of plastics was intended at least in part to protect property owners such as the city from an increased risk of injury to their property. The evidence showed that plastic materials of the type stored by the defendant burn fiercely if not properly stored, thereby causing a fire of increasing magnitude to spread rapidly, and that the increased size and ferocity of the fire vastly enhanced the risk to adjacent property owners (*198 Cal. App. 3d 1009, 1021)* .

Cappa v. Oscar C. Holmes, Inc. (1972) 25 Cal. App. 3d 978, 102 Cal. Rptr. 207 , was a personal injury action against a city and a contractor by a 16-year-old boy who took a short cut through an area that was under construction and partially barricaded. There were no fences or railings along the edge of the area, and the plaintiff fell over the edge. An industrial safety order required the fencing of passageways "extending to the side of a floor where a [person] or material might fall." The court of appeal upheld a jury verdict for the plaintiff, rejecting the defendants' argument that the safety order was intended only for the protection of workers on the job, not for uninvited members of the public such as the plaintiff. Because the safety order in question did not expressly or impliedly limit its protection to construction workers, the court concluded that the order was designed to protect members of the public consensually on the premises (*25 Cal. App. 3d 978, 982)* . The court furthermore held that, under *Rowland v. Christian (1968) 69 Cal. 2d 108, 112, 70 Cal. Rptr. 97, 443 P.2d 561* (discussed in *§ 165.60[3][a]*), once it found that the safety order applied to the general public, it could make no distinction among trespassers, licensees, or invitees (*25 Cal. App. 3d 978, 982-983)* .

[d] Effect of Statutes That Do Not Provide for Civil Liability

In *Vesely v. Sager (1971) 5 Cal. 3d 153, 95 Cal. Rptr. 623, 486 P.2d 151* , the plaintiff was injured by an automobile driven by a person to whom the defendant had furnished alcoholic beverages in violation of *Bus. & Prof. Code § 25602*. In reversing a judgment of dismissal in favor of the defendant, the Supreme Court noted that a duty of care and the attendant standard of conduct required of a reasonable person may be found in a legislative enactment that does not provide for civil liability (*5 Cal. 3d 153, 164)* .

NOTE:

The abrogation of the specific holding of this case by the enactment of *Civ. Code § 1714(b)* does not appear to affect this general point of law [*see Civ. Code § 1714(b)*; *see also Stoiber v. Honeychuck (1980) 101 Cal. App. 3d 903, 923, 162 Cal. Rptr. 194]* .

California Points & Authorities

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CHAPTER 165 NEGLIGENCE
PART II. FORMS
B. Duty
3. Breach of Statutory Duty

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[Reserved]

§§ 165.71[Reserved]

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
CHAPTER 165 NEGLIGENCE
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B. Duty
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16-165 California Points & Authorities § 165.80

§ 165.80 Presumption of Negligence Not Established Under Evidence Code § 669

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

THE PRESUMPTION OF NEGLIGENCE SET FORTH IN SECTION 669 OF THE EVIDENCE CODE DOES NOT APPLY BECAUSE _____ [DEFENDANT DID NOT VIOLATE THE _____ (STATUTE *or* ORDINANCE *or* REGULATION) IN QUESTION *and/or* PLAINTIFF WAS NOT A MEMBER OF THE CLASS FOR WHOSE BENEFIT THE _____ (STATUTE *or* ORDINANCE *or* REGULATION) WAS ENACTED *and/or* THE ACCIDENT CAUSING THE INJURY WAS NOT OF THE NATURE THAT THE _____ (STATUTE *or* ORDINANCE *or* REGULATION) WAS DESIGNED TO PREVENT *and/or* THE VIOLATION OF THE _____ (STATUTE *or* ORDINANCE *or* REGULATION) WAS NOT A PROXIMATE CAUSE OF PLAINTIFF'S INJURY *and/or* THE PLAINTIFF HAS NOT PROVEN THAT DEFENDANT OWED PLAINTIFF A LEGAL DUTY TO EXERCISE DUE CARE].

A. Presumption of Negligence Not Established. Presumption of negligence under *Evid. Code § 669* does not apply unless the plaintiff proves: (1) the violation of a statute, ordinance, or regulation of a public entity; (2) that the violation was a proximate cause of the injury; (3) injury resulting from an occurrence of the nature that the statute was designed to prevent; and (4) that the injured party was a member of the class for whose protection the statute was adopted (*see Evid. Code § 669(a)*; *Salinero v. Pon (1981) 124 Cal. App. 3d 120, 134, 177 Cal. Rptr. 204*).

[*EITHER*]

B. Insufficient Evidence of Violation. If there is no showing that the defendant's conduct violated the statute in question, the court will conclude that the plaintiff has failed to establish a requisite element of negligence per se, that is, the statutory violation (*see Salinero v. Pon (1981) 124 Cal. App. 3d 120, 134, 177 Cal. Rptr. 204*).

[*AND/OR*]

C. Violation Was Not Proximate Cause of Injury. Proof of violation of a statute, ordinance, or regulation does not establish a presumption of negligence unless the violation proximately caused the death or injury to person or property (*Evid. Code § 669(a)(2)*; *Roth v. Parker (1997) 57 Cal. App. 4th. 542, 550, 67 Cal. Rptr. 2d 250* ; *Beaupre v. Nave (1970) 13 Cal. App. 3d 402, 406, 91 Cal. Rptr. 473* ; *see Blodgett v. B.H. Dyas Co. (1935) 4 Cal. 2d 511, 513, 50 P.2d 801*).

[*AND/OR*]

D. Harm to Plaintiff Was Not Type of Harm Statute Was Designed to Prevent. Negligence is not presumed from a violation of a statute, ordinance, or regulation unless the death or injury resulted from an occurrence of the nature that the statute, ordinance, or regulation was designed to prevent (*Evid. Code § 669(a)(3)*; *Morris v. Horton (1994) 22 Cal. App. 4th 968, 972, 27 Cal. Rptr. 2d 585* ; *see Nunneley v. Edgar Hotel (1950) 36 Cal. 2d 493, 497, 225 P.2d 497*).

[*AND/OR*]

E. Plaintiff Was Not Member of Protected Class. A person may not recover damages based on the violation of a statute, ordinance, or regulation, unless he or she was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted (*Evid. Code § 669(a)(4)*; *Richards v. Stanley (1954) 43 Cal. 2d 60, 62, 271 P.2d 23*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the presumption of negligence under *Evid. Code § 669(a)* does not apply [*see Evid. Code § 669(a)*]. It may be used if the defendant contends that the plaintiff has failed to establish the elements set forth in *Evid. Code § 669(a)* or has failed to establish in the first instance that a legal duty to exercise due care was owed to the plaintiff. This form should be combined with § 165.20, if applicable to the case.

This argument may arise in several procedural contexts. For example, the defendant might raise this issue on an appeal from an adverse judgment, if the ground for the appeal is the impropriety of a jury instruction regarding the statutory violation, or in support of a motion for nonsuit or a motion for judgment notwithstanding the verdict [*see, e.g., Nunneley v. Edgar Hotel (1950) 36 Cal. 2d 493, 495-496, 225 P.2d 497* (jury instruction); *Morris v. Horton (1994) 22 Cal. App. 4th 968, 970, 27 Cal. Rptr. 2d 585* (judgment notwithstanding the verdict); *Salinero v. Pon (1981) 124 Cal. App. 3d 120, 126, 177 Cal. Rptr. 204* (nonsuit)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should discuss the facts of the case and argue that (1) the defendant did not violate the statute in question; (2) the harm produced was not of the type that the statute was designed to prevent; (3) the plaintiff was not a member of the class that the statute was designed to protect; or (4) the defendant's violation was not a proximate cause of injury to the plaintiff [*see Salinero v. Pon (1981) 124 Cal. App. 3d 120, 134, 177 Cal. Rptr. 204]* . Alternatively, counsel should

discuss the facts and argue that the defendant did not owe a legal duty to the plaintiff to exercise due care under the circumstances [*see California Serv. Station & Auto. Repair Ass'n v. American Home Assurance Co. (1998) 62 Cal. App. 4th 1166, 1176-1180, 73 Cal. Rptr. 2d 182]* .

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and a form of complaint with respect to negligence based on violation of statute, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§ 165.20*.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in § 165.70* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Presumption of Negligence Not Established

In ***Salinero v. Pon*** *(1981) 124 Cal. App. 3d 120, 177 Cal. Rptr. 204* , an experienced window washer brought an action against the owners of an apartment building for personal injuries suffered when he fell from the building while washing windows. The defendants cross-complained against the architect who designed the building. The trial court granted summary judgment for the architect on the cross-complaint on the ground that the action was barred by the four-year statute of limitations of *Code Civ. Proc. § 337.1*, which limits the time for filing actions against architects and construction contractors for deficient construction or design. The court granted the owners' motion for a nonsuit on the plaintiff's complaint, and the plaintiff appealed.

The court of appeal affirmed. With regard to the motion for nonsuit that dismissed the action against the owners, it stated that the trial court was not in error when it excluded certain evidence of statutory violations, contained in *Lab. Code §§ 7325-7327* and *7330*, that required safety devices on multistory buildings to protect window washers. Although the plaintiff attempted to introduce these violations for the purpose of establishing the owners' breach of statutory duties of care, the court stated that the legislature expressly intended, as shown by *Lab. Code § 6304.5*, that the statutes offered by the plaintiff were inadmissible in evidence in a third-party action by an employee (*124 Cal. App. 3d 120, 129-131)* . In addition, the plaintiff sought to have certain provisions of the city building code introduced into evidence, contending that these building code provisions imposed a statutory duty of care, making the doctrine of negligence per se applicable (*124 Cal. App. 3d 120, 131-134)* . Although the court conceded that the lower court's exclusion of these provisions may have been erroneous, it noted that under *Evid. Code § 669*, the following must be shown for the presumption of negligence to apply: (1) the violation; (2) the violation as a proximate cause of the injury; (3) an injury resulting from an occurrence of the nature that the statute was designed to prevent; and (4) the injured party being a member of the class of persons for whose protection the statute was adopted (*124 Cal. App. 3d 120, 134)* . In this case, the relevant building code provisions were directed to the upkeep of existing safety devices and maintenance of the condition of the building. They did not impose design requirements and did not expand the scope of the landowners' common law duty to invitees. In addition, the provisions required the landowner to maintain a structure in "good workin order." That requirement was not violated by the failure of the owners in this case to install hooks or safety devices, because the focus of the

ordinance was on maintenance, not improvement. Because the plaintiff made no showing of unsatisfactory maintenance, the court concluded that a requisite element of negligence per se--the statutory violation--was not established (*124 Cal. App. 3d 120, 134)* . After determining that the peculiar risk doctrine was not applicable to this case, the court affirmed the lower court's judgment of nonsuit (*124 Cal. App. 3d 120, 135-139)* .

NOTE:

Effective for injuries occurring on or after January 1, 2000, the legislature has amended *Lab. Code § 6304.5* to remove the exception relied on in *Salinero* that prevented an injured worker from introducing evidence of Cal-OSHA statutes and regulations to create a presumption of negligence under *Evid. Code § 669*, although the exception still exists in actions against the state alleging that the state took or failed to take actions in its regulatory capacity [*Elsner v. Uveges (2004) 34 Cal. 4th 915, 935-939, 22 Cal. Rptr. 3d 530, 102 P.3d 915]* .

[b] Insufficient Evidence of Violation

The factual and procedural background of ***Salinero v. Pon*** *(1981) 124 Cal. App. 3d 120, 177 Cal. Rptr. 204* , is discussed in *§ 165.80[3][a]*. In affirming a judgment of nonsuit against the plaintiff, the court of appeal conceded that although the trial court may have erroneously excluded from evidence certain city building code provisions, the exclusion was not prejudicial (*124 Cal. App. 3d 120, 133)* . The provisions in question were directed at the upkeep of existing safety devices and maintenance of the condition of the building, but did not impose design requirements. Because the plaintiff failed to make a showing of unsatisfactory maintenance of the building, the court concluded that a requisite element of negligence per se--the statutory violation--had not been established (*124 Cal. App. 3d 120, 134)* .

[c] Violation Was Not Proximate Cause of Injury

In ***Blodgett v. B.H. Dyas Co.*** *(1935) 4 Cal. 2d 511, 50 P.2d 801* , the plaintiff fell on a stairway while looking into the defendant's store window. A city ordinance required a hand rail on stairways more than seven feet in width. Because the defendant's stairway did not have a hand rail, the plaintiff contended that the defendant was guilty of negligence as a matter of law. Although the trial court admitted the ordinance into evidence over the defendant's objection, the trial court granted the defendant's motion for nonsuit. The plaintiff appealed.

The Supreme Court affirmed the judgment of nonsuit. The Court noted that the evidence showed that the lack of a hand rail was neither the proximate nor the actual cause of the plaintiff's fall. In addition, the Court stated that even if the defendant was negligent in violating the ordinance, that fact would not preclude the court from finding that the plaintiff was contributorily negligent as a matter of law. The Court held that the undisputed evidence showed that the plaintiff lacked due caution that precluded her right of recovery (*4 Cal. 2d 511, 513)* .

NOTE:

Under the present doctrine of comparative negligence, the plaintiff's contributory negligence would no longer completely bar her recovery [*see* *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226* (replacing bar of contributory negligence with rule of comparative negligence)].

In ***Roth v. Parker*** *(1997) 57 Cal. App. 4th 542, 67 Cal. Rptr. 2d 250* , the plaintiff was a passenger in a car that failed to stop at a stop sign and was half-way through the intersection when it was broad-sided by a car traveling between 50 and 70 miles per hour. The plaintiff sued the owner and driver of the car in which she was a passenger for the injuries she sustained as a result of the accident. The defendants moved for judgment of nonsuit on the ground that the plaintiff had failed to provide evidence showing that the statutory violation regarding the failure to come to a complete stop at a stop sign was the cause in fact of the accident. The trial court granted the motion.

The appellate court affirmed. It determined that the trial court reasonably could have disbelieved the plaintiff's account

of the accident (particularly given her admission that she had consumed five beers before the accident) and concluded that there was insufficient evidence to establish that the accident would not have occurred if the driver had come to a stop at the stop sign. Moreover, even if the trial court had believed the plaintiff's testimony, it still reasonably could have refused to draw any inferences in her favor because there was no testimony about what the driver was able to see, other cars on the road, the number of feet per second the other car was traveling, the distance it traveled, and its path of travel (*57 Cal. App. 4th 542, 550)* .

In ***Beaupre v. Nave*** *(1970) 13 Cal. App. 3d 402, 91 Cal. Rptr. 473* , several unrelated plaintiffs sought damages from proprietors of a restaurant for allegedly causing the plaintiffs to contract infectious hepatitis. The defendants' son, a food handler and dishwasher at the restaurant, came down with the disease a short time before most of the plaintiffs became ill. The plaintiffs asserted, among other causes of action, that the defendants' restaurant violated many sanitation regulations and that these violations presumptively established the defendants' negligence. The trial judge entered judgment for the defendants, and the plaintiffs appealed.

The court of appeal affirmed. Quoting *Green v. Menveg Props., Inc. (1954) 126 Cal. App. 2d 1, 11, 271 P.2d 544* , the court noted that proof of violation of a law does not establish actionable negligence unless there exists a causal connection between the violation and the act that causes injury or, as some courts express it, unless there exists reasonable grounds for a belief that the violation was a proximate cause of the injury. Based on expert testimony concerning the period of incubation for the infections and the rarity of food-transmitted outbreaks, the court of appeal found that the trial court had properly held that the various sanitation violations were not the actual or proximate cause of the plaintiffs' infections (*13 Cal. App. 3d 402, 405-406)* .

[d] Harm to Plaintiff Was Not Type of Harm Statute Was Designed to Prevent

In ***Morris v. Horton*** *(1994) 22 Cal. App. 4th 968, 27 Cal. Rptr. 2d 585* , the defendants hired the plaintiff to provide woodwork for buildings they were constructing on their estate. The plaintiff subcontracted the construction of a staircase for the defendants' main residence. Before the woodwork was completed, the defendants ordered the plaintiff off their property and refused to pay for the plaintiff's work. After the plaintiff filed suit to recover his costs, the defendants filed a cross-complaint claiming that the subcontractor was liable to them for reasonable costs of repair for negligently constructing the staircase. The defendants argued that the subcontractor was presumptively negligent because inspection of the staircase revealed building code violations. After a jury rejected this claim, the defendants filed motions for judgment notwithstanding the verdict, a new trial, and to vacate the judgment, all of which the trial court denied. The defendants appealed.

The court of appeal affirmed, holding that the defendants, as owners and occupiers of the building in which the staircase was installed, were within the class of persons for whose protection the local building code was adopted. However, the injury they suffered was not one the code was designed to prevent. The code requirements regarding height and width of stairs and handrails were designed to ensure the safety of persons using the staircase, not to prevent property owners from incurring costs associated with removal or repair of building code violations (*22 Cal. App. 4th 968, 972)* .

The factual and procedural background of ***Nunneley v. Edgar Hotel*** *(1950) 36 Cal. 2d 493, 225 P.2d 497* , is discussed in *§ 165.70[3][c]*. In *Nunneley*, the Supreme Court affirmed a judgment for the plaintiff awarding damages for injuries sustained when she fell down a vent shaft after sitting on a parapet that was three inches lower than that required by statute. The Court also held that the statute on which the plaintiff relied was not enacted for the purpose of protecting her from the type of hazard she encountered. The manifest intention of the legislature in specifying a minimum height of 30 inches for the parapet of every vent shaft in the roof of an apartment house or hotel was to protect persons lawfully on the premises from walking or stumbling into the opening. The Court did not believe that the legislation was designed to guard a person from the danger of falling into a shaft by reason of sitting on the parapet (*36 Cal. 2d 493, 498)* .

[e] Plaintiff Was Not Member of Protected Class

The factual and procedural background of ***Richards v. Stanley*** *(1954) 43 Cal. 2d 60, 271 P.2d 23* , is discussed in *§ 165.30[3][b]*. In *Richards,* the Supreme Court affirmed a judgment for the defendants in an action in which the plaintiff was struck by the defendants' car, which was driven by a person who had stolen it. The Court also ruled that a plaintiff may not recover damages based on the violation of a criminal statute or ordinance, unless he or she is one of the class of persons for whose benefit the statute or ordinance was enacted (*43 Cal. 2d 60, 62)* . In this case, the ordinance expressly stated that it was not enacted for the benefit of persons who might be injured by the operation of stolen automobiles. Therefore, the Court found that evidence of the ordinance was properly excluded as irrelevant (*43 Cal. 2d 60, 62-63)* . Quoting *Routh v. Quinn (1942) 20 Cal. 2d 488, 491, 127 P.2d 1* , the Court stated that it is an elementary principle that an indispensable factor to liability founded on negligence is the existence of a duty of care by the alleged wrongdoer to the person injured, or to a class of which he or she is a member (*43 Cal. 2d 60, 63)* .

[4] Additional Authorities

[a] Insufficient Evidence of Violation

In *Smith v. AC and S, Inc. (1994) 31 Cal. App. 4th 77, 37 Cal. Rptr. 2d 457* , the plaintiff, who had worked as a pipe fitter for 30 years, sued an asbestos insulation contractor, a utility company, and others for negligence and negligence per se resulting in the plaintiff's exposure to asbestos. The utility company was found negligent per se for violation of California industry safety orders that set standards for the prevention of harmful exposure of employees to asbestos dust. The court of appeal reversed on the ground that the utility company was not an employer as defined by the statute. The court noted that it was undisputed that the dust was caused by insulation contractors rather than by the utility company. The plaintiff claimed that the utility company was bound by the safety orders because it took an active role in supervising the various aspects of construction, but the court held that general supervision of an independent contractor's work does not make an owner a statutory employer bound by safety regulations of the Labor Code (*31 Cal. App. 4th 77, 91)* .

[b] Harm to Plaintiff Was Not Type of Harm Statute Was Designed to Prevent

In *Stafford v. United Farm Workers (1983) 33 Cal. 3d 319, 188 Cal. Rptr. 600, 656 P.2d 564* , the Supreme Court reversed a lower court judgment for the plaintiff after a jury trial in a personal injury action against a labor union. The plaintiff, a passing motorist, was injured when her automobile collided with a truck parked by a striking farm worker. A temporary restraining order (TRO) had been issued against the union prior to the accident, prohibiting the union from blocking access to the tomato fields and barring certain violent conduct. The Court held that the TRO was improperly admitted at trial because it was irrelevant and prejudicial. The Court stated that for a statute or ordinance--and by analogy, an injunction or TRO--to be relevant to a determination of a presumption of negligence under *Evid. Code § 669*, the harm must have been one the statute or order was designed to prevent. Holding that the order was not designed to prevent the type of harm that the plaintiff suffered in this case, the Court stated that even if a violation of the TRO were a contributing cause of the accident, the TRO was designed to prevent labor violence, not automobile collisions (*33 Cal. 3d 319, 322-324)* .

In *Urhausen v. Longs Drug Stores California, Inc. (2007) 155 Cal. App. 4th 254, 65 Cal. Rptr. 3d 838* , plaintiff injured her wrist when she slipped and fell while walking toward a store entrance across an empty disabled access parking space on crutches. While plaintiff could have parked in the disability parking space, she chose not to do so because she was capable of scaling normal curbs while using her crutches. Plaintiff sued the store and shopping mall, arguing that the slope of the disabled parking space and adjacent aisle was greater than permitted by state building codes, and that this regulatory violation constituted negligence per se. The court of appeal disagreed. After reviewing the relevant administrative materials, the court concluded that the building code regulation placing the slope restriction on disability parking spaces and adjacent access lanes was intended to facilitate the transition of disabled persons,

particularly those in wheelchairs, from their vehicle to the pavement. As such, it was not designed to prevent an injury to a pedestrian who falls while walking across an unoccupied parking space, even if the injured party happens to also have a disability. Because plaintiff's particular injury was not the type of injury the regulation was designed to prevent, plaintiff could not rely on the negligence per se doctrine to establish liability (*155 Cal. App. 4th 254, 268-270)* .

The factual and procedural background of *Victor v. Hedges (1999) 77 Cal. App. 4th 229, 91 Cal. Rptr. 2d 466* , is discussed in *§ 165.60[4][a]*. Addressing the claim of negligence per se based on a violation of *Veh. Code § 22500(f)*, the court of appeal reviewed the statute and concluded that the particular provision was intended to prevent vehicular obstruction of pedestrian traffic and prevent injuries to pedestrians that might occur if a pedestrian (1) walks around the obstructing vehicle and is injured by another hazard, (2) walks into the obstructing vehicle, or (3) is struck when the vehicle illegally on the sidewalk is put in motion. Because the plaintiff's injury, which was caused when another vehicle struck the parked vehicle, did not come within any of those situations, the trial court correctly ruled that the defendant's violation of the statute could not support the plaintiff's action for negligence per se (*77 Cal. App. 4th 229, 238)* .

The factual and procedural background of *Wawanesa Mut. Ins. Co. v. Matlock (1997) 60 Cal. App. 4th 583, 70 Cal. Rptr. 2d 512* , is discussed in *§ 165.60[4][a]*. The court of appeal held that negligence per se did not apply because the statute at issue was not designed to protect against the kind of harm that occurred. *Penal Code § 308*, which makes it unlawful to give cigarettes to minors, had nothing to do with fire suppression but was intended to prevent early addiction to tobacco (*60 Cal. App. 4th 583, 587)* .

[c] Plaintiff Was Not Member of Protected Class

In *Ramirez v. Nelson (2008) 44 Cal. 4th 908, 80 Cal. Rptr. 3d 728, 188 P.3d 659* , defendant homeowners hired a landscaping contractor to trim trees in their yard. While working in a tree, an employee of the contractor electrocuted himself, apparently when he brought his polesaw in contact with overhead power lines. Plaintiffs had exercised no control over the way the work was performed, and although plaintiffs had failed to warn the contractor or his employees about the overhead lines, they were clearly visible. The decedent's family brought a wrongful death action against the homeowners. The trial court sent the case to the jury solely on the basis of general negligence, refusing to instruct on negligence per se based on an alleged violation of *Pen. Code § 385(b)*, which makes it a misdemeanor for any person or employee of any person to operate or place any equipment within six feet of a high voltage overhead conductor. The jury found for defendants. The court of appeal reversed, concluding that the trial court erred in refusing to instruct the jury on negligence per se. The California Supreme Court reversed the court of appeal. The Supreme Court concluded that *Pen. Code § 385(b)* was intended to protect the public at large from an injury caused if an equipment operator severs a power line while in violation of the statute and was not intended to protect against injury to the equipment operator himself. In addition, even assuming that the homeowners could be considered to be the employers of the decedent at the time of the accident, the Court concluded that the statute did not impose any specific duty of care on employers for the protection of their own employees. Thus, the Court held that *Pen. Code § 385(b)* could not be used under the negligence per se doctrine to impose liability on defendant homeowners and the trial court was correct in refusing to instruct the jury on that theory (*44 Cal. 4th 908, 919)* .

In *Randi W. v. Muroc Joint Unified Sch. Dist. (1997) 14 Cal. 4th 1066, 60 Cal. Rptr. 2d 263, 929 P.2d 582* , a 13-year-old middle school student who had been sexually molested by a school vice principal sued the vice principal's former school district employers for failing to disclose to prospective employers facts that the defendants knew regarding prior charges or complaints of sexual misconduct and impropriety leveled against the vice principal. In one count, the plaintiff charged the defendants with negligence per se, based on the breach of their statutory duty under the Child Abuse Reporting Act (*Penal Code § 11166(a)*) to report to the authorities the various incidents of sexual misconduct involving the vice principal, of which they had knowledge. The court of appeal concluded that the complaint stated a cause of action for negligence per se. The Supreme Court held that it was unnecessary to decide whether the complaint's allegations were sufficient to allege that the defendants knew or suspected reportable child abuse, because the plaintiff was not a member of the class for whose protection the Reporting Act was enacted. The

statutory duty to report protects children in the custodial care of the person charged with reporting the abuse. However, the plaintiff, who attended school in another school district, was never in the defendants' custodial care (*14 Cal. 4th 1066, 1087)* .

NOTE:

The court of appeal held in a 2009 case that the amendments to the Child Abuse and Neglect Reporting Act, *Pen. Code § 11164 et seq.*, made in 2000 did not abrogate the holding reached by the Supreme Court in *Randi W. v. Muroc Joint Unified School Dist.*, thus reaffirming the principle that a school district that fails to report suspected sexual abuse committed by an employee cannot be held liable for abuse committed by that employee while working for a subsequent employer [*P.S. v. San Bernardino City Unified School Dist. (2009) 174 Cal. App. 4th 953, 964-965, 94 Cal. Rptr. 3d 788*].

The factual and procedural background of *Stafford v. United Farm Workers (1983) 33 Cal. 3d 319, 188 Cal. Rptr. 600, 656 P.2d 564* , is discussed in *§ 165.80[4][b]*. In *Stafford*, the Supreme Court held that even if a violation of the TRO were a contributing cause of the accident that injured the plaintiff, the plaintiff was not a member of the class that the TRO was designed to protect. The Court held that the TRO was designed to protect only the class of tomato growers and those with whom they did business, not passing motorists such as the plaintiff (*33 Cal. 3d 319, 324)* .

In *Spates v. Dameron Hosp. Ass'n (2003) 114 Cal. App. 4th 208, 7 Cal. Rptr. 3d 597* , a hospital had custody of a patient who died after being brought to the hospital by a nursing home. The hospital turned the decedent's remains over to the coroner for disposition after attempting unsuccessfully to contact the decedent's daughter, who had been to the hospital only once, nine months earlier, when the decedent had also been brought to the hospital by the nursing home. When the daughter found out about the decedent's death and cremation, she sued the hospital for negligent infliction of emotional distress for failing to locate her so that she could dispose of the decedent's remains properly. The court of appeal concluded, first, that the brief contact the daughter had with the hospital nine months earlier did not establish a relationship between the two sufficient to impose a duty on the hospital that ran to the plaintiff (*114 Cal. App. 4th 208, 215)* . Second, the court held that *Health & Safety Code § 7104*, which imposes a duty of interment on the coroner if no other accommodations for interment of a decedent have been made and the duty of interment has not devolved to another person who can be located with reasonable diligence within the state, does not impose a duty on the person having custody of the remains of a decedent that is enforceable in tort by persons who in fact have the right of interment of those remains. The court held that *Health & Safety Code § 7104* creates a condition of last resort with respect to the expense of interment of an unclaimed decedent and was designed to protect the county treasury, not the family members of the decedent (*114 Cal. App. 4th 208, 219)* .

In *Selger v. Steven Bros., Inc. (1990) 222 Cal. App. 3d 1585, 272 Cal. Rptr. 544* , the plaintiff slipped and fell on dog feces on the sidewalk abutting a shop owner's property and brought an action against the shop owner. At trial, the jury found against the defendant by special verdict, on the grounds that the defendant had violated city ordinances requiring abutting landowners to keep the city sidewalk clean and clear of waste or refuse, and that this violation constituted negligence per se (*222 Cal. App. 3d 1585, 1588)* . The defendant appealed, and the court of appeal reversed. The presumption of negligence does not arise under *Evid. Code § 669(a)(4)* unless the person suffering injury was one of the class of persons for whose protection the statute was adopted. An ordinance requiring the abutting landowner to maintain the sidewalk creates a duty of care to third persons only if the ordinance clearly and unambiguously so provides (*222 Cal. App. 3d 1585, 1590)* . The court reviewed the relevant ordinances and concluded that although the ordinances imposed a duty on the defendant to keep the sidewalk in a clean and wholesome condition, that duty was owed to the city, enforceable through criminal punishment, nuisance abatement, or the assessment procedures under the Streets and Highways Code (*222 Cal. App. 3d 1585, 1591)* . The court emphasized that the defendant did not affirmatively create the hazard on which the plaintiff slipped, distinguishing a number of cases imposing liability on shop owners who were the source of the hazard (*222 Cal. App. 3d 1585, 1592)* .

In *Hosking v. San Pedro Marine, Inc. (1979) 98 Cal. App. 3d 98, 159 Cal. Rptr. 369* , the plaintiff, who was injured in

an automobile collision with a truck, sued the company that owned the truck and the thief that stole the truck. The court of appeal affirmed judgment for the owner (the thief was not involved in the appeal). The court noted that the defendant's violation of *Veh. Code § 22515* (requiring that unattended vehicles have their motors stopped and brakes set) did not proximately cause the plaintiff's injury and was not the kind of harm that the statute was designed to prevent. Moreover, the plaintiff was not in the class of persons for whose protection this law was enacted. The harm that the statute was designed to prevent is that resulting from runaway vehicles, rather than that resulting from thefts. The court found that the plaintiff was not the victim of a runaway vehicle, but of an irresponsible thief seeking to avoid capture by the authorities (*98 Cal. App. 3d 98, 102)* .

California Points & Authorities

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
CHAPTER 165 NEGLIGENCE
PART II. FORMS
B. Duty
3. Breach of Statutory Duty

16-165 California Points & Authorities § 165.81

§ 165.81 Defendant Rebutted Presumption of Negligence Under Evidence Code § 669

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT HAS REBUTTED THE PRESUMPTION OF NEGLIGENCE SET FORTH IN SECTION 669 OF THE EVIDENCE CODE IN THAT DEFENDANT HAS PRESENTED SUFFICIENT PROOF THAT DEFENDANT ACTED AS MIGHT BE REASONABLY EXPECTED OF A PERSON OF ORDINARY PRUDENCE ACTING UNDER SIMILAR CIRCUMSTANCES, WHO DESIRED TO COMPLY WITH THE LAW.

Defendant Acted Reasonably Under Circumstances. The presumption of a failure to exercise due care is rebutted by proof that the person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence acting under similar circumstances, who desired to comply with the law (*Evid. Code § 669(b)(1)*; *see Alarid v. Vanier (1958) 50 Cal. 2d 617, 624, 327 P.2d 897*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the defendant has rebutted the presumption of negligence under *Evid. Code § 669(a)* [*see Evid. Code § 669(b)*].

This issue may arise in several procedural contexts. For example, the defendant may raise the issue on an appeal from an adverse judgment, if the issue on appeal is the propriety of a jury instruction regarding the statutory violation [*see, e.g., Alarid v. Vanier (1958) 50 Cal. 2d 617, 620, 327 P.2d 897]* , or in support of a motion for nonsuit [*see, e.g., Salinero v. Pon (1981) 124 Cal. App. 3d 120, 126, 177 Cal. Rptr. 204]* .

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should discuss how the defendant has sustained the burden of showing that he or she did what would reasonably be expected of a person with ordinary prudence under similar circumstances [*see Alarid v. Vanier (1958) 50 Cal. 2d 617, 624, 327 P.2d 897]* .

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and a form of complaint with respect to negligence based on violation of statute, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in § 165.70* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Defendant Acted Reasonably Under Circumstances

In ***Alarid v. Vanier*** *(1958) 50 Cal. 2d 617, 327 P.2d 897* , the plaintiff's car was struck by that of the defendant. The defendant attempted to apply his brakes, but they did not work. A presumption of negligence arose at trial by reason of the defendant's operation of a vehicle without brakes, which was in violation of former Veh. Code §§ 670 and 679. After judgment was granted for the defendant, the plaintiff appealed, contending that the judgment was contrary to the evidence and that certain jury instructions were improper.

The Supreme Court affirmed, finding that the defendant produced sufficient evidence to rebut the presumption of negligence that arose when the defendant violated the statute. The Court stated that the correct test to apply is whether or not the person violating the statute has sustained the burden of showing that he or she did what might reasonably be expected of a person of ordinary prudence (*50 Cal. 2d 617, 624)* . It appeared to the Court that the evidence was sufficient to go to the jury on the question whether or not the defendant acted as an ordinary prudent person who wished to comply with the statutory requirements regarding brakes. The evidence showed that the defendant had the car checked frequently and had no reason to suspect that the brakes would not be operational (*50 Cal. 2d 617, 624)* . The evidence was uncontradicted and amply sufficient to show that prior to the accident, the defendant took reasonable precautions to see that his brakes were in good working condition. The Court concluded that under the circumstances there had been no miscarriage of justice (*50 Cal. 2d 617, 625)* .

NOTE:

Although this case was decided prior to the enactment of *Evid. Code § 669* in 1967, subsequent cases continued to hold that the presumption of negligence that arises from the violation of a statute is rebuttable and may be overcome by evidence of justification [*see Byrne v. City & County of San Francisco (1980) 113 Cal. App. 3d 731, 740, 170 Cal. Rptr. 302]* .

[4] Additional Authorities

[a] Defendant Acted Reasonably Under Circumstances

In *Byrne v. City & County of San Francisco (1980) 113 Cal. App. 3d 731, 170 Cal. Rptr. 302* , the court of appeal affirmed judgment for the defendants in an action in which the plaintiff was struck by the defendant's car. The plaintiff contended that a new trial should be granted in that the evidence established negligence per se because the defendants violated *Veh. Code § 21950*, setting forth the reciprocal duties of motorists and pedestrians when a pedestrian crosses the street within either a marked or unmarked crosswalk. The court noted that in determining if the party has overcome the presumption, the correct test is whether or not the violator of the statute has met the burden of showing that he or she did what might be expected of a person of ordinary prudence who desired to comply with the law, acting under similar circumstances). In this case, the court held that although the defendant violated the statute by striking the plaintiff in the crosswalk, that conduct was justified under the circumstances (*113 Cal. App. 3d 731, 740-741)* .

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16-165 California Points & Authorities § 165.82

§ 165.82 Defendant's Compliance With Statute Met Standard of Care

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT DID NOT BREACH HIS/HER/ITS DUTY TO PLAINTIFF BECAUSE DEFENDANT COMPLIED FULLY WITH THE PROVISIONS OF THE _____ [STATUTE *or* ORDINANCE *or* REGULATION] PRESCRIBING THE STANDARD OF CARE REQUIRED OF DEFENDANT.

Statutory Compliance Met Standard of Care. In the ordinary situation contemplated by a statute or administrative rule, the minimum standard prescribed by the legislation or regulation may be accepted as a sufficient standard of care, and the defendant's compliance with that standard may establish that no breach of duty occurred (*Ramirez v. Plough, Inc. (1993) 6 Cal. 4th 539, 547-548, 25 Cal. Rptr. 2d 97, 863 P.2d 167*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the defendant fully complied with the provisions of a statute, ordinance, or regulation that prescribed the standard of care owed by the defendant to the plaintiff [*see* *Ramirez v. Plough, Inc. (1993) 6 Cal. 4th 539, 547-548, 25 Cal. Rptr. 2d 97, 863 P.2d 167]* .

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should discuss the particular statute, ordinance, or regulation, and how the defendant's conduct fully complied with its provisions.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and a form of complaint with respect to negligence based on violation of statute, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in § 165.70* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Statutory Compliance Met Standard of Care

In ***Ramirez v. Plough, Inc.*** *(1993) 6 Cal. 4th 539, 25 Cal. Rptr. 2d 97, 863 P.2d 167* , the plaintiff's mother, who was literate only in Spanish, gave him a children's aspirin manufactured by the defendant. The aspirin's label warned users in English not to administer it to children without consulting a doctor because of the possibility of contracting Reye's Syndrome. These warnings fully complied with both California and federal statutes and regulations governing the labeling of nonprescription drugs. The plaintiff subsequently developed Reye's Syndrome, which left him severely disabled. The plaintiff, by and through his mother as guardian ad litem, sued the defendant for negligence on the ground that the defendant failed to warn that its aspirin could cause Reye's Syndrome. The defendant moved for summary judgment on the ground that its English language label warnings were adequate. The trial court granted the defendant's motion, holding that the defendant had no duty to supply warnings in a foreign language. The plaintiff appealed.

The court of appeal reversed, ruling that the adequacy of a product warning is normally a question of fact, and that the defendant's knowledge that persons literate only in Spanish were using its aspirin made the reasonableness of the defendant's failure to provide warning labels in Spanish a triable issue of fact. The defendant sought review by the California Supreme Court.

The Supreme Court reversed the judgment of the court of appeal and ordered it to affirm the trial court's summary judgment for the defendant. Before the Supreme Court, the defendant argued that state and federal statutes and regulations controlling the packaging and labeling of nonprescription drugs, which require warning labels only in English, have prescribed the standard of care that the defendant owes the plaintiffs and other users of its products. Having complied fully with these statutory and regulatory requirements, the defendant contended it had met its duty and was therefore not negligent. The Court acknowledged that statutory compliance as a defense to tort liability is uncommon and not generally favored. The Court nevertheless held that in the ordinary situation contemplated by the statute or regulation and in the absence of unusual circumstances, compliance with the minimum standard of care prescribed by the statute or regulation may be sufficient to establish that no breach of duty occurred (*6 Cal. 4th 539, 547-548)* . The Court pointed out that defining when warnings or other information must be in a language other than English is a task for which legislative and administrative bodies are particularly well suited, because of their ability to investigate, gather data, and consider the viewpoints of all affected parties. If the Court rejected the statutes and regulations at issue in this case as the proper standard of care, it would have to choose between two alternatives: (1) resolving the question of non-English warning labels on a case-by-case basis under the usual reasonable person standard of care; or (2) judicially declaring a particular standard of care. The Court noted that the first alternative would probably compel manufacturers such as the defendant to supply warning in multiple foreign languages because it is foreseeable

that someone proficient only in a particular foreign language will eventually purchase a particular nonprescription drug. The burden on manufacturers wold be onerous and possibly counterproductive by resulting in product inserts so large that a user could not easily find the warning in the user's language. The Court noted that, unlike legislative and administrative bodies, it lacked the procedure and resources to choose the second alternative (*6 Cal. 4th 539, 552-553)* . The court therefore concluded that the prudent course was to adopt for tort purposes the existing legislative and administrative standard of care (*6 Cal. 4th 539, 553)* .

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16-165 California Points & Authorities §§ 165.83-165.89

[Reserved]

§§ 165.83[Reserved]

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4. Public Policy

16-165 California Points & Authorities § 165.90

§ 165.90 Public Policy Precludes Imposition of Duty

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

A DUTY SHOULD NOT BE IMPOSED ON DEFENDANT BECAUSE THE IMPOSITION OF A DUTY IN THIS CASE WOULD CONTRAVENE PUBLIC POLICY IN THAT _____ [*describe*].

A. Public Policy Considerations Warrant Nonliability for Negligence. Judicial recognition of a duty on the part of a defendant is initially dictated or precluded by considerations of public policy, and public policy considerations as exceptional factors might alone warrant nonliability for negligence (*Peter W. v. San Francisco Unified Sch. Dist. (1976) 60 Cal. App. 3d 814, 822, 131 Cal. Rptr. 854* ; *see* *Rowland v. Christian (1968) 69 Cal. 2d 108, 112-113, 70 Cal. Rptr. 97, 443 P.2d 561*).

B. Policy Factors Considered in Scope of Duty Determination. [*See § 165.30, Paragraph D.*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the imposition of a duty on the defendant would contravene public policy. It may be combined with the *form in § 165.91*, if applicable to the particular case.

This issue may arise in any of several procedural situations, including on demurrer or summary judgment [*see, e.g., Peter W. v. San Francisco Unified Sch. Dist. (1976) 60 Cal. App. 3d 814, 817, 131 Cal. Rptr. 854* (demurrer); *see also Rowland v. Christian (1968) 69 Cal. 2d 108, 110, 70 Cal. Rptr. 97, 443 P.2d 561* (summary judgment)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should discuss the negligent conduct allegedly involved in the action in light of various public policy considerations and should argue that these considerations preclude the imposition of a duty on the defendant in the action.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of complaints and answers regarding a cause of action for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§ 165.91*. For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Public Policy Considerations Warrant Nonliability for Negligence

The factual and procedural background of ***Rowland v. Christian*** *(1968) 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561* , is discussed in *§ 165.30[3][d]*. In reversing a summary judgment for the defendant in an action involving damages for personal injuries caused by a defective bathroom faucet, the Supreme Court noted that all persons are required to use ordinary care to prevent others from being injured as a result of their conduct. The Court stated, however, that there are exceptions to this general principle that are based on public policy considerations (*69 Cal. 2d 108, 112)* . The major policy considerations are: the foreseeability of harm to the plaintiff; the degree of certainty that the plaintiff suffered injury; the closeness of the connection between the defendant's conduct and the injury suffered; the moral blame attached to the defendant's conduct; the policy of preventing future harm; the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach; and the availability, cost, and prevalence of insurance for the risk involved (*69 Cal. 2d 108, 112-113)* .

Peter W. v. San Francisco Unified Sch. Dist. *(1976) 60 Cal. App. 3d 814, 131 Cal. Rptr. 854* , was an action by a high school graduate against a public school district and its administrative board for negligently failing to educate him properly and for negligently or intentionally misrepresenting his progress to his mother. The trial court granted the defendants' general demurrer with leave to amend and dismissed the action when the plaintiff failed to amend. The plaintiff appealed.

The court of appeal affirmed the dismissal, stating that for public policy reasons, the defendants did not owe a duty of care to the plaintiff (*60 Cal. App. 3d 814, 821-822)* . Citing *Rowland v. Christian (1968) 69 Cal. 2d 108, 112, 70 Cal. Rptr. 97, 443 P.2d 561* [*see § 165.30[3][d]*], the court noted that the Supreme Court has defined various public policy considerations as exceptional factors that might alone warrant nonliability for negligence. Liability flows from the fundamental principle that all persons are required to use ordinary care to prevent others from being injured as the result of their conduct, unless a departure from this rule is clearly supported by public policy (*60 Cal. App. 3d 814, 822-823)* . In this case, the court felt that educational institutions should not be held to an actionable duty of care because that would expose them to tort claims of disaffected students and parents in countless numbers. Considering the role imposed on the public schools by the law and the limitations imposed on them by publicly supported budgets, the court found no such duty on the part of the school to properly provide the plaintiff with adequate instruction (*60 Cal. App. 3d 814, 825)* . The court also held, on the basis of public policy considerations, that the plaintiff's complaint stated no cause of action for negligent misrepresentation (*60 Cal. App. 3d 814, 827)* . After examining the other counts presented by the plaintiff, the court affirmed the judgment (*60 Cal. App. 3d 814, 827-828)* .

[4] Additional Authorities

[a] Public Policy Considerations Warrant Nonliability for Negligence

In *Rice v. Center Point, Inc. (2007) 154 Cal. App. 4th 949, 65 Cal. Rptr. 3d 312* , plaintiffs were attacked and injured in a park by inmates who had escaped from a nearby residential substance abuse treatment facility. The inmates had been assigned to the facility by the Department of Corrections and they escaped at night through a window with a steak knife that they stole from the facility kitchen. The court of appeal held that the facility owed no legal duty to the neighborhood residents who were injured by the escaped inmates, even if the treatment facility was negligent in allowing the inmates to escape. Relying on earlier court of appeal decisions that had reached a similar conclusion, the court held that the imposition of a duty in such circumstances was outweighed by the public policy of encouraging the rehabilitation of criminal offenders, the lack or foreseeability of injury to any specifically identifiable individual, and the fact that the risk of injury was shared by all members of the general public (*154 Cal. App. 4th 949, 958-959)* .

In *Munoz v. City of Union City (2004) 120 Cal. App. 4th 1077, 16 Cal. Rptr. 3d 521* , family members of a decedent brought a lawsuit against the police officer who shot and killed the decedent, as well as against the agency and city employing the officer. The officer was in charge of a police response to a call that brought several officers to the decedent's residence when she was high on methamphetamine and armed with two knives. She was contained in her residence, but appeared very agitated, and she was convinced that someone was trying to hurt her. The police feared for the safety of the decedent's daughter and father, who were also in the house, although the decedent had made no threats toward them. The police stationed outside the house tried to talk to the decedent and calm her, with little success. When the decedent, who until then had been standing by the open front door, made a slight move in the direction in which her daughter and father had gone, the officer shot and killed her. The jury found in favor of the plaintiffs, but the court of appeal reversed in part. The court held that the trial court erred in allowing the jury to impose liability based on the alleged negligence of the officer when making tactical decisions after arriving on the scene, but prior to the shooting. Under the court's earlier analysis in *Adams v. City of Fremont (1998) 68 Cal. App. 4th 243, 80 Cal. Rptr. 2d 196* , discussed in *§ 165.60[4][b],* public policy precluded holding the agency and city liable for the officer's alleged negligence in making tactical decisions during a crisis situation if those decisions proved to be ineffective in preventing harm. Therefore, liability could not be predicated on the officer's alleged negligence in deciding how to deploy the other officers at the scene, or otherwise in handling the attempt to defuse the situation (*120 Cal. App. 4th 1077, 1097-1098)* . However, under traditional legal principles, the officer could be liable, and his employers vicariously liable, for the officer's unreasonable use of deadly force. The court then concluded that substantial evidence supported the jury's finding that the use of deadly force was unreasonable under the circumstances (*120 Cal. App. 4th 1077, 1099-1105)* . The court also reversed a finding that the agency and city could be directly liable for their own negligence in failing to promulgate better police procedures or properly train or supervise their officers, because imposing direct liability on a public entity required a specific statutory authority, and no such authority existed for imposing liability under the theories advanced by the plaintiffs (*120 Cal. App. 4th 1077, 1111-1114)* .

The factual and procedural background of *Adams v. City of Fremont (1998) 68 Cal. App. 4th 243, 80 Cal. Rptr. 2d 196* , is discussed in *§ 165.60[4][b]*. In *Adams,* the court found that a duty of care could not be imposed under the circumstances through weighing of the *Rowland* factors, largely due to policy concerns for the safety of the police and third parties. The court also declined to impose a duty of care on the ground that a "special relationship" had been forged between the police and the decedent, creating a duty on the part of the police to exercise reasonable care to prevent decedent's suicide. In reaching this conclusion, the court noted that the same policy concerns that weigh against the imposition of a legal duty of care under a *Rowland* analysis may also weigh against imposition of a duty under the "special relationship" doctrine (*68 Cal. App. 4th 243, 285)* .

In *White v. Southern Cal. Edison Co. (1994) 25 Cal. App. 4th 442, 30 Cal. Rptr. 2d 431* , the moped driven by the plaintiff collided with a van at an intersection after dark. The plaintiff claimed that the street lights at the intersection were not functioning adequately and did not sufficiently illuminate the intersection, which diminished the plaintiff's

ability to see other vehicles in the intersection. The plaintiff filed suit against the defendant, which owned and maintained the street lights under a contract with the County of Los Angeles. The trial court granted summary judgment to the defendant, holding that the defendant had no duty to the plaintiff to maintain the street lights in an operable condition. The plaintiff appealed. The court of appeal affirmed, observing that no California court had yet decided the precise issue in this case, but several out-of-state courts had held that a utility company's duty to supply street lighting extended only to the public entity with which it had contracted and not to the general public. In agreeing with these courts, the court held that imposing liability would create a burden on the utility by increasing utility costs and disrupting existing rate schedules. This burden would far outweigh any benefit to the motoring public, because the use of headlights makes it unlikely that an inoperable street light would be a substantial factor in causing a collision and because insurance is available to cover the resulting damages (*25 Cal. App. 4th 442, 450-451)* .

The factual and procedural background of *Koepke v. Loo (1993) 18 Cal. App. 4th 1444, 23 Cal. Rptr. 2d 34* , is discussed in *§ 165.10[3][a]*. In *Koepke*, the court of appeal held that strong public policy favors the encouragement of voluntary acts of assistance by not imposing undefined and indefinite additional obligations as a consequence of volunteering (*18 Cal. App. 4th 1444, 1457)* . The court noted that this case essentially involved a domestic dispute and held that society particularly favors attempts to help in these types of disputes because they are commonplace and often lead to violence. Therefore, imposing a continuing duty to warn and protect would contravene that policy by dissuading friends and associates from any attempt at assisting the parties involved (*18 Cal. App. 4th 1444, 1458)* .

In *Jordy v. County of Humboldt (1992) 11 Cal. App. 4th 735, 14 Cal. Rptr. 2d 553* , an adolescent sued for damages for injuries suffered while in the care of a foster family where he had been placed by a county social worker after being removed from the custody of his natural parents. He alleged that the county was liable because, having removed him from the custody of his natural parents, it owed a duty of care to him that it could not delegate to foster parents. The court of appeal affirmed the trial court's order of a new trial following a jury verdict for the plaintiff. The court held that a public agency may delegate the responsibility for children removed from their parents to foster parents and others without fear that it will be liable for injury proximately caused by occasional negligence in the day-to-day supervision of the children. The court stated that a contrary result would impose such a burden on the already difficult administration of juvenile law that any benefit to individual minors would be far outweighed by the damage to the greater number (*11 Cal. App. 4th 735, 741-742)* .

In *Allen v. Toten (1985) 172 Cal. App. 3d 1079, 218 Cal. Rptr. 725* , the court of appeal refused to hold police officers or a public entity liable for negligent infliction of emotional distress to a family member who was brought to the scene of a police standoff to aid in the surrender of an armed and suicidal relative. The court stated that police officers, as a matter of public policy, have no duty to prevent the family member from witnessing what is obvious, potential, and inherent in all such crises. Instead, it is the duty of the family member to weigh the risks of emotional trauma against the benefit of saving the life of a loved one, and, after weighing these risks, the family member, unlike the police, may decline to go to the scene (*172 Cal. App. 3d 342, 1091)* .

The factual and procedural background of *Beauchene v. Synanon Found., Inc. (1979) 88 Cal. App. 3d 342, 151 Cal. Rptr. 796* , is discussed in *§ 165.20[4][a]*. In *Beauchene*, the court of appeal affirmed a demurrer to the plaintiff's complaint in an action in which a convicted criminal escaped from a rehabilitation facility operated by the defendant and harmed the plaintiff. The court listed various policy considerations that must be considered in determining whether or not the defendant owes a duty to the plaintiff. In this action, the court stated that it must balance the public interest in safety from violent assault against the public policy favoring innovative private criminal release and rehabilitation programs (*88 Cal. App. 3d 342, 347)* . In weighing these considerations, the court concluded that the defendant owed no legal duty to the plaintiff (*88 Cal. App. 3d 342, 348)* .

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16-165 California Points & Authorities § 165.91

§ 165.91 Social Utility of Defendant's Conduct Militates Against Imposing Duty

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT DOES NOT OWE PLAINTIFF A DUTY OF CARE BECAUSE THE OPERATION OF DEFENDANT'S _____ [*describe machine or apparatus*] IS SOCIALLY BENEFICIAL AND THAT _____ [*describe machine or apparatus*] WAS BEING PROPERLY USED IN THE MANNER FOR WHICH IT WAS DESIGNED.

Social Utility of Defendant's Conduct. The social utility of a socially beneficial machine or apparatus that is properly used in the manner for which it was designed, may preclude the imposition of a duty on the owner of the machine or apparatus (*Parsons v. Crown Disposal Co. (1997) 15 Cal. 4th 456, 474, 63 Cal. Rptr. 2d 291, 936 P.2d 70*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that a defendant does not owe a duty of care to the plaintiff because the operation of the defendant's machine or apparatus was socially beneficial [*see Parsons v. Crown Disposal Co. (1997) 15 Cal. 4th 456, 474, 63 Cal. Rptr. 2d 291, 936 P.2d 70* (injury to a horseback rider when horse was frightened by garbage truck)]. It should be combined with the *form in § 165.90*, if applicable to the particular case.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may argue that the defendant's machine or apparatus is socially beneficial, for specified reasons relating to the performance

of vital public service and a matter of high social utility. Counsel may also argue that to impose restrictions suggested by the plaintiff would be unduly burdensome to the defendant in light of the social utility of the purpose of the machine or apparatus.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of answers regarding a cause of action for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§ 165.90*. For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Social Utility of Defendant's Conduct

The factual and procedural background of ***Parsons v. Crown Disposal Co.*** *(1997) 15 Cal. 4th 456, 476, 63 Cal. Rptr. 2d 291, 936 P.2d 70* , is discussed in *§ 165.60[3][b]*. The Supreme Court ruled that the court of appeal erred in reversing the trial court judgment in favor of the defendant, a garbage company. Noise from the defendant's garbage truck, which was being operated in its usual manner, frightened a horse being ridden by the plaintiff on a nearby trail. Public policy reasons, the social utility of the defendant's conduct in particular, precluded the imposition of a duty on the defendant. The court's analysis began with early cases which stood for the proposition that, as a matter of policy, there is no liability for fright to a horse and consequent damages arising therefrom if all the plaintiff can point to is that a socially beneficial machine or apparatus was properly used in the manner for which it was designed. According to the Court, nothing involved in this social utility analysis has changed to direct a different result. If anything, given the declining relative importance of horses in contemporary society, the court held that the defendant's position had strengthened. The court found that the defendant's garbage collection activity was a vital public service and a matter of high social utility and that there was no basis for treating a garbage truck differently from the various machines and devices discussed in those early cases, nor was there any reason for increasing the burden on machine operators over what was considered reasonable in an earlier age, when horse riding was more than a mere recreational activity. The Court rejected the plaintiff's argument that the defendant might have guarded against his injuries by employing various preventative measures--for example, by changing the hours of collection, temporarily blocking off the area with warning cones or tape, posting warning signs, or providing riders with a schedule of collection times. It ruled that to impose such conditions on the employment of beneficial machines would impair the utility of the devices (*15 Cal. 4th 456, 474)* .

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[Reserved]

§§ 165.92[Reserved]

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5. Duty Arising From Contract

16-165 California Points & Authorities § 165.100

§ 165.100 Defendant Breached Duty Arising From Contract

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT OWED A DUTY TO PLAINTIFF CREATED BY CONTRACT. THE BREACH OF THAT DUTY BY DEFENDANT CREATED A CAUSE OF ACTION BASED ON NEGLIGENCE, [WHICH MAY BE ASSERTED BY PLAINTIFF EVEN THOUGH PLAINTIFF WAS NOT IN PRIVITY OF CONTRACT WITH DEFENDANT].

A. Duty Created by Contract. A contract not only creates certain contractual rights and obligations between the contracting parties that may be enforced through an action on the contract, but may also create duties the breach of which creates a cause of action based on negligence (*see Eads v. Marks (1952) 39 Cal. 2d 807, 810-811, 249 P.2d 257*).

[*Optional*] **B. Liability to Persons Not in Privity.** The determination of whether or not the defendant is liable to a third person not in privity is a matter of policy and involves the balancing of various factors, including (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct, and (6) the policy of preventing future harm (*Christensen v. Superior Court (1991) 54 Cal. 3d 868, 891, 2 Cal. Rptr. 2d 79, 820 P.2d 181* ; *Biakanja v. Irving (1958) 49 Cal. 2d 647, 650, 320 P.2d 16*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the defendant owed a duty to the plaintiff based on a contract and the breach of that duty gave rise to an action for negligence [*see, e.g., Eads v. Marks*

(1952) 39 Cal. 2d 807, 810-811, 249 P.2d 257] . Optional Paragraph B may be submitted if the plaintiff and the defendant were not in privity of contract.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should discuss the contract involved and show how the duty arises from this contract. If there was no privity of contract between the plaintiff and the defendant, counsel should show how the facts of the case, in light of public policy considerations, warrant the imposition of a duty on the defendant [*see Eads v. Marks (1952) 39 Cal. 2d 807, 810-811, 249 P.2d 257* ; *see also Biakanja v. Irving (1958) 49 Cal. 2d 647, 650-651, 320 P.2d 16]* .

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of complaint for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in §§ 165.110 -165.111* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Duty Created by Contract

In ***Eads v. Marks*** *(1952) 39 Cal. 2d 807, 249 P.2d 257* , a two-year-old child was cut by a glass milk bottle that was left on his family's doorstep by an employee of the defendant, a creamery company. The child's father, a customer of the creamery company, had informed its employees not to leave glass containers on the back porch of the family's residence because his child might be injured. The defendant, however, left a milk container on the back porch, which fell and cut the child's face. The defendant demurred to the plaintiffs' complaint. The demurrer was sustained, and judgment was entered in favor of the defendant. The plaintiffs appealed.

The Supreme Court reversed, finding that there was a contract between the father and the defendant and that the child was a third-party beneficiary of this contract. The Court stated that the plaintiffs, the father and child, had a cause of action in tort as well as in contract. Even if there is a contractual relationship between the parties, a cause of action in tort may sometimes arise out of the negligent manner in which the contractual duty is performed or out of a failure to perform that duty (*39 Cal. 2d 807, 810)* . In this case, the duty of care arose by reason of the contract, and the plaintiffs had sued in tort for the breach of that duty. The Court noted that the contract is of significance only in creating the legal duty and that the negligence of the defendant should not be considered as a breach of contract, but as a tort governed by tort rules (*39 Cal. 2d 807, 811)* . Although the injury resulted from the independent intervening act of the child, the occurrence was readily foreseeable and should have been anticipated by the defendant (*39 Cal. 2d 807, 812)* . Because the other points raised by the defendant could have been obviated by amendment, the lower court abused its discretion in sustaining a demurrer without leave to amend (*39 Cal. 2d 807, 812-813)* .

[b] Liability to Persons Not In Privity

In ***Christensen v. Superior Court*** *(1991) 54 Cal. 3d 868, 2 Cal. Rptr. 2d 79, 820 P.2d 181* , surviving spouses, relatives, and designated representatives of several decedents whose remains had been mishandled brought actions against a mortuary and crematory, seeking recovery of damages for emotional distress. The trial court ordered that only the plaintiffs entitled under *Health & Safety Code § 7100* to control the disposition of the decedents' remains, or those who actually contracted for the disposition, had standing to sue. The other plaintiffs petitioned for writ of mandate. The court of appeal treated the ruling as one in the nature of a ruling on a demurrer and considered whether the allegations stated a cause of action for which each plaintiff could recover emotional distress damages. After issuance of an alternative writ, the court of appeal directed that a peremptory writ issue to compel the trial court to modify its order to recognize the standing of additional plaintiffs.

The Supreme Court modified the judgment of the court of appeal to direct the superior court to conform its order on standing to sue to reflect the views expressed in the Court's opinion. The specific issue was whether persons other than those who contract for the services of mortuaries and crematoria or who have a statutory right to direct the disposition of the body of a decedent may recover damages for emotional distress engendered by knowledge of the negligent or intentional mishandling of the decedent's remains, if they did not observe the misconduct or its consequences. The Court reiterated the principle that to recover for negligence, the potential plaintiff must be a person to whom the defendant owes a duty recognized by the law (*54 Cal. 3d 868, 876)* . The Court found that the defendants assumed a duty to the close relatives of the decedents for whose benefit they were to provide funeral and or related services, under which they created a special relationship obligating them to perform those services in the dignified and respectful manner the bereaved expect of mortuary and crematory operators (*54 Cal. 3d 868, 890-891)* .

Citing ***Biakanja v. Irving*** *(1958) 49 Cal. 2d 647, 320 P.2d 16* , which held that a notary who negligently prepared a will had assumed and breached a duty to an intended beneficiary, the Court stated that tort recovery for breach of a duty arising out of a third-party contract is consistent with well-established California precedent. The Court quoted *Biakanja,* stating that the determination whether in a specific case the defendant is liable to a third person not in privity is a matter of policy involved the balance of various factors, including (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct, and (6) the policy of preventing future harm. The Court concluded that in this case, as in *Biakanja,* a benefit to the plaintiff was the purpose of the contract. The damage was foreseeable (*54 Cal. 3d 868, 891)* .

In ***Biakanja v. Irving*** *(1958) 49 Cal. 2d 647, 320 P.2d 16* , the plaintiff brought an action for damages against a notary public for drawing an invalid will for the plaintiff's brother. The will, which devised and bequeathed all of the decedent's property to the plaintiff, was denied probate for lack of sufficient attestation. The court entered judgment for the plaintiff, and the defendant appealed.

The Supreme Court affirmed. The principal question was whether or not the defendant was under a duty to exercise due care to protect the plaintiff from injury and was liable for damages caused to the plaintiff by the defendant's negligence, even though they were not in privity of contract (*49 Cal. 2d 647, 648)* . The determination of whether or not the defendant is liable to a third person not in privity is a matter of policy involving the balance of various factors, including (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct, and (6) the policy of preventing future harm (*49 Cal. 2d 647, 650)* . In this case, the aim of the transaction was to provide for the passing of the decedent's estate to the plaintiff. The Court found that the defendant must have been aware from the terms of the will that if faulty solemnization caused the will to be invalid, the plaintiff would suffer the very loss that occurred (*49 Cal. 2d 647, 650)* . Because the decedent died without revoking his will, the plaintiff, but for the defendant's negligence, would have received all of his property. The fact that the plaintiff received only one-eighth of the property was directly

caused by the defendant's conduct (*49 Cal. 2d 647, 650-651)* . In addition, the defendant's conduct was not only negligent, but consisted of the unauthorized practice of law. Therefore, the Court concluded that the plaintiff should be allowed recovery despite the absence of privity (*49 Cal. 2d 647, 651)* .

[4] Additional Authorities

[a] Duty Created by Contract

In *National Union Fire Ins. Co. of Pittsburgh, PA v. Cambridge Integrated Services Group, Inc. (2009) 171 Cal. App. 4th 35, 89 Cal. Rptr. 3d 473* , a self-insured bank hired a company to handle workers' compensation claims made by the bank's employees. Despite self-insured status, the bank also had an excess insurer policy that paid workers' compensation claims to the extent they exceeded $250,000. The claims administrator approved surgery for an employee. The employee was severely injured due to the surgery, resulting in a workers' compensation claim of over $1.5 million, for which the excess insurer was liable. The excess insurer sued the claims administration company on the grounds that the employee's claim and request for surgery was wrongly approved due to the negligence of the claims administrator. The trial court sustained the defendant's demurrer, but the court of appeal reversed. The court held that the claims administrator owed a duty of care to the excess insurer under the circumstances of the case, even though the excess insurer was not a party to the administrator's contract with the bank. In reaching this conclusion, the court noted that the contract for claims services was clearly intended to benefit the excess insurer to the same extent that it was to benefit the bank, at least when the claim was likely to reach $250,000 or more; it was clearly foreseeable that the mishandling of such a claim would affect the excess insurer; the administrator's allegedly negligent conduct in approving the claim and the surgery, which directly caused injury to the claimant, could be found by the trier of fact to be a cause of the insurer's loss; negligence in the execution of contractual duties is generally held to be morally blameworthy; and to the extent imposition of liability for breach of contract would prevent future harm, imposition of a tort duty of care that runs to plaintiff would further that purpose as well. The court also noted that imposition of a duty of care would not result in a new or additional duty that did not already exist for the claims administrator, as the administrator already owed a duty to the bank to process claims without negligence (*171 Cal. App. 4th 35, 46-47)* .

In *Stonegate Homeowners Assn. v. Staben (2006) 144 Cal. App. 4th 740, 50 Cal. Rptr. 3d 709* , a homeowners' association brought an action against a general contractor and a subcontractor for damages sustained by the failure to properly waterproof retaining walls and provide adequate drainage on a large residential construction project. The general contractor settled and the action went to trial only against the subcontractor, who had been hired by the general contractor to perform the relevant work. The trial court refused to admit evidence as to whether the subcontractor's work met the standard of care in the industry, concluding that such evidence was irrelevant because the issue was whether the subcontractor performed the work as instructed by the general contractor under their oral contract. In the absence of evidence that the subcontractor was negligent, the trial court granted nonsuit for the subcontractor. The court of appeal reversed. The court noted that despite the lack of privity of contract, it is clearly established that a subcontractor on a construction project can be held liable in negligence to the party who hires the general contractor if the subcontractor's work is not performed in a good and workmanlike manner. The subcontractor had agreed to perform the waterproofing and drainage work, owed a duty to perform that work in a good and workmanlike manner, and the excluded evidence was relevant to establishing whether the subcontractor's work on the project fell below the applicable standard of care (*144 Cal. App. 4th 740, 748-749)* .

In *North Am. Chem. Co. v. Superior Court (1997) 59 Cal. App. 4th 764, 69 Cal. Rptr. 2d 466* , the plaintiff sued the defendant for negligence, seeking to recover money it paid as damages in settlement of a customer's claim that arose from a contaminated product packaged and shipped for the plaintiff by the defendant. The defendant demurred to the negligence cause of action, contending that it was liable, if at all, only for breach of contract. The trial court sustained the defendant's demurrer without leave to amend, and the plaintiff sought a writ of mandate to compel the restoration of the negligence action. The court of appeal issued a peremptory writ directing the trial court to vacate its order sustaining the demurrer to the negligence cause of action and enter a new order sustaining the demurrer with leave to amend. It

held that the plaintiff's packaging and shipping contract with the defendant imposed a duty on the defendant that required it to perform its contractual obligations reasonably and carefully. The plaintiff alleged sufficient facts to demonstrate that the defendant failed to do so (*59 Cal. App. 4th 764, 776, 787)* .

In *Bloomberg v. Interinsurance Exch. (1984) 162 Cal. App. 3d 571, 207 Cal. Rptr. 853* , the plaintiff alleged that his son was killed when he was struck by a car driven by a drunk driver after the defendant, an automobile club, negligently failed to send a tow truck. On appeal from a judgment of dismissal entered on the sustaining of a demurrer without leave to amend, the threshold question was whether the defendant owed a duty of care to the plaintiff's son. The allegations of the complaint in relation to the defendant sounded in a negligent performance of contract theory. The defendant's demurrer did not deny the existence of a contractual duty, but instead argued that the defendant did not contribute to the accident. The court stated that although the plaintiff's ability to go forward on a contractual theory would depend on the wording of the contract (which was not before the court of appeal), the plaintiff should be given the opportunity to amend his complaint to state a cause of action, solely or alternatively, that describes a negligent undertaking (*162 Cal. App. 3d 571, 576)* . Therefore, the trial court erred in holding that the defendant could not, as a matter of law, be held liable for the death of the plaintiff's son (*162 Cal. App. 3d 571, 577)* .

[b] Liability to Persons Not in Privity

In *Mintz v. Blue Cross of California (2009) 172 Cal. App. 4th 1594, 92 Cal. Rptr. 3d 422* , plaintiff was denied coverage for an experimental cancer treatment by the third-party administrator for plaintiff's health insurance plan. The administrator advised plaintiff of the right to internal review of that decision, but failed to notify of the right to request an independent external review as required by statute. In addition, the health plan itself stated that a member would be advised of the right to external review when the denial of services triggered such a right. Plaintiff sued the third-party administrator for intentional interference with contract, reckless infliction of emotional distress, and negligence. The trial court sustained defendant's demurrer on all causes of action, but the court of appeal reversed on the negligence cause of action, concluding that the administrator owed a duty of care to plan members despite lack of privity of contract with those members. Recognizing case authority for the proposition that an independent adjustor retained by an insurance company owes no duty of care to the insured with whom the adjustor has no contract to prevent economic harm caused by the handling of a claim, the court of appeal nonetheless held that a corporation under contract to a health plan to administer claims owes a duty to health plan members to exercise due care to protect those members from physical injury caused by negligence in denying benefits under the plan (*172 Cal. App. 4th 1594, 1611)* . Applying the *Biakanja* factors, the court concluded that the claims services were obviously intended to benefit plan members; it was foreseeable that members would be harmed if decisions on medical necessity were made imprudently; the moral blame for erroneous decisions to withhold medical treatment was apparent; and the policy of preventing future harm would be served by imposing negligence liability on the administrator. Given the record on appeal, the court was not as certain on application of the other two factors, the degree of certainty that plaintiff suffered injury and the closeness of the connection between the administrator's conduct and the injury suffered, but the court was not willing to find that no duty existed based on factual questions surrounding those factors, given that the other factors clearly supported finding a duty of care (*172 Cal. App. 4th 1594, 1612-1613)* .

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[Reserved]

§§ 165.101[Reserved]

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16-165 California Points & Authorities § 165.110

§ 165.110 Public Policy Precludes Imposition of Contractual Duty on Defendant Not in Privity

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT DID NOT OWE A DUTY TO PLAINTIFF THAT WAS CREATED BY CONTRACT BECAUSE THE PARTIES WERE NOT IN PRIVITY OF CONTRACT AND PUBLIC POLICY REASONS PRECLUDE A DUTY FROM BEING IMPOSED.

Public Policy Precludes Imposition of Duty. The determination of whether or not the defendant will be held liable to a third person not in privity of contract is a matter of policy. It involves the balancing of various factors, including (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct, and (6) the policy of preventing future harm (*Goodman v. Kennedy (1976) 18 Cal. 3d 335, 342-343, 134 Cal. Rptr. 375, 556 P.2d 737*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the defendant did not owe a duty imposed by contract, based on public policy reasons [*see Goodman v. Kennedy (1976) 18 Cal. 3d 335, 342-343, 134 Cal. Rptr. 375, 556 P.2d 737]* .

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should discuss the public policy considerations that preclude the imposition of a duty in this case [*see Goodman v.*

Kennedy (1976) 18 Cal. 3d 335, 343-344, 134 Cal. Rptr. 375, 556 P.2d 737] .

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of answers regarding a cause of action for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in § 165.100* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Public Policy Precludes Imposition of Duty

In ***Goodman v. Kennedy*** *(1976) 18 Cal. 3d 335, 134 Cal. Rptr. 375, 556 P.2d 737* , the plaintiffs brought an action for damages against an attorney for losses they suffered when they purchased shares of stock from the attorney's clients. The plaintiffs alleged, among other things, that the defendant negligently advised his clients that the shares could be issued to them as stock dividends and sold to third persons without the subsequent decline in the stock's value that ensued when the Securities and Exchange Commission suspended the stock's previously granted exemption from registration requirements. The trial court granted the defendant's demurrer to the plaintiffs' third amended complaint and subsequently entered a dismissal of the action. The plaintiffs appealed.

The Supreme Court affirmed. The Court noted that whether or not the attorney had a duty with respect to the allegedly negligent advice he gave is a question of law that depends on a weighing of policy considerations for and against the imposition of liability under the circumstances (*18 Cal. 3d 335, 342)* . The Court stated that privity of contract was not necessary for the imposition of a duty. Quoting *Biakanja v. Irving (1958) 49 Cal. 2d 647, 650, 320 P.2d 16* (discussed in *§ 165.100[3][b]*), the Court said that the determination of whether or not the defendant is liable to a third person not in privity is a matter of policy involving the balance of various factors, including (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct, and (6) the policy of preventing future harm (*18 Cal. 3d 335, 342-343)* .

In this case, the Court noted that the defendant had no relationship to the plaintiffs that would give rise to his owing the plaintiffs any duty of care, nor was the advice given by the defendant for the purpose of enabling the defendant's clients to discharge any obligation to the plaintiffs (*18 Cal. 3d 335, 343)* . In addition, although the plaintiffs contended that harm to them was foreseeable, the Court disagreed, noting that the defendant's clients had no wish or obligation to confer a benefit on the plaintiffs in this transaction. Furthermore, to impose a duty on attorneys, not only with respect to the client, but also with respect to other parties in the transaction with whom the client deals at arm's length, would inject undesirable self-protective reservations into the attorney's counseling role. An attorney's need to be concerned with the possibility of negligence claims by anyone with whom his or her client might deal would prevent the attorney from devoting all the attorney's energies to the client's interests (*18 Cal. 3d 335, 344)* .

[4] Additional Authorities

[a] Public Policy Precludes Imposition of Duty

White v. Southern Cal. Edison Co. (1994) 25 Cal. App. 4th 442, 445, 30 Cal. Rptr. 2d 431 , is discussed in *§ 165.90[4][a]*.

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16-165 California Points & Authorities § 165.111

§ 165.111 Defendant Did Not Breach Limited Contractual Duty to Party Not in Privity

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

ANY DUTY OWED TO PLAINTIFF IS STRICTLY LIMITED BY THE TERMS OF THE CONTRACT BETWEEN THE CONTRACTING PARTIES, AND DEFENDANT DID NOT BREACH THE DUTY OWED TO PLAINTIFF AS DELINEATED IN THAT CONTRACT.

Duty Limited by Terms of Contract. If a duty of due care is alleged to arise from a contract, a defendant's duty to a party not in privity to the contract is strictly limited by the terms of the contract (*see Cacciaguidi v. Elliott (1974) 39 Cal. App. 3d 261, 264, 114 Cal. Rptr. 93*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the defendant does not owe a duty to the plaintiff imposed by contract, on the ground that in the absence of privity of contract between the defendant and the plaintiff, the defendant's duty is limited by the terms of the contract [*see Cacciaguidi v. Elliott (1974) 39 Cal. App. 3d 261, 264, 114 Cal. Rptr. 93]* .

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should discuss the terms of the contract in light of the defendant's allegedly negligent conduct and argue that the defendant's duty should be limited by the contract terms [*see Cacciaguidi v. Elliott (1974) 39 Cal. App. 3d 261, 264, 114 Cal. Rptr. 93]* .

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of answers to a cause of action for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in § 165.100* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Duty Limited by Terms of Contract

In ***Cacciaguidi v. Elliott*** *(1974) 39 Cal. App. 3d 261, 114 Cal. Rptr. 93* , a woman who slipped and fell in a parking lot on a greasy substance brought an action for personal injuries against the janitorial service that had contracted with her employer to clean the parking lot. The defendant's motion for a nonsuit was granted. The plaintiff appealed.

The court of appeal stated that actionable negligence involves the breach of a legal duty on the part of the defendants. Any duty owed to the plaintiff stems from the contract between her employer and the defendants. That contract, however, provided that the defendant would sweep the blacktop with an industrial sweeper. The court noted that the industrial sweeper was designed to pick up dirt and paper, not oil or grease. There was no evidence that the contract required any greasy substance to be picked up (*39 Cal. App. 3d 261, 264)* . In addition, the evidence was uncontradicted that the plaintiff's employer did not complain of the manner in which the contract was performed or about the practice of the defendants in avoiding grease spots. Therefore, the court found that the defendants' duty was simply to sweep the lot and that their duty was limited by the terms of the contract (*39 Cal. App. 3d 261, 264-265)* .

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[Reserved]

§§ 165.112[Reserved]

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6. Duty Owed by or to Particular Persons or Entities

16-165 California Points & Authorities § 165.120

§ 165.120 Defendant Owed and Breached Duty to Child

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT OWED A DUTY TO PLAINTIFF AND BREACHED THAT DUTY BECAUSE DEFENDANT IS UNDER A DUTY TO EXERCISE GREATER CAUTION WHEN DEALING WITH CHILDREN THAN WHEN DEALING WITH ADULTS, AND DEFENDANT DID NOT EXERCISE THIS GREATER CAUTION WHEN THE INJURY TO PLAINTIFF OCCURRED.

A. Greater Degree of Caution Necessary With Children. Persons dealing with young children are under a duty to exercise greater caution than when dealing with adults (*Schwartz v. Helms Bakery Ltd. (1967) 67 Cal. 2d 232, 240, 60 Cal. Rptr. 510, 430 P.2d 68* ; *Pamela L. v. Farmer (1980) 112 Cal. App. 3d 206, 210-211, 169 Cal. Rptr. 282*).

B. Degree of Caution Increases With Immaturity of Child. The amount of care due to children increases with their immaturity (*Raymond v. Paradise Unified Sch. Dist. (1963) 218 Cal. App. 2d 1, 11, 31 Cal. Rptr. 847* ; *Satariano v. Sleight (1942) 54 Cal. App. 2d 278, 283, 129 P.2d 35*).

C. Known Characteristics of Child Are Factor in Breach Determination. The known characteristics of children, including their childish propensities to intermeddle, must be taken into consideration in determining whether or not ordinary care for the safety of a child has been exercised under the particular circumstances (*Crane v. Smith (1943) 23 Cal. 2d 288, 297, 144 P.2d 356*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the defendant breached a duty owed

to a child, in that the defendant did not exercise the appropriate greater degree of caution in the situation in question [*see Schwartz v. Helms Bakery Ltd. (1967) 67 Cal. 2d 232, 240, 60 Cal. Rptr. 510, 430 P.2d 68]* . It should be combined with the *form in § 165.30* if applicable to the particular case.

This issue may arise in several procedural contexts, including opposing a demurrer and in opposing a motion for nonsuit [*see, e.g., Pamela L. v. Farmer (1980) 112 Cal. App. 3d 206, 208, 169 Cal. Rptr. 282* (demurrer); *Schwartz v. Helms Bakery Ltd. (1967) 67 Cal. 2d 232, 234-235, 60 Cal. Rptr. 510, 430 P.2d 68* (nonsuit)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may discuss the greater degree of caution that the defendant should have exercised in this situation and argue that the lack of exercise of this degree of caution proximately caused the injury to the plaintiff.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of complaint for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§ 165.30*. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Greater Degree of Caution Necessary With Children

The factual and procedural background of ***Schwartz v. Helms Bakery Ltd.*** *(1967) 67 Cal. 2d 232, 60 Cal. Rptr. 510, 430 P.2d 68* , is discussed in *§ 165.31[3][a]*. In *Schwartz*, the Supreme Court reversed the judgment of nonsuit against the plaintiff in an action in which the plaintiff, a four-year-old child, was struck by an automobile as he crossed the street to buy a doughnut from the driver of a truck owned by a bakery. With regard to the issue of standard of care, the Court stated that when dealing with a young child, a defendant must exercise greater caution than when dealing with an adult. Quoting its earlier opinion in *Hilyar v. Union Ice Co. (1955) 45 Cal. 2d 30, 36, 286 P.2d 21* , the Court noted that the presence of a child is in itself a warning requiring the exercise of care for their safety (*67 Cal. 2d 232, 240)* . In this case, the driver of the truck was obliged to exercise greater caution regarding the plaintiff than that required with respect to an adult. In discharging this duty of due care, the driver should have taken into consideration not merely the normal characteristics of four-year-old children, but his actual knowledge of the plaintiff's heedlessness of the hazards of traffic. The Court explained that the driver acquired that knowledge before their first encounter when he saw the plaintiff dart across the street. The Court held that the lower court erroneously granted the motion for nonsuit. It should have left to the jury the question whether or not, in view of the reasonably foreseeable behavior of the child, the defendants exposed him to an unreasonable risk of harm (*67 Cal. 2d 232, 243-244)* . In addition, the Court held that by undertaking to direct the child to an assigned rendezvous with the truck, the defendants assumed a duty to exercise due care for his safety (*67 Cal. 2d 232, 235-242)* .

In ***Pamela L. v. Farmer*** *(1980) 112 Cal. App. 3d 206, 169 Cal. Rptr. 282* , three minor girls brought an action for negligence and assault and battery against the defendants, a husband and wife. The plaintiffs alleged that they were

sexually molested by the husband at his home when the wife had invited them to use her swimming pool. The plaintiffs contended that the wife had knowledge of her husband's past record of molesting women and children and that she invited the children to swim in the pool when she knew that her husband would be alone with the plaintiffs. The trial court granted the wife's demurrer, and the plaintiffs appealed from the subsequent judgment of dismissal.

The court of appeal reversed, finding that the wife failed to prevent harm to the plaintiffs and, by her own acts, increased the risk of the occurrence of such harm (*112 Cal. App. 3d 206, 210)* . The court noted that the measure of precaution required by one having a child in his or her care, who stands in no relation to the child except that he or she has undertaken to care for the child, is care that a prudent person would exercise under like circumstances (*112 Cal. App. 3d 206, 210-211)* . In addition, the victims were entitled to more stringent precautions than necessary for an adult. The court examined relevant policy considerations and determined that (1) the foreseeability of harm was great, (2) the burden on the wife to avoid harm to the children was slight, (3) there was a fairly close connection between the wife's invitation and the ultimate harm, and (4) there was moral culpability for the wife's conduct that increased the risk of harm (*112 Cal. App. 3d 206, 211)* .

[b] Degree of Caution Increases With Immaturity of Child

The factual and procedural background of ***Raymond v. Paradise Unified Sch. Dist.*** *(1963) 218 Cal. App. 2d 1, 31 Cal. Rptr. 847* , is discussed in *§ 165.30[3][a]*. In *Raymond*, the court of appeal affirmed the judgment for a seven-year-old child against the defendant, a school district, on the ground that it negligently failed to supervise a school bus stop area. After examining several policy factors that might require the court to impose a duty on the defendant, the court stated that the defendant owed a duty to the plaintiff based on the foreseeability of harm to the plaintiff and other considerations (*218 Cal. App. 2d 1, 6-10)* . The court stated that a factor in determining whether or not a duty was owed to the plaintiff is the character of the pupils that used the bus terminal. Having designated the bus stop for primary school pupils, the defendant had knowledge of the presence of small children, who could not be expected to exercise the same judgment as high school students. The amount of care due to children increases with their immaturity (*218 Cal. App. 2d 1, 10)* . The court noted that the testimony of the bus driver showed that there was an increased hazard attributed to the heedless habits of the younger children. The numerical possibilities of accident at that particular location were multiplied not only by the frequency of its use, but also by the character of the persons involved in its use. In addition, the location was in the complete control of the defendant, which had the authority to enforce regulatory measures necessary for the protection of children on school property (*218 Cal. App. 2d 1, 10-11)* . Therefore, the court found as a matter of law that the defendant owed a duty to provide adequate supervisory measures to protect children using the bus loading zone (*218 Cal. App. 2d 1, 11)* .

In ***Satariano v. Sleight*** *(1942) 54 Cal. App. 2d 278, 129 P.2d 35* , a 17-year-old boy brought an action against a school district and a driver after he was struck by a car while running across the street between crosswalks. The trial court granted a nonsuit in favor of the defendants, and the plaintiffs appealed.

The court of appeal reversed the judgment of nonsuit as to all the defendants. Even though the plaintiff had a duty to yield the right of way to the automobile, the court of appeal felt that it could not be said that he was contributorily negligent as a matter of law (*54 Cal. App. 2d 278, 280-281)* . [However, the present doctrine of comparative negligence, set forth in *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226* , supersedes the previous doctrine of contributory negligence, which provided a complete bar to recovery.] On the question of liability of the school district, the court stated that the evidence presented a question for the jury on whether or not the school district, which knew that students habitually walked and ran across a well-traveled street during school hours, should have taken action to protect the students from injury (*54 Cal. App. 2d 278, 282-283)* . The court also stated that the amount of care due to minors increases with their immaturity and consequent heedlessness to danger. Even though the student in this case was nearing 18 years of age, the court stated that this principle still applied. It said that it could not close its eyes to the fact that even students of 17 and 18 years of age, particularly in groups in which the herd instinct and competitive spirit tend naturally to relax vigilance, are not accustomed to exercising the same amount

of care for their own safety as persons of more mature years (*54 Cal. App. 2d 278, 283)* .

[c] Known Characteristics of Child Are Factor in Breach Determination

In ***Crane v. Smith*** *(1943) 23 Cal. 2d 288, 144 P.2d 356* , the plaintiff, a three-year-old girl, through her father as guardian ad litem, and her father in his individual capacity, brought an action against a market after she caught her finger in a coffee grinder on the premises. The trial court entered judgment for the plaintiffs, and the defendant appealed.

The court of appeal affirmed. It noted that the known characteristics of children, including their childish propensities to intermeddle, must be taken into consideration in determining whether or not ordinary care for the safety of a child has been exercised under particular circumstances (*23 Cal. 2d 288, 297)* . The court stated that because children have neither an adult's capacity to appreciate the risk involved in a potentially dangerous natural or artificial condition, nor the ability to avoid danger to the same degree as do adults, and because all persons dealing with them are chargeable with such knowledge, the possessor of land owed the invited children the duty to exercise a greater degree of care than that exercised for the safety of adults (*23 Cal. 2d 288, 296)* . The court noted that the coffee grinder was brightly painted, which would attract a child, and that it was placed on an aisle. Under these circumstances, there was substantial evidence justifying the trial court's finding that the failure of the defendant to place the coffee grinder in a place reasonably inaccessible to immature children, or to warn the child against meddling with the machine, constituted actionable negligence (*23 Cal. 2d 288, 298)* .

[4] Additional Authorities

[a] Greater Degree of Caution Necessary With Children

In *Huggans v. Southern Pac. Co. (1949) 92 Cal. App. 2d 599, 207 P.2d 864* , a 12-year-old boy who was struck by a train brought an action against the railroad and the train engineer. The court of appeal affirmed judgment for the plaintiff, noting that the plaintiff was obviously a child and that the quantum of care to be exercised toward children, from whom the natural heedlessness of youth is to be expected, is always greater than that required to be exercised toward adult persons (*92 Cal. App. 2d 599, 611)* .

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16-165 California Points & Authorities § 165.121

§ 165.121 Duty Owed by Child--Adult Standard of Care Applies

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT SHOULD BE HELD TO AN ADULT STANDARD OF CARE BECAUSE HE/SHE WAS ENGAGING IN AN ADULT ACTIVITY WHEN THE INJURY TO PLAINTIFF OCCURRED.

A. Child Engaged in Adult Activity Held to Adult Standard of Care. An exception to the general rule regarding a child's standard of care arises when a minor engages in an activity that is normally undertaken only by adults and for which adult qualifications are required. The age of the minor does not excuse him or her from liability for negligence, and the minor must meet the standard established for adults (*Prichard v. Veterans Cab Co. (1965) 63 Cal. 2d 727, 731, 47 Cal. Rptr. 904, 408 P.2d 360* ; *Neudeck v. Bransten (1965) 233 Cal. App. 2d 17, 21, 43 Cal. Rptr. 250*).

[*Optional*] **B. Child Driving Car Held to Adult Standard.** The age of a minor who operates a motor vehicle does not excuse him or her from liability for driving it in a negligent manner, and the minor must meet the standard established primarily for adults (*Prichard v. Veterans Cab Co. (1965) 63 Cal. 2d 727, 731, 47 Cal. Rptr. 904, 408 P.2d 360* (motorcycle); *Neudeck v. Bransten (1965) 233 Cal. App. 2d 17, 21, 43 Cal. Rptr. 250* (automobile)).

[*Optional*] **C. Effect of Statutory Violation.** A child who violates a statute, ordinance, or regulation will be held to the same standard of conduct as an adult if the child is engaging in an activity that is normally undertaken by adults and for which adult qualifications are required when the injury to the plaintiff occurred (*see Evid. Code § 669(b)(2)*; *see also Neudeck v. Bransten (1965) 233 Cal. App. 2d 17, 19-21, 43 Cal. Rptr. 250*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that a defendant who is a child should be held to an adult standard of care because he or she was engaged in an activity normally undertaken by adults [*see Prichard v. Veterans Cab Co. (1965) 63 Cal. 2d 727, 731, 47 Cal. Rptr. 904, 408 P.2d 360]* . Optional Paragraph B may be submitted if the defendant was driving a car. Optional Paragraph C may be submitted if the defendant has violated a statute ordinance, or regulation. This form should be combined with the *form in § 165.30*, if applicable to the particular case.

These issues may arise in several procedural contexts, including the challenging of the propriety of the trial court's refusal to give a requested jury instruction concerning the applicable standard of care for a defendant who is a minor [*see Neudeck v. Bransten (1965) 233 Cal. App. 2d 17, 18, 43 Cal. Rptr. 250* (jury instruction regarding minor the defendant)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may show that the defendant's activity was an activity for which adult qualifications are required and that therefore the defendant should be held to an adult standard of care, as opposed to the lower standard of care to which minors are generally held [*see Cummings v. County of Los Angeles (1961) 56 Cal. 2d 258, 263, 14 Cal. Rptr. 668, 363 P.2d 900* (standard of care for minors); *Prichard v. Veterans Cab Co. (1965) 63 Cal. 2d 727, 731, 47 Cal. Rptr. 904* (standard of care for adult activity)].

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of complaint for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§ 165.30*. For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in § 165.190* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Child Engaged in Adult Activity Held to Adult Standard of Care

In ***Prichard v. Veterans Cab Co.*** *(1965) 63 Cal. 2d 727, 47 Cal. Rptr. 904, 408 P.2d 360* , a 17-year-old boy whose motorcycle collided with a taxicab brought an action through his guardian ad litem against the taxicab company. His mother also sought to recover medical expenses incurred in the treatment of her son's injuries. The trial court entered judgment in favor of the defendant, and the plaintiffs appealed.

The Supreme Court affirmed, stating that the plaintiff may have been contributorily negligent, and therefore the verdict for the defendant was reasonable. [However, the doctrine of comparative negligence, set forth in *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226* , supersedes the doctrine of contributory negligence, which provided a complete bar to recovery.] The Court noted that the plaintiff, while driving his motorcycle, observed that an oncoming taxicab was about to turn left into his path, and that the plaintiff admittedly could have applied his

brakes in ample time to avoid a collision. It appeared, however, that the plaintiff decided not to apply his brakes, choosing rather to proceed onward at the same rate of speed, while paying no further attention to the taxicab (*63 Cal. 2d 727, 731)* . The Court also found that the lower court did not err in refusing an instruction that a child is not held to the same standard of conduct as an adult and is only required to exercise that degree of care that ordinarily is exercised by a child of like age, mental capacity, and experience. The Court stated that an exception to the general rule about a child's standard of care arises when a minor engages in an activity that is normally undertaken by adults and for which adult qualifications are required. The Court added that the age of a minor who operates a motor vehicle will not excuse him or her from liability for driving it in a negligent manner and that the minor will be required to meet the standard established primarily for adults (*63 Cal. 2d 727, 731-732)* . After examining other contentions regarding the propriety of jury instructions and the admission of evidence, the Court affirmed the judgment (*63 Cal. 2d 727, 732-735)* .

NOTE:

A plaintiff's contributory negligence no longer completely bars his or her recovery [*see Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226* (replacing bar of contributory negligence with rule of comparative negligence); *see also Hasson v. Ford Motor Co. (1977) 19 Cal. 3d 530, 551-552, 138 Cal. Rptr. 705, 564 P.2d 857* (minor plaintiff's contributory negligence does not bar recovery)].

In ***Neudeck v. Bransten*** *(1965) 233 Cal. App. 2d 17, 43 Cal. Rptr. 250* , the plaintiff brought an action for personal injuries she suffered and for the wrongful death of her sister resulting from a collision with an automobile driven by the owner's minor son. The jury rendered a verdict in favor of the plaintiff. The defendants, the owner of the automobile and his minor son, appealed, contending that the trial court erroneously refused to instruct the jury on the special standard of care applicable to minor drivers.

The court of appeal affirmed, noting that children are generally held to that degree of care that might reasonably have been expected of a child of like age, capacity, and experience under the same or similar circumstances (*233 Cal. App. 2d 17, 20)* . The court stated, however, that when a minor engages in an activity such as driving, which is normally undertaken by adults and for which adult qualifications are required, an exception to the general rule arises, holding the minor to the ordinary standard of care (*233 Cal. App. 2d 17, 21)* . The court stated that it would be impractical to give legal sanction to the operation of automobiles by teenagers with less than ordinary care for the safety of others. Although minors are entitled to be judged by standards commensurate with age, experience, and wisdom when they are engaged in activities appropriate to their age, experience, and wisdom, it would be unfair to the public to permit a minor operating a motor vehicle to observe any other standards of care and conduct than those expected of all others. A person observing children at play with toys, throwing balls, operating tricycles or bicycles, or engaged in other childhood activities may anticipate conduct that does not reach an adult standard of care or prudence. One, however, cannot know whether or not the operator of an approaching automobile, airplane, or powerboat is a minor or adult and usually cannot protect oneself against youthful imprudence, even if warned. The court held that in the operation of an automobile, airplane, or powerboat, a minor is held to the same standard of care as an adult (*233 Cal. App. 2d 17, 22)* .

[b] Child Driving Car Held to Adult Standard

The factual and procedural background of ***Prichard v. Veterans Cab Co.*** *(1965) 63 Cal. 2d 727, 47 Cal. Rptr. 904, 408 P.2d 360* , is discussed in *§ 165.121[3][a]*. The Supreme Court held that the lower court did not err in refusing to give the plaintiffs' requested jury instruction that the plaintiff, a minor driving a motorcycle, is not held to the same standard of conduct as an adult and is only required to exercise that degree of care that ordinarily is exercised by children of like age, mental capacity, and experience. The Court stated that an exception to this general rule arises when the minor engages in an activity that is normally undertaken only by adults and for which adult qualifications are required. The Court added that the age of a minor will not excuse the minor from liability for driving a motor vehicle in a negligent manner and that the minor will be required to meet the standard established primarily for adults (*63 Cal. 2d 727, 731)* .

The factual and procedural background of ***Neudeck v. Bransten*** *(1965) 233 Cal. App. 2d 17, 43 Cal. Rptr. 250* , is discussed in *§ 165.121[3][a]*. The defendant, on appeal, contended that the trial court erroneously refused to instruct the jury on the special standard of care applicable to minor drivers. The court of appeal noted that children are generally held to that degree of care that might reasonably have been expected of a child of like age, capacity, and experience under the same or similar circumstances (*233 Cal. App. 2d 17, 20)* . The court stated, however, that when a minor engages in an activity such as driving, which is normally undertaken by adults and for which adult qualifications are required, an exception to the general rule arises, and the minor should be held to the ordinary standard of care (*233 Cal. App. 2d 17, 21)* .

[c] Effect of Statutory Violation

The factual and procedural background of ***Neudeck v. Bransten*** *(1965) 233 Cal. App. 2d 17, 43 Cal. Rptr. 250* , is discussed in *§ 165.121[3][a]*. The defendants contended that the trial court erred in refusing their proposed jury instruction that stated, in effect, that a child, although in violation of an ordinance or statute, is not held to the same standard of conduct as an adult and is only required to exercise that degree of care that ordinarily is exercised by a child of like age, mental capacity, and experience (*233 Cal. App. 2d 17, 19)* . The court noted, however, that the cases relied on by the defendants involved actions in which the defendant was not engaged in allegedly negligent operation of a motor vehicle (*233 Cal. App. 2d 17, 20-21)* . The court held that when a minor engages in an adult activity, such as driving, that is normally undertaken by adults and for which adult qualifications are required, an exception to the general rule arises, and the minor should be held to the ordinary standard of care (*233 Cal. App. 2d 17, 21)* . Therefore, the lower court's refusal of the requested instruction was proper (*233 Cal. App. 2d 17, 21-23)* .

[4] Additional Authorities

[a] Child Engaged in Adult Activity Held to Adult Standard of Care

In *Schauf v. Southern Cal. Edison Co. (1966) 243 Cal. App. 2d 450, 52 Cal. Rptr. 518* , the court of appeal affirmed a judgment in favor of the defendants in an action in which the vehicle driven by the plaintiff, a minor, collided with another vehicle. The plaintiff joined the county and an electric company as the defendants, contending that they maintained a hazardous condition at an intersection because a stop sign was obscured by a power pole. On appeal, the plaintiff maintained that the lower court erroneously imposed the duty of care of an adult and that to prove contributory negligence, the defendant should have been required to prove that the plaintiff failed to exercise the care required of a minor of his age, experience, and capacity. The court held, however, that in the operation of a motor vehicle, a minor is required to meet the same standard of care established for adults (*243 Cal. App. 2d 450, 457)* .

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[Reserved]

§§ 165.122[Reserved]

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16-165 California Points & Authorities § 165.130

§ 165.130 Defendant Owed Plaintiff Duty to Control or Warn of Third Party's Dangerous Conduct Based on Existence of Special Relationship

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT OWED A DUTY TO PLAINTIFF AND BREACHED THAT DUTY BECAUSE DEFENDANT SHOULD HAVE _____ [WARNED PLAINTIFF OF THE FORESEEABLY DANGEROUS CONDUCT OF _____ (*specify third party*) *and/or* CONTROLLED THE FORESEEABLY DANGEROUS CON _____ (*specify third party*)98 DUCT OF _____ (*specify third party*)] BECAUSE DEFENDANT STOOD IN A SPECIAL RELATIONSHIP TO _____ [PLAINTIFF *and/or* _____ (*specify third party*)].

A. Special Relationship Imposed Duty to Control or Warn. When the avoidance of foreseeable harm requires a defendant to control the conduct of another person, or to warn of that conduct, the common law imposes a duty if the defendant bears a special relationship to the dangerous person or to the foreseeable victim of that conduct (*Tarasoff v. Regents of Univ. of Cal. (1976) 17 Cal. 3d 425, 435, 131 Cal. Rptr. 14, 551 P.2d 334* ; *Draper Mortuary v. Superior Court (1982) 135 Cal. App. 3d 533, 537, 185 Cal. Rptr. 396* ; *see Hedlund v. Superior Court (1983) 34 Cal. 3d 695, 700, 194 Cal. Rptr. 805, 669 P.2d 41*).

B. Relationship of Dependence Created Special Relationship. A relationship of dependence may create a special relationship (*Mann v. State of California (1977) 70 Cal. App. 3d 773, 780, 139 Cal. Rptr. 82* ; *see Baldwin v. Zoradi (1981) 123 Cal. App. 3d 275, 283, 176 Cal. Rptr. 809*).

[*Optional*] **C. Single Relationship Sufficient to Create Special Relationship.** A duty exists if the defendant has a special relationship to both the victim and the person whose conduct created the danger, but the duty is not logically restricted to such situations, and a single relationship may be enough to require the exercise of reasonable care to protect

a victim (*Tarasoff v. Regents of Univ. of Cal. (1976) 17 Cal. 3d 425, 435-437, 131 Cal. Rptr. 14, 551 P.2d 334* ; *see Draper Mortuary v. Superior Court (1982) 135 Cal. App. 3d 533, 537, 185 Cal. Rptr. 396*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the defendant owed a duty to the plaintiff to warn the plaintiff of the foreseeably dangerous conduct of a third party or that the defendant owed a duty to the plaintiff to control the foreseeably dangerous conduct of a third party [*see Tarasoff v. Regents of Univ. of Cal. (1976) 17 Cal. 3d 425, 435-437, 131 Cal. Rptr. 14, 551 P.2d 334]* . Optional Paragraph C may be submitted to assert that a single relationship was sufficient to create a special relationship. This form should be combined with the *form in § 165.131*, if applicable to the particular case.

This issue may arise in several procedural contexts, including opposing a demurrer, opposing a motion for summary judgment, or challenging the propriety of the trial court's granting of a motion for a directed verdict [*see, e.g., Tarasoff v. Regents of Univ. of Cal. (1976) 17 Cal. 3d 425, 430, 131 Cal. Rptr. 14, 551 P.2d 334* (demurrer); *Draper Mortuary v. Superior Court (1982) 135 Cal. App. 3d 533, 534, 185 Cal. Rptr. 396* (summary judgment); *Mann v. State of California (1977) 70 Cal. App. 3d 773, 776, 139 Cal. Rptr. 82* (directed verdict)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may show that a special relationship existed between either the defendant and the plaintiff, or between the defendant and the person whose conduct created the danger to the plaintiff. Counsel should argue that because of the existence of this special relationship, the defendant had a duty to warn the plaintiff or to control the dangerous conduct of the third party. In addition, counsel should show how the dangerous conduct of the third party was foreseeable to the defendant [*see Hedlund v. Superior Court (1983) 34 Cal. 3d 695, 705-706, 194 Cal. Rptr. 805, 669 P.2d 41* ; *Tarasoff v. Regents of Univ. of Cal. (1976) 17 Cal. 3d 425, 434-436, 131 Cal. Rptr. 14, 551 P.2d 334]* .

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of complaint for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§ 165.131*. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and authorities in *§ 165.230* et seq. may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Special Relationship Imposed Duty to Control or Warn

Hedlund v. Superior Court *(1983) 34 Cal. 3d 695, 194 Cal. Rptr. 805, 669 P.2d 41* , was an action for professional malpractice against two psychotherapists by a woman and her minor child for injuries inflicted by a patient of the defendants. The mother's suit was based on the negligent failure of the defendants to diagnose, and warn the woman of, the threat of danger to her by the patient. The child's suit was based on mental distress from witnessing the patient's assault on the child's mother. The complaint alleged that in the course of his counseling and treatment, the patient told the defendants of his intent to commit serious injury on the mother and that the defendants did not take steps to notify the mother of the danger. Subsequently, the patient seriously injured the mother by shooting her with a shotgun. At the time of the shooting, her two-year-old son was sitting next to her, and she threw herself over the child to prevent him from getting hurt. The trial court overruled the defendants' demurrer to the complaint. The defendants petitioned for a writ of mandate to compel the trial court to vacate its order and sustain their demurrer on the ground that the action was barred by former Code Civ. Proc. § 340(3) (*now see Code Civ. Proc. § 335.1* (two-year statute of limitations, beginning in 2003), which established a one-year statute of limitations for actions for personal injury.

The Supreme Court held that the applicable statute of limitations is the three-year period set forth in *Code Civ. Proc. § 340.5* for actions for professional negligence (*34 Cal. 3d 695, 705)* . The Court first analyzed whether the failure to comply with the duty enunciated in *Tarasoff v. Regents of Univ. of Cal. (1976) 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334* , to predict whether a patient poses a serious danger to others and then to exercise reasonable care to protect the foreseeable victims of the danger, constitutes ordinary or professional negligence. The defendants had argued that professional negligence involves only acts in the course of diagnosis or treatment and that a failure to warn is ordinary negligence. The Court concluded that the negligence involved was professional negligence because the warning aspect of the duty is inextricably interwoven with the diagnostic function. The Court said that the diagnosis and prediction of danger is an essential element of a cause of action for failure to warn and that it is not separate and severable from the duty to take steps to warn. The Court further stated that the decision to warn and the manner in which the warning is given may also involve professional judgment (*34 Cal. 3d 695, 703)* .

NOTE:

Hedlund was decided before the enactment of *Civ. Code § 43.92*, which limits the liability of a psychotherapist for failure to warn a third party of a patient's threats. It is not clear whether or not the holding concerning the statute of limitations that applies to such an action may now be limited by the provisions of *Civ. Code § 43.92*. For a form of points and authorities for use in a case involving the provisions of *Civ. Code § 43.92*, see Ch. 117, *Insane and Incompetent Persons: Actions Involving Mental Patients* .

In ***Tarasoff v. Regents of Univ. of Cal.*** *(1976) 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334* , a murdered woman's parents brought an action for wrongful death against the murderer's therapists, the therapists' employer (the University of California), and the police officers involved. The plaintiffs contended that the defendants failed to warn the plaintiffs' daughter of the impending danger posed by their patient and failed to have the patient confined pursuant to the Lanterman-Petris-Short Act (*Welf. & Inst. Code § 5000 et seq.*). The trial court granted the defendants' demurrers to the plaintiffs' second amended complaint without leave to amend. The plaintiffs appealed judgment for the defendants.

The Supreme Court reversed with regard to the therapists and the University of California, and affirmed the judgment with regard to the police officers. The Court stated that the plaintiffs' second cause of action could be amended to allege that their daughter's death proximately resulted from the defendants' negligent failure to warn their daughter or others likely to apprise her of the danger (*17 Cal. 3d 425, 433)* . As a general principle, the Court noted that a person owes a duty of care to all persons who are foreseeably endangered by his or her conduct, with respect to risks that make the conduct unreasonably dangerous (*17 Cal. 3d 425, 434-435)* . Although the Court noted that one person owed no duty to control the conduct of another under common law, nor to warn those endangered by that conduct, it stated that the courts have carved out an exception to this rule when the defendant stands in some special relationship to either the

person whose conduct needs to be controlled or the foreseeable victim of that conduct. The Court reiterated that when the avoidance of foreseeable harm requires a defendant to control the conduct of another person, or to warn of that conduct, the common law has traditionally imposed liability only if the defendant bears some special relationship to the dangerous person or to the potential victim. Applying this exception to the present case, the Court noted that a relationship of the therapists to either the murdered woman or their patient would suffice to establish a duty of care (*17 Cal. 3d 425, 435)* . However, this specific holding would now appear to be limited by the provisions of *Civ. Code § 43.92*, which limits the liability of psychotherapists for their failure to warn of a patient's threats. For a form of points and authorities for use in a case involving the provisions of *Civ. Code § 43.92*, see Ch. 117, *Insane and Incompetent Persons: Actions Involving Mental Patients* .

In ***Draper Mortuary v. Superior Court*** *(1982) 135 Cal. App. 3d 533, 185 Cal. Rptr. 396* , the plaintiff brought an action for negligence and breach of an oral contract against a mortuary, alleging that the defendant failed to lock the door of the mortuary chapel in which the decedent's remains lay. A third party entered the chapel and sexually assaulted the decedent. The plaintiff, the husband of the decedent, also alleged that the defendant knew or should have known that the failure to provide a secure facility would have allowed the desecration in question because other persons had committed similar acts. The defendant's motion for summary judgment, including affidavits and declarations, established that prior to the date in question no remains in the mortuary had ever been sexually molested or abused. Based on this record, the trial court granted the defendant's motion for summary judgment on the cause of action based on breach of an oral contract, but denied the motion as to the negligence cause of action. The defendant petitioned for a writ of mandate directing the trial court to vacate its order denying its motion for summary judgment on the negligence cause of action.

The court of appeal granted an alternative writ, but refused to grant a peremptory writ (*135 Cal. App. 3d 533, 534)* . Although the defendant contended that it owed no duty to the plaintiff, the court disagreed. It stated that the defendant's reliance on cases that found no duty was misplaced because the cases were based on factual situations in which no special relationship existed and the defendant did not undertake to care for or take custody of the plaintiffs. Therefore, the courts in those cases did not impose a duty of care to control the conduct of third persons. However, the court noted that a special relationship between parties may give rise to a duty that would not otherwise be imposed. Although under the common law, one person owed no duty to control the conduct of another, nor to warn those endangered by that conduct, the courts have carved out an exception to this rule in cases in which the defendant stands in some special relationship to either the person whose conduct needs to be controlled or the foreseeable victim. Other courts have increased the number of instances in which affirmative duties are imposed by expanding the list of special relationships that justify a departure from the common law rule. The basis for analysis of whether or not there is a duty is the relationship of the parties. If the conduct of the one who is to be charged with the duty brings that person into a human relationship with another in which social policy requires that either affirmative action or precaution be taken by that person to avoid harm, then the law should impose a duty to act or to take the precaution (*135 Cal. App. 3d 533, 537)* . The court found that the facts of this case compelled the imposition of duty. Once a mortuary undertakes to accept the care, custody, and control of a decedent's remains, it owes a duty of care to the members of the decedent's bereaved family. Whether or not that duty has been breached by the omission of the defendant in failing to lock its chapel door is a question of fact for he jury that precludes the granting of a motion for summary judgment (*135 Cal. App. 3d 533, 538)* .

[b] Relationship of Dependence Created Special Relationship

In ***Baldwin v. Zoradi*** *(1981) 123 Cal. App. 3d 275, 176 Cal. Rptr. 809* , the plaintiff brought an action against the trustees of a university, its governing body and administrative agency, certain dormitory advisors, and students for personal injuries suffered in an automobile accident. The plaintiff, a student, was a passenger in an automobile driven by intoxicated university students who were engaged in a speed driving contest when their automobile collided with other vehicles. The plaintiff contended that a special relationship existed between the students and the trustees pursuant to a license agreement that governed student conduct in the dormitories. Because the agreement prohibited the

possession and consumption of alcoholic beverages in the dormitories, the plaintiff contended that the trustees and the dormitory advisors knowingly permitted the students to possess and consume alcoholic beverages in contravention of the license agreement. The trial court sustained a general demurrer with regard to the trustees, governing and administrative agency, and dormitory advisors. The plaintiff appealed from the ensuing judgment of dismissal.

Even though the court of appeal affirmed the judgment dismissing the plaintiff's cause of action, it discussed the nature of a special relationship. In confronting the difficult question of whether the relationship between the trustees, on the one hand, and the students and the plaintiff, on the other, created a special relationship imposing a duty of care to prevent injuries, the court noted that a relationship of dependence may create a special relationship (*123 Cal. App. 3d 275, 283)* . The court examined the license agreement and found that although it prohibited the consumption of alcohol, it did not create a dependent relationship that would impose a duty to control alcoholic intake by students. In addition, the court found that the facts of this case were different from other cases that imposed a duty, because there was no apparent imminent danger or potential for loss in this case (*123 Cal. App. 3d 275, 285)* . Furthermore, the students' conduct was not reasonably foreseeable, nor could the defendants be morally blamed for their omission (*123 Cal. App. 3d 275, 286-287)* . After examining the plaintiff's other causes of action, the court affirmed the judgment of dismissal (*123 Cal. App. 3d 275, 287-295)* .

In ***Mann v. State of California*** *(1977) 70 Cal. App. 3d 773, 139 Cal. Rptr. 82* , the plaintiff alleged that a state traffic officer, after an investigation, had left several stranded motorists in a dangerous situation on the freeway where some were subsequently killed and others injured as a result of another motorist's negligence. The trial court granted a motion for directed verdict in favor of the state because it concluded as a matter of law that the sole cause of the accident was the conduct of the motorist who subsequently collided with the stranded cars. The plaintiff appealed.

The court of appeal reversed, stating that a directed verdict was improper because the evidence did not foreclose a finding that the traffic officer's conduct may have been negligent. The court noted that anyone legally responsible for the victims' vulnerable position could have substantially contributed to the cause of the accident (*70 Cal. App. 3d 773, 777)* . The court noted that the officer, and through him, the state, could be liable for negligent omissions only if a special relationship existed between him and the plaintiff (*70 Cal. App. 3d 773, 779-780)* . The court also noted that the law appears to be heading toward a recognition of the duty to aid or protect in any relationship of dependence or of mutual dependence (*70 Cal. App. 3d 773, 780)* . The court stated that the plaintiff was dependent on the officer, who was the expert in traffic safety and who was charged with specific responsibility for safety on the stretch of freeway in question. Once he had apprised himself of the dangerous position of the stranded motorists, the officer had a duty to exercise ordinary care to protect them from traffic dangers. Although no special relationship may exist between members of the California Highway Patrol and the motoring public generally, or between the Patrol and stranded motorists generally, once a state traffic officer has chosen to investigate the plight of specific persons on a freeway and inform himself or herself of the foreseeable danger to them from passing traffic, a special relationship arises requiring the officer to protect the motorists by readily available means. Liability may attach if the officer's limited duty to protect these people under these special circumstances is not performed. Stated otherwise, the court found that the foreseeable risk of harm to those people may have been unreasonable, and if so, the state traffic officer, who had acquainted himself with their plight, had a duty to exercise ordinary are to protect them from this risk (*70 Cal. App. 3d 773, 780)* .

[c] Single Relationship Sufficient to Create Special Relationship

The factual and procedural background of ***Tarasoff v. Regents of Univ. of Cal.*** *(1976) 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334* , is discussed in *§ 165.130[3][a]*. The Court noted that California decisions recognize a duty to warn or to control a third person's behavior if the defendant stands in a special relationship with both the victim and the person whose conduct created the danger. The Court stated, however, that the duty should not logically be restricted to such situations and that a single relationship is sufficient to support the duty of reasonable care (*17 Cal. 3d 425, 436)* . The duty of care may arise from either (1) a special relationship between the actor and the third person that imposes a duty on the actor to control the third person's conduct, or (2) a special relationship between the actor and the victim that

gives the victim a right of protection (*17 Cal. 3d 425, 435)* .

The factual and procedural background of ***Draper Mortuary v. Superior Court*** *(1982) 135 Cal. App. 3d 533, 185 Cal. Rptr. 396* , is discussed in *§ 165.130[3][a]*. In examining whether or not the defendants owed a duty to the plaintiff, the court of appeal stated that a duty of care may arise from either (1) a special relationship between the actor and the third person that imposes a duty on the actor to control the third person's conduct, or (2) a special relationship between the actor and the other person that gives the other person a right of protection (*135 Cal. App. 3d 533, 537)* . In this case, the court found that once a mortuary undertakes to accept the care, custody, and control of a decedent's remains, it owes a duty to the members of the decedent's bereaved family to protect those remains from harm by a third person (*135 Cal. App. 3d 533, 538)* .

[4] Additional Authorities

[a] Special Relationship Imposed Duty to Control or Warn

In *Peterson v. San Francisco Cmty. Coll. Dist. (1984) 36 Cal. 3d 799, 205 Cal. Rptr. 842, 685 P.2d 1193* , an action for damages arising out of a public entity's maintenance of a dangerous condition of property under *Gov. Code § 835*, a student in a community college was assaulted while ascending a stairway in the college's parking lot. The Supreme Court held that the community college district, a public entity, owed a duty to exercise due care to protect and warn its students against reasonably foreseeable assaults on the campus. The duty arose out of a special relationship, that of landowner and invitee, that existed between the college and the plaintiff because the plaintiff used the parking lot in exchange for payment of a fee (*36 Cal. 3d 799, 805-809)* . The Court found the condition of the property to be dangerous because thick and untrimmed foliage and trees surrounding the parking lot area permitted the assailant to perpetrate his crime. The Court also found the risk of assault to be foreseeable (*36 Cal. 3d 799, 812-813)* . Although the defendant was immune from liability for failure to provide adequate police protection, it was not immune from liability for failure to warn (*36 Cal. 3d 799, 814-815)* .

In *Johnson v. State of California (1968) 69 Cal. 2d 782, 73 Cal. Rptr. 240, 447 P.2d 352* , the Supreme Court reversed a summary judgment for the defendant in an action in which the plaintiff contended that the defendant negligently failed to inform her of the homicidal tendencies of a delinquent child placed in her home. With regard to the issue of the defendant's duty to the plaintiff, the Court stated that as the party placing the youth with the plaintiff, the defendant's relationship to the plaintiff was such that its duty extended to warning of latent, dangerous qualities suggested by the youth's history or character (*69 Cal. 2d 782, 785)* . The Court recognized that other cases impose a duty on those who create a foreseeable peril, not readily discoverable, to warn endangered persons of such potential peril. The defendant owed a duty to inform the plaintiff of any facts that its agents knew or should have known that might endanger the plaintiff's family. Minimally, these facts included homicidal tendencies, a background of violence and cruelty, and the youth's criminal record (*69 Cal. 2d 782, 786)* .

In *Walker v. City of Los Angeles (1993) 12 Cal. App. 4th 1385, 16 Cal. Rptr. 2d 113* , a murder suspect killed a witness who was lulled into a false sense of security by a city homicide detective. Citing the *Carpenter* case, the court of appeal concluded that the city owed the witness a duty of care (*12 Cal. App. 4th 1385, 1401)* .

In *Carpenter v. City of Los Angeles (1991) 230 Cal. App. 3d 923, 281 Cal. Rptr. 500* , the plaintiff, a witness in a criminal prosecution, was shot by an unknown assailant, allegedly in retaliation for the plaintiff's testimony. The trial court granted the city's motion for summary judgment. The plaintiff appealed. The court of appeal reversed the judgment, concluding that assurances by city police officers that the plaintiff was in no danger from the criminal defendant against whom the plaintiff was testifying were sufficient to create a special relationship between the city and the plaintiff. The relationship imposed a duty to warn the plaintiff about the criminal defendant's threat to the plaintiff's life (*230 Cal. App. 3d 923, 931)* .

In *Robertson v. Wentz (1986) 187 Cal. App. 3d 1281, 232 Cal. Rptr. 634* , the husband of a woman who had been shot and killed by a minor in the course of a robbery sued the minor's mother for wrongful death. The plaintiff sought to impose liability both for the mother's alleged negligence in controlling and supervising the son and on statutory grounds [*Civ. Code §§ 1714.1, 1714.3*]. The trial court entered summary judgment in favor of the defendant on all causes of action. In reversing the judgment with respect to one of the statutory grounds of liability [*Civ. Code § 1714.1*], the court of appeal stated that in the absence of statute, a parent ordinarily is not liable for the torts of his or her minor child. Although no common law vicarious liability is imposed on parents, a parent may become liable for an injury caused by the child if the parent's negligence made it possible for the child to cause the injury and probable that the child would do so (*187 Cal. App. 3d 1281, 1288)* . The court explained that California follows the rule of Restatement (Second) of Torts § 316, which finds a "special relationship" between parent and child, and accordingly places on the parent a duty to exercise reasonable care in controlling the minor child to prevent the child from intentionally harming others or from creating an unreasonable risk of bodily harm to them, if the parent (1) knows or has reason to know that he or she has the ability to control the child, and (2) knows or should know of the necessity and opportunity for exercising such control (*187 Cal. App. 3d 1281, 1288-1289)* . The parent incurs liability for the minor child's intentional acts of violence or damage to persons or property if, knowing of the child's vicious or destructive tendencies or acts, the parent fails to exercise reasonable measures to restrain or discipline the child, and thus encourages or acquiesces in the misconduct *187 Cal. App. 3d 1281, 1289)* . The court concluded, however, that the ability to control the child, rather than the relationship as such, is the basis for a finding of liability on the part of the parent. The absence of this ability is fatal to a claim of legal responsibility. The ability to control is inferred from the relationship of parent to minor child, as it is from the relationship of custodian to charge. It may be disproved by the circumstances surrounding the particular situation. Knowledge of dangerous habits and ability to control the child are prerequisites to imposition of liability (*187 Cal. App. 3d 1281, 1290)* .

In *Duffy v. City of Oceanside (1986) 179 Cal. App. 3d 666, 224 Cal. Rptr. 879* , the court of appeal reversed that part of a judgment that sustained a city's demurrer to a wrongful death action alleging that the city had negligently failed to warn the plaintiffs' decedent of the dangerous propensities of a fellow city employee whom she was dating and who later kidnaped and killed her. The fellow employee was on parole for a previous kidnap, rape, and sexual assault. The court explained that ordinarily a public employer is not liable for failing to warn an employee of the dangerous propensities of another employee, even one whom she is dating. In this case, however, the victim had previously complained to her employer that the parolee had sexually harassed her. At that point, an inference might be reasonably drawn that the parolee might repeat the earlier criminal conduct with the employee as a possible victim. It then became a question of fact as to whether the employer acted reasonably in failing to respond to the harassment report by alerting the employee in some manner to the parolee's past conduct. Whether the magnitude of that threat required the employer to warn the victim is a question of fact. Therefore, the demurrer to that cause of action should have been overruled (*179 Cal. App. 3d 666, 674-675)* .

In *Myers v. Quesenberry (1983) 144 Cal. App. 3d 888, 193 Cal. Rptr. 733* , the court of appeal reversed the trial court's judgment dismissing the plaintiff's complaint, after the lower court had sustained the defendants' demurrer without leave to amend. The court of appeal held that liability may be imposed against two physicians for negligently failing to warn their patient of the foreseeable and dangerous consequences of engaging in certain conduct, which proximately caused injuries to the plaintiff. The defendants' patient suffered from an uncontrolled diabetic condition that caused her to lose control of her car and collide with the plaintiff, who was standing by the side of the road (*144 Cal. App. 3d 888, 890-891)* . The court held that a special relationship existed between physician and patient that supported an affirmative duty for the benefit of third persons. Therefore, a physician must warn a patient if the patient's condition or medication renders certain conduct, such as driving a car, dangerous to others (*144 Cal. App. 3d 888, 892)* .

[b] Relationship of Dependence Created Special Relationship

In *Lawson v. Superior Court (2010) 180 Cal. App. 4th 1372, 1390, 103 Cal. Rptr. 3d 834* , a female inmate was serving a prison sentence with her infant daughter at a community-based facility pursuant to the Pregnant and Parenting

Women's Alternative Sentencing Program Act (PPWASPA), *Pen. Code § 1174 et seq.*, which provides an alternative to state prison commitment to female prisoners with substance abuse problems who are pregnant or have young children at the time of sentencing. The inmate's daughter developed severe respiratory problems, later diagnosed as double pneumonia, but, according to the complaint, facility staff members repeatedly denied requests for treatment for eight to eleven days. A staff member eventually took the inmate's daughter for treatment, but the delay resulted in permanent injury. The inmate, on behalf of herself and her daughter, sued the State, certain state employees, the facility, and certain facility employees, including causes of action for negligence, infliction of emotional distress, and failure to furnish medical care to a prisoner under *Gov. Code § 845.6*. The trial court sustained defendants' demurrers to most of the causes of action, but the court of appeal granted a writ of mandate directing the trial court to vacate portions of its order sustaining the demurrers. The court held that the complaint adequately alleged a negligence cause of action brought on behalf of the daughter against the state employees working in the facility. The court noted that case law imposed an affirmative duty on a person to protect another from harm when a "special relationship" exists, typically found when the plaintiff is particularly vulnerable and dependent on the defendant, who correspondingly has some control over plaintiff's welfare. The court noted that a special relationship exists between a prisoner and his or her jailer, and thus because a child residing with his or her incarcerated mother under PPWASPA is similarly dependent on the personnel running the housing facility when medical care is needed by the child, a special relationship between the facility and the daughter existed sufficient to impose a duty to care on facility staff (*180 Cal. App. 4th 1372, 1389-1390)* .

In *Giraldo v. Department of Corrections & Rehabilitation (2008) 168 Cal. App. 4th 231, 85 Cal. Rptr. 3d 371* , plaintiff, a self-described "male-to-female transgender person" with the appearance of a female, was an inmate of the California prison system and was incarcerated with male inmates. Despite her repeated complaints to her jailers that she was being beaten and raped on a regular basis, plaintiff alleged that her jailers did nothing to protect her from this continual abuse. Plaintiff sued the Department of Corrections, alleging in one cause of action negligence based on a special relationship between the jailers and herself. The trial court sustained a demurrer on this cause of action, but the court of appeal reversed. The court of appeal held that because a prisoner is dependent and vulnerable, there is a special relationship between a jailer and a prisoner such that the jailer owes a duty of care to the prisoner to take steps to protect the prisoner from foreseeable harm (*168 Cal. App. 4th 231, 250-251)* . Recognizing that the issue was apparently one of first impression in California, the court noted that recognition of such a duty was supported by numerous authorities, including various treatises and state and federal case law (*168 Cal. App. 4th 231, 246-250)* .

In Doe 1 v. *City of Murrieta (2002) 102 Cal. App. 4th 899, 126 Cal. Rptr. 2d 213* , the plaintiffs were two minor females who were participants in a program sponsored by a city police department that was designed to encourage teenagers to consider careers in law enforcement. While on patrol with a police officer as part of that program, the plaintiffs engaged in consensual sexual activities with him. The plaintiffs then brought suit based on sexual abuse against the city and the police department, alleging causes of action based on vicarious liability, breach of contract, and negligent supervision. After the trial court granted demurrers and summary judgment in favor of the defendants on all causes of action, the court of appeal affirmed in part and reversed in part. As to the cause of action for negligent supervision, the court of appeal reversed the trial court. Analogizing the facts of the case to other sexual abuse cases in which a special relationship was found, cases involving students under the protection of a school district and boy scouts under the supervision of the Boy Scouts of Am., the court concluded that the city and the police department had a special relationship with the two plaintiffs and therefore a duty to protect the minors from sexual abuse committed by the police officer during the course of program activities (*102 Cal. App. 4th 899, 917-918)* . The court also concluded that a duty of care could be imposed under the circumstances through application of the traditional, policy-driven *Rowland* factors, especially because of indications that the plaintiffs, who were spending excessive time with the officer, were infatuated with him and thus the foreseeability that sexual activities might occur (*102 Cal. App. 4th 899, 913-916)* .

Ronald S. v. County of San Diego (1993) 16 Cal. App. 4th 887, 895, 20 Cal. Rptr. 2d 418 , was a negligence action brought against a county by a minor declared a dependent of that county by the courts. The county had placed the minor

in an abusive foster home, approved his adoption by the abusive foster parents, and transferred funds belonging to the minor to the adoptive parents, who converted them to their own use. The court of appeal upheld the trial court's various rulings that the county had a duty of care toward the minor based on the special relationship that existed between the county and the minor. This special relationship existed because the minor was wholly dependent on the county to supervise his placement. It was foreseeable that the minor would be harmed if the county did not adequately investigate the qualifications of any proposed foster or adoptive parents (*16 Cal. App. 4th 887, 895)* .

In *Pamela L. v. Farmer (1980) 112 Cal. App. 3d 206, 169 Cal. Rptr. 282* , the court of appeal reversed the lower court's dismissal of the plaintiffs' action against the defendant after the lower court sustained a demurrer to the plaintiffs' second amended complaint with regard to the defendant. The plaintiffs, three minor girls, brought the action for assault and battery and negligence against a man who allegedly sexually molested them and against the defendant, the man's wife, who had invited the plaintiffs to play in her swimming pool even though she knew of her husband's molestation of women and children in the past. In dictum, the court noted that if the case were analyzed in terms of a special relationship, the necessary special relationship could be inferred between the defendant and the plaintiffs. The court said that the law appears to be heading toward a recognition of the duty to aid or protect in any relation of dependence or of mutual dependence. In this case, the plaintiffs were dependent on the defendant because as children they were vulnerable to this sort of misconduct and unable to protect themselves against it. By inviting the children to her home, the defendant assumed the special relationship. She recognized that special duty and relationship when she assured the plaintiffs' parents that it would be safe for them to play at her house (*112 Cal. App. 3d 206, 211-212)* .

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CHAPTER 165 NEGLIGENCE
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B. Duty
6. Duty Owed by or to Particular Persons or Entities

16-165 California Points & Authorities § 165.131

§ 165.131 Defendant's Duty to Control or Warn of Third Party's Dangerous Conduct Extended to Foreseeable Victims

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT OWED A DUTY TO PLAINTIFF AND BREACHED THAT DUTY BECAUSE DEFENDANT SHOULD HAVE _____ [WARNED PLAINTIFF OF THE FORESEEABLY DANGEROUS CONDUCT OF _____ (*specify third party*) *and/or* CONTROLLED THE FORESEEABLY DANGEROUS CONDUCT OF _____ (*specify third party*)] BECAUSE DEFENDANT STOOD IN A SPECIAL RELATIONSHIP TO _____ (*specify third party*), THE PERSON WHOSE CONDUCT CREATED THE DANGER, AND PLAINTIFF WAS A FORESEEABLE VICTIM.

Duty Extends to Foreseeable Victims. The duty to warn a person of the dangerous conduct of another, which is imposed because of a special relationship between the defendant and the person whose conduct created the danger, extends to other foreseeable victims who are likely to be in close contact with the original victim, such as a young child who is likely to be near his or her parent (*Hedlund v. Superior Court (1983) 34 Cal. 3d 695, 705-706, 194 Cal. Rptr. 805, 669 P.2d 41*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the plaintiff was a foreseeable victim of the wrongdoer, with whom the defendant had a special relationship that imposed on the defendant a duty to control or warn [*see Hedlund v. Superior Court (1983) 34 Cal. 3d 695, 705-706, 194 Cal. Rptr. 805, 669 P.2d 41]* . It should be combined with the *form in § 165.130*, if applicable to the particular case.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may discuss the various relationships among the involved parties and argue that the plaintiff was a foreseeable victim.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of complaint for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§ 165.130*. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in § 165.230* et seq. may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Duty Extends to Foreseeable Victims

The factual and procedural background of ***Hedlund v. Superior Court*** *(1983) 34 Cal. 3d 695, 194 Cal. Rptr. 805, 669 P.2d 41* , is discussed in *§ 165.130[3][a]*. In addition to holding that two therapists owed a duty to protect the plaintiff from danger from their patient, the Court held that this duty extended to the plaintiff's son. The Court stated that the therapists' duty extended to the son because there could be no reasonable difference of opinion that the risk of harm to him was foreseeable (*34 Cal. 3d 695, 705)* . The Court compared the situation to that in *Dillon v. Legg (1968) 68 Cal. 2d 728, 69 Cal. Rptr. 72, 441 P.2d 912* (discussed in *§ 165.50[3][a]*), which allowed recovery to a mother in an action in which the mother suffered mental distress from witnessing the death of her child and held that it is equally foreseeable that a small child of a person who is injured will not be far distant from his or her mother. The Court stated that it is not unreasonable to recognize the existence of a duty to persons in a close relationship with the person who is the object of a patient's threat. A therapists must consider the existence of those persons both in evaluating the seriousness of the danger posed by the patient and in determining the appropriate steps to be taken to protect the object of the patient's threat (*34 Cal. 3d 695, 705-706)* .

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16-165 California Points & Authorities §§ 165.132-165.139

[Reserved]

§§ 165.132[Reserved]

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16-165 California Points & Authorities § 165.140

§ 165.140 Defendant Owed and Breached Duty to Rescuer

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT OWED A DUTY TO PLAINTIFF BECAUSE PLAINTIFF WAS INJURED IN THE COURSE OF UNDERTAKING A NECESSARY RESCUE AND MAY RECOVER FROM THE PERSON WHOSE NEGLIGENCE CREATED THE PERIL THAT NECESSITATED THAT RESCUE.

Defendant Liable for Injuries Sustained by Necessary Rescuer. Persons injured in the course of undertaking a necessary rescue may, absent rash or reckless conduct on their part, recover from the person whose negligence created the peril that necessitated the rescue (*Solgaard v. Guy F. Atkinson Co. (1971) 6 Cal. 3d 361, 368, 99 Cal. Rptr. 29, 491 P.2d 821*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the defendant owed a duty to the plaintiff because the plaintiff was a foreseeable rescuer [*see Solgaard v. Guy F. Atkinson Co. (1971) 6 Cal. 3d 361, 368, 99 Cal. Rptr. 29, 491 P.2d 821]* . It should be combined with the *form in § 165.30* if applicable to the particular case.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may show that the plaintiff was injured in effecting a necessary rescue, and that the defendant's negligence created the situation of peril, and argue that the defendant should be charged with having proximately caused not only the peril that

necessitated the rescue, but also any injury suffered during the course of the rescue [*see Solgaard v. Guy F. Atkinson Co. (1971) 6 Cal. 3d 361, 368, 99 Cal. Rptr. 29, 491 P.2d 821]* .

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of complaint for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§ 165.30*. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in § 165.240* et seq. may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Defendant Liable for Injuries Sustained by Necessary Rescuer

In ***Solgaard v. Guy F. Atkinson Co.*** *(1971) 6 Cal. 3d 361, 99 Cal. Rptr. 29, 491 P.2d 821* , the plaintiff was one of several doctors who had agreed to provide medical services to the defendant's employees at a construction project. When two of the defendant's employees became pinned in a trench, the defendant's representatives contacted the plaintiff, who slipped and hurt his back while climbing down to the injured men. The trial court entered judgment on a jury verdict for the plaintiff, and the defendant appealed.

The Supreme Court affirmed the judgment, holding that the plaintiff was a rescuer as a matter of law (*6 Cal. 3d 361, 367)* . The Court noted that persons injured in the course of undertaking a necessary rescue may, absent rash or reckless conduct on their part, recover from persons whose negligence created the peril that necessitated the rescue. The theory that underlies the rescue rule is that rescuers as a class are always foreseeable if the defendant's negligence endangers anyone. Therefore, if a defendant creates a situation of peril for one person (the victim), the defendant may properly be charged with having proximately caused not only that peril, but also the rescue and any injury suffered during its course (*6 Cal. 3d 361, 368)* . In this case, the evidence was uncontradicted that the employees were in peril of their lives, that immediate action was required to save or assist them, that the plaintiff undertook to rescue them, and that he was injured in the course of doing so. Therefore, the plaintiff was entitled to the benefits of the rescuer doctrine (*6 Cal. 3d 361, 369)* .

[4] Additional Authorities

[a] Defendant Liable for Injuries Sustained by Necessary Rescuer

In *Sears v. Morrison (1999) 76 Cal. App. 4th 577, 90 Cal. Rptr. 2d 528* , the plaintiff was injured while attempting to rescue a person who, while working on a "swamp cooler," tripped over an electrical cord, causing the machinery to fall on him. The plaintiff sued both the injured worker and his mother, who owned the property. The trial court granted summary judgment for the defendants on the grounds that the rescue doctrine did not apply if the party whose

negligence created the peril is also the party being rescued. The court of appeal reversed the judgment as it applied to the injured worker, concluding that although the rescue doctrine has traditionally been applied to allow recovery to one who rescues a third party from a peril created by the defendant's negligence, the doctrine may also be applied if the rescued party was the defendant whose negligence created the peril. In so holding, the court concluded that most of the policy considerations that justify the doctrine in third-party cases apply equally if the party being rescued is the original negligent party (*76 Cal. App. 4th 577, 581)* . The court rejected a contrary conclusion reached by the court of appeal in *Holland v. Crumb (1994) 26 Cal. App. 4th 1844, 32 Cal. Rptr. 2d 366* , noting that the court in *Holland* cited no authority and provided no reasoned analysis for its conclusion that the rescue doctrine applied only if the rescued victim was a third party (*76 Cal. App. 4th 577, 588)* .

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16-165 California Points & Authorities §§ 165.141-165.149

[Reserved]

§§ 165.141[Reserved]

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16-165 California Points & Authorities § 165.150

§ 165.150 Defendant Owed and Breached Voluntarily Assumed Duty

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT OWED A DUTY TO PLAINTIFF BECAUSE DEFENDANT ENTERED ON AN AFFIRMATIVE COURSE OF CONDUCT THAT AFFECTED PLAINTIFF'S INTERESTS, VOLUNTARILY ASSUMING A DUTY TO ACT. DEFENDANT SHOULD THEREFORE BE LIABLE FOR HIS/HER/ITS NEGLIGENT _____ [ACTS *or* OMISSIONS].

A. Liability Based on Voluntary Assumption of Duty. If the defendant enters on an affirmative course of conduct affecting the interests of another, he or she is deemed to have assume a duty to act and will be liable for related negligent acts or omissions (*Schwartz v. Helms Bakery Ltd. (1967) 67 Cal. 2d 232, 238, 60 Cal. Rptr. 510, 430 P.2d 68*).

[*Optional*] **B. Services Necessary for Protection of Third Person.** A defendant who undertakes to render services to another person that the defendant should recognize as necessary for the protection of a third person or a third person's property has a duty to the third person to exercise reasonable care in the undertaking. The defendant is subject to liability to the third person for breach of this duty if (1) the defendant's failure to exercise reasonable care increases the risk of harm to the third person, (2) the defendant has undertaken to perform a duty owed by the other person to the third person, or (3) the third person suffers harm because either the third person or the person to whom the defendant rendered the services relied on the defendant's undertaking (*FNS Mortgage Serv. Corp. v. Pacific Gen. Group, Inc. (1994) 24 Cal. App. 4th 1564, 1572, 29 Cal. Rptr. 2d 916*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the defendant owed a duty to the plaintiff based on the defendant's voluntary assumption of a duty. This argument may arise in several procedural contexts, including opposing a motion for nonsuit and opposing a demurrer to the plaintiff's complaint [*see, e.g., Schwartz v. Helms Bakery Ltd. (1967) 67 Cal. 2d 232, 235, 60 Cal. Rptr. 510, 430 P.2d 68* (nonsuit); *Brockett v. Kitchen Boyd Motor Co. (1968) 264 Cal. App. 2d 69, 70, 70 Cal. Rptr. 136* (demurrer)]. Optional Paragraph B should be used if the defendant rendered services to another person that the defendant should have recognized as necessary for the protection of a third person or a third person's property [*see FNS Mortgage Serv. Corp. v. Pacific Gen. Group, Inc. (1994) 24 Cal. App. 4th 1564, 1572, 29 Cal. Rptr. 2d 916]* . This form should be combined with the *form in § 165.30*, if appropriate to the case.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should discuss the defendant's affirmative course of conduct, how that conduct affected the plaintiff's interests, and how public policy considerations required some affirmative action on the defendant's part to avoid harm to the plaintiff [*see Schwartz v. Helms Bakery Ltd. (1967) 67 Cal. 2d 232, 238, 60 Cal. Rptr. 510, 430 P.2d 68]* . If Optional Paragraph B is used, counsel should discuss the services the defendant undertook to provide, their necessity for the protection of the plaintiff or the plaintiff's property, and either (1) the increase in the risk of harm to the plaintiff caused by the defendant, (2) the duty owed by the other person to the plaintiff that the defendant has undertaken to perform, or (3) the reliance on the defendant's undertaking by either the plaintiff or the person to whom the defendant undertook to render the services [*see FNS Mortgage Serv. Corp. v. Pacific Gen. Group, Inc. (1994) 24 Cal. App. 4th 1564, 1572, 29 Cal. Rptr. 2d 916]* .

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of complaint for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§ 165.30*. For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in § 165.240* et seq. may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Liability Based on Voluntary Assumption of Duty

The factual and procedural background of ***Schwartz v. Helms Bakery Ltd.*** *(1967) 67 Cal. 2d 232, 60 Cal. Rptr. 510, 430 P.2d 68* , is discussed in *§ 165.31[3][a]*. The Court noted the common-law concept that although one individual need do nothing to rescue another from peril not of that individual's own making, if that person undertakes to do an act, he or she must do it with care. If the defendant enters on an affirmative course of conduct affecting the interests of another, he or she assumes a duty to act and is liable for resultant negligent acts or omissions. In addition, if the actor's conduct has brought him or her into a human relationship with another, of such character that sound social policy requires some affirmative action or some precaution on his or her part to avoid harm, the duty to act or take precaution is imposed by law (*67 Cal. 2d 232, 238)* .

[b] Services Necessary for Protection of Third Person

In ***FNS Mortgage Serv. Corp. v. Pacific Gen. Group, Inc.*** *(1994) 24 Cal. App. 4th 1564, 1572, 29 Cal. Rptr. 2d 916* , the defendant was a nonprofit association that promoted uniformity in the plumbing trade through its uniform plumbing code (UPC) and its listing of plumbing products that met the standards of the UPC. Virtually all public entities have adopted the UPC. Unlisted pipe not bearing the UPC logo is unmarketable, because building inspectors will not sanction its use, plumbing wholesalers will not sell it, and plumbers will not buy it. The defendant tests samples of plumbing products before listing them and requires manufacturers to enter into an agreement to make the product according to the defendant's standards and to permit unannounced inspections by the defendant at the manufacturer's expense. In March 1985, the defendant discovered that a particular manufacturer's pipe did not meet its standards and ordered the manufacturer to destroy it or remove the UPC logo. In May 1985, the defendant required this manufacturer to cease using the UPC logo on its pipe for 30 days because the pipe failed the defendant's tests. In that same month, however, the defendant renewed its listing agreement with the manufacturer for the same pipe. The plaintiffs contracted for the construction of a multi-unit apartment complex. This contract and a subcontract for installation of the plumbing required all plumbing systems to meet UPC specifications. From May 1985 through July 1985, the subcontractor purchased from a distributor pipe made by this manufacturer that was listed with the defendant and bore the UPC logo. The plaintiffs filed suit against the contractor, the distributor, and the defendant after the pipe prematurely deteriorated and caused substantial damage to the apartment complex. The trial court granted summary judgment for the defendant, holding that the defendant had no duty to protect the plaintiffs from the risk of damage by defective pipe. The plaintiffs appealed.

The court of appeal reversed, holding that under the Restatement (Second) of Torts (Second) § 324A, a defendant that undertakes to render services to another person, which the defendant should recognize as necessary for the protection of a third person or that third person's property, is subject to liability to that third person for failing to exercise reasonable care in the undertaking, if (1) the defendant's failure to exercise reasonable care increases the risk of harm to the third person, (2) the defendant has undertaken to perform a duty owed by the other person to the third person, or (3) the third person suffers harm because either the third person or the person to whom the defendant rendered the services relied on the defendant's undertaking. The court noted that (1) the defendant had undertaken to render the service of inspecting pipe manufacturers and not listing those who did not adhere to its standards, (2) the defendant should recognize that its services are necessary for the protection of consumers who acquire and install the pipe, (3) the defendant had undertaken to perform a duty owed by local building officials to consumers, and (4) the defendant's failure to exercise reasonable care in its activities increased the risk of harm to consumers from defective pipe because local building officials rely on the defendant's undertaking (*24 Cal. App. 4th 1564, 1572)* .

[4] Additional Authorities

[a] Liability Based on Voluntary Assumption of Duty

In *Coffee v. McDonnell-Douglas Corp. (1972) 8 Cal. 3d 551, 105 Cal. Rptr. 358, 503 P.2d 1366* , the California Supreme Court affirmed judgment for the plaintiff in an action for damages resulting from the defendant's failure to discover the plaintiff's disease in the course of a preemployment physical examination. The Court stated that an employer generally owes no duty to his or her prospective employees to ascertain whether or not they are physically fit for the job they seek, but the employer is liable if he or she assumes that duty and performs it negligently. The Court noted that one who voluntarily undertakes to perform an action must do so with due care (*8 Cal. 3d 551, 557)* .

In *Jacoves v. United Merch. Corp. (1992) 9 Cal. App. 4th 88, 11 Cal. Rptr. 2d 468* , parents sued the psychiatric hospital in which their adult son was treated. The complaint alleged negligent infliction of emotional distress based on their son's suicide shortly after the hospital released him into their custody at the treating doctors' insistence, despite his continued exhibition of suicidal tendencies. The plaintiffs alleged that the hospital had assumed a duty of care to them when the hospital required them to contract with the hospital for their son's care and that the son's doctors, as agents of

the hospital, had assumed a duty of care to them by involving them in their son's treatment through family therapy sessions. The court of appeal reversed summary judgment for the hospital, holding that a hospital or doctor may be liable to the parents of a psychiatric patient for negligent infliction of emotional distress caused by the breach of a duty assumed by the hospital or doctor. This assumed duty may arise if the parents are used as active instrumentalities in the patient's treatment (*9 Cal. App. 4th 88, 109)* .

In *Coca-Cola Bottling Co. v. Superior Court (1991) 233 Cal. App. 3d 1273, 286 Cal. Rptr. 855* , the plaintiff brought an action against his former employer for negligent spoliation of evidence, based on the employer's alleged failure to preserve a truck that was involved in an accident that injured the plaintiff. The court of appeal affirmed the trial court's denial of the defendant's motion for summary judgment. The court rejected the defendant's argument that, as the owner of the truck, it had an unfettered right to dispose of the truck without notice to anyone else and with total immunity from any liability for that disposal. The court held that this argument ignored the defendant's status as a party litigant having a duty not to lose or destroy evidence relevant to the lawsuit and that evidence indicating that a mixed question of law and fact may exist regarding the defendant's voluntary assumption of a duty to preserve the truck (*233 Cal. App. 3d 1273, 1294 n.9*).

AIM Ins. Co. v. Culcasi (1991) 229 Cal. App. 3d 209, 215, 280 Cal. Rptr. 766 , was a declaratory relief action brought by a liability insurance carrier against its insured. The complaint sought a declaration that the plaintiff had no potential duty to indemnify the insured should he be found liable in an action by the insured's employee, based on the insured's failure to properly complete the employee's application for medical insurance. The trial court granted the plaintiff's motion for summary judgment, and the defendant appealed. The court of appeal affirmed, principally on the basis that the carrier was not obligated to indemnify or defend because the underlying complaint did not allege any property damage and the policy did not provide coverage for liability based on emotional distress under its bodily injury clause. The court noted that the defendant had a duty to exercise due care in the sending of the application once he volunteered to do so, whether or not the defendant had a contractual duty to send the employee's health plan application to the health insurance carrier (*229 Cal. App. 3d 209, 216)* .

In *Bloomberg v. Interinsurance Exch. (1984) 162 Cal. App. 3d 571, 207 Cal. Rptr. 853* , the plaintiff alleged that his son was killed by a drunk driver while the son was waiting for a tow truck that the defendant negligently failed to send. The court of appeal held that, on the facts alleged in the complaint, it could not state that the defendant owed no duty of care to the son, because the defendant's undertaking to send the tow truck clearly affected the son's interest. The son relied on the defendant's undertaking and returned to the car to await help. Had he not expected the defendant to arrive, he might have made other arrangements for assistance. The court found further that the drunk driver's act, if proven, was foreseeable, and that if the plaintiffs could prove the defendant's negligence, the defendant would be held liable for its breach of duty (*162 Cal. App. 3d 571, 575-576)* .

In *Bock v. County of Los Angeles (1983) 150 Cal. App. 3d 65, 197 Cal. Rptr. 470* , the wife of an accident victim sued the county and the county coroner for failing to notify her when her dead husband was identified. The court of appeal reversed the trial court's sustaining of the defendant's demurrer without leave to amend. The court held that although a county coroner ordinarily has no duty to notify a decedent's next of kin, failure to so notify could give rise to a cause of action for negligent infliction of emotional distress if, as in this case, the county voluntarily assumes a duty to assist in locating a victim and then fails to act in a careful and reasonably diligent manner in carrying out the assumed duty. In such cases, the conduct of the public entity or its employees, in a situation of dependency, creates a special relationship that justifies detrimental reliance on the public entity's statements or promises (*150 Cal. App. 3d 65, 72)* .

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[Reserved]

§§ 165.151[Reserved]

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16-165 California Points & Authorities § 165.160

§ 165.160 Defendant Owed and Breached Duty to Plaintiff Despite Sudden Onset of Mental Illness

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

AN EVIDENTIARY SHOWING THAT DEFENDANT SUFFERED A SUDDEN AND UNANTICIPATED MENTAL ILLNESS THAT RENDERED HIM/HER INCAPABLE OF ACTING IN A CAREFUL MANNER DOES NOT, AS A MATTER OF LAW, PRECLUDE LIABILITY FOR NEGLIGENCE.

Sudden Mental Illness No Defense to Negligence. Sudden mental illness may is not a defense to harmful conduct. In a negligence action, the harm caused by such an individual's behavior must be judged by the objective reasonable person standard (*Bashi v. Wodarz (1996) 45 Cal. App. 4th 1314, 1323, 53 Cal. Rptr. 2d 635*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a plaintiff's contention in a negligence action that the defendant was liable for the injuries caused despite the defendant's having suffered a sudden and unanticipated mental illness that rendered the defendant incapable of acting in a careful manner [*see Bashi v. Wodarz (1996) 45 Cal. App. 4th 1314, 1323, 53 Cal. Rptr. 2d 635]* . It should be combined with any of the *forms in § 165.30*, if applicable to the particular case.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may discuss evidence of the defendant's sudden and unanticipated mental illness at the time of the accident and argue that the illness did not relieve the defendant of liability [*see Bashi v. Wodarz (1996) 45 Cal. App. 4th 1314, 1323, 53 Cal. Rptr.*

2d 635] .

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of complaint for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§ 165.30*. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Sudden Mental Illness No Defense to Negligence

In ***Bashi v. Wodarz*** *(1996) 45 Cal. App. 4th 1314, 53 Cal. Rptr. 2d 635* , the plaintiffs were involved in a rear-end collision with the defendant's vehicle and sued for negligence. The defendant produced medical expert evidence indicating that the accident was unavoidable due to the sudden, unanticipated onset of her mental illness. The trial court granted a summary judgment motion by the defendant, on the ground that the sudden anticipated mental disorder precluded the defendant from being negligent as a matter of law.

The court of appeal reversed, holding that an evidentiary showing that the defendant suffered a sudden and unanticipated mental illness that rendered it impossible for her to control her vehicle does not, as a matter of law, preclude her liability for negligence. In arriving at this decision the court discussed the case of *Cohen v. Petty (D.C. Cir. 1933) 65 F.2d 820* , which held that as between an innocent passenger and an innocent fainting driver, the passenger must suffer. The driver in *Cohen* had suffered a sudden illness rendering him unconscious. The defendant admitted that no prior California decision had decided whether the *Cohen* rule also applied if a defendant suffered a sudden and unanticipated mental, as opposed to physical illness, and urged the court to extend the *Cohen* rule to any sudden illness, without distinguishing between physical and mental illness. In declining to extend the application of *Cohen*, the court relied on (1) *Civ. Code § 41*, which provides that a person of unsound mind is civilly liable for wrongs caused by that person unless at the time of the act he or she was capable of knowing that it was wrongful, and (2) the Restatement (Second) of Torts, which provides that unless the actor is a child, his or her insanity or other mental deficiency does not relieve the actor from liability for conduct that does not conform to the standard of a reasonable person under similar circumstances. The court concluded that sudden mental illness is not a defense to harmful conduct and that the harm caused by the individual's behavior must be judged by the objective reasonable person standard in the context of a negligence action, as expressed in *Civ. Code § 41* (*45 Cal. App. 4th 1314, 1323)* .

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16-165 California Points & Authorities §§ 165.161-165.169

[Reserved]

§§ 165.161[Reserved]

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16-165 California Points & Authorities § 165.170

§ 165.170 Defendant Owed and Breached Duty to Reveal Risk of HIV Infection

[1] FORM

[*The following may be included in a supporting memorandum, or in a trial or appellate brief.*]

DEFENDANT MAY BE LIABLE FOR NEGLIGENT TRANSMISSION OF HIV INFECTION TO PLAINTIFF BECAUSE DEFENDANT KNEW OR HAD REASON TO KNOW OF _____ [HIS or HER] INFECTION AND FAILED TO WARN OF THE RISK BEFORE ENGAGING IN UNPROTECTED SEXUAL ACTIVITY WITH PLAINTIFF.

Negligent Transmission of HIV. A plaintiff who contracts HIV from a sexual partner who purports to be in a monogamous relationship with plaintiff may state a cause of action for negligent transmission of HIV if the defendant, without revealing the risk of infection, engages in unprotected sexual activity with plaintiff when defendant had actual knowledge that he or she was infected with HIV, or, in the absence of actual knowledge, if defendant under the totality of the circumstances had reason to know that he or she was infected (*see John B. v. Superior Court (2006) 38 Cal. 4th 1177, 1191, 45 Cal. Rptr. 3d 316, 137 P.3d 153*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a cause of action for negligent transmission of HIV when defendant knew or had reason to know that he or she was infected with HIV but had unprotected sexual activities with plaintiff without revealing the risk of HIV infection. While the extent of the duty is not yet defined when the sexual partners are not in a long-term relationship, the Supreme Court has recognized a cause of action when the defendant makes representations to plaintiff that defendant is not engaging in sexual activities with other partners and is disease-free, and convinces plaintiff to engage in sex without the use of condoms.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should include facts describing defendant's representations to plaintiff prior to the sexual activity at issue, including any representations about monogamy, being free of sexually transmitted disease, or any other conduct by defendant relied on by plaintiff when making a decision to engage in sex without the use of condoms. Counsel should also include any known facts about defendants other activities that should have put defendant on notice that he or she was actually or probably infected with HIV.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of complaint for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[3] Discussion of Authorities

[a] Negligent Transmission of HIV

In ***John B. v. Superior Court*** *(2006) 38 Cal. 4th 1177, 45 Cal. Rptr. 3d 316, 137 P.3d 153* , plaintiff was the wife of defendant. Prior to their marriage, defendant represented to plaintiff that he did not have any sexually-transmitted diseases and that he was in a monogamous relationship with her. In light if these representations and at defendant's insistence, plaintiff agreed to forego the use of condoms when they engaged in sexual relations. About three months after they were married, plaintiff became ill and learned that she was infected with HIV. Defendant was then tested and also determined to be infected. Although defendant insisted that his wife had infected him, about a year after the positive tests defendant admitted that he had engaged in unprotected sexual relations with other men before they were married. Plaintiff sued her husband for intentional and negligent infliction of emotional distress, fraud, and negligence, alleging that her husband's sexual encounters with other men had not ended when they were married and that he had infected her with HIV. During pretrial discovery, plaintiff sought through the use of interrogatories and other discovery devices to gain information about her husband's sexual and medical history, but defendant resisted, primarily on privacy grounds. The trial court overruled defendant's objections to the discovery. Defendant filed a petition for writ of mandate. The court of appeal granted the petition as to some of the discovery requests and denied relief as to others. Defendant appealed.

The California Supreme Court reversed the court of appeal in part and remanded for further proceedings. The Court noted that resolution of the discovery dispute required first determining the scope of plaintiff's available cause of action. The Court, focusing exclusively on the cause of action for negligence, held that a plaintiff who has contracted HIV from a sexual partner may state a cause of action for negligent transmission of HIV. Moreover, the Court also concluded that this cause of action does not require actual knowledge on the part of the defendant that he or she was infected at the time of transmission. It is sufficient that the defendant, under the totality of the circumstances, had reason to know that he or she was infected. A person would have "reason to know" of infection if there is sufficient information to cause a reasonably intelligent person to infer that he or she is infected with the virus or that infection is so highly probable that his or her conduct would be predicated on that assumption (*38 Cal. 4th 1177, 1191)* .

The Supreme Court cautioned, however, that its holding should be understood in the context of the facts of the present case. Plaintiff and defendant were engaged and eventually married, the husband represented himself as monogamous and disease-free, and insisted that the couple stop using condoms, and the wife stopped using condoms in reliance on those representations. The Supreme Court did not consider the scope of any duty that might be owed by a person when the relationship does not extend beyond the sexual encounter itself or does not contemplate sexual exclusivity, or when the defendant has not made representations of being disease-free or insisted on having sex without the use of condoms (*38 Cal. 4th 1177, 1193)* .

Addressing the discovery dispute, the Court noted that the right to privacy is not absolute and discovery may be ordered when a litigant has put his or her own medical condition at issue. Balancing the defendant's privacy rights with the need for the information at trial, the Court permitted discovery into the husband's sexual conduct and knowledge of his HIV status, but because of a negative HIV test the husband received right after their marriage, the Court limited discovery to the relevant time period between which the husband could have first been infected and the time when the couple stopped engaging in sexual relations (*38 Cal. 4th 1177, 1199-1200)* . The Court noted, however, that the relevant time period could be expanded should plaintiff provide evidence bringing into doubt the accuracy of the negative HIV test result relied on by the defendant (*38 Cal. 4th 1177, 1201)* .

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16-165 California Points & Authorities §§ 165.171-165.179

[Reserved]

§§ 165.171[Reserved]

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16-165 California Points & Authorities § 165.180

§ 165.180 Duty Owed by Employer at Multi-Employer Worksite

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

AN EMPLOYER AT A MULTI-EMPLOYER WORK SITE OWES A DUTY TO THE EMPLOYEES OF OTHER EMPLOYERS AT THE SITE TO REPORT NON-OBVIOUS HAZARDS ABOUT WHICH THE EMPLOYER LEARNS DUE TO EXPOSURE BY ITS OWN EMPLOYEES DURING THE COURSE OF THEIR WORK.

Duty of Employer at Multi-Employer Sites to Report Hazards. Taken in conjunction, *Lab. Code § 6400(b)* and *8* Cal. Code Regs. § 336.11 impose a duty of care on each employer engaged at a multi-employer work site, both construction and non-construction, to report all non-obvious hazards about which the employer learns because its own employees were exposed to the hazard during the course of their work, even if that employer did not create the hazard, and a breach of this duty is actionable in tort by any worker at the site who is subsequently injured by the hazard if it is not reported (*Suarez v. Pacific Northstar Mechanical, Inc. (2009) 180 Cal. App. 4th 430, 445, 103 Cal. Rptr. 3d 168*).

[2] Comments

These points and authorities may be submitted in support of the contention that an employer at a multi-employer work site may be liable to the employees of another employer at the site for failing to report a non-obvious hazard about which the employer became aware due to exposure by its own employees, when the plaintiff employees were injured by the same hazard.

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law stated. Thus, counsel should include facts showing that defendant employer learned of a non-obvious hazard when its own employees were exposed to the hazard, that the defendant employer failed to report the hazard to a party in control of the site or responsible for work-site safety, and plaintiff was subsequently injured by the same hazard.

These points and authorities may be adapted for use in a trial or appellate brief.

[3] Discussion of Authorities

[a] Duty of Employer at Multi-Employer Sites to Report Hazards

In ***Suarez v. Pacific Northstar Mechanical, Inc.*** *(2009) 180 Cal. App. 4th 430, 103 Cal. Rptr. 3d 168* , plaintiffs were two employees of a general contractor hired to oversee a tenant improvement project. Plaintiffs were injured when one of them climbed to the top of a ladder, grabbed an I-bolt to steady himself, and received an electrical shock caused by an ungrounded light fixture hanging from the I-bolt, which caused him to fall off the ladder and land on the other plaintiff. Plaintiffs sued the premises owner, and subsequently added as a defendant a subcontractor on the work project after learning that, prior to plaintiffs' accident, an employee of that subcontractor had been shocked by the same ungrounded light fixture, had reported the hazard to his employer, but that employer failed to report the hazard or take any corrective action. The parties discovered that the ungrounded light fixture was a hazard created by the prior owners of the building, rather than by anyone working on the current improvement project. The trial court granted summary judgment for the subcontractor and plaintiffs appealed.

The court of appeal reversed. The court first held that under standard common-law tort principles, a person who was not responsible for creating a hazard is not liable for failing to take action to assist or protect another from that hazard unless a special relationship exists between the parties. Because an employer such as defendant was not in such a special relationship with the employees of another employer, liability could not be imposed under the common law (*180 Cal. App. 4th 430, 437-438)* . In addition, the language of the contract between the general contractor and the defendant did not support the imposition of liability for failing to correct or report the hazard (*180 Cal. App. 4th 430, 439)* . However, the court noted that under the Supreme Court's holding in *Elsner v. Uveges (2004) 34 Cal. 4th 915, 22 Cal. Rptr. 3d 530, 102 P.3d 915* , Cal-OSHA statutes and regulations may be used to impose a duty of care on employers that, if breached, may be the basis of a tort suit brought by an injured employee (*180 Cal. App. 4th 430, 440)* . Consistent with that principle, the court of appeal held that two Cal-OSHA provisions, *Lab. Code § 6400(b)* and *8* Cal. Code Regs. § 336.11, impose a duty of care on each employer engaged at a multi-employer work site, both construction and non-construction, to report all non-obvious hazards about which the employer learns because its own employees were exposed to the hazard during the course of their work, even if that employer did not create the hazard. The duty to report is fulfilled under these provisions if the employer reports the hazard to the employer responsible for creating the hazard, to the employer responsible for safety and health conditions at the worksite, or to the employer actually responsible for correcting the hazard. The court also concluded that a breach of this duty is actionable in tort by any worker at the site who is subsequently injured by the hazard if it is not reported (*180 Cal. App. 4th 430, 440-445)* .

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16-165 California Points & Authorities §§ 165.181-165.189

[Reserved]

§§ 165.181[Reserved]

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16-165 California Points & Authorities § 165.190

§ 165.190 Duty Owed by Child--Adult Standard of Care Does Not Apply

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT, WHO IS A MINOR, SHOULD NOT BE HELD TO THE SAME STANDARD OF CARE AS AN ADULT AND IS REQUIRED TO EXERCISE ONLY THAT DEGREE OF CARE THAT IS ORDINARILY IS EXERCISED BY CHILDREN OF LIKE AGE, MENTAL CAPACITY, AND EXPERIENCE.

Children Not Engaged in Adult Activities Held to Standard of Care Applicable to Children. Children are not held to the same standard of conduct as an adult, but are held to the degree of care ordinarily exercised by children of like age, mental capacity, and experience (*Ellis v. D'Angelo (1953) 116 Cal. App. 2d 310, 314-315, 253 P.2d 675*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the defendant, a minor, has not breached a duty to the plaintiff because the defendant should not be held to the same standard of care as an adult, and that the defendant should be required to exercise only that degree of care expected of children of like age, experience, and intelligence [*see* *Ellis v. D'Angelo (1953) 116 Cal. App. 2d 310, 314-315, 253 P.2d 675]* .

This contention may arise in several procedural contexts, including in support of a demurrer or in challenging the propriety of jury instructions regarding the applicable standard of care [*see, e.g.,* *Ellis v. D'Angelo (1953) 116 Cal. App. 2d 310, 312, 253 P.2d 675* (demurrer); *Cummings v. County of Los Angeles (1961) 56 Cal. 2d 258, 261, 14 Cal. Rptr. 668, 363 P.2d 900* (jury instructions)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should discuss the activity engaged in by the defendant and argue that the defendant, a child, should be required to be held only to the degree of care ordinarily exercised by children of like age, mental capacity, and experience, and not the standard of conduct applied to adults [*see Olsen v. McGillicuddy (1971) 15 Cal. App. 3d 897, 903, 93 Cal. Rptr. 530]* .

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of answer in a cause of action for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in § 165.121* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Children Not Engaged in Adult Activities Held to Standard of Care Applicable to Children

In ***Ellis v. D'Angelo*** *(1953) 116 Cal. App. 2d 310, 253 P.2d 675* , the plaintiff alleged that the defendant, a four-year-old child, pushed the plaintiff violently to the floor. The plaintiff's complaint was based on negligence and on assault and battery. The trial court sustained a demurrer to the complaint and entered judgment for the defendant, and the plaintiff appealed.

The court of appeal reversed judgment for the defendant. The court noted that a child is required to exercise only that degree of care that the great mass of children of the same age ordinarily exercise, taking into account the experience, capacity, and understanding of the child (*116 Cal. App. 2d 310, 314-315)* . The court stated that although a four-year-old child lacks the capacity for negligent conduct, the child might be liable for battery (*116 Cal. App. 2d 310, 316-320)* . Therefore, the court directed the lower court to overrule the demurrer with regard to those counts of the complaint that alleged assault and battery (*116 Cal. App. 2d 310, 320)* .

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16-165 California Points & Authorities §§ 165.191-165.199

[Reserved]

§§ 165.191[Reserved]

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16-165 California Points & Authorities § 165.200

§ 165.200 Auditor Owes No Duty of Care to Persons Other Than Client

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

IN PERFORMING A FINANCIAL AUDIT OF _____ [*name of company or other person that was subject of audit*] AND RENDERING A WRITTEN REPORT, DEFENDANT DID NOT OWE ANY GENERAL DUTY OF CARE TO PLAINTIFF REGARDING THE CONDUCT OF THE AUDIT BECAUSE PLAINTIFF WAS NOT DEFENDANT'S CLIENT.

Auditor's Duty Limited to Client. An auditor's liability for general negligence in the conduct of an audit of the client's financial statements is confined to the client--that is, the person that contracted for and engaged the audit services. Other persons may not recover on a theory of negligence (*Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370, 406, 11 Cal. Rptr. 2d 51, 834 P.2d 745*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the defendant did not owe a general duty of care to the plaintiff, based on the defendant's audit on which the plaintiff relied, because the plaintiff was not the defendant's client [*see* *Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370, 406, 11 Cal. Rptr. 2d 51, 834 P.2d 745]* .

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may discuss the circumstances under which the plaintiff learned of the audit in question and argue that the plaintiff was not

the defendant's client.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of answer in a cause of action for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Auditor's Duty Limited to Client

In ***Bily v. Arthur Young & Co.*** *(1992) 3 Cal. 4th 370, 11 Cal. Rptr. 2d 51, 834 P.2d 745* , an investor in a computer manufacturing company sued an accounting firm for damages on theory that the accounting firm negligently performed an audit of the company and that, in reliance on the audit, the plaintiff made and retained his investment, which was lost when the company soon became bankrupt. The trial court entered judgment on a jury verdict in the plaintiff's favor, and the court of appeal affirmed.

The Supreme Court reversed. The Court reviewed the audit function in public accounting and cases concerning the extent of an auditor's duty of care in the performance of an audit (*3 Cal. 4th 370, 379-392)* . The Court also considered various provisions of the Restatement (Second) of Torts and federal securities laws (*3 Cal. 4th 370, 392-396)* . The Court analyzed the auditor's liability to third persons for audit opinions and held that an auditor's liability for general negligence in the conduct of an audit of its client's financial statements is confined to the client--that is, the person who contracts for or engages the audit services. Other persons may not recover on a pure negligence theory (*3 Cal. 4th 370, 406)* . The reference to a "pure" negligence theory is intended to distinguish this holding from a related holding in the same case, to the effect that nonclients may be able to recover on theory of negligent misrepresentation (*3 Cal. 4th 370, 407)* . For discussion of that point, in the context of a form of memorandum of points and authorities opposing a demurrer to a complaint, see Ch. 105, *Fraud and Deceit* .

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16-165 California Points & Authorities §§ 165.201-165.219

[Reserved]

§§ 165.201[Reserved]

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16-165 California Points & Authorities § 165.220

§ 165.220 Gas Company's Limited Duty of Care to Gas Customer

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT GAS COMPANY MAY NOT BE HELD LIABLE FOR DAMAGES TO PLAINTIFF BECAUSE DEFENDANT DID NOT BREACH ANY DUTY OF CARE TO PLAINTIFF.

Limited Duty Based on Inherently Hazardous Substance. Although natural gas is an inherently hazardous substance, a gas company owes no duty based on its supplying natural gas if the gas did not cause the injury, and there were no defective gas lines or valves that caused the gas to leak (*Salazar v. Southern Cal. Gas Co. (1997) 54 Cal. App. 4th 1370, 1378, 63 Cal. Rptr. 2d 522*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the defendant, a gas company, did not owe a duty of care to the plaintiff in an action for negligence [*see Salazar v. Southern Cal. Gas Co. (1997) 54 Cal. App. 4th 1370, 1378, 63 Cal. Rptr. 2d 522]* . This form may be used if the plaintiff contends that the defendant owed an expansive duty to, for example, warn of the potential fire danger of an unelevated water heater.

This argument may arise in any of several procedural situations. For example, it may be made in support of a demurrer, or a motion for summary judgment [*see, e.g., Salazar v. Southern Cal. Gas Co. (1997) 54 Cal. App. 4th 1370, 63 Cal. Rptr. 2d 522* (summary judgment)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may argue that the natural gas supplied by the gas company did not cause the accident in issue and that there were no defective gas lines or valves that caused the gas to leak.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of answer in a cause of action for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender). For legal background, research and procedural guides, and forms relating to gas companies, see California Forms of Pleading and Practice, Ch. 277, *Gas and Electricity* (Matthew Bender).

[d] Related Points and Authorities

For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Limited Duty Based on Inherently Hazardous Substance

In ***Salazar v. Southern Cal. Gas Co.*** *(1997) 54 Cal. App. 4th 1370, 63 Cal. Rptr. 2d 522,* the plaintiff was burned in a flash fire that occurred while he was working in his garage, spraying metal parts with a spray can of carburetor cleaner while an open, five-gallon can of gasoline was next to him. He was standing approximately four feet from a water heater when vapors from the carburetor cleaner or gasoline he was using were ignited by the pilot light on the water heater. The plaintiff rented the garage and a guest house from the owner, who had installed the water heater 10 years earlier. It was elevated only two to three inches off the floor of the garage. The applicable Municipal Code required that water heaters in residential garages be elevated at least 18 inches above the floor. There were two labels on the water heater, one placed there by the manufacturer and one by the defendant, the company that supplied natural gas for the water heater, warning not to store or use flammable liquids near the water heater. The plaintiff sued the defendant, a gas company, for negligence, and the trial court granted summary judgment in favor of the defendant. The plaintiff appealed.

The plaintiff had two arguments on appeal: (1) because the defendant supplied an inherently dangerous substance, gas, it owed the plaintiff a duty of care; and (2) because the defendant created a hidden danger by supplying gas to a hazardous appliance, it had a duty to warn of the danger or disconnect service. The court of appeal disagreed with both arguments and held that the trial court correctly declined to impose a duty on the defendant and correctly granted summary judgment on that basis. The court acknowledged that a gas company may have a duty to its customers under certain circumstances (*see Ambriz v. Petrolane Ltd. (1957) 49 Cal. 2d 470, 319 P.2d 1*), but ruled that in this case the gas did not cause the explosion and there were no defective gas lines or valves that caused the gas to leak. The defendant therefore did not breach any duty of care with respect to the product it supplied to the plaintiff (*54 Cal. App. 4th 1370, 1378)* . The court analyzed the following factors in determining that the gas company owed the plaintiff no duty in this case: (1) the foreseeability of harm to the plaintiff, (2) the degree of certainty that the plaintiff suffered injury, (3) the closeness of the connection between the defendant's conduct and the injury suffered, (4) the moral blame attached to the defendant's conduct, (5) the policy of preventing future harm, (6) the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and (7) the availability, cost and prevalence of insurance for the risk involved. It then offered the following reasoning in support of its holding: (1) harm from a gas-fired water heater when flammable substances are stored or used nearby was

foreseeable, but the harm was more likely if the heater was not elevated; (2) there was no certain connection between elevation of the heaters and a decrease in the incidence of fires caused by vapors from flammable liquids coming into contact with the heater; (3) any lack of safety in this case was not in the supplying of natural gas to the plaintiff's residence, over which the defendant had absolute control, but rather was in the positioning of the water heater and in the plaintiff's use of flammable liquids near the heater, over which the defendant had no control; (4) there was no close connection between the defendant's conduct and the plaintiff's injury and little moral blame attached because warning labels were inadequate to prevent the plaintiff's injuries; (5) because of the uncertainty as to whether elevating water heaters in garages would decrease the incidence of fires caused by vapors from flammable liquids coming to contact with the heaters, the policy of preventing future harm would not be best served by requiring the defendant to warn its customers of the potential dangers or disconnecting service to those who have them in their garages. The policy of preventing future harm would better be served by educating the public as to the hazards of storing or using flammable liquids in close proximity to gas-fired appliances or by modifying these appliances to minimize or reduce the risk of igniting flammable vapors, which policy the defendant already followed. Moreover, placing the proposed duties on the defendant would impose significant costs on society. If liability was imposed on the defendant, the cost of that liability would be borne by the defendant's customers (*54 Cal. App. 4th 1370, 1385)* .

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16-165 California Points & Authorities §§ 165.221-165.229

[Reserved]

§§ 165.221[Reserved]

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16-165 California Points & Authorities § 165.230

§ 165.230 Defendant Owed Plaintiff No Duty to Control or Warn of Third Party's Dangerous Conduct Because No Special Relationship Existed

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT DID NOT OWE A DUTY TO PLAINTIFF _____ [TO CONTROL A THIRD PARTY'S CONDUCT *and/or* TO WARN PLAINTIFF OF A THIRD PARTY'S CONDUCT] BECAUSE _____ [NO SPECIAL RELATIONSHIP EXISTED BETWEEN _____ (PLAINTIFF AND DEFENDANT *and/or* DEFENDANT AND THE THIRD PARTY THAT ENGAGED IN THE FORESEEABLY DANGEROUS CONDUCT)].

A. No Duty to Control or Warn Absent Special Relationship. One normally owes no duty to control the conduct of another, nor to warn those endangered by such conduct, but the duty may arise if (1) a special relationship exists between the actor and the third person that imposes a duty on the actor to control the third person's conduct, or (2) a special relationship exists between the actor and the other that gives the other a right to protection (*see Davidson v. City of Westminster (1982) 32 Cal. 3d 197, 201-203, 185 Cal. Rptr. 252, 649 P.2d 894* ; *see also Todd v. Dow (1993) 19 Cal. App. 4th 253, 258, 23 Cal. Rptr. 2d 490*).

[*Optional*] **B. No Ability to Control Third Party.** In determining whether there is a special relationship between the defendant and the person whose conduct needs to be controlled, the ability to control the third party is an essential element, and the absence of that ability is fatal to a claim of legal responsibility (*Wise v. Superior Court (1990) 222 Cal. App. 3d 1008, 1013, 272 Cal. Rptr. 222* ; *see also Todd v. Dow (1993) 19 Cal. App. 4th 253, 259, 23 Cal. Rptr. 2d 490*).

[*Optional*] **C. No Actual Custodial Ability.** If the natural relationship between the parties creates no inference of an ability to control, the actual custodial ability must affirmatively appear (*Wise v. Superior Court (1990) 222 Cal. App.*

3d 1008, 1013-1014, 272 Cal. Rptr. 222).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the defendant did not owe a duty to warn the plaintiff of the conduct of a third party or to control the conduct of a third party, because no special relationship existed between either the plaintiff and the defendant or between the defendant and the person who committed the dangerous conduct [*see Davidson v. City of Westminster (1982) 32 Cal. 3d 197, 201-203, 185 Cal. Rptr. 252, 649 P.2d 894]* . Optional Paragraph B may be submitted to assert that the defendant did not have the ability to control the third party. Optional Paragraph C may be submitted to assert that the defendant did not have any custodial ability over the third party. This form should be combined with any of the *forms in §§ 165.231 -165.232* that are applicable to the particular case.

This argument may arise in several procedural contexts. For example, the defendant might raise this argument in support of a motion for judgment on the pleadings, a motion for summary judgment, or a demurrer [*see, e.g., Megeff v. Doland (1981) 123 Cal. App. 3d 251, 255, 176 Cal. Rptr. 467* (judgment on pleadings, summary judgment); *Davidson v. City of Westminster (1982) 32 Cal. 3d 197, 201, 185 Cal. Rptr. 252, 649 P.2d 894* (demurrer)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may discuss the defendant's relationship with the plaintiff or the third person in question and argue that it is not a special relationship for the purpose of imposing a duty [*see Todd v. Dow (1993) 19 Cal. App. 4th 253, 258-259, 23 Cal. Rptr. 2d 490]* .

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of answer to a cause of action for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§§ 165.231 -165.232*. For points and authorities asserting that a landlord has no duty to warn a prospective tenant of the presence of a vicious dog in the neighborhood, see Ch. 178, *Premises Liability* . For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in §§ 165.130 -165.131* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] No Duty to Control or Warn Absent Special Relationship

In ***Davidson v. City of Westminster*** *(1982) 32 Cal. 3d 197, 185 Cal. Rptr. 252, 649 P.2d 894* , a husband and wife brought an action for negligent and intentional infliction of emotional distress, and for negligent investigation, failure to protect, and failure to warn against a city and certain city police officers. The plaintiffs alleged that two police officers had a laundromat under surveillance for the purpose of apprehending a suspect who had stabbed other women at nearby laundromats. The police saw a man who closely resembled the attacker enter the premises where the wife was doing her laundry. The police identified the man as the likely perpetrator of the assaults, but they failed to warn the wife, who was eventually stabbed by the suspect. The plaintiffs alleged that a special relationship existed between the wife and the police officers, as well as between the assailant and the officers, and that this relationship imposed a duty of care on the officers toward the wife. The defendants demurred on the ground that no special relationship existed under the allegations of the complaint and that the action was barred under the immunity provision of *Gov. Code § 845*, which absolves a public entity or employee of liability for failure to provide adequate police protection. Without indicating the grounds for the ruling, the trial court sustained the demurrer. The plaintiffs appealed.

The Supreme Court affirmed, noting that considering the duty issue before addressing the immunity issue is important, because statutory immunity does not arise until it is determined that the defendant otherwise owes a duty of care to the plaintiff (*32 Cal. 3d 197, 201-202)* . The Court then turned to the issue of the special relationship. As a general rule, one owes no duty to control the conduct of another, nor to warn those endangered by that conduct. Such a duty may arise, however, if (1) a special relationship exists between the actor and the third person that imposes a duty on the actor to control the third person's conduct, or (2) a special relationship exists between the actor and the other that gives the other a right to protection. In determining the existence of a duty of care in a given case, pertinent factors include: (1) the foreseeability of harm to the plaintiff; (2) the degree of certainty that the plaintiff suffered injury; (3) the closeness of the connection between the defendant's conduct and the injury suffered; (4) the moral blame attached to the defendant's conduct; (5) the policy of preventing future harm; (6) the extent of the burden to the defendant and consequence to the community of imposing a duty to exercise care with resulting liability for breach; and (7) the availability, costs, and prevalence of insurance for the risk involved (*32 Cal. 3d 197, 203)* . In addition, if a public agency is involved, additional elements involve the extent of the agency's powers, the role imposed on it by law, and the limitations imposed on it by budget (*32 Cal. 3d 197, 203)* .

The Court stated that there was no special relationship between the police officers and the assailant because there was only a minimal connection between the officers and the assailant--a visual identification from a distance (*32 Cal. 3d 197, 205)* . With regard to the special relationship between the wife and the police officers, the factors allegedly giving rise to the special relationship included the decision to conduct the surveillance, the observation of the potential assailant in the laundromat where the wife was present, the recognition of the assailant as the likely perpetrator of previous assault, the dependence of the wife on the officers to secure her safety, and the officers' failure to intervene by warning or otherwise protecting her (*32 Cal. 3d 197, 206)* . Moreover, a finding of a special relationship does not require a promise or reliance on it to impose a duty of care. A special relationship may be predicated on a victim's dependence on the police for protection (*32 Cal. 3d 197, 207)* . However, the Court decided that a special relationship did not exist in this case. The officers did not create the peril to the wife, and she was unaware of their presence and did not rely on them for protection. The officers' conduct did not change the risk that would have existed in their absence. In addition, there is no reason to speculate that anyone--the wife or the assailant--would have acted differently if the officers had not placed the laundromat under surveillance. In addition, mere knowledge of the wife's danger did not impose a duty on the officers to warn her (*32 Cal. 3d 197, 208)* . Therefore, the Court concluded that the plaintiffs had not stated any cause of action for negligence. Even though the facts as alleged may establish that the wife, or indeed any other woman using the laundromat, was a reasonably foreseeable victim as was the plaintiff in *Tarasoff v. Regents of Univ. of Cal. (1976) 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334* (discussed in *§ 165.130[3][a]*; but decided prior to enactment of *Civ. Code § 43.92*, establishing limitations on psychotherapist's duty to predict, warn of, and protect third person from patient's violent behavior), the Court concluded that foreseeability alone did not suffice to establish a special relationship with the officers that imposed on them a duty to warn or protect (*32 Cal. 3d 197, 209)* .

In ***Todd v. Dow*** *(1993) 19 Cal. App. 4th 253, 23 Cal. Rptr. 2d 490* , the plaintiff and his cousin engaged in mock hand-to-hand combat in the plaintiff's bedroom, each holding a rifle, and the cousin's rifle discharged. The cousin was 24 years old, married, and no longer living at his parents' home, but stored his rifle and some other firearms there. The plaintiff brought suit against his cousin and his cousin's parents, claiming that the parents had a special relationship with their son and had breached a duty of care by not controlling their son's use of a firearm. The trial court granted summary judgment to the defendants, and the plaintiff appealed.

The court of appeal affirmed, holding that one owes no duty to control the conduct of another unless one stands in a special relationship either with the person whose conduct needs to be controlled or the person who is the foreseeable victim. Rejecting the plaintiff's argument that the parent/child relationship created a duty on the part of the defendants to control their son, the court found that the defendants had no ability to control him, which is fatal to a claim of legal responsibility (*19 Cal. App. 4th 253, 259)* . Citing *Wise v. Superior Court (1990) 222 Cal. App. 3d 1008, 1012-1013, 272 Cal. Rptr. 222* [*see § 165.230[3][b]*], in which a wife had no duty to control the conduct of her husband, the court stated that the public policy of holding individuals responsible for their own tortious acts mandates against shifting the liability for those acts to third parties. The court pointed out that the facts in this case were even less persuasive than the facts in *Wise*, because the cousin had not threatened anyone, was not violent, and had intended no harm (*19 Cal. App. 4th 253, 259-260)* .

[b] No Ability to Control Third Party

In ***Wise v. Superior Court*** *(1990) 222 Cal. App. 3d 1008, 272 Cal. Rptr. 222* , the defendant's husband mounted a sniper attack from the roof of his home, severely injuring a number of passing motorists, including the plaintiffs, before taking his own life. The defendant filed a general demurrer to the plaintiffs' complaint, which the trial court overruled. The defendant petitioned for a writ of mandate.

The court of appeal granted a peremptory writ of mandate directing the superior court to vacate its order overruling the defendant's demurrer and enter a new and different order sustaining the demurrer without leave to amend. In issuing the writ, the court of appeal stated that the substance of the plaintiffs' claim was that the defendant failed to control her husband. In general, the court noted, one owes no duty to control the conduct of a third person to prevent him or her from causing physical harm to another, absent a special relationship between the defendant and either the person whose conduct needs to be controlled or the foreseeable victim of that conduct. With regard to the first category, the court cited Restatement (Second) of Torts, §§ 316-319, for a list of the relationships included as special relationships. It observed that in all of those relationships, the ability to control the third party is essential. The absence of this ability is fatal to a claim of legal responsibility (*222 Cal. App. 3d 1008, 1013)* . The court concluded that the complaint, rather than alleging facts consistent with the defendant's assumption of responsibility for the assailant, was replete with facts making apparent the defendant's lack of control (*222 Cal. App. 3d 1008, 1014)* .

The factual and procedural background of ***Todd v. Dow*** *(1993) 19 Cal. App. 4th 253, 23 Cal. Rptr. 2d 490* , is discussed in *§ 165.230[3][a]*. The court found that parents had no ability and therefore no duty to control the behavior of their son, because he was a married adult no longer living in their home, the gun involved in the incident was not theirs, and the incident took place in their absence hundreds of miles away (*19 Cal. App. 4th 253, 259-260)* .

[c] No Actual Custodial Ability

The factual and procedural background of ***Wise v. Superior Court*** *(1990) 222 Cal. App. 3d 1008, 272 Cal. Rptr. 222* , is discussed in *§ 165.230*[3][b]. In holding that the plaintiffs were unable to state causes of action for negligence and negligent entrustment, based on the defendant's failure to prevent an attack against them, the court of appeal stated that if the natural relationship between the parties creates no inference of an ability to control, the actual custodial ability must affirmatively appear (*222 Cal. App. 3d 1008, 1013-1014)* .

[4] Additional Authorities

[a] No Duty to Control or Warn Absent Special Relationship

In *Minch v. Department of California Highway Patrol (2006) 140 Cal. App. 4th 895, 44 Cal. Rptr. 3d 846* , plaintiff was a tow truck driver who was seriously injured when struck by a passing motorist after having extracted an accident vehicle from a roadside ditch. Plaintiff sued the Highway Patrol, arguing that officers failed to properly monitor or regulate traffic at the accident scene. The trial court entered summary judgment for the Highway Patrol after finding that the officers owed no duty of care to plaintiff, and the court of appeal affirmed. The court of appeal held that no duty was owed to plaintiff because the officers did not create or increase the risk of harm that led to plaintiff's injuries, nor did the circumstances establish a special relationship between the officers and the tow truck driver such that they had a duty to protect him. The evidence clearly established that plaintiff was injured after he had completed extraction of the accident vehicle from the roadside ditch and plaintiff was returning to his tow truck for his own business purposes to get a receipt book. The officers on the scene had not told plaintiff to remain after he finished extracting the vehicle form the ditch, nor did they instruct plaintiff on where to park his vehicle. They did nothing to cause plaintiff to walk on the traffic side of his vehicle when returning to his truck. The tow truck driver was not in a position of dependency on the officers at the time of the accident and the officers did not say anything to indicate that they would guarantee plaintiff's safety. Plaintiff knew when he went to retrieve his receipt book that one of the two officers on the scene had just departed and the other was behind the accident vehicle talking to the driver of the accident vehicle. Under these circumstances, the Highway Patrol owed no duty to protect plaintiff from injury (*140 Cal. App. 4th 895, 906-907)* .

In *Titus v. Canyon Lake Prop. Owners Ass'n (2004) 118 Cal. App. 4th 906, 13 Cal. Rptr. 3d 807* , the plaintiff's father was killed when the car in which he was a passenger was driven into a tree by the intoxicated driver. The plaintiff sued the property owners association of the privately owned and operated community where the decedent and the intoxicated driver resided and where the accident occurred. The plaintiff argued that the property owners association, and the security service hired to protect the community, owed a duty to take affirmative steps to protect the decedent from the risks created by allowing the intoxicated driver to drive in the community. The trial court sustained a demurrer for the property owners association, as well as for the security service, and the court of appeal affirmed. Although the bylaws for the property owners association stated that one general objective of the association was to "preserve, protect, and police" the common facilities of the community, the court of appeal held that these general statements of purpose did not create a special relationship imposing a duty on the property owners' association to prevent the residents from driving while intoxicated. Even though there was evidence that the property owners association knew that the driver had used illegal drugs and alcohol in the past, there was no evidence that the association provided either the alcohol or the car on the night of the accident, nor did they cause the decedent to become a passenger in the car (*118 Cal. App. 4th 906, 912-913)* . The court also noted that there was no evidence that officers of the security company knew that the driver was driving while intoxicated on the night of the accident (*118 Cal. App. 4th 906, 916)* . Based on these and other considerations, the court of appeal held that the property owners association had no prior duty to eject the driver from the community, and the security service had no duty to detain or prevent the driver from driving while intoxicated on the night of the accident (*118 Cal. App. 4th 906, 914-916)* .

In *Ochoa v. California State Univ. (1999) 72 Cal. App. 4th 1300, 85 Cal. Rptr. 2d 768* , the plaintiff was a university student who was punched by another player while participating in an intramural soccer game. Although the game was officiated, the referee closest to the plaintiff and his attacker was unable to prevent the punch, although the referee did separate the combatants immediately afterwards. The plaintiff brought suit against the university, alleging that the university negligently failed to supervise the game and instruct the participants. The defendant successfully moved for summary judgment, with the trial court determining that under *Crow v. State of California (1990) 222 Cal. App. 3d 192, 271 Cal. Rptr. 349* , the defendant had no special relationship with the plaintiff that created a duty on the part of the defendant. The court of appeal affirmed, reiterating that colleges and universities no longer have a general duty of care to supervise student activities. Although language in the referee handbook supplied by the defendant authorized referees to take steps to control unruly behavior at games, the court rejected the plaintiff's contention that the

defendant's acts of organizing and sponsoring the intramural activity created a special relationship that gave rise to a duty to protect students from the criminal acts of third parties (*72 Cal. App. 4th 1300, 1305)* . The court also agreed with the defendant that no duty should be created under general tort law or public policy (*72 Cal. App. 4th 1300, 1306)* .

The facts and procedural background of *Koepke v. Loo (1993) 18 Cal. App. 4th 1444, 23 Cal. Rptr. 2d 34* , are discussed in *§ 165.10[3][a]*. The court of appeal held that the defendant had no duty to continue to warn or protect the plaintiff because the defendant's previous warnings and advice to the plaintiff created no special relationship between the plaintiff and the defendant (*18 Cal. App. 4th 1444, 1453)* . The court held that nonprofessionals who voluntarily attempt to assist others with problems have not assumed any duty of continued assistance, because imposing such a duty would be contrary to public policy (*18 Cal. App. 4th 1444, 1457)* .

In *Tanja H. v. Regents of Univ. of Cal. (1991) 228 Cal. App. 3d 434, 278 Cal. Rptr. 918* , the court applied a rationale similar to that used in *Crow* to hold that a trial court properly sustained the university's demurrer to the complaint filed by a student who was sexually assaulted by fellow students in the dormitory (*228 Cal. App. 3d 434, 441)* .

Crow v. State of California (1990) 222 Cal. App. 3d 192, 271 Cal. Rptr. 349 , involved an action by a student dormitory resident who was assaulted by another student at a dormitory party. In affirming the summary judgment for the defendants, the court of appeal considered whether the university was liable in negligence. It held that on the facts before it, the university/student relationship did not create a special relationship giving rise to a duty on the part of the university either to control the conduct of the assailant or to warn of that conduct. The court distinguished between young, immature school children in grammar and high schools on the one hand, where duty had been found, and adult students in colleges and universities on the other, where duty had not been found. The court noted factors weighing against a conclusion that a special relationship existed, such as cessation of control of general morals by college administrators, insistence by college students on expanded rights of privacy such as liberal or unlimited parietal visiting hours, students' attainment of the age of majority, and the impracticality of imposing a duty of care to safeguard its students from the risks of harm flowing from the use of alcoholic beverages (*222 Cal. App. 3d 192, 208-209)* .

In *Brenneman v. State of California (1989) 208 Cal. App. 3d 812, 256 Cal. Rptr. 363* , the plaintiffs sued the state for negligent failure to control or to warn them of the dangerous proclivities of a convicted child molester who was released on parole. The trial court sustained the state's demurrer without leave to amend. The court of appeal held that the state did not have a duty, under general tort law, to supervise or control the parolee or to warn the victim or his parents of the danger that the parolee posed. The court concluded that the allegations that the victim was a paperboy residing in and serving the parolee's neighborhood were not substantially distinguishable from those in *Thompson v. County of Alameda (1980) 27 Cal. 3d 741, 751, 167 Cal. Rptr. 70, 614 P.2d 728* . *Thompson* confined the special relationship exception to situations involving either a direct or continuing relationship between the state and the plaintiff (or the plaintiff's decedent) or a prior threat to a specific identifiable victim (*208 Cal. App. 3d 812, 820)* .

The case of *Baldwin v. Zoradi (1981) 123 Cal. App. 3d 275, 176 Cal. Rptr. 809* , is discussed in *§ 165.130[3][b]*.

In *J.A. Meyers & Co. v. Los Angeles County Probation Dep't (1978) 78 Cal. App. 3d 309, 144 Cal. Rptr. 186* , the court of appeal affirmed a judgment dismissing the plaintiff's complaint, which alleged negligence on the part of the Los Angeles County Probation Department and certain of its employees for failing to warn the plaintiffs that a probationer was a convicted embezzler, thus enabling the probationer to embezzle funds from the plaintiffs. The court concluded that there was no special relationship that existed and created a duty to warn (*78 Cal. App. 3d 309, 314-315)* . Although the court noted that the law appears to be heading toward a recognition of the duty to aid or protect in any relation of dependence or of mutual dependence, it found that no relationship of dependency existed in this case (*78 Cal. App. 3d 309, 315)* .

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CHAPTER 165 NEGLIGENCE
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B. Duty
6. Duty Owed by or to Particular Persons or Entities

16-165 California Points & Authorities § 165.231

§ 165.231 Defendant Owed Plaintiff No Duty to Control or Warn of Third Party's Dangerous Conduct Because Defendant Had No Knowledge of Specific Risk to Foreseeable Victim

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT DID NOT OWE A DUTY TO PLAINTIFF _____ [TO CONTROL A THIRD PARTY'S CONDUCT *and/or* TO WARN PLAINTIFF OF A THIRD PARTY'S CONDUCT] BECAUSE DEFENDANT DID NOT HAVE KNOWLEDGE OF A SPECIFIC RISK TO AN IDENTIFIABLE AND FORESEEABLE VICTIM.

No Knowledge of Specific Risk to Foreseeable Victim. The duty to control or warn of the conduct of a third person is not owed to the world at large. The element of foreseeability remains, and the custodian of the third person must have knowledge of a specific risk to an identifiable and foreseeable victim (*Megeff v. Doland (1981) 123 Cal. App. 3d 251, 256-257, 176 Cal. Rptr. 467*).

[*Optional*] **B. Actual Knowledge of Risk Required.** In determining whether the requisite foreseeability of harm was present, foreseeability must be measured by what the defendant actually knew, not by constructive knowledge or information that the defendant arguably should have known, but did not (*Margaret W. v. Kelley R. (2006) 139 Cal. App. 4th 141, 156, 42 Cal. Rptr. 3d 519*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the defendant did not owe a duty to warn the plaintiff of the conduct of a third party or to control the conduct of a third party because the defendant had no knowledge of a specific risk to the plaintiff as a foreseeable victim [*see* *Megeff v. Doland (1981) 123 Cal. App. 3d 251,*

256-257, 176 Cal. Rptr. 467] . This form should be combined with any of the *forms in § 165.230* and *§ 165.232* that are applicable to the particular case.

This argument may arise in several procedural contexts. For example, the defendant might raise this argument in support of a motion for judgment on the pleadings, a motion for summary judgment, or a demurrer [*see, e.g.,* *Megeff v. Doland (1981) 123 Cal. App. 3d 251, 255, 176 Cal. Rptr. 467* (judgment on pleadings, summary judgment); *Davidson v. City of Westminster (1982) 32 Cal. 3d 197, 201, 185 Cal. Rptr. 252, 649 P.2d 894* (demurrer)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may show that the defendant had no knowledge of a specific risk to the plaintiff as a foreseeable victim [*see* *Megeff v. Doland (1981) 123 Cal. App. 3d 251, 256-257, 176 Cal. Rptr. 467]* .

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of answer to a cause of action for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see the *forms in § 165.230* and *§ 165.232*. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in §§ 165.130 -165.131* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] No Knowledge of Specific Risk to Foreseeable Victim

The factual and procedural background of ***Megeff v. Doland*** *(1981) 123 Cal. App. 3d 251, 176 Cal. Rptr. 467* , is discussed in *§ 165.60[3][a]*. The court of appeal noted that one owes no duty to control the conduct of another person, but that the courts have created limited exceptions based on various special relationships between a defendant and either the person whose conduct needs to be controlled or the foreseeable victim of that conduct. However, the duty is not necessarily one owed to the world at large. The element of foreseeability remains. The custodian must have knowledge of a specific risk to an identifiable and foreseeable victim (*123 Cal. App. 3d 251, 257)* . In this case, there was nothing in the hospital reports to suggest a violent history or generalized violent behavior on the part of the third party (*123 Cal. App. 3d 251, 258)* , although the third party had become physically aggressive when the hospital staff refused to allow him to leave. The court decided that his wife's knowledge of his one incidence of aggressive behavior may have created a foreseeable risk that he might physically attack a person who confined him to a place other than his home. It did not, however, give her a basis for foreseeing that her husband would stab the plaintiffs, who were his landlords (*123 Cal. App. 3d 251, 260)* .

[b] Actual Knowledge of Risk Required

In ***Margaret W. v. Kelley R.*** *(2006) 139 Cal. App. 4th 141, 42 Cal. Rptr. 3d 519* , the plaintiff, a teenaged girl who had been invited to spend the night at the home of a friend, was raped by a group of teenage boys after the plaintiff had voluntarily left her friend's house. Her friend's mother had made it clear in advance that she would be out for most of the evening, and the plaintiff had left the home before the mother returned. The mother returned prior to the rape, but took no steps to contact the plaintiff's parents to notify them that the plaintiff was no longer at her house. Instead, the mother's attention was focused on taking care of her own daughter, who had passed out after drinking too much alcohol, which had been provided by persons who had come to the house earlier in the evening while the mother was out. The plaintiff sued her friend's mother for negligence and negligent supervision. The trial court granted summary judgment for the mother. The plaintiff appealed.

The court of appeal affirmed. The plaintiff argued on appeal that the defendant had a special relationship with her, arising out of her invitation to her home, and that in measuring the foreseeability of the attack that occurred, the plaintiff was not required to show that the defendant had actual knowledge of the specific risk of harm to the plaintiff, merely that a sexual assault was a reasonably foreseeable occurrence under the circumstances (*139 Cal. App. 4th 141, 151, 156-157)* . The court of appeal disagreed. The court recognized that a special relationship existed, but concluded that foreseeability of harm, which was also a requirement for imposing liability on the defendant, must be analyzed in terms of what the defendant actually knew at the time she was in a position to protect the plaintiff, not by constructive knowledge or information that the defendant arguably should have known, but did not. Reviewing the relevant facts, the court held that the defendant could not be liable for the harm that occurred to the plaintiff after she left the defendant's house that night. The defendant had no knowledge that the plaintiff was in any danger from a sexual assault, did not know the boys with whom the plaintiff had left, and did not even know that the plaintiff had left with those boys. The defendant knew that the plaintiff had left with other friends to go to a party and had probably been drinking. However, the plaintiff had made a phone call to her friend's house after the defendant had returned and at that time the plaintiff was in no apparent danger from the people she was with. This call suggested to the defendant that the plaintiff had the means to contact her parents herself, and the defendant told the plaintiff that she should go home rather than return to the defendant's house. Under those circumstances, there was nothing to indicate a threat to the plaintiff that required a response of any type from the defendant, even a minimally burdensome response such as a phone call to the plaintiff's parents (*139 Cal. App. 4th 141, 158-161)* .

[4] Additional Authorities

[a] No Knowledge of Specific Risk to Foreseeable Victim

In *J.L. v. Children's Institute, Inc. (2009) 177 Cal. App. 4th 388, 99 Cal. Rptr. 3d 5* , a minor was sexually assaulted by the 14-year-old grandson of a licensed daycare provider to whom the victim's mother had been referred by a nonprofit home daycare referral organization. Through his guardian ad litem, the minor sued the referral organization for the sexual assault, but the trial court granted summary judgment for defendant. The court of appeal affirmed. The court held that the referral organization did not owe a duty to the victim to prevent the assault. The court noted that while there may have been a special relationship between the referral organization and the minor child, a special relationship by itself was not a sufficient basis for imposing liability. To impose such liability, it must have been reasonably foreseeable to the defendant that plaintiff was in danger of the harm suffered. In that particular case, however, there was no evidence that the assailant had a history of sexual misconduct, that the referral organization had any knowledge of any such prior history, or that any children had previously suffered any type of injury at that daycare home. In the absence of such evidence, defendant could not be held liable for unforeseeable criminal conduct committed by a third person (*177 Cal. App. 4th 388, 396-398)* .

In *Greenberg v. Superior Court (2009) 172 Cal. App. 4th 1339, 92 Cal. Rptr. 3d 96* , plaintiffs were the survivors of a family of which two members were shot and killed by a neighbor who suffered from Asperger's syndrome. Plaintiffs

sued the treating psychiatrist, alleging that the psychiatrist's negligent prescription of multiple drugs caused the patient to become violent and kill plaintiffs' family members. While the trial court held that triable issues of fact precluded summary judgment for the psychiatrist, the court of appeal disagreed. The court of appeal held that the psychiatrist owed no duty of care to the patient's neighbors. The court concluded that despite plaintiffs' causation argument based on alleged negligence in prescribing the drugs, plaintiffs neglected to show first that the psychiatrist owed them a duty of care, a requirement to establishing liability. The court noted that the patient, who had come to the psychiatrist with a preexisting mental disorder, had exhibited no violent tendencies or expressed any dangerous motives against the neighbors that would have put the psychiatrist on notice that the patient may have been a danger to his eventual victims. Absent such advance indicators of potential violence towards the neighbors, the psychiatrist owed no duty of care to protect them from danger (*172 Cal. App. 4th 1339, 1348-1350)* .

In *Romero v. Superior Court (2001) 89 Cal. App. 4th 1068, 107 Cal. Rptr. 2d 801* , a 13-year-old girl was sexually assaulted by a 16-year-old boy in the home of the defendants, who were the parents of another boy. The girl's mother had agreed to leave the girl there with a group of teenagers after the defendants had indicated that they would be at home working in the garden while the teenagers were there, although the assault took place when the defendants left the house for about an hour. The court of appeal held that although a special relationship existed between the defendants and the girl, the defendants did not owe a duty of care to prevent the sexual assault, because in the absence of any actual knowledge on their part that the assailant had any propensities to commit a sexual assault, the assault on the girl was not reasonably foreseeable (*89 Cal. App. 4th 1068, 1081)* . The record showed that the defendants had known the assailant for about a year. He had been to the defendants' home about once or twice a month, had spent the night there about eight times, and had gone to church with them. They considered him to be a polite and likeable boy, and to the best of their knowledge, he had acted appropriately with girls. In fact, the only information the defendants had about any trouble that the assailant may have been in was information about potential curfew violations. Based on this record, the court held that defendants had no actual knowledge that the assailant was a risk to the girl (*89 Cal. App. 4th 1068, 1087-1089)* .

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B. Duty
6. Duty Owed by or to Particular Persons or Entities

16-165 California Points & Authorities § 165.232

§ 165.232 Defendant Owed Plaintiff No Duty to Control or Warn of Third Party's Dangerous Conduct Because Risk Could Not Be Guarded Against by Warning Plaintiff

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT DID NOT OWE A DUTY TO PLAINTIFF _____ [TO CONTROL A THIRD PARTY'S CONDUCT *and/or* TO WARN PLAINTIFF OF A THIRD PARTY'S CONDUCT] BECAUSE THE RISK TO PLAINTIFF WAS NOT ONE THAT COULD BE GUARDED AGAINST BY WARNING PLAINTIFF.

Risk Could Not Be Guarded Against by Warning Potential Victim. Although there may be evidence that a special relationship existed between the defendant and the dangerous person or the potential victim, and evidence from which the jury could reasonably conclude that the defendant had notice or knowledge of facts suggesting the potentially dangerous conduct, a duty will not be imposed if the risk is not one that could be guarded against by warning potential victims (*see Harland v. State of California (1977) 75 Cal. App. 3d 475, 481-482, 142 Cal. Rptr. 201*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the defendant did not owe a duty to warn the plaintiff of the conduct of a third party or to control the conduct of a third party because the risk could not have been guarded against by warning the plaintiff as a potential victim [*see Harland v. State of California (1977) 75 Cal. App. 3d 475, 481-482, 142 Cal. Rptr. 201]* . This form should be combined with any of the *forms in §§ 165.230 -165.231* that are applicable to the particular case.

This argument may arise in several procedural contexts. For example, the defendant might raise this argument in support of a motion for judgment on the pleadings, a motion for summary judgment, or a demurrer [*see, e.g., Megeff v.*

Doland (1981) 123 Cal. App. 3d 251, 255, 176 Cal. Rptr. 467 (judgment on pleadings, summary judgment); *Davidson v. City of Westminster (1982) 32 Cal. 3d 197, 201, 185 Cal. Rptr. 252, 649 P.2d 894* (demurrer)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may argue that the defendant could not have guarded against the risk to the plaintiff by warning the plaintiff [*see Megeff v. Doland (1981) 123 Cal. App. 3d 251, 256-257, 176 Cal. Rptr. 467]* .

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of answer to a cause of action for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§§ 165.230 -165.231*. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in §§ 165.130 -165.131* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Risk Could Not Be Guarded Against by Warning Potential Victim

In ***Harland v. State of California*** *(1977) 75 Cal. App. 3d 475, 142 Cal. Rptr. 201* , the plaintiffs brought an action against the state for wrongful death and personal injuries suffered in an automobile collision on the Benicia-Martinez Bridge. The driver of the other vehicle was a resident of a state veterans' home who had a history of mental and physical disabilities and was regularly administered several prescription drugs that affected his central nervous system. The jury rendered a verdict for the plaintiffs on two independent theories: negligence in permitting the resident to drive a vehicle and maintaining the bridge in a dangerous condition.

The court of appeal affirmed on the ground that the bridge was maintained in a dangerous condition, but not on the theory that the state should have prevented the resident from driving a vehicle. The court stated that absent a special relationship, there is ordinarily no duty to control the conduct of a third person so as to prevent him or her from causing harm to another (*75 Cal. App. 3d 475, 480)* . The court agreed that there was evidence of a special relationship between the state home and the resident, because the resident was incapable of sustaining himself outside the home due to his mental and physical disabilities. He was also regularly administered prescription drugs by employees of the home that affected his ability to drive and had a history of blackouts (*75 Cal. App. 3d 475, 481)* . The court also noted that there was evidence from which the jury could reasonably conclude that employees of the home had notice or knowledge of facts suggesting that the resident's driving presented a risk of harm to himself and others. The court stated, however, that the risk presented by the resident was not one that could be guarded against by warning potential victims. In addition, even though a physician at the home had warned the resident that he should not drive when he was under the influence of medication, the resident did not have a guardian and had not surrendered the responsibility for his own

conduct. There was no statute or regulation purporting to authorize the commandant of the home to order a resident of the home not to drive a car. Therefore, the court concluded that the judgment could not be sustained on the theory that the state should have prevented the resident from driving (*75 Cal. App. 3d 475, 482)* .

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CHAPTER 165 NEGLIGENCE
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B. Duty
6. Duty Owed by or to Particular Persons or Entities

16-165 California Points & Authorities §§ 165.233-165.239

[Reserved]

§§ 165.233[Reserved]

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6. Duty Owed by or to Particular Persons or Entities

16-165 California Points & Authorities § 165.240

§ 165.240 Rescuer Not Liable for Act That Did Not Increase Risk of Harm to Plaintiff or Induce Plaintiff's Reliance

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT SHOULD NOT BE FOUND LIABLE TO PLAINTIFF FOR FAILING TO ACT BECAUSE DEFENDANT'S CONDUCT DID NOT INCREASE THE RISK OF HARM TO PLAINTIFF OR INDUCE PLAINTIFF's RELIANCE.

No Liability Unless Rescuer's Act Increased Risk of Harm or Induced Reliance. Liability may not be imposed on a party who has voluntarily undertaken to aid or protect another unless (1) the injured party suffered the injury because he or she relied on the acts of the rescuer, or (2) the acts of the rescuer increased the risk of harm to the injured party (*Westbrooks v. State of California (1985) 173 Cal. App. 3d 1203, 1208-1209, 219 Cal. Rptr. 674*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the defendant did not owe the plaintiff a duty to take affirmative action to assist the plaintiff and that the defendant's conduct did not increase the risk to the plaintiff or induce the plaintiff's reliance [*see Westbrooks v. State of California (1985) 173 Cal. App. 3d 1203, 1208-1209, 219 Cal. Rptr. 674]* . It should be combined with any of the *forms in §§ 165.241 -165.242* that are applicable to the particular case.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may

describe the circumstances of the defendant's conduct with respect to the plaintiff and show that the defendant's conduct did not increase the risk to the plaintiff or induce the plaintiff's reliance.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of answer to a cause of action for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§§ 165.241 -165.242*. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in § 165.150* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] No Liability Unless Rescuer's Act Increased Risk of Harm or Induced Reliance

In ***Westbrooks v. State of California*** *(1985) 173 Cal. App. 3d 1203, 219 Cal. Rptr. 674* , the heirs of a deceased motorist brought suit against three defendants, including the County of Ventura and one of its deputies, for the wrongful death of the motorist. The death occurred when the motorist drove into a void created when a bad storm washed out a bridge. Prior to the accident, the motorist evaded a roadblock set up by the deputy to divert traffic from the road leading to the bridge. The plaintiffs alleged that the deputy negligently failed to stop the motorist and warn him of the dangerous condition. The jury found that the county was negligent in the operation of the roadblock and found the county 15 percent liable (*173 Cal. App. 3d 1203, 1206-1208)* .

The court of appeal reversed this portion of the judgment and remanded with directions to enter judgment for the county and the deputy. Because the county was in no way responsible for the dangerous condition that caused the death of the motorist, the plaintiff's theory against the deputy and the county was based on the duty created when the officer undertook to aid or protect the motorist. The trial court had instructed the jury in this regard (using *BAJI No. 4.45*) that although a person is normally not under a duty to protect other persons, one who assumes such a duty may be liable for failing to exercise ordinary care in the performance of the duty. The court of appeal held that these instructions were improper (*173 Cal. App. 3d 1203, 1208)* . It held that liability may not be imposed on a party who has voluntarily undertaken to aid or protect another unless (1) the injured party suffered the injury because he or she relied on the acts of the rescuer, or (2) the acts of the rescuer increased the risk of harm to the injured party (*173 Cal. App. 3d 1203, 1208)* . It then found as a matter of law that the acts of the deputy did not increase the risk of harm to the plaintiff's decedent and that the decedent in no way relied on the county's attempt to divert traffic away from the danger (*173 Cal. App. 3d 1203, 1209)* .

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
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B. Duty
6. Duty Owed by or to Particular Persons or Entities

16-165 California Points & Authorities § 165.241

§ 165.241 Defendant Did Not Breach Duty to Plaintiff Because Voluntarily Assumed Duty Expired

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT DID NOT BREACH A DUTY TO PLAINTIFF BECAUSE DEFENDANT'S PERFORMANCE OF A VOLUNTARY DUTY WITHOUT ANY EXPRESS OR IMPLIED PROMISE OF FUTURE ASSISTANCE HAD ENDED AND DEFENDANT WAS NOT REQUIRED TO RENDER AID INDEFINITELY.

Duty of "Good Samaritan" Is Limited In Duration. The duty of a "good Samaritan" is of limited duration. A person who has performed a voluntary duty without an express or implied promise of future assistance is not required to render aid indefinitely (*Koepke v. Loo (1993) 18 Cal. App. 4th 1444, 1457, 23 Cal. Rptr. 2d 34* ; *Weissich v. County of Marin (1990) 224 Cal. App. 3d 1069, 1077-1079, 274 Cal. Rptr. 342*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the defendant owed no duty to the plaintiff because the defendant's role as a rescuer had expired [*see Koepke v. Loo (1993) 18 Cal. App. 4th 1444, 1457, 23 Cal. Rptr. 2d 34]* . It should be combined with any of the *forms in § 165.240* and *§ 165.242* that are applicable to the particular case.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may argue that circumstances were such that the defendant's role as rescuer had expired during the time in question.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of answer to a cause of action for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§ 165.240* and *§ 165.242*. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in § 165.150* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Duty of "Good Samaritan" Is Limited In Duration

The factual and procedural background of ***Koepke v. Loo*** *(1993) 18 Cal. App. 4th 1444, 23 Cal. Rptr. 2d 34* , is discussed in *§ 165.10[3][a]*. In *Koepke,* the court of appeal rejected the plaintiff's argument that because the defendant had undertaken to warn her of an impending assault and then advised her that the assailant was no longer a danger, the defendant was obliged to warn her when the situation changed. The court held that voluntarily assisting an unrelated person in danger does not impose any continuing obligation to keep assisting that person. By volunteering information about the assailant, the defendant was not undertaking to provide future warnings. Imposing this burden on unrelated persons would be contrary to public policy because it would discourage voluntary acts of assistance (*18 Cal. App. 4th 1444, 1457-1458)* .

In ***Weissich v. County of Marin*** *(1990) 224 Cal. App. 3d 1069, 274 Cal. Rptr. 342* , a former district attorney was killed by a man he had successfully prosecuted 30 years earlier. His heirs brought a wrongful death suit against the county and the state, alleging that the killer had threatened the life of the decedent and others at sentencing in the criminal action, that the defendants voluntarily assumed a duty to warn the decedent by promising to alert him to any threatening behavior on the part of the assailant to the extent that information was known, and that law enforcement officials breached that duty by failing to warn the decedent of continuing criminal behavior of the killer eight years after the defendants' alleged voluntary promise to warn. The defendants demurred on the grounds that the complaint did not allege facts giving rise to an existence of a duty and that any failure to warn was not the proximate cause of the decedent's death. The trial court sustained the demurrers without leave to amend and dismissed the action against the defendants. The plaintiffs appealed.

The court of appeal affirmed. The court cited the general principle that one has no duty either to control the conduct of another or to warn those endangered by that conduct. Therefore, public entities and employees have no affirmative duty to warn of a release of an inmate with a violent history who has made nonspecific threats of harm directed at nonspecific victims (*224 Cal. App. 3d 1069, 1076)* . However, the court also noted the exception to this general rule: that a duty can exist if the defendant stands in some special relationship either to the dangerous person whose conduct needs to be controlled or to the reasonable victim of that person's conduct (*224 Cal. App. 3d 1069, 1077-1078)* . A duty may also result from the voluntary act of a "good Samaritan." That is, liability may be imposed on a person who has no general duty to act, but who has voluntarily assumed a protective duty toward an individual and who undertakes

action on his or her behalf, inducing reliance. The court concluded that the allegation that the decedent would be alerted to any threatening behavior on the part of the assailant, to the extent that information was known, was sufficient to establish that the defendants had assumed some protective duty toward the decedent (*224 Cal. App. 3d 1069, 1077)* .

However, the court also held that absent some express or implied promise that the duty assumed would continue indefinitely, the duty of a "good Samaritan" is of limited duration. A person who has performed a voluntary duty is not required to render aid indefinitely (*224 Cal. App. 3d 1069, 1077)* . The court held that whatever the outer limits of the defendants' duty may have been, the trial court did not err in concluding that under the facts alleged in the complaint, liability could not be imposed because any duty had long since expired (*224 Cal. App. 3d 1069, 1080)* .

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16-165 California Points & Authorities § 165.242

§ 165.242 No Duty to Act Absent Special Relationship

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT IS NOT LIABLE TO PLAINTIFF FOR FAILING TO ACT BECAUSE DEFENDANT DID NOT HAVE A SPECIAL RELATIONSHIP WITH PLAINTIFF IMPOSING ON DEFENDANT A DUTY TO ACT UNDER THE CIRCUMSTANCES.

No Liability for Failure to Act Unless Special Relationship Exists. A person who has not created a peril is ordinarily not liable in tort merely for failure to take affirmative action to assist or protect another, if there is no special relationship between them that gives rise to a duty to act (*Williams v. State of California (1983) 34 Cal. 3d 18, 192 Cal. Rptr. 233, 664 P.2d 137* ; *Winkelman v. City of Sunnyvale (1976) 59 Cal. App. 3d 509, 512, 130 Cal. Rptr. 690*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that no special relationship existed between the plaintiff and the defendant giving rise to a duty on the defendant's part to act [*see Williams v. State of California (1983) 34 Cal. 3d 18, 192 Cal. Rptr. 233, 664 P.2d 137]* . It should be combined with any of the *forms in §§ 165.240 -165.241* that are applicable to the particular case.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may argue that the defendant's failure to act is not a basis for imposing a duty on him or her in the absence of a special relationship [*see Williams v. State of California (1983) 34 Cal. 3d 18, 23, 192 Cal. Rptr. 233, 664 P.2d 137* ; *see also*

Mikialian v. City of Los Angeles (1978) 79 Cal. App. 3d 150, 159, 144 Cal. Rptr. 794] .

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of answer to a cause of action for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§§ 165.240 -165.241*. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in § 165.150* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] No Liability for Failure to Act Unless Special Relationship Exists

In ***Williams v. State of California*** *(1983) 34 Cal. 3d 18, 192 Cal. Rptr. 233, 664 P.2d 137* , the plaintiff brought an action against the state of California and several highway patrol officers based on the highway patrol officers' alleged negligence in failing to make a proper investigation of the cause and source of the plaintiff's injury. The complaint alleged that this failure caused the plaintiff to lose her opportunity to obtain compensation from the persons who caused her injuries. The plaintiff was injured when a piece of a heated brake drum flew from a passing truck into her car's windshield and struck her in the face. The lower court granted the defendants' motion for judgment on the pleadings, finding that the patrol officers were immune under certain immunity statutes. The plaintiff appealed.

The Supreme Court reversed, finding that the plaintiff should be given leave to amend her complaint. The Court stated that the issue of statutory immunity does not arise until it is determined that the defendant otherwise owes a duty of care to the defendant (*34 Cal. 3d 18, 22)* . As a rule, one has no duty to come to the aid of another. A person who has not created a peril is not liable in tort merely for failure to take affirmative action unless there is some relationship between them that gives rise to a duty to act (*34 Cal. 3d 18, 23)* . Moreover, a volunteer who otherwise has no duty to help, but who undertakes to aid another--the "good Samaritan"--is under a duty to exercise due care and is liable if (1) his or her failure to exercise care increases the risk of harm, or (2) harm is suffered because of the other's reliance on the undertaking (*34 Cal. 3d 18, 23)* . The Court held that stopping to aid a motorist does not, in itself, create a special relationship that would give rise to such a duty (*34 Cal. 3d 18, 21, 23)* . In this case, the officers did not create the peril in which the plaintiff found herself. They took no affirmative action that contributed to, increased, or changed the risk that would have otherwise existed. Moreover, there are no allegations supporting a finding of special relationship--namely, detrimental reliance by the plaintiff on the officers' conduct or statements made by them that induced a false sense of security and thereby worsened her position (*34 Cal. 3d 18, 27-28)* .

NOTE:

In a subsequent action against the state and a highway patrol officer for damages stemming from the officer's negligent failure to ascertain the identity of a vehicle driver, the court of appeal reversed and remanded the trial court's sustaining of the defendants' demurrer, holding that the plaintiff could state a

cause of action under the facts. Subsequently, the Supreme Court disapproved the law on which the appellate decision was based. In affirming the judgment in this case, the Supreme Court held that the decision in *Williams* does not preclude liability if the officer's conduct prevents other assistance, and therefore it does not constitute a change in law warranting rejection of the law of the case that the officer could have breached a duty of care [*Clemente v. State of California (1985) 40 Cal. 3d 202, 213, 219 Cal. Rptr. 445, 707 P.2d 818]* .

Winkelman v. City of Sunnyvale *(1976) 59 Cal. App. 3d 509, 130 Cal. Rptr. 690* , James Carl brought an action to recover for damages suffered in connection with an automobile accident against Karen Winkelman. Winkelman cross-complained against the City of Sunnyvale. Winkelman alleged that she was traveling on the Central Expressway when she was struck from behind by a pickup truck. Her car was propelled into the opposite stream of traffic and she collided head-on with Carl. The driver of the pickup truck left the scene of the accident, but later visited the department of public safety and reported that he possibly had been involved in an automobile accident on the Central Expressway. The officer present radioed an investigating officer at the scene, who had not interviewed Winkelman and therefore stated that no pickup truck was involved in the accident. The officer at headquarters allowed the driver to leave without securing any identifying information. Winkelman alleged that the City of Sunnyvale was negligent in permitting the driver of the pickup truck to leave without securing identification and that she sustained damages in the frustration of a valid cause of action for her own injuries and of a defense against Carl's suit. The trial court sustained the city's demurrer without leave to amend. Winkelman appealed the subsequent dismissal of her cross-complaint.

The court of appeal affirmed. The court noted that police officers are not under a duty to investigate automobile accidents properly and carefully, because police officers have the right, not the duty, to investigate accidents (*59 Cal. App. 3d 509, 511)* . Winkelman argued that a duty to exercise due care arose when the officers voluntarily undertook to investigate the accident. The court stated, however, that whatever detriment Winkelman suffered by reason of the involvement of the driver of the pickup truck had already occurred when that individual drove away from the scene. The court noted that Winkelman's cross-complaint did not allege that the claimed negligence of the officers inflicted an injury on her. It alleged that the officers failed to protect her from the effect of events that had already occurred. The court stated that a person who has not created a peril is ordinarily not liable in tort for the failure to take affirmative action to assist or protect another unless there is some relationship between them that gives rise to a duty to act (*59 Cal. App. 3d 509, 511-512)* . Inasmuch as the court found no effective allegation of a special relationship in Winkelman's cross-complaint, it found that the dismissal of the action was proper (*59 Cal. App. 3d 509, 512)* .

NOTE:

However, a subsequent court of appeal decision casts some doubt on the rule that liability for "nonfeasance" may not be imposed in the absence of a special relationship [*see* *Soldano v. O'Daniels (1983) 141 Cal. App. 3d 443, 449-453, 190 Cal. Rptr. 310* , discussed in *§ 165.40*]2]]a]].

[4] Additional Authorities

[a] No Liability for Failure to Act Unless Special Relationship Exists

In *Hernandez v. KWPH Enters. (2004) 116 Cal. App. 4th 170, 10 Cal. Rptr. 3d 137* , the plaintiffs were the husband and other family members of a woman who fled an ambulance upon its arrival at a hospital, made her way onto a nearby highway, and was struck by a car and killed. The ambulance was driven by emergency medical technicians (EMTs), who were called to the scene by police officers because the woman's behavior was extremely erratic and the officers suspected that she required psychiatric assistance. The officers declined to exercise their statutory authority to have the woman detained as mentally disordered, and they explained that her transportation to the hospital would be strictly voluntary and that the woman and her husband were free to leave at any time. Both the woman and her husband agreed to the transportation, but the woman fled the ambulance when it arrived at the hospital and was subsequently killed on the highway. The plaintiffs sued the employers of the EMTs, alleging that they had a special relationship with the

woman that imposed a legal duty on them to prevent her from fleeing the ambulance in order to protect her from her own erratic behavior. The court of appeal disagreed and affirmed summary judgment for the defendants. The court noted that the basis of the plaintiffs' claim was an alleged failure to act, but concluded that the mere fact that the EMTs agreed to transport the woman and her husband voluntarily to the hospital did not create a special relationship sufficient to impose an affirmative duty to act on the EMTs. Therefore, the EMTs (and thus their employers) could not be liable for failing to protect the woman from her own suicidal, reckless, or irrational conduct (*116 Cal. App. 4th 170, 177-180)* .

In *Seo v. All-Makes Overhead Doors (2002) 97 Cal. App. 4th 1193, 119 Cal. Rptr. 2d 160* , the plaintiff, a subtenant in a commercial office building, reached between the vertical bars on the electronic fence surrounding the parking lot of the building to trigger a toggle switch to close the sliding gate behind him. Because his arm was placed between the bars of both the fence and the gate, it was crushed when the gate immediately began to close. The plaintiff sued a gate repair company that had regularly been called on to make requested repairs to the gate. This repair company had neither manufactured nor installed the gate, had not installed the toggle switch, did not have a regular contract to service the gate for the property owner, and had not agreed either to warn the property owner of any design defects in the gate or to install safety features that might have prevented the plaintiff's accident. However, the plaintiff argued that the defendant, because of the regularity of its repairs, had acted as an agent of the property owner in maintaining the gate and was negligent in failing to warn of or correct defects in the design that contributed to the plaintiff's injury. The trial court granted summary judgment for the defendant, and the court of appeal affirmed. The court noted that a special relationship sufficient to support tort liability for nonfeasance may arise out of a contract in which a repair company agrees for a fee to keep a piece of equipment in repair, perform all work necessary for the safety and maintenance of the equipment, and make periodic inspections of the equipment, or if the repair company has otherwise voluntarily assumed the owner's duty to inspect and maintain the safety of the equipment or undertaken a systematic inspection of the equipment and fails to do so properly. However, the facts did not support any such findings in this case, because the defendant had only repaired the gate when called on to make specific repairs (*97 Cal. App. 4th 1193, 1204-1206)* . The court also held that in the absence of a special relationship derived from a contract or voluntary undertaking, a repair company hired to repair equipment that it did not manufacture does not owe a duty of care to third parties to warn the equipment owner of design defects in the equipment being repaired, at least if the defect is unrelated to the repairs being made. In this particular case, the repairs made by the defendant were unrelated to the alleged design defects that contributed to the plaintiff's injury (*97 Cal. App. 4th 1193, 1205-1206)* .

In *Olson v. Children's Home Soc'y (1988) 204 Cal. App. 3d 1362, 252 Cal. Rptr. 11* , the plaintiff had surrendered a son to the defendant for adoption in 1967. In 1983, the plaintiff gave birth to another son who died from a genetically transmitted disease. She asked the defendant about the health of the child whom she had surrendered years earlier and was informed that that child also had the disease, about which the defendant learned in 1971. The plaintiff sued under various theories, all based on the failure of the agency to inform the plaintiff of the adopted child's genetic disease. The trial court sustained the defendant's demurrer, and the court of appeal affirmed. The court held that the defendant had no duty to act with regard to the information because there was no special relationship between the parties. Cases finding a duty based on a special relationship involve a nexus between the impending peril and the specific duties undertaken by the defendants in the special relationships. Special relationship situations generally involve some kind of dependency or reliance. A permanent condition of dependency or reliance with respect to the health of the plaintiff's children could not be postulated. All duty arising from the relationship between the parties terminated with the adoption proceedings (*204 Cal. App. 3d 1362, 1365-1367)* .

In *Stangle v. Fireman's Fund Ins. Co. (1988) 198 Cal. App. 3d 971, 244 Cal. Rptr. 103* , the owner of a sapphire ring sued the insurance company on whose premises the ring was stolen. A friend of the plaintiff, who had custody of the ring for the purpose of selling it, had entrusted it to a purported prospective buyer for the purpose of having it photographed. Both the prospective buyer and the ring disappeared. The defendant's receptionist refused to allow the custodian the use of the company telephone to alert the building security director. By the time the custodian reported the theft to building security personnel in the lobby, the thief had escaped. In affirming a judgment for the defendant, the

court of appeal stated that whether a duty exists is primarily a question of law. As a general rule, absent a special relationship giving rise to a duty to act, a person is under no duty to take affirmative action to assist or protect another, no matter how great the danger in which the other is placed, or how easily he or she could be rescued (*198 Cal. App. 3d 971, 974)* . The court acknowledged the existence of a narrow exception to this "harsh" rule if physical violence is threatened, but held that the exception did not apply to the case before it (*198 Cal. App. 3d 971, 974)* . The court held that no special relationship existed between the custodian of the ring and the defendant that would impose on the defendant an affirmative duty to aid the custodian in summoning help (*198 Cal. App. 3d 971, 974-975)* . The court further held that the defendant's conduct in refusing the use of the telephone was not the proximate cause of the loss (*198 Cal. App. 3d 971, 975)* .

In *Baker v. City of Los Angeles (1986) 188 Cal. App. 3d 902, 233 Cal. Rptr. 760* , police responded to a domestic violence call and confiscated a gun from the plaintiff's intoxicated husband. After serving a jail sentence for assaulting a police officer, the husband retrieved his gun from the police station, where no one ascertained that the terms of his probation prohibited him from possessing a dangerous weapon. Several months later the husband shot the plaintiff, who sued the city, alleging its employees had negligently returned the gun (*188 Cal. App. 3d 902, 905)* . A jury found for the plaintiff, and the trial court denied the defendant's motion for judgment notwithstanding the verdict. The court of appeal reversed, holding that the officer who returned the gun had no special relationship with the plaintiff and therefore had no duty to protect her (*188 Cal. App. 3d 902, 908)* . The court also found that the officer who first confiscated the husband's gun may have assumed such a duty voluntarily, but only for the limited purpose of protecting the plaintiff from the threat of the moment (*188 Cal. App. 3d 902, 907)* . Because the officer made no express or implied promise to render additional aid, any duty to the plaintiff ended when the officer left the gun at the police station (*188 Cal. App. 3d 902, 907-908)* .

In *Reid v. State Farm Mut. Auto. Ins. Co. (1985) 173 Cal. App. 3d 557, 218 Cal. Rptr. 913* , the permissive user of an insured's automobile brought an action against the insurer, alleging breach of covenant of good faith and fair dealing based on the insurer's failure to preserve the evidence of the automobile or to conduct investigations concerning any potential claims by the plaintiff against third parties. The trial court granted the defendant's motion for summary judgment. The court of appeal affirmed, holding that no special relationship existed between the plaintiff and the defendant that imposed a duty on the defendant to take the affirmative action desired by the plaintiff. Because the defendant did not voluntarily assume responsibility to preserve or protect the plaintiff's claims against third parties and the plaintiff did not detrimentally rely on the defendant to do so, the court held that no duty to do so existed (*173 Cal. App. 3d 557, 573-578)* .

In *Rubio v. Swiridoff (1985) 165 Cal. App. 3d 400, 211 Cal. Rptr. 338* , the defendant and his girlfriend quarreled, after which the defendant left the scene of the argument in his automobile at high speed. The girlfriend followed him in her automobile, overtook him, and consequently collided with another automobile, fatally injuring its passenger. The trial court dismissed the action against the defendant following an order granting summary judgment in his favor. The court of appeal considered whether the defendant committed nonfeasance, based on a duty arising form a special relationship between him and either the person causing the harm or the injured person. In affirming the judgment, the court concluded that neither special relationship existed and that no duty was created requiring the defendant to control the actions of the driver who caused the injuries (*165 Cal. App. 3d 400, 404-405)* .

In *Harris v. Smith (1984) 157 Cal. App. 3d 100, 203 Cal. Rptr. 541* , the court of appeal affirmed the trial court's judgment of dismissal on a motion for nonsuit in a case alleging attorney malpractice in a prior negligence action against the California Highway Patrol. The court stated that the underlying negligence action must be meritorious for the attorney to have committed malpractice. However, the plaintiff in the underlying action failed to establish a cause of action. There was no showing of an affirmative act that placed the plaintiff in peril or increased the risk of harm, there was no omission or failure to act after a promise was made, and there was no special relationship in which the plaintiff relied to her detriment on official conduct in a situation of dependency (*157 Cal. App. 3d 100, 105)* .

In *Stout v. City of Porterville (1983) 148 Cal. App. 3d 937, 196 Cal. Rptr. 301* , the plaintiff sued a city and a city police officer for failing to take the plaintiff into custody after he was stopped and found intoxicated. Shortly after being stopped, the plaintiff was injured. The plaintiff alleged that the officer, once having stopped the plaintiff and seeing his intoxicated condition, owed a duty to him based on a special relationship between the plaintiff and the officer and on a mandatory duty under a former version of *Pen. Code § 647(f)* to take an intoxicated person into custody. The trial court sustained the defendants' demurrer to the complaint. The court of appeal affirmed. The court stated that the defendants did not owe a duty to the plaintiff because the former version of *Pen. Code § 647(ff)* is not mandatory and because no special relationship existed (*148 Cal. App. 3d 937, 942-948)* . Normally, a police officer has no additional duty to a specific individual, but has a duty to the public at large. However, a special duty may exist if the officer acts affirmatively to place the person in peril or increase the risk of harm or if the officer's conduct results in detrimental reliance on him or her for protection because of a situation of dependency between the parties (*148 Cal. App. 3d 937, 942-943)* . Because the officer did not take affirmative action that contributed to, increased, or changed the risk that would have otherwise existed, and because there was no indication that he voluntarily assumed responsibility to protect the plaintiff or that his conduct or statements created detrimental reliance inducing a false sense of security or protection, the officer owed no duty to the plaintiff (*148 Cal. App. 3d 937, 945)* .

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[Reserved]

§§ 165.243[Reserved]

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16-165 California Points & Authorities § 165.250

§ 165.250 Defendant Placed in Imminent Peril Did Not Breach Duty to Plaintiff

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT DID NOT BREACH HIS/HER DUTY TO PLAINTIFF BECAUSE DEFENDANT, WITHOUT NEGLIGENCE ON DEFENDANT'S PART, WAS PLACED IN A SITUATION OF IMMINENT PERIL. THEREFORE, DEFENDANT IS NOT EXPECTED OR REQUIRED TO USE THE SAME JUDGMENT AND PRUDENCE THAT IS REQUIRED IN THE EXERCISE OF ORDINARY CARE IN CALMER AND MORE DELIBERATE MOMENTS.

Standard of Care in Situation of Imminent Peril. A person who, without negligence on his or her part, is suddenly and unexpectedly confronted with peril, arising from either the actual presence or the appearance of imminent danger to himself or herself or others, is not expected nor required to use the same judgment and prudence that is required of him or her in the exercise of ordinary care in calmer and more deliberate moments (*Leo v. Dunham (1953) 41 Cal. 2d 712, 714, 264 P.2d 1* ; *Schultz v. Mathias (1970) 3 Cal. App. 3d 904, 912, 83 Cal. Rptr. 888*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that because the defendant was placed in a situation of imminent peril, the defendant is not held to the same degree of care applicable in calmer or more deliberate moments [*see Schultz v. Mathias (1970) 3 Cal. App. 3d 904, 912, 83 Cal. Rptr. 888]* .

This argument may arise in several procedural contexts. For example, the defendant may raise this argument in support of a motion for new trial or on appeal from an adverse judgment, if one of the grounds for appeal is the propriety of jury instructions concerning the doctrine of imminent peril [*see, e.g., Schultz v. Mathias (1970) 3 Cal. App. 3d 904, 83 Cal.*

Rptr. 888 (motion for new trial); *Leo v. Dunham (1953) 41 Cal. 2d 712, 264 P.2d 1* (jury instructions)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may discuss the situation of imminent peril in which the defendant was placed and argue that the defendant should not be held to the same standard of conduct as one who has had full opportunity to reflect [*see, e.g., Schultz v. Mathias (1970) 3 Cal. App. 3d 904, 912-913, 83 Cal. Rptr. 888]* .

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of answer to a cause of action for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Standard of Care in Situation of Imminent Peril

In ***Leo v. Dunham*** *(1953) 41 Cal. 2d 712, 264 P.2d 1* , the plaintiff was struck by the defendant's tank truck. The defendant alleged that he saw the plaintiff attempting to walk across the highway, but continued to approach at about 35 miles per hour. When he was 60 to 80 feet away from the plaintiff, the defendant stated that he concluded that a collision was imminent and applied his brakes, "hollered," and swerved to his right. The plaintiff allegedly did not look around until the truck suddenly appeared in front of him. There was evidence that the plaintiff walked into the side of the truck. The jury rendered a verdict for the defendant, and the plaintiff appealed, contending that the instructions to the jury based on the doctrine of imminent peril were prejudicially erroneous.

The Supreme Court affirmed judgment for the defendant. The Court stated that a person who, without negligence on his or her part, is suddenly and unexpectedly confronted with peril, arising from either the actual presence or the appearance of imminent danger to himself or to others, is not expected nor required to use the same judgment and prudence required in the exercise of ordinary care in calmer and more deliberate moments. Regarding the jury instruction given, the Court stated that an instruction should be given only when it is applicable to the issues raised by the pleadings or pertinent to some issue or theory developed by the evidence (*41 Cal. 2d 712, 714)* . In this case, the evidence justified the inference of negligence on the defendant's part, but it also supported the jury's implied finding that the defendant was not negligent until the time he concluded that the plaintiff was not going to look around again. Both parties saw each other when they were 300 feet apart. The defendant had the right of way, and the plaintiff was crossing the road at a point that was neither within a marked crosswalk nor within an unmarked crosswalk at an intersection. Therefore, it could not be said as a matter of law that the defendant was negligent in failing to anticipate, until the truck was some 60 to 80 feet away, that the plaintiff would not yield the right of way (*41 Cal. 2d 712, 715)* . At that instant, the defendant reasonably may be said to have been confronted unexpectedly with a sudden and imminent peril. A deliberately calculated and cool choice was no longer possible. Therefore, the record showed adequate basis for the instruction on imminent peril (*41 Cal. 2d 712, 716)* .

In ***Schultz v. Mathias*** *(1970) 3 Cal. App. 3d 904, 83 Cal. Rptr. 888* , the plaintiffs' son was killed in a automobile collision between a car in which he was a passenger and a car driven by the defendant. The defendant, after noticing the

decedent's car approaching in the wrong lane, swerved to the left and applied his brakes. Just before the collision, the decedent's car veered to the right. Following a verdict and judgment for the defendant, the plaintiffs moved for a new trial on several grounds, including insufficiency of the evidence to support the verdict and newly discovered evidence [*see Code Civ. Proc. § 657(4), (6)*]. When the motion was granted on both grounds, the defendant appealed the order.

The court of appeal reversed the order granting a new trial, finding that neither ground was sufficient (*3 Cal. App. 3d 904, 909-914)* . In addition, the court found that the doctrine of imminent peril was applicable as a matter of law and that there was no substantial evidence that the defendant's attempt to avoid the collision by veering to his left instead of the right constituted negligence (*3 Cal. App. 3d 904, 914)* . The Court held that a person who, without negligence on his or her part, is suddenly and unexpectedly confronted with peril, arising from either the actual presence, or the appearance, of imminent danger to himself or herself or to others, is not expected nor required to use the same judgment and prudence that is required of him or her in the exercise of ordinary care in calmer and more deliberate moments. The basis of the rule, the court noted, is that the actor is left no time for thought or is reasonably so disturbed or excited that he or she cannot weigh alternative courses of action and must make a speedy decision, based very largely on impulse or guess. Under these conditions, the actor cannot be held to the same conduct as one who has had full opportunity to reflect, even though it later appears that he or she made the wrong decision, one that no reasonable person could possibly have made after due deliberation (*3 Cal. App. 3d 904, 912)* . The test is whether or not the actor took one of the courses of action that a reasonable person in that emergency might have taken. That course is not negligent even though it led to an injury that might have been prevented by adopting an alternative course of action (*3 Cal. App. 3d 904, 912-913)* . In this case, the defendant, through no fault of his own, was confronted with an emergency and had no time for a deliberate and considered choice of alternatives. Although the plaintiffs suggested that the defendant was negligent in failing to anticipate that the decedent's car would attempt to get back into the correct lane, the defendant could just as reasonably have anticipated that the decedent's car would continue in its course or even would have veered further to the defendant's right. Reflection after the fact might indicate that the defendant's choice of alternatives was a mistake. Whether or not the disaster could have been avoided if the defendant had veered to his right, however, is open to question. The evidence of the defendant's conduct therefore did not establish negligence (*3 Cal. App. 3d 904, 913)* .

NOTE:

Schultz v. Mathias (1970) 3 Cal. App. 3d 904, 83 Cal. Rptr. 888 , was criticized on other grounds in *Scala v. Jerry Witt & Sons, Inc. (1970) 3 Cal. 3d 359, 364 n.1, 90 Cal. Rptr. 592, 475 P.2d 864* . In *Scala,* the Supreme Court held that a lower court's specification of reasons for granting a new trial under *Code Civ. Proc. § 657* should not be stated in terms of ultimate fact [*see Scala v. Jerry Witt & Sons, Inc. (1970) 3 Cal. 3d 359, 370, 90 Cal. Rptr. 592, 475 P.2d 864]* .

[4] Additional Authorities

[a] Standard of Care in Situation of Imminent Peril

In *Damele v. Mack Trucks, Inc. (1990) 219 Cal. App. 3d 29, 267 Cal. Rptr. 197* , a worker brought a personal injury action against his employer and a truck company, alleging that he was crushed between a truck and trailer after trying to reconnect the trailer to prevent it from rolling off a ramp or into an area where other trucks were waiting to deliver their loads. The trial court instructed the jury on the duty of one in imminent peril. The jury found that the truck company was 49 percent at fault, the employer was 49 percent at fault, and the worker was two percent at fault. The truck company appealed, contending that the trial court erred by giving the imminent peril instruction because the worker's conduct caused or contributed to creating the perilous situation as a matter of law. The court of appeal affirmed the judgment, stating that the doctrine of imminent peril applies not only if a person perceives danger to himself or herself, but also if he or she perceives an imminent danger to others. In addition, the mere appearance of an imminent peril to others, not an actual imminent peril, is all that is required to invoke the doctrine. Moreover, even if the worker's conduct created the perilous situation as a matter of law, reading the instruction would have been harmless error because although the instruction permitted the jury to apply the imminent peril doctrine, it did not require that it do so. If the

facts were as clear as the truck company claimed, then it follows that the jury would have found the doctrine inapplicable (*219 Cal. App. 3d 29, 36-37)* .

In *McShane v. Cleaver (1966) 247 Cal. App. 2d 260, 55 Cal. Rptr. 427* , the court of appeal affirmed judgment for the defendants in an action involving an automobile accident. On appeal, the plaintiffs contended that the evidence did not support the giving of an instruction on imminent peril. The court noted that the doctrine applies when a nonnegligent person is confronted with a situation of imminent danger to himself or herself or others, in which case he or she is not required to exercise the same degree of care otherwise required (*247 Cal. App. 2d 260, 268)* . In this case, the jury may have found that the defendant was confronted with a dangerous situation and that her action in attempting to pull her car to the right instead of applying the brakes may have been a standard of care that was reasonable under the situation. Therefore, because the question was one of fact, it was properly left to the jury (*247 Cal. App. 2d 260, 269)* .

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
CHAPTER 165 NEGLIGENCE
PART II. FORMS
B. Duty
6. Duty Owed by or to Particular Persons or Entities

16-165 California Points & Authorities §§ 165.251-165.259

[Reserved]

§§ 165.251[Reserved]

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CHAPTER 165 NEGLIGENCE
PART II. FORMS
C. Causation
1. General Rules

16-165 California Points & Authorities § 165.260

§ 165.260 Sufficient Causal Connection Exists Between Defendant's Actions and Plaintiff's Injuries

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT'S CONDUCT CAUSED PLAINTIFF'S INJURY.

A. Sufficient Causal Connection Between Defendant's Actions and Plaintiff's Damages. Basic to the statement of a cause of action for damages premised on wrongful or negligent conduct is a showing that the charged conduct caused the claimed damages (*Hutchison v. Southern Cal. First Nat'l Bank (1980) 27 Cal. App. 3d 572, 578-579, 103 Cal. Rptr. 816*).

[*Optional*] **B. Absolute Certainty Not Required.** The plaintiff is not required to establish the fact of causation with absolute certainty. Evidence is sufficient if reasonable persons could conclude from it that it is more probable than not that the defendant's conduct was a cause of the plaintiff's injury (*Valdez v. J.D. Diffenbaugh Co. (1975) 51 Cal. App. 3d 494, 509, 124 Cal. Rptr. 467*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that sufficient causal connection exists between the defendant's actions and the plaintiff's injuries to establish proximate cause. Optional Paragraph B may be submitted to assert that the plaintiff need not establish absolute certainty of a causal connection. This argument may arise in opposing a demurrer or motion for summary judgment in an action for damages for negligence [*see, e.g., Whitcombe v. County of Yolo (1977) 73 Cal. App. 3d 698, 702, 141 Cal. Rptr. 189* (demurrer); *see also Brown v. Critchfield (1980) 100 Cal. App. 3d 858, 861, 161 Cal. Rptr. 342* (summary judgment)]. This form should be combined with any of the *forms in §§ 165.261 -165.263* that are applicable to the particular case.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may discuss the facts of the case showing a substantial connection between the defendant's conduct and the plaintiff's injuries or damages.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of answer to a cause of action for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§§ 165.261 -165.263*. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in §§ 165.270 -165.273* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Sufficient Causal Connection Between Defendant's Actions and Plaintiff's Damages

The factual and procedural background of ***Hutchison v. Southern Cal. First Nat'l Bank*** *(1980) 27 Cal. App. 3d 572, 103 Cal. Rptr. 816* , is discussed in *§ 165.20[3][c]*. The plaintiffs, pledgors of shares of corporate stock, brought an action for damages against the defendant, the pledgee, based on the pledgee's allegedly negligent failure to consent to certain transactions involving the shares. Although the court of appeal affirmed the judgment of dismissal after sustaining a demurrer to the plaintiff's complaint, it stated that basic to the statement of a cause of action for damages premised on wrongful or negligent conduct is a showing that the charged conduct caused the claimed damages (*27 Cal. App. 3d 572, 578)* . It noted, however, that the plaintiffs failed to adequately allege the elements of causation and damages in any of its various causes of action, in that they failed to show a chain of causation between the defendant's refusal to consent to a certain business transaction and their claimed damages (*27 Cal. App. 3d 572, 579)* . The court added that the lack of adequate allegations of causation between the defendant's conduct and the plaintiffs' claimed damages is a fatal omission supporting the order sustaining the general demurrer (*27 Cal. App. 3d 572, 579-580)* . After discussing other reasons for sustaining the general demurrer without leave to amend, the court stated that the order sustaining the general demurrer without leave to amend was not error (*27 Cal. App. 3d 572, 585)* .

[b] Absolute Certainty Not Required

The factual and procedural background of ***Valdez v. J.D. Diffenbaugh Co.*** *(1975) 51 Cal. App. 3d 494, 124 Cal. Rptr. 467* , is discussed in *§ 165.30[3][b]*. In *Valdez,* an employee of a pipe manufacturer brought an action for damages for personal injuries against the general contractor who built the plant in which the plaintiff was injured and two suppliers and installers of equipment involved in the plaintiff's injury. Negligence was an issue regarding the general contractor only

In affirming a judgment for the plaintiff against all three defendants and an order granting the suppliers' motion for a new trial, the court of appeal examined various policy considerations. It found that the contractor owed a duty to the plaintiff and that its conduct was in breach of this duty (*51 Cal. App. 3d 494, 506-508)* . In addition, the court found that the concurrence of several negligent acts caused the plaintiff's injury and that "but for" the occurrence of each of these acts, the plaintiff would not have been injured (*51 Cal. App. 3d 494, 508)* . For the plaintiff to establish causation, the defendant's act must, in some way, have contributed to the injury--that is, "but for" the defendant's negligence, the injury would not have occurred. Therefore, the plaintiff had to demonstrate only that but for a single negligent act by the defendant, he would have escaped injury. In addition, to hold the defendant liable, the defendant's negligent act must be the proximate or legal cause of the injury (*51 Cal. App. 3d 494, 509)* .

In this case, the defendant attached fail-safe delatching devices to oven entry doors at the plant at which the plaintiff was injured. The fail-safe devices were designed to prevent certain carts from crashing into the oven doors. If the oven doors did not close completely, the fail-safe devices would not work. The defendant was aware of this (*51 Cal. App. 3d 494, 509)* . Because of problems experienced with the original door, the defendant reworked and rehung the door that was involved in the plaintiff's injury. The court noted that the defendant's workers negligently hung the oven door. On the day of the accident, the door failed to completely close, the fail-safe device did not engage, and the cart crashed into the oven door (*51 Cal. App. 3d 494, 509-510)* . Thus, but for the failure of the oven door to close tightly, the fail-safe device would have halted the cart, and the plaintiff would have avoided the injury. Therefore, it appeared reasonably probable from the evidence presented at trial, and the inferences drawn from it, that the defendant's negligence in hanging the door was a proximate cause of the plaintiff's injury (*51 Cal. App. 3d 494, 510)* .

[4] Additional Authorities

[a] Sufficient Causal Connection Between Defendant's Actions and Plaintiff's Damages

The factual and procedural background of *City of Los Angeles v. Shpegel-Dimsey, Inc. (1988) 198 Cal. App. 3d 1009, 244 Cal. Rptr. 507* , is discussed in *§ 165.70[4][c]*. In reversing the judgment for the defendant, the court of appeal stated that to recover under the theory of negligence per se, the injury suffered must have been proximately caused by the hazardous condition or the violation of statute (*198 Cal. App. 3d 1009, 1021)* .

In *Brown v. Critchfield (1980) 100 Cal. App. 3d 858, 161 Cal. Rptr. 342* , a property owner brought an action against an attorney and a real estate broker, alleging negligence and fraud in connection with the sale of land. The court of appeal reversed judgment for the defendants after granting their motion for summary judgment, finding that the plaintiff had stated a cause of action. The court held that in an action for damages resulting from fraud or negligence, a causal connection between the tortfeasor's actions and the victim's damages must be pleaded and ultimately proved (*100 Cal. App. 3d 858, 866)* .

[b] Absolute Certainty Not Required

In *Lineaweaver v. Plant Insulation Co. (1995) 31 Cal. App. 4th 1409, 37 Cal. Rptr. 2d 902* , the plaintiff, a laborer and journeyman boilermaker/welder, brought an action against the defendant, an asbestos supplier, to recover for personal injuries sustained from repeated exposure to asbestos insulation products. The trial court granted a defense motion for nonsuit, concluding that the plaintiff failed to present sufficient evidence of exposure to the defendant's product. The court of appeal reversed, stating that although there was no direct evidence that the plaintiff was exposed to the defendant's product, the circumstantial evidence was sufficient to support a reasonable inference of exposure. As for biological causation, expert testimony indicated that exposure to the defendant's products was "a very substantial factor" in causing the plaintiff's asbestosis. Although there were other possible sources of the plaintiff's asbestosis, the defendant's products were prominent and prevalent at the plaintiff's work site (*31 Cal. App. 4th 1409, 1420)* .

In *Ahrentzen v. Westburg (1968) 263 Cal. App. 2d 749, 69 Cal. Rptr. 916* , the plaintiff brought an action for damages

for personal injuries suffered in an automobile collision. The court of appeal affirmed judgment for the plaintiff. The defendant contended that other evidence should have been believed at trial and that the accident did not happen as the plaintiff related it. The court stated, however, that the jury apparently believed the plaintiff and did not believe the defendant and his witnesses. The court stated that the plaintiff is not required to establish the fact of causation with absolute certainty. It is sufficient if there is evidence from which reasonable persons could conclude that it is more probable than not that the defendant's conduct was a cause (*263 Cal. App. 2d 749, 751)* .

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CHAPTER 165 NEGLIGENCE
PART II. FORMS
C. Causation
1. General Rules

16-165 California Points & Authorities § 165.261

§ 165.261 Defendant's Conduct Was Cause in Fact of Plaintiff's Injuries

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT IS LIABLE FOR HIS/HER/ITS NEGLIGENCE BECAUSE DEFENDANT'S CONDUCT WAS THE CAUSE IN FACT OF PLAINTIFF'S INJURY.

A. "But For" Test Met. To hold the defendant liable, the plaintiff must show that the defendant's negligence contributed in some way to the plaintiff's injury, so that "but for" the defendant's negligence, the injury would not have been sustained (*Akins v. County of Sonoma (1967) 67 Cal. 2d 185, 198-199, 60 Cal. Rptr. 499, 430 P.2d 57* ; *Valdez v. J.D. Diffenbaugh Co. (1975) 51 Cal. App. 3d 494, 508, 124 Cal. Rptr. 467*).

B. Proximate Cause Includes Cause in Fact. Proximate cause includes the concept of legal cause as well as cause in fact (*Banville v. Schmidt (1974) 37 Cal. App. 3d 92, 107, 112 Cal. Rptr. 126*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the defendant's acts or omissions proximately caused injury to the plaintiff. This form should be combined with any of the *forms in § 165.260* and *§§ 165.262 -165.263* that are applicable to the particular case.

This argument may arise in opposing a demurrer or motion for summary judgment in an action for damages for negligence [*see, e.g.,* *Whitcombe v. County of Yolo (1977) 73 Cal. App. 3d 698, 702, 141 Cal. Rptr. 189* (demurrer); *see also* *Brown v. Critchfield (1980) 100 Cal. App. 3d 858, 861, 161 Cal. Rptr. 342* (summary judgment)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may argue that the defendant's acts or omissions were the cause in fact of the plaintiff's injury and the legal cause of the plaintiff's injury as well.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of answer to a cause of action for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§ 165.260* and *§§ 165.262 -165.263*. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in §§ 165.270 -165.273* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] "But For" Test Met

In ***Akins v. County of Sonoma*** *(1967) 67 Cal. 2d 185, 60 Cal. Rptr. 499, 430 P.2d 57* , a two-year-old boy brought an action through his guardian ad litem against the defendants for personal injuries suffered when he fell from his seat in the bleachers at a county fairground. The plaintiff, who was sitting on the top row of the bleachers while watching a roller derby exhibition with his parents, fell through an open space between the rear of his seat and a back rail onto a concrete floor ten to 15 feet below. The trial court entered judgment for the defendants. The plaintiff appealed, contending that various errors occurred at trial, particularly in the jury instructions, requiring reversal.

The Supreme Court affirmed. After examining the issues of res ipsa loquitur and violations of safety orders by the defendant, the Court addressed the issue of proximate cause (*67 Cal. 2d 185, 192-197)* . The Court noted that the negligence of the plaintiff's parents was relevant to the issue of actual causation (*67 Cal. 2d 185, 198)* . To hold the defendants liable, the plaintiff must show that the negligence of the defendants contributed in some way to the plaintiff's injury, so that "but for" the defendants' negligence, the injury would not have been sustained (*67 Cal. 2d 185, 198-199)* . If because of lack of supervision by his parents, the plaintiff would have fallen from the bleachers even if the defendants had provided safe seating arrangements and had adequately supervised the seating at the fairgrounds, then the defendants' negligence would not be the cause in fact of the plaintiff's injuries (*67 Cal. 2d 185, 199)* . Furthermore, the issue of the negligence of the plaintiff's parents was relevant to the issue of proximate cause. This issue, the Court explained, is concerned with whether or not, assuming that a defendant was negligent and that his or her negligence was an actual cause of the plaintiff's injury, the defendant should be held responsible for the plaintiff's injury when the injury was brought about by a later cause of independent origin (*67 Cal. 2d 185, 199)* . This presented a question for the jury: was negligence of the plaintiff's parents foreseeable to the defendants? If not, did it nevertheless result in a type of injury that was foreseeable to the defendants (*67 Cal. 2d 185, 199-200)* ? The Court further stated if either of these questions is answered in the affirmative, then the defendants are not relieved from liability towards the plaintiff. If,

however, the intervening cause posed by the parents' conduct was not foreseeable, and the results that it caused were not foreseeable, then the intervening cause is a supervening cause, and the defendants are relieved of liability for the plaintiff's injuries (*67 Cal. 2d 185, 199)* . Based on the Court's conclusion that the negligence of the plaintiff's parents was properly injected into the case, it concluded that the lower court's jury instructions were proper (*67 Cal. 2d 185, 200-201)* .

The factual and procedural background of ***Valdez v. J.D. Diffenbaugh Co.*** *(1975) 51 Cal. App. 3d 494, 124 Cal. Rptr. 467* , is discussed in *§ 165.30[3][b]*. In this case, an employee of a pipe manufacturer brought an action for damages for personal injuries against the general contractor who built the plant in which the plaintiff was injured and two suppliers and installers of equipment involved in the plaintiff's injury. Negligence was an issue regarding the general contractor only.

In affirming judgment for the plaintiff against all three defendants and an order granting the suppliers' motion for a new trial, the court of appeal examined various policy considerations and found that the contractor owed a duty to the plaintiff and that its conduct was in breach of this duty (*51 Cal. App. 3d 494, 506-508)* . In addition, the court found that the concurrence of several negligent acts caused the plaintiff's injury and that "but for" the occurrence of each of these acts, the plaintiff would not have been injured (*51 Cal. App. 3d 494, 508)* . To establish causation, the plaintiff must establish that the defendant's act, in some way, contributed to the injury. That is, "but for" the defendant's negligence, the injury would not have occurred. Thus, the plaintiff had to demonstrate only that but for a single negligent act by the defendant, the plaintiff would have escaped injury. In addition, the defendant's negligent act must be the proximate or legal cause of the injury in order for the defendant to be held liable (*51 Cal. App. 3d 494, 509)* .

In this case, the defendant attached fail-safe delatching devices to oven entry doors at the plant at which the plaintiff was injured. The fail-safe devices were designed to prevent certain carts from crashing into the oven doors. If the oven doors did not close completely, the fail-safe devices would not work, and the defendant was aware of this (*51 Cal. App. 3d 494, 509)* . Because of problems experienced with the original door, the defendant reworked and rehung the door that was involved in the plaintiff's injury. The court noted that the defendant's workers negligently hung the oven door and that on the day of the accident, the door failed to completely close. The fail-safe device did not engage, and the cart crashed into the oven door (*51 Cal. App. 3d 494, 509-510)* . Thus, but for the failure of the oven door to close tightly, the fail-safe device would have halted the cart, and the plaintiff would have avoided the injury. Hence, the court found that it appeared reasonably probable from the evidence presented at trial, and the inferences drawn from it, that the defendant's negligence in hanging the door was a proximate cause of the plaintiff's injury (*51 Cal. App. 3d 494, 510)* .

[b] Proximate Cause Includes Cause in Fact

In ***Banville v. Schmidt*** *(1974) 37 Cal. App. 3d 92, 112 Cal. Rptr. 126* , the plaintiffs brought an action against several defendants for rescission of a real estate sale and for damages for negligence, fraud, and misrepresentation. The plaintiffs contended, in part, that one defendant, First American Title Company, negligently failed to discover the recordation of a deed that conveyed certain property back to another defendant. After a nonjury trial, the plaintiffs appealed from that portion of the judgment entered in favor of First American Title Company and against the plaintiffs. The trial court found that First American was negligent in its failure to ascertain the status of the title of the property in question, but that its negligence was not the proximate cause of the damage sustained by the plaintiffs. The plaintiffs, however, contended that First American's negligence, as a matter of law, was a proximate cause of the damage sustained by them. In addition, another defendant, Tom Kiernan Realtors, Inc., appealed from a judgment in favor of the plaintiff and from an order sustaining, without leave to *amend, First* American's demurrer to Kiernan's cross complaint against First American.

The court of appeal affirmed the judgment in favor of the plaintiff against Kiernan Company and reversed the judgment in favor of First American Company and against the plaintiffs. After first finding that First American owed a duty to the

plaintiff, the court turned to the issue of proximate cause (*37 Cal. App. 3d 92, 102-106)* . The court noted that when the facts are clear and undisputed, it is a question of law for the court to determine the legal consequences of those facts (*37 Cal. App. 3d 92, 106)* . The issue of proximate cause includes the concept of legal cause in addition to cause in fact. The actor's negligent conduct is a legal cause of harm to another if (1) his or her conduct is a substantial factor in bringing about the harm, and (2) there is no rule of law relieving the actor from liability because of the manner in which his or her negligence has resulted in the harm (*37 Cal. App. 3d 92, 107)* . In this case, the court found that First American's failure to discover and report the duly recorded deed was a cause in fact of the damage sustained by the plaintiff. A resort to reason, the court said, compelled the inference that "but for" the negligence of First American, the escrow would never have closed in a manner causing the plaintiffs to lose that for which they had bargained (*37 Cal. App. 3d 92, 107)* . In addition, the court explained that proximate cause, to be actionable, need not be the sole factor contributing to the damages sustained. Although this case involved joint tortfeasors, the court also held that no act of any other defendant could be considered a superseding cause that would absolve First American of liability (*37 Cal. App. 3d 92, 107-108)* .

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C. Causation
1. General Rules

16-165 California Points & Authorities § 165.262

§ 165.262 Defendant's Conduct Was Substantial Factor in Causing Plaintiff's Injuries

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT IS LIABLE FOR HIS/HER/ITS NEGLIGENCE BECAUSE DEFENDANT'S CONDUCT WAS A SUBSTANTIAL FACTOR IN CAUSING PLAINTIFF'S INJURY.

Conduct Was Substantial Factor. If the act or omission was a substantial factor in bringing about the result, it is regarded as a legal cause of the injury (*Willis v. Gordon (1978) 20 Cal. 3d 629, 635, 143 Cal. Rptr. 723, 574 P.2d 794* ; *Hardison v. Bushnell (1993) 18 Cal. App. 4th 22, 26, 22 Cal. Rptr. 2d 106*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the defendant's conduct was a substantial factor in bringing about the plaintiff's injuries [*see Willis v. Gordon (1978) 20 Cal. 3d 629, 635, 143 Cal. Rptr. 723, 574 P.2d 794]* . This form should be combined with any of the *forms in §§ 165.260 -165.261* and *§ 165.263* that are applicable to the particular case.

This argument may arise in opposing a demurrer or motion for summary judgment in an action for damages for negligence [*see, e.g., Whitcombe v. County of Yolo (1977) 73 Cal. App. 3d 698, 702, 141 Cal. Rptr. 189* (demurrer); *see also Brown v. Critchfield (1980) 100 Cal. App. 3d 858, 861, 161 Cal. Rptr. 342* (summary judgment)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may

discuss the facts leading to the plaintiff's injury and argue that the defendant's conduct was a substantial factor in their cause.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of answer to a cause of action for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§§ 165.260 -165.261* and *§ 165.263*. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in §§ 165.270 -165.273* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Conduct Was Substantial Factor

In ***Willis v. Gordon*** *(1978) 20 Cal. 3d 629, 143 Cal. Rptr. 723, 574 P.2d 794* , the plaintiffs brought an action for wrongful death and personal injuries suffered in an automobile collision. The defendants were parked on the side of a highway, intending to fix a flat tire, when Mrs. Willis swerved left to avoid hitting the parked car, crossed over the center line, and collided with a third car driven by Mrs. Galarza. Mrs. Willis was killed, and Mrs. Galarza suffered serious injuries from the ensuing collision. Mr. Galarza joined in the action against the defendants. At the close of the plaintiffs' opening statement, the court entered a judgment of nonsuit. The plaintiffs appealed.

The Supreme Court reversed. The Court held that the judgment of nonsuit was erroneous because it could not be said that the opening statements permitted no construction other than that the plaintiffs failed to sustain a prima facie case of actionable negligence. The Court noted that the opening statements set forth facts showing certain statutory violations and the common law duty to exercise reasonable care from which the jury could reasonably have found the defendants negligent (*20 Cal. 3d 629, 634)* . Although the defendants contended that the decedent's inattention and failure to handle her vehicle properly was the sole and proximate cause of the accident, whether or not the defendants' conduct in parking on the curve had such an effect in producing the accident that reasonable persons would regard it as a cause of the collision is a question of fact (*20 Cal. 3d 629, 634-635)* . There is no requirement that the defendants' negligent action be the sole cause of the accident. It is sufficient if it was a proximate cause or substantial factor in producing the collision. If the jury determines that the defendants' negligence was a substantial factor in producing the accident, but that the immediate cause of the harm was the decedent's excessive reaction, the defendant would not be relieved of liability if the risk of harm that resulted in the plaintiffs' injury and death was foreseeable to the defendants. It was, however, for the jury to decide whether or not the decedent's swerving was foreseeable, and therefore, one of the hazards that would make the defendants' parking negligent. Therefore, the Court concluded that the lower court erroneously granted the motion for nonsuit (*20 Cal. 3d 629, 635)* .

In ***Hardison v. Bushnell*** *(1993) 18 Cal. App. 4th 22, 22 Cal. Rptr. 2d 106* , the truck in which the plaintiff was riding struck a semitractor driven by the defendant. The truck, which was traveling north at an unsafe speed, hit the semitractor

after the defendant, who was traveling south, turned left across the northbound lane. The plaintiff, who was not wearing a seat belt, shattered his wrist when he was thrown forward into the truck's dashboard. The plaintiff brought a personal injury action against the defendant and the defendant's employer. The jury found that the defendant was negligent, but that the defendant's conduct was not the proximate cause of the plaintiff's injuries. The plaintiff appealed.

The court of appeal reversed and remanded, holding that the jury's verdict was not supported by substantial evidence. The court held that the defendant's negligence was a proximate cause of the collision and of the plaintiff's injuries, because the jury could not reasonably have found that an independent intervening act that the defendant could not have foreseen absolved the defendant of being a legal cause of the plaintiff's injuries (*18 Cal. App. 4th 22, 26)* . The court held that the defendant's negligence was the actual cause or cause-in-fact of the plaintiff's injuries, because the defendant's turning his semitractor into the path of the truck was a substantial factor in causing those injuries (*18 Cal. App. 4th 22, 26)* . The court also held that an independent intervening act breaks the chain of causation and absolves a defendant only if the act is unforeseeable and the type of injury it caused is unforeseeable (*18 Cal. App. 4th 22, 27)* . In this case, the only possible intervening acts were the plaintiff's failure to wear a seat belt and the truck's excessive rate of speed. The court held that the plaintiff's failure to wear a seat belt was foreseeable by the defendant, as was a speeding approaching vehicle. The defendant was negligent because his turn created the risk of collision with oncoming traffic, and the speed of those oncoming vehicles only enhanced the hazard created by the defendant's negligence (*18 Cal. App. 4th 22, 28)* .

[4] Additional Authorities

[a] Conduct Was Substantial Factor

In *Greathouse v. Amcord, Inc. (1995) 35 Cal. App. 4th 831, 41 Cal. Rptr. 2d 561* , the plaintiffs, the survivors of a construction worker who died from asbestos-related disease, filed a wrongful death action against various defendants, including a company that marketed plastic gun cement. Plastic gun cement was designed for use in plaster guns and contained about 2 percent asbestos by volume. Evidence indicated that the decedent used a plaster gun regularly in his work. The case was submitted to a jury, which awarded damages to the plaintiffs. The defendant appealed, contending that the verdict on the issue of causation was not supported by substantial evidence. The court of appeal affirmed, noting that the substantial factor test of causation applies generally for tort liability and that in the specific context of asbestos litigation, a plaintiff must demonstrate exposure to a product and biological processes from the exposure that result in disease. The court stated that the record disclosed an abundance of evidence from which the jury could infer that the decedent commonly purchased the defendant's product and that he was exposed to the product to such an extent that it was a substantial factor in bringing about his illness (*35 Cal. App. 4th 831, 837)* .

The facts and procedural background of *City of Los Angeles v. Shpegel-Dimsey, Inc. (1988) 198 Cal. App. 3d 1009, 244 Cal. Rptr. 507* , are discussed in *§ 165.70[4][c]*. In reversing judgment for the defendant, the court of appeal stated that proximate causation exists if the condition or the violation of statute is a substantial factor in causing the injury--that is, if there is reason to believe that the absence of the condition or compliance with the statute would have prevented or lessened the likelihood of injury (*198 Cal. App. 3d 1009, 1021)* .

In *Greenfield v. Insurance, Inc. (1971) 19 Cal. App. 3d 803, 97 Cal. Rptr. 164* , the plaintiff asked the defendant, an insurance broker, to obtain business interruption insurance for him that covered mechanical breakdown. The defendant informed the plaintiff that it had obtained the desired coverage, but the policy, which neither party read before filing it, did not cover mechanical breakdown. After the plaintiff suffered losses from mechanical breakdown, he obtained coverage from another company. The court of appeal held that the defendant's negligence proximately caused the plaintiff's losses because it was a substantial factor in causing them. If the defendant had not misrepresented the extent of the insurance coverage it claimed to have obtained for the plaintiff, it was reasonable to infer that the plaintiff would have obtained coverage elsewhere (*19 Cal. App. 3d 803, 810-811)* .

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16-165 California Points & Authorities § 165.263

§ 165.263 Defendant's Conduct Was Proximate Cause of Plaintiff's Injuries

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT IS LIABLE FOR HIS/HER/ITS NEGLIGENCE BECAUSE DEFENDANT'S CONDUCT WAS THE PROXIMATE CAUSE OF PLAINTIFF'S INJURY.

A. Proximate Cause Encompasses Legal Cause and Cause in Fact. Proximate cause includes the concept of legal cause in addition to cause in fact (*Banville v. Schmidt (1974) 37 Cal. App. 3d 92, 107, 112 Cal. Rptr. 126*).

B. Proximate Cause Is Policy Determination. The defendant's negligent act must be the proximate or legal cause of the plaintiff's injury to hold the defendant liable. Proximate cause is not a question of causation, but is simply a policy determination of whether or not the defendant should be held responsible for his or her acts (*Valdez v. J.D. Diffenbaugh Co. (1975) 51 Cal. App. 3d 494, 509, 124 Cal. Rptr. 467*).

C. Policy Considerations in Proximate Cause Determination. The questions of duty and proximate cause are sometimes the same. Principal policy considerations in determining whether or not duty or proximate cause exists include: (1) the foreseeability of harm to the plaintiff; (2) the degree of certainty that the plaintiff suffered injury; (3) the closeness of connection between the defendant's conduct and the injury suffered; (4) the moral blame attached to the defendant's conduct; (5) the policy of preventing future harm; (6) the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach; and (7) the availability, costs, and prevalence of insurance for the risk involved (*Tara v. California State Auto. Ass'n (1979) 93 Cal. App. 3d 227, 231, 155 Cal. Rptr. 497*)

D. No Intervening Cause. Proximate cause is a cause that, in a natural and continuous sequence, unbroken by any efficient intervening cause, produced the injury or damage complained of and without which such injury or damage

would not have occurred (*Whitcombe v. County of Yolo (1977) 73 Cal. App. 3d 698, 708, 141 Cal. Rptr. 189*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the defendant's acts or omissions proximately caused injury to the plaintiff [*see Banville v. Schmidt (1974) 37 Cal. App. 3d 92, 107, 112 Cal. Rptr. 126]* . This form should be combined with any of the *forms in §§ 165.260 -165.262* that are applicable to the particular case.

This argument may arise in opposing a demurrer or motion for summary judgment in an action for damages for negligence [*see, e.g., Whitcombe v. County of Yolo (1977) 73 Cal. App. 3d 698, 702, 141 Cal. Rptr. 189* (demurrer); *see also Brown v. Critchfield (1980) 100 Cal. App. 3d 858, 861, 161 Cal. Rptr. 342* (summary judgment)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may argue that the defendant's acts or omissions were the cause in fact of the plaintiff's injury, in addition to the legal cause of the plaintiff's injury. Counsel may also argue that no intervening cause broke the chain of causation.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of answer to a cause of action for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§§ 165.260 -165.262*. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in §§ 165.270 -165.273* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Proximate Cause Encompasses Legal Cause and Cause in Fact

The factual and procedural background of ***Banville v. Schmidt*** *(1974) 37 Cal. App. 3d 92, 112 Cal. Rptr. 126* , is discussed in *§ 165.261[3][b]*. In *Banville*, the court of appeal affirmed judgment in favor of the plaintiff against Kiernan Company and reversed the judgment in favor of First American Company and against the plaintiffs. After first finding that First American owed a duty to the plaintiff, the court turned to the issue of proximate cause (*37 Cal. App. 3d 92, 102-106)* . The court noted that if the facts are clear and undisputed, it is a question of law for the court to determine the legal consequences of those facts (*37 Cal. App. 3d 92, 106)* . The issue of proximate cause includes the concept of legal cause in addition to cause in fact. The actor's negligent conduct is a legal cause of harm to another if (1) his or her conduct is a substantial factor in bringing about the harm, and (2) there is no rule of law relieving the actor

from liability because of the manner in which his or her negligence has resulted in the harm (*37 Cal. App. 3d 92, 107)* . The court found that First American's failure to discover and report the duly recorded deed was a cause in fact of the damage sustained by the plaintiffs. A resort to reason, the court said, compelled the inference that "but for" the negligence of First American, the escrow would never have closed in a manner causing the plaintiffs to lose that for which they had bargained (*37 Cal. App. 3d 92, 107)* . In addition, proximate cause, to be actionable, need not be the sole factor contributing to the damages sustained. Although this case involved joint tortfeasors, the court also held that no act of any other defendant could be considered a superseding cause that would absolve First American of liability (*37 Cal. App. 3d 92, 107-108)* .

[b] Proximate Cause Is Policy Determination

The factual and procedural background of ***Valdez v. J.D. Diffenbaugh Co.*** *(1975) 51 Cal. App. 3d 494, 124 Cal. Rptr. 467* , is discussed in *§ 165.30[3][b]*. In finding that it was reasonably probable that the defendant's negligence in hanging an oven door was the proximate cause of the plaintiff's injury, the court stated that the defendant's negligent act must be the proximate or legal cause of the plaintiff's injury for the defendant to be held liable (*51 Cal. App. 3d 494, 509)* . In a philosophical sense, the court noted, cause and effect find their beginning and end in the boundless and unascertainable. Consequently, the courts do not attempt to approach cause and effect in any absolute degree, but only in such a manner as is practicable. Thus, terms such as "proximate," "legal," and "natural" have come into use as establishing the boundaries beyond which the courts will not traverse in the attempt to trace the connection between a given cause and a given effect. For example, a plaintiff alleges, as an effect, some injury that has been done to his or her person or property. He or she shows that prior to the injury a wrongful act of another person occurred and that but for the occurrence of this wrongful act, the injury complained of would not have been sustained. The courts then state that the wrong was a cause of the injury. To make such a standard (that if the cause had not existed, the effect would not have occurred) the basis of legal responsibility, however, would soon prove very unsatisfactory. A reduction ad absurdum may result by noting that if the injured person had never been born, the injury would not have occurred. The courts then ask the question of whether the wrongful act was the proximate cause (*51 Cal. App. 3d 494, 508-509)* . Thus, the courts have concluded that proximate cause is not a question of causation. It is simply a policy determination of whether or not the defendant should be held responsible for his or her acts (*51 Cal. App. 3d 494, 509)* .

[c] Policy Considerations in Proximate Cause Determination

In ***Tara v. California State Auto. Ass'n*** *(1979) 93 Cal. App. 3d 227, 155 Cal. Rptr. 497* , the plaintiff, whose mother was injured in an automobile accident with an uninsured motorist, brought an action against her mother's insurance company for the value of housekeeping services that she furnished to her mother while her mother was recuperating from the accident. The plaintiff's mother had previously settled her claims against her insurer on the uninsured motorist coverage of her insurance policy. The trial court affirmed an arbitration award in favor of the defendant. The plaintiff appealed, contending that she was entitled to recover for the care of her mother because she was an "insured" under *Ins. Code § 11580.2*.

The court of appeal affirmed. Under the clause in question, a person may recover damages from an insurer only if that person is legally entitled to recover those damages in tort directly from the owner or operator of the uninsured vehicle. The court explained that the question of duty and proximate cause are sometimes the same. Quoting *Rowland v. Christian (1968) 69 Cal. 2d 108, 113, 70 Cal. Rptr. 97, 443 P.2d 561* (discussed in *§ 165.30[3][d]*), the court added that principal policy considerations in deciding whether or not a duty exists include (1) the foreseeability of harm to the plaintiff, (2) the degree of certainty that the plaintiff suffered injury, (3) the closeness of the connection between the defendant's conduct and the injury suffered, (4) the moral blame attached to the defendant's conduct, (5) the policy of preventing future harm, (6) the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and (7) the availability, cost, and prevalence of insurance for the risk involved. In this case, the court found that the uninsured motorist owed no duty to the plaintiff and that the motorist's actions were not the proximate cause of any injury to the plaintiff. Although the court admitted that the

plaintiff's assistance to her recuperating mother was admirable, the performance of these services was too remote from the actions of the uninsured motorist to give rise to a cause of action by the plaintiff against the uninsured motorist for the value of her services (*93 Cal. App. 3d 227, 231)* .

[d] No Intervening Cause

In ***Whitcombe v. County of Yolo*** *(1977) 73 Cal. App. 3d 698, 141 Cal. Rptr. 189* , an employer and his employee brought an action against the county, the county probation department, and two probation officers for personal injuries suffered when they were assaulted by a probationer. The probationer had previously been arrested and charged with theft of certain property owned by the employer, but the county released the probationer after several days. On his release, the probationer returned and attacked the plaintiffs. The plaintiffs' complaint alleged ten causes of action based primarily on the negligent and wrongful conduct of the defendants with regard to their duties concerning probation and the breach of a special relationship between the defendants and the plaintiffs. The trial court sustained the defendants' demurrer to the complaint, based on the plaintiffs' failure to state a cause of action, and subsequently entered a judgment of dismissal. The plaintiffs appealed.

Although the court of appeal affirmed the judgment, it discussed the concept of proximate cause. It stated that proximate cause is legal cause, as distinguished from the lay person's notion of actual cause, and is always a question of law (*73 Cal. App. 3d 698, 707)* . Proximate cause, the court explained, is the cause that, in a natural and continuous sequence, unbroken by any efficient intervening cause, produced the injury or damage complained of and without which the result would not have occurred. The court was not convinced by the plaintiffs' argument that the defendants' alleged inaction in keeping and presenting reports about the probationer precluded the court from revoking the probationer's probation and thus proximately caused the plaintiffs' injuries (*73 Cal. App. 3d 698, 708)* . The court noted that even if the court had reviewed the probationer's record, it remained under no obligation to revoke probation. If the court had not revoked probation, the proximate cause of the plaintiffs' injuries would be the court's considered decision, which would be immunized from liability by *Gov. Code § 845.8(a)*. Therefore, the court held that the injury was not proximately caused by the defendants' failure to discharge a duty (*73 Cal. App. 3d 698, 708-709)* .

[4] Additional Authorities

[a] No Intervening Cause

In *Hall v. Macco Corp. (1961) 198 Cal. App. 2d 415, 18 Cal. Rptr. 273* , the plaintiff brought an action for damages for personal injuries resulting from a fire and explosion. The court of appeal affirmed. The court stated that although an act or omission is removed from the injury and damage by intermediate causes or effects, that act or omission is a proximate cause of the injury or damage if, in a natural and continuous sequence, unbroken by any superseding cause, that act or omission produces that injury or damage and if without that act or omission, the injury would not have happened (*198 Cal. App. 2d 415, 423-424)* .

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[Reserved]

§§ 165.264[Reserved]

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16-165 California Points & Authorities § 165.270

§ 165.270 Insufficient Causal Connection Between Defendant's Actions and Plaintiff's Injuries

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS NOT LIABLE FOR NEGLIGENCE BECAUSE THERE IS NO CAUSAL CONNECTION BETWEEN DEFENDANT'S CONDUCT AND PLAINTIFF'S INJURY.

Insufficient Causal Connection Between Defendant's Actions and Plaintiff's Injuries. To state a cause of action for damages premised on wrongful or negligent conduct, the plaintiff must show that the charged conduct caused the claimed damages (*Hutchison v. Southern Cal. First Nat'l Bank (1972) 27 Cal. App. 3d 572, 578-579, 103 Cal. Rptr. 816* ; *see* *Petersen v. Lewis (1935) 2 Cal. 2d 569, 572-573, 42 P.2d 311*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the defendant's acts or omissions were not the cause of the plaintiff's injuries [*see* *Hutchison v. Southern Cal. First Nat'l Bank (1972) 27 Cal. App. 3d 572, 578-579, 103 Cal. Rptr. 816]* . This form should be combined with any of the *forms in §§ 165.271 -165.273* that are applicable to the particular case.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the contention--for example, in support of a defendant's demurrer or motion for summary judgment in an action for damages for negligence [*see, e.g.,* *Whitcombe v. County of Yolo (1977) 73 Cal. App. 3d 698, 702, 141 Cal. Rptr. 189* (demurrer); *see also* *Brown v. Critchfield (1980) 100 Cal. App. 3d 858, 861, 161 Cal. Rptr. 342* (summary judgment)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may argue facts showing that there is insufficient causal connection between the defendant's actions and the plaintiff's injuries to establish a cause of action for negligence.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of answer to a cause of action for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§§ 165.271 -165.273*. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in §§ 165.260 -165.263* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Insufficient Causal Connection Between Defendant's Actions and Plaintiff's Injuries

In ***Petersen v. Lewis*** *(1935) 2 Cal. 2d 569, 42 P.2d 311* , the plaintiff brought an action for personal injuries suffered in an automobile collision. The defendant was driving an automobile with a two-wheel trailer attached and attempted to turn left at an intersection. The plaintiff, a passenger in the automobile following defendant's vehicle, was struck by an oncoming car that had swerved to avoid defendant's left-turning vehicle. The oncoming vehicle was traveling in excess of the speed limit at the time of the collision. The defendant was also in violation of certain statutory provisions in failing to give the proper left turning signal and in passing to the left of the center of the intersection. The lower court granted the defendant's motion for a directed verdict. The plaintiff appealed the judgment.

The Supreme Court affirmed, stating that notwithstanding the negligence per se of the defendant, it was unconvinced that the negligence was the proximate cause of the injury. The court noted that this conclusion could only be reached through surmise and speculation. The Court noted that the burden of proving that negligence was the cause of injury was on the plaintiff. By proving the negligence of the defendant without in some way fastening that negligence to the injury, a cause is not made out (*2 Cal. 2d 569, 572)* . The Court added that assuming that driver of the oncoming vehicle, who was not here to answer for himself, was negligent, and that his negligence may have been the proximate cause of the collision between the automobiles and the resulting injury to the plaintiff, a careful analysis of the evidence and a thorough study of the details of the accident failed to show such a proximate or necessary connection between the negligence of the defendant and the happening of the accident as to render defendant liable for the plaintiff's injuries (*2 Cal. 2d 569, 572-573)* .

The factual and procedural background of ***Hutchison v. Southern Cal. First Nat'l Bank*** *(1972) 27 Cal. App. 3d 572, 578-579, 103 Cal. Rptr. 816* , is discussed in *§ 165.260[3][a]*.

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16-165 California Points & Authorities § 165.271

§ 165.271 Defendant's Conduct Was Not Cause in Fact of Plaintiff's Injuries

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT IS NOT LIABLE FOR NEGLIGENCE BECAUSE DEFENDANT'S CONDUCT WAS NOT THE CAUSE IN FACT OF PLAINTIFF'S INJURY.

A. Defendant's Conduct Not Cause in Fact of Harm. If an accident would have happened even if the defendant had not been negligent, then the defendant's alleged negligence is not a cause in fact of the plaintiff's harm and cannot be the legal or responsible cause (*Arthur v. Santa Monica Dairy Co. (1960) 183 Cal. App. 2d 483, 487, 6 Cal. Rptr. 808*).

B. "But for" Test Applicable to Actual Rather Than Proximate Cause. The "but for" test defines actual cause, rather than proximate cause. Whether a cause may be the proximate, effective, or legal cause demands further characterization (*Godwin v. La Turco (1969) 272 Cal. App. 2d 475, 479, 77 Cal. Rptr. 305*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the defendant's acts or omissions were not the cause in fact of the plaintiff's injuries [*see Arthur v. Santa Monica Dairy Co. (1960) 183 Cal. App. 2d 483, 487, 6 Cal. Rptr. 808]* . This form should be combined with any of the *forms in § 165.270* and *§§ 165.272 -165.273* that are applicable to the particular case.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the contention, for example, in support of a defendant's demurrer or motion for summary judgment in an action for damages for negligence [*see, e.g., Whitcombe v. County of Yolo (1977) 73 Cal.*

App. 3d 698, 702, 141 Cal. Rptr. 189 (demurrer); *see also Brown v. Critchfield (1980) 100 Cal. App. 3d 858, 861, 161 Cal. Rptr. 342* (summary judgment)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may discuss facts showing that the accident that caused the plaintiff's injury would have occurred even in the absence of the defendant's allegedly negligent act, so that the defendant's conduct was not the actual cause of the plaintiff's injury.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of answer to a cause of action for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§ 165.270* and *§§ 165.272 -165.273*. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in §§ 165.260 -165.263* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Defendant's Conduct Not Cause in Fact of Harm

In ***Arthur v. Santa Monica Dairy Co.*** *(1960) 183 Cal. App. 2d 483, 6 Cal. Rptr. 808* , the plaintiff brought an action against the defendants for personal injuries suffered while he was riding as a guest in an automobile that collided with the rear of the defendants' parked truck. The driver of the car in which the plaintiff was a passenger was trying to locate a lit cigarette on the floor of the car, when he collided with the defendants' double-parked truck. The trial court found for the defendants. The plaintiff appealed, contending that the lower court's finding that the accident was not proximately caused by the conduct of the defendants was unsupported by the evidence.

The court of appeal affirmed. It stated that when the facts are undisputed and only one conclusion may be drawn therefrom, it is apparent that the issue of proximate cause is essentially one of fact (*183 Cal. App. 2d 483, 486-487)* . The plaintiff contended that had the defendants' truck not been double-parked, the collision would not have occurred, thus the truck was the proximate cause of the accident. The court noted, however, that the driver would have run into anything at that location, legally or illegally parked. If the accident would have occurred whether or not the defendant was negligent, then his or her negligence was not a cause in fact and, of course, cannot be the legal or responsible cause. The record disclosed, and the trial court implicitly found, that the driver of the car was looking for the lit cigarette for ten seconds prior to the collision. Had he been looking where he was driving, he would have had a clear unrestricted view of the truck already parked in plain sight. Thus, he could have avoided the accident by either changing to the empty lane and passing the truck, or by slowing down and bringing his car to a halt safely behind the truck (*183 Cal. App. 2d 483, 487)* . It was clear from the conduct of the driver that had the defendants' milk truck been proceeding lawfully, that is, had it been traveling slowly, stopped in a long line of traffic, or stopped to avoid conflict with other

traffic, the accident would still have occurred (*183 Cal. App. 2d 483, 487-488)* . Therefore, the court held that the defendants' negligence in double-parking the truck did not constitute the cause in fact of the accident (*183 Cal. App. 2d 483, 488)* .

[b] "But for" Test Applicable to Actual Rather Than Proximate Cause

In ***Godwin v. La Turco*** *(1969) 272 Cal. App. 2d 475, 77 Cal. Rptr. 305* , the plaintiff brought an action for personal injuries suffered in an automobile collision with a truck. The plaintiff was following the defendant La Turco, who was turning left at an intersection. A truck, traveling in excess of the speed limit, approached the defendant La Turco from the opposite direction and, in an effort to avoid a collision with the defendant, the truck driver slammed on his brakes. The truck driver missed the defendant's left turning car, but a brake defect caused him to swerve across the center line and collide with the plaintiff. The jury rendered a verdict against the defendant La Turco and the co-owner of her car. The defendants appealed, contending that the trial judge failed to give proper instructions on the issue of proximate cause.

The court of appeal reversed the judgment against both the defendants. The court noted that the trial judge disliked "ritualistic" jury instructions and thus refused to give a requested BAJI instruction regarding proximate cause, instead giving an instruction that deleted the only reference to proximate causation. In essence the trial judge determined as a matter of law that the left turn of the defendant La Turco was a proximate cause of the collision (*272 Cal. App. 2d 475, 478)* . The court of appeal concluded that this was erroneous. It explained that in a philosophical sense, any given event has a long sequential history. A person might reason that the accident would not have occurred if A had not been at the point of collision at 1:30 p.m.; A would not have been there if he or she had arisen five minutes later that morning; or if he or she had not run the stop sign five miles back; and so forth. One could validly say that but for any of these events, the collision would not have occurred. The "but for" test, familiar to every law school graduate, defines actual cause, but not proximate cause. Whether a cause may be the proximate, effective, or legal cause demands further characterization. When some cause is found to be proximate, it still must consist of some negligent act or omission to sustain an award of damages. The court added that the jurors need a definition of the ultimate factual conclusions which, if found, either gives the plaintiff a right to recover or the defendant a right of exoneration (*272 Cal. App. 2d 475, 479)* . The court noted that some jurists have found it helpful to give the requested BAJI instruction with some explanatory paragraphs that state, in essence, that the jury must first find that the defendant's conduct was an actual cause of the collision, then further examine the defendant's conduct to determine if it was a proximate cause (*272 Cal. App. 2d 475, 479-480)* . The court held that the trial judge's "shorthand" instruction did not cover this subject accurately or completely, and that his refusal to give the requested BAJI instruction was prejudicial error (*272 Cal. App. 2d 475, 480)* .

NOTE:

The Supreme Court has held that it is error to use former BAJI No. 3.75, the official jury instruction that attempted to employ the "but for" test of actual causation [*Mitchell v. Gonzales (1991) 54 Cal. 3d 1041, 1048, 1 Cal. Rptr. 2d 913, 819 P.2d 872]* . The instruction, in essence, provided that a proximate cause of harm is a cause that, in natural and continuous sequence, produces the harm and without which the harm would not have occurred. The Court concluded that use of the term "proximate cause" may mislead jurors, causing them, if they can glean the instruction's meaning despite the grammatical flaws, to focus improperly on the cause that is spatially or temporally closest to the harm [*Mitchell v. Gonzales (1991) 54 Cal. 3d 1041, 1052, 1 Cal. Rptr. 2d 913, 819 P.2d 872]* . The Court held that courts should use the "substantial factor" instruction set forth in *BAJI No. 3.76* [*Mitchell v. Gonzales (1991) 54 Cal. 3d 1041, 1052-1054, 1 Cal. Rptr. 2d 913, 819 P.2d 872]* .

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
CHAPTER 165 NEGLIGENCE
PART II. FORMS
C. Causation
1. General Rules

16-165 California Points & Authorities § 165.272

§ 165.272 Defendant's Conduct Was Not Proximate Cause of Plaintiff's Injuries

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT IS NOT LIABLE FOR NEGLIGENCE BECAUSE DEFENDANT'S CONDUCT WAS NOT THE PROXIMATE CAUSE OF PLAINTIFF'S INJURY.

A. Conduct Too Remote in Chain of Causation. Even though one has been guilty of negligence, he or she may not be liable if such negligence is remote in the chain of causation and did not contribute proximately to the injury (*Johnson v. Union Furniture Co. (1939) 31 Cal. App. 2d 234, 237, 87 P.2d 917* ; *see Tara v. California State Auto. Ass'n (1979) 93 Cal. App. 3d 227, 231, 155 Cal. Rptr. 497*).

[*Optional*] **B. Intervening Cause.** Proximate cause is a cause that, in a natural and continuous sequence, unbroken by any efficient intervening cause, produced the injury or damage complained of and without which such result would not have occurred (*Whitcombe v. County of Yolo (1977) 73 Cal. App. 3d 698, 708, 141 Cal. Rptr. 189*).

[*Optional*] **C. Prior Proximate Cause Determinations Lack Precedential Value.** Each proximate cause decision turns on its own facts and has little value as precedent (*Beck v. San Francisco Unified Sch. Dist. (1964) 225 Cal. App. 2d 503, 508, 37 Cal. Rptr. 471*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the defendant's acts or omissions were not a proximate cause of injury to the plaintiff. Optional Paragraph B may be submitted to assert that an intervening cause broke the chain of causation [*see Johnson v. Union Furniture Co. (1939) 31 Cal. App. 2d 234, 237,*

87 P.2d 917] . Optional Paragraph C may be submitted to assert that a prior proximate cause determination is irrelevant to the instant case. This form should be combined with any of the *forms in §§ 165.270 -165.271* and *§ 165.273* that are applicable to the particular case.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the contention, for example, in support of a defendant's demurrer or motion for summary judgment in an action for damages for negligence [*see, e.g., Whitcombe v. County of Yolo (1977) 73 Cal. App. 3d 698, 702, 141 Cal. Rptr. 189* (demurrer); *see also Brown v. Critchfield (1980) 100 Cal. App. 3d 858, 861, 161 Cal. Rptr. 342* (summary judgment)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may discuss facts showing that the accident that caused the plaintiff's injury would have occurred even in the absence of the defendant's allegedly negligent act, so that the defendant's conduct was not the actual cause of the plaintiff's injury. In addition, counsel should discuss any policy considerations relevant to the case for the purpose of arguing that the defendant's conduct, even if considered an actual cause of the plaintiff's injury, should not be regarded as the legal or proximate cause of the injury.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of answer to a cause of action for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§§ 165.270 -165.271* and *§ 165.273*. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in §§ 165.260 -165.263* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Conduct Too Remote in Chain of Causation

The factual and procedural background of ***Tara v. California State Auto. Ass'n*** *(1979) 93 Cal. App. 3d 227, 155 Cal. Rptr. 497* , is discussed in *§ 165.263[3][c]*.

In ***Johnson v. Union Furniture Co.*** *(1939) 31 Cal. App. 2d 234, 87 P.2d 917* , the wife of the decedent brought an action for damages based on the wrongful death of her husband. The plaintiff contended that the defendant promised to return before nightfall with a bed that the defendant had wrongfully removed from the plaintiff's house. The defendant did not appear as promised, and the decedent was compelled to sleep on the floor. Because he was exposed to drafts, he contracted pneumonia and died two days later. The trial court granted the defendant's demurrer to the plaintiff's seventh amended complaint without leave to amend. The plaintiff appealed.

The court of appeal affirmed. The court stated that to maintain an action for damages based on the wrongful act or neglect of another, a plaintiff must allege and prove that the wrongful act of the defendant was a direct and proximate cause of the injury. Showing merely that an injury would not have occurred in the absence of the negligent act is insufficient. The plaintiff must show that the act was the efficient cause of the injury, that is, the act from which the injury followed in a continuous sequence unbroken by any efficient intervening cause. Thus, even though one has been guilty of negligence, he or she may still not be liable if the negligence is remote in the chain of causation and did not contribute proximately to the injury. In this connection, "proximate" means direct or immediate, as opposed to remote (*31 Cal. App. 2d 234, 237)* . Two independent conditions must be satisfied. First, the cause must be one "but for" which the result would not have occurred. Second, the cause must be active enough in the result to be regarded as efficient in responsibility (*31 Cal. App. 2d 234, 237-238)* . The injury must be the natural and probable consequence of the wrongful act. In addition, that consequence must reasonably have been foreseeable by a person of ordinary intelligence in the light of attending circumstances, unless the act is one of wanton wrong (*31 Cal. App. 2d 234, 238)* . Furthermore, an intervening cause that has an independent origin, or that is not reasonably foreseeable as a natural and probable result of the initial cause, breaks the connection between the initial cause and the effect, and becomes a proximate cause of the injury rendering the initial cause remote (*31 Cal. App. 2d 234, 238-239)* .

The court found that there were no pleaded facts that showed that the defendant could reasonably have foreseen that a failure to deliver the bed would result in the decedent's sleeping on the floor. Even though the plaintiff alleged that the undelivered bed was the only one they possessed, it would not necessarily follow that they would not be able to obtain suitable living quarters elsewhere. Even assuming that the defendant might reasonably have anticipated that if the bed were not delivered the decedent would sleep on the floor, the defendant could not have foreseen that the room in which decedent would sleep would be cold and drafty, and that as the probable result of sleeping on the floor, the decedent would contract acute pneumonia. The court stated that in this case the unusual happened; and that the law holds a wrongdoer responsible in damages only for the natural and probable results of his or her wrongful acts, and for the injurious effects that he or she might have reasonably foreseen (*31 Cal. App. 2d 234, 239)* . In addition, the plaintiff did not show that the defendant's wrongful act was a proximate cause of the death of the decedent. On the contrary, the proximate cause of decedent's death was apparently a disease that he contracted by sleeping in cold, drafty quarters and a weakened physical condition resulting from 11 years of sickness. Thus, the trial court properly determined that the complaint failed to state a cause of action (*31 Cal. App. 2d 234, 239-240)* .

[b] Intervening Cause

The factual and procedural background of ***Whitcombe v. County of Yolo*** *(1977) 73 Cal. App. 3d 698, 708, 141 Cal. Rptr. 189* , is discussed § 165.263[3][d].

[c] Prior Proximate Cause Determinations Lack Precedential Value

In ***Beck v. San Francisco Unified Sch. Dist.*** *(1964) 225 Cal. App. 2d 503, 37 Cal. Rptr. 471* , a minor, through his father as guardian ad litem, brought an action against the defendant school district for personal injuries suffered when he was struck by two other students on school grounds. The plaintiff alleged that the school district was liable for injuries resulting from the negligence of its officers or employees. After the jury returned a verdict for the plaintiff, the court denied the defendant school district's motion for judgment notwithstanding the verdict. The court granted the defendant's motion for a new trial on the ground of insufficiency of the evidence [*Code Civ. Proc. § 657(6)*]. The defendant appealed from the order denying its motion for judgment notwithstanding the verdict; the plaintiff cross appealed from the order granting the new trial.

The court of appeal affirmed the order granting a new trial and the order denying the motion for judgment n.o.v. (*225 Cal. App. 2d 503, 509)* . It noted that a school district has a duty to supervise the conduct of children on school grounds at all times and to enforce reasonable rules and regulations. The failure to do so may constitute actionable negligence.

The court added that the plaintiff need not prove that the very injury that occurred must have been foreseeable by the school authorities in order to constitute actionable negligence. Negligence is established if a reasonably prudent person would foresee that injury of the same general type would be likely to happen in the absence of the safeguards. The court added, however, that there must be a proximate causal connection between the inadequacy of the supervision and the accident (*225 Cal. App. 2d 503, 507)* . The defendant school district argued that its motion for judgment n.o.v. should have been granted because the proximate cause of the accident was not the claimed lack of supervision, but an intervening wrong that supervision would not have prevented. The court stated that the better approach was to treat the causal relationship between the lack of supervision and the injury as a fact determination for the jury. Each of the proximate cause decisions turns on its own facts and has little value as precedent (*225 Cal. App. 2d 503, 508)* . Although a school district is not liable for injuries arising from the unlawful or willful misconduct of its students, the willful act of a student may not in itself be a sufficient intervening cause to relieve the district of its own liability. There is no fixed standard of supervision. Whether or not the intervening cause was sufficient to relieve the district of liability was a question of fact properly left to the jury, as was the question of proximate cause. Thus, the court concluded that the motion for judgment notwithstanding the verdict was properly denied (*225 Cal. App. 2d 503, 508-509)* .

[4] Additional Authorities

[a] Conduct Too Remote in Chain of Causation

In *Ochoa v. Pacific Gas & Elec. Co. (1998) 61 Cal. App. 4th 1480, 72 Cal. Rptr. 2d 232* , the plaintiff sued a gas company alleging that the defendant's negligent failure to discover a methane gas leak in her home caused or exacerbated her respiratory injuries. The defendant moved for summary judgment, arguing that there were no triable issues of fact regarding whether a gas leak existed inside her house, or whether the alleged gas leak had caused or exacerbated the plaintiff's illnesses. In support of its motion the defendant proffered unequivocal testimony of two qualified experts that, even assuming there was a leak of methane gas into her home, the exposure could not have caused the plaintiff's respiratory distress. The plaintiff, in opposition to the defendant's motion, submitted the declaration of her allergist "that the leak of some unspecified gas probably aggravated the plaintiff's respiratory problems because he did not know of any more medically probable cause." The trial court granted the defendant's motion. The court of appeal affirmed, on the ground that the allergist's declaration was insufficient to create a triable issue of fact as to probable cause. Specifically, the court stated that the allergist had no expertise in the relevant subject matter, that his declaration was equivocal and speculative, and insufficient to rebut the unequivocal testimony of two qualified experts (*61 Cal. App. 4th 1480, 1485)* .

In *Jordan v. City of Santa Barbara (1996) 46 Cal. App. 4th 1245, 54 Cal. Rptr. 2d 340* , landowners filed an action against various public agencies alleging that the defendants' activities increased the salinity of the plaintiffs' groundwater, causing crop losses and reduced land value. The trial court granted judgment to the defendants. On appeal, the plaintiffs contended that the trial court unfairly imposed on them the burden of allocating damages among the defendants. The court of appeal affirmed. To establish a causal connection between an act and damages, the plaintiff must show a substantial cause-and-effect relationship excluding the probability that other forces alone produced the injury. When a defendant is only one of a number of contributors to the acts alleged to have caused damages, it does not become a joint tortfeasor simply because its consequences united with the consequences of several other torts committed by other persons or entities. For example, when one pollutes a stream, that person is responsible only for the actual damages resulting from his or her own acts, but not for damages caused by other persons who pollute the stream independently of those acts (*46 Cal. App. 4th 1245, 1273)* .

In *Skinner v. Vacaville Unified Sch. Dist. (1995) 37 Cal. App. 4th 31, 43 Cal. Rptr. 2d 384* , a former student brought an action against a school district for injuries suffered in an attack by another student. The incident occurred during a volleyball game in a high school physical education class. The plaintiff sought to prove that the school's principal and vice-principal were negligent in failing to warn the physical education teacher of the other student's proclivity toward fighting. The jury found the school district negligent; the district appealed. The court of appeal reversed, ruling that the

record did not support the jury's finding on causation (*37 Cal. App. 4th 31, 43)* . The court noted that California has adopted the substantial factor test of the Restatement Second of Torts, and that the plaintiff has the burden of proving causation by a preponderance of the evidence (*37 Cal. App. 4th 31, 41)* . The court reasoned that while it was possible that knowledge of the previous record of the attacking student would have somewhat intensified the vigilance of the physical education teacher, it is quite another thing to conclude that the absence of this information was a substantial factor in bringing about the injury (*37 Cal. App. 4th 31, 42-43)* .

In *Williams v. Wraxall (1995) 33 Cal. App. 4th 120, 39 Cal. Rptr. 2d 658* , the plaintiff sued a forensic serologist for failure accurately to disclose the results of his serological analysis of evidence in his murder trial. The defendant had been engaged by an attorney for the plaintiff's co-the defendant in the criminal trial, and obtained test results that differed from those of the prosecution's serologist. However, according to the plaintiff's' attorney, the defendant indicated that he had not obtained enough crime scene evidence to obtain any results. The defendant was not called as a witness during the plaintiff's murder trial, which according to the plaintiff, compromised the trial and resulted in his conviction. The plaintiff's conviction was reversed. He was retried, and again convicted of murder. Meanwhile, the plaintiff was awarded damages in his action against the defendant. The court of appeal reversed, based on lack of evidence of causation (*33 Cal. App. 4th 120, 130)* . The court noted that the plaintiff's original conviction was reversed on appeal. The court reasoned that the plaintiff's burden of proof of causation required him to establish a reasonable probability of his acquittal in his first trial, had the defendant's test results and expert testimony been made available (*33 Cal. App. 4th 120, 133)* . While the defendant's test results may have assisted the plaintiff's defense in some measure by rebutting the conclusions of the prosecution's expert, they did not exonerate the plaintiff. Furthermore, the plaintiff's guilt was established by circumstantial evidence and the testimony of numerous other witnesses (*33 Cal. App. 4th 120, 134)* .

In *Talbott v. Csakany (1988) 199 Cal. App. 3d 700, 245 Cal. Rptr. 136* , a decedent's estate brought an action for negligent entrustment against persons who had made a wedding gift of a car to a habitual drunk driver whose later intoxicated driving killed the decedent. The defendants' demurrer to the first amended complaint was sustained without leave to amend. The plaintiff acknowledged that it could not further amend its complaint, and that the driver was at the relevant time an adult holding a valid driver's license. Further, the plaintiff was aware of no facts suggesting that the donors had a relationship with the driver giving them any ability to direct or control his actions, or that the driver would have lacked access to a vehicle except for the gift. The court affirming. The court held that liability for negligent entrustment does not depend on any special relationship between the donor and the donee or the victim, whether the donee is an adult or minor, or whether the vehicle was conveyed or loaned. It depends rather on a balancing of all the factors considered in general negligence actions, most importantly foreseeability of harm (*199 Cal. App. 3d 700, 705-706)* . Even when there is no evidence of control of the donee by the donor, liability is appropriate when the facts show sufficient causation, because the foreseeability of injury by a known habitual drunk driver is strong and the policy of preventing drunk driving is compelling (*199 Cal. App. 3d 700, 706)* . The court acknowledged that the issue of causation is generally a question of fact for the jury. However, at a minimum, the pleading allegations must be such that, if true, a reasonable trier of fact could conclude the donor's act was a substantial factor in bringing about the injury. In the absence of allegations that the donee would not have had ready access to a vehicle so as to injure the plaintiff without a gift from the donor, the causation allegation was too tenuous to support a cause of action (*199 Cal. App 3d 700, 706)* . Moreover, the pleaded facts did not support an inference that the act of giving the car was peculiarly the means that afforded the adult, licensed driver the means to injure the plaintiff. Accordingly, the causal connection was too remote to state a cause of action (*199 Cal. App. 3d 700, 707)* .

In *Redfoot v. J.T. Jenkins Co. (1955) 138 Cal. App. 2d 108, 291 P.2d 134* , the court of appeal affirmed judgment for the defendant truck repair business in an action for damages suffered when an electrical short circuit caused the plaintiff's truck to catch fire while it was in the defendant's garage to have a leaky radiator repaired. The court stated that one is bound to anticipate and provide against what usually happens and what is likely to happen, but not to guard against what is unusual and unlikely to happen, or what is only remotely and slightly probable (*138 Cal. App. 2d 108, 119)* . To warrant a finding that negligence or an act not amounting to wanton wrong is the proximate cause of an

injury, the injury must be not only the natural and probable consequence of the act, but also foreseen in light of attendant circumstances. If the wrong and resulting damages are not known by common experience to be usually and naturally in sequence, and the damage does not in the ordinary course of events follow from the wrong, then the wrong and the damage are not sufficiently conjoined to support an action (*138 Cal. App. 2d 108, 119-120)* .

[b] Prior Proximate Cause Determinations Lack Precedential Value

The factual and procedural background of *Raymond v. Paradise Unified Sch. Dist. (1963) 218 Cal. App. 2d 1, 31 Cal. Rptr. 847* , is discussed in *§ 165.30[3][a]*. The court of appeal affirmed judgment for the plaintiff after a lower court found that the defendant school district was negligent in failing to provide supervision of a school bus stop. The plaintiff, a minor, was injured while waiting for a school bus. The court noted that each of the proximate cause decisions turns on its own facts and has little value as precedent (*218 Cal. App. 2d 1, 7-8)* .

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16-165 California Points & Authorities § 165.273

§ 165.273 Public Policy Militates Against Finding That Defendant's Conduct Was Proximate Cause

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT IS NOT LIABLE FOR NEGLIGENCE BECAUSE DEFENDANT'S CONDUCT WAS NOT THE PROXIMATE CAUSE OF PLAINTIFF'S INJURY, BASED ON THE PUBLIC POLICY THAT _____ [*describe*].

A. Proximate Cause Finding Contravenes Public Policy. In examining the questions of duty and proximate cause, the court must balance various public policy considerations; if holding the defendant civilly liable will be in contravention of public policy, the court may decline to find liability on the part of the defendant (*see Beauchene v. Synanon Found., Inc. (1979) 88 Cal. App. 3d 342, 347-348, 151 Cal. Rptr. 796*).

B. Policy Considerations in Proximate Cause Determination. [*See § 165.263, Paragraph C.*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the defendant is not liable for negligence because his or her conduct was not the proximate cause of the plaintiff's injury or damage, based on public policy considerations [*see Tara v. California State Auto. Ass'n (1979) 93 Cal. App. 3d 227, 231, 155 Cal. Rptr. 497]* . It should be combined with any of the *forms in §§ 165.270 -165.272* that are applicable to the particular case.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may

argue that one or more of the policy considerations set forth in *Tara v. California State Auto. Ass'n (1979) 93 Cal. App. 3d 227, 231, 155 Cal. Rptr. 497* militates against the imposition of liability based on the facts of the case [*see § 165.273[3*][b]].

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of answer to a complain for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§§ 165.270 -165.272*. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in §§ 165.260 -165.263* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Proximate Cause Finding Contravenes Public Policy

The factual and procedural background of ***Beauchene v. Synanon Found., Inc.*** *(1979) 88 Cal. App. 3d 342, 151 Cal. Rptr. 796* , is discussed in *§ 165.20[4][a]*. In affirming a demurrer to the complaint in an action in which a convicted criminal escaped from a Synanon rehabilitation home and harmed the plaintiff, the court of appeal listed various policy considerations that must be considered in determining whether or not the defendant owes a duty to the plaintiff. The court noted that the questions of duty and proximate cause are sometimes the same. Quoting *Rowland v. Christian (1968) 69 Cal. 2d 108, 113, 70 Cal. Rptr. 97, 443 P.2d 561* (discussed in *§ 165.30[3][d]*), the court stated that principal policy considerations in deciding whether a duty exists, and by inference whether proximate cause exists, include (1) the foreseeability of harm to the plaintiff, (2) the degree of certainty that the plaintiff suffered injury, (3) the closeness of the connection between the defendant's conduct and the injury suffered, (4) the moral blame attached to the defendant's conduct, (5) the policy of preventing future harm, (6) the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and (7) the availability, cost, and prevalence of insurance for the risk involved. In this action, the court stated that it must balance the public interest in safety from violent assault against the public policy favoring innovative private criminal release and rehabilitation programs (*88 Cal. App. 3d 342, 347)* . The court noted that public release and rehabilitation programs are immune from liability under *Gov. Code § 845.8*; and that the Legislature intended to immunize public programs in order to encourage innovations in the interests of criminal justice. The court stated that to hold the defendant civilly liable would deter the development of innovative criminal offender release and rehabilitation programs, which would be in contravention of public policy (*88 Cal. App. 3d 342, 348)* .

[4] Additional Authorities

[a] Policy Considerations in Proximate Cause Determination

In *Mosley v. Arden Farms Co. (1945) 26 Cal. 2d 213, 157 P.2d 372* , the Supreme Court affirmed a judgment for the

plaintiff in an action in which the plaintiff was injured when his tractor ran into some of the defendant's milk crates. In a concurring opinion, Justice Traynor explained that the question of legal responsibility in terms of proximate cause is ordinarily concerned, not with the fact of causation, but with the various considerations of policy that limit an actor's responsibility for the consequences of his or her conduct (*26 Cal. 2d 213, 220-221)* . He added that what is meant by the word "proximate" is that, because of convenience and of public policy, the law arbitrarily declines to trace a series of events beyond a certain point (*26 Cal. 2d 213, 221)* .

In *Smith v. Superior Court (1992) 10 Cal. App. 4th 1033, 13 Cal. Rptr. 2d 133* , the plaintiff sued her lawyers for malpractice in representing her in connection with the dissolution of her marriage. She alleged that she suffered various economic injuries and emotional distress. The trial court denied the lawyers' motion to strike the allegations regarding emotional distress. On the lawyers' petition for an extraordinary writ, the court of appeal directed the trial court to vacate its order and grant the motion to strike. The court's rationale was that "the conclusory allegations of the amended complaint reflect no basis for concluding [that] it was reasonably foreseeable [by the lawyers that] their handling of the dissolution would result in emotional injury to [the] plaintiff, separate and apart from that which every family law litigant suffers" (*10 Cal. App. 4th 1033, 1039)* . The court concluded that mere negligence will not support a recovery for mental suffering if the defendant's tortious conduct has resulted in only economic injury to the plaintiff. In support of this conclusion, the court cited cases to the effect that for policy reasons, emotional distress is not recognized as a proximate result of merely negligent conduct causing no other harm but economic injury (*10 Cal. App. 4th 1033, 1040)* .

In *Evan F. v. Hughson United Methodist Church (1992) 8 Cal. App. 4th 828, 10 Cal. Rptr. 2d 748* , a minister sexually molested an adolescent boy in the congregation, who subsequently (and, according to expert testimony, consequently) molested his younger sister. The sister sued the church and its governing organization, which had appointed the minister to the church, for damages on theory of negligent hiring of the minister. At the time it appointed the minister, the organization had knowledge of facts indicating that the minister had previously exhibited sexual interest in young adolescent boys. The trial court granted summary judgment to the church and the organization on the ground of lack of proximate cause, based on considerations of policy. The court of appeal affirmed, stating that to conclude otherwise would impose liability on the person "who hired the person who molested the person who molested ... [the plaintiff]. This convoluted syntax alone argues against imposing liability in this situation" (*8 Cal. App. 4th 828, 837)* .

In *Cardenas v. Eggleston Youth Ctr. (1987) 193 Cal. App. 3d 331, 238 Cal. Rptr. 251* , the plaintiff brought a negligence action against a private rehabilitation center after he was attacked by one of the center's inmates. The plaintiff alleged that the center failed to take adequate precautions to protect the public from the inmate. The defendant's demurrer was sustained without leave to amend. The trial court entered a judgment of dismissal; the plaintiff appealed. Finding this case analogous to *Beauchene v. Synanon Found. (1979) 88 Cal. App. 3d 342, 344, 151 Cal. Rptr. 796* [*see § 165.273[3][a]*], the court of appeal affirmed. The court held that the defendant owed no duty to the plaintiff, noting that to permit the plaintiff recourse against the defendant would have a devastating effect on private rehabilitation programs (*193 Cal. App. 3d 331, 335)* .

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[Reserved]

§§ 165.274[Reserved]

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2. Concurrent Causes

16-165 California Points & Authorities § 165.280

§ 165.280 Defendant's Concurrent Negligent Act Was Proximate Cause of Plaintiff's Injuries

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT IS LIABLE FOR HIS/HER/ITS NEGLIGENCE, EVEN THOUGH THERE WERE OTHER CONCURRENT CAUSES OF PLAINTIFF'S INJURY, BECAUSE TWO OR MORE CONCURRENT CAUSES MAY BE THE PROXIMATE CAUSE OF A SINGLE INJURY IF DEFENDANT'S ORIGINAL NEGLIGENCE CONTINUES AND EXISTS UP TO THE TIME OF PLAINTIFF'S INJURY.

A. One of Two Concurrent Acts May Be Proximate Cause of Injury. If the defendant's original negligence continues and exists up to the time of the injury, the concurrent negligent act of a third person causing the injury will not be regarded as an independent act of negligence, but the two concurring acts of negligence will be held to be the proximate cause of the injury (*Fennessey v. Pacific Gas & Elec. Co. (1942) 20 Cal. 2d 141, 145, 124 P.2d 51*).

[*Optional*] **B. Defendant's Conduct Alone Was Sufficient to Cause Injury.** If several causes concur to cause an event, and either one of them operating alone would have been sufficient to cause the result, neither cause can be absolved from responsibility on the ground that the identical harm would have occurred without it. The proper rule is that the defendant's conduct is a cause of the event if it is a material element and a substantial factor in bringing about the injury (*Thomsen v. Rexall Drug & Chem. Co. (1965) 235 Cal. App. 2d 775, 783, 45 Cal. Rptr. 642*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that a defendant's acts or omissions are a concurrent cause of the plaintiff's injury. That is, the defendant's acts, together with the acts of a third party, concur to proximately cause plaintiff's injuries [*see* *Fennessey v. Pacific Gas & Elec. Co. (1942) 20 Cal. 2d 141, 145, 124 P.2d*

51] . Optional Paragraph B may be submitted to assert that the defendant's act by itself was sufficient to cause the injury.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the contention, for example, in opposition to a defendant's demurrer or motion for summary judgment in an action for damages for negligence [*see, e.g., Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 595-597, 163 Cal. Rptr. 132, 607 P.2d 924* (demurrer); *see also Orser v. George (1967) 252 Cal. App. 2d 660, 663, 60 Cal. Rptr. 708* (summary judgment)]. It should be combined with any of the *forms in §§ 165.281 -165.284* that are applicable to the particular case.

This argument may arise in several situations--for example, the plaintiff wishes to hold two or more concurrently negligent parties liable for the injury, the plaintiff wishes to hold one party liable if there were other innocent concurring causes of the injury, or the plaintiff wishes to sue only one of several negligent actors.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may argue that the defendant's acts concurred with the acts of a third party or with an innocent cause, such as a force of nature, to cause the plaintiff's injuries.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of complaint for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender). For discussion and forms relating to contribution and equitable indemnity among joint and joint and several tortfeasors, see California Forms of Pleading and Practice, Ch. 300, *Indemnity and Contribution* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§§ 165.281 -165.284*. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For points and authorities relating to contribution and indemnity actions among joint tortfeasors, see Ch. 115, *Indemnity and Contribution* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] One of Two Concurrent Acts May Be Proximate Cause of Injury

In ***Fennessey v. Pacific Gas & Elec. Co.*** *(1942) 20 Cal. 2d 141, 124 P.2d 51* , the plaintiff brought an action against the defendants Pacific Gas and Electric Company (PG&E) and Thomas Foley, one of its employees, for personal injuries suffered when the plaintiff's automobile collided with a jitney bus driven by another defendant, George Manecis. The defendant PG&E employee Foley parked a company truck on the side of the street between the safety zone and the curb so that he could service street lighting fixtures. The defendant jitney driver Manecis, while attempting to pass the company truck, struck the plaintiff who was standing in or very near the crosswalk. The trial court entered judgment for the plaintiff. The defendants PG&E and its employee, Foley, appealed, contending in part that the act of the jitney bus driver broke the chain of causation between any negligence in parking the truck and the plaintiff's injuries. The defendant Manecis defaulted, and judgment was entered against him.

The Supreme Court affirmed. The Court stated that when the original negligence continues and exists up to the time of the injury, the concurrent negligent act of a third person causing the injury is not considered an independent act of negligence, but the two concurring acts of negligence are the proximate cause of the injury (*20 Cal. 2d 141, 145)* . Whether the parking of the defendants' repair truck had anything to do with the swerve or turn of the jitney bus or whether the jitney driver could have averted the accident, notwithstanding that he violated the ordinance prohibiting driving to the left of a safety zone, was purely a question of fact to be determined by the jury. If the jury believed the evidence in support of the plaintiff's theory that parking the company's car was a proximate cause of the injury, the Court would not interfere (*20 Cal. 2d 141, 144-145)* .

[b] Defendant's Conduct Alone Was Sufficient to Cause Injury

In ***Thomsen v. Rexall Drug & Chem. Co.*** *(1965) 235 Cal. App. 2d 775, 45 Cal. Rptr. 642* , the plaintiff brought an action for damages based on negligence and breach of warranty for personal injuries allegedly suffered as a result of taking an erroneously filled prescription. The plaintiff brought the action against the defendants Rexall Drug and Chemical Company and the pharmacist that supplied the prescription. The plaintiff's condition, known as vasculitis, which is an inflammation of the small blood vessels, may have been caused by the ingestion of the prescription, from preexisting illnesses, or by the effects of prolonged cortisone therapy. The trial court denied the defendants' motions for a nonsuit, judgment notwithstanding the verdict, and new trial. The defendants appealed the judgment in favor of the plaintiff.

The court of appeal affirmed the judgment. The defendants contended that the plaintiff failed to establish a cause in fact, that is, one "but for" whose action or omission the injury would not have been sustained. The court stated that the rule was inappropriate in this case (*235 Cal. App. 2d 775, 782-783)* . The court explained that the "but for" rule serves to explain many cases but fails when several causes concur to bring about an event, and either one of them operating alone would have been sufficient to cause the result. The court noted that this appeared to be the case, because apparently the plaintiff's vasculitis could have been caused by the cortisone or the ingestion of the erroneous prescription. In such situations, neither cause can be absolved from responsibility on the ground that the identical harm would have occurred without it. Moreover, the proper rule in such situations is that the defendants' conduct is a cause of the event if it is a material element and a substantial factor in bringing it about. Whether or not it was a substantial factor is for the jury to determine, unless the issue is so clear that reasonable persons cannot differ. In the instant case, it was clear that the medical experts differed regarding the nature and cause of the plaintiff's condition (*235 Cal. App. 2d 775, 783)* . Since there was evidence that supported the jury's verdict, the court affirmed the trial court's order denying the defendants' motion for judgment n.o.v., and the entering judgment for the plaintiff (*235 Cal. App. 2d 775, 783-789)* .

[4] Additional Authorities

[a] One of Two Concurrent Acts May Be Proximate Cause of Injury

In *Harris v. City of Compton (1985) 172 Cal. App. 3d 1, 217 Cal. Rptr. 884* , the plaintiff, who had been injured in a multiple vehicle collision, sued the vehicle drivers and a city that employed one of the drivers, on a respondeat superior theory. The trial court found against the city and the driver of its vehicle. The city appealed, contending that the third driver caused the accident. The court of appeal affirmed, holding that when the negligence of two or more persons contributes to the plaintiff's harm, the conduct of each is regarded as the legal cause. Substantial evidence supported the jury's finding that both drivers were the proximate cause of the plaintiff's injuries (*172 Cal. App. 3d 1, 10)* .

In *Bigbee v. Superior Court (1979) 93 Cal. App. 3d 451, 155 Cal. Rptr. 545* , the plaintiff was in a telephone booth when he was struck by an intoxicated driver. The plaintiff brought an action for personal injuries against the intoxicated driver for negligent driving; against a club for serving alcoholic beverages to the defendant; and against Pacific Telephone and Telegraph, and Western Electric Company, Inc. for negligent and defective design, location, and

maintenance of a phone booth. In issuing a peremptory writ of mandate requiring the lower court to vacate its order sustaining the general demurrers of the defendants Pacific Telephone and Western Electric without leave to amend, the court stated that it is well settled that proximate causation is not always arrested by the intervention of an independent force. If the original negligence continues to the time of the injury and contributes substantially to it in conjunction with the intervening act, each may be a proximate concurring cause for which full liability may be imposed (*93 Cal. App. 3d 451, 455)* .

[b] Defendant's Conduct Alone Was Sufficient to Cause Injury

In *Vecchione v. Carlin (1980) 111 Cal. App. 3d 351, 168 Cal. Rptr. 571* , the plaintiffs brought an action against a pediatrician and a hospital for the alleged wrongful death of their infant daughter. The central factual issue at trial was whether the infant died from intracranial bleeding as a result of an overdose of the drug heparin, or as the result of intrauterine problems during pregnancy. The court of appeal affirmed judgment for the defendants, stating that substantial evidence supported the verdict and that the jury instruction regarding causation was proper. The plaintiffs requested a BAJI instruction 3.78 that stated that when two causes combine to bring about an injury and either one of them operating alone would have been sufficient to cause the injury, either cause is considered to be a proximate cause of the injury if it is a material element and a substantial factor in bringing it about, even though the result would have occurred without it (*111 Cal. App. 3d 351, 358)* . The court noted, however, that this instruction is appropriate only when several causes concur to bring about an event and either one of them operating alone would have been sufficient to cause the result. In those situations, one cannot escape responsibility for his or her negligence on the ground that identical harm would have occurred without it. The proper rule for such situations is that the defendant's conduct is a cause of the event because it is a material element and a substantial factor in bringing it about. The court found that this was not a case of two causes, either of which alone would have been sufficient to bring about the same result. The jury was asked to decide which one caused the death, thus making the instruction improper (*111 Cal. App. 3d 351, 359)* .

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16-165 California Points & Authorities § 165.281

§ 165.281 Defendant Liable Despite Failure to Anticipate Concurrent Act

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT IS LIABLE FOR HIS/HER/ITS NEGLIGENCE, EVEN THOUGH DEFENDANT FAILED TO ANTICIPATE THE CONCURRENT ACT OF _____ [*describe*].

Failure to Anticipate Concurrent Act No Defense. A defendant's inability reasonably to anticipate the occurrence of another concurrent proximate cause does not shield the defendant from liability if the defendant's own negligence was one of the causes of the injury (*Taylor v. Oakland Scavenger Co. (1941) 17 Cal. 2d 594, 602, 110 P.2d 1044*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the defendant is liable for negligence despite the defendant's failure to anticipate a concurrent event [*see Taylor v. Oakland Scavenger Co. (1941) 17 Cal. 2d 594, 602, 110 P.2d 1044]* . It should be combined with any of the *forms in § 165.180* and *§§ 165.282 -165.284* that are applicable to the particular case.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may discuss the concurrent event raised by the defendant, and argue that it does not militate against the defendant's liability for negligence.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of complaint for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§ 165.180* and *§§ 165.282 -165.284*. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Failure to Anticipate Concurrent Act No Defense

In ***Taylor v. Oakland Scavenger Co.*** *(1941) 17 Cal. 2d 594, 110 P.2d 1044* , a 15-year-old girl brought an action against a school district, a municipal sanitation company, the owner of a garbage truck, and the driver of the truck for personal injuries suffered when a garbage truck ran over her foot. The plaintiff was running to a volleyball field during a high school physical education class when a garbage truck came around a blind corner at a rate of approximately 25 miles per hour. Unable to stop herself, the plaintiff ran into the side of the truck, was knocked to the pavement, and was run over by the truck. The plaintiff contended that the truck was negligently driven and that the school district was negligent in failing to take adequate precautionary measures to prevent such accidents. The jury rendered a verdict for the plaintiff against all the defendants. The trial court denied a motion for new trial on the condition that the plaintiff accept a reduction of damages. The plaintiff accepted the reduction and judgment was entered accordingly. All the defendants appealed.

The Supreme Court affirmed, finding that there was substantial evidence to support the finding by the jury that the truck driver was negligent (*17 Cal. 2d 594, 599)* . The court also stated that there was sufficient evidence to justify the finding that the defendant school district was negligent (*17 Cal. 2d 594, 600)* . The school district maintained that any breach of duty on the part of its employees was not a proximate cause of the injury to the plaintiff because the negligence of the truck driver was an efficient intervening or superseding cause. Conversely, the driver of the truck, the owner of the truck, and the sanitation company contended that any breach of duty on the part of the truck driver was not a proximate cause of the plaintiff's injury because the negligence of the school authorities operated as a superseding cause. The Court stated that if any injury is produced by the concurrent effect of two separate wrongful acts, each is a proximate cause of the injury, and neither can operate as an efficient intervening or superseding cause with regard to the other. The fact that neither party could reasonably anticipate the occurrence of the other concurrent cause will not shield him or her from liability so long as his or her own negligence was one of the causes of the injury. The court noted that the arguments of the defendants themselves made clear that more than one conclusion may reasonably be drawn from conflicting evidence in this case. The jury determination that the negligence of each defendant contributed concurrently to the plaintiffs' injury could not therefore be disturbed on appeal (*17 Cal. 2d 594, 602)* .

[4] Additional Authorities

[a] Failure to Anticipate Concurrent Act No Defense

The factual and procedural background of *Bigbee v. Superior Court (1979) 93 Cal. App. 3d 451, 155 Cal. Rptr. 545* , is discussed in *§ 165.280[3][a]*. The court issued a peremptory writ of mandate requiring the lower court to vacate its order sustaining the general demurrers of Pacific Telephone and Western Electric without leave to amend. The court stated that when an actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor

neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him or her from becoming liable. Citing *Taylor v. Oakland Scavenger Co. (1941) 17 Cal. 2d 594, 602, 110 P.2d 1044* , the court noted that the precise act need not necessarily be foreseeable (*93 Cal. App. 3d 451, 455)* .

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16-165 California Points & Authorities § 165.282

§ 165.282 Defendant Liable Despite Nonsimultaneous Nature of Act

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT IS LIABLE FOR HIS/HER/ITS NEGLIGENCE, BECAUSE CONCURRENT NEGLIGENCE THAT MAY IMPOSE LIABILITY ON MORE THAN ONE INDIVIDUAL NEED NOT NECESSARILY OCCUR SIMULTANEOUSLY.

Simultaneous Negligent Acts Not Required. Concurrent negligence that may impose liability on multiple individuals acting separately need not necessarily occur simultaneously if the acts of negligence are so related as to directly contribute to the accident that results in the injuries to the plaintiff. The concurrent acts of negligence need only contribute to a substantial degree as a proximate cause of the injuries (*Cummings v. Kendall (1939) 34 Cal. App. 2d 379, 382, 93 P.2d 633*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted when concurrent but unsimultaneous negligence occurred, in support of a contention that the concurrent negligence may nevertheless impose liability on the individuals who acted separately to cause the plaintiff's injuries (*see* *Cummings v. Kendall (1939) 34 Cal. App. 2d 379, 382, 93 P.2d 633*). It should be combined with any of the *forms in §§ 165.280 -165.281* and *§§ 165.283 -165.284* and that are applicable to the particular case.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may

discuss facts showing that separate individuals did not act simultaneous, and argue that the acts of negligence each contributed to a substantial degree as a proximate cause of the plaintiff's injuries. For example, if supported by the facts, counsel may argue that one individual's conduct was so continuous in its character that it conjoined with another's negligent act.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of complaint for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§§ 165.280 -165.281* and *§§ 165.283 -165.284*. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Simultaneous Negligent Acts Not Required

Cummings v. Kendall *(1939) 34 Cal. App. 2d 379, 93 P.2d 633* , involved the collision of three automobiles. The plaintiff and the defendants were in two different cars traveling in the same direction. The third car, driven by Norman Gobet, was approaching from the opposite direction and swerved into the wrong lane of the road, thus colliding head-on with the plaintiff's car. The driver of the defendants' car did not see the car driven by Gobet or the collision, but heard the impact of the collision. The defendant driver, failing to apply his brakes until it was too late, collided with the plaintiff's car as it lay on its side or stood on its wheels on the middle of the highway. The plaintiff sued Gobet jointly with the defendants, but apparently failed to serve him with process. Consequently, Gobet did not answer or appear at trial and no judgment was rendered against him. The judgment was rendered solely against the defendants, who appealed. The plaintiff moved to dismiss the case without a hearing on the merits, on the ground that the appeal was taken merely for delay and that the issues were unsubstantial.

The court of appeal disagreed, stating that the appeal presented a legal problem too serious to justify a dismissal without a hearing on its merits. It noted that the defendants contended that there was no evidence supporting the findings or judgment that their alleged negligence contributed to the plaintiff's injuries (*34 Cal. App. 2d 379, 380)* . The court posed the vital questions: whether or not the plaintiff's injuries were sustained as a proximate result of the concurrent negligence of Gobet and the defendant driver, whether or not they were joint tortfeasors, and whether or not the concurrent negligence of the defendants contributed in any manner as a proximate cause of the plaintiff's injuries (*34 Cal. App. 2d 379, 381)* . With regard to concurrent negligence in successive collisions, to hold the defendant liable for negligence, his or her act or omission need not be the sole cause or injury suffered. When injury results from two separate and distinct acts by different persons, operating simultaneously and concurrently, both are the proximate cause, and recovery may be had against either or both. Although the negligence of two persons must be simultaneous in order to be concurrent, a primary act of negligence may be so continuous in its character that it conjoins with an act of negligence of another committed at a much later date, and an act not negligent at the time committed may become negligent because of the acts of another. The court added that concurrent negligence that may impose liability on two individuals acting separately need not necessarily occur simultaneously if the acts are so related as to directly contribute to the accident that results in the plaintiff's injuries. The court noted, however, that the concurrent acts of negligence must contribute to a substantial degree as a proximate cause of the injuries (*34 Cal. App. 2d 379, 382)* . The court

stated that the mere proof of concurrent negligence may not be sufficient to hold them liable unless there is substantial evidence that the defendant's negligence contributed in some degree to the injuries sustained by the plaintiff. Thus, the Court denied the motion to dismiss the appeal, gave the plaintiff 20 days in which to file a brief of the merits, and gave the defendant ten days to reply (*34 Cal. App. 2d 379, 383)* .

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16-165 California Points & Authorities § 165.283

§ 165.283 Defendant Liable Despite Innocent Nature of Concurring Cause

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT IS LIABLE FOR HIS/HER/ITS NEGLIGENCE, EVEN THOUGH THERE WAS A CONCURRENT CAUSE THAT WAS INNOCENT IN NATURE.

Concurring "Act of God" No Defense. A tortfeasor may not escape liability for his or her negligent acts because another act, either an "innocent" occurrence, such as an "act of God," or other negligent conduct, may also have been a cause of the injury (*American Motorcycle Ass'n v. Superior Court (1978) 20 Cal. 3d 578, 586, 146 Cal. Rptr. 182, 578 P.2d 899*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the defendant is liable for negligence despite the occurrence of a concurring cause innocent in nature [*see American Motorcycle Ass'n v. Superior Court (1978) 20 Cal. 3d 578, 586, 146 Cal. Rptr. 182, 578 P.2d 899]* . It should be combined with any of the *forms in §§ 165.280 -165.282* and *§ 165.284* that are applicable to the particular case.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may argue that the concurring cause was in the nature of an "act of God," and therefore that the defendant is liable despite its occurrence.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of complaint for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§§ 165.280 -165.282* and *§ 165.284*. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Concurring "Act of God" No Defense

In ***American Motorcycle Ass'n v. Superior Court*** *(1978) 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899* , a teenage boy brought an action to recover damages for personal injuries suffered in a cross-country motorcycle race. The plaintiff sued the American Motorcycle Association (AMA) and the Viking Motorcycle Club (Viking), the organizations that sponsored and collected the entry fees for the race. The defendant AMA sought leave to file a cross-complaint against the plaintiff's parents for negligent supervision, for indemnity from the plaintiff's parents if AMA was found liable, and for declaratory relief. The trial court denied AMA's motion to file a cross-complaint; AMA petitioned the court of appeal for a writ of mandate to compel the trial court to grant its motion. The court of appeal granted a peremptory writ of mandate. In view of the importance of the questions in the case, the Supreme Court ordered a hearing in the case on its own motion.

The Supreme Court issued a writ of mandate directing the trial court to vacate its order denying AMA's leave to file its proposed cross-complaint for partial indemnity against the plaintiff's parents. The Court discussed the modification of the common law equitable indemnity doctrine to permit a right of partial indemnity that would allow liability among multiple tortfeasors to be apportioned on a comparative negligence basis (*20 Cal. 3d 578, 587-598)* . In so doing, the Court reviewed the rights of injured persons under current law. It stated that a negligent tortfeasor is generally liable for all damage for which his or her negligence is a proximate cause. Stated another way, in order to recover damages sustained as a result of an indivisible injury, a plaintiff is not required to prove that a tortfeasor's conduct was the sole proximate cause of his injury, but only that the negligence was a proximate cause. This result follows from the declaration of *Civ. Code § 1714* that everyone is responsible for an injury occasioned to another by want of ordinary care or skill. In addition, a tortfeasor may not escape this responsibility simply because another act--either an "innocent" occurrence such as an "act of God" or other negligence conduct--may have been a cause of the injury (*20 Cal. 3d 578, 586)* .

[4] Additional Authorities

[a] Concurring "Act of God" No Defense

In *Stone v. Foster (1980) 106 Cal. App. 3d 334, 164 Cal. Rptr. 901* , the plaintiff brought an action against a plastic surgeon for medical malpractice and fraud. The defendant operated on the plaintiff to remove an abdominal scar, but the plaintiff suffered further scarring after the operation because it appeared that silicone, injected years earlier, may have possibly migrated from her breasts to cause abdominal blistering. The court of appeal reversed judgment for the plaintiff, holding that the cause of action for fraud was not supported by the evidence, and that the plaintiff's counsel was guilty of prejudicial misconduct. With regard to the plaintiff's cause of action for medical malpractice, the court

rejected the defendant's contention that the lower court erroneously instructed the jury on concurrent causes. The court stated that it is well settled under California law that a negligent tortfeasor is liable for all of the damage proximately caused by his or her negligence. He or she may not escape liability merely because another cause, whether innocent or not, contributes to the injury (*106 Cal. App. 3d 334, 348)* .

Dufour v. Henry J. Kaiser Co. (1963) 215 Cal. App. 2d 26, 29 Cal. Rptr. 871 , involved two consolidated actions for property damage based on the defendant's removal of vegetation and topsoil from his land. A subsequent rainstorm caused sediment to wash down into the plaintiffs' trout pool, killing substantial numbers of fish. The court of appeal reversed judgment for the defendant on the basis of certain prejudicial jury instructions given at trial (*215 Cal. App. 2d 26, 28-29)* . In examining these instructions, the court stated that if the defendant's negligence combined with an "act of God" to cause injury, liability will result (*215 Cal. App. 2d 26, 29)* .

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16-165 California Points & Authorities § 165.284

§ 165.284 Plaintiff Does Not Have Burden of Apportioning Damages Between Concurring Causes

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF DOES NOT HAVE THE BURDEN TO APPORTION DAMAGES BETWEEN CONCURRING CAUSES.

Plaintiff Not Required to Prove Apportionment. A plaintiff does not have the burden of apportioning damages between concurring causes of the plaintiff's injuries. The plaintiff need only demonstrate that the negligence of a defendant was a substantial factor in causing injury (*Espinosa v. Little Co. of Mary Hosp. (1995) 31 Cal. App. 4th 1304, 1321, 37 Cal. Rptr. 2d 541*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the plaintiff is not required to apportion damages between concurring causes [*see Espinosa v. Little Co. of Mary Hospital (1995) 31 Cal. App. 4th 1304, 1321, 37 Cal. Rptr. 2d 541]* . It should be combined with any of the *forms in §§ 165.280 -165.283* that are applicable to the particular case.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may discuss the existence of concurring causes, and argue that the plaintiff need not apportion damages among the parties responsible.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of complaint for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§§ 165.280 -165.283*. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Plaintiff Not Required to Prove Apportionment

In ***Espinosa v. Little Co. of Mary Hosp.*** *(1995) 31 Cal. App. 4th 1304, 37 Cal. Rptr. 2d 541* , the guardian ad litem of a child who allegedly sustained brain damage through certain prenatal care and testing brought an action for medical malpractice. One of the plaintiff's expert witnesses testified that the child should have been delivered sooner than he was, and that the failure to deliver earlier was below the standard of care and therefore negligent. Another of the plaintiff's expert witnesses testified that the plaintiff had structural damage to his brain, and that this damage was caused by three factors: the mother's use of Lithium, negligence in monitoring the pregnancy, and negligence in the delivery. The defendants were not responsible for the mother's use of Lithium; the plaintiff's expert was not able to quantify the extent to which the plaintiff's condition was caused by this factor. The expert testified that the two factors for which the defendants were responsible were substantial factors in causing the injury. Stating that the plaintiff had not met the burden of proof of causation because of the failure to show that the defendants' actions were more than a 50 percent factor in causing the damage, the trial court granted a defense motion for nonsuit.

The court of appeal reversed, holding that it is not the plaintiff's burden to apportion damages among multiple causes (*31 Cal. App. 4th 1304, 1321)* . Noting that the concurrence of a nontortious cause for an injury does not absolve a defendant from liability for the tortious cause, the court held that a plaintiff need demonstrate only that the negligence of a defendant is a substantial factor in causing a claimed injury (*31 Cal. App. 4th 1304, 1321)* . The court stated that when the trial court required the plaintiff to show that the defendants' conduct was more than a 50 percent factor in causing the plaintiff's damage, it confused the issue of damage apportionment, which was not the plaintiffs' burden, with the requirement that the plaintiff had satisfied, to provide evidence that the defendants' negligence was a cause of the plaintiff's damage (*31 Cal. App. 4th 1304, 1322)* .

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
CHAPTER 165 NEGLIGENCE
PART II. FORMS
C. Causation
2. Concurrent Causes

16-165 California Points & Authorities §§ 165.285-165.299

[Reserved]

§§ 165.285[Reserved]

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
CHAPTER 165 NEGLIGENCE
PART II. FORMS
C. Causation
3. Intervening and Superseding Acts

16-165 California Points & Authorities § 165.300

§ 165.300 Defendant Is Liable Because Intervening Act or Harm to Plaintiff Was Foreseeable

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS LIABLE FOR HIS/HER/ITS NEGLIGENCE BECAUSE THE INTERVENING ACT WAS FORESEEABLE BY DEFENDANT, OR IF NOT FORESEEABLE, NEVERTHELESS CREATED AN INJURY OF THE TYPE THAT WAS FORESEEABLE.

A. Foreseeability of Act or Injury Sufficient to Show Proximate Cause. If an injury was brought about by a later cause of independent origin, the question of proximate cause revolves around a determination of whether the later cause of independent origin, or intervening cause, was foreseeable by the defendant or, if not foreseeable, whether it caused an injury of a type that was foreseeable. If either of these questions is answered in the affirmative, the defendant is not relieved from liability towards the plaintiff (*Hoyem v. Manhattan Beach City Sch. Dist. (1978) 22 Cal. 3d 508, 521, 150 Cal. Rptr. 1, 585 P.2d 851* ; *Hardison v. Bushnell (1993) 18 Cal. App. 4th 22, 27, 22 Cal. Rptr. 2d 106*).

B. Risk of Harm Was Foreseeable. Even if the intervening negligent conduct is not foreseeable, the defendant is not relieved of liability if the risk of harm suffered was foreseeable (*Pappert v. San Diego Gas & Elec. Co. (1982) 137 Cal. App. 3d 205, 211, 186 Cal. Rptr. 847*).

C. Precise Harm Need Not Be Foreseen. In determining whether an intervening act negates the defendant's liability, the question is not whether the defendant did foresee, or by the exercise of due care should have foreseen, the identical consequence that happened. Rather, he question is whether the likelihood of the occurrence of the injury or damage was reasonably foreseeable (*Pappert v. San Diego Gas & Elec. Co. (1982) 137 Cal. App. 3d 205, 211, 186 Cal. Rptr. 847* ; *Bilyeu v. Standard Freight Lines (1960) 182 Cal. App. 2d 536, 543, 6 Cal. Rptr. 65*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the intervening conduct of a third party did not supersede the defendant's original negligence [*see Hoyem v. Manhattan Beach City Sch. Dist. (1978) 22 Cal. 3d 508, 521, 150 Cal. Rptr. 1, 585 P.2d 851]* . This form should be combined with any of the *forms in §§ 165.301 -165.304* that are applicable to the particular case.

This form should be used when the originally negligent defendant's conduct is not sufficient in and of itself to produce the plaintiff's injury and the intervening conduct of the third party is the "immediate cause" of the injury [*see Fish v. Los Angeles Dodgers Baseball Club (1976) 56 Cal. App. 3d 620, 636, 128 Cal. Rptr. 807]* . In other cases, the first actor's conduct will itself cause the injury or death unless successful protective action is taken by a third party. When the third party fails to prevent the harm to the plaintiff, negligently or otherwise, that failure will generally not supersede the defendant's original negligence [*see Fish v. Los Angeles Dodgers Baseball Club (1976) 56 Cal. App. 3d 620, 636, 128 Cal. Rptr. 807]* .

This argument may arise, for example, in opposing a demurrer in an action for damages for negligence [*see, e.g., Landeros v. Flood (1976) 17 Cal. 3d 399, 405, 131 Cal. Rptr. 69, 551 P.2d 389* ; *see also O'Hara v. Western Seven Trees Corp. (1977) 75 Cal. App. 3d 798, 801, 142 Cal. Rptr. 487]* .

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should argue that the acts of the third party were reasonably foreseeable by the defendant at the time the defendant committed the originally negligent act and/or that the harm suffered by the plaintiff was reasonably foreseeable by the defendant [*see Hoyem v. Manhattan Beach City Sch. Dist. (1978) 22 Cal. 3d 508, 521, 150 Cal. Rptr. 1, 585 P.2d 851* ; *Hardison v. Bushnell (1993) 18 Cal. App. 4th 22, 27, 22 Cal. Rptr. 2d 106]* . If the acts of the third party may not have been foreseeable, counsel might argue that the injury suffered, although perhaps not the precise harm actually suffered, was foreseeable to the originally negligent defendant [*see Pappert v. San Diego Gas & Elec. Co. (1982) 137 Cal. App. 3d 205, 210, 186 Cal. Rptr. 847* ; *see also Bilyeu v. Standard Freight Lines (1960) 182 Cal. App. 2d 536, 543, 6 Cal. Rptr. 65]* .

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of complaint for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§§ 165.301 -165.304*. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in §§ 165.320 -165.323* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Foreseeability of Act or Injury Sufficient to Show Proximate Cause

In ***Hoyem v. Manhattan Beach City Sch. Dist.*** *(1978) 22 Cal. 3d 508, 150 Cal. Rptr. 1, 585 P.2d 851* , a mother and her ten-year-old son, Michael, brought an action against a school district to recover for personal injuries suffered as a result of the school authorities' allegedly negligent supervision of students on school premises. The plaintiff Michael was injured by a motorist when he left school grounds during school hours. The plaintiffs sought to recover damages for Michael's injuries and medical expenses, for the plaintiff mother's loss of her son's "comfort and society," and for her own injuries allegedly incurred when viewing him in the hospital. The trial court sustained the defendant's demurrer to all causes of action in the plaintiffs' complaint and subsequently dismissed the action. The plaintiffs appealed from the resulting judgment.

The Supreme Court concluded that the trial court erroneously dismissed the causes of action seeking to recover damages for Michael's injuries and medical expenses, but properly dismissed the causes of action based on the loss of Michael's "comfort and society" and the plaintiff mother's injuries suffered when viewing her son in the hospital. The Court found that the school district bears a duty to supervise students while on the school premises, and that it may be held liable for a student's injuries that are proximately caused by its failure to exercise reasonable care under the circumstances (*22 Cal. 3d 508, 513-520)* . In addition, the Court held that whether or not the defendant's negligence proximately caused the plaintiff's injury is a question of fact for the jury, and that the trial court could not properly hold as a matter of law that the defendant's alleged negligent supervision on campus did not proximately cause the plaintiff's off-campus injury (*22 Cal. 3d 508, 520)* . Quoting *Akins v. County of Sonoma (1967) 67 Cal. 2d 185, 199, 60 Cal. Rptr. 499, 430 P.2d 57* , the Court explained that when an injury was brought about by a later cause of independent origin, the question of proximate cause depends on a determination of whether the later cause of independent origin, or intervening cause, was foreseeable by the defendant or, if not foreseeable, whether it caused injury of a type that was foreseeable. If either of these questions is answered in the affirmative, then the defendant is not relieved of liability towards the plaintiff. If, however, it is determined that the intervening cause was not foreseeable and that the results that it caused were not foreseeable, the intervening cause becomes a supervening cause and the defendant is relieved from liability for the plaintiff's injuries (*22 Cal. 3d 508, 521)* . The Court stated that it could not say that Michael's departure from school was unforeseeable as a matter of law (*22 Cal. 3d 508, 520)* . In addition, the Court held tat the fact that another student's misconduct was the immediate precipitating cause of the injury did not compel a conclusion that negligent supervision was not the proximate cause of the plaintiff's injuries. It added that it could not state that the risk of a student's injury at the hands of a negligent motorist was, as a matter of law, not a foreseeable risk created by the school district's failure to exercise due care in supervising its pupils (*22 Cal. 3d 508, 521)* .

In ***Hardison v. Bushnell*** *(1993) 18 Cal. App. 4th 22, 22 Cal. Rptr. 2d 106* , the plaintiff was injured when the truck in which he was riding struck the semitractor driven by the defendant. The truck, which was traveling north at an unsafe speed, hit the semitractor after the defendant, who was traveling south, turned left across the northbound lane. The plaintiff, who was not wearing a seat belt, shattered his wrist when he was thrown forward into the truck's dashboard. The plaintiff brought a personal injury action against the defendant and the defendant's employer. The jury found that the defendant was negligent, but that the defendant's conduct was not the proximate cause of the plaintiff's injuries. The plaintiff appealed.

The court of appeal reversed and remanded, holding that the jury's verdict was not supported by substantial evidence. The court held that the defendant's negligence was a proximate cause of the collision and of the plaintiff's injuries, because the jury could not reasonably have found that an independent intervening act that the defendant could not have foreseen absolved the defendant of being a legal cause of the plaintiff's injuries (*18 Cal. App. 4th 22, 26)* . The court held that an independent intervening act breaks the chain of causation and absolves a defendant only if the act is unforeseeable and the type of injury it caused is unforeseeable (*18 Cal. App. 4th 22, 27)* . The court noted that in this case the only possible intervening acts were the plaintiff's failure to wear a seat belt and the truck's excessive rate of speed. The court held that the plaintiff's failure to wear a seat belt was foreseeable by the defendant, as was a speeding approaching vehicle. The defendant was negligent because his turn created the risk of collision with oncoming traffic.

The speed of those oncoming vehicles only enhanced the hazard created by the defendant's negligence (*18 Cal. App. 4th 22, 28)* .

[b] Risk of Harm Was Foreseeable

In ***Pappert v. San Diego Gas & Elec. Co.*** *(1982) 137 Cal. App. 3d 205, 186 Cal. Rptr. 847* , the plaintiffs were a surviving wife and her three minor children who brought an action for wrongful death against a utility company. The plaintiff wife's husband was electrocuted while trimming a tree that fell against the defendant's power line. The jury's special verdict found that the defendant was negligent, but that its negligence was not a proximate cause of the death. The plaintiffs appealed, contending that the trial court erred by submitting the issue of superseding cause based on decedent's own actions to the jury, and by erroneously stating the test on this issue. The trial court's instructions emphasized only the foreseeability of decedent's intervening acts but failed to mention the principle of foreseeability of the injury received.

The court of appeal reversed. In examining the law concerning intervening causes and superseding causes, the court, quoting *Vesely v. Sager (1971) 5 Cal. 3d 153, 163, 95 Cal. Rptr. 623, 486 P.2d 151* , stated that an actor may be liable if his or her negligence is a substantial factor in causing an injury. He or she is not relieved of liability because of the intervening act of a third person if the act was reasonably foreseeable at the time of the negligent conduct. Stated another way, the general test of whether an independent intervening act will break the chain of causation is the foreseeability of the independent intervening act. The court noted, however, that the foreseeability test is two-fold, relating to both the act and the nature of the harm suffered (*137 Cal. App. 3d 205, 210)* . In this case, the court found that the injury sustained was foreseeable and was a precise and direct result to be expected when a person trimming a tree is exposed to the charge from an uninsulated power line passing through the tree's foliage (*137 Cal. App. 3d 205, 211)* . In addition, the court found that decedent was within the class of persons exposed to danger when the power company deliberately permitted its uninsulated power line to remain close to the tree. Thus, the court held that there was no factual issue on superseding cause for jury consideration and the trial court erred in presenting this issue to the jury (*137 Cal. App. 3d 205, 211)* . The court also explained that when an injury is brought about by a later cause of independent origin, the question of proximate cause revolves around a determination of whether the later cause of independent origin, commonly referred to as an intervening cause, was foreseeable by the defendant or, if not foreseeable, whether it caused injury of a type that was foreseeable. If either of these questions is answered in the affirmative, then the defendant is not relieved of liability towards the plaintiff. If, however, it is determined that the intervening case was not foreseeable and that the results that it caused were not foreseeable, then the intervening cause becomes a supervening cause and the defendant is relieved of liability for the plaintiff's injuries (*137 Cal. App. 3d 205, 210)* . The court noted, however, that even if the intervening negligent conduct is not foreseeable, the defendant is not relieved of liability unless the risk of harm suffered also was unforeseeable (*137 Cal. App. 3d 205, 210-211)* . If properly instructed, the jurors could only have concluded, even while finding that the power company could not have reasonably foreseen the specific nature of decedent's negligent conduct, that the defendant's original negligence in installing an uninsulated, high voltage wire, or in failing to trim the tree away from the wire, exposed persons within decedent's class to a foreseeable risk of electrocution (*137 Cal. App. 3d 205, 211)* . Thus, the court found that the injury sustained by the decedent, death by electrocution, was a foreseeable result to be expected when a person trimming a tree on his or her residential property is exposed to the charge from an uninsulated 12,000 volt power line passing through the tree's foliage (*137 Cal. App. 3d 205, 211)* .

[c] Precise Harm Need Not Be Foreseen

The factual and procedural background of ***Pappert v. San Diego Gas & Elec. Co.*** *(1982) 137 Cal. App. 3d 205, 186 Cal. Rptr. 847* , is discussed in *§ 165.300[3][b]*. The court of appeal reversed judgment for the defendant power company in an action based on the wrongful death of the plaintiffs' decedent, who was electrocuted while trimming a tree that fell across an uninsulated power line. The court of appeal concluded that decedent's conduct did not constitute a superseding cause as a matter of law (*137 Cal. App. 3d 205, 208)* . The court noted that even if the intervening

negligent conduct is not foreseeable, the defendant is not relieved of liability unless the risk of harm also suffered was unforeseeable (*137 Cal. App. 3d 205, 211)* . The court found that the jury instructions given by the trial court, ignoring the foreseeability of the risk of harm, were fatally defective, misleading the jury and creating the reasonable probability that a result more favorable to the plaintiffs would have been reached in the absence of the error. The court stated that if the jury had been properly instructed it could only have concluded, even while finding that the power company could not have reasonably foreseen the specific nature of decedent's negligent conduct, that the defendant's original negligence in installing an uninsulated, high voltage wire, or in failing to trim the tree away from the wire, exposed persons within decedent's class to a foreseeable risk of electrocution. Quoting *Bilyeu v. Standard Freight Lines (1960) 182 Cal. App. 2d 536, 542-543, 6 Cal. Rptr. 65* , the court noted that the question is not whether the identical consequences of the negligent act were reasonably foreseeable, but whether the likelihood of the injury from that act was reasonably foreseeable. The test of reasonable foreseeability is directed to the likelihood of injury from the negligent act and not the identical circumstances tat occurred. Neither the particular injuries sustained, the manner by which they were inflicted, nor the circumstances under which they were received are factors included within the foreseeability test (*137 Cal. App. 3d 205, 211)* . In this case, the court found that the injuries sustained, death by electrocution, was a foreseeable result to be expected when a person trimming a tree on his residential property is exposed to the charge from an uninsulated 12,000 volt power line passing through the tree's foliage (*137 Cal. App. 3d 205, 211)* .

In ***Bilyeu v. Standard Freight Lines*** *(1960) 182 Cal. App. 2d 536, 6 Cal. Rptr. 65* , a highway patrol officer brought an action for damages against the defendants, a freight company and a truck driver, for personal injuries sustained when the plaintiff pushed heavy rolls of steel off the highway. The rolls of steel had previously fallen from the defendant's truck after an accident, and the plaintiff was attempting to clear the highway of obstructions when he injured his neck. Without a jury, the trial court entered judgment for the plaintiff, and the defendants appealed.

The court of appeal affirmed. With regard to the issue of proximate cause, the court stated that a highway patrol officer's participation and injury while removing an obstruction from a highway are foreseeable occurrences. The court concluded that the plaintiff's participation in removing the steel rolls from the highway was not an efficient intervening cause sufficient to break the legal chain of causation between the negligent conduct of the driver and the plaintiff's injuries. The manner of the plaintiff's participation in the removal, although pertinent to the determination of duty to exercise ordinary care for his own protection, is not determinative of the issue of proximate cause. The question is not whether the identical consequences of the negligent act were reasonably foreseeable, but whether the likelihood of injury from that act was reasonably foreseeable. The test of reasonable foreseeability is directed to the likelihood of injury from the negligent act rather than to the identical circumstances that occurred. Neither the particular injuries sustained, the manner by which they were inflicted, nor the circumstances under which they were received are factors included within the foreseeability test (*182 Cal. App. 2d 536, 543)* . Thus, whether the plaintiff was injured while removing the steel rolls through the use of mechanical equipment or his own strength, or whether he sustained injury while pushing a steel roll that knocked against and broke his leg or caused a strain on his back that broke his neck vertebrae, are not foreseeable factors pertinent to the proximate cause determination (*182 Cal. App. 2d 536, 543-544)* . The likelihood of injury from negligent conduct causing an obstruction in the highway, either while the obstruction remains in the highway or in the course of its removal, if not self-evident, is properly determined as a question of fact. When the effect of an intervening act as an efficient intervening cause is at issue, and when there is room for a reasonable difference of opinion as to whether the intervening act was foreseeable, the question should be left to the trier of fact (*182 Cal. App. 2d 536, 544)* .

[4] Additional Authorities

[a] Foreseeability of Act or Injury Sufficient to Show Proximate Cause

The factual and procedural background of *Akins v. County of Sonoma (1967) 67 Cal. 2d 185, 60 Cal. Rptr. 499, 430 P.2d 57* , is discussed in *§ 165.261[3][a]*. In *Akins*, the Supreme Court affirmed judgment for the defendant's promotion company and the county of Sonoma against the plaintiff, a two-year-old boy. The plaintiff suffered personal injuries

when he fell from his bleachers seat while watching a roller derby game with his parents at a county fairground. In examining whether or not the parents' conduct in failing to exercise proper care for the boy's safety constituted an intervening cause that would supersede the defendant's original negligence, the Court noted that this question depends on a determination of whether the later cause of independent origin, or intervening cause, was foreseeable by the defendant or, if not foreseeable, whether it caused injury of a type that was foreseeable. If either of these questions is answered in the affirmative, then the defendant is not relieved from liability towards the plaintiff. If, however, it is determined that the intervening cause was not foreseeable and that the results that it caused were not foreseeable, then the intervening cause becomes a supervening cause and the defendant is relieved from liability for the plaintiff's injuries (*67 Cal. 2d 185, 199)* . In this case, the Court felt that the issue of the parents' negligence was relevant to the issue of proximate cause, and was properly submitted to the jury (*67 Cal. 2d 185, 199-200)* .

The factual and procedural background of *Pappert v. San Diego Gas & Elec. Co. (1982) 137 Cal. App. 3d 205, 186 Cal. Rptr. 847* , is discussed in *§ 165.300[3][b]*. The court of appeal held that the trial court had prejudicially failed to inform the jury that decedent's conduct was not a superseding cause, and that the defendant could not escape liability for negligence unless both (1) the defendant could not reasonably have foreseen decedent's intervening act and (2) the defendant's negligence did not cause injury of a type that was reasonably foreseeable (*137 Cal. App. 3d 205, 207-208)* . The court found that the injury sustained by decedent, death by electrocution, was precisely the result to be expected when a person trimming a tree is exposed to the charge from an uninsulated power line (*137 Cal. App. 3d 205, 211)* .

[b] Precise Harm Need Not Be Foreseen

The factual and procedural background of *City of Los Angeles v. Shpegel-Dimsey, Inc. (1988) 198 Cal. App. 3d 1009, 244 Cal. Rptr. 507* , is discussed in *§ 165.70[4][c]*. In reversing the judgment for the defendant, the court of appeal stated that foreseeability is not measured by what is more probable than not, but rather includes whatever is likely enough in the setting of modern life that a reasonably thoughtful person would take into account in guiding practical conduct. Moreover, the foreseeability of the general character of the event or harm, rather than its precise nature or manner of occurrence, is required (*198 Cal. App. 3d 1009, 1022)* .

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16-165 California Points & Authorities § 165.301

§ 165.301 Intervening Act of Third Person Was Foreseeable

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS LIABLE FOR HIS/HER/ITS NEGLIGENCE BECAUSE THE INTERVENING ACT OF A THIRD PERSON WAS FORESEEABLE BY DEFENDANT.

A. Intervening Act of Third Person Was Foreseeable. An actor may be liable if his or her negligence is a substantial factor in causing an injury; he or she is not relieved of liability because of the intervening act of a third person if the act was reasonably foreseeable at the time of the negligent conduct (*Landeros v. Flood (1976) 17 Cal. 3d 399, 411, 131 Cal. Rptr. 69, 551 P.2d 389* ; *Pappert v. San Diego Gas & Elec. Co. (1982) 137 Cal. App. 3d 205, 210, 186 Cal. Rptr. 847*).

B. Foreseeability Is Question for Trier of Fact. Whether or not the intervening act of a third person was foreseeable and therefore not a superseding cause generally frames a question for the trier of fact (*Landeros v. Flood (1976) 17 Cal. 3d 399, 411, 131 Cal. Rptr. 69, 551 P.2d 389*).

C. Intervening Act Not Highly Extraordinary Response to Situation. An intervening act of a third person performed in a negligent manner does not constitute a superseding cause if a reasonable person knowing that the situation existed when the act of the third person is performed, did not regard it as highly extraordinary that the third person so acted, or the act is not an extraordinary response to the situation created by the defendant's conduct and the intervening act is not performed with extraordinary negligence (*see* *Stasulat v. Pacific Gas & Elec. Co. (1937) 8 Cal. 2d 631, 637, 67 P.2d 678*).

D. Intervening Act May Be Innocent, Negligent, Intentionally Tortious, or Criminal. If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards that makes the actor negligent, the act, whether

innocent, negligent, intentionally tortious, or criminal does not prevent the actor's liability for harm caused (*Landeros v. Flood (1976) 17 Cal. 3d 399, 411, 131 Cal. Rptr. 69, 551 P.2d 389*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the intervening conduct of a third party was foreseeable [*see Landeros v. Flood (1976) 17 Cal. 3d 399, 411, 131 Cal. Rptr. 69, 551 P.2d 389]* . It should be combined with any of the *forms in § 165.300* and *§§ 165.302 -165.304* that are applicable to the particular case.

This argument may arise, for example, in opposing a demurrer in an action for damages for negligence [*see, e.g., Landeros v. Flood (1976) 17 Cal. 3d 399, 405, 131 Cal. Rptr. 69, 551 P.2d 389* ; *see also O'Hara v. Western Seven Trees Corp. (1977) 75 Cal. App. 3d 798, 801, 142 Cal. Rptr. 487]* .

This form should be used when the originally negligent defendant's conduct is not sufficient in and of itself to produce the plaintiff's injury and the intervening conduct of the third party is the "immediate cause" of the injury [*see Fish v. Los Angeles Dodgers Baseball Club (1976) 56 Cal. App. 3d 620, 636, 128 Cal. Rptr. 807]* . In other cases, the first actor's conduct will itself cause the injury or death unless successful protective action is taken by a third party. When the third party fails to prevent the harm to the plaintiff, negligently or otherwise, that failure will generally not supersede the defendant's original negligence [*see Fish v. Los Angeles Dodgers Baseball Club (1976) 56 Cal. App. 3d 620, 636, 128 Cal. Rptr. 807]* .

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may argue that the acts of the third party were foreseeable by the defendant at the time the defendant committed the originally negligent act [*see Landeros v. Flood (1976) 17 Cal. 3d 399, 411, 131 Cal. Rptr. 69, 551 P.2d 389]* .

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of complaint for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§ 165.300* and *§§ 165.302 -165.304*. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in §§ 165.320 -165.323* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Intervening Act of Third Person Was Foreseeable

In ***Landeros v. Flood*** *(1976) 17 Cal. 3d 399, 131 Cal. Rptr. 69, 551 P.2d 389* , a minor brought an action through her guardian ad litem against a hospital and a physician for personal injuries suffered as a result of the defendant physician's alleged medical malpractice. The plaintiff, an 11-month-old infant, was taken to the defendants for medical care exhibiting injuries that appeared to have been inflicted by her mother or other persons. The plaintiff contended that the defendants negligently failed to diagnose her as a battered child, and that proper medical treatment would have included reporting her injuries to local law enforcement authorities or the juvenile probation department. In addition, she contended that the defendants failed to comply with various Penal Code sections that required the defendants to report her injuries to local law enforcement authorities. As a result of the defendants' failure to diagnose and report her injuries, the plaintiff contended that she was returned to the custody of her mother and her mother's boyfriend, and consequently suffered permanent physical injuries and mental distress. The trial court granted the defendants' general demurrer to the plaintiff's complaint and later entered a judgment dismissing the entire action. The plaintiff appealed.

The Supreme Court reversed, finding that the trial court could not, on the facts alleged, conclude as a matter of law that the defendants' standard of professional care did not include the diagnostic and treatment procedures outlined in the complaint (*17 Cal. 3d 399, 410)* . With respect to proximate cause, the Court stated that it was evident from the allegations of the complaint that the continued beating inflicted on the plaintiff by her mother and her mother's boyfriend after the plaintiff was released from the hospital constituted an intervening act that was the immediate cause in fact of the injuries for which she sought relief. The Court noted, however, that an intervening act does not amount to a superseding cause relieving the negligent defendant of liability if the act was reasonably foreseeable. An actor may be liable if his or her negligence is a substantial factor in causing an injury. He or she is not relieved of liability because of the intervening act of a third person if the act was reasonably foreseeable at the time of the negligent conduct. The Court also stated that intervening criminal acts, such as those committed by the plaintiff's mother and her boyfriend, do not prevent the original actor's liability. The Court noted that the question of foreseeability of an intervening act is generally a question for the trier of fact (*17 Cal. 3d 399, 411)* . In examining the facts, the Court could not categorically state that an ordinarily prudent physician who had correctly diagnosed the plaintiff as a victim of the battered child syndrome would not have foreseen the likelihood of further serious injuries to her if she were returned directly to the custody of her caretakers. Thus, the lower court could not properly rule that the defendants' negligence, as a matter of law, was not the proximate cause of the plaintiff's injuries (*17 Cal. 3d 399, 412)* .

The factual and procedural background of ***Pappert v. San Diego Gas & Elec. Co.*** *(1982) 137 Cal. App. 3d 205, 186 Cal. Rptr. 847* , is discussed in *§ 165.300[3][b]*.

[b] Foreseeability Is Question for Trier of Fact

The factual and procedural background of ***Landeros v. Flood*** *(1976) 17 Cal. 3d 399, 131 Cal. Rptr. 69, 551 P.2d 389* , is discussed in *§ 165.301[3][a]*. In reversing judgment for the defendants, the Court noted that the continued beating inflicted on the plaintiff by her mother and her mother's boyfriend after the defendants returned the plaintiff to their custody constituted an intervening act that was the immediate cause in fact of the injuries for which the plaintiff sought to recover. The Court stated, however, that an intervening act does not amount to a superseding cause relieving the defendant of liability if the act was reasonably foreseeable. The Court added that with regard to the determination of duty, foreseeability is a question of fact for the jury. The same rule applies when the issue is whether the intervening act of a third person was foreseeable and therefore not a superseding cause. The Court stated that in such circumstances, the foreseeability of the risk generally frames a question for the trier of fact (*17 Cal. 3d 399, 411)* .

[c] Intervening Act Not Highly Extraordinary Response to Situation

In ***Stasulat v. Pacific Gas & Elec. Co.*** *(1937) 8 Cal. 2d 631, 67 P.2d 678* , the surviving mother, brother, and two sisters of a lineman employed by the Pacific Telephone Company, brought an action against Pacific Gas and Electric Company to recover damages for his alleged wrongful death. The plaintiffs' decedent received an electric shock and fell

from a telephone pole on which he was working. The plaintiffs alleged that the defendant negligently permitted its power lines to sag so that they contacted a guy wire fastened to the telephone pole, and that the decedent received the electric shock when he touched the guy wire. Witnesses stated that the power lines could not have been lifted to contact the telephone pole by wind or other natural causes, and that the position of the wires could only have occurred through the intervention of a human agency. In addition, witnesses testified that no inexperienced person could have changed the position of the wires because of his or her appreciation of the danger of so doing. The jury, however, found that the defendant was negligent in maintaining the power lines in a sagging condition and returned a verdict in favor of the plaintiffs. The defendant appealed.

The Supreme Court reversed. The Court found that the defendant was negligent in permitting the wires to sag and to remain in a position that did not give the clearance required by the rules of the Railroad Commission. It stated, however, that negligence was not the proximate cause of the decedent's injuries (*8 Cal. 2d 631, 636)* . The Court also stated that the rules for determining whether the independent force that acts on the situation created by the original negligence is an intervening cause that supersedes the original negligence as a proximate cause of the injury, lead to the conclusion that the defendant was not liable. This is so even though the defendant negligently allowed its wires to sag, if the realizable likelihood of the second negligent act was not one of the factors contributing to the negligent character of the first act (*8 Cal. 2d 631, 637)* . The Court explained that an intervening act of a third person acts as a superseding cause of the injuries if a reasonable person knowing the situation created by the first act would regard as highly extraordinary that the intervening act should have been performed, or the act, although not an extraordinary response to the situation created by the original negligence, is performed in an extraordinarily negligent manner (*8 Cal. 2d 631, 637)* . Although it is not necessary to preserve the chain of causation from the original negligence from which the precise nature of the second negligent act should reasonably have been anticipated, it is necessary that such negligence should have been anticipated as reasonably likely to follow as a natural and ordinary consequence of the situation created by the original negligent act (*8 Cal. 2d 631, 637-638)* . Although as a general rule the question of whether the original negligence is a proximate cause of the injury is a jury question, here, as a matter of law, the issue of proximate cause had not been proven. There was no evidence from which the jury could reasonably conclude that the lifting of the wires over the top of the pole with such a force that would break their insulation was an act that should reasonably have been foreseen and anticipated as a result of the sagged condition of the wires, or even that there was more than a remote and slight probability of the occurrence of any positive act that would bring the wires in contact with the telephone pole or its equipment or destroy its insulation. The Court added that this was especially true in light of the fact that only experienced linemen, who knew that such an act would increase the danger inherent in the sagged condition, could reasonably be expected to climb the telephone pole and interfere with the wires of the defendant company. Furthermore, the Court noted that there was no contention that there was any such interference by any employee of the defendant (*8 Cal. 2d 631, 638)* .

[d] Intervening Act May Be Innocent, Negligent, Intentionally Tortious, or Criminal

The factual and procedural background of ***Landeros v. Flood*** *(1976) 17 Cal. 3d 399, 131 Cal. Rptr. 69, 551 P.2d 389* , is discussed in *§ 165.301[3][a]*. The Supreme Court reversed a judgment for the defendants entered by the trial court after it had sustained the defendants' demurrer to the complaint. The Court noted that the continued beating inflicted on the plaintiff by her mother and her mother's boyfriend after the defendants returned the plaintiff to their custody constituted an intervening act that was the immediate cause in fact of the plaintiff's injuries. The plaintiff's mother and her boyfriend were subsequently convicted of the crime of child abuse. The Court stated that an intervening act does not amount to a superseding cause relieving the defendant of liability if it was reasonably foreseeable. In addition, if the likelihood that a third person may act in a particular manner is the hazard or one of the hazards that makes the actor negligent, the act, whether innocent, negligent, intentionally tortious, or criminal, does not prevent the actor from being liable for harm caused (*17 Cal. 3d 399, 411)* .

[4] Additional Authorities

[a] Intervening Act of Third Person Was Foreseeable

In *USAir, Inc. v. United States Dep't of Navy (9th Cir. 1994) 14 F.3d 1410* , the plaintiff was an airline passenger who was hit on the head when an airline attendant opened an overhead bin with one hand while looking away from the bin, and a briefcase fell out. The defendant's employee had stowed the briefcase in the bin in an admittedly unstable position. The plaintiff sued the airline for the attendant's negligence and accepted a settlement. The plaintiff then sued the defendant in federal district court. The court ruled that the attendant's act was so unforeseeable that it superseded any possible negligence by the defendant's employee. The plaintiff appealed to the Ninth Circuit Court of Appeals, which reversed. The appellate court held that the defendant's employee should have foreseen that the briefcase might fall out. The likelihood that someone would open the overhead bin was not only foreseeable, but inevitable. The likelihood that the attendant or another passenger might do so negligently was a normal, foreseeable consequence of the employee's own negligence and therefore not a superseding cause of the plaintiff's injuries (*14 F.3d 1410, 1413)* .

In *Anaya v. Superior Court (2000) 78 Cal. App. 4th 971, 93 Cal. Rptr. 2d 228* , the plaintiffs were the parents of a child who was killed following an automobile accident involving the defendants. The child, who was injured in the automobile accident, was killed when the helicopter that was transporting the child to the hospital crashed. The trial court sustained a demurrer for the defendants on the ground that the death was not foreseeable. The court of appeal reversed, noting the established rule that an actor is not relieved of liability for negligent conduct because of an intervening act of a third person if the intervening act was reasonably foreseeable at the time of the original negligent conduct (*78 Cal. App. 4th 971, 973)* . The court also noted the corollary rule that a tortfeasor responsible for the original injury is also liable for further injury or death occurring during the course of medical treatment to treat injuries caused by the original tortfeasor (*78 Cal. App. 4th 971, 974)* . The court then concluded that the tortfeasors allegedly liable for the original automobile accident that necessitated transportation of the victim to a hospital could be held liable for further injury or death suffered by the victim on the way to the hospital, because it was foreseeable that the injured victim of an automobile accident would require transportation to a medical facility for treatment. Allegations that the helicopter malfunctioned, was negligently maintained, or that the manufacturer was strictly liable for the malfunction did not establish a superseding cause that would relieve the original tortfeasors from liability (*78 Cal. App. 4th 971, 976)* .

In *Bloomberg v. Interinsurance Exch. (1984) 162 Cal. App. 3d 571, 207 Cal. Rptr. 853* , the plaintiffs' son was struck and killed by a drunk driver while awaiting the tow truck he requested from the defendant, who had failed to send the truck. The court of appeal held that, on the facts alleged in the complaint, it could not say that the defendant owed no duty of care to the son (*162 Cal. App. 3d 571, 575)* . The court of appeal held further that it is not uncommon, and therefore it is foreseeable, for intoxicated or speeding drivers to lose control and crash into whatever may be standing alongside the roads they travel (*162 Cal. App. 3d 571, 577)* . The court noted that if an independent intervening act occurs that is highly unusual or extraordinary, not reasonably likely to happen and hence not foreseeable, it is considered a superseding cause and the defendant is not liable. However, if the risk of injury might have been reasonably foreseen, a defendant is liable (*162 Cal. App. 3d 571, 576)* .

[b] Intervening Act Not Highly Extraordinary Response to Situation

In *Leno v. Young Men's Christian Ass'n (1971) 17 Cal. App. 3d 651, 95 Cal. Rptr. 96* , the plaintiffs brought an action for damages against the YMCA for the wrongful death of their son. The court of appeal reversed a judgment of nonsuit in favor of the defendants, finding that the plaintiffs had introduced sufficient evidence on the issue of the negligence of decedent's scuba diving instructor so as to require the case to be submitted to the jury (*17 Cal. App. 3d 651, 659)* . In addition, there was some question regarding the liability of the YMCA for the acts of the diving instructor because of certain intervening causes, such as the negligence of another instructor, the negligence of the ambulance crew, or the acts of the doctors that cared for the decedent. The court stated that regarding superseding causes, the fact that an intervening act of a third person is performed in a negligent manner does not make it a superseding cause if a reasonable person, knowing the situation exists when the act of the third person is performed, would not regard it as highly

extraordinary that the third person so acted, or the act is a normal response to a situation created by the defendant's conduct, and the manner in which the intervening act is performed is not extraordinarily negligent (*17 Cal. App. 3d 651, 659-660)* .

[c] Intervening Act May Be Innocent, Negligent, Intentionally Tortious, or Criminal

The factual and procedural background of *Richardson v. Ham (1955) 44 Cal. 2d 772, 285 P.2d 269* , is discussed in *§ 165.303[3][a]*. In *Richardson*, persons who suffered injury and damages caused by a runaway bulldozer, brought consolidated actions for damages against the defendants, members of a construction contracting partnership. In affirming an order granting a new trial for the plaintiffs, the Supreme Court stated that it was well settled that if the realizable likelihood that a third person may act in a particular manner is the hazard or one of the hazards that makes the actor negligent, the act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby. The Court concluded that the possibility of the intentional, wrongful misconduct that occurred in this case was not so remote as not to constitute one of the hazards that would justify the conclusion that the defendants' failure to lock the bulldozer was negligent. Accordingly, the defendants' duty to protect the plaintiffs from injuries caused by the uncontrolled and unauthorized operation of their bulldozer included a duty to protect the plaintiffs from the intentional misconduct of the young men. Therefore, the misconduct did not constitute a superseding cause of the plaintiffs' harm (*44 Cal. 2d 772, 777)* .

In *Carrera v. Maurice J. Sopp & Son (2009) 177 Cal. App. 4th 366, 99 Cal. Rptr. 3d 268* , a tow truck was stolen from the lot of a truck service center when the key was left in the ignition and the lot's gate left open. The thief, a parolee who was drunk at the time of the theft, drove the tow truck about a mile before jumping a curb and striking a group of pedestrians waiting for a bus. The driver eventually came to a halt when he ran the truck into a series of utility poles. He was sentenced to prison for murder. Suit was brought against the truck service center on behalf of persons who were injured or killed in the incident. Plaintiffs argued that the service center was negligently operated so as to allow a thief access to the tow truck and the company had a duty to take reasonable measures to prevent the theft. The trial court granted summary judgment for the defendant, but the court of appeal reversed. The court of appeal held that the plaintiffs had presented sufficient evidence to withstand summary judgment by showing that the defendant owed a duty of care under the circumstances. Noting the general rule that a person is not liable for harm caused by a thief who steals that person's vehicle, even if the keys had been left in the vehicle, the court of appeal held that the "special circumstances" exception to that rule applied. Under that exception, a duty can exist if special circumstances are shown, such as a sizable vehicle left unattended and available for use by persons who are unfamiliar with its operation. The court noted that the tow truck was a sizable, powerful vehicle designed to move other vehicles. To perform those tasks, it was equipped with specialized equipment that required special training and skills to operate. Based on these facts, the court concluded that safe operation of the truck was not a matter of common experience (*177 Cal. App. 4th 366, 381)* . The court also stressed that the service center was located in a high-crime area, the gate to the yard was left open, and the tow truck was left with the keys in the ignition. Even though other vehicles were parked around the tow truck, a surveillance video demonstrated how the thief was able to extricate the tow truck in about a minute. Moreover, no personnel of the service center were within sight when the thief got into the tow truck and started driving it (*177 Cal. App. 4th 366, 383)* . Finally, based on the close temporal connection between the theft and the harm caused to plaintiffs, the court could not say as a matter of law that defendant was not a legal cause of the harm (*177 Cal. App. 4th 366, 384-385)* .

The factual and procedural background of *City of Los Angeles v. Shpegel-Dimsey, Inc. (1988) 198 Cal. App. 3d 1009, 244 Cal. Rptr. 507* , is discussed in *§ 165.70[4][c]*. In reversing the judgment for the defendant, the court of appeal held that if the likelihood that a third person may act in a particular manner is the hazard or one of the hazards that makes the actor negligent, the act, whether innocent, negligent, intentionally tortious, or criminal, does not prevent the actor from being liable for harm caused (*198 Cal. App. 3d 1009, 1022)* .

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16-165 California Points & Authorities § 165.302

§ 165.302 Intervening Force of Nature Was Foreseeable

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS LIABLE FOR HIS/HER/ITS NEGLIGENCE BECAUSE THE INTERVENING FORCE OF NATURE WAS FORESEEABLE BY DEFENDANT.

Foreseeable Intervening Forces of Nature. A natural force, such as a rainstorm of unusual intensity, is not a superhuman cause or "act of God" superseding the defendant's original negligence if the natural force was not totally unforeseeable by the defendant (*see Southern Pac. Co. v. City of Los Angeles (1936) 5 Cal. 2d 545, 549, 55 P.2d 847*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that an intervening force of nature that contributed to the cause of the plaintiff's injuries was foreseeable [*see Southern Pac. Co. v. City of Los Angeles (1936) 5 Cal. 2d 545, 549, 55 P.2d 847]* . It should be combined with any of the *forms in §§ 165.300 -165.301* and *§§ 165.303 -165.304* that are applicable to the particular case.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may argue that the intervening event was a force of nature, and discuss facts supporting its foreseeability by the defendant.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of complaint for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§§ 165.300 -165.301* and *§§ 165.303 -165.304*. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in §§ 165.320 -165.323* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Foreseeable Intervening Forces of Nature

In ***Southern Pac. Co. v. City of Los Angeles*** *(1936) 5 Cal. 2d 545, 55 P.2d 847* , the plaintiffs brought an action for damages alleged to have been proximately caused by the negligence of the defendant city in the construction and maintenance of an aqueduct. Following a rainstorm of unusual force, the defendant's aqueduct gave way, damaging the plaintiffs' property. The trial court found that the defendant city was not negligent. It also concluded that the accident was caused by a cloudburst of unprecedented violence so that it constituted an unforeseeable superhuman cause or act of God. Judgment was entered against the plaintiffs, who appealed.

The Supreme Court reversed, finding that the defendant city was negligent in leaving an open aqueduct with considerable curvature and a slow grade in a position below a large steep cone of loose materials where heavy and at times torrential rains have been known to occur without any provision for spillways or other drainage methods (*5 Cal. 2d 545, 548-549)* . In addition, the Court stated that a rainstorm that is merely of unusual intensity is not a superhuman cause or "act of God," which would supersede the original negligence as the proximate cause of the injury. The Court stated that there was nothing in the nature of the rainstorm involved in this case that made it so totally unforeseeable as to act as a superseding cause. It was simply a heavy rain, commencing and continuing for several days, perhaps establishing a record for volume in inches in that region. The Court explained that it could not conclude, however, that the cause was wholly unforeseeable. Rainfall is foreseeable in most places; heavy rainfall was characteristic of that region. The Court further noted that there is no point at which an expectable heavy rain becomes an "act of God" by reason of its unusual volume. With respect to the issues both of negligence and proximate cause, the foreseeability of unusual rainfall was clearly established by the evidence, calling for some precautions by way of overhead or underground drainage to meet the requirement of reasonable care under the circumstances (*5 Cal. 2d 545, 549)* .

[4] Additional Authorities

[a] Foreseeable Intervening Forces of Nature

In *Diamond Springs Lime Co. v. American River Constr. (1971) 16 Cal. App. 3d 581, 94 Cal. Rptr. 200* , a limestone quarry and rock crushing operator brought an action against the builder and owner of the dam to recover for property damage suffered when the dam burst after a severe rainstorm. The court of appeal affirmed a judgment holding the defendant builder liable, but exonerating the defendant owner. The court noted that the defendant builder had argued

that the flood was an unprecedented calamity, and that this unforeseeable event formed an independent superseding cause of the plaintiff's damage, eliminating the defendant's own negligence, if any, as a proximate cause. The court stated, however, that a defendant may be liable if his or her negligence is a substantial factor in causing the injury. The presence of independent causal forces does not relieve him or her of liability if the forces were foreseeable (*16 Cal. App. 3d 581, 596)* . In this case, the court felt that the question of foreseeability of harm was a question for the jury, and that there was substantial evidence to support the jury's inference that the downstream flooding was a reasonably foreseeable peril (*16 Cal. App. 3d 581, 597-598)* .

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16-165 California Points & Authorities § 165.303

§ 165.303 Defendant Is Liable Despite Intervening Criminal Act

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS LIABLE FOR HIS/HER/ITS NEGLIGENCE DESPITE THE INTERVENING CRIMINAL ACT BECAUSE DEFENDANT'S CONDUCT CREATED THE OPPORTUNITY FOR THE CRIMINAL ACT.

Defendant's Conduct Created Opportunity for Intervening Criminal Act. The criminal act of a third person is a superseding cause unless the first actor at the time of his or her negligent conduct realized or should have realized the likelihood that the conduct created an opportunity for the commission of the crime, and that the third person might avail himself or herself of that opportunity (*O'Hara v. Western Seven Trees Corp. (1977) 75 Cal. App. 3d 798, 804, 142 Cal. Rptr. 487* ; *see Richardson v. Ham (1955) 44 Cal. 2d 772, 777, 285 P.2d 269*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the defendant is liable for negligence despite an intervening criminal act, because the defendant's conduct created the opportunity for the criminal act to occur [*see O'Hara v. Western Seven Trees Corp. (1977) 75 Cal. App. 3d 798, 804, 142 Cal. Rptr. 487]* . It should be combined with any of the *forms in §§ 165.300 -165.302* and *§ 165.304* that are applicable to the particular case.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may discuss the circumstances under which the criminal act occurred, and show that the defendant's conduct created a

situation that allowed the criminal act to occur.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of complaint for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§§ 165.300 -165.302* and *§ 165.304*. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in §§ 165.320 -165.323* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Defendant's Conduct Created Opportunity for Intervening Criminal Act

In ***Richardson v. Ham*** *(1955) 44 Cal. 2d 772, 285 P.2d 269* , persons who suffered injury and damages caused by a runaway bulldozer, brought consolidated actions for damages against members of a construction contracting partnership. The plaintiffs alleged that the defendants were negligent in leaving the bulldozer unattended and unlocked at a construction site. Several drunken young men drove the bulldozer and abandoned it. The bulldozer then rolled down a hill, hit a house, collided with a house-trailer, and smashed an automobile. The jury returned verdicts for the defendants. The trial court granted the plaintiffs' motion for a new trial on the ground of insufficiency of the evidence and misconduct of the jury [*see Code Civ. Proc. § 657(2), (6)*]. The defendants appealed.

The Supreme Court affirmed on the ground that there was insufficient evidence to support the verdict (*44 Cal. 2d 772, 777)* . The Court found that the extreme danger created by a bulldozer in uncontrolled motion and the foreseeable risk of intermeddling fully justified imposing a duty on the owner to exercise reasonable care to protect third parties from injuries arising from its operation by intermeddlers (*44 Cal. 2d 772, 776)* . The defendants contended that even if they were under a duty to protect the plaintiffs from injuries from operation of the bulldozer by ordinary intermeddlers, they were not under a duty to protect the plaintiffs from intermeddlers who deliberately undertook to operate the bulldozer, or in other words, that the intentional misconduct of the young men constituted a superseding cause of the plaintiffs' injuries. The Court noted, however, that if the realizable likelihood that a third person may act in a particular manner is the hazard or one of the hazards that makes the actor negligent, the act, whether innocent, negligent, intentionally tortious, or criminal, does not prevent the actor from being liable for harm caused. The Court concluded that the possibility of the intentional, wrongful misconduct that occurred in this case was not so remote as not to constitute one of the hazards that would justify the conclusion that the defendants' failure to lock the bulldozer was negligent. Accordingly, the defendants' duty to protect the plaintiffs from injuries caused by the uncontrolled and unauthorized operation of their bulldozer included a duty to protect the plaintiffs from the intentional misconduct of the young men. The misconduct did not therefore constitute a superseding cause of the plaintiffs' harm (*44 Cal. 2d 772, 777)* .

In ***O'Hara v. Western Seven Trees Corp.*** *(1977) 75 Cal. App. 3d 798, 142 Cal. Rptr. 487* , the plaintiff was raped in her apartment and brought an action against the owners and operators of the complex. The plaintiff's first cause of

action alleged that the defendants were negligent in failing to provide adequate security, for misrepresenting security measures on the premises, and for concealing information concerning a man who had raped several female tenants. The plaintiff's second cause of action was for deceit, alleging that the defendants knowingly misrepresented the safety and security of the complex with the intent to induce her to rent an apartment. The trial court sustained the defendants' demurrer; the plaintiff appealed.

The court of appeal reversed the judgment with directions to the lower court to overrule the general demurrer. With regard to the plaintiff's first cause of action, the court stated that generally a person is liable for injuries caused by his or her failure to exercise reasonable care under the circumstances. The court noted that the landlord-tenant relationship has given rise to liability when landlords fail to take reasonable steps to protect tenants from criminal activity (*75 Cal. App. 3d 798, 802)* . This liability does not make the landlord an insurer of the tenant's safety; the duty is merely to exercise reasonable care (*75 Cal. App. 3d 798, 802-803)* . The court further found that an analysis of the factors in *Rowland v. Christian (1968) 69 Cal. 2d 108, 113, 70 Cal. Rptr. 97, 443 P.2d 561* (discussed in *§ 165.30[3][d]*), showed that there is potential liability in this case. The court found that the plaintiff alleged the most important factor, foreseeability. The defendants allegedly knew of the past assaults and of conditions making future attacks likely. By not acting affirmatively to protect the plaintiff, the defendants increased the likelihood that the plaintiff would become a victim. This failure to act, either by warning her or by providing adequate security, allegedly created a risk of injury to appellant (*75 Cal. App. 3d 798, 804)* . The court found further that the defendants' possible liability was suggested by Restatement (Second) of Torts § 302B, which states that an act or omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of a third person that is intended to cause harm, even though the conduct is criminal. The court explained that the defendants allegedly knew of conditions that made sexual assaults likely. The risk was unreasonable because the defendants could have decreased the risk with a simple disclosure of information. The court further noted that the criminal act of a third person is a superseding cause unless the actor at the time of his or her negligent conduct realized or should have realized the likelihood that the conduct created an opportunity for the commission of the crime, and that the third person might avail himself or herself of the opportunity. If the likelihood that the third person may act in a particular manner is the hazard or one of the hazards that makes the actor negligent, the act, whether innocent or criminal, does not prevent the actor from being liable for harm caused. The court concluded that the risk of the sexual assault by the plaintiff's attacker was the hazard that made the defendants' conduct negligent. Thus, it found that it was error to sustain the demurrer to the plaintiff's first cause of action (*75 Cal. App. 3d 798, 804)* .

[4] Additional Authorities

[a] Defendant's Conduct Created Opportunity for Intervening Criminal Act

In *Mukthar v. Latin Am. Sec. Serv. (2006) 139 Cal. App. 4th 284, 42 Cal. Rptr. 3d 563* , the court of appeal held that a trial court erred in granting summary judgment in favor of a security company that failed to provide an armed security guard at a convenience store one night as the company was under contract to do. A clerk at the store was hit in the face by a woman who was attempting to leave the store without paying for her goods, and the clerk sued the security company, arguing that the injury would not have occurred if the armed guard had been present. The court of appeal held that the issue of causation should have gone to the jury. The court noted undisputed evidence that the security guard was normally positioned about a foot from the door where the altercation occurred and concluded that it was more likely than not that the woman would not have struck the clerk if an armed guard had been standing right there. The court also noted that the harm that was inflicted on the clerk was precisely the type of harm that the security company had been employed to prevent (*139 Cal. App. 4th 284, 291)* .

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16-165 California Points & Authorities § 165.304

§ 165.304 Defendant Is Liable Despite Third Party's Failure to Prevent Harm

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS LIABLE FOR HIS/HER/ITS NEGLIGENCE BECAUSE A THIRD PARTY'S FAILURE TO PROTECT PLAINTIFF FROM HARM IS NOT A SUPERSEDING CAUSE THAT CUTS OFF DEFENDANT'S LIABILITY FOR NEGLIGENTLY CAUSING THE HARM.

A. Risk of Injury Was Reasonably Foreseeable. If the risk of injury is reasonably foreseeable, the defendant is liable. An independent intervening act is a superseding cause relieving the actor of liability for his or her negligence only if the intervening act is highly unusual or extraordinary and hence not reasonably foreseeable (*Cline v. Watkins (1977) 66 Cal. App. 3d 174, 178, 135 Cal. Rptr. 838*).

B. Failure to Prevent Harm Is Not Superseding Cause. A third person's failure to perform his or her duty to protect the plaintiff from harm, because he or she either makes no effort or through his or her negligence does not succeed, is not a superseding cause that cuts off the defendant's liability for negligently causing the harm (*Stewart v. Cox (1961) 55 Cal. 2d 857, 864, 13 Cal. Rptr. 521, 362 P.2d 345*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the intervening conduct of a third party in failing to prevent harm to the plaintiff did not supersede the defendant's original negligence [*see Cline v. Watkins (1977) 66 Cal. App. 3d 174, 178, 135 Cal. Rptr. 838]* . It should be combined with any of the *forms in §§ 165.300 -165.303* that are applicable to the particular case.

This argument may arise, for example, in opposing a demurrer in an action for damages for negligence [*see, e.g., Cline v. Watkins (1977) 66 Cal. App. 3d 174, 176, 135 Cal. Rptr. 838* (demurrer)].

This form should be used only if the originally negligent defendant's conduct will, in and of itself, cause the plaintiff's injury or death unless successful protective action is taken by the intervening third party [*see Fish v. Los Angeles Dodgers Baseball Club (1976) 56 Cal. App. 3d 620, 636, 128 Cal. Rptr. 807* (discussed in *§ 165.304[4]*)]. If the originally negligent defendant's conduct is not sufficient in and of itself to produce the plaintiff's injury and the intervening conduct of the third party is the "immediate cause" of the injury, counsel should use the points and authorities *in §§ 165.300 -165.303* [*see Fish v. Los Angeles Dodgers Baseball Club (1976) 56 Cal. App. 3d 620, 636, 128 Cal. Rptr. 807]* .

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may first show that the plaintiff's injury was reasonably foreseeable by the defendant [*see Cline v. Watkins (1977) 66 Cal. App. 3d 174, 178, 135 Cal. Rptr. 838]* . Counsel may then argue that the third party's failure to prevent harm to the plaintiff was not a superseding cause that would prevent the originally negligent defendant from being held liable for the plaintiff's injuries [*see Stewart v. Cox (1961) 55 Cal. 2d 857, 864, 13 Cal. Rptr. 521, 362 P.2d 345* ; *see also Fish v. Los Angeles Dodgers Baseball Club (1976) 56 Cal. App. 3d 620, 636, 128 Cal. Rptr. 807]* .

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of complaint for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§§ 165.300 -165.303*. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in §§ 165.320 -165.323* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Risk of Injury Was Reasonably Foreseeable

In ***Cline v. Watkins*** *(1977) 66 Cal. App. 3d 174, 135 Cal. Rptr. 838* , the plaintiff brought a negligence action against her two attorneys, alleging that her second counsel negligently failed to cure the results of her first counsel's negligence. The trial court granted the first attorney's demurrer to the complaint and subsequently dismissed the action against him. The plaintiff appealed.

The court of appeal reversed the judgment with regard to the first attorney, finding that the issue must be decided on the basis of the reasonable foreseeability of the second lawyer's failure. Because foreseeability in this context is a question of fact, the issue should be determined by the trier of fact (*66 Cal. App. 3d 174, 176-180)* . The court explained that if

the risk of injury is reasonably foreseeable, the defendant is generally liable. An independent intervening act is a superseding cause that relieves the actor of liability for his or her negligence only if the intervening act is highly unusual or extraordinary and hence not reasonably foreseeable. Reasonable foreseeability is a question for the trier of fact. The issue of the actor's responsibility for negligence is a question of law (*66 Cal. App. 3d 174, 178)* . Quoting the Restatement (Second) of Torts § 452(1), approved in *Fish v. Los Angeles Dodgers Baseball Club (1976) 56 Cal. App. 3d 620, 635-636, 128 Cal. Rptr. 807* , the court stated that the failure of a third person to act to prevent harm to another threatened by the actor's negligent conduct is not a superseding cause of the harm. Quoting Restatement (Second) of Torts § 452(2), the court stated that the Restatement (Second) of Torts § 452(1) applies unless, because of the lapse of time or otherwise, the duty to prevent harm to another threatened by the actor's negligent conduct shifts from the actor to a third person. In that case, the failure of the third person to prevent the harm is a superseding cause. Although a third person negligently fails to discharge a duty to take affirmative action that would have prevented the harm, under Restatement (Second) of Torts § 452(1), the originally negligent actor generally remains liable if the third person's conduct is reasonably foreseeable. Restatement (Second) of Torts § 452(2) applies only in exceptional circumstances to relieve the original actor of the forseeable consequences of his or her acts. In these exceptional circumstances, the duty and hence entire responsibility shifts from the original actor to the third person. The court added that the responsibility may be shifted by agreement between the actor and the third person. In the absence of an agreement, the circumstances must be such that the court finds that all duty and responsibility for the prevention of the harm has passed to the third person (*66 Cal. App. 3d 174, 179)* .

In this case, the court of appeal noted that the trial court treated the first attorney as absolved from liability as a matter of law because of the second attorney's failure to prevent the harm ordinarily flowing from the first attorney's negligence from occurring. The court of appeal stated that it needed to determine whether or not Restatement (Second) of Torts § 452(2) applied in this case (*66 Cal. App. 3d 174, 179)* . In light of public policy, the court held that a negligent attorney should not be relieved of liability because he or she is replaced by another attorney. Thus, the issue of proximate causation of the damage flowing from the first attorney's negligence is one of foreseeability to be determined by the trier of fact and not on demurrer (*66 Cal. App. 3d 174, 180)* .

[b] Failure to Prevent Harm Is Not Superseding Cause

In ***Stewart v. Cox*** *(1961) 55 Cal. 2d 857, 13 Cal. Rptr. 521, 362 P.2d 345* , the plaintiffs brought an action for damages to their real property resulting from the escape of water from a swimming pool constructed on their property. The plaintiffs settled prior to trial with the general contractor, Wahlstrom, and the plastering company. The action proceeded against the defendant Cox, the subcontractor who installed the pool's concrete. Cox unsuccessfully attempted to repair a crack in the swimming pool. However, when the pool was again filled with water the crack widened and other cracks appeared. Water leaked from the pool, damaging the plaintiffs' house and yard. The plaintiffs recovered against the defendant Cox, who appealed.

The Supreme Court affirmed. Cox contended that Wahlstrom's conduct after the crack in the pool was discovered constituted a superseding cause that prevented Cox from being liable. Cox also asserted that Wahlstrom had actual knowledge for a period of over two months that the pool had cracked and was leaking, resulting in a dangerous quantity of water going into the ground. He also asserted that Walhstrom undertook the repair of the pool without informing Cox of the defects, but negligently failed to make effective repairs or prevent refilling of the pool (*55 Cal. 2d 857, 863)* . The Court stated that an intervening act of a third person performed in a negligent manner does not constitute a superseding cause if a reasonable person, knowing the situation exists when the act of the third person is performed, would not regard it as highly extraordinary that the third person so acted, or if the act is a normal response to a situation created by the defendant's conduct and the manner in which the intervening act is performed is not extraordinarily negligent. TA third person's failure to perform his or her duty to protect the plaintiff from harm, because he or she either makes no effort or through his or her negligence does not succeed, is not a superseding cause. In this case, although the evidence may point to the negligence of Wahlstrom, the record did not establish that Wahlstrom actually knew that the condition was dangerous. The negligence of Wahlstrom consisted of his failure to perform his duty to the plaintiffs to

protect them from the harm threatened by the negligence of Cox. Wahlstrom's conduct was not, as a matter of law, highly extraordinary. Thus, Wahlstrom's conduct did not constitute a superseding cause. The trial court's finding that the plaintiffs were damaged as a direct and proximate result of Cox's negligence must therefore be upheld (*55 Cal. 2d 857, 864)* .

[4] Additional Authorities

[a] Failure to Prevent Harm Is Not Superseding Cause

In *Springmeyer v. Ford Motor Co. (1998) 60 Cal. App. 4th 1541, 71 Cal. Rptr. 2d 190* , a mechanic was working on the engine of a Ford truck when a fan blade broke off and struck him in the shoulder, severing his right arm from his body. The fan involved in the accident was installed as part of the engine cooling system in Ford trucks from 1963 to 1977, including the truck the plaintiff was repairing when he was injured. Ford became aware of the problem with the fan blades and attempted to remedy the problem by changing the design. When those changes failed to eliminate the problem, Ford decided to recall the affected trucks. The truck involved in the accident was originally purchased by Avis Rent-A-Car, and was subject to the fan blade recall campaign. However, the truck was sold by Avis to the plaintiff's employer in 1979, without the fan blade replacement. The mechanic sued the manufacturer of the fan and the manufacturer of the truck for damages based on strict product liability for defective design. He also sued Avis for negligent failure to have the fan replaced in response to a manufacturer's recall of these fans. A jury found for the plaintiff and apportioned 20 percent of the fault to Avis.

Avis appealed, contending that even if it negligently failed to repair the truck, Ford's failure to follow up on the fan recall after 1982 was a superseding cause of the accident. Avis reasoned that because recalls continue indefinitely and Ford knew that the truck had not been repaired, it had a continuing duty to follow up on the recall for this truck; that it breached that duty by failing to mail further notices to the plaintiff's employer after 1982; and that this breach of duty was a superseding cause of the accident. The court of appeal rejected this argument. It was not apparent to the court that Ford was negligent in failing to furnish further follow up recall notices for the truck. To the contrary, the evidence indicated that Ford had made reasonable efforts to recall the fan. In addition to the original recall notice to Avis, it mailed two follow-up notices to the plaintiff's employer. Therefore, the court had no basis to conclude as a matter of law that Ford's failure to mail more notices was such an exceptional circumstances as to constitute a superseding cause of the accident (*60 Cal. App. 4th 1541, 1567)* .

In *Fish v. Los Angeles Dodgers Baseball Club (1976) 56 Cal. App. 3d 620, 128 Cal. Rptr. 807* , the plaintiff's decedent was negligently diagnosed and treated by the defendant doctor at a baseball park first-aid station after decedent had been struck in the head by a baseball. After this treatment, decedent was taken to a hospital where he was also negligently treated. In reversing judgment as to the defendant doctor who was originally negligent with regard to the hospital that subsequently treated the decedent, the court of appeal noted that the fact that a third person does not perform his or her duty to protect the plaintiff from harm, because he or she either makes no effort or through his or her negligence does not succeed, does not constitute a superseding cause (*56 Cal. App. 3d 620, 637-638)* .

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16-165 California Points & Authorities §§ 165.305-165.319

[Reserved]

§§ 165.305[Reserved]

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16-165 California Points & Authorities § 165.320

§ 165.320 Defendant Is Not Liable Because Intervening Act Broke Chain of Causation

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS NOT LIABLE FOR HIS/HER/ITS NEGLIGENCE BECAUSE AN INTERVENING ACT BROKE THE CHAIN OF CAUSATION FROM THE DEFENDANT'S ORIGINAL ACT.

Intervening Act Broke Chain of Causation. An intervening cause that breaks the chain of causation from the original negligent act is itself regarded as the proximate cause of the injury, and relieves the original negligent actor of liability (*Schrimscher v. Bryson (1976) 58 Cal. App. 3d 660, 664, 130 Cal. Rptr. 125*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that intervening acts of a third party relieve the defendant from liability [*see Schrimscher v. Bryson (1976) 58 Cal. App. 3d 660, 664, 130 Cal. Rptr. 125]* . It should be combined with any of the *forms in §§ 165.321 -165.323* that are applicable to the particular case.

This form should be used by an originally negligent defendant to contend that the intervening third party's acts and the harm caused were unforeseeable, and that the defendant should therefore not be held liable for the harm caused by the third party's acts. This argument may arise in several procedural contexts. For example, the defendant may raise the points in this form in support of a demurrer to the complaint, or a motion for summary judgment or nonsuit [*see, e.g., Kane v. Hartford Accident & Indem. Co. (1979) 98 Cal. App. 3d 350, 360, 159 Cal. Rptr. 446* (nonsuit); *see also Schrimscher v. Bryson (1976) 58 Cal. App. 3d 660, 664, 130 Cal. Rptr. 125* (summary judgment)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may discuss facts surrounding the chain of causation, and show that the third party's acts broke the chain [*see Schrimscher v. Bryson (1976) 58 Cal. App. 3d 660, 664, 130 Cal. Rptr. 125]* .

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of answer to a cause of action for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§§ 165.321 -165.323*. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in §§ 165.300 -165.304* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Intervening Act Broke Chain of Causation

In ***Schrimscher v. Bryson*** *(1976) 58 Cal. App. 3d 660, 130 Cal. Rptr. 125* , a highway patrol officer brought an action to recover for personal injuries suffered when he was struck by an automobile. The plaintiff had spotted the defendant's damaged car on the shoulder of the road and stopped to investigate the collision of that car with another vehicle. The defendant, who was intoxicated, was handcuffed and placed into the back seat of the highway patrol car. A car driven by an intoxicated third party, Shelton, suddenly veered off the freeway, striking the defendant's car. As a result of this impact, the defendant's car was knocked into the plaintiff, injuring him severely. The trial court granted the defendant's motion for summary judgment, concluding as a matter of law that because the defendant had been physically removed from the scene and handcuffed, his previous negligence could not be a proximate cause of the plaintiff's injuries. The plaintiff appealed.

The court of appeal affirmed. It noted that the direct and efficient cause of the plaintiff's injury was the action of Shelton in negligently driving his car into the defendant's vehicle (*58 Cal. App. 3d 660, 663-664)* . The court disagreed with the plaintiff's contention that the defendant's antecedent negligence caused the plaintiff to be in the situation that exposed him to the peril of Shelton's action, and that the defendant's negligence was thus also a cause of his injuries (*58 Cal. App. 3d 660, 663-664)* . The court stated that an intervening cause that breaks the chain of causation from the original negligent act is itself regarded as the proximate cause of the injury and relieves the original negligent actor of liability. Generally, the determination of whether the intervening act is foreseeable is a question of fact unless under the undisputed facts there is no room for a reasonable difference of opinion. The court concluded that under the undisputed facts here, there can be no reasonable difference of opinion as to the foreseeability of the intervening act. The action of Shelton could not reasonably have been anticipated by the defendant at the time of his original negligence; as a matter of law the chain of causation was broken. The court added that liability cannot be predicated on a prior or remote cause that merely furnishes the condition or occasion for an injury resulting from an intervening unrelated and efficient cause, even though the injury would not have resulted but for such condition or occasion (*58 Cal. App. 3d 660, 664)* .

[4] Additional Authorities

[a] Intervening Act Broke Chain of Causation

In *Custodio v. Bauer (1967) 251 Cal. App. 2d 303, 59 Cal. Rptr. 463* , the plaintiff brought an action to recover damages resulting from her pregnancy following a sterilization operation. The court of appeal reversed the judgment of dismissal entered on an order sustaining the defendant's demurrer without leave to amend. It stated, however, that the general test of whether an independent intervening act, which actively operates to produce an injury, breaks the chain of causation is whether the intervening act is foreseeable. In this action, the court found that sexual activity between the plaintiffs with the resulting pregnancy could not be considered unforeseeable (*251 Cal. App. 2d 303, 316-317)* .

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16-165 California Points & Authorities § 165.321

§ 165.321 Intervening Act of Third Person Was Not Foreseeable

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS NOT LIABLE FOR HIS/HER/ITS NEGLIGENCE BECAUSE THE INTERVENING ACT OF _____ [*specify third party*] WAS NOT FORESEEABLE.

A. Intervening Act of Third Person Was Not Foreseeable. The general test of whether an independent intervening act that operates to produce an injury breaks the chain of causation is whether the act is foreseeable. An act is not foreseeable and thus is a superseding cause of the injury if the independent intervening act is highly unusual or extraordinary and not reasonably likely to happen (*Schrimscher v. Bryson (1976) 58 Cal. App. 3d 660, 664, 130 Cal. Rptr. 125*).

B. Two-Fold Test of Foreseeability. If it is determined that the intervening cause of independent origin was not foreseeable and that the results that it caused were not foreseeable, then the intervening cause becomes a supervening cause and the defendant is relieved from liability for the plaintiff's injuries (*Hoyem v. Manhattan Beach City Sch. Dist. (1978) 22 Cal. 3d 508, 521, 150 Cal. Rptr. 1, 585 P.2d 851* ; *Pappert v. San Diego Gas & Elec. Co. (1982) 137 Cal. App. 3d 205, 210, 186 Cal. Rptr. 847*).

C. Foreseeability Is Question for Trier of Fact. [*See § 165.301, Paragraph B.*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the intervening acts of a third party relieved the defendant from liability in that the intervening act was not reasonably foreseeable [*see Schrimscher v.*

Bryson (1976) 58 Cal. App. 3d 660, 664, 130 Cal. Rptr. 125] . It should be combined with any of the *forms in § 165.320* and *§§ 165.322 -165.323* that are applicable to the particular case.

This form should be used by an originally negligent defendant to contend that the intervening third party's acts and the harm caused thereby were unforeseeable, and that the defendant should therefore not be held liable for the harm caused by the third party's acts. This argument may arise in several procedural contexts. For example, the defendant may raise the points in this form in support of a demurrer to the complaint, or a motion for summary judgment or nonsuit [*see, e.g., Kane v. Hartford Accident & Indem. Co. (1979) 98 Cal. App. 3d 350, 360, 159 Cal. Rptr. 446* (nonsuit); *see also Schrimscher v. Bryson (1976) 58 Cal. App. 3d 660, 664, 130 Cal. Rptr. 125* (summary judgment)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may argue that the third party's acts were not foreseeable by the originally negligent defendant because the third party's acts were highly unusual or extraordinary [*see Schrimscher v. Bryson (1976) 58 Cal. App. 3d 660, 664, 130 Cal. Rptr. 125]* . In addition, counsel should show how the injuries suffered by the plaintiff were also unforeseeable by the defendant [*see Pappert v. San Diego Gas & Elec. Co. (1982) 137 Cal. App. 3d 205, 210, 186 Cal. Rptr. 847]* . Counsel should then argue that the originally negligent defendant should not therefore be held liable for the injuries caused by the third party's actions.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of answer to a cause of action for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§ 165.320* and *§§ 165.322 -165.323*. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in §§ 165.300 -165.304* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Intervening Act of Third Person Was Not Foreseeable

The factual and procedural background of ***Schrimscher v. Bryson*** *(1976) 58 Cal. App. 3d 660, 130 Cal. Rptr. 125* , is discussed in *§ 165.320[3][a]*. The court of appeal affirmed summary judgment in favor of the defendant, finding that the acts of the third party were not reasonably foreseeable by the defendant at the time of his initial negligence and that, as a matter of law, the chain of causation was broken. The court explained that the general test of whether an independent intervening act that operates to produce an injury breaks the chain of causation is whether the act is foreseeable. An act is not foreseeable and thus is a superseding cause of the injury if the independent intervening act is highly unusual or extraordinary and not reasonably likely to happen (*58 Cal. App. 3d 660, 664)* .

[b] Two-Fold Test of Foreseeability

The factual and procedural background of ***Hoyem v. Manhattan Beach City Sch. Dist.*** *(1978) 22 Cal. 3d 508, 150 Cal. Rptr. 1, 585 P.2d 851* , is discussed in *§ 165.300[3][a]*. Quoting *Akins v. County of Sonoma (1967) 67 Cal. 2d 185, 199, 60 Cal. Rptr. 499, 430 P.2d 57* , the Court explained that when an injury was brought about by a later cause of independent origin, the question of proximate cause depends on a determination of whether the later cause of independent origin, or intervening cause, was foreseeable by the defendant or, if not foreseeable, whether it caused injury of a type that was foreseeable. If either of these questions is answered in the affirmative, then the defendant is not relieved of liability towards the plaintiff. If, however, it is determined that the intervening cause was not foreseeable and that the results that it caused were not foreseeable, the intervening cause becomes a supervening cause and the defendant is relieved from liability for the plaintiff's injuries (*67 Cal. 2d 185)* . The Court could not state that the sons departure from school was unforeseeable as a matter of law (*67 Cal. 2d 185)* . In addition, the fact that another student's misconduct was the immediate precipitating cause of the injury did not compel a conclusion that negligent supervision was not the proximate cause of the plaintiff's injuries. The Court could not state that the risk of a student's injury at the hands of a negligent motorist was not, as a matter of law, a foreseeable risk created by the school district's failure to exercise due care in supervising its pupils (*67 Cal. 2d 185)* .

The factual and procedural background of ***Pappert v. San Diego Gas & Elec. Co.*** *(1982) 137 Cal. App. 3d 205, 186 Cal. Rptr. 847* , is discussed in *§ 165.300[3][b]*. Although the court in *Pappert* concluded that the decedent's conduct did not constitute a superseding cause as a matter of law, it discussed the law concerning superseding causes. The court explained that the foreseeability test is two-fold, relating to both the act and the nature of the harm suffered. When an injury was brought about by a later cause of independent origin, the question of proximate cause depends on a determination of whether the later cause of independent origin, commonly referred to as an intervening cause, was foreseeable by the defendant or, if not foreseeable, whether it caused injury of a type that was foreseeable. If either of these questions is answered in the affirmative, then the defendant is not relieved of liability to the plaintiff. If, however, it is determined that the intervening cause was not foreseeable and that the results that it caused were not foreseeable, then the intervening cause becomes a supervening cause, and the defendant is relieved of liability for the plaintiff's injuries (*137 Cal. App. 3d 205, 210)* . The court noted that the instructions given to the jury by the lower court were fatally defective because they ignored the question of foreseeability of the risk of harm. Thus, the instructions created a reasonable probability that a more favorable result to the plaintiffs would have been reached in the absence of the error. The court found that the injury sustained, death by electrocution, was precisely and directly the result to be expected when a person trimming a tree on his residential property is exposed to the charge from an uninsulated 12,000 volt power line. Since the facts in the record indisputably showed that decedent was within the class of persons exposed to danger when the power company deliberately permitted its uninsulated power line o remain in the proximity of the tree, the court of appeal held that there was no factual issue on superseding cause for jury consideration, and the trial court erred in presenting this issue to the jury (*137 Cal. App. 3d 205, 211)* .

[4] Additional Authorities

[a] Intervening Act of Third Person Was Not Foreseeable

In *Martinez v. Vintage Petroleum, Inc. (1998) 68 Cal. App. 4th 695, 80 Cal. Rptr. 2d 449* , the employee of an independent contractor hired to work in an oil field, was injured by a fragment of a gas pipe that exploded when coworkers cut into the pipe with a torch. The plaintiff sued the operator of the oil field for negligence. At trial, the jury found that, although the defendant was negligent, the superseding negligence of the plaintiff's co-workers relieved the defendant of liability for the injury. The plaintiff appealed, arguing in part that because the harm that occurred was foreseeable, an instruction on superseding cause was not warranted. The court of appeal affirmed. The court reaffirmed the established rule that intervening negligence can relieve a party from liability for earlier negligent conduct, even when the type of injury is foreseeable, if the intervening negligence is highly extraordinary. The court held that the intervening action of the plaintiff's co-workers in using a torch to cut a gas pipe that may have contained pressurized gas

was extraordinarily negligent and dangerous (*68 Cal. App. 4th 695, 700-701*).

In *Bryant v. Glastetter (1995) 32 Cal. App. 4th 770, 38 Cal. Rptr. 2d 291* , the family of a tow truck driver brought a wrongful death action against the driver of a car that the tow truck driver was attempting to remove from a freeway when he was struck and killed by a third party. The defendant had been arrested for driving under the influence of alcohol; Highway Patrol Officers had called decedent to tow away the defendant's vehicle. The complaint alleged that the defendant had a duty to avoid driving under the influence of alcohol, and that she should have known that driving under the influence of alcohol could lead to her arrest and affect the safety of others at the scene of the traffic stop. The defendant filed a demurrer, arguing that her conduct was not a proximate cause of decedent's death. The trial court sustained the demurrer, stating that no actionable duty had been alleged; the court of appeal affirmed. The court reasoned that the harm suffered by decedent was not a harm of the kind normally to be expected as a consequence of negligent driving, such as a collision involving the defendant. Furthermore, the court stated that even without being intoxicated, the defendant might well have been positioned at the side of the road needing a tow truck (*32 Cal. App. 4th 770, 779)* . Thus, while granting that the defendant might have foreseen that her consumption of alcohol would result in her being stopped by the side of the road, the court declined to hold that the defendant should have foreseen that her consumption of alcohol would result in the harm actually suffered by decedent (*32 Cal. App. 4th 770, 780)* .

The factual and procedural background of *Kane v. Hartford Accident & Indemn. Co. (1979) 98 Cal. App. 3d 350, 159 Cal. Rptr. 446* , is discussed in *§ 165.322[3][a]*. In *Kane*, the court of appeal affirmed a judgment of nonsuit in favor of the insurer, finding that the intervening criminal act of the janitor was not foreseeable at the time it bonded him (*98 Cal. App. 3d 350, 360)* . The court of appeal noted that if the defendant insurer had investigated the background of the janitor, it would have found out that he had an extensive record of property-related crimes. An investigation would therefore only have put the insurer on notice that the janitor might foreseeably revert to his propensity for committing property-related crimes (*98 Cal. App. 3d 350, 361)* .

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16-165 California Points & Authorities § 165.322

§ 165.322 Defendant Is Not Liable Because Superseding Criminal Act Was Cause of Plaintiff's Injuries

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS NOT LIABLE FOR HIS/HER/ITS NEGLIGENCE BECAUSE A SUPERSEDING CRIMINAL ACT CAUSED PLAINTIFF'S INJURIES.

Unforeseeable Criminal Acts Are Superseding Causes. A criminal act will be deemed a superseding cause unless it involves a particular and foreseeable hazard inflicted on a member of a foreseeable class (*Kane v. Hartford Accident & Indem. Co. (1979) 98 Cal. App. 3d 350, 360, 159 Cal. Rptr. 446*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the defendant is not liable for his or her conduct with respect to the plaintiff because a criminal act was the superseding cause [*see Kane v. Hartford Accident & Indem. Co. (1979) 98 Cal. App. 3d 350, 360, 159 Cal. Rptr. 446]* . It should be combined with any of the *forms in §§ 165.320 -165.321* and *§ 165.323* that are applicable to the particular case.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may describe the criminal act that occurred subsequent to the defendant's conduct, and argue that the criminal conduct was unforeseeable, and was that the plaintiff was in an foreseeable class of victims.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of answer to a cause of action for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§§ 165.320 -165.321* and *§ 165.323*. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in §§ 165.300 -165.304* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Unforeseeable Criminal Acts Are Superseding Causes

In ***Kane v. Hartford Accident & Indem. Co.*** *(1979) 98 Cal. App. 3d 350, 159 Cal. Rptr. 446* , the plaintiff was raped on hospital grounds by an employee (Williams) of Certified Janitorial and Window Cleaning Company (Certified), an independent contractor that provided cleaning services for the hospital. The action proceeded to trial against Hartford Accident and Indemnity Company (Hartford), which bonded the employees of the independent contractor. Hartford subjected all applicants for bonds to a background investigation of the matters and representations stated in the application. Hartford's procedure was not to hire persons with criminal histories. Certified relied on Hartford's checks to reveal evidence of questionable activities. Because of the costs of these checks, however, Hartford discontinued the checks without notice to Certified. Williams' application for bonding was granted by Hartford without any investigation. If Hartford had investigated, it would have found that Williams had an extensive criminal record of property-related crimes. The trial court granted the defendant Hartford's motion for nonsuit. The plaintiff appealed.

The court of appeal affirmed. In examining policy considerations in order to determine if the defendant owed a duty to the plaintiff, the court stated that foreseeability of the risk was of primary importance (*98 Cal. App. 3d 350, 355)* . In this case, Hartford had no reason to suspect that Williams represented a latent threat of physical harm to anyone. Even if it had investigated Williams's past, Hartford would have discovered that the foreseeable risk, if any, was for property-related crimes (*98 Cal. App. 3d 350, 357)* . With respect to the issue of proximate cause, the next issue is whether or not the original act of negligence is a proximate cause when the injury directly results from the intervening act of another, which act is not reasonably anticipated by the first party as likely to occur and result from his or her own act (*98 Cal. App. 3d 350, 359)* . A criminal act of another party is foremost among these intervening superseding forces that negate the original act of negligence. The common law rule that an intervening criminal act is, by its very nature, a superseding cause has lost its universal application and its dogmatic rigidity. A third person's commission of an intentional tort or crime is a superseding cause, even though the actor's initial negligent conduct created the situation that afforded that opportunity. This is so unless the actor at the time of his negligent conduct realized or should have realized that such a situation might likely be created, and that a third person might avail himself of the opportunity to commit a tort or crime. California decisions have established that a criminal act will be deemed a superseding cause unless it involves a particular and foreseeable hazard inflicted on a member of a foreseeable class (*98 Cal. App. 3d 350, 360)* .

In this case, the defendant Hartford contended that the hazard encountered by the plaintiff, the rape by an employee of

Certified, was not foreseeable at the time it bonded Williams. The plaintiff contended that Williams's act was foreseeable and thus not a superseding cause (*98 Cal. App. 3d 350, 360)* . The court, however, agreed with the defendant. It stated that when the actor's conduct creates a situation that is utilized by another or provides a temptation to do so to which the third person yields, but the actor has no reason to expect that the third person would so act, the actor is not responsible for the harm thus inflicted merely because the situation that his or her negligence has created has afforded an opportunity or temptation for its infliction (*98 Cal. App. 3d 350, 360-361)* . The court found that Hartford did not have actual possession of information that would make the risk encountered reasonably foreseeable. In addition, even if the defendant had discovered Williams's past activities, it would be put on notice only that Williams might foreseeably revert to his propensity for committing property-related crimes. It would not have indicated that a violent criminal act directed against the person of an unforeseeable the plaintiff was either contemplated or impending (*98 Cal. App. 3d 350, 361)* .

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3. Intervening and Superseding Acts

16-165 California Points & Authorities § 165.323

§ 165.323 Defendant Is Not Liable Because Plaintiff's Injuries Were Result of Unanticipated and Unusual Natural Event

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS NOT LIABLE FOR NEGLIGENCE BECAUSE THE SOLE CAUSE OF PLAINTIFF'S INJURY WAS A NATURAL EVENT THAT WAS SO UNUSUAL IN ITS PROPORTIONS THAT IT COULD NOT HAVE BEEN ANTICIPATED BY DEFENDANT.

Plaintiff's Injuries Caused by "Act of God." A defendant is not liable for an injury suffered by the plaintiff that was caused solely by an "act of God" if: (1) an unanticipated natural occurrence was the sole cause of a plaintiff's injury or damage; (2) the natural event was so unusual in its proportions that it could not be anticipated by a defendant; and (3) human agency did not participate in proximately causing the harm (*Mancuso v. Southern Cal. Edison Co. (1991) 232 Cal. App. 3d 88, 103-104, 283 Cal. Rptr. 300*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the defendant is not liable for injury caused by a foreseeable natural occurrence, based on the fact that there was nothing the defendant could have done to prevent or lessen the harm to the plaintiff [*see Mancuso v. Southern Cal. Edison Co. (1991) 232 Cal. App. 3d 88, 104, 283 Cal. Rptr. 300]* . This form should be combined with any of the *forms in §§ 165.320 -165.322* that are applicable to the particular case.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may explain why the natural event in question was unusual and not reasonably anticipated [*see Mancuso v. Southern Cal. Edison Co. (1991) 232 Cal. App. 3d 88, 103, 283 Cal. Rptr. 300]* .

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of answer to a cause of action for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§§ 165.320 -165.322*. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in §§ 165.300 -165.304* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Plaintiff's Injuries Caused by "Act of God"

In ***Mancuso v. Southern Cal. Edison Co.*** *(1991) 232 Cal. App. 3d 88, 283 Cal. Rptr. 300* , an electricity user sued an electric utility company for negligence and strict products liability, among other theories. The plaintiff's business facilities were destroyed by a fire that resulted from an explosion caused by electricity generated by lightning that struck an adjacent power pole and traversed to the plaintiff's building along the defendant's wires. After denying the defendant the opportunity to present any evidence on the "act of God" defense, the trial court determined that the utility was liable to the plaintiff, as a matter of law, on a product liability theory. It granted the plaintiff's motion for summary adjudication of that issue. The plaintiff then dismissed the negligence cause of action. At trial, the jury awarded the plaintiff damages; the trial court entered judgment in the plaintiff's favor. The defendant appealed.

The court of appeal reversed. It also remanded the matter to the trial court with directions to reinstate the plaintiff's cause of action for negligence and to conduct further proceedings. Because electricity generated by lightning is not a "product," the court held that the defendant could not be liable under the doctrine of strict product liability. It may be liable for negligence, however, if a defect in its transmission facilities allowed nongenerated electricity to reach the plaintiff's facilities (*232 Cal. App. 3d 88, 101-103)* .

In view of its decision to reinstate the negligence cause of action and remand for further proceedings, the court considered the issue of whether the "act of God" defense could apply. The court observed that the expert testimonial evidence, if believed, would have supported a finding that the lightning stroke was so powerful that it would have caused the plaintiff's damages irrespective of the defendant's ability to anticipate an electrical storm or to install lightning arrester gear. In other words, the defendant was arguing that no act or omission of the defendant was the proximate cause of the plaintiff's damage (*232 Cal. App. 3d 88, 103)* . In the court's view, the case presented a classic example of the overlap that exists between an "act of God" defense and the issue of causation (*232 Cal. App. 3d 88, 103)* . The defense that an event was an "act of God" may be asserted in those limited cases in which an unanticipated natural occurrence is the sole cause of a plaintiff's injury or damage. The natural event must be so unusual in its

proportions that it could not be anticipated by a defendant (*232 Cal. App. 3d 88, 103-104)* . It is not enough, however, that the event merely be unforeseeable. The exculpatory rule applies only if human agency does not participate in proximately causing the harm. If a defendant's negligence combines with an "act of God" to cause injury, liability will result (*232 Cal. App. 3d 88, 104)* . The court concluded that it was error for the trial court summarily to dismiss the defensive claim merely because electrical storms are foreseeable. The ruling deprived the defendant of the opportunity to dispute the issue of whether or not any act or omission on its part was a proximate cause of the plaintiff's damage (*232 Cal. App. 3d 88, 105)* . It should be noted that *Mancuso,* in stating that the defense that an event was an "act of God" exists, also acknowledged the viewpoint that the defenses of unavoidable accident and, implicitly, "act of God," have no place in modrn pleading and practice, because they are in reality nothing more than the denial by a defendant of culpable conduct proximately causing a plaintiff's injury or damage [*see Mancuso v. Southern Cal. Edison Co. (1991) 232 Cal. App. 3d 88, 103 n.18, 283 Cal. Rptr. 300* (citing *Butigan v. Yellow Cab Co. (1958) 49 Cal. 2d 652, 658-660, 320 P.2d 500*)].

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16-165 California Points & Authorities §§ 165.324-165.329

[Reserved]

§§ 165.324[Reserved]

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4. Unidentified Causation

16-165 California Points & Authorities § 165.330

§ 165.330 Defendant Has Burden to Prove Defendant's Conduct Was Not Proximate Cause of Plaintiff's Injury

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

BECAUSE PLAINTIFF HAS BROUGHT TWO OR MORE CONCURRENTLY NEGLIGENT DEFENDANTS BEFORE THE COURT, ALL OF WHOM WERE NEGLIGENT, BUT ONLY ONE OF WHOM COULD HAVE BEEN THE PROXIMATE CAUSE OF PLAINTIFF'S INJURY, AS A MATTER OF PUBLIC POLICY THE BURDEN OF PROOF SHOULD BE SHIFTED TO EACH DEFENDANT TO PROVE THAT DEFENDANT'S NEGLIGENCE WAS NOT THE PROXIMATE CAUSE OF THE INJURY. [MOREOVER, DEFENDANT'S FAILURE TO COMPLY WITH A _____ (STATUTE *and/or* ORDINANCE *and/or* ADMINISTRATIVE REGULATION) HAS DEPRIVED PLAINTIFF OF A MEANS OF ESTABLISHING THE CAUSE OF HIS/HER/ITS INJURY].

A. Concurrent Negligence but Single Unidentified Cause. If the injured plaintiff has brought two or more concurrently negligent defendants before the court, all of whom the plaintiff has proved were negligent, but only one of whom could have been the proximate cause of the plaintiff's injury, the burden of proof shifts, as a matter of public policy, to each defendant to prove that his or her negligence was not the proximate cause of the injury (*see Summers v. Tice (1948) 33 Cal. 2d 80, 86, 199 P.2d 1* ; *see also Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 598-599, 163 Cal. Rptr. 132, 607 P.2d 924*).

[*Optional*] **B. Defendant's Statutory Violation Deprived Plaintiff of Means of Establishing Causation.** If the defendant's failure to comply with a statute or safety regulation deprives the plaintiff of a means of establishing the cause of the injury, the burden of proof shifts to the defendant to negate causation (*see Haft v. Lone Palm Hotel (1970) 3 Cal. 3d 756, 771-774, 91 Cal. Rptr. 745, 478 P.2d 465*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the burden of proof should be shifted to each defendant to prove that he or she was not a proximate cause of the plaintiff's injury [*see Summers v. Tice (1948) 33 Cal. 2d 80, 86, 199 P.2d 1]* . This argument arises when the plaintiff has brought two or more concurrently negligent defendants before the court and only one of the defendants has actually caused the plaintiff's injuries. It may arise in several procedural contexts, including opposing a demurrer or on appeal from a judgment in an action for damages for negligence [*see, e.g., Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 598-599, 163 Cal. Rptr. 132, 607 P.2d 924* ; *see also Summers v. Tice (1948) 33 Cal. 2d 80, 86, 199 P.2d 1* (appeal)].

Optional Paragraph B may be submitted to assert that the burden of proof should be shifted to each defendant because the defendant's violation of a statute, ordinance, or administrative regulation has deprived the plaintiff of a means of establishing the cause of his or her injury [*see Haft v. Lone Palm Hotel (1970) 3 Cal. 3d 756, 771-774, 91 Cal. Rptr. 745, 478 P.2d 465* ; *see also Evid. Code § 669(a)*]. This argument may arise in several procedural contexts. For example, the plaintiff may invoke this argument when challenging the adequacy of jury instructions given at trial or when appealing from an adverse judgment in an action for damages for negligence [*see, e.g., McGee v. Cessna Aircraft Co. (1983) 139 Cal. App. 3d 179, 182, 188 Cal. Rptr. 542* (jury instruction); *see also Haft v. Lone Palm Hotel (1970) 3 Cal. 3d 756, 761, 91 Cal. Rptr. 745, 478 P.2d 465* (appeal); *cf. Fagerquist v. Western Sun Aviation, Inc. (1987) 191 Cal. App. 3d 709, 723-726, 236 Cal. Rptr. 633* (facts did not support finding that the defendant's failure to comply prevented the plaintiff from proving causation)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may first argue that the defendants have been concurrently negligent, that is, that the defendants each owed and breached a duty to the plaintiff. Counsel should then argue that, as a matter of public policy, because the plaintiff cannot prove which of the defendants actually caused his or her injuries, the burden of proof should be shifted to the defendants to prove which of them were not responsible for the plaintiff's injury [*see Summers v. Tice (1948) 33 Cal. 2d 80, 86, 199 P.2d 1]* . If optional Paragraph B applies, counsel may also argue that the defendants have been presumptively negligent under the requirements set forth in *Evid. Code § 669(a)*. To do this, counsel may desire to combine this form with the memorandum of points and authorities *in § 165.70*, which sets forth the law regarding duty created by statute, ordinance, or regulation pursuant to *Evid. Code § 669(a)*. Counsel should then show that the defendant's violation of the statute, ordinance, or administrative regulation deprived the plaintiff of a means of establishing the cause of his or her injury and that the burden should therefore be shifted to the defendant to negate causation [*see Haft v. Lone Palm Hotel (1970) 3 Cal. 3d 756, 771-774, 91 Cal. Rptr. 745, 478 P.2d 465]* .

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of complaint for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Concurrent Negligence but Single Unidentified Cause

In ***Summers v. Tice*** *(1948) 33 Cal. 2d 80, 199 P.2d 1* , the plaintiff brought an action against two the defendants for personal injuries suffered in a hunting accident. The defendants, with knowledge of the plaintiff's location, simultaneously fired their shotguns in the plaintiff's direction. The plaintiff was struck in the face and eye by bird shot. It appeared that the shots that caused the injury came from one gun only. Although only one defendant could have caused the injury, the trial court held that the negligence of both the defendants was the legal cause of the injury, or in other words, that both the defendants were responsible. Each the defendant appealed, contending that they were not joint tortfeasors, and thus not jointly and severally liable, because they were not acting in concert. In addition, they argued that there was insufficient evidence to show which the defendant was guilty of the negligence that caused the plaintiff's injuries.

The Supreme Court affirmed, holding that the lower court properly determined that the defendants were jointly liable and thus the negligence of both the defendants was the proximate cause of the injury (*33 Cal. 2d 80, 84)* . The Court noted that when two or more persons by their acts are possibly the sole cause of a harm, or when two or more acts of the same person are possibly the sole cause, and the plaintiff has introduced evidence that one of the two persons, or one of the same person's two acts is culpable, then the defendant has the burden of proving that the other person, or his or her other act was the sole cause of the harm (*33 Cal. 2d 80, 85)* . The Court stated that when it considered the relative position of the parties and the results that would flow if the plaintiff was required to attribute the injury to only one of the defendants, a requirement that the burden of proof on that subject be shifted to the defendants becomes manifest. The Court noted that both the defendants are wrongdoers and negligent toward the plaintiff. Because the defendants caused a situation in which the negligence of one of them injured the plaintiff, each of them should absolve himself if possible. The injured party has been placed by the defendants in the unfair position of determining which the defendant caused the harm. If one defendant can escape liability, the other the defendant may also escape liability, and then the plaintiff would be remediless. In addition, the defendants are ordinarily in a far better position to offer evidence to determine which one caused the injury (*33 Cal. 2d 80, 86)* . Furthermore, because of public policy reasons, each defendant is liable for the whole damage whether they are deemed to be acting in concert or independently (*33 Cal. 2d 80, 87-88)* .

NOTE:

The rule established in *Summers v. Tice (1948) 33 Cal. 2d 80, 86, 199 P.2d 1* , applies whenever there are multiple tortfeasors, at least one of whom proximately caused the plaintiff's injury, regardless of whether all of the tortfeasors have been joined as the defendants. Thus, it may be proper to shift the burden of proof to a defendant to prove he or she was not negligent, even though the action has gone to trial with only one defendant, because the plaintiff has previously settled with the other joint tortfeasors [*see* *Vahey v. Sacia (1981) 126 Cal. App. 3d 171, 177, 178 Cal. Rptr. 559]* .

In ***Sindell v. Abbott Lab.*** *(1980) 26 Cal. 3d 588, 163 Cal. Rptr. 132, 607 P.2d 924* , the plaintiff Judith Sindell brought an action against 11 drug companies and Does 1 through 100, on behalf of herself and other women similarly situated. The defendants were engaged in the business of manufacturing, promoting, and marketing diethylstilbestrol (DES), a drug that was administered to the plaintiff's mother for the purpose of preventing miscarriages. DES was later discovered to cause cancerous and precancerous growths in the daughters of the mothers who took it. As a result of DES ingested by her mother, the plaintiff developed a malignant bladder tumor. Although she could not identify the particular manufacturer that produced the DES taken by her mother, the plaintiff's complaint suggested three theories on which the defendants may be held liable for her injuries. One of theories presented, classically illustrated by *Summers v. Tice (1948) 33 Cal. 2d 80, 85-86, 199 P.2d 1* , placed the burden of proof of causation on tortious the defendants in certain circumstances. The second theory was that the defendants acted "in concert" to cause her injury. The plaintiff's third theory was based on "industry-wide" liability, that is, that the industry-wide standard itself was the cause of the plaintiff's injury. The trial court dismissed the action after sustaining the defendants demurrers without leave to amend. The plaintiff appealed.

The Supreme Court reversed. Although it concluded that none of the plaintiff's suggested doctrines could be applied to hold the defendants liable, it proposed a fourth basis for permitting the action to be tried, based on an extension of the *Summers* doctrine (*26 Cal. 3d 588, 598)* . The Court stated that it was reasonable to measure the likelihood that any of the defendants supplied the product that allegedly injured the plaintiff by the percentage that the DES sold by each of them for the purpose of preventing miscarriage bears to the entire production of the drug sold by all for that purpose (*26 Cal. 3d 588, 611-612)* . The Court held that each defendant should be held liable for the proportion of the judgment represented by its share of that market unless it demonstrates that it could not have made the product that caused the plaintiff's injuries (*26 Cal. 3d 588, 611-612)* . In reaching this conclusion, the Court discussed *Summers v. Tice (1948) 33 Cal. 2d 80, 199 P.2d 1* . The *Summers* doctrine, often referred to as the "alternative liability" theory, states that if a party cannot identify which of two or more the defendants caused an injury, then the burden of proof may shift to the defendants to show that they were not responsible for the harm caused (*26 Cal. 3d 588, 598-599)* . The Court concluded that the fact that the defendants did not have greater access to information that might establish the identity of the manufacturer did not per se prevent application of the *Summers* rule (*26 Cal. 3d 588, 600-602)* . The Court, however, found that the plaintiff could not prevail in her claim that the *Summers* rationale should govern, at least as the rationale had previously been applied. In *Summers,* all the parties who were or could have been responsible for the harm to the plaintiff were joined as the defendants. Here, by contrast, there were approximately 200 drug companies that made DES, any of which might have manufactured the injury-producing drug (*26 Cal. 3d 588, 602)* . Because the plaintiff only named five the defendants in her suit, the possibility that any of these five the defendants supplied DES to the plaintiff's mother was so remote that it would be unfair to require each defendant to exonerate itself (*26 Cal. 3d 588, 603)* . The Court, however, found forceful arguments in favor of holding that the plaintiff had a cause of action. The most persuasive of these arguments was that advanced in *Summers,* that is, between an innocent the plaintiff and negligent defendants, the defendants should bear the cost of the injury (*26 Cal. 3d 588, 610-611)* . In addition, if the plaintiff joins in her action the manufacturers of a substantial share of the DES that her mother might have taken, the injustice of shifting the burden of proof is significantly diminished. The manufacturers named by the plaintiff may in turn cross-complain against other nonjoined DES manufacturers that may have supplied the injury-causing product (*26 Cal. 3d 588, 612)* .

[b] Defendant's Statutory Violation Deprived Plaintiff of Means of Establishing Causation

The factual and procedural background of ***Haft v. Lone Palm Hotel*** *(1970) 3 Cal. 3d 756, 91 Cal. Rptr. 745, 478 P.2d 465* , is discussed in *§ 165.70[3][b]*. In that action, the Supreme Court noted that no direct evidence revealed the manner in which the drownings occurred. The Court found, however, that uncontroverted evidence established that while the defendants had furnished the lounging space, wading pool, and swimming pool, they failed to provide any safety measures required by law for pools available for the use of the public (*3 Cal. 3d 756, 762-763)* . Because the defendants had violated several statutes and administrative regulations regarding the maintenance of swimming pools, they were unquestionably negligent as a matter of law (*3 Cal. 3d 756, 763)* .

The Court found, however, that this proof of negligence alone did not automatically establish liability. The plaintiffs still bore the initial burden of showing that the defendants' negligence was a proximate cause of the deaths. The Court also stated that the breach of a statutory duty will often suffice to give rise to an inference from which a jury may find that a given injury was the actual or proximate result of the violation (*3 Cal. 3d 756, 765)* . The Court held that the plaintiffs, in proving the defendants' violation of the statutory lifeguard requirement, sustained their initial burden of proof on the issue of causation. The burden then shifted to the defendants to show that their violation was not a proximate cause of the deaths (*3 Cal. 3d 756, 765)* . The Court explained that under former Health & Safety Code § 24101.4 [*now see Health & Safety Code § 116045*], pool owners who fail either to provide lifeguard services or to post a sign warning of the absence of a lifeguard are, as a matter of statutory policy, responsible for the consequences attributable to a failure to provide lifeguard services (*3 Cal. 3d 756, 766-769)* . Because the defendants failed to provide these services, the burden shifted to them to prove that their violation was not a proximate cause of the deaths. In the absence of this proof, the defendants' causation is established as a matter of law (*3 Cal. 3d 756, 769)* . The Court added that the instant action presented a stronger case for shifting the burden of proof than did *Summers v. Tice (1948)*

33 Cal. 2d 80, 85-86, 199 P.2d 1 [*see § 165.330[3][a]*]. In this case, the defendants are more culpably responsible for the uncertainty of proof than in *Summers*. Although the difficulty in proof in *Summers* was attributable to the coincidence of the defendants' actions, each hunter was negligent, not because he shot simultaneously with the other defendant, but only because he shot in the direction of the plaintiff. The uncertainty of proof in that situation, while emanating from the defendants' conduct, was not a foreseeable consequence of the defendants' negligence. On the other hand, in this case the absence of definite evidence on causation was a direct and foreseeable result of the defendants' negligent failure to provide a lifeguard. Thus, the defendants may more appropriately be designated at fault for the factual deficiencies that were present (*3 Cal. 3d 756, 773-774)* . Because the respective burdens of proof were unclear at the time of trial, the Court determined that justice would be best served by a remand of the cause for a new trial (*3 Cal. 3d 756, 765, 779)* .

[4] Additional Authorities

[a] Concurrent Negligence But Single Unidentified Cause

Vahey v. Sacia (1981) 126 Cal. App. 3d 171, 178 Cal. Rptr. 559 , involved an action for personal injuries brought by a passenger of one of five cars involved in an automobile collision. The plaintiff settled the case with three other the defendants. The case went to trial only against the nonsettling defendant. The jury returned a verdict in favor of the defendant. In reversing the judgment for the defendant, the court of appeal held that the lower court committed reversible error in refusing the plaintiff's requested jury instruction regarding a shift in the burden of proof. The court restated the doctrine of *Summers v. Tice (1948) 33 Cal. 2d 80, 85-86, 199 P.2d 1* . The court stated that when two or more persons who, by their acts, are possibly the sole cause of a harm, and the plaintiff has introduced evidence that one of the two persons is culpable, then the defendant has the burden of proving that the other person was the sole cause of the harm (*126 Cal. App. 3d 171, 174-175)* .

[b] Defendant's Statutory Violation Deprived Plaintiff of Means of Establishing Causation

In *McGee v. Cessna Aircraft Co. (1983) 139 Cal. App. 3d 179, 188 Cal. Rptr. 542* , the plaintiff brought a products liability action against an aircraft manufacturer (Cessna) to recover damages for burns suffered when her airplane caught fire after a crash. In reversing a lower court judgment for Cessna, the court of appeal found that the trial court erroneously failed to instruct the jury to shift the burden of proving proximate causation. The plaintiff contended that Cessna had been presumptively negligent under *Evid. Code § 669(a)* because Cessna violated federal air regulations regarding requirements for airplane firewalls and for the protection of airplane occupants in emergency landing conditions. The court stated that once the plaintiff proved that (1) the defendant violated the regulations, (2) the plaintiff's injury resulted from an occurrence that the regulations were designed to prevent, and (3) she was within the class of persons protected by the statute, the issue regarding proximate cause should have been shifted to the defendant to prove that its violations were not the proximate cause of the plaintiff's injury (*139 Cal. App. 3d 179, 186-187)* . The court noted that the burden on this issue was critical because the fire also destroyed the physical evidence (*139 Cal. App. 3d 179, 187)* .

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[Reserved]

§§ 165.331[Reserved]

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D. Proof by Application of Res Ipsa Loquitur Presumption
1. Presumption Applicable

16-165 California Points & Authorities § 165.340

§ 165.340 Conditions for Application of Res Ipsa Loquitur Presumption Have Been Met

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE DOCTRINE OF RES IPSA LOQUITUR SHOULD BE APPLIED IN THIS CASE BECAUSE _____ [*describe occurrence*] (1) IS AN OCCURRENCE OF A KIND THAT ORDINARILY DOES NOT OCCUR IN THE ABSENCE OF SOMEONE'S NEGLIGENCE; (2) WAS CAUSED BY AN AGENCY OR INSTRUMENTALITY WITHIN THE EXCLUSIVE CONTROL OF DEFENDANT _____ [*name*]; AND (3) WAS NOT DUE TO ANY VOLUNTARY ACTION OR CONTRIBUTION ON THE PART OF PLAINTIFF.

A. Accident Was Probable Result of Negligence. The doctrine of res ipsa loquitur is applicable if the accident is of such a nature that it can be said, in light of past experience, that it probably was the result of negligence by someone and that the defendant is probably the one responsible (*Newing v. Cheatham (1975) 15 Cal. 3d 351, 359, 124 Cal. Rptr. 193, 540 P.2d 33*).

B. Conditions for Application of Doctrine Have Been Met. The three conditions for the application of the doctrine of res ipsa loquitur are: (1) the accident must be of a kind that ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; and (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff (*Newing v. Cheatham (1975) 15 Cal. 3d 351, 359, 124 Cal. Rptr. 193, 540 P.2d 33* ; *Ybarra v. Spangard (1944) 25 Cal. 2d 486, 489, 154 P.2d 687*).

C. Existence of Conditions Is Question of Fact Unless Facts Are Undisputed. The existence of one or more of the conditions for application of the res ipsa loquitur presumption is usually a question of fact for the jury; but when facts supporting all three conditions are undisputed, the inference of the defendant's negligence arises as a matter of law (

Newing v. Cheatham (1975) 15 Cal. 3d 351, 359, 364, 124 Cal. Rptr. 193, 540 P.2d 33).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the doctrine of res ipsa loquitur should be applied in this case [*see Newing v. Cheatham (1975) 15 Cal. 3d 351, 359, 124 Cal. Rptr. 193, 540 P.2d 33]* . This form should be combined with any of the *forms in §§ 165.341 -165.344* that are applicable to the particular case.

This argument may arise, for example, in supporting the plaintiff's motion for summary judgment, directed verdict, judgment notwithstanding the verdict, or new trial [*see, e.g., Kaiser Steel Corp. v. Westinghouse Elec. Corp. (1976) 55 Cal. App. 3d 737, 740, 127 Cal. Rptr. 838* (summary judgment); *Newing v. Cheatham (1975) 15 Cal. 3d 351, 355, 124 Cal. Rptr. 193, 540 P.2d 33* (directed verdict); *see also Roddiscraft, Inc. v. Skelton Logging Co. (1963) 212 Cal. App. 2d 784, 790, 28 Cal. Rptr. 277* (new trial)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may discuss facts showing that each of the three conditions for the application of the doctrine of res ipsa loquitur exist [*see Ybarra v. Spangard (1944) 25 Cal. 2d 486, 489, 154 P.2d 687]* .

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and a form of complaint regarding the doctrine of res ipsa loquitur, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§§ 165.341 -165.344*. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in §§ 165.360 -165.362* and *§§ 165.370 -165.371* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Accident Was Probable Result of Negligence

In ***Newing v. Cheatham*** *(1975) 15 Cal. 3d 351, 124 Cal. Rptr. 193, 540 P.2d 33* , the surviving wife and children of a decedent brought an action for damages for wrongful death arising out of the crash of a private airplane. Three persons, the plaintiffs' decedent, Harold Cheatham, and a third party, departed in an airplane. When the plane failed to return, a search was commenced. A rescue party found the wreckage of the plane, in which all three occupants were dead. The plaintiffs alleged that the crash was caused by pilot Harold Cheatham's negligence, and brought the action against the administrator of the estate of the deceased pilot of the plane. The plaintiffs contended that the pilot had negligently

permitted the plane to run out of fuel; that the pilot had been negligent as a matter of law because he had violated applicable federal air regulations; and that his negligence was established by the doctrine of res ipsa loquitur. The jury found in favor of the plaintiffs. The defendant appealed, contending that the trial court erroneously directed a verdict on the issue of liability.

The Supreme Court affirmed, stating that it is settled law in this state that the doctrine of res ipsa loquitur is applicable when the accident is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone and that the defendant is probably the one responsible (*15 Cal. 3d 351, 359)* . The Court then examined the conditions for the application of the doctrine and found that, as a matter of law, the conditions were satisfied (*15 Cal. 3d 351, 359-364)* . Consequently, the Court found that the lower court correctly concluded that res ipsa loquitur established Cheatham's negligence as a matter of law (*15 Cal. 3d 351, 365)* .

[b] Conditions for Application of Doctrine Have Been Met

The factual and procedural background of ***Newing v. Cheatham*** *(1975) 15 Cal. 3d 351, 124 Cal. Rptr. 193, 540 P.2d 33* , is discussed in *§ 165.340[3][a]*. The Supreme Court affirmed judgment for the plaintiffs in an action for damages based on the wrongful death of the plaintiffs' decedent arising out of the crash of a private airplane. In reviewing whether or not the trial court properly applied the doctrine of res ipsa loquitur in this case, the Court noted that according to the classic statement, the three conditions for application of the doctrine are: (1) the accident must be of a kind that ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; and (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff (*15 Cal. 3d 351, 359)* . The Court concluded that, as a matter of law, the conditions were satisfied and that the trial court properly applied the doctrine of res ipsa loquitur (*15 Cal. 3d 351, 359-364)* .

In ***Ybarra v. Spangard*** *(1944) 25 Cal. 2d 486, 154 P.2d 687* , the plaintiff sustained an injury while unconscious on an operating table. He was confronted with the task of proving which of the many doctors and attendants who participated in the operation were responsible for his injury. The trial court entered judgments of nonsuit as to all the defendants; the plaintiff appealed. The plaintiff contended that the doctrine of res ipsa loquitur should be applied, and that the inference of negligence arising from it made the granting of the nonsuit improper. The defendants contended that assuming that the plaintiff's condition was the result of an injury, there was no showing that the act of any particular the defendant, nor any particular instrumentality, was the cause of the injury.

In view of the magnitude and unfairness of the plaintiff's burden, the Supreme Court found that under the doctrine of res ipsa loquitur, the plaintiff could maintain his claim against all persons who had any connection with the operation, even though he could not select which particular person or which particular acts led to his injury (*25 Cal. 2d 486, 491-492)* . The Court thus placed the burden on the individual the defendants to demonstrate their noninvolvement (*25 Cal. 2d 486, 494)* . In reaching this conclusion, the Court noted that the doctrine of res ipsa loquitur has three conditions: (1) the accident must be of a kind that ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; and (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff (*25 Cal. 2d 486, 489)* . The Court concluded that the condition that the injury must not have been due to the plaintiff's voluntary action was fully satisfied under the evidence produced, as was the condition that the accident must be one that ordinarily does not occur unless someone was negligent (*25 Cal. 2d 486, 491)* . The defendants had argued that the plaintiff had not shown an injury caused by an instrumentality under the defendant's control, because the plaintiff had not shown (1) which of the several instrumentalities that he came in contact with while in the hospital caused his injury, and (2) that any one defendant or his servants had exclusive control over any particular instrumentality (*25 Cal. 2d 486, 491)* . However, the Court stated that it did not believe that either the number or relationship of the defendants alone determined whether the doctrine of res ipsa loquitur applied. Every the defendant in whose custody the plaintiff was placed for any period was bound to exercise ordinary care to see that no unnecessary harm came to the plaintiff. Each would be liable for failure in this

regard (*25 Cal. 2d 486, 491-492)* . The control, at one time or another, of one or more of the various agencies or instrumentalities that might have harmed plaintiff, was in the hands of every the defendant or of his or her employees or temporary servants. The Court thought that this was sufficient to place the burden of the initial explanation on them. The plaintiff was rendered unconscious for the purpose of undergoing surgical treatment by the defendants. Thus, it was manifestly unreasonable for them to insist that he identify any one of them as the person who performed the alleged negligent act (*25 Cal. 2d 486, 492)* . In addition, the Court found that the plaintiff need not identify the specific instrumentality that injured him. It is enough, the Court noted, that the plaintiff can show an injury resulting from an external force applied while he lay unconscious in the hospital. This was as clear a case of identification of the instrumentality as the plaintiff may ever be able to make (*25 Cal. 2d 486, 492-493)* .

[c] Existence of Conditions Is Question of Fact Unless Facts Are Undisputed

The factual and procedural background of ***Newing v. Cheatham*** *(1975) 15 Cal. 3d 351, 124 Cal. Rptr. 193, 540 P.2d 33* , is discussed in *§ 165.340[3][a]*. In affirming judgment for the plaintiffs in an action in which the doctrine of res ipsa loquitur was applied by the trial court, the Supreme Court noted that there were three conditions for the application of the doctrine. The existence of one or more of these conditions is usually a question of fact for the jury. In a proper case, however, they may exist as a matter of law (*15 Cal. 3d 351, 359)* . In this case, the Court stated that the evidence presented in the trial court satisfied all three conditions for the applicability of the doctrine of res ipsa loquitur as a matter of law. Inasmuch as the facts giving rise to the doctrine were undisputed, the inference of negligence arose as a matter of law. In other words, the conclusion is feasible that there was a balance of probabilities pointing to the deceased pilot's negligence (*15 Cal. 3d 351, 364)* . Because the defendant did not introduce sufficient evidence to sustain a finding that the deceased pilot was not negligent, the Supreme Court concluded that the trial court correctly found that res ipsa loquitur established the pilot's negligence as a matter of law (*15 Cal. 3d 351, 364-365)* .

[4] Additional Authorities

[a] Accident Was Probable Result of Negligence

In *Di Mare v. Cresci (1962) 58 Cal. 2d 292, 23 Cal. Rptr. 772, 373 P.2d 860* , a woman brought an action against the owner of the apartment building in which she was a tenant. She alleged personal injuries suffered when a wooden stairway collapsed as she descended from her apartment. In affirming judgment for the plaintiff, the court of appeal approved the trial court's jury instruction based on the doctrine of res ipsa loquitur (*58 Cal. 2d 292, 298)* . The court stated that the doctrine of res ipsa loquitur is applicable when the accident is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence and that the defendant is probably the one responsible (*58 Cal. 2d 292, 298-299)* . The court noted that ordinarily steps that are part of a common stairway do not collapse when used by a tenant in a normal manner, unless the landlord who has had the duty to maintain and inspect them was negligent (*58 Cal. 2d 292, 299)* .

[b] Conditions for Application of Doctrine Have Been Met

In *Sanchez v. Bay Gen. Hosp. (1981) 116 Cal. App. 3d 776, 172 Cal. Rptr. 342* , the four minor children of the decedent brought an action for damages for their mother's wrongful death resulting from the alleged negligence of the nursing staff of the defendant Bay General Hospital (Hospital). Evidence presented at trial showed that (1) the decedent's death occurred because of a lack of adherence to basic nursing principles, (2) the decedent was under the exclusive control of the defendant's nursing staff, and (3) the decedent was not contributorily negligent (*116 Cal. App. 3d 776, 787-788)* . The court of appeal affirmed judgment for the plaintiffs, finding that the lower court properly directed a verdict on the issue of liability. In deciding that the doctrine of res ipsa loquitur was applicable in this case, the court stated that there were three conditions for the application of the doctrine. Quoting *Newing v. Cheatham (1975) 15 Cal. 3d 351, 359, 124 Cal. Rptr. 193, 540 P.2d 33* [*see § 165.340[3][a]*], the court stated that (1) the accident must be of a kind that ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; and (3) it must not have been due to any

voluntary action or contribution on the part of the plaintiff (*116 Cal. App. 3d 776, 786)* . The court concluded that the doctrine of res ipsa loquitur was applicable as a matter of law, and that the defendant Hospital did not carry its burden of producing sufficient evidence to rebut the presumption (*116 Cal. App. 3d 776, 789-793)* .

In *Roddiscraft, Inc. v. Skelton Logging Co. (1963) 212 Cal. App. 2d 784, 28 Cal. Rptr. 277* , the plaintiff brought an action for damages caused by a forest fire. The trial court granted the plaintiffs' motion for a new trial following a verdict for the defendant, on the ground that it erroneously refused a jury instruction on the doctrine of res ipsa loquitur. The court of appeal noted that before the doctrine may be applied, the following requisite conditions must be met: (1) the accident must be of a kind that ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; and (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff (*212 Cal. App. 2d 784, 793)* . After a detailed discussion of each condition, the court found that each had been met and determined that the doctrine applied to the facts of the case (*212 Cal. App. 2d 784, 795-802)* .

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
CHAPTER 165 NEGLIGENCE
PART II. FORMS
D. Proof by Application of Res Ipsa Loquitur Presumption
1. Presumption Applicable

16-165 California Points & Authorities § 165.341

§ 165.341 Res Ipsa Loquitur Presumption Applies Because Accident Was Kind Not Ordinarily Occurring in Absence of Negligence

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE DOCTRINE OF RES IPSA LOQUITUR SHOULD BE APPLIED IN THIS CASE BECAUSE _____ [*describe occurrence*] WAS AN OCCURRENCE OF SUCH A NATURE THAT IT WOULD ORDINARILY NOT OCCUR IN THE ABSENCE OF NEGLIGENCE.

A. Conditions for Application of Doctrine Have Been Met. [*See § 165.340*, Paragraph B].

B. Determination of Whether Accident Is Kind Not Occurring in Absence of Negligence. In determining whether or not an accident is of the type that does not ordinarily occur in the absence of negligence, a court may consider common knowledge, the testimony of expert witnesses, and the circumstances relating to the particular accident at issue; negligence need not be concluded to be the only explanation of the accident but merely the most probable one (*Newing v. Cheatham (1975) 15 Cal. 3d 351, 359-360, 124 Cal. Rptr. 193, 540 P.2d 33*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the doctrine of res ipsa loquitur should apply because the criteria for its application have been met, particularly with respect to the requirement that the accident is of a type that would not otherwise occur in the absence of negligence [*see Newing v. Cheatham (1975) 15 Cal. 3d 351, 359-360, 124 Cal. Rptr. 193, 540 P.2d 33]* . It should be combined with any of the *forms in § 165.340* and *§§ 165.342 -165.344* that are applicable to the particular case.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may discuss the circumstances of the occurrence, and argue that it would not have occurred in the absence of negligence.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and a form of complaint regarding the doctrine of res ipsa loquitur, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§ 165.340* and *§§ 165.342 -165.344*. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in §§ 165.360 -165.362* and *§§ 165.370 -165.371* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Determination of Whether Accident Is Kind Not Occurring in Absence of Negligence

The factual and procedural background of ***Newing v. Cheatham*** *(1975) 15 Cal. 3d 351, 124 Cal. Rptr. 193, 540 P.2d 33* , is discussed in *§ 165.340[3][a]*. In *Newing,* the plaintiffs alleged that the airplane crash was caused by the pilot's negligence, and brought the action against the administrator of his estate. Expert testimony presented by the plaintiffs at trial indicated that the plane had crashed because it had run out of fuel. In examining whether or not the trial court properly applied the doctrine of res ipsa loquitur in this case, the Court addressed the first condition, that is, that the accident must be of a kind that ordinarily does not occur in the absence of negligence. The Court noted that in determining whether this condition is satisfied, a court may consider common knowledge, the testimony of expert witnesses, and the circumstances relating to the particular accident at issue. A court need conclude not that negligence is the only explanation of the accident but rather that it is the most probable one (*15 Cal. 3d 351, 359-360)* . The Court stated that the first condition is satisfied if, under the facts of the case, common experience indicates that the accident would not have occurred unless there had been negligence on someone's part (*15 Cal. 3d 351, 361)* . In this case, it seemed reasonably clear in light of the circumstances surrounding the crash that the accident ordinarily would not have taken place in the absence of negligence. The evidence was uncontradicted that the airplane took off in clear weather with no restrictions on visibility. There was evidence neither that weather conditions contributed in any way to the crash of the plane, nor that the plane collided with another while in flight. Indeed, the Court noted that the condition of the plane after the crash eliminated the possibility of a collision. The plane apparently fell to the ground unaffected by external factors, only a few miles from the airport from where it had departed some hours earlier. The Court concluded that the evidence on these circumstances was not only uncontradicted but of such a nature that no issue of fact was raised as to the existence of the first condition for the application of the doctrine of res ipsa loquitur. Thus, the Court concluded that the first condition was established as a matter of law (*15 Cal. 3d 351, 361-362)* .

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
CHAPTER 165 NEGLIGENCE
PART II. FORMS
D. Proof by Application of Res Ipsa Loquitur Presumption
1. Presumption Applicable

16-165 California Points & Authorities § 165.342

§ 165.342 Res Ipsa Loquitur Presumption Applies Because Defendant Had Exclusive Control of Instrumentality Causing Accident

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE DOCTRINE OF RES IPSA LOQUITUR SHOULD BE APPLIED IN THIS CASE BECAUSE DEFENDANT HAD EXCLUSIVE CONTROL OF _____ [*describe*], WHICH WAS THE INSTRUMENTALITY THAT CAUSED THE ACCIDENT.

A. Conditions for Application of Doctrine Have Been Met. [*See § 165.340*, Paragraph B].

B. Defendant Had Exclusive Control of Instrumentality Causing Accident. The second condition of the doctrine of res ipsa loquitur is that the agency or instrumentality causing the accident must have been within the exclusive control or management of the defendant. The purpose of this requirement is to link the defendant with the probability that the accident was negligently caused (*Newing v. Cheatham (1975) 15 Cal. 3d 351, 362, 124 Cal. Rptr. 193, 540 P.2d 33*).

[*Optional*] **C. Joint and Exclusive Control of Instrumentality by Multiple Defendants.** The exclusive control required by the doctrine of res ipsa loquitur is not the exclusive control of any one defendant. When the control, at one time or another, of the agency that might have harmed the plaintiff was in the hands of several the defendants, the initial burden of explanation shifts to each defendant having that control (*Ybarra v. Spangard (1944) 25 Cal. 2d 486, 490-493, 154 P.2d 687* ; *Martinides v. Mayer (1989) 208 Cal. App. 3d 1185, 1195, 256 Cal. Rptr. 679*).

[*Optional*] **D. Doctrine Applies Despite Relinquishment of Control by Defendant.** The fact that the accident occurs some time after the defendant relinquishes control of the instrumentality that causes the accident does not preclude application of the doctrine of res ipsa loquitur, provided that there is evidence that the instrumentality had not been improperly handled by the plaintiff or by some third person, or its condition had otherwise been changed after the

control was relinquished by the defendant (*Zentz v. Coca Cola Bottling Co. (1952) 39 Cal. 2d 436, 444, 247 P.2d 344*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the doctrine of res ipsa loquitur should apply because the criteria for its application have been met, particularly with respect to the requirement that the defendant have exclusive control of the instrumentality causing the accident [*see Newing v. Cheatham (1975) 15 Cal. 3d 351, 362, 124 Cal. Rptr. 193, 540 P.2d 33]* . Optional Paragraph C may be submitted to assert that the exclusive control need not have been isolated to any one defendant [*see Ybarra v. Spangard (1944) 25 Cal. 2d 486, 490-493, 154 P.2d 687]* . Optional Paragraph D may be submitted to assert that doctrine applies even though the defendant relinquished control over the instrumentality. This paragraph may be used if there is evidence that the instrumentality had not been improperly handled by the plaintiff or by some third person, or its condition had otherwise been changed, after the control was relinquished [*see Zentz v. Coca Cola Bottling Co. (1952) 39 Cal. 2d 436, 444, 247 P.2d 344]* . This form should be combined with any of the *forms in §§ 165.340 -165.341* and *§§ 165.343 -165.344* that are applicable to the particular case.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may discuss facts showing that the defendant had exclusive control over the instrumentality in question. If Optional Paragraph C is appropriate, counsel may also argue that joint control over the instrumentality does not negate the doctrine. If Optional Paragraph D is appropriate, counsel may also argue that although the defendant relinquished control over the instrumentality, no third person improperly handled it after that point.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and a form of complaint regarding the doctrine of res ipsa loquitur, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§§ 165.340 -165.341* and *§§ 165.343 -165.344*. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in §§ 165.360 -165.362* and *§§ 165.370 -165.371* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Defendant Had Exclusive Control of Instrumentality Causing Accident

The factual and procedural background of ***Newing v. Cheatham*** *(1975) 15 Cal. 3d 351, 124 Cal. Rptr. 193, 540 P.2d 33* , is discussed in *§ 165.340[3][a]*. In *Newing,* the California Supreme Court examined whether or not the trial court properly applied the doctrine of res ipsa loquitur. The Court stated that the doctrine's second condition, as traditionally formulated, is that the agency or instrumentality causing the accident must have been within the exclusive control or management of the defendant. The purpose of this requirement is to link the defendant with the probability that the accident was negligently caused. The Court stated that the facts of this case satisfied this condition. The pilot of the plane was the owner of the aircraft; there was no dispute that he was at the controls when the plane took off on its final flight. The Court stated that because neither of his passengers was a licensed pilot, there was no reason to suppose that anyone other than the pilot operated the plane at any time before the crash. Moreover, the pilot's ultimate responsibility for the crash was established by applicable federal air regulations (*15 Cal. 3d 351, 362)* . Although the defendant contended that the plaintiffs had not negated the possibility that the crash was caused by something other than the manner in which the plane was operated, and that crashes commonly occur because of mechanical failures, the Court held that the record was devoid of evidence of mechanical failure (*15 Cal. 3d 351, 362-363)* . Furthermore, the Court noted that even if such evidence had been produced, it would be irrelevant to the issue of whether or not the airplane was within the exclusive control of the pilot. The Court concluded that with respect to the operation and maintenance of the aircraft, the control exercised by the owner-pilot was complete, and that there could be no doubt that this element of the doctrine existed as a matter of law (*15 Cal. 3d 351, 363)* .

[b] Joint and Exclusive Control of Instrumentality by Multiple Defendants

The factual and procedural background of ***Ybarra v. Spangard*** *(1944) 25 Cal. 2d 486, 154 P.2d 687* , is discussed in *§ 165.340[3][b]*. In *Ybarra,* the defendants took the position that, assuming the plaintiff's condition was in fact the result of an injury, there was no showing that the act of any particular the defendant, nor any particular instrumentality, was the cause of the injury. The Supreme Court reversed the judgment for the defendants. It held that when a plaintiff receives unusual injuries while unconscious and in the course of medical treatment, all those the defendants who had any control over the plaintiff's body or the instrumentalities that might have caused the injuries may properly be called on to meet the inference of negligence by giving an explanation of their conduct. The Court stated that application of the doctrine of res ipsa loquitur was appropriate because the control, at one time or another, of one or more of the various agencies or instrumentalities that might have harmed the plaintiff was in the hands of every the defendant or his or her employees or temporary servants (*25 Cal. 2d 486, 492-494)* .

Martinides v. Mayer *(1989) 208 Cal. App. 3d 1185, 1195, 256 Cal. Rptr. 679* , was an action to recover damages for personal injuries suffered by the plaintiff when she was hit by a car. The jury returned its verdict in favor of the plaintiff and against two the defendants, finding that each defendant negligently operated the vehicle at the time of the accident. The defendant appealed, asserting that the trial court erred by erroneously allowing the jury to apply the doctrine of res ipsa loquitur, on the ground that it was physically and legally impossible under the facts presented for both the defendants to operate the vehicle simultaneously.

The court of appeal affirmed. The court held that in view of suit having been brought against both of the parties who had joint and exclusive right of control and access to the vehicle and the jury's implicit determination that each of the defendants failed to rebut the inference that he or she negligently caused the accident, for the purposes of civil liability each was deemed to be the negligent driver who legally caused the accident. The court quoted *Ybarra v. Spangard (1944) 25 Cal. 2d 486, 490-493, 154 P.2d 687* (discussed in *§ 165.340[3][b]*), which stated application of the res ipsa loquitur doctrine requires that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to the defendants but inaccessible to the injured person. The court, citing *Poulsen v. Charlton (1964) 224 Cal. App. 2d 262, 268, 36 Cal. Rptr. 347* , also noted that the exclusive control required by the doctrine of res ipsa loquitur is not the exclusive control of any one defendant. All that it necessary is that the plaintiff eliminate the probability that the accident was caused by someone other than the defendants (*208 Cal. App. 3d 1185, 1194-1195)* .

[c] Doctrine Applies Despite Relinquishment of Control by Defendant

In ***Zentz v. Coca Cola Bottling Co.*** *(1952) 39 Cal. 2d 436, 247 P.2d 344* , the plaintiff brought an action to recover damages for personal injuries suffered when she was injured by an exploding Coca Cola bottle that had been bottled and delivered by the defendant. The driver of the defendant's truck delivered several cases of Coca Cola to the plaintiff's restaurant and put the bottles in the cooler. No one else handled the bottles from the time they were loaded in the truck until they were placed in the cooler. An hour after the delivery, the plaintiff reached into the cooler. Before she touched any of the bottles, one exploded, cutting her arm severely. The jury rendered a verdict for the plaintiff. The defendant appealed, contending that the trial court improperly gave a jury instruction based on the doctrine of res ipsa loquitur.

The Supreme Court affirmed. Discussing the conditions for the application of the doctrine, the Court noted that the defendant must have management or control of the agency or instrumentality that caused the injury. The Court also noted that the requirement of control is not an absolute one (*39 Cal. 2d 436, 443)* . Although the doctrine will not ordinarily apply if it is equally probable that the negligence was that of someone other than the defendant, the plaintiff need not exclude all other persons who might possibly have been responsible for injury when the defendant's negligence appears to be the more probable explanation of the accident (*39 Cal. 2d 436, 443-444)* . In addition, the Court stated that the occurrence of accident some time after the defendant relinquished control of the instrumentality causing the accident does not preclude application of the doctrine, provided that there is evidence that the instrumentality had not been improperly handled by the plaintiff or by some third person, or its condition had otherwise been changed after control was relinquished by the defendant. The defendant, however, must have had sufficient control or connection with the accident to support the finding that he or she was more probably than not the person responsible for the plaintiff's injury (*39 Cal. 2d 436, 444)* .

The Court stated that it was reasonably clear that the accident probably would not have occurred without negligence by someone. The bottle may have been improperly handled, improperly inspected, filled with excessive gas, or improperly manufactured. The question of control presented more difficulty for the Court. It was undisputed that the defendant had control over the bottle and its contents for a substantial portion of the time during which the defect might have been created or discovered. The Court noted, however, that the defendant did not have control after the bottle was delivered to the restaurant (*39 Cal. 2d 436, 447)* . The plaintiff, however, introduced evidence sufficient to warrant an inference that the bottle was not mistreated subsequent to the time it was placed in the cooler. The plaintiff did not handle any of the bottles that were delivered by the defendant. The bottle simply exploded without being touched when the plaintiff reached into the cooler. Although the plaintiff's employees removed some of the bottles, the construction of the cooler was such that the bottles would ordinarily be lifted straight up without disturbing any of those remaining. The Court stated that the plaintiff need not eliminate every remote possibility of damage to the bottle after the defendant relinquished control. A court could reasonably infer that the bottle that exploded was not damaged by the plaintiff or by any third person after it was left by the defendant's driver (*39 Cal. 2d 436, 447-448)* . Because sound and properly prepared bottles of carbonated beverages will not explode when carefully handled, and because there was evidence that the bottle was kept in a safe place after delivery by the defendant, the Court concluded that the jury could have properly found that the bottle was in some manner defective when the defendant's employee placed it in the cooler (*39 Cal. 2d 436, 448)* . The Court then examined the possible causes of the explosion, and concluded that it more probably than not resulted from a cause or causes for which the defendant was responsible (*39 Cal. 2d 436, 448-449)* . The Court therefore held that the plaintiff was entitled to invoke the aid of the doctrine of res ipsa loquitur (*39 Cal. 2d 436, 449)* .

[4] Additional Authorities

[a] Defendant Had Exclusive Control of Instrumentality Causing Accident

Hinckley v. La Mesa R.V. Ctr., Inc. (1984) 158 Cal. App. 3d 630, 205 Cal. Rptr. 22 , was an action against the manufacturer of a mobile home for, among other things, negligence in repairing the mobile home's electrical system after an earlier fire had broken out as an apparent result of electrical failure. The court held that the exclusive control requirement for the application of the res ipsa loquitur doctrine is satisfied when the defendant had exclusive control at

the time of the alleged negligent act, even though he or she did not have control at the time of the accident itself, if the plaintiff produces evidence sufficient to show that the instrumentality was not mishandled, or that its condition had not changed after leaving the defendant's possession (*158 Cal. App. 3d 630, 640)* . The court concluded that the plaintiff's evidence supported a conclusion that no change had taken place, or that any change that had been made was not a cause of the fire (*158 Cal. App. 3d 630, 640-641)* .

[b] Doctrine Applies Despite Relinquishment of Control by Defendant

In *Bedford v. Re (1973) 9 Cal. 3d 593, 108 Cal. Rptr. 364, 510 P.2d 724* , the plaintiff, through her guardian ad litem, appealed from a judgment for the defendants in a personal injury action, contending that the trial court erroneously denied a res ipsa loquitur instruction. In deciding that the doctrine of res ipsa loquitur was applicable and in reversing the judgment, the Supreme Court, quoting *Zentz v. Coca Cola Bottling Co. (1952) 39 Cal. 2d 436, 443-444, 247 P.2d 344* [*see § 165.342[3][c]*], noted that the requirement that the defendant control the instrumentality that caused the accident is not an absolute one. The plaintiff need not exclude all other persons who might have possibly been responsible when the defendant's negligence appears to be the more probable explanation of the accident. Thus, in cases in which the defendant has relinquished control of the instrumentality, the plaintiff may raise the inference that it was defective when it left the defendant's possession by demonstrating that it was not improperly handled or its condition otherwise changed after leaving the defendant's control (*9 Cal. 3d 593, 597)* . In this action, the Court noted that the plaintiff had presented evidence to show that the instrumentality had not been materially altered after leaving the defendant's control, and that negligence on the part of the defendant probably caused the plaintiff's injury (*9 Cal. 3d 593, 598)* .

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D. Proof by Application of Res Ipsa Loquitur Presumption
1. Presumption Applicable

16-165 California Points & Authorities § 165.343

§ 165.343 Res Ipsa Loquitur Presumption Applies Because Plaintiff's Actions Did Not Contribute to Accident

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE DOCTRINE OF RES IPSA LOQUITUR SHOULD BE APPLIED IN THIS CASE BECAUSE PLAINTIFF DID NOT CONTRIBUTE TO THE ACCIDENT.

Plaintiff's Actions Did Not Contribute to Accident. The purpose of the requirement for application of the doctrine of res ipsa loquitur, that the accident must not have been caused by any voluntary action or contribution on the part of the plaintiff, is to establish that the defendant is the one probably responsible for the accident. The plaintiff need not show that he or she was entirely inactive at the time of the accident to satisfy this requirement, so long as the evidence eliminates the plaintiff's conduct as a factor contributing to the occurrence (*Newing v. Cheatham (1975) 15 Cal. 3d 351, 363, 124 Cal. Rptr. 193, 540 P.2d 33*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the doctrine of res ipsa loquitur should apply because the criteria for its application have been met, particularly with respect to the requirement that the plaintiff's actions did not contribute to the accident [*see Newing v. Cheatham (1975) 15 Cal. 3d 351, 363, 124 Cal. Rptr. 193, 540 P.2d 33]* . It should be combined with any of the *forms in §§ 165.340 -165.342* and *§ 165.344* that are applicable to the particular case.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may

discuss the criteria that the plaintiff's actions did not contribute to the accident, describe the plaintiff's conduct, and argue that criteria has been met.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and a form of complaint regarding the doctrine of res ipsa loquitur, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§§ 165.340 -165.342* and *§ 165.344*. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in §§ 165.360 -165.362* and *§§ 165.370 -165.371* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Plaintiff's Actions Did Not Contribute to Accident

The factual and procedural background of ***Newing v. Cheatham*** *(1975) 15 Cal. 3d 351, 124 Cal. Rptr. 193, 540 P.2d 33* , is also discussed in *§ 165.340[3][a]*. In *Newing*, the California Supreme Court examined whether or not the doctrine of res ipsa loquitur was properly applied. The Court noted that the third of the traditional conditions for the application of the doctrine is that the accident must not have been caused by any voluntary action or contribution on the part of the plaintiff. The purpose of this requirement, the Court explained, is to establish that the defendant is the one probably responsible for the accident. The plaintiff need not show that he or she was entirely inactive at the time of the accident in order to satisfy this requirement, so long as the evidence is such as to eliminate his or her conduct as a factor contributing to the occurrence. The defendant contended on appeal that the trial court confused the existence of this third condition with the availability of defenses of assumption of risk and contributory negligence. The Supreme Court noted that these are separate questions, because the burden of proof with respect to the first rests on the plaintiff as part of his or her general obligation to establish the defendant's negligence, while the burden of proof as to the latter rests on the defendant. However, whether or not the trial court's remarks indicated that it confused the two questions, the uncontradicted evidence showed that the body of the plaintiffs' decedent was found by the rescue party in one of the rear seats of the four-seater aircraft. From that position, the Court could not easily imagine how the decedent could have interfered with the operation of the aircraft in any way. Moreover, Cheatham was the pilot in command of the aircraft, and presumably made all decisions concerning its operation and preparation for flight. The Court stated that there was no basis for supposing that the decedent exerted any influence with respect to the making of these decisions. Thus, the Court concluded that the evidence concerning the basic operation of the aircraft is such as to conclusively eliminate decedent's conduct as a potential cause of the accident (*15 Cal. 3d 351, 363)* . The evidence presented in the trial court, therefore, satisfied all three conditions for the applicability of the doctrine of res ipsa loquitur as a matter of law. Because the facts giving rise to the doctrine were undisputed, an inference of negligence arose as a matter of law. This gave rise to a presumption affecting the burden of producing evidence pursuant to *Evid. Code § 646*. It then became the defendant's obligation to introduce sufficient evidence to sustain a finding either that the accident resulted from some cause other than the pilot's negligence or that the pilot exercised due care in all possible respects in which he might have been negligent (*15 Cal. 3d 351, 364-365)* . The Court concluded that the defendant introduced no such evidence. At

most, he argued that the crash could have resulted from causes other than the negligence of his decedent, the pilot. Mere speculation of this sort is insufficient to discharge the defendant's burden of explanation. Consequently, the Supreme Court found that the trial court correctly concluded that res ipsa loquitur established the pilot's negligence as a matter of law (*15 Cal. 3d 351, 365)* .

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D. Proof by Application of Res Ipsa Loquitur Presumption
1. Presumption Applicable

16-165 California Points & Authorities § 165.344

§ 165.344 Due to Application of Res Ipsa Loquitur Presumption, Defendant Has Burden of Producing Evidence

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

BECAUSE THE DOCTRINE OF RES IPSA LOQUITUR APPLIES IN THIS CASE, DEFENDANT HAS THE BURDEN OF PRODUCING EVIDENCE THAT _____ [*describe occurrence*] WAS NOT THE PROBABLE RESULT OF NEGLIGENCE AND THAT IT WAS NOT CAUSED BY DEFENDANT.

Application of Doctrine Shifts Burden of Producing Evidence to Defendant. The judicial doctrine of res ipsa loquitur is a presumption affecting the burden of producing evidence. If the doctrine applies to the facts of the case, then a presumption of negligence arises. It then becomes the defendant's obligation to introduce sufficient evidence to sustain a finding either that the accident resulted from some cause other than his or her negligence, or that the defendant exercised due care in all possible respects in which he or she may have been negligent (*Newing v. Cheatham (1975) 15 Cal. 3d 351, 364-365, 124 Cal. Rptr. 193, 540 P.2d 33* ; *see Evid. Code § 646(b), (c)*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that inasmuch as the doctrine of res ipsa loquitur applies to the instant case, the burden of producing evidence has shifted to the defendant with respect to showing either that the accident resulted from some cause other than his or her negligence, or that the defendant exercised due care in all possible respects in which he or she may have been negligent [*see Newing v. Cheatham (1975) 15 Cal. 3d 351, 364-365, 124 Cal. Rptr. 193, 540 P.2d 33]* . It should be combined with any of the *forms in §§ 165.340 -165.343* that are applicable to the particular case.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may argue that the doctrine of res ipsa applies, and that the burden of production has shifted to the defendant with respect to the burden of producing evidence has shifted to the defendant with respect to showing either that the accident resulted from some cause other than his or her negligence, or that the defendant exercised due care in all possible respects in which he or she may have been negligent.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and a form of complaint regarding the doctrine of res ipsa loquitur, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§§ 165.340 -165.343*. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in §§ 165.360 -165.362* and *§§ 165.370 -165.371* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Application of Doctrine Shifts Burden of Producing Evidence to Defendant

The factual and procedural background of ***Newing v. Cheatham*** *(1975) 15 Cal. 3d 351, 124 Cal. Rptr. 193, 540 P.2d 33* , is discussed in *§ 165.340[3][a]*. In *Newing*, the Supreme Court noted that the judicial doctrine of res ipsa loquitur is a presumption affecting the burden of producing evidence pursuant to *Evid. Code § 646*. After the evidence presented at trial satisfied the conditions for the applicability of the doctrine, a presumption of the defendant's negligence arose. It then became the defendant's obligation to introduce sufficient evidence to sustain a finding that the accident resulted from some cause other than the defendant's negligence, or that the defendant exercised due care in all possible respects in which he might have been negligent (*15 Cal. 3d 351, 364)* . The Court found that the defendant introduced no such evidence. He had at most argued that the airplane crash resulted from causes other than negligence of his decedent. The court concluded that "mere speculation" of this sort was insufficient to discharge his burden of explanation (*15 Cal. 3d 351, 365)* .

NOTE

Evid. Code § 646(b) provides that the judicial doctrine of res ipsa loquitur is a presumption affecting the burden of producing evidence. This is to be distinguished from a presumption that affects the burden of proof [*see Evid. Code § 606*]. A presumption that affects the burden of proof imposes on the party against whom it operates the burden of proving the nonexistence of the presumed fact (by a preponderance of the evidence or other appropriate burden of proof standard) [*Evid. Code §§ 606, 607*; *see Frantz v. San Luis Med. Clinic (1978) 81 Cal. App. 3d 34, 42, 146 Cal. Rptr. 146]* . On the other hand, a presumption that affects the burden of producing evidence imposes on the party against whom the presumption operates only the obligation to introduce evidence that will support a finding of the nonexistence of the presumed fact [*see Evid. Code § 604*]. This burden on the opponent of a presumption

that affects the burden of producing evidence is far less than the burden of proof imposed on an opponent of a presumption that is classified as a presumption that affects the burden of proof [*see Frantz v. San Luis Med. Clinic (1978) 81 Cal. App. 3d 34, 42, 146 Cal. Rptr. 146]* .

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1. Presumption Applicable

16-165 California Points & Authorities §§ 165.345-165.359

[Reserved]

§§ 165.345[Reserved]

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D. Proof by Application of Res Ipsa Loquitur Presumption
2. Presumption Not Applicable

16-165 California Points & Authorities § 165.360

§ 165.360 Conditions for Application of Res Ipsa Loquitur Presumption Have Not Been Met

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE DOCTRINE OF RES IPSA LOQUITUR SHOULD NOT BE APPLIED IN THIS CASE BECAUSE THE CONDITIONS FOR THE APPLICATION OF THE DOCTRINE HAVE NOT BEEN MET IN THAT _____ [IT CANNOT BE SAID, IN LIGHT OF PAST EXPERIENCE, THAT THE ACCIDENT WAS OF A NATURE THAT ORDINARILY OCCURS ONLY IF SOMEONE IS NEGLIGENT *and/or* IT WAS PROBABLE THAT THE ACCIDENT WAS CAUSED BY SOMEONE OTHER THAN DEFENDANT].

A. Accident Was Not Probable Result of Negligence. If the accident is of such a nature that it cannot be said, in light of past experience, that it probably was the result of negligence by someone, the doctrine of res ipsa loquitur is not applicable to the action (*see Folk v. Kilk (1975) 53 Cal. App. 3d 176, 184-187, 126 Cal. Rptr. 172*).

[*AND/OR*]

B. Accident Was Not Caused by Defendant. The doctrine of res ipsa loquitur is applicable when it is more likely than not that the accident was caused by the defendant's negligence. When it is equally probable that the negligence was that of someone other than the defendant, the doctrine does not apply (*Gotcher v. Metcalf (1970) 6 Cal. App. 3d 96, 102, 85 Cal. Rptr. 566*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the doctrine of res ipsa loquitur

does not apply because the requisite conditions for the application of the doctrine have not been met, that is: that the accident was the probable result of negligence, and that the defendant probably caused the accident [*see Folk v. Kilk (1975) 53 Cal. App. 3d 176, 184-187, 126 Cal. Rptr. 172]* . It should be combined with any of the *forms in §§ 165.361 -165.362* that are applicable to the particular case.

This issue may arise, for example, in opposing a plaintiff's motion for summary judgment, directed verdict, judgment notwithstanding the verdict, or new trial [*see, e.g., Kaiser Steel Corp. v. Westinghouse Elec. Corp. (1976) 55 Cal. App. 3d 737, 740, 127 Cal. Rptr. 838* (summary judgment); *Newing v. Cheatham (1975) 15 Cal. 3d 351, 355, 124 Cal. Rptr. 193, 540 P.2d 33* (directed verdict); *see also Roddiscraft, Inc. v. Skelton Logging Co. (1963) 212 Cal. App. 2d 784, 790, 28 Cal. Rptr. 277* (new trial)].

In addition to contesting the existence of the conditions for the application of the doctrine of res ipsa loquitur, counsel may also introduce evidence overcoming his or her burden of producing evidence--that is, to show that the defendant was not negligent or that any negligence on the defendant's part was not a proximate cause of the plaintiff's injury [*see Evid. Code § 646(c)*; *see also Frantz v. San Luis Med. Clinic (1978) 81 Cal. App. 3d 34, 44, 146 Cal. Rptr. 146]* .

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may argue that these conditions for the application of the doctrine, i.e., that the accident was the probable result of negligence, and that the defendant probably caused the accident, do not exist in the action [*see Ybarra v. Spangard (1944) 25 Cal. 2d 486, 489, 154 P.2d 687]* .

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and a form of complaint regarding the doctrine of res ipsa loquitur, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§§ 165.361 -165.362*. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in §§ 165.340 -165.344* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Accident Was Not Probable Result of Negligence

In ***Folk v. Kilk*** *(1975) 53 Cal. App. 3d 176, 126 Cal. Rptr. 172* , the plaintiff brought an action against several doctors and a hospital to recover damages for personal injuries suffered as a result of alleged medical malpractice. Five days after the plaintiff had a tonsillectomy performed on him by the defendant doctor Kilk, the plaintiff developed a brain abscess. There was evidence presented at trial that a bacteria from the plaintiff's throat could have produced the abscess by migrating to the brain. However, the plaintiff's brain abscess contained no bacteria because of the antibiotics that had

been prescribed, and no bacteria could be identified as its cause. After refusing a conditional res ipsa loquitur instruction by the plaintiff, the trial court entered a judgment of nonsuit in favor of the defendant hospital. The jury returned a verdict in favor of the defendant doctors; the plaintiff appealed.

The court of appeal affirmed. The court noted that a conditional res ipsa loquitur instruction must be given when requested by the plaintiff whenever the evidence or facts otherwise established would support the presumption (*53 Cal. App. 3d 176, 184-185)* . An exception to this rule is that the instruction need not be given if a defendant establishes that he or she was free from negligence by evidence that cannot be rationally disbelieved. The court, quoting *Ybarra v. Spangard (1944) 25 Cal. 2d 486, 489, 154 P.2d 687* (discussed in *§ 165.340[3][b]*), stated that three elements are required for the application of the doctrine: (1) the accident must be of a kind that ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; and (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff (*53 Cal. App. 3d 176, 184)* . A simplified two-part rule was formulated in *Zentz v. Coca Cola Bottling Co. (1952) 39 Cal. 2d 436, 446, 247 P.2d 344* (discussed in *§ 165.342[3][b]*), in which the Court held that the doctrine was applicable when the accident was of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone and that the defendant is the person who is responsible (*53 Cal. App. 3d 176, 184)* . The court explained that in medical malpractice cases, the second two elements for the application of the doctrine of res ipsa loquitur are usually inherent in the situation, because the patient is under the exclusive control of the doctors or the hospital, and in no condition to perform a voluntary action that might contribute to his or her injury. Thus, the court focused on the first element for application of the doctrine from *Ybarra* and the first clause of the rule of *Zentz,* concluding that the two-part test of *Zentz* didnot replace the three-part test of *Ybarra,* but that the *Zentz* test was promulgated to emphasize the greater probability of negligence as the fundamental basis of the doctrine (*53 Cal. App. 3d 176, 184-185)* .

The court examined expert testimony presented at trial and felt bound by that testimony, because whether or not a brain abscess formed after a tonsillectomy was probably caused by negligence is not a matter of common knowledge (*53 Cal. App. 3d 176, 185)* . The court noted that experts knew little about the causation of brain abscesses because of the difficulties presented in studying them. In addition, most abscesses did not originate in the throat, but in the sinus passages, middle ear, and lungs, and take a longer time to develop than in the plaintiff's case (*53 Cal. App. 3d 176, 185-186)* . The court concluded that the defendant's performance of the tonsillectomy without determining whether certain bacteria were present in the plaintiff's throat was not a violation of the prevailing standard of care. The court also found that the failure to take a throat culture in time to secure the results prior to surgery was not an act that would invoke the doctrine of res ipsa loquitur. Although some cases have held that a res ipsa loquitur instruction may be given whenever the evidence establishes the rarity of occurrence plus specific acts of negligence, the cited cases held only that the combination of the two factors may suffice to warrant the instruction. The giving of a res ipsa loquitur instruction would depend on whether the combination of rarity of occurrence and specific acts afforded reasonable grounds for believing that the accident was more probably caused by negligence than not (*53 Cal. App. 3d 176, 186-187)* . In this case, the combination of the rarity of the occurrence of the brain abscess plus the defendant's specific acts in failing to determine whether certain bacteria were present in the plaintiff's throat did not present a situation that led to a reasonable conclusion that it was more probable than not that negligence caused the untoward result (*53 Cal. App. 3d 176, 187)* .

[b] Accident Was Not Caused by Defendant

In ***Gotcher v. Metcalf*** *(1970) 6 Cal. App. 3d 96, 85 Cal. Rptr. 566* , the plaintiffs' decedent was killed in a midair collision between two small airplanes. The plaintiffs brought an action for wrongful death against the pilot of the other plane. The pilot of the plaintiffs' decedent's plane, who may have been solely or equally negligent, was not before the court. The plaintiffs' decedent's plane lost part of its right wing in the collision, plunged into a lake, and was never recovered. The defendant's plane lost part of its tail, but landed safely at a nearby airport. The jury rendered a verdict for the defendant, and judgment was entered accordingly. The plaintiffs moved for a new trial. The court granted the

motion on the ground of irregularity in the proceedings of the adverse party, because the defendant's counsel read certain proposed prejudicial jury instructions during trial without court approval or consultation [*see Code Civ. Proc. § 657(1)*]. The defendant appealed from the order granting a new trial. The plaintiffs cross-appealed from the judgment, contending that the court erroneously refused to instruct the jury on the doctrine of res ipsa loquitur.

The court of appeal affirmed judgment for the defendant, reversing the order granting a new trial, because it found that the alleged misconduct of counsel was not prejudicial (*6 Cal. App. 3d 96, 99-101)* . With regard to the trial court's failure to give a res ipsa loquitur instruction, the court first noted that there are three conditions for the application of the doctrine: (1) the accident must be of a kind that ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; and (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff. In addition, the court noted that the instruction is properly refused unless the evidence supports a preliminary determination by the court that in light of past experience: (1) the accident was of the type that ordinarily does not happen unless someone was negligent, and (2) it is more likely than not that the accident was caused by the defendant's negligence (*6 Cal. App. 3d 96, 102)* . The court stated that the evidence could not reasonably be said to establish that it was more probable than not that the defendant was negligent, and that his negligence caused or contributed to the accident. An eyewitness testified that he saw the plaintiffs' decedent's airplane circle in the direction of the defendant's plane. Even at the minimum speed necessary to maintain two planes in flight, it could not be said that the defendant could have avoided striking the plaintiffs' decedent's plane, assuming the defendant saw it. The court stated that if the eyewitness testimony was correct, it could not be said that it was more likely than not that the accident was caused by the defendant's negligence or that the defendant could have avoided the accident. On the other hand, the physical evidence established that only the tail assembly and the rear portion of the defendant's plane was damaged. This could indicate that decedent's plane was not in font of the defendant's plane and in plain sight. Thus, decedent's plane could possibly have struck the defendant's plane from the rear or from the side. This interpretation of the physical evidence was supported by the defendant's testimony and that of his passengers that, although looking ahead, down, and about them, they did not see decedent's airplane. Under this view of the evidence, the court could not reasonably state that it was more probable than not that the accident was caused by the defendant's negligence or that he could have avoided it (*6 Cal. App. 3d 96, 103)* .

[4] Additional Authorities

[a] Accident Was Not Probable Result of Negligence

In *Ford v. Miller Meat Co. (1994) 28 Cal. App. 4th 1196, 33 Cal. Rptr. 2d 899* , the court of appeal affirmed judgment for the defendant in a suit alleging the plaintiff was injured when she bit into a fragment of bone contained in ground beef purchased at the defendant's supermarket. At the nonjury trial, the court found that the fragment could not have been larger than one-eighth of an inch, and that no one could reasonably expect the defendant to remove such a small particle from ground beef. The court of appeal rejected the plaintiff's contention that the doctrine of res ipsa loquitur applied, noting that the trial court's determination regarding the bone fragment was the same as finding that its presence could not be attributed to lack of due care, actual or presumed (*28 Cal. App. 4th 1196, 1203)* .

In *Zavala v. Board of Trs. (1993) 16 Cal. App. 4th 1755, 20 Cal. Rptr. 2d 768* , the court of appeal affirmed the trial court's granting of the defendants' motion for nonsuit in a medical malpractice action claiming negligent failure properly to diagnose and treat accumulation of fluid due to shunt failure. At trial, the plaintiff presented her mother's testimony regarding her medical treatment by the defendants, but did not present any expert testimony. The court held that the nonsuit was proper. Because the plaintiff's problem was not a matter of common knowledge, the defendants' negligence was not apparent to a layperson. Therefore, the plaintiff's evidence was insufficient to support a jury verdict in her favor on a res ipsa loquitur theory. The court noted that the plaintiff's evidence failed even to describe the precise nature of the plaintiff's injury. A jury could therefore not conclude that the injury was the type that ordinarily does not occur in the absence of negligence (*16 Cal. App. 4th 1755, 1765-1766)* .

[b] Accident Was Not Caused by Defendant

In *Gicking v. Kimberlin (1985) 170 Cal. App. 3d 73, 215 Cal. Rptr. 834* , lessees in a shopping center brought an action against adjacent lessees for damages resulting from a real property fire of unknown origin. Evidence at trial indicated two possible causes for the fire: an unserviced walk-in cooler in the defendants' shop, or the shopping center owner's old-fashioned electrical system. The court held that the res ipsa loquitur doctrine was not available to the plaintiffs because one of two possible causes of the fire was not under the control of the defendants. The court stated the fundamental rule that the doctrine of res ipsa loquitur does not apply if it is equally probable that an accident was caused by some fault for which the defendant was not responsible (*170 Cal. App. 3d 73, 77)* . A plaintiff is entitled to a conditional res ipsa loquitur instruction, in which the jury determines whether or not the conditions for the doctrine have been established, only if the plaintiff has shown that the defendant's negligence was the more probable explanation of the accident. In this case, the plaintiffs failed to establish the probability that the defendants were responsible for the fire as a matter of law (*170 Cal. App. 3d 73, 78)* .

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2. Presumption Not Applicable

16-165 California Points & Authorities § 165.361

§ 165.361 Res Ipsa Loquitur Presumption Does Not Apply Because Defendant Did Not Have Exclusive Control of Instrumentality Causing Accident

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE DOCTRINE OF RES IPSA LOQUITUR SHOULD NOT BE APPLIED IN THIS CASE BECAUSE THE CONDITIONS FOR THE APPLICATION OF THE DOCTRINE HAVE NOT BEEN MET IN THAT THE ACCIDENT WAS NOT CAUSED BY AN AGENCY OR INSTRUMENTALITY WITHIN THE EXCLUSIVE CONTROL OF DEFENDANT.

A. No Exclusive Control of Instrumentality by Defendant. To invoke the doctrine of res ipsa loquitur, the plaintiff must produce evidence permitting the conclusion that it was more likely than not that the defendant was responsible for the accident. If it is not shown that the specific instrumentality causing the accident was under the exclusive control of the defendant, the doctrine will not be applied (*see Cordova v. Ford (1966) 246 Cal. App. 2d 180, 186-187, 54 Cal. Rptr. 508*).

[*AND/OR*]

B. Instrumentality Mishandled or Condition Changed After Leaving Defendant's Possession. The control element of the doctrine of res ipsa loquitur is satisfied if the defendant had control of the instrumentality at the time of the alleged negligent act, although not at the time of the accident, provided the plaintiff produces evidence sufficient to show that the instrumentality was not mishandled or that its condition had not been changed after it left the defendant's possession. If there is evidence that the condition of the instrumentality was changed after it left the defendant's possession, the second condition of the doctrine of res ipsa loquitur is not met (*Putensen v. Clay Adams, Inc. (1970) 12 Cal. App. 3d 1062, 1075-1076, 91 Cal. Rptr. 319*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the doctrine of res ipsa loquitur is inapplicable because the requisite conditions for the application of the doctrine have not been met with respect to the defendant's exclusive control over the instrumentality in question [*see Cordova v. Ford (1966) 246 Cal. App. 2d 180, 186-187, 54 Cal. Rptr. 508]* . Paragraph B may be submitted to assert that the criteria for application of the res ipsa loquitur doctrine have not been met with respect to interference with the instrumentality in question after leaving the defendant's possession [*see Putensen v. Clay Adams, Inc. (1970) 12 Cal. App. 3d 1062, 1075-1076, 91 Cal. Rptr. 319]* . This form should be combined with any of the *forms in § 165.360* and *§ 165.362* that are applicable to the particular case.

The issue of the inapplicability of the doctrine may arise, for example, in opposing a plaintiff's motion for summary judgment, directed verdict, judgment notwithstanding the verdict, or new trial [*see, e.g., Kaiser Steel Corp. v. Westinghouse Elec. Corp. (1976) 55 Cal. App. 3d 737, 740, 127 Cal. Rptr. 838* (summary judgment); *Newing v. Cheatham (1975) 15 Cal. 3d 351, 355, 124 Cal. Rptr. 193, 540 P.2d 33* (directed verdict); *see also Roddiscraft, Inc. v. Skelton Logging Co. (1963) 212 Cal. App. 2d 784, 790, 28 Cal. Rptr. 277* (new trial)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may argue that the condition with respect to the defendant's exclusive control for the application of the doctrine do not exist in the action [*see Ybarra v. Spangard (1944) 25 Cal. 2d 486, 489, 154 P.2d 687]* .

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and a form of complaint regarding the doctrine of res ipsa loquitur, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§ 165.360* and *§ 165.362*. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in §§ 165.340 -165.344* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] No Exclusive Control of Instrumentality by Defendant

In ***Cordova v. Ford*** *(1966) 246 Cal. App. 2d 180, 54 Cal. Rptr. 508* , the plaintiff brought an action for damages for personal injuries suffered as a result of a two-car collision at an unobstructed intersection. At trial, the court refused to instruct the jury on the doctrine of res ipsa loquitur. The jury returned a verdict for the defendants; the plaintiff

appealed.

The court of appeal affirmed, noting that three conditions that must be satisfied in order for the doctrine of res ipsa loquitur to apply. The conditions are that: (1) the accident must be of a kind that ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; and (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff (*246 Cal. App. 2d 180, 184)* . The court stated that, as a general rule, the mere occurrence of a collision between two motor vehicles does not of itself present a situation for the application of the doctrine. In certain situations, however, the doctrine may apply, for example, when there has been a rear-end collision in which the rear car has collided with a stopped or stationary vehicle (*246 Cal. App. 2d 180, 185)* . The court noted that the first condition for the application of the doctrine was present, that is, a two-car collision ordinarily does not occur in the absence of someone's negligence. The second requirement, however, was not satisfied because there were two instrumentalities involved in the accident; the defendant was in control of only one of them (*246 Cal. App. 2d 180, 186)* . The court explained that to eliminate other responsible causes and thus hold the defendant negligent, the plaintiff must usually show that the specific instrumentality causing the accident was under the exclusive control of the defendant. In this case, the court said that the plaintiff attempted to distort the rationale of the doctrine by arguing that the defendant was in exclusive control of his own vehicle. Because the plaintiff was in exclusive control of her own vehicle, the court concluded that the requisite control in the defendant was not established (*246 Cal. App. 2d 180, 186-187)* .

[b] Instrumentality Mishandled or Condition Changed After Leaving Defendant's Possession

In ***Putensen v. Clay Adams, Inc.*** *(1970) 12 Cal. App. 3d 1062, 91 Cal. Rptr. 319* , the plaintiff brought an action against a manufacturer, a hospital, and a physician for damages for personal injuries suffered as a result of alleged medical malpractice and allegedly defective tubing used in her heart operation. When the defendant doctor inserted the tubing into the plaintiff's blood vessel, he could not properly position it because a kink developed in the tubing. In order to remove the tubing from the plaintiff's aorta, he had to perform surgery on the plaintiff. The court granted a nonsuit in favor of the defendant manufacturer. The jury rendered a verdict in favor of the defendant hospital and the defendant doctor. The plaintiff appealed.

The court of appeal reversed as to the defendant manufacturer, and affirmed as to the defendants doctor and hospital. With regard to the manufacturer, the plaintiff contended that a nonsuit was improper because the doctrine of res ipsa loquitur applied, and that therefore the jury was permitted to infer negligence from the occurrence of the accident alone (*12 Cal. App. 3d 1062, 1074)* . The court found that in this case, the first and third conditions for the application of the doctrine were present, that is, the accident was not due to any voluntary contribution of the plaintiff and that it was more probable than not that the accident was the result of negligence (*12 Cal. App. 3d 1062, 1074-1075)* . The court noted that the second condition was not present, that is, it was not shown that the defendant manufacturer had exclusive management or control of the instrumentality that caused the accident. The court explained that the control element was satisfied if the defendant had control of the instrumentality at the time of the alleged negligent act, although not at the time of the alleged accident, provided that the plaintiff produced evidence that was sufficient to show that the instrumentality was not mishandled or that its condition had not been changed after it left the defendant's possession (*12 Cal. App. 3d 1062, 1075)* . The court found uncontradicted evidence that the condition of the tubing was changed after it left the manufacturer's possession. After leaving the defendant manufacturer's possession, the tubing was soaked in a detergent solution and stretched by the defendant doctor, then inserted over another tube. This process may well have weakened the tube's resilient qualities. The court concluded that the absence of this second condition precluded the application of the doctrine of res ipsa loquitur (*12 Cal. App. 3d 1062, 1075-1076)* . The court found, however, that there was substantial evidence of negligence on the part of the defendant manufacturer that would support a verdict in the plaintiff's favor, and that therefore the lower court's granting of a nonsuit in favor of the manufacturer was erroneous (*12 Cal. App. 3d 1062, 1076-1079)* .

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CHAPTER 165 NEGLIGENCE
PART II. FORMS
D. Proof by Application of Res Ipsa Loquitur Presumption
2. Presumption Not Applicable

16-165 California Points & Authorities § 165.362

§ 165.362 Res Ipsa Loquitur Presumption Does Not Apply Because Plaintiff's Actions Contributed to Accident

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE DOCTRINE OF RES IPSA LOQUITUR SHOULD NOT BE APPLIED IN THIS CASE BECAUSE THE CONDITIONS FOR THE APPLICATION OF THE DOCTRINE HAVE NOT BEEN MET IN THAT THE ACCIDENT WAS DUE TO VOLUNTARY ACTION OR CONTRIBUTION ON THE PART OF PLAINTIFF.

Plaintiff's Actions Contributed to Accident. Although the plaintiff may properly rely on the doctrine of res ipsa loquitur even though he or she was not inactive at the time of the accident and participated in the events leading up to it, the plaintiff must nevertheless exclude his or her conduct as a responsible cause of the accident before he or she may invoke the doctrine (*Cordova v. Ford (1966) 246 Cal. App. 2d 180, 187, 54 Cal. Rptr. 508* ; *see* *Vistica v. Presbyterian Hosp. (1967) 67 Cal. 2d 465, 470-471, 62 Cal. Rptr. 577, 432 P.2d 193*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the doctrine of res ipsa loquitur is inapplicable because the requisite conditions for the application of the doctrine have not been met, in that the plaintiff contributed to the accident [*see* *Cordova v. Ford (1966) 246 Cal. App. 2d 180, 187, 54 Cal. Rptr. 508]* . It should be combined with any of the *forms in §§ 165.360* and *165.361* that are applicable to the particular case.

The issue of the applicability of the doctrine may arise, for example, in opposing a plaintiff's motion for summary judgment, directed verdict, judgment notwithstanding the verdict, or new trial [*see, e.g.,* *Kaiser Steel Corp. v. Westinghouse Elec. Corp. (1976) 55 Cal. App. 3d 737, 740, 127 Cal. Rptr. 838* (summary judgment); *Newing v. Cheatham (1975) 15 Cal. 3d 351, 355, 124 Cal. Rptr. 193, 540 P.2d 33* (directed verdict); *see also* *Roddiscraft, Inc. v.*

Skelton Logging Co. (1963) 212 Cal. App. 2d 784, 790, 28 Cal. Rptr. 277 (new trial)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may argue that the conditions for the application of the doctrine do not exist in the action because the plaintiff contributed to the cause of the accident [*see Ybarra v. Spangard (1944) 25 Cal. 2d 486, 489, 154 P.2d 687]* .

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and a form of complaint regarding the doctrine of res ipsa loquitur, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§§ 165.360* and *165.361*. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in §§ 165.340 -165.344* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Plaintiff's Actions Contributed to Accident

The factual and procedural background of ***Cordova v. Ford*** *(1966) 246 Cal. App. 2d 180, 54 Cal. Rptr. 508* , is discussed in *§ 165.361[3][a]*. The plaintiff sought to recover damages for personal injuries suffered as a result of a two-car collision at an unobstructed intersection. The court of appeal affirmed judgment for the defendants and found that the trial court properly refused to give a res ipsa loquitur instruction to the jury. The court noted that one of the three conditions for application of the doctrine was that the accident must not have been due to any voluntary action or contribution on the part of the plaintiff (*246 Cal. App. 2d 180, 184)* . In examining whether this condition was met, the court stated that it must consider whether or not the plaintiff's conduct under the evidence had been eliminated as a responsible cause of the accident. While a plaintiff may properly rely on the doctrine of res ipsa loquitur even though he or she was not inactive at the time of the accident and participated in the events leading up to it, before the plaintiff can do so, the evidence must exclude his or her conduct as the responsible cause (*246 Cal. App. 2d 180, 187)* . The court found that the plaintiff's own testimony showed that despite the early hour and the dark and cloudy condition of the weather, she was driving her car with the headlights off. Although she saw the defendant's car some distance before the intersection in which the accident occurred, she admitted that she never saw it again until immediately prior to the collision. The uncontradicted evidence showed that both she and the defendant were proceeding at approximately the same speed. The court noted that the plaintiff's testimony gave no inkling regarding why she did not see what was directly in front of her and why she did nothing to avoid the collision until it was too late. Because the plaintiff's own testimony did not exclude her own conduct as a responsible cause of the accident, the curt concluded that the third condition for the application of the doctrine of res ipsa loquitur had not been met (*246 Cal. App. 2d 180, 187-188)* .

In ***Vistica v. Presbyterian Hosp.*** *(1967) 67 Cal. 2d 465, 62 Cal. Rptr. 577, 432 P.2d 193* , the surviving spouse and

children of the decedent brought an action for wrongful death. The plaintiffs' decedent was a woman confined to the psychiatric ward of the defendant hospital. The decedent's doctors were aware of her suicidal tendencies and her desire to escape from the hospital. She apparently had attempted to pile up furniture so that she could climb out of an upper window in the solarium. Her body was later found on the street outside a window of the psychiatric ward. The trial court instructed the jury that application of the doctrine of res ipsa loquitur required the jury to find that the decedent's death was not due to any voluntary action or contribution of her part. After the jury returned a verdict for the defendant, the plaintiffs appealed.

The Supreme Court reversed the judgment, finding that it was prejudicially erroneous for the trial court to give the above-mentioned jury instruction. Quoting *Zentz v. Coca Cola Bottling Co. (1952) 39 Cal. 2d 436, 444-445, 247 P.2d 344* (discussed in *§ 165.342[3][b]*), the court noted that application of the doctrine of res ipsa loquitur requires that the accident not be attributable to any voluntary action or contribution on the part of the plaintiff. A plaintiff may properly rely on the doctrine even though he or she has participated in the events leading up to the accident, if the evidence excludes his or her conduct as the responsible cause. The Court noted that the plaintiff need not be entirely static, and need not be completely inactive, but there must be evidence removing the inference of his or her responsibility (*67 Cal. 2d 465, 470)* . The Court stated that the lower court's instruction on the third condition of the doctrine was insufficient without an explanation that the plaintiffs' decedent's voluntary conduct had to be the responsible cause of her death. The jury might have misunderstood the requirement to mean that decedent's voluntary participation in her own attempted escape precluded an inference that it was more probable than not that the hospital breached its duty of care to protect her from her own actions, voluntary or involuntary (*67 Cal. 2d 465, 470-471)* .

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16-165 California Points & Authorities §§ 165.363-165.369

[Reserved]

§§ 165.363[Reserved]

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3. Presumption Rebutted

16-165 California Points & Authorities § 165.370

§ 165.370 Defendant Has Produced Sufficient Evidence to Rebut Res Ipsa Loquitur Presumption Under Evidence Code Section 646(b)

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

BECAUSE DEFENDANT HAS PRODUCED SUFFICIENT EVIDENCE TO SUSTAIN A FINDING THAT _____ [DEFENDANT WAS NOT NEGLIGENT *and/or* ANY NEGLIGENCE ON DEFENDANT'S PART WAS NOT A PROXIMATE CAUSE OF PLAINTIFF'S INJURY], DEFENDANT HAS REBUTTED THE RES IPSA LOQUITUR PRESUMPTION AFFECTING THE BURDEN OF PRODUCING EVIDENCE AS SET FORTH IN SECTION 646 OF THE EVIDENCE CODE. PLAINTIFF MUST THEREFORE PROVE, BY A PREPONDERANCE OF THE EVIDENCE, THAT PLAINTIFF'S INJURY WAS PROXIMATELY CAUSED BY DEFENDANT'S NEGLIGENCE.

A. Presumption Affects Burden of Producing Evidence. The judicial doctrine of res ipsa loquitur is a presumption affecting the burden of producing evidence (*Evid. Code § 646(b)*).

B. Evidence Proved That Defendant Was Not Negligent or That Defendant's Negligence Was Not Proximate Cause of Occurrence. A presumption affecting the burden of producing evidence imposes on the party against whom the presumption operates only the obligation to introduce evidence sufficient to support a finding of the nonexistence of the presumed fact, that is, that the defendant was not negligent or that the defendant's negligence was not the proximate cause of the occurrence (*Frantz v. San Luis Med. Clinic (1978) 81 Cal. App. 3d 34, 42-43, 146 Cal. Rptr. 146* ; *see Evid. Code §§ 604, 646(c)*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the res ipsa loquitur presumption should not be applied in the action because the defendant has rebutted the presumption, that is, the defendant contends that he or she has introduced evidence sufficient to support a finding that he or she was not negligent or that his or her negligence was not a proximate cause of the plaintiff's injury [*see* Evid. Code § 646(c)]. It should be combined with the *form in § 165.371* if applicable to the particular case.

This issue may arise, for example, if the defendant raises this argument when challenging the propriety of jury instructions given at trial, on appeal, or on a motion for a new trial [*see Frantz v. San Luis Med. Clinic (1978) 81 Cal. App. 3d 34, 41-47, 146 Cal. Rptr. 146* ; *see also Code Civ. Proc. § 657(7)*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may discuss how the defendant presented evidence sufficient to sustain a finding that he or she was not negligent or that his or her negligence was not the proximate cause of injury to the plaintiff [*see Frantz v. San Luis Med. Clinic (1978) 81 Cal. App. 3d 34, 44, 146 Cal. Rptr. 146* ; *see also Evid. Code § 646(c)*].

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and a form of complaint regarding the doctrine of res ipsa loquitur, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§ 165.371*. For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in §§ 165.340 -165.344* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Evidence Proved That Defendant Was Not Negligent or That Defendant's Negligence Was Not Proximate Cause of Occurrence

In *Frantz v. San Luis Med. Clinic (1978) 81 Cal. App. 3d 34, 146 Cal. Rptr. 146* , the plaintiff sued a medical partnership, a physician, and a hospital for personal injuries allegedly suffered as a result of medical malpractice. The plaintiff contended that she was injured as a result of a nurse's negligently administered injection. In addition, she alleged that the nurse negligently failed to report the error to her doctor in time to remedy the injury. The trial court gave the several jury instructions on res ipsa loquitur. The jury found in favor of the plaintiff as against all the defendants. The defendants appealed, contending in part that the jury instructions were prejudicially erroneous.

The court of appeal reversed with regard to all the defendants, instructing the lower court to enter judgment in favor of the defendant physician and the defendant medical partnership. First, the court found that there was insufficient evidence to sustain a verdict against the doctor and the medical clinic (*81 Cal. App. 3d 34, 39-40)* . With regard to the defendant hospital, the court noted that *Evid. Code § 646(b)* provided that the doctrine of res ipsa loquitur is a presumption affecting the burden of producing evidence. It is therefore to be distinguished from a presumption affecting the burden of proof [*see Evid. Code § 606*]. The court explained that a presumption that affects the burden of proof

imposes on the party against whom it operates the burden of proving, by a preponderance of evidence or other appropriate burden of proof standard, the nonexistence of the presumed fact. On the other hand, a presumption that affects the burden of producing evidence imposes on the party against whom it operates only the obligation to introduce evidence that will support a finding of the nonexistence of the presumed fact [*see Evid. Code § 604*]. This burden, the court noted, is obviously far less than that of burden of proof (*81 Cal. App. 3d 34, 42)* . The court stated that if the plaintiff establishes the basic facts of the res ipsa loquitur presumption and the defendant does not contest the existence of these basic facts, but contests the existence of the presumed fact--that the defendant's negligence was the proximate cause of the plaintiff's injury--the defendant's burden is only to introduce evidence sufficient to support a finding that he or she was not negligent or that any negligence on his or her part was not a proximate cause of the occurrence [*see Evid. Code § 646(c)*]. If the defendant introduces this evidence, contesting the presumed conclusion of negligence, the presumptive effect of the doctrine vanishes, and the greatest effect that the doctrine can have in the case is to support an inference that the accident resulted from the defendant's negligence (*81 Cal. App. 3d 34, 43-44)* . In this case, the court felt that the modified jury instruction, based on *BAJI No. 2.60*, misled the jury because it implied that the jury was compelled to draw the inference of negligence in the absence of the defendant hospital's proof by a preponderance of evidence that it was not negligent nor the proximate cause of the plaintiff's injury. The court concluded that this imposed a greater burden on the defendant hospital than that required by statute (*81 Cal. App. 3d 34, 44-45)* . In addition, the court noted that the trial court gave several BAJI instructions in incorrect order, some of which conflicted with the modified instruction given earlier (*81 Cal. App. 3d 34* , 45-46). The court concluded that the erroneous instructions constituted reversible error (*81 Cal. App. 3d 34, 46-47)* .

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3. Presumption Rebutted

16-165 California Points & Authorities § 165.371

§ 165.371 Defendant's Rebuttal Nullifies Res Ipsa Loquitur Presumption

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

BECAUSE DEFENDANT HAS REBUTTED THE RES IPSA LOQUITUR PRESUMPTION AFFECTING THE BURDEN OF PRODUCING EVIDENCE AS SET FORTH IN SECTION 646 OF THE EVIDENCE CODE, THE PRESUMPTION THAT PLAINTIFF'S INJURY WAS PROXIMATELY CAUSED BY DEFENDANT'S NEGLIGENCE IS NULLIFIED. PLAINTIFF MUST THEREFORE PROVE THIS ELEMENT BY A PREPONDERANCE OF THE EVIDENCE.

A. Defendant Entitled to Jury Instruction on Effect of Presumption. If the evidence, or facts otherwise established, would support a res ipsa loquitur presumption, and the defendant has introduced evidence that would support a finding that he or she was not negligent or that any negligence on his or her part was not a proximate cause of the occurrence, the court may, and on request shall, instruct the jury to the effect that: (1) if the facts that would give rise to a res ipsa loquitur presumption are found or otherwise established, the jury may draw the inference from such facts that a proximate cause of the occurrence was some negligent conduct on the part of the defendant; and (2) the jury shall not find that a proximate cause of the occurrence was some negligent conduct on the part of the defendant unless the jury believes, after weighing all the evidence in the case and drawing such inferences therefrom as the jury believes are warranted, that it is more probable than not that the occurrence was caused by some negligent conduct on the part of the defendant (*Evid. Code § 646(c)*).

B. Presumption Nullified and Burden of Producing Evidence Shifted Back to Plaintiff. When the defendant produces evidence sufficient to sustain a finding that the defendant was not negligent or that any negligence on his or her part was not a proximate cause of the plaintiff's injury, the res ipsa loquitur presumption disappears and the plaintiff has the burden of proving by a preponderance of evidence that his or her injury was proximately caused by the negligence of the defendant; thus, the greatest effect that the doctrine can have in the case is to support an inference that

the accident resulted from the defendant's negligence (*Frantz v. San Luis Med. Clinic (1978) 81 Cal. App. 3d 34, 44, 146 Cal. Rptr. 146* ; *see Evid. Code § 646(c)*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that inasmuch as the defendant has rebutted the res ipsa loquitur presumption, the presumption is nullified, and the defendant is entitled to a jury instruction on the burden of producing evidence [*see Evid. Code § 646(c)*; *Frantz v. San Luis Med. Clinic (1978) 81 Cal. App. 3d 34, 44, 146 Cal. Rptr. 146]* . It should be combined with the *form in § 165.370* if applicable to the particular case.

This issue may arise in several procedural contexts. For example, the defendant may raise this argument when challenging the propriety of jury instructions given at trial, on appeal, or on a motion for a new trial [*see Frantz v. San Luis Med. Clinic (1978) 81 Cal. App. 3d 34, 41-47, 146 Cal. Rptr. 146* ; *see also Code Civ. Proc. § 657(7)*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may discuss that the defendant presented evidence sufficient to sustain a finding that he or she was not negligent or that his or her negligence was not the proximate cause of injury to the plaintiff. Counsel should then argue that the res ipsa loquitur presumption has disappeared and that the plaintiff has the burden of proving by a preponderance of evidence that his or her injury was proximately caused by the defendant's negligence [*see Frantz v. San Luis Med. Clinic (1978) 81 Cal. App. 3d 34, 44, 146 Cal. Rptr. 146* ; *see also Evid. Code § 646(c)*].

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and a form of complaint regarding the doctrine of res ipsa loquitur, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§ 165.370*. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in §§ 165.340 -165.344* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Presumption Nullified and Burden of Producing Evidence Shifted Back to Plaintiff

The factual and procedural background of ***Frantz v. San Luis Med. Clinic*** *(1978) 81 Cal. App. 3d 34, 146 Cal. Rptr. 146* , is discussed in *§ 165.370[3][a]*. In that action, the court of appeal reversed a judgment for the plaintiff on the basis of the trial court's erroneous jury instructions regarding the presumption of producing evidence arising from the

application of the doctrine of res ipsa loquitur. The court noted that if the plaintiff establishes the basic facts of the res ipsa loquitur presumption and the defendant does not contest the basic facts, but contests the existence of the presumed fact--that the defendant's negligence was a proximate cause of the plaintiff's injury--the defendant's burden is only to introduce evidence sufficient to support a finding that he or she was not negligent or that his or her negligence was not a proximate cause of the occurrence [*Evid. Code § 646(c)*]. If the defendant introduces this evidence, contesting the presumed conclusion of negligence, the doctrine vanishes, and the greatest effect that the doctrine can have in the case is to support an inference that the accident resulted from the defendant's negligence (*81 Cal. App. 3d 34, 43-44)* . The court noted that it is undisputed in light of *Evid. Code § 646* that when the defendant produces evidence sufficient to sustain a finding that the defendant was not negligent or that any negligence on his or her part was not a proximate cause of the plaintiff's injury, the res ipsa loquitur presumption disappears. The plaintiff then has the burden of proving, by a preponderance of evidence, that the plaintiff's injury was proximately caused by the negligence of the defendant (*81 Cal. App. 3d 34, 44)* . In this case, the court concluded that the jury instructions given by the court on the res ipsa loquitur presumption were incorrect, contradictory, confusing. The court therefore reversed the judgment (*81 Cal. App. 3d 34, 46-47)* .

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16-165 California Points & Authorities §§ 165.372-165.379

[Reserved]

§§ 165.372[Reserved]

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E. Defenses
1. Comparative Negligence

16-165 California Points & Authorities § 165.380

§ 165.380 Comparative Negligence Applies to Assess Liability in Proportion to Negligence

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

BECAUSE DEFENDANT HAS SHOWN THAT PLAINTIFF'S CONDUCT WAS A PROXIMATE CAUSE OF THE PLAINTIFF'S INJURIES, THE COURT SHOULD APPLY PRINCIPLES OF COMPARATIVE NEGLIGENCE IN ASSESSING LIABILITY ACCORDING TO THE PROPORTION OF NEGLIGENCE ATTRIBUTABLE TO THE PARTIES.

A. Liability Assessed in Proportion to Negligence. In all actions for negligence resulting in injury to persons or property, the contributory negligence of the person injured in person or property does not bar recovery, but the damages awarded must be diminished in proportion to the amount of negligence attributable to the person recovering (*Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226*).

B. Proof That Plaintiff's Negligence Was Proximate Cause of Harm Warrants Application of Comparative Negligence. Once the defendant has established that the plaintiff's negligence was a proximate cause of a portion of the plaintiffs' harm, the principles of comparative negligence apply to apportion liability (*see Potter v. Firestone Tire & Rubber Co. (1993) 6 Cal. 4th 965, 1011, 25 Cal. Rptr. 2d 550, 863 P.2d 795*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the plaintiff's negligence was a proximate cause of a portion of the plaintiff's injuries, and that therefore the court should apply the principles of comparative negligence to apportion liability [*see Potter v. Firestone Tire & Rubber Co. (1993) 6 Cal. 4th 965, 1011, 25 Cal. Rptr. 2d 550, 863 P.2d 795* ; *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532*

P.2d 1226] .

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may argue that the defendant has provided sufficient evidence to show that the plaintiff's negligence was a proximate cause of a portion of the plaintiff's injuries. Counsel should further argue that the court should then apply principles of comparative negligence to apportion liability between the defendant and the plaintiff, or among other parties as appropriate to the case.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and a form of affirmative defense of comparative negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Liability Assessed in Proportion to Negligence

In ***Li v. Yellow Cab Co.*** *(1975) 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226* , the plaintiff brought an action against a taxicab company and the driver of a taxicab, to recover for personal injuries and property damage suffered when her automobile was struck by a cab. The trial court found that when the defendant driver entered the intersection, he was traveling at an unsafe speed and that the traffic light was yellow. Nevertheless, the court found that the plaintiff turned left across the defendant's lane while a vehicle approached from the opposite direction so closely as to constitute an immediate hazard. Finding that the plaintiff was contributorily negligent and that her negligence was a proximate cause of the collision, the court held that she was barred from recovery. Judgment for the defendants was entered accordingly.

The Supreme Court reversed, holding that the "all or nothing" rule of contributory negligence as a complete bar to the plaintiff's recovery is superseded by a system of "pure" comparative negligence, the fundamental purpose of which is to assign responsibility and liability for damage in direct proportion to the amount of negligence of each of the parties. Therefore, the Court stated that in all actions for negligence resulting in injury to persons or property, the contributory negligence of the person injured in person or property shall not bar recovery, but the damages awarded shall be diminished in proportion to the amount of negligence attributable to the person recovering. In addition, the Court stated that the doctrine of "last clear chance" is abolished; and the defense of assumption of the risk is also abolished to the extent that it is merely a variant of the principles of contributory negligence. Both of these concepts are to be subsumed under the general process of assessing liability in proportion to negligence (*13 Cal. 3d 804, 828-829)* .

NOTE:

The adoption of the principles of comparative negligence in *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226* , did not have the effect of abolishing the term, "contributory negligence," nor did it abolish the concept of contributory negligence, meaning negligence on the part of the plaintiff contributing causally to the plaintiff's injury [*Wittenbach v. Ryan (1976) 63 Cal. App. 3d 712, 718, 134 Cal. Rptr. 47* ; *see* *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 829, 119 Cal. Rptr. 858, 532 P.2d 1226]* . Thus, the term "contributory negligence" is still used, but a finding of contributory

negligence will no longer completely bar the plaintiff's recovery. If the trier of fact finds that the plaintiff was also at fault for the accident, it must reduce the total amount of the plaintiff's damages by the proportion or percentage of negligence attributable to the plaintiff [*Drust v. Drust (1980) 113 Cal. App. 3d 1, 6 n.1, 169 Cal. Rptr. 750* ; *see Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 829, 119 Cal. Rptr. 858, 532 P.2d 1226]* .

[b] Proof That Plaintiff's Negligence Was Proximate Cause of Harm Warrants Application of Comparative Negligence

Potter v. Firestone Tire & Rubber Co. *(1993) 6 Cal. 4th 965, 25 Cal. Rptr. 2d 550, 863 P.2d 795* , was a suit brought by landowners living near a landfill. The plaintiffs claimed that the defendants had dumped toxic waste materials at the landfill, which contaminated their domestic water wells and subjected them to prolonged exposure to carcinogens. The trial court found the defendant negligent and entered judgment in the plaintiffs' favor, including damages for the plaintiff's lifelong fear of developing cancer and resultant emotional distress. The defendant appealed, claiming that the court had erred by not considering the plaintiff's comparative negligence. The court of appeal affirmed, rejecting the defendant's argument that, under comparative fault principles, the plaintiffs' long histories of cigarette smoking should reduce or entirely preclude their recovery for fear of cancer because cigarette smoke contains more than 2,500 times the concentration of benzene, a carcinogen that was detected in the plaintiffs' contaminated well water. The court reasoned that comparative fault is applicable only if the plaintiffs' negligence is a proximate cause of the injury. The plaintiffs' smoking in this case was wholly unrelated to the circumstances that caused the contamination of the plaintiffs' water supply. For comparative fault principles to apply, the court concluded, the plaintiffs' conduct would have had to contribute, in some manner to this contamination (*6 Cal. 4th 965, 1010-1011)* . The defendants sought review by the California Supreme Court.

The Supreme Court affirmed, although it found the court of appeal's reasoning erroneous because damages are apportioned under comparative fault principles based on the various causes contributing to a plaintiff's *harm*, as opposed to contributing to a particular defendant's *negligence*. Thus, the fact that the plaintiff's smoking did not contribute to the contamination of their well water is irrelevant. However, the Supreme Court upheld the court of appeal's decision because the defendant had not introduced any evidence at trial establishing that any portion of the plaintiffs' fear of cancer was attributable to their own smoking. If the defendant had done so, comparative fault principles would have been applicable (*6 Cal. 4th 965, 1011)* .

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California Points & Authorities

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
CHAPTER 165 NEGLIGENCE
PART II. FORMS
E. Defenses
1. Comparative Negligence

16-165 California Points & Authorities §§ 165.381-165.399

[Reserved]

§§ 165.381[Reserved]

California Points & Authorities

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
CHAPTER 165 NEGLIGENCE
PART II. FORMS
E. Defenses
2. Assumption of Risk

16-165 California Points & Authorities § 165.400

§ 165.400 Primary Assumption of Risk Bars Recovery if Defendant Owed No Duty of Care to Plaintiff

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PRIMARY ASSUMPTION OF RISK BARS PLAINTIFF'S RECOVERY FOR INJURIES RECEIVED IF PLAINTIFF CHOSE TO ENCOUNTER A KNOWN RISK, BECAUSE DEFENDANT OWED NO DUTY TO PLAINTIFF AND PLAINTIFF ASSUMED RISK OF INCURRING THE INJURIES RECEIVED.

A. Primary Assumption of Risk Bars Recovery. In cases involving "primary assumption of risk," in which by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury, the doctrine of assumption of the risk operates as a complete bar to the plaintiff's recovery. If the defendant has no duty of care to the plaintiff to eliminate a risk or protect the plaintiff against it, the plaintiff's knowingly encountering that risk is primary assumption of risk that bars the plaintiff's recovery (*Knight v. Jewett (1992) 3 Cal. 4th 296, 314-315, 11 Cal. Rptr. 2d 2, 834 P.2d 696* ; *Cohen v. McIntyre (1993) 16 Cal. App. 4th 650, 655, 20 Cal. Rptr. 2d 143*).

B. No Relationship With Plaintiff Creating Duty to Avoid Increasing Risks Inherent in Plaintiff's Activity. If no relationship exists between the plaintiff and the defendant, and instead the parties are independent actors separately pursuing their own activities, and there is no policy reason for imposing a duty, a defendant has no duty to avoid increasing the risks inherent in the plaintiff's activity (*Parsons v. Crown Disposal Co. (1997) 15 Cal. 4th 456, 483, 63 Cal. Rptr. 2d 291, 936 P.2d 70*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the defendant is not liable for

negligence because the plaintiff is barred from recovery under the doctrine of primary assumption of risk. The basis of this contention is that the defendant owed no legal duty to eliminate the risk that the plaintiff knowingly chose to encounter or to protect the plaintiff from that risk [*see Knight v. Jewett (1992) 3 Cal. 4th 296, 314-315, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* . It should be combined with any of the *forms in §§ 165.401 -165.402* that are applicable to the particular case.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may argue that the plaintiff engaged in an activity with an inherent known risk, and that the defendant owed the plaintiff no legal duty to protect the plaintiff from the particular risk of harm, or to avoid increasing the risk inherent in the activity.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of the affirmative defense of assumption of the risk, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender). For discussion and forms related to primary and secondary assumption of risk as defenses to a premises liability action, see California Forms of Pleading and Practice, Ch. 421, *Premises Liability* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§§ 165.401 -165.402*. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in §§ 165.410-* 411 may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Primary Assumption of Risk Bars Recovery

In ***Knight v. Jewett*** *(1992) 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2, 834 P.2d 696* , the plaintiff was injured while playing touch football when the defendant stepped on her hand. The injury ultimately resulted in the amputation of her little finger. The plaintiff commenced an action seeking damages from the defendant on theories of negligence and assault and battery. After filing an answer, the defendant moved for summary judgment, and the trial court granted the motion. On appeal, the court of appeal affirmed the judgment.

The Supreme Court, in the lead opinion by Justice George and joined by Chief Justice Lucas and Justice Arabian, affirmed the judgment of the court of appeal upholding the summary judgment entered by the trial court. The Court recapped its reexamination of the common law doctrine of contributory negligence in *Li v. Yellow Cab. Co. (1975) 13 Cal. 3d 804, 824, 119 Cal. Rptr. 858, 532 P.2d 1226* , discussed in *§ 165.380[3][a]* (*3 Cal. 4th 296, 304)* . With respect to the effect of the adoption of comparative negligence on the assumption of risk doctrine, the Court referred to the statement in *Li* that in instances in which a plaintiff "*unreasonably* undertakes to encounter a specific known risk imposed by a defendant's negligence, the plaintiff's conduct, although he may encounter that risk in a prudent manner, is in reality a form of contributory negligence." (*3 Cal. 4th 296, 305-307)* . After a review of appellate decisions

construing *Li*, the Court concluded that the decisions, regardless whether they reached the correct result on the facts at issue, had misinterpreted *Li* by suggesting that *Li* contemplated less favorable legal treatment for a plaintiff who *reasonably* encounters a known risk (and was therefore barred from recovery) than for a plaintiff who *unreasonably* encounters such a risk (whose damages would be apportioned under comparative fault principles) (*3 Cal. 4th 296, 307)* . The Court summarized its conclusions regarding the current state of the doctrine of assumption of risk in light of the adoption of comparative fault principles in *Li*, as follows: In cases involving "primary assumption of risk," in which by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury, the doctrine continues to operate as a complete bar to the plaintiff's recovery. In cases nvolving "secondary assumption of risk," in which the defendant does owe a duty of care to the plaintiff, but the plaintiff proceeds to encounter a known risk imposed by the defendant's breach of duty, the doctrine is merged into the comparative fault scheme, and the trier of fact, in apportioning the loss resulting from the injury, may consider the relative responsibility of the parties (*3 Cal. 4th 296, 314-315)* .

In applying the defendant's duty approach to the facts before the Court, the lead opinion found that the overwhelming majority of the cases, both within and outside California, that have addressed the issue of coparticipant liability in a sport such as that involved in this case, have concluded that it is improper to hold a sports participant liable to a coparticipant for ordinary careless conduct committed during the sport. Further, the cases have concluded that liability properly may be imposed on a participant only when he or she intentionally injures another player or engages in reckless conduct that is totally outside the range of the ordinary activity involved in the sport (*3 Cal. 4th 296, 318)* . Thus, the court concluded that a participant in an active sport breaches a legal duty of care to other participants--that is, engages in conduct that properly may subject him or her to financial liability--only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of ordinary activity involved in the sport (*3 Cal. 4th 296, 320)* . The Court noted that a defendant has no duty to eliminate or protect a plaintiff against risks inherent in the sport, but does have a duty of due care not to increase the risks to a coparticipant over and above those risks inherent in the sport (*3 Cal. 4th 296, 315-316)* . The Court concluded that the defendant did not have a legal duty of care to prevent the injury suffered by the plaintiff, and was therefore entitled to summary judgment (*3 Cal. 4th 296, 321)* .

Justice Mosk, in his concurring and dissenting opinion, concurred "generally" with the analysis set forth in Part II of the Court's lead opinion (in which the duty analysis was set forth), but stated that he would have gone further, and would have eliminated the implied assumption of risk doctrine entirely, and simply applied comparative fault principles to determine liability (*3 Cal. 4th 296, 321-322)* . He also concluded that the liability of sports participants should be limited to those cases in which their misconduct falls outside the range of ordinary activity involved in the sport. Thus, he concluded that "the kind of overexuberant conduct that is alleged here was not of that nature," and that the defendant was entitled to summary judgment.

Justice Kennard in her dissent criticized the opinion and maintained the view that *Ordway v. Superior Court (1988) 198 Cal. App. 3d 98, 102-107, 243 Cal. Rptr. 536* , correctly analyzed the issue. Justice Kennard stated that the defense of implied assumption of risk survives *Li*'s adoption of a system of comparative fault, and that the defense remains a complete bar to recovery in negligence cases in which the plaintiff has knowingly and voluntarily consented to encounter a specific risk (*3 Cal. 4th 296, 331)* .

Justices Panelli and Baxter, although concurring in the result reached by the "majority" opinion, dissented from the reasoning and would have applied the "consent-based" analysis of Justice Kennard's dissenting opinion (*3 Cal. 4th 296, 322)* .

Cohen v. McIntyre *(1993) 16 Cal. App. 4th 650, 20 Cal. Rptr. 2d 143* , was an action for personal injuries brought by a plaintiff veterinarian who was treating a dog owned by the defendant. The defendant knew that the dog had bitten three people in the preceding two years. At the plaintiff's request, the defendant muzzled her dog after he snapped at the plaintiff, who was trying to put the dog on the examining table. The plaintiff removed the muzzle himself after

completing the examination, and the dog then bit him several times. The plaintiff did not ask for, and the defendant did not volunteer, any information about the dog's propensity to bite. The plaintiff filed a complaint alleging that the defendant knew of the dog's vicious propensities but had negligently failed to warn the plaintiff. The trial court granted summary judgment to the defendant, holding that the plaintiff was barred from recovery because of his assumption of risk, and the court of appeals affirmed. The Supreme Court granted review and ultimately transferred the case back to the court of appeals for reconsideration in light of its decision in *Knight v. Jewett (1992) 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2, 834 P.2d 696* .

Following the lead opinion in *Knight,* the court of appeals focused on whether the defendant owed any legal duty to the plaintiff. The court noted that under the veterinarian's rule, an extension of the firefighter's rule, being bitten by a dog is an occupational hazard that veterinarians accept by entering this profession, just as fighting fires in which they may be injured is a danger that firefighters are employed to confront. In either case, the ordinary duty of care of the defendant, who created the risk either by starting the fire or by failing to warn of an animal's vicious propensities, is negated [*see Nelson v. Hall (1985) 165 Cal. App. 3d 709, 211 Cal. Rptr. 668* ; *Baker v. Superior Court (1982) 129 Cal. App. 3d 710, 181 Cal. Rptr. 311]* . Because the defendant had no duty to warn the plaintiff, primary assumption of risk applies to bar the plaintiff's recovery unless the defendant's conduct was intentional or so reckless as to fall outside the range of behavior ordinarily expected. The court held that the defendant's silence was neither intentional nor reckless, noting that the defendant's behavior was understandable because the dog's snapping and the plaintiff's request that the dog be muzzled gave her no reason to believe she needed to tell the plaintiff about the dog's history. Having concluded that primary assumption of risk applied, the court affirmed the grant of summary judgment (*16 Cal. App. 4th 650, 654-666)* .

[b] No Relationship With Plaintiff Creating Duty to Avoid Increasing Risks Inherent in Plaintiff's Activity

In ***Parsons v. Crown Disposal Co.*** *(1997) 15 Cal. 4th 456, 476, 63 Cal. Rptr. 2d 291, 936 P.2d 70*), the plaintiff was thrown from the horse on which he was riding after the horse was frightened by loud noises from a nearby garbage truck that was operating in its normal manner. The plaintiff sought recovery for his injuries from the defendant garbage company but the trial court granted summary judgment for the defendant. The court of appeal reversed, concluding that under the Court's decision in *Knight v. Jewett (1992) 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2, 834 P.2d 696* [*see § 165.400[3][a]*], the defendant owed a duty to the plaintiff to avoid increasing the risk of harm over that inherent in the recreational activity of horseback riding, and that there was a triable issue of fact as to whether the defendant had breached that duty.

The Supreme Court held that the court of appeal erred in reversing the trial court judgment, concluding that the court of appeal improperly interpreted its decision in *Knight*. In *Knight* the Supreme Court held that a participant in an active sport owes only a limited duty of care to coparticipants, a duty to avoid intentional injury or conduct so reckless as to be totally outside the range of ordinary activity involved in the sport. In the course of its discussion in *Knight* the Court mentioned that the defendants generally have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport, and cited as an example, the duty of a commercial sporting operator to maintain its premises or equipment so as not to expose its patrons to an increased risk of harm. The court of appeal read the above passage in *Knight* as imposing on the defendants, generally, a duty owed to all persons engaged in a sport or similar activity, not to increase the risks of harm over those inherent in the activity in which the plaintiff happens to be engaged and as a result concluded that the defendant garbage company owed a duty not to increase the risks to the plaintiff over those inherent in the sport of recreational horseback riding.

The Supreme Court ruled that the decision in *Knight* offered no support for the court of appeal's conclusion. While the Court acknowledged the above passage in *Knight,* it determined that the statement was made in the context of a discussion of the duty owed by parties who have some organized relationship with each other and to a sporting activity. The Court ruled that the statement is not support for a general duty not to increase the risk inherent in whatever sporting or recreational activity a plaintiff happens to be pursuing, regardless of the lack of relationship between the parties. On

the contrary, the Court held that where, as here, no relationship exists between the plaintiff and the defendant, and instead the parties are independent actors separately pursuing their own activities, and there is no policy reason for imposing a duty, a defendant has no duty to avoid increasing the risks inherent in the plaintiff's activity (*15 Cal. 4th 456, 482-483, 63 Cal. Rptr. 2d 291, 936 P.2d 70*).

[4] Additional Authorities

[a] Primary Assumption of Risk Bars Recovery

In *Levinson v. Owens (2009) 176 Cal. App. 4th 1534, 98 Cal. Rptr. 3d 779* , the court of appeal held that the primary assumption of risk doctrine provided a complete defense to the owners of a cattle ranch who had invited friends to their ranch for a barbecue and one guest who asked to ride one of their horses was injured. The guest assured the owners that she had ridden before, but she lost control of the horse, which broke into a gallop and swerved suddenly, throwing her into a fence. The court of appeal noted that while the horse was trained for work on the cattle ranch, a fact that the guest should have realized under the circumstances, the owners had no reason to know that the horse would bolt without apparent reason, as he had been a gentle horse previously around guests and when being ridden. Moreover, the owners did not purport to be horseback riding instructors or coaches and had not organized a riding event. The court concluded that the owners were entitled to take the guest at her word when she assured them that she had experience as a rider, especially in light of the fact that the guest appeared confident and in control of the horse when she first mounted. Under those circumstances, the owners had no duty to provide the guest with instructions on how to ride or control the horse (*176 Cal. App. 4th 1534, 1549-1551)* . In addition, the court also concluded that one comment made to the guest while the stirrups were being adjusted telling her not to pull back on the reins could not reasonably be interpreted to mean, even by a rider with only minimal experience, that she should never pull back on the reins to control the horse, and thus did not constitute conduct that increased the risks inherent in horseback riding (*176 Cal. App. 4th 1534, 1552)* .

In *Beninati v. Black Rock City, LLC (2009) 175 Cal. App. 4th 650, 96 Cal. Rptr. 3d 105* , the court of appeal held that the primary assumption of risk doctrine provided a complete defense to the possessors of land upon which a "Burning Man" festival was held when a participant tripped and fell, burning his hands, after voluntarily entering the aftermath of a large, man-shaped bonfire. An experienced participant in the festival, plaintiff walked into the remnants of the large fire in order to ceremoniously burn a photograph of a recently-deceased friend. The court held that plaintiff was aware of the risks inherent in walking into the remnants of the fire, which was still actively burning in spots, and that the risk of falling and being burned was inherent, obvious, and necessary to the event (*175 Cal. App. 4th 650, 658-659)* . The fact that plaintiff could not see beneath the flames and ash that covered the ground did not render the risk of tripping less obvious. The court also concluded that plaintiff had failed to provide any evidence that defendant had done anything to increase the risk of harm inherent in the activity (*175 Cal. App. 4th 650, 660-661)* .

In *McGarry v. Sax (2008) 158 Cal. App. 4th 983* , *70 Cal. Rptr. 3d 519* , primary assumption of risk was a defense when plaintiff was injured by co-participants in a "product toss" at a skateboarding competition sponsored by a skateboard store. In this particular product toss, professional skateboarders who had been performing at the event in the store's parking lot threw a skateboard deck (a skateboard without wheels or other hardware) into a crowd of fans located in a designated area, who were to compete with each other to gain possession of the board. Plaintiff, who was a willing participant, initially caught the board, but eventually fell to the ground and was injured by other participants, some of whom fell on top of him. Concluding that primary assumption of risk was a complete defense to plaintiff's negligence suit against the store, the court of appeal noted that the product toss had aspects of a competitive sporting activity and the inherent risk of injury from participating was self-evident, despite plaintiff's claim that he personally did not appreciate the risk of injury (*158 Cal. App. 4th 983, 1000)* .

In *Truong v. Nguyen (2007) 156 Cal. App. 4th 865, 67 Cal. Rptr. 3d 675* , a young girl was killed while riding as a passenger on a two-seater personal watercraft that was struck by another personal watercraft. The girl's watercraft was

being driven by a friend at a modest rate of speed of 5 to 10 miles per hour at the time of the collision. In a suit brought by the girl's parents, the trial court entered summary judgment for the owner and operator of the other watercraft and the court of appeal affirmed. The court of appeal held that the primary assumption of risk doctrine applied to the activity of riding a personal watercraft, even if the rider is merely a passenger on the watercraft and the watercraft is being operated at a modest rate of speed. The court noted that a personal watercraft is open to the elements, with no hull or cabin, and is designed for high performance, speed, and quick turning maneuvers. In addition, unlike the benign activity of riding in a boat, riding a personal watercraft requires some physical exertion and balance by the passenger to hold onto the operator or grips or handles on the vessel to avoid being thrown off. Because plaintiffs did not allege that the conduct of the operator of the other watercraft was intentional, reckless, or otherwise outside the range of ordinary activity involved in the use of a personal watercraft, the primary assumption of risk doctrine was a complete defense (*156 Cal. App. 4th 865, 887-891)* .

In Rostai v. Neste Enters. (2006) 138 Cal. App. 4th 326 , the plaintiff suffered a heart attack due to overexertion during his first workout at a gym with a personal trainer. The plaintiff sued the trainer and the gym for negligence, arguing that the trainer failed to adequately assess the plaintiff's physical condition and his cardiac risk factors prior to putting him through the workout that triggered the heart attack. The plaintiff also argued that the primary assumption of risk doctrine did not apply to the activity because it was not a "sport." Nevertheless, the trial court granted summary judgment in favor of the trainer, and the court of appeal affirmed. The court of appeal held that fitness training under the guidance of a personal trainer is a physical activity involving an element of risk or danger to which the primary assumption of risk doctrine may be applied. The risks of injury inherent in fitness training may include injury to the obvious muscles, such as those in the legs and arms, but also to less obvious areas, such as the heart. The court concluded that the trainer did nothing more than push the plaintiff beyond his comfort level, which was inherent in the training regimen and consistent with the goals of the activity (*138 Cal. App. 4th 326, 333-334*).

In *Saville v. Sierra College (2005) 133 Cal. App. 4th 857, 868-869, 36 Cal. Rptr. 3d 515* , the plaintiff was a student in a community college police officer training class who was injured while participating in training exercises demonstrating police officer arrest and control maneuvers. The trial court granted summary judgment for the community college on the basis of the primary assumption of risk doctrine, and the court of appeal affirmed. The court of appeal noted that the risk of injury was inherent in the physically-demanding maneuvers and that the instructors had no duty to eliminate all risk of injury to the students, because doing so would invariably chill vigorous participation in the learning exercises. The maneuvers, which were integral to the purpose of the class, could not be learned without incurring the risk of some injury. Although not a sport or employment activity, the classroom maneuvers were a type of activity to which the defense could apply, and the plaintiff was an adult who voluntarily participated in the class activities (*133 Cal. App. 4th 857, 867-871)* .

[b] No Relationship With Plaintiff Creating Duty to Avoid Increasing Risks Inherent in Plaintiff's Activity

In *Calhoon v. Lewis (2000) 81 Cal. App. 4th 108, 96 Cal. Rptr. 2d 394* , the plaintiff, at the invitation of a friend, arrived at his friend's parents' home to pick up his friend so that the two could drive downtown to visit the friend's girlfriend. The plaintiff, who began skateboarding in the driveway while he waited for his friend to get ready to leave, fell and impaled himself on a pipe inside a planter located in the driveway. The plaintiff sued the owners of the home, alleging negligence and premises liability. The court of appeal affirmed summary judgment for the defendants on the basis of primary assumption of risk, rejecting the plaintiff's argument that the defendants increased the risk of his injury by concealing a pipe in the planter. First, the court concluded that the injury was caused because the plaintiff fell, which was an inherent risk of skateboarding, and that the pipe in the planter did not increase the plaintiff's risk of falling, even though it may have increased the severity of his injury when he did fall (*81 Cal. App. 4th 108, 116)* . Second, relying primarily on the Supreme Court's analysis in *Parsons v. Crown Disposal Co.*, discussed in *§ 165.400[3][b]*, the court of appeal held that the defendants owed no duty to the plaintiff not to increase the risks to him while he was skateboarding. Unlike a commercial facility that might provide a course for skateboarding, the defendants did not hold out their driveway as an appropriate or safe place to skateboard and did not otherwise have any organized relationship with the

plaintiff's skateboarding (*81 Cal. App. 4th 108, 116-117)* .

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CHAPTER 165 NEGLIGENCE
PART II. FORMS
E. Defenses
2. Assumption of Risk

16-165 California Points & Authorities § 165.401

§ 165.401 Primary Assumption of Risk Bars Recovery by Plaintiff Injured by Coparticipant in Active Sport

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PRIMARY ASSUMPTION OF RISK BARS PLAINTIFF'S RECOVERY FOR INJURIES RECEIVED DURING PLAINTIFF'S VOLUNTARY PARTICIPATION IN AN ACTIVE SPORT BECAUSE DEFENDANT'S ACTIONS WERE NOT INTENTIONAL OR RECKLESS CONDUCT TOTALLY OUTSIDE THE RANGE OF THE ORDINARY ACTIVITY INVOLVED IN THE SPORT AND DID NOT INCREASE THE RISK TO PLAINTIFF BEYOND THE RISK INHERENT IN THAT SPORT.

A. Defendant's Duty Is Merely to Avoid Intentional or Reckless Conduct. Under the doctrine of primary assumption of risk, the duty of participants in active sports toward their coparticipants is merely to avoid either intentionally injuring those coparticipants or engaging in conduct so reckless as to be totally outside the range of the ordinary activity involved in the sport (*Ford v. Gouin (1992) 3 Cal. 4th 339, 342, 11 Cal. Rptr. 2d 30, 834 P.2d 724* ; *Knight v. Jewett (1992) 3 Cal. 4th 296, 320, 11 Cal. Rptr. 2d 2, 834 P.2d 696*).

B. Defendant's Conduct Within Range of Ordinary Activity of Sport. A plaintiff who voluntarily participates in an active sport is barred by primary assumption of risk from recovering for injuries resulting from a defendant's careless or negligent conduct that is within the range of ordinary activity of that sport and that does not increase the risk to the plaintiff over and above the risk inherent in the sport (*Ford v. Gouin (1992) 3 Cal. 4th 339, 342, 11 Cal. Rptr. 2d 30, 834 P.2d 724* ; *Knight v. Jewett (1992) 3 Cal. 4th 296, 320, 11 Cal. Rptr. 2d 2, 834 P.2d 696*).

[*Optional*] **C. Rule Applies to Student-Teacher Relationship.** The primary assumption of risk doctrine applies to coaches, trainers, and instructors, and to support a cause of action in cases in which it is alleged that a sports instructor has required a student to perform beyond the student's capacity or without providing adequate instruction, a plaintiff must prove that the instructor intended to cause an injury to the student or acted recklessly in engaging in conduct that is

totally outside the range of ordinary activity involved in teaching or coaching the sport (*Kahn v. East Side Union High Sch. Dist. (2003) 31 Cal. 4th 990, 1011, 4 Cal. Rptr. 3d 103, 75 P.3d 30* ; *see also Rodrigo v. Koryo Martial Arts (2002) 100 Cal. App. 4th 946, 956, 122 Cal. Rptr. 2d 832*).

[*Optional*] **D. Local Ordinance Does Not Impose Duty on Defendant That Abrogates Rule.** A local ordinance placing a duty on skiers to ski in a safe and reasonable manner, does not alter the rule that a skier owes a duty to fellow skiers not to injure them intentionally or to act recklessly or abrogate the assumption of risk defense (*Cheong v. Antablin (1997) 16 Cal. 4th 1063, 1069-1070, 68 Cal. Rptr. 2d 859, 946 P.2d 817*).

[*Optional*] **E. State Statute Does Not Impose Duty That Abrogates Rule.** A statute that provides a general standard of care applicable to a particular activity does not abrogate the primary assumption of risk doctrine unless the language of the statute explicitly demonstrates a clear intent to do so (*Whelihan v. Espinoza (2003) 110 Cal. App. 4th 1566, 1575, 2 Cal. Rptr. 3d 883*).

[*Optional*] **F. Primary Assumption of Risk May Protect Defendant Engaged in Different Activity Than Plaintiff.** The primary assumption of risk doctrine protects a party who is pursuing a sport in an appropriate venue from liability for an injury to another party who is engaged in a different activity in the same venue (*Mastro v. Petrick (2001) 93 Cal. App. 4th 83, 90, 112 Cal. Rptr. 2d 185*).

[*Optional*] **G. Intentional Conduct Within Ordinary Range of Activity Not Actionable.** Intentional conduct that is within the ordinary range of activity inherent in the particular sport is not actionable as a tort (*Avila v. Citrus Cmty. Coll. Dist. (2006) 38 Cal. 4th 148, 161-165, 41 Cal. Rptr. 3d 299, 131 P.3d 383*).

[*Optional*] **H. Primary Assumption of Risk Applies to Non-Contact Sports.** The primary assumption of risk doctrine may be applied to non-contact sports such as golf (*Shin v. Ahn (2007) 42 Cal. 4th 482, 486, 64 Cal. Rptr. 3d 803, 165 P.3d 581*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that a defendant is not liable for negligence because the plaintiff is barred from recovery under the primary assumption of risk doctrine [*see Knight v. Jewett (1992) 3 Cal. 4th 296, 320, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* . The ground of the contention is that the defendant has breached no legal duty to protect the plaintiff from harm by virtue of the fact that the parties were coparticipants in an active sport and the defendant did not commit intentional or reckless misconduct or increase the risks inherent in the sport [*see Ford v. Gouin (1992) 3 Cal. 4th 339, 342, 11 Cal. Rptr. 2d 30, 834 P.2d 724]* . Optional Paragraph C may be submitted to if the injuries arose between teacher and student [*see Rodrigo v. Koryo Martial Arts (2002) 100 Cal. App. 4th 946, 956, 122 Cal. Rptr. 2d 832]* . Optional Paragraph D may be submitted if the plaintiff raises a local ordinance that conflicts with the case law with respect to primary assumption of the risk in sports participation [*see Cheong v. Antablin (1997) 16 Cal. 4th 1063, 1069-1070, 68 Cal. Rptr. 2d 859, 946 P.2d 817]* . Optional Paragraph E may be submitted if the plaintiff raises the argument that the primary assumption of risk doctrine does not apply because the defendant was engaged in a different sporting activity in the same venue [*see Mastro v. Petrick (2001) 93 Cal. App. 4th 83, 89-91, 112 Cal. Rptr. 2d 185]* .

This form should be combined with any of the *forms in § 165.400* and *§ 165.402* that are applicable to the particular case.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may refer to facts showing that (1) the parties were coparticipants, (2) in an active sport, whether competitive or noncompetitive, and (3) the defendant's conduct was neither intentional nor reckless and did not increase the risk to the plaintiff over and above the risk inherent in the sport.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of the affirmative defense of assumption of the risk, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§ 165.401* and *§ 165.402*. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For points and authorities regarding Primary assumption of risk that may be used if the defendant is the owner or possessor of property, see Ch. 178, *Premises Liability* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Defendant's Duty Is Merely to Avoid Intentional or Reckless Conduct

Ford v. Gouin *(1992) 3 Cal. 4th 339, 11 Cal. Rptr. 2d 30, 834 P.2d 724* , involved an action for negligence against the driver of a boat for injuries sustained while the plaintiff was waterskiing barefoot and backward. The plaintiff was injured when the back of his head struck a tree limb that extended over the channel from one of the riverbanks. The defendant filed a motion for summary judgment, asserting that even had he been negligent in driving the boat, the plaintiff nonetheless was totally barred from bringing the action by the reasonable implied assumption of risk doctrine. The trial court granted summary judgment in favor of the defendant. On appeal, the court of appeal affirmed the judgment and the plaintiff sought review by the Supreme Court.

The Supreme Court affirmed the judgment of the court of appeal. The Court cited the lead opinion in *Knight v. Jewett (1992) 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2, 834 P.2d 696* [*see § 165.400[3][a]*], the companion case to *Ford*, in which it explained that in light of adoption of comparative fault principles in *Li v. Yellow Cab. Co. (1975) 13 Cal. 3d 804, 824, 119 Cal. Rptr. 858, 532 P.2d 1226* [*see § 165.380[3][a]*], the assumption of risk doctrine operates as a complete bar to a plaintiff's action only in instances in which, in view of the nature of the activity at issue and the parties' relationship to that activity, the defendant's conduct did not breach a legal duty of care owed to the plaintiff. Further, as *Knight* explains, in general the legal duty applicable to a coparticipant in an active sport is simply a duty to avoid either intentionally injuring another participant or engaging in conduct so reckless as to bring it totally outside the range of ordinary activity involved in the sport (*3 Cal. 4th 339, 342)* . The Court concluded that in light of such a limited duty owing to the plaintiff, summary judgment in favor of the defendant was properly entered because the plaintiff's evidence indicates that the defendant was, at most, careless in steering the boat (*3 Cal. 4th 339, 345)* .

The factual and procedural background of ***Knight v. Jewett*** *(1992) 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2, 834 P.2d 696* , is discussed in *§ 165.400[3][a]*.

[b] Defendant's Conduct Within Range of Ordinary Activity of Sport

The factual and procedural background of ***Ford v. Gouin*** *(1992) 3 Cal. 4th 339, 11 Cal. Rptr. 2d 30, 834 P.2d 724* , is

discussed in *§ 165.401[3][a]*. The Supreme Court cited its opinion in *Knight v. Jewett (1992) 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2, 834 P.2d 696* [*see § 165.400[3][a]*], in which it stated that a coparticipant in an active sport ordinarily bears no liability for an injury resulting from conduct in the course of the sport that is merely careless or negligent (*3 Cal. 4th 339, 342)* . Because the defendant's conduct was, at most, careless, the Court held that summary judgment in the defendant's favor was proper (*3 Cal. 4th 339, 345)* .

The factual and procedural background of ***Knight v. Jewett*** *(1992) 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2, 834 P.2d 696* , is discussed in *§ 165.400[3][a]*. In *Knight,* the parties' declarations supporting and opposing the defendant's motion for summary judgment disagreed regarding the facts of how the accident took place. The plaintiff contended that on the touch football play preceding the one in which she was injured, she told the defendant "not to play so rough or I was going to have to stop playing." The defendant recalled that the plaintiff asked him to be careful, but did not remember her saying that she would stop playing. On the very next play, the defendant recalled, he jumped up in an attempt to intercept a pass. In coming down he collided with the plaintiff, knocking her over. When he landed, he stepped backward onto her right hand, injuring her hand and little finger. In the plaintiff's version, another player had already caught the ball and the defendant ran into the plaintiff from behind, knocked her down, and stepped on her hand. Although the plaintiff maintained that the defendant's rough play as described in declarations by her and another player properly could have been characterized as "reckless," the conduct alleged was not even closely comparable to the kind of conduct--conduct so reckless as to be totally outside the range of the ordinary activity involved in the sport--that is prerequisite to the imposition of legal liability on a participant in such a sport (*3 Cal. 4th 296, 320-321)* .

In a footnote, the lead opinion in *Knight* stated that the limited duty of care applicable to coparticipants has been applied in situations involving a wide variety of active sports, ranging from baseball to ice hockey and skating. Because the touch football game at issue in the case clearly fell within the rationale of this rule, the Court stated that it had no occasion to decide whether a comparable limited duty of care appropriately should be applied to other less active sports, such as archery or golf. The Court noted that because of the special danger to others posed by the sport of hunting, past cases generally have found the ordinary duty of care to be applicable to hunting accidents [*see Knight v. Jewett (1992) 3 Cal. 4th 296, 320 n.7, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* .

NOTE:

The question of the existence and scope of a defendant's duty of care, in relation to the plaintiff's assumption of risk, is a legal question that depends on the nature of the sport or activity in question and on the parties' general relationship to the activity. As such, the issue is to be decided by the court, not by the jury [*Knight v. Jewett (1992) 3 Cal. 4th 296, 313, 11 Cal. Rptr. 2d 2, 834 P.2d 696*].

Court of appeal decisions disagree on whether the court, rather than the jury, decides the question of whether the defendant increased the risks inherent in the activity. Court opinions assigning this responsibility to the court point out that this issue goes to establishing the proper duty of care, which is the province of the court [*compare Huff v. Wilkins (2006) 138 Cal. App. 4th 732, 745, 41 Cal. Rptr. 3d 754* (court decides issue) *with Vine v. Bear Valley Ski Co. (2004) 118 Cal. App. 4th 577, 592-593* & n.4, *13 Cal. Rptr. 3d 370* (jury decides issue)]. Conversely, courts concluding that the issue should go to the jury point out that the inquiry requires application of a general duty of care, the duty not to increase the risks inherent in the activity, to the facts of the particular case, and as such, the inquiry is one traditionally left for the trier of fact [*Luna v. Vela (2008) 169 Cal. App. 4th 102, 112, 86 Cal. Rptr. 3d 588* (jury to determine whether homeowner increased risks inherent in volleyball when failing to mark net tie-down lines)]. In a 2007 opinion, the Supreme Court suggested that, in the context of primary assumption of risk, the question of whether a defendant has acted recklessly should be left to the jury, supporting the conclusion that the question of whether the defendant increased the risks inherent in an activity should also be left to the jury [*Shin v. Ahn (2007) 42 Cal. 4th 482, 499-500, 64 Cal. Rptr. 3d 803, 165 P.3d 581* ; *see Luna v. Vela (2008) 169 Cal. App. 4th 102, 113, 86 Cal. Rptr. 3d 588]* .

[c] Rule Applies to Student-Teacher Relationship

In ***Kahn v. East Side Union High Sch. Dist.*** *(2003) 31 Cal. 4th 990, 4 Cal. Rptr. 3d 103, 75 P.3d 30* , the plaintiff was a 14-year-old member of a high school swimming team who broke her neck when she hit the bottom of a shallow racing pool during a swim meet on school property. The plaintiff sued the school district and the swim coach, based in part on the failure of the coach to provide any instruction on how to make the dive properly. Although the coach disputed the factual claim, the plaintiff presented evidence that she had not received any instruction from her coach on how to perform the dive safely, even though the dive into the shallow pool was considered one of the riskiest maneuvers in the sport. She also presented evidence that the coach knew that she had a deep-seated fear of performing the dive, had previously promised her she would not have to make the dive, and had waited until the beginning of a competitive meet to inform her that she had the choice of either making the dive or not competing with the team. Feeling pressured to participate despite her fears, she began to practice making the dive without assistance from her coach. On the third practice dive, she broke her neck. The trial court granted summary judgment for the defendants on the basis of the primary assumption of risk doctrine. The plaintiff appealed, but the court of appeal affirmed, concluding that the dive was a fundamental part of competitive swimming and that the risk of injury when making the dive was inherent in the sport. The plaintiff appealed to the California Supreme Court, which reversed.

The California Supreme Court held that in applying the primary assumption of risk doctrine to a claim that a sports instructor has required a student to perform beyond the student's capacity or without providing adequate instruction, the same basic principles apply as in the context of an injury caused by one sports participant to another participant. Therefore, a sports instructor is not liable to a student for risks inherent in learning the sport, and an instructor generally does not increase the risk of harm inherent in learning a sport merely by pushing or urging a student to strive to perform beyond his or her previous level of competence. Instead, the duty imposed on a coach or instructor is a duty not to increase the risks inherent in learning a sport (*31 Cal. 4th 990, 1006)* . To overcome the primary assumption of risk doctrine, a plaintiff in an action against a coach or an instructor must allege and prove that the coach or instructor either intended to cause an injury to the student or acted recklessly in engaging in conduct that was totally outside the range of ordinary activity involved in teaching or coaching the sport (*31 Cal. 4th 990, 1011)* . Applying these principles to this particular case, the Supreme Court held that triable issues of fact, as to whether the swimming instructor was reckless in requiring the plaintiff to dive into a shallow racing pool without adequate instruction, precluded summary judgment. The facts presented by the plaintiff showed much more than an ordinary error in judgment by the coach regarding the plaintiff's readiness to perform the shallow-water dive. Instead, if plaintiff's evidence was credited, the coach provided no instruction to the plaintiff at all on how to perform the dangerous dive, but pressured her to perform the dive anyway, which could constitute reckless conduct totally outside the range of ordinary activity involved in teaching or coaching the sport (*31 Cal. 4th 990, 1011-1013)* .

In ***Rodrigo v. Koryo Martial Arts*** *(2002) 100 Cal. App. 4th 946, 122 Cal. Rptr. 2d 832* , a student was attending a class in the martial art of tae kwon do. She was allegedly kicked by another student while waiting in line to perform a kick movement with the instructor. She brought suit against the martial arts studio, alleging that the instructor was providing insufficient supervision and control over the students. The defendant successfully moved for summary judgment on the grounds that under the primary assumption of risk doctrine, the defendant owed no duty of care to the plaintiff. The plaintiff appealed.

The court of appeal affirmed. After reviewing earlier court decisions discussing the primary assumption of risk doctrine as applied to the student-instructor relationship in the context of sporting activities, the court concluded that the duty owed by coaches, trainers, and instructors to those they instruct is a limited duty not to increase the risks inherent in learning the particular sport (*100 Cal. App. 4th 946, 956)* . The court concluded that tae kwon do carries the risk, and indeed almost the certainty, of being kicked or punched. Because the plaintiff presented no evidence that the instructor's actions in lining the students up to wait their turn to perform a kicking drill, nor the kicking drill itself, increased the risks inherent in learning tae kwon do, the instructor was entitled to assert the primary assumption of risk doctrine (*100 Cal. App. 4th 946, 957)* . Addressing the plaintiff's claim that she did not expect to be injured while standing in line, the court noted that a student's subjective expectation that he or she would not be injured during a sporting activity is irrelevant to application of the primary assumption of risk doctrine. Instead, the scope of an instructor's duty is

determined by the nature of the sport and the parties' relationship to the sport and to each other (*100 Cal. App. 4th 946, 957-960)* . The court also rejected the plaintiff's argument that liability could be premised on the instructor's failure to assure compliance with his own admonition that the students were not to practice kicking while standing in line. The court noted that although a failure to supervise may have constituted a lack of due care, it did not increase the risks inherent in learning tae kwon do and consequently did not defeat the primary assumption of risk doctrine (*100 Cal. App. 4th 946, 961)* .

[d] Local Ordinance Does Not Impose Duty on Defendant That Abrogates Rule

In ***Cheong v. Antablin*** *(1997) 16 Cal. 4th 1063, 68 Cal. Rptr. 2d 859, 946 P.2d 817* , two friends went skiing together. One collided with the other, inflicting injury. The plaintiff sued the defendant for general negligence. The trial court granted the defendant's motion for summary judgment, finding that (1) a collision was an inherent risk of downhill skiing, (2) under the principles of *Knight v. Jewett (1992) 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2, 834 P.2d 696* [*see § 165.400[3][a]*], this was a case of primary assumption of risk, which was an absolute bar to the plaintiff's recovery, and (3) under *Ford v. Gouin (1992) 3 Cal. 4th 339, 11 Cal. Rptr. 2d 30, 834 P.2d 724* [*see § 165.401[3][a]*], a local ordinance placing a duty on skiers to ski in a safe and reasonable manner did not give the plaintiff a valid cause of action, and (4) the accident involved an active sport (skiing), and the defendant's conduct neither intentionally caused injury or was so reckless as to be totally outside the range of ordinary activity involved in the sport. The plaintiff appealed and the court of appeal affirmed. The California Supreme Court granted the plaintiff's petition to review the issue of the ordinance's effect.

The Supreme Court affirmed the judgment of the court of appeal, concluding that under the applicable common law principles, a skier owed no duty to fellow skiers not to injure them intentionally or to act recklessly, but a skier cannot sue another for simple negligence, and that the ordinance at issue in this case did not alter this rule. As there was no evidence that the defendant in this case intentionally injured the plaintiff or acted recklessly, the court held that the trial court correctly granted summary judgment in his favor (*16 Cal. 4th 1063, 1066)* . The Court first reiterated the general test as stated in *Knight,* that a participant in an active sport breaches a legal duty of care to other participants only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport. Then the Court addressed the question presented by the plaintiff's petition for review--namely, whether a local ordinance changed this general test. The relevant portion of the Skier Responsibility Code provided that skiers assumed the risks inherent in skiing including collision with other skiers and a skiers failure to ski within the skiers own ability, and that skiers had certain safety-related duties, a violation of which would constitute an infraction. The plaintiff argued that the ordinance imposed a higher duty of care on the defendant than *Knight* established. The Court disagreed. It recognized that *Knight* was a development of the common law of torts, and that the Legislature could, within constitutional limits choose to modify the common law by statute. Whether a local ordinance such as the instant one could modify *Knight* was, according to the Court, less clear. However, the Court did not decide this question here because it concluded that the ordinance did not modify the *Knight* standard even if it assumed it could. According to the Court, this ordinance evinced no clear intent to modify common law assumption of risk principles. It did state various skier duties, but in context these duties did not govern liability between skiers. The ordinance was adopted several years before the decision in *Knight* but preserved common law principles of assumption of risk. The Court dismissed the plaintiffs argument that the assumption of the risk provisions of the ordinance were intended to protect ski area operators and not skiers, from liability for injuries due to negligent skiing, saying that nothing in the language of the ordinance limits the scope of those provisions in this fashion. Accordingly, it concluded that the ordinance by itself, did not give the plaintiff a cause of action (*16 Cal. 4th 1063, 1069-1070)* .

The plaintiff's second argument was that *Evid. Code § 669(a)* provided him with a cause of action in that (1) the defendant violated an ordinance, (2) the violation caused his injury, (3) the ordinance was designed to prevent his injury, and (4) he was one of the class the ordinance was intended to protect. Relying heavily on *Ford v. Gouin,* the plaintiff argued that if a plaintiff who is a participant in an active sport is also a member of the class of persons intended to be protected by a statute, then *Evid. Code § 669* will in turn transform the statute into a legal duty of due care on the

defendant, thus abrogating the assumption of risk defense. In response, the Court determined that there was no legal duty in this case because the elements of *Evid. Code § 669(a)* had not been met, specifically, the plaintiff had not demonstrated that he was one of the class of persons the ordinance was intended to protect. By stating that skiers assumed the inherent risks of skiing, including the risk of collision and the risk that others would fail to ski within their own ability, the ordinance made clear that petitioner, who was injured in a collision with a fellow skier, was not one of the class of persons for whose protection the ordinance was adopted. Accordingly, the Court found that *Evid. Code § 669(a)* did not aid the plaintiff's position (*16 Cal. 4th 1063, 1070-1072)* .

In its opinion, the California Supreme Court raised two issues of potential significance to an assumption of risk case involving an ordinance or statute, but declined to decide either. The first involved the question of whether an ordinance or statute could impose a higher duty of care on the defendant than *Knight* established. The Court acknowledged that *Knight* was a development of the common law of torts, and that the Legislature could, within constitutional limits choose to modify the common law by statute. Whether a local ordinance such as the instant one could modify *Knight* was, according to the Court, less clear. However, the Court did not decide this question here because it concluded that the ordinance did not modify the *Knight* standard even if it assumed it could (*16 Cal. 4th 1063, 1069)* .

The second issue left open by the Court's opinion in *Cheong* was whether the breach of a statutory duty under *Evid. Code § 669(a)* would create tort liability between coparticipants in an active sport despite the *Knight* doctrine of primary assumption of risk. According to the Court, Justice Arabian's opinion in *Ford* implicitly assumed, and the opinions of Justice George, joined by Chief Justice Lucas, and Justice Mosk expressly concluded, that if the four elements of *Evid. Code § 669(a)* were satisfied, that statute creates tort liability between coparticipants in an active sport despite the *Knight* doctrine of primary assumption of risk. A number of the justices who signed the majority opinion in *Cheong* questioned whether this conclusion was correct. Three justices were of the opinion that *Evid. Code § 669(a)* only creates an evidentiary presumption of negligence, while the *Knight* doctrine, if applicable, provides that negligence alone is insufficient to impose tort liability. However the Court did not resolve the issue because it determined that even if the conclusion was correct, the elements of *Evid. Code § 669(a)* had not been met in this case (*16 Cal. 4th 1063, 1071)* .

NOTE:

One subsequent court of appeal decision, *Distefano v. Forester (2001) 85 Cal. App. 4th 1249, 1272-1274, 102 Cal. Rptr. 2d 813* [*see § 165.401[4][a]*], adopted the approach that a presumption of negligence under *Evid. Code § 669(a)* could not overcome the primary assumption of risk defense, because the primary assumption of risk defense protects against liability for conduct that is merely negligent. In that particular case, the court of appeal concluded that the violation of a standard of care provided by *Veh. Code §§ 38305* and *38316*, statutory provisions governing off-highway driving, did not overcome the primary assumption of risk defense, because negligence was an insufficient basis for tort liability between participants in the sport of off-roading (*85 Cal. App. 4th 1249, 1270-1274)* . However, the court of appeal's analysis of the issue was dicta because the court had already held that the plaintiff failed to plead the issue at trial and could not amend his pleading on appeal (*85 Cal. App. 4th 1249, 1266)* .

At least one subsequent court of appeal opinion, *Moser v. Ratinoff (2003) 105 Cal. App. 4th 1211, 1226, 130 Cal. Rptr. 2d 198* [*see § 165.401[4][a]*], has adopted the conclusion of the *Distefano* court as applied in the context of an injury sustained in an organized bicycle ride, based primarily on the fact that a majority of the California Supreme Court appeared to agree with that conclusion.

[e] State Statute Does Not Impose Duty That Abrogates Rule

In ***Whelihan v. Espinoza*** *(2003) 110 Cal. App. 4th 1566, 2 Cal. Rptr. 3d 883* , the plaintiff was jet skiing with a friend and turned her jet ski in front of her friend, apparently to try to escape from what she perceived as her friend's

dangerous maneuvers, which resulted in a collision. The plaintiff sued her friend for negligence, but the trial court granted summary judgment for the defendant on the basis of the primary assumption of risk doctrine. The plaintiff appealed, arguing that the primary assumption of risk doctrine did not apply because *Harb. & Nav. Code § 655(a)* and *Harb. & Nav. Code § 655.7(c)*, which created a standard of care when using jet skis, abrogated the doctrine under the facts of the case. In the alternative, the plaintiff also argued that a triable issue of fact existed as to whether the defendant engaged in reckless behavior sufficient to overcome the primary assumption of risk doctrine.

The court of appeal affirmed. The court noted that although the statutes at issue criminalize reckless or negligent operation of watercraft and were enacted after the Supreme Court's decision in *Knight v. Jewett*, these statutes did not prevent application of the primary assumption of risk doctrine to the active sport of jet skiing, which by its very nature involves dangerous maneuvers, as well as skill and challenges that pose a significant risk of injury (*110 Cal. App. 4th 1566, 1573-1575)* . Recognizing that the legislature is free to abrogate the primary assumption of risk doctrine should it so choose, the court held that to abrogate that doctrine, the language of the relevant statutes must demonstrate a clear intent to do so. *Harb. & Nav. Code § 655(a)* and *Harb. & Nav. Code § 655.7(c)* are general statutes providing a standard of care applicable to the activity, but they contain no language evidencing an intent to abrogate the primary assumption of risk doctrine (*110 Cal. App. 4th 1566,1575)* . Therefore, to overcome the primary assumption of risk defense, the plaintiff was required to plead and prove that the defendant intended to injure the plaintiff or engaged in conduct so reckless as to be outside the range of ordinary activity inherent in the sport of jet skiing. Because the plaintiff specifically pleaded only negligent conduct on the part of the defendant, the court rejected the plaintiff's argument that triable issues remained as to whether the defendant's conduct was so reckless as to be outside the range of the ordinary activity involved in jet skiing (*110 Cal. App. 4th 1566, 1575-1576)* .

[f] Primary Assumption of Risk Protects Defendant Engaged in Different Activity Than Plaintiff

In ***Mastro v. Petrick*** *(2001) 93 Cal. App. 4th 83, 112 Cal. Rptr. 2d 185* , the plaintiff was a skier who was injured in a collision with a snowboarder. Both skiing and snowboarding were permitted on the slope where the collision occurred. The plaintiff sued the snowboarder, but the defendant answered that the primary assumption of risk doctrine provided a complete defense because his conduct was not reckless. The plaintiff countered that because the two were not coparticipants in the same sport, the primary assumption of risk doctrine did not apply. The plaintiff further argued that if the doctrine did apply, the defendant's conduct was reckless. The trial court granted summary judgment for the defendant, and the plaintiff appealed.

The court of appeal affirmed. The court rejected the parties' focus on whether the parties were properly labeled as "coparticipants" in the same sport. Instead, the court noted that the question of whether the defendant owed a duty to the plaintiff was determined by the nature of the sport or activity in question and the parties' general relationship to the activity (*93 Cal. App. 4th 83, 89)* . The court then concluded that the primary assumption of risk doctrine may be used to protect a party who is pursuing a sport in an appropriate venue from liability for an injury to another party who is engaged in a different activity in the same venue. The court noted that a plaintiff who knowingly engages in his or her own activity in the same venue assumes the risk of injury caused by a party who is vigorously engaged in a different activity, and that the nature of the defendant's duty is defined with reference to the sport in which the *defendant* is engaged. Therefore, the question of whether the defendant was liable for the plaintiff's injury depended on whether the defendant's conduct was so reckless as to fall outside the range of ordinary activity involved in the defendant's sport (snowboarding) (*93 Cal. App. 4th 83, 90-91)* . In the unpublished portion of the opinion, the court concluded that the defendant's conduct was not reckless.

[g] Intentional Conduct Within Ordinary Range of Activity Not Actionable

In ***Avila v. Citrus Cmty. Coll. Dist.*** *(2006) 38 Cal. 4th 148, 41 Cal. Rptr. 3d 299, 131 P.3d 383* , the plaintiff, a baseball player for a community college baseball team, was struck in the head by a pitch thrown during a preseason exhibition game played on the opponent's field. The plaintiff alleged that the pitch was either thrown negligently or

intentionally in retaliation because one of the pitcher's teammates was hit by a pitch in the previous inning. The plaintiff staggered, felt dizzy, and was in pain, although his manager made him stay in the game for a few minutes before finally taking him out. No one tended to his injuries, which turned out to be serious. The plaintiff sued both school districts, his manager, and various other entities. As to the opposing school district, the plaintiff alleged that it school was negligent in failing to summon or provide medical care at the time of the injury, failing to supervise and control the opposing pitcher, failing to provide adequate supervisory personnel and officials, and failing to provide adequate equipment. The school district demurred on the grounds that it was immune from liability under *Gov. Code § 831.7(a)*, the public entity immunity statute for injuries occurring during hazardous recreational activities, and the trial court sustained the demurrer and dismissed the action as to the district. The court of appeal reversed, relying on previous court of appeal opinions to rule that *Gov. Code § 831.7* does not extend immunity to claims predicated on the negligent supervision of public school athletes and that the school district owed a duty of supervision to plaintiff. The school district appealed.

The California Supreme Court reversed the court of appeal. Addressing the issue of immunity under *Gov. Code § 831.7*, the Court held that school-sponsored and supervised sports activities are not "recreational" in the sense of voluntary unsupervised play as envisioned by the statute. Instead, these sports are a fundamental part of the school's educational mission. Therefore, the statute did not apply to immunize public educational entities from liability for injuries to students sustained during those activities (*38 Cal. 4th 148, 158-160)* . However, the Court then went on to hold that under the primary assumption of risk doctrine, the school district owed no duty to the plaintiff to protect him from the injury he suffered. The Court determined that the risk of being hit with a pitch was inherent in the game of baseball, and despite the fact that the conduct was in violation of the official rules of the game, intentionally throwing a pitch at or near a batter was a recognized strategy that was also inherently part of the game. Players pitch at or near the batter to disrupt a batter's timing or back the batter away from the plate, to retaliate after a teammate has been hit by a pitch, or to punish a batter for having hit a home run (*38 Cal. 4th 148, 163-165)* . The Court also rejected the other claims asserted by the plaintiff because the undisputed facts of the case did not demonstrate that the defendant violated any duty of care owed to the plaintiff (*38 Cal. 4th 148, 166-168)* .

[h] Primary Assumption of Risk Applies to Non-Contact Sports

In *Shin v. Ahn (2007) 42 Cal. 4th 482, 64 Cal. Rptr. 3d 803, 165 P.3d 581* , plaintiff was golfing in a group with two other golfers when he was injured by a tee shot hit by one of the other two. Plaintiff had just finished putting on one hole and was walking toward the next tee when he stopped to get out a bottle of water and check his cell phone for messages. Defendant hit his tee shot, which struck plaintiff in the head and caused serious injury. Plaintiff alleged that he and defendant had made eye contact before defendant had teed off, suggesting that defendant knew where plaintiff was before taking the shot. Defendant alleged, however, that he checked the area in front of the tee, determined that the area was clear, and then focussed on the ball for 15 to 20 seconds before making the shot. The trial court held that the primary assumption of risk doctrine applied, but that triable issues remained that precluded summary judgment. The court of appeal affirmed, but for different reasons. The court of appeal held that the primary assumption of risk doctrine did not apply, that the case should be tried according to general negligence principles, and that defendant had breached a duty of care owed to plaintiff. Because it concluded that plaintiff's conduct raised issues of comparative negligence, however, the court of appeal remanded for trial on the apportionment of fault. Defendant appealed.

The California Supreme Court agreed that summary judgment was properly denied, but disagreed with the analysis of the court of appeal. The Supreme Court held that the primary assumption of risk doctrine may be applied to non-contact sports such as golf (*42 Cal. 4th 482, 486)* . Thus, so long as the defendant golfer did not intend to injure the other golfer or engage in conduct so reckless as to be totally outside the range of ordinary activity involved in the sport, a golfer who injures another golfer with an errant golf shot may defend against liability on the basis of the primary assumption of risk doctrine (*42 Cal. 4th 482, 497*). The Court stated that primary assumption of risk may be applied under these circumstances regardless of whether plaintiff and defendant were golfing as part of the same group or merely happened to be on the same course (*42 Cal. 4th 482, 494)* . The Court also ruled that the violation of a golfing rule of etiquette by the defendant does not in and of itself establish a basis for liability. Thus, while rules of golfing

etiquette state that a player should ensure that no one is standing close by or in a position to be hit when making a shot, the risk of being hit with an errant ball is inherent in the sport and whether the defendant acted recklessly when injuring another golfer with an errant shot depends on the totality of circumstances. While a golfer cannot just ignore other players when making a shot, once having checked to see if others are reasonably likely to be struck and having concluded that it is safe to hit, a golfer who then concentrates on the ball in order to make the shot is not required to break his or her concentration in order to check the field again (*42 Cal. 4th 482, 497-500)* . The Court added that factors that may bear on whether a golfer's conduct was reasonable, negligent, or reckless may include the golfer's skill level, whether topographical conditions obscure the golfer's view, what steps the golfer took to determine whether anyone was within range, and the distance and angle between plaintiff and defendant when the shot was made (*42 Cal. 4th 482, 500)* .

[4] Additional Authorities

[a] Defendant's Conduct Within Range of Ordinary Activity of Sport

In *Towns v. Davidson (2007) 147 Cal. App. 4th 461, 54 Cal. Rptr. 3d 568* , plaintiff was injured while snow skiing at a ski resort when an employee of the resort collided with her. At the time of the collision, the resort employee was practicing giant, slalom-type turns, and was concentrating on holding an edge through the turns. As such, he was looking down and did not look to his left before making a quick left-turn, leading to the collision with plaintiff, who was skiing slowly straight down the hill. The court of appeal held that the primary assumption of risk doctrine precluded imposing liability on the ski resort or the employee. The court noted first that the fact that the defendant skier was an employee of the resort had no impact on application of the defense, as his employee status did not increase the risk of injury while skiing (*147 Cal. App. 4th 461, 470)* . The court then held that plaintiff had failed to raise a triable issue as to whether the employee's conduct was so reckless as to be totally outside the range of ordinary activity involved in skiing. While the employee was skiing quickly and aggressively at the time of the collision, the court concluded that this was an inherent part of the sport. The fact that the employee was concentrating on his technique and may have turned without looking did not establish conduct totally outside the range of ordinary activity for the sport. Moreover, the court concluded that imposing liability for such conduct would chill vigorous participation in the sport (*147 Cal. App. 4th 461, 471)* .

In *Souza v. Squaw Valley Ski Corp. (2006) 138 Cal. App. 4th 262, 41 Cal. Rptr. 3d 389* , an eight-year-old snow skier lost her balance, veered off course, and collided with a plainly-visible snowmaking hydrant located on a ski run. There was sufficient room for skiers to go around the hydrant on either side. Most of the hydrant was padded, although apparently the nozzle that caused the skier's injury was not. She sued the ski resort, but the resort successfully defended on the basis of primary assumption of risk. The court of appeal held that the risk of colliding with other skiers, with ski lift towers, or with properly marked or plainly visible snowmaking or snow grooming equipment was a danger that was inherent in snow skiing. The court rejected the plaintiff's argument that the defendant increased the risks of the sport by placing the hydrant in the middle of the ski run, noting that it was undisputed that the hydrant was plainly visible and that there was sufficient room for skiers to go around it. The court also rejected the plaintiff's argument that the ski resort had a legal duty to completely pad the plainly-visible hydrant (*138 Cal. App. 4th 262, 267)* .

In *Moser v. Ratinoff (2003) 105 Cal. App. 4th 1211, 130 Cal. Rptr. 2d 198* , the plaintiff was participating in an organized, noncompetitive bicycle ride on a public highway when another rider traveling beside the plaintiff swerved into him. The plaintiff sued the coparticipant for negligence, but the trial court granted summary judgment for the defendant based on the primary assumption of risk doctrine. The court of appeal affirmed. After holding that a signed release only applied to release the sponsors and organizers of the event, the court concluded that the bicycle ride was a sport subject to the primary assumption of risk doctrine, even though the ride was noncompetitive. A ride of that kind, with a large number of riders, is an athletic activity done for enjoyment and physical challenge (*105 Cal. App. 4th 1211, 1220-1221)* . Furthermore, the risk of injury caused by a negligent coparticipant who swerves into another rider was inherent in the sport (*105 Cal. App. 4th 1211, 1222)* . Finally, based on the fact that a majority of the California

Supreme Court appeared to agree with the proposition that the negligence per se doctrine could not be used to impose a duty of care under circumstances in which negligence was not actionable under the primary assumption of risk doctrine, the court rejected the argument that the primary assumption of risk doctrine was abrogated because the defendant allegedly violated various Vehicle Code provisions (*105 Cal. App. 4th 1211, 1226)* .

In *West v. Sundown Little League of Stockton, Inc. (2002) 96 Cal. App. 4th 351, 116 Cal. Rptr. 2d 849* , the plaintiff was a ten-year-old participant on a Little League Baseball team who was hit in the eye during pregame practice by a fly ball that he lost sight of in the glare of the sun. The plaintiff brought suit against the league, its agents, and his coach. The trial court granted summary judgment for the defendants on the basis of the primary assumption of risk doctrine, and the court of appeal affirmed. The court concluded that the possibility of being hit with a ball when it gets lost in the glare of the sun, either in practice or during a game, was an inherent risk of playing baseball. The court rejected the argument that the coach or the league had done anything to increase this risk. The fact that the coach was serving up fly balls from the left field line to center field at the time of the injury was irrelevant, because that was the same trajectory that a ball hit to right field would take during a game. Moreover, the duty of the league and its coaches was not to increase the inherent risks, and they owed no duty to decrease the risks inherent in the game. Therefore, they owed no duty to take affirmative steps to protect the players from fly balls by providing nonstandard equipment, such as protective glasses to reduce the glare (*96 Cal. App. 4th 351, 359)* . The court also noted that it was irrelevant that the injury occurred during practice, rather than during a game, and rejected the argument that liability could be predicated on the fact that, in hindsight, the coach may have pushed the plaintiff beyond his skill level (*96 Cal. App. 4th 351, 360-361)* .

In *Distefano v. Forester (2001) 85 Cal. App. 4th 1249, 102 Cal. Rptr. 2d 813* , the plaintiff was riding his motorcycle at an "off-roading" course when the defendant's dune buggy crested a blind hill and collided with the plaintiff as he ascended the opposite side. The plaintiff sued for negligence, but the trial court granted summary judgment for the defendant on the basis of primary assumption of risk. The court of appeal affirmed. The court concluded that the risk of inadvertent collision and injury was inherent when engaging in the recreational activity of off-roading at a course provided for those particular activities (*85 Cal. App. 4th 1249, 1262-1264)* . The court also concluded that driving fast in the middle of a dirt trail while ascending a blind hill was not so reckless as to be outside the range of ordinary activities involved in the sport (*85 Cal. App. 4th 1249, 1274)* . Finally, the court concluded that the defendant owed the plaintiff no duty to use a "spotter" at the top of the hill or equip his buggy with a tall whipper to make the vehicle visible over the crest of the hill, because the plaintiff failed to provide evidence that the lack of these precautions was so reckless as to be outside the range of ordinary activities involved in the sport (*85 Cal. App. 4th 1249, 1275)* .

In *American Golf Corp. v. Superior Court (2000) 79 Cal. App. 4th 30, 93 Cal. Rptr. 2d 683* , the plaintiff was golfing when he was struck by an errant golf ball that ricocheted off a wooden yardage marker after being hit by a companion golfer. The plaintiff brought suit against the golf course, alleging that it was negligent in the design and placement of the yardage marker. The trial court denied the defendant's motion for summary judgment, but the court of appeal held that summary judgment was proper under the primary assumption of risk doctrine. The court of appeal held that the risk of being hit by an errant shot is inherent to the sport of golf, yardage markers are integral to play, and there was no triable issue as to whether the golf course increased the risk of being hit by an errant shot through its design and placement of the yardage marker. In this case, the court noted that the plaintiff's injury was sustained when another golfer hooked his shot and struck an object that was not in the line of play and had not been removed, even though it was removable. In addition, there were no prior reports of injuries caused by the construction or location of any of the fairway yardage markers on the course. Therefore, the golf course had no duty to protect the plaintiff from the inherent risk of being struck by an errant shot under those circumstances. The court also rejected the claim that a triable issue of fact was created by the opinion of the plaintiff's expert that the particular yardage marker should have been farther from the fairway or made of softer material (*79 Cal. App. 4th 30, 38-39)* .

In *Record v. Reason (1999) 73 Cal. App. 4th 472, 86 Cal. Rptr. 2d 547* , the plaintiff suffered neck and back injuries from engaging in water "tubing" while being towed by a motorboat driven by the defendant. The plaintiff alleged that

the defendant operated the motorboat negligently and at excessive speeds, causing the plaintiff to fall off the tube when the defendant tried to execute a sharp turn. The plaintiff also alleged that he had told the defendant immediately prior to going out on the water that he wanted to "go slow," and that the defendant should "take it easy." The trial court granted the defendant's motion for summary judgment on the grounds that water tubing was a sport subject to the primary assumption of risk doctrine, that the purpose of the sport was to "whip around" and feel as if the participant were water skiing, and that the defendant's conduct was not reckless enough to take the defendant's conduct outside the protection of the primary assumption of risk doctrine. The court of appeal affirmed. After determining that the primary assumption of risk doctrine applied to water tubing, the court concluded that even if the plaintiff told the defendant not to drive the motorboat at a fast speed, those statements could not be used to change the inherent nature of the sport of water tubing or to take the defendant's actions out of the normal range of activities for that sport, if they were otherwise within that range (*73 Cal. App. 4th 472, 483-484)* . The court analyzed whether the defendant's actions increased the risk inherent in water tubing, and concluded that even if the defendant was driving the boat slightly above the recommended speed for the sport and turned too sharply, this activity was merely negligent and therefore protected by the primary assumption of risk doctrine. Holding a boat driver to a duty to ensure that the tube rider does not fall off the tube would inevitably chill participation in the sport of water tubing, the purpose of which was to ride the tube at a rate of speed that would cause the tube to whip through the water (*73 Cal. App. 4th 472, 484-485)* . However, as pointed out by the dissent in this case, the court of appeal's decision is subject to criticism on the grounds that the plaintiff's words to the defendant should have created a factual dispute as to whether the plaintiff actually assumed the risk of water tubing or merely assumed the risks of a less vigorous activity (*73 Cal. App. 4th 472, 490-491)* .

In *Shelly v. Stepp (1998) 62 Cal. App. 4th 1288, 73 Cal. Rptr. 2d 323* , the plaintiff was injured when a racehorse he was exercising at a racetrack collided with another horse also being exercised at the track. The plaintiff argued that the other horse was too young and too easily spooked, and thus should not have been exercising on the track when other, more mature horses were exercising, absent a second horse and rider to control the young horse. Holding that the primary assumption of risk doctrine applied, the trial court granted summary judgment for the defendants, the owners of the horse that caused the injury and employers of the rider of that horse. The court of appeal affirmed. The court rejected the plaintiff's argument that the primary assumption of risk doctrine does not apply to practice activities in preparation for competitive events. The court concluded that because racehorses are by nature difficult to control, a rider traveling on a track at high speeds in close proximity to others engaged in similar activity assumes the risk of injury caused by another unruly horse, even though the injury may have been caused through the ordinary negligence of the person in charge of the other horse (*62 Cal. App. 4th 1288, 1294-1295)* .

In *Balthazor v. Little League Baseball, Inc. (1998) 62 Cal. App. 4th 47, 72 Cal. Rptr. 2d 337* , an 11-year-old boy who was struck in the face by a wild pitch during a Little League baseball game sued the League for his injuries. The trial court granted the Leagues' request for summary judgment, concluding recovery was barred by the doctrine of primary assumption of risk. The appellate court affirmed, holding that the plaintiff failed to assert any basis for finding that the League breached a duty to protect him from the injury sustained, because the injury resulted from an errant pitch, a risk inherent in the sport (*62 Cal. App. 4th 47, 53)* . The court rejected all three of the plaintiff's arguments that attempted to show that the League increased the risks inherent in baseball: that the League negligently supervised the game by failing to end it as sunset approached; that the League was negligent in failing to remove the "wild pitcher" from the game because he had earlier struck two other players; and that the League had a duty to reduce the risk of injury from being struck by a baseball by providing helmets with face guards. The court found that each factor was in reality a normal aspect of Little League baseball as played by youngsters everywhere. As to the face guard argument the court stated that under the doctrine of primary assumption of risk, the defendant has a duty not to increase the risks inherent in a sport, not to decrease the risks. Here, the face guard which the plaintiff argued should have been required was not a part of the normal safety equipment used by the League. The League's failure to require additional equipment did not increase the risk inherent in the sport, that a player might be struck by a carelessly thrown ball [*62 Cal. App. 4th 47, 52]* .

In *Dilger v. Moyles (1997) 54 Cal. App. 4th 1452, 63 Cal. Rptr. 2d 591* , the plaintiff, while golfing, was struck by a

ball hit by another golfer. Whether or not the defendant yelled "fore" while hitting his errant shot was disputed. The plaintiff sued the other golfer. The trial court granted summary judgment for the defendant finding that primary assumption of the risk barred the plaintiff's lawsuit. The appellate court affirmed. First, the court ruled that the doctrine of assumption of the risk applied to the sport of golf (*54 Cal. App. 4th 1452, 1454)* . The court determined that the failure to yell "fore", while possibly negligent, was not that reckless or intentional conduct contemplated by the *Knight* Court. Whether or not the golfer yells "fore" does not alter the inherent risk of the sport, being struck by a golf ball (*54 Cal. App. 4th 1452, 1456)* .

In *Staten v. Superior Court (1996) 45 Cal. App. 4th 1628, 53 Cal. Rptr. 2d 657* , the plaintiff was a figure skater who was injured when she collided with another figure skater during a group skating session. The plaintiff brought a personal injury action against the other skater, her parents, the skating club she belonged to as well as the ice rink. The defendants moved for summary judgment on the ground of primary assumption of the risk. The trial court denied the motion, specifically ruling there was a triable issue of material fact on the question whether such an injury as suffered by the plaintiff was an inherent risk in figure skating. The court of appeal reversed, relying on the case of *Knight v. Jewett (1992) 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2, 834 P.2d 696* (discussed in *§ 165.400[3][a]*). The plaintiff argued that *Knight* only applied to contact sports, and not to "solo" figure skating. The court agreed with the defendants that collisions with other skaters in group skating sessions, and the injuries that may result therefrom, were inherent risks of the sport of figure skating. Further, the court ruled that this would be true regardless of whether the group skating was practice for skating competition or merely recreational (*45 Cal. App. 4th 1628, 1634)* .

In *Regents of Univ. of Cal. v. Superior Court (1996) 41 Cal. App. 4th 1040, 48 Cal. Rptr. 2d 922* , the widow of a man killed during a rock climbing class brought a wrongful death action against the sponsor of the class. The defendant moved for summary judgment on the ground that the action was barred by the doctrine of primary assumption of risk. The trial court denied the motion, holding that the defendant owed the decedent a duty of care as a matter of law. The court of appeal noted that in the context of sporting activities, the overriding consideration in the application of primary assumption of risk is to avoid imposing a duty that might chill vigorous participation in the implicated activity and thereby alter its fundamental nature. In student/instructor cases, the determination of duty turns on the facts surrounding their levels of experience and their relationships to one another in the activity. As the moving party on the motion for summary judgment, the defendant had the burden of establishing that the decedent was not taken beyond his level of experience and capability, and that the risk was not beyond that inherent in any top rope climbing activity. The court concluded that the defendant met its burden, because falling is the very risk inherent in the sport of rock climbing and cannot be completely eliminated without destroying the sport itself (*41 Cal. App. 4th 1040, 1046)* .

In *Stimson v. Carlson (1992) 11 Cal. App. 4th 1201, 14 Cal. Rptr. 2d 670* , the plaintiff sued for damages based on injuries that he suffered when he was hit by the mainsheets of the defendant's sailboat, on which the plaintiff was sailing recreationally as one of a six-person crew. The plaintiff was an experienced sailor and had sailed on the defendant's boat a number of times. The trial court granted summary judgment to the defendant, based on the defense of assumption of risk. The court of appeal affirmed, concluding that a swinging boom is a risk inherent in the sport of sailing. The defendant's failure to give an audible warning of a course change--the boom having swung and hit the plaintiff in the execution of a course change--may have been unexpected but was not reckless and did not alter the fundamental risk of a swinging boom on a sailboat (*11 Cal. App. 4th 1201, 1205-1206)* . The court concluded, "Particularly in the area of athletics and recreation, the doctrine of primary assumption of risk prevents lawsuits among participants who are knowingly engaged in the normal activities, and inherent risks, of an active sport. By eliminating liability for unintended accidents, the doctrine ensures that the fervor of athletic competition will not be chilled by the constant threat of litigation from every misstep, sharp turn and sudden stop. ... On a larger scale, participation in amateur athletics is a socially desirable activity that improves the mental and physical well-being of its participants. The freedom to enjoy such activity is preserved through application of the doctrine of primary assumption of risk" (*11 Cal. App. 4th 1201, 1206)* .

[b] Rule Applies to Student-Teacher Relationship

In *Hamilton v. Martinelli & Assocs. (2003) 110 Cal. App. 4th 1012, 2 Cal. Rptr. 3d 168* , the plaintiff was employed as a probation officer at a youth detention facility. The plaintiff was injured by her trainer while engaging in a self-defense maneuver at a required training session, and the injury left her unable to work as a correctional officer or peace officer. The plaintiff sued the training course business and its owner for negligence and intentional tort. The trial court granted summary judgment for the defendants on the grounds that the claims were barred by the primary assumption of risk doctrine, and the court of appeal affirmed. The court of appeal reviewed the primary assumption of risk doctrine in the context of physical sports and training, noting its application in the student-teacher context and the fact that liability is not imposed on an instructor simply because, in hindsight, the instructor may have pushed the student beyond the student's capabilities. Liability can only be imposed if the instructor intentionally injured the student, acted recklessly, or otherwise increased the risks inherent in the activity. Because the plaintiff presented no evidence that the instructor had done anything to increase the risks inherent in the training activity, and because the injury suffered by the plaintiff was an inherent risk of the training maneuver and comparable to the risks associated with her job, the primary assumption of risk doctrine barred the plaintiff's claims (*110 Cal. App. 4th 1012, 1022-1024)* .

In *Kane v. National Ski Patrol Sys., Inc. (2001) 88 Cal. App. 4th 204, 105 Cal. Rptr. 2d 600* , a married couple, both experienced skiers, were engaged in an instruction course in preparation for joining a volunteer ski patrol at a ski resort. After being led by an instructor to an ungroomed, icy part of the most difficult trail at the resort, the husband lost his skis and poles and slid over a cliff. The same then happened to the wife as she went to look for her husband. The wife sustained a severely broken leg, and the husband was killed. The wife and her two sons then brought a suit for personal injuries and wrongful death against the resort and the organization that conducted the training. After the resort settled, the trial court ruled for the plaintiffs, and the remaining defendant appealed. The court of appeal reversed, holding that liability was precluded by the primary assumption of risk doctrine. The court held that as a matter of law, the ski instructor's assessment errors in evaluating either the skill level of his students or the difficulty of the conditions of the terrain did not rise to the level of recklessness sufficient to overcome the primary assumption of risk doctrine. The court noted that the risks of falling and being injured or even killed are inherent in skiing and that instructors must make subjective judgments about a student's skill level to sufficiently challenge the student so that the student will improve those skills. The court also concluded that holding the ski patrol instructor liable under the circumstances would discourage the provision of ski patrol training, which would in turn endanger all skiers (*88 Cal. App. 4th 204, 214)* .

In *Lupash v. City of Seal Beach (1999) 75 Cal. App. 4th 1428, 89 Cal. Rptr. 2d 920* , the plaintiff was severely injured while participating in a junior lifeguard competition when he allegedly tripped over a natural depression in the shallow ocean bottom and fell forward into the water. He brought suit against the city that sponsored the event, alleging that the city had assumed a special obligation to protect the participants when selecting the particular beach, which was unduly risky; that the instructors in the competition had negligently failed to instruct the participants regarding safe entry into the ocean and checking the ocean floor first; and that the instructors had been negligent in cajoling or verbally pushing him into continuing with the competition when they knew that he was tired and upset. The trial court entered a judgment of nonsuit, and the court of appeal affirmed. The court of appeal reiterated the rule that public entities do not owe the general public a duty to provide safe beaches or warn of concealed dangers, regardless of whether lifeguards are present. The court then rejected the plaintiff's claim that the particular beach selected was unduly risky compared to other beaches in the area (*75 Cal. App. 4th 1428, 1434-1436)* . As to the negligence allegations based on the actions of the instructors in guiding the junior lifeguards, the court applied established primary assumption of risk principles. In doing so, the court concluded that given the nature of a lifeguard's work, the instructors did nothing to increase the inherent risks, and had no duty to decrease the risk of injuries by instructing the junior lifeguards to walk down the beach and check the ocean floor for uneven terrain before swimming, especially in light of the fact that in the earlier parts of the competition, the plaintiff had already familiarized himself with the area (*75 Cal. App. 4th 1428, 1436-1439)* . The court also concluded that the coach's verbally pushing or cajoling of the plaintiff to continue the competition when he was tired and upset was normal in youth sports and did not constitute recklessness or show an intent to cause injury (*75 Cal. App. 4th 1428, 1439-1441)* .

In *Lilley v. Elk Grove Unified Sch. Dist. (1998) 68 Cal. App. 4th 939, 80 Cal. Rptr. 2d 638* , primary assumption of risk was successfully invoked by a school district and one of its instructors to defend against liability for an arm injury sustained by a student during a supervised wrestling practice while engaged in a maneuver with the instructor. The court of appeal, in affirming the summary judgment granted for the defendants by the trial court, held that the risk of the injury was inherent in the sport of wrestling, and the fact that the injury was sustained while practicing a maneuver with the instructor did not affect application of the doctrine. The court held that an instructor cannot be held liable merely because he or she may have pushed the student beyond his or her capabilities, absent evidence of recklessness or other risk-increasing activity (*68 Cal. App. 4th 939, 943-944)* . The court also held that *Educ. Code § 44807*, which imposes a general duty on school authorities to supervise students in order to prevent physical injuries to students caused by disorderly and dangerous practices, did not preclude application of the primary assumption of risk doctrine to injuries sustained during extracurricular sports activities (*68 Cal. App. 4th 939, 944-946)* .

In *Aaris v. Las Virgenes Unified Sch. Dist. (1998) 64 Cal. App. 4th 1112, 75 Cal. Rptr. 2d 801* , the plaintiff was a high school cheerleader injured while practicing a gymnastic stunt during cheerleader practice at school while being supervised by an instructor. In the personal injury action for negligence against the school district, the trial court granted the defendant's motion for summary judgment, finding the plaintiff had assumed the risk of the injury, which was inherent to modern cheerleading. The court of appeal affirmed. The court first rejected the plaintiff's claim that the primary assumption of risk doctrine did not apply to instructors or coaches, and held that there was no evidence the instructor took the cheerleading team beyond the scope of their level of experience and capability or did anything to increase the risk inherent in the gymnastic stunt (*64 Cal. App. 4th 1112, 1117-1118)* . The court also held that the instructor did not fail adequately to supervise the students such that the district could be liable for violation of its statutory duty under *Educ. Code § 44807* (*64 Cal. App. 4th 1112, 1118-1120)* . The court also held that summary judgment was proper because the action was barred by an express waiver of liability executed before the injury by the plaintiff's mother that shielded the District from liability absent negligence on the part of the District. Since the District violated no legal duty of care to the student under the primary assumption of risk doctrine, the District could not be liable for negligence (*64 Cal. App. 4th 1112, 1120)* .

In *Fortier v. Los Rios Cmty. Coll. Dist. (1996) 45 Cal. App. 4th 430, 52 Cal. Rptr. 2d 812* , a college student enrolled in an advanced football class brought a negligence action for injuries suffered when he collided with another player during a football practice drill. The defendants argued the injuries suffered by the plaintiff were inherent in the sport of football, and thus the plaintiff's claim was barred by primary assumption of the risk. The trial court granted summary judgment and the court of appeal affirmed, stating that the collision in which the plaintiff was injured was an inherent risk in the sport in which he was participating so that the plaintiff's injury could not result from an increase by the defendants in the inherent risk. The court rejected the plaintiff's arguments that the defendants breached their duty not to increase the inherent risks by encouraging class participants to be aggressive in the practice drills, misleading participants into believing the exercises would be noncontact drills, and failing to inform offensive players that defensive players would try to intercept passes. The plaintiff's injuries were the result of his voluntary participation in a sport in which the risk of injury due to accidental collision was known, acknowledged and accepted (*45 Cal. App. 4th 430, 440)* .

In *Bushnell v. Japanese-Am. Religious & Cultural Ctr. (1996) 43 Cal. App. 4th 525, 50 Cal. Rptr. 2d 671* , a student in a judo class was injured while attempting to perform an exercise with an instructor. The plaintiff contended that the defense of primary assumption of risk should not apply because he was injured by an instructor rather than an amateur coparticipant. The trial court granted summary judgment to the defendant judo club. The court of appeal affirmed, stating that application of the doctrine does not depend on whether the defendant is a coparticipant or whether the activity is competitive rather than co-operative. The correct approach is to examine the nature of the activity, the relationship of the defendant to the activity, and the relationship of the defendant to the plaintiff, and to then determine whether the defendant's conduct at issue is an inherent risk of the activity (*43 Cal. App. 4th 525, 530)* . The plaintiff had been working to improve his skills by repeating an exercise more and more quickly. There was no evidence that the instructor acted recklessly or with an intent to cause injury. The plaintiff's theory was that the instructor moved more

quickly than he had expected, but instruction in an activity such as judo necessarily requires pushing a student to move more quickly, attempt a new move, or take some other action that the student previously may not have attempted (*43 Cal. App. 4th 525, 532)* . Concluding that to impose liability in this situation would chill vigorous participation in the activity, the court affirmed the summary judgment for the defendant.

[c] State Statute Does Not Impose Duty That Abrogates Rule

In *Peart v. Ferro (2004) 119 Cal. App. 4th 60, 13 Cal. Rptr. 3d 885* , the plaintiff was a 16-year-old who was riding on personal watercraft that collided with another personal watercraft. The plaintiff, who had been riding at a faster rate of speed and attempting riskier maneuvers, attempted a turn approximately 200 feet in front of the other watercraft, which was traveling in a straight line at a moderate speed and unable to evade the plaintiff's maneuver. The plaintiff brought suit for negligence against the riders of the other vehicle. Although the watercraft were not technically jet skis because they were equipped with seats, the court of appeal held that there was no relevant difference between the case at hand and the facts of the case in *Whelihan v. Espinoza (2003) 110 Cal. App. 4th 1566, 2 Cal. Rptr. 3d 883* [*see § 165.401[3][e]*]. The court of appeal agreed with the court in *Whelihan* that operation of this type of personal watercraft for recreational purposes came within the primary assumption of risk doctrine (*119 Cal. App. 4th 60, 70-78)* . The court also agreed with the *Whelihan* court that *Harb. & Nav. Code §§ 655, 655.3,* and *655.7,* which impose standards for the operation of personal watercraft and criminal sanctions for violations, did not abrogate the primary assumption of risk doctrine in the absence of any legislative intent to do so (*119 Cal. App. 4th 60, 78-82)* . Finally, the court noted that even if the statutes created a basis for imposing civil liability, the plaintiff failed to show that the defendants were negligent or otherwise violated any of the cited statutes. Instead, the evidence showed that the cause of the accident was the plaintiff's own maneuvers (*119 Cal. App. 4th 60, 82-83)* .

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CHAPTER 165 NEGLIGENCE
PART II. FORMS
E. Defenses
2. Assumption of Risk

16-165 California Points & Authorities § 165.402

§ 165.402 Plaintiff Expressly Assumed Risk

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS NOT LIABLE TO PLAINTIFF FOR NEGLIGENCE BECAUSE (1) PRIOR TO THE ACCIDENT IN WHICH PLAINTIFF SUSTAINED THE _____ [PERSONAL INJURIES *or* PROPERTY DAMAGE *or* PERSONAL INJURIES AND PROPERTY DAMAGE] COMPLAINED OF, PLAINTIFF SIGNED A VALID AGREEMENT BY THE TERMS OF WHICH PLAINTIFF ASSUMED ALL RISKS OF THE ACTIVITY INVOLVED AND EXPRESSLY RELEASED DEFENDANT FROM ANY AND ALL LIABILITY FOR FUTURE NEGLIGENCE RESULTING IN PERSONAL INJURY, PROPERTY DAMAGE, OR DEATH TO PLAINTIFF IN THE COURSE OF THAT ACTIVITY, AND (2) THE _____ [INJURIES *or* DAMAGE *or* INJURIES AND DAMAGE] TO PLAINTIFF WERE SUSTAINED IN THE COURSE OF THAT ACTIVITY.

A. Consensual Assumption of Risk Not Subsumed in Doctrine of Comparative Negligence. Only that aspect of the doctrine of assumption of risk referred to as implied unreasonable assumption of the risk, and not that aspect based on express consensual assumption of the risk, has been subsumed into the doctrine of comparative negligence (*Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 824-825, 119 Cal. Rptr. 858, 532 P.2d 1226*).

B. Express Assumption of Risk. Assumption of risk applies when the plaintiff, in advance, has given his or her express consent to relieve the defendant of an obligation of conduct towards him or her, and to take his or her chances of injury from a known risk arising from what the defendant is to do or leave undone. The result is that a defendant is relieved of legal duty to the plaintiff, and, being under no duty, the defendant cannot be charged with negligence (*Madison v. Superior Court (1988) 203 Cal. App. 3d 589, 597, 250 Cal. Rptr. 299* ; *Coates v. Newhall Land & Farming, Inc. (1987) 191 Cal. App. 3d 1, 8, 236 Cal. Rptr. 181*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the defendant is not liable for negligence because the plaintiff expressly assumed the risk of injury [*see Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 824-825, 119 Cal. Rptr. 858, 532 P.2d 1226]* . It should be combined with any of the *forms in §§ 165.400 -165.401* that are applicable to the particular case.

This argument may arise in several procedural contexts. For example, the defendant may raise this argument in support of a motion for summary judgment, directed verdict, judgment notwithstanding the verdict, or new trial. This argument may also arise in a challenge to the propriety of the trial court's decision to give certain jury instructions regarding comparative negligence or express assumption of risk [*see Gonzalez v. Garcia (1977) 75 Cal. App. 3d 874, 875, 142 Cal. Rptr. 503]* .

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may argue that the plaintiff expressly assumed the risk prior to his or her injury by the defendant's allegedly negligent conduct. If a written exculpatory agreement is involved, counsel must show that the agreement does not involve the public interest [*see Tunkl v. Regents of Univ. of Cal. (1963) 60 Cal. 2d 92, 96-97, 32 Cal. Rptr. 33, 383 P.2d 441]* . An exculpatory agreement, being essentially contractual in nature, is subject to the defenses generally applicable to contracts such as fraud, duress, and lack of consideration. For memoranda of points and authorities relating to these defenses, see Ch. 50, *Contracts* , and Ch. 92, *Duress, Menace, Fraud, Undue Influence, and Mistake* .

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of the affirmative defense of assumption of the risk, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§§ 165.400 -165.401*. For points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For a memorandum of points and authorities supporting the contention that a valid express assumption of risk by a decedent prior to his or her death is a complete defense to a wrongful death action, see Ch. 66, *Death and Survival Actions* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in §§ 165.410-* 411 may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Consensual Assumption of Risk Not Subsumed in Doctrine of Comparative Negligence

The factual and procedural background of ***Li v. Yellow Cab Co.*** *(1975) 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d*

1226 , is discussed in *§ 165.400[3][a]*. In declaring that contributory negligence is no longer a complete bar to the plaintiff's recovery and in adopting a system of comparative negligence, the Court discussed the status of the doctrine of assumption of the risk. It stated that assumption of the risk, to the extent that it overlaps contributory negligence, is to be subsumed under the general process of assessing liability in proportion to negligence (*13 Cal. 3d 804, 829)* . It explained that assumption of the risk is made up of at least two distinct defenses and proceeded to explain the difference between what is commonly referred to as implied unreasonable assumption of the risk and express assumption of the risk. The Court noted that in one form of assumption of the risk, often referred to as implied unreasonable assumption of the risk, the plaintiff unreasonably undertakes to encounter a specific known risk imposed by the defendant's negligence. In this type of assumption of the risk, the plaintiff's conduct, although he or she may encounter that risk in a prudent manner, is in reality a form of contributory negligence. Thus, implied unreasonable assumption of the risk appears to be merged with comparative negligence and liability may be assessed in proportion to fault in situations in which that doctrine arises (*13 Cal. 3d 804, 824-825)* . The Court then proceeded to explain what is commonly referred to as express assumption of the risk. It stated that other situations within the doctrine of assumption of the risk are those, for example, when the plaintiff is held to agree to relieve the defendant of an obligation of reasonable conduct toward him or her. Such a situation would not involve contributory negligence, but rather a reduction of the defendant's duty of care. The court noted that this type of assumption of the risk is not subsumed into the system of comparative negligence (*13 Cal. 3d 804, 824-825)* .

[b] Express Assumption of Risk

In ***Madison v. Superior Court*** *(1988) 203 Cal. App. 3d 589, 250 Cal. Rptr. 299* , a wrongful death action, the decedent, the plaintiffs' 19-year-old son, drowned while participating in a scuba diving training class make-up dive. During the dive, decedent had run low on air. The defendants' instructor accompanied the decedent to the surface and directed him to swim toward a buoy that had been anchored prior to the commencement of the dive. The instructor then left the decedent alone on the surface to continue the dive with another student (which was a violation of the "buddy system" rule). About ten minutes later, when the instructor and the other student surfaced, the decedent was nowhere to be found. A search was commenced, and the decedent's body was located on the bottom. At the time he enrolled in the class, the decedent had signed a written waiver and release by the terms of which he voluntarily released, discharged, waived, and relinquished any and all actions or causes of action for personal injury, property damage, or wrongful death arising from his participation in the class and its activities. The defendants' motion for summary judgment was denied, and the defendants petitioned the court of appeal for a writ of mandate.

In ordering issuance of a peremptory writ of mandate directing the trial court to vacate its order denying the defendants' motion for summary judgment and to enter an order granting the motion, the court of appeal stated that assumption of risk means the plaintiff, in advance, has given his or her express consent to relieve the defendant of an obligation of conduct towards him or her, and to take his or her chances of injury from a known risk arising from what the defendant is to do or leave undone. The result is that a defendant is relieved of legal duty to the plaintiff, and, being under no duty, the defendant cannot be charged with negligence (*203 Cal. App. 3d 589, 597)* .

In ***Coates v. Newhall Land & Farming, Inc.*** *(1987) 191 Cal. App. 3d 1, 236 Cal. Rptr. 181* , a wrongful death action, the plaintiffs' decedent was fatally injured while riding a dirt bike in a recreational park that was owned and operated by the defendants and included a trail used for off-road motorcycle (dirt bike) riding by the public. On entering the park and paying his admission, the decedent had signed a waiver and release form by the terms of which he expressly released the defendants from all liability for loss or damage and any claims or demands therefor, on account of injury to the person or property or resulting in the death of the releasor, whether caused by the negligence of the releasees or otherwise, and expressly assumed all risks of such loss, damage, or injury that might be sustained by him. His heirs sued for wrongful death, alleging negligent design and maintenance of the dirt bike trail. The trial court granted the defendants' motion for summary judgment based on the preinjury contractual agreement the decedent had signed before he was injured and in which he had expressly assumed the risk of the activity, and the plaintiffs appealed. In affirming the judgment, the court of appeal stated that assumption of risk means the plaintiff, in advance, has given his or her

express consent to relieve the defendant of an obligation of conduct towards him or her, and to take his or her chances of injury from a known risk arising from what the defendant is to do or leave undone. The result is that a defendant is relieved of legal duty to the plaintiff, and, being under no duty, the defendant cannot be charged with negligence (*191 Cal. App. 3d 1, 8)* .

[4] Additional Authorities

[a] Express Assumption of Risk

In *Benedek v. PLC Santa Monica (2002) 104 Cal. App. 4th 1351, 1358, 129 Cal. Rptr. 2d 197* , the plaintiff was a health club member who tried to reposition a television set that normally faced an elliptical training machine. As he attempted to turn the television set, it began to slide off of its rack over his head, and when the plaintiff attempted to support the falling set, he sustained a knee injury. The plaintiff brought suit against the club, but the trial court granted summary judgment for the defendant, and the court of appeal affirmed. The plaintiff's health club membership agreement contained a clear, unambiguous, explicit provision releasing the club from liability for all injuries to the member sustained on the premises, whether sustained while using exercise equipment or not. The court of appeal held that this release applied to the plaintiff's injury. The language of the release was clear and unambiguous, the purpose of the release was to allow the plaintiff access to the defendant's services and facilities, and the plaintiff's injury was sustained while in the defendant's facilities (*104 Cal. App. 4th 1351, 1358)* .

In *Platzer v. Mammoth Mountain Ski Area (2002) 104 Cal. App. 4th 1253, 128 Cal. Rptr. 2d 885* , the plaintiff was a minor who fell from a ski lift during a ski lesson. The trial court granted summary adjudication in favor of the ski resort on a claim for ordinary negligence on the basis of a release signed by the plaintiff's parent before the accident expressly protecting the resort from liability for ordinary negligence, and a jury returned a verdict for the defendant on a claim of gross negligence. The court of appeal affirmed the summary adjudication for the defendant on the ordinary negligence claim. The court held that nothing in *Civ. Code § 2174*, which allows a carrier to limit its obligations by special contract, or *Civ. Code § 2175*, which prohibits a carrier from negotiating an advance release for gross negligence, prevents a carrier such as a ski lift operator from negotiating a release from liability for ordinary negligence. The court also concluded that ski lift operations are part of a recreational sports activity that is routinely excluded from application of public policy limitations that might otherwise invalidate an express release from liability for negligence (*104 Cal. App. 4th 1253, 1257-1260)* .

In *Lund v. Bally's Aerobic Plus, Inc. (2000) 78 Cal. App. 4th 733, 93 Cal. Rptr. 2d 169* , the plaintiff was injured when exercising under the supervision of a personal trainer employed by the defendant's health club. Following nonsuit for the defendant, the court of appeal affirmed based on an express assumption of risk and release from liability in the health club membership contract. The court held that the contract clearly and unambiguously covered the injury and that exculpatory agreements in the recreational sports context do not implicate the public interest (*78 Cal. App. 4th 733, 738-739)* .

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[Reserved]

§§ 165.403[Reserved]

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16-165 California Points & Authorities § 165.410

§ 165.410 Veterinarian Barred From Recovering for Animal Bite

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS NOT LIABLE FOR THE HARM TO PLAINTIFF _____ [VETERINARIAN *or* VETERINARY ASSISTANT] BECAUSE VETERINARIANS AND VETERINARY ASSISTANTS ARE BARRED FROM RECOVERING FOR ANIMAL BITES OCCURRING WHILE THEY ARE PROVIDING MEDICAL TREATMENT TO THOSE ANIMALS.

A. No Liability to Veterinarians and Veterinary Assistants. A variant of the firefighter's rule, the veterinarian's rule, bars recovery to veterinarians and their assistants who are bitten by animals while providing medical treatment to those animals (*Nelson v. Hall (1985) 165 Cal. App. 3d 709, 714, 211 Cal. Rptr. 668* ; *see Cohen v. McIntyre (1993) 16 Cal. App. 4th 650, 655, 20 Cal. Rptr. 2d 143* ; *see also Neighbarger v. Irwin Indus., Inc. (1994) 8 Cal. 4th 532, 545, 34 Cal. Rptr. 2d 630, 882 P.2d 347*).

[*Optional*] **B. No Liability to Kennel Workers.** The rationale of the veterinarian rule is equally applicable to an injury suffered by a kennel worker who is bitten while tending to a dog under the kennel's care, thus providing an assumption of risk defense to the strict liability otherwise imposed under *Civil Code § 3342*, the dog-bite statute (*Priebe v. Nelson (2006) 39 Cal. 4th 1112, 1132, 47 Cal. Rptr. 3d 553, 140 P.3d 848*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the defendant is not liable for injury to a veterinarian or veterinary assistant providing medical treatment to the defendant's animal, on the ground that under the "veterinarian's rule" the defendant had no duty to prevent the injury [*see Nelson v. Hall (1985) 165 Cal. App. 3d*

709, 714, 211 Cal. Rptr. 668] . Optional Paragraph B may be used if the plaintiff is a kennel worker rather than a veterinarian or veterinarian assistant. Issue may arise, for example, in a motion for summary judgment [*see, e.g.,* *Baker v. Superior Court (1982) 129 Cal. App. 3d 710, 722, 181 Cal. Rptr. 311]* .

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may discuss the plaintiff's status as a veterinarian or veterinary assistant and the occurrence of the animal bite while the plaintiff was providing medical care to the animal pursuant to some agreement between the defendant and the plaintiff.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of forms of the affirmative defense of assumption of the risk, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender). For forms and discussion relating to the firefighter's rule, see California Forms of Pleading and Practice, Ch. 267, *Fires* , Ch. 380, *Negligence* , and Ch. 421, *Premises Liability* (Matthew Bender).

[d] Related Points and Authorities

For forms and discussion relating to the firefighter's rule in cases involving negligence of the defendants who are owners or possessors of property, see Ch. 178, *Premises Liability* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in §§ 165.400 -165.402* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] No Liability to Veterinarians and Veterinary Assistants

The factual and procedural background of ***Neighbarger v. Irwin Indus., Inc.*** *(1994) 8 Cal. 4th 532, 34 Cal. Rptr. 2d 630, 882 P.2d 347* , is discussed in *§ 165.430[3][a]*. The Supreme Court noted that several decisions have held that the defendants who contract with veterinarians to treat their dogs are not liable under the firefighter's rule to the veterinarians or their assistants for injuries sustained from dog bites occurring during examination or treatment of the animals. In this situation, the defendant's ordinary duty of care is negated because of the nature of the activity and the relationship of the parties. The Court held that the application of the rule may be sound if it is based on the defendant's relationship with the plaintiff and the defendant's conduct in entrusting an animal to the plaintiff's professional care and control. However, decisions applying the rule to veterinarians and their assistants are on shaky ground if they are based on the veterinarian's or veterinary assistant's subjective acceptance of the foreseeable occupational hazard of dog bites (*8 Cal. 4th 532, 545)* .

The factual and procedural background of ***Cohen v. McIntyre*** *(1993) 16 Cal. App. 4th 650, 20 Cal. Rptr. 2d 143* , is discussed in *§ 165.400[3][a]*.

In ***Nelson v. Hall*** *(1985) 165 Cal. App. 3d 709, 211 Cal. Rptr. 668* , a veterinary assistant filed suit against the owners of a dog that bit her while she was assisting in the dog's treatment at the animal hospital where she was employed. The

plaintiff brought her action under the so-called "Dog Bite Statute" (*Civ. Code § 3342*), alleging strict liability. The trial court granted summary judgment to the defendants, who contended that the plaintiff had assumed the risk of injury, and the plaintiff appealed.

The court of appeal affirmed, ruling that the plaintiff had, by accepting employment involving a known risk, assumed the risk and relieved the defendants of any duty of care and thus any liability for the injuries caused by the dog's bite (*165 Cal. App. 3d 709, 714)* . The court noted that assuming the risks inherent in one's occupation is the basis of the firefighter's rule, which bars recovery in actions based on strict liability as well as negligence, and held therefore that that rule applied to both veterinarians and veterinary assistants (*165 Cal. App. 3d 709, 714-715)* .

[b] No Liability to Kennel Workers

In ***Priebe v. Nelson*** *(2006) 39 Cal. 4th 1112, 47 Cal. Rptr. 3d 553, 140 P.3d 848* , plaintiff, a technician at a kennel, was bitten on the foot and ankle by a pit bull that was being boarded at the kennel and sustained serious nerve injuries. Plaintiff sued the dog's owner, asserting claims for statutory and common law strict liability, negligence, and tortious misrepresentation. The trial court initially allowed plaintiff to proceed at trial on a claim of statutory strict liability under the dog bite statute, *Civ. Code § 3342*, which generally makes a dog's owner strictly liable for injury caused when the dog bites another person. At the close of evidence, however, the trial court reversed course and refused to instruct the jury on strict liability under that statute. The jury returned a verdict in favor of the defendant. Plaintiff moved for judgment notwithstanding the verdict on the statutory strict liability claim, but the court denied the motion. Plaintiff then moved for a new trial, which the trial court granted after concluding that it was unfair to have required the plaintiff to build a case premised on the applicability of the strict liability statute and then disallow the claim at the close of evidence. Both parties appealed. The court of appeal upheld the grant of a new trial, but agreed with the trial court that plaintiff could not recover under the dog bite statute by virtue of the so-called veterinarian's rule, since as a kennel worker, plaintiff assumed the risk of being bitten by dogs that are boarded at the kennel. Plaintiff appealed this ruling.

The California Supreme Court affirmed the court of appeal. The Court concluded that the assumption of risk doctrine, as embodied in the veterinarian's rule, provided a complete defense to the claim brought under *Civ. Code § 3342* (*39 Cal. 4th 1112, 1132)* . The Court recognized that the dog bite statute generally imposes a duty of care on every dog owner to prevent his or her dog from biting persons while in a public place or while lawfully in a private place. However, the Court saw nothing to suggest that the Legislature intended that this duty of care should apply in those situations in which the care, custody, and control of the dog has been entrusted to trained professionals in exchange for compensation, as is the case when a dog is left with a veterinarian or placed in a commercial kennel (*39 Cal. 4th 1112, 1128)* . The Court concluded that when kennel operators assume for the care and handling of a dog, they also assume the risk that the dog might bight someone. The kennel operator, rather than the dog's absent owner, is the party in position to take precautions to ensure that the dog does not bite someone, including a kennel employee (*39 Cal. 4th 1112, 1129)* .

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16-165 California Points & Authorities § 165.411

§ 165.411 Tow Truck Driver Barred From Recovering for Injuries Due to Risk Necessitating Presence

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF IS BARRED FROM RECOVERY FROM DEFENDANT BECAUSE PLAINTIFF, AS A TOW TRUCK DRIVER, WAS INJURED WHILE PERFORMING HIS/HER DUTIES IN THAT CAPACITY, IN A SITUATION THAT REQUIRED HIS/HER PRESENCE FOR THAT PURPOSE. PLAINTIFF'S NEGLIGENCE CLAIM IS THEREFORE BARRED BY THE FIREFIGHTER'S RULE.

A. Motorist Owes No Duty to Tow Truck Driver to Keep Vehicle in Good Mechanical Condition. A tow truck driver's contract-based obligation, through a motorist's membership in an organization providing help to the motorist in case of mechanical breakdown, along with compelling policy considerations, warrant the conclusion that the motorist owes no duty to the tow truck driver to keep his or her car in good mechanical condition (*Dyer v. Superior Court (1997) 56 Cal. App. 4th 61, 69, 65 Cal. Rptr. 2d 85*).

B. Firefighter's Rule Applies to Private as Well as Public Safety Employees. The assumption of risk doctrine, and more specifically, the firefighter's rule, applies to some private workers, including auto club tow truck drivers (*Dyer v. Superior Court (1997) 56 Cal. App. 4th 61, 72-73, 65 Cal. Rptr. 2d 85*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the firefighter's rule bars recovery for injury, on the ground that a motorist owes no duty to a tow truck driver to keep his or her car in good mechanical order [*see Dyer v. Superior Court (1997) 56 Cal. App. 4th 61, 69, 65 Cal. Rptr. 2d 85]* .

This issue may arise, for example, in a motion for summary judgment [*see, e.g., Dyer v. Superior Court 56 Cal. App. 4th 61, 65, 65 Cal. Rptr. 2d 85]* .

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may provide facts showing the plaintiff's contract-based obligation to the defendant motorist to render assistance in the event of a mechanical breakdown, and the nature of the injury-causing activity, and argue that the plaintiff should not be entitled to recover because the particular risk of harm that caused the injury was the very risk inherent in the plaintiff's contractual obligation.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of the affirmative defense of assumption of the risk, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender). For forms an discussion relating to the firefighter's rule, see California Forms of Pleading and Practice, Ch. 267, *Fires* , Ch. 380, *Negligence* and Ch. 421, *Premises Liability* (Matthew Bender).

[d] Related Points and Authorities

For memoranda of points and authorities relating to the firefighter's rule in cases involving negligence of the defendants who are owners or possessors of property, see Ch. 178, *Premises Liability* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in §§ 165.400 -165.402* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Motorist Owes No Duty to Tow Truck Driver to Keep Vehicle in Good Mechanical Condition

In ***Dyer v. Superior Court*** *(1997) 56 Cal. App. 4th 61, 69, 65 Cal. Rptr. 2d 85* , a driver experienced mechanical problems while driving on the freeway. The driver, an auto club member, pulled his car completely off the freeway onto the right shoulder and called for a tow truck. An auto club tow truck driver arrived and parked his truck completely off the freeway on the right shoulder, in front of the driver's car. After obtaining the driver's membership information, the tow truck driver walked towards the truck. When he was between the car and the tow truck, another car struck the parked car, pinning the tow driver between the car and the tow truck. The tow truck driver, the plaintiff, sued the driver of the broken down car, the defendant, for negligence, alleging that the defendant had a duty to maintain his car, and his failure to do so caused the mechanical breakdown that brought the plaintiff to the freeway location where he suffered injury. The defendant filed a motion for summary judgment contending that the doctrine of assumption of risk and the firefighter's rule barred the plaintiff's action against him. The trial court denied summary judgment and the court of appeal granted the defendant's petition for writ of mandate.

The court of appeal ruled that the trial court erred in denying the defendant's motion for summary judgment and entered a new order granting summary judgment in the defendants favor. The court concluded that on the facts of this case, the defendant owed no duty to the plaintiff to maintain his car in running order, and hence that the assumption of risk

doctrine barred the plaintiff's negligence claim (*56 Cal. App. 4th 61, 72)* . The court first determined the extent to which a footnote in another case controlled the resolution of the substantive legal issues presented by the defendant's motion. At the trial court level the plaintiff opposed the defendant's summary judgment motion on the basis of a footnote in *Neighbarger v. Irwin Indus., Inc. (1994) 8 Cal. 4th 532, 34 Cal. Rptr. 2d 630, 882 P.2d 347* (discussed in *§ 165.430[3][a]*), in which the Supreme Court rejected the reasoning by which a Court of Appeal applied the firefighter's rule to claims by private tow truck operators [*see Holland v. Crumb (1994) 26 Cal. App. 4th 1844, 32 Cal. Rptr. 2d 366]* . The trial court had concluded that the *Neighbarger* footnote was dispositive and on that basis denied summary judgment. The court of appeal ruled that this footnote, viewed in context, did not overrule the holding in *Holland,* nor was the footnote a persuasive dictum that *Holland* was wrongly decided. Although the court found that the *Neighbarger* footnote left the holding in *Holland* intact, it declined to treat *Holland* as persuasive precedent. According to the court, the footnote's clear import was that the question decided in *Holland* should be analyzed afresh under the principles stated in *Knight v. Jewett (1992) 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2, 834 P.2d 696* .

The court then analyzed this case under the principles stated in *Knight*. It said that under *Knight* the key question concerning the application of assumption of risk doctrine was whether by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owed a legal duty to protect the plaintiff from the particular risk of harm that caused the injury. It applied this rule to the plaintiff's contention that the defendant breached his duty to maintain his car and thereby prevent the call for assistance that brought him to the freeway shoulder and determined that (1) the "nature of the activity" was taking responsibility for the defendant's car in the case of breakdown, even at hazardous locations such as freeway shoulders, (2) the "parties relationship to the activity" was the plaintiff's contractual obligation to provide his service, and (3) the "particular risk of harm that caused the injury" was the very risk inherent in working on the defendant's car on a freeway shoulder. The court's conclusion that the assumption of the risk doctrine precluded imposing liability on the defendant was also supported by an analysis of the factors in *Rowland v. Christian (1968) 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561* (discussed in *§ 165.30[3][d]*). Under this analysis the court found that the plaintiff's injuries were not a foreseeable result of the defendant's negligence in maintaining his car because this negligence only brought the plaintiff to the freeway shoulder, but did not make it more probable that a negligent third party would harm him at that location, and that it was good social policy to encourage motorists like the defendant to rely on their contractual arrangements for aid from private towing services, rather than to discourage them by imposing on them potential liability for asking for help (*56 Cal. App. 4th 61, 72)* .

[b] Firefighter's Rule Applies to Private as Well as Public Safety Employees

The facts and procedural background of ***Dyer v. Superior Court*** *(1997) 56 Cal. App. 4th 61, 65 Cal. Rptr. 2d 85* are discussed in *§ 165.411[3][a]*. The court concluded, on the facts of the case, that the defendant owed no duty to the plaintiff to maintain his car in running order, and that the assumption of risk doctrine, specifically, the firefighter's rule, barred the plaintiff's claim for negligence against the defendant. The plaintiff contended that this doctrine was inapplicable to him because he was not a public safety employee, and thus he did not receive the "special public compensation for confronting the dangers posed by the defendant's negligence" that the *Neighbarger* court identified as one of the policy bases for the firefighter's rule. In *Neighbarger v. Irwin Indus., Inc. (1994) 8 Cal. 4th 532, 542, 34 Cal. Rptr. 2d 630, 882 P.2d 347* (discussed in *§ 165.410[3][a]*), the Supreme Court stated that the firefighter's rule was intended to eliminate the duty of care to a limited class of workers, the need for whose employment arises from certain inevitable risks that threaten the public welfare. That Court identified three policy considerations warranting elimination of duty. First, it said that it was unfair to charge the defendant with a duty of care to prevent injury to the plaintiff arising from the very condition or hazard the defendant had contracted with the plaintiff to remedy or confront. Second, it said that public safety employees receive special public compensation for confronting dangers posed by the defendant's negligence. Third, abolition of the firefighter's rule would embroil the courts in relatively pointless litigation over rights of indemnification among the employer, the retirement system and the defendant's insurer. The court of appeal in *Dyer* ruled that *Neighbarger* did not support the plaintiff's contention. According to the court, *Neighbarger* discussedin dicta applications of the assumption of risk doctrine to private workers, but did not decide the viability of these applications. Moreover, the *Neighbarger* court acknowledged that the firefighter's rule has been applied to some

safety workers despite the absence of "special public compensation," and stated that in these cases, the crucial question was the relationship between the public and the safety workers. The court in this case held that the defendant's relationship with the plaintiff, together with compelling policy considerations, warranted the conclusion that the defendant owed no duty to the plaintiff (*56 Cal. App. 4th 61, 73)* . Lastly, the court noted that the post-*Neighbarger* case of *Herrle v. Estate of Marshall (1996) 45 Cal. App. 4th 1761, 53 Cal. Rptr. 2d 713* demonstrated that the doctrine applies to some private workers, such as certified nurse's aides.

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[Reserved]

§§ 165.412[Reserved]

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16-165 California Points & Authorities § 165.420

§ 165.420 Primary Assumption of Risk Does Not Bar Recovery if Imposition of Duty Would Not Fundamentally Alter Nature of Sporting Activity

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S CAUSE OF ACTION IS NOT BARRED BY THE PRIMARY ASSUMPTION OF RISK DOCTRINE BECAUSE IMPOSITION OF A DUTY OF CARE ON THE DEFENDANT WOULD NOT FUNDAMENTALLY ALTER THE NATURE OF, OR CHILL VIGOROUS PARTICIPATION IN, THE SPORTING ACTIVITY.

Duty of Care Would Not Fundamentally Alter Nature of Activity. If imposition of a duty of care on the defendant would not fundamentally alter the nature of the sporting activity, or chill vigorous participation in that activity, the primary assumption of risk defense does not apply (*Hemady v. Long Beach Unified School Dist. (2006) 143 Cal. App. 4th 566, 576, 49 Cal. Rptr. 3d 464*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted by a plaintiff in opposition to the defense that the primary assumption of risk bars recovery in the action. The grounds for the opposition are that under the circumstances of the case, imposition of a duty of care on the defendant would not fundamentally alter the nature of the activity in which the parties were engaged at the time of the injury.

[b] Argument

Counsel should insert argument linking the points in this form with the facts of the case. For example, counsel should

provide facts showing the circumstances of the injury, describing the nature of the injury-causing activity, and argue that imposition of a duty of care on the defendant would not fundamentally alter the nature of that activity or chill vigorous participation.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of complaint for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Opposing Points and Authorities

The points and authorities provided in §§ 165.400-165.401 may be used in an appropriate case to oppose the points and authorities provided in this form.

[3] Discussion of Authorities

[a] Duty of Care Would Not Fundamentally Alter Nature of Activity

In *Hemady v. Long Beach Unified School Dist. (2006) 143 Cal. App. 4th 566, 49 Cal. Rptr. 3d 464* , plaintiff was a seventh-grade student in a physical education golf class who was injured when inadvertently hit in the face by a golf club swung by another student. The student sued the instructor and the school district, alleging negligent supervision. The trial court granted summary judgment for the defendants on the basis of the primary assumption of risk doctrine. The trial court concluded that plaintiff failed to raise a triable issue of material fact as to whether defendants increased the risks inherent in the sporting activity of golf.

The court of appeal reversed. The court held that the primary assumption of risk was not a defense under the circumstances of the case and that the defendants' potential liability should be determined under a prudent person standard of care. The court noted that application of the primary assumption of risk defense is justified in order to avoid fundamentally altering, or chilling vigorous participation in, activities that by their very nature pose certain risks, such as sporting activities (*143 Cal. App. 4th 566, 573-574)* . However, imposing a duty of care can be appropriate if such a duty would not fundamentally alter the inherent nature of the activity. The court concluded that being hit in the head by a golf club was not an inherent risk of the game of golf. The court also concluded that imposing a prudent person duty of care on the defendants in order to prevent an injury such as that sustained by the plaintiff would not fundamentally alter the game of golf, chill vigorous participation in the sport, or chill a coach's ability to challenge student athletes to push themselves in order to hone their skills (*143 Cal. App. 4th 566, 576-579)* . The court also noted that the prudent person standard of care had historically been used to determine the liability of school districts and their instructors for injuries to students sustained during school hours, and nothing in the primary assumption of risk cases had overruled this principle (*143 Cal. App. 4th 566, 579-583)* .

[4] Additional Authorities

[a] Duty of Care Would Not Fundamentally Alter Nature of Activity

In *Kindrich v. Long Beach Yacht Club (2008) 167 Cal. App. 4th 1252, 84 Cal. Rptr. 3d 824* , a yacht club loaned one of its boats to the family of a deceased member of the club for use during a ceremonial spreading of the deceased's ashes at sea. While returning to the club after the ceremony, the deceased's son broke his leg when he jumped off of the boat in an attempt to help in tying off the boat as it was docking. He brought suit for negligence against the yacht club, alleging that the steps that had been provided when boarding had been removed. The trial court granted judgment for the yacht club on the basis of the primary assumption of risk doctrine, but the court of appeal reversed. The court of appeal held that primary assumption of risk did not apply to plaintiff's activities while a passenger on the boat and that imposition of a duty of care on the yacht club under the facts of the case would not fundamentally alter the nature of the

activity of riding as a passenger on a boat. The court concluded that plaintiff passenger was not engaged in an active sport when he was injured and any comparison of the negligence of the respective parties was a question of fact still to be resolved under secondary assumption of risk principles (*167 Cal. App. 4th 1252, 1262)* .

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16-165 California Points & Authorities § 165.421

§ 165.421 Plaintiff's Express Assumption of Risk Does Not Extend to Defendant's Gross Negligence

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S PRE-INJURY AGREEMENT TO EXCUSE DEFENDANT FROM LIABILITY FOR NEGLIGENCE DOES NOT EXCUSE DEFENDANT FROM LIABILITY FOR GROSS NEGLIGENCE.

Clause Excusing Defendant From Liability for Negligence Inapplicable to Gross Negligence Claim. While a pre-injury agreement shielding a party from liability for negligence may be justified in order to create an incentive for that party to provide a valuable service for the public, such an agreement does not excuse the party from liability for gross negligence, because exculpation from liability for gross negligence removes any obligation to adhere to even a minimal standard of care (*City of Santa Barbara v. Superior Court (2007) 41 Cal. 4th 747, 776-777, 62 Cal. Rptr. 3d 527, 161 P.3d 1095*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that a plaintiff's pre-injury agreement to excuse the defendant from liability for the defendant's own negligence does not shield the defendant from liability for gross negligence. For these purposes, "gross negligence" would include the failure to exercise even slight care, or an extreme departure from the ordinary standard of conduct [*City of Santa Barbara v. Superior Court (2007) 41 Cal. 4th 747, 766, 62 Cal. Rptr. 3d 527, 161 P.3d 1095]* .

[b] Argument

Counsel should include argument linking the points in this form with the facts of his or her case. Thus, for example,

counsel could include facts showing the language of the pre-injury agreement, showing the type of activity or services provided by the defendant, and argue that public policy would not be served by allowing the agreement to shield the defendant from liability for gross negligence.

[c] Opposing Points and Authorities

The points and authorities provided in § 165.402 may be used in an appropriate case to oppose the points and authorities provided in this form.

[3] Discussion of Authorities

[a] Clause Excusing Defendant From Liability for Negligence Inapplicable to Gross Negligence Claim

In *City of Santa Barbara v. Superior Court (2007) 41 Cal. 4th 747, 62 Cal. Rptr. 3d 527, 161 P.3d 1095* , plaintiffs were the parents of a 14-year-old girl who drowned while swimming in a pool during a city's recreational activities program designed for children who were developmentally disabled. Plaintiff's daughter suffered from cerebral palsy, epilepsy, and other disabilities. Prior to allowing a child to participate in the program, the city required parents to sign release agreements excusing the city from liability for any injuries that might occur while participating in the program, including injuries caused by the city's own negligence and that of its employees. On the day of the decedent's accident, she had suffered a mild seizure about 45 minutes before being allowed to swim in the water. Supervisors were watching the decedent and several hundred other children in the pool area, but the supervisor who had been monitoring the decedent turned away momentarily while the decedent was swimming after a successful dive. When she turned back, she did not see the decedent. Five minutes later, lifeguards pulled the girl from the bottom of the pool and she died the next day. Plaintiffs sued the city and its employee for wrongful death, but the defendants argued that the pre-injury release excused them from liability. However, the trial court denied the defendant's motion for summary judgment upon concluding that there were issues of fact concerning whether the release was valid and whether the defendants acted with gross negligence. Defendants sought a writ of mandate to set aside the trial court's order denying the motion. The court of appeal denied the writ, holding that while the release was enforceable as to any claim of ordinary negligence on the part of the city or its employees, the release was unenforceable as to any claim of gross negligence. The court then reviewed the facts in the record and concluded that a triable issue of fact existed as to potential gross negligence on the part of the city and its employees, precluding summary judgment. Defendants appealed.

The California Supreme Court granted review solely on the issue of whether the release extended to claims of gross negligence and agreed with the court of appeal that it did not. While the city argued that the language of the release covered all degrees of negligence, the Court disagreed and held that the release did not excuse the city from liability for gross negligence, which would include the failure to exercise even slight care or an extreme departure from the ordinary standard of conduct (*41 Cal. 4th 747, 766*). The Court recognized that public interest restraints on the enforcement of exculpatory clauses can limit the enforceability of such clauses even when mere negligence is alleged and noted that most other states that had considered the issue had concluded that comparable exculpatory clauses did not extend to gross negligence (*41 Cal. 4th 747, 755-760)* . Unlike the "public interest" factors to be considered when analyzing a release for mere negligence, however, the Court based its conclusion that a release purporting to cover gross negligence is generally invalid on the public policy that a contrary rule would remove any incentive to adhere to even a minimal standard of care. The Court also noted that the distinction between ordinary and gross negligence reflects an established rule of policy that harsher legal consequences should result when negligence is aggravated rather than merely ordinary (*41 Cal. 4th 747, 764, 776-777)* . While the city had a legitimate interest in protecting itself from the risk of unlimited liability when offering recreational programs, neither the defendants nor amicus curiae were able to provide the Court with any data from other states showing that a rule in which exculpatory releases are not extended to gross negligence has a actual negative impact on the availability of recreational opportunities (*41 Cal. 4th 747, 768-776)* .

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16-165 California Points & Authorities §§ 165.422-165.429

[Reserved]

§§ 165.422[Reserved]

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3. Firefighter's Rule

16-165 California Points & Authorities § 165.430

§ 165.430 Firefighter's Rule Bars Recovery for Injuries Due to Risk Necessitating Presence

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS NOT LIABLE FOR THE HARM TO PLAINTIFF _____ [POLICE OFFICER *or* FIREFIGHTER] BECAUSE A MEMBER OF THE PUBLIC OWES NO DUTY OF CARE TO PROTECT A _____ [POLICE OFFICER *or* FIREFIGHTER] FROM THE VERY RISK NECESSITATING THE PRESENCE OF THE _____ [POLICE OFFICER *or* FIREFIGHTER]. THEREFORE A _____ [POLICE OFFICER *or* FIREFIGHTER] CANNOT RECOVER FOR INJURY RESULTING FROM NEGLIGENCE OR WILLFUL MISCONDUCT IF THAT INJURY IS DUE TO THE SPECIFIC RISK THAT NECESSITATED HIS/HER PRESENCE.

No Liability for Injury Due to Risk Necessitating Presence. A publicly employed police officer or firefighter cannot recover for injury resulting from negligence or willful misconduct, if the injury was due to the specific risk that necessitated his or her presence on the scene (*see Walters v. Sloan (1977) 20 Cal. 3d 199, 202, 142 Cal. Rptr. 152, 571 P.2d 609* ; *Baker v. Superior Court (1982) 129 Cal. App. 3d 710, 713, 181 Cal. Rptr. 311*); *see also Neighbarger v. Irwin Indus., Inc. (1994) 8 Cal. 4th 532, 538, 34 Cal. Rptr. 2d 630, 882 P.2d 347*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the defendant is not liable for injury to a police officer or firefighter called to the scene, on the ground that under the firefighter's rule there is no liability to the police officer or firefighter for injuries resulting from any original negligence that caused the officer's intervention [*see Walters v. Sloan (1977) 20 Cal. 3d 199, 202, 142 Cal. Rptr. 152, 571 P.2d 609]* . It should be combined with the *form in § 165.431* if applicable to the particular case.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may discuss the relationship between the risk necessitating the presence of the police officer or firefighter, and the cause of the plaintiff's injury. Counsel may properly raise the issue, for example, in a motion for summary judgment [*see, e.g., Baker v. Superior Court (1982) 129 Cal. App. 3d 710, 722, 181 Cal. Rptr. 311]* .

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of answer to a cause of action for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender). For forms and discussion relating to the firefighter's rule, see California Forms of Pleading and Practice, Ch. 267, *Fires* , Ch. 380, *Negligence* , and Ch. 421, *Premises Liability* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§ 165.431*. For forms and discussion relating to the firefighter's rule in cases involving negligence of the defendants who are owners or possessors of property, see Ch. 178, *Premises Liability* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in §§ 165.450 -165.455* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] No Liability for Injury Due to Risk Necessitating Presence

Walters v. Sloan *(1977) 20 Cal. 3d 199, 142 Cal. Rptr. 152, 571 P.2d 609* , was an action brought by a police officer against the defendants who left their home in the charge of their teenage daughter. Acting with their knowledge, she hosted a large party at which alcohol and drugs were available and disorder eventually developed. The plaintiff, who was on duty, was sent to the defendants' residence where he was attacked while trying to arrest various guests for being drunk in public. The trial court entered a judgment of dismissal, and the plaintiff appealed to the Supreme Court.

The Court affirmed, rejecting the argument that the firefighter's rule, which applies to police officers as well as firefighters, should be abolished (*20 Cal. 3d 199, 202)* . The Court noted that the rule, which precludes firefighters and police officers from "complain[ing] of negligence in the creation of the very occasion for [their] engagement," is based not only on fundamental tort principles denying recovery to anyone who knowingly and voluntarily confronts a hazard, but also on modern public policy (*20 Cal. 3d 199, 204-205)* . Because most fires are attributable to negligence, it would be too burdensome to impose liability for firefighters' injuries on everyone who carelessly caused or failed to prevent a fire. The Court also pointed out that firefighters and police officers are paid to face the hazards of their professions and are provided special benefits for being injured on duty that are in addition to the usual workers' compensation benefits (*20 Cal. 3d 199, 205-206)* .

In ***Baker v. Superior Court*** *(1982) 129 Cal. App. 3d 710, 181 Cal. Rptr. 311* , the plaintiffs were two paid-call members of a fire department who were injured while fighting a fire at a ranch. As paid-call firefighters, the plaintiffs

were volunteers who could choose to respond to fires and, if they responded, were paid $5 per fire. One of the plaintiffs was a full-time cook and the other was a homemaker. The injuries occurred when the plaintiffs jumped from a truck and the truck rolled over on them. The plaintiffs sued the ranch owners and some of their employees, alleging negligence, willful misconduct, and violations of statutes, ordinances, and regulations, in setting the fire and failing to control it. The defendants petitioned for mandate after the trial court denied their motion for summary judgment, apparently on the ground that the firefighter's rule did not apply to volunteer firefighters.

The court of appeal issued a writ of mandate ordering the trial court to vacate is order denying the motion and enter an order granting the motion and dismissing the action. The court held that the firefighter's rule that precluded recovery for injuries suffered by firefighters in attempting to put out a fire was applicable to volunteer firefighters. In doing so, the court observed that the primary basis for the rule was the fundamental principle that one who has knowingly and voluntarily confronted a hazard cannot recover for injuries sustained thereby (*129 Cal. App. 3d 710, 713-714)* . The court held that the type of assumption of risk underlying the firefighter's rule continued to be viable as a separate defense negating a defendant's duty of care after comparative negligence replaced the contributory negligence doctrine pursuant to *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 826, 119 Cal. Rptr. 858, 532 P.2d 1226* , discussed in *§ 165.380[3][a]* (*129 Cal. App. 3d 710, 720-721)* .

Neighbarger v. Irwin Indus., Inc. *(1994) 8 Cal. 4th 532, 34 Cal. Rptr. 2d 630, 882 P.2d 347* , was an action for personal injuries brought by two safety employees of an oil company. The plaintiffs were injured by liquid petroleum that ignited and burned when employees of the defendant, a company that contracted to provide maintenance services to the oil company, negligently unplugged a valve on the oil company's premises. The trial court granted summary judgment to the defendant on the ground that the firefighter's rule applied and precluded the existence of a cause of action. The court of appeal upheld the order, ruling that private safety employees assume the risk of injury that may occur when they respond to emergencies on the job, as the defendants did not owe the plaintiffs a duty of care to eliminate those risks. The plaintiffs appealed to the Supreme Court, which reversed.

The Court distinguished between publicly employed firefighters and private safety employees, holding that the firefighter's rule does not preclude a private safety employee from stating a cause of action against a third party who is not his or her employer for injuries caused by that third party's negligence in starting a fire (*8 Cal. 4th 532, 546-547)* . The Court reasoned that by establishing fire departments and taxing themselves to pay for their services, the public in effect has purchased exoneration from the duty of care and does not have to pay twice, through taxation and individual liability, for those services (*8 Cal. 4th 532, 542-543)* . Because of this relationship between the public, the firefighter, and the individual members of the public who require the firefighter's services, the individual's duty of care towards the firefighter is replaced by the individual's contribution to tax-supported compensation for the firefighter (*8 Cal. 4th 532, 546)* . In contrast, a defendant whose negligence injures private safety employees employed by another does not have the same relationship with those private safety employees as a member of the public has with publicly employed firefighters, because the defendant has not paid in any way to be relieved of the duty of care owed toward the private employees (*8 Cal. 4th 532, 543)* . Another consideration supporting the distinction between publicly employed firefighters and private safety employees is that actions by publicly employed firefighters would involve costly litigation over subrogation that would ultimately be financed by the public and that would not benefit the firefighter, who receives retirement or workers' compensation benefits, whereas actions by private safety employees shift the loss from the innocent employees and their employer to the third party whose negligence caused the injuries (*8 Cal. 4th 532, 543)* . A third distinction is that the public good is best served by a quick response to fires without questions about the fire's cause, which warrants eliminating the public's duty of care to publicly employed firefighters, but no similar concern justifies eliminating the duty of care owed by third parties to private safety employees (*8 Cal. 4th 532, 544)* .

The Court observed that the firefighter's rule is not actually a separate concept, but rather is an example of the application of the primary versus secondary assumption of risk doctrine set forth in *Knight v. Jewett (1992) 3 Cal. 4th 296, 313, 11 Cal. Rptr. 2d 2, 834 P.2d 696* (discussed in *§ 165.400[3][a]*): a legal determination of whether, based on the nature of the activity involved and the relationship of the parties to that activity, the defendant owed the plaintiff a

duty of care (*8 Cal. 4th 532, 541)* . The Court held that the proper basis for the rule is not, as had been held before *Knight*, a plaintiff's voluntary acceptance of a known risk of injury in the course of employment, but rather a public policy determination that a person who negligently starts a fire does not owe a duty of care to protect the responding firefighter from the very danger that requires the firefighter's presence (*8 Cal. 4th 532, 541)* .

NOTE:

In drawing this distinction between publicly employed firefighters and private safety employees, the Court rejected the reasoning of a court of appeal decision, *Holland v. Crumb (1994) 26 Cal. App. 4th 1844, 1852, 32 Cal. Rptr. 2d 366* , that applied the firefighter's rule to preclude recovery by a privately employed tow truck driver who was struck by traffic while preparing to tow a disabled vehicle. The Court observed that the court of appeal had based its decision on theory that the driver had assumed the foreseeable risk of his hazardous employment; noting that private employees do not assume all the foreseeable risks of their employment, the Court held, citing *Knight v. Jewett (1992) 3 Cal. 4th 296, 313, 11 Cal. Rptr. 2d 2, 834 P.2d 696* , that application of the firefighter's rule requires a closer analysis focusing on the relationship of the parties and the defendant's duty of care (*8 Cal. 4th 532, 545 n.4*).

[4] Additional Authorities

[a] No Liability for Injury Due to Risk Necessitating Presence

In *Hamilton v. Martinelli & Assocs. (2003) 110 Cal. App. 4th 1012, 2 Cal. Rptr. 3d 168* , the plaintiff was employed as a probation officer at a youth detention facility. The plaintiff was injured by her trainer while engaging in a self-defense maneuver at a required training session, and the injury left her unable to work as a correctional officer or peace officer. The plaintiff sued the training course business and its owner for negligence and intentional tort. The trial court granted summary judgment for the defendants on the grounds that the claims were barred by the primary assumption of risk doctrine, and the court of appeal affirmed. In addition to holding that recovery was barred by the primary assumption of risk doctrine [*see § 165.401[4][b]*], the court of appeal also held that the firefighter's rule precluded liability. The court noted that the plaintiff was employed as a peace officer and was injured while training to perform the duties of her job. The court held that the firefighter's rule extended not only to the risk of injury while responding to actual emergency situations, but also to the risks of injury while training to respond to actual emergencies (*110 Cal. App. 4th 1012, 1026)* . Moreover, the court rejected the argument that liability could be predicated on the exception to the firefighter's rule for injury-causing conduct that occurs after the person knows or should have known about the officer's presence at the scene, as codified in *Civ. Code § 1714.9(a)(1)*. The court noted that this exception only applies to separate, subsequent acts of negligence other than the conduct that necessitated the officer's presence. The court reasoned that because the training program was the conduct necessitating the plaintiff's presence at the scene, and because the alleged negligence occurred during the training program, the injury-causing conduct was not a separate, subsequent act of misconduct, and the exception did not apply (*110 Cal. App. 4th 1012, 1027-1028)* .

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3. Firefighter's Rule

16-165 California Points & Authorities § 165.431

§ 165.431 Firefighter's Rule Bars Recovery for Injuries Due to Hazards Encountered by Chance While on Duty

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS NOT LIABLE UNDER THE FIREFIGHTER'S RULE FOR THE HARM SUFFERED BY PLAINTIFF _____ [FIREFIGHTER *or* POLICE OFFICER] BECAUSE A HAZARD THAT A _____ [FIREFIGHTER *or* POLICE OFFICER] RESPONDS TO IN HIS/HER PROFESSIONAL CAPACITY WHILE ON DUTY IS NOT AN INDEPENDENT ACT OF MISCONDUCT MERELY BECAUSE HE/SHE ENCOUNTERED THAT HAZARD BY CHANCE.

Hazard Encountered by Chance Not Independent Act of Misconduct. Firefighters or police officers who have not been called to the scene of a fire or other emergency, but who have been injured while responding to a hazard that they encounter by chance while on duty, are barred from recovery by the firefighter's rule, because their presence at a particular location for reasons unrelated to the hazard to which they responded does not make the hazard an independent act of misconduct (*Kelhi v. Fitzpatrick (1994) 25 Cal. App. 4th 1149, 1158-1160, 31 Cal. Rptr. 2d 182* ; *see Seibert Sec. Serv., Inc. v. Superior Court (1993) 18 Cal. App. 4th 394, 411, 22 Cal. Rptr. 2d 514*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the firefighter's rule bars a firefighter or police officer from recovering for injuries suffered due to a hazard that he or she encountered by chance while on duty, because this type of hazard is not an independent act of misconduct that would permit recovery [*see Kelhi v. Fitzpatrick (1994) 25 Cal. App. 4th 1149, 1158-1160, 31 Cal. Rptr. 2d 182]* . It should be combined with the *form in § 165.430* if applicable to the particular case.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may discuss the hazard that the firefighter or police officer encountered by chance while on duty, the firefighter's or police officer's response to that hazard in his or her professional capacity, and the relationship between that hazard and the cause of the injury complained of by the firefighter or police officer.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of answer in a cause of action for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender). For forms and discussion relating to the firefighter's rule, see California Forms of Pleading and Practice, Ch. 267, *Fires* Ch. 380, *Negligence,* and Ch. 421, *Premises Liability* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§ 165.430*. For forms and discussion relating to the firefighter's rule in cases involving negligence of the defendants who are owners or possessors of property, see Ch. 178, *Premises Liability* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in §§ 165.450 -165.455* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Hazard Encountered by Chance Not Independent Act of Misconduct

In ***Kelhi v. Fitzpatrick*** *(1994) 25 Cal. App. 4th 1149, 31 Cal. Rptr. 2d 182* , the plaintiff was a highway patrol officer in uniform who was driving to work on his official motorcycle when he saw tires break off a pickup truck on the highway ahead of him. The plaintiff responded by turning on his flashers, checking traffic behind him to ensure that no vehicles ran into the tires, and asking the truck's driver to move onto the shoulder; after the plaintiff moved around the truck to look for the tires, which were rolling down the highway, they veered, bounced off a retaining wall, and hit him. The plaintiff brought an action for personal injury against the driver and owner of the truck and several other the defendants. The trial court granted the defendants' motion for summary judgment, which was based on the firefighter's rule, and the plaintiff appealed.

The court of appeal affirmed, rejecting the plaintiff's argument that the firefighter's rule did not apply to bar his recovery because his presence at the accident scene was fortuitous and unrelated to the hazard that injured him. The court acknowledged that the plaintiff's situation was unlike the classic scenario in which the risk that causes injury is the very reason a police officer or firefighter is summoned to the scene (*25 Cal. App. 4th 1149, 1158)* . The risk that caused the plaintiff's injuries, the runaway tires, was not the conduct that brought him to that highway at that moment. However, the runaway tires were the risk that prompted his response as a police officer. His actions were the same as those he would have taken had he been summoned to the scene, and an officer called to the scene would have been barred from recovery by the firefighter's rule for a similar injury; therefore, the exception for unrelated or independent acts did not apply to allow his recovery for any negligence that caused the tires to come off the truck (*25 Cal. App. 4th 1149,*

1158-1160) .

In ***Seibert Sec. Serv., Inc. v. Superior Court*** *(1993) 18 Cal. App. 4th 394, 22 Cal. Rptr. 2d 514* , the plaintiff was a police officer who brought an arrested suspect to a hospital for examination of possible injuries. While he was at the hospital completing paperwork on the suspect, a mental patient became abusive and tried to grab a baton held by a hospital security guard employed by the defendant security company. The plaintiff helped the guard subdue the patient, who was handcuffed and put in an isolation cell, and the plaintiff returned to his paperwork. Sometime later, another hospital security guard also employed by the defendant decided to remove the patient's handcuffs, and the patient then attacked this guard. The plaintiff responded to the guard's call for help and was injured while subduing the patient. During the struggle, the guard who had been attacked dropped back and did not assist the plaintiff, but another of the defendant's employees also attempted to subdue the patient. The plaintiff sued the defendant security company for the negligence of its employee in removing the patient's handcuffs. The defendant moved for summary judgment on the basis of the firefighter's rule. The trial court denied the motion, and the defendant sought a writ in the court of appeal.

The court of appeal issued a writ of mandate ordering the trial court to vacate its order denying the defendant's motion for summary judgment and to enter a new order granting the motion. The court held that the firefighter's rule barred the plaintiff's recovery, and that the statutory exception under *Civ. Code § 1714.9(a)(1)* did not apply despite the defendant's employee's knowledge of the plaintiff's presence when he removed the patient's handcuffs. *Civ. Code § 1714.9(a)(1)* establishes liability for negligent injury-causing conduct occurring after the defendant knows or has reason to know of the presence of the peace officer, firefighter, or emergency medical personnel (*see § 165.451*). The court ruled that this exception applies only to conduct occurring after peace officers, firefighters, or emergency medical personnel have undertaken their duties. In this case, the plaintiff was not performing any duties as a police officer when the guard removed the patient's handcuffs. The court noted that ruling otherwise and permitting the exception to apply merely because a police officer was present would lead to absurd results (*18 Cal. App. 4th 394, 408-409)* . For example, a person standing on a city street may observe a patrolling police officer nearby. The person, feeling safe due to the officer's presence, allows a valuable camera to hang loosely from his or her arm, and a passing thief is thereby encouraged to grab it. If the officer responds and is injured in a struggle with the thief, the victim was no doubt negligent but should not be liable in tort to the officer (*18 Cal. App. 4th 394, 409)* . The court held that applying the statutory exception to conduct occurring before peace officers, firefighters, or emergency medical personnel had undertaken their duties would lead to inequitable distinctions by allowing recovery to officers, such as the plaintiff, who happened to be at the scene when a negligently caused incident occurred, but denying recovery to officers who responded to a radio call (*18 Cal. App. 4th 394, 410)* . One basis for the trial court's denial of the defendant's motion for summary judgment was that a triable issue of fact existed as to whether the negligence of the defendant's employees was an independent act of misconduct. The court held that no independent act of misconduct occurred as a matter of law. Although the conduct of the defendant's employees may have been independent of and unrelated to the conduct that originally brought the plaintiff to the hospital, that conduct was the immediate cause of the plaintiff's being asked to respond and assist in subduing the violent patient (*18 Cal. App. 4th 394, 410-411)* .

California Points & Authorities

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CHAPTER 165 NEGLIGENCE
PART II. FORMS
E. Defenses
3. Firefighter's Rule

16-165 California Points & Authorities § 165.432

§ 165.432 Firefighter's Rule Bars Recovery For Negligence of Public Safety Personnel Employed by Different Public Safety Agency

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

IF PLAINTIFF'S NEGLIGENCE CLAIM WOULD OTHERWISE BE BARRED BY THE FIREFIGHTER'S RULE, DEFENDANT IS NOT LIABLE UNDER _____ [*CIVIL CODE SECTION 1714.9(a)(1) or* THE COMMON LAW EXCEPTION FOR INDEPENDENT ACTS OF MISCONDUCT] FOR THE HARM TO PLAINTIFF BECAUSE THAT EXCEPTION TO THE FIREFIGHTER'S RULE DOES NOT APPLY IF DEFENDANT IS A _____ [PEACE OFFICER *or* FIREFIGHTER] EMPLOYED BY A DIFFERENT PUBLIC SAFETY AGENCY AND PLAINTIFF'S INJURIES WERE CAUSED BY DEFENDANT'S NEGLIGENCE WHILE BOTH PARTIES WERE JOINTLY ENGAGED IN THE DISCHARGE OF THEIR PROFESSIONAL RESPONSIBILITIES.

A. Firefighter's Rule Applicable to Negligence of Public Safety Personnel Employed by Different Public Agency While Responding to Same Public Hazard. The firefighter's rule applies if one public safety officer is negligently injured by another public safety officer while both officers were engaged in their professional duties responding to the same public hazard or condition (*see Farnam v. State of California (2000) 84 Cal. App. 4th 1448, 1455, 101 Cal. Rptr. 2d 642*).

B. Statutory Exception to Firefighter's Rule Under *Civ. Code § 1714.9(a)(1)* Does Not Apply to Negligence of Public Safety Personnel Employed by Different Public Agency. The liability in *Civil Code Section 1714.9(a)(1)* for injury-causing conduct occurring after a person knows or has reason to know of the presence of a peace officer, firefighter, or emergency medical personnel, does not apply if the peace officer, firefighter, or emergency medical personnel is negligently injured by another peace officer, firefighter, or emergency medical personnel who is employed by a different public safety agency and if both parties were jointly engaged in the discharge of their public safety

responsibilities (*Calatayud v. State of California (1998) 18 Cal. 4th 1057, 1072, 77 Cal. Rptr. 2d 202, 959 P.2d 360* ; *see Civ. Code § 1714.9(a)(1)*).

[*AND/OR*]

C. Common Law Exception to Firefighter's Rule for Independent Acts of Misconduct Inapplicable to Negligence of Public Safety Personnel Employed by Different Public Entity. The common law exception to the firefighter's rule for acts of misconduct that are independent of the conduct that necessitates the presence of a public safety employee and that occur after the arrival of the public safety employee does not apply to actions based on conduct between public safety employees who have different public employers but who were engaged in a joint public safety operation when plaintiff's injuries were sustained (*City of Oceanside v. Superior Court (2000) 81 Cal. App. 4th 269, 280-283, 96 Cal. Rptr. 2d 621*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the firefighter's rule applies if one public safety officer seeks recovery for an injury negligently caused by another public safety officer employed by a different public entity while both were jointly engaged in the discharge of their professional duties. These points and authorities also support the contention that neither the liability in *Civ. Code § 1714.9(a)(1)* for injury-causing conduct occurring after the person knows or has reason to know of the presence of a peace officer, firefighter, or emergency medical personnel, nor the common law exception to the firefighter's rule for independent acts of misconduct, apply under those circumstances. This form should be combined with the *form in § 165.430*, if applicable to the particular case.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the fact that both the plaintiff and the defendant were firefighters, peace officers or emergency medical personnel, and that although they were employed by different public safety agencies, the plaintiff's injuries were caused by the defendant's negligence while both parties were jointly engaged in carrying out their public responsibilities. Counsel should then argue that under those facts, the firefighter's rule bars recovery under the authorities discussed in this form.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms of answer in a cause of action for negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender). For forms and discussion relating to the firefighter's rule, see California Forms of Pleading and Practice, Ch. 267, *Fires* , Ch. 380, *Negligence* , and Ch. 421, *Premises Liability* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§ 165.430*. For forms and discussion relating to the firefighter's rule in cases involving negligence of defendants who are owners or possessors of property, see Ch. 178, *Premises Liability* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Firefighter's Rule Applicable to Negligence of Public Safety Personnel Employed by Different Public Agency While Responding to Same Public Hazard

In ***Farnam v. State of California*** *(2000) 84 Cal. App. 4th 1448, 101 Cal. Rptr. 2d 642* , the plaintiff was a city police officer who was holding a suspected felon at gunpoint when he was attacked by a police dog under the control of the defendant, a California Highway Patrol (CHP) officer who was attempting to aid in the arrest of the suspect. In the plaintiff's suit against the CHP officer and the state for negligence, the trial court granted summary judgment on the grounds that public safety officers were shielded from liability under *Gov. Code § 821.6*, which provides immunity for instituting or prosecuting any judicial or administrative proceeding. The plaintiff appealed. After the appeal had been briefed, the California Supreme Court decided *Calatayud v. State of California (1998) 18 Cal. 4th 1057, 77 Cal. Rptr. 2d 202, 959 P.2d 360* [*see § 165.432[3][b]*], and the court of appeal required and received supplemental briefing on the effect of that case.

The court of appeal affirmed the summary judgment, but through application of the firefighter's rule rather than on the grounds relied on by the trial court. First, the court recognized that the firefighter's rule is merely one application of the assumption of risk doctrine (*84 Cal. App. 4th 1448, 1451)* . Next, although recognizing that the firefighter's rule is often described as applying only to conduct that necessitates summoning an officer to the scene, the court noted that the veterinarian's rule, discussed in *§ 165.410*, is an application of the same basic assumption of risk principles as the firefighter's rule and is not limited to conduct necessitating the veterinarian's presence. Therefore, the court concluded that the firefighter's rule is not actually limited to the original conduct that necessitates the officer's presence but may apply to conduct occurring after the officer's arrival on the scene (*84 Cal. App. 4th 1448, 1452)* . The court of appeal then concluded that the *Calatayud* decision, as well as the subsequent court of appeal decision in *City of Oceanside v. Superior Court (2000) 81 Cal. App. 4th 269, 96 Cal. Rptr. 2d 621* [*see § 165.432[3][c]*], implicitly require application of the firefighter's rule in a case in which one public safety officer is negligently injured by another public safety officer while both are jointly engaged in carrying out their professional duties. The court concluded that the rationale used in both those cases, supporting the conclusion that exceptions to the firefighter's rule for negligent conduct occurring after the officer arrives on the scene do not apply if one public safety officer is injured by another officer employed by a different agency, apply with equal force to the determination that the firefighter's rule applies in the first place (*84 Cal. App. 4th 1448, 1452-1455)* . In the case before the court, the plaintiff and the defendant were both engaged in their official duties, those duties included facing hazards that they were paid to confront, and the hazard posed by the police dog was just such an inherent hazard. Concluding that the circumstances precluded the officers from owing a duty to each other that might compromise the duties they owed to the public, the court of appeal held that the assumption of risk principles of the firefighter's rule barred the plaintiff's claim against the CHP officer (*84 Cal. App. 4th 1448, 1455)* .

[b] Statutory Exception to Firefighter's Rule Under Civ. Code § 1714.9(a)(1) Does Not Apply to Negligence of Public Safety Personnel Employed by Different Public Agency

In ***Calatayud v. State of California*** *(1998) 18 Cal. 4th 1057, 77 Cal. Rptr. 2d 202, 959 P.2d 360* , the plaintiff was a Pasadena police officer who had received an "officer needs assistance" call in the early morning hours and proceeded to a parking structure where California Highway Patrol (CHP) officers holding shotguns were attempting to subdue a highly agitated professional football player. When the plaintiff approached the CHP officers to assist them in subduing and arresting the man, one of the CHP officers fell, accidentally causing his shotgun to discharge and injuring the plaintiff. In the plaintiff's suit against the State of California and the CHP officer, the defendants unsuccessfully sought to invoke the firefighter's rule as a bar to liability. At trial, a jury returned a verdict in favor of the plaintiff in excess of $700,000, apportioning fault between the man who was being subdued and the two CHP officers. The court of appeal affirmed the judgment. The court found the firefighter's rule applicable based on "evidence establish[ing] that [the plaintiff's] immediate presence at the scene of the struggle ... was necessitated by [the man's] resistance, and by the conduct of the [CHP] officers in attempting to subdue [the man] while holding their shotguns." However, the court of

appeal also determined that the circumstances came within the exception set forth in *Civ. Code § 1714.9(a)(1)*, which establishes liability for negligent injury-causing conduct occurring after the defendant knows or has reason to know of the presence of the peace officer, firefighter, or emergency medical personnel. The Supreme Court granted the defendants' petition for review to decide the sole issue of whether § 1714.9(a)(1) applied to injuries caused by the negligence of other public safety personnel.

The Supreme Court reversed the court of appeal, holding that the legislature in enacting the statute did not intend for it to apply to public safety members who are jointly engaged in the discharge of their responsibilities. The Court first reviewed the firefighter's rule and its rationale, including (1) the basis of the rule in assumption of the risk and the legal conclusion that no one owes a duty to public safety personnel to exercise care so as not to require the special services for which they are trained and paid; (2) public policy considerations for the rule, including the availability to public safety employees of special public compensation for confronting the dangers posed by their occupations and the public policy decision to spread the cost of the public's own negligence through tax-supported compensation rather than through individual tort recoveries; and (3) the policy of efficient judicial administration furthered by eliminating claims that would burden the courts with litigation among the public agency employing the public safety employee, the retirement system, and the negligence insurer, even though the cost for compensating the injured employee would eventually be passed on to the public in any event (*18 Cal. 4th 1057, 1061-1063)* .

The Court then considered the statutory exception to the firefighter's rule embodied in *Civ. Code § 1714.9(a)(1)*, which if read literally applies to "any person" negligently causing an injury to a peace officer, firefighter, or emergency medical personnel when the person knows or should have known of the presence of the peace officer, firefighter, or emergency medical personnel. Applying principles of statutory construction, the Court noted that the statute was intended to overrule the holding of the Supreme Court in *Hubbard v. Boelt (1980) 28 Cal. 3d 480, 169 Cal. Rptr. 706, 620 P.2d 156* , which had held that an officer was barred by the firefighter's rule from recovering for an injury caused while seeking to avoid the debris from a collision with a third party caused by the defendant, a speeding motorist who fled from the officer at a high speed. The Court also noted the dissent of Justice Tobriner in *Hubbard*, which was adopted as the rationale for the subsequent legislative activity that became *Civ. Code § 1714.9(a)(1)*. Justice Tobriner had argued that the firefighter's rule provides no shelter for a defendant who, after the officer arrives, commits subsequent negligent acts that cause the officer' s injury. From this genesis, the Court concluded that the legislature did not intend that § 1714.9(a)(1) would impose liability for injuries caused by other officers jointly engaged in the discharge of public safety responsibilities, noting the absence in *Hubbard* and the subsequent legislative debates of any discussion of injuries caused by other officers (*18 Cal. 4th 1057, 1063-1068, 1072)* .

Finally, the Court noted the practical problems that would accompany a contrary holding. The Court reasoned that public safety members have a primary responsibility for the protection of the public, that sound policy mandates that the discharge of these duties takes precedence over avoiding injury to other officers, particularly when responding to a rapidly developing emergency or crisis, and that the potential for conflicting duties would be substantial given the size of the class of possible defendants and the scope of liability. Although the Court had no occasion to rule on the issue, the Court expressed concern that imposing liability under the circumstances presented might arguably override existing statutory immunities conferred on public safety personnel and their employers. Addressing the cost-spreading rationale of the firefighter's rule and the possibility for increased litigation of liability issues, the Court thought it unlikely the legislature intended to encourage costly litigation, including the possibility of derivative actions, when the public has already financed statutory compensation of injured public safety members. Similarly, addressing the argument for efficient judicial administration supporting the firefighter's rule, the Court reasoned that extending liability under *Civ. Code § 1714.9(a)(1)* to other officers jointly discharging their duties would impair efficient judicial administration, noting the problems of determining causation in cases turning on the propriety of police tactics or emergency procedures and the fact that the public would ultimately pay the compensation for the injury and any added expense caused by protracted litigation. The Court also refused to extend *Civ. Code § 1714.9(a)(1)* to jointly engaged officers employed by different public agencies to avoid the otherwise anomalous result that, because § 1714.9 preserves the exclusivity of the Workers' Compensation Act, an injured officer would be allowed to sue if the negligent officer was

employed by another agency but not by his or her own employer (*18 Cal. 4th 1057, 1068-1072)* .

[c] Common Law Exception to Firefighter's Rule for Independent Acts of Misconduct Does Not Apply to Negligence of Public Safety Personnel Employed by Different Public Entity

In ***City of Oceanside v. Superior Court*** *(2000) 81 Cal. App. 4th 269, 96 Cal. Rptr. 2d 621* , the plaintiff was a lifeguard employed by Camp Pendleton who had engaged in a joint operation with lifeguards employed by the City of Oceanside to rescue a jet ski collision victim who was stranded in ocean water adjacent to a Camp Pendleton jetty. The plaintiff brought suit against the City and the City lifeguard who had asserted authority over the rescue operation, alleging that the City lifeguard was negligent in directing the plaintiff to follow an unreasonable rescue plan that had resulted in the plaintiff's sustaining back and other injuries when she was pushed against the jetty rocks by a wave. While granting summary adjudication on certain causes of action, the trial court denied summary judgment for the defendants, partly on the basis that the firefighter's rule did not apply to the facts as alleged. The defendants filed a petition for a peremptory writ of mandate, prohibition, or other relief, contending that the firefighter's rule applied as a matter of law and was a complete defense to the action.

The court of appeal granted the defendant's petition, holding that the trial court erred in failing to apply the firefighter's rule as a complete defense to the plaintiff's claims. After reviewing the rationale for the firefighter's rule, the court of appeal noted that there is an established common law exception to the rule for conduct other than the conduct that necessitated the summoning of the public safety employee, and that the rule does not apply to independent acts of misconduct that are committed after the public safety employee has arrived on the scene. However, the California Supreme Court in *Calatayud v. State of California (1998) 18 Cal. 4th 1057* [*see § 165.432[3][b]*], had held that a similar statutory exception to *Civ. Code § 1714.9(a)(1)* did not apply to injuries sustained by one public safety employee due to the negligence of another public safety employee employed by a different public entity while the two parties were engaged in a joint public safety operation. The court of appeal then concluded that the firefighter's rule extended to publicly-employed lifeguards (*81 Cal. App. 4th 269, 279-280)* and that the policy rationale of the *Calatayud* decision applied equally to the common law exception for independent acts of misconduct (*81 Cal. App. 4th 269, 282)* .

Policy considerations relied on by the Supreme Court in *Calatayud* and echoed by the court of appeal in *City of Oceanside* included: allowing public safety personnel to concentrate on public safety responsibilities without an unnecessary fear of lawsuits for injuring another public safety officer; spreading costs via taxpayer-funded compensation and other benefits for injured public safety officers; furthering efficient judicial administration by avoiding issues of causation and the second-guessing of tactical decisions made by public safety officers; and avoiding the anomaly that, due to the exclusive remedy doctrine of the workers' compensation system, an injured public safety officer would be entitled to sue a public safety officer employed by another public agency if the two officers were engaged in a joint enterprise, but would not be entitled to sue a public safety officer who was employed by the same agency (*81 Cal. App. 4th 269, 280-283)* . In reaching its decision, the court of appeal noted that although the firefighter's rule is normally applied only to the original conduct that necessitated the presence of the public safety personnel, the same policy considerations that would exonerate the person in need of rescue from liability for the original negligent conduct should also exonerate another lifeguard whose presence and actions were in furtherance of a joint rescue operation for that person (*81 Cal. App. 4th 269, 282-283)* . The court also rejected the argument that the firefighter's rule should not be applied because, as a lifeguard, the plaintiff did not receive the special benefits or compensation that firefighters or police officers receive if they are injured in the performance of their duties. The court instead concluded that allegedly inadequate compensation was not a sufficient reason to preclude application of the firefighter's rule (*81 Cal. App. 4th 269, 284-285)* .

[4] Additional Authorities

[a] Statutory Exception to Firefighter's Rule Under Civ. Code § 1714.9(a)(1) Does Not Apply to Negligence

of Public Safety Personnel Employed by Different Public Agency

In *McElroy v. State of California (2002) 100 Cal. App. 4th 546, 122 Cal. Rptr. 2d 612* , the plaintiffs were city police officers whose police car collided with the car of the defendants, who were officers of the California Highway Patrol. At the time of the collision, the plaintiffs were engaged in a pursuit, and the defendants had joined the pursuit without being summoned by the plaintiffs or their agency to assist in the chase and without making radio contact with the plaintiff's agency to discover what the chase was about. The court of appeal affirmed summary judgment for the defendants. The plaintiffs had argued that the rule of *Calatayud v. State of California (1998) 18 Cal. 4th 1057, 77 Cal. Rptr. 2d 202, 959 P.2d 360* [*see § 165.432[3][b]*], did not apply because the defendants were not "jointly engaged" with the plaintiffs or their agency. The court of appeal held that for these purposes, joint engagement between public service agencies did not require formal coordination between the agencies, and that under the facts of the case, the public policies supporting the firefighter's rule supported immunity from suit (*100 Cal. App. 4th 546, 548-549)* .

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[Reserved]

§§ 165.433[Reserved]

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3. Firefighter's Rule

16-165 California Points & Authorities § 165.450

§ 165.450 Firefighter's Rule Does Not Bar Recovery for Injuries Caused by Independent Acts of Misconduct

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS LIABLE FOR HARM TO PLAINTIFF _____ [POLICE OFFICER *or* FIREFIGHTER] BECAUSE THE FIREFIGHTER'S RULE DOES NOT BAR RECOVERY FOR INJURIES DUE TO ACTS OF MISCONDUCT INDEPENDENT FROM THE ACT THAT CREATED THE EMERGENCY TO WHICH THE _____ [POLICE OFFICER *or* FIREFIGHTER] RESPONDED.

Plaintiff May Recover for Injuries Caused by Independent Acts of Misconduct. The firefighter's rule does not prohibit a firefighter or police officer from recovering damages for injuries caused by acts of misconduct independent from the act that created the emergency to which the firefighter or police officer responded (*Lipson v. Superior Court (1982) 31 Cal. 3d 362, 378, 182 Cal. Rptr. 629, 644 P.2d 822* ; *see also Donohue v. San Francisco Hous. Auth. (1993) 16 Cal. App. 4th 658, 663, 20 Cal. Rptr. 2d 148*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the firefighter's rule does not shield a defendant from liability for injuries incurred by a firefighter or police officer, because the injuries were caused by acts of misconduct independent of the risk creating the necessity of the firefighter's or police officer's presence [*see Lipson v. Superior Court (1982) 31 Cal. 3d 362, 378, 182 Cal. Rptr. 629, 644 P.2d 822* ; *see also Civ. Code § 1714.9* (establishing liability for negligent injury-causing conduct occurring after the defendant knows or has reason to know of presence of peace officer, firefighter, or emergency medical personnel); § 165.451)]. It should be combined with any of the *forms in §§ 165.451 -165.455* that are applicable to the particular case.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may argue that the act that caused the plaintiff's injuries was independent of the act that created the emergency to which the firefighter or police officer responded.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms regarding negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender). For forms and discussion relating to the firefighter's rule, see California Forms of Pleading and Practice, Ch. 380, *Negligence* , and Ch. 421, *Premises Liability* , (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§§ 165.451 -165.455*. For forms and discussion relating to the firefighter's rule in cases involving negligence of the defendants who are owners or possessors of property, see Ch. 178, *Premises Liability* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in §§ 165.430 -165.431* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Plaintiff May Recover for Injuries Caused by Independent Acts of Misconduct

In ***Lipson v. Superior Court*** *(1982) 31 Cal. 3d 362, 182 Cal. Rptr. 629, 644 P.2d 822* , the plaintiff firefighter was injured while containing a boilover, caused by the defendants' negligence, at the defendants' chemical plant. The plaintiff alleged that his injury was caused by the defendants' negligent or intentional misrepresentation of the nature of the hazard, because the defendants told him when he arrived at the plant that the boilover did not involve toxic chemicals, which in fact it did. The plaintiff alleged that he suffered injury because of exposure to the toxic chemicals that would not have occurred if he had been warned of their presence; the plaintiff also alleged that his injury was caused by the defendants' maintaining an ultrahazardous activity on their premises. The defendants moved for summary judgment on the ground that the firefighter's rule barred the plaintiff's action. The trial court denied the motion, and the defendants obtained a peremptory writ of mandate from the court of appeal ordering the trial court to grant the motion and dismiss the action. The Supreme Court granted the plaintiff's request for a hearing and held that the trial court was correct in refusing to grant the defendants' motion for summary judgment.

Holding that the firefighter's rule did not bar recovery for the plaintiff's injuries, the Court reaffirmed the continued existence of the rule but held that its narrow parameters do not prohibit a firefighter from recovering damages if the act that results in his or her injury is independent from the act that created the emergency to which he or she responded. Thus, a defendant is liable for failing to warn of a known, hidden danger or for misrepresenting the nature of the hazard, if that failure or misrepresentation caused the injuries (*31 Cal. 3d 362, 378)* . The Court also held that a firefighter may seek recovery on the basis of strict liability if the maintenance of an ultrahazardous activity produces an injury separate from the injuries caused by the risk creating the emergency to which the firefighter responds (*31 Cal. 3d 362, 376-379)*

.

Donohue v. San Francisco Hous. Auth. *(1993) 16 Cal. App. 4th 658, 20 Cal. Rptr. 2d 148* , was an action brought against a public housing authority by a firefighter who fell on wet steps while conducting a fire safety inspection of one of the authority's apartment buildings. The concrete steps did not have skid-resistant treads, which had previously been recommended by the authority's own safety committee, and employees of the authority had washed down the steps with a hose just prior to the plaintiff's arrival.

The court of appeals reversed the trial court's grant of summary judgment for the defendant housing authority, holding that the defendant had a duty to tenants and visitors to maintain its premises in reasonably safe condition. Therefore a jury must decide whether the defendant had breached that duty by not installing the treads and by leaving the stairs wet and slippery. The plaintiff's choosing to traverse the wet steps was secondary assumption of risk, which did not automatically bar his recovery, but could be considered by the jury for purposes of determining comparative fault (*16 Cal. App. 4th 658, 665-666)* . The court also held that the firefighter's rule did not bar recovery in this case because the plaintiff's injuries were caused not by the hazard that required his presence on the premises, but by an entirely independent negligent act. The plaintiff was not on the premises to inspect the slipperiness of the steps on which he fell. Therefore, even though the plaintiff was injured in the regular course of his duties as a fire inspector, and the hazard of slippery steps was one he would normally encounter as part of his job, the plaintiff was not barred from seeking recovery for the injuries he suffered in the fall (*16 Cal. App. 4th 658, 663)* .

[4] Additional Authorities

[a] Plaintiff May Recover for Injuries Caused by Independent Acts of Misconduct

In *Terry v. Garcia (2003) 109 Cal. App. 4th 245, 134 Cal. Rptr. 2d 565* , the plaintiff was a police officer who was responding at high speed to a call of a domestic disturbance when his vehicle was hit by a truck driven by the defendant. The plaintiff sued the defendant and his employer for negligence, but the trial court granted summary judgment for the defendants on the grounds of assumption of risk. The court of appeal reversed. The court of appeal held that the assumption of risk doctrine, in the form of the so-called "firefighter's rule," did not apply to the case. The firefighter's rule only precludes liability if the defendant's alleged negligence was the conduct that necessitated the plaintiff's presence at the scene. The defendant's negligence in causing a collision with plaintiff while the plaintiff was speeding toward a domestic disturbance was an independent act of misconduct, and therefore the defendant could be liable for the plaintiff's injuries (*109 Cal. App. 4th 245, 252-253)* . The court also rejected the defendants' contention that the proper inquiry is whether the risk causing the injury was inherent in the activity. In the context of applying the firefighter's rule, the only negligence for which the general public cannot be liable is the original negligence that necessitates employing the public officer (*109 Cal. App. 4th 245, 252)* .

In *Boon v. Rivera (2000) 80 Cal. App. 4th 1322, 96 Cal. Rptr. 2d 276* , the plaintiff was a police officer who responded to an emergency call at the defendant's residence, where the defendant's husband had barricaded himself in the house. The defendant advised the plaintiff and other police officers that her husband was not violent. However, she knew, but did not disclose, that there was an M-16 rifle and a gun safe in the house, that her husband had previously been diagnosed as a danger to himself and others, that her husband had threatened to kill her and their child, and that her husband had threatened to kill the first police officer who arrived at the residence. Based on the defendant's information that her husband was not violent, the plaintiff responded with non-lethal force and was shot by the defendant's husband. The plaintiff alleged that if he had known the truth about the husband's violent nature, he would have responded differently. The trial court sustained the defendant's demurrer, finding that the action against the defendant was barred by the firefighter's rule and that the defendant owed no duty to the plaintiff. The court of appeal reversed, concluding that the facts were analogous to those in *Lipson v. Superior Court*, discussed in *§ 165.450[3][a]*. The court concluded that the firefighter's rule was not a defense to the action brought against the defendant. Although a police officer may expect to encounter force when responding to an emergency call of a barricaded man, the risk that someone at the scene

would deceive the officer as to the nature of the man's violent tendencies was not an inherent risk of the situation. Instead, the defendant's misrepresentation was an independent act of misconduct occurring after the plaintiff arrived on the scene (*80 Cal. App. 4th 1322, 1328-1330)* .

In *Stapper v. GMI Holdings, Inc. (1999) 73 Cal. App. 4th 787, 86 Cal. Rptr. 2d 688* , the plaintiff was a firefighter who was fighting a fire in a house when an automatic garage door failed to open, trapping the plaintiff and another firefighter inside the garage. Although other firefighters were eventually able to open the garage door, the plaintiff suffered brain damage and blindness, and the other firefighter suffered fatal injuries. The plaintiff brought suit against the garage door manufacturer, alleging that the door was defective and did not operate as intended. The trial court granted the defendant's motion for nonsuit on the grounds that the firefighter's rule barred the plaintiff's claim. The court of appeal reversed, concluding that the claim was not barred because the plaintiff alleged that the garage door malfunction was independent of the fire and not caused by the fire. The firefighter's rule was inapplicable because the plaintiff was not complaining of negligence in the creation of the fire or negligence that otherwise made the plaintiff's employment necessary (*73 Cal. App. 4th 787, 791-792)* . The court went on to discuss the concerns that underlie the firefighter's rule generally, including fairness to the public, the provision of tax-supported compensation, and the desire to avoid creating an incentive not to call firefighters, and concluded that most of those concerns did not apply to the injury caused by the allegedly defective door mechanism (*73 Cal. App. 4th 787, 792-793)* . However, although the court held that the firefighter's rule did not bar the claim, the procedural posture of the case did not require the court to determine whether a duty of care actually existed under the facts (*73 Cal. App. 4th 787, 796-797)* .

In *Terhell v. American Commonwealth Assoc. (1985) 172 Cal. App. 3d 434, 218 Cal. Rptr. 256* , the plaintiff was a firefighter who fell through an unguarded opening in the roof of the defendants' building while fighting a fire on the premises. The plaintiff's complaint alleged that the defendants' negligent maintenance of the roof created a concealed opening that was hazardous to anyone on the roof and that the defendants knew of the opening and its hazard but failed to warn the plaintiff of its existence. The court of appeal reversed the trial court's judgment of dismissal, holding that it did not appear on the face of the plaintiff's complaint that the firefighter's rule barred his action (*172 Cal. App. 3d 434, 437)* . The court held that the unguarded hole in the roof was not the cause of the plaintiff's presence at the scene, and that the rule does not apply to negligence that did not cause the fire. Citing *Lipson v. Superior Court (1982) 31 Cal. 3d 362, 371, 182 Cal. Rptr. 629, 644 P.2d 822* [*see 165.450[3][a]*], the court noted that the situation most frequently confronted by the courts has been the failure to warn a firefighter of a known hidden danger, and that virtually all jurisdictions have allowed recovery if the failure to warn ultimately resulted in an injury to the firefighter (*172 Cal. App. 3d 434, 440)* .

In *Rose v. City of Los Angeles (1984) 159 Cal. App. 3d 883, 206 Cal. Rptr. 49* , the plaintiff was a reserve police officer working in plain clothes who was shot by an officer from another police department while both were participating in a joint effort by their respective departments to serve search warrants on a suspected narcotics dealer. The court of appeal reversed the trial court's grant of summary judgment to the defendants, the other officer and his employer, holding that the firefighter's rule did not apply in this case to bar the plaintiff's recovery. The court ruled that the other officer's negligence in not recognizing the plaintiff as a police officer was completely independent of the conduct that was the reason for the plaintiff's presence at the scene, namely, the illegal conduct of the suspect on whom the plaintiff was attempting to serve the search warrants (*159 Cal. App. 3d 883, 889)* .

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CHAPTER 165 NEGLIGENCE
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E. Defenses
3. Firefighter's Rule

16-165 California Points & Authorities § 165.451

§ 165.451 Firefighter's Rule Does Not Bar Recovery Because Conduct Causing Injury Occurred After Firefighter's Presence Was Known to Defendant and Firefighter Had Undertaken Duties

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS LIABLE UNDER *CIVIL CODE SECTION 1714.9(a)(1)* FOR THE HARM TO PLAINTIFF _____ [PEACE OFFICER *or* FIREFIGHTER *or* EMERGENCY MEDICAL PERSONNEL EMPLOYED BY A PUBLIC ENTITY] BECAUSE THE CONDUCT CAUSING PLAINTIFF'S INJURY OCCURRED AFTER DEFENDANT KNEW OR SHOULD HAVE KNOWN OF PLAINTIFF'S PRESENCE AND AFTER PLAINTIFF HAD UNDERTAKEN HIS/HER DUTIES AS _____ [A PEACE OFFICER *or* A FIREFIGHTER *or* EMERGENCY MEDICAL PERSONNEL EMPLOYED BY A PUBLIC ENTITY].

A. Conduct Causing Injury Occurred After Plaintiff's Presence Was Known to Defendant. A defendant is liable for willful and negligent conduct causing injury to a peace officer, a firefighter, or emergency medical personnel employed by a public entity, if the conduct causing the injury occurs after the defendant knows or should have known of the presence of the peace officer, firefighter, or emergency medical personnel (*Civ. Code § 1714.9(a)(1)*).

B. Conduct Causing Injury Occurred After Plaintiff Had Undertaken Duties. A defendant is liable under *Civil Code Section 1714.9(a)(1)* only for conduct that occurs after the plaintiff has undertaken his or her duties as a peace officer, a firefighter, or emergency medical personnel employed by a public entity (*Seibert Sec. Serv., Inc. v. Superior Court (1993) 18 Cal. App. 4th 394, 408-409, 22 Cal. Rptr. 2d 514*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the firefighter's rule does not shield

a defendant from liability for injuries incurred by a peace officer, a firefighter, or emergency medical personnel employed by a public entity. This form is based on *Civ. Code § 1714.9(a)(1)*, which applies if the willful or negligent conduct causing the injuries occurred after the defendant knew or should have known of the presence of the peace officer, firefighter, or emergency medical personnel, and after the peace officer, firefighter, or emergency medical personnel had undertaken his or her duties. This form should be combined with any of the *forms in § 165.450* and *§§ 165.452 -165.455* that are applicable to the particular case.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may state facts showing the plaintiff's status as a peace officer, a firefighter, or emergency medical personnel employed by a public entity. Counsel may also discuss the conduct causing the plaintiff's injury, and argue that the conduct occurred after the defendant knew or should have known of the plaintiff's presence and after the plaintiff had undertaken his or her duties.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms regarding negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender). For forms and discussion relating to the firefighter's rule, see California Forms of Pleading and Practice, Ch. 380, *Negligence* , and Ch. 421, *Premises Liability* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§ 165.450* and *§§ 165.452 -165.455*. For forms and discussion relating to the firefighter's rule in cases involving negligence of defendants who are owners or possessors of property, see Ch. 178, *Premises Liability* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in §§ 165.430 -165.431* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Conduct Causing Injury Occurred After Plaintiff Had Undertaken Duties

The factual and procedural background of ***Seibert Sec. Serv. Inc. v. Superior Court*** *(1993) 18 Cal. App. 4th 394, 22 Cal. Rptr. 2d 514* , is discussed in *§ 165.431[3][a]*.

[4] Additional Authorities

[a] Conduct Causing Injury Occurred After Plaintiff's Presence Was Known to Defendant

The facts and procedural background of *Boon v. Rivera (2000) 80 Cal. App. 4th 1322, 96 Cal. Rptr. 2d 276* , are described in § 165.381[4][a]. In addition to ruling that the action against the defendant was not barred by the firefighter's rule, the court also held that under the facts of that particular case, *Civ. Code § 1714.9(a)* established a duty

by those present at the scene of the emergency to refrain from misstating material facts concerning the nature of the emergency to those public safety officials called to the scene. Therefore, the defendant (the wife of the man who shot the plaintiff) had a duty under that statute not to misrepresent affirmatively the nature of the hazard faced by the plaintiff (*80 Cal. App. 4th 1322, 1330-1333)* .

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3. Firefighter's Rule

16-165 California Points & Authorities § 165.452

§ 165.452 Firefighter's Rule Does Not Bar Recovery Because Conduct Causing Injury Violated Statute

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS LIABLE UNDER *CIVIL CODE SECTION 1714.9(a)(2)* FOR THE HARM TO PLAINTIFF _____ [PEACE OFFICER *or* FIREFIGHTER *or* EMERGENCY MEDICAL PERSONNEL EMPLOYED BY A PUBLIC ENTITY] BECAUSE THE CONDUCT CAUSING PLAINTIFF'S INJURY VIOLATED A _____ [STATUTE *or* ORDINANCE *or* REGULATION], AND THAT CONDUCT WAS NOT ITSELF THE EVENT THAT PRECIPITATED EITHER THE RESPONSE OR THE PRESENCE OF PLAINTIFF _____ [PEACE OFFICER, FIREFIGHTER, OR EMERGENCY MEDICAL PERSONNEL EMPLOYED BY A PUBLIC ENTITY].

Conduct Causing Injury Violated Statute. A defendant is liable for willful and negligent conduct causing injury to a peace officer, a firefighter, or emergency medical personnel employed by a public entity if the conduct causing the injury violates a statute, ordinance, or regulation, and if the conduct causing injury was not itself the event that precipitated either the response or presence of the peace officer, firefighter, or emergency medical personnel (*Civ. Code § 1714.9(a)(2)*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the firefighter's rule does not shield a defendant from liability for injuries incurred by a peace officer, a firefighter, or emergency medical personnel employed by a public entity. This form is based on *Civ. Code § 1714.9(a)(2)* (*see § 165.451*), which applies if: (1) the willful or negligent conduct causing the injuries violated a statute, ordinance, or regulation; and (3) that conduct was not itself the event that precipitated either the response or presence of the peace officer, firefighter, or emergency medical

personnel [*Civ. Code § 1714.9(a)(2)*]. This form should be combined with any of the *forms in §§ 165.450 -165.451* and *§§ 165.453 -165.455* that are applicable to the particular case.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may show that the plaintiff was a peace officer, a firefighter, or emergency medical personnel employed by a public entity, and argue that the conduct violated the particular statute, ordinance, or regulation, and that the conduct causing injury was not itself the event that precipitated either the response or the presence of the peace officer, firefighter, or emergency medical personnel [*Civ. Code § 1714.9(a)(2)*].

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms regarding negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender). For forms and discussion relating to the firefighter's rule, see California Forms of Pleading and Practice, Ch. 380, *Negligence* , and Ch. 421, *Premises Liability* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§§ 165.450 -165.451* and *§§ 165.453 -165.455*.

For forms and discussion relating to the firefighter's rule in cases involving negligence of the defendants who are owners or possessors of property, see Ch. 178, *Premises Liability* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in §§ 165.430 -165.431* may be used in an appropriate case to oppose the points and authorities in this form.

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16-165 California Points & Authorities § 165.453

§ 165.453 Firefighter's Rule Does Not Bar Recovery Because Conduct Causing Injury Was Intended to Injure Plaintiff

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS LIABLE UNDER *CIVIL CODE SECTION 1714.9(a)(3)* FOR THE HARM TO PLAINTIFF _____ [PEACE OFFICER *or* FIREFIGHTER *or* EMERGENCY MEDICAL PERSONNEL EMPLOYED BY A PUBLIC ENTITY] BECAUSE THE CONDUCT CAUSING PLAINTIFF'S INJURY WAS INTENDED TO INJURE PLAINTIFF.

Conduct Causing Injury Was Intended to Injure Plaintiff. A defendant is liable for willful and negligent conduct causing injury to a peace officer, a firefighter, or emergency medical personnel employed by a public entity, if the conduct causing the injury was intended to injure the peace officer, firefighter, or emergency medical personnel (*Civ. Code § 1714.9(a)(3)*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the firefighter's rule does not shield a defendant from liability for injuries incurred by a peace officer, a firefighter, or emergency medical personnel employed by a public entity, because the defendant willfully or negligently caused the injuries in a manner intended to injure the peace officer, firefighter, or emergency medical personnel [*Civ. Code § 1714.9(a)(3)*]. It should be combined with any of the *forms in §§ 165.450 -165.452* and *§§ 165.454 -165.455* that are applicable to the particular case.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may argue that the plaintiff was a peace officer, a firefighter, or emergency medical personnel employed by a public entity, and that the defendant intentionally injured the plaintiff.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms regarding negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender). For forms and discussion relating to the firefighter's rule, see California Forms of Pleading and Practice, Ch. 380, *Negligence* , and Ch. 421, *Premises Liability* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§§ 165.450 -165.452* and *§§ 165.454 -165.455*. For forms and discussion relating to the firefighter's rule in cases involving negligence of the defendants who are owners or possessors of property, see Ch. 178, *Premises Liability* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in §§ 165.430 -165.431* may be used in an appropriate case to oppose the points and authorities in this form.

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3. Firefighter's Rule

16-165 California Points & Authorities § 165.454

§ 165.454 Firefighter's Rule Does Not Bar Recovery Because Conduct Causing Injury Was Arson

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS LIABLE UNDER *CIVIL CODE SECTION 1714.9(a)(4)* FOR THE HARM TO PLAINTIFF _____ [PEACE OFFICER *or* FIREFIGHTER *or* EMERGENCY MEDICAL PERSONNEL EMPLOYED BY A PUBLIC ENTITY] BECAUSE THE CONDUCT CAUSING PLAINTIFF'S INJURY WAS ARSON AS DEFINED IN PENAL CODE SECTION 451.

Conduct Causing Injury Was Arson. A defendant is liable for willful and negligent conduct causing injury to a peace officer, a firefighter, or emergency medical personnel employed by a public entity, if the conduct causing the injury was arson as defined in *Penal Code Section 451* (*Civ. Code § 1714.9(a)(4)*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the firefighter's rule does not shield a defendant from liability for injuries incurred by a peace officer, a firefighter, or emergency medical personnel employed by a public entity. This form is based on *Civ. Code § 1714.9(a)(4)*, which applies when willful or negligent conduct causing the injuries was arson as defined in *Penal Code § 451* [*Civ. Code § 1714.9(a)(4)*]. This form should be combined with any of the *forms in §§ 165.450 -165.453* and *§ 165.455* that are applicable to the particular case.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may argue that the plaintiff was a peace officer, a firefighter, or emergency medical personnel employed by a public entity,

and that the defendant's conduct was arson as defined by *Penal Code § 451*.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms regarding negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender). For forms and discussion relating to the firefighter's rule, see California Forms of Pleading and Practice, Ch. 380, *Negligence* , and Ch. 421, *Premises Liability* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§§ 165.450 -165.453* and *§ 165.455*. For forms and discussion relating to the firefighter's rule in cases involving negligence of the defendants who are owners or possessors of property, see Ch. 178, *Premises Liability* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in §§ 165.430 -165.431* may be used in an appropriate case to oppose the points and authorities in this form.

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16-165 California Points & Authorities § 165.455

§ 165.455 Firefighter's Rule Does Not Bar Recovery by Private Safety Employee for Injuries Caused by Negligent Third Party

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS LIABLE FOR HARM TO PLAINTIFF BECAUSE PLAINTIFF IS A PRIVATE SAFETY EMPLOYEE, NOT A PUBLICLY EMPLOYED FIREFIGHTER, AND THE FIREFIGHTER'S RULE DOES NOT BAR RECOVERY BY A PRIVATE SAFETY EMPLOYEE FOR INJURIES CAUSED BY THE NEGLIGENCE OF A THIRD PARTY, WHO IS NOT PLAINTIFF'S EMPLOYER, IN STARTING A FIRE.

Private Safety Employee May Recover for Injuries Caused by Negligent Third Parties. The firefighter's rule does not preclude a private safety employee from stating a cause of action against a third party, not the employer, for injuries caused by the third party's negligence in starting a fire (*Neighbarger v. Irwin Indus., Inc. (1994) 8 Cal. 4th 532, 547, 34 Cal. Rptr. 2d 630, 882 P.2d 347*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the firefighter's rule does not apply to private safety employees and does not preclude such a person from stating a cause of action against a third party, not the employer, for injuries caused by the third party's negligence in starting a fire [*see Neighbarger v. Irwin Indus., Inc. (1994) 8 Cal. 4th 532, 547, 34 Cal. Rptr. 2d 630, 882 P.2d 347]* . It should be combined with any of the *forms in §§ 165.450 -165.454* that are applicable to the particular case.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may discuss the status of the plaintiff as a private safety employee, rather than a publicly employed firefighter, the defendant's status as a third party and not the plaintiff's employer, and the negligence of the defendant in starting the fire that resulted in the plaintiff's injuries, and argue that the exception set forth above applies.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms regarding negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender). For forms and discussion relating to the firefighter's rule, see California Forms of Pleading and Practice, Ch. 380, *Negligence* , and Ch. 421, *Premises Liability* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities to combine with this form, see *§§ 165.450 -165.454*. For forms and discussion relating to the firefighter's rule in cases involving negligence of the defendants who are owners or possessors of property, see Ch. 178, *Premises Liability* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in §§ 165.430 -165.431* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Private Safety Employee May Recover for Injuries Caused by Negligent Third Party

The factual and procedural background of ***Neighbarger v. Irwin Indus., Inc.*** *(1994) 8 Cal. 4th 532, 34 Cal. Rptr. 2d 630, 882 P.2d 347* , is discussed in *§ 165.430[3][a]*. In *Neighbarger*, the California Supreme Court distinguished between publicly employed firefighters and private safety employees and held that the firefighter's rule does not preclude a private safety employee from stating a cause of action against a third party who is not his or her employer for injuries caused by that third party's negligence in starting a fire (*8 Cal. 4th 532, 546-547)* . The Court reasoned that by establishing fire departments and taxing themselves to pay for their services, the public in effect has purchased exoneration from the duty of care and does not have to pay twice, through taxation and individual liability, for those services (*8 Cal. 4th 532, 542-543)* . Because of this relationship between the public, the firefighter, and the individual members of the public who require the firefighter's services, the individual's duty of care towards the firefighter is replaced by the individual's contribution to tax-supported compensation for the firefighter (*8 Cal. 4th 532, 546)* . In contrast, a defendant whose negligence injures private safety employees employed by another does not have the same relationship with those private safety employees as a member of the public has with publicly employed firefighters, because the defendant has not paid in any way to be relieved of the duty of care owed toward the private employees (*8 Cal. 4th 532, 543)* . Another consideration supporting the distinction between publicly employed firefighters and private safety employees is that actions by publicly employed firefighters would involve costly litigation over subrogation that would ultimately be financed by the public and that would not benefit the firefighter, who receives retirement or workers' compensation benefits, whereas actions by private safety employees shift the loss from te innocent employees and their employer to the third party whose negligence caused the injuries (*8 Cal. 4th 532, 543)* . A third distinction is that the public good is best served by a quick response to fires without questions about the fire's cause, which warrants eliminating the public's duty of care to publicly employed firefighters, but no similar concern justifies eliminating the

duty of care owed by third parties to private safety employees (*8 Cal. 4th 532, 544)* .

The Court observed that the firefighter's rule is not actually a separate concept, but rather is an example of the application of the primary versus secondary assumption of risk doctrine set forth in *Knight v. Jewett (1992) 3 Cal. 4th 296, 313, 11 Cal. Rptr. 2d 2, 834 P.2d 696* : a legal determination of whether, based on the nature of the activity involved and the relationship of the parties to that activity, the defendant owed the plaintiff a duty of care (*8 Cal. 4th 532, 541)* . [*Knight v. Jewett* is discussed in *§ 165.400[3*][a].] The Court held that the proper basis for the rule is not, as had been held before *Knight*, a plaintiff's voluntary acceptance of a known risk of injury in the course of employment, but rather a public policy determination that a person who negligently starts a fire does not owe a duty of care to protect the responding firefighter from the very danger that requires the firefighter's presence (*8 Cal. 4th 532, 541)* .

NOTE:

In drawing this distinction between publicly employed firefighters and private safety employees, the Court rejected the reasoning of a court of appeal decision, *Holland v. Crumb (1994) 26 Cal. App. 4th 1844, 1852, 32 Cal. Rptr. 2d 366* , that applied the firefighter's rule to preclude recovery by a privately employed tow truck driver who was struck by traffic while preparing to tow a disabled vehicle. The Court observed that the court of appeal had based its decision on theory that the driver had assumed the foreseeable risk of his hazardous employment; noting that private employees do not assume all the foreseeable risks of their employment, the Court held, citing *Knight v. Jewett (1992) 3 Cal. 4th 296, 313, 11 Cal. Rptr. 2d 2, 834 P.2d 696* , that application of the firefighter's rule requires a closer analysis focusing on the relationship of the parties and the defendant's duty of care (*8 Cal. 4th 532, 545 n.4*).

[4] Additional Authorities

[a] Private Safety Employee May Recover for Injuries Caused by Negligent Third Party

In *Marquez v. Mainframe (1996) 42 Cal. App. 4th 881, 50 Cal. Rptr. 2d 34* , a private security guard slipped and fell while patrolling a building operated and maintained by the defendants. In his action for personal injury, the trial court granted a summary judgment for the defendants on the basis that the claim was barred by the firefighter's rule of the doctrine of assumption of the risk, as stated in *Knight v. Jewett (1992) 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2, 834 P.2d 696* (discussed in *§ 165.400[3][a]*). The court of appeal reversed, following the analysis of *Neighbarger v. Irwin Indus., Inc. (1994) 8 Cal. 4th 532, 34 Cal. Rptr. 2d 630, 882 P.2d 347* (discussed in *§ 165.430[3][a]*). The court began with the general principle that an owner or occupier of property owes a duty of reasonable care to maintain the premises in a safe condition (*42 Cal. App. 4th 881, 886)* . With regard to the "firefighter's rule," the court noted that the plaintiff was not a public employee; there was no special relationship between the parties suggesting that the normal duty of care was waived, particularly since the plaintiff was not hired by the defendants but by a private company; and the security guard received no special financial reward for engaging in hazardous work. The court concluded that application of the key *Neighbarger* factors showed that the plaintiff, as a private security guard, should not be barred from recovery by the "firefighter's rule" (*42 Cal. App. 4th 881, 886)* .

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[Reserved]

§§ 165.456[Reserved]

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E. Defenses
4. Third Party Liability

16-165 California Points & Authorities § 165.480

§ 165.480 Under Civ. Code § 1431.2(a), Defendant Only Liable for Proportionate Share of Plaintiff's Noneconomic Damages Because Third Party Was Partially at Fault

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT _____ [*name*] IS NOT LIABLE FOR PLAINTIFF'S NONECONOMIC DAMAGES IN ANY AMOUNT ABOVE DEFENDANT'S PROPORTIONATE SHARE BASED ON DEFENDANT'S PERCENTAGE OF FAULT IN A PERSONAL INJURY ACTION BASED ON COMPARATIVE FAULT.

A. Defendant Severally Liable for Plaintiff's Noneconomic Damages. In actions for personal injury, wrongful death, or property damage that are based on principles of comparative fault, the liability of a tortfeasor for the plaintiff's noneconomic damages is several only and is not joint (*Civ. Code § 1431.2(a)*).

B. Defendant Liable Only for Proportionate Share of Plaintiff's Noneconomic Damages. The defendant's share of the plaintiff's noneconomic damages is his/her/its proportionate share of those damages based on the percentage of fault allocated to the defendant under the principles of comparative fault (*Civ. Code § 1431.2(a)*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that the defendant is not liable for the full extent of the plaintiff's noneconomic damages. Its use is limited to actions for personal injury, wrongful death, or property damage that are based on principles of comparative fault [*see Civ. Code § 1431.2(a)*]. This issue may arise, for example, on appeal or when challenging the propriety of the trial court's decisions regarding the admissibility of evidence, jury instructions, or the form of judgment.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel may argue that the case in one for personal injury, wrongful death, or property damage based on principles of comparative fault, and therefore that the defendant is not liable for the full extent of the plaintiff's noneconomic damages.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural guides, and forms regarding negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Defendant Severally Liable for Plaintiff's Noneconomic Damages

In 1986, the people of California, through Proposition 51, enacted the Fair Responsibility Act of 1986. The act added *Civ. Code §§ 1431.1-1431.5*, which significantly changed the doctrine of joint and several liability. The stated purpose of the initiative was to rectify the perceived injustices of the "deep pocket rule," under which a defendant whose fault was minimal was required to shoulder the entire liability when the other more culpable tortfeasors were judgment proof [*see Civ. Code § 1431.1*]. Proposition 51 has been found to be constitutional [*Evangelatos v. Superior Court (1988) 44 Cal. 3d 1188, 1200-1205, 246 Cal. Rptr. 629, 753 P.2d 585]* . However, it does not apply retroactively, that is, it does not apply to causes of action accruing prior to its effective date (June 4, 1986) [*Evangelatos v. Superior Court (1988) 44 Cal. 3d 1188, 1206-1225, 246 Cal. Rptr. 629, 753 P.2d 585]* . Under *Civ. Code § 1431.2*, the substantive provision of the Fair Responsibility Act of 1986, in actions for personal injury, property damages, or wrongful death based on principles of comparative fault, the liability of each defendant for noneconomic damages is proportionate to his or her share of fault and is several only and not joint.

"Economic damages" under *Civ. Code § 1431.2* means objectively verifiable monetary losses, including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment, and loss of business or employment opportunities. "Noneconomic damages" means subjective, nonmonetary losses, including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation, and humiliation [*Civ. Code § 1431.2(b)*].

[b] Defendant Liable Only for Proportionate Share of Plaintiff's Noneconomic Damages

Under *Civ. Code § 1431.2(a)*, in a suit involving multiple tortfeasors, a defendant's share of the plaintiff's noneconomic damages is his or her proportionate share of those damages based on the percentage of fault allocated to the defendant under the principles of comparative fault [*see § 165.380*].

Under *Civ. Code § 1431.2(a)*, in actions for personal injury, property damages, or wrongful death, based on principles of comparative fault, judgments for noneconomic losses must be made separately.

California Points & Authorities

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
CHAPTER 165 NEGLIGENCE
PART II. FORMS
E. Defenses
4. Third Party Liability

16-165 California Points & Authorities § 165.481

§ 165.481 Federal Communications Decency Act Immunizes Internet Site Operator From Liability When Third Party Sexually Assaults Minor After Communicating With and Meeting Victim Through Defendant's Site [47 U.S.C.S. § 230]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT INTERNET SITE OPERATOR IS IMMUNE FROM LIABILITY PURSUANT TO THE FEDERAL COMMUNICATIONS DECENCY ACT OF 1996 FOR COMMUNICATIONS MADE BY THIRD PARTIES ON THE SITE AND FOR ANY ALLEGED FAILURE TO IMPLEMENT SAFETY MEASURES ON THE SITE THAT WOULD LIMIT COMMUNICATIONS.

Communications Decency Act Immunizes Web Site Operators From Liability. The federal Communications Decency Act of 1996 provides a broad immunity from liability to web site operators for communications that they did not create, and this immunity extends to claims that they failed to implement measures that would have prevented sexual predators from using the site to communicate with minors (*Doe II v. MySpace Inc. (2009) 175 Cal. App. 4th 561, 572-573, 96 Cal. Rptr. 3d 148* ; *see 47 U.S.C.S. § 230*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted as an affirmative defense under the federal Communications Decency Act of 1996 when an Internet site operator is sued in negligence for failing to implement measures on the site that would have prevented sexual predators from communicating with minors.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue of defendant's immunity. These points and authorities may also be adapted for

use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law stated. Thus, counsel should include facts showing that plaintiff is seeking damages for sexual assaults committed by third persons and that defendant's only role was to create an Internet forum for communication between users and failed to block certain communications that facilitated those sexual assaults.

[3] Discussion of Authorities

[a] Communications Decency Act Immunizes Web Site Operators From Liability

In ***Doe II v. MySpace Inc.*** *(2009) 175 Cal. App. 4th 561, 96 Cal. Rptr. 3d 148* , plaintiffs were teenage girls who were sexually assaulted by men that they met after communicating with them on defendant's Internet site, MySpace.com, a popular social networking site. Plaintiffs sued the site operators for negligence, gross negligence, and strict products liability for failing to implement reasonable safety measures that they allege would have prevented sexual predators form communicating with underage girls. The trial court sustained defendant's demurrer without leave to amend, concluding that plaintiffs had failed to allege facts sufficient to defeat the broad immunity provided to Internet site operators under the federal Communications Decency Act of 1996, *47 U.S.C.S. § 230*. Plaintiffs appealed.

The court of appeal affirmed. The court held that, as a consensus of federal and state case law concludes, the Communications Decency Act provides a broad immunity from liability to web site operators for communications that they did not create, and that this immunity also extends to claims that defendant failed to implement measures that would have curtailed certain types of communications. The court noted that under existing case law, immunity under the Act required proof that (1) MySpace.com is an interactive computer services provider, (2) MySpace.com is not an information content provider with respect to the disputed activity, and (3) plaintiffs seek to hold MySpace.com liable for information originating from a third-party user of its service. The court concluded that MySpace.com was not an information content provider merely by providing a framework through which users could provide their own profiles detailing their personal information, which could include name, gender, location, date of birth, and background interests, among other categories. The site did not require that this information be provided to use the site, but rather left to the user to decide what information to provide, even though it then provided tools to allow users to find and communicate with other users based on information provided in these profiles (*175 Cal. App. 4th 561, 574-575)* . The court also held that the site was not liable for content provided by third parties, or more specifically in this case, for communications between the sexual predators and the minor girls, nor for failing to implement measures that would block such communications, as the Act expressly provided immunity to site operators for decisions on whether to restrict or make available certain third-party information on a site (*175 Cal. App. 4th 561, 572-573)* .

California Points & Authorities

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CHAPTER 166 NEGOTIABLE INSTRUMENTS

16-166 California Points & Authorities 166.syn

§ 166.syn Synopsis to Chapter 166: NEGOTIABLE INSTRUMENTS

§ 166.01 Scope of Chapter

§ 166.02 Governing Law

[1] Division 3 of Commercial Code

[2] Negotiability

[3] Negotiable Instruments

[4] Promissory Notes

[5] Negotiation

[6] Holders in Due Course

[7] Statute of Limitations

§ 166.03 Use of Forms in Chapter

§ 166.04 Related Discussion and Forms

[1] Related Pleading and Practice Forms

[2] Related Points and Authorities

§ 166.05 Other Related Publications

§§ 166.06-166.19 [Reserved]

§ 166.20 Supporting Contention That Instrument Is Negotiable--Requirements of Negotiability [Com. Code §§

3103, 3104]

[1] FORM

[2] Comments

[a] Use of Form

[b] Money Orders

[c] Related Publications

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Certificate of Deposit

[4] Additional Authorities

[a] Draft

[b] Cashier's Check

[c] Certificate of Deposit

§ 166.21 Supporting Contention That Instrument Is Negotiable--Writing Contains Unconditional Promise or Order to Pay Money [Com. Code §§ 3104(a), 3106]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Publications

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Separate Agreement, Not Referred to in Instrument, That Does Not Create Contingency

[4] Additional Authorities

[a] Unconditional Nature of Promise or Order Not Affected

§ 166.22 Supporting Contention That Instrument Is Negotiable--Promise or Order Specifies Payment of Fixed Amount of Money [Com. Code §§ 1201(b)(24), 3104(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Fixed Amount of Money

[c] Variable Interest Rates Permitted in Negotiable Instruments

[d] Related Publications

§ 166.23 Supporting Contention That Instrument Is Negotiable--Promise or Order Is Payable to Bearer [Com. Code §§ 3104(a)(1), 3109]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Publications

[c] Related Points and Authorities

§ 166.24 Supporting Contention That Instrument Is Negotiable--Promise or Order Is Payable to Order [Com. Code §§ 3104(a)(1), 3109, 3110]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Publications

[c] Related Points and Authorities

§ 166.25 Supporting Contention That Instrument Is Negotiable--Promise or Order Is Payable on Demand [Com. Code §§ 3104(a)(2), 3108]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Publications

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Payable on Demand

[b] Check Is Payable on Demand

[4] Additional Authorities

[a] Payable on Demand

[b] Check Is Payable on Demand

§ 166.26 Supporting Contention That Instrument Is Negotiable--Promise or Order Is Payable at Definite Time [Com. Code §§ 3104(a)(2), 3108]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Publications

[c] Related Points and Authorities

[3] Additional Authorities

[a] Payable at Fixed Date

[b] Payable at Definite Time Subject to Certain Rights

§ 166.27 Opposing Contention That Writing Is Negotiable Instrument [Com. Code § 3104]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Savings Bank Passbook

[b] Conditional Sales Contract

[c] County Warrant

[d] Money Order Not Requiring Signature of Drawer

[e] Parties May Not Stipulate Negotiability

[4] Additional Authorities

[a] Savings Bank Passbook

[b] Conditional Sales Contract

[c] County Warrant

[d] Parties Cannot Stipulate Negotiability

§ 166.28 Opposing Contention That Instrument Is Negotiable--Conditional Promise or Order [Com. Code §§ 3104(a), 3106]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Promise or Order Subject to Another Writing

[4] Additional Authorities

[a] Promise or Order Subject to Another Writng

§ 166.29 Opposing Contention That Instrument Is Negotiable--Promise or Order Does Not Specify Payment of Fixed Amount of Money [Com. Code §§ 1201(b)(24), 3104(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

§ 166.30 Opposing Contention That Instrument Is Negotiable--Promise or Order Not Payable to Order or Bearer [Com. Code §§ 3104(a)(1), 3109]

[1] FORM

[2] Comments

[a] Use of Form

[b] Purpose of Payable to Bearer or Order Requirement

[c] Related Points and Authorities

§ 166.31 Opposing Contention That Instrument Is Negotiable--Instrument Is Not Payable on Demand or at Definite Time [Com. Code §§ 3104(a)(2), 3108]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

§§ 166.32-166.49 [Reserved]

§ 166.50 Supporting Contention That Instrument Was Negotiated [Com. Code § 3201]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Publications

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Note Payable to Order of Maker and Endorsed Is Payable to Bearer

[b] Transfer Presumed From Possession

[c] Statute Not Definitive

[d] Bank-Payee's Deposit of Check to Account of Creditor of Maker, Pursuant to Written Agreement

[4] Additional Authorities

[a] Transfer Presumed From Possession

§ 166.51 Opposing Contention That Instrument Was Negotiated [Com. Code §§ 3201, 3204]--Instrument Not Endorsed

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Endorsement Must Be on Instrument or Paper Affixed to Instrument

[b] Endorsement Must Convey Entire Instrument

[c] Presentation of Check to Drawee Does Not Constitute an Endorsement That Transfers Check

[d] Exchanging Check for Cashier's Check Is Not Endorsement

[4] Additional Authorities

[a] Negotiation of Instrument Payable to Identified Person

[b] Endorsement Must Be on Instrument or Paper Affixed to Instrument

[c] Endorsement Must Convey Entire Instrument

§ 166.52 Opposing Contention That Instrument Was Negotiated [Com. Code §§ 3201, 3203]--Instrument Not Transferred

[1] FORM

[2] Comments

[a] Use of Form

[b] Transfer of Instrument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Condition Precedent to Transfer Not Met

[4] Additional Authorities

[a] Condition Precedent to Transfer Not Met

§§ 166.53-166.69 [Reserved]

§ 166.70 Supporting Contention That Holder of Instrument Is Holder in Due Course--Holder Took Instrument for Value [Com. Code §§ 3302(a), 3303]

[1] FORM

[2] Comments

[a] Use of Form

[b] Distinction Between Value and Consideration

[c] Related Publications

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Holder in Due Course

[b] Antecedent Claim

[c] Bank's Applying Funds From Deposit of Instruments to Checks Drawn Against Insufficient Funds

[4] Additional Authorities

[a] Holder in Due Course

[b] Bank's Applying Funds From Deposit of Instruments to Checks Drawn Against Insufficient Funds

§ 166.71 Supporting Contention That Holder of Instrument Is Holder in Due Course--Holder Did Not Have Notice of Claim or Defense or Knowledge That Instrument Was Overdue [Com. Code §§ 1201(b)(20), 3302(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Filing or Recording of Document

[b] Mere Fact of Discounted Price Is Insufficient to Evidence Notice

[c] Endorsement Made Within Reasonable Time After Maturity

[d] Endorsement During Business Hours on Day After Maturity Date Is Within Reasonable Time

[e] Knowledge Acquired After Purchasing Instrument

[f] No Duty to Inquire Absent Circumstances Justifying Suspicion

[4] Additional Authorities

[a] Holder in Due Course

[b] Default in Payment of Interest

[c] Mere Fact of Discounted Price Is Insufficient to Evidence Notice

[d] No Duty to Inquire Absent Circumstances Justifying Suspicion

§ 166.72 Opposing Contention That Holder of Instrument Is Holder in Due Course--Holder Did Not Take Instrument for Value [Com. Code §§ 3302(a)(2)(A), 3303]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Publications

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Promise Not Performed

[b] Instrument Taken in Exchange for Preexisting Debt Must Be Under Express Agreement

[4] Additional Authorities

[a] Instrument Taken in Exchange for Preexisting Debt Must Be Under Express Agreement

§ 166.73 Opposing Contention That Holder of Instrument Is Holder in Due Course--Instrument Is Irregular or Incomplete or Holder Had Notice of Claim or Defense or Knowledge That Instrument Was Overdue [Com. Code §§ 1201(b)(20), 3302(a), 3304]

[1] FORM

[2] Comments

[a] Use of Form

[b] Notice of Claim or Defense

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Notice Determined by Actual Knowledge, Notice, or Reason to Know

[b] Failure to Make Inquiry Arising From Suspicion

[c] Close Connection Between Financial Institution Holder and Underlying Transaction

[4] Additional Authorities

[a] Notice Determined by Actual Knowledge, Notice, or Reason to Know

[b] Failure to Make Inquiry Arising From Suspicion

[c] Close Connection Between Financial Institution Holder and Underlying Transaction

§§ 166.74-166.89 [Reserved]

§ 166.90 Supporting Contention That Party Is Liable on Instrument--Signature Obligates Party [Com. Code §§ 3401-3403]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Publications

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Signer on Face of Instrument Is Maker Despite Relative Location of Signature

[b] Ratification of Unauthorized Signature

[c] Repudiation of Unauthorized Execution Must Be Timely

[d] Location of Signature Not Controlling

[4] Additional Authorities

[a] Representative's Signature Binding on Prinicpal/Principal's Liability

[b] Ratification of Unauthorized Signature

§ 166.91 Supporting Contention That Party Is Liable on Instrument--Party Cannot Claim Status of Accommodation Party [Com. Code § 3419(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Limitation on Accommodation Party's Liability

[c] Related Publications

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Accommodation Party Who Signs as Maker Has Same Liability as Co-maker

[b] Presumption That Multiple Signers Are Co-makers

[4] Additional Authorities

[a] Liability in Capacity Shown on Instrument

[b] Accommodation Party Who Signs as Maker Has Same Liability as Co-maker

[c] Presumption That Multiple Signers Are Co-makers

§ 166.92 Supporting Contention That Party Is Liable on Instrument--Purported Accommodated Party Is Not Party on Instrument [Com. Code § 3419(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Additional Authorities

[a] Purported Accommodated Party and Accommodation Party Must Be Parties to Instrument

§ 166.93 Supporting Contention That Maker of Promissory Note Is Liable on Instrument [Com. Code §§ 3105, 3412]--Action by Holder [Com. Code §§ 3407, 3115], Including Authorized Completion of Instrument and Enforceable Alterations

[1] FORM

[2] Comments

[a] Use of Form

[b] Liability of Maker Is Primary

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Alteration Defined

[b] Material Alteration Made by Stranger Who Acts Without Authority

[c] Related Agreement Does Not Modify Obligation

[4] Additional Authorities

[a] Related Agreement Does Not Modify Obligation

§ 166.94 Supporting Contention That Maker of Promissory Note Is Liable on Instrument [Com. Code §§ 3105, 3412]--Action by Transferee [Com. Code § 3203(a), (b)]--"Shelter" Doctrine

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] "Shelter" Doctrine

[b] Purpose and Effect of "Shelter" Doctrine

§ 166.95 Supporting Contention That Maker of Promissory Note Is Liable on Instrument [Com. Code §§ 3105, 3412]--Action by Accommodation Party [Com. Code § 3419(e)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Payor of Note Succeeds to Rights of Holder

[4] Additional Authorities

[a] Accommodation Party May Recover From Accommodated Party

[b] Payor of Note Succeeds to Rights of Holder

§ 166.96 Supporting Contention That Endorser of Promissory Note Is Liable on Instrument [Com. Code §§ 3415,

3502(a)]--Scope of Liability, Dishonor, and Special Endorsements

[1] FORM

[2] Comments

[a] Use of Form

[b] Liability of Endorser Is Secondary or Conditional

[c] Federal Law Governs Liability for Endorsement of Checks and Money Orders Between Banks and Customers

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Special Endorsee Is Not Sole Obligee of Special Endorser

§ 166.97 Supporting Contention That Endorser of Promissory Note Is Liable on Instrument [Com. Code §§ 3415, 3502(a)]--Presentment, Notice of Dishonor, or Delay in Notice Excused [Com. Code § 3504]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Presentment Excused by Waiver

[4] Additional Authorities

[a] Presentment Excused by Waiver

§ 166.98 Supporting Contention That Accommodation Endorser Is Liable to Joint Endorser for Contribution

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Accommodation Endorser Entitled to Contribution From Joint Endorsers

[4] Additional Authorities

[a] Accommodation Endorser Entitled to Contribution From Joint Endorsers

§ 166.99 Supporting Contention That Guarantor of Promissory Note Is Liable on Instrument [Com. Code § 3419(d)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Guarantors Under Revised Article 3

[c] Obligation of Guarantor Identical to That of Surety

[d] Related Publications

[e] Related Points and Authorities

§ 166.100 Supporting Contention That Party Is Liable on Instrument--No Discharge by Conditional or Partial Tender [Civ. Code §§ 1486, 1494; Com. Code § 3603(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Tender Must Be Unconditional

[b] Tender Must Be of Full Performance

§ 166.101 Supporting Contention That Maker Remains Liable on Instrument--Creditor's Objections to Tender [Civ. Code § 1501; Code Civ. Proc. § 2076] Were Sufficient

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Creditor Must Specify Objections to Tender

[b] Purpose for Requiring Objections to Tender

[c] Reasonable Compliance Is Sufficient

§ 166.102 Supporting Contention That Maker Remains Liable on Instrument--Payee Not Barred by Its Unintentional Mistake in Failing to Demand Proper Tender [Civ. Code § 1501; Code Civ. Proc. § 2076]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Objections Not Required in Case of Creditor's Unintentional Mistake

§ 166.103 Supporting Contention That Maker Remains Liable on Instrument--Equitable Estoppel [Evid. Code § 623] Not Applicable to Payee--Maker Knew or Should Have Known True Facts and Suffered No Detriment

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Doctrine of Equitable Estoppel

[b] Equitable Estoppel Is Not Applicable to Maker Who Knew True Facts and Suffered No Detriment

[4] Additional Authorities

[a] Doctrine of Equitable Estoppel

§ 166.104 Opposing Contention That Party Is Liable on Instrument--No Signature [Com. Code § 3401]

[1] FORM

[2] Comments

[a] Use of Form

[b] Liability on Underlying Obligation

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Undisclosed Principal Not Liable

[b] Language Purporting to Include Other Obligors Not Controlling

[c] Ratification of Unauthorized Signature/Mere Silence Does Not Constitute Ratification

[4] Additional Authorities

[a] No Liability Without Signature

[b] Undisclosed Principal Not Liable

§ 166.105 Opposing Contention That Party Is Liable on Instrument in Capacity in Which Party Signed--Party Is Accommodation Party Although Did Not Sign Expressly in That Capacity [Com. Code § 3419(a), (c)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Publications

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Action Between Parties

[4] Additional Authorities

[a] Accommodation Party Signs Instrument to Incur Liability

§ 166.106 Opposing Contention That Maker of Promissory Note Is Liable on Instrument--Payee Equitably Estopped to Assert Maker's Liability [Evid. Code § 623]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Payee's Assertion to Maker That Obligation Was Extinguished Defeats Right to Recover

[4] Additional Authorities

[a] Party Estopped From Contradicting Prior Conduct Relied on by Other Party

§ 166.107 Opposing Contention That Party Is Liable as Endorser of Promissory Note--Signature Not Placed on Instrument or Attached Document [Com. Code § 3204(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Liability of Endorser Attaches Only if Signature Is Properly Placed

§ 166.108 Opposing Contention That Endorser of Promissory Note Is Liable on Instrument--No Dishonor, Presentment, and/or Notice of Dishonor [Com. Code §§ 3415(a), (c), 3501(b)(3), 3502(a)(1), (2), 3503]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Presentment and Notice of Dishonor Not Excused if Corporate Director-Endorser Had Knowledge of Corporate Payee's Affairs

[b] Presentment and Notice of Dishonor Not Waived Because Waiver Must Be Clear and Unequivocal

[c] Presentment Not Excused if Insufficient Attempt to Locate Maker

[4] Additional Authorities

[a] Notice of Dishonor Required

§ 166.109 Opposing Contention That Endorser of Promissory Note Is Liable on Instrument--Endorsement Disclaims Liability [Com. Code § 3415(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Effect of Endorsement Without Recourse

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Endorser Not Liable Under Qualified Endorsement

[b] Manifested Intent Not to Assume Responsibility Constitutes Qualified Endorsement

[c] Transfer of Right, Title, and Interest Is Equivalent to Endorsement Without Recourse

[4] Additional Authorities

[a] Transfer of Right, Title, and Interest Is Equivalent to Endorsement Without Recourse

§ 166.110 Opposing Contention That Accommodation Party of Promissory Note Is Liable on Instrument--Right to Reimbursement From and Enforcement of Instrument Against Accommodated Party [Com. Code § 3419(e)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Right to Reimbursement From and Enforcement of Instrument Against Accommodated Party

[b] Accommodated Party Has No Right of Recourse to or Contribution From Accommodation Party

[4] Additional Authorities

[a] Right to Reimbursement From and Enforcement of Instrument Against Accommodated Party

§ 166.111 Opposing Contention That Party Is Liable as Guarantor of Promissory Note [Civ. Code §§ 2787, 2819]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Oral Agreement Cannot Transform Written General Endorsement Into Guaranty

[b] Original Obligation Altered

[c] Extension of Time for Definite Time, Without Surety's Consent, Exonerates Surety

[d] Contract Not Within Terms of Guaranty

[4] Additional Authorities

[a] Original Obligation Altered

[b] Contract Not Within Terms of Guaranty

§ 166.112 Supporting Contention That Maker or Drawer Is Liable on Check, Draft, or Order for Treble Damages After Dishonor and Demand--Action by Payee [Civ. Code § 1719]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Publications

[3] Discussion of Authorities

[a] Treble Damages Mandatory

§ 166.113 Opposing Contention That Maker or Drawer Is Liable on Check, Draft, or Order for Treble Damages After Dishonor and Demand--Action by Payee [Civ. Code § 1719]--Stop Payment Based on Good-Faith Dispute

[1] FORM

[2] Comments

[a] Use of Form

[b] Notice of Payee to Maker Regarding Stop Payment

§ 166.114 Opposing Contention That Maker or Drawer Is Liable on Check, Draft, or Order for Prejudgment Interest After Dishonor and Demand--Action by Payee [Civ. Code § 1719]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Publications

[3] Discussion of Authorities

[a] Statutory Relief Under Civil Code Section 1719 Precludes Recovery of Prejudgment Interest

§§ 166.115-166.129 [Reserved]

§ 166.130 Supporting Contention That Holder in Due Course Is Not Subject to Defenses of Obligor [Com. Code § 3305]

[1] FORM

[2] Comments

[a] Use of Form

[b] Holder in Due Course Is Subject Only to "Real Defenses"

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Holder in Due Course Is Not Subject to Defenses of Obligor

§ 166.131 Supporting Contention That Holder May Enforce Interest Provision in Note [Com. Code § 3305]--Note Not Usurious, or Provision Not Usurious on Its Face, and Holder Is Holder in Due Course [Cal. Const., art. XV, § 1; Stats. 1919, p. lxxxiii, as amended by Stats. 1970, ch. 784, § 1]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Holder in Due Course That Acquired Note Before Maturity

[b] Delay Caused by Borrower in Receiving Proceeds of Maximum Interest Note

[c] Bonus Added to Actual Interest Does Not Exceed Maximum Allowable Interest

[4] Additional Authorities

[a] Holder in Due Course That Acquired Note Before Maturity

§ 166.132 Opposing Contention That Holder in Due Course Not Subject to Defenses of Obligor [Com. Code § 3305]

[1] FORM

[2] Comments

[a] Use of Form

[b] Fraud in Execution of Instrument

[c] Related Publications

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Void Instrument Unenforceable by Holder in Due Course

[4] Additional Authorities

[a] Nullifying Effect on Instrument

[b] Void Instrument Unenforceable by Holder in Due Course

§ 166.133 Opposing Contention That Holder May Enforce Interest Provision in Note [Com. Code § 3305]--Note Is Usurious and Holder Is Not Holder in Due Course [Cal. Const., art. XV, § 1; Stats. 1919, p. lxxxiii, as amended by Stats. 1970, ch. 784, § 1]

[1] FORM

[2] Comments

[a] Use of Form

[b] Effect of Usurious Interest Provision

[c] Related Publications

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Usurious Interest Provision Void

[b] Immaterial That Borrower Took Initiative in Transaction

[c] Adding Unpaid Interest to Principal Is Usurious

[d] Actual Transaction, Not Face of Note, Controls

[e] Bonus Added to Actual Interest Exceeds Maximum Allowable Interest

[f] Interest Payments Made on Usurious Note Are Offset Against Principal

§ 166.134 Opposing Contention That Holder Not Subject to Defenses--Action by Nonholder in Due Course--Lack of Consideration [Com. Code §§ 3303(b), 3305]

[1] FORM

[2] Comments

[a] Use of Form

[b] Circumstances Under Which Lack of Consideration Not a Defense

[c] Debt Arising From Illegal Transaction

[d] Related Publications

[e] Related Points and Authorities

[3] Discussion of Authorities

[a] Defense Applies to Nonholder in Due Course

[b] Parol Evidence Admissible to Show Lack of Consideration Between Original Parties

[c] Moral Obligation Insufficient

[d] Mere Motive, Inducement, or Hope of Profit

[e] Mere Pledge of Consideration

[f] Cancellation of Prior Debt Without Knowledge of Maker

[g] Purported Maker of Note Did Not Sign Note, Nor Receive Any Benefit

[h] No Intention of Parties Evidencing Forbearance

[i] Note Given in Exchange for Note Lacking Consideration

[4] Additional Authorities

[a] Note Given in Exchange for Note Lacking Consideration

§ 166.135 Supporting Contention That Maker Is Liable for Interest on Note--Usury Exemption Applicable--Loan

Arranged by Licensed Real Estate Broker and Secured by Real Property [Cal. Const., art. XV, § 1; Civ. Code § 1916.1]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Statement of Exemption

[b] Test to Determine Whether Loan Was Arranged by Broker

[c] Minimal Broker Involvement Is Sufficient

[d] Broad Definition of Compensation

[e] Existence of Compensation Is Determined by Trier of Fact

[f] Whether Loan Was Arranged by Broker Is Determined by Trier of Fact

[g] Loan to Entity of Which Broker Is Member

[h] Anticipated Profit Qualifies as Broker's Compensation

[i] Contribution to Expenses Qualifies as Broker's Compensation

[j] Retroactive Application of Exemption

[4] Additional Authorities

[a] Test to Determine Whether Loan Was Arranged by Broker

[b] Retroactive Application of Exemption

§ 166.136 Supporting Contention That Maker Is Liable for Interest on Note--Usury Exemption Applicable--Loan Made by Licensed Real Estate Broker as Principal [Cal. Const., art. XV, § 1; Civ. Code § 1916.1]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Broker as Lender

§ 166.137 Supporting Contention That Maker Is Liable for Interest on Note--Usury Exemption Applicable--Note Generated in Bona Fide Purchase and Sale Is Not Loan or Forbearance

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Bona Fide Credit Sale

§ 166.138 Supporting Contention That Maker Is Liable for Interest on Note--Usury Exemption Applicable--Modification [Refinance] of Note Initially Generated in Bona Fide Purchase and Sale Continues to Be Exempt

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Modified Note Remains Exempt

§ 166.139 Opposing Contention That Maker Is Liable for Interest on Note--Usury Exemption for Loan Arranged by Licensed Real Estate Broker and Secured by Real Property [Cal. Const., art. XV, § 1; Civ. Code § 1916.1] Is Not Applicable--Broker Was Borrower

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Loan Is Not Made by Broker Who Is Borrower

[b] Loan Is Not Arranged by Broker Who Is Borrower

§ 166.140 Supporting Contention That Usury Law Does Not Apply--Note Was Element of Joint Venture, Instead of

Evidence of Loan, Between Maker and Holder

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Promissory Note Can Be Aspect of Joint Venture Between Maker and Holder

[b] Nature of Transaction Is Question of Fact

[c] Several Facts, Considered Together, Support Conclusion That Transaction Was Joint Venture

[d] Usury Law Does Not Apply to Note Between Joint Venturers

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16-166 California Points & Authorities § 166.01

§ 166.01 Scope of Chapter

This chapter contains memoranda relating to negotiable instruments, with particular emphasis on promissory notes.

Part II, Subpart A contains memoranda supporting [*see §§ 166.20 -166.26*] and opposing [*see §§ 166.27 -166.31*] the contention that an instrument is negotiable.

Part II, Subpart B contains memoranda supporting [*see § 166.50*] and opposing [*see §§ 166.51, 166.52*] the contention that an instrument was negotiated.

Part II, Subpart C contains memoranda supporting [*see §§ 166.70, 166.71*] and opposing [*see §§ 166.72, 166.73*] the contention that a holder is a holder in due course.

Part II, Subpart D contains memoranda supporting [*see § 166.90*] and opposing [*see § 166.104*] the contention that a party is liable on an instrument based on the existence or nature of the party's signature; supporting [*see §§ 166.91, 166.92*] and opposing [*see § 166.105*] the contention that a party is liable on an instrument in the capacity of an actual party instead of an accommodation party; supporting [*see §§ 166.93 -166.95, 166.100 -166.103*] and opposing [*see § 166.106*] the contention that a maker is liable on a note; supporting [*see §§ 166.96, 166.97*] and opposing [*see §§ 166.107 -166.109*] the contention that an endorser is liable on a note; supporting the contention that an accommodation endorser is liable to a joint endorser for contribution [*see § 166.98*]; opposing the contention that an accommodation party of a note is liable on the instrument [*see § 166.110*]; supporting [*see § 166.99*] and opposing [*see § 166.111*] the contention that a party is liable as a guarantor of a promissory note; supporting [*see § 166.112*] and opposing [*see § 166.113*] the contention that a payee of a dishonored check is entitled to treble damages; and opposing the contention that a payee of a dishonored check is entitled to claim and recover prejudgment interest after making a statutory demand for payment [*see § 166.114*].

Part II, Subpart E contains memoranda supporting [*see § 166.130*] and opposing [*see §§ 166.132, 166.134*] the contention that the holder is not subject to the obligor's defenses; supporting [*see § 166.131*] and opposing [*see § 166.133*] the contention that the holder may enforce a usurious note or that the note is usurious; supporting [§ 166.135, § 166.136] and opposing [*see § 166.139*] the contention that a particular note qualifies for the usury exemption available

for loans made or arranged by licensed real estate brokers and secured by real property; and supporting the contention that the usury law does not apply because a promissory note, which the maker asserts is evidence of a usurious loan, actually was created to effectuate a joint venture, instead of a loan, between the maker and the holder [*see* § 166.140].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsDefinitionsHolders in Due CourseCommercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsDefinitionsNegotiable & Nonnegotiable InstrumentsContracts LawNegotiable InstrumentsEnforcementDuties & Liabilities of PartiesTypes of PartiesIndorsees & IndorsersContracts LawNegotiable InstrumentsNegotiationIndorsementGeneral OverviewContracts LawNegotiable InstrumentsTypesPromissory Notes

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16-166 California Points & Authorities § 166.02

§ 166.02 Governing Law

[1] Division 3 of Commercial Code

Negotiable instruments are generally governed by Article 3 of the Uniform Commercial Code. The 1990 revision to Article 3 was, for the most part, adopted by California and is set forth in *Com. Code § 3101 et seq.* (referred to in this chapter as "Division 3 of the Commercial Code"). Definitions relating to the Uniform Commercial Code are set forth in *Com. Code § 1201*. The Commercial Code uses the spelling "indorsement" or "indorser" [*see, e.g., Com. Code § 3204*], but this chapter uses the more commonly accepted spelling "endorsement" or "endorser." Counsel may prefer to use the former spelling when quoting the code in a memorandum.

Usury is governed by *Cal. Const., art. XV, § 1*; Stats. 1919, p. lxxxiii, as amended by Stats. 1970, ch. 784, § 1; and *Civ. Code § 1916.1 et seq.*. A payee's cause of action against a maker or drawer of a check, draft, or order, to recover treble damages on the instrument, is governed by *Civ. Code § 1719*. The creation of a presumption that a check has been paid is set forth in *Evid. Code § 670*. Equitable estoppel is governed by *Evid. Code § 623*. *Civ. Code § 1485 et seq.*, relating to offers of performance, and *Code Civ. Proc. § 2076*, governing objections to tender, are also sometimes relevant to promissory notes.

[2] Negotiability

The basic distinguishing features of negotiability are that (1) intangible rights are transferable, and (2) a good-faith transferee of these rights may take greater rights than the transferor under certain conditions [*see* Hart & Willier, Negotiable Instruments Under the Uniform Commercial Code, § 1.01 (Matthew Bender)].

[3] Negotiable Instruments

Com. Code § 3101 et seq. apply to negotiable instruments and not to money, payment orders governed by *Com. Code § 11101 et seq.*, or securities governed by *Com. Code § 8101 et seq.* [*Com. Code § 3102(a)*]. Except as provided in *Com. Code § 3104(c)* and *(d)* (relating to checks and the exclusion of certain qualified writings as negotiable instruments), the term "negotiable instrument" means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it satisfies all the following requirements [*Com. Code §*

3104(a)]:

- It is payable to bearer or to order at the time it is issued or first comes into possession of a holder [*see Com. Code § 3109*] (payable to bearer or order defined).

- It is payable on demand or at a definite time [*see Com. Code § 3108* (payable on demand or at definite time defined)].

- It does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money. However, the promise or order may contain (1) an undertaking or power to give, maintain, or protect collateral to secure payment; (2) an authorization or power to the holder to confess judgment or realize on or dispose of collateral; or (3) a waiver of the benefit of any law intended for the advantage or protection of an obligor.

"Promise" is defined as a written undertaking to pay money signed by the person undertaking to pay [*Com. Code § 3103(a)(9)*]. "Order" means a written instruction to pay money signed by the person giving the instruction [*Com. Code § 3103(a)(6)*]. Whether a promise or order is "unconditional" is set forth in *Com. Code § 3106*.

"Instrument" is a synonym for negotiable instrument [*Com. Code § 3104(b)*], and in most places Division 3 of the Commercial Code uses the term "instrument."

An order that meets all of the requirements of a negotiable instrument, except that it is not payable to either bearer or order, is negotiable if it is a "check" as defined in *Com. Code § 3104(f)* [*Com. Code § 3104(c)*]. In addition, a promise or order other than a check is not an instrument if, at the time it is issued or first comes into a holder's possession, it contains a conspicuous statement, however expressed, to the effect that the promise or order is not negotiable or is not an instrument governed by this division [*Com. Code § 3104(d)*].

[4] Promissory Notes

A promissory note (or simply note) is a formal IOU. The maker (or debtor or borrower) expressly promises to pay the named payee (or creditor) an amount of money in the future at the time or times indicated [*see* Hart & Willier, Negotiable Instruments Under the Uniform Commercial Code, § 1A.03 (Matthew Bender)]. For purposes of determining the negotiability of an instrument, an instrument is a note if it is a promise [*Com. Code § 3104(e)*; *see Com. Code § 3103(a)(9)* ("promise" defined)].

[5] Negotiation

"Negotiation" means a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder [*Com. Code § 3201(a)*; *see Com. Code §§ 1201(b)(21)* ("holder" defined), 3105 ("issuer" defined)]. Except for negotiation by a remitter, if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its endorsement by the holder. If an instrument is payable to bearer, it may be negotiated by transfer of possession alone [*Com. Code § 3201(b)*]. A "bearer" is the person in possession of an instrument, document of title, or certificated security payable to bearer or endorsed in blank [*Com. Code § 1201(b)(5)*].

[6] Holders in Due Course

A "holder," with regard to a negotiable instrument, is the person in possession if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, if the identified person is in possession. [*Com. Code § 1201(b)(21)*]. Subject to *Com. Code § 3106(c), (d)* (relating to specified conditional promises and orders), a "holder in

due course" is the holder of an instrument if all of the following apply [*Com. Code § 3302(a)*]:

- The instrument when issued or negotiated to the holder does not bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call into question its authenticity;

- The holder took the instrument for value and in good faith; and

- The holder took the instrument without notice (1) that the instrument is overdue or has been dishonored or that there is an uncured default with regard to payment of another instrument issued as part of the same series, (2) that the instrument contains an unauthorized signature or has been altered, (3) of any claim to the instrument described in *Com. Code § 3306*, and (4) that any party has a defense or claim in recoupment described in *Com. Code § 3305(a)*.

Com. Code § 3302(b) sets forth those acts not constituting notice of a defense, claim in recoupment, or claim to the instrument. *Com. Code § 3302(f)* provides that for notice to be effective it must be received at a time and in a manner that gives a reasonable opportunity to act on it.

Except to the extent a transferor or predecessor in interest has rights as a holder in due course, a person does not acquire rights of a holder in due course of an instrument by the following methods [*Com. Code § 3302(c)*]:

- Through legal process or by purchase in an execution, bankruptcy, or creditor's sale or similar proceeding;

- Through purchase as part of a bulk transaction not in ordinary course of business of the transferor; or

- As the successor in interest to an estate or other organization.

If, under *Com. Code § 3303(a)(1)*, the promise of performance that is the consideration for an instrument has been partially performed, the holder may assert rights as a holder in due course of the instrument only to the fraction of the amount payable under the instrument equal to the value of the partial performance divided by the value of the promised performance [*Com. Code § 3302(d)*]. If (1) the person entitled to enforce an instrument has only a security interest in the instrument and (2) the person obliged to pay the instrument has a defense, claim in recoupment, or claim to the instrument that may be asserted against the person who granted the security interest, the person entitled to enforce the instrument may assert rights as a holder in due course only to an amount payable under the instrument which, at the time of enforcement of the instrument, does not exceed the amount of the unpaid obligation secured [*Com. Code § 3302(e)*].

Com. Code § 3302 is subject to any law limiting status as a holder in due course in particular classes of transactions [*Com. Code § 3302(g)*].

[7] Statute of Limitations

Generally, an action to enforce a party's obligation to pay a note payable at a definite time must be commenced within six years after the due date or dates stated in the note, or if a due date is accelerated, within six years after the accelerated due date [*Com. Code § 3118(a)*]. Similarly, if demand for payment is made to the maker of a note payable on demand, an action to enforce a party's obligation to pay must be commenced within six years after the demand [*Com. Code § 3118(b)*]. The times within which other actions must be commenced, such as actions for conversion or breach of warranty, are set forth in *Com. Code § 3118(c)-(g)*.

The purpose of *Com. Code § 3118* is to define the time within which an action to enforce an obligation, duty, or right

arising under Division 3 of the Commercial Code must be commenced. Thus, *Com. Code § 3118* should not be confused with other provisions relating to when a cause of action accrues on an instrument. Accrual of a cause of action is governed by other sections such as those that state the various obligations of parties to an instrument [Official Comment 1 to U.C.C. § 3-118 (1990)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsDefinitionsHolders in Due CourseCommercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsDefinitionsNegotiable & Nonnegotiable InstrumentsCommercial Law (UCC)Negotiable Instruments (Article 3)Negotiation, Transfer & IndorsementIndorsementContracts LawNegotiable InstrumentsEnforcementDefensesStatutes of LimitationsContracts LawNegotiable InstrumentsTypesPromissory Notes

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16-166 California Points & Authorities § 166.03

§ 166.03 Use of Forms in Chapter

The forms in this chapter are in the form of contentions based on substantive points of the law of negotiable instruments. The contentions may be combined with each other, as appropriate, according to the facts of the case. Many of the supporting contentions have corresponding opposing contentions on the same point. However, a supporting contention that does not have a corresponding opposing form may itself be adapted for use in opposing the supporting contention, depending on the facts of the case. For example, although § 166.97 supports the contention that an endorser of a note is liable because presentment or notice is excused, the same authorities may be used with distinguishing factual evidence in an argument that those requirements were not excused.

When appropriate under the circumstances of the particular case, the contentions in this chapter may be used to support or oppose a specific pleading, motion, or request. For example, the contentions in Subpart C of the Forms in this chapter [§ 166.70 et seq.] may be used to support or oppose a motion for summary judgment, contending that a triable issue of fact does not remain with regard to whether the holder is a holder in due course. The contentions in this chapter should be combined, when appropriate, with points and authorities from other chapters supporting or opposing the use of specific procedures, such as demurrers or motions for summary judgment [*see, e.g.*, Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* , Ch. 90, *Dismissal* , Ch. 155, *Motions After Trial* , Ch. 160, *Motions to Strike* , and Ch. 221, *Summary Judgments*]. Finally, the contentions may be adapted for use in a trial or appellate brief or in jury instructions.

For a discussion of how to use the forms in this chapter to draft a memorandum of points or authorities or a trial or appellate brief, and for a sample of a complete memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedureSummary JudgmentSupporting MaterialsGeneral OverviewCommercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsDefinitionsHolders in Due CourseCommercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsDefinitionsNegotiable & Nonnegotiable InstrumentsCommercial Law (UCC)Negotiable Instruments (Article 3)Negotiation, Transfer & IndorsementIndorsementContracts LawNegotiable

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16-166 California Points & Authorities § 166.04

§ 166.04 Related Discussion and Forms

[1] Related Pleading and Practice Forms

For discussion and forms relating to commercial paper generally, see Ch. 385, *Negotiable Instruments* in California Forms of Pleading and Practice (Matthew Bender). For discussion and forms relating to banks, see Ch. 95, *Banks, Deposits, and Checks* in that set. For discussion and forms relating to contract issues generally, see Ch. 140, *Contracts* . For discussion and forms relating to usury, see Ch. 568, *Usury* .

[2] Related Points and Authorities

For memoranda applicable to a bank's duties regarding checks, see Ch. 166, *Negotiable Instruments* . For memoranda regarding contract issues generally, see Ch. 50, *Contracts* . For points and authorities concerning interest on obligations and judgments, see Ch. 121, *Interest* . For memoranda addressing various aspects of notes secured by deeds of trust, see Ch. 230, *Trust Deeds and Real Property Mortgages* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsDefinitionsHolders in Due CourseCommercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsDefinitionsNegotiable & Nonnegotiable InstrumentsCommercial Law (UCC)Negotiable Instruments (Article 3)Negotiation, Transfer & IndorsementIndorsementContracts LawDefensesUsuryContracts LawNegotiable InstrumentsTypesPromissory Notes

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16-166 California Points & Authorities § 166.05

§ 166.05 Other Related Publications

For discussion of negotiable instruments generally, see Hart & Willier, Negotiable Instruments Under the Uniform Commercial Code (Matthew Bender). Chapter 1C of that publication discusses the 1990 revision of Article 3 of the Uniform Commercial Code which, for the most part, has been adopted by California. That chapter emphasizes how the revised article differs from former Article 3.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Negotiable Instruments (Article 3)General OverviewCommercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsDefinitionsHolders in Due CourseCommercial Law (UCC)Negotiable Instruments (Article 3)Negotiation, Transfer & IndorsementIndorsementContracts LawNegotiable InstrumentsTypesPromissory Notes

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16-166 California Points & Authorities §§ 166.06-166.19

[Reserved]

§§ 166.06[Reserved]

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PART II. FORMS
A. Attributes Of Negotiable Instruments

16-166 California Points & Authorities § 166.20

§ 166.20 Supporting Contention That Instrument Is Negotiable--Requirements of Negotiability [Com. Code §§ 3103, 3104]

[1] FORM

[*The following may be included in a memorandum, or may be adapted for use in a trial or appellate brief or jury instructions.*]

THE INSTRUMENT THAT IS THE SUBJECT OF THIS ACTION IS NEGOTIABLE BECAUSE IT IS A _____ [PROMISE *or* ORDER] AS DEFINED IN COMMERCIAL CODE SECTION 3103 THAT COMPLIES WITH THE REQUIREMENTS OF NEGOTIABILITY IN COMMERCIAL CODE SECTION 3104(a).

A. Requirements of Negotiability. An instrument is either a promise or order. A promise is a written undertaking to pay money signed by the person undertaking to pay and an order is a written instruction to pay money signed by the person giving the instrument (*Com. Code § 3103(a)(6), (9)*). To be a negotiable instrument, the promise or order must also (1) be unconditional; (2) pay a fixed amount of money, with or without interest or other charges described in the promise or order; (3) be payable to bearer or to order at the time it is issued or first comes into possession of a holder; (4) be payable on demand or at a definite time; and (5) not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money (*Com. Code § 3104(a)*).

[*EITHER*]

B. Note. An instrument is a "note" if it is a promise (*Com. Code § 3104(e)*).

[*OR*]

B. Draft. An instrument is a "draft" if it is an order (*Com. Code § 3104(e)*).

[*Add, as appropriate, EITHER*]

C. Check. A "check" is a (1) draft, other than a documentary draft, payable on demand and drawn on a bank, (2) a cashier's check or teller's check, or (3) a demand draft (*Com. Code § 3104(f)*).

[*OR*]

C. Cashier's Check. A "cashier's check" is a draft with regard to which the drawer and drawee are the same bank or branches of the same bank (*Com. Code § 3104(g)*).

[*OR*]

C. Teller's Check. A "teller's check" is a draft drawn by a bank (1) on another bank, or (2) payable at or through a bank (*Com. Code § 3104(h)*).

[*OR*]

C. Traveler's Check. A "traveler's check" is an instrument that (1) is payable on demand; (2) is drawn on or payable at or through a bank; (3) is designated by the term "traveler's check" or by a substantially similar term; and (4) requires, as a condition to payment, a countersignature by a person whose specimen signature appears on the instrument (*Com. Code § 3104(i)*).

[*OR*]

C. Certificate of Deposit. A "certificate of deposit" is an instrument containing an acknowledgment by a bank that a sum of money has been received by the bank and a promise by the bank to repay the sum of money (*Com. Code § 3104(j)*; *McCully v. Cooper (1896) 114 Cal. 258, 262, 46 P. 82*).

[*OR*]

C. Demand Draft. A demand draft is a writing not signed by a customer that is created by a third party under the purported authority of the customer for the purpose of charging the customer's account with a bank. A demand draft must contain the customer's account number and may contain the customer's printed or typewritten name, a notation that the customer authorized the draft, or the statement "No Signature Required" or words to that effect. The term "demand draft" does not include a check purportedly drawn by and bearing the signature of a fiduciary (*Com. Code § 3104(k)*; *see Com. Code § 3307(a)(1)*).

[*This form may be combined, when appropriate, with forms supporting particular elements of negotiability (see, e.g., §§ 166.21 -166.26).*]

[2] Comments

[a] Use of Form

This memorandum is for use in supporting the contention that a particular type of instrument is negotiable because it complies with *Com. Code §§ 3103* and *3104*. Paragraph A sets forth the statutory requirements applicable to negotiable instruments. The alternatives in Paragraph B establish the two general categories of instruments, and the Paragraph C options define particular instruments that fall within the categories specified in Paragraph B.

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Therefore, counsel should describe the instrument, establish that the instrument satisfies all the requirements of negotiability, and show how one of the foregoing descriptions applies to it.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the writing is a negotiable instrument.

[b] Money Orders

Money orders may or may not be negotiable instruments. For example, an instrument may be a check even though it is described on its face by the term "money order" [*Com. Code § 3104(f)*]. If the issuance of a money order requires a signature of the drawer, and that requirement is strictly enforced by the drawee bank, the money order should be treated as a negotiable instrument, similar to a check [*see Central Bank v. Kaiperm Santa Clara Fed. Credit Union (1987) 191 Cal. App. 3d 186, 197-202, 236 Cal. Rptr. 262* (construing former version of Com. Code § 3104; money orders were not negotiable instruments under the circumstances; discussed in *§ 166.27[3*][d]); *see also* Official Comment 4 to U.C.C. § 3-104 (1990) (form of money order determines how they are treated for purposes of Article 3)].

[c] Related Publications

For discussion regarding types of negotiable instruments, see Hart & Willier, Negotiable Instruments Under the Uniform Commercial Code, Chapter 1C, § 1C.04 (Matthew Bender).

[d] Related Points and Authorities

In an appropriate case, the points and authorities *set out in § 166.27* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Certificate of Deposit

In ***McCully v. Cooper*** *(1896) 114 Cal. 258, 46 P. 82* , an action by the administratrix of an estate to recover possession of a certificate of deposit, the Supreme Court reversed the trial court's order refusing plaintiff's motion for new trial, on grounds concerning jurisdiction over the property of the deceased's estate. In discussing the nature of the instrument, the Court noted that a certificate of deposit is a negotiable security, and to that extent is similar to a promissory note (*114 Cal. 258, 262)* .

[4] Additional Authorities

[a] Draft

In *People v. McNear (1961) 190 Cal. App. 2d 541, 12 Cal. Rptr. 124* , a criminal action for issuance of drafts without sufficient funds, the court of appeal determined that the instruments in question constituted drafts. A draft is an open letter of request from, and an order by, one person on another to pay a sum of money stated in the letter to a third person on demand or at a specified future time; and the word "draft" is commonly used for a bill of exchange (*190 Cal. App.*

2d 541, 546) .

[b] Cashier's Check

In *Bank of America v. Cranston (1967) 252 Cal. App. 2d 208, 60 Cal. Rptr. 336* , the court found that a cashier's check has the same legal effect as a certificate of deposit, certified check, or draft. The legal result of certifying a check at the request of the payee is the same as though the cash for which the check called had been paid over the counter to the payee, redeposited to the payee's own credit, and a certificate of deposit issued for it. Thus, the substance of a certificate of deposit, cashier's check, and certified check are the same. Each is a negotiable instrument pledging the credit of the bank to the holder (*252 Cal. App. 2d 208, 217)* .

[c] Certificate of Deposit

In *Mills v. Barney (1863) 22 Cal. 240* , an unsuccessful action to recover on a forged certificate of deposit, the Supreme Court held that an agent's erroneous endorsement of the certificate constituted the payee-principal's warranty of title. The Court noted that with regard to that point, certificates of deposits are similar to promissory notes [*citing Welton et al. v. Adams & Co. (1854) 4 Cal. 37]* (*22 Cal. 240, 248)* .

In *Welton et al. v. Adams & Co. (1854) 4 Cal. 37* , an action to recover on a certificate of deposit that was destroyed in a fire, the Supreme Court held that the bank was required to indemnify the loss, noting that the certificate is a negotiable security, and is similar to a promissory note (*4 Cal. 37, 40)* .

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CHAPTER 166 NEGOTIABLE INSTRUMENTS
PART II. FORMS
A. Attributes Of Negotiable Instruments

16-166 California Points & Authorities § 166.21

§ 166.21 Supporting Contention That Instrument Is Negotiable--Writing Contains Unconditional Promise or Order to Pay Money [Com. Code §§ 3104(a), 3106]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or jury instructions. It may also be combined with a general contention that a particular type of instrument is negotiable (see, e.g., § 166.20).*]

THE INSTRUMENT THAT IS THE SUBJECT OF THIS ACTION IS NEGOTIABLE BECAUSE IT CONTAINS AN UNCONDITIONAL _____ [PROMISE *or* ORDER] TO PAY MONEY, AND THE UNCONDITIONAL OBLIGATION TO PAY THE STATED AMOUNT IS NOT MADE CONDITIONAL _____ [*specify, e.g.,* BY A REFERENCE TO ANOTHER WRITING FOR RIGHTS REGARDING PREPAYMENT].

A. Promise or Order Unconditional Unless Includes Specified Statement. A promise or order is unconditional unless it states (1) an express condition to payment, (2) that the promise or order is subject to or governed by another writing, or (3) that rights or obligations with regard to the promise or order are stated in another writing (*Com. Code § 3106(a)*).

B. Unconditional Nature of Promise or Order Not Affected.

[*EITHER*]

A reference to another writing does not of itself make the promise or order conditional (*Com. Code § 3106(a)*).

[*OR*]

A promise or order is not made conditional by reference to another writing for a statement of rights with regard to _____ [*specify e.g.*, collateral *or* prepayment *or* acceleration] (*Com. Code § 3106(b)(1)*)

[*OR*]

A promise or order is not made conditional because payment is limited to resort to a particular fund or source (*Com. Code § 3106(b)(2)*).

[*OR*]

A promise or order is not made conditional because it requires, as a condition to payment, a countersignature by a person whose specimen signature appears on the promise or order (*Com. Code § 3106(c)*).

[*OR*]

A promise or order is not made conditional because it contains a statement, required by applicable statutory or administrative law, to the effect that the rights of a holder or transferee are subject to claims or defenses that the issuer could assert against the original payee (*Com. Code § 3106(d)*).

[*CONTINUE*]

[*Optional*] **C. Separate Agreement, Not Referred to in Instrument, That Does Not Create Contingency.** A note and a separate agreement that constitute one transaction do not render the note nonnegotiable if there is no intent to make the payment dependent on any contingency, and the agreement is in no way incompatible with the terms of the note, and does not purport to change, limit, or modify its provisions (*Williams v. Silverstein (1931) 213 Cal. 269, 275-276, 2 P.2d 165*).

[*This form may be combined with §§ 166.70 and 166.71 (contending that a holder is a holder in due course), and/or with §§ 166.90-166.103 (contending that a party is liable on an instrument).*]

[2] Comments

[a] Use of Form

This memorandum is for use in supporting the contention that an instrument is negotiable with regard to the requirement that it contain an unconditional promise or order to pay money [*see Com. Code §§ 3104(a)* ("negotiable instrument" defined as unconditional promise or order to pay fixed amount of money), 3106 (unconditional or conditional promises or orders)].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Therefore, counsel should set forth facts regarding the nature of the promise or order to pay money, and apply the descriptions in this form to those facts. For example, if a note was executed in conjunction with another writing regarding prepayment rights, counsel should describe the agreement, and show that the note nevertheless remains negotiable under *Com. Code § 3106(b)*.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the instrument contains an unconditional promise or order to pay money.

[b] Related Publications

For discussion regarding the attribute of an unconditional promise, see Hart & Willier, Negotiable Instruments Under the Uniform Commercial Code (Matthew Bender).

[c] Related Points and Authorities

In an appropriate case, the points and authorities *set out in § 166.28* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Separate Agreement, Not Referred to in Instrument, That Does Not Create Contingency

In ***Williams v. Silverstein*** *(1931) 213 Cal. 269, 2 P.2d 165* , the seller of real property accepted as partial payment two promissory notes in which he was named as the payee. One of the two purchasers signed the note, and two other persons acting as brokers signed on the back of the notes. The notes were executed in conjunction with an escrow agreement, but did not refer to the agreement. The escrow agent held all the documents, with instructions to deliver the property lease to the purchasers after they had paid the notes in full with interest. The purchasers defaulted on the notes, and the payee brought suit against the two persons who signed on the back. The action primarily concerned issues regarding whether those two signatories were endorsers or makers of the notes [*see* discussion in *§ 166.104[3][b]*]. The trial court found in the payee's favor, and the court of appeal reversed. The payee appealed to the Supreme Court.

The Supreme Court upheld the court of appeal's decision, reversing the trial court's judgment for the payee. With regard to the issue of the negotiability of the notes, the Court rejected the payee's contention that the notes were not negotiable by reason of the separate escrow agreement. Although a negotiable instrument may be rendered nonnegotiable when it purports to incorporate the terms of a separate and incompatible agreement, the notes in question did not refer to the escrow agreement. Moreover, they contained an absolute and unconditional promise to pay at a certain time, and together with the agreement did not evidence an intention to make the payment dependent on any contingency (*213 Cal. 269, 275)* . The escrow agreement was in no way incompatible with the terms of the notes, nor did it purport to change, limit, or modify the provisions of the notes. Consequently, the notes remained negotiable (*213 Cal. 269, 275-276)* .

[4] Additional Authorities

[a] Unconditional Nature of Promise or Order Not Affected

The facts and procedural background of *Coml. Credit Corp. v. Orange Co. Mach. Works (1950) 34 Cal. 2d 766, 214 P.2d 819* , are discussed in *§ 166.73[3][c]*. In *Coml. Credit,* the Supreme Court held that a finance company that is closely connected to the underlying transaction cannot be regarded as a holder in due course of a note given in the transaction. The Court also held that the concurrent execution of a note and a conditional sales contract does not defeat the negotiability of an otherwise negotiable instrument (*34 Cal. 2d 766, 770)* .

In *Mann v. Leasko (1960) 179 Cal. App. 2d 692, 4 Cal. Rptr. 124* , an action to enforce collection of a note and to foreclose a lien on real property given as security for it, the court of appeal held that contemporaneous execution and transfer of a promissory note and a nonnegotiable contract securing performance by a lien on real property does not, in and of itself, impair the negotiability of the note (*179 Cal. App. 2d 692, 696)* .

In *Martin v. Ajax Construction Co. (1954) 124 Cal. App. 2d 425, 269 P.2d 132* , a usury action, the court of appeal held that although parties indicate by a contemporary writing the fund from which repayment should be made, and thereby set forth the circumstances that give rise to the instrument, the underlying note is still an unconditional promise to pay (*124 Cal. App. 2d 425, 430)* .

For an additional case in which an instrument that referred to another agreement was nevertheless found to be negotiable, see *Johnston v. Wolf (1931) 118 Cal. App. 388, 390, 5 P.2d 673* .

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A. Attributes Of Negotiable Instruments

16-166 California Points & Authorities § 166.22

§ 166.22 Supporting Contention That Instrument Is Negotiable--Promise or Order Specifies Payment of Fixed Amount of Money [Com. Code §§ 1201(b)(24), 3104(a)]

[1] FORM

[*The following may be included in a memorandum, or may be adapted for use in a trial or appellate brief or jury instructions. It may also be combined with a general contention that a particular type of instrument is negotiable (see, e.g., § 166.20).*]

THE INSTRUMENT THAT IS THE SUBJECT OF THIS ACTION IS NEGOTIABLE BECAUSE IT SPECIFIES PAYMENT OF A FIXED AMOUNT OF MONEY [AND THE INCLUSION OF A VARIABLE RATE OF INTEREST IN THE INSTRUMENT DOES NOT DESTROY THE INSTRUMENT'S NEGOTIABILITY].

A. Fixed Amount of Money. To be negotiable, an instrument must be an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order (*Com. Code § 3104(a)*). An instrument specifies the payment of money if it involves a medium of exchange authorized or adopted by a domestic or foreign government, including a monetary unit of account established by an intergovernmental organization or by agreement between two or more nations (*Com. Code § 1201(b)(24)*).

[*Optional*] **B. Variable Interest.** Interest may be stated in an instrument as a fixed or variable amount of money or it may be expressed as a fixed or variable rate or rates. The amount or rate of interest may be stated or described in the instrument in any manner and may require reference to information not contained in the instrument (*Com. Code § 3112(b)*).

[2] Comments

[a] Use of Form

This memorandum is for use in supporting the contention that an instrument is negotiable with regard to the requirement that it is pays a fixed amount of money [*see Com. Code §§ 1201(b)(24)* ("money" defined), 3104(a) (amount of money

must be "fixed amount")]. Paragraph B sets forth the applicable law that the inclusion in the instrument of a provision for a variable rate of interest does not destroy the instrument's negotiability [*see Com. Code § 3112*].

Counsel should insert argument in this form showing the relationship between the facts of the case and points of law stated. Therefore, counsel should set forth facts establishing that the instrument involves payment of money as that term is defined by *Com. Code § 1201(b)(24)*.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the instrument specifies payment of a fixed amount of money.

[b] Fixed Amount of Money

The requirement that the amount of money payable must be a "fixed amount" replaces the former requirement that the writing specify payment of a "sum certain" [*compare Com. Code § 3104(a) with* former Com. Code §§ 3104(1)(b), 3106]. Unfortunately, "fixed amount" is not defined in Division 3 of the Commercial Code or in the 1990 version of Article 3 of the Uniform Commercial Code. The only guiding authority is set forth in Official Comment 1 to U.C.C. § 3-112 (1990), which states that "the requirement of a 'fixed amount' applies only to principal."

[c] Variable Interest Rates Permitted in Negotiable Instruments

Article 3 of the Uniform Commercial Code, as it existed before its 1990 revision, took the position that a variable interest rate in an instrument destroyed its negotiability [*see* U.C.C. §§ 3-106, 3-118 (pre-1990 version); *see also* Hart & Willier, Negotiable Instruments Under the Uniform Commercial Code, § 1C.09[3] (Matthew Bender)]. However, the 1990 revision to Article 3, adopted for the most part by California [*see Com. Code § 3101 et seq.*] specifically allows variable interest rates in negotiable instruments [*see Com. Code § 3112(b)*]. The purpose of these provisions is to clarify the meaning of "interest" in the introductory clause of U.C.C. § 3-104(a) [*Com. Code § 3104(a)*]. They are not intended to validate an interest provision that violates other law [Official Comment 2 to U.C.C. § 3-112 (1990)].

[d] Related Publications

For discussion regarding the attribute of paying a fixed amount, see Hart & Willier, Negotiable Instruments Under the Uniform Commercial Code, § 1C.09 (Matthew Bender).

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16-166 California Points & Authorities § 166.23

§ 166.23 Supporting Contention That Instrument Is Negotiable--Promise or Order Is Payable to Bearer [Com. Code §§ 3104(a)(1), 3109]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or jury instructions. It may also be combined with a general contention that a particular type of instrument is negotiable (see, e.g., § 166.20).*]

THE INSTRUMENT THAT IS THE SUBJECT OF THIS ACTION IS NEGOTIABLE IN THAT IT IS PAYABLE TO BEARER, BECAUSE THE _____ [PROMISE *or* ORDER] _____ [*specify, e.g.,* IS PAYABLE TO THE ORDER OF CASH].

A. Payable to Bearer. A promise or order is payable to bearer if it: (1) is payable to bearer; (2) is payable to the order of bearer; (3) indicates that the person in possession is entitled to payment; (4) does not state a payee; (5) is payable to or to the order of cash; or (6) indicates that it is not payable to an identified person (*Com. Code § 3109(a)*).

[*Optional*] **B. Payable to Identified Person and Endorsed in Blank.** An instrument payable to an identified person may become payable to bearer if it is endorsed in blank, and may be negotiated by transfer of possession alone until specially endorsed (*Com. Code §§ 3109(c), 3205(b)*).

[*This form may be combined with §§ 166.70 and 166.71 (contending that a holder is a holder in due course), and/or with §§ 166.90-166.103 (contending that a party is liable on an instrument).*]

[2] Comments

[a] Use of Form

This memorandum is for use in supporting the contention that an instrument is negotiable with regard to the requirement that it is payable to bearer or to order, on the ground that it is payable to bearer [*see Com. Code §§ 3104(a)(1)*

(negotiable instrument must be payable to order or bearer), 3109 ("payable to bearer" defined); *but see Com. Code § 3104(c)* (order that meets all requirements of negotiable instrument, except that it is not payable to bearer or order, is negotiable if it is a check)]. To qualify as negotiable, the instrument must be payable to bearer or to order at the time it is issued or first comes into a holder's possession [*Com. Code § 3104(a)(1)*; *see Com. Code § 3105* ("issue" defined)].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Therefore, counsel should set forth facts regarding the payee, and apply one of the foregoing provisions to it. For example, if the promise or order does not state a payee or states that it is payable to cash, counsel should show that it is negotiable under *Com. Code § 3109(a)(2)* or *(3)*.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the promise or order is payable to bearer.

[b] Related Publications

For discussion regarding the attribute of being payable to bearer, see Hart & Willier, Negotiable Instruments Under the Uniform Commercial Code, §§ 1C.12 (Matthew Bender).

[c] Related Points and Authorities

In an appropriate case, the points and authorities *set out in § 166.30* may be used to oppose the contention supported by this form.

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16-166 California Points & Authorities § 166.24

§ 166.24 Supporting Contention That Instrument Is Negotiable--Promise or Order Is Payable to Order [Com. Code §§ 3104(a)(1), 3109, 3110]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or jury instructions. It may also be combined with a general contention that a particular type of instrument is negotiable (see, e.g., § 166.20).*]

THE INSTRUMENT THAT IS THE SUBJECT OF THIS ACTION IS NEGOTIABLE IN THAT IT IS PAYABLE TO ORDER, BECAUSE THE _____ [PROMISE *or* ORDER] IS PAYABLE TO _____ [*specify, e.g.,* THE ORDER OF AN IDENTIFIED PERSON].

A. Payable to Order. A promise or order that is not payable to bearer is payable to order if it is payable (1) to the order of an identified person or (2) to an identified person or order (*Com. Code § 3109(b)*).

[*Optional*] **B. Identification of Person to Whom Instrument Is Payable.** The person to whom an instrument is initially payable is determined by the intent of the person signing as, or in the name or behalf of, the issuer of the instrument. The instrument is payable to the person intended by the signer even if that person is identified in the instrument by name or other identification that is not that of the intended person. If more than one person signs in the name or behalf of the issuer of an instrument and all the signers do not intend the same person as payee, the instrument is payable to any person intended by one or more of the signers (*Com. Code § 3110(a)*). A person to whom an instrument is payable may be identified in any way, including by name, identifying number, office, or account number (*Com. Code § 3110(c)*). An instrument may be payable to

[*EITHER*]

an account identified only by number, in which case it is payable to the person to whom the account is payable (*Com.*

Code § 3110(c)(1)).

[*OR*]

an account identified by number and by a person's name, in which case it is payable to the named person (*Com. Code § 3110(c)(1)*).

[*OR*]

a trust, an estate, or a person described as trustee or representative of a trust or estate, in which case it is payable to the trustee, the representative, or a successor of either (*Com. Code § 3110(c)(2)(A)*).

[*OR*]

a person described as agent or similar representative of a named or identified person, in which case it is payable to the represented person, the representative, or a successor of the representative (*Com. Code § 3110(c)(2)(B)*).

[*OR*]

a fund or organization that is not a legal entity, in which case it is payable to a representative of the members of the fund or organization (*Com. Code § 3110(c)(2)(C)*).

[*OR*]

an office or to a person described as holding an office, in which case it is payable to the named person, the incumbent of the office, or a successor to the incumbent (*Com. Code § 3110(c)(2)(D)*).

[*OR*]

to two or more persons alternatively, in which case it is payable to any of them (*Com. Code § 3110(d)*).

[*OR*]

to two or more persons not alternatively, in which case it is payable to all of them (*Com. Code § 3110(d)*).

[*This form may be combined with §§ 166.70 and 166.71 (contending that a holder is a holder in due course), and/or with §§ 166.90-166.103 (contending that a party is liable on an instrument).*]

[2] Comments

[a] Use of Form

This memorandum is for use in supporting the contention that an instrument is negotiable with regard to the requirement

that it is payable to bearer or to order, on the ground that it is payable to order [*see Com. Code §§ 3104(a)(1)* (negotiable instrument must be payable to order or bearer), 3109 ("payable to order" defined), 3110 (rules determining identity of person); *but see Com. Code § 3104(c)* (order that meets all requirements of negotiable instrument, except that it is not payable to bearer or order, is negotiable if it is a check)]. To qualify as negotiable, the instrument must be payable to bearer or to order at the time it is issued or first comes into a holder's possession [*Com. Code § 3104(a)(1); see Com. Code § 3105* ("issue" defined)].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Therefore, counsel should set forth facts regarding the payee, and apply the foregoing provisions to it. For example, if the promise or order states that it is payable to an identified person, as that term is defined and described in *Com. Code § 3110*, counsel should show that it is negotiable under *Com. Code § 3109(b)*.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the instrument is payable to order.

[b] Related Publications

For discussion of the attribute of being payable to order, see Hart & Willier, Negotiable Instruments Under the Uniform Commercial Code, §§ 1C.12 (Matthew Bender).

[c] Related Points and Authorities

In an appropriate case, the points and authorities *set out in § 166.30* may be used to oppose the contention supported by this form.

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16-166 California Points & Authorities § 166.25

§ 166.25 Supporting Contention That Instrument Is Negotiable--Promise or Order Is Payable on Demand [Com. Code §§ 3104(a)(2), 3108]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or jury instructions. It may also be combined with a general contention that a particular type of instrument is negotiable (see, e.g., § 166.20).*]

THE INSTRUMENT THAT IS THE SUBJECT OF THIS ACTION IS NEGOTIABLE IN THAT IT IS PAYABLE ON DEMAND, BECAUSE THE _____ [PROMISE *or* ORDER] _____ [*specify, e.g.,* STATES THAT IT IS PAYABLE AT SIGHT].

A. Payable on Demand. A promise or order is payable on demand if it (1) states that it is payable on demand or at sight, or otherwise indicates that it is payable at the will of the holder, or (2) does not state any time of payment (*Com. Code § 3108(a)*; *Holmes v. West (1861) 17 Cal. 623, 624-625)* .

[*Optional*] **B. Check Is Payable on Demand.** A check regular on its face is payable on demand (*Sasner v. Ornsten (1949) 93 Cal. App. 2d 467, 470, 209 P.2d 44* (construing prior law)).

[*This form may be combined with §§ 166.70 and 166.71 (contending that a holder is a holder in due course), and/or with §§ 166.90-166.103 (contending that a party is liable on an instrument).*]

[2] Comments

[a] Use of Form

This memorandum is for use in supporting the contention that an instrument is negotiable with regard to the requirement that it is payable at a definite time or on demand, on the ground that it is payable on demand [*see Com. Code §§ 3104(a)(2)* (negotiable instrument must be payable at definite time or on demand), 3108 ("payable on demand"

defined)].

Counsel should insert argument in this form showing the relationship between the facts of the case and points of law stated. Therefore, counsel should set forth facts regarding the provision or lack of provision for time of payment and show why it is payable on demand.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the instrument is payable on demand.

[b] Related Publications

For discussion regarding the attribute of being payable on demand or at a definite time, see Hart & Willier, Negotiable Instruments Under the Uniform Commercial Code, § 1C.11 (Matthew Bender).

[c] Related Points and Authorities

In an appropriate case, the points and authorities *set out in § 166.31* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Payable on Demand

In ***Holmes v. West*** *(1861) 17 Cal. 623* , an action to recover on a promissory note and to enforce a mortgage given to secure it, the maker demurred to the complaint on the ground that the note was not due at the time of the suit. The Supreme Court affirmed the trial court's judgment in favor of the holder. A note that does not state any particular time within which it is payable is payable on demand, and is due immediately (*17 Cal. 623, 624-625)* .

[b] Check Is Payable on Demand

In ***Sasner v. Ornsten*** *(1949) 93 Cal. App. 2d 467, 209 P.2d 44* , construing former provisions of the Negotiable Instrument Law, a payee brought an action against the maker of several checks. The court of appeal affirmed the trial court's judgment in favor of the maker, discussing holder-in-due-course issues and other grounds. With regard to whether the checks were negotiated within a reasonable length of time, the court noted that each check was regular and complete on its face, and that a check regular on its face is payable on demand (*93 Cal. App. 2d 467, 470)* .

[4] Additional Authorities

[a] Payable on Demand

In *Keyes v. Fenstermaker et al. (1864) 24 Cal. 329* , an action on a promissory note, the Supreme Court held that if no day or time of payment is specified in the note, it is payable on demand, and an endorser's liability is the same as that on a demand note (*24 Cal. 329, 331-332)* .

In *Rottman v. Hevener (1921) 54 Cal. App. 485, 202 P. 334* , construing prior law, an action on a promissory note, the court of appeal reversed the trial court's judgment in favor of the maker of the note. The court held that a purported oral agreement conditioning maturity of the note on a demand for payment did not alter the terms of the written instrument, which stated that it is payable "on demand, after date, without grace." When an obligation for the payment of money is payable "on demand" or "on call," the debt is payable presently, and due immediately (*54 Cal. App. 485, 487-488)* .

[b] Check Is Payable on Demand

In *Wright v. Bank of America (1959) 176 Cal. App. 2d 176, 1 Cal. Rptr. 202* , decided under former provisions of the Negotiable Instrument Law, an action by makers of a check against the drawee bank, the court of appeal ultimately held that the maker's negligence, and not the drawee bank's honoring of a postdated check, proximately caused the makers' loss. In discussing the legitimacy of a postdated check, the court noted that an essential characteristic of a check is that it is payable on demand (*176 Cal. App. 2d 176, 180)* .

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16-166 California Points & Authorities § 166.26

§ 166.26 Supporting Contention That Instrument Is Negotiable--Promise or Order Is Payable at Definite Time [Com. Code §§ 3104(a)(2), 3108]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or jury instructions. It may also be combined with a general contention that a particular type of instrument is negotiable (see, e.g., § 166.20).*]

THE INSTRUMENT THAT IS THE SUBJECT OF THIS ACTION IS NEGOTIABLE IN THAT IT IS PAYABLE AT A DEFINITE TIME, BECAUSE THE _____ [PROMISE *or* ORDER] IS [*specify, e.g.,* PAYABLE AT A FIXED DATE].

[*EITHER*]

A. Payable on Elapse of Time. A promise or order is "payable at a definite time" if it is payable on elapse of a definite period of time after sight or acceptance (*Com. Code § 3108(b)*).

[*OR*]

A. Payable at Fixed Date. A promise or order is "payable at a definite time" if it is payable at a fixed date or dates (*Com. Code § 3108(b)*).

[*OR*]

A. Payable at Readily Ascertainable Time. A promise or order is "payable at a definite time" if it is payable at a time

or times readily ascertainable at the time the promise or order is issued (*Com. Code § 3108(b)*).

[*CONTINUE*]

B. Payable at Definite Time Subject to Certain Rights. A promise or order payable at a definite time is subject to rights of (1) prepayment, (2) acceleration, (3) extension at the holder's option, or (4) extension to a further definite time at the option of the maker or acceptor or automatically on or after a specified act or event (*Com. Code § 3108(b)*).

[*This form may be combined with §§ 166.70 and 166.71 (contending that a holder is a holder in due course), and/or with §§ 166.90-166.103 (contending that a party is liable on an instrument).*]

[2] Comments

[a] Use of Form

This memorandum is for use in supporting the contention that an instrument is negotiable with regard to the requirement that it is payable at a definite time or on demand, on the ground that it is payable at a definite time [*see Com. Code §§ 3104(a)(2)* (negotiable instrument must be payable at definite time or on demand), 3108(b) ("payable at a definite time" defined)].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Therefore, counsel should set forth facts regarding the time provisions, and apply one of the descriptions in this form to those facts. For example, if the instrument provides for payment at a fixed date, counsel should show that the note is negotiable under *Com. Code § 3108(b)*.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the instrument is payable at a definite time.

[b] Related Publications

For discussion regarding the attribute of being payable on demand or at a definite time, see Hart & Willier, Negotiable Instruments Under the Uniform Commercial Code, § 1C.11 (Matthew Bender).

[c] Related Points and Authorities

In an appropriate case, the points and authorities *set out in § 166.31* may be used to oppose the contention supported by this form.

[3] Additional Authorities

[a] Payable at Fixed Date

In *Bank of America v. Agles (1959) 171 Cal. App. 2d 527, 340 P.2d 643* , the court of appeal held that a note payable "on or before five years from date" was payable at a "fixed or determinable future time," within the meaning of former Civ. Code §§ 3082, 3085 [*now see Com. Code §§ 3104(a)(2), 3108*], rather than payable "on demand" (concluding that the complaint had been filed within the appropriate limitations period) (*171 Cal. App. 2d 527, 528)* .

[b] Payable at Definite Time Subject to Certain Rights

People's F. & T. Co. v. Shaw-Leahy Co. (1931) 214 Cal. 108, 3 P.2d 1012 , was an action to recover on a trade

acceptance. The Supreme Court held that a provision in the instrument accelerating its maturity date on the occurrence of any of five stated events did not destroy the negotiability of the instrument. However, negotiability may be destroyed if acceleration is placed entirely under the holder's control, or made dependent on the holder's whim or caprice regardless of any act of the acceptor (*214 Cal. 108, 111-113)* .

In *Pugh v. Dawson (1928) 95 Cal. App. 505, 273 P. 39* , the maker of a promissory note contended that the note was nonnegotiable because it contained a provision, inter alia, in which the makers, sureties, guarantors, and endorsers consented to extensions of time at or after the date of maturity. The court of appeal held that the fact that the holder and maker had the right at any time to agree on an extension did not affect the negotiability of the paper. The obvious purpose of the provision was to relieve the holder from the burdens of securing the continued liability of the sureties and endorsers on the paper in the event of an extension. Consequently, the effect of the provision was that if the holder and maker agree on an extension, the sureties and endorsers were not discharged (*95 Cal. App. 505, 509-510)* .

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16-166 California Points & Authorities § 166.27

§ 166.27 Opposing Contention That Writing Is Negotiable Instrument [Com. Code § 3104]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or jury instructions.*]

THE WRITING THAT IS THE SUBJECT OF THIS ACTION IS NOT A NEGOTIABLE INSTRUMENT BECAUSE IT IS _____ [*specify, e.g.,* A MONEY ORDER THAT DOES NOT REQUIRE A SIGNATURE OF THE DRAWER].

[*EITHER*]

A. Savings Bank Passbook. A savings bank passbook is not a negotiable instrument (*Ornbaun v. First Nat. Bank (1932) 215 Cal. 72, 77-78, 8 P.2d 470*).

[*OR*]

A. Conditional Sales Contract. A conditional sales contract is not a negotiable instrument (*American Nat. Bk. v. A.G. Sommerville (1923) 191 Cal. 364, 370, 216 P. 376*) (construing prior law).

[*OR*]

A. County Warrant. A warrant by which the county auditor draws money from the county treasury is not a negotiable instrument because it is not intended to constitute a new debt, or evidence of a new debt, against the county (*Dana v. San Francisco (1861) 19 Cal. 486, 491)* .

[*OR*]

A. Money Order Not Requiring Signature of Drawer. A money order that does not require the signature of the drawer is not a negotiable instrument (*Central Bank v. Kaiperm Santa Clara Fed. Credit Union (1987) 191 Cal. App. 3d 186, 202, 236 Cal. Rptr. 262*) (construing prior law).

[*CONTINUE*]

[*Optional*] **B. Parties May Not Stipulate Negotiability.** Parties may not stipulate to the negotiability of an otherwise nonnegotiable instrument (*American Nat. Bk. v. A.G. Sommerville (1923) 191 Cal. 364, 370, 216 P. 376*).

[2] Comments

[a] Use of Form

This memorandum is for use in opposing the contention that a particular type of instrument is negotiable [*see Com. Code § 3104*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. For example, if the instrument is a money order, counsel should show that it is nonnegotiable in that the drawee bank does not require the signature of the drawer on the instrument [*see Central Bank v. Kaiperm Santa Clara Fed. Credit Union (1987) 191 Cal. App. 3d 186, 197-202, 236 Cal. Rptr. 262* (construing former Com. Code § 3104)].

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the writing is not a negotiable instrument.

[b] Related Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposing the contention supported by the points and *authorities in § 166.20*.

[3] Discussion of Authorities

[a] Savings Bank Passbook

In ***Ornbaun v. First Nat. Bank*** *(1932) 215 Cal. 72, 8 P.2d 470* , an action by the administrator of an estate to quiet title and recover money on a passbook bank account, the Supreme Court held that a bank is not entitled to indemnification for liability from paying the money over to the administrator of an estate, because no liability can arise from that transaction. In discussing the nature of the passbook as an instrument, the Court noted that a holder of the passbook cannot assert an exclusive right to obtain the deposit in the account. The holder of a passbook is relegated to the position of the assignee of a chose in action that the debtor pays, before notice of the assignment, to the creditor. Consequently, a passbook is a nonnegotiable instrument, governed by the same rules applicable to nonnegotiable instruments generally (*215 Cal. 72, 77-78)* .

[b] Conditional Sales Contract

In ***American Nat. Bk. v. A.G. Sommerville*** *(1923) 191 Cal. 364, 216 P. 376* (construing former Civ. Code § 3082, now see *Com. Code § 3104*), an action to recover money due on conditional sales contracts, the Supreme Court reversed

the trial court's judgment for plaintiff-assignee on general contract principles of estoppel and illegality. In discussing the nature of the instruments (with regard to defenses of an assignee), the Court noted that conditional contracts of sale are nonnegotiable instruments in California. Moreover, parties may not impart the character of negotiability to any writing that is not otherwise a negotiable instrument under the applicable laws. The negotiability of an instrument cannot be stipulated by the parties, but must be implied by law as the result of the form and effect of the instrument itself (*191 Cal. 364, 370)* .

[c] County Warrant

In ***Dana v. San Francisco*** *(1861) 19 Cal. 486* , the payee on several county warrants endorsed and delivered them in exchange for valuable consideration. After demand for payment was refused, the endorsee brought an action against the county. The trial court found for the county on the ground that the warrants were not negotiable, and plaintiff appealed.

The Supreme Court affirmed, holding that county warrants are not negotiable. The county auditor has no authority to draw a bill of exchange, but only, in certain instances, the authority to issue warrants on the order of the county supervisors, which is chargeable as a debt on the county. The warrant is not intended to constitute a new debt, or evidence of a new debt, against the county, but is the prescribed means the law has devised for drawing money from the county treasury. The fact that the warrant may possibly be assigned, and the assignee protected as the holder of a claim against the county, does not give the endorsement the effect of carrying with it the legal title of the scrip to the assignee. The county auditor does not have the power to give the warrant the form and qualities of a negotiable instrument (*19 Cal. 486, 491)* .

[d] Money Order Not Requiring Signature of Drawer

In ***Central Bank v. Kaiperm Santa Clara Fed. Credit Union*** *(1987) 191 Cal. App. 3d 186, 236 Cal. Rptr. 262* (construing former Com. Code § 3104, *now see Com. Code § 3104*), an agent selling a bank's money orders failed to carefully safeguard the money orders, several of which were stolen and paid by the bank. The bank brought an action against the agent to recover the money paid out on the forged money orders. The agent defended on the ground that the money orders were negotiable instruments, and therefore the bank could not recover on money paid out on a forged instrument. The trial court found that there was no valid signature card required by the bank or between the parties, and further that there was no necessity for anyone to sign the money orders at the time of the sale. The agent's employees who issued the money orders did not routinely sign them, and the bank paid them without regard to whether they had been signed. The trial court found in the bank's favor, and the agent appealed.

The court of appeal affirmed, holding that those particular money orders were not negotiable instruments (*191 Cal. App. 3d 186, 197-202)* . Under former Com. Code § 3104(1)(a) a negotiable instrument was required, inter alia, to be signed by the maker or drawer. The court rejected the agent's contention that the signature line on the money order was intended for the signature of its employee, without which the bank was not authorized to pay, because the facts supported the finding that signatures were not required. Money orders on which a signature is not required are not negotiable. Consequently, those money orders cannot qualify as negotiable instruments (*191 Cal. App. 3d 186, 197-198)* .

The current version of *Com. Code § 3104* no longer includes the words "signed by the maker or drawer" [*compare Com. Code § 3104(a) with* former Com. Code 3104(1)]. However, the requirement that a negotiable instrument must be signed still exists; it has simply been moved to the definition of order and promise. An "order" is a signed written instruction and a "promise" is a signed written undertaking [*see Com. Code § 3103(a)(6), (9)*].

[e] Parties May Not Stipulate Negotiability

In ***American Nat. Bk. v. A. G. Sommerville*** *(1923) 191 Cal. 364, 216 P. 376* (construing former Civ. Code § 3082,

now see *Com. Code § 3104*; *discussed under § 166.27[3][b]*), the court held that parties may not stipulate to the negotiability of an otherwise nonnegotiable instrument (*191 Cal. 364, 370)* . It should be noted, however, that the immediate parties to an order or promise that is not an instrument may agree that one or more of the provisions of Article 3 of the Uniform Commercial Code determine their rights and obligations under the writing [*see* Official Comment 2 to U.C.C. § 3-104 (1990)].

[4] Additional Authorities

[a] Savings Bank Passbook

In *Witte v. Vincenot (1872) 43 Cal. 325* , plaintiff obtained judgment against defendant and attached all money in defendant's name in a bank. The seized property included a passbook attached to bylaws authorizing it to be transferred "to order." The Supreme Court affirmed the trial court's holding that a passbook, otherwise nonnegotiable, is not rendered negotiable by bylaws that purport to allow transfer "to order." It is clear that a negotiable instrument may be transferred "to order;" however, it does not follow that every transferable instrument necessarily becomes negotiable (*43 Cal. 325, 329-331)* .

For additional cases holding that a passbook is not a negotiable instrument, see *Bryson v. Security Trust etc. Bank. (1916) 29 Cal. App. 596, 599-600, 156 P. 987* , and *First National Bank v. Golden (1912) 19 Cal. App. 501, 505, 126 P. 498* (payment of draft must be accompanied by passbook).

[b] Conditional Sales Contract

Hollywood State Bk. v. Wilde (1945) 70 Cal. App. 2d 103, 160 P.2d 846 , consolidated several actions concerning recovery of money due on a promissory note given in conjunction with certain contracts. Contracts are not rendered negotiable by reason of a stipulation asserting that they constitute the entire agreement. Moreover, the parties to a contract may not render the instrument negotiable by stipulation, because negotiability must be implied by law under the instrument itself (citing *American Nat. Bk. v. A. G. Sommerville (1923) 191 Cal. 364, 216 P. 376* , *discussed under § 166.27[3][b]*) (*70 Cal. App. 2d 103, 113)* .

For additional cases holding that particular writings are not instruments, see *Commercial Discount Co. v. Los Angeles (1940) 16 Cal. 2d 158, 161, 105 P.2d 115* (trust receipts), and *American Security Bank v. Clarno (1984) 151 Cal. App. 3d 874, 881, 199 Cal. Rptr. 127* (unconditional guaranties).

[c] County Warrant

People v. Gray (1863) 23 Cal. 125 , was an action to recover money from the county treasurer by the purchaser of a warrant that had been lost by the payee. The Supreme Court held that county warrants do not possess the qualities of negotiable paper. The fact that the warrant is payable to bearer does not make it transferable by delivery like a promissory note payable to bearer (*23 Cal. 125, 126-127)* .

[d] Parties Cannot Stipulate Negotiability

Hollywood State Bk. v. Wilde (1945) 70 Cal. App. 2d 103, 160 P.2d 846 , is *discussed under § 166.27[4][b]*.

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16-166 California Points & Authorities § 166.28

§ 166.28 Opposing Contention That Instrument Is Negotiable--Conditional Promise or Order [Com. Code §§ 3104(a), 3106]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or jury instructions.*]

THE INSTRUMENT THAT IS THE SUBJECT OF THIS ACTION IS NOT NEGOTIABLE BECAUSE IT CONTAINS A CONDITIONAL _____ [PROMISE *or* ORDER].

A. Promise or Order Must Be Unconditional. A promise or order must be unconditional to be a negotiable instrument (*Com. Code § 3104(a)*).

[*Optional*] **B. Promise or Order Includes Express Condition to Payment.** A promise or order is conditional if it states an express condition to payment (*Com. Code § 3106(a)(1)*).

[*Optional*] **C. Promise or Order Subject to Another Writing.** A promise or order is conditional if it states that it is subject to or governed by another writing (*Com. Code § 3106(a)(2)*; *see Growth Equities Corp. v. Freed (1991) 227 Cal. App. 3d 506, 509-511, 277 Cal. Rptr. 848*) (construing prior law).

[*Optional*] **D. Rights or Obligations Stated in Another Writing.** A promise or order is conditional if it states that rights or obligations with regard to the promise or order are stated in another writing (*Com. Code § 3106(a)(3)*).

[2] Comments

[a] Use of Form

This memorandum is for use in opposing the contention that an instrument is negotiable, on the ground that it contains a conditional promise or order [*see Com. Code §§ 3104(a)* (promise or order must be unconditional), 3106 (unconditional

or conditional promises or orders)].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Therefore, counsel should describe the terms of the instrument and explain why the promise or order is conditional. For example, if a promissory note states an express condition to payment, counsel should show that that provision renders the note nonnegotiable under *Com. Code § 3106(a)(1)*.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the writing is not negotiable because of a conditional promise or order.

[b] Related Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposing the contention supported by the points and *authorities in § 166.21*.

[3] Discussion of Authorities

[a] Promise or Order Subject to Another Writing

Plaintiff in ***Growth Equities Corp. v. Freed*** *(1991) 227 Cal. App. 3d 506, 277 Cal. Rptr. 848* (construing prior law), loaned money to a limited partnership of which defendants were limited partners. As security for the loan, the partnership assigned to plaintiff two promissory notes, each made by one of the defendants, and payable to the order of the partnership or to bearer. Each note provided that it was "secured by and subject to the provisions of the partnership debt assumption agreement between maker and payee hereof which is incorporated herein." The Partnership Debt Assumption Agreement (referred to below as "PDAA") listed several conditions precedent to payment on the note, and provided that the agreement was not assignable without the limited partner's written consent. The partnership filed for bankruptcy, and plaintiff obtained relief from the automatic stay to proceed against the defendants on the notes. Defendants demurred, and when it became clear that plaintiff could not amend to truthfully allege that defendants had given their written consent to assignment of the notes, the demurrer to the third amended complaint was sustained without leave to amend. Plaintiff appealed.

The court of appeal affirmed. The court set forth former Com. Code §§ 3104(1) and 3105 (*now see Com. Code §§ 3104(a), 3106*), and concluded that the fact that the note was secured by the PDAA did not undermine its negotiability [*see* former Com. Code § 3105(1)(e)], but the "subject to" language on the face of the notes did [*see* former Com. Code § 3105(2)(a), *now see Com. Code § 3106(a)(2)*] (*227 Cal. App. 3d 506, 509)* . Plaintiff contended that "subject to" language was redundant and meant the same thing as "secured by." The court did not agree, and distinguished *Mann v. Leasko (1960) 179 Cal. App. 2d 692, 4 Cal. Rptr. 124* (which involved a note that was secured by a lien contract but did not recite that it was subject to the lien), saying that nothing in *Leasko* supports the contention that the unequivocal statement that a note is "subject to" another agreement should be disregarded if the note also states that the same agreement secures performance of the maker's obligations (*227 Cal. App. 3d 506, 510)* . Plaintiff could not be a holder in due course because the nonnegotiability of the notes is apparent on their faces (*227 Cal. App. 3d 506, 511)* .

[4] Additional Authorities

[a] Promise or Order Subject to Another Writng

Harrison v. Turner (1915) 27 Cal. App. 423, 150 P. 395 , was an action on a contract that incorporated a promissory note. The court of appeal held that a note that is inseparable from other necessary parts of a related contract is nonnegotiable because it is conditional on the performance of the terms of the contract as a whole (*27 Cal. App. 423, 424)* .

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16-166 California Points & Authorities § 166.29

§ 166.29 Opposing Contention That Instrument Is Negotiable--Promise or Order Does Not Specify Payment of Fixed Amount of Money [Com. Code §§ 1201(b)(24), 3104(a)]

[1] FORM

[*The following may be included in a memorandum, or may be adapted for use in a trial or appellate brief or jury instructions.*]

THE INSTRUMENT THAT IS THE SUBJECT OF THIS ACTION IS NOT NEGOTIABLE BECAUSE THE _____ [PROMISE *or* ORDER] DOES NOT SPECIFY PAYMENT OF A FIXED AMOUNT OF MONEY.

A. Promise or Order Must Be to Pay Fixed Amount of Money. A promise or order must pay a fixed amount of money to be included in the definition of negotiable instrument (*Com. Code § 3104(a)*).

B. Money. Money is defined as a medium of exchange authorized or adopted by a domestic or foreign government, and includes a monetary unit of account established by an intergovernmental organization or by agreement between two or more nations (*Com. Code § 1201(b)(24)*).

[*This form may be combined, when appropriate, with the form in § 166.133 (opposing contention that holder may enforce usurious provision).*]

[2] Comments

[a] Use of Form

This memorandum is for use in opposing the contention that an instrument is negotiable, on the ground that it does not specify payment of a fixed amount of money [*see Com. Code §§ 1201(b)(24)* ("money" defined), 3104(a) (promise or order must be to pay fixed amount of money)].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Although the term "fixed amount" is not defined, counsel should presumably discuss facts showing that the amount payable is unascertained or not specified in the promise or order. In addition, counsel should make sure that an opposition based on failure to pay a fixed amount relates to principal [*see* Official Comment 1 to U.C.C. § 3-112 (1990) (requirement of fixed amount applies only to principal)].

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the writing is not negotiable because it does not specify payment of a fixed amount of money.

[b] Related Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposing the contention supported by the points and *authorities in § 166.22*.

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16-166 California Points & Authorities § 166.30

§ 166.30 Opposing Contention That Instrument Is Negotiable--Promise or Order Not Payable to Order or Bearer [Com. Code §§ 3104(a)(1), 3109]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or jury instructions.*]

THE INSTRUMENT THAT IS THE SUBJECT OF THIS ACTION IS NOT NEGOTIABLE BECAUSE THE _____ [PROMISE *or* ORDER] IS NOT PAYABLE TO BEARER OR TO ORDER.

Payable to Bearer or to Order. A promise or order must be payable to bearer or to order at the time it is issued or first comes into possession of a holder to be a negotiable instrument (*Com. Code § 3104(a)(1)*). A promise or order is payable to bearer if it (1) is payable to bearer, (2) is payable to the order of bearer, (3) indicates that the person in possession is entitled to payment, (4) does not state a payee, (5) is payable to the order of cash, or (6) indicates that it is not payable to an identified person (*Com. Code § 3109(a)*). A promise or order that is not payable to bearer is payable to order if it is payable (1) to the order of an identified person or (2) to an identified person or order (*Com. Code § 3109(b)*).

[2] Comments

[a] Use of Form

This memorandum is for use in opposing the contention that an instrument is negotiable, on the ground that it is not payable to bearer or order [*see Com. Code § 3104(a)(1)*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Therefore, counsel should describe the payee and show that it is not payable to bearer or to order under *Com. Code § 3109*. However, in opposing the negotiability of an instrument on this ground, counsel should recognize an exception to the requirement that the promise or order must be payable to bearer or to order. An order that meets all of

the requirements of a negotiable instrument, except that it is not payable to bearer or order, is negotiable if it is a check [*Com. Code § 3104(c)*; *see Com. Code § 3104(f)* ("check" defined].

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the instrument is not payable to order or bearer.

[b] Purpose of Payable to Bearer or Order Requirement

In opposing a contention that a promise or order is a negotiable instrument on the ground that it is not payable to bearer or order, counsel may find it useful to emphasize the purpose of the payable to bearer or order requirement. The requirement provides a simple device to clearly exclude a writing from the definition of negotiable instrument that does not fit the pattern of typical negotiable instruments and that is not intended to be a negotiable instrument. If a writing could be an instrument despite the absence of "to order" or "to bearer" language and a dispute arises with regard to the writing, it might be argued that the writing is a negotiable instrument because the other requirements of negotiability are met. Even if the argument is eventually found to be without merit it can be used as a litigation ploy. Words making a promise or order payable to bearer or to order are the most distinguishing feature of a negotiable instrument and are frequently referred to as "words of negotiability." The absence of these words in other writings that may resemble negotiable instruments because they contain a promise to pay money, such as contracts for the sale of goods or services or the sale or lease of real property, precludes any argument that the writings might be negotiable instruments [Official Comment 2 to U.C.C. § 3-104 (1990)].

[c] Related Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposing the contention supported by the points and *authorities in §§ 166.23* or *166.24*.

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16-166 California Points & Authorities § 166.31

§ 166.31 Opposing Contention That Instrument Is Negotiable--Instrument Is Not Payable on Demand or at Definite Time [Com. Code §§ 3104(a)(2), 3108]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or jury instructions.*]

THE INSTRUMENT THAT IS THE SUBJECT OF THIS ACTION IS NOT NEGOTIABLE BECAUSE THE _____ [PROMISE *or* ORDER] IS NOT PAYABLE ON DEMAND OR AT A DEFINITE TIME.

Payable on Demand or at Definite Time. A promise or order must be payable on demand or at a definite time to be a negotiable instrument (*Com. Code § 3104(a)(2)*). A promise or order is payable on demand if it (1) states that it is payable on demand or at sight, or otherwise indicates that it is payable at the will of the holder, or (2) does not state any time of payment (*Com. Code § 3108(a)*). A promise or order is "payable at a definite time" if it is payable on elapse of a definite period of time after sight or acceptance or at a fixed date or dates or at a time or times readily ascertainable at the time the promise or order is issued, subject to rights of (1) prepayment, (2) acceleration, (3) extension at the holder's option, or (4) extension to a further definite time at the option of the maker or acceptor or automatically on or after a specified act or event (*Com. Code § 3108(b)*).

[2] Comments

[a] Use of Form

This memorandum is for use in opposing the contention that an instrument is negotiable, on the ground that it is not payable on demand or at a definite time [*see Com. Code § 3104(a)(2)*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Therefore, counsel should describe the terms of the instrument applicable to when payment is due and explain why the promise or order is not payable on demand or at a definite time as described in *Com. Code § 3108*.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the instrument is not payable on demand or at a definite time.

[b] Related Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposing the contention supported by the points and *authorities in §§ 166.25* or *166.26*.

California Points & Authorities

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
CHAPTER 166 NEGOTIABLE INSTRUMENTS
PART II. FORMS
A. Attributes Of Negotiable Instruments

16-166 California Points & Authorities §§ 166.32-166.49

[Reserved]

§§ 166.32[Reserved]

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
CHAPTER 166 NEGOTIABLE INSTRUMENTS
PART II. FORMS
B. Negotiation And Transfer

16-166 California Points & Authorities § 166.50

§ 166.50 Supporting Contention That Instrument Was Negotiated [Com. Code § 3201]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or jury instructions.*]

THE INSTRUMENT THAT IS THE SUBJECT OF THIS ACTION WAS NEGOTIATED BECAUSE _____ [*specify, e.g.,* IT WAS PAYABLE TO BEARER, AND POSSESSION WAS TRANSFERRED].

A. Negotiation by Transfer of Possession or by Transfer of Possession and Endorsement. Negotiation means a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder (*Com. Code § 3201(a)*). Except for negotiation by a remitter, if an instrument is payable to an identified person, negotiation requires transfer of possession and its endorsement by the holder. If an instrument is payable to bearer, it may be negotiated by transfer of possession alone (*Com. Code § 3201(b)*).

[*Optional*] **B. Note Payable to Order of Maker and Endorsed Is Payable to Bearer.** A promissory note payable to the order of the maker, and endorsed by the maker and a third party, is payable to bearer (*Meyer v. Foster (1905) 147 Cal. 166, 170-171, 81 P. 402*).

[*Optional*] **C. Transfer Presumed From Possession.** The holder or owner of a negotiable instrument is presumed to have acquired it in due course; the rebuttable presumption of ownership and transfer of the instrument duly endorsed arises from its possession (*California S.F. Corp. v. J.D. Millar R. Co. (1931) 118 Cal. App. 185, 188, 5 P.2d 41* (construing prior law)).

[*Optional*] **D. Statute Not Definitive.** *Commercial Code Section 3201* is illustrative, but not definitive, of the manners in which an instrument may be negotiated (*see Flores v. Woodspecialties, Inc. (1956) 138 Cal. App. 2d 763, 770, 292 P.2d 626* (construing prior law)).

[*Optional*] **E. Bank-Payee's Deposit of Check to Account of Creditor of Maker, Pursuant to Written Agreement.** Pursuant to an agreement between the relevant parties, if a bank deposits a check payable to it to a creditor of the maker, and in consideration of the deposit indicates that the creditor's debt to the bank is satisfied, and if the bank and the creditor had no knowledge of a defect in the check, the check is thereby negotiated, and the creditor may recover from the maker of the check (*Flores v. Woodspecialties, Inc. (1956) 138 Cal. App. 2d 763, 771, 292 P.2d 626* (construing prior law)).

[*Optional*] **F. Endorsement on Affixed Paper Valid Despite Space on Instrument.** An endorsement on a separate paper that is affixed to the instrument is valid even though there is sufficient space on the instrument for an endorsement (*Com. Code § 3204(a)*).

[*This form may be combined with §§ 166.70 and 166.71 (contending that a holder is a holder in due course), and/or with §§ 166.90-166.103 (contending that a party is liable on an instrument).*]

[2] Comments

[a] Use of Form

This memorandum is for use in supporting the contention that an instrument was negotiated [*see Com. Code § 3201*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Therefore, counsel should describe the relevant transactions, and either show that the conduct is expressly set forth in *Com. Code § 3201*, or contend that the statute is not exhaustive, and that the instrument was negotiated under the facts.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the instrument was negotiated.

[b] Related Publications

For discussion regarding negotiation generally, see Hart & Willier, Negotiable Instruments Under the Uniform Commercial Code, § 1C.20 (Matthew Bender).

[c] Related Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 166.51* or *166.52* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Note Payable to Order of Maker and Endorsed Is Payable to Bearer

In ***Meyer v. Foster*** *(1905) 147 Cal. 166, 81 P. 402* , a promissory note made payable to the order of the maker, and endorsed by the maker and a third party, was delivered to the maker's creditor, then transferred twice. The holder brought an action against the maker and the endorser, and the case was decided on endorsement issues. In discussing the effect of the transfer of the note, and the timeliness of the notice of dishonor, the Supreme Court observed that a note payable to the maker and endorsed is payable to the bearer (*147 Cal. 166, 170-171)* .

[b] Transfer Presumed From Possession

In ***California S.F. Corp. v. J.D. Millar R. Co.*** *(1931) 118 Cal. App. 185, 5 P.2d 41* (construing prior law), the maker of a note delivered it to the payee, who endorsed the note and assigned and transferred it to the holder. After default, the holder brought an action against the maker and payee-endorser to recover the amount due. At trial, the note was introduced into evidence over the objection that there was no proof of delivery. The trial court found in favor of the holder, and the maker appealed.

The court of appeal affirmed, holding that the note itself was competent prima facie evidence of the instrument's delivery, the ownership of that instrument by the holder, and the authority of the corporate officer-payee to endorsee it. The holder or owner of a negotiable instrument is presumed to have acquired it in due course. The presumption of ownership and delivery of an instrument duly endorsed arises from its possession, although the presumption is rebuttable (*118 Cal. App. 185, 188)* . Although this decision was reached under prior law, the substance of the law does not appear to have changed. The former statutory provisions used the terms "transfer" and "delivery" in defining negotiation. The current version of the statute simply replaces these terms with the term "transfer of possession" [*compare* former Civ. Code § 3133 and former Com. Code § 3202 *with Com. Code § 3201*].

[c] Statute Not Definitive

In ***Flores v. Woodspecialties, Inc.*** *(1956) 138 Cal. App. 2d 763, 292 P.2d 626* (construing prior law), the maker of a check delivered it to the bank that was the payee. The bank, according to previous agreements with the parties involved, deposited the check in the account of the maker's creditor. The creditor drew the amount in favor of the bank, to which it was indebted under a promissory note, in exchange for which the bank returned the creditor's note. The maker of the check stopped payment, and notified the bank, which then charged the creditor's account with the amount of the check. The creditor delivered additional notes for the amount due, which it later paid in full. The creditor then brought an action against the maker of the check, and the trial court found in the creditor's favor. The maker appealed.

The court of appeal affirmed, holding essentially that both the bank and the creditor were holders in due course of the check (*138 Cal. App. 2d 763, 771)* . The court rejected the maker's contention that the check was not negotiated because it had not been placed in the hands of the holder, then delivered by the holder to another, with proper endorsement. Under the former statute, negotiation meant the transfer of an instrument in such form that the transferee become a holder. If the instrument was payable to order, it was negotiated by delivery with any necessary endorsement. If payable to bearer, it was negotiated by delivery [former Civ. Code § 3111; *now see Com. Code § 3201*]. However, the statute is not definitive of the only manners in which an instrument may be negotiated, but is rather merely illustrative. It was not intended to include all the ways in which an instrument might be negotiated, nor to restrict the comprehensive terms of its first sentence (*138 Cal. App. 2d 763, 770)* . Consequently, there was no sound reason to hold that the bank should not be held to be a holder in due course. When a bank deposits a check into the account of a creditor of the maker, the creditor becomes a holder of the check through transfer from the bank, and if the bank is a holder in due course, the creditor has the same rights as the bank (*138 Cal. App. 2d 763, 771)* .

The court's reasoning appears to be sound in light of *Com. Code § 3201*, which, although worded differently from former Civ. Code § 3111, has the same effect as the prior law. For example, negotiation still entails the transfer of possession of an instrument by one person to another who becomes the holder [*see Com. Code § 3201(a)*].

[d] Bank-Payee's Deposit of Check to Account of Creditor of Maker, Pursuant to Written Agreement

Flores v. Woodspecialties, Inc. *(1956) 138 Cal. App. 2d 763, 292 P.2d 626* , is *discussed under § 166.50[3][c]*.

[4] Additional Authorities

[a] Transfer Presumed From Possession

In *Sipe v. W.I. Hollingsworth & Co. (1950) 99 Cal. App. 2d 391, 221 P.2d 991* (construing prior law), a real property

action that centered on the title to a bond, the court of appeal held that possession of commercial paper, with endorsement, makes a prima facie case of delivery by the endorser to the holder, and of the holder's ownership (*99 Cal. App. 2d 391, 392)* .

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B. Negotiation And Transfer

16-166 California Points & Authorities § 166.51

§ 166.51 Opposing Contention That Instrument Was Negotiated [Com. Code §§ 3201, 3204]--Instrument Not Endorsed

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or jury instructions.*]

THE INSTRUMENT THAT IS THE SUBJECT OF THIS ACTION WAS NOT NEGOTIATED IN THAT IT WAS NOT ENDORSED, BECAUSE _____ [*specify, e.g.,* THE ENDORSEMENT PURPORTED TO CONVEY LESS THAN THE INSTRUMENT'S ENTIRE AMOUNT].

A. Negotiation of Instrument Payable to Identified Person. Except for negotiation by a remitter, if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its endorsement by the holder (*Com. Code § 3201(b)*).

[*Optional*] **B. Endorsement Must Be on Instrument or Paper Affixed to Instrument.** Endorsement means a signature, other than that of a signer as maker, drawer, or acceptor, that alone or accompanied by other words is made on the instrument for the purpose of (1) negotiating the instrument, (2) restricting payment of the instrument, or (3) incurring endorser's liability on the instrument. For the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument (*Com. Code § 3204(a)*; *see Security Pacific Nat. Bank v. Chess (1976) 58 Cal. App. 3d 555, 561-562, 129 Cal. Rptr. 852*) (construing prior law).

[*Optional*] **C. Endorsement Not Valid.** A signature and its accompanying words is not an endorsement if the accompanying words, terms of the instrument, place of the signature, or other circumstances unambiguously indicate that the signature was made for a purpose other than endorsement (*Com. Code § 3204(a)*).

[*Optional*] **D. Endorsement Must Convey Entire Instrument.** If a transferor purports to transfer less than the entire instrument, negotiation of the instrument does not occur (*Com. Code § 3203(d)*; *see* Official Comment 5 to U.C.C. §

3-203 (1990)).

[*Optional*] **E. Presentation of Check to Drawee Does Not Constitute an Endorsement That Transfers Check.** The presentation of a check to a drawee is not a negotiation and involves no warranties, because the drawee is not a holder in due course. A drawee who pays the instrument is not a transferee of title, because the last holder's endorsement does not transfer the check, but rather converts what was a check into a voucher (*Wells Fargo Bank etc. Co. v. Bank of Italy (1931) 214 Cal. 156, 164, 4 P.2d 781*) (construing prior law).

[*Optional*] **F. Exchanging Check for Cashier's Check Is Not Endorsement.** A bank's exchanging an original unendorsed check for issuance of its own cashier's check is not a negotiation of the check; endorsement of a depositor's check is necessary for the negotiation of the check (*Wright v. Bank of California (1969) 276 Cal. App. 2d 485, 488, 81 Cal. Rptr. 11*).

[*This form may be combined with § 166.107 (relating to lack of signature on instrument or attached document).*]

[2] Comments

[a] Use of Form

This memorandum is for use in opposing the contention that an instrument was negotiated, on the ground that it was not endorsed [*see Com. Code §§ 3201(b), 3204(a)*]. Note that the Commercial Code uses the spelling "indorse" [*see Com. Code § 3204*], but this chapter uses the more commonly accepted spelling "endorse." Counsel may prefer to use the former spelling when quoting the code in a memorandum.

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Therefore, counsel should set forth facts describing the transactions that took place, and show that they did not constitute endorsement. For example, if appropriate, counsel should show that the purported endorser did not sign the instrument, but signed a document that was not affixed to the instrument itself.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the instrument was not endorsed.

[b] Related Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposing the contention supported by the points and *authorities in § 166.50*.

[3] Discussion of Authorities

[a] Endorsement Must Be on Instrument or Paper Affixed to Instrument

In ***Security Pacific Nat. Bank v. Chess*** *(1976) 58 Cal. App. 3d 555, 129 Cal. Rptr. 852* (construing prior law), the payee of 13 promissory notes endorsed them by executing an "assignment" on the back of each, in favor of the transferee. The transferee pledged the notes to a bank as security for loans, executing a series of separate written assignments describing the notes as collateral security. One note was endorsed in the name of the transferee corporation. Eight were endorsed in the name of the president of the transferee corporation. Four were not endorsed at all, except for the original endorsement ("assignment") of the payee. After default of the underlying loans, and after cessation of payments on the notes, the holder, or bank-transferee, brought an action to recover on the amounts due. The trial court found in favor of the bank-transferee, and against the makers for unpaid balances due on the notes. The makers appealed.

The court of appeal reversed with regard to the four notes lacking the endorsement of the penultimate transferee, holding that former Com. Code § 3202(2) required the endorsement to be written by or on behalf of the holder and on the instrument or a paper so firmly affixed to it as to become a part of it [*now see Com. Code § 3204(a)* (endorsement must be made on instrument or paper affixed to instrument)]. The court rejected the bank's contention that the payee's endorsement, together with the separate written assignments of the initial transferee, should be read together, making the bank the holder by endorsement. That argument confuses transfer with negotiation. The separate assignment is effective evidence that the notes were transferred to the bank, and the bank became the transferee and owner, at least for security purposes. However, a transferee is not a holder under the negotiation requirements of former Com. Code § 3202(2) [*now see Com. Code § 3204(a)*], if no endorsement is written on the note itself or on a document affixed to it (*58 Cal. App. 3d 555, 560-562)* .

[b] Endorsement Must Convey Entire Instrument

Official Comment 5 to U.C.C. § 3-203 (1990) provides that the cause of action on an instrument cannot be split and that any endorsement purporting to convey to any party less than the instrument's entire amount is not effective for negotiation. However, the Comment also states that an endorsement conveying less than the entire instrument operates as a partial assignment of the cause of action.

[c] Presentation of Check to Drawee Does Not Constitute an Endorsement That Transfers Check

In ***Wells Fargo Bank etc. Co. v. Bank of Italy*** *(1931) 214 Cal. 156, 4 P.2d 781* (construing prior law), the name of the payee on a check was erased, and another name was skillfully substituted. The person whose name was substituted as payee appeared at the drawee bank, and the drawee bank certified the check. The payee endorsed the check. His creditor also endorsed the check, and presented it to a bank with which he was a depositor. The bank cashed the check, and presented it to the drawee bank, which paid it. Subsequently, the maker of the check notified the bank that the payee's name had been altered, and demanded repayment. The drawee bank brought an action against the bank that cashed the check. The trial court found that the bank that cashed the check was a holder in due course by virtue of the drawee bank's certification of the check, and entered judgment for defendant. The drawee bank appealed.

The Supreme Court affirmed, holding that the drawee bank had authenticated the check in a certain form, and that commercial policy favors the protection of anyone who, in due course, changes position on the faith of that authentication (*214 Cal. 156, 166)* . In discussing the issue of warranties by the drawee bank, the Court noted that the presentation of a check to a drawee for payment is not a negotiation, and involves no warranties, because the drawee is not a holder in due course. The warranties of a general endorser are based on a transfer of title and run only to holders in due course [discussing former Civ. Code § 3147, *now see Com. Code § 3415*; for forms regarding holders in due course, see *§ 166.70* et seq.]. Consequently, a drawee who has paid the instrument is not a transferee of title, because the last holder's endorsement does not transfer the check, but rather converts what was a check into a voucher (*214 Cal. 156, 164)* .

[d] Exchanging Check for Cashier's Check Is Not Endorsement

Wright v. Bank of California *(1969) 276 Cal. App. 2d 485, 81 Cal. Rptr. 11* , involved a joint checking account maintained by two depositors for certain commercial purposes. Both signatures were required on the checks. One depositor fraudulently induced the other to sign a check payable to a creditor, and, in collusion with another person, forged the signature of the creditor's agent on the check and exchanged it for a cashier's check of the drawee bank. An agent of the creditor endorsed the cashier's check (purportedly for redeposit in the makers' account), which the defrauding co-maker presented to a different bank. That bank issued its own cashier's check, which the defrauding co-maker negotiated, later diverting the funds to his own use. The defrauded co-maker of the original check brought an action against the other co-maker, the colluding forger, the drawee bank, and the bank that issued the ultimate cashier's check for negligence, conversion, and related causes of action. The drawee bank filed a demurrer to the complaint,

which the trial court sustained, without leave to amend. Plaintiff appealed.

The court of appeal partially reversed, holding that a cause of action was stated in negligence, on the theory that issuance of a cashier's check in place of the original check under the circumstances constituted negligence (*276 Cal. App. 2d 485, 488-492)* . The court rejected the drawee's contention that the Commercial Code protects it from liability for accepting the original check and application for a cashier's check. The taking of the original unendorsed check in exchange for issuance of its own cashier's check was not a negotiation of the depositor's check, but only a payment. Endorsement of a depositor's check is necessary for the negotiation of the check, pursuant to former Com. Code § 3202 [*now see Com. Code § 3201*]. However, presentation of a check to the drawee for payment is not a negotiation of the check, because the drawee is not a holder in due course. Presentation of an unnegotiated check calls merely for payment of the check (*276 Cal. App. 2d 485, 488)* .

[4] Additional Authorities

[a] Negotiation of Instrument Payable to Identified Person

In *Cassetta v. Baima (1930) 106 Cal. App. 196* , the court of appeal held that a promissory note payable to order is not rendered nontransferable by reason of not being endorsed. In clarifying the issue of endorsement, the court noted that the endorsement is necessary in order to carry the qualities and incidents of negotiable paper to the endorsee (*106 Cal. App. 196, 201)* .

[b] Endorsement Must Be on Instrument or Paper Affixed to Instrument

In *Lopez v. Puzina (1966) 239 Cal. App. 2d 708, 49 Cal. Rptr. 122* , the payee of a promissory note payable to order, and secured by a deed of trust, assigned the note by a separate attached document. The transferees executed an "assignment of deed of trust" completely separate from the note, and delivered it, along with the note and the deed of trust, to the holders. After default on the note, the holders brought an action against the transferees, as alleged endorsers, to recover the amount due. The trial court granted the transferees' motion for nonsuit. The court of appeal affirmed, rejecting the holders' contention that defendants were endorsers, thereby giving the holders the right to recover on refusal of the makers to pay. A promissory note cannot be endorsed by an instrument that is separate from the note (*239 Cal. App. 2d 708, 711-714)* .

[c] Endorsement Must Convey Entire Instrument

In *D'Orazi v. Bank of Canton (1967) 254 Cal. App. 2d 901, 62 Cal. Rptr. 704* , the payee of a promissory note signed the back of a note that contained an assignment of a portion of the interest to another. The payee also fraudulently pledged the note in connection with a loan from a bank. The assignee brought an action against the bank to determine the ownership of the note. The trial court found in the bank's favor, and the assignee appealed. The court of appeal reversed to the extent that the judgment was appealed, and ordered the trial court to modify the findings consistent with its opinion. In rejecting the transferee's contention that the assignment was not valid because it did not convey the payee's complete interest, the court noted that the transferee confused effective assignment with negotiation. Under former Com. Code § 3202(3), an assignment conveying part of the instrument is not effective for negotiation purposes (*254 Cal. App. 2d 901, 904-905)* [*now see Com. Code § 3203(d)* (negotiation does not occur if transferor purports to transfer less than entire instrument) and Official Comment 5 to U.C.C. § 3-203 (1990)].

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16-166 California Points & Authorities § 166.52

§ 166.52 Opposing Contention That Instrument Was Negotiated [Com. Code §§ 3201, 3203]--Instrument Not Transferred

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or jury instructions.*]

THE INSTRUMENT THAT IS THE SUBJECT OF THIS ACTION WAS NOT NEGOTIATED IN THAT POSSESSION WAS NOT TRANSFERRED.

[*EITHER*]

A. Instrument Payable to Identified Person. If an instrument is payable to an identified person, negotiation requires transfer of the instrument's possession and endorsement by the holder (*Com. Code § 3201(b)*).

[*OR*]

A. Instrument Payable to Bearer. If an instrument is payable to bearer, transfer of possession is required for its negotiation (*Com. Code § 3201(b)*).

[*CONTINUE*]

[*Optional*] **B. Condition Precedent to Transfer Not Met.** An instrument is not transferred if conditions precedent to transfer are not met (*see Borgonovo v. Henderson (1960) 182 Cal. App. 2d 220, 226-227, 6 Cal. Rptr. 236*) (construing prior law).

[2] Comments

[a] Use of Form

This memorandum is for use in opposing the contention that an instrument was negotiated, on the ground that it was not transferred [*see Com. Code § 3201*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Therefore, counsel should set forth facts describing the transactions that took place, and show that there was no transfer of the instrument. For example, if appropriate, counsel should show that conditions precedent to transfer were not met.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the instrument was not transferred.

[b] Transfer of Instrument

Transfer of an instrument occurs when the instrument is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument (*Com. Code § 3203(a)*).

[c] Related Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposing the contention supported by the points and *authorities in § 166.50*.

[3] Discussion of Authorities

[a] Condition Precedent to Transfer Not Met

In ***Borgonovo v. Henderson*** *(1960) 182 Cal. App. 2d 220, 6 Cal. Rptr. 236* (construing prior law), the instigator of a fraudulent construction scheme induced investors to tender cash and a promissory note, and obtain a construction loan, in exchange for a long-term lease on a motel that he agreed to construct. He then fabricated sham corporations through which to transact the financing. The investors executed the note, secured by a deed of trust on the leasehold interest, and deposited both documents in escrow with a title company, with instructions to hold them until it received a certain sum from one of the sham corporations, at which time the title company was authorized to release the documents on demand of the makers. While the note was still in possession of the title company, however, the sham corporation endorsed the note without tendering any money. It executed an assignment of the note and the deed of trust to the construction company with which it had contracted, and deposited the documents in escrow. Subsequently, the parties obtained the construction loan, and the title insurance company recorded the second deed of trust, the assignment of the deed of trust, and the promissory note. The contractors constructed the motel, spending more than the amount of the construction loan, and failed to receive additional amounts as promised from the sham corporation. The contractors assigned the note and deed of trust for valuable consideration. After completion of the motel, various creditors who were to have been paid by the sham corporation sought reimbursement from the makers of the note, who brought an action against the sham corporation and the defrauding individual. The trial court entered judgment in favor of the makers of the note and against the sham corporation and the defrauding individual, awarding damages in a certain amount for failure to pay creditors. It also found in favor of certain creditors and against the makers in a certain amount, on the ground that he makers had no right to a setoff against the note because the contractor-assignee was a holder in due course of the note. The court granted the title company's motion for nonsuit, rejecting the maker's contention that if the note and deed had been transferred, the makers were entitled to damages for violation of escrow instructions. The makers appealed.

The court of appeal reversed the judgment with regard to the title company, the ultimate assignee of the note, and the

creditors who prevailed in the trial court (*182 Cal. App. 2d 220, 226-235)* . With regard to the promissory note, the court held that there was no delivery of the note. If conditions precedent to delivery are not met, there is no delivery. Hence, the first assignee was not a holder in due course of the note [discussing former Civ. Code § 3097, now repealed, which necessitated delivery; *now see Com. Code §§ 3305* (enforcement of obligations and defenses), 3306 (claims to instruments), 8202 (rights regarding investment securities)]. The makers in the instant case clearly specified that compliance with its instructions to the title company be a condition precedent to delivery. Moreover, delivery or recordation by or on behalf of the escrow holder before full performance of escrow terms is a nullity; no title passes. Until the escrow holder received the specified amount, it did not occupy the status of an agent for the payee so that it could effectuate a constructive delivery (*182 Cal. App. 2d 220, 226-227)* .

[4] Additional Authorities

[a] Condition Precedent to Transfer Not Met

In *Doria v. International Union (1961) 196 Cal. App. 2d 22, 16 Cal. Rptr. 429* (construing prior law), involving two promissory notes made on behalf of a labor union, but not approved by the union's board as required by its internal laws, the court of appeal held that there is no delivery if conditions precedent to delivery are not met. Because board approval was an unmet condition precedent to delivery, the payee in the instant case could not recover (discussing former Civ. Code § 3097 [erroneously cited as Civ. Code § 3079), now repealed, which necessitated delivery; *now see Com. Code §§ 3305* (enforcement of obligations and defenses), 3306 (claims to instruments), 8202 (rights regarding investment securities)] (*196 Cal. App. 2d 22, 36-37)* .

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[Reserved]

§§ 166.53[Reserved]

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C. Enforcement Of Instruments

16-166 California Points & Authorities § 166.70

§ 166.70 Supporting Contention That Holder of Instrument Is Holder in Due Course--Holder Took Instrument for Value [Com. Code §§ 3302(a), 3303]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or jury instructions.*]

THE HOLDER OF THE INSTRUMENT THAT IS THE SUBJECT OF THIS ACTION IS A HOLDER IN DUE COURSE WITH REGARD TO TAKING THE INSTRUMENT FOR VALUE BECAUSE _____ [*specify, e.g.,* THE INSTRUMENT WAS ISSUED IN EXCHANGE FOR A NEGOTIABLE INSTRUMENT].

A. Holder in Due Course. To be a holder in due course, the instrument when issued or negotiated to the holder must not bear such apparent evidence of forgery or alteration or must not be so irregular or incomplete as to call into question its authenticity. In addition, the holder must take the instrument for value, in good faith, and without the following notices: (1) that the instrument is overdue or has been dishonored or that there is an uncured default with regard to payment of another instrument issued as part of the same series; (2) that the instrument contains an unauthorized signature or has been altered; (3) of any claim to the instrument described in *Com. Code § 3306*; and *(4)* that any party has a defense or claim in recoupment described in *Commercial Code Section 3305(a)* (*Com. Code § 3302(a)*; *see Gentner v. Wells Fargo Bank (1999) 76 Cal. App. 4th 1165, 1168-1176, 90 Cal. Rptr. 2d 904*).

[*EITHER*]

B. Promise Performed. An instrument is issued or transferred for value if it is issued or transferred for a promise of performance, to the extent the promise has been performed (*Com. Code § 3303(a)(1)*).

[*OR*]

B. Acquisition of Security Interest or Lien. An instrument is issued or transferred for value if the transferee acquires a security interest or other lien in the instrument other than a lien obtained by judicial proceeding (*Com. Code § 3303(a)(2)*).

[*OR*]

B. Antecedent Claim. An instrument is issued or transferred for value if it is issued or transferred as payment of, or as security for, an antecedent claim against any person whether or not the claim is due (*Com. Code § 3303(a)(3)*; *see Adolph Ramish, Inc. v. Woodruff (1934) 2 Cal. 2d 190, 203, 40 P.2d 509*).

[*Optional*] **C. Bank's Applying Funds From Deposit of Instruments to Checks Drawn Against Insufficient Funds.** A bank's applying the funds from the deposit of instruments to checks drawn against insufficient funds constitutes a taking for value under *Commercial Code Section 3303(a)(3)* (*Tokai Bank of California v. First Pacific Bank (1986) 186 Cal. App. 3d 1664, 1668-1669, 231 Cal. Rptr. 503* (construing prior law)).

[*OR*]

B. Tender of Negotiable Instrument. An instrument is issued or transferred for value if it is issued or transferred in exchange for a negotiable instrument (*Com. Code § 3303(a)(4)*).

[*OR*]

B. Irrevocable Obligation to Third Party. An instrument is issued or transferred for value if it is issued or transferred in exchange for the incurring of an irrevocable obligation to a third party by the person taking the instrument (*Com. Code § 3303(a)(5)*).

[*This form may be combined, when appropriate, with §§ 166.71 (holder's lack of notice or knowledge) and 166.130 (holder in due course not subject to defenses of obligor).*]

[2] Comments

[a] Use of Form

This memorandum is for use in supporting the contention that a holder of an instrument took it for value, in order to support an underlying contention that the holder is a holder in due course [*see Com. Code §§ 3302(a)* (definition of "holder in due course"), 3303 (taking for value)].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Therefore, counsel should describe the what the instrument was issued or transferred for and apply one of these descriptions to the transaction.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the holder took the instrument for value.

[b] Distinction Between Value and Consideration

The 1990 version of Article 3 of the Uniform Commercial Code, which has been adopted for the most part by California, distinguishes value from consideration. Whether an instrument is taken for value is a requirement applicable to whether the holder is a holder in due course [*see Com. Code § 3302(a)*]. If an instrument is not issued for consideration the drawer or maker has a defense to the obligation to pay the instrument [*see Com. Code § 3303(b)*; *see also* Official Comment 1 to U.C.C. § 3-303 (1990)]. Consideration is defined as any consideration sufficient to support a simple contract [*Com. Code § 3303(b)*]. Because "value" is defined in *Com. Code § 3303(a)*, the definition of value applicable to other transactions in the Commercial Code does not apply [*see Com. Code § 1204* (definition of value includes consideration sufficient to support simple contract)]. Thus, outside the provisions governing negotiable instruments, anything that is consideration is also value [*see* Official Comment 1 to U.C.C. § 3-303 (1990)]. However, for transactions involving negotiable instruments, a different rule applies; that is, if an instrument is issued for value, it is also issued for consideration [*Com. Code § 3303(b)*].

[c] Related Publications

For discussion regarding holders in due course generally, see Hart & Willier, Negotiable Instruments Under the Uniform Commercial Code, § 1C.40 (Matthew Bender).

For discussion of consideration generally, see Ch. 140, *Contracts* , in California Forms of Pleading and Practice (Matthew Bender).

[d] Related Points and Authorities

In an appropriate case, the points and authorities *set out in § 166.72* may be used to oppose the contention supported by this form.

For memoranda regarding consideration issues relating to contracts generally, see Ch. 50, *Contracts* .

For memoranda supporting the contention that a transferee from a holder in due course also takes free of claims and defenses, see *§ 166.94*.

[3] Discussion of Authorities

[a] Holder in Due Course

In ***Gentner v. Wells Fargo Bank*** *(1999) 76 Cal. App. 4th 1165, 90 Cal. Rptr. 2d 904* , a Wells Fargo customer paid a consulting firm for services by check, on which it later stopped payment. When the firm presented the check to Wells Fargo, however, the bank paid it by issuing a cashier's check to the firm. Later, Wells Fargo issued a stop payment on the cashier's check. When the firm tried to deposit it at another bank, the cashier's check was not honored. The firm brought suit against Wells Fargo for wrongful dishonor of the cashier's check. The trial court found that the firm was a holder in due course of the cashier's check and entered judgment in the amount of the check plus interest (*76 Cal. App. 4th 1165, 1166-1167)* .

The court of appeal affirmed, concluding that as between a bank and a payee who acts in good faith, the Commercial Code clearly requires the bank to suffer the loss occasioned by its error in accepting or paying a check covered by a stop payment order. The result is the same whether the check is paid in cash or exchanged for a cashier's check. The court first stated that the firm was entitled to holder-in-due-course status under *Com. Code § 3302*. It noted that the payee of an instrument can be a holder in due course, even though this is not the usual situation. The firm was acting in complete good faith and had no knowledge of any potential defenses held by Wells Fargo as drawer of the instrument. Specifically, it did not know that the check which it submitted was subject to a stop notice (*76 Cal. App. 4th 1165, 1168-1170)* . The court then held that the provisions of *Com. Code § 3418* precluded the bank from recovering its mistaken payment as long as the payee took the instrument in good faith (*76 Cal. App. 4th 1165, 1175-1176)* .

[b] Antecedent Claim

In ***Adolph Ramish, Inc. v. Woodruff*** *(1934) 2 Cal. 2d 190, 40 P.2d 509* , the maker of a promissory note delivered the note to the payee, who endorsed the note and extended the time for payment, and then delivered it to the holder. The holder also held a note executed by the payee of the endorsed note. After default on the endorsed note, the holder brought an action against the maker. Whether the endorsed note was extended as collateral security for the indebtedness of the payee to the holder, and therefore constituted consideration, was one of many issues in the cases, which also concerned issues of negotiability and whether the holder was a holder in due course. The trial court found in favor of the holder, and the maker appealed.

The Supreme Court affirmed, after first reversing the trial court judgment, then granting a rehearing for the purpose of taking additional evidence. With regard to consideration, the Court noted that the trial court was justified in concluding that the holder took the note as collateral security, and therefore for value. An antecedent debt constitutes a valuable consideration for a transfer as security, and the holder of the security is a purchaser for value in regard to third persons (*2 Cal. 2d 190, 203)* .

[c] Bank's Applying Funds From Deposit of Instruments to Checks Drawn Against Insufficient Funds

In ***Tokai Bank of California v. First Pacific Bank*** *(1986) 186 Cal. App. 3d 1664, 231 Cal. Rptr. 503* (construing prior law), a customer of a bank (the depositary bank) deposited two cashiers' checks into his checking account. The checks were issued by another bank (the payor or drawee bank), payable to the depositary bank. The depositor's account was credited immediately, and the total deposit applied to personal checks that had been drawn against insufficient funds in his account. The payor bank refused to honor the cashiers' checks because the government checks that the depositor had used to purchase them bore forged endorsements. The depositary bank had no previous notice of any defense to payment on the cashiers' checks. The depositary bank brought an action against the payor bank for wrongful dishonor of the checks, and the trial court granted the depositary bank's motion for summary judgment, and the payor bank appealed.

The court of appeal affirmed, holding ultimately that the depositary bank was a holder in due course (*186 Cal. App. 3d 1664, 1667-1669)* . A holder in due course is one who takes the instrument for value, in good faith and without notice that it has been dishonored, or of any defense against it [former Com. Code § 3302(1); *now see Com. Code § 3302(a)*]. The court rejected the payor bank's contention that the depositary bank gave the depositor nothing of value in return for the cashiers' checks, except perhaps a provisional credit to his account, which it could have later reversed. In fact, the depositary bank gave the depositor immediate credit, whose funds were used to pay checks written on the account against insufficient funds. Consequently, the depositor received final, not provisional, credit. Further, applying a deposit to checks drawn against insufficient funds constitutes a taking for value under former Com. Code § 3303(b) [*now see Com. Code § 3303(a)(3)*], which states that a holder takes the instrument for value by taking the instrument in payment of or as security for an antecedent claim against any person whether or not the claim is due. The trial court correctly determined there were no triable issues of fact regarding the depositary bank's status as a holder in due course, and none of the defenses against a holder in due course applied in this case (*186 Cal. App. 3d 1664, 1668-1669)* .

[4] Additional Authorities

[a] Holder in Due Course

In Sharpe v. F.D.I.C. (9th Cir. [Cal.] 1997) *126 F.3d 1147* , appellants and a bank entered into a settlement agreement which required the bank to pay appellants an amount by wire transfer to a trust account. The bank tendered cashier's checks in lieu of a wire fund transfer. Appellants brought an action against the FDIC as the bank's receiver, seeking to enjoin it from recording the instrument they had given the bank pursuant to their agreement and requesting enforcement or rescission of the agreement. The transferees moved for summary judgment, and the FDIC sought dismissal or

summary judgment. The district court dismissed the action and the transferees appealed. The court of appeals held that appellants were neither "depositors" of the bank under California law nor "creditors" of bank subject to the FIRREA claims process (*126 F.3d 1147, 1156-1157)* . It found that appellants were holders in due course of the cashier's checks because they took the instrument for value, in good faith and without notice that it had been dishonored or of any defense against it (*citing Tokai Bank of California v. First Pacific Bank (1996) 186 Cal. App. 3d 1664* , discussed in *§ 166.70[3][c]*). As such, they were entitled to enforce the obligation imposed on the FDIC by the failed bank's issuance of the cashier's checks (*126 F.3d 1147, 1153-1154)* .

[b] Bank's Applying Funds From Deposit of Instruments to Checks Drawn Against Insufficient Funds

In *Bank of Costa Mesa v. Losack (1977) 74 Cal. App. 3d 287, 141 Cal. Rptr. 550* (construing prior law), a bank received three checks from the depositor, which it immediately credited to checks held for insufficient funds, and on which the depositor then placed stop-payment orders. The court of appeal affirmed the trial court's judgment for the bank in its action against the drawer for damages, holding, inter alia, that the bank obtained a security interest by cashing checks in reliance on the deposit, thus giving value (interpreting former Com. Code § 3302, defining "holder in due course" [*now see Com. Code § 3302*, as revised in 1992] as well as former Com. Code §§ 4208, 4209, regarding security interests [*now see Com. Code §§ 4210, 4211*)] (*74 Cal. App. 3d 287, 293-294)* .

California Points & Authorities

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
CHAPTER 166 NEGOTIABLE INSTRUMENTS
PART II. FORMS
C. Enforcement Of Instruments

16-166 California Points & Authorities § 166.71

§ 166.71 Supporting Contention That Holder of Instrument Is Holder in Due Course--Holder Did Not Have Notice of Claim or Defense or Knowledge That Instrument Was Overdue [Com. Code §§ 1201(b)(20), 3302(a)]

[1] FORM

[*The following may be included in a memorandum, or may be adapted for use in a trial or appellate brief or jury instructions.*]

THE HOLDER OF THE INSTRUMENT THAT IS THE SUBJECT OF THIS ACTION IS A HOLDER IN DUE COURSE WITH REGARD TO LACK OF NOTICE OF A CLAIM TO THE INSTRUMENT OR A DEFENSE TO IT, OR THAT THE INSTRUMENT WAS OVERDUE, BECAUSE _____ [*specify, e.g.,* THE ENDORSEMENT WAS MADE WITHIN A REASONABLE TIME AFTER MATURITY].

A. Holder in Due Course. [*See § 166.70, Paragraph A.*]

B. Good Faith Defined. "Good faith" is honesty in fact and the observance of reasonable commercial standards of fair dealing (*Com. Code § 1201(b)(20)*).

[*EITHER*]

C. Notice of Discharge. Notice of discharge of a party, other than discharge in an insolvency proceeding, is not notice of a defense (*Com. Code § 3302(b)*).

[*OR*]

C. Filing or Recording of Document. The public filing or recording of a document does not of itself constitute notice of a defense, claim in recoupment, or claim to the instrument (*Com. Code § 3302(b)*; *see Ross v. Title Guarantee etc.*

Co. (1934) 136 Cal. App. 393, 398, 29 P.2d 236).

[*OR add the following Paragraph C and one of the optional versions of Paragraph D immediately following*]

C. Breach of Fiduciary Duty. If (1) an instrument is taken from a fiduciary for payment or collection or for value, (2) the taker has knowledge of the fiduciary status of the fiduciary, and (3) the represented person makes a claim to the instrument or its proceeds on the basis that the transaction of the fiduciary is a breach of fiduciary duty, then notice of breach of fiduciary duty by the fiduciary is notice of the claim of the represented person (*Com. Code § 3307(b)(1)*).

[*Add one of the following Optional Paragraph D's to be used with the preceding version of Paragraph C, above, as appropriate*]

[*Optional*] **D. Instrument Payable to Represented Person or Fiduciary.** When an instrument is payable to the represented person or the fiduciary as such, the taker has notice of the breach of fiduciary duty if the instrument is (1) taken in payment of or as security for a debt known by the taker to be the personal debt of the fiduciary, (2) taken in a transaction known by the taker to be for the personal benefit of the fiduciary, or (3) deposited to an account other than an account of the fiduciary, as such, or an account of the represented person (*Com. Code § 3307(b)(2)*).

[*Optional*] **D. Instrument Issued by Represented Person or Fiduciary and Made Payable to Fiduciary.** If an instrument is issued by the represented person or the fiduciary as such, and made payable to the fiduciary personally, the taker does not have notice of the breach of fiduciary duty unless the taker knows of the breach of fiduciary duty (*Com. Code § 3307(b)(3)*).

[*Optional*] **D. Instrument Issued by Represented Person or Fiduciary to Taker as Payee.** If an instrument is issued by the represented person or the fiduciary as such, to the taker as payee, the taker has notice of the breach of fiduciary duty if the instrument is (1) taken in payment of or as security for a debt known by the taker to be the personal debt of the fiduciary, (2) taken in a transaction known by the taker to be for the personal benefit of the fiduciary, or (3) deposited to an account other than an account of the fiduciary, as such, or an account of the represented person (*Com. Code § 3307(b)(4)*).

[*OR*]

C. Default in Payment of Interest. Unless the due date of principal has been accelerated, an instrument does not become overdue if there is default in payment of interest by no default in payment of principal (*Com. Code § 3304(c)*).

[*OR*]

C. Mere Fact of Discounted Price Is Insufficient to Evidence Notice. The mere fact that an unusually large discount is accepted is not of itself sufficient to charge the purchaser with notice of existing equities, unless the consideration is merely nominal or the rate of discount so great as to compel the inference that the negotiation is fraudulent or in some way illegal or unauthorized (*Szczotka v. Idelson (1964) 228 Cal. App. 2d 399, 405, 39 Cal. Rptr. 466*).

[*OR add the following Paragraphs C and D*]

C. Endorsement Made Within Reasonable Time After Maturity. If an instrument payable on demand is endorsed

before a reasonable time after the maturity date of the instrument, the endorsee and holder for value takes the instrument relieved of all equities existing between the original parties to it (*Poorman v. Mills & Co. (1870) 39 Cal. 345, 351-352)* .

[*Optional*] **D. Endorsement During Business Hours on Day After Maturity Date Is Within Reasonable Time.** Endorsement and transfer of an instrument at any time during the business hours of the next day after its maturity date is within a reasonable time, and the holder has all the protections of an endorsee before maturity or presumptive dishonor (*Poorman v. Mills & Co. (1870) 39 Cal. 345, 351-352)* .

[*CONTINUE*]

[*Optional*] **E. Notice in Reasonable Time.** To be effective, notice must be received at a time and in a manner that gives a reasonable opportunity to act on it (*Com. Code § 3302(f)*).

[*Optional*] **F. Knowledge Acquired After Purchasing Instrument.** The acquisition of knowledge of infirmities after purchase of an instrument does not affect the holder-in-due-course status of the purchaser (*Mann v. Andrus (1959) 169 Cal. App. 2d 455, 459, 337 P.2d 473*).

[*Optional*] **G. No Duty to Inquire Absent Circumstances Justifying Suspicion.** When there are no circumstances to justify suspicions regarding the instrument or transaction, the holder is under no duty to inquire regarding any possible infirmities in the instrument or transaction, and failure to inquire will not negate the holder's status as holder in due course (*Witty v. Clinch (1929) 207 Cal. 779, 783-785, 279 P. 797*).

[*This form may be combined, when appropriate, with the forms in §§ 166.70 (holder took instrument for value) and 166.130 (holder in due course not subject to defenses of obligor).*]

[2] Comments

[a] Use of Form

This memorandum is for use in supporting the contention that the holder of an instrument is a holder in due course with regard to the requirement of lack of notice of a claim or defense, or that the instrument was overdue [*see Com. Code §§ 1201(b)(20)* ("good faith" defined), 3302(a) ("holder in due course" defined), 3304 (overdue instruments)]. Optional Paragraphs E-G may need to be relettered depending on which alternative paragraphs are selected for the preceding paragraphs of the form.

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Therefore, counsel should discuss facts relating to notice, and show why one or more of the provisions in this form precludes a finding of notice by the purchaser of the instrument. For example, if appropriate, counsel should show that the only ground for contending that the purchaser had notice is the public filing of a document, and that, therefore, there was no notice under *Com. Code § 3302(b).*

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the holder did not have notice or knowledge.

[b] Related Points and Authorities

In an appropriate case, the points and authorities *set out in § 166.73* may be used to oppose the contention supported by this form.

For a memorandum supporting the contention that a transferee from a holder in due course also takes free of claims and defenses, see *§ 166.94*.

[3] Discussion of Authorities

[a] Filing or Recording of Document

In ***Ross v. Title Guarantee etc. Co.*** *(1934) 136 Cal. App. 393, 29 P.2d 236* , the maker of a promissory note sought cancellation of the note and a related trust deed, on grounds of lack of consideration and fraud. The trial court found in favor of the maker, ordering cancellation of the note, and finding the trust deed void. The court of appeal reversed, finding that the holder of the note was a bona fide purchaser for a valuable consideration before the note's maturity, and that he had no actual notice of any defect or infirmity in the instrument. The filing of a lis pendens does not effect constructive notice of infirmities of a related note (*136 Cal. App. 393, 398)* .

[b] Mere Fact of Discounted Price Is Insufficient to Evidence Notice

In ***Szczotka v. Idelson*** *(1964) 228 Cal. App. 2d 399, 39 Cal. Rptr. 466* , a complicated action to declare a note void on the ground of usury, the court of appeal reversed the trial court's judgment, and ruled in favor of the note's holder. The court held, inter alia, that the mere fact that an unusually large discount is accepted is not of itself sufficient to charge the purchaser with notice of existing equities, unless the consideration is merely nominal or the rate of discount so great as to compel the inference that the negotiation is fraudulent or in some way illegal or unauthorized (*228 Cal. App. 2d 399, 405)* .

[c] Endorsement Made Within Reasonable Time After Maturity

In ***Poorman v. Mills & Co.*** *(1870) 39 Cal. 345* , the makers of a certificate of deposit mistakenly entered on the face of the instrument an amount double its true value. The payee transferred the certificate in a gambling environment to an endorsee who routinely gambled, in exchange for cash and other instruments. The certificate was transferred on the evening of the maturity date, and delivered to the ultimate holder the next morning. The ultimate holder brought an action against the makers after they failed to honor the certificate on demand. The trial court entered judgment for the holder for half the amount on the face of the certificate, and denied the holder's motion for new trial. The holder appealed, asserting entitlement to the entire face value of the note.

The Supreme Court reversed, holding, inter alia, that if an instrument payable on demand is endorsed before a reasonable time after the maturity date of the instrument, the endorsee and holder for value takes the instrument relieved of all equities existing between the original parties to it. Endorsement and transfer of an instrument at any time during the business hours of the next day after its maturity date is within a reasonable time, giving the holder all the protections of an endorsee before maturity or presumptive dishonor (*39 Cal. 345, 351-352)* . (With regard to consideration, the Court noted that there was no evidence that the transfer to the first endorsee was for gambling purposes (*39 Cal. 345, 352-353)* .)

[d] Endorsement During Business Hours on Day After Maturity Date Is Within Reasonable Time

Poorman v. Mills & Co. *(1870) 39 Cal. 345* , is *discussed under § 166.71[3][c]*.

[e] Knowledge Acquired After Purchasing Instrument

In ***Mann v. Andrus*** *(1959) 169 Cal. App. 2d 455, 337 P.2d 473* , the court of appeal reversed the trial court's judgment in favor of the maker of a promissory note in an action by the holder against the maker on the note. The court held, inter alia, that the acquisition by the purchaser of information concerning infirmities in the instrument after the time of

purchase did not affect the purchaser's status as a holder in due course (*169 Cal. App. 2d 455, 459)* .

[f] No Duty to Inquire Absent Circumstances Justifying Suspicion

In ***Witty v. Clinch*** *(1929) 207 Cal. 779, 279 P. 797* , one of the co-makers of a note agreed to build a house on the property securing the note. The payee sold the note for approximately one quarter of its value. Before purchasing the note, the transferee investigated the value of the property, and determined that it was worth more than the price she paid, but less than the value of the note. Moreover, under a collateral agreement, the transferee agreed to resell the note and mortgage to the makers within a certain time after purchase, for slightly more than her purchase price. After default on the note, the transferee brought an action to recover on it. The trustees under the trust deed answered the complaint, asserting that the maker failed to build the house, that the transferee paid no consideration, and that the transferee took with knowledge of the various transactions underlying the note. The trial court found in the transferee's favor, and the trustees appealed.

The Supreme Court affirmed, holding, inter alia, that when circumstances surrounding a transaction are insufficient to arouse the purchaser's suspicions, there is no duty to inquire regarding a possible infirmity in the note. In the instant case, the difference between the value of the note and the price paid by the transferee was not sufficient, in itself, to arouse the suspicions that the note was not what it purported to be. As a result of the agreements made, the transferee acquired only an interest in the security to the extent of the resale price, with a possibility of becoming the owner of the security itself. Under all the circumstances of the sale, there was no evidence that the transferee had any knowledge of the note maker's solvency, nor that she made any inquiry in that regard (*207 Cal. 779, 784)* .

[4] Additional Authorities

[a] Holder in Due Course

In *Appel v. Morford (1943) 62 Cal. App. 2d 36, 144 P.2d 95* , the court of appeal affirmed the trial court's ruling in favor of the holder of a note. If, under the circumstances, a holder acted in good faith in taking the instrument, the holder is a holder in due course, even though at some previous time the holder may have had notice of the defect (*62 Cal. App. 2d 36, 40)* .

In *Drukker v. Howe & Haun Invest. Co. (1934) 136 Cal. App. 437* , an action to declare a note and trust deed void on the ground that the payee failed to perform the underlying obligation on an executory contract, the court of appeal modified the amount due under the note. Knowledge by an endorsee that the note was given in consideration of an executory contract by the payee does not deprive the endorsee of holder-in-due-course status, if the holder had no notice of a previous breach of the contract (*136 Cal. App. 437, 442)* .

For an additional case holding that knowledge that a note was given in consideration of an executory agreement does not nullify an endorsee's status as holder in due course absent further knowledge of breach, see *Flood v. Petry (1913) 165 Cal. 309, 316, 132 P. 256* . For a case holding that recordation of a document does not constitute constructive notice, see *Haulman v. Crumal (1936) 13 Cal. App. 2d 612, 619-621, 57 P.2d 179* .

[b] Default in Payment of Interest

In *Wilson v. Steele (1989) 211 Cal. App. 3d 1053, 259 Cal. Rptr. 851* (construing prior law), an action by a decedent's estate to cancel a note and deed of trust made by decedent's niece under a power of attorney, the court of appeal reversed a judgment for defendants, holders in due course, and remanded for further findings regarding whether the purpose of the loan evidenced by the note was to pay for construction done by an unlicensed contractor. The note called for monthly payments of principal and interest of $131.72 or more. That entire amount would have gone towards interest. The payee/seller told defendants that no interest payments had been made because the makers were friends of his and he didn't want to cause any problems. The court of appeal said that defendants were protected by former Com.

Code § 3304(4)(f) [*now see Com. Code § 3304(c)*]: the default in payment of interest did not put them on notice or deprive them of their status as holders in due course (*211 Cal. App. 3d 1053, 1064-1065)* .

[c] Mere Fact of Discounted Price Is Insufficient to Evidence Notice

In *Wilson v. Steele (1989) 211 Cal. App. 3d 1053, 259 Cal. Rptr. 851* (construing prior law; *discussed under § 166.71[4][b]*), plaintiffs contended that defendants were not holders in due course because they had purchased an $11,064 note for $7,000. The court of appeal said that although an offer to sell a note for two thirds of its value is not itself sufficient to raise an inference that the instrument is tainted, it is a circumstance to be considered in determining the question of a buyer's good faith. However, when the trial court found that the buyer acted in good faith, the fact that the buyer acquired a note with a value of $11,064 for $7,000 does not defeat his or her status as a holder in due course (*211 Cal. App. 3d 1053, 1065)* .

In *Mann v. Leasko (1960) 179 Cal. App. 2d 692, 4 Cal. Rptr. 124* , the court of appeal reversed the trial court's judgment against the holders of a note. The mere fact that a note is purchased for an amount less than its face, or that an unusually large discount is accepted, is never of itself sufficient to charge the purchaser with notice of existing equities, unless the consideration is merely nominal or the rate of discount so great as to compel the inference that the negotiation is fraudulent or is some way illegal or unauthorized (*179 Cal. App. 2d 692, 698)* .

[d] No Duty to Inquire Absent Circumstances Justifying Suspicion

In *Nuckolls v. Bank of California (1937) 10 Cal. 2d 278, 74 P.2d 271* , the holder of a usurious note apparently acted innocently and in good faith in accepting the note as a part of her share of a community property division. The Supreme Court affirmed the trial court's holding that notice to a spouse is not imputed to the other spouse solely because a note is community property, if there is no basis to put the holder on inquiry as to whether the note was usurious or that the holder took the note in bad faith (*10 Cal. 2d 278, 283-284)* .

In *Wilson v. Steele (1989) 211 Cal. App. 3d 1053, 259 Cal. Rptr. 851* (construing prior law; *discussed under § 166.71[4][b]*), the payee on the note was a finance company, but the beneficiary on the deed of trust was the contractor's daughter. Plaintiffs contended that this was an infirmity that precluded defendants from attaining the status of holders in due course. The court said that the fact that the payee of the note and the beneficiary of the deed of trust securing it are different people does not constitute such an irregularity as to preclude the buyer from becoming a holder in due course, at least when it gives no notice of the actual defect to which that particular note is subject [p. 1065, citing former West's Ann. Com. Code § 3304, Cal. Code Comment, P 3, pp. 190-191; *now see Com. Code § 3302(a)(1)*].

In *Ross v. Title Guarantee etc. Co. (1934) 136 Cal. App. 393, 29 P.2d 236* (*discussed under § 166.71[3][a]*), the court of appeal held that there is no duty to inquire about possible infirmities of the instrument, if under the circumstances of the case, the holder is a holder in due course (*136 Cal. App. 393, 404)* .

For additional cases holding that the purchaser had no ground for suspicion regarding the validity of the instrument, see *Condor Corp. v. Cunningham (1945) 71 Cal. App. 2d 25, 33, 162 P.2d 21* ; *Robb v. Cardoza (1930) 110 Cal. App. 116, 122-123, 293 P. 851* ; and *Kopperud v. Cookson (1920) 50 Cal. App. 180, 182-183, 194 P. 748* .

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
CHAPTER 166 NEGOTIABLE INSTRUMENTS
PART II. FORMS
C. Enforcement Of Instruments

16-166 California Points & Authorities § 166.72

§ 166.72 Opposing Contention That Holder of Instrument Is Holder in Due Course--Holder Did Not Take Instrument for Value [Com. Code §§ 3302(a)(2)(A), 3303]

[1] FORM

[*The following may be included in a memorandum, or may be adapted for use in a trial or appellate brief or jury instructions.*]

THE HOLDER OF THE INSTRUMENT THAT IS THE SUBJECT OF THIS ACTION IS NOT A HOLDER IN DUE COURSE BECAUSE HE/SHE DID NOT TAKE THE INSTRUMENT FOR VALUE, IN THAT _____ [*specify, e.g.,* THE INSTRUMENT WAS TAKEN IN EXCHANGE FOR AN EXECUTORY PROMISE AND THE PROMISE HAS NOT BEEN PERFORMED].

A. Requirement of Taking for Value. A holder of an instrument must take the instrument for value to be a holder in due course (*Com. Code § 3302(a)(2)(A)*).

[*EITHER*]

B. Promise Not Performed. An instrument issued or transferred for a promise of performance is not issued or transferred for value if the promise has not been performed (*Com. Code § 3303(a)(1)*; *see* Official Comment 1 to U.C.C. § 3-303, Case #2 (1990)).

[*OR*]

B. Acquisition of Judicial Lien. An instrument is not issued or transferred for value if the transferee acquires a lien in the instrument through a judicial proceeding (*Com. Code § 3303(a)(2)*).

[*OR*]

B. Instrument Taken in Exchange for Preexisting Debt Must Be Under Express Agreement. The taking of an instrument, either of the debtor or of a third person, for a prior existing debt is no payment, unless it is expressly agreed to take the note as payment; and on failure to pay the note, the creditor may ignore it and sue on the original debt (*Roth v. Guardian Thrift & Loan (1958) 162 Cal. App. 2d 320, 322, 327 P.2d 945*).

[*This form may be combined, when appropriate, with §§ 166.73 (holder had notice of defense) and 166.134 (lack of consideration).*]

[2] Comments

[a] Use of Form

This memorandum is for use in opposing the contention that a holder of an instrument is a holder in due course, on the ground that the holder did not take it for value [*see Com. Code §§ 3302(a)(2)(A)* (holder in due course takes for value), 3303 (definition of taking for value)].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Therefore, counsel should describe the circumstances under which the instrument was given and explain why it was not taken for value. For example, if appropriate, counsel should show that the instrument's holder took the instrument on the basis of an executory promise that was not performed, that was not a negotiable instrument, and that was not an irrevocable commitment to a third party.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the holder did not take the instrument for value.

[b] Related Publications

For discussion regarding holders in due course generally, see Hart & Willier, Negotiable Instruments Under the Uniform Commercial Code, § 1C.40 (Matthew Bender).

[c] Related Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposing the contention supported by the points and *authorities in § 166.70*.

For a memorandum regarding lack of consideration as a defense to an action by a nonholder in due course, see *§ 166.134* . For a discussion regarding the distinction between value and consideration under Article 3 of the Uniform Commercial Code see *§ 166.70[2][b]*.

[3] Discussion of Authorities

[a] Promise Not Performed

Official Comment 1 to U.C.C. § 3-303, Case # 2 (1990) provides an example of the distinction between value and consideration under Article 3. The example states that although an executory promise may constitute consideration for the issuance of a check, the promise constitutes value for purposes of determining holder in due course status only to the extent the promise is performed.

[b] Instrument Taken in Exchange for Preexisting Debt Must Be Under Express Agreement

In ***Roth v. Guardian Thrift & Loan*** *(1958) 162 Cal. App. 2d 320, 327 P.2d 945* , a customer of a car dealer returned the car for repairs. When the car was not returned promptly, she demanded either return of the car or a refund. The dealer gave her an amount of cash, and an endorsed check drawn by a finance company in favor of the endorser, the total amount of which equaled the purchase price of the car. The drawee bank refused to pay her the amount of the check because the maker had stopped payment on it. The holder brought an action against the maker, the endorser, and an agent of the endorser who had personally guaranteed the endorsement. The maker and the agent of the endorser defended on the ground that the check was originally obtained on the basis of forged documents. The trial court granted plaintiff-holder's motion for summary judgment with regard to the maker and the agent, and judgment was so entered for plaintiff. The maker and agent appealed.

The court of appeal reversed, holding, inter alia, that a question of fact remained regarding whether the holder was a holder in due course. The taking of a note, either of the debtor or of a third person, for a prior existing debt is not payment, unless it is expressly agreed to take the note as payment. On failure to pay the note, the creditor may ignore it and sue on the original debt. Under the facts of the instant case, taking from the holder's debtor a third-party check to the debtor did not operate as payment of the debt to the holder unless the holder agreed to take the check as payment. If the payee's title to the check is defective, the holder must prove that she took the check for value, that is, that she took the check under an express agreement that it constituted payment of the payee's antecedent debt to her (*162 Cal. App. 2d 320, 322)* .

[4] Additional Authorities

[a] Instrument Taken in Exchange for Preexisting Debt Must Be Under Express Agreement

The facts and procedural background of *Merchants Nat. Bank v. Bentel (1913) 166 Cal. 473, 137 P. 25* , are discussed in *§ 166.111[3][a]*. In *Merchants*, the Supreme Court held that a written general endorsement on a promissory note is a contract between the parties, and cannot be changed into a guaranty by an oral agreement (*166 Cal. 473, 476)* . *Merchants* also held that taking a note either of the debtor or of a third person for a prior existing debt is not payment, unless the parties expressly agree that the transaction has that effect. On failure to pay that type of note, the creditor may ignore it and sue on the original debt. (The Court held ultimately that although the holder stated a cause of action on the original debt, it was barred by the statute of limitations (*166 Cal. 473, 477-478)* .)

In *Bramante v. Krug (1956) 143 Cal. App. 2d 771, 300 P.2d 71* , the court of appeal affirmed the trial court's judgment in favor of the maker of a check on the ground that the holder was not a holder in due course. The court held that taking from the holder's debtor a check of a third person to the debtor does not operate as payment of the debt to the holder unless the holder agreed to take the check as payment (*143 Cal. App. 2d 771, 773)* .

For an additional case holding that an instrument taken in exchange for a preexisting debt must be under an express agreement, see *Williams v. Walker (1924) 66 Cal. App. 672, 676-677, 226 P. 939* , discussed in *§ 166.95[4][a]*.

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CHAPTER 166 NEGOTIABLE INSTRUMENTS
PART II. FORMS
C. Enforcement Of Instruments

16-166 California Points & Authorities § 166.73

§ 166.73 Opposing Contention That Holder of Instrument Is Holder in Due Course--Instrument Is Irregular or Incomplete or Holder Had Notice of Claim or Defense or Knowledge That Instrument Was Overdue [Com. Code §§ 1201(b)(20), 3302(a), 3304]

[1] FORM

[*The following may be included in a memorandum, or may be adapted for use in a trial or appellate brief or jury instructions.*]

THE HOLDER OF THE INSTRUMENT THAT IS THE SUBJECT OF THIS ACTION IS NOT A HOLDER IN DUE COURSE BECAUSE _____ [THE INSTRUMENT WHEN ISSUED WAS SO IRREGULAR OR INCOMPLETE AS TO CALL INTO QUESTION ITS AUTHENTICITY *or* HE/SHE HAD NOTICE THAT THE INSTRUMENT WAS OVERDUE, OF A CLAIM ON THE INSTRUMENT, OR OF A DEFENSE TO THE INSTRUMENT], IN THAT _____ [*specify, e.g., if opposition is based on notice of claim on instrument,* HE/SHE HAD NOTICE OF A BREACH OF FIDUCIARY DUTY BY THE AGENT TO THE INSTRUMENT].

A. Holder in Due Course. [*See § 166.70, Paragraph A.*]

B. Good Faith Defined. [*See § 166.71, Paragraph B.*]

[*ADD, If opposition is based on notice that instrument is overdue or notice of claim on or defense to instrument*]

C. Notice Determined by Actual Knowledge, Notice, or Reason to Know. A person has "notice" of a fact when any of the following occurs: (a) the person has actual knowledge of it; (b) the person has received a notice or notification of it; or (c) from all the facts and circumstances known to the person at the time in question, the person has reason to know that it exists. A person "knows" or has "knowledge" of a fact when the person has actual knowledge of it (*Com. Code § 1202(a)*; *see California Bank v. Diamond (1956) 144 Cal. App. 2d 387, 392, 301 P.2d 60* (actual notice)).

[*CONTINUE, EITHER*]

D. Party Discharged. Notice of discharge of a party in an insolvency proceeding is notice of a defense (*see Com. Code §§ 3302(b), 3305(a)(1)*).

[*OR*]

D. Instruments Payable on Demand--When Overdue. An instrument payable on demand becomes overdue at the earliest of the following times: (1) on the day after the day demand for payment is duly made; (2) if the instrument is a check, within 90 days after its date; (3) if the instrument is not a check, when the instrument has been outstanding for a period of time after its date which is unreasonably long under the circumstances of the particular case in light of the nature of the instrument and usage of the trade (*Com. Code § 3304(a)*).

[*OR*]

D. Instruments Payable at Definite Time/Principal Payable in Installments--When Overdue. If an instrument is payable at a definite time and the principal is payable in installments and a due date has not been accelerated, the instrument becomes overdue on default under the instrument for nonpayment of an installment, and the instrument remains overdue until the default is cured (*Com. Code § 3304(b)(1)*).

[*OR*]

D. Instruments Payable at Definite Time/Principal Not Payable in Installments--When Overdue. If an instrument is payable at a definite time and the principal is not payable in installments and the due date has not been accelerated, the instrument becomes overdue on the day after the due date (*Com. Code § 3304(b)(2)*).

[*OR*]

D. Instruments Payable at Definite Time/Due Date Accelerated--When Overdue. If an instrument is payable at a definite time and a due date with regard to principal has been accelerated, the instrument becomes overdue on the day after the accelerated due date (*Com. Code § 3304(b)(3)*).

[*OR*]

D. Breach of Fiduciary Duty--Notice of Claim of Represented Party. If (1) an instrument is taken from a fiduciary for payment or collection or for value, (2) the taker has knowledge of the fiduciary status of the fiduciary, and (3) the represented person makes a claim to the instrument or its proceeds on the basis that the transaction of the fiduciary is a breach of fiduciary duty, then notice of breach of fiduciary duty by the fiduciary is notice of the claim of the represented person (*Com. Code § 3307(b)(1)*).

[*Add one of the following Optional Paragraph E's to be used with the preceding version of Paragraph D, above, as appropriate*]

[*Optional*] **E. Notice of Claim--Instrument Payable to Represented Person or Fiduciary.** When an instrument is payable to the represented person or the fiduciary as such, the taker has notice of the breach of fiduciary duty if the instrument is (1) taken in payment of or as security for a debt known by the taker to be the personal debt of the fiduciary, (2) taken in a transaction known by the taker to be for the personal benefit of the fiduciary, or (3) deposited to an account other than an account of the fiduciary, as such, or an account of the represented person (*Com. Code § 3307(b)(2)*).

[*Optional*] **E. Notice of Claim--Instrument Issued by Represented Person or Fiduciary and Made Payable to Fiduciary.** If an instrument is issued by the represented person or the fiduciary as such, and made payable to the fiduciary personally, the taker does not have notice of the breach of fiduciary duty unless the taker knows of the breach of fiduciary duty (*Com. Code § 3307(b)(3)*).

[*Optional*] **E. Notice of Claim--Instrument Issued by Represented Person or Fiduciary to Taker as Payee.** If an instrument is issued by the represented person or the fiduciary as such, to the taker as payee, the taker has notice of the breach of fiduciary duty if the instrument is (1) taken in payment of or as security for a debt known by the taker to be the personal debt of the fiduciary, (2) taken in a transaction known by the taker to be for the personal benefit of the fiduciary, or (3) deposited to an account other than an account of the fiduciary, as such, or an account of the represented person (*Com. Code § 3307(b)(4)*).

[*CONTINUE*]

[*Optional*] **F. Failure to Make Inquiry Arising From Suspicion.** When failure to make inquiry arose from a suspicion that inquiry would disclose a defect in the instrument or transaction, the endorsee is charged with knowledge of the defect (*Christian v. California Bank (1947) 30 Cal. 2d 421, 425, 182 P.2d 554*).

[*Optional*] **G. Close Connection Between Financial Institution Holder and Underlying Transaction.** A finance company that is closely connected to the underlying transaction cannot be regarded as a holder in due course of a note given in the transaction (*King v. Central Bank (1977) 18 Cal. 3d 840, 846, 135 Cal. Rptr. 771, 558 P.2d 857* ; *Coml. Credit Corp. v. Orange Co. Mach. Works (1950) 34 Cal. 2d 766, 771, 214 P.2d 819*).

[*This form may be combined, when appropriate, with the forms in §§ 166.72 (holder did not take instrument for value) and 166.134 (lack of consideration).*]

[2] Comments

[a] Use of Form

This memorandum is for use in opposing the contention that a holder of an instrument is a holder in due course, on the ground that the instrument was irregular or incomplete or that the holder had notice of a claim or defense, or that the instrument was overdue [*see Com. Code §§ 3302(a)* ("holder in due course" defined), 3304 (overdue instruments)]. Optional Paragraphs F and G may need to be relettered depending on which alternative paragraphs are selected for the preceding paragraphs of the form.

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Therefore, counsel should discuss facts relating to either the irregularity or incompleteness of the instrument or notice, and apply the pertinent foregoing provisions to explain why the instrument was irregular or incomplete or why the purchaser had actual or constructive notice of the claim, defense, or overdue nature of the instrument. For example, if appropriate, counsel should show that although the holder had no actual notice of a defect in the instrument, it is

apparent from the circumstances that the holder failed to investigate because of a suspicion that a defect existed.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the holder had notice or knowledge.

[b] Notice of Claim or Defense

Note that a section comparable to former Com. Code § 3304 (which defined what is meant by notice in the context of whether one is a holder in due course) does not exist in the provisions governing negotiable instruments as amended effective January 1, 1993. Most of the rules of that section, however, are repeated in various places. For example, a new section deals with the issue of when an instrument becomes overdue [*see Com. Code § 3304*], another describes adverse claims [*see Com. Code § 3306*], and another specifies when a transferee has notice that a fiduciary duty has been breached [*see Com. Code § 3307*]. In light of the lack of a comparable section specifying when the purchaser has notice of a claim or defense, the basic definition of notice takes on greater importance under the revised law [*see Com. Code § 1202(a)*].

[c] Related Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposing the contention supported by the points and *authorities in § 166.71*.

[3] Discussion of Authorities

[a] Notice Determined by Actual Knowledge, Notice, or Reason to Know

In ***California Bank v. Diamond*** *(1956) 144 Cal. App. 2d 387, 301 P.2d 60* , an action for declaratory relief brought by a drawee bank regarding a cashed check, the maker had postdated the check and given it to the payee, and later delivered a stop-payment notice to the drawee bank. The check, with the date altered, was endorsed and presented to the drawee bank over two years later, and the bank paid the amount to the endorsee. The court of appeal affirmed the trial court's judgment for the drawee bank, holding that the endorsee had actual notice of an infirmity in the payee's title, and consequently did not become a holder in due course of the check (*144 Cal. App. 2d 387, 392)* .

[b] Failure to Make Inquiry Arising From Suspicion

Christian v. California Bank *(1947) 30 Cal. 2d 421, 182 P.2d 554* , was an action to recover on a wrongfully paid cashier's check. Plaintiff and the individual defendant had formed a partnership, under which they agreed that both their signatures were required to sign or endorse negotiable paper or draw a check or voucher. Plaintiff purchased a cashier's check from the first defendant bank, payable to himself. He executed a restrictive endorsement, payable to another bank, and delivered the check to his partner, with instructions to deliver it to the endorsee bank. The partner, however, took the check to the second defendant bank, with which he had an account. The partner and an agent of the bank blocked out the restrictive endorsement. The partner signed his own name to the check, and deposited it in his personal account. At that time, the second bank had knowledge that defendant partner's account was overdrawn, and was holding several checks chargeable against his account, pending deposit of sufficient funds. The second bank then charged defendant partner's personal obligations against the funds provided by the altered cashier's check. The first defendant bank paid the amount of the check to the second bank. Plaintiff brought an action against his partner, the bank that issued the cashier's check, and the bank that deposited the check to the partner's account. The trial court sustained demurrers by both defendant banks, and entered dismissals in their favor. Plaintiff appealed.

The Supreme Court affirmed with regard to the first defendant bank, but reversed with regard to the second bank (*30 Cal. 2d 421, 423-425)* . The second bank knew that the partner had overdrawn his personal account at that bank, and that it would be advantageous to deposit the altered check, in order to cover his outstanding indebtedness. The

information that the bank necessarily acquired from the partner when the check was altered may have constituted knowledge of facts sufficient to put it on inquiry, and to raise an issue regarding its good faith in accepting the instrument. Mere knowledge of facts sufficient to put a prudent person on inquiry, without actual knowledge, or mere suspicion of an infirmity or defect of title, does not preclude the transferee from being a holder in due course, unless the circumstances or suspicions are so cogent and obvious that to remain passive would amount to bad faith [based on former Civ. Code § 3137, which included "badfaith" provision; *now see Com. Code § 1202(a)*, which omits "bad faith" from notice definition; *cf. Com. Code § 3302(a)*, which defines holder in due course in terms of "good faith"]. However, when circumstances justify the conclusion that the failure to inquire arose from a suspicion that inquiry would disclose a vice or defect in the instrument or transaction, the endorsee is charged with knowledge (*30 Cal. 2d 421, 425)* .

[c] Close Connection Between Financial Institution Holder and Underlying Transaction

In ***King v. Central Bank*** *(1977) 18 Cal. 3d 840, 135 Cal. Rptr. 771, 558 P.2d 857* , the purchasers of automobile insurance brought an action against the bank that financed the purchase, and the insurance broker who sold the insurance. The complaint alleged causes of action under the Unruh Act (*Civ. Code § 1801 et seq.*, regarding retail installment sales contracts) and the federal Truth-in-Lending Act (TILA) (*15 U.S.C. § 1601 et seq.*). Defendants demurred generally on the ground that neither the Unruh Act nor TILA applied to the insurance transactions. The trial court overruled the broker's demurrer, sustained the bank's demurrer without leave to amend, and entered a dismissal in the bank's favor. The bank appealed.

The Supreme Court reversed, holding that plaintiff stated causes of action under the Unruh Act and TILA (*18 Cal. 3d 840, 843-849)* . In discussing application of the Unruh Act, the Court noted that the complaint allegations, if proved, would support a finding that the broker and bank were jointly engaged in the business of "providing" automobile insurance within the meaning of *Civ. Code § 1802.2*. The legislative policy under the Act is to protect retail consumers from the documented abuses that plagued the consumer credit field. The Act's provisions should be liberally construed to protect consumers, with a view toward expanding, rather than limiting, its coverage (*18 Cal. 3d 840, 845-846)* . A "close connection" between the seller of goods and the finance company to which the installment contract is assigned may result in treating the finance company *as a party to the original transaction*, subject to those statutory restrictions applicable to those parties (emphasis provided by the Court). It has long been settled in California that a financial institution may be denied the status of a holder in due course because of its close connection with the seller. Moreover, a finance company cannot shed the duties and responsibilities of a lender by accepting the assignment of contracts from a seller with which it is intimately connected (citing *Coml. Credit Corp. v. Orange Co. Mach. Works (1950) 34 Cal. 2d 766, 214 P.2d 819* , discussed *below*) (*18 Cal. 3d 840, 846)* .

In ***Coml. Credit Corp. v. Orange Co. Mach. Works*** *(1950) 34 Cal. 2d 766, 214 P.2d 819* , two companies entered into a conditional sales contract, under which the vendor company agreed to procure for the purchaser company a particular machine. The vendor company consulted with a finance company regarding the terms of the installment provisions. The finance company knew all of the details of the transaction, and provided financing because the vendor company did not have the money to procure the promised machinery. The vendor company used the finance company's blank forms for the contract and promissory note, which were printed on the same paper and separated by perforations. The payee-vendor company immediately assigned the contract to the finance company, and endorsed the note, without perforating the documents. The vendor company sent its own check to the machine company, which refused to deliver the machine because the check was dishonored on presentation. The endorsee-finance company brought an action against the maker-purchasing company and the payee-vendor company of the note. The maker cross complained against the payee. The trial court found in favor of the endorsee only against the payee of the note, on default judgment. It found in favor of the maker of the note with regard to both its cross complaint and the complaint brought by the endorsee. The endorsee appealed.

The Supreme Court affirmed, holding that the endorsee was so closely connected with the entire transaction that it was not an innocent purchaser of the instrument for value before maturity. Rather than being a purchaser of the instrument

after its execution, it was for all purposes a party to the agreement and instrument from the beginning (*34 Cal. 2d 766, 770)* . Throughout the transaction, the endorsee negotiated with the future payee, rather than the future maker, and advanced money with the understanding that the agreement and note would be assigned or endorsed to it immediately. The endorsee was a moving force in the transaction from its inception, and acted as a party to it. Moreover, it knew the financial status of the future payee. When a finance company actively participates in a transaction from its inception, counseling and aiding the future vendor-payee, it cannot be regarded as a holder in due course of the note given in the transaction (*34 Cal. 2d 766, 771)* .

[4] Additional Authorities

[a] Notice Determined by Actual Knowledge, Notice, or Reason to Know

In *Berger v. Steiner (1945) 72 Cal. App. 2d 208, 164 P.2d 559* an attorney, who was subsequently disbarred, advised an elderly client to execute a note and trust deed to the client's relative. The payee, on the attorney's advise, left the documents with him. The documents were forged and assigned to a friend of the attorney's, with whom he had previously engaged in questionable financial transactions. The court of appeal held that the purported assignee's conduct regarding the loan evidenced that party's notice of an irregularity in the transaction (*72 Cal. App. 2d 208, 217)* .

In *Bishop v. Morrow (1936) 12 Cal. App. 2d 720, 55 P.2d 1216* , an action to cancel a note and trust deed, the court of appeal affirmed the trial court's judgment in favor of the note's maker, holding that notice of a defect in the title of the person negotiating an instrument may be actual or based on knowledge of facts evidencing bad faith (*12 Cal. App. 2d 720, 724)* .

For additional cases holding that the purchaser took an instrument with notice of an infirmity, see *Burke v. Mission Bay Yacht Sales (1963) 214 Cal. App. 2d 723, 730-731, 29 Cal. Rptr. 685* (constructive notice); *Sasner v. Ornsten (1949) 93 Cal. App. 2d 467, 471-472, 209 P.2d 44* (notice evidenced by surrounding circumstances); and *Barthelmess v. Cavalier (1934) 2 Cal. App. 2d 477, 492-493, 38 P.2d 484* (lack of good faith inferred by circumstances, in action regarding nonnegotiable stock certificates).

Cases construing statutes effective before January 1, 1965, were governed by former Civ. Code § 3137, defining notice as actual knowledge or knowledge amounting to "bad faith." The superseding statute defining notice, *Com. Code § 1202(a)*, omits any reference to "bad faith."

[b] Failure to Make Inquiry Arising From Suspicion

In *Anderson v. Lee (1951) 103 Cal. App. 2d 24, 228 P.2d 613* , an action to reform a promissory note, the court of appeal held that an endorsee is charged with knowledge of a vice or defect in the instrument when the circumstances justify the conclusion that the failure to make inquiry arose from a suspicion of the defect (*103 Cal. App. 2d 24, 27)* .

In *Imperial Gypsum & Oil Corp. v. Chaplin (1935) 4 Cal. App. 2d 109, 40 P.2d 596* , an action to recover on a defaulted promissory note, the court of appeal held that a purchaser of a note who has a suspicion that further inquiry would disclose true facts regarding the execution is not a holder in due course (*4 Cal. App. 2d 109, 113)* .

[c] Close Connection Between Financial Institution Holder and Underlying Transaction

In *Morgan v. Reasor Corp. (1968) 69 Cal. 2d 881* , an action under the Unruh Act (*Civ. Code § 1801 et seq.*, regarding retail installment sales contracts), the Supreme Court reiterated the holding in *Coml. Credit Corp. v. Orange Co. Mach. Works (1950) 34 Cal. 2d 766, 214 P.2d 819* (*discussed under § 166.73[3][c]*), that a financing institution may be denied the status of a holder in due course because it is too closely connected with the seller or the particular sale at issue. The Court applied that principle to a contract for the construction of residential housing to which the Unruh Act applied (*69 Cal. 2d 881, 894-895)* .

For an additional case reiterating the holding in *Coml. Credit*, see *Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 822-823, 94 Cal. Rptr. 796, 484 P.2d 964* (applying the principle to the Unruh Act).

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[Reserved]

§§ 166.74[Reserved]

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CHAPTER 166 NEGOTIABLE INSTRUMENTS
PART II. FORMS
D. Liability Of Parties

16-166 California Points & Authorities § 166.90

§ 166.90 Supporting Contention That Party Is Liable on Instrument--Signature Obligates Party [Com. Code §§ 3401-3403]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or jury instructions.*]

DEFENDANT _____ [*name*] IS LIABLE AS A _____ [*specify, e.g.,* MAKER] ON THE INSTRUMENT THAT IS THE SUBJECT OF THIS ACTION BECAUSE _____ [*specify, e.g.,* ALTHOUGH HIS/HER SIGNATURE WAS INITIALLY PLACED ON THE FACE OF THE INSTRUMENT WITHOUT AUTHORIZATION, HE/SHE HAS SUBSEQUENTLY RATIFIED IT].

A. No Liability Without Signature. A person is not liable on an instrument unless (1) the person signed the instrument, or (2) the person is represented by an agent or representative who signed the instrument and the signature is binding on the represented person under *Commercial Code § 3402* (*Com. Code § 3401(a)*).

B. How Signature May Be Made. A signature may be made (1) manually or by means of a device or machine, and (2) by the use of any name, including a trade or assumed name, or by a word, mark, or symbol executed or adopted by a person with present intention to authenticate a writing (*Com. Code § 3401(b)*).

[*EITHER*]

C. Representative's Signature Binding on Principal/Principal's Liability. If a person acting, or purporting to act, as a representative signs an instrument by signing either the name of the represented person or the name of the signer, the represented person is bound by the signature to the same extent the represented person would be bound if the signature were on a simple contract. If the represented person is bound, the signature of the representative is the "authorized signature of the represented person" and the represented person is liable on the instrument, whether or not identified in

the instrument (*Com. Code § 3402(a)*).

[*AND/OR*]

D. Personal Liability of Representative. If a representative signs the name of a representative to an instrument, the signature is an authorized signature of the represented person, and the form of the signature shows unambiguously that the signature is made on behalf of the represented person who is identified in the instrument, the representative is not liable on the instrument (*Com. Code § 3402(b)(1)*). However, if the form of the signature does not show unambiguously that the signature is made in a representative capacity or the represented person is not identified in the instrument, the representative is liable on the instrument to a holder in due course that took the instrument without notice that the representative was not intended to be liable on the instrument. With regard to any other person, the representative is liable on the instrument unless the representative proves that the original parties did not intend the representative to be liable on the instrument (*Com. Code § 3402(b)(2)*).

[*AND/OR*]

E. Signer on Face of Instrument Is Maker Despite Relative Location of Signature. The location of additional signatures in the space intended for makers' signatures on the face of the instrument does not render questionable another maker's signature placed in another acceptable location on the face of the instrument (*Schaeffle v. Nolan (1953) 115 Cal. App. 2d 651, 653, 252 P.2d 732*).

[*AND/OR*]

F. Unauthorized Signer Liable to Taker for Value. Unless otherwise provided by Division 3 or 4 (*Com. Code § 3101 et seq.*), an unauthorized signature is ineffective except as the signature of the unauthorized signer in favor of a person who in good faith pays the instrument or takes it for value (*Com. Code § 3403(a)*).

[*AND/OR*]

G. Ratification of Unauthorized Signature. Any unauthorized signature may be ratified for all purposes of Division 3 (*Com. Code § 3101 et seq.*) (*Com. Code § 3403(a)*; *Volandri v. Hlobil (1959) 170 Cal. App. 2d 656, 659-660, 339 P.2d 218*).

[*AND/OR*]

H. Repudiation of Unauthorized Execution Must Be Timely. Repudiation of an obligation based on an unauthorized signature must occur before ratification (*see Rakestraw v. Rodrigues (1972) 8 Cal. 3d 67, 75, 104 Cal. Rptr. 57, 500 P.2d 1401*).

[*AND/OR*]

I. Ambiguous Signature Constitutes Endorsement. A signature and its accompanying words is an endorsement unless the accompanying words, terms of the instrument, place of the signature, or other circumstances unambiguously indicate that the signature was made for a purpose other than endorsement (*Com. Code § 3204(a)*).

[*AND/OR*]

J. Location of Signature Not Controlling. Although there is a customary place for the signature of parties to an instrument according to whether they are makers, drawers, or endorsers, the place of signature does not determine the character of the signer, which is determined by the purpose of signing (*Engelman v. Gordon (1966) 242 Cal. App. 2d 510, 517, 51 Cal. Rptr. 627*).

[*This form may be combined, when appropriate, with forms regarding the nature and extent of a particular party's liability (see, e.g., §§ 166.93 -166.103).*]

[2] Comments

[a] Use of Form

This memorandum is for use in supporting the contention that a party is liable on an instrument, on the ground that that party's or another's signature on the instrument obligates that party [*Com. Code §§ 3401* (signature required), 3402 (representative's signature), 3403 (unauthorized signature and ratification); *see Com. Code § 3204(a)* (ambiguous signature)].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. For example, if the party's signature was originally forged, but later ratified in an affirmative manner, counsel should show that the party is obligated under the instrument [*see Com. Code § 3403(a)*].

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the signature is binding.

[b] Related Publications

For discussion and forms relating to principal-agency liability generally, see Ch. 427, *Principal and Agent* in California Forms of Pleading and Practice (Matthew Bender).

[c] Related Points and Authorities

In an appropriate case, the points and authorities *set out in § 166.104* may be used to oppose the contention supported by this form.

For memoranda of points and authorities regarding principal-agency liability generally, see Ch. 182, *Principal and Agent* .

[3] Discussion of Authorities

[a] Signer on Face of Instrument Is Maker Despite Relative Location of Signature

In ***Schaeffle v. Nolan*** *(1953) 115 Cal. App. 2d 651, 252 P.2d 732* , two signers of a promissory note signed the note in the usual place provided, on lines above their typed names in the right-hand portion of the space below the text of the note. A third signer signed below the others, with no line nor typed name. In an action against all the signers to enforce the note, the third signer contended that he was merely an endorser and therefore, under the facts of the case, was not liable on the note. The court of appeal affirmed the trial court's judgment that he was a maker of the note, not an endorser, and therefore liable. The court rejected the signer's contention that former Civ. Code § 3098 [*now see Com.*

Code § 3204, ambiguous signature renders signer an endorser] controlled. The mere fact that the signatures of the other makers appeared in a space specially provided did not render the location of his signature inappropriate as that of a maker. *Com. Code § 3204* is inapplicable when the signer quite clearly signs as a maker (*115 Cal. App. 2d 651, 653)* .

[b] Ratification of Unauthorized Signature

In ***Volandri v. Hlobil*** *(1959) 170 Cal. App. 2d 656, 339 P.2d 218* , the court of appeal affirmed the trial court's judgment in favor of the payee of a forged promissory note, and against the party whose name was forged as maker. The evidence supported the finding that the individual whose name was forged did not deny the existence of his execution of the instrument when contacted by the payee, and further asked the payee to be patient in waiting for the money. A party whose name has been forged as maker and who affirms the existence of the obligation ratifies the obligation and becomes liable under it (*170 Cal. App. 2d 656, 659-660)* .

[c] Repudiation of Unauthorized Execution Must Be Timely

In ***Rakestraw v. Rodrigues*** *(1972) 8 Cal. 3d 67, 104 Cal. Rptr. 57, 500 P.2d 1401* , an individual forged his wife's name on a promissory note and a deed of trust to obtain funds for a business venture. After discovering the forgeries, the wife sought no remedy, but rather initially attempted to obtain control over the underlying business, with no success. Several years later, the payees on the note brought an action against her, among others, to recover money due. The trial court found in favor of the payees, and the wife appealed.

The Supreme Court reversed with regard to a business associate-defendant, but affirmed with regard to the wife, holding that a repudiation of an unauthorized signature must be timely. As a matter of law, the wife affirmatively endorsed the fraudulent acts of the forgers in anticipation of benefits to be gained, and sought to negate her endorsement only when benefits failed to materialize as anticipated. If she had repudiated the forgeries before ratifying the transaction, her failure to seek restitution of the proceeds of the loan would not have validated the forged signatures (*8 Cal. 3d 67, 74-75)* .

[d] Location of Signature Not Controlling

In ***Engelman v. Gordon*** *(1966) 242 Cal. App. 2d 510, 51 Cal. Rptr. 627* , an individual signed a promissory note on the left-hand side of the bottom of the face of the note. In an action to recover on the note, testimony showed that the payees would not have entered into the transaction without that individual's participation. The trial court found in favor of the signer, and the payees appealed.

The court of appeal reversed, holding that the individual signed in the capacity of an endorser (*242 Cal. App. 2d 510, 517-519)* . Under the facts of the case, his signature added nothing of value unless he thereby undertook an independent obligation with regard to the debt that was represented by the notes. There is a customary place for the signature of parties to an instrument according to whether they are makers or drawers or endorsers; makers or drawers sign to the right at the bottom of the face of the instrument, and endorsers sign on the back. However, the place of signature does not determine the character of the signer, which is determined by the purpose of signing (*242 Cal. App. 2d 510, 517)* . Signing in an unusual place requires proof to disclose the capacity in which the instrument was signed, but has no other effect. Therefore, an endorser may sign on the face of the instrument when that party labels the signature as such, or makes the intent clear (*242 Cal. App. 2d 510, 517-518)* .

[4] Additional Authorities

[a] Representative's Signature Binding on Prinicpal/Principal's Liability

The court of appeal in *White v. Moriarty (1993) 15 Cal. App. 4th 1290, 19 Cal. Rptr. 2d 200* , affirmed a judgment against the maker and in favor of the assignee of Federal Deposit Insurance Corporation, as receiver of the payee of a

note. The maker's signature on note was "MM by CA, Attny in fact." The court held that the maker's signature was authorized even though the power of attorney was not signed until two days after the note was signed. The power of attorney specified that it "ratified and confirmed" all things attorney in fact "shall cause to be done" in furtherance of the specific transaction involved (*15 Cal. App. 4th 1290, 1295-1296)* .

[b] Ratification of Unauthorized Signature

See *White v. Moriarty (1993) 15 Cal. App. 4th 1290, 19 Cal. Rptr. 2d 200 , discussed under § 166.90[4][a]*.

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16-166 California Points & Authorities § 166.91

§ 166.91 Supporting Contention That Party Is Liable on Instrument--Party Cannot Claim Status of Accommodation Party [Com. Code § 3419(b)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions. It may also be combined with a general contention that a party is liable on an instrument because of the signature on it (see, e.g., § 166.90).*]

DEFENDANT _____ [*name*] IS LIABLE AS A _____ [*specify, e.g.,* MAKER], AND NOT AS AN ACCOMMODATION PARTY, ON THE _____ [*specify, e.g.,* NOTE] THAT IS THE SUBJECT OF THIS ACTION BECAUSE _____ [*specify, e.g.,* THE FACE OF THE NOTE INDICATES THAT HE/SHE IS A PRINCIPAL].

A. Liability in Capacity Shown on Instrument. An accommodation party may sign the instrument as maker, drawer, acceptor, or endorser and is obliged to pay the instrument in the capacity in which the accommodation party signs. The obligation of an accommodation party may be enforced notwithstanding any statute of frauds and whether or not the accommodation party receives consideration for the accommodation (*Com. Code § 3419(b)*).

[*Optional*] **B. Accommodation Party Who Signs as Maker Has Same Liability as Co-maker.** If one who is in fact an accommodation party nevertheless signs as maker of the note, that party is bound on the instrument to the same extent as the co-maker (*Caito v. United California Bank (1978) 20 Cal. 3d 694, 701, 144 Cal. Rptr. 751, 576 P.2d 466* (construing prior law)).

[*Optional*] **C. Presumption That Multiple Signers Are Co-makers.** If an instrument is signed by two or more makers, it will be presumed that they are co-makers, and liable as such, and not as principal and surety, regardless of whether the payee knew that some the signers agreed among themselves to act in surety capacities only (*Estate of Chamberlain (1941) 44 Cal. App. 2d 193, 200, 112 P.2d 53*).

[*This form may be combined, when appropriate, with forms regarding the nature and extent of a particular party's liability (see, e.g., §§ 166.93 -166.103).*]

[2] Comments

[a] Use of Form

This memorandum is for use in supporting the contention that a party is liable on an instrument and cannot claim the status of an accommodation party [*see Com. Code § 3419*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Therefore, counsel should discuss the facts regarding the nature of the signature of the party to be charged. For example, if appropriate, counsel should show that the face of the instrument indicates that the party is a maker, and that that party is therefore held to the liability of a principal, even though the payee knew at the time that the party was treated as an accommodation party as between co-makers.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that defendant is not an accommodation party on the instrument.

[b] Limitation on Accommodation Party's Liability

Subject to *Com. Code § 3419(d)*, an accommodation party is liable on the instrument in the capacity in which the party signed [*Com. Code § 3419(b)*]. However, if the signature of the accommodation party is accompanied by words indicating unambiguously that the party is guaranteeing collection rather than payment of the instrument, liability is limited to paying the amount due on the instrument only if (1) execution of judgment against the other party has been returned unsatisfied, (2) the other party is insolvent or in an insolvency proceeding, (3) the other party cannot be served with process, or (4) it is otherwise apparent that payment cannot be obtained from the other party [*Com. Code § 3419(d)*]. For a form supporting the contention that a guarantor of a promissory note is liable on the instrument [*see § 166.99*].

[c] Related Publications

For discussion of a surety's defenses and rights generally, see Hart & Willier, Negotiable Instruments Under the Uniform Commercial Code, § 13.15 (Matthew Bender).

For discussion and forms regarding suretyship issues generally, see Ch. 538, *Suretyship, Bonds, and Undertakings* in California Forms of Pleading and Practice(Matthew Bender).

[d] Related Points and Authorities

In an appropriate case, the points and authorities *set out in § 166.105* may be used to oppose the contention supported by this form.

For memoranda of points and authorities relating to suretyship generally, see Ch. 222, *Suretyship* .

[3] Discussion of Authorities

[a] Accommodation Party Who Signs as Maker Has Same Liability as Co-maker

In ***Caito v. United California Bank*** *(1978) 20 Cal. 3d 694, 144 Cal. Rptr. 751, 576 P.2d 466* (construing prior law), the co-tenants of real property signed a promissory note in favor of a bank, which loaned a sum of money that was used

by one of the co-tenants. The other co-tenant signed for the purpose of accommodation, but signed as a principal on the note. After default on the note, the purported accommodation makers brought an action for petition against the cosigners, the payee-bank (and holder of a first trust deed), and a second bank, which had also loaned money to the cosigners and therefore held a second trust deed on the same property. The bank that held the first trust deed caused the property to be sold pursuant to foreclosure, and deposited with the court the proceeds remaining from its share to satisfy the balance on its note. That bank was then dismissed from the action. Issues in trial concerned allocation of the remaining proceeds of the sale. The trial court found that plaintiffs acted only as accommodation makers, and therefore were entitled to their portion of the proceeds without reduction of one half the amount due under the note. The bank appealed.

The Supreme Court reversed, holding that one who is in fact an accommodation party but nevertheless signs as maker of a note and security instruments is bound on the instruments to the same extent as the co-maker. Pursuant to former Com. Code § 3415 [*now see Com. Code § 3419*], an accommodation party is one who signs an instrument in any capacity for the purpose of lending that person's name for the benefit of another. An accommodation party is a surety and the accommodated party a principal (*20 Cal. 3d 694, 700)* . However, one who appears to be a principal cannot be characterized as a surety against persons who have acted on the faith of the signer's apparent character of principal [*see Civ. Code § 2832*]. Inasmuch as the bank under the first trust deed was a bona fide encumbrancer for value, the purported accommodation makers, as well as the purported sole principals, were all liable as principal obligors, and the entire value of the property was thus subject to the satisfaction of the note (*20 Cal. 3d 694, 701)* .

[b] Presumption That Multiple Signers Are Co-makers

In ***Estate of Chamberlain*** *(1941) 44 Cal. App. 2d 193, 112 P.2d 53* , a promissory note executed by a father and son remained unpaid and due after the death of the father. The son and widow, as administrators of the estate, executed a new note so that the estate would not be charged with the debt. Consequently, both of them took from the estate a share greater than they would have if the estate proceeds had been used to satisfy the original note. After the mother's death, the son who had signed the note became coexecutor of the estate. In his executor capacity, he filed a petition to permit the estate to borrow sufficient money to pay the note. The court granted the petition, and the claim was paid in full from the borrowed funds. The court then charged his distributive share of the estate with that amount, and he appealed, contending that the decedent's estate was primarily liable for the debt.

The court of appeal reversed with regard to the amount chargeable against the appellant's distributive share, holding that the decedent was a maker, and not an accommodation party, on the note; but that the estate was entitled to contribution from appellant, as co-maker of the note (*44 Cal. App. 2d 193, 200-205)* . The court rejected the contention of the respondent (the coexecutor) that the decedent's estate was not obligated on the note because the decedent was merely an accommodation party, and not a maker (*44 Cal. App. 2d 193, 200-202)* . The parties were severally liable on the note, and under those conditions, each is bound to performance. If one dies, the obligation may be enforced against that maker's estate. If a note is signed by two or more makers, they are presumed to be co-makers, and not principal and surety, notwithstanding the fact that the creditor knew that one party was acting only as surety in an agreement between the two signers. Consequently, the burden of proving that the decedent signed in a capacity other than that shown on the face of the instrument lies on the respondent, which burden he failed to meet (*44 Cal. App. 2d 193, 200)* . The court decided the contribution issue after petition on rehearing (*44 Cal. App. 2d 193, 203-205)* .

[4] Additional Authorities

[a] Liability in Capacity Shown on Instrument

In *First Nat. Bank v. Kinslow (1934) 2 Cal. App. 2d 456, 38 P.2d 163* , an action against the accommodation maker of a renewal note, the court of appeal affirmed the trial court's judgment for plaintiff, holding that between the accommodation maker and the payee, the accommodation maker is held as a principal, even if the payee knew that the

accommodation maker was, in fact, only a surety with regard to the relationship among all the makers (*2 Cal. App. 2d 456, 457-458)* .

For additional cases holding that a person who signs a note as a maker is responsible as a principal, despite the fact that the payee knew that that party was an accommodation maker with regard to other co-makers, see *Schaeffle v. Nolan (1953) 115 Cal. App. 2d 651, 657, 252 P.2d 732* , discussed in *§ 166.90[3][a]*, and *People's Fin. & Thrift Co. v. Moon (1941) 44 Cal. App. 2d 223, 224, 112 P.2d 24* .

[b] Accommodation Party Who Signs as Maker Has Same Liability as Co-maker

In *California Nat. Bank v. Ginty (1895) 108 Cal. 148, 41 P. 38* , two individual signers of a promissory note executed the note with the understanding that they were sureties only, with regard to the third signer, a corporation. The payee knew of the agreement among the co-makers, but treated all three signers as principals. The payee released the corporation from liability on the note, with the consent of the individual signers. In an action on the note, the Supreme Court held that a party who signs as principal is held as such, notwithstanding the fact that the creditor knew that party was only a surety in relation to a co-maker under an agreement between themselves (*108 Cal. 148, 150-151)* .

For additional cases holding that a party who signs as a maker is liable in that capacity, despite an intention to be a mere accommodation maker, see *Shriver v. Lovejoy (1867) 32 Cal. 574, 577* ; and *Casner v. San Diego T. & Sav. Bank (1939) 34 Cal. App. 2d 524, 533-534, 94 P.2d 65* .

[c] Presumption That Multiple Signers Are Co-makers

In *Common Wealth Ins. Systems, Inc. v. Kersten (1974) 40 Cal. App. 3d 1014, 115 Cal. Rptr. 653* , a consolidation action to recover the proceeds of a loan involving corporate shareholders, the court of appeal affirmed the trial court's finding that two of the shareholders who signed the notes were not accommodation makers, but were, rather, principals on the note, and therefore were unable to claim the defenses of a surety. Evidence showing that signers represented themselves in their individual capacities, that they were among the principal stockholders of the corporation for whose benefit a loan was made, and that the loan was essential to their own financial interests supported the finding that the signers were principals rather than accommodation makers (*40 Cal. App. 3d 1014, 1029)* .

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16-166 California Points & Authorities § 166.92

§ 166.92 Supporting Contention That Party Is Liable on Instrument--Purported Accommodated Party Is Not Party on Instrument [Com. Code § 3419(a)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions. It may also be combined with a general contention that a purported accommodation party is, in fact, a principal on the note (see, e.g., § 166.91).*]

DEFENDANT _____ [*name*] IS LIABLE AS A _____ [*specify, e.g.,* MAKER], AND NOT AS AN ACCOMMODATION PARTY, ON THE _____ [*specify, e.g.,* NOTE] THAT IS THE SUBJECT OF THIS ACTION BECAUSE THE PURPORTED ACCOMMODATED PARTY IS NOT A PARTY TO THE INSTRUMENT.

Purported Accommodated Party and Accommodation Party Must Be Parties to Instrument. If an instrument is issued for value given for the benefit of a party to the instrument ("accommodated party") and another party to the instrument ("accommodation party") signs the instrument for the purpose of incurring liability on the instrument without being a direct beneficiary of the value given for the instrument, the instrument is signed by the accommodation party "for accommodation" (*Com. Code § 3419(a)*).

[2] Comments

[a] Use of Form

This memorandum is for use in supporting the contention that a party is liable on an instrument in a capacity other than as an accommodation party, on the ground that the purported accommodated party is not a party to the instrument [*see Com. Code § 3419(a)*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Therefore, counsel should discuss facts regarding the signatures on the instrument, and show that the party

purported to be the accommodated party is not a party to the instrument.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that defendant is not an accommodation party on the instrument.

[b] Related Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposing the contention supported by the points and *authorities in § 166.105*.

[3] Additional Authorities

[a] Purported Accommodated Party and Accommodation Party Must Be Parties to Instrument

In *Bank of America v. Superior Court (1970) 4 Cal. App. 3d 435, 84 Cal. Rptr. 421* (construing prior law), an individual induced a bank to lend a corporation a certain sum of money, and in connection with that transaction executed a promissory note on which he was the sole maker, payable to the bank. He was not an officer of the corporation that received the funds. After default on the note, the bank brought an action against the individual, who answered specially, contending that he was merely an accommodation maker on behalf of the corporation that received the funds, and was therefore entitled to raise certain defenses under the laws of suretyship. The trial court denied the bank's motion for summary judgment, and the bank filed a petition for writ of mandamus to set aside the order denying the motion.

The court of appeal let the writ issue, finding that summary judgment for plaintiff was proper, and holding that an accommodation party must be a party to the instrument. Former Com. Code § 3415 [*now see Com. Code § 3419*] defined an accommodation party as one who signs the instrument in any capacity for the purpose of lending that party's name to another party to it. The only parties to the instrument in the instant case were the individual who signed the note and the bank. Although there have been cases in which the maker of a note has acted for the accommodation of the payee, defendant did not make that contention. Defendant claimed that the person accommodated was a person who was not a party to the instrument. Consequently, pursuant to former Com. Code § 3415 [*now see Com. Code § 3419*], the maker of the note was not an accommodation party (*4 Cal. App. 3d 435, 439)* . Any defenses arguably available to an accommodation party arising under the law of suretyship are based on the fact that the accommodation party is not the principal obligor. Evidence that the proceeds of a loan were wholly paid to another party to a note is evidence bearing on the question of whether a signer is an accommodation party. Although former Civ. Code § 3110, the predecessor statute to former Com. Code § 3415 [*now see Com. Code § 3419*], omitted the requirement that an accommodation party be a party to the instrument, former Com. Code § 3415 (as well as the current statute) contains that limitation [*see Com. Code § 3419(a)*]. Logic favors the limitation. A written promise to pay made by only one signer, which is intended only as a contract of suretyship or guaranty with regard to a separate contract with another person containing an obligation possibly different in many crucial regards, should so state on the face of the instrument (*4 Cal. App. 3d 435, 440)* .

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16-166 California Points & Authorities § 166.93

§ 166.93 Supporting Contention That Maker of Promissory Note Is Liable on Instrument [Com. Code §§ 3105, 3412]--Action by Holder [Com. Code §§ 3407, 3115], Including Authorized Completion of Instrument and Enforceable Alterations

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or jury instructions. It may also be combined with a general contention that a party is liable on an instrument because of the signature on it (see, e.g., § 166.90).*]

DEFENDANT _____ [*name*], THE MAKER OF THE PROMISSORY NOTE THAT IS THE SUBJECT OF THIS ACTION, IS LIABLE ON THAT INSTRUMENT BECAUSE _____ [*specify, e.g.,* IT WAS COMPLETED AFTER HE/SHE SIGNED IT, IN ACCORDANCE WITH THE PROVISIONS OF THE NOTE, AND HE/SHE IS THEREFORE LIABLE ON THE INSTRUMENT AS COMPLETED].

A. Issuer Includes Maker. "Issuer" means a maker or drawer of an instrument (*Com. Code § 3105(c)*).

B. Maker Held to Instrument According to its Terms or as Later Completed. The issuer of a note is obliged to pay the instrument (a) according to its terms at the time it was issued or, if not issued, at the time it first came into possession of a holder, or (b) if the issuer signed an incomplete instrument, according to its terms when completed, to the extent stated in *Commercial Code Sections 3115* and *3407*. The obligation is owed to a person entitled to enforce the instrument or to an endorser who paid the instrument under *Commercial Code Section 3415* (*Com. Code § 3412*).

[*EITHER*]

[*Optional*] **C. Authorized Completion of Incomplete Instrument--Incomplete Instrument Is Instrument Under *Commercial Code Section 3104*.** If a signed writing the contents of which show at the time of signing that it is incomplete but that the signer intended it to be completed by the addition of words or numbers is an instrument under

Commercial Code Section 3104, it may be enforced according to its terms if it is not completed, or according to its terms as augmented by completion (*Com. Code § 3115(a), (b)*).

[*OR*]

[*Optional*] **C. Authorized Completion of Incomplete Instrument--Incomplete Instrument Is Not Instrument Under *Commercial Code Section 3104*.** If a signed writing the contents of which show at the time of signing that it is incomplete but that the signer intended it to be completed by the addition of words or numbers is not an instrument under *Commercial Code Section 3104*, but, after completion, the requirements of *Commercial Code Section 3104* are met, the instrument may be enforced according to its terms as augmented by completion (*Com. Code § 3115(a), (b)*).

[*CONTINUE*]

[*Optional*] **D. Alterations Enforceable by Nonholder in Due Course.** A party whose obligation is affected by an alteration fraudulently made is liable on the obligation if that party assents to or is precluded from asserting the alteration. [No other alteration discharges a party, and the instrument may be enforced according to its original terms] (*Com. Code § 3407(b)*).

[*Optional*] **E. Alteration Defined.** "Alteration" means (1) an unauthorized change in an instrument that purports to modify in any regard the obligation of a party, or (2) an unauthorized addition of words or numbers or other change to an incomplete instrument relating to the obligation of a party (*Com. Code § 3407(a)*). The term means physical alteration of the instrument, for example, erasure or interlineation, not acts done that are unconnected with or beyond the instrument affecting the rights of the parties (*Borden v. Berg (1965) 232 Cal. App. 2d 169, 172, 42 Cal. Rptr. 664*).

[*Optional*] **F. Material Alteration Made by Stranger Who Acts Without Authority.** A material alteration in a note, made in accordance with an agreement between the maker and payee, does not avoid the note (*American Trust Co. v. Greuner (1936) 13 Cal. App. 2d 279, 283, 56 P.2d 967*).

[*Optional*] **G. Alterations Enforceable by Holder in Due Course.** A person taking a fraudulently altered instrument for value, in good faith, and without notice of the alteration, may enforce rights with regard to the instrument (1) according to its original terms, or (2) in the case of an incomplete instrument altered by unauthorized completion, according to its terms as completed (*Com. Code § 3407(c)*).

[*Optional*] **H. Alteration of Instrument Occurs if Unauthorized Completion of Incomplete Instrument.** If words or numbers are added to an incomplete instrument without the signer's authority, there is an alteration of the incomplete instrument under *Commercial Code Section 3407* (*Com. Code § 3115(c)*).

[*Optional*] **I. Related Agreement Does Not Modify Obligation.** An agreement executed contemporaneous with an instrument does not modify the obligation to pay the instrument (*Kent v. Lampman (1943) 59 Cal. App. 2d 407, 411, 139 P.2d 57*).

[2] Comments

[a] Use of Form

This memorandum is for use in supporting the contention that a maker of a note is liable on the instrument [*see Com. Code §§ 3115* (incomplete instruments), 3407 (alterations), 3412 (maker's obligation)].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Therefore, counsel should discuss the facts regarding the signatures on the note, and show that the defendant is a maker. For example, if appropriate, counsel should show that although the party sought to be charged signed an incomplete instrument, it was later completed according to the terms of the agreement, and consequently that party is liable on it under *Com. Code §§ 3115(b)* and *3407(c)*.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the maker is liable on the instrument.

[b] Liability of Maker Is Primary

The maker's liability is "primary," in the contractual (as opposed to the suretyship) sense, which means that there are no conditions precedent to the maker's liability. At the time stated in the instrument, the maker must seek out and pay the holder. The holder has the right to bring an action as soon as the note becomes due, but will first usually make a demand on the maker, for the following reasons: (1) the maker may not have knowledge of the identity and whereabouts of a subsequent holder; and (2) the holder may wish to preserve enforcement rights against endorsers, which generally includes making a presentment to the maker [*see* Hart & Willier, Negotiable Instruments Under the Uniform Commercial Code, § 1B.05[2] (Matthew Bender)]. For discussion of endorsers' liability [*see § 166.96[2]*].

[c] Related Points and Authorities

In an appropriate case, the points and authorities *set out in § 166.106* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Alteration Defined

In ***Borden v. Berg*** *(1965) 232 Cal. App. 2d 169, 42 Cal. Rptr. 664* , a bank loaned two business associates money in connection with their business concern. One of the associates signed a promissory note as maker, payable to the second associate, who endorsed the note in the form of an endorsement and guaranty of payment. Subsequently, a second note was executed in the same form. The notes were unsecured, but the payee-endorser told a bank official that his money in a savings account in that bank would "stand good" for his obligation. The payee-endorser died, at which time nothing had been paid on either note. After paying the interest due, at the request of the bank, the maker executed a third note. In the following year, the bank took the funds remaining in the decedent's account and applied it on the note. The executrix of the decedent's estate brought an action against the bank to recover the savings account money. The trial court found in favor of the bank, and plaintiff filed a motion to vacate and set aside the judgment, which the court denied. Plaintiff appealed.

The court of appeal affirmed, holding that there was no alternation of any instrument within the meaning of former Civ. Code §§ 3205 and 3206 [*now see Com. Code § 3407*]. The court rejected plaintiff's contention that the maker's execution of the third note discharged the obligation of the deceased because it constituted a novation of the prior notes (*232 Cal. App. 2d 169, 171)* . Rather, the intent of both the maker and the bank in executing the third note was to extend the time for payment. Neither party intended to release the guarantor nor to discharge or pay or alter in any way the guaranteed obligation on the first two notes. The court also rejected plaintiff's argument that the instrument was avoided by reason of "material alteration." The term "alteration," as used in relation to negotiable instruments, means physical alteration of the instrument, for example, erasure or interlineation, not acts done unconnected with or outside the instrument affecting the rights of the parties (*232 Cal. App. 2d 169, 172)* .

[b] Material Alteration Made by Stranger Who Acts Without Authority

In ***American Trust Co. v. Greuner*** *(1936) 13 Cal. App. 2d 279, 56 P.2d 967* , the maker of a promissory note that was secured by several other notes, which were in turn secured by a deed of trust, failed to pay on the note. Concerned that the bank-payee would take action against him, the maker spoke to a bank representative, who told him that he could obtain an extension on the note, but would have to pay increased interest. A bank teller who had charge of the note pencilled in the new rate of interest on the face of the note as a notation to himself. There was a conflict in evidence regarding whether the maker expressly agreed to the increase. In an action by the bank against the maker, the trial court found in the bank's favor, and denied the maker's motion for new trial. The maker appealed.

The court of appeal affirmed, holding that the rule that a material alteration of an instrument avoids it has no application when the alteration has been made by a stranger who acts without authority. The mere placing of the notation on the instrument by the note teller for the purpose of his information in computing the interest did not constitute a material alteration of the instrument (*13 Cal. App. 2d 279, 282)* .

[c] Related Agreement Does Not Modify Obligation

In ***Kent v. Lampman*** *(1943) 59 Cal. App. 2d 407, 139 P.2d 57* , the payee of a promissory note entered into several related transactions with the makers of the note, who were three individuals and a corporation. One of the agreements, executed contemporaneously with the note, purported to promise a bonus from profits to the payee, and to set forth a condition precedent for the payment of the note. In an action by the payee against the makers, the court of appeal affirmed the trial court's holding that the agreement did not modify the obligation to pay the note. The condition precedent under the related agreement was therefore inapplicable as a defense. The makers of a note engage to pay it according to the tenor of the instrument [interpreting former Civ. Code § 3141, *now see Com. Code § 3412*] (*59 Cal. App. 2d 407, 411)* .

[4] Additional Authorities

[a] Related Agreement Does Not Modify Obligation

In *Sapin v. Security First National Bank (1966) 243 Cal. App. 2d 201, 52 Cal. Rptr. 254* , the maker of several promissory notes brought an action for declaratory and injunctive relief, and for reformation, against the holders of the note. The court of appeal affirmed with regard to the causes of action that concerned whether the terms of the note could be supplemented by proof of an oral promise. A note may not be varied or supplemented by evidence of the parties' contemporaneous oral agreements (*243 Cal. App. 2d 201, 204)* .

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16-166 California Points & Authorities § 166.94

§ 166.94 Supporting Contention That Maker of Promissory Note Is Liable on Instrument [Com. Code §§ 3105, 3412]--Action by Transferee [Com. Code § 3203(a), (b)]--"Shelter" Doctrine

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT _____ [*name*], THE MAKER OF THE PROMISSORY NOTE, IS LIABLE ON THE NOTE BECAUSE _____ [*name of plaintiff*] TOOK AS TRANFEREE AND IS ENTITLED TO THE PROTECTION OF THE SHELTER DOCTRINE, COMMERCIAL CODE SECTION 3203(b).

A. "Transfer" Defined. An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving it to the person receiving delivery the right to enforce the instrument (*Com. Code § 3203(a)*).

B. "Shelter" Doctrine. Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any rights of the transferor to enforce the instrument, including any right as holder in due course, but the transferee cannot acquire rights of a holder in due course by a transfer, directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument (*Com. Code § 3203(b)*; see *Finalco, Inc. v. Roosevelt (1991) 235 Cal. App. 3d 1301, 1306*).

C. Purpose and Effect of "Shelter" Doctrine. The purpose of the "shelter" policy of *Commercial Code Section 3203(b)* is to assure the holder in due course a free market for its paper. Thus, when a transferee takes an instrument from a holder in due course, the transferee takes free from all claims and defenses to the same extent as did the holder in due course even if the transferee is aware of those claims and defenses (*Finalco, Inc. v. Roosevelt (1991) 235 Cal. App. 3d 1301, 1305* ; *see* Official Comment 2 to U.C.C. § 3-203 (1990)).

[2] Comments

[a] Use of Form

This memorandum is for use in supporting the contention that the maker is liable to a transferee from a holder in due course [*see Com. Code § 3203(a), (b)*], even if the transferee knew of certain claims and defenses at the time it acquired the instrument.

Counsel should insert argument in this form, showing the relationship between the facts and the points of law stated. For instance, it will be important to establish that the transferee was not a party to any fraud or illegality affecting the instrument.

These points and authorities may be adapted for use in another procedural context, such as a trial or appellate brief.

[3] Discussion of Authorities

[a] "Shelter" Doctrine

The note in ***Finalco, Inc. v. Roosevelt*** *(1991) 235 Cal. App. 3d 1301* , originated as part of a private offering of tax shelter units in computer equipment and related equipment leases. The defendant/maker purchased units and theoretically did not have to make any payments on the notes given as part of the purchase price because the projected lease payments were supposed to cover the payments on the notes. The original equipment owner assigned purchaser's note to the defendant, the equipment lessee, which endorsed it to a bank. After the purchaser stopped making payments on the notes, the lessee commenced suit for collection. The purchaser defended and cross complained on the ground that the original offering was fraudulent and in violation of securities laws and that the lessee and the original owner of the equipment conspired in the fraud and offering. The evidence did not establish any conspiracy between the lessee and the original owner/issuer. The lessee reacquired the note from the bank several months before trial. The trial court entered judgment for plaintiff/lessee on the complaint and on the cross complaint. Defendant/maker appealed.

The court of appeal affirmed. The court said the "shelter" policy of former Com. Code § 3201(1) [*now see Com. Code § 3203(b)*] is to assure the holder in due course a free market for its paper. Thus, when a transferee takes an instrument from a holder in due course, the transferee takes free from all claims and defenses to the same extent as did the holder in due course even if the transferee is aware of those claims and defenses (*235 Cal. App. 3d 1301, 1305)* . If this was not the rule, a holder in due course could be deprived of a market for the instrument if the obligor widely disseminated notice of a claim or defense (*235 Cal. App. 3d 1301, 1305-1306)* . In construing the former statute, the court stated that the issue of whether the plaintiff/lessee "had notice of any claim or defense against it" when it reacquired the note from the bank was apparently never raised because the opinion did not discuss application of that exception to the shelter doctrine to the record before it, except to make clear that the lessee had no notice of the default when it endorsed the note to the bank (*235 Cal. App. 3d 1301, 1305)* . The court said it was irrelevant that the lessee could not reacquire the note as a holder in due course. Former Com. Code § 3201(1) [*now see Com. Code § 3203(b)*] does not make the transferee a holder in due course; it transfers the freedom from claims and defenses of the original holder in due course to each succeeding transferee. The lessee was merely another transferee in the chain of transfers of the note. If the transferee happens to have been a prior holder in due course, it takes back from its transferor the same rights it transferred. Thus, the lessee was in no better or worse position vis-a-vis the purchaser's claims and defenses against the issuer than if it had originally retained possession of the note (*235 Cal. App. 3d 1301, 1306)* .

[b] Purpose and Effect of "Shelter" Doctrine

Finalco, Inc. v. Roosevelt *(1991) 235 Cal. App. 3d 1301* , is *discussed under § 166.94[3][a]*.

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16-166 California Points & Authorities § 166.95

§ 166.95 Supporting Contention That Maker of Promissory Note Is Liable on Instrument [Com. Code §§ 3105, 3412]--Action by Accommodation Party [Com. Code § 3419(e)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or jury instructions.*]

DEFENDANT _____ [*name*], THE MAKER OF THE PROMISSORY NOTE THAT IS THE SUBJECT OF THIS ACTION, IS LIABLE TO PLAINTIFF ON THAT INSTRUMENT BECAUSE PLAINTIFF IS _____ [*specify, e.g.,* AN ACCOMMODATION PARTY WHO WAS COMPELLED TO PAY THE FULL AMOUNT OF THE NOTE].

A. Accommodation Party Signs Instrument to Incur Liability. An accommodation party is a party to the instrument who signs the instrument for the purpose of incurring liability on the instrument without being a direct beneficiary of the value given for the instrument (*Com. Code § 3419(a)*).

B. Accommodation Party May Recover From Accommodated Party. An accommodation party who pays the instrument is entitled to reimbursement from the accommodated party and is entitled to enforce the instrument against the accommodated party (*Com. Code § 3419(e)*).

C. Payor of Note Succeeds to Rights of Holder. On payment and surrender of the paper, the payor succeeds to the rights of the holder (*Collection Control Bureau v. Weiss (1975) 50 Cal. App. 3d 865, 870, 123 Cal. Rptr. 625*).

[2] Comments

[a] Use of Form

This memorandum is for use in supporting the contention that a maker of a note is liable on the instrument in an action brought by an accommodation party [*see Com. Code § 3419(e)* (accommodation party)].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Thus, counsel should discuss the facts regarding the capacity of the person bringing the action, for example, that of accommodation party, on the instrument.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the maker is liable on the instrument.

[3] Discussion of Authorities

[a] Payor of Note Succeeds to Rights of Holder

In ***Collection Control Bureau v. Weiss*** *(1975) 50 Cal. App. 3d 865, 123 Cal. Rptr. 625* , the payee of a promissory note made demand on the maker after default, the guarantor paid the amount of the note, and the payee assigned the note to the guarantor. The note was not marked paid on its face. The guarantor assigned the note to a collection agency, which brought an action against the maker to recover the amount due. The trial court sustained defendant's demurrer on the ground that payment of the note by the guarantor extinguished the note. Plaintiff appealed.

The court of appeal reversed, holding ultimately that a note assigned to a guarantor after payment is not thereby extinguished (discussing various factors regarding the parties' intent, and the fact that the note was not marked paid on its face) (*50 Cal. App. 3d 865, 868-871)* . One of the inconsistencies eliminated by the adoption of the Uniform Commercial Code is the denial of the guarantor's right to collect on a note that the guarantor has paid. Under former Com. Code § 3415(5) [*now see Com. Code § 3419(e)*], an accommodation party is not liable to the party accommodated, and an accommodation party who pays the instrument has a right of recourse on the instrument against that party. Former Com. Code § 3415(5) [*now see Com. Code § 3419(e)*] is intended to supersede decisions that held that an accommodation endorser who paid the instrument could not maintain an action on it against the accommodated party, because the endorser had no former rights to which the endorser was remitted. Under ordinary principles of suretyship, the accommodation party who pays is subrogated to the rights of the holder paid, and should have recourse on the instrument [citing former Official Comment 5 to U.C.C. § 3-415, *now see* Official Comment 5 to U.C.C. § 3-419 (1990)] (*50 Cal. App. 3d 865, 870)* .

[4] Additional Authorities

[a] Accommodation Party May Recover From Accommodated Party

In *Williams v. Walker (1924) 66 Cal. App. 672, 226 P. 939* , the court of appeal reversed the trial court's judgment in favor of accommodation endorsers of a note in an action against the payee and makers, on the ground that there was insufficient consideration for the note. In discussing the standing of the endorsers, however, the court noted that the maker of a negotiable promissory note is liable to one who, before maturity, in good faith, and without notice or knowledge of fraud or lack of original consideration, endorses the note for the accommodation of the payee, and without the maker's request, if the endorser is compelled to pay it on default of the maker (*66 Cal. App. 672, 674)* .

[b] Payor of Note Succeeds to Rights of Holder

The court of appeal in *Flojo Internat., Inc. v. Lassleben (1992) 4 Cal. App. 4th 713, 6 Cal. Rptr. 2d 99* , reversed the trial court's denial of attorney's fees and calculation of interest to an accommodation maker. Cross defendant was the assignee of the guarantor or accommodation maker who paid plaintiff corporation's note. The payee assigned the note after payment to the guarantor or accommodation maker, who in turn assigned it to his son, the cross defendant. The trial court allowed cross defendant to recover the principal amount of the note and interest at the legal rate from the date of payment, but cross defendant sought attorney's fees and interest at the note rate, which was two percent above the payee's prime rate, increasing to four percent over prime after default. The corporate maker argued that the guarantor

could not be an "accommodation maker" as defined by former Com. Code § 3415(1) [*now see Com. Code § 3419(a)* ("accommodation party")], because the guaranty was not on the note itself but on a separate piece of paper. The court said the distinction did not matter. Whether considered an accommodation maker whose rights are determined by former Com. Code § 3415(5) [*now see Com. Code § 3419(e)*] or a guarantor whose rights are determined by *Civ. Code § 2848*, cross defendant was entitled to enforce the note against the principal (or "party accommodated") in accordance with its terms, which included the right to recover attorney's fees and interest at the note rate rather than the legal rate. The court cited *Collection Control Bureau v. Weiss (1975) 50 Cal. App. 3d 865, 869, 123 Cal. Rptr. 625* (*discussed under § 166.95[3][a]*), for the rule that payment extinguishes the note and only leaves the accommodation maker or guarantor its equitable remedies does not apply when the note is assigned rather than marked "paid" on its face (*4 Cal. App. 4th 713, 721-723)* .

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16-166 California Points & Authorities § 166.96

§ 166.96 Supporting Contention That Endorser of Promissory Note Is Liable on Instrument [Com. Code §§ 3415, 3502(a)]--Scope of Liability, Dishonor, and Special Endorsements

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or jury instructions. It may also be combined with a general contention that a party is liable on an instrument because of the signature on it (see, e.g., § 166.90).*]

DEFENDANT _____ [*name*], AN/THE ENDORSER OF THE PROMISSORY NOTE THAT IS THE SUBJECT OF THIS ACTION, IS LIABLE ON THAT INSTRUMENT BECAUSE _____ [*specify, e.g.,* TIMELY PRESENTMENT WAS MADE TO THE MAKER, AND NOTICE OF DISHONOR GIVEN].

[*EITHER*]

A. Endorser's Liability/Endorsement of Complete Instrument. If an instrument is dishonored and the endorsement does not disclaim the endorser's liability, the endorser is obliged to pay the amount due on the instrument according to the instrument's terms at the time it was endorsed. The endorser's obligation is owed to a person entitled to enforce the instrument or to a subsequent endorser who paid the instrument under *Commercial Code Section 3415* (*Com. Code § 3415(a), (b)*).

[*OR*]

A. Endorser's Liability/Endorsement of Incomplete Instrument. If an instrument is dishonored and the endorsement does not disclaim the endorser's liability, the endorser is obliged to pay the amount due on the instrument according to its terms when completed, to the extent stated in *Commercial Code Sections 3115* and *3407*. The endorser's obligation is owed to a person entitled to enforce the instrument or to a subsequent endorser who paid the instrument

under *Commercial Code Section 3415* (*Com. Code § 3415(a), (b)*).

[*CONTINUE, EITHER*]

B. Note Payable on Demand/Dishonor After Presentment. If the note is payable on demand, the note is dishonored if presentment is duly made to the maker and the note is not paid on the day of presentment (*Com. Code § 3502(a)(1)*).

[*OR*]

B. Note Not Payable on Demand/Dishonor After Presentment. If the note is not payable on demand and is payable at or through a bank or the terms of the note require presentment, the note is dishonored if presentment is duly made and the note is not paid on the day it becomes payable or the day of presentment, whichever is later (*Com. Code § 3502(a)(2)*).

[*OR*]

B. Note Not Payable on Demand/Dishonor When Not Paid When Due. If the note is not payable on demand and is not payable at or through a bank or the terms of the note do not require presentment, the note is dishonored if it is not paid on the day it becomes payable (*Com. Code § 3502(a)(3)*).

[*CONTINUE*]

[*Optional*] **C. Special Endorsee Is Not Sole Obligee of Special Endorser.** A special endorsement does not limit liability by the special endorser to the person to whom the endorsement is expressly payable; the endorser's obligation under a special endorsement runs to all subsequent endorsees whose title is derived from the special endorsement (*Kingsbury v. Whitacre (1934) 1 Cal. App. 2d 100, 103-105, 36 P.2d 241* ; *see Com. Code § 3205(a)* (definition of "special endorsement")).

[*This form may be combined, when appropriate, with contention relating to excuse of presentment or notice (see, e.g., § 166.97).*]

[2] Comments

[a] Use of Form

This memorandum is for use in supporting the contention that an endorser of a promissory note is liable on the instrument [*see Com. Code §§ 3415* (endorser's obligation), 3501 (presentment), 3502 (when dishonor occurs), 3503 (notice of dishonor), 3505 (evidence of dishonor)]. Note that the Commercial Code uses the spelling "indorser" [*see Com. Code § 3415*], but this chapter uses the more commonly accepted spelling "endorser." Counsel may prefer to use the former spelling when quoting the code in a memorandum.

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Therefore, counsel should discuss the facts regarding the endorsement signatures on the note, and show that defendant is an endorser with regard to the note's contents at the time of the signing.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel

wishes to raise the issue that the endorser is liable on the instrument.

[b] Liability of Endorser Is Secondary or Conditional

The endorser's liability is "secondary," in that the endorser's promise is conditional. Before the endorser's duty to pay the holder or subsequent endorser arises, certain events must occur or acts must be performed by the holder or subsequent holder. The three conditions to the liability of an endorser of either a draft or a note are the following [*see* Hart & Willier, Negotiable Instruments Under the Uniform Commercial Code, § 8.01 (Matthew Bender)]:

- Unless excused, presentment for payment must be made to the drawee or acceptor of a draft, the maker of a note, or any other payor of an instrument. This is required because each endorser takes the instrument relying primarily on the promise or credit of the party who issues the instrument. Thus, payment should be looked to first and must be sought first from the maker or the person whom the maker has ordered to pay on its behalf [*see Com. Code §§ 3501* (presentment), 3502 (dishonor generally requires presentment), 3504(a) (excused presentment)];

- The drawee, acceptor, or maker must dishonor the instrument [*see Com. Code §§ 3415(a)* (endorser's obligation exists only if instrument is dishonored), 3502 (when instrument dishonored), 3505 (evidence of dishonor)]; and

- Unless excused, notice of that dishonor must be given to the endorser against whom recovery is sought [*see Com. Code §§ 3415(c)* (failure to give notice of dishonor as required discharges endorser's liability), 3503].

For a memorandum of points and authorities regarding excuse of presentment and notice, see *§ 166.97*.

[c] Federal Law Governs Liability for Endorsement of Checks and Money Orders Between Banks and Customers

Although the authority in this form is applied in the context of a promissory note, counsel should be aware that, as related to endorsements on checks and postal money orders, *Com. Code §§ 3414, 3415*, and *3503* no longer apply between banks or between a depositary bank and its customer. They have been superseded by *12 C.F.R. § 229.35* to the extent they are inconsistent with that regulation [*see 12 C.F.R. § 229.35*; 12 C.F.R. § 229, Appendix E, Commentary to § 229.35; *see also 12 U.S.C. § 4007(b)* (authority for regulations that supersede Com. Code)]. Similarly, *Com. Code § 3501(b)(1)* has been superseded by *12 C.F.R. § 229.36(b)* with regard to the place at which a paying bank must accept presentment [*12 C.F.R. § 229.36(b)*; 12 C.F.R. § 229, Appendix E, Commentary to § 229.36(b)].

[d] Related Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 166.107 -166.109* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Special Endorsee Is Not Sole Obligee of Special Endorser

In ***Kingsbury v. Whitacre*** *(1934) 1 Cal. App. 2d 100, 36 P.2d 241* , the payees of a promissory note endorsed the note. The first endorsee signed the note with a special endorsement. The person to whom the note was payable under the special endorsement endorsed the note and delivered it to the ultimate holder, who brought suit against the makers and the first endorsee (who had specially endorsed the note). (The payees, as general endorsers, had been released from liability, an issue not raised at trial.) The trial court found in the holder's favor and against the party who specially

endorsed the note. The special endorsee appealed, contending that by virtue of the special endorsement, her liability ran only to the party expressly named in that endorsement, and not to subsequent endorsees.

The court of appeal affirmed, holding that there is no liability limitation regarding special endorsements. The special endorsee must sign the note in order to render the note negotiable, but the special endorsement per se does not affect the endorser's liability to subsequent endorsees [discussing former Civ. Code § 3115, *now see Com. Code § 3205*]. The court contrasted the effect of a qualified endorsement with that of a special endorsement. A qualified endorsement may be made by adding to the endorser's signature the words "without recourse," or similar words, which limits the endorser's liability [discussing former Civ. Code § 3119, *now see Com. Code § 3415*]. Because the endorser in the instant case did not include a qualified endorsement, her liability was unaffected, and ran to the ultimate holder whose title derived through the special endorsement (*1 Cal. App. 2d 100, 103-105)* .

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16-166 California Points & Authorities § 166.97

§ 166.97 Supporting Contention That Endorser of Promissory Note Is Liable on Instrument [Com. Code §§ 3415, 3502(a)]--Presentment, Notice of Dishonor, or Delay in Notice Excused [Com. Code § 3504]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or jury instructions. It may also be combined with a general contention that a party is liable on an instrument because of the signature on it (see, e.g., § 166.90), or with a general contention that an endorser of a note is liable on an instrument (see, e.g., § 166.96).*]

[THE DELAY IN] _____ [PRESENTMENT AND/OR NOTICE OF DISHONOR] OF THE PROMISSORY NOTE THAT IS THE SUBJECT OF THIS ACTION _____ IS/ARE EXCUSED BECAUSE _____ [*specify, e.g.,* PLAINTIFF EXPRESSLY WAIVED PRESENTMENT AND NOTICE OF DISHONOR].

[*EITHER*]

A. Presentment Excused by Reasonable Diligence. Presentment for payment or acceptance of an instrument is excused if the person entitled to present the instrument cannot with reasonable diligence make presentment (*Com. Code § 3504(a)(1)*).

[*OR*]

A. Presentment Excused by Repudiation. Presentment for payment or acceptance of an instrument is excused if the maker or acceptor has repudiated an obligation to pay the instrument (*Com. Code § 3504(a)(2)*).

[*OR*]

A. Presentment Excused by Death or Insolvency. Presentment for payment or acceptance of an instrument is excused if the maker or acceptor is dead or in insolvency proceedings (*Com. Code § 3504(a)(2)*).

[*OR*]

A. Presentment Excused by Terms of Instrument. Presentment for payment or acceptance of an instrument is excused if by the terms of the instrument presentment is not necessary to enforce the obligation of endorsers or the drawer (*Com. Code § 3504(a)(3)*).

[*OR*]

A. Presentment Excused by Waiver. Presentment for payment or acceptance of an instrument is excused if the drawer or endorser whose obligation is being enforced has waived presentment (*Com. Code § 3504(a)(4)*); *Wiener v. Van Winkle (1969) 273 Cal. App. 2d 774, 785, 78 Cal. Rptr. 761* ; *Moore v. Trinity Oil & Gas Co. (1957) 149 Cal. App. 2d 221, 223-224, 308 P.2d 31*).

[*OR*]

A. Presentment Excused Because Party to Be Charged Does Not Expect Payment. Presentment for payment or acceptance of an instrument is excused if the drawer or endorser whose obligation is being enforced has no reason to expect or right to require that the instrument be paid or accepted (*Com. Code § 3504(a)(4)*).

[*OR*]

A. Presentment Excused Because of Instruction Not to Pay. Presentment for payment or acceptance of an instrument is excused if the drawer instructed the drawee not to pay or accept the draft (*Com. Code § 3504(a)(5)*).

[*OR*]

A. Presentment Excused Because of No Obligation to Pay. Presentment for payment or acceptance of an instrument is excused if the drawee was not obligated to the drawer to pay the draft (*Com. Code § 3504(a)(5)*).

[*OR*]

A. Notice Excused by Terms of Instrument. Notice of dishonor is excused if by the terms of the instrument notice of dishonor is not necessary to enforce the obligation of a party to pay the instrument (*Com. Code § 3504(b)(1)*).

[*OR*]

A. Notice Excused By Waiver. Notice of dishonor is excused if the party whose obligation is being enforced waived notice of dishonor (*Com. Code § 3504(b)(2)*).

[*OR*]

A. Delay in Notice of Dishonor Excused. Delay in giving notice of dishonor is excused if the delay was caused by circumstances beyond the control of the person giving notice and the person giving the notice exercised reasonable diligence after the cause of the delay ceased to operate (*Com. Code § 3504(c)*).

[*CONTINUE*]

[*Optional*] **B. Waiver of Presentment Also Waiver of Notice.** A waiver of presentment is also a waiver of notice of dishonor (*Com. Code § 3504(b)*).

[2] Comments

[a] Use of Form

This memorandum is for use in supporting the contention that an endorser of a promissory note is liable on the instrument, if presentment or notice of dishonor was not made, or was delayed, and the omission or delay was excused [*see Com. Code § 3504*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Therefore, counsel should discuss the facts regarding the delay or failure of presentment and/or notice of dishonor. For example, if appropriate, counsel should show that the endorser expressly waived entitlement thereto by language incorporated in the instrument itself.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the endorser is liable on the instrument.

[b] Related Points and Authorities

In an appropriate case, the points and authorities *set out in § 166.108* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Presentment Excused by Waiver

In ***Wiener v. Van Winkle*** *(1969) 273 Cal. App. 2d 774, 78 Cal. Rptr. 761* , the makers of a promissory note requested extensions on two occasions; the requests were denied because the holders feared an extension would jeopardize their rights against the endorsers and guarantors. The endorsers and guarantors also requested an extension, but did not agree with the proposed conditions. After default on the note, the holders brought an action against the endorsers and guarantors. The trial court found in favor of the holders, and the endorsers and guarantors appealed.

The court of appeal affirmed, holding that presentment may be excused if waived expressly or by implication. Requesting an extension on a note constitutes a waiver of any defect in presentment (*273 Cal. App. 2d 774, 785)* .

In ***Moore v. Trinity Oil & Gas Co.*** *(1957) 149 Cal. App. 2d 221, 308 P.2d 31* , an action on two promissory notes, the endorser promised to pay the amount due, even though the holder made a late presentment to the maker. The court of appeal reversed the trial court's judgment in the endorser's favor, holding that a failure to make a timely presentation or

give a timely notice of dishonor may be waived by the endorser (*149 Cal. App. 2d 221, 223)* . In the instant case, the facts showed the endorser's implied waiver by virtue of his promise to pay (*149 Cal. App. 2d 221, 223-224)* .

[4] Additional Authorities

[a] Presentment Excused by Waiver

The facts and procedural background of *Hurlbut v. Quigley (1919) 180 Cal. 265, 180 P. 613* , are discussed in *§ 166.98[3][a]*. In *Hurlbut*, the Supreme Court held that an accommodation endorser has a right of contribution against joint endorsers to recover their proportional share of a note. The signatures of the joint endorsers were preceded by the words, "For value received I hereby waive presentment, demand and notice of protest on the within note." The Court affirmed the trial court's finding in plaintiff's favor on the issue that all the endorsers were bound jointly. The Court held that when an endorser precedes a signature by a statement waiving presentment, demand, and notice, it constitutes a valid endorsement with an enlarged liability, and is a waiver of some of the conditions imposed by law on the payee in the endorser's favor (*180 Cal. 265, 269)* .

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D. Liability Of Parties

16-166 California Points & Authorities § 166.98

§ 166.98 Supporting Contention That Accommodation Endorser Is Liable to Joint Endorser for Contribution

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT _____ [*name*], AN ACCOMMODATION ENDORSER OF THE PROMISSORY NOTE THAT IS THE SUBJECT OF THIS ACTION, IS LIABLE TO PLAINTIFF FOR HIS/HER PROPORTIONAL OBLIGATION ON THAT INSTRUMENT BECAUSE PLAINTIFF IS A JOINT ENDORSER WHO WAS COMPELLED TO PAY THE NOTE ON THE MAKER'S DEFAULT.

Accommodation Endorser Entitled to Contribution From Joint Endorsers. An accommodation endorser who paid more than that endorser's proportional share of a note is entitled to contribution from the joint endorsers (*Hurlbut v. Quigley (1919) 180 Cal. 265, 270, 180 P. 613*).

[2] Comments

[a] Use of Form

This memorandum is for use in supporting the contention that an accommodation endorser is liable to a joint endorser who paid the full amount of a note for contribution in the amount of the proportional share owed under the note.

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Therefore, counsel should discuss the facts showing that the endorser paid the full amount of a note when that note was due, and set forth the proportional amounts owed by the remaining joint endorsers.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that an accommodation endorser is liable to a joint endorser.

[3] Discussion of Authorities

[a] Accommodation Endorser Entitled to Contribution From Joint Endorsers

In ***Hurlbut v. Quigley*** *(1919) 180 Cal. 265, 180 P. 613* , one of three accommodation endorsers of a note paid the full amount due on the note, under a judgment on the note against him, and brought an action for contribution to recover one-third of the amount from one of the other endorsers. The Supreme Court affirmed the trial court's finding in plaintiff's favor on the issue that all the endorsers were bound jointly, and held that the right of contribution exists in favor of any of the joint accommodation endorsers who paid more than that endorser's proportional share of the debt (*180 Cal. 265, 270)* . (This case is discussed for the issue of waiver of notice in § 166.97[4][a].)

[4] Additional Authorities

[a] Accommodation Endorser Entitled to Contribution From Joint Endorsers

In *Machado v. Fernandez (1887) 74 Cal. 362, 16 P. 19* , the payee on a promissory note made demand on the maker and gave notice of dishonor to the joint accommodation endorsers, one of whom paid the note in full, then brought an action against the co-endorser for contribution. The Supreme Court reversed the trial court's order that sustained defendant's demurrer on grounds that the payee's delay in making a demand exonerated the endorsers from liability. The Court also held that an accommodation endorser who pays the full amount of a note has a right of contribution against a joint endorser (*74 Cal. 362, 365)* .

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16-166 California Points & Authorities § 166.99

§ 166.99 Supporting Contention That Guarantor of Promissory Note Is Liable on Instrument [Com. Code § 3419(d)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions. It may also be combined with a general contention that a party is liable on an instrument because of the signature on it (see, e.g., § 166.90).*]

DEFENDANT IS LIABLE AS A GUARANTOR ON THE PROMISSORY NOTE THAT IS THE SUBJECT OF THIS ACTION BECAUSE _____ [*specify, e.g.,* HE/SHE SIGNED THE NOTE WITH THE WORDS "COLLECTION GUARANTEED" AND IT IS APPARENT THAT PAYMENT CANNOT BE OBTAINED FROM THE OTHER PARTY].

Obligation to Pay. If the signature of a party to an instrument is accompanied by words indicating unambiguously that the party is guaranteeing collection rather than payment of the obligation of another party to the instrument, the signer is obliged to pay the amount due on the instrument to a person entitled to enforce the instrument only if (1) execution of judgment against the other party has been returned unsatisfied, (2) the other party is insolvent or in an insolvency proceeding, (3) the other party cannot be served with process, or (4) it is otherwise apparent that payment cannot be obtained from the other party (*Com. Code § 3419(d)*).

[2] Comments

[a] Use of Form

This memorandum is for use in supporting the contention that a guarantor of a promissory note is liable on the instrument [*see Com. Code § 3419(d)*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Therefore, counsel should discuss the facts regarding the words added to the signature, and show why the

language constitutes a guaranty, and specify to what extent the guaranty applies.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that a guarantor is liable on the instrument.

[b] Guarantors Under Revised Article 3

The 1990 version of Article 3 of the Uniform Commercial Code, adopted for the most part by California in 1992 (effective January 1, 1993), omitted pre-1990 U.C.C. § 3-416 [*see* former Com. Code § 3416], which defined and determined the rights of persons who signed using the words "payment guaranteed" or "collection guaranteed." The reason for and the effect of the omission is stated to be as follows: "Former Article 3 was confusing because the obligation of a guarantor was covered both in Section 3-415 and in Section 3-416. The latter section suggested that a signature accompanied by words of guaranty created an obligation distinct from that of an accommodation party. Revised Article 3 eliminates that confusion by stating in Section 3-419 the obligation of a person who uses words of guaranty" [Official Comment 4 to U.C.C. § 3-419 (1990)]. Although Subsection (2) of the pre-1990 version of Section 3-416 is carried over to Section 3-419 with no substantial change [*compare* former Com. Code § 3416(2) *with Com. Code § 3419(d)*], there is no provision in the revised Article 3 (or the revised California Commercial Code) comparable to the pre-1990 Section 3-416(1) [*see* former Com. Code § 3416(1)]. That section stated, in effect, that if an endorser signs with the words "payment guaranteed" the endorser waives presentment, dishonor, and notice of dishonor. Since the law generally protects sureties, it would appear that omission of the provision in the 1990 version (and the revised California Commercial Code) means that one signing "payment guaranteed" is now entitled to a dishonor of the instrument, and presentment and notice of dishonor if these are required [*see* Hart & Willier, Negotiable Instruments Under the Uniform Commercial Code, § 1C.34[5] (Matthew Bender)].

[c] Obligation of Guarantor Identical to That of Surety

The former distinction between guarantors and sureties was abolished by *Civ. Code § 2787*, which provides that a surety or guarantor is one who promises to answer for the debt, default, or miscarriage of another, or hypothecates property as security for such an obligation. Guaranties of collection and continuing guaranties are forms of suretyship obligations, and except insofar as necessary to give effect to provisions specially relating thereto, are subject to all provisions of law relating to suretyships in general [*Civ. Code § 2787*; *see Civ. Code §§ 2787-2855* (governing sureties generally)]. A letter of credit, however, is not a form of suretyship obligation. The term "letter of credit" means a "letter of credit" as defined in *Com. Code § 5102(a)(10)*, whether or not the engagement is governed by *Com. Code § 5101 et seq.* (letters of credit) [*Civ. Code § 2787*].

[d] Related Publications

For discussion regarding guarantors generally, see Hart & Willier, Negotiable Instruments Under the Uniform Commercial Code, §§ 13.12-13.14 (Matthew Bender).

For discussion and forms regarding suretyship issues generally, see California Forms of Pleading and Practice, Ch. 538, *Suretyship, Bonds, and Undertakings* (Matthew Bender).

[e] Related Points and Authorities

In an appropriate case, the points and authorities *set out in § 166.111* may be used to oppose the contention supported by this form.

For memoranda of points and authorities relating to suretyship generally, see Ch. 222, *Suretyship* .

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16-166 California Points & Authorities § 166.100

§ 166.100 Supporting Contention That Party Is Liable on Instrument--No Discharge by Conditional or Partial Tender [Civ. Code §§ 1486, 1494; Com. Code § 3603(a)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

THE NOTE HAS NOT BEEN DISCHARGED BY DEFENDANT'S ALLEGED TENDER BECAUSE DEFENDANT'S OFFER WAS PARTIAL AND IMPOSED AN UNWARRANTED CONDITION.

A. Effect of Tender. If tender of payment of an obligation to pay an instrument is made to a person entitled to enforce the instrument, the effect of tender is governed by principles of law applicable to tender of payment under a simple contract (*Com. Code § 3603(a)*).

B. Tender Must Be Unconditional. To constitute a valid tender, the offer of performance must be unconditional (*Civ. Code § 1494*; *Still v. Plaza Marina Commercial Corp. (1971) 21 Cal. App. 3d 378, 385* ; *Wiener v. Van Winkle (1969) 273 Cal. App. 2d 774, 782, 78 Cal. Rptr. 761*).

C. Tender Must Be of Full Performance. To constitute a valid tender, the offer must be of full performance (*Civ. Code § 1486*; *Still v. Plaza Marina Commercial Corp. (1971) 21 Cal. App. 3d 378, 385* ; *Wiener v. Van Winkle (1969) 273 Cal. App. 2d 774, 783, 78 Cal. Rptr. 761*).

[2] Comments

[a] Use of Form

This memorandum is for use in supporting the contention that a maker, endorser, or guarantor remains liable on a note after an offer of performance that failed to qualify as a tender because is was not unconditional or was not an offer of full performance [*see Com. Code § 3603* (effect of tender)].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that a maker, endorser, or guarantor remains liable on the instrument.

[b] Related Points and Authorities

Other aspects of tender and objections to tender are addressed by the points and *authorities in §§ 166.101* and *166.102*. Points and authorities addressing the related doctrine of equitable estoppel are included in §§ 166.103 (opposing application of the doctrine) and 166.106 (supporting application of the doctrine to prohibit collection by the payee of the remaining balance).

For points and authorities concerning tender and other acts that stop the accrual of interest on an obligation, see Ch. 121, *Interest* .

For additional points and authorities addressing other issues relating to tender in the context of notes secured by deed of trust, see Ch. 230, *Trust Deeds and Real Property Mortgages* .

[3] Discussion of Authorities

[a] Tender Must Be Unconditional

Civ. Code § 1494 provides that an offer of performance must be free from any conditions that the creditor is not bound to perform.

Still ***v. Plaza Marina Commercial Corp.*** *(1971) 21 Cal. App. 3d 378* , commenced suit to collect a $326,000 note taken as part of the down payment for land sold to defendant. The note contained a provision for attorney's fees; plaintiffs alleged, in an affidavit supporting their attachment of the real property, that the amount of attorney's fees for which defendant was obligated was $100,000. Defendant's undertaking for release of the attachment was set at $400,000. Defendant's answer denied that it was necessary for plaintiffs to employ an attorney, but admitted the genuineness of the note, that it was overdue, and the amount owed. Defendant also interposed a defense and counterclaim of partial failure of consideration in the sum of $30,000 based on the value of land not conveyed to defendant at the time of the sale. At the same time defendant filed its answer and counterclaim, it filed a "Tender of Payment," which stated that defendant tendered to plaintiffs the sum of $326,000 principal, accrued interest, and costs of suit properly incurred, and which included an offer to pay $1,000 as attorney's fees. The tender provided that if plaintiffs refused to accept the sum offered as attorney's fees, defendant continued to offer the principal amount, interest, and costs, without prejudice to the right of plaintiffs to litigate the amount of attorney's fees. After unsuccessfully trying to have the tender and the counterclaim stricken, plaintiffs filed a response to the tender, in which plaintiffs stated they would accept the $326,000 principal, together with all interest through the date of tender of payment, costs of suit allowed by the court, and attorney's fees of 10 percent of the principal amount. No money was ever paid. Judgment was awarded for plaintiffs in the principal amount of $324,000, which reflected a $2,000 offset for the land defendant had not received, plus interest and costs and attorney's fees of $27,500. Defendant appealed, contending, among other things, that the tender stopped the running of interest and additional attorney's fees beyond the sum of $1,000.

The court of appeal affirmed. The court first described a tender as an offer of performance made with the intent to extinguish an obligation [*see Civ. Code § 1485*]. When properly made, it has the effect of putting the other party in default if he or she refuses to accept it. The court cited former Com. Code § 3604 [*now see Com. Code § 3603*] and *Civ.*

Code § 1504 for the proposition that when a party makes a tender of full payment to the holder of a promissory note when or after it is due, he or she is discharged to the extent of all subsequent liability for interest, costs, and attorney's fees (*21 Cal. App. 3d 378, 385)* . However, to be valid, a tender must be of full performance [*Civ. Code § 1486*] and it must be unconditional [*Civ. Code § 1494*]. The court said there was substantial evidence in the record before it to support an implied finding that the so-called tender was not an offer of full payment of the note and was qualified and conditional by reason of the counterclaim. At the hearing on the motion to strike, defendant's counsel explained the reason for filing the counterclaim and the tender simultaneously, saying defendant was willing to pay the amount of the tender. Then, if it turned out after trial that defendant was entitled to a setoff, defendant would collect that as a separate matter. Defendant's counsel viewed it, in effect, as two separate law suits. The court of appeal disagreed, noting that the counterclaim arose out of the very transaction for which the promissory note was given and that defendant claimed a partial failure of consideration for the note (*21 Cal. App. 3d 378, 385)* . Defendant's argument was further weakened by its contention that the tender constituted a waiver of the counterclaim (*21 Cal. App. 3d 378, 385-386)* . The court said the facts were contrary; defendant continually asserted the counterclaim from the time of filing through the trial and to judgment (*21 Cal. App. 3d 378, 386)* .

Plaintiffs in ***Wiener v. Van Winkle*** *(1969) 273 Cal. App. 2d 774, 78 Cal. Rptr. 761* , were assignees of a note and deed of trust and sought to impose liability on defendants as guarantors and endorsers. Defendants were the original payees and had endorsed the note and guaranteed it as part of the transfer to plaintiffs. After the suit was commenced, the attorney for the makers contacted plaintiffs' attorney in an attempt to settle the matter. Plaintiffs' attorney included $1,900 for attorney's fees in their demands. That was the amount that was provided for by the default schedule established in the local rules of court. The makers objected to paying attorney's fees. Plaintiffs' attorney countered by saying that plaintiffs would accept the full amount of principal and interest owing, would assign the note and deed of trust back to defendants (it appears at this point that plaintiffs thought the makers' attorney was acting for defendants), and that the matter of attorney's fees and costs could be left for the court to decide. That offer was rejected, and no unconditional offer or tender was ever made. Judgment was entered for plaintiffs for the difference between the amount of the note and the proceeds of the foreclosure sale plus interest from the date of the sale to the date of judgment, but plaintiffs were denied attorney's fees. Both parties appealed.

Except for reversing the denial of attorney's fees, the court of appeal affirmed. One of defendants' contentions was that they had been discharged from any liability by the makers' offer on the ground that that offer constituted a tender. The trial court had found that the offer by the makers was not free from an improper condition and therefore failed as a tender. The court of appeal held that the record supported that finding. The court cited *Civ. Code §§ 1494* and *1498*, saying it is well established that a tender must be unconditional and that an unwarranted condition annexed to an offer to pay is in effect a refusal to perform. The demand that plaintiffs eliminate or reduce their claim for attorney's fees was such an unwarranted condition (*273 Cal. App. 2d 774, 782)* .

[b] Tender Must Be of Full Performance

Civ. Code § 1486 provides that an offer of partial performance is of no effect.

Still v. Plaza Marine Commercial Corp. *(1971) 21 Cal. App. 3d 378* , is *discussed under § 166.100[3][a]*.

The facts and procedural background of ***Wiener v. Van Winkle*** *(1969) 273 Cal. App. 2d 774, 78 Cal. Rptr. 761* , are *discussed under § 166.100[3][a]*. Defendants also claimed to have made a tender of their own, although the only evidence of it that was introduced was the reply letter from plaintiffs' attorney. Defendants characterized that letter as an admission of their tender. The so-called "admission" letter referred to the fact that defendants did not have the cash to be able to pay any stipulated judgment and so had offered to enter into a confession of judgment if plaintiffs would immediately reassign the beneficial interest under the deed of trust. The court of appeal said that the letter referred to an offer less than a full tender, and thus was not a tender (*273 Cal. App. 2d 774, 783)* .

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16-166 California Points & Authorities § 166.101

§ 166.101 Supporting Contention That Maker Remains Liable on Instrument--Creditor's Objections to Tender [Civ. Code § 1501; Code Civ. Proc. § 2076] Were Sufficient

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT'S LIABILITY ON THE NOTE HAS NOT BEEN DISCHARGED BY DEFENDANT'S [ALLEGED] TENDER BECAUSE PLAINTIFF'S OBJECTIONS TO THAT OFFER WERE SUFFICIENT TO INFORM DEFENDANT WHAT WOULD BE REQUIRED FOR DISCHARGE.

A. Creditor Must Specify Objections to Tender. A person to whom tender is made must, at the time, specify any objection he or she may have to the money, instrument, or property, or be deemed to have waived the objection. If the objection is to the amount of money, the terms of the instrument, or the amount or kind of property, he or she must specify the amount, terms, or kind that he or she requires or be precluded from objecting afterwards (*Code Civ. Proc. § 2076*; *see Civ. Code § 1501*).

B. Purpose for Requiring Objections to Tender. The purpose of *Code of Civil Procedure Section 2076* [and *Civil Code Section 1501*] in requiring a creditor to specify his or her objections to a tender from the debtor is to inform a debtor who is willing and able to pay his or her debt what the creditor demands so the debtor may, if he or she wishes, make a conforming tender (*Sanguansak v. Myers (1986) 178 Cal. App. 3d 110, 115, 223 Cal. Rptr. 490* ; see *Still v. Plaza Marine Commercial Corp. (1971) 21 Cal. App. 3d 378, 386*).

C. Reasonable Compliance Is Sufficient. A creditor's reasonable compliance with *Code of Civil Procedure Section 2076* is sufficient not to constitute a waiver if the creditor has made known to the debtor what will be required for full performance (see *Still v. Plaza Marine Commercial Corp. (1971) 21 Cal. App. 3d 378, 386, 98 Cal. Rptr. 414*).

[2] Comments

[a] Use of Form

This memorandum is for use in supporting the contention that a payee or holder has not waived full performance by failing to object to an insufficient tender, and that the maker remains liable on a note when the payee's or holder's objections to the tendered performance were sufficient under the circumstances to make known what would be required as full performance [*see Code Civ. Proc. § 2076*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that objections to the tendered performance were sufficient under the circumstances.

[b] Related Points and Authorities

The points and *authorities in § 166.102* may be combined with those in this form to make the additional argument that compliance with *Code Civ. Proc. § 2076* was not even required in the particular situation. Those in § 166.103 may be included to negate any contention that the payee is equitably estopped from collecting the remaining balance. The points and *authorities in § 166.100* address the insufficiency of tender.

For additional points and authorities addressing other issues relating to tender in the context of notes secured by deed of trust, see Ch. 230, *Trust Deeds and Real Property Mortgages* .

[3] Discussion of Authorities

[a] Creditor Must Specify Objections to Tender

Civ. Code § 1501 provides that all objections to the mode of an offer of performance, which the creditor has an opportunity to state at the time to the person making the offer, and which could be then obviated by him or her, are waived by the creditor if not then stated.

[b] Purpose for Requiring Objections to Tender

Plaintiff in ***Sanguansak v. Myers*** *(1986) 178 Cal. App. 3d 110, 223 Cal. Rptr. 490* , was the maker of a promissory note that was executed by plaintiff's attorney-in-fact and secured by a deed of trust. Defendant was the payee. The note provided for a prepayment penalty equal to six month's interest on any amount paid in excess of 20 percent of the principal in any 12-month period. The attorney-in-fact had been assisted by an attorney at law in procuring the loan. On February 4, 1983, plaintiff's attorney-in-fact went to a branch of defendant's collection agent with a $60,000 cashier's check to prepay the note. The agent's employee forgot the prepayment penalty, which would have been $4,104, and calculated the amount owing as $57,085.50. The employee accepted the cashier's check and gave the attorney-in-fact the agent's check for the difference. Thereafter, the agent sent three notices to the attorney-in-fact: one on February 10 indicating a zero balance owed; one on February 17 indicating a balance owing of $4,104; and another on March 3 showing the $4,104 balance. The attorney-in-fact had moved and the notices were not forwarded or received. Eventually, defendant commenced foreclosure proceedings and plaintiff commenced an action to restrain the foreclosure sale.

During the trial of the action, the attorney-in-fact testified that the maker had another account from which the penalty could possibly have been paid if it had been assessed on February 4. By October, however, when the foreclosure sale was scheduled, plaintiff no longer had sufficient funds to pay the penalty. Judgment was entered for defendant, and plaintiff appealed.

The court of appeal affirmed. Plaintiff contended that acceptance of the tender without objection precluded defendant from raising any objection to the sufficiency of the tender. The court of appeal disagreed. The court first set forth *Code Civ. Proc. § 2076* and *Civ. Code § 1501,* and noted that those two sections should be read together. The purpose of both sections is to allow a debtor who is willing and able to pay his or her debt to know what the creditor demands so the debtor, if he or she wishes, may make a conforming tender. The court commented that most of the decisions applying *Code Civ. Proc. § 2076* and *Civ. Code § 1501* rely on the doctrine of estoppel, and that the cases generally arise either from the creditor's refusal of a tender without specifying the reason for the refusal or from the creditor's acceptance of a tender without informing the debtor that the tender is nonconforming (*178 Cal. App. 3d 110, 115)* .

The facts and procedural background of ***Still v. Plaza Marine Commercial Corp.*** *(1971) 21 Cal. App. 3d 378, 98 Cal. Rptr. 414* , are discussed in *§ 166.100[3][a]*. After concluding that defendant's offer did not constitute a valid tender, the court said that even if the tender was assumed to be valid, substantial evidence to support a finding of plaintiffs' objection to the amount offered for attorney's fees existed in the declaration attached to plaintiffs' motion to strike, statements of plaintiffs' counsel at the hearing on the motion to strike, and the response to the tender. *Code Civ. Proc. § 2076* requires a person to whom tender is made to specify, at that time, any objection he or she may have "to the money" or be deemed to have waived the objection. If the objection is to the amount of money, he or she must specify the amount required or be precluded from objecting afterwards. The purpose of these requirements is to inform a debtor who is willing and able to pay his or her debt what the creditor demands so the debtor may make his or her offer conform. The court concluded that under the circumstances, which included the confusion caused by defendant's counterclaim and the time required to hear and decide plaintiffs' motion to strike, plaintiffs' response to the tender was a reasonable compliance with *Code Civ. Proc. § 2076* (*21 Cal. App. 3d 378, 386)* .

[c] Reasonable Compliance Is Sufficient

See discussion of ***Still v. Plaza Marine Commercial Corp.*** *(1971) 21 Cal. App. 3d 378, 98 Cal. Rptr. 414* , under § 166.101[3][b].

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16-166 California Points & Authorities § 166.102

§ 166.102 Supporting Contention That Maker Remains Liable on Instrument--Payee Not Barred by Its Unintentional Mistake in Failing to Demand Proper Tender [Civ. Code § 1501; Code Civ. Proc. § 2076]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

THE NOTE HAS NOT BEEN DISCHARGED BY OPERATION OF CODE OF CIVIL PROCEDURE SECTION 2076 ON THE GROUND OF PLAINTIFF'S FAILURE TO OBJECT TO THE INSUFFICIENCY OF A TENDER BECAUSE THAT SECTION DOES NOT APPLY TO AN UNINTENTIONAL MISTAKE BY A PAYEE.

Objections Not Required in Case of Creditor's Unintentional Mistake. The requirements of *Code of Civil Procedure Section 2076* [and *Civil Code Section 1501*], that a creditor specify his or her objections to an insufficient tender from the debtor, do not apply to, and thus the creditor's right to full performance is not waived by, a creditor's unintentional failure to demand proper tender (see *Sanguansak v. Myers (1986) 178 Cal. App. 3d 110, 116-117, 223 Cal. Rptr. 490*).

[2] Comments

[a] Use of Form

This memorandum is for use in supporting the contention that *Code Civ. Proc. § 2076* and *Civ. Code § 1501* are not applicable and thus do not result in waiver of the right to full performance because of a payee's unintentional mistake in failing to demand proper tender.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel

wishes to raise the issue that objections to the tendered performance were not waived.

[b] Related Points and Authorities

The points and *authorities in § 166.101* may be combined with those in this form to make the additional argument that objections sufficient under *Code Civ. Proc. § 2076* have been made in the particular situation. The points and *authorities in § 166.100* address the insufficiency of tender.

For additional points and authorities addressing other issues relating to tender and objections to tender in the context of notes secured by deed of trust, see Ch. 230, *Trust Deeds and Real Property Mortgages* .

[3] Discussion of Authorities

[a] Objections Not Required in Case of Creditor's Unintentional Mistake

The facts and procedural background of ***Sanguansak v. Myers*** *(1986) 178 Cal. App. 3d 110, 223 Cal. Rptr. 490* , are *set forth in § 166.101[3][b]*. The court of appeal concluded that *Code Civ. Proc. § 2076* and *Civ. Code § 1501* were not applicable to the case because application of those sections is limited to debtors who perform or tender performance in good faith to creditors who refuse to accept or intentionally fail to demand proper tender (*178 Cal. App. 3d 110, 116-117)* . This situation involved neither of the foregoing criteria. The agent's failure to obtain the prepayment penalty was the result of a mistake, which it attempted to correct by immediately sending the notice. Defendant was not responsible for the fact that the notices were never received. In addition, the court said that plaintiff, through the attorney-in-fact, was, or should have been, aware of the prepayment charge because the provision was clearly stated in the note (*178 Cal. App. 3d 110, 117)* .

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16-166 California Points & Authorities § 166.103

§ 166.103 Supporting Contention That Maker Remains Liable on Instrument--Equitable Estoppel [Evid. Code § 623] Not Applicable to Payee--Maker Knew or Should Have Known True Facts and Suffered No Detriment

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

PLAINTIFF IS NOT EQUITABLY ESTOPPED TO REQUIRE PAYMENT OF THE BALANCE OWING ON THE NOTE BECAUSE [THE FAILURE TO INCLUDE THAT AMOUNT IN ITS INITIAL DEMAND WAS AN UNINTENTIONAL OVERSIGHT AND] DEFENDANT KNEW, OR SHOULD HAVE KNOWN, THE CORRECT BALANCE OWING AND SUFFERED NO DETRIMENT FROM PLAINTIFF'S ERRONEOUS CALCULATION.

[*EITHER*]

A. Doctrine of Equitable Estoppel. The doctrine of equitable estoppel provides that when a creditor is apprised of the facts and misrepresents those facts to a debtor who is ignorant of the true facts, with the intention that the debtor act on the representation or in a way that would lead the debtor to believe his or her reliance was intended by the creditor, and the debtor relies on the creditor's misstatement or conduct, the creditor is estopped to deny that the facts are other than as represented (*Sanguansak v. Myers (1986) 178 Cal. App. 3d 110, 117-118, 223 Cal. Rptr. 490* ; *San Diego Mun. Credit Union v. Smith (1986) 176 Cal. App. 3d 919, 922-923, 222 Cal. Rptr. 467*).

[*AND/OR*]

B. Party Estopped From Contradicting Prior Conduct Relied on by Other Party. [*See § 166.106, Paragraph A.*]

[*CONTINUE*]

C. Equitable Estoppel Is Not Applicable to Maker Who Knew True Facts and Suffered No Detriment. The doctrine of equitable estoppel does not apply to prevent a payee from collecting the full amount it is owed when the maker knows or should know the true amount owing[, for instance, when the amount in dispute relates to a prepayment charge provision shown clearly on the face of the note], and has not suffered any detriment by the time the payee notifies him or her of the correct amount owing (*Sanguansak v. Myers (1986) 178 Cal. App. 3d 110, 118, 223 Cal. Rptr. 490*).

[2] Comments

[a] Use of Form

This memorandum is for use in supporting the contention that the doctrine of equitable estoppel does not bar a payee from collecting the full balance owing on a note after the payee's incorrect statement of the final balance owing when the maker was, or should have been, aware of the true balance and suffered no detriment [*see Evid. Code § 623*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that equitable estoppel does not apply.

[b] Related Points and Authorities

The points and *authorities in § 166.106* may be used to oppose those in this form when the maker did not know the true facts and relied, to his or her detriment, on the payee's statement. The points and *authorities in §§ 166.100 -166.102* address related issues of tender and objections to tender.

For additional points and authorities addressing other related issues in the context of notes secured by deed of trust, see Ch. 230, *Trust Deeds and Real Property Mortgages* .

[3] Discussion of Authorities

[a] Doctrine of Equitable Estoppel

The facts and procedural background of ***Sanguansak v. Myers*** *(1986) 178 Cal. App. 3d 110, 223 Cal. Rptr. 490* , are discussed in *§ 166.101[3][b]*. Concerning plaintiff's contention that defendant was equitably estopped from relying on the prepayment charge as a basis for instituting foreclosure proceedings, the court of appeal noted that the doctrine of equitable estoppel is founded on concepts of equity and fair dealing, and provides that a person may not deny the existence of a state of facts if he or she has intentionally led another to believe a particular circumstance to be true and to rely on that belief to his or her detriment (*178 Cal. App. 3d 110, 117)* . There are four elements that must be present in order for the doctrine to apply: (1) the party to be estopped must be apprised of the facts; (2) the party to be estopped must intend that his or her conduct be acted on, or must so act that the party asserting estoppel has the right to believe it was so intended; (3) the other party must be ignorant of the true state of the facts; and (4) the party asserting estoppel must rely on the other party's conduct to his or her detriment (*178 Cal. App. 3d 110, 117-118)* .

San Diego Mun. Credit Union v. Smith *(1986) 176 Cal. App. 3d 919, 222 Cal. Rptr. 467* , is discussed in *§ 166.106[3][a]*.

[b] Equitable Estoppel Is Not Applicable to Maker Who Knew True Facts and Suffered No Detriment

The facts and procedural background of ***Sanguansak v. Myers*** *(1986) 178 Cal. App. 3d 110, 223 Cal. Rptr. 490* , are discussed in *§ 166.101[3][b]*. The portion of the opinion discussing the basis and elements of the doctrine of equitable estoppel is set forth under § 166.103[3][a]. Considering the application of the doctrine to the facts before it, the court of appeal said it was clear that plaintiff was not "ignorant of the true state of the facts." The attorney-in-fact, acting on behalf of plaintiff, executed the note with the advice of legal counsel, and made payment. The terms of the prepayment penalty were clearly set forth in the promissory note. Thus, plaintiff could not claim to be ignorant of the prepayment penalty. In addition, plaintiff had not suffered any detriment when the collection agent sent the correct information to the attorney-in-fact. The obligation could have been satisfied at that time by the payment of the same amount that was properly due when the attorney-in-fact tendered payment at the collection agent's office. Thus, the court concluded, defendant was not equitably estopped from relying on this debt as the basis for instituting foreclosure proceedings (*178 Cal. App. 3d 110, 118)* .

[4] Additional Authorities

[a] Doctrine of Equitable Estoppel

Although holding the doctrine of equitable estoppel inapplicable, the court of appeal in *Hair v. State of California (1991) 2 Cal. App. 4th 321, 2 Cal. Rptr. 2d 871* , affirmed a judgment for the State of California, saying that the elements of the doctrine were: (1) the party to be estopped must be apprised of the true facts; (2) that party must intend that his or her conduct be acted on, or must act so that the party asserting the estoppel had a right to believe that was the intent; (3) the party asserting the estoppel must be ignorant of the true facts; and (4) that party must rely on the conduct or statement to his or her injury. If any one of the elements is missing, there is no estoppel (*2 Cal. App. 4th 321, 328)* . The case was brought by the assignee of the purchaser of a winning lottery ticket. The ticket was purchased by plaintiff's spouse, who did not rely on an outdated sign where the ticket was purchased stating that the payout would be over 10 years. Because there was no reliance, the regular 18-year payout mandated by the lottery rule actually in effect governed (*2 Cal. App. 4th 321, 329)* .

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CHAPTER 166 NEGOTIABLE INSTRUMENTS
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16-166 California Points & Authorities § 166.104

§ 166.104 Opposing Contention That Party Is Liable on Instrument--No Signature [Com. Code § 3401]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT _____ [*name*] IS NOT LIABLE ON THE INSTRUMENT THAT IS THE SUBJECT OF THIS ACTION BECAUSE HIS/HER SIGNATURE IS NOT ON THE INSTRUMENT.

A. No Liability Without Signature. [*See § 166.90, Paragraph A.*]

B. Undisclosed Principal Not Liable. An undisclosed principal is not liable on an instrument because each party who takes a negotiable instrument makes a contract with the parties who appear on the face of the instrument to be bound for its payment; a person chargeable on an instrument must be disclosed by name on the instrument itself (*Pratt v. Hopper (1936) 12 Cal. App. 2d 291, 294, 55 P.2d 517*).

C. Language Purporting to Include Other Obligors Not Controlling. An instrument that contains language purporting to include other obligors does not extend the obligation beyond the actual signer of instrument (*Williams v. Silverstein (1931) 213 Cal. 269, 276, 2 P.2d 165*).

[*Optional*] **D. Unauthorized Signature Ineffective/Liability Limited to Parties Taking or Paying In Good Faith.** Unless otherwise provided by Division 3 or 4 (*Commercial Code Section 3101 et seq.*), an unauthorized signature is ineffective except as the signature of the unauthorized signer in favor of a person who in good faith pays the instrument or takes it for value (*Com. Code § 3403(a)*).

[*Optional*] **E. Ratification of Unauthorized Signature/Mere Silence Does Not Constitute Ratification.** An unauthorized signature may be ratified for all purposes of Division 3 (*Commercial Code Section 3101 et seq.*) (*Com. Code § 3403(a)*). However, mere silence of a party does not constitute ratification (*California Bank v. Sayre (1890) 85*

Cal. 102, 105, 24 P. 713).

[*This form may be combined, when appropriate, with a contention that a signature was not placed on the instrument (see, e.g., § 166.107).*]

[2] Comments

[a] Use of Form

This memorandum is for use in opposing the contention that a party is liable on an instrument, on the ground that that party's signature is not on the instrument [*see Com. Code § 3401*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. For example, if the client is an undisclosed principal, counsel should discuss the fact that the client did not sign the note.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that a party is not liable because he or she did not sign the instrument.

[b] Liability on Underlying Obligation

Notwithstanding *Com. Code § 3401(a)*, a party who does not sign an instrument may still be liable on the original obligation for which the instrument was given, or liable based on other facts and circumstances relating to the same transaction [*Potts v. First City Bank (1970) 7 Cal. App. 3d 341, 344, 86 Cal. Rptr. 552* ; *McClung v. Saito (1970) 4 Cal. App. 3d 143, 151, 84 Cal. Rptr. 44]* . The law distinguishes between an action on a promissory note and an action to recover the consideration given for the note [*McClung v. Saito (1970) 4 Cal. App. 3d 143, 151, 84 Cal. Rptr. 44]* .

[c] Related Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposing the contention supported by the points and *authorities in § 166.90*.

For memoranda of points and authorities relating to issues regarding the liability of an undisclosed principal generally, see Ch. 182, *Principal and Agent* .

[3] Discussion of Authorities

[a] Undisclosed Principal Not Liable

In ***Pratt v. Hopper*** *(1936) 12 Cal. App. 2d 291, 55 P.2d 517* , an individual signed a promissory note on behalf of undisclosed principals with whom he conducted related real estate transactions. In an action by the payee of the note against the signer and the undisclosed principals, the trial court sustained demurrers of the undisclosed principals, and the payee appealed.

The court of appeal affirmed, holding that an undisclosed principal on a negotiable instrument is not liable because of the character of the instrument. When a negotiable instrument is executed by an agent without sufficiently indicating on its face who the principal is, parol evidence cannot be introduced to charge the principal, although the agent executed the instrument as an agent. This is an exception to the general contract rule holding an undisclosed principal liable, because each party who takes a negotiable instrument makes a contract with the parties who appear on its face to be bound for its payment. In suits on negotiable instruments, no evidence is admissible to charge any person as principal unless that name is in some way disclosed on the instrument itself (*12 Cal. App. 2d 291, 293-294)* . Regardless of the

nature of the cause of action, an attempt to hold an undisclosed principal to a negotiable instrument must fail (interpreting former Civ. Code § 3099, now see *Com. Code § 3401(a)*) (*12 Cal. App. 2d 291, 297)* .

[b] Language Purporting to Include Other Obligors Not Controlling

The facts and procedural background of ***Williams v. Silverstein*** *(1931) 213 Cal. 269, 2 P.2d 165* , are discussed in *§ 166.21[3][a]*. In *Williams,* the Supreme Court held that a separate agreement does not render a related note nonnegotiable if the note contains an absolute and unconditional promise to pay at a certain time, and together with the agreement does not evidence an intention to make the payment dependent on any contingency (*213 Cal. 269, 275)* . The issues in *Williams* primarily concerned the parties' obligation on a note with regard to the locations of the various signatures. The note included the clause "we promise to pay," and was signed by one maker, whose signature was followed by two blank lines. Two additional signatures were placed on the back of the note. The holder of the note brought an action against all the signers as makers of the note. The Court upheld the appellate court ruling that the signatures on the back of the note rendered the signers endorsers and not original makers or guarantors (*213 Cal. 269, 271)* . The mere fact that the notes contained the words "we promise to pay" had no significance, even though signed by only one maker. The words "we promise to pay" cannot be held to include endorsers or other parties whose names are not signed as makers (*213 Cal. 269, 276)* .

[c] Ratification of Unauthorized Signature/Mere Silence Does Not Constitute Ratification

In ***California Bank v. Sayre*** *(1890) 85 Cal. 102, 24 P. 713* , a person discovered that her name had been forged on a promissory note, and immediately notified the payee's agent of the forgery. The agent told her that the note had been deposited with the principal as collateral. The person whose name was forged did nothing further, and the payee brought an action against her. In affirming the trial court's judgment against the payee, the Supreme Court held that mere silence does not amount to a ratification (*85 Cal. 102, 104-105)* .

[4] Additional Authorities

[a] No Liability Without Signature

In *Federal Deposit Ins. Corp. v. First Nat. Finance (9th Cir. 1978) 587 F.2d 1009* , the federal court of appeals affirmed the granting of summary judgments in favor of the holder of certain promissory notes. The notes were signed by an individual as president of a corporation, and the funds obtained in exchange for the notes were transferred to a different corporation. The court rejected the makers' contention that they were exonerated because the primary obligor was the corporation to which the funds were transferred, and that corporation was dismissed from the suit. A person whose name does not appear on an instrument is not a party to it (*587 F.2d 1009, 1013)* .

[b] Undisclosed Principal Not Liable

In *First Western Bank & Trust Co. v. Bookasta (1968) 267 Cal. App. 2d 910, 73 Cal. Rptr. 657* , an action to recover on a corporate promissory note, the court of appeal affirmed the sustaining of a demurrer by an officer of the corporation who was neither an obligor nor a signing officer. Under former Com. Code § 3401(1) [*now see Com. Code § 3401(a)*], no person is liable on an instrument unless that person's signature appears on it (*267 Cal. App. 2d 910, 913-914)* .

In *Lady v. Thomas (1940) 38 Cal. App. 2d 688, 102 P.2d 396* , the court of appeal affirmed the trial court's judgment denying relief against an undisclosed principal of a promissory note secured by a trust deed. A suit may not be maintained on a promissory note against an undisclosed principal whose signature does not appear on the note, unless the note is signed by use of the trade or other assumed name of the undisclosed principal (interpreting former Civ. Code § 3099, *now see Com. Code § 3401(a)*) (*38 Cal. App. 2d 688, 689-690)* .

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16-166 California Points & Authorities § 166.105

§ 166.105 Opposing Contention That Party Is Liable on Instrument in Capacity in Which Party Signed--Party Is Accommodation Party Although Did Not Sign Expressly in That Capacity [Com. Code § 3419(a), (c)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

_____ [*Specify party opposing liability, e.g.,* DEFENDANT] IS NOT LIABLE ON THE _____ [*specify instrument, e.g.,* NOTE] AS _____ [*specify, e.g.,* A MAKER] BECAUSE HE/SHE IS IN FACT _____ [*specify, e.g.,* AN ACCOMMODATION PARTY] TO THAT INSTRUMENT. HE/SHE SIGNED THE _____ [*specify instrument, e.g.,* NOTE] FOR THE PURPOSE OF INCURRING LIABILITY ON THE INSTRUMENT WITHOUT BEING A DIRECT BENEFICIARY OF THE VALUE GIVEN FOR THE INSTRUMENT[, AND _____ (*specify, e.g.,* PAROL EVIDENCE IS ADMISSIBLE TO SUPPORT THE ACCOMMODATION CHARACTER OF HIS/HER SIGNATURE BECAUSE THE ACTION IS BETWEEN THE PARTIES TO THE INSTRUMENT)].

A. Accommodation Party Signs Instrument to Incur Liability. If an instrument is issued for value given for the benefit of a party to the instrument ("accommodated party") and another party to the instrument ("accommodation party") signs the instrument for the purpose of incurring liability on the instrument without being a

direct beneficiary of the value given for the instrument, the instrument is signed by the accommodation party "for accommodation" (*Com. Code § 3419(a)*).

[*Optional*] **B. Presumption of Accommodation Party.** A person signing an instrument is presumed to be an accommodation party (*Com. Code § 3419(c)*; *see Com. Code § 1206* (presumption affects burden of producing evidence)). A party challenging accommodation-party status must rebut the presumption by producing evidence that the signer was in fact a direct beneficiary of the value given for the instrument (Official Comment 3 to U.C.C. § 3-419 (1990)).

[*Optional*] **C. Notice That Instrument Is Signed for Accommodation.** There is notice that the instrument is signed for accommodation if the signature is an anomalous endorsement or is accompanied by words indicating that the signer is acting as surety or guarantor with regard to the obligation of another party to the instrument (*Com. Code § 3419(c)*).

[*Optional*] **D. Discharge of Accommodation Party.** An accommodation party is discharged under *Commercial Code Section 3605(c), (d),* or *(e)* if the person entitled to enforce the instrument knows of the accommodation or has notice under *Commercial Code Section 3419(c)* that the instrument was signed for accommodation (*Com. Code § 3605(h)*).

[*Optional*] **E. Action Between Parties.** As between the parties, parol evidence is admissible to show that the maker of a note is, in fact, an accommodation maker (*Brown v. Volz (1949) 90 Cal. App. 2d 793, 799, 204 P.2d 110* (construing prior law)).

[2] Comments

[a] Use of Form

This memorandum is for use in opposing the contention that a party is liable on an instrument in the capacity in which that party signed, if the party did not expressly sign in an accommodation capacity but may nevertheless claim that status [*see Com. Code § 3419*].

The contention would likely arise either in an action against the purported accommodation party charging that party as a maker to the instrument [*see, e.g., Com. Code § 3419(b)*] or in an action between the parties, in which the purported accommodation party would wish to assert rights against another party [*see, e.g., Brown v. Volz (1949) 90 Cal. App. 2d 793, 204 P.2d 110* (construing prior law; *discussed in § 166.105[3*][a])]. Consequently, this contention would most likely be made by the person purporting to be an accommodation party.

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Therefore, counsel should discuss the facts regarding the character of the signature. If parol evidence is sought to be introduced, counsel should show that the action is of a type in which parol evidence is admissible, for example, an action between the parties.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that a party is an accommodation party to the instrument.

[b] Related Publications

For discussion regarding accommodation makers generally, see Hart & Willier, Negotiable Instruments Under the Uniform Commercial Code, § 13.10 (Matthew Bender).

[c] Related Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposing the contention supported by the points and *authorities in § 166.91*.

[3] Discussion of Authorities

[a] Action Between Parties

In ***Brown v. Volz*** *(1949) 90 Cal. App. 2d 793, 204 P.2d 110* (construing prior law), the vendors of real property required a cosigner on the promissory note for the balance due, because of the purchaser's age and financial condition.

The purchaser obtained the cosignature of a friend on the note, who was also named in the deed as joint tenant. The purchaser of the property occupied the property herself, and was solely responsible for the payments on the note. After unsuccessfully requesting the cosigner to execute a quit claim deed to the property, she brought an action to quiet title to the property. The trial court found that plaintiff had included the cosigner's name on the deed under the mistaken impression that the cosigner was subject to a deficiency obligation on default of the note. The court ordered judgment for plaintiff, and defendant appealed.

The court of appeal affirmed, holding that, as between the parties, parol evidence is admissible to show that the maker of a note is, in fact, an accommodation maker (*90 Cal. App. 2d 793, 799)* . Under the facts, it was clear that the sole purpose and intent of defendant in signing the promissory note and trust deed was the loan of her name and credit to make the transaction acceptable to the sellers (construing former Civ. Code § 3110; *now see Com. Code § 3419(a)*). She wanted to further the transactions, not by paying any portion of the purchase price of the property, or any expenses incurred or to be incurred therewith, or by making the monthly payments on the note, all of which were to be paid by plaintiff, but by merely lending her name and credit to that of plaintiff (*90 Cal. App. 2d 793, 798)* . As between the parties, the status of defendant on the note was that of an accommodation maker. Under former Civ. Code § 3110, which required that the accommodation party not take for value, the court noted that the application of the rule was limited to those cases in which there is no consideration passing [*now see Com. Code § 3419(a), (b)*] (*90 Cal. App. 2d 793, 799)* .

[4] Additional Authorities

[a] Accommodation Party Signs Instrument to Incur Liability

In *Quality Wash Group v. Hallak (1996) 50 Cal. App. 4th 1687, 58 Cal. Rptr. 2d 592* , the purchaser of a car wash business located on leased property sued the sellers for breach of contract and negligent misrepresentation after improvements and fixtures were found to encroach on adjoining property. The purchaser also sought to hold the sellers liable as joint and several co-obligors on a promissory note that the purchasers had assumed from the sellers as part of the purchase price of the car wash and eventually paid off in settlement of a collection action brought by the holders of the note against the seller and purchaser. The purchaser also cross-complained against the seller seeking to collect on a separate promissory noted executed by the purchaser in favor of the seller, also as part of the purchase price of the car wash. The superior court entered judgment for the sellers.

The appellate court found that as guarantors of the purchaser's obligation to pay the note assumed by the purchasers, the sellers were exonerated by the purchaser's satisfaction of that obligation under *Civ. Code § 2839*. Correspondingly, the court found that the purchaser, as principal obligor under the note, had no right to seek reimbursement or contribution from the sellers as guarantors (*50 Cal. App. 4th 1687)* . The court also found that as guarantors of the note, the sellers came within the definition of "accommodation party" under *Com. Code § 3419(a)*.

Having assumed the note as part of the purchase price of the car wash, the purchaser was the direct beneficiary of the value given for the note and, therefore, was the "accommodated party" under *Com. Code § 3419(a)* (*50 Cal. App. 4th 1687, 1701-1702)* . The court held that as an accommodated party to the note who paid the note, the purchaser had no right of recourse against and was not entitled to contribution from the sellers, who were accommodation parties under the note (*50 Cal. App. 4th 1687, 1701-1702* ; *see § 166.110*).

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16-166 California Points & Authorities § 166.106

§ 166.106 Opposing Contention That Maker of Promissory Note Is Liable on Instrument--Payee Equitably Estopped to Assert Maker's Liability [Evid. Code § 623]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT _____ [*name*], THE MAKER OF THE PROMISSORY NOTE THAT IS THE SUBJECT OF THIS ACTION, IS NOT LIABLE ON THAT INSTRUMENT BECAUSE PLAINTIFF _____ [*name*] DELIBERATELY LED DEFENDANT TO BELIEVE HIS/HER OBLIGATION HAD BEEN EXTINGUISHED, AND CAUSED DEFENDANT TO RELY ON THAT BELIEF, AND IS THEREFORE EQUITABLY ESTOPPED FROM CONTRADICTING THAT ASSERTION.

A. Party Estopped From Contradicting Prior Conduct Relied on by Other Party. Whenever a party has, by that party's own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act on that belief, that party is not, in any litigation arising out of that statement or conduct, permitted to contradict it (*Evid. Code § 623*).

B. Payee's Assertion to Maker That Obligation Was Extinguished Defeats Right to Recover. A payee on a promissory note who leads a maker to believe that the maker's obligation under the instrument has been extinguished is equitably estopped from recovering from the maker on the note (*San Diego Mun. Credit Union v. Smith (1986) 176 Cal. App. 3d 919, 922-925, 222 Cal. Rptr. 467*).

[2] Comments

[a] Use of Form

This memorandum is for use in opposing the contention that a maker of a note is liable on the instrument, on the ground that the payee is estopped from asserting the maker's liability [*see Evid. Code § 623*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Therefore, counsel should discuss facts regarding the maker's assertions to the payee to the effect that the note was paid, and show that the maker relied on the payee's conduct.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the payee is estopped from asserting the maker's liability.

[b] Related Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposing the contention supported by the points and *authorities in § 166.103*.

[3] Discussion of Authorities

[a] Payee's Assertion to Maker That Obligation Was Extinguished Defeats Right to Recover

In ***San Diego Mun. Credit Union v. Smith*** *(1986) 176 Cal. App. 3d 919, 222 Cal. Rptr. 467* , a person wishing to buy an automobile obtained a loan from a credit union, for which he signed a promissory note and security agreement. Shortly thereafter, he sold the automobile, and brought the buyer to the payee's office. An employee of the payee accepted the buyer's check for the balance of the note, and induced the note's maker to sign over documents of title to the buyer. The employee stamped the note and security agreement "Paid." The buyer sold the automobile to a third party. The buyer's check to the payee was returned for insufficient funds. The payee declared the balance due, and presented the note's maker with an "extension agreement" to pay interest only, which the maker signed. The payee brought an action against the note's maker to recover damages for the balance due. The maker asserted the affirmative defenses of negligence and equitable estoppel. The trial court found in the maker's favor on the ground of equitable estoppel, and the payee appealed.

The court of appeal affirmed, holding that, under *Evid. Code § 623*, whenever a party has, by that party's own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act on that belief, that party is not, in any litigation arising out of that statement or conduct, permitted to contradict it (*176 Cal. App. 3d 919, 922-923)* . The elements of estoppel are (1) a representation or concealment of material facts (2) made with knowledge, actual or virtual, of the facts (3) to a party ignorant, actually and permissibly, of the truth (4) with the intent, actual or virtual, that the latter act on it (5) and the party must have been induced to act on it. In the instant case, the payee's employee told the maker of the note to sign off the pink slip. He relinquished both title to and possession of the automobile, based on the payee's representations, to his detriment (*176 Cal. App. 3d 919, 923)* . The court rejected the payee's contention that the extension agreement was enforceable on the ground that it was without consideration (*176 Cal. App. 3d 919, 924)* . The trial court's ruling on equitable estoppel was not based on any notice of express agreement to accept the buyer's check as payment, nor any contention that the payee was bound because it marked the note "Paid." Rather, the estoppel arose because the payee led the maker to believe it was accepting the buyer's check as payment of his debt, and instructed him that he could safely part with title to and possession of the automobile (*176 Cal. App. 3d 919, 924-925)* .

[4] Additional Authorities

[a] Party Estopped From Contradicting Prior Conduct Relied on by Other Party

The court of appeal in *Alling v. Universal Manufacturing Corp. (1992) 5 Cal. App. 4th 1412, 7 Cal. Rptr. 2d 718* , reversed a judgment in favor of a licensor/owner of patents and related technology and its successor corporation for breach of the covenant of good faith and fair dealing in the licensing agreement. Defendant, a manufacturer, had purchased the exclusive licensee. The primary cause of action was for breach of that purchase agreement. When

plaintiffs sought to introduce claims related to the licensing agreement, plaintiffs represented to the court that the license agreement was not being sued on in the action and that claims of the licensor/owner and its successor were based entirely on the purchase agreement. Again, in response to defendant's motion for summary judgment in which defendant contended that any litigation under the license agreement was barred by its arbitration clause, plaintiffs told the court that it was the purchase agreement that was the subject of the alleged breach. Nevertheless, the trial court permitted the claims for breach of the covenant in the licensing agreement to go to the jury. In reversing, the court of appeal set forth *Evid. Code § 623,* and said the principle is well established that once a party has gained an advantage on the basis of specific representations to the trial court, it is not thereafter permitted to disavow its previous representations (*5 Cal. App. 4th 1412, 1442)* . Here, plaintiffs' actions and statements clearly lead both the court and defendant to believe they were waiving any claims they might have under the licensing agreements (*5 Cal. App. 4th 1412, 1443)* .

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16-166 California Points & Authorities § 166.107

§ 166.107 Opposing Contention That Party Is Liable as Endorser of Promissory Note--Signature Not Placed on Instrument or Attached Document [Com. Code § 3204(a)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions. It may also be combined with a general contention that a party whose signature is not on an instrument is not liable on it (see, e.g., § 166.104).*]

DEFENDANT _____ [*name*] IS NOT LIABLE AS AN ENDORSER OF THE PROMISSORY NOTE THAT IS THE SUBJECT OF THIS ACTION BECAUSE _____ [*specify, e.g.,* HE/SHE DID NOT SIGN HIS/HER NAME ON THE INSTRUMENT ITSELF OR ON A DOCUMENT AFFIXED TO IT].

A. Endorsement Must Be on Instrument or Paper Affixed to Instrument. [*See § 166.51, Paragraph B.*].

B. Liability of Endorser Attaches Only if Signature Is Properly Placed. An endorsement must be written on the instrument itself or on a paper attached or annexed to the instrument in order to effectively charge one with the liability of an endorser, or give rights of an endorsee (*Lopez v. Puzina (1966) 239 Cal. App. 2d 708, 712, 49 Cal. Rptr. 122*).

[2] Comments

[a] Use of Form

These points and authorities oppose the contention that a purported endorser of a promissory note is liable on the note, on the ground that the signature of the party sought to be charged was not placed on the document itself, nor on an affixed document [*see Com. Code § 3204(a)*]. The Commercial Code uses the spelling "indorse" [*see Com. Code § 3204*], but this chapter uses the more commonly accepted spelling "endorse." Counsel may prefer to use the former spelling when quoting the code in a memorandum.

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law

stated. Therefore, counsel should show that the signature was absent from the document, and, if appropriate, that the document on which the signature was placed was not affixed to the note.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that defendant is not liable on the instrument as an endorser.

[b] Related Points and Authorities

For a memorandum of points and authorities opposing the contention that an instrument was not negotiated because it was not endorsed, see *§ 166.51*.

In an appropriate case, these points and authorities may be submitted in opposing the contention supported by the points and *authorities in § 166.96*.

[3] Discussion of Authorities

[a] Liability of Endorser Attaches Only if Signature Is Properly Placed

In ***Lopez v. Puzina*** *(1966) 239 Cal. App. 2d 708, 49 Cal. Rptr. 122* , the payee of a promissory note assigned the note without recourse to a transferee, who tendered the note, along with the deed of trust securing it, to the ultimate holders. As evidence of the transaction, the persons transferring the note signed an "Assignment of Deed of Trust," which purported to "endorse, assign, and transfer" the deed of trust and the underlying note. The assignment was not attached to the note. After maturity of the note, the holders presented it to the makers, and on their failure to pay brought suit against the makers and their transferors (the persons who signed the assignment). The trial court granted the transferors' motion for nonsuit, and the holders appealed.

The court of appeal affirmed, holding that the transferors of the note were not endorsers because their signatures were not on the instrument, or a document affixed to it, as required by former Com. Code § 3202 [*now see Com. Code § 3204*]. In order to hold defendants liable on the promissory note as endorsers, the holders were required to establish that defendants endorsed the note. The endorsement must be written on the instrument itself or on a paper attached to it [*see* former Civ. Code § 3112, *now see Com. Code § 3204(a)*] (*239 Cal. App. 2d 708, 712)* . A signature on a separate agreement cannot be considered an endorsement. Because defendants did not effectively endorse the note, they were, by the terms of the separate agreement, merely assignors of the note. Consequently, they were not liable on the note on the obligor's failure to pay, because an assignor of a promissory note does not by the mere fact of assignment warrant that the obligor is solvent or that the assignor will perform the obligor's obligations (*239 Cal. App. 2d 708, 714-715)* .

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16-166 California Points & Authorities § 166.108

§ 166.108 Opposing Contention That Endorser of Promissory Note Is Liable on Instrument--No Dishonor, Presentment, and/or Notice of Dishonor [Com. Code §§ 3415(a), (c), 3501(b)(3), 3502(a)(1), (2), 3503]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT _____ [*name*], AN/THE ENDORSER OF THE PROMISSORY NOTE THAT IS THE SUBJECT OF THIS ACTION, IS NOT LIABLE ON THAT INSTRUMENT BECAUSE _____ [*specify, e.g.,* THE HOLDER FAILED TO PROVIDE NOTICE OF DISHONOR AS REQUIRED].

A. Endorser's Liability/Dishonor Required. If an instrument is dishonored, an endorser is obliged to pay the amount due on the instrument according to the terms of the instrument at the time it was endorsed or, if the endorser endorsed an incomplete instrument, according to its terms when completed, to the extent stated in *Commercial Code Sections 3115* and *3407* (*Com. Code § 3415(a)*).

[*EITHER, if note is payable on demand*]

B. Presentment Required. For notes payable on demand, dishonor occurs if presentment is duly made to the maker and the note is not paid on the day of presentment (*Com. Code § 3502(a)(1)*).

[*OR, if note is payable at definite time and at or through a bank*]

B. Presentment Required. For notes not payable on demand and payable at or through a bank, dishonor occurs if presentment is duly made and the note is not paid on the day it becomes payable or the day of presentment, whichever is later (*Com. Code § 3502(a)(2)*).

[*OR, if note is payable at definite time and terms of note require presentment*]

B. Presentment Required. For notes not payable on demand and the notes terms require presentment, dishonor occurs if presentment is duly made and the note is not paid on the day it becomes payable or the day of presentment, whichever is later (*Com. Code § 3502(a)(2)*).

[*CONTINUE*]

C. Notice of Dishonor Required. An endorser's obligation to pay the required amount is not enforceable unless (1) the endorser is given notice of the instrument's dishonor that complies with *Commercial Code Section 3503* or *(2)* notice of dishonor is excused under *Commercial Code Section 3504(b)* (*Com. Code § 3503(a)*; *see Com. Code § 3415(c)* (failure to give notice of dishonor when required discharges endorser's liability)).

[*Optional*] **D. Return for Lack of Endorsement Will Not Dishonor Instrument.** Without dishonoring the instrument, the party to whom presentment is made may return the instrument for lack of a necessary endorsement (*Com. Code § 3501(b)(3)(A)*).

[*Optional*] **E. Refusing Payment or Acceptance Will Not Dishonor Instrument Under Certain Circumstances.** Without dishonoring the instrument, the party to whom presentment is made may refuse payment or acceptance for failure of the presentment to comply with the terms of the instrument, an agreement of the parties, or other applicable law or rule (*Com. Code § 3501(b)(3)(B)*).

[*Optional*] **F. Presentment and Notice of Dishonor Not Excused if Corporate Director-Endorser Had Knowledge of Corporate Payee's Affairs.** The fact that an endorser on a note of a corporation is also a director, with full knowledge of the corporate affairs, does not excuse the lack of notice of presentment and dishonor (*Keiser v. Butte Creek Consol. D. Co. (1920) 48 Cal. App. 38, 39-40, 191 P. 552*).

[*Optional*] **G. Presentment and Notice of Dishonor Not Waived Because Waiver Must Be Clear and Unequivocal.** Statements constituting a waiver of presentment and notice of dishonor must be clear and unequivocal (*Keiser v. Butte Creek Consol. D. Co. (1920) 48 Cal. App. 38, 40-41, 191 P. 552*).

[*Optional*] **H. Presentment Not Excused if Insufficient Attempt to Locate Maker.** Presentment for payment is not excused by virtue of the inability to locate the maker, unless the maker has no place of business or residence within the state, or the maker's place of business or residence cannot be ascertained with reasonable diligence (*Haber v. Brown (1894) 101 Cal. 445, 451, 35 P. 1035*).

[2] Comments

[a] Use of Form

This memorandum is for use in opposing the contention that an endorser of a promissory note is liable on the note, on the ground that there was no dishonor, presentment (since dishonor of a note likely requires presentment), notice of dishonor, or any of the above [*see Com. Code §§ 3415* (endorser's obligation to pay on notice of dishonor), 3501 (requirements of presentment), 3502 (when dishonor occurs), 3503 (notice of dishonor), 3505 (evidence of dishonor and of any notice of dishonor)]. The Commercial Code uses the spelling "indorser" [*see Com. Code § 3415*], but this chapter uses the more commonly accepted spelling "endorser." Counsel may prefer to use the former spelling when quoting the code in a memorandum.

Although the authority in this form is applied in the context of a promissory note, counsel should be aware that, as applied to endorsements on checks and postal money orders, *Com. Code §§ 3414*, *3415*, and *3503* no longer govern transactions between banks or between a depositary bank and its customer. They have been superseded by *12 C.F.R. § 229.35* to the extent they are inconsistent with that regulation [*see 12 C.F.R. § 229.35*; 12 C.F.R. § 229, app. E, Commentary to § 229.35; *see also 12 U.S.C. § 4007(b)* (authority for regulations that supersede Com. Code)].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Thus, counsel should show that the note's holder failed to fulfill the requirements of presentment, or notice of dishonor, or both. For example, if appropriate, counsel should show that the holder's excuse for failure to present the note is insufficient for lack of due diligence in locating the maker.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that defendant is not liable on the instrument as an endorser.

[b] Related Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposing the contention supported by the points and *authorities in §§ 166.96* or *166.97*.

[3] Discussion of Authorities

[a] Presentment and Notice of Dishonor Not Excused if Corporate Director-Endorser Had Knowledge of Corporate Payee's Affairs

Keiser v. Butte Creek Consol. D. Co. *(1920) 48 Cal. App. 38, 191 P. 552* , is *discussed under § 166.108[3][b]*.

[b] Presentment and Notice of Dishonor Not Waived Because Waiver Must Be Clear and Unequivocal

In ***Keiser v. Butte Creek Consol. D. Co.*** *(1920) 48 Cal. App. 38, 191 P. 552* , several directors and an officer of a corporate payee on a promissory note endorsed the note after maturity in favor of another director of the corporation. The endorsee brought an action on the note against the endorsers without first making a presentment to the maker, nor giving notice of dishonor. The endorsee contended that presentment and notice were unnecessary because they were waived by virtue of a statement made by one of the endorsers. Allegedly, the endorser said to the endorsee in the presence of the other endorsers and without objection from them, "You are taking no risk whatever; we are all responsible on that note--on those notes." Contradictory evidence was introduced refuting the substance of the statement. The trial court found in favor of the endorsers on grounds of lack of presentment and notice, and the endorsee appealed.

The court of appeal affirmed, holding that a waiver of presentment and notice of dishonor requires strict proof, and clear and unequivocal statements (*48 Cal. App. 38, 40-41)* . Preliminarily, the court rejected the endorsee's contention that no presentment or notice was required because at all times the endorsers had full knowledge of the fact that the corporation had not satisfied its obligations to the endorsee. The fact that an endorser on a note of a corporation is also a director, with full knowledge of the corporate affairs, does not excuse the lack of notice of presentment and dishonor (*48 Cal. App. 38, 39-40)* . With regard to whether those requirements were waived, even if the words, "we are all responsible," were used by the endorser, that statement is of insufficient positive scope to constitute a waiver of the presentment and notice of dishonor. An endorser's promise to pay, made after maturity with full knowledge of the payee's neglect to make demand and give notice, must be established by clear and distinct evidence (*48 Cal. App. 38, 40-41)* .

[c] Presentment Not Excused if Insufficient Attempt to Locate Maker

In ***Haber v. Brown*** *(1894) 101 Cal. 445, 35 P. 1035* , an action for foreclosure of a mortgage and deficiency judgment on the underlying promissory note, the payee endorsed the note, then assigned it to the ultimate holder. The holder failed to make presentment to the maker before bringing suit against the endorser. The holder alleged that she unsuccessfully attempted to locate the maker in the city in which the note was dated, and presentment was thereby excused. The trial court found in the holder's favor, and the endorser appealed.

The Supreme Court remanded the matter for modification. With regard to the issue of presentment, the Court found that presentment was not excused under the facts of the case by virtue of the holder's inability to locate the maker (*101 Cal. 445, 451-452)* . The note was not by its terms payable in the city in which the maker dated it. A note not payable at any particular place is payable and should be presented for payment at the residence or place of business of the maker, or wherever the maker may be found, at the option of the presentor. Presentment for payment is excused only when the maker has no place of business or residence within the state, or when those addresses cannot be ascertained with reasonable diligence. Merely looking for the payor at the place where the instrument is dated is not of itself due diligence. Presentment must be shown to have been made at the promisor's last-known place of residence or business; and if the endorsee knew of any subsequent address, the endorsee must make demand there. Consequently, the holder had no sufficient excuse for nonpresentment (*101 Cal. 445, 451)* .

[4] Additional Authorities

[a] Notice of Dishonor Required

In *Navajo County Bank v. Dolson (1912) 163 Cal. 485, 126 P. 153* , the Supreme Court affirmed judgment in favor of the note's endorser, holding that notice of dishonor or nonpayment is essential to an endorser's liability, in the absence of waiver (which was not an issue under the facts) (*163 Cal. 485, 488)* .

In *Farmers' & Mech. Bk. v. Colby (1883) 64 Cal. 352, 28 P. 118* , the note's holder contended that individuals who signed the face of the note, and designated themselves thereon as officers of a particular corporation, and who also endorsed the note, were makers of the note, and therefore not entitled to notice of dishonor before incurring liability. The Supreme Court affirmed judgment for the endorsers, finding that the form of their signatures evidenced an intent to bind only the corporation as maker, and holding that endorsers are not liable in the absence of notice of the maker's failure to pay (*64 Cal. 352, 353-354)* .

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16-166 California Points & Authorities § 166.109

§ 166.109 Opposing Contention That Endorser of Promissory Note Is Liable on Instrument--Endorsement Disclaims Liability [Com. Code § 3415(b)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT _____ [*name*] IS NOT LIABLE AS AN ENDORSER OF THE PROMISSORY NOTE THAT IS THE SUBJECT OF THIS ACTION BECAUSE HE/SHE SIGNED THE NOTE WITHOUT RECOURSE.

A. Endorser Not Liable Under Qualified Endorsement. If an endorsement states that it is made "without recourse" or otherwise disclaims the endorser's liability, the endorser is not liable under *Commercial Code Section 3415(a)* to pay the amount due on the instrument (*Com. Code § 3415(b)*; see *Fleming v. Kagan (1961) 189 Cal. App. 2d 791, 799, 11 Cal. Rptr. 737*).

[*Optional*] **B. Manifested Intent Not to Assume Responsibility Constitutes Qualified Endorsement.** Words clearly indicating the endorser's intent not to assume responsibility for payment of the note on maturity, but rather to become no more than a mere assignor of the title to the instrument, constitute an endorsement without recourse (*Mathes v. Bangs (1932) 128 Cal. App. 171, 172-173, 16 P.2d 749*).

[*Optional*] **C. Transfer of Right, Title, and Interest Is Equivalent to Endorsement Without Recourse.** The transfer and assignment of the endorser's right, title, and interest in a promissory note is the equivalent of an endorsement without recourse, and constitutes a qualified endorsement (*Kern v. Henry (1934) 138 Cal. App. 46, 49-51, 31 P.2d 454*).

[2] Comments

[a] Use of Form

This memorandum is for use in opposing the contention that an endorser of a promissory note is liable on the note, on the ground that the endorsement was "without recourse," either expressly or impliedly [*see Com. Code § 3415(b)* (endorser not liable if endorsement is made "without recourse" or otherwise disclaims liability)]. The Commercial Code uses the spelling "indorser" [*see Com. Code § 3415*], but this chapter uses the more commonly accepted spelling "endorser." Counsel may prefer to use the former spelling when quoting the code in a memorandum.

Note also that *Com. Code § 3415* has been superseded by *12 C.F.R. § 229.35* with regard to endorsement of checks in the context of interbank transactions or between a depositary bank and its customer [*12 C.F.R. § 229.35*; 12 C.F.R. § 229, app. E, Commentary to § 229.35; *see 12 U.S.C. § 4007(b)* (authority for regulations that supersede Commercial Code)].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Therefore, counsel should show that the endorsement contains the language "without recourse," or similar words to that effect.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that defendant is not liable on the instrument as an endorser.

[b] Effect of Endorsement Without Recourse

An endorsement "without recourse" limits the endorser's liability on the note in that it simply transfers the endorser's rights in the instrument. The endorser does not thereby contract to perform in any way. However, it reduces, rather than completely negates, the endorser's warranty liability, which is limited to defenses known to the endorser [*see* Hart & Willier, Negotiable Instruments Under the Uniform Commercial Code, § 8.01 (Matthew Bender)].

[c] Related Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposing the contention supported by the points and *authorities in § 166.96*.

[3] Discussion of Authorities

[a] Endorser Not Liable Under Qualified Endorsement

In ***Fleming v. Kagan*** *(1961) 189 Cal. App. 2d 791, 11 Cal. Rptr. 737* , the perpetrators of a construction fraud obtained a maker's signature on a promissory note and trust deed under false pretenses. After fraudulently assuring the makers that the promissory note had been paid, they sold the note at a discount. The party endorsing the note did so "without recourse." In an action brought by the makers to cancel the note, and for related relief, the trial court found in the maker's favor and against the note's endorsee. The endorsee appealed.

The court of appeal affirmed. The court rejected the endorsee's claim to damages on the theory of unjust enrichment, basing its reasoning on the liability limitations of an endorser of a qualified endorsement. An endorsement transfers title to the instrument, and subjects the endorser to a contractual liability. A note endorsed "without recourse" is a qualified endorsement, by which an endorser warrants to have no knowledge of any fact that would render the instrument valueless, but does not warrant that the obligor will pay. Even when the note is executed under terms of an agreement, one who takes by that type of endorsement has no recourse against the endorser if the maker fails to pay. It therefore follows that the endorsee should have no greater right to a lien on benefits that may revert to the payee under the contract pursuant to which the note was executed (*189 Cal. App. 2d 791, 799)* .

[b] Manifested Intent Not to Assume Responsibility Constitutes Qualified Endorsement

In ***Mathes v. Bangs*** *(1932) 128 Cal. App. 171, 16 P.2d 749* , the payee of a promissory note signed an endorsement that stated, "For value received, I hereby assign to (endorsee) all of my right, title and interest in and to the within note, together with all right accrued or to accrue under deed of trust securing same, so far as the same relates to this note." In an action by the holder against the maker and endorser of the note, the trial court refused to allow the admission of evidence regarding the endorser's purported oral promise to guarantee the note. The trial court entered a default judgment against the maker, but found in the endorser's favor, on the ground that her liability was limited by the qualified endorsement. The holder appealed.

The court of appeal affirmed, holding that the use of restrictive phraseology constitutes a qualified endorsement. A qualified endorsement may be made by adding to the endorser's signature the words "without recourse," or any words of similar import. An endorsement evidencing an intent by the signer not to assume responsibility for payment, and to become no more than a mere assignor of the title to the instrument, is the equivalent of an endorsement "without recourse." Consequently, evidence tending to show that the endorser verbally guaranteed payment was inadmissible (*128 Cal. App. 171, 172-173)* .

[c] Transfer of Right, Title, and Interest Is Equivalent to Endorsement Without Recourse

In ***Kern v. Henry*** *(1934) 138 Cal. App. 46, 31 P.2d 454* , the vendees of real property endorsed a promissory note with the words, "For value received, I hereby transfer, grant and assign to (transferees) all my right, title, and interest in the within note ... without recourse." At the transferees' insistence, the endorsers struck out the words "without recourse," and otherwise executed and delivered the note. In an action by the transferees against the endorsers on the note, the court of appeal affirmed the trial court's judgment for the endorsers, holding that language transferring and assigning all right, title, and interest in a note constitutes a qualified endorsement, even if the endorsers struck out the words "without recourse" before signature (*138 Cal. App. 46, 49-51)* .

[4] Additional Authorities

[a] Transfer of Right, Title, and Interest Is Equivalent to Endorsement Without Recourse

In *Hammond Lumber Co. v. Kearsley (1918) 36 Cal. App. 431, 172 P. 404* , the payees and another individual endorsed the back of a promissory note with the words, "For value received we hereby assign all of our interest in the promissory note. ..." The court of appeal affirmed the trial court's judgment for the endorsers, holding that a transfer by endorsement of the "right and title" of the payee or endorser to a negotiable note is equivalent to an endorsement "without recourse," and that words similar in meaning have the same effect (*36 Cal. App. 431, 432)* .

In *Gaetani v. Goss-Golden West Sheet Metal (2000) 84 Cal. App. 4th 1118, 101 Cal. Rptr. 2d 432* , a purchaser took a promissory note indorsed to him by the noteholder with the words: "assigns and transfers all right, title and interest." The words "without recourse" were not included. The trial court found the language of assignment used was equivalent to "without recourse" language. The court of appeal affirmed. It held that former Com. Code § 3414(1), applicable to this case, preserved the rule under long-standing case law (the *Hammond Lumber* cases, discussed *above*) that the words assigning all of one's right, title and interest in a note is equivalent to indorsing it without recourse (*84 Cal. App. 4th 1118, 1133)* .

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16-166 California Points & Authorities § 166.110

§ 166.110 Opposing Contention That Accommodation Party of Promissory Note Is Liable on Instrument--Right to Reimbursement From and Enforcement of Instrument Against Accommodated Party [Com. Code § 3419(e)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT _____ [*name*] IS NOT LIABLE AS AN ACCOMMODATION PARTY ON THE PROMISSORY NOTE THAT IS THE SUBJECT OF THIS ACTION BECAUSE PLAINTIFF IS THE ACCOMMODATED PARTY ON THE NOTE.

Right to Reimbursement From and Enforcement of Instrument Against Accommodated Party. An accommodation party who pays the instrument is entitled to reimbursement from the accommodated party and is entitled to enforce the instrument against the accommodated party (*Com. Code § 3419(e)*; *see First Nat. Bank v. Reed (1926) 198 Cal. 252, 258-259, 244 P. 368*).

Accommodated Party Has No Right of Recourse to or Contribution From Accommodation Party. An accommodated party who pays the instrument has no right of recourse against, and is not entitled to contribution from, an accommodation party (*Com. Code § 3419(e)*; *Quality Wash Group v. Hallak (1996) 50 Cal. App. 4th 1687, 58 Cal. Rptr. 2d 592*).

[2] Comments

[a] Use of Form

These points and authorities oppose the contention that an accommodating party is liable on an instrument, on the ground that the party seeking to recover is the accommodated party [*see Com. Code § 3419(e)*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law

stated. Thus, counsel should discuss facts showing that the person seeking to recover is the accommodated party on the note.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the party seeking to recover is the accommodated party.

[b] Related Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposing the contention supported by the points and *authorities in § 166.90*.

[3] Discussion of Authorities

[a] Right to Reimbursement From and Enforcement of Instrument Against Accommodated Party

In ***First Nat. Bank v. Reed*** *(1926) 198 Cal. 252, 244 P. 368* , an action by a bank against a party that had signed a promissory note as an accommodation to the bank, the Supreme Court affirmed judgment against plaintiff, holding that the party for whose accommodation a negotiable note is signed may not sue the accommodation party (*198 Cal. 252, 258-259)* .

[b] Accommodated Party Has No Right of Recourse to or Contribution From Accommodation Party

Quality Wash Group v. Hallak *(1996) 50 Cal. App. 4th 1687, 58 Cal. Rptr. 2d 592* , is discussed in *§ 166.105[4][a]*. The court of appeals held that the purchaser was the "accommodated party" under *Com. Code § 3419(a)*. As the accommodated party, after paying the note at issue, the purchaser had no right of recourse against and was not entitled to contribution from the accommodation parties under the note pursuant to *Com. Code § 3419(e)* (*50 Cal. App. 4th 1687, 1701-1702)* .

[4] Additional Authorities

[a] Right to Reimbursement From and Enforcement of Instrument Against Accommodated Party

In *Western H. Lbr. Co. v. Superior F. Mfrs. (1936) 18 Cal. App. 2d 287, 63 P.2d 828* , two persons endorsed the back of several promissory notes at the payee's request to enable the payee to obtain discounts on the notes from a bank. After the corporate maker's bankruptcy, the payee brought an action against the endorsers, and the court of appeal upheld the trial court's judgment against the payee. An accommodation endorser is not liable to the accommodated party (*18 Cal. App. 2d 287, 289)* .

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16-166 California Points & Authorities § 166.111

§ 166.111 Opposing Contention That Party Is Liable as Guarantor of Promissory Note [Civ. Code §§ 2787, 2819]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT _____ [*name*] IS NOT LIABLE AS A GUARANTOR OF THE PROMISSORY NOTE THAT IS THE SUBJECT OF THIS ACTION BECAUSE _____ [*specify, e.g.,* HE/SHE EXECUTED A GENERAL ENDORSEMENT, AND HIS/HER CHARACTER AS ENDORSER CANNOT BE TRANSFORMED TO A GUARANTOR BY REASON OF A PURPORTED ORAL AGREEMENT].

[*EITHER*]

Oral Agreement Cannot Transform Written General Endorsement Into Guaranty. The written general endorsement on a promissory note is a contract between the parties, and cannot be changed into a guaranty by an oral agreement (*Merchants Nat. Bank v. Bentel (1913) 166 Cal. 473, 476, 137 P. 25*).

[*OR*]

A. Original Obligation Altered. A surety is exonerated, except insofar as the surety may be indemnified by the principal, if by any act of the creditor, without the consent of the surety, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, is in any way impaired or suspended (*Civ. Code § 2819*; *Coutin v. Nessanbaum (1971) 17 Cal. App. 3d 156, 161-162, 94 Cal. Rptr. 453*).

B. Guarantor Is Surety. The terms "surety" and "guarantor" have the same meaning (*Civ. Code § 2787*).

[*Optional*] **C. Extension of Time for Definite Time, Without Surety's Consent, Exonerates Surety.** An agreement to extend time, without the surety's consent, exonerates a surety if the extension is for a definite period (*Wise v. Clapper (1968) 257 Cal. App. 2d 770, 774-775, 65 Cal. Rptr. 231*).

[*OR*]

Contract Not Within Terms of Guaranty. A guarantor is not liable on any contract that is not within the terms of the guaranty (*see Ralston-Purina Co. v. Carter (1962) 210 Cal. App. 2d 372, 378, 26 Cal. Rptr. 690*).

[2] Comments

[a] Use of Form

This memorandum is for use in opposing the contention that a party is liable on a promissory note as a guarantor [*see Civ. Code §§ 2787* (guarantor is surety), 2819 (surety exonerated if obligation altered); *Com. Code § 3419(d)* (obligation of person using words of guaranty)].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Therefore, counsel should discuss the language accompanying the signature, or the circumstances surrounding it. For example, if appropriate, counsel should show that the instrument itself does not contain language evidencing an intent to create a guaranty.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that defendant is not liable on the instrument as a guarantor.

[b] Related Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposing the contention supported by the points and *authorities in § 166.99*.

[3] Discussion of Authorities

[a] Oral Agreement Cannot Transform Written General Endorsement Into Guaranty

In ***Merchants Nat. Bank v. Bentel*** *(1913) 166 Cal. 473, 137 P. 25* , the maker of a promissory note paid a portion of the note after it became overdue. At the same time, he endorsed a second note payable to him by merely signing his name on the back of it. He delivered the second note to the payee of the first note. The holder of the second note brought an action on that note, against the endorser, alleging that the endorser intended to guarantee payment of the note in satisfaction of the preexisting debt based on the first note. He also averred that he had made a demand on the maker, and notified the endorser that the note was not paid. The trial court sustained the endorser's demurrer, and the holder appealed.

The Supreme Court affirmed, holding that an oral agreement to guarantee a note is ineffective to vary the terms of a written general endorsement. Consequently, the extent of the endorser's liability is determined by the instrument itself. A general endorsement renders the endorser liable only on presentment to the maker, accompanied by demand for payment. In doing so, the holder must present the actual instrument to the maker at the time of the demand. In the instant case, inasmuch as the holder did not aver in his complaint that the note was presented to the maker at the time of the demand, or at all, the "presentment" as such was not valid. Consequently, the complaint fails on either a cause of action on the endorsement, or on the alleged guaranty (*166 Cal. 473, 476)* . (The Court proceeded to reject the holder's cause of action based on the original debt; see discussion in *§ 166.72[3][b]*.)

[b] Original Obligation Altered

In ***Coutin v. Nessanbaum*** *(1971) 17 Cal. App. 3d 156, 94 Cal. Rptr. 453* , an action on a written document entitled "Unconditional and Absolute Guaranty," the court of appeal affirmed the trial court's finding that the document was a true guaranty, as opposed to a new and primary obligation. Moreover, the guarantor's obligation was exonerated on the guaranty, because under *Civ. Code § 2819* a guarantor is released if the original obligation is altered (*17 Cal. App. 3d 156, 161-162)* . *Civ. Code §§ 2819, 2922* were amended, codifying as declarative of existing law [Stats 1993, ch. 149, § 3], the rule that if the creditor agrees with the principal debtor to accept a lesser sum in full satisfaction of the obligation, the surety (endorser, accommodation party) is not exonerated, but remains liable to the extent of that lesser sum [*Civ. Code §§ 2819, 2922(b)*].

[c] Extension of Time for Definite Time, Without Surety's Consent, Exonerates Surety

In ***Wise v. Clapper*** *(1968) 257 Cal. App. 2d 770, 65 Cal. Rptr. 231* , the holder of a promissory note granted the maker an extension of time for payment, without the guarantor's knowledge or consent. In an action by the holder against the maker and guarantors, the trial court found in the guarantor's favor, on the ground that the time extension exonerated them. The holder appealed.

The court of appeal reversed, holding that an extension of time for payment on a note exonerates the guarantor if it is made without the guarantor's consent, but only if the extension is for a definite period of time (*257 Cal. App. 2d 770, 774-775)* . Inasmuch as the trial court made no findings with regard to whether the extended time period was definite, the case was remanded for the purpose of obtaining those findings (*257 Cal. App. 2d 770, 777)* .

[d] Contract Not Within Terms of Guaranty

In ***Ralston-Purina Co. v. Carter*** *(1962) 210 Cal. App. 2d 372, 26 Cal. Rptr. 690* , the guarantor on a promissory note guaranteed payment for merchandise to be selected by the maker in future commercial transactions with the payee. Subsequently, the note's maker and the payee entered into a contract in which the maker agreed to execute delivery receipts and promissory notes regarding merchandise sold thereunder. In accordance with the contract, the maker signed 20 notes and receipts. In an action brought by the payee against the maker and guarantor to recover the balance due on the notes after default, the trial court found in the payee's favor, and the guarantor appealed.

The court of appeal affirmed with regard to the guarantor's liability for items expressly stated in the note, holding that the guarantor's liability of an absolute and unconditional guaranty is fixed when the principal obligation matures. It is not predicated on the exhaustion by the creditor of the creditor's remedies against the principal debtor, or the exhaustion of other security for the debt. It is immaterial whether or not the debtor can pay the debt (*210 Cal. App. 2d 372, 380)* . The court rejected the guarantor's contention that the terms of the note were altered, and consequently he was released. The alteration was purportedly the maker's receipt of cash from the payee for the maker's personal use. Although a guarantor is released if the original obligation is altered, under *Civ. Code § 2819*, and a guarantor is not liable on any contract not within the terms of the guaranty, there was no alteration under the facts. The recipient of the cash merely attempted to charge the guarantor with items under the guaranty for which he was not liable, and that attempt did not constitute an alteration (*210 Cal. App. 2d 372, 378)* . However, although the defendant was found liable on the note in the capacity of a guarantor, the court also found that his obligation did not extend to certain amounts of money given to the maker. Thus, the court modified the judgment with regard to attorney's fees charged to the guarantor, because they were not included within the guaranty (*210 Cal. App. 2d 372, 379-380)* .

[4] Additional Authorities

[a] Original Obligation Altered

In *Southern Cal. First Nat. Bank v. Olsen (1974) 41 Cal. App. 3d 234, 116 Cal. Rptr. 4* , a party had signed a

continuing guaranty of indebtedness without knowledge of the effect of the document. The party was found by the trial court not to be liable on a related note because the note had been altered after the party's guaranty, and the guarantor's timely revocation exonerated any further obligation. The court of appeal affirmed, holding that an increase in the rate of interest on an obligation constitutes an alteration within the meaning of *Civ. Code § 2819*. The court did find that under the facts the guarantor's contract included obligation on a changed rate of interest, but the guarantor was exonerated due to his revocation, in accordance with the guaranty's terms (*41 Cal. App. 3d 234, 240-241)* .

In *Nissen v. Ehrenpfort (1919) 42 Cal. App. 593, 183 P. 956* , an assignee brought an action against the maker and guarantor of a promissory note that was altered after execution without the guarantor's knowledge. The court of appeal affirmed the trial court's judgment for the guarantor, holding that a guarantor is exonerated, except insofar as the guarantor may be indemnified by the principal, if by any act of the creditor, without the guarantor's consent, the original obligation of the principal is altered in any regard, or the remedies or rights of the creditor against the principal, in regard thereto, are in any way impaired or suspended (*42 Cal. App. 593, 595)* .

[b] Contract Not Within Terms of Guaranty

In *Coutin v. Nessanbaum (1971) 17 Cal. App. 3d 156, 94 Cal. Rptr. 453* (*discussed under § 166.111[3][b]*), the court also held that a subsequent compromise agreement between the maker and payee exonerated the guarantor's obligation. A guarantor is not liable on any contract not within the terms of the guaranty (*17 Cal. App. 3d 156, 162)* .

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16-166 California Points & Authorities § 166.112

§ 166.112 Supporting Contention That Maker or Drawer Is Liable on Check, Draft, or Order for Treble Damages After Dishonor and Demand--Action by Payee [Civ. Code § 1719]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief.*]

DEFENDANT _____ [*name*] IS LIABLE FOR DAMAGES OF TREBLE THE AMOUNT OWING ON THE _____ [CHECK *or* DRAFT *or* ORDER] THAT IS THE SUBJECT OF THIS ACTION AND A SERVICE CHARGE BECAUSE HE/SHE IS THE MAKER; THE INSTRUMENT WAS DISHONORED BY THE DRAWEE BECAUSE OF _____ [LACK OF FUNDS *or* LACK OF CREDIT TO PAY *or* LACK OF AN ACCOUNT WITH THE DRAWEE *or* A STOP PAYMENT ORDER]; PLAINTIFF, WHO IS THE PAYEE, MADE A WRITTEN DEMAND BY CERTIFIED MAIL FOR THE AMOUNT DUE MORE THAN THIRTY DAYS AGO; THERE IS NO GOOD FAITH DISPUTE ABOUT THE MONEY OWING; AND DEFENDANT HAS FAILED TO PAY.

A. Treble Damages Due. Any person who passes a check on insufficient funds is liable to the payee for the amount of the check, and a service charge in an amount not to exceed $25 for the first check passed on insufficient funds and an amount not to exceed $35 for each subsequent check passed on insufficient funds [*Civ. Code § 1719(a)(1)*]. Furthermore, the person passing such a check is liable to the payee for damages equal to treble the amount of the check if a written demand for payment is made. The person who passed the check has 30 days from the demand to pay the amount of the check, service charge, and costs to mail the written demand. If those amounts are not paid within the 30-day period, the person instead will be liable for the amount of the check, less any partial payments made toward the check or service charge within 30 days of the demand, and damages equal to treble that amount, but not less that $100 nor more than $1,500 [*Civ. Code § 1719(a)(2)*].

B. Treble Damages Mandatory. *Civil Code Section 1719* imposes a mandatory obligation on the trial court to award treble damages when the statutory conditions are met (*Civ. Code § 1719(h)*; *see Mughrabi v. Suzuki (1988) 197 Cal.*

App. 3d 1212, 1215-1216, 243 Cal. Rptr. 438).

C. Service Charges. *Civ. Code § 1719(a)* imposes a service charge but provides that a person will not be liable for the service charge if, at any time, he or she presents the payee with written confirmation by his or her financial institution that the check was returned to the payee by the financial institution because of an error on its part. Furthermore, a person will not be liable for the service charge if he or she presents the payee with written confirmation that his or her account had insufficient funds as a result of a delay in the regularly scheduled transfer of, or the posting of, a direct deposit of a social security or government benefit assistance payment (*Civ. Code § 1719(a)(4), (5)*).

[2] Comments

[a] Use of Form

This memorandum may be used to support the contention that a maker or drawer of a check, draft, or order is liable for treble damages in an action brought by the payee [*see Civ. Code § 1719*].

Counsel should add argument linking the points in this form with the facts of his or her case; for example, discuss the facts regarding the instrument's dishonor by the drawee, and lack of a good faith dispute regarding the maker's reasonable belief of a legal right to withhold payment. Counsel should also discuss the written demand sent by certified mail, and show that 30 days have elapsed without payment by the maker.

This form may be combined with memoranda pertaining to the specific procedural context in which counsel wishes to raise the issue that defendant is liable for treble damages on the instrument.

[b] Related Publications

For discussion and forms regarding *Civ. Code § 1719*, see California Forms of Pleading and Practice, Ch. 385, *Negotiable Instruments* (Matthew Bender).

[3] Discussion of Authorities

[a] Treble Damages Mandatory

In ***Mughrabi v. Suzuki*** *(1988) 197 Cal. App. 3d 1212, 243 Cal. Rptr. 438* , many payroll checks were cashed at a store. The drawee bank returned all the checks, stamped either "Refer to Maker" or "Account Closed." The store owner sent demand letters to the makers, but received no payment. The makers filed a Chapter 11 bankruptcy petition. The store owner brought an action to recover the principal amount of the checks, as well as treble damages under *Civ. Code § 1719*. The trial court granted plaintiff's motion for summary judgment with regard to the principal amount, but not treble damages. Plaintiff appealed.

The court of appeal reversed with regard to the award of treble damages, holding that *Civ. Code § 1719* imposes a mandatory obligation on the trial court to award treble damages when the statutory conditions are met. The statute's language is unambiguous. The manifest purpose of *Civ. Code § 1719* is to discourage the issuance of bank checks, drafts, or orders when the maker's funds are insufficient. By increasing the stakes for a defendant, it serves as a statutory incentive to refrain from the writing of bad checks. Moreover, the use of both "shall" and "may" in close proximity in a particular context manifests a legislative intent to provide mandatory and discretionary meanings, respectively. The court concluded that this particular case lacks any factors supporting a contrary interpretation (*197 Cal. App. 3d 1212, 1215-1216)* .

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16-166 California Points & Authorities § 166.113

§ 166.113 Opposing Contention That Maker or Drawer Is Liable on Check, Draft, or Order for Treble Damages After Dishonor and Demand--Action by Payee [Civ. Code § 1719]--Stop Payment Based on Good-Faith Dispute

[1] FORM

[*The following may be included in a memorandum, or may be adapted for use in a trial or appellate brief.*]

DEFENDANT _____ [*name*] IS NOT LIABLE FOR DAMAGES OF TREBLE THE AMOUNT OWING ON THE _____ [CHECK *or* DRAFT *or* ORDER] THAT IS THE SUBJECT OF THIS ACTION BECAUSE THE DRAWEE'S DISHONOR OF THE INSTRUMENT AROSE FROM DEFENDANT'S STOP PAYMENT ORDER UNDER A GOOD-FAITH DISPUTE WITH THE PAYEE.

A. Stop Payment Under Good Faith Dispute. There is no cause of action under *Civil Code Section 1719* if a maker stops payments in order to resolve a good-faith dispute with the payee. The payee is entitled to damages only on proving by clear and convincing evidence that there was no good-faith dispute, as defined in *Civil Code Section 1719(b)* (*Civ. Code § 1719(a)(3)*).

B. Good Faith Determination. In the case of a stop payment, the existence of a "good-faith dispute" is to be determined by the trier of fact. A "good-faith dispute" is one in which the court finds that the maker reasonably believed in legal entitlement to withhold payment, on grounds including, but not limited to, the following: services were not rendered, goods were not delivered, goods or services purchased are faulty, not as promised, or otherwise unsatisfactory, or there was an overcharge (*Civ. Code § 1719(b)*).

[*Optional*] **C. Proof of Demand Required.** In the case of a stop payment, a court may not award damages or costs under *Civil Code Section 1719* unless the court receives into evidence a copy of the written demand which, in that case, must have been sent to the drawer, and a signed certified mail receipt showing delivery, or attempted delivery if refused, of the written demand to the maker's address (*Civ. Code § 1719(d)*).

[2] Comments

[a] Use of Form

This memorandum may be used to oppose the contention that a maker or drawer of a check, draft, or order is liable for treble damages in an action brought by the payee, on the ground that the drawee dishonored the instrument because of a stop-payment order that was based on a good faith dispute with the payee [*see Civ. Code § 1719*].

Counsel should add argument linking the points in this form with the facts of his or her case; for example, discuss the facts regarding the transaction between the maker and the payee, the good-faith basis of the stop-payment order, and, if appropriate, the payee's noncompliance with the required notice to the maker, or lack of evidence of the notice.

This form may be combined with memoranda pertaining to the specific procedural context in which counsel wishes to raise the issue that defendant is not liable for treble damages on the instrument.

[b] Notice of Payee to Maker Regarding Stop Payment

To recover under *Civ. Code § 1719* in the case of a stop-payment order, the payee must give notice to the maker in a form that substantially complies with *Civ. Code § 1719(c)*, which sets out a sample form of notice.

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16-166 California Points & Authorities § 166.114

§ 166.114 Opposing Contention That Maker or Drawer Is Liable on Check, Draft, or Order for Prejudgment Interest After Dishonor and Demand--Action by Payee [Civ. Code § 1719]

[1] FORM

[*The following may be included in a memorandum, or may be adapted for use in a trial or appellate brief.*]

DEFENDANT _____[*name*] IS NOT LIABLE FOR PREJUDGMENT INTEREST ON THE AMOUNT OF THE [CHECK *or* DRAFT *or* ORDER] THAT IS THE SUBJECT OF THIS ACTION BECAUSE THE PLAINTIFF SEEKS STATUTORY RELIEF UNDER *CIVIL CODE SECTION 1719.*

A. Statutory Relief Under *Civil Code Section 1719* Precludes Recovery of Prejudgment Interest. The statutory damages prescribed in *Civil Code Section 1719* are exclusive. A payee who recovers pursuant to Section 1719 may not also recover prejudgment interest under *Civil Code Section 3287* (*Imperial Merchant Servs., Inc. v. Hunt (2009) 47 Cal. 4th 381, 393, 97 Cal. Rptr. 3d 464, 212 P.3d 736*).

[2] Comments

[a] Use of Form

This memorandum may be used to oppose the contention that a maker or drawer of a check, draft, or order is liable for prejudgment interest after dishonor and demand in an action brought by the payee [*see Civ. Code § 1719*].

Counsel should add argument linking the points in this form with the facts of his or her case; for example, if the instrument was taken as payment of an obligation, discuss the fact that the plaintiff elected to pursue relief under *Civ. Code § 1719* whereas the plaintiff could have instead sued on the underlying obligation and in that case could have claimed prejudgment interest [*see Com. Code §§ 3302, 3310(b)(3)*].

This form may be combined with memoranda pertaining to the specific procedural context in which counsel wishes to raise the issue that the defendant is not liable for prejudgment interest on the instrument.

[b] Related Publications

For discussion and forms regarding *Civ. Code § 1719*, see California Forms of Pleading and Practice, Ch. 385, *Negotiable Instruments* (Matthew Bender).

[3] Discussion of Authorities

[a] Statutory Relief Under Civil Code Section 1719 Precludes Recovery of Prejudgment Interest

In ***Imperial Merchant Servs., Inc. v. Hunt*** *(2009) 47 Cal. 4th 381, 97 Cal. Rptr. 3d 464, 212 P.3d 736* , the California Supreme Court answered the question, certified to it by the Ninth Circuit, whether a debt collector recovering on a dishonored check may recover both a service charge under *Civ. Code § 1719(a)(1)* and prejudgment interest under *Civ. Code § 3287*. The court held that the statutory damages prescribed in section 1719 are exclusive; therefore, a payee who recovers a service charge pursuant to section 1719 may not also recover prejudgment interest under section 3287 (*47 Cal. 4th 381, 393)* . In discussing the consequences of proceeding under section 1719, the court further stated that if, after a proper demand, the service charge is not paid (together with the amount of the check and the cost of mailing the demand), and the payee or an assignee sues for treble damages instead, then in that case as well, prejudgment interest may not be recovered (*47 Cal. 4th 381, 398)* . The court also made the observation that in lieu of pursuing the statutory relief authorized in section 1719, if the check was taken as payment of an obligation, the payee or an assignee could seek damages for breach of the underlying obligation [*see Com. Code § 3310(b)(3)*], and in that case, prejudgment interest could be claimed pursuant to *Com. Code § 3302* (*47 Cal. 4th 381, 390)* .

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[Reserved]

§§ 166.115[Reserved]

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16-166 California Points & Authorities § 166.130

§ 166.130 Supporting Contention That Holder in Due Course Is Not Subject to Defenses of Obligor [Com. Code § 3305]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions. It may also be combined with a general contention that a holder is a holder in due course (see, e.g., §§ 166.70, 166.71).*]

DEFENDANT _____ [*name*] IS LIABLE ON THE INSTRUMENT THAT IS THE SUBJECT OF THIS ACTION BECAUSE PLAINTIFF IS A HOLDER IN DUE COURSE AND THE DEFENSE OF _____ [*specify, e.g.,* FAILURE OF CONSIDERATION] IS THEREFORE INAPPLICABLE TO HIM/HER.

Holder in Due Course Is Not Subject to Defenses of Obligor. The right of a holder in due course to enforce the obligation of a party to pay the instrument is not subject to defenses of the obligor that are specifically stated in Division 3 of the Commercial Code or those defenses based on common law contract principles (*Com. Code § 3305(b)*; *see Com. Code § 3305(a)(2)*; *see also Gribble v. Mauerhan (1961) 188 Cal. App. 2d 221, 225, 10 Cal. Rptr. 296*). Other defenses available to the obligor that are stated in *Commercial Code Section 3305(a)(1)*, which may be asserted against any person entitled to enforce an instrument, are not applicable because they are not supported by the facts of this case.

[*This form may be combined with contentions that a party is liable on an instrument (see, e.g., §§ 166.90 -166.103), and/or with a contention that a holder may enforce an interest provision in a note (see, e.g., § 166.131).*]

[2] Comments

[a] Use of Form

This memorandum is for use in supporting the contention that a party is liable on an instrument, on the ground that the holder is a holder in due course, and therefore is not subject to defenses of the obligor, with the exception of enumerated

defenses [*see Com. Code § 3305(a), (b)*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Therefore, counsel should show that the holder is a holder in due course, and that the defense propounded is not among those enumerated in *Com. Code § 3305(a)(1)*.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that a party is a holder in due course and thus is not subject to an obligor's defenses.

[b] Holder in Due Course Is Subject Only to "Real Defenses"

The right of a holder in due course to enforce the obligation of a party to pay the instrument is subject to the defenses of the obligor stated in *Com. Code § 3305(a)(1)* [*Com. Code § 3305(b)*]. These "real defenses" may be asserted against any person entitled to enforce the instrument. They are infancy, duress, lack of capacity, illegality, fraud that induced the obligor to sign the instrument without knowledge or reasonable opportunity to learn of its character or essential terms, and discharge in insolvency [*see Com. Code § 3305(a)(1)*; Official Comment 1 to U.C.C. § 3-305 (1990)]. However, those defenses specifically stated in Division 3 of the Commercial Code and those based on common law contract principles are cut off by a holder in due course [*Com. Code § 3305(b)*; Official Comment 2 to U.C.C. § 3-305 (1990); *see Com. Code § 3305(a)(2)*]. Division 3 defenses include nonissuance and conditional issuance of the instrument [*see Com. Code § 3105(b)*], modification of the obligation by a separate agreement [*see Com. Code § 3117*], and instruments issued without consideration [*see Com. Code § 3303(b)*]. The most prevalent common law defenses are fraud, misrepresentation, and mistake in the instrument's issuance [*see* Official Comment 2 to U.C.C. § 3-305 (1990)].

[c] Related Points and Authorities

In an appropriate case, the points and authorities *set out in § 166.132* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Holder in Due Course Is Not Subject to Defenses of Obligor

Gribble v. Mauerhan *(1961) 188 Cal. App. 2d 221, 10 Cal. Rptr. 296* , was a complicated real estate case in which various parties, in individual and alter-ego corporate capacities, engaged in overlapping transactions and nonsequential recordation. In one transaction, the payee of a note secured by a trust deed assigned the note to the holder, who paid a sum for the note that was less than its face value. In resulting lawsuits among all the parties to the transactions, involving title to and foreclosure of deeds of trust against the real property, the payee-assignor of the note in question was a plaintiff in one action and a defendant in the other. The trial court found, inter alia, that the holder of the note in question held a first encumbrance against the property in the amount of the note's face value. (The trial court also ordered foreclosure on both the trust deeds that were found to constitute encumbrances.) The party that was found to be the owner of the property appealed.

The court of appeal affirmed, supporting the trial court's finding on all issues, including those involving equitable estoppel, good faith, and notice (*188 Cal. App. 2d 221, 225-228)* . With regard to the holder of the note in question, the court rejected the property owner's contention that the note was void and of no effect for any amount in excess of the amount paid for it, because it originally was issued for no consideration and was given effect by the subsequent assignment only to the extent of the amount paid for it. The contention was without merit for two reasons. First, under the evidence, the payee-assignor executed a demand note in exchange for the note, which constituted sufficient consideration. Second, the evidence supported the conclusion that the holder was a holder in due course of the note, which was a negotiable instrument. Consequently, he took free of any defense of lack of consideration. Moreover, the fact that the holder purchased the note at a substantial discount, although a circumstance material to a determination

whether the purchase was in good faith, was insufficient to charge him with notice of any defense to the note (*188 Cal. App. 2d 221, 225)* .

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16-166 California Points & Authorities § 166.131

§ 166.131 Supporting Contention That Holder May Enforce Interest Provision in Note [Com. Code § 3305]--Note Not Usurious, or Provision Not Usurious on Its Face, and Holder Is Holder in Due Course [Cal. Const., art. XV, § 1; Stats. 1919, p. lxxxiii, as amended by Stats. 1970, ch. 784, § 1]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT _____ [*name*] IS LIABLE ON THE INTEREST PROVISIONS OF THE PROMISSORY NOTE THAT IS THE SUBJECT OF THIS ACTION BECAUSE THE INTEREST IS NOT USURIOUS [WITH REGARD TO PLAINTIFF], IN THAT _____ [*specify, e.g.,* PLAINTIFF IS A HOLDER IN DUE COURSE WITH NO NOTICE OF THE USURIOUS NATURE OF THE OBLIGATION].

[*EITHER*]

Holder in Due Course That Acquired Note Before Maturity. A negotiable promissory note that does not show its usurious nature on its face is enforceable in the hands of a bona fide holder who became such before maturity, even though the contract was usurious in its inception (*Brown v. Guaranty Mortgage Co. (1934) 220 Cal. 532, 534, 31 P.2d 788*).

[*OR*]

Delay Caused by Borrower in Receiving Proceeds of Maximum Interest Note. A delay in receiving the proceeds of a note, when the note provides for maximum interest, does not render the interest provision usurious, if the borrower caused the delay (*First American Title Ins. & Trust Co. v. Cook (1970) 12 Cal. App. 3d 592, 597, 90 Cal. Rptr. 645*).

[*OR*]

Bonus Added to Actual Interest Does Not Exceed Maximum Allowable Interest. A bonus extracted by a lender in addition to the interest provided in a note does not render the interest provision usurious if the sum of the interest and bonus does not exceed the maximum allowable interest (*Brown v. Cardoza (1944) 67 Cal. App. 2d 187, 192, 153 P.2d 767*).

[2] Comments

[a] Use of Form

This memorandum is for use in supporting the contention that a party is liable for the interest provisions of a note, on the ground that the provision is not usurious, or that it is not unlawfully usurious with regard to a particular party who is a holder in due course [*see Cal. Const., art. XV, § 1*; Stats. 1919, p. lxxxiii, as amended by Stats. 1970, ch. 784, § 1, uncodified provisions published in most codes on the pages containing *Civ. Code § 1916.1 et seq.* (definitions regarding interest, real estate provisions, and variable interest rate provisions)]. For discussion of the effect of usury provisions, see *§ 166.133[2]*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Therefore, counsel should describe the rate of interest of the note, and apply the appropriate options in this form to the facts. For example, if appropriate, counsel should show that the note is not usurious on its face, and that the holder took with no knowledge of any usurious aspect of the underlying transaction.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the holder may enforce the interest provision in a note.

[b] Related Points and Authorities

In an appropriate case, the points and authorities *set out in § 166.133* may be used to oppose the contention supported by this form.

For points and authorities supporting the contention that a provision for a variable rate of interest will not destroy the instrument's negotiability, see *§ 166.22*.

[3] Discussion of Authorities

[a] Holder in Due Course That Acquired Note Before Maturity

Brown v. Guaranty Mortgage Co. *(1934) 220 Cal. 532, 31 P.2d 788* , involved two promissory notes given in exchange for a loan, secured by the real property that was the subject of the loan. The financial institution lender, and payee on the notes, deducted from the principal of one note the amount of a bonus for the entire transaction. The notes were transferred before maturity to another financial institution, which became a holder of them. The makers of the notes paid a certain amount of the interest, but paid no principal. The holder of the notes brought an action to foreclose on the real property. The makers brought an action against the payee and the holder institutions and others to declare the notes usurious, and to obtain an injunction against foreclosure. The cases were consolidated for trial, which resulted in the findings that the loans were usurious, but that the holder could enforce them because it was a bona fide holder of them, with no notice of their usurious nature. The makers appealed.

The Supreme Court affirmed, holding that usurious notes are enforceable by a bona fide holder who became such before maturity, even though the contract was usurious in its inception. The Court rejected the makers' contention that an

agreement to pay interest in violation of the usury law is void and that the invalidity continues throughout the existence of the agreement regardless of status of the transferee (*220 Cal. 532, 534)* .

[b] Delay Caused by Borrower in Receiving Proceeds of Maximum Interest Note

The facts and procedural background of ***First American Title Ins. & Trust Co. v. Cook*** *(1970) 12 Cal. App. 3d 592, 90 Cal. Rptr. 645* , are discussed in *§ 166.133[3][c]*. In *Cook,* the court of appeal held that a note providing for the monthly payment of interest at the maximum legal rate is usurious if it includes a provision that the interest not so paid be added to the principal and thereafter bear like interest as the principal. *Cook* also discussed the maker's contention that the interest on the note was usurious because it provided for maximum interest to accrue on a particular date, but the maker did not receive the proceeds until some months later. When a loan provides for maximum legal interest, delay in paying over the proceeds to the borrower may result in the borrower paying excessive interest and render the loan usurious. However, a good-faith delay in paying over the proceeds does not require that result, and when the delay is caused by a contingency under the borrower's control, the loan is not usurious even though it results in excessive interest. In the instant case, the delay was caused by the borrower's failure to provide title to the land that he had agreed would secure the loan. In determining whether the loan was usurious, the borrower was considered to have received the money on the date that the agreement was signed, and the money deposited to his account (*12 Cal. App. 3d 592, 597)* .

[c] Bonus Added to Actual Interest Does Not Exceed Maximum Allowable Interest

Brown v. Cardoza *(1944) 67 Cal. App. 2d 187, 153 P.2d 767* , involved several promissory notes between various parties in conjunction with a sale of real property, in which the court of appeal affirmed the trial court's holding that a note was not usurious because the total amount of money chargeable as interest did not exceed the maximum allowable amount (*67 Cal. App. 2d 187, 191-194)* . In one transaction, money was loaned in exchange for an interest rate lower than the allowed maximum, as well as a "splitting of profits." Any device is prohibited whereby the lender, by charging a fee, bonus, commission, discount, or other compensation, will receive more than ten percent per annum for any loan of money [former Cal. Const., art. XX, § 22; *now see Cal. Const., art. XV, § 1*]. A plan in which the lender refuses to make a loan unless the borrower will "split" profits is obviously a device whereby the lender demands for the loan a consideration in addition to interest. It constitutes a bonus for the loan. However, the transaction is not usurious if, as in the instant case, the bonus in addition to the interest is less than lawfully could have been charged for interest (*67 Cal. App. 2d 187, 191-192)* .

[4] Additional Authorities

[a] Holder in Due Course That Acquired Note Before Maturity

Nuckolls v. Bank of California (1937) 10 Cal. 2d 278, 74 P.2d 271 , is discussed in *§ 166.71[4][d]*.

For an additional case holding that the defense of usury is not available against a holder in due course, see *Szczotka v. Idelson (1964) 228 Cal. App. 2d 399, 406-407, 39 Cal. Rptr. 466* , discussed in *§ 166.71[3][b]*.

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16-166 California Points & Authorities § 166.132

§ 166.132 Opposing Contention That Holder in Due Course Not Subject to Defenses of Obligor [Com. Code § 3305]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

PLAINTIFF DOES NOT TAKE THE INSTRUMENT THAT IS THE SUBJECT OF THIS ACTION FREE FROM THE DEFENSE OF _____ [*specify, e.g.,* FRAUD IN THE EXECUTION] BECAUSE THAT DEFENSE IS EFFECTIVE AS AGAINST A HOLDER IN DUE COURSE.

[*EITHER*]

A. Infancy. The right of a holder in due course to enforce the obligation of a party to pay the instrument is subject to a defense based on infancy of the obligor to the extent it is a defense to a simple contract (*Com. Code § 3305(a)(1)(A), (b)*).

[*AND/OR*]

B. Nullifying Effect on Instrument. The right of a holder in due course to enforce the obligation of a party to pay the instrument is subject to a defense based on duress, lack of legal capacity, or illegality of the transaction which, under other law, nullifies the obligation of the obligor (*Com. Code § 3305(a)(1)(B), (b)*).

[*AND/OR*]

C. Fraud in the Execution. The right of a holder in due course to enforce the obligation of a party to pay the instrument is subject to a defense based on fraud that induced the obligor to sign the instrument with neither knowledge nor reasonable opportunity to learn of its character or its essential terms (*Com. Code § 3305(a)(1)(C), (b)*).

[*AND/OR*]

D. Discharge in Insolvency. The right of a holder in due course to enforce the obligation of a party to pay the instrument is subject to a defense based on discharge of the obligor in insolvency proceedings (*Com. Code § 3305(a)(1)(D), (b)*).

[*AND/OR*]

E. Void Instrument Unenforceable by Holder in Due Course. An instrument that is void because the maker signed it with the reasonable belief that it was some other document is not enforceable by a holder in due course in the absence of negligence on the part of the maker (*C.I.T. Corporation v. Panac (1944) 25 Cal. 2d 547, 549-550, 154 P.2d 710*).

[2] Comments

[a] Use of Form

This memorandum is for use in opposing the contention that a holder in due course is not subject to defenses of the obligor, on the ground that the defense asserted is among those enumerated in *Com. Code § 3305(a)(1)* that are available against holders in due course [*see Com. Code § 3305(b)*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Therefore, counsel should describe the defense asserted, and show that it is a defense that is not cut off by a holder in due course under *Com. Code § 3305(a)(1)* and *(b)*.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that a holder in due course is subject to certain defenses.

[b] Fraud in Execution of Instrument

The type of fraud that provides a defense against the rights of a holder in due course is variously described as "real" or "essential" fraud, or "fraud in the essence" or "fraud in the factum." Commonly, the maker of an instrument is tricked into signing a note in the belief that it is merely a receipt or some other document. The theory of the defense is that the signature on the instrument is ineffective because the signer did not intend to sign the instrument at all. Under *Com. Code § 3305(a)(1)(C)*, the defense extends to an instrument signed with knowledge that it is a negotiable instrument, but without knowledge of its essential terms [*see* Official Comment 1 to U.C.C. § 3-305 (1990)].

Fraud in the execution renders the instrument void. In contrast, a merely voidable instrument would not provide a maker with a defense under *Com. Code § 3305*, that is, the maker of a voidable instrument could not defend against a holder in due course on that ground. Facts underlying a voidable instrument would concern issues regarding whether the holder was in fact a holder in due course. For a discussion regarding the distinction between instruments void and voidable by reason of fraud, see *C.I.T. Corporation v. Panac (1944) 25 Cal. 2d 547, 548-550, 154 P.2d 710 , discussed under § 166.132[3][a]*.

[c] Related Publications

For discussion and forms regarding void and voidable contracts generally, see Ch. 140, *Contracts* in California Forms of Pleading and Practice (Matthew Bender). For discussion and forms regarding fraudulent misrepresentation generally, see Ch. 269, *Fraud and Deceit* in that publication.

For discussion of fraudulent misrepresentation generally, see Levy, Golden, Sacks CALIFORNIA TORTS, Ch. 40 (Matthew Bender).

[d] Related Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposing the contention supported by § 166.130.

For memoranda of points and authorities regarding fraudulent misrepresentation generally, see Ch. 105, *Fraud and Deceit* . For memoranda of points and authorities regarding dischargeability of debts generally, see Ch. 30, *Bankruptcy* .

[3] Discussion of Authorities

[a] Void Instrument Unenforceable by Holder in Due Course

In ***C.I.T. Corporation v. Panac*** *(1944) 25 Cal. 2d 547, 154 P.2d 710* , an illiterate married couple was fraudulently persuaded by the payee's agent to sign a promissory note with the understanding that the document was merely a contract to repair their house. Ultimately, a holder in due course of the note brought an action against the makers to enforce the note. The trial court found in favor of the makers, holding that they were not negligent in signing the note, and that their defense of fraud was valid against the holder in due course. The holder appealed.

The Supreme Court affirmed, holding that when a person is fraudulently induced to sign or endorse a bill or note in the reasonable belief that the document is something else, that person cannot be said to have made or endorsed the bill or note, absent the maker's negligence in doing so. The resulting negotiable instrument is void, and is not enforceable by a holder in due course absent negligence on the part of the maker (*25 Cal. 2d 547, 549-550)* . The Court distinguished a voidable instrument from a void one, holding that an instrument signed through fraud in the inducement, that is, signed on the basis of misrepresentations but with full knowledge of the nature of the instrument, is voidable rather than void. By contrast, when a maker signs an instrument, understanding it to be some other document, there is no contract whatsoever. A mistake regarding the instrument's character may relate to its existence as a contract or legally operative document of any kind, or to whether it is the kind of contract or legal document that it purports or is represented to be (*25 Cal. 2d 547, 548-549)* .

[4] Additional Authorities

[a] Nullifying Effect on Instrument

Wilson v. Steele (1989) 211 Cal. App. 3d 1053, 259 Cal. Rptr. 851 , was an action by decedent's administrator to cancel a note and deed of trust made by decedent's niece with power of attorney. Judgment was for defendants, holders in due course of the note. The court of appeal reversed and remanded for findings regarding whether the purpose of the note and loan was to pay for construction work by an unlicensed contractor. If that was the case, the fact that defendants were holders in due course would be irrelevant. The illegality defense of former Com. Code § 3305(2) [*now see Com. Code § 3305(a)(1)*] would render the note void (*211 Cal. App. 3d 1053, 1063-1064)* .

[b] Void Instrument Unenforceable by Holder in Due Course

In *Millrose Corporation v. Brent (D.C. Cir. 1959) 271 F.2d 508* , the federal court of appeals held that instruments procured by fraud amounted to forgeries, and the purported obligation under them could be terminated, notwithstanding

that the notes had come into the ownership of a holder in due course (citing *C.I.T. Corporation v. Panac (1944) 25 Cal. 2d 547, 154 P.2d 710 , discussed under § 166.132[3][a]*) (*271 F.2d 508, 509)* .

In *Danning v. Bank of America (1984) 151 Cal. App. 3d 961, 199 Cal. Rptr. 163* (disapproved on another ground in *In re Marriage of Arceneaux (1990) 51 Cal. 3d 1130, 1137-1138, 275 Cal. Rptr. 797, 800 P.2d 1227*), a trustee in bankruptcy of a bankrupt corporation sued the corporation's bank for negligence and breach of contract for charging the corporate account for payment of a $250,000 check drawn on the corporate account with only one of two required signatures. The trial court entered judgment for plaintiff on the complaint and for defendant on its cross complaint against the payee and certain officers of both corporations. Defendant appealed, and the court of appeal affirmed. Among other issues, the court discussed the defenses that the drawer's trustee in bankruptcy could assert against the payee and the collecting bank. The court set forth former Com. Code § 3305(2)(b) [*now see Com. Code § 3305(a)(1)(B)*] and said that the California Commercial Code comments explain that if under local law the effect is to render the obligation on the instrument entirely null and void, the defense may be asserted against a holder in due course [*now see* Official Comment 1 to U.C.C. § 3-305]. Thus, even a holder in due course may not recover when the underlying debt is illegal, unenforceable, and otherwise null and void. Here, two courts had found that the options issuance scheme operated by the corporate drawer and the payee-broker was fraudulent (*151 Cal. App. 3d 961, 978)* . The court of appeal said the trial court was not bound by the stipulation of the drawer and the payee that a debt was owed (*151 Cal. App. 3d 961, 978 n.3*). The conclusion in the trial court's statement of decision that the check was not used to pay a valid outstanding obligation was sufficient finding of illegality of the underlying claim (*151 Cal. App. 3d 961, 978-979)* .

In *Gardner v. Rubin (1957) 149 Cal. App. 2d 368, 308 P.2d 892* , an action to cancel a note and trust deed on the ground of fraud in the execution, the court of appeal affirmed the trial court's judgment for the makers. The facts were similar to those under *C.I.T. Corporation v. Panac (1944) 25 Cal. 2d 547, 154 P.2d 710 , discussed under § 166.100[3][d]*. Citing *C.I.T.,* the court of appeal held that when one is fraudulently induced to sign a negotiable instrument, believing it to be a different type of document, the instrument is not enforceable, even by a holder in due course, in the absence of negligence on the part of the maker (*149 Cal. App. 2d 368, 372)* .

For an additional case based on facts similar to *C.I.T.,* but applying the holding to a nonholder in due course, see *Fleming v. Kagan (1961) 189 Cal. App. 2d 791, 11 Cal. Rptr. 737* discussed in *§ 166.109[3][a]*.

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16-166 California Points & Authorities § 166.133

§ 166.133 Opposing Contention That Holder May Enforce Interest Provision in Note [Com. Code § 3305]--Note Is Usurious and Holder Is Not Holder in Due Course [Cal. Const., art. XV, § 1; Stats. 1919, p. lxxxiii, as amended by Stats. 1970, ch. 784, § 1]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT _____ [*name*] IS NOT LIABLE ON THE PROMISSORY NOTE THAT IS THE SUBJECT OF THIS ACTION BECAUSE THE INTEREST PROVISION IN THE NOTE IS USURIOUS [IN THAT _____ (*specify, e.g.,* THE BONUS PAID TO THE LENDER IN ADDITION TO THE INTEREST EXPRESSLY SET FORTH IN THE NOTE RENDERS THE INTEREST RATE USURIOUS)], AND PLAINTIFF IS NOT A HOLDER IN DUE COURSE.

A. Usurious Interest Provision Void. Any agreement or contract of any nature in conflict with the provisions for maximum interest allowed by law shall be null and void with regard to any agreement or stipulation therein contained to pay interest, and no action at law to recover interest in any sum shall be maintained and the debt cannot be declared due until the full period of time it was contracted for has elapsed (*Cal. Const., art. XV, § 1*; Stats. 1919, p. lxxxiii, § 2, as amended by Stats. 1970, ch. 784, § 1; *Epstein v. Frank (1981) 125 Cal. App. 3d 111, 122-123, 177 Cal. Rptr. 831*).

[*Optional*] **B. Immaterial That Borrower Took Initiative in Transaction.** If the transaction violates the usury law, it is not material that the borrower rather than the lender took the initiative in the transaction (*Williams v. Reed (1957) 48 Cal. 2d 57, 68, 307 P.2d 353*).

[*Optional*] **C. Adding Unpaid Interest to Principal Is Usurious.** When a note provides for the monthly payment of interest at the maximum legal rate, a provision adding interest not so paid to the principal, thereafter bearing like interest as the principal, renders the note usurious (*First American Title Ins. & Trust Co. v. Cook (1970) 12 Cal. App. 3d 592, 597, 90 Cal. Rptr. 645*).

[*Optional*] **D. Actual Transaction, Not Face of Note, Controls.** A note must be tested for usury with reference to the actual sum given by the lender to the borrower, and not by the mere face of the note (*Taylor v. Budd (1933) 217 Cal. 262, 265, 18 P.2d 333*).

[*Optional*] **E. Bonus Added to Actual Interest Exceeds Maximum Allowable Interest.** A bonus extracted by a lender in addition to the interest provided in a note renders the interest provision usurious if the sum of the interest and bonus exceeds the maximum allowable interest (*Moore v. Russell (1931) 114 Cal. App. 634, 641, 300 P. 479*).

[*Optional*] **F. Interest Payments Made on Usurious Note Are Offset Against Principal.** If an interest provision of a note is usurious, no interest is collectible; therefore, all payments made on a note must necessarily be credited as payments on the principal (*Moore v. Russell (1931) 114 Cal. App. 634, 641, 300 P. 479*).

[2] Comments

[a] Use of Form

This memorandum is for use in opposing the contention that a party is liable for the interest provision in a note in an action by a nonholder in due course, on the ground that the note is usurious [*see Cal. Const., art. XV, § 1*; Stats. 1919, p. lxxxiii, as amended by Stats. 1970, ch. 784, § 1 (uncodified provisions published in most annotated codes on pages containing *Civ. Code § 1916.1 et seq.*, regarding interest, real estate provisions, and variable interest rate provisions)].

The issue of usury would commonly arise either in defense of an action against the maker of a note to recover interest on the note, or in an action by a maker to recover treble damages against the payee on the ground that the interest rate was usurious [*see* Stats. 1919, p. lxxxiii, §§ 2 (interest provision void), 3(a) (treble damages), as amended by Stats. 1970, ch. 784, § 1; *see also Civ. Code § 1916.1 et seq.*].

Counsel should insert argument in this form showing the relationship between the facts of the case and points of law stated. Therefore, counsel should describe the rate of interest of the note and, if the usurious nature does not appear on the face of the note, show why the transaction as a whole renders the note usurious.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the holder may not enforce a usurious interest provision in a note.

[b] Effect of Usurious Interest Provision

Generally, when a note provides for usurious interest, the payee is entitled to no interest [*see Cal. Const., art. XV, § 1*; Stats. 1919, p. lxxxiii, § 2, as amended by Stats. 1970, ch. 784, § 1; *Paillet v. Vroman (1942) 52 Cal. App. 2d 297, 305, 126 P.2d 419]* . The usurious provision voids only the portion of the instrument that is relevant to the interest charge [*Campbell v. Realty Title Co. (1942) 20 Cal. 2d 195, 197, 124 P.2d 810* ; *Forte v. Nolfi (1972) 25 Cal. App. 3d 656, 691, 102 Cal. Rptr. 455]* .

Consequently, the inclusion of an usurious interest provision results, in effect, in a note payable at maturity without interest [*Epstein v. Frank (1981) 125 Cal. App. 3d 111, 123, 177 Cal. Rptr. 831]* . Inasmuch as the payee of a noninterest-bearing note is entitled to interest at the legal rate from the date the note matures until the date of judgment (in the nature of damages), the payee of an usurious note is similarly entitled to post maturity interest on the note [*Green v. Future Two (1986) 179 Cal. App. 3d 738, 744, 225 Cal. Rptr. 3* ; *Epstein v. Frank (1981) 125 Cal. App. 3d 111, 123, 177 Cal. Rptr. 831]* .

[c] Related Publications

For discussion of usury provisions generally, see Ch. 568, *Usury* in California Forms of Pleading and Practice (Matthew Bender).

[d] Related Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposing the contention supported by the points and *authorities in § 166.131*.

Note that even an interest rate exempted from the usury law may be unenforceable on the ground of unconscionability [*see Civ. Code § 1670.5*; *Carboni v. Arrospide (1991) 2 Cal. App. 4th 76, 81-85, 2 Cal. Rptr. 2d 845* (affirming allowance of enforcement of note and deed of trust written with 200 percent interest at 24 per cent)]. For memoranda of points and authorities addressing unconscionability, see Ch. 50, *Contracts* .

[3] Discussion of Authorities

[a] Usurious Interest Provision Void

In ***Epstein v. Frank*** *(1981) 125 Cal. App. 3d 111, 177 Cal. Rptr. 831* , the payees of 15 promissory notes brought an action to enforce the notes. The trial court found, inter alia, that four of the notes were usurious, and denied recovery of any interest on them. The payees appealed the judgment, contending, inter alia, an entitlement to post maturity legal interest rate on the four usurious notes (although not contesting the usury finding).

The court of appeal reversed with regard to allowance of post maturity legal interest on the usurious notes. The attempt to exact the usurious rate of interest renders the interest provisions of a note void (*125 Cal. App. 3d 111, 122)* . The usurious provisions, however, do not affect the payee's right to recover the principal amount of the note when due; the inclusion of a usurious interest provision results essentially in a note payable at maturity without interest (*125 Cal. App. 3d 111, 123)* .

[b] Immaterial That Borrower Took Initiative in Transaction

Williams v. Reed *(1957) 48 Cal. 2d 57, 307 P.2d 353* , was an action on a promissory note. After trial, appeal, and subsequent trial, judgment was rendered against the makers, who appealed. The Supreme Court affirmed, except with regard to the award of interest on the note (*48 Cal. 2d 57, 68)* . The $10,000 note, given as a "bonus" or "finder's fee" for a loan of $30,000 under the remaining note, was part of the entire loan transaction and therefore constituted usurious interest, under former Cal. Const., art. XX, § 22 [*now see Cal. Const., art. XV, § 1*] (*48 Cal. 2d 57, 67)* . When the transaction violates the usury law, the intent of neither of the parties is material, nor is it material that the borrower rather than the lender took the initiative in the transaction (*48 Cal. 2d 57, 68)* .

Counsel should note the discussion in *Buck v. Dahlgren (1972) 23 Cal. App. 3d 779, 787-788, 100 Cal. Rptr. 462* , an action in which the issue of usury arose not in defense to recovery on a note, but in a cause of action by the maker of a note to recover usurious interest paid as well as treble damages. In *Buck*, the court noted that court decisions have given the trial court discretion to disallow treble damages to a borrower who was the moving force in the transaction. The maker in *Buck* was entitled to neither treble damages nor the recovery of the actual interest paid, due to his own conduct and the equities of underlying circumstances.

[c] Adding Unpaid Interest to Principal Is Usurious

In ***First American Title Ins. & Trust Co. v. Cook*** *(1970) 12 Cal. App. 3d 592, 90 Cal. Rptr. 645* , two parties experienced in real estate transactions, and represented by brokers, executed a promissory note providing for the legal rate of interest. The note was prepared on a printed form by the title company, which inadvertently let stand the provision "should the interest not be so paid, it shall be added to the principal and thereafter bear like interest as the

principal." After the parties discovered the usurious clause, the title company brought an action to reform the note on the ground of mutual mistake. The payee cross complained, requesting the same reformation as well as damages against the title company for negligence. The maker counterclaimed against the payee on the ground of usury, and sought to recover treble damages. The trial court found that both parties intended the interest should not exceed the maximum legal rate, entered judgment for reformation, and declared the note nonusurious. The maker appealed.

The court of appeal affirmed, holding that reformation of the note was proper because the error was caused by mutual mistake (*12 Cal. App. 3d 592, 597-599)* . All parties conceded that the note as originally drafted was usurious on its face. The note, providing for the monthly payment of interest at the maximum legal rate, was usurious by reason of the provision that the interest not so paid be added to the principal and thereafter bear like interest as the principal. When interest is compounded annually at the maximum rate after default, the sum charged as interest for any one year will not exceed the maximum rate on the amount of money owed at the commencement of the year, but the sum charged will exceed that rate if the interest is compounded at shorter intervals (*12 Cal. App. 3d 592, 597)* . (For additional discussion of *Cook, see § 166.131[3][b]*.)

[d] Actual Transaction, Not Face of Note, Controls

In ***Taylor v. Budd*** *(1933) 217 Cal. 262, 18 P.2d 333* , a promissory note secured by a trust deed provided for monthly payment of interest in advance. When the makers of the note received the amount of the loan, attorney's fees as well as the first month's interest had been deducted. After a decisional holding that advance interest is usurious, the trustee struck the provision from the note and notified the makers not to pay advance interest in the future. Ultimately, the makers defaulted, and the trustee instituted proceedings to sell the property under the deed of trust. The makers brought an action against the trustee to declare the loan usurious and the interest provisions void, and for related relief, including an injunction on the sale of the property. The trial court found that although the original note was usurious, the change had eliminated the defect, and constituted a compromise and settlement of any claim for prior usurious payments. The makers appealed.

The Supreme Court reversed, holding, inter alia, that no compromise or waiver resulted from the modification of the note (*217 Cal. 262, 266)* . The original note was usurious in two regards. The requirement of the maximum monthly interest in advance was a violation of the pertinent statute, regardless of whether there was any criminal intent. Moreover, a note must be tested for usury with reference to the actual sum given by the lender to the borrower, and not by the mere face of the note. When the first month's interest has been collected in advance, the principal sum loaned will be held to be the amount of the loan less the interest or commission deducted in advance (*217 Cal. 262, 265)* . Consequently, the makers continually paid interest on the amount of principal evidenced by the face of the note, although they received less than that amount (*217 Cal. 262, 265-266)* . Therefore, the interest was usurious during the entire period of the loan (*217 Cal. 262, 266)* .

[e] Bonus Added to Actual Interest Exceeds Maximum Allowable Interest

Moore v. Russell *(1931) 114 Cal. App. 634, 300 P. 479* , is *discussed under § 166.133[3][f]*.

[f] Interest Payments Made on Usurious Note Are Offset Against Principal

In ***Moore v. Russell*** *(1931) 114 Cal. App. 634, 300 P. 479* , the payee on a promissory note paid the makers $4,250, in exchange for a note to repay $5,000 as principal in addition to interest at the rate of seven percent per annum. After default on the renewal note, the holder brought an action against the makers. The makers defended on the grounds that the original note was knowingly given to advance an illegal scheme (and was therefore void), and that the note was usurious because the principal exceeded the amount given by an usurious percentage. The trial court found in the holder's favor in the amount of $4,250, and one of the makers appealed.

The court of appeal modified the judgment with regard to the amount of the award, and affirmed with regard to all other issues (*114 Cal. App. 634, 644)* . The $750 difference between the amount of money given for the note and the amount of principal on the note constituted a bonus, rendering the note usurious. Interest on an usurious note is not collectible. Inasmuch as there was no interest collectible, all payments made on the note necessarily had to be credited as payments on the principal. Consequently, the judgment was reduced to reflect an offset of the principal in the amount of the "interest" paid (*114 Cal. App. 634, 641-642)* .

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16-166 California Points & Authorities § 166.134

§ 166.134 Opposing Contention That Holder Not Subject to Defenses--Action by Nonholder in Due Course--Lack of Consideration [Com. Code §§ 3303(b), 3305]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

DEFENDANT _____ [*name*] IS NOT LIABLE ON THE INSTRUMENT THAT IS THE SUBJECT OF THIS ACTION BECAUSE THERE WAS NO VALID CONSIDERATION FOR THE NOTE, AND PLAINTIFF IS NOT A HOLDER IN DUE COURSE.

A. Lack of Consideration Defense. The drawer or maker of an instrument has a defense if the instrument is issued without consideration (*Com. Code § 3303(b)*).

B. Defense Applies to Nonholder in Due Course. Unless the holder is a holder in due course, the right to enforce a party's obligation to pay an instrument is subject to a defense of the obligor stated in another section of Division 3 of the Commercial Code or a defense of the obligor that would be available if the person entitled to enforce the instrument were enforcing a right to payment under a simple contract (*Com. Code § 3305(a)(2)*; *see Com. Code § 3305(b)*; *see also Bargioni v. Hill (1962) 211 Cal. App. 2d 21, 22, 27 Cal. Rptr. 142*).

[*Optional*] **C. Parol Evidence Admissible to Show Lack of Consideration Between Original Parties.** As between original parties to a promissory note, parol evidence is admissible to show lack or failure of consideration (*Coast Bank v. Holmes (1971) 19 Cal. App. 3d 581, 590, 97 Cal. Rptr. 30*).

[*Add, as applicable, EITHER*]

D. Moral Obligation Insufficient. Unless a moral obligation was preceded by a good and valuable consideration, it is

insufficient to support an obligation of indebtedness, which requires an existing legal obligation owed by instrument's maker (*Civ. Code § 1606*; *Estate of McConnell (1936) 6 Cal. 2d 493, 498, 58 P.2d 639*).

[*AND/OR*]

E. Mere Motive, Inducement, or Hope of Profit. Mere motive, inducement, or hope of profit is not consideration (*Williams v. Hasshagen (1913) 166 Cal. 386, 390, 137 P. 9*).

[*AND/OR*]

F. Mere Pledge of Consideration. The mere pledge of consideration to the instrument's maker does not constitute consideration for the instrument (*Williams v. Hasshagen (1913) 166 Cal. 386, 389, 137 P. 9*).

[*AND/OR*]

G. Cancellation of Prior Debt Without Knowledge of Maker. The cancellation of a prior debt does not constitute consideration if the instrument's maker had no knowledge of the prior debt's existence (*Williams v. Hasshagen (1913) 166 Cal. 386, 390, 137 P. 9*).

[*AND/OR*]

H. Purported Maker of Note Did Not Sign Note, Nor Receive Any Benefit. An instrument is given without consideration if the purported maker did not sign the note, was not a party to the underlying agreement, and neither received nor was promised anything of benefit in consideration for the instrument (*Nakagawa v. Okamoto (1913) 164 Cal. 718, 721-722, 130 P. 707*).

[*AND/OR*]

I. No Intention of Parties Evidencing Forbearance. There is no consideration for an instrument based on forbearance to sue, when there is no showing that the parties intended forbearance (*Parrino v. Rallis (1931) 116 Cal. App. 364, 366, 2 P.2d 515*).

[*AND/OR*]

J. Note Given in Exchange for Note Lacking Consideration. When a note is executed to a payee only in renewal of a prior note given to that payee, the real consideration for which it is given is that for which the prior note was given, and the failure of the consideration of the first note may be pleaded in an action on the subsequent note (*Newark Trust Co. v. Kriebel (1920) 49 Cal. App. 614, 620-621, 193 P. 962*).

[2] Comments

[a] Use of Form

This memorandum is for use in opposing the contention that a party is liable on an instrument in an action by a

nonholder in due course, on the ground that there was no valid consideration for the instrument [*see Com. Code §§ 3303(b), 3305*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Therefore, counsel should describe the transaction, show that the holder is not a holder in due course, and establish the failure of consideration.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that a holder is not liable because there was no valid consideration for the instrument.

[b] Circumstances Under Which Lack of Consideration Not a Defense

Lack of consideration is not a defense as against a holder in due course. Although the right of a holder in due course to enforce the obligation of a party to pay the instrument is subject to the "real defenses" of an obligor (such as infancy, illegality, and fraud) [*see Com. Code § 3305(a)(1)*], the right to enforce payment is not subject to any defenses of the obligor set forth in another section of Division 3 of the Commercial Code (such as consideration) [*Com. Code § 3305(b)*; *see Com. Code § 3305(a)(2)*; *see also* Official Comments 1 and 2 to U.C.C § 3-305 (1990)].

Moreover, an instrument issued for value is also issued for consideration [*Com. Code § 3303(b)*]. Thus, whether or not under contract law adequate consideration was given for an instrument, if the instrument is deemed issued for value under *Com. Code § 3303(a)*, it is also issued for consideration [*see* Official Comment 1 to U.C.C. § 3-303, Case # 1 (1990)].

[c] Debt Arising From Illegal Transaction

The consideration for a promissory note given solely to evidence an alleged indebtedness arising from an illegal transaction is unlawful, and a holder with full notice of the nature of the debt cannot recover on the note [*see Union Collection Co. v. Buckman (1907) 150 Cal. 159, 161, 88 P. 708]* .

For cases holding that a gambling debt does not constitute consideration for an instrument (and the payee cannot recover on the instrument), see *Hamilton v. Abadjian (1947) 30 Cal. 2d 49, 51, 179 P.2d 804* ; *Lane & Pyron, Inc. v. Gibbs (1968) 266 Cal. App. 2d 61, 63-64, 71 Cal. Rptr. 817* ; *Leite v. Dietz (1949) 95 Cal. App. 2d 41, 42-43, 212 P.2d 265* ; *Braverman v. Horn (1948) 88 Cal. App. 2d 379, 381, 198 P.2d 948* ; and *Lavick v. Nitzberg (1948) 83 Cal. App. 2d 381, 383, 188 P.2d 758* .

[d] Related Publications

For discussion of consideration generally, see Ch. 140, *Contracts* in California Forms of Pleading and Practice (Matthew Bender).

[e] Related Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposing the contention supported by the points and *authorities in §§ 166.90, 166.93, 166.96,* and *166.99*.

For points and authorities regarding consideration issues relating to contracts generally, see Ch. 50, *Contracts* .

[3] Discussion of Authorities

[a] Defense Applies to Nonholder in Due Course

In ***Bargioni v. Hill*** *(1962) 211 Cal. App. 2d 21, 27 Cal. Rptr. 142* , the maker of a promissory note gave the note as partial payment for real property, secured by a junior trust deed on the property in the same amount. The maker defaulted on the first installment due, then executed a second note for the amount due under the first two installment payments, before the time that the second payment was due. In an action by the payee against the maker for the amount due on the second note, the trial court found in the payee's favor. The maker appealed.

The court of appeal reversed, holding that absence of consideration is a defense against any person not a holder in due course. Although a note is deemed to have been issued for a valuable consideration, that is a disputable presumption. It is essential to the existence of any contract that there be sufficient consideration. In the instant case, the payee did not introduce any testimony regarding any new consideration of the note, but rather relied on the presumption of consideration. The maker should be permitted to introduce evidence regarding consideration (*211 Cal. App. 2d 21, 22)* .

[b] Parol Evidence Admissible to Show Lack of Consideration Between Original Parties

In ***Coast Bank v. Holmes*** *(1971) 19 Cal. App. 3d 581, 97 Cal. Rptr. 30* , a bank-creditor induced a third party to assume the debtor's obligations by executing his own promissory note, in exchange for the bank's oral promise to obtain a third trust deed on the related real property, not to demand payment until the property was sold, to protect the maker's trust deed by preventing foreclosure by senior lien holders, and to cancel the note in the event of any foreclosure. In an action by the bank against the maker, the trial court found for the maker, holding, inter alia, that the bank's promises constituted consideration for the note, and that the consideration failed because conditions precedent to the obligation did not occur. The bank appealed.

The court of appeal modified the judgment with regard to a reformation decree, but affirmed with regard to the issue of consideration. Evidence of the bank's oral promises was properly admissible to show lack or failure of consideration. As between the original parties to a promissory note, parol evidence is admissible to show lack or failure of consideration. Failure of consideration is the failure to execute a promise, the performance of which has been exchanged for performance by the other party. Among other situations, the failure may arise from the willful breach of the promise (*19 Cal. App. 3d 581, 590)* .

[c] Moral Obligation Insufficient

In ***Estate of McConnell*** *(1936) 6 Cal. 2d 493, 58 P.2d 639* , the deceased executed a promissory note in favor of his former business partner, apparently in appreciation of work he had done to further the partnership, and possibly to repay him for certain advice given after the partnership had dissolved. The deceased told the payee that he had left him the same amount of money in previous wills, but had revoked those wills and executed the note in lieu of a testamentary gift to him. The payee assigned and transferred the note to a religious organization, and on an action for account of the estate, the trial court allowed the assignee's claim on the note.

The Supreme Court reversed with regard to the allowance of the claim, holding that there was no valuable consideration for the note. Under *Civ. Code § 1606*, an existing legal obligation resting on the promisor, or a moral obligation originating in some benefit conferred on the promisor, or prejudice suffered by the promisee, is a good consideration for a promise, to an extent corresponding with the extent of the obligation, but no further or otherwise. A moral obligation is sufficient to support an express promise when good and valuable consideration once existed. However, a moral, as distinguished from a legal, consideration is not sufficient to form a valid and binding contract (*6 Cal. 2d 493, 498)* .

[d] Mere Motive, Inducement, or Hope of Profit

In ***Williams v. Hasshagen*** *(1913) 166 Cal. 386, 137 P. 9* , an elderly woman was induced by her son to execute a promissory note in favor of a financial institution of which he was an officer. In exchange for her note, the institution

canceled several notes executed by the son and other officers. The maker was ignorant of the existence and cancellation of the notes, and received nothing in return for her note. The institution became insolvent, and its agent brought an action to recover from the maker. The trial court found in the maker's favor, and the note's holder appealed.

The Supreme Court affirmed, holding that there was no valuable consideration for the note (*166 Cal. 386, 388-393)* . The canceled notes did not constitute consideration because the maker had no knowledge of them. Consequently, there was no meeting of the minds of the parties before the contract in that regard. Promises to the maker that she would be "reimbursed" did not constitute consideration. In the absence of fraud, they might have amounted to an assurance that she was making an accommodation note for the payee and that she would not be required to pay it. The party for whose accommodation the paper was made may not sue the accommodation party. Moreover, her hope that her son might profit by the use of the note in the purchase of stock from another bank did not constitute consideration. Mere motive, inducement, or hope of profit is not consideration (*166 Cal. 386, 390)* . The holder asserted that the bank's stock that had been pledged as collateral security for the canceled notes was transferred to the new note's maker, and constituted consideration. However, there was no evidence that the stock was consideration. The mere pledge of its stock to the note's maker did not constitute consideration for the note (*166 Cal. 386, 389)* .

[e] Mere Pledge of Consideration

Williams v. Hasshagen *(1913) 166 Cal. 386, 137 P. 9* , is *discussed under § 166.134[3][d].*

[f] Cancellation of Prior Debt Without Knowledge of Maker

Williams v. Hasshagen *(1913) 166 Cal. 386, 137 P. 9* , is *discussed under § 166.134[3][d].*

[g] Purported Maker of Note Did Not Sign Note, Nor Receive Any Benefit

In ***Nakagawa v. Okamoto*** *(1913) 164 Cal. 718, 130 P. 707* , a consolidated action concerning several promissory notes, a group of businesspeople executed "promissory notes" payable to a business association, and attempted to set forth an "agreement" establishing the purpose of the notes. However, the purported maker in question did not sign any of the notes, was not a party to the agreement, and received no consideration for the notes. The Supreme Court held, inter alia, that with regard to that party, the notes were given with no consideration (*164 Cal. 718, 721-722)* . (The "notes" were found to be attempts to establish a contract provision for liquidated damages) (*164 Cal. 718, 722-724)* .

[h] No Intention of Parties Evidencing Forbearance

In ***Parrino v. Rallis*** *(1931) 116 Cal. App. 364, 2 P.2d 515* , a husband and wife executed a promissory note for the amount due the payee by the husband for previous sums owed for a loan and other services. In an action by the payee to recover the amount of the note, the court of appeal upheld judgment in the wife's favor on the ground that there was no consideration for the note with regard to her (*116 Cal. App. 364, 366-367)* . Although forbearance is sufficient to constitute a valid consideration, it must be under an agreement to forbear, which the evidence did not support. Mere forbearance alone is not sufficient (*116 Cal. App. 364, 366)* .

[i] Note Given in Exchange for Note Lacking Consideration

Newark Trust Co. v. Kriebel *(1920) 49 Cal. App. 614, 193 P. 962* , concerned a note given in exchange for renewal on a previous note. The maker executed the original note in partial payment for a certain number of preincorporation shares of the company represented by the payee, as agent and trustee. Contemporaneous with the note, the payee executed a promise to sell all the maker's stock after incorporation, at a certain price. At the time of the transaction, the company had full knowledge of the terms of the agreement, and acquiesced in the payee's authority to represent the company. At that time the maker was an incompetent. The stock was worthless, and the only consideration for the note was the payee's promise to sell the stock. Following the company's incorporation, the payee failed to sell or attempt to

sell the maker's stock. Subsequently, the payee executed a second note given as a renewal of the first note. The note was transferred and then assigned for collection. The assignee brought an action to recover the amount of the note. The trial court found in the maker's favor and the assignee appealed.

The court of appeal affirmed, holding, inter alia, that the payee's failure to perform his agreement rendered the first note without consideration. Consequently, the second note was without consideration. When a note is executed to a payee only in renewal of a prior note, the real consideration for the note is that for which the prior note was given, and the failure of consideration for the prior note may be pleaded in an action on the subsequent note (*49 Cal. App. 614, 620-621)* .

[4] Additional Authorities

[a] Note Given in Exchange for Note Lacking Consideration

In *Saks v. Charity Mission Baptist Church (2001) 90 Cal. App. 4th 1116, 110 Cal. Rptr. 2d 45* , an investor brought an action for breach of contract and fraud against a church, attempting to hold the church liable for promissory notes signed by its pastor. The pastor had been involved with a developer in various real estate schemes, and had signed two promissory notes made payable to plaintiff after he advanced money to purchase property in the church's name. The church contended in its defense that it was being used by the other parties as a conduit to obtain a loan or grant from a city agency, and that as soon as the anticipated loan was received, the parties planned to use the city's funds to repay plaintiff and immediately transfer the property to a partnership owned by the developer, the investor, and the pastor. The jury found that the church was liable on the promissory notes and the trial court entered judgment for plaintiff. The court of appeal reversed, holding that the jury verdicts in favor of plaintiff were unsupported by the evidence. It stated that when an officer of a corporation is openly using the corporation to obtain a benefit for himself and his cohorts in a transaction in which the corporation will ultimately not benefit, the other parties to the transaction cannot later seek to hold the corporation liable for its actions. The evidence established that the pastor and developer, in their discussions with the plaintiff, made no secret of their plan to use the church as a front to obtain a loan or grant from a governmental agency. Plaintiff at no time expressed any disapproval of the plan or unwillingness to participate in the proposed subterfuge (*90 Cal. App. 4th 1116, 1120-1121)* . The court noted that negotiable instruments are subject to the defense of failure of consideration, citing *Com. Code § 3303(b)*. No consideration was given to the church in exchange for the promise to pay contained in the notes, and all expected benefits flowed to the developer, the pastor, and plaintiff. It was undisputed that the church would end up with no interest in either the property or the partnership. The court concluded that the uncontradicted evidence established the church's defense to the breach of contract action that the notes lacked consideration (*90 Cal. App. 4th 1116, 1133-1137)* .

California Points & Authorities

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CHAPTER 166 NEGOTIABLE INSTRUMENTS
PART II. FORMS
E. Defenses

16-166 California Points & Authorities § 166.135

§ 166.135 Supporting Contention That Maker Is Liable for Interest on Note--Usury Exemption Applicable--Loan Arranged by Licensed Real Estate Broker and Secured by Real Property [Cal. Const., art. XV, § 1; Civ. Code § 1916.1]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

THE NOTE IS NOT USURIOUS BECAUSE IT QUALIFIES FOR THE EXEMPTION FOR LOANS ARRANGED BY LICENSED REAL ESTATE BROKERS AND SECURED BY REAL PROPERTY.

A. Statement of Exemption. Any loan or forbearance made or arranged by any person licensed as a real estate broker by the State of California, and secured, directly or collaterally, in whole or in part by liens on real property is exempt from all interest limitations (*Cal. Const., art. XV, § 1*; *Civ. Code § 1916.1*).

B. Test to Determine Whether Loan Was Arranged by Broker. In considering whether a loan qualifies as one "arranged by a real estate broker" for purposes of the exemption provided by *Civil Code Section 1916.1*, two things are necessary: (1) the broker must have acted for another or for others, not for himself or herself, and (2) the broker must have received or expected to receive compensation (*Civ. Code § 1916.1*; *Park Terrace Ltd. v. Teasdale (2002) 100 Cal. App. 4th 802, 806-807, 122 Cal. Rptr. 2d 797* ; *Stickel v. Harris (1987) 196 Cal. App. 3d 575, 583, 242 Cal. Rptr. 88* ; *Green v. Future Two (1986) 179 Cal. App. 3d 738, 742-743, 225 Cal. Rptr. 3*).

[*Optional*] **C. Minimal Broker Involvement Is Sufficient.** In order to qualify for the usury exemption provided by *Civil Code Section 1916.1*, it is not necessary that the broker be actively involved in arranging the loan. Minimal involvement[, such as being the contact with the borrower's primary broker, advising the lender regarding terms, and checking documents prepared by a salesperson in his or her office], is sufficient.

It is sufficient that the real estate broker have engaged in some conduct as a third party intermediary that actually causes

the loan to be obtained or procured. (*Jones v. Kallman (1988) 199 Cal. App. 3d 131, 134-135, 244 Cal. Rptr. 609* ; *Gibbo v. Berger (2004) 123 Cal. App. 4th 396, 403-404*).

[*Optional*] **D. Broad Definition of Compensation.** Compensation within the meaning of the usury exemption provided by *Civil Code Section 1916.1* is a concept that has an extremely broad definition sufficient to encompass the receipt of just about any form of monetary or tangible benefit that is not self-bestowed (*Jones v. Kallman (1988) 199 Cal. App. 3d 131, 136, 244 Cal. Rptr. 609* ; *Stickel v. Harris (1987) 196 Cal. App. 3d 575, 584, 242 Cal. Rptr. 88*).

[*Optional*] **E. Existence of Compensation Is Determined by Trier of Fact.** Whether payment, advantage, benefit, or other form of consideration amounts to compensation has traditionally been regarded as an issue to be decided by the trier of fact (*Jones v. Kallman (1988) 199 Cal. App. 3d 131, 136, 244 Cal. Rptr. 609* ; *Stickel v. Harris (1987) 196 Cal. App. 3d 575, 584, 242 Cal. Rptr. 88*).

[*Optional*] **F. Whether Loan Was Arranged by Broker Is Determined by Trier of Fact.** The issue of whether a licensed broker "arranged" a nonusurious loan within the meaning of *Civil Code Section 1916.1* is committed to the trier of fact unless, as a matter of law, a given transaction failed to meet the two-prong test previously cited above. [The only task for the appellate court is to decide whether the trial court's determination (that the loan was exempt) can claim the support of substantial evidence] (*Jones v. Kallman (1988) 199 Cal. App. 3d 131, 135, 244 Cal. Rptr. 609* ; *Stickel v. Harris (1987) 196 Cal. App. 3d 575, 584, 242 Cal. Rptr. 88*).

[*Optional*] **G. Loan to Entity of Which Broker Is Member.** In arranging a loan to a partnership or joint venture in which he or she is a partner or venturer, a broker who receives compensation for arranging the loan is acting for another so as to qualify for the usury exemption provided by *Civil Code Section 1916.1*. [The fact that the loan is made before the partnership or venture is formed does not prevent the loan from qualifying for the exemption] (*Stickel v. Harris (1987) 196 Cal. App. 3d 575, 584-585, 242 Cal. Rptr. 88*).

[*Optional*] **H. Anticipated Profit Qualifies as Broker's Compensation.** The fact that the broker's compensation is deferred is irrelevant, because anticipated profits qualify as compensation (*Stickel v. Harris (1987) 196 Cal. App. 3d 575, 585, 242 Cal. Rptr. 88*).

[*Optional*] **I. Contribution to Expenses Qualifies as Broker's Compensation.** When a licensed real estate broker and the salesperson who receives the entire commission for arranging a loan have a business relationship pursuant to which a portion of the commission is placed in the company account from which expenses are paid, the broker reaps sufficient benefits in the form of future profitability to satisfy the compensation requirement of the usury exemption (*Jones v. Kallman (1988) 199 Cal. App. 3d 131, 135-136, 244 Cal. Rptr. 609*).

[*Optional*] **J. Retroactive Application of Exemption.** The usury exemption provided by *California Constitution, Article XV, Section 1* for loans secured by real property and made or arranged by licensed real estate brokers is applied retroactively to transactions that occurred before its adoption (*Garcia v. Wetzel (1984) 159 Cal. App. 3d 1093, 1096, 206 Cal. Rptr. 251* ; *Chapman v. Farr (1982) 132 Cal. App. 3d 1021, 1023-1024, 183 Cal. Rptr. 606*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a loan is not usurious because it qualifies for the exemption allowed for loans secured by real property and arranged by licensed real estate brokers [*see Cal. Const., art. XV, § 1*; *Civ. Code § 1916.1*]. Paragraphs A and B set forth the statutory authority and general statement of the criteria for the exemption. The other paragraphs relate to particular applications of the exemption criteria and may or may not be appropriate in a particular situation. The bracketed text in Paragraph F is appropriate in

an appellate brief.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that a loan is not usurious.

[b] Related Points and Authorities

These points and authorities may be combined, as appropriate in a particular situation, with those in § 166.131, which address additional aspects of usury and its application to a situation involving a holder in due course.

Note that even an interest rate exempted from the usury law may be unenforceable on the ground of unconscionability [*see Civ. Code § 1670.5*; *Carboni v. Arrospide (1991) 2 Cal. App. 4th 76, 81-85, 2 Cal. Rptr. 2d 845]* . For memoranda of points and authorities addressing unconscionability, see Ch. 50, *Contracts* .

[3] Discussion of Authorities

[a] Statement of Exemption

Cal. Const., art. XV, § 1 exempts from all interest limitations any loans made by building and loan associations, credit unions, banks, pawnbrokers, and other specified lending institutions. It also exempts loans made or arranged by any person licensed by California as a real estate broker and secured in whole or in part by liens on real property. The exemption for loans made or arranged by any licensed real estate broker was added by Proposition 2, which was enacted at special election on November 6, 1979.

Civ. Code § 1916.1 provides that the restrictions on rate of interest contained in *Cal. Const., art. XV, § 1* do not apply to any loan or forbearance made or arranged by any person licensed by California as a real estate broker and secured, directly or collaterally, in whole or in part by liens on real property. For purposes of *Civ. Code § 1916.1*, a loan or forbearance is arranged by any person licensed as a real estate broker when the broker does any of the following [*Civ. Code § 1916.1*]:

- Acts for compensation or in expectation of compensation for soliciting, negotiating, or arranging the loan for another.

- Acts for compensation or in expectation of compensation for selling, buying, leasing, exchanging, or negotiating the sale, purchase, lease, or exchange of real property or a business for another and (1) arranges a loan to pay all or any portion of the purchase price of, or an improvement to, that property or business, or (2) arranges a forbearance, extension, or refinancing of any loan in connection with that sale, purchase, lease, or exchange of, or of an improvement to, real property or a business.

- Arranges or negotiates for another a forbearance, extension, or refinancing of any loan secured by real property in connection with a past transaction in which the broker had acted for compensation or in expectation of compensation for selling, buying, leasing, exchanging, or negotiating the sale, purchase, lease, or exchange of real property or a business.

For purposes of *Civ. Code § 1916.1*, the term "made or arranged" includes any loan made by a person licensed as a real estate broker as a principal or as an agent for others, and whether or not the person is acting within the course and scope of his or her license.

[b] Test to Determine Whether Loan Was Arranged by Broker

In ***Park Terrace Ltd. v. Teasdale*** *(2002) 100 Cal. App. 4th 802* , 122 Cal. Rtpr. 2d 797, five real estate partnerships sought damages from and declaratory relief against a lender for loaning them money at allegedly usurious interest rates. One of the partnerships wanted to refinance debts secured by its property, including a note held by defendants. Ultimately, this partnership paid off defendants with proceeds from a new loan secured by property owned by another of the partnerships. The note evidencing this loan provided for an initial annual interest rate of 10 percent, later increasing to 13.5 percent. As part of this transaction, the partners of this second partnership signed a certificate designating its general partner, who was a licensed real estate broker, to act on the partnership's behalf in soliciting, negotiating and arranging the loan. In accordance with that designation, this person initiated discussions with the lender. In return, he was to receive compensation as a general partner under the terms of the partnership agreement. On this basis, the partners signed a certificate stating that in accordance with *Civ. Code § 1916.1*, the loan was not usurious. Defendants also made secured loans to four other plaintiff partnerships with interest exceeding the maximum legal rate. Each note provided that the loan was arranged through the same individual as a licensed real estate person (*100 Cal. App. 4th. 802, 804-805)* .

Subsequently, the five real estate partnerships sued the lender for loaning them money at allegedly usurious rates. Defendants moved for summary judgment, claiming the usury limitations did not apply because the loans were arranged by a real estate broker for compensation. The trial court granted summary judgment in all five actions, based on the exemption for loans arranged by a licensed real estate broker (*100 Cal. App. 4th. 802, 804-805)* .

The appellate court agreed that the exemption applied and affirmed the judgment. The plaintiffs argued that the exemption did not apply because the general partner neither "arranged" the loans nor performed acts requiring him to have a license. The appellate court found that both arguments lacked merit. Citing *Stickel v. Harris (1987) 196 Cal. App. 3d 575, 242 Cal. Rptr. 88* , discussed *below*, the court stated that a licensed real estate broker arranges a loan if he or she acts for another and receives or expects to receive compensation for it. The general partner negotiated the loans for each partnership's benefit, not merely for his own. Further, his right to participate in partnership profits satisfied the requirement that he expect compensation for his efforts (*100 Cal. App. 4th 802, 806-808)* . With respect to the plaintiffs' argument that the exemption did not apply because it was limited to brokers who engage in an activity requiring a license, and a license was not required unless the broker acts in expectation of special compensation, the court stated that the usury exemption is not so limited. *Civ. Code § 1916.1* expressly provides that the phrase "made or arranged" applies even if the broker is not acting within the course and scope of the license. Again citing *Stickel v. Harris*, discussed *below*, the court held that the exemption applied even though the law did not require the general partner to be licensed when he arranged the loans (*100 Cal. App. 4th 802, 808-810)* .

The plaintiff in ***Stickel v. Harris*** *(1987) 196 Cal. App. 3d 575, 242 Cal. Rptr. 88* , was approached by one of the defendants, who was a licensed real estate broker, and asked to invest in a joint venture project to purchase real estate and build condominiums on the property. The broker first offered to pay 25 percent and then offered 30 percent on any amount loaned, and assured plaintiff that neither rate was usurious. The broker was one of the venture partners. The first loan was executed by two of the partners, bore interest at 30 percent per annum, and was to be repaid by October 15, 1981. It was secured by deeds of trust on the property. The partners made one interest payment, and asked plaintiff to consider extending the loan and advancing additional funds so they could acquire two new lots for another construction project. That note also bore interest at 30 percent per annum, was executed by three of the partners, and was to be repaid in six months. It was initially secured by deeds of trust on the original property, but those deeds of trust were substituted for a subordinate deed of trust on the new lots. The second loan was extended. The last extension was for an additional year and provided for the interest rate to be increased to 32.5 percent per annum. The partners experienced financial difficulties. After the holder of the first deed of trust foreclosed, plaintiff sued the partners to recover the interest arrearages and principal. Judgment was entered for plaintiff, and defendants appealed.

The court of appeal affirmed. Even though the transaction arose before *Civ. Code § 1916.1* was enacted, the parties

agreed that *Civ. Code § 1916.1*, as originally adopted and as amended, was entitled to retroactive application to this case (*196 Cal. App. 3d 575, 582 n.5*). The court noted that *Civ. Code § 1916.1* is construed to mean that a loan is "arranged by a person licensed as a real estate broker" only if two things occur: (1) the broker acts for another or others, not for himself or herself; and (2) the broker receives or expects to receive compensation (*196 Cal. App. 3d 575, 583)* .

The facts and procedural background of ***Green v. Future Two*** *(1986) 179 Cal. App. 3d 738, 225 Cal. Rptr. 3* , are discussed in *§ 166.139[3][a]*. In discussing whether the loan in question had been arranged by the partner who was licensed as a real estate broker, the court of appeal said that *Civ. Code § 1916.1* clarifies *Cal. Const., art. XV, § 1* (*179 Cal. App. 3d 738, 742)* , and provides that a loan is arranged by a person licensed as a real estate broker only if two things occur: (1) the broker acts for another or others, not for himself or herself; and (2) the broker receives or expects to receive compensation (*179 Cal. App. 3d 738, 743)* .

[c] Minimal Broker Involvement Is Sufficient

Plaintiff in ***Jones v. Kallman*** *(1988) 199 Cal. App. 3d 131, 244 Cal. Rptr. 609* , was transferred about the time a second trust deed loan matured. Plaintiff gave a power of attorney to a licensed real estate broker so the broker could arrange to have the loan refinanced. The broker could not arrange a refinance, so the broker contacted a second broker, who was a co-owner of a real estate brokerage firm. The second broker turned the transaction over to a licensed real estate salesperson who was the other co-owner of the brokerage firm. The salesperson found a lender who was willing to refinance for one year at 21 percent interest, plus 10 points. The first broker, who had power of attorney, accepted those terms. Under the second broker's supervision, the salesperson drafted the loan documents and opened the escrow. Plaintiff signed the note and second deed of trust. The entire commission was paid to the salesperson. Before the refinance note became due, the broker with the power of attorney negotiated an extension from the lender for another year, this time at 18 percent interest. Again, the salesperson drafted the loan documents and was paid the entire commission. Plaintiff made all interest payments due on the notes, paid the principal balance, received a reconveyance, and sued the lender and the salesperson, claiming the notes were usurious. The trial court gave judgment for defendants, holding that the loans were exempt under *Cal. Const., art. XV, § 1*, and *Civ. Code § 1916.1*. Plaintiff appealed, contending that only transactions in which the broker is actively involved and receives compensation qualify for the exemption.

The court of appeal affirmed. The trial court found that the second broker was the first broker's contact, advising the lender in setting the terms and reviewing the documents, and that such participation, while minimal, was sufficient to qualify the loan as "broker arranged" (*199 Cal. App. 3d 131, 134-135)* . The court of appeal said that factual findings on those issues are peculiarly the province of the trial court, and noted that in usury cases, the trier of fact is vested with the power to resolve many issues, including the ultimate question of whether a particular transaction is usurious. Therefore, appellate review is limited to deciding whether the trial court's findings are supported by substantial evidence. After reviewing the testimony of the second broker and the lender, the court concluded that the record supported the trial court's findings regarding participation (*199 Cal. App. 3d 131, 135)* .

In ***Gibbo v. Berger*** *(2004) 123 Cal. App. 4th 396, 403-404, 19 Cal. Rptr. 3d 629* , the lender sued to foreclose on a note, and in defense of the borrower's usury claim asserted that the loan was exempt because it had been arranged by a real estate broker. The trial court agreed, but in this case, because the facts at trial had been undisputed, the court of appeal reviewed the question de novo. The court of appeal concluded that the broker's conduct in this case was not sufficient to constitute "arrangement" of the loan. The broker had merely prepared documentation of loan terms already agreed upon by the lender and the borrower, and then ordered title insurance and disbursed funds in accordance with the lender and borrower's instructions. The court held that the broker must engage in some conduct as a third party intermediary that actually causes the loan to be obtained or procured (*123 Cal. App. 4th 396, 403-404)* .

In reaching this result, the court criticized the broad definition of "arranged" used in *Del Mar v. Caspe (1990) 222 Cal. App. 3d 1316, 272 Cal. Rptr. 446* , discussed in *§ 166.135[4][a]* as dicta that would lead to absurd results. *Gibbo v.*

Berger noted that the broad interpretation used in *Del Mar v. Caspe* was unnecessary because in that case the broker "arranged" the loan even under narrowest interpretation, and that such a broad interpretation would allow otherwise usurious loans when the real estate broker had done nothing more than photocopy and collate pages of a loan document for a nominal fee (*123 Cal. App. 4th 396, 401-402)* .

[d] Broad Definition of Compensation

The facts and procedural background of ***Jones v. Kallman*** *(1988) 199 Cal. App. 3d 131, 244 Cal. Rptr. 609* , are *discussed under § 166.135[3][c]*. Regarding the question of the broker's compensation, although the broker received no specific benefit as recompense for the brokerage services rendered in connection with the loans, the trial court alluded to the business relationship between the broker and the salesperson. The court of appeal said that the trial court impliedly must have found that the broker was compensated through the commissions paid to his partner. The partnership agreement provided that each partner would keep commissions earned by him, while nonpartner salespersons split their commissions with the broker (*199 Cal. App. 3d 131, 135)* . A portion of each commission earned by the partners was placed in the company account from which expenses were paid (*199 Cal. App. 3d 131, 135)* . The court of appeal quoted *Stickel v. Harris (1987) 196 Cal. App. 3d 575, 584, 242 Cal. Rptr. 88* (discussed *below*), for the propositions that compensation is a concept that has received an extremely broad definition sufficient to encompass the receipt of just about any form of monetary or tangible benefit that is not self-bestowed, and that the issue of whether a payment, advantage, benefit, or other form of consideration amounts to compensation has traditionally been regarded as an issue to be decided by the trier of fact. The court of appeal said the trial court must have reasoned that the partners' practice of putting a portion of each commission back into the business ultimately enhanced the partnership operation, and both partners expected to reap the benefits of this particular contribution through future profitability. Although this form of compensation may be unorthodox, the court concluded that it was sufficient (*199 Cal. App. 3d 131, 136)* .

The facts and procedural background of ***Stickel v. Harris*** *(1987) 196 Cal. App. 3d 575, 242 Cal. Rptr. 88* , are *discussed under § 166.135[3][b]*. The court said that precisely what constitutes "compensation" for purposes of *Civ. Code § 1916.1* was a question of first impression. Within the context of other statutes, compensation is a concept that has received an extremely broad definition sufficient to encompass the receipt of just about any form of monetary or tangible benefit that is not self-bestowed. The nature of compensation is as variable as the particular facts involved. The court also noted that the term "interest" has been treated with a similar expansiveness. Further, whether a payment, advantage, benefit, or other form of consideration amounts to compensation traditionally has been regarded as an issue to be decided by the trier of fact (*196 Cal. App. 3d 575, 584)* .

[e] Existence of Compensation Is Determined by Trier of Fact

See the discussion of ***Jones v. Kallman*** *(1988) 199 Cal. App. 3d 131, 244 Cal. Rptr. 609* , and ***Stickel v. Harris*** *(1987) 196 Cal. App. 3d 575, 242 Cal. Rptr. 88* , under § 166.135[3][d].

[f] Whether Loan Was Arranged by Broker Is Determined by Trier of Fact

Jones v. Kallman *(1988) 199 Cal. App. 3d 131, 244 Cal. Rptr. 609* , is *discussed under § 166.135[3][c]*.

The facts and procedural background of ***Stickel v. Harris*** *(1987) 196 Cal. App. 3d 575, 242 Cal. Rptr. 88* , are *discussed under § 166.135[3][b]*. The court also noted that in usury cases, the trier of fact is vested with the power to resolve many issues attending and including the ultimate question of whether a particular transaction is usurious. Thus, the issue of whether the second broker "arranged" a nonusurious loan within the meaning of *Civ. Code § 1916.1* is committed to the trier of fact unless, as a matter of law, a given transaction failed to meet the two-prong test previously cited. The only task for the appellate court is to decide whether the trial court's determination that the loan was exempt is supported by substantial evidence (*196 Cal. App. 3d 575, 584)* .

[g] Loan to Entity of Which Broker Is Member

The facts and procedural background of ***Stickel v. Harris*** *(1987) 196 Cal. App. 3d 575, 242 Cal. Rptr. 88* , are *discussed under § 166.135[3][b]*. The court of appeal said the broker clearly was not soliciting the loans for himself, but as an intermediary for the partnership and joint venture. Further, that status was not forfeited when the broker became a member of those entities (*196 Cal. App. 3d 575, 585)* . The joint venture that purchased the second parcel was not formed until after the second note had been executed (*196 Cal. App. 3d 575, 580 n.2*). Thus, defendants argued that the broker could not have been acting for the venture in arranging the loan. The court of appeal analogized to preincorporation contracts entered into by corporate promoters, saying that if the corporation is subsequently formed and accepts the benefits of the contract, the promoter's contract becomes enforceable against the corporation (*196 Cal. App. 3d 575, 586)* . The court found no reason in law or logic not to extend the same reasoning to this situation, noting that the venture ratified the loan by making interest payments (*196 Cal. App. 3d 575, 586-587)* .

[h] Anticipated Profit Qualifies as Broker's Compensation

The facts and procedural background of ***Stickel v. Harris*** *(1987) 196 Cal. App. 3d 575, 242 Cal. Rptr. 88* , are *discussed under § 166.135[3][b]*. Other portions of the opinion relating to the compensation issue are *discussed under § 166.135[3][d]*. The only compensation the broker expected to receive was his share of the profits generated by the sale of condominiums, the profits of which would be paid to the partners at the conclusion of the project. That was sufficient to qualify for the exemption. The fact that the broker's recompense would be deferred until the completion of the project was irrelevant, because anticipated profits qualify as compensation (*196 Cal. App. 3d 575, 585)* .

[i] Contribution to Expenses Qualifies as Broker's Compensation

See the discussion of ***Jones v. Kallman*** *(1988) 199 Cal. App. 3d 131, 244 Cal. Rptr. 609* , in § 166.135[3][d].

[j] Retroactive Application of Exemption

The facts and procedural background of ***Garcia v. Wetzel*** *(1984) 159 Cal. App. 3d 1093, 206 Cal. Rptr. 251* , are discussed in *§ 166.136[3][a]*. The court of appeal noted that the exemption of *Cal. Const., art. XV, § 1*, for loans made or arranged by licensed real estate brokers is applied retroactively to transactions that occurred before enactment of the exemption. Retroactive application is based on the rationale that remedies previously provided for allegedly usurious contracts are in the nature of penalty, and that no person has a vested right in an unenforced penalty or forfeiture (*159 Cal. App. 3d 1093, 1096)* .

The trial court in ***Chapman v. Farr*** *(1982) 132 Cal. App. 3d 1021, 183 Cal. Rptr. 606* , awarded damages, and injunctive and declaratory relief based on a finding that a loan arranged by a licensed real estate broker was usurious. Three months after entry of that judgment, *Cal. Const., art. XV, § 1* was amended by referendum to exempt such loans. The sole question on appeal was whether that amendment should be applied retroactively. The court of appeal concluded that it should be so applied, based on the rule that statutes that repeal or modify usury laws are to be given retrospective effect to determine the scope of liability with regard to transactions entered into before the repeal or modification. That rule is an application of another well-established principle that no person nor the state has a vested right in an unenforced statutory penalty or forfeiture (*132 Cal. App. 3d 1021, 1023)* . The remedies previously provided for allegedly usurious contracts are in the nature of a penalty. Thus the foregoing rules are applicable to exempt all broker-arranged loans made before November 6, 1979, whether or not any action on the loan was reduced to judgment (*132 Cal. App. 3d 1021, 1024)* .

[4] Additional Authorities

[a] Test to Determine Whether Loan Was Arranged by Broker

In *Stoneridge Parkway Partners, LLC v. MW Housing Partners III, L.P. (2007) 153 Cal. App. 4th 1373, 64 Cal. Rptr.*

3d 61 , the issue for the court was whether a broker who negotiates a loan on behalf of the lender, and who is an officer and employee of an affiliate of the lender but is not employed by the lender itself, negotiates the loan "for another" as *Civ. Code § 1916.1* provides. The court concluded that the broker in this case did negotiate the loan for another and that, therefore, the usury prohibition did not apply (*153 Cal. App. 4th 1373, 1379-1380)* .

The court of appeal in *Del Mar v. Caspe (1990) 222 Cal. App. 3d 1316, 272 Cal. Rptr. 446* , affirmed the trial court's holding in regard to two of the three notes that were at issue in the case. The court declared that they were not usurious, because they fell within the exemption for loans arranged by licensed real estate brokers. The third note was executed at a time when the party who arranged them was a licensed attorney, but not a licensed real estate broker. Thus, judgment was reversed regarding the third note. The attorney/real estate broker's involvement on behalf of the payee of the three notes consisted of title searches on the real property that secured the notes, document reviews, consultations and advisement, calculation of principal and interest (all three notes were consolidations and renewals of prior notes and additional advances), preparation of loan documents, discussion of documents and terms with the lender and the borrower, and securing execution of the documents (*222 Cal. App. 3d 1316, 1328)* .

The court of appeal reviewed the legislative analysis to the ballot proposition that enacted the constitutional exemption and to the legislative history of *Civ. Code § 1916.1*, and determined that a broad rather than narrow construction of the exemption is appropriate and most apt to realize its purpose (*222 Cal. App. 3d 1316, 1326)* . The court found that the broker's services were within the common understanding of the term "arrange," and were not nominal or ostensibly pretext, that is, there was no evidence that the broker merely lent his license to the payee to avoid the 10 percent interest limitation (*222 Cal. App. 3d 1316, 1328-1329)* . The fact that the notes were all renewals and consolidations was irrelevant to the question of whether the broker's services constituted sufficient involvement in the transactions to come within the meaning of the term "arrange" (*222 Cal. App. 3d 1316, 1329)* .

[b] Retroactive Application of Exemption

The court of appeal in *Orden v. Crawshaw Mortgage & Investment Co. (1980) 109 Cal. App. 3d 141, 167 Cal. Rptr. 62* , affirmed a judgment in favor of a licensed real estate broker holding a loan made by the broker at a variable rate often in excess of 10 percent per annum was not usurious. The loan originated in 1974 and judgment was entered after passage of Proposition 2 in 1979, which added the exemption for loans secured by real property and made or arranged by licensed real estate brokers. The court said it is a generally recognized principal of law that the right to recover a penalty imposed under a usury statute terminates with the repeal or modification of the statute unless the repealing statue contains a savings clause (*109 Cal. App. 3d 141, 144)* . Since no person nor the state has a vested right in an unenforced penalty or forfeiture, the court applied the rule that statutes that repeal or modify usury laws are to be given retrospective effect to determine the scope of liability with regard to transactions entered into before the repeal or modification (*109 Cal. App. 3d 141, 145-146)* .

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16-166 California Points & Authorities § 166.136

§ 166.136 Supporting Contention That Maker Is Liable for Interest on Note--Usury Exemption Applicable--Loan Made by Licensed Real Estate Broker as Principal [Cal. Const., art. XV, § 1; Civ. Code § 1916.1]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

THE NOTE IS NOT USURIOUS BECAUSE IT QUALIFIES FOR THE EXEMPTION FOR LOANS MADE BY LICENSED REAL ESTATE BROKERS, EVEN THOUGH PLAINTIFF BROKER ACTED AS PRINCIPAL IN THE TRANSACTION.

A. Statement of Exemption. [*See § 166.135, Paragraph A.*]

B. Broker as Lender. A loan made by a licensed real estate broker, as principal rather than as agent for others, is within the usury exemption provided by *California Constitution, Article XV, Section 1* and *Civil Code Section 1916.1* (*Garcia v. Wetzel (1984) 159 Cal. App. 3d 1093, 1097-1098, 206 Cal. Rptr. 251*).

[*Optional*] **C. Retroactive Application of Exemption.** [*See § 166.135, Paragraph J.*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in supporting the contention that a loan made by a licensed real estate broker as principal may qualify for the usury exemption provided by *Cal. Const., art. XV, § 1,* and *Civ. Code § 1916.1*. Additional points from § 166.135 may also be added as appropriate in a particular case.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the loan is not usurious.

[b] Related Points and Authorities

These points and authorities may be combined, as appropriate, with those in § 166.131, which address additional aspects of usury and its application to a situation involving a holder in due course.

Note that even an interest rate exempted from the usury law may be unenforceable on the ground of unconscionability [*see Civ. Code § 1670.5*; *Carboni v. Arrospide (1991) 2 Cal. App. 4th 76, 81-85, 2 Cal. Rptr. 2d 845]* . For memoranda of points and authorities addressing unconscionability, see Ch. 50, *Contracts* .

[3] Discussion of Authorities

[a] Broker as Lender

Plaintiffs in ***Garcia v. Wetzel*** *(1984) 159 Cal. App. 3d 1093, 206 Cal. Rptr. 251* , were about to have their real property sold at foreclosure when defendant, a licensed real estate broker, offered to lend them the sum required to redeem the property and to assume their existing loan on the property. This was done by deed from plaintiffs to defendant and by a written deposit receipt agreement, which granted plaintiffs a 30-day option to repurchase the property at approximately $4,000 more than defendant paid to redeem the loan. Plaintiffs exercised the repurchase option, paid the full amount, received reconveyance, and sued for a determination that the $4,000 represented usurious interest in violation of *Cal. Const., art. XV, § 1*. Judgment was entered in favor of defendant, and plaintiffs appealed.

The court of appeal affirmed. Although defendant claimed that the transaction was secured by the real property, the court disagreed (*159 Cal. App. 3d 1093, 1096 n.3*). Defendant admitted that he was not acting as broker, but was acting as a principal, for his own benefit. The court pointed out that defendant was not acting within the scope of his real estate broker's license and that defendant was not required to be licensed as a broker to make this loan. The court noted the 1983 enactment of *Civ. Code § 1916.1* and focused on the last sentence of that section, which states that the term "made or arranged" includes any loan made by a person licensed as a real estate broker as a principal or as an agent for others, and whether or not the person is acting within the course and scope of his or her license. The court considered the enactment of *Civ. Code § 1916.1* as the Legislature's interpretation of the constitutional provision, and said it was bound by that interpretation provided it was not unreasonable (*159 Cal. App. 3d 1093, 1097)* . Without addressing any further the unsecured nature of the transaction, the court affirmed the judgment in favor of the defendant (*159 Cal. App. 3d 1093, 1098)* .

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16-166 California Points & Authorities § 166.137

§ 166.137 Supporting Contention That Maker Is Liable for Interest on Note--Usury Exemption Applicable--Note Generated in Bona Fide Purchase and Sale Is Not Loan or Forbearance

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

THE NOTE IS NOT USURIOUS BECAUSE IT IS PART OF A BONA FIDE CREDIT SALE.

Bona Fide Credit Sale. The owner of property may offer to sell at a designated price for cash or at a much higher price on credit. A bona fide credit sale is not a "loan or forbearance" and will not constitute usury, however great the difference between the two prices, unless the buying and selling was a mere pretense (*Ghirardo v. Antoniolo (1995) 8 Cal. 4th 791, 803-804, 35 Cal. Rptr. 2d 418, 883 P.2d 960* ; *Verbeck v. Clymer (1927) 202 Cal. 557, 563, 261 P. 1017* ; *DCM Partners v. Smith (1991) 228 Cal. App. 3d 729, 733, 278 Cal. Rptr. 778*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a negotiable instrument is not usurious because it is part of a bona fide credit sale.

Counsel should insert argument in this form showing the relationship between the particular case and the point of law stated. Thus, counsel should insert facts, or refer to findings, establishing that the transaction is a bone fide sale.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the instrument is not usurious.

[b] Related Points and Authorities

Ch. 121, *Interest*, contains points and authorities that address the related concept of "time price" differentials as not being loans or forbearances and therefore outside the usury law.

[3] Discussion of Authorities

[a] Bona Fide Credit Sale

Ghirardo v. Antoniolo *(1995) 8 Cal. 4th 791, 35 Cal. Rptr. 2d 418, 883 P.2d 960* , involved a debt restructuring agreed to between plaintiff, a buyer of real property, and defendant, who had sold the property to an intermediate owner from whom plaintiff purchased it. In buying the property, plaintiff had executed a promissory note and deed of trust, and also had taken the property subject to a previous deed of trust executed by the intermediate owner in favor of defendant. A dispute arose over payment under these notes, and after defendant instituted nonjudicial foreclosure proceedings, a settlement was reached in which plaintiff agreed to pay a sum of cash, execute two new notes, and pay an additional fee. That additional fee made the effective rate of interest on the larger of the two notes higher than the maximum permissible rate of interest. After a further dispute arose between the parties, plaintiff instituted an action for damages, treble interest, prejudgment interest, and attorney's fees, claiming that the restructured notes were was usurious. The trial court found that the settlement notes were usurious. The court of appeal affirmed, and the defendants appealed.

The Supreme Court reversed, ruling that the transaction was not usurious. The Court reviewed the essential elements of usury (*8 Cal. 4th 791, 798)* , noting that the first element requires that the transaction be a loan or forbearance, but that the creation of a debtor-creditor relationship does not, without more, constitute a loan (*8 Cal. 4th 791, 802)* . In this case, the Court reasoned that the defendant's transfer of an interest in real property to the intermediate owner (and then to the plaintiff buyer) in exchange for promissory notes and a deed of trust was not a loan, but a sale (*8 Cal. 4th 791, 802)* . Citing *Verbeck v. Clymer (1927) 202 Cal. 557, 563, 261 P. 1017* (discussed *below*), the Court reiterated that such sales were exempt from the usury doctrine under the credit-sale doctrine. This doctrine applies, the Court wrote, when the seller finances the purchase of property by extending payments over time and charging a higher price for carrying the financing (*8 Cal. 4th 791, 803)* . In response to the plaintiff's contention that the restructuring (the execution of the two notes) constituted a loan, to which the credit-sale exemption should not apply, the Court noted the substantial similarity between the settlement and resulting notes in this case and the credit-sale modification approved in *DCM Partners v. Smith (1991) 228 Cal. App. 3d 729, 278 Cal. Rptr. 778* (discussed *below*) and concluded that the rule stated in *DCM Partners v. Smith* was sound: since a credit sale is exempt from the usury law, so is a modification of a credit sale (*8 Cal. 4th 791, 807)* . The Court further held that the exemption is applicable even though the interest rate on the modification was greater than that on the original transaction (*8 Cal. 4th 791, 805-806)* . The Court reasoned that it would be impractical and unfair to both buyer and seller if the only alternative to foreclosure for a seller who had suffered a default was the extension of credit to the buyer on new terms favorable only to the buyer (*8 Cal. 4th 791, 804-806)* .

Verbeck v. Clymer *(1927) 202 Cal. 557, 261 P. 1017* , was an ejectment action in which defendant cross complained, claiming to be entitled to possession of the property without making payments on the note because the note provided for interest that was usurious. The transaction of the parties called for sale to defendant of premises owned by plaintiff for $20,000. The initial payment was $5,000. The remaining $15,000 was payable over fifteen years with payments of $200 per month. Judgment was for plaintiff. Defendant appealed.

The Supreme Court affirmed. The Court said the contract was admittedly a bona fide sale and purchase of real property in which the vendor retained title. There is no element in the transaction that is a loan. The transaction was not a subterfuge devised to conceal what was in fact a loan. In view of this conclusion, there is no support for the contention that the usury law will intervene to give equitable relief to defendants or to penalize plaintiffs. Clearly, any person owning property may sell it at whatever price and on whatever terms as to time and mode of payment he or she sees fit.

Such a sale cannot be usurious, however unconscionable it may be. The first element of a usurious transaction is that there be a loan or forbearance of money; if there is neither, there is no usury. The owner of property has a perfect right to name the price for which he or she is willing to sell, and to refuse to accede to any other. The seller may offer to sell at a designated price for cash or at a much higher price on credit; and unless the buying and selling was a mere pretense, such a credit sale will not constitute usury however great the difference between the two prices. It is not material that the agreement for the purchase price in the future does not specify the whole sum then to be paid, but rather names a particular sum as principal and declares that it shall draw interest at a rate which, were the transaction a borrowing and lending, would clearly be usurious (*202 Cal. 557, 563)* .

Plaintiff in ***DCM Partners v. Smith*** *(1991) 228 Cal. App. 3d 729, 278 Cal. Rptr. 778* , purchased real property from defendant and her former spouse in 1979. As part of the transaction, plaintiff made a note payable to sellers for $160,000. It was secured and bore interest at 10 percent per annum. Before the initial due date in 1984, plaintiff asked sellers to extend the due date, which sellers agreed to do in consideration of increasing the interest rate to 15 percent. The "legal rate" at the time under *Cal. Const., art. XV, § 1*, was 14 percent. After the modified note was fully paid, plaintiff instituted an action to recover what it alleged to be usurious interest. Judgment was for plaintiff, and defendant appealed.

The court of appeal reversed. The court recited the relevant portions of *Cal. Const., art. XV, § 1*, which provide that the interest rate for a loan or forbearance of money not primarily for personal, family, or household purposes is limited to the higher of (1) 10 percent per annum, or (2) 5 percent plus the rate of interest prevailing on the 25th day of the month preceding the earlier of the date of the extension of the contract to make the loan or forbearance or the date of making the loan or forbearance, established by the Federal Reserve Bank of San Francisco on advances to member banks under Sections 13 and 13(1) of the Federal Reserve Act. Thus, if the federal reserve rate was nine percent at the time in question, then 15 percent would be a usurious rate, if the transaction was a loan or forbearance. Sensitive to the ingenuity and creativity of those entrepreneurs willing to engage in legal brinkmanship to maximize profits, courts have carefully scrutinized the form of seemingly innocuous commercial transactions to determine whether the substance amounts to a usurious arrangement. A bona fide credit sale is not a loan or forbearance. The articulated rationale for this distinction is that the owner of property may offer to sell at a designated price for cash or at a much higher price on credit, and a credit sale will not constitute usury however great the difference between the two prices, unless the buying and selling was a mere pretense. It is not material that the agreement for the purchase price in the future does not specify the whole sum then to be paid, but rather names a particular sum as principal and declares that it shall draw interest at a rate which, were the transaction a borrowing and lending, would clearly be usurious (*228 Cal. App. 3d 729, 733)* . Based on this principle, the initial transaction between the sellers and plaintiff was not usurious (*228 Cal. App. 3d 729, 734)* .

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16-166 California Points & Authorities § 166.138

§ 166.138 Supporting Contention That Maker Is Liable for Interest on Note--Usury Exemption Applicable--Modification [Refinance] of Note Initially Generated in Bona Fide Purchase and Sale Continues to Be Exempt

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

THE MODIFIED NOTE IS NOT USURIOUS BECAUSE IT RETAINS ITS EXEMPT CHARACTER AS PART OF A BONA FIDE CREDIT SALE.

A. Bona Fide Credit Sale. [*See § 166.137.*]

B. Modified Note Remains Exempt. When a note that is part of a bone fide credit sale is modified at the request of the buyer/maker, the modified note remains exempt from usury law (*Ghirardo v. Antoniolo (1995) 8 Cal. 4th 791, 806-807, 35 Cal. Rptr. 2d 418, 883 P.2d 960* ; *DCM Partners v. Smith (1991) 228 Cal. App. 3d 729, 734-738, 278 Cal. Rptr. 778*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a renewal, extension, or modification note is not usurious because it retains its exempt character as part of a bona fide credit sale.

Counsel should insert argument in this form showing the relationship between the particular case and the point of law stated. Thus, counsel should insert facts, or refer to findings, establishing that the initial transaction is a bone fide sale and that the modification was initiated by the maker.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the modified note is not usurious.

[3] Discussion of Authorities

[a] Modified Note Remains Exempt

The facts and procedural background of ***Ghirardo v. Antoniolo*** *(1995) 8 Cal. 4th 791, 35 Cal. Rptr. 2d 418, 883 P.2d 960* , are discussed in *§ 166.137[3][a]*. In *Ghirardo,* the Supreme Court upheld the court of appeal's ruling in *DCM Partners v. Smith (1991) 228 Cal. App. 3d 729, 278 Cal. Rptr. 778* , discussed *below,* and specifically approved the credit-sale modification rule approved in that case (*8 Cal. 4th 791, 806-807)* . The Supreme Court held that the settlement notes at issue in *Ghirardo* were the functional equivalents of a modification to an originally exempt credit sale, and that such a modification is not subject to the usury laws (*8 Cal. 4th 791, 807)* .

The facts and procedural background of ***DCM Partners v. Smith*** *(1991) 228 Cal. App. 3d 729, 278 Cal. Rptr. 778* , are discussed in *§ 166.137[3][a]*. The court did not agree with the theory, advanced by defendant, that the crucial determinant was the fact that the extension and modification occurred before the original note became due (*228 Cal. App. 3d 729, 734-735)* . The court considered it unfair to conclude that the modification was usurious when the original transaction was not. Powerful reasons should exist before the law transmutes a legal transaction into an illegal one, particularly when the illegality places the entire financial burden on one party with the other seemingly unjustly enriched having the benefit of an interest-free loan (*228 Cal. App. 3d 729, 735)* . This situation in part is governed by the general principle that a debtor by voluntary act cannot render an otherwise valid transaction usurious. If the sellers had foreclosed when plaintiff could not meet the balloon payment, the sellers could have sold the property back to plaintiff again and any new note that was part of the second sale would be exempt. The general principle that precludes a debtor's voluntary act from making a nonusurious transaction usurious applied in light of plaintiff's implied request to avoid the time, risk, and expense of the more complicated process of reacquisition and sale (*228 Cal. App. 3d 729, 736)* . In addition, treating the modified note as usurious would be anomalous when a modified note retains its character as a purchase money mortgage for purposes of depriving the lender/seller of any right to seek a deficiency judgment [*see Code Civ. Proc. § 580b*] (*228 Cal. App. 3d 729, 737)* . Thus, treating this transaction as remaining nonusurious is consistent with the law's unwillingness to change the modified secured note into a nonpurchse money obligation. When the law insists the legal effect of the bargain continues for one purpose, absent valid reasons that same bargain should continue for other purposes (*228 Cal. App. 3d 729, 738)* .

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16-166 California Points & Authorities § 166.139

§ 166.139 Opposing Contention That Maker Is Liable for Interest on Note--Usury Exemption for Loan Arranged by Licensed Real Estate Broker and Secured by Real Property [Cal. Const., art. XV, § 1; Civ. Code § 1916.1] Is Not Applicable--Broker Was Borrower

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

_____ [*Name of maker*] IS NOT LIABLE FOR PAYMENT OF ANY INTEREST ON THE NOTE PRIOR TO ITS MATURITY BECAUSE THE NOTE WAS NEITHER MADE NOR ARRANGED BY A LICENSED REAL ESTATE BROKER WITHIN THE MEANING OF THE USURY EXEMPTION.

A. Statement of Exemption. [*See § 166.135, Paragraph A.*]

[*Optional*] **B. Test to Determine Whether Loan Was Arranged by Broker.** [*See § 166.135, Paragraph B.*]

[*EITHER*]

C. Loan Is Not Made by Broker Who Is Borrower. The usury exemption provided by *California Constitution, Article XV, Section 1* and *Civil Code Section 1916.1* for loans secured by real property and made or arranged by licensed real estate brokers does not apply to a loan made to a broker as the borrower. [As a matter of law, neither lending nor borrowing necessarily involves arranging] (*Green v. Future Two (1986) 179 Cal. App. 3d 738, 742-743, 225 Cal. Rptr. 3* ; *see* *Winnett v. Roberts (1986) 179 Cal. App. 3d 909, 917, 225 Cal. Rptr. 82* (dicta)).

[*AND/OR*]

D. Loan Is Not Arranged by Broker Who Is Borrower. When a transaction is between a borrower and a lender, each acting on his or her own behalf, and there is no third-party licensed real estate broker acting for compensation as an intermediary, the loan is not "arranged" by a broker within the meaning of the usury exemption provided by *California Constitution, Article XV, Section 1* and *Civil Code Section 1916.1* (*Winnett v. Roberts (1986) 179 Cal. App. 3d 909, 917, 920, 921, 225 Cal. Rptr. 82* ; *Green v. Future Two (1986) 179 Cal. App. 3d 738, 743, 225 Cal. Rptr. 3*).

[*CONTINUE*]

E. Usurious Interest Provision Void. [*See § 166.133, Paragraph A.*]

[2] Comments

[a] Use of Form

These points and authorities may be used to oppose the contention that a loan to a licensed real estate broker qualifies for the usury exemption allowed to loans secured by real property and made or arranged by licensed real estate brokers [*see Cal. Const., art. XV, § 1*; *Civ. Code § 1916.1*]. Paragraphs A and B set forth the statutory authority and general statement of the criteria for the exemption. Paragraphs C and/or D establish that the exemption does not apply when the broker is the borrower and no third party is acting as an intermediary in arranging the loan.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that usury exemption does not apply.

[b] Related Points and Authorities

These points and authorities may be combined, as appropriate in a particular situation, with those in §§ 166.132 and 166.133, which address additional aspects of usury and its application to a situation involving a holder in due course. The points and *authorities in §§ 166.135 -166.136* generally oppose those in this form.

[3] Discussion of Authorities

[a] Loan Is Not Made by Broker Who Is Borrower

Green v. Future Two *(1986) 179 Cal. App. 3d 738, 225 Cal. Rptr. 3* , was a foreclosure action by payees of a promissory note secured by a deed of trust on real property owned by the general partnership "Future Two." When the partnership sought to refinance the existing loan on its property, one of the general partners, who was a licensed real estate broker, contacted a friend. The friend arranged a meeting between plaintiffs and the partners. Defendant executed a note for $156,000, and received that amount from plaintiffs, although $26,000 was paid immediately to plaintiffs as "points." The note called for interest at the rate of 10 percent per annum until maturity (one year) and 25 percent after that. The trial court granted judgment allowing plaintiffs to foreclose, but found the note usurious and denied any interest prior to maturity. The sums previously paid as interest, which included the $26,000 paid as points, were credited to principal. Interest at seven percent per annum was awarded on that reduced principal from the maturity of the note to the date of judgment. Plaintiffs appealed, contending that the note was not usurious because it had been made or arranged by a broker and that interest should have been allowed at the rate of 10 percent per annum rather than seven percent per annum from maturity to the date of the judgment.

The court of appeal affirmed. First the court discussed the language of *Cal. Const., art. XV, § 1*. The court concluded

that the loan was not made by the partner who was a broker and that thus the exemption for loans made by real estate brokers was inapplicable. The broker was one of the borrowers. A borrower does not make a loan; he or she receives or obtains a loan from a lender. Also, the court noted that the exemption for loans made or arranged by brokers was contained in the same sentence of *Cal. Const., art. XV, § 1*, that exempted loans made by other types of lenders, all of which were in the business of lending money (*179 Cal. App. 3d 738, 742)* .

The facts and procedural background of ***Winnett v. Roberts*** *(1986) 179 Cal. App. 3d 909, 225 Cal. Rptr. 82* , are *discussed under § 166.139[3][b]*. The court of appeal pointed out that the meaning of the term "made" was not in issue. In the language of the constitutional and statutory provisions, as well as in common parlance, an exempt loan is "made" under the real estate broker exemption when the broker acts as principal in the transaction by lending his or her own money. When, as here, the only participant in the transaction who is licensed as a real estate broker is the borrower, the loan has not been "made" by the broker within the meaning of the exemption. Defendants did not contend to the contrary (*179 Cal. App. 3d 909, 917)* .

[b] Loan Is Not Arranged by Broker Who Is Borrower

Winnett v. Roberts *(1986) 179 Cal. App. 3d 909, 225 Cal. Rptr. 82* , was initiated as an action by a borrower-trustor to have a threatened private foreclosure sale enjoined on the ground that the note was usurious. The note provided for interest at the rate of 40 percent per annum. The borrower was a licensed real estate broker, and the trial court refused to grant a preliminary injunction, concluding that plaintiff had arranged the loan within the meaning of the exemption provided by *Cal. Const., art. XV, § 1*, and *Civ. Code § 1916.1*. After the foreclosure sale, the borrower amended the complaint to seek to have the sale set aside. The trial court granted judgment for defendant, and plaintiff appealed.

The court of appeal reversed. The disagreement concerned precisely what activities on the part of a licensed real estate broker constitute arrangement of a loan. Defendants contended that the identity of the arranger turns on the relative involvement of the borrower and lender in the necessary and formal steps culminating in the loan. The court disagreed, saying such a mechanical approach rendered the term "arranged" almost meaningless because every borrower participates in arranging a loan, if only by signing the note and holding out his or her hand to receive the money, and every lender participates, if only by securing the necessary funds and tendering the money (*179 Cal. App. 3d 909, 918)* . The court discussed various rules of constitutional and statutory interpretation and considered the statement of the Legislative Analyst in the ballot pamphlet for the proposition that led to enactment of the exemption for broker arranged loans (*179 Cal. App. 3d 909, 918-920)* . The court also considered the statement of legislative findings declaring the justification for this exemption [*see* Stats. 1983, ch. 307, § 2], which, it said, was not applicable when the borrower was a licensed real estate broker (*179 Cal. App. 3d 909, 920)* . The court concluded that when a transaction is between a borrower and lender, each acting on his or her own behalf, and there is no third-party licensed real estate broker acting for compensation as an intermediary, the loan is not "arranged" by a broker within the meaning of the usury law (*179 Cal. App. 3d 909, 920, 921)* .

The facts and procedural background of ***Green v. Future Two*** *(1986) 179 Cal. App. 3d 738, 225 Cal. Rptr. 3* , are *discussed under § 166.139[3][b]*. Discussing whether the loan had been arranged by the partner who was a licensed real estate broker, the court of appeal noted the trial court's finding that the loan was arranged by the friend who brought the parties together (*179 Cal. App. 3d 738, 742)* . The court said this narrowed the issue to whether, as a matter of law, a secured loan to a real estate broker acting on his or her own behalf is "arranged" by the broker and therefore exempt from the usury restrictions. To so hold, the court would have to find that a borrower is necessarily an arranger. Such a finding, the court said, is not justified. A loan set up or shaped by an intermediary may be said to be arranged by the intermediary, but neither lending nor borrowing necessarily involves arranging (*179 Cal. App. 3d 738, 742)* . The court set forth the two-part test for determining whether a loan is arranged by a broker within the meaning of *Civ. Code § 1916.1* (*179 Cal. App. 3d 738, 742-743)* [*see* discussion in *§ 166.135[3][b]*]. Excluded from the exemption under this test is a broker who, as in this case, acts for himself or herself. Also excluded is a broker who, as in this case, does not receive or expect to receive compensation (*179 Cal. App. 3d 738, 743)* . The court said they were not unmindful of the

final sentence of *Civ. Code § 1916.1*, which reads, "The term 'made or arranged' includes any loan made by a person licensed as a real estate broker as a principal or as an agent for others, whether or not the person is acting within the course and scope of his or her license." This literally excepts from the usury restriction loans made by licensed brokers whether or not they are acting as brokers. Although the legislative policy of exempting loans made by brokers although they are not acting as brokers, while not exempting loans received by brokers who are not acting as brokers, is not readily apparent, it is entirely consistent with the basic approach of *Cal. Const., art. XV, § 1*, which exempts loans made by various types of lenders but does not in any manner deal with the type of borrower (*179 Cal. App. 3d 738, 743)* .

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16-166 California Points & Authorities § 166.140

§ 166.140 Supporting Contention That Usury Law Does Not Apply--Note Was Element of Joint Venture, Instead of Evidence of Loan, Between Maker and Holder

[1] FORM

[*The following may be included in a memorandum, or may be adapted for use in a trial or appellate brief or in jury instructions*]

THE USURY LAW DOES NOT APPLY WHEN A PROMISSORY NOTE WAS MADE TO EFFECTUATE A JOINT VENTURE, INSTEAD OF TO MEMORIALIZE A LOAN, BETWEEN THE MAKER AND THE HOLDER. THE HOLDER MAY ENFORCE THE NOTE WITHOUT REGARD TO WHETHER THE TERMS WOULD VIOLATE THE USURY LAW.

A. Promissory Note Can Be Aspect of Joint Venture Between Maker and Holder. A promissory note can be an aspect of a joint venture, instead of evidence of a loan, between the maker and the holder (*Junkin v. Golden West Foreclosure Serv., Inc. (2010) 180 Cal. App. 4th 1150, 1156, 103 Cal. Rptr. 3d 582*).

B. Nature of Transaction Is Question of Fact. Whether a transaction is a joint venture or a loan is a question of fact (*Junkin v. Golden West Foreclosure Serv., Inc. (2010) 180 Cal. App. 4th 1150, 1156, 103 Cal. Rptr. 3d 582*).

C. Several Facts, Considered Together, Support Conclusion That Transaction Was Joint Venture. The conclusion that the transaction in this case was a joint venture, not a loan, is supported by the following facts, considered together:

[*Delete any of the following that are inapplicable to the particular case at issue:*]

(1) The purpose of the transaction was to purchase a parcel of real estate from a third person.

(2) The purchase was financed by a loan from a third person, and both the maker and the holder of the

note in question were jointly obligated to repay the purchase money loan.

(3) The note in question covered the holder's contribution of cash to make up the difference between the purchase price and the purchase money loan.

(4) The vendor's deed named both the maker and the holder of the note in question as grantees.

(5) The holder of the note in question assumed the risk of loss of capital in the transaction.

(6) The maker and the holder of the note in question both testified that they considered themselves to be partners in the transaction.

(*Junkin v. Golden West Foreclosure Serv., Inc. (2010) 180 Cal. App. 4th 1150, 1156-1157, 103 Cal. Rptr. 3d 582*)

D. Usury Law Does Not Apply to Note Between Joint Venturers. When all of the facts, considered together, show that a promissory note was made to effectuate a joint venture, not to memorialize a loan, between the maker and the holder, the usury law does not apply. The holder may enforce the note without regard to whether its terms would violate the usury law (*Junkin v. Golden West Foreclosure Serv., Inc. (2010) 180 Cal. App. 4th 1150, 1157-1158, 103 Cal. Rptr. 3d 582*).

[2] Comments

[a] Use of Form

These points and authorities may be used to support the contention that the usury law does not apply because a promissory note, which the maker asserts is evidence of a usurious loan, actually was created to effectuate a joint venture, instead of a loan, between the maker and the holder.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. The facts listed in Paragraph C as evidencing a joint venture rather than a loan are based on those in *Junkin v. Golden West Foreclosure Serv., Inc. (2010) 180 Cal. App. 4th 1150, 1156-1157, 103 Cal. Rptr. 3d 582* , which is cited as authority for that paragraph. If those facts exist in a particular case, they should be cited in support of the argument. If not all of those factors exist in a particular case, or if other factors do exist to support the existence of a joint venture, Paragraph C should be modified as appropriate.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the usury law does not apply.

[3] Discussion of Authorities

[a] Promissory Note Can Be Aspect of Joint Venture Between Maker and Holder

In ***Junkin v. Golden West Foreclosure Serv., Inc.*** *(2010) 180 Cal. App. 4th 1150, 103 Cal. Rptr. 3d 582* , the maker of a promissory note resisted the holder's efforts to enforce the note. The maker asserted that the note was unenforceable because it provided for usurious interest. The holder asserted that the usury law did not apply because the note was made to effectuate a joint venture in which the parties undertook to invest in a parcel of real property, which they jointly purchased from a third person. The trial court found that the evidence showed a joint venture; therefore, the court concluded, the usury law did not apply. Judgment was rendered in favor of the holder of the note.

The court of appeal affirmed. One of the key points in the court's analysis was that, while the existence of the note "would tend to undermine the conclusion that a joint venture existed," in fact "the note was not executed in isolation. It

was simply one aspect of a larger transaction under which [the maker and the holder] invested jointly" in the parcel of real property. Therefore, in context, the existence of the note was "only slightly" indicative of a loan (*180 Cal. App. 4th 1150, 1156)* . Other facts overwhelmingly indicated a joint venture [*see* § 166.140[3][b] -[d]].

[b] Nature of Transaction Is Question of Fact

Junkin v. Golden West Foreclosure Serv., Inc. *(2010) 180 Cal. App. 4th 1150, 103 Cal. Rptr. 3d 582* , is described in § 166.140[3][a]. The court observed that whether a transaction is a joint venture or a loan is a question of fact, and the answer depends on resolving several factual issues. "One is whether there is an absolute obligation of repayment [by the maker of the note in question]. Another is whether the investor [who holds the note] may suffer a risk of loss. Another factor courts consider is whether the investor has any right to participate in management. The identity of the seller is also a factor. If the venture between the parties involves the acquisition of property from a third party, the courts tend to conclude that the arrangement between the parties was a risk capital venture and not a loan. The presence or absence of any one factor is not conclusive when characterizing a transaction" (*180 Cal. App. 4th 1150, 1155-1156)* (citations and internal quotation marks omitted).

[c] Several Facts, Considered Together, Support Conclusion That Transaction Was Joint Venture

Junkin v. Golden West Foreclosure Serv., Inc. *(2010) 180 Cal. App. 4th 1150, 103 Cal. Rptr. 3d 582* , is described in § 166.140[3][a]. The court reviewed the evidence and concluded that the parties' transaction was a joint venture, not a loan (*180 Cal. App. 4th 1150, 1156-1157)* :

> In this case, [the maker of the note in question] and [the holder] both testified that they considered themselves to be partners in this venture. We view this as strong evidence that the joint venture existed.
>
> [The maker] and [the holder] were both on the title to the property and both were jointly obligated on the [purchase-money] loan. Again, we view this as strong evidence that the joint venture existed.
>
> * * *
>
> This leads us to another factor: whether [the holder] assumed a risk of the loss of capital. The answer is clearly yes. [The holder] was on the title to this property and under his agreement with [the maker] he owned 10 percent of the property. If the venture failed, [the holder]'s investment could be worth nothing. Clearly, [the holder] assumed a risk that he might suffer a loss.
>
> There is no evidence that [the holder] participated in the management of this venture. Indeed, the evidence showed [the maker] was the motivating force behind the purchase. He selected the property, arranged the financing, and even drafted the note that he signed in favor of [the holder]. On the other hand, there is no evidence that [the holder] was precluded from participating in the management of the venture. Rather, it appears [the holder] voluntarily ceded control to his partner. We view this factor as neutral.
>
> Finally, [the maker] and [the holder] purchased this property from third parties. This tends to support the conclusion that a joint venture existed.
>
> Weighing these factors de novo we agree with the trial court. The joint venture exception to the usury rules applied.

[d] Usury Law Does Not Apply to Note Between Joint Venturers

Junkin v. Golden West Foreclosure Serv., Inc. *(2010) 180 Cal. App. 4th 1150, 103 Cal. Rptr. 3d 582* , is described in § 166.140[3][a]. After reviewing the evidence, the court rejected several arguments by the maker of the note in

question. The existence of the note, entitling the holder to unconditional payment, was not dispositive, especially since the holder had in fact put capital at risk [*see* § 166.140[3][a], [c]]. The fact that the holder of the note did not exercise any control of the investment transaction was not determinative; he could have exercised some control but simply did not, and, in any event, both parties testified that they were partners [*see* § 166.140[3][c]]. The holder's failure to provide additional funding after the purchase of the property was irrelevant because there was no contractual obligation to do that. Finally, there was no equitable ground for refusing to enforce the note. The maker was "a highly experienced real estate investor who saw an opportunity to make money on a well-located piece of land. Now that the deal has soured, he seeks to use the courts to evade the consequences of the transaction that he himself structured. We decline to apply the equitable doctrine of estoppel here. We conclude the trial court correctly ruled that the joint venture exception to the usury rules applied." (*180 Cal. App. 4th 1150, 1157-1158)* .

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[1] Related Pleading and Practice Chapters

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§§ 167.04-167.19 [Reserved]

§ 167.20 Supporting Contention That Plaintiff May Bring Action for Private Nuisance [Civ. Code §§ 3479, 3481, 3501; Code Civ. Proc. § 731]--Interference With Use or Enjoyment of Property

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Activity Interferes With Use or Enjoyment of Property Interest

[b] Sufficiency of Property Interest

[c] Tenancy for Term as Property Interest

[4] Additional Authorities

[a] Sufficiency of Property Interest

[b] Tenancy for Term as Property Interest

§ 167.21 Supporting Contention That Plaintiff May Bring Private Action for Public Nuisance [Civ. Code §§ 3479, 3480, 3491, 3493; Code Civ. Proc. § 731]--Special Injury to Plaintiff

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Injury Different in Kind and Not Just in Degree

[4] Additional Authorities

[a] Specific Injury to Plaintiff Alleged

[b] Injury Different in Kind and Not Just in Degree

§ 167.22 Supporting Contention That Plaintiff May Bring Private Action for Public Nuisance Without Showing of Special Injury [Civ. Code §§ 3479, 3480, 3491, 3493; Code Civ. Proc. § 731]--Nuisance Both Private and Public

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Nuisance Both Public and Private

[b] Plaintiff Need Not Show Damage Different in Kind From That Suffered by General Public

[c] Number of Persons Affected Not Conclusive

[4] Additional Authorities

[a] Plaintiff Need Not Show Damage Different in Kind to That Suffered by General Public

§ 167.23 Supporting Contention That Activity or Conduct Constitutes Nuisance [Civ. Code § 3479]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Definition Is Broad

[4] Additional Authorities

[a] Definition Is Broad

§ 167.24 Supporting Contention That Activity or Conduct Constitutes Nuisance [Civ. Code § 3479]--Unreasonable Use of Property

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Unreasonable Use

[b] Existence of Nuisance Is Matter of Degree and Depends on Circumstances

[c] Factors Considered

[4] Additional Authorities

[a] Unreasonable Use

§ 167.25 Supporting Contention That Activity or Conduct Constitutes Nuisance [Civ. Code § 3479]--Fire Hazards

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Fire Hazard as Nuisance

[b] Construction in Accord With Previous Standards Not a Defense

§ 167.26 Supporting Contention That Activity or Conduct Constitutes Nuisance [Civ. Code § 3479]--Diversion or Obstruction of Water Flow

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Diversion or Obstruction of Water Flow as Nuisance

[b] Single Flood Constitutes Nuisance

[4] Additional Authorities

[a] Diversion or Obstruction of Water Flow as Nuisance

§ 167.27 Supporting Contention That Activity or Conduct Constitutes Nuisance [Civ. Code § 3479]--Water and Air Pollution

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Pollution as Nuisance

[4] Additional Authorities

[a] Pollution as Nuisance

§ 167.28 Supporting Contention That Activity or Conduct Constitutes Nuisance [Civ. Code § 3479]--Obstruction of Streets

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Obstruction of Streets as Nuisance

[b] Chemical Fog as Obstruction

§ 167.29 Supporting Contention That Activity or Conduct Constitutes Nuisance [Civ. Code § 3479]--Noise

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Noise as Nuisance

[b] Airport as Nuisance

[c] Airport Proprietor-Landlord Liable for Damages

§ 167.30 Supporting Contention That Activity or Conduct Constitutes Nuisance [Civ. Code § 3479]--Odors

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Odors as Nuisance

§ 167.31 Supporting Contention That Activity or Conduct Constitutes Nuisance [Civ. Code § 3479]--Obscenity

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Obscenity as Nuisance

[b] Clear and Convincing Proof of Obscenity for Abatement

§ 167.32 Supporting Contention That Activity or Conduct Constitutes Nuisance [Civ. Code § 3479]--Places Used for Unlawfully Selling Controlled Substances ("Drug Houses") [Health & Safety Code § 11570 et seq.]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Use

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Damages Recoverable in Lieu of Action for Abatement

§ 167.33 Supporting Contention That Activity or Conduct Constitutes Nuisance [Civ. Code § 3479]--Unnecessary Use and Injurious Method of Operation in Area Zoned for Purpose [Code Civ. Proc. § 731a]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Unnecessary and Injurious Method of Operation in Area Zoned for Purpose

§ 167.34 Supporting Contention That Activity or Conduct Constitutes Nuisance [Civ. Code § 3479]--Nuisance May Be Created On Plaintiff's Property

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Recovery for Nuisance Is Not Limited to Offensive Use of Neighboring Lands

[4] Additional Authorities

[a] Recovery for Nuisance Is Not Limited to Offensive Use of Neighboring Lands

§ 167.35 Supporting Contention That Activity or Conduct Constitutes a Nuisance [Civ. Code §§ 3479]--Activity or Conduct Is Within Statutory Definition of Public Nuisance [Civ. Code § 3480]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Facts Pleaded or Proved Must Satisfy Statutory Definition of Nuisance

[b] Gang Activity Constitutes Public Nuisance

[c] Use of Lead for Interior Paint Can Constitute Public Nuisance

§ 167.36 Supporting Contention That Activity or Conduct Constitutes Nuisance Per Se--Proof of Injury Not Required

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Legislative Declaration of Nuisance

[b] Municipal Declaration of Nuisance

[c] Interference With Flow of Water

[d] Proof of Injury Not Required for Injuntive Relief From Nuisance Per Se

[4] Additional Authorities

[a] Legislative Declaration of Nuisance

[b] Municipal Declaration of Nuisance

[c] Proof of Injury Not Required for Injunctive Relief from Nuisance Per Se

§ 167.37 Supporting Contention That Defendant Is Liable for Nuisance--Consent Not a Defense--Violation of Ordinance

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Violation of Ordinance Negates Consent

§ 167.38 Supporting Contention That Defendant Is Liable for Nuisance--Consent Not a Defense--Consent by Plaintiff's Grantor

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Acquiescence of Plaintiff's Grantor or Predecessor Not Defense

§ 167.39 Supporting Contention That Defendant Is Liable for Nuisance--Adoption of Most Approved Appliances and Methods of Production Not Defense

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Adoption of Most Approved Appliances and Methods of Production Not Defense

§ 167.40 Supporting Contention That Defendant Is Liable for Nuisance--Other Sources of Personal Discomfort in Neighborhood Not a Defense

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Other Sources of Personal Discomfort in Neighborhood Not a Defense

[4] Additional Authorities

[a] Other Sources of Personal Discomfort in Neighborhood Not a Defense

§ 167.41 Supporting Contention That Defendant Is Liable for Nuisance--Nuisance Created to Relieve Its Creator From Injury Caused by Third Party Not a Defense

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Creation of Nuisance to Abate Injury

§ 167.42 Supporting Contention That Defendant Is Liable for Nuisance--Defendant Successor With Actual or

Constructive Knowledge of Nuisance Who Neglected to Abate Continuing Nuisance on Property

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Requirement of Actual or Constructive Knowledge

§ 167.43 Supporting Contention That Defendant Is Liable for Nuisance--Defense of Statutory Authorization [Civ. Code § 3482] Inapplicable--Activity or Conduct Not Expressly Authorized by Statute

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Nuisance Not Expressly Authorized by Statute

[4] Additional Authorities

[a] Nuisance Not Expressly Authorized by Statute

§ 167.44 Supporting Contention That Action for Nuisance Not Barred by Statute of Limitations--Continuing Nuisance

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Statute of Limitations Does Not Apply to Continuing Nuisance

[b] Continuing Nuisance Defined

[c] Plaintiff's Election to Treat Nuisance as Continuing or Permanent

[d] Toxic Contamination as Continuing Nuisance

[4] Additional Authorities

[a] Statute of Limitations Does Not Apply to Continuing Nuisance

[b] Continuing Nuisance Defined

[c] Plaintiff's Election to Treat Nuisance as Continuing or Permanent

§ 167.45 Supporting Contention That Action for Nuisance Not Barred by Statute of Limitations--Obstruction of Public Right

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Obstruction of Public Right

§ 167.46 Supporting Contention That Injunctive Relief Available to Abate Nuisance--Injurious Effect on Property or Lessening of Personal Enjoyment

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Injunction Available

[b] Preliminary Injunction to Abate Nuisance

[c] Contributory Negligence Not a Bar

[d] Criminal Statute Is Not Exclusive Remedy for Abating Public Nuisance

[4] Additional Authorities

[a] Preliminary Injunction to Abate Nuisance

§ 167.47 Supporting Contention That Injunctive Relief Available to Abate Nuisance--Relative Hardships (Balance of Conveniences) Test Favors Plaintiff

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Relative Hardships (Balance of Conveniences) Test

[b] Doubtful Cases Resolved in Plaintiff's Favor

[c] Irreparable Injury

[d] Responsibility for Nuisance

[e] Disproportionate Hardships

[f] Private Right of Eminent Domain

[4] Additional Authorities

[a] Irreparable Injury

[b] Responsibility for Nuisance

[c] Disproportionate Hardships

§ 167.48 Supporting Contention That Plaintiff Is Entitled to Damages for Nuisance [Civ. Code § 3484; Code Civ.

Proc. § 731]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Damages Recoverable

[b] Damages Without Injunction

[c] Punitive Damages With Proof of Oppression or Malice

§ 167.49 Opposing Contention That Plaintiff May Bring Action for Private Nuisance [Civ. Code §§ 3479, 3481, 3501; Code Civ. Proc. § 731]--Interference With Purely Personal Right or Lack of Present Property Interest

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Purely Personal Right

[b] Insufficient Property Interest

§ 167.50 Opposing Contention That Plaintiff May Bring Private Action for Public Nuisance [Civ. Code §§ 3479, 3480, 3491, 3493; Code Civ. Proc. § 731]--No Special Injury to Plaintiff

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Injury Merely Different in Degree and Not in Kind From Injury Suffered by General Public

§ 167.51 Opposing Contention That Plaintiff May Bring Private Action for Public Nuisance [Civ. Code §§ 3479, 3480, 3491, 3493; Code Civ. Proc. § 731]--No Public Nuisance

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Nuisance Which Does Not Injure General Public Is Not Public Nuisance

§ 167.52 Opposing Contention That Plaintiff May Bring Private Action for Public Nuisance [Civ. Code §§ 3479, 3480, 3491, 3493; Code Civ. Proc. § 731]--Award Would Interfere with Policies of a Public Commission

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Superior Court Lacks Jurisdiction to Issue Judgment Which Would Interfere with Policies of a Public Commission

§ 167.53 Opposing Contention That Activity or Conduct Constitutes a Nuisance [Civ. Code § 3479]--Activity or Conduct Not Within Statutory Definition of Nuisance [Civ. Code § 3479]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Facts Pleaded or Proved Must Satisfy Statutory Definition of Nuisance

[b] Every Annoyance or Disturbance Is Not Nuisance

[c] Defective Product Is Not Nuisance

[4] Additional Authorities

[a] Facts Pleaded or Proved Must Satisfy Statutory Definition of Nuisance

§ 167.54 Opposing Contention That Activity or Conduct Constitutes a Nuisance [Civ. Code § 3479]--Actitivity or Conduct Authorized by Statute [Civ. Code § 3482]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Activity or Conduct Expressly Authorized by Statute

[b] Contemplation by Legislature of Act Causing Injury

[4] Additional Authorities

[a] Activity or Conduct Expressly Authorized by Statute

§ 167.55 Opposing Contention That Activity or Conduct Constitutes a Nuisance [Civ. Code § 3479]--Obstruction of Light and Air

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Mere Obstruction of Light and Air Is Not Nuisance

[4] Additional Authorities

[a] Mere Obstruction of Light and Air Is Not Nuisance

§ 167.56 Opposing Contention That Activity or Conduct Constitutes a Nuisance [Civ. Code § 3479]--Preexisting Agricultural Activity [Civ. Code § 3482.5(a)(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Defense Applies to Actions Between Commercial Agricultural Entities

[b] Defense Applies to Actions Alleging Physical Invasion of Neighboring Property

[c] Change of Ownership of Land on Which Activity Occurs Is Irrelevant

§ 167.57 Opposing Contention That Activity or Conduct Constitutes a Nuisance [Civ. Code § 3479]--Activity of District Agricultural Association [Civ. Code § 3482.5(a)(2)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

§ 167.58 Opposing Contention That Activity or Conduct Constitutes a Nuisance [Civ. Code § 3479]--Preexisting Agricultural Processing Activity [Civ. Code § 3482.6]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

§ 167.59 Opposing Contention That Activity or Conduct Constitutes a Nuisance [Civ. Code § 3479]--Not Unreasonable to Normal Person

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Not Unreasonable to Normal Person

[4] Additional Authorities

[a] Not Unreasonable to Normal Person

§ 167.60 Opposing Contention That Activity or Conduct Constitutes Nuisance [Civ. Code § 3479]--Fact That Plaintiff's Own Acts Constitute Same Type of Nuisance Considered in Determination

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Plaintiff's Own Acts Constitute Same Type of Nuisance

§ 167.61 Opposing Contention That Activity or Conduct Constitutes Nuisance [Civ. Code § 3479]--Area Expressly Zoned for Purpose [Code Civ. Proc. § 731a]

[1] FORM

[2] Comments

[a] Use of Form

§ 167.62 Opposing Contention That Action for Nuisance Not Barred by Statute of Limitations--Permanent Nuisance

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Limitations Period as Commencing to Run at Creation of Permanent Nuisance

[b] Plaintiff Is Required to Bring One Action for All Damages

[c] Limitation Period for Injury to Real Property

[d] Opportunity for Election to Treat Nuisance as Continuing or Permanent Is Limited

[e] Permissible Election Allowed Only in "Close" Cases

[f] Plaintiff Cannot Have Both Remedies

[g] Abatement Alone Does Not Transform Permanent Nuisance Into Continuing Nuisance or Close Case

[h] Solid Structures Are Permanent in Nature

[i] Structure Is Necessary Part of Public Utility Operations

[j] No Continuing Nuisance Without Proof That Injury Is Capable of Being Abated and That Cost of Abatement Is Reasonable

[4] Additional Authorities

[a] Structure Is Necessary Part of Public Utility Operations

[b] No Continuing Nuisance Without Proof That Injury Is Capable of Being Abated and That Cost of Abatement Is Reasonable

§ 167.63 Opposing Contention That Defendant Is Liable for Nuisance--Defendant Did Not Create Nuisance, and Notice of Nuisance or Request for Abatement Not Given to Defendant

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Successor Not Liable in Absence of Notice of Nuisance

§ 167.64 Opposing Contention That Defendant Is Liable for Nuisance--Plaintiff Consented to Activity or Conduct Complained of

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Plaintiff's Consent to Defendant's Activity or Conduct as Defense to Action for Nuisance

[b] Successor Owner Bound by Predecessor's Consent to Conduct of Predecessor's Lessee

[4] Additional Authorities

[a] Plaintiff's Consent to Defendant's Activity or Conduct as Defense to Action for Nuisance

§ 167.65 Opposing Contention That Nuisance Can Be Enjoined--Prospective Injury Not Probable and Imminent

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Prospective Injury Must Be Probable and Imminent

§ 167.66 Opposing Contention That Injunctive Relief Available to Abate Nuisance--Relative Hardships (Balance of

Conveniences) Test Favors Defendant

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Irreparable Injury

[b] Responsibility for Nuisance

[c] Disproportionate Hardships

[d] Consideration of Public Interest

§ 167.67 Opposing Contention That Plaintiff Is Entitled to Damages for Nuisance--Full Recovery Barred by Comparative Negligence

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Comparative Negligence Can Bar Full Recovery for Damages for Nuisance

[4] Additional Authorities

[a] Comparative Negligence as Bar to Full Recovery for Damages for Nuisance

§ 167.68 Opposing Contention That Plaintiff Is Entitled to Damages for Nuisance--Injury Not Present, Real, or Ascertainable

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Damages Only Recoverable for Present, Real, or Ascertainable Injuries

§ 167.69 Opposing Contention That Plaintiff Is Entitled to Damages for Nuisance--Plaintiff May Not Obtain Both Injunctive Relief and Depreciation or Other Future Damages

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Plaintiff Should Not Receive Both Abatement and Future Damages

[b] Plaintiff Should Not Be Unjustly Enriched

[c] Presumption That Defendant Will Comply With Valid Order

§ 167.70 Opposing Contention That Plaintiff Is Entitled to Damages for Nuisance--Damages Not Recoverable for Diminution in Value for Continuing and Abatable Nuisance

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Damages Not Recoverable for Diminution in Value Caused by Continuing and Abatable Nuisance

[b] Interest Rate Differential Damages Caused by Inability to Refinance Not Permitted

California Points & Authorities

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CHAPTER 167 NUISANCE
PART I. INTRODUCTION

16-167 California Points & Authorities § 167.01

§ 167.01 Scope of Chapter

This chapter discusses and presents memoranda of points and authorities relating to the law of nuisance. It includes memoranda for use in supporting [*see §§ 167.20 -167.22*] and opposing [*see §§ 167.49 -167.53*] the contention that plaintiff has stated a cause of action for nuisance; supporting [*see §§ 167.23 -167.36*] and opposing [*see §§ 167.53 -167.61*] the contention that the act or conduct complained of constitutes a nuisance; and supporting [*see §§ 167.37 -167.43*] and opposing [*see §§ 167.63, 167.64*] the contention that the defendant is liable for the nuisance. Also included are memoranda for use in supporting [*see §§ 167.44, 167.45*] and opposing § 167.62 the contention that an action is barred by the statute of limitations; supporting [*see §§ 167.46, 167.47*] and opposing [*see §§ 167.65, 167.66*] the contention that the nuisance can be enjoined; and supporting § 167.48 and opposing [*see §§ 167.67 -167.69*] the contention that plaintiff is entitled to damages for the nuisance.

This chapter does not discuss the law of trespass, negligence, ultrahazardous activity, or inverse condemnation.

For points and authorities relating to negligence, see Ch. 165, *Negligence* . For points and authorities relating to trespass, see Ch. 225, *Trespass* . For points and authorities relating to strict liability for ultrahazardous activities, see Ch. 234, *Ultrahazardous Activities* . For points and authorities pertaining to inverse condemnation actions, see Ch. 95, *Eminent Domain* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawTortsNuisanceGeneral OverviewReal Property LawTortsNuisanceElementsReal Property LawTortsNuisanceTypesGeneral Overview

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16-167 California Points & Authorities § 167.02

§ 167.02 Governing Statutes

Nuisance is governed generally by *Civ. Code § 3479 et seq.*, *Code Civ. Proc. §§ 731-731c*, and *Penal Code §§ 370-372*. The right to bring an action to abate a nuisance or receive damages is governed by *Code Civ. Proc. § 731*.

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16-167 California Points & Authorities § 167.03

§ 167.03 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

For forms for use in actions between adjoining landowners, see California Forms of Pleading and Practice, Ch. 11, *Adjoining Landowners* (Matthew Bender). For general forms relating to temporary restraining orders and preliminary and permanent injunctions, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender). For discussion and forms for use in nuisance actions, see California Forms of Pleading and Practice, Ch. 391, *Nuisance* (Matthew Bender). For discussion and forms relating to pollution as a nuisance, see California Forms of Pleading and Practice, Ch. 418, *Pollution and Environmental Matters* (Matthew Bender). For forms for use in nuisance actions against public entities, see California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Tort Claims Act* (Matthew Bender). For forms for use in trespass actions, see California Forms of Pleading and Practice, Ch. 550, *Trespass* (Matthew Bender).

[2] Related Points and Authorities Chapters

For points and authorities for use in trespass actions, see Ch. 225, *Trespass* . For points and authorities pertaining to strict liability for damages caused by ultrahazardous activities, see Ch. 234, *Ultrahazardous Activities* . For points and authorities pertaining to nuisance actions against public entities, see Ch. 196, *Public Entities* .

For discussion of the format and content requirements governing memoranda generally, discussion of how to use the forms in this chapter to draft a complete memorandum or brief, and a form of skeletal complete memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsReal Property LawAdjoining LandownersGeneral OverviewReal Property LawTortsNuisanceGeneral OverviewReal Property LawTortsNuisanceElementsReal Property LawTortsNuisanceRemediesInjunctionsTemporary InjunctionsReal Property LawTortsNuisanceTypesGeneral Overview

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16-167 California Points & Authorities §§ 167.04-167.19

[Reserved]

§§ 167.04[Reserved]

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16-167 California Points & Authorities § 167.20

§ 167.20 Supporting Contention That Plaintiff May Bring Action for Private Nuisance [Civ. Code §§ 3479, 3481, 3501; Code Civ. Proc. § 731]--Interference With Use or Enjoyment of Property

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF MAY BRING AN ACTION FOR A PRIVATE NUISANCE BECAUSE THE ACTS OR CONDUCT COMPLAINED OF INTERFERED WITH PLAINTIFF'S USE OR ENJOYMENT OF A PROPERTY INTEREST.

A. Private Nuisance Defined. Every nuisance not included in the definition of public nuisance under *Section 3480 of the Civil Code* is private (*Civ. Code § 3481*).

B. Civil Action for Private Nuisance. The remedies against a private nuisance are a civil action or abatement (*Civ. Code § 3501*).

C. Activity Interferes With Use or Enjoyment of Property Interest. The essence of a private nuisance is an interference with the use and enjoyment of a property right (*Venuto v. Owens-Corning Fiberglas Corp. (1971) 22 Cal. App. 3d 116, 124-125, 99 Cal. Rptr. 350*).

D. Sufficiency of Property Interest. Any interest sufficient to be dignified as a property right is sufficient to support an action based on a private nuisance (*Venuto v. Owens-Corning Fiberglas Corp. (1971) 22 Cal. App. 3d 116, 125, 99 Cal. Rptr. 350*).

[*Optional*] **E. Tenancy for Term as Property Interest.** A property right sufficient to support an action based on a private nuisance includes a tenancy for a term (*Venuto v. Owens-Corning Fiberglas Corp. (1971) 22 Cal. App. 3d 116, 124-125, 99 Cal. Rptr. 350*).

[*Optional*] **F. Apprehension of Injury Sufficient.** Mere apprehension of injury from a dangerous condition may constitute a nuisance when it interferes with the comfortable enjoyment of property (*McIvor v. Mercer-Fraser Co.*

(1946) 76 Cal. App. 2d 247, 254, 172 P.2d 758).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a plaintiff's contention that the plaintiff may bring an action for private nuisance because the conduct or activity complained of interferes with plaintiff's use or enjoyment of his or her property.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue concerning plaintiff's right to bring an action for private nuisance. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should insert discussion showing that the activities complained of interfere with a property interest of plaintiff. If there has been no direct injury to the property itself, counsel should discuss facts showing that defendant's activities or conduct nevertheless interfere with a private right incidental to such property, such as plaintiff's use or enjoyment of his or her property.

[b] Related Pleading and Practice Forms

For discussion and forms relating to nuisance generally, see California Forms of Pleading and Practice, Ch. 391, *Nuisance* (Matthew Bender).

[c] Opposing Memoranda

When appropriate, the points and *authorities in §§ 167.49* and *167.50* may be submitted in opposition to the contention that plaintiff may bring a private action for private nuisance, supported by these points and authorities.

[3] Discussion of Authorities

[a] Activity Interferes With Use or Enjoyment of Property Interest

In ***Venuto v. Owens-Corning Fiberglas Corp.*** *(1971) 22 Cal. App. 3d 116, 99 Cal. Rptr. 350* , four plaintiffs seeking injunctive relief and damages alleged that emissions from defendant's plant severely polluted the air in the county, obstructed the public view of the surrounding hills, and injured the health of the citizens of the county. Three of the plaintiffs alleged that their allergies and respiratory disorders were aggravated as a result of the alleged nuisance. The fourth plaintiff claimed injury by reason of obstruction to his view. The trial court entered judgment for defendant after the sustaining of a general demurrer to the complaint without leave to amend. Plaintiffs appealed, and the court of appeal affirmed.

The court of appeal held that the facts alleged did not support an action based on public nuisance nor did they support an action based on private nuisance. As to the plaintiff who claimed injury by reason of obstruction to his view, the court stated that the essence of a private nuisance is an interference with the use and enjoyment of a property right and any interest sufficient to be dignified as a property right is sufficient to support an action based on a private nuisance, including a tenancy for a term, but not that of a licensee, lodger, or employee (*22 Cal. App. 3d 116, 124-125)* . The court found that, although plaintiff had a property interest that was interfered with, the interference in this case was not encompassed within the definition of nuisance in *Civ. Code § 3479* (*22 Cal. App. 3d 116, 126-127)* .

[b] Sufficiency of Property Interest

Venuto v. Owens-Corning Fiberglas Corp. *(1971) 22 Cal. App. 3d 116, 99 Cal. Rptr. 350* , is discussed in *§ 167.20[3][a]*.

[c] Tenancy for Term as Property Interest

Venuto v. Owens-Corning Fiberglas Corp. *(1971) 22 Cal. App. 3d 116, 99 Cal. Rptr. 350* , is discussed in *§ 167.20[3][a]*.

[4] Additional Authorities

[a] Sufficiency of Property Interest

The facts and procedural background of *Granone v. County of Los Angeles (1965) 231 Cal. App. 2d 629, 42 Cal. Rptr. 34* , are discussed in *§ 167.26[3][b]*. The court of appeal affirmed the trial court's judgment for plaintiff. The court stated that where private property is taken or damaged as a result of a plan of construction or maintenance adopted by a county or flood control district for a storm drainage or flood control project, then a taking or a damaging for a public use occurs and the fact that the interest affected is a leasehold, as distinguished from an ownership in fee simple, is immaterial. The court stated that a tenant whose leasehold interest has been damaged is as much entitled to recover for his or her loss or injury as is the owner of the land (*231 Cal. App. 2d 629, 646)* . The court held that the acts complained of did interfere with an existing property right in the plaintiffs, and that such acts did not benefit plaintiffs but on the contrary, caused the damage of which plaintiffs complained (*231 Cal. App. 2d 629, 650)* .

[b] Tenancy for Term as Property Interest

In *Birke v. Oakwood Worldwide (2009) 169 Cal. App. 4th 1540, 87 Cal. Rptr. 3d 602* , suit for public nuisance was brought against an apartment complex owner on behalf of a minor child in a family that was renting an apartment in the complex. The complaint alleged that the owner had created a nuisance by allowing persons to smoke in the complex's outdoor common areas, which included areas around the swimming pools and other recreational areas, and that the secondhand smoke was pervasive enough in these areas that it had an adverse effect on the child's asthma and allergies. The trial court sustained defendant's demurrer, but the court of appeal reversed. Noting that plaintiff had also alleged that the conditions constituted a private nuisance, the court concluded that plaintiff had sufficiently alleged that the secondhand smoke interfered with her use and enjoyment of the complex's outdoor facilities. The court rejected defendant's argument that the child did not have a property interest in the apartment area because she was not a tenant, but merely a lodger. The court held that a child residing with her family in a rented apartment had standing to bring a private nuisance claim based on interference with her right to enjoy the rented premises (*169 Cal. App. 4th 1540, 1551)* .

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16-167 California Points & Authorities § 167.21

§ 167.21 Supporting Contention That Plaintiff May Bring Private Action for Public Nuisance [Civ. Code §§ 3479, 3480, 3491, 3493; Code Civ. Proc. § 731]--Special Injury to Plaintiff

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF MAY BRING A PRIVATE ACTION ON ACCOUNT OF A PUBLIC NUISANCE BECAUSE PLAINTIFF SUFFERED INJURY THAT IS DIFFERENT IN KIND, AND NOT MERELY DIFFERENT IN DEGREE, FROM THAT SUFFERED BY THE GENERAL PUBLIC.

A. Public Nuisance Defined. A public nuisance is one which affects an entire community, neighborhood, or any considerable number of persons at the same time, although the extent of the annoyance or damage inflicted on individuals may be unequal (*Civ. Code § 3480*).

B. Civil Action for Public Nuisance. Remedies against a public nuisance are indictment or information, civil action, or abatement (*Civ. Code § 3491*).

C. Specific Injury to Plaintiff Alleged. A private person may maintain an action for a public nuisance, if it is specially injurious to himself or herself, but not otherwise (*Civ. Code § 3493*).

D. Injury Different in Kind and Not Just in Degree. If the nuisance alleged is not also a private nuisance as to a private individual, that individual does not have a cause of action on account of a public nuisance unless he or she alleges facts showing special injury to his or her person or property of a character different in kind from that suffered by the general public. Under this rule, plaintiff's damage must be different in kind, rather than in degree, from that shared by the general public (*Brown v. Petrolane, Inc. (1980) 102 Cal. App. 3d 720, 726-727, 162 Cal. Rptr. 551* ; *see Hitch v. Scholle (1919) 180 Cal. 467, 469, 181 P. 657* ; *Brown v. Rea (1907) 150 Cal. 171, 174, 88 P. 713*).

[2] Comments

[a] Use of Form

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the plaintiff may bring a private action on account of a public nuisance because the condition or activity complained of is specially injurious to him or her and the injury is different in kind, not just in degree, from that suffered by the general public.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue concerning plaintiff's right to bring a private action for a public nuisance. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts indicating that, although the nuisance alleged is public, plaintiff has suffered an injury that is different in kind, not merely in degree, from that suffered by the general public.

[b] Related Pleading and Practice Forms

For discussion and forms relating to nuisance generally, see California Formsof Pleading and Practice, Ch. 391, *Nuisance* (Matthew Bender).

[c] Opposing Memoranda

In an appropriate case, the points and *authorities in § 167.50* may be used to oppose these points and authorities.

[3] Discussion of Authorities

[a] Injury Different in Kind and Not Just in Degree

Brown v. Petrolane, Inc. *(1980) 102 Cal. App. 3d 720, 162 Cal. Rptr. 551* , was an action for public and private nuisance. Plaintiffs claimed that defendant's maintenance and continued operation of its liquified petroleum gas facilities within 2,000 feet of plaintiffs' homes constituted a nuisance within the meaning of *Civ. Code § 3479* because it was offensive to the senses and interfered with plaintiffs' comfortable enjoyment of life and property. The trial court sustained defendant's general demurrer without leave to amend. Plaintiffs appealed, and the court of appeal affirmed.

The court of appeal, finding that plaintiffs purported to plead a cause of action predicated on claim that defendant was conducting and maintaining a business that constituted a public nuisance, held that they must allege sufficient facts to show that the operation of defendant's business constituted a public nuisance pursuant to *Civ. Code §§ 3479* and *3480*. The court found that plaintiffs had pleaded facts stating a public nuisance but that the action was not one also for private nuisance. The court held that when an alleged public nuisance is not also a private nuisance, a private individual plaintiff does not have a cause of action unless he or she alleges facts showing special injury to himself or herself in person or property of a character different in kind from that suffered by the general public. The court found that the fear plaintiffs alleged to be caused by the presence of defendant's facility was common to the general community of which they were a part and differed between individuals within that community, if at all, in degree rather than in kind. Since no other special damages to plaintiffs were alleged, the court of appeal sustained the trial court's conclusion that plaintiffs could not maintain a cause of action for public nuisance (*102 Cal. App. 3d 720, 726)* .

In ***Hitch v. Scholle*** *(1919) 180 Cal. 467, 181 P. 657* , plaintiff sought and secured a judgment decreeing the existence of a public highway over the lands of defendant. As an incident of the judgment, defendant was enjoined from obstructing the highway. Defendant appealed, contending that the action was one for abatement of a public nuisance by a private person and therefore the complaint did not state facts sufficient to constitute a cause of action because plaintiff did not allege any special injury. The Supreme Court reversed.

The Court found that the complaint did attempt to state a cause of action to abate a public nuisance; therefore, it held that the complaint was defective because it failed to allege that the highway constituted the only mode of ingress and egress to and from plaintiff's land, showing that injury was different in kind from the injury that was suffered by the public in general, as well as irreparable (*180 Cal. 467, 469)* .

Brown v. Rea *(1907) 150 Cal. 171, 88 P. 713* , was an action for an injunction and damages arising from construction and intended operation of a four-track railroad by defendant on the public street in front of the plaintiff's business premises. The trial court sustained defendant's demurrer with leave to amend. Plaintiff failed to amend, and judgment was entered for defendant. The Supreme Court affirmed.

Holding that the general demurrers were properly sustained, the Supreme Court found that plaintiff attempted to allege facts showing a threatened nuisance, the maintenance of which would be especially injurious to him. In making this finding, the court noted that a public nuisance does not furnish ground for action by a private person unless the public nuisance inflicts on an individual such peculiar injury as to entitle him or her to maintain a separate action for its abatement, or to recover damages, and that the injury to the individual must be different in kind and not merely in degree from that suffered by the general public. The Court stated that ordinarily an obstruction to a highway, if unauthorized and illegal, is a public nuisance but may constitute a private nuisance as well. The Court stated that every owner of land abutting on a highway has a right of access from his land to the highway and from the highway to his land. It found this right of access to be an easement and held that an obstruction to the highway that obstructs this easement constitutes a peculiar injury to the abutting landowner and gives him a cause of action. The Court, however, found that plaintiff did not set forth any facts showing that his right of access had been obstructed by the work done or impaired by the work to be done by defendant, and that the facts merely alleged that defendants were constructing and intended to operate a four-track railroad on the street in front of plaintiff's premises (*150 Cal. 171, 174)* . The Court held that these facts alone did not show that plaintiff's right of passage between street and premises will be, or has been in any degree affected (*150 Cal. 171, 174-175)* .

[4] Additional Authorities

[a] Specific Injury to Plaintiff Alleged

In *Kempton v. City of Los Angeles (2008) 165 Cal. App. 4th 1344, 81 Cal. Rptr. 3d 852* , plaintiff homeowners filed a claim with the city because their neighbors had built fences on city property that obstructed the sight lines for drivers emerging from plaintiffs' garage. When the city declined plaintiffs' claim and refused to have the fences removed, plaintiffs filed suit seeking monetary damages and injunctive relief. The trial court granted judgment on the pleadings in favor of the city, but the court of appeal reversed. The court noted that a private individual may bring an action against a city to abate a public nuisance if the individual suffers harm that is specially injurious to himself or herself, that is, damage that is different in kind, not merely in degree, from that suffered by other members of the public. The court concluded that plaintiffs' allegations that the fences blocked the sight lines upon entering or exiting their garage, thereby causing fear of being in a vehicle collision or of hitting a pedestrian, could constitute a special injury sufficient to support a cause of action for public nuisance. Because plaintiffs alleged facts sufficient to support a cause of action for public nuisance, but did not specifically plead that cause of action, the court reversed with directions to grant leave to amend the complaint to state a cause of action for nuisance (*165 Cal. App. 4th 1344, 1349-1350)* .

[b] Injury Different in Kind and Not Just in Degree

The facts and procedural background of *Helix Land Co. v. City of San Diego (1978) 82 Cal. App. 3d 932, 147 Cal. Rptr. 683* , are discussed in *§ 167.26[3][a]*. The court of appeal found that plaintiff had not stated a cause of action for nuisance (*82 Cal. App. 3d 932, 949)* . The court held that a party does not have a cause of action on account of a public nuisance unless he alleges facts showingspecial injury to himself in person or property of a character different in kind from that suffered by the general public. The court found that plaintiff had not stated facts showing that the threatened

flooding was different in kind than that suffered by the general public (*82 Cal. App. 3d 932, 949)* .

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16-167 California Points & Authorities § 167.22

§ 167.22 Supporting Contention That Plaintiff May Bring Private Action for Public Nuisance Without Showing of Special Injury [Civ. Code §§ 3479, 3480, 3491, 3493; Code Civ. Proc. § 731]--Nuisance Both Private and Public

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF MAY BRING A PRIVATE ACTION FOR PUBLIC NUISANCE WITHOUT SHOWING THAT THE NUISANCE WAS SPECIALLY INJURIOUS TO THE PLAINTIFF BECAUSE THE NUISANCE IS BOTH PUBLIC AND PRIVATE.

A. Nuisance Both Public and Private. A nuisance that interferes with the use and enjoyment of plaintiff's land and is a danger to the neighborhood is both public and private (*Buchanan v. Los Angeles County Flood Control Dist. (1976) 56 Cal. App. 3d 757, 768, 128 Cal. Rptr. 770* ; *see* *Lane v. San Diego Elec. Ry. Co. (1929) 208 Cal. 29, 34, 280 P. 109*).

B. Plaintiff Need Not Show Damage Different in Kind From That Suffered by General Public. If the nuisance is a private as well as a public one, there is no requirement that the plaintiff suffer damage different in kind from that suffered by the general public, and the plaintiff does not lose rights as a landowner merely because others suffer damage of the same kind or even of the same degree (*Lew v. Superior Court (1993) 20 Cal. App. 4th 866, 873, 25 Cal. Rptr. 2d 42* ; *see also* *Venuto v. Owens-Corning Fiberglas Corp. (1971) 22 Cal. App. 3d 116, 124, 99 Cal. Rptr. 350*).

[*Optional*] **C. Number of Persons Affected Not Conclusive.** The fact that a nuisance affects a great number of persons in the same way does not conclusively establish that the nuisance is public and not also private (*see* *Fisher v. Zumwalt (1900) 128 Cal. 493, 496, 61 P. 82*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a plaintiff's contention that a private action can be brought

for a public nuisance without a showing of special injury to the plaintiff because the nuisance is also private in that it interferes with plaintiff's use or enjoyment of his or her property.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a private action can be brought for a public nuisance without a showing of special injury to the plaintiff because the nuisance is also private. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that, although the alleged nuisance is public, it also interferes with plaintiff's use and enjoyment of his or her property and therefore, constitutes an actionable private nuisance.

[b] Related Pleading and Practice Forms

For discussion and forms relating to nuisance generally, see California Forms of Pleading and Practice, Ch. 391, *Nuisance* (Matthew Bender).

[3] Discussion of Authorities

[a] Nuisance Both Public and Private

Buchanan v. Los Angeles County Flood Control Dist. *(1976) 56 Cal. App. 3d 757, 128 Cal. Rptr. 770* , was an action for injunctive relief to abate a nuisance. The trial court granted a motion by defendant for nonsuit. Plaintiffs appealed, and the court of appeal reversed.

The court of appeal found that plaintiffs' pleadings and opening statement disclosed both erosion of land occupied by them through improper activity of defendant and hence, an interference with enjoyment of their property as well as a condition maintained by defendant that was a danger to the neighborhood. The court concluded that the nuisance was both public and private and that plaintiff had standing to sue to abate the nuisance whether it was treated as public or private because plaintiffs' pleadings disclosed special injury to them not shared by others as well as injury to their land (*56 Cal. App. 3d 757, 768)* .

In ***Lane v. San Diego Elec. Ry. Co.*** *(1929) 208 Cal. 29, 280 P. 109* , plaintiffs applied for permanent injunction restraining defendant from maintaining its electric streetcar tracks and operating its electric streetcars across the sidewalk and street immediately adjacent to and in front of plaintiffs' building. The trial court denied the application; plaintiff appealed, and the court of appeal reversed, directing trial court to enter judgment in favor of plaintiffs. The Supreme Court granted a hearing and adopted the court of appeals' judgment in part.

The Court found that evidence demonstrated that an auto or truck could not be parked in front of plaintiffs' lot while a streetcar passed and held that plaintiff'saccess to the property was substantially and seriously interfered with by the operation of the electric streetcars. The Court further found that the maintenance of a loop track for bringing the streetcars around defendant's depot in its present location and the operation of cars thereover would substantially depreciate the market value of plaintiffs' property (*208 Cal. 29, 32)* . The Court noted that an abutting owner has two kinds of rights in a highway: (1) a public right that he or she enjoys in common with all other citizens, and (2) certain private rights that arise from his or her ownership of property contiguous to the highway, which are not common to the public generally. It held that an abutting landowner on a public highway has a special right of easement and use in the public road for access purposes, and this is a property right that cannot be damaged or taken away from him or her without due compensation, and that he or she has by reason of such ownership a special easement in such street for the purpose of ingress and egress, which is property as fully as the lot itself (*208 Cal. 29, 33)* . The Court, therefore, held that the obstruction of an abutting owner's access to a public street constitutes a private as well as a public nuisance and

that any injury to the use of the street that impairs plaintiff's private easement in the street in front of and adjacent to his lot amounts to an injury giving plaintiff, as an abutting owner, the right to maintain an action for damages or for an injunction (*208 Cal. 29, 34)* . The Court also found plaintiffs' right to be neither technical nor unsubstantial but a valuable property right (*208 Cal. 29, 34-35)* .

[b] Plaintiff Need Not Show Damage Different in Kind From That Suffered by General Public

The facts and procedural background of ***Lew v. Superior Court*** *(1993) 20 Cal. App. 4th 866, 25 Cal. Rptr. 2d 42* , are discussed in *§ 167.32[3][a]*. In denying defendants' petition for a writ of mandate to compel the superior court to set aside its judgment awarding damages to plaintiffs, the court of appeal rejected defendants' argument that plaintiffs were not entitled to recover because the injury suffered by plaintiffs differed only in degree and not in kind from the injury suffered by the general public at large. The court held that this distinction is inapplicable if a nuisance, such as the nuisance claimed by plaintiffs, is private as well as public because it obstructs plaintiffs' free use and enjoyment of their private property (*20 Cal. App. 4th 866, 873)* .

The facts and procedural background of ***Venuto v. Owens-Corning Fiberglas Corp.*** *(1971) 22 Cal. App. 3d 116, 99 Cal. Rptr. 350* , are discussed in *§ 167.20[3][a]*. In affirming the trial court's judgment, the court of appeal noted that when the nuisance is a private as well as a public one, there is no requirement that the plaintiff suffer damage different in kind from that suffered by the general public, and the plaintiff does not lose rights as a landowner merely because others suffer damage of the same kind or even of the same degree. The court, however, held that, although the plaintiff who claimed injury by reason of obstruction to his view had alleged a sufficient property right to support an action based on a private nuisance, this interference was not encompassed within the definition of nuisance in *Civ. Code § 3479* (*22 Cal. App. 3d 116, 124)* .

[c] Number of Persons Affected Not Conclusive

Fisher v. Zumwalt *(1900) 128 Cal. 493, 61 P. 82* , was an action to abate a nuisance and for damages. Plaintiff contended that the accumulated refuse from defendant's creamery threw off vile and noxious odors and gases that were offensive to the senses and dangerous to the health of plaintiff and his family and all others living in the immediate vicinity. Defendant claimed that the creamery constituted a public nuisance because it affected all the people of the neighborhood and therefore, since the nuisance was not especially injurious to plaintiff and the damage was not different in kind or character from that suffered by the general public, plaintiff could not in his private capacity maintain the action. The trial court gave judgment for plaintiff. Defendant appealed, and the Supreme Court affirmed.

The Court held that plaintiff was entitled to sustain his action because defendant's acts interfered with the comfortable enjoyment of plaintiff's property and the nuisance was private as to him, regardless of whether or not it was a private or public nuisance in other respects (*128 Cal. 493, 494)* . The Court noted that there are nuisances that would require a showing of special injury different in kind or character from that suffered by the general public, but stated that this class of nuisances was confined to instances where there has been an invasion of a right that is common to every person in the community and not where the wrong has been done to private property or the rights of private individuals, although many individuals may have been injured in the same manner and by the same means (*128 Cal. 493, 495-496)* . The Court held that the fact that a nuisance affects a great number of persons in the same way does not conclusively establish that the nuisance is public and not also private (*128 Cal. 493, 496)* .

[4] Additional Authorities

[a] Plaintiff Need Not Show Damage Different in Kind to That Suffered by General Public

Birke v. Oakwood Worldwide (2009) 169 Cal. App. 4th 1540, 87 Cal. Rptr. 3d 602 , is described in § 167.20[4][b]. In that case, although plaintiff tenant had alleged that the secondhand smoke that allegedly permeated the outdoor common areas of the apartment complex aggravated her asthma and allergies, and that this was an injury that was different in

kind from the increased risks of heart disease and lung cancer faced by general public, plaintiff had also alleged both a public and private nuisance. Because both private and public nuisances were alleged, the court of appeal held that the tenant could bring suit against the apartment owner for harm caused by the secondhand cigarette smoke without a showing that the tenant suffered damage different in kind from that suffered by the general public, so long as plaintiff alleged that the presence of the secondhand smoke interfered with plaintiff's use and enjoyment of the common area outdoor facilities (*169 Cal. App. 4th 1540, 1551)* .

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16-167 California Points & Authorities § 167.23

§ 167.23 Supporting Contention That Activity or Conduct Constitutes Nuisance [Civ. Code § 3479]--General Form

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE COMPLAINED OF ACT OR COURSE OF CONDUCT CONSTITUTES A NUISANCE WITHIN THE DEFINITION SET FORTH IN SECTION 3479 OF THE CIVIL CODE BECAUSE IT _____ [IS INJURIOUS TO HEALTH *or* INVOLVES THE ILLEGAL SALE OF CONTROLLED SUBSTANCES *or* IS INDECENT AND OFFENSIVE TO THE SENSES *or* OBSTRUCTS PLAINTIFF'S FREE USE OF HIS/HER PROPERTY, SO AS TO INTERFERE WITH PLAINTIFF'S COMFORTABLE ENJOYMENT OF LIFE AND PROPERTY *or* UNLAWFULLY OBSTRUCTS FREE PASSAGE OR USE, IN THE CUSTOMARY MANNER, OF A _____ (NAVIGABLE LAKE *or* RIVER *or* BAY *or* STREAM *or* CANAL *or* BASIN *or* PUBLIC _____ (PARK *or* SQUARE *or* STREET *or* HIGHWAY))].

A. Definition of Nuisance Under *Civ. Code § 3479*. Anything that is injurious to health, including but not limited to the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, or highway, is a nuisance (*Civ. Code § 3479*).

B. Definition Is Broad. The statutory definition of nuisance is broad enough to encompass almost every conceivable type of interference with the enjoyment or use of land or property (*Mangini v. Aerojet-Gen. Corp. (1991) 230 Cal. App. 3d 1125, 1136, 281 Cal. Rptr. 827*).

[*If appropriate, add points and authorities pertaining to specific types of activities that are alleged to constitute a nuisance (see, e.g., §§ 167.24 -167.34).*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of plaintiff's contention that the condition or activity complained of constitutes a nuisance under *Civ. Code § 3479*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the condition or activity complained of constitutes a nuisance under *Civ. Code § 3479*. This form may also be combined with forms setting out points and authorities pertaining to specific types of activities that are alleged to constitute a nuisance [*see, e.g., §§ 167.24 -167.33*]. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the definition of nuisance set out in the form.

[b] Related Pleading and Practice Forms

For discussion and forms relating to nuisance generally, see California Forms of Pleading and Practice, Ch. 391, *Nuisance* (Matthew Bender).

[3] Discussion of Authorities

[a] Definition Is Broad

The facts and procedural background of ***Mangini v. Aerojet-Gen. Corp.*** *(1991) 230 Cal. App. 3d 1125, 281 Cal. Rptr. 827* , are discussed in *§ 167.34[3][a]*. The court of appeal held that the California nuisance statutes do not limit recovery for nuisance to instances involving an offensive use of neighboring lands, but that the broad language of *Civ. Code § 3479* sanctions recovery for direct injury to a plaintiff's property. Hence, a plaintiff was permitted to sue a party who had leased the plaintiff's property from prior owners, and who allegedly contaminated the property with hazardous waste during the leasehold. The court, quoting *Stoiber v. Honeychuck (1980) 101 Cal. App. 3d 903, 919, 162 Cal. Rptr. 194* [*see § 167.23[4][a]*], stated that more modern California cases have recognized that the statutory definition of nuisance appears to be broad enough to encompass almost every conceivable type of interference with the enjoyment or use of land or property (*230 Cal. App. 3d 1125, 1136)* .

[4] Additional Authorities

[a] Definition Is Broad

Stoiber v. Honeychuck (1980) 101 Cal. App. 3d 903, 162 Cal. Rptr. 194 , involved an action by a tenant against property owners and managers for damages resulting from the dilapidated and unsafe condition of the premises. The trial court sustained various demurrers and granted defense motions for judgment on the pleadings, striking several causes of action including a cause of action for nuisance. The court of appeal reversed, stating that the statutory definition of nuisance appears to be broad enough to encompass almost any conceivable type of interference with the enjoyment or use of land or property, and holding that nuisance liability was not precluded by the existence of a contractual relationship between the tenant and landlord (*101 Cal. App. 3d 903, 919)* .

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16-167 California Points & Authorities § 167.24

§ 167.24 Supporting Contention That Activity or Conduct Constitutes Nuisance [Civ. Code § 3479]--Unreasonable Use of Property

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with points and authorities pertaining to the general statutory definition of nuisance (see § 167.23).*]

DEFENDANT'S ACTIVITY OR CONDUCT CONSTITUTES A NUISANCE BECAUSE THE USE TO WHICH DEFENDANT HAS PUT HIS/HER PROPERTY IS UNREASONABLE UNDER THE CIRCUMSTANCES AND HAS CAUSED MATERIAL INJURY TO PLAINTIFF'S PROPERTY.

A. Unreasonable Use. One may not make an unreasonable use of one's own premises to the material injury of his neighbor's property (*McIntosh v. Brimmer (1924) 68 Cal. App 770, 776-777, 230 P. 203* ; *see Vowinckel v. N. Clark & Sons (1932) 216 Cal. 156, 164, 13 P.2d 733*).

B. Existence of Nuisance Is Matter of Degree and Depends on Circumstances. What is or is not a nuisance is ultimately a matter of degree, varying with the particular circumstances of each individual case (*Hassell v. San Francisco (1938) 11 Cal. 2d 168, 170, 78 P.2d 1021* ; *County of San Diego v. Carlstrom (1961) 196 Cal. App. 2d 485, 489, 16 Cal. Rptr. 667*).

C. Factors Considered. Whether or not a use, which in itself is lawful, is a nuisance depends on a number of circumstances: locality and surroundings, the number of people living there, the prior use, whether it is continual or occasional, and the nature and extent of the nuisance and of the injury caused thereby. No hard-and-fast rule controls (*McIntosh v. Brimmer (1924) 68 Cal. App 770, 777, 230 P. 203*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of plaintiff's contention that the defendant's use of property

constitutes a nuisance because the use is unreasonable under the circumstances.

These points and authorities may be combined with other forms supporting the contention that the specific activity or conduct complained of constitutes a nuisance [*see, e.g., §§ 167.25 -167.33*]. These points and authorities may also be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that defendant's use of his or her property constitutes a nuisance because the use is unreasonable under the circumstances. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel may argue that the locality and surroundings, the number of people living nearby, the prior use, the continuousness of the activity, or the nature and extent of the nuisance and of the injury caused thereby, make defendant's use of his or her property unreasonable and therefore a nuisance.

[3] Discussion of Authorities

[a] Unreasonable Use

McIntosh v. Brimmer *(1924) 68 Cal. App 770, 230 P. 203* , was an action to abate a nuisance by enjoining defendants from continuing to conduct their chicken corrals in such a manner that the dust therefrom would injure plaintiff's trees, vines, and grapes, and to recover damages for past injuries. Trial court gave judgment for plaintiff. Defendants appealed, and the court of appeal affirmed.

Defendants contended that the complaint did not state a cause of action because the pleading failed to show that defendants were maintaining an actionable nuisance. The court held that the complaint stated all the facts necessary to entitle plaintiff to the relief granted. The court held that the maintenance of the chicken ranch in the manner described in the complaint was a nuisance. The court based its decision on the well-established rule that no one may make an unreasonable use of his or own premises to the material injury of his neighbor's property (*68 Cal. App 770, 776)* .

Vowinckel v. N. Clark & Sons *(1932) 216 Cal. 156, 13 P.2d 733* , was an action for damages and to enjoin defendant's operation of its factory on the grounds of nuisance. Defendant's business involved manufacturing sewer-pipe, tile, pottery, and stoneware in an area zoned for industrial use and was located within a partly industrial, partly residential section of the city. Defendant's factory had eighteen kilns, nine of which were placed along and about 20 feet from the fence dividing plaintiff's and defendant's properties. Plaintiff alleged injuries to, and continued discomfort and interference with, the peaceable enjoyment of his property by reason of the discharge of large quantities of noxious soot, smoke, and malodorous and injurious gaseous substances; vibrations and noise caused by the operations of the kilns and furnaces and of freight cars; and light disturbances or flares at night caused by successive combustions in furnaces and danger by reason of fire hazard. The trial court found the allegations of emission of filthy and noxious smoke, soot, and gas, the maintenance of the railway switch and the injuries resulting to the plaintiff thereby untrue; however, it found that the manner of operation of the kilns and furnaces and the combustion of the fuel therein caused great vibration and noise disturbing to the peace and quiet of plaintiff and, together with the flares, prevented plaintiff from the comfortable use and enjoyment of his property, were offensive to the senses of persons living on plaintiff's property, and constituted a fire hazard. The judgment decreed that defendant be enjoined from operating the four southernmost kilns and furnaces on the west side of its property entirely and from operating the remaining kilns and furnaces on the west side of its property unless it erected a substantial fireproof wall or fence at least 15 feet high between the furnaces and plaintiff's property. Defendant appealed, and the Supreme Court affirmed.

The Court held that the fact that the factory's operations were conducted with the consent of the municipality, that defendant was doing a legal act, that its operations were conducted in a district zoned for industry, and that defendant was first in the field could not avail defendant. The Court stated that a person may not use his or her own property, even in and about a business in itself lawful, if it be used in such a manner as to seriously interfere with another in the

enjoyment of his or her right in the use of his or her property (*216 Cal. 156, 164)* .

[b] Existence of Nuisance Is Matter of Degree and Depends on Circumstances

In ***Hassell v. San Francisco*** *(1938) 11 Cal. 2d 168, 78 P.2d 1021* , defendant city and county was enjoined from constructing a public convenience station in a park according to the plans of its park commission. Its charter granted to the park commission the exclusive control and management of parks, including the exclusive right to erect and to superintend the erection of buildings. The trial court gave judgment for plaintiff, and defendant appealed. The Supreme Court affirmed.

Defendant contended that the trial court's finding that the building would constitute a nuisance was not supported by the evidence. In evaluating the trial court's finding, the Supreme Court stated that in determining whether a present or proposed use of property is a nuisance, many factors must be considered because the law relating to private nuisances is one of degree, and a use that would be reasonable under one set of facts might be unreasonable under another. The Court found that defendant's proposed building would constitute a nuisance under the circumstances (*11 Cal. 2d 168, 170)* .

County of San Diego v. Carlstrom *(1961) 196 Cal. App. 2d 485, 16 Cal. Rptr. 667* , was an action for an injunction to abate a public nuisance caused by defendant's maintenance of extremely dilapidated, unsightly, dangerous, and fire-hazardous condition of temporarily stored structures. The trial issued a mandatory injunction, and defendant appealed. The court of appeal affirmed.

The court of appeal, finding that the storage of the structures constituted a fire hazard amounting to a public nuisance, stated that what is or is not a nuisance was ultimately a matter of degree, varying with the particular circumstances of each individual case (*196 Cal. App. 2d 485, 489)* . The court noted that while people have the right to use their property, within certain limits as they see fit even if it annoys the neighbors or depreciates the value of adjoining property, they have no legal right to put their land to an unnatural use and to create thereon an unnecessary hazard to other property. The court stated that there must be a balancing of conveniences and of rights. The court also stated that when danger to an entire neighborhood is demonstrated and when the condition created is unnecessary and can be remedied, prudence, common sense, fair play, and justice require that the danger to the entire neighborhood be eliminated (*196 Cal. App. 2d 485, 490)* . On this basis, the court found that the evidence showed that a fire hazard existed and under the conditions was a public nuisance subject to abatement (*196 Cal. App. 2d 485, 491)* .

[c] Factors Considered

The facts and procedural background of ***McIntosh v. Brimmer*** *(1924) 68 Cal. App 770, 230 P. 203* , are discussed in *§ 167.24[3][a]*. In affirming the trial court's judgment, the court of appeal found that the complaint stated all the facts necessary to entitle plaintiff to the relief granted. The court held that the maintenance of the chicken ranch in the manner described in the complaint was unreasonable and therefore a nuisance. In making its decision, the court found that no hard-and-fast rule controlled whether or not a use, which in itself is lawful, is a nuisance, but that it depended on a number of circumstances: locality and surroundings, prior use, the number of people living there, whether it is continual or occasional, and the nature and extent of the nuisance and of the injury caused thereby (*68 Cal. App. 770, 777)* . The court stated that the law relating to private nuisances is one of degree and that a use that would be reasonable under one set of facts might be unreasonable under another. Although matters to be considered, location, priority of occupation, and the fact that the injury is only occasional were held not to be conclusive but only to be considered in connection with all the circumstances in a particular case; the court stated that whether the use is unreasonable or not was an inference to be drawn from all the facts (*68 Cal. App. 770, 777)* .

[4] Additional Authorities

[a] Unreasonable Use

In *Booska v. Patel (1994) 24 Cal. App. 4th 1786, 30 Cal. Rptr. 2d 241* , the plaintiff and the defendant were owners of neighboring property. The roots of a large tree in the plaintiff's yard extended into the defendant's yard. The defendant hired a contractor to sever these roots. Because this work was negligently performed, the tree became unsafe, and was removed at the plaintiff's expense. The plaintiff sued the defendant for negligence, destruction of timber, and nuisance. The trial court granted summary judgment to the defendant on the basis of his "absolute right" to sever the tree roots on his property, and the plaintiff appealed. In reversing and remanding the matter to the trial court, the court of appeal held that no one has the absolute right to do whatever he or she wishes on his or her property regardless of the consequences to others. The right to use one's property is qualified by the requirement that one must use one's property reasonably, so as not to harm others in the vicinity (*24 Cal. App. 4th 1786, 1791)* .

In *Schild v. Rubin (1991) 232 Cal. App. 3d 755, 283 Cal. Rptr. 533* , the plaintiff obtained an injunction to prohibit his neighbors from playing basketball in their back yard except during specified hours of the day. Although the plaintiff sought the injunction pursuant to *Code Civ. Proc. § 527.6*, which authorizes injunctive relief from willful harassment, the plaintiff characterized the basketball playing as a nuisance, claiming that it was excessively noisy. The court dissolved the injunction, holding that the basketball playing was not a nuisance, despite the annoyance and disturbance suffered by the plaintiff from the noise, because it was a reasonable use of the defendants' property. The court held that the plaintiff had suffered no injury to his legal rights because people who live in organized communities must expect to suffer some inconvenience and annoyance from their neighbors (*232 Cal. App. 3d 755, 760)* .

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16-167 California Points & Authorities § 167.25

§ 167.25 Supporting Contention That Activity or Conduct Constitutes Nuisance [Civ. Code § 3479]--Fire Hazards

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with points and authorities pertaining to the general statutory definition of nuisance (see § 167.23).*]

DEFENDANT'S ACTIVITY OR CONDUCT CONSTITUTES A NUISANCE BECAUSE IT CREATED A FIRE HAZARD THAT INTERFERED WITH PLAINTIFF'S USE AND ENJOYMENT OF PROPERTY.

A. Fire Hazard as Nuisance. The presence in a settled residential community of an unnecessarily extreme fire hazard can create and maintain, in the lives of the people of that community, a fear that will destroy all happiness in life and property and render the hazard a public nuisance (*City of Los Angeles v. Shpegel-Dimsey, Inc. (1988) 198 Cal. App. 3d 1009, 1017-1018, 244 Cal. Rptr. 507* ; *see also* *County of San Diego v. Carlstrom (1961) 196 Cal. App. 2d 485, 491, 16 Cal. Rptr. 667*).

[*Optional*] **B. Construction in Accord With Previous Standards Not a Defense.** The fact that a building was constructed in accordance with all existing statutes does not immunize it from subsequent abatement as a public nuisance when judged to be a fire hazard using standards from statutes enacted subsequent to the erection of the building (*City of Bakersfield v. Miller (1966) 64 Cal. 2d 93, 101, 48 Cal. Rptr. 889, 410 P.2d 393*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of plaintiff's contention that a fire hazard constitutes a nuisance within the meaning of *Civ. Code § 3479*.

These points and authorities may be combined with other forms supporting the general contention that the activity or conduct complained of constitutes a nuisance [*see §§ 167.24, 167.26 -167.33*]. They may also be combined with points

and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a fire hazard constitutes a nuisance within the meaning of *Civ. Code § 3479*. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion and forms relating to nuisance generally, see California Forms of Pleading and Practice, Ch. 391, *Nuisance* (Matthew Bender).

For discussion and forms relating to liability for fire damage, see California Forms of Pleading and Practice, Ch. 267, *Fires* (Matthew Bender).

[3] Discussion of Authorities

[a] Fire Hazard as Nuisance

City of Los Angeles v. Shpegel-Dimsey, Inc. *(1988) 198 Cal. App. 3d 1009, 244 Cal. Rptr. 507* was an action by a city to recover fire abatement costs and property damages from a defendant who operated a plastic conversion business that violated numerous fire code requirements regarding the storage of combustible materials. Burning of these materials produces smoke, fumes, and gases that can adversely affect human health, resulting in some cases in death. Eventually, an extremely serious fire broke out on defendant's property that released large amounts of these fumes, gases, and smoke, and that also obstructed the free use of adjacent property and the free passage of surrounding streets. The fire escaped defendant's property and damaged utility poles and other fixtures owned by plaintiff. Plaintiff appealed judgment for defendant to the court of appeal.

The court of appeal reversed, holding that the maintenance of a fire hazard sufficiently extreme to menace public health and safety is unquestionably a public nuisance. Because the fire would have been confined to a small area within defendant's premises if defendant had complied with the fire code requirements, defendant's failure to do so created a threat sufficiently extreme to constitute a nuisance subject to abatement (*198 Cal. App. 3d 1009, 1017-1018)* .

The facts and procedural background of ***County of San Diego v. Carlstrom*** *(1961) 196 Cal. App. 2d 485, 16 Cal. Rptr. 667* , are discussed in *§ 167.24[3][b]*. The court of appeal, in holding that defendant's temporary storage of the extremely dilapidated, unsightly, dangerous, and fire-hazardous structures constituted a nuisance, stated that the presence of an unnecessarily extreme fire hazard in a settled residential community can well create and maintain a fear, in the lives of the people of the community, that often destroys all happiness in life and property and renders the hazard a public nuisance (*196 Cal. App. 2d 485, 491)* .

[b] Construction in Accord With Previous Standards Not a Defense

In ***City of Bakersfield v. Miller*** *(1966) 64 Cal. 2d 93, 48 Cal. Rptr. 889, 410 P.2d 393* , a complaint filed by the city alleged that defendant's hotel constituted a fire hazard and a public nuisance because it violated a city building ordinance. The ordinance declared that any building not conforming with the building code contained in the ordinance constituted a fire hazard and a public nuisance. Violations of the building code adopted by such ordinance were shown by undisputed evidence. Concluding that the hotel constituted both a fire hazard and a public nuisance under the city's ordinance, the trial court ordered that the nuisance be abated. Defendant appealed, and the Supreme Court affirmed the judgment.

On appeal, defendant challenged the power of a municipality to declare as a matter of law that the violation of an

ordinance will constitute a public nuisance and maintained that the trial court erred in failing to make an independent finding as to whether the building was in fact a nuisance under general state law. The Supreme Court stated that although "nuisance" is a term for the Legislature to define, the semantics of *Civ. Code § 3479* provide little guide in ascertaining the degree of danger that must be present for a condition or an activity to be considered a nuisance (*64 Cal. 2d 93, 99)* . The Court noted that in certain areas of law the term "nuisance" had been defined with more particularity and held that city legislative bodies are empowered to declare what constitutes a nuisance. The Court, however, did not reach the question of whether the city was empowered to declare as nuisances only specific conditions within the general areas of regulation enumerated in *Civ. Code § 3479*, since they held that a fire hazard clearly constitutes a nuisance within the provisions of *Civ. Code § 3479* (*64 Cal. 2d 93, 100)* . The fact that a building was constructed in accordance with all existing statutes does not immunize it from subsequent abatement as a public nuisance when judged to be a fire hazard using standards from statutes enacted subsequent to the erection of the building (*64 Cal. 2d 93, 101)* .

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16-167 California Points & Authorities § 167.26

§ 167.26 Supporting Contention That Activity or Conduct Constitutes Nuisance [Civ. Code § 3479]--Diversion or Obstruction of Water Flow

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with points and authorities pertaining to the general statutory definition of nuisance (see § 167.23).*]

DEFENDANT'S ACTIVITY OR CONDUCT CONSTITUTES A NUISANCE UNDER SECTION 3479 OF THE CIVIL CODE BECAUSE A DIVERSION OR OBSTRUCTION OF WATER FLOW RESULTED.

A. Diversion or Obstruction of Water Flow as Nuisance. An act of obstruction or diversion of water constitutes a nuisance under *Section 3479 of the Civil Code* (*Helix Land Co. v. City of San Diego (1978) 82 Cal. App. 3d 932, 949, 147 Cal. Rptr. 683*).

[*Optional*] **B. Single Flood Constitutes Nuisance.** A single act of flooding resulting in the destruction of crops constitutes a nuisance (*Granone v. County of Los Angeles (1965) 231 Cal. App. 2d 629, 650, 42 Cal. Rptr. 34* ; *Ambrosini v. Alisal Sanitary Dist. (1957) 154 Cal. App. 2d 720, 727, 317 P.2d 33*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of plaintiff's contention that the diversion or obstruction of water flow constitutes a nuisance.

These points and authorities may be combined with other forms supporting the general contention that the activity or conduct complained of constitutes a nuisance [*see §§ 167.24 -167.35*] or a nuisance per se [*see § 167.36*]. These points and authorities may also be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the diversion or obstruction of water flow constitutes a nuisance. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion and forms relating to nuisance generally, see California Forms of Pleading and Practice, Ch. 391, *Nuisance* (Matthew Bender).

[3] Discussion of Authorities

[a] Diversion or Obstruction of Water Flow as Nuisance

In ***Helix Land Co. v. City of San Diego*** *(1978) 82 Cal. App. 3d 932, 147 Cal. Rptr. 683* , plaintiffs sued the city of San Diego and the state of California for damages and injunctive relief. Plaintiffs contended that the United States and Mexico agreed to build a flood control channel. Plaintiffs further alleged that after Mexico built its portion, the original design was altered and that, due to actions and inactions on the part of the city and state, construction of the United States' portion had been prevented. As a result, plaintiffs' property was subject to a greater threat of flooding and to discharge of raw and untreated sewage and other chemicals and substances injurious to plaintiffs' health and to their lands. The trial court sustained defendants' demurrers to the complaint without leave to amend. Plaintiffs appealed, and the court of appeal affirmed the judgment.

On appeal, plaintiffs contended that defendants introduced a condition that proximately caused a public and private nuisance. The court holding that plaintiffs had not stated a cause of action for nuisance because sufficient facts were not alleged from which the court could conclude that a nuisance existed within the statutory provisions, acknowledged that an act of pollution, obstruction, or diversion of water constitutes a nuisance under *Civ. Code § 3479* (*82 Cal. App. 3d 932, 949)* .

[b] Single Flood Constitutes Nuisance

Granone v. County of Los Angeles *(1965) 231 Cal. App. 2d 629, 42 Cal. Rptr. 34* , was an action for damages caused by a city's maintenance of a nuisance. Plaintiff contended that defendant city designed defective culverts and negligently maintained a channel, allowing tremendous accumulation of debris, thereby blocking the flow of water in the channel and causing the water to overflow the levees, flood plaintiffs' land, and damage and destroy their crops. Defendants contended that no property right of plaintiffs was invaded and that they were not liable to plaintiffs on any theory of law. The trial court issued an order denying defendant's motion for judgment notwithstanding the verdict and entered judgment for plaintiff. Defendant appealed, and the court of appeal affirmed.

The court of appeal stated that when private property is taken or damaged as a result of a plan of construction or maintenance adopted by a county or flood control district for a storm drainage or flood control project, then a taking or a damaging for a public use occurs (*231 Cal. App. 2d 629, 646)* . The court held that the acts complained of did interfere with an existing property right in the plaintiffs and that such acts did not benefit plaintiffs but, on the contrary, caused the damage of which plaintiffs complained. Noting that *Ambrosini v. Alisal Sanitary Dist. (1957) 154 Cal. App. 2d 720, 317 P.2d 33* , seemed to be authority for the proposition that a single act of flooding resulting in the destruction of crops constitutes a nuisance, the court found defendant's acts to constitute a nuisance (*231 Cal. App. 2d 629, 650)* .

Ambrosini v. Alisal Sanitary Dist. *(1957) 154 Cal. App. 2d 720, 317 P.2d 33* , was an action for damages to celery crop on the grounds of nuisance and inverse condemnation. Plaintiff's celery field bordered a highway and was adjacent to a portion of a sewage outfall line installed, maintained, and operated by defendant district. Water containing sewage came out of the sewer and entered plaintiff's celery field. This resulted in a quarantine of the field. Plaintiff contended that defendant's construction of nonpressurized manholes constituted a nuisance, causing the damage to the celery field.

The trial court entered judgment on a jury verdict for plaintiffs on both counts. Defendant appealed. The court of appeal, holding that defendant's acts constituted a nuisance, affirmed the trial court's judgment and found that the trial court did not err in denying defendant's motions.

On appeal, defendant contended that it could not be held liable for nuisance because the property was used entirely for governmental purposes and was authorized by statute. The court of appeal held that in California a municipality may be held liable for creating and maintaining a nuisance notwithstanding the fact that a governmental activity is involved and that the statute did not authorize a defective outfall line (*154 Cal. App. 2d 720, 726-727)* . As to defendant's contention that a single act does not constitute a nuisance, the court held it had no merit because the duration or recurrence of the interference is not necessarily a conclusive factor in determining whether the damage is so substantial as to amount to a nuisance (*154 Cal. App. 2d 720, 727)* .

[4] Additional Authorities

[a] Diversion or Obstruction of Water Flow as Nuisance

Learned v. Castle (1889) 78 Cal. 454, 18 P. 872 , was an action for damages for a nuisance and for mandatory injunction to prevent its continuance. Plaintiff contended that by tapping a stream north of plaintiff's land and placing obstructions in the stream, defendants caused water, which would ordinarily run away from plaintiff's land, to flow onto the land. Plaintiff further contended that defendants wrongfully entered plaintiff's land to remove a protective embankment. The trial court gave judgment for defendants. Plaintiffs appealed. The Supreme Court reversed and ordered a new trial.

In reversing the trial court's judgment, the Supreme Court stated that there can be no more marked interference with a man's free enjoyment of his property than to wrongfully cause water to flow onto his land that would not flow there naturally (*78 Cal. 454, 460)* . The Court found that the waters diverted by the canal flow onto plaintiffs' land but would not flow there if allowed to take their natural course. The Court held that to thus wrongfully cause water to flow upon another's land, which would not flow there naturally, is a nuisance because it is an injury to property right and it cannot be continued even though other persons might have a low estimate of the damage that it causes, especially when the continuance of the wrongful act might ripen into a right in the nature of an easement or servitude (*78 Cal. 454, 461)* .

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16-167 California Points & Authorities § 167.27

§ 167.27 Supporting Contention That Activity or Conduct Constitutes Nuisance [Civ. Code § 3479]--Water and Air Pollution

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with points and authorities pertaining to the general statutory definition of nuisance (see § 167.23).*]

DEFENDANT'S ACTIVITY OR CONDUCT CONSTITUTES A NUISANCE UNDER SECTION 3479 OF THE CIVIL CODE BECAUSE IT RESULTED IN POLLUTION.

Pollution as Nuisance. An act of pollution constitutes a nuisance under *Section 3479 of the Civil Code* (see *Helix Land Co. v. City of San Diego (1978) 82 Cal. App. 3d 932, 949, 147 Cal. Rptr. 683* ; *City of Turlock v. Bristow (1930) 103 Cal. App 750, 754, 284 P. 962*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of plaintiff's contention that defendant's activity or conduct constitutes a nuisance under *Civ. Code § 3479* because it resulted in pollution.

These points and authorities may be combined with other forms supporting the general contention that the activity or conduct complained of constitutes a nuisance [*see §§ 167.24 -167.26, 167.28 -167.33*]. These points and authorities may also be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that defendant's activity or conduct complained of constitutes a nuisance under *Civ. Code § 3479* because it resulted in pollution. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion and forms relating to nuisance generally, see California Forms of Pleading and Practice, Ch. 391, *Nuisance* (Matthew Bender). For discussion and forms for use in actions involving pollution generally, see California Forms of Pleading and Practice, Ch. 418, *Pollution and Environmental Matters* (Matthew Bender).

[3] Discussion of Authorities

[a] Pollution as Nuisance

In ***Helix Land Co. v. City of San Diego*** *(1978) 82 Cal. App. 3d 932, 147 Cal. Rptr. 683* , plaintiffs sued the City of San Diego and the State of California for damages and injunctive relief. Plaintiffs contended that the United States and Mexico agreed to build a flood control channel. Plaintiffs further alleged that after Mexico built its portion, the original design was altered and that due to actions and inactions on the part of the city and state, construction of the United States' portion had been prevented. As a result, plaintiffs' property was subject to a greater threat of flooding and to discharge of raw and untreated sewage and other chemicals and substances injurious to plaintiffs' health and to their lands. The trial court sustained defendants' demurrers to the complaint without leave to amend. Plaintiffs appealed, and the court of appeal affirmed the judgment.

On appeal, plaintiffs contended that defendants introduced a condition that proximately caused a public and private nuisance. Although holding that plaintiffs had not stated a cause of action for nuisance because sufficient facts were not alleged from which the court could conclude that a nuisance existed within the statutory provisions, the court acknowledged that an act of pollution, obstruction, or diversion of water constitutes a nuisance under *Civ. Code § 3479* (*82 Cal. App. 3d 932, 949)* .

City of Turlock v. Bristow *(1930) 103 Cal. App 750, 284 P. 962* , was an action for relief from a public nuisance caused by the pollution of the water of an irrigation ditch. The trial court found that the ditch was maintained by the defendants in such a manner as to permit the accumulation of foul and stagnant water, refuse matter, filth and garbage, which became a breeding place for typhoid and other disease germs and permeated the air with noxious, unwholesome and offensive vapors and odors, rendering the ditch unsanitary, causing the neighborhood to become unhealthful, and destroying the comfort and enjoyment of the homes and property of the citizens of the vicinity. The trial court granted plaintiff's request for an injunction. Defendants appealed, and the court of appeal affirmed.

The court held that the condition of the ditch unquestionably constituted a nuisance that affected the entire neighborhood and could be abated by the city (*103 Cal. App 750, 754-755)* .

[4] Additional Authorities

[a] Pollution as Nuisance

Dauberman v. Grant (1926) 198 Cal. 586, 246 P. 319 , was an action, inter alia, to enjoin defendant from maintaining a chimney or smokestack on the premises adjoining plaintiff's in such a manner that smoke therefrom would be conveyed into plaintiff's dwelling. The trial court found that the maintenance and operation of the smokestack constituted a nuisance and granted plaintiff's request for an injunction. Defendant appealed.

The Supreme Court stated that smoke and soot may constitute a nuisance. The Court found that the trial court was correct in finding that defendant's maintenance of the smokestack at a height low enough to permit pollution of the air of the plaintiff's premises and thereby interfere with her comfortable enjoyment was sufficient to constitute a nuisance (*198 Cal. 586, 590)* . The trial court's judgment was, however, reversed and the cause remanded for a new trial because the trial court had committed error in not admitting evidence regarding other actions of defendant that were alleged to constitute separate nuisances, and the damages allotted to those nuisances could not be separated from those awarded

for the pollution of plaintiff's air (*198 Cal. 586, 591-592)* .

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16-167 California Points & Authorities § 167.28

§ 167.28 Supporting Contention That Activity or Conduct Constitutes Nuisance [Civ. Code § 3479]--Obstruction of Streets

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with points and authorities pertaining to the general statutory definition of nuisance (see § 167.23).*]

THE ACTIVITY OR CONDUCT COMPLAINED OF CONSTITUTES A NUISANCE UNDER SECTION 3479 OF THE CIVIL CODE BECAUSE IT RESULTED IN THE OBSTRUCTION OF A PUBLIC STREET OR HIGHWAY.

A. Obstruction of Streets as Nuisance. Anything that unlawfully obstructs the free passage or customary use of a public street is a nuisance (*Phillips v. City of Pasadena (1945) 27 Cal. 2d 104, 106, 162 P.2d 625*).

[*Optional*] **B. Chemical Fog as Obstruction.** Release of a chemical fog, when of such density that it obstructs the passage and use of the highway in the customary manner, constitutes a nuisance (*Bright v. East Side Mosquito Abatement Dist. (1959) 168 Cal. App. 2d 7, 10, 335 P.2d 527*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of plaintiff's contention that defendant's activity or conduct, of which plaintiff complains, constitutes a nuisance under *Civ. Code § 3479* because it unlawfully obstructed a street or highway.

These points and authorities may be combined with other forms supporting the general contention that the activity or conduct complained of constitutes a nuisance [*see §§ 167.24 -167.27, 167.29 -167.33*]. They may also be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the activity or conduct of which plaintiff complains constitutes a nuisance under *Civ. Code § 3479* because unlawfully obstructed a street or highway. These points and authorities may also be adapted for use in a trial or

appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion and forms relating to nuisance generally, see California Forms of Pleading and Practice, Ch. 391, *Nuisance* (Matthew Bender).

[3] Discussion of Authorities

[a] Obstruction of Streets as Nuisance

Phillips v. City of Pasadena *(1945) 27 Cal. 2d 104, 162 P.2d 625* , was an action for damages against a city brought by the owner of a mountain resort outside the city. The only safe means of ingress and egress to the resort was by a road partly within the city limits that was used by plaintiff, patrons of plaintiff's resort, and the general public. Defendant closed the road by placing a locked gate across it at an intersection within the city limits. Plaintiff appealed the trial court's sustaining of defendant's demurrer to the Supreme Court. The Supreme Court reversed, holding that the unlawful barricading of a public street is a nuisance, that anyone injured by it may bring an action for nuisance, and that an obstruction cutting off all access is an especially injurious nuisance (*27 Cal. 2d 104, 106)* .

[b] Chemical Fog as Obstruction

Bright v. East Side Mosquito Abatement Dist. *(1959) 168 Cal. App. 2d 7, 335 P.2d 527* , was an action to recover damages for personal injuries sustained in a series of automobile collisions. Plaintiff alleged in one count that the release of a chemical fog impeded and obstructed the free and safe passage and use of the highway and constituted a nuisance. The trial court entered judgment of dismissal after sustaining a demurrer to plaintiff's second amended complaint without leave to amend. Plaintiff appealed, and the court of appeal reversed the judgment of dismissal.

The court, in considering whether the facts alleged showed defendants' acts to be within the statutory definition of a nuisance, held that the spray was of such density that it obstructed the passage and use of the highway in the customary manner. The court stated that one of the meanings of the word "obstruct" is to hinder from passing, action, or operation; hence to hinder, impede, or retard, as clouds obstruct the light (*168 Cal. App. 2d 7, 10)* .

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16-167 California Points & Authorities § 167.29

§ 167.29 Supporting Contention That Activity or Conduct Constitutes Nuisance [Civ. Code § 3479]--Noise

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with points and authorities pertaining to the general statutory definition of nuisance (see § 167.23).*]

THE ACTIVITY OR CONDUCT COMPLAINED OF CONSTITUTES A NUISANCE BECAUSE IT CAUSED NOISE THAT UNREASONABLY INTERFERED WITH PLAINTIFF'S COMFORTABLE ENJOYMENT OF PROPERTY.

A. Noise as Nuisance. Noise that unreasonably interferes with the neighbors' comfortable enjoyment of life and property is a nuisance (*People v. Mason (1981) 124 Cal. App. 3d 348, 353-354, 177 Cal. Rptr. 284*).

[*Optional*] **B. Airport as Nuisance.** An airport is not a nuisance per se, but it may become a nuisance because of either unsuitable location or improper operation, or both (*Anderson v. Souza (1952) 38 Cal. 2d 825, 838, 243 P.2d 497*).

[*Optional*] **C. Airport Proprietor-Landlord Liable for Damages.** An airport proprietor-landlord can be held liable for damages, since federal courts and the Federal Aviation Agency have refrained from imposing limitations on the rights and obligations of a proprietor-landlord, and there is no compelling federal interest precluding state imposition of nuisance liability on the proprietor of an airport for damage to the persons of the owners or occupants of the affected property (*Greater Westchester Homeowners Ass'n v. City of Los Angeles (1979) 26 Cal. 3d 86, 94-100, 160 Cal. Rptr. 733, 603 P.2d 1329*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of plaintiff's contention that defendant's activity or conduct constituted a nuisance pursuant to *Civ. Code § 3479* because it created noise that interfered with plaintiff's use and enjoyment of his or her property.

Optional Paragraph B should be used when the noise is created by the operation of an airport. Optional Paragraph C should be used to refute an airport proprietor/landlord's claim that he or she cannot be held liable for damages when defendant contends that such liability is preempted by federal law.

These points and authorities may be combined with other forms supporting the general contention that the activity or conduct complained of constitutes a nuisance [*see §§ 167.24 -167.28, 167.30 -167.33*]. These points and authorities may also be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that defendant's activity or conduct constitutes a nuisance pursuant to *Civ. Code § 3479* because it created noise that interfered with plaintiff's use and enjoyment of his or her property. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion and forms relating to nuisance generally, see California Forms of Pleading and Practice, Ch. 391, *Nuisance* (Matthew Bender). For discussion of governmental regulation of airports, see California Forms of Pleading and Practice, Ch. 16, *Airplanes and Airports* (Matthew Bender). For discussion and forms relating to actions for inverse condemnation based on airport noise, see California Forms of Pleading and Practice, Ch. 247, *Eminent Domain* (Matthew Bender).

[3] Discussion of Authorities

[a] Noise as Nuisance

People v. Mason *(1981) 124 Cal. App. 3d 348, 177 Cal. Rptr. 284* , was an action to abate a public nuisance caused by music and noise from defendants' restaurant and bar business. The trial court gave judgment for plaintiffs, permanently enjoining defendants. Defendants appealed, challenging plaintiffs' standing to bring suit and the sufficiency of evidence to support findings of nuisance as well as the terms of the injunction. The court of appeal held that the evidence presented was sufficient to support the finding that a public nuisance was created because residents testified that the noise caused extreme discomfort and annoyance interfering with the residents' ability to use their outdoor facilities and significantly affecting their ability to sleep, and that the amplified music, foot stomping, and hand clapping created discomfort and obstructed the free use of property so as to interfere with the comfortable enjoyment of life and property (*124 Cal. App. 3d 348, 353)* . The court, however, did find the injunction too broad, holding that the injunction should have been worded so as to permit some noise to be audible, since an audible level of noise is not necessarily a nuisance, and restrict only that noise which unreasonably interferes with the residents' use and enjoyment of their property (*124 Cal. App. 3d 348, 354)* .

[b] Airport as Nuisance

Anderson v. Souza *(1952) 38 Cal. 2d 825, 243 P.2d 497* , was an action for damages and injunctive relief. Plaintiffs contended that defendants' operation of an airport constituted a nuisance because it created such a tremendous noise that it interfered with the lawful use, enjoyment, and occupancy of the dwellings of plaintiffs. The trial court gave judgment for plaintiffs. Defendants appealed. The Supreme Court affirmed the damage award but reversed the portion of the judgment granting injunctive relief.

The Court stated that an airport is not a nuisance per se, but it may become a nuisance because of either unsuitable location or improper operation, or both (*38 Cal. 2d 825, 838)* . The Court found the airport, as operated, to be a nuisance, but held that the injunction was too broad because there was no testimony indicating that the runways were

too short to allow lawful operation of the field (*38 Cal. 2d 825, 844)* .

[c] Airport Proprietor-Landlord Liable for Damages

In ***Greater Westchester Homeowners Ass'n v. City of Los Angeles*** *(1979) 26 Cal. 3d 86, 160 Cal. Rptr. 733, 603 P.2d 1329* , plaintiffs, as owners and occupants of homes near an airport, sued the city in inverse condemnation for damages and on a nuisance theory, for personal injuries caused by noise, smoke, and vibrations emanating from aircraft using the airport. At trial, the actions were bifurcated. On the nuisance issue, the trial court gave judgment for plaintiffs, holding that plaintiffs had established the existence of an actionable nuisance giving rise to damages for annoyance, inconvenience, discomfort, mental distress, and emotional distress, and that a nuisance recovery was independent of plaintiffs' claim for diminution of their property values. Defendant city appealed. Defendant contended that plaintiffs' nuisance claim must fail because noise control is federally preempted and the operation of the aircraft is expressly sanctioned by statutory law and therefore cannot constitute a nuisance. The Supreme Court affirmed judgment for plaintiffs.

The Court stated that it had previously acknowledged that commercial flights that are conducted in strict compliance with federal regulations may not be enjoined as nuisances because of both the continuing public interest in air transportation and the likelihood of direct conflict with federal law. In so holding, however, the Court said that it had expressly cautioned that the decision did not determine the right of landowners, who suffer from airplane annoyances, to seek damages from the owners or operators of aircraft or to seek compensation from the owners or operators of airports and observed that preemption did not operate per se to preclude the enforcement of private state remedies for aircraft noise damage and that only a compelling federal interest would support a finding that Congress intended to nullify state-created rights (*26 Cal. 3d 86, 94)* . The Court then held that the nuisance claims did not fail by reason of federal preemption because there was no compelling federal interest precluding state imposition of nuisance liability on the proprietor of an airport for damage to the persons of the owners or occupants of the affected property. The Court pointed out that the federal courts and Federal Aviation Agency have refrained from imposing limitations on the rights and obligations of a proprietor-landlord (*26 Cal. 3d 86, 94-100)* . The Court also noted that the city, not the federal government, chose the location and built and expanded the airport in the immediate vicinity of a residential area with foreknowledge of the nature and usage of the area and was not rendered powerless to prevent or reduce the damages of which plaintiffs complained (*26 Cal. 3d 86, 98-99)* .

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16-167 California Points & Authorities § 167.30

§ 167.30 Supporting Contention That Activity or Conduct Constitutes Nuisance [Civ. Code § 3479]--Odors

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with points and authorities pertaining to the general statutory definition of nuisance (see § 167.23).*]

THE ACTIVITY OR CONDUCT COMPLAINED OF CONSTITUTES A NUISANCE UNDER SECTION 3479 OF THE CIVIL CODE BECAUSE IT CREATED SMELLS AND NOXIOUS ODORS THAT ARE A SOURCE OF DISCOMFORT TO PLAINTIFF AND THAT DIMINISH THE VALUE OF PLAINTIFF'S PROPERTY AND UNREASONABLY INTERFERE WITH PLAINTIFF'S COMFORTABLE ENJOYMENT OF HIS/HER PROPERTY.

Odors as Nuisance. Creation of smells and noxious odors that are offensive enough to destroy comfort and enjoyment of one's home or diminish value of property are a nuisance (*Varjabedian v. City of Madera (1977) 20 Cal. 3d 285, 293-294, 142 Cal. Rptr. 429, 572 P.2d 43*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of plaintiff's contention that the activity or conduct complained of constitutes a nuisance under *Civ. Code § 3479* because it produced noxious odors that interfered with plaintiff's use and enjoyment of his or her property.

These points and authorities may be combined with other forms supporting the general contention that the activity or conduct complained of constitutes a nuisance [*see, e.g., see §§ 167.24 -167.29, 167.31, 167.33*]. These points and authorities may also be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that odors constitute a nuisance under *Civ. Code § 3479*. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of

law stated.

[b] Related Pleading and Practice Forms

For discussion and forms relating to nuisance generally, see California Forms of Pleading and Practice, Ch. 391, *Nuisance* (Matthew Bender).

[3] Discussion of Authorities

[a] Odors as Nuisance

Varjabedian v. City of Madera *(1977) 20 Cal. 3d 285, 142 Cal. Rptr. 429, 572 P.2d 43* , was an action for damages caused by a city's operation of a sewage treatment plant near plaintiff's property. The action was based in part on a theory of nuisance. Plaintiff sought recovery for permanent diminution in value of property caused by the nuisance as well as compensation for personal discomfort. Defendant moved for judgment on the pleadings; the trial court denied the motion regarding the nuisance cause of action and gave judgment for plaintiff on a jury verdict. Defendant appealed, and the Supreme Court affirmed.

On appeal, defendant challenged the trial court's instruction regarding plaintiff's compensation for damages to property proximately caused by permanent nuisance, claiming that the plant was authorized by statute and that the awards of damages for loss in value of real property and for the personal discomfort of plaintiffs were unsupported by the evidence. The Supreme Court held that construction of sewage treatment plants by cities is admittedly authorized by statute but found that none of the Government Code statutes under which the city claimed to have acted mentions the possibility of noxious emanations from such facilities, that the odors were not authorized by the plainest and most necessary implication from the general powers conferred by these statutes, and that the Legislature did not contemplate the creation of a malodorous nuisance when it authorized sewage plan construction. Therefore, the Court held that the general authorization of municipal construction of sewage plants did not expressly sanction the production of any particular level of odors (*20 Cal. 3d 285, 292)* . The Court further held that the record revealed substantial evidence to sustain the verdict that a nuisance existed because the testimony indicated that the odors were offensive enough to destroy the comfort and enjoyment of plaintiffs' homes (*20 Cal. 3d 285, 293-294)* .

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16-167 California Points & Authorities § 167.31

§ 167.31 Supporting Contention That Activity or Conduct Constitutes Nuisance [Civ. Code § 3479]--Obscenity

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should combined with points and authorities pertaining to the general statutory definition of nuisance (see § 167.23).*]

THE ACTIVITY OR CONDUCT COMPLAINED OF CONSTITUTES A PUBLIC NUISANCE BECAUSE IT IS INDECENT AND OFFENSIVE TO THE SENSES.

A. Obscenity as Nuisance. Any act that is an offense against public decency, or any public exhibition that is offensive to the senses, whether of sight, sound, or smell, or that tends to corrupt public morals or disturb the good order and welfare of society is a public nuisance (*People ex rel. Busch v. Projection Room Theater (1976) 17 Cal. 3d 42, 51, 130 Cal. Rptr. 328, 550 P.2d 600* ; *Weis v. Superior Court (1916) 30 Cal. App 730, 733, 159 P. 464*).

B. Clear and Convincing Proof of Obscenity for Abatement. Both the *First Amendment to the United States Constitution* and *Article I, Section 2, of the California Constitution* require that obscenity be proven by clear and convincing evidence in a public nuisance abatement action (*People ex rel. Cooper v. Mitchell Bros' Santa Ana Theater (1982) 128 Cal. App. 3d 937, 940, 180 Cal. Rptr. 728*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of plaintiff's contention that defendant's acts or conduct constitutes a nuisance under *Civ. Code § 3479* because it is indecent or offensive to the senses in that it is offensive to a community's moral sensibilities or tends to corrupt public morals. This type of nuisance is a public nuisance for which a private person bringing a private action for damages or injunctive relief would have to show special injury [see *People ex rel. Busch v. Projection Room Theater (1976) 17 Cal. 3d 42, 51, 130 Cal. Rptr. 328, 550 P.2d 600* ; *Weis v. Superior Court (1916) 30 Cal. App 730, 733, 159 P. 464]* .

These points and authorities may be combined with other forms supporting the general contention that the activity or conduct complained of constitutes a nuisance [*see, e.g., §§ 167.24 -167.30, 167.33*]. If standing is an issue, they should be combined with points and authorities supporting the contention that plaintiff has suffered a special injury different in kind from that suffered by the general public [see *§ 167.21*]. These points and authorities may also be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that defendant's acts or conduct constitutes a nuisance under *Civ. Code § 3479* because it is indecent or offensive to the senses in that it is offensive to a community's moral sensibilities or tends to corrupt public morals. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion and forms relating to nuisance generally, see California Forms of Pleading and Practice, Ch. 391, *Nuisance* (Matthew Bender).

[3] Discussion of Authorities

[a] Obscenity as Nuisance

People ex rel. Busch v. Projection Room Theater *(1976) 17 Cal. 3d 42, 130 Cal. Rptr. 328, 550 P.2d 600* , was an action brought by public officials acting on behalf of the public generally to restrain the exhibition of obscene books and films under public nuisance laws. Defendants contended that their operations did not constitute public nuisances that were subject to regulation and abatement. The trial court, sustaining defendants' general demurrers to the complaint, entered judgments of dismissal. The Supreme Court reversed and remanded the cause for further proceedings consistent with its opinion.

The Supreme Court held that plaintiffs' complaint was sufficient to state a cause of action based on general nuisance theory (*17 Cal. 3d 42, 60)* . The Court stated that nuisance as described in *Penal Code § 370* and *Civ. Code § 3479* could not be limited to conduct that is offensive to the five senses but must also include conduct that is indecent; therefore, conduct offensive to a community's moral sensibilities is subject to regulation under *Penal Code § 370* (*17 Cal. 3d 42, 50-51)* . Finding the exhibition of obscene magazines and films to be a form of activity that may be characterized as indecent or offensive to the senses, interfering with the comfortable enjoyment of life of a considerable number of persons, the Court held that injunctive relief could be granted as long as defendants' constitutional rights are protected (*17 Cal. 3d 42, 49, 60)* .

Weis v. Superior Court *(1916) 30 Cal. App 730, 159 P. 464* , was an application for a writ of prohibition to restrain the trial court from further proceedings in a nuisance action. In the nuisance action, the district attorney of San Diego County sought to restrain defendants' activities in exhibiting nude women as a public nuisance. A demurrer to the complaint was overruled by the trial court. In the application for the writ, defendants contended that unless restrained, the trial court would grant an injunction that is beyond the jurisdiction of the trial court. The court of appeal denied the application for a peremptory writ and dismissed the proceeding.

The court of appeal held that when the threatened acts will constitute a public nuisance, courts of equity can grant injunctive relief (*30 Cal. App. 730, 732)* . The court stated that an act displayed before a public audience that is debasing in its character, debauching in its influence on public morals, and brutalizing in its effect on the spectators is a public nuisance. The court, therefore, found that the acts complained of here clearly constituted a public nuisance within the meaning of *Civ. Code § 3479* (*30 Cal. App. 730, 732)* . The court further held that any act that is an offense against public decency, or any public exhibition that is offensive to the senses, whether of sight, sound, or smell, or that tends to

corrupt public morals or disturb the good order and welfare of society is a public nuisance (*30 Cal. App. 730, 733)* .

[b] Clear and Convincing Proof of Obscenity for Abatement

People ex rel. Cooper v. Mitchell Bros' Santa Ana Theater *(1982) 128 Cal. App. 3d 937, 180 Cal. Rptr. 728* , was reversed and remanded from the United States Supreme Court for further proceedings not inconsistent with the opinion of that Court. On remand, the court of appeal held that California's law does not require the application of the strictest standard of proof (beyond a reasonable doubt) in obscenity cases (*128 Cal. App. 3d 937, 939)* . The court, therefore, held that both *U.S. Const. amend. I* and *Cal. Const. art. I, § 2*, require that obscenity be proved by clear and convincing evidence in a public nuisance abatement action (*128 Cal. App. 3d 937, 940)* .

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16-167 California Points & Authorities § 167.32

§ 167.32 Supporting Contention That Activity or Conduct Constitutes Nuisance [Civ. Code § 3479]--Places Used for Unlawfully Selling Controlled Substances ("Drug Houses") [Health & Safety Code § 11570 et seq.]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with points and authorities pertaining to the general statutory definition of nuisance (see § 167.23).*]

THE ACTIVITY OR CONDUCT COMPLAINED OF CONSTITUTES A NUISANCE UNDER SECTION 3479 OF THE CIVIL CODE AND SECTION 11570 OF THE HEALTH AND SAFETY CODE BECAUSE IT IS A BUILDING OR PLACE USED FOR THE PURPOSE OF UNLAWFULLY SELLING, SERVING, STORING, KEEPING, MANUFACTURING, OR GIVING AWAY CONTROLLED SUBSTANCES.

A. "Drug House" as Nuisance. Every building or place used for the purpose of unlawfully selling, serving, storing, keeping, manufacturing, or giving away any controlled substance, precursor, or analog specified in the Uniform Controlled Substances Act [*Civ. Code § 3479*; *Health & Safety Code § 11000 et seq.*], and every building or place where those acts take place, is a nuisance that shall be enjoined, abated, and prevented, and for which damages may be recovered, whether it is a public or private nuisance (*Health & Safety Code § 11570*).

B. Damages Recoverable in Lieu of Action for Abatement. Plaintiffs injured by the existence of a "drug house" may bring an action for damages and are not limited to the statutory remedy of abatement provided in *Health & Safety Code § 11571 et seq.* because a "drug house" is specifically defined as a nuisance under *Civ. Code § 3479* and because *Health & Safety Code § 11573.5(f)* specifically permits other remedies (*Lew v. Superior Court (1993) 20 Cal. App. 4th 866, 871-872, 25 Cal. Rptr. 2d 42*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of plaintiff's contention that property owned by defendant

constitutes a nuisance because it is a building or place used to sell, store, serve, manufacture, or give away controlled substances (a "drug house") [*Civ. Code § 3479*; *see Health & Safety Code § 11570*], and that plaintiff may recover damages for injury caused by this nuisance.

These points and authorities may be combined with other forms supporting the general contention that the property constitutes a nuisance [*see, e.g., §§ 167.23 -167.25, 167.27 -167.31*]. They may also be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that defendant's property is a "drug house" and therefore a nuisance for which plaintiff may recover damages. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Use

The Red Light Abatement Law [*Penal Code § 11225 et seq.*], which declares that every building used either for the purpose of illegal gambling or prostitution or as a bathhouse that permits AIDS-transmitting conduct is a nuisance, contains provisions substantially similar to those in *Health & Safety Code § 11570 et seq.* Counsel could conceivably modify these points and authorities and submit them in support of plaintiff's contention that plaintiff is entitled to recover damages from defendant because defendant's property constitutes a nuisance under the Red Light Abatement Law that has injured plaintiff.

[c] Related Pleading and Practice Forms

For discussion and forms relating to nuisance generally, see California Forms of Pleading and Practice, Ch. 391, *Nuisance* (Matthew Bender).

[3] Discussion of Authorities

[a] Damages Recoverable in Lieu of Action for Abatement

In ***Lew v. Superior Court*** *(1993) 20 Cal. App. 4th 866, 25 Cal. Rptr. 2d 42* , decided before the amendment of *Civ. Code § 3479* to specifically include the illegal sale of controlled substances in the definition of a nuisance, plaintiffs were neighbors of an apartment complex owned by defendants who filed numerous separate actions in small claims court that were consolidated for trial. Plaintiffs claimed that drug dealers, drug customers, and prostitutes frequented or worked in and nearby the building, confronted and threatened plaintiffs, deprived them of sleep, prevented them from using their own front or back yards, and made them fear for their lives and safety. Plaintiffs prevailed in small claims court, and in the trial de novo in superior court. Defendants sought a writ of mandate to compel the superior court to set aside its judgment, which the court of appeal denied.

Holding that defendants' building was a nuisance by legislative definition under the provisions of *Health & Safety Code § 11570*, the court of appeal rejected defendants' argument that plaintiffs were not entitled to recover damages because the only remedy for a nuisance as defined by that statute is the abatement action described in *Health & Safety Code § 11571 et seq.*, which involves sale of chattels, closure of the premises, and civil penalties. The court held that the definition of a "drug house" under *Health & Safety Code § 11570* qualifies as a nuisance under the broader terms of *Civ. Code § 3479*, the general nuisance statute, because it is injurious to health, indecent or offensive to the senses, an obstruction to the free use of property, and interferes with the comfortable enjoyment of life or property (*20 Cal. App. 4th 866, 871-872)* . Moreover, the very provisions cited by defendants as limiting plaintiff's remedy to abatement specify, in *Health & Safety Code § 11573.5(f)*, that the remedies set forth in that section are in addition to any other existing remedies for nuisance abatement actions. The court concluded that plaintiffs were entitled to seek damages in small claims court and that the court had the power to consolidate their numerous claims (*20 Cal. App. 4th 866, 872)* .

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16-167 California Points & Authorities § 167.33

§ 167.33 Supporting Contention That Activity or Conduct Constitutes Nuisance [Civ. Code § 3479]--Unnecessary Use and Injurious Method of Operation in Area Zoned for Purpose [Code Civ. Proc. § 731a]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with points and authorities pertaining to the general statutory definition of nuisance (see § 167.23).*]

THE ACTIVITY OR CONDUCT COMPLAINED OF CONSTITUTES A NUISANCE EVEN THOUGH THE AREA WAS ZONED FOR THE PURPOSE BECAUSE THE METHOD OF OPERATION WAS UNNECESSARY AND INJURIOUS.

Unnecessary and Injurious Method of Operation in Area Zoned for Purpose. The rule set out in *Section 731a of the Code of Civil Procedure*, that whenever any city, county, or city and county has established under authority of law zones or districts wherein certain manufacturing or commercial or airport uses are expressly permitted, such uses may not be deemed a nuisance, does not apply when there is evidence of the employment of unnecessary and injurious methods of operation (*see* Civ. Code § 731a; *Gelfand v. O'Haver (1948) 33 Cal. 2d 218, 220, 200 P.2d 790*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of plaintiff's contention that defendant's activity or conduct constitutes a nuisance and that defendant may be enjoined from engaging in the conduct complained of, even though the area is zoned for the specific use to which defendant is putting his or her property, because the method of operation is unnecessary and injurious [*see Code Civ. Proc. § 731a*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issues that defendant's activity or conduct constitutes a nuisance and may be enjoined. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion and forms relating to nuisance generally, see California Forms of Pleading and Practice, Ch. 391, *Nuisance* (Matthew Bender).

[3] Discussion of Authorities

[a] Unnecessary and Injurious Method of Operation in Area Zoned for Purpose

Gelfand v. O'Haver *(1948) 33 Cal. 2d 218, 200 P.2d 790* , was an action to enjoin defendants from maintaining a nuisance by unreasonable and injurious methods of operating their music studio. There was evidence that nothing was done to soundproof or adapt the residential building to the defendants' business, that windows were left open permitting the free flow of sound, and that noise emanated from the studio day and night. The trial court granted an injunction. Defendants appealed, and the Supreme Court affirmed.

The Supreme Court held that the evidence was sufficient to support the finding of unnecessary and injurious methods of operation and to satisfy the requirement of *Code Civ. Proc. § 731a* that there be evidence of unnecessary and injurious methods of operation. The Court noted that the manifest purpose of the adoption of *Code Civ. Proc. § 731a* was to eliminate injunctive relief when the business is operated in its appropriate zone and the only showing is an injury and nuisance to the plaintiff in such operation. The Court stated that plaintiff must show more, namely, that the defendant employed "unnecessary and injurious methods" in the operation of the business. The Court held that this did not mean that the only evidence that would establish an unnecessary and injurious method of operation is a failure to pursue the methods customarily and usually employed in other similar businesses in the vicinity, and that while such evidence may be relevant to that issue, there is no reason why it should be indispensable (*33 Cal. 2d 218, 220)* .

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16-167 California Points & Authorities § 167.34

§ 167.34 Supporting Contention That Activity or Conduct Constitutes Nuisance [Civ. Code § 3479]--Nuisance May Be Created On Plaintiff's Property

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with points and authorities pertaining to the general statutory definition of nuisance (see § 167.23).*]

THE ACTIVITY OR CONDUCT COMPLAINED OF CONSTITUTES A NUISANCE EVEN THOUGH IT WAS CREATED ON THE PLAINTIFF'S OWN PROPERTY.

Recovery for Nuisance Is Not Limited to Offensive Use of Neighboring Lands. The California nuisance statutes have been construed, according to their broad terms, to allow an owner of property to sue for damages caused by a nuisance created on the owner's property. Under California law, it is not necessary that a nuisance have its origin in neighboring property (*Newhall Land & Farming Co. v. Superior Court (1993) 19 Cal. App. 4th 334, 343, 23 Cal. Rptr. 2d 377* ; *Mangini v. Aerojet-Gen. Corp. (1991) 230 Cal. App. 3d 1125, 1134, 281 Cal. Rptr. 827*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of plaintiff's contention that defendant's activity or conduct constitutes a nuisance even though the origin of the nuisance was on plaintiff's own property. For example, a current owner of property may recover for a nuisance caused by a previous possessor who unlawfully contaminated the property with hazardous waste [*see* *Mangini v. Aerojet-Gen. Corp. (1991) 230 Cal. App. 3d 1125, 1134, 281 Cal. Rptr. 827* (expressing no view whether regulation under federal and state law either authorizes or precludes relief)].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issues that defendant's activity or conduct constitutes a nuisance and may be enjoined. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should identify the plaintiff's interest in the property, and state facts supporting the conclusion that the condition constitutes a nuisance under *Civ. Code § 3479 et seq.* notwithstanding the fact that the nuisance resulted from acts of defendant committed on the same property.

[b] Related Pleading and Practice Forms

For discussion and forms relating to nuisance generally, see California Forms of Pleading and Practice, Ch. 391, *Nuisance* (Matthew Bender).

[3] Discussion of Authorities

[a] Recovery for Nuisance Is Not Limited to Offensive Use of Neighboring Lands

In ***Newhall Land & Farming Co. v. Superior Court*** *(1993) 19 Cal. App. 4th 334, 23 Cal. Rptr. 2d 377* , plaintiff brought an action against prior owners of plaintiff's real property for having discharged hazardous waste onto the property that was continuing to pollute the soil and groundwater. The trial court sustained defendants' demurrer without leave to amend, and plaintiff appealed to the court of appeal.

The court of appeal reversed, rejecting defendants' argument that nuisance requires an invasion of real property other than one's own, and therefore one cannot be liable for committing a nuisance to one's own property. The court, citing *Mangini v. Aerojet-Gen. Corp. (1991) 230 Cal. App. 3d 1125, 1134, 281 Cal. Rptr. 827* , held that California nuisance law is a creature of statute [*see, e.g., Civ. Code § 3479*] and that the applicable statutes have been construed broadly to allow an owner of property to sue for damages from a nuisance on his or her own property as well as damages from by nuisances originating on neighboring property (*19 Cal. App. 4th 334, 343)* . Defendants also argued that they were the owners of the property at the inception of the contamination, and therefore no nuisance occurred then because they could not be liable to themselves. Because there was no nuisance then, defendants argued, there could not be a continuing nuisance as claimed by plaintiff. The court held that this argument was fundamentally flawed because defendants had created a condition on their property that was injurious to health, which *Civ. Code § 3479* defines as a nuisance (*19 Cal. App. 4th 334, 344)* .

In ***Mangini v. Aerojet-Gen. Corp.*** *(1991) 230 Cal. App. 3d 1125, 281 Cal. Rptr. 827* , owners of real property brought an action against parties who leased the property from prior owners and who allegedly contaminated the property with hazardous waste during the lease. Defendant demurred and the trial court sustained the demurrer without leave to amend.

The court of appeal reversed. With regard to plaintiffs' causes of action for nuisance, the defendant argued that the critical fact of the case--that the claim of nuisance is being made by a present owner of property for alleged injury to that property resulting from acts of a defendant committed on that very property--takes the case entirely outside the area of nuisance (*230 Cal. App. 3d 1125, 1133)* . The court rejected this argument on the ground that defendant failed to recognize that California nuisance law is a creature of statute. The California nuisance statutes have been construed, according to their broad terms, to allow an owner of property to sue for damages caused by a nuisance created on the owner's property, and that under California law, it is not necessary that a nuisance have its origin in neighboring property (*230 Cal. App. 3d 1125, 1134)* . The court stated that modern California cases have recognized that the statutory definition of nuisance appears to be broad enough to encompass almost every conceivable type of interference with the enjoyment or use of land or property (*230 Cal. App. 3d 1125, 1136)* . The court cited cases finding that various conditions on plaintiffs' property constituted nuisances, including obstruction of a plaintiff's private road with a gate, obstruction of a private alley, and the defective condition of a tenant's rented premises caused by the landlord (*230 Cal. App. 3d 1125, 1136-1137)* .

[4] Additional Authorities

[a] Recovery for Nuisance Is Not Limited to Offensive Use of Neighboring Lands

In *KFC W., Inc. v. Meghrig (1994) 23 Cal. App. 4th 1167, 28 Cal. Rptr. 2d 676* , plaintiffs brought a nuisance action against defendants, the former owners of plaintiffs' real property, seeking reimbursement for costs of cleaning up contamination of the property, which plaintiffs claimed was caused by defendants' negligent operation of a gasoline station on the property. The trial court sustained defendants' demurrer without leave to amend, and plaintiff appealed. The court of appeal reversed and remanded, rejecting defendants' argument that a cause of action for nuisance requires an invasion of property other than one's own, citing the holding of *Newhall Land & Farming Co. v. Superior Court (1993) 19 Cal. App. 4th 334, 344, 23 Cal. Rptr. 2d 377* [*see § 167.34[3][a]*], that the statutes governing nuisance permit a property owner to sue for damages resulting from a nuisance on his or her own property (*23 Cal. App. 4th 1167, 1178-1179)* .

In *Wilshire Westwood Assocs. v. Atlantic Richfield Co. (1993) 20 Cal. App. 4th 732, 24 Cal. Rptr. 2d 562* , defendants operated a gasoline service station on leased property that was eventually sold to plaintiffs, who discovered that the soil was contaminated with gasoline. Plaintiffs filed a nuisance action against defendants to recover the costs of cleaning up the property. The trial court granted summary judgment to defendants, and plaintiffs appealed. The court of appeal reversed the summary judgment. The court held that under *Mangini v. Aerojet Gen. Corp. (1991) 230 Cal. App. 3d 1125, 1134, 281 Cal. Rptr. 827* [*see § 167.34[3][a]*], which the court described as well-reasoned and fully applicable to the case in question, a party can maintain a nuisance action for activity occurring on the party's own land against a prior occupier of that land (*20 Cal. App. 4th 732, 745-746)* .

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16-167 California Points & Authorities § 167.35

§ 167.35 Supporting Contention That Activity or Conduct Constitutes a Nuisance [Civ. Code §§ 3479]--Activity or Conduct Is Within Statutory Definition of Public Nuisance [Civ. Code § 3480]

[1] FORM

[*The following may be included in a memorandum or points and authorities, or in a trial or appellate brief, and should be combined with points and authorities pertaining to the general statutory definition of nuisance (See § 167.23).*]

THE _____ [*specify activity or conduct complained of*]
IS A PUBLIC NUISANCE WITHIN THE DEFINITION OF PUBLIC NUISANCE IN *CIVIL CODE SECTIONS 3480*.

A. Definition of Public Nuisance Under *Civil Code Section 3480* . A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons (*Civ. Code § 3480*).

B. Facts Pleaded or Proved Must Satisfy Statutory Definition of Nuisance. The basis of a nuisance action must be found in the statute (*People v. Lim (1941) 18 Cal. 2d 872, 880-881, 118 P.2d 472*).

[*Optional*] **C. Gang Activity Constitutes Public Nuisance.** Gang activity which obstructs residents' use of their own property, obstructs the free passage or use of public streets, and is indecent or offensive to the senses, meets the statutory standard for public nuisance (*People ex rel. Gallo v. Acuna (1997) 14 Cal. 4th 1090, 1120, 60 Cal. Rptr. 2d 277*).

[*Optional*] **D. Use of Lead for Interior Paint Can Constitute Public Nuisance.** The use of lead in paint designed for the interior of buildings, which creates a public health hazard and interferes with the comfortable enjoyment of life and property, can constitute a public nuisance subject to abatement in an action brought against manufacturers of lead that promoted use of their product in paint with knowledge of the harm that it could cause (*County of Santa Clara v. Atlantic Richfield Co. (2006) 137 Cal. App. 4th 292, 305-311, 40 Cal. Rptr. 3d 313 , review granted, depublished, 80 Cal. Rptr. 3d 629, 188 P.3d 579, 2008 Cal. LEXIS 9073*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of plaintiff's contention that the condition or activity complained of constitutes a public nuisance under *Civ. Code § 3480*. Optional Paragraph C may be used if the activity cited as a nuisance by plaintiff is gang related. Optional Paragraph D may be used in certain circumstances if the activity cited as a nuisance is the use of lead in interior paint.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the existence of a nuisance. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the definition of nuisance set out in the form. Thus, counsel should cite facts from supporting declarations, or the record, showing that the conduct of opposing party satisfies the requirements of *Civ. Code §§ 3479, 3480*.

[c] Related Pleading and Practice Forms

For discussion and forms relating to nuisance generally, see California Forms of Pleading and Practice, Ch. 391, *Nuisance* (Matthew Bender).

[3] Discussion of Authorities

[a] Facts Pleaded or Proved Must Satisfy Statutory Definition of Nuisance

The facts and procedural background of ***People v. Lim*** *(1941) 18 Cal. 2d 872, 118 P.2d 472* , are discussed in *§ 167.53[3][a]*. The Supreme Court held that the basis of a nuisance action must be found in the statutes rather than by reference to the common law definitions of public nuisance (*18 Cal. 2d 872, 880-881)* .

[b] Gang Activity Constitutes Public Nuisance

In ***People ex rel. Gallo v. Acuna*** *(1997) 14 Cal. 4th 1090, 1120, 60 Cal. Rptr. 2d 277* , the Supreme Court granted review to resolve challenges to a preliminary injunction entered by the superior court against individual members of a criminal street gang. The petition sought review of two specific provisions within the injunction, paragraph (a) which effectively forbid gang members from engaging in any form of social intercourse with anyone known to them to be a gang member anywhere in public view within a four block area, and paragraph (b) which forbid those subject to the injunction from confronting, intimidating or similarly challenging (including assaulting and battering) residents of the area or any other persons who gang members know have complained about their conduct within the neighborhood. In the underlying action, a City Attorney attempted to enjoin specific gang behavior under *Code Civ. Proc. § 731* as a public nuisance under *Civ. Code § 3480*. The trial court granted an ex parte temporary restraining order and then a preliminary injunction against defendant gang members. Defendants appealed. The court of appeal upheld only those provisions of the preliminary injunction which enjoined acts or conduct defined as crimes under the Penal Code, and concluded that many of the provisions of the preliminary injunction were void and unenforceable under the *First* and *Fifth Amendments to the federal Constitution* as unconstitutionally vague or overbroad.

The Supreme Court held that the two challenged provisions fell within the superior court's equitable power to abate a public nuisance and neither ran afoul of rights secured to defendants by the federal Constitution (*14 Cal. 4th 1090, 1102)* . Specifically, the Court found that the conduct enjoined by the trial court clearly met the statutory definition of public nuisance in *Civ. Code §§ 3479, 3480*. In support of this holding the Court looked to the declarations filed in support of the City's request for injunctive relief. These declarations detailed the fact that gang members routinely

obstructed area residents' use of their own property by dealing drugs from apartment houses, lawns, carports and even residents' cars, as well as habitually obstructed the free passage or use of the neighborhood's public streets. According to the Court, the following conduct of gang members qualified as indecent or offensive to the senses of reasonable area residents, easily meeting the statutory standard: drinking, consumption of illegal drugs, loud talk, loud music, vulgarity, profanity, brutality, fistfights and gunfire. In addition, the Court felt that it was easy to see how threats of violence to individual residents, murder, attempted murder, drive-by shootings, assault and battery, vandalism, arson and associated crimes obstructed the free use of property and interfered with the enjoyment of life of the entire community (*14 Cal. 4th 1090, 1102)* .

[c] Use of Lead for Interior Paint Can Constitute Public Nuisance

In ***County of Santa Clara v. Atlantic Richfield Co.*** *(2006) 137 Cal. App. 4th 292, 40 Cal. Rptr. 3d 313 , review granted, depublished, 80 Cal. Rptr. 3d 629, 188 P.3d 579, 2008 Cal. LEXIS 9073* , several California counties and related local entities brought a lawsuit against lead manufacturers that, prior to 1978, promoted lead for use in paint to be used in building interiors. The plaintiffs alleged that the defendants had promoted lead as safe for that use, even though they had known for years of lead's harmful health effects on humans, had actively concealed these known dangers, and even had campaigned against the regulation of lead. The plaintiffs' lawsuit, which was based on the presence of lead-based paint in public buildings, included a cause of action for abatement of a public nuisance brought on behalf of the People of the State of California, as well as a public nuisance cause of action on the plaintiffs' own behalf to recover damages for the costs of testing and remediation. The trial court sustained the defendants' demurrer to the public nuisance causes of action. The plaintiffs appealed.

The court of appeal reversed as to the representative public nuisance action seeking abatement, but affirmed as to the nuisance action seeking damages. The court held that the plaintiffs had pleaded the elements of a public nuisance sufficient to withstand a demurrer. The plaintiffs had alleged that lead causes grave harm, is injurious to health, and interferes with the comfortable enjoyment of life and property (*137 Cal. App. 4th 292, 305-306)* . The plaintiffs had also alleged that the defendants assisted in the creation of this nuisance by concealing the dangers of lead, mounting a campaign against the regulation of lead, and promoting lead paint for interior use, even though the defendants had known for nearly a century that the use of lead paint was hazardous to humans. Based on these allegations, the plaintiffs were entitled to seek abatement, despite the defendants' argument that the plaintiffs' claim was essentially a products liability claim, and under existing case law, a nuisance action was an inappropriate remedy for what is essentially a products liability claim. The court noted that the plaintiffs, who were suing on behalf of the People, unlike the plaintiffs in earlier cases, were seeking abatement of a public health hazard, rather than damages. The plaintiffs were entitled to seek a remedy for a public health hazard before that hazard causes any physical injury or damage to property. Moreover, the court noted that the plaintiffs' representative cause of action was not premised on a defect in the product or merely a failure to warn of a danger presented by a product. Instead, the cause of action was predicated on the defendants' active participation in creating the public hazard (*137 Cal. App. 4th 292, 306, 309-311)* . However, the court agreed with the defendants that under existing case law, the demurrer was properly sustained as to the nuisance action brought to recover the plaintiffs' own damages, because the plaintiffs were seeking to pursue a claim for past damages suffered, which is properly brought as a products liability action (*137 Cal. App. 4th 292, 311-313)* .

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
CHAPTER 167 NUISANCE
PART II. FORMS

16-167 California Points & Authorities § 167.36

§ 167.36 Supporting Contention That Activity or Conduct Constitutes Nuisance Per Se--Proof of Injury Not Required

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE ACTIVITY OR CONDUCT COMPLAINED OF CONSTITUTES A NUISANCE PER SE IN THAT _____ [(THE LEGISLATURE *or* A MUNICIPALITY) HAS DECLARED IT TO BE A PUBLIC NUISANCE *or* IT RESULTED IN A DIVERSION OF WATER FROM ITS NATURAL COURSE] AND THEREFORE PLAINTIFF NEED NOT SHOW INJURY OR DAMAGE.

[*EITHER*]

A. Legislative Declaration of Nuisance. An action or condition that has been declared by the Legislature to be a public nuisance is a nuisance per se (*McClatchy v. Laguna Lands Ltd. (1917) 32 Cal. App 718, 725, 164 P. 41*).

[*OR*]

A. Municipal Declaration of Nuisance. An action or condition within a municipality that has been declared by ordinance to be a public nuisance, when the ordinance does not conflict with state laws and the Legislature has not preempted the field, is a nuisance per se (*City of Costa Mesa v. Soffer (1992) 11 Cal. App. 4th 378, 382-385, 13 Cal. Rptr. 2d 735*).

[*OR*]

A. Interference With Flow of Water. To wrongfully cause water to flow upon another's land, which would not flow

there naturally is to create a nuisance per se (*Allen v. Stowell (1905) 145 Cal. 666, 669, 79 P. 371*).

[*Optional*] **B. Proof of Injury Not Required for Injunctive Relief From Nuisance Per Se.** When an action or condition is a nuisance per se, no proof is required beyond the actual fact of the prescribed actions or conditions to establish them as for the purpose of obtaining injunctive relief; no ill effects need be proved (*see McClatchy v. Laguna Lands Ltd. (1917) 32 Cal. App 718, 725, 164 P. 41*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of plaintiff's contention that defendant's acts or conduct constitutes a nuisance per se and no proof is required to obtain injunctive relief beyond the actual fact of the prescribed actions or conditions.

These points and authorities may be combined with forms supporting the contention that plaintiff may bring an action for public or private nuisance [*see §§ 167.20 -167.22*]. If alternate Paragraph A is used, this form can be combined with the form supporting the contention that diversion or obstruction of water flow constitutes a nuisance [*see § 167.26*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that defendant's acts or conduct constitutes a nuisance per se. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. To establish the act or conduct as a nuisance per se, counsel should cite the specific legislation or ordinance that makes the act or conduct a nuisance per se or show that defendant wrongfully caused water to flow onto plaintiff's land, which would not flow there naturally.

[b] Related Pleading and Practice Forms

For discussion and forms relating to nuisance generally, see California Forms of Pleading and Practice, Ch. 391, *Nuisance* (Matthew Bender).

[3] Discussion of Authorities

[a] Legislative Declaration of Nuisance

In ***McClatchy v. Laguna Lands Ltd.*** *(1917) 32 Cal. App 718, 164 P. 41* , an action for abatement of a public nuisance brought under provisions of an act of the Legislature, defendants moved for a change of place of trial, which was denied. On appeal of this motion, the court of appeal affirmed.

The court found that the act under which the action was brought provided for creation of a drainage district, gave the district board power to restrain diversion of waters, and declared such diversion to be a public nuisance. Defendants contended that there was no allegation in the complaint to show that there was any present interference with the rights or enjoyment of property in the county in which the action was brought. The court of appeal noted that within reasonable limits the Legislature has the power to declare certain uses of property to be a nuisance and such use thereon becomes a nuisance per se. The court held that the Legislature had declared the acts complained of here to be a public nuisance and that such acts constituted a nuisance per se. The court stated that nuisances per se are so regarded because no proof is required, beyond the actual fact of their existence, to establish the nuisance, that no ill effects need be proved, and that all parties to a nuisance per se are responsible for its effect without limitations of condition or time (*32 Cal. App 718, 725)* .

[b] Municipal Declaration of Nuisance

In ***City of Costa Mesa v. Soffer*** *(1992) 11 Cal. App. 4th 378, 13 Cal. Rptr. 2d 735* , the city had ordained that the presence of an abandoned, wrecked, dismantled, or inoperative vehicle, or parts of such a vehicle, on private or public property constituted a public nuisance. Exceptions covered vehicles and parts inside buildings or stored pursuant to permits and vehicles and parts held by licensed dismantlers, dealers, and junkyards. The city sought to apply the ordinance in an abatement action for injunctive relief against the defendant, who was not subject to one of the exceptions and on whose residential property eight vehicles were allegedly kept, in the conditions described in the ordinance. The trial court entered judgment for the city. The defendant did not deny being in violation of the ordinance but challenged the ordinance on the grounds of lack of authority for the city to adopt the ordinance and contravention of constitutional standards. The court of appeal concluded that the city had authority to adopt the ordinance, and the court rejected the constitutional arguments. The court noted the California constitutional authority of a city to adopt ordinances not in conflict with general laws, as well as *Gov. Code § 38771*, which provides, "By ordinance the city legislative body may declare what constitutes a nuisance." More specifically, *Veh. Code § 22660* provides that a city "may adopt an ordinance establishing procedures for the abatement and removal, as public nuisances, of abandoned, wrecked, dismantled, or inoperative vehicles or parts thereof from private or public property." The court also concluded that the Legislature has not preempted the field of public nuisance law by enacting a general penal statute regarding public nuisances [*see Penal Code § 372*] (*11 Cal. App. 4th 378, 382-385)* .

[c] Interference With Flow of Water

Allen v. Stowell *(1905) 145 Cal. 666, 79 P. 371* , was an action for an injunction compelling defendants to remove certain dams erected by defendants. Plaintiff contended that the dams caused the flow of water to be diverted from its natural course and to flow through a railroad culvert onto plaintiff's land. The trial court gave judgment for plaintiff, granting a mandatory injunction. Defendants appealed, and the Supreme Court affirmed.

The Court found that the water diverted onto plaintiff's land by the dams erected by defendant would not flow there if allowed to take its natural course (*145 Cal. 666, 668-669)* . The Court held that to thus wrongfully cause water for flow upon another's land which would not flow there naturally is to create a nuisance per se (*145 Cal. 666, 669)* .

[d] Proof of Injury Not Required for Injuntive Relief From Nuisance Per Se

McClatchy v. Laguna Lands Ltd. *(1917) 32 Cal. App 718, 164 P. 41* , is discussed in *§ 167.36[3][a]*.

[4] Additional Authorities

[a] Legislative Declaration of Nuisance

Smith v. David (1981) 120 Cal. App. 3d 101, 176 Cal. Rptr. 112 , was an action for nuisance. The jury was instructed that if the dwelling in question was found to constitute a nuisance under *Civ. Code § 3479*, they could award damages to plaintiffs only if it was found that the nuisance was specially injurious to them as opposed to the community in general. The jury was not instructed that the dwelling was a nuisance as a matter of law under pertinent provisions of the California Code of Regulations. Under *25 Cal. Code Reg § 122*, buildings that meet the definition of substandard (that is, any building in which exist any of the conditions listed in Chapter 10 of the Uniform Housing Code, to an extent that endangers life, limb, health, property, safety, or welfare of the public or the occupants thereof) are public nuisances per se that may be enjoined by appropriate procedures (*120 Cal. App. 3d 101, 113)* . Defendants contended that failure to instruct the jury on *25 Cal. Code Reg § 122* constituted prejudicial error. The court of appeal found that had the jury been given such instructions there was a strong probability they would have found the dwelling to be substandard and consequently a nuisance. The court held that if the jury determined that the housing code violations in the dwelling endangered life, limb, health, property, safety or welfare of the occupants thereof, then the jury would have had to find that the building was a nuisance; thus, the failure to give the instructions constituted prejudicial error (*120 Cal. App. 3d*

101, 114) .

[b] Municipal Declaration of Nuisance

In *City of Claremont v. Kruse (2009) 177 Cal. App. 4th 1153, 100 Cal. Rptr. 3d 1* , defendant opened a medical marijuana dispensary within city limits. Prior to opening the business, defendant had informed city personnel that he intended to do so and applied for a business permit and business license. The city denied the application, concluding that the proposed business was not a permitted business under the city's land use laws, but informed defendant that he could apply for a discretionary amendment to the land use code. Defendant chose not to do so, but continued operating his business. The city adopted an ordinance prohibiting the establishment of medical marijuana clinics in the city, and fined defendant for each day he was in violation. The city also filed a civil suit seeking an injunction against defendant. The trial court issued the injunction, which the court of appeal upheld. The court of appeal concluded that the city had the authority to seek an injunction to shut down defendant's dispensary as a nuisance per se because defendant's dispensary was being operated without a local business license and in violation of the city's zoning laws (*177 Cal. App. 4th 1153, 1164-1166)* . The court also concluded that the city's action was not preempted by the Compassionate Use Act, *Health & Safety Code § 11362.5*, which legalizes the use of medical marijuana in California (*177 Cal. App. 4th 1153, 1169-1176)* .

[c] Proof of Injury Not Required for Injunctive Relief from Nuisance Per Se

City of Claremont v. Kruse (2009) 177 Cal. App. 4th 1153, 100 Cal. Rptr. 3d 1 , is described in [4][b], *above*. The court of appeal rejected defendant's claim that the city had failed to establish a public nuisance because the city made no showing the defendant's business operations caused any actual harm. The court noted that for a cause of action alleging a nuisance per se, no proof of harm is required beyond the actual fact of the existence of the activity that constitutes the nuisance (*177 Cal. App. 4th 1153, 1166)* .

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16-167 California Points & Authorities § 167.37

§ 167.37 Supporting Contention That Defendant Is Liable for Nuisance--Consent Not a Defense--Violation of Ordinance

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S CONSENT TO THE ACTS OR CONDUCT COMPLAINED OF IS NO DEFENSE TO AN ACTION FOR NUISANCE BECAUSE DEFENDANT'S CONDUCT VIOLATED AN ORDINANCE.

Violation of Ordinance Negates Consent. Consent is not a defense when violation of an ordinance is involved (*Friedman v. Pacific Outdoor Adver. Co. (1946) 74 Cal. App. 2d 946, 952, 170 P.2d 67* ; *see Newhall Land & Farming Co. v. Superior Court (1993) 19 Cal. App. 4th 334, 345, 23 Cal. Rptr. 2d 377*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of plaintiff's contention that defendant is liable for a nuisance created by defendant's acts or conduct, even though plaintiff consented, because defendant violated an ordinance.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that defendant is liable for a nuisance created by defendant's acts or conduct, even though plaintiff consented, because defendant violated an ordinance. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion and forms relating to nuisance generally, see California Forms of Pleading and Practice, Ch. 391, *Nuisance* (Matthew Bender).

[c] Opposing Memoranda

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 167.54*.

[3] Discussion of Authorities

[a] Violation of Ordinance Negates Consent

Friedman v. Pacific Outdoor Adver. Co. *(1946) 74 Cal. App. 2d 946, 170 P.2d 67* , was an action for damages to plaintiff's building, which was destroyed by defendants' unlawful burning of rubbish on a vacant lot adjacent to plaintiff's building. Plaintiff contended that defendants' acts constituted a nuisance. The trial court denied recovery to plaintiff. Plaintiff appealed, and the court of appeal reversed.

On appeal, defendants contended that plaintiff had knowledge of defendants' acts on the vacant lot and therefore was precluded from recovery. The court of appeal found that storing of combustible litter was a violation of a municipal code to which plaintiff could not consent. The court stated that the doctrine of "volenti non fit injuria" (one who, knowing and comprehending the danger, voluntarily exposes himself to it, though not negligent in so doing, is deemed to have assumed the risk and is precluded from recovery) is not applicable when injury arises from violation of an ordinance (*74 Cal. App. 2d 946, 952)* .

The facts and procedural background of ***Newhall Land & Farming Co. v. Superior Court*** *(1993) 19 Cal. App. 4th 334, 23 Cal. Rptr. 2d 377* , are discussed in *§ 167.34[3][a]*. The trial court had relied on *Mangini v. Aerojet-Gen.Corp. (1991) 230 Cal. App. 3d 1125, 1134, 281 Cal. Rptr. 827* [*see § 167.64[3][a]*], as providing a "consent defense" for a property owner that had discharged hazardous waste on its own property before selling it. In reversing the trial court, the court of appeal distinguished this case from *Mangini* because *Mangini* involved a defendant lessee whose use of the property was both lawful and authorized by its lease with the property's former owner. In this case, the defendant was a property owner whose conduct violated several California statutes in effect at the time (*19 Cal. App. 4th 334, 344-345)* .

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16-167 California Points & Authorities § 167.38

§ 167.38 Supporting Contention That Defendant Is Liable for Nuisance--Consent Not a Defense--Consent by Plaintiff's Grantor

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

CONSENT BY PLAINTIFF'S GRANTOR OR PREDECESSOR TO THE ACTS OR CONDUCT COMPLAINED OF IS NOT A DEFENSE TO PLAINTIFF'S ACTION FOR NUISANCE

Acquiescence of Plaintiff's Grantor or Predecessor Not Defense. Acquiescence of plaintiff's grantor to the nuisance does not constitute a defense to plaintiff's cause of action for nuisance (*Learned v. Castle (1889) 78 Cal. 454, 457, 18 P. 872* ; *see Newhall Land & Farming Co. v. Superior Court (1993) 19 Cal. App. 4th 334, 344-345, 23 Cal. Rptr. 2d 377*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that defendant is liable for nuisance created by defendant's acts or conduct because the consent by plaintiff's grantor or predecessor is not a defense.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that defendant is liable for nuisance created by defendant's acts or conduct because the consent by plaintiff's grantor is not a defense. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion and forms relating to nuisance generally, see California Forms of Pleading and Practice, Ch. 391, *Nuisance* (Matthew Bender).

[c] Opposing Memoranda

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 167.64*.

[3] Discussion of Authorities

[a] Acquiescence of Plaintiff's Grantor or Predecessor Not Defense

Learned v. Castle *(1889) 78 Cal. 454, 18 P. 872* (also discussed in *§ 167.26[4][a]*), was an action for damages for a nuisance and for mandatory injunction to prevent its continuance. Plaintiffs contended that by tapping a stream north of plaintiffs' land and placing obstructions in the stream, defendants caused water, which would ordinarily run away from plaintiffs' land, to flow onto the land. Plaintiffs further contended that defendants wrongfully entered plaintiffs' land to remove a protective embankment. The trial court gave judgment for defendants. Plaintiffs appealed. The case was heard by the court of appeal, and the judgment was affirmed. The Supreme Court accepted the case for hearing, reversed, and ordered a new trial.

The Supreme Court upheld the portion of the court of appeal's holding that found that the complaint was sufficient and that the alleged acquiescence of plaintiffs' grantor did not constitute a defense to plaintiffs' action. The Court, however, found the findings of the trial court to be fatally conflicting and contradictory, that they did not support the judgment, and that they were not supported by the evidence (*78 Cal. 454, 457)* .

The facts and procedural background of ***Newhall Land & Farming Co. v. Superior Court*** *(1993) 19 Cal. App. 4th 334, 23 Cal. Rptr. 2d 377* , are discussed in *§ 167.34[3][a]*. The trial court had relied on *Mangini v. Aerojet-Gen. Corp. (1991) 230 Cal. App. 3d 1125, 1134, 281 Cal. Rptr. 827* [*see § 167.64[3][a]*], as providing a "consent defense" for a property owner that had discharged hazardous waste on its own property before selling it. In reversing the trial court, the court of appeal noted that the *Mangini* court was discussing the conduct of a lessee, not an owner, and the absurdity that could result by not permitting lessees to claim consent as a defense. For example, if an owner leased property for the purpose of operating a quarry, it would be ludicrous to permit the owner to sue the lessee at the end of the lease term for creating the inevitable hole that was the object of the lease. The court ruled that it made no sense to extend this rule and thereby hold that an owner was not liable to a successor owner of the property because the original owner had consented to his or her own use of the property (*19 Cal. App. 4th 334, 344-345)* .

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16-167 California Points & Authorities § 167.39

§ 167.39 Supporting Contention That Defendant Is Liable for Nuisance--Adoption of Most Approved Appliances and Methods of Production Not Defense

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT'S ADOPTION OF THE MOST APPROVED APPLIANCES AND METHODS OF PRODUCTION CANNOT JUSTIFY ACTIVITY OR CONDUCT THAT CONSTITUTES A NUISANCE AND IS NO DEFENSE TO THIS ACTION.

Adoption of Most Approved Appliances and Methods of Production Not Defense. The adoption of the most approved appliances and methods of production will not justify the continuance of that which in spite of them remains a nuisance (*Vowinckel v. N. Clark & Sons (1932) 216 Cal. 156, 164, 13 P.2d 733*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of plaintiff's contention that defendant is liable for a nuisance created by defendant's acts or conduct and that defendant's adoption of the most approved appliances and methods of production does not constitute a defense.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that defendant is liable for a nuisance created by defendant's acts or conduct and that defendant's adoption of the most approved appliances and methods of production does not constitute a defense. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion and forms relating to nuisance generally, see California Forms of Pleading and Practice, Ch. 391, *Nuisance* (Matthew Bender).

[3] Discussion of Authorities

[a] Adoption of Most Approved Appliances and Methods of Production Not Defense

The facts and procedural background of ***Vowinckel v. N. Clark & Sons*** *(1932) 216 Cal. 156, 13 P.2d 733* , are discussed in *§ 167.24[3][a]*. In affirming the trial court's judgment, the Supreme Court held that the adoption of the most approved appliances and methods of production will not justify the continuance of that which in spite of them remains a nuisance (*216 Cal. 156, 164)* .

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16-167 California Points & Authorities § 167.40

§ 167.40 Supporting Contention That Defendant Is Liable for Nuisance--Other Sources of Personal Discomfort in Neighborhood Not a Defense

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE FACT THAT OTHER SOURCES OF PERSONAL DISCOMFORT TO PLAINTIFF EXIST IN THE NEIGHBORHOOD IS NOT A DEFENSE TO PLAINTIFF'S ACTION FOR NUISANCE.

Other Sources of Personal Discomfort in Neighborhood Not a Defense. The fact that other sources of personal discomfort to the plaintiff exist in the neighborhood is not a defense to the existence of a nuisance (*Vowinckel v. N. Clark & Sons (1932) 216 Cal. 156, 164, 13 P.2d 733*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of plaintiff's contention that defendant is liable for a nuisance because the acts or conduct complained of constitutes a nuisance and the existence of other sources of personal discomfort in the neighborhood is not a defense.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that defendant is liable for a nuisance because the acts or conduct complained of constitutes a nuisance and the existence of other sources of personal discomfort in the neighborhood is not a defense. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion and forms relating to nuisance generally, see California Forms of Pleading and Practice, Ch. 391, *Nuisance* (Matthew Bender).

[3] Discussion of Authorities

[a] Other Sources of Personal Discomfort in Neighborhood Not a Defense

The facts and procedural background of ***Vowinckel v. N. Clark & Sons*** *(1932) 216 Cal. 156, 13 P.2d 733* , are discussed in *§ 167.24[3][a]*. In affirming the trial court's judgment, the Supreme Court stated that the fact that the plaintiff has also for his neighbors an airport on the north and busy railroad right-of-way on the south may not control and held that the fact that other sources of possible discomfort to plaintiff existed in the neighborhood of his property is no defense to an action of this kind (*216 Cal. 156, 164)* .

[4] Additional Authorities

[a] Other Sources of Personal Discomfort in Neighborhood Not a Defense

Carter v. Chotiner (1930) 210 Cal. 288, 291 P. 577 , was an action to restrain and enjoin defendants from using land adjacent to plaintiffs for cemetery purposes. Plaintiffs contended that such use would constitute a nuisance because it would pollute water in wells plaintiffs used for domestic and stock purposes. The trial court, finding that maintenance of a cemetery did not constitute a nuisance, denied plaintiffs' application for an injunction prohibiting defendants from operating a cemetery. The trial court, however, did enjoin defendants from interring any bodies within a strip 40 feet wide encircling the cemetery grounds. Plaintiffs appealed. The Supreme Court affirmed.

On appeal, plaintiffs claimed that the cemetery would pollute their water and violate ordinances against establishing a cemetery in the area without a permit. The Court stated that there is no doubt that pollution of water constitutes a nuisance and in a proper case would be enjoined (*210 Cal. 288, 291)* , but here the Court found a conflict in the evidence, which on appeal was resolved in favor of the defendants. The Court found that the testimony showed no actual danger to plaintiffs, that plaintiffs themselves maintained cesspools and toilet vaults on their own property in close proximity to the wells used for domestic purposes, and that these constituted a greater danger than the cemetery (*210 Cal. 288, 291)* . The Court stated that the mere fact that others in the neighborhood are likewise maintaining a nuisance would in no way excuse the defendants for their maintenance of a nuisance, but when plaintiffs' own acts create the same type of danger of which they are complaining, those acts may certainly be considered in determining whether or not defendants' acts actually constitute a nuisance under all the circumstances (*210 Cal. 288, 291-292)* . The Court held that plaintiffs' maintenance of cesspools and toilet vaults was not controlling in this case but merely one of the circumstances to be considered and found that here there was ample evidence to sustain the trial court's finding that no nuisance in fact existed (*210 Cal. 288, 292)* .

Judson v. Los Angeles Suburban Gas Co. (1910) 157 Cal. 168, 106 P. 581 , was an action for damages and injunctive relief from a nuisance. Defendants managed, conducted, and operated gasworks in such a manner as to precipitate about and above plaintiff's property dense smoke and noxious, offensive gases, as well as to produce loud, disturbing noises and roaring and rumbling sounds that reached and penetrated plaintiff's house, making the house and studio places devoid of quiet, peace, and rest. The trial court gave judgment for plaintiff and enjoined defendants from maintaining the nuisance. Defendants appealed from the judgment and from the order denying a motion for a new trial.

On appeal, defendants contended that the evidence was not sufficient to justify a judgment in favor of plaintiff. In affirming the judgment, the Supreme Court held that considered as a whole, the evidence on behalf of plaintiff was amply sufficient to sustain the judgment. In regard to the evidence presented, that an electric railroad passed near plaintiff's studio and that there was a wagon road nearby, the Court stated that the fact that other sources of possible discomfort to plaintiff existed in the neighborhood of his property is no defense to an action of this kind (*157 Cal. 168,*

171) .

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16-167 California Points & Authorities § 167.41

§ 167.41 Supporting Contention That Defendant Is Liable for Nuisance--Nuisance Created to Relieve Its Creator From Injury Caused by Third Party Not a Defense

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS LIABLE FOR NUISANCE AND THE FACT THAT DEFENDANT CREATED THE NUISANCE TO ABATE INJURY CAUSED BY A THIRD PARTY IS NOT A DEFENSE.

Creation of Nuisance to Abate Injury. Defendant cannot justify or defend acts constituting a nuisance on the ground that the nuisance was created to obviate the mistakes of a third party (*Allen v. Stowell (1905) 145 Cal. 666, 670, 79 P. 371*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of plaintiff's contention that defendant is liable for a nuisance because the acts or conduct complained of constitutes a nuisance, and the fact that the nuisance was created to relieve defendant from injury caused by a third party is not a defense.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that defendant is liable for a nuisance because the acts or conduct complained of constitutes a nuisance, and the fact that the nuisance was created to relieve defendant from injury caused by a third party is not a defense. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion and forms relating to nuisance generally, see California Forms of Pleading and Practice, Ch. 391, *Nuisance* (Matthew Bender).

[3] Discussion of Authorities

[a] Creation of Nuisance to Abate Injury

The facts and procedural background of ***Allen v. Stowell*** *(1905) 145 Cal. 666, 79 P. 371* , are discussed in *§ 167.36[3][c]*. The Supreme Court affirmed the trial court's judgment and issuance of an injunction for plaintiffs. Defendants contended that they had a right to build the dams to correct a mistake of the railroad company in locating its culverts. The Court held that defendants could not justify or defend their acts on the ground that they were endeavoring to obviate the mistakes of a third party. The Court found that the dams did not merely reinstate natural conditions but created new conditions; therefore, an injunction could issue (*145 Cal. 666, 670)* .

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16-167 California Points & Authorities § 167.42

§ 167.42 Supporting Contention That Defendant Is Liable for Nuisance--Defendant Successor With Actual or Constructive Knowledge of Nuisance Who Neglected to Abate Continuing Nuisance on Property

[1] FORM

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

DEFENDANT IS LIABLE FOR NUISANCE BECAUSE DEFENDANT IS A SUCCESSOR WITH ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF A CONTINUING NUISANCE ON OR IN THE USE OF HIS/HER PROPERTY WHO NEGLECTED TO ABATE THAT NUISANCE.

A. Successor Liability. Every successive owner of property that neglects to abate a continuing nuisance, which was created by a former owner, on or in the use of that property is liable for the nuisance in the same manner as whoever first created it (*Civ. Code § 3483*).

B. Requirement of Actual or Constructive Knowledge. A successive owner that did not create a nuisance is not liable unless he or she had actual or constructive knowledge of the nuisance (*Reinhard v. Lawrence Warehouse Co. (1940) 41 Cal. App. 2d 741, 746-749, 107 P.2d 501*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the defendant is liable as a successor for a continuing nuisance created by a former owner of the defendant's property, if the defendant had actual or constructive notice of the nuisance but neglected to abate it. They may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of liability of a successor for an unabated nuisance. For example, these points and authorities may be used to support the plaintiff's motion for summary judgment [*see Code Civ. Proc. § 437c*]. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should assert facts establishing the defendant's ownership of the property, the creation of the nuisance by a former owner of the property, the continuing nature of the nuisance, the defendant's actual or constructive knowledge of the nuisance, and the defendant's failure to abate it.

[b] Opposing Memoranda

In an appropriate case, the points and *authorities in § 167.63* may be used to oppose the contention supported by these points and authorities.

[c] Related Pleading and Practice Forms

For discussion and forms relating to nuisance generally, see California Forms of Pleading and Practice, Ch. 391, *Nuisance* (Matthew Bender).

[3] Discussion of Authorities

[a] Requirement of Actual or Constructive Knowledge

Reinhard v. Lawrence Warehouse Co. *(1940) 41 Cal. App. 2d 741, 107 P.2d 501* , was an action for damages brought by a construction worker against the owner and lessee of the building he was repairing. The owner had purchased the building from the heirs of the man who had contracted for its construction over 25 years earlier. Plaintiff was injured when the skylight he was working on collapsed beneath his weight. Plaintiff claimed that the skylight had been constructed defectively because its cross bars were not safely anchored and extended into the building walls and that this defective skylight was a private nuisance. At trial, plaintiff and other witnesses with extensive experience with skylights of this type testified that it would have been impossible to tell whether the skylight had been properly constructed without taking it apart and tearing out the metal flashing and the brick in which it was embedded. The trial court granted the defendants' motions for a directed verdict, and plaintiff appealed to the court of appeal.

The court of appeal affirmed, holding that the language of *Civ. Code § 3483,* which imposes liability on a successive owner who neglects to abate a continuing nuisance, expressed the sound principle that a person who has not created a nuisance is not liable unless he or she knows of its existence. The court held that the word "neglect" is not synonymous with "omit" because "neglect" involves intent, which presupposes knowledge. Although the creator of a nuisance is presumed to have knowledge of his or her own acts, a successor cannot be presumed to have knowledge of the acts of his or her predecessor. Plaintiff's own testimony proved that the defendants could not possibly have known whether the skylight was defectively constructed, which was exactly the contrary of that which plaintiff was required to prove (*41 Cal. App. 2d 741, 746-748)* .

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16-167 California Points & Authorities § 167.43

§ 167.43 Supporting Contention That Defendant Is Liable for Nuisance--Defense of Statutory Authorization [Civ. Code § 3482] Inapplicable--Activity or Conduct Not Expressly Authorized by Statute

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT'S CONDUCT CONSTITUTES A NUISANCE AND WAS NOT DONE UNDER AUTHORITY OF A STATUTE WITHIN THE MEANING OF SECTION 3482 OF THE CIVIL CODE BECAUSE THE SPECIFIC CONDUCT WAS NOT AUTHORIZED BY THE EXPRESS TERMS OF ANY STATUTE.

Nuisance Not Expressly Authorized by Statute. A statutory sanction cannot be pleaded in justification of acts otherwise constituting a nuisance unless the acts complained of are authorized by the express terms of the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the Legislature contemplated the doing of the very act that occasions the injury (*Greater Westchester Homeowners Ass'n v. City of Los Angeles (1979) 26 Cal. 3d 86, 101, 160 Cal. Rptr. 733, 603 P.2d 1329* ; *Hassell v. San Francisco (1938) 11 Cal. 2d 168, 171, 78 P.2d 1021*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of plaintiff's contention that defendant is liable for a nuisance because the acts or conduct complained of constitutes a nuisance and is not expressly authorized by statute.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that defendant is liable for a nuisance because the acts or conduct complained of constitutes a nuisance and is not expressly authorized by statute. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of

law stated.

[b] Related Pleading and Practice Forms

For discussion and forms relating to nuisance generally, see California Forms of Pleading and Practice, Ch. 391, *Nuisance* (Matthew Bender).

[c] Opposing Memoranda

In an appropriate case, the points and *authorities in § 167.54* may be used to oppose the contention supported by the points and authorities in this form.

[3] Discussion of Authorities

[a] Nuisance Not Expressly Authorized by Statute

In ***Greater Westchester Homeowners Ass'n v. City of Los Angeles*** *(1979) 26 Cal. 3d 86, 160 Cal. Rptr. 733, 603 P.2d 1329* , plaintiffs, as owners and occupants of homes near an airport, sued the city for damages under inverse condemnation and nuisance theories, for personal injuries caused by noise, smoke, and vibrations emanating from aircraft using the airport. At trial, the actions were bifurcated. On the nuisance issue, the trial court gave judgment for plaintiffs, holding that plaintiffs had established the existence of an actionable nuisance giving rise to damages for annoyance, inconvenience, discomfort, mental distress, and emotional distress, and that a nuisance recovery was independent of plaintiffs' claim for diminution of their property values. Defendant city appealed. The Supreme Court affirmed judgment for plaintiffs.

On appeal, defendant contended that an airport cannot be held liable for nuisance because the noise-generating activity complained of is specifically sanctioned by federal and state statutes. The Court held that the state and federal legislation, after particularized inquiry into each to ascertain whether there existed a legislative intent to sanction a nuisance, preserved both the authority and responsibility of an airport proprietor to acquire adequate noise easements and to institute reasonable noise abatement procedures that do not conflict with federal law and held that the statutes conferred no immunity from traditional nuisance liability (*26 Cal. 3d 86, 102)* . The Court further held that the city's liability was not precluded by *Civ. Code § 3482*, which provides that nothing done or maintained under the express authority of a statute can be deemed a nuisance because statutes broadly authorizing or regulating airports and aircraft flights do not create a legislative sanction for their maintenance as a nuisance (*26 Cal. 3d 86, 101)* .

The facts and procedural background of ***Hassell v. San Francisco*** *(1938) 11 Cal. 2d 168, 78 P.2d 1021* , are discussed in *§ 167.24[3][b]*. The Supreme Court affirmed the trial court's judgment for plaintiff, enjoining construction of a convenience station. On appeal, defendant contended that the trial court's finding that construction of the building in the proposed manner would be a nuisance was not supported by the evidence and relied on *Civ. Code § 3482*, which provides that nothing that is done or maintained under the express authority of a statute can be deemed a nuisance. Affirming the judgment granting the injunction because the authority for the construction of the new building was not express, the Supreme Court stated that a statutory sanction cannot be pleaded in justification of acts that by the general rules of law constitute a nuisance, unless the acts complained of are authorized by the express terms of the statute under which the justification is made or by the plainest and most necessary implication from the powers expressly conferred so that it can be fairly stated that the Legislature contemplated the doing of the very act that occasions the injury (*11 Cal. 2d 168, 171)* .

[4] Additional Authorities

[a] Nuisance Not Expressly Authorized by Statute

The facts and procedural background of *Varjabedian v. City of Madera (1977) 20 Cal. 3d 285, 142 Cal. Rptr. 429, 572 P.2d 43* , are discussed in *§ 167.30[3][a]*. In affirming the trial court's judgment, the Supreme Court held that construction of sewage treatment plants by cities is admittedly authorized by statute but noted that the exculpatory effect of *Civ. Code § 3482* had been circumscribed by decisions of the Court. The Court stated it would adhere to previous interpretations of *Civ. Code § 3482*, that a requirement of express authorization embodied in the statute itself insures that an unequivocal legislative intent to sanction a nuisance will be effectuated, while avoiding the uncertainty that would result if every generally worded statute were a source of undetermined immunity from nuisance liability (*20 Cal. 3d 285, 291)* . Applying this standard, the Court found that none of the Government Code statutes, under which the city claimed to have acted mentions the possibility of noxious emanations from such facilities, that the odors were not authorized by the plainest and most necessary implication from the general powers conferred by these statutes, and that the Legislature did not contemplate the creation of a malodorous nuisance when it authorized sewage plan construction. Therefore, the Court held that the general authorization of municipal construction of sewage plants did not expressly sanction the production of any particular level of odors (*20 Cal. 3d 285, 292)* .

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16-167 California Points & Authorities § 167.44

§ 167.44 Supporting Contention That Action for Nuisance Not Barred by Statute of Limitations--Continuing Nuisance

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THIS ACTION FOR NUISANCE IS NOT BARRED BY THE RUNNING OF THE STATUTE OF LIMITATIONS BASED ON THE ORIGINAL WRONG BECAUSE DEFENDANT'S ACTS CONSTITUTING THE NUISANCE ARE CONTINUING, AND THE DAMAGES SOUGHT WERE SUSTAINED WITHIN THE STATUTORY PERIOD PRECEDING THE COMMENCEMENT OF THIS ACTION.

A. Statute of Limitations Does Not Apply to Continuing Nuisance. If continuing or recurring injury results from a wrongful act or from a condition wrongfully created and maintained, there is not only a cause of action for the original wrong arising when the wrong is committed but also separate and successive causes of action. Because consequential damages arise when the damages are sustained, so long as the cause of the injury continues to exist and the damages continue to occur, plaintiff is not barred from recovery for those damages, based on the original wrong, that have accrued after the statutory period has expired. Although a cause of action based solely on the original wrong may be barred by the running of the statute of limitations, a continuing nuisance and every continuance thereof amounts to a new nuisance for which successive actions will lie (*Kafka v. Bozio (1923) 191 Cal. 746, 751, 218 P. 753*).

B. Continuing Nuisance Defined. Nuisances consisting of acts done or particular uses of property may be properly termed "continuing" if they may continue indefinitely or may be discontinued at any time (*Kafka v. Bozio (1923) 191 Cal. 746, 751, 218 P. 753* ; *Wilshire Westwood Assocs. v. Atlantic Richfield Co. (1993) 20 Cal. App. 4th 732, 744, 24 Cal. Rptr. 2d 562*).

C. Plaintiff's Election to Treat Nuisance as Continuing or Permanent. In case of doubt as to the permanency of the injury caused by a nuisance, plaintiff may elect to treat the nuisance as either permanent or continuing (*Baker v. Burbank-Glendale-Pasadena Airport Auth. (1985) 39 Cal. 3d 862, 870, 218 Cal. Rptr. 293, 705 P.2d 866*).

[*Optional*] **D. Toxic Contamination as Continuing Nuisance.** If the alleged nuisance is the existence of toxic contamination, the strong public policy in favor of cleaning it up as promptly and thoroughly as possible should incline a court to allow the plaintiff to proceed on the theory of continuing nuisance, if there is a reasonable question whether the nuisance is continuing or permanent and the defendant asserts that an action is barred by the statute of limitations (*Capogeannis v. Superior Court (1993) 12 Cal. App. 4th 668, 682, 15 Cal. Rptr. 2d 796*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of plaintiff's contention that an action for nuisance is not barred by the running of the statute of limitations based on the original wrong because the nuisance is a continuing one for which successive actions may be brought, and the damages that are being sought were sustained within the statutory period preceding the commencement of the action. Optional Paragraph D should be used if the nuisance is caused by toxic contamination.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that an action for nuisance is not barred by the statute of limitations because the nuisance is a continuing one. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion and forms relating to nuisance generally, see California Forms of Pleading and Practice, Ch. 391, *Nuisance* (Matthew Bender).

[c] Opposing Memoranda

In an appropriate case, the points and *authorities in § 167.62* may be used to oppose the contention, supported by the points and authorities in this form.

[3] Discussion of Authorities

[a] Statute of Limitations Does Not Apply to Continuing Nuisance

Kafka v. Bozio *(1923) 191 Cal. 746, 218 P. 753* , was an action for damages and injunctive relief. Defendant and plaintiffs were adjoining landowners and had both built four-story buildings on their properties. Originally the buildings were two inches apart, but due to movement of the foundation wall, defendant's building tipped over plaintiffs' lot, pressing against their building causing damage. Plaintiffs contended that this encroachment constituted a nuisance. The trial court rendered judgment for defendant. Plaintiffs appealed, and the Supreme Court reversed.

On appeal, defendant contended that injunctive relief was barred by the statute of limitations. The Court noted that the maintenance of an encroachment that is not willful but unintentional and abatable, producing temporary injury only, or that may not result in further injury, is a continuing nuisance, and every continuance thereof amounts to a new nuisance for which successive actions will lie. The Court stated that nuisances consisting of acts done or particular uses of property may be properly termed "continuing" when they are of such a character that they may continue indefinitely or may be discontinued at any time. The Court also stated that when continuing or recurring injury results from a wrongful act or from a condition wrongfully created and maintained, there is not only a cause of action for the original wrong arising when the wrong is committed, but separate and successive causes of actions for consequential damages arise as

and when such damages are sustained; therefore, so long as the cause of the injury exists and the damages continue to occur, plaintiff is not barred from recovery for such damages as have accrued within the statutory period prior to the action. Although a cause of action based solely on the original wrong may be barred, a continuing nuisance and every continuance thereof amounts to a new nuisance for which successive actions will lie (*191 Cal. 746, 751)* . The Court then held that when the nuisance consists of a structure of a permanent nature and is intended by the defendant to be so, is of a use or invasion of the plaintiff's property, or is a deprivation of some benefit appurtenant to it for an indefinitely long period in the future, the injured party has an option to complain of it as a permanent injury and recover damages for the whole time, estimating its duration according to the defendant's purpose in creating or continuing it, or to treat it as a temporary wrong to be compensated for while it continues. The Court found that plaintiffs elected to treat the nuisance as a temporary wrong to be abated, providing that an injunction could be issued, and that even if plaintiffs had not elected to treat it thus, the statute of limitations could not be a complete bar because the encroachment had progressively increased up to the time of commencing the action (*191 Cal. 746, 752)* .

[b] Continuing Nuisance Defined

Kafka v. Bozio *(1923) 191 Cal. 746, 218 P. 753* , is discussed in *§ 167.44[3][a]*.

In ***Wilshire Westwood Assocs. v. Atlantic Richfield Co.*** *(1993) 20 Cal. App. 4th 732, 24 Cal. Rptr. 2d 562* , defendants operated a gasoline service station on leased property that was eventually sold to plaintiffs, who discovered that the soil was contaminated with gasoline. Plaintiffs filed a nuisance action against defendants to recover the costs of cleaning up the property. The trial court granted summary judgment to defendants, and plaintiffs appealed.

Before the court of appeal, defendants argued that plaintiff's claims were barred by the three-year statute of limitations applicable to injuries to real property because the claimed nuisance was permanent and therefore the statute began to run when the claimed nuisance was created. The court of appeal disagreed and reversed the summary judgment, holding that the nuisance in this case was continuing, not permanent, because it could be discontinued or abated at any time. The court noted that a letter from a state agency allowing plaintiffs to proceed with construction because the cleanup of the gasoline was adequate and complete demonstrated that the nuisance was abatable (*20 Cal. App. 4th 732, 744-745)* .

[c] Plaintiff's Election to Treat Nuisance as Continuing or Permanent

In ***Baker v. Burbank-Glendale-Pasadena Airport Auth.*** *(1985) 39 Cal. 3d 862, 218 Cal. Rptr. 293, 705 P.2d 866* , homeowners living adjacent to an airport brought an action for nuisance against the airport authority based on the noise, smoke, and vibrations from flights over their homes. The trial court sustained the defendant's demurrer and dismissed the action as barred by the statutes of limitations applicable to permanent nuisances. Plaintiffs appealed to the California Supreme Court, which reversed.

The Court rejected the trial court's conclusion that the nuisance was permanent because commercial flights conducted in strict compliance with federal regulations cannot be enjoined (*39 Cal. 3d 862, 868)* . Noting that a use that may be discontinued at any time is considered a continuing nuisance, the Court pointed out that vibration, noise, and odors are classic examples of a continuing nuisance (*39 Cal. 3d 862, 869)* . Moreover, in case of doubt as to whether an injury is permanent, a plaintiff may elect to treat the particular nuisance causing the injury as either permanent or continuing. Otherwise, a plaintiff who was uncertain as to the extent of injury would be forced to bring an action before the statutory period ran and run the risk of being prevented by res judicata from recovering for all injury suffered (*39 Cal. 3d 862, 870)* . The Court concluded that because plaintiffs had elected to treat defendant's airport operations as a continuing nuisance, the statute of limitations did not bar their action against defendant (*39 Cal. 3d 862, 873)* .

[d] Toxic Contamination as Continuing Nuisance

In ***Capogeannis v. Superior Court*** *(1993) 12 Cal. App. 4th 668, 15 Cal. Rptr. 2d 796* , a landowner sued his vendor

and the vendor's tenant for damages based on nuisance in the form of toxic contamination of the soil and ground water. The contamination was caused by leakage from underground petroleum storage tanks that had been last used (by the tenant) about three years before the plaintiff purchased the land. The plaintiff did not know about the tanks until more than a year after purchasing the land. The widespread extent of the contamination became known, after extensive sampling and testing, about a year after the plaintiff learned about the tanks. A little more than three years thereafter, the plaintiff filed the complaint. The trial court granted a defense motion for summary adjudication on the ground that the action was barred by the three-year limitation on actions for injury to real property [*see Code Civ. Proc. § 338(b)*]. On the plaintiff's petition for an extraordinary writ, the court of appeal directed the trial court to vacate its order and deny the defense motion. The issue was whether the nuisance was permanent (and therefore the action was barred) or continuing (and the action was not barred). The complaint did not reveal whether the plaintiff was proceeding on the theory of permanent nuisance or on the theory of continuing nuisance.

The court of appeal observed that there is a judicial preference for viewing a nuisance as continuing and that when the question is close, the plaintiff should be allowed to elect one or the other characterization of the nuisance (*12 Cal. App. 4th 668, 678-679)* . In the present case the plaintiff expressly made that election, in favor of a continuing nuisance, at the hearing on the defense motion for summary adjudication. The court of appeal concluded that the question was close; therefore, the trial court should have allowed the plaintiff to proceed. This conclusion was influenced primarily by the strong policy consideration that toxic contamination should be cleaned up as promptly and thoroughly as possible. Allowing the plaintiff to proceed would encourage private clean-up of toxic contamination with appropriate financial support from responsible persons. The alternative would be enforcement proceedings by government agencies at public expense (*12 Cal. App. 4th 668, 682)* --at least in this case, since the plaintiff was not actually harmed by the toxic contamination but only had a legal duty to clean it up (*12 Cal. App. 4th 668, 683)* .

[4] Additional Authorities

[a] Statute of Limitations Does Not Apply to Continuing Nuisance

In *Lee v. Los Angeles County Metro. Transp. Auth. (2003) 107 Cal. App. 4th 848, 132 Cal. Rptr. 2d 444* , the plaintiff brought an action for inverse condemnation, continuing nuisance, and other related causes of action against a county transportation authority, claiming that the county's underground transit construction project had damaged the structural integrity of her building. Because the action was not brought within three years after the date that the plaintiff learned from a city inspector that settlement on the sidewalk in front of her building was not caused by anything on her property, the trial court sustained the defendant's demurrer based on the statute of limitations. The court of appeals reversed, holding that the statute of limitations on a claim for inverse condemnation or nuisance involving continuous and repeated property damage incident to a public improvement does not begin to run until the situation has stabilized. Because the plaintiff alleged a continuous and repeated course of conduct that was causing damage to her property, and because the situation had not stabilized at the time that the plaintiff filed her complaint, the causes of action had not yet accrued, and it was error for the trial court to sustain the demurrer (*107 Cal. App. 4th 848, 857-858)* .

[b] Continuing Nuisance Defined

KFC W., Inc. v. Meghrig (1994) 23 Cal. App. 4th 1167, 28 Cal. Rptr. 2d 676 , is discussed in *§ 167.44[3][c]*.

[c] Plaintiff's Election to Treat Nuisance as Continuing or Permanent

In *KFC W., Inc. v. Meghrig (1994) 23 Cal. App. 4th 1167, 28 Cal. Rptr. 2d 676* , plaintiffs brought a nuisance action against defendants, the former owners of plaintiffs' real property, seeking reimbursement for costs of cleaning up contamination of the property, which plaintiffs claimed was caused by defendants' negligent operation of a gasoline station on the property. The trial court sustained defendants' demurrer without leave to amend, and plaintiff appealed to the court of appeal. The court reversed and remanded, holding that plaintiff should be granted leave to amend to allege a continuing nuisance and thereby withstand demurrer based on the statute of limitations. The court held that a nuisance

that may be discontinued at any time is considered continuing; moreover, in case of doubt as to the permanency of the injury caused by the nuisance, plaintiff may elect to treat the nuisance as permanent or continuing (*23 Cal. App. 4th 1167, 1180-1181)* . In this case, the continuing nature of the nuisance refers not to defendants' conduct, but to the continuing damage caused by the offensive condition (*23 Cal. App. 4th 1167, 1181)* .

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16-167 California Points & Authorities § 167.45

§ 167.45 Supporting Contention That Action for Nuisance Not Barred by Statute of Limitations--Obstruction of Public Right

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THIS ACTION FOR NUISANCE IS NOT BARRED BY THE STATUTE OF LIMITATIONS BECAUSE DEFENDANT'S ACTIVITY OR CONDUCT CONSTITUTES A PUBLIC NUISANCE THAT AMOUNTS TO AN ACTUAL OBSTRUCTION OF A PUBLIC RIGHT, WHICH A LAPSE OF TIME CANNOT LEGALIZE.

Obstruction of Public Right. Lapse of time cannot legalize a public nuisance amounting to actual obstruction of public right (*Civ. Code § 3490*; *see Williams v. Blue Bird Laundry Co. (1927) 85 Cal. App. 388, 395, 259 P. 484*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of plaintiff's contention that an action for nuisance is not barred by the statute of limitations because the nuisance is a public nuisance amounting to actual obstruction of public right, which a lapse of time cannot legalize.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that an action for nuisance is not barred by the statute of limitations because the nuisance is a public nuisance amounting to actual obstruction of public right. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel should also include facts showing that the nuisance is public and amounts to an actual obstruction of a public right.

[b] Related Pleading and Practice Forms

For discussion and forms relating to nuisance generally, see California Forms of Pleading and Practice, Ch. 391, *Nuisance* (Matthew Bender).

[c] Opposing Memoranda

In an appropriate case, the points and *authorities in § 167.62* may be used to oppose the contention supported by these points and authorities that an action for nuisance is not barred by the statute of limitations because the nuisance is public and amounts to an obstruction of a public right.

[3] Discussion of Authorities

[a] Obstruction of Public Right

Williams v. Blue Bird Laundry Co. *(1927) 85 Cal. App. 388, 259 P. 484* , was an action for injunctive relief restraining the operation of defendant's laundry and construction of a new building for the same purposes. Plaintiffs contended that the laundry constituted a nuisance in that it emitted offensive odors and caused loud and disturbing noises that were offensive to the senses and deleterious to the health of the plaintiffs. Defendant contended that it had operated its laundry for a period of more than ten years and that plaintiffs had waived any legal objection that they may have had. The trial court gave judgment for plaintiffs, and defendant appealed. The court of appeal affirmed.

In its opinion, the court of appeal noted that it has repeatedly been held that in suits in which defendant's activity or conduct amounts to a public nuisance, no lapse of time would justify the special injury to plaintiff (*85 Cal. App. 388, 395)* . The court held that the operation of the laundry was a continuing nuisance giving rise to successive rights of action; therefore, an injunction could issue (*85 Cal. App. 388, 398)* .

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
CHAPTER 167 NUISANCE
PART II. FORMS

16-167 California Points & Authorities § 167.46

§ 167.46 Supporting Contention That Injunctive Relief Available to Abate Nuisance--Injurious Effect on Property or Lessening of Personal Enjoyment

[1] FORM

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

THE COURT SHOULD ENJOIN THE NUISANCE BECAUSE THE CONDUCT OR ACTIVITY THAT CONSTITUTES THE NUISANCE _____ [INJURIOUSLY AFFECTS PLAINTIFF'S PROPERTY *or* LESSENS PLAINTIFF'S PERSONAL ENJOYMENT OF HIS/HER PROPERTY].

A. Injunction Available. Injunctive relief is available to any person whose property is injuriously affected or whose personal enjoyment of that property is lessened by a nuisance (*Code Civ. Proc. § 731*; *see also Los Angeles Brick & Clay Prods. Co. v. City of Los Angeles (1943) 60 Cal. App. 2d 478, 486, 141 P.2d 46*).

B. Preliminary Injunction to Abate Nuisance. A preliminary injunction may be issued to abate a private nuisance in order to protect plaintiff's rights (*Hartsif v. Wann (1956) 139 Cal. App. 2d 119, 120, 293 P.2d 65* ; *Wilms v. Hand (1951) 101 Cal. App. 2d 811, 815-816, 226 P.2d 728*).

[*Optional*] **C. Contributory Negligence Not a Bar.** Contributory negligence is not a defense to an action seeking injunctive relief to abate a nuisance (*Kafka v. Bozio (1923) 191 Cal. 746, 749, 218 P. 753*).

[*Optional*] **D. Criminal Statute Is Not Exclusive Remedy for Abating Public Nuisance.** The California Street Terrorism Enforcement and Prevention (STEP) Act, *Penal Code Section 186.20 et seq.*, is not the exclusive remedy for abating criminal street gang activity constituting a public nuisance and does not preempt the use of the general public nuisance statutes (*People ex rel. Gallo v. Acuna (1997) 14 Cal. 4th 1090, 1119, 60 Cal. Rptr. 2d 277*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of plaintiff's contention that a nuisance may be enjoined because it injuriously affects the plaintiff's property or lessens the plaintiff's personal enjoyment of his or her property. Optional Paragraph C should be used if the plaintiff is or may be guilty of contributory negligence, to support the contention that contributory negligence cannot be used as a defense to an action for injunctive relief.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of availability of injunctive relief to abate a nuisance. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms and discussion regarding nuisance, see California Forms of Pleading and Practice, Ch. 391, *Nuisance* (Matthew Bender). For forms and discussion relating to injunctive relief generally, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender).

[c] Related Memoranda

For points and authorities regarding injunction generally, see Ch. 116, *Injunctions* .

[d] Opposing Memoranda

If appropriate, the points and authorities in *see §§ 167.65* and *167.66* may be used to oppose these points and authorities.

[3] Discussion of Authorities

[a] Injunction Available

In ***Los Angeles Brick & Clay Prods. Co. v. City of Los Angeles*** *(1943) 60 Cal. App. 2d 478, 141 P.2d 46* , was an action for a permanent injunction. Plaintiff contended that defendant city's action in paving two streets caused discharge of storm waters onto plaintiff's land. While plaintiff's land was in an unimproved condition, no damage occurred. However, once plaintiff improved the property the runoff caused increasing damage. The trial court entered judgment for plaintiff, and defendant appealed. The court of appeal affirmed.

The court of appeal stated that anything that obstructs the free use of property so as to interfere with its comfortable enjoyment is a nuisance, and injunction is the traditional method of abating a nuisance (*60 Cal. App. 2d 478, 486)* . Finding that defendant's action constituted a nuisance, the court of appeal upheld the trial court's decision, issuing a permanent injunction to abate the nuisance (*60 Cal. App. 2d 478, 485, 491)* .

[b] Preliminary Injunction to Abate Nuisance

In ***Hartsif v. Wann*** *(1956) 139 Cal. App. 2d 119, 293 P.2d 65* , plaintiff sought an injunction to restrain defendant from interfering with plaintiff's access to his mining property over a road that plaintiff and the general public had used for more than 35 years. The superior court issued a preliminary injunction that restrained defendant from obstructing or interfering with the use by the general public, including plaintiff, of the road in question. Defendant appealed.

The court of appeal affirmed the order granting the preliminary injunction, stating that a preliminary injunction may lie

to protect the enjoyment of an easement, against the obstruction of it, or for the abatement of the nuisance constituted by that obstruction. The court observed that if plaintiff had the easement rights for the period claimed, the purpose of the injunction was to preserve those rights without defendant's obstruction pending the hearing on the merits (*139 Cal. App. 2d 119, 120)* .

In ***Wilms v. Hand*** *(1951) 101 Cal. App. 2d 811, 226 P.2d 728* , plaintiffs were owners and occupants of a motel. Defendants conducted a dog and cat hospital on property adjacent to the motel. Plaintiffs obtained a preliminary injunction restraining defendants from permitting the dogs they harbored and maintained from annoying and disturbing the peace and comfort of plaintiffs and any guests they might have at their motel. Defendants appealed.

The court of appeal affirmed the order granting the preliminary injunction. The court noted that plaintiffs were suffering substantial damage to their business and were having their peace and comfort disturbed; thus, there was no abuse of discretion in granting the preliminary injunction (*101 Cal. App. 2d 811, 815-816)* .

[c] Contributory Negligence Not a Bar

The facts and procedural background of ***Kafka v. Bozio*** *(1923) 191 Cal. 746, 218 P. 753* , are discussed in *§ 167.44[3][a]*. On appeal, plaintiffs waived all claims for damages and the Court dealt only with the issue of injunctive relief. Defendant contended that the sinking of the foundation wall and the resulting encroachment of defendant's building on plaintiffs' premises were caused, or at least contributed to, by the act of plaintiffs in building on that portion of the wall within their property, and that plaintiffs were thus barred from seeking damages and injunctive relief. The Court held that plaintiffs' use of the wall was not a legal wrong or a violation of any duty owed to defendant and could form no predicate for an estoppel (*191 Cal. 746, 749)* . The Court held that the fact that plaintiffs were guilty of contributory negligence, if it be a fact, could not confer on defendant a right to the continued maintenance of his own building in such condition that it obstructs and interferes with the free use and enjoyment by plaintiffs of their own property (*191 Cal. 746, 749)* . This being the rule, the Court found that it did not have to decide the issue of whether plaintiffs were guilty of contributory negligence (*191 Cal. 746, 750)* .

[d] Criminal Statute Is Not Exclusive Remedy for Abating Public Nuisance

The facts and procedural background of ***People ex rel. Gallo v. Acuna*** *(1997) 14 Cal. 4th 1090, 60 Cal. Rptr. 2d 277* , are discussed in *§ 167.35[3][b]*. The Supreme Court held that two challenged provisions in a preliminary injunction entered by the superior court against individual members of a criminal street gang fell within the superior court's equitable power to abate a public nuisance and did not run afoul of rights secured to defendants by the federal Constitution (*14 Cal. 4th 1090, 1102)* . In reaching this conclusion the Court considered and rejected defendants' argument that the California Street Terrorism Enforcement and Prevention (STEP) Act [*Penal Code §§ 186.20 et seq.*] is the exclusive means of obtaining nuisance-based injunctive relief against a criminal street gang. Defendants contended that the STEP Act, which declares a building or place used by members of a street gang for specified illegal activities to be a nuisance per se, preempted use of the general public nuisance statutes. The Supreme Court disagreed, finding that the Act expressly provided that it was not the exclusive remedy for abating gang activity constituting a public nuisance and thus contemplated additional remedies including those made available by the general public nuisance statutes (*14 Cal. 4th 1090, 1119)* .

[4] Additional Authorities

[a] Preliminary Injunction to Abate Nuisance

In Island Reclamation Dist. No. 776 v. *Floribel Alfalfa Syndicate (1914) 167 Cal. 467, 140 P. 4* , plaintiff was a reclamation district that sought to enjoin the erection of a dam by defendants. The superior court issued a preliminary injunction, and defendants appealed. The California Supreme Court affirmed the order granting the preliminary injunction. Defendants had contended by general demurrer that the complaint failed to state a cause of action because

the alleged threatened damage was merely a matter of opinion, and thus the complaint did not show why an action at law would not be sufficient. The Court disagreed, observing that, for the purposes of the preliminary injunction, it was sufficient for the court to know that defendants contemplated the construction and maintenance of a dam at the point indicated in the complaint. The court noted that one may not dam the natural flow of a stream to the detriment of one's neighbor by causing the water to empty onto the latter's land; therefore, prohibitory injunctive relief will issue if the damage is threatened, and mandatory injunctive relief will issue to remove the cause once some injury has been done (*167 Cal. 467, 470-471)* .

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16-167 California Points & Authorities § 167.47

§ 167.47 Supporting Contention That Injunctive Relief Available to Abate Nuisance--Relative Hardships (Balance of Conveniences) Test Favors Plaintiff

[1] FORM

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

THE COURT SHOULD ENJOIN THE NUISANCE BECAUSE THE HARDSHIP PLAINTIFF WILL SUFFER IF THE INJUNCTION IS REFUSED AND THE NUISANCE CONTINUES OUTWEIGHS THE HARDSHIP DEFENDANT WILL SUFFER IF THE INJUNCTION IS GRANTED.

A. Relative Hardships (Balance of Conveniences) Test. In determining whether to enjoin a nuisance, a court must weigh the hardship caused the plaintiff by refusing the injunction against the hardship caused the defendant by granting it (*Christensen v. Tucker (1952) 114 Cal. App. 2d 554, 560, 562, 250 P.2d 660*).

B. Doubtful Cases Resolved in Plaintiff's Favor. In applying the relative hardships or balance of conveniences test, the court must resolve doubtful cases in the plaintiff's favor because the defendant is a wrongdoer (*Christensen v. Tucker (1952) 114 Cal. App. 2d 554, 560, 562, 250 P.2d 660*).

C. Irreparable Injury. A court cannot refuse to enjoin a nuisance if refusing the injunction would cause the plaintiff irreparable injury and granting the injunction would not cause the defendant irreparable injury (*Fairrington v. Dyke Water Co. (1958) 50 Cal. 2d 198, 200, 323 P.2d 1001* ; *Christensen v. Tucker (1952) 114 Cal. App. 2d 554, 560, 562, 250 P.2d 660*).

D. Responsibility for Nuisance. A court cannot refuse to enjoin a nuisance if the defendant's negligence or willful acts caused the nuisance and if the plaintiff is not responsible by delay or otherwise for the situation (*Dolske v. Gormley (1962) 58 Cal. 2d 513, 520-521, 25 Cal. Rptr. 270, 375 P.2d 174* ; *Christensen v. Tucker (1952) 114 Cal. App. 2d 554, 562-563, 250 P.2d 660*).

E. Disproportionate Hardships. A court cannot refuse to enjoin a nuisance if the hardship caused the defendant by granting the injunction is not greatly disproportionate to the hardship caused the plaintiff by refusing the injunction and allowing the nuisance to continue (*Christensen v. Tucker (1952) 114 Cal. App. 2d 554, 562-563, 250 P.2d 660*).

[*Optional*] **F. Private Right of Eminent Domain.** The plaintiff is entitled to injunctive relief against an encroachment because refusing to enjoin an encroachment in effect gives the defendant, a private person, the right of eminent domain over plaintiff's property by permitting the defendant to continue occupying that property (*Fairrington v. Dyke Water Co. (1958) 50 Cal. 2d 198, 200, 323 P.2d 1001* ; *Christensen v. Tucker (1952) 114 Cal. App. 2d 554, 559-560, 250 P.2d 660*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of plaintiff's contention that, under the relative hardships or balance of conveniences test, a nuisance should be enjoined because refusing an injunction would cause greater hardship to plaintiff than that caused defendant by granting the injunction. If the nuisance is an encroachment, counsel may use optional Paragraph F.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of whether the relative hardship tests favors the party seeking to enjoin a nuisance. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should assert facts tending to establish that the plaintiff would suffer hardship in the absence of an injunction, and that this hardship is greater than any hardship the defendant would suffer from the granting of the injunction.

[b] Related Pleading and Practice Forms

For forms and discussion regarding nuisance, see California Forms of Pleading and Practice, Ch. 391, *Nuisance* (Matthew Bender).

[c] Opposing Memoranda

In an appropriate case, the points and *authorities in § 167.66* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Relative Hardships (Balance of Conveniences) Test

In ***Christensen v. Tucker*** *(1952) 114 Cal. App. 2d 554, 250 P.2d 660* , plaintiff brought an action against defendants, the owners of adjoining real property, seeking both damages and an injunction to compel removal of structures built by defendants that encroached on plaintiff's property. The trial court found that encroachments did exist and permitted defendants either to remove the encroachments and pay an amount in damages or to pay a larger sum in damages and receive title to the area involved. Defendants chose the latter, and plaintiff appealed the denial of the injunction to the court of appeal.

The court of appeal reversed and remanded the case, holding that the trial court has discretion to grant or refuse to enjoin a nuisance and must exercise that discretion by weighing the hardship plaintiff will suffer if the injunction is

denied against the hardship defendant will suffer if the injunction is granted. This test, referred to by the courts and commentators as the relative hardships or balance of conveniences test, looks at various factors. First, doubtful cases must be decided in plaintiff's favor because defendant is a wrongdoer. Second, the court must enjoin the nuisance if defendant's acts were either willful or negligent, and if plaintiff is not in any way responsible for the situation. Third, the court must enjoin the nuisance if plaintiff will suffer irreparable injury from the nuisance. Fourth, the court must enjoin the nuisance unless defendant proves that the hardship caused by the granting of the injunction will be greatly disproportionate to the hardship caused plaintiff by the continuing nuisance. The court found that the trial court's judgment was not supported by the findings because the trial court had made no findings concerning either the relative responsibility of each party for the nuisance or the hardship the defendants would suffer if compelled to remove the encroaching structures (*114 Cal. App. 2d 554, 564-565)* .

[b] Doubtful Cases Resolved in Plaintiff's Favor

Christensen v. Tucker *(1952) 114 Cal. App. 2d 554, 250 P.2d 660* is discussed in *§ 167.47[3][a]*.

[c] Irreparable Injury

In ***Fairrington v. Dyke Water Co.*** *(1958) 50 Cal. 2d 198, 323 P.2d 1001* , defendant erected a sign with the name of its business on property belonging to plaintiffs, who sought an injunction compelling defendant to remove it. The trial court refused to grant the injunction because the sign was a substantial benefit to defendant in carrying on its business and did not interfere with plaintiffs' use of their property. Plaintiffs appealed to the Supreme Court.

The Court reversed, ruling that a court cannot, in applying the balance of conveniences test, refuse an injunction unless defendant can show that defendant would suffer irreparable injury if the injunction were granted. Irreparable injury requires proof of more than mere deprivation of a substantial benefit (*50 Cal. 2d 198, 200)* .

The facts and procedural background of ***Christensen v. Tucker*** *(1952) 114 Cal. App. 2d 554, 250 P.2d 660* are discussed in *§ 167.47[3][a]*. The court of appeal noted that there was no evidence of irreparable injury to plaintiff's property from refusing the injunction because it was unimproved except for a garage that was not affected by defendants' encroaching structures. In addition, plaintiff provided no evidence concerning future plans for the property that plaintiff claimed would be adversely affected by the encroachments (*114 Cal. App. 2d 554, 557)* .

[d] Responsibility for Nuisance

Dolske v. Gormley *(1962) 58 Cal. 2d 513, 25 Cal. Rptr. 270, 375 P.2d 174* , was an action seeking injunctive relief to compel defendant to remove a fence that plaintiff claimed interfered with plaintiff's driveway easement. Defendant cross-complained, claiming that plaintiff's front porch pillar, eaves, gas meters and pipes extended over the property line and therefore encroached on defendant's property. The trial court held for defendant and issued an injunction compelling plaintiff to remove all encroachments. Plaintiff appealed to the Supreme Court.

The Court reversed the order to remove the encroachments and remanded the case for further proceedings, holding that there was no evidence that plaintiff's predecessor had constructed the encroachments negligently or willfully. Furthermore, the court found that defendant had waited eight years before seeking legal relief against the encroachments (*58 Cal. 2d 513, 520-521)* .

Christensen v. Tucker *(1952) 114 Cal. App. 2d 554, 250 P.2d 660* , is discussed in *§ 167.47[3][a]*.

[e] Disproportionate Hardships

Christensen v. Tucker *(1952) 114 Cal. App. 2d 554, 250 P.2d 660* , is discussed in *§ 167.47[3][a]*.

[f] Private Right of Eminent Domain

The facts and procedural background of ***Fairrington v. Dyke Water Co.*** *(1958) 50 Cal. 2d 198, 323 P.2d 1001* , are discussed in *§ 167.47[3][c]*. In reversing the trial court's refusal to grant an injunction compelling defendant to remove a sign it had erected on plaintiff's property, the Supreme Court noted that by balancing the conveniences in defendant's favor the trial court was in effect giving a private person the right of eminent domain over another person's property.

The facts and procedural background of ***Christensen v. Tucker*** *(1952) 114 Cal. App. 2d 554, 250 P.2d 660* , are discussed in *§ 167.47[3][a]*. In enunciating the rule that a court may refuse to enjoin a nuisance if an innocently made encroachment does not irreparably injure plaintiff and if the cost of its removal would greatly outweigh its inconvenience to plaintiff, the court acknowledged that the practical effect of this rule is, in some circumstances, to give a private person the right of eminent domain by permitting that private person to occupy property owned by another. The court also noted that a frequent justification of the rule is that granting an injunction as of right would encourage plaintiffs to engage in what amounts to legal extortion (*114 Cal. App. 2d 554, 562)* .

[4] Additional Authorities

[a] Irreparable Injury

In *Pahl v. Ribero (1961), 193 Cal. App. 2d 154, 14 Cal. Rptr. 174* , the court of appeal upheld the granting of an injunction compelling defendants to remove an overhang that was encroaching on plaintiff's property. The court ruled that refusal of the injunction would cause plaintiff irreparable injury because plaintiff's building, which had moved laterally and become misaligned due to an unknown cause, could not be straightened out unless the encroachment was removed (*193 Cal. App. 2d 154, 164)* .

[b] Responsibility for Nuisance

The facts and procedural background of *Pahl v. Ribero (1961), 193 Cal. App. 2d 154, 14 Cal. Rptr. 174* , are discussed in *§ 167.47[4][a]*. Although the court of appeal overruled the trial court's refusal of an injunction, because plaintiff's building could not be straightened out unless the encroachment by defendants was removed, the court noted that defendants were innocent of responsibility for the lateral movement that had misaligned the building, which was due to an unknown cause (*193 Cal. App. 2d 154, 164)* .

[c] Disproportionate Hardships

In *Pahl v. Ribero (1961), 193 Cal. App. 2d 154, 14 Cal. Rptr. 174* , the court of appeal upheld the granting of an injunction compelling the defendant to remove an overhang that was encroaching on plaintiff's property. The court found that the hardships of plaintiff and defendant were equal, because the cost of removal was $5,950 and the decline in market value of plaintiff's property was $5,600. Therefore, it was proper to rule in plaintiff's favor because the hardship caused defendant by the injunction was not greatly disproportionate to the hardship caused plaintiff by the nuisance (*193 Cal. App. 2d 154, 164)* .

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16-167 California Points & Authorities § 167.48

§ 167.48 Supporting Contention That Plaintiff Is Entitled to Damages for Nuisance [Civ. Code § 3484; Code Civ. Proc. § 731]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF IS ENTITLED TO RECOVER DAMAGES FOR THE NUISANCE CAUSED BY DEFENDANT.

A. Right to Damages. An action may be brought by any person whose property is injuriously affected or whose personal enjoyment is lessened by a nuisance, as defined in *Section 3479 of the Civil Code*, and by the judgment in such action the nuisance may be enjoined or abated as well as damages recovered therefor (*Code Civ. Proc. § 731*).

B. Damages Recoverable. Damages recoverable by plaintiff in a successful nuisance action for injuries to real property include diminution of land value as well as damages for annoyance, inconvenience, and discomfort (*Lew v. Superior Court (1993) 20 Cal. App. 4th 866, 874, 25 Cal. Rptr. 2d 42* ; *see also Smart v. City of Los Angeles (1980) 112 Cal. App. 3d 232, 239-240, 169 Cal. Rptr. 174*).

[*Optional*] **C. Abatement Does Not Bar Action.** Abatement of a nuisance does not prejudice the right of any person to recover damages for its past existence (*Civ. Code § 3484*).

[*Optional*] **D. Damages Without Injunction.** The injured party need not seek an abatement of the nuisance but may sue for damages (*McIvor v. Mercer-Fraser Co. (1946) 76 Cal. App. 2d 247, 254, 172 P.2d 758*).

[*Optional*] **E. Punitive Damages With Proof of Oppression or Malice.** Clear and convincing proof that an act on the part of the offender was intended to cause injury to the plaintiff, or was despicable conduct on the part of the offender carried on with a willful and conscious disregard of the rights or safety of others, or was despicable conduct by the offender that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights, proves malice and/or oppression and justifies an award of punitive damages for nuisance (*see Civ. Code § 3294(a), (c)(1), (2)*; *see also Farmy v. College Hous., Inc. (1975) 48 Cal. App. 3d 166, 181-182, 121 Cal. Rptr. 658* (decided before 1987

amendment to *Civ. Code § 3294*)].

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of plaintiff's contention that defendant is liable for damages for nuisance.

Optional Paragraph C may be used if plaintiff seeks to recover past damages for a nuisance that has been abated or enjoined. Optional Paragraph D may be used if plaintiff seeks damages without seeking an injunction. Optional Paragraph E may be used if plaintiff is seeking to recover punitive as well as consequential damages.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that defendant is liable for damages for nuisance. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. If punitive damages are sought, counsel should show that the defendant exercised his or her lawful rights either with callous disregard of the rights of another or with the knowing intention to subject a person to cruel and unjust hardship in conscious disregard of his or her rights in order to show oppression and malice.

[b] Related Pleading and Practice Forms

For discussion and forms relating to nuisance generally, see California Forms of Pleading and Practice, Ch. 391, *Nuisance* (Matthew Bender). For discussion and forms pertaining to damages in tort actions generally, see California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender).

[c] Related Memoranda

For points and authorities pertaining to tort damages generally, including exemplary damages, see Ch. 64, *Damages: Tort* .

[d] Opposing Memoranda

In an appropriate case, the points and *authorities in §§ 167.67 -167.69* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Damages Recoverable

The facts and procedural background of ***Lew v. Superior Court*** *(1993) 20 Cal. App. 4th 866, 25 Cal. Rptr. 2d 42* , are discussed in *§ 167.32[3][a]*. In denying the defendants' petition for a writ of mandate to compel the superior court to set aside its judgment awarding damages to plaintiffs, the court of appeal held that the mental suffering that was the main component of the injuries alleged by plaintiffs was compensable under a nuisance theory. Whether or not plaintiffs sustain physical injury, they may recover damages in a nuisance action not only for diminution in the market value of their property, but also for discomfort and annoyance and for mental suffering caused by fear for the safety of themselves and their families. Mental distress caused by a nuisance is an element of loss of enjoyment (*20 Cal. App. 4th 866, 873-874)* .

In ***Smart v. City of Los Angeles*** *(1980) 112 Cal. App. 3d 232, 169 Cal. Rptr. 174* , plaintiff, owner of a vacant parcel of land near defendant's airport, brought an action for inverse condemnation and nuisance. The trial court held that plaintiff's nuisance cause of action was barred by reason of federal preemption of air space regulation and entered judgment in favor of defendant. The court of appeal reversed and remanded the matter to the trial court for further proceedings consistent with the opinion.

The court of appeal, finding that the California Supreme Court had ruled that a nuisance action for airport noise was not barred by federal preemption, held that damages recoverable by plaintiff in a successful nuisance action for injuries to real property include diminution of land value as well as damages for annoyance, inconvenience, and discomfort (*112 Cal. App. 3d 232, 239-240)* .

[b] Damages Without Injunction

In ***McIvor v. Mercer-Fraser Co.*** *(1946) 76 Cal. App. 2d 247, 172 P.2d 758* , defendants excavated their property in such a way as to cause sloughing off of a portion of plaintiffs' land and created a hazardous condition for anyone using plaintiffs' garage, which was located near the edge of the pit created by defendants. Plaintiffs sued defendants, adjoining landowners, for damages based on nuisance created by violation of a city ordinance requiring permit for nonconforming uses. The trial court entered judgment for plaintiffs, and defendants appealed. The court of appeal affirmed.

The court of appeal held that violation of the provisions of the ordinance constituted an actionable wrong against each member of the community for whose particular welfare the ordinance was enacted and created a public nuisance remediable at the suit of persons specially injured thereby, as plaintiffs had shown themselves to be (*76 Cal. App. 2d 247, 253-254)* . The court of appeal stated that in view of the circumstances herein, defendants' contention that the evidence was insufficient to support the verdict and judgment was without foundation because their argument failed to take into consideration the fact that the injured party need not seek an abatement of the nuisance but may sue for damages (*76 Cal. App. 2d 247, 254)* .

[c] Punitive Damages With Proof of Oppression or Malice

Farmy v. College Hous., Inc. *(1975) 48 Cal. App. 3d 166, 121 Cal. Rptr. 658* , was an action for damages and injunction bifurcated at trial. Defendants built a 15-unit apartment building next to plaintiff's 8-unit building, separated only by an alley. Plaintiff contended that defendant's exhaust fans blew polluted air from their garage onto plaintiff's property, polluting the air as well as creating noise, and that the traffic entering defendants' garage blocked the alley entrance. The trial court granted an injunction and awarded compensatory and punitive damages. Defendants appealed only from the portion of the judgment awarding damages. The court of appeal, finding that plaintiff's introduction of evidence regarding defendants' wealth was prejudicial, tainting the award for compensatory damages, reversed the judgment.

On appeal, defendants contended that there was insufficient evidence to sustain the amount of the judgment of compensatory damages and that there was a lack of any evidence to sustain punitive damages. The court of appeal held that, since defendants did not appeal the judgment granting injunctive relief, they conceded that a nuisance for which they were responsible called for relief and admitted liability for damage (*48 Cal. App. 3d 166, 173)* . However, the court found that nothing in the evidence supported an instruction for or an award of punitive damages (*48 Cal. App. 3d 166, 183)* . The court held that the criterion for an award of punitive damages was that defendants exercised their lawful rights with callous disregard of the rights of another or with the knowing intention to subject a person to cruel and unjust hardship in conscious disregard of his or her rights (*48 Cal. App. 3d 166, 176)* . The court stated that in every case involving a continuous nuisance mere proof thereof, to the satisfaction of a court or jury by an act that on the part of the offender has the complexion of knowing harassment to the injured, may be considered for the purpose of injunctive or compensatory relief, but unless the act is motivated by a callous disregard of whether the act will affect another or result in cruel and unjust hardship there is no oppression or malice (*48 Cal. App. 3d 166, 181-182)* . The

court found that the fact that defendants at all times complied with applicable building ordinances and regulations, did not violate any zoning ordinances, that the building was not an improper improvement for the area, and that defendants had initiated procedures in good faith to meet plaintiff's complaints, showed that there was no oppression or malice (*48 Cal. App. 3d 166, 175, 177, 182-183)* . Therefore, the court directed the trial court to modify the judgment and to enter judgment on subject of punitive damages for defendants and ordered a retrial on the issue of compensatory damages (*48 Cal. App. 3d 166, 183)* .

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16-167 California Points & Authorities § 167.49

§ 167.49 Opposing Contention That Plaintiff May Bring Action for Private Nuisance [Civ. Code §§ 3479, 3481, 3501; Code Civ. Proc. § 731]--Interference With Purely Personal Right or Lack of Present Property Interest

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF MAY NOT BRING AN ACTION FOR PRIVATE NUISANCE BECAUSE _____ [THE ACTIVITY OR CONDUCT COMPLAINED OF INTERFERES WITH A PURELY PERSONAL RIGHT *or* PLAINTIFF IS A _____ (LICENSEE *or* LODGER *or* EMPLOYEE) AND THUS DOES NOT HAVE A SUFFICIENT PROPERTY RIGHT].

[*EITHER*]

Purely Personal Right. The fact that plaintiff may have suffered a personal injury or an interference with some purely personal right is not sufficient to support an action based on private nuisance; there must be an interference with the use and enjoyment of a property interest (*Venuto v. Owens-Corning Fiberglas Corp. (1971) 22 Cal. App. 3d 116, 124-125, 99 Cal. Rptr. 350*).

[*OR*]

Insufficient Property Right. The property right of a licensee, lodger, or employee is not sufficient to support an action based on a private nuisance (*Venuto v. Owens-Corning Fiberglas Corp. (1971) 22 Cal. App. 3d 116, 124-125, 99 Cal. Rptr. 350*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to plaintiff's contention that plaintiff may bring an action for nuisance because the acts or conduct complained of only interfered with a purely personal right of plaintiff, or plaintiff is a licensee, lodger, or employee and does not have a sufficient property right to support the action.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of plaintiff's right to bring a private action for nuisance. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. In support of defendant's contention that plaintiff may not bring an action for private nuisance, counsel may discuss facts showing either that only a personal right of the plaintiff is being interfered with and that there was no interference with plaintiff's use and enjoyment of a property interest, or that plaintiff was a licensee, lodger, or employee so that his or her property interest was not sufficient to support an action based on a private nuisance.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 167.20*.

[3] Discussion of Authorities

[a] Purely Personal Right

The facts and procedural background of ***Venuto v. Owens-Corning Fiberglas Corp.*** *(1971) 22 Cal. App. 3d 116, 99 Cal. Rptr. 350* , are discussed in *§ 167.20[3][a]*. The court of appeal affirmed the trial court's judgment for defendant. One of the plaintiffs claimed injury by reason of obstruction to his view. In reviewing this plaintiff's standing, the court stated that the essence of a private nuisance is an interference with the use and enjoyment of a property right and any interest sufficient to be dignified as a property right is sufficient to support an action based on a private nuisance, but the fact that plaintiff may have suffered a personal injury or have suffered an interference with some purely personal right is not sufficient to support an action based on private nuisance. The court found plaintiff's interest to be a purely personal interest and therefore held that he did not have standing to bring a nuisance action (*22 Cal. App. 3d 116, 124-125)* .

[b] Insufficient Property Interest

The facts and procedural background of ***Venuto v. Owens-Corning Fiberglas Corp.*** *(1971) 22 Cal. App. 3d 116, 99 Cal. Rptr. 350* , are discussed in *§ 167.20[3][a]*. In affirming the trial court's decision that the facts stated did not support a cause of action, the court of appeal found that the three plaintiffs claiming injury for respiratory disorders had not alleged any interference with a known property right. Therefore, the court held that their action had to rest on the determination whether or not they were entitled to bring an action based on public nuisance. The court, in dictum, stated that the essence of a private nuisance is an interference with the use and enjoyment of a property right and that any interest sufficient to be dignified as a property right is sufficient to support an action based on a private nuisance, including a tenancy for a term but not that of a licensee, lodger, or employee (*22 Cal. App. 3d 116, 124-125)* .

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16-167 California Points & Authorities § 167.50

§ 167.50 Opposing Contention That Plaintiff May Bring Private Action for Public Nuisance [Civ. Code §§ 3479, 3480, 3491, 3493; Code Civ. Proc. § 731]--No Special Injury to Plaintiff

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF MAY NOT BRING A PRIVATE ACTION FOR PUBLIC NUISANCE BECAUSE PLAINTIFF SUFFERED INJURY THAT IS MERELY DIFFERENT IN DEGREE, NOT DIFFERENT IN KIND, FROM THAT SUFFERED BY THE GENERAL PUBLIC.

Injury Merely Different in Degree and Not in Kind From Injury Suffered by General Public. A private party cannot maintain an action based on a public nuisance unless the injury suffered is different in kind and not merely in degree from that suffered by other members of the general public (*Koll-Irvine Ctr. Prop. Owners Ass'n v. County of Orange (1994) 24 Cal. App. 4th 1036, 1040, 29 Cal. Rptr. 2d 664*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to plaintiff's contention that plaintiff may bring an action for nuisance. The basis of opposition is that the nuisance alleged is a public nuisance and plaintiff has not suffered injury that is different in kind, not just degree, from that suffered by the general public.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that plaintiff cannot bring an action for public nuisance because plaintiff has not suffered injury different in kind, not merely degree, from that suffered by the general public. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of

law stated. Counsel should discuss facts showing the nature of the nuisance, the injury suffered by plaintiff, and the injury suffered by the general public.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 167.21*.

[3] Discussion of Authorities

[a] Injury Merely Different in Degree and Not in Kind From Injury Suffered by General Public

In ***Koll-Irvine Ctr. Prop. Owners Ass'n v. County of Orange*** *(1994) 24 Cal. App. 4th 1036, 29 Cal. Rptr. 2d 664* , plaintiffs were owners of commercial property in an industrial park adjacent to defendant's "Fuel Farm," which consisted of three large above-ground fuel storage tanks. Plaintiffs claimed that the Fuel Farm was a nuisance because it presented a severe risk of damage from fire and the release of toxic chemicals and that this risk caused plaintiffs extreme mental anguish and fear that their property insurance would be canceled or become unaffordable. Plaintiffs also alleged that the risk of an explosion if a plane from the nearby airport collided with the tanks had diminished the value of their property. After the trial court sustained defendant's demurrer without leave to amend, plaintiffs appealed to the court of appeal.

The court of appeal affirmed the trial court, ruling that plaintiffs' complaint failed to allege that they had suffered injury from the Fuel Farm that was different in kind from that suffered by the public, which is required for a private party to bring an action for public nuisance. The court noted that plaintiffs' complaint itself alleged that all members of the public within one-half to three miles of the Fuel Farm would be hurt in the event of an explosion. Although plaintiffs' proximity arguably exposed them to a higher degree of injury, it did not expose them to injury of a different kind altogether (*24 Cal. App. 4th 1036, 1040-1041)* .

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16-167 California Points & Authorities § 167.51

§ 167.51 Opposing Contention That Plaintiff May Bring Private Action for Public Nuisance [Civ. Code §§ 3479, 3480, 3491, 3493; Code Civ. Proc. § 731]--No Public Nuisance

[1] FORM

[*The following may be included in a memorandum or points and authorities, or in a trial or appellate brief.*]

PLAINTIFF MAY NOT BRING A PRIVATE ACTION FOR PUBLIC NUISANCE BECAUSE THE ALLEGED INJURY ONLY AFFECTS THE PLAINTIFF AND NOT THE GENERAL PUBLIC.

Nuisance Which Does Not Injure General Public Is Not Public Nuisance. A finding of public nuisance must be supported by specific evidence of injury to the general public as identified in *Civ. Code § 3479* (*Beck Dev. Co. v. Southern Pac. Transp. Co. (1996) 44 Cal. App. 4th 1160, 1209-1210, 52 Cal. Rptr. 2d 518*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a defendant's contention in a public nuisance action that the alleged nuisance complained of by plaintiff is a private nuisance rather than a public nuisance.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the alleged nuisance does not constitute a public nuisance, for example in a motion for summary judgment. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence of the nature of the alleged nuisance, and should argue that it has no effect on the general public.

[3] Discussion of Authorities

[a] Nuisance Which Does Not Injure General Public Is Not Public Nuisance

In ***Beck Dev. Co. v. Southern Pac. Transp. Co.*** *(1996) 44 Cal. App. 4th 1160, 52 Cal. Rptr. 2d 518* , a real estate developer brought a nuisance action against a prior owner for subsurface contamination. The contamination consisted of an oil reservoir which had been constructed sixty years and buried forty years prior to the lawsuit. The trial court found that the alleged contamination constituted a public nuisance. The matter proceeded to trial and a judgment was entered in favor of plaintiff.

The court of appeal reversed, finding that the contamination did not constitute a public nuisance. For something to be a public nuisance, there must be an injurious affect upon an entire neighborhood or community as identified in *Civ. Code § 3479*. However, the primary public effect in this case related to the City's loss of development fees if plaintiff were unable to use its property for residential development (*44 Cal. App. 4th 1160, 1209)* . The only other potential nuisance suggested by plaintiff was the possibility of health concerns through the possibility of exposure to the substance. However, the evidence was uncontradicted that the substance posed no risk to health through personal proximity if it is left where it is. Similarly, there was no evidence that the substance had invaded other property or the water supplies of other persons (*44 Cal. App. 4th 1160, 1210-1211)* . The court thus concluded that the plaintiff failed to meet its burden of proof that the substance had an affect on the general public.

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16-167 California Points & Authorities § 167.52

§ 167.52 Opposing Contention That Plaintiff May Bring Private Action for Public Nuisance [Civ. Code §§ 3479, 3480, 3491, 3493; Code Civ. Proc. § 731]--Award Would Interfere with Policies of a Public Commission

[1] FORM

[*The following may be included in a memorandum or points and authorities, or in a trial or appellate brief.*]

PLAINTIFF MAY NOT BRING A PRIVATE ACTION FOR PUBLIC NUISANCE BECAUSE AN AWARD OF DAMAGES ON THE BASIS ALLEGED BY PLAINTIFF WOULD INTERFERE WITH THE POLICIES OF A PUBLIC REGULATORY COMMISSION.

Superior Court Lacks Jurisdiction to Issue Judgment Which Would Interfere with Policies of a Public Commission. Superior courts lack jurisdiction to render a judgment based on a finding of nuisance if that judgment would interfere with a broad regulatory policy of a public commission (*San Diego Gas & Elec. v. Superior Court (1996) 13 Cal. 4th 893, 903, 55 Cal. Rptr. 2d 724, 920 P.2d 669*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a defendant's contention in a public nuisance action that an award for plaintiff would interfere with a regulatory policy of a public commission.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that an award would interfere with a policy of a public commission, for example in a motion for summary judgment. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law

stated. Thus, counsel should discuss evidence of a regulatory policy of a public commission, and should argue that an award in the nuisance action alleged by plaintiff would interfere with this policy.

[3] Discussion of Authorities

[a] Superior Court Lacks Jurisdiction to Issue Judgment Which Would Interfere with Policies of a Public Commission

In ***San Diego Gas & Elec. v. Superior Court*** *(1996) 13 Cal. 4th 893* , *55 Cal. Rptr. 2d 724* , *920 P.2d 669* , plaintiffs filed an action for damages and injunctive relief against a power company, alleging that an increase in the number of power lines housed by the power company in an easement adjacent to plaintiff's property dramatically increased the dangerous levels of electromagnetic radiation flowing onto plaintiff's property. The power company demurred to the complaint on the ground that the superior court lacked subject matter jurisdiction because a judgment for plaintiffs would hinder or frustrate a general regulatory policy of the Public Utilities Commission. The trial court overruled the demurrer, but on a petition for writ of mandate the court of appeal directed the trial court to enter a new order sustaining the demurrer.

On appeal, plaintiffs contended that the electromagnetic fields generated by the power lines impaired their use and enjoyment of their property because of their fear that the fields would cause them physical harm. The Supreme Court initially noted that *Pub. Util. Code § 1759* has been construed to prohibit an award of damages which would hinder or frustrate the declared supervisory and regulatory policies of the Public Utilities Commission. The court then noted that in order to award damages to plaintiffs on their nuisance theory, the trier of fact would be required to find that reasonable persons would experience a substantial fear that the fields cause physical harm, and would deem the invasion so serious that it outweighs the social utility of the power company's conduct. However, such findings would be inconsistent with a conclusion by the Public Utilities Commission that the available evidence does not support a reasonable belief that these electromagnetic fields present a substantial risk of physical harm (*13 Cal. 4th 893, 939)* . The judgment of the court of appeal was thus affirmed.

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16-167 California Points & Authorities § 167.53

§ 167.53 Opposing Contention That Activity or Conduct Constitutes a Nuisance [Civ. Code § 3479]--Activity or Conduct Not Within Statutory Definition of Nuisance [Civ. Code § 3479]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE ACTIVITY OR CONDUCT COMPLAINED OF IS NOT A NUISANCE BECAUSE IT IS NOT WITHIN THE DEFINITION OF NUISANCE IN *CIVIL CODE SECTION 3479*.

A. Facts Pleaded or Proved Must Satisfy Statutory Definition of Nuisance. The basis of a nuisance action must be found in the statute (*People v. Lim (1941) 18 Cal. 2d 872, 880-881, 118 P.2d 472*).

B. Definition of Nuisance Under *Civil Code Section 3479*. Anything that is injurious to health, including but not limited to the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, or highway, is a nuisance (*Civ. Code § 3479*).

[*Optional*] **C. Every Annoyance or Disturbance Is Not Nuisance.** The question is not whether the plaintiff has been annoyed or disturbed, but whether there has been an injury to his or her legal rights. People who live in organized communities must of necessity suffer some inconvenience and annoyance from their neighbors and must submit to annoyances consequent to the reasonable use of property by others (*Schild v. Rubin (1991) 232 Cal. App. 3d 755, 764, 283 Cal. Rptr. 533*).

[*Optional*] **D. Defective Product Is Not Nuisance.** A plaintiff cannot recover damages from the manufacturer of defective asbestos-containing building materials or other defective products under a nuisance cause of action, because nuisance cases universally concern the use or condition of property, not products, and allowing a nuisance action in this situation would convert nearly every product liability action into a nuisance claim (*City of San Diego v. United States Gypsum Co. (1994) 30 Cal. App. 4th 575, 586, 35 Cal. Rptr. 2d 876*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to plaintiff's contention that defendant is liable for nuisance if the activity or conduct complained of is not within the statutory definition of nuisance under *Civ. Code § 3479*. Optional Paragraph C may be used if the activity cited as a nuisance by plaintiff is not an injury to plaintiff's legal rights because it is a result of the reasonable use of defendant's property. Optional Paragraph D may be used if plaintiff is seeking recovery for damages caused by defective asbestos-containing building materials or other products, under a nuisance cause of action.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the existence of a nuisance. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should cite facts from supporting declarations, or the record, showing that the conduct of the opposing party fails to satisfy the requirements of *Civ. Code § 3479*.

If appropriate, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 167.23*.

[3] Discussion of Authorities

[a] Facts Pleaded or Proved Must Satisfy Statutory Definition of Nuisance

People v. Lim *(1941) 18 Cal. 2d 872, 118 P.2d 472* , was an action to restrain the continued operation of a gambling house. The complaint alleged that the operation of the gambling house constituted a public nuisance for the reason that it tends to, and does in fact, debauch and corrupt the public morals, encourage idle and dissolute habits, draws together great numbers of disorderly persons, disturbs the public peace, brings together idle persons and cultivates dissolute habits among them, and creates traffic and fire hazards, and is thereby injurious to health, indecent and offensive to the senses, and impairs the free enjoyment of life and property. The trial court sustained defendants' general and special demurrers to the complaint and denied plaintiff's motion for a temporary restraining order. Plaintiff refused to amend the complaint, and judgment was entered for defendants. On appeal, plaintiff contended that the complaint stated a proper cause of action and that it was error for the trial court to sustain the general demurrer. The Supreme Court reversed.

On appeal, the People maintained that the statutory definition of nuisance under *Civ. Code § 3479* was not exclusive and that the court was empowered by the common law to restrain gambling activities. In rejecting this contention, the Supreme Court noted that the term "nuisance" did not have a fixed content either at common law or at the present time and held that it was the proper function of the Legislature to define those breaches of public policy that are to be considered public nuisances within the control of equity and that the basis of a nuisance action must be found in the statutes rather than by reference to the common law definitions of public nuisance (*18 Cal. 2d 872, 880-881)* . In this case, the Court, finding that crowds of disorderly people who disturb the peace and obstruct the traffic may well impair the free enjoyment of life and property and give rise to the hazards designated in the *Civ. Code § 3479*, held that sufficient facts were alleged so that the court could conclude that a nuisance existed within the general statutory provisions (*18 Cal. 2d 872, 881-882)* .

[b] Every Annoyance or Disturbance Is Not Nuisance

In ***Schild v. Rubin*** *(1991) 232 Cal. App. 3d 755, 283 Cal. Rptr. 533* , the cross complainants sought damages and an

injunction against their next-door neighbors under the willful harassment statute (*Code Civ. Proc. § 527.6*). The object of the injunction was to enjoin the neighbors from playing basketball in the neighbors' yard. The cross complaint was filed after the neighbors sued the cross complainants for battery, among other theories, as a consequence of the cross complainants' having sprayed the neighbors with a garden hose. After the trial court reviewed the evidence at a hearing on the cross complainants' application for a permanent injunction, it ordered the cross defendants not to engage in basketball playing on their property of any kind, "except between 10:00 a.m. and 12:00 p.m.; between 2:30 p.m. and 5:30 p.m.; and between 7:30 p.m. and 8:30 p.m. daily." The cross defendants appealed.

The court of appeal reversed the judgment and dissolved the injunction against the cross defendants. The court concluded that the cross defendants correctly contended that substantial evidence did not support the injunction and that evidence was lacking to support all of the requisite elements of the willful harassment statute. The court found, however, that there was sufficient evidence to establish that the noise from the basketball playing penetrated the air, offended "the senses" of the cross complainants, invaded their "peace and quiet," and generally interfered with their "comfortable enjoyment of life and property." Specifically, the sounds of the basketball playing interfered with the cross complainants' ability to rest, sleep, relax, read, watch television, eat in their home and to converse in their backyard. The court concluded, however, that there was no evidence in the record that the sounds of basketball playing caused the complainants substantial emotional distress within the meaning of the harassment statute (*232 Cal. App. 3d 755, 763)* .

Although the injunction was premised on the harassment statute and not on the theory of nuisance, the cross complainants characterized the basketball playing as amounting to a nuisance and argued that a nuisance is equivalent to harassment, so the court considered whether the cross defendants' conduct constituted a nuisance. While acknowledging that excessive and inappropriate noise may under certain circumstances constitute an interference with the present enjoyment of land amounting to a nuisance, the court stated that not every activity that is offensive to the senses and interferes with the comfortable enjoyment of life is a nuisance (*232 Cal. App. 3d 755, 763-764)* . The court quoted from a South Carolina decision that stated that every annoyance or disturbance of a landowner from the use made of property by a neighbor does not constitute a nuisance. The question, the decision declared, is not whether the plaintiffs have been annoyed or disturbed, but whether there has been an injury to their legal rights. People who live in organized communities, the opinion observed, must of necessity suffer some inconvenience and annoyance from their neighbors and must submit to annoyances consequent on the reasonable use of property by others (*232 Cal. App. 3d 755, 764)* . The court held that its view of the record compelled the conclusion there was no basis for the cross complainants' characterization of the neighbors' basketball playing as a nuisance (*232 Cal. App. 3d 755, 764-765)* .

[c] Defective Product Is Not Nuisance

In ***City of San Diego v. United States Gypsum Co.*** *(1994) 30 Cal. App. 4th 575, 35 Cal. Rptr. 2d 876* , plaintiff was a city that claimed that its public buildings had been contaminated by the asbestos-containing building materials manufac tured and distributed by defendants. Plaintiff's suit against defendants contained several causes of action, including nuisance. The trial court granted defendants judgment on the pleadings for failure to state a nuisance cause of action, and plaintiffs appealed.

The court of appeal affirmed, rejecting plaintiff's argument that the broad statutory definition of nuisance provided by *Civ. Code § 3479* encompasses the release of asbestos from building materials and that the manufacturer of a defective product can be liable in nuisance because "the stream of commerce can carry pollutants every bit as effectively as a stream of water" (*30 Cal. App. 4th 575, 584-585)* . The court noted that no California decision allows recovery for a defective product under a nuisance cause of action, and that other jurisdictions have not permitted plaintiffs to recover damages for defective asbestos-containing building materials under a nuisance action. The court agreed with these other jurisdictions that nuisance cases universally concern the use or condition of property, not products, and concluded that nuisance, under plaintiff's theory, would "become a monster" devouring tort law in one gulp, would convert almost every product liability action into a nuisance claim, and would rob nuisance of any meaning at all (*30 Cal. App. 4th 575, 586)* .

NOTE:

Although agreeing that an action for past damages brought under a theory of public nuisance would be inappropriate for what is essentially a products liability action, one court of appeal has held that public entities could pursue a public nuisance action on behalf of the people seeking abatement of a nuisance, which in that particular case meant that the plaintiffs could pursue an abatement action against lead manufacturers for their role in creating the hazard of lead-based paint applied to the interiors of government buildings [*County of Santa Clara v. Atlantic Richfield Co. (2006) 137 Cal. App. 4th 292, 313, 40 Cal. Rptr. 3d 313 , review granted, depublished, 80 Cal. Rptr. 3d 629, 188 P.3d 579, 2008 Cal. LEXIS 9073 ; see § 167.35[3][c]*].

[4] Additional Authorities

[a] Facts Pleaded or Proved Must Satisfy Statutory Definition of Nuisance

In *Beck Dev. Co. v. Southern Pac. Transp. Co. (1996) 44 Cal. App. 4th 1160, 52 Cal. Rptr. 2d 518* , a real estate developer brought a nuisance action against a prior owner for subsurface contamination. The contamination consisted of an oil reservoir which had been constructed sixty years and buried forty years prior to the lawsuit. The trial court found that the alleged contamination constituted nuisance per se. The matter proceeded to trial and a judgment was entered in favor of plaintiff. The court of appeal reversed, finding no support for the holding that the oil contamination was nuisance per se. To be considered a nuisance per se the substance must be expressly declared to be a nuisance by its very existence by some applicable law. The court noted that there were multiple agencies with jurisdiction over the situation on the property, but none had taken action against the plaintiff or the property (*44 Cal. App. 4th 1160, 1207)* .

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16-167 California Points & Authorities § 167.54

§ 167.54 Opposing Contention That Activity or Conduct Constitutes a Nuisance [Civ. Code § 3479]--Actitivity or Conduct Authorized by Statute [Civ. Code § 3482]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE ACTIVITY OR CONDUCT COMPLAINED OF DOES NOT CONSTITUTE A NUISANCE BECAUSE IT IS AUTHORIZED BY STATUTE.

A. Activity or Conduct Expressly Authorized by Statute. Nothing that is done or maintained under the express authority of a statute can be deemed a nuisance (*Civ. Code § 3482*; *see Friends of H St. v. City of Sacramento (1993) 20 Cal. App. 4th 152, 159, 160, 24 Cal. Rptr. 2d 607*).

B. Contemplation by Legislature of Act Causing Injury. An activity is expressly authorized by statute if the Legislature contemplated the doing of the very act that resulted in the injury complained of by plaintiff (*Pekarek v. City of San Diego (1994) 30 Cal. App. 4th 909, 918, 36 Cal. Rptr. 2d 22*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that defendant's conduct constitutes a nuisance if the conduct complained of is authorized by statute [*see Civ. Code § 3482*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that defendant's conduct did not constitute a nuisance because the conduct complained of was authorized by statute. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of

law stated. Thus, counsel should cite the statutory provision that is alleged to authorize the conduct or activity complained of and show that the particular activity and the manner of carrying it out are expressly authorized by that statute as required by *Civ. Code § 3482*.

In an appropriate case, these points and authorities may be submitted in opposition to the points and *authorities in §§ 167.23 -167.31*.

[3] Discussion of Authorities

[a] Activity or Conduct Expressly Authorized by Statute

In ***Friends of H St. v. City of Sacramento*** *(1993) 20 Cal. App. 4th 152, 24 Cal. Rptr. 2d 607* , plaintiff was an unincorporated association comprising residents owning real property abutting on a city street. Plaintiff filed a complaint for nuisance seeking an injunction to force the city to reduce the traffic speed and volume on the street. Plaintiff claimed that the traffic substantially impaired the residents' ability to use their own driveways and caused excessive noise, emissions, and accidents that interfered with the residents' enjoyment of their property and lowered the property's value. The trial court sustained defendant city's demurrer without leave to amend. The plaintiff appealed to the court of appeal.

The court of appeal affirmed, holding that plaintiff had failed to state a cause of action because defendant's acts were authorized by statute, and *Civ. Code § 3482* bars an action for nuisance against a public entity for allegedly wrongful acts that are expressly authorized by statute (*20 Cal. App. 4th 152, 160)* . The statutes authorizing defendant's acts, such as designating the street as a through street and not restricting or rerouting traffic, include various provisions [*see, e.g., Veh. Code § 21100*] giving local governments the authority to regulate traffic and maintain and control streets within their jurisdictions (*20 Cal. App. 4th 152, 161)* . The court also noted that the California courts have consistently held that *Civ. Code § 3482* applies to alleged nuisances arising from the construction, operation, and maintenance of streets and highways (*20 Cal. App. 4th 152, 162)* .

[b] Contemplation by Legislature of Act Causing Injury

Pekarek v. City of San Diego *(1994) 30 Cal. App. 4th 909, 36 Cal. Rptr. 2d 22* , was an action brought against defendant city by plaintiff, a five-year-old child, who was struck by a van while she was running across the street. The van driver's view was obstructed by the ice cream truck from which plaintiff had just purchased ice cream. Plaintiff's suit alleged that defendant was liable for creating a nuisance by permitting ice cream trucks to operate on city streets. After plaintiff settled her claims against the van driver and the operator of the ice cream truck, defendant moved for summary judgment on the ground that a city ordinance immunized the city from liability for nuisance. The trial court granted defendant's motion, and plaintiff appealed.

The court of appeal affirmed, noting that *Civ. Code § 3482* provides that nothing done or maintained under express authority of a statute is a nuisance. The court agreed with plaintiff's argument that no immunity from liability exists under this provision unless the legislative body enacting the authorizing statute has contemplated the very act resulting in the injury claimed by plaintiff. However, the court pointed out that the language of the city ordinance authorizing the operation of ice cream trucks on city streets showed that the city council had carefully considered risks to pedestrians such as plaintiff, but nonetheless had authorized the very conduct, sales of food from vehicles on public streets, that led to plaintiff's injury (*30 Cal. App. 4th 909, 917-918)* .

[4] Additional Authorities

[a] Activity or Conduct Expressly Authorized by Statute

In *Jordan v. City of Santa Barbara (1996) 46 Cal. App. 4th 1245, 54 Cal. Rptr. 2d 340* , landowners filed an action

against various public agencies alleging that defendants' activities increased the salinity of plaintiffs' groundwater, thereby causing crop losses and reduced land value. The trial court granted judgment to defendants, concluding, among other things, that the operation of a waste treatment facility was authorized by a state permit, thus precluding liability for nuisance pursuant to *Civ. Code § 3482*, which provides that nothing done under the express authority of a statute can be deemed a nuisance. Plaintiffs contended that the permit did not specify that wastewater could be used in the way that it was. The court of appeal disagreed with plaintiffs, and affirmed the judgment. The court recognized that courts have circumscribed the exculpatory effect of to *Civ. Code § 3482* by making the statutory immunity available only where the acts complained of are authorized by the express terms of the statute or permit. However, the permit in question specified that the discharge could not contain specified substances in concentrations which would promote aquatic growths, and plaintiffs did not allege that the facility was operating in violation of this or any other standards imposed in the permit (*46 Cal. App. 4th 1245, 1258-1259)* .

In *Lombardy v. Peter Kiewit Sons' Co. (1968) 266 Cal. App. 2d 599, 72 Cal. Rptr. 240* , plaintiffs sought damages from defendant construction company on the theory that construction and operation of a freeway adjacent to their property was a nuisance due to fumes, noise, dust, shocks and vibration, and imminent hazards from foreseeable accidents and collisions. The court of appeal affirmed the trial court's sustaining of demurrers to plaintiffs' complaint and giving judgment for defendants. The court of appeal held that construction of state highways was not a nuisance under *Civ. Code § 3482* because the state constitution and various statutes expressly authorized both their construction and maintenance (*266 Cal. App. 2d 599, 605)* .

In *Larson v. Santa Clara Valley Water Conservation Dist. (1963) 218 Cal. App. 2d 515, 32 Cal. Rptr. 875* , plaintiff sought damages for personal injuries sustained while water skiing at defendant's reservoir. Defendant had released water as part of its conservation activities. Plaintiff fell and struck his head on the bottom of the reservoir where the water was shallow and murky. Finding that the evidence did not show a nuisance, the trial court granted defendant's motion for a nonsuit regarding the first count of the complaint, which alleged that the shallowness and murky condition of the water constituted a nuisance. Plaintiff appealed, and the court of appeal affirmed. In its holding, the court stated that plaintiff's nuisance contention was answered by *Civ. Code § 3482* in that the activity of releasing water from the reservoir was carried out as one of the express powers of the defendant district (*218 Cal. App. 2d 515, 526)* .

Liebman v. Richmond (1930) 103 Cal. App 354, 284 P. 731 , was an action to abate a county courthouse as a nuisance. The trial court sustained defendant supervisors' demurrer to the complaint without leave to amend. Plaintiff appealed, and the court of appeal affirmed. The court found that defendants' contention that the power to build and maintain a courthouse was vested in the defendant board by the express provisions of the statutes and that the building may not be abated as a nuisance was sound (*103 Cal. App 354, 356-357)* .

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16-167 California Points & Authorities § 167.55

§ 167.55 Opposing Contention That Activity or Conduct Constitutes a Nuisance [Civ. Code § 3479]--Obstruction of Light and Air

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE ACTIVITY OR CONDUCT COMPLAINED OF DOES NOT CONSTITUTE A NUISANCE BECAUSE IT ONLY OBSTRUCTS LIGHT AND AIR.

Mere Obstruction of Light and Air Is Not Nuisance. No structure may be considered a nuisance merely because it obstructs the passage of light and air to the building of the adjoining owner or merely because it obstructs the adjoining owner's view of neighboring property (*Ingwersen v. Barry (1897) 118 Cal. 342, 343, 50 P. 536* ; *Venuto v. Owens-Corning Fiberglas Corp. (1971) 22 Cal. App. 3d 116, 127, 99 Cal. Rptr. 350*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to plaintiff's contention that the activity or conduct complained of constitutes a nuisance because an obstruction of light or air does not constitute a nuisance pursuant to *Civ. Code § 3479*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that obstruction of light or air does not constitute a nuisance pursuant to *Civ. Code § 3479*. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel should show that defendant's activity or conduct obstructs only light or air, that there is no perceptible injury to plaintiff's property, and that if smoke emissions are involved, the emissions do not pollute the air so as to impair plaintiff's enjoyment of his or her property.

In an appropriate case, these points and authorities may be submitted in opposition to the contention that the activity or conduct complained of constitutes a nuisance pursuant to *Civ. Code § 3479*, supported by the points and *authorities in §§ 167.23* and *167.24*.

[3] Discussion of Authorities

[a] Mere Obstruction of Light and Air Is Not Nuisance

Ingwersen v. Barry *(1897) 118 Cal. 342, 50 P. 536* , was an action to abate as a nuisance a fence that was erected and stood wholly on defendant's land. Plaintiff contended that the fence was a nuisance because it interfered with the comfortable enjoyment of his property by obstructing the access of light and air to the building on his abutting premise. The trial court entered judgment for plaintiff. Defendant appealed, and the Supreme Court reversed.

The Court held that the English doctrine of "ancient lights" is not generally recognized in this country and that the fence was not a nuisance merely because it obstructed the passage of light and air to the building of the adjoining owner (*118 Cal. 342, 343)* .

The facts and procedural background of ***Venuto v. Owens-Corning Fiberglas Corp.*** *(1971) 22 Cal. App. 3d 116, 99 Cal. Rptr. 350* , are discussed in *§ 167.20[3][a]*. The court of appeal held that the plaintiff, who claimed injury by reason of obstruction to his view, had not alleged a sufficient property right to support an action based on a private nuisance because this interference was not encompassed within the definition of nuisance. The Court noted that in California, activities that disturb or prevent the comfortable enjoyment of property have been held to constitute nuisances even though they did not directly damage the land or prevent its use (*22 Cal. App. 3d 116, 126)* . It stated that although it would appear that an interference with the view from land may amount to a nuisance, the courts have held that a building or structure cannot be complained of as a nuisance merely because it obstructs the view from neighboring property. Similarly, the court noted that it has been held that a building or structure may not be complained of as a nuisance merely because it interferes with the passage of light and air to adjoining premises and stated that this rule applied equally to an obstruction or interference caused by the emission of smoke or other waste matter, provided that such emission does not otherwise constitute a nuisance (*22 Cal. App. 3d 116, 127)* . The court found that the plaintiff had alleged nothing more than an interference with his view by the emissions from defendant's plant, and that he did not allege any perceptible injury to his property. The court also found that plaintiff had not alleged that these emissions polluted the air so as to impair the enjoyment of his property. Therefore, the court held that plaintiff had not brought himself within the purview of those cases that granted relief from activities that have disturbed or prevented the comfortable enjoyment of property because they produced smoke, dust, or odors (*22 Cal. App. 3d 116, 127-128)* .

[4] Additional Authorities

[a] Mere Obstruction of Light and Air Is Not Nuisance

In *Oliver v. AT&T Wireless Servs. (1999) 76 Cal. App. 4th 521, 90 Cal. Rptr. 2d 491* , the plaintiffs were landowners who brought an action against neighboring landowners and other parties responsible for erecting a 130-foot cellular transmission tower on adjacent property. The plaintiffs alleged causes of action for nuisance and inverse condemnation. However, the only allegation in support of the plaintiffs' cause of action for nuisance was that the appearance of the tower, which they claimed "loom[ed] over" their property (even though it was only visible from within their home through one small window), interfered with the enjoyment of their own property. In upholding a summary judgment for the defendants on the plaintiffs' nuisance cause of action, the court of appeal held that the displeasing height and shape of the tower was insufficient, by itself, to support a nuisance action. In reaching this conclusion, the court noted that as a general rule, a landowner has no natural right to air, light, or an unobstructed view (*76 Cal. App. 4th 521, 534-535)* . The court then concluded that it follows from this general rule that a tower that did not obstruct the plaintiffs' view and is otherwise permitted by law could not be a nuisance merely because the size, shape, and appearance of the tower was

displeasing to the plaintiffs (*76 Cal. App. 4th 521, 535-536)* .

Sher v. Leiderman (1986) 181 Cal. App. 3d 867, 226 Cal. Rptr. 698 , was an action for nuisance brought by plaintiffs when the trees of defendants, their neighbors, grew to a point where they prevented the sunlight from reaching plaintiffs' house, which created a gloomy atmosphere and raised the cost of heating the house. The court of appeal affirmed judgment for defendants, citing precedents holding that blocking light to a neighbor's property is not an actionable nuisance unless malice is the overriding motive (*181 Cal. App. 3d 867, 875-880)* .

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16-167 California Points & Authorities § 167.56

§ 167.56 Opposing Contention That Activity or Conduct Constitutes a Nuisance [Civ. Code § 3479]--Preexisting Agricultural Activity [Civ. Code § 3482.5(a)(1)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE ACTIVITY OR CONDUCT COMPLAINED OF DOES NOT CONSTITUTE A NUISANCE BECAUSE IT IS A PREEXISTING AGRICULTURAL USE UNDER THE PROVISIONS OF SECTION 3482.5 OF THE CIVIL CODE.

A. Preexisting Agricultural Uses Are Not Nuisance. No agricultural activity, operation, or facility, or appurtenances thereof, conducted or maintained for commercial purposes, and in a manner consistent with proper and accepted customs and standards, as established and followed by similar agricultural operations in the same locality, shall be or become a nuisance, private or public, due to any changed condition in or about the locality, after the same has been in operation for more than three years if it was not a nuisance at the time it began (*Civ. Code § 3482.5(a)(1)*).

B. *Civil Code Section 3482.5* Preempts Local Regulations. The provisions of *Section 3482.5 of the Civil Code* prevail over any contrary provision of any ordinance or regulation of any city, county, city and county, or other political subdivision of the state (*Civ. Code § 3482.5(d)*).

C. Agricultural Activity Defined. For purposes of *Section 3482.5 of the Civil Code*, the term "agricultural activity, operation, or facility, or appurtenances thereof" shall include, but not be limited to, the cultivation and tillage of the soil; dairying; the production, cultivation, growing, and harvesting of any agricultural commodity including timber, viticulture, apiculture, or horticulture; the raising of livestock, fur bearing animals, fish, or poultry; and any practices performed by a farmer or on a farm as incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market, or to carriers for transportation to market (*Civ. Code § 3482.5(e)*).

D. Defense Applies to Actions Between Commercial Agricultural Entities. *Civil Code § 3482.5* applies broadly to bar a nuisance action brought by one commercial agricultural entity against another commercial agricultural entity (*Souza v. Lauppe (1997) 59 Cal. App. 4th 865, 874, 69 Cal. Rptr. 2d 494*).

E. Defense Applies to Actions Alleging Physical Invasion of Neighboring Property. *Civ. Code § 3482.5* applies even if the nuisance consists of a physical invasion of neighboring property, such as might be caused by irrigation runoff, and even if the cause of action is labeled as one for trespass (*Rancho Viejo v. Tres Amigos Viejos (2002) 100 Cal. App. 4th 550, 560-563, 123 Cal. Rptr. 2d 479*).

F. Change of Ownership of Land on Which Activity Occurs Is Irrelevant. If the offending agricultural activity has been ongoing for more than three years, the fact that ownership of the land on which the activity occurs has changed within the three-year period is irrelevant to the application of *Civ. Code § 3482.5* (*Rancho Viejo v. Tres Amigos Viejos (2002) 100 Cal. App. 4th 550, 567, 123 Cal. Rptr. 2d 479*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to plaintiff's contention that the activity or conduct complained of constitutes a nuisance when the conduct or activity involves a preexisting agricultural use that has been in operation for more than three years and therefore cannot be or become a nuisance [*see Civ. Code § 3482.5(a)(1)*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the activity or conduct complained of does not constitute a nuisance because it involves a preexisting agricultural use that has been in operation for more than three years. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel should show that defendant's activity or conduct is agricultural activity as defined in *Civ. Code § 3482.5(e)*, that the activity is conducted or maintained for commercial purposes in a manner consistent with proper and accepted customs and standards, and that the activity has been carried on for more than three years.

[b] Opposing Memoranda

In an appropriate case, these points and authorities may be submitted in opposition to the points and *authorities in §§ 167.23 -167.36*.

[3] Discussion of Authorities

[a] Defense Applies to Actions Between Commercial Agricultural Entities

Souza v. Lauppe *(1997) 59 Cal. App. 4th 865, 868, 69 Cal. Rptr. 2d 494* ; was a nuisance action between farmers of neighboring parcels, brought after plaintiffs switched from rice to row crops. Plaintiffs alleged that defendant's rice farming caused water to seep under and onto plaintiff's property, resulting in damage to the property and lost profits from plaintiff's farming operations. Defendants successfully moved for summary judgment on the ground plaintiff's action was precluded by *Civ. Code § 3482.5*. On appeal plaintiffs claimed that *Civ. Code § 3482.5* did not apply because the statue was never intended to bar an action by one farmer against another; rather, its purpose was to preclude suburban dwellers from seeking to enjoin neighboring agricultural practices. Defendants responded that the plain language of *Civ. Code § 3482.5* precluded any lawsuit which attempts to enjoin a lawful, commercial agricultural activity that meets the requisites of the statute. The court of appeal agreed with defendants' construction of the statue, holding that the statute's unambiguous language did not limit its preclusive effect to nuisance actions commenced by nonagricultural plaintiffs. Rather, the statute applied broadly to bar nuisance actions brought by one commercial agricultural entity against another commercial agricultural entity (*59 Cal. App. 4th 865, 874)* .

[b] Defense Applies to Actions Alleging Physical Invasion of Neighboring Property

In ***Rancho Viejo v. Tres Amigos Viejos*** *(2002) 100 Cal. App. 4th 550, 123 Cal. Rptr. 2d 479* , the plaintiff was a residential developer who purchased land adjacent to land that had for decades been used for growing avocados. After the plaintiff removed the orange groves on the newly-purchased property and had the property graded for building lots, which included cutting into the hills that ran along the boundary between the two properties, the plaintiff found water seepage and streams on several of the lots. This was caused by irrigation for the adjacent avocado farm, which required an unusually large amount of water because the well being used had a high salt content and less salty metropolitan water was unavailable for that particular farm. The avocado farm's owner refused to take measures to eliminate the runoff, and the plaintiff was forced to add a subdrain system to solve the problem. The plaintiff then brought suit against the avocado farm's owner, alleging causes of action for nuisance, trespass, and failure to contain irrigation water. The defendant moved for summary judgment on the grounds of the immunity provided by *Civ. Code § 3482.5*, and in response the plaintiff voluntarily dismissed the nuisance cause of action. Nonetheless, the trial court granted summary judgment for the defendant, and the plaintiff appealed.

The court of appeal affirmed. The court rejected the plaintiff's argument that the statute, by expressly limiting its protection to nuisance lawsuits, necessarily excludes other activities that cause physical damage to other property. The court pointed out that a nuisance action itself may include tangible intrusions on neighboring property. Therefore, many activities involving physical intrusions that cause actual damage to neighboring property may constitute both a nuisance and a trespass. To further the purpose of *Civ. Code § 3482.5*, which is the protection of existing agricultural activities from complaints caused by encroaching residential development, the court concluded that if commercial agricultural activity otherwise falls within the statute, a plaintiff cannot avoid the immunity defense simply by recharacterizing or relabeling the action as one for trespass (*100 Cal. App. 4th 550, 560-563)* .

[c] Change of Ownership of Land on Which Activity Occurs Is Irrelevant

The facts and procedural background of ***Rancho Viejo v. Tres Amigos Viejos*** *(2002) 100 Cal. App. 4th 550, 123 Cal. Rptr. 2d 479* , are discussed in *§ 167.56[3][b]*. The court noted that the plaintiff was the one who caused the changed condition in the locality by purchasing the adjacent lot, eliminating orange groves that had been present for at least 30 years, and excavating the cut slopes, thereby bringing the situation within the immunity of *Civ. Code § 3482.5*. The court also noted that the fact that ownership over the adjacent avocado farm had changed hands less than a year before the water seepage was discovered did not prevent application of the statutory immunity. The relevant inquiry for establishing the immunity is the duration of the offending agricultural activity, not the duration of the farmland's ownership, and the new owners had used the same farming techniques that had been used by the prior owner (*100 Cal. App. 4th 550, 567)* .

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16-167 California Points & Authorities § 167.57

§ 167.57 Opposing Contention That Activity or Conduct Constitutes a Nuisance [Civ. Code § 3479]--Activity of District Agricultural Association [Civ. Code § 3482.5(a)(2)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE ACTIVITY OR CONDUCT COMPLAINED OF DOES NOT CONSTITUTE A NUISANCE BECAUSE IT IS AN ACTIVITY OF A DISTRICT AGRICULTURAL ASSOCIATION CONDUCTED UNDER THE PROVISIONS OF SECTION 3482.5(a)(2) OF THE CIVIL CODE.

A. Activity of District Agricultural Association. No activity of a district agricultural association that is operated in compliance with *Section 3001 et seq. of the Food and Agricultural Code* shall be or become a private or public nuisance due to any changed condition in or about the locality, after it has been in operation for more than three years if it was not a nuisance at the time it began (*Civ. Code § 3482.5(a)(2)*).

B. *Civil Code Section 3482.5* Preempts Local Regulations. [*See § 167.56, Paragraph B.*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to plaintiff's contention that the activity complained of constitutes a nuisance, if the activity is conducted by a district agricultural association operated in compliance with *Food & Agric. Code § 3001 et seq.*, after it has been in operation for more than three years if it was not a nuisance at the time it began.

This exclusion does not apply to any public nuisance action brought by a city, county, or city and county, alleging that the activities, operations, or conditions of a district agricultural association have substantially changed after more than three years from the time the activities, operations, or conditions began [*Civ. Code § 3482.5(a)(2)* (provision also inapplicable to activities of 52nd Dist. Agricultural Assoc. conducted on state exposition and fair grounds)].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should refer to facts showing: (1) the date the association commenced operation; (2) that the activity was not a nuisance when it was commenced; (3) that the association has complied with Food & Agric. Code § 3000 et seq.; and (4) that operations commenced more than three years before the changed condition occurred.

[b] Opposing Memoranda

In an appropriate case, these points and authorities may be submitted in opposition to the contention that the activity complained of constitutes a nuisance because it unreasonably interferes with plaintiff's use and enjoyment of his or her property supported by the points and *authorities in §§ 167.23 -167.36*.

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16-167 California Points & Authorities § 167.58

§ 167.58 Opposing Contention That Activity or Conduct Constitutes a Nuisance [Civ. Code § 3479]--Preexisting Agricultural Processing Activity [Civ. Code § 3482.6]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE ACTIVITY OR CONDUCT COMPLAINED OF IS NOT A NUISANCE BECAUSE IT IS A PREEXISTING AGRICULTURAL PROCESSING USE UNDER THE PROVISIONS OF SECTION 3482.6 OF THE CIVIL CODE THAT HAS NOT SUBSTANTIALLY INCREASED AFTER JANUARY 1, 1993.

A. Preexisting Agricultural Processing Uses Not Nuisance. No agricultural processing activity, operation, or facility, or appurtenances thereof, shall be or become a private or public nuisance due to any changed condition in or about the locality after it has been in continuous operation for more than three years, if it is conducted or maintained for commercial purposes and according to proper and accepted customs and standards, and if it was not a nuisance at the time it began (*Civ. Code § 3482.6(a)*).

B. Substantial Increases After January 1, 1993. A nuisance action may be brought against an agricultural processing activity, operation, facility, or appurtenances thereof that has substantially increased its operations or activities after January 1, 1993, with respect to those increases in activities or operations that have a significant effect on the environment. However, for increases that have been in effect for more than three years, it is rebuttably presumed, for purposes of producing evidence, that the increase was not substantial (*Civ. Code § 3482.6(b)*).

C. *Civil Code Section 3482.6* Preempts Local Regulations. The provisions of *Civ. Code § 3482.6* prevail over any contrary provision of any ordinance or regulation of any political subdivision of the state, except regulations adopted under *Health & Safety Code § 41700* as applied to agricultural processing activities surrounded by housing or commercial development on January 1, 1993 (*Civ. Code § 3482.6(d)*).

D. *Civil Code Section 3482.6* Does Not Supersede Other Provisions Specifically Defining Activity as Nuisance.

The provisions of *Civ. Code § 3482.6* do not supersede any provision of law, other than provisions of Part Three of the Civil Code (*Civ. Code § 3479 et seq.*), if the agricultural processing activity, operation, facility, or appurtenances thereof, is a public or private nuisance as specifically defined or described in that provision (*Civ. Code § 3482.6(c)*).

E. Agricultural Processing Activity Defined. For purposes of *Civ. Code § 3482.6*, the term "agricultural activity, operation, facility, or appurtenances thereof" includes, but is not limited to, canning or freezing of agricultural products, processing of dairy products, production of bottling of beer and wine, processing of meat and egg products, drying of fruits and grains, packing and cooling of fruits and vegetables, and storage or warehousing of any agricultural products. The term includes processing of agricultural products for wholesale or retail markets (*Civ. Code § 3482.6(e)(1)*).

F. Continuous Operation Defined. For purposes of *Civil Code Section 3482.6*, the term "continuous operation" means at least 30 days of agricultural processing operations per year (*Civ. Code § 3482.6(e)(2)*).

G. Proper and Accepted Customs and Standards Defined. For purposes of *Civil Code Section 3482.6*, the term "proper and accepted customs and standards" means compliance with all applicable state and federal statutes and regulations governing operation of the agricultural processing activity, operation, or facility, or appurtenances thereof, with respect to the condition or effect alleged to be a nuisance (*Civ. Code § 3482.6(e)(3)*).

[2] Comments

CAUTION:

These points and authorities cannot be used in any litigation pending, or against any cause of action accruing, before January 1, 1993 [*Civ. Code § 3482.6(f)*].

[a] Use of Form

These points and authorities may be submitted in opposition to plaintiff's contention that the activity or facility complained of constitutes a nuisance, if the conduct or activity involves a preexisting agricultural processing use that has been in operation for more than three years and has not substantially increased its operations or activities after January 1, 1993, and therefore cannot be or become a nuisance [*see Civ. Code § 3482.6(a)*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context, such as a demurrer or motion for summary judgment [*Code Civ. Proc. §§ 430.10(e), 430.30(a), 437c*], in which counsel wishes to raise the substantive issue that the activity or conduct complained of is not a nuisance because it involves a preexisting agricultural processing use that has been in continuous operation for more than three years and that has not substantially increased its operations after January 1, 1993. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel should show that the defendant's activity or conduct fits within the definition of agricultural processing activity as defined in *Civ. Code § 3482.6(e)(1)*, that the activity is conducted or maintained for commercial purposes in a manner consistent with proper and accepted customs and standards, that the activity has been in continuous operation for more than three years, that it was not a nuisance at the time that it began, that it has not substantially increased after January 1, 1993, and that it is not a nuisance as specifically described or defined by any provision of law other than *Civ. Code § 3479 et seq.*

In an appropriate case, these points and authorities may be submitted in opposition to the contention, supported by the points and *authorities in §§ 167.23 -167.36*, that the activity or conduct complained of is a nuisance because it unreasonably interferes with plaintiff's use and enjoyment of his or her property.

[b] Related Pleading and Practice Forms

For discussion and forms relating to nuisance generally, see California Forms of Pleading and Practice, Ch. 391, *Nuisance* (Matthew Bender).

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16-167 California Points & Authorities § 167.59

§ 167.59 Opposing Contention That Activity or Conduct Constitutes a Nuisance [Civ. Code § 3479]--Not Unreasonable to Normal Person

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE ACTIVITY OR CONDUCT COMPLAINED OF IS NOT A NUISANCE BECAUSE THE ACTION IS BASED ON PERSONAL DISCOMFORT AND THE ACTIVITY OR CONDUCT IS NOT UNREASONABLE TO A NORMAL PERSON.

Not Unreasonable to Normal Person. In an action based on personal discomfort, defendant may show that other persons similarly affected by the nuisance do not complain, in order to show that only persons of unusual and abnormal sensibilities would be affected by the alleged nuisance (*McIntosh v. Brimmer (1924) 68 Cal. App. 770, 784, 230 P. 203*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to plaintiff's contention that defendant is liable for nuisance because defendant's use of his or her property is unreasonable, causing personal discomfort to plaintiff. These points and authorities may be submitted in support of defendant's contention that the activity or conduct complained of is not unreasonable to persons of ordinary sensibilities and therefore does not constitute a nuisance.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the activity or conduct complained of is not unreasonable to persons of ordinary sensibilities and therefore does not constitute a nuisance. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of

law stated. Counsel should show that only defendant's personal comfort is infringed and that the activity or conduct complained of would not be deemed unreasonable to a person of ordinary sensibilities. Counsel may wish to compare the response of others in the area to the activity or conduct complained of in order to establish that plaintiff's response is not the norm, thus establishing that the activity or conduct is not unreasonable.

In an appropriate case, these points and authorities may be submitted in opposition to the contention that defendant is liable for nuisance because defendant's use of his or her property is unreasonable, causing personal discomfort to plaintiff, supported by the points and *authorities in § 167.24*.

[3] Discussion of Authorities

[a] Not Unreasonable to Normal Person

The facts and procedural background of ***McIntosh v. Brimmer*** *(1924) 68 Cal. App. 770, 230 P. 203* , are discussed in *§ 167.24[3][a]*. The court of appeal affirmed the trial court's decision granting plaintiff damages and an injunction. The court, holding that defendant's maintenance of the chicken ranch in the manner described in the complaint was a private nuisance, ruled that the trial court did not err in sustaining an objection to a defense question regarding whether or not any of the neighbors other than plaintiff had ever complained of the dust from the chicken yard. In order to show that only persons of unusual and abnormal sensibilities would be affected by the alleged nuisance, the court held that in an action based on personal discomfort defendant may show that other persons similarly affected by the nuisance do not complain. In this case, however, the court found that injury was to plaintiff's trees and fruit, which are property (*68 Cal. App. 770, 784)* .

[4] Additional Authorities

[a] Not Unreasonable to Normal Person

Fendley v. City of Anaheim (1930) 110 Cal. App 731, 294 P. 769 , was an action for damages to properties owned and occupied by plaintiffs and for damages for personal discomfort of plaintiffs. Plaintiffs contended that defendants' operation of machinery created vibrations, noises, and shaking and jarring of their residences, causing them personal discomfort. The trial court gave judgment for defendants. Plaintiffs appealed, and the court of appeal reversed.

The court of appeal held that the operation of the gas engine, compressor, and machinery of defendants, under all the circumstances, was a private nuisance and an invasion of both plaintiffs' right in property and plaintiffs' personal right to comfortable use of their residences (*110 Cal. App 731, 736)* . In making its decision, the court noted that the law of nuisances, where personal discomfort is the ground of complaint, is only applied to normal persons, that is to persons of normal sensibilities. The court found the record in this case to be silent regarding any evidence from which a conclusion or inference could be drawn that plaintiffs were persons of other than ordinary sensibilities (*110 Cal. App 731, 735-736)* .

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16-167 California Points & Authorities § 167.60

§ 167.60 Opposing Contention That Activity or Conduct Constitutes Nuisance [Civ. Code § 3479]--Fact That Plaintiff's Own Acts Constitute Same Type of Nuisance Considered in Determination

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE FACT THAT PLAINTIFF'S OWN ACTS CONSTITUTE THE SAME TYPE OF NUISANCE AS THE ACTIVITY OR CONDUCT COMPLAINED OF MAY BE CONSIDERED IN DETERMINING WHETHER OR NOT COMPLAINED OF ACTIVITY OR CONDUCT CONSTITUTES A NUISANCE.

Plaintiff's Own Acts Constitute Same Type of Nuisance. When plaintiff's own acts create the same type of danger of which he or she is complaining, those acts may certainly be considered in determining whether or not defendant's acts actually constitute a nuisance under all the circumstances (*Carter v. Chotiner (1930) 210 Cal. 288, 291-292, 291 P. 577*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to plaintiff's contention that the activity or conduct complained of constitutes a nuisance when plaintiff's own acts constitute the same type of nuisance of which he or she complains and may be considered in determining whether or not the complained of activity or conduct constitutes a nuisance.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the activity or conduct complained of does not constitute a nuisance. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show that plaintiff is engaged in the same activity or conduct of which he or she

complains.

In an appropriate case, these points and authorities may be submitted in opposition to the contention that the activity or conduct complained of constitutes a nuisance supported by the points and *authorities in §§ 167.23 -167.33*.

[3] Discussion of Authorities

[a] Plaintiff's Own Acts Constitute Same Type of Nuisance

Carter v. Chotiner *(1930) 210 Cal. 288, 291 P. 577* , was an action to restrain and enjoin defendants from using land adjacent to plaintiffs for cemetery purposes. Plaintiffs contended that such use would constitute a nuisance because it would pollute water in wells plaintiffs used for domestic and stock purposes. The trial court, finding that maintenance of a cemetery did not constitute a nuisance, denied plaintiffs' application for an injunction prohibiting defendants from operating a cemetery. The trial court, however, did enjoin defendants from interring any bodies within a strip 40 feet wide encircling the cemetery grounds. Plaintiffs appealed. The Supreme Court affirmed.

In affirming the trial court's judgment, the Supreme Court found that the testimony showed that plaintiffs themselves maintained cesspools and toilet vaults on their own property in close proximity to the wells used for domestic purposes, and that these constituted a greater danger than the cemetery maintained by defendants (*210 Cal. 288, 291)* . The Court stated that the mere fact that others in the neighborhood are likewise maintaining a nuisance in no way excuses the defendants for their maintenance of a nuisance, but when plaintiffs' own acts create the same type of danger of which they are complaining, those acts may certainly be considered in determining whether or not defendants' acts actually constitute a nuisance under all the circumstances (*210 Cal. 288, 291-292)* . The Court held that plaintiffs' maintenance of cesspools and toilet vaults was not controlling in this case but merely one of the circumstances to be considered; the court, however, found that there was ample evidence to sustain the trial court's finding that in fact no nuisance existed (*210 Cal. 288, 292)* .

California Points & Authorities

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
CHAPTER 167 NUISANCE
PART II. FORMS

16-167 California Points & Authorities § 167.61

§ 167.61 Opposing Contention That Activity or Conduct Constitutes Nuisance [Civ. Code § 3479]--Area Expressly Zoned for Purpose [Code Civ. Proc. § 731a]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE ACTIVITY COMPLAINED OF CANNOT BE ENJOINED AS A NUISANCE BECAUSE SUCH ACTIVITY IS EXPRESSLY PERMITTED IN THE ZONE IN WHICH IT HAS TAKEN PLACE AND THERE IS NO EVIDENCE THAT DEFENDANT HAS EMPLOYED UNNECESSARY OR INJURIOUS METHODS OF OPERATION.

Area Expressly Zoned for Use. Except in an action to abate a public nuisance brought in the name of the people of the State of California, whenever any city, city and county, or county has established zones or districts under authority of law wherein certain manufacturing or commercial or airport uses are expressly permitted, no person or persons, firm, or corporation shall be enjoined or restrained by the injunctive process from the reasonable and necessary operation in any such industrial or commercial zone or airport of any use expressly permitted therein, nor shall such use be deemed a nuisance, without evidence of the employment of unnecessary and injurious methods of operation. Nothing in this act shall be deemed to apply to the regulation and working hours of canneries, fertilizing plants, refineries, and other similar establishments whose operation produce offensive odors (*Code Civ. Proc. § 731a*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to plaintiff's contention that the activity or conduct complained of constitutes a nuisance because the area is zoned for the specific use to which defendant is putting his or her property [*see Code Civ. Proc. § 731a*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the activity or conduct complained of does not constitute a nuisance because the area is zoned for the specific use to which defendant is putting his or her property. These points

and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel should discuss facts showing that the specific use to which plaintiff is putting his or her property is expressly permitted in the zone in which it is located and that the methods of operation are neither unnecessary nor injurious.

In an appropriate case, these points and authorities may be submitted in opposition to the contention that the activity or conduct complained of constitutes a nuisance supported by the points and *authorities in §§ 167.23 -167.36*.

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
CHAPTER 167 NUISANCE
PART II. FORMS

16-167 California Points & Authorities § 167.62

§ 167.62 Opposing Contention That Action for Nuisance Not Barred by Statute of Limitations--Permanent Nuisance

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF IS BARRED BY THE STATUTE OF LIMITATIONS FROM BRINGING AN ACTION FOR NUISANCE BECAUSE THE NUISANCE WAS PERMANENT AND THIS ACTION WAS COMMENCED MORE THAN _____ [2 *or* 3] YEARS AFTER THE ALLEGED CREATION OF THE NUISANCE.

A. Limitations Period as Commencing to Run at Creation of Permanent Nuisance. If a nuisance is of such character that it will presumably continue indefinitely, it is considered permanent, and the limitations period runs from the time that the nuisance is created (*Phillips v. Pasadena (1945) 27 Cal. 2d 104, 107, 162 P.2d 625*).

B. Plaintiff Is Required to Bring One Action for All Damages. In cases of a permanent nuisance, the plaintiff is required to bring one action for all past, present, and future damages within the statutory limitation period (*Spar v. Pacific Bell (1991) 235 Cal. App. 3d 1480, 1482, 1 Cal. Rptr. 2d 480*).

[*EITHER*]

C. Limitation Period for Injury to Real Property. The statute of limitations for injury to real property resulting from a permanent nuisance is three years (*Code Civ. Proc. § 338(b)*; *see* *Spar v. Pacific Bell (1991) 235 Cal. App. 3d 1480, 1485, 1 Cal. Rptr. 2d 480*).

[*OR*]

C. Limitation Period for Personal Injury or Wrongful Death. The statute of limitations for personal injury or

wrongful death is two years (one year, prior to 2003) (*Code Civ. Proc. § 335.1*; *see* former Code Civ. Proc. § 340(3); *see also California Forms of Pleading and Practice, Ch. 345, Limitation of Actions § 345.14* (Matthew Bender)).

[*CONTINUE*]

[*Optional*] **D. Opportunity for Election to Treat Nuisance as Continuing or Permanent Is Limited.** Although it has been recognized that in certain cases a plaintiff may have an election to treat a nuisance as either permanent or not, a plaintiff does not have an unbridled election in every case (*Spar v. Pacific Bell (1991) 235 Cal. App. 3d 1480, 1487, 1 Cal. Rptr. 2d 480*).

[*Optional*] **E. Permissible Election Allowed Only in "Close" Cases.** For plaintiff to be able to elect whether to treat a nuisance as continuing or permanent, the case must be a "close" one pertaining to the permanency of the encroachment (*Spar v. Pacific Bell (1991) 235 Cal. App. 3d 1480, 1487, 1 Cal. Rptr. 2d 480*).

[*Optional*] **F. Plaintiff Cannot Have Both Remedies.** Although in doubtful cases a plaintiff should have an election to treat the nuisance as either permanent or continuing, a plaintiff cannot have both remedies (*see Spaulding v. Cameron (1952) 38 Cal. 2d 265, 268, 239 P.2d 625*).

[*Optional*] **G. Abatement Alone Does Not Transform Permanent Nuisance Into Continuing Nuisance or Close Case.** The solitary fact that there is a voluntary abatement of an alleged nuisance does not necessarily transform the nuisance into a continuing nuisance or bring into play the benefit of the "close case" election (*Spar v. Pacific Bell (1991) 235 Cal. App. 3d 1480, 1486, 1 Cal. Rptr. 2d 480*).

[*Optional*] **H. Solid Structures Are Permanent in Nature.** Cases that have found the nuisance complained of to be unquestionably permanent in nature have involved solid structures (*see Spar v. Pacific Bell (1991) 235 Cal. App. 3d 1480, 1484, 1 Cal. Rptr. 2d 480*).

[*Optional*] **I. Structure Is Necessary Part of Public Utility Operations.** A clear case of a permanent nuisance is the one in which the offending structure or condition is maintained as a necessary part of the operations of a public utility (*see Spar v. Pacific Bell (1991) 235 Cal. App. 3d 1480, 1484, 1 Cal. Rptr. 2d 480*).

[*Optional*] **J. No Continuing Nuisance Without Proof That Injury Is Capable of Being Abated and That Cost of Abatement Is Reasonable.** A property owner seeking to maintain a nuisance action for damages after the three-year statute of limitations period applicable to permanent nuisances has expired, on the theory that the nuisance is continuing in nature, must present evidence that the injury is one capable of being abated and that the cost of abatement is reasonable (*Mangini v. Aerojet-Gen. Corp. (1996) 12 Cal. 4th 1087, 1104, 51 Cal. Rptr. 2d 272*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that plaintiff can bring an action for nuisance when the alleged nuisance is permanent and the action was brought either: (1) more than one year after its creation, if damages for personal injury are sought; or (2) more than three years after its creation, if damages for injury to real property are sought.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the action is barred by the statute of limitations. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show that the alleged nuisance is not a continuing one, describe the type of injury sustained, and point out that the applicable statutory period has expired.

In an appropriate case, these points and authorities may be submitted in opposition to the contention, supported by the points and *authorities in § 167.44*, that the action is not barred by the statute of limitations because it is a continuing nuisance

[3] Discussion of Authorities

[a] Limitations Period as Commencing to Run at Creation of Permanent Nuisance

Phillips v. Pasadena *(1945) 27 Cal. 2d 104, 162 P.2d 625* , was an action for nuisance caused by defendant closing and placing a locked gate across the only safe ingress and egress to plaintiff's resort. Defendant contended, inter alia, that the complaint was not filed within time required by statute. Plaintiff contended that the locked gate constituted a continuing nuisance, giving rise to separate causes of action. The trial court sustained defendant's demurrer to the complaint and dismissed the action. Plaintiff appealed, and the Supreme Court reversed.

The Court, in reversing the trial court's entry of dismissal, stated that if a nuisance is of such character that it will presumably continue indefinitely, it is considered permanent and the limitations period runs from the time the nuisance is created, but when the nuisance may be discontinued at any time, it is considered continuing and plaintiff may bring successive actions for damages until the nuisance is abated even though an action based on the original wrong may be barred (*27 Cal. 2d 104, 107-108)* . The Court held that they could not say as a matter of law that the locked gate constituted a permanent nuisance, since it appeared from the allegations in the complaint that it could have been removed at any time. Therefore, plaintiff's action was not barred (*27 Cal. 2d 104, 108)* .

[b] Plaintiff Is Required to Bring One Action for All Damages

In ***Spar v. Pacific Bell*** *(1991) 235 Cal. App. 3d 1480, 1 Cal. Rptr. 2d 480* , an investment company filed suit against a public utility for trespass and nuisance. Both theories of recovery were based on the existence of telephone lines and equipment that defendant buried under the plaintiff's property. Defendant's amended answer asserted the affirmative defenses that it had acquired the right to maintain the facilities on the property as a prescriptive easement and that the three-year statute of limitations for a permanent trespass and nuisance had run when the plaintiff filed its claim. Prior to trial, the defendant removed the facilities from the property in response to the plaintiff's demands. The trial court bifurcated the trial and considered the statute of limitations first. The trial court ruled that the elements of prescription were not established and that the plaintiff's claims were barred by the three-year statute of limitations. The plaintiff appealed.

The court of appeal affirmed the judgment. The court reviewed the legal precedents that have evolved in California jurisprudence and noted that in cases of a permanent trespass or nuisance, the damages are complete when the nuisance comes into existence and the plaintiff is required to bring one action for all past, present, and future damages within three years after the permanent nuisance/trespass has occurred (*235 Cal. App. 3d 1480, 1485)* . The court contrasted characteristics of a permanent nuisance and a continuing nuisance, citing classic examples of each (*235 Cal. App. 3d 1480, 1484-1485)* , and discussed when a plaintiff may be permitted to elect to treat a case either as permanent or a continuing nuisance (*235 Cal. App. 3d 1480, 1486-1487)* . The court concluded that because the nuisance/trespass in the case before it had characteristics that were "overwhelmingly permanent," the plaintiff should not have been allowed to elect to treat the encroachment as a continuing rather than a permanent nuisance (*235 Cal. App. 3d 1480, 1488)* .

[c] Limitation Period for Injury to Real Property

The facts and procedural background of ***Spar v. Pacific Bell*** *(1991) 235 Cal. App. 3d 1480, 1 Cal. Rptr. 2d 480* , are discussed in *§ 167.62[3][b]*. The court of appeal affirmed the trial court's judgment that the defendant's trespass/nuisance was permanent in nature and therefore barred by the three-year statute of limitation (*235 Cal. App. 3d 1480, 1482)* .

[d] Opportunity for Election to Treat Nuisance as Continuing or Permanent Is Limited

The facts and procedural background of ***Spar v. Pacific Bell*** *(1991) 235 Cal. App. 3d 1480, 1 Cal. Rptr. 2d 480* , are discussed in *§ 167.62[3][b]*. The court of appeal cited *Kornoff v. Kingsburg Cotton Oil Co. (1955) 45 Cal. 2d 265, 270-271, 288 P.2d 507* , in which the Supreme Court allowed the plaintiffs to elect to treat the defendants' operation of a cotton gin six months out of the year as a permanent nuisance, thus asking for past, present, and future damages. The court noted that there was nothing in *Kornoff* to suggest that a plaintiff has an unbridled election in every case to elect whether to treat a nuisance as permanent or continuing (*235 Cal. App. 3d 1480, 1487)* .

[e] Permissible Election Allowed Only in "Close" Cases

The facts and procedural background of ***Spar v. Pacific Bell*** *(1991) 235 Cal. App. 3d 1480, 1 Cal. Rptr. 2d 480* , are discussed in *§ 167.62[3][b]*. The court of appeal stated that the proper analysis in determining whether the plaintiff may elect to treat a nuisance as permanent or continuing appears to be that a permissible election is dependent on whether the case is a "close" one pertaining to the permanency of the encroachment. In this case, the encroachment was a telephone conduit, which was designed to have a useful life of 100 years, buried 10 feet in the earth for approximately 25 years. The court concluded that the case was not factually close (*235 Cal. App. 3d 1480, 1487)* .

[f] Plaintiff Cannot Have Both Remedies

Spaulding v. Cameron *(1952) 38 Cal. 2d 265, 239 P.2d 625* , was an action for damages and injunctive relief. Defendant removed the tops of three knolls and dumped the earth into the adjoining canyons, thereby creating fills. Plaintiff contended that this action constituted a nuisance because the fill was washed onto plaintiff's land by heavy rains causing damage. The trial court gave judgment for plaintiff. Defendant appealed, and the Supreme Court affirmed the damage award but reversed the injunctive relief.

The Court found that defendant's fill constituted a nuisance and ordered a retrial on the issue of whether the nuisance was permanent or continuing to determine what further relief should be granted (*38 Cal. 2d 265, 266, 270)* . The Court held that in doubtful cases plaintiff should have an election to treat the nuisance as either permanent or continuing, but plaintiff cannot have both remedies (*38 Cal. 2d 265, 268-270)* . The Court affirmed the past damages award and held that if the trial court found the nuisance to be permanent, it could award damages for the decrease in market value of plaintiff's property; if it found the nuisance to be continuing, it could grant injunctive relief (*38 Cal. 2d 265, 270)* .

[g] Abatement Alone Does Not Transform Permanent Nuisance Into Continuing Nuisance or Close Case

The facts and procedural background of ***Spar v. Pacific Bell*** *(1991) 235 Cal. App. 3d 1480, 1 Cal. Rptr. 2d 480* , are discussed in *§ 167.62[3][b]*. The court of appeal held that the fact that there is a voluntary abatement of an alleged nuisance does not necessarily transform the nuisance into a continuing nuisance or bring into play the benefit of the "close case" election (*235 Cal. App. 3d 1480, 1486)* .

Because the "permanent nuisance" was in fact abated before trial, it is apparent that the court considered the test to be an objective one, rather than a subjective one. The dissent commented that the majority opinion resulted in "an apparent oxymoron" of the abated "unabatable" nuisance and the impermanent "permanent" trespass, and created something of a legal anomaly. The dissent pointed out that the primary difference between a cause of action for a permanent nuisance and a cause of action for a continuing nuisance is that the former entitles the plaintiff to future damages and the latter for past injuries. Because the nuisance had been abated, there would be no future injuries to suffer and the plaintiff

could only file an action for a "continuing nuisance," which it had done. Yet, according to the dissent, the majority opinion paradoxically held that the plaintiff was limited to a cause of action for "permanent nuisance" even though that would not have been a viable cause of action once the nuisance abated. Given that the nuisance/trespass shared characteristics of both a permanent and continuing nuisance, the dissent would have allowed the election (*235 Cal. App. 3d 1480, 1494)* .

[h] Solid Structures Are Permanent in Nature

The facts and procedural background of ***Spar v. Pacific Bell*** *(1991) 235 Cal. App. 3d 1480, 1 Cal. Rptr. 2d 480* , are discussed in *§ 167.62[3][b]*. The court of appeal reviewed the legal precedents that have evolved in California jurisprudence. The court observed that cases that have found the nuisance complained of to be unquestionably permanent in nature have involved solid structures, such as a building encroaching on the plaintiff's land. The court cited as examples: concrete piers that extend across a common boundary line, a steam railroad operating on a plaintiff's land, and a buried sewer line running through a plaintiff's property (*235 Cal. App. 3d 1480, 1484)* .

[i] Structure Is Necessary Part of Public Utility Operations

The facts and procedural background of ***Spar v. Pacific Bell*** *(1991) 235 Cal. App. 3d 1480, 1 Cal. Rptr. 2d 480* , are discussed in *§ 167.62[3][b]*. The court of appeal quoted the Supreme Court's decision in *Spaulding v. Cameron (1952) 38 Cal. 2d 265, 267, 239 P.2d 625* [*see § 167.62[3][f]*], that "[t]he clearest case of a permanent nuisance is the one in which the offending structure or condition is maintained as a necessary part of the operations of a public utility" (*235 Cal. App. 3d 1480, 1484)* .

[j] No Continuing Nuisance Without Proof That Injury Is Capable of Being Abated and That Cost of Abatement Is Reasonable

In ***Mangini v. Aerojet-Gen. Corp.*** *(1996) 12 Cal. 4th 1087, 51 Cal. Rptr. 2d 272* , owners of real property brought a nuisance action against an industrial manufacturer of solid fuels who leased the property from prior owners and who had contaminated the property caused by defendant's dumping and burning of hazardous chemicals during the lease. Defendant demurred and the trial court sustained the demurrer. The court of appeal issued two opinions. In *Mangini I, Mangini v. Aerojet-Gen. Corp. (1991) 230 Cal. App. 3d 1125, 281 Cal. Rptr. 827* , the court of appeal validated plaintiffs' theory that the contamination of their property might qualify as a continuing nuisance because, although the actual dumping at the cite had ceased, toxic chemicals continued to migrate within the soil itself, causing further damage to the land. The court stated that the crucial distinction between a permanent and continuing nuisance was whether the nuisance may be discontinued or abated and concluded that, although features of the original complaint suggested plaintiffs had alleged a permanent nuisance, their proposed pleading met the test of a continuing nuisance: that the offensive condition was abatable. The case was then remanded to the superior court for trial. The jury returned a special verdict for plaintiffs. Defendant moved for judgment notwithstanding the verdict, and the trial court denied the motion. In *Mangini II*, the court of appeal held that the trial court should have granted defendant's motion for judgment notwithstanding the verdict because plaintiffs had failed to prove that the contamination was a continuing nuisance. The court of appeal concluded that plaintiffs had failed to present substantial evidence that defendant's chemical contamination of their land was capable of being abated at a reasonable cost.

The Supreme Court affirmed the judgment of the court of appeal in favor of defendant, holding that the statute of limitations barred the action because plaintiffs presented no substantial evidence of continuing nuisance (*12 Cal. 4th 1087, 1096)* . The court ruled that in order for a property owner to maintain a nuisance action for damages after the three-year statute of limitations applicable to permanent nuisances has expired, on the theory that the nuisance is continuing, the plaintiff must present evidence that the injury is one capable of being abated and that the cost of abatement is reasonable (*12 Cal. 4th 1087, 1103-1104)* . The evidence showed that contaminants were found but the extent of contamination and viability of remediation were unknown. Since the extent of contamination was uncertain, it

was also uncertain whether the nuisance was abatable (*12 Cal. 4th 1087, 1103)* . The court addressed the issue of what the term "abatable" meant and concluded that "abatable" means that the nuisance can be remedied at a reasonable cost by reasonable means (*12 Cal. 4th 1087, 1103)* . The court agreed that something less than total decontamination may suffice to show abatability, but that mere technological feasibility was insufficient. The court also stated that while cost is an appropriate factor to consider, an estimate of the cost for removing the contamination will suffice (*12 Cal. 4th 1087, 1099)* .

[4] Additional Authorities

[a] Structure Is Necessary Part of Public Utility Operations

In *Bartleson v. United States (9th Cir. 1996) 96 F.3d 1270* , plaintiffs, owners of large ranches adjacent to a military artillery range, filed a claim under the Federal Tort Claims Act against the United States seeking damages for the permanent nuisance caused by artillery shells from the facility landing on their property. The district court awarded plaintiffs damages for diminution in value, relying on a theory of permanent nuisance. The government appealed, arguing that plaintiffs should have recovered only under a theory of continuing nuisance. After initially ruling that California nuisance law governed the case, the Ninth Circuit Court of Appeal held that because the military artillery range was an instrument of the government that could not be enjoined, like a public utility, and because the shelling activities would continue, it was appropriate to treat the nuisance as permanent (*96 F.3d 1270, 1276)* .

[b] No Continuing Nuisance Without Proof That Injury Is Capable of Being Abated and That Cost of Abatement Is Reasonable

In *McCoy v. Gustafson (2009) 180 Cal. App. 4th 56, 103 Cal. Rptr. 3d 37* , the operation of a laundromat caused oil contamination of the underlying property. In 1986, the owner of adjacent real property downhill from the laundromat discovered oil seeping through her property and wrote a letter to the laundry owners complaining of the problem. In 1993, subsequent owners of the laundromat property had 560 tons of soil excavated in an effort to remedy the contamination. However, after a soil test showed that the downhill property still suffered from the oil contamination that occurred years before, the downhill property owner brought a lawsuit against the original and subsequent owner in 2002. Based primarily on the 1986 letter written by plaintiff to the original laundry owner, the trial court granted summary adjudication in favor of the defendants on the grounds that the plaintiff's claims for permanent nuisance, negligence, and permanent trespass were time-barred under the applicable three-year limitations period. Plaintiff went to trial on the theory of continuing nuisance and trespass. The jury found through special verdict that it was unknown whether the condition of plaintiff's property could have been repaired or abated by reasonable means and at a reasonable cost, but the trial court granted a motion for new trial after concluding that the jury form was confusing and ambiguous. The Court of Appeal reversed the granting of a new trial and directed entry of judgment in favor of defendants. Consistent with the jury's special verdict answers, the court agreed with defendants that plaintiff had failed to introduce evidence at trial proving that plaintiff's property could be repaired or abated at a reasonable cost by reasonable means, and this failure of proof defeated plaintiff's attempt to prove a continuing nuisance or trespass. The court noted plaintiff's attempts before and during trial to introduce expert evidence relating to the remediation that would be required, but the court concluded that this evidence was properly excluded by the trial court because the plaintiff's attorney had failed during the discovery period to properly designate experts who would provide such testimony (*180 Cal. App. 4th 56, 96-101)* . In the absence of this evidence, plaintiff's claim was one for a permanent nuisance and trespass and was barred by the three-year statute of limitations that began to run in 1986 when plaintiff became aware of the soil contamination (*180 Cal. App. 4th 56, 85-90)* .

In *Beck Dev. Co. v. Southern Pac. Transp. Co. (1996) 44 Cal. App. 4th 1160, 52 Cal. Rptr. 2d 518* , a real estate developer brought a nuisance action against a prior owner for subsurface contamination. The contamination consisted of an oil reservoir which had been constructed 60 years and buried 40 years prior to the lawsuit. Plaintiff sought to avoid the bar of *Code Civ. Proc. § 338(b)* by identifying the nuisance as continuing rather that permanent. The trial court

agreed with the plaintiff, and the matter proceeded to trial, resulting in a judgment in favor of plaintiff. The court of appeal reversed, concluding that the nuisance could not be considered continuing under the abatability test. The court referred to *Mangini v. Aerojet-Gen. Corp. (1996) 12 Cal. 4th 1087, 51 Cal. Rptr. 2d 272* , in which the Supreme Court held that "abatable" means reasonably abatable in light of the fundamental considerations that enter into the determination, such as expenses, time, and legitimate competing interests (*44 Cal. App. 4th 1160, 1220)* . The court noted that there was no evidence that the buried substances in issue was migrating to other properties or into public water supplies, or that it was injurious or offensive to persons on the property. The only detriment established was the loss in value to the developer if the property could not be used for single-family residences (*44 Cal. App. 4th 1160, 1221)* . However, total removal of the oil reservoir would not end the contamination problem, and the cost of remediation would greatly exceed the value of the land after remediation, and would far exceed the detriment that would be suffered if remediation is denied (*44 Cal. App. 4th 1160, 1221-1222)* .

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16-167 California Points & Authorities § 167.63

§ 167.63 Opposing Contention That Defendant Is Liable for Nuisance--Defendant Did Not Create Nuisance, and Notice of Nuisance or Request for Abatement Not Given to Defendant

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS NOT LIABLE FOR NUISANCE BECAUSE DEFENDANT DID NOT CREATE THE NUISANCE, AND NOTICE OF THE NUISANCE OR REQUEST FOR ABATEMENT WAS NOT GIVEN TO DEFENDANT.

Successor Not Liable in Absence of Notice of Nuisance. A successive owner of property who neglects to abate a continuing nuisance, created by a former owner, on or in the use of that property, cannot be held liable therefor if he or she does not have actual notice or knowledge of the nuisance (*Reinhard v. Lawrence Warehouse Co. (1940) 41 Cal. App. 2d 741, 746, 107 P.2d 501*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to plaintiff's contention that defendant is liable for nuisance because defendant did not create the nuisance, and notice of nuisance was not given to defendant.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that defendant is not liable for the nuisance even though he or she is a successor who neglected to abate a continuing nuisance on his or her property. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show that defendant did not create and had no notice of the nuisance on his or her property.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 167.42*.

[3] Discussion of Authorities

[a] Successor Not Liable in Absence of Notice of Nuisance

Reinhard v. Lawrence Warehouse Co. *(1940) 41 Cal. App. 2d 741, 107 P.2d 501* , was an action for damages for injuries sustained while repairing defendants' skylight. Defendant owner was a corporation composed of the children of the original owner of the building where the skylight was located, and defendant lessee was the person who hired plaintiff to repair the skylight. The trial court granted defendants' motions for a directed verdict. Plaintiff appealed, and the court of appeal affirmed.

On appeal, plaintiff sought to hold the owner of the property liable on the ground that the faulty construction of the roof was a nuisance. The court of appeal held that the evidence failed to prove a nuisance, either public or private. In holding that the owner was not liable for private nuisance, the court stated that one who was not the creator of a nuisance must have notice or knowledge of it before he can be held liable (*41 Cal. App. 2d 741, 746)* .

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16-167 California Points & Authorities § 167.64

§ 167.64 Opposing Contention That Defendant Is Liable for Nuisance--Plaintiff Consented to Activity or Conduct Complained of

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS NOT LIABLE FOR NUISANCE BECAUSE PLAINTIFF CONSENTED TO THE ACTS OR CONDUCT ALLEGEDLY CONSTITUTING THE NUISANCE.

A. Plaintiff's Consent to Defendant's Activity or Conduct as Defense to Action for Nuisance. When the owner of property consents to, acquiesces in, or even stands by and makes no suitable objection to its use, he or she cannot thereafter enjoin the continuance of such use as a nuisance or obtain damages (*see Sutro Heights Land Co. v. Merced Irrigation Dist. (1931) 211 Cal. 670, 690, 693-696, 296 P. 1088* ; *Mangini v. Aerojet-Gen. Corp. (1991) 230 Cal. App. 3d 1125, 1139, 281 Cal. Rptr. 827*).

[*Optional*] **B. Successor Owner Bound by Predecessor's Consent to Conduct of Predecessor's Lessee.** A successor owner is bound by a valid consent by a predecessor owner to the conduct of the predecessor owner's lessee, and therefore an owner who has lost the right to sue by consenting to a lessee's nuisance can pass no right to sue to a successor owner (*Mangini v. Aerojet-Gen. Corp. (1991) 230 Cal. App. 3d 1125, 1139, 281 Cal Rptr. 827*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that defendant is liable for nuisance because plaintiff has acquiesced or consented to the nuisance and is therefore barred from injunctive relief or from recovering damages. If the plaintiff is a successor to the owner who originally consented to the conduct the plaintiff is alleging to be a nuisance, counsel may use optional Paragraph B.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context

in which counsel wishes to raise the substantive issue that defendant is not liable for nuisance because plaintiff or plaintiff's predecessor has acquiesced or consented to the nuisance and plaintiff is therefore barred from injunctive relief or from recovering damages. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in §§ 167.23 -167.36*.

[3] Discussion of Authorities

[a] Plaintiff's Consent to Defendant's Activity or Conduct as Defense to Action for Nuisance

Sutro Heights Land Co. v. Merced Irrigation Dist. *(1931) 211 Cal. 670, 296 P. 1088* , was an action for injunction and damages. Plaintiffs contended that defendant's construction, maintenance, and operation of irrigation canals, permitting water to flow or seep through its canals onto plaintiffs' lands, constituted a nuisance. The trial court gave judgment for defendant. Plaintiffs appealed, and the Supreme Court affirmed.

Defendant contended that the canal system was built and operated with knowledge and acquiescence of the plaintiffs. The Supreme Court found that plaintiffs had acquiesced in the construction of defendant's canals by deeding defendant right of ways across their land for that purpose and had consented to and acquiesced in the construction of all canals. The Court, therefore, held that plaintiffs were not in a position to ask for an injunction prohibiting defendant from maintaining and operating the canals, nor to have the same abated as a nuisance (*211 Cal. 670, 690)* . As to damages, the Court found that plaintiffs were in the same position they would have been in had their land been condemned. The Court stated the rule in condemnation proceedings to be that whenever a grant of a right of way is executed by plaintiff, he or she estops himself or herself from afterwards prosecuting any action for the past, present, or future damages that may have occurred or would reasonably be expected to occur by reason of the necessary, natural, and ordinary use for which the right of way was granted. In this case, the Court found that plaintiffs had given consent to the taking of their land by the deeds granting defendant right of ways for the construction, and that all damages resulting from the seepage were the natural, necessary, and reasonable incident to the use and operation of the canal to which plaintiffs had consented. Therefore, plaintiffs were precluded from any recovery (*211 Cal. 670, 693-696)* .

However, the Supreme Court held that only damages that were the natural, necessary, and reasonable incident of acts or conduct consented to would be barred; that is, plaintiff would not be barred if the damages were beyond the scope of what would be reasonably expected to result from the activity consented to. The Court also held that damages that were the result of negligent acts or conduct would not be barred (*211 Cal. 670, 694)* .

The facts and procedural background of ***Mangini v. Aerojet-Gen. Corp.*** *(1991) 230 Cal. App. 3d 1125, 281 Cal Rptr. 827* , are discussed in *§ 167.64[3][b]*. In agreeing with defendant that consent by a landowner is a defense to a nuisance action, the court cautioned that it was not ruling that consent can impede the abatement of a public nuisance. The court noted that it limited its holding to the facts in question, which involved a claim for damages for a special injury suffered as a result of a public nuisance (*230 Cal. App. 3d 1125, 1139)* .

[b] Successor Owner Bound by Predecessor's Consent to Conduct of Predecessor's Lessee

Mangini v. Aerojet-Gen. Corp. *(1991) 230 Cal. App. 3d 1125, 281 Cal Rptr. 827* , was an action by property owners against a former lessee claiming that the former lessee had created a nuisance on the property by contaminating it with hazardous waste. In 1975, plaintiffs acquired the property from the estate of the owner who had originally leased it to defendant from 1960 to 1970. Plaintiffs eventually discovered that defendant had left millions of pounds of hazardous

substances, such as waste rocket fuel, on the property. The trial court sustained defendants' demurrer, and plaintiffs appealed to the court of appeal.

Defendant contended that it was not liable to plaintiffs for a nuisance because any disposal of hazardous waste was undertaken lawfully with the consent of plaintiffs' predecessor owners. The court of appeal agreed that a lessee may defend against a nuisance action by showing that the owner of the property consented to the lessee's use of the property by authorizing that use in the lease. The court noted that not permitting this defense could lead to absurd results. For example, if an owner leased property for the purpose of operating a quarry, it would be ludicrous to permit the owner to sue the lessee at the end of the lease term for creating the inevitable hole that was the object of the lease. The court also held that this defense applies against any successor owner. Once an original owner has lost the right to sue by authorizing the construction of a private nuisance, that original owner cannot pass any right to sue to his or her grantee (*230 Cal. App. 3d 1125, 1138-1139)* . However, the court held that the trial court should not have sustained defendant's demurrer because the language of the lease was ambiguous and extrinsic evidence was needed to determine whether the lease either authorized disposal of hazardous waste on the property or required defendant to clean up any hazard on the property before the lease terminated (*230 Cal. App. 3d 1125, 1140)* .

[4] Additional Authorities

[a] Plaintiff's Consent to Defendant's Activity or Conduct as Defense to Action for Nuisance

Churchill v. Baumann (1892) 95 Cal. 541, 30 P. 770 , was an action for damages to plaintiff's riparian and appropriated water rights, caused by defendants' diversion of water from a natural stream by building a dam across the creek above plaintiff's lands. The trial court gave judgment for defendants. Plaintiff appealed, and the Supreme Court affirmed. Defendants denied injury to plaintiff, alleging that plaintiff participated with and assisted defendants in maintaining the dam, in keeping the dam and ditch in repair, and in acting with defendants to divert water from the stream. The trial court found that plaintiff was a tenant in common with defendants in the dam and that by his participation and assistance in maintaining the dam and diverting the water, plaintiff was estopped from maintaining this action. The Supreme Court found the trial court's judgment to be justified by the finding that the acts complained of were done with plaintiff's consent (*95 Cal. 541, 546)* . The Court, in dictum, stated that consent is generally a full and perfect shield when what is complained of is a civil injury that was consented to, and plaintiff could not complain of a nuisance if he or she concurred in or countenanced its erection (*95 Cal. 541, 544)* .

In *Beck Dev. Co. v. Southern Pac. Transp. Co. (1996) 44 Cal. App. 4th 1160, 52 Cal. Rptr. 2d 518* , a real estate developer brought a nuisance action against a prior owner for subsurface contamination. The contamination consisted of an oil reservoir which had been constructed sixty years and buried forty years prior to the lawsuit. The matter proceeded to trial and a judgment was entered in favor of plaintiff. The court of appeal reversed, holding that plaintiff was barred from obtaining relief by the defense of consent as set forth in *Mangini v. Aerojet-Gen. Corp. (1991) 230 Cal. App. 3d 1125, 281 Cal. Rptr. 827* (*44 Cal. App. 4th 1160, 1214)* . When it appears that the defendant conducted a lawful activity on a landowner's property with the consent of the landowner, the landowner is precluded from pursuing a cause of action based on that activity. In this case, the defendant was the landowner when it conducted the activities, and thus it had the consent of the owner. When defendant sold the property it did so with the oil reservoir in full view and with his full knowledge of the past usage of the property. The subsequent owner acquired no right to sue defendant for private nuisance, and could pass no such right to future owners such as the plaintiff (*44 Cal. App. 4th 1160, 1216)* . The judgment for the plaintiff was thus reversed, and the case remanded with directions to enter judgment for defendant.

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
CHAPTER 167 NUISANCE
PART II. FORMS

16-167 California Points & Authorities § 167.65

§ 167.65 Opposing Contention That Nuisance Can Be Enjoined--Prospective Injury Not Probable and Imminent

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE ACTIVITY COMPLAINED OF MAY NOT BE ENJOINED BECAUSE THE INJURY IS PROSPECTIVE AND PLAINTIFF HAS NOT SHOWN THAT THE DANGER FROM SUCH ACTIVITY IS PROBABLE AND IMMINENT.

Prospective Injury Must Be Probable and Imminent. Although a prospective nuisance may be enjoined, facts must be alleged to show that the danger is probable and imminent (*Helix Land Co. v. City of San Diego (1978) 82 Cal. App. 3d 932, 950-951, 147 Cal. Rptr. 683* ; *see Nicholson v. Getchell (1892) 96 Cal. 394, 396, 31 P. 265*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to plaintiff's contention that an alleged nuisance can be enjoined when the injury is prospective and is not probable and imminent.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the activity or conduct complained of may not be enjoined because the injury is prospective and is not probable and imminent. They points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, these points and authorities may be submitted in opposition to the contention that the activity or conduct complained of can be enjoined, supported by the points and *authorities in § 167.46*.

[3] Discussion of Authorities

[a] Prospective Injury Must Be Probable and Imminent

The facts and procedural background of ***Helix Land Co. v. City of San Diego*** *(1978) 82 Cal. App. 3d 932, 147 Cal. Rptr. 683* , are discussed in *§ 167.26[3][a]*. The court of appeal found that plaintiff had not stated a cause of action for nuisance (*82 Cal. App. 3d 932, 949)* . In its holding, the court stated that a prospective nuisance may be enjoined but that facts must be alleged to show that the danger is probable and imminent (*82 Cal. App. 3d 932, 950-951)* . The court found that there was a distinct lack of factual allegations in plaintiff's complaint, from which it could be reasonably concluded that the prospective nuisance was either probable or imminent. Therefore, the court held that no cause of action was stated for equitable relief against a prospective nuisance (*82 Cal. App. 3d 932, 951)* .

Nicholson v. Getchell *(1892) 96 Cal. 394, 31 P. 265* , was an action for a mandatory injunction to prevent defendant from maintaining a breakwater that had already been built. Plaintiff alleged that the breakwater would inevitably throw water with great force onto plaintiff's bank of the creek and damage would inevitably ensue. The trial court granted defendant's demurrer to the complaint and entered judgment for defendant. Plaintiff appealed, and the Supreme Court reversed. The Court, stating that it is not necessary to show that injury is inevitable to maintain an action, held that the complaint stated facts showing that danger was probable and imminent and that therefore, the demurrer should have been overruled (*96 Cal. 394, 396)* .

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16-167 California Points & Authorities § 167.66

§ 167.66 Opposing Contention That Injunctive Relief Available to Abate Nuisance--Relative Hardships (Balance of Conveniences) Test Favors Defendant

[1] FORM

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

THE COURT SHOULD NOT ENJOIN THE NUISANCE BECAUSE THE HARDSHIP DEFENDANT WILL SUFFER IF THE INJUNCTION IS GRANTED OUTWEIGHS THE HARDSHIP PLAINTIFF WILL SUFFER IF THE INJUNCTION IS REFUSED.

A. Relative Hardships (Balance of Conveniences) Test. [*See § 167.47, Paragraph A.*]

B. Irreparable Injury. A court cannot enjoin a nuisance if granting the injunction would cause the defendant irreparable injury and refusing the injunction would not cause the plaintiff irreparable injury (*Dolske v. Gormley (1962) 58 Cal. 2d 513, 520-521, 25 Cal. Rptr. 270, 375 P.2d 174* ; *Christensen v. Tucker (1952) 114 Cal. App. 2d 554, 560, 562, 250 P.2d 660*).

C. Responsibility for Nuisance. A court cannot enjoin a nuisance if the defendant's negligence or willful acts did not cause the nuisance and if the plaintiff is responsible by delay or otherwise for the situation (*Dolske v. Gormley (1962) 58 Cal. 2d 513, 520-521, 25 Cal. Rptr. 270, 375 P.2d 174* ; *Christensen v. Tucker (1952) 114 Cal. App. 2d 554, 562-563, 250 P.2d 660*).

D. Disproportionate Hardships. A court cannot enjoin a nuisance if the hardship caused the defendant by granting the injunction is greatly disproportionate to the hardship caused the plaintiff by refusing the injunction (*Dolske v. Gormley (1962) 58 Cal. 2d 513, 520-521, 25 Cal. Rptr. 270, 375 P.2d 174* ; *Christensen v. Tucker (1952) 114 Cal. App. 2d 554, 562-563, 250 P.2d 660*).

[*Optional*] **E. Consideration of Public Interest.** In determining whether to enjoin a nuisance, the court must consider

the interests of third persons and the general public and must refuse the injunction if it will produce great public mischief (*Loma Portal Civic Club v. American Airlines, Inc. (1964) 61 Cal. 2d 582, 588, 39 Cal. Rptr. 708, 394 P.2d 548* ; *McCarty v. Macy & Co. (1959) 167 Cal. App. 2d 164, 167-168, 334 P.2d 156*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of defendant's contention that, under the relative hardships or balance of conveniences test, a nuisance should not be enjoined because granting an injunction would cause greater hardship to defendant than that caused to plaintiff by refusing the injunction. If the injunction would affect the public, counsel may use optional Paragraph E.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of whether the relative hardship tests favors the party against whom an injunction would issue. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should assert facts establishing that the defendant would suffer hardship from the granting of an injunction, and that this hardship is greater than any hardship the plaintiff would suffer if the injunction were refused. If optional Paragraph E is used, counsel should discuss facts showing that the hardship to the public from granting the injunction would outweigh the hardship to the plaintiff if the injunction were refused.

In an appropriate case, these points and authorities may be used to oppose the contention supported by the points and *authorities in § 167.47*.

[b] Related Pleading and Practice Forms

For forms and discussion regarding nuisance, see California Forms of Pleading and Practice, Ch. 391, *Nuisance* (Matthew Bender).

[3] Discussion of Authorities

[a] Irreparable Injury

The facts and procedural background of ***Dolske v. Gormley*** *(1962) 58 Cal. 2d 513, 25 Cal. Rptr. 270, 375 P.2d 174* , are discussed in *§ 167.66[3][c]*. The Court found no irreparable injury to the party seeking to enjoin an encroachment because it extended into a driveway area used as such by both parties (*58 Cal. 2d 513, 521)* .

Christensen v. Tucker *(1952) 114 Cal. App. 2d 554, 250 P.2d 660* , is discussed in *§ 167.47[3][a]*.

[b] Responsibility for Nuisance

Dolske v. Gormley *(1962) 58 Cal. 2d 513, 25 Cal. Rptr. 270, 375 P.2d 174* , is discussed in *§ 167.47[3][d]*.

Christensen v. Tucker *(1952) 114 Cal. App. 2d 554, 250 P.2d 660* , is discussed in *§ 167.47[3][a]*.

[c] Disproportionate Hardships

Dolske v. Gormley *(1962) 58 Cal. 2d 513, 25 Cal. Rptr. 270, 375 P.2d 174* , was an action seeking injunctive relief to compel defendant to remove a fence that plaintiff claimed interfered with plaintiff's driveway easement. Defendant

cross-complained, claiming that plaintiff's front porch pillar, eaves, gas meters, and pipes extended over the property line into that driveway and therefore encroached on defendant's property. The trial court held for defendant and issued an injunction compelling plaintiff to remove all encroachments. Plaintiff appealed to the Supreme Court.

The Court reversed the order to remove the encroachments and remanded the case for further proceedings, holding that the cost of removal would be disproportionate to any damage caused if they were left in place. The Court took notice of the fact that removal would not only be expensive but would disfigure defendant's house. In contrast, plaintiff was suffering little or nominal inconvenience or damage from the encroachments (*58 Cal. 2d 513, 521)* .

Christensen v. Tucker *(1952) 114 Cal. App. 2d 554, 250 P.2d 660* , is discussed in *§ 167.47[3][a]*.

[d] Consideration of Public Interest

Loma Portal Civic Club v. American Airlines, Inc. *(1964) 61 Cal. 2d 582, 39 Cal. Rptr. 708, 394 P.2d 548* , was an action brought by owners of property located near a San Diego airport to enjoin certain flight operations because of noise, vibration, and the fear caused by the low-level flying of jets taking off and landing. The trial court refused to grant an injunction, and plaintiffs appealed to the Supreme Court.

The Court upheld the refusal of the injunction as proper, ruling that any determination regarding the availability and appropriateness of injunctive relief must take into account the interests of third persons and the public. The Court found that flight operations at the airport not only provided benefits to the people of San Diego and the state of California, but also furthered the national interest in commerce, transportation, and defense. The Court cited state and federal statutes indicating a policy not to enjoin airport uses unless they are being carried out in an unnecessary and injurious manner. The Court concluded that this overriding public interest required denial of injunctive relief (*61 Cal. 2d 582, 588-589, 594)* .

In ***McCarty v. Macy & Co.*** *(1959) 167 Cal. App. 2d 164, 334 P.2d 156* , property owners living near a grain mill sought to enjoin operation of the mill because of noise and dust. The trial court refused to grant an injunction. Plaintiffs appealed to the court of appeal.

The court of appeal affirmed, ruling that the benefit to plaintiffs from an injunction would be slight compared to the injury to the general welfare caused by restricting the operation of legitimate businesses.. The court noted that ruling otherwise would prohibit railroads from operating near residences and would prevent the establishment of factories that were not located on prohibitively large areas of property (*167 Cal. App. 2d 164, 167-168)* .

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PART II. FORMS

16-167 California Points & Authorities § 167.67

§ 167.67 Opposing Contention That Plaintiff Is Entitled to Damages for Nuisance--Full Recovery Barred by Comparative Negligence

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS NOT LIABLE FOR ALL DAMAGES CAUSED BY NUISANCE BECAUSE PLAINTIFF IS GUILTY OF CONTRIBUTORY NEGLIGENCE, AND THEREFORE HIS/HER RECOVERY IS DIMINISHED UNDER THE DOCTRINE OF COMPARATIVE NEGLIGENCE.

Comparative Negligence Can Bar Full Recovery for Damages for Nuisance. At least when a nuisance is caused by negligence, comparative negligence principles can reduce the damages recoverable by a plaintiff whose negligence contributed to his or her injury (*Tint v. Sanborn (1989) 211 Cal. App. 3d 1225, 1234, 259 Cal. Rptr. 902* ; *see Curtis v. Kastner (1934) 220 Cal. 185, 191, 30 P.2d 26* ; *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 808, 119 Cal. Rptr. 858, 532 P.2d 1226*).

[2] Comments

CAUTION:

No case has yet applied comparative negligence principles to nuisance actions that are based on intentional conduct, or that are based on strict liability in cases involving ultrahazardous activities [*see Tint v. Sanborn (1989) 211 Cal. App. 3d 1225, 1233-1234, 1234 n.3, 259 Cal. Rptr. 902* (limiting holding to case in which nuisance was at least arguably created negligently)].

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that defendant is liable for damages for injuries to plaintiff caused by defendant's maintenance of a nuisance when plaintiff is guilty of comparative negligence.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context

in which counsel wishes to raise the substantive issue that defendant is not fully liable for damages for injuries to plaintiff caused by defendant's maintenance of a nuisance, based on the fact that plaintiff is guilty of comparative negligence. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that plaintiff's injury was caused or contributed to by his or her own failure to exercise due care.

[3] Discussion of Authorities

[a] Comparative Negligence Can Bar Full Recovery for Damages for Nuisance

In ***Curtis v. Kastner*** *(1934) 220 Cal. 185, 30 P.2d 26* , plaintiff sought damages for injuries caused by striking her head against a projecting rafter of defendant's garage. The trial court found plaintiff's injuries to be proximately caused by her negligence and failure to exercise ordinary care for her own safety, thus barring her recovery. Plaintiff appealed, and the Supreme Court affirmed.

The Court found that the obstruction that caused plaintiff's injuries was per se a wrongful encroachment on a public street. The Court, however, held that whether nuisance has its origin in negligence or is absolute and exists without regard to negligent acts or omissions of the defendant, one who sustains injury by reason of his or her own failure to exercise due care, as plaintiff, cannot recover (*220 Cal. 185, 191)* .

NOTE:

Curtis was decided before *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 808, 119 Cal. Rptr. 858, 532 P.2d 1226* , in which the California Supreme Court adopted the doctrine of comparative negligence. *Li* was an action for damages based on negligence. Defendants contended that plaintiff was contributorily negligent and therefore barred from recovery. The trial court found for defendants. Plaintiff appealed, and the Supreme Court reversed. The Court held that the doctrine of contributory negligence, which bars all recovery when the plaintiff's negligent conduct has contributed as a legal cause in any degree to the harm suffered by him or her, must give way to a system of comparative negligence, which assesses liability in direct proportion to fault. In light of the Supreme Court's holding in *Li*, the rule stated in *Curtis* that a person who sustains injury by reason of his or her own failure to exercise due care cannot recover, is probably no longer applicable to nuisance actions.

Tint v. Sanborn *(1989) 211 Cal. App. 3d 1225, 259 Cal. Rptr. 902* , involved an action for nuisance alleging that trees growing on defendant's property damaged plaintiff by reducing the value of plaintiff's property, allegedly in violation of a recorded declaration of restrictions and a municipal ordinance. The complaint did not allege that the nuisance was negligently created, but defendant included in his answer an affirmative defense of comparative negligence, and the trial court gave (on defendant's request) a comparative negligence instruction. The jury awarded damages to plaintiff, who appealed on the ground that it was error to give a comparative negligence instruction. The court of appeal affirmed.

The court held that, although the complaint did not allege negligence, the answer's affirmative defense was sufficient to raise the issue of comparative negligence (*211 Cal. App. 3d 1225,1230)* . The court rejected plaintiff's contention that comparative negligence can never be raised in, or be relevant to, a nuisance action. Instead, the court relied on the rationale used in *Curtis v. Kastner (1934) 220 Cal. 185, 30 P.2d 26* , and the breadth of the discussion in *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226* , as well as treatises and out-of-state authority, to conclude that, at least in a case in which the defendant claims that any nuisance was negligently caused, the jury may be instructed on comparative fault principles (*211 Cal. App. 3d 1225, 1232-1234)* .

NOTE:

In *Tint v. Sanborn*, the court expressly declined to decide whether comparative fault principles could

properly be applied to a nuisance that all concede arose from intentional or reckless conduct, or an ultrahazardous activity to which strict liability would be applied. This issue parallels an issue in negligence law generally--that is, whether or not comparative negligence applies in a case in which the party arguing that another party's negligence should reduce that party's recovery of damages when the action is based on a theory other than negligence [*see, e.g.,* *Daly v. General Motors Corp. (1978) 20 Cal. 3d 725, 742, 144 Cal. Rptr. 380, 575 P.2d 1162* (award based on strict products liability reduced by percentage of negligent plaintiff's fault); *Sorenson v. Allred (1980) 112 Cal. App. 3d 717, 722* , *169 Cal. Rptr. 441* (award based on "willful misconduct," defined by court as synonymous with recklessness, reduced by percentage of negligent plaintiff's fault); *see generally* Levy, Golden & Sacks, California Torts, Ch. 4 (Matthew Bender)].

[4] Additional Authorities

[a] Comparative Negligence as Bar to Full Recovery for Damages for Nuisance

Calder v. San Francisco (1942) 50 Cal. App. 2d 837, 123 P.2d 897 , was an action for damages against defendant for personal injuries sustained when plaintiff fell in the driveway leading to a private garage in the basement of one of defendant's buildings. Plaintiff contended that defendant's construction and maintenance of a depressed area for driveway purposes next to a public sidewalk constituted a public nuisance. Defendant denied the allegations and affirmatively alleged that plaintiff was guilty of contributory negligence. The trial court instructed the jury on the issues of nuisance, negligence, and contributory negligence. Judgment on a jury verdict was entered for defendant. Plaintiff appealed, and the court of appeal affirmed.

On appeal, plaintiff attacked the instructions given by the trial court. In evaluating plaintiff's contentions, the court of appeal noted the relationship between negligence and nuisance. The court stated that while nuisance and liability for injuries, occasioned thereby, may exist without negligence, they are frequently coexisting and in many instances, nuisance, especially with respect to buildings or premises, presupposes negligence. The court then stated that when a claim of liability is predicated on either the theory of nuisance or the theory of negligence, the defense of contributory negligence is available to the defendant (*50 Cal. App. 2d 837, 839)* . The court, noting that under certain circumstances stock instructions regarding negligence would constitute prejudicial error, held that there was no prejudicial error in the giving of the challenged instructions because the major test on the question of nuisance in a case like this is the factor of reasonableness and, for all practical purposes, the same factor of reasonableness is the major factor in test on the question of negligence; therefore, a finding by the jury of nuisance would have necessarily presupposed a finding of negligence on the part of the defendant (*50 Cal. App. 2d 837, 840)* .

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16-167 California Points & Authorities § 167.68

§ 167.68 Opposing Contention That Plaintiff Is Entitled to Damages for Nuisance--Injury Not Present, Real, or Ascertainable

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS NOT LIABLE FOR DAMAGES FOR NUISANCE WHEN THE INJURIES ALLEGED ARE POTENTIAL AND FUTURE INJURIES ARISING FROM THE THREAT OF NUISANCE AND ARE NOT PRESENT, REAL, OR ASCERTAINABLE.

Damages Only Recoverable for Present, Real, or Ascertainable Injuries. Plaintiff cannot recover damages for potential and future injuries arising from the threat of nuisance. The injuries must be present, real, and ascertainable (*see Jordan v. City of Santa Barbara (1996) 46 Cal. App. 4th 1245, 54 Cal. Rptr. 2d 340* ; *Helix Land Co. v. City of San Diego (1978) 82 Cal. App. 3d 932, 950, 147 Cal. Rptr. 683*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to plaintiff's contention that defendant is liable for damages for nuisance when the alleged damages are not present, real, or ascertainable.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that defendant is not liable for damages for nuisance when the alleged damages are not present, real, or ascertainable. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Damages Only Recoverable for Present, Real, or Ascertainable Injuries

In ***Jordan v. City of Santa Barbara*** *(1996) 46 Cal. App. 4th 1245, 54 Cal. Rptr. 2d 340* , landowners filed an action against various public agencies alleging that defendants' activities increased the salinity of plaintiffs' groundwater, thereby causing crop losses and reduced land value. The trial court granted judgment to defendants, on the grounds that the evidence did not prove that the alleged conduct caused damage or a cognizable nuisance. The court of appeal affirmed, stating that damage or injury has long been considered an essential element of a cause of action for nuisance, and that an action for private nuisance cannot be maintained for an interference in the use and enjoyment of land caused solely by the fear of future injury (*46 Cal. App. 4th 1245, 1257)* . The court found that substantial evidence supported that plaintiffs' property values were not diminished due to any actions by defendants, and that plaintiffs had suffered no actual harm or interference with the use of their properties (*46 Cal. App. 4th 1245, 1261)* .

The facts and procedural background of ***Helix Land Co. v. City of San Diego*** *(1978) 82 Cal. App. 3d 932, 147 Cal. Rptr. 683* , are discussed in *§ 167.27[3][a]*. The plaintiffs contended that due to actions and inactions on the part of defendants in preventing completion of a flood control channel, plaintiffs' property was subjected to greater threat of flooding and possible subjection to raw and untreated sewage and other chemicals and substances injurious to the health of plaintiffs and to their lands. In affirming the trial court's judgment, the court of appeal held that the landowners' complaint did not state a cause of action for nuisance (*82 Cal. App. 3d 932, 949)* . The court stated that an essential element of a cause of action for nuisance is damage or injury. The court found that Helix's injuries were not present, real, or ascertainable and held that he could not recover damages for potential and future injuries arising from the threat of nuisance (*82 Cal. App. 3d 932, 950)* .

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16-167 California Points & Authorities § 167.69

§ 167.69 Opposing Contention That Plaintiff Is Entitled to Damages for Nuisance--Plaintiff May Not Obtain Both Injunctive Relief and Depreciation or Other Future Damages

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Identify party, e.g.,* PLAINTIFF] SHOULD NOT BE AWARDED FUTURE DAMAGES, BECAUSE THE INJUNCTIVE RELIEF SOUGHT WILL, IF GRANTED, TERMINATE THE NUISANCE FOR THE FUTURE. ANY DAMAGES AWARDED WOULD THEREFORE CONSTITUTE A DOUBLE RECOVERY.

A. Plaintiff Should Not Receive Both Abatement and Future Damages. It is well established that if the plaintiff receives an injunction against the defendant that requires the defendant to abate the nuisance, the plaintiff can recover past and present damages, but not future damages, since the abatement order will terminate the nuisance for the future (*Alexander v. McKnight (1992) 7 Cal. App. 4th 973, 979, 9 Cal. Rptr. 2d 453*).

B. Plaintiff Should Not Be Unjustly Enriched. A plaintiff obtains a double recovery if he or she is permitted to recover for depreciation in value and also have the cause of that depreciation removed (*Spaulding v. Cameron (1952) 38 Cal. 2d 265, 269, 239 P.2d 625* ; *Alexander v. McKnight (1992) 7 Cal. App. 4th 973, 978, 9 Cal. Rptr. 2d 453*).

C. Presumption That Defendant Will Comply With Valid Order. When considering whether a party may recover for economic loss as a consequence of a nuisance, the court must presume that the party will comply with the terms of a valid court order (*Alexander v. McKnight (1992) 7 Cal. App. 4th 973, 978, 9 Cal. Rptr. 2d 453*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a plaintiff's contention that he or she should recover future damages as a consequence of a nuisance. The basis for the opposition is that an award of future damages would unjustly enrich the plaintiff, because injunctive relief sought by the plaintiff, ordering the abatement of the cause of the

future damages, would terminate the nuisance for the future.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 167.48*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that defendant is not liable for future damages for nuisance. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, if this form were to be used in an appellant's brief contending that the trial court erred in awarding both future damages and permanent injunctive relief, counsel would: (1) identify the behavior found by the trial court to reduce the value of plaintiff's property; (2) refer to the trial court's order abating that behavior; (3) argue that, based on the necessary presumption that a defendant will comply with the terms of a valid court order, the problem has been corrected by equitable relief and plaintiff will therefore incur no future loss; and (4) conclude that the award of damages would permit the plaintiff to be unjustly enriched and should therefore be reversed.

[3] Discussion of Authorities

[a] Plaintiff Should Not Receive Both Abatement and Future Damages

In ***Alexander v. McKnight*** *(1992) 7 Cal. App. 4th 973, 9 Cal. Rptr. 2d 453* , the plaintiffs filed an action seeking equitable relief and damages, alleging that defendants violated a declaration of restrictions by engaging in various activities that were nuisances. The trial court agreed, finding the defendants' behavior constituted a pattern of offensive and noxious activities, ordering them to remove a structure, and enjoining them from other specified activity. The trial court also determined that because Civ. Code § 1106.6 required the plaintiffs to disclose to potential buyers that the defendants were "difficult neighbors" the value of their respective properties would be reduced by a total of $24,000 and therefore included that sum in its $28,000 award of damages. The defendants appealed.

The court of appeal modified the judgment to reduce the damage award from $28,000 to $4,000, and remanded the case for further proceedings for the limited purpose of allowing the trial court to include any damages because of emotional distress, if any, in its decision. The court of appeal stated that it is well established that if a plaintiff receives an injunction against a defendant that requires the defendant to abate the nuisance, the plaintiff can recover past and present damages, but not future damages, because the abatement order will terminate the nuisance for the future. The court observed that, assuming the defendants comply with the equitable terms of the judgment, the neighborhood problems will be resolved and the plaintiffs will suffer no damages. Further, the plaintiffs are not being denied an effective remedy or deprived of damages that they have actually suffered. At the time of the trial none of the plaintiffs' houses were on the market, and if at some future time the defendants fail to comply with the judgment or insist on finding other ways to offend their neighbors, the plaintiffs will be able to enforce the existing judgment through contempt proceedings or obtain appropriate relief, including damages, by filing new actions alleging what the defendants have done and why they are entitled to redress (*7 Cal. App. 4th 973, 978-979)* .

[b] Plaintiff Should Not Be Unjustly Enriched

Spaulding v. Cameron *(1952) 38 Cal. 2d 265, 239 P.2d 625* , involved an action for damages and for injunctive relief by a homeowner against a neighbor because of leveling operations that the neighbor was conducting on his property. As a result of those operations, a large quantity of mud was washed down a canyon by heavy rains. The mud surrounded the plaintiff's house and inundated her garage. The trial court ordered the defendant to build protective structures to prevent future mudslides and also awarded damages for diminution in value due to the continuing threat of future mudslides.

The Supreme Court reversed the judgment. The Court stated that the plaintiff would obtain a double recovery if she could recover for the depreciation in value and also have the cause of that depreciation removed. The Court reasoned that if the defendant obeys the injunction and takes measures that will prevent the property of the plaintiff from being endangered or threatened by the existence of deposits of loose dirt, there will no longer be a threat to depreciate the value of the property (*38 Cal. 2d 265, 269)* .

The facts and procedural background of ***Alexander v. McKnight*** *(1992) 7 Cal. App. 4th 973, 9 Cal. Rptr. 2d 453* , are discussed in *§ 167.69[3][a]*. The court of appeal stated that problems corrected through equitable relief may not be compensated through an award of damages. To hold otherwise, the court concluded, permits a plaintiff to be unjustly enriched, receiving financial compensation when there is no compensable loss (*7 Cal. App. 4th 973, 978)* .

[c] Presumption That Defendant Will Comply With Valid Order

The facts and procedural background of ***Alexander v. McKnight*** *(1992) 7 Cal. App. 4th 973, 9 Cal. Rptr. 2d 453* , are discussed in *§ 167.69[3][a]*. The court of appeal reversed the depreciation component of a damages award because the trial court had ordered abatement of the behavior giving rise to those damages. The court stated that the trial court omitted in its calculus of damages to be awarded the presumption that necessarily must accompany a valid court order, that is, a party will comply with its terms (*7 Cal. App. 4th 973, 978)* .

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
CHAPTER 167 NUISANCE
PART II. FORMS

16-167 California Points & Authorities § 167.70

§ 167.70 Opposing Contention That Plaintiff Is Entitled to Damages for Nuisance--Damages Not Recoverable for Diminution in Value for Continuing and Abatable Nuisance

[1] FORM

[*The following may be included in a memorandum or points and authorities, or in a trial or appellate brief.*]

PLAINTIFF MAY NOT RECOVER DAMAGES FOR DIMINUTION OF VALUE OF PROPERTY CAUSED BY A CONTINUING BUT ABATABLE NUISANCE.

A. Damages Not Recoverable for Diminution in Value Caused by Continuing and Abatable Nuisance. California law does not recognize a recovery for diminution in value to property as a result of a continuing and abatable nuisance (*Santa Fe Partnership v. ARCO Prods. Co. (1996) 46 Cal. App. 4th 967, 973, 54 Cal. Rptr. 2d 214*).

[*Optional*] **B. Interest Rate Differential Damages Caused by Inability to Refinance Not Permitted.** If the presence of a continuing nuisance impairs a real property owner's ability to obtain refinancing on the land, plaintiff cannot recover as damages for a continuing nuisance the difference in interest paid under the original loan and what would have been paid had plaintiff been able to obtain refinancing at a lower rate, as such damages are effectively a component of damages for diminution in value of the land and would be available only in an action for a permanent nuisance (*Gehr v. Baker Hughes Oil Field Operations, Inc. (2008) 165 Cal. App. 4th 660, 670-671, 81 Cal. Rptr. 3d 219*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a plaintiff's contention in a nuisance action that plaintiff is entitled to recover for the diminution in value to property as a result of a continuing and abatable nuisance.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context

in which counsel wishes to raise the issue that no recovery is allowed for the diminution in value to property as a result of a continuing and abatable nuisance. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Opposing Memoranda

If appropriate, the points and *authorities in § 167.48* may be used to oppose these points and authorities.

[3] Discussion of Authorities

[a] Damages Not Recoverable for Diminution in Value Caused by Continuing and Abatable Nuisance

In ***Santa Fe Partnership v. ARCO Prods. Co.*** *(1996) 46 Cal. App. 4th 967, 54 Cal. Rptr. 2d 214* , property owners brought an action for nuisance against the prior owner of their property seeking damages for the diminution in value of their property due to continuing nuisance. When defendant owned the property it had underground gasoline storage tanks on the property. The tanks leaked into the soil and groundwater, and were subsequently removed. Defendant then began continuing remedial efforts to clean up the contamination. Plaintiffs acknowledged that they had not suffered any costs of abatement because defendant continued to remediate the contamination on the property. However, plaintiffs claimed damages for postcleanup stigma damages to the property. Plaintiffs stipulated to a defense judgment in order to immediately seek review to request an extension of the law which would entitle them to recover damages for diminution in value on a theory of continuing nuisance.

The court of appeal affirmed the judgment, holding that under current California law, damages for diminution in value are not recoverable for a continuing and abatable nuisance. The court based its decision on the holding in *Spaulding v. Cameron (1952) 38 Cal. 2d 265, 239 P.2d 625* , that a plaintiff-landowner cannot recover damages for future or prospective harm, including damages for diminution in value, in a case where the nuisance is deemed to be continuing and abatable (*46 Cal. App. 4th 967, 975)* . The court concluded that as an intermediate appellate court it was bound to follow and apply the decisions of the highest court which expressly disallowed prospective damages in cases of continuing nuisance (*46 Cal. App. 4th 967, 978)* .

[b] Interest Rate Differential Damages Caused by Inability to Refinance Not Permitted

In ***Gehr v. Baker Hughes Oil Field Operations, Inc.*** *(2008) 165 Cal. App. 4th 660, 81 Cal. Rptr. 3d 219* , plaintiff was unable to obtain refinancing on real property due to soil contamination caused by the previous owner. Because the time period for filing a claim for a permanent nuisance had expired, plaintiff sued the previous owner for a continuing nuisance and sought to recover the difference in interest paid under the original loan and what would have been paid in interest had plaintiff been able to obtain refinancing at a lower rate. The trial court granted summary judgment for defendant on the grounds that plaintiff was attempting to recover damages for what was essentially a decline in property value, which could only be recovered in an action for a permanent nuisance. Plaintiff appealed.

The court of appeal affirmed. The court noted that plaintiff's inability to encumber the property with a new trust deed, the only loss alleged, was not a physical injury to the property the type of which is normally the focus of an action for a continuing nuisance (*165 Cal. App. 4th 660, 668)* . The court agreed with the trial court that plaintiff could not recover damages for interest rate differential in an action for a continuing nuisance. The court concluded that the interest rate differential damages were effectively a component of damages for diminution in value of the land and as such would be available only in an action for a permanent nuisance (*165 Cal. App. 4th 660, 670-671)* .

California Points & Authorities

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CHAPTER 168 PARTIES

16-168 California Points & Authorities 168.syn

§ 168.syn Synopsis to Chapter 168: PARTIES

§ 168.01 Scope of Chapter

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§ 168.04 Procedure

[1] Plaintiff Seeking Joinder of New Party

[2] Defendant Objecting to Misjoinder of Parties

[3] Defendant Objecting to Nonjoinder of Party Required to Be Joined Under Code Civ. Proc. § 389(a)

[4] Omitted Party Seeking to Join Pending Action

[5] Statute of Limitations

§ 168.05 Related Pleading and Practice Chapters

§ 168.06 Related Points and Authorities Chapters

§§ 168.07-168.29 [Reserved]

§ 168.30 Supporting Contention That Joinder of Person as Plaintiff Is Proper [Code Civ. Proc. § 378(a)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Statutory Authority

[b] Liberal Construction

[c] Extent of Interest Required

[4] Additional Authorities

[a] Statutory Authority

§ 168.31 Supporting Contention That Joinder of Person as Plaintiff Is Proper [Code Civ. Proc. § 378(a)]--Multiple Plaintiffs Suing Same Tortfeasor for Personal Injuries

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Multiple Plaintiffs Suing Same Tortfeasor for Personal Injuries

§ 168.32 Supporting Contention That Joinder of Person as Plaintiff Is Proper [Code Civ. Proc. § 378(a)]--Multiple Plaintiffs in Action Against Same Tortfeasor Involving Injury to Property

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Multiple Plaintiffs in Action Against Same Tortfeasor Involving Injury to Property

§ 168.33 Supporting Contention That Joinder of Person as Plaintiff Is Proper [Code Civ. Proc. § 378(a)]--Multiple Plaintiffs Seeking Damages Based on Single Scheme of Misrepresentation, Fraud, or Conspiracy

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Multiple Plaintiffs Seeking Damages Based on Single Scheme of Misrepresentation, Fraud, or Conspiracy

§ 168.34 Supporting Contention That Joinder of Person as Plaintiff Is Proper [Code Civ. Proc. § 378(a)]--Multiple Taxpayers Challenging Validity of Assessment or Seeking Recovery of Taxes Paid

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Multiple Taxpayers Challenging Validity of Assessment

[b] Multiple Taxpayers Seeking Recovery of Taxes Paid

§ 168.35 Supporting Contention That Joinder of Person as Plaintiff Is Proper [Code Civ. Proc. § 378(a)]--Receiver of Corporation in Suit by Corporation to Recover Corporate Property

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Receiver of Corporation

§ 168.36 Supporting Contention That Joinder of Person as Plaintiff Is Proper [Code Civ. Proc. § 378(a)]--Purchaser of Securities Sold by Defendant in Violation of Securities Laws

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Purchaser of Securities

§ 168.37 Supporting Contention That Joinder of Person as Plaintiff Is Proper [Code Civ. Proc. § 378(a)]--Multiple Plaintiffs Suing for Injuries From Ongoing Incident of Industrial Contamination

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Multiple Plaintiffs Suing for Ongoing Industrial Contamination

§ 168.38 Opposing Contention That Joinder of Person as Plaintiff Is Proper [Code Civ. Proc. § 378(a)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Statutory Requirements Not Met

§ 168.39 Supporting Contention That Joinder of Person as Defendant Is Proper [Code Civ. Proc. § 379(a)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Statutory Authority

[b] Liberal Construction

[c] Extent of Interest Required

§ 168.40 Supporting Contention That Joinder of Person as Defendant Is Proper [Code Civ. Proc. § 379(a)]--Guarantor of Debtor as Proper Party

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Guarantor of Debtor as Proper Party

§ 168.41 Supporting Contention That Joinder of Person as Defendant Is Proper [Code Civ. Proc. § 379(a)]--Surety as Proper Party in Action Against Principal for Acts Covered by Suretyship Agreement

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Surety of Principal as Proper Party

[4] Additional Authorities

[a] Surety of Principal as Proper Party

§ 168.42 Supporting Contention That Joinder of Person as Defendant Is Proper [Code Civ. Proc. § 379(a)]--Insurer

as Proper Party When Policy Benefits Run Directly to Plaintiff

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Insurer as Proper Party

[b] Multiple Insurers

[4] Additional Authorities

[a] Insurer as Proper Party

§ 168.43 Supporting Contention That Joinder of Person as Defendant Is Proper [Code Civ. Proc. § 379(a),(c)]--Joint, Concurrent, or Successive Tortfeasors

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Joint, Concurrent, or Successive Tortfeasors

[b] When Plaintiff in Doubt as to Liability

[c] Liability Based on Negligence

[4] Additional Authorities

[a] Joint, Concurrent, or Successive Tortfeasors

[b] When Plaintiff in Doubt as to Liability

§ 168.44 Opposing Contention That Joinder of Person as Defendant Is Proper [Code Civ. Proc. § 379]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Statutory Requirements Not Met

[b] Failure to Allege That Plaintiff Is in Doubt as to Liability of Defendants

§ 168.45 Supporting Contention That Omitted Party Is Required to Be Joined Under Code Civ. Proc. § 389(a)--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] In Absence of Omitted Party, Complete Relief Cannot Be Granted to Existing Parties

[b] Disposition of Action in Omitted Party's Absence Will Impair His or Her Ability to Protect Interest in Subject of Action

[c] Disposition of Action in Absence of Omitted Party Will Leave Existing Parties Subject to Risk of Double, Multiple, or Inconsistent Obligations

[4] Additional Authorities

[a] In Absence of Omitted Party, Complete Relief Cannot Be Granted to Existing Parties

[b] Disposition of Action in Omitted Party's Absence Will Impair His or Her Ability to Protect Interest in Subject of Action

[c] Disposition of Action in Absence of Omitted Party Will Leave Existing Parties Subject to Risk of Double, Multiple, or Inconsistent Obligations

§ 168.46 Supporting Contention That Omitted Party Is Required to Be Joined Under Code Civ. Proc. §

389(a)--Partial Assignee or Subrogee

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Partial Assignees or Subrogees Required to Be Joined

[4] Additional Authorities

[a] Partial Assignees or Subrogees Required to Be Joined

§ 168.47 Supporting Contention That Omitted Party Is Required to Be Joined Under Code Civ. Proc. § 389(a)--Corporation Required to Be Joined in Shareholder's Derivative Suit Brought on Its Behalf

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Shareholder's Derivative Action on Behalf of Corporation

§ 168.48 Opposing Contention That Omitted Party Is Required to Be Joined Under Code Civ. Proc. § 389(a)

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Joinder Not Required When Neither Omitted Party nor Existing Parties Substantially Prejudiced by Absence of

Omitted Party

[b] The Complete Relief Clause of Code of Civil Procedure 389(a) Does Not Mandate That, Whenever Feasible, Persons Materially Interested in the Subject of an Action Should Be Joined

[4] Additional Authorities

[a] Statutory Requirements Not Met

[b] Joinder Not Required When Neither Omitted Party nor Existing Parties Substantially Prejudiced by Absence of Omitted Party

§ 168.49 Supporting Contention That Action Must Be Dismissed Without Prejudice Because Omitted Party Described in Code Civ. Proc. § 389(a) Cannot Be Joined [Code Civ. Proc. § 389(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] When a Party Is Indispensable

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Omitted Party Not Subject to Court's Process

[b] Joinder of Omitted Party Would Deprive Court of Jurisdiction Over Subject Matter

§ 168.50 Opposing Contention That Action Must Be Dismissed Without Prejudice Because Omitted Party Described in Code Civ. Proc. § 389(a) Cannot Be Joined [Code Civ. Proc. § 389(b)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] When Court Can Proceed If Joinder Not Feasible

[b] Time When Indispensability Tested

[c] Court Can Proceed in Absence of Necessary or Proper Parties

[4] Additional Authorities

[a] When Court Can Proceed If Joinder Not Feasible

[b] Time When Indispensability Tested

[c] Court Can Proceed in Absence of Necessary or Proper Parties

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CHAPTER 168 PARTIES
PART I. INTRODUCTION

16-168 California Points & Authorities § 168.01

§ 168.01 Scope of Chapter

This chapter contains points and authorities relating to permissive and compulsory joinder of parties. It contains points and authorities supporting [*see §§ 168.30 -168.37*] and opposing § 168.38 the contention that a particular person is a proper plaintiff under *Code Civ. Proc. § 378*, as well as points and authorities supporting [*see §§ 168.39 -168.43*] and opposing § 168.44 the contention that a particular person is a proper defendant under *Code Civ. Proc. § 379*. The chapter also contains points and authorities supporting [*see §§ 168.45 -168.47*] and opposing § 168.48 the contention that a particular person is required to be joined under *Code Civ. Proc. § 389(a)* and points and authorities supporting § 168.49 and opposing § 168.50 dismissal of an action for failure to join a party required to be joined under *Code Civ. Proc. § 389(a)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureParties JoinderGeneral OverviewCivil ProcedureParties JoinderCompulsory JoinderCivil ProcedureParties JoinderPermissive Joinder

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16-168 California Points & Authorities § 168.02

§ 168.02 Governing Statutes

Permissive joinder of plaintiffs is governed by *Code Civ. Proc. § 378*. Permissive joinder of defendants is governed by *Code Civ. Proc. § 379*. Compulsory joinder is governed by *Code Civ. Proc. § 389*. Joinder of persons having an interest in real or personal property that is the subject of an action between others to determine conflicting claims to the property is governed by *Code Civ. Proc. § 389.5*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesJoinderCompulsory JoinderCivil ProcedurePartiesJoinderNecessary PartiesCivil ProcedurePartiesJoinderPermissive Joinder

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16-168 California Points & Authorities § 168.03

§ 168.03 Use of Federal Authority

The statutes governing joinder of parties were substantially revised in 1971 [*see* Stats. 1971, chs. 244, 950] to conform to *Fed. R. Civ. P., Rules 19* and *20* [*see* 10 Cal. L. Rev. Comm. Reports 500, 515-517, 534-540]. Federal cases may therefore be useful as a guide in interpreting the amended joinder statutes [*see People ex rel Lungren v. Community Redevelopment Agency (1997) 56 Cal. App. 4th 868, 875, 65 Cal. Rptr. 2d 786* (as revised, *Code Civ. Proc. § 389* conforms substantially to *Fed. R. Civ. P., Rule 19* and cases relating to the federal rules are relevant); *Conrad v. Unemployment Ins. Appeals Bd. (1975) 47 Cal. App. 3d 237, 241, 120 Cal. Rptr. 803* (appropriate to use federal precedents as guide to application of *Code Civ. Proc. § 389*)]. Some federal cases are cited in this chapter as authority in the forms relating to compulsory joinder of parties under *Code Civ. Proc. § 389(a)*; counsel may wish to consult these and other federal cases in support of their arguments when a particular issue has not been decided under the revised statutes by the California courts.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsGeneral OverviewCivil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesJoinderCompulsory JoinderCivil ProcedurePartiesJoinderNecessary PartiesCivil ProcedurePartiesJoinderPermissive Joinder

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16-168 California Points & Authorities § 168.04

§ 168.04 Procedure

[1] Plaintiff Seeking Joinder of New Party

A plaintiff may join additional parties as plaintiffs or defendants in his or her original complaint or cross complaint [*see Code Civ. Proc. §§ 378, 379, 389*]. After the complaint has been filed, plaintiff may amend the complaint as a matter of course at any time before the answer or demurrer is filed or after demurrer and before trial of the issue of law thereon [*see Code Civ. Proc. § 472*]. Thereafter, the plaintiff may seek leave of the court to amend the pleading to add a new party [*see Code Civ. Proc. § 473*]. For points and authorities pertaining to amendments to pleadings generally, see Ch. 16, *Amended and Supplemental Pleadings* .

If the omitted party is one who is required to be joined under *Code Civ. Proc. § 389(a)*, the court must, if joinder is feasible, permit plaintiff to amend the complaint to add the new party [*see De La Beckwith v. Superior Court (1905) 146 Cal. 496, 498, 80 P. 717* ; *Conrad v. Unemployment Ins. Appeals Bd. (1975) 47 Cal. App. 3d 237, 241, 120 Cal. Rptr. 803]* .

[2] Defendant Objecting to Misjoinder of Parties

A defendant may object to the complaint on the ground of misjoinder of parties by demurrer, if the ground of objection appears on the face of the complaint or from any matter of which the court must or may take judicial notice [*see Code Civ. Proc. §§ 430.10(d), 430.30(a)*]. If the ground of objection does not appear on the face of the complaint, the objection should be taken by answer [*see Code Civ. Proc. § 430.30(b)*]. The objection is waived unless it is raised by demurrer or answer [*see Code Civ. Proc. § 430.80(a)*].

[3] Defendant Objecting to Nonjoinder of Party Required to Be Joined Under Code Civ. Proc. § 389(a)

Defendant may also raise the issue of defect (nonjoinder) of parties by demurrer or answer [*see Code Civ. Proc. §§ 430.10(d), 430.30*]. Normally, when a defendant fails to object to the pleading, either by demurrer or answer, he or she is deemed to have waived the objection unless it is an objection that the court has no jurisdiction of the subject of the cause of action alleged in the pleading or an objection that the pleading does not state facts sufficient to constitute a cause of action [*Code Civ. Proc. § 430.80(a)*]. Some early cases stated that the failure to join a party required to be

joined under *Code Civ. Proc. § 389* is a "jurisdictional" defect, implying that such a defect is not waived by failure to object to the complaint and can be raised for the first time on appeal [*see, e.g., Bank of California v. Superior Court (1940) 16 Cal. 2d 516, 522, 106 P.2d 879]* . This is apparently not the rule under *Code Civ. Proc. § 389*, as amended in 1971 [*see Kraus v. Willow Park Public Golf Course (1977) 73 Cal. App. 3d 354, 364-365, 140 Cal. Rptr. 744* ; *see also* 10 Cal. L. Rev. Comm. Reports 500, 535-536; *but see Welch v. Bodeman (1986) 176 Cal. App. 3d 833, 840, 222 Cal. Rptr. 435* (relying on case law decided prior to effective date of 1971 amendment to *Code Civ. Proc. § 389*, and holding that a trial court can be said to lack subject matter jurisdiction when the absence of a truly indispensable party precludes the court from rendering effective judgment between the parties before it)]. Thus, failure to raise the issue of nonjoinder of such a party in a timely fashion before the trial court may result in waiver of the defect, at least when the action does not adversely affect the interests of the absent party [*see Kraus v. Willow Park Public Golf Course (1977) 73 Cal. App. 3d 354, 369-370, 140 Cal. Rptr. 744]* .

If the court finds that the nonparty is required to be joined under *Code Civ. Proc. § 389(a)*, the action should not be dismissed on the demurrer; instead, the missing party should be joined, if joinder is feasible [*see Code Civ. Proc. § 389(a)*; *Conrad v. Unemployment Ins. Appeals Bd. (1975) 47 Cal. App. 3d 237, 241, 120 Cal. Rptr. 803]* . If the person cannot be made a party, the court must determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed [*see Code Civ. Proc. § 389(b)*; *see also §§ 168.49, 168.50*].

[4] Omitted Party Seeking to Join Pending Action

Ordinarily, *Code Civ. Proc. § 389* is invoked by an existing party to a pending action. However, an omitted party may also seek an order under *Code Civ. Proc. § 389* joining him or her as a new party by filing a noticed motion [*see Cuneo v. Superior Court (1963) 213 Cal. App. 2d 452, 454-456, 28 Cal. Rptr. 791]* . If the action is for recovery of real or personal property, or to determine conflicting claims thereto, an omitted party who has an interest in the subject of the action may also apply under *Code Civ. Proc. § 389.5* for an order that he or she be made a party to the action.

Alternatively, an omitted party may seek to join a pending action through intervention under *Code Civ. Proc. § 387*. For points and authorities pertaining to intervention, see Ch. 124, *Intervention* in this publication.

Should none of the foregoing steps be taken to join the unnamed party and the unnamed party nevertheless voluntarily intrudes into the lawsuit, the party, by the intrusion, has consented to the jurisdiction of the court over it and is bound by any adjudication made in the case [*California Concrete Co. v. Beverly Hills Savings & Loan Assn. (1989) 215 Cal. App. 3d 260, 267-268, 261 Cal. Rptr. 484]* .

[5] Statute of Limitations

When an additional party plaintiff, joining in a suit brought before the statute of limitations has run against the original plaintiff, seeks to enforce an independent right, the amended pleading does not relate back so as to render substitution permissible or to preclude the defense of the statute of limitations [*Basin Construction Corp. v. Department of Water & Power (1988) 199 Cal. App. 3d 819, 826, 245 Cal. Rptr. 178]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of CourtCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePartiesJoinderCompulsory JoinderCivil ProcedurePartiesJoinderNecessary PartiesCivil ProcedurePartiesJoinderPermissive Joinder

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16-168 California Points & Authorities § 168.05

§ 168.05 Related Pleading and Practice Chapters

For a discussion and forms pertaining to joinder of parties and intervention, see Ch. 395, *Parties* in California Forms of Pleading and Practice. For discussion and forms relating to answers, complaints, and demurrers, see California Forms of Pleading and Practice, Ch. 26, *Answers* ; Ch. 123, *Complaints and Cross Complaints* ; and Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , respectively (Matthew Bender). For discussion of abatement of actions, see California Forms of Pleading and Practice, Ch. 3, *Abatement of Actions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionGeneral OverviewCivil ProcedurePartiesInterventionMotions to InterveneCivil ProcedurePartiesJoinderCompulsory JoinderCivil ProcedurePartiesJoinderNecessary PartiesCivil ProcedurePartiesJoinderPermissive Joinder

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16-168 California Points & Authorities § 168.06

§ 168.06 Related Points and Authorities Chapters

Points and authorities supporting and opposing a motion for leave to amend a complaint to add a new party may be *found in Ch. 16, Amended and Supplemental Pleadings, § 16.30* et seq. Points and authorities supporting and opposing a demurrer to a complaint on the grounds of defect or misjoinder of parties may be *found in Ch. 71, Demurrers and Motions for Judgment on the Pleadings, § 71.20* et seq. Points and authorities supporting a motion for a separate trial of the issue of defect or misjoinder of parties may be *found in Ch. 10, Abatement and Survival of Actions, § 10.30* et seq.

For memoranda of points and authorities relating to intervention, see Ch. 124, *Intervention* . For points and authorities pertaining to class actions and shareholder's derivative actions, see Ch. 41, *Class and Representative Actions* and Ch. 52, *Corporations* , Pt. V, respectively.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPartiesJoinderCompulsory JoinderCivil ProceduresPartiesJoinderNecessary PartiesCivil ProceduresPartiesJoinderPermissive JoinderCivil ProceduresPretrial JudgmentsJudgment on the PleadingsCivil ProceduresPretrial MattersSeparate Trials

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16-168 California Points & Authorities §§ 168.07-168.29

[Reserved]

§§ 168.07[Reserved]

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16-168 California Points & Authorities § 168.30

§ 168.30 Supporting Contention That Joinder of Person as Plaintiff Is Proper [Code Civ. Proc. § 378(a)]--General Form

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Name*] MAY PROPERLY BE JOINED IN THIS ACTION AS A PLAINTIFF BECAUSE HE/SHE/IT HAS _____ [A RIGHT TO RELIEF _____ (JOINTLY *or* SEVERALLY *or* IN THE ALTERNATIVE) ARISING OUT OF THE SAME _____ (TRANSACTION OR OCCURRENCE *or* SERIES OF TRANSACTIONS OR OCCURRENCES) AND THERE EXISTS A COMMON QUESTION OF LAW OR FACT *and/or* A RIGHT, CLAIM, OR INTEREST ADVERSE TO DEFENDANT IN THE _____ (PROPERTY *or* CONTROVERSY) THAT IS THE SUBJECT OF THE ACTION BEFORE THE COURT].

A. Statutory Authority. Persons may join in an action as plaintiffs if (1) they assert a right to relief jointly, severally, or in the alternative, arising out of the same transaction or occurrence or series of transactions or occurrences, and any common question of law or fact will arise in the action, or (2) they have a claim, right, or interest adverse to the defendant in the property or controversy which is the subject of the action (*Code Civ. Proc. § 378(a)*).

B. Liberal Construction. *Section 378 of the Code of Civil Procedure*, authorizing joinder of plaintiffs in one action containing several causes of action arising out of identical or related transactions and involving common issues, should be liberally construed, to permit joinder whenever possible in furtherance of the statute (*see Coleman v. Twin Coast Newspaper, Inc. (1959) 175 Cal. App. 2d 650, 653, 346 P.2d 488*).

[*Optional*] **C. Extent of Interest Required.** It is not necessary that each plaintiff be interested as to every cause of action or as to all relief prayed for. Judgment may be given for one or more plaintiffs according to their respective rights to relief (*Code Civ. Proc. § 378(b)*).

[*Add additional points and authorities, if appropriate, pertaining to specific reasons why joinder of the particular*

person as a plaintiff is proper (see, e.g., §§ 168.31 -168.36).]

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that a person may properly be joined as a plaintiff under the provisions of *Code Civ. Proc. § 378*, which govern permissive joinder of plaintiffs.

This form sets forth the general point that joinder of plaintiffs is proper when all the parties (1) can assert the same right to relief jointly, severally, or in the alternative, in respect of or arising out of the same transaction or occurrence or series of transactions or occurrences, and there will arise in the action questions of law and fact common to all; or (2) have a claim, right, or interest adverse to the defendant in the property or controversy which is the subject of the action [*Code Civ. Proc. § 378(a)*]. The form may be used either to support the contention that a new plaintiff may properly be joined in the action before the court, or to respond to the objection, by answer or demurrer, to the joinder of plaintiffs in the original complaint.

Paragraph B should be included in the points and authorities to support the contention that the statute permitting joinder should be liberally construed in furtherance of the objectives of the statute. The optional Paragraph C may be included when the complaint contains multiple causes of action and the party whose joinder is at issue is not interested in every cause of action of relief prayed for [*Code Civ. Proc. § 378(b)*].

The foregoing points and authorities may be combined with points and authorities relating to the specific procedural context in which the issue of joinder of parties arises. For example, the argument supported by the foregoing memorandum may be made by a plaintiff in support of a motion for leave to amend his or her complaint to add a new plaintiff or in opposition to a demurrer to the complaint on the ground of misjoinder of plaintiffs. The points and authorities set out in this form may also be adapted for use in a trial or appellate brief.

For a discussion of procedures for obtaining or objecting to joinder of parties, see *§ 168.04*.

If appropriate, counsel should add further points and authorities relating to specific reasons why the person whose joinder is at issue is a proper plaintiff under *Code Civ. Proc. § 378* [*see, e.g., §§ 168.31 -168.36*].

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing that all existing or prospective plaintiffs assert a right to relief arising out of the same transaction or occurrence or series of transactions or occurrences. Counsel should also discuss any common questions of law or fact that will arise in the action.

[b] Related Pleading and Practice Forms

For discussion, forms, and procedures relating to joinder of parties in an action, see Ch. 395, *Parties* in California Forms of Pleading and Practice (Matthew Bender).

[c] Related Points and Authorities

For points and authorities supporting a motion for leave to amend a complaint to add a new plaintiff, see Ch. 16, *Amended and Supplemental Pleadings* .

For points and authorities relating to cross complaints generally, see Ch. 61, *Cross Complaints* .

For points and authorities opposing a demurrer to a complaint for misjoinder of plaintiffs, see Ch. 71, *Demurrers and*

Motions for Judgment on the Pleadings .

[d] Opposing Points and Authorities

The points and authorities *set out in § 168.38* may be used in an appropriate case to oppose the contention that joinder of plaintiffs is proper on grounds supported by the foregoing memorandum.

[3] Discussion of Authorities

[a] Statutory Authority

Code Civ. Proc. § 378(a), governing permissive joinder of plaintiffs, provides that all persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative, in respect of or arising out of the same transaction or occurrence or series of transactions or occurrences, and if any question of law or fact common to all these persons will arise in the action [*see Code Civ. Proc. § 378(a)(1)*]; or they have a claim, right, or interest adverse to the defendant in the property or controversy which is the subject of the action [*see Code Civ. Proc. § 378(a)(2)*].

This statute was amended in 1971 to its present form. The Legislative Committee Comment to the 1971 amendment states that *Code Civ. Proc. § 378* continues the substance of former California law governing permissive joinder of plaintiffs contained in former Code Civ. Proc. § 378, as well as those portions of former Code Civ. Proc. §§ 381, 383, and 384 under which joinder of plaintiffs was formerly permitted. The Legislative Committee Comment also states that subdivision (a)(1) is phrased in substantial conformity with FRCP, Rule 20(a), which governs permissive joinder of plaintiffs in federal actions. Under the federal rule, as well as under *Code Civ. Proc. § 378*, the Comment further states, the broadest sort of joinder is permitted.

According to the Legislative Committee Comment, Paragraph (2) of *Code Civ. Proc. § 378(a)*, which provides that joinder is proper when a person has a claim, right, or interest adverse to the defendant in the property or controversy which is the subject of the action, is not needed to expand the broad scope of permissive joinder under the transaction clause of subdivision (a)(1) of the statute. Paragraph (2), the Comment states, was included to eliminate any possibility that the omission of the "interest in the subject of the action" provision formerly found in Code Civ. Proc. § 378 [*see, e.g., North v. Cecil B. DeMille Productions, Inc. (1934) 2 Cal. 2d 55, 57-58, 39 P.2d 199* (discussed in *§ 168.35*, under [3], Receiver of Corporation in Suit by Corporation to Recover Corporate Property)], and the deletion of other permissive joinder provisions, might be construed to preclude joinder in cases where it was formerly permitted [*see* Legislative Committee Comment--Assembly, 1971 Amendment to *Code Civ. Proc. § 378*].

[b] Liberal Construction

The facts and procedural background of ***Coleman v. Twin Coast Newspaper, Inc.*** *(1959) 175 Cal. App. 2d 650, 346 P.2d 488* , are discussed in *§ 168.38*, under [3], Statutory Requirements Not Met. In *Coleman*, the court of appeal stated that the purpose of *Code Civ. Proc. § 378* [*now see Code Civ. Proc. § 378(a)*] was to permit the joinder in one action of several causes of action arising out of identical or related transactions and involving common issues. The statute should be liberally construed, the court held, so as to permit joinder whenever possible in furtherance of this purpose (*175 Cal. App. 2d 650, 653)* .

Counsel should note that this case was decided before the 1971 amendment to *Code Civ. Proc. § 378*. However, this case still appears to be good law regarding the issue of permissive joinder of a plaintiff (*see, e.g., Anaya v. Superior Court (1984) 160 Cal. App. 3d 228, 232, 206 Cal. Rptr. 520*). For discussion of the effect of the 1971 amendment relating to prior California law concerning joinder of plaintiffs, see Statutory Authority, *above.*

[c] Extent of Interest Required

Code Civ. Proc. § 378(b) provides that it is not necessary that each plaintiff be interested as to every cause of action or as to all relief prayed for. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief. This subsection was added in 1971 and corresponds to the similar provision in *Code Civ. Proc. § 379(b)*, which governs permissive joinder of defendants in one action [*see § 168.39*].

[4] Additional Authorities

[a] Statutory Authority

Garrison v. Hogan (1931) 112 Cal. App. 525, 297 P. 87 , was an action by owners of certain lands for cancellation of a lease of the lands in question. Plaintiffs each owned adjoining parcels of land; however, in leasing the lands to defendant, they executed a single-lease instrument of the two lands. The purpose for leasing the property was for oil exploration and development. Under the terms of the lease, development of oil exploration operations on either lot would have shown complete compliance with the terms of the lease with respect to both lots. On defendant's failure to commence oil development operations, plaintiffs brought their suit to cancel the lease. Defendant subsequently appealed from the judgment of the trial court in favor of plaintiffs, contending, among other things, misjoinder of parties in that plaintiffs were not united in interest.

The court of appeal, in affirming the judgment for plaintiffs, among other things, held that there was a proper joinder of both plaintiffs in the action. The lands in question, the court stated, were leased to defendant under a single-lease instrument that treated the separate lots as one parcel, and the terms and intent of the lease agreement were that the conditions contained within the lease were for the equal benefit of each parcel. The underlying motive of the lease agreement, the court noted, was that oil development and exploration on one tract would inure equally to the benefit of the other. The facts of the case, the court concluded, came clearly within the terms of former Code Civ. Proc. § 378 [*now see Code Civ. Proc. § 378(a)*], which provided that all persons could be joined in one action as plaintiffs who had an interest in the subject of the action or in whom any right to relief existed in respect to or arising out of the same transaction or series of transactions, when, if separate actions were brought, questions of law or fact common to all parties would arise (*112 Cal. App. 525, 531-532)* .

Counsel should note that the above case was decided before the 1971 amendment to *Code Civ. Proc. § 378*. However, this case still appears to be good law regarding the issue of permissive joinder of plaintiffs. For discussion of the effect of the 1971 amendment to *Code Civ. Proc. § 378*, see *§ 168.30[3][a]*.

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16-168 California Points & Authorities § 168.31

§ 168.31 Supporting Contention That Joinder of Person as Plaintiff Is Proper [Code Civ. Proc. § 378(a)]--Multiple Plaintiffs Suing Same Tortfeasor for Personal Injuries

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with the general form of memorandum of points and authorities pertaining to permissive joinder of plaintiffs (see § 168.30).*]

_____ [*Name*] MAY PROPERLY BE JOINED AS A PLAINTIFF BECAUSE HIS/HER/ITS INJURIES WERE CAUSED BY THE SAME DEFENDANT IN THE SAME TRANSACTION AND A COMMON QUESTION OF LAW AND FACT IS INVOLVED.

Multiple Plaintiffs Suing Same Tortfeasor for Personal Injuries. Multiple plaintiffs injured in the same accident or incident involving the same defendant may join in a single action for damages for personal injury (*see Emery v. Pacific Employers Ins. Co. (1937) 8 Cal. 2d 663, 666, 67 P.2d 1046* ; *Peters v. Bigelow (1934) 137 Cal. App. 135, 140, 30 P.2d 450* ; *Colla v. Carmichael U--Drive Autos, Inc. (1931) 111 Cal. App. Supp. 784, 786, 294 P. 378*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that a person may properly be joined as a plaintiff under the provisions of *Code Civ. Proc. § 378*, which govern permissive joinder of plaintiffs. This form sets forth the point that all persons having a right of action against the same tortfeasor for personal injuries arising out of the same accident or incident may be properly joined as plaintiffs. The form may be used either to support the contention that a new party plaintiff may be properly joined in the action before the court, or to respond to an objection, by answer or demurrer, to the joinder of plaintiffs in the original complaint.

The form does not provide a complete memorandum but is designed to be combined with the general form of memorandum of points and authorities *set out in § 168.30* in support of the contention that joinder of a person as a

plaintiff in an action is proper if he or she can assert the same right to relief arising out of the same transaction or occurrence or series of transactions or occurrences, and there exists a common question of law and fact.

The foregoing points and authorities may be combined with points and authorities relating to the specific procedural context in which the issue of joinder of parties arises. For example, the argument supported by the foregoing memorandum may be made by a plaintiff in support of a motion for leave to amend his or her complaint to add a new plaintiff or in opposition to a demurrer to the complaint on the ground of misjoinder of plaintiffs. The points and authorities set out in this form may also be adapted for use in a trial or appellate brief.

For a discussion of procedures for obtaining or objecting to joinder of parties, see *§ 168.04*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should include a discussion of the relevant facts showing that all actual or prospective plaintiffs suffered personal injuries as a result of the same accident or incident involving the same defendant and that there exists a question of law or fact common to all.

[b] Opposing Points and Authorities

The points and authorities *set out in § 168.38* may be used in an appropriate case to oppose the contention that joinder of plaintiffs is proper on grounds supported by the foregoing memorandum.

[3] Discussion of Authorities

[a] Multiple Plaintiffs Suing Same Tortfeasor for Personal Injuries

Emery v. Pacific Employers Ins. Co. *(1937) 8 Cal. 2d 663, 67 P.2d 1046* , involved an appeal by defendant insurer from a directed verdict in favor of plaintiffs, judgment creditors of insured. In rejecting defendant's assertion that joinder was improper in the previous action upon which plaintiff's claims were based, the Supreme Court held that joinder of such plaintiffs was proper in cases where several persons have sustained personal injuries in the same accident (*8 Cal. 2d 663, 666)* .

In ***Peters v. Bigelow*** *(1934) 137 Cal. App. 135, 30 P.2d 450* , two plaintiffs filed an amended complaint containing two counts. The first count alleged a cause of action for false imprisonment arising out of an arrest by defendants of one plaintiff. The second count alleged the same matter, substituting the name of the second plaintiff and asserting that the same acts complained of in the first complaint were the same acts complained of in the second, differing only as to named individual. Defendants demurred to, among other things, misjoinder of parties, and the trial court sustained the demurrer without leave to amend.

On appeal from the trial court's dismissal of the action, the court of appeal held that both plaintiffs were proper parties to the action. Citing *Code Civ. Proc. § 378*, the court concluded that the acts of the defendants in falsely arresting plaintiffs at the same time and the same place were one transaction within the meaning of the statute and gave rise to a cause of action by both plaintiffs against the same tortfeasors. Both plaintiffs, the court stated, could try their claims against defendants in a single cause of action, since it involved the same parties, the same witnesses, and a question of fact common to both plaintiffs (*137 Cal. App.135, 140)* .

In ***Colla v. Carmichael U--Drive Autos, Inc.*** *(1931) 111 Cal. App. Supp. 784, 294 P. 378* , defendants appealed a judgment awarded to multiple plaintiffs in an action arising out of a collision between an automobile driven by one of the plaintiffs and another automobile driven by one of the defendants. The other plaintiffs were passengers in the car struck by the defendant driver.

In affirming the judgment for plaintiffs, the appellate department of the superior court rejected appellant's contention that the plaintiff passengers were misjoined in the suit. Citing *Code Civ. Proc. § 378*, the court held that all persons may be joined as plaintiffs in one action who have any right to relief arising out of the same transaction or series of transactions. Included in the term "transaction" are tortious or delictual doings, such as a collision of the two automobiles, out of which arise questions of law and fact common to all the injured plaintiffs. Furthermore, the court, citing a New York case interpreting the comparable New York statute, found that joinder in such a case is proper, because the purpose of the statute is to lessen the delay and expense of litigation by permitting the claims of different plaintiffs to be decided in one action instead of many and that a single proceeding could be had with fairness to the different parties (*111 Cal. App. Supp. 784, 786-787)* .

Counsel should note that these cases were decided before the 1971 amendment to *Code Civ. Proc. § 378*. However, these cases still appear to be good law regarding the issue of permissive joinder of plaintiffs when all parties can assert the same right to relief for personal injuries arising out of the same accident or incident and caused by the same defendant (*see, e.g., Anaya v. Superior Court (1984) 160 Cal. App. 3d 228, 232, 206 Cal. Rptr. 520*). For discussion of the effect of the 1971 amendment to *Code Civ. Proc. § 378* on prior California law concerning the permissive joinder of plaintiffs, see *§ 168.30[3][a]*.

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16-168 California Points & Authorities § 168.32

§ 168.32 Supporting Contention That Joinder of Person as Plaintiff Is Proper [Code Civ. Proc. § 378(a)]--Multiple Plaintiffs in Action Against Same Tortfeasor Involving Injury to Property

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with the general form of memorandum of points and authorities pertaining to permissive joinder of plaintiffs (see § 168.30).*]

_____ [*Name*] MAY PROPERLY BE JOINED AS A PLAINTIFF BECAUSE INJURIES TO HIS/HER/ITS PROPERTY AROSE OUT OF THE SAME INCIDENT AND INVOLVED THE SAME DEFENDANT AND THERE EXISTS A COMMON QUESTION OF LAW AND FACT.

Multiple Plaintiffs in Action Against Same Tortfeasor Involving Injury to Property. All parties having an interest in property injured by the same defendant in the same incident may be joined as plaintiffs in a single action against that defendant arising out of that incident (*see Union Oil Co. v. Domengeaux (1939) 30 Cal. App. 2d 266, 273-274, 86 P.2d 127*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that a person may properly be joined as a plaintiff under the provisions of *Code Civ. Proc. § 378*, which govern permissive joinder of plaintiffs. This form sets forth the point that all persons having a right of action against the same tortfeasor for injuries to property in which they have an interest, when the injuries arose out of the same incident, may be properly joined as plaintiff in a single action. The form may be used either to support the contention that a new party plaintiff may properly be joined in the action before the court, or to respond to an objection, by answer or demurrer, to the joinder of plaintiffs in the original complaint.

The form does not provide a complete memorandum but is designed to be combined with the general form of

memorandum of points and authorities *set out in § 168.30* in support of the contention that joinder of a person as a plaintiff in an action is proper if he or she can assert the same right to relief arising out of the same transaction or occurrence or series of transactions or occurrences, and there exists a common question of law and fact.

The foregoing points and authorities may be combined with points and authorities relating to the specific procedural context in which the issue of joinder of parties arises. For example, the argument supported by the foregoing memorandum may be made by a plaintiff in support of a motion for leave to amend his or her complaint to add a new plaintiff or in opposition to a demurrer to the complaint on the ground of misjoinder of plaintiffs. The points and authorities set out in this form may also be adapted for use in a trial or appellate brief.

For a discussion of procedures for obtaining or objecting to joinder of parties, see *§ 168.04*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should include a discussion of the relevant facts showing that all actual or prospective plaintiffs suffered injuries to property in which they had an interest and those injuries arose out of the same accident or incident and involved the same defendant and that there exists a question of law or fact common to all.

[b] Opposing Points and Authorities

The points and authorities *set out in § 168.38* may be used in an appropriate case to oppose the contention that joinder of plaintiffs is proper on grounds supported by the foregoing memorandum.

[3] Discussion of Authorities

[a] Multiple Plaintiffs in Action Against Same Tortfeasor Involving Injury to Property

Union Oil Co. v. Domengeaux *(1939) 30 Cal. App. 2d 266, 86 P.2d 127* , arose out of an action for an accounting or for damages and for injunctive relief resulting to property held by holders of separate oil and gas leases on various tracts of property adjacent to property held by defendants as tenants in common. Plaintiffs alleged that defendants' slant drilling of a well on their property crossed over and came within the boundary lines of the respective leaseholds of the plaintiffs, consequently drawing oil from property in which plaintiffs had exclusive oil and gas rights. Plaintiff leaseholders each brought separate actions against defendants. After Union Oil brought its action, defendants, in a separate action, were adjudicated bankrupt, and the trustee in bankruptcy was joined in the Union Oil action. At a later time, Texas Oil Co., the other leaseholder, also brought suit, and the trustee in bankruptcy was joined in that action as well. Subsequently, both actions were consolidated for trial. Plaintiffs abandoned the claims for an accounting or for damages, and sought only the injunctive relief. The trial court granted the requested relief and defendants appealed, contending, among other things, that there was a misjoinder of plaintiffs.

The court of appeal affirmed the judgment of the trial court. Addressing itself to the issue of misjoinder of parties, the court answered defendants' assertions by pointing out that *Code Civ. Proc. § 378,* as amended in 1927 [subsequently amended in 1971; *now see Code Civ. Proc. § 378(a)*], liberalized the rules pertaining to joinder of parties to permit joinder of plaintiffs under circumstances such as presented in this action (*30 Cal. App. 2d. 266, 273)* .

Counsel should note that the court of appeal did not directly address the issue of joinder of plaintiffs. In this case, the separate causes of action were joined at the trial court level. The court pointed out that defendants failed to object at that time to the order for consolidation. Consequently, concluded the court, any misjoinder of plaintiffs, if there was a misjoinder, was without prejudice to defendants (*30 Cal. App. 2d. 266, 274)* .

This case was decided before the 1971 amendment to *Code Civ. Proc. § 378*. However, this case still appears to be good law regarding the issue of permissive joinder of plaintiffs when all parties can assert the same right to relief for injury to

property arising out of the same incident and caused by the same defendant (*see, e.g., Anaya v. Superior Court (1984) 160 Cal. App. 3d 228, 232, 206 Cal. Rptr. 520*). For discussion of the effect of the 1971 amendment to *Code Civ. Proc. § 378* on prior California law concerning the permissive joinder of plaintiffs, see *§ 168.30[3][a]*.

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16-168 California Points & Authorities § 168.33

§ 168.33 Supporting Contention That Joinder of Person as Plaintiff Is Proper [Code Civ. Proc. § 378(a)]--Multiple Plaintiffs Seeking Damages Based on Single Scheme of Misrepresentation, Fraud, or Conspiracy

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with the general form of memorandum of points and authorities pertaining to permissive joinder of plaintiffs (see § 168.30).*]

_____ [*Name*] MAY PROPERLY BE JOINED AS PLAINTIFF BECAUSE HIS/HER/ITS CAUSE OF ACTION ARISES OUT OF THE SAME SCHEME AS, AND INVOLVES _____ [MISREPRESENTATION *and/or* FRAUD *and/or* CONSPIRACY] THAT IS EXACTLY SIMILAR IN KIND AND MANNER OF OPERATION TO, THAT ALLEGED BY THE OTHER PLAINTIFF(S) IN THIS ACTION AND INVOLVES A COMMON QUESTION OF LAW AND FACT.

Multiple Plaintiffs Seeking Damages Based on Single Scheme of Misrepresentation, Fraud, or Conspiracy. A right to relief arising out of the same transaction or series of transactions exists when plaintiffs whose causes of action are based upon misrepresentation, fraud, or conspiracy allege a single scheme depending on the same basic misrepresentations and leading to a series of transactions exactly similar in kind and manner of operation (*see Aldrich v. Transcontinental Land & Water Co. (1955) 131 Cal. App. 2d 788, 795, 281 P.2d 362* ; *Adams v. Albany (1954) 124 Cal. App. 2d 639, 646, 269 P.2d 142*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that a person may properly be joined as a plaintiff under the provisions of *Code Civ. Proc. § 378*, which govern permissive joinder of plaintiffs. This form sets forth the point that all persons having a right of action against the same defendant for damages based on a single scheme of misrepresentation, fraud, or conspiracy may properly be joined as plaintiffs in a single action. The form may

be used either to support the contention that a new party plaintiff may be properly joined in a pending action, or to respond to the objection, by demurrer or answer, to the joinder of any or all of the plaintiffs in the original complaint.

The form does not provide a complete memorandum but is designed to be combined with the general form of memorandum of points and authorities *set out in § 168.30* in support of the contention that joinder of a person as a plaintiff in an action is proper if he or she can assert the same right to relief arising out of the same transaction or occurrence or series of transactions or occurrences, and there exists a common question of law and fact.

The foregoing points and authorities may be combined with points and authorities relating to the specific procedural context in which the issue of joinder of parties arises. For example, the argument supported by the foregoing memorandum may be made by a plaintiff in support of a motion for leave to amend his or her complaint to add a new plaintiff or in opposition to a demurrer to the complaint on the ground of misjoinder of plaintiffs. The points and authorities set out in this form may also be adapted for use in a trial or appellate brief.

For a discussion of procedures for obtaining or objecting to joinder of parties, see *§ 168.04*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should include a discussion of the relevant facts concerning the alleged misrepresentation, fraud, or conspiracy involving the party whose joinder is at issue that shows that the representations made by defendant were of the same nature as those made to other plaintiffs, that they were part of a general scheme to defraud the public, that they led to a series of transactions exactly similar in kind and operation, and that there exists a common question of law and fact that can be more expeditiously tried in one action than in a series of actions. In addition, counsel may wish to show that multiple actions would result in a duplication of the evidence.

[b] Opposing Points and Authorities

The points and authorities *set out in § 168.38* may be used in an appropriate case to oppose the contention that joinder of plaintiffs is proper on grounds supported by the foregoing memorandum.

[3] Discussion of Authorities

[a] Multiple Plaintiffs Seeking Damages Based on Single Scheme of Misrepresentation, Fraud, or Conspiracy

Aldrich v. Transcontinental Land & Water Co. *(1955) 131 Cal. App. 2d 788, 281 P.2d 362* , arose out of an action pendente lite involving 98 plaintiffs who brought suit for money had and received. Plaintiffs alleged that defendants had entered into a scheme to cheat and defraud the public, including plaintiffs, in a real estate venture. Defendants appealed an order of the superior court enjoining them from seeking to enforce or prosecute any actions in the municipal court by assignees seeking to collect on some of the contracts involved in the action in superior court. Defendants contended that there was a misjoinder of parties in that the cause of action affected different pieces of property and separate contracts involving each plaintiff, and the alleged misrepresentations occurred at different times and places and concerned different pieces of property.

The court of appeal found contrary to defendant's contentions and affirmed the order granting the preliminary injunction. The court stated that the causes of action presented questions of law and fact common to all parties, and arising out of the same series of transactions, and that there was no misjoinder of parties (*131 Cal. App. 2d. 788, 796)* . In reaching this conclusion, the court relied on similar cases that had arisen in California and New York in which the courts had found that (1) there existed a community of interest between all plaintiffs who had relied upon the alleged misrepresentations, (2) there was a common question of law and fact as to the intent of the defendants to defraud the plaintiffs, and (3) the purchases by plaintiffs at different times and places for different amounts were all factual

variations of the same series of transactions (*131 Cal. App. 2d. 788, 794-796)* .

In ***Adams v. Albany*** *(1954) 124 Cal. App. 2d 639, 269 P.2d 142,* 78 plaintiffs sued for damages for civil conspiracy and fraud in the sale of houses to certain World War II veterans. Demurrers were sustained, some with leave to amend, others without, and plaintiffs elected to appeal from the judgment of dismissal.

The court of appeal reversed the trial court's judgment on the causes of action concerning the fraudulent conspiracy, holding that the trial court erred in sustaining the demurrers without leave to amend on grounds of misjoinder. The court of appeal found that there existed a community of interest in the questions of law and fact presented, in that one scheme was alleged, based upon conspiracy and fraud, which depended on the same basic misrepresentations, and led to a series of transactions exactly similar in kind and manner of operation, which affected all the plaintiffs. Although the court noted that the individual agreements and instruments involved incidental variations in details affecting different plaintiffs, nonetheless, the controlling questions of law relating to liability were the same with respect to all of the plaintiffs. Also, though some of the evidence about details and amounts varied, a large part of the evidence concerning one of the series of transactions applied equally to the others (*124 Cal. App. 2d. 639, 646-647)* .

Counsel should note that these cases were decided before the 1971 amendment to *Code Civ. Proc. § 378*. However, these cases still appear to be good law regarding the issue of permissive joinder of plaintiffs when all parties assert the same right to relief arising out of a single scheme of misrepresentation, fraud, or conspiracy, against the same defendant (*see, e.g.,* *Anaya v. Superior Court (1984) 160 Cal. App. 3d 228, 232, 206 Cal. Rptr. 520*). For discussion of the effect of the 1971 amendment to *Code Civ. Proc. § 378* relating to prior California law concerning the permissive joinder of plaintiffs, see *§ 168.30[3][a]*.

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16-168 California Points & Authorities § 168.34

§ 168.34 Supporting Contention That Joinder of Person as Plaintiff Is Proper [Code Civ. Proc. § 378(a)]--Multiple Taxpayers Challenging Validity of Assessment or Seeking Recovery of Taxes Paid

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with the general form of memorandum of points and authorities pertaining to permissive joinder of plaintiffs (see § 168.30).*]

_____ [*Names*] MAY PROPERLY BE JOINED AS PLAINTIFFS IN THIS ACTION BECAUSE THEY ARE ALL TAXPAYERS SEEKING _____[TO ATTACK THE VALIDITY OF A TAX ASSESSMENT *or* TO RECOVER TAXES PAID UNDER PROTEST] AND THERE EXISTS A COMMON QUESTION OF LAW AND FACT.

[*EITHER*]

Multiple Taxpayers Challenging Validity of Assessment. Taxpayers seeking to challenge the validity of a tax assessment may properly be joined in one cause of action (*see DeMille v. County of Los Angeles (1938) 25 Cal. App. 2d 506, 508, 77 P.2d 905* ; *General Engineering and Dry Dock Co. v. East Bay MUD (1932) 126 Cal. App. 349, 14 P.2d 828*).

[*OR*]

Multiple Taxpayers Seeking Recovery of Taxes Paid. Taxpayers seeking to recover taxes paid under protest may properly be joined in one cause of action (*see People's Federal Savings & Loan Assn. v. State Franchise Tax Bd. (1952) 110 Cal. App. 2d 696, 699, 243 P.2d 902* ; *DeMille v. County of Los Angeles (1938) 25 Cal. App. 2d 506, 508, 77 P.2d 905*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that a person may properly be joined as a plaintiff under the provisions of *Code Civ. Proc. § 378*, governing permissive joinder of plaintiffs. This form sets forth the point that all persons having a right as taxpayers to challenge the validity of the same tax assessment or to seek recovery of the same type of taxes paid under protest may properly be joined in a single action against the same taxing authority. This form may be used either to support the contention that a new plaintiff may properly be joined in a pending action, or to respond to the objection, by answer or demurrer, to the joinder of any or all of the plaintiffs in the original complaint. The first alternative paragraph should be used when the joinder of a party in an action challenging the validity of a tax assessment is at issue. The second alternative paragraph should be used when the joinder of a party in an action to recover taxes paid under protest is at issue.

The form does not provide a complete memorandum but is designed to be combined with the general form of memorandum of points and authorities *set out in § 168.30* in support of the contention that joinder of a person as a plaintiff in an action is proper if he or she can assert the same right to relief arising out of the same transaction or occurrence or series of transactions or occurrences, and there exists a common question of law and fact.

The foregoing points and authorities may be combined with points and authorities relating to the specific procedural context in which the issue of joinder of parties arises. For example, the argument supported by the foregoing memorandum may be made by a plaintiff in support of a motion for leave to amend his or her complaint to add a new plaintiff or in opposition to a demurrer to the complaint on the ground of misjoinder of plaintiffs. The points and authorities set out in this form may also be adapted for use in a trial or appellate brief.

For a discussion of procedures for obtaining or objecting to joinder of parties, see *§ 168.04*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should include a discussion of the relevant facts concerning the tax assessment or taxes paid under protest and show that all parties joined as plaintiff are challenging the same tax assessed by the same defendant taxing authority on the same grounds. Counsel should also show that the determination of the legality of the assessment or collection would affect all plaintiffs in the same manner.

[b] Opposing Points and Authorities

The points and authorities *set out in § 168.38* may be used in an appropriate case to oppose the contention that joinder of plaintiffs is proper on grounds supported by the foregoing memorandum.

[3] Discussion of Authorities

[a] Multiple Taxpayers Challenging Validity of Assessment

DeMille v. County of Los Angeles *(1938) 25 Cal. App. 2d 506, 77 P.2d 905* , was an action to have declared void an assessment on property levied by the County of Los Angeles and for recovery of taxes paid under protest [*see* discussion under Multiple Taxpayers Seeking Recovery of Taxes Paid, infra]. Defendant's demurrer on grounds of misjoinder of parties and failure to state facts sufficient to constitute a cause of action was overruled by the trial court.

On appeal by defendant from the judgment of the trial court in favor of plaintiffs, the court of appeal upheld the trial court's ruling on the demurrer regarding misjoinder of parties. Citing *Code Civ. Proc. § 378*, [*now see Code Civ. Proc. § 378(a)*], as amended in 1927, the court concluded that there were questions of law common to all of the parties mentioned as plaintiff, since the validity of the assessment was attacked upon the same ground by all and the decision on the law involved in the case necessarily would determine the rights of each of the plaintiffs (*25 Cal. App. 2d 506,*

508) .

As to the question of fact common to all the parties, the court found that the rate of assessment would be the same for all properties levied upon, the only different questions being the value of the properties and the amount of assessment. Under the circumstances, the court found no actual or possible disadvantage to defendant by the joinder of all plaintiffs in one suit (*25 Cal. App. 2d 506, 508)* .

In ***General Engineering and Dry Dock Co. v. East Bay MUD*** *(1932) 126 Cal. App. 349, 14 P.2d 828* , plaintiffs appealed the trial court's judgment sustaining demurrers to the complaint challenging the validity of a tax assessment. The court of appeal, while affirming the lower court's order finding that the complaints were insufficient, nonetheless held that there had been no misjoinder of parties and that the plaintiffs therefore had properly been joined under *Code Civ. Proc. § 378* (*126 Cal. App. 349, 356)* .

Counsel should note that these cases were decided before the 1971 amendment to *Code Civ. Proc. § 378*. However, they still appear to be good law regarding the issue of permissive joinder as plaintiffs of taxpayers seeking to challenge the validity of the same type of tax assessment (*see, e.g., Anaya v. Superior Court (1984) 160 Cal. App. 3d 228, 232, 206 Cal. Rptr. 520*). For discussion of the effect of the 1971 amendment to *Code Civ. Proc. § 378*, see *§ 168.30[3][a]*.

[b] Multiple Taxpayers Seeking Recovery of Taxes Paid

People's Federal Savings & Loan Assn. v. State Franchise Tax Bd. *(1952) 110 Cal. App. 2d 696, 243 P.2d 902* , involved an action by 29 taxpayers for a refund of taxes paid under the Bank and Corporations Franchise Tax Act. Defendant appealed an adverse judgment in the trial court on grounds of, among other things, misjoinder of parties.

In affirming the judgment, the court of appeal found that there was no misjoinder of plaintiffs. The court held that there was the same question of law applicable to all parties, and that the decision on that point of law would necessarily determine the rights of all of the plaintiffs. If successful, all plaintiffs would be entitled to the same relief, differing only in the amount of refund each plaintiff claimed to be entitled to (*110 Cal. App. 2d 696, 699)* .

DeMille v. County of Los Angeles *(1938) 25 Cal. App. 2d 506, 77 P.2d 905 , discussed under § 168.34[3][a] above,* also concerned the recovery of taxes paid. In affirming the trial court's overruling of defendant's demurrer on the ground of misjoinder, the court of appeal held that joinder was proper in an action by taxpayers seeking to recover taxes paid under protest (*25 Cal. App. 2d 506, 508)* .

Counsel should note that these cases were decided before the 1971 amendment to *Code Civ. Proc. § 378*. However, these cases still appear to be good law regarding the issue of permissive joinder as plaintiffs of taxpayers seeking recovery of the same type of taxes paid under protest (*see, e.g., Anaya v. Superior Court (1984) 160 Cal. App. 3d 228, 232, 206 Cal. Rptr. 520*). For discussion of the effect of the 1971 amendment to *Code Civ. Proc. § 378*, see *§ 168.30[3][a]*.

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16-168 California Points & Authorities § 168.35

§ 168.35 Supporting Contention That Joinder of Person as Plaintiff Is Proper [Code Civ. Proc. § 378(a)]--Receiver of Corporation in Suit by Corporation to Recover Corporate Property

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with the general form of memorandum of points and authorities pertaining to permissive joinder of plaintiffs (see § 168.30).*]

_____ [*Name*] MAY PROPERLY BE JOINED AS PLAINTIFF BECAUSE HE/SHE/IT, AS A RECEIVER OF PLAINTIFF CORPORATION, HAS AN INTEREST ADVERSE TO THE DEFENDANT IN THE PROPERTY WHICH IS THE SUBJECT OF THE ACTION BEFORE THE COURT.

Receiver of Corporation. A receiver of a corporation, having equitable title over property of the corporation, has an interest in property claimed by the corporation and is a proper plaintiff in an action to recover the property (*see North v. Cecil B. DeMille Productions, Inc. (1934) 2 Cal. 2d 55, 57-58, 39 P.2d 199*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that a person may properly be joined as a plaintiff under the provisions of *Code Civ. Proc. § 378*, governing permissive joinder of plaintiffs. This form sets forth the point that a receiver of a corporation has an interest in the property claimed by that corporation and may properly be joined in an action by the corporation to recover the property claimed. This form may be used either to support the contention that a new plaintiff may properly be joined in a pending action, or to respond to the objection, by answer or demurrer, to the joinder of any or all of the plaintiffs in the original complaint.

The form does not provide a complete memorandum but is designed to be combined with the general form of memorandum of points and authorities *set out in § 168.30* in support of the contention that joinder of a person as a plaintiff in an action is proper if he or she can assert the same right to relief arising out of the same transaction or

occurrence or series of transactions or occurrences, and there exists a common question of law and fact.

The foregoing points and authorities may be combined with points and authorities relating to the specific procedural context in which the issue of joinder of parties arises. For example, argument supported by the foregoing memorandum may be made by a plaintiff in support of a motion for leave to amend his or her complaint to add a new plaintiff or in opposition to a demurrer to the complaint on the ground of misjoinder of plaintiffs. The points and authorities set out in this form may also be adapted for use in a trial or appellate brief.

For a discussion of procedures for obtaining or objecting to joinder of parties, see *§ 168.04*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should include a discussion of the relevant facts concerning the status of the receiver of the corporation whose property is sought to be recovered.

[b] Opposing Points and Authorities

The points and authorities *set out in § 168.38* may be used in an appropriate case to oppose the contention that joinder of plaintiffs is proper on grounds supported by the foregoing memorandum.

[3] Discussion of Authorities

[a] Receiver of Corporation

In ***North v. Cecil B. DeMille Productions, Inc.*** *(1934) 2 Cal. 2d 55, 39 P.2d 199* , the receiver of a bankrupt corporation joined in an action by the bankrupt corporation to recover usurious interest rates paid to defendant. Defendant demurred to the complaint on grounds, among others, that there was a misjoinder of parties. The demurrer was sustained with leave to amend; however, plaintiffs elected to stand upon their pleading, and judgment was rendered dismissing them from the action. Plaintiffs appealed.

The Supreme Court reversed the judgment of the trial court, holding that there was a proper joinder of parties under *Code Civ. Proc. § 378*. A receiver, said the Court, holds equitable title to the corporation's property and is charged with securing the corporation's property so that it may be appropriated in accordance with the rights of the parties as they may be determined in bankruptcy proceedings. Consequently, having an equitable trust in the money paid to defendant by the corporation, the receiver had an interest in the subject matter of the action (*2 Cal. 2d 55, 57-58)* .

Counsel should note that this case was decided before the 1971 amendment to *Code Civ. Proc. § 378*. However, this case still appears to be good law regarding the issue of permissive joinder as plaintiffs of persons having an interest in the subject of the action (*see, e.g.,* *Anaya v. Superior Court (1984) 160 Cal. App. 3d 228, 232, 206 Cal. Rptr. 520*). For discussion of the effect of the 1971 amendment to *Code Civ. Proc. § 378* on cases decided under the "subject of the action" language employed by the former statute, see *§ 168.30[3][a]*.

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16-168 California Points & Authorities § 168.36

§ 168.36 Supporting Contention That Joinder of Person as Plaintiff Is Proper [Code Civ. Proc. § 378(a)]--Purchaser of Securities Sold by Defendant in Violation of Securities Laws

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with the general form of memorandum of points and authorities pertaining to permissive joinder of plaintiffs (see § 168.30).*]

_____ [*Name*] MAY PROPERLY BE JOINED AS ONE OF THE PLAINTIFFS BECAUSE HE/SHE/IT WAS A PURCHASER OF SECURITIES SOLD BY THE SAME DEFENDANT IN VIOLATION OF THE SECURITIES LAWS.

Purchaser of Securities. Purchasers of securities sold in violation of the securities laws have an interest in the subject of the action and may properly be joined in an action to recover money had and received (*see Parmely v. Boone (1939) 35 Cal. App. 2d 517, 519, 96 P.2d 164*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that a person may properly be joined as a plaintiff under the provisions of *Code Civ. Proc. § 378*, governing permissive joinder of plaintiffs. This form sets forth the point that all persons who purchased securities from the same seller, who sold them in violation of the laws regulating the sale of securities, may join in a single action against the seller for recovery of their investment money. This form may be used either to support the contention that a new plaintiff may properly be joined in a pending action, or to respond to the objection, by answer or demurrer, to the joinder of any or all of the plaintiffs in the original complaint.

The form does not provide a complete memorandum but is designed to be combined with the general form of memorandum of points and authorities *set out in § 168.30* in support of the contention that joinder of a person as a

plaintiff in an action is proper if he or she can assert the same right to relief arising out of the same transaction or occurrence or series of transactions or occurrences, and there exists a common question of law and fact.

The foregoing points and authorities may be combined with points and authorities relating to the specific procedural context in which the issue of joinder of parties arises. For example, the argument supported by the foregoing memorandum may be made by a plaintiff in support of a motion for leave to amend his or her complaint to add a new plaintiff or in opposition to a demurrer to the complaint on the ground of misjoinder of plaintiffs. The points and authorities set out in this form may also be adapted for use in a trial or appellate brief.

For a discussion of procedures for obtaining or objecting to joinder of parties, see *§ 168.04*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should include discussion showing that all plaintiffs were purchasers of securities from defendant, who sold the securities in violation of the securities laws.

[b] Opposing Points and Authorities

The points and authorities *set out in § 168.38* may be used in an appropriate case to oppose the contention that joinder of plaintiffs is proper on grounds supported by the foregoing memorandum.

[3] Discussion of Authorities

[a] Purchaser of Securities

Parmely v. Boone *(1939) 35 Cal. App. 2d 517, 96 P.2d 164* , involved four plaintiffs suing in one complaint upon four separate causes of action for money had and received relating to purported sales of securities in violation of the Corporate Securities Act. Judgment was entered against defendant, awarding specific amounts to each plaintiff, and defendant appealed.

The court of appeal found that there was no misjoinder of plaintiffs, holding that under *Code Civ. Proc. § 378*, it was permissible to join as plaintiffs in one action those who have an interest in the subject of the action when the questions of law and fact which would arise would be common to all the parties (*35 Cal. App. 2d 517, 519)* .

Counsel should note that this case was decided before the 1971 amendment to *Code Civ. Proc. § 378*. However, this case still appears to be good law regarding the issue of permissive joinder as plaintiffs of persons having an interest in the subject of the action (*see, e.g.,* *Anaya v. Superior Court (1984) 160 Cal. App. 3d 228, 232, 206 Cal. Rptr. 520*). For discussion of the effect of the 1971 amendment to *Code Civ. Proc. § 378* on cases decided under the "subject of the action" language employed by the former statute, see *§ 168.30[3][a]*.

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16-168 California Points & Authorities § 168.37

§ 168.37 Supporting Contention That Joinder of Person as Plaintiff Is Proper [Code Civ. Proc. § 378(a)]--Multiple Plaintiffs Suing for Injuries From Ongoing Incident of Industrial Contamination

[1] FORM

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief, and should be combined with the general form of memorandum of points and authorities pertaining to permissive joinder of plaintiffs (see § 168.30).*]

_____ [*Name(s)*] MAY PROPERLY BE JOINED AS [ONE OF THE] PLAINTIFF[S] BECAUSE _____ [HIS/HER *OR* THEIR] INJURIES WERE CAUSED BY EXPOSURE TO INDUSTRIAL CONTAMINATION IN ONE LOCATION OVER A PERIOD OF YEARS.

Multiple Plaintiffs Suing for Ongoing Industrial Contamination. Persons alleging injuries resulting from exposure of themselves or family members to industrial contamination in one location over a period of years may properly be joined as plaintiffs in an action for resulting damages (*Anaya v. Superior Court (1984) 160 Cal. App. 3d 228, 233, 206 Cal. Rptr. 520*).

[2] Comments

[a] Use of Form

The foregoing form of points and authorities may be submitted in support of the contention that one or more persons may properly be joined as plaintiffs under *Code Civ. Proc. § 378* governing permissive joinder of plaintiffs. The foregoing form sets out the point that persons who allege injuries from exposure to industrial contamination in one location over a period of years may properly be joined as plaintiffs [*Anaya v. Superior Court (1984) 160 Cal. App. 3d 228, 233, 206 Cal. Rptr. 520]* .

The foregoing form may be used either to support the contention that new plaintiffs may properly be joined in a pending action, or to respond to defendant's objection to the joinder of any plaintiffs in the original complaint.

The foregoing form should be combined with the general form of points and authorities *set out in § 168.30*. The foregoing may also be combined with points and authorities relating to the specific procedural contexts in which the issue of joinder arises.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the point of law stated.

[3] Discussion of Authorities

[a] Multiple Plaintiffs Suing for Ongoing Industrial Contamination

In ***Anaya v. Superior Court*** *(1984) 160 Cal. App. 3d 228, 206 Cal. Rptr. 520* , numerous employees of defendant corporation and their family members initiated two actions (treated as one for convenience on appeal) for injuries allegedly caused by exposure of the employees over a period of years to certain hazardous chemicals at one of defendant's industrial plants. The trial court granted defendants' demurrer on the ground that plaintiffs were misjoined in the two actions. Plaintiffs petitioned for writ of mandate.

The court of appeal granted the writ. The court stated that under *Code Civ. Proc. § 378* a finding of misjoinder was proper only if either (1) plaintiffs had not asserted rights to relief arising from one series of transactions or occurrences, or (2) no question of law of fact common to all plaintiffs would arise in the action (*160 Cal. App. 3d 228, 231)* . The court concluded that plaintiffs' allegations that the employees were exposed to harmful chemicals over a period of many years at one location by inhalation, drinking, and physical contact showed that they were all involved in the same series of transactions or occurrences and established that common issues of fact and law abounded (*160 Cal. App. 3d 228, 233)* . The fact that each employee was not exposed on every other occasion that any other employee was exposed did not destroy the community of interest linking the plaintiffs. The court stated further that certain differences in evidence and legal theories to be presented by plaintiffs did not negate propriety of joinder since *Code Civ. Proc. § 378* permits joinder when any question of law or fact common to all plaintiffs will arise (*160 Cal. App. 3d 228, 233)* .

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16-168 California Points & Authorities § 168.38

§ 168.38 Opposing Contention That Joinder of Person as Plaintiff Is Proper [Code Civ. Proc. § 378(a)]--General Form

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Name*] CANNOT PROPERLY BE JOINED AS PLAINTIFF, BECAUSE HE/SHE/IT HAS NOT ALLEGED THAT HE/SHE/IT HAS A RIGHT TO RELIEF ARISING OUT OF THE SAME TRANSACTION OR OCCURRENCE OR SERIES OF TRANSACTIONS OR OCCURRENCES, AND THAT THERE EXISTS A COMMON QUESTION OF LAW OR FACT, OR THAT HE/SHE/IT HAS A RIGHT, CLAIM, OR INTEREST ADVERSE TO THE DEFENDANT IN THE PROPERTY OR TRANSACTION WHICH IS THE SUBJECT OF THE ACTION.

Statutory Requirements Not Met. Joinder of plaintiffs under *Code Civ. Proc. § 378* is improper when the parties joined do not have a right to relief arising out of the same transaction or occurrence or series of transactions or occurrences, and there is no question of law or fact common to all of them, and when all the parties joined do not have a claim, interest, or right adverse to defendant in the property or controversy which is the subject of the action (*Code Civ. Proc. § 378*; *see also Coleman v. Twin Coast Newspaper, Inc. (1959) 175 Cal. App. 2d 650, 654, 346 P.2d 488*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in opposition to the contention that a person may properly be joined as a plaintiff under the provisions of *Code Civ. Proc. § 378*, governing permissive joinder of plaintiffs. This form sets forth the general point that joinder of plaintiffs is not proper unless the criteria of *Code Civ. Proc. § 378(a)* are satisfied. The form may be used either to oppose the contention that a new plaintiff may properly be joined in the action before the court or to oppose the joinder of plaintiffs in the original complaint.

The foregoing points and authorities may be combined with points and authorities relating to the specific procedural

context in which the issue of joinder of parties arises. For example, the argument supported by the foregoing memorandum may be made by a defendant in opposition to plaintiff's motion for leave to amend the complaint to add a new plaintiff or in support of a demurrer to the complaint on the ground of misjoinder of plaintiffs. The points and authorities set out in this form may also be adapted for use in a trial or appellate brief.

For discussion of procedures for obtaining and objecting to joinder of parties, see *§ 168.04*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should include a discussion of the relevant facts concerning the interest of the party whose joinder is at issue and how that interest is insufficient to permit joinder under *Code Civ. Proc. § 378*.

In an appropriate case this form may be used in opposition to the contention that a person or persons are properly joined as plaintiffs pursuant to *Code Civ. Proc. § 378(a)*, as supported by the points and authorities *set out in §§ 168.30 -168.36*.

[b] Related Pleading and Practice Forms

For a discussion and forms relating to joinder of parties, see Ch. 395, *Parties* in California Forms of Pleading and Practice.

[c] Related Points and Authorities

For points and authorities opposing a motion for leave to amend a complaint to add a new plaintiff, see Ch. 16, *Amended and Supplemental Pleadings* .

For points and authorities relating to cross complaints generally, see Ch. 64, *Cross Complaints* .

For a form of memorandum of points and authorities supporting a demurrer to a complaint for misjoinder of plaintiffs, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Statutory Requirements Not Met

Coleman v. Twin Coast Newspaper, Inc. *(1959) 175 Cal. App. 2d 650, 346 P.2d 488* , arose out of actions for damages for alleged trespasses and conversions against three defendants. Each plaintiff set forth a separate cause of action against the three defendants alleging a joint venture by defendants to molest, hinder, and discredit the particular plaintiff by conducting an alleged investigation into his practice of chiropractic in which defendants entered the premises without consent, took photographs, inspected files, ransacked through papers, and committed other related acts. Plaintiffs also separately alleged conversion against two of the defendants. Each cause of action referred only to the particular plaintiff involved. One of the defendants demurred on the ground of misjoinder of parties. The demurrer was sustained and the action was dismissed against that defendant. Plaintiffs appealed from the judgment of dismissal.

The court of appeal affirmed the judgment of the trial court, holding that plaintiffs failed to show that plaintiffs had any community of interest. They were three separate and distinct plaintiffs suing for alleged trespasses on separate and distinct premises and for alleged conversions of separate and distinct property. These events, the court concluded, did not constitute a single transaction, and nothing was alleged to show a series of transactions (*175 Cal. App. 2d 650, 654)* .

Counsel should note that this case was decided before the 1971 amendment to *Code Civ. Proc. § 378*. However, this case still appears to be good law regarding the issue of permissive joinder of plaintiffs (*see, e.g.,* *Anaya v. Superior*

Court (1984) 160 Cal. App. 3d 228, 232, 206 Cal. Rptr. 520). For discussion of the effect of the 1971 amendment to *Code Civ. Proc. § 378*, see *§ 168.30[3][a]*.

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16-168 California Points & Authorities § 168.39

§ 168.39 Supporting Contention That Joinder of Person as Defendant Is Proper [Code Civ. Proc. § 379(a)]--General Form

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Name*] MAY PROPERLY BE JOINED IN THIS ACTION AS A DEFENDANT BECAUSE PLAINTIFF HAS _____ [A RIGHT TO RELIEF _____ (JOINTLY *or* SEVERALLY *or* IN THE ALTERNATIVE), ARISING OUT OF THE SAME _____ (TRANSACTION OR OCCURRENCE *or* SERIES OF TRANSACTIONS OR OCCURRENCES) AND THERE EXISTS A QUESTION OF LAW OR FACT COMMON TO, *and/or* A RIGHT, CLAIM, OR INTEREST ADVERSE TO, _____ (*name*)) IN THE _____ (PROPERTY *or* CONTROVERSY) WHICH IS THE SUBJECT OF THE ACTION BEFORE THE COURT].

A. Statutory Authority. All persons may be joined in a pending action as defendants if (1) there is asserted against them any right to relief jointly, severally, or in the alternative, in respect of or arising out of the same transaction or occurrence or series of transactions or occurrences, and if any question of law or fact common to all these persons will arise in the action, or (2) there is asserted against them a claim, right, or interest adverse to them in the property or controversy which is the subject of the action (*Code Civ. Proc. § 379(a)*).

B. Liberal Construction. Joinder of parties under *Code Civ. Proc. § 379* should be permitted whenever possible and practicable to allow the settlement of all matters of controversy between the parties in one action (*Dallman Supply Co. v. Sweet (1948) 86 Cal. App. 2d 780, 784, 195 P.2d 864* ; *see also Shotwell v. Bloom (1943) 60 Cal. App. 2d 303, 308-309, 140 P.2d 728*).

[*Optional*] **C. Extent of Interest Required.** It is not necessary that each defendant be interested as to every cause of action or as to all relief prayed for. Judgment may be given against one or more defendants according to their respective liabilities (*Code Civ. Proc. § 379(b)*; *see Lawler v. Gleason (1955) 130 Cal. App. 2d 390, 393-394, 279 P.2d 70*).

[*Add additional points and authorities, if appropriate, pertaining to specific reasons why joinder of the particular person as a defendant is proper (see, e.g., §§ 168.40 -168.43).*]

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that a person may properly be joined as a defendant under the provisions of *Code Civ. Proc. § 379*, governing permissive joinder of defendants. This form sets forth the general point that joinder of defendants is proper when there can be asserted against all defendants any right to relief, jointly, severally, or in the alternative, in respect of or arising out of the same transaction or occurrence or series of transactions or occurrences, and there will arise in the action questions of law and fact common to all defendants; or when there can be asserted against all defendants a claim, right, or interest adverse to them in the property or controversy which is the subject of the action [*Code Civ. Proc. § 379(a)*]. The form may be used either to support the contention that a new party defendant may properly be joined in the action before the court, or to respond to an objection, by answer or demurrer, to the joinder of defendants in the original complaint.

Paragraph B should be included in the points and authorities to support the contention that the statute permitting joinder of defendants should be liberally construed in furtherance of the objectives of the statute. The optional Paragraph C may be included when the complaint contains multiple causes of action and the party whose joinder is at issue is not interested in every cause of action or all relief prayed for [*Code Civ. Proc. § 379(b)*].

If appropriate, counsel should add further points and authorities relating to specific reasons why the person whose joinder is at issue is a proper defendant under *Code Civ. Proc. § 379* [*see, e.g., §§ 168.40 -168.43*].

The foregoing points and authorities may be combined with points and authorities relating to the specific procedural context in which the issue of joinder of parties arises. For example, argument supported by the foregoing memorandum may be made by a plaintiff in support of a motion for leave to amend his or her complaint to add a new defendant or in opposition to a demurrer to the complaint on the ground of misjoinder of defendants. The points and authorities set out in this form may also be adapted for use in a trial or appellate brief.

For a discussion of procedures for obtaining or objecting to joinder of parties, see *§ 168.04*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion of the relevant facts concerning the right to relief asserted by plaintiff in the action and show that plaintiff's right to relief against all existing or prospective defendants arose out of the same transaction or occurrence or series of transactions or occurrences, and there exists a question of law and fact common to all defendants.

[b] Opposing Points and Authorities

The points and authorities *set out in § 168.44* may be used in an appropriate case to oppose the contention that joinder of defendants is proper on grounds supported by the foregoing memorandum.

[c] Related Pleading and Practice Forms

For a discussion and forms relating to joinder of defendants, see Ch. 395, *Parties* in California Forms of Pleading and Practice.

[d] Related Points and Authorities

For points and authorities in support of a motion for leave to amend a complaint to add a new defendant, see Ch. 16, *Amended and Supplemental Pleadings* .

For points and authorities relating to cross complaints generally, see Ch. 64, *Cross Complaints* .

For points and authorities opposing a demurrer to a complaint for misjoinder of defendants, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Statutory Authority

Code Civ. Proc. § 379(a), governing permissive joinder of defendants, provides that all persons may be joined in one action as defendants if there is asserted against them any right to relief jointly, severally, or in the alternative, in respect of or arising out of the same transaction or occurrence or series of transactions or occurrences, and any question of law or fact common to all these persons will arise in the action [*Code Civ. Proc. § 379(a)(1)*]; or if there is asserted against them a claim, right, or interest adverse to them in the property or controversy which is the subject of the action [*Code Civ. Proc. § 379(a)(2)*].

This statute was amended in 1971 to its present form. The Legislative Committee Comment to the 1971 amendment states that the liberal joinder rules of former Code Civ. Proc. §§ 379a, 379b, 379c, 380, and 383 were replaced by the even broader transaction test as set forth in FRCP, Rule 20. However, in so doing, the Comment advises, the amended section probably merely made explicit what was implicit in prior decisions. The Legislative Committee Comment also states that *Code Civ. Proc. § 379(a)(2)* was included merely to make clear that *Code Civ. Proc. § 379* as amended permitted joinder in any case where it formerly was permitted [*see* Legislative Committee Comment--Assembly, 1971 Amendment to *Code Civ. Proc. § 379*].

[b] Liberal Construction

In ***Dallman Supply Co. v. Sweet*** *(1948) 86 Cal. App. 2d 780, 195 P.2d 864* , plaintiff's assignor entered into an agreement to supply coolers and electric motors to defendant Sweet for installation at a federal housing project. Plaintiff subsequently entered into an agreement with defendant Royal to purchase the specified equipment. After the equipment was delivered to the housing project, it was discovered that it was not to specifications and the equipment was rejected by the housing authority. Plaintiff informed defendant Royal of the rejection and both parties attempted to find the proper equipment but were unable to do so. The housing authority later agreed to accept the equipment subject to revised specifications, thereby increasing the installation costs, which were borne by defendant Sweet. Sweet then installed the equipment and, after notice to plaintiff, deducted the additional installment costs from the amount of the purchase price due plaintiff. Plaintiff brought an action for declaratory relief against both defendants, alleging that a controversy existed between itself and both defendants about the meaning of the specifications. The complaint alleged that plaintiff was in doubt which one of the defendants should be held liable and sought in the alternative money due from Sweet on the original purchase of the equipment or damages against Royal for its failure to provide equipment as specified in the contract. Defendant Royal filed a motion for an order changing venue from the county where the action was commenced, in which defendant Sweet resided, to the county in which Royal had its principal place of business. The trial court granted the motion, and plaintiff appealed.

The court of appeal reversed the order, holding that both defendants had properly been joined pursuant to former Code Civ. Proc. § 379c [*now see Code Civ. Proc. § 379(c)*] and that the motion to change venue from the county where defendant Sweet resided was therefore improperly granted. In so holding, the court noted that the courts have consistently held that the provisions of the Code of Civil Procedure governing joinder should be liberally construed, permitting joinder whenever possible in furtherance of the objects of the procedure, that is, to simplify the pleadings and

conduct of actions and, so far as practicable, to permit the settlement of all matters of controversy between the parties in one action (*86 Cal. App. 2d 780, 784)* .

In ***Shotwell v. Bloom*** *(1943) 60 Cal. App. 2d 303, 140 P.2d 728* , plaintiffs brought an action against their employer and its landlord to recover the value of their personal effects, which were lost in a fire that destroyed the premises provided for them by their employers and owned by the landlord. The defendant landlord demurred to the complaint on the ground, among others, that there was a misjoinder of causes of action and of parties. During the course of the trial, plaintiffs dismissed the action against their employer and received a verdict in their favor against the landlord. Defendant landlord appealed the judgment entered on the verdict.

The court of appeal found the trial court's overruling of the demurrer proper, holding that the rules of joinder of defendants had been so broadened that *Code Civ. Proc. § 379* now permitted joinder as a defendant a person who is a necessary party to a complete determination or settlement of the question involved (*60 Cal. App. 2d 303, 308)* .

Counsel should note that these cases were decided before the 1971 amendment to *Code Civ. Proc. § 379*. However, they still appear to be good law regarding the issue of permissive joinder of defendants (*see, e.g.,* *Service Employees International Union v. Hollywood Park, Inc. (1983) 149 Cal. App. 3d 745, 758, 197 Cal. Rptr. 316*). For discussion of the effect of the 1971 amendment to *Code Civ. Proc. § 379* on prior California law concerning the permissive joinder of defendants, see Statutory Authority, *above.*

[c] Extent of Interest Required

Code Civ. Proc. § 379(b) provides that it is not necessary that each defendant be interested as to every cause of action or as to all relief prayed for. Judgment may be given against one or more defendants according to their respective liabilities.

This section as amended is the same as former Code Civ. Proc. § 379b, and prior case law interpreting this section is not affected. For discussion of the effect of the 1971 amendment relating to prior California law concerning the permissive joinder of defendants, see *§ 168.39[3][a]*.

In ***Lawler v. Gleason*** *(1955) 130 Cal. App. 2d 390, 279 P.2d 70* , plaintiff filed a complaint containing three counts against defendant sheriff and three other persons. The first count sought a declaration of the rights of the parties under various certificates of redemption issued by defendant sheriff to determine whether a tender by one of the other defendants to the sheriff of a certain amount of money was sufficient to redeem the property rather than the larger amount demanded by plaintiff. The second cause of action sought to quiet plaintiff's title to the real property in question against the claims of the other named defendants. The third cause of action sought a writ of mandate to compel defendant sheriff to make and record a sheriff's deed to the property and to deliver it to plaintiff. The sheriff demurred to the complaint on the ground of misjoinder of defendants, among other grounds. The trial court sustained the demurrer without leave to amend. Plaintiff appealed from the ensuing judgment entered in defendant sheriff's favor.

The court of appeal reversed the order of the trial court, which had sustained the demurrer, holding that the sheriff was a proper and necessary party to the action, even though he made no claim to the property and was therefore not directly interested in the quiet title action. The sheriff was, however, interested in the action seeking determination of the rights of plaintiff and the other defendants regarding the various certificates of redemption issued by the sheriff, as well as in the action seeking the writ of mandate to compel him to make, record, and deliver a deed of the property to plaintiff. The court stated that it was not necessary for each named defendant to be made a party to each pleaded cause of action. Under former Code Civ. Proc. § 379b [repealed; *now see Code Civ. Proc. § 379(b)*], named defendants need not be interested in or affected by all of the relief requested or every cause of action set forth in the complaint (*130 Cal. App. 2d 390, 393-394)* .

Counsel should note that this case was decided before the 1971 amendment to *Code Civ. Proc. § 379*. However, this case still appears to be good law regarding the issue of the extent of interest required by defendants joined in a single action (*see, e.g., Service Employees International Union v. Hollywood Park, Inc. (1983) 149 Cal. App. 3d 745, 758, 197 Cal. Rptr. 316*). For discussion of the effect of the 1971 amendment on prior California law concerning the permissive joinder of defendants, see *§ 168.39[3][a]*.

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16-168 California Points & Authorities § 168.40

§ 168.40 Supporting Contention That Joinder of Person as Defendant Is Proper [Code Civ. Proc. § 379(a)]--Guarantor of Debtor as Proper Party

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with the general form of memorandum of points and authorities pertaining to permissive joinder of defendants (see § 168.39).*]

_____ [*Name*] MAY PROPERLY BE JOINED AS A DEFENDANT BECAUSE HE/SHE/IT IS LIABLE AS A GUARANTOR FOR THE AMOUNT OF THE NOTE SIGNED BY THE DEFENDANT DEBTOR.

Guarantor of Debtor as Proper Party. Joinder as defendants of a debtor and guarantor in one cause of action to recover judgment on a note is proper (*Rodabaugh v. Kauffman (1921) 53 Cal. App. 676, 682, 200 P. 747*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that a person may properly be joined as a defendant under the provisions of *Code Civ. Proc. § 379*, governing permissive joinder of defendants. This form sets forth the point that a guarantor of a defendant debtor may properly be joined as a defendant in an action against the debtor for recovery of the debt. The form may be used either to support the contention that a new defendant may properly be joined in the action before the court, or to respond to an objection, by answer or demurrer, to the joinder of defendants in the original complaint.

This form does not provide a complete memorandum but is designed to be combined with the general form of memorandum of points and authorities *set out in § 168.39*.

The foregoing points and authorities may be combined with points and authorities relating to the specific procedural context in which the issue of joinder of parties arises. For example, argument supported by the foregoing memorandum

may be made by a plaintiff in support of a motion for leave to amend his or her complaint to add a new defendant or in opposition to a demurrer to the complaint on the ground of misjoinder of defendants. The points and authorities set out in this form may also be adapted for use in a trial or appellate brief.

For a discussion of procedures for obtaining or objecting to joinder of parties, see *§ 168.04*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should indicate the relevant facts concerning the party's status as a guarantor of the instrument executed by the defendant debtor.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 168.44* may be used to oppose the contention supported by the foregoing points and authorities.

[3] Discussion of Authorities

[a] Guarantor of Debtor as Proper Party

In ***Rodabaugh v. Kauffman*** *(1921) 53 Cal. App. 676, 200 P. 747* , plaintiff brought an action to recover on a promissory note, joining as defendants the maker of the note and two separate guarantors, one for the full amount of the note, and one for half the amount. Plaintiff prevailed at trial, and defendants appealed the judgment against them. The defendant guarantor who had guaranteed only half the amount of the note contended that it could not be sued in the same cause of action as that of the maker of the note.

The court of appeal, in rejecting this contention, held that if the guaranty is on the same instrument, the guarantor is properly joined as a party with the maker of the note. Likewise, when the guaranty is executed on a separate paper, as in appellant's case, the guarantor is properly joined if the guaranty was part of the same transaction, was demanded by the payee, and was agreed to by the guarantor before the note was executed (*53 Cal. App. 676, 682)* .

Counsel should note that this case was decided before the 1971 amendment to *Code Civ. Proc. § 379*. However, this case still appears to be good law regarding the issue of permissive joinder as defendants of a guarantor and his or her debtor in an action to recover the debt (*see, e.g., Service Employees International Union v. Hollywood Park, Inc. (1983) 149 Cal. App. 3d 745, 758, 197 Cal. Rptr. 316*). For discussion of the effect of the 1971 amendment to *Code Civ. Proc. § 379* on prior California law concerning the permissive joinder of defendants, see *168.38[3][a]*.

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16-168 California Points & Authorities § 168.41

§ 168.41 Supporting Contention That Joinder of Person as Defendant Is Proper [Code Civ. Proc. § 379(a)]--Surety as Proper Party in Action Against Principal for Acts Covered by Suretyship Agreement

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with the general form of memorandum of points and authorities pertaining to permissive joinder of defendants (see § 168.39).*]

_____ [*Name*] MAY PROPERLY BE JOINED AS A DEFENDANT BECAUSE HE/SHE/IT IS LIABLE AS A SURETY FOR THE AMOUNT OF THE SURETY BOND FOR ACTS COMMITTED BY THE DEFENDANT PRINCIPAL.

Surety of Principal as Proper Party. Joinder of a principal and its surety as defendants is permitted in an action for damages against the principal for tortious acts committed by the principal against the plaintiff (*see Kane v. Mendenhall (1936) 5 Cal. 2d 749, 755, 56 P.2d 498*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that a person may properly be joined as a defendant under the provisions of *Code Civ. Proc. § 379*, governing permissive joinder of defendants. This form sets forth the point that a surety of a defendant principal may properly be joined as a defendant in an action against the principal relating to acts of the principal covered by the suretyship agreement. The form may be used either to support the contention that a new defendant may properly be joined in the action before the court, or to respond to an objection, by answer or demurrer, to the joinder of defendants in the original complaint.

This form does not provide a complete memorandum but is designed to be combined with the general form of memorandum of points and authorities *set out in § 168.39*.

The foregoing points and authorities may be combined with points and authorities relating to the specific procedural context in which the issue of joinder of parties arises. For example, the argument supported by the foregoing memorandum may be made by a plaintiff in support of a motion for leave to amend his or her complaint to add a new defendant or in opposition to a demurrer to the complaint on the ground of misjoinder of defendants. The points and authorities set out in this form may also be adapted for use in a trial or appellate brief.

For a discussion of procedures for obtaining or objecting to joinder of parties, see *§ 168.04*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should indicate the relevant facts concerning the party's status as a surety for the other defendant.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 168.44* may be used to oppose the contention supported by the foregoing points and authorities.

[3] Discussion of Authorities

[a] Surety of Principal as Proper Party

Kane v. Mendenhall *(1936) 5 Cal. 2d 749, 56 P.2d 498* , was an action to procure cancellation of a deed involving as defendants both a real estate broker and the surety on the broker's bond. The trial court rendered judgment against both the broker and the surety, and defendant surety company appealed on grounds of misjoinder of causes of action and of parties. Defendant contended that since its liability was only for the amount of the surety bond, an amount wholly within the jurisdictional limits of the municipal court, plaintiff had improperly joined it to its cause of action against the broker.

The Supreme Court rejected the surety's claim of misjoinder. The Court held that plaintiff had a right to join both defendants in one cause of action under the Real Estate Broker's Act as well as under *Code Civ. Proc. § 379*, which permits joinder of defendants when causes of action arise out of the same transaction and involve common questions (*5 Cal. 2d 749, 752-755)* . It would be unfortunate, the Court said, to require plaintiff to prosecute two separate actions. The liability of the principal and the liability of the surety, though differing in amount, rest alike upon the acts of fraud committed by the principal to the damage of the plaintiff and require the examination of questions common to both principal and surety (*5 Cal. 2d 749, 751)* . The Court also held that the differing amounts of liability, the principal for the full amount of damages suffered, and the surety only for the amount of the bond were not a bar to the superior court having jurisdiction over the matter, since the principal's liability was within the jurisdictional limits of that court (*5 Cal. 2d 749, 755-757)* .

Counsel should note that this case was decided before the 1971 amendment to *Code Civ. Proc. § 379*. However, this case still appears to be good law regarding the issue of permissive joinder as defendants of a surety and its principal in an action against the principal for acts covered by the surety agreement. For discussion of the effect of the 1971 amendment to *Code Civ. Proc. § 379* on prior California law concerning the permissive joinder of defendants, see *§ 168.39[3][a]*.

[4] Additional Authorities

[a] Surety of Principal as Proper Party

Dreher v. Fidelity & Casualty Co. (1957) 148 Cal. App. 2d 695, 307 P.2d 407 , involved a suit against certain detectives and their sureties arising out of an investigation of plaintiff. On appeal from an order granting a change of

venue to defendants, the court of appeal noted that joinder as defendants of the principal and surety was entirely proper, since liability rested alike on acts committed by the principal to the damage of plaintiff and required the examination of questions common to both principal and surety (*148 Cal. App. 2d 695, 700)* .

Counsel should note that this case was decided before the 1971 amendment to *Code Civ. Proc. § 379*. However, this case still appears to be good law regarding the issue of permissive joinder as defendants of a surety and its principal in an action against the principal for acts covered by the surety agreement (*see, e.g.*, *Service Employees International Union v. Hollywood Park, Inc. (1983) 149 Cal. App. 3d 745, 758, 197 Cal. Rptr. 316*). For discussion of the effect of the 1971 amendment to *Code Civ. Proc. § 379* on prior California law concerning the permissive joinder of defendants, see *§ 168.39[3][a]*.

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16-168 California Points & Authorities § 168.42

§ 168.42 Supporting Contention That Joinder of Person as Defendant Is Proper [Code Civ. Proc. § 379(a)]--Insurer as Proper Party When Policy Benefits Run Directly to Plaintiff

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with the general form of memorandum of points and authorities pertaining to permissive joinder of defendants (see § 168.38)*].

_____ [*Name*] MAY PROPERLY BE JOINED AS A PARTY DEFENDANT BECAUSE IT IS LIABLE AS AN INSURER ON A POLICY WHOSE BENEFITS RUN DIRECTLY TO PLAINTIFF.

A. Insurer as Proper Party. Joinder of plaintiff's, defendant's, or a third party's insurer as a defendant in an action for damages is proper when the benefits of the contract between insured and insurer run directly to the plaintiff (*see Zak v. State Farm etc. Ins. Co. (1965) 232 Cal. App. 2d 500, 505, 42 Cal. Rptr. 908*).

[*Optional*] **B. Multiple Insurers.** When the same person or thing is insured by two or more insurers separately in respect to the same subject and interest, any or all of the insurers may be joined in a single action for recovery of a loss under the several policies (see *Fageol Truck & Coach Co. v. Pacific Indemnity Co. (1941) 18 Cal. 2d 748, 754, 117 P.2d 669*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that a person may properly be joined as a defendant under the provisions of *Code Civ. Proc. § 379*, governing permissive joinder of defendants. This form sets forth the point that an insurer may be joined as a defendant when the benefits of its policy with the insured run to the benefit of the plaintiff. The optional points and authorities may be included when an insurer is one of two or more insurers providing policy coverage in respect to the same subject and interest [Paragraph B]. The form may be used either to support the contention that a new defendant may properly be joined in the action before the court, or to respond

to an objection, by answer or demurrer, to the joinder of defendants in the original complaint.

This form does not provide a complete memorandum but is designed to be combined with the general form of memorandum of points and authorities *set out in § 168.39*.

The foregoing points and authorities may be combined with points and authorities relating to the specific procedural context in which the issue of joinder of parties arises. For example, argument supported by the foregoing memorandum may be made by a plaintiff in support of a motion for leave to amend his or her complaint to add a new defendant or in opposition to a demurrer to the complaint on the ground of misjoinder of defendants. The points and authorities set out in this form may also be adapted for use in a trial or appellate brief.

For a discussion of procedures for obtaining or objecting to joinder of parties, see *§ 168.04*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should indicate the relevant facts concerning the party's status as an insurer of plaintiff, defendant, or a third party, and describe the terms of the insurance policy, showing that the benefits of the policy run directly to plaintiff.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 168.44* may be used to oppose the contention supported by the foregoing points and authorities.

[3] Discussion of Authorities

[a] Insurer as Proper Party

Zak v. State Farm etc. Ins. Co. *(1965) 232 Cal. App. 2d 500, 42 Cal. Rptr. 908* , arose out of an action for damages resulting from a multiple automobile accident in which plaintiff was a passenger. Plaintiff was a guest in a vehicle driven by Jones when it was struck by a vehicle operated by defendant Grassley, and then pushed into the vehicle of defendant Romick. In her fourth and fifth causes of action, plaintiff joined the insurer of Jones and her own insurer on grounds that defendant Grassley was an uninsured motorist and therefore the insurers were liable on their respective policies in the event that the uninsured motorist was held liable. Jones's insurer moved to strike the fourth and fifth causes of action, and the trial court granted the motion. Plaintiff appealed from the order. The court of appeal reversed the trial court's order, holding, inter alia, that the applicable provisions of former Code Civ. Proc. §§ 379, 379a, 379c and 383 [*now see Code Civ. Proc. § 379(a), (c)*] dealing with the question of what persons may be named as defendants permit joinder of an insurer when the benefits of the contract between the insurer and insured run directly to the benefit of plaintiff (*232 Cal. App. 2d 500, 505)* .

Counsel should note that this case was decided before the 1971 amendment to *Code Civ. Proc. § 379*. However, this case still appears to be good law regarding the issue of permissive joinder as a defendant of an insurer of a party to the action whose benefits under its policy coverage run to the benefit of the plaintiff (*see, e.g.*, *Service Employees International Union v. Hollywood Park, Inc. (1983) 149 Cal. App. 3d 745, 758, 197 Cal. Rptr. 316*). For discussion of the effect of the 1971 amendment to *Code Civ. Proc. § 379* on prior California law concerning the permissive joinder of defendants under former Code Civ. Proc. §§ 379a and 383, see *§ 168.39[3][a]*.

[b] Multiple Insurers

Fageol Truck & Coach Co. v. Pacific Indemnity Co. (1941) 18 Cal. 2d 748, 117 P.2d 669 , involved an action by a conditional seller to recover on insurance policies issued to it and to the purchaser of a truck that was damaged in an accident. The purchaser of the truck, at the time of the conditional sale, took out a policy naming as its primary

beneficiary plaintiff seller. This policy covered loss from accident and fire. Plaintiff also had taken out an excess insurance policy that provided for indemnity to plaintiff in the event that all specific insurance covering purchaser and truck had been exhausted. After the accident involving the truck, plaintiff sought to recover on the policies. The trial court found in favor of plaintiff, holding that both insurers were liable but that plaintiff's insurer, the excess insurer, need only pay that part of the judgment not paid by purchaser's insurer. Plaintiff's insurer appealed, contending, among other things, that there was a misjoinder of parties.

In affirming the trial court's judgment, the Supreme Court held on page 754 that when the same person is insured by two or more insurers separately in respect to the same subject and interest, that person, or the beneficiary under the policies, may join any or all of the insurers in a single cause of action for the loss covered under the several policies [citing former Code Civ. Proc. § 383 (repealed; *see now Code Civ. Proc. §§ 378, 379, 389*) (*18 Cal. 2d 748, 754)*].

Counsel should note that this case was decided under former Code Civ. Proc. § 383, which was subsequently repealed. However, this case still appears to be good law under the broad language of *Code Civ. Proc. § 379(a)*, as amended in 1971. For discussion of the effect of the 1971 amendment to *Code Civ. Proc. § 379* on prior California law pertaining to permissive joinder of defendants, see *§ 168.39[3][a]*.

[4] Additional Authorities

[a] Insurer as Proper Party

In *Grier v. Ferrant (1944) 62 Cal. App. 2d 306, 144 P.2d 631* , plaintiff sued for personal injuries, joining defendant's insurer on the ground that plaintiff was the beneficiary of the terms of the contract between insurer and the defendant's employer as mandated by municipal ordinance. The court of appeal, in reversing the trial court's judgment dismissing the action, held that under former Code Civ. Proc. § 379a [repealed; *see now Code Civ. Proc. § 379(a)*], all persons may be joined in an action against whom the right to any relief is alleged to exist and that the insurer was properly joined as a defendant, since the policy issued to defendant's employer covering defendant in accordance with the municipal ordinance inured to the benefit of plaintiff (*62 Cal. App. 2d 306, 313-314)* .

Counsel should note that this case was decided before the 1971 amendment to *Code Civ. Proc. § 379*. However, this case still appears to be good law regarding the issue of permissive joinder as a defendant of an insurer of a party to the action when the policy coverage runs to the benefit of the plaintiff (*see, e.g.,* *Service Employees International Union v. Hollywood Park, Inc. (1983) 149 Cal. App. 3d 745, 758, 197 Cal. Rptr. 316*). For discussion of the effect of the 1971 amendment to *Code Civ. Proc. § 379* on prior California law concerning the permissive joinder of defendants, see *§ 168.39[3][a]*.

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
CHAPTER 168 PARTIES
PART II. FORMS

16-168 California Points & Authorities § 168.43

§ 168.43 Supporting Contention That Joinder of Person as Defendant Is Proper [Code Civ. Proc. § 379(a),(c)]--Joint, Concurrent, or Successive Tortfeasors

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with the general form of memorandum of points and authorities pertaining to permissive joinder of defendants (see § 168.39).*]

_____ [*Name*] MAY PROPERLY BE JOINED AS A DEFENDANT BECAUSE HE/SHE/IT IS LIABLE _____ [JOINTLY *or* IN THE ALTERNATIVE] TO PLAINTIFF AS A _____ [JOINT *or* INDEPENDENTLY CONCURRENT *or* INDEPENDENTLY SUCCESSIVE] TORTFEASOR.

A. Joint, Concurrent, or Successive Tortfeasors. The plaintiff may join as defendants in a single action two or more persons on a showing that these persons, whether jointly, concurrently, or successively, contributed proximately to cause the alleged injury (*Kraft v. Smith (1944) 24 Cal. 2d 124, 130-131, 148 P.2d 23*).

[*Optional*] **B. When Plaintiff in Doubt as to Liability.** When the plaintiff is in doubt as to the person from whom he or she is entitled to obtain redress, he or she may join two or more defendants, with the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined between the parties (*Code Civ. Proc. § 379(c)*; *see Kraft v. Smith (1944) 24 Cal. 2d 124, 128-131, 148 P.2d 23* ; *see also Landau v. Salam (1971) 4 Cal. 3d 901, 909, 95 Cal. Rptr. 46, 484 P.2d 1390* ; *Lambert v. Southern Counties Gas Co. (1959) 52 Cal. 2d 347, 353, 340 P.2d 608*).

[*Optional*] **C. Liability Based on Negligence.** A plaintiff, by pleading an injury, negligence by one or more tortfeasors, and doubt as to which tortfeasor is liable comes within the express terms of *Section 379(c) of the Code of Civil Procedure* (*Landau v. Salam (1971) 4 Cal. 3d 901, 906-907, 95 Cal. Rptr. 46, 484 P.2d 1390*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that a person may properly be joined as a defendant under the provisions of *Code Civ. Proc. § 379,* governing permissive joinder of defendants. This form sets forth the point that all persons who are liable, either jointly or in the alternative, for injuries to the plaintiff as joint, independently concurrent, or successive tortfeasors may properly be joined in a single action. The optional paragraphs may be included in the points and authorities when the plaintiff is in doubt as to the respective liability of two or more persons [Paragraph B] and their liability is based on negligence [Paragraph C]. The form may be used either to support the contention that a new defendant may properly be joined in the action before the court, or to respond to an objection, by answer or demurrer, to the joinder of defendants in the original complaint.

This form does not provide a complete memorandum but is designed to be combined with the general form of memorandum of points and authorities *set out in § 168.39*.

The foregoing points and authorities may be combined with points and authorities relating to the specific procedural context in which the issue of joinder of parties arises. For example, argument supported by the foregoing memorandum may be made by a plaintiff in support of a motion for leave to amend his or her complaint to add a new defendant or in opposition to a demurrer to the complaint on the ground of misjoinder of defendants. The points and authorities set out in this form may also be adapted for use in a trial or appellate brief.

For a discussion of procedures for obtaining or objecting to joinder of parties, see *§ 168.04*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion of the relevant facts concerning the alleged injury sustained, the facts demonstrating the liability of the party whose joinder is at issue, and, if applicable, the reasons why doubt exists as to the respective liability of each defendant. For example, in an action involving two or more independently successive tortfeasors, counsel should show the facts surrounding the separate incidents, the interrelationship of the injuries, and the reasons why doubt exists as to the respective liability of each defendant [*see Kraft v. Smith (1944) 24 Cal. 2d 124, 128-131, 148 P.2d 23* (see *§ 168.43[3*][b])].

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 168.44* may be used to oppose the contention supported by the foregoing points and authorities.

[3] Discussion of Authorities

[a] Joint, Concurrent, or Successive Tortfeasors

The facts and procedural background of ***Kraft v. Smith*** *(1944) 24 Cal. 2d 124, 148 P.2d 23* , are *discussed under § 168.43[4][b] below*.

In *Kraft,* the Supreme Court, in discussing the liability of multiple tortfeasors alleged to have injured plaintiff independently of each other, held that the procedure available in former Code Civ. Proc. §§ 379a, 379b, and 379c [*now see Code Civ. Proc. § 379(a),(b),(c)*] was clearly intended for use by a plaintiff on showing that either the negligence of two or more persons, whether joint, independently concurrent, or successive, contributed proximately to cause the injury for which recovery is sought, or that the injury for which recovery is sought was proximately caused by the negligence of either one or more persons and, as to each person who was not charged absolutely, there was a reasonable uncertainty, requiring determination of some factual or legal issue, as to alternative or quantitative liability (*24 Cal. 2d 124, 130-131)* .

Counsel should note that this case was decided before the 1971 amendment to *Code Civ. Proc. § 379*. However, this case still appears to be good law regarding the issue of permissive joinder as defendants of joint, concurrent, or successive tortfeasors (*see, e.g., Service Employees International Union v. Hollywood Park, Inc. (1983) 149 Cal. App. 3d 745, 758, 197 Cal. Rptr. 316*). For discussion of the effect of the 1971 amendment to *Code Civ. Proc. § 379* on prior California law concerning the permissive joinder of defendants, see *§ 168.39[3][a]*.

[b] When Plaintiff in Doubt as to Liability

Code Civ. Proc. § 379(c) provides that when the plaintiff is in doubt as to the person from whom he or she is entitled to redress, he or she may join two or more defendants, with the intent that the question which, if any, of the defendants is liable, and to what extent, may be determined between the parties.

Kraft v. Smith *(1944) 24 Cal. 2d 124, 148 P.2d 23* , involved a malpractice suit against two physicians who, independently of each other, treated plaintiff at different times and places for the same injuries, including a broken leg, broken ankle, and fractured knee. In count one of the second amended complaint, plaintiff alleged that she received negligent and improper treatment from the first physician, and in count three, she alleged the same concerning the second physician. She further alleged that she was damaged to such an extent that her right leg was made permanently shorter than her left leg, and that she was in doubt as to which defendant she was entitled to redress from, and for that reason joined both of them with the intent that the question as to alternative or quantitative liability be determined. The second physician demurred to the complaint, alleging, among other things, misjoinder of parties. Plaintiff appealed the judgment entered on an order sustaining the demurrer without leave to amend.

The Supreme Court, in reversing the judgment of the trial court, held that plaintiff's joinder of both physicians under the provisions of former Code Civ. Proc. §§ 379a and 379c [*now see Code Civ. Proc. § 379(a),(c)*] was proper. Plaintiff, the Court stated, had properly alleged that she had a right to relief from the defendants either jointly, severally, or in the alternative as required in former Code Civ. Proc. § 379a [*now see Code Civ. Proc. § 379(a)*] and that she entertained a doubt as to the person from whom she was entitled to redress as required by former Code Civ. Proc. § 379c [*now see Code Civ. Proc. § 379(c)*] (*24 Cal. 2d 124, 128)* .

The Court further held that the fact that defendants were not joint tortfeasors, but independent wrongdoers, did not defeat plaintiff's right of joinder. The salutary procedure afforded by the joinder statutes regarding permissive joinder of defendants, the Court said, is clearly intended to be available to a plaintiff on a showing that the negligence of two or more persons, whether joint, independently concurrent, or successive, contributed proximately to cause the injury for which relief is sought. Furthermore, this procedure is also available on the showing that there exists a reasonable uncertainty requiring determination of some factual or legal issue with respect to the alternative or quantitative liability of the several defendants (*24 Cal. 2d 124, 130-131)* .

The Court then held that neither defendant was prejudiced by such joinder, since neither would be liable for any injury caused by the independent tort of his codefendant to which he himself did not proximately contribute. Joinder of defendants, the Court said, would promote rather than obstruct justice, since if it develops that only one defendant was negligent, the verdict will be simple. On the other hand, if it appears that the negligence of both defendants contributed proximately to the injury, then the matter of apportioning the damages to which each defendant was responsible would be considerably eased by having both defendants before the court at the same time and in the same action. Such joinder would also enable a jury to arrive at soundly based and just verdicts (*24 Cal. 2d 124, 130)* .

In ***Landau v. Salam*** *(1971) 4 Cal. 3d 901, 95 Cal. Rptr. 46, 484 P.2d 1390* , plaintiff brought an action against two separate and successive tortfeasors alleging personal injury as a result of the negligence of one defendant in the operation of an automobile and of the other in the maintenance of property, and a doubt as to which the damage was attributable. Defendants demurred to the complaint on grounds of misjoinder, and the trial court sustained the demurrer

without leave to amend.

On appeal from the judgment of dismissal, the Supreme Court reversed. Although the Court found the complaint clearly deficient in setting forth facts showing a fair doubt or reasonable uncertainty about the liability of defendants, nonetheless, it was error for the trial court to sustain the demurrer without leave to amend, since it is an abuse of discretion not to allow plaintiff leave to amend if there is a reasonable possibility that the defect can be cured by amendment. In this case, the Court held that plaintiff had alleged only an undescribed injury arising from two accidents that were separated by a period of over three months; nevertheless, he could, by amending his complaint, set forth more specific information concerning the facts of the two accidents, the nature of the injuries, and the interrelationship of the injuries. In so doing, plaintiff could well demonstrate a reasonable uncertainty about the respective liabilities of defendants (*4 Cal. 3d 901, 909)* .

For discussion of other issues raised in this case, see *§ 168.43[3][a], below.*

Counsel should note that the Supreme Court in *Landau* held that the theory that there must be some sort of "factual nexus" connecting or associating the claim pleaded against the several defendants in order for joinder to be permitted under former Code Civ. Proc. §§ 379a-379c [*now see Code Civ. Proc. § 379(a)-(c)*] was inapplicable to cases under Code Civ. Proc. § 379c [*now see Code Civ. Proc. § 379(c)*]. The Court stated that the imposition of the "factual nexus" theory on former Code Civ. Proc. § 379c [*now see Code Civ. Proc. § 379(c)*] would be superfluous. This section does not permit the unlimited joinder of defendants; rather it provides for joinder only when plaintiff pleads a specific relationship between the defendants, namely a single or cumulative injury, giving rise to doubt as to the respective liability of defendants for that injury. Therefore, the Court concluded, when a plaintiff states facts showing a reasonable uncertainty as to the respective liability of the defendants, these same facts constitute the connection that links the acts of the defendants and fulfills any claimed requisite of "factual nexus" (*4 Cal. 3d 901, 907)* .

Lambert v. Southern Counties Gas Co. *(1959) 52 Cal. 2d 347, 340 P.2d 608* , arose out of an action for damages resulting from destruction of a bulldozer owned by plaintiffs that caught fire after it struck and punctured a gas pipeline. In count one, plaintiffs alleged negligence of the lessors of the bulldozer in operating it over the pipeline. In count two, plaintiffs alleged negligence on part of the gas company in permitting its pipeline to remain so near the surface of the ground. Defendant gas company demurred generally to the entire complaint on the grounds that plaintiff had pleaded its own contributory negligence by alleging negligence on the part of defendant lessors. The trial court sustained the demurrer without leave to amend. Plaintiff appealed from the subsequent judgment of the trial court in favor of defendant.

The Supreme Court reversed the judgment of the trial court, holding that plaintiff could properly plead inconsistent causes of action. Moreover, the Court stated, the two counts in their respective statements of alleged negligence indicated that plaintiffs were in doubt as to which defendants should be held liable for the damages sustained and for that reason elected to set forth their two causes of action in one complaint. The Court concluded that plaintiffs had a right to do this under former Code Civ. Proc. §§ 379a, 379b, and 379c [*now see Code Civ. Proc. § 379(a),(b),(c)*] (*52 Cal. 2d 347, 353)* .

Counsel should note that these cases were decided before the 1971 amendment to *Code Civ. Proc. § 379*. However, these cases still appear to be good law regarding the issue of permissive joinder as defendants of all persons as to whom the plaintiff is in doubt concerning their respective liability (*see, e.g.,* *Service Employees International Union v. Hollywood Park, Inc. (1983) 149 Cal. App. 3d 745, 758, 197 Cal. Rptr. 316*). For discussion of the effect of the 1971 amendment to *Code Civ. Proc. § 379* on prior California law concerning the permissive joinder of defendants, see *§ 168.39[3][a]*.

[c] Liability Based on Negligence

The facts and procedural background of ***Landau v. Salam*** *(1971) 4 Cal. 3d 901, 95 Cal. Rptr. 46, 484 P.2d 1390* , are *discussed under § 168.43[4][b] above.* The Supreme Court in *Landau* held that plaintiff had pleaded (1) an injury, (2) negligence by successive tortfeasors, and (3) doubt as to which tortfeasor was liable and therefore came within the express terms of former Code Civ. Proc. § 379c [*now see Code Civ. Proc. § 379(c)*]. Under that provision, the Court stated, a plaintiff was not required to further plead a factual nexus connecting or associating the claim pleaded against the several defendants as required when the theory was solely grounded on former Code Civ. Proc. § 379a [*now see Code Civ. Proc. § 379(a)*]. That requirement, the Court added, would be superfluous, since former Code Civ. Proc. § 379c [*now see Code Civ. Proc. § 379(c)*] did not permit unlimited joinder, but rather permitted joinder only upon the plaintiff pleading a specific relationship between the defendants, namely a single or cumulative injury, giving rise to doubt as to the respective liability of defendants for that injury (*4 Cal. 3d 901, 906-907)* .

Counsel should note that this case was decided before the 1971 amendment to *Code Civ. Proc. § 379*. However, this case still appears to be good law regarding the issue of permissive joinder as defendants of all persons as to whom the plaintiff is in doubt concerning their respective liability (*see, e.g.,* *Service Employees International Union v. Hollywood Park, Inc. (1983) 149 Cal. App. 3d 745, 758, 197 Cal. Rptr. 316*). For discussion of the effect of the 1971 amendment to *Code Civ. Proc. § 379* on prior California law concerning the permissive joinder of defendants, see *§ 168.39[3][a]*.

[4] Additional Authorities

[a] Joint, Concurrent, or Successive Tortfeasors

Hege v. Worthington, Park & Worthington (1962) 209 Cal. App. 2d 670, 26 Cal. Rptr. 132 , involved an action by a client against attorneys for negligence in allowing the statute of limitations to run on his claim against contractors for alleged failure to complete a residence and against the contractor's surety on the performance bond. The surety demurred specially to the complaint on several grounds, including improper joinder of the cause of action against the surety with the cause of action against the attorneys. The trial court sustained this demurrer, and plaintiff appealed. Although affirming the portion of the judgment based on the sustaining of the defendant surety's special demurrer on other grounds (*209 Cal. App. 2d 670, 682-684)* , the court of appeal concluded that counts were properly joined. The court noted that if it is shown that the wrongful acts of two or more persons, whether joint, independently concurrent, or successive, contributed proximately to cause the injury for which recovery is sought, the causes of action thus arising may be joined in the same complaint under the statutes governing joinder of parties. The court concluded that in this case, the acts of defendants were successive events contributing to plaintiff's injury (*209 Cal. App. 2d 670, 680-688)* .

Counsel should note that this case was decided before the 1971 amendment to *Code Civ. Proc. § 379*. However, this case still appears to be good law regarding the issue of permissive joinder as defendants of joint, concurrent, and successive tortfeasors (*see, e.g.,* *Service Employees International Union v. Hollywood Park, Inc. (1983) 149 Cal. App. 3d 745, 758, 197 Cal. Rptr. 316*). For discussion of the effect of the 1971 amendment to *Code Civ. Proc. § 379* on prior California law concerning the permissive joinder of defendants, see *§ 168.39[3][a]*.

[b] When Plaintiff in Doubt as to Liability

The facts and procedural background of *Dallman Supply Co. v. Sweet (1948) 86 Cal. App. 2d 780, 195 P.2d 864* , are discussed in *§ 168.39*, under [3], Liberal Construction. In reversing an order of the trial court granting the motion of one of the defendants for a change of venue, the court of appeal held that parties had properly been joined as defendants under the provisions of former Code Civ. Proc. § 379c [*now see Code Civ. Proc. § 379(c)*] permitting joinder of parties as defendants when plaintiff is in doubt as to the defendant from whom he or she is entitled to redress (*86 Cal. App. 2d 780, 784)* .

In *Smith v. City of Los Angeles (1944) 66 Cal. App. 2d 562, 153 P.2d 69* , plaintiffs brought suit against defendant city,

as well as against the local flood control district and the Southern Pacific Railroad Company, among others, for damages caused by flooding from the overflow of the Tujunga River, allegedly caused by the construction of certain dikes by the various defendants. In reversing the trial court's sustaining of defendant's demurrers, the court of appeal held, among other things, that under the circumstances of the case, defendants were properly joined. The court said that plaintiffs properly alleged that they were unable to determine whether the damage sustained by them was caused by a concurrence of the acts of all of the defendants, or was caused in part by the acts of certain of the defendants and in part by the acts of the other defendants, and they were in doubt as against which of the defendants they were entitled to redress, the extent of the liability, and whether such liability was joint or several (*66 Cal. App. 2d 562, 575-576)* .

In *Morris v. Duncan (1936) 14 Cal. App. 2d 635, 58 P.2d 669* , plaintiff filed suit for personal injury against the driver of an automobile in which she was riding for negligent operation of the vehicle and against defendant county for negligence based on allegedly dangerous and defective warnings and barricade where a bridge had been washed out. In reversing the judgment of the trial court, the court of appeal held that plaintiff had stated a good cause of action when she joined the defendants and stated that she was in doubt whether she was entitled to recover against the driver, the county, or both (*14 Cal. App. 2d 635, 638)* .

See also *Ramey v. General Petroleum Corp. (1959) 173 Cal. App. 2d 386, 398, 343 P.2d 787* ; *Russello v. Mori (1957) 153 Cal. App. 2d 828, 833, 315 P.2d 343* ; *Sareussen v. Lowe (1954) 125 Cal. App. 2d 288, 290, 270 P.2d 27* ; and *Klinger v. Modesto Fruit Co., Inc. (1930) 107 Cal. App. 97, 101, 290 P. 127* , for additional appellate cases holding that when plaintiff is in doubt as to the liability of one or more persons, arising out of the same transaction or occurrence or series of transactions of occurrences, he or she may join those persons in a single action to determine their respective liability.

Counsel should note that these cases were decided before the 1971 amendment to *Code Civ. Proc. § 379*. However, these cases still appear to be good law regarding the issue of permissive joinder as defendants of all persons as to whom the plaintiff is in doubt concerning their respective liability (*see, e.g.,* *Service Employees International Union v. Hollywood Park, Inc. (1983) 149 Cal. App. 3d 745, 758, 197 Cal. Rptr. 316*). For discussion of the effect of the 1971 amendment to *Code Civ. Proc. § 379* on prior California law concerning the permissive joinder of defendants, see *§ 168.39[3][a]*.

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CHAPTER 168 PARTIES
PART II. FORMS

16-168 California Points & Authorities § 168.44

§ 168.44 Opposing Contention That Joinder of Person as Defendant Is Proper [Code Civ. Proc. § 379]--General Form

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Name*] CANNOT PROPERLY BE JOINED AS A DEFENDANT, BECAUSE PLAINTIFF HAS NOT ALLEGED THAT HE/SHE/IT HAS A RIGHT TO RELIEF AGAINST _____ [*name*] ARISING OUT OF THE SAME TRANSACTION OR OCCURRENCES OR SERIES OF TRANSACTIONS OR OCCURRENCES, AND THAT THERE EXISTS A COMMON QUESTION OF LAW OR FACT, OR THAT PLAINTIFF HAS A RIGHT, CLAIM, OR INTEREST ADVERSE TO _____ [*name*] IN THE PROPERTY OR TRANSACTION WHICH IS THE SUBJECT OF THE ACTION.

A. Statutory Requirements Not Met. Joinder of defendants under *Section 379 of the Code of Civil Procedure* is improper when plaintiff fails to allege that he or she has a right to relief against each defendant, arising out of the same transaction or occurrence or series of transactions or occurrences, or that he or she has a claim, interest, or right adverse to each defendant in the property or controversy which is the subject of the action (*Code Civ. Proc. § 379(a)*; *see also Hoag v. Superior Court (1962) 207 Cal. App. 2d 611, 618-620, 24 Cal. Rptr. 659*).

[*Optional*] **B. Failure to Allege That Plaintiff Is in Doubt as to Liability of Defendants.** Joinder of defendants under *Section 379(c) of the Code of Civil Procedure* is improper when plaintiff fails to allege that he or she is in doubt as to which defendant he or she is entitled to seek redress from (*Code Civ. Proc. § 379(c)*; *see also San Francisco M. Co. Ltd. v. Mordecai (1933) 134 Cal. App. 755, 761-762, 26 P.2d 669*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in opposition to the contention that a person may properly be joined as a defendant under the provisions of *Code Civ. Proc. § 379*, governing permissive joinder of defendants. This

form sets forth the general point that joinder of defendants is not proper unless the criteria of *Code Civ. Proc. § 379(a)*, or, if appropriate, *Code Civ. Proc. § 379(c)*, are met. The form may be used to oppose the contention that a new defendant may properly be joined in the action before the court, or to oppose the joinder of defendants in the original complaint. The optional Paragraph B may be included in the points and authorities when the plaintiff seeks relief under *Code Civ. Proc. § 379(c)* but has failed to allege that he or she is in doubt as to the liability of the respective defendants.

The foregoing points and authorities may be combined with points and authorities relating to the specific procedural context in which the issue of joinder of parties arises. For example, argument supported by the foregoing memorandum may be made by a plaintiff in support of a motion for leave to amend his or her complaint to add a new defendant or in opposition to a demurrer to the complaint on the ground of misjoinder of defendants. The points and authorities set out in this form may also be adapted for use in a trial or appellate brief.

For a discussion of procedures for obtaining or objecting to joinder of parties, see *§ 168.04*.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion of the relevant facts supporting the contention that the plaintiff has failed to allege the necessary statutory requirements that he or she has a right to relief against all the defendants arising out of the same transaction or occurrence or series of transactions or occurrences and that there will arise a question of law and fact common to all these persons.

In an appropriate case, this form may be used in opposition to the contention that a person or persons are properly joined as defendants pursuant to *Code Civ. Proc. § 379*, as supported by the points and authorities *set out in §§ 168.39 -168.43*.

[b] Related Pleading and Practice Forms

For a discussion and forms relating to joinder of parties, see Ch. 395, *Parties* in California Forms of Pleading and Practice.

[c] Related Points and Authorities

For points and authorities opposing a motion for leave to amend a complaint to add a new defendant, see Ch. 16, *Amended and Supplemental Pleadings* .

For points and authorities relating to cross complaints generally, see Ch. 64, *Cross Complaints* .

For points and authorities supporting a demurrer to a complaint for misjoinder of defendant, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Statutory Requirements Not Met

In ***Hoag v. Superior Court*** *(1962) 207 Cal. App. 2d 611, 24 Cal. Rptr. 659* , petitioner sought a writ of mandate to direct the respondent trial court to transfer certain causes of action relating to him to the superior court in the county of his residence. In the underlying action, three former students at the University of California, Berkeley, brought an action against each of four defendants for damages arising out of an alleged invasion of privacy. Plaintiffs in the underlying action had been arrested, though subsequently released with charges dismissed, after demonstrating against the House Un-American Activities Committee when it held hearings in San Francisco. Plaintiffs alleged in their respective causes of action that certain "mug shots" taken of them following their arrest had somehow been obtained by defendants and used maliciously to harass the respective plaintiffs by displaying these "mug shots" at various meetings in schools and

in other media. In the twelve causes of action, each plaintiff set forth an identical cause of action against each defendant based on his or her displaying or disseminating of the "mug shot" of each plaintiff, giving the differing dates and places of each activity. Petitioner demurred to the complaint, filed a motion to strike the complaint, and a motion for a change of venue, on the ground of misjoinder of parties. In his affidavits in sup port of the motions, petitioner denied that he knew two of the other defendants and denied that he discussed or communicated with any of the other defendants about any of the matters referred to in plaintiffs' causes of action and specifically denied displaying any of plaintiffs' mug shots to large public audiences at certain alleged places and times as alleged in some of the causes of action. The trial court denied the motions and overruled the demurrer. Petitioner then filed an application for the writ of mandate.

The court of appeal issued the writ, holding that there was an improper joinder of parties (*207 Cal. App. 2d 611, 620)* . The court noted that the complaint alleged that the defendants acted in four entirely different transactions independently of each other. Furthermore, there was no allegation of any conspiracy, community of interest, or concerted action in any respect, nor was there any single cause in which all of the defendants were interested or affected, or a necessary party to its determination. The court stated that although the general rule that statutes governing joinder of defendants are to be liberally construed should normally be followed, neither the statutes nor case law permitted unlimited joinder. Relying on *Landau v. Salam (1971) 4 Cal. 3d 901, 907, 95 Cal. Rptr. 46, 484 P.2d 1390* , the court observed that although each named defendant need not be interested in or affected by every count pleaded in the complaint [*see Code Civ. Proc. § 379(b)*], there still needed to be some sort of factual nexus connecting or associating the claim pleaded against the several defendants (*207 Cal. App. 2d 611, 618-619)* .

Counsel should note that this case was decided before the 1971 amendment to *Code Civ. Proc. § 379*. However, this case still appears to be good law regarding the issue of permissive joinder of defendants (*see, e.g., Service Employees International Union v. Hollywood Park, Inc. (1983) 149 Cal. App. 3d 745, 758, 197 Cal. Rptr. 316*). For discussion of the effect of the 1971 amendment to *Code Civ. Proc. § 379*, see *§ 168.39[3][a]*.

[b] Failure to Allege That Plaintiff Is in Doubt as to Liability of Defendants

San Francisco M. Co. Ltd. v. Mordecai *(1933) 134 Cal. App. 755, 26 P.2d 669* , arose out of an action for recovery of money and conversion of cattle. Plaintiff filed a complaint containing four separate and distinct causes of action against four separate defendants, praying for separate and distinct relief against each defendant on the cause of action specifically pleaded. In the first cause of action, plaintiff alleged the defendant Mordecai had agreed to sell a certain number of cattle but that later he rescinded the contract and took possession of the cattle, and that plaintiff's assignor had expended a certain sum for the care of the cattle. Plaintiff sought recovery of that money. In the second cause of action, plaintiff alleged defendant Mordecai assigned all of his rights in the contract to the second defendant, who chose to rescind the contract and took possession of the cattle, and plaintiff sought judgment for the same sum alleged to have been expended for the care of the cattle. In the third and fourth causes of action, plaintiff alleged that the third and fourth defendants wrongfully converted the cattle from the possession of its assignor, and plaintiff sought the value of the cattle from each defendant. Defendant Mordecai moved for a change of venue to the county of his residence on ground of misjoinder of parties in that the three other defendants were joined in order to obtain venue elsewhere. Plaintiff contended that joinder was justified on the theory that it was in doubt as to which of the defendants was liable. The trial court denied the motion, and defendant Mordecai appealed.

The court of appeal reversed the order denying the motion for a change of venue. While plaintiff may have argued that it was in doubt as to the defendant from whom it was entitled to seek redress, the court found that there was no allegation in any part of the complaint to that effect. To the contrary, stated the court, the complaint demonstrated no doubt as to the liability of Mordecai in the first cause of action based on an implied contract for the care of the cattle involved. The complaint also demonstrated no doubt as to the liability of the named defendants in the third and fourth causes of action for damages for conversion of the cattle. The court suggested that had plaintiff pleaded any uncertainty as to whether the appellant or either of the other named defendants was liable for the care of the cattle, the joinder of these defendants would have been permissible under the code section. The court further noted that relief was not sought

in the alternative; separate judgments were demanded against each defendant separately. No doubt was expressed as to appellant's liability under the other causes of action, nor of the other defendants' liability under the first cause of action against appellant (*134 Cal. App. 755, 760-762)* .

Counsel should note that this case was decided before the 1971 amendment to *Code Civ. Proc. § 379*. However, this case still appears to be good law regarding the issue of permissive joinder of defendants (*see, e.g.,* *Service Employees International Union v. Hollywood Park, Inc. (1983) 149 Cal. App. 3d 745, 758, 197 Cal. Rptr. 316*). For discussion of the effect of the 1971 amendment to *Code Civ. Proc. § 379*, see *§ 168.39[3][a]*.

California Points & Authorities

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
CHAPTER 168 PARTIES
PART II. FORMS

16-168 California Points & Authorities § 168.45

§ 168.45 Supporting Contention That Omitted Party Is Required to Be Joined Under Code Civ. Proc. § 389(a)--General Form

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Name*] MUST BE JOINED AS A PARTY TO THIS ACTION UNDER SECTION 389(a) OF THE CODE OF CIVIL PROCEDURE BECAUSE _____ [IN HIS/HER/ITS ABSENCE, COMPLETE RELIEF CANNOT BE ACCORDED AMONG THOSE WHO ARE ALREADY PARTIES *and/or* HE/SHE/IT CLAIMS AN INTEREST RELATING TO THE SUBJECT OF THE ACTION AND IS SO SITUATED THAT THE DISPOSITION OF THE ACTION IN HIS/HER/ITS ABSENCE MAY _____ (AS A PRACTICAL MATTER IMPAIR OR IMPEDE HIS/HER/ITS ABILITY TO PROTECT THAT INTEREST *and/or* LEAVE THOSE PERSONS WHO ARE ALREADY PARTIES TO THE ACTION SUBJECT TO A SUBSTANTIAL RISK OF INCURRING DOUBLE, MULTIPLE, OR OTHERWISE INCONSISTENT OBLIGATIONS BECAUSE OF HIS/HER/ITS CLAIMED INTEREST)].

[*EITHER*]

A. In Absence of Omitted Party, Complete Relief Cannot Be Granted to Existing Parties. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action must be joined as a party in the action if in his or her absence complete relief cannot be accorded among those who are already parties. If the person has not been joined, the court shall order that he or she be made a party (*Code Civ. Proc. § 389(a)(1)*; *see Cook v. Superior Court (2008) 161 Cal. App. 4th 569, 579* , *73 Cal. Rptr. 3d 895* ; *Kaczorowski v. Board of Supervisors for the County of Mendicino (2001) 88 Cal. App. 4th 564, 570-571, 106 Cal. Rptr. 2d 14* ; *Sierra Club, Inc. v. California Coastal Com. (1979) 95 Cal. App. 3d 495, 499-501, 157 Cal. Rptr. 190*).

[*AND/OR*]

B. Disposition of Action in Omitted Party's Absence Will Impair His or Her Ability to Protect Interest in Subject of Action. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action must be joined as a party in the action if he or she claims an interest relating to the subject matter of the action and is so situated that the disposition of the action in his or her absence may as a practical matter impair or impede his or her ability to protect that interest. If the person has not been joined in the action, the court shall order that he or she be made a party (*Code Civ. Proc. § 389(a)(2)(i)*; *see Cook v. Superior Court (2008) 161 Cal. App. 4th 569, 579 , 73 Cal. Rptr. 3d 895* ; *Conrad v. Unemployment Ins. Appeals Bd. (1975) 47 Cal. App. 3d 237, 241, 120 Cal. Rptr. 803* ; *Ursino v. Superior Court (1974) 39 Cal. App. 3d 611, 616, 114 Cal. Rptr. 404*).

[*AND/OR*]

C. Disposition of Action in Absence of Omitted Party Will Leave Existing Parties Subject to Risk of Double, Multiple, or Inconsistent Obligations. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action must be joined as a party in the action if he or she claims an interest relating to the subject matter of the action and if the disposition of the action in his or her absence would leave any of the persons already parties to the action subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of his or her claimed interest. If the person has not been joined, the court shall order that he or she be made a party (*Code Civ. Proc. § 389(a)(2)(ii)*; *see Atlantic Richfield Co. v. Superior Court (1975) 51 Cal. App. 3d 168, 176, 124 Cal. Rptr. 63*).

[*Optional*] **D. Unwilling Plaintiff May Be Joined as Defendant.** If the consent of anyone who should have been joined as plaintiff cannot be obtained, he or she may be made a defendant (*see Code Civ. Proc. § 382*).

[*Add further points and authorities if appropriate, relating to specific reasons why omitted party must be joined under Code Civ. Proc. § 389(a) (see §§ 168.46 and 168.47). If dismissal of the action is sought because the omitted party cannot be joined, this form should be combined with the points and authorities set out in § 168.49.*]

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that an omitted party is required to be joined under the provisions of *Code Civ. Proc. § 389(a)*, governing compulsory joinder of parties. This form sets forth the point that a person who is subject to the jurisdiction of the court and whose joinder will not deprive the court of jurisdiction must be joined if (1) in his or her absence complete relief cannot be accorded among those parties already in the action [*Code Civ. Proc. § 389(a)(1)*], or (2) he or she claims an interest relating to the subject of the action and is so situated that the disposition of the action in his or her absence may as a practical matter impair or impede his or her ability to protect that interest [*Code Civ. Proc. § 389(a)(2)(i)*] or leave any of the persons already parties to the action subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of his or her claimed interest [*Code Civ. Proc. § 389(a)(2)(ii)*].

The foregoing points and authorities may be combined with points and authorities pertaining to the specific procedural context in which the issue of joinder of parties arises. For example, the argument supported by the foregoing form may be raised by plaintiff in support of a motion for leave to amend the complaint to add a party required to be joined under *Code Civ. Proc. § 389(a)* [*see Code Civ. Proc. § 473*; *see also § 168.04[1]*]. The argument may also be raised by defendant when objecting, by answer or demurrer, to the nonjoinder of a party required to be joined under *Code Civ. Proc. § 389(a)* [*see Code Civ. Proc. §§ 430.10(d), 430.30*; *see also § 168.04[3]*]. The argument may also be raised by the omitted party in support of a noticed motion for an order compelling his or her joinder [*see Cuneo v. Superior*

Court (1963) 213 Cal. App. 2d 452, 454-456, 28 Cal. Rptr. 791 ; *see also § 168.04[4]*]. The points and authorities set out in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 168.48* may be used to oppose the contention supported by the foregoing points and authorities.

[c] Related Pleading and Practice Forms

For a discussion and forms relating to joinder of parties, see Ch. 395, *Parties* in California Forms of Pleading and Practice. For a discussion of amendment of a complaint to bring in a new defendant after the statute of limitations has run, see Ch. 345, *Limitation of Actions* in that set.

For a discussion and forms relating to intervention of a party into a pending action, see Ch. 395, *Parties* in California Forms of Pleading and Practice.

[d] Related Points and Authorities

For points and authorities supporting a motion for leave to amend a complaint to add a new party, see Ch. 16, *Amended and Supplemental Pleadings* in this set.

For points and authorities relating to complaints and cross complaints generally, see Ch. 61, *Cross Complaints* in this set.

For points and authorities opposing a demurrer to a complaint for nonjoinder of parties required to be joined, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* in this set.

For points and authorities relating to intervention generally, see Ch. 124, *Intervention* in this set.

[3] Discussion of Authorities

[a] In Absence of Omitted Party, Complete Relief Cannot Be Granted to Existing Parties

Code Civ. Proc. § 389(a) provides that a person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his or her absence complete relief cannot be accorded among those who are already parties, or (2) he or she claims an interest relating to the subject of the action and is so situated that the disposition of the action in his or her absence may (i) as a practical matter impair or impede his or her ability to protect that interest, or (ii) leave any of the persons already parties subject to substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his or her claimed interest. If he or she has not been so joined, the court shall order that he or she be made a party.

Code Civ. Proc. § 389 was amended in 1971 to conform substantially to FRCP, Rule 19, governing compulsory joinder in federal courts. As amended, *Code Civ. Proc. § 389* requires joinder of persons materially interested in an action whenever feasible. In certain instances, for example, joinder cannot be accomplished, because it would deprive the court of jurisdiction over the subject matter, as in cases where federal courts would have exclusive jurisdiction over matters involving the omitted party, or because personal jurisdiction over the omitted party cannot be obtained.

Under the former law, parties required to be joined were characterized as indispensable, and in their absence, the court could not proceed, since it had no jurisdiction to do so without their presence in the action before it. Under the revised law, a party required to be joined by the provisions of *Code Civ. Proc. § 389(a)* is to be regarded as indispensable only in the conclusional sense that in his or her absence, the court has decided that the action should be dismissed. When the decision is to proceed, the court has power to make a legally binding adjudication between the parties before it pursuant to *Code Civ. Proc. § 389(b)*.

In practice, however, the change from the former absolute rule is perhaps more one of emphasis, since the guidelines regarding the compulsory joinder of parties as set forth under revised *Code Civ. Proc. § 389* are substantially those that have guided the courts for years, as represented by the principles enunciated in *Bank of California v. Superior Court (1940) 16 Cal. 2d 516, 521-523, 106 P.2d 879* [*see* Law Revision Commission Comment to the 1971 Amendment to *Code Civ. Proc. § 389*]. For discussion of *Bank of California*, see *§ 168.50[3][c]*.

In ***Cook v. Superior Court*** *(2008) 161 Cal. App. 4th 569 , 73 Cal. Rptr. 3d 895* , the treasurer of the state Republican party filed an action in Orange County Superior Court requesting a writ of mandate stopping a candidate in the Democratic primary for Congress from using the title of "mayor" in her ballot designation. The candidate, Cook, filed a motion to dismiss the action for lack of jurisdiction. Cook then brought a petition for writ of mandate seeking dismissal of the action and a stay of her scheduled deposition. The treasurer had brought the action under *Elec. Code § 13314*, which allowed any "elector" to challenge by writ of mandate an error in ballot designations. The statute provides that the venue for such a proceeding is "exclusively in Sacramento" when the Secretary of State is named as a real party in interest or respondent. Under *Code Civ. Proc. § 389(a)*, if the Secretary of State is an indispensable party to the proceedings, the Secretary must be joined in the action. The court then analyzed whether the Secretary of State was an indispensable party because, if so, the treasurer would have to file the action in Sacramento County.

The court of appeals held that because the Secretary of State has a statutorily required role in determining whether a ballot designation contravenes the Election Code, complete relief could not be given in her absence. Additionally, the Secretary of State has an interest in the subject matter of the action because the Secretary is independently bound not to accept improper ballot designations and as a practical matter there is a risk she may not be able to review the results of a trial in Orange County. Because the Secretary of State was an indispensable party, the case had to be dismissed since the Secretary could not be made a party in Orange County (*161 Cal. App. 4th 569, 579)* .

In ***Kaczorowski v. Board of Supervisors for the County of Mendicino*** *(2001) 88 Cal. App. 4th 564, 570-571, 106 Cal. Rptr. 2d 14* , the court held that, in light of the indisputable centrality of the California Coastal Commission, its status as an indispensable party to an administrative mandamus challenging the Commission's issuance of a permit appears as a matter of law. If the court had entered a judgment against the Mendocino County Board of Supervisors in the proceeding, that judgment would not bind the Commission and would be vulnerable to collateral attack by the Commission. Thus, a judgment in the absence of the Commission would not be a complete determination of the controversy. A judgment without the Commission would be neither effective nor adequate.

In ***Sierra Club, Inc. v. California Coastal Com.*** *(1979) 95 Cal. App. 3d 495, 157 Cal. Rptr. 190* , plaintiff sought a writ of mandate to set aside decisions of the defendant coastal commission authorizing construction of condominiums and filed an amended petition naming developer of the project as the real party in interest. Developer moved for a judgment on the pleadings and dismissal of the action on ground that he was an indispensable party to the action and was not joined until after the statute of limitations had run on the time allowed for plaintiff to bring an action to set aside the decision of the commission. The trial court granted the motion and dismissed the action, and plaintiff appealed.

In affirming the decision, the court of appeal agreed with trial court's finding that the developer was a party required to be joined under Code *Civ. Proc. § 389*. The court of appeal held that the developer met the requirements of *Code Civ. Proc. § 389(a)(1)* in that he was a party in whose absence complete relief could not be accorded to those already parties,

because he would not be bound by any judgment adversely affecting his permit and would be free to attack any such judgment collaterally (*95 Cal. App. 3d 495, 501)* . The court of appeal also found that the omitted party could have been required to be joined under *Code Civ. Proc. § 389(a)(2)(i)* and *Code Civ. Proc. § 389(a)(2)(ii)* as well as under *Code Civ. Proc. § 389(a)(1)*.

[b] Disposition of Action in Omitted Party's Absence Will Impair His or Her Ability to Protect Interest in Subject of Action

In ***Cook v. Superior Court*** *(2008) 161 Cal. App. 4th 569* , *73 Cal. Rptr. 3d 895* , the treasurer of the state Republican party filed an action in Orange County Superior Court requesting a writ of mandate stopping a candidate in the Democratic primary for Congress from using the title of "mayor" in her ballot designation. The candidate, Cook, filed a motion to dismiss the action for lack of jurisdiction. Cook then brought a petition for writ of mandate seeking dismissal of the action and a stay of her scheduled deposition. The treasurer had brought the action under *Elec. Code § 13314*, which allowed any "elector" to challenge by writ of mandate an error in ballot designations. The statute provides that the venue for such a proceeding is "exclusively in Sacramento" when the Secretary of State is named as a real party in interest or respondent. Under *Code Civ. Proc. § 389(a)*, if the Secretary of State is an indispensable party to the proceedings, the Secretary must be joined in the action. The court then analyzed whether the Secretary of State was an indispensable party because, if so, the treasurer would have to file the action in Sacramento County.

The court of appeals held that because the Secretary of State has a statutorily required role in determining whether a ballot designation contravenes the Election Code, complete relief could not be given in her absence. Additionally, the Secretary of State has an interest in the subject matter of the action because the Secretary is independently bound not to accept improper ballot designations and as a practical matter there is a risk she may not be able to review the results of a trial in Orange County. Because the Secretary of State was an indispensable party, the case had to be dismissed since the Secretary could not be made a party in Orange County (*161 Cal. App. 4th 569, 579)* .

Conrad v. Unemployment Ins. Appeals Bd. *(1975) 47 Cal. App. 3d 237, 120 Cal. Rptr. 803* , was a mandamus proceeding by a former employee of the federal Social Security Administration seeking to compel the Unemployment Insurance Appeals Board to vacate its decision denying him benefits. The trial court sustained defendant's demurrer on ground that an indispensable party, the federal government, had not been joined, and the court entered judgment for the board.

The court of appeal reversed, holding that the trial court erred in failing to afford plaintiff the opportunity to join the federal agency as a defendant (*47 Cal. App. 3d 237, 242)* . The court found that in this case, the federal government had a direct pecuniary interest in the outcome of litigation, since a judgment compelling an award of benefits would fall upon federal funds budgeted for support of the agency, and was therefore an indispensable party required to be joined under *Code Civ. Proc. § 389(a)(2)* because it was a party subject to service of process and the court's jurisdiction (*47 Cal. App. 3d 237, 241-242)* .

In ***Ursino v. Superior Court*** *(1974) 39 Cal. App. 3d 611, 114 Cal. Rptr. 404* , petitioners moved to set aside and vacate the judgment of respondent superior court that restrained the city board of permit appeals from hearing petitioners' appeal from its grant of a building permit for a proposed McDonald's Restaurant, and to require the board to hear petitioners' appeal. Petitioners, operators of restaurants in the vicinity of the proposed restaurant, filed a timely notice of appeal, as authorized by local ordinance, from the department of public works' issuance of a building permit authorizing construction of the proposed restaurant. Petitioners claimed that their interest would be adversely affected by the operation of McDonald's Restaurant as a result of the issuance of the permit. Because of vacancies on the board, the hearing on the appeal was delayed several times. In the meantime, the owners of the construction site and McDonald's filed separate actions in the trial court and obtained writs of prohibition restraining the board from taking any action on petitioners' appeal other than upholding the validity of the previously issued permit. When the board with its full membership convened, it refused to hear the appeal of petitioners. Petitioners moved the trial court to set aside and

vacate the order of the trial court in granting its writ of prohibition. The owners had, however, voluntarily dismissed their own action, leaving only the McDonald's action before the court. Petitioners were not named as parties in the McDonald's action. The trial court denied the motions to set aside the judgment. Subsequently, petitioners brought an action against the site owners, McDonald's, and the construction company to enjoin construction of the restaurant. The trial court sustained defendants' demurrers to petitioners' complaint without leave to amend. Petitioners then applied to the court of appeal for a writ of mandate to require the trial court in the prohibition action brought by McDonald's to set aside and vacate its judgment restraining the board of permit appeals from hearing petitioners' appeal.

The court of appeal granted the writ, holding, among other things, that the superior court acted in excess of its jurisdiction by entering its judgment in the action brought by McDonald's without naming petitioners as real parties in interest, since McDonald's brought the action to prevent the hearing of petitioners' appeal on the issue of the validity of the original permit (*39 Cal. App. 3d 611, 616)* . The court noted that petitioners, as operators of nearby restaurants, had exercised their right to appeal to the board of permit appeals and that McDonald's lawsuit enjoining the board from hearing the appeal, if successful, as it was, would as a practical matter frustrate petitioners' appeal before that board and thus impair their ability to protect their interest. Petitioners, the court held, were indispensable parties because the relief sought would injure or adversely affect their interests and any attempt to adjudicate their rights without joinder was futile (*39 Cal. App. 3d 611, 617)* .

[c] Disposition of Action in Absence of Omitted Party Will Leave Existing Parties Subject to Risk of Double, Multiple, or Inconsistent Obligations

The facts and procedural background of ***Atlantic Richfield Co. v. Superior Court*** *(1975) 51 Cal. App. 3d 168, 124 Cal. Rptr. 63* , are discussed in *§ 168.49[3][a]*. In *Atlantic Richfield*, the court of appeal held that joinder of 57 royalty claimants in the action was required pursuant to *Code Civ. Proc. § 389* because any disposition in the action without their presence would subject petitioners to possible substantial risk of incurring multiple obligations to pay the same oil royalty (*51 Cal. App. 3d 168, 176)* .

[4] Additional Authorities

[a] In Absence of Omitted Party, Complete Relief Cannot Be Granted to Existing Parties

In *Hayes v. State Dept. of Developmental Services (2006) 138 Cal. App. 4th 1523, 42 Cal. Rptr. 3d 363* , the court held that the Department of General Services, Office of Administrative Hearings (OAH) was not a necessary party, let alone an indispensable one, in an autistic minor's action challenging a decision that affirmed the termination of funding for the educational portion of the minor's "In-Home Discrete Trial Program"; therefore, the trial court abused its discretion in dismissing the minor's petition for peremptory writ of administrative mandamus. The contracts between the Department of Developmental Services (DDS) and OAH unequivocally demonstrated that OAH was DDS' designee with respect to the fair hearing procedure of the Lanterman Developmental Disabilities Services Act (*Welf. & Inst. Code, § 4500 et seq.*). The minor could be accorded complete relief among those who were already parties without the need to join OAH. Moreover, OAH would suffer no harm from the minor's failure to join it as a party (*138 Cal. App. 4th 1523, 1533-1534)* .

In *Deltakeeper v. Oakdale Irrigation District (2001) 94 Cal. App. 4th 1092, 115 Cal. Rptr. 2d 244* , the court of appeal clarified that the complete relief clause of *Code Civ. Proc. § 389(a)* focuses not on whether complete relief can be afforded all possible parties to the action, but on whether complete relief can be afforded the parties named in the action (*94 Cal. App. 4th 1092, 1101* , citing *Countrywide Home Loans, Inc. v. Superior Court (1999) 69 Cal. App. 4th 785*). See *§ 168.48* for discussion of this case and its application in opposing joinder of a party.

The following cases were decided under FRCP, Rule 19, which is the source of *Code Civ. Proc. § 389*, as amended in 1971 [*see* 10 Cal. L. Rev. Comm. Reports 501, 535]. Federal cases interpreting FRCP, Rule 19(a), may be useful in

interpreting the provisions of *Code Civ. Proc. § 389(a)*, as amended, in those instances in which a California appellate court has not ruled on a particular issue [*see, e.g.,* *Conrad v. Unemployment Ins. Appeals Bd. (1975) 47 Cal. App. 3d 237, 241, 120 Cal. Rptr. 803]* .

Lopez v. Arraras (1st Cir. 1979) 606 F.2d 347 , involved an action by tenants in a federally funded housing project against local officials for failure to meet statutory requirements, which caused them to pay rents in excess of the permissible maximum. The federal court of appeals remanded the case for, among other things, joinder of the Department of Housing and Urban Development (HUD). The court agreed with defendants that the availability of federal funds was a decision solely within the responsibility of HUD. Consequently, without HUD, the district court would be unable to accord complete relief to those already parties in the action pursuant to *Fed. R. Civ. P., Rule 19(a)(1),* (*606 F.2d 347, 351-354)* .

In *Harris v. White (D. Mass. 1979) 479 F. Supp. 996* , plaintiffs brought an action challenging employment practices of a municipal public works department on the grounds of discrimination. Various state officials, joined as defendants, moved to dismiss the action, as against them, on the grounds that the complaint failed to allege state involvement in the allocation of revenue sharing funds to the public works department. The federal district court denied the motion, holding that there was sufficient state involvement and that under *Fed. R. Civ. P., Rule 19(a)(1),* state defendants were proper parties, since in their absence the court would be unable to fashion complete and effective relief to the other parties already in the case (*479 F. Supp. 996, 1011)* .

Dyke v. Gulf Oil Corp. (Temp. Emer. Ct. App. 1979) 601 F.2d 557 , arose out of an action by plaintiffs for private damages under the Economic Stabilization Act. Plaintiff had joined the Department of Energy as a defendant under *Fed. R. Civ. P., Rule 19.* As to the term "complete relief," the court of appeals in a footnote said that it refers to relief as between the persons already parties and not as between the parties and the absent person whose joinder is sought (*601 F.2d 557, 566, n.20*).

[b] Disposition of Action in Omitted Party's Absence Will Impair His or Her Ability to Protect Interest in Subject of Action

In *In re Marriage of Lugo (1985) 170 Cal. App. 3d 427, 217 Cal. Rptr. 74* , the court of appeal held that a county that provides public assistance benefits for a child to a custodial parent is an indispensable party to an action that seeks to reduce or suspend the noncustodial parent's obligation to pay child support. The court rejected the noncustodial parent's contention that a stipulation he made with the custodial parent to suspend his payment of child support should be upheld, even though a county that was paying Aid to Families With Dependent Children benefits for the child did not receive written notice of the hearing at which the stipulation was made. Under *Civ. Code § 248* the county may proceed on behalf of an obligee to enforce his or her right of support against the obligor. In any proceeding that seeks to diminish or impair those statutory rights, the county is an indispensable party under *Code Civ. Proc. § 389(a)(2)(i)* (*170 Cal. App. 3d 427, 430, 433)* . Note that *Civ. Code § 248* is repealed operative January 1, 1994, and replaced by *Fam. Code § 4002(a),* with respect to enforcement of child support.

The facts and procedural background of *Sierra Club, Inc. v. California Coastal Com. (1979) 95 Cal. App. 3d 495, 157 Cal. Rptr. 190* , are discussed in *§ 168.45[3][a].*

In *Sierra Club,* the court of appeal affirmed the decision of the trial court dismissing the action for failure to join a party required to be joined within the applicable statute of limitations. In so doing, the court agreed with the subsequently joined omitted party's contention that he was required to be joined by *Code Civ. Proc. § 389.* The court noted that when the plaintiff seeks affirmative relief that, if granted, would injure or affect the interest of a third person not joined, the third person is an indispensable party. The court held in this case that plaintiff, in seeking to set aside the decision authorizing construction of condominiums in a certain area along the coast, sought relief that, if granted, would adversely affect the rights of the developer who had received permission to begin construction and therefore was

required to join the developer as a defendant (*95 Cal. App. 3d 495, 501)* .

In *Hartman Ranch Co. v. Associated Oil Co. (1937) 10 Cal. 2d 232, 73 P.2d 1163* , plaintiff lessor brought an action for, among other things, forfeiture of an oil lease against defendant sublessee on grounds of breach of an implied convenant to protect plaintiff's land from drainage. Plaintiff prevailed at trial, and the trial court granted a conditional decree of forfeiture. On appeal, defendant contended, regarding the forfeiture, that as sublessees they were not subject to an action by the original lessor for breach of covenants of the parent lease. The Supreme Court on its own motion raised the objection of failure to join indispensable parties, though noting that defendant had unsuccessfully demurred on the grounds that there was a defect of parties, and held that the owners and holders of the parent lease were indispensable parties who should have been joined, since the relief sought affected the rights of the sublessors who are the owners and holders of the parent lease and the judgment of forfeiture of the lease would necessarily affect their rights (*10 Cal. 2d 232, 262)* .

Southern Cal. Title Clearing Co. v. Laws (1969) 2 Cal. App. 3d 586, 83 Cal. Rptr. 8 , involved an action by plaintiff for partition of certain property and termination of a community oil and gas lease on the property. The lease involved 13 lots in a certain area, and by the terms of the leases between the original lessee and the 13 owners, all 13 leases were to be construed together and constituted one community lease. Each lot owner was to receive a pro rata share of oil and gas royalties for oil and gas discovered and produced on any of the 13 lots. Plaintiff was coowner of only one lot, together with defendant coowner. Defendant lessee was the successor to the lease entered into between the 13 owners and the original lessee. Plaintiff sought to terminate the lease on the ground that the oil and gas being extracted from the lots were not being produced in paying quantities. Defendant lessee had brought the trial court's attention to the absence in the action of the other lot owners, but apparently the trial court took no action concerning the omission. On the issue of the termination of the lease, the trial court refused to declare it terminated, and plaintiff, who had prevailed in the partition action, appealed from the order denying termination of the lease.

The court of appeal reversed the trial court's judgment declaring the lease to be in full force and effect. The court of appeal held that the other coowners of lots involved in the community gas and oil lease were required to be joined in the action pursuant to *Code Civ. Proc. § 389*. A community oil and gas lease, the court stated, gives each lessor an interest in any oil or gas produced on each of the other lots involved in the lease. Consequently, the court concluded, plaintiff's attempt to terminate the lease with regard to only one lot affected the owners of the other lots as well, since they would be deprived of their right to share royalties on any oil that might be produced on the property in question.

Counsel should note that both *Hartman* and *Laws, above,* were decided under *Code Civ. Proc. § 389* prior to its 1971 amendment; however, both cases are probably still good law under present *Code Civ. Proc. § 389(a)(2)(i),* since a judgment forfeiting the oil and gas lease in each case would probably, as a practical matter, impair the ability of the omitted parties to protect their interests in the lease.

The following case was decided under FRCP, Rule 19, which is the source of *Code Civ. Proc. § 389*, as amended in 1971 [*see* 10 Cal. L. Rev. Comm. Reports 501, 535]. Federal cases interpreting FRCP, Rule 19(a), may be useful in interpreting the provisions of *Code Civ. Proc. § 389(a)*, as amended, in those instances in which a California appellate court has not ruled on a particular issue [see, *e.g.,* *Conrad v. Unemployment Ins. Appeals Bd. (1975) 47 Cal. App. 3d 237, 241, 120 Cal. Rptr. 803]* .

In *Schutten v. Shell Oil Co. (5th Cir. 1970) 421 F.2d 869* , plaintiff filed suit to evict defendant oil company from certain land and to secure accounting for removal of oil, gas, and other minerals. Plaintiff failed to join defendant's lessor who had a conflicting claim regarding the land. The federal court of appeals stated that despite the fact that the omitted party would not be bound by the judgment, a judgment in favor of plaintiff would nonetheless create a cloud on the omitted party's title and deprive it of royalties. Therefore, held the court, joinder was required pursuant to FRCP, Rule 19(a)(2)(i), since a disposition in the lessor's absence would as a practical matter affect its rights in the property (*421 F. 2d 869, 873)* .

[c] Disposition of Action in Absence of Omitted Party Will Leave Existing Parties Subject to Risk of Double, Multiple, or Inconsistent Obligations

The following cases were decided under FRCP, Rule 19, which is the source of *Code Civ. Proc. § 389*, as amended in 1971 [*see* 10 Cal. L. Rev. Comm. Reports 501, 535]. Federal cases interpreting *Fed. R. Civ. P., Rule 19(a)*, may be useful in interpreting the provisions of *Code Civ. Proc. § 389(a)*, as amended, in those instances in which a California appellate court has not ruled on a particular issue [*see, e.g., Conrad v. Unemployment Ins. Appeals Bd. (1975) 47 Cal. App. 3d 237, 241, 120 Cal. Rptr. 803]* .

In *Window Glass Cutters League of America v. American St. Gobain Corp. (3d Cir. 1970) 428 F.2d 353* , plaintiff union sought to compel defendant employer to arbitrate a grievance involving an alleged violation of its collective bargaining agreement when defendant employer assigned certain work to be done by persons outside the contractual bargaining unit. Defendant company moved to join the union that represented the assigned workers. The court of appeals held that joinder was required under FRCP, Rule 19(a)(2)(ii), since there was a substantial risk that arbitration between only defendant and plaintiff would expose defendant company to the risk that the omitted union would in turn initiate a separate grievance against the company, leading to potentially conflicting awards, thus giving rise to a substantial risk of inconsistent obligations being imposed on defendant (*428 F. 2d 353, 354-355)* .

N.Y.S. Association for Retarded Children, Inc. v. Carey (E.D. N.Y. 1977) 438 F. Supp. 440 , involved an action by plaintiffs to force a state agency to comply with a consent judgment entered against it in a previous action. The state agency, through an order to show cause, sought to join the civil service employee's union that represented agency employees, for the limited purpose of determining whether the proposed contract between the state agency and a private organization to operate certain facilities would infringe on any rights of its employees. The district court ordered the union to be joined, holding, among other things, that the state agency might be subject to double liability should it conclude a contract with the private organization and thereafter discover it had no right to do so (*438 F. Supp. 440, 443)* .

The following cases were decided under *Code Civ. Proc. § 389* prior to its 1971 amendment; however, both cases still appear to be good law under *Code Civ. Proc. § 389*, as amended. In both cases, the court held that the omitted party's joinder was required because a disposition of the action in his or her absence would leave existing parties subject to future litigation by the omitted party and the consequent possibility of inconsistent obligations. Thus, joinder would probably have been held to be required under present *Code Civ. Proc. § 389(a)(2)(ii)*.

Warner v. Pacific Tel. & Tel. Co. (1953) 121 Cal. App. 2d 497, 263 P.2d 465 , was an action for damages against defendant telephone company for damages allegedly resulting from the form of listing of the former wife of plaintiff's husband in the telephone directory. The directory listed plaintiff's husband, Caryl Warner, with office and residence address and phone number, followed by two listings for Mrs. Caryl Warner. The first listing had a residential address and phone number different from Caryl Warner, while the second listing for Mrs. Warner corresponded to Caryl Warner's residential address and phone number. After previously sustaining defendant's demurrer, the trial court sustained defendant's demurrer to the third amended complaint without leave to amend and granted judgment to defendant. The court of appeal, on appeal by plaintiff, affirmed the judgment of the trial court, holding that the former Mrs. Warner was a party required to be joined in the action. Should plaintiff prevail, reasoned the court, and should the omitted party's listing be discontinued as requested, the telephone company would be subjected to a possible future action brought against it by the omitted party. Since the telephone company has a right to be protected against unnecessary litigation to which it might be subjected, the trial court's action was proper in sustaining defendant's demurrer without leave to amend in as much as plaintiff had twice failed to include the omitted party in the amended complaints after the original ruling (*121 Cal. App. 2d 497, 500-502)* .

In *Nau v. Santa Ana Sugar Co. (1926) 79 Cal. App. 685, 250 P. 705* , plaintiff, creditor of the omitted parties, brought an action for a declaration of rights against defendant, also a creditor of the same parties, to determine whether money

received by defendant for the benefit of the mutual debtors should be applied to the debt owed to plaintiff or to the debt owed to defendant. Plaintiff owned certain property, which he leased to one of the omitted parties, Buck, who in turn assigned his lease to the other omitted party, Culver, subject to the same terms and conditions, including the creation of an equitable lien on future crops in favor of plaintiff. Defendant sugar-processing company executed with Culver a chattel mortgage on future crops. Culver delivered the crop to defendant for processing, and defendant applied the proceeds of the sale in excess of the value of the crop to the debt of Culver. The court of appeal reversed the judgment in favor of plaintiff on the ground that the trial court had failed to join Buck and Culver as necessary parties. Their presence was required, said the court, for the full protection of defendant, who would be subjected to an inconvenience and danger of future litigation with the omitted parties, since they would not be bound by the judgment in favor of plaintiff and could resist and defend any action brought against Culver by defendant (*79 Cal. App. 685, 694-695)* .

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16-168 California Points & Authorities § 168.46

§ 168.46 Supporting Contention That Omitted Party Is Required to Be Joined Under Code Civ. Proc. § 389(a)--Partial Assignee or Subrogee

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with the general points and authorities set out in § 168.45.*]

_____ [*Name*] MUST BE JOINED AS A PARTY TO THIS ACTION UNDER SECTION 389(a) OF THE CODE OF CIVIL PROCEDURE BECAUSE HE/SHE/IT IS A PARTIAL _____ [ASSIGNEE *or* SUBROGEE] OF THE CLAIM ASSERTED BY PLAINTIFF.

Partial Assignees or Subrogees Required to Be Joined. A person who has been partially subrogated to, or has received a partial assignment of, another's claim must be joined in an action by the other on that claim (*see Bank of Orient v. Superior Court (1977) 67 Cal. App. 3d 588, 595, 136 Cal. Rptr. 741*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that an omitted party must be joined under Code Civ. Proc. § 389(a). The form sets forth the point that a partial assignee or subrogee must be joined as a party in an action by another on the assigned or subrogated claim. The points and authorities set out in this form should be combined with the general form of points and authorities supporting the contention that joinder is required under *Code Civ. Proc. § 389(a)* [*see § 168.45*].

The foregoing points and authorities may be combined with points and authorities pertaining to the specific procedural context in which the issue of joinder arises. For example, the argument supported by the foregoing form may be raised by plaintiff in support of a motion for leave to amend the complaint to add a party required to be joined under *Code Civ. Proc. § 389(a)* [*see Code Civ. Proc. § 473*; *see also § 168.04[1]*]. The argument may also be raised by defendant when objecting, by answer or demurrer, to the nonjoinder of a party required to be joined under *Code Civ. Proc. § 389(a)* [*see*

Code Civ. Proc. §§ 430.10(d), 430.30; *see also § 168.04[3]*]. The argument may also be raised by the omitted party in support of a noticed motion for an order compelling his or her joinder [*see Cuneo v. Superior Court (1963) 213 Cal. App. 2d 452, 454-456, 28 Cal. Rptr. 791* ; *see also § 168.04[4]*]. The points and authorities set out in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should discuss facts in the record showing that the omitted party has received a partial assignment of, or has been partially subrogated to, the claim asserted by plaintiff in the action.

[b] Related Pleading and Practice Forms

For discussion and pleading forms relating to assignment of claims, see Ch. 60, *Assignments* in California Forms of Pleading and Practice. For discussion and pleading forms pertaining to subrogation, see Ch. 536, *Subrogation* in that set.

[3] Discussion of Authorities

[a] Partial Assignees or Subrogees Required to Be Joined

In ***Bank of Orient v. Superior Court*** *(1977) 67 Cal. App. 3d 588, 136 Cal. Rptr. 741* , petitioner savings and loan association, defendant in an underlying action, sought a writ of mandate directing the respondent superior court to order joinder of plaintiff bank's insurer as a plaintiff in the underlying action. In the underlying action, plaintiff bank brought an action to recover funds converted by one of its branch managers, who had deposited some $435,000 in the savings and loan association and had subsequently withdrawn the entire amount. The bank's insurer had paid the bank some $449,000 on its loss and obtained a partial release. After an additional payment of $124,000, it obtained a full release. The bank, in return for these payments, assigned all of its claims and demands arising out of the loss to its insurer. After the trial court refused to order joinder, petitioner sought the writ of mandate to compel it to do so.

The court of appeal granted the writ directing that the insurer be joined as a party to the action. Citing *Taylor v. Sanford (1962) 203 Cal. App. 2d 330, 347, 21 Cal. Rptr. 697* , the court observed that when, in a situation such as this, there has been a partial assignment, all parties claiming an interest in the assignment must be joined as plaintiffs. The court stated that the same reasoning applies to partial subrogees (*67 Cal. App. 3d 588, 595)* . The court held that because of the partial release executed contemporaneously with the commencement of this action, plaintiff's insurer became a partial assignee and subrogee, possessed of a substantial interest in plaintiff's claims (*67 Cal. App. 3d 588, 595-596)* . The court concluded that the presence of plaintiff's insurer was compelled under the provisions of *Code Civ. Proc. § 389* and that the defendant bank should be permitted to file its proposed cross complaint for declaratory relief, offset, and damages against the joined plaintiff (*67 Cal. App. 3d 588, 597)* .

[4] Additional Authorities

[a] Partial Assignees or Subrogees Required to Be Joined

In *Ferraro v. Southern Cal. Gas Co. (1980) 102 Cal. App. 3d 33, 162 Cal. Rptr. 238* , plaintiffs brought an action against defendants for damages caused by alleged negligence. Plaintiffs failed to join as parties their insurer, with whom they had reached a settlement and subrogation agreement. On appeal, defendants raised, for the first time, the failure to join an indispensable party. The court of appeal affirmed the decision, holding that while the insurer was a partial subrogee and therefore was required to be joined pursuant to *Code Civ. Proc. § 389(a)*, nonetheless, defendants waived their right to assert the issue by failing to object to the defect in parties until appeal (*102 Cal. App. 3d 33, 44-45)* .

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16-168 California Points & Authorities § 168.47

§ 168.47 Supporting Contention That Omitted Party Is Required to Be Joined Under Code Civ. Proc. § 389(a)--Corporation Required to Be Joined in Shareholder's Derivative Suit Brought on Its Behalf

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with the general points and authorities set out in § 168.45.*]

_____[*Name of corporation*] MUST BE JOINED AS A PARTY TO THIS ACTION BECAUSE IT IS THE CORPORATION ON WHOSE BEHALF PLAINTIFF IS BRINGING THIS ACTION.

Shareholder's Derivative Action on Behalf of Corporation. A corporation is required to be joined in a representative action brought on its behalf by shareholders, since its rights, not that of the nominal plaintiff, are to be litigated (*see Keeler v. Schulte (1957) 47 Cal. 2d 801, 803, 306 P.2d 430* ; *Beyerbach v. Juno Oil Co. (1954) 42 Cal. 2d 11, 27-28, 265 P.2d 1*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that an omitted party is required to be joined under the provisions of *Code Civ. Proc. § 389(a)*, governing compulsory joinder of parties. This form sets forth the point that joinder of a corporation is required when plaintiff shareholders bring an action on the corporation's behalf. The points and authorities set out in this form should be combined with the general form of memorandum of points and authorities *set out in § 168.45*.

The foregoing points and authorities may be combined with points and authorities pertaining to the specific procedural context in which the issue of joinder arises. For example, the argument supported by the foregoing form may be raised by plaintiff in support of a motion for leave to amend the complaint to add a party required to be joined under *Code Civ. Proc. § 389(a)* [*see Code Civ. Proc. § 473*; *see also § 168.04[1]*]. The argument may also be raised by defendant when objecting, by answer or demurrer, to the nonjoinder of a party required to be joined under *Code Civ. Proc. § 389(a)* [*see*

Code Civ. Proc. §§ 430.10(d), 430.30; *see also § 168.04[3]*]. The argument may also be raised by the omitted party in support of a noticed motion for an order compelling his or her joinder [*see Cuneo v. Superior Court (1963) 213 Cal. App. 2d 452, 454-456, 28 Cal. Rptr. 791* ; *see also § 168.04[4]*]. The points and authorities set out in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the point of law stated.

[b] Related Pleading and Practice Forms

For discussion and forms pertaining to shareholder's derivative actions generally, see Ch. 160, *Corporations* in California Forms of Pleading and Practice.

[c] Related Points and Authorities

For points and authorities relating to shareholders' derivative suits generally, see Ch. 52, *Corporations* , in this set. For points and authorities relating to class and representative actions, see Ch. 41, *Class and Representative Actions* in this set.

[3] Discussion of Authorities

[a] Shareholder's Derivative Action on Behalf of Corporation

In ***Keeler v. Schulte*** *(1957) 47 Cal. 2d 801, 306 P.2d 430* , plaintiff brought a representative suit on behalf of a lodge organized as a California corporation, to set aside a deed of lodge property and to enjoin an attempted dissolution of the lodge. Defendants demurred to plaintiff's complaint on the ground that it failed to state a cause of action because of the failure to include the lodge as a party. The trial court sustained the demurrer with leave to amend. When plaintiff declined to amend the complaint, the trial court entered judgment dismissing the action. Plaintiff appealed.

The Supreme Court affirmed the judgment of dismissal. Citing *Beyerbach v. Juno Oil Co. (1954) 42 Cal. 2d 11, 27-28, 265 P.2d 1* (discussed infra), the Court held that a corporation is an indispensable party to a representative action brought on its behalf, since its rights, not those of the nominal plaintiff, are to be litigated. In this case, the Court observed, plaintiff in a representative capacity was attempting to recapture the lodge's funds and property (*47 Cal. 2d 801, 803)* . The Court concluded that since plaintiff refused to amend his complaint to join the corporation as a party, the action could not continue on its behalf, and the trial court had no alternative but to order dismissal of the action (*47 Cal. 2d 801, 804)* .

Beyerbach v. Juno Oil Co. *(1954) 42 Cal. 2d 11, 265 P.2d 1* , involved a stockholder's derivative suit to compel certain individual defendants to transfer to the defendant corporation a certain oil lease in return for stock issued. The court ordered plaintiff to deposit security for the reasonable expenses incurred by defendant corporation and individual defendants.

On appeal by plaintiff, the Supreme Court upheld the trial court's decision to dismiss the action upon failure of plaintiff to obey the security order. The Court held that regardless of the propriety of the trial court's order concerning the individual defendants, plaintiff's refusal in regard to the corporation left the trial court no choice. The stockholders were only nominal plaintiffs, and the rights to be litigated were that of the corporation. Therefore, concluded the Court, when plaintiff failed to furnish the required security for the corporation, the action could not continue against it and since it was an indispensable party to the action, the trial court had no alternative but to dismiss as to all defendants (*42 Cal. 2d 11, 27-28)* .

Counsel should note that both of the above-cited cases were decided before the 1971 revision of the compulsory joinder

of parties statute [*Code Civ. Proc. § 389*]. However, cases decided under the former statute appear still to be good law insofar as they define which persons must be joined under *Code Civ. Proc. § 389(a)* if subject to the court's process and if joinder would not deprive the court of jurisdiction. These cases, however, are no longer authority insofar as they hold that the court's failure to bring in a particular person as a party to an action deprives the court of jurisdiction to render judgment in an action between the parties already before the court [*see* 10 Cal. L. Rev. Comm. Reports 501, 535-537 (1971)]. For discussion of the effect of the 1971 amendment to *Code Civ. Proc. § 389* on prior California law, see *§ 168.45[3][a]*.

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16-168 California Points & Authorities § 168.48

§ 168.48 Opposing Contention That Omitted Party Is Required to Be Joined Under Code Civ. Proc. § 389(a)

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Name*] IS NOT REQUIRED TO BE JOINED AS A PARTY TO THIS ACTION UNDER SECTION 389(a) OF THE CODE OF CIVIL PROCEDURE, BECAUSE (1) HE/SHE/IT IS NOT SO SITUATED THAT A DISPOSITION OF THIS ACTION IN HIS/HER/ITS ABSENCE WILL AS A PRACTICAL MATTER IMPAIR OR IMPEDE HIS/HER/ITS ABILITY TO PROTECT HIS/HER/ITS CLAIMED INTEREST IN THE SUBJECT OF THIS ACTION, (2) A DISPOSITION OF THIS ACTION IN HIS/HER/ITS ABSENCE WILL NOT LEAVE ANY OF THE PERSONS WHO ARE ALREADY PARTIES TO THIS ACTION SUBJECT TO ANY SUBSTANTIAL RISK OF INCURRING DOUBLE, MULTIPLE, OR OTHERWISE INCONSISTENT OBLIGATIONS BECAUSE OF HIS/HER/ITS CLAIMED INTEREST, AND (3) THE COURT CAN ACCORD COMPLETE RELIEF TO THE PERSONS WHO ARE ALREADY PARTIES TO THIS ACTION, WITHOUT _____'S [*name*] PRESENCE.

A. Statutory Requirements Not Met. Joinder of a person who claims an interest in the subject of the action is not required when he or she is not so situated that a disposition of the action in his or her absence will as a practical matter impair or impede his or her ability to protect that interest; when a disposition of the action in his or her absence will not leave any of the persons already parties to the action subject to substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of his or her claimed interest; and when the court can accord complete relief to the persons already parties to the action without the omitted party's presence (*see Code Civ. Proc. § 389(a)*).

B. Joinder Not Required When Neither Omitted Party nor Existing Parties Substantially Prejudiced by Absence of Omitted Party. *Section 389 of the Code of Civil Procedure* limits compulsory joinder to those situations in which the absence of a person may result in substantial prejudice to that person or to the parties already before the court (*Union Carbide Corp v. Superior Court (1984) 36 Cal. 3d 15, 21-24, 201 Cal. Rptr. 580, 679 P.2d 14* ; *Copley v. Copley (1981) 126 Cal. App. 3d 248, 296-297, 178 Cal. Rptr. 842* ; *see also Camp v. Board of Supervisors (1981) 123 Cal. App. 3d 334, 354, 176 Cal. Rptr. 620*).

[*AND/OR*]

C. The Complete Relief Clause of *Code of Civil Procedure 389(a)* Does Not Mandate That, Whenever Feasible, Persons Materially Interested in the Subject of an Action Should Be Joined. *Section 389(a)(1) of the Code of Civil Procedure* focuses not on whether complete relief can be afforded all possible parties to the action, but on whether complete relief can be afforded the parties named in the action; courts must be careful to avoid converting Section 389 from a discretionary power or a rule of fairness into an arbitrary and burdensome requirement which may thwart rather than accomplish justice (*Olszewski v. Scripps Health (2003) 30 Cal. 4th 798, 808, 135 Cal. Rptr. 2d 1* ; *Deltakeeper v. Oakdale Irrigation District (2001) 94 Cal. App. 4th 1092, 1100-1109, 115 Cal. Rptr. 2d 244*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in opposition to the contention that a person is required to be joined under the provisions of *Code Civ. Proc. § 389(a)*, governing compulsory joinder of parties. This form sets forth the general point that an omitted party need not be joined in an action unless one of the three criteria of *Code Civ. Proc. § 389(a)* are satisfied. The form may also be used in opposition to the contention that the action should be dismissed on the ground that a party required to be joined under *Code Civ. Proc. § 389(a)* cannot be joined [*see §§ 168.49, 168.50*].

The foregoing points and authorities may be combined with points and authorities pertaining to the specific procedural context in which the issue of joinder arises. For example, the points and authorities set out in this form may be submitted by plaintiff in opposition to the objection, by answer or demurrer, to the nonjoinder of a party, when defendant contends that the omitted party is required to be joined under *Code Civ. Proc. § 389(a)* [*see Code Civ. Proc. §§ 430.10(d), 430.30*; *see also § 168.04[1]*]. The points and authorities in this form may also be submitted by either existing party in opposition to a noticed motion by the omitted party for an order compelling his or her joinder [*see Cuneo v. Superior Court (1963) 213 Cal. App. 2d 452, 454-456, 28 Cal. Rptr. 791* ; *see also § 168.04[4]*]. The points and authorities set out in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the claimed interest of the omitted party and show how the absence of the omitted party would not substantially prejudice the rights of either the omitted party or that of existing parties in the action.

In an appropriate case, the points and authorities set out in the foregoing form may be submitted in opposition to the contention supported by the points and authorities *set out in § 168.45*.

[b] Related Pleading and Practice Forms

For a discussion and forms relating to joinder of parties, see Ch. 395, *Parties* in California Forms of Pleading and Practice. For a discussion of amendment of a complaint to bring in a new defendant after the statute of limitations has run, see Ch. 345, *Limitation of Actions* in that set.

For a discussion and forms relating to intervention of a party into a pending action, see Ch. 395, *Parties* in California Forms of Pleading and Practice.

[c] Related Points and Authorities

For points and authorities opposing a motion for leave to amend a complaint to add a new party, see Ch. 16, *Amended*

and Supplemental Pleadings in this set.

For points and authorities opposing a demurrer to a complaint for nonjoinder of indispensable parties, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* in this set.

For points and authorities relating to intervention generally, see Ch. 124, *Intervention* in this set.

[3] Discussion of Authorities

[a] Joinder Not Required When Neither Omitted Party nor Existing Parties Substantially Prejudiced by Absence of Omitted Party

Union Carbide Corp. v. Superior Court *(1984) 36 Cal. 3d 15, 201 Cal. Rptr. 580, 679 P.2d 14* , was an action under the Cartwright Act (*Bus. & Prof. Code §§ 16700-16758*) for an alleged price-fixing conspiracy. Plaintiffs were indirect end purchasers (consumers) of gas from defendant. Defendants petitioned for a writ of mandate, in part in order to join all persons in the chain of distribution between plaintiffs and defendants as additional parties under *Code Civ. Proc. § 389(a)(2)(ii).*

The Supreme Court denied the writ. The Court stated that the risk of multiple liability must be substantial before joinder of parties will be required under *Code Civ. Proc. § 389(a)(2)(ii).* The Court stated that a "substantial risk" means more than a theoretical possibility of the absent party asserting a claim that would result in multiple liability; the risk must be substantial as a practical matter (*36 Cal. 3d 15, 21)* . The Court further stated that in the context of an indirect-purchaser suit under the Cartwright Act, care must be taken to avoid an application of *Code Civ. Proc. § 389* that would thwart the legislative purpose of the Cartwright Act, which is to retain the availability of indirect-purchaser suits as a viable means of enforcing California's antitrust laws. The Court said that the legislative mandate was to avoid unnecessary procedural barriers to indirect-purchaser suits. Thus, unless necessary under the particular facts of the case, the parties should not be joined (*36 Cal. 3d 15, 21-22)* . The Court concluded that defendants' papers did not demonstrate a substantial risk of multiple liability sufficient to require that additional parties be joined in the complaint (*36 Cal. 3d 15, 22)* .

Copley v. Copley *(1981) 126 Cal. App. 3d 248, 178 Cal. Rptr. 842* , arose out of an action by two cotrustees of marital and nonmarital trusts for declaratory relief and a petition in probate seeking to determine the propriety of the cotrustees' actions regarding their entry into a stock redemption agreement to fund the nonmarital trust's obligation to pay taxes arising out of the death of the settlor. Each trust held 862,500 shares of common stock in a family-held corporation. The trustees, after extensive negotiations with the Internal Revenue Service, entered into an agreement whereby the fair market value of the stock was set, for tax purposes, at approximately $35 per share. The trustees then sold to the corporation some 672,133 shares of stock held by the nonmarital trust at the agreed market value to pay the settlor's federal estate tax liability, leaving only 190,367 shares in the trust. Subsequently, the trustees caused the corporation to redeem at the same value an additional 102,474 shares of its stock on a pro rata basis from the marital and nonmarital trusts in relation to their respective holdings of the total outstanding shares. The second redemption resulted in 83,946 shares being redeemed from the marital trust and 18,528 shares from the nonmarital trust. Two of the beneficiaries under the nonmarital trust claimed that the stock sold in the first redemption was undervalued and that the nonmarital trust was therefore deprived of its proper pro rata share of the proceeds of the second redemption. The trial court, among other things, found the value of the stock to be approximately $58 per share and ordered the trustees to transfer 173,346 shares of the stock from the marital trust to the nonmarital trust, as well as the dividends received on those shares and the redemption price for additional shares that the nonmarital trust would have sold to the corporation under the second redemption based on what would have been its proper pro rata share. The trial court also removed the trustees from both trusts. After the rendition of the judgment in the case, two potential beneficiaries of the nonmarital trust who had not been named parties to the action filed a notice of motion to vacate the judgment on the ground that they were indispensable parties to the action. The trial court found that it was without jurisdiction to rule on the motion to vacate

the judgment. Omitted parties then appealed the order of the trial court. Their appeal, as well as that of the trustees, was consolidated for appeal purposes.

The court of appeal affirmed the order of the trial court relating to the stock and money transfers between the marital and nonmarital trusts, but reversed the order removing trustees from their trusteeship over the nonmarital trust. In determining whether or not the omitted parties were indispensable, the court examined *Code Civ. Proc. § 389*, as adopted in 1971, and found that the statute limits compulsory joinder to those situations in which the absence of a person may result in substantial prejudice to that person, or to the parties already before the court (*126 Cal. App. 3d 248, 296)* . Furthermore, stated the court, under the statute as adopted, failure to join an indispensable party did not necessarily deprive the court of the power to render a decision as to the parties before it. Indispensability of a party is tested by looking to the status of the parties at the time relief is to be entered, or at the time the issue of indispensability is raised, rather than to the status of a party at the time the suit is filed. Consequently, said the court, it is not for want of jurisdiction but for discretionary and equitable reasons that a court may decline to proceed with the absent party. Applying this equitable approach, and the test of indispensability at the time the issue was raised, or relief entered, the court concluded that the omitted parties had not been injured or prejudiced by the judgment of the trial court as modified by the opinion of the court of appeal (*126 Cal. App. 3d 248, 297)* . The trial court had required the transfer of certain stock and money to the nonmarital trust, of which omitted parties were beneficiaries, thereby increasing the value of that trust. The money and stock came from the marital trust, which neither omitted party had an interest in. The court did find that the omitted parties may have suffered a detriment by the removal of the trustees of the nonmarital trust; however, any potential loss or detriment was avoided by the court's reversal of that part of the judgment of the trial court. Consequently, the court found that the omitted parties, having suffered no loss or prejudice, could not assert any basis for equitable relief requiring the court to return the action to the trial court (*126 Cal. App. 3d 248, 297)* .

Camp v. Board of Supervisors *(1981) 123 Cal. App. 3d 334, 176 Cal. Rptr. 620* , involved one of three separate proceedings commenced by residents, taxpayers, and the Attorney General against a county board of supervisors to declare invalid the county's plan for development for failure to comply with statutory requirements for the development of a general plan concerning land use, housing, and circulation. At trial, defendants apparently brought into issue the joinder of 100 land developers who had received subdivision approval at various stages before issuance of the preliminary injunction. The trial court found, however, that there were no indispensable parties absent from the proceeding. In the first action, the trial court found for defendant. In the other two proceedings, the trial court found for plaintiffs and granted a peremptory writ of mandate compelling the board to vacate its approval of certain subdivision development and a permanent injunction restraining the county from developing or accepting applications for subdivisions in the affected area.

On consolidated appeals, the court of appeal reversed the judgment of the trial court in the first case and affirmed the other two judgments with modifications. On the issue of joinder of parties, the court of appeal found that the trial court's ruling that there were no indispensable parties absent from the case was supported by the record. None of the relief sought in the petitions involved the cancellation or suspension of any subdivision permit previously granted by the board to any developer who was not a party to the action. The court found that nonparty subdividers of land in the county were slightly affected by the proceedings and would be so affected until the county adopted a valid general plan. The court stated that these subdividers could properly be classified as necessary parties, but they were not indispensable, and the trial court did not exceed its jurisdiction in proceeding without them and not pursuing the impractical prospect of joining them (*123 Cal. App. 3d 334, 354)* .

For discussion of this case, involving the same issue raised in another context, see *§ 168.50[3][a]*.

[b] The Complete Relief Clause of Code of Civil Procedure 389(a) Does Not Mandate That, Whenever Feasible, Persons Materially Interested in the Subject of an Action Should Be Joined

In ***Olszewski v. Scripps Health*** *(2003) 30 Cal. 4th 798, 135 Cal. Rptr. 2d 1* , plaintiff sought to invalidate liens filed by

defendant pursuant to Welf. & Inst. Code § 14124.791. Because plaintiff did not assert an imbedded claim for declaratory relief seeking to invalidate Section 14124.791, the California Supreme Court rejected defendant's contention that the court of appeal erred by deciding the federal preemption issue without making the State of California a party to the action. A person is an indispensable party only when the judgment to be rendered necessarily must affect his rights. In this case, the court could grant the relief requested by plaintiff without injuring or affecting the rights of the State of California. The fact that an adverse ruling against defendants may have a financial impact on the state or require a finding that federal law preempts a California statute does not make the state an indispensable party (*30 Cal. 4th 798, 808)* .

In ***Deltakeeper v. Oakdale Irrigation District*** *(2001) 94 Cal. App. 4th 1092, 115 Cal. Rptr. 2d 244* , defendants entered into an agreement with various entities for the sale of water by defendants to those entities. As the lead agencies, defendants prepared an Environmental Impact Report (EIR) for the project, which the plaintiffs challenged by a petition for a writ of mandate. The trial court entered an order dismissing the petition for failure to join the other entities which were parties to the agreement. In reversing the trial court, the court of appeal clarified that the complete relief clause of *Code Civ. Proc. § 389(a)* focuses not on whether complete relief can be afforded all *possible* parties to the action, but on whether complete relief can be afforded the parties named in the action. In this case, there was no risk of partial or hollow relief to the named parties. Resolution of the adequacy of the EIR would provide them complete relief. (*94 Cal. App. 4th 1092, 1101-1109* , citing *Countrywide Home Loans, Inc. v. Superior Court (1999)69 Cal. App. 4th 785*).

[4] Additional Authorities

[a] Statutory Requirements Not Met

In *Salsedo v. California Dept. of Parks and Recreation (2009) 175 Cal. App. 4th 1510, 97 Cal. Rptr. 3d 493* , Salsedo brought a petition for writ of mandate against the California Department of Parks and Recreation (DPR) to compel it to reissue his revoked vehicle access permit, which allowed him to engage in commercial surf fishing at Gold Bluffs Beach. Gold Bluffs Beach is a part of Prairie Creek Redwoods State Park, which is managed cooperatively by the DPR and the National Park Service (NPS), a federal entity. After filing the action, Salsedo received a temporary restraining order and an order to show cause why a preliminary injunction should not be issued. DPR argued that Salsedo could not show a probability of success because NPS was a necessary and indispensable party within the meaning of *Code Civ. Proc. § 389*, and complete relief could not be afforded in its absence. The trial court disagreed, and issued the preliminary injunction. The court of appeals affirmed, finding NPS was not a necessary or indispensable party. Although the two agencies developed joint procedures for processing permits such as Salsedo's, legislative history made clear that the state has retained jurisdiction over Gold Bluffs Beach and has sole statutory authority to issue permits. Thus, complete relief could be afforded without NPS (*175 Cal. App. 4th 1510, 1521-1522*).

The following cases were decided under *Fed. R. Civ. P., Rule 19*, which is the source of *Code Civ. Proc. § 389*, as amended in 1971 [*see* 10 Cal. L. Rev. Comm. Reports 500, 535]. Federal cases interpreting *Fed. R. Civ. P., Rule 19(a)*, may be useful in interpreting the provisions of *Code Civ. Proc. § 389(a)*, as amended, in those instances in which a California appellate court has not ruled on a particular issue [*see, e.g.,* *Conrad v. Unemployment Ins. Appeals Bd. (1975) 47 Cal. App. 3d 237, 241, 120 Cal. Rptr. 803]* .

In *United Automobile Workers v. Brock (1986) 477 U.S. 274, 106 S. Ct. 2523, 91 L. Ed. 2d 228* , a union and several of its members brought suit challenging the Secretary of Labor's interpretation, and resultant guidelines, of the eligibility provisions of the Trade Act of 1974 (*19 U.S.C. § 2101*). The United States District Court for the District of Columbia held that the guidelines were inconsistent, and ordered the Secretary of Labor to notify all cooperating state agencies of the proper construction of the Trade Act, and to direct those agencies to process anew any claims wrongfully denied as a result of the guidelines by applying the proper eligibility standards. The United States Circuit Court of Appeals for the District of Columbia reversed on the grounds that the union had no standing to sue under the

circumstances, and never discussed the merits of the case. The United States Supreme Court disagreed on the standing issue, and reversed. In its reversal, the Supreme Court also held that the fact that the state agencies had not been joined as parties to the action, and could not be so joined because they were outside the jurisdiction of the district court, was not fatal to the action because the state agencies were not indispensable parties under the meaning of *Fed. R. Civ. P., Rule 19(b)*. The Court noted that the state agencies, who had entered into agreements with the Secretary, were bound to comply with the relief ordered, and if they balked, they would be found in breach of agreement. Such a finding would cause employers in that agency's state to lose certain tax credits against their liability for federal unemployment tax. The district court could therefore issue an order that would result in proper action by the state agency, albeit through an indirect method. Thus, the court was not unable to grant in full the relief sought by petitioners in the absence of the joinder of the state agencies. In addition, the state agencies themselves would not be prejudiced by not being joined in the action, because they would be fully reimbursed by the federal government for the Trade Act benefits they would pay, and for the administrative costs of processing those payments. Thus, the state agencies were not indispensable parties, and the failure to join them was not an obstacle to the suit (*477 U.S. 274, 292-293)* .

In *New England Patriots Football Club, Inc. v. University of Colorado (1st Cir. 1979) 592 F.2d 1196* , plaintiff football team sued to enjoin defendants from contracting with its head coach while he was contracted to the team. A preliminary injunction was granted, and defendants appealed, contending that the head coach was an indispensable party who should have been joined. The federal court of appeals affirmed, rejecting defendants' contention. The court observed that historically in induced breach of contract cases, the contracting party allegedly induced was not a party to that action. In this action, the head coach was allowed to file an amicus brief. Moreover, the court stated, no unfairness resulted to defendants by reason of his absence, nor were the general rights of plaintiff and the head coach in the underlying contract affected by the decision. Therefore, under Fed. R. Civ. P., Rule 19(a), the head coach was not an indispensable party (*592 F.2d 1196, 1201)* .

Kaiser v. Local No. 83 *(9th Cir. 1978) 577 F.2d 642* , arose out of an action by an employee who sued defendant labor union for alleged breach of contract of its duty to represent him fairly in grievance proceedings against his employer. The district court dismissed the proceeding for failure to join the employer as an indispensable party. Employee filed an amended complaint joining his employer, and the district court granted summary judgment to defendants. The court of appeals reversed the district court's ruling as to the employer being an indispensable party, holding that neither the employer nor the union is an indispensable party in a suit by an employee union member against the other when the action against the union is based on the statutory duty of fair representation, or the action against the employer is based on a violation of the collective bargaining agreement. In such cases, complete relief could be accorded without the joinder of the other (*577 F.2d 642, 644)* .

Miller v. United States (6th Cir. 1978) 583 F.2d 857 , involved an action by plaintiffs, owners of property adjoining Lake Superior against the United States to recover damages caused by flooding. Plaintiffs alleged that the manner in which flood gates were operated by the federal government resulted in a loss of some 6,000 square feet of lake-front property submerged beneath the lake. The district court dismissed the action on the ground that plaintiffs had failed to join the state of Michigan as a party required to be joined, since the state had title to the land now submerged under navagible water. The federal court of appeals reversed the order of the district court, holding that plaintiffs did not by their action seek to hold Michigan responsible and a judgment for or against the federal government would not bind the state; therefore, its interests would not be impaired or impeded by any disposition in the matter in its absence (*583 F.2d 857, 862)* .

Air-Exec, Inc. v. Two Jacks, Inc. (10th Cir. 1978) 584 F.2d 942 , arose out of an action by plaintiff against defendant for conversion of an airplane. On appeal, the federal court of appeals rejected defendant's argument that a certain bank was an indispensable party under *Fed. R. Civ. P., Rule 19(a)(2)(ii)*, because it had a security interest executed by plaintiff in the airplane allegedly converted by defendants. The court held, among other things, that the bank's interest in the airplane was insufficient to compel joinder in this action. This was an action for conversion, the court noted, and the bank was not a party through whom the defendant converter could claim title, or right to possession, to defeat the action

for conversion. Moreover, the court stated, no harm resulted to defendant by the judgment of the court rendered in the bank's absence requiring defendant to pay damages for the conversion. Although the bank could compel plaintiff to pay on its obligation on the airplane by instituting its own action, defendant would be subrogated to any possible bank claim by the amount of the judgment in favor of plaintiff. Therefore, the court concluded, the bank's absence would not subject defendant to inconsistent obligations arising from any judgment in the action (*584 F.2d 942, 944-945)* .

In People, etc. v. *City of South Lake Tahoe (E.D. Cal. 1978) 466 F. Supp. 527* , plaintiff State of California sought to prevent defendant city and a local planning agency from constructing the California segments of a road project at the south end of Lake Tahoe without first complying with certain applicable state and federal laws. Plaintiff argued that defendants were subject to and violated applicable provisions of the regional planning agency. Defendants claimed that the suit should be dismissed for failure to join the regional planning agency as required by *Fed. R. Civ. P., Rule 19(a)(2)(ii)*, since a state court was considering the same issue in an action brought by the regional planning agency and there was a substantial risk that defendants would be subject to inconsistent obligations. The district court rejected defendant's claim, holding that a resolution of the issue before the respective trial courts could result in only one possible obligation by defendants, that is, to comply with the regional agency's provisions; consequently, that agency was not required to be joined, since there would not be any inconsistent obligations incurred by defendants (*466 F. Supp. 527, 540-541)* .

In *Wylain, Inc. v. Kidde Consumer Durables Corp. (D. Del. 1977) 74 F.R.D. 434* , plaintiff brought an action against a Delaware corporation, alleging unfair competition and other misconduct. Defendant moved to dismiss for failure to join as indispensable parties two officers of the corporation who had knowledge that the acts were committed by two associated corporations. The district court denied the motion, holding, among other things, that no particular harm would befall the omitted parties as a result of their absence in the case, since their property would not be jeopardized and their ability to defend subsequent litigation would not be impaired (*74 F.R.D. 434, 436)* .

[b] Joinder Not Required When Neither Omitted Party nor Existing Parties Substantially Prejudiced by Absence of Omitted Party

Harboring Villas Homeowners Assn. v. Superior Court (1998) 63 Cal. App. 4th 426, 73 Cal. Rptr. 2d 646 , involved an action by a homeowners association composed of owners of condominium units against a developer. The association sought compensatory damages for construction defects. The trial court sustained the developers's demurrer on the grounds of misjoinder of parties and ordered the association to amend its complaint to name the secured lenders of each condominium unit. The association filed a writ proceeding (*63 Cal. App. 4th 426, 427-428)* . The court of appeal issued a peremptory writ of mandate directing the trial court to vacate its order sustaining the demurrer and to enter a new and different order overruling the demurrer (*63 Cal. App. 4th 426, 433)* . The court held, quoting from *Union Carbide Corp. v. Superior (1984) 36 Cal. 3d 15, 22, 201 Cal. Rptr. 580, 679 P.2d 14* , held that the lenders are not indispensable parties because the pleadings do not demonstrate a substantial risk of multiple liability sufficient to require that additional parties be joined in the complaint (*63 Cal. App. 4th 426, 428)* . The joinder claim was raised by way of demurrer. Observing that a party may be added to an action at any stage, the court in *Union Carbide*, quoting from the California Law Revision Comment to *Code Civ. Proc. § 389*, which quotes pertinent observations from the Advisory Committees notes on *Fed. R. Civ. P., Rule 19*, stated that a joinder question should be decided with reasonable promptness, but decision may be properly deferred if adequate information is not available at the time (*63 Cal. App. 4th 426, 429)* . Thus, a trial court does not have to make an immediate determination of what parties must be joined at the pleading stage (*63 Cal. App. 4th 426, 430)* . Moreover, the court in *Union Carbide* interpreted of *Code Civ. Proc. § 389(a)(2)(ii)* which permits joinder where an existing party to the action may incur "a substantial risk of incurring double, multiple, or otherwise inconsistent obligations." A "substantial risk" means more than a theoretical possibility of the absent party's asserting a claim that would result in multiple liability. The risk must be substantial as a practical matter (*63 Cal. App. 4th 426, 429-430)* .

In *Noguera v. North Monterey County Unified Sch. Dist. (1980) 106 Cal. App. 3d 64, 164 Cal. Rptr. 808* , plaintiffs

brought an action for writ of mandate, alleging improper termination of employment in conjunction with the formation of a unified school district. Plaintiffs contended that pursuant to provisions of the Education Code, the new school district was required to offer them employment. On appeal from a judgment sustaining a demurrer to the complaint for failure to state a cause of action, the court of appeal reversed. The court held, among other things, that the plaintiffs' failure to join as indispensable parties the newly employed persons was not error. The court said that the omitted parties were not indispensable to the disposition of the case against the parties before the court, but were necessary parties in the sense that the main issue affected their own interests. The court did suggest that the better procedure would have been for the trial court to have ordered their joinder (*106 Cal. App. 3d 64, 72-73)* .

For further discussion of this case, see *§ 168.50[4][c]*.

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CHAPTER 168 PARTIES
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16-168 California Points & Authorities § 168.49

§ 168.49 Supporting Contention That Action Must Be Dismissed Without Prejudice Because Omitted Party Described in Code Civ. Proc. § 389(a) Cannot Be Joined [Code Civ. Proc. § 389(b)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with the general form of points and authorities supporting the contention that an omitted party is required to be joined under Code Civ. Proc. § 389(a)* (*see § 168.45*) and, if appropriate, with points and authorities relating to specific reasons why the omitted party must be joined under *Code Civ. Proc. § 389(a)* (*see, e.g., §§ 168.46, 168.47*)].

THIS ACTION SHOULD BE DISMISSED BECAUSE _____ [*name*] IS REQUIRED TO BE JOINED AS A PARTY TO THIS ACTION UNDER SECTION 389(a) OF THE CODE OF CIVIL PROCEDURE AND HE/SHE/IT CANNOT BE JOINED, BECAUSE _____ [HE/SHE/IT IS NOT SUBJECT TO THE COURT'S PROCESS *and/or* JOINDER OF _____ (*name*) WOULD DEPRIVE THE COURT OF JURISDICTION OVER THE SUBJECT MATTER OF THIS ACTION].

[*EITHER*]

Omitted Party Not Subject to Court's Process. When joinder of an omitted party described in *Section 389(a) of the Code of Civil Procedure* cannot be obtained because he or she is not subject to the court's process, and the court has determined that it cannot in equity and good conscience proceed among the parties before it, the action must be dismissed without prejudice, the absent party being regarded as indispensable (*see Code Civ. Proc. § 389(b)*; *see also Atlantic Richfield Co. v. Superior Court (1975) 51 Cal. App. 3d 168, 175-176, 124 Cal. Rptr. 63*).

[*AND/OR*]

Joinder of Omitted Party Would Deprive Court of Jurisdiction Over Subject Matter. When joinder of an omitted party described in *Section 389(a) of the Code of Civil Procedure* cannot be obtained because joinder would deprive the

court of jurisdiction over the subject matter, and the court has determined that it cannot in equity and good conscience proceed among the parties before it, the action must be dismissed without prejudice, the absent party being regarded as indispensable (*see Code Civ. Proc. § 389(b)*; *see also Conrad v. Unemployment Ins. Appeals Bd. (1975) 47 Cal. App. 3d 237, 241-242, 120 Cal. Rptr. 803* ; *Vanoni v. County of Sonoma (1974) 40 Cal. App. 3d 743, 746-747, 115 Cal. Rptr. 485*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of the contention that an action should be dismissed pursuant to Code Civ. Proc. § 389(b) because a person described in *Code Civ. Proc. § 389(a)* has not and cannot be made a party to the action. The first alternative paragraph should be used if the omitted party cannot be joined because he or she is not subject to service of process. The second alternative paragraph should be used if the omitted party cannot be joined because such joinder would deprive the court of subject matter jurisdiction. This form should be used in conjunction with the general form of points and authorities supporting the contention that the omitted party is required to be joined under *Code Civ. Proc. § 389(a)* as *set out in § 168.45* and, if appropriate, with points and authorities relating to specific reasons why the omitted party is a party described in *Code Civ. Proc. § 389(a)* [*see, e.g., §§ 168.46, 168.47*].

Counsel should combine the foregoing points and authorities with points and authorities relating to the specific procedural context in which the issue of nonjoinder of indispensable parties arises. For example, defendant might make the above argument in conjunction with a demurrer for defect of parties [*see Code Civ. Proc. §§ 430.10(d), 430.30, 430.70*; *see also § 168.04[3]*] or in support of a subsequent motion to dismiss the action for failure to join an indispensable party. The points and authorities set out in this form may also be adapted for use in a trial or appellate brief.

Counsel should also insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion of the relevant facts concerning the interest of the omitted party and why joinder cannot be obtained.

[b] When a Party Is Indispensable

Under *Code Civ. Proc. § 389*, as amended in 1971, a party is to be regarded as indispensable only in the conclusional sense that in his or her absence, the court has decided that the action should be dismissed [*see Code Civ. Proc. § 389(b)*; 10 Cal. L. Rev. Comm. Reports 501, 535 (1970); *see also Kraus v. Willow Park Public Golf Course (1977) 73 Cal. App. 3d 354, 366, 140 Cal. Rptr. 744* (*see § 168.50[3*][b])].

The California Law Revision Commission Comment to *Code Civ. Proc. § 389* states that in deciding whether or not a particular omitted party whose joinder is not feasible is an indispensable party, the court must examine the facts of the case pragmatically and choose between the alternatives of proceeding with the action in the omitted party's absence or dismissing the case without prejudice to the plaintiff. *Code Civ. Proc. § 389(b)* sets out four factors to be considered in making this decision.

The first factor relates to the effect the judgment would have on the omitted party, or on the existing parties. The court should consider whether or not the omitted party would be adversely affected in a practical sense by any judgment and, if so, whether the prejudice would be immediate and serious, or remote and minor. In addition, the court should consider whether or not an existing party would, as a result of any judgment, be subjected to a serious threat of future litigation by an omitted party.

The second factor relates to the means by which a court, existing party, or omitted party can avert or lessen any prejudice. The court can shape relief or take other protective measures, for example, awarding money damages in lieu of specific relief. A defendant may also take measures to avoid prejudice, such as bringing in an omitted party by interpleader or cross complaint. In addition, an omitted party can voluntarily appear in the action or intervene and the court should consider whether or not such action would impose undue hardship on him or her.

The third factor relates to the adequacy of the judgment and whether or not such a judgment can be accomplished in the absence of the omitted party.

The fourth factor relates to the practical effect of a dismissal on the plaintiff and whether or not plaintiff could effectively bring his or her action in another forum [*see* 10 Cal. L. Rev. Comm. Reports 501, 538-539 (1970)].

Indispensable parties have been identified as those who are essential for a complete determination of the controversy or the ability of a court to enter any effective judgment. Whether a party qualifies as indispensable is ordinarily treated as a matter where the trial court has a large measure of discretion in weighing factors of practical realities and other considerations. Accordingly, the trial court's determination that an entity is an indispensable party will be reversed only if it amounts to an abuse of discretion [*Kaczorowski v. Board of Supervisors for the County of Mendicino (2001) 88 Cal. App. 4th 564, 568, 106 Cal. Rptr. 2d 14]* .

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 168.50* may be used to oppose the contention supported by the foregoing points and authorities.

[3] Discussion of Authorities

[a] Omitted Party Not Subject to Court's Process

Atlantic Richfield Co. v. Superior Court *(1975) 51 Cal. App. 3d 168, 124 Cal. Rptr. 63* , arose out of mandate proceedings instituted by petitioner to compel the trial court to dismiss an action against petitioner. Petitioner was defendant in an underlying action for fraud and an accounting brought by royalty claimants under an oil and gas lease on property leased by plaintiffs' predecessors in interest. Petitioner moved to dismiss the action on the ground of inconvenient forum, contending, among other things, that the court lacked jurisdiction to hear the matter, since some 57 purported assignees of the interest of the original lessors, residing in Texas, were indispensable parties and had not been joined. The trial court denied the motion to dismiss, and petitioners sought review in the court of appeal. That court denied the petition for a writ of mandate on the ground that petitioner's motion to dismiss was an improper procedure to raise the issues involved, including failure to join indispensable parties. The Supreme Court granted a hearing and retransferred the matter to the court of appeal with instructions to issue the alternative writ of mandate.

The court of appeal granted the peremptory writ compelling the trial court to dismiss the action before it for inconvenient forum (*51 Cal. App. 3d 168, 176)* . The court interpreted the Supreme Court's order as a determination that petitioner had properly raised the issue of nonjoinder of an indispensable party under *Code Civ. Proc. § 389*. Directing itself to that issue, the court found that the 57 claimants to the lessors' royalty interest in the leased property were required to be joined under *Code Civ. Proc. § 389(a)(2)(ii)*. These claimants were nonresidents of California and not subject to the jurisdiction of California process. The court concluded that these parties were indispensable under *Code Civ. Proc. § 389(b)* because a judgment rendered in their absence would be prejudicial to petitioners because of the conflicting claims on the same fund, and it did not appear that any prejudice could be mitigated by protective provisions or any other measure in an eventual judgment. Furthermore, plaintiffs had a remedy by suing in Texas where jurisdiction could be obtained and all claimants to ownership of the lessors' royalty interest could be brought before the court (*51 Cal. App. 3d 168, 175-176)* .

For discussion of another issue raised in this case, see *§ 168.45[3][a]*.

[b] Joinder of Omitted Party Would Deprive Court of Jurisdiction Over Subject Matter

The facts and procedural background of ***Conrad v. Unemployment Ins. Appeals Bd.*** *(1975) 47 Cal. App. 3d 237, 120 Cal. Rptr. 803* , are discussed in *§ 168.45[3][b]*. In *Conrad,* the court of appeal found that the federal agency involved in the action was required to be joined in the action under *Code Civ. Proc. § 389(a)(2)(i),* since it had a direct pecuniary interest in the outcome of the case. However, unless Congress had vested state courts with jurisdiction to determine matters in which the United States claimed an interest, a state court had no power to exercise jurisdiction in matters where a federal agency had a direct pecuniary interest (*47 Cal. App. 3d 237, 241-242)* .

The facts and procedural background of ***Vanoni v. County of Sonoma*** *(1974) 40 Cal. App. 3d 743, 115 Cal. Rptr. 485* , are discussed in *§ 168.50[3][a]*. In *Vanoni*, the court of appeal implied that normally a contractor who performed work pursuant to a contract with a government entity was required to be joined in a taxpayer suit seeking a declaration that the contract was void. In this case, however, the contractor was the United States, and joinder of the United States, the court held, was not feasible, since it would not be subject to the jurisdiction of the state courts (*40 Cal. App. 3d 743, 746-747)* .

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§ 168.50 Opposing Contention That Action Must Be Dismissed Without Prejudice Because Omitted Party Described in Code Civ. Proc. § 389(a) Cannot Be Joined [Code Civ. Proc. § 389(b)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THIS ACTION SHOULD NOT BE DISMISSED PURSUANT TO SECTION 389(b) OF THE CODE OF CIVIL PROCEDURE, BECAUSE THE COURT CAN IN EQUITY AND GOOD CONSCIENCE PROCEED AMONG THE PARTIES ALREADY BEFORE THE COURT.

A. When Court Can Proceed If Joinder Not Feasible. If a person described in *Section 389(a) of the Code of Civil Procedure* cannot be made a party, the court must determine whether in equity and good conscience the action should proceed among the parties before it, or be dismissed without prejudice, the absent parties being thus regarded as indispensable. The factors to be considered in determining whether or not the action should be dismissed include (1) the extent to which a judgment rendered in the omitted party's absence would be prejudicial to him or her, or those who are already parties; (2) the extent to which, by protective provisions in the judgment, or by the shaping of relief, or other measures, the court may lessen or avoid any prejudice; (3) whether or not the judgment rendered in the person's absence will be adequate; and (4) whether or not plaintiff will have an adequate remedy should the action be dismissed for nonjoinder (*Code Civ. Proc. § 389(b)*; *see People ex rel Lungren v. Community Redevelopment Agency (1997) 56 Cal. App. 4th 868, 879-885, 65 Cal. Rptr. 2d 786* ; *Vanoni v. County of Sonoma (1974) 40 Cal. App. 3d 743, 746-747, 115 Cal. Rptr. 485*).

B. Time When Indispensability Tested. Indispensability is tested by looking to the status of the parties at the time relief is to be entered, or at the time the issue of indispensability is raised, rather than to their status at the time the suit is filed (*Kraus v. Willow Park Public Golf Course (1977) 73 Cal. App. 3d 354, 364-370, 140 Cal. Rptr. 744*).

[*Optional*] **C. Court Can Proceed in Absence of Necessary or Proper Parties.** A trial court may, in its discretion, properly proceed in an action in the absence of parties who normally should have been joined because they were necessary or proper parties to the action and whose presence may be necessary for a complete determination of the

action when the court can render a judgment between the parties before the court without affecting the interests of the omitted parties (*see Bank of California v. Superior Court (1940) 16 Cal. 2d 516, 524-527, 106 P.2d 879* ; *see also Camp v. Board of Supervisors (1981) 123 Cal. App. 3d 334, 354, 176 Cal. Rptr. 620*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that an action must be dismissed pursuant to *Code Civ. Proc. § 389(b)* for failure to join a party required to be joined under *Code Civ. Proc. § 389(a)* when joinder is not feasible and the court can in equity and good conscience proceed among the parties before it. The optional Paragraph C may be included in the points and authorities when the omitted party is a person who should normally have been joined in order for the court to make a complete determination of the action, but the court can nonetheless render a judgment between the parties before it without affecting the interests of the omitted party.

The form may be used in conjunction with the general form of points and authorities opposing the contention that the omitted party is required to be joined under *Code Civ. Proc. § 389(a)*, as *set out in § 168.48*, when counsel wishes to argue that even if the omitted party should have been joined in order for the court to have made a complete determination of the action, the court nonetheless can render a judgment between the parties before it without affecting the interests of the absent party, so that the action should not be dismissed.

Counsel should combine these points and authorities with points and authorities relating to the specific procedural context in which the issue of nonjoinder of indispensable parties arises. For example, plaintiff might make the above argument in opposition to a demurrer for defect of parties [*see Code Civ. Proc. §§ 430.10(d), 430.30, 430.70*; *see also § 168.04[3]*] or in opposition to a subsequent motion to dismiss the action for failure to join an indispensable party. The points and authorities set out in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the interest of the omitted party and the relief sought, and indicate how the judgment can be rendered to allow the court in equity and good conscience to proceed among the parties before it.

In an appropriate case, this form may be submitted in opposition to the contention supported by the points and authorities *set out in § 168.49*.

[3] Discussion of Authorities

[a] When Court Can Proceed If Joinder Not Feasible

People ex rel Lungren v. Community Redevelopment Agency *(1997) 56 Cal. App. 4th 868, 65 Cal. Rptr. 2d 786* , involved an action brought by the Attorney General against an Indian tribe, a redevelopment agency and a transfer corporation. In the complaint the Attorney General challenged actions of the agency in entering into a contract with the tribe under which the Agency would transfer real property owned or acquired by it to the tribe for use in the tribe's gaming operations, and in exchange the tribe would give the agency a share of the gambling proceeds. The complaint sought a declaration that (1) the conveyance of the lands to the tribe or transfer corporation under the agreement was subject to an implied reservation by the state of exclusive and complete civil and criminal jurisdiction, (2) the agency had no power to surrender, impair, or embarrass the state's exclusive, sovereign civil or criminal jurisdiction over land, including the state's jurisdiction to prohibit or regulate gambling on such land, (3) the agreement was void to the extent it purported to dispose of issues related to the conduct of class III gambling in the state, and (4) the agreement was void as inconsistent with *Cal. Const., art IV § 19(e)*. The complaint also sought a preliminary injunction prohibiting the agency from conveying to the tribe title to any property to be used in connection with any prohibited gambling operation under California law except to the extent that such a conveyance is expressly permitted by statute or by an

approved tribal-state compact. The tribe moved to quash service of the summons on the ground that the tribe possessed sovereign immunity from unconsented suit, which immunity had not been waived. The agency filed its own motion demurring to the complaint on the ground that the Attorney General could not join the tribe because of the tribe's sovereign immunity, and that since the tribe was an party indispensable to a proper adjudication of the case the court was compelled to dismiss the entire action. The trial court concluded that the tribe was an indispensable party, and that the inability to join the tribe required dismissal of the action. Judgment was entered dismissing the Attorney General's complaint and an appeal followed (*56 Cal. App. 4th 868, 870-874)* .

The court of appeal reversed. The court initially concluded that the tribe was a proper party to be joined in the suit, and was therefore a necessary party under *Code Civ. Proc. § 389(a)* (*56 Cal. App. 4th 868, 876-879)* . The court went on to examine whether the tribe was also an indispensable party under *Code Civ. Proc. § 389(b)*. It is under *Code Civ. Proc. § 389(b)* that a court must decide whether a party is truly indispensable. If a party is found under *Code Civ. Proc. § 389(a)* to be necessary to the action but cannot be a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or whether the action should be dismissed, the absent person being thus regarded as indispensable. In making this determination the court should consider the four factors listed in the statute (*56 Cal. App. 4th 868, 879-880)* . With regard to the first factor in *Code Civ. Proc. § 389(b)*, *i.e.*, to what extent a judgment rendered in the person's absence might be prejudicial to him or her or those who are already parties, this is essentially the same assessment that must be made under *Code Civ. Proc. § 389(a)* in determining whether a party's absence would impair or impede that party's ability to protect his or her interests, and determining whether proceeding to judgment would subject existing parties to inconsistent obligations (*56 Cal. App. 4th 868, 880)* . The court, in discussing *Code Civ. Proc. § 389(a)* had noted that although the tribe and agency have interests under the agreement that are not identical, the tribe's object in the litigation, *i.e.*, establishing that the agency acted lawfully in entering into the agreement, would duplicate that of the agency and would be adequately represented by the agency in the present litigation. There is authority, however, stating that a party to a contract is always an indispensable party to a suit to set aside that contract (*56 Cal. App. 4th 868, 877)* . The effect of this, however, as a firm rule in determining whether to dismiss would be to eliminate the exercise of discretion accorded the trial court under *Code Civ. Proc. § 389(a)*. The mere fact of participation in a contract would render a party indispensable. The court then distinguished the cases stating this rule (*56 Cal. App. 4th 868, 877-878* . Turning to the factor of prejudice under *Code Civ. Proc. § 389(b)*, the court cited *Makah Indian Tribe v. Verity (9th Cir. 1990) 910 F.2d 555* , in which the court adopted a public rights exception to traditional joinder rules. In so doing, the court noted that the absent tribes would not be prejudiced because under the facts all of the tribes had an equal interest in an administrative process that is lawful. In the instant case, however, it could not be said that the absent tribe would not be prejudiced because all of the parties have an equal interest in a process that is lawful. The tribe was not subject to the laws that the Attorney General sought to enforce and would have very little interest in enforcement of those laws. Nonetheless, the court concluded that the interest the public has in obtaining some level of review of actions of the agency in transferring property and placing it beyond the reach of the state's police power is sufficiently important that it provides an exception to the general application of the rule, under *Code Civ. Proc. § 389*, that an action challenging a contract should be dismissed if a party to the contract cannot be joined as a party. The court must recognize the interest of the citizens of the state, as represented by the Attorney General, in providing some review of the power of a local agency to permanently relinquish its interest in property within its control (*56 Cal. App. 4th 868, 882-883)* .

The court next turned to the third and forth factors listed in *Code Civ. Proc. § 389(b)*. With regard to the third factor, *i.e.*, the adequacy of the judgment that could be rendered in the absence of an unavailable party, the court concluded that the judgment that could be rendered in the absence of the tribe would be completely adequate. The only real issue for the court to consider is whether the agency had the power to enter into the contract it did with the agency. Although the tribe would be affected by the outcome of the court's decision on the issue, the presence or absence of the tribe would not appear to have any direct resolution of the legal issues themselves (*56 Cal. App. 4th 868, 883)* . With regard to the fourth factor dealing with the adequacy of the remedy available to the plaintiff if the action was dismissed for nonjoinder, the court noted that there would be no other remedy available to the Attorney General once the contract takes effect and the real property is transferred to the tribe. This factor clearly weighted in the court's decision. The

court's overall conclusion was that it could not in equity and good conscience affirm the trial court's dismissal of the action for failure to join the tribe. The trial court has jurisdiction over the suit and can enter a binding judgment on the parties before the court (*56 Cal. App. 4th 868, 883-884)* .

Vanoni v. County of Sonoma *(1974) 40 Cal. App. 3d 743, 115 Cal. Rptr. 485* , arose out of an action by taxpayers of a county against the county, a coterminous flood control district, and the members of both the county board of supervisors and the board of directors of the flood control district. Taxpayers sought declaratory relief and an injunction prohibiting further action under a contract between the district and the United States until the contract was approved by the voters as required by the California Constitution. Plaintiff taxpayers contended that by entering into the contract, the county and district became obligated for debts in excess of the county's annual revenue and income, and therefore the contract had to be approved by two-thirds of the electors within the county. The trial court sustained defendants' demurrer without leave to amend, and plaintiffs appealed the subsequent judgment for defendants. in response to the appeal, defendants, for the first time, raised the issue of the United States being an indispensable party to the action because it had interests in the contract that would be affected by the relief sought by plaintiffs.

The court of appeal affirmed the judgment of the trial court. However, the court of appeal did discuss the issue raised by defendants concerning whether the United States was an indispensable party to the action because it had interests in the contract that would be affected by any relief sought by plaintiffs. The court first determined that the issue could be raised for the first time on appeal (*40 Cal. App. 3d 743, 746)* . It also determined that parties to a contract should usually be joined in an action challenging the validity of the contract, but that joinder of the United States, a party to the contract that was the subject of the action before the court, was not feasible, because the United States was not subject to the jurisdiction of state courts. When joinder is not feasible, the court must look to *Code Civ. Proc. § 389(b)* to determine whether in equity or good conscience the action should proceed among the parties before it, or should be dismissed without prejudice, the absent party thus being regarded as indispensable. The court noted that *Code Civ. Proc. § 389(b)* sets forth the following four factors to be considered by the court in making that determination: (1) the extent to which a judgment rendered in the person's absence might be prejudicial to him or her, or to those already parties; (2) the extent to which, by protective measures, by the shaping of relief, or by other measures, the prejudice can be lessened or avoided; (3) whether or not a judgment rendered in the person's absence will be adequate; and (4) whether or not the plaintiff or cross complainant will have an adequate remedy if the action is dismissed for nonjoinder. The court concluded that the term "indispensable" as used in *Code Civ. Proc. § 389(b)* was a term used only in a conclusional sense--that is, a person is regarded as indispensable when he or she cannot be made a party and, on consideration of the relevant factors, it is determined that in his or her absence it would be preferable to dismiss he action. The court could find no direct authority concerning whether or not, under the circumstances of the case, the United States should be regarded as indispensable. However, the court declined to make that determination. Instead, the court found, equity and good conscience suggested that this type of action should proceed rather than be dismissed pursuant to *Code Civ. Proc. § 389(b)*, since dismissal would leave plaintiffs without a remedy in the state court, one of the factors to be considered in determining whether or not the omitted party is indispensable (*40 Cal. App. 3d 743, 747)* .

For discussion of an additional issue raised by this case, see *§ 168.49[3][b]*.

[b] Time When Indispensability Tested

Kraus v. Willow Park Public Golf Course *(1977) 73 Cal. App. 3d 354, 140 Cal. Rptr. 744* , involved an action by certain limited partners in a limited partnership against a corporate assignee of the indebtedness to all those limited partners who had paid money for the development of a golf course, and against various other individuals. Plaintiffs alleged, among other things, fraud, breach of contract, conversion, and fraudulent conveyance. The trial court found for plaintiffs based on evidence which indicated that plaintiffs and other limited partners had each invested money toward the construction of a golf course, but that the defendants never intended to use the money for that purpose. The trial court also set the respective percentages of ownership of all the general and limited partners, including those limited

partners not before the court. This action did not affect the respective percentages of ownership of any of the limited partners. Defendants appealed from the judgment of the trial court, raising for the first time the issue of the failure to join all the limited partners. Defendants contended that absent partners were indispensable parties and that the trial court lacked jurisdiction over the action because of their absence. At the time the case began in litigation, *Code Civ. Proc. § 389* had not been amended to its present form.

The court of appeal, in affirming the judgment of the trial court, rejected defendants' argument that the omitted limited partners were indispensable parties. The court discussed in detail both former Code Civ. Proc. § 389, as amended in 1957, and *Code Civ. Proc. § 389*, as amended in 1971, concerning what constituted an indispensable party and what effect failure to join that party would have in a pending action. The court observed that many cases held that failure to join an indispensable party deprived the court of jurisdiction over the case. The court rejected these holdings, finding that even before the 1971 amendment, a trial court still had power to render a decision on the case before it in the absence of an indispensable party. The court observed that it was not for want of jurisdiction that the trial court would not proceed further with a case, but for reasons of equity and convenience (*73 Cal. App. 3d 354, 364)* . The court also noted that *Code Civ. Proc. § 389* as amended in 1971 substantially conformed to FRCP, Rule 19, relating to the compulsory joinder of parties. Relying on the California Law Review Commission Comment to *Code Civ. Proc. § 389* and the Advisory Committee's Note to FRCP, Rule 19, regarding the reasons for adopting the respective provisions, the court stated that failure to join an omitted party who may be regarded as indispensable was not a jurisdictional defect under the new *Code Civ. Proc. § 389* in the technical sense (*73 Cal. App. 3d 354, 365-367)* . Although the trial court would have no jurisdiction over the omitted party, and its judgment could not bind him or her, the court did have jurisdiction over existing parties and would have the power to render a judgment affecting their interests. Therefore, indispensability was not a matter of jurisdiction in the strict sense of the term. Rather, it was more accurately a consideration so crucial to equity that dismissal was in order if, for whatever reason, an indispensable party could not be joined. The court further stated that indispensability is to be tested by looking to the status of the parties at the time that relief is to be entered, or at the time that the issue of indispensability is raised, rather than to their status at the time the suit is filed (*73 Cal. App. 3d 354, 368)* . Consequently, the court found that the judgment of the trial court should not be reversed on the ground that the absent limited partners were indispensable parties to the suit. The case had been fully tried, and until the appeal, no objection had been raised to the absence of the parties. The trial court's decision did not in a real and practical sense adversely affect the interests of the absent limited partners. While defendants may be subjected to some risk of multiple lawsuits, the court implied that because of the judgment rendered, the risk was not a substantial one (*73 Cal. App. 3d 354, 369-370)* .

[c] Court Can Proceed in Absence of Necessary or Proper Parties

Bank of California v. Superior Court *(1940) 16 Cal. 2d 516, 106 P.2d 879* , arose out of an action by petitioners for a writ of prohibition to restrain the respondent superior court from proceeding with the trial in the underlying action without bringing in certain beneficiaries of a will alleged to be necessary and indispensable parties. Petitioner bank, executor of decedent's will, and petitioner hospital, residuary legatee and devisee under the terms of the will, were defendants in an underlying action brought by plaintiff, a niece and legatee of the decedent, to enforce provisions of an alleged contract by which the decedent agreed to leave her entire estate to plaintiff. Although all beneficiaries were named defendants in the action, only petitioners were served summons. Petitioners argued that since the complaint challenged the right of every legatee and devisee to share in the estate, and prayed for the award of the entire estate, any judgment without the absent defendants would subject petitioners to inconvenience, expense, and the burden of future litigation. The trial court denied petitioners' motions for compulsory joinder, and petitioners applied for a writ of prohibition to restrain the trial until the other parties were brought in. The Supreme Court granted an alternative writ pending the outcome of its decision.

The Supreme Court discharged the alternative writ and denied the peremptory writ of prohibition (*16 Cal. 2d 516, 527)* . In doing so, the Court discussed in detail what constituted indispensable and necessary parties. As to indispensable parties, the Court held that among those types of persons who were indispensable parties were persons who had

undetermined interests in the same property, or in a particular trust fund, when one of them seeks, in an action, to recover all of it, to fix his or her share, or to recover a portion claimed by him or her. The Court said that such parties were indispensable because any judgment in favor of one claimant for part of the property or fund would necessarily determine the amount or extent which remains available to the others (*16 Cal. 2d 516, 521)* . Necessary parties, on the other hand, the Court explained, were normally persons who were interested in the action in the sense that they might possibly be affected by a decision, or whose interests in the subject matter or transaction are such that it cannot finally and completely be settled without them, but nevertheless their interests are so separable that a decree may be rendered between the parties before the court without affecting those others. These latter may be necessary to a complete determination of an action, but are not indispensable. The Court stated that these persons should normally be joined, but when, for example, it is impossible to find them, or bring them in, the action may proceed in regard to those parties who are present (*16 Cal. 2d 516, 523)* .

The Supreme Court found that the omitted parties, the remaining distributees of the estate, were not indispensable parties, but only necessary parties, since the action was not to recover the entire estate, but to impose a constructive trust on the property of each of the individual legatees, and was against the executor and a distributee, personally. In actions of this type, the Court said, the distributees of the estate are considered to succeed to the legal title of the estate, and should plaintiff prevail, they would be considered to hold, individually, as trustees, only the property that came to each of them and none of the distributees would be interested in the granting or denial of similar relief as to any other. Consequently, the absent parties would not be bound by the judgment one way or the other, and their property interests would not be affected. Therefore, the Court concluded, the trial court had jurisdiction to proceed without them and to determine the rights of the parties actually before it (*16 Cal. 2d 516, 524-527)* .

Counsel should note that the *Bank of California* case was decided before the 1971 revision of the compulsory joinder of parties statute [*Code Civ. Proc. § 389*]. However, cases decided under the former statute still appear to be good law insofar as they define which persons must be joined under *Code Civ. Proc. § 389(a)* if subject to the court's process and if joinder would not deprive the court of jurisdiction. Indeed, the Law Revision Commission Comment to the 1971 amendment to *Code Civ. Proc. § 389*, citing the *Bank of California* case, states that the factors to be considered by the court in determining whether or not to dismiss an action under *Code Civ. Proc. § 389(b)* are substantially those that have guided the courts for years [*see* 10 Cal. L. Rev. Comm. Reports 501, 536]. The prior cases, however, are no longer authority insofar as they hold that the court's failure to bring in a particular person as a party to an action deprives the court of jurisdiction to render judgment in an action between the parties already before the court [*see* 10 Cal. L. Rev. Comm. Reports 501, 535-537 (1971)]. For discussion of the effect of the 1971 amendment to *Code Civ. Proc. § 389* on prior California law, see *§ 168.45*.

The facts and procedural background of ***Camp v. Board of Supervisors*** *(1981) 123 Cal. App. 3d 334, 176 Cal. Rptr. 620* , are discussed in *§ 168.48*, under [3], Joinder Not Required When Neither Omitted Party nor Existing Parties Substantially Prejudiced by Absence of Omitted Party. In *Camp*, the court of appeal held that the trial court's ruling that there were no indispensable parties absent in an action brought to declare invalid a county's general development plan was supported by the evidence. The court noted that none of the relief sought in the petitions in the case involved the cancellation or suspension of any subdivision permit previously granted by the board to any developer who was not a party to the action. Although there were nonparty subdividers of land in the county who would be slightly affected by the court's ruling until a valid general plan was adopted, these subdividers, the court stated, could properly be classified as necessary parties, but they were not indispensable. Consequently, the court concluded, the trial court did not exceed its jurisdiction in proceeding without them and not pursuing the impractical prospect of joining them (*123 Cal. App. 3d 334, 354)* .

Counsel should note that *Code Civ. Proc. § 389* no longer uses the term "necessary parties." However, the courts have continued to use that term to characterize absent parties who would be proper parties to an action and who are necessary to a complete determination of the action and should therefore be joined under *Code Civ. Proc. § 389(a)* but in whose absence the court can nonetheless accord complete relief to the parties already before it without prejudicially affecting

the interests of the absent parties, so that dismissal is not required under *Code Civ. Proc. § 389(b)*.

[4] Additional Authorities

[a] When Court Can Proceed If Joinder Not Feasible

In *Citizens Task Force on Sohio v. Board of Harbor Comm'rs (1979) 23 Cal. 3d 812, 153 Cal. Rptr. 584, 591 P.2d 1236* , petitioner sought a writ of mandate challenging the adequacy of an environmental impact report prepared jointly by a city port and the Public Utilities Commission (PUC) with regard to a project to move crude oil from a city harbor overland to an out-of-state site. The trial court granted respondents' motion to compel joinder of the PUC and transferred the matter to the Supreme Court on the ground that joinder of the PUC deprived it of jurisdiction over the subject matter. The Supreme Court transferred the case back to the trial court, holding that although the PUC could not properly be made a party, the trial court should nonetheless have proceeded in the matter without its presence. Defendant port, the Court noted, was the first of the two agencies to act on the project and was therefore the lead agency and, as such, it was required under *Pub. Res. Code § 21167* to defend the report in the action challenging its adequacy (*23 Cal. 3d 812, 814)* .

[b] Time When Indispensability Tested

The facts and procedural background of *Ferraro v. Southern Cal. Gas Co. (1980) 102 Cal. App. 3d 33, 162 Cal. Rptr. 238* , are discussed in *§ 168.46*, under Additional Authorities, Partial Assignees or Subrogees Required to Be Joined. In that case, the court of appeal held that the failure of defendant to object to any defect in parties at the trial of the case constituted a waiver of the issue and therefore defendant could not assert it for the first time on appeal. Although the court conceded that the omitted party, an insurer and partial subrogee, was a party who should have been joined pursuant to *Code Civ. Proc. § 389(a)*, it did not expressly rule whether or not the omitted party was an indispensable party under *Code Civ. Proc. § 389(b)*. However, because the court of appeal affirmed the action of the trial court in entering judgment for plaintiffs and reducing the amount of damages awarded by the jury to plaintiffs, the decision in effect implied that the insurer was not an indispensable party pursuant to § 389(b), since the trial court had shaped the relief so that no prejudice occurred to defendant and there was no substantial risk that defendant could be subjected to multiple damages as a result of any action taken by the omitted party (*102 Cal. App. 3d 33, 44-48)* .

[c] Court Can Proceed in Absence of Necessary or Proper Parties

Bowles v. Superior Court (1955) 44 Cal. 2d 574, 283 P.2d 704 , involved a proceeding in prohibition by absent beneficiaries of a trust to restrain the superior court in an underlying action brought by other beneficiaries for removal of trustees. Petitioners also sought to have court orders already made relating to the removal and appointment of new trustees declared null and void. In the underlying action, petitioners had sought to intervene and/or be joined as necessary and indispensable parties to that action. The Supreme Court held that the trial court, having jurisdiction to proceed to protect property, acted within its jurisdiction, and the denial of petitioners' application for intervention or joinder was within its discretion. The Court stated that although the absent beneficiaries were proper parties, they were not indispensable parties required to be joined in the action for the removal of the trustees, since that action involved the preservation of the trust and not the particular interest of the beneficiaries of the trust property (*44 Cal. 2d 574, 582-584)* .

Counsel should note that the above-cited case was decided before the 1971 revision of the compulsory joinder of parties statute [*Code Civ. Proc. § 389*]. However, cases decided under the former statute still appear to be good law insofar as they define which persons must be joined under *Code Civ. Proc. § 389(a)* if subject to the court's process and if joinder would not deprive the court of jurisdiction. These cases, however, are no longer authority insofar as they hold that the court's failure to bring in a particular person as a party to an action deprives the court of jurisdiction to render judgment in an action between the parties already before the court [*see* 10 Cal. L. Rev. Comm. Reports 501, 535-537 (1971)]. For discussion of the effect of the 1971 amendment to *Code Civ. Proc. § 389* on prior California law, see *§ 168.45*, under

[3], In Absence of Omitted Party, Complete Relief Cannot Be Granted to Existing Parties.

The factual and procedural background of *Noguera v. North Monterey County Unified Sch. Dist. (1980) 106 Cal. App. 3d 64, 164 Cal. Rptr. 808* , is discussed in *§ 168.48*. In that action, involving mandate proceedings to determine the validity of a new school district's failure to rehire teachers employed in the former districts that now made up the new district, the court of appeal reversed the trial court's order sustaining the district's demurrer to the complaint for failure to state a cause of action. The court itself raised the issue of petitioner's failure to join as indispensable parties persons newly employed in the former districts. The court held, however, that the omitted parties were not indispensable to the disposition of the case against the parties before it, but were necessary parties in the sense that the main issue affected their own interests. However, the court suggested that the better procedure would have been for the trial court to have ordered their joinder (*106 Cal. App 3d 64, 72-73)* .

Counsel should note that *Code Civ. Proc. § 389* no longer uses the term "necessary parties." However, the courts have continued to use that term to characterize absent parties who would be proper parties to an action and who are necessary to a complete determination of the action and should therefore be joined under *Code Civ. Proc. § 389(a)* but in whose absence the court can nonetheless accord complete relief to the parties already before it without prejudicially affecting the interests of the absent parties, so that dismissal is not required under *Code Civ. Proc. § 389(b)*.

California Points & Authorities

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CHAPTER 169 PARTITION

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§ 169.syn Synopsis to Chapter 169: PARTITION

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§ 169.04 Related Pleading and Practice Chapters

§§ 169.05-169.19 [Reserved]

§ 169.20 Supporting Demurrer to Complaint Failure to Allege Plaintiff Is Authorized to Bring Partition Action [Code Civ. Proc. § 872.210]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Allegation of Authorization

[4] Additional Authorities

[a] Person Authorized to Bring Partition Action

§ 169.21 Supporting Demurrer to Complaint--Failure to Allege Interests of All Persons in Property Sought to be Partitioned [Code Civ. Proc. § 872.230]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Interests in Property

[b] Allegation of Interests

§ 169.22 Supporting Demurrer to Complaint--Failure to Allege Plaintiff Is Authorized to Bring Action for Partition of Condominium [Civ. Code § 1359(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

§ 169.23 Supporting Demurrer to Complaint--Failure to Allege Condition Required for Partition of Condominium Project [Civ. Code § 1359(b)]

[1] FORM

[2] Comments

[a] Use of Form

§ 169.24 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Probate Homestead When Child Is Minor

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Probate Homestead With Minor Child

§ 169.25 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Homestead for Married Spouses

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Homestead Claimed for Spouses

[4] Additional Authorities

[a] Homestead Claimed for Spouses

§ 169.26 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Waiver of Right to Partition [Code Civ. Proc. § 872.710(b)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Waiver of Right to Partition

[4] Additional Authorities

[a] Waiver of Right to Partition

§ 169.27 Supporting Motion for Confirmation of Report of Referee [Code Civ. Proc. § 873.290]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Uses

[3] Discussion of Authorities

[a] Correct Division and Allotment

[b] Error Required

§ 169.28 Supporting Motion for Confirmation of Sale by Referee [Code Civ. Proc. § 873.720]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Uses

[3] Discussion of Authorities

[a] Reason Required to Refuse Confirmation

[b] Affirmative Appearance of Ground

§ 169.29 Opposing Demurrer to Complaint--Complaint Alleges Facts Showing Plaintiff Authorized to Bring Partition Action [Code Civ. Proc. § 872.210]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Partition by Tenant in Common

[b] Partition by Joint Tenant

[4] Additional Authorities

[a] Partition by Tenant in Common

§ 169.30 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--Partition Not Barred by Cotenant's Statutory Homestead

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Cotenant's Statutory Homestead as Not a Bar

§ 169.31 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--Agreement Does Not Waive Right to Partition

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Agreement Not Waiving Partition

[b] Intention Necessary to Imply Waiver

§ 169.32 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--Agreement Waiving Right to Partition Breached by Defendant

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Breach of Agreement Waiving Right to Partition

[4] Additional Authorities

[a] Breach of Agreement Waiving Right to Partition

§ 169.33 Opposing Motion for Confirmation of Report of Referee [Code Civ. Proc. § 873.290]--Partition Violative of Statutory Requirements [Code Civ. Proc. §§ 873.210-873.240]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
CHAPTER 169 PARTITION
PART I. INTRODUCTION

16-169 California Points & Authorities § 169.01

§ 169.01 Scope of Chapter

This chapter contains forms of points and authorities relating to partition. It includes the following types of forms:

- Supporting [*see §§ 169.20 -169.23*] and opposing [*see § 169.29*] a general demurrer to a complaint or cross complaint for partition.

- Supporting [*see §§ 169.24 -169.26*] and opposing [*see §§ 169.30 -169.32*] a motion for summary judgment in a partition action.

- Supporting [*see § 169.27*] and opposing [*see § 169.33*] a motion for confirmation of a referees' report.

- Supporting a motion for confirmation of a sale by the referees [*see § 169.28*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedureJudicial OfficersRefereesGeneral OverviewCivil ProcedureSummary JudgmentOppositionGeneral OverviewReal Property LawEstatesConcurrent OwnershipPartition Actions

California Points & Authorities

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16-169 California Points & Authorities § 169.02

§ 169.02 Governing Statutes

Actions for partition of real and personal property are governed by *Code Civ. Proc. § 872.010 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsReal Property LawEstatesConcurrent OwnershipPartition Actions

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16-169 California Points & Authorities § 169.03

§ 169.03 Page Limits on Points and Authorities Chapters

In general, a supporting or opposing memorandum must not exceed 15 pages, or, in the case of a motion for summary judgment or summary adjudication, 20 pages. A reply or closing memorandum may not exceed 10 pages [*see Cal. Rules of Ct., Rule 3.1113(d)*]. Any party desiring to file a longer memorandum must obtain leave of court [*see Cal. Rules of Ct., Rule 3.1113(e)*]. For further discussion of the page limitations under *Cal. Rules of Ct., Rule 3.1113*, and of other basic format requirements of memoranda, see *Ch. 1, Writing Legal Memoranda and Briefs, § 1.05*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureSummary JudgmentSupporting MaterialsMemoranda of Law

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16-169 California Points & Authorities § 169.04

§ 169.04 Related Pleading and Practice Chapters

For a discussion and forms of complaints, allegations, notices of motions, and orders involving the partition of real and personal property, see California Forms of Pleading and Practice, Ch. 397, *Partition* (Matthew Bender).

For discussions and forms for use in particular cases involving partition, see in that set the following chapters:

- Ch. 101, *Boundaries*.
- Ch. 265, *Federal Courts: Jurisdiction and Removal*.
- Ch. 290A, *Guardianship and Conservatorship: Maintenance of Ward or Conservatee*.
- Ch. 294, *Homesteads*.
- Ch. 316, *Joint Tenancy and Tenancy in Common*.
- Ch. 440, *Probate*.
- Ch. 522, *Ships and Shipping*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPleading & PracticeMotion PracticeSupporting MemorandaEstate, Gift & Trust LawProbateGeneral OverviewReal Property LawEstatesConcurrent OwnershipPartition ActionsReal Property LawEstatesConcurrent OwnershipTenancies in Common

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16-169 California Points & Authorities §§ 169.05-169.19

[Reserved]

§§ 169.05[Reserved]

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16-169 California Points & Authorities § 169.20

§ 169.20 Supporting Demurrer to Complaint Failure to Allege Plaintiff Is Authorized to Bring Partition Action [Code Civ. Proc. § 872.210]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff, vs.	)	NO. _____
_____ [*name*(*s*)],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Defendant(s).	)	IES IN SUPPORT OF DEMURRER TO COM-
	)	PLAINT
	)	

_____

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT FAILS TO ALLEGE THAT PLAINTIFF IS A PERSON AUTHORIZED BY STATUTE TO BRING A PARTITION ACTION.

A. Objection by Demurrer. The party against whom a complaint has been filed may object, by demurrer as provided in *Section 430.30 of the Code of Civil Procedure*, to the complaint on the ground that it does not state facts sufficient to constitute a cause of action (*Code Civ. Proc. § 430.10(e)*). When any ground for objection to a complaint appears on the face of the complaint (*or* from any matter of which the court is required to or may take judicial notice), the objection on that ground may be taken by a demurrer to the complaint (*Code Civ. Proc. § 430.30(a)*).

B. Person Authorized to Bring Partition Action. A partition action may be commenced and maintained by a co-owner of personal property or by an owner of an estate of inheritance, an estate for life, or an estate for years in real property when the property or estate in the property is owned by several persons concurrently or in successive estates. However, a partition action may not be commenced or maintained between spouses or putative spouses for partition of their community or quasi-community property or their quasi-marital interest in property (*Code Civ. Proc. § 872.210*).

C. Allegation of Authorization. A complaint fails to state a cause of action for partition when it fails to allege facts showing that the plaintiff is a person entitled to maintain an action for partition under the provisions of *Section 872.210 of the Code of Civil Procedure* (*Jacquemart v. Jacquemart (1956) 142 Cal. App. 2d 794, 795-798, 299 P.2d 281*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a general demurrer to a complaint when the demurrer asserts that the complaint fails to state facts sufficient to constitute a cause of action in that it fails to allege that the plaintiff is a person entitled to maintain an action for partition under *Code Civ. Proc. § 872.210*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should note the absence of an allegation that the plaintiff is authorized to bring the partition action.

[3] Discussion of Authorities

[a] Allegation of Authorization

In ***Jacquemart v. Jacquemart*** *(1956) 142 Cal. App. 2d 794, 299 P.2d 281* , the complaint for partition of real property alleged that plaintiff and defendant owned the property as community property in equal undivided interests. After the presentation of evidence, the trial court sustained the defendant's objection to the introduction of evidence and granted the defendant's motions to strike the evidence and for judgment on the pleadings. In affirming, the court of appeal held that ownership of community property is not the same as ownership of property as joint tenants or tenants in common. Thus, the complaint failed to allege facts showing that plaintiff was a person within the meaning of former Code Civ. Proc. § 752, now *Code Civ. Proc. § 872.210*, who is entitled to maintain an action for the partition of the property (*142 Cal. App. 2d 794, 795-798)* .

[4] Additional Authorities

[a] Person Authorized to Bring Partition Action

In *In re Marriage of Graves (1988) 198 Cal. App. 3d 1047, 244 Cal. Rptr. 110* , the court of appeal held that a former spouse was required to bring a separate partition action, rather than a post-dissolution motion, to divide a former community asset (a military pension) that was omitted from adjudication in a marital dissolution. Community property that is not mentioned in the dissolutionpleadings is held post-dissolution by the parties as tenants in common. Neither the doctrine of res judicata nor a failure to resolve jurisdiction bars a subsequent action for partition of the missed

community asset. The enactment of former Civ. Code § 4800.4 [*now see Fam. Code § 2650*], which permits a court to divide the separate property interests of spouses held in joint tenancy or tenancy in common when it divides their community and quasi-community property, did not abrogate the requirement of bringing a partition action to divide omitted assets (*198 Cal. App. 3d 1047, 1050-1052)* .

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16-169 California Points & Authorities § 169.21

§ 169.21 Supporting Demurrer to Complaint--Failure to Allege Interests of All Persons in Property Sought to be Partitioned [Code Civ. Proc. § 872.230]

[1] FORM

[*Caption. See § 169.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT FAILS TO ALLEGE FACTS SHOWING THE INTERESTS OF ALL PERSONS IN THE PROPERTY.

A. Objection by Demurrer. [*See § 169.20, Paragraph A.*]

B. Interests in Property. The complaint in an action for partition must set forth the interests known to plaintiff of all persons, known or unknown, in the property sought to be partitioned (*Code Civ. Proc. § 872.230*).

C. Allegation of Interests. A complaint fails to state a cause of action for partition if it fails to allege facts showing the interests of all persons in the property (*Neusted v. Skernswell (1945) 69 Cal. App. 2d 361, 364, 159 P.2d 49*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a general demurrer to a complaint when the demurrer asserts that the complaint fails to state facts sufficient to constitute a cause of action in that it fails to allege the interests of all persons in the property.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should note the absence of facts regarding the interests of all persons in the property.

[3] Discussion of Authorities

[a] Interests in Property

The complaint must set forth, among other facts, (1) all interests the plaintiff has or claims in the property and (2) all interests of record or actually known to the plaintiff that persons other than the plaintiff have or claim in the property and that the plaintiff reasonably believes will be materially affected by the action, whether the names of the persons are known or unknown to the plaintiff (*Code Civ. Proc. § 872.230*). The plaintiff must join as defendants all persons having or claiming interests of record, or actually known to the plaintiff, or reasonably apparent from an inspection of the property, in the estate as to which partition is sought (*Code Civ. Proc. § 872.510*). However, if the property is subject to a lease, community lease, unit agreement, or other pooling arrangement with respect to oil, or gas, or both, the plaintiff need not join as defendants persons whose only interest in the property is that of a lessee, royalty owner, lessor/owner of other real property in the community, unit, or pooled area, or working-interest owner, or persons claiming under them (*Code Civ. Proc. § 872.540*).

[b] Allegation of Interests

Neusted v. Skernswell *(1945) 69 Cal. App. 2d 361, 159 P.2d 49* , decided under former Code Civ. Proc. § 753 (*now see Code Civ. Proc. § 872.230*) was an action to establish a resulting trust for plaintiff in an undivided interest in real property in which the plaintiff also sought partition of the property. The complaint alleged only that the plaintiff and defendants were owners of the property involved in the action. The defendants' demurrer, general and special, was overruled. Interlocutory and final decrees in partition were entered after trial and reversed on appeal with directions to sustain the defendants' demurrer with leave to amend. The court of appeal held that the complaint did not state a cause of action and the demurrer should have been sustained in that the allegation that the plaintiff and defendants were the owners of the property failed to state the proportionate interests of the respective parties (*69 Cal. App. 2d 361, 364)* .

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16-169 California Points & Authorities § 169.22

§ 169.22 Supporting Demurrer to Complaint--Failure to Allege Plaintiff Is Authorized to Bring Action for Partition of Condominium [Civ. Code § 1359(b)]

[1] FORM

[*Caption. See § 169.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT FAILS TO ALLEGE THAT PLAINTIFF IS A PERSON AUTHORIZED BY STATUTE TO BRING AN ACTION FOR PARTITION OF A CONDOMINIUM PROJECT.

A. Objection by Demurrer. [*See § 169.20, Paragraph A.*]

B. Allegation of Ownership. A complaint fails to state a cause of action for partition of a condominium project by sale of the entire project if it fails to allege facts showing that plaintiff owns a condominium, as defined in *Section 783 of the Civil Code*, in the condominium project sought to be partitioned (*Civ. Code § 1359(b)*).

C. Condominium Defined. A condominium consists of an undivided interest in common in a portion of real property coupled with a separate interest in space called a unit (*Civ. Code § 1351(f)*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a general demurrer to a complaint when the demurrer asserts that the complaint fails to state facts sufficient to constitute a cause of action in that it fails to allege that the plaintiff is a person authorized to bring an action for the partition of a condominium project under *Civ. Code § 1359(b)*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should note the absence of an allegation that the plaintiff is authorized to bring the partition action.

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16-169 California Points & Authorities § 169.23

§ 169.23 Supporting Demurrer to Complaint--Failure to Allege Condition Required for Partition of Condominium Project [Civ. Code § 1359(b)]

[1] FORM

[*Caption. See § 169.20.*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT FAILS TO ALLEGE FACTS SHOWING THE EXISTENCE OF A CONDITION REQUIRED BY STATUTE FOR PARTITION OF A CONDOMINIUM PROJECT BY SALE OF THE ENTIRE PROJECT.

A. Objection by Demurrer. [*See § 169.20, Paragraph A.*]

B. Allegation of Condition Required by Statute. A complaint fails to state a cause of action for partition of a condominium project where it fails to allege facts showing that (1) three years after damage or destruction to the project which renders a material part thereof unfit for its use prior thereto, the project has not been rebuilt or repaired substantially to its state prior to its damage or destruction; (2) three-fourths or more of the project has been destroyed or substantially damaged, and condominium owners holding in aggregate more than a 50 percent interest in the common areas are opposed to repair or restoration of the project; (3) the project has been in existence in excess of 50 years, it is obsolete and uneconomic, and condominium owners holding in aggregate more than a 50 percent interest in the common areas are opposed to repair or restoration of the project; or (4) conditions for such a partition by sale set forth in the declaration have been met (*Civ. Code § 1359(b)*).

C. Condominium Defined. [*See § 169.22, Paragraph C.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a general demurrer to a complaint when the demurrer asserts that the complaint fails to state facts sufficient to constitute a cause of action in that it fails to allege the existence of a condition specified in *Civ. Code § 1359(b)* required for partition of acondominium project by sale of the entire project.

Counsel should insert argument in this form showing the relationship between the facts of his or her case and the points of law stated.

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16-169 California Points & Authorities § 169.24

§ 169.24 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Probate Homestead When Child Is Minor

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name(s*)],	)	IES IN SUPPORT OF MOTION FOR SUMMARY
Defendant(s).	)	JUDGMENT
	)	[*Code Civ. Proc. § 437c*]
	)	

_____

SUMMARY JUDGMENT FOR DEFENDANT IS PROPER WHERE THE PROPERTY WAS SET ASIDE AS A PROBATE HOMESTEAD FOR DECEDENT'S FAMILY AND A CHILD IS STILL A MINOR.

A. Summary Judgment. A defendant may move for summary judgment in any action or proceeding if it is contended that the action has no merit. Such motion must be granted if all of the papers submitted show that there is no triable issue as to any material fact and that defendant is entitled to a judgment as a matter of law (*Code Civ. Proc. § 437c*).

B. Probate Homestead With Minor Child. The defendant is entitled to judgment in an action for partition of real property when the property has been set aside in the administration of a decedent's estate as a probate homestead for the decedent's minor child or children and surviving spouse, if any, and one such child has not attained its majority (*Hoppe v. Hoppe (1894) 104 Cal. 94, 101, 37 P. 894*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion forsummary judgment when the motion asserts that defendant is entitled to a judgment as a matter of law since the property sought to be partitioned was set aside as a probate homestead for a decedent's family and at least one child is still a minor.

Counsel should insert argument in this form showing the relationship between the facts of his or her case and the points of law stated. In addition, counsel should attach affidavits or declarations that support the motion [*Code Civ. Proc. § 437c*].

[3] Discussion of Authorities

[a] Probate Homestead With Minor Child

Hoppe v. Hoppe *(1894) 104 Cal. 94, 37 P. 894* , was an action for partition of real property which was consolidated with an action for foreclosure of a mortgage on the property. The pleadings showed (1) the property had been set apart in a decedent's estate for the use of the decedent's wife and nine children as a probate homestead; (2) the wife had subsequently executed a mortgage on the homestead property; (3) this mortgage was being foreclosed in the action for foreclosure; and (4) the action for partition against the wife and mortgagee was brought by the decedent's children who were still minors. The mortgagee's demurrer to the complaint for partition was sustained. In affirming, the court of appeal stated that a homestead must remain intact until the youngest child has reached majority. Hence, it was not competent for the other cotenants to have a partition until that time had been reached. The court qualified this by noting that circumstances might exist where it would be the duty of the court, for the benefit of the minor, to decree a partition or order the interest of the minor to be sold, but such circumstances were not involved in the case at hand (*104 Cal. 94, 101)* .

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16-169 California Points & Authorities § 169.25

§ 169.25 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Homestead for Married Spouses

[1] FORM

[*Caption. See § 169.24.*]

SUMMARY JUDGMENT FOR DEFENDANT IS PROPER WHERE THE PROPERTY IS SUBJECT TO A HOMESTEAD SELECTED AND RECORDED FOR THE BENEFIT OF A HUSBAND AND WIFE DURING THEIR MARRIAGE.

A. Summary Judgment. [*See § 169.24, Paragraph A.*]

B. Homestead Claimed for Spouses. The defendant is entitled to judgment in an action brought for the partition of real property that is subject to a valid and subsisting homestead selected and recorded for the benefit of a husband and wife during their marriage (*Swan v. Walden (1909) 156 Cal. 195, 200, 103 P 931*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for summary judgment when the motion asserts that defendant is entitled to a judgment as a matter of law since the property sought to be partitioned is subject to a homestead selected and recorded for the benefit of a husband and wife during their marriage.

Counsel should insert argument in this form showing the relationship between the facts of his or her case and the points of law stated. In addition, counsel should attach affidavits or declarations that support the motion [*Code Civ. Proc. § 437c*].

[3] Discussion of Authorities

[a] Homestead Claimed for Spouses

Swan v. Walden *(1909) 156 Cal. 195, 103 P 931* , was an action for partition of property. The property consisted of three lots which had been conveyed in joint tenancy to a husband and wife, the defendants. A homestead had been declared by the wife on the two lots where she and her husband resided and the homestead was never abandoned. Subsequently, a grant deed was executed by the husband purportedly conveying his interest in the lots to the plaintiff. The Supreme Court reversed a judgment for plaintiff, holding that the homestead declared by the wife was valid and, as a necessary consequence, the deed of the husband alone, made after the declaration, was inoperative and void (*156 Cal. 195, 200)* .

[4] Additional Authorities

[a] Homestead Claimed for Spouses

Kaupe v. Kaupe (1955) 131 Cal. App. 2d 511, 280 P.2d 856 , involved a partition action brought by a wife for the sale of real property. The property had been acquired during marriage by deed to them as joint tenants. The wife executed and recorded a declaration of homestead for herself and her husband in the property. Subsequently, she commenced an action for divorce but none was granted. She then executed and recorded an abandonment of the homestead, but her husband had not signed this document. In affirming the judgment denying partition, theappellate court stated that there was no compliance with the provisions of Civ. Code §§ 1242 and 1243 for abandonment of a homestead, and the partition action was not authorized by *Civ. Code § 1241* as an exception to a homestead's exemption from forced sale.

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16-169 California Points & Authorities § 169.26

§ 169.26 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--Waiver of Right to Partition [Code Civ. Proc. § 872.710(b)]

[1] FORM

[*Caption. See § 169.24.*]

SUMMARY JUDGMENT FOR DEFENDANT IS PROPER WHEN PLAINTIFF HAS WAIVED HIS OR HER RIGHT TO PARTITION THE PROPERTY.

A. Summary Judgment. [*See § 169.24, Paragraph A.*]

B. Partition as Right. Partition as to concurrent interests in the property is a matter of right unless barred by a valid waiver (*Code Civ. Proc. § 872.710(b)*).

C. Waiver of Right to Partition. The defendant is entitled to judgment in an action for partition of property when the plaintiff has expressly or impliedly waived his or her right to partition the property (*Schwartz v. Shapiro (1964) 229 Cal. App. 2d 238, 253, 40 Cal. Rptr. 189*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for summary judgment when the motion asserts that defendant is entitled to a judgment as a matter of law since the plaintiff expressly or impliedly waived his or her right to partition the property.

Counsel should insert argument in this form showing the relationship between the facts of his or her case and the points of law stated. In addition, counsel should attach affidavits or declarations that support the motion [*Code Civ. Proc. § 437c*].

[3] Discussion of Authorities

[a] Waiver of Right to Partition

Schwartz v. Shapiro *(1964) 229 Cal. App. 2d 238, 40 Cal. Rptr. 189* , was an action for partition of real property in which the plaintiff and the defendant couple each owned a half interest. The parties had agreed that they would not sell their interest without giving the other party the right to purchase it at a price not in excess of the original purchase price. The court of appeal reversed an interlocutory decree ordering partition, sale, and distribution of the proceeds. In holding that the plaintiff under the agreement must first offer her interest to the defendant couple before proceeding with an action for partition, the court held that while it is the general rule that a cotenant may require a partition of the cotenancy as a matter of absolute right, this right may be modified or waived by contract, either expressly or by implication (*229 Cal. App. 2d 238, 253)* .

[4] Additional Authorities

[a] Waiver of Right to Partition

In *Pine v. Tiedt (1965) 232 Cal. App. 2d 733, 43 Cal. Rptr. 184* , the property sought to be partitioned had been acquired for the construction of a sanitarium, which was to be leased to a corporation. Title to the property was taken in the names of the plaintiff and the promoter's nominee. A lease to the corporation was executed by the plaintiff and nominee, which then conveyed undivided interests in the property amounting to 56/100 to the defendants and other small investors by a grant deed waiving the grantees' right to partition. However, the plaintiff and nominee retained respectively 25/100 and 19/100 interests in the property without such waiver. The court of appeal reversed an interlocutory decree in partition, concluding as a matter of law that there was an implied waiver of any right of the plaintiff to partition during the leasing. To permit partition would frustrate the very purpose for which the land was acquired by the investors and for which it was being used.

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16-169 California Points & Authorities § 169.27

§ 169.27 Supporting Motion for Confirmation of Report of Referee [Code Civ. Proc. § 873.290]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*(*s*)],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Defendant(s).	)	IES IN SUPPORT OF MOTION FOR CONFIRMA-
	)	TION OF REPORT OF REFEREE
	)	

_____ [*Identify party, e.g.,* PLAINTIFF'S *or* DEFENDANT'S] MOTION FOR A CONFIRMATION OF THE REFEREE'S REPORT SHOULD BE GRANTED BECAUSE THERE IS A FULL AND CORRECT DIVISION AND ALLOTMENT OF PROPERTY AND THERE IS NO ERROR SHOWN OR APPEARING ON THE FACE OF THE REPORT.

A. Confirming Referee's Report. Any party to a partition action, on notice to the other parties who have appeared, may move the court to confirm the referee's report. At the hearing, the court may either confirm the report as filed or as the court may modify and enter judgment of partition accordingly or set aside the report and order the preparation of a new report and, if necessary, appoint a new referee for this purpose (*Code Civ. Proc. § 873.290(a), (b)*).

B. Correct Division and Allotment. A referee's report should be confirmed if the referee reports a full and correct division and allotment of property under the reference (*Worcester v. Worcester (1966) 246 Cal. App. 2d 56, 60-62, 54 Cal. Rptr. 436*).

C. Error Required. When no error appears on the face of the referee's report, none will be presumed, and the report will not be set aside unless a party excepting to it shows a state of facts that will make the alleged error affirmatively and clearly appear (*Camicia v. Camicia (1944) 65 Cal. App. 2d 487, 491, 150 P.2d 814*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion to confirm the report of the referee in a partition action.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should include facts showing that there is a full and correct division and allotment of property in the report.

[c] Related Uses

These points and authorities may be used to oppose a motion to change, modify, or set aside the referee's report.

[3] Discussion of Authorities

[a] Correct Division and Allotment

Worcester v. Worcester *(1966) 246 Cal. App. 2d 56, 54 Cal. Rptr. 436* , was an action to partition four parcels of real property. Pursuant to the parties' stipulation, the interlocutory decree allotted the property to the parties and appointed a referee to fix and determine an easement over a parcel allotted to defendant as access to a parcel allotted to plaintiff. After taking evidence and hearing argument, the trial court overruled defendant's objections to the referee's report incorporating a map delineating an easement, denied defendant's motion for new instructions to the referee, confirmed the report on plaintiff's notice of motion, and proceeded to enter judgment. In affirming the judgment, the court of appeal held that being satisfied from the evidence before it that the purpose of the reference had been fully and correctly accomplished, nothing remained to be done by the court except to confirm the report and enter a judgment in accordance with the judgment (*246 Cal. App. 2d 56, 60-62)* .

[b] Error Required

In ***Camicia v. Camicia*** *(1944) 65 Cal. App. 2d 487, 150 P.2d 814* , plaintiffs brought an action to partition property owned by plaintiffs and defendants as tenants in common. Pursuant to stipulation of the parties, the trial court made and entered an interlocutory decree regarding the respective rights of the parties and appointed three referees to make partition. The referees made their report in which they alleged they had divided the property according to the respective

rights of the parties into two equal parts. The plaintiffs moved to modify or set aside the report, contending that the division was not fair or just. The motion was denied and amotion by defendants to confirm the report was granted.

The court of appeal affirmed. Whether the division made by the referees was fair and equitable was a question of fact. An appellate court in a partition suit will not ordinarily consider the sufficiency of the evidence to sustain the findings of the trial court, and these findings will be taken as conclusive when the evidence is conflicting and there is sufficient evidence to sustain them. In this case the trial judge viewed the premises, which constituted independent evidence that enabled him to verify the referees' report, and on appeal this evidence had to be presumed to support the judgment. Citing *Seale v. Greer (1868) 1 Cal Unrep 423, 424* , the court found that when no error appears on the fact of a referee's report, none will be presumed, and the report must not be set aside unless a party excepting to it shows a state of facts that will make alleged error affirmatively and clearly appear (*65 Cal. App. 2d 487, 490-491*).

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
CHAPTER 169 PARTITION
PART II. FORMS

16-169 California Points & Authorities § 169.28

§ 169.28 Supporting Motion for Confirmation of Sale by Referee [Code Civ. Proc. § 873.720]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*(*s*)],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Defendant(s).	)	IES IN SUPPORT OF MOTION FOR CONFIRMA-
	)	TION OF SALE BY REFEREE
	)	

_____ [*Identify party, e.g.,* PLAINTIFF'S] MOTION FOR CONFIRMATION OF THE SALE BY THE REFEREE SHOULD BE GRANTED BECAUSE THERE ARE NO GROUNDS WARRANTING A REFUSAL TO CONFIRM.

A. Confirming Referee's Sale. A party, referee, or purchaser in a partition action may move the court to confirm any sale or sales reported by the referee to the court, after giving 10 days' notice to the other parties who have appeared in the action and any purchaser who is not the moving party (*Code Civ. Proc. § 873.720*).

B. Reason Required to Refuse Confirmation. A sale reported by the referee should be confirmed unless there is a reason recognized by law as warranting a refusal to confirm (*Dunn v. Dunn (1902) 137 Cal. 51, 57-58, 69 P. 847*).

C. Grounds for Vacating Sale. A court may vacate the sale reported by the referee if the proceedings were unfair or the sum bid disproportionate to the value, and if it appears that a sum exceeding the bid accepted by at least 10 percent on the first $10,000 and 5 percent on the amount in excess thereof, exclusive of the expenses of a new sale, may be

obtained (*Code Civ. Proc. § 873.730(c)*).

D. Affirmative Appearance of Ground. The ground alleged for refusing confirmation of a referee's sale must be made affirmatively to appear (*Dunn v. Dunn (1902) 137 Cal. 51, 57-60, 69 P. 847*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for confirmation of a sale by a referee in a partition action when there are no grounds warranting a refusal to confirm the sale.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should note the absence of any grounds for vacating the sale.

[c] Related Uses

With appropriate modification, these points and authorities may be used to support a motion to confirm a referee's sale of personal property in a partition action.

[3] Discussion of Authorities

[a] Reason Required to Refuse Confirmation

In ***Dunn v. Dunn*** *(1902) 137 Cal. 51, 69 P. 847* , the appellant bought one parcel at the public auction conducted by a referee in an action for partition of several tracts of real property. When the referee's report and a petition for approval of the proceedings were filed, an objection to confirmation was filed for alleged inadequacy of the price bid. At the hearing held six months after the sale, there was evidence that the parcel sold to the appellant had advanced in value after the sale but had brought all that it would sell for at the time of the sale. There was no other evidence of the parcel's value at the date of sale. The judgment denying confirmation and ordering a resale was reversed with directions to confirm the referee's sale to appellant. The Supreme Court held that confirmation must follow unless there exists some reason recognized by law as warranting a refusal to confirm (*137 Cal. 51, 57-58)* .

When *Dunn v. Dunn* arose, former Code Civ. Proc. § 784 [*now see Code Civ. Proc. § 873.720*], did not expressly provide for a hearing on a motion to confirm or set aside the sale reported by a referee or authorize the court to vacate a sale.

[b] Affirmative Appearance of Ground

The factual background of ***Dunn v. Dunn*** *(1902) 137 Cal. 51, 69 P. 847* , is *set forth in § 169.28[3][a]*.

In holding that the evidence did not support denial of confirmation for alleged inadequacy of the price bid, the Supreme Court stated that the ground alleged for refusing confirmation of sale should be made affirmatively to appear (*137 Cal. 51, 57-60)* .

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
CHAPTER 169 PARTITION
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16-169 California Points & Authorities § 169.29

§ 169.29 Opposing Demurrer to Complaint--Complaint Alleges Facts Showing Plaintiff Authorized to Bring Partition Action [Code Civ. Proc. § 872.210]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*(*s*)],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Defendant(s).	)	IES IN OPPOSITION TO DEMURRER TO COM-
	)	PLAINT
	)	

_____

DEFENDANT'S DEMURRER SHOULD NOT BE SUSTAINED BECAUSE THE COMPLAINT ALLEGES FACTS SHOWING THAT PLAINTIFF IS A PERSON AUTHORIZED BY STATUTE TO BRING A PARTITION ACTION.

[*EITHER*]

Partition by Tenant in Common. When the plaintiff owns as a tenant in common an estate of inheritance, for life or lives, or for years, in the property sought to be partitioned, the plaintiff is a person entitled to bring an action for partition of real property (*Code Civ. Proc. § 872.210*; *Oliver v. Sperry (1934) 220 Cal. 327, 329, 30 P.2d 402*).

[*OR*]

Partition by Joint Tenant. When the plaintiff owns as a joint tenant an estate of inheritance, for life or lives, or for years, in the property, sought to be partitioned, the plaintiff is a person entitled to bring an action for partition of real property (*Code Civ. Proc. § 872.210*; *Lazzarevich v. Lazzarevich (1952) 39 Cal. 2d 48, 50-51, 244 P.2d 1*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a general demurrer to a complaint when the demurrer asserts that the complaint fails to allege facts showing that plaintiff is a person authorized to bring a partition action under *Code Civ. Proc. § 872.210* and when the plaintiff is a tenant in common, joint tenant, or holder of a lien on the property on a parity with that on which the title of the property's owner is based.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should set forth the facts showing that the plaintiff is authorized to bring the action.

[3] Discussion of Authorities

[a] Partition by Tenant in Common

Oliver v. Sperry *(1934) 220 Cal. 327, 30 P.2d 402* , was an action for partition of real property brought by the surviving spouse of a deceased cotenant. The final judgment of partition allotted the property to the surviving cotenant and the successors in interest of the deceased cotenant. In affirming the judgment, the Supreme Court held that on the death of his wife, who owned part of the property in her lifetime, the plaintiff was vested with an interest in the property. As he was owner as a tenant in common with the other owners, he was authorized to commence the partition action under former Code Civ. Proc. § 752 (*220 Cal. 327, 329* ; *now see Code Civ. Proc. § 872.210*).

[b] Partition by Joint Tenant

Lazzarevich v. Lazzarevich *(1952) 39 Cal. 2d 48* , was an action for the partition of real property held in joint tenancy by plaintiff and defendant. The trial court concluded that the plaintiff should be barred from obtaining partition because the plaintiff had not paid a judgment the defendant had against him. In reversing the judgment against plaintiff, the Supreme Court held that in the absence of a waiver, a joint tenant is entitled as a matter of right to have his interest severed from that of his cotenant (*39 Cal. 2d 48, 50-51)* .

[4] Additional Authorities

[a] Partition by Tenant in Common

In *Brunson v. Brunson (1985) 168 Cal. App. 3d 786, 214 Cal. Rptr. 378* , the court of appeal held that a military pension omitted from adjudication in a 1971 marital dissolution proceeding could be divided in a partition action by a former spouse, and that current community property principles should be applied in apportioning the parties' interests. The court rejected the argument that because the pension had been considered in making an award of spousal support the former spouse was barred from dividing it later. Mere mention of the pension inan interlocutory judgment was not an adjudication, and the pension was not listed in the pleadings as community property (*168 Cal. App. 3d 786, 788)* .

In *Bacon v. Wahrhaftig (1950) 97 Cal. App. 2d 599, 218 P.2d 144* , the complaint for partition alleged that the plaintiff was the owner in fee of a specific undivided interest in the land. Judgments of dismissal were entered after the sustaining of the defendants' demurrers on special and general grounds. In reversing, the court of appeal held that it was error to sustain the demurrers since ordinarily if the party seeking partition is shown to be a tenant in common, and as such entitled to possession of the land sought to be partitioned, the right is absolute (*97 Cal. App. 2d 599, 605-606)* .

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
CHAPTER 169 PARTITION
PART II. FORMS

16-169 California Points & Authorities § 169.30

§ 169.30 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--Partition Not Barred by Cotenant's Statutory Homestead

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name(s*)],	)	IES IN OPPOSITION TO MOTION FOR SUM-
Defendant(s).	)	MARY JUDGMENT
	)	[*Code Civ. Proc. § 437c*]
	)	

_____

PARTITION IS NOT BARRED BY A COTENANT'S STATUTORY HOMESTEAD ON HIS OR HER INTEREST IN THE PROPERTY.

Cotenant's Statutory Homestead as Not a Bar. A statutory homestead on a cotenant's interest in property is not a defense to an action by another cotenant for partition of the property (*Squibb v. Squibb (1961) 190 Cal. App. 2d 766, 768-770, 12 Cal. Rptr. 346*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion for summary judgment when the motion asserts that partition is barred by the existence of a statutory homestead and where the homestead affected only the cotenant's interest in the property.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law raised. In addition, counsel should attach affidavits or declarations that support the memorandum [*Code Civ. Proc. § 437c*].

[3] Discussion of Authorities

[a] Cotenant's Statutory Homestead as Not a Bar

Squibb v. Squibb *(1961) 190 Cal. App. 2d 766, 12 Cal. Rptr. 346* , was an action for partition of real property where the evidence showed the parties had previously acquired the property in joint tenancy during their marriage. When they were divorced, no disposition was made of the property's use and ownership. After the divorce, the defendant with the parties' children continued to live on the property and executed and recorded a declaration of homestead on it. In her answer to the plaintiff's action for partition, the defendant alleged the recordation of her declaration of homestead on the property. This defense was stricken on plaintiff's motion. An interlocutory judgment ordering partition was entered and affirmed. The court of appeal determined that defendant, as an unmarried person at the time she selected her homestead, could do so only for her own property. The court held that a cotenant's statutory homestead interest does not deprive a cotenant of the right to have the common property partitioned and sold, and the homestead right of the cotenant in his own interest in the common property is no bar to a suit for that purpose (*190 Cal. App. 2d 766, 768-770)* .

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CHAPTER 169 PARTITION
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16-169 California Points & Authorities § 169.31

§ 169.31 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--Agreement Does Not Waive Right to Partition

[1] FORM

[*Caption. See § 169.30.*]

AN AGREEMENT IS NOT A DEFENSE TO AN ACTION FOR PARTITION WHEN IT DOES NOT WAIVE THE RIGHT TO PARTITION.

A. Agreement Not Waiving Partition. An agreement is not a defense to an action for partition when the agreement does not expressly or impliedly waive the right to partition (*Heber v. Yaeger (1967) 251 Cal. App. 2d 258, 262-263, 59 Cal. Rptr. 353*).

B. Intention Necessary to Imply Waiver. A waiver of the right to partition real property will not be implied unless the parties' agreement clearly indicates an intention to restrict the property to a use foreclosing its partition (*Heber v. Yaeger (1967) 251 Cal. App. 2d 258, 262-263, 59 Cal. Rptr. 353*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion for summary judgment when the motion alleges that the plaintiff waived the right to partition and where the agreement on relief does not have this effect.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law raised. In addition, counsel should attach affidavits or declarations that support the memorandum [*Code Civ. Proc. § 437c*].

[3] Discussion of Authorities

[a] Agreement Not Waiving Partition

Heber v. Yaeger *(1967) 251 Cal. App. 2d 258, 59 Cal. Rptr. 353* , involved a series of actions. In her first action for declaratory relief and an accounting, plaintiff was declared vested with a life estate in an undivided half interest in real property under an agreement dividing partnership property. The defendant owned a life estate in the other half interest and the remainder in the real property. Plaintiff's second action for an accounting had been dismissed on the plaintiff's waiving future income from the property as long as defendant operated it as a citrus ranch and plaintiff was not charged with any portion of ownership and operation costs and expenses. In an action for partition, the defendant's motion for summary judgment was granted on the ground that plaintiff had waived her right to partition. The court of appeal reversed the judgment and concluded that the plaintiff had not waived partition by agreeing to divide partnership property or waiving income from the property.

[b] Intention Necessary to Imply Waiver

The factual background of ***Heber v. Yaeger*** *(1967) 251 Cal. App. 2d 258, 59 Cal. Rptr. 353* , is discussed in *§ 169.31[3][a]*. The court of appeal in that case held that the agreement in the first action and the waiver in the second action did not sustain judgment for the defendant on the ground of the plaintiff's having waived her right to partition because neither clearly indicated an intention that the subject property should be restricted to a use foreclosing its partition.

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16-169 California Points & Authorities § 169.32

§ 169.32 Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c]--Agreement Waiving Right to Partition Breached by Defendant

[1] FORM

[*Caption. See § 169.30.*]

AN AGREEMENT WAIVING THE RIGHT TO PARTITION IS NOT A DEFENSE TO AN ACTION FOR PARTITION WHEN THE DEFENDANT'S BREACH OF THE AGREEMENT RELEASED PLAINTIFF FROM THE PROMISE NOT TO PARTITION.

Breach of Agreement Waiving Right to Partition. An agreement expressly or impliedly waiving the right to partition is not a defense to an action for partition when the defendant has breached the agreement so that the plaintiff is no longer obligated under the agreement (*Lehmann v. Kamp (1969) 273 Cal. App. 2d 701, 706, 77 Cal. Rptr. 910*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion for summary judgment when the motion alleges that the plaintiff has waived the right to partition but where the defendant has breached the agreement constituting a waiver, releasing the plaintiff from his or her waiver.

Counsel should insert argument in this form showing the relationship between the facts of his or her case and the point of law raised. In addition, counsel should attach affidavits or declarations which support the memorandum [*Code Civ. Proc. § 437c*].

[3] Discussion of Authorities

[a] Breach of Agreement Waiving Right to Partition

In ***Lehmann v. Kamp*** *(1969) 273 Cal. App. 2d 701, 77 Cal. Rptr. 910* , the plaintiffs had agreed to leave their ranch on their deaths to the defendants, who had agreed to provide plaintiffs with physical care and financial support during their old age. Subsequently, (1) plaintiffs conveyed a half interest in the ranch to defendants in joint tenancy with plaintiffs; (2) plaintiffs conveyed the remaining half interest to defendants subject to a limited life estate in order only to avoid a reduction in public assistance received by plaintiffs; and (3) defendants breached their agreement to provide financial support and physical care. In an action to set aside both deeds or for partition in case only the second deed was set aside, the judgment set aside the second deed, ordered partition of the ranch excepting a house remodeled by defendants, and awarded damages for breach of the agreement for support and care. On appeal, the defendants contended that the trial court erred in partitioning the ranch because plaintiffs had promised to leave it to defendants. However, the court of appeal affirmed, noting that the defendants' argument ignored the fact that they promised to provide the plaintiffs with financial support and physical care during their old age, a promise which the trial court found they had breached. Consequently, the plaintiffs were no longer obligated to leave the ranch to the defendants (*273 Cal. App. 2d 701, 706)* .

[4] Additional Authorities

[a] Breach of Agreement Waiving Right to Partition

De Harlan v. Harlan (1946) 74 Cal. App. 2d 555, 168 P.2d 985 , was an action for an adjudication of the parties' rights and partition of real property. The parties had entered into a written agreement concurrently with defendant's conveying of the property in joint tenancy to plaintiff and himself. Generally, the agreement provided for joint occupancy during defendant's life and reserved to defendant the exclusive right to rent, sell, encumber, or dispose of the property. The action was brought after defendant had barred plaintiff from any use of the property. Interlocutory and final judgments directed sale of the property and division of the proceeds subject to a lien on defendant's share for damages caused by his excluding plaintiff from the premises. In affirming the judgments, the court of appeal stated that if the defendant had performed the agreement on his part, its provision might reasonably have been construed as a waiver by the plaintiff of the right to have the property sold in a partition action. But since defendant breached the agreement, no such waiver would be enforced.

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Volume 16 Chapters 160-169 MOTIONS TO STRIKE---to---PARTITION
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16-169 California Points & Authorities § 169.33

§ 169.33 Opposing Motion for Confirmation of Report of Referee [Code Civ. Proc. § 873.290]--Partition Violative of Statutory Requirements [Code Civ. Proc. §§ 873.210-873.240]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,		
COUNTY OF _____		
_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name(s*)],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Defendant(s).	)	IES IN OPPOSITION TO MOTION FOR CON-
	)	FIRMATION OF REPORT OF REFEREE [*Code*
	)	*Civ. Proc. § 873.290*]

_____

A MOTION FOR CONFIRMATION OF THE REFEREE'S REPORT SHOULD NOT BE GRANTED WHERE THE PARTITION _____ [*either* IS NOT ACCORDING TO THE PARTIES' RESPECTIVE RIGHTS AS DETERMINED BY THE COURT *or* DOES NOT ALLOT A SPECIFIC TRACT TO A PURCHASER PURPORTEDLY CONVEYED THE WHOLE TITLE TO THE TRACT *or* DOES NOT ALLOT TO AN ALLOTTEE A SHARE EMBRACING HIS OR HER IMPROVEMENTS].

[*EITHER*]

Partition According to Court's Determination Required. In making a partition, the referee must divide the property and allot the portions thereof, quality and quantity relatively considered, according to the respective rights of the parties

as determined by the court (*Code Civ. Proc. § 873.210*).

[*OR*]

Allotment of Specific Tract to Purchaser. When one of the tenants in common has sold to another person a specific tract out of the common land and purported to convey the whole title to such a specific tract to the purchaser, the land described in the deed of conveyance should be allotted to the purchaser in a partition action if the specific portion can be set apart to the purchaser without material injury to the other cotenants (*Code Civ. Proc. § 873.230*).

[*OR*]

Allotment of Share With Cotenant's Improvements. It is the duty of the referee, in making partition, to allot to each cotenant a share of the land sought to be partitioned embracing as far as practicable the cotenant's own improvements on the land where the share embracing his or her improvements can be allotted to the cotenant without material injury to other cotenants owning the land sought to be partitioned (*Code Civ. Proc. § 873.220*).

[*OR*]

Allotment Without Division of Distinct Lots. When real property consists of more than one distinct lot or parcel, the property is required to be divided by such lots or parcels without other internal division to the extent that it can be done without material injury to the rights of the parties (*Code Civ. Proc. § 873.240*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion for confirmation of the report of the referees when the partition made violates the requirements of *Code Civ. Proc. §§ 873.210-873.240* in regard to the court's determination of the parties' respective rights, the allotment of a specific tract to a purchaser purportedly conveyed the whole title to the tract, or the allotment of shares embracing the cotenants' improvements.

Counsel should insert argument in this form showing the relationship between the facts of his or her case and the points of law raised.

[b] Related Uses

With appropriate modifications, these points and authorities may be used to oppose or support a motion to change, modify, or set aside a referee's report.

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Volume 17 Chapters 170-179 PARTNERSHIPS---to---PREMISES LIABILITY
CHAPTER 170 PARTNERSHIPS

17-170 California Points & Authorities 170.syn

§ 170.syn Synopsis to Chapter 170: PARTNERSHIPS

§ 170.01 Scope of Chapter

§ 170.02 Governing Law

[1] Uniform Partnership Act (pre-'97 Act)

[2] Uniform Partnership Act of 1994 (UPA'94)

[a] Enactment

[b] Operative Dates

[c] Application to Other Partnership Forms

[d] Application of Rules of Law and Equity; Interest Rates

[3] Correlation Table

[4] Uniform Limited Partnership Act (ULPA)

[5] California Revised Limited Partnership Act (CRLPA)

[6] Uniform Limited Partnership Act of 2008

§ 170.03 How to Use the Forms in This Chapter

[1] Page Limits on Memoranda

[2] Using the Forms to Build a Draft Memorandum

[3] Citing to the Correct Governing Statute

§ 170.04 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

[2] Related Points and Authorities Chapters

[3] Other Related Publications

§§ 170.05-170.09 [Reserved]

§ 170.10 Supporting Contention That UPA'94 Governs Action Involving General Partnership [Corp. Code § 16111(b)]--Partnership Formed Prior to Effective Date of UPA'94

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Uniform Partnership Act of 1994 Applies to pre-1997 Partnerships

§ 170.11 Supporting Contention That pre-'97 Act Governs Action Involving General Partnership [Corp. Code § 16112]--Action Filed or Right Accrued Prior to January 1, 1997

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Former Uniform Partnership Act Continues to Govern Pre-Existing Rights and Actions

§§ 170.12-170.19 [Reserved]

§ 170.20 Supporting Contention That Partnership Exists-Requirements [Corp. Code §§ 16101, 16102; former Corp. Code §§ 15002, 15006]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Partnership Defined

[b] Sufficiency of Partnership Agreement

[c] Finding of Partnership Need Be Proved by Only Preponderance of Evidence

[4] Additional Authorities

[a] Sufficiency of Partnership Agreement

§ 170.21 Supporting Contention That Partnership Exists or Existed [Corp. Code §§ 16101, 16202(a); former Corp. Code §§ 15002, 15006]--Intent Regarding Formation Is Determinative

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Intent to Carry On Business as Co-owners Is Determinative of Partnership

[b] Intent to Do Things That Constitute Partnership Is Material

[4] Additional Authorities

[a] Intent to Carry On Business as Co-owners Is Determinative of Partnership

[b] Intent to Do Things That Constitute Partnership Is Material

§ 170.22 Supporting Contention That Partnership Exists or Existed [Corp. Code §§ 16101, 16202(a); former Corp. Code §§ 15002, 15006]--Relinquishment of Control Is Evidence of Partnership

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Community of Interest May Exist Even Though Party Relinquishes Control

[4] Additional Authorities

[a] Community of Interest May Exist Even Though Party Relinquishes Control

§ 170.23 Supporting Contention That Partnership Exists or Existed [Corp. Code §§ 16101, 16202(a); former Corp. Code §§ 15002, 15006]--Person Who Receives Share of Profits Is Presumed to Be Partner [Corp. Code § 16202(c)(3)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Sharing Profits Is Prima Facie Evidence of Partnership

[b] Implied Agreement to Share Losses

[4] Additional Authorities

[a] Sharing Profits Is Prima Facie Evidence of Partnership

§ 170.24 Supporting Contention That Partnership Exists or Existed [Corp. Code §§ 16101, 16202(a); former Corp. Code §§ 15002, 15006]--Joint Ownership of Property or Capital Contribution Not Necessary

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Joint Ownership of Property That Constitutes Partnership Capital Not Necessary

[b] Contribution of Capital Not Necessary

[4] Additional Authorities

[a] Joint Ownership of Property That Constitutes Partnership Capital Not Necessary

§§ 170.25-170.29 [Reserved]

§ 170.30 Opposing Contention That Partnership Exists or Existed [Corp. Code §§ 16101, 16202(a); former Corp. Code §§ 15002, 15006]--Failure to Prove Partnership's Existence

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Burden of Proof That Partnership Exists

[b] Persons Not Partners Between Themselves Are Not Partners as to Third Parties

[4] Additional Authorities

[a] Burden of Proof That Partnership Exists

§ 170.31 Opposing Contention That Partnership Exists or Existed [Corp. Code §§ 16101, 16202(a); former Corp. Code §§ 15002, 15006]--Absence of Words or Phrases in Agreement That Designate Partnership Relation Is Significant

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Absence of Words or Phrases Designating Partnership Significant When Intent of Parties Is Unclear

[4] Additional Authorities

[a] Absence of Words or Phrases Designating Partnership Significant When Intent of Parties Is Unclear

§ 170.32 Opposing Contention That Partnership Exists or Existed [Corp. Code §§ 16101, 16202(a); former Corp. Code §§ 15002, 15006]--No Community of Interest

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Community of Interest Is Necessary for Partnership to Exist

[4] Additional Authorities

[a] Community of Interest Is Necessary for Partnership to Exist

§ 170.33 Opposing Contention That Partnership Exists or Existed [Corp. Code §§ 16101, 16202(a); former Corp. Code §§ 15002, 15006]--Joint Ownership of Property Does Not in Itself Establish Partnership [Corp. Code § 16202(c)(1); former Corp. Code § 15007(2)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Joint Ownership Does Not in Itself Establish Partnership

[4] Additional Authorities

[a] Joint Ownership Does Not in Itself Establish Partnership

§ 170.34 Opposing Contention That Partnership Exists or Existed [Corp. Code §§ 16101, 16202(a); former Corp. Code §§ 15002, 15006]--Sharing of Gross Returns Does Not Establish Partnership [Corp. Code § 16202(c)(2); former Corp. Code § 15007(3)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Sharing of Gross Returns Does Not of Itself Establish Partnership

[4] Additional Authorities

[a] Sharing of Gross Return Does Not of Itself Establish Partnership

§ 170.35 Opposing Contention That Partnership Exists or Existed [Corp. Code §§ 16101, 16202(a); former Corp. Code §§ 15002, 15006]--No Presumption of Partnership When Profits Received as Payment [Corp. Code § 16202(c)(3); former Corp. Code § 15007(4)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] No Presumption of Partnership From Sharing of Profits Under Certain Circumstances

§§ 170.36-170.49 [Reserved]

§ 170.50 Supporting Contention That Joint Venture Exists or Existed [Corp. Code § 16202; former Corp. Code § 15006]--Law Applicable to Joint Ventures, Joint Venture Defined, and Intent to Create Joint Venture

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Joint Ventures Governed by Law of Partnerships

[b] Joint Venture Defined

[c] Existence of Joint Venture Dependent on Intention of Parties

[d] Joint Venture Agreement Need Not Be in Writing

[4] Additional Authorities

[a] Joint Ventures Governed by Law of Partnerships

[b] Joint Venture Defined

[c] Joint Venture Agreement Need Not Be in Writing

§ 170.51 Supporting Contention That Joint Venture Exists or Existed [Corp. Code § 16202; former Corp. Code § 15006]--Elements of Joint Venture

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Elements of Joint Venture

[b] Sharing of Losses Implied

[4] Additional Authorities

[a] Elements of Joint Venture

[b] Sharing of Losses Implied

§§ 170.52-170.59 [Reserved]

§ 170.60 Opposing Contention That Joint Venture Exists [Corp. Code § 16202; former Corp. Code § 15006]--No Intent to Form Joint Venture

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Mere Agreement to Go Into Business Together Does Not Imply Joint Venture

§ 170.61 Opposing Contention That Joint Venture Exists or Existed [Corp. Code § 16202; former Corp. Code § 15006]--Essential Elements Not Present

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] No Joint Venture When Essential Elements Are Lacking

[b] Right of Management and Control of Business Is Essential Element of Partnership or Joint Venture

[4] Additional Authorities

[a] No Joint Venture When Essential Elements Are Lacking

§§ 170.62-170.69 [Reserved]

§ 170.70 Supporting Contention That Limited Partnership Exists or Existed Under California Revised Limited Partnership Act (CRLPA) [Corp. Code §§ 15611-15723]--Applicable Partnership Law [Corp. Code §§ 15533, 15711, 15712(b)(1), 15714, 15722]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Application of California Revised Limited Partnership Act

§ 170.71 Supporting Contention That Limited Partnership Exists or Existed Under Uniform Limited Partnership Act (ULPA) [Corp. Code §§ 15501-15533]--Applicable Partnership Law [Corp. Code §§ 15711, 15712(b)(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Uniform Limited Partnership Act Governs Limited Partnerships Existing on or Before July 1, 1984 That Have Not Elected to Be Governed by California Revised Limited Partnership Act

§ 170.72 Supporting Contention That Limited Partnership Exists or Existed Under California Revised Limited Partnership Act (CRLPA)--Definition, Written Agreement, and Certificate of Limited Partnership [Corp. Code §§ 15611(r), 15621(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Limited Partnership Defined

[b] Requirements of Formation

§ 170.73 Supporting Contention That Limited Partnership Exists or Existed Under California Revised Limited Partnership Act--Surviving Limited Partnership Liable After Merger of Limited Partnerships [Corp. Code § 15678.6]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[3] Discussion of Authorities

[a] Surviving Limited Partnership Is Liable After Merger

§ 170.74 Supporting Contention That Limited Partnership Exists or Existed Under California Revised Limited Partnership Act (CRLPA)--Converted Entity Liable for Debts and Obligations of Converting Limited Partnership [Corp. Code § 15677.9]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Converted Entity Is Liable After Conversion

§ 170.75 Supporting Contention That Limited Partnership Exists or Existed Under ULPA '08--Applicable Partnership Law [Corp. Code § 15912.06(a), (b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Uniform Partnership Act of 2008 Governs Limited Partnerships Formed After Operative Date or Electing to Be Governed by Act

§ 170.76 Supporting Contention That Limited Partnership Exists or Existed Under ULPA '08--Definition, Written Agreement, and Certificate of Limited Partnership [Corp. Code §§ 15901.02(q), 15902.01]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Limited Partnership Defined

[b] Requirements of Formation

§ 170.77 Supporting Contention That Limited Partnership Exists or Existed Under ULPA '08--Surviving Limited Partnership Liable After Merger of Limited Partnerships [Corp. Code § 15911.16]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[3] Discussion of Authorities

[a] Surviving Limited Partnership Is Liable After Merger

[4] Comments

[a] Use of Form

[b] Argument

[5] Discussion of Authorities

[a] Converted Entity Is Liable After Conversion

§ 170.78 Supporting Contention That Limited Partnership Exists or Existed Under ULPA '08--Converted Entity Liable for Debts and Obligations of Converting Limited Partnership [Corp. Code § 15911.09]

[1] FORM

§§ 170.79-170.99 [Reserved]

§ 170.100 Supporting Contention That Partners Owe Fiduciary Duties of Loyalty and Care to Partnership and Other Partners [Corp. Code § 16404(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Partners Are Fiduciaries or Trustees for Each Other

[b] Partners Remain Fiduciaries Through Dissolution and Winding Up of Partnership Affairs

[c] Fiduciary Duties of Loyalty and Care Continue After Dissociation

[4] Additional Authorities

[a] Partners Are Fiduciaries or Trustees for Each Other

[b] Fiduciary Duties of Loyalty and Care Continue After Dissociation

§ 170.101 Supporting Contention That Partner Has Breached Fiduciary Duty--Exploitation of Partnership Opportunity or Acquisition of Interest Adverse to Partnership [Corp. Code § 16404; former Corp. Code § 15021]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Partner's Fiduciary Duty Prevents Exploitation of Partnership Opportunity

[b] Partner May Not Acquire Property in Which Partnership Is Interested

[c] Partner May Not Engage in Other Ventures Adverse to Interests of Partnership

[d] Lease Option or Expectancy of Renewal Is Partnership Asset

[e] Partner May Not Secretly Encumber Partnership Property for Personal Use

[f] Partner May Not Occupy Partnership Real Property and Pay Below-Market Rent

[4] Additional Authorities

[a] Partner May Not Acquire Property in Which Partnership Is Interested

§ 170.102 Supporting Contention That Partner Has Breached Fiduciary Duty--Taking Secret Profits [Corp. Code § 16404(b)(1); former Corp. Code § 15021]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Partner Must Account for Secret Profits

[4] Additional Authorities

[a] Partner Must Account for Secret Profits

§ 170.103 Supporting Contention That Partner Has Breached Fiduciary Duty--Failure to Disclose Information to Other Partners [Evid. Code § 962; Corp. Code §§ 16403(c); former Corp. Code § 15020]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Partner's Fiduciary Duty Requires Disclosure

[b] Attorney for Partner

§ 170.104 Supporting Contention That Partner's Fiduciary Duty Extends to Sale or Purchase of Partnership Interest to or From Another Partner or Estate of Deceased Partner

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Fiduciary Duty Extends to Sale or Purchase of Interest to or From Another Partner or Estate of Deceased Partner

[4] Additional Authorities

[a] Fiduciary Duty Extends to Sale or Purchase of Interest to or From Another Partner or Estate of Deceased Partner

§ 170.105 Supporting Contention That Person Winding Up Partnership's Affairs as Personal or Legal Representative of Last Surviving Partner Has Same Fiduciary Duty As A Partner [Corp. Code § 16404(g); former Corp. Code § 15021(2)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Person Winding Up Partnership Affairs Owes Same Fiduciary Duty as Would a Partner

§ 170.106 Supporting Contention That General Partners Owe Fiduciary Duties of Loyalty and Care to Limited Partnership and Other Partners Under ULPA '08 [Corp. Code § 15904.08]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] General Partners are Fiduciaries for Each Other

[b] General Partners Remain Fiduciaries Through Dissolution and Winding Up of Partnership Affairs

[c] Fiduciary Duties of Loyalty and Care Continue After Dissociation

§§ 170.107-170.119 [Reserved]

§ 170.120 Opposing Contention That Partner Breached Fiduciary Duty--Partner's Actions Did Not Amount to a Breach of Partner's Fiduciary Duty of Loyalty or Care [Corp. Code § 16404]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Partner's Conduct of Partnership Business Must Be Grossly Negligent, Reckless, Intentional Misconduct, or Knowing Violation of Law to Constitute Breach of Fiduciary Duty of Due Care

[b] Conduct Consistent With Duty of Good Faith and Fair Dealing Does Not Violate Partner's Fiduciary Duties

[c] Transaction Furthering Partner's Own Interest Does Not Automatically Violate Fiduciary Duty

[d] Loan of Money to or Transaction of Business With Partnership Does Not Automatically Violate Fiduciary Duty

[e] Partner May Purchase Partnership Property At Foreclosure Sale

[f] Partner Does Not Breach Fiduciary Duty by Paying Undisputed Partnership Debt

[g] Partner May Purchase Partnership Debt

[h] Partner Need Not Bear Disproportionate Burden of Partnership Obligation

[i] Creditor Partner May Use Partnership Funds to Pay Personal Debts

[j] Lessor Partner May Retain Improvements Financed by Partnership When Authorized by Agreement

[k] Partner's Interest in Land Was Not Adverse to Interests of Partnership

[l] Partner May Purchase Judgment Against Copartner

[m] Partner May Purchase Judgment Against Partnership

§ 170.121 Opposing Contention That Plaintiff Breached Fiduciary Duty--No Fiduciary Duty Is Owed to Former Partner Who Is Now Only Secured Party

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] No Fiduciary Duty Is Owed to Secured Party

§ 170.122 Opposing Contention That General Partner Breached Fiduciary Duty Under ULPA '08--Partner's Action Did Not Amount to a Breach of Partners' Fiduciary Duty of Loyalty or Care [Corp. Code § 15904.08]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] General Partner's Conduct of Partnership Business Must Be Grossly Negligent, Reckless, Intentional Misconduct, or Knowing Violation of Law to Constitute Breach of Fiduciary Duty of Care

[b] Conduct Consistent With Duty of Good Faith and Fair Dealing Does Not Violate Partner's Fiduciary Duties

[c] Transaction Furthering General Partner's Own Interest Does Not Automatically Violate Fiduciary Duty

§§ 170.123-170.129 [Reserved]

§ 170.130 Supporting Contention That Partner Is Entitled to Compensation for Services Rendered to Partnership [Corp. Code § 16401(h); former Corp. Code § 15018(f)]--Implied Agreement for Salary

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Consent to Compensation Implied

§ 170.131 Supporting Contention That Irregular Amendment of Partnership Agreement Is Effective

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[3] Discussion of Authorities

[a] Irregular Amendment of Partnership Agreement Is Effective

§ 170.132 Supporting Contention That General Partner Is Entitled to Reimbursement for Payments Made to Limited Partnership Under ULPA '08 [Corp. Code § 15904.06]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Reimbursement By Limited Partnership for Payment or Advance

§§ 170.133-170.139 [Reserved]

§ 170.140 Opposing Contention That Partner Is Entitled to Compensation for Services Rendered to Partnership [Corp. Code § 16401(h); former Corp. Code § 15018(f)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Partners Are Not Entitled to Compensation

[b] Agreement to Agree on Amount of Compensation Is Insufficient

§ 170.141 Opposing Contention That Assignee of Partnership Interest Is Entitled to Examine Books or Participate in Management [Corp. Code § 16503; former Corp. Code § 15027(1); Corp. Code §§ 15519(3) (ULPA), 15672 (CRLPA)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Assignee of Partnership Interest Has Only Limited Rights

§ 170.142 Opposing Contention That General Partner Is Entitled to Payment by Limited Partnership Under ULPA '08 [Corp. Code § 15904.06]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] General Partners Are Not Entitled to Compensation

§§ 170.143-170.159 [Reserved]

§ 170.160 Supporting Contention That General Partner Is Not Liable for Losses or Mistakes Incurred in Good-Faith Exercise of Business Judgment

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Business Judgment Rule

[4] Additional Authorities

[a] Business Judgment Rule

§ 170.161 Supporting Contention That Purchaser of Limited Partnership Interest Is Entitled to Rescission Because No Permit for Sale Was Obtained as Required by California Securities Law [Corp. Code § 25503]--Limited Partnership Interests Were Offered to Public and/or Unsophisticated Investors

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[d] Related Forms

[3] Discussion of Authorities

[a] Sale of Limited Partnership Interest Required Permit

[b] Limitation Period for Rescission

[4] Additional Authorities

[a] Sale of Limited Partnership Interest Without Permit

[b] Limitation Period for Rescission

§ 170.162 Supporting Contention That Person Who Has Withdrawn as Limited Partner and/or Legal Representative of Deceased/Incompetent Limited Partner Is Entitled to Distribution of Profits and/or Return of Contribution [Corp. Code §§ 15515, 15516, 15521(1) (ULPA), 15675 (CRLPA)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Return of Withdrawing Limited Partner's Contribution Under California Uniform Limited Partnership Act

[b] Rights of Personal Representative of Deceased Limited Partner Under California Uniform Limited Partnership Act

[c] Right of Limited Partner to Withdraw Under California Revised Limited Partnership Act

§§ 170.163-170.169 [Reserved]

§ 170.170 Opposing Contention That General Partner Is Not Liable for Losses Incurred in Good-Faith Exercise of Business Judgment--Business Judgment Cannot Contravene Specific Terms of Partnership Agreement or Obstruct Ordinary Business of Partnership (ULPA) [Corp. Code § 15509(1)(a), (b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] General Partner Liable if Exercise of Business Judgment Contravenes Partnership Agreement or Bars Ordinary Partnership Business

[4] Additional Authorities

[a] General Partner Liable if Exercise of Business Judgment Contravenes Partnership Agreement or Bars Ordinary Partnership Business

§ 170.171 Opposing Contention That Purchaser of Limited Partnership Interest Is Entitled to Rescission Because No Permit for Sale Was Obtained as Required by California Securities Law [Corp. Code § 25503]--Offering Was Exempt From Permit Requirement

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Exempt Sale

§§ 170.172-170.199 [Reserved]

§ 170.200 Supporting Contention That Act of Partner Binds Partnership [Corp. Code § 16301; former Corp. Code § 15009]--Partner as Agent, Presumption of Agency, and Burden of Proving Lack of Authority to Act

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Partner Is Agent of Partnership

[b] Scope of Partnership Business and Presumption of Ostensible or Apparent Agency

[c] Burden of Proof

[4] Additional Authorities

[a] Partner Is Agent of Partnership

§ 170.201 Supporting Contention That Act of Partner Binds Partnership [Corp. Code § 16301; former Corp. Code § 15009]--Authority to Make Contracts and Execute Negotiable Instruments

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Authority to Enter Into Written Agreement

[b] Partnership May Be Bound by Instrument Executed in Individual Partner's Name if Parties so Intended

[c] Execution of Promissory Note

[4] Additional Authorities

[a] Authority to Enter Into Written Agreement

[b] Execution of Promissory Note

§ 170.202 Supporting Contention That Act of Partner Binds Partnership [Corp. Code § 16301; former Corp. Code § 15009]--Ratification of Acts Beyond Scope of Authority

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Ratification of Partner's Acts Beyond Scope of Authority

[4] Additional Authorities

[a] Ratification of Partner's Acts Beyond Scope of Authority

§ 170.203 Supporting Contention That Act of Partner Binds Partnership [Corp. Code § 16301; former Corp. Code § 15009]--Failure to Inform Third Parties of Special Restrictions on Authority

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Third Parties Are Required to Be Informed of Special Restrictions on Partner's Authority

§§ 170.204-170.209 [Reserved]

§ 170.210 Opposing Contention That Act of Partner Binds Partnership [Corp. Code § 16301; former Corp. Code § 15009]--Statutory Limitations on Partner's Authority to Act

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Partner's Act Apparently Outside Usual Course of Partnership Business

§ 170.211 Opposing Contention That Act of Partner Binds Partnership--Notice of Limitation on Authority [Corp. Code §§ 16301, 16303; former Corp. Code §§ 15009(1), (4), 15010.7]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Partnership Not Bound When Third Party Has Notice of Limitation on Partner's Authority to Act

[4] Additional Authorities

[a] Partnership Not Bound When Third Party Has Notice of Limitation on Partner's Authority to Act

§ 170.212 Opposing Contention That Act of Partner Binds Partnership [Corp. Code § 16301; Corp. Code § 15009]--Burden of Proof and Presumption Against Binding Partnership to Contract Signed by Individual Partner

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Presumption That Contract Signed by Individual Partner Is Partner's Own Obligation

§ 170.213 Opposing Contention That Act of Partner Binds Partnership [Corp. Code § 16301; former Corp. Code § 15009]--Partner Has No Authority to Bind Partnership on Contract of Guaranty

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Authority of Partner to Execute Guaranty

§§ 170.214-170.219 [Reserved]

§ 170.220 Supporting Contention That Partnership Is Liable for Wrongful Act or Omission of Partner--Willful Misconduct, Recklessness, Negligence, Fraud, and Misrepresentation [Corp. Code § 16305(a); former Corp. Code § 15013]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Partnership Liable for Partner's Wrongful Act or Omission

[b] Partnership Liable for Partner's Willful and Malicious or Negligent Acts

[c] Fraud or Misrepresentation

§ 170.221 Supporting Contention That Partnership Liable for Partner's Breach of Trust--Misapplication of Money or Property Belonging to Third Person [Corp. Code § 16305(b); former Corp. Code § 15014]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Partnership Liable for Partner's Misapplication of Third Person's Money or Property

§ 170.222 Supporting Contention That All Partners Are Liable for Partnership Obligations [Corp. Code § 16301; former Corp. Code § 15009]--Joint and Several Liability [Corp. Code § 16306; former Corp. Code § 15015(a)(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Joint and Several Liability

[4] Additional Authorities

[a] Joint Liability

§ 170.223 Supporting Contention That All Partners Are Liable for Partnership Debts and Obligations [Corp. Code § 16301; former Corp. Code § 15009] or Individual Partner's Wrongful Acts, Omissions, or Breaches of Trust [Corp. Code § 16305; former Corp. Code §§ 15013, 15014]--Dormant or Undisclosed Partners

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[2] Discussion of Authorities

[a] Partnership Debts Chargeable to Dormant Partners

§ 170.224 Supporting Contention That All Partners Are Liable for Partnership Debts and Obligations or Individual Partner's Wrongful Acts, Omissions, or Breaches of Trust--Ostensible Partner by Estoppel [Corp. Code § 16308; former Corp. Code § 15016]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Ostensible Partner or Partnership by Estoppel

[b] Test of Ostensible Partnership

[c] Standard by Which to Hold Party Liable as Ostensible Partner

§§ 170.225-170.239 [Reserved]

§ 170.240 Opposing Contention That All Partners Are Liable for Partnership Debts and Obligations or Individual Partner's Wrongful Acts, Omissions, or Breaches of Trust--Judgment Against Partnership Not a Judgment Against Partner

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Partner's Individual Property Not Liable Without Judgment Against Partner

§ 170.241 Opposing Contention That All Partners Are Liable for Partnership Debts and Obligations or Individual Partner's Wrongful Acts, Omissions, or Breaches of Trust--Failure to Plead Ostensible Partnership [Corp. Code § 16308; former Corp. Code § 15016]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Ostensible Partnership Must Be Pleaded

[4] Additional Authorities

[a] Existence of Ostensible Partnership

§ 170.242 Opposing Contention That All Partners Are Liable for Partnership Obligations--Incoming Partner Is Not Personally Liable for Existing Partnership Obligations [Corp. Code § 16306(b); former Corp. Code § 15017]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Incoming Partner Presumed Not Personally Liable for Preexisting Partnership Debts

§§ 170.243-170.249 [Reserved]

§ 170.250 Supporting Contention That Act of Joint Venturer Binds Joint Venture [Corp. Code § 16301; former Corp. Code § 15009]--Joint Venturer as Agent Has Authority to Bind Other Joint Venturers by Contract

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Law of Partnerships as to Third Parties Applies to Joint Ventures

[b] Joint Venturers Are Agents in Transaction of Enterprise Business

[c] Authority to Bind Joint Venture in Contract

[4] Additional Authorities

[a] Authority to Bind Joint Venture in Contract

§§ 170.251-170.254 [Reserved]

§ 170.255 Opposing Contention That Act of Joint Venturer Binds Joint Venture [Corp. Code § 16301; former Corp. Code § 15009]--No Authority to Bind Other Joint Venturers by Acts Not Within Express, Implied, or Ostensible Authority

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Joint Venturer May Not Bind Associates by Acts Exceeding His or Her Authority

[b] No Liability on Theory of Ostensible Agency When Third Party Did Not Rely on Representations of Agency

[4] Additional Authorities

[a] Joint Venturer May Not Bind Associates by Acts Exceeding His or Her Authority

§§ 170.256-170.259 [Reserved]

§ 170.260 Supporting Contention That All Joint Venturers Are Liable for Obligations of Joint Venture or Individual Joint Venturer's Wrongful Acts--Contracts, Negligence, and Fraud

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Joint Venture Liable for Joint Venturer's Wrongful Act or Omission

[b] Liability of Joint Venture on Contracts

[c] Liability of Joint Venture for Negligence

[d] Liability of Joint Venture for Fraud

§ 170.261 Supporting Contention That All Joint Venturers Are Liable for Obligations of Joint Venture or Individual Joint Venturer's Wrongful Acts--Joint and Several Liability [Corp. Code § 16306; former Corp. Code § 15015(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Joint and Several Liability

[4] Additional Authorities

[a] Joint and Several Liability

§ 170.262 Opposing Contention That Act of Joint Venturer Binds Non-Negligent Joint Venture--Injured Employee of Joint Venturer Covered by Workers' Compensation Act

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Non-Negligent Joint Venture Is Not Liable for Injuries to Joint Venturer's Employee When Coverage Is Provided by Workers' Compensation Act

§§ 170.263-170.264 [Reserved]

§ 170.265 Supporting Contention That Act of General Partner Binds Limited Partnership Under CRLPA [Corp. Code § 15643(a)] and ULPA [Corp. Code § 15509(1)]--Authority of General Partner to Act on Behalf of Limited Partnership

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Rights and Powers of General Partner in Limited Partnership

§ 170.266 Supporting Contention That Act of General Partner Binds Limited Partnership Under ULPA '08 [Corp. Code § 15904.02(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] General Partner as Agent of Limited Partnership Under ULPA '08

§§ 170.267-170.269 [Reserved]

§ 170.270 Supporting Contention That Limited Partners Are Not Liable for Partnership Obligations Under CRLPA [Corp. Code § 15632]--No Control of Business

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Certain Acts Do Not Constitute Control of Business

§ 170.271 Supporting Contention That Limited Partners Are Not Liable for Partnership Obligations Under ULPA [Corp. Code §§ 15501, 15507]--No Control of Business

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] No Liability as General Partner if No Control of Business

[b] Other Acts May Not Constitute Control of Business

§ 170.272 Supporting Contention That Putative Limited Partner Is Not Liable for Partnership Obligations Under CRLPA [Corp. Code § 15633(a)]--Discovery of Failure to File Certificate of Limited Partnership

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Certificate of Limited Partnership

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] When Putative Limited Partner Is Not Liable

§ 170.273 Supporting Contention That Putative Limited Partner Is Not Liable for Partnership Obligations Under ULPA [Corp. Code § 15511]--Prompt Renunciation of Interest in Partnership Profits

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Putative Limited Partner Is Not Liable if Erroneously Believed Limited Partnership Existed and Promptly Renounced Interest in Profits and Business

§ 170.274 Supporting Contention That Limited Partner Is Not Liable for Partnership Obligations Under ULPA '08 [Corp. Code § 15903.03]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] No Liability for Partnership Obligations If No Control of Business

§§ 170.275-170.280 [Reserved]

§ 170.281 Opposing Contention That Limited Partners Are Not Liable for Partnership Obligations Under ULPA [Corp. Code § 15505]--Limited Partner's Name Used in Name of Limited Partnership

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Limited Partner Whose Name Is Part of Partnership Name Generally is Liable for Partnership Obligations

§ 170.282 Opposing Contention That Putative Partner Is Not Liable for Partnership Obligations Under CRLPA [Corp. Code § 15633]--Liability for Partnership Transactions Made Before Certificate of Limited Partnership Filed

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Liability for Acts Prior to Filing of Certificate of Limited Partnership

§ 170.283 Opposing Contention That Limited Partner Is Not Liable for Partnership Obligations Under ULPA '08 [Corp. Code § 15903.03]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Limited Partner Who Is Named in Certificate or Participates In Control of Business Is Liable for Partnership Obligations

§§ 170.284-170.299 [Reserved]

§ 170.300 Supporting Contention That Partner Is Entitled to Settlement of Accounts Upon Winding Up Partnership Business [Corp. Code § 16807(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Partner Is Entitled to Settlement of All Partnership Accounts Upon Winding Up the Partnership Business

§ 170.301 Supporting Contention That Partner May Sue Individual Partners for Legal or Equitable Relief, Including Dissolution and Accounting [Corp. Code § 16405(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Partner May Sue Other Partners for Legal or Equitable Relief, Including Dissolution and Accounting.

§ 170.302 Supporting Contention That Partner Has Right to Reasonable Compensation for Completing Unfinished Partnership Business [Corp. Code § 16401(h); former Corp. Code § 15018(f)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Partner's Right to Compensation

§ 170.303 Supporting Contention That Noncompetition Agreement Is Enforceable Against Withdrawn Partner [Bus. & Prof. Code §§ 16601, 16602]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[3] Discussion of Authorities

[a] Attorneys in Partnership May Make Enforceable Noncompetition Agreements

[b] Physicians in Partnership May Make Enforceable Noncompetition Agreements

[c] Accountants in Partnership May Make Enforceable Noncompetition Agreements

[d] Professionals in Partnership May Make Enforceable Noncompetition Agreements

§ 170.304 Supporting Contention That Aggrieved Partner May Elect Dissolution and Sale of Assets [Corp. Code § 16801(5)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Aggrieved Partner May Elect Dissolution Rather than Damages

§§ 170.305-170.309 [Reserved]

§ 170.310 Opposing Contention That Partner Is Entitled to Settlement of Accounts Upon Winding Up Partnership Business [Corp. Code § 16807(b)]--Forfeiture

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Forfeiture Provision Eliminates Right to Settlement of Accounts

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Volume 17 Chapters 170-179 PARTNERSHIPS---to---PREMISES LIABILITY
CHAPTER 170 PARTNERSHIPS
PART I. INTRODUCTION

17-170 California Points & Authorities § 170.01

§ 170.01 Scope of Chapter

This chapter contains memoranda of points and authorities relating to general partnerships, joint ventures, and limited partnerships. The forms for general partnerships also can be adapted for use in actions involving limited liability partnerships, which are a species of general partnership, available only to certain specified professions, that afford the individual partners a measure of protection from individual liability [*see Corp. Code §§ 16101(8)(A), 16306(c), 16951 et seq.*; *see also* California Legal Forms, Ch. 16C, *Limited Liability Partnerships*]. The forms in this chapter include:

- Contentions regarding which partnership act governs a particular partnership [§ 170.10 et seq.].
- Contentions relating to the formation and existence of partnerships and joint ventures [§ 170.20 et seq.].
- Actions or proceedings among partners or joint venturers [§ 170.100 et seq.].
- Actions relating to third parties [§ 170.200 et seq.].
- Actions or proceedings related to dissolution and dissociation [§ 170.300 et seq.].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral PartnershipsDissolution & Winding UpDissolutionGeneral OverviewBusiness & Corporate LawGeneral PartnershipsFormationGeneral OverviewBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesCauses of ActionGeneral OverviewBusiness & Corporate LawJoint VenturesGeneral OverviewBusiness & Corporate LawJoint VenturesDissolution & Winding UpBusiness & Corporate LawJoint VenturesFormationBusiness & Corporate LawLimited Liability PartnershipsBusiness & Corporate LawLimited PartnershipsGeneral OverviewBusiness & Corporate LawLimited PartnershipsDissolution & Winding Up

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Volume 17 Chapters 170-179 PARTNERSHIPS---to---PREMISES LIABILITY
CHAPTER 170 PARTNERSHIPS
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17-170 California Points & Authorities § 170.02

§ 170.02 Governing Law

[1] Uniform Partnership Act (pre-'97 Act)

The Uniform Partnership Act [former Corp. Code § 15001 et seq.] governed California partnerships that were formed before January 1, 1997, the operative date of the Uniform Partnership Act of 1994 (UPA'94) [*see Corp. Code § 16100 et seq.*]. For this reason, the former version of the Uniform Partnership Act is referred to in this chapter as the "pre-'97 Act." Partnerships formed before January 1, 1997, and partnerships continuing the business of a dissolved partnership, continued to be governed by the pre-'97 Act until January 1, 1999, unless they elected at an earlier date to be governed by UPA'94 [*Corp. Code § 16111(a)*]. As of January 1, 1999, the pre-'97 Act was repealed, and since that date the UPA'94 governs all partnerships regardless of their date of formation [*Corp. Code § 16111(a)*, *(b)*; *see* Stats. 1996, ch. 1003, § 18 (repealing the pre-'97 Act operative January 1, 1999)].

Repeal of the pre-'97 Act, however, did not affect actions or proceedings commenced, or rights accrued, prior to the effective date of UPA'94 [*Corp. Code § 16112*]. For that reason, discussion of the pre-'97 Act has been retained in the partnership coverage in this publication. All references to former Corp. Code §§ 15001-15045 are to the repealed provisions of the pre-'97 Act. When the two acts have the same or similar provisions, this chapter cites the UPA'94 provision first, followed by the corresponding pre-'97 Act provision. When the two Acts differ, the distinction will be pointed out in context and the appropriate act cited. Obviously, only the relevant section should be cited to the court in an actual memorandum of points and authorities, depending on whether the case is governed by the current or by the former statute. Cases decided under the pre-'97 Act that have continuing applicability are cited throughout this chapter.

[2] Uniform Partnership Act of 1994 (UPA'94)

[a] Enactment

The Uniform Partnership of 1994 [*Corp. Code § 16100 et seq.*] was enacted in 1996 [Stats. 1996, ch. 1003] and is referred to in this chapter as "UPA'94." Since January 1, 1999, all California general partnerships have been governed by the UPA'94 [*Corp. Code § 16111(b)*; *see Corp. Code § 16100 et seq.*; *see also* [1][a], *above*, and [b], *below*].

[b] Operative Dates

UPA'94 initially applied to [Corp. Code § 116111(a)]:

- Partnerships formed on or after January 1, 1997; and

- Partnerships formed prior to January 1, 1997, that elected to be governed by the provisions of the UPA'94 instead of the pre-'97 Act.

The effect of these operative dates was to provide a two-year grace period during which pre-existing partnerships remained subject to the pre-'97 Act [*see* [1], *above*] On January 1, 1999, this two-year grace period expired, and since that date all partnerships have been subject to UPA'94, regardless of when they were formed [*Corp. Code § 16111(b)*]. UPA'94, however, does not affect actions or proceedings commenced, or rights accrued, prior to its effective date [*Corp. Code § 16112*; *see* [1], *above*].

If a partnership formed under the pre-'97 Act elected to be governed by UPA'94 before January 1, 1999, to the extent that UPA'94's provisions limit partners' liabilities to third parties, those limitations applied to third parties who had done business with the partnership within one year preceding the partnership's election to be governed by UPA'94, but only if the third party knew or received notification of the partnership's election to be governed by UPA'94 [*Corp. Code § 16111(c)*; *see Corp. Code § 16102* (defining "notice" and "notification")]. This rule does not apply, however, to any of the UPA'94 provisions that specifically apply to the liability of registered limited liability partnerships [*Corp. Code § 16111(c)*].

[c] Application to Other Partnership Forms

UPA'94 governs all general partnerships, including limited liability partnerships [*Corp. Code § 16101(9)* (defining "partnership")]. The definition of "partnership" excludes any partnership formed under the ULPA [*Corp. Code § 15501*] or CLRPA [*Corp. Code § 16101(9)*; *see Corp. Code § 15611*; *see also* [4], [5], *below*], the statutes governing formation of limited partnerships. However, limited partnerships, to the extent the law governing them is not inconsistent, are also governed by UPA'94 [*Corp. Code § 15722*].

[d] Application of Rules of Law and Equity; Interest Rates

UPA'94's provisions regarding the rights and duties of surviving partners, legal representatives of deceased partners, creditors of either, and creditors of the partnership all supersede any conflicting provisions in the Probate Code [*Corp. Code § 16109*]. Unless displaced by particular provisions of UPA'94, the principles of law and equity supplement UPA'94 [*Corp. Code § 16104(a)*]. When UPA'94 imposes an obligation to pay interest (*e.g.*, on the amount owed a dissociating partner for that partner's partnership interest), and the rate is not specified, the rate is the one specified in *Civ. Code § 3289* [*Corp. Code § 16104(b)*].

[3] Correlation Table

This table compares and correlates the former Uniform Partnership Act [former Corp. Code §§ 15001-15058] with the Uniform Partnership Act of 1994 [*Corp. Code § 16100 et seq.*]. Using this table, readers can determine the sections of the former UPA that correspond to those in UPA'94, and vice versa. The table also indicates whether or not each section was revised and, if so, whether the revision was minor or major. Classification of revisions as "minor" or "major" obviously involves a degree of discretionary judgment by the authors of this table.

The left hand column gives the section number of the former UPA sections. The middle column indicates the corresponding section of the UPA'94, if any. The right hand column indicates whether or not any revision was made, as well as the extent of the revision.

Pre-1997 Act Section	UPA'94 Section	Effect
15001	16100	Minor revision
15002	16101	Minor revision
15003	16102	Major revision
	16103	New
15004, 15005	16104	Minor revision
15010.5	16105	Minor revision
	16106	New
	16107	New
15004(4)	16108	No revision
15045	16109	No revision
	16110	New
	16111	New
	16112	New
	16113	New
	16114	New
	16201	New
15006	16202	Minor revision
15006(2)		Not reenacted, but see Pub. Res. Code § 3940
15007	16202(c)	Minor revision
	16203	New
15008	16204	Minor revision
15009	16301	Minor revision
15010	16302	Minor revision
15010.5	16105, 16302(b), 16304	Minor revision
15010.6		Not reenacted
15010.7	16303	Minor revision
15011		Not reenacted, but see § 16301
15012	Not reenacted	
	16304	New
15013	16305(a)	Minor revision
15014	16305(b)	Minor revision
15015	16306	Minor revision
	16307	New
15016	16308	Minor revision
15017	16306(b)	Major revision

15018	16401	Minor revision
	16402	New
15019	16403(a), (b)	Minor revision
15020	16403(c)	Minor revision
15021(1)	16404(b)	Minor revision
15021(2)	16404(g)	Minor revision
	16404(b)-(f)	New
15022	16405(b)	Minor revision
	16405(a)	New
	16405(c)	New
15023	16406	No revision
15024		Not reenacted, but see § 16502
	16501	New
15025		Not reenacted
15026	16502	Minor revision
15027	16503	Minor revision
15028	16504	Minor revision
	16601	New
	16602	New
	16603	New
	16701	New
	16701.5	New
	16702	New
	16703	New
	16704	New
	16705	New
15029		Not reenacted
15030	16802(a)	No revision
15031	16801	Major revision
	16802(b)	New
15032		Not reenacted
	16803(c)	New
15033		Not reenacted
15034		Not reenacted
15035	16804	Minor revision
15035.5	16805	Major revision
15036		Not reenacted
15037	16803(a), (b)	Minor revision

15038		Not reenacted
15039		Not reenacted
15040	16807	Major revision
	16806	New, but see § 15035
15041		Not reenacted
15042		Not reenacted
15043		Not reenacted
15044		Not reenacted
15045	16109	No revision
	16901	New
	16902	New
	16903	New
	16904	New
	16905	New
	16906	New
	16907	New
	16908	New
	16909	New
15046	16910	Major revision
	16911	New
	16912	New
	16913	New
	16914	New
	16915	New
	16916	New
	16917	New
15047	16951	No revision
15048(a)	16952	No revision
15048(b)-(e)		Not reenacted
15049	16953	No revision
15050	16954	No revision
15051	16955	No revision
	16955.5	New
15052	16956	No revision
15053	16957	No revision
15054	16958	No revision
15055	16959	No revision
15056	16960	No revision

15057	16961	No revision
15058	16962	No revision

For a summary of UPA'94 changes from the pre-'97 Act, see *California Forms of Pleading and Practice (Matthew Bender), Ch. 400, Partnerships: Governing Statutes, § 400.11[5]*. For a summary of definitions pertaining to partnerships, see §§ 400.20, 400.21 in that publication.

[4] Uniform Limited Partnership Act (ULPA)

The Uniform Limited Partnership Act [*Corp. Code § 15501 et seq.*], referred in this chapter as "ULPA," generally governed limited partnerships existing on or before July 1, 1984. The California Revised Limited Partnership Act [*Corp. Code § 15611 et seq.*; *see* [5], *below*], referred to as "CRLPA," governed limited partnerships formed on or after July 1, 1984, as well as limited partnerships existing on or before July 1, 1984, that elected to be governed by it [*Corp. Code §§ 15711, 15712(b)(1), 15714*]. The Uniform Limited Partnership Act of 2008 (ULPA '08) [*Corp. Code §§ 15900-15912.07*; *see* [6], *below*], applies to all limited partnerships on and after January 1, 2010 [*Corp. Code § 15912.06(b)*].

The ULPA became inoperative and was repealed on January 1, 2010 [*see Corp. Code § 15534*; *see also* [6], *below*]. Citations to its provisions, therefore, refer to former law. Repeal of the ULPA, however, does affect actions commenced, proceedings brought, or rights accrued before January 1, 2008, the operative date of the ULPA '08 [*Corp. Code § 15912.07*; *see Corp. Code § 15900 et seq.*; *see also* [6], *below*]. Furthermore, certain provisions of the ULPA '08 do not apply to limited partnerships formed before January 1, 2008 unless the partners otherwise elect [*see Corp. Code § 15912.06(c)*; *see also* Clark, California's Uniform Limited Partnership Act of 2008, §§ 5, 8.03 (LexisNexis)]. For these reasons, discussion of the ULPA has been retained in the partnership coverage in this publication.

[5] California Revised Limited Partnership Act (CRLPA)

Limited partnerships formed on or after July 1, 1984 and before January 1, 2008 [*see* 6, *below*] were governed by CRLPA [*Corp. Code §§ 15711, 15712(b), 15714*]. CRLPA limited partnerships were also governed, in any case not provided for by CRLPA, in the same manner as general partnerships, either under the pre-'97 Uniform Partnership Act or by UPA'94 [*Corp. Code § 15722*]. For further discussion of the law applicable to limited partnerships, see *California Forms of Pleading and Practice (Matthew Bender), Ch. 400, Partnerships: Governing Statutes, §§ 400.12, 400.13*.

The CRLPA became inoperative and was repealed on January 1, 2010 [*see Corp. Code § 15724*; *see also* [6], *below*]. Citations to its provisions, therefore, refer to former law. Repeal of the CRLPA, however, does not affect actions commenced, proceedings brought, or rights accrued before January 1, 2008, the operative date of the ULPA '08 [*Corp. Code § 15912.07*; *see Corp. Code § 15900 et seq.*; *see also* [6], *below*]. Furthermore, certain provisions of the ULPA '08 do not apply to limited partnerships formed before January 1, 2008 unless the partners otherwise elect [*see Corp. Code § 15912.06(c)*; *see also* Clark, California's Uniform Limited Partnership Act of 2008, §§ 5, 8.03 (LexisNexis)]. For these reasons, discussion of the CRLPA has been retained in the partnership coverage in this publication.

[6] Uniform Limited Partnership Act of 2008

The Uniform Limited Partnership Act of 2008 (ULPA '08) [*see* Stats. 2006, ch. 495, § 20; *Corp. Code §§ 15900-15912.07*], operative January 1, 2008 [*see Corp. Code § 15912.04*], governed the following limited partnerships before January 1, 2010 [*see Corp. Code § 15912.06(a)*]:

- Limited partnerships formed on or after January 1, 2008; and

- Limited partnerships formed before January 1, 2008, which elected to be subject to the new Act.

Beginning January 1, 2010, except as otherwise provided, the ULPA '08 governs *all* limited partnerships, regardless of the date of formation [*see Corp. Code § 15912.06(b)*]. However, it does not affect any action commenced, proceeding brought, or right accrued before its operative date [*see Corp. Code § 15912.07*]. Furthermore, certain provisions of the ULPA '08 do not apply to limited partnerships formed before January 1, 2008 unless the partners otherwise elect [*see Corp. Code § 15912.06(c)*; *see also* Clark, California's Uniform Limited Partnership Act of 2008, §§ 5, 8.03 (LexisNexis)].

It will take time before new appellate decisions interpreting the ULPA '08 begin to appear. Discussion of the ULPA and the CRLPA, therefore, has been retained in the partnership coverage in this publication. When applicable, discussions of points and authorities under the ULPA '08 include cross-references to similar points and authorities drafted under prior law. However, users of this chapter with litigation involving limited partnerships governed by the ULPA '08 are cautioned to independently verify that any cases decided under the old acts are consistent with the statutory provisions of the new limited partnership legislation before citing or relying on those decisions in actions involving limited partnerships governed by the new law. The ULPA '08 extensively recasts and revises the provisions governing the organization and governance of limited partnerships. It creates a stand-alone law covering formation, filings, contributions and distributions, rights of transferees and creditors, dissociation, dissolution, actions by partners, conversion and merger, dissenting limited partners' rights, and foreign limited partnerships. For an extensive discussion of the ULPA '08, see Ballantine & Sterling, California Corporation Laws, Ch. 25, *Limited Partnerships* , Part C (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral PartnershipsGeneral OverviewBusiness & Corporate LawGeneral PartnershipsFormationGeneral OverviewBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesGeneral OverviewBusiness & Corporate LawLimited Liability PartnershipsBusiness & Corporate LawLimited PartnershipsGeneral Overview

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CHAPTER 170 PARTNERSHIPS
PART I. INTRODUCTION

17-170 California Points & Authorities § 170.03

§ 170.03 How to Use the Forms in This Chapter

[1] Page Limits on Memoranda

Some of the most significant drafting requirements to keep in mind are page limits: supporting and opposing memoranda must not exceed 15 pages, or 20 pages in summary judgment or summary adjudication proceedings. A reply or closing memorandum may not exceed 10 pages. Exhibits, declarations, attachments, a table of contents, a table of authorities, and the proof of service are excluded from these page limits [*Cal. Rules of Ct., Rule 3.1113(d)*]. Any party must obtain leave of court to file a longer memorandum [*see Cal. Rules of Ct., Rule 3.1113(e)*]. A memorandum that exceeds 10 pages must include a table of contents and a table of authorities. A memorandum that exceeds 15 pages must also include an opening summary of argument [*Cal. Rules of Ct., Rule 3.1113(f)*]. A memorandum that includes a table of contents and a table of authorities must be paginated as provided in *Cal. Rules of Ct., Rule 3.1113(h)*. These and other drafting requirements are discussed in further detail in Ch. 1, *Writing Legal Memoranda and Briefs* .

[2] Using the Forms to Build a Draft Memorandum

The forms included in this chapter are designed to be combined with other forms to form a complete memorandum. For a detailed discussion on how to select and use the forms in the publication to build a draft memorandum and complete the draft, with detailed discussion of all drafting requirements and strategic or stylistic considerations, see Ch. 1, *Writing Legal Memoranda and Briefs* . That chapter also sets forth a skeletal form for a memorandum, for use in creating a properly formatted outline in which to compile relevant forms from this publication.

[3] Citing to the Correct Governing Statute

As discussed in § 17.02[1][a], actions involving general partnerships may be governed either by the Uniform Partnership Act of 1994 or by its predecessor statute, the Uniform Partnership Act, depending on when the action was commenced and when the rights at issue accrued. For that reason, some of the individual forms in this chapter include alternative citations of authority to the relevant sections of both the UPA'94 and its predecessor. When these forms are incorporated into an actual memorandum, however, the drafter should be careful to retain only statutory references to the partnership act that actually governs the action, and should delete any citation in these forms to the provisions of the partnership act that does not apply.

CAUTION:

If citations to only one general partnership act are included following a statement of law in a form in this chapter, the practitioner should not use that provision in an action controlled by the other partnership act without conducting careful independent research to verify that the statement of law is valid under the partnership statute that is applicable to the particular action. For example, the UPA'94 is more detailed in many respects than its predecessor act, and has codified a number of rules that either are new or were previously controlled by case law rather than by statute [*see* correlation table in § 170.02[3]].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesCauses of ActionGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureSummary JudgmentOppositionMemoranda in OppositionCivil ProcedureSummary JudgmentSupporting MaterialsMemoranda of Law

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17-170 California Points & Authorities § 170.04

§ 170.04 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

For a discussion and forms relating to partnerships and joint ventures, see the following chapters of California Forms of Pleading and Practice (Matthew Bender):

- Ch. 400, *Partnerships: Governing Statutes*.
- Ch. 401, *Partnerships: Actions Between General Partners and Partnership*.
- Ch. 402, *Partnerships: Actions Between General Partners or Partnership and Third Parties*.
- Ch. 403, *Partnerships: Actions by and Against Dissociated Partners*.
- Ch. 404, *Partnerships: Actions Between Limited Partners and Partnerships*.
- Ch. 405, *Partnerships: Actions Between Limited Partners or Partnerships and Third Parties*.
- Ch. 406, *Partnerships: Dissolution*.

For discussion and forms relating to limited liability companies, see California Forms of Pleading and Practice, Ch. 346, *Limited Liability Companies* (Matthew Bender).

For a discussion of mining partnerships, see California Forms of Pleading and Practice, Ch. 363, *Mining* (Matthew Bender). For discussion and forms relating to unincorporated associations generally and nonprofit organizations, see the following chapters in California Forms of Pleading and Practice (Matthew Bender):

- Ch. 61, *Associations and Clubs*.

- Ch. 110, *Churches and Religious Organizations*.
- Ch. 388, *Nonprofit Corporations*.

For discussion and forms for use in specific actions in which points of law regarding partnership may be relevant, see the following chapters in California Forms of Pleading and Practice (Matthew Bender):

- Ch. 103, *Brokers*.
- Ch. 248, *Employer's Liability for Employee's Torts*.
- Ch. 427, *Principal and Agent*.

For discussion and forms relating to corporations generally, see California Forms of Pleading and Practice (Matthew Bender), Chapters 160 through 170.

[2] Related Points and Authorities Chapters

For memoranda relating to the requirement that a partnership must file a fictitious business name statement before it can maintain an action on any transaction had in the fictitious name, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For memoranda as to the effect of failure to file a fictitious business name statement, see Ch. 10, *Abatement and Survival of Actions* .

Related memoranda that may be useful in particular cases involving partnerships may be found in Ch. 31, *Brokers and Salespersons* and Ch. 182, *Principal and Agent* .

For memoranda relating to the procedural requirements of accountings and appointments of receivers and referees, see Ch. 12, *Accounting* , Ch. 200, *Receivers* , and Ch. 201, *Reference and Referees* .

[3] Other Related Publications

For a detailed discussion and analysis of the enactment of and transition to UPA'94, see Ballantine & Sterling, California Corporation Laws, Ch. 24, *Partnerships* (Matthew Bender). For statements of partnership, certificates of limited partnership, and registration forms for limited liability partnerships, see California Legal Forms, Ch. 15, *General Partnerships*, Ch. 16, *Formation of Limited Partnerships*, and Ch. 16C, *Limited Liability Partnerships* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
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Volume 17 Chapters 170-179 PARTNERSHIPS---to---PREMISES LIABILITY
CHAPTER 170 PARTNERSHIPS
PART I. INTRODUCTION

17-170 California Points & Authorities §§ 170.05-170.09

[Reserved]

§§ 170.05[Reserved]

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17-170 California Points & Authorities § 170.10

§ 170.10 Supporting Contention That UPA'94 Governs Action Involving General Partnership [Corp. Code § 16111(b)]--Partnership Formed Prior to Effective Date of UPA'94

[1] FORM Supporting Contention That UPA'94 Governs Action Involving General Partnership [Corp. Code § 16111(b)]--Partnership Formed Prior to Effective Date of UPA'94

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

BECAUSE _____ [THIS ACTION (*or* PROCEEDING) WAS FILED *or* THE RIGHTS AT ISSUE IN THIS ACTION ACCRUED] AFTER _____ [JANUARY 1, 1999 *or, if partnership made a valid election between January 1, 1997 and December 31, 1998, to be governed by UPA'94:* _____ (*date of election*), THE DATE ON WHICH THE PARTNERSHIP MADE A VALID ELECTION TO BE GOVERNED BY THE PROVISIONS OF THE UNIFORM PARTNERSHIP ACT OF 1994], _____ (THIS ACTION IS *or* THOSE ISSUES ARE) GOVERNED BY THE UNIFORM PARTNERSHIP ACT OF 1994.

A. Uniform Partnership Act of 1994 Applies to pre-1997 Partnerships. [*If partnership elected prior to Jan. 1, 1999 to be governed by UPA'94, include:* A partnership formed prior to January 1, 1997, could elect on or after that date to be governed by the Uniform Partnership Act of 1994 (*Corp. Code § 16100 et seq.*), at which point the Uniform Partnership Act of 1994, rather than the predecessor statute, would govern the partnership. (*Corp. Code § 16111(a)*)]. On and after January 1, 1999, the Uniform Partnership Act of 1994 [*Corp. Code § 16100 et seq.*] governs all partnerships, regardless of the date on which they were formed. (*Corp. Code § 16111(b)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that UPA'94 governs an action or proceeding, or legal issues, involving a partnership that was formed under the pre-'97 Act [former Corp. Code § 15001 et seq.]. It may be used in any action in by a party contending that the UPA'94, rather than former partnership law, is the governing law with respect to such a partnership.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of applicable governing law. They also may be adapted for use in a trial or appellate brief.

If the partnership in question was formed *on or after* January 1, 1997, the effective date of UPA'94 (unless it was continuing the business of a dissolved partnership under former Corp. Code 15041), it was automatically subject to the UPA'94 from the date of its formation [*Corp. Code § 16111(a)*], and the need for these points and authorities should not arise.

If a party wishes to argue that the UPA'94 does *not* apply in a particular action, § 170.11 should be used in appropriate cases, instead of this form.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. If the application of the UPA'94 is at issue, this entails showing that the partnership was not within the very limited exceptions to applicability of the UPA'94 [*see Corp. Code §§ 16111(a), 16112*; *see also § 170.11*]. To show that UPA'94 applies in the action or to the rights at issue when a pre-1997 partnership is involved, the party supporting application of UPA'94 need show only that the action was commenced, or the rights in question accrued, subsequent to either:

- The date, if any, on which the partnership made a valid election to be governed by UPA'94 [*see Corp. Code §§ 16111(a), 16112*]; or

- January 1, 1999, the date on which UPA'94 became applicable to all partnerships regardless of the date of formation [*see Corp. Code § 16111(b)*].

[3] Discussion of Authorities

[a] Uniform Partnership Act of 1994 Applies to pre-1997 Partnerships

Corp. Code § 16111(b) provides that on and after January 1, 1999, the Uniform Partnership Act of 1994 [*Corp. Code § 16100 et seq.*] governs all partnerships. Formerly, partnerships formed before January 1, 1997, and partnerships continuing the business of a dissolved partnership, continued to be governed by the pre-'97 Act until January 1, 1999, unless they elected at an earlier date to be governed by UPA'94 [Corp. Code § 16111(a)]. However, as of January 1, 1999, the pre-'97 Act was repealed, and since that date the UPA'94 governs all partnerships regardless of their date of formation [*Corp. Code § 16111(a), (b)*; *see* Stats. 1996, ch. 1003, § 18 (repealing the pre-'97 Act operative January 1, 1999)].

Repeal of the pre-'97 Act, however, did not affect actions or proceedings commenced, or rights accrued, prior to the effective date of UPA'94 [*Corp. Code § 16112*]. For discussion, and points and authorities supporting the application of the pre-'97 Act to a particular claim, see *§ 170.11*.

Note that ***Corp. Code § 16111(c)*** provides that except with respect to the UPA'94 provisions specifically relating to registered limited liability partnerships and foreign limited liability partnerships, the UPA'94 provisions relating to the liability of the partnership's partners to third parties apply to limit those partners' liability to a third party who had done business with the partnership within one year preceding the partnership's election to be governed by the UPA'94 only if the third party knew or received a notification of the partnership's election.

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17-170 California Points & Authorities § 170.11

§ 170.11 Supporting Contention That pre-'97 Act Governs Action Involving General Partnership [Corp. Code § 16112]--Action Filed or Right Accrued Prior to January 1, 1997

[1] FORM Supporting Contention That pre-'97 Act Governs Action Involving General Partnership [Corp. Code § 16112]--Action Filed or Right Accrued Prior to January 1, 1997

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

BECAUSE _____ [THIS ACTION (*or* PROCEEDING) WAS FILED *or* THE RIGHTS AT ISSUE IN THIS ACTION ACCRUED] PRIOR TO JANUARY 1, 1997, IT IS GOVERNED BY THE FORMER UNIFORM PARTNERSHIP ACT [former Corp. Code § 15001 et seq.], NOT THE UNIFORM PARTNERSHIP ACT OF 1994 [*Corp. Code § 16100 et seq.*].

A. Former Uniform Partnership Act Governed All Partnerships Formed Before January 1, 1997. The former Uniform Partnership Act [former Corp. Code § 15001 et seq.] governed California general partnerships that were formed before January 1, 1997, the effective date of the Uniform Partnership Act of 1994 [*Corp. Code § 16100 et seq.*] (former Corp. Code § 15001 et seq.; *see Corp. Code § 16111(a)*).

B. Former Uniform Partnership Act Continues to Govern Pre-Existing Rights and Actions. The Uniform Partnership Act of 1994 [*Corp. Code § 16100 et seq.*] does not affect any action or proceeding commenced, or right accrued, before that Act takes effect. Thus, if an action or proceeding was commenced, or rights accrued, prior to January 1, 1997, the effective date of the Uniform Partnership Act of 1994, the action, proceeding, or rights continue to be governed by the Uniform Partnership Act [former Corp. Code § 15001 et seq.]. (*Corp. Code § 16112*; *see Dickson, Carlson & Campillo v. Pole (2000) 83 Cal. App. 4th 436, 445, 99 Cal. Rptr. 2d 678*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the argument that an action or proceeding involving a

general partnership formed before January 1, 1997, or the rights at issue in such an action or proceeding, are governed by the pre-'97 partnership act [former Corp. Code § 15001 et seq.] rather than by UPA'94 [*Corp. Code § 16100 et seq.*]. In appropriate cases, it may be modified to oppose a contention that the UPA'94 controls the action [*see § 170.10*].

Note that after January 1, 1997, a pre-1997 partnership continued to be governed by the pre-'97 act until January 1, 1999, or the earlier date, if any, on which it elected to be governed by UPA'94 [*see Corp. Code § 16111(a), (b)*]. *Corp. Code § 16112*, in contrast, states simply that UPA'94 does not affect an action or proceeding commenced or right accrued "before this chapter takes effect." As applied to an action or proceeding that was commenced, or a right that accrued, with respect to a pre-1997 partnership after January 1, 1997, but while the partnership was still governed by the pre-'97 Act, the words "takes effect" presumably were intended to refer the date on which the UPA'94 *became applicable to the specific partnership in question*, rather than to January 1, 1997, the date on which the UPA'94 first went into effect. A contrary reading of *Corp. Code § 16112* would give the illogical result that the UPA'94 would govern all actions or proceedings that were initiated after January 1, 1997, even if, under *Corp. Code § 16111(a), (b)*, the partnership was still governed by pre-1997 act at the time the action was commenced or the right accrued [*but see Dickson, Carlson & Campillo v. Pole (2000) 83 Cal. App. 4th 436, 445 n.6, 99 Cal. Rptr. 2d 678* (stating that pre-'97 act governs actions commenced and rights accrued before January 1, 1997), discussed in *§ 170.11[3]*]. Counsel should read these statutes carefully, and understand the potential issue, before modifying these points and authorities to apply to an action involving a pre-1997 partnership that arose after January 1, 1997, but before that partnership became subject to UPA'94.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the applicable governing law. They also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel needs to demonstrate that the partnership in question was formed before January 1, 1997. Counsel then must further establish that the action or proceeding commenced, or the rights accrued, prior to January 1, 1997 [*see Corp. Code § 16112*].

[3] Discussion of Authorities

[a] Former Uniform Partnership Act Continues to Govern Pre-Existing Rights and Actions

Corp. Code § 16112 provides that UPA'94 [*Corp. Code § 16100 et seq.*] does not affect actions or proceedings commenced, or rights accrued, "before this chapter takes effect" [*Corp. Code § 16112*]. The effective date of the UPA was January 1, 1997.

In ***Dickson, Carlson & Campillo v. Pole*** *(2000) 83 Cal. App. 4th 436, 99 Cal. Rptr. 2d 678* , two partners informed their law partnership on August 28, 1995, that they had decided to withdrew, and took the firm's largest client with them. The remaining partners immediately dissolved the firm (on September 20, 1995), and in two separate actions sued the two departing partners and their new firm in October/November 1995 for declaratory relief, accounting, breach of fiduciary duty, breach of contract, and other causes of action seeking their share of the profits earned from the completion of the partnership's unfinished business representing a defendant in numerous product liability cases. The trial court in the first action (1) found that the plaintiffs had a fiduciary duty to complete some of the unfinished business but had failed to do so and therefore had failed to "do equity," (2) barred the plaintiffs from recovering in the accounting any of the profits earned by the defendants, and (3) referred the accounting cause of action to the court hearing the second action, which primarily asserted tort claims against the departing partners. The trial court in the second action consolidated the two actions and determined that the prior ruling in the first action completely precluded the recovery of tort and contract damages based on profits earned by the defendants after the date of dissolution, granted

a motion in limine excluding all evidence of those profits, and granted a motion for judgment on the pleadings in favor of the defendants (*83 Cal. App. 4th 436, 440)* . Plaintiffs challenged both rulings on appeal. The appellate court concluded that the equitable maxim to "do equity" was not a complete defense in an accounting action and also did not preclude the recovery of damages on the plaintiffs' tort and contract causes of action, and thus reversed and remanded (*83 Cal. App. 4th 436, 440, 449)* .

With respect to the law governing post-dissolution profits from unfinished partnership business, the court noted that the Uniform Partnership Act [former Corp. Code § 15001 et seq.] was repealed effective January 1, 1999 [Stats. 1996, ch. 1003, § 1.2, p. 88], and replaced by the Uniform Partnership Act of 1994 [*Corp. Code § 16100 et seq.*]. It stated that the former act governs actions commenced and rights accrued before January 1, 1997 [*Corp. Code § 16112*], and therefore governed this action (*83 Cal. App. 4th 436, 445 n. 6*). (Note, however, that the court was not faced with the issue of an action that was commenced or a right that accrued during the 2-year grace period beginning on January 1, 1997, and ending on December 31, 1998, during which pre-1997 partnerships that had not affirmatively elected application of UPA'94 continued to be governed by the pre-'97 Act [*see* Corp Code § 19111(a), (b)].)

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17-170 California Points & Authorities §§ 170.12-170.19

[Reserved]

§§ 170.12[Reserved]

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17-170 California Points & Authorities § 170.20

§ 170.20 Supporting Contention That Partnership Exists-Requirements [Corp. Code §§ 16101, 16102; former Corp. Code §§ 15002, 15006]

[1] FORM Supporting Contention That Partnership Exists-Requirements [Corp. Code §§ 16101, 16102; former Corp. Code §§ 15002, 15006]

A PARTNERSHIP _____ [EXISTS or EXISTED] BETWEEN _____ [PLAINTIFF *or* DEFENDANT] _____ [*name*] AND _____ [DEFENDANT *or* PLAINTIFF] _____ [*name*] BECAUSE THEY ENTERED INTO AN ASSOCIATION TO CARRY ON AS CO-OWNERS A BUSINESS FOR PROFIT[, AND ALTHOUGH THERE _____ (IS or WAS) NO WRITTEN AGREEMENT, THE EXISTENCE OF THE PARTNERSHIP _____ (IS or WAS) EVIDENCED BY THE CONDUCT OF THE PARTIES].

A. Partnership Defined. A partnership is an association of two or more persons to carry on as co-owners a business for profit [*add if relevant:* and includes, for all purposes of the laws of California, a registered limited liability partnership] (*Corp. Code §§ 16101(9), 16202(a) or* former Corp. Code § 15006(1); *Holmes v. Lerner (1999) 74 Cal. App. 4th 442, 88 Cal. Rptr. 2d 130*).

B. Business Defined. "Business" includes every trade, occupation, and profession (*Corp. Code § 16101(1) or* former Corp. Code § 15002(b)).

C. Person Defined. "Person" includes an individual, corporation, business trust, estate, trust, partnership, limited partnership, limited liability partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity (*Corp. Code § 16101(13)*).

[*Optional*] **D. Sufficiency of Partnership Agreement.** A partnership need not be evidenced by a writing; it may be an oral agreement. When there is no writing as evidence for the agreement, the existence of a partnership may be shown by

the conduct of the parties (*Calada Materials Co. v. Collins (1960) 184 Cal. App. 2d 250, 253, 7 Cal. Rptr. 374*).

[*Optional*] **E. Finding of Partnership Need Be Proved Only by Preponderance of Evidence.** A party who alleges that a partnership existed based on an oral agreement need prove the partnership's existence only by a preponderance of the evidence (*Weiner v. Fleischman (1991) 54 Cal. 3d 476, 490, 286 Cal. Rptr. 40, 816 P.2d 892*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a partnership was formed because two or more persons entered into an association to carry on as co-owners of a business for profit [*see Corp. Code §§ 16101(9), 16202(a)*; former Corp. Code §§ 15002, *15006*]. It may be used in any action in which a party contends that a partnership was formed.

The issue of whether a partnership was formed most often arises when there is no formal partnership agreement. Thus, optional Paragraph D may be used to support the contention that a written partnership agreement is not necessary and a partnership may be established by the conduct and acts of the parties [*see Calada Materials Co. v. Collins (1960) 184 Cal. App. 2d 250, 253, 7 Cal. Rptr. 374]* .

Optional Paragraph E may be used to clarify the burden of proof. Although some cases have held that clear and convincing proof of an oral partnership or joint venture is required, the California Supreme Court has established that the normal preponderance of the evidence rule applies [*Weiner v. Fleischman (1991) 54 Cal. 3d 476, 490, 286 Cal. Rptr. 40, 816 P.2d 892* (analyzing and declining to follow cases such as *Lyon v. MacQuarrie (1941) 46 Cal. App. 2d 119, 124, 115 P.2d 594*)].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a partnership existed. They also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should discuss facts showing that the parties entered into an arrangement whereby they conducted a business jointly and shared in the profits, thereby forming a partnership.

[c] Opposing Points and Authorities

The points and *authorities in § 170.30* may be used in an appropriate case to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Partnership Defined

The facts and procedural background of ***Holmes v. Lerner*** *(1999) 74 Cal. App. 4th 442, 88 Cal. Rptr. 2d 130* , are discussed in *§ 170.23*. In *Holmes*, defendants contended that they did not discuss sharing profits of the business with plaintiff and that without an agreement to share profits, there could be no partnership. The court examined the definition of "partnership" set forth in former Corp. Code § 15006 [*see now Corp. Code § 16101(9)*] and the fact that it omitted language regarding division of profits which had been included in prior versions of the definition of partnership. The fact that former Corp. Code § 15006 defined a partnership as "an association of two or more persons to carry on as

coowners a business for profit," and that former Corp. Code § 15007(4) [*see now Corp. Code § 16202(c)(3)*] provided that in determining whether a partnership exists, "[t]he receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner," mandates the conclusion that profit sharing is prima facie evidence of being a partner, rather than a required element of the definition of a partnership. The appellate court therefore held that the trial court properly determined that a partnership had been formed, notwithstanding the absence of an express agreement to share profits (*74 Cal. App. 4th 442, 453-454, 457)* .

[b] Sufficiency of Partnership Agreement

Calada Materials Co. v. Collins *(1960) 184 Cal. App. 2d 250, 7 Cal. Rptr. 374* , involved an action for the value of oil well materials delivered to defendants. Plaintiff delivered the materials to two wells operated by defendants and drilled by the same drilling contractor. The trial court rendered judgment against defendants individually and doing business as a partnership for the unpaid balance on the deliveries to both sites. One of the defendants appealed, contending that the trial court's finding that a partnership existed as to the second site was unsupported by the evidence.

The appellate court affirmed, holding that because defendant personally signed the contract with the contractor with respect to the second site and held himself out to plaintiff and others as the other defendant's partner, the inferences to be drawn from these and other acts adequately supported the challenged finding (*184 Cal. App. 2d 250, 252-253)* . The court held that a partnership may be oral, and the existence of a partnership may be evidenced by the conduct of the parties (*184 Cal. App. 2d 250, 253)* .

[c] Finding of Partnership Need Be Proved by Only Preponderance of Evidence

Both plaintiff and defendant in ***Weiner v. Fleischman*** *(1991) 54 Cal. 3d 476, 286 Cal. Rptr. 40, 816 P.2d 892* , were attorneys. Plaintiff owned 100 shares of Pioneer Theaters stock and also represented other shareholders who wished to sell their Pioneer stock. Plaintiff and defendant orally agreed that if the opportunity arose, they would find a third-party buyer for the stock and share the finder's fee equally. Plaintiff also testified that they agreed to purchase the stock together if they were unable to find a third-party buyer. Defendant and a third party ended up purchasing the stock, although plaintiff and defendant shared the finder's fee as agreed. Plaintiff commenced the action alleging that defendant concealed his participation in the transaction as buyer in violation of their agreement. The trial court instructed the jury that they had to find by clear and convincing evidence that the parties had entered into an oral agreement and its essential terms. The jury held for defendant and plaintiff appealed. The court of appeal reversed and remanded for a new trial, holding that it was error to require proof of the oral agreement by clear and convincing evidence. The California Supreme Court granted review to determine the proper standard of proof for establishing an oral joint venture or partnership agreement.

The court noted that the general rule is that issues of fact in civil cases are determined by a preponderance of testimony [*see Evid. Code § 115*]. The court then considered whether any constitutional, statutory, or decisional law required a burden of proof higher than a preponderance to establish an oral joint venture or partnership agreement (*54 Cal. 3d 476, 483)* . Neither of the parties found any constitutional law that dictated a higher standard (*54 Cal. 3d 476, 483)* , nor did any statute require an oral partnership or joint venture agreement to be established by clear and convincing evidence (*54 Cal. 3d 476, 483)* .

The court considered all the cases relied on by defendant in light of the rule enunciated in *Liodas v. Sahadi (1977) 19 Cal. 3d 278, 289 n.6, 137 Cal. Rptr. 635, 562 P.2d 316* , that statements in case law purporting to require clear and convincing or clear and satisfactory evidence must be read in light of the statutory provision for proof by a preponderance of the evidence, and concluded that none required clear and convincing evidence to prove the existence of an oral joint venture or partnership agreement (*54 Cal. 3d 476, 484)* . The court considered the statement in *Welch v. Alcott (1921) 185 Cal. 731, 742, 198 P. 626* , that proof of an oral partnership agreement be "clear," and said that in light of *Evid. Code § 115*, that language in *Welch* should not be interpreted as holding that a "clear and convincing"

burden of proof is required. Defendant contended that *Liodas v. Sahadi (1977) 19 Cal. 3d 278, 137 Cal. Rptr. 635, 562 P.2d 316* , and *Cameron v. Crocker-Citizens Nat. Bank (1971) 19 Cal. App. 3d 940, 943, 97 Cal. Rptr. 269* , state that "clear proof" is merely a variant of the "clear and convincing" standard of proof. However, the court said, *Cameron*, which involved an oral contract to make a will, did not hold that "clear proof" and "clear and convincing proof" were equivalent standards, but only said that English precedents permitted the enforcement of oral contracts to make a will "upon clear proof" of their execution (*54 Cal. 3d 476, 484)* . *Liodas* merely noted that some court of appeal cases in civil fraud actions had required proof of fraud by "clear and convincing evidence" or a variant of that standard, but held that the proper standard of proof in civil fraud actions is preponderance of the evidence (*54 Cal. 3d 476, 484-485)* .

The court conceded that certain appellate decisions have stated that proof of an oral joint venture or partnership agreement must be made by clear and convincing evidence, naming specifically *Sullivan v. Schellinger (1959) 170 Cal. App. 2d 111, 113, 338 P.2d 462* , *Smalley v. Baker (1968) 262 Cal. App. 2d 824, 839, 69 Cal. Rptr. 521* , and *Lyon v. MacQuarrie (1941) 46 Cal. App. 2d 119, 124, 115 P.2d 594* . *Smalley* relied on *Sullivan* and *Sullivan* relied on *Lyon*. *Lyon* relied on *Welch v. Alcott (1921) 185 Cal. 731, 742, 198 P. 626* (discussed *above*), *Swanson v. Siem (1932) 124 Cal. App. 519, 523, 12 P.2d 1053* , and *Blinn v. Ritchie (1929) 101 Cal. App. 691, 692-693, 282 P. 390* . When this trail of citations was traced and analyzed, the court said, it lost much of its persuasiveness. *Swanson* stated only that the existence of an oral agreement of partnership need be proved by "competent evidence." *Blinn* stated that there was no finding that a partnership existed between the parties, nor was there "competent evidence in the record to sustain such a finding." The *Blinn* court reasoned that a contract of partnership must be proved in the same manner that any other contract must be established. The defendant in *Weiner v. Fleischman* did not contend that an oral contract must be established by clear and convincing evidence (*54 Cal. 3d 476, 485)* .

The court continued to name other cases that relied on *Sullivan*, *Smalley*, and/or *Lyon*, specifically, *ABC Egg Ranch v. Abdelnour (1963) 223 Cal. App. 2d 12, 15-16, 35 Cal. Rptr. 487* and *Coronet Constr. Co., Inc. v. Palmer (1961) 194 Cal. App. 2d 603, 611, 15 Cal. Rptr. 601* (*54 Cal. 3d 476, 485-486)* , and noted that *Coronet Constr*. also cited *Milstein v. Saratain (1943) 56 Cal. App. 2d 924, 932, 133 P.2d 836* (discussed in *§ 170.30[4]*), which states that the burden is on the one asserting the existence of the partnership to prove it by "competent evidence." Finally, the court distinguished the last two cases relied on by defendant to establish the clear and convincing standard of proof. *Tannehill v. Finch (1986) 188 Cal. App. 3d 224, 232 Cal. Rptr. 749* and *Toney v. Nolder (1985) 173 Cal. App. 3d 791, 219 Cal. Rptr. 497* , involved attempts to rebut legal and beneficial title to real property and were expressly decided under *Evid. Code § 662*, which provides for a presumption in favor or the owner of legal title to property and provides that the presumption may be rebutted only by clear and convincing proof. Thus, the court concluded that the case law does not justify or require a departure from the ordinary civil standard of preponderance of the evidence when a party seeks to establish the existence and scope of an oral joint venture or partnership agreement (*54 Cal. 3d 476, 486)* .

The court considered and rejected defendant's contention that imposition of a higher burden of proof was necessary because of the gravity of the consequences flowing from a finding that an oral joint venture or partnership agreement exists, distinguishing the issues for which a higher standard is required, such as the creation of trusts and oral agreements to make wills (*54 Cal. 3d 476, 487-490)* . The error, the court held, was prejudicial, and required reversal and remand for a new trial (*54 Cal. 3d 476, 491)* .

[4] Additional Authorities

[a] Sufficiency of Partnership Agreement

The facts and procedural background of *Greene v. Brooks (1965) 235 Cal. App. 2d 161, 45 Cal. Rptr. 99* , are discussed in *§ 170.21[3]*. In *Greene*, defendants appealed an interlocutory decree declaring the dissolution of their former partnership with plaintiffs in a club and ordering the sale and equitable distribution of partnership assets. Defendants contended that the evidence was insufficient to support the trial court's finding that the parties had been associated as partners because they never agreed on terms. The court of appeal held that a partnership need not be

evidenced by writing, and that it is immaterial that the parties do not designate the relationship as a partnership or realize that they are partners because the intent to carry on a business as co-owners may be implied from their acts (*235 Cal. App. 2d 161, 166)* .

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17-170 California Points & Authorities § 170.21

§ 170.21 Supporting Contention That Partnership Exists or Existed [Corp. Code §§ 16101, 16202(a); former Corp. Code §§ 15002, 15006]--Intent Regarding Formation Is Determinative

[1] FORM Supporting Contention That Partnership Exists or Existed [Corp. Code §§ 16101, 16202(a); former Corp. Code §§ 15002, 15006]--Intent Regarding Formation Is Determinative

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with § 170.20, and may be combined with §§ 170.22-170.24 if appropriate based on the issues involved.*]

A PARTNERSHIP _____ [EXISTS *or* EXISTED] BETWEEN _____ [PLAINTIFF *or* DEFENDANT] _____ [*name*] AND _____ [DEFENDANT *or* PLAINTIFF] _____ [*name*] BECAUSE IT IS EVIDENT FROM THE TERMS OF THE AGREEMENT AND THE PARTIES' CONDUCT THAT THEY INTENDED TO ENTER INTO A PARTNERSHIP.

A. Intent to Carry On Business as Co-owners Is Determinative of Partnership. The ultimate test of the existence of a partnership is the intention of the parties to carry on a definite business as co-owners. That intention may be determined from the terms of the parties' agreement or from the surrounding circumstances (*Greene v. Brooks (1965) 235 Cal. App. 2d 161, 165-166, 45 Cal. Rptr. 99* ; *Constans v. Ross (1951) 106 Cal. App. 2d 381, 386, 235 P.2d 113*).

[*Optional*] **B. Intent to Do Things That Constitute Partnership Is Material**. The fact that the parties did not intend their relationship to be called a partnership is immaterial; it is the intent to do the things that constitute a partnership that usually determines whether or not that relationship exists between the parties (*Associated Piping & Eng'g Co., Ltd. v. Jones (1936) 17 Cal. App. 2d 107, 110-111, 61 P.2d 536*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that a partnership was formed based on

the intent of the parties to an agreement. This contention may be used if there is no written partnership agreement, or if the parties did enter into a written agreement but that agreement either (1) did not specify clearly the nature of the relationship between the parties or (2) attempted to designate the relationship between them as something other than a partnership.

The parties' intent may be ascertained by the terms of the agreement, the parties' conduct, or both [*see Greene v. Brooks (1965) 235 Cal. App. 2d 161, 165-166, 45 Cal. Rptr. 99* ; *Constans v. Ross (1951) 106 Cal. App. 2d 381, 386, 235 P.2d 113]* . Although the terms of a written agreement are important with respect to whether a partnership has been formed, they do not always reflect the true intention of the parties as to their relationship. For example, it is possible for a written agreement to expressly provide that the relationship it covers is not a partnership. However, this type of provision generally has been found only to reflect the parties' intention that the relationship covered by the agreement not be called a partnership, which is immaterial. It is the intent of the parties to do the things that constitute partnership that usually is determinative [*Associated Piping & Eng'g Co., Ltd. v. Jones (1936) 17 Cal. App. 2d 107, 110-111, 61 P.2d 536]* . Thus, optional Paragraph B may be used to support a contention that a partnership was formed even though a written agreement provides to the contrary.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the parties' intent to form a partnership is determinative. They also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should discuss facts that show that regardless of the agreement between the parties, whether written or oral, the parties intended to enter into a partnership. This may be established by facts showing that the parties acted in such a manner to indicate their intent to carry on as co-owners of a business.

[c] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 170.30* and *170.31* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Intent to Carry On Business as Co-owners Is Determinative of Partnership

In ***Greene v. Brooks*** *(1965) 235 Cal. App. 2d 161, 45 Cal. Rptr. 99* , defendants approached plaintiffs and proposed that they go into business together as partners, and that plaintiffs buy a one-half interest in defendants' liquor license. Plaintiffs agreed and borrowed money from a third party to buy their interest. During the course of their relationship, plaintiffs and defendants discussed a formal partnership agreement, but plaintiffs were not interested due to defendants' pre-existing debts and corresponding liens on the license. The parties agreed to place plaintiffs' names on the liquor license, but did not agree on several other items. They left these matters to be resolved in the future. Thereafter, the relationship of the parties broke down, and plaintiffs brought an action to dissolve the partnership, and to liquidate and distribute the partnership assets. The trial court found that plaintiffs and defendants were associated as partners, and entered an interlocutory decree in plaintiffs' favor. Defendants appealed, contending that, at most, the evidence indicated that they had an agreement with plaintiffs to form a partnership in the future, but never executed the agreement since they could not agree on all of the terms.

The appellate court affirmed, holding that the ultimate test of the existence of a partnership is the intention of the parties to carry on a definite business as co-owners (*235 Cal. App. 2d 161, 165-166)* . The court held that that intention may be determined from the terms of the parties' agreement or from the surrounding circumstances. It held that the parties'

joint loan negotiations, a joint search for the business premises, mutual lease and sublease arrangements, a combined effort to remodel and equip the premises and manage the business, the fact that the alleged partners names were to go on a liquor license, the sharing of profits, and the presence of both names on checking accounts, service accounts, and health permits were all facts indicating the parties' intention to carry on as co-owners (*235 Cal. App. 2d 161, 166)* .

Constans v. Ross *(1951) 106 Cal. App. 2d 381, 235 P.2d 113* , arose from an action against three defendants (two brokers and a contractor) for the value of building materials furnished to defendant contractor. Defendant brokers entered into a written agreement with defendant contractor wherein they agreed to secure suitable locations, arrange financing, arrange and pay for plans and specifications, and provide venetian blinds, nails, and hardware with respect to residences to be built by defendant contractor. Defendant contractor agreed to enter into a written contract with each purchaser of a residence, and build the residences in accordance with the plans and specifications provided by defendant brokers. At trial, the jury concluded that defendants were partners, and awarded judgment against them. Defendant brokers appealed, contending that the agreement was not a partnership agreement because, among other things, it contained no express intention that defendant contractor would share the conduct of his business with them.

The appellate court affirmed, holding that the question of the existence of a partnership depends primarily on the intention of the parties ascertained from the terms of the agreement and from the corresponding circumstances (*106 Cal. App. 2d 381, 386)* . The court held that it is the intention as evidenced by the terms of the agreement that controls, not the subjective or undisclosed intention of the parties. The court found that defendants' agreement provided that the parties to it were mutually interested in the construction of residences for sale. They agreed to cooperate and work together in obtaining suitable sites and financing, and in the construction of the residences. It also found that defendants then proceeded to an apportionment of duties (*106 Cal. App. 2d 381, 387)* . Thus, the court held that the jury was justified in finding that there was a mutual interest and purpose between defendants to carry on business jointly (*106 Cal. App. 2d 381, 390)* .

[b] Intent to Do Things That Constitute Partnership Is Material

In ***Associated Piping & Eng'g Co., Ltd. v. Jones*** *(1936) 17 Cal. App. 2d 107, 61 P.2d 536* , defendants entered into a written contract whereby one defendant agreed to loan money to the other two defendants to promote and sell machines patented by the latter. In consideration of the loan, defendant borrowers assigned to defendant lender a one-third interest in the profits derived from the sale of the machines. Under the agreement, defendant lender was to collect and retain the funds derived from any sales and apply them to the loans. However, the agreement also provided that defendant borrowers were to retain full management and operation of the business. Plaintiff, the manufacturer and installer of the machines, sued to recover a balance due for merchandise sold and delivered, and for money advanced to and services performed for defendants. The trial court found that defendant lender was a partner of defendant borrowers by virtue of the contract, and rendered judgment for plaintiff against all defendants. Defendant lender appealed, contending that the contract merely established a relationship of debtor and creditor.

The appellate court affirmed, holding that notwithstanding the provisions of the contract that defendant lender was to loan defendant borrowers various sums of money, defendant lender was a member of the partnership. The court conceded that the relationship of debtor and creditor was shown and expressly provided for in the contract, but held that this fact did not establish that the parties did not intend to create a partnership. The court held that the parties did intend to create exactly the relationship as shown by the contract, but did not intend that relationship to be called that of partnership (*17 Cal. App. 2d 107, 110)* . It held that the parties' intent in that respect was immaterial, and if a contract by its terms establishes a partnership between the parties, even the expressed intent that it should not be so classed would be of no avail (*17 Cal. App. 2d 107, 110-111)* . It is the intent to do the things that constitute a partnership that usually determines whether or not that relationship exists between the parties (*17 Cal. App. 2d 107, 111)* .

[4] Additional Authorities

[a] Intent to Carry On Business as Co-owners Is Determinative of Partnership

Estate of Foreman (1969) 269 Cal. App. 2d 180, 74 Cal. Rptr. 699 , involved a proceeding in probate on a petition of respondents, decedent's partners and co-executors, for conveyance of decedent's partnership interest to them pursuant to a "Buy and Sell" agreement between the partners. Appellant, decedent's surviving spouse, also filed a petition for the removal of respondents as co-executors. Appellant contended that a partnership did not exist. The appellate court held that in the face of 20 years of partnership actions, it was unreasonable to deny the existence of the partnership merely because a schedule of assets was never attached to the partnership agreement, the assets were never appraised or valued, and the appraisal sum was never inserted in the blank space provided in the agreement. The court held that indefiniteness as to details will not void a partnership agreement when the indefiniteness may be made definite by other evidence. Citing *Greene v. Brooks (1965) 235 Cal. App. 2d 161, 45 Cal. Rptr. 99* (discussed in *§ 170.21[3][a]*), the court held that the ultimate test of the existence of a partnership is the intention of the parties to carry on a definite business as co-owners, and that intention may be determined from the terms of the parties' agreement or from the surrounding circumstances (*269 Cal. App. 2d 180, 188)* .

[b] Intent to Do Things That Constitute Partnership Is Material

In *Singleton v. Fuller (1953) 118 Cal. App. 2d 733, 259 P.2d 687* , an action on an account stated and on an indebtedness, the trial court found that defendants were associated together in a business venture for the purpose of purchasing, remodeling, and selling barracks, and that their relationship to each other was a general partnership. The evidence indicated that defendants became mutually interested in the venture. One defendant, however, did not desire that it appear that way and accordingly made it appear that his interest was only in loaning money to the other defendant, with the obligation of repayment of the principal, together with interest, being the only objective. There was evidence that on the first defendant's insistence, the instrument executed by defendants was drawn so that it did not show a partnership. The appellate court held that there was sufficient evidence to support the court's finding of a partnership. The court relied on the rule that an express stipulation under written articles of agreement, to the effect that the relationship is not one of partnership, is of no value if such is the actual nature of the business (*118 Cal. App. 2d 733, 740-742)* .

California Employment Stabilization Comm'n v. Walters (1944) 64 Cal. App. 2d 554, 149 P.2d 17 , was an action to recover money alleged to be due as contributions, interest, and penalties under the provisions of the California Unemployment Insurance Act. Plaintiff contended that because the word "partnership" was not used in framing an agreement between defendant and her employees to share the profits of defendant's business, it was not a partnership agreement. The appellate court held that the existence of a partnership may be established although the parties may not have used the words "partner" or "partnership." Furthermore, it is not essential that the parties should have known that their contract in law created a partnership. Citing *Associated Piping & Eng'g Co., Ltd. v. Jones (1936) 17 Cal. App. 2d 107, 61 P.2d 536* (discussed in *§ 170.21[3][b]*), the court held that it is the intent to do the things that constitute a partnership that usually determines whether or not that relationship exists between the parties (*64 Cal. App. 2d 554, 558)* .

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CHAPTER 170 PARTNERSHIPS
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1. General Partnerships

17-170 California Points & Authorities § 170.22

§ 170.22 Supporting Contention That Partnership Exists or Existed [Corp. Code §§ 16101, 16202(a); former Corp. Code §§ 15002, 15006]--Relinquishment of Control Is Evidence of Partnership

[1] FORM Supporting Contention That Partnership Exists or Existed [Corp. Code §§ 16101, 16202(a); former Corp. Code §§ 15002, 15006]--Relinquishment of Control Is Evidence of Partnership

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with 170.20, and may be combined with §§ 170.21, 170.23, 170.24 if appropriate according to the issues involved.*]

A PARTNERSHIP _____ [EXISTS *or* EXISTED] BETWEEN _____ [PLAINTIFF *or* DEFENDANT] _____ [*name*] AND _____ [DEFENDANT *or* PLAINTIFF] _____ [*name*] EVEN THOUGH _____ [PLAINTIFF *or* DEFENDANT] _____ [*name*] _____ [DID *or* DOES] NOT HAVE CONTROL OR MANAGEMENT OF THE BUSINESS BECAUSE THE PARTNERSHIP AGREEMENT _____ [PROVIDES *or* PROVIDED] THAT MANAGEMENT AND CONTROL WOULD BE ENTRUSTED TO _____ [*specify, e.g.,* PLAINTIFF *or* DEFENDANT _____ (*name*) *or specify some other alleged partner not a party to the action*], AND THEREFORE _____ [PLAINTIFF *or* DEFENDANT] _____ [*name*] WAS EXERCISING HIS/HER RIGHT TO CONTROL BY RELINQUISHING IT.

Community of Interest May Exist Even Though Party Relinquishes Control. When persons jointly associated agree that management of the enterprise should be entrusted to one of the group, there may nevertheless be a community of interest in view of the fact that the making of the agreement to relinquish control is itself exercise of the requisite right to control (*Moulin v. Der Zakarian (1961) 191 Cal. App. 2d 184, 190, 12 Cal. Rptr. 572*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention by a party that a partnership exists even though management or control of the partnership was given to one or more of the alleged partners. Relinquishing control by agreement between the parties is itself an exercise of the requisite right of control [*Moulin v. Der Zakarian (1961) 191 Cal. App. 2d 184, 190, 12 Cal. Rptr. 572]* . This form may be used in circumstances in which the parties have agreed that control should rest primarily with one partner because of the particular character of the business, or the duties of the other partners do not allow them the time to engage in the management and control of the business [*see, e.g.,* *Moulin v. Der Zakarian (1961) 191 Cal. App. 2d 184, 190, 12 Cal. Rptr. 572]* . This form may be most persuasive when the parties have reserved the right to terminate the management authority of the managing partner.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a partnership has been formed notwithstanding the fact that management or control of the business rests with one or more of the alleged partners. They also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should discuss facts that show that management or control of the business has been given to one or more of the parties by agreement among the parties.

[c] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 170.32* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Community of Interest May Exist Even Though Party Relinquishes Control

In ***Moulin v. Der Zakarian*** *(1961) 191 Cal. App. 2d 184, 12 Cal. Rptr. 572* , plaintiffs and defendant, pursuant to a written partnership agreement, entered into an association to carry on the business of trading in commodities for profit. The agreement provided that capital contributed to the partnership by the parties was only to be used to finance the trading in commodities and commodity futures. Plaintiffs brought an action against defendant for money had and received, contending that these payments constituted investments in a security that could not be lawfully sold by defendant without a permit from the Commissioner of Corporations [*see Corp. Code § 25008*]. The trial court found that a bona fide general partnership had been formed, and therefore it was not necessary for defendant to obtain a permit from the Commissioner. Plaintiffs appealed, contending, among other things, that the agreement did not constitute a partnership because the sole power to manage the business and incur liabilities was in defendant.

The appellate court affirmed. The court held that the necessary community of interest in the control of the partnership affairs existed under the agreement by reason of the fact that the partners elected to recognize circumstances requiring immediate and decisive action in a fluctuating market, and to give almost complete managerial powers to defendant as one of the partners. The court held that the other partners were not completely without control because they could terminate the agreement and defendant's managerial powers on 30 days written notice. It also held that the execution of an agreement relinquishing control is itself an exercise of the requisite right of control over the conduct of the partnership business (*191 Cal. App. 2d 184, 190)* .

[4] Additional Authorities

[a] Community of Interest May Exist Even Though Party Relinquishes Control

The facts and procedural background of *Associated Piping & Eng'g Co., Ltd. v. Jones (1936) 17 Cal. App. 2d 107, 61 P.2d 536* , are discussed in *§ 170.21[3][b]*. In *Associated Piping*, the court held that it is the intent to do the things that constitute a partnership that usually determines whether or not that relationship exists between the parties. The court held that a provision in the partnership agreement that two of three partners were to retain full control of the management and operation of the business did not prevent a partnership. It held that the fact that the parties agreed to give the management of the partnership enterprise to one or more person did not prevent a partnership from arising (*17 Cal. App. 2d 107, 111)* .

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1. General Partnerships

17-170 California Points & Authorities § 170.23

§ 170.23 Supporting Contention That Partnership Exists or Existed [Corp. Code §§ 16101, 16202(a); former Corp. Code §§ 15002, 15006]--Person Who Receives Share of Profits Is Presumed to Be Partner [Corp. Code § 16202(c)(3)]

[1] FORM Supporting Contention That Partnership Exists or Existed [Corp. Code §§ 16101, 16202(a); former Corp. Code §§ 15002, 15006]--Person Who Receives Share of Profits Is Presumed to Be Partner [Corp. Code § 16202(c)(3)]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with § 170.20, and may be combined with §§ 170.21, 170.22, or 170.24 if appropriate according to the issues involved.*]

BECAUSE THE AGREEMENT BETWEEN _____ [PLAINTIFF *or* DEFENDANT] _____ [*name*] AND _____ [DEFENDANT *or* PLAINTIFF]_____ [*name*] _____ [PROVIDES *or* PROVIDED] THAT THE PROFITS OF THE BUSINESS _____ [ARE *or* WERE] TO BE SHARED BY THEM, _____ [*name*] IS PRESUMED TO BE A PARTNER IN THE BUSINESS.

A. Sharing Profits Is Prima Facie Evidence of Partnership. A person who receives a share of the profits of a business is presumed to be a partner in the business (*Corp. Code § 16202(c)(3)*; *Constans v. Ross (1951) 106 Cal. App. 2d 381, 386, 235 P.2d 113* ; *see Holmes v. Lerner (1999) 74 Cal. App. 4th 442, 453-454, 88 Cal. Rptr. 2d 130*).

[*Optional*] **B. Implied Agreement to Share Losses.** If an agreement only contains an express provision for the division of profits, a corresponding division of losses will be implied (*California Employment Stabilization Comm'n v. Walters (1944) 64 Cal. App. 2d 554, 558, 149 P.2d 17* ; *San Joaquin Light & Power Corp. v. Costaloupes (1929) 96 Cal. App. 322, 334, 274 P. 84*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a partnership existed when the evidence shows that the parties agreed to and did share in the profits of the business. A person who receives a share of the profits of a business is presumed to be a partner in the business [*Corp. Code § 16202(c)(3)*]. Optional Paragraph B may be used when it is not evident from the agreement that the parties also agreed to share losses. An agreement to share profits implies an agreement to also share losses [*see California Employment Stabilization Comm'n v. Walters (1944) 64 Cal. App. 2d 554, 558, 149 P.2d 17* ; *San Joaquin Light & Power Corp. v. Costaloupes (1929) 96 Cal. App. 322, 334, 274 P. 84]* . This may be most useful when the opposing party is attempting to defend an action on the ground that a partnership did not exist because the parties allegedly only agreed to share profits.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that because a party shared in the profits of a business, he or she is presumed to be a partner in the business. They also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should discuss facts showing that the agreement between the parties provided for a sharing of the profits of the business.

[c] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 170.30, 170.34*, and *170.35* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Sharing Profits Is Prima Facie Evidence of Partnership

The facts and procedural background of ***Constans v. Ross*** *(1951) 106 Cal. App. 2d 381, 235 P.2d 113* , are discussed in *§ 170.21[3][a]*. In *Constans*, the appellate court, relying in part on former Corp. Code § 15007(4), held that ordinarily the existence of a partnership is evidenced by the right of the respective parties to participate in the profits and losses and in the management of the business (*106 Cal. App. 2d 381, 386)* . It held that the agreement in this case was not cast in the form of an agency contract as defendant brokers alleged, because it contained no agreement by defendant contractor to pay defendant brokers a commission for their services. The court held that, to the contrary, the agreement provided for a division of profits in that defendant contractor was to receive as profit $9,000 or $7,990, less the cost to him of construction, and the practice of the parties, operating under the agreement, was that defendant brokers received $1,000 of the purchaser's payments (*106 Cal. App. 2d 381, 387)* . The court also held that the fact that the profits and losses were not equally shared did not necessarily compel a conclusion that no partnership existed because although a partnership generally contemplates an equal sharing of the profits and losses in the prosecution of a common purpose, the division may be left to the agreement of the parties (*106 Cal. App. 2d 381, 389)* .

In ***Holmes v. Lerner*** *(1999) 74 Cal. App. 4th 442, 88 Cal. Rptr. 2d 130* , plaintiff claimed that the first defendant breached an oral partnership agreement with plaintiff for creation of a cosmetics company, and that the second defendant interfered with the contract. The trial court found defendants liable to plaintiff for compensatory and punitive damages and granted a nonsuit on various causes of action against the second defendant. The appellate court reversed the judgment against the second defendant for interference with the contract and the order granting a nonsuit, and in all other respects affirmed the judgment and a postjudgment order. Defendants contended that they did not discuss sharing profits of the business with plaintiff and that without an agreement to share profits, there could be no partnership. The court examined the definition of "partnership" set forth in former Corp. Code § 15006 [*see now Corp. Code § 16101(9)*] and the fact that it omitted language regarding division of profits which had been included in prior versions of the

definition of partnership. The fact that former Corp. Code § 15006 defined a partnership as "an association of two or more persons to carry on as coowners a business for profit," and that former Corp. Code § 15007(4) [*see now Corp. Code § 16202(c)(3)*] provided that in determining whether a partnership exists, "[t]he receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner," mandated the conclusion that profit sharing is prima facie evidence of being a partner, rather than a required element of the definition of a partnership. The court therefore held that the trial court properly determined that a partnership had been formed, notwithstanding the absence of an express agreement to share profits (*74 Cal. App. 4th 442, 453-454, 457)* .

[b] Implied Agreement to Share Losses

California Employment Stabilization Comm'n v. Walters *(1944) 64 Cal. App. 2d 554, 149 P.2d 17* , was an action brought by plaintiff state commission to recover money alleged to be due as contributions, interest, and penalties under the California Unemployment Insurance Act. Defendant operated an inn and connected concessions located on a state park. At the beginning of the inn's last year of operation, defendant entered into a written agreement with her former employees to operate the business together and divide the net earnings. The agreement defined net earnings as gross earnings or income less expenses incident to the operation of the inn. The trial court found that the parties that signed the agreement entered into a partnership, and therefore defendant was not subject to payment of the contributions provided for in the act. Plaintiff appealed.

The appellate court affirmed, holding that it did not matter, as plaintiff contended, that the agreement failed to provide for a share of the losses, for it is well settled that an agreement to divide profits implies an agreement for corresponding division of losses (*64 Cal. App. 2d 554, 558)* .

In ***San Joaquin L. & P. Corp. v. Costaloupes*** *(1929) 96 Cal. App. 322, 274 P. 84* , two defendants entered into a written contract by which one agreed to loan money to the other in consideration of which the former could warehouse and sell all of the latter's output. The contract provided that after payment from the sales proceeds, expenses, wage allowances, and the monies advanced by defendant lender, the surplus was to be divided equally between the two defendants. It expressly provided that the relationship was not a partnership, the monies advanced to defendant borrower were advanced as a loan and not as a contribution to the business, and the receipt of one-half of the net profits was in lieu of interest payments on the indebtedness. There was no provision as to the sharing of losses, although the contract did provide that if it appeared that the business did not pay, the agreement could be terminated. Plaintiff, a power company, sued defendants to recover money allegedly due under contracts for the furnishing of light and power by plaintiff to defendant borrower. All defendants except defendant lender were dismissed from the action, and the trial court rendered judgment against him, finding that he was a partner in defendant borrower's firm. Defendant lender appealed, contending that he was only defendant borrower's creditor.

The appellate court affirmed, holding that, in essence, the agreement between the defendants contemplated the united action of the parties in manufacturing and sales, and the sharing of joint expenses incurred through such activities. The court held that an agreement to divide the profits of a business implies an agreement for corresponding division of its losses, unless otherwise expressly stipulated. Courts will not countenance contrivances for giving persons the whole of the advantage of a partnership without subjecting them to the liabilities, and an agreement that attempts to carry out a joint venture for the mutual profit of the adventurers and evade their responsibility for losses may be enforced and construed as creating a partnership (*96 Cal. App. 322, 334)* .

[4] Additional Authorities

[a] Sharing Profits Is Prima Facie Evidence of Partnership

The facts and procedural background of *Moulin v. Der Zakarian (1961) 191 Cal. App. 2d 184, 12 Cal. Rptr. 572* , are discussed in *§ 170.22[3][a]*. In *Moulin*, the court held that one of the rules applicable to the determination of a

partnership is that a partnership agreement between the parties must provide for the sharing of profits and losses, or in other words, the sharing of net profits (*191 Cal. App. 2d 184, 189)* . The court held that the evidence, and the instrument at issue alleged to be a partnership agreement, fully supported the finding that a general partnership was formed because, among other things, the agreement was unequivocal in stating the basis under which the partners were to share the net profits of the partnership (*191 Cal. App. 2d 184, 190-191)* .

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17-170 California Points & Authorities § 170.24

§ 170.24 Supporting Contention That Partnership Exists or Existed [Corp. Code §§ 16101, 16202(a); former Corp. Code §§ 15002, 15006]--Joint Ownership of Property or Capital Contribution Not Necessary

[1] FORM Supporting Contention That Partnership Exists or Existed [Corp. Code §§ 16101, 16202(a); former Corp. Code §§ 15002, 15006]--Joint Ownership of Property or Capital Contribution Not Necessary

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with § 170.20, and may be combined with §§ 170.21-170.23 if appropriate according to the issues involved*].

A PARTNERSHIP _____ [EXISTS *or* EXISTED] BETWEEN _____ [PLAINTIFF or DEFENDANT] _____ [*name*] AND _____ [DEFENDANT *or* PLAINTIFF] _____ [*name*] EVEN THOUGH _____ [_____ (PLAINTIFF *or* DEFENDANT) DID NOT CONTRIBUTE ANY CAPITAL TO THE PARTNERSHIP *or* THEY _____ (DO *or* DID) NOT JOINTLY OWN THE PROPERTY THAT FORMED THE PARTNERSHIP CAPITAL].

A. Joint Ownership of Property That Constitutes Partnership Capital Not Necessary. It is not necessary for a partnership's existence that the partners jointly own the property that constitutes the partnership capital (*Brown v. Fairbanks (1953) 121 Cal. App. 2d 432, 441, 263 P.2d 355*).

B. Contribution of Capital Not Necessary. The fact that members of a partnership do not put money into the business may have some evidentiary value, but it is not determinative as to whether a partnership exists (*Whitley v. Bradley (1910) 13 Cal. App. 720, 729, 110 P. 596*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a partnership was formed and exists even

though the party asserting existence did not contribute any capital or own any portion of the partnership property. It is not necessary that parties jointly own partnership capital in order to establish a partnership [*Brown v. Fairbanks (1953) 121 Cal. App. 2d 432, 441, 263 P.2d 355]* . For example, the above contention may be used when one party to an alleged partnership agreement initially obtains the financing necessary to acquire partnership property and commence business with the understanding that the other party will contribute his or her share at a later date, and the first party thereafter claims that a partnership does not exist before the second party makes a contribution.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a partnership was formed and exists even though the parties do not jointly own the partnership capital. For example, this form may be used in opposition to a demurrer to a complaint made on the ground that no facts have been pleaded showing that there is joint ownership. These points and authorities also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, it is important for counsel to demonstrate affirmatively that a partnership exists under the facts of the case. For example, counsel should discuss facts showing that a partnership agreement exists, and/or that the conduct of the parties indicates that they intended to form a partnership.

[3] Discussion of Authorities

[a] Joint Ownership of Property That Constitutes Partnership Capital Not Necessary

In ***Brown v. Fairbanks*** *(1953) 121 Cal. App. 2d 432, 263 P.2d 355* , plaintiffs alleged that they initially agreed that defendant would contribute money to commence operation of a mine in exchange for one-half interest therein. Allegedly, when this agreement fell through, plaintiffs proposed that defendant work the mine for them and they would pay him for his labor. Thereafter, plaintiffs leased the mine to another party, and paid defendant one-half of the proceeds received from the party for ore extracted from the mine. Plaintiffs brought an action for a declaration that the latter agreement was merely a contract of employment, and not a partnership. The trial court found that plaintiffs and defendant entered into an oral agreement of venture or partnership even though record title of the mining claim stood in plaintiffs' name. Plaintiffs appealed.

The appellate court affirmed, holding that to constitute a partnership, it is not necessary for partners to jointly own property forming its capital (*121 Cal. App. 2d 432, 441)* . The court held that because plaintiffs first contacted defendant and offered him one-half interest in the claim, this fact, in and of itself, indicated that plaintiffs were willing to give a one-half interest in the mine under certain conditions (*121 Cal. App. 2d 432, 440-441)* . The court then noted that defendant was subsequently urged to go into the mine and perform certain services with plaintiffs, and promised that if their efforts proved successful, he was to receive one-half interest in "it." The court held that this provision under these circumstances could be construed to mean the mine as well as the profits from its operations (*121 Cal. App. 2d 432, 442)* .

[b] Contribution of Capital Not Necessary

In ***Whitley v. Bradley*** *(1910) 13 Cal. App. 720, 110 P. 596* , plaintiffs and defendant entered into an agreement to form a partnership for the purpose of manufacturing and selling cement washtrays, and doing a general cement construction business. The agreement provided that each of the partners would contribute one-third of the capital, receive one-third of the profits, and be liable for one-third of the debts. Thereafter, defendant denied the existence of a partnership, and excluded plaintiffs from the business. Plaintiffs brought an action for accounting and dissolution, and requested that a receiver be appointed to take possession of the assets and manage the business. The trial court granted plaintiffs' request and appointed a receiver, pendente lite. Defendant appealed, contending that the evidence was insufficient to show that

there was ever an agreement to organize a partnership, but that the parties agreed to form a corporation, and the property claimed as partnership property was transferred to and owned by the corporation.

The appellate court affirmed. The court noted that although plaintiffs did not contribute any money towards establishing the business, they testified that they were ready and willing to put up their respective shares but were told by defendant to wait until the business was incorporated. At that time, the stock and profits would be divided equally (*13 Cal. App. 720, 727)* . The court held that because there was some showing that the parties actually formed and for a time carried on business through a partnership, it could not reverse the trial court's order. It noted that the lease under which the business was run was a valuable asset taken in the names of two of the original parties. The property of the business was never transferred to the corporation, and still remained in the name of the partnership. The court held that the fact that plaintiffs did not put any money into the business may have had some evidentiary value tending to negate the existence of a partnership, but it by no means follows that, because one partner may not put up his or her share of the capital under an agreement to form a partnership, the combination so formed is any less a partnership (*13 Cal. App. 720, 729)* .

[4] Additional Authorities

[a] Joint Ownership of Property That Constitutes Partnership Capital Not Necessary

In *Galardi v. State Bar (1987) 43 Cal. 3d 683* , the California Supreme Court upheld certain findings and conclusions of the Review Department of the State Bar Court in a matter in which discipline was based on petitioner's breach of fiduciary duties to real estate venture partners who were not clients. In one venture, petitioner contributed real property, title to which remained in his name, and the venture partner contributed cash. The California Supreme Court said that a joint venture may exist although the property forming the capital contribution of the venture is not jointly owned by the parties, and although one of the parties contributed money, another property, and another skill to the enterprise (*43 Cal. 3d 683, 691)* .

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B. Partnership Formation and Existence
1. General Partnerships

17-170 California Points & Authorities §§ 170.25-170.29

[Reserved]

§§ 170.25[Reserved]

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17-170 California Points & Authorities § 170.30

§ 170.30 Opposing Contention That Partnership Exists or Existed [Corp. Code §§ 16101, 16202(a); former Corp. Code §§ 15002, 15006]--Failure to Prove Partnership's Existence

[1] FORM Opposing Contention That Partnership Exists or Existed [Corp. Code §§ 16101, 16202(a); former Corp. Code §§ 15002, 15006]--Failure to Prove Partnership's Existence

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE EXISTENCE OF A PARTNERSHIP BETWEEN _____ [PLAINTIFF *or* DEFENDANT] _____ [*name*] AND _____ [DEFENDANT *or* PLAINTIFF] _____ [*name*] HAS NOT BEEN ESTABLISHED BECAUSE _____ [PLAINTIFF *or* DEFENDANT] _____ [*name*] HAS NOT MET HIS/HER BURDEN OF SHOWING THAT THE PARTIES ENTERED INTO AN ASSOCIATION TO CARRY ON AS CO-OWNERS A BUSINESS FOR PROFIT [BY CLEAR AND CONVINCING EVIDENCE].

A. Partnership Defined. [*See § 170.20, Paragraph A.*]

B. Burden of Proof That Partnership Exists. The burden of proving the existence of a partnership by competent evidence is on the person asserting its existence (*Frisch v. Frisch (1950) 97 Cal. App. 2d 183, 185, 217 P.2d 150*).

[*Optional*] **C. Persons Not Partners Between Themselves Are Not Partners as to Third Parties.** Except for persons who are liable as partners under *Corporations Code Section 16308* either because they misrepresent themselves as partners or consent to such misrepresentations, persons who are not partners as to each other are not partners as to third persons (*see Corp. Code § 16202(c) or* former Corp. Code § 15007(1); *see also Armato v. Baden (1999) 71 Cal. App. 4th 885, 897-899, 84 Cal. Rptr. 2d 294* ; *Henningsen v. Howard (1953) 117 Cal. App. 2d 352, 359, 255 P.2d 837*).

[*Add points and authorities relating to the specific fact situation in question (see, e.g., §§ 170.31 -170.35*)].

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that a partnership was formed. The burden of proving the existence of a partnership by competent evidence is on the person asserting it; the above contention may be used when it is alleged that a party failed to meet that burden [*see Frisch v. Frisch (1950) 97 Cal. App. 2d 183, 185, 217 P.2d 150]* . Optional Paragraph C may be useful if the parties to an enterprise did not intend to be partners, or one or more of the essential elements of partnership was missing, and thus the parties are not liable as partners to third-party creditors.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a partnership was not formed and does not exist. These points and authorities also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should discuss facts showing that the party asserting that a partnership existed did not meet his or her burden of proof.

[c] Opposing Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposition to the contentions supported by the points and *authorities in §§ 170.20 -170.24*.

[3] Discussion of Authorities

[a] Burden of Proof That Partnership Exists

Frisch v. Frisch *(1950) 97 Cal. App. 2d 183, 217 P.2d 150* , involved an action by plaintiff against his parents to establish the existence of a partnership between himself and his parents in real property purchased by his parents and in the personal property used in the business conducted on the property. A dissolution, accounting, and sale was also sought by plaintiff. The trial court rendered judgment for defendants, and plaintiff appealed. The appellate court affirmed, holding that the burden of proving the existence of a partnership by competent evidence was on plaintiff (*97 Cal. App. 2d 183, 185)* . The court held that there was ample evidence to support the trial court's finding that there was no partnership agreement. Certain admissions contained in letters written by plaintiff's father and relied on by plaintiff created, at most, a conflict in the evidence that was resolved in favor of defendants by the trial court (*97 Cal. App. 2d 183, 184-185)* .

[b] Persons Not Partners Between Themselves Are Not Partners as to Third Parties

In ***Armato v. Baden*** *(1999) 71 Cal. App. 4th 885, 897-899, 84 Cal. Rptr. 2d 294* , a former patient of a medical group who was treated by a physician assistant employed by the group filed an action against independent contractor doctors who worked part time for the group. Plaintiff alleged that defendants' conduct created an ostensible partnership within the group, so that the doctors were jointly liable for the negligent treatment plaintiff allegedly received from the physician assistant. The trial court granted summary judgment for defendants and the appellate court affirmed. The court held that even if former Corp. Code § 15016 applied [*see now Corp. Code § 16308*], it did not support imposition of liability since defendants did not represent themselves (or consent to another representing them) as "partners in an existing partnership" or as a partner "with one or more persons not actual partners." The mere listing of the independent contractor doctors' names on the door to the medical group's office and on appointment cards and prescription pads did not reasonably induce the belief that the doctors and group's physician assistant, or doctors and medical group, were partners (*71 Cal. App. 4th 885, 898-899)* .

In ***Henningsen v. Howard*** *(1953) 117 Cal. App. 2d 352, 255 P.2d 837* , defendant brothers owned an office equipment business as a partnership. They also transacted other kinds of business, and had a general understanding that if the second defendant brother transacted any business in his own name, the first defendant brother would receive 50 percent of the profit and contribute 50 percent of any loss. Defendant brothers purchased surplus equipment in New York with other persons, including another defendant, as a joint venture. The second defendant brother went to New York to transact the venture, and opened an office there. At the third defendant's initiative, the New York venture entered the textile business. A certificate of limited partnership was filed stating that the third defendant, a fourth defendant, and the second defendant brother were interested in the textile business under the defendant brothers' partnership name. The first defendant brother had no contact with the textile business, although, pursuant to the understanding noted above, he received 50 percent of the profits. The certificate listed the second defendant brother as a limited partner, and the third and fourth defendants as the general partners in the textile business. The second defendant brother made a capital contribution to the business out of a bank account in the defendant brothers' partnership name. Thereafter, the limited partnership bought and received textiles from plaintiff's assignor. Plaintiff brought an action against all defendants individually, and doing business as a partnership for a balance due on the account. The trial court rendered judgment for defendants, finding that the first defendant brother was not a partner in the limited partnership, and that the second defendant brother was a limited partner and was not liable for the debts of the partnership. Plaintiff moved for a new trial, and the motion was granted on the ground that the evidence was insufficient to support the decision of the court. Defendants appealed.

The appellate court reversed, holding that although it may be inferred from the evidence that the second defendant brother was representing his partnership with his brother, it did not follow that it would cause defendant brothers to be liable as general partners (*117 Cal. App. 2d 352, 358)* . The court held that under the Uniform Partnership Act, except in cases of estoppel, one is not a partner as to third persons unless he or she is a partner with respect to his or her partners. The only persons who are partners are those who carry on a business as co-owners for profit. The court held that the receipt of a share of the profits is only prima facie evidence that a person is a partner, and it can be rebutted with evidence that the person is not a partner (*117 Cal. App. 2d 352, 359)* . The court held that the second defendant brother was not a general partner because he did not intend to become one, and only represented himself as a limited partner (*117 Cal. App. 2d 352, 360)* . It then held that the first defendant brother, although he may have been a subpartner with the second defendant brother, was not a partner in the limited partnership because he had no direct connection with it. Even if he was directly entitled to profits from the limited partnership because the second defendant brother represented him as an undisclosed principal or represented the brothers' partnership, the prima facie evidence was rebutted because the first defendant brother did not intend to be a partner, did not hold himself out as a partner, and nobody relied on his being so (*117 Cal. App. 2d 352, 361)* .

[4] Additional Authorities

[a] Burden of Proof That Partnership Exists

In *Milstein v. Sartain (1943) 56 Cal. App. 2d 924, 133 P.2d 836* , an action in assumpsit for recovery on five different promissory notes, plaintiff alleged that the individual defendants were engaged in business as partners. A default judgment was entered against defendants for procedural defects in their answer, and the appellate court reversed. After disposing of the procedural issues, the court held that affidavits of plaintiff and his attorney to the effect that they interviewed one of the defendants and that this defendant then admitted the existence of the partnership were not competent to show that defendants were engaged in business as partners (*56 Cal. App. 2d 924, 932)* . The court held that the burden is on the one asserting the existence of a partnership to prove it by competent evidence. Before a partner may be charged as such by a plaintiff's declarations, a prima facie showing of the existence of the partnership first must be established (*56 Cal. App. 2d 924, 932-933)* .

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17-170 California Points & Authorities § 170.31

§ 170.31 Opposing Contention That Partnership Exists or Existed [Corp. Code §§ 16101, 16202(a); former Corp. Code §§ 15002, 15006]--Absence of Words or Phrases in Agreement That Designate Partnership Relation Is Significant

[1] FORM Opposing Contention That Partnership Exists or Existed [Corp. Code §§ 16101, 16202(a); former Corp. Code §§ 15002, 15006]--Absence of Words or Phrases in Agreement That Designate Partnership Relation Is Significant

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with § 170.30, and may be combined with §§ 170.32-170.35 if appropriate according to the issues involved*].

A PARTNERSHIP _____ [DOES *or* DID] NOT EXIST BETWEEN _____ [PLAINTIFF *or* DEFENDANT] _____ [*name*] AND _____ [DEFENDANT *or* PLAINTIFF] _____ [*name*] BECAUSE _____ [THE AGREEMENT _____ (DOES *or* DID) NOT CONTAIN ANY WORDS OR PHRASES DESIGNATING A PARTNERSHIP RELATION *or* THE PARTIES DESIGNATED THEIR RELATIONSHIP AS SOMETHING OTHER THAN A PARTNERSHIP], AND IT IS _____ [UNCLEAR WHETHER THE PARTIES INTENDED THEIR RELATIONSHIP TO BE A PARTNERSHIP *or* EVIDENT FROM THE PARTIES' CONDUCT THAT THEY DID NOT INTEND THEIR RELATIONSHIP TO BE A PARTNERSHIP].

Absence of Words or Phrases Designating Partnership Significant When Intent of Parties Is Unclear. Although the existence of a partnership may be established when the words "partner" or "partnership" are not used, the presence or absence of such words may be significant when the intent of parties to form a partnership is not clear under the circumstances (*Smith v. Schultz (1891) 89 Cal. 526, 534, 26 P. 1087* ; *Oscar Krenz Copper & Brass Works, Inc. v. England (1930) 109 Cal. App. 747, 753, 293 P. 689*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that a partnership existed between the parties. Although the general rule is that the parties' intention not to call their relationship a partnership is immaterial when it is clear from the terms of the agreement and the parties' conduct that they intended to enter into a partnership [*see § 170.21, above*], the name the parties have given to their relationship should be given some weight when that intent is unclear [*Smith v. Schultz (1891) 89 Cal. 526, 534, 26 P. 1087* ; *Oscar Krenz Copper & Brass Works, Inc. v. England (1930) 109 Cal. App. 747, 753, 293 P. 689]* . This form may be useful when it is unclear what the parties intended when they entered into an agreement, or their conduct suggests that they did not intend to form a partnership, and the agreement clearly designates their relationship as something other than a partnership.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that because the parties did not designate their relationship as a partnership in their agreement, a partnership was not formed. They also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should discuss facts showing that the parties to the agreement designated their relationship as something other than a partnership. Counsel should also discuss any facts showing that the parties' conduct indicates that they did not intend to enter into a partnership.

[c] Opposing Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 170.21*.

[3] Discussion of Authorities

[a] Absence of Words or Phrases Designating Partnership Significant When Intent of Parties Is Unclear

In ***Smith v. Schultz*** *(1891) 89 Cal. 526, 26 P. 1087* , plaintiff and defendants entered into a lease for a three-year term. Plaintiff contended that the lease instrument created a partnership and gave each party the right to end the relationship at any time. He brought an action for dissolution of the alleged partnership, an accounting and settlement, and the appointment of a receiver. The trial court found that a partnership existed. The partnership was dissolved, and a receiver was appointed to take possession of the subject property. There was an accounting and a judgment rendered against defendants to be paid out of the assets. Defendants appealed.

The California Supreme Court reversed, holding that the instrument did not create a partnership (*89 Cal. 526, 533)* . The Court observed that neither the word "partner" nor "partnership," nor any other word or phrase ordinarily employed in written contracts of partnership, was used in the agreement. The court held that although the use of those words is not essential when the whole instrument shows clearly that a partnership was meant, their absence is significant when such intent is not clear. The court based its holding on the fact that there was nothing in any of the language of the instrument that expressed or suggested plaintiff's intention was to be a general partner in business with defendants (*89 Cal. 526, 534)* .

In ***Oscar Krenz Copper & Brass Works, Inc. v. England*** *(1930) 109 Cal. App. 747, 293 P. 689* , defendant entered into a contract with a licensee, granting the licensee the exclusive right to manufacture and sell patented paint spraying machines. Defendant agreed to advance $750 to the licensee for advertising costs. This sum was to be repaid out of the first profits realized. The licensee agreed to pay defendant, as monthly royalty payments, 50 percent of the profits. The licensee assured defendant that he had made arrangements for funds to carry on the business, but he contributed no

capital. When the licensee was unable to procure the funds, defendant advanced money to him for living expenses. All of the management and control of the business was done by the licensee. Thereafter, the licensee went into bankruptcy. A creditor of the licensee brought an action to recover for goods alleged to have been sold to defendant by virtue of his relationship with the licensee. However, the trial court rendered judgment in favor of defendant, finding that no partnership existed between defendant and the licensee. Plaintiff creditor appealed.

The appellate court affirmed, holding that the evidence, taken as a whole, was sufficient to support the conclusion of the trial court that no partnership existed. The court observed that a partnership relation was not mentioned in the agreement between defendant and licensee. The court held that although the existence of the relation may be established when the words "partner" and "partnership" are not used, the presence or absence of such words may be significant when the circumstances leave the question in doubt (*109 Cal. App. 747, 753)* .

[4] Additional Authorities

[a] Absence of Words or Phrases Designating Partnership Significant When Intent of Parties Is Unclear

Title Ins. & Trust Co. v. Grider (1908) 152 Cal. 746, 94 P. 601 , involved an action by plaintiff receiver to recover money received by defendants from the sale of lots under an agreement between defendants and a third party. The action was brought against defendants as the third party's agents. Defendants appealed the judgment rendered against them, contending, among other things, that the agreement between them and the third party constituted a partnership. The California Supreme Court affirmed, holding that while the question whether or not a partnership exists is to be determined from the nature of the relation agreed on, rather than the name that the parties have given to it, some weight must be allowed to the language of the parties themselves. The court observed that the agreement designated defendants as agents. It also observed that there was nothing in the agreement that indicated that defendants were to pay any part of the losses that might be suffered, nor were they given power to make contracts binding all. The court held that although certain expenses were to be borne by defendants, and their compensation for their services was to be determined by the net profits, these features were not inconsistent with the existence of an agency, which, on the face of the agreement, the parties were creating (*152 Cal. 746, 752)* .

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17-170 California Points & Authorities § 170.32

§ 170.32 Opposing Contention That Partnership Exists or Existed [Corp. Code §§ 16101, 16202(a); former Corp. Code §§ 15002, 15006]--No Community of Interest

[1] FORM Opposing Contention That Partnership Exists or Existed [Corp. Code §§ 16101, 16202(a); former Corp. Code §§ 15002, 15006]--No Community of Interest

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with § 170.30, and may be combined with § 170.31 or §§ 170.33-170.35 if appropriate according to the issues involved.*]

A PARTNERSHIP _____ [DOES *or* DID] NOT EXIST BETWEEN _____ [PLAINTIFF *or* DEFENDANT] _____ [*name*] AND _____ [DEFENDANT *or* PLAINTIFF] _____ [*name*] BECAUSE THERE _____ [IS *or* WAS] NO COMMUNITY OF INTEREST IN THE BUSINESS.

Community of Interest Is Necessary for Partnership to Exist. To constitute a partnership relation, there must be a community of interest that empowers each party to make contracts, incur liabilities, and manage the whole business (*Smith v. Grove (1941) 47 Cal. App. 2d 456, 461-462, 118 P.2d 324*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that a partnership has been formed or exists. A partnership requires a community of interest such that each party may make contracts, incur liabilities, and manage the whole business, and this form may be used to contend the absence of such a relationship [*see Smith v. Grove (1941) 47 Cal. App. 2d 456, 461-462, 118 P.2d 324]* . For example, the argument in this memorandum might be raised by a defendant against whom recovery is sought as a partner in a business that is the subject of litigation, and in which the defendant shared profits, but had no management or control of the business.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a partnership was not formed because there was no community of interest therein. They also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should discuss any facts showing that a party had no duties with respect to the management or control of the business.

[c] Opposing Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in §§ 170.20* and *170.22*.

[3] Discussion of Authorities

[a] Community of Interest Is Necessary for Partnership to Exist

In ***Smith v. Grove*** *(1941) 47 Cal. App. 2d 456, 118 P.2d 324* , plaintiffs and defendant entered into an agreement whereby defendant was to manage, patent, manufacture, sell, or otherwise dispose of an invention by plaintiffs. The agreement stated that in consideration for defendant's services, plaintiffs and defendant entered into a partnership to share equally in the benefits that accrued from the invention. Plaintiff brought a declaratory action to establish the existence of a partnership, and for an accounting and other relief. The trial court rendered its findings in favor of defendant, and plaintiff appealed.

The appellate court affirmed, holding that the agreement between the plaintiffs and defendant did not create a partnership relation between them because, among other things, it purported to impose on defendant not only the duty of perfecting the invention but of negotiating sales of rights to the use of the invention (*47 Cal. App. 2d 456, 462)* . The court held that to constitute a partnership relation, there must be a community of interest that empowers each party to make contracts, incur liabilities, and manage the whole business (*47 Cal. App. 2d 456, 461-462)* .

[4] Additional Authorities

[a] Community of Interest Is Necessary for Partnership to Exist

In *Swofford v. Industrial Acc. Com. (1953) 121 Cal. App. 2d 400, 263 P.2d 129* , the appellate court annulled an award by respondent against petitioner. Respondent had found that a truck driver sustained personal injury while allegedly employed by petitioner and his son, individually and as partners. Relying on the rule that the basic elements necessary for a partnership are a community of interest and a sharing of profits, the court held that no inferences could be drawn from the conduct of petitioner and his son that they intended to associate themselves because the evidence showed that petitioner had no degree of control in his son's business, and that all control of the truck in which the driver was injured was with the son (*121 Cal. App. 2d 400, 401-402)* .

Dickenson v. Samples (1951) 104 Cal. App. 2d 311, 231 P.2d 530 , involved an action by plaintiff to recover rent on a business premises leased to defendant for use as a billiard parlor. Defendant cross complained for breach of an alleged partnership contract because the contract provided that rent was to be paid on a basis of profits realized from the business. The appellate court affirmed a directed verdict that no partnership existed, holding that a mere sharing in the profits paid as rent to a landlord does not justify an inference of partnership (*104 Cal. App. 2d 311, 315)* . Citing *Smith v. Grove (1941) 47 Cal. App. 2d 456, 462, 118 P.2d 324* (discussed in [3], *above*), the court relied on the rule that participation to some extent in the management of a business is a primary element in a partnership organization, and is

virtually essential to a determination that such a partnership relationship exists (*104 Cal. App. 2d 311, 315)* .

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17-170 California Points & Authorities § 170.33

§ 170.33 Opposing Contention That Partnership Exists or Existed [Corp. Code §§ 16101, 16202(a); former Corp. Code §§ 15002, 15006]--Joint Ownership of Property Does Not in Itself Establish Partnership [Corp. Code § 16202(c)(1); former Corp. Code § 15007(2)]

[1] FORM Opposing Contention That Partnership Exists or Existed [Corp. Code §§ 16101, 16202(a); former Corp. Code §§ 15002, 15006]--Joint Ownership of Property Does Not in Itself Establish Partnership [Corp. Code § 16202(c)(1); former Corp. Code § 15007(2)]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with § 170.30, and may be combined with §§ 170.31-170.32 or §§ 170.34-170.35 if appropriate according to the issues involved.*]

A PARTNERSHIP _____ [DOES *or* DID] NOT EXIST BETWEEN _____ [PLAINTIFF *or* DEFENDANT] _____ [*name*] AND _____ [DEFENDANT *or* PLAINTIFF] _____ [*name*] SIMPLY BY VIRTUE OF THEIR JOINT OWNERSHIP OF PROPERTY BECAUSE JOINT OWNERSHIP DOES NOT IN ITSELF ESTABLISH A PARTNERSHIP.

Joint Ownership Does Not in Itself Establish Partnership. Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, even if the co-owners share profits made by the use of the property (*Corp. Code § 16202(c)(1) or* former Corp. Code § 15007(2); *Fischer v. Carey (1916) 173 Cal. 185, 186, 159 P. 577* ; *Billups v. Tiernan (1970) 11 Cal. App. 3d 372, 379, 90 Cal. Rptr. 246*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention by one of the parties that a partnership was formed. It may be used when the other party alleges that a partnership exists because the parties are joint owners in

some property or business that is the subject of litigation. Joint ownership does not, in itself, constitute a partnership relation [*Corp. Code § 16202(c)(1)*; former Corp. Code § 15007(2); *Fischer v. Carey (1916) 173 Cal. 185, 186, 159 P. 577]* . These points and authorities may be useful in circumstances in which a party is attempting to assert a partnership relation because he or she is a joint tenant or a tenant in common in certain property.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a partnership was not formed and does not exist merely because the parties jointly own certain property on which the subject business has been established. They also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel may discuss facts showing that although the parties were co-owners, one of them did not exercise any management or control over the property or business.

[3] Discussion of Authorities

[a] Joint Ownership Does Not in Itself Establish Partnership

Fischer v. Carey *(1916) 173 Cal. 185, 159 P. 577* , involved an action for an accounting and sale of a vessel jointly owned by respondents and appellants, and for the division of the sale proceeds. The trial court appointed a receiver to take possession of the vessel and operate it until further notice from the court. Appellants appealed this order on the ground that the action was cognizable in admiralty, and that the state court was without jurisdiction to proceed in the matter. Respondents supported jurisdiction on the ground that they and appellants were partners, and therefore a determination by the admiralty court was not appropriate.

The California Supreme Court reversed. The court held preliminarily that the relationship of partners does not arise between part owners of ships merely by virtue of their ownership, particularly when respondents relieved themselves from liability from potential loss, and at the same time deprived themselves of the right to share in the profits resulting from the use of the ship when they compelled appellants to give a bond for its safe return (*173 Cal. 185, 187)* . The court held that a partnership arises only by special contract. The court used the term "special contract" to distinguish between the circumstances in which several persons merely jointly own a ship, and when there is a specific and distinct agreement to share in profits and losses (*173 Cal. 185, 186)* . As part owners the parties were merely tenants in common, not partners (*173 Cal. 185, 186)* .

In ***Billups v. Tiernan*** *(1970) 11 Cal. App. 3d 372, 90 Cal. Rptr. 246* , plaintiff, a minor, suffered personal injuries while playing near a truck owned by decedent defendant doing business as a partnership. Plaintiff's mother, individually and as guardian ad litem for her son, filed a complaint against decedent, decedent's estate, a partnership consisting of decedent and his wife, and the wife as executrix of decedent's estate. The trial court found that although decedent's wife had community property rights in defendant's business, she did not meet the factual prerequisites for a partner. The court, therefore, dismissed the cause of action against defendant's wife. Plaintiff appealed from the judgment decreeing dismissal.

The appellate court affirmed. Citing former Corp. Code § 15007 [*see now Corp. Code § 16202(c)(1)*], the court held that mere common ownership of property or a common interest in a business does not of itself establish a partnership. The court observed that the trial court apparently applied the well recognized rule that some degree of participation by partners in management and control of the business is one of the primary elements of partnership (*11 Cal. App. 3d 372, 379)* .

[4] Additional Authorities

[a] Joint Ownership Does Not in Itself Establish Partnership

The facts and procedural background of *Frisch v. Frisch (1950) 97 Cal. App. 2d 183, 217 P.2d 150* , are discussed in *§ 170.30[3][a]*. In *Frisch*, the court held that the burden of proving the existence of a partnership by competent evidence is on the party asserting that a partnership existed. The court also held that there was substantial evidence to sustain the trial court's finding that plaintiff and defendants held title to the subject property as joint tenants, and the mere fact that plaintiff was named grantee in the deed did not create a partnership in the property (*97 Cal. App. 2d 183, 185)* .

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17-170 California Points & Authorities § 170.34

§ 170.34 Opposing Contention That Partnership Exists or Existed [Corp. Code §§ 16101, 16202(a); former Corp. Code §§ 15002, 15006]--Sharing of Gross Returns Does Not Establish Partnership [Corp. Code § 16202(c)(2); former Corp. Code § 15007(3)]

[1] FORM Opposing Contention That Partnership Exists or Existed [Corp. Code §§ 16101, 16202(a); former Corp. Code §§ 15002, 15006]--Sharing of Gross Returns Does Not Establish Partnership [Corp. Code § 16202(c)(2); former Corp. Code § 15007(3)]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with § 170.30, and may be combined with §§ 170.31-170.33 or § 170.35 if appropriate according to the issues involved.*]

A PARTNERSHIP _____ [DOES *or* DID] NOT EXIST BETWEEN _____ [PLAINTIFF *or* DEFENDANT] _____ [*name*] AND _____ [DEFENDANT *or* PLAINTIFF] _____ [*name*] EVEN THOUGH THEY _____ [SHARE *or* SHARED] THE GROSS PROCEEDS OF THE BUSINESS BECAUSE THE SHARING OF GROSS PROCEEDS DOES NOT BY ITSELF ESTABLISH A PARTNERSHIP, AND THERE IS INSUFFICIENT EVIDENCE TO OTHERWISE ESTABLISH THE EXISTENCE OF A PARTNERSHIP.

Sharing of Gross Returns Does Not By Itself Establish Partnership. The sharing of gross returns does not by itself establish a partnership, even if the persons sharing them have a joint or common right or interest in property from which the returns are derived (*Corp. Code § 16202(c)(2) or* former Corp. Code § 15007(3); *Blankenship v. Hearst Corp. (9th Cir. 1975) 519 F.2d 418, 425* .

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that the parties were partners based solely

on the fact that they shared gross earnings or receipts of a business. The sharing of gross returns does not by itself establish a partnership [*Corp. Code § 16202(c)(2)*; former Corp. Code § 15007(3)]. Sharing profits is one of the essential elements of a partnership, but it implies the sharing of losses [*see § 170.23, above*]. Therefore, these points and authorities may be used in cases when a party did not share in the expenses or losses of the business.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the sharing of gross returns does not of itself establish partnership. They also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should discuss facts that show that although the parties may have had an agreement to share in the gross proceeds of a business, the parties did not agree to share in the expenses or losses of the business, nor was there any actual sharing in those expenses or losses.

[c] Opposing Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 170.23*.

[3] Discussion of Authorities

[a] Sharing of Gross Returns Does Not of Itself Establish Partnership

In ***Blankenship v. Hearst Corp.*** *(9th Cir. 1975) 519 F.2d 418* , a newspaper distributor brought a private antitrust action against the newspaper publisher and its director of circulation. Plaintiff distributed papers to news carriers who then delivered the papers to home subscribers. He alleged that defendant's dual distribution scheme (to home-delivery dealers and to street dealers) violated the Sherman Act, and that defendant engaged in a price-fixing conspiracy. The district court granted judgment on the pleadings with respect to the Sherman Act. With respect to the price-fixing charge, the court concluded that plaintiff and the carriers were in partnership, and thus plaintiff did not have capacity to prosecute the case without the carriers' approval. The court granted judgment on the pleadings for defendants on that cause of action (*519 F.2d 418, 422* .

The Ninth Circuit held that the evidence relied on by the court to find a partnership was insufficient. The carriers made collections from the subscribers, kept 20 percent of the gross proceeds, and gave plaintiff 80 percent of the gross proceeds. If a subscriber failed to pay his or her bill, the carriers did not have to pay plaintiff the amount owed. Citing former Corp. Code § 15007(3) [*now see Corp. Code § 16202*], the court stated that the sharing of gross returns does not alone establish a partnership. In this case, the carriers had no community of interest with one another; they had no management role; they did not share in each other's profits or losses; they did not share in plaintiff's risks except to the limited extent of losing their profit if a subscriber failed to pay; and there was no writing between plaintiff and the carriers indicating a partnership (*519 F.2d 418, 425-426* .

[4] Additional Authorities

[a] Sharing of Gross Return Does Not of Itself Establish Partnership

The appellate court in *Cislaw v. Southland Corp. (1992) 4 Cal. App. 4th 1284, 6 Cal. Rptr. 2d 386* , affirmed a judgment in favor of defendant franchisor, on which plaintiffs sought to impose wrongful death liability arising out of a franchisee's sale of clove cigarettes to their child. The trial court found no evidence of an agency relationship between the franchisor and the franchisee, nor evidence of any partnership or joint venture. Plaintiffs argued that because the

franchise fee was calculated as percentage of total receipts after deducting cost of goods sold, a partnership or joint venture existed. The court agreed that as there was no participation in net profits or losses, no joint venture or partnership existed (*4 Cal. App. 4th 1284, 1297-1298)* .

In ***Wheeler v. Farmer*** *(1869) 38 Cal. 203* , plaintiff appointed defendant as his agent to procure patents in Great Britain for certain devices to which plaintiff already had patents in the United States. Their agreement provided that defendant was authorized to make, vend, and use the patents for the best prices he could procure. Further, any agreement defendant made under this arrangement was to be at defendant's own expense, account, and responsibility. Defendant was required to collect all monies that became due on the sale and use of the patents. He was required to then account for and quarterly pay over to plaintiff one-half of the money received. Thereafter, defendant refused to pay plaintiff the money he received on sales, and plaintiff obtained a writ of attachment for the money owed to him. Defendant filed a motion to discharge the attachment. The motion was denied, and defendant appealed on the ground that he and plaintiff were partners in the business to which their agreement related, and therefore an action at law could not be maintained between them.

The California Supreme Court affirmed, holding that an agreement to divide gross earnings does not transform the parties to the agreement into partners (*38 Cal. 203, 213)* . The court held that the essential elements of a partnership were wanting because there was no community of interest in capital, stock, profit, or loss (*38 Cal. 203, 213-214)* . It held that one-half of the proceeds of the sales of the devices was consideration for the arrangement plaintiff entered into with defendant (*38 Cal. 203, 214-215)* . In reaching its holding, the court observed that plaintiff had no voice or right of control in the conduct and management of the business in Great Britain, and incurred no liability for the expenses of the business or any losses sustained in its conduct (*38 Cal. 203, 215)* .

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17-170 California Points & Authorities § 170.35

§ 170.35 Opposing Contention That Partnership Exists or Existed [Corp. Code §§ 16101, 16202(a); former Corp. Code §§ 15002, 15006]--No Presumption of Partnership When Profits Received as Payment [Corp. Code § 16202(c)(3); former Corp. Code § 15007(4)]

[1] FORM Opposing Contention That Partnership Exists or Existed [Corp. Code §§ 16101, 16202(a); former Corp. Code §§ 15002, 15006]--No Presumption of Partnership When Profits Received as Payment [Corp. Code § 16202(c)(3); former Corp. Code § 15007(4)]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with § 170.30, and may be combined with §§ 170.31-170.34 if appropriate according to the issues involved*].

THE FACT THAT PLAINTIFF AND DEFENDANT _____ [SHARE *or* SHARED] PROFITS IN A BUSINESS DOES NOT GIVE RISE TO A PRESUMPTION THAT A PARTNERSHIP _____ [EXISTS *or* EXISTED] BETWEEN THEM. IF THE PROFITS _____ [ARE *or* WERE] RECEIVED IN PAYMENT _____ [*specify, e.g.,* OF A DEBT *or* OF WAGES *or* OF RENT *or* OF AN ANNUITY TO A _____ (BENEFICIARY *or* REPRESENTATIVE *or* DESIGNEE OF A DECEASED OR RETIRED PARTNER) *or* OF INTEREST ON A LOAN *or* FOR THE SALE OF THE GOODWILL OF A BUSINESS OR OTHER PROPERTY].

No Presumption of Partnership From Sharing of Profits Under Certain Circumstances. A person who receives a share of the profits of a business is presumed to be a partner in the business, unless the profits were received for any of the following reasons:

(1) In payment of a debt by installments or otherwise (*Corp. Code § 16202(c)(3)(A)*; *Dills v. Delira Corp. (1956) 145 Cal. App. 2d 124, 131, 302 P.2d 397*).

(2) In payment for services as an independent contractor or of wages or other compensation to an employee (*Corp. Code § 16202(c)(3)(B)*; *Sievert v. Simonds (1948) 89 Cal. App. 2d 34, 38, 200 P.2d 95*

).

(3) In payment of rent (*Corp. Code § 16202(c)(3)(C)*; *Dickenson v. Samples (1951) 104 Cal. App. 2d 311, 315, 231 P.2d 530*).

(4) In payment of an annuity or other retirement benefit to a beneficiary, representative, or designee of a deceased or retired partner (*Corp. Code § 16202(c)(3)(D)*).

(5) In payment of interest or other charge on a loan, even if the amount of payment varies with the profits of the business, including a direct or indirect present or future ownership of the collateral, or rights to income, proceeds, or increase in value derived from the collateral (*Corp. Code § 16202(c)(3)(E)*).

(6) In payment for the sale of the goodwill of a business or other property by installments or otherwise (*Corp. Code § 16202(c)(3)(F)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention by a party that because he or she received a share of the profits of a business, he or she is presumed to be a partner in the business. This presumption does not apply if the profits were received in payment of a debt, of wages or rent, of an annuity to a beneficiary of a deceased or retired partner, of interest on a loan, or in payment for the sale of the good will of a business or other property [*see Corp. Code § 16202(c)(3)*; former Corp. Code § 15007(4)(a)-(e)].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a presumption of partnership should not be made merely because the parties shared in the profits of a business. These points and authorities also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should discuss facts that show that although the parties shared in the profits of a business, the profits were received in payment of a debt; in payment for services as an independent contractor, or of wages or other compensation to an employee; in payment of rent; in payment of an annuity or other retirement benefit to a beneficiary, representative, or designee of a deceased or retired partner; in payment of interest or other charge on a loan; or in payment for the sale of the goodwill of a business or other property. In an appropriate case, counsel also may argue that because there is no corresponding obligation to share in the losses of a business, or no community of interest in the business, the mere sharing of profits does not give rise to a presumption of partnership.

[c] Opposing Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 170.23*.

[3] Discussion of Authorities

[a] No Presumption of Partnership From Sharing of Profits Under Certain Circumstances

In ***Dills v. Delira Corp***. *(1956) 145 Cal. App. 2d 124, 302 P.2d 397* , plaintiffs, a producer, and six manufacturers

joined together to form defendant corporation for the purpose of producing promotional radio and television programs. One plaintiff was president, and the producer was vice-president of the corporation. The producer also owned his own independent production company. The producer was entrusted with sole management of the technical work in producing the programs because plaintiffs were busy with other duties. The producer used his own company to produce the programs, and plaintiffs agreed to advance $8,000 to the producer's company for production. For the loan of the money, the producer's company agreed to repay the loan, and repay plaintiffs for their services in securing the capital out of the profits of the program. When the producer induced defendant company to transfer to his company the exclusive right to produce the programs, plaintiffs brought suit for a declaration of a partnership, and that the partnership owned the principal asset on which it was allegedly formed. The trial court found that no partnership was created and rendered judgment for defendant. Plaintiffs appealed.

The appellate court affirmed. Citing former Corp. Code § 15007(4) [*see now Corp. Code § 16202(c)(3)*], the court held that although it is true that a partnership relation is presumed when parties enter into a profit-sharing agreement and actually share profits, the presumption evaporates when substantial evidence shows the relationship to be one of borrower-lender, with the shares of profit being paid for services rendered or money advanced. The court held that plaintiff failed to show that no substantial evidence supported the finding of nonpartnership or that the admitted facts did show a partnership as a matter of law because the facts proved were just as consistent with the theory of a loan and interest as with partnership (*145 Cal. App. 2d 124, 131)* .

Dickenson v. Samples *(1951) 104 Cal. App. 2d 311, 231 P.2d 530* , involved an action by plaintiff to recover rentals from defendant. Defendant cross-complained for breach of an alleged contract between plaintiff and defendant to form a partnership or joint venture. Defendant claimed that he was excluded from the operation of the alleged partnership business when he was evicted from the premises on which it was located. Defendant based his claim on the fact that plaintiff had leased his premises to defendant and a third party for the operation of a billiard parlor. Although the evidence was conflicting, the rental agreement apparently provided that the rent involved payment of a portion of the profits of the business to plaintiff. The third party subsequently withdrew from his partnership with defendant, and no rent was paid to plaintiff for several months thereafter. The trial court granted a directed verdict against defendant on the cross complaint. Defendant appealed.

The appellate court affirmed. The court held that although it was true that rent was to be paid on a basis of profits realized, there was no further evidence of any joint liability for debts and losses, and there was no evidence of a community of interest insofar as plaintiff having any control or management of any of the factors influencing the net worth of the business. Accordingly, the court held that a mere sharing in the profits paid as rental to a landlord does not justify an inference of partnership under former Corp. Code § 15007(4) [*see now Corp. Code § 16202(c)(3)*] (*104 Cal. App. 2d 311, 315)* .

In ***Sievert v. Simonds*** *(1948) 89 Cal. App. 2d 34, 200 P.2d 95* , defendant operated a business and employed plaintiff for several years, first as a salesman, and then as a manager. Plaintiff was paid a regular salary at first, and then entered into a profit-sharing arrangement with defendant. Another plaintiff was employed by defendant as a bookkeeper and office manager, and received a salary and a share in the profits. No one but defendant at any time contributed any money to his business. Plaintiffs brought an action for an accounting of an alleged partnership in defendant's business. The trial court found that defendant did not enter into any partnership agreement with plaintiffs. Plaintiffs appealed.

The appellate court affirmed, holding that the fact that some of the plaintiffs were employed by defendant and were to share in a division of the profits did not require the trial court to conclude that a partnership existed between the parties (*89 Cal. App. 2d 34, 38)* .

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[Reserved]

§§ 170.36[Reserved]

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2. Joint Ventures

17-170 California Points & Authorities § 170.50

§ 170.50 Supporting Contention That Joint Venture Exists or Existed [Corp. Code § 16202; former Corp. Code § 15006]--Law Applicable to Joint Ventures, Joint Venture Defined, and Intent to Create Joint Venture

[1] FORM Supporting Contention That Joint Venture Exists or Existed [Corp. Code § 16202; former Corp. Code § 15006]--Law Applicable to Joint Ventures, Joint Venture Defined, and Intent to Create Joint Venture

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with the points and authorities in § 170.51 to set out the requisite elements of a joint venture.*]

A JOINT VENTURE _____ [EXISTS *or* EXISTED] BETWEEN _____ [PLAINTIFF *or* DEFENDANT] _____ [*name*] AND _____ [DEFENDANT *or* PLAINTIFF] _____ [*name*] BECAUSE THEY JOINTLY _____ [CARRY *or* CARRIED] ON A SINGLE BUSINESS ENTERPRISE FOR PROFIT AND INTENDED TO CREATE A JOINT VENTURE THEREBY[, AND ALTHOUGH THERE _____ (IS *or* WAS) NO WRITTEN AGREEMENT, THE EXISTENCE OF THE JOINT VENTURE IS EVIDENCED BY THE CONDUCT OF THE PARTIES].

A. Joint Ventures Governed by Law of Partnerships. The rights and liabilities of joint venturers, as between themselves, generally are governed by the principles applicable to partnerships (*Stodd v. Goldberger (1977) 73 Cal. App. 3d 827, 836, 141 Cal. Rptr. 67* ; *Milton Kauffman, Inc. v. Superior Court (1949) 94 Cal. App. 2d 8, 17, 210 P.2d 88*).

B. Joint Venture Defined. A joint venture is an undertaking by two or more persons jointly to carry on a single business enterprise for profit (*Holtz v. United Plumbing & Heating Co. (1957) 49 Cal. 2d 501, 506-507, 319 P.2d 617* ; *Franco Western Oil Co. v. Fariss (1968) 259 Cal. App. 2d 325, 344, 66 Cal. Rptr. 458*).

C. Existence of Joint Venture Dependent on Intention of Parties. Whether a joint venture exists largely depends on determining the intention of the parties from the facts of the particular case, because there is no certain and all-inclusive

definition to be applied (*Holtz v. United Plumbing & Heating Co. (1957) 49 Cal. 2d 501, 506-507, 319 P.2d 617* ; *Franco Western Oil Co. v. Fariss (1968) 259 Cal. App. 2d 325, 344, 66 Cal. Rptr. 458*).

[*Optional*] **D. Joint Venture Agreement Need Not Be in Writing.** A joint venture requires little formality in its creation, and may be the result of a parol agreement or may be assumed as a reasonable deduction from the acts and declarations of the parties (*Nelson v. Abraham (1947) 29 Cal. 2d 745, 749-750, 177 P.2d 931* ; *Rickless v. Temple (1970) 4 Cal. App. 3d 869, 893, 84 Cal. Rptr. 828*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a joint venture was created. The rights and liabilities of joint venturers are generally governed by the law of partnerships. Optional paragraph D may be useful when there is no written agreement between the parties.

Distinctions between joint ventures and partnerships, when made, have been based on concepts of the former involving a single transaction of limited duration and the latter involving an ongoing business enterprise [*see Nelson v. Abraham (1947) 29 Cal. 2d 745, 749, 177 P.2d 931]* . A partnership, however, may be formed for a single venture and for a limited time [*see Kaufman-Brown Potato Co. v. Long (9th Cir. 1950) 182 F.2d 594, 599* ; *see also Page v. Page (1961) 55 Cal. 2d 192, 196, 10 Cal. Rptr. 356, 358 P.2d 684]* . UPA'94 indirectly recognizes this fact by defining a "partnership at will" to include a partnership in which the partners have not agreed to remain partners until the expiration of a definite term or the completion of a particular project [*Corp. Code § 16101(9)*]. The distinction between partnerships and joint ventures in most cases, therefore, is rather indefinite and of little practical significance [*see* California Legal Forms, Ch. 15, *General Partnerships*, Part A, § 15.10[3] (Matthew Bender); Ballantine & Sterling, California Corporation Laws, Ch. 24, *Partnerships* , §§ 602.01, 617.02 (Matthew Bender); *see also California Forms of Pleading and Practice, Ch. 401, Actions Between General Partners and Partnership, §§ 401.11[3][a][ii], 401.45*; *Ch. 402, Partnerships: Actions Between General Partner or Partnership and Third Parties, § 402.23* (Matthew Bender) (distinction made in some cases involving liability to third parties)].

Because the general principles regarding the creation of joint ventures are essentially the same as those that govern partnerships, the forms in Subpart A generally may be combined with the forms in this subpart to support the existence of a joint venture. The cases discussed in this subpart illustrate the application of general partnership principles to joint ventures.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the parties have entered into a joint venture. These points and authorities also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should discuss facts that show an undertaking by two or more persons jointly to carry on a single business enterprise for profit and that the parties intended to enter into a joint venture. This may be shown by a written joint venture agreement. If the agreement is ambiguous, or if there is no written agreement, counsel should discuss facts that indicate that the parties' conduct established a joint venture relationship.

[c] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 170.60* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Joint Ventures Governed by Law of Partnerships

In ***Stodd v. Goldberger*** *(1977) 73 Cal. App. 3d 827, 141 Cal. Rptr. 67* , a corporation entered into a written joint venture agreement with defendant limited partnership for the ownership and operation of a hotel. The agreement allocated to defendant all income and profits from the operation. However, it provided that on a sale of the hotel, any gain would be divided equally among the venturers. The corporation subsequently went bankrupt. Plaintiff, as trustee in bankruptcy, sued defendants seeking, among other things, contribution from defendants for one-half of the joint venture's debts. The trial court granted defendants' motion for judgment on the pleadings, and plaintiff appealed.

The appellate court affirmed, holding that the rights and liabilities of joint venturers among themselves are governed by the principles applicable to partnerships (*73 Cal. App. 3d 827, 836)* . Thus, the court held that plaintiff stated no viable cause of action for contribution, because even if he could claim to be a representative of the bankrupt joint venturer, partners or joint venturers may not bring suit against one another on causes of action arising from the partnership or joint venture business until there has been a dissolution of the relationship, a settlement of its affairs, and an accounting. Further, the court held that because plaintiff was a trustee in bankruptcy of one of the joint venturers as opposed to the joint venture, he could not compel contribution on the theory that it was an asset of the joint venture (*73 Cal. App. 3d 827, 837-838)* .

In ***Milton Kauffman, Inc. v. Superior Court*** *(1949) 94 Cal. App. 2d 8, 210 P.2d 88* , respondent and petitioner entered into an oral agreement to construct housing projects. Profits were to be shared equally. Respondent transferred to petitioner a one-half interest in his construction and development corporation, and petitioner became director and treasurer of the corporation. The venture was financed and carried on through the corporation, and after successful operation for a time the parties agreed that some of the projects of the venture would be carried on through a corporation to be formed by petitioner. The parties agreed to share equally in the profits of this new venture. Using the old venture's assets, the new venture acquired several tracts of land and constructed houses on them. When profits were realized on each tract, they were reinvested progressively in succeeding tracts. Except for certain sums determined by petitioner to be due, no part of the net profits were paid to respondent. Respondent brought suit, seeking an accounting and a share of the net profits. He moved for an order permitting the inspection and copying of certain writings in petitioner's possession to establish the disbursements, receipts, and profits from the tracts of land. The trial court granted the motion, and petitioners refused to comply with the court's order. Petitioners were cited for contempt, and they filed a petition for a writ of prohibition to restrain the court from entering judgment on the contempt citation. Petitioner contended that he never agreed to enter into a joint venture with respondents, and therefore the order was in violation of the constitutional guarantees against unlawful searches and seizures.

The appellate court denied the writ, holding that the facts alleged in the amended complaint and stated in respondent's affidavits were sufficient to warrant the court's conclusion for the purpose of the motion that respondent and petitioner were joint venturers. The court held that the resemblance between a partnership and a joint venture is so close that the rights as between joint venturers are governed practically by the same rules that govern partners. Thus, relying on former Civ. Code § 2401(4) [*now see Corp. Code § 16202*], the court held that the receipt by a person of a share of the profits of a business is prima facie evidence that he or she is a partner in the business (*94 Cal. App. 2d 8, 17)* .

[b] Joint Venture Defined

Holtz v. United Plumbing & Heating Co. *(1957) 49 Cal. 2d 501, 319 P.2d 617* , arose out of a an action for the wrongful deaths of plaintiff's husband and son, who were killed when their automobile collided with an automobile driven by a contractor's employee. The contractor was hired on a cost-plus-15-percent profit basis to install sprinklers in housing units being built in an out-of-state city. As the contractor was not licensed to do work in that city, he enlisted the cooperation of defendant, a corporation who was licensed there. Defendant agreed to take over the jobs by obtaining

the necessary permits, hiring and paying workmen, and furnishing material requested by the contractor. The contractor agreed to draw plans, direct the workers on the job, and furnish material not supplied by defendant. It was agreed that defendant would receive the cost of labor and material supplied by it plus 10 percent. The contractor was to receive the balance of the fifteen percent profit. One of the contractor's employees worked on the jobs. He was transferred from contractor's payroll to defendant's, and was employed and paid by defendant as a fitter and supervisor. Plaintiff sued both the contractor and defendant as employers of the employee. At trial, a nonsuit was granted in defendant's favor. Plaintiff appealed.

The California Supreme Court reversed the judgment of nonsuit as to defendant. The Court held that the evidence was sufficient to show that defendant and the contractor were engaged in a joint venture and that, at the time of the accident, the employee was acting in the course of his employment in the venture. The Court stated that whether a joint venture exists must largely depend on determining the intention of the parties from the facts of a particular case because there is no certain and all-inclusive definition to be applied. It defined a joint venture as an association of two or more persons who combine their property, skill, or knowledge to carry out a single business enterprise for profit (*49 Cal. 2d 501, 506)* . The Court held that defendant and contractor entered into an agreement pursuant to which they both contributed services and material toward a common end. Further, it could be inferred that their contributions were made for the purpose of obtaining the 15 percent fee to be paid as profit. The Court held that an understanding as to the manner in which the profit was to be shared was also shown (*49 Cal. 2d 501, 507)* .

In ***Franco Western Oil Co. v. Fariss*** *(1968) 259 Cal. App. 2d 325, 66 Cal. Rptr. 458* , plaintiff and defendant entered into a written operating agreement involving oil and gas leases owned by plaintiff and located within a certain area. Defendant agreed to drill a test well in the area, and in return would operate plaintiff's leases and receive one-half interest in them. The agreement also provided that if either party acquired a lease or other interest in any land adjacent to the land covered by their agreement, the other party would be notified and given the option to purchase a one-half interest therein. Plaintiff and defendant subsequently discussed joint acquisition of various leases in an area not covered by their agreement. Thereafter, defendant entered into an agreement with a third party to acquire leases on land located in the area that was the subject of the discussions. Defendant then notified plaintiff of the acquisition, and gave it the opportunity to participate. Plaintiff accepted, and contributed to the expenses of acquisition. Defendant subsequently repudiated, and plaintiff sued. The trial court granted defendant's motion for judgment, finding that the latter agreement between plaintiff and defendant was not a joint venture because the parties intended to enter into a formal joint venture and operating agreement, and did not do so. Plaintiff appealed.

The appellate court reversed. It held that the post-agreement discussions between plaintiff and defendant, and plaintiff's acceptance of defendant's proposal, constituted an agreement between plaintiff and defendant to buy and hold leases jointly and to jointly bear the expenses of them (*259 Cal. App. 2d 325, 342)* . The court held that all of the evidence showed the acts of partners in relation to a well-defined, definitely understood area separate from that included within the original agreement (*259 Cal. App. 2d 325, 343)* . It defined a joint venture as an undertaking by two or more persons jointly to carry on a single business enterprise for profit, and held that its existence largely depends on determining the intention of the parties from the facts of a particular case (*259 Cal. App. 2d 325, 344)* . The court held that the requisite intent may be implied from the conduct of the parties, and in this case both direct evidence and the unequivocal conduct of the parties showed an intent to form a joint venture (*259 Cal. App. 2d 325, 345)* .

[c] Existence of Joint Venture Dependent on Intention of Parties

Holtz v. United Plumbing & Heating Co. *(1957) 49 Cal. 2d 501, 319 P.2d 617* , and ***Franco Western Oil Co. v. Fariss*** *(1968) 259 Cal. App. 2d 325, 66 Cal. Rptr. 458* , are discussed in *§ 170.50[3][b]*.

[d] Joint Venture Agreement Need Not Be in Writing

In ***Nelson v. Abraham*** *(1947) 29 Cal. 2d 745, 177 P.2d 931* , plaintiff and defendant entered into an oral agreement

providing for plaintiff to conduct business in a new office for defendant's ice company in return for one-third of the net profits. However, plaintiff would not have an interest in the business. Plaintiff commenced operation of the new office, and performed all of the details of management. He had the power to sign checks drawn from the new office's bank account, to hire and discharge employees, fix their compensation, and to determine the sale price of ice. Sometime thereafter, defendant sold the new office to two competitors without notifying plaintiff. Plaintiff then asked defendant for an accounting and division of profits. Defendant refused on the ground that the profit and loss statement showed a net operative loss. Plaintiff commenced an action for an accounting and dissolution of partnership. The trial court found that a partnership did not exist and that plaintiff was not entitled to any portion of the profits. Plaintiff appealed.

The California Supreme Court reversed. The court first held that the fact that the complaint was drawn on the theory that the agreement contemplated only a partnership did not prevent the granting of the relief on some other theory based on the facts in evidence (*29 Cal. 2d 745, 749)* . It then held that a joint venture or undertaking may be formed by parol agreement, or it may be assumed as a reasonable deduction from the acts and declarations of the parties (*29 Cal. 2d 745, 749-750)* . The court held that the oral agreement and the conduct of the parties under the agreement, considering the nature of the undertaking and the surrounding circumstances, defined their respective rights, liabilities, and duties to each other (*29 Cal. 2d 745, 750)* .

In ***Rickless v. Temple*** *(1970) 4 Cal. App. 3d 869, 84 Cal. Rptr. 828* , plaintiff was a director and officer of a corporation. She was asked by the corporation's president to loan the corporation $20,000 to defray the costs of a Labor Commission investigation and attorney's fees. Plaintiff did not have the money on hand, but the president convinced her to borrow against a lot she owned. Defendant then was engaged by the president to arrange for the loan, and he did so with a savings and loan association. Thereafter, plaintiff was asked to deed her lot to defendant, ostensibly to make the loan easier to negotiate. Plaintiff did so, and signed an agreement that provided that when she paid defendant the sum of $23,000, the lot would be deeded back to her. Plaintiff endorsed defendant's check for $20,000 in blank, and gave it to the president. Defendant received the check back, and deposited it in his own account. With the funds, defendant purchased a foreign draft payable to the president's brother-in-law to acquire land in Mexico for a resort hotel venture. Plaintiff brought an action to have the deed to her lot declared to be a mortgage, to have the court determine the amount justly due on the loan, and after deposit in the court of the funds due, that she be granted a decree quieting title on the lot. The trial court rendered judgment in favor of plaintiff, finding that the president and defendant were engaged in a joint venture to build the hotel. The court imposed vicarious liability on defendant for the use of plaintiff's money to purchase the land in Mexico. Defendant appealed.

The appellate court affirmed, holding that although a joint venture ordinarily is created by contract or agreement between the parties, there need not be any formal written agreement defining the parties' respective rights and duties. Citing *Nelson v. Abraham (1947) 29 Cal. 2d 745, 749-750, 177 P.2d 931* (discussed *above*), the court held that such a venture may be formed by parol agreement, and may be assumed as a reasonable deduction from the acts and declarations of the parties. It held that there was substantial evidence to support the trial court's finding of a joint venture. Among other things, defendant and president discussed the enterprise; they went to Mexico together to survey possible sites, and determine the best city for a hotel; they consulted a law firm together to ascertain the best means to acquire property for the project; and the site was selected before the money was borrowed from plaintiff (*4 Cal. App. 3d 869, 893)* .

[4] Additional Authorities

[a] Joint Ventures Governed by Law of Partnerships

In *Orlopp v. Willardson Co. (1965) 232 Cal. App. 2d 750, 43 Cal. Rptr. 125* , appellant corporation was an undisclosed joint venturer with a poultry and egg company. In accordance with a planned program, respondents delivered eggs to the egg company, and a bookkeeping account was set up in the company's name. The company had a secret written joint venture agreement with appellant, who was to finance the program. Appellant then withdrew from the joint venture and

assigned its interest to a new corporation formed by some of appellant's former stockholders. Respondents filed an action to recover a balance existing on the open account, and the trial court awarded judgment to them. On appeal, it was contended that payments made by the new corporation should have been credited to the existing balance rather than to new purchases made. Observing that the relations of joint venturers are generally the same as those of partners and to the extent they are the same, the law of partnerships applies to both, the appellate court held that appellant was in the position of an undisclosed or dormant partner in the joint venture and was fully liable as an ostensible partner for the firm's debts (*232 Cal. App. 2d 750, 754)* . Although the joint venture was dissolved when appellant withdrew, and its successor was a new entity, appellant nevertheless remained liable for the old firm's debts (*232 Cal. App. 2d 750, 755)* .

[b] Joint Venture Defined

Boyd v. Bevilacqua (1966) 247 Cal. App. 2d 272, 55 Cal. Rptr. 610 , involved an oral joint venture agreement between the parties for the purpose of purchasing and developing real property. Plaintiffs sued when defendants repudiated, and the trial court, finding a joint venture, rendered judgment in plaintiff's favor. Defendants appealed, contending that as plans for the development of the subject property had not yet been made, that part of the agreement was unenforceable as an agreement to agree, fatally infecting the joint venture agreement as a whole. The appellate court affirmed, defining a joint venture as an undertaking by two or more persons jointly to carry out a single business enterprise for profit, and held that its existence depends on the intention of the parties, which may be implied from their conduct. The court also held that the law requires little formality in the creation of a joint venture and an agreement is not invalid because it may be indefinite with respect to its details (*247 Cal. App. 2d 272, 285)* .

Sadugor v. Holstein (1962) 199 Cal. App. 2d 477, 18 Cal. Rptr. 859 , involved an oral agreement between plaintiff and defendant to purchase real property together. The parties made an offer on the property, and while the offer was pending, defendant arranged a loan with a third-party lender using the property as security without plaintiff's knowledge. When plaintiff refused to execute the note and a deed of trust conveying the property as security, defendant took the property in his own name. Plaintiff brought an action to establish a trust in a one-half interest in the property, and judgment was rendered in his favor. Defendant appealed, and the appellate court held that there was a sufficient showing to support a finding of joint venture because the parties made a joint offer, jointly advanced funds, and orally agreed to put up one-half of the purchase price each and that each would acquire a one-half interest thereby (*199 Cal. App. 2d 477, 482-483)* . The court observed that the common definition of a joint venture is a special combination of two or more persons, where in some specific venture a profit is jointly sought without any actual partnership or corporate designation, or as an association of persons to carry on a single business enterprise for profit, for which purpose they combine their property, money, effects, skill, and knowledge. It held that whether the parties have created such a relationship as between themselves depends on their actual intention (*199 Cal. App. 2d 477, 483)* .

In *Nels E. Nelson, Inc. v. Tarman (1958) 163 Cal. App. 2d 714, 329 P.2d 953* , an action for materials and services furnished to defendants and used in the construction of houses, the trial court found that defendants were in a joint venture with each other in the construction of the houses, and gave plaintiffs personal judgment against them. One of the defendants appealed, and the appellate court held that although the evidence probably was sufficiently conflicting to support a contrary finding, it was sufficient to support a finding that defendants were engaged in a joint venture (*163 Cal. App. 2d 714, 721)* . The court observed that a joint venture has been defined as an undertaking by two or more persons jointly to carry out a single business enterprise for profit with its existence dependent on the intention of the parties as shown by an express agreement or by inference from their acts and conduct (*163 Cal. App. 2d 714, 724)* . It held that in view of the fact that third parties were involved, the complete picture of all of the circumstances, statements, and conduct of defendants supported a finding that they were engaged in a joint venture regardless of the fact that perhaps, as between themselves, they did not consider themselves to be in such a relationship (*163 Cal. App. 2d 714, 726)* .

[c] Joint Venture Agreement Need Not Be in Writing

In *Weinstock v. L.A. Carpet, Inc. (1965) 234 Cal. App. 2d 809, 44 Cal. Rptr. 852* , plaintiff and defendant negotiated a plan to jointly engage in the retail carpet business. Plaintiff invested $15,000, and defendant contributed inventory and accounts receivable from his existing carpet business in an amount equal to plaintiff's investment. The parties agreed to incorporate their business, and while waiting for a permit from the Commissioner of Corporations to issue stock, the parties loaned the corporation $15,000 each so that it could function in the interim. Plaintiff later sued to recover his $15,000, claiming that he paid the money for shares of corporate stock issued without a permit. The trial court granted defendant's motion for judgment after plaintiff presented his case. Plaintiff appealed, and the appellate court affirmed, holding that the enterprise between plaintiff and defendant was exempt from the Corporate Securities Law because it was a joint venture. The court held that a joint venture requires little formality in its creation, and may be the result of a parol agreement or it may be assumed as a reasonable deduction from the acts and declarations of the parties (*234 Cal. App. 2d 809, 813)* .

The facts and procedural background of *Milton Kauffman, Inc. v. Superior Court (1949) 94 Cal. App. 2d 8, 210 P.2d 88* , are discussed in *§ 170.50[3][a]*. In *Kauffman*, the appellate court held that the facts alleged in an amended complaint and stated in plaintiff's affidavits supporting a motion for an order permitting the inspection and copying of certain writings in defendants' possession were sufficient to warrant the court's conclusion that for the purpose of the motion the parties were joint venturers. It held that a joint venture or undertaking may be formed by parol agreement or it may be inferred from the acts and declarations of the parties (*94 Cal. App. 2d 8, 17)* .

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17-170 California Points & Authorities § 170.51

§ 170.51 Supporting Contention That Joint Venture Exists or Existed [Corp. Code § 16202; former Corp. Code § 15006]--Elements of Joint Venture

[1] FORM Supporting Contention That Joint Venture Exists or Existed [Corp. Code § 16202; former Corp. Code § 15006]--Elements of Joint Venture

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with the points and authorities in § 170.50.*]

A JOINT VENTURE _____ [EXISTS *or* EXISTED] BETWEEN _____ [PLAINTIFF *or* DEFENDANT] _____ [*name*] AND _____ [DEFENDANT *or* PLAINTIFF] _____ [*name*] BECAUSE THERE _____ [IS *or* WAS] A COMMUNITY OF INTEREST IN THE ENTERPRISE, A SHARING IN THE PROFITS AND LOSSES, AND AN EQUAL RIGHT OF CONTROL[, AND THE FACT THAT THERE _____ (IS *or* WAS) NO EXPRESS AGREEMENT TO SHARE THE LOSSES IS IMMATERIAL BECAUSE THAT PROVISION IS IMPLIED BY LAW].

A. Elements of Joint Venture. The elements necessary for the creation of a joint venture are (1) joint interest in a common business, (2) with an understanding to share profits and losses, and (3) a right to joint control (*April Enterprises, Inc. v. KTTV (1983) 147 Cal. App. 3d 805, 819, 195 Cal. Rptr. 421* ; *Stilwell v. Trutanich (1960) 178 Cal. App. 2d 614, 618, 3 Cal. Rptr. 285*).

[*Optional*] **B. Sharing of Losses Implied.** The omission of a provision for the sharing of losses in a joint venture is immaterial because the law supplies the provision, and in the absence of agreement, losses are shared in the same proportion as profits are to be divided (*Fitzgerald v. Provines (1951) 102 Cal. App. 2d 529, 535-536, 227 P.2d 860* ; *Parker v. Trefry (1943) 58 Cal. App. 2d 69, 75, 136 P.2d 55*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a joint venture was created. It is most useful in circumstances when a joint venture relationship is challenged on the ground that one or more of the elements of joint venture was not present. In order for a relationship to be a joint venture, there must be a joint interest in a common business, an understanding to share profits and losses, and a right to joint control [*April Enterprises, Inc. v. KTTV (1983) 147 Cal. App. 3d 805, 819, 195 Cal. Rptr. 421* ; *Stilwell v. Trutanich (1960) 178 Cal. App. 2d 614, 618, 3 Cal. Rptr. 285]* .

Optional Paragraph B may be used when the joint venture agreement does not expressly provide that the parties contemplated a sharing of losses, if any. The absence of such a provision is immaterial because an agreement to share losses is normally implied by law [*Fitzgerald v. Provines (1951) 102 Cal. App. 2d 529, 535-536, 227 P.2d 860* ; *Parker v. Trefry (1943) 58 Cal. App. 2d 69, 75, 136 P.2d 55]* .

Because the general principles regarding the creation of joint ventures are essentially the same as those that govern partnerships [*see § 170.50[2][a]*], the forms in Subpart A generally may be combined with the forms in this subpart to support the existence of a joint venture. The cases discussed in this subpart illustrate the application of general partnership principles to joint ventures.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a joint venture existed because the relationship between the parties contained the necessary elements of joint venture. For example, this form may be used in an opposition to a demurrer made on the ground that a complaint does not state sufficient facts to constitute a cause of action by showing that these elements have been pleaded on the face of the complaint. They also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts that establish the presence of the requisite elements. In the case of an opposition to a demurrer, it will be necessary to show that these facts have been properly pleaded.

[c] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 170.61* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Elements of Joint Venture

In ***April Enterprises, Inc. v. KTTV*** *(1983) 147 Cal. App. 3d 805, 195 Cal. Rptr. 421* , appellants and respondents entered into two written contracts to produce a television show. The first contract set forth the rights of the parties with respect to the show's production and syndication. It provided that respondents owned the videotapes of the show, but that both parties had the right to initiate syndication with third parties. Each party was to receive 50 percent of the profits resulting from any syndication. The contract also provided that respondents could erase the videotapes within six months of the original broadcast. Thereafter, the parties entered into a second contract giving respondents the exclusive right to initiate syndication, and changing appellants' compensation to 20 percent. The contract also provided that respondents no longer had the right to erase the videotapes. Appellants subsequently offered to purchase the videotapes from respondents. In response, respondents offered to purchase the exclusive rights to broadcast the show, and warned appellants that if they did not agree to the offer, the videotapes would be erased. The videotapes were erased, and

appellants sued, alleging, among other things, breach of fiduciary duty of a joint venturer. At trial, the court granted respondents' motion for judgment on the pleadings on the ground that the complaint failed to state a cause of action for breach of fiduciary duty. Appellants appealed, contending that both contracts were merely implementing an over-arching oral joint venture arrangement between the parties.

The appellate court reversed. The court held that the elements necessary for the creation of a joint venture are (1) joint interest in a common business, (2) with an understanding to share profits and losses, and (3) a right to joint control. The court held that it could not be determined as a matter of law that the complaint failed to allege facts supporting creation of a joint venture. A common interest was properly alleged with facts showing that the parties planned to co-produce the show in order to exploit the market for its syndication, and that each party contributed its own unique talents in furtherance of this objective. The requisite joint control was alleged by facts showing that each party agreed to have equal rights to initiate syndication. The court also disagreed with respondents' assertion that the requirement of sharing profits and losses was not met. The first contract provided that each party was to receive 50 percent of the profits, and the complaint alleged that the parties intended to share losses, which may be inferred from a contract provision to share profits (*147 Cal. App. 3d 805, 819)* .

Stilwell v. Trutanich *(1960) 178 Cal. App. 2d 614, 3 Cal. Rptr. 285* , involved a written joint venture agreement between plaintiff seafood company, defendant vessel owners, and defendant ship captain. Plaintiff sued for an accounting to apportion losses. It alleged that under the agreement, the parties were to make a single voyage to purchase, transport, and ultimately sell seafood products; that the agreement designated the percentage of the net profits that each party was to receive; that the voyage was completed, and the venture suffered financial losses; and that the losses were borne by plaintiff who was not reimbursed in accordance with the terms of the agreement. When plaintiff attempted to present its case at trial, defendants objected on the ground that the complaint failed to state a cause of action. The objection was sustained, a motion to dismiss was granted, and judgment was entered for defendants. Plaintiff appealed.

The appellate court reversed. The court held that the elements of a joint venture are (1) a community of interest in the subject of the undertaking, (2) a sharing in profits and losses, (3) an equal right or a right in some measure to direct and control the conduct of each other and of the enterprise, and (4) a fiduciary relation between or among the parties (*178 Cal. App. 2d 614, 618)* . It held that a complaint for an accounting need only state facts showing the nature of the relationship that requires an accounting and that some balance is due plaintiff. The court held that, in light of these rules, the complaint adequately stated a cause of action for an accounting. It held that, taking the facts in the complaint to be true, it must be accepted that the parties expressly declared their intention to establish a joint venture relationship, and the evidence on both sides should be presented at a trial on the merits (*178 Cal. App. 2d 614, 620-621)* .

[b] Sharing of Losses Implied

In ***Fitzgerald v. Provines*** *(1951) 102 Cal. App. 2d 529, 227 P.2d 860* , defendant and a third party were real estate brokers with whom an apartment building was listed for sale. Plaintiff told the third party that she would purchase the property, but then decided that she could not complete the transaction. Instead, she agreed to lend the third party the money to purchase the property. The third party told plaintiff that in return he would give her one-third of any profits realized from the operation of the apartment building. Plaintiff then completed the original sales transaction with the understanding that the third party would take over, and at the close of escrow a grant deed was executed to plaintiff. During escrow, plaintiff, defendant, and the third party entered into another escrow agreement wherein plaintiff conveyed the property to defendant and the third party as tenants in common. Defendant and the third party assumed a first deed of trust on the property, and executed a promissory note payable to plaintiff and a second deed of trust as security for their note. Defendant and the third party then took possession of the property and operated the apartment building. After awhile, the third party sold his interest in the property to defendant. Defendant notified plaintiff that he was ready to pay the note she held. Plaintiff responded by claiming her one-third interest in the property. Defendant filed an action to compel plaintiff to accept payment of the note, and prior to trial, plaintiff accepted payment with

interest. Plaintiff subsequently brought an action for declaratory relief, to impress a trust on the property, and for an accounting. She contended that the parties had orally proposed a joint venture. The trial court rendered judgment for plaintiff. Defendant appealed, arguing that there was no evidence that plaintiff undertook the risks of a joint venturer.

The appellate court affirmed, noting that at the time the transaction was entered into, there was no discussion relative to losses. The evidence showed that the possibility of sustaining a loss was not within the contemplation of the parties. However, the court held that a provision to share losses may be implied in a joint venture. It held that if the facts sustain a finding that a joint venture was created, the omission of a provision for the sharing of losses is immaterial because the law supplies that provision. In the absence of agreement, losses by the parties are shared in the same proportion as profits are to be divided (*102 Cal. App. 2d 529, 535-536)* .

In ***Parker v. Trefry*** *(1943) 58 Cal. App. 2d 69, 136 P.2d 55* , plaintiff building contractor and defendant property owner entered into an agreement to construct two houses on defendant's property. Defendant agreed to pay the cost of construction, and plaintiff agreed to build the houses. The agreement provided that when the houses were completed, the property would be sold, and the parties would share the profits equally. However, losses rather than profits were sustained. Plaintiff brought suit to recover the cost of labor and materials less the amount he received from defendant and from building loans, an administration fee as provided for in the agreement, and one-half of the difference between the total cost of the houses and the prices at which the parties agreed to sell them. Defendant filed a cross complaint alleging a partnership, and seeking actual and punitive damages. The trial court rendered judgment for plaintiff, and against defendant on his cross complaint. Defendant appealed, contending that the parties were joint venturers, and that plaintiff should pay one-half of the loss.

The appellate court reversed. The court held that the omission of a provision for the sharing of losses in a joint venture is immaterial because the law supplies the provision, and in the absence of agreement, losses are shared in the same proportion as profits are to be divided (citing former Civ. Code § 2412(a); *now see Corp. Code § 16401*) (*58 Cal. App. 2d 69, 75)* . It held that an analysis of the agreement in this case, coupled with the acts of the parties under the agreement, revealed an intent to enter into a joint enterprise, and the fact that it resulted in a loss rather than in a profit was not sufficient to change the character of the transaction (*58 Cal. App. 2d 69, 76)* .

[4] Additional Authorities

[a] Elements of Joint Venture

In *Buck v. Standard Oil Co. (1958) 157 Cal. App. 2d 230, 321 P.2d 67* , defendants and a third party entered into an agreement wherein the third party agreed, for an hourly wage and five percent of the profits, to operate defendants' tractor to level some property. The third party followed defendants' guidelines and suggestions in performing the work. During the course of the work, an oil pipe line owned by defendant oil company was damaged. Oil sprayed across a nearby highway causing an accident involving plaintiffs, and they filed an action for damages for personal injury. The trial court rendered judgment for plaintiffs, and the appellate court affirmed, holding that a joint venture requires the following elements: (1) a community of interest in the object of the undertaking; (2) an equal right to direct and govern the conduct of each other with respect to the undertaking; (3) a share in the losses, if any; and (4) a close and even fiduciary relationship between the parties (*157 Cal. App. 2d 230, 239)* . Responding to defendants' contention that there was no evidence to sustain the second element, the appellate court held that the evidence presented would justify a finding that there was sufficient control exercised by defendants (*157 Cal. App. 2d 230, 239-240)* .

[b] Sharing of Losses Implied

The facts and procedural background of *Stilwell v. Trutanich (1960) 178 Cal. App. 2d 614, 3 Cal. Rptr. 285* , are discussed in [3][a], *above*. In *Stilwell*, the appellate court held that one of the elements of a joint venture is a sharing in profits and losses (*178 Cal. App. 2d 614, 619)* . The court held that the omission of a provision for the sharing of losses

in a joint venture is immaterial because in the absence of agreement, the law implies a provision that losses are to be shared among the parties in the same proportion as profits were to have been divided (*178 Cal. App. 2d 614, 619)* . Thus, the court held that it must assume that some balance was due plaintiffs in the same proportion that they agreed to share losses, even though the agreement did not provide for the manner in which losses were to be divided (*178 Cal. App. 2d 614, 620-621)* .

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[Reserved]

§§ 170.52[Reserved]

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17-170 California Points & Authorities § 170.60

§ 170.60 Opposing Contention That Joint Venture Exists [Corp. Code § 16202; former Corp. Code § 15006]--No Intent to Form Joint Venture

[1] FORM Opposing Contention That Joint Venture Exists [Corp. Code § 16202; former Corp. Code § 15006]--No Intent to Form Joint Venture

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

A JOINT VENTURE BETWEEN _____ [PLAINTIFF *or* DEFENDANT] _____ [*name*] AND _____ [DEFENDANT *or* PLAINTIFF] _____ [*name*] SHOULD NOT BE IMPLIED FROM THE FACT THAT THEY AGREED TO GO INTO BUSINESS TOGETHER BECAUSE THEY DID NOT INTEND THEIR RELATIONSHIP TO BE A JOINT VENTURE.

A. Joint Venture Defined. [*See § 170.50, Paragraph B*].

B. Existence of Joint Venture Dependent on Intention of Parties. [*See § 170.50, Paragraph C*].

C. Mere Agreement to Go Into Business Together Does Not Imply Joint Venture. An agreement to go into business of itself does not imply a joint venture or any specific type of operation (*Myers v. Gager (1959) 175 Cal. App. 2d 314, 320-321, 346 P.2d 251*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that the parties created a joint venture. Whether a joint venture has been created depends on the intention of the parties. The fact that the parties agree to go into business together does not, of itself, imply a joint venture [*Myers v. Gager (1959) 175 Cal. App. 2d 314, 320-321, 346 P.2d 251]* . For example, an agreement may be interpreted to have created a broker relationship rather than a joint

venture because the parties, as between themselves, did not intend to create a joint venture [*see, e.g., Myers v. Gager (1959) 175 Cal. App. 2d 314, 320-321, 346 P.2d 251]* .

Because the general principles regarding the creation of joint ventures are essentially the same as those that govern partnerships [*see § 170.50[2][a]*], the forms in Subpart 1 generally may be combined with the forms in this subpart to oppose the existence of a joint venture. The cases discussed in this subpart illustrate the application of general partnership principles to joint ventures.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that although the parties had an agreement to conduct business together, they did not intend their relationship to be a joint venture. They also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points and authorities in this form with the facts of the case. For example, counsel should discuss facts supporting the position that the parties did not intend their relationship to be a joint venture.

[c] Opposing Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposition to the contentions supported by the points and *authorities in § 170.50*.

[3] Discussion of Authorities

[a] Mere Agreement to Go Into Business Together Does Not Imply Joint Venture

Myers v. Gager *(1959) 175 Cal. App. 2d 314, 346 P.2d 251* , involved an agreement between plaintiff broker and defendant property owners to grant plaintiff the exclusive right, for one year, to attempt to secure a change in zoning of defendants' property. If the attempt was successful, plaintiff and defendants were to form a corporation for the purpose of developing the property. If development did not prove to be advisable, the property would be sold, and the proceeds of the sale, after payment of a minimum amount to defendants, would be divided equally between the parties. Rezoning was accomplished, but plaintiff was unable to secure financing for the development, and prior to the expiration of the one-year term, he received an offer on the property. Defendants refused to accept the offer, and plaintiff brought an action for breach of contract and declaratory relief. The trial court rendered judgment for defendants, finding that plaintiff had not fully performed the contract, and that defendants had not refused to cooperate or discuss the sale of the property. Plaintiff appealed, contending that the court misinterpreted the contract. He argued that the contract created a joint venture, and as the property was an asset of the venture, he had a right to have the property sold and the proceeds divided.

The appellate court affirmed. The court held that whether parties to a contract have thereby created, as between themselves, a joint venture or some other relation involving cooperative effort depends on their actual intention, which is determined in accordance with the ordinary rules governing the interpretation and construction of contracts (*175 Cal. App. 2d 314, 320)* . The court held that a reasonable conclusion from a reading of the contract and the oral evidence was that plaintiff was acting as a real estate broker. The court held that an agreement to go into business of itself does not imply a joint venture or any specific type of operation (*175 Cal. App. 2d 314, 321)* .

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17-170 California Points & Authorities § 170.61

§ 170.61 Opposing Contention That Joint Venture Exists or Existed [Corp. Code § 16202; former Corp. Code § 15006]--Essential Elements Not Present

[1] FORM Opposing Contention That Joint Venture Exists or Existed [Corp. Code § 16202; former Corp. Code § 15006]--Essential Elements Not Present

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It may be combined with § 170.60, if appropriate, according to the issues involved*].

A JOINT VENTURE _____ [DOES *or* DID] NOT EXIST BETWEEN _____ [PLAINTIFF *or* DEFENDANT] _____ [*name*] AND _____ [DEFENDANT *or* PLAINTIFF] _____ [*name*] BECAUSE _____ [*specify the missing essential element of join venture, e.g.*, THE PARTIES _____ (DO *or* DID) NOT HAVE JOINT MANAGEMENT AND CONTROL OF THE ENTERPRISE], AND THIS IS AN ESSENTIAL ELEMENT OF A JOINT VENTURE.

A. Elements of Joint Venture. [*See § 170.51, Paragraph A.*]

B. No Joint Venture When Essential Elements Are Lacking. When an agreement is entirely lacking in the essential elements of a joint undertaking of an enterprise, a joint venture has not been created (*see Orosco v. Sun-Diamond Corp. (1997) 51 Cal. App. 4th 1659, 1666, 60 Cal. Rptr. 2d 179* ; Howard v. Societa di Unione etc. *(1944) 62 Cal. App. 2d 842, 847-848, 145 P.2d 694*).

[*Optional*] **C. Right of Management and Control of Business Is Essential Element of Partnership or Joint Venture.** An essential element of a partnership or joint venture is the right of joint participation in the management and control of the business. Absent such a right, the mere fact that one party is to receive benefits in consideration of services rendered or for capital contribution does not, as a matter of law, make that party a partner or joint venturer (*Bank of California v. Connolly (1973) 36 Cal. App. 3d 350, 364, 111 Cal. Rptr. 468* ; Howard v. Societa di Unione etc. *(1944) 62 Cal. App. 2d 842, 847-848, 145 P.2d 694*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that the parties have created a joint venture. In order for a relationship to be a joint venture, there must be a joint interest in a common business, an understanding to share profits and losses, and a right to joint control [*April Enterprises, Inc. v. KTTV (1983) 147 Cal. App. 3d 805, 819, 195 Cal. Rptr. 421]* . If essential elements are entirely lacking, there is no joint venture relationship [*see Orosco v. Sun-Diamond Corp. (1997) 51 Cal. App. 4th 1659, 1666, 60 Cal. Rptr. 2d 179]* . Optional Paragraph C may be useful when a party does not have a right of management and control in the enterprise, an essential element to a joint venture. An agreement by the parties to share jointly in the profits and losses, and a joint proprietary interest, have also been held to be essential elements [*see* Howard v. Societa di Unione etc. *(1944) 62 Cal. App. 2d 842, 847-848, 145 P.2d 694]* . Thus, it appears that none of the elements of joint venture, standing on their own, are sufficient to establish a joint venture relationship. For example, a party may share in the profits of an enterprise, but if that party has no control over the enterprise, there probably is no joint venture.

Because the general principles regarding the creation of joint ventures are essentially the same as those that govern partnerships [*see § 170.50[2][a]*], the forms in Subpart 1 generally may be combined with the forms in this subpart to oppose the existence of a joint venture. The cases discussed in this subpart illustrate the application of general partnership principles to joint ventures.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that there is no joint venture relationship because one of the essential elements of a joint venture is not present. They also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should discuss facts that show that although some of the elements or features of a joint venture may have been present in an agreement between the parties, no joint venture was actually created because one of the essential elements of a joint venture, such as a sharing in the profits or joint control of the enterprise, was missing.

[c] Opposing Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 170.51*.

[3] Discussion of Authorities

[a] No Joint Venture When Essential Elements Are Lacking

In ***Orosco v. Sun-Diamond Corp****. (1997) 51 Cal. App. 4th 1659, 60 Cal. Rptr. 2d 179* , a worker who lost his arm in an industrial accident filed a claim under his employer's workers compensation insurance. He also sought to recover in tort from corporations engaged in various business pursuits with and on behalf of the employer, on a theory of joint venture. The superior court granted summary judgment for the corporations, and the injured employee appealed. The appellate court held that respondent corporations were not engaged in a joint venture with the employer for production of raisins at the employer's plant (*51 Cal. App. 4th 1659, 1666)* .

The court reiterated that there are three basic elements of a joint venture: (1) the members must have joint control over the venture (even though they may delegate it), (2) they must share the profits of the undertaking, and (3) the members each must have an ownership interest in the enterprise. The court noted that although members can meet these

requirements in many different ways, there was no evidence that any entity other than the employer had any control over the production of raisins, that any entity shared with the employer the profits from producing raisins, or that any entity other than the employer had an ownership interest in the raisin crop prior to its sale in the marketplace. The court therefore held that the evidence did not raise a triable issue of fact whether a joint venture composed of respondents and the employer engaged in the production of raisins at the employer's plant (*51 Cal. App. 4th 1659, 1666)* .

The court further held that even if the injured employee could establish that a joint venture ran the raisin plant by or through the employer, the joint venture would not be liable without evidence of negligence by any joint venture member other than the employer (*51 Cal. App. 4th 1659, 1669-1670)* .

In **Howard v. Societa di Unione etc**. *(1944) 62 Cal. App. 2d 842, 847-848, 145 P.2d 694* , defendant association rented a baseball field from defendant lessor so that the association could use the field for its own events when lessor was not using it. Under the lease, the association could use the facilities already located on the property, and it agreed to construct, at its own expense, improvements needed for its activities. All structural work done by the association was to be under its own control. Although any structures erected by the association were to belong to lessor, lessor was not to be deemed the association's principal or employer, nor connected with the construction. The association was to maintain and repair the structures. It also agreed to indemnify lessor for any damage to the property, and against any liability resulting from its activities under the lease. Thereafter, the association erected improvements, and became indebted to various creditors for materials, services, goods, wares, and merchandise. The creditors assigned their claims to plaintiff, who brought an action against the association and lessor for the amounts of the claims. Plaintiff alleged a joint venture between lessor and the association. The trial court awarded judgment for plaintiff, holding both the association and lessor personally liable, and declaring the judgment sum an equitable lien on lessor's property. Defendant lessor appealed.

The appellate court reversed, enumerating some of the elements of a joint venture. It observed that the parties must have a community of interest in the purposes of the undertaking and equal authority or right to direct the movements and conduct of each other in connection therewith (*62 Cal. App. 2d 842, 847)* . The court also noted that an agreement by the parties to jointly share profits and losses is an indispensable feature of a joint venture. It held that the agreement in this case was entirely lacking in the essential elements of a joint undertaking of the association's enterprise. Among other things, there was no agreement to share gains and losses. In fact, the association expressly agreed to indemnify lessor against loss. Further, the lessor did not reserve the right to direct or govern the conduct of the association (*62 Cal. App. 2d 842, 847-848)* . The court also held that there was neither expression nor intimation that the two organizations contemplated other than completely independent operations, or that they intended to become partners (*62 Cal. App. 2d 842, 848)* .

[b] Right of Management and Control of Business Is Essential Element of Partnership or Joint Venture

In ***Bank of California v. Connolly*** *(1973) 36 Cal. App. 3d 350, 111 Cal. Rptr. 468* , decedent and appellants, decedent's associates, agreed to equally share 50 percent of the proceeds realized from the sale of two parcels of property owned by decedent and a third party. Appellants did not contribute any money toward the original purchase of the property, but they did render some service in connection with its acquisition. Further, appellants were expected to and did promote the sale of the property. Plaintiff, as successor administrator of decedent's estate, brought a declaratory relief action to determine the rights and obligations of the parties under the agreement. The trial court concluded that the agreement was enforceable only on the theory of an assignment of an equitable interest because profits from the sale of the land was only a possibility. In doing so, it impliedly rejected appellants' claim that their agreement with decedent was a joint venture. Appellants appealed.

The appellate court affirmed, holding that a joint venture exists when there is a community of interest or a joint interest in a common business undertaking, a sharing of profits and losses, and a right of joint control. The court held that the latter right is an essential element of a partnership or joint venture, and absent that right, the mere fact that one party

received benefits in consideration of services rendered or for capital contribution does not, as a matter of law, make that party a partner or joint venturer (*36 Cal. App. 3d 350, 364)* .

The facts and procedural background of **Howard v. Societa di Unione etc.** *(1944) 62 Cal. App. 2d 842, 145 P.2d 694* , are discussed in *§ 170.61[3][a]*. In *Howard*, the court held that because the subject agreement was entirely lacking in the essential elements of a joint undertaking, no joint venture existed between the parties. The court set out several elements that have been held to be essential features of joint ventures. These are (1) an agreement by the parties to share jointly in the profits and losses, (2) a joint proprietary interest, and (3) a right of mutual control over the subject matter of the enterprise or over the property (*62 Cal. App. 2d 842, 847-848)* . The court held that even when there is a sharing of profits, it does not follow that there is a joint venture relationship when there is no joint participation in the management and control of the business (*62 Cal. App. 2d 842, 848)* .

[4] Additional Authorities

[a] No Joint Venture When Essential Elements Are Lacking

In *Zorich v. Petroff (1957) 152 Cal. App. 2d 806, 313 P.2d 118* , plaintiff and defendants entered into a written agreement to form a motion picture company for the purpose of producing, selling, and distributing one motion picture. Plaintiff was to be the associate producer of the picture, and he rendered numerous services for the production. Plaintiff brought an action for the reasonable value of his services, and for a declaration that he had an interest in the enterprise, alleging a contemporaneous oral agreement wherein the parties formed a joint venture or partnership. The trial court entered judgment for defendants, finding that no partnership or joint venture was formed, and that plaintiff had no interest in the picture. The appellate court affirmed, holding that the fact that plaintiff was to receive an interest in the profits of the picture in consideration for his services did not, as a matter of law, make him a partner or joint venturer. Plaintiff assumed none of the financial risks of the enterprise, and he had no right of control over the production of the picture or its business affairs (*152 Cal. App. 2d 806, 810)* .

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[Reserved]

§§ 170.62[Reserved]

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17-170 California Points & Authorities § 170.70

§ 170.70 Supporting Contention That Limited Partnership Exists or Existed Under California Revised Limited Partnership Act (CRLPA) [Corp. Code §§ 15611-15723]--Applicable Partnership Law [Corp. Code §§ 15533, 15711, 15712(b)(1), 15714, 15722]

[1] FORM Supporting Contention That Limited Partnership Exists or Existed Under California Revised Limited Partnership Act (CRLPA) [Corp. Code §§ 15611-15723]--Applicable Partnership Law [Corp. Code §§ 15533, 15711, 15712(b)(1), 15714, 15722]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

THE CALIFORNIA REVISED LIMITED PARTNERSHIP ACT APPLIES TO THE LIMITED PARTNERSHIP RELATIONSHIP BETWEEN _____ [PLAINTIFF *or* DEFENDANT] _____ [*name*] AND _____ [DEFENDANT *or* PLAINTIFF] _____ [*name*] BECAUSE _____THE LIMITED PARTNERSHIP WAS [*specify. e.g.,* CREATED ON OR AFTER JULY 1, 1984, THE EFFECTIVE DATE OF THAT ACT *or* IN EXISTENCE ON JULY 1, 1984, THE EFFECTIVE DATE OF THAT ACT, AND THE PARTNERSHIP ELECTED TO BE GOVERNED BY THAT ACT].

[*EITHER, if limited partnership formed on or after July 1, 1984*]

A. California Revised Limited Partnership Act Governs Limited Partnerships Formed on or After July 1, 1984. The California Revised Limited Partnership Act governs limited partnerships formed on or after July 1, 1984, the effective date of the act (*Corp. Code §§ 15533, 15711, 15714*).

[*OR, if limited partnership formed prior to and existing on July 1, 1984*]

A. Election by Limited Partnership Existing on or Before July 1, 1984 to Be Governed by the California Revised Limited Partnership Act. Although the California Revised Limited Partnership Act does not apply to any limited partnership organized under the laws of California and existing on or before July 1, 1984, the effective date of the act, a limited partnership formed prior to and existing on the effective date may elect to be governed by the act (*Corp. Code §§ 15711, 15712(b)(1), 15714*).

[*Continue with the following*]

B. Applicability of General Partnership Law. In any case not provided for in the California Revised Limited Partnership Act, limited partnerships are governed in the same manner as general partnerships would be governed by the Uniform Partnership Act or the Uniform Partnership Act of 1994 (*Corp. Code § 15722*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that the provisions of the California Revised Limited Partnership Act ("CRLPA") contained in *Corp. Code § 15611 et seq.* apply to govern issues relating to the formation and operation of a limited partnership. Note that in cases not provided for in the CRLPA, limited partnerships are governed by the law applicable to general partnerships [*Corp. Code § 15722*].

One of the versions of Alternative Paragraph A may be used depending on whether the limited partnership was formed on or after July 1, 1984, or was in existence on July 1, 1984, but has elected to be governed by the provisions of the CRLPA [*see Corp. Code §§ 15712(b)(1), 15714*]. For further discussion of the relationship between the acts that may govern a limited partnership, see *§ 170.02[4], [5]*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the CRLPA governs the issue of whether a limited partnership was created in his or her particular case. They also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should discuss facts that show that the CRLPA applies because the partnership was created on or after July 1, 1984, or the partnership elected to be governed by the CRLPA even though it was in existence when the CRLPA went into effect [*see Corp. Code §§ 15712, 15714*].

[3] Discussion of Authorities

[a] Application of California Revised Limited Partnership Act

The California Revised Limited Partnership Act [*Corp. Code § 15611*] governs limited partnerships formed on or after July 1, 1984, as well as limited partnerships existing on or before July 1, 1984 that have elected to be governed by it [*Corp. Code §§ 15711, 15712(b)(1), 15714*; *see § 170.02[4], [5]*]. Note that such an election must be made by the written consent of all the partners, or a lesser number provided by the partnership election [*Corp. Code § 15712(b)(1)*]. Thus, any purported unwritten election is invalid, as is a written election not in compliance with the foregoing criteria.

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17-170 California Points & Authorities § 170.71

§ 170.71 Supporting Contention That Limited Partnership Exists or Existed Under Uniform Limited Partnership Act (ULPA) [Corp. Code §§ 15501-15533]--Applicable Partnership Law [Corp. Code §§ 15711, 15712(b)(1)]

[1] FORM Supporting Contention That Limited Partnership Exists or Existed Under Uniform Limited Partnership Act (ULPA) [Corp. Code §§ 15501-15533]--Applicable Partnership Law [Corp. Code §§ 15711, 15712(b)(1)]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

THE UNIFORM LIMITED PARTNERSHIP ACT APPLIES TO THE LIMITED PARTNERSHIP RELATIONSHIP BETWEEN _____ [PLAINTIFF *or* DEFENDANT] _____ [*name*] AND _____ [DEFENDANT *or* PLAINTIFF] _____ [*name*] BECAUSE THE LIMITED PARTNERSHIP WAS IN ALREADY IN EXISTENCE ON JULY 1, 1984, THE EFFECTIVE DATE OF THE CALIFORNIA REVISED LIMITED PARTNERSHIP ACT, AND THE PARTNERSHIP HAS NOT ELECTED TO BE GOVERNED BY THE LATTER ACT.

Uniform Limited Partnership Act Governs Limited Partnerships Existing on or Before July 1, 1984 That Have Not Elected to Be Governed by California Revised Limited Partnership Act. Unless limited partnerships in existence on or before July 1, 1984, elect to be governed by the California Revised Limited Partnership Act pursuant to *Corporations Code Section 15712*, they continue to be governed by the Uniform Limited Partnership Act (*Corp. Code §§ 15711, 15712(b)(1)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that the provisions of the Uniform Limited Partnership Act ("ULPA") [*Corp. Code § 15501 et seq.*] apply to govern issues relating to the formation and operation of a limited partnership.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the ULPA governs the issue of whether a limited partnership was created in his or her particular case. They also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should discuss facts showing that a limited partnership in the case was in existence on July 1, 1984, and it has not elected to be governed by the CRLPA.

[3] Discussion of Authorities

[a] Uniform Limited Partnership Act Governs Limited Partnerships Existing on or Before July 1, 1984 That Have Not Elected to Be Governed by California Revised Limited Partnership Act

The CRLPA expressly provides that it does not apply to limited partnerships formed prior to and in existence on July 1, 1984, its effective date, unless a limited partnership elects to be so governed [*Corp. Code §§ 15711*, *15712*; *see § 170.02[4]*, *[5]*]. Note that such an election must be made by the written consent of all the partners, or a lesser number provided by the partnership election [*Corp. Code § 15712(b)(1)*]. Thus, any purported unwritten election is invalid, as is a written election not in compliance with the foregoing criteria.

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17-170 California Points & Authorities § 170.72

§ 170.72 Supporting Contention That Limited Partnership Exists or Existed Under California Revised Limited Partnership Act (CRLPA)--Definition, Written Agreement, and Certificate of Limited Partnership [Corp. Code §§ 15611(r), 15621(a)]

[1] FORM Supporting Contention That Limited Partnership Exists or Existed Under California Revised Limited Partnership Act (CRLPA)--Definition, Written Agreement, and Certificate of Limited Partnership [Corp. Code §§ 15611(r), 15621(a)]

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief. It should be combined with § 170.70 in order to set out the applicable governing statutes.*]

THE RELATIONSHIP BETWEEN _____ [PLAINTIFF *or* DEFENDANT] _____ [*name*] AND _____ [DEFEN DANT *or* PLAINTIFF] _____ [*name*] _____ [IS *or* WAS] A LIMITED PARTNERSHIP UNDER THE CALIFORNIA REVISED LIMITED PARTNERSHIP ACT BECAUSE IT _____ [CONSISTS *or* CONSISTED] OF BOTH GENERAL PARTNERS AND LIMITED PARTNERS. THE LIMITED PARTNERSHIP WAS PROPERLY FORMED BECAUSE THE PARTIES EXECUTED A PARTNERSHIP AGREEMENT AND EXECUTED, ACKNOWLEDGED, AND FILED A CERTIFICATE OF LIMITED PARTNERSHIP WITH THE CALIFORNIA SECRETARY OF STATE.

A. Limited Partnership Defined. Under the California Revised Limited Partnership Act, a limited partnership or domestic limited partnership is a partnership formed by two or more persons under the laws of California and having one or more general partners and one or more limited partners (*Corp. Code § 15611(r)*; *see Corp. Code § 15611(n)* ("general partner" defined), (q) ("limited partner" defined)).

B. Requirements of Formation. In order to form a limited partnership, the parties must execute a partnership agreement. The general partners also must execute, acknowledge, and file with the Secretary of State of California a certificate of limited partnership stating the name of the limited partnership; the street address of the principal executive

office; the names and addresses of the general partners; the name and address of the partnership's agent for service of process, unless the agent is a corporation, and then only the name; and any other matters the general partners determine to include (*Corp. Code § 15621(a)*).

C. Limited Partnership Formed at Time Certificate Is Filed. A limited partnership is formed at the time of the filing of the certificate of limited partnership in the office of the Secretary of State, and, for all purposes, a copy of the certificate duly certified by the Secretary of State is conclusive evidence of the formation of a limited partnership and prima facie evidence of its existence (*Corp. Code § 15621(b), (c)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a limited partnership exists or existed because there was proper compliance with the formation requirements of the California Revised Limited Partnership Act (CRLPA) contained in *Corp. Code § 15621*. The CRLPA applies to limited partnerships formed on or after July 1, 1984, its effective date, and to limited partnerships organized under the laws of this state and existing on the effective date which elect to be governed by its provisions [*see Corp. Code §§ 15533* (ULPA), 15711 (CRLPA), 15712 (CRLPA), 15714 (CRLPA); *see also § 170.02[4], [5]*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a limited partnership was properly formed under the CRLPA. These points and authorities also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should discuss facts that show that the parties executed a partnership agreement, and executed, acknowledged, and filed a certificate of limited partnership.

[3] Discussion of Authorities

[a] Limited Partnership Defined

A limited partnership under the CRLPA is a partnership formed by two or more persons under the laws of California and having one or more general partners and one or more limited partners [*Corp. Code § 15611(r)*].

[b] Requirements of Formation

In order to form a limited partnership under the CRLPA, the parties must execute a partnership agreement and the general partners must execute, acknowledge, and file a certificate of limited partnership providing several designated items of information about the partnership [*Corp. Code § 15621(a)*]. A partnership agreement is any valid oral or written agreement of the partners as to the affairs of a limited partnership and the conduct of its business, including all amendments to the agreement [*Corp. Code § 15611(y)*]. If the partnership agreement consists of an oral agreement and a dispute arises in connection with the agreement, the burden of proof is on the general partner or partners [*Corp. Code § 15611(y)*]. The CRLPA does not define a valid oral or written agreement, and presumably general partnership principles apply when this becomes an issue [*see Corp. Code § 15722* (CRLPA)].

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17-170 California Points & Authorities § 170.73

§ 170.73 Supporting Contention That Limited Partnership Exists or Existed Under California Revised Limited Partnership Act--Surviving Limited Partnership Liable After Merger of Limited Partnerships [Corp. Code § 15678.6]

[1] FORM Supporting Contention That Limited Partnership Exists or Existed Under California Revised Limited Partnership Act--Surviving Limited Partnership Liable After Merger of Limited Partnerships [Corp. Code § 15678.6]

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief. It should be combined with § 170.70 in order to set out the applicable governing statutes*].

_____ [*Name of disappearing limited partnership*], A PROPERLY FORMED LIMITED PARTNERSHIP, CEASED TO EXIST ON MERGER WITH _____ [PLAINTIFF *or* DEFENDANT] _____ [*name of surviving limited partnership*], AND AS THE SURVIVING LIMITED PARTNERSHIP, _____ [PLAINTIFF *or* DEFENDANT] _____ [*name of surviving limited partnership*] _____ [SUCCEEDED TO ALL THE RIGHTS AND PROPERTY *or* BECAME SUBJECT TO ALL THE DEBTS AND LIABILITIES] OF _____ [*name of disappearing limited partnership*].

A. Limited Partnership Defined (CRLPA). [*See § 170.72, Paragraph A*].

B. Requirements of Formation. [*See § 170.72, Paragraph B*].

C. Limited Partnership Formed at Time Certificate Is Filed. [*See § 170.72, Paragraph C.*]

D. Surviving Limited Partnership Is Liable After Merger. In a merger pursuant to *Corporations Code Section 15678.1 et seq.*, the separate existence of each of the disappearing limited partnerships ceases and the surviving limited partnership succeeds, without other transfer, act, or deed, to all the rights and property, whether real, personal, or mixed, of each of the disappearing partnerships, and is subject to all the debts and liabilities of each in the same manner as if

the surviving partnership had itself incurred them. All rights of creditors and all liens on the property of each of the constituent partnerships are preserved unimpaired and may be enforced against the surviving partnership to the same extent as if the debt, liability, or duty that gave rise to the lien had been incurred or contracted by the surviving partnership (*Corp. Code § 15678.6(a), (b)*).

[*Optional*] E. Pending Action. Any action or proceeding pending by or against any disappearing partnership may be prosecuted to judgment, and the judgment binds the surviving partnership, or the surviving partnership may be proceeded against or be substituted in the disappearing partnership's place (*Corp. Code § 15678.6(c)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a limited partnership existed but disappeared as a result of a merger with one or more other limited partnerships pursuant to *Corp. Code § 15678.1 et seq.*, and that the surviving partnership succeeded to the rights and liabilities of the disappearing partnership.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a limited partnership was properly formed under the CRLPA and another limited partnership succeeded to its rights and liabilities under *Corp. Code § 15678.6(a), (b)*. This form also may be adapted for use in a trial or appellate brief.

This form may be adapted to include a merger with "other business entity or entities" pursuant to *Corp. Code § 15678.1 et seq.* and as defined by *Corp. Code § 15611(v)*.

For detailed discussion of the merger of limited partnerships, see California Legal Forms, Ch. 15C, *Conversions and Mergers of Limited Partnerships* (Matthew Bender); see also Ballantine & Sterling, California Corporation Laws, Ch. 25, *Limited Partnerships* , § 7.21A (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should discuss facts showing that the disappearing partnership was properly formed, the right or liability at issue arose before the merger became effective, and a certificate of merger was filed pursuant to *Corp. Code § 15678.5(a), (b)* (discussed in *§ 170.73[3][a]*) to effectuate the merger.

[c] Related Pleading and Practice Chapters

For discussion and forms relating to actions against a disappearing or a surviving limited partnership, see California Forms of Pleading and Practice, Ch. 404, *Partnerships: Actions Between Limited Partners and Partnerships* (Matthew Bender).

[3] Discussion of Authorities

[a] Surviving Limited Partnership Is Liable After Merger

The following entities may be merged under ***Corp. Code § 15678.1*:**

- Two or more limited partnerships into one limited partnership.
- One or more limited partnerships and one or more "other business entities" (i.e., a corporation,

general partnership, limited liability company, business trust, real investment trust, or unincorporated for-profit association [*Corp. Code § 15611(v)* (definition); *see also Corp. Code § 23006* for rules governing mergers of limited partnerships with REITs)]) into one of those other business entities.

- One or more limited partnerships and one or more other business entities into one limited partnership.

The merger of any number of limited partnerships with any number of other business entities may be effected only if the other business entities that are organized in California are authorized by the laws under which they are organized to effect the merger, and [*Corp. Code § 15678.1*]:

- If a limited partnership is the surviving limited partnership, any foreign other business entities are not prohibited by the laws under which they are organized from effecting the merger.

- If a foreign limited partnership or foreign other business entity is the survivor of the merger, the laws of the jurisdiction under which the survivor is organized authorize that merger.

If one or more domestic corporations is also a party to the merger, the merger may be effected only if, with respect to any foreign other business entity that is a corporation, the foreign corporation is authorized by the laws under which it is organized to effect that merger [*Corp. Code § 15678.1*].

A limited partnership that merged with or into one or more other limited partnerships or other business entities is referred to as a "constituent" limited partnership [*Corp. Code § 15611(e)*]. A "constituent other business entity" refers to an other business entity that is merged with or into one or more limited partnerships [*Corp. Code § 15611(f)*]. Constituents include the "surviving" limited partnership, into which one or more other limited partnerships or other business entities have been merged, and the "disappearing" limited partnership or partnerships or other business entity or entities, which do not survive the merger [*Corp. Code § 15611(e), (f), (h), (i)*].

After approval of a merger, the constituent partnerships and constituent other business entities must file a certificate of merger, or, if one is required by *Corp. Code § 15678.4(b)* when the surviving entity is a corporation, an agreement of merger, in the office of, and on a form prescribed by, the Secretary of State. The merger becomes effective on filing, unless the certificate or agreement provides for a future date. For all purposes, a copy of the certificate duly certified by the Secretary is conclusive evidence of the merger [*Corp. Code § 15678.5(a), (b)*]. In addition, filing of the certificate has the effect of filing a certificate of cancellation for each disappearing limited partnership [*Corp. Code § 15678.4(c)*].

Once the merger is effective, the separate existence of each of the disappearing partnerships and disappearing other business entities ceases and the surviving partnership or other surviving business entity succeeds, without other transfer, act, or deed, to all the rights and property, whether real, personal, or mixed, of each of the disappearing partnerships or other business entities, and is subject to all the debts and liabilities of each in the same manner as if the surviving partnership or other business entity had itself incurred them [*Corp. Code § 15678.6(a)*]. All rights of creditors and all liens on the property of each of the constituent partnerships and constituent other business entities are preserved unimpaired and may be enforced against the surviving partnership or other business entity to the same extent as if the debt, liability, or duty that gave rise to the lien had been incurred or contracted by it. Liens on the property of a disappearing partnership or other business entity are limited, however, to the property affected by the liens immediately before the merger is effective [*Corp. Code § 15678.6(b)*]. Any action or proceeding pending by or against any disappearing partnership or other business entity may be prosecuted to judgment. The judgment binds the surviving partnership or other business entity, or the action or proceeding may be prosecuted against the surviving partnership or other business entity by substitution in the disappearing partnership's or disappearing other business entity's place [*Corp. Code § 15678.6(c)*]. This does not affect the liability a general partner of a disappearing limited partnership may have in connection with the debts and liabilities of the disappearing limited partnership existing prior to the time the

merger is effective [*Corp. Code § 15678.6(d)*].

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17-170 California Points & Authorities § 170.74

§ 170.74 Supporting Contention That Limited Partnership Exists or Existed Under California Revised Limited Partnership Act (CRLPA)--Converted Entity Liable for Debts and Obligations of Converting Limited Partnership [Corp. Code § 15677.9]

[1] FORM Supporting Contention That Limited Partnership Exists or Existed Under California Revised Limited Partnership Act (CRLPA)--Converted Entity Liable for Debts and Obligations of Converting Limited Partnership [Corp. Code § 15677.9]

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief. It should be combined with § 170.70 in order to set out the applicable governing statutes.*]

_____ [*Name of converting limited partnership*], A PROPERLY FORMED LIMITED PARTNERSHIP, CONVERTED INTO _____ [PLAINTIFF *or* DEFENDANT], AND ALL DEBTS, LIABILITIES, AND OBLIGATIONS OF _____ [*name of converting limited partnership*], THE CONVERTING LIMITED PARTNERSHIP, CONTINUED AS DEBTS, LIABILITIES, AND OBLIGATIONS OF _____ [PLAINTIFF *or* DEFENDANT] _____ [*name of converted entity*] AS THE CONVERTED ENTITY.

A. Limited Partnership Defined (CRLPA). [*See § 170.72, Paragraph A.*]

B. Requirements of Formation. [*See § 170.72, Paragraph B*].

C. Limited Partnership Formed at Time Certificate is Filed. [*See § 170.72, Paragraph C*].

D. Converted Entity Is Liable After Conversion. When a limited partnership converts into an other business entity, a foreign other business entity, or a foreign limited partnership pursuant to *Corp. Code § 15677.4*, all the rights and property, whether real, personal, or mixed, of the converting limited partnership are vested in the converted entity. All debts, liabilities, and obligations of the converting limited partnership continue as debts, liabilities, and obligations of

the converted entity. All rights of creditors and liens upon the property of the converting limited partnership are preserved unimpaired and remain enforceable against the converted entity to the same extent as against the converting limited partnership, as if the conversion had not occurred (*Corp. Code § 15677.9(b)(1)-(3)*).

[*Optional*] **E. Pending Action**. Any action or proceeding pending by or against the converting limited partnership may be continued against the converted entity as if the conversion had not occurred (*Corp. Code § 15677.9(b)(4)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that in the case of a limited partnership that has converted into another form of business entity, the rights and property of the converting limited partnership became vested in the converted entity, and that all debts, liabilities, and obligations of the converting limited partnership continued as debts, liabilities, and obligations of the converted entity [*see Corp. Code § 15677.9(b)*]. These points and authorities may be used, for example, to refute a contention that a business entity which was converted from a limited partnership is no longer liable for the former limited partnership's debts and obligations, or in other situations in which issues involving succession to the former limited partnership's rights or obligations are at issue. Note than when another type of business entity converts *into* a limited partnership, similar rules apply to the converted limited partnership [*see Corp. Code § 15677.9(a), (b)*].

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a limited partnership was properly formed under the CRLPA and another entity succeeded to its rights and liabilities under *Corp. Code § 15677.9(b)*. This form also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Converted Entity Is Liable After Conversion

A limited partnership may be converted into an other business entity (i.e., a corporation, general partnership, limited liability company, business trust, real investment trust, or unincorporated for-profit association [*Corp. Code § 15611(v)* (definition)]), foreign other business entity [*see Corp. Code § 15611(m)*], or a foreign limited partnership [*see Corp. Code § 15611*(*l*) (definition)] pursuant to *Corp. Code §§ 15677.1-15677.9* (CRLPA, Article 7.4) if, pursuant to the proposed conversion, each of the partners of the converting limited partnership receives a percentage interest in the profits and capital of the converted entity equal to that partner's percentage interest in profits and capital of the converting limited partnership as of the effective time of the conversion. Such a conversion may be effected only if the law under which the converted entity will exist expressly permits the formation of that entity pursuant to a conversion and the limited partnership complies with all other requirements of any other law that applies to conversion to the converted entity [*Corp. Code § 15677.2*; *see Corp. Code § 15677.5*]. A "converting limited partnership" is defined as a domestic limited partnership that converts to an other business entity, foreign other business entity, or a foreign limited partnership under the CRLPA [*Corp. Code § 15677.1(c)*]. A "converted entity" means the other business entity, foreign other business entity, or foreign limited partnership that results from a conversion of a domestic limited partnership under the CRLPA [*Corp. Code § 15677.1(a)*].

A limited partnership that wishes to convert to an other business entity, foreign other business entity, or a foreign limited partnership must approve a plan of conversion [*see Corp. Code § 15677.3* (content and approval requirements)].

The conversion becomes effective upon the earliest date that all of the following occur [*Corp. Code § 15677.4*]:

- The approval of the plan of conversion by the partners of the converting limited partnership [*see Corp. Code § 15677.3*];
- The filing of all documents required by law to create the converted entity; and
- The occurrence of the effective date if set forth in the plan of conversion.

Upon conversion, a statement or certificate of conversion must be completed or filed [*see Corp. Code § 15677.6*]. The filing with the Secretary of State of a certificate of conversion or a statement of partnership authority or articles of organization containing a statement of conversion has the effect of the filing of a certificate of cancellation by the converting limited partnership, and no converting limited partnership that has made the filing is required to file a certificate of dissolution or cancellation [*see Corp. Code § 15623*] as a result of conversion [*Corp. Code § 15677.6(c)*].

A limited partnership that converts into another entity pursuant to *Corp. Code §§ 15677.1-15677.9* is for all purposes the same entity that existed before the conversion [*Corp. Code § 15677.9(a)*]. Upon a conversion taking effect, all the rights and property, whether real, personal, or mixed, of the converting limited partnership are vested in the converted entity [*Corp. Code § 15677.9(b)(1)*]. All debts, liabilities, and obligations of the converting limited partnership continue as debts, liabilities, and obligations of the converted entity [*Corp. Code § 15677.9(b)(2)*]. All rights of creditors and liens upon the property of the converting limited partnership are preserved unimpaired and remain enforceable against the converted entity to the same extent as against the converting limited partnership, as if the conversion had not occurred [*Corp. Code § 15677.9(b)(3)*].

Any action or proceeding pending by or against the converting limited partnership may be continued against the converted entity as if the conversion had not occurred [*Corp. Code § 15677.9(b)(4)*]. The continuing liabilities of partners of the converting limited partnership are delineated in *Corp. Code § 15677.9(c)-(e)*.

For detailed discussion of the conversion of limited partnerships, see California Legal Forms, Ch. 16B, *Conversions and Mergers of Limited Partnerships* (Matthew Bender); see also Ballantine & Sterling, California Corporation Laws, Ch. 25, *Limited Partnerships* (Matthew Bender).

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17-170 California Points & Authorities § 170.75

§ 170.75 Supporting Contention That Limited Partnership Exists or Existed Under ULPA '08--Applicable Partnership Law [Corp. Code § 15912.06(a), (b)]

[1] FORM Supporting Contention That Limited Partnership Exists or Existed Under ULPA '08--Applicable Partnership Law [Corp. Code § 15912.06(a), (b)]

[*The following may be included in a memorandum, or in a trial or appellate brief*.]

THE UNIFORM LIMITED PARTNERSHIP ACT OF 2008 APPLIES TO THE LIMITED PARTNERSHIP RELATIONSHIP BETWEEN _____ [PLAINTIFF *or* DEFENDANT] _____ [*name*] AND _____ [DEFENDANT or PLAINTIFF] _____ [*name*].

Uniform Partnership Act of 2008 Governs Limited Partnerships. Before January 1, 2010, the ULPA '08 governed limited partnerships formed on or after January 1, 2008, or limited partnerships formed before that date that elected, in the manner provided in the partnership agreement or by law for amending the partnership agreement, to be subject to the ULPA '08. On or after January 1, 2010, the ULPA '08 governs all limited partnerships (*Corp. Code § 15912.06(a),(b)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that the Uniform Limited Partnership Act of 2008 (ULPA '08) [*Corp. Code § 15900 et seq.*] applies to govern issues relating to the formation and operation of a limited partnership.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the ULPA '08 governs the issue of whether a limited partnership was created. These points and authorities also may be used adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[3] Discussion of Authorities

[a] Uniform Partnership Act of 2008 Governs Limited Partnerships Formed After Operative Date or Electing to Be Governed by Act

Corp. Code § 15912.06(a) provides that before January 1, 2010, the ULPA '08 governs only (1) limited partnerships formed on or after January 1, 2008, or (2) limited partnerships formed before that date that elect, in the manner provided in the partnership agreement or by law for amending the partnership agreement, to be subject to the ULPA '08. On or after January 1, 2010, the ULPA '08 governs all limited partnerships [*Corp. Code § 15912.06(b)*]. Certain ULPA '08 provisions, however, will not apply to pre-2008 partnerships except as the partners otherwise elect [*Corp. Code § 15912.06(c)*; *see § 170.02[4] -[6]*; *see also* Clark, California's Uniform Limited Partnership Act of 2008, §§ 5, 8.03 (LexisNexis)]. Furthermore, the ULPA '08 does not affect an action commenced, proceeding brought, or right accrued before it became operative [*Corp. Code § 15912.07*].

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17-170 California Points & Authorities § 170.76

§ 170.76 Supporting Contention That Limited Partnership Exists or Existed Under ULPA '08--Definition, Written Agreement, and Certificate of Limited Partnership [Corp. Code §§ 15901.02(q), 15902.01]

[1] FORM Supporting Contention That Limited Partnership Exists or Existed Under ULPA '08--Definition, Written Agreement, and Certificate of Limited Partnership [Corp. Code §§ 15901.02(q), 15902.01]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with § 170.75 in order to set out the applicable governing statutes*.]

THE RELATIONSHIP BETWEEN _____ [PLAINTIFF *or* DEFENDANT] _____ [*name*] AND _____ [PLAINTIFF *or* DEFENDANT] _____ [*name*] _____ [IS or WAS] A LIMITED PARTNERSHIP UNDER THE UNIFORM LIMITED PARTNERSHIP ACT OF 2008 BECAUSE IT _____ [CONSISTS *or* CONSISTED] OF BOTH GENERAL PARTNERS AND LIMITED PARTNERS. THE LIMITED PARTNERSHIP WAS PROPERLY FORMED BECAUSE THE PARTIES EXECUTED A PARTNERSHIP AGREEMENT AND EXECUTED, ACKNOWLEDGED, AND FILED A CERTIFICATE OF LIMITED PARTNERSHIP WITH THE CALIFORNIA SECRETARY OF STATE.

A. Limited Partnership Defined. Under the Uniform Limited Partnership Act of 2008, a limited partnership or domestic limited partnership (except in the phrases "foreign limited partnership" and "foreign limited liability limited partnership") is an entity having one or more general partners and one or more limited partners which is formed under the Act by two or more persons, or becomes subject to the Act pursuant to conversion or merger under *Corp. Code § 15911.01 et seq.* or by election or operation of law under *Corp. Code § 15912.06(a)* or *(b)* (*Corp. Code § 15901.02(q)*; *see Corp. Code § 15901.02(m)* ("general partner" defined), (p) ("limited partner" defined)).

B. Requirements of Formation. In order to form a limited partnership, the partners must enter into a partnership agreement. A certificate of limited partnership must be filed with and on a form prescribed by the Secretary of State, stating the name of the limited partnership; the address of the initial designated office; the name and address of the

initial agent for service of process in accordance with *Corp. Code § 15901.16(d)(1)*; the name and address of each general partner; and any other matters the partners wish to include (*Corp. Code § 15902.01(a), (b)*).

C. Limited Partnership Formed at Time Certificate is Filed. A limited partnership is formed when the Secretary of State files the certificate of limited partnership, unless a delayed effective date is specified pursuant to *Corp. Code § 15902.06(c)* (*Corp. Code § 15902.01(c)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a limited partnership exists or existed because there was proper compliance with the formation requirements of the ULPA '08 contained in *Corp. Code § 15902.01*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a limited partnership was properly formed under the ULPA '08. These points and authorities also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Therefore, counsel should discuss facts that show that the parties entered into a partnership agreement and filed a certificate of limited partnership.

[3] Discussion of Authorities

[a] Limited Partnership Defined

Under the ULPA '08, a limited partnership or domestic limited partnership (except in the phrases "foreign limited partnership" and "foreign limited liability limited partnership") is an entity having one or more general partners and one or more limited partners which is formed under the Act by two or more persons, or becomes subject to the Act pursuant to conversion or merger under *Corp. Code § 15911.01 et seq.* or by election or operation of law under *Corp. Code § 15912.06(a)* or *(b)* [*Corp. Code § 15901.02(q)*; *see Corp. Code § 15901.02(m)* ("general partner" defined), (p) ("limited partner" defined)].

[b] Requirements of Formation

To form a limited partnership under the ULPA '08, the partners must enter into a partnership agreement and file a certificate of limited partnership with and on a form prescribed by the Secretary of State, providing several designated items of information about the partnership [*Corp. Code § 15902.01(a), (b)*]. A partnership agreement means the partners' agreement, whether oral, implied, in a record, or in any combination, concerning the limited partnership. The term includes the agreement as amended [*Corp. Code § 15901.02(x)*]. A limited partnership is formed when the Secretary of State files the certificate of limited partnership, unless a delayed effective date is specified pursuant to *Corp. Code § 15902.06(c)* [*Corp. Code § 15902.01(c)*].

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17-170 California Points & Authorities § 170.77

§ 170.77 Supporting Contention That Limited Partnership Exists or Existed Under ULPA '08--Surviving Limited Partnership Liable After Merger of Limited Partnerships [Corp. Code § 15911.16]

[1] FORM Supporting Contention That Limited Partnership Exists or Existed Under ULPA '08--Surviving Limited Partnership Liable After Merger of Limited Partnerships [Corp. Code § 15911.16]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with § 170.75 in order to set out the applicable governing statutes*.]

_____ [*Name of disappearing limited partnership*], A PROPERLY FORMED LIMITED PARTNERSHIP, CEASED TO EXIST ON MERGER WITH _____ [PLAINTIFF or DEFENDANT] _____ [*name of surviving limited partnership*], AND AS THE SURVIVING LIMITED PARTNERSHIP, _____ [PLAINTIFF or DEFENDANT] _____ [*name of surviving limited partnership*] _____ [SUCCEEDED TO ALL THE RIGHTS AND PROPERTY *or* BECAME SUBJECT TO ALL THE DEBTS AND LIABILITIES] OF _____ [*name of disappearing limited partnership*].

A. Limited Partnership Defined (ULPA '08). [*See § 170.76, Paragraph A*].

B. Requirements of Formation. [*See § 170.76, Paragraph B*].

C. Limited Partnership Formed at Time Certificate Is Filed. [*See § 170.76, Paragraph C*].

D. Surviving Limited Partnership Is Liable After Merger. Upon a merger of limited partnerships pursuant to *Corp. Code § 15911.10 et seq.*, the separate existence of the disappearing limited partnerships ceases and the surviving limited partnership succeeds without other transfer, act, or deed to all the rights and property, whether real, personal, or mixed, of each of the disappearing limited partnerships, and is subject to all the debts and liabilities of each in the same manner as if the surviving limited partnership had itself incurred them. All rights of creditors and all liens on the property of

each of the constituent limited partnerships are preserved unimpaired and may be enforced against the surviving limited partnership to the same extent as if the debt, liability, or duty that gave rise to that lien had been incurred or contracted by the surviving limited partnership, provided that those liens on the property of a disappearing limited partnership are limited to the property affected thereby immediately before the time the merger is affected (*Corp. Code § 15911.16(a),(b)*).

[*Optional*] **E. Pending Action.** Any action or proceeding pending by or against any disappearing limited partnership may be prosecuted to judgment, and the judgment binds the surviving limited partnership, or the surviving limited partnership may be proceeded against or be substituted in the place of the disappearing limited partnership (*Corp. Code § 15911.16(c)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a limited partnership existed but disappeared as a result of a merger with one or more other limited partnerships pursuant to *Corp. Code § 15911.10 et seq.* and that the surviving partnership succeeded to the rights and liabilities of the disappearing partnership.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a limited partnership was properly formed under the ULPA '08 and another limited partnership succeeded to its rights and liabilities under *Corp. Code § 15911.16(a),(b)*. These points and authorities also may be adapted for use in a trial or appellate brief.

This form may be adapted to include a merger with an "other business entity" pursuant to *Corp. Code § 15911.16* and as defined by *Corp. Code § 15901.02(u)*.

For detailed discussion of the merger of limited partnerships, see California Legal Forms, Ch. 16B, *Conversions and Mergers of Limited Partnerships* (Matthew Bender); *see also* Ballantine & Sterling, California Corporation Laws, Ch. 25, *Limited Partnerships* , § 7.12A (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should discuss facts showing that the disappearing partnership was properly formed, the right or liability at issue arose before the merger became effective, and a certificate of merger was filed pursuant to *Corp. Code § 15911.14* (discussed in [3][a], *below*) to effectuate the merger.

[c] Related Pleading and Practice Chapters

For discussion and forms relating to actions against a disappearing or a surviving limited partnership, see California Forms of Pleading and Practice, Ch. 404, *Partnerships: Actions Between Limited Partners and Partnerships* (Matthew Bender).

[3] Discussion of Authorities

[a] Surviving Limited Partnership Is Liable After Merger

The following entities may be merged under ***Corp. Code § 15911.11*** :

- Two or more limited partnerships into one limited partnership.

- One or more limited partnerships and one or more "other business entities" (*i.e.*, a corporation, general partnership, limited liability company, business trust, real estate investment trust, or an unincorporated association other than a nonprofit association [*Corp. Code § 15911.02(u)* (definition)]) into one of those other business entities.

- One or more limited partnerships and one or more other business entities into one limited partnership.

The merger of any number of limited partnerships with any number of other business entities may be effected only if the other business entities that are organized in California are authorized by the laws under which they are organized to effect the merger, and [*Corp. Code § 15911.11*]:

- If a limited partnership is the surviving limited partnership, the foreign other business entities are not prohibited by the laws under which they are organized from effecting that merger, and

- If a foreign limited partnership or foreign other business entity is the survivor of the merger, the laws of the jurisdiction under which the survivor is organized authorize that merger.

If one or more domestic corporations is also a party to the merger, the merger may be effected only if, with respect to any foreign other business entity that is a corporation, the foreign corporation is authorized by the laws under which it is organized to effect that merger [*Corp. Code § 15911.11*].

A limited partnership that is merged with or into one or more other limited partnerships or other business entities is referred to as a "constituent limited partnership" [*Corp. Code § 15911.01(f)*]. A "constituent other business entity" means an other business entity that is merged with or into one or more limited partnerships [*Corp. Code § 15911.01(g)*]. Constituents include the "surviving limited partnership" or "surviving other business entity," into which one or more other limited partnerships or other business entities are merged, and the "disappearing" limited partnership or other business entity which do not survive the merger [*Corp. Code § 15911.01(h), (i), (l), (m)*].

After approval of a merger, the constituent limited partnerships and any constituent other business entities must file a certificate of merger (or, if the surviving entity is a corporation, an agreement of merger if required by *Corp. Code § 15911.15(b)*) in the office of, on a form prescribed by, the Secretary of State [*Corp. Code § 15911.14(a)*]. The merger becomes effective on filing, unless the certificate or agreement of merger provides for a future effective date [*Corp. Code § 15911.15(a)*]. For all purposes, a copy of the certificate of merger duly certified by the Secretary of State is conclusive evidence of the merger [*Corp. Code § 15911.15(b)*]. In addition, filing of the certificate has the effect of filing a certificate of cancellation for each disappearing limited partnership [*Corp. Code § 15911.14(c)*].

Once the merger is effective, the separate existence of the disappearing limited partnerships and disappearing other business entities ceases and the surviving limited partnership or surviving other business entity succeeds, without other transfer, act or deed, to all the rights and property, whether real, personal, or mixed, of each of the disappearing limited partnerships and disappearing other business entities, and is subject to all the debts and liabilities of each in the same manner as if the surviving limited partnership or surviving other business entity had itself incurred them [*Corp. Code § 15911.16(a)*]. All rights of creditors and all liens upon the property of each of the constituent limited partnerships and constituent other business entities are preserved unimpaired and may be enforced against the surviving limited partnership or the surviving other business entity to the same extent as if the debt, liability, or duty that gave rise to that lien had been incurred or contracted by it. Liens on the property of a disappearing limited partnership or disappearing other business entity are limited to the property affected by the liens immediately before the merger is effective [*Corp. Code § 15911.16(b)*]. Any action or proceeding pending by or against any disappearing limited partnership or disappearing other business entity may be prosecuted to judgment. The judgment binds the surviving limited partnership

or surviving other business entity, or the surviving limited partnership or surviving other business entity may be proceeded against or be substituted in the place of the disappearing limited partnership or disappearing other business entity effective [*Corp. Code § 15911.16(c)*]. This does not affect the liability a general partner of a disappearing limited partnership may have in connection with the debts and liabilities of the disappearing limited partnership existing prior to the time the merger is effective [*Corp. Code § 15911.16(d)*].

[4] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that in the case of a limited partnership that has converted into another form of business entity, the rights and property of the converting limited partnership became vested in the converted entity, and that all debts, liabilities, and obligations of the converting limited partnership continue as debts, liabilities, and obligations of the converted entity [*see Corp. Code § 15911.09(b)*]. These points and authorities may be used, for example, to refute a contention that a business entity which was converted from a limited partnership is no longer liable for the former limited partnership's debts and obligations, or in other situations in which issues involving succession to the former limited partnership's rights and obligations are at issue. Note that when another type of business entity converts *into* a limited partnership, similar rules apply to the converted limited partnership [*see Corp. Code § 15911.09(a)*].

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a limited partnership was properly formed under the ULPA '08 and another entity succeeded to its rights and liabilities under *Corp. Code § 15911.09(b)*. This form also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[5] Discussion of Authorities

[a] Converted Entity Is Liable After Conversion

A limited partnership may be converted into another business entity (*i.e.*, a corporation, general partnership, limited liability company, business trust, real estate investment trust, or unincorporated association other than a nonprofit association [*see Corp. Code § 15911.01(k)*)] or a foreign other business entity [*see Corp. Code § 15911.01(j)* (definition)] or a foreign limited partnership pursuant to *Corp. Code §§ 15911.01-15911.19* (ULPA '08, Art. 11) if, pursuant to the conversion, each of the partners of the converting limited partnership receives a percentage interest in the profits and capital of the converted entity equal to that partner's percentage interest in profits and capital of the converting limited partnership as of the effective time of the conversion. Such a conversion may be effected only if the law under which the converted entity will exist expressly permits the formation of that entity pursuant to a conversion, and the limited partnership complies with all other requirements of any other law that applies to conversion to the converted entity [*Corp. Code § 15911.02*]. A "converting limited partnership" is defined as a domestic limited partnership that converts to an other business entity or a foreign other business entity or a foreign limited partnership under the ULPA '08 [*Corp. Code § 15911.01(c)*]. A "converted entity" means the other business entity or foreign other business entity or foreign limited partnership that results from a conversion of a domestic limited partnership under the ULPA '08 [*Corp. Code § 15911.01(a)(1)*]. For a conversion into an other business entity or foreign other business entity not specified above, each limited partnership interest of the same class must be treated equally with respect to any distribution of cash, property, rights, interests, or securities of the converted entity, unless all limited partners of the class consent; and the nonredeemable limited partnership interests of the converting limited partnership must be converted only into nonredeemable interests or securities of the converted entity, unless all holders of the unredeemable

interests consent [*Corp. Code § 15911.01(a)(2)*].

A limited partnership that wishes to convert to an other business entity or a foreign other business entity or a foreign limited partnership must approve a plan of conversion [*see Corp. Code § 15911.03* (content and approval requirements)]. The conversion becomes effective on the earliest date that all of the following occur [*Corp. Code § 15911.04(a)*]:

- The approval of the plan of conversion by the partners of the converting limited partnership [*see Corp. Code § 15911.03*].
- The filing of all documents required by law to create the converted entity.
- The occurrence of the effective date, if set forth in the plan of conversion.

Upon conversion, a statement or certificate of conversion must be completed or filed [*see Corp. Code § 15911.06(a)*]. The filing with the Secretary of State of a certificate of conversion or a statement of partnership authority, articles of organization, or articles of incorporation containing a statement of conversion has the effect of the filing of a certificate of cancellation by the converting limited partnership, and no converting limited partnership that has made the filing is required to file a certificate of cancellation [*see Corp. Code § 15902.03*] as a result of that conversion [*Corp. Code § 15911.06(c)*].

A limited partnership that converts into another entity pursuant to *Corp. Code § 15911.01-15911.09* is for all purposes (other than for the purposes of *Rev. & Tax Code §§ 17001 et seq., 18401 et seq.,* and *23001 et seq.*) the same entity that existed before the conversion and the conversion will not be deemed a transfer of property [*Corp. Code § 15911.09(a)*]. Upon a conversion taking effect, all the rights and property, whether real, personal, or mixed, of the converting entity or converting limited partnership are vested in the converted entity or converted limited partnership [*Corp. Code § 15911.09(b)(1)*]. All debts, liabilities, and obligations of the converting entity or converting limited partnership continue as debts, liabilities, and obligations of the converted entity or converted limited partnership [*Corp. Code § 15911.09(b)(2)*]. All rights of creditors and liens on the property of the converting entity or converting limited partnership are preserved unimpaired and remain enforceable against the converted entity or converted limited partnership to the same extent as against the converting entity or converting limited partnership as if the conversion had not occurred [*Corp. Code § 15911.09(b)(3)*].

Any action or proceeding pending by or against the converting entity or converting limited partnership may be continued against the converted entity or converted limited partnership as if the conversion had not occurred [*Corp. Code § 15911.09(b)(4)*]. The continuing liabilities of partners of the converting limited partnership are delineated in *Corp. Code § 15911.09(c)-(e)*].

For detailed discussion of the conversion of limited partnerships, see California Legal Forms (Matthew Bender), Ch. 16B, *Conversions and Mergers of Limited Partnerships*; *see also* Ballantine & Sterling, California Corporation Laws, Ch. 25, *Limited Partnerships* (Matthew Bender).

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Volume 17 Chapters 170-179 PARTNERSHIPS---to---PREMISES LIABILITY
CHAPTER 170 PARTNERSHIPS
PART II. FORMS
B. Partnership Formation and Existence
3. Limited Partnerships

17-170 California Points & Authorities § 170.78

§ 170.78 Supporting Contention That Limited Partnership Exists or Existed Under ULPA '08--Converted Entity Liable for Debts and Obligations of Converting Limited Partnership [Corp. Code § 15911.09]

[1] FORM Supporting Contention That Limited Partnership Exists or Existed Under ULPA '08--Converted Entity Liable for Debts and Obligations of Converting Limited Partnership [Corp. Code § 15911.09]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with § 170.75 in order to set out the applicable governing statutes*.]

_____ [*Name of converting limited partnership*], A PROPERLY FORMED LIMITED PARTNERSHIP, CONVERTED INTO _____ [PLAINTIFF *or* DEFENDANT], AND ALL DEBTS, LIABILITIES, AND OBLIGATIONS OF _____ [*name of converting limited partnership*], THE CONVERTING LIMITED PARTNERSHIP, CONTINUED AS DEBTS, LIABILITIES, AND OBLIGATIONS OF _____ [PLAINTIFF *or* DEFENDANT] _____ [*name of converted entity*] AS THE CONVERTED ENTITY.

A. Limited Partnership Defined (ULPA '08). [*See § 170.76, Paragraph A*].

B. Requirements of Formation. [*See § 170.76, Paragraph B*].

C. Limited Partnership Formed at Time Certificate Is Filed. [*See § 170.76, Paragraph C*].

D. Converted Entity Is Liable After Conversion. When a limited partnership converts into an other business entity, a foreign other business entity, or a foreign limited partnership pursuant to *Corp. Code § 15911.04*, all the rights and property, whether real, personal, or mixed, of the converting entity or converting limited partnership are vested in the converted entity or converted limited partnership. All debts, liabilities, and obligations of the converting entity or converting limited partnership continue as debts, liabilities, and obligations of the converted entity or converted limited partnership. All rights of creditors and liens on the property of the converting entity or converting limited partnership

are preserved unimpaired and remain enforceable against the converted entity or converted limited partnership to the same extent as against the converting entity or converting limited partnership as if the conversion had not occurred (*Corp. Code § 15911.09(b)(1)-(3)*).

[*Optional*] **E. Pending Action.** Any action or proceeding pending by or against the converting entity or converting limited partnership may be continued against the converted entity or converted limited partnership as if the conversion had not occurred (*Corp. Code § 15911.09(b)(4)*).

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CHAPTER 170 PARTNERSHIPS
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17-170 California Points & Authorities §§ 170.79-170.99

[Reserved]

§§ 170.79[Reserved]

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CHAPTER 170 PARTNERSHIPS
PART II. FORMS
C. Relations Among Partners
1. Fiduciary Duties

17-170 California Points & Authorities § 170.100

§ 170.100 Supporting Contention That Partners Owe Fiduciary Duties of Loyalty and Care to Partnership and Other Partners [Corp. Code § 16404(a)]

[1] FORM Supporting Contention That Partners Owe Fiduciary Duties of Loyalty and Care to Partnership and Other Partners [Corp. Code § 16404(a)]

[*The following may be included in a memorandum, or in a trial or appellate brief*].

PARTNERS ARE FIDUCIARIES OR TRUSTEES FOR EACH OTHER AND OWE TO THE PARTNERSHIP AND THE OTHER PARTNERS THE DUTIES OF LOYALTY AND THE DUTY OF CARE, [AND THEIR FIDUCIARY DUTIES TO EACH OTHER CONTINUE THROUGH DISSOLUTION AND WINDING UP OF THE PARTNERSHIP AFFAIRS].

A. Partners Are Fiduciaries or Trustees for Each Other. A partner owes to the partnership and the other partners a duty of loyalty and a duty of care. The partnership relationship is confidential and fiduciary in nature; partners are trustees for each other. In all matters connected with the partnership business, every partner is bound to act in the highest good faith toward his or her copartner(s) and may not obtain any unfair advantage or secure an undue benefit by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind. The burden is on the partner seeking the advantage to show complete good faith and fairness towards the other partner(s) (*Corp. Code § 16404*; *Page v. Page (1961) 55 Cal. 2d 192, 197, 10 Cal. Rptr. 643, 359 P.2d 41* ; *Laux v. Freed (1960) 53 Cal. 2d 512, 522, 2 Cal. Rptr. 265, 348 P.2d 873* ; *BT-I v. Equitable Life Assurance Soc'y (1999) 75 Cal. App. 4th 1406, 1411-1413, 89 Cal. Rptr. 2d 811*).

[*Optional*] **B. Partners Remain Fiduciaries Through Dissolution and Winding Up of Partnership Affairs.** The fiduciary obligations of partners continue until the partnership is dissolved and the affairs of the partnership are wound up (*Page v. Page (1961) 55 Cal. 2d 192, 196-198, 10 Cal. Rptr. 643, 359 P.2d 41* ; *Laux v. Freed (1960) 53 Cal. 2d 512, 522, 2 Cal. Rptr. 265, 348 P.2d 873* ; *see Corp. Code § 16404(b)(1), (2), (c)*).

[*Optional*] **C. Fiduciary Duties of Loyalty and Care Continue After Dissociation**. A partner's duties of loyalty and care continue after dissociation with regard to matters arising and events occurring before a partner's dissociation (*Corp. Code § 16603(3)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the general proposition that a partner owes the fiduciary duties of loyalty and care to the partnership and the other partners. Since the UPA'94 fiduciary duty rules are largely codifications of cases decided prior to its enactment, cases decided under the pre-'97 Act are included. However, to the extent to which a case decided under pre-1997 law imposes a higher level of loyalty or care, it may be in conflict with the specific provisions of UPA'94. Note also that *Corp. Code § 16404*, the principal UPA'94 section delineating the fiduciary duties of the partners, is considerably more detailed than was former Corp. Code § 15021, the predecessor provision in the pre-1997 law. Thus, cases decided under the pre-'97 Act need to be examined carefully to determine if their principles have been codified in UPA'94.

These points and authorities should be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the relation of partners is fiduciary. They also may be adapted for use in a trial or appellate brief.

Paragraph A may be used alone to set forth the general fiduciary obligations of the partners to the partnership. It also may be combined with points and *authorities in §§ 170.101* -170.109 relating to particular applications of the partners' fiduciary duties.

Optional Paragraph B may be used to establish that the fiduciary obligation continues through dissolution and winding up of the partnership affairs. If the partnership business is being wound up by the personal or legal representative of the last surviving partner, these points and authorities should be combined with the points and *authorities in § 170.105* to assert that such a person is held to the same fiduciary standards as an actual partner [*see Corp. Code § 16404(g)*].

Optional Paragraph C may be used to set forth a withdrawn partner's continuing duty not to adversely exploit a partnership opportunity, and may be combined with points and authorities from § 170.102.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should specify the members of the partnership, its business and date of formation, and the particular activity that is to be compared to the required standard.

[3] Discussion of Authorities

[a] Partners Are Fiduciaries or Trustees for Each Other

Corp. Code § 16404(a) provides that a partner owes the fiduciary duties of loyalty and care to the partnership and the other partners. These duties must be discharged consistently with the obligation of good faith and fair dealing [*Corp. Code § 16404(d)*].

Page v. Page *(1961) 55 Cal. 2d 192, 10 Cal. Rptr. 643, 359 P.2d 41* , was an action for declaratory relief to determine whether the partnership of the parties was at will or for a term, as that would determine the extent of liability, if any, for unilateral dissolution. Plaintiff owned the major supplier and largest creditor of the partnership to which the partnership owed $47,000. Plaintiff dissolved the partnership when, after eight years of losses, it was finally showing a

small profit. The trial court found that the partnership was one for a term, and plaintiff appealed.

The California Supreme Court reversed. Prior to the adoption of the Uniform Partnership Act ("UPA") in California in 1949, former Civ. Code § 2411 provided that "Partners are trustees for each other, and in all proceedings connected with the conduct of the partnership, every partner is bound to act in the highest good faith to his copartner and may not obtain any advantage over him in the partnership affairs by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind." The Court said the repeal of *Civ. Code § 2411* and adoption of the UPA was not intended to diminish the fiduciary duties between partners (*55 Cal. 2d 192, 197)* . Applying the general duty to the right to require dissolution, the Court said that a partner cannot use adverse pressure to "freeze out" a copartner and appropriate the business to his or her own use. A partner cannot dissolve the partnership to gain the benefits of the business for himself or herself unless he or she compensates any copartners for their share of the prospective business opportunity. Although the record before it did not indicate any bad faith or that the improved profit situation was more than temporary, the Court went on to say that a bad-faith attempt to appropriate the prosperity of a partnership without compensating one's copartners would be a wrongful dissolution and subject the dissolving partner to liability under former Corp. Code § 15038(2)(a) [*see now Corp. Code § 16404(b)(1)*] for breach of what it termed the implied agreement not to exclude a partner wrongfully from the partnership business opportunity (*55 Cal. 2d 192, 196-198)* .

Laux v. Freed *(1960) 53 Cal. 2d 512, 2 Cal. Rptr. 265, 348 P.2d 873* , was an action to determine the extent of an easement granted by plaintiff to defendant. The two had been partners, and for five years had farmed a parcel, hunted there during the deer season, and granted licenses to others to hunt there. On dissolution of the partnership, the property was divided into two parcels. The dissolution agreement provided that whoever got the southerly parcel (defendant) should also receive and have a right of way across the northerly parcel over the private access road, the only road used while the land was one parcel. Plaintiff drafted the deed that granted the right of way without any limitation either to its purpose or use by defendant. Defendant thereafter granted hunting leases, including one to a lessee who sold memberships for hunting purposes. Plaintiff, displeased with this use of the road, instituted the action to impose limitations on defendant's use of the right of way. Judgment was for plaintiff, and defendant appealed.

The California Supreme Court reversed. The Court first discussed the confidential and fiduciary nature of the partnership relationship. The Court stated that neither party has the right to take an unfair advantage or secure an undue benefit, and that the burden is on the one seeking advantage to show complete good faith and fairness towards the other. The duty of good faith and the burden of showing it extend to the dissolution and liquidation of partnership affairs, as well as to the sale by one partner to another of his or her interest in the partnership. Plaintiff, as the partner who drafted the deed, had a duty to disclose any intended limitation or restriction in the deed itself, not four years later by way of action to restrict defendant's use of the easement (*53 Cal. 2d 512, 522)* .

BT-I v. Equitable Life Assurance Society *(1999) 75 Cal. App. 4th 1406, 89 Cal. Rptr. 2d 811* , was an action by a limited partner for breach of fiduciary duty, breach of contract, and breach of the covenant of good faith and fair dealing. The limited partner alleged that the general partner violated its fiduciary duties by purchasing and foreclosing a deed of trust on an office building which was the partnership's sole asset. The trial court sustained the general partner's demurrer without leave to amend. It found that the partnership agreement authorized the general partner's conduct and relieved it of any duty to the limited partner (*75 Cal. App. 4th 1406, 1408)* .

The limited partner argued that the limited partnership agreement could not abrogate the general partner's fiduciary duty not to engage in self-dealing. The appellate court agreed that the complaint was sufficient to state a cause of action and reversed. Citing *Leff v. Gunter (1983) 33 Cal. 3d 508, 514, 189 Cal. Rptr. 377, 658 P.2d 740* , discussed in *§ 170.101[3][a],* the court first stated that a partnership is a fiduciary relationship and partners are held to the standards and duties of a trustee in their dealings with each other. Although under *Corp. Code § 15618* partners may determine by agreement many aspects of their relationship, there are limitations. The acquisition of partnership debt by a general partner is a breach of fiduciary duty. A general partner that acquires a partnership obligation cannot foreclose on partnership assets. The fiduciary duty not to purchase partnership debt and foreclose out one's partner cannot be

contracted away in the partnership agreement. A limited partnership agreement cannot relieve the general partner of its fiduciary duties in matters fundamentally related to the partnership business. The court specifically held that a partnership agreement cannot relieve a general partner of its fiduciary duties to a limited partner and the partnership when the purchase and foreclosure of partnership debt is involved (*75 Cal. App. 4th 1406, 1411-1413)* .

[b] Partners Remain Fiduciaries Through Dissolution and Winding Up of Partnership Affairs

Both ***Page v. Page*** *(1961) 55 Cal. 2d 192, 10 Cal. Rptr. 643, 359 P.2d 41* , and ***Laux v. Freed*** *(1960) 53 Cal. 2d 512, 2 Cal. Rptr. 265, 348 P.2d 873* , discussed in [a], *above*, also hold that the fiduciary relation of partners continues through the dissolution and winding up of the partnership affairs.

Corp. Code § 16404(b)(1) provides that a partner's duty of loyalty requires the partners to account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the conduct *or winding up* of the partnership business. Similarly, ***Corp. Code § 16404(b)(2)*** provides that the partner's duty of loyalty requires a partner to refrain from dealing with the partnership in the conduct *or winding up* of the partnership business. ***Corp. Code § 16404(c)*** limits the partner's duty of care (as opposed to the duty of loyalty) to the partnership and the other partners in the conduct and winding up of the partnership business to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.

[c] Fiduciary Duties of Loyalty and Care Continue After Dissociation

With respect to matters arising and events occurring before a partner's dissociation, the partner's duties of loyalty [*see Corp. Code § 16404(b)(1), (2)*] and care [*see Corp. Code § 16404(c)*] as to the conduct of the partnership business are generally continued after dissociation [*Corp. Code § 16603(3)*].

[4] Additional Authorities

[a] Partners Are Fiduciaries or Trustees for Each Other

The Ninth Circuit, in Ragsdale v. Haller (9th Cir. 1986) 780 F.2d 794 , affirmed a bankruptcy court's determination of nondischargeability of sums owing from the operating partner, who filed bankruptcy, to the other partner for his share of profits. Although under *11 U.S.C. § 523(a)(4)* (governing nondischargeability of debts arising from fiduciary defalcation), the meaning of fiduciary is an issue of federal law, state law determines when a trust in the strict sense occurs. The court said that the words "hold as trustee" in former Corp. Code § 15021(1) [*now see Corp. Code § 16404(b)(1)*] did not apply here, because the profits were not derived without the consent of the partnership. Further, a trust imposed by law as the result of malfeasance or wrongdoing is not included within the purview of *11 U.S.C. § 523(a)(4)*. Nevertheless, relying on California case law making all partners trustees over the assets of the partnership, the court held that California partners are fiduciaries within the meaning of *11 U.S.C. § 523(a)(4)* (*780 F.2d 794, 796-797)* .

In *Nelson v. Abraham (1947) 29 Cal. 2d 745, 177 P.2d 931* , the plaintiff, an employee of defendant, had an oral agreement with defendant to open and manage a sales office in return for one-third of the profits, in addition to salary. Defendant sold that office to a third party and refused to account to plaintiff for any of the profits. The California Supreme Court, reversing a judgment for the defendant, said that whether the oral agreement created a partnership or a joint venture was immaterial. In either case, the relationship would be of a fiduciary character (*29 Cal. 2d 745, 750)* . In addition, like every contract, the agreement called for the highest degree of good faith and fair dealing between the parties and entitled plaintiff to an accounting (*29 Cal. 2d 745, 750-754)* .

[b] Fiduciary Duties of Loyalty and Care Continue After Dissociation

In *Crouse v. Brobeck, Phleger & Harrison (1998) 67 Cal. App. 4th 1509, 80 Cal. Rptr. 2d 94* , a client brought a legal

malpractice action against the attorney who had represented her in a business transaction, and the two law firms in which he had practiced during the times of the alleged acts of malpractice. One firm cross-claimed for indemnity against the attorney. The superior court granted summary judgment to all defendants on the malpractice claims, and granted summary judgment to the first firm with respect to the cross-claims. The attorney's cross-complaint against his former firm included a claim titled "Breach of Fiduciary Duty" that alleged that his partnership relationship with the firm gave rise to fiduciary obligations from the firm to him, and that the firm breached those duties by cross-complaining against him for indemnity rather than defending and indemnifying him. The appellate court concluded that the trial court correctly granted summary adjudication in favor of the firm on the attorney's claim for breach of fiduciary duty. The court noted that the fiduciary duty among partners is limited. Citing *Leff v. Gunter*, discussed in *§ 170.101[3][a]*, the court stated that the continuing fiduciary duty that survives dissolution of partnership is breached only if the ex-partner attempts to divert partnership opportunities for his or her personal benefit to the detriment of the former partners, or if the remaining partners exclude an ex-partner from the benefits of an existing partnership opportunity. When the partnership is held liable to a third party based on a partner's negligence, the partnership is entitled to seek indemnity from the partner whose negligence caused the loss. Because the right to seek indemnity from the former partner would be hollow if its pursuit exposed the partnership to damages for breach of fiduciary duty, the court determined that pursuit of the indemnity action did not violate any fiduciary obligation the firm owed to the former partner (*67 Cal. App. 4th 1509, 1551)* .

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C. Relations Among Partners
1. Fiduciary Duties

17-170 California Points & Authorities § 170.101

§ 170.101 Supporting Contention That Partner Has Breached Fiduciary Duty--Exploitation of Partnership Opportunity or Acquisition of Interest Adverse to Partnership [Corp. Code § 16404; former Corp. Code § 15021]

[1] FORM Supporting Contention That Partner Has Breached Fiduciary Duty--Exploitation of Partnership Opportunity or Acquisition of Interest Adverse to Partnership [Corp. Code § 16404; former Corp. Code § 15021]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT BREACHED HIS/HER FIDUCIARY DUTY BY _____ [EXPLOITING A PARTNERSHIP OPPORTUNITY FOR HIS/HER PERSONAL ADVANTAGE *or* ACQUIRING AN INTEREST ADVERSE TO THAT OF THE PARTNERSHIP].

[*EITHER*:]

A. Partner's Fiduciary Duty Prevents Exploitation of Partnership Opportunity. A partner cannot derive any benefit from the partnership relationship for himself or herself as against his or her copartners. [When one partner secretly enters into a contract that is sought by the partnership and for which another partner is negotiating on behalf of the partnership, that partner is in violation of his or her fiduciary duty.] A partner who derives profit or benefit from [such a contract or from] appropriation of a partnership

opportunity holds those profits as [constructive] trustee for the partnership (*Corp. Code § 16404(b) or* former Corp. Code § 15021(1); *Leff v. Gunter (1983) 33 Cal. 3d 508, 513-518, 189 Cal. Rptr. 377, 658 P.2d 740* ; *Ferry v. McNeil (1963) 214 Cal. App. 2d 411, 415-416, 29 Cal. Rptr. 577*).

[*AND/OR*:]

B. Partner May Not Acquire Property in Which Partnership Is Interested. Once the partnership or joint venture is established, the parties assume the status of fiduciaries and do not have the right, while the venture continues, to acquire property in which the partnership is interested to the exclusion of the others. A partner or venturer acquiring that property is a trustee for his or her partners or coventurers (*Sadugor v. Holstein (1962) 199 Cal. App. 2d 477, 483, 18 Cal. Rptr. 859*).

[*AND/OR*:]

C. Partner May Not Engage in Other Ventures Adverse to Interests of Partnership. A partner who agrees to give his or her personal attention to the partnership business may not engage in any other business that gives him or her an interest adverse to that of the partnership (*Corp. Code § 16404(b)(2)*; *see Neilson v. Holmes (1947) 82 Cal. App. 2d 315, 324-325, 186 P.2d 197*).

[*Optional*] **D. Lease Option or Expectancy of Renewal Is Partnership Asset.** The expectancy of renewal of a lease is a species of property of the lessee. If the lessee is a partnership, the expectancy of renewal is a distinct partnership asset in which all partners have an interest. The general rule that a partner cannot derive any benefit from the partnership relationship for himself or herself as against his or her copartners prevents a partner from obtaining a renewal of a partnership lease for his or her own purposes, to commence after the expiration of the original lease or after termination of the partnership. If a partner does take such a lease, he or she holds it as constructive trustee for the partnership (*Ferry v. McNeil (1963) 214 Cal. App. 2d 411, 415-416, 29 Cal. Rptr. 577* ; *Donleavey v. Johnston (1914) 24 Cal. App. 319, 327-330, 141 P. 229*).

[*Optional*] **E. Partner May Not Secretly Encumber Partnership Property for Personal Use.** It is a breach of fiduciary duty for a partner to encumber partnership property without notifying the other partners and obtaining their consent, and to use the proceeds of the loan for his or her personal expenses (*Galardi v. State Bar (1987) 43 Cal. 3d 683, 693, 238 Cal. Rptr. 774, 739 P.2d 134*).

[*Optional*] **F. Partner May Not Occupy Partnership Real Property and Pay Below-Market Rent.** When one partner, over the other partner's objection, occupies the partnership's real property and pays below-market rent, the occupying partner is in violation of the fiduciary duty imposed by law (*Enea v. Superior Court (2005) 132 Cal. App. 4th 1559, 1565-1566, 34 Cal. Rptr. 3d 513*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that partners' fiduciary duty prevents one partner from appropriating a partnership asset or opportunity to the detriment of the partnership or the other partners or from acquiring an interest adverse to that of the partnership. Alternative Paragraphs A through C may be used alone or together depending on the facts of the case. Optional Paragraph D is for use when the particular asset exploited is a lease option or merely the expectancy of renewal. Optional Paragraph E is for use when a partner has secretly encumbered partnership property and used the proceeds for personal purposes. Optional Paragraph F is for use when one partner has occupied partnership real property over the objection of the other party.

These points and authorities may be combined with points and *authorities in § 170.21*, setting forth the general rule that the relation of partners is fiduciary in nature. They should be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the fiduciary relation of partners prevents one partner from reaping personal benefits from a partnership asset or opportunity. The points and authorities set forth in this form also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should specify the members of the partnership, its business and date of formation, the particular assets or opportunity appropriated, the acts that constitute the appropriation, and, if known, the amount of the monetary benefit to which the partnership or complaining partner is entitled.

[c] Opposing Points and Authorities

The points and *authorities in § 170.120* may be used in particular situations to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Partner's Fiduciary Duty Prevents Exploitation of Partnership Opportunity

Corp. Code § 16404(b)(1) provides that every partner must account to the partnership and hold as trustee for it any property, profit, or benefit derived by him or her in the conduct and winding up of the partnership business, or derived from a use by the partner of partnership property or information, including the appropriation of a partnership opportunity. *Corp. Code § 16404(b)(3)* provides that a partner's duty of loyalty includes refraining from competing with the partnership in the conduct of the partnership business before dissolution.

Leff v. Gunter *(1983) 33 Cal. 3d 508, 189 Cal. Rptr. 377, 658 P.2d 740* , was an action by one joint venturer against three former venture partners for unfair competition based on breach of their fiduciary duty. Plaintiff, a real estate developer, and S, an architectural engineer, agreed to enter a joint bid for the construction of an IRS center in Fresno. S had already submitted a joint bid with defendants for construction of a similar center in Memphis. S suggested to plaintiff that defendants join in their venture and bid on the Fresno project. This was orally agreed to on January 28, 1970. Defendants were to have two-thirds of the profits, with plaintiff and S each taking one-sixth. Between late February and late March, 1970, defendants informed S that they wished to withdraw from the Fresno project. On April 10, 1970, defendants and one other person submitted their own bid on the Fresno project. That became the successful bid. Judgment was for plaintiff for $416,666 or one-sixth of the profits lost because of defendants' conduct. Plaintiff was denied prejudgment interest. (S had not joined in the suit because a company of which he was president had continuing business relationships with one of defendants.) Defendants appealed from the judgment and plaintiff appealed the denial of prejudgment interest.

Defendants contended that they were free to exploit the partnership opportunity since they had withdrawn from the partnership, are discussed in *§ 170.100*. Defendants conceded that it would have been improper if they had engaged in "secret preemptive activities" while still members of the partnership (*33 Cal. 3d 508, 513)* . The California Supreme Court concluded that when the partnership is obviously pursuing an opportunity, the fiduciary duty not to compete with the partnership with respect to that opportunity survives after withdrawal (*33 Cal. 3d 508, 514)* .

The Court discussed former Corp. Code § 15021(1) [*now see Corp. Code § 16404(b)*], reviewed the various cases regarding appropriation of partnership opportunities, and reiterated its approval of the following jury instruction: "You are instructed that where one partner secretly enters into a contract sought to be contracted by the partnership which another partner is negotiating on behalf of the partnership such partner is in violation of his fiduciary duty to the excluded partner" (*33 Cal. 3d 508, 513-517)* . The Court considered the evidence in this case and found it supported each essential element: the oral venture agreement, that the venture was formed for the sole purpose of becoming successful bidder on the project, that useful information was exchanged between the parties, and that defendants without the knowledge or consent of the co-venturers began ultimately successful negotiations (*33 Cal. 3d 508, 518)* .

Defendants contended that prejudgment interest under *Civ. Code § 3287(a)* was not proper because plaintiff's damages were not certain or capable of being made certain. The Court said damages are deemed certain or capable of being made certain if there is essentially no dispute between the parties concerning the basis of computation of damages. The Court reversed and remanded for the purpose of calculating and awarding plaintiff prejudgment interest from the date of completion of the center (*33 Cal. 3d 508, 519-521)* .

Ferry v. McNeil *(1963) 214 Cal. App. 2d 411, 29 Cal. Rptr. 577* , was an action for declaration of rights between partners in the business of quarrying and processing rock, sand, and gravel. Defendant's contribution to the partnership was two leasehold interests representing the extraction rights on two parcels. Both leases were in defendant's name; one included an option to renew ("parcel one"). After formation of the partnership defendant assigned his interest in the leasehold on the second parcel ("parcel two") to the partnership and assigned a one-half interest in the leasehold on the parcel one to plaintiff. Plaintiff expended several hundred thousand dollars for installation of equipment and other expenses incident to the commencement of operations on the parcels. Plaintiff independently negotiated a lease with the owner of parcel two. That lease was to commence on expiration of the original lease to defendant. Plaintiff contended that he was merely an assignee or sublessee of defendant and that he had the right, as to parcel one, to sell his equipment and his interest therein free of any claim of defendant after the expiration of the renewal term, and, as to parcel two, to operate there free of any claim of defendant after the commencement of the lease term he had negotiated. Judgment was for defendant, with the court finding that the parties were cotenants as to parcel one and partners as to parcel two (*214 Cal. App. 2d 411, 415)* . The findings further recited that the agreement between the parties created a confidential relationship that imposed on plaintiff the duty to operate the leasehold premises under the leases as they were in effect on the date of the agreement, and further imposed on plaintiff the duty to make every effort in good faith to continue the operations, by extensions or renewal of the original leases, in compliance with the parties' original agreement (*214 Cal. App. 2d 411, 414)* . Plaintiff appealed.

The appellate court affirmed. The court's characterization of the expectancy of renewal as a partnership asset is discussed in *§ 170.101[3][d]*. The court stated that a partner cannot derive any benefit from the partnership relationship for himself or herself as against his or her copartners. This general rule prevents a partner from obtaining a renewal of a partnership lease for his or her own purposes, to commence after the expiration of the original lease or after termination of the partnership (*214 Cal. App. 2d 411, 415)* . If a partner does take such a lease, he or she holds it as constructive trustee for the partnership (*214 Cal. App. 2d 411, 415-416)* .

[b] Partner May Not Acquire Property in Which Partnership Is Interested

Sadugor v. Holstein *(1962) 199 Cal. App. 2d 477, 18 Cal. Rptr. 859* , was an action to establish a trust in a half interest in real property. The parties agreed to acquire a certain property together for a purchase price of $170,000, each contributing $85,000. Plaintiff was prepared to pay cash, but defendant was raising his share by obtaining a $100,000 loan secured by a deed of trust on the property. Defendant's lender required that plaintiff join in execution of the deed of trust. Plaintiff refused to do this on advice of counsel. Defendant bought the property in his own name, and plaintiff brought this action. Judgment was for plaintiff, and defendant appealed.

The appellate court affirmed. After reviewing various authorities to the effect that a partnership or joint venture in land can be formed by oral agreement, the appellate court determined that a joint venture had indeed been formed. The court went on to discuss the effect of the joint venture and the status of the parties, saying that once the partnership or joint venture is established, the parties assume the status of fiduciaries and none have the right, while the venture continues, to acquire the property to the exclusion of the others. A joint venturer holding property for the joint venture is a trustee for his or her coventurers even if he or she has purchased the property with his or her own funds (*199 Cal. App. 2d 477, 483)* .

[c] Partner May Not Engage in Other Ventures Adverse to Interests of Partnership

The facts and procedural background of ***Neilson v. Holmes*** *(1947) 82 Cal. App. 2d 315, 186 P.2d 197* are discussed in *§ 170.120[3]*. The appellate court cited former Corp. Code § 2411 to the effect that a general partner who agrees to give personal attention to the partnership business may not engage in any other business which gives that partner an interest adverse to that of the firm. The court noted that in this case the partnership was almost continually indebted to defendant and that there was no evidence that the partnership either desired or could afford to purchase additional land in the area. Thus, since the partnership suffered no injury on account of defendant's purchase of land for himself individually in the area of the partnership, the purchase was not adverse to the partnership (*82 Cal. App. 2d 315, 324-325)* .

[d] Lease Option or Expectancy of Renewal Is Partnership Asset

The facts and procedural background of ***Ferry v. McNeil*** *(1963) 214 Cal. App. 2d 411, 29 Cal. Rptr. 577* , are discussed in *§ 170.101[3][a]*. The court characterized an expectancy of lease renewal as a species of property of the lessee, and, if the lessee is a partnership, a distinct partnership asset in which all partners have an interest (*214 Cal. App. 2d 411, 415)* .

[e] Partner May Not Secretly Encumber Partnership Property for Personal Use

In ***Galardi v. State Bar*** *(1987) 43 Cal. 3d 683, 238 Cal. Rptr. 774, 739 P.2d 134* , the California Supreme Court upheld certain findings and conclusions of the Review Department of the State Bar Court in a matter in which discipline was based on petitioner's breach of fiduciary duties to real estate venture partners who were not clients. In one venture, petitioner contributed real property, title to which remained in his name, and the venture partner contributed cash. Petitioner encumbered the property of both ventures and used the proceeds of the loans for personal expenses and for purposes not related to that venture. In neither case did petitioner obtain the consent of the other venture partner to the borrowings. There was a finding that the other partner in one venture did not know about the loans. There was no finding regarding the knowledge of the other partner in the other venture.

Citing *Prince v. Harting (1960) 177 Cal. App. 2d 720, 727, 2 Cal. Rptr. 545* (discussed in *§ 170.102*), the Court stated that a partner has no right to use the partnership property for purposes unrelated to the partnership. Petitioner's use of the property to secure financing to pay expenses unrelated to the venture, and his failure to notify and obtain consent of the other partner before encumbering the property with those loans, was a breach of fiduciary duty. Concerning the venture for which no finding was made regarding the other partner's awareness of the loans, the Court said even if the other partner knew of the loans, the failure to obtain that partner's consent was a breach of both the written partnership agreement and of petitioner's fiduciary duty (*43 Cal. 3d 683, 693)* .

[f] Partner May Not Occupy Partnership Real Property and Pay Below-Market Rent

In ***Enea v. Superior Court*** *(2005) 132 Cal. App. 4th 1559, 34 Cal. Rptr. 3d 513* , the plaintiff had bought a one-third interest in an existing partnership, which had only one significant asset: a small commercial office building, which was being held with a prospect toward selling it at a profit. The building was occupied and used as a professional office by the other partners, who paid below-market rent both before and after the plaintiff acquired his interest. The plaintiff was not aware that the partnership was receiving below-market rent until about eight years later, when the plaintiff raised objections to that arrangement and demanded to be bought out. No such buyout occurred. Instead, the plaintiff became disassociated and subsequently sued for determination of a buy-out price and damages, on the grounds of the occupying partners' fraud and breach of fiduciary duty. The trial court granted a defense motion for summary adjudication, on the ground that there was no legal duty, nor was there evidence of any contractual obligation, for the occupying partners to pay fair-market rent or for the partnership to receive fair-market rent.

The court of appeal reversed, observing that "the sole question presented is whether defendants were categorically entitled to lease partnership property to themselves, or associated entities (or for that matter, to anyone) at less than it

could yield in the open market. Remarkably, we have found no case squarely addressing this precise question. We are satisfied, however, that the answer is a resounding 'No.' ... Here the facts ... plainly depict defendants taking advantages for themselves from partnership property *at the expense of the partnership.* The advantage consisted of occupying partnership property at below-market rates, i.e., less than they would be required to pay to an independent landlord for equivalent premises. The cost to the partnership was the additional rent thereby rendered unavailable for collection from an independent tenant willing to pay the property's value" (*132 Cal. App. 4th 1559, 1563, 1564* ; footnote omitted; original emphasis). The court made three points in support of its conclusion:

- *Corp. Code § 16404* does not exclusively delineate a partner's duty of loyalty to the partnership and other partners. On the contrary, the statute only lists particular obligations that are "included" in the duty of loyalty, leaving further articulation of the duty of loyalty to traditional common law processes (*132 Cal. App. 4th 1559, 1565)* .

- Even if the statutory enumeration of duties were held to be exclusive, that could not entitle the defendants to rent partnership property to themselves at below-market rates. The first duty listed in the statute is to "account to the partnership and hold as trustee for it *any property, profit, or benefit* derived by the partner in the conduct ... of the partnership business or *derived from a use by the partner of partnership property* ..." (*132 Cal. App. 4th 1559, 1565* ; emphasis supplied by court).

- The exemption in *Corp. Code § 16404(e)* ("A partner does not violate a duty or obligation under this chapter or under the partnership agreement merely because the partner's conduct furthers the partner's own interest.") is intended to excuse partners from accounting for incidental benefits obtained in the course of partnership activities, when there is no detriment to the partnership. The statute could not be invoked here to justify the defendants' occupying the partnership property for their own exclusive benefit at partnership expense, in effect converting a partnership asset to themselves and appropriating the value the partnership would otherwise have realized as distributable profits (*132 Cal. App. 4th 1559, 1566)* .

[4] Additional Authorities

[a] Partner May Not Acquire Property in Which Partnership Is Interested

In *Lasry v. Lederman (1957) 147 Cal. App. 2d 480, 305 P.2d 663* , an action for declaratory relief and accounting, the appellate court reversed the trial court judgment for defendants. The parties had to purchase and lease a commercial building, each contributing one third of the downpayment. Defendants purchased the property as tenants in common and, although plaintiff tendered them one-third of the downpayment, refused to acknowledge any interest of plaintiff in the property. The appellate court said there is little formality required in the formation of a joint venture. Once the venture is established, the parties assume the status of fiduciaries and none has the right, while the venture exists, to acquire the subject property to the exclusion of the others (*147 Cal. App. 2d 480, 487)* .

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17-170 California Points & Authorities § 170.102

§ 170.102 Supporting Contention That Partner Has Breached Fiduciary Duty--Taking Secret Profits [Corp. Code § 16404(b)(1); former Corp. Code § 15021]

[1] FORM Supporting Contention That Partner Has Breached Fiduciary Duty--Taking Secret Profits [Corp. Code § 16404(b)(1); former Corp. Code § 15021]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT HAS BREACHED HIS/HER FIDUCIARY DUTY TO THE PARTNERSHIP BY TAKING SECRET PROFITS ON PARTNERSHIP TRANSACTIONS AND IS ACCOUNTABLE TO THE PARTNERSHIP FOR THOSE PROFITS.

Partner Must Account for Secret Profits. The fiduciary relation of partners prevents a partner from making any secret separate profit on partnership transactions. If a partner does make a secret profit, he or she is accountable at law or in equity as the situation requires for those profits (*Corp. Code § 16404(b)(1) or* former Corp. Code § 15021(1); *Cagnolatti v. Guinn (1983) 140 Cal. App. 3d 42, 189 Cal. Rptr. 151* ; *Prince v. Harting (1960) 177 Cal. App. 2d 720, 727-728, 2 Cal. Rptr. 545*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a partner has breached his or her fiduciary duty by making secret profits on a partnership transaction and must account to the partnership for those profits.

These points and authorities should be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the partner must account for the secret profits made on a partnership transaction. They also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should specify the transaction in question, that the partnership was interested in the transaction, how it was interested, and how and to what extent defendant profited from the transaction.

[3] Discussion of Authorities

[a] Partner Must Account for Secret Profits

Corp. Code § 16404(b)(1) provides that every partner must account to the partnership and hold as trustee for it any property, profit, or benefit derived by him or her in the conduct and winding up of the partnership business, or derived from a use by the partner of partnership property or information, including the appropriation of a partnership opportunity.

In ***Cagnolatti v. Guinn*** *(1983) 140 Cal. App. 3d 42, 189 Cal. Rptr. 151* , an action by former members of a partnership investment club who sued because defendant managing partners had not redeemed the value of plaintiffs' units as provided in the partnership agreement, the appellate court affirmed the trial court's judgment for plaintiffs. Defendants had used the money that should have been used for redemption of plaintiffs' interests to pay themselves commissions, expenses, salaries, and interest. When the investment club got so large that the number of signatory partners on deeds was too cumbersome, all the partnership property was deeded to a management trust of which defendants were also officers. The appellate court based liability on both the fiduciary duty of a partner and the duties of trustees under former Civ. Code §§ 2228-2230, *2239* [*but see Prob. Code § 15003(b)*, Communication from California Law Revision Commission Concerning Assembly Bill 2652, comment to *Prob. Code § 15003(b)* (repeal not intended to affect general fiduciary principles); *see Prob. Code § 15003(c)* (trust principles of *Prob. Code § 15000 et seq.* may be applied to other relationships)] (*140 Cal. App. 3d 42, 48-49)* . Discussing the liability of one defendant for profits taken by another, the court noted that a fiduciary who breaches the duty of disclosure and causes secret profits to flow to a third party will be held liable for those profits even though he or she did not personally receive any of them (*140 Cal. App. 3d 42, 49)* .

Prince v. Harting *(1960) 177 Cal. App. 2d 720, 2 Cal. Rptr. 545* , was an action for dissolution, accounting, and damages designated as secret profits. Plaintiffs and defendant were partners in a business formed to distribute soft water in the 11 western states. Defendant told plaintiffs that he had the western states franchise from the national company that owned the patents for the best water softening equipment in the country. In fact, the national company was a corporation owned by defendant, his brother, and the brother's wife. During the six years of the partnership's operation, it paid the national company $245,683 for equipment that the national company purchased from the manufacturer for $138,046. In addition, defendant received commissions from the manufacturer. Defendant and his coconspirators sold other items to the partnership for total profits of $119,052. Judgment was in favor of the plaintiffs "on behalf of the partnership" for the profits plus interest. One plaintiff had withdrawn as partner several years earlier; he was given a lien on the assets of the partnership to secure his portion of the judgment. The other plaintiff was to wind up the business. Defendant appealed.

The appellate court modified the judgment to retain jurisdiction to make adjustments during the winding up and in all other respects affirmed the judgment. Citing former Corp. Code § 15021 [*now see Corp. Code § 16404*], the court said defendant was trustee for his partners and quoted from former Civ. Code §§ 2410 and *2411* that a partner may not obtain any advantage over another in the partnership affairs. Reiterating that a partner has no right to deal with the partnership property other than for the sole benefit of the partnership, the court described the fraud as allowing the conspirators to make for themselves the very kind of profit that the partnership was designed to make, and to that extent reduced the profits of the partnership. Equity will not tolerate such a transaction, but will require the conspirators to make good the entire profit of which the partnership has been deprived (*177 Cal. App. 2d 720, 727-728)* . Defendant advanced the novel theory that since his brother had the right to buy at as low a price as possible and sell to the

partnership at a high price, his own conduct was excused. The court said this argument completely disregarded the nature of defendant's fiduciary duty. Each conspirator is liable for the entire loss suffered by plaintiffs (*177 Cal. App. 2d 720, 728)* .

Defendant challenged the measure of damages on several grounds. The court held that *Civ. Code § 3343*, governing damages for fraud and deceit in the purchase or sale of property, did not apply. *Civ. Code § 3343* applies when the fraud is perpetrated by the other party to the transaction, not by an agent or fiduciary. Nor were damages to be limited, on an unjust enrichment theory, to the profits that could be traced to defendant's pockets. Breach of fiduciary duty is a tort. Thus, the maximum measure of damages applies to allow the beneficiary to recover under *Civ. Code § 3333* the entire profit that has been lost (*177 Cal. App. 2d 720, 729-731)* . As in other conspiracies, each conspirator is liable for the entire loss (*177 Cal. App. 2d 720, 731)* .

[4] Additional Authorities

[a] Partner Must Account for Secret Profits

The parties in ***Stenian v. Tashjian*** *(1918) 178 Cal. 623, 174 P. 883* , formed a partnership to purchase land and to divide the profits on its sale. After the partnership was terminated, plaintiff discovered that defendant had taken a commission from the original sellers of the land and sought to recover half of that commission. Judgment was for plaintiff, and defendant appealed.

The California Supreme Court affirmed. The Court reasoned that each partner is the agent of the partnership in all matters coming within the scope of the relationship, and recited the elementary principle of equity that an agent may not make a profit for himself or herself in a transaction on behalf of the principal. Once parties enter into an agreement of partnership, each partner occupies a fiduciary relation to the others in all matters pertaining to the partnership enterprise, and each partner is precluded by the relationship from making any secret, separate profit on a partnership transaction. When one of the partners makes a secret profit, it constitutes fraud on the others, and the partner is accountable in law or in equity as the situation requires for those profits (*178 Cal. 623, 627)* .

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17-170 California Points & Authorities § 170.103

§ 170.103 Supporting Contention That Partner Has Breached Fiduciary Duty--Failure to Disclose Information to Other Partners [Evid. Code § 962; Corp. Code §§ 16403(c); former Corp. Code § 15020]

[1] FORM Supporting Contention That Partner Has Breached Fiduciary Duty--Failure to Disclose Information to Other Partners [Evid. Code § 962; Corp. Code §§ 16403(c); former Corp. Code § 15020]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT BREACHED HIS/HER FIDUCIARY AND STATUTORY DUTIES TO DEFENDANT BY FAILING TO DISCLOSE TO PLAINTIFF INFORMATION REGARDING THE PARTNERSHIP BUSINESS.

A. Partner's Fiduciary Duty Requires Disclosure. The fiduciary duty of partners or joint venturers requires that each fully disclose to the others information affecting the partnership or venture (*Corp. Code § 16403(c)*; former Corp. Code § 15020; *Milton Kauffman, Inc. v. Superior Court (1949) 94 Cal. App. 2d 8, 17, 210 P.2d 88* ; *see Corp. Code § 16403(a), (b) or* former Corp. Code § 15019).

[*Optional*] **B. Attorney for Partner.** An attorney for a partnership represents all the partners as to matters of partnership business. The joint-client rule of *Evidence Code Section 962* applies to require disclosure by the attorney to all partners, even when the communication by one partner to the attorney was not made in the presence of the other partners (*Wortham & Van Liew v. Superior Court (1987) 188 Cal. App. 3d 927, 931-933, 233 Cal. Rptr. 725* ; *McCain v. Phoenix Resources, Inc. (1986) 185 Cal. App. 3d 575, 581, 230 Cal. Rptr. 25*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a partner has breached his or her fiduciary duty by failing to fully and honestly disclose information relevant to the partnership [*see Corp. Code § 16403(c)*; former Corp. Code § 15020]. Optional Paragraph B may be used, particularly in the context of a discovery

proceeding, to extend the duty of disclosure to an attorney for one partner or the partnership.

These points and authorities should be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a partner must make full and complete disclosure to all other partners. The issue may arise in discovery proceedings incident to other actions involving the partnership. They also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should specify whether the party seeking the information is a general partner or the personal representative or conservator of a partner, the interest of the partnership in the matter at issue, the information sought or withheld, any demands made for the information, and/or any false or incomplete information given.

[3] Discussion of Authorities

[a] Partner's Fiduciary Duty Requires Disclosure

Corp. Code § 16403(c)(1) provides that each partner and the partnership must furnish to a partner (and to the legal representative of a deceased partner or partner under legal disability) without demand, any information concerning the partnership's business and affairs reasonably required for the proper exercise of the partner's rights and duties under the partnership agreement or partnership law. On demand, a partner must receive any other information concerning the partnership's business and affairs, except to the extent the demand or information demanded is unreasonable or otherwise improper under the circumstances [*Corp. Code § 16403(c)(2)*; *see also* former Corp. Code § 15020]. This information may be transmitted by electronic transmission by the partnership [*Corp. Code § 16403(c)*; *see Corp. Code § 16101(4)* (definition)]. *Corp. Code § 16403(b)* provides that a partnership must provide partners (and their agents and attorneys) access to its books and records [*see also* former Corp. Code § 15019].

Milton Kauffman, Inc. v. Superior Court *(1949) 94 Cal. App. 2d 8, 210 P.2d 88* , was a proceeding for writ of prohibition to restrain the superior court from holding petitioners, a corporation and its principal, in contempt for refusal to comply with discovery orders relating to inspection and copying of records. Petitioners were venture partners of the real party in interest. The venture agreements were for construction and sale of houses on eight tracts--approximately 1700 homes in all. During the period at issue, some of the venture projects were conducted through a corporation controlled by real party and some through the corporate petitioner. The proceeding arose out of an action for accounting and to recover profits. Petitioners had accounted to real party for profits on sales from two tracts, but profits from the other tracts had been reinvested.

The appellate court rejected petitioners' contention that no discovery was proper until real party had first established his right to an accounting. The court said that only a prima facie showing of the right to an accounting is required, a requirement that had been met here by former Civ. Code §§ 2413, *2414* (*now see Corp. Code § 16403*). As the rights of joint venturers are the same as those of partners, the above partnership statutes applied to the facts at hand. In addition, the parties were fiduciaries, owing each other a duty of disclosure (*94 Cal. App. 2d 8, 16-17)* .

[b] Attorney for Partner

Wortham & Van Liew v. Superior Court *(1987) 188 Cal. App. 3d 927, 233 Cal. Rptr. 725* , involved an action for dissolution and accounting of partnership, declaration of constructive trust, injunctive relief, and damages. In the course of that action, a discovery order was made compelling an attorney who had allegedly handled the transfer of partnership assets to a second partnership formed by defendant partners to answer questions regarding the transfer. Defendant partnership and partners sought a writ of prohibition to prevent enforcement of the discovery order. The writ was denied.

The appellate court first discussed the duties owed by partners and general partners to provide partnership information and to deal with one another fairly and in good faith. In the context of representation of a partnership, an attorney for a partnership represents all the partners as to matters of partnership business. All partners are entitled to a wide range of information, whether or not the information is generated under the aegis of the partnership's attorney. The court cited *McCain v. Phoenix Resources, Inc. (1986) 185 Cal. App. 3d 575, 581, 230 Cal. Rptr. 25* , for the proposition that the attorney-client privilege will not bar disclosure of matters related to partnership business simply because such business is conducted through a law firm. As applied to partnerships, the joint-client rule of Evid. Code § 962 requires disclosure by the attorney to all partners of any communication made to the attorney by one partner outside the presence of the other partners (*188 Cal. App. 3d 927, 931-933)* .

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17-170 California Points & Authorities § 170.104

§ 170.104 Supporting Contention That Partner's Fiduciary Duty Extends to Sale or Purchase of Partnership Interest to or From Another Partner or Estate of Deceased Partner

[1] FORM Supporting Contention That Partner's Fiduciary Duty Extends to Sale or Purchase of Partnership Interest to or From Another Partner or Estate of Deceased Partner

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT BREACHED HIS/HER FIDUCIARY DUTY BY _____ [MISREPRESENTING *or* FAILING TO DISCLOSE] TO PLAINTIFF MATERIAL FACTS REGARDING THE VALUE OF [PLAINTIFF'S INTEREST IN] THE PARTNERSHIP AT THE TIME PLAINTIFF _____ [PURCHASED *or* SOLD] HIS/HER/DECEDENT'S INTEREST IN THE PARTNERSHIP.

Fiduciary Duty Extends to Sale or Purchase of Interest to or From Another Partner or Estate of Deceased Partner. The fiduciary duty of partners requires the highest good faith and full disclosure to another partner, or the personal representative of a deceased partner, on the sale of one's interest to another partner or the purchase of an interest from the other partner (*Estate of Witlin (1978) 83 Cal. App. 3d 167, 175-176, 147 Cal. Rptr. 723* ; *Sibert v. Shaver (1952) 111 Cal. App. 2d 833, 245 P.2d 514*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a partner has breached his or her fiduciary duty by concealing or misrepresenting facts material to the sale of a partnership interest to or purchase of a partnership interest from another partner or the estate of a partner.

The points and authorities in this form should be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a partner's fiduciary duty extends to the

purchase or sale of a partnership interest to or from another partner. They also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should specify the particulars of the transaction in question and the material matters that were concealed or misrepresented. Counsel should note that the fiduciary duties, including disclosure, end after a contract has been formed for the purchase and sale of a partnership interest [*see Stone v. Millstein (9th Cir. 1986) 804 F.2d 1434, 1437-1438* (applying California law; plaintiff had no claim based on offer and purchase of partnership assets by third party at substantial profit to partnership because offer was made after plaintiff agreed to sell his interest); *see also Corp. Code § 16603(2)* (partner's duty of loyalty under *Corp. Code § 16404(b)(3)* regarding noncompetition terminates upon partner's dissociation)].

[3] Discussion of Authorities

[a] Fiduciary Duty Extends to Sale or Purchase of Interest to or From Another Partner or Estate of Deceased Partner

The trial court in ***Estate of Witlin*** *(1978) 83 Cal. App. 3d 167, 147 Cal. Rptr. 723* , awarded the widow/executrix of a deceased partner the amount by which the decedent's interest in the partnership had been undervalued. At the time it offered plaintiff/executrix $24,600 per unit for decedent's interest, the partnership's management committee was negotiating to sell the hospital that was the partnership's main asset for a price that would amount to $93,000 per unit. No disclosure was ever made of the possibility of a sale. The sale eventually was consummated for the equivalent of $84,000 per unit.

The appellate court affirmed. The court said that throughout the transaction the management committee was bound to act in the highest good faith towards the executrix and was forbidden to obtain any advantage over her in the matter by, among other things, the slightest concealment. For authority, the court cited former Civ. Code § 2228 (*but see* Communication from California Law Revision Commission Concerning Assembly Bill 2652, comment to *Prob. Code § 15003(b)*, repeal not intended to affect general fiduciary principles), former Corp. Code § 15020 [*now see Corp. Code § 16403(c)*] [*see also Prob. Code § 15003(c)* (trust principles of *Prob. Code § 15000 et seq.* may be applied to other relationships)], and Vai v. Bank of America (1961) *56 Cal. 2d, 329, 349-350* , *15 Cal. Rptr. 71, 364 P.2d 247* , a case in which the obligations of spouses with respect to a property settlement agreement are compared to those of partners on dissolution. The court described the management committee's negotiations with the widow for between $16,000-$24,600 per unit while negotiating with conglomerates for between $60,000-$93,500 per unit as talking out of both sides of their mouth and the antithesis of good faith. The court cited *Arnold v. Arnold (1902) 137 Cal. 291, 296, 70 P. 23* , and *Laux v. Freed (1960) 53 Cal. 2d 512, 522, 2 Cal. Rptr. 265, 348 P.2d 873* (discussed in *§ 170.100[3]*), to the effect that the duty of good faith continued until consummation of the buy-out (*83 Cal. App. 3d 167, 175-176)* .

With respect to the proper basis for valuation, the court said that a valuation based on book value could not be a good faith valuation, since it did not take into account the goodwill of the business or its value as a going concern (*83 Cal. App. 3d 167, 174)* . Decedent died in July, 1971 (*83 Cal. App. 3d 167, 171)* ; negotiations with one conglomerate continued from April, 1971 until September, 1971; and the sale to another entity was consummated in July, 1972 (*83 Cal. App. 3d 167, 176)* . The sale was not too remote in time from the date of death to be a consideration in establishing the buy-out price (*83 Cal. App. 3d 167, 174)* .

In ***Sibert v. Shaver*** *(1952) 111 Cal. App. 2d 833, 245 P.2d 514* , two men invented a potato slicer and began the process of patenting and marketing their invention. One of the men then died, and plaintiff, the decedent's widow, assigned the decedent's interest in the invention to the other man for a small sum, after the latter downplayed and

misrepresented the value of the invention and its current state of development and manufacture. The surviving inventor ultimately made a great deal of money from the invention, and plaintiff eventually filed an action against the surviving inventor for rescission of the assignment. Judgement was for plaintiff, and defendant appealed on the grounds of the insufficiency of the proof, inconsistency of the findings, and lack of support for the conclusions of law. Defendant contended, among other things, that no partnership existed between him and the decedent (*111 Cal. App. 2d 833, 838)* .

The appellate court concluded, however, that the evidence clearly established that the two men invented the potato slicer together as partners, and that the survivor had misrepresented and concealed material facts relative to the partnership. The court then held that a surviving partner is a trustee of the trust inherited from the decedent partner, and of the assets of the partnership. As such, the survivor owes the maximum of good faith and personal confidence to the decedent and to the latter's beneficiaries. In all matters connected with this trust, the trustee is bound to act in the highest good faith toward the beneficiaries (*111 Cal. App. 2d 833, 839-840)* .

[4] Additional Authorities

[a] Fiduciary Duty Extends to Sale or Purchase of Interest to or From Another Partner or Estate of Deceased Partner

In Everest Investors 8 v. *McNeil Partners (2003) 114 Cal. App. 4th 411, 8 Cal. Rptr. 3d 31* , a real estate limited partnership merged into a new entity, becoming a wholly owned subsidiary of the new entity. The interests of the limited partners were liquidated or cashed out. The general partner, however, retained an equity interest in the post-merged entity, which then sold the assets of the limited partnership to third parties for more than the assets were valued for purposes of the cash-out and merger. The limited partners brought an action against the general partner for breach of fiduciary duty, unfair competition, and constructive fraud, claiming that the merger transaction harmed the limited partners by undervaluing their partnership interests or by depriving them of the future earnings and growth generated by the assets of the limited partnership. The trial court granted summary judgment for defendants. The appellate court reversed, finding that the claims asserted by plaintiff limited partners were not derivative but were individual in nature (*124 Cal. App. 4th 407)* .

Although *Wise Realty Co. v. Stewart (1915) 169 Cal. 176, 146 P. 534* , enunciates the rule set forth in the form, the partner who was guilty of failing to disclose the material change in conditions was not named as a defendant. Defendants were the third partner and the people to whom he sold the stock that was the major asset of the venture. Although the venture was carried out through corporations, the action was in equity for imposition of a constructive trust, and thus the corporate form was disregarded and the law of partnership and joint venture applied. Plaintiff had invested $3,333, part of $10,000 that was required as a deposit to secure the 35-year lease that was the main asset of the venture and which would earn $2.8 million over its term. After plaintiff departed for Alaska, negotiations with the school board/lessee continued and problems arose in getting a $25,000 bond that the board demanded. Plaintiff, communicating by wire, refused to advance additional funds. The nondefendant partner, R, who was plaintiff's friend and had introduced him to the project, became disenchanted with the project and thought it was about to fail. R and defendant partner agreed that R and plaintiff would sell their interests to defendant partner for $1000 with full repayment of their investments contingent on the success of the project. R wired plaintiff for authority to consummate that agreement, and plaintiff replied: "Accept any proposition that has any of our money." Later on the day this wire was received, the school board agreed to drop the requirement for the bond, considering the deposit to be sufficient, and the prospects of the venture improved markedly. Without informing plaintiff of this new development, R accepted the $1000. A new corporation was formed by defendant partner to which the lease was assigned and which assumed the obligation to construct the school. Later, unable to arrange construction financing, defendant partner sold his interest to the other defendants for $120,000, representing a profit after expenses of approximately $85,000. Plaintiff's shares of the original corporation had not been released by his attorneys. On his return from Alaska, plaintiff signed over his stock for the remainder of his $3,333 investment, with interest. This was done at a meeting with defendant partner, and

without disclosure to plaintiff that defendant partner had resold the venture for the substantial profit. Judgment was for defendants in the action to impose a constructive trust. Plaintiff appealed.

The California Supreme Court affirmed. The Court, in discussing the authority given by plaintiff to R in the wire, said the obligations of fair play and disclosure were imposed on all three associates by virtue of their relationship, yet the personal obligations of friendship and fidelity existed only between R and plaintiff (*169 Cal. 176, 181)* . The Court noted that plaintiff's reply, which was addressed only to R, was not an acceptance of defendant partner's offer, but gave authority to R, and that the trial court found plaintiff did not rely on the previous telegram from R, but understood the possibility that some way had been found to break the impasse in negotiations. The Court concluded that if there was any fraud, it was R's, not defendants' (*169 Cal. 176, 186)* . As to the claim that defendant partner had a duty to disclose to plaintiff the profits and resale before taking conveyance of the stock, the Court said no such duty was owed because plaintiff and defendant partner ceased to be partners when R consummated the sale and thereafter plaintiff and defendant partner could deal with each other at arms length (*169 Cal. 176, 184)* .

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17-170 California Points & Authorities § 170.105

§ 170.105 Supporting Contention That Person Winding Up Partnership's Affairs as Personal or Legal Representative of Last Surviving Partner Has Same Fiduciary Duty As A Partner [Corp. Code § 16404(g); former Corp. Code § 15021(2)]

[1] FORM Supporting Contention That Person Winding Up Partnership's Affairs as Personal or Legal Representative of Last Surviving Partner Has Same Fiduciary Duty As A Partner [Corp. Code § 16404(g); former Corp. Code § 15021(2)]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT[S], AS THE _____ [PERSONAL *or* LEGAL] REPRESENTATIVE[S] OF THE LAST SURVIVING PARTNER, _____ [*name*], IN WINDING UP THE AFFAIRS OF THE PARTNERSHIP, OWED TO THE OTHER PARTNERS AND THE PARTNERSHIP THE SAME FIDUCIARY DUTIES THAT WOULD BE OWED BY A PARTNER IN THE PARTNERSHIP.

A. Person Winding Up Partnership Affairs Owes Same Fiduciary Duty as Would a Partner. A person winding up the partnership affairs as the personal or legal representative of the last surviving partner owes the same duties to the partnership and the other partners that would exist if the person were a partner (*Corp. Code § 16404(g) or* former Corp. Code 15021(2)). [These fiduciary obligations specifically include the obligation to hold as trustee for the partnership any property, profit, or benefit derived by the partner in the winding up of the partnership business, and the obligation to refrain from dealing with the partnership in winding up the partnership business as or on behalf of a party having an adverse interest to the partnership (*Corp. Code § 16404(b)(1), (2)*)].

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a person who is winding up a partnership business as personal or legal representative of the last surviving partner has the same fiduciary obligations

that would exist if that person were actually a partner in the partnership [*see Corp. Code § 16404(g) or* former Corp. Code 15021(2)]. In a UPA'94 partnership, these duties specifically include the statutory obligation to hold partnership assets as trustee for the partnership [*Corp. Code § 16404(b)(1)*] and to refrain from dealing with the partnership as or on behalf of a party having an interest adverse to the partnership [*Corp. Code § 16404(b)(2)*]. If either or both of these duties is at issue in a case involving a UPA'94 partnership, the second sentence of these points and authorities should be included.

These points and authorities should be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the actions taken by the partner's representative violate his or her fiduciary duties. For example, they may be combined with the points and *authorities in § 170.104* if the alleged violation involves a purchase or buyout of a deceased partner's interest. These points and authorities also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should specify the particulars of the transaction in question and the material matters that were concealed or mismanaged.

[3] Discussion of Authorities

[a] Person Winding Up Partnership Affairs Owes Same Fiduciary Duty as Would a Partner

Under both the UPA'94 [*see* Corp. Code § 16064(g)] and the pre-'97 Act [*see* former Corp. Code § 15021(2)], the legal or personal representatives of a deceased partner, when winding up the partnership affairs as representatives of the last surviving partner, owe the same fiduciary duties to the partnership and the other partners as would be owed by a partner.

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17-170 California Points & Authorities § 170.106

§ 170.106 Supporting Contention That General Partners Owe Fiduciary Duties of Loyalty and Care to Limited Partnership and Other Partners Under ULPA '08 [Corp. Code § 15904.08]

[1] FORM Supporting Contention That General Partners Owe Fiduciary Duties of Loyalty and Care to Limited Partnership and Other Partners Under ULPA '08 [Corp. Code § 15904.08]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

GENERAL PARTNERS ARE FIDUCIARIES FOR EACH OTHER AND OWE TO THE LIMITED PARTNERSHIP AND THE OTHER PARTNERS THE DUTIES OF LOYALTY AND CARE.

A. General Partners are Fiduciaries for Each Other. A general partner owes to the limited partnership and the other partners the duties of loyalty and care (*Corp. Code § 15904.08*).

B. General Partners Remain Fiduciaries Through Dissolution and Winding Up of Partnership Affairs. The fiduciary obligations of partners continue until the partnership is dissolved and the affairs of the partnership are wound up (*see Corp. Code § 15904.08(b), (c)*).

[*Optional*] **C. Fiduciary Duties of Loyalty and Care Continue After Dissociation.** Upon a person's dissociation as a general partner, the person's duty of loyalty pursuant to *Corp. Code § 15904.08(b)(1), (2)* and duty of care under *Corp. Code § 15904.08(c)* continue with regard to matters arising and events occurring before the person's dissociation as a general partner (*Corp. Code § 15906.05(a)(3)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the general proposition that a general partner owes the fiduciary duties of loyalty and care to the limited partnership and the other partners.

This form should be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the relation of partners is fiduciary. It may be adapted for use in a trial or appellate brief.

Paragraph A may be used alone to set forth the general fiduciary obligations of the general partners to the limited partnership and the other partners. Optional Paragraph B may be used to establish that the fiduciary obligation continues through dissolution and winding up of the partnership affairs. Optional Paragraph C may be used to establish that the duties of loyalty and care continue after a partner's dissociation with respect to matters arising before the dissociation.

The enumeration of the fiduciary duties of the general partners in a limited partnership under the ULPA '08 was derived from the Uniform Partnership Act of 1994 (UPA '94) [*see* Clark, California's Uniform Limited Partnership Act of 2008, § 29.08 (LexisNexis)]. For points and authorities drafted under the applicable provisions of UPA '94 [*see Corp. Code § 16404*], *see § 170.100*.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] General Partners are Fiduciaries for Each Other

Corp. Code § 15904.08(a) provides that a general partner owes the fiduciary duties of loyalty and care, as specified in *Corp. Code § 15904.08(b)* and *(c)*, to the limited partnership and the other partners. These duties must be discharged consistently with the obligation of good faith and fair dealing [*Corp. Code § 15904.08(d)*].

Under ***Corp. Code § 15904.08(b)*** , a general partner's duty of loyalty to the limited partnership and the other partners is limited to the following:

- To account to the limited partnership and hold as trustee for it any property, profit, or benefit derived by the general partner in the conduct and winding up of the limited partnership's activities or derived from a use by the general partner of limited partnership property, including the appropriation of a limited partnership opportunity.

- To refrain from dealing with the limited partnership in the conduct or winding up of the limited partnership's activities as or on behalf of a party having an interest adverse to the limited partnership.

- To refrain from competing with the limited partnership in the conduct or winding up of the limited partnership's activities.

Corp. Code § 15904.08(c) provides that a general partner's duty of care to the limited partnership and the other partners in the conduct and winding up of the limited partnership's activities is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.

[b] General Partners Remain Fiduciaries Through Dissolution and Winding Up of Partnership Affairs

Corp. Code § 15904.08(b)(1) , discussed in [a], *above*, provides that a general partners's duty of loyalty requires the partner to account to the partnership and hold property as trustee in the conduct *or winding up* of the partnership business. Similarly, *Corp. Code § 15904.08(b)(2)*, discussed in [1], *above*, provides that a general partner's duty of

loyalty requires the partner to refrain from dealing with the partnership in the conduct *or winding up* of the partnership business as a party with an adverse interest. Finally, *Corp. Code § 15904.08(b)(3)*, discussed in [a], *above*, provides that a general partner's duty of loyalty requires the partner to refrain from competing with the partnership in the conduct *or winding up* of the partnership's activities.

[c] Fiduciary Duties of Loyalty and Care Continue After Dissociation

With respect to matters arising and events occurring before a general partner's dissociation, the partner's duties of loyalty [*see Corp. Code § 15904.08(b)*] and care [*Corp. Code § 15904.08(c)*] as to the conduct of the partnership business are generally continued after dissociation [*Corp. Code § 15906.05(a)(3]*.

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17-170 California Points & Authorities §§ 170.107-170.119

[Reserved]

§§ 170.107[Reserved]

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17-170 California Points & Authorities § 170.120

§ 170.120 Opposing Contention That Partner Breached Fiduciary Duty--Partner's Actions Did Not Amount to a Breach of Partner's Fiduciary Duty of Loyalty or Care [Corp. Code § 16404]

[1] FORM Opposing Contention That Partner Breached Fiduciary Duty--Partner's Actions Did Not Amount to a Breach of Partner's Fiduciary Duty of Loyalty or Care [Corp. Code § 16404]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT'S ACT[S] DID NOT CONSTITUTE A BREACH OF DEFENDANT'S FIDUCIARY DUTIES, AS A PARTNER OF _____ [*name of partnership*], TO THE _____ [PARTNERSHIP *and/or* OTHER PARTNERS OF THAT PARTNERSHIP].

[*EITHER*]

A. Partner's Conduct of Partnership Business Must Be Grossly Negligent, Reckless, Intentional Misconduct, or Knowing Violation of Law to Constitute Breach of Fiduciary Duty of Due Care. A partner's duty of due care to the partnership and the other partners in the conduct and winding up of the partnership business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or knowing violation of law (*Corp. Code § 16404(c)*).

[*AND/OR*]

B. Conduct Consistent With Duty of Good Faith and Fair Dealing Does Not Violate Partner's Fiduciary Duties. A partner is required to discharge his or her duties to the partnership and the other partners under the Uniform Partnership Act of 1994 and the partnership agreement and to exercise his or her rights consistently with the obligation of good faith and fair dealing (*Corp. Code § 16404(d)*).

[*AND/OR*]

C. Transaction Furthering Partner's Own Interest Does Not Automatically Violate Fiduciary Duty. A partner does not violate his or her fiduciary obligations under the Uniform Partnership Act of 1994 merely because the partner's conduct further's the partner's own interest. (*Corp. Code § 16404(e)*).

[*AND/OR*]

D. Loan of Money to or Transaction of Business With Partnership Does Not Automatically Violate Fiduciary Duty. A partner may lend money to and transact other business with the partnership, and as to each loan or transaction the rights and obligations of the partner regarding performance or enforcement are the same as those of a person who is not a partner, subject to other applicable law (*Corp. Code § 16404(f)*).

[*AND/OR*]

E. Partner May Purchase Partnership Property At Foreclosure Sale. It is not a breach of fiduciary duty for a partner to bid on and purchase partnership real property at a foreclosure sale which takes place after the other partners failed to fulfill their obligation to make mortgage payments on the property (*Jones v. Wagner (2001) 90 Cal. App. 4th 466, 473-474, 108 Cal. Rptr. 2d 669*).

[*AND/OR*]

F. Partner Does Not Breach Fiduciary Duty by Paying Undisputed Partnership Debt. It is not a breach of fiduciary duty for a partner to pay an undisputed debt of the partnership, rather than attempting to extract a discount on a partnership loan by refusing to pay and putting the creditor to the expense and risk of a lawsuit to collect the amount owed. Equity will not recognize as a partnership opportunity the possibility of leveraging a discount from a lender by the threat of nonpayment (*AB Group v. Wertin (1997) 59 Cal. App. 4th 1022, 1040, 69 Cal. Rptr. 2d 652*).

[*AND/OR*]

G. Partner May Purchase Partnership Debt. Partners may agree among themselves that they may purchase partnership debts at full value, even if that means the purchasing partner will obtain grace and favor with the lender and that goodwill helps the purchasing partner with his or her own outside business dealings (*AB Group v. Wertin (1997) 59 Cal. App. 4th 1022, 1040, 69 Cal. Rptr. 2d 652*).

[*AND/OR*]

H. Partner Need Not Bear Disproportionate Burden of Partnership Obligation. A partner may withdraw his or her individual property as security for a partnership obligation and substitute partnership property as security in order to avoid bearing the entire loss on enforcement of the partnership obligation (*Bowman v. Sears (1923) 63 Cal. App. 235, 253, 218 P. 489*).

[*AND/OR*]

I. Creditor Partner May Use Partnership Funds to Pay Personal Debts. If the partnership owes the partner more than he or she withdraws, no breach of fiduciary duty arises from payment of a partner's personal obligations with partnership funds (*Neilsen v. Holmes (1947) 82 Cal. App. 2d 315, 328-329, 186 P.2d 197*).

[*AND/OR*]

J. Lessor Partner May Retain Improvements Financed by Partnership When Authorized by Agreement. When an agreement between a lessor partner and the lessee partnership so provides, the lessor partner, on termination of the lease, may retain improvements to the property made with partnership funds (*Speka v. Speka (1954) 124 Cal. App. 2d 181, 188-189, 268 P.2d 129*).

[*AND/OR*]

K. Partner's Interest in Land Was Not Adverse to Interests of Partnership. If a higher price could be obtained in eminent domain proceedings if title to all lands sought by the public entity, including those of the partnership, were in one name, a partner does not breach his or her fiduciary duty to the partnership by taking title to lands of third parties under pooling agreements from which he or she does not profit, or by making profits on land purchased with personal funds, if certain showings are not made. Specifically, there is no breach if there is no showing that the partner's interests are adverse to those of the partnership, or that the partner devoted so much time to the other interests that he or she was prevented from giving the partnership business all the attention that would be advantageous to it (*Neilsen v. Holmes (1947) 82 Cal. App. 2d 315, 328-329, 186 P.2d 197*).

[*AND/OR*]

L. Partner May Purchase Judgment Against Copartner. The fiduciary relation is confined to the business of the partnership, and thus it is not a breach of fiduciary duty for one partner, with his or her individual funds, to purchase a note of or judgment against a copartner or to enforce such a judgment against the partnership interest of the debtor partner (*In re Levy & Schwab (1900) 130 Cal. 282, 284, 62 P. 520* ; *McKenzie v. Dickinson (1872) 43 Cal. 119, 133-135)* .

[*AND/OR*]

M. Partner May Purchase Judgment Against Partnership. A partner may purchase a judgment against the partnership, and may enforce the judgment against the partnership if he or she does not hold sufficient partnership assets to satisfy the judgment (*see Bradbury v. Barnes (1861) 19 Cal. 120, 123-124)* .

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a partner breached his or her fiduciary duties. The general ground for opposition is that the actions of the defendant partner(s) did not amount to a breach of fiduciary duty to the partnership or the other partner(s).

Corp. Code § 16404 (UPA'94) sets forth a partner's duties of loyalty and care to the partnership and the other partners. The pre-'97 Act contained only passing references to these matters, while the cases decided under that act articulated the scope of fiduciary duties. The UPA'94 rules are considerably more specific. Since the UPA'94 fiduciary duty rules are largely codifications of cases decided prior to its enactment, cases decided under the pre-'97 Act are included here. However, to the extent to which a case decided under pre-1997 law imposes a higher level of loyalty or care, it may be in conflict with the specific provisions of UPA'94. Note also that because *Corp. Code § 16404*, the principal UPA'94 section delineating the fiduciary duties of the partners, is considerably more detailed than was former Corp. Code § 15021, the predecessor provision in the pre-'97 Act, cases decided under the pre-'97 Act need to be examined carefully to determine if their principles have been codified in UPA'94.

Alternative Paragraphs A through N provide language relating to specific activities by one or more partners:

- Alternative Paragraph A should be used if the partnership is a UPA'94 partnership, the acts complained of occurred in the conduct and/or winding up of the partnership's business, and defendant is contending that those acts did not constitute gross negligence, reckless conduct, intentional misconduct, or a knowing violation of law. This alternative may be appropriate, for example, when the defendant contend that he or she is guilty, at worst, of bad business judgment or ordinary negligence that does not rise to the level of conduct proscribed by the UPA'94. This alternative should be combined with points and authorities supporting the position that the specific conduct complained of is, at worst, simply bad business judgment or ordinary negligence.

- Alternative Paragraph B should be used if the partnership is a UPA'94 partnership and the defendant is contending that all his or her actions in relation to the partnership are consistent with his or her general duty of good faith and fair dealing to the partnership and the other partners. This alternative should be combined with other alternatives relevant to the specific acts in question.

- Alternative Paragraph C should be used if the partnership is a UPA'94 partnership and the acts in question arguably were in furtherance of the defendant's own interest. This alternative should be combined with other alternatives relevant to the specific acts in question, and demonstrating that in performing these acts the defendant did not violate his or her fundamental duty of loyalty to the partnership as specified in *Corp. Code § 16404(a)* -- that is, that he or she did not (1) personally derive profit, property, or other benefit from his or her conduct or winding up of the partnership business, or from his or her use of partnership property or information, or appropriate a partnership opportunity; (2) deal with the partnership as or on behalf of a party having an interest adverse to the partnership; or (3) compete with the partnership.

- Alternative Paragraph D should be used if the partnership is a UPA'94 partnership, the acts in question involve a loan of money or the transaction of business with the partnership, and the plaintiff is seeking to impose fiduciary standards on the defendant in connection with those transactions.

- Alternative Paragraph E should be used when the partner has purchased partnership property at a foreclosure sale after the other partners failed to fulfill their obligations to make mortgage payments on the property.

- Alternative Paragraph F should be used when the claim for breach of fiduciary duty is based on a partner's payment of a lawful and undisputed partnership debt.

- Alternative Paragraph G should be used when the partner has purchased partnership debt.

- Alternative Paragraph H may be used to establish that a partner has the right to substitute partnership

property in place of his or her individual property as security for a partnership debt.

- Alternative Paragraph I may be used to establish that if the partnership owed the particular partner more money than is withdrawn by that partner, no breach of fiduciary duty arises from payment of the partner's personal obligation with partnership funds.

- Alternative Paragraph J sets forth the right of a lessor partner, with the consent of the partnership and pursuant to an agreement, to retain improvements made by the partnership on real property leased to the partnership.

- Alternative Paragraph K sets forth an example of a partner's personal dealing in an area related to the partnership's interests which was not in fact adverse. The example involves a partner taking title to land that could be obtained in an eminent domain proceeding.

- Alternative Paragraph L should be used when the partner has purchased or enforced a note of or judgment against another partner.

- Alternative Paragraph M should be used when the partner has purchased or enforced a note of or judgment against the partnership.

These points and authorities should be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a partner's acts do not amount to breach of fiduciary duty. These issues are most likely to arise in a motion for summary judgment or at trial because whether or not a particular action by a partner is or is not a breach of fiduciary duty will depend on the facts of the particular situation. These points and authorities also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument showing the relationship between the facts of the case and the points of law stated. Thus, counsel should specify the acts of the partner at issue, the interests of the partnership, any disclosures to or agreements with the other partners, whether the partner held partnership funds and if so, how much, when he or she did the acts in question, or whether and to what extent the partnership was indebted to the partner at the time of the draws or acts in question. Specific arguments relative to some of the alternatives included in this form are noted in § 170.12[2][a]

[3] Discussion of Authorities

[a] Partner's Conduct of Partnership Business Must Be Grossly Negligent, Reckless, Intentional Misconduct, or Knowing Violation of Law to Constitute Breach of Fiduciary Duty of Due Care

Corp. Code § 16404(c) specifically limits the partner's duty of due care in the conduct and winding up of the partnership to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or knowing violation of law. Note that UPA'94 does not permit the partnership agreement to "unreasonably" reduce the duty of due care [Corp. Code § 16103(b)(4)], thereby implying that restrictions or elaborations defining the duty of due care may be upheld if determined to be "reasonable."

[b] Conduct Consistent With Duty of Good Faith and Fair Dealing Does Not Violate Partner's Fiduciary Duties

Corp. Code § 16404(d) states that a partner is required to discharge his or her duties to the partnership and the other partners under the Uniform Partnership Act of 1994 and the partnership agreement and to exercise his or her rights consistently with the obligation of good faith and fair dealing. By implication, therefore, if a partner can demonstrate

that his or her acts were consistent with this obligation of good faith and fair dealing, no violation of fiduciary duty has occurred. UPA'94 does not further define the obligation of good faith and fair dealing in the partnership context, but presumably it would be determined with reference to the partner's general fiduciary duties under *Corp. Code § 16404*, other provisions of UPA'94, and the general case law on the duty of good faith and fair dealing. Note that UPA'94 also allows the partners broad latitude to define the duty of good faith and fair dealing in the partnership agreement, although that duty cannot be waived or eliminated entirely [*Corp. Code § 16103(b)(5)*].

[c] Transaction Furthering Partner's Own Interest Does Not Automatically Violate Fiduciary Duty

Corp. Code § 16404(e) states that a partner does not violate his or her fiduciary obligations under the Uniform Partnership Act of 1994 merely because the partner's conduct further's the partner's own interest. It appears, rather, that the existence or nonexistence of a breach of fiduciary duty must be determined with respect to the statutory duties of loyalty and due care. The duty of due care is discussed in [a], *above*. The duty of loyalty requires that partners must (1) account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property or information, including the appropriation of a partnership opportunity [*Corp. Code § 16404(b)(1)*]; (2) refrain from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership [*Corp. Code § 16404(b)(2)*]; and (3) refrain from competing with the partnership in the conduct of the partnership business prior to the dissolution of the partnership [*Corp. Code § 16404(b)(3)*]. Note that while the UPA'94 does not permit the partnership to waive the duty of loyalty in the partnership agreement, it does allow the partnership agreement to identify specific types or categories of activities that do not violate that duty and gives all the partners, or a number or percentage specified in the partnership agreement, authority to ratify a specific act or transaction that otherwise would violate the duty after full disclosure of all the material facts, as long as the partnership agreement provisions or ratification are not manifestly unreasonable [*Corp. Code § 16103(b)(3)*]. Thus, the partnership agreement must always be examined to determine whether it deals directly or indirectly with the issue of fiduciary duty.

[d] Loan of Money to or Transaction of Business With Partnership Does Not Automatically Violate Fiduciary Duty

Corp. Code § 16404(f) provides that a partner may lend money to and transact other business with the partnership, and as to each loan or transaction the rights and obligations of the partner regarding performance or enforcement are the same as those of a person who is not a partner, subject to other applicable law. Thus, as to such transactions, the fiduciary standards that govern the dealings among the partners and the partnership are inapplicable.

[e] Partner May Purchase Partnership Property At Foreclosure Sale

Jones v. Wagner *(2001) 90 Cal. App. 4th 466, 108 Cal. Rptr. 2d 669* was an action for breach of contract and constructive fraud by partners who were liable on the mortgage of a townhouse against other partners who provided the down payment on the townhouse. The parties had purchased a beachfront townhouse that subsequently dropped in value. Plaintiffs stopped making mortgage payments, and defendants refused to pay the delinquent installments. The bank foreclosed on the property and defendants' trusts purchased the townhouse at the foreclosure sale. Defendants filed a cross-complaint. The trial court ordered dissolution of the partnership and made a monetary award for defendants on their cross-complaint. Plaintiffs appealed, claiming the trial court erred in failing to find constructive fraud.

The appellate court affirmed. It stated that there were unquestionably fiduciary duties among the partners, citing *Corp. Code § 16404*. However, there was no legal or fiduciary obligation for defendants to use partnership funds to pay the individual liability of plaintiffs for plaintiffs' agreed capital contribution to the partnership. Further, defendants had no duty to prevent the partnership property from going into foreclosure. Finally, defendants were entitled to bid on and buy the property at the foreclosure sale through their pension trust. Substantial evidence supported the trial court's decision that there was no breach of any duty by defendants that would justify an award of damages for constructive fraud (*90*

Cal. App. 4th 466, 473-474) .

[f] Partner Does Not Breach Fiduciary Duty by Paying Undisputed Partnership Debt

In ***AB Group v. Wertin*** *(1997) 59 Cal. App. 4th 1022, 1040, 69 Cal. Rptr. 2d 652* , three individuals formed a real estate development partnership and obtained multimillion dollar loans from a bank under their individual personal guarantees. Subsequently the Southern California real estate market collapsed. The value of the partnership assets was substantially reduced and the partnership defaulted on its loan payments. One of the partners advocated withholding payments on the partnership's debt during negotiations with the bank as a tactic to attempt to leverage a discount from the bank. The other two partners refused to adopt this approach and made interest payments totaling about $740,000 to the bank. Under the partnership agreement, whenever one partner made a payment to the bank pursuant to a lender guarantee, the other partner was obligated to make an equal payment, and failure to do so was a default under the partnership agreement. The dissenting partner did not make any payment. Ultimately, the other two partners sued the dissenting partner for, among other things, partnership dissolution and accounting. In response, the dissenting partner filed a cross-complaint which alleged breach of fiduciary duty based on the payments made by the other two partners to the bank (*59 Cal. App. 4th 1022, 1025-1026)* .

A referee was appointed to hear the accounting and dissolution phase of the case. During the proceedings before the referee, the dissenting partner sought to introduce evidence which, he contended, would have shown that the other two partners obtained discounts on debts unrelated to the partnership as a result of the interest payments made on the partnership debt. The referee refused to admit the proffered evidence, remarking that he could not "accept the argument that there is a breach of fiduciary duty for paying a legal debt," and accordingly found that all payments made by the plaintiffs were proper. The referee credited the interest payments to the capital accounts of the two partners who had made the payments, found that the third (dissenting) partner was fully liable to the other two partners for one-half the unsecured debt owed by the partnership, and declared that the third partner had breached the partnership agreement by failing to make required capital contributions. The result was a finding that the defendant owed the other two partners $6.7 million plus interest. The trial court adopted the referee's findings, stating that defendant could hardly complain that plaintiffs had committed the "outrageous and audacious act of paying off his debt" (*59 Cal. App. 4th 1022, 1027)* .

The appellate court agreed with the referee and the trial court. The court noted that "the centerpiece of [defendant's] appeal is the idea that [the other partners] 'advanced their own interests at the expense of the partnership' when they made interest payments on the loans to the partnership." However, the court found that what the defendant was really saying was that "[b]y the simple act of not paying a lawful debt, a debtor can force a discount from a creditor because of the risks and collection expenses associated with litigation ... [t]hus deconstructed, [defendant's] argument plainly rests on the premise that in partnership matters it is ok -- and sometimes even required -- *not* to pay one's debts" (*59 Cal. App. 4th 1022, 1028* , italics in original). The court held that equity would not recognize any such duty, distinguishing between the situation in which a partnership simply buys up its own obligation at a discounted present value and one in which it tries to create such a discount by a bad faith refusal to pay a loan (*59 Cal. App. 4th 1022, 1029-1030)* . It concluded that for purposes of determining whether or not a breach of fiduciary duty has occurred, "[e]quity will not recognize as a partnership opportunity the possibility of leveraging a discount from a lender by the threat of nonpayment" (*59 Cal. App. 4th 1022, 1040)* .

[g] Partner May Purchase Partnership Debt

The underlying facts in ***AB Group v. Wertin*** *(1997) 59 Cal. App. 4th 1022, 1040, 69 Cal. Rptr. 2d 652* are discussed in [f], *above*. In that case, during the discovery phase of the litigation, the parties entered into two "pre-workout" agreements that provided, among other things, that each party had the right to "negotiate various courses of action with any other Party." The pre-workout agreements also contemplated the possibility of bilateral or side agreements on "individual issues" between various of the parties, acknowledged the fact that each of the parties might have "other," independent loans with the bank, and specifically provided that each party would have the right to negotiate with the

bank regarding those loans. Furthermore, under the terms of these agreements, any evidence in connection with the workout discussions could not be used for any purpose whatsoever in any judicial proceeding. Subsequently, the parties discussed with the bank the purchase of the outstanding unsecured debt of the partnership. The end result was that one of the plaintiff partners purchased the debt from the bank for its undiscounted face value (*59 Cal. App. 4th 1022, 1026)* .

In addition to his other arguments, defendant claimed that the partner who purchased the partnership's debt from the bank may have co-opted a partnership opportunity when he purchased that unsecured debt. Because the purchase occurred after trial commenced, defendant claimed it was error for the referee and trial court not to allow further discovery into the issue (*59 Cal. App. 4th 1022, 1034)* . In rejecting this contention, the appellate court emphasized the fact that the partners, by agreement, gave themselves the right to keep whatever benefits concerning their own loans might come their way as a result of purchasing the partnership debt at face value (*59 Cal. App. 4th 1022, 1034)* . Defendant's contention that the parties could not legally have agreed to such an arrangement because it violated their fiduciary duties to one another was rejected as equally unpersuasive (*59 Cal. App. 4th 1022, 1036)* . The court therefore held that partners may agree among themselves that they may purchase partnership debts at full value, even if that means the purchasing partner will obtain grace and favor with the lender and that goodwill helps the purchasing partner with his or her own outside business dealings (*59 Cal. App. 4th 1022, 1040)* . However, the court expressly declined to deal with the situation in which partners have not modified by agreement fiduciary duties which they might otherwise have owed each other (*59 Cal. App. 4th 1022, 1034)* , or the restrictions that California law might place on partners who chose to structure their relationship in nontraditional ways (*59 Cal. App. 4th 1022, 1037)* .

[h] Partner Need Not Bear Disproportionate Burden of Partnership Obligation

Bowman v. Sears *(1923) 63 Cal. App. 235, 218 P. 489* , was an action by plaintiff partner to foreclose a note and chattel mortgage on partnership property. Plaintiff and the named defendant were husband and wife, as well as partners. The original note, from the partnership to a bank, was secured by a pledge of defendant's individual stock. Fearing the partnership would not be able to pay the note and that he would lose his stock, defendants executed a renewal note secured by a chattel mortgage on partnership property. Later, defendant made a gift to plaintiff of sufficient funds for her to pay the principal and interest then owing on the note. In return for payment, the bank assigned to her the note and chattel mortgage and released the pledged stock. Other defendants claimed the note had been extinguished because the funds with which it was purchased were the property of the named defendant and he was one of the makers of the note. The trial court found the funds were plaintiff's because the gift was completed before the bank was paid, and entered judgment of foreclosure. Defendants appealed.

The appellate court affirmed. After discussing the gift and assignment, the court went on to consider the claim that the plaintiff and the named defendant were guilty of fraud. The court said that defendant never sought to evade payment of his share of the obligation, and that he had the right to prevent his separate property from bearing the entire burden of the partnership debt (*63 Cal. App. 235, 252-253)* .

[i] Creditor Partner May Use Partnership Funds to Pay Personal Debts

Neilsen v. Holmes *(1947) 82 Cal. App. 2d 315, 186 P.2d 197* , was an action to set aside a prior agreement settling partnership accounts and for an accounting. The partnership was composed of four partners: plaintiff, who owed a one-fifth interest, defendant L, who owed two-fifths and was the husband of defendant G who owed a one-fifth interest, and defendant M, who held a one-fifth interest. Plaintiff sought to have the prior agreement set aside on numerous grounds, including fraud and mistake, that defendants L and G had improperly taken salaries and applied partnership funds to their personal transactions, and that certain real property in L's name was partnership property, profits from the condemnation of which should have been credited to the partnership. The partnership was formed in 1922 to develop carob trees and to subdivide and sell land. At one time the partnership owned 1175 acres of land, most of which were the subject of eminent domain proceedings by the Metropolitan Water District of Southern California ("the water

district") in 1936 when plaintiff gave notice of dissolution and demanded the accounting that gave rise to the agreement now sought to be set aside. All the partnership real property was held in name of defendant L. When it became known that the water district wanted a large tract of land, including the partnership land, for a reservoir, someone conceived the idea that a better price could be obtained if title was vested in one person. In accordance with this scheme, defendant L took title to additional acreage under pooling agreements with other land owners, the profits on eminent domain to be returned to the original owners. Defendant L also had acquired land in his own name in the area sought to be condemned. Loans on some of these latter properties were paid with partnership funds, but at a time when substantial amounts of salary and commissions were unpaid and owing from the partnership to defendant. The liability of the partnership to him was always decreased by the amounts advanced by the partnership for his personal transactions. Judgment was for defendants and plaintiff appealed.

The appellate court affirmed. The court's discussion regarding defendants' rights to salaries and commissions is discussed in *§ 170.130[3]*. The court's discussion regarding defendants' purchase of land in the neighborhood of the partnership land and his interests in the pooling agreements are discussed in [k], *below*. Quoting from *Dennis v. Gordon (1912) 163 Cal. 427, 125 P. 1063* , as to the loyalties owed to the partnership, the court noted that the partnership was almost continually indebted to defendant and that the proceeds of at least one bank loan to the defendant secured by assets of the partnership were paid to the partnership. It characterized the accounting methods as awkward and unusual, but concluded that in view of the indebtedness of the partnership to defendant, the fact that all personal expenditures were credited against salary owed, and the fact that the partnership suffered no injury on account of these transactions, the funds were to be considered defendant's funds and not the partnership's (*82 Cal. App. 2d 315, 324-325)* . Similarly, taxes paid by the partnership on defendant's individual property were deducted from sums owed to defendant by the partnership, so there was no irregularity (*82 Cal. App. 2d 315, 326)* .

[j] Lessor Partner May Retain Improvements Financed by Partnership When Authorized by Agreement

Speka v. Speka *(1954) 124 Cal. App. 2d 181, 268 P.2d 129* , was an action for dissolution of partnership, accounting, and contribution. Plaintiff had run a bakery business as a sole proprietorship for eight years before giving his brother, defendant, the funds to purchase a half interest in the business. Sometime after defendant became a partner, plaintiff purchased with his individual funds the real property out of which the bakery operated and leased it to the partnership. Defendant was one of the parties who executed the lease on behalf of the partnership. The lease provided that all improvements would become property of the lessor and would be surrendered at the termination of the lease. Improvements were made to the premises with partnership funds. Defendant knew of, consented to, and designed some of the improvements. The partnership amortized the value of the improvements on its books. Disagreements arose between the brothers when the business began losing money and defendant, who had always taken his share of profits, refused to make contributions for losses. Plaintiff gave notice of dissolution in accordance with the terms of the partnership agreement and also terminated the lease for nonpayment of one year's rent. Judgment was for plaintiff. Defendant appealed.

The appellate court modified the judgment by decreasing the amount found owing from defendant to plaintiff on the accounting in recognition of certain taxes paid by defendant and in all other respects affirmed. Defendant contended that since the improvements to the real property were made with partnership funds, he was entitled to credit for half their value. The court set forth the general rule stated in *Minikin v. Hendrix (1940) 15 Cal. 2d 338, 101 P.2d 473* , that when improvements purchased with partnership funds are placed on realty owned by one of the partners who is compensated by the partnership for the use thereof, and no agreement has been entered into by the partners respecting the disposition of the improvements in the event of dissolution, the improvements become a partnership asset and the nonlandowning partner is entitled to a proportionate share of their value (*124 Cal. App. 2d 181, 187-188)* . However, the agreement and lease in this case that provided otherwise were upheld. The court found no unfair advantage had been taken of defendant in the terms of the lease. No unjust enrichment was involved. Defendant contended the value of the improvements were profits within the meaning of former Corp. Code § 15021 [*now see Corp. Code § 16404*] for which plaintiff was accountable to the firm. The court said that former Corp. Code § 15021 refers to profits taken by one

partner without the consent of the other partner, and that here consent was given in the lease (*124 Cal. App. 2d 181, 188-189)* .

[k] Partner's Interest in Land Was Not Adverse to Interests of Partnership

The facts and procedural background of ***Neilsen v. Holmes*** *(1947) 82 Cal. App. 2d 315, 186 P.2d 197* , are discussed in [i], *above*. The appellate court quoted from *Dennis v. Gordon (1912) 163 Cal. 427, 125 P. 1063* , as to the loyalties owed to the partnership in terms of interest and a partner's continuing duty to devote to the partnership all the attention advantageous to it. The court noted that in this case the partnership was almost continually indebted to defendant and that there was no evidence that the partnership either desired or could afford to purchase additional land in the area. Thus, since the partnership suffered no injury on account of defendant's purchase of land for himself individually in the area of the partnership, the purchase was not adverse to the partnership (*82 Cal. App. 2d 315, 324-325)* .

Plaintiff also claimed for the partnership the profits made by defendant on the sale of his individually owned land, the land defendant held under the pooling agreements, and the profits from the sale of those lands. The court held that a partner may engage in business other than that of the partnership when the other business does not give that partner an interest adverse to the partnership nor prevent him or her from giving its business all the attention that would be advantageous to it. Since there was no evidence of injury to the partnership in this case, the profits made by defendant L on the land he purchased for himself were his own to retain. Both the pooling agreements and the purchase of the land individually by defendant L were in furtherance of the plan, from which the partnership benefitted, to put title to as much of the land sought by the water district as possible in one name (*82 Cal. App. 2d 315, 329)* . Findings indicated that land purchased by the partnership for $50 per acre was purchased by the water district at $700 per acre (*82 Cal. App. 2d 315, 321)* . Since defendant L's act of taking title to the land under the pooling agreements was not adverse to the partnership but in fact enabled it to get a higher price for its land, the partnership had no claim on either the third parties' land or their profits (*82 Cal. App. 2d 315, 329)* .

[l] Partner May Purchase Judgment Against Copartner

In re Levy & Schwab *(1900) 130 Cal. 282, 62 P. 520* , arose out of the insolvency proceeding of a partnership and its individual partners instituted by creditors. At the public auction of the firm's assets, the assignee had allowed one partner to purchase the firm's accounts receivable from the other partner. The purchaser partner collected a pro rata share of the receivable from the estate of the debtor partner. A creditor raised objections to the account of the assignee, claiming that the dividend from the debtor partner's estate should have been paid to the firm, not to the purchaser partner. The dividend to the purchaser partner was allowed, and the creditor appealed.

The California Supreme Court affirmed. The Court noted that there was no showing that the sale had been other than fair and open, nor was there any claim of fraud on the purchaser's part. The Court noted that the purchase price had been credited to the firm's account and distributed to its creditors. The money with which the purchase was made was no part of the insolvency estate of the purchaser partner (*130 Cal. 282, 284)* .

McKenzie v. Dickinson *(1872) 43 Cal. 119* , was an action by one former partner against another to collect $3,090 paid to satisfy a note ("the Burns note") and judgment on the note against defendant. A cross complaint alleged the firm had never been dissolved, and that plaintiff had purchased another note and judgment against defendant ("the Lane note") and wrongfully caused execution of that note against defendant's share of partnership funds that were in plaintiff's possession. The trial court found that the Burns note had been made by the defendant partner in the name of the firm but in fact had been given for his personal debt (*43 Cal. 119, 128-129)* , that the firm had been dissolved and plaintiff left to collect its assets and apply them to pay its debts and the obligation owing by the firm to plaintiff (*43 Cal. 119, 133)* , and that plaintiff did in fact purchase the Lane note and judgment and cause execution of it against defendant's share of the partnership assets that were in plaintiff's possession, but that those assets did not consist of cash (*43 Cal. 119, 131-132)* . Judgment was for plaintiff, and defendant appealed.

The California Supreme Court affirmed. The Court said no principle of equity prohibits one partner from purchasing with his or her own funds a judgment or other evidence of indebtedness, even against one who may be his or her own partner at the time, or prohibits enforcement and collection by levy and sale of the debtor partner's interest in the partnership. The fiduciary duties of partners refer only to the business in which the partnership is engaged (*43 Cal. 119, 133-135)* .

[m] Partner May Purchase Judgment Against Partnership

Bradbury v. Barnes *(1861) 19 Cal. 120* , was an action for dissolution and accounting. The trial court found that defendant had purchased three judgments against the firm and a certificate of sale resulting from a tax sale of the partnership property. These totaled approximately $7,440. Executions had been made under all three judgments, and the sheriff had issued certificates, although deeds had not yet been given. The trial court also found that defendant had retained $7,074 of proceeds from certain partnership sales in the ordinary course of its business. Judgment was for cancellation of the sheriff's certificates, for an accounting in which defendant was to be charged with the $7,074 and credited with the sums paid for the judgment and tax certificate, and contained instructions for proceeding with the sheriff's sales. Defendant appealed.

The California Supreme Court affirmed, modifying only certain particulars in regard to the sheriff's sale, which it deemed premature. The Court first discussed the right of a partner to purchase with his or her own funds and at public sale a copartner's interest in the partnership if there are no circumstances of fraud or other trust relation preventing it. The fact that a sheriff's sale is public and open is prima facie evidence that no unfair advantage is taken. However, the Court stated that this situation differed because defendant made the purchases at a time when he had partnership funds in his possession. He could have paid the judgments and demanded contribution from the other partners, but not having proceeded that way, equity required that he be deemed to have purchased the judgment on behalf of the partnership (*19 Cal. 120, 123-124)* .

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1. Fiduciary Duties

17-170 California Points & Authorities § 170.121

§ 170.121 Opposing Contention That Plaintiff Breached Fiduciary Duty--No Fiduciary Duty Is Owed to Former Partner Who Is Now Only Secured Party

[1] FORM Opposing Contention That Plaintiff Breached Fiduciary Duty--No Fiduciary Duty Is Owed to Former Partner Who Is Now Only Secured Party

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT DOES NOT OWE PLAINTIFF ANY FIDUCIARY DUTY BECAUSE PLAINTIFF IS NO LONGER A PARTNER BUT ONLY A SECURED PARTY.

No Fiduciary Duty Is Owed to Secured Party. When a partner has sold his or her interest in the partnership and that partnership interest is pledged as collateral to secure payment of the sales price, no fiduciary duty is owed to the former partner[, although the former partner may have a cause of action based on statutory, contractual, or common law rights for impairment of the value of his or her security interest] (*Baldwin v. Marina City Properties, Inc. (1978) 79 Cal. App. 3d 393, 406, 145 Cal. Rptr. 406* ; *see Corp. Code § 16603(3)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a fiduciary duty is owed to a former partner who only retains a security interest in the partnership interest that was sold.

These points and authorities should be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the parties' relations are no longer as fiduciaries. For example, this issue may be raised by demurrer. These points and authorities also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should specify the date of sale of the partnership interest and that the sale was of all of the creditor's interest in the partnership, and should attach any documentary evidence of sale, such as the agreement of sale, the note, and the security agreement.

[3] Discussion of Authorities

[a] No Fiduciary Duty Is Owed to Secured Party

Baldwin v. Marina City Properties, Inc*. (1978) 79 Cal. App. 3d 393, 145 Cal. Rptr. 406* , was an action by former limited partners against the general partner and the new limited partner to whom they had sold their interests. Plaintiffs' limited partnership interests had represented eleven percent of the partnership equity. The sale of their interests were evidenced by notes and security agreements by which the interests sold were pledged as collateral for repayment of the sales price. Defendant purchaser would have no personal liability on default, and plaintiffs' sole recourse would be to the partnership interests. Shortly after the sale of plaintiffs' interests, the general partner made a capital call. None of the limited partners responded to the capital call, so the general partner contributed $500,000. That contribution increased the general partner's interest to 90 percent of the partnership equity and decreased the collateral to a one-percent share of the equity. Defendant purchaser had defaulted prior to the institution of the action and had agreed to reconvey the collateral security, but no allegation was made that the security had actually been reconveyed. Plaintiffs sought damages for breach of fiduciary duty and interference with prospective advantage from the general partner and for conspiracy to convert their security interest from all defendants. Plaintiffs claimed that the general partner's contribution amounted to self-dealing because there were other sources of funds available to the partnership, specifically notes receivable from the parent corporation of the general partner. Judgment for defendants was entered after demurrers were sustained without leave to amend. Plaintiffs appealed.

The appellate court reversed to allow amendment to set forth a cause of action for impairment of security interest (*79 Cal. App. 3d 393, 414-415)* . In regard to the cause of action for breach of fiduciary duty, the court said that one's status as a former partner or as a secured party is not sufficient to give rise to a fiduciary duty, although there may be a statutory, contractual, or common law right not to have the value of one's security interest impaired (*79 Cal. App. 3d 393, 406)* . Concerning the cause of action for interference, the complaint was fatally defective in its lack of a sufficient, nonconclusionary allegation that the value of plaintiffs' security interest had been impaired. The fact that the proportionate percentage share represented by the collateral had decreased did not mean that the collateral had a lower value or that its value had been impaired (*79 Cal. App. 3d 393, 407)* . In any action for damages for impairment of their security interest, plaintiffs' damages would be limited to the impairment of the value of the security, but in no event a sum greater than the unpaid balance due on the secured indebtedness plus collection costs. Further, they would be required by the California Commercial Code to resell the collateral and to turn any excess proceeds over to the debtor (*79 Cal. App. 3d 393, 412-413)* .

Corp. Code § 16603(3) provides that upon a partner's dissociation, the partner's duties of loyalty and due care continue only with regard to matters arising and events occurring before the partner's dissociation.

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17-170 California Points & Authorities § 170.122

§ 170.122 Opposing Contention That General Partner Breached Fiduciary Duty Under ULPA '08--Partner's Action Did Not Amount to a Breach of Partners' Fiduciary Duty of Loyalty or Care [Corp. Code § 15904.08]

[1] FORM Opposing Contention That General Partner Breached Fiduciary Duty Under ULPA '08--Partner's Action Did Not Amount to a Breach of Partners' Fiduciary Duty of Loyalty or Care [Corp. Code § 15904.08]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE ACT[S] OF DEFENDANT _____ [*name of general partner*] DID NOT CONSTITUTE A BREACH OF DEFENDANT'S FIDUCIARY DUTIES, AS A GENERAL PARTNER OF _____ [*name of limited partnership*], TO THE _____ [PARTNERSHIP and/or OTHER PARTNERS OF THAT PARTNERSHIP].

[*EITHER*]

A. General Partner's Conduct of Partnership Business Must Be Grossly Negligent, Reckless, Intentional Misconduct, or Knowing Violation of Law to Constitute Breach of Fiduciary Duty of Care. A general partner's duty of care to the limited partnership and the other partners in the conduct and winding up of the limited partnership's activities is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law (*Corp. Code § 15904.08(c)*).

[*AND/OR*]

B. Conduct Consistent With Duty of Good Faith and Fair Dealing Does Not Violate Partner's Fiduciary Duties. A general partner is required to discharge the duties to the partnership and the other partners under the ULPA '08 and the partnership agreement, and to exercise any rights consistently with the obligation of good faith and fair dealing (

Corp. Code § 15904.08(d)).

[*AND/OR*]

C. Transaction Furthering General Partner's Own Interest Does Not Automatically Violate Fiduciary Duty. A general partner does not violate a duty or obligation under the ULPA '08 or under the limited partnership agreement merely because the general partner's conduct furthers the general partner's own interest (*Corp. Code § 15904.08(e)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a general partner breached his or her fiduciary duties. The general ground for opposition is that the actions of the defendant general partner did not amount to a breach of fiduciary duty to the limited partnership or the other partners.

Paragraph A should be used if the acts complained of occurred in the conduct and winding up of the limited partnership's business, and the defendant is contending that those acts did not constitute gross negligence, reckless conduct, intentional misconduct, or a knowing violation of law. This alternative may be appropriate, for example, if the defendant contends that he or she is guilty only of bad business judgment or ordinary negligence that does not rise to the level of conduct proscribed by the ULPA '08.

Paragraph B should be used if the defendant is contending that all of his or her actions in relation to the limited partnership are consistent with his or her general duty of good faith and fair dealing to the partnership and the other partners.

Paragraph C should be used if the acts in question arguably were in furtherance of the defendant's own interest. This alternative should be combined with other alternatives relevant to the specific acts in question and demonstrate that in performing these acts the defendant did not violate his or her fundamental duty of loyalty to the limited partnership as demonstrated in *Corp. Code § 15904.08(b)*, *i.e.*, he or she did not (1) personally derive property, profit, or benefit from his or her conduct or winding up of the limited partnership's activities, or from his or her use of limited partnership property, or appropriate a limited partnership opportunity; (2) deal with the limited partnership as or on behalf of a party with an adverse interest to the limited partnership; or (3) compete with the limited partnership.

The enumeration of the fiduciary duties of the general partners in a limited partnership under the ULPA '08 was derived from the Uniform Partnership Act of 1994 (UPA '94) [*see* Clark, California's Uniform Limited Partnership Act of 2008, § 29.08 (LexisNexis)]. For similar points and authorities drafted under the applicable provisions of UPA '94 [*see Corp. Code § 16404*], *see § 170.120*.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Specifically, counsel should specify the acts of the general partner that are at issue and explain why those acts did not violate any of the standards set out in these points and authorities.

[3] Discussion of Authorities

[a] General Partner's Conduct of Partnership Business Must Be Grossly Negligent, Reckless, Intentional Misconduct, or Knowing Violation of Law to Constitute Breach of Fiduciary Duty of Care

Corp. Code § 15904.08(c) specifies that a general partner's duty of care to the limited partnership and the other partners in the conduct and winding up of the limited partnership's activities is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.

[b] Conduct Consistent With Duty of Good Faith and Fair Dealing Does Not Violate Partner's Fiduciary Duties

Corp. Code § 15904.08(d) provides that a general partner must discharge the duties to the partnership and the other partners under the ULPA '08 and the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing.

[c] Transaction Furthering General Partner's Own Interest Does Not Automatically Violate Fiduciary Duty

Corp. Code § 15904.08(e) states that a general partner does not violate a duty or obligation under the ULPA '08 or under the partnership agreement merely because the general partner's conduct furthers the general partner's own interest.

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17-170 California Points & Authorities §§ 170.123-170.129

[Reserved]

§§ 170.123[Reserved]

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2. Other Rights and Duties

17-170 California Points & Authorities § 170.130

§ 170.130 Supporting Contention That Partner Is Entitled to Compensation for Services Rendered to Partnership [Corp. Code § 16401(h); former Corp. Code § 15018(f)]--Implied Agreement for Salary

[1] FORM Supporting Contention That Partner Is Entitled to Compensation for Services Rendered to Partnership [Corp. Code § 16401(h); former Corp. Code § 15018(f)]--Implied Agreement for Salary

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

PLAINTIFF ACCEPTED THE BENEFITS OF DEFENDANT'S SERVICES ON BEHALF OF THE PARTNERSHIP, KNEW THAT DEFENDANT TOOK A SALARY, AND FAILED TO OBJECT, AND THUS PLAINTIFF'S CONSENT TO THE PAYMENT OF SALARY SHOULD BE IMPLIED AND PLAINTIFF SHOULD BE ESTOPPED FROM OBJECTING TO ITS PAYMENT.

Consent to Compensation Implied. If partners have accepted the benefits of profits and increased asset values attributable to another partner's management skills and services devoted to the partnership business, have seen financial statements or accounts, and know, or are chargeable with knowledge, that the partner was taking a salary, and have failed to object, their consent will be implied to an agreement for salary (*Broffman v. Newman (1989) 213 Cal. App. 3d 252, 259-260, 261 Cal. Rptr. 532* ; *Busick v. Stoetzl (1968) 264 Cal. App. 2d 736, 738-742, 70 Cal. Rptr. 581* ; *Neilsen v. Holmes (1947) 82 Cal. App. 2d 315, 322-324, 186 P.2d 197*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a partner is entitled to be compensated for services rendered in the partnership business, despite the fact that there was no express agreement for salary, because the other partners knew salary was being taken and failed to object.

These points and authorities should be combined with points and authorities pertaining to the specific procedural

context in which counsel wishes to raise the substantive issue that an implied agreement for salary exists. They also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should specify the amount of time plaintiff put into the business, any unique skills plaintiff had, the profits or increased asset values attributable to plaintiff's management, and the annual reports or copies of tax returns forwarded to the other partners showing salary was being taken, attaching copies if possible. Counsel should also specify that none of the other partners ever objected to the salary being taken.

[c] Opposing Points and Authorities

The points and *authorities in § 170.140* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Consent to Compensation Implied

In ***Broffman v. Newman*** *(1989) 213 Cal. App. 3d 252, 261 Cal. Rptr. 532* , a limited partnership owned a medical office building. After the full-time site manager died, one of the two general partners offered to manage the building and requested special compensation. The other partners did not object, and the two general partners entered into a one-year contract providing for such a fee. They later entered into a second one-year contract. Thereafter, a limited partner objected to the special compensation and demanded that the manager refund his compensation for the previous year. Plaintiff limited partner then sued for breach of contract, breach of fiduciary duties, and declaratory relief. The general partner defended on the ground that the partners agreed to his special compensation and the partnership benefitted because the fee he charged was fair. The trial court entered judgment in favor of the general partner, and the limited partner appealed. The appellate court stated that an agreement for compensation may be implied by a course of conduct or found in an express agreement. In this case, plaintiff limited partner's failure to object to the compensation of the general partner constituted an implied agreement and estoppel to complain (*213 Cal. App. 3d 252, 259-260)* . However, once the limited partner objected to payment of the management fee, there was no longer in effect either an express or implied agreement to employ the general partner for additional compensation to perform the business of the partnership--management of the building (*213 Cal. App. 3d 252, 260-261)* . The court reversed the judgment, concluding that it was impermissible for the general partner to receive special compensation once a majority of the partnership interests no longer consented to his receipt of the management fee (*213 Cal. App. 3d 252, 264)* .

Busick v. Stoetzl *(1968) 264 Cal. App. 2d 736, 70 Cal. Rptr. 581* , was an action for judicial dissolution and accounting. Plaintiff, her deceased husband, and two other couples were partners. Plaintiff's husband and defendant were the managing partners while her husband was alive, each taking a salary. After her husband's death, she and defendant spoke about his salary, and he said he was taking a raise--to $11,004 per year. Plaintiff called the bookkeeper after the fact and learned that defendant had taken the raise as indicated. Defendant's salary remained at that level for 1960-1962, but thereafter increased each year to $20,000 in 1967. Plaintiff received copies of the profit and loss statements and copies of the partnership income tax returns for each year in question; the books and records of the partnership were available for her inspection. The trial court found that plaintiff's share of profits and increases in assets during the years in question were $156,000, and that defendant's salary was less than the reasonable value of his services. All other partners agreed to the increases. The increases in 1963-1967 were discussed at meetings between the parties and their attorneys, but plaintiff remained silent. Still, on the basis of letters written by her attorney after those meetings objecting to the increases, the trial court required defendant to return the excess over $11,004 per year to the partnership. He did not appeal, but plaintiff appealed the portion of the judgment upholding the $11,004 per year.

The appellate court affirmed. The court first discussed cases approving salary to a retired partner who continued to provide services to the partnership, stating that equitable principles would entitle such a partner to more than the share of profits allowed by former Corp. Code § 15042, and noting that these cases rely heavily on principles of estoppel (*264 Cal. App. 2d 736, 738-739)* . The court stated that an agreement for salary may be implied and the existence or nonexistence of such an agreement is a question of fact in each case (*264 Cal. App. 2d 736, 741)* . After reviewing the evidence described above, the appellate court affirmed (*264 Cal. App. 2d 736, 741-742)* .

The facts and procedural background in ***Neilsen v. Holmes*** *(1947) 82 Cal. App. 2d 315, 186 P.2d 197* , are discussed in *§ 170.120[3]*. At the time plaintiff bought into the partnership, she examined the books and knew that salaries were being taken, albeit in accordance with a prior partnership agreement (*82 Cal. App. 2d 315, 322)* . The salaries for the period in question were clearly shown on the account that was the basis of the settlement agreement here sought to be set aside. Plaintiff claimed that she never read the exhibits to the account and signed the settlement agreement on the advice of her attorney. The court stated, however, that the attorney was plaintiff's agent, and the salary and commission items in the account should have put both plaintiff and her attorney on notice that they had been taken. There was no legal reason to set aside the prior agreement regarding salary (*82 Cal. App. 2d 315, 323)* . An agreement for salary may be express or implied, and is a question of fact to be determined in the trial court. When the written agreement of the parties is silent on the subject of salary, parol evidence and conduct of the parties may establish the agreement for compensation (*82 Cal. App. 2d 315, 324)* .

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17-170 California Points & Authorities § 170.131

§ 170.131 Supporting Contention That Irregular Amendment of Partnership Agreement Is Effective

[1] FORM Supporting Contention That Irregular Amendment of Partnership Agreement Is Effective

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

AN IRREGULAR AMENDMENT OF THE PARTNERSHIP AGREEMENT IS EFFECTIVE IF THE PARTNERS AGREED TO THE AMENDMENT.

Irregular Amendment of Partnership Agreement Is Effective. When the partnership agreement has been amended without following provisions of the agreement for amending it--such as, for instance, an amendment to which the partners orally agreed, although the partnership agreement required amendments to be in writing--the amendment is effective even though done irregularly, as long as the partners agreed to it, since the partners can waive requirements of that kind (*Richard B. LeVine, Inc. v. Higashi (2005) 131 Cal. App. 4th 566, 587, 32 Cal. Rptr. 3d 244*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that an amendment of a partnership agreement is effective even though it was done without meeting requirements in the partnership agreement for amending it, as long as the partners in fact agreed to the amendment.

These points and authorities may also be used in a trial or appellate brief, or in a memorandum submitted in any procedural context in which a party seeks to raise this contention.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if the contention is

raised in opposition to a defendant's motion for summary judgment, the memorandum would include an analysis of the supporting and opposing papers showing that undisputed facts establish that the plaintiff's claim is supported by an irregular amendment of the partnership agreement, to which the partners agreed.

[c] Related Pleading and Practice Chapters

For discussion and forms relating to actions in which the issue addressed in this form might arise, see California Forms of Pleading and Practice, Ch. 401, *Partnerships: Actions Between General Partners and Partnership* , and Ch. 404, *Partnerships: Actions Between Limited Partners and Partnerships* (Matthew Bender).

[3] Discussion of Authorities

[a] Irregular Amendment of Partnership Agreement Is Effective

In ***Richard B. LeVine, Inc. v. Higashi*** *(2005) 131 Cal. App. 4th 566, 32 Cal. Rptr. 3d 244* , a partner unsuccessfully sued an accountant whom the partnership had engaged for the task of determining the partners' distributive shares and preparing tax-related forms. The plaintiff was not satisfied with the accountant's determination of the amount of the plaintiff's share of profits. The accountant's determination of the partners' shares had conformed to instructions from the partnership as to how those shares should be determined. Those instructions reflected the partners' oral agreement to change the method prescribed in the partnership agreement. The trial court granted the accountant's motion for summary judgment after concluding that the dissatisfied partner could not make a case against the accountant on any viable theory of liability.

The court of appeal affirmed. One of the arguments made by the dissatisfied partner was that the accountant was required to determine the allocation of profits by strictly following the method prescribed in the written partnership agreement, despite having received contrary instructions from the partnership. The court observed that "although the *written* partnership agreement provided a method of allocation, the partners *orally* agreed to modify the formula, and gave [the accountant] a written confirmation that the modification had been made. Although ... the written partnership agreement requires amendments to the agreement to be in writing, this type of provision may be waived. That is what happened here. And third parties, such as the ... [accountant], have no responsibility to police the internal governance of the partnership. What matters to third parties is the fact of amendment--not how it was done" (*131 Cal. App. 4th 566, 587* ; emphasis in original; internal citation omitted).

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17-170 California Points & Authorities § 170.132

§ 170.132 Supporting Contention That General Partner Is Entitled to Reimbursement for Payments Made to Limited Partnership Under ULPA '08 [Corp. Code § 15904.06]

[1] FORM Supporting Contention That General Partner Is Entitled to Reimbursement for Payments Made to Limited Partnership Under ULPA '08 [Corp. Code § 15904.06]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF _____ [*name of general partner*] IS ENTITLED TO REIMBURSEMENT/INDEMNITY BY DEFENDANT FOR _____ [MAKING PAYMENTS/INCURRING LIABILITIES IN THE ORDINARY COURSE OF THE ACTIVITIES OF THE PARTNERSHIP OR FOR THE PRESERVATION OF ITS ACTIVITIES OR PROPERTY *or* MAKING AN ADVANCE TO THE LIMITED PARTNERSHIP BEYOND THE AMOUNT OF CAPITAL THE GENERAL PARTNER AGREED TO CONTRIBUTE].

Reimbursement By Limited Partnership for Payment or Advance. A limited partnership must reimburse a general partner for payments made, and indemnify a general partner for liabilities incurred, by the general partner in the ordinary course of the activities of the partnership or for the preservation of its activities or property, or for making an advance to the partnership beyond the amount of capital the general partner agreed to contribute (*Corp. Code § 15904.06(c), (d)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a general partner is entitled to reimbursement for payments or advances made to, or indemnity for liabilities incurred on behalf of, the limited partnership.

These points and authorities should be combined with points and authorities pertaining to the specific procedural

context in which counsel wishes to raise the substantive issue that the general partner's actions give rise to an obligation of the limited partnership to reimburse or indemnify the partner. They also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Reimbursement By Limited Partnership for Payment or Advance

Corp. Code § 15904.06(c) provides that a limited partnership must reimburse a general partner for payments made and indemnify a general partner for liabilities incurred by the general partner in the ordinary course of the activities of the partnership or for the preservation of its activities or property. *Corp.* ***Code § 15904.06(d)*** requires a limited partnership to reimburse a general partner for an advance to the partnership beyond the amount of capital the general partner agreed to contribute.

A payment or advance made by a general partner which gives rise to an obligation of the limited partnership under *Corp. Code § 15904.06(c)* or *(d)* constitutes a loan to the limited partnership which accrues interest from the date of the payment or advance [*Corp. Code § 15904.06(e)*]. A general partner, however, is not entitled to remuneration for services performed for the partnership [*Corp. Code § 15904.06(f)*].

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[Reserved]

§§ 170.133[Reserved]

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17-170 California Points & Authorities § 170.140

§ 170.140 Opposing Contention That Partner Is Entitled to Compensation for Services Rendered to Partnership [Corp. Code § 16401(h); former Corp. Code § 15018(f)]

[1] FORM Opposing Contention That Partner Is Entitled to Compensation for Services Rendered to Partnership [Corp. Code § 16401(h); former Corp. Code § 15018(f)]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

INASMUCH AS THE PARTNERSHIP AGREEMENT DOES NOT CONTAIN ANY PROVISIONS TO THE CONTRARY, PLAINTIFF IS NOT ENTITLED TO ANY COMPENSATION, OTHER THAN HIS/HER SHARE OF PROFITS, FOR SERVICES HE/SHE RENDERED TO THE PARTNERSHIP.

A. Partners Are Not Entitled to Compensation. Subject to the partnership agreement, a partner is not entitled to remuneration for services performed for the partnership, except for reasonable compensation for services rendered in winding up the business of the partnership (*Corp. Code § 16401(h) or* former Corp. Code § 15018(f); *Broffman v. Newman (1989) 213 Cal. App. 3d 252, 263-264, 261 Cal. Rptr. 532* ; *Cagnolatti v. Guinn (1983) 140 Cal. App. 3d 42, 50, 189 Cal. Rptr. 151* ; *Estate of McConnell (1936) 6 Cal. 2d 493, 497, 58 P.2d 639*).

[*Optional*] **B. Agreement to Agree on Amount of Compensation Is Insufficient**. An agreement which provides that a partner is entitled to compensation for services rendered in carrying out the partnership business in an amount to be agreed on later is insufficient to support a claim for compensation, even an equitable claim for the reasonable value of the services, if no amount was ever agreed on (*Security-First Nat'l Bank of Los Angeles v. Lutz (9th Cir. 1963) 322 F.2d 348, 351* ; *Vangel v. Vangel (1953) 116 Cal. App. 2d 615, 631-632, 254 P.2d 919*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a partner is entitled to be

compensated for services performed for the partnership [*Corp. Code § 16401(h)*; former Corp. Code § 15018(f)]. Paragraph A should be used to set forth the general rule. The other circumstances referred to in Paragraph A are the winding up the business of the partnership. A partner winding up the partnership affairs is entitled to the reasonable value of his or her services, as discussed in *§ 170.302*. Paragraph B should be used when the partnership or other agreement provided that the partner was to receive a salary, the amount of which was left to future agreement, and no agreement as to amount was ever reached.

These points and authorities should be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a partner is not entitled to compensation, other than his or her share of profits, for services rendered in the partnership business. They also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should specify that there is no written agreement, oral agreement, or history from which it can be inferred that there was any agreement between the partners to vary the statutory rule prohibiting compensation.

[c] Opposing Points and Authorities

These points and authorities may be used to oppose the points and *authorities in § 170.130*.

[3] Discussion of Authorities

[a] Partners Are Not Entitled to Compensation

Corp. Code § 16401(h) provides that a partner is not entitled to remuneration for services performed for the partnership, except for reasonable compensation for services rendered in winding up the business of the partnership [*see also* former Corp. Code § 15018(f)]. The exception for services in winding up the partnership affairs is the subject of § 170.302.

The facts and procedural background of ***Broffman v. Newman*** *(1989) 213 Cal. App. 3d 252, 261 Cal. Rptr. 532* , are discussed in *§ 170.130[3]*. Based on the statute governing remuneration to partners acting in the partnership business, former Corp. Code § 15018(f) [*see now Corp. Code § 16401*], the appellate court held that it was impermissible for the general partner to receive special compensation once a majority of the partnership interests no longer consented to his receipt of a management fee (*213 Cal. App. 3d 252, 264)* .

The facts and procedural background of ***Cagnolatti v. Guinn*** *(1983) 140 Cal. App. 3d 42, 189 Cal. Rptr. 151* , are discussed in *§ 170.102[3]*. The appellate court rejected the assertion that the disputed transactions, if found to be self-dealing, were justified as reasonable compensation. It quoted the rule that absent an express agreement, a partner is not entitled to any compensation for services to the partnership other than his or her share of the profits. In this case, the partnership agreement was silent as to compensation of partners, and the trust agreement specified compensation only for extraordinary services. The court found no extraordinary services which might warrant additional compensation (*140 Cal. App. 3d 42, 50-51)* .

Estate of McConnell *(1936) 6 Cal. 2d 493, 58 P.2d 639* , involved the appeal of the allowance of a claim against an estate by decedent's former partner. The claimant and decedent had been partners for 12 years. The articles of partnership had not provided for extra compensation to either partner. During the term of the partnership, the claimant devoted more time to the partnership business than decedent, who was ill. When the partnership accounts were settled, the claimant did not receive credit for any compensation based on services performed in aid of the partnership business. The note that was the basis of the claim was made nine years after dissolution of the partnership and was to be paid by

the estate, not the deceased partner. The claimant contended the note was not a gift but was given in consideration of services rendered on behalf of the partnership during its existence. The estate appealed the allowance of the claim.

The California Supreme Court reversed. In reversing, the Court relied on the general rule that in the absence of an agreement to the contrary, one partner is entitled to no more compensation (in the form of shared profits) than another (*6 Cal. 2d 493, 497)* . It is also a settled rule that a gift note cannot create an obligation in favor of the donee against the estate of the donor (*6 Cal. 2d 493, 495)* .

[b] Agreement to Agree on Amount of Compensation Is Insufficient

Security-First Nat'l Bank of Los Angeles v. Lutz (9th Cir. 1963) 322 F.2d 348 , considered adjustments to be made in the respective amounts of stock issued to partners of a former partnership when it was taken over by a corporation. One of the adjustments being considered was the claim of partner S that his stock did not reflect accrued, but unpaid, salary owed him by the partnership. The partnership agreement provided that the managing partners were entitled to "such reasonable compensation for services as shall be agreed upon between said general partners and a majority in interest of the limited partners." No agreement was ever reached regarding the amount of compensation, but S claimed to be entitled to salary in a reasonable amount. The Ninth Circuit denied the claim for reasonable value of services, citing *Vangel v. Vangel (1953) 116 Cal. App. 2d 615, 254 P.2d 919* (discussed *below*). Based on former Corp. Code § 15018(f), if the partnership agreement reserves the matter of compensation for future determination, an agreement of the partners fixing the amount is necessary before any legal or equitable right to receive salary even in a reasonable amount exists (*322 F.2d 348, 351)* .

Vangel v. Vangel *(1953) 116 Cal. App. 2d 615, 254 P.2d 919* , was an action for dissolution of partnership and accounting. Defendant partner made a claim for salary for services rendered to the partnership. The claim was based on a provision in the partnership agreement which said: "[t]he parties shall from time to time agree on a fixed amount to be drawn by each party by way of drawing account, living expenses, or wages." The partners were never able to reach agreement on the subject. The judgment of the trial court denied defendant any compensation as wages. Defendant appealed.

The appellate court reversed on other grounds, but upheld the trial court's finding that defendant was not entitled to any salary. With respect to the claim for salary, the court recited the general rule that in the absence of an express or implied agreement, a partner is not entitled to compensation for his or her services to the partnership other than his or her share of the profits. This is predicated on the theory that during the lifetime of the partners each of them is required to donate his or her time and talents to the affairs of the partnership. The service and labor of one partner offsets that of the other. The fact that one partner contributes greater skill and takes over the management of the business does not give rise to a right to extra compensation without an agreement for it (*116 Cal. App. 2d 615, 631)* . Defendant also argued he should receive the reasonable value of his services based on the fact that the partners were never able to agree. However, the court held that neither law nor equity provides a remedy for breach of an agreement to agree in the future (*116 Cal. App. 2d 615, 631-632)* .

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17-170 California Points & Authorities § 170.141

§ 170.141 Opposing Contention That Assignee of Partnership Interest Is Entitled to Examine Books or Participate in Management [Corp. Code § 16503; former Corp. Code § 15027(1); Corp. Code §§ 15519(3) (ULPA), 15672 (CRLPA)]

[1] FORM Opposing Contention That Assignee of Partnership Interest Is Entitled to Examine Books or Participate in Management [Corp. Code § 16503; former Corp. Code § 15027(1); Corp. Code §§ 15519(3) (ULPA), 15672 (CRLPA)]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

INASMUCH AS PLAINTIFF IS ONLY AN ASSIGNEE OF A PARTNERSHIP INTEREST AND HAS NOT BEEN SUBSTITUTED AS A PARTNER, HE/SHE DOES NOT HAVE THE RIGHT TO _____ [PARTICIPATE IN THE MANAGEMENT OR CONDUCT OF PARTNERSHIP BUSINESS *and/or* REQUIRE ACCESS TO INFORMATION CONCERNING PARTNERSHIP TRANSACTIONS *and/or* INSPECT OR COPY THE PARTNERSHIP BOOKS OR RECORDS].

Assignee of Partnership Interest Has Only Limited Rights. Unless the partnership agreement provides otherwise, the assignee of a partnership interest does not become substituted as partner unless and until all other partners consent. In the absence of that consent, the assignee, [other than the assignee of a limited partnership interest in a limited partnership with over one hundred limited partners governed by the California Revised Limited Partnership Act], has no right to _____ [participate in the management or conduct of the partnership business *or* require access to information concerning partnership transactions *or* to inspect or copy the partnership books or records] (*Corp. Code § 16503 or* former Corp. Code § 15027(1) (general partnerships) *or Corp. Code § 15519(3)* (limited partnerships governed by ULPA) *or Corp. Code § 15672* (limited partnerships governed by CRLPA); *Kellis v. Ring (1979) 92 Cal. App. 3d 854, 858-860, 155 Cal. Rptr. 297*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that an assignee of a partnership interest is entitled to participate in the management or conduct of the partnership business, require access to information concerning partnership transactions, or to inspect or copy the partnership books or records [*Corp. Code § 16503* (UPA'94); former Corp. Code §§ 15027(1) (pre-'97 Act); *Corp. Code § 15519(3)* (ULPA); *Corp. Code § 15672(a)* (CRLPA)]. If the limited partnership involved is governed by the CRLPA, the denial of these rights to an assignee is subject to two exceptions. The first exception grants the assignee of a limited partnership interest in a limited partnership with over one hundred limited partners all the information and records inspection rights set forth in *Corp. Code § 15634* [*Corp. Code § 15672*; *see Corp. Code § 15634*]. The second exception allows limited partnerships to provide for certificates evidencing interests of partners and assignees and to make provision for the admission of transferees of certificates as additional or substituted limited partners [*Corp. Code § 15638*].

The appropriate section of the Corporations Code should be chosen depending on whether the partnership involved is a general partnership, a limited partnership still governed by the Uniform Limited Partnership Act, or a limited partnership governed by the California Revised Limited Partnership Act.

These points and authorities should be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that an assignee has no rights other than to the share of income his or her assignor would otherwise take. This issue may be raised at the demurrer stage to establish that the assignee has no right to the specific relief he or she is seeking. These points and authorities also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should specify that no agreement provides for automatic partnership status to an assignee and that the other partners have not consented to the assignee's substitution as a partner. Any pertinent details relating to the assignees' acquisition of his or her interest should also be set forth.

[3] Discussion of Authorities

[a] Assignee of Partnership Interest Has Only Limited Rights

Corp. Code § 16503 (UPA'94), which governs general partnerships, provides that a transfer in whole or part of a partner's transferable interest is permissible, and does not by itself cause the partner's dissociation or dissolution and winding up of the partnership business [*Corp. Code § 16503(a)(1)*]. Such a transfer does not entitle the transferee, as against the other partners or the partnership during the continuance of the partnership, to participate in the management or conduct of the partnership business, to require access to information concerning partnership transactions, or to inspect or copy the partnership books or records [*Corp. Code § 16503(a)(1)*; *see also* former Corp. Code § 15027(1) (similar provisions under pre-'97 Act).

Corp. Code § 15519(3) governs limited partnerships formed before July 1, 1984, which have not elected to be governed by the California Revised Limited Partnership Act (CRLPA) [*see Corp. Code §§ 15711, 15712, 15714*; *see also § 170.02[4], [5]*]. It provides that an assignee who does not become a substituted limited partner has no right to require any information or account of the partnership transactions, to inspect the partnership books, or to vote on any of the matters as to which a limited partner would be entitled to vote under *Corp. Code § 15507* and the certificate of limited partnership. He or she is only entitled to receive the share of profits or other compensation by way of income, or the return of contributions, to which his or her assignor would otherwise be entitled.

Corp. Code § 15672 (CRLPA) provides that unless the partnership agreement specifies otherwise [*see Corp. Code §*

15618 (variance of limited partnership provisions by agreement of partners)], a limited partnership interest is assignable in whole or in part. An assignment of a limited partnership interest does not dissolve a limited partnership or entitle the assignee to become or to exercise any rights of a partner except as set forth in the CRLPA [*Corp. Code § 15611 et seq.*]. An assignment entitles the assignee to receive, to the extent assigned, only the distributions and allocations of income, gain, loss, deduction, credit, or similar item to which the assignor would be entitled. Except as otherwise provided in the assignment, an assignee of a limited partnership interest in a limited partnership with over 100 limited partners is entitled to all the rights granted to a limited partner by *Corp. Code § 15634*. A limited partner remains a partner on assignment of all or part of his or her limited partnership interest, subject to the assignees becoming a limited partner pursuant to *Corp. Code § 15674(a)* (partnership agreement so provides or all of the general partners and a majority in interest of the limited partners consent) [*Corp. Code § 15672(a)*]. The pledge or grant of a security interest, lien, or other encumbrance in or against any or all of the partnership interest of a partner will not cause the partner to cease to be a partner and will not effect a grant to anyone else of the power to exercise any rights or powers of a partner [*Corp. Code § 15672(b)*]. In addition, the partnership agreement may provide that a general partner may not assign or encumber a partnership interest in a limited partnership [*Corp. Code § 15672(c)*].

Note that if the partnership agreement so provides, a limited partnership governed by the CRLPA may issue certificates of limited partnership as provided by *Corp. Code § 15638*. That section provides that the interest of a partner or assignee may be evidenced by a certificate of interest issued by the partnership. The partnership agreement may provide for the transfer of any interest represented by a certificate and for the admission of transferees of certificates as additional or substituted limited partners. The partnership agreement also may include other provisions with respect to the form of the certificates not inconsistent with the CRLPA. A certificate of interest may be, but is not required to be, a security as defined in *Com. Code § 8102* [*Corp. Code § 15638*].

In ***Kellis v. Ring*** *(1979) 92 Cal. App. 3d 854, 155 Cal. Rptr. 297* , plaintiff assignee of a limited partnership interest sued the general partner for a declaration that defendant's employment as officer and director of companies that supplied management services to the apartment complex that was the limited partnership's only asset amounted to breach of fiduciary duty. A demurrer was sustained and judgment of dismissal entered on the ground that plaintiff had no standing to bring the action.

The appellate court affirmed. Plaintiff claimed that construing *Corp. Code § 15519(3)* so as to prohibit him from suing for breach of fiduciary duty was contrary to general principles of law and equity, and specifically to *Corp. Code § 15529*, which provides that "[i]n any case not provided for in this act the rules of law and equity ... shall govern." The court set forth the provisions of *Corp. Code § 15519(3)*, which are discussed *above*. Defendant conceded that if plaintiff's rights to profits or other compensation were impaired, he would have the right to sue for damages, but that no such allegations were made here (*92 Cal. App. 3d 854, 858)* . The court characterized plaintiff's suit as an attempt to interfere in the management of the limited partnership, and found that strict construction of *Corp. Code § 15519(3)* in this instance did not deprive plaintiff of any property right (*92 Cal. App. 3d 854, 858-860)* . The court noted that plaintiff did have remedies, as conceded by defendant, if his rights to income were interfered with or, as a preventive measure, by having initially conditioned the assignment on his substitution as a limited partner (*92 Cal. App. 3d 854, 860)* .

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17-170 California Points & Authorities § 170.142

§ 170.142 Opposing Contention That General Partner Is Entitled to Payment by Limited Partnership Under ULPA '08 [Corp. Code § 15904.06]

[1] FORM Opposing Contention That General Partner Is Entitled to Payment by Limited Partnership Under ULPA '08 [Corp. Code § 15904.06]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [PLAINTIFF or DEFENDANT] _____ [*name of general partner*] IS NOT ENTITLED TO REMUNERATION FOR SERVICES PERFORMED FOR THE PARTNERSHIP.

General Partners Are Not Entitled to Compensation. A general partner is not entitled to remuneration for services performed for the partnership (*Corp. Code § 15904.06(f)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that a general partner is entitled to payment by the limited partnership.

These points and authorities should be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the general partner is not entitled to compensation for services rendered in the partnership business. They also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] General Partners Are Not Entitled to Compensation

Corp. Code § 15904.06(f) states that a general partner is not entitled to remuneration for services performed for the limited partnership. Only a right of reimbursement is available to a general partner, either (1) for payments made in the ordinary course of the activities of the partnership or for the preservation of its activities or property, or (2) for an advance made to the limited partnership beyond the amount of capital the general partner agreed to contribute [*Corp. Code § 15904.06(c), (d)*; *see § 170.132*]. A limited partnership also must indemnify a general partner for liabilities incurred by that partner in the ordinary course of the activities of the partnership or for the preservation of its activities or property [*Corp. Code § 15904.06(c)*].

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17-170 California Points & Authorities §§ 170.143-170.159

[Reserved]

§§ 170.143[Reserved]

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17-170 California Points & Authorities § 170.160

§ 170.160 Supporting Contention That General Partner Is Not Liable for Losses or Mistakes Incurred in Good-Faith Exercise of Business Judgment

[1] FORM Supporting Contention That General Partner Is Not Liable for Losses or Mistakes Incurred in Good-Faith Exercise of Business Judgment

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT IS NOT LIABLE FOR THE LOSSES INCURRED BY PLAINTIFFS BECAUSE THOSE LOSSES RESULTED FROM MISTAKES IN THE GOOD-FAITH EXERCISE OF PLAINTIFF'S BUSINESS JUDGMENT.

Business Judgment Rule. A general partner is not liable to his or her limited partners for losses incurred in the good faith exercise by the general partner of his or her business judgment (*Moore v. Tristar Oil and Gas Corp (S.D.N.Y. 1981) 528 F. Supp. 296, 312-314* ; *Wyler v. Feuer (1978) 85 Cal. App. 3d 392, 402-403, 149 Cal. Rptr. 626*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a general partner of a limited partnership is not liable to the limited partners for losses or shortfalls in expected profits as long as the losses were incurred because of mistakes in the good-faith exercise of business judgment.

These points and authorities should be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a general partner is insulated from liability for mistakes or losses based on good-faith exercise of his or her business judgment. This issue may arise on a motion for summary judgment or at trial. These points and authorities also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should specify the particular venture involved, the reasonable profit and expense expectations, the particular risks inherent in the venture, any specific representations, assurances, warnings, or disclaimers made to the limited partners, the reasons for the decision that is being challenged, and any action taken to mitigate the unfortunate results once they became apparent.

[3] Discussion of Authorities

[a] Business Judgment Rule

Moore v. Tristar Oil and Gas Corp. *(S.D.N.Y. 1981) 528 F. Supp. 296* , was a federal diversity action by dissenting limited partners of a California limited partnership against its corporate general partners, their principals (hereafter collectively referred to as the "general partners"), and the brokerage firm that assisted in the sale of assets. The limited partners claimed that the general partners had breached their fiduciary duty to the limited partners by (1) improperly claiming interests in the oil and gas leasehold in which the partnership was interested; (2) improperly valuing their separate interests so as to claim for themselves too great a share of the proceeds of the combined sale; (3) overcompensating the broker who arranged the sale; and (4) reimbursing one general partner for expenses incurred prior to formation of the partnership. Prior to the formation of the partnership, one of the general partners owned an 80 percent working interest in the leasehold, the landowner having retained a 20 percent overriding royalty. He determined that additional capital was necessary to steam flood the field in order to recover oil in commercial quantities, and thus the limited partnership was conceived. The prospectus that was the basis of plaintiffs' purchase and the partnership agreement provided that the general partner would contribute his 80 percent interest to the limited partnership; that the general partners would receive a five percent overriding royalty in production revenues as a management fee; that after the limited partner's initial capital contributions were repaid, this would increase to a 10 percent overriding royalty and a 10 percent working interest. An overriding royalty is not charged with production expenses, although a working interest is. Thus, over the remaining term of the lease, the general partners were projected to receive 36.5 percent of net revenues, and the limited partners would receive 63.5 percent. Within a few months of the formation of the limited partnership and before it began normal production, a third party offered to purchase all interests of the partnership and the general partners for $8.5 million. The proceeds went $2.38 million or 28 percent to the general partners for their overriding and working interests and $6.12 million or 78 percent to the limited partners, of whom the required 60 percent in interest had approved the sale. The sale returned $100,000 to each limited partner per $40,000 unit of initial contribution.

The district court cited ***Wyler v. Feuer*** *(1978) 85 Cal. App. 3d 392, 402, 149 Cal. Rptr. 626* (discussed *below*), as establishing a business judgment rule insulating the general partner from liability for mistakes made or losses incurred in the good-faith exercise of reasonable business judgment (*528 F. Supp. 296, 312)* . Although the district court was of the opinion that the business judgment rule was narrower than the general fiduciary duty of partners to act in the highest good faith toward each other and not to take any advantage, it found that under either standard, plaintiffs failed to establish any breach of fiduciary duty (*528 F. Supp. 296, 313)* . As a matter of mining law and pursuant to the partnership agreement, the overriding and working interests of the general partners were valid interests, and no breach of contract was involved in defendant partners' claiming them (*528 F. Supp. 296, 308-311)* . Noting that the general partners' interests supposedly were worth 36.5 percent of the future income stream and that they had taken only 28 percent of the proceeds, the court found that defendants exercised their reasonable business judgment in good faith and did not take advantage of the limited partners in allocating the sale proceeds. Similarly, the evidence supported the reasonableness of the broker's fee, which was borne in proportion to the parties' share of the proceeds, and negotiation and payment of the fee did not constitute a breach of fiduciary duty under either standard. With respect to the reimbursement of preformation expenses, the defendant took those fees believing they were proper and repaid them to the partnership when informed five months later by the accountant that they were not. The court said that neither the taking of the expenses nor the failure to pay the partnership interest for the period before they were returned constituted

a breach of fiduciary duty under either formulation of the rule (*528 F. Supp. 296, 314)* .

Wyler v. Feuer *(1978) 85 Cal. App. 3d 392, 149 Cal. Rptr. 626* , arose out of a limited partnership agreement for the production of a movie based on a book about the life of Edith Piaf written by her sister. Defendants owned the movie rights to the book and were the general partners/producers; plaintiff was the only capital contributor/limited partner, investing $1.6 million. Defendants were to raise an additional $850,000 of production financing from the sale of various distribution rights. Their $150,000 producer's fee was to be decreased by $10,000 for each $100,000 of the $850,000 they failed to raise. Plaintiff's initial profit percentage of 50 percent was adjustable in increments down to 25 percent in the event defendants raised $1.5 million of outside production financing. Two versions of the film were made, one in English and one in French. Production costs totaled $1.512 million. Warner Brothers sued for copyright infringement on the basis of Piaf material it owned. Although the suit was settled, the film was never released in the United States. Receipts from distribution abroad were $478,000, of which $313,000 went to plaintiff as reimbursement for his investment. He sued for rescission based on fraud and for damages for mismanagement of the business, based on excessive costs of the French version, failure to produce a marketable English version, improvident selection of relatively unknown actors, unreasonable scheduling of photography, failure to obtain production financing, and procurement of disadvantageous distribution contracts. The jury returned a verdict for defendants. Plaintiff appealed.

The appellate court affirmed. The court began by noting that in a limited partnership, the general partner managed and controlled the partnership business pursuant to the rights and powers established in *Corp. Code § 15509(1)* (ULPA). In exercising his or her management functions, the general partner came under a fiduciary duty of good faith and fair dealing toward other members of the partnership, as established in former Corp. Code § 15021 [*see now Corp. Code § 16404*]. The court reasoned that the characteristics of a limited partner--limited liability, delegation of authority to management, and fiduciary duty owed by management to investors--are similar to those existing for corporate investment, in which it has long been the rule that directors are not liable to stockholders for mistakes made in the exercise of honest business judgment, or for losses incurred in the good-faith performance of their duties when they have used such care as an ordinarily prudent person would use (citing *Corp. Code § 309(a)*). By this standard a general partner may not be held liable for mistakes made or losses incurred in the good-faith exercise of reasonable business judgment (*85 Cal. App. 3d 392, 402)* . The court continued that although the picture did not make money and was not sought after by distributors, the same could be said of the majority of motion pictures made since the invention of cinematography. No evidence showed that defendants' efforts and decisions failed to conform to the general duty of care demanded of an ordinarily prudent person in a like position under the circumstances. The good-faith business judgment of a general partner need only satisfy that standard, and the court refused to apply hindsight (*85 Cal. App. 3d 392, 403)* .

[4] Additional Authorities

[a] Business Judgment Rule

The Ninth Circuit in *Toombs v. Leone (9th Cir. 1985) 777 F.2d 465* , affirmed a judgment of dismissal entered against plaintiff limited partner in an action against the general partner of a fishing venture for, among other things, damages for state and common law negligent mismanagement and breach of fiduciary duty. The type of fish to be caught was changed after plaintiff purchased his interest. Projections were continually revised downward, and after less than three years of operation, all the boats were sold to avoid foreclosure. Plaintiff's claims were based on defendant's failure to research the venture adequately and failure to hire experienced managers and employees. In view of plaintiff's failure to introduce evidence of the industry standard for management and defendant's evidence that the partnership's catches and revenues were comparable to those of other fishing ventures in the area, that the venture was formed only after consultation with an experienced participant in the industry, and that later projections were made with the aid of industry journals and publications, the dismissal was proper (*777 F.2d 465, 470)* .

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17-170 California Points & Authorities § 170.161

§ 170.161 Supporting Contention That Purchaser of Limited Partnership Interest Is Entitled to Rescission Because No Permit for Sale Was Obtained as Required by California Securities Law [Corp. Code § 25503]--Limited Partnership Interests Were Offered to Public and/or Unsophisticated Investors

[1] FORM Supporting Contention That Purchaser of Limited Partnership Interest Is Entitled to Rescission Because No Permit for Sale Was Obtained as Required by California Securities Law [Corp. Code § 25503]--Limited Partnership Interests Were Offered to Public and/or Unsophisticated Investors

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF IS ENTITLED TO RESCIND THE PURCHASE OF HIS/HER LIMITED PARTNERSHIP INTEREST BECAUSE ALTHOUGH A PERMIT WAS REQUIRED PRIOR TO SALE OF THE LIMITED PARTNERSHIP INTEREST, NONE WAS OBTAINED.

A. Sale of Limited Partnership Interest Required Permit. The purchaser of a limited partnership interest that was offered for public sale in violation of the California Securities Law, specifically *Corporations Code Section 25110*, is entitled to rescind the purchase and to recover the purchase price plus interest at the legal rate (*Corp. Code § 25503*; *Sherman v. Lloyd (1986) 181 Cal. App. 3d 693, 700-702, 226 Cal. Rptr. 495* ; *People v. Graham (1985) 163 Cal. App. 3d 1159, 1165-1169, 1174, 210 Cal. Rptr. 318*).

[*Optional*] **B. Limitation Period for Rescission.** An action for rescission under *Corporations Code Section 25503* must be brought within two years after the violation on which it is based or within one year after plaintiff discovers the facts which constitute the violation, whichever expires first. Discovery of the facts constituting the violation does not occur until plaintiff has actual, not inquiry, notice of those facts (*Corp. Code § 25507(a)*; *Eisenbaum v. W. Energy Res., Inc. (1990) 218 Cal. App. 3d 314, 325-326, 267 Cal. Rptr. 5*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a particular limited partnership interest was a "security" subject to qualification under the state securities laws, and did not qualify for any exemption from qualification, and that because the interest was not "qualified" (in other words, no permit for sale was obtained) prior to sale, as required by law, the purchaser is entitled to the return of his or her consideration, less any profits, on tender of the limited partnership interest. The form may be modified by substitution of *Corp. Code § 25130* (nonissuer transactions) or *Corp. Code § 25133* (escrowed securities or securities subject to legend condition) in place of the reference to *Corp. Code § 25110* if the purchase was not from the original issuer. Optional Paragraph B is for use when the limitation period for exercise of the right of rescission is in issue.

These points and authorities should be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that rescission is available for failure to comply with the California Securities Law. Because the determination of the availability of the private offering exemption is likely to rest on factual considerations, this issue would be most likely to arise at trial or on appeal.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should specifically rebut each item of the private offering exemption requirements *set forth in § 170.171*.

[c] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 170.171* may be used to oppose the contention supported by these points and authorities.

[d] Related Forms

For discussion of the various California qualification requirements and complaints for rescission based on failure to comply with these requirements, see California Forms of Pleading and Practice, Ch. 515, *Securities and Franchise Regulation* (Matthew Bender). For detailed discussion of the qualification of securities for sale in California, see California Legal Forms, Ch. 6H, *Qualification of Securities* (Matthew Bender). For discussion of various securities exemptions that may be available to qualifying limited partnership interests, see Chapters 6 through 6D of California Legal Forms(Matthew Bender).

[3] Discussion of Authorities

[a] Sale of Limited Partnership Interest Required Permit

Corp. Code § 25503 provides in part that any person who violates *Corp. Code § 25110* (issuer transactions), 25130 (nonissuer transactions), or 25133 (escrowed securities or securities subject to legend condition), or a condition of qualification imposed under *Corp. Code § 25141*, or an order suspending trading, will be liable to any person acquiring the security sold in violation of any of those sections. The purchaser may recover the consideration paid for the security with interest at the legal rate, less the amount of any income received from the security, on tender of the security, or damages if he or she no longer owns the security or if the consideration given for the security is not capable of being returned.

Sherman v. Lloyd *(1986) 181 Cal. App. 3d 693, 226 Cal. Rptr. 495* , was an action by a limited partner/investor for rescission and restitution based on the failure of the offering to qualify under California securities law. Plaintiff purchased a 4.38 percent limited partnership interest in October, 1981. Plaintiff was told by the general partner that in fact two partnerships were to be formed in order to comply with the exemption allowable when there were 10 or fewer

limited partners [*see Corp. Code § 25102(f)*] (the current exemption allows sales to 35 or fewer persons)]. He was told that this arrangement was permissible under California securities law and was guaranteed an eight percent return on his investment. In January, 1983, when he had received no income from his investment and was notified that one of the limited partnerships had filed bankruptcy, plaintiff sought advice of counsel. He was told the scheme did not qualify for the exemption under California securities law. He then gave notice of rescission and offered to reassign his interest in the partnerships. The action followed, and summary judgment was entered for plaintiff. Defendants appealed.

The appellate court affirmed. The court based its determination that the scheme did not qualify for the exemption under California securities law on the fact that no bona fide partnership was involved. The critical factor in determining whether a bona fide limited partnership exists is whether each partner had the right to determine the membership of the partnership. In a situation such as this one in which the limited partners never meet each other and the general partner seeks out investors, there is no bona fide partnership, and the exemption of *Corp. Code § 25102(f)* is inapplicable (*181 Cal. App. 3d 693, 700-702)* . The portion of the opinion considering the statute of limitations is discussed in *§ 170.161[4]*.

People v. Graham *(1985) 163 Cal. App. 3d 1159, 210 Cal. Rptr. 318* , involved a conviction for making an offer to sell an unqualified security consisting of a limited partnership interest in a venture to promote a machine that would detoxify chemical wastes. An investor in another of the general partner's ventures, to whom it was suggested that he recruit up to 25 investors for the new venture, became suspicious about the capabilities of the machine. Eventually he arranged for an investigator from the district attorney's office to pose as an investor to meet the general partner. An offer of sale was made at that meeting. After conviction, defendant appealed.

The conviction was upheld by the appellate court. First the court determined that the limited partnership interest being offered was a security within the definition of *Corp. Code § 25019* because it met the federal criteria of a security and it met the California "risk capital" test. The definition of a security in *15 U.S.C. § 77b* is substantially identical to the definition in *Corp. Code § 25019*. Under federal criteria, the limited partnership interest was a security because it involved a scheme whereby a person invests his or her money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party. Citing *SEC v. Glenn W. Turner Enter., Inc. (9th Cir. 1973) 474 F.2d 476, 482* , the court noted that the Ninth Circuit has not literally interpreted the term "solely," but only requires that the efforts made by those other than the investor are the undeniably significant ones, that is, those essential managerial efforts that affect the failure or success of the enterprise (*163 Cal. App. 3d 1159, 1165-1166)* . The "risk capital" definition involves any situation when investors provide capital that will be risked in the promoter's venture and implies that the investor not exercise managerial control. *Corp. Code § 15509*, giving the general partner all the significant managerial control, led the court to conclude that the "no control" requirement was met (*163 Cal. App. 3d 1159, 1166-1169)* .

Defendant contended that the offer was exempt under the former version of Corp. Code § 25102(f) (repealed November 1, 1981), and under the Commissioner of Corporations Rule 260.102.2 (*10 Cal. Code Reg. § 260.102.2*). The latter regulation applies when offers are not made to more than 25 people and sales are not consummated to more than 10 of such people, and when all offerees either have a preexisting business or personal relationship with the offeror or related persons, or by reason of their business or financial expertise could reasonably be assumed to have the capacity to protect their own interests in connection with the transaction. The court found that neither the second-hand relationship, nor the investigator's past investment experience, nor his knowledge of the scheme were sufficient to bring the offer within the exemption. His knowledge of the scheme was acquired from being given a brochure about the machine and a copy of the limited partnership agreement, and from discussion with defendant about the technical and business aspects of the venture. He told the defendant at their meeting that although he had invested in real estate, "I don't know a damn about this." Regarding the second-hand relationship, the court said that since the party who introduced him had a minor and relatively insignificant role in the venture, it was insufficient to give the investigator any significant insight into the character, business acumen, and general business and financial circumstances of the persons who would control the venture (*163 Cal. App. 3d 1159, 1172-1174)* .

The requirements for nonpublic offering exemption in current *Corp. Code § 25102(f)*, set forth in more detail in § 170.171, change the number of purchasers to 35, add specificity to the relationship and sophistication conditions of *10 Cal. Code Reg. § 260.102.2*, and add the requirement that the offers not be accomplished by means of published advertisement. The similarity of the current requirements for the nonpublic offering exemption and the ones under which *Graham* were decided indicate that *Graham* is still good authority for an investor who does not meet the sophistication and relationship criteria of the present law.

[b] Limitation Period for Rescission

In ***Eisenbaum v. W. Energy Res., Inc.*** *(1990) 218 Cal. App. 3d 314, 267 Cal. Rptr. 5* , plaintiff bought a limited partnership interest in a Colorado partnership. The president of the partnership told plaintiff that he was not licensed to sell securities in California but also sent plaintiff, along with other promotional and subscription materials, a document stating that the security was exempt from registration under state and federal securities law. Nearly two years later, plaintiff consulted an attorney and a few months later filed an action for rescission and damages on the ground that the investment was not exempt and that the sale violated *Corp. Code § 25110*, which prohibits the sale of unqualified securities. The trial court granted summary judgment for defendant, holding that the action was barred by *Corp. Code § 25507(a)*, because plaintiff discovered the violation of securities law more than one year before commencing the action.

The appellate court reversed, holding that the action was not barred by *Corp. Code § 25507(a)*, because plaintiff did not have actual notice of the facts constituting a violation until his consultation with his attorney (*218 Cal. App. 3d 314, 326)* . The court reasoned that under principles of fiduciary duty, the usual duty of diligence to discover facts did not exist, and the limitations period did not begin to run, until plaintiff actually discovered the facts constituting the cause of action (*218 Cal. App. 3d 314, 325)* . An insider-promoter such as the partnership's president had a fiduciary duty, based both in common and statutory law, to disclose all material facts to a subscriber such as plaintiff (*218 Cal. App. 3d 314, 324-325)* . As an alternative ground for its holding, the court reasoned that the language of *Corp. Code § 25507(a)*, which requires "discovery of the facts," by its plain language requires actual knowledge, not just "inquiry notice" (*218 Cal. App. 3d 314, 325)* . The court found its conclusion buttressed by a comparison with *Corp. Code § 25506.1*, which establishes a statute of limitations for fraud liability against certain persons who "expertise" a prospectus. The latter statute by its terms starts to run after discovery "should have been made by the exercise of reasonable diligence" (*218 Cal. App. 3d 314, 325-326)* .

[4] Additional Authorities

[a] Sale of Limited Partnership Interest Without Permit

An issuer also violates *Corp. Code § 25110* if it obtained an order or permit but offers or sells the security in a manner that varies from, exceeds the scope of, or fails to conform with, either a material term or condition of qualification of the offering as set forth in the permit or qualification order or a material representation as to the manner of offering that is set forth in the application for qualification. Such a variation renders the offer or sale an unqualified offer or sale [*Corp. Code § 25110*].

[b] Limitation Period for Rescission

The facts and procedural background of *Sherman v. Lloyd (1986) 181 Cal. App. 3d 693, 226 Cal. Rptr. 495* , are discussed in [3][a], *above*. Defendants contended that plaintiff was in possession of all material facts more than one year before the filing of the complaint and that the action was therefore barred by the applicable limitation period of *Corp. Code § 25507(a)*. The appellate court agreed that a plaintiff's ignorance of his or her cause of action will not bar the running of the statute of limitation, but said that rule did not govern this situation. Plaintiff was in essence told by the general partner, a fiduciary, that no cause of action existed. Plaintiff was thus entitled to rely on the representations concerning the propriety of the investment structure. The cause of action did not accrue until plaintiff learned from

counsel that the scheme did not qualify (*181 Cal. App. 3d 693, 697-700)* .

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17-170 California Points & Authorities § 170.162

§ 170.162 Supporting Contention That Person Who Has Withdrawn as Limited Partner and/or Legal Representative of Deceased/Incompetent Limited Partner Is Entitled to Distribution of Profits and/or Return of Contribution [Corp. Code §§ 15515, 15516, 15521(1) (ULPA), 15675 (CRLPA)]

[1] FORM Supporting Contention That Person Who Has Withdrawn as Limited Partner and/or Legal Representative of Deceased/Incompetent Limited Partner Is Entitled to Distribution of Profits and/or Return of Contribution [Corp. Code §§ 15515, 15516, 15521(1) (ULPA), 15675 (CRLPA)]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

PLAINTIFF, _____ [WHO HAS WITHDRAWN AS A *or* THE PERSONAL REPRESENTATIVE OF A DECEASED *or* THE _____ (GUARDIAN *or* CONSERVATOR) OF A] LIMITED PARTNER OF A LIMITED PARTNERSHIP GOVERNED BY THE _____ [UNIFORM *or* CALIFORNIA REVISED] LIMITED PARTNERSHIP ACT THAT IS CONTINUING IN BUSINESS, IS ENTITLED TO HAVE DISTRIBUTION OF _____ [HIS/HER *or* HIS/HER DECEDENT'S or HIS/HER CONSERVATEE'S *or* HIS/HER WARD'S] SHARE OF PROFITS AND THE RETURN OF _____ [HIS/HER *or* HIS/HER DECEDENT'S or HIS/HER CONSERVATEE'S or HIS/HER WARD'S] CONTRIBUTION.

[*If partnership is a limited partnership governed by the Uniform Limited Partnership Act*]

[*EITHER*]

A. Return of Withdrawing Limited Partner's Contribution Under Uniform Limited Partnership Act. If a limited partnership is governed by the Uniform Limited Partnership Act, a limited partner who has withdrawn or the legal representative of a deceased limited partner is entitled to the return of his/her [decedent's] contribution when all the following requirements have been met: (1) the partnership certificate has been amended to set forth the withdrawal; (2)

after return of his/her contribution there will remain sufficient partnership assets to pay all liabilities of the partnership except liabilities to general partners and to limited partners on account of their capital contributions; and (3) _____ [all members of the partnership have consented or the partnership has been dissolved *or* _____ (*specify date*), the date specified in the partnership certificate for the return, is past or there is no time specified in the partnership certificate either for return of the contribution or for dissolution of the partnership and notice was given on _____ (*date*), more than six months ago, to all other members demanding the return or the contribution] (*Corp. Code § 15516(1)*, [(2)]).

[*AND/OR*]

B. Rights of Personal Representative of Deceased Limited Partner Under Uniform Limited Partnership Act. In a partnership governed by the California version of the Uniform Limited Partnership Act, the personal representative of a deceased limited partner has all the rights of a limited partner for the purpose of settling his or her estate, including _____ [any right the deceased had to constitute his or her assignee a substituted limited partner *and/or* the right to receive the full share of profits provided to decedent's interest whenever after payment of those profits, the partnership assets will remain in excess of all liabilities of the partnership except liabilities to limited partners on account of their capital contributions and to general partners] (*Corp. Code §§ 15515* (right to receive profits), 15521(1) (right to constitute assignee as substituted limited partner); *Lissman v. McDonald (1953) 119 Cal. App. 2d 228, 229, 258 P.2d 1057* (right to receive profits)).

[*OR, if partnership is a limited partnership governed by the California Revised Limited Partnership Act*]

[*EITHER*]

A. Right of Limited Partner to Withdraw Under California Revised Limited Partnership Act. If a limited partnership is governed by the California Revised Limited Partnership Act, a _____ [limited partner *or* legal representative of a _____ (deceased *or* incompetent) limited partner] may withdraw from a limited partnership only at the time or on the happening of events specified in the partnership agreement (*Corp. Code § 15663*; *see Corp. Code § 15675* (executor, administrator, guardian, conservator, or other legal representative is entitled to exercise individual partner's rights for purposes of settling partner's estate or administering partner's property; entity's legal representative or successor as entitled to exercise entity's powers)).

[*AND/OR*]

B. Right of Withdrawing Limited Partner to Receive Distribution In Accordance With Partnership Agreement Under California Revised Limited Partnership Act. In a partnership governed by the California Revised Limited Partnership Act, a withdrawing limited partner is entitled to receive any distribution to which that partner is entitled under the partnership agreement (*Corp. Code § 15664*).

[*AND/OR*]

C. Right of Withdrawing Limited Partner to Receive Fair Value of Interest in Limited Partnership Under California Revised Limited Partnership Act. In a partnership governed by the California Revised Limited Partnership Act, a withdrawing limited partner is entitled to receive, within a reasonable time after withdrawal, the fair value of the limited partner's interest in the limited partnership as of the date of withdrawal, based on the limited partner's right to

share in the distributions from the limited partnership (*Corp. Code § 15664*).

[*AND/OR*]

D. Rights of Legal Representative of _____ [Deceased *or* Incompetent] Limited Partner Under California Revised Limited Partnership Act. In a partnership governed by the California Revised Limited Partnership Act, the _____ [executor *or* administrator *or* guardian *or* conservator *or* legal representative] of a _____ [deceased limited partner *or* limited partner who has been adjudged by a court of competent jurisdiction to be incompetent to manage his/her person and/or property] is entitled to exercise all the limited partner's rights for the purpose of _____ [settling the partner's estate *or* administering the partner's property], including the right to constitute his or her assignee a substituted limited partner (*Corp. Code §§ 15674(a), 15675*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contentions that (1) a limited partner in a partnership governed by the CRLPA has the right to withdraw, and/or (2) withdrawing limited partners are entitled to return of their contributions, and/or (3) the legal representative of a decedent limited partner, and in the case of a partnership governed by the CRLPA, an incompetent limited partner as well, is entitled to exercise all the rights and receive all the distributions the limited partner could have exercised or received.

The form is split up into two alternative divisions. The first division applies if the limited partnership in question is governed by the ULPA [*Corp. Code § 15501 et seq.*]. The second division applies if the limited partnership in question is governed by the CRLPA [*Corp. Code § 15611 et seq.*]. For discussion of the applicability of these statutes, see *§ 170.02[4], [5]*.

Paragraph A of the first division sets forth the provisions governing the return of a limited partner's contribution under the ULPA. In Paragraph A, the citation of *Corp. Code § 15516(2)* should be used when any alternative other than consent is used in item (3). Paragraph B sets forth the provisions applicable to the rights of the representative of a deceased limited partner of a limited partnership governed by the ULPA. The case cited therein and *Corp. Code § 15515* are authority only for the entitlement to decedent's share of profit distributions. Paragraph A should be used in conjunction with Paragraph B if the representative of the deceased limited partner is seeking return of the contribution.

Paragraph A of the second division sets forth the right of a limited partner in a partnership governed by CRLPA (and, thus, the right of the legal representative of an incompetent or deceased limited partner) to withdraw. A copy of the partnership agreement should be attached if possible. Paragraph B (CRLPA) sets forth one basis for computation of the limited partner's distribution on withdrawal and may be used without Paragraph A (CRLPA) if the right to withdraw is not in issue. Paragraph C (CRLPA) sets forth the basis for computation of the limited partner's distribution on withdrawal when none is specified in the partnership agreement, and may be used without Paragraph A (CRLPA) if the right to withdraw is not in issue. Paragraph D sets forth the provisions applicable to a legal representative's rights in a limited partnership governed by the CRLPA. Although *Corp. Code § 15675* does not specifically refer to the exercise by the legal representative of the limited partner's power to constitute his or her assignee a substituted limited partner, such a right would exist if the partnership agreement so provides or all of the general partners and a majority in interest of the limited partners consent [*see Corp. Code § 15674(a)*].

It should be noted that the withdrawing limited partner or the estate of the deceased limited partner will be liable to return any distribution necessary to meet liabilities to creditors who extended credit or whose claim arose before the distribution [*see Corp. Code §§ 15517(4), 15521(2)* (ULPA); *Corp. Code § 15666(a)* (CRLPA)]. Similarly, substitution

of one's assignee as limited partner does not totally absolve the assignor limited partner or his or her estate for all liability with respect to the partnership [*see Corp. Code § 15519(7)* (ULPA); *Corp. Code § 15674(c)* (CRLPA)].

These points and authorities should be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise any of the substantive issues relating to the rights of the withdrawing limited partner or the legal representative of the deceased or incompetent limited partner. These points and authorities also may be used in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should specify the relevant date of death or withdrawal, previous demands made for distribution or recognition of the assignee as substituted partner, and if one is seeking a distribution from a limited partnership governed by the ULPA, the financial reports, attaching copies if possible, which establish that the partnership has sufficient funds to pay the distribution.

[3] Discussion of Authorities

[a] Return of Withdrawing Limited Partner's Contribution Under California Uniform Limited Partnership Act

Corp. Code § 15516(1) applies to partnerships still governed by the ULPA and provides that a limited partner may not receive from a general partner or out of partnership property any part of his or her contribution until:

- All liabilities of the partnership, except liabilities to general partners and to limited partners on account of their capital contributions, have been paid or there remains property of the partnership sufficient to pay them;

- The consent of all members is had, unless the contribution may be rightfully demanded under the provision of paragraph two; and

- The certificate is canceled or so amended as to set forth the withdrawal or reduction.

Subject to the above provisions, a limited partner may rightfully demand return of his or her contribution under any of the following circumstances [*Corp. Code § 15516(2)*]:

- On dissolution of the partnership;

- When the date specified in the certificate for its return has arrived; or

- After he or she has given six months notice in writing to all other members, if no time is specified in the certificate either for return of the contribution or for the dissolution of the partnership.

In the absence of any statement in the certificate to the contrary or the consent of all members, a limited partner, irrespective of the nature of his or her contribution, has only the right to demand and receive cash in return for his contribution [*Corp. Code § 15516(3)*].

A limited partner may have the partnership dissolved and its affairs wound up when either of the following events occurs [*Corp. Code § 15516(4)*]:

- He or she rightfully but unsuccessfully demands the return of his or her contribution; or

- The other liabilities of the partnership have not been paid, or the partnership property is insufficient for their payment as required and the limited partner would otherwise be entitled to return of his or her contribution.

[b] Rights of Personal Representative of Deceased Limited Partner Under California Uniform Limited Partnership Act

In ***Lissman v. McDonald*** *(1953) 119 Cal. App. 2d 228, 258 P.2d 1057* , plaintiff was a widow and executrix whose decedent had owned a 20 percent interest as general partner and a five percent interest as limited partner in a limited partnership that was continued after his death by the other general partners. Plaintiff brought an action for declaration of her rights as executrix to share in the annual profits of the firm. The trial court ruled for plaintiff, finding that the partnership agreement required the partnership to pay and distribute to plaintiff as executrix each year on account of the decedent's limited partnership interest the full share of profits attributable to that interest, "provided that after payment of such profits, the partnership assets are in excess of all liabilities of the partnership business, except liabilities to limited partners on account of their contributions and to general partners." (The quoted portion of the finding is nearly identical to a portion of *Corp. Code § 15515*, describing a limited partner's entitlement to annual profit distributions). The defendants appealed. The appellate court affirmed, adopting the reasoning stated in the trial court's opinion (*119 Cal. App. 2d 228, 229)* .

[c] Right of Limited Partner to Withdraw Under California Revised Limited Partnership Act

Corp. Code § 15663 (CRLPA) provides that a limited partner may withdraw only at the time or on the happening of events specified in the partnership agreement.

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[Reserved]

§§ 170.163[Reserved]

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17-170 California Points & Authorities § 170.170

§ 170.170 Opposing Contention That General Partner Is Not Liable for Losses Incurred in Good-Faith Exercise of Business Judgment--Business Judgment Cannot Contravene Specific Terms of Partnership Agreement or Obstruct Ordinary Business of Partnership (ULPA) [Corp. Code § 15509(1)(a), (b)]

[1] FORM Opposing Contention That General Partner Is Not Liable for Losses Incurred in Good-Faith Exercise of Business Judgment--Business Judgment Cannot Contravene Specific Terms of Partnership Agreement or Obstruct Ordinary Business of Partnership (ULPA) [Corp. Code § 15509(1)(a), (b)]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT IS LIABLE FOR THE LOSSES INCURRED BY PLAINTIFFS EVEN IF THOSE LOSSES RESULTED FROM THE GOOD-FAITH EXERCISE OF DEFENDANT'S BUSINESS JUDGMENT BECAUSE A GENERAL PARTNER'S BUSINESS JUDGMENT CANNOT BE EXERCISED _____ [IN DEROGATION OF SPECIFIC PROVISIONS OF THE PARTNERSHIP AGREEMENT *and/or* SO AS TO MAKE IT IMPOSSIBLE TO CARRY ON THE ORDINARY BUSINESS OF THE PARTNERSHIP].

General Partner Liable if Exercise of Business Judgment Contravenes Partnership Agreement or Bars Ordinary Partnership Business. A general partner of a limited partnership is liable to the limited partners for losses incurred in the good-faith exercise of his or her reasonable business judgment if the business decision at issue contravenes a specific provision of the partnership agreement or makes it impossible to carry on the ordinary business of the partnership (*Corp. Code § 15509(1)(a), (b) or Corp. Code § 15643(a)*; *Fisher v. Hampton (1975) 44 Cal. App. 3d 741, 746, 118 Cal. Rptr. 811*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a general partner in a limited partnership is not liable to the limited partners for losses or shortfalls in expected profits incurred in the good-faith

exercise of business judgment. The ground for opposition is that the business decision at issue contravenes a specific provision of the partnership agreement or makes it impossible to carry on the ordinary business of the partnership [*Corp. Code § 15509(1)(a), (b)*]. The governing statute is *Corp. Code § 15509* for ULPA limited partnerships; for CRLPA limited partnerships, counsel should substitute *Corp. Code § 15643(a)* as authority [*see § 170.02[4], [5*] for discussion of governing law].

These points and authorities should be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the provisions of the partnership agreement override the business judgment rule. This issue may arise on a motion for summary judgment or at trial. These points and authorities also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should specify the particular business decision involved and the particular provisions of the partnership agreement that prohibit the action taken, or how the business decision involved makes it impossible to carry on the partnership business.

[3] Discussion of Authorities

[a] General Partner Liable if Exercise of Business Judgment Contravenes Partnership Agreement or Bars Ordinary Partnership Business

Corp. Code § 15509(1) (ULPA) provides that a general partner has all the rights and powers of and is subject to all the restrictions and liabilities of a partner in a partnership without limited partners, except that without the written consent or ratification of the specific act by all the limited partners, a general partner (or all the general partners) has no authority to take six specified types of action, including: (1) any act in contravention of the certificate, and (2) any act which would make it impossible to carry on the ordinary business of the partnership action [*Corp. Code § 15509(1)(a)-(g)*].

Unlike ULPA, CRLPA does not include specific restrictions on the powers of a general partner. ***Corp. Code § 15643(a)*** (CRLPA) simply provides that except as otherwise provided in the CRLPA, a general partner of a limited partnership has the rights and powers and is subject to the restrictions of a partner in a partnership without limited partners. However, the result is similar to that under the ULPA because, in a general partnership, the partnership may maintain an action against a partner for breach of the partnership agreement, violation of duty to the partnership, or causing harm to the partnership [*Corp. Code § 16405(a)*; *see also Corp. Code § 16103(a)* (partnership agreement governs relations among partners and partnership)]. For additional discussion, see Ballantine & Sterling, California Corporation Laws, Ch. 25, *Limited Partnerships* , § 716.01[2] (Matthew Bender).

Fisher v. Hampton *(1975) 44 Cal. App. 3d 741, 118 Cal. Rptr. 811* , involved a limited partnership governed by the ULPA and *Corp. Code § 15509*. Plaintiff limited partners sought damages for breach of the partnership agreement from the general partner. The partnership was formed to acquire a specific oil and gas lease, to drill test wells, and if successful, to further drill, develop, and produce the property, and the partnership agreement set forth this specific purpose, describing the property in question. Plaintiff limited partners' contribution to the partnership was the lease. Defendant general partner was to finance the test wells and manage production. The partnership agreement specified that the general partner's contribution was "such sums ... as may be required to drill and complete the one well ... or to abandon such well if the same shall not produce oil in paying quantities, provided that the general partner shall not be required to expend in excess of $35,000." A geologist's report estimated a million barrels of oil were recoverable, but later the general partner's own investigation and that of two other people determined that oil in paying quantities would not be found. On the basis of the later information, defendant decided not to drill a test well. Plaintiff limited partners

sued for damages for breach of the limited partnership agreement. Judgment was for defendant on the theory that he had the authority as a matter of business judgment to decide not to expend $35,000 on test wells.

The appellate court affirmed because no damages were shown, but it did not agree with the statement of defendant's authority (*44 Cal. App. 3d 741, 745)* . The court said the partnership agreement expressly required the general partner to drill at least one well and to expend up to $35,000 for that purpose. To exempt the general partner from that requirement would be a violation of the plain terms of *Corp. Code § 15509* and would render his promise under the partnership agreement wholly illusory. The court continued that refusal to drill the well was in violation of *Corp. Code § 15509(1)(a)* and *(b)*, in that it was both in contravention of the partnership certificate and made it impossible to carry out the partnership business. Thus, the general partner's acts caused dissolution under former Corp. Code § 15031(2) and gave plaintiffs a cause of action under former Corp. Code § 15038(2)(a)(II) (*thereafter* former Corp. Code § 15038(b)(1)(B) (UPA)), which provided that when dissolution is caused in contravention of the certificate, each partner who has not caused wrongful dissolution has, as against each partner who has caused the wrongful dissolution, damages for breach of the agreement (*44 Cal. App. 3d 741, 746)* . Nevertheless, as the trial court's findings that no profits could be proven and no damages were suffered were supported by the evidence, the judgment was affirmed (*44 Cal. App. 3d 741, 747-752)* .

[4] Additional Authorities

[a] General Partner Liable if Exercise of Business Judgment Contravenes Partnership Agreement or Bars Ordinary Partnership Business

In Everest Investors 8 v. *McNeil Partners (2003) 114 Cal. App. 4th 411, 8 Cal. Rptr. 3d 31* , a real estate partnership merged into a new entity, becoming a wholly owned subsidiary of the new entity. The interests of the limited partners were liquidated or cashed out. The general partner, however, retained an equity interest in the post-merger entity, which then sold the assets of the limited partnership to third parties for more than the assets were valued for purposes of the cash-out and merger. The limited partners brought an action against the general partner for breach of fiduciary duty, unfair competition, and constructive fraud, claiming that the merger transaction harmed the limited partners by undervaluing their partnership interest or by depriving them of the future earnings and growth generated by the assets of the limited partnership. The defendant moved for summary judgment on two grounds, one of which was that plaintiffs' claims were barred by application of the business judgment rule. The trial court granted summary judgment for defendants. The appellate court reversed. With respect to the application of the business judgment rule, the appellate court reviewed the basis of the rule, stating that it does not shield actions taken without reasonable inquiry, with improper motives, or as a result of a conflict of interest. It agreed with plaintiffs that triable issues of fact as to the existence of defendant's improper motives and a conflict of interest precluded summary judgment based on the business judgment rule. Furthermore, triable issues of fact existed regarding whether the merger transaction was preceded by a good faith and reasonable investigation into whether the merger transaction was in the best interests of the limited partners (*114 Cal. App. 4th 411, 429-434)* .

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17-170 California Points & Authorities § 170.171

§ 170.171 Opposing Contention That Purchaser of Limited Partnership Interest Is Entitled to Rescission Because No Permit for Sale Was Obtained as Required by California Securities Law [Corp. Code § 25503]--Offering Was Exempt From Permit Requirement

[1] FORM Opposing Contention That Purchaser of Limited Partnership Interest Is Entitled to Rescission Because No Permit for Sale Was Obtained as Required by California Securities Law [Corp. Code § 25503]--Offering Was Exempt From Permit Requirement

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

PLAINTIFF IS NOT ENTITLED TO RESCIND THE PURCHASE OF HIS/HER LIMITED PARTNERSHIP INTEREST BECAUSE NO PERMIT WAS REQUIRED PRIOR TO THE SALE OF THE LIMITED PARTNERSHIP INTEREST.

Exempt Sale. The purchaser of a limited partnership interest has no right to rescind the purchase of the interest under *Corporations Code Section 25503* when the offering was exempt from qualification under the California securities laws by virtue of the exemption contained in _____ [*specify specific exemption relied upon, e.g., Corporations Code Section 25102(f)*].

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the purchaser of a limited partnership interest has a right to rescind the purchase for failure to comply with the securities permit requirement. The ground for opposition is that no permit was required because the purchase and sale were exempt pursuant to a specific exemption under the Corporate Securities Law.

This form should be combined with points and authorities pertaining to the specific procedural context in which counsel

wishes to raise the substantive issue that no permit was required. Because the determination of the availability of a specific exemption is likely to rest on factual considerations, this issue would be most likely to arise at trial or on appeal, and thus may be used in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case; for example, facts demonstrating compliance with each of the specific exemption requirements set forth *below*.

[3] Discussion of Authorities

[a] Exempt Sale

Limited partnership interests generally are considered to be "securities" within the meaning of the California Corporate Securities Law, although they are not specifically defined as such [*see Corp. Code § 25019*; for discussion of limited partnership interests as securities, *see* California Legal Forms, Ch. 15A, *Formation of Limited Partnerships*, § 15A.13 (Matthew Bender)]. As securities, they must be approved ("qualified") for sale by the Commissioner of Corporations prior to offer or sale in California [*see Corp. Code § 25110*]. ***Corp. Code § 25503*** provides that anyone who violates this requirement is liable any to person who acquired from the violator a security sold in violation of this requirement. There are, however, numerous exemptions from the statutory qualification requirement. ***Corp. Code § 25102(f)*** , commonly known as the "limited offering exemption," is the most commonly used exemption for limited partnership interests, and provides that any offer or sale of any security (other than an offer or sale to a pension or profit-sharing trust of the issuer) must meet each of the following requirements to be exempt from the permit provisions of *Corp. Code § 25110*:

- Sales of the security are not made to more than 35 persons, including persons not in California.

- All purchasers either have a preexisting personal or business relationship with the offeror or any of its partners, officers, directors, or controlling persons, or managers (as appointed or elected by the members) if the offeror is a limited liability company, or by reason of their business or financial experience or the business or financial experience of their professional advisors who are unaffiliated with and who are not compensated by the issuer or any affiliate or selling agent of the issuer, directly or indirectly, could be reasonably assumed to have the capacity to protect their own interests in connection with the transaction.

- Each purchaser represents that the purchaser is purchasing for the purchaser's own account (or a trust account if the purchaser is a trustee) and not with a view to or for sale in connection with any distribution of the security.

- The offer and sale of the security is not accomplished by the publication of any advertisement.

The number of purchasers referred to above is exclusive of any described in *Corp. Code § 25102(i)* (institutional investors), any officer, director, or affiliate of the issuer, or manager (as appointed or elected by the members) if the issuer is a limited liability company, and any other purchaser who the commissioner designates by rule. For these purposes, a husband and wife (together with any custodian or trustee acting for the account of their minor children) are counted as one person and a partnership, corporation, or other organization which was not specifically formed for the purpose of purchasing the security offered in reliance on this exemption is counted as one person [*Corp. Code § 25102(f)(4)*]. For detailed discussion of the limited offering exemption, see California Legal Forms, Ch. 6B, *California Limited Offering Exemptions* (Matthew Bender).

See *Corp. Code § 15638* regarding issuance of certificates of interest of a partner or assignee, discussed in *§ 170.141*.

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17-170 California Points & Authorities §§ 170.172-170.199

[Reserved]

§§ 170.172[Reserved]

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17-170 California Points & Authorities § 170.200

§ 170.200 Supporting Contention That Act of Partner Binds Partnership [Corp. Code § 16301; former Corp. Code § 15009]--Partner as Agent, Presumption of Agency, and Burden of Proving Lack of Authority to Act

[1] FORM Supporting Contention That Act of Partner Binds Partnership [Corp. Code § 16301; former Corp. Code § 15009]--Partner as Agent, Presumption of Agency, and Burden of Proving Lack of Authority to Act

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE PARTNERSHIP WAS BOUND BY THE ACT OF ITS PARTNER _____ [*name*] IN _____ [*specify act on behalf of partnership, e.g.,* ENTERING INTO AN AGREEMENT TO SELL THE SUBJECT PROPERTY] BECAUSE THE PARTNER WAS ACTING AS THE PARTNERSHIP'S AGENT IN THAT HE/SHE WAS ACTING WITHIN THE SCOPE OF HIS/HER AUTHORITY FOR APPARENTLY CARRYING ON IN THE USUAL WAY THE BUSINESS OF THE PARTNERSHIP, AND PLAINTIFF HAS NOT MET ITS BURDEN OF PROVING THAT THE PARTNER HAD NO AUTHORITY TO ACT.

A. Partner Is Agent of Partnership. Every partner is an agent of the partnership for the purpose of its business. The act of a partner, including the execution of an instrument in the partnership name, for apparently carrying on in the ordinary course the partnership business (or business of the kind carried on by the partnership) binds the partnership, unless the partner had no authority to act for the partnership in the particular matter, and the person with whom the partner was dealing knew or received notification that the partner lacked authority (*Corp. Code § 16301(1)*; former Corp. Code § 15009(1); *MacLeod v. Fox West Coast Theatres Corp. (1937) 10 Cal. 2d 383, 387-388, 74 P.2d 276*).

B. Scope of Partnership Business and Presumption of Ostensible or Apparent Agency. The apparent scope of the partnership business depends primarily on the conduct of the partnership and its partners and what they cause third persons to believe about the authority of the partners. Ostensible agency or acts within the scope of the partnership business are presumed when the business done by the supposed agent, so far as open to the observation of third parties, is consistent with the existence of an agency, and when, as to the transaction in question, the third party was justified in believing that an agency existed (*Blackmon v. Hale (1970) 1 Cal. 3d 548, 557, 83 Cal. Rptr. 194, 463 P.2d 418*).

C. Burden of Proof. When the act of a partner is within his or her apparent authority under the Corporations Code, the burden is on the objecting partner to prove the acting partner's lack of authority (*Barton v. Ludy (1938) 11 Cal. 2d 1, 3, 76 P.2d 654*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a partnership is bound by the acts of one of its partners. The general rule is that a partner is an agent of the partnership with respect to any act done for apparently carrying on in the ordinary course of the partnership business (or business of the kind carried on by the partnership). The act binds the partnership unless the partner had no authority to act for the partnership in the particular matter, and the person with whom he or she was dealing knew or had received notification that the partner lacked authority [*Corp. Code § 16301(1)*; former Corp. Code § 15009(1); *see* Paragraph A]. Whether an act is within the ordinary course of the partnership business depends on what third parties are led to believe. Acts are presumed to be within the usual business of the partnership as long as third parties with whom the partner is dealing justifiably believe that the acts are consistent with the business of the partnership [*Blackmon v. Hale (1970) 1 Cal. 3d 548, 557, 83 Cal. Rptr. 194, 463 P.2d 418* ; *see* Paragraph B]. The burden is on the objecting party to prove that a partner had no authority to act [*Barton v. Ludy (1938) 11 Cal. 2d 1, 3, 76 P.2d 654* ; *see* Paragraph C]. Thus, a partnership may be bound by a partner's action when a partnership and its partner represent to third parties that the partner has authority to act, and it appears to the third parties from the partnership's conduct that the action is within the partnership business.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that an action by a partner has bound the partnership. They also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should discuss facts that show that a third party relied on representations by the partnership and its partner that the partner had authority to act. Counsel should also discuss facts showing that the third party's belief that the partner's act was within the ordinary course of the partnership's business was justified by the conduct of the partnership and its partner.

[c] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 170.210 -170.213* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Partner Is Agent of Partnership

In ***MacLeod v. Fox West Coast Theatres Corp.*** *(1937) 10 Cal. 2d 383, 74 P.2d 276* , a visitor to defendant theater who attempted to attend an invitation-only "preshowing" of a film there but who was ejected before the show brought a tort action against the theater. He claimed that the film corporation and the theater had a joint venture for the preshowing. Citing the precursor to *Corp. Code § 16301*, the court stated that it was a correct statement of the law that with respect to transactions within the scope of partnership business, one of the partners therein is fully authorized to bind the partnership. It also found that either partner may revoke any executory contract. Thus, even if plaintiff had been invited to the show by one of the parties to the "joint venture," it was within the power of the other partner to revoke his right to

attend. Since the record showed that a representative of the film company ejected him from the theater lobby without excessive force, plaintiff had no cause of action against either party to the "joint venture" (*10 Cal. 2d 383, 387-388)* .

[b] Scope of Partnership Business and Presumption of Ostensible or Apparent Agency

In ***Blackmon v. Hale*** *(1970) 1 Cal. 3d 548, 83 Cal. Rptr. 194, 463 P.2d 418* , plaintiff engaged defendant's partner, an attorney, to represent him in a proposed purchase of a note and mortgage on real property. An agreement was made to deposit the funds necessary for the purchase in a trust account under the partnership name. Shortly thereafter, the partnership was dissolved. After securing defendant's authorization, the partner transferred funds from the partnership trust account to a new trust account in his own name. He then diverted the funds to his own use. Plaintiff's proposed purchase and sale was never carried out, and he demanded the return of his funds. He received only a small portion, and subsequently brought an action against defendant, among others, to recover the balance. The trial court rendered judgment against plaintiff, and he appealed.

The California Supreme Court reversed, holding that if the partner received plaintiff's funds while acting within the scope of his apparent authority or if the partnership received the funds in the course of its business, defendant was jointly and severally liable for plaintiff's losses. Citing former Corp. Code § 15009 [*now see Corp. Code § 16301*], the Court held that the apparent scope of the partnership business depends primarily on the conduct of the partnership and its partners and what they cause third persons to believe about the authority of the partners. It held that ostensible agency or acts within the scope of the partnership business are presumed when the business done by the supposed agent, so far as open to the observation of third parties, is consistent with the existence of an agency, and when, concerning the transaction in question, the third party was justified in believing that an agency existed (*1 Cal. 3d 548, 557)* . Defendant and his partner held themselves out to the public and plaintiff as partners. The partnership displayed a sign indicating a partnership. Plaintiff dealt with the partner in the partnership's offices. The partner instructed plaintiff to make his check payable to a trust fund bearing the partners' names. Thus, the Court held that in the absence of other evidence, these facts would justify a reasonable person in believing that he or she was dealing with a partnership (*1 Cal. 3d 548, 558)* .

[c] Burden of Proof

In ***Barton v. Ludy*** *(1938) 11 Cal. 2d 1, 76 P.2d 654* , appellant was a co-lessee of real property that respondent had acquired by bequest. Appellant's co-lessee assigned his interest to respondent. Respondent then brought an action for partition against appellant as a tenant in common. The trial court found that appellant and the co-lessee had acquired the lease and farmed the land as partners, but that the partnership was secret and undisclosed as to respondent. It found that the lessees held the land as to respondent merely as cotenants, and awarded judgment to respondent. Appellant appealed, contending that he and his co-lessee entered into the lease as partners and that it was partnership property. Appellant also contended that the title transferred by the assignment to respondent was subject to the partnership's interest, and that respondent was not entitled to partition.

The Supreme Court affirmed, citing former Civ. Code § 2404(4) (*now see Corp. Code § 16302*). That section provided that when the title to real property is in the name of one or more of the partners, or in a third person in trust for the partnership, a conveyance executed by a partner in the partnership name, or in his or her own name, passes the equitable interest of the partnership, provided the act is one within the authority of the partner under the provisions of former Civ. Code § 2403(1) (*now see Corp. Code § 16301*). The Court held that former Civ. Code § 2403(1) required appellant to prove the co-lessee's lack of authority to make the assignment to respondent (*11 Cal. 2d 1, 3)* .

[4] Additional Authorities

[a] Partner Is Agent of Partnership

In *Refinite Sales Co. v. Fred R. Bright Co. (1953) 119 Cal. App. 2d 56, 258 P.2d 1116* , plaintiff entered into a written

agreement with defendant partnership to sell and install a water conditioning unit on defendant partner's individually owned property. The agreement was signed for defendant's partner by the partnership's secretary. The trial court did not allow the agreement into evidence, and thus granted a nonsuit for defendant on her claim that there was no evidence to show that the obligation was a partnership obligation. Plaintiff appealed, arguing, among other things, that there was sufficient evidence that the agreement was executed on behalf of defendant partnership. The appellate court reversed. After holding that the partnership's secretary had authority to sign the agreement for defendant's partner, the court held that under former Corp. Code § 15009 [*now see Corp. Code § 16301*] every partner is an agent of the partnership for the purpose of its business, but an act of a partner that is not apparently for carrying on of the business of the partnership in the usual way does not bind the partnership unless authorized by the other partners (*119 Cal. App. 2d 56, 62)* . The court held that the issue of whether plaintiff was liable as a partner should have been submitted to a jury because there was evidence that the unit was paid for by partnership checks, and charged to a partnership account (*119 Cal. App. 2d 56, 63-64)* .

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17-170 California Points & Authorities § 170.201

§ 170.201 Supporting Contention That Act of Partner Binds Partnership [Corp. Code § 16301; former Corp. Code § 15009]--Authority to Make Contracts and Execute Negotiable Instruments

[1] FORM Supporting Contention That Act of Partner Binds Partnership [Corp. Code § 16301; former Corp. Code § 15009]--Authority to Make Contracts and Execute Negotiable Instruments

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with § 170.201 to set out the general rule concerning the partner's authority to act as an agent of the partnership.*]

THE PARTNERSHIP IS BOUND BY THE ACT OF PARTNER _____ [*name*] IN _____ [*specify, e.g.,* EXECUTING THE SUBJECT PROMISSORY NOTES] BECAUSE, AS AN AGENT OF THE PARTNERSHIP, HE/SHE HAD THE AUTHORITY TO ENTER INTO A WRITTEN AGREEMENT ON THE PARTNERSHIP'S BEHALF.

A. Authority to Enter Into Written Agreement. As an agent for a partnership in the transaction of its business, every general partner may bind his or her partners by an agreement in writing (*Corp. Code § 16301(1)*; *Krasky v. Wollpert (1901) 134 Cal. 338, 342, 66 P. 309* ; *Jacobson v. Lamb (1928) 91 Cal. App. 405, 410-412, 267 P. 114*).

[*EITHER, if instrument executed in partnership name:*]

B. Apparent Authority May Be Presumed if Documents Executed in Partnership Name. The execution of an instrument in the partnership name for apparently carrying on in the ordinary course the partnership business (or business of the kind carried on by the partnership) binds the partnership. Such an act is presumed when partners cause third parties to believe that the partners have authority to act, and the third parties are justified in their belief (*Owens v. Palos Verdes Monaco (1983) 142 Cal. App. 3d 855, 865, 191 Cal. Rptr. 381* ; *see Corp. Code § 16301(1) or* former Corp. Code § 15009(1)).

[*OR, if instrument executed in partner's own name:*]

B. Partnership May Be Bound by Instrument Executed in Individual Partner's Name if Parties so Intended. The fact that an instrument is signed by a partner individually is only a circumstance to be considered in determining the intention of the parties. It does not relieve the partnership of liability if the signing partner had authority to bind the firm and the instrument was executed with that intent (*Wurm v. Metz (1958) 162 Cal. App. 2d 262, 269, 327 P.2d 969*).

[*Optional*] **C. Execution of Promissory Note.** A promissory note executed by a general partner in the ordinary course of business is binding on the other partners, even though they have no knowledge of the execution of the note (*Wurm v. Metz (1958) 162 Cal. App. 2d 262, 269, 327 P.2d 969* ; *Stauffer v. Ti Hang Lung & Co. (1938) 29 Cal. App. 2d 121, 124-125, 84 P.2d 209*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a partnership is bound by a document executed by one of its partners because the partner was acting within the scope of his or her authority as a partner in executing the document.

The Corporations Code expressly provides that a partner may bind the partnership by executing an instrument in the partnership name [*Corp. Code § 16301(1)*; former Corp. Code § 15009(1)]. This includes the authority to make contracts [*see* *Krasky v. Wollpert (1901) 134 Cal. 338, 342, 66 P. 309* (prior law; every general partner, as agent for partnership in transaction of its business, could bind his or her partners by written agreement)]. Apparent authority may be presumed when documents are executed in the partnership name (*see* *Blackmon v. Hale (1970) 1 Cal. 3d 548, 557, 83 Cal. Rptr. 194, 463 P.2d 418* ; *see* first alternative Paragraph B).

When a partner signs an agreement in his or her own name, it may be presumed that the obligation is his or hers alone [*Bank of America v. Kumle (1945) 70 Cal. App. 2d 362, 368, 160 P.2d 875* (discussed in *§ 170.210[3*])]. However, the fact that a partner signs an agreement in his or her own name is merely a circumstance to be considered in determining the intention of the parties. It does not relieve the partnership of liability if the partner had authority to bind the partnership and that was what the partner and the third parties with whom he or she was dealing intended [*Wurm v. Metz (1958) 162 Cal. App. 2d 262, 269, 327 P.2d 969* ; *see* second alternative Paragraph B].

A specific rule has evolved for circumstances in which a partner enters into an agreement represented by negotiable instruments, such as promissory notes. It is generally held that promissory notes executed by a general partner in the ordinary course of business are binding on the other partners, even though they have no knowledge of the execution of the note [*Stauffer v. Ti Hang Lung & Co. (1938) 29 Cal. App. 2d 121, 124-125, 84 P.2d 209* ; *see* Optional Paragraph C].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a partner bound the partnership when he or she executed a written agreement either in the partnership's name or in his or her own name. They also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of

law stated. Thus, counsel should discuss facts showing that an agreement was entered into by a partner, and that the partner was acting within the scope of his or her authority. In other words, the partner's act must have been within the ordinary course of the partnership business [*see Corp. Code § 16301*; former Corp. Code § 15009(1)].

[c] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 170.211, 170.212* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Authority to Enter Into Written Agreement

Krasky v. Wollpert *(1901) 134 Cal. 338, 66 P. 309* , involved a partnership between defendants. One of the defendants was the active partner who ran the business. He borrowed money to put into the partnership, and he informed the passive partner that he had done so. Thereafter, one of the notes executed by the active partner was presented to the passive partner. He made a partial payment, and promised to pay the balance. He also made payments on other notes executed by the active partner. The passive partner conceded that in at least one of these cases, payments were made for the partnership. Plaintiff brought an action against both partners on one of the promissory notes executed by the active partner. The trial court rendered judgment for plaintiff, finding that defendants were partners, and that the active partner, as a member of the partnership, made, executed, and delivered the subject note to plaintiff for good and valuable consideration. Defendants appealed.

The California Supreme Court affirmed, holding that the finding that the active partner made the promissory note as a member of the partnership is the equivalent of finding that the partnership made it (*134 Cal. 338, 341)* . The Court held that the active partner did not make the note as an individual only (*134 Cal. 338, 341-342)* . It held that every general partner is an agent for the partnership in the transaction of its business, and he or she may bind his or her copartners by an agreement in writing. Therefore, the findings by the trial court that the note was made by one member of the partnership as a member, and that the note was signed in the partnership name, should be sufficient to uphold the judgment (*134 Cal. 338, 342)* .

In ***Jacobson v. Lamb*** *(1928) 91 Cal. App. 405, 267 P. 114* , defendant partners entered into an agreement whereby the managing partner was to purchase the passive partner's interest in the partnership for a sum payable in monthly installments. The agreement expressly provided that its execution would not result in dissolution of the partnership. It also provided that the managing partner would not incur any obligations other than those incident to the partnership business, and that he was to provide the passive partner with a monthly statement showing assets and liabilities, and all moneys received and disbursed in the conduct of the business. Thereafter, the managing partner executed six promissory notes in the partnership's name in plaintiff's favor. The passive partner had no knowledge of the execution of the notes. The managing partner subsequently disappeared, and the passive partner continued to run the business. He received the face value of the notes payable to the partnership, and deposited the money in the partnership account maintained in the regular course of business. Plaintiff brought an action to recover on the notes, and a jury rendered a verdict in her favor against each of the defendants individually, and as partners. Defendant passive partner appealed.

The appellate court affirmed. Citing former Civ. Code § 2429 (*now see Corp. Code § 16301*), the court held that every general partner is an agent for the general partnership in the transaction of its business and has authority to do whatever is necessary to carry on such business in the ordinary manner, and for this purpose may bind his or her copartners by an agreement in writing. Thus, the court held that the managing partner had implied authority to execute promissory notes on behalf of the partnership. As plaintiff gave valuable consideration for each of the notes and accepted them in good faith as the obligation of the partnership without any knowledge that the managing partner was acting beyond the scope of his authority, the jury was justified in returning a verdict for plaintiff (*91 Cal. App. 405, 410-412)* .

[b] Partnership May Be Bound by Instrument Executed in Individual Partner's Name if Parties so Intended

In ***Wurm v. Metz*** *(1958) 162 Cal. App. 2d 262, 327 P.2d 969* , defendants were partners engaged in the business of raising, buying, producing, and selling poultry. During the course of the business, one of the defendant partners obtained several loans from plaintiff. Plaintiff was told that the funds were needed to purchase chickens and other supplies for current needs, for operational expenses, and to keep the plant going. The promissory notes that evidenced the loans were signed by the active partner individually. Plaintiff brought an action against the partnership and its individual members for the money loaned. The trial court rendered judgment for plaintiff, and the passive partners appealed, contending, among other things, that the money was loaned to defendant active partner individually.

The appellate court affirmed, holding that the fact that the promissory notes were signed by the active partner individually was a circumstance to be considered in determining the intention of the parties. This circumstance did not relieve the partnership of liability if the active partner had authority to bind the firm and the notes were executed with such intent and were so accepted and credit was extended based on them. The court held that in this case, the nature of the partnership business fairly and reasonably implied the borrowing of money to accommodate its necessities (*162 Cal. App. 2d 262, 269)* .

[c] Execution of Promissory Note

The facts and procedural background of ***Wurm v. Metz*** *(1958) 162 Cal. App. 2d 262, 327 P.2d 969* , are discussed in *§ 170.201[3][b]*. In *Wurm*, the appellate court held that promissory notes executed by a general partner in the ordinary course of business were binding on the other partners, even though they had no knowledge of the execution of the notes.

In ***Stauffer v. Ti Hang Lung & Co.*** *(1938) 29 Cal. App. 2d 121, 84 P.2d 209* , defendant partnership owned a one-third interest in a corporation. One of the corporation's stockholders and a managing partner for defendant secured a loan from a bank on a note executed by the partner in defendant's name. The proceeds of the loan were then paid over to the corporation. Thereafter, the note was renewed three times with the corporation as maker and defendant as endorser. After the third renewal, the bank wrote to defendant advising it that the bank was holding the note. This was the first time that defendant was informed of the existence of the note. The bank subsequently assigned its interest in the note to plaintiff. Plaintiff brought an action for recovery, and the trial court rendered judgment in his favor. Defendant appealed, contending that the managing partner was without authority to make the endorsement because defendant's endorsement was made without consideration, making defendant an accommodation endorser.

The appellate court affirmed. The court held that because defendant owned a considerable portion of the capital stock of the corporation, and the corporation was engaged in selling defendant's merchandise, anything that would contribute to the financial stability and credit of the corporation would directly benefit defendant. It held, therefore, that there was sufficient evidence to support the trial court's finding that defendant was not an accommodation endorser (*29 Cal. App. 2d 121, 124)* . The court recognized the general rule that the power of partners to bind one another by commercial paper does not extend to endorsements or other contracts for the accommodation of a third person. However, promissory notes executed by a general partner in the ordinary course of business are binding on the other partners, even though they have no knowledge of the execution of the notes. The court held that the basis for this rule was former Civ. Code § 2403(1) (*now see Corp. Code § 16301*) (*29 Cal. App. 2d 121, 124-125)* .

[4] Additional Authorities

[a] Authority to Enter Into Written Agreement

In *First Nat'l. Bank of Dixon v. Spangler (1920) 49 Cal. App. 133, 192 P. 874* , defendant partner executed three promissory notes in plaintiff's favor. The trial court found that the notes represented the obligation of defendant's partnership even though they were only signed by him. Defendant appealed, and the appellate court affirmed. The court

held that if a partner acts within the apparent scope of his or her authority, whether in good or bad faith, the partner's acts or declarations are binding on his or her copartners in favor of third persons if the third persons believe in and rely on the partner's statements, and on the strength of that confidence extend credit or advance money to the partner for the use and benefit of the partnership. The fact that the notes were signed by the partner individually rather than in the partnership name, although a circumstance to be considered in determining the intention of the parties, did not relieve the partnership of liability if the partner had authority to bind the firm and that was what was intended (*49 Cal. App. 133, 135-136)* .

[b] Execution of Promissory Note

The facts and procedural background of *Jacobson v. Lamb (1928) 91 Cal. App. 405, 267 P. 114* , are discussed in [3][a], *above*. In *Jacobson*, the court held that as an agent for a partnership in the transaction of its business, every general partner may bind his or her copartners by an agreement in writing. The court noted that the execution of negotiable notes is not one of the acts that a partner is by law prohibited from performing on behalf of the general partnership (*91 Cal. App. 405, 410-411)* . The court held that if the promissory notes being sued on were executed by the partnership's managing partner in the ordinary course of business, the passive partner would be bound, even though he had no knowledge of the execution of the notes (*91 Cal. App. 405, 409)* . The managing partner told plaintiff that he needed the borrowed funds for the partnership business because it was expanding, and because the partnership had to advance freight charges before it could take delivery of merchandise (*91 Cal. App. 405, 413)* . The court held that there was substantial evidence from which the jury could determine that it was within the ordinary and usual course of the conduct of the partnership business to borrow money and execute promissory notes. Trial testimony indicated that the nature of the partnership business fairly and reasonably implied borrowing money to accommodate its necessities and convenience whenever the occasion occurred (*91 Cal. App. 405, 415-416)* .

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CHAPTER 170 PARTNERSHIPS
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1. General Partnerships

17-170 California Points & Authorities § 170.202

§ 170.202 Supporting Contention That Act of Partner Binds Partnership [Corp. Code § 16301; former Corp. Code § 15009]--Ratification of Acts Beyond Scope of Authority

[1] FORM Supporting Contention That Act of Partner Binds Partnership [Corp. Code § 16301; former Corp. Code § 15009]--Ratification of Acts Beyond Scope of Authority

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with the points and authorities in § 170.200 to set out the general rule concerning the partner's authority to act as an agent of the partnership*].

THE PARTNERSHIP IS BOUND BY THE UNAUTHORIZED ACT OF ITS PARTNER _____ [*name*] BECAUSE, ALTHOUGH THE PARTNER(S) _____ [WAS *or* WERE] AWARE OF THE ACT, HE/SHE/THEY _____ [RATIFIED *or* ACQUIESCED IN] THE ACT BY _____ [*specify, e.g.,* ACCEPTING AND ENJOYING THE BENEFITS OF THE TRANSACTION].

Ratification of Partner's Acts Beyond Scope of Authority. Notwithstanding a partner's lack of authority, his or her partners may be bound by his or her acts if the partners have knowledge of the acts and acquiesce in them, for example by accepting and retaining the benefits of the transaction (*Cowan v. Tremble (1931) 111 Cal. App. 458, 464, 296 P. 91*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a partnership is bound by the acts of one of its partners. Even if a partner's act is beyond his or her authority, a partnership is bound if it ratifies or acquiesces in the act by accepting and enjoying the benefits of it [*Cowan v. Tremble (1931) 111 Cal. App. 458, 464, 296 P. 91]* . However, if a partnership expressly repudiates a partner's act, the mere fact that the partnership enjoys the benefits of the act does not in itself bind the partnership unless it ultimately acquiesces to the transaction [*see DeSantis v. Miller*

Petroleum Co. (1938) 29 Cal. App. 2d 679, 683-684, 85 P.2d 489 (discussed in *§ 170.211[3*])].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a partnership is bound by the act of one of its partners because it ratified or acquiesced in the act. They also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should discuss facts showing that the partnership was aware of the unauthorized act of one of its partners, failed to repudiate it, and in fact ratified or acquiesced in the act by accepting and enjoying the benefits of the transaction.

[c] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 170.211, 170.212* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Ratification of Partner's Acts Beyond Scope of Authority

In ***Cowan v. Tremble*** *(1931) 111 Cal. App. 458, 296 P. 91* , plaintiff's agent and defendant active partner entered into an agreement whereby plaintiff was to purchase the partnership business. The agreement provided that the partnership was to be incorporated during escrow, and the partnership property thereafter transferred to plaintiff as stock. However, certain conditions requested by defendant's passive partner to be included in the agreement were not made a part of it, and he refused to sign the agreement. Plaintiff sued for breach of contract. At trial, the jury rendered a verdict for plaintiff, and defendants appealed.

The appellate court affirmed. The court held that when a person dealing with a partner has notice of restrictions on the partner's authority, the acts of a partner in contravention of those restrictions are not binding on the partnership or the other partners unless the other partners have waived the restrictions or limitation by their conduct (*111 Cal. App. 458, 463)* . The passive partner's consent was conditional, and thus the active partner had no authority to act until the conditions were met, and plaintiff's agent was apprised of the passive partner's objection to the contract. Nevertheless, the evidence indicated that the partners incorporated the partnership using plaintiff's deposit. The court held that this was a manifest recognition of the contract. Notwithstanding a partner's want of authority, his or her copartners may be bound by the partner's acts when, with knowledge of the facts, they acquiesce to them, as by accepting and retaining the benefits of the transaction (*111 Cal. App. 458, 464)* .

[4] Additional Authorities

[a] Ratification of Partner's Acts Beyond Scope of Authority

In *Bissell v. King (1928) 91 Cal. App. 420, 267 P. 356* , defendant partners entered into an agreement whereby the managing partner was to purchase the passive partner's interest in the partnership for a sum payable in monthly installments. The partnership was not to be dissolved until the last installment had been paid, and during the payment period, the managing partner executed several promissory notes in the partnership's name, including one in plaintiff's favor. The managing partner subsequently disappeared, and plaintiff sued to recover on the note. Judgment was entered against both defendants individually and as copartners, and the passive partner appealed, contending that the managing partner had no authority to execute the promissory notes. The appellate court affirmed, based on *Jacobson v. Lamb (1928) 91 Cal. App. 405, 410-412, 267 P. 114* (discussed in *§ 170.201[3][a]*) (*91 Cal. App. 420, 425-426)* . The court

noted that even if the managing partner had no authority to bind the passive partner, the passive partner told plaintiff he would do what he could after seeing the note with full knowledge of the facts regarding the loan, and later stated that he would protect plaintiff in the note. The court held that this action was a ratification of the managing partner's act in signing the partnership name to plaintiff's note (*91 Cal. App. 420, 427)* . The court held that when an agent is authorized to do an act, and he or she transcends his or her authority, it is the duty of the principal to repudiate the act as soon as he or she is fully informed of what has been done in his or her name. If this is not done, the principal will be bound by the act by having ratified it by implication (*91 Cal. App. 420, 428)* .

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17-170 California Points & Authorities § 170.203

§ 170.203 Supporting Contention That Act of Partner Binds Partnership [Corp. Code § 16301; former Corp. Code § 15009]--Failure to Inform Third Parties of Special Restrictions on Authority

[1] FORM Supporting Contention That Act of Partner Binds Partnership [Corp. Code § 16301; former Corp. Code § 15009]--Failure to Inform Third Parties of Special Restrictions on Authority

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

THE PARTNERSHIP WAS BOUND BY THE ACTS OF ITS PARTNER _____ [*name*] EVEN THOUGH HE/SHE HAD NO AUTHORITY TO ACT BECAUSE PLAINTIFF _____ [*name*] HAD NO KNOWLEDGE OF ANY SPECIAL LIMITATION ON THE PARTNER'S AUTHORITY TO ACT, AND THE PARTNERSHIP FAILED TO INFORM HIM/HER OF ANY SUCH RESTRICTIONS.

Third Parties Are Required to Be Informed of Special Restrictions on Partner's Authority. Sound public policy dictates that a partnership must inform those who deal with its members in the course of the partnership's business of any special restrictions on a particular partner's authority (*Blackmon v. Hale (1970) 1 Cal. 3d 548, 558, 83 Cal. Rptr. 194, 463 P.2d 418* ; *see Corp. Code § 16301(1)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a partnership is bound by the acts of one of its partners. *Corp. Code § 16301(1)* provides that an act of a partner for apparently carrying on in the ordinary course the partnership business will not bind a partnership if a partner had no authority to act for the partnership in the particular matter and the third person with whom the partner was dealing knew or had notification that the partner had no authority to act. However, a third party cannot be charged with knowledge of private agreements between the parties restricting authority [*Blackmon v. Hale (1970) 1 Cal. 3d 548, 557-558, 83 Cal. Rptr. 194, 463 P.2d 418]* . Thus, if a third party deals with a partner with apparent authority to act, and the third party is not informed that the partner is

specially prohibited from acting in his or her individual capacity in that particular circumstance, the third party will not be charged with knowledge of the prohibition and the partnership may be bound by the act.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that because a third party did not know and was not informed of restrictions on a partner's authority to act in a particular transaction, the partnership is bound by the partner's acts. They also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that although a partner had no authority to act, the person with whom the partner was dealing did not know of the restrictions on the partner's authority. Counsel should also discuss facts indicating that neither the partnership nor the active partner told plaintiff that the partner had no authority to act.

[c] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 170.211* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Third Parties Are Required to Be Informed of Special Restrictions on Partner's Authority

The facts and procedural background of ***Blackmon v. Hale*** *(1970) 1 Cal. 3d 548, 83 Cal. Rptr. 194, 463 P.2d 418* , are discussed in *§ 170.200[3]*. In *Blackmon*, the California Supreme Court held that every partner is an agent of the partnership for the purpose of its business, and the act of every partner for apparently carrying on in the usual way the business of the partnership binds the partnership. However, the Court noted that former Corp. Code § 15009 [*see now Corp. Code § 16301*] provides that the partnership will be relieved from liability for the wrongs of its partners acting individually when the third person with whom the partner is dealing has knowledge of the fact that he or she is dealing with the partner in his or her individual capacity and not on behalf of the partnership (*1 Cal. 3d 548, 557)* . Accordingly, the Court held that if defendant's partner was acting only in an individual capacity, the partnership was not liable. However, it also held that sound public policy dictates that a partnership must inform those who deal with its members in the course of the partnership's business of any special restrictions on a particular partner's authority. A person dealing with a partnership usually is in no position to know of special agreements between the partners and thus cannot be charged with knowledge of such agreements absent specific notice. The Court observed that there was no evidence that either defendant or his partner ever informed plaintiff that defendant's partner was not representing plaintiff as a member of the partnership. The Court held that this was one of the factors that would justify a reasonable person in believing that he or she was dealing with a partnership (*1 Cal. 3d 548, 558)* .

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17-170 California Points & Authorities §§ 170.204-170.209

[Reserved]

§§ 170.204[Reserved]

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17-170 California Points & Authorities § 170.210

§ 170.210 Opposing Contention That Act of Partner Binds Partnership [Corp. Code § 16301; former Corp. Code § 15009]--Statutory Limitations on Partner's Authority to Act

[1] FORM Opposing Contention That Act of Partner Binds Partnership [Corp. Code § 16301; former Corp. Code § 15009]--Statutory Limitations on Partner's Authority to Act

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE PARTNERSHIP WAS NOT BOUND BY THE ACT OF ITS PARTNER _____ [*name*] IN _____ [*describe act*] BECAUSE THE ACT WAS NOT APPARENTLY FOR CARRYING ON IN THE ORDINARY COURSE THE PARTNERSHIP BUSINESS (OR BUSINESS OF THE KIND CARRIED ON BY THE PARTNERSHIP) AND WAS NOT AUTHORIZED BY THE OTHER PARTNERS.

A. Partner's Act Apparently Outside Ordinary Course of Partnership Business. An act of a partner that is not apparently for the carrying on in the ordinary course the partnership business, or business of the kind carried on by the partnership, binds the partnership only if the act was authorized by the other partners (*Corp. Code § 16301(2) or* former Corp. Code § 15009(2); *Ellis v. Mihelis (1963) 60 Cal. 2d 206, 217-218, 32 Cal. Rptr. 415, 384 P.2d 7* ; *Bank of America v. Kumle (1945) 70 Cal. App. 2d 362, 366, 160 P.2d 875*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that a partnership is bound by the act of one of its partners. They may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a partner's act was not binding on the partnership. They also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that the partner's act was not one that was within the ordinary business of the partnership

[c] Opposing Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in §§ 170.200 -170.202*.

[3] Discussion of Authorities

[a] Partner's Act Apparently Outside Usual Course of Partnership Business

Corp. Code § 16301(2) [formerly Corp. Code § 15009 (pre-'97 Act)] provides that an act of a partner that is not apparently for carrying on in the ordinary course the partnership business, or business of the kind carried on by the partnership, binds the partnership only if the act was authorized by the other partners. When the act of a partner is not within the ordinary business of the partnership, the partnership is not bound unless the other partners have given their express authority to act [*Corp. Code § 16301(2)*; former Corp. Code § 15009(2); *Ellis v. Mihelis (1963) 60 Cal. 2d 206, 217-218, 32 Cal. Rptr. 415, 384 P.2d 7]* .

In ***Ellis v. Mihelis*** *(1963) 60 Cal. 2d 206, 32 Cal. Rptr. 415, 384 P.2d 7* , defendant brothers owned two ranches as partners. They decided to sell one of the ranches, and agreed that only one of them would handle sale negotiations and submit prospective deals to the other. Plaintiffs were interested in purchasing certain property, but the owner of that property was only interested in an exchange for a ranch. One of the plaintiffs deposited funds in escrow and instructed the owner of the property that plaintiffs wanted to purchase, as plaintiff's agent, to find a ranch to purchase with the funds. The owner of the property plaintiffs wanted to purchase then entered into an agreement with the active defendant partner to buy defendants' ranch, and the agreement and funds for a down payment were placed in escrow. However, at a subsequent meeting the defendant active partner stated that he had changed his mind. One of the reasons given was that his brother, the passive partner, did not want to sell. Thereafter, plaintiffs ratified the acts of the owner of the property that plaintiffs wanted to purchase, and tendered full performance under the agreement with the owner. Plaintiffs then brought an action against defendants for specific performance. The trial court rendered judgment for plaintiffs, finding that defendants were partners, that the ranch was an asset of the partnership, and that each orally authorized the other to sell the ranch for the partnership. Defendants appealed, contending that the agreement could not be binding on the passive partner because he did not sign the contract and he did not give the active partner any written authorization to enter into the agreement on the passive partner's behalf.

The California Supreme Court reversed, noting that although the statute of frauds provides that an agreement for the sale of real property must be signed by the party to be charged or by an agent who has authority in writing, the Court disagreed with plaintiff's contention that former Corp. Code § 15009 overcame that requirement in this case. The court held that former Corp. Code § 15009(1) and *(2)* distinguished between acts of a partner that bind the partnership because of his or her status as a partner without any express authority being required, and acts binding on the partnership only after express authorization by all partners. Under the express terms of former Corp. Code § 15009(1) [*now see Corp. Code § 16301(1)*], all acts of a partner that are apparently within the usual course of the particular business bind the partnership. The effect of this provision is that the status of a partner, without more, serves as complete authority with respect to such acts, obviating the necessity of any express authority, either oral or written, from the other members of the partnership. On the other hand, former Corp. Code § 15009(2) [*now see Corp. Code § 16301(2)*] provided that there must be express authority for the acts of a partner that do not appear to be in the usual course of the business. The Court held that former Corp. Code § 15009(2), unlike the broad provision in former Corp. Code § 15009(1), contained no language that would justify a conclusion that written authority is not necessary in

situations when the statute of frauds would ordinarily be applicable (*60 Cal. 2d 206, 217-218)* . Because there was no evidence that defendants were in the business of buying and selling real estate or the sale of the ranch was in the usual course of the partnership business, the Court held that a contract to sell it would come within former Corp Code § 15009(2). Therefore, the statute of frauds was applicable, and the active partner could not bind the passive partner without authority in writing (*60 Cal. 2d 206, 218)* .

In ***Bank of America v. Kumle*** *(1945) 70 Cal. App. 2d 362, 160 P.2d 875* , defendant leased some real property he owned to a mining partnership. Defendant then expressed an interest in joining the partnership to engage in mining some property in another state. It was proposed that defendant would contribute money, and the other partners would contribute their equipment, skill, and experience. During these discussions, defendant negotiated with plaintiff for a loan of the required money. Thereafter, a copy of the proposed articles of partnership was delivered to plaintiff by defendant. Plaintiff subsequently approved defendant's loan application. About a week later, the articles of partnership were executed by all parties. The loan was advanced in monthly installments, some of which were paid after the partnership came into existence. Later, the partnership encountered difficulties, and the work on the property was abandoned. Plaintiff brought an action on six promissory notes to recover the balance of the loan against the partnership, and against defendant and the other partners individually. The trial court entered judgment in favor of the partnership and its individual members except for defendant. Judgment was entered against defendant individually for the balance of the loan. Plaintiff appealed.

The appellate court affirmed, holding that the case was governed by the provisions of former Civ. Code § 2403(2) (*now see Corp. Code § 16301(2)*), which provided that an act of a partner that is not apparently for the carrying on of the business of the partnership in the usual way does not bind the partnership unless authorized by the other partners (*70 Cal. App. 2d 362, 366)* . The court held that the transaction in this case must be considered an "unusual act" as defined in that provision. The subject promissory notes were not executed in the partnership name but in defendant's individual name. Further, the notes were not executed for the purpose of the partnership business because at the time there was no partnership business (*70 Cal. App. 2d 362, 366-367)* .

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17-170 California Points & Authorities § 170.211

§ 170.211 Opposing Contention That Act of Partner Binds Partnership--Notice of Limitation on Authority [Corp. Code §§ 16301, 16303; former Corp. Code §§ 15009(1), (4), 15010.7]

[1] FORM Opposing Contention That Act of Partner Binds Partnership--Notice of Limitation on Authority [Corp. Code §§ 16301, 16303; former Corp. Code §§ 15009(1), (4), 15010.7]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined, when appropriate, with other forms opposing the contention that a partner's act binds the partnership (see, e.g., §§ 170.210, 170.212, 170.213)*].

THE PARTNERSHIP IS NOT BOUND BY THE ACT OF ITS PARTNER _____ [*name*] BECAUSE HE/SHE HAD NO AUTHORITY TO ACT FOR THE PARTNERSHIP IN THIS PARTICULAR MATTER, AND THE PARTY WITH WHOM HE/SHE WAS DEALING KNEW OF THE LIMITATION ON _____ [*name*]'S AUTHORITY [BECAUSE THAT PARTY HAD CONSTRUCTIVE NOTICE OF THE LIMITATION FROM THE FILED STATEMENT OF PARTNERSHIP].

A. Partnership Not Bound When Third Party Has Notice of Limitation on Partner's Authority to Act. The act of a partner does not bind the partnership if the partner has in fact no authority to act for the partnership in a particular matter, and the person with whom he or she is dealing knows or receives notification that he or she has no such authority. (*Corp. Code § 16301(1) or* former Corp. Code § 15009(1), *(4)*; *see DeSantis v. Miller Petroleum Co. (1938) 29 Cal. App. 2d 679, 683, 85 P.2d 489*).

[*Optional*] **B. Constructive Notice of Restrictions on Authority of Partner to Convey Partnership Real Property.** "Knowledge" of restrictions on a partner's authority to convey partnership real property includes constructive notice pursuant to the Corporations Code. A person not a partner is deemed to know of a limitation on the authority of a partner to transfer real property held in the name of the partnership if a certified copy of the filed statement containing the limitation on authority is of record in the office for recording transfers of that real property (*Corp. Code § 16303(e) or* former Corp. Code §§ 15009(1), *15010.7*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that a partnership is bound by the acts of its partners. If a person with whom a partner was dealing knew that the partner had no authority to act, apparent or otherwise, or that the partner was expressly prohibited from acting in the particular circumstance, the partnership will not be bound by the partner's unauthorized act in such a circumstance.

Optional Paragraph B may be used when a partner transfers the partnership's real property despite an express prohibition against such a transfer in the filed statement of partnership. The third party with whom the partner was dealing will be charged with constructive notice of the restriction, and the partnership will not be bound by the conveyance [*see Corp. Code § 16303(e)*; former Corp. Code §§ 15009(1), *15010.7*].

Those points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a partnership is not bound by the acts of a partner who had no authority to act when the third party with whom the partner transacted business knew of the partner's limited authority. The points and authorities also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that a partner's act was beyond his or her authority, that the third party with whom the partner transacted business was aware of that fact, and the circumstances under which the third party acquired that knowledge.

[3] Discussion of Authorities

[a] Partnership Not Bound When Third Party Has Notice of Limitation on Partner's Authority to Act

Corp. Code § 16301(1) [*see* former Corp. Code § 15009(1), *(4)* (pre-'97 Act)] states the general rule that a partner is an agent of the partnership for the purpose of its business. An act of a partner apparently for carrying on in the ordinary course the partnership business (or business of the kind carried on by the partnership) binds the partnership. However, if the partner has in fact no authority to act for the partnership in the particular matter, and the person with whom he or she is dealing knows or receives notification of that fact, the partnership will not be bound.

In ***DeSantis v. Miller Petroleum Co.*** *(1938) 29 Cal. App. 2d 679, 85 P.2d 489* , defendant companies were partners. A third-party company sold oil well tubing and casing to one of the defendants. Plaintiff guaranteed that the purchasing defendant would pay for the material, and when it failed to do so, plaintiff paid for it. Plaintiff then sued both defendants to recover the purchase price of the material. The trial court originally rendered judgment for plaintiff, but after a successful motion to reopen by the passive partner it was learned that before the sale the passive partner told a representative of the third-party company that it would not be responsible for material purchased by the active partner. The third-party company was expressly told that the active partner had no authority to purchase for the passive partner's account. The trial court rendered judgment for the passive partner, and plaintiff appealed.

The appellate court affirmed. Citing former Civ. Code § 2403(1) (*now see Corp. Code § 16301(1)*), the court held that a partner is not liable to third parties for contracts entered into with a partnership when the third party has notice that the partner endeavoring to bind the partnership does not have authority to do so (*29 Cal. App. 2d 679, 683)* . The court held that when a partner gives notice to a third person that he or she will not be bound by the acts of his or her copartner, that partner is not then bound by a contract entered into by the copartner, although the fruits of the contract have been enjoyed by the partnership of which he or she is a member, unless the objecting partner, after making his or

her objection, finally acquiesces in the acts (*29 Cal. App. 2d 679, 682-683)* .

[4] Additional Authorities

[a] Partnership Not Bound When Third Party Has Notice of Limitation on Partner's Authority to Act

In *Federal Deposit Ins. Corp. v. Superior Court (1997) 54 Cal. App. 4th 337, 62 Cal. Rptr. 2d 713* , the trial court found that recorded, amended statements of partnership omitting the names of certain partners created a conclusive presumption under former Corp. Code § 15010.5 that they were not partners in 1984 and thus had no authority to bind the partnership or encumber its property. The trial court therefore held that there were no material issues of fact. The court applied the conclusive presumption against the FDIC, a bona fide purchaser for value of partnership property. The appellate court held that the trial court improperly applied the presumption. It stated that language in former Corp. Code § 15010.5 ("in favor of any bona fide purchaser for value of the partnership real property") would be rendered a nullity if the presumption were construed to apply in favor of any party seeking to rely on it. It concluded that the Legislature intended to limit the application of the conclusive presumption. Nothing in former Corp. Code § 15010.5 suggested that persons other than the partnership are conclusively bound by the content of a statement of partnership. Further, no language in the statute suggests that a good faith purchaser of partnership property can be denied a claim against the partnership if the purchaser relied on evidence other than the partnership's most recently recorded statement of partnership and dealt with a person not listed in that statement. In those circumstances, under the statutory language, the only consequence is that the purchaser must establish a claim against the partnership without the assistance of a conclusive presumption. Without application of the presumption, there were triable issues of fact as to whether the persons omitted from the recorded statement were actual or ostensible agents of the partnership and could bind the partnership. The appellate court held that the fact question precluded summary judgment (*54 Cal. App. 4th 337, 345-348)* .

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17-170 California Points & Authorities § 170.212

§ 170.212 Opposing Contention That Act of Partner Binds Partnership [Corp. Code § 16301; Corp. Code § 15009]--Burden of Proof and Presumption Against Binding Partnership to Contract Signed by Individual Partner

[1] FORM Opposing Contention That Act of Partner Binds Partnership [Corp. Code § 16301; Corp. Code § 15009]--Burden of Proof and Presumption Against Binding Partnership to Contract Signed by Individual Partner

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined, when appropriate, with other forms opposing the contention that a partner's act binds the partnership (see, e.g., §§ 170.210, 170.211*)].

THE PARTNERSHIP IS NOT BOUND BY THE _____ [*specify agreement, e.g.,* PROMISSORY NOTES] EXECUTED BY _____ [*name*], ONE OF ITS PARTNERS, IN HIS/HER OWN NAME BECAUSE SUCH [A] PAPER[S] _____ [IS *o* r ARE] PRESUMED TO BE THE OBLIGATION OF THE INDIVIDUAL PARTNER, AND PLAINTIFF _____ [*name*] HAS NOT MET HIS/HER BURDEN OF PROOF BY CLEAR AND CONVINCING EVIDENCE THAT THE PARTNER'S SIGNATURE WAS INTENDED AS THE SIGNATURE OF THE PARTNERSHIP.

Presumption That Contract Signed by Individual Partner Is Partner's Own Obligation. On its face, a contract is to be presumed to be the paper of the individual partner whose name is signed to it. The burden of proof is on the holder to show affirmatively that the signature was intended for the signature of the partnership (*Bank of America v. Kumle (1945) 70 Cal. App. 2d 362, 368, 160 P.2d 875*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that a partnership is bound by the acts of one of its partners. When a partner executes an agreement in his or her own name, it is presumed that the obligation

thereby created is personal to the partner. The burden is on the party holding the agreement to prove by clear and convincing evidence that the partner signed the agreement for the partnership [*Bank of America v. Kumle (1945) 70 Cal. App. 2d 362, 368, 160 P.2d 875]* . For example, a partnership will not be bound by promissory notes executed by a partner individually until the presumption is overcome.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a party holding an obligation executed by a partner in his or her own name has not proved by clear and convincing evidence that the parties intended to bind the partnership. They also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that a partner signed an agreement in his or her own name, and that the circumstances evidence an intent only to bind the individual partner.

[c] Opposing Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 170.201*.

[3] Discussion of Authorities

[a] Presumption That Contract Signed by Individual Partner Is Partner's Own Obligation

The facts and procedural background of ***Bank of America v. Kumle*** *(1945) 70 Cal. App. 2d 362, 160 P.2d 875* , are discussed in *§ 170.210[3]*. In *Kumle*, the appellate court held that an act of a partner that is not apparently for the carrying on of the business of the partnership in the usual way does not bind the partnership unless authorized by the other partners (*70 Cal. App. 2d 362, 366)* . The court held that on its face, a contract is to be presumed to be the paper of the individual partner whose name is signed to it, and the burden of proof is on the holder to show affirmatively that the signature was intended for the signature of the partnership. In other words, the presumption is that a written instrument deliberately executed expresses the intention of the parties. This presumption should prevail unless the evidence offered to show a contrary contention is clear and convincing (*70 Cal. App. 2d 362, 368)* . The court held that the trial court's opinion on conflicting questions of fact must be considered as final. The trial court found that the evidence introduced by plaintiff to overcome the presumption that notes signed by defendant were defendant's personal obligation was not clear and convincing (*70 Cal. App. 2d 362, 369)* .

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17-170 California Points & Authorities § 170.213

§ 170.213 Opposing Contention That Act of Partner Binds Partnership [Corp. Code § 16301; former Corp. Code § 15009]--Partner Has No Authority to Bind Partnership on Contract of Guaranty

[1] FORM Opposing Contention That Act of Partner Binds Partnership [Corp. Code § 16301; former Corp. Code § 15009]--Partner Has No Authority to Bind Partnership on Contract of Guaranty

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined when appropriate with other forms opposing the contention that a partner's act binds the partnership (see, e.g., §§ 170.210 -170.212)*].

THE PARTNERSHIP IS NOT BOUND BY THE CONTRACT OF GUARANTY EXECUTED BY _____ [*name*] BECAUSE _____ [*name*] LACKED AUTHORITY TO EXECUTE CONTRACTS OF GUARANTY ON BEHALF OF THE PARTNERSHIP AND THE PARTNERSHIP DID NOT RATIFY THE EXECUTION OF THE CONTRACT.

Authority of Partner to Execute Guaranty. A partner has no authority to execute contracts of guaranty on behalf of the partnership without authority specially given him or her for the purpose, or implied from the common course of the business of the firm, or from the previous course of dealing between the parties, unless the act of the partner is later ratified by the copartners (*Tsakos Shipping & Trading, S.A. v. Juniper Garden Town Homes, Ltd. (1993) 12 Cal. App. 4th 74, 93, 15 Cal. Rptr. 2d 585*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that a partnership is bound by a guaranty agreement entered into by one of its partners.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context

in which counsel wishes to raise the substantive issue that the partnership is not bound under a guaranty agreement. They also may be adopted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, for example, counsel should discuss facts showing that the partnership never ratified the guaranty agreement and that the partner lacked authority to enter into the agreement.

[3] Discussion of Authorities

[a] Authority of Partner to Execute Guaranty

In ***Tsakos Shipping & Trading, S.A. v. Juniper Garden Town Homes, Ltd.*** *(1993) 12 Cal. App. 4th 74, 15 Cal. Rptr. 2d 585* , a general partner of defendant partnership had borrowed $35,000 from plaintiff and signed an indemnity provision purporting to bind the partnership to guarantee the loan. After the general partner failed to repay the loan, plaintiff lender filed a complaint in a New York court naming both the general partner and the partnership as defendants. Plaintiff served the complaint on the general partner by mail, and the general partner defended the action without the other partners having knowledge of the suit. The New York court entered judgment in plaintiff's favor against the general partner and partnership. After plaintiff entered notice of entry of the judgment in a California court, the partnership filed a motion to vacate the sister state judgment under *Code Civ. Proc. § 1710.40* on the basis that it had never been served in the New York action. The trial court denied the motion, finding that the partnership had been represented in the New York action by the general partner's attorney.

The appellate court reversed. The court did not squarely hold whether or not the service on the partnership in the New York action was adequate, but noted that even assuming that service was inadequate, defective service alone would not be a sufficient basis to vacate the judgment. The partnership would be required to plead and prove that it had a meritorious case, that is, that a different result would likely follow if the New York judgment were set aside and a new trial held (*12 Cal. App. 4th 74, 89-90)* . Reviewing applicable authority, the court stated that courts have consistently concluded that a general partner has no authority to bind the partnership on a contract of guaranty. The normal partnership is organized to carry on a business for its members, and not to assist other persons by becoming surety for them, or answerable for their debts. A partner has no authority to execute contracts of guaranty on behalf of the partnership without authority specially given him for the purpose, or implied from the common course of the business of the firm, or from the previous course of dealing between the parties, unless the act of the partner is afterward ratified by the copartners. The court concluded that defendant met its burden of pleading and proving it had a meritorious defense to the New York action; plaintiff failed to show that the partnership had specifically given the general partner the authority to execute contracts of guaranty on behalf of the partnership, that such authority could be implied from prior dealings between plaintiff and defendant, or that defendant later ratified the general partner's action (*12 Cal. App. 4th 74, 93-94)* .

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17-170 California Points & Authorities §§ 170.214-170.219

[Reserved]

§§ 170.214[Reserved]

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17-170 California Points & Authorities § 170.220

§ 170.220 Supporting Contention That Partnership Is Liable for Wrongful Act or Omission of Partner--Willful Misconduct, Recklessness, Negligence, Fraud, and Misrepresentation [Corp. Code § 16305(a); former Corp. Code § 15013]

[1] FORM Supporting Contention That Partnership Is Liable for Wrongful Act or Omission of Partner--Willful Misconduct, Recklessness, Negligence, Fraud, and Misrepresentation [Corp. Code § 16305(a); former Corp. Code § 15013]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with § 170.200 to set forth the scope of a partner's apparent authority to act*].

THE PARTNERSHIP IS LIABLE FOR THE _____ [*specify, e.g.*, RECKLESSNESS *or* NEGLIGENCE *or* MISREPRESENTATION] OF ITS PARTNER _____ [*name*] BECAUSE THE _____ [*specify, e.g.*, WRONGFUL ACT *or* OMISSION] WAS MADE WITHIN THE SCOPE OF THE PARTNER'S APPARENT AUTHORITY TO ACT.

A. Partnership Liable for Partner's Wrongful Act or Omission. A partnership is liable for loss or injury caused to a person or for a penalty incurred, as a result of a wrongful act or omission, or other actionable conduct, of a partner acting in the ordinary course of business of the partnership or with the authority of the partnership (*Corp. Code § 16305(a) or* former Corp. Code § 15013; *Madsen v. Cawthorne (1938) 30 Cal. App. 2d 124, 125, 85 P.2d 909*).

[*Optional*] **B. Partnership Liable for Partner's Willful and Malicious or Negligent Acts.** The principle on which liability rests is the same as that applicable to the relation of principal and agent, and master and servant. Every partner is the agent of the partnership. A principal is liable for the wrongful acts of his or her agent committed in the transaction of the principal's business. This liability includes willful and malicious acts as well as acts of simple negligence (*Madsen v. Cawthorne (1938) 30 Cal. App. 2d 124, 126, 85 P.2d 909*).

[*Optional*] **C. Partnership Liable for Partner's Fraud or Misrepresentation.** All partners are bound by the fraud of

one of the partners in contracts relating to the partnership made with innocent third parties, whether they are cognizant of the fraud or not (*Zemelman v. Boston Ins. Co. (1970) 4 Cal. App. 3d 15, 18, 84 Cal. Rptr. 206*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a partnership is bound by the acts of one of its partners. A partnership is liable for the wrongful act or omission of one of its partners acting in the ordinary course of business of the partnership [*Corp. Code § 16305(a)*; former Corp. Code § 15013; *Madsen v. Cawthorne (1938) 30 Cal. App. 2d 124, 125, 85 P.2d 909]* . Optional Paragraph B may be used to apply this rule to cases of willful or malicious acts or simple negligence [*see Madsen v. Cawthorne (1938) 30 Cal. App. 2d 124, 126, 85 P.2d 909]* . Optional Paragraph C may be used to apply the rule in cases of partner fraud and misrepresentation [*Zemelman v. Boston Ins. Co. (1970) 4 Cal. App. 3d 15, 18, 84 Cal. Rptr. 206]* . For example, the partnership may be liable for false insurance claims filed by one of its partners.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a partnership is liable for the injuries or other damages caused by the wrongful act or omission of one of its partners. These points and authorities also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that a third party was injured or suffered some form of damage as a result of some wrongful act or omission by a partner, and the act or omission occurred within the ordinary course of the partnership business.

[3] Discussion of Authorities

[a] Partnership Liable for Partner's Wrongful Act or Omission

In ***Madsen v. Cawthorne*** *(1938) 30 Cal. App. 2d 124, 85 P.2d 909* , defendant's partner was on partnership business when he was driving an automobile in a reckless manner while intoxicated. Plaintiff was a passenger in the automobile, and she received serious personal injuries when the automobile was involved in an accident. Plaintiff sued for her injuries, and at trial a jury rendered a verdict in her favor. Defendant appealed.

The appellate court affirmed, holding that a partnership is liable for injuries resulting from willful misconduct or intoxication of a copartner while he or she is engaged on the business of the partnership. The court noted that former Civ. Code § 2407 (*now see Corp. Code § 16305(a)*) provided in part that when, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership, loss or injury is caused to any person, the partnership is liable for that act to the same extent as the partner so acting or omitting to act (*30 Cal. App. 2d 124, 125)* . The court held that it is true that one partner is not presumed to concur in another partner's willful torts or clearly illegal acts even though such acts are connected with, but not within the scope of, partnership affairs. However, it held that the true test seems to be not the illegality or the malicious and willful character of the wrong, but whether it was done within the scope of the wrongdoing partner's authority. Such a determination must necessarily rest on the facts of the particular case (*30 Cal. App. 2d 124, 125-126)* .

[b] Partnership Liable for Partner's Willful and Malicious or Negligent Acts

The facts and procedural background of ***Madsen v. Cawthorne*** *(1938) 30 Cal. App. 2d 124, 85 P.2d 909* are discussed

in [a], *above*. In *Madsen*, the appellate court held that a partnership is liable for injuries resulting from willful misconduct or intoxication of a copartner while he or she is engaged on the business of the partnership. The court held that the principle on which the liability rests is the same as that applicable to the relation of principal and agent, and master and servant. It held that every partner is the agent of the partnership, and a principal is liable for the wrongful acts of his or her agent committed in the transaction of the principal's business. This liability includes willful and malicious acts as well as acts of simple negligence (*30 Cal. App. 2d 124, 126)* .

[c] Fraud or Misrepresentation

In ***Zemelman v. Boston Ins. Co.*** *(1970) 4 Cal. App. 3d 15, 84 Cal. Rptr. 206* , a partnership's premises were damaged by fire. Appellant partners brought an action against six insurance companies to recover the proceeds of fire insurance policies and interest on the proceeds. The respondents claimed in their answers that the policies were voided when one of the partners made false statements on behalf of the partnership in its claim for the proceeds. The trial court granted summary judgments to five of the insurance companies. Appellants appealed.

The appellate court affirmed, holding that all the partners will be bound by the fraud of one of the partners in contracts relating to the partnership made with innocent third parties. The court held that all of the partners are responsible for the injury occasioned by the fraud, whether they are cognizant of the fraud or not. The rule is the same as it is in respect to the responsibility of the principal for the fraud of his or her agent, while acting within the scope of his or her authority. A partner becomes liable for the fraud of his or her copartner because of the relation of agent each bears to the other in the partnership business. If it can be said that the partner's acts were done within the scope of his or her acts as copartner under former Corp. Code § 15009(1) [*see now Corp. Code §§ 16301, 16305*], then the partnership is bound to accept the legal consequences of those acts (*4 Cal. App. 3d 15, 18)* . The court held that the false filing of insurance claims were acts done with apparent authority (*4 Cal. App. 3d 15, 18-19)* .

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17-170 California Points & Authorities § 170.221

§ 170.221 Supporting Contention That Partnership Liable for Partner's Breach of Trust--Misapplication of Money or Property Belonging to Third Person [Corp. Code § 16305(b); former Corp. Code § 15014]

[1] FORM Supporting Contention That Partnership Liable for Partner's Breach of Trust--Misapplication of Money or Property Belonging to Third Person [Corp. Code § 16305(b); former Corp. Code § 15014]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with § 170.200 to set forth the scope of a partner's apparent authority to act*].

THE PARTNERSHIP IS LIABLE FOR THE BREACH OF TRUST BY ITS PARTNER _____ [*name*] BECAUSE THAT PARTNER MISAPPLIED THE _____ [MONEY *or* PROPERTY] BELONGING TO PLAINTIFF _____ [*name*] AND RECEIVED BY THAT PARTNER _____ [IN THE COURSE OF THE PARTNERSHIP'S BUSINESS *or* WHILE ACTING WITH AUTHORITY OF THE PARTNERSHIP].

Partnership Liable for Partner's Misapplication of Third Person's Money or Property. If, in the course of the partnership's business or while acting with authority of the partnership, a partner receives or causes the partnership to receive money or property of a person not a partner, and the money or property is misapplied by a partner, the partnership is liable for the loss (*Corp. Code § 16305(b) or* former Corp. Code § 15014; *Blackmon v. Hale (1970) 1 Cal. 3d 548, 557, 83 Cal. Rptr. 194, 463 P.2d 418*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a partnership is liable for a breach of trust by one of its partners. A partnership is liable for any loss occurring as a result of a partner's misapplication of money or property belonging to third parties if a partner receives or causes the partnership to receive the money or property in the course of the partnership's business or while acting with authority of the partnership [*Corp. Code § 16305(b)*; former

Corp. Code § 15014; *Blackmon v. Hale (1970) 1 Cal. 3d 548, 557, 83 Cal. Rptr. 194, 463 P.2d 418]* . For example, the partnership may be liable for the actions of one of its partners in diverting funds to his or her own use that have been given to him by a third party within the usual course of the partnership business.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a partnership is liable for a breach of trust by one of its partners. They also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that either the partnership or one of its partners has been entrusted with a third party's money or property, and the partner has misapplied the money or property.

[3] Discussion of Authorities

[a] Partnership Liable for Partner's Misapplication of Third Person's Money or Property

The facts and procedural background of ***Blackmon v. Hale*** *(1970) 1 Cal. 3d 548, 83 Cal. Rptr. 194, 463 P.2d 418* , are discussed in *§ 170.200[2]*. In *Blackmon*, the California Supreme Court held that if defendant's partner received plaintiff's investment funds while acting within the scope of his apparent authority, or if the partnership received the funds in the course of its business, defendant was jointly and severally liable for plaintiff's losses caused by the partner's diversion of the funds to his own use. The Court based its holding in part on former Corp. Code § 15014 [*see now Corp. Code § 16305(b)*], which provided that a partnership is bound to make good the loss (1) when one partner acting within the scope of his or her apparent authority receives money or property of a third person and misapplies it, and (2) when the partnership in the course of its business receives money or property of a third person and the money or property received is misapplied by any partner while it is in the custody of the partnership (*1 Cal. 3d 548, 557)* .

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17-170 California Points & Authorities § 170.222

§ 170.222 Supporting Contention That All Partners Are Liable for Partnership Obligations [Corp. Code § 16301; former Corp. Code § 15009]--Joint and Several Liability [Corp. Code § 16306; former Corp. Code § 15015(a)(1)]

[1] FORM Supporting Contention That All Partners Are Liable for Partnership Obligations [Corp. Code § 16301; former Corp. Code § 15009]--Joint and Several Liability [Corp. Code § 16306; former Corp. Code § 15015(a)(1)]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It may be combined with §§ 170.200-170.203 and §§ 170.220-170.221, as appropriate*].

DEFENDANT PARTNER[S] _____ [IS *or* ARE] JOINTLY AND SEVERALLY LIABLE FOR THE _____ [*specify debt, obligation, wrongful act, omission, or breach of trust, e.g.,* CONTRACT WITH PLAINTIFF THAT WAS ENTERED INTO BY _____ (DEFENDANT'S *or* DEFENDANTS') PARTNER _____ (*name*) UNDER _____ (*name*)'S APPARENT AUTHORITY *or* MISAPPLICATION OF THE FUNDS ENTRUSTED TO _____ (THE PARTNERS[S] *or* THE PARTNERSHIP) IN THE USUAL COURSE OF BUSINESS BY PLAINTIFF _____ (*name*)].

A. Joint and Several Liability. All partners are liable jointly and severally for all obligations of the partnership, unless otherwise agreed by the claimant or provided by law (*Corp. Code § 16306(a)*; former Corp. Code § 15015(a)(1); *Blackmon v. Hale (1970) 1 Cal. 3d 548, 557, 83 Cal. Rptr. 194, 463 P.2d 418* ; *Hobgood v. Glass (1958) 161 Cal. App. 2d 208, 211, 326 P.2d 546*).

[*Optional*] **B. Individual Partner Named as Party May Be Personally Liable If Served.** If service of process is made on a member of a partnership as an individual who is joined in an action against the partnership, whether or not he or she is also served as a person on whom service is made on behalf of the partnership, a judgment against him or her based on his or her personal liability may be obtained in the action, whether such liability is joint, joint and several, or several (*Code Civ. Proc. § 369.5*; *see Corp. Code § 16307*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that individual partners are jointly and severally liable for partnership obligations or other liabilities created by one of its partners [*Corp. Code § 16306(a)*; former Corp. Code § 15015]. Special rules apply to the liability of partners in a registered limited liability partnership (LLP) [*see Corp. Code § 16306(c)-(g)*; former Corp. Code § 15015(b)-(g)].

Partners who are named as individual defendants in an action are personally liable on a judgment rendered against them [*Code Civ. Proc. § 369.5*; *Corp. Code § 16307(b)*]. Thus, Optional Paragraph B may be used when counsel wishes to have judgment executed against a partner's personal property.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the partners are jointly and severally liable for the acts of one of the other partners. These points and authorities also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus counsel should discuss facts establishing either that a partner bound the partnership to a contract entered into under his or her apparent authority, or that the partnership is liable for the wrongful acts, omissions or breach of trust by one of its partners, and therefore the other partners are also liable.

[c] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 170.240 -170.241* may be used to oppose the contention supported by these points and authorities.

[d] Related Pleading and Practice Forms

For a complaint for damages by an injured party against the partnership and partners individually and as members of the partnership, see *California Forms of Pleading and Practice, Ch. 402, Partnerships: Actions Between General Partners or Partnership and Third Parties, § 402.42* (Matthew Bender).

[3] Discussion of Authorities

[a] Joint and Several Liability

The facts and procedural background of ***Blackmon v. Hale*** *(1970) 1 Cal. 3d 548, 83 Cal. Rptr. 194, 463 P.2d 418* , are discussed in *§ 170.200[3]*. In *Blackmon*, the California Supreme Court held that if defendant's partner received plaintiff's investment funds while acting within the scope of his apparent authority, or if the partnership received the funds in the course of its business, defendant was jointly and severally liable for plaintiff's losses caused by the partner's diversion of the funds to his own use. The Court based its holding in part on former Corp. Code § 15015(a) [*now see* Corp. Code § 15306], which provided that each partner is jointly and severally liable for the misapplication of funds belonging to a third party by another partner when the misapplication is chargeable to the partnership under former Corp. Code § 15014 [*now see Corp. Code § 16305(b)*] (*1 Cal. 3d 548, 557)* .

[4] Additional Authorities

[a] Joint Liability

In *Jans v. Nelson (2000) 83 Cal. App. 4th 848, 100 Cal. Rptr. 2d 106* , a partnership borrowed $750,000 from a bank.

The bank required each owner of the partnership to execute a general continuing guarantee in favor of the bank. After the partnership business ceased operations, the loan went into default and the bank sued all of the guarantors. The bank obtained judgments against some partners and entered into settlement agreements with others. Ultimately, one partner who had paid to the bank a portion of partnership debt for which all partners were co-guarantors brought an action for contribution against the other partners. The trial court concluded that each solvent guarantor was responsible in equity for an equal share of the total sum paid to the bank. The appellate court reversed. It first stated that the question presented -- what is the appropriate contributory share among partners who are sureties of a partnership debt -- had not been decided in any known published opinion (*83 Cal. App. 4th 848, 851)* . The court examined the "proportionate contribution" concept set forth in *Civ. Code §§ 1432, 2848* (*83 Cal. App. 4th 848, 855-856)* . It concluded that in a circumstance in which all limited partners execute guaranties of a partnership debt and there is no other express agreement concerning rights of contribution, equity requires the proportionate obligation for contribution to be based upon the ownership interest of the various guarantors. Thus, plaintiff was entitled to recover contribution from other solvent partners but the amount of contribution was limited to the excess of his actual payments over his own fair share of the debt (*83 Cal. App. 4th 848, 852, 858-859)* .

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17-170 California Points & Authorities § 170.223

§ 170.223 Supporting Contention That All Partners Are Liable for Partnership Debts and Obligations [Corp. Code § 16301; former Corp. Code § 15009] or Individual Partner's Wrongful Acts, Omissions, or Breaches of Trust [Corp. Code § 16305; former Corp. Code §§ 15013, 15014]--Dormant or Undisclosed Partners

[1] FORM Supporting Contention That All Partners Are Liable for Partnership Debts and Obligations [Corp. Code § 16301; former Corp. Code § 15009] or Individual Partner's Wrongful Acts, Omissions, or Breaches of Trust [Corp. Code § 16305; former Corp. Code §§ 15013, 15014]--Dormant or Undisclosed Partners

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It may be combined with §§ 170.200-170.203 and §§ 170.220-170.221, as appropriate*].

DEFENDANT _____ [*name of partner*] IS LIABLE FOR _____ [*specify obligation incurred, e.g.,* THE LOAN AGREEMENT ENTERED INTO BY _____ (*name of partner)*, THE ACTIVE PARTNER, ON BEHALF OF THE PARTNERSHIP AND WHICH REMAINS UNPAID] BECAUSE DEFENDANT IS A DORMANT PARTNER WHO WAS A PARTNER, BUT REMAINED UNDISCLOSED, AT THE TIME OF THE TRANSACTION, AND PLAINTIFF _____ [*name of creditor*] IS ENTITLED TO RECOVER AGAINST ALL THE PARTNERS.

Partnership Debts Chargeable to Dormant Partners. In cases of secret partnership and dormant partners, a creditor is entitled to recover from all the partners when discovered, although the debt was not originally charged to all. Even though one partner holds himself or herself out as the sole owner, the ostensible partner is the agent of the dormant one, and the latter is bound by his or her representations (*Schwaegler Co. v. Marchesotti (1948) 88 Cal. App. 2d 738, 743, 199 P.2d 331* ; *Bissell v. King (1928) 91 Cal. App. 420, 423, 267 P. 356*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a dormant or secret partner is liable for

partnership obligations. Creditors may recover against all the partners whenever they are discovered for partnership obligations entered into by an individual partner even if the partner represents himself or herself to be the sole owner of the business, and the debt or obligation was not originally charged to all [*Schwaegler Co. v. Marchesotti (1948) 88 Cal. App. 2d 738, 743, 199 P.2d 331* ; *Bissell v. King (1928) 91 Cal. App. 420, 423, 267 P. 356]* . Thus, a partner cannot protect himself or herself from partnership obligations by remaining undisclosed during partnership transactions.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that one of the parties was a dormant partner, and he or she is liable with the other partner or partners for an obligation incurred on behalf of the partnership while the dormant partner remained undisclosed. They also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that although an obligation was incurred by an agreement procured by an individual partner or partners, there was a partner who remained undisclosed to the third party with whom the active partner or partners were dealing.

[2] Discussion of Authorities

[a] Partnership Debts Chargeable to Dormant Partners

In ***Schwaegler Co. v. Marchesotti*** *(1948) 88 Cal. App. 2d 738, 199 P.2d 331* , defendant was the undisclosed principal in a farming partnership. Plaintiff acted as the partnership's broker for three carloads of partnership onions that were shipped to plaintiff for sale. As an accommodation to the partnership, plaintiff paid drafts attached to the bills of lading and drawn by the partnership in the partnership name. When plaintiff then attempted to sell the onions, they were rejected by the purchasers. The partnership only repaid one-half of the sum advanced by plaintiff on the aforementioned drafts, and plaintiff brought suit for money had and received. The trial court rendered judgment for plaintiff, and against defendant and his partner jointly. Defendant appealed.

The appellate court affirmed, holding that the drawing of the drafts by the partnership against plaintiff created an obligation against the undisclosed partner jointly with his partner. The court held that in cases of secret partnership and dormant partners, a creditor is entitled to recover from all the partners when discovered, though the debt was not originally charged to all, and even though one partner holds himself or herself out as the sole owner, the ostensible partner is the agent of the dormant one, and the latter is bound by his or her representations. As a rule, the dormant partner is liable to the partnership creditors to the same extent as if he or she were known to the creditor at the time the credit was obtained, under the doctrine that an undisclosed principal is liable for the acts of his or her agent (*88 Cal. App. 2d 738, 743)* .

The facts and procedural background of ***Bissell v. King*** *(1928) 91 Cal. App. 420, 267 P. 356* , are discussed § 170.202[4]. In *Bissel*, the appellate court held that the managing partner had authority to borrow money and execute promissory notes, and the defendant passive partner was bound thereby (*91 Cal. App. 420, 425-426)* . Plaintiff had loaned money to the partnership after a discussion with defendant that the managing partner had purchased defendant's interest in the partnership. The court held that defendant was bound as the managing partner's partner irrespective of whether or not plaintiff thought, from the aforementioned discussion, that defendant owned an interest in the partnership. The court held that this is because a partner's liability is measured not by the impression a third party dealing with the partnership may have respecting his or her interest in the partnership, but is measured by whether or not he or she is a partner. Thus, in cases of secret partnership and dormant partners, a creditor is entitled to recover from all the partners when discovered, though the debt was not originally charged to all, and even though one partner holds himself or herself out as the sole owner, the ostensible partner is the agent of the dormant one, and the latter is bound by

his or her representations (*91 Cal. App. 420, 423)* .

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17-170 California Points & Authorities § 170.224

§ 170.224 Supporting Contention That All Partners Are Liable for Partnership Debts and Obligations or Individual Partner's Wrongful Acts, Omissions, or Breaches of Trust--Ostensible Partner by Estoppel [Corp. Code § 16308; former Corp. Code § 15016]

[1] FORM Supporting Contention That All Partners Are Liable for Partnership Debts and Obligations or Individual Partner's Wrongful Acts, Omissions, or Breaches of Trust--Ostensible Partner by Estoppel [Corp. Code § 16308; former Corp. Code § 15016]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It may be combined with §§ 170.200-170.203 and §§ 170.220-170.221, as appropriate*].

DEFENDANT _____ [*name*] IS LIABLE WITH THE OTHER _____ [PARTNERS IN THE DEFENDANT PARTNERSHIP *or* DEFENDANT[S]] TO PLAINTIFF _____ [*name of creditor*] _____ [*specify obligation incurred, e.g.,* ON AN OPEN BOOK ACCOUNT FOR MERCHANDISE SOLD AND DELIVERED] BECAUSE DEFENDANT _____ [*name*] BECAME AN OSTENSIBLE PARTNER BY _____ [REPRESENTING or CONSENTING TO OTHERS REPRESENTING] THAT HE/SHE WAS A _____ [MEMBER OF THE PARTNERSHIP or PARTNER WITH THE OTHER DEFENDANT[S]] WHEN THAT OBLIGATION WAS INCURRED.

A. Ostensible Partner or Partnership by Estoppel. If a person, by words or conduct, purports to be a partner, or consents to being represented by another as a partner in a partnership or with one or more persons not partners, the purported partner is liable to the person to whom the representation was made if that person, relying on the representation, enters into a transaction with the actual or purported partnership. If the representation, either by the purported partner or by a person with the purported partner's consent, is made in a public manner, the purported partner is liable to a person who relies on the purported partnership, even if the purported partner is not aware of being held out as a partner to the claimant. If partnership liability results, the purported partner is liable with respect to that liability as if he or she were a partner. If no partnership liability results, the purported partner is liable with respect to that liability jointly and severally with any other persons consenting to the representation (*Corp. Code § 16308(a) or* former Corp.

Code § 15016(1); *Dodd v. Tebbetts (1926) 198 Cal. 333, 339-340, 244 P. 1081*).

B. Test of Ostensible Partnership. When it is contended that a defendant is an ostensible partner, the question is whether his or her acts and conduct were sufficient to lead the creditor to believe that he or she was a partner and that he or she assumed responsibility as such (*J & J Builders Supply v. Caffin (1967) 248 Cal. App. 2d 292, 297, 56 Cal. Rptr. 365*).

C. Standard by Which to Hold Party Liable as Ostensible Partner. Representations or acts to hold a party liable as a partner to third persons need not be actuated by an actual intent to deceive. It is sufficient if the representations or acts are such as to induce a reasonable and prudent person to believe that which the conduct would imply (*Crabbe v. Mires (1952) 112 Cal. App. 2d 456, 459, 246 P.2d 991*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a person is liable as an ostensible partner for a debt or other obligation incurred based on a representation that the person was a partner.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a person, through his or her words or conduct, represents or consents to a representation being made, that he or she is a partner in an existing partnership or with other persons. These points and authorities also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing conduct, or oral or written representations establishing ostensible partnership.

[c] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 170.241* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Ostensible Partner or Partnership by Estoppel

Corp. Code § 16308(a) [*see* former Corp. Code § 15016(1) (pre-'97 Act)] provides that if a person represents, or allows another to represent, that he or she is a member of a partnership, or that he and another person or persons are partners, the person making the representation or consenting to it may be liable for any obligations incurred as if he or she were a partner. If partnership liability results, the ostensible partner will be liable with respect to that liability as if he or she were a partner. If no partnership liability results, the purported partner is liable with respect to that liability jointly and severally with other persons who consent to his or her representations [*Corp. Code § 16308(a)*; former Corp. Code § 15016(1)(b)].

In ***Dodd v. Tebbetts*** *(1926) 198 Cal. 333, 244 P. 1081* , plaintiff gave some securities to the first defendant's partnership. On that date, the first defendant executed a promissory note to a bank in the partnership name, and deposited the securities with the bank as security for the notes. In order to procure the loan, the first defendant told the bank that the second defendant was a partner in the partnership. The second defendant signed a written statement

representing herself to be a partner. Thereafter, defendants defaulted on the note, and plaintiff was forced to pay the note to get his securities back. Plaintiff then sued both defendants to recover the amount of the note. The trial court rendered judgment for plaintiff against defendants doing business as the partnership. The second defendant appealed.

The California Supreme Court affirmed, holding that the utmost that could be claimed was that the second defendant represented herself to the bank to be a partner in the partnership and that on the faith of that representation the bank gave credit to the partnership (*198 Cal. 333, 339)* . The Court observed that the statute then in effect, former Civ. Code § 2444, provided that anyone permitting himself or herself to be represented as a partner, general or special, is liable, as such to third persons to whom the representation is communicated, and who, on the faith of the representations, give credit to the partnership. The Court held that the rule of responsibility and liability declared in former Civ. Code § 2444 is founded on the equitable doctrine of estoppel (*198 Cal. 333, 339-340)* .

[b] Test of Ostensible Partnership

In ***J & J Builders Supply v. Caffin*** *(1967) 248 Cal. App. 2d 292, 56 Cal. Rptr. 365* , defendants met with plaintiff corporation to inform it that the first defendant, with whom plaintiff had already been doing business, and the second defendant were going into business as partners. The first defendant introduced the second defendant as his new partner, and asked plaintiff to have his existing open account changed to the new partnership name. The second defendant said nothing during the meeting. The account was changed, and plaintiff began delivering materials to the partnership. When plaintiff's invoices were not paid, plaintiff's representative attempted to collect payment. However, the second defendant told plaintiff's representative that he was not personally liable because the association was actually a corporation. In fact, defendants had participated in forming a corporation with plaintiff's knowledge, but plaintiff believed that the corporation and the partnership were separate companies. Plaintiff then sued both defendants individually and as partners doing business as the partnership in order to recover the balance owed. The trial court rendered judgment in plaintiff's favor. Defendants appealed, contending that plaintiff had prior notice that their corporation was the principal because they filed on its behalf a certificate of doing business under a fictitious firm name.

The appellate court affirmed, holding that when it is contended that a defendant is an ostensible partner, the question is whether his or her acts and conduct were sufficient to lead the creditor to believe that he or she was a partner and that he or she assumed responsibility as such. The court held that the first defendant's declarations of partnership in the second defendant's presence under circumstances in which the second defendant must have known that a response negating the first defendant's representation should be made to avoid misleading plaintiff, were properly received as adoptive admissions of the second defendant (*248 Cal. App. 2d 292, 297)* . The court held that these facts, plus the extension of credit to the defendants in the fictitious name that the defendants led plaintiff to believe was the partnership name, were sufficient to sustain the liability of the second defendant as an ostensible partner of the first defendant (*248 Cal. App. 2d 292, 298)* .

[c] Standard by Which to Hold Party Liable as Ostensible Partner

In ***Crabbe v. Mires*** *(1952) 112 Cal. App. 2d 456, 246 P.2d 991* , plaintiff sued to recover for equipment and dredging supplies sold, delivered to, and used by four defendants. One of the defendants made credit arrangements with plaintiff, telling plaintiff that a new company was to be formed, and that two of the other defendants had put up capital to enable the operation to be continued. Defendant did not state whether the organization was to be a corporation or a partnership. When plaintiff was not paid for the merchandise, he sued the defendants individually and doing business as a partnership. The trial court found that all of the defendants orally, in writing, and by their conduct represented themselves to various creditors and plaintiff to be partners in an existing partnership. It found that in reliance on the representations, plaintiff gave credit to the partnership. The court also found that the representations were made and consented to be made by all of the defendants in a public manner. Two of the defendants appealed.

The appellate court affirmed. The court stated that if a judgment is attacked as being unsupported by the evidence, the

power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, that will support the conclusions reached by the trial court. The court was satisfied that the record amply supported the judgment (*112 Cal. App. 2d 456, 458)* . The court held that representations or acts need not be actuated by the actual intent to deceive; it is sufficient if the course of conduct is such as to induce a reasonable and prudent person to believe that which the conduct would imply. It held that this was a question of fact to be determined by the trial court (*112 Cal. App. 2d 456, 459)* .

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[Reserved]

§§ 170.225[Reserved]

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17-170 California Points & Authorities § 170.240

§ 170.240 Opposing Contention That All Partners Are Liable for Partnership Debts and Obligations or Individual Partner's Wrongful Acts, Omissions, or Breaches of Trust--Judgment Against Partnership Not a Judgment Against Partner

[1] FORM Opposing Contention That All Partners Are Liable for Partnership Debts and Obligations or Individual Partner's Wrongful Acts, Omissions, or Breaches of Trust--Judgment Against Partnership Not a Judgment Against Partner

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

THE JUDGMENT CANNOT BE ENFORCED AGAINST THE INDIVIDUAL PROPERTY OF DEFENDANT _____ [*name*] BECAUSE A JUDGMENT WAS NEVER OBTAINED AGAINST HIM/HER IN THE SUBJECT ACTION [AND THE JUDGMENT AGAINST THE PARTNERSHIP MAY NOT BE ENFORCED AGAINST THE PARTNERS INDIVIDUAL ASSETS].

Partner's Individual Property Not Liable for Judgment Against Partnership. A judgment against a partnership is not by itself a judgment against a partner. A judgment against a partnership may not be satisfied from a partner's assets unless there is also a judgment against the partner (*Corp. Code § 16307(c)*; *see Promotus Enter., Inc. v. Jiminez (1971) 21 Cal. App. 3d 560, 564, 98 Cal. Rptr. 571*); *Fazzi v. Peters (1968) 68 Cal. 2d 590, 594-598, 68 Cal. Rptr. 170, 440 P.2d 242* .

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that an individual partner's property is bound by a judgment based on the partnership's obligations. In an action against a partnership, a judgment against a partnership may not be satisfied from a partner's assets unless there is also a judgment against the partner [*Corp. Code § 16307(c)*; *see Promotus Enter., Inc. v. Jiminez (1971) 21 Cal. App. 3d 560, 564, 98 Cal. Rptr. 571]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a partner's individual property is not bound by a judgment against the partnership because there is no judgment against the partner. These points and authorities also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should present facts showing that a judgment was never obtained against the partner in the subject action.

[c] Opposing Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 170.222*.

[3] Discussion of Authorities

[a] Partner's Individual Property Not Liable Without Judgment Against Partner

Corp. Code § 16307(c) provides that a judgment against a partnership is not by itself a judgment against a partner. A judgment against a partnership may not be satisfied from a partner's assets unless there is also a judgment against the partner.

Promotus Enter., Inc. v. Jiminez *(1971) 21 Cal. App. 3d 560, 98 Cal. Rptr. 571* , decided prior to enactment of *Corp. Code § 16307(c)*, the UPA'94 provision discussed *above*, involved a limited partnership formed for the purpose of promoting and leasing a juke-box type of device. Defendant was the partnership's sales representative, and had an interest in the profits. Plaintiff commenced an action in one county based on an obligation assumed by the partnership at its inception. The action named defendant and his partner as general partners as well as naming them as individuals. However, defendant was never served process, and did not appear in the action. A judgment was entered in the action against the partnership. Plaintiff brought a subsequent action in another county to enforce the judgment. The trial court found that the prior judgment was unenforceable to the extent that it attempted to bind defendant's individual property. Plaintiff appealed.

The appellate court affirmed, holding that although statutory authority permits a plaintiff who is entitled to recover to enter judgment against all of the partners even though only one, or less than all of them, has been served, execution on such a judgment is limited to the partnership property and the real and personal property of the partners summoned. The judgment is not enforceable against the person or sole property of a partner who was not summoned. A partner can be individually bound by the judgment, over and above his or her interest in the partnership property, only if he or she was served in the action or authorized an appearance in it on his or her behalf (*21 Cal. App. 3d 560, 564)* . Thus, the court held that the prior judgment was void against defendant as an individual, but valid to the extent of his interest in the partnership and his possession of partnership assets (*21 Cal. App. 3d 560, 567)* .

In ***Fazzi v. Peters*** *(1968) 68 Cal. 2d 590, 68 Cal. Rptr. 170, 440 P.2d 242* , decided prior to enactment of *Corp. Code § 16307(c)*, the UPA'94 provision discussed *above*, a partnership was named in a complaint as consisting of several Does whose true names were unknown at the time, but which would be inserted when ascertained. The individual partners were not named as defendant parties in the summons that were thereafter issued. One partner was served as a person being sued under the fictitious name of Doe. However, the complaint was never amended to reflect his true name. The other partner was also served, but not as a person sued under a fictitious name. The complaint also was never amended to reflect his true name. Neither the partners nor the partnership appeared in the action, and a default judgment

was entered allowing plaintiffs to recover from the partners individually and doing business as the partnership, jointly and severally. One of the partners subsequently moved to have the judgment against him set aside on the ground that it was void because the court had no jurisdiction to enter an in personam judgment against him as an individual. The motion was denied. Defendant appealed.

The California Supreme Court reversed, holding that the self-evident proposition that a judgment in personam may not be entered against one not a party to the action was applicable to this case (*68 Cal. 2d 590, 591)* . The Court noted that the former version of Code Civ. Proc. § 388 provided that when a partnership was sued by its common name with summons being served on one or more of the partners, a judgment bound the joint property of all the partners and the individual property of the partners served. Nevertheless, the Court held that this section was never intended to abrogate the elementary common law principle that a judgment may not be entered either for or against one not a party to an action or proceeding (*68 Cal. 2d 590, 592-594)* . The legislative history of the former version of Code Civ. Proc. § 388 manifested a continuing legislative effort to permit efficient enforcement of claims against the joint property of partnerships while facilitating concurrent enforcement of claims against the individual property of partners joined as defendants (*68 Cal. 2d 590, 595)* . The Court noted that the original version of former Code Civ. Proc. § 388 did not contain the language regarding the individual property of the partners served; it was added because the statute might have been construed to mean that individual partner property could by no means be bound in an action under the section even if those partners were joined as defendants (*68 Cal. 2d 590, 595-596)* . The Court stated that it thereafter formulated the principle that the added language did not render individual partners "parties" to the suit unless they were so named, but if partners were joined with the partnership as defendants a judgment against them in their individual capacities was valid, based on their statutory joint liability (*68 Cal. 2d 590, 596-597)* .

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Volume 17 Chapters 170-179 PARTNERSHIPS---to---PREMISES LIABILITY
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1. General Partnerships

17-170 California Points & Authorities § 170.241

§ 170.241 Opposing Contention That All Partners Are Liable for Partnership Debts and Obligations or Individual Partner's Wrongful Acts, Omissions, or Breaches of Trust--Failure to Plead Ostensible Partnership [Corp. Code § 16308; former Corp. Code § 15016]

[1] FORM Opposing Contention That All Partners Are Liable for Partnership Debts and Obligations or Individual Partner's Wrongful Acts, Omissions, or Breaches of Trust--Failure to Plead Ostensible Partnership [Corp. Code § 16308; former Corp. Code § 15016]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT _____ [*name*] CANNOT BE HELD LIABLE AS AN OSTENSIBLE PARTNER _____ [*specify obligation incurred, e.g.,* ON THE OPEN BOOK ACCOUNT FOR MERCHANDISE SOLD AND DELIVERED TO DEFENDANT _____ (*name*)] BECAUSE THE COMPLAINT CONTAINS NO ALLEGATIONS OF PARTNERSHIP, OSTENSIBLE OR OTHERWISE.

Ostensible Partnership Must Be Pleaded. A plaintiff who relies on the doctrine of partnership by estoppel must plead facts establishing that estoppel (Moen v. Art's Cafe *(1950) 95 Cal. App. 2d 577, 579, 213 P.2d 393*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that a the party is an ostensible partner, and thus liable for debts or other obligations procured on behalf a purported partnership [*see Corp. Code § 16308*; former Corp. Code § 15016]. A judgment cannot stand against a party as an ostensible partner in an existing partnership or with other persons if the existence of a partnership, ostensible or otherwise, has not been pleaded [*Moen v. Art's Cafe (1950) 95 Cal. App. 2d 577, 579, 213 P.2d 393]* . Thus, in order to prevail on a claim that a person is estopped from claiming that he or she is not a partner, a plaintiff must include allegations of ostensible partnership in his or her complaint.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a party may not be held liable as an ostensible partner. For example, the points and authorities may be used to support a demurrer to a complaint when the existence of a partnership has not been pleaded. It also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that no cause of action has been stated because an ostensible partnership has not been pleaded. This normally be done by showing that the complaint is deficient on its face in this respect.

[c] Opposing Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 170.224*.

[3] Discussion of Authorities

[a] Ostensible Partnership Must Be Pleaded

In **Moen v. Art's Cafe** *(1950) 95 Cal. App. 2d 577, 213 P.2d 393* , one defendant leased a restaurant to the other defendant for five years. The lease provided for a monthly rental represented by a fixed sum or a certain percentage of the gross receipts, whichever was greater, and that defendant lessee was the sole proprietor of the business and premises. The liquor license for the restaurant was taken out in the names of both defendants. The business was conducted solely by the defendant lessee. Plaintiff's assignors delivered liquor to the premises, and billed defendants whose names were on the license. Some of the liquor bills were paid by checks signed by defendant lessee. When the rest of the bills remained unpaid, plaintiff brought an action against defendants on an open book account for the balance due. The trial court rendered judgment against defendant lessee, but found that plaintiff was entitled to nothing as against defendant lessors. Plaintiff appealed.

The appellate court affirmed, holding that the rule of responsibility and liability declared in former Corp. Code § 15016 [*now see Corp. Code § 16308*] is founded on the doctrine of equitable estoppel. The court held that a plaintiff who relies on the doctrine of partnership by estoppel as declared in former Corp. Code § 15016 must plead the facts establishing that estoppel in order to be entitled to make proof of the same or to have the benefit of a finding predicated on the section. It held that the complaint in this case failed to state facts sufficient to establish liability under former Corp. Code § 15016 because there was no allegation of the existence of a partnership between the defendants, ostensible or otherwise. It was not alleged that defendant lessors represented themselves as members of a partnership, nor was it alleged that plaintiff's assignors extended credit to defendant lessors by reason of any words, acts, or conduct of defendants (*95 Cal. App. 2d 577, 579-580)* .

[4] Additional Authorities

[a] Existence of Ostensible Partnership

In *Armato v. Baden (1999) 71 Cal. App. 4th 885, 897-899, 84 Cal. Rptr. 2d 294* , a former patient of a medical group who was treated by a physician assistant employed by the group filed an action against independent contractor doctors who worked part time for the group. Plaintiff alleged that defendants' conduct created an ostensible partnership within the group so that the doctors were jointly liable for the negligent treatment plaintiff allegedly received from the physician assistant. The trial court granted summary judgment for defendants and the appellate court affirmed. The

court held even if former Corp. Code § 15016 applied, it did not support imposition of liability since defendants did not represent themselves (or consent to another representing them) as "partners in an existing partnership" or as a partner "with one or more persons not actual partners." The mere listing of the independent contractor doctors' names on the door to the medical group's office and on appointment cards and prescription pads did not reasonably induce the belief that the doctors and group's physician assistant, or doctors and medical group, were copartners (*71 Cal. App. 4th 885, 898-899)* .

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17-170 California Points & Authorities § 170.242

§ 170.242 Opposing Contention That All Partners Are Liable for Partnership Obligations--Incoming Partner Is Not Personally Liable for Existing Partnership Obligations [Corp. Code § 16306(b); former Corp. Code § 15017]

[1] FORM Opposing Contention That All Partners Are Liable for Partnership Obligations--Incoming Partner Is Not Personally Liable for Existing Partnership Obligations [Corp. Code § 16306(b); former Corp. Code § 15017]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT _____ [*name of incoming partner*] IS NOT PERSONALLY LIABLE FOR _____ [*specify preexisting partnership debt or obligation, e.g.,* THE AMOUNT DUE ON THE PARTNERSHIP'S OPEN BOOK ACCOUNT WITH PLAINTIFF _____ (*name*)] BECAUSE THERE WAS NO AGREEMENT BETWEEN DEFENDANT _____ [*name of incoming partner*] AND THE PARTNERSHIP OR THE EXISTING CREDITORS THAT HE/SHE WOULD ASSUME THE _____ [OBLIGATION *or* DEBT].

Incoming Partner Presumed Not Personally Liable for Preexisting Partnership Debts. A person admitted as a partner into an existing partnership is not personally liable for any partnership obligation incurred before the person's admission as a partner (*Corp. Code § 16306(b)*; *see Wine Packing Corp. of Cal. v. Voss (1940) 37 Cal. App. 2d 528, 533-534, 100 P.2d 325*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that an incoming partner is personally liable for the partnership's preexisting debts or obligations. A person admitted as a partner into an existing partnership is not personally liable for any partnership obligation incurred before the person's admission as a partner [*Corp. Code § 16306(b)*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that an incoming partner is not individually responsible for partnership debts or obligations incurred before he or she became a partner. They also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Incoming Partner Presumed Not Personally Liable for Preexisting Partnership Debts

Corp. Code § 16306(b) provides that a person admitted as a partner into an existing partnership is not personally liable for any partnership obligation incurred before the person's admission as a partner.

In ***Wine Packing Corp. of Cal. v. Voss*** *(1940) 37 Cal. App. 2d 528, 100 P.2d 325* , decided before enactment of *Corp. Code § 16306(b)*, the UPA'94 provision discussed *above*, a sole proprietor in the wine business bought wine from respondent on an open book account. Shortly thereafter, appellant and another person became the proprietor's partners in the business. All the merchandise on the subject account was sold and delivered to appellant before the partnership was formed. When the account was not paid, respondent sued appellant and several fictitious defendants doing business as a partnership to recover the amount due. Judgment was rendered against appellant as a surviving partner of the partnership. The trial court found that as a part of the transaction of acquiring the business as a partnership business, the partnership assumed liability for outstanding debts and obligations of the prior business. Appellant appealed.

The appellate court reversed, holding that it was clear that the partnership, and not appellant, was held by the trial court to have made the assumption of the business' original obligations (*37 Cal. App. 2d 528, 532)* . Thus, the court held that if appellant was to be held individually liable for the sole proprietor's indebtedness to respondent because of an assumption by the partnership, it had to be based on the bare fact that because appellant bought into a going business that owed money, liability was automatically fastened on him for the old indebtedness payable out of his own pocket and not recoverable out of partnership property as provided by former Civ. Code § 2411 (thereafter former Corp. Code § 15017) (*37 Cal. App. 2d 528, 533)* . The court declined to so hold, and instead held that the general rule states that a person becoming a member of an existing partnership, or forming a partnership with another in the latter's existing business, does not thereby become liable for the debts already incurred, nor does the new partnership become liable for them. An agreement, express or implied, is necessary to create such liability, not only between the creditors and the new partnership but also as between the partners. In other words, the presumption is against the assumption of such liability, and the burden to prove it is on the one who asserts it (*37 Cal. App. 2d 528, 533-534)* .

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17-170 California Points & Authorities §§ 170.243-170.249

[Reserved]

§§ 170.243[Reserved]

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2. Joint Ventures

17-170 California Points & Authorities § 170.250

§ 170.250 Supporting Contention That Act of Joint Venturer Binds Joint Venture [Corp. Code § 16301; former Corp. Code § 15009]--Joint Venturer as Agent Has Authority to Bind Other Joint Venturers by Contract

[1] FORM Supporting Contention That Act of Joint Venturer Binds Joint Venture [Corp. Code § 16301; former Corp. Code § 15009]--Joint Venturer as Agent Has Authority to Bind Other Joint Venturers by Contract

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

_____ [PLAINTIFF *or* DEFENDANT] JOINT VENTURER[S] _____ [WAS *or* WERE] BOUND BY THE ACT OF THEIR FELLOW JOINT VENTURER[S] IN _____ [*specify, e.g.,* ENTERING INTO THE AGREEMENT WITH _____ (PLAINTIFF *or* DEFENDANT) _____ (*name*) TO SELL THE SUBJECT PROPERTY] BECAUSE THE ACTIVE JOINT VENTURER[S] _____ [WAS *or* WERE] ACTING AS THE JOINT VENTURE'S AGENT[S] FOR THE PURPOSE OF ITS BUSINESS.

A. Law of Partnerships as to Third Parties Applies to Joint Ventures. The relations of joint venturers as between themselves and as to third parties are generally the same as those of partners, and to the extent they are the same, the law of partnerships applies to both (*Orlopp v. Willardson Co. (1965) 232 Cal. App. 2d 750, 754, 43 Cal. Rptr. 125*).

B. Joint Venturers Are Agents in Transaction of Enterprise Business. Each member of a joint venture is the agent of the others for the purpose of its business (*Corp. Code § 16301(1) or* former Corp. Code § 15009(1); *Bariffi v. Longridge Dev. Co. (1958) 156 Cal. App. 2d 583, 592, 320 P.2d 192* ; *Eng'g Serv. Corp. v. Longridge Inv. Co. (1957) 153 Cal. App. 2d 404, 410, 314 P.2d 563*).

[*Optional*] **C. Authority to Bind Joint Venture in Contract**. The rules governing liability of partners for partnership debts also apply to joint ventures. Each joint venturer, therefore, has authority to bind the others in making contracts reasonably necessary to carry out the enterprise (*Medak v. Cox (1970) 12 Cal. App. 3d 70, 76 fn. 2, 90 Cal. Rptr. 452* ; *Lindner v. Friednash (1958) 160 Cal. App. 2d 511, 517, 325 P.2d 612*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a joint venturer is bound by the acts of one or more of his or her fellow joint venturers. Generally, the law of partnerships applies to joint ventures [*Orlopp v. Willardson Co. (1965) 232 Cal. App. 2d 750, 754, 43 Cal. Rptr. 125]* . Like partners, each member of a joint venture is the agent of the others for the purpose of the joint venture's business [*Corp. Code § 16301(1)*; former Corp. Code § 15009(1); *Bariffi v. Longridge Dev. Co. (1958) 156 Cal. App. 2d 583, 592, 320 P.2d 192]* . For example, a joint venturer can bind his or her fellow venturers by contracts with third persons within the scope of the joint enterprise [*Medak v. Cox (1970) 12 Cal. App. 3d 70, 76 fn. 2, 90 Cal. Rptr. 452]* .

Because the general principles regarding the authority of joint venturers to act for the joint venture are essentially the same as those that govern partnerships, the forms in this chapter generally may be used to support or oppose similar contentions that arise in the context of a joint venture.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the act of a joint venturer binds the joint venture in the transaction of its business. These points and authorities also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that a joint venturer acted on behalf of the joint venture in transacting business.

[c] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 170.255* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Law of Partnerships as to Third Parties Applies to Joint Ventures

The facts and procedural background of ***Orlopp v. Willardson Co.*** *(1965) 232 Cal. App. 2d 750, 43 Cal. Rptr. 125* , are discussed in *§ 170.50[4]*. In *Orlopp*, the appellate court held that as appellant was in the position of an undisclosed or dormant partner in a joint venture between it and an egg and poultry company, it was fully as liable for a balance due on an open book account in the company's name as an ostensible partner. The court reached this result by first holding that the relations of joint venturers as between themselves and as to third parties are generally the same as those of partners, and to the extent they are the same, the law of partnerships applies to both (*232 Cal. App. 2d 750, 754)* .

[b] Joint Venturers Are Agents in Transaction of Enterprise Business

In ***Bariffi v. Longridge Dev. Co.*** *(1958) 156 Cal. App. 2d 583, 320 P.2d 192* , a developer entered into an escrow to purchase a parcel of real property. Thereafter, he entered into a joint venture agreement with two other persons to obtain sufficient financing to comply with the escrow. Developer agreed with his associates to contribute some cash and to convey the property to an escrow company as trustee. The joint venture agreement provided that anyone else who participated and invested in the venture would be beneficiaries in the aforementioned trust. Thereafter, a joint bank account was opened in the names of the joint venturers, and funds received from various beneficiaries, including appellants, were deposited in it. The joint venturers subsequently caused three of the trust beneficiaries to organize an

investment corporation for the purpose of selling the property in lots to the public. The corporation then entered into a written agreement to sell one of the lots to respondent. Respondent made a down payment, and later another payment, but received nothing in return. Respondent then sued for money had and received. The trial court rendered judgment for plaintiff, finding, among other things, that the persons named as beneficiaries in the trust, including appellants, were joint venturers in the transaction. Appellants appealed, contending, among other things, that the declaration of trust they executed was a true business trust and that they were not personally liable on any obligation incurred by the original joint venturers. They also argued that they did not authorize or establish any agency for the subdivision and sale of the property.

The appellate court affirmed. It held that these contentions were refuted in *Eng'g Serv. Corp. v. Longridge Inv. Co. (1957) 153 Cal. App. 2d 404, 314 P.2d 563* (discussed *below*) (*156 Cal. App. 2d 583, 590)* . The court noted that *Engineering* held that the reservation of complete management in the developer and his associates as the beneficiaries' representatives, to the exclusion of the trustee, left them in the status of partners or joint venturers, and deprived them of the advantage of a true trust agreement (*156 Cal. App. 2d 583, 591)* . The court held that as the developer and his joint venturers were business managers appointed by the beneficiaries to control the trust, the beneficiaries were also joint venturers, and that each member of a joint venture is the agent of the others in transaction of its business (*156 Cal. App. 2d 583, 592)* .

The facts and procedural background of ***Eng'g Service Corp. v. Longridge Inv. Co.*** *(1957) 153 Cal. App. 2d 404, 314 P.2d 563* , are the same as those in *Bariffi v. Longridge Development Co. (1958) 156 Cal. App. 2d 583, 320 P.2d 192* , discussed *above*. Respondent brought an action to foreclose a mechanic's lien for work performed in making engineering studies and in creating a tentative subdivision map of property purchased by a developer in furtherance of a joint venture. Two of the appellants were the developer's associates. The third was a beneficiary under a trust created by appellants and the developer to hold title to the property. The trial court granted the foreclosure, and held all appellants personally liable for respondent's claim. Appellants appealed, contending that they were not liable as joint venturers, and should not be held personally liable for an obligation incurred in the developer's name or in the name of the corporation formed by appellants and the developer for the purpose of selling the property.

The appellate court affirmed, preliminarily holding that all of the appellants were joint venturers. The court held that none of the appellants were protected by the trust because the developer and appellants, as opposed to the trustee, had management and control of the property. It held that reservation of complete management to the developer and appellants as representatives of the beneficiaries, and to the exclusion of the trustee, left all the participants in the status of partners or joint venturers and deprived them of the advantage of a true trust arrangement (*153 Cal. App. 2d 404, 409-410)* . The court also noted that the developer engaged respondent on the day escrow closed, which was before the declaration of trust, and that therefore it could not be disputed that the developer was acting for the joint venture between himself and appellants in doing so. The court held that each member of the joint venture was the agent of the others in the transaction of its business (*153 Cal. App. 2d 404, 411)* .

[c] Authority to Bind Joint Venture in Contract

In ***Medak v. Cox*** *(1970) 12 Cal. App. 3d 70, 90 Cal. Rptr. 452* , appellants were members of a partnership that was one of the associates in a joint venture created to construct single family houses on property owned by appellants. The other joint venture associate was a development corporation. Respondent contracted with the joint venture to render architectural services. The contract was signed on behalf of the joint venture by the president of the associate development corporation. When respondent was not paid for his services, he sued appellants and the corporation president for foreclosure of a mechanic's lien. The trial court entered judgment for respondent, finding that management and control of the joint venture was vested in appellants and the president equally, and it was the president's duty to do all the things necessary to construct homes on the property for the enterprise. Appellants appealed, contending that the contract was not binding on them.

The appellate court affirmed. Relying on former Corp. Code § 15009(1) [*now see Corp. Code § 16301*], the court held that the contract signed by the president was sufficient to bind the joint venture (*12 Cal. App. 3d 70, 76-77)* . The court noted that the rules governing liability of partners for partnership debts also apply to joint ventures, and the rule has been fairly well established that each joint venturer has authority to bind the others in making contracts reasonably necessary to carry out the enterprise (*12 Cal. App. 3d 70, 76 fn. 2*).

In ***Lindner v. Friednash*** *(1958) 160 Cal. App. 2d 511, 325 P.2d 612* , plaintiff was a wine processor. Defendant and a wine broker entered into a written joint venture agreement for the purchase and sale of 50,000 gallons of wine. The agreement named the broker as purchaser, and provided that he would store the wine in his winery. It also provided, among other things, that defendant was to contribute a share of the purchase price, and use his credit to secure a loan from the bank to pay for the balance. The loan was to be secured by warehouse receipts for the wine. In fact, the wine was not stored in the broker's winery, and he procured a warehouse receipt in defendant's name from plaintiff for the wine. Thereafter, at the bank's request, the broker caused plaintiff to issue a new warehouse receipt naming defendant as pledgor and the bank as pledgee. The bank then loaned the balance of the purchase price to defendant, and defendant remitted the money, together with his own contribution, to the broker. Defendant subsequently repaid the loan, and the bank authorized delivery of the wine to defendant. The broker sold most of the wine to various persons. He retained the proceeds received from the sales, and neither plaintiff nor defendant received any part of them. Plaintiff instituted an action against defendant to recover the balance of the purchase price. Judgment was rendered in favor of defendant. Plaintiff appealed.

The appellate court reversed, holding that substantially the same rules with respect to principal and agent applicable to members of a partnership apply to members of a joint venture with respect to contracts with third persons within the scope of the joint enterprise, and a joint venturer may bind his or her associates by a contract that is in furtherance, or within the scope, of the joint enterprise (*160 Cal. App. 2d 511, 517)* . The court held that when one joint adventurer purchases personal property pursuant to the joint venture agreement, the property belongs to the joint venture and there is liability for the purchase price against both venturers, and delivery of the property to one joint venturer constitutes delivery to both (*160 Cal. App. 2d 511, 517-518)* . It further held that in light of the above principles, it appeared clear that defendant was liable for the wine purchased and delivered to him on behalf of the joint venture (*160 Cal. App. 2d 511, 518)* .

[4] Additional Authorities

[a] Authority to Bind Joint Venture in Contract

In *Block v. D.W. Nicholson Corp (1947) 77 Cal. App. 2d 739, 176 P.2d 739* , defendant joint venturers were hired to construct a War Department project. Defendants' representative, the manager of the joint venture, contacted plaintiff insurance broker to engage him to secure a performance bond and the additional financing required for the bond to be issued. If plaintiff was successful, he was to be defendants' insurance broker for the project. Plaintiff then induced a third party to advance financing for the project and to become a joint venturer with defendants. Consequently, he was then able to procure the performance bond. At the representative's direction, plaintiff submitted a bill for a commission on the advance, but the other defendant stated that it had no obligation to pay it. On plaintiff's action on an express and implied contract, the trial court made general findings that the allegations of the complaint were true, and those of the answers were untrue. The appellate court reversed and remanded on the ground that these findings failed to dispose of the issues litigated, and failed to show what issues were considered by the court (*77 Cal. App. 2d 739, 743)* . The court held that one of the issues that should have been considered was plaintiff's belief that as the advance was procured for the joint venture, both joint venturers may be held liable (*77 Cal. App. 2d 739, 744)* . Relying on former Civ. Code § 2403 (*now see Corp. Code § 16301*), the court held that the general rule is that as to third persons who deal with a joint venturer in good faith and without knowledge of any limitations on his or her authority, the law presumes him or her to have been given the power to bind his or her associates by such contracts as are reasonably necessary to carry on the business in which the joint venturers are engaged (*77 Cal. App. 2d 739, 744-745)* .

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[Reserved]

§§ 170.251[Reserved]

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17-170 California Points & Authorities § 170.255

§ 170.255 Opposing Contention That Act of Joint Venturer Binds Joint Venture [Corp. Code § 16301; former Corp. Code § 15009]--No Authority to Bind Other Joint Venturers by Acts Not Within Express, Implied, or Ostensible Authority

[1] FORM Opposing Contention That Act of Joint Venturer Binds Joint Venture [Corp. Code § 16301; former Corp. Code § 15009]--No Authority to Bind Other Joint Venturers by Acts Not Within Express, Implied, or Ostensible Authority

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT JOINT VENTURER[S] _____ [WAS *or* WERE] NOT BOUND BY THE ACT OF [AN]OTHER FELLOW JOINT VENTURER[S] IN _____ [*specify, e.g.*, PURCHASING THE SUBJECT CONSTRUCTION MATERIALS FROM PLAINTIFF _____ (*name of alleged creditor*)] BECAUSE THE ACTIVE JOINT VENTURER[S] HAD NO _____ [EXPRESS *or* IMPLIED *o* r OSTENSIBLE] AUTHORITY TO ACT IN THIS CIRCUMSTANCE INASMUCH AS _____ [*specify, e.g.*, THE JOINT VENTURE AGREEMENT EXPRESSLY LIMITED THE POWERS OF THE INDIVIDUAL JOINT VENTURERS TO BIND THE JOINT VENTURE TO A CONTRACT], AND PLAINTIFF WAS NOT AWARE OF, [AND DID NOT RELY ON THE EXISTENCE OF], THE JOINT VENTURE.

A. Joint Venturer May Not Bind Associates by Acts Exceeding His or Her Authority. A member of a joint venture who is undisclosed to a third person at the time the third person enters into a contract with another member individually is not rendered liable to the third person for services rendered under the contract, or for damages for the breach of the contract, by the fact that the contract relates to the business of the joint venture, if the contracting member exceeded his or her authority and had no power to bind his or her associates by the contract (*Hansen v. Burford (1931) 212 Cal. 100, 111, 297 P. 908*).

[*Optional*] **B. No Liability on Theory of Ostensible Agency When Third Party Did Not Rely on Representations of Agency.** Although a person who has caused a third party to give credit or incur a liability on the strength of his or her

representations, made or permitted, that he or she is in fact a joint venturer will not thereafter be allowed to deny those representations, the third party is not entitled to recover against the ostensible agent's associates if the third party placed no particular reliance on the association, or the associate's responsibility, in extending credit (*Hansen v. Burford (1931) 212 Cal. 100, 111-112, 297 P. 908*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that a joint venturer is bound by the acts of one or more of his or her fellow joint venturers. If a third party enters into a contract with a joint venturer individually, and he or she is unaware of the existence of the joint venture, the non-contracting joint venturer or venturers will not be bound, even if the contract relates to the joint venture, if the contracting joint venturer had no authority to contract in the matter [*Hansen v. Burford (1931) 212 Cal. 100, 111, 297 P. 908]* . For example, this rule seems to apply most often when the joint venture is so limited in scope that it would be inappropriate to imply broad authority to each joint venturer.

Optional Paragraph B may be used if it is contended that an active joint venturer's associates are liable on a theory of ostensible agency. This theory will not prevail if the third party with whom the active joint venturer was dealing did not rely on his or her representations in extending credit [*Hansen v. Burford (1931) 212 Cal. 100, 111-112, 297 P. 908]* . Thus, even if a person makes, or allows to be made, a representation to a third person with whom he or she is dealing that he or she is a member of a joint venture, and that his or her actions are in furtherance of the enterprise, the other joint venturers will not be bound if the third party does not rely on the relationship in entering into an agreement with the person.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that an individual joint venturer had no authority to bind his or her fellow joint venturers. These points and authorities also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel may discuss facts showing that the joint venture agreement expressly limited the authority of the joint venturers. Facts also may be presented that indicate that the third parties with whom the individual joint venturer contracted were aware of his or her lack of authority.

[c] Opposing Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 170.250*.

[3] Discussion of Authorities

[a] Joint Venturer May Not Bind Associates by Acts Exceeding His or Her Authority

In ***Hansen v. Burford*** *(1931) 212 Cal. 100, 297 P. 908* , defendant sellers owned a tract of property. They approached defendant purchaser to sell him the property. As a result of negotiations, defendant sellers entered into agreements with defendant grantees, defendant purchaser's daughter and son-in-law, to sell them two lots on the property. Defendant purchaser negotiated the purchase agreements. They provided that defendant grantees had to secure a loan to build a house and chicken coop on the property. After the buildings were finished, the property was to be sold, and the profits were to be equally divided between defendant sellers and defendant grantees. The construction of the buildings was

supervised by defendant purchaser, and he purchased lumber from respondents. The lumber was charged to his name. Defendant grantees were not able to obtain building loans to cover the entire cost of construction, and respondents' bill remained unpaid. Respondents brought an action in assumpsit to recover the price of the lumber. The trial court found that defendants were engaged in a joint venture, and that the lumber was sold and delivered to them as joint venturers. It rendered judgment against all defendants. Defendant sellers appealed.

The California Supreme Court reversed, holding that defendant purchasers were independent contractors as opposed to partners (*212 Cal. 100, 104-105)* . However, the Court noted with approval that the appellate court held that whether the enterprise was a partnership or not, there could be no doubt that it was some sort of joint venture and all defendants were participants in it (*212 Cal. 100, 110)* . Thus, when the rights of third parties are involved, the basis of inquiry is what did the third parties have the right to believe from the language of the contract and from the conduct of the parties to it as affecting them (*212 Cal. 100, 110-111)* . The Court held that one who is a member of a joint venture but who is not known to be such at the time by a third person who enters into a contract with another member individually is not rendered liable to the third person for services rendered under the contract, or for damages for the breach thereof, by the fact that the contract relates to the business of the joint venture, if the contracting member in making the contract exceeded his or her authority and had no power to bind his or her associates thereby. The Court held that it was clearly understood by all defendants that the material bills were to be paid from the mortgage loans pursuant to the purchase agreement, and that the agreements dispelled any idea that defendant sellers would be liable for them. Thus, it was clear that defendant purchaser had no actual authority to bind defendant sellers to the lumber bills (*212 Cal. 100, 111)* .

[b] No Liability on Theory of Ostensible Agency When Third Party Did Not Rely on Representations of Agency

The facts and procedural background of ***Hansen v. Burford*** *(1931) 212 Cal. 100, 297 P. 908* , are discussed in [a], *above*. In *Hansen*, the California Supreme Court held that in the absence of estoppel or ratification, an undisclosed principal is not liable on the contracts of one assuming, without authority, to act for him or her (*212 Cal. 100, 111)* . Thus, the Court held that if there was any basis for the trial court to find that defendant sellers participated in ordering the lumber that was the subject of the suit, it must rest on some apparent authority of defendant purchaser to represent defendant sellers in doing so. The Court stated that it was clear from the evidence that in furnishing the lumber, respondents placed no particular reliance on defendant purchaser's claimed association with defendant sellers, or on defendant seller's responsibility. It held that although the rule is that one who has suffered a third party to give credit or incur a liability on the strength of his or her representations, made or permitted, that he or she is in fact a joint venturer will not thereafter be allowed to deny those representations, it was apparent that respondents did not give credit to defendant purchaser because of his statements concerning relation of defendant sellers to the enterprise. The Court held that the evidence was too tenuous to support any claim of estoppel, or any theory that respondents were entitled to recover against defendant sellers because of reliance on any ostensible agency (*212 Cal. 100, 112)* .

[4] Additional Authorities

[a] Joint Venturer May Not Bind Associates by Acts Exceeding His or Her Authority

The facts and procedural background of ***Block v. D.W. Nicholson Corp.*** *(1947) 77 Cal. App. 2d 739, 176 P.2d 739* , are discussed in *§ 170.250[4]*. In *Block*, the appellate court held that findings of the trial court failed to dispose of the issues litigated, and failed to show what issues were considered by the court (*77 Cal. App. 2d 739, 743)* . The court held that one of the issues that should have been considered was plaintiff's belief that both joint venturers may be held liable because of the general rule that as to third persons who deal with a joint venturer in good faith and without knowledge of any limitations on his or her authority, the law presumes him or her to have been given the power to bind his or her associates by such contracts as are reasonably necessary to carry on the business in which the joint venturers are engaged (citing former Civ. Code § 2403; *now see Corp. Code § 16301*) (*77 Cal. App. 2d 739, 744-745)* . However, the court also noted that a member of a joint venture, who is unknown to be such at the time by a third person

who enters into a contract with another member individually, is not rendered liable to the third person for services rendered under the contract, or for damages for breach of the contract, by the fact that the contract relates to the business of the joint venture if the contracting member in making the contract exceeded his or her authority and had no power to bind his or her associates thereby (*77 Cal. App. 2d 739, 745)* .

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17-170 California Points & Authorities §§ 170.256-170.259

[Reserved]

§§ 170.256[Reserved]

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17-170 California Points & Authorities § 170.260

§ 170.260 Supporting Contention That All Joint Venturers Are Liable for Obligations of Joint Venture or Individual Joint Venturer's Wrongful Acts--Contracts, Negligence, and Fraud

[1] FORM Supporting Contention That All Joint Venturers Are Liable for Obligations of Joint Venture or Individual Joint Venturer's Wrongful Acts--Contracts, Negligence, and Fraud

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with § 170.250 to set forth the joint venturer's scope of authority.*]

DEFENDANT JOINT VENTURERS ARE LIABLE FOR THE _____ [*specify, e.g.*, RECKLESSNESS or NEGLIGENCE or MISREPRESENTATION] OF THEIR ASSOCIATE _____ [*name*] BECAUSE THE _____ [*specify, e.g.*, WRONGFUL ACT or OMISSION] WAS MADE IN FURTHERANCE OF THE JOINT ENTERPRISE.

A. Joint Venture Liable for Joint Venturer's Wrongful Act or Omission. The relations of joint venturers, as between themselves and as to third parties, generally are the same as those of partners, and to the extent they are the same, the law of partnerships applies to both. Thus, when by any wrongful act or omission of a joint venturer acting in the ordinary course of the joint venture's business, or with the authority of his or her joint venturers, loss or injury is caused to a person who is not one of the joint venturers, or a penalty is incurred, the joint venture is liable for the loss or injury to the same extent as the joint venturer who acted or omitted to act (*see Orlopp v. Willardson Co. (1965) 232 Cal. App. 2d 750, 754, 43 Cal. Rptr. 125* ; *see also Corp. Code § 16305(a) or* former Corp. Code § 15013).

[*Optional*] **B. Liability of Joint Venture on Contracts.** The parties to a joint venture are jointly and severally liable in an action brought by a third person to enforce an obligation of the joint venture (*Morrison Drilling Co., Inc. v. Superior Court (1962) 208 Cal. App. 2d 740, 742, 25 Cal. Rptr. 682* ; *see Corp. Code § 16306*).

[*Optional*] **C. Liability of Joint Venture for Negligence.** The negligence of one joint venturer committed in performing an act in furtherance of the joint enterprise is imputable to the other joint venturers (*Hupfeld v. Wadley*

(1948) 89 Cal. App. 2d 171, 175, 200 P.2d 564).

[*Optional*] **D. Liability of Joint Venture for Fraud.** When one joint venturer, acting within the scope of the joint venture, and in furtherance of its agreed purpose, is guilty of fraud in procuring benefits that are retained by the joint venturers, all are liable for the fraud in compensatory damages (*Rickless v. Temple (1970) 4 Cal. App. 3d 869, 894, 84 Cal. Rptr. 828* ; *Grant v. Weatherholt (1954) 123 Cal. App. 2d 34, 45, 266 P.2d 185*).

[*Optional*] **E. Liability of Joint Venture for Breach of Trust.** The joint venture is liable for a loss if one joint venturer, in the course of the joint venture's business or while acting with authority of the joint venture, receives or causes the joint venture to receive money or property of a third person, and the money or property is misapplied by a joint venturer (*see Corp. Code § 16305(b) or* former Corp. Code § 15014; *see also Orlopp v. Willardson Co. (1965) 232 Cal. App. 2d 750, 754, 43 Cal. Rptr. 125* (law of partnerships applies to both partnerships and joint ventures)).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that joint venturers are liable for wrongful acts or omissions of their associates. Generally, the law of partnerships applies to joint ventures [*Orlopp v. Willardson Co. (1965) 232 Cal. App. 2d 750, 754, 43 Cal. Rptr. 125* ; *see §§ 170.200* et seq.]. Therefore, joint venturers are obligated on contracts entered into by one of their associates on behalf of the enterprise [*Morrison Drilling Co., Inc. v. Superior Court (1962) 208 Cal. App. 2d 740, 742, 25 Cal. Rptr. 682* ; *Corp. Code § 16306(a)*; *see* Optional Paragraph B]. They are also obligated by the negligence of a joint venturer committed in performing an act in furtherance of the joint enterprise [*Hupfeld v. Wadley (1948) 89 Cal. App. 2d 171, 175, 200 P.2d 564* ; *Corp. Code § 16305(a)*; *see* Optional Paragraph C], and by a joint venturer's fraud or misrepresentation under the same circumstances [*Rickless v. Temple (1970) 4 Cal. App. 3d 869, 894, 84 Cal. Rptr. 828* ; *Corp. Code § 16305(a) ; see* Optional Paragraph D]. A joint venture also is bound by a breach of trust by one of the joint venturers [*see Corp. Code § 16305(b)*; former Corp. Code § 15014; Optional Paragraph E].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that either all of the joint venturers are bound by a contract entered into by another joint venturer on behalf of the joint enterprise, or that the joint venturers are all liable for some wrongful act or omission committed by a joint venturer in furtherance of the enterprise. These points and authorities also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that the joint venturer entered into a contract with a third party on behalf of the joint venture, or committed some wrongful act or omission on its behalf.

[3] Discussion of Authorities

[a] Joint Venture Liable for Joint Venturer's Wrongful Act or Omission

Orlopp v. Willardson Co. *(1965) 232 Cal. App. 2d 750, 43 Cal. Rptr. 125* , is discussed in *§ 170.250*.

[b] Liability of Joint Venture on Contracts

In ***Morrison Drilling Co., Inc. v. Superior Court*** *(1962) 208 Cal. App. 2d 740, 25 Cal. Rptr. 682* , respondents and an oil corporation entered into a written joint venture agreement to drill an oil and gas well. Petitioner entered into an oral

agreement with the corporation, acting as respondents' agent, to provide services and materials in drilling the well. When petitioner was not paid, he brought an action against respondents to recover the value of its services. However, petitioner failed to join the oil corporation as a defendant, and respondents demurred. The demurrer was granted, and petitioner filed an amended complaint naming the corporation as a party defendant. Petitioner was unable to serve the oil corporation in California, and its motion to serve the corporation as a foreign corporation doing business in the state was denied because there was no showing that it had conducted any business in California. Petitioner then filed a petition for a writ of certiorari to review the superior court's order to stay proceedings until petitioner brought the corporation into the action.

The appellate court granted a writ of mandamus as the more appropriate relief. The court held that the parties to a joint venture are jointly liable in an action brought by a third person to enforce an obligation of the joint venture (*208 Cal. App. 2d 740, 742)* . Then the court noted that although the general rule is that joint obligors are indispensable parties to an action brought to enforce a joint liability, former Code Civ. Proc. § 414 (*now see Code Civ. Proc. § 410.70*) provides that when an action is against two or more defendants jointly or severally liable on a contract, and the summons is served on one or more, but not on all of them, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants (*208 Cal. App. 2d 740, 743)* .

[c] Liability of Joint Venture for Negligence

In ***Hupfeld v. Wadley*** *(1948) 89 Cal. App. 2d 171, 200 P.2d 564* , appellant and his associate were joint venturers in the business of beekeeping. They employed respondent, who was from another city, to do some work for them, and the associate transported respondent to the city where the joint venture business was located. When the work was completed, respondent accepted a ride from the associate back to his own city. On the way, an accident occurred while the associate was driving, and respondent was seriously injured. Respondent sued appellant and his associate as partners, alleging negligence. The trial court found that the business of appellant and his associate constituted a joint venture. It concluded that respondent was a passenger for hire, and that the associate was driving as an agent for the joint venture. The court entered judgment against both appellant and the associate. Appellant appealed.

The appellate court affirmed, holding that the evidence was sufficient to support the finding that the associate was negligent in his driving (*89 Cal. App. 2d 171, 174)* . The court then held that the negligence of one joint venturer committed in performing an act in furtherance of the joint enterprise is imputable to the other joint venturers. It held that the negligence was imputed to appellant even though he was absent from the scene (*89 Cal. App. 2d 171, 175)* .

[d] Liability of Joint Venture for Fraud

The facts and procedural background of ***Rickless v. Temple*** *(1970) 4 Cal. App. 3d 869, 84 Cal. Rptr. 828* , are discussed in *§ 170.50[3]*. In *Rickless*, the appellate court held that although a joint venture ordinarily is created by contract or agreement between the parties, there need not be any formal written agreement defining the parties' respective rights and duties (*4 Cal. App. 3d 869, 893)* . There was substantial evidence to support the finding that defendant and his associate used money advanced by plaintiff to finance their joint venture. The court then held that when one joint venturer, acting within the scope of the joint venture, and in furtherance of its agreed purpose, is guilty of fraud in procuring benefits that are retained by the joint venturers, all are liable for the fraud in compensatory damages (*4 Cal. App. 3d 869, 893-894)* . Under the facts of this case, and the law applicable to it, defendant became liable to plaintiff when the joint venture accepted and used plaintiff's money obtained from her by the associate's fraud (*4 Cal. App. 3d 869, 894)* .

In ***Grant v. Weatherholt*** *(1954) 123 Cal. App. 2d 34, 266 P.2d 185* , defendants were joint venturers in the purchase of property. The first defendant drew a check from a checking account in the name of himself and his wife to pay for the property. The second defendant and his wife executed a note for the amount secured by a trust deed in favor of first defendant's wife, and took title to the property. Defendants then organized a holding company and divided the stock

between themselves and their wives. Defendants were the corporate officers. Thereafter, the second defendant approached plaintiff to secure money to develop the property, and represented to him that the property was free of encumbrances. Plaintiff agreed to advance money and do the work to make the improvements. The enterprise subsequently ran out of money, and the operation stopped. The note held by the first defendant's wife remained unpaid, and she gave notice of default. Consequently, plaintiff learned that the property was encumbered, and brought an action for fraud and breach of contract against the second defendant and his wife, the holding company, and the first defendant and his wife. At trial, a jury rendered a verdict in favor of plaintiff against the first defendant and his wife, the holding company, and the second defendant's wife individually and as administratrix of second defendant's estate. The court entered a judgment notwithstanding the verdict in favor of plaintiff against the holding company and the second defendant's wife as administratrix of the estate, but against plaintiff in favor of the second defendant's wife individually, and the first defendant and his wife. It also granted a new trial for the holding company on the ground of insufficiency of the evidence. Plaintiff appealed.

The appellate court reversed, holding that when one joint venturer, acting within the scope of the joint venture, and in furtherance of its agreed purpose, is guilty of fraud in procuring benefits that are retained by the joint venturers, all are liable for the fraud in compensatory damages (*123 Cal. App. 2d 34, 45)* . The court held that in enlisting the assistance of plaintiff, the second defendant was acting under the authority conferred by the joint venture agreement. The results of his negotiations and oral promises were known and consented to by the first defendant (*123 Cal. App. 2d 34, 46)* . Thus, the court held that the verdict against the first defendant was supported by substantial evidence, and that it was error to enter a judgment notwithstanding the verdict in his favor (*123 Cal. App. 2d 34, 47)* .

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17-170 California Points & Authorities § 170.261

§ 170.261 Supporting Contention That All Joint Venturers Are Liable for Obligations of Joint Venture or Individual Joint Venturer's Wrongful Acts--Joint and Several Liability [Corp. Code § 16306; former Corp. Code § 15015(a)]

[1] FORM Supporting Contention That All Joint Venturers Are Liable for Obligations of Joint Venture or Individual Joint Venturer's Wrongful Acts--Joint and Several Liability [Corp. Code § 16306; former Corp. Code § 15015(a)]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with § 170.250 to set forth the joint venturer's scope of authority. It should also be combined with § 170.260 to establish that each joint venturer is liable for the obligations of the joint venture and for wrongs committed on its behalf*].

DEFENDANT JOINT VENTURER[S] _____ [IS *or* ARE] _____ [JOINTLY AND SEVERALLY] LIABLE FOR _____ [*specify, e.g.,* THE INJURY TO PLAINTIFF THAT OCCURRED ON THE PREMISES WHERE ONE OF THE JOINT VENTURERS WAS ENGAGED IN AN ACT IN FURTHERANCE OF THE JOINT ENTERPRISE].

Joint and Several Liability. As between themselves, the rights of joint venturers are governed by the same principles that apply to partnerships. Joint venturers are jointly and severally liable for all obligations of the partnership (*Corp. Code § 16306(a) or* former Corp. Code § 15015(a); *see McClung v. Saito (1970) 4 Cal. App. 3d 143, 150, 84 Cal. Rptr. 44* ; *Cahill Bros., Inc. v. Clementina Co. (1962) 208 Cal. App. 2d 367, 388, 25 Cal. Rptr. 301*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that individual joint venturers are jointly and severally liable for the joint venture's obligations or other liabilities created by a wrong committed by one of the

venturers. The law of partnerships generally applies to joint ventures [*Orlopp v. Willardson Co. (1965) 232 Cal. App. 2d 750, 754, 43 Cal. Rptr. 125* (discussed in *§§ 170.250, 170.260*)]. Thus, *Corp. Code § 16306* [*see* former Corp. Code § 15015 (pre-'97 Act)] is applicable to joint ventures [*see McClung v. Saito (1970) 4 Cal. App. 3d 143, 150, 84 Cal. Rptr. 44]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the joint venturers are either jointly or jointly and severally liable for the acts of one of the other joint venturers. These points and authorities also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Joint and Several Liability

In ***Cahill Bros., Inc. v. Clementina Co.*** *(1962) 208 Cal. App. 2d 367, 25 Cal. Rptr. 301* , plaintiff corporation entered into a contract with the owner of some buildings to demolish the buildings. Plaintiff orally contracted with defendant corporation, which was independently owned by plaintiff's general superintendent, to perform the work. Defendant erected a wooden barricade around the site to protect the public. The lumber was provided by plaintiff, and furnished pursuant to the superintendent's order as plaintiff's employee. Despite the barricade, a pedestrian was injured when he fell into an excavation on the site. He sued plaintiff and defendant for negligence, and was awarded a judgment. The judgment was satisfied by payment of one-half of the sum by both plaintiff and defendant. Thereafter, plaintiff sued defendant for indemnification. The trial court awarded judgment for plaintiff. Defendant appealed, contending that the relationship between itself and plaintiff was a joint venture.

The appellate court reversed, noting that there was an apparent inconsistency in the jury instructions about which party had the burden of proving the nature of the relationship (*208 Cal. App. 2d 367, 384-385)* . Plaintiff sought to soften the impact of the error in the instructions by contending that the existence of a joint venture would not, in any event, bar plaintiff's recovery because one joint venturer may recover from another for a breach of his or her duties to the joint venture. The court disagreed, stating that this case involved a situation in which possible joint venturers wronged a third party. The court noted the general rule that all members of a joint venture are jointly liable for injuries resulting from the negligent conduct of one of the members because the negligence of one joint venturer or his or her employee acting in connection with the joint venture is imputed to the other joint venturers (*208 Cal. App. 2d 367, 387)* . The court held that in the case of joint venturers each owes the same duty to the injured party because each member of a joint venture is the agent of the others in the venture's business transactions. As between themselves, the rights of joint venturers are governed by the same principles that apply to partnerships. The principle on which the liability of a partnership for injuries to a third person rests is the same as that applicable to principal and agent and master and servant. Thus, a principal whose agent has committed a tort in the transaction of the business of the agency is jointly and severally liable to the injured party (*208 Cal. App. 2d 367, 388)* .

In ***McClung v. Saito*** *(1970) 4 Cal. App. 3d 143, 84 Cal. Rptr. 44* , defendants were interested in developing property for residential purposes. They entered into an agreement to acquire the stock of the company that owned the property. In order to obtain a construction loan, the property was then conveyed to a corporation owned by the contractor who was to develop the property. The loan was secured by a deed of trust on the property. Thereafter, the contractor's corporation, the contractor, and defendants entered into a joint venture agreement to construct and sell homes on the property. The enterprise subsequently became short of funds, and one of the defendants approached plaintiff to borrow

money to complete the project. Plaintiff agreed to loan the money, and delivered a check to defendant and the contractor payable to the contractor's corporation. In return, plaintiff received the corporation's promissory note signed by the contractor as president and the defendant as secretary. This loan was secured by a second deed of trust. The financial condition of the venture worsened, and the holder of the first deed on the property declared a default. The property was sold at a trustee's sale, thereby extinguishing the security represented by plaintiff's second deed. Plaintiff sued defendants to recover the balance due on her loan. The trial court rendered judgment in favor of plaintiff, finding that defendants, the contractor, and the contractor's corporation associated themselves together as joint venturers; and that, although legal title to the property was vested for convenience in the contractor's corporation, the joint venture was the true beneficial owner. Defendants appealed.

The appellate court affirmed, holding that the trial court's findings were adequately supported by the record. The court held that because defendants were joint venturers, such an arrangement imposed on them the obligations of members of a partnership. Citing former Corp. Code § 15015 [*now see Corp. Code § 16306*], the court held that each of the defendants thus had become jointly liable to creditors for the obligations of the enterprise (*4 Cal. App. 3d 143, 150)* .

[4] Additional Authorities

[a] Joint and Several Liability

The facts and procedural background of *Hupfeld v. Wadley (1948) 89 Cal. App. 2d 171, 200 P.2d 564* , are discussed in *§ 170.260[3]*. In *Hupfeld*, the appellate court held that the negligence of one joint venturer committed in performing an act in furtherance of the joint enterprise is imputable to the other joint venturers (*89 Cal. App. 2d 171, 175)* . Thus, the members of a joint venture may be held jointly liable for the injuries arising from the negligent conduct of one of the parties to it (*89 Cal. App. 2d 171, 176)* .

In *Di Vita v. Martinelli (1932) 123 Cal. App. 392, 11 P.2d 423* , one of the defendants owned an automobile that was parked near a curb where plaintiff was standing. The other defendant was inside the automobile while it was parked. At defendant owner's direction, the other defendant started the automobile and stepped on the starter. The automobile struck and injured plaintiff. At trial in an action to recover damages for personal injuries, the trial court granted defendants' individual motions for nonsuit. In reversing the judgment, the appellate court held that if the second defendant was acting under the direction and supervision of the owner defendant, they both might have been held severally or jointly liable; and as the record showed some evidence that defendants were on a joint venture at the time of the accident, they could have been held jointly liable for the tort (*89 Cal. App. 2d 171)* . Thus, the court held that these issues should have been presented to the jury (*89 Cal. App. 2d 171)* .

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17-170 California Points & Authorities § 170.262

§ 170.262 Opposing Contention That Act of Joint Venturer Binds Non-Negligent Joint Venture--Injured Employee of Joint Venturer Covered by Workers' Compensation Act

[1] FORM Opposing Contention That Act of Joint Venturer Binds Non-Negligent Joint Venture--Injured Employee of Joint Venturer Covered by Workers' Compensation Act

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief*].

DEFENDANT JOINT VENTURER[S] _____ [IS *or* ARE] NOT LIABLE FOR THE INJURY TO PLAINTIFF THAT OCCURRED ON THE PREMISES WHERE ONE OF THE JOINT VENTURERS, _____ [*name of joint venturer/employer*], WAS ENGAGED IN AN ACT IN FURTHERANCE OF THE JOINT ENTERPRISE, BECAUSE _____ [*name of joint venturer/employer*] PROVIDED COVERAGE TO PLAINTIFF UNDER THE WORKERS' COMPENSATION ACT.

Non-Negligent Joint Venture Is Not Liable For Injuries To Joint Venturer's Employee When Coverage Is Provided by Workers' Compensation Act. A non-negligent joint venture is not liable when a member of the joint venture negligently injures that member's own employee and the member of the joint venture has provided coverage to the injured employee under the *Workers' Compensation Act (Orosco v. Sun-Diamond Corp. (1997) 51 Cal. App. 4th 1659, 1669-1670, 60 Cal. Rptr. 2d 179*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a non-negligent joint venture is liable to an employee of a joint venturer when that joint venturer provided coverage to the employee under the Workers' Compensation Act.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context

in which counsel wishes to raise the substantive issue that the joint venture was not liable to an injured employee of a joint venturer. They also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[c] Opposing Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set forth in § 170.261*.

[3] Discussion of Authorities

[a] Non-Negligent Joint Venture Is Not Liable for Injuries to Joint Venturer's Employee When Coverage Is Provided by Workers' Compensation Act

In ***Orosco v. Sun-Diamond Corp****. (1997) 51 Cal. App. 4th 1659, 60 Cal. Rptr. 2d 179* , a worker lost his arm in an industrial accident at a raisin plant. His employer had workers' compensation insurance under which the injured employee filed a claim. The employee also sought to recover in tort from other corporations engaged in various business pursuits with and on behalf of the employer, on a theory of joint venture. The superior court granted summary judgment for the corporations, and the injured employee appealed.

The appellate court first held that the respondent corporations were not engaged in a joint venture with the employer for production of raisins at the employer's plant (*51 Cal. App. 4th 1659, 1666)* . It found that there was no evidence that any entity other than the employer had any control over the production of raisins, that any entity shared with the employer the profits from producing raisins, or that any entity other than the employer had an ownership interest in the raisin crop prior to its sale in the marketplace. The court therefore held that the evidence did not raise a triable issue of fact whether a joint venture composed of respondents and the employer engaged in the production of raisins at the employer's plant (*51 Cal. App. 4th 1659, 1666)* .

The court then held that even if the injured employee could establish that a joint venture ran the raisin plant by or through the employer, the joint venture would not be liable when a member of the joint venture negligently injures the member's employee and the member of the joint venture has provided coverage under the Workers' Compensation Act (*51 Cal. App. 4th 1659, 1669-1670)* . The court found that the same two factors of fairness and social policy that led the California Supreme Court to terminate the liability of non-negligent landowners to the employees of independent contractors, in *Privette v. Superior Court (1993) 5 Cal. 4th 689, 700-702, 21 Cal. Rptr. 2d 72, 854 P.2d 721* , applied in this case. First, the workers' compensation exclusive remedy doctrine would operate to prevent the joint venture from seeking indemnity from its negligent member, and thus place an unfair burden on a fault-free party. Second, workers compensation coverage for the injured employee should provide uniform compensation for all injured employees regardless of the form of hiring business organization, i.e., employees of a joint venture should not be an exempt class. The court concluded that even if appellant could establish that a joint venture ran the raisin plant by or through the employer, the respondent corporations would not be liable in the absence of some negligence on the part of the joint venture or one of its members other than the employer (*51 Cal. App. 4th 1659, 1669-1670)* .

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2. Joint Ventures

17-170 California Points & Authorities §§ 170.263-170.264

[Reserved]

§§ 170.263[Reserved]

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17-170 California Points & Authorities § 170.265

§ 170.265 Supporting Contention That Act of General Partner Binds Limited Partnership Under CRLPA [Corp. Code § 15643(a)] and ULPA [Corp. Code § 15509(1)]--Authority of General Partner to Act on Behalf of Limited Partnership

[1] FORM Supporting Contention That Act of General Partner Binds Limited Partnership Under CRLPA [Corp. Code § 15643(a)] and ULPA [Corp. Code § 15509(1)]--Authority of General Partner to Act on Behalf of Limited Partnership

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. Depending on the facts involved, it may be combined with §§ 170.200-170.203, 170.220-170.221, relating to the authority of a partner to bind a general partnership*].

UNDER THE _____ [CALIFORNIA REVISED *or* UNIFORM] LIMITED PARTNERSHIP ACT, _____ [PLAINTIFF *or* DEFENDANT] LIMITED PARTNERSHIP SHOULD BE BOUND BY THE ACT OF ITS GENERAL PARTNER _____ [*name*] BECAUSE HE/SHE HAS THE RIGHTS AND POWERS OF A PARTNER IN A PARTNERSHIP WITHOUT LIMITED PARTNERS.

[*EITHER, under California Revised Limited Partnership Act*]

Rights and Powers of General Partner in Limited Partnership Under CRLPA. Except as otherwise provided under the California Revised Limited Partnership Act or in the partnership agreement, a general partner of a limited partnership has the rights and powers and is subject to the restrictions of a partner in a partnership without limited partners (*Corp. Code § 15643(a)*).

[*OR, under Uniform Limited Partnership Act*]

Rights and Powers of General Partner in Limited Partnership Under ULPA. Subject to specified exceptions that require written consent or ratification by all the limited partners, a general partner has all the rights and powers and is subject to all the restrictions and liabilities of a partner in a partnership without limited partners (*Corp. Code § 15509(1)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a limited partnership is bound by the acts of its general partner. Whether counsel uses the first or second alternative depends on whether the subject limited partnership is governed by the CRLPA or the ULPA. *See §§ 170.70 -170.74* for points and authorities discussing the formation of limited partnerships and the applicable statutes.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that an action by a general partner has bound the limited partnership. They also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should discuss facts that show that a third party relied on representations by the limited partnership and the general partner that the general partner had authority to act. Counsel should also discuss facts showing that the third party's belief that the general partner's act was within the usual course of the limited partnership's business was justified by the conduct of the general partner and the limited partnership.

[3] Discussion of Authorities

[a] Rights and Powers of General Partner in Limited Partnership

Generally, both the California Revised Limited Partnership Act (CRLPA) and the Uniform Limited Partnership Act (ULPA) provide that a general partner in a limited partnership has the same powers and authority, and restrictions thereon, as a partner in a partnership without limited partners [*Corp. Code § 15643(a)* (CRLPA); *Corp. Code § 15509(1)*(ULPA)]. Thus, the general partner may bind the limited partnership by the execution of contracts in the partnership name [*Corp. Code § 16301* (UPA'94); former Corp. Code § 15009(1) (pre-'97 Act); *see 170.200 -170.201*]. The limited partnership also may be liable for the wrongful act or omission of the general partner if the act or omission occurred during the ordinary course of the partnership business [*Corp. Code § 16305(a)* (UPA'94); former Corp. Code § 15013 (pre-'97 Act); *see § 170.220*]. It also may be liable for the general partner's misapplication of money or property belonging to third parties either when the partner was acting within his or her partnership authority or when the money or property was received by the limited partnership in the course of its business, and was in the partnership's custody at the time of misapplication [*Corp. Code § 16305(b)* (UPA'94); former Corp. Code § 15014 (pre-'97 Act); *see § 170.221*].

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17-170 California Points & Authorities § 170.266

§ 170.266 Supporting Contention That Act of General Partner Binds Limited Partnership Under ULPA '08 [Corp. Code § 15904.02(a)]

[1] FORM Supporting Contention That Act of General Partner Binds Limited Partnership Under ULPA '08 [Corp. Code § 15904.02(a)]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

UNDER THE UNIFORM LIMITED PARTNERSHIP ACT OF 2008, _____ [PLAINTIFF or DEFENDANT] LIMITED PARTNERSHIP IS BOUND BY THE ACT OF ITS GENERAL PARTNER _____ [*name*], BECAUSE AN ACT OF A GENERAL PARTNER FOR APPARENTLY CARRYING ON IN THE ORDINARY COURSE THE LIMITED PARTNERSHIP'S ACTIVITIES, OR ACTIVITIES OF THE KIND CARRIED ON BY THE LIMITED PARTNERSHIP, BINDS THE LIMITED PARTNERSHIP.

General Partner as Agent of Limited Partnership Under ULPA '08. An act of the general partner for apparently carrying on in the ordinary course the limited partnership's activities or activities of the kind carried on by the limited partnership binds the limited partnership, unless the general partner did not have authority to act for the limited partnership in the particular matter and the person with whom the general partner was dealing either knew, received a notification, or had notice pursuant to *Corp. Code § 15901.03(d)* that the general partner lacked authority (*Corp. Code § 15904.02(a)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a limited partnership is bound by the acts of a general partner under the ULPA '08.

These points and authorities should be combined with points and authorities pertaining to the specific procedural

context in which counsel wishes to raise the substantive issue that an action by a general partner has bound the limited partnership. They also may be adapted for use in a trial or appellate brief.

For similar points and authorities drafted under the applicable provisions of the CRLPA [*see Corp. Code § 15643* (repealed Jan. 1, 2010)], *see § 170.265*.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] General Partner as Agent of Limited Partnership Under ULPA '08

Corp. Code § 15904.02(a) provides that each general partner is an agent of the limited partnership for the purposes of its activities. An act of a general partner, including the signing of a record in the partnership's name, for apparently carrying on in the ordinary course the limited partnership's activities or activities of the kind carried on by the limited partnership binds the limited partnership. However, an exception exists if the general partner did not have authority to act for the limited partnership in the particular matter and the person with whom the general partner was dealing either knew, received a notification, or had notice pursuant to *Corp. Code § 15901.03(d)* that the general partner lacked authority.

An act of a general partner that is not apparently for carrying on in the ordinary course the limited partnership's activities, or activities of the kind carried on by the limited partnership, binds the limited partnership only if the act was actually authorized by all the other partners [*Corp. Code § 15904.02(b)*].

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[Reserved]

§§ 170.267[Reserved]

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17-170 California Points & Authorities § 170.270

§ 170.270 Supporting Contention That Limited Partners Are Not Liable for Partnership Obligations Under CRLPA [Corp. Code § 15632]--No Control of Business

[1] FORM Supporting Contention That Limited Partners Are Not Liable for Partnership Obligations Under CRLPA [Corp. Code § 15632]--No Control of Business

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT _____ [*name*] IS A LIMITED PARTNER, AND THEREFORE SHOULD NOT BE LIABLE FOR _____ [*specify partnership obligation, e.g.,* THE CONTRACT BETWEEN THE LIMITED PARTNERSHIP AND PLAINTIFF] BECAUSE LIMITED PARTNERS ARE NOT LIABLE FOR THE OBLIGATIONS OF THE LIMITED PARTNERSHIP[, AND ALTHOUGH _____ (*specify action alleged to be an exercise of control, e.g.,* HE/SHE CONSULTED WITH THE GENERAL PARTNER CONCERNING THE CONTRACT), THAT DID NOT CONSTITUTE AN EXERCISE OF CONTROL OVER THE PARTNERSHIP BUSINESS BECAUSE THAT ACTION IS SPECIFICALLY ENUMERATED BY CORPORATIONS CODE SECTION 15632(b)] AS NOT BEING INDICATIVE OF CONTROL].

A. No Liability for Partnership Obligations if No Control of Business. A limited partner is not liable for any obligation of a limited partnership unless named as a general partner in the certificate or, in addition to the exercise of the rights and powers of a limited partner, he or she participates in the control of the business (*Corp. Code § 15632(a)*).

B. Third Party Must Know of Partner's Participation. If a limited partner participates in the control of the business without being named a general partner, that limited partner may be held liable as a general partner only to persons who transact business with the limited partnership with actual knowledge of that partner's participation in control and with a reasonable belief, based on the limited partner's conduct, that that partner is a general partner (*Corp. Code § 15632(a)*).

[*Optional*] **C. Certain Acts Do Not Constitute Control of Business.** A limited partner does not participate in the control of the business solely by doing one or more of the following:

(1) Being any of the following:

(a) An independent contractor for, or an agent or employee of, or transacting business with, the limited partnership or a general partner of the limited partnership;

(b) An officer, director, or shareholder of a corporate general partner or a person or persons charged with the management of a limited liability company;

(c) A limited partner of a partnership that is a general partner of the limited partnership;

(d) A trustee, administrator, executor, custodian, or other fiduciary or beneficiary of an estate or trust that is a general partner; or

(e) A trustee, officer, advisor, shareholder, or beneficiary of a business trust that is a general partner;

(2) Consulting with and advising a general partner with respect to the business of the limited partnership;

(3) Acting as a surety for the limited partnership or for a general partner, guaranteeing one or more specific debts of the limited partnership, or providing collateral for the limited partnership or for a general partner, or borrowing money from the limited partnership or from a general partner, or lending money to the limited partnership or to a general partner;

(4) Approving or disapproving an amendment to the partnership agreement;

(5) Voting, proposing, or calling a meeting on one or more specified matters;

(6) Winding up the partnership pursuant to *Corporations Code Section 15683*;

(7) Executing and filing a certificate as required by *Corporations Code Section 15625*, or a certificate of dissolution as required by *Corporations Code Section 15624(a)(3)*, or a certificate of cancellation of certificate of limited partnership as required by *Corporations Code Section 15624(a)(4)*];

(8) Serving on an audit committee or committee performing the functions of an audit committee;

(9) Serving on a committee of the limited partnership or of the limited partners for the purpose of approving actions of the general partner;

(10) Calling, requesting, attending, or participating at any meeting of the partners or of the limited partners;

(11) Taking any action required or permitted by law to bring, pursue, settle, or terminate a derivative action on behalf of the limited partnership;

(12) Serving on the board of directors or on a committee of, consulting with, or advising, being, or acting as an officer, director, stockholder, partner, agent, or employee of, or being or acting as a fiduciary for, any person in which the limited partnership has an interest; or

(13) Exercising any right or power permitted to limited partners by *Corporations Code Section 15611 et*

seq. (*Corp. Code § 15632(b)*; *see Gruendl v. Oewel Partnership (1997) 55 Cal. App. 4th 654, 659, 64 Cal. Rptr. 2d 217*).

[*Optional*] **D. Other Acts May Not Constitute Control of Business**. The enumeration in *Corporations Code Section 15632(b)* does not mean that any other conduct or the possession or exercise of any other power by a limited partner constitutes participation by the limited partner in the control of the business of the limited partnership (*Corp. Code § 15632(c)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a limited partner is not liable for the obligations of a CRLPA limited partnership [*see Corp. Code § 15632(a)*] (not to be construed to affect liability of limited partner for participation in tortious conduct)]. If the partnership is a ULPA limited partnership [*see § 170.02[4], [5]* for discussion], the points and *authorities in § 170.271* should be used in place of those in this form.

Under the CRLPA, a limited partner is not liable for any obligation of a limited partnership unless he or she participates in the control of the business [*Corp. Code § 15632(a)*]. Paragraph B is provided because even if a limited partner does participate in control of the business, he or she will not be held liable to a third person who transacts business with the partnership unless the person knows of the participation, and reasonably believes, based on the limited partner's conduct, that the limited partner is a general partner [*Corp. Code § 15632(a)*].

The CRLPA does not explain what control of the business is, but it specifically enumerates what it is not [*see Corp. Code § 15634(b)*]. Thus, Optional Paragraph C may be useful when an act by a limited partner is alleged to be an exercise of control, and it is one that is specifically listed as not being so under the CRPLA (the list can be tailored as necessary to fit the specific allegations in the plaintiff's case). However, the enumeration in *Corp. Code § 15632(b)* does not necessarily mean that any other conduct by a limited partner constitutes participation in the control of the business [*Corp. Code § 15632(c)*]. Optional Paragraph D may be used when a limited partner's act is not enumerated by the CRPLA.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a limited partner is not liable for the obligations of the limited partnership. These points and authorities also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that a partner is a limited partner and has exercised no control over the partnership business.

[3] Discussion of Authorities

[a] Certain Acts Do Not Constitute Control of Business

In ***Gruendl v. Oewel Partnership*** *(1997) 55 Cal. App. 4th 654, 64 Cal. Rptr. 2d 217* , after an award of damages that defendant entities failed to pay because of insufficient assets, plaintiff moved to amend the judgment to add as a defendant the individual who was the sole shareholder of the corporate general partner and the sole limited partner of the limited partnership. The superior court held that the individual was the alter ego of the named limited liability defendants and granted the motion. The appellant contended that the judgment should be reversed because the trial court failed to issue a statement of decision under *Code Civ. Proc. § 632* and that substantial evidence did not support the trial

court's finding that appellant was the alter ego of the named limited liability defendants. Citing *Corp. Code § 15632(a), (b)(1), (3),* the appellate court found that a limited partner may not be deemed to have participated in control merely because he exercised his duties as president of a corporate general partner, or acted as surety or lent money to the limited partnership (*55 Cal. App. 4th 654, 659)* . The court concluded that when a motion to amend the judgment seeks to impose alter ego liability for a judgment on one who was neither named nor served as a defendant in the action, the trial court is required to prepare a statement of decision after a timely request has been made under *Code Civ. Proc. § 632* (*55 Cal. App. 4th 654, 661-662)* .

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17-170 California Points & Authorities § 170.271

§ 170.271 Supporting Contention That Limited Partners Are Not Liable for Partnership Obligations Under ULPA [Corp. Code §§ 15501, 15507]--No Control of Business

[1] FORM Supporting Contention That Limited Partners Are Not Liable for Partnership Obligations Under ULPA [Corp. Code §§ 15501, 15507]--No Control of Business

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT _____ [*name*] IS A LIMITED PARTNER, AND THEREFORE IS NOT LIABLE FOR _____ [*specify partnership obligation, e.g.*, THE CONTRACT BETWEEN THE LIMITED PARTNERSHIP AND PLAINTIFF] BECAUSE LIMITED PARTNERS ARE NOT LIABLE FOR THE OBLIGATIONS OF THE LIMITED PARTNERSHIP[, AND ALTHOUGH _____ (*specify action alleged to be an exercise of control, e.g.*, HE/SHE NEGOTIATED THE CONTRACT AS THE AGENT OF THE CORPORATE GENERAL PARTNER,) THAT ACTION IS NOT DEEMED TO CONSTITUTE AN EXERCISE OF CONTROL OVER THE PARTNERSHIP BUSINESS].

A. No Liability as General Partner if No Control of Business. A limited partner is not bound by the obligations of the partnership. He or she will not become liable as a general partner unless, in addition to the exercise of his or her rights and powers as a limited partner, he or she takes part in the control of the business (*Corp. Code §§ 15501, 15507(a)*; *Grainger v. Antoyan (1957) 48 Cal. 2d 805, 807, 313 P.2d 848*).

[*Optional*] **B. Certain Acts Do Not Constitute Control of Business.** A limited partner will not be deemed to take part in the control of the business by virtue of his or her possessing or exercising a power, specified in the certificate of limited partnership, to vote on matters affecting the basic structure of the partnership, including the following matters or others of a similar nature: (1) election or removal of general partners; (2) termination of the partnership; (3) amendment of the partnership agreement; or (4) sale of all or substantially all of the assets of the partnership (*Corp. Code § 15507(b)*).

[*Optional*] **C. Other Acts May Not Constitute Control of Business.** The statement of powers set forth in *Corporations Code Section 15507(b)* will not be construed as exclusive or as indicating that any other powers possessed or exercised by a limited partner will be sufficient to cause that limited partner to be deemed to take part in the control of the business within the meaning of *Corporations Code Section 15507(a)*(*Corp. Code § 15507(c)*; *see Western Camps, Inc. v. Riverway Ranch Enter. (1977) 70 Cal. App. 3d 714, 727-730, 138 Cal. Rptr. 918*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a limited partner is not liable for the obligations of a ULPA limited partnership. Under the ULPA, a limited partner is not liable for any obligation of a limited partnership unless he or she participates in the control of the business [*Corp. Code § 15507(a)*; *Grainger v. Antoyan (1957) 48 Cal. 2d 805, 807, 313 P.2d 848]* . If the partnership is a CRLPA limited partnership [*see § 170.02[4], [5]* for discussion], the points and *authorities in § 170.270* should be used in place of those in this form.

The ULPA enumerates certain powers that are permitted without a limited partner being deemed to have taken part in the control of the business [*see Corp. Code § 15507(b)*]. Thus, Optional Paragraph B may be useful when an act by a limited partner is alleged to be an exercise of control, and it is one that is specifically provided as not being so under the ULPA. However, the enumeration in *Corp. Code § 15507(b)* does not necessarily mean that any other conduct by a limited partner will be deemed to constitute participation in the control of the business [*Corp. Code § 15507(c)*; *see Western Camps, Inc. v. Riverway Ranch Enter. (1977) 70 Cal. App. 3d 714, 727-730, 138 Cal. Rptr. 918]* . Optional Paragraph C may be used when a limited partner's act is not enumerated by the ULPA.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a limited partner is not liable for the obligations of the limited partnership. These points and authorities also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that a partner is a limited partner, and has exercised no control over the partnership business.

[c] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 170.281* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] No Liability as General Partner if No Control of Business

In ***Grainger v. Antoyan*** *(1957) 48 Cal. 2d 805, 313 P.2d 848* , defendant was the sales manager in a limited partnership doing business as an automobile dealership. He had no authority in the management and control of the business, employing or discharging personnel, or setting prices. The owner of the dealership was the general partner, and his son was the limited partner. The owner and his son executed a chattel mortgage to defendant, stating that they would pay defendant a sum of money payable in monthly installments plus interest, or 10 percent of the profits of the partnership, whichever was greater. The parties also executed articles of limited partnership and an Amendment of Certificate of Limited Partnership naming defendant as second limited partner, and guaranteeing and reiterating the terms of the aforementioned mortgage. Shortly thereafter, the parties modified the initial agreement, and defendant

agreed not to participate in the profits of the business until his loan was repaid by fixed monthly payments, and thereafter, he would remain a limited partner and receive a monthly percentage. The loan became delinquent, and defendant served the owner with a demand for payment and a notice of default. Subsequently, the partnership business became bankrupt. Plaintiff, as trustee for the limited partnership estate, filed an action against defendant for declaratory relief alleging that defendant was actually a general partner. The trial court rendered judgment for defendant. Plaintiff appealed.

The California Supreme Court affirmed. It held that the evidence clearly demonstrated that defendant had no control over prices, purchases, the extension of credit, wages, salaries, employment, and the dealership funds, and that he did not take part in the control of the business, and thus the trial court findings were fully sustained (*48 Cal. 2d 805, 813)* . In reaching this holding, the Court applied the rule in *Corp. Code § 15507* (ULPA) that a limited partner is not liable as a general partner unless, in addition to the exercise of his or her rights and powers as a limited partner, he or she takes part in the control of the business (*48 Cal. 2d 805, 807)* .

[b] Other Acts May Not Constitute Control of Business

In ***Western Camps, Inc. v. Riverway Ranch Enter.*** *(1977) 70 Cal. App. 3d 714, 138 Cal. Rptr. 918* , a corporation leased several acres of land, and concurrently executed an option agreement with the landowners to purchase real property. The lease was to operate only so long as the corporation continued to exercise its options. Thereafter, the corporation formed defendant limited partnership with the corporation as general partner, and assigned its rights in the lease and the agreement to the partnership. Defendant partnership subsequently subleased the property to plaintiff. One of plaintiff's officers met with one of defendant's limited partners for the purpose of obtaining a long term sublease. The limited partner agreed on the condition that plaintiff make improvements on the land at its own expense. In order to protect plaintiff in the event defendant failed to exercise its purchase options, the limited partner agreed to pay plaintiff a certain sum of money on termination of the sublease, and reimburse it for any improvements made. The parties drafted a sublease incorporating these provisions. The sublease also provided that defendant would give plaintiff written notice by a certain date of any intent to terminate it, and plaintiff would have the right to exercise defendant's purchase options should defendant choose not to do so. Thereafter, defendant exercised one option, but decided not to exercise any more. It so informed plaintiff, but plaintiff received no written notice expressly terminating the sublease. Plaintiff was unable to raise the money necessary to exercise the options. Plaintiff commenced an action against defendant and the limited partner for negligent misrepresentation, fraud, and breach of contract. Judgment was entered in favor of plaintiff and against both defendants. The trial court found that the limited partner exercised complete management and control over all negotiations for, and execution of, the sublease, and therefore, acted as a general partner. Defendants appealed.

The appellate court reversed in regard to the limited partner. Citing *Corp. Code §§ 15501* and *15507* (ULPA), the court held that a limited partner is not bound by the obligations of the limited partnership unless he or she takes part in the control of the partnership business (*70 Cal. App. 3d 714, 727)* . The court stated that the question in this case was whether a limited partner becomes liable as a general partner if he or she takes part in the control of the partnership business while acting as an agent of a corporation that is also the general partner in the limited partnership (*70 Cal. App. 3d 714, 728)* . It held that the dominant consideration in determining the personal liability of a limited partner is reliance by the third party, not control by the limited partner. A limited partner is made liable as a general partner when he or she participates in the control of the business, in order to protect third parties from dealing with the partnership under the mistaken assumption that the limited partner is a general partner with general liabilities. However, there is no substantive difference between the creditor who does business with a corporation that is the general partner and a creditor who simply does business with a corporation, and in the absence of fraud or other inequitable conduct, the corporate entity should be respected (*70 Cal. App. 3d 714, 729)* . Thus, the court held that the corporate general partner in this case was solely liable for the obligations of the limited partnership, and the limited partner had no personal liabilities for such obligations (*70 Cal. App. 3d 714, 730)* .

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17-170 California Points & Authorities § 170.272

§ 170.272 Supporting Contention That Putative Limited Partner Is Not Liable for Partnership Obligations Under CRLPA [Corp. Code § 15633(a)]--Discovery of Failure to File Certificate of Limited Partnership

[1] FORM Supporting Contention That Putative Limited Partner Is Not Liable for Partnership Obligations Under CRLPA [Corp. Code § 15633(a)]--Discovery of Failure to File Certificate of Limited Partnership

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT _____ [*name*] IS NOT LIABLE FOR THE OBLIGATIONS OF THE PURPORTED LIMITED PARTNERSHIP BECAUSE HE/SHE ERRONEOUSLY BELIEVED THAT HE/SHE WAS A LIMITED PARTNER THEREIN. WHEN HE/SHE FOUND OUT THAT A CERTIFICATE OF LIMITED PARTNERSHIP HAD NOT BEEN FILED, HE/SHE ASKED THE GENERAL PARTNER[S] TO DO SO. WHEN HE/SHE/THEY FAILED TO FILE THE CERTIFICATE, DEFENDANT PROMPTLY FILED ONE AND SENT A COPY TO EACH GENERAL PARTNER.

When Putative Limited Partner Is Not Liable. Except as provided in *Corporations Code Section 15633(b)*, if a certificate of limited partnership has not been filed, a person who makes a contribution to the purported limited partnership and in good faith believes that he or she has become a limited partner is not liable for the obligations of the purported limited partnership, if, on ascertaining that the certificate has not been filed and after a failure of the general partner or partners to file the certificate within a reasonable time after the request, that person promptly files the certificate and sends a copy of the certificate so filed to each general partner at the general partner's last known address (*Corp. Code § 15633(a)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a person who erroneously believes he or she is a limited partner is not liable for the obligations of a purported CRLPA limited partnership. They may be

combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a putative limited partner should not be held liable for the partnership's obligations. These points and authorities also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts that show that a person erroneously believed that he or she was a limited partner, and that when he or she found out that a certificate of limited partnership had not been filed, either he or she or the general partner or partners promptly filed it.

[c] Certificate of Limited Partnership

In order to form a limited partnership under the CRLPA, the parties must execute a partnership agreement and the general partners must execute, acknowledge, and file a certificate of limited partnership providing several designated items of information about the partnership [*Corp. Code § 15621(a)*]. For points and authorities relating to the specific requirements for the certificate, see *§ 170.72*.

[d] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 170.282* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] When Putative Limited Partner Is Not Liable

Corp. Code § 15633(a) (CRLPA) provides that a person who believes he or she is a limited partner when the limited partnership has not been properly formed because no certificate of limited partnership has been filed pursuant to *Corp. Code § 15621(a)* will not be liable for the purported limited partnership's obligations, if he or she promptly files a certificate within a reasonable time after asking the general partner or partners to do so [*Corp. Code § 15633(a)*]. A limited partner executing and filing a certificate of limited partnership must also send a copy of the certificate to each general partner at the general partner's last known address [*Corp. Code § 15633(a)*]. Counsel should bear in mind, however, that the person may be liable for obligations incurred prior to the time that the certificate was filed if the third person who transacted business with the purported limited partnership reasonably believed that the person was a general partner [*Corp. Code § 15633(b)*; *see § 170.282*].

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17-170 California Points & Authorities § 170.273

§ 170.273 Supporting Contention That Putative Limited Partner Is Not Liable for Partnership Obligations Under ULPA [Corp. Code § 15511]--Prompt Renunciation of Interest in Partnership Profits

[1] FORM Supporting Contention That Putative Limited Partner Is Not Liable for Partnership Obligations Under ULPA [Corp. Code § 15511]--Prompt Renunciation of Interest in Partnership Profits

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT _____ [*name*] IS NOT LIABLE FOR THE OBLIGATIONS OF THE PURPORTED LIMITED PARTNERSHIP BECAUSE HE/SHE ERRONEOUSLY BELIEVED THAT HE/SHE WAS A LIMITED PARTNER THEREIN. WHEN HE/SHE FOUND OUT THAT HE/SHE WAS NOT A LIMITED PARTNER, HE/SHE PROMPTLY RENOUNCED HIS/HER INTEREST IN THE PARTNERSHIP BUSINESS.

Putative Limited Partner Is Not Liable if Erroneously Believed Limited Partnership Existed and Promptly Renounced Interest in Profits and Business. A person who has contributed to the capital of a business conducted by a person or partnership erroneously believing that he or she has become a limited partner in a limited partnership is not, by reason of his or her exercise of the rights of a limited partner, a general partner with the person or in the partnership carrying on the business, or bound by the obligations of that person or partnership provided that, on ascertaining the mistake, he or she promptly renounces his or her interest in the profits of the business or other compensation by way of income (*Corp. Code § 15511*; *see J.C. Wattenbarger & Sons v. Sanders (1963) 216 Cal. App. 2d 495, 502, 30 Cal. Rptr. 910*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a person who erroneously believes he or she is a limited partner is not liable for the obligations of a purported ULPA limited partnership. Under the ULPA, a person who erroneously believes that he or she is a limited partner will not be liable for the purported limited

partnership's obligations if he or she renounces his or her interest in the profits of the business when he or she ascertains his or her mistake [*Corp. Code § 15511*].

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a person contributed to a purported limited partnership in the good faith but erroneous belief that he or she was becoming a limited partner, and therefore should not be held liable for the partnership's obligations. They also may be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts that show that a person erroneously believed that he or she was a limited partner, and that when he or she found out that he or she was not, he or she promptly renounced his or her interest in the profits of the business.

[3] Discussion of Authorities

[a] Putative Limited Partner Is Not Liable if Erroneously Believed Limited Partnership Existed and Promptly Renounced Interest in Profits and Business

In ***J.C. Wattenbarger & Sons v. Sanders*** *(1963) 216 Cal. App. 2d 495, 30 Cal. Rptr. 910* , appellant had an account for supplies and materials against a partnership comprised of respondent and several other persons. Appellant sued respondent and his partners individually and doing business as a partnership to recover on the account. The trial court found that respondent entered into a limited partnership in good faith, believing that he was to be a limited partner, and it rendered judgment for him. Appellant appealed, contending that it had the right to treat respondent as a general partner because respondent executed, filed, and published a fictitious name certificate with two of his partners, and did not declare in the certificate that he was a limited partner.

The appellate court affirmed, noting that respondent specifically renounced any claim to the partnership property in his answer. It held that although it believed that respondent was at all times a limited partner, if appellant's contention were correct, then respondent's renunciation pursuant to *Corp. Code § 15511* would serve to justify a judgment in his favor because the trial court found that he believed that he was a limited partner and that he acted in good faith (*216 Cal. App. 2d 495, 502)* .

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17-170 California Points & Authorities § 170.274

§ 170.274 Supporting Contention That Limited Partner Is Not Liable for Partnership Obligations Under ULPA '08 [Corp. Code § 15903.03]

[1] FORM Supporting Contention That Limited Partner Is Not Liable for Partnership Obligations Under ULPA '08 [Corp. Code § 15903.03]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT _____ [*name*] IS A LIMITED PARTNER AND THEREFORE IS NOT LIABLE FOR _____ [*specify partnership obligation, e.g.,* THE CONTRACT BETWEEN THE LIMITED PARTNERSHIP AND PLAINTIFF] BECAUSE LIMITED PARTNERS ARE NOT LIABLE FOR THE OBLIGATIONS OF THE LIMITED PARTNERSHIP. [ALTHOUGH _____ (*specify action alleged to be participation in control of the business, e.g.,* DEFENDANT CONSULTED WITH THE GENERAL PARTNER CONCERNING THE CONTRACT), CORPORATIONS CODE SECTION 15903.03(b) SPECIFIES THAT SUCH AN ACTION DOES NOT CONSTITUTE PARTICIPATION IN THE CONTROL OF THE BUSINESS].

A. No Liability for Partnership Obligations If No Control of Business. A limited partner is not liable for any obligation of a limited partner unless he or she is named as a general partner in the certificate or, in addition to exercising the rights and powers of a limited partner, he or she participates in the control of the business (*Corp. Code § 15903.03(a)*).

B. Third Party Must Know of Partner's Participation. If a limited partner participates in the control of the business without being named as a general partner, that limited partner may be held liable as a general partner only to persons who transact business with the limited partnership with actual knowledge of that partner's participation in control and with a reasonable belief, based on the limited partner's conduct, that the partner is a general partner at the time of the transaction business (*Corp. Code § 15903.03(a)*).

[*Optional*] **C. Certain Acts Do Not Constitute Control of Business.** A limited partner does not participate in the

control of the business solely by (*Corp. Code § 15903.03(b)*):

(1) Being any of the following:

(a) An independent contractor for, an agent or employee of, or transacting business with, the limited partnership or a general partner of the limited partnership.

(b) An officer, director, or shareholder of a corporate general partner of the limited partnership.

(c) A member, manager, or officer of a limited liability company that is a general partner of the limited partnership.

(d) A limited partner of a partnership that is a general partner of the limited partnership.

(e) A trustee, administrator, executor, custodian, or other fiduciary or beneficiary of an estate or trust that is a general partner.

(f) A trustee, officer, adviser, shareholder, or beneficiary of a business trust that is a general partner.

(2) Consulting with and advising a general partner with respect to the business of the limited partnership.

(3) Acting as surety for the limited partnership or for a general partner, guaranteeing one or more specific debts of the limited partnership, providing collateral for the limited partnership or general partner, borrowing money from the limited partnership or a general partner, or lending money to the limited partnership or a general partner.

(4) Approving or disapproving an amendment to the partnership agreement.

(5) Voting on, proposing, or calling a meeting of the partners.

(6) Winding up the partnership pursuant to *Corporations Code Section 15908.03*.

(7) Executing and filing a certificate pursuant to *Corporations Code Section 15902.05*, a certificate of withdrawal pursuant to *Corporations Code Section 15902.04(a)(4)*, or a certificate of cancellation of the certificate of limited partnership pursuant to *Corporations Code Section 15902.04(a)(6)*.

(8) Serving on an audit committee or committee performing the functions of an audit committee.

(9) Serving on a committee of the limited partnership or the limited partners for the purpose of approving actions of the general partner.

(10) Calling, requesting, attending, or participating at any meeting of the partners or the limited partners.

(11) Taking any action required or permitted by law to bring, pursue, settle, or terminate a derivative action on behalf of the limited partnership.

(12) Serving on the board of directors or a committee of, consulting with or advising, being or acting as an officer, director, stockholder, partner, member, manager, agent, or employee of, or being or acting as

a fiduciary for, any person in which the limited partnership has an interest.

(13) Exercising any right or power permitted to limited partners under the Uniform Limited Partnership Act of 2008 and not specifically listed above.

[*Optional*] **D. Other Acts May Not Constitute Control of Business.** The enumeration in *Corp. Code Section 15903.03(b)* does not mean that any other conduct or the possession or exercise of any other power by a limited partner constitutes participation by the limited partner in the control of the business of the limited partnership (*Corp. Code § 15903.03(c)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a limited partner is not liable for the obligations of the limited partnership under ULPA '08 [*see Corp. Code § 15903.03(a)* (statute not to be construed to affect liability of limited partner to third parties for participation in tortious conduct)]. Paragraph B is provided because even if a limited partner does participate in control of the business (without being named as a general partner), *Corp. Code § 15903.03(a)* provides that he or she will not be held liable to a third person who transacts business with the partnership unless the person has actual knowledge of the participation and reasonably believes, based on the limited partner's conduct, that the limited partner is a general partner at the time of the transaction. Optional Paragraph C may be used when an act by a limited partner is alleged to amount to participation in the control of the business, but ULPA '08 specifically provides that does not constitute such participation. Optional Paragraph D may be used when a limited partner's particular act is not listed in the ULPA '08.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a limited partner is not liable for the obligations of the limited partnership. They also may be adapted for use in a trial or appellate brief.

For points and authorities supporting a similar contention under the CRLPA [*Corp. Code § 15632* (repealed Jan. 1, 2010)], see *§ 170.270*.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing that a partner is a limited partner and has exercised no control over the partnership business.

[3] Discussion of Authorities

[a] No Liability for Partnership Obligations If No Control of Business

Corp. Code § 15903.03(a) provides that a limited partner is not liable for any obligation of a limited partnership unless he or she is named as a general partner in the certificate, or unless he or she or participates in the control of the business. ***Corp. Code § 15903.03(b)*** does not explain what control of the business is, but rather enumerates what actions do not constitute "participation in the control of the business." ***Corp. Code § 15903.03(c)*** states that the enumeration in *Corp. Code § 15903.03(b)* does not mean that any other conduct or the possession or exercise of any other power by a limited partner constitutes participation by the limited partner in the control of the business of the limited partnership.

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[Reserved]

§§ 170.275[Reserved]

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17-170 California Points & Authorities § 170.281

§ 170.281 Opposing Contention That Limited Partners Are Not Liable for Partnership Obligations Under ULPA [Corp. Code § 15505]--Limited Partner's Name Used in Name of Limited Partnership

[1] FORM Opposing Contention That Limited Partners Are Not Liable for Partnership Obligations Under ULPA [Corp. Code § 15505]--Limited Partner's Name Used in Name of Limited Partnership

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

ALTHOUGH DEFENDANT _____ [*name*] IS A LIMITED PARTNER, HE/SHE IS LIABLE FOR _____ [*specify partnership obligation, e.g.*, THE CONTRACT BETWEEN THE LIMITED PARTNERSHIP AND PLAINTIFF] BECAUSE DEFENDANT ALLOWED HIS/HER NAME TO BE USED IN THE PARTNERSHIP NAME, AND PLAINTIFF DID NOT KNOW THAT DEFENDANT WAS NOT A GENERAL PARTNER WHEN PLAINTIFF EXTENDED CREDIT TO THE PARTNERSHIP.

Limited Partner Whose Name Is Part of Partnership Name Generally is Liable for Partnership Obligations. The surname of a limited partner must not appear in the partnership name, unless it is also the surname of a general partner, or prior to the time when the limited partner became a limited partner the business had been carried on under a name in which his or her surname appeared. A limited partner whose name appears in the partnership, except under the above circumstances, is liable as a general partner to partnership creditors who extend credit to the partnership without actual knowledge that he or she is not a general partner (*Corp. Code § 15505(1), (2)*; *Russell v. Warner (1950) 96 Cal. App. 2d 986, 988, 217 P.2d 43*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that a limited partner is not liable for the obligations of a ULPA limited partnership. The ULPA provides that except under specified circumstances a limited partner will be liable for the partnership obligations if he or she permits his or her name to be used in the partnership

name and creditors who extend credit to the limited partnership do not know that the limited partner is not a general partner [*Corp. Code § 15505(1), (2)*; *Russell v. Warner (1950) 96 Cal. App. 2d 986, 988, 217 P.2d 43]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a limited partner is liable for the obligations of the limited partnership. They also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that the limited partner has allowed his or her name to be used in the name of the limited partnership, and that creditors who extended credit to the partnership did not know that the limited partner was not a general partner.

[c] Opposing Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 170.271*.

[3] Discussion of Authorities

[a] Limited Partner Whose Name Is Part of Partnership Name Generally is Liable for Partnership Obligations

In ***Russell v. Warner*** *(1950) 96 Cal. App. 2d 986, 217 P.2d 43* , defendant was a partner in a partnership that used part of his name in its own name. Defendant's partner made certain false representations to plaintiff concerning the business and assets of the partnership. Plaintiff relied on the misrepresentations and invested money in the partnership. Plaintiff brought an action for fraud against defendant and his partner, and the trial court rendered judgment for him. The court impliedly found that defendant and his partner were general partners. Defendant appealed.

The appellate court affirmed, holding that the evidence amply supported the trial court's finding that there was no substantial compliance with, among other provisions, former Civil Code § 2481 (*now see Corp. Code § 15505* [ULPA]) because an abbreviation of defendant's surname appeared in the partnership name. The court noted that the statute provided that the surname of a limited partner must not appear in the partnership name, with exceptions not shown to exist in this case (*96 Cal. App. 2d 986, 988)* .

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17-170 California Points & Authorities § 170.282

§ 170.282 Opposing Contention That Putative Partner Is Not Liable for Partnership Obligations Under CRLPA [Corp. Code § 15633]--Liability for Partnership Transactions Made Before Certificate of Limited Partnership Filed

[1] FORM Opposing Contention That Putative Partner Is Not Liable for Partnership Obligations Under CRLPA [Corp. Code § 15633]--Liability for Partnership Transactions Made Before Certificate of Limited Partnership Filed

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT _____ [*name*] IS LIABLE FOR THE OBLIGATIONS OF THE PURPORTED LIMITED PARTNERSHIP THAT WERE INCURRED PRIOR TO THE TIME THE CERTIFICATE OF LIMITED PARTNERSHIP WAS FILED, [EVEN THOUGH HE/SHE ERRONEOUSLY BELIEVED THAT HE/SHE WAS A LIMITED PARTNER AND THAT A CERTIFICATE HAD BEEN FILED, AND EVEN THOUGH HE/SHE PROMPTLY FILED THE CERTIFICATE WHEN HE/SHE DISCOVERED THAT ONE HAD NOT BEEN FILED].

Liability for Acts Prior to Filing of Certificate of Limited Partnership. A person who makes a contribution to a purported limited partnership and in good faith believes that he or she has become a limited partner is liable to any third party who transacted business with the purported limited partnership before the certificate of partnership was filed and who reasonably believed that the person was a general partner at the time of the transaction (*Corp. Code § 15633(b)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that a person who erroneously believes he or she is a limited partner is not liable for the obligations of a purported CRLPA limited partnership. For a discussion relating to the circumstances under which a putative partner will not be held liable for the obligations of the purported limited partnership under the CRLPA, see *§ 170.272*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that although a person erroneously believed in good faith that he or she was a limited partner, he or she should be responsible for obligations incurred before the certificate of limited partnership was filed. These points and authorities also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts that show that although a person erroneously believed that he or she was a limited partner and that a certificate of limited partnership was filed after it was discovered that one had not been, obligations were incurred by the partnership before the certificate was filed.

[c] Opposing Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 170.272*.

[3] Discussion of Authorities

[a] Liability for Acts Prior to Filing of Certificate of Limited Partnership

Under the California Revised Limited Partnership Act (CRLPA), a putative limited partner may be liable for obligations incurred prior to the time that a certificate of limited partnership was filed if the third person who transacted business with the partnership reasonably believed that the putative limited partner was a general partner at the time of the transaction [*Corp. Code § 15633(b)*].

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17-170 California Points & Authorities § 170.283

§ 170.283 Opposing Contention That Limited Partner Is Not Liable for Partnership Obligations Under ULPA '08 [Corp. Code § 15903.03]

[1] FORM Opposing Contention That Limited Partner Is Not Liable for Partnership Obligations Under ULPA '08 [Corp. Code § 15903.03]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT _____ [*name of limited partner*] IS LIABLE FOR _____ [*specify partnership obligation, e.g.,* THE CONTRACT BETWEEN THE LIMITED PARTNERSHIP AND PLAINTIFF] BECAUSE DEFENDANT _____ [*specify reason, e.g.,* IS NAMED AS A GENERAL PARTNER IN THE CERTIFICATE OF LIMITED PARTNERSHIP or PARTICIPATES IN THE CONTROL OF THE BUSINESS].

Limited Partner is Liable for Partnership Obligations If Named as General Partner in the Certificate or Participates in Control of the Business. A limited partner is liable for an obligation of a limited partnership if that partner is named as a general partner in the certificate or participates in the control of the business (*Corp. Code § 15903.03(a)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a limited partner is not liable for the obligations of the limited partnership under ULPA '08. These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a limited partner is liable for the obligations of the limited partnership. They also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing, for example, that a limited partner has exercised control over the partnership business.

[c] Opposing Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 170.274*.

[3] Discussion of Authorities

[a] Limited Partner Who Is Named in Certificate or Participates In Control of Business Is Liable for Partnership Obligations

Corp. Code § 15903.03(a) provides that a limited partner is not liable for any obligation of a limited partnership *unless* he or she is named as a general partner in the certificate or participates in the control of the business. *Corp. Code § 15903.03(b)* does not explain what control of the business is, but rather enumerates certain actions that do *not* constitute "participation in the control of the business." *Corp. Code § 15903.03(c)*, further states that the enumeration in *Corp. Code § 15903.03(b)* does not mean that any other conduct or the possession or exercise of any other power by a limited partner constitutes participation by the limited partner in the control of the business of the limited partnership.

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17-170 California Points & Authorities §§ 170.284-170.299

[Reserved]

§§ 170.284[Reserved]

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17-170 California Points & Authorities § 170.300

§ 170.300 Supporting Contention That Partner Is Entitled to Settlement of Accounts Upon Winding Up Partnership Business [Corp. Code § 16807(b)]

[1] FORM Supporting Contention That Partner Is Entitled to Settlement of Accounts Upon Winding Up Partnership Business [Corp. Code § 16807(b)]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Specify party, e.g.,* PLAINTIFF(S)] _____ [IS *or* ARE] ENTITLED TO A SETTLEMENT OF ALL PARTNERSHIP ACCOUNTS UPON WINDING UP THE PARTNERSHIP BUSINESS.

Each Partner Is Entitled to A Settlement of All Partnership Accounts Upon Winding Up the Partnership Business. Each partner is entitled to a settlement of all partnership accounts upon winding up the partnership business (*Corp. Code § 16807(b)*; *O'Flaherty v. Belgum (2004) 115 Cal. App. 4th 1044, 1056-1058, 9 Cal. Rptr. 3d 286*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a partner is entitled to a settlement of all partnership accounts upon winding up the partnership business. They may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue of the appropriate defendant. They may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

[c] Opposing Points and Authorities

The points and *authorities in § 170.310* may be used in an appropriate case to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Partner Is Entitled to Settlement of All Partnership Accounts Upon Winding Up the Partnership Business

O'Flaherty v. Belgum *(2004) 115 Cal. App. 4th 1044, 9 Cal. Rptr. 3d 286* involved the dissolution of a law partnership. After a dispute, one group of partners withdrew from the partnership and formed a new partnership (the "withdrawing partners"). The remaining partners filed an action for breach of contract, intentional violation of fiduciary duty, conversion, appointment of an impartial receiver, an accounting, and judicial dissolution of the original partnership. The withdrawing partners filed a cross-complaint for declaratory relief and appointment of a receiver, and the superior court appointed a receiver. The withdrawing partners thereafter filed a petition to compel arbitration pursuant to an arbitration clause in the partnership agreement. That clause provided that an arbitrator did not have the power to alter any terms of the agreement or grant any remedy which was either prohibited by the terms of the agreement or not available in a court of law. The trial court granted the petition for binding arbitration and dismissed the action, but retained jurisdiction to enforce the arbitration award and jurisdiction over the actions of the receiver. It later amended the order to provide that the matter was stayed pending arbitration. Another action was filed and assigned as a related action. After the liability phase of the arbitration began, the receiver notified the withdrawing partners' attorney that he was the only authorized representative of the original partnership and that he had not authorized anyone to represent the firm in the arbitration proceeding. Ultimately, the arbitrator found that because of the withdrawing partners' breaches of their contractual and fiduciary duties, they had forfeited all rights under the partnership agreement rendering "unnecessary" any calculations regarding the partnership's capital accounts. The arbitrator awarded the remaining partners various sums as damages against the withdrawing partners. The remaining partners filed a petition for confirmation of the award, and the withdrawing partners filed petitions to vacate. The receivership court terminated the receivership but refused to determine whether the partnership was properly represented in the arbitration. It approved the receiver's final account. The trial court entered judgment on the arbitration award in favor of the remaining partners, and the withdrawing partners appealed.

The appellate court reversed the judgment and ordered that the award be vacated, holding that because the arbitration clause in the partnership agreement expressly precluded the arbitrator from granting any remedy prohibited by the agreement or "not available in a court of law," the arbitrator exceeded his authority by declaring a forfeiture of the withdrawing partners' capital accounts. It held that the forfeiture was contrary to partnership law, the partnership agreement, and decisional law. The court first noted that under *Corp. Code § 16807(b)*, a partner is entitled to a settlement of all partnership accounts upon winding up the partnership business. Among the various remedies in the UPA'94 with respect to a partner who wrongfully dissociates, there is no provision for forfeiture of a capital account (*115 Cal. App. 4th 1044, 1056-1057)* . The court next noted that the partnership agreement did not provide for forfeiture of a partner's capital account in the event the partner wrongfully withdrew from the firm or upon involuntary termination of a partner for cause. On the contrary, it provided for a return of capital, even to a wrongfully withdrawing partner (*115 Cal. App. 4th 1044, 1057-1058)* . The court further stated that California case law did not support forfeiture of a capital account of a partner whose wrong causes dissolution of a partnership (*115 Cal. App. 4th 1044, 1058-1059* ; *see also* discussion in *§ 170.310[3]*). By providing a remedy inconsistent with the provisions of the partnership agreement and specifically in contradiction to the partnership agreement provision that the arbitrator has no power to order a remedy prohibited by the agreement or not available in a court of law, the arbitrator in effect awarded a remedy expressly forbidden by the arbitration agreement (*115 Cal. App. 4th 1044, 1061)* .

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Volume 17 Chapters 170-179 PARTNERSHIPS---to---PREMISES LIABILITY
CHAPTER 170 PARTNERSHIPS
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17-170 California Points & Authorities § 170.301

§ 170.301 Supporting Contention That Partner May Sue Individual Partners for Legal or Equitable Relief, Including Dissolution and Accounting [Corp. Code § 16405(b)]

[1] FORM Supporting Contention That Partner May Sue Individual Partners for Legal or Equitable Relief, Including Dissolution and Accounting [Corp. Code § 16405(b)]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF[S], AS _____ [A PARTNER *or* PARTNERS] OF A PARTNERSHIP WHOSE COPARTNERS ALSO INCLUDED DEFENDANT[S] _____ [*name(s)*], _____ [IS *or* ARE] PERMITTED TO SUE THE PARTNERSHIP OR DEFENDANT[S] IN _____ [DEFENDANT'S *or* DEFENDANTS'] INDIVIDUAL _____ [CAPACITY *or* CAPACITIES] FOR LEGAL OR EQUITABLE RELIEF, SPECIFICALLY _____ [*e.g.*, DISSOLUTION AND AN ACCOUNTING].

Partner May Sue Individual Partners for Legal or Equitable Relief, Including Dissolution and Accounting. Partners are permitted to maintain an action against the partnership or another partner for legal or equitable relief, including dissolution and accounting (*Corp. Code § 16405(b)*; *Schnabel v. Lui (9th Cir. 2002) 302 F.3d 1023, 1029-1031)* .

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a partner may maintain an action for dissolution and accounting against the partnership or an individual partner. These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue of the appropriate defendant. They may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

[c] Related Pleading and Practice Forms

For a complaint for partnership dissolution, accounting, and appointment of receiver by a partner, with related discussion, see *California Forms of Pleading and Practice, Ch. 406, Partnerships: Dissolution, § 406.60* (Matthew Bender).

[3] Discussion of Authorities

[a] Partner May Sue Other Partners for Legal or Equitable Relief, Including Dissolution and Accounting.

Corp. Code § 16405(b)(2) provides that a partner may maintain an action against the partnership or another partner for legal or equitable relief, with or without an accounting as to partnership business, to enforce the partner's rights under the law, including the partner's right to compel a dissolution and winding up of the partnership business.

Schnabel v. Lui *(9th Cir. 2002) 302 F.3d 1023* , concerned a partnership formed to produce attractions for an amusement park in China. Several partners became disenchanted with the business arrangement and sued the other partners in federal court. Defendants' countersuit was filed in superior court and then removed to federal court, based on diversity jurisdiction, and the two suits were consolidated as the removed action was essentially a counterclaim to the claims originally brought in federal court. Defendants moved to dismiss for lack of subject matter jurisdiction and failure to join the partnership as an indispensable party. Any joinder of the partnership would destroy diversity jurisdiction. The trial court found that the partnership was not an indispensable party, because California law permits actions against general partners for claims arising from the partnership, and the partnership at issue had no separate name, assets, or contracts. Therefore, nonjoinder of the partnership would not prevent the court from according complete relief among the parties nor would it prejudice any party. The court found defendants liable to plaintiffs for breach of contract, fraud, and intentional interference. Defendants appealed, claiming that the district court abused its discretion in denying their motion to dismiss for failure to join the partnership as an indispensable party.

The court examined the standard for indispensable parties [Fed. Rule *Civ. Proc. 19*]. To find that a person who is not joined is "indispensable," the absent person must be deemed necessary as a "person to be joined if feasible." The Ninth Circuit stated that under California law [*Corp. Code § 16405(b)*], partners are permitted to maintain an action against the partnership or another partner for legal or equitable relief. Relief is available against another partner for an accounting, enforcement of rights under the partnership agreement, dissolution, and to enforce other rights of a partner arising under the code or for rights independent of the partnership agreement. Given the state law permitting plaintiff partners to sue defendant partners for breach of contract, dissolution, and accounting, the district court had rejected the argument that plaintiffs' claims stated injury only to the partnership. In addition, plaintiffs presented affirmative evidence that the partnership had no separate assets, and was not a party to any contracts in its own name. The district court therefore had held that complete relief could be afforded among existing parties without joinder of the partnership, and that the failure to join the partnership would not prejudice any party. The Ninth Circuit agreed that in light of the current California statute permitting suit against individual partners, and the finding that the partnership did not have its own assets, the district court's legal conclusion that the partnership need not be joined was correct (*302 F.3d 1023, 1029-1031)* .

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17-170 California Points & Authorities § 170.302

§ 170.302 Supporting Contention That Partner Has Right to Reasonable Compensation for Completing Unfinished Partnership Business [Corp. Code § 16401(h); former Corp. Code § 15018(f)]

[1] FORM Supporting Contention That Partner Has Right to Reasonable Compensation for Completing Unfinished Partnership Business [Corp. Code § 16401(h); former Corp. Code § 15018(f)]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Specify party, e.g.,* PLAINTIFF(S)] _____ [IS *or* ARE] ENTITLED TO REASONABLE COMPENSATION FOR SERVICES RENDERED IN WINDING UP THE BUSINESS OF THE PARTNERSHIP.

Partner's Right to Compensation. A partner is entitled to reasonable compensation for services rendered in winding up the partnership's business. The particular facts of the situation determine what is reasonable, and the burden is on the party claiming the compensation to establish his or her claim [*Corp. Code § 16401(h) or* former Corp. Code § 15018(f); *Jacobson v. Wikholm (1946) 29 Cal. 2d 24, 29-32, 172 P.2d 878*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contentions that a partner is entitled to reasonable compensation for winding up the partnership's business. They may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the proper compensation for completing the partnership's unfinished business. They also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should specify the unfinished business at issue, who completed the partnership business, and at

what expense.

[c] Opposing Points and Authorities

The points and *authorities in § 170.140* may be used in an appropriate case to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Partner's Right to Compensation

Corp. Code § 16401(h) provides that a partner is entitled to reasonable compensation for services rendered in winding up the partnership's business.

In ***Jacobson v. Wikholm*** *(1946) 29 Cal. 2d 24, 172 P.2d 878* , the administratrix of the deceased partner sought an accounting from the surviving partner and claimed half the profits from the proceeds of a contract completed by defendant. The contract had been 20 percent completed at the date of death. Plaintiff contended defendant was not entitled to any compensation for his services in completing the contract. Judgment was for plaintiff, and defendant appealed. The California Supreme Court reversed. After noting the duty of a surviving partner to complete all executory contracts of the firm remaining in force after a partner's death, the Court said since the enactment of former Civ. Code § 2412(f) [*now see Corp. Code § 16401(h)* (UPA'94); *see also* former Corp. Code § 15018(f) (pre-'97 Act)], there is no distinction between services for merely winding up the partnership affairs and for those in performing executory contracts of the firm. Despite the fact that the relation is fiduciary, compensation is allowable (*29 Cal. 2d 24, 29)* . The amount of compensation is a question of the particular skill required and the amount of time devoted as well as of the portion of profits attributable to decedent's capital and the portion attributable to the survivor's skill and labor (*29 Cal. 2d 24, 30-31)* . The burden is on the party claiming the compensation to prove its worth (*29 Cal. 2d 24, 32)* .

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17-170 California Points & Authorities § 170.303

§ 170.303 Supporting Contention That Noncompetition Agreement Is Enforceable Against Withdrawn Partner [Bus. & Prof. Code §§ 16601, 16602]

[1] FORM Supporting Contention That Noncompetition Agreement Is Enforceable Against Withdrawn Partner [Bus. & Prof. Code §§ 16601, 16602]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT ENTERED INTO A NONCOMPETITION AGREEMENT _____ [UPON *or* IN ANTICIPATION OF] THE [DISSOLUTION OF THE PARTNERSHIP *or* DISSOCIATION FROM THE PARTNERSHIP *or* SALE OR OTHER DISPOSITION OF THE PARTNER'S INTEREST], AND DEFENDANT IS BOUND BY THAT AGREEMENT.

[*EITHER*]

A. Partners May Make Noncompetition Agreements Anticipating Dissolution of Their Partnership or Dissociation of a Partner. Any partner upon or in anticipation of a dissolution of the partnership, or dissociation of the partner from the partnership, may agree that he or she will not carry on a similar business within a specified geographic area where the partnership business has been transacted, as long as any other member of the partnership, or any person deriving title to the business or its goodwill from any such other member of the partnership, carries on a like business therein (*Bus. & Prof. Code § 16602*).

[*OR*]

A. Partners May Make Noncompetition Agreements Anticipating Sale of Their Interests in the Partnership. Any person who sells the goodwill of a business, or any owner of a business entity selling or otherwise disposing of all of his or her ownership interest in the business entity, or any owner of a business entity that sells (1) all or substantially all of

its operating assets together with the goodwill of the business entity, (2) all or substantially all of the operating assets of a division or a subsidiary of the business entity, together with the goodwill of that division or subsidiary, or (3) all of the ownership interest of any subsidiary, may agree with the buyer to refrain from carrying on a similar business within a specified geographic area in which the business so sold, or that of the business entity, division or subsidiary, has been carried on, as long as the buyer or any person deriving title to the goodwill or ownership interest from the buyer, carries on a like business therein (*Bus. & Prof. Code § 16601*).

[*EITHER*]

B. Attorneys in Partnership May Make Enforceable Noncompetition Agreements. *Business & Professions Code Section 16602* applies to partners in law firms (*Howard v. Babcock (1993) 6 Cal. 4th 409, 418, 25 Cal. Rptr. 2d 80, 863 P.2d 150* ; *Haight, Brown & Bonesteel v. Superior Court (1991) 234 Cal. App. 3d 963, 969, 285 Cal. Rptr. 845*).

[*OR*]

B. Physicians in Partnership May Make Enforceable Noncompetition Agreements. Physicians in partnership are free under *Business & Professions Code Section 16602* to impose a covenant not to compete on each other (*South Bay Radiology Medical Associates v. Asher (1990) 2220 Cal. App. 3d 1074, 269 Cal. Rptr. 15*).

[*OR*]

B. Accountants in Partnership May Make Enforceable Noncompetition Agreements. *Business & Professions Code Section 16602* governs the rights of the parties to a covenant not to compete that is contained in a partnership agreement between accountants (*Swenson v. File (1970) 3 Cal. 3d 389, 393, 90 Cal. Rptr. 580, 475 P.2d 852*).

[*OR*]

B. Professionals in Partnership May Make Enforceable Noncompetition Agreements. *Business & Professions Code Section 16602* speaks in general terms, providing that "any partner" may agree not to compete with members of the partnership upon dissolution. This statutory language may be relied on in enforcing covenants not to compete among partners practicing in the professions (*Howard v. Babcock (1993) 6 Cal. 4th 409, 416, 417, 25 Cal. Rptr. 2d 80, 863 P.2d 150* ; *Swenson v. File (1970) 3 Cal. 3d 389, 393, 90 Cal. Rptr. 580, 475 P.2d 852* ; *South Bay Radiology Medical Associates v. Asher (1990) 220 Cal. App. 3d 1074, 269 Cal. Rptr. 15*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that a noncompetition agreement is enforceable against a withdrawn partner. The governing statute is applicable to partners in any partnership [*see Bus. & Prof. Code § 16602*; *Howard v. Babcock (1993) 6 Cal. 4th 409, 417, 25 Cal. Rptr. 2d 80, 863 P.2d 150]* . This form includes provisions for use when the withdrawn partner is an accountant or a physician or an attorney, as well as a general provision for use when the withdrawn partner is some other professional.

Bus. & Prof. Code § 16602, which previously governed noncompetition agreements upon dissolution of the partnership, dissociation of the partner from the partnership, or sale or other disposition of the partner's interest in a

partnership, was amended in 2002 to govern noncompetition agreements in the context of a dissolution or dissociation only [*see* Stats. 2002, ch. 179, § 2]. *Bus. & Prof. Code § 16601*, which previously governed noncompetition agreements only in the context of the sale of a corporation's goodwill or shares, was amended to govern sales by any owner of a "business entity," a term that now includes any partnership (including a limited partnership or limited liability partnership), limited liability company (including a series of a limited liability company formed under the laws of a jurisdiction that recognizes such a series), or corporation [*see* Stats. 2002, ch. 179, § 1; Stats. 2006, ch. 495, § 1].

This form may be combined with other forms pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the enforceability of a noncompetition agreement between partners--for example, supporting or opposing a petition for writ of mandate or a petition for confirmation of an arbitration award. This form also may be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case.

[c] Related Pleading and Practice Chapters

For a complaint for damages and injunctive relief for breach of an agreement not to compete made by partners on dissolution, see *California Forms of Pleading and Practice, Ch. 406, Partnerships: Dissolution, § 406.66* (Matthew Bender).

[3] Discussion of Authorities

[a] Attorneys in Partnership May Make Enforceable Noncompetition Agreements

In ***Howard v. Babcock*** *(1993) 6 Cal. 4th 409, 25 Cal. Rptr. 2d 80, 863 P.2d 150* , the parties were partners in a law firm. Their partnership agreement contained a provision that if a withdrawn partner were to practice law in a specified geographical area for a specified period after withdrawal from the firm, that partner would forfeit all withdrawal benefits (amounting, mainly, to a payment equal to the post-withdrawal year's net profit interest) and would receive only the partner's capital interest. The plaintiffs withdrew and started a competing firm. The defendants refused to pay any withdrawal benefits, citing the noncompetition provision in the partnership agreement, and only tendered payment of the withdrawn partners' capital interests. In the ensuing action, the plaintiffs sought a declaration that the noncompetition provision was not enforceable, while the defendants asserted that the provision was authorized by *Bus. & Prof. Code § 16602*. The trial court ruled that the provision was valid and enforceable.

The court of appeal held that under the Rules of Professional Conduct, *Bus. & Prof. Code § 16602* does not apply to attorneys, who therefore may not make noncompetition agreements.

The California Supreme Court concluded "that an agreement among law partners imposing a reasonable toll on departing partners who compete with the firm is enforceable" (*6 Cal. 4th 409, 412)* . Therefore, the court reversed and ordered remand to the trial court for a determination of whether the noncompetition agreement was reasonable. With respect to the applicability of *Bus. & Prof. Code § 16602*, the Court concluded that the section "speaks in general terms, providing that 'any partner' may agree not to compete with members of the partnership upon dissolution. Nothing in its language conveys an exception to its terms for lawyers, nor have the parties or amicus curiae directed us to any legislative history indicating that the statute was intended to apply to all partners except those who happened to be lawyers" (*6 Cal. 4th 409, 417)* . "Accordingly, finding no ambiguity in the terms of the statute, and finding no demonstrated legislative intent to create a silent exception for lawyers, ... we conclude that the statute applies to partners in law firms" (*6 Cal. 4th 409, 418)* . On the asserted conflict between the statute and the Rules of Professional conduct, the court agreed with the court in *Haight, Brown & Bonesteel v. Superior Court (1991) 234 Cal. App. 3d 963, 285 Cal. Rptr. 845* , discussed *below*, that an agreement between law partners that a reasonable cost will be assessed for

competition is consistent with Rule 1-500" (*6 Cal. 4th 409, 419)* , and stated that the *Haight* court's construction of the rule is consistent with *Bus. & Prof. Code § 16602*, permitting agreements between partners restricting competition (*6 Cal. 4th 409, 420)* .

In ***Haight, Brown & Bonesteel v. Superior Court*** *(1991) 234 Cal. App. 3d 963, 285 Cal. Rptr. 845* , the real parties in interest were withdrawn partners who started a competing law firm. The partnership agreement contained a provision that if a withdrawn partner were to practice law in a specified geographical area for a specified period after withdrawal from the firm, that partner would forfeit all withdrawal benefits (but, under another provision, would receive the partner's capital interest). The provision stated the parties' intent specifically to take advantage of *Bus. & Prof. Code § 16602*. In the partnership's action for a declaration of the parties' rights and duties under the noncompetition provision, the trial court granted the withdrawn partners' motion for judgment on the pleadings, on the ground that the noncompetition provision was a forfeiture provision as a matter of law, and therefore it was unenforceable.

The appellate court granted the partnership's petition for a writ of mandate directing the trial court to vacate its order. The court cited *Bus. & Prof. Code § 16602*, and first rejected the argument that under the Rules of Professional Conduct, lawyers may not make noncompetition agreements. The court stated: "In our opinion, ... [Rule 1-500] simply provides that an attorney may not enter into an agreement to refrain altogether from the practice of law. The rule does not, however, prohibit a withdrawing partner from agreeing to compensate his former partners in the event he chooses to represent clients previously represented by the firm from which he has withdrawn" (*234 Cal. App. 3d 963, 969)* . The court then also rejected the argument that the provision in question was a forfeiture provision as a matter of law. Summarizing its opinion, the court stated: "We find no reason to treat attorneys any differently from professionals such as physicians or certified public accountants, for example, by holding that lawyers may not enter into noncompetition agreements in accordance with section 16602" (*234 Cal. App. 3d 963, 971)* .

[b] Physicians in Partnership May Make Enforceable Noncompetition Agreements

In ***South Bay Radiology Medical Associates v. Asher*** *(1990) 220 Cal. App. 3d 1074, 269 Cal. Rptr. 15* , the respondent was a radiologist who withdrew from a medical partnership. The partnership agreement contained a provision binding each partner not to engage in the private practice of medicine in a specified geographical area for a specified period after withdrawal from the partnership, except with the consent of the partnership. A dispute over the value of the respondent's interest was settled by an arbitrator, who ruled against the respondent's contention that the noncompetition agreement was not enforceable under *Bus. & Prof. Code § 16602* without the payment of compensation for goodwill. In the partnership's proceeding for confirmation of the arbitrator's award, the respondent opposed the petition on the same ground that the arbitrator had rejected. The trial court confirmed the award.

The appellate court affirmed. The court concluded that the covenant not to compete was proper under *Bus. & Prof. Code § 16602*. Contrary to the radiologist's argument, the court found nothing on the face of *Bus. & Prof. Code § 16602* or its history which requires that a withdrawing partner be compensated for the partnership's goodwill (*220 Cal. App. 3d 1074, 1080)* . Thus, the court concluded that the remaining partners were free under *Bus. & Prof. Code § 16602* both to impose a covenant not to compete on each other and to refrain from paying a withdrawing partner any amount for the partnership's goodwill (*220 Cal. App. 3d 1074, 1084)* .

[c] Accountants in Partnership May Make Enforceable Noncompetition Agreements

In ***Swenson v. File*** *(1970) 3 Cal. 3d 389, 90 Cal. Rptr. 580, 475 P.2d 852* , the parties were former partners in an accounting firm in Los Angeles County. Their partnership agreement contained a covenant binding each partner not to compete with the partnership in a specified geographical area for a specified period after withdrawal from the firm. The defendant withdrew and opened an accounting practice in Los Angeles County but not in the same two cities where the firm's offices were located. In the partners' action based on alleged breach of the covenant not to compete, the trial court entered judgment for the defendant. The trial court held that the parties were subject to *Bus. & Prof. Code § 16602* as it

existed before a 1961 amendment. The applicable version authorized agreements to prevent competition in the same city or town, but not elsewhere, where the partnership business was transacted.

The California Supreme Court affirmed. On appeal the principal issue was which version of *Bus. & Prof. Code § 16602* governed the parties' rights under the covenant not to compete. The court agreed with defendant's and the trial court's position that the former version of Bus. & Prof. Code § 16602 governed the rights of the parties under the revised partnership agreement since the agreement was executed prior to the amendment of that section (*3 Cal. 3d 389, 392-393)* .

[d] Professionals in Partnership May Make Enforceable Noncompetition Agreements

Howard v. Babcock *(1993) 6 Cal. 4th 409, 25 Cal. Rptr. 2d 80, 863 P.2d 150* , is discussed in [a], *above*.

South Bay Radiology Medical Associates v. Asher *(1990) 220 Cal. App. 3d 1074, 269 Cal. Rptr. 15* , is discussed in [b], *above*.

Swenson v. File *(1970) 3 Cal. 3d 389, 90 Cal. Rptr. 580, 475 P.2d 852* , is discussed in [c], *above*.

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17-170 California Points & Authorities § 170.304

§ 170.304 Supporting Contention That Aggrieved Partner May Elect Dissolution and Sale of Assets [Corp. Code § 16801(5)]

[1] FORM Supporting Contention That Aggrieved Partner May Elect Dissolution and Sale of Assets [Corp. Code § 16801(5)]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

AFTER WRONGFUL REPUDIATION OF THE PARTNERSHIP AGREEMENT BY DEFENDANT(S), _____ [*specify party, e.g.,* PLAINTIFF(S)] _____ [IS *or* ARE] ENTITLED TO DISSOLUTION BY SALE OF THE PARTNERSHIP ASSETS AND DISTRIBUTION OF THE PROCEEDS.

After Wrongful Repudiation of the Partnership Agreement, the Aggrieved Partner May Elect to Have the Partnership Dissolved by Sale of the Partnership Assets. After wrongful repudiation of a partnership agreement, the aggrieved partner is not required to accept an award of damages, but may elect instead to have the partnership dissolved by sale of the partnership assets and distribution of the proceeds (*Corp. Code §§ 16801(5), 16807*; *Navarro v. Perron (2004) 122 Cal. App. 4th 797, 799*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that an aggrieved partner is not required to accept an award of damages, but may elect to have the partnership dissolved by sale of the partnership assets and distribution of the proceeds. They may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue of the appropriate defendant. They may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Aggrieved Partner May Elect Dissolution Rather than Damages

In ***Navarro v. Perron*** *(2004) 122 Cal. App. 4th 797, 10 Cal. Rptr. 3d 198* , plaintiff and defendants formed a partnership to purchase a duplex. Plaintiff owned 50 percent and defendants owned the other half. The partners purchased the premises and contributed equal amounts of cash. Because plaintiff had credit problems, defendants alone signed the note and took title to the property. Eventually, defendants repudiated the partnership, and plaintiff sued for breach of contract and specific performance. He requested that the court order defendants to execute a deed conveying to him an undivided 50 percent interest in the property. Defendants cross-complained for slander of title, abuse of process, trespass, and declaratory relief. They also filed an unlawful detainer action. Both parties brought actions for injunctions to prohibit harassment. All the actions were consolidated for trial. The trial court found an enforceable partnership agreement and ruled against the defendants on their cross-complaint and unlawful detainer action. In its tentative statement of decision, the trial court stated that it would not be just or reasonable to order defendants to execute a deed granting plaintiff 50 percent of the property for two reasons: (1) transfer might trigger the trust deed's due on sale clause; and (2) deterioration in the parties' relationship made common ownership impossible. The court found the value of the property to be $292,000, and gave defendants until May 1, 2002, to purchase plaintiff's share. If defendants did not exercise their right, then plaintiff would have the right to purchase their interest until June 30, 2002. If neither party exercised the right to purchase, the property would be put on the market for sale. Neither party exercised the option to purchase. Plaintiff asked the trial court to place the property on the market. Instead, the trial court issued another tentative statement of decision with a different remedy. The court awarded plaintiff damages in the amount of $38,750, leaving title to the property to defendants. Plaintiff objected to the damages as inadequate on the ground, among others, that the value of the property had increased since trial. The trial court issued another statement of decision increasing the amount of damages awarded. It stated that it had considered a judicial dissolution of the partnership, but that would require a sale of the property and a distribution of the net proceeds. The court decided to award damages instead because of defendants' desire to retain the property as their residence and because plaintiff considered the property as a relatively short term investment (*122 Cal. App. 4th 797, 799-800)* .

Plaintiff appealed, contending that the trial court erred in awarding an arbitrary amount of damages, and that it should have dissolved the partnership and ordered the property sold on the open market. In the alternative, plaintiff claimed he should have been given the right to purchase defendants' interest based on the court's evaluation. The appellate court held that the trial court could not force plaintiff to accept an award of damages rather than a dissolution of the partnership and a sale of the premises. Citing *Corp. Code § 16801(5)(C)* as applicable, the court found that when the trial court has determined that it is not reasonably practical to carry on the partnership, the court has no discretion to deny a partner's application to dissolve it. Plaintiff's request that the property be sold was the equivalent of an application to dissolve the partnership (*122 Cal. App. 4th 797, 801-802)* . Furthermore, the court could not dissolve the partnership by awarding defendants the property and plaintiff damages, as *Corp. Code § 16402* provides that a partner has no right to receive a distribution in kind. A judgment awarding plaintiff damages and defendants possession of the property would be equivalent to granting defendants a right to distribution in kind. Citing *Corp. Code § 16807(a)*, the court held that the property must be sold, the proceeds applied to discharge the partnership's obligations to creditors, and any surplus paid in cash to the partners in accordance with their rights to distributions (*122 Cal. App. 4th 797, 802)* . Finally, the court stated that merely because the non-breaching partner may sue for damages without seeking dissolution does not mean that the partner is *required* to do so. The party who is wronged has the election of remedies (*122 Cal. App. 4th 797, 802)* . The court therefore reversed the judgment with instructions to order the property sold, the proceeds applied to pay the obligations of the partnership, and any surplus distributed to the partners in cash (*122 Cal. App. 4th 797, 803)* .

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[Reserved]

§§ 170.305[Reserved]

California Points & Authorities

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Volume 17 Chapters 170-179 PARTNERSHIPS---to---PREMISES LIABILITY
CHAPTER 170 PARTNERSHIPS
PART II. FORMS
E. Dissolution/Dissociation

17-170 California Points & Authorities § 170.310

§ 170.310 Opposing Contention That Partner Is Entitled to Settlement of Accounts Upon Winding Up Partnership Business [Corp. Code § 16807(b)]--Forfeiture

[1] FORM Opposing Contention That Partner Is Entitled to Settlement of Accounts Upon Winding Up Partnership Business [Corp. Code § 16807(b)]--Forfeiture

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Specify party, e.g.,* PLAINTIFF(S)] _____ [IS *or* ARE] NOT ENTITLED TO AN ACCOUNTING AND SETTLEMENT OF PARTNERSHIP ACCOUNTS UPON WINDING UP THE PARTNERSHIP BUSINESS BECAUSE _____ [*specify ground for forfeiture, e.g.,* THE PARTNERSHIP AGREEMENT INCLUDES A FORFEITURE PROVISION APPLICABLE TO BREACH OF THE PARTNERSHIP AGREEMENT].

Forfeiture Provision Eliminates Right to Settlement of Accounts. A partner is not entitled to a settlement of partnership accounts when the partnership agreement contains an applicable forfeiture provision (*B.K.K. Co. v. Schultz (1970) 7 Cal. App. 3d 786, 797, 86 Cal. Rptr. 760* ; *see O'Flaherty v. Belgum (2004) 115 Cal. App. 4th 1044, 1056-1058, 9 Cal. Rptr. 3d 286*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose the contention that a partner is entitled to a settlement of all partnership accounts upon winding up the partnership business when an applicable forfeiture provision applies. These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue. They may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

[c] Opposing Points and Authorities

These points and authorities may be used in an appropriate case to oppose the contention supported by the points and *authorities in § 170.300*.

[3] Discussion of Authorities

[a] Forfeiture Provision Eliminates Right to Settlement of Accounts

In ***B.K.K. Co. v. Schultz*** *(1970) 7 Cal. App. 3d 786, 86 Cal. Rptr. 760* , the plaintiff leased a ranch to defendant and also sold him livestock and equipment for use on the ranch. After defendant abandoned the ranch, taking the livestock and equipment with him, plaintiff sued for breach of the lease and sales agreement. Defendant filed a cross-complaint seeking an accounting with respect to a business with plaintiff in which defendant allegedly held a one-third interest. The trial court entered judgment for the plaintiff on the complaint, and on the cross-complaint found that defendant did not hold any interest in the business and was not entitled to an accounting.

The appellate court reversed. With respect to the cross-complaint, the court stated that the parties had formed an agreement making them joint venturers or partners (*7 Cal. App. 3d 786, 796)* . Although the trial court had found that defendant did not contribute equally in the business, the most that could be derived from this finding was that defendant breached the agreement in some manner. The appellate court stated that a breach of the partnership agreement does not necessarily result in a forfeiture of the partner's interest or deprive him or her of the right to an accounting. Citing former Corp. Code § 15038, it stated that when a partner wrongfully withdraws, that partner is entitled to the value of his or her partnership interest, less any damages caused by that partner. Defendant had requested the trial court to make explicit findings as to the terms of the joint venture agreement, the performance of defendant under that agreement, the existence of any subsequent agreement among the parties, and the property owned by the business and the disposition of it. All those requests were refused. The appellate court stated that without such findings, it had no way of determining whether defendant was refused an accounting on some proper factual ground, or whether it was upon some erroneous interpretation of the law (*7 Cal. App. 3d 786, 797)* . The court therefore reversed the judgment and remanded the case to superior court to make new findings of fact and conclusions of law determining the nature and extent of the parties' interests in the business, and requiring an accounting with respect to that interest if appropriate (*7 Cal. App. 3d 786, 797)* .

The facts and procedural background of ***O'Flaherty v. Belgum*** *(2004) 115 Cal. App. 4th 1044, 9 Cal. Rptr. 3d 286* are discussed in *§ 170.300[3]*. In citing *B.K.K. Co. v. Schultz (1970) 7 Cal. App. 3d 786, 86 Cal. Rptr. 760* , discussed *above*, it quoted the court's statement that "a breach of the partnership agreement does not necessarily result in a forfeiture of the partner's interest or deprive him of his right to an accounting." The appellate court said that the *B.K.K.* court's use of the phrase "does not necessarily" alluded to the fact that the partnership agreement itself might include a forfeiture provision and that the trial court might properly refuse an accounting on that basis (*15 Cal. App. 4th 1044, 1058)* .

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CHAPTER 171 PATERNITY

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[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Depriving the Court of Jurisdiction

[4] Additional Authorities

[a] Child as Party to Action

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[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Personal Jurisdiction as Required in Paternity Action

[b] Jurisdiction Over Nonresident

[4] Additional Authorities

[a] Jurisdiction Over Nonresident

§ 171.22 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] in Action by Presumed Father to Declare Nonexistence of Father-Child Relationship [Fam. Code § 7630(a)(2)]--Action Not Brought Within Reasonable Time

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Additional Authorities

[a] Bringing an Action

§ 171.23 Supporting Defendant's Motion for Special Trial of Special Defense [Code Civ. Proc. § 597] in Action to Declare Nonexistence of Father-Child Relationship [Fam. Code § 7630(a)(2)]--Action Not Brought Within Reasonable Time

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Effect of Special Trial Statute

[b] Prevention of Needless Trial

[4] Additional Authorities

[a] Declaring Nonexistence of Father-Child Relationship

§ 171.24 Supporting Plaintiff's Motion for Pendente Lite Order for Support, Medical and Hospital Expenses, and Attorney's Fees [Fam. Code §§ 7637, 7640] in Action to Establish Paternity [Fam. Code § 7630]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Pendente Lite Child Support Order

[b] Pendente Lite Medical and Hospital Expenses for Birth of Child

[4] Additional Authorities

[a] Pendente Lite Child Support Order

§ 171.25 Supporting Contention That Paternity Determination Is Barred by Conclusive Presumption That Mother's Husband Is Child's Father [Fam. Code § 7540]--Mother Was Married at Time of Conception and Husband Was Neither Impotent Nor Sterile

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[c] Constitutionality of Conclusive Presumption

[d] Rebutting Presumption

[3] Discussion of Authorities

[a] Child Presumed Issue of Marriage if Wife Cohabits With Husband

[b] Presumption Attaches if Cohabitation at Time of Conception Is Established

[c] Cohabiting Defined

[d] Evidence of Nonintercourse Not Admissible

[4] Additional Authorities

[a] Child Presumed Issue of Marriage if Wife Cohabits With Husband

[b] Evidence of Nonintercourse Not Admissible

§ 171.26 Supporting Contention That Paternity Determination Is Barred by Conclusive Presumption That Mother's Husband Is Child's Father [Fam. Code § 7540]--Biological Father's Constitutional Rights Are Outweighed by State's Interest in Protecting Familial Relationships

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Protecting Family Unit and Promoting Familial Stability

[b] Preserving Existing Father-Child Relationship

§ 171.27 Supporting Motion for Order Requiring Mother, Child, Alleged Father, and Any Other Man Claimed to Be the Child's Father to Submit to Blood or Other Genetic Tests [Fam. Code § 7551] in Action to Establish Paternity [Fam. Code § 7630] and for Support [Fam. Code § 7637]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Tests Reliable to Exclude Possible Father

[b] Scientific Basis of Blood Tests

[c] Use of HLA Blood Test to Prove Paternity

[d] Persons Included in Alleged-Father Category

[4] Additional Authorities

[a] Tests Showing Probability of Paternity or Expert's Disagreement

[b] Persons Included in Alleged-Father Category

§ 171.28 Supporting Motion for Order Requiring County to Pay Expenses of Blood or Other Genetic Tests [Fam. Code § 7553] Required to Be Taken by Mother, Child, and Alleged Father [Fam. Code § 7551] in Action to Establish Paternity [Fam. Code § 7630] and for Support [Fam. Code § 7637]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] County Required to Pay for Tests of Indigent Defendant

§ 171.29 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action to Establish Paternity [Fam. Code § 7630] and for Support [Fam. Code § 7637]--Defendant Excluded as Possible Father by Blood or Other Genetic Tests [Fam. Code § 7554(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

§ 171.30 Supporting Defendant's Motion for Order for Court-Appointed Counsel in Action to Establish Paternity and Child Support Obligation [Fam. Code § 17400 et seq.]--Action Brought by State Against Indigent Defendant

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Right to Counsel in Paternity Action

[4] Additional Authorities

[a] Right to Counsel in Paternity Action

§ 171.31 Supporting Plaintiff's Demurrer to Answer [Code Civ. Proc. §§ 430.20(a), 430.30(a)] in Action to Establish Paternity [Fam. Code § 7630] and for Support [Fam. Code § 7637]--No Limitation Period or Laches Apply During Child's Minority

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Laches Not Imputed to Child

[b] Statute of Limitations Tolled During Minority

[c] Father's Duty of Support Not Affected by Statute of Limitations

§ 171.32 Supporting Defendant's Motion to Set Aside and Vacate Stipulated Judgment [Fam. Code § 17416] in County's Action to Establish Paternity and Support Obligation [Fam. Code § 17400 et seq.]--Denial of Procedural Due Process Rights

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Denial of Knowing and Intelligent Waiver of Right to Judicial Hearing Is Denial of Due Process

[b] Judgment in Violation of Due Process Is Voidable

[4] Additional Authorities

[a] Judgment in Violation of Due Process Is Voidable

§ 171.33 Supporting Contention That Paternity Determination Is Barred by Presumption That Mother's Husband Is Natural Father of Child Born During Marriage or Within 300 Days After Its Termination or Entry of Judgment of Separation [Fam. Code § 7611(a)]--Biological Father Who Lacks Presumed Father Status Has No Constitutionally Protected Interest That Defeats the Presumption or Standing Requirements to Rebut Presumption [Fam. Code § 7630]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Rebuttal of Presumption

[b] Alleged Biological Father Who Is Not Presumed Father Lacks Constitutional Right to Challenge Presumption

§ 171.34 Supporting Contention That Paternity of Child is Conclusive as to Married Person Who Consented to Spouse's Artificial Insemination or Contracted for Insemination of Third Party Surrogate Mother With Fertilized Ovum from Unrelated Parties [Fam. Code § 7613]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Married Persons Who Contract for Artificial Insemination of Third Party Surrogate Mother With Fertilized Ovum from Other Unrelated Parties Are Deemed Parents of Child

[4] Additional Authorities

[a] Husband Who Consents to Artificial Insemination of Wife Is Deemed Father of Child

[b] Married Persons Who Contract for Artificial Insemination of Third Party Surrogate Mother With Fertilized Ovum from Other Unrelated Parties Are Deemed Parents of Child

§ 171.35 Supporting Contention That Parentage Presumption Arising from Child's Reception Into Home [Fam. Code § 7611(d)] Is Not Necessarily Rebutted by Admission of No Biological Connection to Child if Court Proceeding Is Not "Appropriate Action" [Fam. Code § 7612(a)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Admission of No Biological Connection to Child Does Not Necessarily Rebut Presumption of Fam. Code § 7611(d) if Court Proceeding Is Not "Appropriate Action"

[b] Holding of Nicholas H. Applies to Mothers as Well as Presumed Fathers

[4] Additional Authorities

[a] Admission of No Biological Connection to Child Does Not Necessarily Rebut Presumption of Fam. Code § 7611(d) if Court Proceeding Is Not "Appropriate Action"

[b] Holding of Nicholas H. Applies to Mothers as Well as Presumed Father

§ 171.36 Supporting Motion to Set Aside and Vacate Judgment of Paternity--Genetic Testing Indicates That Previously Established Father Is Not Biological Father [Fam. Code § 7646]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Points and Authorities

[d] Related Points and Authorities

[3] Additional Authorities

[a] Judgment of Paternity May Be Set Aside or Vacated If Genetic Testing Indicates That Established Father Is Not Biological Father

[b] Child Support Order Must Also Be Vacated

§ 171.37 Opposing Plaintiff's Motion for Pendente Lite Order for Support, Medical and Hospital Expenses, and Attorney's Fees [Fam. Code §§ 7637, 7640] in Action to Establish Paternity [Fam. Code § 7630]--No Preliminary Finding of Parent-Child Relationship

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Hearing Must Be Held

[b] Proof of Parentage Jurisdictional Prerequisite

[c] Paternity Established by Preponderance of Evidence

[d] Order Implies Finding of Parentage

[e] Allegations in Complaint Insufficient

[4] Additional Authorities

[a] Paternity Established by Preponderance of Evidence

§ 171.38 Opposing Contention That Paternity Determination Is Barred by Conclusive Presumption That Mother's Husband Is Child's Father [Fam. Code § 7540]--Application of Presumption Would Violate Constitutional Rights of Biological Father

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Constitutional Protection of Parent-Child Relationship

[b] Balancing Respective Private and State Interests

[c] Respective Relationships of Putative Father and Presumed Father With Child

[d] Insufficient State Interest if No Intact Family

[4] Additional Authorities

[a] Respective Relationships of Putative Father and Presumed Father With Child

§ 171.39 Opposing Contention That Paternity Determination Is Barred by Conclusive Presumption That Mother's Husband Is Child's Father [Fam. Code § 7540]--Presumption Need Not Be Applied if Its Underlying Policies Are Not Furthered

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Underlying Policies Not Furthered

§ 171.40 Opposing Contention That Paternity Determination Is Barred by Conclusive Presumption That Mother's Husband Is Child's Father [Fam. Code § 7540]--Party Is Estopped From Relying on Presumption

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Estoppel by Conduct

[4] Additional Authorities

[a] Estoppel by Conduct

§ 171.41 Opposing Contention That Motion for Blood or Other Genetic Tests Is Time-Barred [Fam. Code § 7541(b), (c)]--Limitations on Right of Rebuttal Do Not Apply if Conclusive Presumption of Husband's Paternity Does Not Apply

[1] FORM

[2] Comments

[a] Use of Form

[b] Limitations on Right of Rebuttal

[3] Discussion of Authorities

[a] Two-Year Limitation on Right to Rebut Presumption Inapplicable

§ 171.42 Opposing Contention That Paternity Judgment Should Be Set Aside on Equitable Grounds of Fraud or Mistake--Fraud or Mistake Must Be Extrinsic to Proceeding

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Alleged Fraud or Mistake Must Be Extrinsic to Proceeding for Equitable Set Aside of Judgment

[b] Intrinsic Fraud Goes to Merits of Proceeding and Is Insufficient Basis to Set Aside Judgment

§ 171.43 Opposing Motion To Set Aside and Vacate Judgment of Paternity on Ground That Genetic Testing Indicates That Previously Established Father Is Not Biological Father [Fam. Code § 7646]--Denial of Motion Is in Best Interest of Child [Fam. Code § 7648]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Additional Authorities

[a] Motion Is Untimely

[b] No Reimbursement for Child Support Paid

[c] Factors Supporting Denial of Motion Include Additional Relevant Factors

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CHAPTER 171 PATERNITY
PART I. INTRODUCTION

17-171 California Points & Authorities § 171.01

§ 171.01 Scope of Chapter

This chapter contains memoranda of points and authorities for use in proceedings under the Uniform Parentage Act (UPA) [*Fam. Code § 7600 et seq.*]. It contains forms of points and authorities supporting a demurrer to a complaint because of improper joinder [*see § 171.20*], and a motion to quash service of summons because of lack of personal jurisdiction [*see § 171.21*]. It also contains forms for use in an action by a presumed father to declare the nonexistence of the father-child relationship because the action was not brought within a reasonable time [*see §§ 171.22, 171.23*].

In addition, the chapter contains points and authorities for use in a UPA action to support [*see § 171.24*] and oppose [*see § 171.37*] a motion for a pendente lite order for support, medical and hospital expenses, and attorney's fees. It also contains forms supporting [*see §§ 171.25, 171.26*] and opposing [*see §§ 171.38 -171.41*] the contention that a paternity action is barred by the presumption of *Fam. Code § 7540* that a child born to a married woman who was cohabiting with her husband is conclusively the child of the marriage, along with a form opposing the contention that a paternity judgment should be set aside on equitable grounds [*see § 171.42*]. Additionally, this chapter includes points and authorities supporting the contention that a paternity determination is barred by the presumption of *Fam. Code § 7611(a)*, that the husband of a woman who bears a child during marriage or within 300 days after the termination of that marriage is the father of the child [*see § 171.33*]. Further, this chapter contains points and authorities supporting the contention that paternity of a child is conclusive as to a married person who consents to his spouse's artificial insemination or provides by contract for insemination of a third party surrogate mother with fertilized ovum from unrelated parties [*see § 171.34*]. Also included are points and authorities in support of the contention that the presumption of parentage arising from receiving a child into the home and holding out the child as one's own [*Fam. Code § 7611(d)*] is not necessarily rebutted by an admission of no biological connection to the child when the proceeding is not an "appropriate action" [*see § 171.35*].

It also includes a motion for an order requiring the mother, child, alleged father, and men other than the alleged father to submit to blood or other genetic tests [*see § 171.27*], to support a motion requiring the county to pay the expenses of blood or other genetic tests [*see § 171.28*], to support a motion for summary judgment because a defendant has been excluded as a possible father by these tests [*see § 171.29*], to support a motion for court-appointed counsel because the defendant is indigent [*see § 171.30*], and to support a demurrer to answer because the answer sets up the defense of laches or the statute of limitations [*see § 171.31*].

This chapter also contains a memorandum of points and authorities in support of motion to vacate and set aside a judgment entered into by stipulation without the defendant's knowing or intelligent waiver of the right to a hearing on the issues of paternity and ability to support [*see § 171.32*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersFamily LawPaternity & SurrogacyEstablishing PaternityUniform Parentage ActFamily LawPaternity & SurrogacyProof of PaternityDefensesGeneral OverviewFamily LawPaternity & SurrogacyProof of PaternityEvidenceGeneral OverviewFamily LawPaternity & SurrogacyProof of PaternityPresumptionsGeneral OverviewFamily LawPaternity & SurrogacySurrogacyAssisted Reproduction Parentage

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PART I. INTRODUCTION

17-171 California Points & Authorities § 171.02

§ 171.02 Governing Statutes

An action to establish paternity or to declare the nonexistence of a father-child relationship may be brought under the Uniform Parentage Act [*Fam. Code § 7600 et seq.*]. A paternity action may also be brought by the local child support agency under *Fam. Code § 17400 et seq.*

Fam. Code § 7540 establishes a presumption, conclusive toward some persons and rebuttable by others under *Fam. Code § 7541*, that a child is the issue of a marriage if the wife is cohabiting with her husband [*see § 171.25*]. *Fam. Code § 7570 et seq.* establishes a presumption of paternity by voluntary declaration.

Child support orders in paternity actions are authorized by *Fam. Code § 7637*, under the standards of the statewide uniform child support guideline, *Fam. Code § 4055*. Blood and other genetic tests are governed by the Uniform Act on Blood Tests to Determine Paternity [*Fam. Code § 7550 et seq.*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsComputationGuidelinesFamily LawPaternity & SurrogacyEstablishing PaternityFather's AcknowledgmentFamily LawPaternity & SurrogacyEstablishing PaternityUniform Parentage ActFamily LawPaternity & SurrogacyProof of PaternityEvidenceGeneral OverviewFamily LawPaternity & SurrogacyProof of PaternityPresumptionsGeneral Overview

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17-171 California Points & Authorities § 171.03

§ 171.03 Actions to Establish Paternity

[1] Elimination of Concept of Illegitimacy

In 1976, the Uniform Parentage Act [*Fam. Code § 7600 et seq.*] became effective in California to establish a procedure for the determination of the existence or nonexistence of the parent and child relationship. The UPA abandoned the prior concept of illegitimacy and replaced it with certain presumptions that a man is the father of a child [*see Fam. Code § 7611*]. In a paternity action, a presumption under *Fam. Code § 7611* that a particular man is the child's father is a rebuttable presumption affecting the burden of proof and may be rebutted in an appropriate action only by clear and convincing evidence [*Fam. Code § 7612(a)*]. In other areas of the law in which rights flow from the parent-child relationship, the effect was to shift the legal focus off of the marital status of a child's parents. Under the UPA, and the other bodies of law that rely on it, the issue is not whether a child's parents were married, but whether it has been or can be established that a particular man is the presumed father of a particular child [*see, e.g., Prob. Code § 6453* (right of child as intestate heir depends on presumptions of paternity)].

[2] When Parentage Issue May Arise

The issue of parentage may arise in a number of legal actions. These include:

- An action to declare the existence or nonexistence of the parent-child relationship under the Uniform Parentage Act [*see Fam. Code § 7630*].

- An action brought by a local child support agency to establish paternity and a child support obligation [*see Fam. Code § 17400 et seq.*].

- An action for child support under *Fam. Code § 4000*.

- A proceeding to determine heirship under *Prob. Code §§ 6450-6455, 11700* [*see Estate of Chambers (2009) 175 Cal. App. 4th 891, 895-897, 96 Cal. Rptr. 3d 651* (parent-child relationship must be shown by clear and convincing evidence, not preponderance of evidence; higher burden of proof is intended to discourage dubious paternity claims made after man's death for sole purpose of inheritance);

Estate of Burden (2007) 146 Cal. App. 4th 1021, 1029-1031, 53 Cal. Rptr. 3d 390 (*Prob. Code § 6453(b)(2)*, which permits child born out of wedlock to establish father-child relationship for intestate succession purposes by providing clear and convincing evidence that father has openly held out child as his own, is satisfied by evidence of father's acknowledgments of child as his own during his lifetime)].

- A juvenile court proceeding under *Welf. & Inst. Code § 300 et seq.* [*see Welf. & Inst. Code § 903.41(b)(2)*].

- A habeas corpus proceeding seeking custody of a child [*see In re Reyna (1976) 55 Cal. App. 3d 288, 295, 126 Cal. Rptr. 138]* .

- An adoption proceeding [*see Fam. Code §§ 7660 et seq., 8604*].

- A guardianship proceeding [*see Prob. Code §§ 1500, 1514*].

- A Uniform Interstate Family Support Act proceeding [*see Fam. Code § 4900 et seq.*].

- A criminal prosecution for failure to support a child [*Penal Code § 270*].

- A proceeding for dissolution of marriage, legal separation or nullity of marriage [*see In re Marriage of Groner (1972) 23 Cal. App. 3d 115, 116-117, 99 Cal. Rptr. 765* ; *see also Fam. Code § 2330.1*].

- A proceeding under the Domestic Violence Prevention Act [*see Fam. Code § 6200 et seq.*] that includes the issuance of orders regarding custody and visitation of minor children [*see Fam. Code § 6323(a)* (court may make ex parte orders regarding temporary custody and visitation of minor children when party establishes parent-child relationship); *Gonzalez v. Munoz (2007) 156 Cal. App. 4th 413, 422-423, 67 Cal. Rptr. 3d 317* (when court has issued ex parte custody and visitation orders at request of one party, it must elicit evidence under *Fam. Code § 6340(a)* as to whether other party can demonstrate parent-child relationship with minor children and, if so, whether earlier custody and visitation orders should be modified to ensure mutual safety of children and party having custody)].

[3] Establishment of Relationship

The parent and child relationship may be established as follows [*Fam. Code § 7610*]:

- Between a child and the natural mother by proof of her having given birth to the child or under the Uniform Parentage Act.

- Between a child and the natural father under the Uniform Parentage Act.

- Between a child and an adoptive parent by proof of adoption [*see Fam. Code § 8616*].

[4] Standing to Bring Parentage Action and Presumptions of Paternity

A child, the child's natural mother, a man presumed to be the child's father under *Fam. Code § 7611(a)-(c)*, an adoption agency to whom the child has been relinquished, or a prospective adoptive parent of the child may bring an action under the Uniform Parentage Act as follows:

- At any time for the purpose of declaring the existence of the father and child relationship presumed

under *Fam. Code § 7611(a)-(c)* [*Fam. Code § 7630(a)(1)*].

- For the purpose of declaring the nonexistence of the father and child relationship presumed under *Fam. Code § 7611(a)-(c)* only if the action is brought within a reasonable time after obtaining knowledge of relevant facts [*Fam. Code § 7630(a)(2)*].

The child's mother has standing to claim that a man is the child's presumed father under *Fam. Code § 7611(c)* or *(d)*, even if the man is not a party to the action [*Gabriel P. v. Suedi D. (2006) 141 Cal. App. 4th 850, 862, 46 Cal. Rptr. 3d 437]* . A man who is not the child's presumed father through marriage lacks standing to bring a paternity action to challenge the presumed father status of the birth mother's husband under *Fam. Code § 7611(c)* [*Gabriel P. v. Suedi D. (2006) 141 Cal. App. 4th 850, 858, 46 Cal. Rptr. 3d 437]* . However, a man is entitled to establish his paternity if the birth mother precluded him from becoming a presumed father and he acted as promptly as was reasonably possible to establish his paternity [*In re J.L. (2008) 159 Cal. App. 4th 1010, 1023-1025, 72 Cal. Rptr. 3d 27* ; *Gabriel P. v. Suedi D. (2006) 141 Cal. App. 4th 850, 859-860, 46 Cal. Rptr. 3d 437]* .

Any interested party may bring an action at any time for the purpose of determining the existence or nonexistence of the father-child relationship presumed under *Fam. Code § 7611(d)* [*Fam. Code § 7630(b)*; *see* *Kevin Q. v. Lauren W. (2009) 175 Cal. App. 4th 1119, 1133, 95 Cal. Rptr. 3d 477* (there are no time limits or standing requirements for challenging or asserting Fam. Code § 7611(d) presumption); *Said v. Jegan (2007) 146 Cal. App. 4th 1375, 1382-1385, 53 Cal. Rptr. 3d 661* (man's status as alleged father, because he was named as father on child's birth certificate, gave him standing to bring action to determine nonexistence of paternity); *Librers v. Black (2005) 129 Cal. App. 4th 114, 124-127, 28 Cal. Rptr. 3d 188* (mother's live-in boyfriend had standing under *Fam. Code § 7630* to bring paternity proceeding, based on presumption that he was child's natural father, which was established by his receipt of child into his home and his openly holding her out as his natural child)]. A broad class of men, including alleged fathers, can bring an action to establish paternity under this provision when the claim is based on the presumed father status that is obtained by receiving the child into his home and openly acknowledging paternity [*Miller v. Miller (1998) 64 Cal. App. 4th 111, 116-117, 74 Cal. Rptr. 2d 797* (man who was child's biological father and who had received child into his home and held her out as his own had standing to pursue paternity claim under *Fam. Code § 7611(d)* even though child's mother was married to another man at time child was conceived and born); *but see* *Lisa I. v. Superior Court (2005) 133 Cal. App. 4th 605, 34 Cal. Rptr. 3d 927* (man's claim that he is child's biological father is insufficient to give him statutory standing under *Fam. Code § 7630* to establish his paternity when he does not qualify as a presumed father under any provision of *Fam. Code § 7611*)].

Any interested party may also bring an action at any time for the purpose of determining the existence or nonexistence of the mother--child relationship presumed under *Fam. Code § 7611(d)* [*see* *Elisa B. v. Superior Court (2005) 37 Cal. 4th 108, 113, 33 Cal. Rptr. 3d 46, 117 P.3d 660* (district attorney brought action to establish that former lesbian partner of child's birth mother was child's presumed mother and thus obligated to pay support for child); *Charisma R. v. Kristina S. (2009) 175 Cal. App. 4th 361, 367-377, 96 Cal. Rptr. 3d 26* ; *Charisma R. v. Kristina S. (2006) 140 Cal. App. 4th 301, 307-308, 44 Cal. Rptr. 3d 332* (registered domestic partner of birth mother is entitled to bring petition to establish parental relationship with child born to birth mother by artificial insemination from anonymous donor)]. For example, a child is necessarily an interested party in a proceeding to determine who his or her biological mother is and may bring an action to adjudicate his or her parentage [*Wynn v. Superior Court (2009) 176 Cal. App. 4th 346, 350, 353-355, 98 Cal. Rptr. 3d 86]* . A woman who had an intimate relationship with the father of minor children, however, does not have standing to join the parents' action under the UPA to seek custody and visitation rights with respect to the children as a presumed or de facto mother, if the parental rights of the natural mother have not been terminated [*Scott v. Superior Court (2009) 171 Cal. App. 4th 540, 544-547, 89 Cal. Rptr. 3d 843* (in same-sex domestic partner relationship, child may have two natural mothers; in heterosexual relationship, there can be only one mother)].

Although more than one individual may fulfill the statutory criteria that give rise to a presumption of paternity under *Fam. Code § 7611*, there can be only *one* presumed father [*In re Jesusa V. (2004) 32 Cal. 4th 588, 603, 10 Cal. Rptr.*

3d 205, 85 P.3d 2] . Competing presumptions of paternity must be reconciled under *Fam. Code § 7612(b)*, which provides that when two or more presumptions arise under *Fam. Code § 7610* or *Fam. Code § 7611* that conflict with each other, or if the presumption under *Fam. Code § 7611* conflicts with a claim under *Fam. Code § 7610*, the presumption which on the facts is founded on the weightier considerations of policy and logic controls. These presumptions are not affected by whether or not the man is the child's biological father. Thus, a man who is not the child's biological father may still be the child's presumed father [*In re Nicholas H. (2002) 28 Cal. 4th 56, 58-59, 63-65, 120 Cal. Rptr. 2d 126, 43 P.3d 932* (familial relationship between nonbiological father and child, resulting from years of living together in ostensible parent-child relationship, is "considerably more palpable" than relationship based only on biology and should not be lightly dissolved)]; and a man who *is* the child's biological father may not necessarily defeat another man's claim to be the child's presumed father [*In re A.A. (2003) 114 Cal. App. 4th 771, 788-789, 7 Cal. Rptr. 3d 755]* . Courts are not bound to accord determinative weight to biology, but must weigh all relevant factors in determining which of two rebuttably presumed fathers will qualify as the child's presumed father [*In re Jesusa V. (2004) 32 Cal. 4th 588, 607-608, 10 Cal. Rptr. 3d 205, 85 P.3d 2* (upholding award of presumed father status to child's stepfather under *Fam. Code § 7611(d)*, rather than biological father under *Fam. Code § 7611(a)*, finding that this award best comported with state's interest in preserving integrity of family and child's welfare); *Librers v. Black (2005) 129 Cal. App. 4th 114, 123, 28 Cal. Rptr. 3d 188* (after *Jesusa V.* it is absolutely clear that biology is not determinative factor in resolving paternity disputes under Uniform Parentage Act)].

An action to determine the existence of the father and child relationship with respect to a child who has no presumed father under *Fam. Code § 7611* or whose presumed father is deceased may be brought by the child or a personal representative of the child, the California Department of Child Support Services, the mother or the personal representative or a parent of the mother if the mother has died or is a minor, a man alleged or alleging himself to be the father, or the personal representative or a parent of the alleged father if the alleged father has died or is a minor [*Fam. Code § 7630(c)*]. The action must be consolidated with a proceeding under *Fam. Code § 7662*. The parental rights of the alleged natural father must be determined as set forth in *Fam. Code § 7664* [*Fam. Code § 7630(d)(2)*].

If any prospective adoptive parent who has physical custody of the child, or any licensed California adoption agency that has legal custody of the child, has not been joined as a party to an action to determine the existence of a father-child relationship, or an action for custody by the alleged natural father, the court must join the prospective adoptive parent or licensed California adoption agency as a party on application or on its own motion, without the necessity of a motion for joinder. A joined party is not required to pay a fee in connection with this action [*Fam. Code § 7630(e)(1)*].

If a man brings an action to determine paternity and custody of a child who he has reason to believe is in the physical or legal custody of an adoption agency, or of one or more persons other than the child's mother who are prospective adoptive parents, then he must serve his entire pleading on and give notice of all proceedings to the adoption agency or the prospective adoptive parents, or both [*Fam. Code § 7630(e)(2)*].

A party to an assisted reproductive agreement may bring an action at any time to establish a parent-child relationship consistent with the intent expressed in that agreement [*Fam. Code § 7630(f)*]. For purposes of this provision, an "assisted reproduction agreement" means a written contract that includes a person who intends to be the legal parent of a child or children born through assisted reproduction and that defines the terms of the relationship between the parties to the contract [*Fam. Code § 7606(b)*].

A local child support agency may also bring an action under the Uniform Parentage Act in any appropriate case [*Fam. Code § 7634(a)*]. However, county paternity proceedings are now brought under special federally mandated provisions of the Family Code that require establishment of paternity and support orders, and for reimbursement by noncustodial parents of public assistance payments made for a child's benefit [*see Fam. Code § 17400 et seq.*; *see also Fam. Code § 7558*].

A UPA action may be brought before the birth of the child [*Fam. Code § 7633*]. An order or judgment may be entered

in that action before the child's birth, but enforcement of that order or judgment is stayed until the child's birth [*Fam. Code § 7633*]. And an agreement between an alleged or presumed father and the mother or child does not bar a UPA action [*Fam. Code § 7632*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityStandingGeneral OverviewFamily LawPaternity & SurrogacyEstablishing PaternityUniform Parentage ActFamily LawPaternity & SurrogacyProof of PaternityPresumptionsFactorsFamily LawPaternity & SurrogacyProof of PaternityPresumptionsRebuttals

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17-171 California Points & Authorities § 171.04

§ 171.04 Orders Under UPA Action

A court in a Uniform Parentage Act proceeding may order pendente lite custody or visitation orders [*Fam. Code § 7604*; *see Fam. Code § 3020 et seq.* (custody orders under Family Code)]. Pendente lite child support may also be ordered, although there is no express statutory authority for such an order [*see Thomas B. v. Superior Court (1985) 175 Cal. App. 3d 255, 258-259, 265, 220 Cal. Rptr. 577* ; § 171.24]. In such a case, the motion for temporary support cannot be made until the plaintiff has made aprima facie showing of paternity [*County of Santa Clara v. Perry (1998) 18 Cal. 4th 435, 445, 75 Cal. Rptr. 2d 738, 956 P.2d 1191]* . Attorney's fees and other costs may be ordered at any time [*see Fam. Code § 7640*].

In addition to the contents required by *Code Civ. Proc. § 412.30*, in a proceeding under the Uniform Parentage Act the summons must contain a temporary restraining order prohibiting all parties, without the prior written consent of the other party or a court order, from removing from the state any minor child for whom the proceeding seeks to establish a parent and child relationship [*Fam. Code § 7700*]. Under this provision, a parent may not remove the child from the state *once the petition* has been filed, without a court order or the written permission of the other party; but it does not provide that a child who is already residing in another state when the petition is filed must be returned to California [*Sarah B. v. Floyd B. (2008) 159 Cal. App. 4th 938, 944, 71 Cal. Rptr. 3d 923*].

The judgment may contain any other provision directed against the appropriate party to the proceeding, concerning the duty of support, the custody and guardianship of the child, visitation privileges with the child, the furnishing of bond or other security for the payment of the judgment, or any other matter in the best interest of the child. It may direct the father to pay the reasonable expenses of the mother's pregnancy and confinement [*Fam. Code § 7637*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsTypesTemporary SupportFamily LawPaternity & SurrogacyEstablishing PaternityUniform Parentage Act

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17-171 California Points & Authorities § 171.05

§ 171.05 Page Limits on Points and Authorities

Generally, a supporting or opposing memorandum of points and authorities may not exceed 15 pages, or, in the case of a motion for summary judgment or summary adjudication, 20 pages. A reply or closing memorandum may not exceed 10 pages [*see Cal. Rules of Ct., Rule 3.1113(d)*]. Any party desiring to file a longer memorandum must obtain leave of court [*see Cal. Rules of Ct., Rule 3.1113(e)*]. This is mentioned for guidance only, because it appears that, except for discovery proceedings, the general civil law and motion rules do not technically apply to causes arising under the Family Code [*see Cal. Rules of Ct., Rules 3.1100, 3.1103(a)(1)*]. For further discussion of the page limitations under *Cal. Rules of Ct., Rule 3.1113*, and of other basic format requirements of memoranda of points and authorities, see *Ch. 1, Writing Legal Memoranda and Briefs, § 1.05*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureSummary JudgmentOppositionMemoranda in OppositionCivil ProcedureSummary JudgmentSupporting MaterialsMemoranda of Law

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17-171 California Points & Authorities § 171.06

§ 171.06 Related Pleading and Practice Chapters

For discussions and forms for use in particular cases involving parentage and support of child, see the following chapters in California Forms of Pleading and Practice:

- Ch. 15, *Affidavits, Certificates, and Declarations*.
- Ch. 174, *Costs and Attorney's Fees*.
- Ch. 220-227, *Dissolution of Marriage and Related Proceedings*.
- Ch. 258, *Family Law Enforcement: General Enforcement Principles and Remedies*.
- Ch. 372, *Motions and Orders*.
- Ch. 395, *Parties*.
- Ch. 412, *Paternity*.
- Ch. 537, *Summary Judgment*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentStandardsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesGeneral OverviewFamily LawChild SupportObligationsGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceGeneral OverviewFamily LawPaternity & SurrogacyGeneral Overview

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17-171 California Points & Authorities § 171.07

§ 171.07 Related Points and Authorities Chapters

Related memoranda of points and authorities that may be useful in particular cases involving paternity or child support may be found in the following chapters:

- Ch. 132, *Jurisdiction: Personal Jurisdiction and Inconvenient Forum*.
- Ch. 133, *Jurisdiction: Subject Matter Jurisdiction*.
- Ch. 160, *Motions to Strike*.
- Ch. 168, *Parties*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueForum Non ConveniensCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewCivil ProcedurePartiesGeneral OverviewFamily LawChild SupportJurisdictionPersonal JurisdictionFamily LawPaternity & SurrogacyGeneral Overview

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[Reserved]

§§ 171.08[Reserved]

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17-171 California Points & Authorities § 171.20

§ 171.20 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(d)] in Action to Establish Paternity [Fam. Code § 7630] and for Support [Fam. Code § 7637]--Failure to Join Child Who Is Indispensable Party [Fam. Code § 7635]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS
Plaintiff,	)	AND AUTHORITIES IN
vs.	)	SUPPORT OF DEMURRER TO COMPLAINT
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Dept.: _____
	)	Trial Date: _____
	)	

_____

THERE IS A DEFECT OR MISJOINDER OF PARTIES IN THE PLAINTIFF'S ACTION TO ESTABLISH PATERNITY BECAUSE PLAINTIFF HAS FAILED TO JOIN THE CHILD, WHO, BEING OVER 12 YEARS OF AGE, IS AN INDISPENSABLE PARTY TO THE ACTION.

A. Objection by Demurrer. The party against whom a complaint has been filed may object by demurrer to the complaint on the ground that there is a defect or misjoinder of parties (*Code Civ. Proc. § 430.10(d)*) if the ground for such objection to the complaint appears on the face of the complaint from any matter of which the court is required to or may take judicial notice (*Code Civ. Proc. § 430.30(a)*).

B. Child as Party to Action. The child may, if under the age of 12 years, and must, if 12 years of age or older, be made a party to the action to establish the existence of a father and child relationship (*Fam. Code § 7635*).

C. Depriving the Court of Jurisdiction. The failure to join a child in an action to establish the father and child relationship deprives the court of jurisdiction and a judgment made under such circumstances is void (*Perez v. Department of Health (1977) 71 Cal. App. 3d 923, 927, 138 Cal. Rptr. 32*).

[*Optional*] **D. Codification of Case Law.** *Family Code Section 7635*, requiring a child of 12 years of age or older to be made a party to an action to establish paternity, codified decisional law on this subject that predated the Uniform Parentage Act (*see Perez v. Department of Health (1977) 71 Cal. App. 3d 923, 927, 138 Cal. Rptr. 32*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a demurrer to a complaint for support and to establish paternity when the demurrer asserts that there is a defect or misjoinder of parties due to failure to join a child 12 years of age or older. If the child's age does not appear on the face of the complaint, and the moving party must request the court to take judicial notice of some document such as the child's birth certificate, authority relating to judicial notice should be added to this form [*see, e.g., Evid. Code § 452(d), (h)* and Ch. 71, *Demurrers and Motions for Judgment on the Pleadings*]. It may be used in an action brought by a local child support agency against an alleged father, in an action brought by an alleged father declaring the nonexistence of a father-child relationship, or in an action brought by an alleged father to establish paternity and obtain custody or visitation rights [*see Fam. Code § 7630*; *Fam. Code § 17400 et seq*]. It would primarily be used in those instances in which the child was not subject to the jurisdiction of the court in which the action has been brought and therefore could not be made a party to the action. If the child is subject to the court's jurisdiction, this memorandum of points and authorities may be modified to support a motion for an order bringing the minor 12 years of age and over into the action as an indispensable party [*see Code Civ. Proc § 389*].

When appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms of notices of motions for leave to file an amended complaint to bring in a new party and for an order that plaintiff be compelled to join an omitted person as party, see Ch. 395, *Parties* in California Forms of Pleading and Practice.

[c] Related Points and Authorities

For general forms of memoranda of points and authorities supporting and opposing motions for orders bringing in a new party to an action, see in this set Ch. 168, *Parties*.

[3] Discussion of Authorities

[a] Depriving the Court of Jurisdiction

In ***Perez v. Department of Health*** *(1977) 71 Cal. App. 3d 923, 138 Cal. Rptr. 32* , plaintiff had filed an action to establish paternity, naming the California Department of Health as respondent and alleging that: (1) he was the natural father of twins, whose mother had recently died; (2) he believed the twins were living with their maternal grandmother in Mexico; and (3) the Department of Health had refused his request to amend the birth certificates to show he was the father of the twins. Based on the verified complaint, exhibits consisting of the twins' certificates of birth (showing the mother had declined to state the father's name) and baptism (showing that the plaintiff was the twins' father), and the fact that the Department of Health had not opposed the action, the trial court entered a judgment declaring plaintiff to be the natural father. When the twins' grandmother had moved back to the United States, plaintiff had the local sheriff deliver the twins to his custody. The maternal grandmother and uncle then moved to have the judgment of paternity set aside on the grounds that necessary and proper parties had not been served and that the judgment was obtained by extrinsic fraud.

Affidavits in support of this motion disclosed: (1) the mother had lived with a man other than the plaintiff for 12 months before the birth of the twins; (2) she had told family members that this man, not plaintiff, was the father; and (3) after she died, custody of the twins was awarded to the grandmother in Mexico with whom the twins resided in Mexico and the United States until plaintiff had the twins seized. Plaintiff had made no search for the children before he commenced his action and did not dispute that he had known the maternal uncle for several years or that the twins had been living with their grandmother and uncle. The motion of the grandmother and uncle was denied, and they appealed. The court of appeal reversed and remanded with directions that the questions of paternity and custody be reheard. The court stated that former Civ. Code § 7008, the predecessor statute to what is now *Fam. Code § 7635*, made it clear that the twins were required to be made parties to the action to determine paternity, and that as such, they were indispensable parties to the action. The absence of such indispensable parties deprives the court of jurisdiction, and a judgment entered under such circumstances is void. The court indicated that under the facts of the case, not naming the grandmother and uncle as parties was strongly suggestive of fraud. The court noted that although former Civ. Code § 7008 was not in effect when the plaintiff's action was pending, the statute codified decisional law on the subject and, therefore, it was applied to the case by the court (*71 Cal. App. 3d 923, 924-927)* .

[4] Additional Authorities

[a] Child as Party to Action

In *Ruddock v. Ohls (1979) 91 Cal. App. 3d 271, 154 Cal. Rptr. 87* , the district attorney's office as guardian ad litem of the minor child brought an action against the defendant to establish the father-child relationship and to seek support. The defendant pleaded an Oregon divorce decree that had found that the defendant was not the father of the minor, who was born five months before the marriage of the parties, and moved to strike the complaint, asserting paternity had been adjudicated by the Oregon court. The defendant contended that even though the child had not been joined as a party to that divorce action, the minor child's mother had represented the child's interests, thus making the Oregon judgment binding on the child. Although the decree suggested that the issues of paternity and child support had been fully litigated, the record did not include a summary of the evidence before the Oregon court. The trial court granted defendant's motion striking the complaint. In reversing, the court of appeal held that in the absence of joinder, the prospective rights of a minor child to establish the parent-child relationship are not foreclosed under the doctrine of res judicata or collateral estoppel by a judgment between the mother and alleged father in a marital dissolution action. The court said that by merely pleading the Oregon decree, the alleged father did not establish that the child's interests had been protected by the mother, acting in a representative capacity, since the decree showed only that the mother had asserted her right to obtain child support based on an allegation of paternity, as distinguished from adjudicating the independent rights of the child (*91 Cal. App. 3d 271, 274-276, 278-279)* .

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17-171 California Points & Authorities § 171.21

§ 171.21 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)] in Action to Establish Paternity [Fam. Code § 7630] and for Support [Fam. Code § 7637]--By Nonresident Defendant for Lack of Personal Jurisdiction Because Child Not Conceived in California

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*]	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN SUPPORT OF MOTION TO QUASH SER-
vs.	)	VICE OF SUMMONS
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD GRANT THE MOTION TO QUASH SERVICE OF SUMMONS BECAUSE IT HAS NO JURISDICTION OF A DEFENDANT IF HE IS A NONRESIDENT OF CALIFORNIA AND THE COMPLAINT DOES NOT ALLEGE THAT THE CHILD WAS CONCEIVED IN CALIFORNIA OR CONCEIVED BY AN ACT OF SEXUAL INTERCOURSE THAT TOOK PLACE IN CALIFORNIA, NOR DOES THE COMPLAINT ALLEGE THAT THE DEFENDANT CAUSED THE CHILD'S CONCEPTION WITH THE INTENT TO BECOME A LEGAL PARENT OF THE CHILD BY ASSISTED REPRODUCTION IN CALIFORNIA, AND NO OTHER BASIS FOR

JURISDICTION EXISTS.

A. Motion to Quash. On or before the last day of his time to plead, or within such time as the court may for good cause allow, a defendant may serve and file a notice of motion to quash service of summons on the ground that the court lacks jurisdiction over him (*Code Civ. Proc. § 418.10(a)(1)*).

B. Jurisdiction of California Courts. A California court may exercise jurisdiction on any basis not inconsistent with the California and United States Constitutions [*Code Civ. Proc. § 410.10*].

C. Jurisdiction Under Uniform Parentage Act. A person who has sexual intercourse in California thereby submits to the jurisdiction of the courts of California as to an action brought under the Uniform Parentage Act with respect to a child who may have been conceived by that act of intercourse; likewise, a person who causes conception with the intent to become a legal parent by assisted reproduction in California hereby submits to the jurisdiction of the courts of California as to an action brought under the Uniform Parentage Act with respect to a child conceived thereby [*Fam. Code § 7620(a)*].

D. Personal Jurisdiction as Required in Paternity Action. In an action to determine whether plaintiff is defendant's child, personal jurisdiction over the defendant is essential [*Hartford v. Superior Court (1956) 47 Cal. 2d 447, 453-455, 304 P.2d 1]* .

E. Jurisdiction Over Nonresident. A state has power to exercise personal jurisdiction over a nonresident individual only if the individual's relationship to the state makes the exercise of jurisdiction reasonable [*Judd v. Superior Court (1976) 60 Cal. App. 3d 38, 43, 44-45, 131 Cal. Rptr. 246]* .
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion to quash service of summons in an action for support and to establish paternity if the defendant is asserting that the court lacks jurisdiction over him. It may be used in an action brought by a child through a guardian ad litem against an alleged father, in an action brought by the mother against an alleged father, or in an action brought by a local child support agency against an alleged father when the mother and child are residents of California, the alleged father is a nonresident of California, and the child was conceived by an act of intercourse between the mother and alleged father which took place outside of California. It may also be used when the child was conceived by assisted production outside of California. "Assisted reproduction" means conception by any means other than sexual intercourse [*Fam. Code § 7606(a)*].

When appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Points and Authorities

For general forms of memoranda supporting and opposing motions for orders to quash service of summons on the ground of lack of jurisdiction of the court over nonresident defendants, see Ch. 132, *Jurisdiction: Personal Jurisdiction*

and Inconvenient Forum .

[3] Discussion of Authorities

[a] Personal Jurisdiction as Required in Paternity Action

In ***Hartford v. Superior Court*** *(1956) 47 Cal. 2d 447, 304 P.2d 1* , plaintiff, by his guardian ad litem, brought an action under former Civ. Code § 231 (which governed paternity determinations before the Uniform Parentage Act was enacted in California) to secure a declaration that defendant was his father. Plaintiff was born in New York but resided in California with his grandmother. Defendant resided in New York, but had visited plaintiff in California several times while on business trips. Plaintiff alleged that in order to conceal the fact that plaintiff was his natural child, defendant had arranged for the names of plaintiff's grandmother and stepgrandfather to be entered as his parents on his birth certificate. Plaintiff sought a judicial determination that defendant was his father in order to avoid any legal difficulty in establishing his true identity when entering the armed forces and when applying for a passport. Defendant was served out of state by publication. The trial court denied defendant's motion for an order quashing service of summons and defendant filed a petition for writ of mandate to compel the trial court to quash the service.

The Supreme Court granted the writ, rejecting plaintiff's contention that the court could determine plaintiff's status as defendant's child without securing personal jurisdiction over the alleged parent. The Court noted plaintiff's concession that if the purpose of the action were to enforce a duty of support or some other personal obligation growing out of the parent-child relationship, personal jurisdiction over the defendant would be essential. The Court held that this requirement cannot be avoided by limiting the relief sought to a binding adjudication of the parties' status, since such an adjudication would prevent relitigation of the basic issue on which defendant's personal obligations to plaintiff must rest and to that extent would necessarily constitute a personal judgment against him (*47 Cal. 2d 447, 454)* . Moreover, stated the Court, the fact that it may appear highly unlikely that plaintiff will ever have occasion to assert any personal rights against defendant, based on the claimed relationship between them, cannot justify giving to any judgment that might be obtained an effect to which it would not otherwise be entitled (*47 Cal. 2d 447, 455)* .

[b] Jurisdiction Over Nonresident

In ***Judd v. Superior Court*** *(1976) 60 Cal. App. 3d 38, 131 Cal. Rptr. 246* , a husband and wife who lived on the east coast entered into a written separation agreement that covered their rights and duties to each other and to their four minor children. A Mexican divorce decree approved and incorporated the terms and conditions of this agreement, and the wife then moved to California with the children of whom she had custody. The husband made child and spousal support payments as provided for in the separation agreement for approximately 12 years after the divorce, visited the children about three times during this period, and conducted business activities in California, including making several business trips, advertising, and maintaining clients in the state. At the end of this period, the wife brought a dissolution proceeding which sought spousal and child support. The husband was served outside of California under *Code Civ. Proc. § 415.40*. The trial court denied the husband's motion to quash service of summons on the ground of lack of personal jurisdiction. After the court of appeals denied his petition for a writ of mandate, the Supreme Court granted the petition and retransferred the matter to the court of appeal for hearing.

In issuing the writ, the court stated that to obtain personal jurisdiction over a nonresident by service outside of California, the trial court must have power to exercise such jurisdiction under *Code Civ. Proc. § 410.10* on any basis not inconsistent with the state or federal Constitution. The court cited the Judicial Council's comment to *Code Civ. Proc. § 410.10* which discusses various bases of judicial jurisdiction over individuals that have been recognized. These include presence; domicile; residence; nationality or citizenship; consent; appearance; doing business in the state; doing an act in the state; causing an effect in the state by an act done elsewhere; ownership, use or possession of a thing in California; and other relationships to the state that make the exercise of judicial jurisdiction reasonable. The court concluded that although California has power to exercise personal jurisdiction over a nonresident individual who does

business in the state with respect to a cause of action arising out of the acts of doing business in California, the husband, even if he was doing business in the state, was not subject to the jurisdiction of the trial court for purposes of support on such ground because the cause of action was not one arising out of such business activity (*60 Cal. App. 3d 38, 41-45)* .

[4] Additional Authorities

[a] Jurisdiction Over Nonresident

In *Bartlett v. Superior Court (1978) 86 Cal. App. 3d 72, 150 Cal. Rptr. 25* , real party in interest, Santa Barbara County, commenced an action in superior court seeking reimbursement from petitioner for welfare funds used to support a minor child whose mother was a resident of the county. The mother alleged that the child was conceived while she was visiting petitioner in Florida. Petitioner denied he was the child's father. Petitioner had never been a California resident; he was a civilian employee of the U.S. Navy stationed in Florida. The county had the complaint and summons served on petitioner in Florida, and petitioner made a special appearance moving to quash the service. The trial court denied the motion and petitioner filed a petition for writ of mandate to review the trial court's order.

The court of appeal issued the writ rejecting the county's contention that California courts could exercise in personam jurisdiction over petitioner. The court held that the fact that petitioner had (1) allegedly caused a California resident to become pregnant, (2) visited the mother in California during courtship and pregnancy, (3) paid the mother's air fare back to California when she was allegedly pregnant with his child, and (4) paid a doctor bill incurred in California in connection with the pregnancy, was not a sufficient constitutional basis for compelling petitioner to defend the action in California (*86 Cal. App. 3d 72, 76)* . The court noted that the fact that California has substantial interests in protecting resident children and in facilitating child support actions on behalf of those children does not make California a fair forum in which to require petitioner, who derived no personal or commercial benefit from the child's presence in California and who lacked any other relevant contact with the state, either to defend a child support action or to suffer liability by default (*86 Cal. App. 3d 72, 77* , quoting *Kulko v. California Superior Court (1978) 436 U.S. 84, 100-101, 98 S. Ct. 1690, 56 L. Ed. 2d 132* (holding that nonresident father who permits child to move to California to live with mother has not purposefully availed himself of the privilege of conducting activities within the state so as to subject him to the jurisdiction of the California courts in a child support action).

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Volume 17 Chapters 170-179 PARTNERSHIPS---to---PREMISES LIABILITY
CHAPTER 171 PATERNITY
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17-171 California Points & Authorities § 171.22

§ 171.22 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)] in Action by Presumed Father to Declare Nonexistence of Father-Child Relationship [Fam. Code § 7630(a)(2)]--Action Not Brought Within Reasonable Time

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*] Plaintiff,	)	IES IN SUPPORT OF DEMURRER TO COM-
vs.	)	PLAINT
_____ [*name*], Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE COMPLAINT DOES NOT STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION TO DECLARE THE NONEXISTENCE OF THE FATHER-CHILD RELATIONSHIP BECAUSE THE PLAINTIFF HAS FAILED TO STATE THAT THE ACTION WAS BROUGHT WITHIN A REASONABLE TIME AFTER OBTAINING KNOWLEDGE OF THE RELEVANT FACTS IN THE MATTER.

A. Objection by Demurrer. The party against whom a complaint has been filed may object by demurrer to the

complaint on the ground that the complaint does not state facts sufficient to constitute a cause of action (*Code Civ. Proc. § 430.10(e)*).

B. Bringing an Action. A man who is presumed to be the father of a child may bring an action for the purpose of declaring the nonexistence of the father and child relationship presumed under *Section 7611(a)-(c) of the Family Code* only if the action is brought within a reasonable time after obtaining knowledge of relevant facts (*Fam. Code § 7630(a)(2)*; *see Fam. Code § 7611(a)-(c)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a demurrer to a complaint brought by a man presumed to be the father of a child under *Fam. Code § 7611(a)-(c)* to declare the nonexistence of the father and child relationship presumed under *Fam. Code § 7611(a)-(c)*. The demurrer asserts that the complaint does not state facts sufficient to constitute a cause of action because the action was not brought within a reasonable time after the presumed father obtained knowledge of relevant facts of the case as required by *Fam. Code § 7630(a)(2)*. The demurrer would be filed by the defendant who might be the child, and if he or she were a minor, the child would be represented by a guardian ad litem appointed by the court [*see Fam. Code § 7635(a)*]. The mother of the child might also be a defendant to the action [*see Fam. Code § 7635(b)*].

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms of affidavits or declarations in support of pleadings, see Ch. 15, *Affidavits, Certificates, and Declarations* in California Forms of Pleading and Practice.

[3] Additional Authorities

[a] Bringing an Action

In *Adoption of Aaron H. (2000) 84 Cal. App. 4th 786, 101 Cal. Rptr. 2d 45* , a man sought to establish his paternity of a child after receiving notice that the child's mother had consented to the child's adoption. The man failed to timely respond within 30 days after receiving notice of his right to bring an action to establish his paternity, although he did file a complaint to establish paternity shortly thereafter, and blood tests revealed he was the biological father. After a hearing, a trial court denied his request to vacate an order that terminated his parental rights, stating that (1) the man (Richard) was personally served with a Notice of Alleged Paternity that provided him adequate notice to satisfy his due process and equal protection rights, (2) Richard failed to bring a paternity action within 30 days of receiving notice, and failed to act diligently to pursue his parental rights during that same 30-day period, (3) Richard failed to show mistake, inadvertence, surprise, or excusable neglect under *Code Civ. Proc. § 473*, and (4) Richard failed to show a change of circumstances between the end of the 30-day period and the date when he signed his paternity action, that would establish that he had obtained new information that was not previously available to him. The trial court dismissed his

complaint to establish paternity. The appellate court affirmed, holding that the trial court did not abuse its discretion in refusing to set aside the order terminating the biological father's parental rights, when he failed to act in a timely manner (*84 Cal. App. 4th 786, 790-791)* .

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17-171 California Points & Authorities § 171.23

§ 171.23 Supporting Defendant's Motion for Special Trial of Special Defense [Code Civ. Proc. § 597] in Action to Declare Nonexistence of Father-Child Relationship [Fam. Code § 7630(a)(2)]--Action Not Brought Within Reasonable Time

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*] Plaintiff,	)	IES IN SUPPORT OF MOTION FOR SPECIAL
vs.	)	TRIAL OF SPECIAL DEFENSE
_____ [*name*], Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

A MOTION FOR A SPECIAL TRIAL OF A SPECIAL DEFENSE THAT THE PLAINTIFF HAS FAILED TO BRING AN ACTION TO DECLARE THE NONEXISTENCE OF THE FATHER-CHILD RELATIONSHIP WITHIN A REASONABLE TIME AFTER OBTAINING KNOWLEDGE OF THE RELEVANT FACTS IN THE MATTER IS PROPERLY GRANTED IF THE ANSWER PLEADS THIS SPECIAL DEFENSE AND IT DOES NOT INVOLVE THE MERITS OF THE PLAINTIFF'S CAUSE OF ACTION BUT CONSTITUTES A BAR OR GROUND OF ABATEMENT TO THE PROSECUTION.

A. Trial of Separate Issues Joined. If the answer pleads or sets up any defense not involving the merits of the plaintiff's cause of action but constituting a bar or ground of abatement to the prosecution of that action, the court may, on the motion of either party, proceed to the trial of the special defense before the trial of any other issue in the case. If the decision of the court on the special defense is in favor of the defendant, judgment for the defendant must be entered and no trial of other issues in the action may be had unless the judgment is reversed on appeal or otherwise set aside or vacated (*Code Civ. Proc. § 597*).

B. Declaring Nonexistence of Father-Child Relationship. A man who is presumed to be a child's father may bring an action to declare the nonexistence of a parent-child relationship only if the action is brought within a reasonable time after obtaining knowledge of the relevant facts (*Fam. Code § 7630(a)(2)*; *see Fam. Code § 7611(a)-(c)*).

[*Optional*] **C. Effect of Special Trial Statute.** If, on the trial of special defenses only, the decision is in favor of the defendant, the trial is at an end and judgment is then entered for the defendant (*Woodhouse v. Pacific Elec. Ry. Co. (1952) 112 Cal. App. 2d 22, 25, 245 P.2d 701*).

[*Optional*] **D. Prevention of Needless Trial.** *Section 597 of the Code of Civil Procedure*, for the entry of a judgment and the suspension of further proceedings following the sustaining of a special defense, was designed primarily to protect a defendant against a needless trial (*People v. Rath Packing Co. (1978) 85 Cal. App. 3d 308, 337, 149 Cal. Rptr. 431*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for a special trial of a special defense in an action brought by a presumed father under *Fam. Code § 7630(a)(2)* to declare the nonexistence of the father-child relationship if the plaintiff did not bring the action within a reasonable time after obtaining knowledge of relevant facts in the paternity matter. The motion for the special trial would be made if the defense was pleaded in an answer rather than being made by way of demurrer.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Effect of Special Trial Statute

In ***Woodhouse v. Pacific Elec. Ry. Co.*** *(1952) 112 Cal. App. 2d 22, 245 P.2d 701* , the plaintiff brought an action, shortly after he attained 21 years of age, for damages for personal injuries alleged to have been sustained as a result of the negligence of defendants when the plaintiff was 14 years of age. Among the defenses in their answer, defendants pleaded a release to them from plaintiff's father resulting from a court settlement when plaintiff was 15 years of age, and the denial by that court of a motion made by plaintiff when he was 15 years of age to have the court settlement set aside. Under *Code Civ. Proc. § 597*, a special trial was had of these special defenses and the court found in the plaintiff's

favor. Defendants appealed, but the court found the order nonappealable. It stated that when the answer sets up special defenses not involving the merits of plaintiff's cause of action but constituting a bar to the prosecution of an action, and the decision of the court is in favor of the plaintiff, the action is in the same status it would have been had the special defenses not been pleaded, and a judgment is not issued until after the full trial on the remaining issues in the complaint, when a final judgment is entered. However, the court said, if on the trial of special defenses only, the decision is in favor of the defendant pleading those special defenses, the trial is at an end, a judgment is then entered for the defendant, and, on a motion for a new trial or upon appeal from the judgment, the decision on the special defenses and all rulings on the trial of them may be reviewed (*112 Cal. App. 2d 22, 23-25)* .

[b] Prevention of Needless Trial

In ***People v. Rath Packing Co.*** *(1978) 85 Cal. App. 3d 308, 149 Cal. Rptr. 431* , defendant was sued by the district attorney for an injunction, civil penalties, and other relief to enjoin it from advertising and selling short-weighted packages of bacon in violation of state law. By answer, defendant denied the allegations, filed a counterclaim against the county and filed a cross complaint against the director of the county's department of weights and measures. At the time the case was called for trial, defendant, under *Code Civ. Proc. § 597*, moved for a special trial of the special defense that some of the causes of action alleged against it were barred by a prior federal district court judgment. The court granted defendant's motion for a special trial, found in defendant's favor on the special issue but refused to enter a judgment as to those causes of action found barred by the prior judgment, and proceeded to trial on the remaining issues.

Plaintiff appealed, contending that the trial court erred in refusing to enter judgment immediately on the special defenses. In ruling that the district attorney's appeal lacked substantial merit, the court of appeal emphasized that the provision of *Code Civ. Proc. § 597* for the entry of a judgment and the suspension of further proceedings following the sustaining of a special defense was designed primarily to protect a defendant against a needless trial rather than to ensure the entry of an immediate judgment from which other parties can appeal. The court concluded that the plaintiff's right to seek review of the trial court's ruling on the res judicata issue raised by the special defense was fully preserved on the appeal from the judgment entered after the court's determination of the entire controversy before it (*85 Cal. App. 3d. 308, 314-316, 318-320, 336-337)* .

[4] Additional Authorities

[a] Declaring Nonexistence of Father-Child Relationship

Robert J. v. Leslie M. (1997) 51 Cal. App. 4th 1642, 59 Cal. Rptr. 2d 905 , was an action to establish nonparentage that was brought after blood tests revealed that the plaintiff, who had admitted paternity in a prior court proceeding, was not the father of a child. A trial court denied relief to the plaintiff on the ground that the action was barred by res judicata. The court of appeal affirmed, holding that plaintiff lacked standing to bring the action because he was not a presumed father, and under *Fam. Code § 7611*, only a presumed father may seek a declaration of nonpaternity. The court also found that the action was barred by res judicata, and that in this case, as in any other child custody or paternity matter, the ends of justice are best served by protecting the best interests of the child. Here, reversal would only serve to deprive the child of needed financial support and sever his legal ties with the paternal grandparents, who were the primary caregivers. Additionally, it was not a denial of plaintiff's due process rights to apply res judicata, because plaintiff had stipulated to the entry of a judgment requiring him to pay support without any coercion and with full knowledge of his rights. The appellate court concluded that the judgment was final even if its factual underpinning was erroneous (*51 Cal. App. 4th 1642, 1648)* .

In *Said v. Jegan (2007) 146 Cal. App. 4th 1375, 53 Cal. Rptr. 3d 661* , the court rejected the contention that Robert J. v. Leslie M. stands for the proposition that only a presumed father, and not an alleged father, can bring an action under *Fam. Code § 7630* to determine nonpaternity. The statement in that case that *Fam. Code § 7630* allows a broad class of

men, including alleged fathers, to bring an action to establish paternity does not means that an alleged father lacks standing to bring an action to determine his nonpaternity, because *Fam. Code § 7630(b)* specifically provides that any interested person may bring an action at any time for the purpose of determining the existence or nonexistence of the father and child relationship presumed under *Fam. Code § 7611(d)*. The appellate court in Said concluded that the trial court erred in finding that an alleged father lacked standing under *Fam. Code § 7630(b)* to file a petition to determine that he is not the father of a son, even though he was named as the father on the son's birth certificate. An alleged father who seeks to establish the nonexistence of paternity qualifies as an interested party under *Fam. Code § 7630(b)*, so long as he alleges that there are facts, which if believed, show he might qualify as a presumed father under *Fam. Code § 7611(d)* (*146 Cal. App. 4th 1375, 1382-1385)* .

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17-171 California Points & Authorities § 171.24

§ 171.24 Supporting Plaintiff's Motion for Pendente Lite Order for Support, Medical and Hospital Expenses, and Attorney's Fees [Fam. Code §§ 7637, 7640] in Action to Establish Paternity [Fam. Code § 7630]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*]	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN SUPPORT OF MOTION FOR PENDENTE
vs.	)	LITE ORDER
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT IN AN ACTION TO ESTABLISH PATERNITY MAY MAKE A PENDENTE LITE ORDER FOR SUPPORT, MEDICAL AND HOSPITAL EXPENSES, AND ATTORNEY'S FEES.

A. Pendente Lite Child Support Order. In an action under the Uniform Parentage Act [*Fam. Code § 7600 et seq.*], the court may order temporary child support on a showing of probable paternity by a preponderance of the evidence [*Thomas B. v. Superior Court (1985) 175 Cal. App. 3d 255, 258-259, 262, 220 Cal. Rptr. 577* ; *see Gadbois v. Superior Court (1981) 126 Cal. App. 3d 653, 656-657, 179 Cal. Rptr. 19]* .

B. Pendente Lite Attorney's Fees and Costs. In an action under the Uniform Parentage Act [*Fam. Code § 7600 et seq.*], the court may order reasonable fees of counsel, experts, and the child's guardian ad litem, and other costs of the action and pretrial proceedings, including blood tests, to be paid by the parties (except a governmental entity) in proportions and at times determined by the court (*Fam. Code § 7640*).

C. Pendente Lite Medical and Hospital Expenses for Birth of Child. In a proceeding to establish paternity, the court may order defendant to pay plaintiff's hospital and medical expenses before judgment of paternity is entered (*Hodge v. Gould (1969) 274 Cal. App. 2d 806, 808, 79 Cal. Rptr. 245* ; *Richter v. Superior Court (1963) 214 Cal. App. 2d 821, 823, 29 Cal. Rptr. 826*).

D. Prima Facie Evidence of Costs of Pregnancy, Childbirth, and Genetic Tests. Notwithstanding any other provision of law, bills for pregnancy, childbirth, and genetic testing shall be admissible as evidence without third-party foundation testimony, and shall constitute prima facie evidence of costs incurred for those services (*Fam. Code § 7604.5*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for a pendente lite order for support, medical and hospital expenses, and attorney's fees in an action to establish paternity brought under the Uniform Parentage Act [*see Fam. Code § 7630*]. The action may be commenced and the motion made before the birth of the child [*Fam. Code § 7633*], or after the child has been born.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms for a motion for an order to show cause for a pendente lite award of support, attorney's fees, and costs with supporting declaration; an order to show cause for attorney's fees, costs, and allowance for support of child during pendency of action; and an order for payment of support, attorney's fees, and costs during pendency of action, see California Forms of Pleading and Practice, Ch. 412, *Paternity* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda supporting and opposing motions for orders for attorney's fees, see Ch. 60, *Costs* .

[3] Discussion of Authorities

[a] Pendente Lite Child Support Order

In ***Thomas B. v. Superior Court*** *(1985) 175 Cal. App. 3d 255, 220 Cal. Rptr. 577* , the trial court ordered defendant,

the alleged father, to produce financial records and tax returns after making a preliminary finding of paternity for the purpose of ordering pendente lite support and while the issue of paternity was still contested. The appellate court noted that under *Carbone v. Superior Court (1941) 18 Cal. 2d 768, 117 P.2d 872* , the court could order temporary support, but reversed on the issue of production of financial records. The court held that the privilege not to be compelled to produce tax returns attached until such time as the defendant was adjudicated as the father, at which time the statutory exception to the privilege that requires production by a parent in a child support proceeding would attach [*see Fam. Code § 3665*]. Therefore, although temporary support could be awarded, the amount could not be set by recourse to privileged records. The issues of paternity and support would have to be bifurcated, and the amount of permanent support could not be determined until after a final adjudication of paternity (*175 Cal. App. 3d 255, 262-266)* . The court's holding, while supporting a right to pendente lite support, greatly restricts the right in any case in which the appropriate amount of support must be determined by resort to otherwise-privileged financial records.

NOTE:

Under the holding in *Carbone*, relied on by the court in *Thomas B.*, the right to a pendente lite child support order before the final adjudication of paternity rests on a construction of former Civ. Code § 196a. However, paternity actions are now controlled by the Uniform Parentage Act [*see Fam. Code § 7600 et seq.*], not by *Fam. Code § 3900*, which sets forth the basic parental duty of child support of former Civ. Code § 196a. Under the UPA, there is no express provision for a pendente lite support order [*see Fam. Code §§ 7636, 7637* (support order may be included in judgment or order of court that determines existence of parent-child relationship)]. Thus, it would seem that the continued validity of a right to a pendente lite support order based on a preliminary showing of paternity by a preponderance of the evidence is open to question under the UPA.

Nevertheless, in cases brought under the UPA, courts have continued to issue temporary support orders before final adjudication of the issue of paternity, although no court has expressly held that the UPA authorizes such an order. *City and County of San Francisco v. Superior Court (1978) 86 Cal. App. 3d 87, 150 Cal. Rptr. 45* , was decided after enactment of the UPA, but does not discuss its possible effect on the right to temporary support. The court awarded temporary support on the authority of *Carbone* and former Civ. Code § 196a (*86 Cal. App. 3d 87, 89-91)* .

In ***Gadbois v. Superior Court*** *(1981) 126 Cal. App. 3d 653, 179 Cal. Rptr. 19* , the issue was the propriety of a temporary visitation order. In this case, the father was the plaintiff, asserting his paternity of the child over the opposition of the mother and seeking visitation rights. The court held in favor of the father on the ground that since he could be compelled to pay support before final adjudication of paternity, he was also entitled to a hearing on the appropriateness of visitation (*126 Cal. App. 3d 653, 656-657)* .

[b] Pendente Lite Medical and Hospital Expenses for Birth of Child

In ***Hodge v. Gould*** *(1969) 274 Cal. App. 2d 806, 79 Cal. Rptr. 245* , plaintiff filed a verified complaint in superior court alleging that defendant was the father of her unborn child. She obtained an order from the court directing defendant to appear and show cause why he should not be required to pay temporary support and maintenance for the unborn child, medical and hospital expenses incident to its birth, and attorney's fees and costs in the action. Defendant filed a verified answer in which he denied he was the father of the child and placed in issue plaintiff's need for the funds requested and his own financial ability to pay. After a hearing at which no evidence was introduced, the court ordered defendant to pay all the medical and hospital expenses incident to the child's birth, attorney's fees and support pending blood test results. Although the court of appeal reversed on grounds concerning the blood tests, it cited *Carbone v. Superior Court (1941) 18 Cal. 2d 768, 117 P.2d 872* , to hold that in an action to establish the paternity of a child, the court may make pendente lite orders for support, medical and hospital expenses, and attorney's fees if probable paternity was established at a hearing by a preponderance of the evidence.

In ***Richter v. Superior Court*** *(1963) 214 Cal. App. 2d 821, 29 Cal. Rptr. 826* , petitioner filed suit against defendant before the birth of her child to establish paternity and for support of the child. They appeared at a hearing on an order to show cause at which time defendant asked for a continuance of the matter to a date after the birth of the child. Indicating it was the policy of the court to grant such continuances in paternity matters until after the birth of the child, the trial court granted defendant's motion. Petitioner asked the court of appeal to issue a writ of mandate to compel the trial court to grant an immediate hearing on the order to show cause. In issuing the writ, the court affirmed the power of the trial court to order the payment of support, costs, and counsel fees pending the trial on the issue of paternity. It stated that in a proceeding to establish paternity, commenced before the birth of the child, the child is entitled to an award of hospital expenses incurred in connection with its birth on the theory that hospital and medical expenses are part of the child's right to support. In addition, the court said that maintenance of the mother is a necessary part of support of the child, and the court has the power to order support and costs from the date of the filing of the complaint (*214 Cal. App. 2d 821, 823)* .

[4] Additional Authorities

[a] Pendente Lite Child Support Order

County of San Luis Osbispo v. Nathaniel J. (1996) 50 Cal. App. 4th 842, 57 Cal. Rptr. 2d 843 concerned a proceeding in which a county sought a finding of paternity, an order for ongoing child support, and AFDC reimbursement against a 15-year-old father. The defendant admitted paternity, but claimed that he was not required to pay support because he was a victim of statutory rape at the hands of the child's 34-year-old mother, with whom he willingly engaged in sexual relations. A trial court entered a judgment establishing paternity and reserved an order for child support pending the defendant's reaching the age of majority. The court of appeal affirmed, holding that the defendant's technical status as a "victim" of statutory rape did not override his parental duty of support. The appellate court reasoned that requiring child support did not violate the public policy which protects minors from sexual exploitation by an adult. The court found that the defendant was not an innocent victim of the woman's criminal acts because there had been consensual intercourse that had occurred approximately five times over a two week period. It was therefore appropriate to follow California law, which provides that every child has the right to support from both parents (*50 Cal. App. 4th 842, 845)* .

Jaycee B. v. Superior Court (1996) 42 Cal. App. 4th 718, 49 Cal. Rptr. 2d 694 , involved a proceeding related to a marital dissolution action. The wife sought temporary child support from her husband regarding a child who was the subject of a surrogacy contract. Although a trial court ruled that it lacked jurisdiction to order support because it had not yet been established that the infant was a "child of the marriage," the court of appeal disagreed. It issued a writ of mandate directing the family court to hold a hearing forthwith to determine an appropriate child support order, and held that the family court did have jurisdiction to enter a temporary child support order pending final determination of the husband's paternity, citing *Carbone v. Superior Court (1941) 18 Cal. 2d 768, 117 P.2d 872* . The child had been conceived through artificial insemination, and the appellate court found that the undisputed fact of the husband signing the surrogacy agreement demonstrated, by a preponderance of the evidence, that he would most likely be found to be the child's father (*42 Cal. App. 4th 718, 730)* .

California Points & Authorities

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Volume 17 Chapters 170-179 PARTNERSHIPS---to---PREMISES LIABILITY
CHAPTER 171 PATERNITY
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17-171 California Points & Authorities § 171.25

§ 171.25 Supporting Contention That Paternity Determination Is Barred by Conclusive Presumption That Mother's Husband Is Child's Father [Fam. Code § 7540]--Mother Was Married at Time of Conception and Husband Was Neither Impotent Nor Sterile

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

ANY DETERMINATION OF PATERNITY WITH REGARD TO THE CHILD IS BARRED BECAUSE THE CHILD WAS BORN TO A MARRIED WOMAN AND CONCEIVED DURING THE PERIOD WHEN THE MOTHER WAS COHABITING WITH HER HUSBAND, WHO WAS NOT IMPOTENT OR STERILE.

A. Child Presumed Issue of Marriage if Wife Cohabits With Husband. Except as provided in *Family Code Section 7541*, the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage (*Fam. Code § 7540*; *see Estate of Cornelious (1984) 35 Cal. 3d 461, 467, 198 Cal. Rptr. 543, 674 P.2d 245*).

[*Optional*] **B. Presumption Attaches if Cohabitation at Time of Conception Is Established.** If the court finds that conception occurred during cohabitation of the spouses, the statutory presumption of *Family Code Section 7540* attaches (*In re Elijah V. (2005) 127 Cal. App. 4th 576, 586-587, 25 Cal. Rptr. 3d 774*).

[*Optional*] **C. Cohabiting Defined.** The word "cohabiting" as used in *Family Code Section 7540* means living together as husband and wife (*Steven W. v. Matthew S. (1995) 33 Cal. App. 4th 1108, 1114-1115, 39 Cal. Rptr. 2d 535*).

[*Optional*] **D. Evidence of Nonintercourse Not Admissible.** If a husband and wife are cohabiting, evidence of nonintercourse between the parties is not permitted (*S.D.W. v. Holden (1969) 275 Cal. App. 2d 313, 315, 80 Cal. Rptr. 269*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a demurrer or motion for summary judgment if the mother was cohabiting with her husband at the time the child was conceived and the conclusive presumption of *Fam. Code § 7540* applies. It may be used by any party who wants to rely on the presumption to establish that the husband and not some other man is conclusively the child's father. It may also be adapted for use to oppose a motion for blood or other genetic tests (*see § 171.27*) if the conclusive presumption makes the paternity of the person sought to be tested a legal impossibility, even if it is a factual possibility. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations that support the motion [*Code Civ. Proc. § 437c(b)(1)*].

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 171.38 -171.40* may be used to oppose the contention supported by these points and authorities.

[c] Constitutionality of Conclusive Presumption

The conclusive presumption of *Fam. Code § 7540* has been subjected to numerous constitutional challenges based on the due process and *equal protection clauses of the Fourteenth Amendment to the United States Constitution*, which have been held to protect the essential right to rear one's own children [*see Stanley v. Illinois (1972) 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed. 2d 551* ; *In re R. (1975) 13 Cal. 3d 636, 647-649, 119 Cal. Rptr. 475, 532 P.2d 123]* .

The California Supreme Court has found that a balance of interests is required [*see Michelle W. v. Ronald W. (1985) 39 Cal. 3d 354, 358-363, 216 Cal. Rptr. 748, 703 P.2d 88* ; *In re R. (1975) 13 Cal. 3d 636, 647-651, 119 Cal. Rptr. 475, 532 P.2d 123]* . The parameters of this balancing test are *considered in §§ 171.26, 171.38*.

[d] Rebutting Presumption

The presumption of *Fam. Code § 7540* was once truly conclusive for all purposes, and as such, was a substantive rule of law rather than an evidentiary presumption [*see Vincent B. v. Joan R. (1981) 126 Cal. App. 3d 619, 623, 179 Cal. Rptr. 9]* . However, it is now subject to a limited statutory right of rebuttal. Under current law, if the court finds that the conclusions of all the experts, as disclosed by evidence based on blood tests [*see Fam. Code § 7550 et seq.*] are that the husband is not the father of the child, the question must be resolved "accordingly" [*Fam. Code § 7541(a)*], meaning that the presumption is not to be applied and the biological father rather than the husband must be adjudged the legal father.

A notice of motion for blood tests or, apparently, for other genetic tests [*see § 171.27*] may be brought by one of the following persons:

1. The husband, who is the otherwise conclusively presumed father of the child [*Fam. Code § 7541(b)*];

2. The mother, but only if another man has filed an affidavit with the court acknowledging paternity [*Fam. Code § 7541(c)*];

3. A man who qualifies as a presumed father under one of the other presumptions of *Fam. Code § 7611*, but only for the purpose of establishing his paternity [*Fam. Code § 7541(b)*]; or

4. The child, through a guardian ad litem [*Fam. Code § 7541(b)*].

Therefore, the presumption is no longer truly conclusive; but the right to rebuttal is limited. No evidence other than blood-test evidence may be presented, and only those listed above are granted standing by statute to move for blood tests. Note, however, that on and after January 1, 1998, statutes under the Uniform Act on Blood Tests to Determine Paternity (*Fam. Code § 7550 et seq.*) provide for "genetic" rather than simply "blood" testing. Although *Fam. Code § 7541* still makes reference only to "blood tests" in rebutting the presumption of *Fam. Code § 7540*, it appears that evidence based on approved genetic testing other than simply blood testing would now be admissible, because *Fam. Code § 7541(a)* refers to blood tests performed "pursuant to [*Fam. Code § 7550 et seq.*]." This interpretation, nevertheless, remains subject to further statutory or judicial clarification.

The presumption of *Fam. Code § 7540* remains conclusive with regard to a man who alleges that he, and not the husband, is the true biological father of a child born to a married woman, but who cannot meet any of the other presumptions of paternity. Such a man cannot move for blood or other genetic tests unless he can obtain the assistance of someone from the favored group, for example, the husband, the mother, or the guardian ad litem for the child. It also remains conclusive as to the mother if the putative father will not file an affidavit acknowledging paternity [*see Michelle W. v. Ronald W. (1985) 39 Cal. 3d 354, 365, 216 Cal. Rptr. 748, 703 P.2d 88* (finding that rebuttal provisions do not violate equal protection on gender grounds because rights of mother and putative father are conditioned on each other)]. Rebuttal by blood or other genetic test evidence is also not available if conception was by artificial insemination [*see Fam. Code § 7613*], or if the wife, with the consent of her husband, conceived by means of a surgical procedure [*Fam. Code § 7541(e)*].

A motion for blood test or, apparently, other genetic test, evidence must be brought no later than two years from the child's date of birth [*Fam. Code § 7541(b), (c)*]. It must be supported by a declaration stating the factual basis for placing the issue of paternity before the court [*Fam. Code § 7541(d)*]. For a form opposing the contention that this limitation period applies to bar the motion, see *§ 171.41*.

[3] Discussion of Authorities

[a] Child Presumed Issue of Marriage if Wife Cohabits With Husband

Estate of Cornelious *(1984) 35 Cal. 3d 461, 198 Cal. Rptr. 543, 674 P.2d 245* , involved the petition of a woman to be named administratrix of the estate of a man she claimed was her natural father. The woman's mother had been living with her husband when the woman was born, and the trial court held that the conclusive presumption of what is now *Fam. Code § 7540* precluded any proof that the decedent was her biological father. The California Supreme Court affirmed, holding that the woman's right to due process was not violated by the application of the conclusive presumption because the state's interests embodied in the presumption outweighed the woman's financial interests in the decedent's estate (*35 Cal. 3d 461, 463-464, 467)* . This balancing of state and private interests is developed further in §§ 171.26, 171.38.

[b] Presumption Attaches if Cohabitation at Time of Conception Is Established

In ***In re Elijah V.*** *(2005) 127 Cal. App. 4th 576, 25 Cal. Rptr. 3d 774* , the court of appeal rejected the contention of the child's biological father that the husband of the child's mother could not qualify as the child's conclusively presumed father under *Fam. Code § 7540* because he and the child's mother were not actually cohabitating at the time of the child's conception. The court noted that to qualify as a conclusively presumed father under that section, a man must be living with his wife at the time the child is conceived. Thus, the presumption has not been applied when the child was born too soon after a husband and wife began living together or too long after they were living together, and the presumption has not been applied when there has been no substantive cohabitation. The biological father contended that the husband and wife were not living together when the child was conceived because the husband was deployed by the Navy. Because they were not physically living in the same home, he asserted that the "laws of nature" barred the

application of the conclusive presumption. However, the record showed that the husband and wife had sexual relations on the date the doctors believed the wife had conceived and they were cohabiting that day because they were living in the husband's military housing. In addition, the average period of gestation is between 270 and 282 days, and the child in this case was born 276 days after the husband and wife had sexual relations. Because the child was born within 276 days of his parents' last physical cohabitation, they were cohabiting within the meaning of *Fam. Code § 7540*, and the trial court properly found that the husband was the child's presumed father within the meaning of that section (*127 Cal. App. 4th 576, 586-587)* .

[c] Cohabiting Defined

In ***Steven W. v. Matthew S.*** *(1995) 33 Cal. App. 4th 1108, 39 Cal. Rptr. 2d 535* , the mother of the child was married to Matthew at all pertinent times. However, she moved out of their apartment and moved in with Steven in 1986. She became pregnant in 1987 while she was still living with Steven, although conception was on account of a weekend tryst with husband Matthew. She continued to live with Steven, who occupied the paternal role in the birth and care of the child. Ultimately, the relationship with Steven ended and she resumed cohabitation with Matthew. Steven continued to share custody and support of the child.

Steven then instituted a paternity action. The trial court refused to apply the conclusive presumption of what is now *Fam. Code § 7540* with regard to Matthew and adjudged Steven the father, ruling that he had the more prolonged, intensive, and continuing relationship with the child (*33 Cal. App. 4th 1108, 1113)* . For further discussion of this aspect of the case, see *§ 171.38[4][a]*.

On appeal, Matthew argued that the presumption precluded the trial court from adjudicating that Steven was Michael's father. However, the appellate court found that the presumption did not apply because Matthew could not establish the condition of cohabitation at the time of conception. The court stated that the settled meaning of "cohabitation" is "living together as husband and wife." Mere access or opportunity for sexual relations is insufficient. Cohabitation implies more than a stolen weekend or a sexual encounter; it is living together in a marital household, sharing day-to-day life. In this case, the evidence showed that Matthew and the mother were not cohabiting within the meaning of the presumption. The mother was living with Steven, not Matthew, at the time of conception (*33 Cal. App. 4th 1108, 1114-1115)* .

[d] Evidence of Nonintercourse Not Admissible

In ***S.D.W. v. Holden*** *(1969) 275 Cal. App. 2d 313, 80 Cal. Rptr. 269* , the mother of a minor child lived with her husband in their residence during the time of the child's conception and for a time thereafter. In divorcing her husband she alleged that she and her husband separated after the child's birth and obtained provision for the child's support in the divorce decree. When the husband did not make the payments decreed, the mother brought this action against defendant. She and her ex-husband both testified over objection that matrimonial intercourse had ended about three months before the date of conception. A blood test was also admitted over objection which purported to show that the ex-husband was not the father. Testimony indicated the mother had had sexual relations with defendant and with no other man during period of conception, and defendant admitted the relationship, but testified that it began some months later. There was also testimony of admissions made by defendant that he was the child's father, but he denied these admissions. The jury found defendant to be the father of the child, and he appealed from the judgment entered after the verdict. In reversing the judgment, the court of appeal said that in California, cohabiting means living together ostensibly as man and wife. If the parties were so living together as husband and wife, evidence of nonintercourse is not permitted to be introduced because of the presumption of what is now *Fam. Code § 7540* (*275 Cal. App. 2d 313, 313-315)* .

[4] Additional Authorities

[a] Child Presumed Issue of Marriage if Wife Cohabits With Husband

In *In re Elijah V. (2005) 127 Cal. App. 4th 576, 25 Cal. Rptr. 3d 774* , the court of appeal held that because the defendant failed to prove he was the child's presumed father under *Fam. Code § 7611*, the trial court erred in ordering the mother's husband to submit to genetic testing on the defendant's motion alleging that the husband was not the child's biological father. The only parties who may seek genetic testing under *Fam. Code § 7541* are the husband, the child, or a man who is a presumed father under *Fam. Code § 7611*. Thus, when a man who is not a presumed father within the meaning of *Fam. Code § 7611* seeks to establish his paternity, the trial court may not order genetic tests under *Fam. Code § 7541* to defeat the conclusive presumption of *Fam. Code § 7540* that the husband is the child's father (*127 Cal. App. 4th 576, 585-586)* .

[b] Evidence of Nonintercourse Not Admissible

In *Vincent B. v. Joan R. (1981) 126 Cal. App. 3d 619, 179 Cal. Rptr. 9* , a putative father brought an action against a formerly married couple to establish a father and child relationship with the couple's child. The trial court held that the conclusive presumption of what has become *Fam. Code § 7540* applied because the couple had been married and cohabiting at the time of the child's conception, and the court granted summary judgment against the plaintiff and dismissed the action. The court of appeal affirmed. It held that evidence of the couple's lack of sexual relations during their cohabitation is irrelevant and will not prevent application of the presumption, once cohabitation has been shown (*126 Cal. App. 3d 619, 622-623)* .

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17-171 California Points & Authorities § 171.26

§ 171.26 Supporting Contention That Paternity Determination Is Barred by Conclusive Presumption That Mother's Husband Is Child's Father [Fam. Code § 7540]--Biological Father's Constitutional Rights Are Outweighed by State's Interest in Protecting Familial Relationships

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THIS ACTION IS BARRED BY THE CONCLUSIVE PRESUMPTION OF FAMILY CODE SECTION 7540, THAT A CHILD BORN TO A MARRIED WOMAN IS A CHILD OF THE MARRIAGE IF CONCEIVED WHILE THE MOTHER WAS COHABITING WITH HER HUSBAND WHO WAS NOT IMPOTENT OR STERILE, BECAUSE ON BALANCE, ANY CONSTITUTIONAL INTEREST OF THE ALLEGED FATHER AND CHILD TO A PARENT-CHILD RELATIONSHIP IS OUTWEIGHED BY THE STATE'S INTEREST IN PRESERVING FAMILIAL RELATIONSHIPS.

A. Protecting Family Unit and Promoting Familial Stability. The presumption of *Family Code Section 7540* must be applied conclusively if the public interest in protecting the family unit and promoting familial stability outweighs the constitutional interest of the putative father (*Michelle W. v. Ronald W. (1985) 39 Cal. 3d 354, 360, 216 Cal. Rptr. 748, 703 P.2d 88* ; *Miller v. Miller (1998) 64 Cal. App. 4th 111, 118-120, 74 Cal. Rptr. 2d 797* ; *Michael H. v. Gerald D. (1987) 191 Cal. App. 3d 995, 1008-1009, 236 Cal. Rptr. 810 , aff'd, 491 U.S. 110 (1989))* .

B. Preserving Existing Father-Child Relationship. The presumption of *Family Code Section 7540* may be applied conclusively to preserve the relationship between the child and the husband-presumed father, even in the context of proceedings for dissolution of marriage (*Michelle W. v. Ronald W. (1985) 39 Cal. 3d 354, 360-362, 216 Cal. Rptr. 748, 703 P.2d 88* ; *In re Marriage of Freeman (1996) 45 Cal. App. 4th 1437, 1444, 53 Cal. Rptr. 2d 439* ; *Susan H. v. Jack S. (1994) 30 Cal. App. 4th 1435, 1442*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the presumption of *Fam. Code § 7540*, that a child born to a married woman who was cohabiting with her husband who was not impotent or sterile at the time of conception, is a child of the marriage [*see § 171.25*], should be applied conclusively. They are for use in opposition to the points and authorities *set forth in § 171.38*.

The points and *authorities in § 171.38* assert the constitutional due process interest of a putative father in a parent-child relationship with his biological child, and the California Supreme Court's balancing of private and state interests to determine whether the presumption cannot be applied for constitutional reasons. These points and authorities then assert that any constitutionally protected interest is outweighed by the state's interest in protecting existing families and parent-child relationships.

This form may be combined with points and authorities pertaining to the specific procedural context in which the application of the presumption is brought before the court. It may be used in a memorandum of points and authorities in connection with a pretrial motion, such as a demurrer, motion for summary judgment, or motion for summary adjudication of the issue of paternity. It may also be used in a trial or appellate brief.

Because the application of the presumption is controlled by a balancing test, proper presentation of the facts is crucial. Some or all of the following facts should be developed: (1) there is a significant and ongoing parental relationship between the mother's husband, who is conclusively the father under the presumption, and the child; (2) there is no significant or ongoing relationship between the alleged true biological father and the child; (3) there is an family unit that includes the child and the presumed father. Other facts showing detriment to the child if the presumption is not applied should be included.

[3] Discussion of Authorities

[a] Protecting Family Unit and Promoting Familial Stability

In ***Michelle W. v. Ronald W.*** *(1985) 39 Cal. 3d 354, 216 Cal. Rptr. 748, 703 P.2d 88* , the mother was married to Ronald when the child Michelle was conceived and born. Ronald occupied the paternal role in the child's life for five years, until the parents separated. In the dissolution matter, Michelle was treated as a child of the marriage, and appropriate support and visitation orders were made with regard to Ronald. The issue of paternity was not raised. Ronald continued visitation with Michelle until the mother married Donald. Then she attempted to terminate visitation, asserting that Michelle was conceived as a result of an extramarital affair with Donald and that Donald was Michelle's actual biological father. Donald had played no role in Michelle's life until the mother's divorce from Ronald and remarriage. Donald and Michelle, through a guardian ad litem who was a family friend of Donald and the mother, then brought a paternity action to establish Donald's paternity.

The trial court, on the uncontroverted facts that Michelle was conceived while the mother was married to Ronald who was neither impotent nor sterile, applied the presumption of what is now *Fam. Code § 7540* and established that Ronald was Michelle's father. Michelle's motion for blood tests was denied. Both Ronald and Michelle appealed, but the California Supreme Court affirmed.

The Court noted its holding of *In re R. (1975) 13 Cal. 3d 636, 648, 119 Cal. Rptr. 475, 532 P.2d 123* , discussed in *§ 171.38[3][b]*, that whether the conclusive application of the presumption violates the putative father's due process rights depends on a balancing of the competing private and state interests. It characterized the state's interest as certain social policies upholding the integrity of the family and protecting the child's welfare. In the case before it, it found that the public interest in protecting the family unit and promoting familial stability outweighed Donald's interest. It distinguished *Lisa R.* as a case in which the putative father was attempting to establish a parental relationship with a child who otherwise would have no father (*39 Cal. 3d 354, 360-363)* .

It also rejected the child's claim, questioning whether the guardian ad litem and her counsel (who also represented Donald) were really asserting a claim that was in her best interests. It used the same balancing test with regard to Michelle, and concluded that her interest in establishing her actual biological paternity did not outweigh the state's interest in preserving and protecting the developed parent-child relationship (*39 Cal. 3d 354, 363-364)* .

In ***Miller v. Miller*** *(1998) 64 Cal. App. 4th 111, 74 Cal. Rptr. 2d 797* , three children were born to Michael Miller and Lillian Miller during their marriage. Following the dissolution of their marriage, Lillian married Michael's brother Gary. Lillian told Gary that he was the biological father of her youngest child, Samantha. Thereafter, Gary filed a complaint to determine whether a parent and child relationship existed between Michael and Samantha, naming Michael as the defendant, and alleging that Gary was Samantha's natural father and seeking full legal and physical custody of Samantha. As an exhibit to the complaint, he attached "parentage/kinship" test results prepared by a laboratory in Seattle, Washington, which concluded that Gary is Samantha's biological father. The court held that the conclusive presumption of paternity established by *Fam. Code § 7540* applied to Michael, and that Gary could not employ the exception to this section afforded by *Fam. Code § 7541* to rebut this conclusive presumption. The blood test results he obtained could not override the conclusive presumption because the tests were not authorized by *Fam. Code § 7541*: they were neither ordered by the court nor performed by court appointed experts, as required by *Fam. Code §§ 7551* and *7552* and, as a result, they have no legal significance. In addition, the tests were not performed within two years of Samantha's birth and were, thus, untimely. Finally, Gary did not have standing to request the blood tests under *Fam. Code § 7541* because the court found he was not a presumed father under *Fam. Code § 7611(d)*. Therefore, the conclusive presumption of paternity applied to Michael as a matter of law and whether or not Gary was in fact Samantha's biological father was immaterial (*64 Cal. App. 4th 111, 118-119)* .

Gary also argued that the presumption of paternity in favor of Michael deprived him of his substantive due process right to establish that he is Samantha's biological father. The court noted that a due process challenge to the conclusive presumption that the husband is the father of a child conceived during marriage was rejected in *Michelle W. v. Ronald W.* "based on strikingly similar facts." Because Michael had established an emotional and financial father-daughter relationship with Samantha, Gary's private interest in establishing a parent and child relationship based on alleged biological father status was overridden by the state interests in familial stability and the best interest of the child (*64 Cal. App. 4th 111, 119-120)* .

In ***Michael H. v. Gerald D.*** *(1987) 191 Cal. App. 3d 995, 236 Cal. Rptr. 810* , the mother, at all times pertinent, was married to Gerald. She had an on-again, off-again extramarital affair with Michael, during which time she conceived and gave birth to a child. Blood tests showed a 98 percent probability that Michael was the father of the child. After living for awhile with Michael, the mother and the child ultimately returned to Gerald. Michael sought an adjudication of his paternity, over the opposition of Gerald and the mother, but the trial court applied the presumption of what is now *Fam. Code § 7540* conclusively to affirm Gerald's paternity. Michael appealed, asserting the unconstitutionality of the conclusive presumption [*see § 171.38*], and the child's guardian ad litem also appealed, asserting the right to a relationship with both men.

The California court of appeal affirmed, essentially using the same analysis and reasoning as that applied in *Michelle W. v. Ronald W.*, discussed *above*. In addition to the state's interests in that case, there was the additional fact that the mother, Gerald, and child continued to live together as a family unit, and the parents did not want the disruption that Michael's involvement in the life of the child might bring. The court stated that the state's interest in preserving the matrimonial family is so significant that it outweighs most other interests (*191 Cal. App. 3d 995, 1008)* .

The California Supreme Court denied review, but the United States Supreme Court granted certiorari [*see Michael H. v. Gerald D. (1989) 491 U.S. 110, 109 S. Ct. 2333, 105 L. Ed. 2d 91]* . In a decision without a majority opinion, the Court upheld the statute's constitutionality as applied to Michael and the child (*491 U.S. 110, 113-136)* . However, five justices refused to foreclose the possibility that a natural father might ever have a constitutionally protected interest in his relationship with a child whose mother was married to and cohabiting with another man at the time of the child's

conception and birth (*491 U.S. 110, 133-136, 156-163* ; opinions of Stevens, J., concurring in judgment; Brennan, J., joined by Blackmun, J. and Marshall, J., dissenting; and White, J., joined by Brennan, J., dissenting). One justice concurred in the judgment of constitutionality as applied to the facts of the case only because, under his view of California law, the alleged biological father could still pursue visitation rights under what is now *Fam. Code § 3100* (*491 U.S. 110, 133-134* ; opinion of Stevens, J., concurring in judgment).

The end result of *Michael H. v. Gerald D.* is that a majority of the United States Supreme Court could find the conclusive operation of the presumption neither constitutional for all purposes, nor unconstitutional for all purposes. Therefore, the approach of the California Supreme Court of balancing the competing private and state interests involved with regard to the facts of each case remains the required approach.

[b] Preserving Existing Father-Child Relationship

The facts and holding of ***Michelle W. v. Ronald W.*** *(1985) 39 Cal. 3d 354, 216 Cal. Rptr. 748, 703 P.2d 88* , are *discussed under § 171.26[3][a]*. In upholding the conclusive operation of the presumption of what is now *Fam. Code § 7540*, the Supreme Court gave primary importance to the established and continuing emotional and financial father-child relationship between the husband-presumed father and the child (*39 Cal. 3d 354, 362)* .

In ***In re Marriage of Freeman*** *(1996) 45 Cal. App. 4th 1437, 53 Cal. Rptr. 2d 439* , a husband filed a marital dissolution petition alleging that there were no children of the marriage. The wife responded by claiming that the marriage produced two children. The husband's position was based on the fact that he had had a vasectomy several years before the marriage. He hoped to avoid the conclusive presumption that he was the father of the children by establishing that he was sterile, although, following two reversal operations, he still produced some live sperm (about one-fourth the amount needed to be considered fertile). The parties later stipulated that another man fathered one of the children. As to the other, a trial court found by a preponderance of evidence that, because it was remotely possible that the husband could be the father, he was not "sterile" within the meaning of former Evid. Code § 621 (*now see Fam. Code § 7540*) at the time the child was conceived. Later, the parties stipulated to a judgment providing that blood tests could not be ordered (because of the sterility ruling) and that it was conclusively presumed that the husband was the child's father. A child support order was set, and the husband appealed.

The court of appeal affirmed the judgment. It reasoned that during the early years of a child's life, the support obligation is based solely on actual or presumed biological paternity. Thereafter, notwithstanding evidence of biological paternity, a husband's obligation to support a child may be demonstrated by the nature and extent of the social relationship that the husband has with the child. After a child has reached his or her third year of life, biology is no longer the predominant consideration. Thus, the subsequent conduct of a husband may estop him from avoiding parental responsibilities even after the marriage has been dissolved. The appellate court added that it was defining "sterility" in the strictest sense, limiting the "sterility exception" to the paternity presumption to cases in which, by a preponderance of evidence, a party can demonstrate that the presumed father could not produce live sperm at the time of conception. Here, the record was clear that the husband was capable of producing live sperm at the time the child was conceived, and therefore he was not sterile within the meaning of *Fam. Code § 7540* (*45 Cal. App. 4th 1437, 1444)* .

Susan H. v. Jack S. *(1994) 30 Cal. App. 4th 1435, 37 Cal. Rptr. 2d 120* , involved a variation on the same basic fact pattern as *Michelle W. v. Ronald W*. Susan was married to and cohabiting with John when the child, Michael, was conceived and born. Susan and John subsequently divorced in proceedings in which both alleged that Michael was a child of the marriage. Custody, visitation, and support orders issued with regard to John. A month later, Susan filed a paternity action against Jack, alleging that he was actually Michael's father. Jack defended on the ground that the conclusive presumption of *Fam. Code § 7540* made John the father as a matter of law. Susan opposed application of the presumption on the ground that it violated Michael's right to know the identity of his biological father. John moved for blood tests in the dissolution matter, which established his nonpaternity. Nevertheless, he did not support Susan's efforts to establish Jack's paternity. The trial court applied the presumption, holding that the state's legitimate concern for the

child's welfare in preserving Michael's existing relationship with John outweighed any interest of Michael in knowing the true identity of his father. It also noted that the state's interest in preserving stable familial relationships exists even during dissolution of marriage.

Susan appealed, but the court of appeal affirmed. While it did not totally reject the proposition that a child's right to know his or her true biological father is a legitimate interest worthy of protection, it gave it little weight on the facts before it. Blood tests conclusively established John's nonpaternity, and Susan presumably knew that Jack was the true father. Therefore, the true facts were sufficiently known without a formal adjudication of Jack's paternity (*30 Cal. App. 4th 1435, 1440-1441)* .

The weightier consideration was that Michael had an ongoing father-child relationship with John. In contrast, there was the absence of any relationship whatsoever between Michael and Jack, and Jack's lack of interest in creating one. The court stated that to afford Jack parental status, including a duty of support and visitation rights, would likely only cause confusion, uncertainty, and embarrassment to the child (*30 Cal. App. 4th 1435, 1441)* .

Susan argued that the interest of the state in preserving the integrity of the family and protecting the child's welfare was rendered irrelevant because her marriage to John had been dissolved. But the court rejected the argument, noting that the familial relationship between the presumed father and the child does not necessarily terminate on dissolution of marriage. Most significantly, conclusive application of the presumption promotes the state's interest in the child's welfare. It noted the state's interest in preserving and protecting familial relationships that give young children social and emotional strength and stability. This interest is served, notwithstanding termination of the mother's marital relationship with the presumed father (*30 Cal. App. 4th 1435, 1441-1442)* .

NOTE:

In *Michelle W. v. Ronald W.,* the California Supreme Court specifically rejected the avoidance of the "stigma of illegitimacy" as a valid state interest in applying the presumption. For this proposition, it cited the enactment of the Uniform Parentage Act and its elimination of the status of illegitimate child and of distinctions in the rights of children based on the marital status of their parents [*Michelle W. v. Ronald W. (1985) 39 Cal. 3d 354, 362 n.5, 216 Cal. Rptr. 748, 703 P.2d 88]* .

However, in later cases, courts have attempted to recast the avoiding of "stigma" as a legitimate state interest. In *Michael H. v. Gerald D.,* the California court of appeal stated that notwithstanding the adoption of the UPA, which rendered illegitimacy to be without any legal effect, conclusive application of the presumption protects the child from the social stigma of being branded a child of an adulterous relationship [*Michael H. v. Gerald D. (1987) 191 Cal. App. 3d 995, 1010, 236 Cal. Rptr. 810]* . This recast stigma interest was cited favorably in *Susan H. v. Jack S. (1994) 30 Cal. App. 4th 1435, 1440 n.3, 37 Cal. Rptr. 2d 120* , but ignored in *County of Orange v. Leslie B. (1993) 14 Cal. App. 4th 976, 980 n.4, 17 Cal. Rptr. 2d 797* , discussed in *§ 171.39*[3]]a].

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Volume 17 Chapters 170-179 PARTNERSHIPS---to---PREMISES LIABILITY
CHAPTER 171 PATERNITY
PART II. FORMS

17-171 California Points & Authorities § 171.27

§ 171.27 Supporting Motion for Order Requiring Mother, Child, Alleged Father, and Any Other Man Claimed to Be the Child's Father to Submit to Blood or Other Genetic Tests [Fam. Code § 7551] in Action to Establish Paternity [Fam. Code § 7630] and for Support [Fam. Code § 7637]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*] Plaintiff,	)	IES IN SUPPORT OF MOTION FOR ORDER RE-
vs.	)	QUIRING SUBMISSION TO BLOOD OR OTHER
_____ [*name*], Defendant.	)	GENETIC TESTS
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD ISSUE AN ORDER REQUIRING _____ [*name(s) of mother, child, and alleged father(s)*] TO SUBMIT TO BLOOD OR OTHER GENETIC TESTS TO DETERMINE PARENTAL RELATIONSHIP BECAUSE PATERNITY IS A RELEVANT FACT IN THIS _____ [ACTION *or* PROCEEDING].

A. Order to Submit to Genetic Tests. In a civil action in which paternity is a relevant fact, the court on timely motion by any party to the action must order the mother, child, and alleged father to submit to genetic tests; and, for this purpose, "genetic tests" means any genetic test that is generally acknowledged as reliable by accreditation bodies designated by the United States Secretary of Health and Human Services (*Fam. Code § 7551*).

[*Optional*] **B. Selection of Laboratory for Tests.** The tests must be performed by a laboratory approved by any accreditation body that has been approved by the Secretary of the United States Department of Health and Human Services, and any party or person at whose suggestion the tests have been ordered may demand that other experts, qualified as examiners of blood types, perform independent tests under order of the court, the results of which may be offered in evidence (*Fam. Code § 7552*).

[*Optional*] **C. Experts' Unanimous Conclusion of Nonpaternity.** If the court finds that the conclusions of all the experts, as disclosed by the evidence based on the tests are that the alleged father is not the father of the child, the question of paternity must be resolved accordingly (*Fam. Code § 7554(a)*).

[*Optional*] **D. Tests Showing Probability of Paternity or Experts' Disagreement.** If the experts disagree in their findings or conclusions or if the tests show the probability of the alleged father's paternity, the question of paternity must be submitted on all evidence including evidence based on the tests, subject to the court's discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate the undue consumption of time or create a substantial danger of undue prejudice, of confusing the issues, or of misleading the jury (*Fam. Code § 7554(b)*; *see also Evid. Code § 352*).

[*Optional*] **E. Tests Reliable to Exclude Possible Father.** Blood grouping tests are scientifically reliable when used to exclude a male as a possible father and the adoption of the Uniform Act on Blood Tests to Determine Paternity (*Fam. Code § 7550 et seq.*) is a recognition of the scientific reliability of such tests (*Jackson v. Jackson (1967) 67 Cal. 2d 245, 248, 60 Cal. Rptr. 649, 430 P.2d 289* ; *see County of Sonoma v. Grant W. (1986) 187 Cal. App. 3d 1439, 1445-1446, 232 Cal. Rptr. 471*).

[*Optional*] **F. Scientific Basis of Blood Tests.** The forensic value of the results of medically approved blood tests to conclusively establish nonpaternity derives from the scientific application of immutable laws of inheritance: unless the child and reputed father share a compatible blood group or type, the existence of a paternal relationship is virtually impossible (*Dodd v. Henkel (1978) 84 Cal. App. 3d 604, 608, 148 Cal. Rptr. 780*).

[*Optional*] **G. Use of HLA Blood Test to Prove Paternity.** The Human Leucocyte Antigen (HLA) blood test is admissible in a paternity proceeding to prove paternity, assuming that an adequate foundation is laid (*Cramer v. Morrison (1979) 88 Cal. App. 3d 873, 879-883, 153 Cal. Rptr. 865* ; *County of Fresno v. Superior Court (1979) 92 Cal. App. 3d 133, 136-137, 154 Cal. Rptr. 660* ; *see County of Sonoma v. Grant W. (1986) 187 Cal. App. 3d 1439, 1445-1446, 1448, 232 Cal. Rptr. 471*).

[*Optional*] **H. Persons Included in Alleged Father Category.** *Section 7551 of the Family Code* authorizes a court to order men other than the defendant alleged father to take blood or other genetic tests in paternity actions (*see Huntingdon v. Crowley (1966) 64 Cal. 2d 647, 652, 51 Cal. Rptr. 254, 414 P.2d 382* (involving predecessor statute)).

[*Optional*] **I. Party's Refusal to Submit to Genetic Tests as Admissible Evidence.** Any party's refusal to submit to court-ordered genetic tests is admissible in evidence in any proceeding to determine paternity (*Fam. Code § 7551*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for an order requiring the mother, child, and alleged father or the mother, child, alleged father, and men other than the alleged father, including a presumed father under *Fam. Code § 7540* and *Fam. Code § 7611(a)*, to submit to blood or other genetic tests in an action for support and to establish paternity brought by the child through a guardian ad litem, by the mother, or by the district attorney. On and after January 1, 1998, statutes under the Uniform Act on Blood Tests to Determine Paternity (*Fam. Code § 7550 et seq.*) were amended to provide for "genetic" rather than simply "blood" testing, although *Fam. Code § 7541* still makes express reference only to "blood tests." Thus, approved genetic testing other than simply blood testing may now be ordered, and this form takes this interpretation into account. Also note that a local child support agency may issue an administrative order requiring a mother, child, and alleged father to submit to genetic testing if prescribed conditions are met, in cases in which support enforcement services are provided [*Fam. Code § 7558*].

For purposes of this form, paragraphs A through G would be used to support the standard motion brought by any party to such proceedings for an order requiring the mother, child, and alleged father to submit to such tests.

Paragraphs A and H, in addition to any applicable Paragraphs B through G, would be used if it was desired to have men other than the alleged father also required to take blood or other genetic tests. Such a situation may arise if the mother was living with her husband at the time of conception and, under the conclusive presumption of *Fam. Code § 7540*, the husband would be considered the father of the child.

Paragraph I should be used if a party has refused to submit to a genetic test under *Fam. Code § 7551*, and the opposing party seeks to have the refusal admitted into evidence.

Fam. Code § 7550 et seq. (Uniform Act on Blood Tests to Determine Paternity) is the statutory basis for blood or other genetic testing to determine paternity. Nothing in *Code Civ. Proc. § 2032.010 et seq.* (general discovery provisions for physical examination) affects tests under this Act [*Code Civ. Proc. § 2032.010(a)*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms of notice of motion by defendant to require parties to submit to blood or other genetic tests and an order to submit to such a test, see California Forms of Pleading and Practice, Ch. 412, *Paternity* (Matthew Bender).

[3] Discussion of Authorities

[a] Tests Reliable to Exclude Possible Father

In ***Jackson v. Jackson*** *(1967) 67 Cal. 2d 245, 60 Cal. Rptr. 649, 430 P.2d 289* , plaintiff husband and defendant wife were married in Nevada. They returned to California, but wife left husband four days after the ceremony. Plaintiff filed suit for annulment. Defendant's denial alleged that she was pregnant with plaintiff's child, and asked for attorney's fees, and support and maintenance for herself and the unborn child. Plaintiff was ordered to pay monthly support, prenatal care, hospital expenses, and counsel fees. After the child was born, plaintiff, defendant, and the child were ordered to submit to blood tests, which results indicated that plaintiff could not be the father of the child. Plaintiff's motion to

terminate all prior orders for support and expenses on the basis of the blood tests was denied. In reversing the trial court and ruling that blood tests were admissible to avoid operation of the conclusive presumption of the predecessor statute to *Fam. Code § 7540*, the Supreme Court said that blood grouping tests are scientifically reliable when used to exclude a male as a possible father and that the adoption of the Uniform Act on Blood Tests to Determine Paternity [*see Fam. Code § 7550 et seq.*] is a recognition of the scientific reliability of such tests (*67 Cal. 2d 245, 246-248)* .

In ***County of Sonoma v. Grant W.*** *(1986) 187 Cal. App. 3d 1439, 232 Cal. Rptr. 471* , defendant in a paternity action entered into a stipulation with plaintiff county to submit to human leukocyte antigen (HLA) blood tests to determine the probability of his paternity. Under the stipulation, the blood of defendant, the mother, and the child were to be drawn at a Santa Rosa laboratory and analyzed at Irwin Memorial Blood Bank in San Francisco. The parties also stipulated that the test results and written reports would be admissible as evidence in the paternity action. The blood samples were then drawn at the Santa Rosa laboratory, but contrary to the stipulation and without defendant's approval, plaintiff sent the samples to Roche Biomedical Laboratories (Roche) in North Carolina. Over defendant's objections, the trial court admitted the testimony of Roche's director of paternity testing regarding the procedures used in making the blood tests, that defendant could not be excluded as the child's father, and that the statistical probability that defendant was the father was between 99.06 and 99.95 percent. The court found beyond a reasonable doubt that defendant was the child's natural father. The father appealed.

The court of appeal affirmed, relying on the analysis in *Cramer v. Morrison (1979) 88 Cal. App. 3d 873, 877-878, 880-882, 153 Cal. Rptr. 865* (*discussed under § 171.27[3][c]*), to preliminarily note that the HLA test can prove nonpaternity much more conclusively than earlier tests, and statistically significant estimates of the probability of actual paternity can now be made (*187 Cal. App. 3d 1439, 1442-1446)* .

[b] Scientific Basis of Blood Tests

In ***Dodd v. Henkel*** *(1978) 84 Cal. App. 3d 604, 148 Cal. Rptr. 780* , an action to establish paternity and for support of a child, plaintiff mother made an offer of proof that the medical expert appointed by the court to conduct blood tests would testify that defendant was among the 141/2 to 15 percent of the population that could be the father of the child. In sustaining defendant's objection, the trial court concluded that such evidence had no probative value. The jury returned a special verdict of nonpaternity, judgment was entered for defendant, and plaintiff appealed. In sustaining the lower court verdict, the court of appeal stated that the forensic value of the results of medically approved blood tests to establish conclusively nonpaternity derives from the scientific application of immutable laws of inheritance: unless the child and reputed father share a compatible blood type or group, the existence of a paternal relationship is virtually impossible. But the converse principle sanctioning the affirmative use of inconclusive blood-test evidence to prove paternity is without precedent and generally rejected on the grounds of the highly prejudicial nature of such evidence and its irrelevance in manifesting no more than a mere possibility of paternity through inclusion within a general blood-type classification (*84 Cal. App. 3d 604, 606-608)* .

[c] Use of HLA Blood Test to Prove Paternity

In ***Cramer v. Morrison*** *(1979) 88 Cal. App. 3d 873, 153 Cal. Rptr. 865* , an action to establish paternity, the trial court granted defendant's motion in limine to exclude the results of a Human Leucocyte Antigen (HLA) blood test on the grounds that while available data indicated the test was reliable, under the California Uniform Act on Blood Tests to Determine Paternity, the evidence was inadmissible and there was a possibility that statistical evidence resulting from the test if introduced into evidence would have a prejudicial effect on the jury which would outweigh its probative value. If admitted into evidence, results of the HLA test would have indicated that there was a 98.3 percent probability that the defendant was the father of the child. The jury returned a verdict for defendant and the trial court entered a judgment decreeing that defendant was not the father of the child. The court of appeal reversed, pointing out that even the defendant agreed that the HLA was a valid scientific test. The court said that at the time the Uniform Act on Blood Tests was enacted in California, the Landsteiner blood test to prove nonpaternity was the standard blood test in use and

was probably the blood test referred to in the statute. In addition, the court noted that the Legislature when enacting the Uniform Act retained the provision of the model act that provided that blood tests could serve as conclusive evidence of an alleged father's nonpaternity, but omitted the part that allowed admission of the results of blood tests to show the possibility of paternity. The court also noted the Legislature omitted similar sections when enacting the Uniform Parentage Act. The court interpreted these omissions from the two uniform acts to mean that the Legislature did not want the standard Landsteiner blood grouping tests to be used to prove parentage, but concluded that the Legislature did not mean that HLA tests could not be used to prove paternity. The court noted that in the case of *Dodd v. Henkel (1978) 84 Cal. App. 3d 604, 608, 148 Cal. Rptr. 780* , the court's ruling that blood tests were not admissible in California to prove paternity, was based on the assumption that the blood tests referred to in the prohibition were the Landsteiner tests. The court then said that the use of HLA tests to prove paternity is not prohibited by California law, and that given an adequate foundation being laid for the admission of the tests, the HLA test was admissible in a paternity proceeding to prove paternity (*88 Cal. App. 3d 873, 877-886)* .

The facts and procedural background of ***County of Sonoma v. Grant W.*** *(1986) 187 Cal. App. 3d 1439, 232 Cal. Rptr. 471* , are discussed in *§ 171.27[3][a]*. The court of appeal held that the trial court could properly consider an HLA blood test in conjunction with evidence adduced at trial in the form of witness testimony in order to determine a meaningful probability-of-paternity percentage (*187 Cal. App. 3d 1439, 1447-1448)* . The court noted that *Cramer v. Morrison (1979) 88 Cal. App. 3d 873, 883, 153 Cal. Rptr. 865* , held that California did not preclude the use of the HLA test to prove paternity as well as nonpaternity (*187 Cal. App. 3d 1439, 1446)* . The court also determined that the predecessor statute to what is now *Fam. Code § 7551*, enacted after *Cramer*, permits *all* blood tests, including inclusionary, exclusionary, and probability-of-paternity percentages, to be admitted on the issue of paternity subject to the restrictions of *Evid. Code § 352*, which provides that evidence may be excluded if its probative value is substantially outweighed by undue consumption of time, or substantial danger of undue prejudice, confusing the issues, or misleading the jury (*187 Cal. App. 3d 1439, 1446-1447)* .

County of Fresno v. Superior Court *(1979) 92 Cal. App. 3d 133, 154 Cal. Rptr. 660* , was an action to establish paternity, in which the county moved under the predecessor statute to what is now *Fam. Code § 7551* for an order that the mother, child, and defendant submit to a Human Leucocyte Antigen (HLA) test, after they had already taken Landsteiner extended factor blood tests, which indicated that the defendant could not be excluded as the child's father and that the probability that he was the father was 47 percent. The defendant opposed the motion on the grounds that the HLA test would be used to establish paternity. The trial court denied the motion, and the court of appeal on the county's request issued a writ of mandate directing the trial court to grant the motion and order the HLA tests. The court held that under *Fam. Code § 7551*, the trial court had no discretion to deny an HLA test on demand of any party at whose suggestion an original Landsteiner test had been ordered. The court held that the statute was mandatory, as far as the second test was concerned, and that the county did not have to show "good cause" for the more precise HLA test. The court ruled the very existence of another more sophisticated and exact test such as the HLA was sufficient good cause, in and of itself, to warrant use of the second test by the trial court in successfully completing its determination as to whether defendant was the child's father. The court also said, citing *Cramer v. Morrison (1979) 88 Cal. App. 3d 873, 879-886, 153 Cal. Rptr. 865* , that the HLA test is admissible to prove paternity, assuming that an adequate foundation is laid (*92 Cal. App. 3d 133, 135, 137-138)* .

[d] Persons Included in Alleged-Father Category

In ***Huntingdon v. Crowley*** *(1966) 64 Cal. 2d 647, 51 Cal. Rptr. 254, 414 P.2d 382* , plaintiff sued defendant to establish paternity of her child and for reasonable support. She alleged that she and defendant had engaged in numerous acts of sexual intercourse over a four-month period during which time she had intercourse with no other persons but defendant. Defendant admitted to having intercourse with plaintiff only during the first month of the four-month period. Conception was established to have occurred in the last three months. Testimony showed, as defendant had alleged, that plaintiff had had intercourse with two other named men during the probable period of conception. Although plaintiff, as early as the pretrial conference, had notice of defendant's evidence concerning her sexual relations with the other men,

she waited until after the defense had rested its case before making a motion for blood tests. Although the court ordered the blood tests be taken, it refused to admit the results into evidence on the ground that there was an insufficient foundation of medical acceptance for the particular tests conducted. The jury found for defendant, judgment was entered accordingly, and plaintiff appealed.

The California Supreme Court reversed on other grounds. However, in interpreting the predecessor statute to *Fam. Code § 7551* with the same wording, the Supreme Court said that taken in its context in the statute, the phrase "alleged father" appears to mean the man actually charged by the complainant with being the father of the child, rather than any other man. However, the Court said that the statute does not expressly exclude blood tests of men other than the alleged father and this evidence has been admitted in both California and other states (*64 Cal. 2d 647, 652-656)* .

NOTE:

The particular California case that the Court relied on for its statement that results of blood tests of men other than those of the alleged father had been admitted in California, *Foster v. Gray (1962) 203 Cal. App. 2d 434, 436, 21 Cal. Rptr. 429* , does not in fact clearly state that a blood test had been ordered of any other man except the defendant in that action. Therefore, since the Supreme Court decided the case on issues other than the propriety of ordering blood tests of a man other than the alleged father, counsel should view the Court's language as dicta. A man other than an original party who is alleged to be the actual biological father of the child should always be made a party to the action [*see Fam. Code § 7635(b)*].

[4] Additional Authorities

[a] Tests Showing Probability of Paternity or Expert's Disagreement

In *City and County of San Francisco v. Givens (2000) 85 Cal. App. 4th 51, 101 Cal. Rptr. 2d 859* , plaintiff city and county government brought an action to have defendant, a putative father, declared to be the father of a particular child born in March of 1996. Defendant took a blood test. *Fam. Code § 7555* provides that a rebuttable presumption exists that if the paternity index score, as calculated by experts comparing genetic markers, is 100 or greater, then the person tested is the father. Defendant's index score was 1290. The score amounted to a 99.92 percent likelihood of paternity. However, defendant testified that he did not have access to the mother at the time of conception. The mother testified that she and appellant had sex one weekend about nine months before the baby was born. The trial court entered an order finding there was no probability defendant was the father. In the course of affirming the judgment, the appellate court held that the paternity presumption raised by the blood test result was not conclusive and had to be considered with other evidence. The appellate court found that defendant's testimony by itself constituted substantial evidence; and that the trial court's finding that defendant did not have access to the mother at the time of conception was supported by defendant's clear and convincing testimony (*85 Cal. App. 4th 862-863)* .

[b] Persons Included in Alleged-Father Category

In *In re William K. (2008) 161 Cal. App. 4th 1, 73 Cal. Rptr. 3d 737* , the court refused to set aside a voluntary declaration of paternity filed by one man on the motion of another man who was shown by genetic testing to be the child's biological father. The court found under *Fam. Code § 7575(b)(1)* that setting aside the declaration of paternity was not in the child's best interests. It also found that the biological father was not a presumed father because he had done nothing to assert his parental responsibilities or to secure custody of the child (*161 Cal. App. 4th 1, 10-11)* .

In *In re J.L. (2008) 159 Cal. App. 4th 1010, 72 Cal. Rptr. 3d 27* , the court held that a man claiming to be the child's biological father had standing under *Fam. Code § 7575(b)(3)(A)* to seek a paternity test and to move to set aside the voluntary declaration of paternity filed by the mother's boyfriend. Because the paternity test confirmed that he was, in fact, the child's biological father, the court adjudged him to be the child's legal father and set aside the voluntary declaration of paternity. In addition, the court held that his federal constitutional right to due process allowed him to

qualify for presumed father status, because he promptly attempted to assume his parental responsibilities. Misconduct by the mother's boyfriend, including threats and violence, estopped the boyfriend under *Evid. Code § 623*, from challenging the biological father's presumed father status (*159 Cal. App. 4th 1010, 1019-1025)* .

In *Gabriel P. v. Suedi D. (2006) 141 Cal. App. 4th 850, 46 Cal. Rptr. 3d 437* , two men claimed to be the child's father. One claimed to be the child's father because he had executed a voluntary declaration of paternity and was also entitled to presumed father status under *Fam. Code § 7611(c)(1)* because he married the child's mother after the child was born and his name was on the child's birth certificate. The other man claimed to be the child's biological father and that the mother had prevented him from achieving presumed father status under *Fam. Code § 7611(d)* by concealing her pregnancy and the child's birth from him. The court held that because the results of genetic testing were relevant to resolve the issues presented by the first man's voluntary declaration of paternity, the trial court was authorized to order the tests on its own motion under *Fam. Code § 7551* and to admit the results to resolve whether the voluntary declaration should be set aside under *Fam. Code § 7575(b)(1)* because the tests show that the declarant is not the child's father (*141 Cal. App. 4th 850, 861-863)* .

In *City and County of San Francisco v. Cartagena (1995) 35 Cal. App. 4th 1061, 41 Cal. Rptr. 2d 797* , a man who had been judicially determined to be the father of a child sought to vacate the paternity judgment on the ground that the mother had committed extrinsic fraud by misrepresenting his paternal status. He requested that the court order blood testing of the mother and the child. A trial court granted this request, even though it had not yet ruled on his motion to set aside the judgment. The court of appeal reversed the trial court's order as premature. Although the blood tests could play a crucial role in accurately determining paternity, the father was not entitled to contest paternity until the prior judgment was vacated. The appellate court determined that the issue of vacating the prior order had to be resolved before the child and mother could be forced to undergo testing. If the trial court ultimately ruled that the judgment should be set aside, then the paternity of the child would be placed directly in issue and the blood test would become an appropriate subject of discovery. If, however, the trial court were to rule that the judgment should not be set aside, then the father would be barred from challenging the paternity determination, and the need for a blood test would become moot (*35 Cal. App. 4th 1061, 1069)* .

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Volume 17 Chapters 170-179 PARTNERSHIPS---to---PREMISES LIABILITY
CHAPTER 171 PATERNITY
PART II. FORMS

17-171 California Points & Authorities § 171.28

§ 171.28 Supporting Motion for Order Requiring County to Pay Expenses of Blood or Other Genetic Tests [Fam. Code § 7553] Required to Be Taken by Mother, Child, and Alleged Father [Fam. Code § 7551] in Action to Establish Paternity [Fam. Code § 7630] and for Support [Fam. Code § 7637]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*] Plaintiff,	)	IES IN SUPPORT OF MOTION FOR ORDER RE-
vs.	)	QUIRING COUNTY TO PAY EXPENSES OF
_____ [*name*], Defendant.	)	BLOOD OR OTHER GENETIC TESTS
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

THE COURT IN A CIVIL ACTION IN WHICH PATERNITY IS A RELEVANT FACT AND IN WHICH IT HAS ORDERED THE MOTHER, CHILD, AND ALLEGED FATHER TO SUBMIT TO BLOOD OR OTHER GENETIC TESTS ON MOTION OF THE DEFENDANT IS REQUIRED TO ORDER THE COUNTY TO INITIALLY PAY THE COSTS OF SUCH BLOOD TESTS IF THE DEFENDANT IS INDIGENT.

A. Compensation of Experts for Blood or Other Genetic Tests. The court may order that the compensation of each expert witness appointed by the court in a paternity action to conduct blood or other genetic tests on the mother, child,

and alleged father be paid by the parties in such proportions and at such times as it shall prescribe. In the alternative, it may order any party's proportion be paid by the county, and that, after payment by the parties, the county, or both, all, part, or none of such expenses be taxed as costs in the action (*see Fam. Code § 7553*).

B. County Required to Pay for Tests of Indigent Defendant. In a case of an indigent defendant receiving public assistance on whose behalf a paternity and support action have been brought, the compensation of the appointed expert for blood tests must be fixed by the court and ordered paid by the county subject to being later taxable to the parties as costs in the action in accordance with *Section 7553 of the Family Code* (*Michael B. v. Superior Court (1978) 86 Cal. App. 3d 1006, 1010, 150 Cal. Rptr. 586*).

[*Optional*] **C. Local Support Agency Must Pay Costs of Tests Ordered Under *Fam. Code § 7558*.** If a local child support agency has issued an administrative order under *Fam. Code § 7558* requiring the mother, child, and alleged father to submit to genetic testing, the agency must pay the costs of such tests, subject to the county obtaining a court order for reimbursement from the alleged father if paternity is established under *Fam. Code § 7553* [*see Fam. Code § 7558(d)*].
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for an order requiring the county to pay expenses of court-ordered blood or other genetic tests required to be taken by the mother, child, and alleged father in an action to establish paternity and for support that has been brought on behalf of the mother and child.

Optional Paragraph C may be used in a civil action or proceeding in which paternity is at issue, if (1) support enforcement services are being provided and (2) the local child support agency has issued an administrative order requiring the mother, child, and alleged father to submit to genetic testing [*see Fam. Code § 7558*]. Note that if the original test creates a rebuttable presumption of paternity under *Fam. Code § 7555* and the result is contested, the support agency shall order an additional test only on request and advance payment of the contestant [*Fam. Code § 7558(f)*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations that support the motion by showing defendant's indigency [*see Code Civ. Proc. §§ 2009, 2015.5*].

[b] Related Pleading and Practice Forms

For forms of affidavits or declarations in support of motions, see Ch. 15, *Affidavits, Certificates, and Declarations* and Ch. 372, *Motions and Orders* in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] County Required to Pay for Tests of Indigent Defendant

In ***Michael B. v. Superior Court*** *(1978) 86 Cal. App. 3d 1006, 150 Cal. Rptr. 586* , the district attorney brought a paternity action on behalf of a mother and child receiving public assistance against defendant, a 16-year-old indigent minor, who was living with an aunt who was receiving public welfare assistance for his care. Defendant's motion to proceed in forma pauperis and for blood tests under what is now *Fam. Code § 7551* was granted by the trial court, which ordered the district attorney to make arrangements for tests of the mother, the child, defendant, and another man, both of whom had sexual relations with the mother during the period of conception of the child. The court ordered that defendant share the costs of the tests of the mother and child with the other man after the district attorney had objected to the county having to pay the expenses of any of the tests. The trial court denied defendant's motion to modify this order and to have the county pay for the tests. Defendant then petitioned the court of appeal for a writ directing the trial court to issue an order directing that the county bear the cost of the blood tests without the necessity of him prepaying the costs on the grounds that the court's refusal to order the county to pay the costs violated due process and equal protection. In granting the writ, it directed the trial court to appoint an expert as required by statutes to conduct the blood tests, rather than have defendant's counsel make the arrangements. The court construed the Uniform Act on Blood Tests to Determine Paternity [*see now Fam. Code § 7550 et seq.*], to require, that in the case of an indigent defendant in which the child and the mother are receiving public assistance, the costs of the blood tests be fixed by the court and ordered paid by the county subject to being later taxable to the parties as costs in the action. It concluded that in such a case, the court cannot order prepayment of the expenses by the indigent. Otherwise, a defendant would be seriously deprived of possible defenses. Because the statutes in fact authorized prepayment by the county, the court found it unnecessary to discuss the defendant's contentions as to due process and equal protection (*86 Cal. App. 3d 1006, 1008-1010)* .

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Volume 17 Chapters 170-179 PARTNERSHIPS---to---PREMISES LIABILITY
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17-171 California Points & Authorities § 171.29

§ 171.29 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action to Establish Paternity [Fam. Code § 7630] and for Support [Fam. Code § 7637]--Defendant Excluded as Possible Father by Blood or Other Genetic Tests [Fam. Code § 7554(a)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM OF POINTS
	)	AND AUTHORITIES IN
_____ [*name*] Plaintiff,	)	SUPPORT OF MOTION FOR SUMMARY JUDG-
vs.	)	MENT
_____ [*name*], Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

SUMMARY JUDGMENT FOR DEFENDANT WHO IS ALLEGED TO BE THE FATHER OF A MINOR CHILD IS PROPER BECAUSE RESULTS OF _____ [BLOOD *or, specify other applicable genetic test*] TESTS INDICATE THE DEFENDANT COULD NOT BE THE FATHER OF THE CHILD.

A. Motion for Summary Judgment. [*See § 171.26, Paragraph A.*]

B. Results of Blood or Other Genetic Tests Showing Nonpaternity. If the court finds that the conclusions of all the

experts, as disclosed by the evidence based on the blood or other genetic tests ordered by the court, are that the alleged father is not the father of the child, the question of paternity must be resolved accordingly (*Fam. Code § 7554(a)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for summary judgment if the results of court-ordered blood or other genetic tests exclude the alleged father from the group of persons who might be the father of the minor child. The motion would be made in an action brought by the child through a guardian ad litem or by the mother against the alleged father.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel might also want to attach affidavits or declarations which support the motion [*Code Civ. Proc. §§ 2009, 2015.5*].

[b] Related Uses

This memorandum with modifications might also be used by a mother or minor child in an action brought by the alleged father to establish the father-child relationship if the results of court-ordered blood or other genetic tests indicate the plaintiff is not included in the group of persons who might be the child's father.

[c] Related Pleading and Practice Forms

For forms of summary judgment, see Ch. 537, *Summary Judgment* in California Forms of Pleading and Practice (Matthew Bender).

For forms of affidavits or declarations in support of motions, see Ch. 15, *Affidavits, Certificates, and Declarations* and Ch. 372, *Motions and Orders* in California Forms of Pleading and Practice (Matthew Bender).

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CHAPTER 171 PATERNITY
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17-171 California Points & Authorities § 171.30

§ 171.30 Supporting Defendant's Motion for Order for Court-Appointed Counsel in Action to Establish Paternity and Child Support Obligation [Fam. Code § 17400 et seq.]--Action Brought by State Against Indigent Defendant

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM OF POINTS
	)	AND AUTHORITIES IN
	)	SUPPORT OF MOTION FOR ORDER APPOINT-
_____ [*name*] Plaintiff,	)	ING LEGAL COUNSEL
vs.	)	Date: _____
_____ [*name*], Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	
	)	Date Action Filed: _____
	)	
	)	Trial Date: _____

_____

A COURT WILL APPOINT LEGAL COUNSEL FOR A DEFENDANT IN AN ACTION TO ESTABLISH PATERNITY WHERE THE DEFENDANT IS INDIGENT AND THE STATE APPEARS AS A PARTY OR APPEARS ON BEHALF OF A MOTHER OR CHILD.

Right to Counsel in Paternity Action. In proceedings to determine paternity, a defendant is constitutionally entitled to

be represented by legal counsel appointed by the court if (1) the state appears as a party or appears on behalf of a mother or child, and (2) the defendant demonstrates he is indigent (*Salas v. Cortez (1979) 24 Cal. 3d 22, 34, 154 Cal. Rptr. 529, 593 P.2d 226*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion for an order to secure court-appointed legal counsel in proceedings to establish paternity if the state appears as a party or appears on behalf of a mother or child.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel might also want to attach affidavits or declarations which support the motion, particularly detailing defendant's indigency [*Code Civ. Proc. §§ 2009, 2015.5*].

[b] Related Pleading and Practice Forms

For forms of affidavits or declarations in support of motions, see Ch. 15, *Affidavits, Certificates, and Declarations* and Ch. 372, *Motions and Orders* in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Right to Counsel in Paternity Action

In ***Salas v. Cortez*** *(1979) 24 Cal. 3d 22, 154 Cal. Rptr. 529, 593 P.2d 226* , a consolidation of two cases, each defendant had been personally served in an action to establish paternity and for support of a minor child and each defendant answered in propria persona denying all allegations. In the first case, the district attorney sent the defendant a seven-page set of interrogatories and moved to compel answers to the interrogatories when the defendant failed to answer them. The defendant, with the assistance of a county legal aid association, requested that the court appoint him legal counsel, denied that he was the child's father, and declared that he could not speak, read, or write English, and that he did not understand the numerous documents filed by the district attorney. In the second case, the defendant, also with the assistance of a county legal aid association, requested court-appointed counsel based on his indigency. He had also been served with interrogatories and requests for admissions. Both defendants' requests for court-appointed legal counsel were denied and each failed to appear at their respective trials. Each was found to be the father of the respective child and was ordered to pay support for the child. The California Supreme Court reversed both denials of court-appointed legal counsel and set aside the judgments of paternity. The Court said that both defendants were entitled to due process of law, and central to this constitutional right is the guarantee that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. The touchstone of due process is fundamental fairness, and whether due process requires the appointment of counsel in a particular case depends on the interests involved and the nature of the proceedings. The Court said that the cases involved more than monetary judgments, and that a determination of paternity has grave implications for the alleged father, the child, the mother, and the state. Freedom from an incorrect imposition of a parent-child relationship on anyone is an equally compelling interest. In addition, failure to support a child may also be prosecuted criminally, and although an indigent is entitled to counsel in such a prosecution, paternity,

which is the most significant element of the offense, may have already been determined in a civil proceeding in which the defendant was unrepresented by counsel. The Court said that all of the responsibilities of fatherhood were imposed by the state on the defendants who were unable to secure the assistance of counsel because they were indigent. Each made a diligent effort to obtain counsel and were ignorant of the intricacies of civil practice. Without the assistance of counsel, neither was in a position to respond adequately to the district attorney's discovery requests nor to initiate discovery himself. Without the assistance of counsel, neither was able to procure the assistance of experts to perform blood group tests which might conclusively have exonerated him. Each was found to be the father of a child on the basis of alleged facts that were deemed admitted because not contradicted, and testimony of the mother that was not subject to cross-examination. As a result, each was named the father of a child by involuntary default. A judgment rendered in this manner, the Court said, is not only unfair, it is unreliable. Unless the rights of indigent paternity defendants are protected, courts risk finding not the right man, but simply the poorest man to be the father of a child. If paternity is to be determined in an adversary proceeding at the behest of the state, the interests of all concerned demand that the defendant be able to defend fully and fairly, which he cannot do when his indigency prevents him from obtaining counsel. Therefore, the Court stated that in proceedings to determine paternity in which the state appears as a party or appears on behalf of a other or child, indigent defendants who can demonstrate their indigency are constitutionally entitled to appointed counsel. The Court made its ruling applicable to all cases not final as of the date of the opinion. In cases in which a judgment of paternity has become final, the fact that the defendant did not have counsel may not be advanced as a reason to attack that judgment (*24 Cal. 3d 22, 24-31, 34)* .

[4] Additional Authorities

[a] Right to Counsel in Paternity Action

In *County of Tulare v. Ybarra (1983) 143 Cal. App. 3d 580, 192 Cal. Rptr. 49* , the county filed an action against defendant on behalf of a minor child, alleging paternity and seeking to establish defendant's obligation to reimburse plaintiff for support payments made to the child. Defendant requested counsel, and the court appointed a public defender. When the public defender's subsequent motion to be relieved as counsel was granted, the court asked defendant if he knew of any attorneys who would represent him gratuitously. When no name was offered, the court stated that it knew of no attorneys that were willing to subsidize the county by representing defendant gratuitously, and dismissed the case without prejudice pending availability of counsel (*143 Cal. App. 3d 580, 582)* . On appeal, the court of appeal held that it had been improper to dismiss the action. It supported the trial court's holding that an indigent defendant in a paternity action is entitled to appointed counsel, but found no statutory or nonstatutory basis for the dismissal. The court noted the constitutional right to counsel in paternity actions, citing the special considerations at stake, and held that the trial court should have appointed private counsel to serve gratuitously (*143 Cal. App. 3d 580, 584-586)* .

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17-171 California Points & Authorities § 171.31

§ 171.31 Supporting Plaintiff's Demurrer to Answer [Code Civ. Proc. §§ 430.20(a), 430.30(a)] in Action to Establish Paternity [Fam. Code § 7630] and for Support [Fam. Code § 7637]--No Limitation Period or Laches Apply During Child's Minority

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*] Plaintiff,	)	MEMORANDUM OF POINTS
vs.	)	AND AUTHORITIES SUPPORTING DEMURRER
_____ [*name*], Defendant.	)	TO ANSWER
	)	Date: _____
	)	Time: _____
	)	Dept.: _____
	)	Trial Date: _____

_____

A DEMURRER TO AN ANSWER WILL BE GRANTED IF THE ANSWER SETS UP LACHES OR THE STATUTE OF LIMITATIONS AS A DEFENSE TO AN ACTION BROUGHT WHILE THE CHILD IS STILL A MINOR.

A. Demurrer to Answer. A plaintiff may, within 10 days after the service of the answer, demur to the whole answer or to one or more of the several defenses set up in the answer (*Code Civ. Proc. §§ 430.40(b), 430.50(b)*).

B. Authority for Demurrer to Answer. A plaintiff may demur to an answer if it appears on the face of the answer or from any matter of which the court is required to or may take judicial notice that the answer fails to state facts sufficient to constitute a defense (*Code Civ. Proc. §§ 430.20(a), 430.30(a)*).

C. Laches Not Imputed to Child. Since in an action brought by a mother to establish paternity and to obtain support for a child, the child is the real party in interest and all benefits derived from the action belong to the child, laches cannot be imputed to the child during his or her minority (*Perez v. Singh (1971) 21 Cal. App. 3d 870, 872, 97 Cal. Rptr. 920*).

D. Statute of Limitations Tolled During Minority. Although the defense of the statute of limitations may be invoked in either a legal or equitable action, in an action to establish paternity and for support, the statute of limitations on the paternity aspect of the case is tolled during the minority of the child (*Perez v. Singh (1971) 21 Cal. App. 3d 870, 872, 97 Cal. Rptr. 920*).

E. Father's Duty of Support Not Affected by Statute of Limitations. The obligation of a father to support his child is a continuing duty against which the statute of limitations does not run during the time the child needs such support (*Perez v. Singh (1971) 21 Cal. App. 3d 870, 872, 97 Cal. Rptr. 920*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a demurrer to an answer if the answer sets up laches or the statute of limitations as a defense to an action for support and to establish paternity while the child is a minor. The demurrer would be made by a plaintiff in an action brought by a child through a guardian ad litem, by the mother, or by a district attorney against an alleged father.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Laches Not Imputed to Child

In ***Perez v. Singh*** *(1971) 21 Cal. App. 3d 870, 97 Cal. Rptr. 920* , plaintiff brought an action against defendant 14 years after her child was born to establish paternity and for support for the child. The defendant, an alleged father, moved for a change of venue to the county where he resided and demurred to the complaint on the ground it failed to state facts sufficient to constitute a cause of action based on laches and the statute of limitations. The lower court granted the change of venue, but did not rule on the demurrer. The action was transferred to defendant's county where the court sustained the demurrer without leave to amend and dismissed the action. The plaintiff appealed, raising the propriety of the court's ruling sustaining the general demurrer without leave to amend. In reversing the lower court, the court of appeal said that unlike the defense of the statute of limitations, which may be invoked in either a legal or equitable action, the defense of laches can be asserted only in equity. An action to establish paternity and to obtain support raises legal, not equitable issues, and laches may not be asserted as a bar to a legal action. Moreover, the court said, an action to establish the paternity of a child and to obtain support for a child is brought by the mother on behalf of the child. In such an action, the child is the real party in interest, and the statute of limitations on the paternity aspects of the case is tolled during the minority of the child. The court emphasized that the obligation of a father to support his child is a continuing duty against which the statute of limitations does not run during the time the child needs such

support. The result would be no different if the complaint were considered to raise equitable issues. Since the action is brought on the child's behalf, and all benefits derived from it would belong to the child, the court said that laches could not be imputed to him or her during minority (*21 Cal. App. 3d 870, 871-872)* .

[b] Statute of Limitations Tolled During Minority

Perez v. Singh *(1971) 21 Cal. App. 3d 870, 97 Cal. Rptr. 920* , is *discussed under § 171.31[3][a]*.

[c] Father's Duty of Support Not Affected by Statute of Limitations

Perez v. Singh *(1971) 21 Cal. App. 3d 870, 97 Cal. Rptr. 920* , is *discussed under § 171.31[3][a]*.

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17-171 California Points & Authorities § 171.32

§ 171.32 Supporting Defendant's Motion to Set Aside and Vacate Stipulated Judgment [Fam. Code § 17416] in County's Action to Establish Paternity and Support Obligation [Fam. Code § 17400 et seq.]--Denial of Procedural Due Process Rights

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*] Plaintiff,	)	IES IN SUPPORT OF EQUITABLE MOTION TO
vs.	)	VACATE AND SET ASIDE JUDGMENT
_____ [*name*], Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE STIPULATED JUDGMENT IN THE ABOVE-ENTITLED PATERNITY ACTION SHOULD BE VACATED AND SET ASIDE BECAUSE THE JUDGMENT WAS ENTERED IN VIOLATION OF DEFENDANT'S DUE PROCESS RIGHTS.

A. Denial of Knowing and Intelligent Waiver of Right to Judicial Hearing Is Denial of Due Process. A judgment for paternity entered without the defendant's knowledge of the consequences of the judgment and without a knowing

and intelligent waiver of the right to a judicial hearing violates due process rights and will not be upheld (*County of Los Angeles v. Soto (1984) 35 Cal. 3d 483, 487-489, 198 Cal. Rptr. 779, 674 P.2d 750* ; *see County of Alameda v. Mosier (1984) 154 Cal. App. 3d 757, 762, 201 Cal. Rptr. 550*).

B. Judgment in Violation of Due Process Is Voidable. A judgment entered in violation of defendant's due process rights is voidable (*County of Los Angeles v. Soto (1984) 35 Cal. 3d 483, 492, 492 n.4, 198 Cal. Rptr. 779, 674 P.2d 750*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion to vacate and set aside an agreement for entry of judgment or a stipulated judgment of paternity and support if the judgment was entered between defendant and the district attorney or local child support agency without defendant's knowledge of the consequences of the agreement or without the knowing and intelligent waiver of the right to a hearing on the issues of paternity and ability to support.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

Counsel should distinguish a stipulated judgment, which may result from the defendant's unequal bargaining position vis-a-vis the district attorney or local child support agency, from a default judgment. A default judgment results from a defendant's choice not to appear. If the defendant was given proper notice of the right to appointed counsel, due process does not require an on-the-record waiver of the right to appointed counsel before a default or default judgment is entered [*County of Mendocino v. Ted S. (1990) 217 Cal. App. 3d 1202, 1206-1207, 266 Cal. Rptr. 452]* . For points and authorities supporting a motion for appointed counsel, see *§ 171.30*.

[b] Related Pleading and Practice Forms

For forms of allegations, complaint, notice of motion, and declaration in support of setting aside a judgment, and orders granting or denying the motion, see California Forms of Pleading and Practice, Ch. 489, *Relief From Judgments and Orders* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing motions to vacate and set aside judgments in general, see Ch. 131, *Judgments* .

[3] Discussion of Authorities

[a] Denial of Knowing and Intelligent Waiver of Right to Judicial Hearing Is Denial of Due Process

In ***County of Los Angeles v. Soto*** *(1984) 35 Cal. 3d 483, 198 Cal. Rptr. 779, 674 P.2d 750* , the California Supreme

Court ruled that given the consequences of a judgment of paternity and support, an agreement to enter judgment entered without defendant's knowing and intelligent waiver of the right to a judicial hearing is constitutionally defective. Defendant had executed an Agreement for Entry of Judgment in conformity with (now former) Welf. & Inst. Code § 11476.1 before its amendment in 1980 conforming to the constitutional requirements of due process [*now see Fam. Code § 17416*]. In the agreement, defendant acknowledged paternity of the minor and stipulated to the amount of child support. Two years later, a contempt proceeding was brought against defendant for nonpayment of support, and he moved to vacate the judgment on the grounds that it was void for due process violations in that his consent was not voluntarily and knowingly obtained. Evidence at the hearing on defendant's motion revealed that the district attorney's office prosecuting the paternity and support action had not advised him of his right to a judicial proceeding in which the district attorney would have the burden of proving paternity and the amount of appropriate support. The trial court granted defendant's motion to set aside the judgment, concluding that the stipulated judgment was void for lack of a knowing, intelligent, and understanding waiver by defendant of his right to notice and opportunity to be heard on the issues of paternity and support. The Supreme Court held that a defendant must establish that he or she was unaware of the consequences of an agreement or of the fact that he or she waived rights by executing it, and that the agreement would not have been entered into had the defendant been aware of these facts (*35 Cal. 3d 483, 485-490, 492)* . As the record only established that defendant was not advised of his rights before executing theagreement, the Court reversed the trial court order and remanded the matter to the superior court to afford deendant a new hearing (35 Cl. 3d 483, 492).

County of Alameda v. Mosier *(1984) 154 Cal. App. 3d 757, 201 Cal. Rptr. 550* , ruled that the *Soto* holding, discussed *above*, applied to a stipulated judgment between an unrepresented defendant and the district attorney. In that case the court remanded the case to the trial court for further proceedings consistent with the rule in *Soto* (*154 Cal. App. 3d 757, 762)* .

[b] Judgment in Violation of Due Process Is Voidable

The facts and procedural background of ***County of Los Angeles v. Soto*** *(1984) 35 Cal. 3d 483, 198 Cal. Rptr. 779, 674 P.2d 750* , are *discussed under § 171.32[3][a]*. The California Supreme Court reversed the trial court's order insofar as it held the judgment of paternity was invalid. The burden of setting aside the judgment is on the defendant who must establish (1) that he or she was unaware of the consequences of the agreement or that execution of the agreement was a waiver of rights, and (2) that he or she would not have entered into the agreement had he or she been aware of these consequences. If the defendant establishes the involuntary nature of the agreement, the court must set aside the judgment. The judgment, however, is voidable, not void (*35 Cal. 3d 483, 492, 492 n.4*).

[4] Additional Authorities

[a] Judgment in Violation of Due Process Is Voidable

Carlson v. Eassa (1997) 54 Cal. App. 4th 684, 62 Cal. Rptr. 2d 884 , concerned a trial courts' denial of a mother's motion to vacate a stipulated judgment for child support arrearages in an action originally brought under the Uniform Reciprocal Enforcement of Support Act [*Fam. Code § 4800 et seq.* (repealed, operative January 1, 1998, and superseded by *Fam. Code § 4900 et seq.*)]. Her motion was brought after a finding of paternity had previously been made. The stipulated judgment that plaintiff sought to vacate had been entered after the district attorney, who was prosecuting the URESA action, settled the mother's claim without her consent. The court of appeal reversed the trial court's order because the mother had not only failed to consent to the order, but her opposition to the settlement was known to the district attorney. His acts were therefore unauthorized, the underlying judgment was void, and the mother's motion should have been granted by the trial court (*54 Cal. App. 4th 684, 696)* .

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17-171 California Points & Authorities § 171.33

§ 171.33 Supporting Contention That Paternity Determination Is Barred by Presumption That Mother's Husband Is Natural Father of Child Born During Marriage or Within 300 Days After Its Termination or Entry of Judgment of Separation [Fam. Code § 7611(a)]--Biological Father Who Lacks Presumed Father Status Has No Constitutionally Protected Interest That Defeats the Presumption or Standing Requirements to Rebut Presumption [Fam. Code § 7630]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PATERNITY OF THIS CHILD IS GOVERNED BY THE PRESUMPTION OF FAMILY CODE SECTION 7611(a), THAT THE HUSBAND OF A CHILD'S MOTHER IS THE CHILD'S FATHER IF THE CHILD WAS BORN _____ [*specify applicable period* DURING THE MARRIAGE OF THE MOTHER AND HER HUSBAND *or* WITHIN 300 DAYS OF THE TERMINATION OF THE MARRIAGE OF THE MOTHER AND HER HUSBAND *or* WITHIN 300 DAYS AFTER A JUDGMENT OF LEGAL SEPARATION IS ENTERED BY A COURT CONCERNING THE MARRIAGE OF THE MOTHER AND HER HUSBAND], AND PLAINTIFF, WHO LACKS THE STATUS OF A PRESUMED FATHER, HAS NO CONSTITUTIONALLY PROTECTED INTEREST THAT DEFEATS THIS PRESUMPTION OR THE STATUTORY REQUIREMENTS FOR STANDING TO REBUT THE PRESUMPTION. THEREFORE, PLAINTIFF'S PATERNITY ACTION SHOULD BE DISMISSED.

A. Presumption of Paternity. *Family Code Section 7611(a)* creates a presumption that a man is the natural father of a child if he and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a judgment of separation is entered by the court (*Family Code Section 7611(a)*).

B. Rebuttal of Presumption. The presumption arising under *Family Code Section 7611(a)* is a rebuttable presumption affecting the burden of proof and may be rebutted only by clear and convincing evidence presented by a person having standing under *Family Code Section 7630* (*Dawn D. v. Superior Court (1998) 17 Cal. 4th 932, 937-938, 72 Cal. Rptr. 2d 871, 952 P.2d 1139* ; *see Family Code Section 7630(a)*).

C. Alleged Biological Father Who Is Not Presumed Father Lacks Constitutional Right to Challenge Presumption. An alleged biological father of a child who lacks the status of a "presumed father" under the Family Code has no constitutionally protected interest in establishing a parental relationship with the child sufficient to defeat the presumption of *Family Code Section 7611(a)* or the requirements of standing to challenge the presumption set forth in *Family Code Section 7630(a)*, because a purported biological link with a child, coupled with a mere desire to establish such a parental relationship does not give rise to a fundamental liberty interest protected by the *Due Process Clause (Dawn D. v. Superior Court (1998) 17 Cal. 4th 932, 941-942, 944, 72 Cal. Rptr. 2d 871, 952 P.2d 1139* ; *Lisa I. v. Superior Court (2005) 133 Cal. App. 4th 605, 34 Cal. Rptr. 3d 927*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that an alleged biological father who is not a "presumed father" has no constitutionally protected interest that defeats the presumption of *Fam. Code § 7611(a)* or the requirements of standing to challenge the presumption under *Fam. Code § 7630*.

Fam. Code § 7611(a) creates a presumption that a man is a child's natural father if he and the child's natural mother are or have been married to each other and the child was born during the marriage, or within 300 days after its termination or after a judgment of separation is entered by the court. However, this presumption is rebuttable by clear and convincing evidence presented by a person having standing under *Fam. Code § 7630* [*Dawn D. v. Superior Court (1998) 17 Cal. 4th 932, 937-938, 72 Cal. Rptr. 2d 871, 952 P.2d 1139]* . That section confers standing to declare the existence of a father and child relationship that is presumed under *Fam. Code § 7611(a), (b),* or *(c)* only on a child, the child's natural mother, a man presumed to be the child's father under *Fam. Code § 7611(a), (b),* or *(c),* an adoption agency to whom the child has been relinquished, or a prospective adoptive parent of the child [*Fam. Code § 7630(a)*].

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, for example, counsel should show why the alleged biological father who has brought the paternity action does not meet the statutory requirements for being a presumed father, or the requirements for standing to bring the action or rebut the applicable presumption of paternity [*see Fam. Code §§ 7611, 7630*].

[3] Discussion of Authorities

[a] Rebuttal of Presumption

In ***Dawn D. v. Superior Court*** *(1998) 17 Cal. 4th 932, 72 Cal. Rptr. 2d 871, 952 P.2d 1139* , plaintiff brought an action to establish his paternity of a child that was conceived during a four month period in which the child's mother lived with him while she was separated from her husband. The mother had resumed living with her husband before the child was born, and plaintiff had never had any contact with the child. He filed his action before the child's birth, completed a parenting class, and attempted to negotiate an agreement with the mother and her husband for child support and visitation, but no agreement was reached. The mother moved for judgment on the pleadings, but a trial court denied her motion on the ground that plaintiff should be permitted to try to establish his paternity, and it granted his motion for blood testing. The mother petitioned the appellate court for a stay of the proceedings and for a writ of mandate to compel the trial court to vacate its order and enter a new order granting her motion. The court of appeal denied her petition and the Supreme Court granted review.

The Supreme Court reversed the judgment, ordering the appellate court to grant the relief the mother had requested. The Court's majority held that plaintiff had no constitutionally protected liberty interested that would defeat California's presumption under *Fam. Code § 7611(a)* that the mother's husband is the child's father, or that would overcome the

requirements of *Fam. Code § 7630(a)(1)* for standing to challenge the presumption. *Fam. Code § 7611(a)* creates a presumption that a man is a child's natural father if he and the child's natural mother are or have been married to each other and the child was born during the marriage, or within 300 days after its termination or after a judgment of separation is entered by the court. However, this presumption is rebuttable by clear and convincing evidence presented by a person having standing under *Fam. Code § 7630*. That section confers standing to declare the existence of a father and child relationship that is presumed under *Fam. Code § 7611(a), (b),* or *(c)* only on a child, the child's natural mother, or a man presumed to be the child's father under *Fam. Code § 7611(a), (b),* or *(c)*. Plaintiff, an alleged biological father, met none of the statutory requirements (*17 Cal. 4th 932, 937-938)* .

[b] Alleged Biological Father Who Is Not Presumed Father Lacks Constitutional Right to Challenge Presumption

The facts and procedural background of ***Dawn D. v. Superior Court*** *(1998) 17 Cal. 4th 932, 72 Cal. Rptr. 2d 871, 952 P.2d 1139* , are *discussed under § 171.33[3][a]*. The Supreme Court rejected plaintiff's claim that he had a constitutional "liberty interest," protected as a matter of substantive due process, in having the opportunity to establish a parental relationship with the child. Although the trial court found that plaintiff had done everything he could to demonstrate a commitment to his parental responsibilities, and therefore had due process rights that must be balanced against the state's interests in enforcing the paternity presumption in favor of the husband, the Supreme Court concluded that the trial court had erred in its analysis.

The interest plaintiff sought to protect was his interest in establishing a relationship with his child who was born to a woman *married* to another man at the time of the child's conception and birth. The U.S. Supreme Court has previously considered and rejected due process protection for this interest, in *Michael H. v. Gerald D. (1989) 491 U.S. 110, 124-127, 109 S. Ct. 2333, 105 L. Ed. 2d 91* . In rejecting the liberty interest claim of a man who was not only the biological father, but also had an actual personal relationship with the child, the plurality of the *Michael H.* Court necessarily rejected as well the position that a biological connection without any personal relationship gives rise to a protected liberty interest. Even dissenting Justices in *Michael H.* rejected the possibility that a biological father having no existing personal relationship with his child born to woman married to another man could have any liberty interest in establishing a relationship with the child. In this case, plaintiff never had any personal relationship with the child, only an alleged biological link with an attempt to negotiate an agreement for child support and visitation. Based on *Michael H.*, a biological father's mere desire to establish a personal relationship with the child is not a fundamental liberty interest protected by the Due Process clause (*17 Cal. 4th 932, 941-942)* .

In *Lisa I. v. Superior Court (2005) 133 Cal. App. 4th 605, 34 Cal. Rptr. 3d 927* , the court of appeal rejected the contention that a child's biological father, who has no relationship with the child and who has failed to make substantial efforts to establish a parent-child relationship with the child or to provide for the child's support, has a constitutional liberty interest in the *opportunity* to develop a relationship with the child. The court noted that this was precisely the test proposed by the dissent in *Dawn D.*, which was specifically rejected by a majority of that court. Under *Dawn D.*, biological fathers who have developed an existing relationship with a child have a protected liberty interest. The "opportunity" interest claimed by the biological father in this case is significantly limited, if it exists at all, to those situations in which the marital parents are dead or have relinquished an interest in the child by placing the child for adoption by third persons.

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Volume 17 Chapters 170-179 PARTNERSHIPS---to---PREMISES LIABILITY
CHAPTER 171 PATERNITY
PART II. FORMS

17-171 California Points & Authorities § 171.34

§ 171.34 Supporting Contention That Paternity of Child is Conclusive as to Married Person Who Consented to Spouse's Artificial Insemination or Contracted for Insemination of Third Party Surrogate Mother With Fertilized Ovum from Unrelated Parties [Fam. Code § 7613]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

THE PETITION IN THIS MATTER TO ESTABLISH PARENTAGE OF THE CHILD SHOULD BE GRANTED AS A MATTER OF LAW AGAINST RESPONDENT(S) BECAUSE

[*EITHER*]

RESPONDENT, WHILE MARRIED TO _____ (*SPECIFY NAME OF BIRTH MOTHER*) CONSENTED IN WRITING TO HER ARTIFICIAL INSEMINATION BY A LICENSED PHYSICIAN AND SURGEON WITH SPERM FROM A THIRD PARTY DONOR, IN ACCORDANCE WITH THE PROCEDURES SET FORTH IN SECTION 7613 OF THE FAMILY CODE.

[*OR*]

RESPONDENTS, WHILE MARRIED TO EACH OTHER, CONTRACTED WITH _____ (*SPECIFY NAME OF SURROGATE MOTHER*), FOR HER ARTIFICIAL INSEMINATION BY A LICENSED PHYSICIAN AND SURGEON WITH OVUM FERTILIZED *IN VITRO* THAT WAS DERIVED FROM OVUM AND SPERM FROM OTHER UNRELATED DONORS, SUCH THAT THE CHILD CONCEIVED THEREBY BEARS NO GENETIC RELATIONSHIP TO RESPONDENTS OR THE SURROGATE MOTHER.

[*EITHER, if husband consented to wife's artificial insemination*]

Husband Who Consents to Artificial Insemination of Wife Is Deemed Father of Child. A husband who consents in writing to the artificial insemination of his wife, pursuant to *Section 7613 of the Family Code*, with semen donated by another man is "treated in law" as if he were the natural father of a child thereby conceived, and the semen donor is treated in law as if he were not the natural father (*Fam. Code § 7613*).

[*OR, if husband or wife (or both of them) contracted with third party surrogate mother for her insemination with fertilized ovum from unrelated parties*]

Married Persons Who Contract for Artificial Insemination of Third Party Surrogate Mother With Fertilized Ovum from Other Unrelated Parties Are Deemed Parents of Child. A husband and wife who have contracted with a third party to serve as a gestational surrogate mother, by means of her artificial insemination with ovum fertilized *in vitro* and derived from unrelated donors of egg and sperm are deemed the lawful parents of a child conceived thereby, on the same basis as a husband who consents to his wife's artificial insemination under *Section 7613 of the Family Code* (*In re Marriage of Buzzanca (1998) 61 Cal. App. 4th 1410, 1418, 1421, 72 Cal. Rptr. 2d 280*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that parentage of a child may be deemed conclusive as against either (1) a husband who consented to his wife's artificial insemination under *Fam. Code § 7613*, or *(2)* as against a married couple who contracted for the services of a gestational surrogate mother, that is, a woman artificially inseminated with fertilized ovum from still other, unrelated sperm and ovum donors. In the case of the husband, the first alternative allegation and authority should be used; and in the case of the married couple, the second alternative allegation and authority should be used.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, for example, if a married couple deny parentage of a child born to a surrogate mother whom they hired to bear a child using fertilized ovum from others--so that neither they nor the surrogate have a genetic connection to the child--counsel should specify the nature and terms of their contract (and append a copy as an exhibit), provide details of the *in vitro* fertilization and artificial insemination procedures, and of any certification of the parties' consents by the licensed physician who performed it. Counsel should also set forth the physician's name and indicia of licensure. Counsel should list any additional information available, such as when the existence of the pregnancy was established in relation to when insemination occurred, along with the date of the child's birth.

[3] Discussion of Authorities

[a] Married Persons Who Contract for Artificial Insemination of Third Party Surrogate Mother With Fertilized Ovum from Other Unrelated Parties Are Deemed Parents of Child

In ***In re Marriage of Buzzanca*** *(1998) 61 Cal. App. 4th 1410, 72 Cal. Rptr. 2d 280* , a married couple entered into a written contract with a woman, by which it was agreed that she would serve as a (gestational) "surrogate mother" of a child to be conceived through artificial insemination of ovum fertilized *in vitro*, originating from sperm and ovum donated by still other, unrelated parties--such that there would be no genetic connection between the child and the surrogate mother or the married couple. Pursuant to this contract, the artificial insemination took place under the auspices of a licensed California physician. After the surrogate became pregnant, the couple experienced marital problems and the husband petitioned for dissolution, claiming there were no children of the marriage. In the wife's

response, she asserted that they were expecting a child by means of a surrogate contract, and the child was born within a few days. Later, she filed a separate petition to establish her parentage of the child, which was consolidated with the dissolution case. A trial court ultimately ruled that the wife was not the lawful mother of the child and the husband, therefore, could not be the lawful father or owe support; in essence, the child had no legal parent. The wife petitioned for a writ of supersedeas to stay the judgment, as well as filing an appeal. The stay was granted pending appeal.

The court of appeal reversed the judgment, holding that the wife and husband were *both* the lawful parents of the child, and directed that the trial court enter a new judgment to that effect. The appellate court found that the trial court erred in assuming that legal motherhood could be established only by either giving birth or by contributing an egg--when well-settled law holds that *fatherhood* can be established by conduct apart from giving birth or being genetically related to a child. The appellate court said that, by parity of reasoning with the rule that makes a husband the lawful father of a child conceived through artificial insemination of his wife with his consent [*Fam. Code § 7613*], both spouses here should be deemed the parents. In each instance, a child is procreated because a medical procedure was initiated and consented to by the intended parents, with the only difference (from artificial insemination) here being that there is no reason to distinguish between husband and wife (*61 Cal. App. 4th 1413, 1418)* .

In this case, the wife is situated like a husband in an artificial insemination case whose consent triggers a medical procedure that results in a pregnancy and eventual birth of a child. The husband's argument here that maternity may only be established through proof of birth or proof of genetic contribution, was an unsound reading of the statutory bases for establishing parentage, because, under *Fam. Code § 7610*, maternity may be established either by proof of giving birth or "under this part [of the Family Code]." It noted that the California Supreme Court had previously concluded that certain other parentage statutes, which on their face applied only to men, were also dispositive of the question of maternity, by parity of reasoning [*see Johnson v. Calvert, 5 Cal. 4th 84, 92, 19 Cal. Rptr. 2d 494, 851 P.2d 776]* . *Johnson*, in dictum, had also foreseen the type of situation found in this case and postulated that in such a situation, "a rule recognizing the intending parents as the child's legal, natural parents should best promote certainty and stability" [*Johnson v. Calvert, 5 Cal. 4th 84, 94-95, 19 Cal. Rptr. 2d 494, 851 P.2d 776]* (*61 Cal. App. 4th 1413, 1424*). Finally, the appellate court concluded that the husband should be deemed the child's father even if the wife had promised to assume all responsibility for the child's care, and even if the written surrogacy contract had not yet been signed when conception and implantation took place. Those occurrences were nonetheless the direct result of actions taken pursuant to an oral agreement, which envisioned that the fertilization, implantation, and ensuing pregnancy would go forward. Thus, for all practical purposes, the husband caused the child's conception "every bit as much as if things had been done the old fashioned way" (*61 Cal. App. 4th 1413, 1426*).

[4] Additional Authorities

[a] Husband Who Consents to Artificial Insemination of Wife Is Deemed Father of Child

In *Steven S. v. Deborah D. (2005) 127 Cal. App. 4th 319, 25 Cal. Rptr. 3d 482* , the court of appeal held that *Fam. Code § 7613(b)* applies even if the sperm donor and the woman who conceives the child are known to each other and the woman acknowledges that the donor is the child's father. This statute does not make an exception for known sperm donors or for cases in which the parties have an intimate relationship (*127 Cal. App. 4th 319, 324-326)* .

In *Dunkin v. Boskey (2000) 82 Cal. App. 4th 171, 98 Cal. Rptr. 2d 44* , the court of appeal held that a written agreement between *unmarried parties* to grant paternity rights to the male party with respect to a child conceived by artificial insemination is binding, and may be enforced by an action for unjust enrichment. Although the case did not fall within the framework of *Fam. Code § 7613* because the parties were unmarried the plaintiff's status had the elements of those of a lawful father by virtue of his written consent to the artificial insemination of his nonmarital partner and his subsequent voluntary assumption of fatherhood duties. In addition, the UPA expresses a legislative preference for the extension of parent-child relationships equally to married and unmarried parties because it was enacted to eliminate the distinction between legitimate and illegitimate children. In this case, although the agreement at

issue could not grant parental rights to the plaintiff, or contract or tort damages for his loss of a relationship with the child, he could sue for unjust enrichment of the child's mother. Therefore, the trial court erred in sustaining a demurrer to the plaintiff's complaint (*82 Cal. App. 4th 171, 196-198)* .

[b] Married Persons Who Contract for Artificial Insemination of Third Party Surrogate Mother With Fertilized Ovum from Other Unrelated Parties Are Deemed Parents of Child

In *Robert B. v. Susan B. (2003) 109 Cal. App. 4th 1109* , the court of appeal held that a single woman who gave birth to a son after being implanted with a married couple's embryos, which had been created from the husband's sperm and an anonymous donor's eggs, was the child's mother under *Fam. Code § 7610*; and that the husband was the child's father under *Fam. Code § 7630*. The court of appeal further held that the husband's wife lacked standing as an "interested person" to bring an action to determine maternity under *Fam. Code § 7650*. The appellate court reasoned that the trial court's ruling "comported with this state's interest 'in establishing paternity for all children' [*see Fam. Code § 7570*], recognized the valid claims of gestational mothers, and adhered to the Supreme Court's determination that there can be only one natural mother under California law." Regarding the father's wife, the appellate court declined to extend *In re Marriage of Buzzanca (1998) 61 Cal. App. 4th 1410, 72 Cal. Rptr. 2d 280* to a situation in which (1) a woman has no genetic or gestational relationship to the child, (2) a woman has no status comparable to that of a presumed father under *Fam. Code § 7611(d)* (reception of child into home), and (3) another woman asserts a legally recognized claim. Here, it was undisputed that the wife had no factual basis on which to claim presumed mother status (*109 Cal. App. 4th 1109, 1116-1117)* .

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CHAPTER 171 PATERNITY
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17-171 California Points & Authorities § 171.35

§ 171.35 Supporting Contention That Parentage Presumption Arising from Child's Reception Into Home [Fam. Code § 7611(d)] Is Not Necessarily Rebutted by Admission of No Biological Connection to Child if Court Proceeding Is Not "Appropriate Action" [Fam. Code § 7612(a)]

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

DESPITE THE ADMISSION BY _____ [*specify name of presumed father or mother*] THAT HE/SHE IS NOT THE BIOLOGICAL PARENT OF THE CHILD, THIS FACT ALONE DOES NOT REBUT THE PRESUMPTION OF PATERNITY/MATERNITY ARISING FROM RECEPTION OF THE CHILD INTO HIS/HER HOME AND HOLDING OUT THE CHILD AS HIS/HER NATURAL CHILD, BECAUSE THE INSTANT PROCEEDING IS NOT AN "APPROPRIATE ACTION" IN WHICH TO FIND THE PRESUMPTION REBUTTED, BECAUSE _____ [*set forth reason, e.g.,* NO ONE ELSE IS A CANDIDATE FOR FATHERHOOD AND THE CHILD WILL OTHERWISE BE LEFT FATHERLESS].

A. Man Who Receives Child Into Home and Holds Child Out as His Own Is Presumed the Child's Father. A man is presumed to be the natural father of a child if he receives the child into his home and openly holds out the child as his natural child (*Fam. Code § 7611(d)*).

B. Presumption Under *Fam. Code § 7611* May Be Rebutted by Clear and Convincing Evidence in "Appropriate Action." Except as provided in *Family Code Section 7540 et seq.* and *Family Code Section 7570 et seq.* or in *Family Code Section 20102*, a presumption arising under *Family Code Section 7611* is a rebuttable presumption affecting the burden of proof and may be rebutted in an appropriate action only by clear and convincing evidence (*Fam. Code § 7612(a)*).

C. Admission of No Biological Connection to Child Does Not Necessarily Rebut Presumption of *Fam. Code § 7611(d)* if Court Proceeding Is Not "Appropriate Action." Although the presumption of *Family Code Section 7611(d)* is rebuttable under *Family Code Section 7612(a)* by clear and convincing evidence that the presumed father is not the child's natural father, the presumed father's admission that he is not the biological father does not necessarily

rebut the presumption when the proceeding is not an "appropriate action" (*In re Nicholas H. (2002) 28 Cal. 4th 56, 59, 70, 120 Cal. Rptr. 2d 146, 46 P.3d 932*).

[*Optional*] **D. Holding of *Nicholas H.*** Applies to Mothers as Well as Presumed Fathers. The holding of *In re Nicholas H. (2002) 28 Cal. 4th 56, 120 Cal. Rptr. 2d 146, 46 P.3d 932* , that clear and convincing evidence of nonpaternity does not always overcome the presumption of paternity, but only overcomes it in an "appropriate action," applies with equal force to a woman, as a presumed mother (*Elisa B. v. Superior Court (2005) 37 Cal. 4th 108, 113, 122-125, 33 Cal. Rptr. 3d 46, 117 P.3d 660* ; *Charisma R. v. Kristina S. (2009) 175 Cal. App. 4th 361, 367-381, 96 Cal. Rptr. 3d 26* ; *Charisma R. v. Kristina S. (2006) 140 Cal. App. 4th 301, 307-308, 44 Cal. Rptr. 3d 332* ; *In re Salvador M. (2003) 111 Cal. App. 4th 1353, 1357-1358, 4 Cal. Rptr. 3d 705* ; *In re Karen C. (2002) 101 Cal. App. 4th 932, 934, 938, 124 Cal. Rptr. 2d 677*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of the contention that the status of a person as a presumed father, arising from a man's reception of a child into his home and holding out the child as his own [*Fam. Code § 7611(d)*], is not necessarily rebutted by his admission that he is not the biological father, when the court proceeding at issue is not an "appropriate action," as that term is used in *Fam. Code § 7612(a)* [*In re Nicholas H. (2002) 28 Cal. 4th 56, 59, 70, 120 Cal. Rptr. 2d 146, 46 P.3d 932]* . Optional Paragraph D may be used if a woman seeks to establish a presumption of motherhood from her reception of a child into her home and holding out the child as her own [*Charisma R. v. Kristina S. (2009) 175 Cal. App. 4th 361, 367-381, 96 Cal. Rptr. 3d 26* ; *Charisma R. v. Kristina S. (2006) 140 Cal. App. 4th 301, 307-308, 44 Cal. Rptr. 3d 332* ; *In re Karen C. (2002) 101 Cal. App. 4th 932, 934, 938, 124 Cal. Rptr. 2d 677]* .

In determining whether a man has received a child into his home and openly held out the child as his own under *Fam. Code § 7611(d)*, courts have looked to such factors as whether the man actively helped the mother in prenatal care, whether he paid pregnancy and birth expenses commensurate with his ability to do so, whether he promptly took legal action to obtain custody of the child, whether he sought to have his name placed on the birth certificate, whether and how long he cared for the child, whether there is unequivocal evidence that he acknowledged the child, the number of people to whom he acknowledged the child, whether he provided for the child after the child no longer resided with him, whether he pursued completion of the required paperwork if the child needed public benefits, and whether his care was merely incidental [*In re T.R. (2005) 132 Cal. App. 4th 1202, 1211, 34 Cal. Rptr. 3d 215]* .

Counsel should submit argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Admission of No Biological Connection to Child Does Not Necessarily Rebut Presumption of Fam. Code § 7611(d) if Court Proceeding Is Not "Appropriate Action"

In ***In re Nicholas H.*** *(2002) 28 Cal. 4th 56, 120 Cal. Rptr. 2d 146, 46 P.3d 932* , an unwed mother named her boyfriend as the father of her child on the child's birth certificate, even though she was already pregnant when she and the boyfriend first met, because the couple wanted the boyfriend to act as the father. The couple separated after several years. Following a domestic dispute that resulted in the mother's arrest, the boyfriend took the child home and later filed an action to establish a parental relationship, and obtained temporary custody of the child. A county social services agency brought a dependency action after removing the child from the boyfriend's home when he was arrested on misdemeanor charges unrelated to the child. In those proceedings, evidence established that he easily satisfied the presumed father requirements of *Fam. Code § 7611(d)*, because (1) the child lived with him for long periods of time, (2) he provided the child with significant financial support, (3) consistently referred to the child as his son, and (4) there

was undisputed evidence that the child had a strong emotional bond with the boyfriend as the only father he had ever known. The mother named another man as the child's biological father, but he could not be located or paternity established. The juvenile court found that the *Fam. Code § 7611(d)* presumption that the boyfriend was the child's father had not been rebutted, despite his admission that he was not the child's biological father. The court ordered that the child's care and custody be committed to the social services agency, with his placement continuing in the boyfriend's home. The mother appealed, and an appellate court reversed, finding that the boyfriend was the child's presumed father under *Fam. Code § 7611(d)*, but that the presumption was rebutted under *Fam. Code § 7612(a)* by the boyfriend's admission that he was not the child's biological father. The social services agency then petitioned for review, and the California Supreme Court granted the petition.

The California Supreme Court reversed, holding that if a man is a presumed father under *Fam. Code § 7611(d)*--by receiving a child into his home and holding out the child as his natural child--and seeks parental rights but admits that he is not the biological father, the section 7611(d) presumption is not necessarily rebutted. Despite the rebuttal language of *Fam. Code § 7612(a)*--that a presumption under *Fam. Code § 7611* "may be rebutted in an appropriate action only by clear and convincing evidence"--the standard was not met because this was not an "appropriate action." The appellate court had misread *Fam. Code § 7612(a)*, which provides that "a presumption under [*Fam. Code § 7611*] is a rebuttable presumption affecting the burden of proof and may be rebutted in an appropriate action only by clear and convincing evidence." [Emphasis added.] In so doing, the appellate court may have conflated *Fam. Code § 7612(a)* with *Fam. Code § 7612(c)*, which provides that "[t]he presumption under [*Fam. Code § 7611*] is rebutted by a judgment establishing paternity of the child by another man." [Emphasis added.] Here, however, there was no judgment establishing another man's paternity, because the purported biological father named by the child's mother had not come forward or even been located, and was only an "alleged" father.

The Court's conclusion, that a man does not lose his status as a presumed father by admitting he is not the biological father, was further supported by *Fam. Code § 7612(b)*, which provides that "[i]f two or more presumptions arise under [*Fam. Code § 7611*] which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls." If the Legislature had intended that a man who is not a biological father cannot be a presumed father under *Fam. Code § 7611*, then the Legislature would not have provided for weighing among competing claims for presumed father status, because there can only be one biological father. That the Legislature, without explicitly so stating would adopt a rule that blood test evidence (or an admission of nonpaternity) must defeat the claim of a person who is a presumed father under *Fam. Code § 7611(d)* is unlikely. The Legislature, in using the phrase an appropriate action, likely had in mind an action in which (1) a candidate vying for parental rights is seeking to rebut another candidate's *Fam. Code § 7611(d)* presumption, or (2) a court decides that parental rights and obligations should devolve upon an unwilling candidate; rather than an action like the present one, in which rebuttal of the *Fam. Code § 7611(d)* presumption will render the child fatherless, because no other candidate has come forward to claim parental rights (*28 Cal. 4th 56, 70)* .

[b] Holding of Nicholas H. Applies to Mothers as Well as Presumed Fathers

In ***Elisa B. v. Superior Court*** *(2005) 37 Cal. 4th 108, 33 Cal. Rptr. 3d 46, 117 P.3d 660* , the California Supreme Court held that, under *Fam. Code § 7611(d)*, a woman may be a presumed mother of a child of her lesbian partner if they agree to raise the child together, she receives the child into her home, and she holds the child out as her natural child. As the child's presumed mother, the woman has an obligation to support the child (*37 Cal. 4th 108, 113)* . The Court noted that although a child can have only one natural mother, this does not mean that a child cannot have two parents, both of whom are mothers (*37 Cal. 4th 108, 117-118)* . This result is now possible under the domestic partnership statutes, specifically *Fam. Code § 297.5(d)*, which provides that the rights and obligations of registered domestic partners with respect to a child of either of them are the same as those of spouses. The Court had also recognized in an adoption case that a child can have two mothers (*37 Cal. 4th 108, 119)* . The Court specifically found that this was not an appropriate action in which to rebut the presumption of presumed motherhood with proof that the former partner was not the child's biological parent. The former partner had actively consented to, and participated in,

the artificial insemination of the birth mother with the understanding that the resulting child would be raised by both of them as coparents, they did, in fact, act as coparents for a substantial time period, and there were no competing claims to her being the child's second parent. Because she had helped to cause the child to be born and had raised the child as her own, the former partner was not permitted to abandon the child merely because her relationship with the birth mother had dissolved (*37 Cal. 4th 108, 122-125)* .

In ***Charisma R. v. Kristina S.*** *(2009) 175 Cal. App. 4th 361, 96 Cal. Rptr. 3d 26*, the appellate court affirmed the trial court's order declaring that the plaintiff was a presumed parent under Fam. Code § 7611(d) of her former domestic partner's child, who was conceived by artificial insemination. It found that the record provided "overwhelming support" for the trial court's findings that the plaintiff actively participated in the child's conception and cared for the child following her birth (175 Cal. App. 4th 361, 370, 377). This was evidenced by the fact that the parties decided that they wanted to have children and that the defendant would try to become pregnant by artificial insemination; the plaintiff was present during the child's birth, gave the child a hyphenated last name including her name on the child's birth certificate, brought the child into the home she shared with the defendant, openly and publicly asserted her parentage in various forums and to numerous people, and shared the child's care with the defendant until she moved out with the child three months after the child's birth (*175 Cal. App. 4th 361, 375)* . The court rejected the contention that the plaintiff was required to receive the child in her home for a "significant period of time" (*175 Cal. App. 4th 361, 370-374)* . The "receiving" requirement of Section 7611(d) is a necessary formality, but not one that requires "receipt" for any particular duration (*175 Cal. App. 4th 361, 372)* . Instead, the plaintiff's receipt of the child in her home must be sufficiently unambiguous as to constitute a clear declaration regarding the nature of their relationship, but it need not continue for any specific duration. Although cohabitation for an extended period may strengthen a claim for presumed parent status, Section 7611(d) does not require that cohabitation or coparenting continue for any particular period of time (*175 Cal. App. 4th 361, 374)* . Finally, the defendant did not meet her burden under Fam. Code § 7612(a) of rebutting with clear and convincing evidence the presumption that the plaintiff was the child's parent (*175 Cal. App. 4th 361, 378-381)* . She also failed to meet her burden of showing that the order declaring the plaintiff to be the child's second parent was an unconstitutional infringement of her state and federal right to substantive due process (*175 Cal. App. 4th 361, 389)* .

In ***Charisma R. v. Kristina S.*** *(2006) 140 Cal. App. 4th 301, 44 Cal. Rptr. 3d 332* , the court held that under *Elisa B.* and *Nicholas H.*, a registered domestic partner of the birth mother is entitled to bring a petition under *Fam. Code § 7611(d)* to establish her parental relationship with a child born to the birth mother by artificial insemination from an anonymous donor. The appellate court remanded the case to the trial court to determine first, whether the petitioner is a presumed parent of the child under *Fam. Code § 7611(d)*, and then, whether this is an appropriate action in which to rebut the presumption that the petitioner is the child's parent (*140 Cal. App. 4th 301, 309)* . Presumed parent status depends on affirmative findings that the petitioner received the child into her home and openly held the child out as her natural child. If the trial court finds that the petitioner is a presumed parent, then it should determine (1) whether the petitioner actively participated in causing the child to be conceived with the understanding that she would raise the child as her own with the birth mother, (2) whether she voluntarily accepted the rights and obligations of parenthood after the child was born, and (3) whether any one else claims to be the child's second parent (*140 Cal. App. 4th 301, 309-310)* . Evidence that the petitioner has no biological tie to the child does not rebut the presumption of the petitioner's parenthood (*140 Cal. App. 4th 301, 310)* . Lastly, the court rejected the birth mother's contention that *Elisa B.* was distinguishable because in that case the biological mother supported the district attorney's action to declare Elisa a presumed parent in order to obtain child support, while in this case the birth mother opposes presumed parent status for the petitioner. The court noted that *Elisa B.* did not suggest that the preferences of the biological mother control the determination of whether presumed parent status arises under *Fam. Code § 7611(d)*. Such a rule would be contrary to the public policy in favor of a child having two parents rather than one, and might implicate the constitutional rights of the person seeking presumed parent status and of the child in the establishment of the parent-child relationship (*140 Cal. App. 4th 301, 310)* .

In ***In re Salvador M.*** *(2003) 111 Cal. App. 4th 1353, 4 Cal. Rptr. 3d 705* , a woman sought presumed mother status

with respect to her half-brother, whom she had cared for since birth and treated as if he were her own son. She continued to care for him in her own home after their mother died when he was three years old. At the juvenile court dispositional hearing, the court denied the woman presumed mother status, finding that she failed to establish that she had held the child out to the community as her child because she had told school officials she was the child's sister. The appellate court reversed and directed the trial court to enter an order granting the woman presumed mother status (*111 Cal. App. 4th 1353, 1359)* . It noted that though most case law has focused on the definition of the presumed father, the legal principles concerning presumed father status apply equally to a woman who is seeking presumed mother status. Thus, a woman may be deemed a child's presumed mother if she can prove by a preponderance of the evidence that one of the rebuttable presumptions of paternity set forth in *Fam. Code § 7611* applies (*111 Cal. App. 4th 1353, 1357)* . In this case, the woman had proved that the presumption of *Fam. Code § 7611(d)* applied. In denying her presumed mother status, the trial court had ignored "the most compelling evidence" that she held the child out as her own son--the fact that the child, who was eight years old at the time of the hearing, believed she was his mother (*111 Cal. App. 4th 1353, 1358)* . The appellate court also concluded that this was clearly *not* an appropriate case in which to find that the presumption was rebutted under *Fam. Code § 7612* because there was no competing maternal interest, and to sever the deeply rooted mother/child bond would contravene the state's interest in maintaining the family relationship (*111 Cal. App. 4th 1353, 1359)* .

In ***In re Karen C.*** *(2002) 101 Cal. App. 4th 932, 124 Cal. Rptr. 2d 677* , a mother gave her child to another woman promptly after the child was born. This woman received the child into her home and raised the child as her own. In dependency proceedings, the child argued, among other things, that the woman had to be granted status as the child's legal mother based on public policy and logic, pursuant to *Fam. Code § 7612(b)*. The child was declared a dependent of the juvenile court and placed in foster care. She appealed a court order denying her petition for an order determining the existence of a mother and child relationship between herself and the woman who raised her. The appellate court found that the child had standing to bring an action to determine the existence of a mother-child relationship between the woman who raised her (the "presumed mother") and the child. Under the facts of this case, the decision reached in *In re Nicholas H. (2002) 28 Cal. 4th 56, 120 Cal. Rptr. 2d 146, 46 P.3d 932* , that the *Fam. Code § 7611(d)* presumption of paternity arising from a man's reception of a child into his home is overcome by clear and convincing evidence of nonpaternity only "in an appropriate action," discussed, above, under Admission of No Biological Connection to Child Does Not Necessarily Rebut Presumption of *Fam. Code § 7611(d)* if Court Proceeding Is Not "Appropriate Action," applies with equal force to a woman, as a presumed mother. A determination had to be made whether the case was "an appropriate action" to rule that the presumption of parentage had been rebutted by clear and convincing evidence. The order of the juvenile court denying the child's petition for an order decreeing the existence of a mother and child relationship was vacated, and the matter was remanded for further proceedings (*101 Cal. App. 4th 932, 938-939)* .

[4] Additional Authorities

[a] Admission of No Biological Connection to Child Does Not Necessarily Rebut Presumption of Fam. Code § 7611(d) if Court Proceeding Is Not "Appropriate Action"

In *In re J.O. (2009) 178 Cal. App. 4th 139, 100 Cal. Rptr. 3d 276* , a juvenile dependency case, the appellate court held that the Supreme Court's admonition in *Nicholas H.* and *Elisa B.* that courts should not make children fatherless by too easily finding cause to rebut the *Fam. Code § 7611(d)* presumption is equally applicable in the commonplace situation involved in this case, in which the mother and the children recognized the defendant as the children's father, his name was on their birth certificates, and the defendant acknowledged the children at birth and supported them for several years. Refusing to grant presumed father status to a man such as the defendant merely because he had failed to provide support for many years, when no other parental figure was available to fill the gap, serves to punish the children by depriving them of a second parent (*178 Cal. App. 4th 139, 149)* . There is no authority for the proposition that abandonment combined with failure to support is a basis for rebutting the Section 7611(d) presumption (*178 Cal. App. 4th 139, 149)* . Section 7611(d) requires nothing more than that the presumed father candidate receive the children into his home and openly hold them out as his natural children, which the defendant had done in this case (*178 Cal. App.*

4th 139, 151) .

In *Kevin Q. v. Lauren W. (2009) 175 Cal. App. 4th 1119, 95 Cal. Rptr. 3d 477* , the trial court erred in finding that the plaintiff, who had filed a petition under *Fam. Code § 7630* to establish a parental relationship, was the child's legal father under the rebuttable presumption of *Fam. Code § 7611(d)*. The appellate court ordered the trial court to enter a new judgment declaring the child's biological father to be the child's legal father. The biological father had signed and filed a valid declaration of paternity that had the force of a judgment under *Family Code Section 7573*. This trumped the plaintiff's presumption under Section 7611(d) (*175 Cal. App. 4th 1119, 1124, 1133, 1136-1141)* . A court does not have the discretion to ignore or treat as a rebuttable presumption a voluntary declaration of paternity (*175 Cal. App. 4th 1119, 1138)* . It is not a mere presumption that may be weighed against competing Section 7611 presumptions under *Fam. Code § 7612(b)* (*175 Cal. App. 4th 1119, 1141)* .

In *In re T.R. (2005) 132 Cal. App. 4th 1202, 34 Cal. Rptr. 3d 215* , a juvenile dependency case, the trial court denied a stepfather's request for presumed father status under *Fam. Code § 7611(d)*. It found that although he had held the child out as his own daughter and had provided support for her, he was not a presumed father because of his history of molesting children, conduct which was fundamentally inconsistent with the role of a parent. The appellate court affirmed. It noted that unlike the typical presumed father applicant, the stepfather was not the child's biological father and his relationship with her did not begin at her birth or shortly thereafter, but only after she was three years old. Since then, there was substantial evidence that he openly acknowledged her as his daughter, provided financial support, and received her in his home. However, these positive factors cannot be viewed in a vacuum, but must be considered with the facts that the stepfather was a registered sex offender who was convicted of molesting young girls and that allegations he had sexually abused the child had been found to be true by clear and convincing evidence when the dependency petition was sustained. His conduct was antithetical to a parent's role and more than counterbalanced the factors favoring his presumed father status (*132 Cal. App. 4th 1202, 1211)* . The court noted that the premise behind the category of presumed father is that an individual who has demonstrated a commitment to the child and the child's welfare, regardless of whether he is the child's biological father, is entitled to the elevated status of presumed fatherhood. If an individual can qualify for presumed father status based on his good deeds consistent with parental responsibilities, it follows that he can be disqualified by repugnant conduct that is detrimental to the child (*132 Cal. App. 4th 1202, 1211-1212)* .

In *Librers v. Black (2005) 129 Cal. App. 4th 114, 28 Cal. Rptr. 3d 188* , the trial court found that a mother's former live-in boyfriend lacked standing as a presumed father under *Fam. Code § 7611* to bring a suit to establish his paternity under the Uniform Parentage Act. In making this determination, the trial court gave considerable weight to the fact that the boyfriend was not the child's biological father and the fact that the child had a loving, stable mother. The appellate court reversed, finding that a presumption of paternity under *Fam. Code § 7611(d)* is not rebutted by evidence that the presumed father is not the child's biological father, regardless of the mother's fitness, which is an issue that is only relevant in a dependency proceeding. Therefore, the boyfriend had standing under *Fam. Code § 7630* to bring the paternity proceeding, based on the presumption that he was the child's natural father, which was established by his receipt of the child into his home and his openly holding her out as his natural child. The child had lived in the boyfriend's home from the time of her birth until her mother removed her at 22 months, and the boyfriend had signed a voluntary declaration of paternity so that he could provide her with medical and other benefits. He also supported her financially. Thus, he was entitled to a determination on the merits as to whether he was the child's presumed father (*129 Cal. App. 4th 114, 124-127)* .

In *In re Raphael P. (2002) 97 Cal. App. 4th 716, 118 Cal. Rptr. 2d 610* , an appellate court discussed a man's contention that he was a child's presumed father under *Fam. Code § 7611(d)*, because he received the child into his home and openly held the child out as his natural child. A juvenile court never determined whether these facts supported application of the *Fam. Code § 7611(d)* presumption, because that court accepted the argument that blood test evidence demonstrating that the man was not the father either precluded him from establishing the presumption or rebutted the presumption. The appellate court concluded that *Fam. Code §§ 7551* and *7554* do not authorize courts to order genetic

testing of a man who meets the statutory test for presumed fatherhood. Thus, if the claimant met the statutory test for presumed fatherhood, then the juvenile court should not have ordered genetic testing, or allowed evidence of biological paternity to rebut his presumed father status. In addition, *Fam. Code § 7551* authorizes a court to order genetic testing when paternity "is a relevant fact." Here, it was questionable whether paternity could be considered a "relevant fact," when the man was claiming presumed father status and no other man was asserting paternity (*97 Cal. App. 4th 716, 734-736)* .

In *In re Jerry P. (2002) 95 Cal. App. 4th 793, 116 Cal. Rptr. 2d 123* , an appellate court stated that lack of a biological relationship does not automatically defeat presumed father status, because, under *Fam. Code § 7612(a)*, a *Fam. Code § 7611* presumption "may be rebutted in an appropriate action only by clear and convincing evidence." [Emphasis added.] Thus, a trial court has discretion to decide whether proof that a presumed father is not a child's biological father is sufficient to rebut the presumption. However, the appellate court distinguished pure parentage actions and dependency actions in which parentage is at issue. In parentage actions, the primary purpose of *Fam. Code § 7611* is to establish a child's paternity through a series of rebuttable presumptions, while in dependency proceedings, the purpose of *Fam. Code § 7611* is to determine whether an alleged father has demonstrated a sufficient commitment to his parental responsibilities to be afforded rights not afforded to natural fathers, which are the rights to reunification services and custody. Therefore, in dependency proceedings, the term "presumed father" does not denote a presumption of fatherhood in the evidentiary sense and presumed father status is not rebutted by evidence someone else is the natural father. Rather, the term "presumed father" is a term of convenience used to identify a preferred class of fathers by reference to the familial bonds described in *Fam. Code § 7611* (*95 Cal. App. 4th 793, 803-805)* .

[b] Holding of Nicholas H. Applies to Mothers as Well as Presumed Father

In K.M. v. E.G. *(2005) 37 Cal. 4th 130, 33 Cal. Rptr. 3d 61, 117 P.3d 673* , the California Supreme Court held that when a woman provides ova to her lesbian partner so that the partner can bear a child who will be raised in their joint home, both women are considered to be the child's parents (*37 Cal. 4th 130, 134)* . The Court reversed the judgment of the appellate court which had affirmed the trial court's decision that the egg donor could not assert her right to parentage because she had signed a waiver, on the ovum donor form, of her right to legal parentage. The Court found that the waiver did not affect the determination of parentage (*37 Cal. 4th 130, 144)* . It noted that the egg donor's genetic relationship with the resulting child constitutes evidence of a mother and child relationship under the Uniform Parentage Act, and the circumstance that her partner gave birth to the child also constitutes evidence of a mother and child relationship. Thus, both women are mothers of the child under the Act (*37 Cal. 4th 130, 142-143)* . *Family Code Section 7613(b)*, which creates an exception to the usual rules governing parentage that applies when a man donates semen to inseminate a woman who is not his wife, does not apply under the circumstances of this case in which a woman supplies ova to impregnate her lesbian partner in order to produce a child who would be raised in their joint home (*37 Cal. 4th 130, 143)* . Because the Court concluded that Fam. Code § 7313(b) did not apply and that the egg donor was the child's parent (along with the birth mother) based on her genetic relationship to the child, it was not necessary for the Court to consider whether she was the child's presumed mother under *Fam. Code § 7611(d)* (*37 Cal. 4th 130, 144)* .

In *Kristine H. v. Lisa R. (2005) 37 Cal. 4th 156, 33 Cal. Rptr. 3d 81, 117 P.3d 690* , the California Supreme Court held that the lesbian mother of a child was estopped from challenging the validity of a stipulated judgment declaring that she and her lesbian partner were the child's parents. Because mother had invoked the jurisdiction of the court to determine the parentage of the child under the Uniform Parentage Act, had stipulated to the issuance of a judgment, and had enjoyed the benefits of that judgment for almost two years, it would be unfair to the partner and the child to permit the mother to challenge the validity of that judgment. It would also contravene the public policy that favors a child having two parents rather than one (*37 Cal. 4th 156, 166)* .

In *Amy G. v. M.W. (2006) 142 Cal. App. 4th 1, 47 Cal. Rptr. 3d 297* , a mother brought an action for custody and visitation rights to her biological child, who had been raised by the biological father and his wife since the child was a

month old. The trial court denied the father's motion to join his wife as a party, and also granted the biological mother's motion to quash the wife's separate action to be declared the child's presumed mother. The court held that the wife was not the child's presumed mother under either *Fam. Code § 7611(a)* by virtue of being married to the child's father, or under *Fam. Code § 7611(d)* because she received the child into her home and held him out as her own child. It rejected the contention that *Fam. Code § 7611* should apply in maternity cases even when the child's birth mother is present and asserts legal parenthood. Because the child's natural father was known and present in the action, the child could have only one additional parent. Cases in which the courts have applied *Fam. Code § 7611* to recognize a presumed mother have all involved circumstances in which there was no competing claim to be the child's mother or second parent. When both the child's biological father and biological mother have identified themselves and come forward to assert their legal parentage, it is not appropriate to invoke a gender-neutral reading of the paternity presumptions to provide the child with another mother.

In *In re Cody B. (2007) 153 Cal. App. 4th 1004, 63 Cal. Rptr. 3d 652* , a mother's parental rights over her biological son were terminated in a dependency action. The child was adopted by the father of one of the mother's other children. He allowed the child to live part time with the mother. In a subsequent proceeding to remove the child from the father's custody, the mother filed a motion to be designated as the child's presumed mother under *Fam. Code § 7611(d)*, because after her parental rights were terminated, the child continued to live with her and she held him out as her biological son. The juvenile court denied the mother's motion, relying on *Welf. & Inst. Code § 366.26(i)(1)*, which provides that any order permanently terminating parental rights is conclusive and binding, and the court lacks jurisdiction to modify or revoke the order once it has become final. The appellate court upheld the juvenile court's order, rejecting the argument that *Fam. Code § 7630(b)* gives the juvenile court jurisdiction to reconsider the termination of parental rights, because it provides that any interested person may bring an action *at any time* for the purpose of determining the existence or nonexistence of the parent and child relationship presumed under *Fam. Code § 7611(d)*. Proceedings under *Fam. Code § 7630(b)* may be brought at any time *before* parental rights have been terminated under *Welf. & Inst. Code § 366.26*. If *Fam. Code § 7630(b)* were interpreted to allow a parent to seek presumed parent status after termination of parental rights, *Welf. & Inst. Code § 366.26(i)(1)* would be meaningless, and the goals of stability and finality within a reasonable time would be substantially undermined. The appellate court concluded that there is no statute that would allow the mother to be designated a presumed mother after the termination of her parental rights (*153 Cal. App. 4th 1004, 1009-1011)* .

In *Scott v. Superior Court (2009) 171 Cal. App. 4th 540, 89 Cal. Rptr. 3d 843* , a woman who had had an intimate relationship with the father of three minor children sought to join the parents' action under the UPA to seek custody and visitation rights with respect to the children as a presumed or de facto mother. The trial court granted the woman's petition for joinder and ordered the parties to mediate the matter of custody and visitation. The appellate court granted the father's petition for a writ of mandate and directed the court to vacate its order and to issue a new order denying the woman's request for relief due to lack of standing (*171 Cal. App. 4th 540, 542-544)* . The appellate court held that the woman could not be a presumed or de facto mother when the parental rights of the natural mother had not been terminated (*171 Cal. App. 4th 540, 544-547)* . In a same-sex domestic partner relationship, a child may have two natural mothers; in a heterosexual relationship, there can be only one mother (*171 Cal. App. 4th 540, 544-545)* . Therefore, the woman could not be the children's presumed mother under *Fam. Code §§ 7611* and *7650(a)*, and is not an interested party who can initiate a UPA proceeding concerning the children (*171 Cal. App. 4th 540, 545)* .

In *Wynn v. Superior Court (2009) 176 Cal. App. 4th 346, 98 Cal. Rptr. 3d 86*, a woman filed a petition seeking an order correcting her original birth certificate to state the actual names of her birth parents, in place of the fictitious names her mother used when the original certificate was prepared. The court denied her petition on the ground that it lacked legal authority to modify the original birth certificate, because a subsequent certificate was issued on her adoption, which listed her adoptive parents, and this subsequent certificate was her legally operative birth certificate (176 Cal. App. 4th 346, 349-350). The appellate court reversed the order, concluding that the plaintiff qualified as an interested person who could bring an action to adjudicate her parentage, and that the trial court had the authority to adjudicate the facts concerning a possible biological relationship between mother and daughter, even though the

daughter had been adopted (*176 Cal. App. 4th 346, 350, 354-355*).

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Volume 17 Chapters 170-179 PARTNERSHIPS---to---PREMISES LIABILITY
CHAPTER 171 PATERNITY
PART II. FORMS

17-171 California Points & Authorities § 171.36

§ 171.36 Supporting Motion to Set Aside and Vacate Judgment of Paternity--Genetic Testing Indicates That Previously Established Father Is Not Biological Father [Fam. Code § 7646]

[1] FORM

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*]	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION TO
vs.	)	SET ASIDE AND VACATE JUDGMENT OF PA-
_____ [*name*],	)	TERNITY
Defendant.	)	Date: _____
	)	Time: _____
	)	Dept.: _____
		Trial Date: _____

_____

THE JUDGMENT OF PATERNITY IN THE ABOVE-ENTITLED PATERNITY ACTION SHOULD BE SET ASIDE AND VACATED BECAUSE GENETIC TESTING INDICATES THAT _____ [*NAME*] IS NOT THE BIOLOGICAL FATHER OF THE CHILD _____ [*NAME*].

A. Judgment of Paternity May Be Set Aside or Vacated If Genetic Testing Indicates That Established Father Is Not Biological Father. Notwithstanding any other provision of law, a judgment establishing paternity may be set aside or vacated on a motion by the previously established mother of a child, the previously established father of a child, the child, or the legal representative of any of these persons if genetic testing indicates that the previously established father of a child is not the biological father of the child [*Fam. Code § 7646*].

B. Underlying "Judgment" That May Be Set Aside Includes Order, Decree Establishing Paternity,

Determination of Paternity, and Voluntary Paternity Declaration. The underlying "judgment" for purposes of this motion means a judgment, order, or decree entered in a California court that establishes paternity, including a determination of paternity made pursuant to a petition filed under *Welfare and Institutions Code Section 300, 601,* or *602*, or a voluntary declaration of paternity [*see Fam. Code 7645(b)*].

THE COURT MUST ALSO VACATE THE ORDER FOR CHILD SUPPORT AND ARREARAGES ISSUED ON THE BASIS OF THIS ERRONEOUSLY ISSUED JUDGMENT OF PATERNITY.

C. Child Support Order Must Also Be Vacated. If the court grants a motion to set aside or vacate a paternity judgment under *Family Code Sections 7645 through 7649.5*, it must also vacate any order for child support and arrearages issued on the basis of that previous paternity judgment [*Fam. Code § 7648.4*].
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion to vacate and set aside a judgment of paternity judgment, order, or decree entered in a California court that establishes paternity, including a determination of paternity made pursuant to a petition filed under *Welf. & Inst. Code § 300, 601,* or *602*, or a voluntary declaration of paternity [*see Fam. Code § 7645(b)*], on the ground that genetic testing has shown that the established father is not the biological father of the child [*see Fam. Code § 7646*; *see generally, Fam. Code § 7645, et seq.*].

This motion may be brought by the previously established mother of a child, the previously established father of a child, the child, or the legal representative of any of these persons [*see Fam. Code § 7646(a)*; *see also Fam. Code § 7645* (definitions of child, previously established father, previously established mother); *Fam. Code § 7646(a)(1)-(3)* (two-year limitations periods commencing from specified times); *Fam. Code § 7647(a)* (conditions for bringing motion; requirements and contents of motion)].

This motion procedure does not apply in the following circumstances [*see generally, Fam. Code § 7645, et seq.*]:

- If the underlying judgment is in any action for marital dissolution, legal separation, or nullity [*see Fam. Code 7645(b)*].

- If the conclusive presumption applies regarding a child of the marriage when the husband and wife are cohabiting [*see Fam. Code §§ 7540, 7646(b)*].

- If the child was conceived by artificial insemination or pursuant to a surrogacy agreement [*see Fam. Code §§ 7613, 7648.9*].

- If the underlying judgment was made or entered by a tribunal of another state, even if the enforcement of that judgment is sought in California [*Fam. Code § 7648.3(a)*].

- If the underlying judgment was made or entered in California, and genetic tests were conducted prior

to the entry of the judgment that did not exclude the previously established father as the biological father [*Fam. Code § 7648.3(b)*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should show that the judgment of paternity on which the motion is based is one properly subject to a motion to set aside and vacate a paternity judgment under *Fam. Code § 7646(a)*.

[b] Related Pleading and Practice Forms

For forms of allegations, complaint, notice of motion, and declaration in support of setting aside a judgment, and orders granting or denying the motion, see California Forms of Pleading and Practice, Ch. 489, *Relief From Judgments and Orders* (Matthew Bender).

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 171.43* may be used to oppose the motion supported in these points and authorities.

[d] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing motions to vacate and set aside judgments in general, see Ch. 131, *Judgments* .

[3] Additional Authorities

[a] Judgment of Paternity May Be Set Aside or Vacated If Genetic Testing Indicates That Established Father Is Not Biological Father

In *San Mateo County Dept. of Child Support Services v. Clark (2008) 168 Cal. App. 4th 834, 85 Cal. Rptr. 3d 763* , the Department brought an action against the defendant to establish his paternity and obligation to pay child support, based on the declaration of the child's mother that the defendant was the child's biological father. The defendant failed to answer, and the court entered a default judgment establishing his paternity and the child support arrears. The defendant later moved to set aside the judgment of paternity under *Family Code Section 7646*, serving the motion on the Department but not on the child's mother. The court found that the motion was timely, ordered genetic testing, directed "both parties" to report to the Department, and further ordered the child's mother to bring the child to submit genetic samples at the date and time specified by the Department. The court subsequently set aside the paternity judgment because the child's mother failed to comply with the court's order for genetic testing. The appellate court held that the trial court lacked authority to set aside the default judgment of paternity. The unavailability of genetic testing results, because of the mother's noncompliance with a testing order or for whatever reason, is not a condition that empowers the court to vacate a prior paternity judgment. The defendant, as the moving party, has the burden of proving that he was not the biological father by producing genetic tests from an approved laboratory that excluded his paternity. In addition, the court did not have personal jurisdiction over the mother or the child and thus the court's attempt to order them to submit to genetic testing had no effect. The defendant should have joined the mother as a party to the proceeding or served the mother with a deposition subpoena requiring her to produce a genetic sample. The Department could also have issued an administrative order under *Family Code Section 7648.2*, requiring the mother and child to submit to genetic testing.

[b] Child Support Order Must Also Be Vacated

In *County of Los Angeles v. James (2007) 152 Cal. App. 4th 253, 60 Cal. Rptr. 3d 880* , a trial court determined that a man was the father of a child and determined that he was obligated to pay child support. Genetic testing later

determined that the man was not the father. Based on the test results, the man moved to set aside the paternity judgment and to obtain reimbursement of the support payments made. The court set aside the paternity judgment, but determined that the man was not entitled to reimbursement under *Family Code 7648.4*. The appellate court upheld this decision. It noted that *Family Code Section 7648.4* does not permit a child support reimbursement order in favor of an erroneously declared father. This provision enables a declared father to challenge a paternity decree, but also safeguards the child. Allowing a declared father to seek reimbursement from the mother might adversely affect the mother's ability to provide financially for the child. In enacting this provision, the legislature was aware of the harm that paternity fraud inflicts on a declared father, but sought to balance the competing interests of a declared father and a child, and concluded that a right of reimbursement should not be permitted (*152 Cal. App. 4th 253, 258-259)* .

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PART II. FORMS

17-171 California Points & Authorities § 171.37

§ 171.37 Opposing Plaintiff's Motion for Pendente Lite Order for Support, Medical and Hospital Expenses, and Attorney's Fees [Fam. Code §§ 7637, 7640] in Action to Establish Paternity [Fam. Code § 7630]--No Preliminary Finding of Parent-Child Relationship

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*]	)	MEMORANDUM IN OPPOSITION TO
Plaintiff,	)	PLAINTIFF'S MOTION FOR PENDENTE LITE
vs.	)	ORDER
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

A PENDENTE LITE ORDER FOR SUPPORT, MEDICAL AND HOSPITAL EXPENSES, AND ATTORNEY'S FEES IN AN ACTION TO ESTABLISH PATERNITY IS IMPROPER IF THERE IS NO INITIAL FINDING OF A PARENT-CHILD RELATIONSHIP BASED ON A PREPONDERANCE OF THE EVIDENCE GIVEN AT A HEARING.

A. Hearing Must Be Held. An application for a pendente lite order for support, medical and hospital expenses, and attorney's fees in an action to establish the paternity of a child requires a hearing where the defendant must be given the opportunity to be heard and present evidence (*Hodge v. Gould (1969) 274 Cal. App. 2d 806, 808, 79 Cal. Rptr. 245*).

B. Proof of Parentage Jurisdictional Prerequisite. Proof of parentage is a jurisdictional prerequisite for a pendente lite order for support of a child in a parentage action (*Carbone v. Superior Court (1941) 18 Cal. 2d 768, 771, 117 P.2d 872*).

C. Paternity Established by Preponderance of Evidence. The plaintiff in an action to establish the paternity of a child must establish the defendant to be the father of the child by a preponderance of the evidence before the court may make pendente lite orders for support, medical and hospital expenses, and attorney's fees (*Hodge v. Gould (1969) 274 Cal. App. 2d 806, 808, 79 Cal. Rptr. 245*).

[*Optional*] **D. Order Implies Finding of Parentage.** Although a pendente lite order for support of a child in a parentage action implies a finding of the existence of a parent-child relationship, the proceeding need not be so complete nor the evidence so extensive as on the trial of the issues of the case, and the order therefore does not determine those issues nor affect the final judgment (*Carbone v. Superior Court (1941) 18 Cal. 2d 768, 772, 117 P.2d 872*).

[*Optional*] **E. Allegations in Complaint Insufficient.** If defendant denies paternity by his verified answer in a paternity action, and no evidence, oral or documentary, is introduced by plaintiff at the hearing, the evidence on the issue of paternity cannot preponderate in plaintiff's favor and there is no legal basis on which the court may make a pendente lite order for support, medical and hospital expenses, or attorney's fees (*Hodge v. Gould (1969) 274 Cal. App. 2d 806, 808, 79 Cal. Rptr. 245*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion for a pendente lite order for support, medical and hospital expenses, and attorney's fees in an action brought under the Uniform Parentage Act [*see Fam. Code § 7640*]. For a form of a memorandum in support of such a motion and consideration of the availability of temporary support under the UPA, see *§ 171.24*. It may be submitted in an action commenced before the birth of the child [*see Fam. Code § 7633*], or after the child has been born.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Points and Authorities

For forms of memoranda supporting and opposing motions for orders for attorney's fees, see Ch. 25, *Attorney's Fees* .

[3] Discussion of Authorities

[a] Hearing Must Be Held

The factual background of ***Hodge v. Gould*** *(1969) 274 Cal. App. 2d 806, 79 Cal. Rptr. 245* , is discussed in *§*

171.24[3][b]. In discussing the authority of a court in granting an application for a pendente lite order for support, medical and hospital expenses, and attorney's fees, the court indicated that before such orders can be made, a hearing must be held, and the defendant must be given the opportunity to be heard and to present evidence. In addition, the plaintiff must establish the defendant to be the father of the child by a preponderance of the evidence. The court also stated that if a defendant denies paternity by a verified answer, and no evidence, oral or documentary, is introduced by the plaintiff at the hearing, the evidence on the issue of paternity cannot preponderate in plaintiff's favor and there is no legal basis on which a court can make a pendente lite order for support, medical and hospital expenses, and attorney's fees (*274 Cal. App. 2d 806, 808)* .

[b] Proof of Parentage Jurisdictional Prerequisite

The factual background of ***Carbone v. Superior Court*** *(1941) 18 Cal. 2d 768, 117 P.2d 872* , is discussed in *§ 171.24[3][a]*. In discussing the authority of a court to grant pendente lite orders for support, medical and hospital expenses, and attorney's fees, the court stated that proof of parentage is a jurisdictional prerequisite for an order to support a child just as the existence of the marriage is a jurisdictional prerequisite for the right of the court to order support, costs, and counsel fees pendente lite in an action for divorce. The court added that even though a defendant in an action for divorce denies the existence of the marriage, the court may nevertheless make the order if defendant is given an opportunity to be heard and the marriage is proved by a preponderance of the evidence. The application is determined on a record of its own and results in an appealable judgment independent of the final judgment in the action. Although such an order implies a finding of the existence of the relationship, the proceeding need not be so complete nor the evidence so extensive as on the trial of the issues of the case, and the order therefore does not determine those issues nor affect the final judgment. Nevertheless, there must be a hearing and the defendant must be given an opportunity to be heard and to present his evidence (*18 Cal. 2d 768, 771-772)* .

[c] Paternity Established by Preponderance of Evidence

Hodge v. Gould *(1969) 274 Cal. App. 2d 806, 79 Cal. Rptr. 245* , is *discussed under § 171.37[3][a]*.

[d] Order Implies Finding of Parentage

Carbone v. Superior Court *(1941) 18 Cal. 2d 768, 117 P.2d 872* , is *discussed under § 171.37[3][b]*.

[e] Allegations in Complaint Insufficient

Hodge v. Gould *(1969) 274 Cal. App. 2d 806, 79 Cal. Rptr. 245* , is *discussed under § 171.37[3][a]*.

[4] Additional Authorities

[a] Paternity Established by Preponderance of Evidence

In *In re Spencer W. (1996) 48 Cal. App. 4th 1647, 56 Cal. Rptr. 2d 524* , the court of appeal affirmed a trial court's judgment, which determined that the defendant did not have a valid claim, and rejected the defendant's claim of presumed-father status. *Fam. Code § 7611* requires that a defendant demonstrate, by a preponderance of the evidence, not only that he received the child into his home, but that he also had openly and publicly acknowledged paternity. Presumed-father status is demonstrated by a commitment toward developing a substantial familial relationship with the child. Under the totality of circumstances demonstrated here, defendant failed to demonstrate that such a relationship existed. The court found that defendant did not "receive" the child into his home; the mother merely permitted defendant to reside with her and the child. It was clear from the evidence that defendant's residence with the child did not indicate a commitment toward the child, but rather reflected actions based on personal convenience and self-interest. Further, the evidence showed that defendant did not satisfy the requirement of openly and publicly admitting paternity, in that defendant did not claim paternity beyond his family and friends, he did not take formal steps to place his name

on the child's birth certificate, and did not assume any child support obligations. Thus, the appellate court affirmed the trial court's ruling that defendant had failed to establish that he was the child's presumed father (*48 Cal. App. 4th 1647, 1654)* .

California Points & Authorities

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Volume 17 Chapters 170-179 PARTNERSHIPS---to---PREMISES LIABILITY
CHAPTER 171 PATERNITY
PART II. FORMS

17-171 California Points & Authorities § 171.38

§ 171.38 Opposing Contention That Paternity Determination Is Barred by Conclusive Presumption That Mother's Husband Is Child's Father [Fam. Code § 7540]--Application of Presumption Would Violate Constitutional Rights of Biological Father

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE CONCLUSIVE PRESUMPTION OF FAMILY CODE SECTION 7540, THAT A CHILD BORN TO A MARRIED WOMAN IS A CHILD OF THE MARRIAGE IF CONCEIVED WHILE THE MOTHER WAS COHABITING WITH HER HUSBAND WHO WAS NOT IMPOTENT OR STERILE, SHOULD NOT BE APPLIED IN THIS CASE BECAUSE THE BIOLOGICAL FATHER OF A CHILD AND THE CHILD HAVE A CONSTITUTIONAL RIGHT TO A PARENT-CHILD RELATIONSHIP.

A. Constitutional Protection of Parent-Child Relationship. The right to rear one's own biological children is a cognizable and substantial right that is within the protection of the Due Process and *Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States*, regardless of the marital status of the parents of the child (*Stanley v. Illinois (1972) 405 U.S. 645, 651-652, 92 S. Ct. 1208, 31 L. Ed. 2d 551*).

B. Balancing Respective Private and State Interests. Notwithstanding *Family Code Section 7540*, the question of whether a man who alleges that he (rather than the husband) is the father of a child born to a married woman may offer evidence of his paternity must be resolved by weighing the competing private and state interests (*In re R. (1975) 13 Cal. 3d 636, 648, 119 Cal. Rptr. 475, 532 P.2d 123*).

[*Optional*] **C. Respective Relationships of Putative Father and Presumed Father With Child.** A putative father has a significant interest in protecting his ongoing relationship with his child, which weighs against the application of the conclusive presumption of *Family Code Section 7540*; conversely, the interest of the state in conclusively applying the presumption may be insufficient if there is no ongoing relationship between the presumed father and the child (*see Comino v. Kelley (1994) 25 Cal. App. 4th 678, 684, 30 Cal. Rptr. 2d 728* ; *In re Melissa G. (1989) 213 Cal. App. 3d 1082, 1089, 261 Cal. Rptr. 894*).

[*Optional*] **D. Insufficient State Interest if No Intact Family.** The interest of the state in applying the conclusive presumption of *Family Code Section 7540* may be insufficient if there is neither a marital union nor a family unit to preserve (*Comino v. Kelley (1994) 25 Cal. App. 4th 678, 684, 30 Cal. Rptr. 2d 728* ; *see In re R. (1975) 13 Cal. 3d 636, 650, 119 Cal. Rptr. 475, 532 P.2d 123* ; *In re Melissa G. (1989) 213 Cal. App. 3d 1082, 1088-1089, 261 Cal. Rptr. 894*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the presumption of *Fam. Code § 7540*, that a child born to a married woman who was cohabiting with her husband who was not impotent or sterile at the time of conception is a child of the marriage [*see § 171.25*], should not be applied. They are for use by a putative father, that is, a man who alleges that he, and not the mother's husband, is the actual biological father of the child.

Paragraph A sets forth the basic constitutional principle that the parent-child relationship is a fundamental interest protected by the *Fourteenth Amendment*. Paragraph B sets forth the California Supreme Court's balancing test of state and individual interests to be applied in determining whether or not the presumption applies conclusively. Paragraphs C, and D then set forth fact situations supporting the nonapplication of the presumption.

This form may be combined with points and authorities pertaining to the specific procedural context in which the application of the presumption is brought before the court. It may be used in a memorandum of points and authorities in connection with a pretrial motion, such as a demurrer, motion for summary judgment, or motion for summary adjudication of the issue of paternity. It may also be used in a trial or an appellate brief.

Because the application of the presumption is controlled by a balancing test, proper presentation and development of the facts is crucial. It should first be established that the man opposing the operation of the presumption is the actual biological father of the child [*see Fam. Code § 7541*; § 171.41]. Some or all of the following facts should then be developed: (1) there is a significant and ongoing parental relationship between that man and the child; (2) there is no significant or ongoing relationship between the presumed father (the mother's husband at the time of conception) and the child; (3) there is no existing family unit that includes the child and the presumed father. Other facts showing detriment to the child if the presumption is applied should be included.

In an appropriate case, the points and authorities in this form may be submitted in opposition to the contention supported by the points and *authorities in § 171.26*.

[3] Discussion of Authorities

[a] Constitutional Protection of Parent-Child Relationship

Stanley v. Illinois *(1972) 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551* , is the landmark United States Supreme Court case that established constitutional protections for unmarried fathers. Stanley lived with the mother of his children off and on for 18 years, but they never married. When the mother died, the state made his children wards of the state and placed them with court-appointed guardians. Under Illinois law, the children of unwed fathers automatically became wards on the death of the mother. The law operated as a conclusive presumption that unwed fathers are unfit to rear their children.

The Supreme Court held that this operation of the statute as a conclusive presumption violated Stanley's rights under the Due Process and *Equal Protection Clauses of the Fourteenth Amendment*. It held that all parents are constitutionally entitled to a hearing on the issue of their fitness as parents before their children are removed from their custody,

regardless of marital status (*405 U.S. 645, 657-658)* .

In reaching this conclusion, the Court stated that the private interest of a man in the children that he has sired and raised undeniably warrants deference, and, absent a powerful countervailing interest, protection. Nor has the law refused to recognize family relationships unlegitimized by a marriage ceremony. The Court labeled Stanley's interest in retaining custody of his children as "cognizable and substantial" (*405 U.S. 645, 651-652)* . Thus, *Stanley v. Illinois* established the constitutional principle that the father-child relationship is a fundamental interest under the *Fourteenth Amendment* that extends to all fathers regardless of marital status.

[b] Balancing Respective Private and State Interests

In re Lisa R. *(1975) 13 Cal. 3d 636, 119 Cal. Rptr. 475, 532 P.2d 123* , was the California Supreme Court's first refusal to conclusively apply a statutory presumption of paternity regarding the child of a married woman. The case arose in Juvenile Court. According to the mother, Lisa was conceived during an extramarital relationship with Victor R. while she was separated from her husband. The husband subsequently died.

In 1969, Lisa was adjudged a dependent of the court due to neglect by the mother. Throughout the dependency proceedings, Victor was identified as Lisa's father although there was no finding of paternity. After the mother also died, Victor attempted to make an offer of proof that he was Lisa's father and sought parental rights. The juvenile court ruled that he lacked standing to appear in the proceeding. Under the then applicable law (former Evid. Code § 621), the child of a married woman who was born during marriage was presumed to be a child of the marriage (i.e., the husband was presumed to be the father). The presumption was rebuttable, but only by the mother, her husband, and the state in a criminal proceeding. Thus, it operated conclusively as to Victor.

The California Supreme Court reversed and granted Victor standing to assert his paternity. The Court based its holding on the constitutional principles of *Stanley v. Illinois* (*discussed under § 171.38[3][a]*). However, the Court did not hold the conclusive operation of the presumption to be unconstitutional under all circumstances. Rather, it held that the question of whether a man claiming to be the biological father of a child born to a married woman can rebut the presumption that the husband is the father must be resolved by weighing the competing private and state interests (*13 Cal. 3d 636, 648)* .

The private interest involved is the constitutional right of the father to a parental relationship with the child. The weight to be given that interest, however, depends on the actual facts. The countervailing interests of the state are the protection of the child, promoting marriage, and not impugning a family unit (*13 Cal. 3d 636, 649-650)* . But again, the weight to be given those interests depends on the facts [*see § 171.38[4][a]*].

On the facts and circumstances before it, the Court held that a presumption that precluded Victor's right to offer evidence that he was Lisa's father was unreasonable, arbitrary, and capricious, and a denial of due process (*13 Cal. 3d 636, 651)* .

[c] Respective Relationships of Putative Father and Presumed Father With Child

In ***Comino v. Kelley*** *(1994) 25 Cal. App. 4th 678, 30 Cal. Rptr. 2d 728* , Stephanie Kelly and Jeffrey Moyer married only for mutual convenience, as a way of obtaining certain military benefits that were only available to married persons. While they shared an apartment, they did not have a sexual relationship. She dated other men, including Paul Comino. She conceived a child in April 1988, while still cohabiting with "husband" Jeffrey. She told Paul that he was the father, identified him as such on the birth certificate, and gave the child his surname. For two and one half years, Paul functioned as the child's father and bonded with the child. Then, in April 1991, Stephanie moved out of the family residence, told Paul that he might not be the father, and threatened to restrict his access to the child.

Paul then filed an action to establish his paternity. Jeffrey answered denying that he was the father, but Stephanie defended, asserting that the conclusive presumption of what is now *Fam. Code § 7540* required that Jeffrey and not Paul be adjudged the father of the child as a matter of law. The trial court refused to apply the presumption conclusively and adjudged Paul to be the father of the child.

The court of appeal affirmed. It applied the balancing test under which competing state and private interests are weighed to determine whether the presumption should be applied in a given case [*see § 171.38[3][b]*]. On the facts before it, the court found that none of the policies underlying the presumption of *Fam. Code § 7540* would be served by its application. It stated that to the extent that there is a recognizable societal concern for the child to have a father, that concern is served by *avoiding* the presumption. Applying the presumption would prevent the child from enjoying a parental relationship with the only man whom he had ever known as a father. Further, the state's interest in ensuring that the child had a source of child support was furthered by the rejecting the presumption and awarding to Paul the responsibility that he sought to assume (*25 Cal. App. 4th 678, 684-685)* .

In re Melissa G. *(1989) 213 Cal. App. 3d 1082, 261 Cal. Rptr. 894* , was a juvenile court proceeding. Rita, while married to Fermin, gave birth to Melissa. Eight days later, Rita and Fermin separated, and Rita began living with Felix. Fermin was listed as Melissa's father on her birth certificate and was named as a child of the marriage in their dissolution proceeding. However, Rita told a social worker that Felix was really Melissa's father, a fact subsequently confirmed to a 99.1 percent probability by blood tests. Rita, Felix, and Melissa lived together in a family unit for four years, during which time Rita and Felix married and had another daughter.

Subsequently, Melissa was adjudged a dependent of the juvenile court due to neglect. In the juvenile court proceedings, Fermin contended that the conclusive presumption of *Fam. Code § 7540* should apply, meaning that he should be considered as Melissa's father as a matter of law. The court concluded that it had to apply the presumption and could not consider the blood test results. It adjudged Fermin to be Melissa's father.

On appeal, counsel for Melissa, Felix, and the county social services department all asked the court to reverse the paternity adjudication, and the court of appeal agreed. It noted the balancing test of competing state and private interests from *Lisa R., discussed under § 171.38[3][b]* (*213 Cal. App. 3d 1082, 1085-1086)* . In balancing the interests, the court gave weight to the fact that Felix lived with Melissa for almost four years beginning shortly after her birth. In contrast, Fermin had no ongoing, or any relationship with Melissa. It also considered Melissa's relationship with her biological sister, which would be affected if Fermin were conclusively presumed to be her father (*213 Cal. App. 3d 1082, 1089)* .

[d] Insufficient State Interest if No Intact Family

The facts of ***Comino v. Kelley*** *(1994) 25 Cal. App. 4th 678, 30 Cal. Rptr. 2d 728* , are set forth under *§ 171.38[3][c]*. In rejecting the conclusive operation of the presumption of *Fam. Code § 7540*, the court of appeal gave weight to the fact that there was neither a marital union nor a family unit to preserve. The so-called marriage of the mother was one in name only, and the child never lived in a family unit with the mother and her husband. The only home he had ever known was with the mother and the putative father (*25 Cal. App. 4th 678, 684)* .

The facts and principal holding of ***In re R.*** *(1975) 13 Cal. 3d 636, 119 Cal. Rptr. 475, 532 P.2d 123* , are presented under *§ 171.38[3][b]*. In applying the balancing test, the California Supreme Court gave weight to the fact that both the mother and the presumed father were deceased. Therefore, the legitimate state interests of promoting marriage and not impugning a family unit could not be advanced by applying the presumption. There simply was no family unit to preserve (*13 Cal. 3d 636, 650)* .

The facts of ***In re Melissa G.*** *(1989) 213 Cal. App. 3d 1082, 261 Cal. Rptr. 894* , are set forth under *§ 171.38[4][a]*. In rejecting the conclusive operation of the presumption of *Fam. Code § 7540*, the court of appeal noted the United States

Supreme Court plurality decision in which the constitutionality of the presumption was upheld [*see Michael H. v. Gerald D. (1989) 491 U.S. 110, 109 S. Ct. 2333, 105 L. Ed. 2d 91* , discussed in *§ 171.26[2][a]*]. However, it stated that the Supreme Court's affirmance in that case was limited to situations in which the mother and her husband wish to rear the wife's child jointly, and that a constitutionally protected interest might be implicated if no such union existed. It found that to be the situation in the case at hand. The marital relationship between the mother and the presumed father-husband ended only eight days after the child's birth. The mother and the putative father reared both the child and her biological sister until shortly before they were made dependents of the juvenile court. The categorical preference for an extant marital union that the plurality recognized as being expressed in the statutory presumption had no application to the facts of the case (*213 Cal. App. 3d 1082, 1088-1089)* .

[4] Additional Authorities

[a] Respective Relationships of Putative Father and Presumed Father With Child

In *Brian C. v. Ginger K. (2000) 77 Cal. App. 4th 1198, 92 Cal. Rptr. 2d 294* , the court of appeal held that a trial court erred in applying the "conclusive" presumption of *Fam. Code § 7540* and in finding that a natural father lacked standing to bring an action to be declared the legal father of a married woman's child, when the child was not "born into" an extant marital union and the natural father had developed a substantial parent-child relationship immediately after the child's birth and for one and one-half years thereafter. Although the wife was living with her husband at the time the child was conceived by another man, the child was born after the couple had separated and the wife was living with the child's biological father. The biological father was named on the child's birth and baptismal records as her father and he cared for the child on a daily basis for a year, after which the child's mother resumed living with her husband and terminated the biological father's contact with the child.

In reversing a grant of summary judgment to the child's mother in a paternity action brought by the biological father, the appellate court reasoned that (1) the child had not been "born into" an extant marital union, (2) the biological father was apparently willing to accept the legal rights and responsibilities of fatherhood and the parties had functioned as a family during the child's first year, (3) given these facts, the state's interest in upholding the integrity of the marital family was relatively weak and any state interest in reconstituting a marital union was undercut by the father-child relationship that was established, and (4) there was a strong private interest in continuing an existing parent-child relationship, based on the substantial time period that elapsed between the child's birth and mother's return to her husband. Given these facts, the biological father's interest in the existing relationship could not be constitutionally cut off by application of the "conclusive" paternity presumption, and therefore, the trial court's grant of summary judgment to the child's mother based only on the facts of marital cohabitation at the time of conception and of her husband's fertility was in error (*77 Cal. App. 4th 1198, 1216-1219)* .

In *Steven W. v. Matthew S (1995) 33 Cal. App. 4th 1108, 39 Cal. Rptr. 2d 535* , the contest was between Matthew, the mother's husband, and Steven, a subsequent cohabitant with whom she was romantically involved. The conclusive presumption of *Fam. Code § 7540* did not apply because Matthew could not establish cohabitation at the time of conception.

Each man was a presumed father under what is now *Fam. Code § 7611*, Matthew under *Fam. Code § 7611(a)* and *(d)*, by virtue of the marriage and receiving the child into his home, and Steven under *Fam. Code § 7611(d)*. However, although Matthew proved to be the actual biological father, Steven actually functioned as the child's father. He was listed as the father on the birth certificate, the child was given his surname, he generally cared for the child while cohabiting with the mother and child, and continued to share custody of and provide support for the child after the relationship ended. On these facts, the trial court's held that Steven's presumption should prevail [*see Fam. Code § 7612(b)* (if two presumptions apply, one founded on weightier policy considerations and logic controls)]. It found that Steven had the more prolonged, intensive, and continuing relationship with the child (*33 Cal. App. 4th 1108, 1113)* . The court of appeal affirmed, noting that courts have repeatedly held that the extant father-child relationship is to be

preserved at the cost of biological ties (*33 Cal. App. 4th 1108, 1115-1117)* .

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CHAPTER 171 PATERNITY
PART II. FORMS

17-171 California Points & Authorities § 171.39

§ 171.39 Opposing Contention That Paternity Determination Is Barred by Conclusive Presumption That Mother's Husband Is Child's Father [Fam. Code § 7540]--Presumption Need Not Be Applied if Its Underlying Policies Are Not Furthered

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE CONCLUSIVE PRESUMPTION OF FAMILY CODE SECTION 7540, THAT A CHILD BORN TO A MARRIED WOMAN IS A CHILD OF THE MARRIAGE IF CONCEIVED WHILE THE MOTHER WAS COHABITING WITH HER HUSBAND WHO WAS NOT IMPOTENT OR STERILE, SHOULD NOT BE APPLIED IN THIS CASE BECAUSE THE UNDERLYING POLICIES THAT SUPPORT THE PRESUMPTION WOULD NOT BE FURTHERED.

A. Balancing Respective Private and State Interests. [*See § 171.38, Paragraph B.*]

B. Underlying Policies Not Furthered. Although the presumption of *Family Code Section 7540* is "conclusive," it need not be applied if its underlying policies are not furthered (*County of Orange v. Leslie B. (1993) 14 Cal. App. 4th 976, 980, 17 Cal. Rptr. 2d 797* ; *see Alicia R. v. Timothy M. (1994) 29 Cal. App. 4th 1232, 1237, 34 Cal. Rptr. 2d 868*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the presumption of *Fam. Code § 7540*, that a child born to a married woman who was cohabiting with her husband who was not impotent or sterile at the time of conception is a child of the marriage [*see § 171.25*], should be applied. Unlike the points and *authorities in § 171.38*, which are for use by a putative father who wants to establish his paternity of the child, these points and authorities are for use by a party who wants to avoid the presumption in order to establish the putative father's paternity over his opposition.

This form may be combined with points and authorities pertaining to the specific procedural context in which the application of the presumption is brought before the court. It may be used in a memorandum of points and authorities in connection with a pretrial motion, such as a demurrer, motion for summary judgment, or motion for summary adjudication of the issue of paternity. It may also be used in a trial or an appellate brief. For further discussion, see *§ 171.38[2]*.

In an appropriate case, the points and authorities in this form may be submitted in opposition to the contention supported by the points and *authorities in § 171.26*.

[3] Discussion of Authorities

[a] Underlying Policies Not Furthered

County of Orange v. Leslie B. *(1993) 14 Cal. App. 4th 976, 17 Cal. Rptr. 2d 797* , represents a significant departure from prior jurisprudence on the application of the conclusive presumption of *Fam. Code § 7540*, that a child born to a married woman who was cohabiting with her husband who was not impotent or sterile at the time of conception is a child of the marriage [*see § 171.25*]. The case was a district attorney support action under *Welf. & Inst. Code § 11350.1* brought against Leslie, the biological father of the child, Jennifer. Jennifer was conceived while her mother Catherine was married to and cohabiting with Gregory, but they separated and divorced shortly thereafter. No father was named on Jennifer's birth certificate, and for twelve years, neither Leslie nor Gregory knew that Catherine had given birth to Jennifer.

Twelve years later, the county filed a support action against Leslie. Voluntary blood tests showed a 99.25 percent probability that Leslie was Jennifer's father. Nevertheless, Leslie defended by relying on the conclusive presumption of *Fam. Code § 7540*, which would have made Gregory Jennifer's father as a matter of law. The trial court refused to apply the presumption, and adjudicated Leslie to be the father.

The court of appeal affirmed. It noted that while the presumption is "conclusive," courts have refused to apply it if its underlying policies are not furthered [*see* cases discussed in *§ 171.38*]. Traditionally, it was stated that the presumption was designed to preserve the integrity of the family unit, to protect children from the legal and social stigma of illegitimacy, and to promote individual rather than state responsibility for child support. However, the court concluded that none of these policies would be furthered by application of the presumption to the facts in this case (*14 Cal. App. 4th 976, 980)* .

The court noted the significant factual difference between the case before it and those cases in which courts had previously addressed the operation of the presumption. It noted that the possible due process violation arises if a putative father is told that he has no right to participate in his child's life because another man is the child's conclusively presumed father. If the child and presumed father are living together in a family unit, application of the presumption does not deny a putative father due process because the policies behind the presumption are significantly furthered [*see § 171.26*]. In contrast, Leslie sought avoidance of participation rather than involvement. The court held that the presumption could not be applied for that purpose (*14 Cal. App. 4th 976, 980)* .

The court then surveyed the previous cases on both sides of the issue. In discussing *In re R. (1975) 13 Cal. 3d 636, 648, 119 Cal. Rptr. 475, 532 P.2d 123* (discussed in *§ 171.38[3][b]*), the court noted the balancing test to determine whether applying the presumption violated the due process rights of a putative father who wished to rebut it. It stated that logic dictated that the same test should apply to determine whether *not* applying the presumption would violate the putative father's due process rights (*14 Cal. App. 4th 976, 981)* .

The appellate court concluded that the trial court had correctly applied the balancing test and correctly determined that

applying the presumption would lead to a ridiculous result. If Leslie prevailed, Jennifer would be given a father whom she knows is not her biological father, to preserve the integrity of a family unit that never existed. It considered the "stigma" of illegitimacy to no longer be a relevant concern [*see* NOTE in § 171.26[3][b]]. Finally, the state's interest in establishing a source of child support was completely served by declaring Leslie to be the legal father. In conclusion, the court agreed with the trial judge, that applying the presumption would lead to an absurd result that defies reason and common sense. To apply the presumption is to rely on a fiction to establish a legal fact that is known to be untrue, in order to protect policies that, on the facts of the case, do not exist (*14 Cal. App. 4th 976, 983)* .

The facts of ***Alicia R. v. Timothy M.*** *(1994) 29 Cal. App. 4th 1232, 34 Cal. Rptr. 2d 868* , are essentially the same as *County of Orange v. Leslie B.* The mother was married to and cohabiting with one man (although the marriage was void and subsequently annulled) when she conceived a child by another man. She filed a paternity action against the true biological father, who defended on the ground that the conclusive presumption of *Fam. Code § 7540* made the "husband" the child's father as a matter of law. The trial court determined that it would be a "travesty" to apply the presumption.

The appellate court agreed, finding the logic of *Leslie B.* and *Lisa R.* to be equally applicable to the case. The court cited *Leslie B.* for the proposition that logic dictated that the same balancing test used to determine whether applying the presumption violated the due process rights of a putative father wishing to rebut it should apply to determine whether not applying the presumption might also violate his due process rights (*29 Cal. App. 4th 1232, 1237)* .

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17-171 California Points & Authorities § 171.40

§ 171.40 Opposing Contention That Paternity Determination Is Barred by Conclusive Presumption That Mother's Husband Is Child's Father [Fam. Code § 7540]--Party Is Estopped From Relying on Presumption

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Party relying on presumption*] SHOULD BE ESTOPPED BY HIS/HER CONDUCT FROM RELYING ON THE CONCLUSIVE PRESUMPTION OF FAMILY CODE SECTION 7540 THAT A CHILD BORN TO A MARRIED WOMAN IS A CHILD OF THE MARRIAGE IF CONCEIVED WHILE THE MOTHER WAS COHABITING WITH HER HUSBAND WHO WAS NOT IMPOTENT OR STERILE.

Estoppel by Conduct. A party who represents to a child that the mother's husband is not the child's father may be estopped from relying on the presumption of *Family Code Section 7540* (*Guardianship of Ethan S. (1990) 221 Cal. App. 3d 1403, 1415-1417, 271 Cal. Rptr. 121*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the presumption of *Fam. Code § 7540*, that a child born to a married woman who was cohabiting with her husband who was not impotent or sterile at the time of conception is a child of the marriage [*see § 171.25*] should not be applied. These points and authorities focus on the conduct of the party who wants to rely on the presumption, rather than on the constitutional rights of the party who is opposing the presumption (*see § 171.38*) or the underlying policies behind the presumption (*see § 171.39*).

This form may be combined with points and authorities pertaining to the specific procedural context in which the application of the presumption is brought before the court. It may be used in a memorandum of points and authorities in connection with a pretrial motion, such as a demurrer, motion for summary judgment, or motion for summary adjudication of the issue of paternity. It may also be used in a trial or an appellate brief. For further discussion, § 171.38[2].

Because estoppel is based on conduct, proper presentation and development of the facts is crucial. It should first be established another man is, and the husband is not, the actual biological father of the child [*see Fam. Code § 7541*; *§ 171.41*]. The crucial facts are that the party who is relying on the presumption represented to the child that the mother's husband was not the father of the child, and that the child relied on the representation by developing a true parent-child relationship with his or her actual biological father. Other facts showing detriment to the child if the presumption is applied should be included.

[3] Discussion of Authorities

[a] Estoppel by Conduct

In ***Craig L. v. Sandy S.*** *(2004) 125 Cal. App. 4th 36, 22 Cal. Rptr. 3d 606* , the court held that when a mother and her husband have allegedly permitted the biological father to receive the child into his home and hold the child out as his child, the presumption of *Fam. Code § 7540* is not "conclusive." Instead, the biological father may assert the rebuttable presumption of paternity provided by *Fam. Code § 7611(d)*, the husband may assert the rebuttable presumption of paternity provided by *Fam. Code § 7611(a)*, and the court must decide under *Fam. Code § 7612* which presumption shall prevail (*125 Cal. App. 4th 36, 45-53)* .

Guardianship of Ethan S. *(1990) 221 Cal. App. 3d 1403, 271 Cal. Rptr. 121* , involved consolidated proceedings through which both the mother's husband and the child's true biological father sought parental rights and custody of a child. The child, Ethan, was born in July of 1980 while the mother was married to and living with Lewis Headrick. However, Headrick was traveling, and the mother was having an extramarital affair with Wayne S. when Ethan was conceived. She was sure that Wayne, and not Headrick, was the child's actual biological father, although the fact apparently was never confirmed by blood tests. Nevertheless, with Headrick's consent, she gave Wayne's surname to Ethan, and Wayne consented to being designated as Ethan's father on the birth certificate. Ethan was told, and always believed, that Wayne was his father. He called him "dad" and called Headrick "Lewis."

The mother and Headrick separated in 1981 and divorced in 1983. The mother moved to Australia in 1984, without Ethan. She took no further role in the proceedings regarding his paternity and custody other than to provide an affidavit in support of Wayne (*221 Cal. App. 3d 1403, 1407)* .

Ethan lived with Headrick until 1985, during which time Headrick consistently represented to the county welfare department and others that Wayne, and not he, was Ethan's father. In March of 1985, Ethan went to live with Wayne with Headrick's permission. Despite the change in custody, Headrick succeeded in having himself appointed Ethan's guardian, although Ethan continued to live with Wayne. Headrick listed Wayne as Ethan's father in his guardianship filings, although Wayne apparently received no actual notice of the proceedings (*221 Cal. App. 3d 1403, 1407-1408)* .

Eventually, the two men had a falling out, and each began proceedings to obtain custody of Ethan. Wayne filed a paternity action, and Headrick sought a preliminary injunction in his guardianship matter compelling the return of Ethan to him. After numerous motions and hearings, the ultimate result was that the trial court in the consolidated matters adjudged Wayne to be the child's father, granted him custody, and terminated the guardianship.

Headrick appealed, contending that the court erred in not applying the presumption of *Fam. Code § 7540* conclusively to affirm his paternity. Without grappling with the constitutional balancing test [*see §§ 171.26*, *171.38*], the court of appeal upheld the judgment on equitable estoppel grounds.

The court set forth the basic equitable principle of estoppel, that a party who, by his or her own conduct or statements, intentionally and deliberately has led another to believe a particular thing to be true and to act on that belief, may not, in any litigation arising out of the conduct or statements, be permitted to contradict it. In this case, it was Ethan and not

Wayne who was deemed to have relied on Headrick's conduct and statements (*221 Cal. App. 3d 1403, 1415-1416)* .

The court extrapolated from cases in which a man who was *not* actually the biological father of a child was estopped by his conduct from later denying his paternity and avoiding parental duties [*see In re Marriage of Johnson (1979) 88 Cal. App. 3d 848, 852, 152 Cal. Rptr. 121* ; *In re Marriage of Valle (1975) 53 Cal. App. 3d 837, 841, 126 Cal. Rptr. 38]* . In these cases, in order to establish an estoppel, the putative father must have represented to the child that he was the father, and the child must have relied on the representation by accepting and treating the putative father as his father (*221 Cal. App. 3d 1403, 1416)* .

In the case before it, Headrick had at all times represented to the child that he was *not* the father, and Ethan relied on the representation by accepting and treating Wayne as his father. He has built a life-long relationship with Wayne and never formed parental bonds with Headrick. On these facts, the court found that all elements of estoppel were present as a matter of law on the record (*221 Cal. App. 3d 1403, 1416-1417)* . It might be additionally noted that the traditional application of estoppel involves treating something as true that really isn't true because of the reliance element. In this case, estoppel involves treating as true something that actually is true (Wayne's paternity), but that is made untrue purely by a statutory presumption.

[4] Additional Authorities

[a] Estoppel by Conduct

In *In re Marriage of Pedregon (2003) 107 Cal. App. 4th 1284, 132 Cal. Rptr. 2d 861* , the court of appeal held that a stepfather was required to pay child support for his former wife's son under the doctrine of "parentage by estoppel," even though the stepfather was not the child's biological father. Although the stepfather rebutted the *Fam. Code § 7611(d)* paternity presumption by showing that he was not the child's biological father, the appellate court found that such rebuttal was not determinative; instead, the issue was whether he was obligated to pay child support under the doctrine of parentage by estoppel. This doctrine originated with *Clevenger v. Clevenger (1961) 189 Cal. App. 2d 658, 11 Cal. Rptr. 707* , which predicated the doctrine on (1) a child's acceptance of a putative father's express or implied representation of being the child's natural father, and (2) a representation of such long continuance that it establishes a paternal relationship between a putative father and child, and frustrates the opportunity of discovering the child's natural father. Here, the stepfather held himself out to be the natural father for a lengthy period of time, and the child considered him to be his father. Furthermore, the stepfather had encouraged his former wife to disregard the biological father, and she had lost contact with him. There was substantial evidence to support a finding of parentage by estoppel, and the trial court abused its discretion by not ordering the husband to pay child support as the putative father (*107 Cal. App. 4th 1284, 1288-1290)* .

In *County of San Diego v. Arzaga (2007) 152 Cal. App. 4th 1336, 62 Cal. Rptr. 3d 329* , a man appealed from a judgment in favor of the county finding him to be the legal father of a child under the doctrine of parentage by estoppel. The appellate court reversed the judgment, concluding that a finding of parentage by estoppel in this case was prevented by the trial court's finding that the man did not know that he was not the biological father and only stopped acting as such when the genetic test results that were received in the action showed that he was not the biological father. The appellate court agreed with the man's contention that the evidence did not establish the elements of parentage by estoppel as set out in *Clevenger v. Clevenger (1961) 189 Cal. App. 2d 658, 11 Cal. Rptr. 707* and in subsequent cases that have followed it. The appellate court noted that he could not find any case applying paternity by estoppel to an alleged father when the facts established that the father acted without knowledge that he was not truly the child's biological parent. To the contrary, it noted that in each case that applied the doctrine it was apparent the father knew the true facts. It concluded that while the court is sensitive to the emotional detriment that can result to a child who has relied on the conduct of a person who has held himself out as the child's father, it would be unfair to apply this equitable doctrine to an individual whose conduct was based on his *mistaken* belief that he actually was the child's natural father (*152 Cal. App. 4th 1336, 1343-1345)* .

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17-171 California Points & Authorities § 171.41

§ 171.41 Opposing Contention That Motion for Blood or Other Genetic Tests Is Time-Barred [Fam. Code § 7541(b), (c)]--Limitations on Right of Rebuttal Do Not Apply if Conclusive Presumption of Husband's Paternity Does Not Apply

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE TIME LIMITATIONS OF FAMILY CODE SECTION 7541 SHOULD NOT BE APPLIED TO _____ [*specify party, e.g.,* PETITIONER'S] MOTION FOR _____ [BLOOD *or, specify other applicable genetic test*] TESTS BECAUSE THE CONCLUSIVE PRESUMPTION OF FAMILY CODE SECTION 7540, THAT A CHILD BORN TO A MARRIED WOMAN IS A CHILD OF THE MARRIAGE IF CONCEIVED WHILE THE MOTHER WAS COHABITING WITH HER HUSBAND WHO WAS NOT IMPOTENT OR STERILE, DOES NOT APPLY TO THIS _____ [ACTION *or* PROCEEDING].

Two-Year Limitation on Right to Rebut Presumption Inapplicable. If, on balance, the court determines that the presumption of *Family Code Section 7540* should not be applied conclusively, then blood or other genetic tests may be ordered beyond the two-years-from-birth limitation period of *Family Code Section 7541(b)* and *(c)* (*see Alicia R. v. Timothy M. (1994) 29 Cal. App. 4th 1232, 1236-1238, 34 Cal. Rptr. 2d 868* ; *In re Melissa G. (1989) 213 Cal. App. 3d 1082, 1084, 261 Cal. Rptr. 894* ; *see also Fam. Code § 7551*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a motion for blood or other genetic tests may be granted beyond the limitations period of *Fam. Code § 7541(b)* and *(c)*. They are for use if the presumption of *Fam. Code § 7540*, that a child born to a married woman who was cohabiting with her husband who was not impotent or sterile at the time of conception is a child of the marriage [*see § 171.25*], is inapplicable to the case.

These points and authorities may be used by any party wishing to avoid the operation of the presumption. They must be

combined with points and authorities in support of the contention that the presumption should not be applied [*see §§ 171.38 -171.41*]. They should also be combined with authorities in support of a motion for blood or other genetic tests [*see § 171.27*]. See also *§ 171.25[2]*, regarding amendments operative January 1, 1998, to the Uniform Act on Blood Tests to Determine Paternity (*Fam. Code § 7550 et seq.*) that now provide for "genetic" rather than simply "blood" testing, although *Fam. Code § 7541* still makes reference only to "blood tests" in rebutting the presumption of *Fam. Code § 7540*.

[b] Limitations on Right of Rebuttal

The presumption of *Fam. Code § 7540* is subject to a limited statutory right of rebuttal, as discussed in *§ 171.25[2]*.

The premise of these points and authorities is that if there are constitutional, public policy, or estoppel grounds (*see §§ 171.38 -171.40*) for not applying the presumption of *Fam. Code § 7540*, then the limitations of *Fam. Code § 7541* also do not apply. The cases cited directly support the nonapplication of the two-year limitations period. The also implicitly support the nonapplication of the limitations on standing, meaning that any party might bring the motion. They probably do not support an attack on the presumption based on other evidence unsupported by blood or other genetic test results.

[3] Discussion of Authorities

[a] Two-Year Limitation on Right to Rebut Presumption Inapplicable

The facts and principal holding of ***Alicia R. v. Timothy M.*** *(1994) 29 Cal. App. 4th 1232, 34 Cal. Rptr. 2d 868* , are *set forth in § 171.39[3][a]*. In the case, the child was born on September 22, 1990. The husband voluntarily had blood tests conducted, apparently extrajudicially, in late 1992 or early 1993. The tests excluded him as the father. The mother filed her paternity action against Timothy M. on August 12, 1993. At the hearing on an order to show cause, the court first determined that it would not apply the presumption of the husband's paternity conclusively, and then ordered the parties to take part in DNA testing. The tests established Timothy's paternity.

He admitted that he was the child's biological father, but nevertheless appealed, arguing that because the action was filed and the blood tests conducted more than two years after the birth of the child, there was no right of rebuttal and the presumption had to be applied conclusively [*see Fam. Code § 7541(b), (c)*]. The court of appeal rejected the contention and affirmed the judgment of paternity. It did not address the question of the limitations of *Fam. Code § 7541* separately. Rather, it rejected application of the presumption on the grounds that applying it would in no way further any of the underlying policies on which it rests [*see § 171.39*]. Having rejected the presumption, it gave no further consideration to the statutory limitations on the right of rebuttal, including the two-year limitation period (*29 Cal. App. 4th 1232, 1236-1238)* . The conclusion, therefore, must be that if the presumption falls, the limitations fall with it.

The facts and principal holding of ***In re Melissa G.*** *(1989) 213 Cal. App. 3d 1082, 261 Cal. Rptr. 894* , are discussed in *§ 171.38[4][a]*. In this case, the child was born in August of 1983, eight days before the mother separated from her husband. Neither the mother nor her husband requested blood tests to determine paternity within two years of the child's birth. In late 1987, the child came within the juvenile court's dependency jurisdiction, and the husband's paternity was challenged. The court then ordered blood tests, apparently on its own motion, which indicated that the mother's subsequent cohabitant and not the husband was the father (*213 Cal. App. 3d 1082, 1084)* . Nevertheless, the juvenile court concluded that it had to apply the presumption of *Fam. Code § 7540* conclusively, and could not consider the blood tests results.

In reversing, the court took the same route as the court in *Alicia R. v. Timothy M*. It found that application of the presumption would violate the constitutional rights of the true biological father [*see § 171.38*]. Having so found, it gave no further consideration to the limitations of *Fam. Code § 7541* (*213 Cal. App. 3d 1082, 1085-1089)* .

NOTE:

The same basic facts existed in *County of Orange v. Leslie B. (1993) 14 Cal. App. 4th 976, 17 Cal. Rptr. 2d 797* . However, in that case, the child was born more than two years before the operative date of what is now *Fam. Code § 7541*, allowing for a limited right of rebuttal of the previously truly conclusive presumption of the husband's paternity [*see* Stats. 1980, ch. 1310, § 1; Stats. 1981, ch. 1180, § 1]. Therefore, compliance with the statutory rebuttal provisions would have been impossible. Once the district attorney filed a support enforcement proceeding in 1989, all parties voluntarily took blood tests. The court of appeal concluded that the presumption did not apply because it's underlying policies were not furthered [*see § 171.39*] (*14 Cal. App. 4th 976, 980-983)* . It saw no reason to reach any additional issues regarding the limitations of *Fam. Code § 7541* (*14 Cal. App. 4th 976, 980 n.3*).

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§ 171.42 Opposing Contention That Paternity Judgment Should Be Set Aside on Equitable Grounds of Fraud or Mistake--Fraud or Mistake Must Be Extrinsic to Proceeding

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

THE JUDGMENT IN THIS PATERNITY MATTER SHOULD NOT BE VACATED AND SET ASIDE ON THE EQUITABLE GROUND OF _____ [FRAUD *and/or* MISTAKE], BECAUSE ONLY FRAUD OR MISTAKE THAT IS EXTRINSIC TO THE PROCEEDING MAY BE THE BASIS FOR SETTING ASIDE A JUDGMENT, AND HERE, THE _____ [*moving party, e.g.,* RESPONDENT] HAD A FULL OPPORTUNITY TO PRESENT HIS/HER CASE TO THE COURT, IN THAT HE/SHE _____ [*specify how moving party had opportunity to present case, e.g.,* APPEARED IN COURT AT THE HEARING ON PATERNITY ISSUES, PRESENTED WITNESSES, CROSS-EXAMINED WITNESSES, AND OTHERWISE FULLY PARTICIPATED IN THE PROCEEDINGS]. THEREFORE, ANY PURPORTED IRREGULARITY IN THE PROCEEDINGS OR EVIDENCE COULD NOT HAVE BEEN EXTRINSIC TO THOSE PROCEEDINGS AND A VALID BASIS FOR A SET ASIDE.

A. Alleged Fraud or Mistake Must Be Extrinsic to Proceeding for Equitable Set Aside of Judgment. After expiration of the time to obtain relief from a judgment pursuant to *Section 473 of the Code of Civil Procedure*, a paternity judgment may be set aside and vacated on equitable grounds of fraud or mistake only if the fraud or mistake is extrinsic to the proceeding, such that the complaining party was effectively prevented from presenting a claim or defense (*see In re Margarita D. (1999) 72 Cal. App. 4th 1288, 1294, 85 Cal. Rptr. 2d 713* ; *City and County of San Francisco v. Cartagena (1995) 35 Cal. App. 4th 1061, 1067, 41 Cal. Rptr. 2d 797*).

B. Intrinsic Fraud Goes to Merits of Proceeding and Is Insufficient Basis to Set Aside Judgment. Intrinsic fraud goes to the merits of a prior proceeding and is not a valid ground for setting aside a paternity judgment when the claimant had notice of the action, an opportunity to present his or her case, and to protect himself or herself from any mistake or fraud by the opposing party, but unreasonably neglected to do so (*In re Margarita D. (1999) 72 Cal. App. 4th 1288, 1295, 85 Cal. Rptr. 2d 713* ; *City and County of San Francisco v. Cartagena (1995) 35 Cal. App. 4th 1061,*

1067-1068, 41 Cal. Rptr. 2d 797).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a paternity judgment may not be set aside on the equitable ground of fraud or mistake after the set aside time of *Code Civ. Proc. § 473* has expired, unless the purported fraud or mistake are "extrinsic" to the proceeding, as opposed to being "intrinsic" and going to the merits of the proceeding.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show that the conduct claimed to be fraudulent or the basis for mistake did not deprive the claimant of his or her "day in court," even assuming, for the sake of argument, that the allegations are true [*see, e.g., In re Margarita D. (1999) 72 Cal. App. 4th 1288, 1295, 85 Cal. Rptr. 2d 713* (claimant's ground for setting aside judgment--that it was based on false facts supplied by child's mother--was not extrinsic fraud)].

[3] Discussion of Authorities

[a] Alleged Fraud or Mistake Must Be Extrinsic to Proceeding for Equitable Set Aside of Judgment

In ***In re Margarita D.*** *(1999) 72 Cal. App. 4th 1288, 85 Cal. Rptr. 2d 713* , a defendant claiming to be the biological father of a child born out of wedlock moved to (1) set aside a juvenile court's paternity judgment against another man who had admitted paternity, (2) obtain an order for paternity testing, and (3) modify an order establishing a plan of adoption for the child by her maternal grandparents. At trial, defendant--who had earlier fathered a child by the same woman--testified that (1) he had lived and had sexual relations with the child's mother during the period of possible conception, (2) she denied being pregnant when he later saw her, (3) he learned of the pregnancy when he received a notice about paternity testing, but a social worker told him that another man was the father, and (4) he later saw photographs of the child and believed the child resembled him. A social worker testified that she did not recall her conversation with defendant, but her notes indicated that he said he was not the child's father and saw no need for paternity testing. The trial court noted that even if paternity testing proved that defendant was the father, he would "merely be a biological father who had not done anything to preserve his parental rights even though he had numerous reasons to suspect he was the father." It denied defendant's motions, and he appealed.

The court of appeal affirmed the judgment. It rejected the contention that, because the mother and the man who had claimed paternity had lied to the juvenile court, the paternity judgment should have been set aside as a product of fraud. A party can seek relief from a final judgment by appealing to a court's equitable power, and a court sitting in equity, can, under limited circumstances, set aside or modify a valid final judgment obtained by fraud, mistake, or accident [*citing Olivera v. Grace (1942) 19 Cal. 2d 570, 575, 122 P.2d 564]* . However, with respect to fraud, only *extrinsic* fraud can be the basis for vacating a final judgment [*citing In re Marriage of Stevenot (1984) 154 Cal. App. 3d 1051, 1068, 202 Cal. Rptr. 116]* . And put simply, extrinsic fraud "is one party's preventing the other from having his day in court" [*citing City and County of San Francisco v. Cartagena (1995) 35 Cal. App. 4th 1061, 1067, 41 Cal. Rptr. 2d 797]* . The allegation of presenting false facts did not constitute extrinsic fraud. Similarly, alleged lies by the mother and the man admitting paternity, and attempts at hiding the pregnancy did not prevent defendant from coming to court or from claiming paternity. Further, the social services agency was not at fault for the lateness of defendant's paternity claim, because substantial evidence supported the finding that defendant had not wanted to take a paternity test when contacted (*72 Cal. App. 4th 1288, 1294-1296)* .

In ***City and County of San Francisco v. Cartagena*** *(1995) 35 Cal. App. 4th 1061, 41 Cal. Rptr. 2d 797* , a defendant

who had been judicially determined to be the father of a child sought to vacate the paternity judgment on the ground that the child's mother had committed extrinsic fraud by misrepresenting his paternal status. He requested that the court order blood testing of the mother and the child. A trial court granted this request, even though it had not yet ruled on his motion to set aside the judgment. The plaintiff appealed.

The court of appeal reversed the trial court's order as being premature. Although blood tests could play a crucial role in accurately determining paternity, the defendant was not entitled to contest paternity until the prior judgment was vacated. In discussing defendant's collateral attack on the paternity judgment, the appellate court explained that, despite the bar to a subsequent action that may result from application of the doctrine of res judicata, a party may seek relief from a final judgment under a court's equitable power to set aside or modify a valid final judgment obtained by fraud, mistake, or accident. But, with respect to fraud, the type of fraud necessary to vacate a final judgment is *extrinsic* fraud, not fraud that is intrinsic to the trial of the case itself. Extrinsic fraud occurs when a party is deprived of the opportunity to present his or her claim or defense to the court; where the party was kept ignorant or, other than from his or her own negligence, fraudulently prevented from fully participating in the proceeding. Examples of extrinsic fraud are: concealment of the existence of a community property asset, failure to give notice of the action to the other party, and convincing the other party not to obtain counsel because the matter will not proceed (and then it does proceed) [*citing In re Marriage of Stevenot (1984) 154 Cal. App. 3d 1051, 1068-1069, 202 Cal. Rptr. 116]* . The essence of extrinsic fraud is one party's preventing the other from "having his day in court." In this case, because there was no judicial determination on whether defendant had proven the requisite evidentiary basis to vacate the judgment of paternity, that issue had to be resolved before the child and his mother could be forced to undergo blood testing. If the trial court ultimately ruled that the judgment should be set aside, then the paternity of the child would be placed directly in issue and the blood test would become an appropriate subject o discovery. If, however, the trial court were to rule that the judgment should not be set aside, then defendant would be barred from challenging the paternity determination, and blood test evidence would provide him no legal recourse (*35 Cal. App. 4th 1061, 1067-1069)* .

[b] Intrinsic Fraud Goes to Merits of Proceeding and Is Insufficient Basis to Set Aside Judgment

The facts and procedural background of ***In re Margarita D.*** *(1999) 72 Cal. App. 4th 1288, 85 Cal. Rptr. 2d 713* are set forth under § 171.42[3][a]. In *Margarita D.*, the court of appeal held that a juvenile court properly refused to (1) set aside a paternity judgment that found another man to be a dependent child's father, (2) order paternity testing, and (3) modify the child's permanent plan of adoption. The appellate court discussed the difference between *extrinsic* fraud--which may be a ground for equitable relief--and *intrinsic* fraud, which may not. Intrinsic fraud is part of the case itself and goes to the merits of the original proceeding. Intrinsic fraud is not a valid ground for setting aside a judgment, when a party has been given notice and an opportunity to present a case or to protect himself or herself from an adversary's mistake or fraud but has unreasonably neglected to do so. Therefore, in demonstrating extrinsic fraud, a party cannot simply assert that a judgment was premised on false facts, but must show that the facts could not reasonably have been discovered prior to entry of the judgment [*citing City and County of San Francisco v. Cartagena (1995) 35 Cal. App. 4th 1061, 1068, 41 Cal. Rptr. 2d 797]* .

The facts and procedural background of ***City and County of San Francisco v. Cartagena*** *(1995) 35 Cal. App. 4th 1061, 41 Cal. Rptr. 2d 797* are set forth under § 171.42[3][a]. In *Cartagena*, the court of appeal reversed a trial court's order for blood tests as being premature, finding that vacating the prior paternity judgment was a prerequisite to ordering blood tests and there had been no judicial determination on whether the defendant had proven the grounds to vacate the judgment. In discussing the grounds for vacating a judgment on equitable grounds of fraud, the court stated that *extrinsic*, as opposed to *intrinsic* fraud must be shown. In describing the difference between these two, it explained that the essence of extrinsic fraud is one party's preventing the other from "having his day in court." By contrast, fraud is intrinsic and not a valid ground for a set aside when the party has been given notice of the action, had an opportunity to present his or her case, and to protect himself or herself from any mistake or fraud of the adversary but has unreasonably neglected to do so. Such a claim of fraud goes to the merits of the prior proceeding, which the moving party should have guarded against at the time. When the defrauded party has failed to take advantage of liberal

discovery policies to fully investigate his or her claim, any fraud is intrinsic fraud. In demonstrating extrinsic fraud, it is insufficient for a party to come into court and simply assert that the judgment was premised on false facts. The party must show that such facts could not reasonably have been discovered prior to the entry of judgment (*35 Cal. App. 4th 1061, 1067-1068)* .

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17-171 California Points & Authorities § 171.43

§ 171.43 Opposing Motion To Set Aside and Vacate Judgment of Paternity on Ground That Genetic Testing Indicates That Previously Established Father Is Not Biological Father [Fam. Code § 7646]--Denial of Motion Is in Best Interest of Child [Fam. Code § 7648]

[1] FORM

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*] Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORIT-
vs.	)	IES IN SUPPORT OF MOTION TO SET ASIDE
_____ [*name*], Defendant.	)	AND VACATE JUDGMENT OF PATERNITY
	)	Date: _____
	)	Time: _____
	)	Dept.: _____
		Trial Date: _____

_____

THE MOTION TO SET ASIDE AND VACATE THE JUDGMENT OF PATERNITY BASED ON GENETIC TESTING INDICATING THAT _____ [*NAME*] IS NOT THE BIOLOGICAL FATHER SHOULD BE DENIED BECAUSE DENIAL OF THE MOTION IS IN THE BEST INTEREST OF THE CHILD _____ [*NAME*].

A. Motion To Set Aside and Vacate Judgment of Paternity Based on Genetic Testing Should Be Denied If Denial of Motion Is in Best Interest of Child. If the court finds that the conclusions of all of the experts, based on the results of genetic tests performed pursuant to *Fam. Code § 7550 et seq.*, indicate that the previously established father is not the biological father of the child, the court may, nevertheless, deny the motion if it determines that denial of the motion is in the best interest of the child, after consideration of factors specified in *Family Code Section 7648* [*Fam. Code § 7648*].

[*EITHER*]

B. Factors Supporting Denial of Motion Include Age of Child. Factors supporting denial of a motion to set aside and vacate a judgment of paternity based on genetic testing under *Family Code Section 7646* include the age of the child [*Fam. Code § 7648(a)*].

[*AND/OR*]

C. Factors Supporting Denial of Motion Include Length of Time Since Judgment. Factors supporting denial of a motion to set aside and vacate a judgment of paternity based on genetic testing under *Family Code Section 7646* include the length of time since the entry of the judgment establishing paternity [*Fam. Code § 7648(b)*].

[*AND/OR*]

D. Factors Supporting Denial of Motion Include Nature of Relationship. Factors supporting denial of a motion to set aside and vacate a judgment of paternity based on genetic testing under *Family Code Section 7646* include the nature, duration, and quality of any relationship between the previously established father and the child, including the duration and frequency of any time periods during which the child and the previously established father resided in the same household or enjoyed a parent-child relationship [*Fam. Code § 7648(c)*].

[*AND/OR*]

E. Factors Supporting Denial of Motion Include Request of Established Father. Factors supporting denial of a motion to set aside and vacate a judgment of paternity based on genetic testing under *Family Code Section 7646* include the request of the previously established father that the parent-child relationship continue [*Fam. Code § 7648(d)*].

[*AND/OR*]

F. Factors Supporting Denial of Motion Include Biological Father's Acquiescence. Factors supporting denial of a motion to set aside and vacate a judgment of paternity based on genetic testing under *Family Code Section 7646* include notice by the biological father of the child that he does not oppose preservation of the relationship between the previously established father and the child [*Fam. Code § 7648(e)*].

[*AND/OR*]

G. Factors Supporting Denial of Motion Include Benefit or Detriment to Child. Factors supporting denial of a motion to set aside and vacate a judgment of paternity based on genetic testing under *Family Code Section 7646* include the benefit or detriment to the child in establishing the biological parentage of the child [*Fam. Code § 7648(f)*].

[*AND/OR*]

H. Factors Supporting Denial of Motion Include Established Father's Conduct That Impairs Ability To Identify

or Seek Support from Biological Father. Factors supporting denial of a motion to set aside and vacate a judgment of paternity based on genetic testing under *Family Code Section 7646* include whether the conduct of the previously established father has impaired the ability to ascertain the identity of, or get support from, the biological father [*Fam. Code § 7648(g)*].

[*AND/OR*]

I. Factors Supporting Denial of Motion Include Additional Relevant Factors. In addition to enumerated factors in *Family Code Section 7648*, denial of a motion to set aside and vacate a judgment of paternity based on genetic testing under *Family Code Section 7646* may be based on additional factors deemed by the court to be relevant to its determination of the best interest of the child [*Fam. Code § 7648(h)*].

[*Optional*] THE MOTION TO SET ASIDE AND VACATE THE JUDGMENT OF PATERNITY BASED ON GENETIC TESTING IS UNTIMELY BECAUSE IT WAS FILED MORE THAN TWO YEARS AFTER THE CHILD'S BIRTH.

J. Motion Is Untimely. Any motion to set aside and vacate a judgment of paternity based on genetic testing must be filed within two years of the date of the child's birth when paternity was established by a voluntary declaration of paternity [*Fam. Code § 7646(a)(2)*].

EVEN IF THE COURT GRANTS THE MOTION TO VACATE THE JUDGMENT OF PATERNITY, THE MOVING PARTY HAS NO RIGHT TO REIMBURSEMENT FOR ANY AMOUNT OF CHILD SUPPORT PAID BEFORE THE GRANTING OF THE MOTION.

K. No Reimbursement for Child Support Paid. If the court grants a motion to set aside or vacate a paternity judgment, the court must also vacate any order for child support and arrearages issued on the basis of that judgment, but the previously established father has no right of reimbursement for any amount of support paid before the motion is granted [*Fam. Code § 7648.4*].
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a motion to vacate and set aside a judgment of paternity made on the ground that genetic testing has shown that the established father is not the biological father of the child [*see Fam. Code § 7646*]. The opposition is based on the contention that denial of the motion is in the best interest of the child [*Fam. Code § 7648*]. The grounds for asserting that the denial of the motion is in the best interest of the child may be used individually or in combination, as appropriate under the facts. Consecutive paragraphs should be renumbered accordingly.

This memorandum of points and authorities may also be submitted in opposition to a motion to vacate and set aside a judgment of paternity on the ground that the motion is untimely [*see Fam. Code § 7646(a)(2)*]. It may also be used in

opposition to a motion for reimbursement of amounts paid for the support of the child if the motion is granted [*see Fam. Code § 7648.4*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should elaborate on the ground or grounds for opposition with respect to how those factors impact the best interest of the child. If the motion is based on the wishes of the established or biological father, then the argument should assert the existence of that factor, for example, that the biological father has given notice that he does not oppose preservation of the relationship between the previously established father and the child, pursuant to *Family Code Section 7648(e)*.

The points and authorities in this form may be submitted in opposition to the motion supported in the points and authorities *set forth in § 171.26*.

[b] Related Points and Authorities

For forms of memoranda supporting and opposing motions for orders for attorney's fees, see Ch. 25, *Attorney's Fees* .

[3] Additional Authorities

[a] Motion Is Untimely

In *County of Sacramento v. Llanes (2008) 168 Cal. App. 4th 1165, 87 Cal. Rptr. 3d 158* , the court held that the two-year period for bringing a motion to set aside a paternity judgment under *Family Code Section 7646(a)(3)* commenced on September 28, 2004, the date the statute was enacted. Thus, the defendant's motion, which was filed on December 29, 2006, was untimely. The defendant was not without a remedy, however, because while the case was pending on appeal the legislature amended *Family Code Section 7646(a)(3)* to provide that the two-year period in which to bring a motion to set aside or vacate a judgment of paternity commences on January 1, 2005. *Family Code Section 7646(c)* was also added and provides that a defendant may file a motion for reconsideration of a motion that was denied solely on the basis that it was untimely, as long as the motion for reconsideration is filed on or before December 31, 2009.

In *County of Orange v. Superior Court (2007) 155 Cal. App. 4th 1253, 66 Cal. Rptr. 3d 689* , the Orange County Department of Child Support Services appealed from an order for genetic testing under *Family Code Section 7575*, which was issued preliminarily to the court's ruling on a motion to set aside a paternity judgment based on a voluntary declaration of paternity. The appellate court agreed with the County that the trial court could not set aside the paternity judgment because it was filed more than two years after the child's birth and was therefore untimely under *Family Code Section 7646(a)(2)*. As a result, the trial court abused its discretion by ordering genetic testing for the purpose of deciding whether to set aside the judgment. It erred in concluding that the legislature intended that genetic testing should be ordered whenever an issue regarding the paternity judgment is raised. A court may not order genetic testing to determine whether to set aside a paternity judgment when the request to set aside the judgment is time-barred. A court does, however, have equitable power to order genetic testing after the expiration of the two-year period, but only if extrinsic fraud is shown (*155 Cal. App. 4th 1253, 1260-1262)* .

[b] No Reimbursement for Child Support Paid

In *County of Los Angeles v. James (2007) 152 Cal. App. 4th 253, 60 Cal. Rptr. 3d 880* , a trial court determined that a man was the father of a child and determined that he was obligated to pay child support. Genetic testing later determined that the man was not the father. Based on the test results, the man moved to set aside the paternity judgment and to obtain reimbursement of the support payments made. The court set aside the paternity judgment, but determined that the man was not entitled to reimbursement under *Family Code 7648.4*. The appellate court upheld this decision. It noted that *Family Code Section 7648.4* does not permit a child support reimbursement order in favor of an erroneously

declared father. This provision enables a declared father to challenge a paternity decree, but also safeguards the child. Allowing a declared father to seek reimbursement from the mother might adversely affect the mother's ability to provide financially for the child. In enacting this provision, the legislature was aware of the harm that paternity fraud inflicts on a declared father, but sought to balance the competing interests of a declared father and a child, and concluded that a right of reimbursement should not be permitted (*152 Cal. App. 4th 253, 258-259)* .

[c] Factors Supporting Denial of Motion Include Additional Relevant Factors

In *San Mateo County Dept. of Child Support Services v. Clark (2008) 168 Cal. App. 4th 834, 85 Cal. Rptr. 3d 763* , the Department brought an action against the defendant to establish his paternity and obligation to pay child support, based on the declaration of the child's mother that the defendant was the child's biological father. The defendant failed to answer, and the court entered a default judgment establishing his paternity and the child support arrears. The defendant later moved to set aside the judgment of paternity under *Family Code Section 7646*, serving the motion on the Department but not on the child's mother. The court found that the motion was timely, ordered genetic testing, directed "both parties" to report to the Department, and further ordered the child's mother to bring the child to submit genetic samples at the date and time specified by the Department. The court subsequently set aside the paternity judgment because the child's mother failed to comply with the court's order for genetic testing. The appellate court held that the trial court lacked authority to set aside the default judgment of paternity. The unavailability of genetic testing results, because of the mother's noncompliance with a testing order or for whatever reason, is not a condition that empowers the court to vacate a prior paternity judgment. The defendant, as the moving party, has the burden of proving that he was not the biological father by producing genetic tests from an approved laboratory that excluded his paternity. In addition, the court did not have personal jurisdiction over the mother or the child and thus the court's attempt to order them to submit to genetic testing had no effect. The defendant should have joined the mother as a party to the proceeding or served the mother with a deposition subpoena requiring her to produce a genetic sample. The Department could also have issued an administrative order under *Family Code Section 7648.2*, requiring the mother and child to submit to genetic testing.

California Points & Authorities

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§ 175.syn Synopsis to Chapter 175: PHYSICIANS AND SURGEONS: MEDICAL MALPRACTICE

§ 175.01 Scope of Chapter

§ 175.02 Governing Statutes

§ 175.03 Related Pleading and Practice Chapters

§ 175.04 Related Points and Authorities Chapters

§§ 175.05-175.19 [Reserved]

§ 175.20 Supporting Contention That Physician Is Liable for Professional Negligence--General Practitioner's Duty to Refer to Specialist

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Duty to Consult With Specialist

§ 175.21 Supporting Contention That Physician Is Liable for Professional Negligence--Rebuttable Presumption of Negligence Based on Violation of Statute [Evid. Code § 669]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Violation of Statute

[4] Additional Authorities

[a] Violation of Statute

§ 175.22 Supporting Contention That Physician Is Liable for Professional Negligence--Failure to Warn Patient of Subsequently Ascertained Risks of Treatment

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Duty to Warn

§ 175.23 Supporting Contention That Physician Is Liable for Professional Negligence--Failure to Disclose Material Risks of Treatment

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Requirement of Expert Testimony

[d] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Physician's Duty of Disclosure

[b] Scope of Minimal Disclosure

[c] Test of Materiality

[d] Risks of Declining Treatment

[e] Experts Alone Cannot Establish Standard of Care Governing Informed Consent

[f] Signed Consent Form Not Conclusive Evidence of Informed Consent

[g] Physician May Have Duty to Disclose Risks Even When Different Physician Performs Treatment

[4] Additional Authorities

[a] Physician's Duty of Disclosure

[b] Risks of Declining Treatment

§ 175.24 Supporting Contention That Physician Is Liable for Professional Negligence--Failure to Warn Contagious Patient to Take Steps to Protect Others

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Duty to Warn of Risk to Others

§ 175.25 Supporting Contention That Physician Is Liable for Professional Negligence--Vicarious Liability for Negligence of Medical Assistants

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Determination of Agency

[d] Related Pleading and Practice Forms

[e] Related Points and Authorities

[f] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Vicarious Liability of Physician

[b] Delegation of Supervision to Others

§ 175.26 Supporting Contention That Physician Is Liable for Professional Negligence--Causation Established by "Substantial Factor" Test

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Existence of Multiple Causes of Damage Does Not Negate Liability If Negligence Was Substantial Factor in Causing Damage

[4] Additional Authorities

[a] Existence of Multiple Causes of Damage Does Not Negate Liability If Negligence Was Substantial Factor in Causing Damage

§ 175.27 Supporting Contention That Physician Is Liable for Professional Negligence--Physician Owes Duty of Care to Examinee Notwithstanding Lack of Physician-Patient Relationship

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Physician Has Duty to Conduct Examination in Manner That Does Not Injure Examinee

§ 175.28 Supporting Contention That Physician May Be Liable for Professional Negligence-Psychiatrist Owes Duty of Care to Suicidal Patients Regardless of Whether They Are Inpatients or Outpatients

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Duty Owed to Suicidal Inpatients as Well as Outpatients

§ 175.28A Supporting Contention That Physician Is Liable for Professional Negligence--Unnecessary Surgery May be Basis for Malpractice Action

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Liability for Unnecessary Surgery

§ 175.29 Opposing Contention That Physician Is Liable for Professional Negligence--No Duty of Care Toward Plaintiff

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Requirement of Physician-Patient Relationship

[b] Requirement of Special Factors for Imposing Nonprivity Duty of Care

[c] No Duty Owed by Proctor to Assist or Protect Patient

[d] Same Alleged Breach of Duty Cannot Give Rise to Distinct Causes of Action for Ordinary and Professional Negligence

[e] No Duty Owed by Psychotherapist to Parent of Adult Patient for Treatment Regarding Allegedly False Recovered Memories of Childhood Sexual Abuse

[f] No Duty Owed by Physician to Obtain Consent of Husband of Patient Who Undergoes Artificial Insemination

[4] Additional Authorities

[a] Requirement of Physician-Patient Relationship

[b] Same Alleged Breach of Duty Cannot Give Rise to Distinct Causes of Action for Ordinary and Professional Negligence

§ 175.30 Opposing Contention That Physician Is Liable for Professional Negligence--Prudent Selection of Method of Diagnosis or Treatment

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Exercise of Best Judgment

[b] Consideration of Entire Course of Conduct

§ 175.31 Opposing Contention That Physician Is Liable for Professional Negligence--Failure to Disclose Material Risk of Treatment--Low Probability Complication or Idiosyncratic Reaction Not Material

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Requirement of Expert Testimony

[d] Related Pleading and Practice Forms

[e] Related Points and Authorities

[f] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Nonmaterial Risk

§ 175.32 Opposing Contention That Physician Is Liable for Professional Negligence--Failure to Disclose Material Risk of Treatment--Patient Unable to Analyze Highly Disturbing Information

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Seriously Disturbing Information

[b] Objective Test of Effect on Patient

§ 175.33 Opposing Contention That Physician Is Liable for Professional Negligence--No Duty of Disclosure When Treatment or Testing Not Recommended

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] No Duty to Disclose When No Diagnostic Testing or Treatment Recommended

[b] No Duty to Disclose Regarding Nonrecommended Testing or Treatment

[c] No Duty to Disclose Alternative Treatment That Is Illegal in California

[4] Additional Authorities

[a] No Duty to Disclose When No Diagnostic Testing or Treatment Recommended

§ 175.34 Opposing Contention That Physician Is Liable for Professional Negligence--No Causal Relationship Between Lack of Informed Consent and Plaintiff's Damage

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] No Liability for Failure to Disclose Where Reasonable Person Would Not Have Declined Procedure

§ 175.35 Opposing Contention That Physician Is Liable for Professional Negligence--Vicarious Liability for Negligence of Medical Assistants--No Control or Direction Over Negligent Acts

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Direct Supervision and Control

[4] Additional Authorities

[a] Direct Supervision and Control

§ 175.36 Opposing Contention That Physician Is Liable for Professional Negligence--Action Does Not Arise Out of Breach of Duty Within Scope of Employment

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Requirement That Act or Omission to Constitute Professional Negligence Be Within Scope of Patient-Physician Relationship

[b] Physician's Duty of Care

[c] Sexual Relations With Patient

[4] Additional Authorities

[a] Requirement That Act or Omission to Constitute Professional Negligence Be Within Scope of Patient-Physician Relationship

§ 175.37 Supporting Contention That Medical Malpractice Action Based on Professional Negligence Is Barred by Statute of Limitations [Code Civ. Proc. § 340.5]--One-Year Limit After Plaintiff Discovers or Should Have Discovered Injury

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Separate Trial of Statute of Limitations Defense

[d] Burden of Proving Discovery Date

[e] Related Pleading and Practice Forms

[f] Related Points and Authorities

[g] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Commencement of Limitations Period

[b] Constructive Knowledge of Injury

[c] Legal Significance of Injury

[d] Nondisclosure by Defendant

[e] Limitations Period Not Tolled by Legal Advice That No Legal Remedy Exists

[f] Limitations Period Begins Running as to All Potential Defendants

[g] Limitations Period Applicable to Action Against Medical Student

[4] Additional Authorities

[a] Commencement of Limitation Period

[b] Constructive Knowledge of Injury

§ 175.38 Supporting Contention That Medical Malpractice Action Based on Professional Negligence Is Barred by Statute of Limitations [Code Civ. Proc. § 340.5]--Three-Year Limit After Date of Injury

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Separate Trial of Statute of Limitations Defense

[d] Related Pleading and Practice Forms

[e] Related Points and Authorities

[3] Discussion of Authorities

[a] Commencement of Limitations Period

[b] Both One and Three-Year Statute of Limitation Provisions Must Be Satisfied

[c] Foreign Body Tolling Provision Not Applicable to Substance Intentionally Introduced for Therapeutic Purpose

[d] Foreign Body Tolling Provision Only Applicable to Medically Inserted Objects

[e] Intentional Concealment Tolling Provision Not Applicable to Lack of Informed Consent or Mere Continuation of Prior Nondisclosure of Information

[f] Intentional Concealment Required to Be That of Health-Care Provider

[g] Action Against Public Entity Must Meet Three-Year Time Limitation

[4] Additional Authorities

[a] Commencement of Limitations Period

[b] Both One- and Three-Year Statute of Limitations Provisions Must Be Satisfied

[c] Foreign Body Tolling Provision Not Applicable to Substance Intentionally Introduced for Therapeutic Purposes

§ 175.39 Supporting Contention That Medical Malpractice Action Based on Professional Negligence Is Barred by Statute of Limitations [Code Civ. Proc. § 340.5]--Limitations Period Not Tolled if Notice of Intent Filed More Than 90 Days Before Expiration of One-Year Limitations Period [Code Civ. Proc. § 364(a), (d)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Separate Trial of Statute of Limitations Defense

[d] Related Pleading and Practice Forms

[e] Related Points and Authorities

[f] Opposing Points and Authorities

[g] Related California Torts Chapters

[3] Discussion of Authorities

[a] Filing Notice of Intent More Than 90 Days Before Expiration of Limitations Period Does Not Toll One-Year Limitations Period

[b] Giving Second Notice of Intent Within Final 90 Days of Limitations Period Does Not Toll One-Year Limitations Period

[4] Additional Authorities

[a] Filing Notice of Intent More Than 90 Days Before Expiration of Limitations Period Does Not Toll One-Year Limitations Period

§ 175.40 Supporting Contention That Medical Malpractice Action Based on Professional Negligence Is Barred by Statute of Limitations [Code Civ. Proc. § 340.5]--Notice of Intent Filed Within 90 Days of Expiration of One-Year Limitation Period--Period Tolled for 90 Days Only [Code Civ. Proc. § 364(a), (d)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Separate Trial of Statute of Limitations Defense

[d] Related Pleading and Practice Forms

[e] Related Points and Authorities

[f] Opposing Points and Authorities

[g] Related California Torts Chapters

[3] Discussion of Authorities

[a] Notice Tolls One-Year Period of Limitations for 90 Days Only

§ 175.41 Supporting Contention That Medical Malpractice Action Based on Professional Negligence Is Barred by Statute of Limitations [Code Civ. Proc. § 340.5]--Action for Injuries Sustained at Birth--MICRA Rather Than General Limitations Statute Applies

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Separate Trial of Statute of Limitations Defense

[d] Related Pleading and Practice Forms

[e] Related Points and Authorities

[3] Discussion of Authorities

[a] Later, More Specific Statute Controls

[b] Code of Civil Procedure Section 340.5 Rather Than Code of Civil Procedure Section 340.4 Controls

[4] Additional Authorities

[a] Code of Civil Procedure Section 340.5 Rather Than Code of Civil Procedure Section 340.4 Controls

§ 175.42 Supporting Contention That Medical Malpractice Action Based on Professional Negligence Is Barred by Statute of Limitations--Action Against Public Physician--Six-Month Limit After Claim Rejected [Gov. Code § 945.6]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Separate Trial of Statute of Limitations Defense

[d] Related Pleading and Practice Forms

[e] Related Points and Authorities

[3] Discussion of Authorities

[a] Section 945.6 of the Government Code Bars Action

[b] Minor Plaintiff Must File Action Within Limitations Period of Gov. Code § 945.6

§ 175.42A Supporting Contention That Action Based on Professional Negligence of Physician Is Barred by Statute of Limitations [Code Civ. Proc. § 340.5]--MICRA Governs Action by Minor for Failing to Report Suspected Child Abuse

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] MICRA Limitations Period Governs Action for Failure to Report Suspected Child Abuse

§ 175.43 Opposing Contention That Action Is Barred by Statute of Limitations--Plaintiff's Reliance on Defendant

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Separate Trial of Statute of Limitations Defense

[d] Related Pleading and Practice Forms

[e] Related Points and Authorities

[3] Discussion of Authorities

[a] Continuance of Physician-Patient Relationship

§ 175.43A Opposing Contention That Action Is Barred by Statute of Limitations--MICRA Limitations Period Inapplicable to Intentional Torts Not Based in Professional Negligence

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Action Alleging Intentional Torts Not Governed by MICRA Limitations Period

§ 175.44 Opposing Contention That Medical Malpractice Action Based on Professional Negligence Is Barred by Statute of Limitations [Code Civ. Proc. § 340.5]--Action by Minor

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Separate Trial of Statute of Limitations Defense

[d] Related Pleading and Practice Forms

[e] Related Points and Authorities

[f] Related California Torts Chapters

[3] Discussion of Authorities

[a] Commencement of Limitations Period

[b] Determination of Plaintiff's Minority

[c] Accrual on Date of Discovery

[d] Time for Filing Prior to Eighth Birthday Extended for Holiday

[e] Statute Tolled by Notice of Intent to Commence Action

§ 175.45 Opposing Contention That Action Is Barred by Statute of Limitations--One-Year Period of Limitation Tolled for 90 Days by Notice of Intent to Commence Action [Code Civ. Proc. § 364(a), (d)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Separate Trial of Statute of Limitations Defense

[d] Related Pleading and Practice Forms

[e] Related Points and Authorities

[f] Opposing Points and Authorities

[g] Related California Torts Chapters

[3] Discussion of Authorities

[a] One-Year Period of Limitation Is Tolled for 90 Days

[b] Actual Notice of Intent to Sue Not Required When Timely Notice Served by Mail

[c] Hospital-Based Negligence Claim Is Action for Professional, Not Ordinary, Negligence

[d] 90-Day Tolling Applies to Defendant Given Notice Who is Substituted in for Doe Defendant

[e] Compliance With Service Statutes Not Mandatory

§ 175.46 Opposing Contention That Action Is Barred by Statute of Limitations [Code Civ. Proc. § 340.5]--Statutory Tolling Provisions Not Found in MICRA Apply to One-Year Period of Limitation

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] One-Year Limitations Period May Be Tolled by Non-MICRA Tolling Provisions

[b] One-Year Period of Limitations Is Tolled by Incarceration

[c] One-Year Period of Limitations Is Tolled by Insanity

[d] One-Year Period Tolled by Defendant's Absence From State

§ 175.47 Opposing Contention That Medical Malpractice Action Based on Professional Negligence Is Barred by Statute of Limitations--Three Year Period of Limitation Tolled for 90 Days by Notice of Intent to Commence Action [Code Civ. Proc. §§ 340.5, 364(a), (d)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Three Year Period of Limitation Is Tolled for 90 Days.

§ 175.48 Opposing Contention That Medical Malpractice Action Based on Professional Negligence Is Barred by Statute of Limitations--One-Year Limit After Discovery of Nontherapeutic Foreign Body in Plaintiff's Body Regardless of When Injury Commenced

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Separate Trial of Statute of Limitations Defense

[d] Related Pleading and Practice Forms

[e] Related Points and Authorities

[f] Related California Torts Chapters

[3] Discussion of Authorities

[a] One-Year Discovery Limitation Period Delayed Under Foreign Body Exception

§ 175.49 Opposing Contention That Medical Malpractice Action Based on Professional Negligence Is Barred by Statute of Limitations [Code Civ. Proc. § 340.5]--Action for Failure to Obtain Informed Consent

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Cause of Action Accrues When Undisclosed Complication Occurs

§ 175.50 Supporting Contention That Res Ipsa Loquitur Doctrine Is Applicable to Medical Malpractice Action--Evidence Supports Inference of Defendant's Negligence as Cause of Injury

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Res Ipsa Loquitur Doctrine

[b] Sufficiency of Evidence to Support Doctrine

[c] Inference Based on Common Knowledge

[d] Evidence Viewed in Favor of Proponent

[e] Presumption May Be Applied to Surgeon for Violation of Nondelegable Duty

[4] Additional Authorities

[a] Res Ipsa Loquitur Doctrine

§ 175.51 Opposing Contention That Res Ipsa Loquitur Doctrine Is Applicable to Action--Plaintiff Failed to Produce Expert Testimony on Issue of Negligence as Probable Cause of Injury

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Relating Pleading and Practice Forms

[3] Discussion of Authorities

[a] Requirement of Expert Testimony

[4] Additional Authorities

[a] Requirement of Expert Testimony

§ 175.52 Opposing Contention That Res Ipsa Loquitur Doctrine Is Applicable to Action--Inference of Defendant's Negligence Rebutted--Absence of Defendant's Negligence or Proximate Cause Between Negligence and Injury

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Evidence Sufficient to Support Finding of Absence of Negligence or Proximate Cause

[4] Additional Authorities

[a] Evidence Sufficient to Support Finding of Absence of Negligence or Proximate Cause

§ 175.53 Supporting Contention That Defendant Is Not Liable for Breach of Medical Services Contract--Lack of Express Promise of Particular Result

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Express Promise of Particular Result

[4] Additional Authorities

[a] Express Promise of Particular Result

§ 175.54 Supporting Contention That In Informed Consent Cases Plaintiff Is Entitled to Recover Damages for Undisclosed and Disclosed Complications

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Damages for Disclosed as Well as Undisclosed Complications Recoverable

§ 175.55 Supporting Contention That Punitive Damages Claim Restricted in Action Against Health Care Provider for Professional Negligence [Code Civ. Proc. § 425.13]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Statutory Requirements Apply If Injury Caused by Conduct Directly Related to Rendition of Professional Services

[b] Statutory Requirements Applicable to Action Based on Intentional Tort Theory

[c] Standard of Proof for Amending Complaint to Include Punitive Damages Claim

[d] Statutory Requirements Applicable to Actions for Sexual Battery Occurring in Course of Gynecological Exams

[e] Statutory Requirements Applicable to Wrongful Life Action Brought Against Sperm Bank and Screening Physicians

[f] Statutory Requirements Applicable to Claims Made Against Medical Group Providing Utilization Review Services to Health Care Service Plan

[g] Statutory Requirements Applicable to Action Against Tissue Bank

[4] Additional Authorities

[a] Statutory Requirements Apply If Injury Caused by Conduct Directly Related to Rendition of Professional Services

[b] Standard of Proof for Amending Complaint to Include Punitive Damages Claim

§ 175.56 Supporting Contention That Amendment Adding Punitive Damages Claim in Action Against Health Care Provider for Professional Negligence Is Untimely [Code Civ. Proc. § 425.13]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] End of Nine-Month Statutory Period Is Actual Trial Date

[b] Applicability of Restrictions in Fast-Track Cases

[4] Additional Authorities

[a] Applicability of Restrictions in Fast-Track Cases

§ 175.57 Opposing Contention That Punitive Damages Claim Barred by Failure to Amend Pleading [Code Civ.

Proc. § 425.13]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Statutory Protection Waived If Not Timely Raised

[b] Claim Seeking Recovery for Purely Economic Injury Not Subject to MICRA Requirements

§ 175.58 Opposing Contention That Amendment Adding Punitive Damages Claim in Action Against Health Care Provider for Professional Negligence Is Untimely [Code Civ. Proc. § 425.13]--Exception for Trial Preference

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Implied Exception to Protect Right to Preferential Trial Date

§ 175.59 Opposing Contention That Amendment Adding Punitive Damages Claim in Action Against Health Care Provider for Professional Negligence Is Untimely [Code Civ. Proc. § 425.13]--Compliance Not Reasonable Due to Fast Track Trial Setting

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Court Should Avoid Injustice When Compliance Is Not Reasonable

§ 175.60 Supporting Contention That Money Damages for Future Damages Must Be Paid by Periodic Payments [Code Civ. Proc. § 667.7]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Periodic Payment Provision Constitutional

§ 175.61 Supporting Contention That Periodic Payment of Future Damages Must Be Based on Present Value of Award at Time of Judgment

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Periodic Payments are Based on Value of Future Damages Award at Time of Judgment

[b] Trial Court May Not Disregard Jury Valuation

§ 175.62 Opposing Contention That Money Damages for Future Damages Must Be Paid by Periodic Payments [Code Civ. Proc. § 667.7]--Lost Years Earnings as Properly Awarded in Lump Sum

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Lost Years Earnings Distinguished From Other Future Earnings

[3] Discussion of Authorities

[a] Lost Years Earnings Awardable In Lump Sum

[b] All Future Loss of Earnings Damages Payable in Lump Sum in Absence of Special Finding on Apportionment

§ 175.63 Opposing Contention That Money Damages for Future Damages Must Be Paid by Periodic Payments [Code Civ. Proc. § 667.7]--Periodic Payments May Not Be Ordered After Entry of Judgment for Lump Sum Amount

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Periodic Payments Not Available After Judgment for Lump Sum Amount Entered

§ 175.64 Supporting Contention That Collateral Source of Benefits Cannot Recover Expenses From Medical Malpractice Defendant [Civ. Code § 3333.1(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Bar to Recovery of Source of Collateral Benefits Constitutional

§ 175.65 Opposing Contention That Plaintiff in Medical Malpractice Action Cannot Prove Recoverable Damages if All Damages Suffered Were Paid by Collateral Source [Civ. Code § 3333.1]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Jury Must Decide How to Apply Evidence of Collateral Source Payments

§ 175.66 Supporting Contention That Noneconomic Damages From Medical Malpractice Are Limited by Statute [Civ. Code § 3333.2]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Limitation Does Not Preclude Award of Punitive Damages

[d] Calculation of Damages When Plaintiff Comparatively Negligent

[e] Related Points and Authorities

[3] Discussion of Authorities

[a] Action Based on Breach of Hospital's Duty to Use Reasonable Care in Reviewing Competence of Its Medical Staff

[b] Wrongful Death Actions

[c] Limitation Applies Regardless of Number of Plaintiffs

[d] Reduction of Award to Reflect Other Tortfeasor's Negligence

[e] Limitation Applies to Indemnity Actions

[f] Limitation Applies to Action for Failure to Provide Stabilizing Treatment Under 42 U.S.C.S. § 1395dd

[g] Limitation Applies to Damages Awarded Against Vicariously Liable Employer

[h] Constitutionality of Limitation

[4] Additional Authorities

[a] Reduction of Award to Reflect Other Tortfeasor's Negligence

§ 175.67 Supporting Contention That Statutory Cap on Noneconomic Damages in Medical Malpractice Actions [Civ. Code § 3333.2] Applies to Present Value of Periodic Payment of Future Damages [Code Civ. Proc. § 667.7]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Statutory Cap on Noneconomic Damages Award Applies to Present Value of Awards for Future Damages

§ 175.68 Opposing Contention That Noneconomic Damages From Medical Malpractice Are Limited by Statute [Civ. Code § 3333.2]--Damages Limitation Does Not Apply to Common Law Battery Action

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Points and Authorities

[e] Related Points and Authorities

[3] Discussion of Authorities

[a] Damages Cap Inapplicable to Common-Law Battery Claim

§ 175.69 Supporting Contention That Expert Medical Witness Lacking Experience in Emergency Medical Care Is Not Qualified to Testify in Medical Malpractice Action--Action Is for Alleged Medical Malpractice Arising Out of Emergency Medical Coverage [Health & Safety Code § 1799.110(c)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Required Qualifications of Expert Medical Witness in Medical Malpractice Action Arising Out of Emergency

Medical Care

[b] "Emergency Medical Coverage" Defined

[c] Applicability of Statute

[d] "On Call" Emergency Room Physician Does Not Provide "Emergency Medical Coverage"

[e] Experience "Within Last Five Years" Means Within Five Years Before Date of Malpractice

§ 175.70 Opposing Contention That Expert Medical Witness Lacking Experience in Emergency Medical Care Is Not Qualified to Testify in Medical Malpractice Action--No Allegation of Negligent Care Implicating Performance of Emergency Physician [Health & Safety Code § 1799.110(c)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Applicability of Statute Limited to Cases Implicating Performance of Treating Physician

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CHAPTER 175 PHYSICIANS AND SURGEONS: MEDICAL MALPRACTICE
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17-175 California Points & Authorities § 175.01

§ 175.01 Scope of Chapter

This chapter contains points and authorities relating to medical malpractice actions. It contains memoranda for use in supporting [*see §§ 175.20 -175.23*] and opposing [*see §§ 175.29 -175.32*] the contention that a physician is liable for professional negligence, and supporting [*see § 175.25*] and opposing [*see § 175.35*] the contention that a physician is vicariously liable for the negligence of medical assistants.

Also included are memoranda for use in supporting [*see §§ 175.37*-175.42A] and opposing [*see §§ 175.43 -175.49*] the contention that an action is barred by the statute of limitations, supporting [*see § 175.50*] and opposing [*see §§ 175.51, 175.52*] the application of res ipsa loquitur to the action, and supporting the contention that a physician is not liable for breach of a medical services contract [*see § 175.53*].

In addition are memoranda used in supporting § 175.60 and opposing [*see §§ 175.62, 175.63*] the contention that money damages for future damages must be paid by periodic payments, supporting the contention that periodic payments of future damages must be based on the present value of the damages award at the time of judgment [*see § 175.61*], supporting the contention that a collateral source of benefits to a medical malpractice plaintiff cannot obtain reimbursement from a defendant [*see § 175.64*], opposing the contention that a plaintiff cannot prove recoverable damages if all the damages suffered were paid by a collateral source [*see § 175.65*], supporting the contention that noneconomic damages are limited [*see § 175.66*], supporting the contention that the statutory cap on noneconomic damages applies only to the present value of future damages when periodic payment is used [*see § 175.67*], opposing the contention that the damage cap on noneconomic damages applies, on the ground that the cap does not apply to a common law battery action [*see § 175.68*], and supporting [*see § 175.69*] and opposing [*see § 175.70*] the contention that an expert witness lacking experience in emergency care is not qualified to testify in an action based on alleged malpractice in rendering that type of care. It also contains points and authorities pertaining to punitive damages claims in medical malpractice actions [*see §§ 175.55 -175.58*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against Healthcare WorkersDoctors & PhysiciansHealthcare LawActions Against Healthcare

WorkersSurgeonsTortsDamagesCollateral Source RuleGeneral OverviewTortsDamagesCompensatory DamagesPain & SufferingGeneral OverviewTortsMalpractice & Professional LiabilityHealthcare ProvidersTortsNegligenceProofRes Ipsa LoquiturElementsGeneral OverviewTortsVicarious LiabilityEmployersGeneral Overview

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17-175 California Points & Authorities § 175.02

§ 175.02 Governing Statutes

The liability of a physician or other health care provider for negligence is governed generally by *Civ. Code § 1714(a)*. The Medical Injury Compensation Reform Act (Stats. 1975, 2d Ex. Sess., chs. 1, 2) added or amended the following statutes that apply specifically to actions brought against licensed health care providers based on professional negligence: *Bus. & Prof. Code § 6146* (limiting attorneys' contingency fees in such actions); *Civ. Code §§ 3333.1-3333.2* (pertaining to damages); *Code Civ. Proc. §§ 340.5* (establishing one-year/three-year limitations period), 364 (establishing requirement of 90 days' notice of intent to file action), 667.7 (requiring payment of future damages in installments), and 1295 (providing for arbitration of malpractice claims) [*see Fein v. Permanente Medical Group (1985) 38 Cal. 3d 137, 155-178, 211 Cal. Rptr. 368, 695 P.2d 665* (upholding constitutionality of *Civ. Code §§ 3333.1, 3333.2*; periodic payments as mandatory under *Code Civ. Proc. § 667.7*, but reversal as not required when defendant failed to request special findings designating damages as either pre-award or future damages)].

Each of these statutes define the terms "health care provider" and "professional negligence" as follows:

"Health care provider" means any person licensed or certified pursuant to *Bus. & Prof. Code § 500 et seq.* (practitioners of healing arts, including veterinarians), or licensed pursuant to the Osteopathic Initiative Act [*see Bus. & Prof. Code § 3600*], or the Chiropractic Initiative Act [*see Bus. & Prof. Code §§ 1000-1058*] or licensed pursuant to *Health & Safety Code § 1200 et seq.* (health facilities, including hospitals). "Health care provider" includes the legal representative of a health care provider [*Bus. & Prof. Code § 6146(c)(2)*; *Civ. Code § 3333.1(c)(1)*; *Code Civ. Proc. §§ 340.5(1), 667.7, 1295*].

"Professional negligence" means a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that the services are within the scope of services for which the provider is licensed and that they are not within any restriction imposed by the licensing agency or licensed hospital [*Bus. & Prof. Code § 6146(c)(2)*; *Civ. Code § 3333.1(c)(1)*; *Code Civ. Proc. §§ 340.5(1), 667.7, 1295*].

Certain immunities against liability for medical negligence are provided by *Bus. & Prof. Code §§ 2395-2398, 2727.5*, and *2861.5*; *Civ. Code §§ 43.9* and *1714.8*; *Gov. Code §§ 855.6, 855.8*, and *856.6*; *Health & Safety Code §§ 1317*,

7190.5 (repealed effective July 1, 2000), and 120450; *Probate Code § 4740*; and *Veh. Code § 165.5*.

Code Civ. Proc. § 1029.8 allows the recovery of treble damages, and costs and attorney's fees at the discretion of the court, when an unlicensed person causes injury or damage to another while providing goods or performing services for which specified licenses are required. For a form based on *Code Civ. Proc. § 1029.8*, see Ch. 177, *Damages* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against Healthcare WorkersDoctors & PhysiciansHealthcare LawActions Against Healthcare WorkersSurgeonsHealthcare LawActions Against Healthcare WorkersTort ReformTortsDamagesPunitive DamagesAvailabilityGeneral OverviewTortsMalpractice & Professional LiabilityHealthcare Providers

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17-175 California Points & Authorities § 175.03

§ 175.03 Related Pleading and Practice Chapters

For discussion and forms relating to malpractice actions against health care providers based on professional negligence, breach of warranty, and battery, see California Forms of Pleading and Practice, Ch. 209, *Dentists* , Ch. 295, *Hospitals* , and Ch. 415, *Physicians: Medical Malpractice* (Matthew Bender).

For a discussion and forms relating to claims brought against public hospitals or clinics, see California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Tort Claims Act* (Matthew Bender).

For a discussion and forms relating to actions in which medical treatment or malpractice is involved, see the following chapters in California Forms of Pleading and Practice:

- Ch. 4, *Abortion and Birth Control Methods*.
- Ch. 58, *Assault and Battery*.
- Ch. 246, *Emergency Vehicles*.
- Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators*.
- Ch. 285, *Guardianship and Conservatorship: Care of Ward or Conservatee*.
- Ch. 304, *Insane and Other Incompetent Persons*.
- Ch. 367A, *Minors: Tort Actions*.
- Ch. 394, *Parent and Child*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against FacilitiesFacility LiabilityHospitalsHealthcare LawActions Against Healthcare WorkersDoctors & PhysiciansTortsMalpractice & Professional LiabilityHealthcare Providers

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17-175 California Points & Authorities § 175.04

§ 175.04 Related Points and Authorities Chapters

Related memoranda that may be useful in particular medical malpractice actions may be found in the following chapters:

- Ch. 21, *Assault and Battery*.
- Ch. 50, *Contracts*.
- Ch. 64, *Damages: Tort*.
- Ch. 65, *Damages: Contract*.
- Ch. 71, *Demurrers and Motions for Judgment on the Pleadings*.
- Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*.
- Ch. 100A, *Employer and Employee: Respondeat Superior*.
- Ch. 239, *Workers' Compensation Exclusive Remedy Doctrine*.
- Ch. 143, *Limitation of Actions*.
- Ch. 155, *Motions After Trial*.
- Ch. 165, *Negligence*.
- Ch. 176, *Physicians and Surgeons: Licensing and Professional Discipline*.
- Ch. 182, *Principal and Agent*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against FacilitiesApparent Agency & Respondeat SuperiorRespondeat SuperiorHealthcare LawActions Against Healthcare WorkersDoctors & PhysiciansHealthcare LawActions Against Healthcare WorkersSurgeonsHealthcare LawBusiness Administration & OrganizationWrongful TerminationGeneral OverviewTortsDamagesGeneral OverviewTortsMalpractice & Professional LiabilityHealthcare ProvidersTortsVicarious LiabilityEmployersGeneral Overview

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17-175 California Points & Authorities §§ 175.05-175.19

[Reserved]

§§ 175.05[Reserved]

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17-175 California Points & Authorities § 175.20

§ 175.20 Supporting Contention That Physician Is Liable for Professional Negligence--General Practitioner's Duty to Refer to Specialist

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS LIABLE FOR NEGLIGENCE IN FAILING TO REFER PLAINTIFF TO A SPECIALIST BECAUSE OTHER PRUDENT GENERAL PRACTITIONERS, UNDER SIMILAR CIRCUMSTANCES, WOULD HAVE DONE SO.

Duty to Consult With Specialist. A general practitioner who undertakes exclusive service in a specialized area of medicine is negligent if, under similar circumstances, a reasonably careful general practitioner would call in a specialist (*Sinz v. Owens (1949) 33 Cal. 2d 749, 758, 205 P.2d 3*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a physician is liable for negligence in rendering medical treatment, when defendant general practitioner failed to call in a specialist under circumstances that would cause a reasonably prudent general practitioner to do so.

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the defendant's negligence. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing how the facts of the case demonstrate that, under the

circumstances, the defendant's failure to call in a specialist was not in accordance with the proper standard of care exercised by other general practitioners.

[c] Related Points and Authorities

For points and authorities relating to negligence actions generally, see Ch. 165, *Negligence* .

[3] Discussion of Authorities

[a] Duty to Consult With Specialist

In ***Sinz v. Owens*** *(1949) 33 Cal. 2d 749, 205 P.2d 3* , a malpractice action based on negligent treatment of a leg fracture, defendant was a general practitioner who treated plaintiff's fracture without calling in an orthopedic specialist. A jury held for plaintiff, and defendant appealed from the judgment. A new trial was granted on the issue of damages alone, and plaintiff appealed from that order.

On appeal, defendant contested the propriety of a portion of the jury instruction regarding standard of care that stated that if a general practitioner undertakes service in a specialized area of medicine, and there are appropriate specialists in the locality, the general practitioner will be held to the standard of learning and skill possessed by such specialists. The court held that the instruction was erroneous, but not prejudicial, since plaintiff had not offered proof at trial of any standard beyond that owed by a general practitioner (*33 Cal. 2d 749, 759)* . However, the court suggested that a sounder instruction would state that if a reasonable general practitioner under similar circumstances would have called in a specialist, the defendant was negligent for failing to do so (*33 Cal. 2d 749, 758)* . In this case, expert testimony regarding the complicated nature of the fracture and the inadequacy of defendant's treatment supported a finding of breach of standard of care (*33 Cal. 2d 749, 759)* .

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17-175 California Points & Authorities § 175.21

§ 175.21 Supporting Contention That Physician Is Liable for Professional Negligence--Rebuttable Presumption of Negligence Based on Violation of Statute [Evid. Code § 669]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT'S VIOLATION OF A STATUTE GIVES RISE TO A REBUTTABLE PRESUMPTION, PURSUANT TO SECTION 669 OFTHE EVIDENCE CODE, OF A FAILURE TO EXERCISE DUE CARE IN CARING FOR PLAINTIFF.

A. Violation of Statute Creates Rebuttable Presumption of Failure to Exercise Due Care. The violation of a statute may give rise to a rebuttable presumption of a failure to exercise due care. This presumption, which defendant may rebut by a showing of due care, arises upon proof that: (1) defendant violated a public statute, ordinance, or regulation; (2) the violation was the proximate cause of death or injury to a person; (3) the type of occurrence that caused the death or injury was the type that the law was designed to protect against; and (4) the victim belonged to the class of persons for whose protection the law was adopted (*see Evid. Code § 669*).

B. Physician's Violation of Statute. Under *Section 669 of the Evidence Code*, a physician's violation of a statute gives rise to the presumption of a failure to exercise due care that may support a medical malpractice action (*see Landeros v. Flood (1976) 17 Cal. 3d 399, 413-415, 131 Cal. Rptr. 69, 551 P.2d 389*).

[*Add further points and authorities relating to the specific statute violated in the case to support contention that defendant violated a statutory duty.*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a physician is liable for negligence in rendering medical treatment. The form may be used when the defendant/physician has violated a statute, thus giving

rise to the presumption of defendant's failure to exercise due care [*see Evid. Code § 669*].

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the defendant's negligence. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts that meet the requirements of *Evid. Code § 669* to raise the rebuttable presumption of defendant's breach of due care. Counsel should set forth the pertinent statute and discuss facts demonstrating that defendant violated the statute. For example, a presumption of negligence arising from the violation of *Penal Code § 11166* might be demonstrated by discussion of defendant's failure to report child abuse, and by facts demonstrating that the minor suffered further abuse as a result of the failure to report [*see Landeros v. Flood (1976) 17 Cal. 3d 399, 413-415, 131 Cal. Rptr. 69, 551 P.2d 389* (interpreting former Penal Code §§ 11160, 11161, 11161.5, repealed by 1980 legislation; *now see Penal Code § 11164 et seq.* (Child Abuse and Neglect Reporting Act))].

[c] Related Pleading and Practice Forms

For a form alleging negligence based on a statutory violation, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

For a form of complaint based on a physician's professional negligence, see California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice* (Matthew Bender).

For a discussion relating to reporting requirements and immunity regarding child abuse and neglect, see California Forms of Pleading and Practice, Ch. 340, *Libel and Slander* , Ch. 415, *Physicians: Medical Malpractice* , and Ch. 429, *Privacy* (Matthew Bender).

[d] Related Points and Authorities

For points and authorities opposing a demurrer to a complaint for negligence based on a defendant's violation of law, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For points and authorities relating to reporting requirements and immunity regarding child abuse, see Ch. 142, *Libel and Slander (Defamation)*.

[3] Discussion of Authorities

[a] Violation of Statute

In ***Landeros v. Flood*** *(1976) 17 Cal. 3d 399, 131 Cal. Rptr. 69, 551 P.2d 389* , a minor plaintiff brought a malpractice action against a physician based on both his negligence in improperly diagnosing her battered child syndrome and his failure to report the condition to authorities in accordance with former Penal Code § 11161.5 [*now see Penal Code § 11164 et seq.* (Child Abuse and Neglect Reporting Act)]. The trial court sustained defendant's general demurrer and dismissed the action.

On appeal by plaintiff from the judgment of dismissal, the Supreme Court reversed, holding that plaintiff's complaint adequately stated a cause of action for negligence and that plaintiff was entitled to prove her case by expert testimony at trial. The court held that the allegations of statutoryviolation set forth a valid alternative legal theory supporting the cause of action based on negligence. Such statutory basis of liability, noted the Court, need not be pleaded at all, as the

trial court is required to take judicial notice of the acts of the legislature (*17 Cal. 3d 399, 413)* .

Citing the provisions of *Evid. Code § 669*, the Court ruled that if plaintiff could establish the statutory conditions for invoking the presumption of lack of due care, the burden would shift to defendant to rebut that presumption (*17 Cal. 3d 399, 414)* . However, under former Penal Code § 11161.5 [*now see Penal Code § 11164 et seq.* (Child Abuse and Neglect Reporting Act)], it would be necessary for plaintiff to prove that defendant knowingly failed to comply with the statute; that is, that he actually observed her injuries, diagnosed them as battered child syndrome, and yet still failed to report her condition to the authorities (*17 Cal. 3d 399, 415)* . This state of mind, noted the Court, could be established by circumstantial evidence and the inferences the trier of fact might draw from such evidence (*17 Cal. 3d 399, 415 n.13*). Note that under present *Penal Code § 11166*, a physician (or other health practitioner or other designated person) who, in the physician's professional capacity or within the scope of the physician's employment, has knowledge of or observes a child whom the physician knows or reasonably suspects has been the victim of child abuse, is required to make a report to the appropriate authorities according to specified procedures.

[4] Additional Authorities

[a] Violation of Statute

The facts and procedural background of *Daum v. SpineCare Med. Group, Inc. (1997) 52 Cal. App. 4th 1285, 61 Cal. Rptr. 2d 260* , are discussed in *§ 175.23[3][e]*. The court of appeal held that the trial court erred in refusing plaintiff's request for a jury instruction on negligence per se since plaintiff had sufficiently established all four elements of the doctrine (*52 Cal. App. 4th 1285, 1312)* . It ruled first that plaintiff presented sufficient evidence that his injury resulted from the kind of occurrence the Protection of Human Subjects in Medical Experimentation Act, *Health & Safety Code §§ 24170 et seq.*, was designed to prevent. That is, participation in a clinical trial without the subject's fully informed consent in writing, under circumstances permitting a free and deliberate choice. Second, the court found that plaintiff, as a patient in a clinical investigation, was within the class of persons for whose protection the laws were enacted. The court concluded that plaintiff's evidence of three different statutory and regulatory violations was substantial. And, lastly it found that plaintiff's evidence of causation was sufficient to raise a question for the jury regarding whether a prudent person in plaintiff's position would have declined the surgery (*52 Cal. App. 4th 1285, 1312)* .

In *Lopez v. Southern Cal. Permanente Med. Group (1981) 115 Cal. App. 3d 673, 171 Cal. Rptr. 527* , plaintiffs injured in an auto accident caused by an epileptic driver sued the physician who had failed to report the driver's epilepsy pursuant to the reporting requirement of former Health & Safety Code § 410 (*now see Health & Safety Code § 103900*). The trial court granted the physician's motion for a nonsuit, and the court of appeal affirmed. Although it held that the presumption of negligence arising from violation of a statute had been adequately rebutted by defendants in this case, the court did not contest the general propriety of using *Evid. Code § 669* to support an action for medical malpractice based on a physician's failure to comply with a statute (*115 Cal. App. 3d 673, 678-680)* .

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Volume 17 Chapters 170-179 PARTNERSHIPS---to---PREMISES LIABILITY
CHAPTER 175 PHYSICIANS AND SURGEONS: MEDICAL MALPRACTICE
PART II. FORMS

17-175 California Points & Authorities § 175.22

§ 175.22 Supporting Contention That Physician Is Liable for Professional Negligence--Failure to Warn Patient of Subsequently Ascertained Risks of Treatment

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT IS LIABLE FOR NEGLIGENCE FOR FAILING TO WARN PLAINTIFF OF DANGEROUS EFFECTS OF TREATMENT BECAUSE, SUBSEQUENT TO ADMINISTERING THE TREATMENT, DEFENDANT GAINED KNOWLEDGE OF THE DANGER.

Duty to Warn. The physician-patient relationship gives rise to a continuing duty to warn the patient of risks arising from treatment rendered pursuant to that relationship, and a physician's failure to warn of subsequently learned risks is a breach of that duty of care giving rise to an action for malpractice (*Tresemer v. Barke (1978) 86 Cal. App. 3d 656, 672, 150 Cal. Rptr. 384*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a plaintiff's contention that a physician was negligent in failing to warn his or her patient of subsequently ascertained risks arising from treatment.

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the defendant's negligence. The pointsand authorities in this form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing how the facts of the case demonstrate a duty of care and the

physician's breach of the duty of care by failing to warn the patient of risks arising from treatment of which the physician subsequently became aware.

[c] Related Points and Authorities

For points and authorities relating to negligence actions generally, see Ch. 165, *Negligence* .

[3] Discussion of Authorities

[a] Duty to Warn

In ***Tresemer v. Barke*** *(1978) 86 Cal. App. 3d 656, 150 Cal. Rptr. 384* , plaintiff brought a medical malpractice action against defendant for damages sustained from use of a Dalkon Shield intrauterine device inserted by defendant. Plaintiff's claim was based on defendant's alleged breach of duty of care arising from his failure to warn her of the danger of using the device when he learned of the risk subsequent to insertion. Summary judgment was granted for defendant, and plaintiff appealed.

The court of appeal reversed, noting that on appeal from summary judgment, it need only determine whether there was a reasonable possibility that plaintiff could establish her case (*86 Cal. App. 3d 656, 661)* . In this case, plaintiff stated a cause of action for defendant's failure to warn plaintiff, arising by virtue of the confidential relationship between doctor and patient that gives rise to a duty to protect the patient from risks arising from the relationship. That duty called for reasonable care by the physician under the circumstances, which required the physician to take action to avoid the risk to the patient (*86 Cal. App. 3d 656, 672)* .

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CHAPTER 175 PHYSICIANS AND SURGEONS: MEDICAL MALPRACTICE
PART II. FORMS

17-175 California Points & Authorities § 175.23

§ 175.23 Supporting Contention That Physician Is Liable for Professional Negligence--Failure to Disclose Material Risks of Treatment

[1] FORM

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

DEFENDANT IS LIABLE FOR NEGLIGENCE BECAUSE HE/SHE BREACHED THE DUTY TO DISCLOSE MATERIAL RISKS OF A MEDICAL PROCEDURE.

A. Physician's Duty of Disclosure. An integral part of the physician's obligation of care to a patient is the duty of reasonable disclosure of available choices with respect to a proposed therapy and of the dangers inherently and potentially involved in each (*Cobbs v. Grant (1972) 8 Cal. 3d 229, 243, 104 Cal. Rptr. 505, 502 P.2d 1*).

B. Scope of Minimal Disclosure. When a given procedure inherently involves a known risk of death or serious bodily harm, a doctor has a duty to disclose the potential of such a risk and to explain in lay terms the complications that might occur (*Cobbs v. Grant (1972) 8 Cal. 3d 229, 244, 104 Cal. Rptr. 505, 502 P.2d 1*).

C. Test of Materiality. A physician must disclose all material information pertaining to a proposed procedure, that is, all information that the physician knows or should know would be regarded as significant by a reasonable person in the patient's position when deciding to accept or reject a recommended procedure (*Truman v. Thomas (1980) 27 Cal. 3d 285, 291, 165 Cal. Rptr. 308, 611 P.2d 902*).

[*Optional*] **D. Risks of Declining Treatment.** The duty to disclose includes the duty to explain the material consequences of declining the proposed treatment (*Truman v. Thomas (1980) 27 Cal. 3d 285, 292, 165 Cal. Rptr. 308, 611 P.2d 902*).

[*Optional*] **E. Statutory Duty to Obtain Informed Consent Before Performing Hysterectomy.** Prior to the performance of a nonemergency hysterectomy, physicians and surgeons must provide specific information to the patient and obtain verbal and written consent for the procedure. The information required to be given includes a description of

the surgery involved in the procedure and any available alternatives, advice that the procedure is considered irreversible and results in infertility, and a description of the benefits and advantages, as well as the discomforts and risks, involved (*Health & Safety Code § 1690*).

[*Optional*] **F. Experts Alone Cannot Establish Standard of Care Governing Informed Consent.** When a duty to disclose is imposed by statute or regulation, it is prejudicial error to require a jury to determine the standard of care governing that duty exclusively from expert testimony (*Daum v. SpineCare Med. Group, Inc. (1997) 52 Cal. App. 4th 1285, 1294, 61 Cal. Rptr. 2d 260*).

[*Optional*] **G. Signed Consent Form Not Conclusive Evidence of Informed Consent.** A signed consent form is not necessarily conclusive proof of informed consent to the procedures performed, and the adequacy of a written consent form is a factual issue for the jury (*Quintanilla v. Dunkelman (2005) 133 Cal. App. 4th 95, 115-116, 34 Cal. Rptr. 3d 557*).

[*Optional*] **H. Physician May Have Duty to Disclose Risks Even When Different Physician Performs Treatment.** A physician actively involved in managing a patient's care may have a duty to disclose the risks involved in undergoing treatment, even if that treatment is to be performed by a different physician (*Wilson v. Merritt (2006) 142 Cal. App. 4th 1125, 1134-1137, 48 Cal. Rptr. 3d 630*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a plaintiff's contention that a physician was negligent in failing to disclose material information regarding a proposed procedure.

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the defendant's negligence. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing how the facts of the case demonstrate that the physician failed to disclose the information necessary to aid the patient in making an informed decision, and that the information was material. Furthermore, counsel should discuss facts that demonstrate any of plaintiff's unique concerns or lack of familiarity with medical procedures that might require disclosure beyond that which was made by defendant.

[c] Requirement of Expert Testimony

Whether the minimal disclosure of objectively material information has been given by a physician may be determined by a jury without expert testimony. Whether proper exercise of care would require disclosure beyond the minimal level, however, must be analyzed by expert witnesses [*Jamison v. Lindsay (1980) 108 Cal. App. 3d 223, 232, 166 Cal. Rptr. 443]* .

[d] Related Pleading and Practice Forms

For forms of complaints based on a physician's performance of a procedure in the absence of a patient's informed consent, see California Forms of Pleading and Practice, Ch. 209, *Dentists* , and Ch. 415, *Physicians: Medical Malpractice* (Matthew Bender).

[d] Related Points and Authorities

For points and authorities supporting and opposing the contention that a physician is liable for battery for performing a procedure in the absence of a patient's informed consent, see Ch. 21, *Assault and Battery* .

For points and authorities relating to negligence actions generally, see Ch. 165, *Negligence* .

[e] Opposing Points and Authorities

The points and *authorities in §§ 175.31* and *175.32* may be used in an appropriate case to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Physician's Duty of Disclosure

In ***Cobbs v. Grant*** *(1972) 8 Cal. 3d 229, 104 Cal. Rptr. 505, 502 P.2d 1* , the leading case on the physician's duty to disclose material information regarding treatment, the Supreme Court established guidelines regarding the duty of disclosure and the type of liability that would result from a breach of the duty. The plaintiff brought a malpractice action based on allegations of the physician's negligence in performing surgery and the failure to obtain the plaintiff's informed consent to the operation. The jury held for plaintiff, but the Supreme Court reversed the verdict on the ground that there was no substantial evidence to support a finding of negligence.

Although the record did not indicate on which theory of negligence the jury relied, the Court addressed itself primarily to the issue of informed consent. An integral part of the physician's obligation of care toward a patient, held the Court, is the duty of reasonable disclosure of the available choices with respect to a proposed therapy and of the dangers inherently and potentially involved in each (*8 Cal. 3d 229, 243)* . The scope of required disclosure depends in part on the type of procedure contemplated; relatively minor risks inherent in a common procedure (such as taking blood samples) need not be disclosed, whereas known risks of death or serious bodily harm inherent in a complicated procedure must be explained in lay terms (*8 Cal. 3d 229, 244-245)* . In addition to this minimal disclosure, the physician must reveal such additional information as a skilled practitioner of good standing would provide under similar circumstances (*8 Cal. 3d 229, 241)* .

The Court established the circumstances under which a failure to disclosewould give rise to an action in battery as opposed to negligence. The Court held that the battery theory should be reserved for those circumstances when a physician performs a treatment different from that to which the patient has consented (*8 Cal. 3d 229, 240)* . The negligence theory should be pleaded when an undisclosed inherent complication with a low probability occurs during treatment to which the patient has consented (*8 Cal. 3d 229, 240-241)* .

[b] Scope of Minimal Disclosure

The facts and procedural background of ***Cobbs v. Grant*** *(1972) 8 Cal. 3d 229, 104 Cal. Rptr. 505, 502 P.2d 1* , are discussed in *§ 175.23[3][a]*. The Supreme Court defined the minimal scope of disclosure required of a physician as an explanation of the available choices with respect to a proposed therapy and the dangers inherently involved in each and, when a complicated procedure involving a risk of death or serious bodily harm is contemplated, a further explanation in lay terms of the complications that might occur (*8 Cal. 3d 229, 243-244)* .

[c] Test of Materiality

In ***Truman v. Thomas*** *(1980) 27 Cal. 3d 285, 165 Cal. Rptr. 308, 611 P.2d 902* , the Supreme Court reversed a special verdict for defendant physician in a medical malpractice action based on negligence, finding that the physician

had breached his duty of disclosure by not informing the patient of risks of declining a pap smear. The scope of the physician's duty to disclose, the Court held, is measured by the amount of knowledge a patient needs in order to make an informed choice. All information material to the patient's decision should be given. The Court defined material information as that which the physician knows or should know would be regarded as significant by a reasonable person in the patient's position when deciding to accept or reject the recommended medical procedure. To be material, the fact must also be one that is not commonly appreciated (*27 Cal. 3d 285, 291)* . Additionally, the Court ruled, a physician's knowledge of a patient's unique concerns or lack of familiarity with medical procedures may broaden the objective scope of materiality (*27 Cal. 3d 285, 291)* .

[d] Risks of Declining Treatment

The facts and procedural background of ***Truman v. Thomas*** *(1980) 27 Cal. 3d 285, 165 Cal. Rptr. 308, 611 P.2d 902* , are discussed in *§ 175.23[3][c]*. The California Supreme Court held that the duty to disclose material information regarding a proposed treatment includes a duty to inform the patient of the risks of declining treatment (*27 Cal. 3d 285, 292-294)* . The Court held that the duty applies whether the procedure involves treatment or a diagnostic test. A physician recommending a risk-free procedure need not disclose information beyond that necessary to conform to competent medical practice and to obtain the patient's consent. If the patient indicates that he or she is going to decline the risk-free procedure, however, the physician must then discuss the risks in so declining. If a procedure involves some risk, the Court stated, the physician must always discuss the potential consequences of declining the procedure (*27 Cal. 3d 285, 292)* .

[e] Experts Alone Cannot Establish Standard of Care Governing Informed Consent

In ***Daum v. SpineCare Med. Group, Inc.*** *(1997) 52 Cal. App. 4th 1285, 1294, 61 Cal. Rptr. 2d 260* , plaintiff sued for medical malpractice arising out of an unsuccessful spinal fusion surgery. Plaintiff's theory of liability at trial was defendant's failure to obtain informed consent for the implantation of a fixation device in his back. Plaintiff did not dispute that he had agreed to the use of the device, but claimed that he was not informed the device was considered investigational or experimental by the FDA, nor was he told that his surgery was part of an FDA-approved clinical investigation of the device conducted by defendant. California statutes and federal regulations incorporated in the manufacturer's protocol for clinical trials of the device required that patients be informed of its investigational status, consent in writing to participate in the trial, and be given a copy of their consent form. Plaintiff did not sign a written consent form disclosing the investigational status of the device until shortly before surgery, when he was lying on a gurney. Soon thereafter he received an anesthetic that had a retroactive amnesia effect such that after surgery he had no memory of signing the form, nor was he given a copy. The surgeon believed he had orally informed plaintiff the device was investigational sometime before the day of surgery. Plaintiff denied this. At trial the parties' experts disagreed as to whether the disclosure to plaintiff was within the standard of care. The jury returned a special verdict finding that defendant had made a sufficient disclosure and a judgment for defendant was entered.

On appeal, plaintiffs argued that the trial court improperly instructed the jury that the standard of care must be determined solely from expert testimony. The court of appeal agreed, concluding that it was prejudicial error to require the jury to determine the standard of care governing informed consent exclusively from expert testimony, and therefore reversed the judgment (*52 Cal. App. 4th 1285, 1294)* . The court ruled that because disclosure of the device's investigational status was required by statute and regulation, it was error to require the jury to consider only testimony by medical experts in deciding whether plaintiff was given all the information relevant to his decision on the implantation of the device. It was also improper to limit the jury to expert testimony in deciding whether the timing and manner of the disclosure to plaintiff was sufficient to allow him to give fully informed consent. The court reasoned that this was not a matter beyond the understanding of lay people; on the contrary, the medical profession had to conform its methods of disclosure to the needs and understanding of patients. The court cited *Arato v. Avedon (1993) 5 Cal. 4th 1172, 23 Cal. Rptr. 2d 131* , and *Cobbs v. Grant (1972) 8 Cal. 3d 229, 104 Cal. Rptr. 505* as prior authority establishing the limited role of experts in establishing standards of disclosure, and found that the procedures followed in

this case overstepped the limits imposed by both (*52 Cal. App. 4th 1285, 1305)* .

[f] Signed Consent Form Not Conclusive Evidence of Informed Consent

In ***Quintanilla v. Dunkelman*** *(2005) 133 Cal. App. 4th 95, 34 Cal. Rptr. 3d 557* , the plaintiffs were a surgery patient and her husband who sued a referring physician, a treating physician, and a medical group for lack of informed consent, battery, intentional infliction of emotional distress, and loss of consortium. The jury returned a verdict in favor of the plaintiffs for negligence based on the lack of informed consent and loss of consortium. The defendants appealed on the grounds that the patient had signed a pre-surgery written consent form.

The court of appeal upheld the jury verdict based on lack of informed consent, rejecting the defendants' contention that the signed consent form was conclusive proof of informed consent. The court concluded that the adequacy of a written consent form in any particular case is a factual issue for the jury (*133 Cal. App. 4th 95, 115)* . In this particular case, the plaintiff was a Spanish-speaking patient who had signed a pre-surgery consent form written in Spanish. However, the patient provided testimony that she did not read Spanish, that she was rushed through the pre-surgery admissions procedures and told to "sign here" and "initial there" without being informed of what was written on the form, and that neither the examining physician nor the surgeon had adequately explained what procedures were actually going to be performed. Under those circumstances, the court upheld the jury's determination that the signed form did not establish informed consent (*133 Cal. App. 4th 95, 115-118)* .

[g] Physician May Have Duty to Disclose Risks Even When Different Physician Performs Treatment

In *Wilson v. Merritt (2006) 142 Cal. App. 4th 1125, 48 Cal. Rptr. 3d 630* , plaintiff was a paraplegic who suffered a torn rotator cuff and a fractured shoulder while undergoing a manipulation under anesthesia procedure performed by a chiropractor at a pain and rehabilitation center. After suffering a stroke that caused problems with his shoulder, plaintiff had sought help at the rehabilitation center, where he was evaluated by and consulted with the medical doctor on staff, who was also the director of the clinical side of the center. This physician mentioned the possibility of undergoing the manipulation under anesthesia procedure, among other treatment options, but recommended physical therapy. During the course of his rehabilitation at the center, plaintiff's chiropractors again mentioned that plaintiff might benefit from the manipulation under anesthesia procedure. To get more information about the procedure, plaintiff consulted again with the physician, because plaintiff believed that the physician was in charge of plaintiff's overall treatment and plaintiff trusted him. Because the physician indicated to plaintiff that the only risks from the procedure were with possible infection from injections, plaintiff decided to undergo the procedure. Although the procedure was performed by a chiropractor at the clinic, the physician was present during the procedure to administer an injection and assist in holding plaintiff steady while the chiropractor performed the treatment. After being injured during the procedure, plaintiff brought suit against the physician and the chiropractor. Plaintiff argued that had he been informed of the risk of suffering the injuries he suffered, he would not have agreed to the treatment. After plaintiff presented his evidence, the trial court granted the physician's motion for nonsuit, determining that the physician owed no duty to get informed consent from plaintiff with respect to a procedure that the physician did not perform. Plaintiff appealed.

The court of appeal reversed. The court noted that, under established case law, whether the unique circumstances of a particular case support a duty of disclosure by a physician is a question for the jury, and that under the appropriate circumstances, consulting physicians who do not perform the treatment and do not meet with the patient do not owe a duty to get the patient's informed consent (*142 Cal. App. 4th 1125, 1134)* . However, the court also recognized that doctors who have actively managed the patient's care may have a duty to inform the patient of the risks involved in a particular treatment, even if the doctor will not personally perform the treatment. In the instant case, the physician had had direct contact with plaintiff during the treatment period prior to the manipulation under anesthesia procedure. The physician was the medical director of the clinic and was apparently the first one to suggest the manipulation under anesthesia procedure as a possible course of treatment. He had recommended plaintiff's physical therapy at the clinic, and when plaintiff seriously considered the manipulation under anesthesia procedure, plaintiff returned to the physician

to learn more about the procedure and seek the physician's advice. In addition, the physician was present during the procedure, and plaintiff was under the impression that the physician would be exercising some level of supervision. The court held that, under the circumstances of the case, a triable issue existed as to whether the physician had a duty to get plaintiff's informed consent (*142 Cal. App. 4th 1125, 1134-1137)* .

[4] Additional Authorities

[a] Physician's Duty of Disclosure

In *Hutchinson v. United States (9th Cir. 1988) 841 F.2d 966* , plaintiff was treated for asthma with prednisone, and then developed aseptic necrosis. Plaintiff sued the doctors under the Federal Tort Claims Act, alleging that the doctors failed to warn him of the risk of developing aseptic necrosis. The district court ruled against plaintiff. The Ninth Circuit reversed and remanded, holding that thedistrict court had erred in concluding under California law that the doctor's duty to warn depended on whether doctors in the community would have customarily provided warnings in the same situation. The appellate court held that the district court should have first determined whether or not the risk was material, and if so the plaintiff can prevail if he or she demonstrates that a reasonable person would not have undergone the treatment if a warning were given. Whether or not prednisone use was prevalent in the treatment of asthma was not directly relevant to whether or not a reasonable person in plaintiff's position would have consented to treatment with it after considering its risk. The district court was directed on remand to resolve the issues of what risk plaintiff faced and whether or not a reasonable person would have consented to the treatment (*841 F.2d 966, 967)* .

In *Jamison v. Lindsay (1980) 108 Cal. App. 3d 223, 166 Cal. Rptr. 443* , plaintiff appealed from a verdict for defendants in a malpractice action based on negligence, arguing that defendants had been negligent in their failure to inform plaintiff of a divergence of medical opinion regarding the diagnosis of her condition. Relying on the information given, plaintiff had consented to surgery that later proved to be inadequate. The court of appeal rejected plaintiff's argument on the ground that she had not raised the issue at trial or requested an appropriate jury instruction. However, the court noted in dictum that consistent with a physician's broad duty of disclosure, a physician should inform the patient of all information relevant to a decision whether to seek additional treatment following surgery, and that had such an instruction been given, the jury might have considered whether the failure to disclose the divergence of opinion constituted negligence (*108 Cal. App. 3d 223, 231)* .

[b] Risks of Declining Treatment

In *Moore v. Preventive Med. Med. Group, Inc. (1986) 178 Cal. App. 3d 728, 223 Cal. Rptr. 859* , plaintiff was examined by an internist who recommended that he see a specialist for diagnosis of a mole on his ear. Plaintiff did not see the internist again and did not go to a specialist. Five months later, plaintiff's dermatologist conducted tests that determined the mole was cancerous. Plaintiff sued the internist and his medical group for negligence in failing to adequately warn him of the potential dangers to him if he did not have the mole promptly diagnosed. Plaintiff settled with the internist prior to trial and at trial, the jury found for plaintiff. Defendant medical group appealed and the court of appeal affirmed. Although the internist had no reason to know that the patient would not follow his recommendation, the court of appeal held that he had a duty to disclose all material information that would enable the plaintiff to make an informed decision about whether or not to see the specialist. The court noted that the fact that the internist would not be doing the diagnosis himself underscored the importance of relaying this information to the patient at the time of his visit, when the internist knew that he would not have another opportunity to discuss with him the risks faced if the patient did not see a specialist (*178 Cal. App. 3d 728, 738-739)* .

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17-175 California Points & Authorities § 175.24

§ 175.24 Supporting Contention That Physician Is Liable for Professional Negligence--Failure to Warn Contagious Patient to Take Steps to Protect Others

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS LIABLE FOR PROFESSIONAL NEGLIGENCE BECAUSE HE/SHE BREACHED THE DUTY TO WARN A CONTAGIOUS PATIENT OF THE RISK TO OTHERS AND TO ADVISE HOW TO PREVENT THE SPREAD OF THE DISEASE.

Duty to Warn of Risk to Others. A physician has a duty to warn a contagious patient to take steps to protect others (*Reisner v. Regents of Univ. of Cal. (1995) 31 Cal. App. 4th 1195, 1203, 37 Cal. Rptr. 2d 518*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted by plaintiff in support of the contention that defendant may be held liable for breaching a duty to warn a patient with a contagious disease of the steps that he or she must take in order to protect others from contracting the disease.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that defendant owed a duty to warn a contagious patient to take steps to protect others, for example, in a summary judgment motion. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that the physician treated a patient with a contagious disease, that the

physician did not warn the patient of the risk of infecting others, and that the plaintiff was infected with the disease from the physician's patient [*see Reisner v. Regents of Univ. of Cal. (1995) 31 Cal. App. 4th 1195, 1201-1203, 37 Cal. Rptr. 2d 518]* .

[3] Discussion of Authorities

[a] Duty to Warn of Risk to Others

In ***Reisner v. Regents of Univ. of Cal.*** *(1995) 31 Cal. App. 4th 1195, 37 Cal. Rptr. 2d 518* , the plaintiff, a young man who became HIV positive after intimate relations with a young woman, brought a negligence action against the woman's physicians. The woman had received a blood transfusion when she was 12 years old with blood that had been contaminated with HIV antibodies, but despite his knowledge of the contamination, the woman's doctor did not tell her or her parents about the tainted blood. The defendants moved for judgment on the pleadings, claiming that they owed no duty to an unidentified third person, and the trial court granted the motion.

The court of appeal reversed, ruling that physicians have a duty to warn a contagious patient to take steps to protect others (*31 Cal. App. 4th 1195, 1203)* . The court first noted that prior case law has established that when a patient presents a serious danger to another, a doctor has a duty to warn the intended victim or others likely to apprise the victim of the danger (*31 Cal. App. 4th 1195, 1199)* . Second, the court pointed out that prior medical negligence cases have held that the fact that a plaintiff was a foreseeable but not a readily identifiable victim does not preclude the plaintiff from stating an action against doctors for failing to warn of the danger (*31 Cal. App. 4th 1195, 1200)* . Finally, the court reasoned that finding a duty would encourage the highest standard of care concerning communicable and infections diseases (*31 Cal. App. 4th 1195, 1201)* . The court concluded that a physician has a duty to warn a contagious patient of the risk to others and to advise the patient how to prevent the spread of the disease (*31 Cal. App. 4th 1195, 1203)* .

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17-175 California Points & Authorities § 175.25

§ 175.25 Supporting Contention That Physician Is Liable for Professional Negligence--Vicarious Liability for Negligence of Medical Assistants

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS LIABLE UNDER THE DOCTRINE OF RESPONDEAT SUPERIOR FOR THE NEGLIGENCE OF MEDICAL ASSISTANTS OVER WHOM HE/SHE EXERCISED CONTROL AND DIRECTION.

A. Vicarious Liability of Physician. A physician is liable for the negligence of assistants that the physician, if exercising reasonablediligence, should have observed and prevented (*see Ales v. Ryan (1936) 8 Cal. 2d 82, 105, 64 P.2d 409*).

B. Delegation of Supervision to Others. The fact that the duty of preventing mistakes during a medical procedure is delegated to others does not relieve the physician of vicarious liability for their negligence (*Ybarra v. Spangard (1944) 25 Cal. 2d 486, 492, 154 P.2d 687* (dictum)).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a physician is vicariously liable for the conduct of medical assistants whose negligence injured plaintiff.

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the defendant's vicarious liability for the acts of medical assistants. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts that demonstrate the physician's duty to supervise and control the conduct of medical assistants. For example, when appropriate, counsel should discuss the fact that the defendant was the chief surgeon in charge of all medical procedures occurring during surgery.

[c] Determination of Agency

The issue of vicarious liability of a physician arises most often in actions based on injuries caused by the negligence of hospital employees assisting a private physician during surgery. The physician may be held liable for such employee's negligence if plaintiff establishes a special employment relationship between the hospital personnel and defendant. This relationship flows from the borrowing employer's power to supervise the details of the employee's work, for example, a chief surgeon's duty and right to control the acts of assisting surgeons or nurses during an operation [*see Ybarra v. Spangard (1944) 25 Cal. 2d 486, 492, 154 P.2d 687]* . Such temporary agency is a question of fact for the jury [*Truhitte v. French Hosp. (1982) 128 Cal. App. 3d 332, 348, 180 Cal. Rptr. 152]* .

For a thorough discussion of the doctrine of respondeat superior in the medical malpractice context, see California Forms of Pleading and Practice, Ch. 295, *Hospitals* , and Ch. 415, *Physicians: Medical Malpractice* (Matthew Bender).

[d] Related Pleading and Practice Forms

For forms of complaints based on a principal's vicarious liability for the negligence of an agent, see California Forms of Pleading and Practice, Ch. 360, *Master and Servant* , and Ch. 427, *Principal and Agent* (Matthew Bender).

[e] Related Points and Authorities

For points and authorities relating to negligence actions based on the vicarious liability of a principal for acts or omissions of an agent, see Ch. 182, *Principal and Agent* . For points and authorities pertaining to the vicarious liability of employers for the torts of their employees, see Ch. 100A, *Employer and Employee: Respondeat Superior* .

For points and authorities relating to negligence actions generally, see Ch. 165, *Negligence* .

[f] Opposing Points and Authorities

The points and *authorities in § 175.35* may be used in an appropriate case to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Vicarious Liability of Physician

Ales v. Ryan *(1936) 8 Cal. 2d 82, 64 P.2d 409* , in which the Supreme Court dealt with the liability of a physician for negligence of medical assistants, involved a patient who died of peritoneal infection when a sponge was left in her abdomen following surgery. Testimony established that although sponge counts are usually the responsibility of the attending nurses, no one had made an accurate count and that this fact must have been apparent to defendant, the chief surgeon.

Reversing a judgment for defendant from which plaintiff, the decedent's administrator, appealed, the Court stated that a physician is liable for the negligence of others that he should have observed if exercising reasonable diligence. The status of the physician as surgeon in charge of the operation gave him the power and therefore the duty to order a sponge count and furthermore to see that it was performed. The Court held that this responsibility was not relieved by any hospital custom or rule requiring the nurses to count sponges removed after surgery. The surgeon was in absolute

charge of and was directing the operation, and was therefore liable for the negligent act of the assistant in failing to remove the sponge and for the absence of an accurate sponge count (*8 Cal. 2d 82, 105)* .

[b] Delegation of Supervision to Others

In ***Ybarra v. Spangard*** *(1944) 25 Cal. 2d 486, 154 P.2d 687* , the Supreme Court reversed a nonsuit for defendants in a malpractice action based on negligent performance of surgery. The ground for reversal was the trial court's erroneous rejection of the res ipsa loquitur doctrine; however, the issue of multiple defendants exercising control over the instrumentality of harm prompted the court to discuss the rule of vicarious liability of a surgeon for the negligence of assistants. In dicta, the Court noted that while assisting physicians and nurses may be employed by the hospital, they normally become the temporary agents of the surgeon in charge during the operation, and liability may be imposed on the physician for their negligent acts. The fact that the surgeon delegates certain aspects of supervision to others, stated the Court, does not absolve him from responsibility for their negligence in carrying out the task (*25 Cal. 2d 486, 492)* .

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17-175 California Points & Authorities § 175.26

§ 175.26 Supporting Contention That Physician Is Liable for Professional Negligence--Causation Established by "Substantial Factor" Test

[1] FORM

[*The following may be included in a memorandum or points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS LIABLE FOR PLAINTIFF'S INJURIES BECAUSE PLAINTIFF HAS ESTABLISHED THAT DEFENDANT'S PROFESSIONAL NEGLIGENCE WAS A SUBSTANTIAL FACTOR IN CAUSING PLAINTIFF'S INJURIES IN THAT THERE IS A REASONABLE MEDICAL PROBABILITY THAT PLAINTIFF WOULD HAVE OBTAINED A BETTER RESULT IN THE ABSENCE OF DEFENDANT'S NEGLIGENCE[, EVEN THOUGH OTHER FACTORS MAY HAVE CONTRIBUTED TO THE INJURIES].

Existence of Multiple Causes of Damage Does Not Negate Liability If Negligence Was Substantial Factor in Causing Damage. Defendant's conduct can be the basis of liability if it was a substantial factor in bringing about plaintiff's damage, even though the damage was caused by interacting causes, some of which are not chargeable to defendants (*Espinosa v. Little Co. of Mary Hosp. (1995) 31 Cal. App. 4th 1304, 1316-1322, 37 Cal. Rptr. 2d 541*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted by plaintiff in support of the contention that a defendant's negligent conduct was the cause of plaintiff's injury under the "substantial factor" test of causation, even though other causes may also exist that are not attributable to defendant.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that defendant's negligence was a cause of plaintiff's injury. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence of plaintiff's injuries and defendant's negligence, and should argue that the negligence was a substantial factor in causing plaintiff's injuries [*see Espinosa v. Little Co. of Mary Hosp. (1995) 31 Cal. App. 4th 1304, 1316-1322, 37 Cal. Rptr. 2d 541]* .

[3] Discussion of Authorities

[a] Existence of Multiple Causes of Damage Does Not Negate Liability If Negligence Was Substantial Factor in Causing Damage

In ***Espinosa v. Little Co. of Mary Hosp.*** *(1995) 31 Cal. App. 4th 1304, 37 Cal. Rptr. 2d 541* , the guardian ad litem of a child who allegedly sustained brain damage through certain prenatal care and testing brought an action for medical malpractice. One of plaintiff's expert witnesses testified that the child should have been delivered sooner than he was, and that the failure to deliver earlier was below the standard of care, and was negligence. Another of plaintiff's expert witnesses testified that plaintiff had structural damage to his brain, and that this damage was caused by three factors: the mother's use of Lithium, negligence in monitoring the pregnancy, and negligence in the delivery. The defendants were not responsible for the mother's use of Lithium, and plaintiff's expert was not able to quantify the extent to which plaintiff's condition was caused by this factor. The expert testified that the two factors caused by the defendants were substantial factors in the outcome, and that they had a contributory role in the outcome. Apparently convinced that the expert had not sufficientlyestablished the element of causation between the defendants' acts and plaintiff's damage, the trial court granted a defense motion for nonsuit.

The court of appeal reversed, concluding that the plaintiff presented sufficient evidence on the issue of causation to permit the dispute to be resolved by the jury (*31 Cal. App. 4th 1304, 1312)* . The court initially noted that in a medical malpractice action the element of causation is satisfied when a plaintiff produces sufficient evidence to allow the jury to infer that, in the absence of defendants' negligence, there was a reasonable medical probability that the plaintiff would have obtained a better result (*31 Cal. App. 4th 1304, 1314-1315)* . With regard to the issue of multiple causes, and the effect of the mother's use of Lithium, the court stated that it was clear from the testimony that Lithium was responsible for only a portion of plaintiff's disabilities. The court concluded that the defendants' conduct was a substantial factor in bringing about the damage, and that the inability to pin down the exact extent to which defendants' conduct contributed to the outcome was immaterial (*31 Cal. App. 4th 1304, 1317)* . The court stated that the evidence did not justify the trial court's reasoning that it was possible that the damage had occurred prior to the actions by the defendants (*31 Cal. App. 4th 1304, 1318)* .

[4] Additional Authorities

[a] Existence of Multiple Causes of Damage Does Not Negate Liability If Negligence Was Substantial Factor in Causing Damage

In *Logacz v. Limansky (1999) 71 Cal. App. 4th 1149, 84 Cal. Rptr. 2d 257* , a wrongful death action was brought against a physician who had performed a hysterectomy on the decedent approximately two weeks before her death, alleging that the defendant was negligent when treating the decedent after the surgery by failing to properly diagnose and take steps to reduce the decedent's circulatory problems. At trial, the defendant argued that the cause of the decedent's death was her extreme obesity combined with a sedentary lifestyle. Although the plaintiffs agreed that those factors can contribute to the risk of circulatory problems, they requested that the trial court instruct the jury that there may be concurrent legal causes to an injury, but the trial court refused to give the submitted instruction based on *BAJI No. 3.77* and the jury found that the defendant's negligence was not a legal cause of death. The court of appeal held that this refusal to instruct on concurrent causation was reversible error. The court recognized the established principle that there may be more than one legal cause of an injury, found that the defendant's negligence may have been an additional proximate cause of the decedent's death, and held that the failure to instruct on concurrent causation likely confused the

jury, especially in light of the fact that the jury specifically found that the defendant had in fact been negligent (*71 Cal. App. 4th 1149, 1157-1159, 1166)* .

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17-175 California Points & Authorities § 175.27

§ 175.27 Supporting Contention That Physician Is Liable for Professional Negligence--Physician Owes Duty of Care to Examinee Notwithstanding Lack of Physician-Patient Relationship

[1] FORM

[*The following may be included in a memorandum or points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS LIABLE FOR NEGLIGENCE OR MEDICAL MALPRACTICE FOR INJURIES INCURRED BY PLAINTIFF DURING AN EXAMINATION BY DEFENDANT, EVEN IN THE ABSENCE OF A PHYSICIAN-PATIENT RELATIONSHIP.

Physician Has Duty to Conduct Examination in Manner That Does Not Injure Examinee. Even in the absence of a physician-patient relationship, a physician is liable to an examinee for negligence or professional malpractice for injuries incurred during the examination itself (*Mero v. Sadoff (1995) 31 Cal. App. 4th 1466, 1478, 37 Cal. Rptr. 2d 769*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted by plaintiff in support of the contention that a physician may be held liable to a person injured in the course of an examination due to the physician's negligence, even if the examinee was not a patient of the physician.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that defendant owed a duty of care to an examinee whether or not the examinee is a patient of the defendant. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that the physician examined the plaintiff and thatduring the course of this examination the defendant was negligent, and that the negligence resulted in injury to the plaintiff [*see Mero v. Sadoff (1995) 31 Cal. App. 4th 1466, 37 Cal. Rptr. 2d 769]* .

[3] Discussion of Authorities

[a] Physician Has Duty to Conduct Examination in Manner That Does Not Injure Examinee

In ***Mero v. Sadoff*** *(1995) 31 Cal. App. 4th 1466, 37 Cal. Rptr. 2d 769* , plaintiff had injured her back while at work and had filed a claim for workers' compensation. In the workers' compensation action plaintiff's employer requested that she submit to a medical examination concerning her injury. Plaintiff subsequently sued the examining physician, alleging that she was injured in the course of this examination when the defendant physician negligently strapped her into an apparatus, which caused her body to be maneuvered into various damaging positions. The trial court granted summary judgment for the defendant on the ground that defendant did not owe a duty to plaintiff because there was no physician-patient relationship between plaintiff and defendant.

The court of appeal reversed the summary judgment, holding that even in the absence of a physician-patient relationship, a physician is liable to an examinee for negligence for injuries incurred during the examination (*31 Cal. App. 4th 1466, 1478)* . The court initially noted that prior case law had held that when a physician conducts an examination of an injured person solely for the purpose of rating the injury for an insurance carrier, there is no duty of professional skill in connection with the report because the physician could not reasonably expect that the examinee would rely on the report (*31 Cal. App. 4th 1466, 1472)* . However, the court determined that whether a physician owes a duty in such a situation to conduct the examination in a manner which does not injure the examinee requires consideration of the foreseeability of harm, the degree of certainty of injury, the closeness of the connection between the defendant's conduct ant the injury, the moral blame, the policy of preventing future harm, the consequences of imposing a duty, and the availability of insurance for the risk involved (*31 Cal. App. 4th 1466, 1477)* . The court concluded that all of these considerations supported the imposition of liability on a physician conducting an examination even in the absence of a physician-patient relationship (*31 Cal. App. 4th 1466, 1478)* .

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17-175 California Points & Authorities § 175.28

§ 175.28 Supporting Contention That Physician May Be Liable for Professional Negligence-Psychiatrist Owes Duty of Care to Suicidal Patients Regardless of Whether They Are Inpatients or Outpatients

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

A PSYCHIATRIST OWES A DUTY OF CARE, CONSISTENT WITH STANDARDS IN THE PROFESSIONAL COMMUNITY, TO PROVIDE APPROPRIATE TREATMENT FOR POTENTIALLY SUICIDAL PATIENTS, WHETHER THE PATIENT IS HOSPITALIZED OR NOT.

A. Duty Owed to Suicidal Inpatients as Well as Outpatients. A psychotherapist or other mental health provider has a duty to use a reasonable degree of skill, knowledge and care in treating a patient, commensurate with that possessed and exercised by others practicing within that specialty in the professional community. This duty exists whether the patient is hospitalized at the time or not (*Kockelman v. Segal (1998) 61 Cal. App. 4th 491, 505, 71 Cal. Rptr. 2d 552*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a mental health professional may be liable for professional negligence on the ground that he or she breached a duty owed to a suicidal outpatient.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should discuss the evidence that defendant treated a suicidal patient on an outpatient basis and should argue that defendant owed a duty of care to plaintiff to provide appropriate treatment, whether the patient was hospitalized or not.

[c] Related Pleading and Practice Forms

For discussion regarding a mental health provider's duty of care to suicidal patients, see California Forms of Pleading and Practice, Ch. 304, *Insane or Other Incompetent Persons* (Matthew Bender). For discussion, forms, and procedures relating to a physician's duty of care generally, see California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice* (Matthew Bender).

[d] Opposing Points and Authorities

For a memorandum of points and authorities opposing the contention that a physician is liable for professional negligence on the ground that the physician owed no duty of care to plaintiff, see *§ 175.29*.

[3] Discussion of Authorities

[a] Duty Owed to Suicidal Inpatients as Well as Outpatients

In ***Kockelman v. Segal*** *(1998) 61 Cal. App. 4th 491, 71 Cal. Rptr. 2d 552* plaintiff filed a wrongful death action alleging that her husband's death was caused by the professional negligence of a psychiatrist and medical clinic. Specifically, plaintiff claimed that defendants were negligent in treating her husband for chronic depression, and that this negligence was a proximate cause of her husband's suicide. The trial court granted summary judgment in favor of defendants, finding as a matter of law that there was no duty owed to the decedent because he was being treated as an outpatient rather than in a hospital setting. Plaintiff appealed.

The court of appeal reversed, concluding that a psychotherapist or other mental health provider has a duty to use a reasonable degree of skill, knowledge and care in treating a patient, commensurate with that possessed and exercised by others practicing within that specialty in the professional community. This duty exists whether the patient is hospitalized at the time or not. The court noted that it did not purport to endorse a rule which imposed an absolute duty on a psychiatrist to prevent a patient's suicide. Rather, only that a psychiatrist's duty of care to a suicidal patient, was not negated by the patient's status as an outpatient. According to the court, whether this particular psychiatrist acted within the duty of care in the circumstances of this case involved factual determinations which had to be resolved by the opinions and specialized knowledge of experts in the field and were therefore beyond the scope of the summary judgment motion. The court merely found that the trial court erred in ruling that decedent's status as an outpatient decided the issue of duty as a matter of law (*61 Cal. App. 4th 491, 503-505)* .

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17-175 California Points & Authorities § 175.28A

§ 175.28A Supporting Contention That Physician Is Liable for Professional Negligence--Unnecessary Surgery May be Basis for Malpractice Action

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

UNNECESSARY SURGERY IS INHERENTLY INJURIOUS TO A PATIENT AND A PHYSICIAN MAY BE HELD LIABLE FOR PERFORMING A SURGERY THAT IS UNNECESSARY UNDER THE APPROPRIATE STANDARD OF CARE.

Liability for Unnecessary Surgery. Unnecessary surgery is inherently injurious to a patient and a physician may be held liable for performing a surgery that was unnecessary under the appropriate standard of care (*see Tortorella v. Castro (2006) 140 Cal. App. 4th 1, 13, 43 Cal. Rptr. 3d 853*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a physician who performs surgery that a reasonable physician adhering to the appropriate standard of care would realize is unnecessary may be held liable for medical malpractice.

This form may be combined with points and authorities pertaining to the specific procedural context in which the argument is made. It may also be used in an appellate brief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include facts showing why the surgery was unnecessary and how the doctor's decision to perform the surgery fell below the applicable standard of care. If a reasonable physician adhering to the appropriate

standard of care would have realized that the surgery was unnecessary, it is not necessary for the plaintiff to show that the surgery itself was performed improperly.

[3] Discussion of Authorities

[a] Liability for Unnecessary Surgery

In *Tortorella v. Castro (2006) 140 Cal. App. 4th 1, 43 Cal. Rptr. 3d 853* , plaintiff underwent sinus surgery in an attempt to correct facial pain and pressure. After the surgery, however, plaintiff twice returned to the surgeon for additional treatment to relieve the effects of the surgery. Plaintiff sued the surgeon, and defendant moved for summary judgment. In support of the motion, the doctor presented the declaration of an expert stating that defendant's conduct did not fall below the relevant standard of care. Plaintiff opposed the motion and presented a declaration of her own expert describing how defendant had misdiagnosed plaintiff's condition and explaining that the surgery defendant performed had been unnecessary. The trial court granted the motion for summary judgment on the grounds that plaintiff's expert's declaration failed to address the issue of causation. Plaintiff subsequently submitted an amended expert declaration that specifically stated that the defendant's negligence caused plaintiff's harm and moved for a new trial. The trial court granted the motion for new trial, concluding that the equities of the case favored a resolution on the merits. Defendant appealed.

The court of appeal affirmed, but for reasons different than those provided by the trial court. The court first held that a motion for new trial was appropriate after the trial court had granted summary judgment and that the order granting the new trial should be upheld if it should have been granted for any reason (*140 Cal. App. 4th 1, 8-10)* . The court then concluded that the trial court had committed an error in law in grantingthe summary judgment in the first place, and this error was sufficient basis for granting the motion for a new trial. In opposing the motion for summary judgment, plaintiff had presented an expert witness declaration describing how, in acting too quickly, the defendant's conduct fell below the applicable standard of care and why the resulting surgery was unnecessary. Although this initial expert declaration was silent on the issue of causation, the court of appeal stated that it was self-evident that unnecessary surgery is inherently injurious and causes harm to the patient, including needless pain and suffering, even if the surgery itself is performed flawlessly. Noting the absence of California case law on point, the court supported its conclusion with a similar case from New Hampshire. The court then held that at the summary judgment stage, the plaintiff's opposing papers had created a triable issue of fact as to whether the physician's treatment fell below the standard of care by performing a surgery that was unnecessary. These papers were also sufficient to raise a triable issue as to whether the plaintiff suffered harm that was caused by the unnecessary surgery, regardless of whether the papers specifically address the issue of causation of harm (*140 Cal. App. 4th 1, 13)* .

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17-175 California Points & Authorities § 175.29

§ 175.29 Opposing Contention That Physician Is Liable for Professional Negligence--No Duty of Care Toward Plaintiff

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS NOT LIABLE FOR PROFESSIONAL NEGLIGENCE IN THE ABSENCE OF A PHYSICIAN-PATIENT RELATIONSHIP GIVING RISE TO A DUTY OF CARE TOWARD PLAINTIFF.

A. Requirement of Physician-Patient Relationship. A physician is generally liable for medical negligence only when a duty of care is owed as the result of a physician-patient relationship arising from express or implied contract (*Keene v. Wiggins (1977) 69 Cal. App. 3d 308, 313, 138 Cal. Rptr. 3* ; *Rainer v. Grossman (1973) 31 Cal. App. 3d 539, 543, 107 Cal. Rptr. 469*).

[*Optional*] **B. Requirement of Special Factors for Imposing Nonprivity Duty of Care.** The imposition of a duty of care on a physician in the absence of a professional relationship with the patient requires findings of intent on the part of the physician to treat the patient, reasonable expectation that the patient will rely on the physician's opinion, and social value in imposing liability (*see* *Keene v. Wiggins (1977) 69 Cal. App. 3d 308, 314-315, 138 Cal. Rptr. 3* ; *see also Rainer v. Grossman (1973) 31 Cal. App. 3d 539, 543-544, 107 Cal. Rptr. 469*).

[*Optional*] **C. No Duty Owed by Proctor to Assist or Protect Patient.** No special relationship exists between a physician acting as a proctor and either the treating surgeons or a patient who suffers injuries due to their negligence that imposes a duty on the proctor to take affirmative action to assist or protect the patient (*Clarke v. Hoek (1985) 174 Cal. App. 3d 208, 211-219, 219 Cal. Rptr. 845*).

[*Optional*] **D. Same Alleged Breach of Duty Cannot Give Rise to Distinct Causes of Action for Ordinary and Professional Negligence.** The same alleged breach of duty cannot give rise to distinct causes of action for ordinary and professional negligence, as they comprise essentially one form of action (*Flowers v. Torrance Mem'l Hosp. (1994) 8 Cal. 4th 992, 995, 35 Cal. Rptr. 2d 685, 884 P.2d 142*).

[*Optional*] **E. No Duty Owed by Psychotherapist to Parent of Adult Patient for Treatment Regarding Allegedly FalseRecovered Memories of Childhood Sexual Abuse.** A psychotherapist owes no duty of care to the parent of an adult patient arising from the therapist's treatment of the patient regarding allegedly false recovered memories of childhood sexual abuse (*Trear v. Sills (1999) 69 Cal. App. 4th 1341, 1343, 82 Cal. Rptr. 2d 281*).

[*Optional*] **F. Physician Owes No Duty to Obtain Consent of Husband of Patient Who Undergoes Artificial Insemination.** In the absence of a patient-physician relationship and for reasons of public policy, a doctor who artificially inseminates a female patient does not owe a duty to the patient's husband to inform the husband and obtain the husband's consent before performing the insemination (*Shin v. Kong (2000) 80 Cal. App. 4th 498, 504-512, 95 Cal. Rptr. 2d 304*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a plaintiff's contention that a physician is liable for negligence in rendering a medical opinion or treatment. The ground of opposition set forth is the absence of a physician-patient relationship from which the duty of care usually arises, and the further absence of special considerations that might otherwise uphold liability in the absence of such privity.

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the absence of defendant's duty of care. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss how the facts of the case demonstrate the absence of a professional relationship between defendant and plaintiff and the further absence of special factors which might otherwise support the imposition of a duty of care on the defendant. For example, a physician who examines a patient for the sole purpose of preparing a report for a workers' compensation insurer and who does not purport to advise or attempt treatment does not owe a duty of care to the person examined [*Keene v. Wiggins (1977) 69 Cal. App. 3d 308, 314-316, 138 Cal. Rptr. 3]* .

[c] Related Pleading and Practice Forms

For a form of general demurrer to a complaint based on plaintiff's failure to state a cause of action, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender).

[d] Related Points and Authorities

For a form of memorandum of points and authorities supporting a motion by defendant for judgment on the pleadings based on plaintiff's failure to allege a legal duty owed by defendant, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

For points and authorities relating to negligence actions generally, see Ch. 165, *Negligence* .

[3] Discussion of Authorities

[a] Requirement of Physician-Patient Relationship

In ***Keene v. Wiggins*** *(1977) 69 Cal. App. 3d 308, 138 Cal. Rptr. 3* , plaintiff was examined by defendant physician at the request of plaintiff's employer's workers' compensation insurer. A report was prepared by defendant for the insurance company in which surgery or further treatment for plaintiff's condition was deemed unnecessary. Plaintiff claimed that he relied on the report in deciding to forego further treatment. The trial court granted summary judgment for defendant, finding that there was no physician-patient relationship between defendant and plaintiff from which a duty of care toward plaintiff arose and hence no liability for negligence in making the report was incurred by defendant.

The court of appeal affirmed. A physician's duty of care, it held, generally arises as the result of a physician-patient relationship arising from an express or implied contract to provide medical services. In the case of a physician examining a person solely for the purpose of preparing a report for an insurance carrier, the doctor's duty of care runs only to the carrier and to the employer requesting the report (*69 Cal. App. 3d 308, 313-314)* . The court noted, however, that a duty of care may still arise under basic tort liability principles of foreseeability of harm and justifiable reliance on the physician's opinion (*69 Cal. App. 3d 308, 312)* . Had defendant offered or intended to treat the plaintiff, or had he reason to expect the plaintiff to rely on his opinion, a duty of care would have been owed to plaintiff. No special factors justifying such reliance were present in this case, the court stated, and thus defendant owed plaintiff no duty of professional skill in connection with the report and was not liable to plaintiff for any negligence in making the medical recommendation (*69 Cal. App. 3d 308, 314-316)* .

In ***Rainer v. Grossman*** *(1973) 31 Cal. App. 3d 539, 107 Cal. Rptr. 469* , defendant was a professor of medicine who had been presented with information regarding plaintiff's condition by her treating physician during a lecture and, for teaching purposes, gave his opinion that surgery was advisable. Defendant never knew plaintiff's identity and never personally examined her. Subsequent to the lecture, plaintiff's physician recommended and performed the surgery that was in fact unnecessary. Defendant was joined in the malpractice action on the basis of his failure to personally examine plaintiff and to amass sufficient information prior to making the recommendation. On the basis of defendant's claim that he neither treated plaintiff for her condition nor was he called for consultation on her case, the trial court granted summary judgment in his favor.

The court of appeal affirmed the judgment. It noted that the contractual physician-patient relationship that usually gives rise to the necessary element of a duty of care was absent in the present case, and thus no duty could be imposed on defendant on that basis (*31 Cal. App. 3d 513)* . In absence of such privity, stated the court, liability could be imposed as a matter of policy based on the consideration of factors, including the extent to which the transaction was intended to effect the plaintiff, the foreseeability of harm to plaintiff, and the policy of preventing future harm (*31 Cal. App. 3d 539, 543-544)* . In the present case, the court held that defendant was entitled to assume that the physicians he addressed would consider the fact that he had not personally examined their patients and would rely on their own ultimate opinions and knowledge in recommending treatment. Furthermore, stated the court, to impose liability under such circumstances would be counterproductive to proper medical care by inhibiting exchange of medical information and the improvement of medical knowledge. Policy considerations, therefore, militated against the imposition of liability (*31 Cal. App. 3d 539, 544-545)* .

[b] Requirement of Special Factors for Imposing Nonprivity Duty of Care

The facts and procedural background of ***Keene v. Wiggins*** *(1977) 69 Cal. App. 3d 308, 138 Cal. Rptr. 3* , are discussed in *§ 175.29[3][a]*. The court of appeal held against the imposition of liability in the absence of a physician-patient relationship when defendant had not intended to treat or otherwise benefit the plaintiff, and circumstances did not otherwise support a finding that plaintiff could reasonably rely on defendant's medical opinion (*69 Cal. App. 3d 308, 315-316)* .

The facts and procedural background of ***Rainer v. Grossman*** *(1973) 31 Cal. App. 3d 539, 107 Cal. Rptr. 469* , are discussed in *§ 175.29[3][a]*. The court of appeal affirmed the dismissal of a physician who was not in contractual privity with plaintiff and whose conduct as a professor giving an opinion on plaintiff's condition solely for teaching

purposes did not, under considerations of policy and foreseeability principles, justify the imposition of nonprivity liability (*31 Cal. App. 3d 539, 543-545)* .

[c] No Duty Owed by Proctor to Assist or Protect Patient

Clarke v. Hoek *(1985) 174 Cal. App. 3d 208, 219 Cal. Rptr. 845* , was an action brought by a surgery patient against a proctoring physician, seeking to recover damages for defendant's failure to intervene in operations in which a proctored physician negligently inflicted injuries on plaintiff. Plaintiff underwent two operations performed by the same two surgeons at two different hospitals. Defendant, an active medical staff member of both hospitals, observed and evaluated one of plaintiff's surgeons, who was an applicant for medical staff privileges at one of the hospitals. Prior to each operation, defendant discussed the operative plan with the proctored surgeon, but otherwise took no part in the care and treatment of plaintiff. At the time of the surgeries, defendant had never met plaintiff, nor entered into any contractual relationship with her. Defendant did not scrub in for the surgeries, but rather observed them from a position outside the sterile field. He did not request, receive, or expect any payment from any source for proctoring the operations. Plaintiff discovered defendant's identity and role solely because the proctored physician mentioned to plaintiff's husband that one of the operations would be proctored. The trial court granted defendant's motion for summary judgment. Plaintiff appealed.

The court of appeal affirmed, holding that there is no special relationship between a patient and a proctoring physician that gives rise to any obligation or duty on the proctor to take affirmative action to assist or protect the patient (*174 Cal. App. 3d 208, 217)* . Proctors are responsible only to the medical staff credentials committee of the hospital charged with peer review. They are only required to observe the candidate for medical staff membership, and not expected to supervise the proctored physicians or to intervene in proctored surgeries (*174 Cal. App. 3d 208, 212)* . Defendant was not plaintiff's physician, and there was no physician-patient relationship between them (*174 Cal. App. 3d 208, 216)* . He neither created a situation that placed plaintiff at risk, nor affirmatively brought about any increased peril to her (*174 Cal. App. 3d 208, 217)* . There is no authority in California for holding that an individual proctor owes a duty of due care to a patient in a proctored surgery, much less an affirmative obligation to intervene in the operation to prevent malpractice on the part of the physicians performing the surgery (*174 Cal. App. 3d 208, 219)* . Moreover, strong public interest warrants supporting, encouraging, and protecting effective medical peer review programs and activities (*174 Cal. App. 3d 208, 220)* . The protection of staff inquiries with a measure of confidentiality encourages the quality of in-hospital medical practice. For example, *Evid. Code § 1157* bars discovery in legal action of either the proceedings or therecords of organized committees of hospital medical staffs that evaluate and improve the quality of care rendered in the hospital (*174 Cal. App. 3d 208, 221)* .

[d] Same Alleged Breach of Duty Cannot Give Rise to Distinct Causes of Action for Ordinary and Professional Negligence

In ***Flowers v. Torrance Mem'l Hosp.*** *(1994) 8 Cal. 4th 992, 35 Cal. Rptr. 2d 685, 884 P.2d 142* , the plaintiff filed suit against a hospital and an attending nurse for general negligence and premises liability, alleging that plaintiff fell asleep while laying on a gurney awaiting treatment for bladder pain and subsequently awoke and fell off the gurney, sustaining injury to her back and arm. The trial court granted summary judgment in favor of the defendants based on their expert's testimony that prevailing standards did not require emergency room personnel to raise gurney side rails for patients like plaintiff, whose condition did not appear to warrant this precaution. In a divided opinion, the court of appeal affirmed the ruling with respect to "professional" negligence, but found the evidence insufficient to negate "ordinary" negligence. Thus, the court of appeal reversed, holding that the pleadings were broad enough to encompass a theory of liability for ordinary as well as professional negligence because the manner of her injury did not involve a breach of duty to provide professional skill or care. The court of appeal concluded that summary judgment was not proper in light of defendants' failure to address this alternative theory of liability (*8 Cal. 4th 992, 995-996)* .

The Supreme Court reversed, holding that, with respect to questions of substantive law, "ordinary" and "professional"

negligence comprise essentially one form of action (*8 Cal. 4th 992, 995)* . As stated by the Court, apart from statutory considerations, characterizing misfeasance as one type of negligence or the other generally only serves to define the standard of care applicable to the defendant's conduct (*8 Cal. 4th 992, 997)* . However, the Court stated that the bifurcation of plaintiff's pleadings in this matter was erroneous and that the Court was unable to determine whether this error had affected the court of appeal's determination of the requisite standard of care and its analysis of the materiality of disputed facts. Accordingly, the Court remanded the matter for further consideration of the trial court's action in light of the views expressed by the Court (*8 Cal. 4th 992, 1001-1002)* . Further, the Court declined to resolve the conflict between *Murillo v. Good Samaritan Hosp. (1979) 99 Cal. App. 3d 50, 160 Cal. Rptr. 33* , and *Gopaul v. Herrick Mem'l Hosp. (1974) 38 Cal. App. 3d 1002, 113 Cal. Rptr. 811* , on the question of whether a patient's fall from a hospital bed or gurney implicates "professional" or "ordinary" negligence in a statutory context. The Court disapproved either of the earlier court of appeal decisions to the extent it may be inconsistent with the Court's own analysis (*8 Cal. 4th 992, 1002 n.6*).

[e] No Duty Owed by Psychotherapist to Parent of Adult Patient for Treatment Regarding Allegedly False Recovered Memories of Childhood Sexual Abuse

In ***Trear v. Sills*** *(1999) 69 Cal. App. 4th 1341, 82 Cal. Rptr. 2d 281* , plaintiff sued his adult daughter's psychotherapist for professional negligence, claiming that he was falsely accused of sexually abusing his daughter and that the therapist planted the idea in her mind in the course of treating her. Plaintiff's daughter, on the prompting of her therapist, had two years earlier filed a civil suit against her father for having raped and sexually abused her during her childhood, although she claimed she had no memory of this abuse until the therapist's treatment and diagnosis. Although the record contained no evidence that the daughter had ever recanted her allegations against her father, plaintiff's complaint against the therapist suggested that the memories were false and that had the therapist exercised reasonable care, she would have foreseen the harm to plaintiff resulting from the misdiagnosis. Defendant therapist demurred to the complaint, which was sustained without leave to amend. Plaintiff appealed.

The court of appeal affirmed, holding that a psychotherapist owes no duty of care to the parent of an adult patient arising from the therapist's treatment of the patient regarding allegedly false recovered memories of childhood sexual abuse (*69 Cal. App. 4th 1341, 1343)* . Absent an assumption of duty, the duty of psychotherapists to exercise due care generally runs to the patients who hire them (*69 Cal. App. 4th 1341, 1348, 1350)* . Although the court recognized that harm to a parent falsely accused of sexual abuse would be foreseeable, it concluded that foreseeability alone was insufficient (*69 Cal. App. 4th 1341, 1346-1348)* . To impose a duty that runs to the parent would impose a divided loyalty on the therapist, who would be unable to explore properly the possibility that the patient's problems were related to repressed memories of childhood abuse for fear of liability to the alleged abuser (*69 Cal. App. 4th 1341, 1350-1352)* . The court of appeal concluded that its holding was consistent with the analytical framework for evaluating a psychotherapist's liability established by the Supreme Court's noted decision in *Tarasoff v. Regents of Univ. of Cal. (1976) 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334* , which had balanced the traditional factors for determining whether a tort duty of care should be imposed under the particular circumstances (*69 Cal. App. 4th 1341, 1355-1356)* .

The court stressed that its holding was limited to treatment of *adult* patients, since treatment of a minor child raises additional concerns as to who actually hired the therapist and whether a duty might run on that basis to a parent of the patient (*69 Cal. App. 4th 1341, 1344 n.4*).

[f] No Duty Owed by Physician to Obtain Consent of Husband of Patient Who Undergoes Artificial Insemination

In ***Shin v. Kong*** *(2000) 80 Cal. App. 4th 498, 95 Cal. Rptr. 2d 304* , the plaintiff was the former husband of a woman who, without the plaintiff's knowledge, had undergone artificial insemination during the marriage and given birth to a child whom the plaintiff had believed was his biological son. After discovering during divorce proceedings that his wife had conceived the child through artificial insemination, the plaintiff brought suit against the physician who performed

the insemination and had used his own semen in doing so, arguing essentially that the physician had owed the plaintiff a duty to notify him and obtain his consent before performing the procedure. However, the plaintiff had never been the physician's patient, had not participated in the insemination procedure, and had no contact with the physician. The trial court granted judgment on the pleadings in favor of the physician, concluding that absent any relationship between the plaintiff and the physician that could serve as basis for a legal duty of care owed to the plaintiff, the plaintiff could plead no viable cause of action. The plaintiff appealed.

The court of appeal affirmed. The court first rejected the plaintiff's contention that a duty could be imposed under *Fam. Code § 7613*, which is part of the Uniform Parentage Act, because that statute deals with establishing the legal paternity of a child conceived through artificial insemination and does not address a physician's tort liability (*80 Cal. App. 4th 498, 504-505)* . The court also rejected the plaintiff's argument that a physician who performs artificial insemination on a married woman has a special relationship with the woman's husband that gives rise to a duty to refrain from performing the procedure without the husband's knowledge and consent. The court concluded instead that public policy concerns embodied in statutes such as *Civ. Code § 43.5*, the so-called "anti-heart balm" statute, cautioned against finding that a duty is owed to the husband (*80 Cal. App. 4th 498, 506-509)* . Finally, the court held that the plaintiff had no basis for recovering for interference with procreative rights, for infliction of emotional distress on either a direct or bystander theory, or for intentional infliction of emotional distress (*80 Cal. App. 4th 498, 509-512)* .

[4] Additional Authorities

[a] Requirement of Physician-Patient Relationship

In *Felton v. Schaeffer (1991) 229 Cal. App. 3d 229, 279 Cal. Rptr. 713* , the defendants had allegedly misdiagnosed plaintiff during a preemployment physical, which had been conducted at the request of the plaintiff's prospective employer. The alleged misdiagnosis purportedly resulted in a lost job opportunity for the plaintiff and associated damages. The trial court entered judgment for the plaintiff on plaintiff's action for medical malpractice and negligence, but the court of appeal reversed. The court of appeal found that a physician-patient relationship never existed between the plaintiff and defendants and that consequently, defendants owed plaintiff no duty to use due care in evaluating plaintiff's medical condition. The court noted that defendants evaluated plaintiff solely for purposes of a preemployment physical examination, the examination was conducted at the request of the employer, plaintiff did not seek medical treatment or advice from defendants, and plaintiff did not seek or decline to seek medical treatment in reliance on the evaluation. Under the facts of the case, the court concluded, plaintiff had no claim in ordinary negligence or medical malpractice based on the alleged misdiagnosis (*229 Cal. App. 3d 229, 234-235)* .

[b] Same Alleged Breach of Duty Cannot Give Rise to Distinct Causes of Action for Ordinary and Professional Negligence

In *Bellamy v. Appellate Department (1996) 50 Cal. App. 4th 797* , the court of appeal applied the holding in *Murillo v. Good Samaritan Hosp. (1979) 99 Cal. App. 3d 50, 160 Cal. Rptr. 33* , and ruled that the plaintiff's allegations of injuries, which occurred when she fell off a rolling X-ray table, were sufficient to state a claim for professional, as opposed to ordinary, negligence against the hospital (*50 Cal. App. 4th 797, 809)* .

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PART II. FORMS

17-175 California Points & Authorities § 175.30

§ 175.30 Opposing Contention That Physician Is Liable for Professional Negligence--Prudent Selection of Method of Diagnosis or Treatment

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

WHEN THERE ARE SEVERAL METHODS OF APPROVED DIAGNOSIS OR TREATMENT, AN IMPROPER SELECTION BY DEFENDANT WHILE EXERCISING DUE CARE DOES NOT GIVE RISE TO LIABILITY FOR NEGLIGENCE.

A. Exercise of Best Judgment. If a physician exercises his or her best judgment in selecting from various approved methods of diagnosis or treatment, it is not negligence to choose one such method that later turns out to be an improper selection (*Barton v. Owen (1977) 71 Cal. App. 3d 484, 501-502, 139 Cal. Rptr. 494* ; see *Fraijo v. Hartland Hosp. (1979) 99 Cal. App. 3d 331, 341-343, 341 fn. 8, 160 Cal. Rptr. 246*).

B. Consideration of Entire Course of Conduct. To properly decide whether a physician's conduct constitutes a recognized and approved method of diagnosis or treatment, it is necessary to view the overall course of conduct followed in connection with the circumstances of the patient's condition (*Barton v. Owen (1977) 71 Cal. App. 3d 484, 502, 139 Cal. Rptr. 494*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a plaintiff's contention that a physician has been negligent in selecting a method of diagnosis or treatment. The ground of opposition set forth is that a physician will not incur liability if he or she uses reasonable care in selecting from among various approved methods of diagnosis or treatment, even if the selection later turns out to be incorrect.

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific

procedural context in which counsel wishes to raise the issue of the defendant's adherence to the proper standard of care. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing how the facts of the case demonstrate defendant's exercise of his or her best medical judgment in selecting from various methods of treatment or diagnosis, and the fact that each of the methods from which the selection was made were medically approved for use in plaintiff's situation.

[3] Discussion of Authorities

[a] Exercise of Best Judgment

In ***Barton v. Owen*** *(1977) 71 Cal. App. 3d 484, 139 Cal. Rptr. 494* , plaintiff was treated by defendant for acute frontal sinusitis. In treating plaintiff, defendant failed to administer a culture and sensitivity test that would have identified the presence of a bacteria that eventually led to a brain abscess and the need for surgery. However, substantial expert testimony was presented to the effect that administration of the sensitivity test was not necessarily the only proper method by which to diagnose plaintiff's condition, and that, even had it been performed, it might not have led to prevention of the abscess. On this basis, the trial court refused to find defendant negligent, as a matter of law, and instructed the jury regarding the fact that a physician may choose between a number of approved methods of diagnosis or treatment without incurring liability for a wrong choice if proper care is exercised in making the selection [relying on *BAJI No. 6.03*].

The jury held in favor of defendant, and plaintiff appealed the judgment, citing use of the instruction as one of his grounds for appeal. Although it reversed the judgment on other grounds, the court of appeal upheld the verdict for defendant on the issue of the nonadministration of the sensitivity test and held that the giving of *BAJI No. 6.03* was proper (*71 Cal. App. 3d 484, 501)* .

The court noted that medicine is not a field of absolutes, and that *BAJI No. 6.03* properly embodied the notion that physicians may disagree in good faith upon what constitutes a proper method of diagnosis or treatment. A physician is required only to exercise reasonable care in deciding among approved methods and is not liable for the consequences of a wrong decision if such care is utilized (*71 Cal. App. 3d 484, 501-502)* . The court held that the expert testimony sufficiently established the existence of alternative approved methods of diagnosis regarding plaintiff's condition and supported the propriety of the jury instruction (*71 Cal. App. 3d 484, 501)* . The evidence also supported the jury's finding of fact that defendant had exercised due care in deciding not to administer the test (*71 Cal. App. 3d 484, 499)* .

In ***Fraijo v. Hartland Hosp.*** *(1979) 99 Cal. App. 3d 331, 160 Cal. Rptr. 246* , the rule that a physician may select from among various approved methods of diagnosis without incurring liability for a wrong choice so long as reasonable care is exercised was applied to nurses. Plaintiff's decedent had entered the hospital for emergency treatment of her asthma condition. Following a physician's directive to administer Demerol to the patient as needed, defendant nurse exercised her medical judgment to administer the drug when she noticed that the patient's condition had worsened. The patient died as the result of an idiosyncratic reaction to the Demerol, and her surviving relatives brought the medical malpractice action against the hospital, the treating physicians, and the nurse who ordered administration of the drug. The trial court instructed the jury on the rule regarding selection from among various approved methods of diagnosis or treatment, as embodied by *BAJI No. 6.03*, modifying the instruction to apply to nurses as well as physicians. The jury held for defendant, and plaintiff appealed, arguing primarily that the instruction erroneously stated the standard of care governing nurses by extending their professionalism into the area of independent judgment.

The court of appeal rejected plaintiff's argument and affirmed the verdict. Noting that in certain situations, standard

medical practice permits physicians to confer upon nurses the exercise of reasonable judgment, nurses in those situations must be accorded the protection of the rule regarding the use of best judgment in selecting the method of treatment or diagnosis. To hold otherwise, stated the court, would impose on nurses a standard of care exceeding that applicable to the medical profession (*99 Cal. App. 3d 331, 342-343)* .

[b] Consideration of Entire Course of Conduct

The facts and procedural background of ***Barton v. Owen*** *(1977) 71 Cal. App. 3d 484, 139 Cal. Rptr. 494* , are discussed in *§ 175.30[3][a]*. The court analyzed the jury instruction (*BAJI No. 6.03*) regarding the physician's freedom to exercise his or her best judgment in selecting from among various approved methods of diagnosis or treatment without incurring liability for a wrong decision. The court held that, in evaluating whether a method is approved, the trier of fact must take into consideration the entire course of the physician's conduct and the particular circumstances of a patient's condition. Individual steps of treatment are not to be compared with general standards of care, but, rather, analysis should focus on whether such steps constitute approved methods in conjunction with the overall plan of treatment (*71 Cal. App. 3d 484, 502)* . For example, the use of nose drops for a sinus infection might be deemed improper if considered as an individual decision, but the same prescription in connection with other aspects of treatment might constitute an approved method. In this case, the decision not to administer a sensitivity test, considered along with other aspects of the care rendered, did not constitute an unapproved method of diagnosis or treatment (*71 Cal. App. 3d 484, 501)* .

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17-175 California Points & Authorities § 175.31

§ 175.31 Opposing Contention That Physician Is Liable for Professional Negligence--Failure to Disclose Material Risk of Treatment--Low Probability Complication or Idiosyncratic Reaction Not Material

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

LOW PROBABILITY COMPLICATIONS AND RARE, IDIOSYNCRATIC REACTIONS TO TREATMENT ARE NOT DEEMED MATERIAL RISKS AND DEFENDANT IS NOT LIABLE FOR FAILURE TO DISCLOSE SUCH RISKS.

Nonmaterial Risk. In determining whether or not information relating to a medical procedure is material so as to require disclosure by the physician, such factors as the seriousness and remoteness of the dangers involved in the procedure as well as the risks of a decision not to undergo the procedure must be considered. A rare, idiosyncratic reaction or a very low probability risk of treatment is not a material risk as a matter of law, and a physician is not liable for failure to inform the patient of such a risk (*see McKinney v. Nash (1981) 120 Cal. App. 3d 428, 440-441, 442, 174 Cal. Rptr. 642*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a plaintiff's contention that a physician was negligent in failing to disclose material information regarding a proposed treatment, when the allegedly nondisclosed risk concerned a low probability complication or idiosyncratic reaction to treatment and was thus not material.

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the defendant's adherence to the proper standard of care. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing how the facts of the case demonstrate that the risk of the complication suffered by plaintiff was highly remote, or that plaintiff's alleged injuries were caused by an idiosyncratic reaction to treatment rather than by a known risk with a high incidence of occurrence.

[c] Requirement of Expert Testimony

Whether the minimal disclosure of objectively material information has been given by a physician may be determined by a jury without expert testimony. Whether proper exercise of care would require disclosure beyond the minimal level, however, must be analyzed by expert witnesses [*Jamison v. Lindsay (1980) 108 Cal. App. 3d 223, 232, 166 Cal. Rptr. 443]* .

[d] Related Pleading and Practice Forms

For forms of complaints based on a physician's performance of a procedure in the absence of a patient's informed consent, see California Forms of Pleading and Practice, Ch. 58, *Assault and Battery* , Ch. 209, *Dentists* , and Ch. 415, *Physicians: Medical Malpractice* (Matthew Bender).

[e] Related Points and Authorities

For points and authorities supporting and opposing the contention that a physician is liable for battery for performing a procedure in the absence of a patient's informed consent, see Ch. 21, *Assault and Battery* .

For points and authorities relating to negligence actions generally, see Ch. 165, *Negligence* .

[f] Opposing Points and Authorities

In an appropriate case, this memorandum may be submitted in opposition to the contention that a physician is liable for negligent nondisclosure of material information supported by the points and *authorities in § 175.23*.

[3] Discussion of Authorities

[a] Nonmaterial Risk

In ***McKinney v. Nash*** *(1981) 120 Cal. App. 3d 428, 174 Cal. Rptr. 642* , plaintiff had undergone surgery for a hernia repair during which he suffered nerve damage resulting in testicular atrophy and impotence. Under the doctrine of res ipsa loquitur, plaintiff sued the surgeon and the anesthesiologist, alleging both negligence in performing the surgery and in failing to inform plaintiff of the risk of the complications suffered. The trial court directed a verdict for defendants, and plaintiff appealed.

The court of appeal reversed the verdict with respect to the surgeon, but affirmed it with respect to the anesthesiologist. Expert testimony at trial had established that neurological damage of the type suffered by plaintiff could be caused by contaminated spinal anesthesia such as that administered by defendant. However, expert testimony also established that the possibility of contamination was no longer considered a risk of treatment. The alternative possible anesthesia-related cause of plaintiff's damage was an extremely rare, idiosyncratic reaction to the anesthetic. The court held that neither the very low incident risk or the rare, idiosyncratic reactions constituted material risks requiring disclosure to the patient, and that the anesthesiologist was therefore not negligent as a matter of law for failing to inform plaintiff of such risks (*120 Cal. App. 3d 428, 442)* .

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17-175 California Points & Authorities § 175.32

§ 175.32 Opposing Contention That Physician Is Liable for Professional Negligence--Failure to Disclose Material Risk of Treatment--Patient Unable to Analyze Highly Disturbing Information

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS NOT LIABLE FOR FAILING TO DISCLOSE INFORMATION WHICH HE/SHE REASONABLY BELIEVED WOULD BE SO DISTURBING THAT THE PLAINTIFF WOULD HAVE BEEN UNABLE TO OBJECTIVELY WEIGH THE RISKS OF DECLINING TREATMENT.

A. Seriously Disturbing Information. A physician need not disclose all information regarding a treatment when such information would be so disturbing as to prevent the patient from making an objective evaluation of the risk of declining the treatment (*Cobbs v. Grant (1972) 8 Cal. 3d 229, 246, 104 Cal. Rptr. 505, 502 P.2d 1* (dictum)).

B. Objective Test of Effect on Patient. The physician must demonstrate that the nondisclosure was based on facts which would demonstrate to a reasonable person the preventive effect of the information on a patient's ability to evaluate risks (*Cobbs v. Grant (1972) 8 Cal. 3d 229, 246, 104 Cal. Rptr. 505, 502 P.2d 1* (dictum)).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a plaintiff's contention that a physician was negligent in failing to disclose material information regarding a proposed treatment, when the allegedly nondisclosed information would be so disturbing as to prevent the patient from objectively weighing the risks of declining treatment.

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the defendant's adherence to the proper standard of care. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and points of law stated. Thus, counsel shouldinclude discussion showing how the facts of the case demonstrate that a disclosure by defendant would have upset the patient to the degree that he or she would be unable to objectively weigh the risks of declining the proposed treatment. Counsel should also refer to facts demonstrating that the nondisclosure was based on information that would objectively demonstrate the chilling effect on the patient.

[c] Related Pleading and Practice Forms

For forms of complaints based on a physician's performance of a procedure in the absence of a patient's informed consent, see California Forms of Pleading and Practice, Ch. 58, *Assault and Battery* , Ch. 209, *Dentists* , and Ch. 415, *Physicians: Medical Malpractice* (Matthew Bender).

[d] Related Points and Authorities

For points and authorities supporting and opposing the contention that a physician is liable for battery for performing a procedure in the absence of a patient's informed consent, see Ch. 21, *Assault and Battery* .

For points and authorities relating to negligence actions generally, see Ch. 165, *Negligence* .

[e] Opposing Points and Authorities

In an appropriate case, this memorandum may be submitted in opposition to the contention that a physician is liable for negligent nondisclosure of material information supported by the points and *authorities in § 175.23*.

[3] Discussion of Authorities

[a] Seriously Disturbing Information

The facts and procedural background of ***Cobbs v. Grant*** *(1972) 8 Cal. 3d 229, 104 Cal. Rptr. 505, 502 P.2d 1* , are discussed in *§ 175.23[4][a]*. The Supreme Court in dicta stated that a physician has the duty to disclose all information material to a patient's decision regarding treatment, except under certain circumstances. One such exceptional situation relieving the physician's duty of disclosure is when the information would so upset the patient that he or she would be unable to objectively weigh the risks of refusing to undergo the recommended treatment (*8 Cal. 3d 229, 246)* .

[b] Objective Test of Effect on Patient

The facts and procedural background of ***Cobbs v. Grant*** *(1972) 8 Cal. 3d 229, 104 Cal. Rptr. 505, 502 P.2d 1* , are discussed in *§ 175.23[3][a]*. In dicta, the Supreme Court noted that the physician is excused from disclosing all material information regarding the risks of a proposed treatment when it can be proved that such disclosure would seriously disturb the patient and render him or her unable to objectively weigh the risks of refusing treatment.

The Court noted in dicta that in order to rely on this defense, the physician must prove that the nondisclosure was based on facts that would demonstrate to a reasonable person that the patient would be so disturbed as to be unable to decide objectively whether or not to undergo treatment (*8 Cal. 3d 229, 246)* .

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17-175 California Points & Authorities § 175.33

§ 175.33 Opposing Contention That Physician Is Liable for Professional Negligence--No Duty of Disclosure When Treatment or Testing Not Recommended

[1] FORM

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

DEFENDANT IS NOT LIABLE FOR FAILURE TO DISCLOSE MATERIAL FACTS NECESSARY FOR PLAINTIFF PROPERLY TO EVALUATE HIS/HER CONDITION AND SEEK APPROPRIATE CARE BECAUSE DEFENDANT RECOMMENDED [NO DIAGNOSTIC TESTING OR TREATMENT TO PLAINTIFF *or* PROCEDURES OTHER THAN THE PROCEDURE ABOUT WHICH PLAINTIFF ALLEGES HE/SHE WAS NOT WARNED].

A. No Duty to Disclose When No Diagnostic Testing or Treatment Recommended. The duty to inform a patient concerning the risks and benefits of treatment or nontreatment is only triggered when the physician actually recommends treatment or diagnostic tests. If a physician believes that a patient is progressing satisfactorily, and that the patient requires no treatment, there can be no liability under a theory that the physician failed to disclose material facts necessary for the patient properly to evaluate his or her condition and seek appropriate care (*see Scalere v. Stenson (1989) 211 Cal. App. 3d 1446, 1449-1453, 260 Cal. Rptr. 152*).

[*Optional*] **B. No Duty to Disclose Regarding Nonrecommended Testing or Treatment.** Although other testing or treatments were recommended, there is no special duty to disclose information about a nonrecommended procedure (*Vandi v. Permanente Med. Group, Inc. (1992) 7 Cal. App. 4th 1064, 1069-1071, 9 Cal. Rptr. 2d 463*).

[*Optional*] **C. No Duty to Disclose Alternative Treatment That Is Illegal in California.** A physician is not liable for failing todisclose the existence of a treatment that cannot legally be administered in the state of *California (Schiff v. Prados (2001) 92 Cal. App. 4th 692, 694, 112 Cal. Rptr. 2d 171*).

[2] Comments

[a] Use of Form

This form may be used in opposition to a plaintiff's contention that a physician was negligent in failing to disclose material information necessary for plaintiff properly to evaluate his or her condition and seek appropriate care, when the physician proposed no diagnostic testing or treatment. The optional paragraphs may be included if the plaintiff alleges that the defendant failed to disclose treatment alternatives that the defendant had no duty to disclose.

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the defendant's adherence to the proper standard of care. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and points of law stated. Thus, for example, counsel should include discussion showing that the physician concluded that the patient's condition was satisfactory and required neither further diagnosis nor treatment.

[c] Related Pleading and Practice Forms

For forms of complaints based on a physician's performance of a procedure in the absence of a patient's informed consent, see California Forms of Pleading and Practice, Ch. 58, *Assault and Battery* , Ch. 209, *Dentists* , and Ch. 415, *Physicians: Medical Malpractice* (Matthew Bender).

[d] Related Points and Authorities

For points and authorities supporting and opposing the contention that a physician is liable for battery for performing a procedure in the absence of a patient's informed consent, see Ch. 21, *Assault and Battery* .

For points and authorities relating to negligence actions generally, see Ch. 165, *Negligence* .

[e] Opposing Points and Authorities

In an appropriate case, this memorandum may be submitted in opposition to the contention that a physician is liable for negligent nondisclosure of material information supported by the points and *authorities in § 175.23*.

[3] Discussion of Authorities

[a] No Duty to Disclose When No Diagnostic Testing or Treatment Recommended

In ***Scalere v. Stenson*** *(1989) 211 Cal. App. 3d 1446, 260 Cal. Rptr. 152* , plaintiff brought a medical malpractice action against a cardiologist who had performed an angiogram on the brachial artery of her right arm. After surgery, plaintiff complained of pain in her right arm. Defendant examined and tested the arm and concluded that it was progressing satisfactorily. He neither told plaintiff about nor recommended any further diagnostic tests or therapy. One year later, plaintiff underwent a saphenous vein bypass of her right brachial artery with resultant damage. At trial, plaintiff relied on the theory that defendant improperly failed to disclose material facts necessary for plaintiff to evaluate her condition and seek postoperative care. The jury found for defendant, and plaintiff appealed.

The court of appeal affirmed, concluding that inasmuch as defendant, following the surgery, recommended neither further therapy nor further diagnostic testing, no duty of disclosure arose (*211 Cal. App. 3d 1446, 1449-1450)* . The court noted, however, that negligent failure to advise a patient to pursue a potentially necessary course of treatment would be actionable under ordinary medical negligence standards (*211 Cal. App. 3d 1446, 1453)* .

[b] No Duty to Disclose Regarding Nonrecommended Testing or Treatment

In ***Vandi v. Permanente Med. Group, Inc.*** *(1992) 7 Cal. App. 4th 1064, 9 Cal. Rptr. 2d 463* , plaintiff suffered a grand mal seizure on a Saturday and was taken to defendant hospital's emergency room. Defendant doctor took a medical history and performed a diagnostic examination. The doctor also contacted a neurological specialist who recommended antiseizure medication and a magnetic resonance imaging (MRI) scan and examination by a neurologist to be scheduled the following Monday. After experiencing additional difficulties on Sunday night, plaintiff was returned to the hospital on Monday and was given a computerized tomography (C.T.) scan, an MRI scan, and, eventually, two surgeries. Plaintiff's medical problems were ultimately discovered to be due to two brain abscesses, which resulted in partial paralysis.

Plaintiff's primary theory at trial was that defendants were negligent in failing to perform a C.T. scan on Saturday night. Plaintiff's expert testified that a C.T. scan would have been able to detect at least one of the brain abscesses, which if discovered and treated earlier, might have avoided or lessened the paralysis. Defendants' experts testified that brain abscesses are rarely the cause of first time grand mal seizures and that plaintiff's medical history indicated none of the symptoms associated with such abscesses. After the jury found defendants not negligent, judgment was entered in favor of defendants.

On appeal, plaintiff contended that defendants should be liable for failing to advise him of the availability of the C.T. scan, the possibility that it could detect brain abscesses, and the risks involved in waiting for an MRI scan. In affirming the trial court, the court held that there is no special duty to disclose information about a nonrecommended procedure. If a procedure is one that should have been recommended, the failure to recommend it would be negligence under the ordinary medical negligence standard (*7 Cal. App. 4th 1064, 1069-1071)* .

[c] No Duty to Disclose Alternative Treatment That Is Illegal in California

In ***Schiff v. Prados*** *(2001) 92 Cal. App. 4th 692, 112 Cal. Rptr. 2d 171* , the plaintiffs, the parents of a minor child who died following treatment for a brain tumor, brought a wrongful death suit against a consulting physician who was the head of the treating medical center's brain tumor service and moderator of its neuro-oncology tumor board. At this medical center, the tumor board served as a consulting body for the treating oncologist, and in tandem they attempted to arrive at a consensus on the best course of treatment for the patient. In the case of the plaintiffs' daughter, the board recommended intensive chemotherapy and radiation as the only option to extend her life, hoping that perhaps by extending her life, a treatment option not currently available could be developed. Based on those recommendations, the plaintiffs' daughter underwent the treatment, although it left some residual tumor. Toward the end of this period, the plaintiffs began doing independent research on alternative treatment methods and learned of a controversial treatment being performed by a doctor in Texas involving substances called antineoplastons. When the plaintiffs met with the defendant to discuss this alternative, the defendant indicated that he was strongly opposed to the treatment and thought that antineoplastons were toxic and ineffective. Even though the plaintiffs knew that this treatment was not approved by the FDA, nor recommended by the AMA or the American Cancer Society, and that a federal injunction prevented the Texas physician from transporting antineoplastons across state lines, the plaintiffs' daughter was taken to Texas where she began this alternative treatment. After returning to California, she remained on this treatment for over a year, until she appeared to be cancer free. When she was taken off the treatment, she deteriorated rapidly, and the tumor reappeared. When she resumed treatment, her tumor regressed. Nevertheless, the plaintiffs' daughter died approximately seven months later, apparently as a result of the aggressive radiation and chemotherapy treatment she had undergone earlier. The plaintiffs then filed their wrongful death action against the defendant, alleging that the defendant did not obtain their informed consent for their daughter's treatment because of the failure to advise of the antineoplaston treatment alternative. The defendant successfully moved for summary judgment on the grounds that he had no duty to inform plaintiffs of that alternative because it had not been approved by the FDA at the time of their daughter's treatment. The plaintiffs appealed.

The court of appeal affirmed. The court reviewed the Supreme Court's holding in *Cobbs v. Grant (1972) 8 Cal. 3d 229, 104 Cal. Rptr. 505, 502 P.2d 1* [*see § 175.23[4][a]*], noting that a physician's duty to disclose only extended to the "available" choices with respect to proposed therapy. In addition, there was no duty of disclosure with respect to nonrecommended procedures (*92 Cal. App. 4th 692, 701)* . Under the relevant statutes, a cancer drug is not legally "available" in California unless: (1) the FDA has approved an application permitting the drug to be marketed; (2) a current, unrevoked investigational new drug application is on file with the FDA allowing the drug to be clinically tested in humans; or (3) specified alternative conditions, including filings with the Medical Board of California, are fulfilled. Because none of these requirements were met for antineoplastons at the time of the plaintiffs' daughter's treatment, it would have been illegal in California to administer those substances at that time. Therefore, that alternative treatment was not "available" during the relevant period, and the defendant had no duty to disclose the treatment to the plaintiffs. Furthermore, the court concluded that to hold that a physician may have a duty to disclose a treatment that is currently unavailable, but may become available in the future, would be equivalent to discarding the availability requirement altogether (*92 Cal. App. 4th 692, 704-706)* .

[4] Additional Authorities

[a] No Duty to Disclose When No Diagnostic Testing or Treatment Recommended

In *Munro v. Regents of Univ. of Cal. (1989) 215 Cal. App. 3d 977, 263 Cal. Rptr. 878* , parents of a child born with the genetic Tay-Sachs disease brought an action for medical malpractice and negligent infliction of emotional distress against a physician and hospital who had provided genetic counseling to the parents before the child's birth. The parents alleged that the defendants had a duty to disclose material information toenable them to make an informed decision whether to take the Tay-Sachs test. The court of appeal affirmed summary judgment in favor of defendants, and held that there was no duty to disclose under the circumstances. The court noted that at the time of counseling, plaintiffs had provided defendants with no facts that should have alerted defendants to the possibility that one or more plaintiffs might be carriers of Tay-Sachs disease (*215 Cal. App. 3d 977, 985-988)* .

In *Parris v. Sands (1993) 21 Cal. App. 4th 187, 25 Cal. Rptr. 2d 800* , the plaintiff brought a malpractice action against a physician, alleging that the failure to administer prophylactic antibiotics to plaintiff resulted in her contracting bacterial pneumonia. The court of appeal affirmed the judgment of the trial court that the physician had no duty to inform plaintiff of "schools of thought" regarding asplenic patients and prophylactic antibiotics (*21 Cal. App. 4th 187, 189)* . The court noted that although courts have rejected a general duty of disclosure concerning a treatment or procedure a physician does not recommend, plaintiffs may still proceed under ordinary medical negligence (i.e., negligent failure to advise a patient to pursue a necessary course of treatment) (*21 Cal. App. 4th 187, 193)* .

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CHAPTER 175 PHYSICIANS AND SURGEONS: MEDICAL MALPRACTICE
PART II. FORMS

17-175 California Points & Authorities § 175.34

§ 175.34 Opposing Contention That Physician Is Liable for Professional Negligence--No Causal Relationship Between Lack of Informed Consent and Plaintiff's Damage

[1] FORM

[*The following may be included in a memorandum or points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS NOT LIABLE FOR AN ALLEGED FAILURE TO DISCLOSE AVAILABLE CHOICES, BECAUSE THE FAILURE TO DISCLOSE DID NOT CAUSE THE PLAINTIFF'S INJURY.

No Liability for Failure to Disclose if Reasonable Person Would Not Have Declined Procedure. To establish liability for a physician's failure to inform and disclose, causation must be established by an objective test, so that plaintiff must show that reasonable prudent persons would decline the procedure if they knew all significant perils (*Spann v. Irwin Memorial Blood Centers (1995) 34 Cal. App. 4th 644, 657, 40 Cal. Rptr. 2d 360*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted by defendant in support of defendant's contention that he or she cannot be held liable for plaintiff's injury, because the alleged failure to inform plaintiff of all dangers inherent in a procedure did not cause the plaintiff's injury because the plaintiff would have proceeded with the procedure had full disclosure been made.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that defendant's alleged failure to inform plaintiff was not a cause of plaintiff's injury. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence of the risk of the recommended procedure and the lack of viable alternative procedures, and should argue that no reasonable prudent person would decline the procedure, with or without a full disclosure of the risks [*see Spann v. Irwin Memorial Blood Centers (1995) 34 Cal. App. 4th 644, 657, 40 Cal. Rptr. 2d 360]* .

[3] Discussion of Authorities

[a] No Liability for Failure to Disclose Where Reasonable Person Would Not Have Declined Procedure

In ***Spann v. Irwin Memorial Blood Centers*** *(1995) 34 Cal. App. 4th 644, 40 Cal. Rptr. 2d 360* , a woman contracted the HIV virus from an infusion of blood plasma that was provided as treatment for a life-threatening blood disease. After the woman died from complications from AIDS, her husband sued for professional negligence and failure to obtain informed consent, arguing that defendant did not notify his wife of the risk of AIDS infection. Defendant moved for summary judgment, which was granted by the trial court. Plaintiff then moved for reconsideration and for a new trial. The trial court denied plaintiff's motions, and entered judgment in favor of defendant. Plaintiff appealed.

The court of appeal affirmed, concluding that the plaintiff did not raise a triable issue of fact with respect to the issue of causation (*34 Cal. App. 4th 644, 660)* . The court stated the rule that for a physician to be liable under the duty to disclose choices and dangers, the failure to disclose mustcause the injury, and a causal connection arises only if it is established that had revelation been made, consent to treatment would not have been given. Furthermore, the court stated that causation must be established by an objective test, so that the plaintiff must show that a reasonable prudent person would decline the procedure if that person knew the risks. The court also noted that plaintiff and his wife were aware of the risk of AIDS, and concluded that given that fact, and in light of the seriousness of the plaintiff's wife's condition, it believed that plaintiff failed to show that a reasonable person in his wife's position would have declined the treatment had full disclosure been made (*34 Cal. App. 4th 644, 657)* . The court also rejected plaintiff's argument that defendant should have made additional disclosures regarding the options and risks, holding that plaintiff did not establish that the failure to disclose alternative treatments breached the standard of care, that at the time of this treatment there was no donor reduction program in place so that defendant had no duty to disclose or maintain such a program, and that there was no evidence regarding the change in the odds of contracting AIDS by the use of more units of blood products than had been originally represented to plaintiff (*34 Cal. App. 4th 644, 658-659)* .

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17-175 California Points & Authorities § 175.35

§ 175.35 Opposing Contention That Physician Is Liable for Professional Negligence--Vicarious Liability for Negligence of Medical Assistants--No Control or Direction Over Negligent Acts

[1] FORM

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

DEFENDANT IS NOT LIABLE FOR NEGLIGENT ACTS OF ASSISTANTS WHO WERE NOT HIS/HER EMPLOYEES BECAUSE THE NEGLIGENT ACTS WERE PERFORMED WHILE THE ASSISTANTS WERE NOT UNDER HIS/HER DIRECTION AND CONTROL.

Direct Supervision and Control. A physician is not liable for the independent negligence of assistants who are not his or her employees when the negligent conduct occurs and who are not under the physician's direct supervision or control (*see Truhitte v. French Hosp. (1982) 128 Cal. App. 3d 332, 344-348, 180 Cal. Rptr. 152*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention by plaintiff that a physician is vicariously liable for the negligent conduct of medical assistants who are not the physician's employees. The ground of opposition is that the allegedly negligent conduct occurred while the assistants were not under the physician's direct supervision and control.

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the defendant's lack of control or supervision over the acts of the assisting hospital employees. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts that demonstrate the absence of the physician's right to control or actual control over the acts of the hospital employees assisting during surgery or other medical procedure, and the nature of the assistants' duties as stemming from their hospital employment rather than from the physician's directions.

For a thorough discussion of the doctrine of respondeat superior in the medical malpractice context, see California Forms of Pleading and Practice, Ch. 295, *Hospitals* , and Ch. 415, *Physicians: Medical Malpractice* (Matthew Bender).

[c] Related Pleading and Practice Forms

For forms of complaints based on a principal's vicarious liability for the negligence of an agent, see California Forms of Pleading and Practice, Ch. 360, *Master and Servant* , and Ch. 427, *Principal and Agent* (Matthew Bender).

[d] Related Points and Authorities

For points and authorities relating to negligence actions based on the vicarious liability of a principal for the acts of an agent, see Ch. 182, *Principal and Agent* . For points and authorities pertaining to the vicarious liability of employers for the torts of their employees, see Ch. 100A, *Employer and Employee: Respondeat Superior* .

For points and authorities relating to negligence actions generally, see Ch. 165, *Negligence* .

[e] Opposing Points and Authorities

In an appropriate case, this memorandum may be submitted in opposition to the contention, that a physician is liable for the negligence of medical assistants, supported by the points and *authorities in § 175.25*.

[3] Discussion of Authorities

[a] Direct Supervision and Control

In ***Truhitte v. French Hosp.*** *(1982) 128 Cal. App. 3d 332, 180 Cal. Rptr. 152* , plaintiff brought an action against a hospital and a private physician for injuries suffered when a sponge was left in her abdomen after surgery. The trial court granted the hospital a judgment notwithstanding the verdict on the ground that the nurse whose negligence in making a preoperative sponge count resulted in the lost sponge was the temporary employee of the physician during surgery, rendering the surgeon rather than the hospital vicariously liable for her negligence. The physician appealed from the judgment notwithstanding the verdict, as well as from certain rulings by the trial court pertaining to other issues of liability.

The court of appeal reversed the judgment in favor of the hospital, holding that there was sufficient evidence for a jury to find that the nurse had been the agent of the hospital at the time the negligent conduct occurred and that the hospital was therefore vicariously liable to plaintiff.

Discussing the borrowed servant doctrine in the context of medical malpractice, the court stated that the modern approach to determining the status of a hospital employee assisting during surgery focused on whether the surgeon exercised actual control or direction over the particular function at issue. The court noted examples in which courts had absolved a surgeon of liability for negligence occurring during postoperative or preoperative procedures, in which nurses carry out duties conferred by the hospital rather than by the surgeon, and for the negligence of anesthesiologists (*128 Cal. App. 3d 332, 347-348)* .

The court briefly discussed the hospital's contention that the physician's nondelegable duty of removing sponges from the patient relieved the hospital of liability. The physician's nondelegable duty, held the court, was distinct from the

hospital's independent negligence regarding the sponge-counting procedures. The court stated that the hospital could not escape liability for its independent negligence in failing to devise adequate preoperative sponge-counting procedures, or for the negligent carrying out of those procedures by the employee nurse (*128 Cal. App. 3d 332, 349)* .

[4] Additional Authorities

[a] Direct Supervision and Control

In *Armato v. Baden (1999) 71 Cal. App. 4th 885, 84 Cal. Rptr. 2d 294* , the plaintiff, who was injured through the negligent treatment of a physician assistant employed by a corporate medical group, brought suit against four doctors who were working part-time as independent contractors for the group. The plaintiff alleged that even though the defendants had never met or treated the plaintiff or supervised the physician assistant's treatment of her, the fact that they allowed their names to be used in connection with the group led the plaintiff to believe that the physician assistant was a medical doctor and she would not have allowed him to treat her if she had known that he was not. Summary judgments were entered in favor of the defendants, and the plaintiff appealed. The court of appeal upheld the summary judgments. The court held that non-treating, non-consulting physicians who are independent contractors of a corporate medical group cannot be held vicariously liable for injuries sustained by a patient of the corporation while being treated by a physician assistant, regardless of whether the names of the physicians may have been included on the door or appointment cards of the corporation. The court also rejected the plaintiff's theory that the defendants could be directly liable for failing to supervise the assistant, because the plaintiff was not a patient of the defendants nor were the defendants consulted specifically as to the treatment of the plaintiff (*71 Cal. App. 4th 885, 894-897)* . Finally, the court also concluded that, under the facts, there was no basis for finding that an ostensible partnership existed under which the defendants could be held liable as partners (*71 Cal. App. 4th 885, 897-899)* .

In *Thomas v. Intermedics Orthopedics, Inc. (1996) 47 Cal. App. 4th 957, 55 Cal. Rptr. 2d 197* , a jury found both an orthopedic surgeon and a prosthetic supplier negligent after an operation to replace a broken component of a hip prosthesis. During the middle of the surgery it was discovered that the supplier did not have available the type of prosthetic device the surgeon believed he had ordered. Surgery proceeded using a substitute device, resulting in an unstable fit. The patient sued and received an award of damages from both the surgeon and the supplier. The supplier then appealed, contending that the trial court should have issued a "captain of the ship" instruction which would have authorized the jury to find the surgeon 100 percent liable for both his own and the supplier's negligence. However, the court of appeal stated that the "captain of the ship" doctrine has never been applied to persons other that medical personnel lending hands-on assistance during surgery (*47 Cal. App. 4th 957, 966)* . In this case, the supplier was not part of the medical team actively assisting the surgeon. Furthermore, the negligence did not occur during the surgery, but rather occurred in the process of ordering the prosthetic devices to be available during the surgery, or in not verifying the delivery (*47 Cal. App. 4th 957, 969)* . The court thus affirmed the judgment which assessed liability at 50 percent each for the surgeon and the supplier.

In *Marvulli v. Elshire (1972) 27 Cal. App. 3d 180, 103 Cal. Rptr. 461* , plaintiff was injured as the result of an adverse reaction to an anesthetic and sued the operating physician under the doctrine of respondeat superior for the negligence of the anesthesiologist and attending nurse. The court of appeal affirmed a judgment for defendant physician, approvingthe trial court's refusal to instruct the jury that the physician could be held vicariously liable for the negligence of the anesthesiologist and nurse. The court found no evidence to support a finding that the physician had control over, or the right to control, the nurse's and anesthesiologist's failure to inform him of the patient's condition during surgery (*27 Cal. App. 3d 180, 187)* . The court noted that an opposite finding would have the unwanted result of forcing one specialist to supervise another specialty in which great expertise was required (*27 Cal. App. 3d 180, 187)* .

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17-175 California Points & Authorities § 175.36

§ 175.36 Opposing Contention That Physician Is Liable for Professional Negligence--Action Does Not Arise Out of Breach of Duty Within Scope of Employment

[1] FORM

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

NO CAUSE OF ACTION FOR MEDICAL MALPRACTICE AGAINST A PHYSICIAN ARISES UNLESS THERE HAS BEEN A BREACH OF THE DUTY OF CARE OWED TO THE PATIENT BY THE PHYSICIAN WITHIN THE SCOPE OF THE PATIENT-PHYSICIAN RELATIONSHIP.

A. Professional Negligence Defined. "Professional negligence," as this term applies to health care providers, is uniformly defined throughout the codes as a negligent act or omission to act in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of the services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital (*see Bus. & Prof. Code § 6146(c)(3)*; *Civ. Code §§ 3333.1(c)(2), 3333.2(c)(2)*; *Code Civ. Proc. §§ 340.5(2), 364(f)(2), 667.7(e)(4)*).

B. Requirement That Act or Omission to Constitute Professional Negligence Be Within Scope of Patient-Physician Relationship. In accordance with this definition of professional negligence, an action for the professional negligence of a physician must arise out of a breach of the duty of care owed to the patient by the physician within the scope of the patient-physician relationship (*Atienza v. Taub (1987) 194 Cal. App. 3d 388, 392, 239 Cal. Rptr. 454*).

C. Physician's Duty of Care. The duty of care owed by a physician to a patient arises in the context of the physician's effort to accomplish the purpose for which the physician is employed (*Atienza v. Taub (1987) 194 Cal. App. 3d 388, 391, 239 Cal. Rptr. 454*).

[*Optional*] **D. Sexual Relations With Patient.** A physician who induces a patient to enter sexual relations is liable for professional negligence medical malpractice only if the physician engaged in the sexual conduct on the pretext that it

was a necessary part of the treatment for which the patient sought out the physician. Conversely, a patient who consults a physician for treatment for a physical disorder and is induced by the physician to have sexual relations, which are in no way represented as being in furtherance of the medical treatment, has no cause of action against the physician for professional negligence medical malpractice (*Atienza v. Taub (1987) 194 Cal. App. 3d 388, 391-394, 239 Cal. Rptr. 454*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that a physician is not liable for medical malpractice for any act or omission that was not within the scope of the patient-physician relationship.

This form may be combined, when appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue. For example, they may be set forth in a memorandum of points and authorities in support of a general demurrer to a complaint by the patient against the physician or a motion for judgment on the pleadings when the complaint shows on its face that the act or omission was not within the scope of the patient-physician relationship or, if it does not so appear, in a memorandum of points and authorities in support of the physician's motion for summary judgment. The points and authorities in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Requirement That Act or Omission to Constitute Professional Negligence Be Within Scope of Patient-Physician Relationship

Atienza v. Taub *(1987) 194 Cal. App. 3d 388, 239 Cal. Rptr. 454* , was an action by a former patient against a physician for damages for medical malpractice and intentional infliction of emotional distress arising out of sexual relations she allegedly was induced to engage in with the physician during the course of her treatment. Plaintiff alleged she went to defendant for treatment for phlebitis allegedly sustained as the result of an industrial injury, and that during the course of the treatment defendant seduced her into having sexual relations. She alleged that by initiating a sexual relationship with her while she was under his care defendant failed to adequately care for and treat her by abusing her psychologically while purportedly treating her physically. She also alleged in the emotional distress cause of action that defendant's conduct constituted a conscious and reckless disregard for the risk to her health and well-being entitling her to punitive damages. Defendant's demurrer to the complaint was sustained as to the professional negligence cause of action and overruled as to the emotional distress cause of action. Defendant secured the issuance of an alternative writ of mandate pursuant to which the trial court vacated its earlier order to the extent it overruled the demurrer and ordered the demurrer sustained without leave to amend. The trial court then dismissed the action.

The court of appeal affirmed. After quoting in pertinent part the provisions of *Bus. & Prof. Code § 6146(c)(3)* defining "professional negligence," the court said that in accordance with that definition, an action for professional negligence of a physician arises out of the breach of the duty of care owed to the patient by the physician *within* the scope of the patient-physician relationship (*194 Cal. App. 3d 388, 392)* .

[b] Physician's Duty of Care

The facts and procedural background of ***Atienza v. Taub*** *(1987) 194 Cal. App. 3d 388, 239 Cal. Rptr. 454* , are discussed in *§ 175.36[3][a]*. In affirming the judgment of dismissal, the court stated that the duty of care owed by a

physician to a patient arises in the context of the physician's effort to accomplish the purpose for which the physician is employed (*194 Cal. App. 3d 388, 391)* .

[c] Sexual Relations With Patient

The facts and procedural background of ***Atienza v. Taub*** *(1987) 194 Cal. App. 3d 388, 239 Cal. Rptr. 454* , are discussed in *§ 175.36[3][a]*. In affirming the judgment of dismissal, the court said that whether a complaint alleging that a physician initiated a sexual relationship with his patient during the time he was treating her for a physical disorder states a cause of action for professional negligence medical malpractice turns on whether the sexual relationship was initiated by the physician under the guise of treatment of the patient. The relevant authorities agree that a physician who induces a patient to enter into sexual relations is liable for professional negligence only if the physician engaged in the sexual conduct on the pretext that it was a necessary part of the treatment for which the patient had sought out the physician (*194 Cal. App. 3d 388, 391, 393)* . The court pointed out that the patient did not so allege, but instead sought to combine the care given to her by the defendant for her phlebitis and the emotionally destructive effect of her romantic and sexual involvement with him under the rubric of "treatment" simply because the two things took place over the same period of time (*194 Cal. App. 3d 388, 393)* . The court observed that plaintiff did not allege that she was induced to have sexual relations with defendant in furtherance of her treatment and that, essentially, plaintiff complained that she had an unhappy affair with a man who happened to be her doctor (*194 Cal. App. 3d 388, 393)* . This, said the court, was plainly insufficient to make out a cause of action for professional negligence (*194 Cal. App. 3d 388, 393-394)* .

The court also rejected the cause of action for intentional infliction of emotional distress on the ground that it was in effect an action for seduction, an action that has been abolished with respect to persons over the age of legal consent by *Civ. Code § 43.5(c)* (*194 Cal. App. 3d 388, 394)* .

NOTE:

The same court later ruled that the pretext of treatment is an essential element of the cause of action, whether the action is against a psychiatrist or a doctor with a different specialty, but that the pretext need not be expressly stated by the defendant [*see McNall v. Summers (1994) 25 Cal. App. 4th 1300, 1313-1314, 30 Cal. Rptr. 2d 914]* . Thus, when a psychiatrist allegedly responded to a patient's expression of feelings of sadness and loneliness by engaging in the act of sexual intercourse with her, the patient stated a cause of action for malpractice because the surrounding circumstances indicated that a reasonable person in the patient's position could have interpreted the psychiatrist's actions as a component of the treatment process. The patient's expert witness testified that the psychiatrist had mishandled the so-called "transference phenomenon" by taking advantage of a vulnerable patient whose feelings for other people had been displaced onto him. The court pointed out that a patient who is being treated for psychological problems is at greater risk of becoming dependent on a doctor and is therefore more susceptible to emotional exploitation. However, Civ.Code § 43.93, enacted in 1987 (Stats. 1987, ch. 1474) and operative January 1, 1988, provides a cause of action against a psychotherapist (defined as including, among others, a physician specializing in the practice of psychiatry) for sexual contact (defined as including, among other things, sexual intercourse) with a patient or former patient even when the contact was not represented to be a part of the patient's treatment [*see Civ. Code § 43.93(b)(1), (2)*].

[4] Additional Authorities

[a] Requirement That Act or Omission to Constitute Professional Negligence Be Within Scope of Patient-Physician Relationship

In *Smith v. Pust (1993) 19 Cal. App. 4th 263, 23 Cal. Rptr. 2d 364* , the plaintiff brought a negligence claim against a therapist who had sexual relations with the plaintiff's wife, a patient of the therapist. The court of appeal affirmed summary judgment for defendant because there was no professional relationship between the parties. Nor was there a

sufficient connection between the allegedly negligent conduct and any professional services for which the defendant may have been engaged in that defendant was engaged to help plaintiff's wife with her own individual problems, as distinct from the couple's relationship (*19 Cal. App. 4th 263, 272)* .

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17-175 California Points & Authorities § 175.37

§ 175.37 Supporting Contention That Medical Malpractice Action Based on Professional Negligence Is Barred by Statute of Limitations [Code Civ. Proc. § 340.5]--One-Year Limit After Plaintiff Discovers or Should Have Discovered Injury

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S ACTION BASED ON MEDICAL NEGLIGENCE IS BARRED BY THE LAPSE OF MORE THAN ONE YEAR BETWEEN THE DATE PLAINTIFF DISCOVERED, OR THROUGH REASONABLE DILIGENCE SHOULD HAVE DISCOVERED, THE INJURY AND THE DATE OF FILING THE COMPLAINT.

A. Statutory Limitations Period. Medical malpractice actions based on professional negligence must be commenced no later than three years after the date of injury or one year after plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first (*Code Civ. Proc. § 340.5*).

B. Commencement of Limitations Period. The one-year statute of limitations period provided by *Section 340.5 of the Code of Civil Procedure* commences when plaintiff either actually discovers his or her injury or could have discovered the injury through the use of reasonable diligence (*Sanchez v. South Hoover Hosp. (1976) 18 Cal. 3d 93, 97, 132 Cal. Rptr. 657, 553 P.2d 1129*).

C. Constructive Knowledge of Injury. The one-year statute of limitations provided by *Section 340.5 of the Code of Civil Procedure* begins to run when the plaintiff has notice of circumstances sufficient to put a reasonable person on inquiry or has the opportunity to obtain knowledge from sources open to his or her investigation (*see Christ v. Lipsitz (1979) 99 Cal. App. 3d 894, 898, 160 Cal. Rptr. 498*).

D. Legal Significance of Injury. The one-year statute of limitations provided by *Section 340.5 of the Code of Civil Procedure* commences when plaintiff gains actual or constructive knowledge of the injury rather than its legal significance (*Graham v. Hansen (1982) 128 Cal. App. 3d 965, 972, 180 Cal. Rptr. 604*).

[*Optional*] **E. Nondisclosure by Defendant.** A physician's nondisclosure of information regarding the patient's injury tolls the statute of limitations period provided by *Section 340.5 of the Code of Civil Procedure* only until such time as the patient discovers or should have discovered the injury (*Sanchez v. South Hoover Hosp. (1976) 18 Cal. 3d 93, 99-101, 132 Cal. Rptr. 657, 553 P.2d 1129*).

[*Optional*] **F. Limitations Period Not Tolled by Legal Advice That No Legal Remedy Exists.** An attorney's advice that no cause of action exists on the facts stated, given to a plaintiff with actual or constructive knowledge of the facts underlying the malpractice claim, does not delay, suspend, or toll the one-year statute of limitations period provided by *Section 340.5 of the Code of Civil Procedure* (*Gutierrez v. Mofid (1985) 39 Cal. 3d 892, 896-902, 218 Cal. Rptr. 313, 705 P.2d 886*).

[*Optional*] **G. Limitations Period Begins Running as to All Potential Defendants.** If the plaintiff suspects medical negligence on the part of someone, the one-year limitations period of *Code of Civil Procedure Section 340.5* begins running as to all potential defendants, and it is not necessary that the plaintiff suspect aparticular physician for the statute to begin running as to that physician (*Knowles v. Superior Court (2004) 118 Cal. App. 4th 1290, 1298-1301, 13 Cal. Rptr. 3d 700*).

[*Optional*] **H. Limitations Period Applicable to Action Against Medical Student.** Medical students and other medical professionals who are authorized to practice in California, but who are specifically exempt from license or certificate requirements, are considered health care providers subject to the MICRA statute of limitations (*Chosak v. Alameda County Medical Center (2007) 153 Cal. App. 4th 549, 567, 63 Cal. Rptr. 3d 184*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that plaintiff's complaint for medical negligence is barred by the statute of limitations set forth by *Code Civ. Proc. § 340.5* based on the expiration of the one-year period from the date when plaintiff discovered, or with the use of reasonable diligence should have discovered, the injury and its negligent cause.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion that demonstrates either that plaintiff had actual knowledge of the injury on a date prior to one year before filing the action or that a reasonable person would have been put on notice of the injury by such a date.

[c] Separate Trial of Statute of Limitations Defense

Any party, or the court itself, may move for a separate trial of the defense that an action is barred by the statute of limitations, if the defense is pleaded in the answer. If the issue is resolved in favor of the plaintiff, the remaining issues are then tried [*Code Civ. Proc. § 597.5*].

[d] Burden of Proving Discovery Date

It is not entirely clear which party bears the burden of proving at trial when a plaintiff in a medical malpractice suit discovered, or through the use of reasonable diligence should have discovered, the facts constituting the alleged malpractice for purposes of applying the one-year limitations period of *Code Civ. Proc. § 340.5*. Traditionally, most courts applying discovery provisions have held that the plaintiff bears the burden of showing that the suit was brought within the requisite time after discovery occurred, and that has been the case when applying the one-year limitations

period of *Code Civ. Proc. § 340.5* [*see, e.g., Christ v. Lipsitz (1979) 99 Cal. App. 3d 894, 898, 160 Cal. Rptr. 498]* . However, the California Supreme Court has held that when applying *Code Civ. Proc. § 340.6(a)*, a similar discovery provision, to an attorney malpractice action, the burden of proof falls on the defendant [*Samuels v. Mix (1999) 22 Cal. 4th 1, 5, 91 Cal. Rptr. 2d 273, 989 P.2d 701]* . The Supreme Court in that opinion held that although the burden of proving discovery usually falls on the plaintiff when applying other discovery rules, such as the common law discovery rule, the burden when applying *Code Civ. Proc. § 340.6(a)* falls instead on the defendant. The Court reached this conclusion primarily because this particular statutory discovery rule is technically an element of the affirmative statute of limitations defense, rather than an exception used by a plaintiff to argue for a delay in accrual of the applicable limitations period [*Samuels v. Mix (1999) 22 Cal. 4th 1, 10, 91 Cal. Rptr. 2d 273, 989 P.2d 701* ; *see Evid. Code § 500* (party generally has burden of proof as to each essential fact of claim or defense that party asserts)]. Although the Supreme Court in *Samuels* did not specifically address the medical malpractice statute of limitations, the pertinent language of the two statutes is virtually identical, suggesting that the Court would reach the same conclusion and impose the burden of proof on the defendant who asserts that the action was barred by the one-year limitations period.

[e] Related Pleading and Practice Forms

For pleading and practice forms relating to the defense that an action is barred by the statute of limitations and to a motion for a separate trial of a statute of limitations defense, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* (Matthew Bender). For discussion and forms relating to medical malpractice generally, see California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice* (Matthew Bender).

[f] Related Points and Authorities

For memoranda of points and authorities supporting the contention that an action is barred by the statute of limitations and supporting a motion for separate trial of the statute of limitations defense, see Ch. 143, *Limitation of Actions* .

[g] Opposing Points and Authorities

The points and *authorities in § 175.43* may be used in an appropriate case to oppose the contention that an action is barred by the statute of limitations supported by this memorandum.

[3] Discussion of Authorities

[a] Commencement of Limitations Period

In ***Sanchez v. South Hoover Hosp.*** *(1976) 18 Cal. 3d 93, 132 Cal. Rptr. 657, 553 P.2d 1129* , plaintiff sued for injuries that occurred during childbirth, and defendants moved for summary judgment on the ground that plaintiff had failed to file the action within one year after her discovery of the injury as required by *Code Civ. Proc. § 340.5*. The trial court granted summary judgment for defendants, and plaintiff appealed, contending that defendants had failed to disclose facts on which the complaint was based and that this nondisclosure tolled the statute of limitations (*18 Cal. 3d 93, 96)* .

The Supreme Court rejected plaintiff's argument and affirmed the judgment, holding that plaintiff had discovered her injury prior to one year before she filed the complaint. An action for medical malpractice based on professional negligence is barred after one year from the date a plaintiff either discovers an injury and its negligent cause or should discover the injury through the use of reasonable diligence (*18 Cal. 3d 93, 97)* .The Court noted that a plaintiff's duty of diligence may be lessened during the continuance of the physician-patient relationship, but in this case, over a year had elapsed since termination of that relationship and its deterrent effect on plaintiff's ability to discover her injury. Furthermore, the Court noted that plaintiff's own recognition of her symptoms and admissions that she did not accept defendant's assurances regarding her condition demonstrated her knowledge of the injury prior to the one-year period (*18 Cal. 3d 93, 102)* .

[b] Constructive Knowledge of Injury

In ***Christ v. Lipsitz*** *(1979) 99 Cal. App. 3d 894, 160 Cal. Rptr. 498* , plaintiff sued for damages resulting from the negligent performance of a vasectomy that resulted in an unwanted childbirth. The complaint was filed over one year after plaintiff's discovery of the pregnancy. Defendants demurred on the ground that the complaint was barred by the one-year statute of limitations period, and the trial court sustained the demurrer without leave to amend.

The court of appeal affirmed the judgment, holding that the one-year period commenced on plaintiff's discovery of the pregnancy (*99 Cal. App. 3d 894, 898)* . The court held that the statute begins to run when plaintiff has notice of circumstances sufficient to put a reasonable person on inquiry or has the opportunity to obtain knowledge from sources open to his or her investigation, regarding the injury. When the wife of a supposedly sterile man gets pregnant, noted the court, that man is put on inquiry that he may not be sterile and may then confirm his suspicion with tests to ascertain the cause of the condition (*99 Cal. App. 3d 894, 898)* .

[c] Legal Significance of Injury

In ***Graham v. Hansen*** *(1982) 128 Cal. App. 3d 965, 180 Cal. Rptr. 604* , plaintiff filed a negligence action more than two years after performance of a gastric examination that allegedly caused her injuries. The trial court granted defendant's motion for summary judgment on the ground that plaintiff had failed to file her action within one year of her discovery of the injury, and plaintiff appealed.

The court of appeal affirmed the judgment of dismissal, finding that plaintiff had sufficient facts to put her on inquiry more than one year prior to the time she filed her complaint. The court rejected plaintiff's contention that the statute proceeded to run only when she realized she had a viable cause of action against defendant, 24 months after the alleged malpractice. This contention, stated the court, ignores the well-settled principle that ignorance of a legal theory of recovery is irrelevant to the limitations period (*128 Cal. App. 3d 965, 972)* . The court noted that the occurrence of a serious injury during a physical examination is sufficient to place a reasonable person on inquiry that the physician might have been at fault, and that such a cognizable event, rather than knowledge of its legal significance, is what starts the running of the statute of limitations (*128 Cal. App. 3d 965, 973-974)* .

[d] Nondisclosure by Defendant

The facts and procedural background of ***Sanchez v. South Hoover Hosp.*** *(1976) 18 Cal. 3d 93, 132 Cal. Rptr. 657, 553 P.2d 1129* , are discussed in *§ 175.37[3][a]*. The plaintiff contended that the statute of limitations was tolled by defendants' nondisclosure of facts relating to her condition. The Court rejected her contention, holding that the tolling provision of *Code Civ. Proc. § 340.5*, which suspends the limitations period for nondisclosure and certain other types of misconduct by defendants, did not apply to the one-year period following actual or constructive discovery of the injury by plaintiff (*18 Cal. 3d 93, 96)* . The Court supported its holding both by noting that the language of the statute specifically links the tolling provision to the three-year limitation period only, and by analogy to the principle of fraudulent concealment. The latter, stated the Court, held that a defendant's concealment of a cause of action against him or her tolls the applicable statute of limitations only until the plaintiff independently discovers, or with reasonable diligence should have discovered, the claim. This rule is applied even in those cases in which there was a fiduciary duty of disclosure imposed on defendant (*18 Cal. 3d 93, 99)* . Such principles, held the Court, apply equally to medical malpractice actions (*18 Cal. 3d 93, 100)* . The Court qualified its ruling by noting that in cases in which the defendant physician is the only possible source of information regarding an injury, then the statute will be tolled until disclosure. In this particular case, however, plaintiff had other sources through which to ascertain her cause of action (*18 Cal. 3d 93, 100)* .

[e] Limitations Period Not Tolled by Legal Advice That No Legal Remedy Exists

In ***Gutierrez v. Mofid*** *(1985) 39 Cal. 3d 892, 218 Cal. Rptr. 313, 705 P.2d 886* , plaintiff underwent an operation after having given consent for exploratory surgery and possible removal of a tumor or her appendix. The surgeons, however, performed a complete hysterectomy, alleging afterward that they did so to avoid risking her life. Four months later, after receiving opinions from medical personnel that the surgery had been excessive, plaintiff consulted a medical malpractice attorney, who told her there was no provable malpractice. Plaintiff continued to discuss the injury with others, who advised her to bring suit. Almost two years after the operation, plaintiff consulted a second firm of attorneys, who brought the action immediately. Plaintiff alleged that the action was timely filed because the first attorney she consulted discouraged litigation, and she did not consult another attorney until after the period had expired. The trial court granted summary judgment in favor of defendants, who contended that a medical malpractice action must be commenced within one year after the patient discovers, or through the use of reasonable diligence should have discovered the injury, pursuant to *Code Civ. Proc. § 340.5*. Plaintiff appealed.

The Supreme Court affirmed, holding that the one-year "discovery" limitations period for medical malpractice is not delayed, suspended, or tolled when a plaintiff with actual or constructive knowledge of the facts underlying the malpractice claim is told by an attorney that he or she has no legal remedy (*39 Cal. 3d 892, 902)* . The Court noted that "injury" within the meaning of *Code Civ. Proc. § 340.5* means both a person's physical condition and its negligent cause. Therefore, a patient who knows, or by reasonable diligence should have known, that he or she has been harmed through professional negligence has one year to bring suit (*39 Cal. 3d 892, 896)* . The evidence clearly showed that plaintiff both knew of her injury, and suspected malpractice,almost immediately after the operation. The Court rejected plaintiff's contention that her reliance on the attorney's advice satisfied her duty of diligent inquiry, and that the limitations period began to run only when the second attorney advised her that she had grounds to bring suit. The Court therefore disapproved the holding in *Jones v. Queen of the Valley Hosp. (1979) 90 Cal. App. 3d 700, 153 Cal. Rptr. 662* , to the extent that it is inconsistent with that view (*39 Cal. 3d 892, 897, 902)* . The uniform California rule is that a limitations period dependent on discovery of the cause of action begins to run no later than the time the plaintiff learns, or should have learned, the *facts* essential to the claim. It is irrelevant that the plaintiff is ignorant of a legal remedy or the legal theories underlying a cause of action. Therefore, if one has suffered appreciable harm and knows or suspects that professional error is its cause, the fact that an attorney has not yet advised suit does not postpone commencement of the limitations period (*39 Cal. 3d 892, 897-898)* . For purposes of the statute of limitations, the risk that discouraging legal advice will lead to loss of a cause of action must fall on the plaintiff who obtains that advice, rather than on a wholly unnvolved defendant. In that situation, the right to be free of stale claims prevails over the right to prosecute them, and plaintiff's remedy is a suit for legal malpractice (*39 Cal. 3d 892, 900)* .

[f] Limitations Period Begins Running as to All Potential Defendants

In ***Knowles v. Superior Court*** *(2004) 118 Cal. App. 4th 1290, 13 Cal. Rptr. 3d 700* , the plaintiffs were the wife and children of a man who died in the hospital four days after being treated for renal artery stenosis and three days after the surgical repair of an abdominal aortic aneurysm. The two procedures were performed by different physicians. The plaintiffs suspected medical negligence as the cause of death shortly after the death. Less than a year after the death, the plaintiffs brought a wrongful death action against the hospital and the physicians who performed the surgery to repair the aneurysm. While that case was pending, the plaintiffs consulted with another physician about the death, and this physician suggested that the physician who performed the procedure to treat the renal artery stenosis may have done something during that procedure to cause internal bleeding. Shortly thereafter, the plaintiffs filed a separate wrongful death action against the physician who treated the stenosis, and dismissed with prejudice the original action filed against the other defendants. The new defendant filed a motion for summary judgment as to the spouse and two of the children on the grounds that their action was brought more than a year after the plaintiffs suspected medical malpractice was the cause of death. This defendant also argued that the fourth plaintiff, a child of the decedent who was mentally disabled, could not prove damages because that child believed that his father was still alive. The trial court denied the summary judgment motion, and the defendant filed a petition for writ of mandate.

The court of appeal granted the writ as to the decedent's spouse and the two non-disabled children. The court noted that

the plaintiffs' own admissions established that those plaintiffs each suspected that the death was caused by medical negligence shortly after the death. Therefore, the one-year statute of limitations began to run as to those plaintiffs at that time, which was more than a year before the action was filed against this defendant. The court rejected the plaintiffs' argument that the statute of limitations as to this defendant did not begin to run until the plaintiffs suspected that this particular defendant may have been negligent. The court noted that under the plain language of *Code Civ. Proc. § 340.5*, it is the discovery of "the injury," rather than the discovery of a particular defendant's negligence, that triggers the limitations period. The plaintiffs suspected shortly after the death that it may have been caused by someone's medical negligence, they had one year from that point to bring suit, and it was up to the plaintiffs to investigate in a timely manner and bring a timely lawsuit (*118 Cal. App. 4th 1290, 1298-1301)* .

The court also noted that the proper procedure for adding defendants after the limitations period has expired is to include Doe defendants in a timely filed action, and then substitute the new defendants for the Doe defendants. Although the plaintiffs in this action had included Doe defendants in the initial, timely lawsuit, the trial court had dismissed the Doe defendants about six months before the second action was filed, for reasons not revealed in the court of appeal opinion (*118 Cal. App. 4th 1290, 1301* & n.6). Therefore, the plaintiffs were apparently left without the ability to add the new defendant in place of a Doe defendant in the original action.

[g] Limitations Period Applicable to Action Against Medical Student

In *Chosak v. Alameda County Medical Center (2007) 153 Cal. App. 4th 549, 63 Cal. Rptr. 3d 184* , plaintiff was injured while receiving a routine eye examination when her ankle was caught between the examination chair as it was being raised and the metal arm of a stationary examination device. The examination was being conducted by an optometry student who was serving an internship at the facility. Plaintiff sued the student and the facility, as well as medical professionals who subsequently treated, and allegedly misdiagnosed, the injury. The trial court sustained demurrers for all defendants on the basis of the one-year statute of limitations of *Code Civ. Proc. § 340.5*. Plaintiff appealed the dismissal of her claims against the the optometry student who raised the eye examination chair, arguing that because the student was not licensed or certified to practice medicine, she was not a health care practitioner under the definition provided by MICRA. As such, plaintiff argued, the action against the student was timely under the two-year limitations period otherwise applicable.

The court of appeal affirmed. The court held that medical students and other medical professionals who are authorized to practice in California, but who are specifically exempt from license or certificate requirements, are considered health care providers subject to the MICRA statute of limitations (*153 Cal. App. 4th 549, 567)* . The court noted that while the statutory definition of health care provider could be interpreted to apply only to practitioners who have actual licenses or certificates, it was equally plausible to conclude that practitioners who are exempt from needing an actual license or certificate, but who are otherwise lawfully authorized to practice, are also included. The court concluded that medical students lawfully practicing should be included within the definition because (1) the legislative history suggested that *Code Civ. Proc. § 340.5* was intended to apply to all medical malpractice actions, (2) the concern with reducing the cost of malpractice insurance underlying MICRA would be frustrated by excluding medical students and others exempt from the licensing requirements, and (3) there was no apparent reason to exclude lawfully practicing, but exempt, persons from MICRA coverage, as they provide the same types of services as licensed physiciansand do so under their supervision (*153 Cal. App. 4th 549, 566-567)* .

[4] Additional Authorities

[a] Commencement of Limitation Period

In *Artal v. Allen (2003) 111 Cal. App. 4th 273, 3 Cal. Rptr. 3d 458* , the plaintiff brought an action for malpractice against the anesthesiologist who assisted in her pelvic surgery, alleging that the defendant's negligence during intubation caused the plaintiff to suffer a thyroid cartilage fracture. The plaintiff suffered persistent throat pain after her surgery,

but 18 months of visiting numerous doctors and specialists failed to reveal the cause of her pain, although she admitted to having suspicions that the pain was caused by the intubation process. However, it was not until the plaintiff underwent exploratory surgery that she learned of the thyroid cartilage damage and that it was probably caused by the defendant's negligence. The plaintiff filed her malpractice action within one year after the date that she underwent the exploratory surgery, but the trial court granted summary judgment for the defendant on statute of limitations grounds, concluding that the plaintiff's admitted suspicions before that date that the intubation caused her pain was sufficient to trigger the running of the one-year statute of limitations period of *Code Civ. Proc. § 340.5*. The court of appeal reversed, reaffirming that the limitations period begins to run when the plaintiff either discovers the injury or reasonably could have discovered the injury through the use of reasonable diligence (*111 Cal. App. 4th 273, 278)* . However, the court noted that the plaintiff must have discovered both the physical injury and its negligent cause to trigger the limitations period. Because the plaintiff exercised reasonable diligence in seeking the cause of her throat pain and did not have evidence of its negligent cause until the exploratory surgery, that surgery was the event that triggered the running of the one-year limitations period, and the plaintiff's action was timely filed (*111 Cal. App. 4th 273, 279-281)* .

In *Kleefeld v. Superior Court (1994) 25 Cal. App. 4th 1680, 31 Cal. Rptr. 2d 12* , the plaintiff contacted a state disciplinary board and expressed his concern that his wife's death might have resulted from improper chiropractic care. The board investigated the matter and took disciplinary action against the treating chiropractor. In ruling that the plaintiff's subsequent malpractice action against the chiropractor was time-barred by the one-year limitations period in *Code Civ. Proc. § 340.5*, the court of appeal held that the statute of limitations was not tolled during the time the disciplinary board looked into the case (*25 Cal. App. 4th 1680, 1685)* .

In *Dolan v. Borelli (1993) 13 Cal. App. 4th 816, 16 Cal. Rptr. 2d 714* , a surgery patient brought a medical malpractice action against the physician more than two years after experiencing post-surgery problems. The court of appeal affirmed dismissal on the ground that the action was time-barred under *Code Civ. Proc. § 340.5*. The court stated that the statute creates two separate statutes of limitations, both of which must be satisfied if plaintiff is to timely file a medical malpractice action: (1) plaintiff must file within one year after first discovering the injury and negligent cause of injury; and (2) plaintiff must file within three years after first experiencing harm from the injury (*13 Cal. App. 4th 816, 824-825)* .

Steingart v. White (1988) 198 Cal. App. 3d 406, 243 Cal. Rptr. 678 , was a medical malpractice action arising out of defendant physician's failure in 1982 to diagnose a lump in plaintiff's breast as cancerous. Plaintiff noticed no change in the lump until 1985, at which time another doctor performed a lumpectomy and advised her that she had "Stage II" breast cancer. She then underwent a radical mastectomy. In 1986, more than four years after defendant's examination of plaintiff but within one year of the diagnosis of breast cancer, plaintiff filed a complaint for medical malpractice. The trial court granted defendant's motion for summary judgment on the ground the action was barred by *Code Civ. Proc. § 340.5*, and plaintiff appealed. The court of appeal said that *Code Civ. Proc. § 340.5* presents two time bars within which a plaintiff claiming medical malpractice must file a complaint, one of which is within one year after the plaintiff discovers, or should have discovered the injury (*198 Cal. App. 3d 406, 412)* , and that in order for the one-year limitation period to be triggered, a plaintiff must be aware of both the injury and its negligent cause (*198 Cal. App. 3d 406, 415)* . The court of appeal reversed the judgment on the grounds that, under the facts presented, there remained at minimum a triable issue of fact as to whether plaintiff exercised reasonable diligence after the purported misdiagnosis, that reasonable minds could easily conclude that she did, and that because the complaint was filed within one year of the date plaintiff discovered her injury and was operated on, it must be deemed filed under the one-year prong of *Code Civ. Proc. § 340.5* (*198 Cal. App. 3d 406, 416)* .

[b] Constructive Knowledge of Injury

In *Rose v. Fife (1989) 207 Cal. App. 3d 760, 255 Cal. Rptr. 440* , plaintiff, who suffered injuries as a result of her use of a Copper 7 intrauterine birth control device (IUD), brought a malpractice action against the physician who prescribed the device. In March 1983, plaintiff had been hospitalized with a pelvic infection, at which time two doctors told her the

infection was caused by the IUD. By that time, she had also heard in the news or read that IUDs caused infections. However, plaintiff claimed that she didn't know that her particular IUD, the Copper 7, caused her injuries until she read an article about the Copper 7 in 1985. Plaintiff filed her complaint in February 1986, more than one year after her hospitalization for the infection. The trial court granted the physician's motion for summary judgment on the ground that the action was barred by *Code Civ. Proc. § 340.5*, and the court of appeal affirmed. The court found that plaintiff, at the time of her hospitalization, had a general mistrust and suspicion about IUDs per se and about their use by women who had not had children. Thus, if at the time of her hospitalization, plaintiff did not truly suspect that her injury was caused by her physicians' wrongfully prescribing an IUD for her, she reasonably should have suspected wrongdoing. The court held as a matter of law that a reasonable person would have suspected wrongdoing by the physician and would have inquired, rather than waiting for the facts to come to her (*207 Cal. App. 3d 760, 769-770)* .

California Points & Authorities

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CHAPTER 175 PHYSICIANS AND SURGEONS: MEDICAL MALPRACTICE
PART II. FORMS

17-175 California Points & Authorities § 175.38

§ 175.38 Supporting Contention That Medical Malpractice Action Based on Professional Negligence Is Barred by Statute of Limitations [Code Civ. Proc. § 340.5]--Three-Year Limit After Date of Injury

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S ACTION BASED ON MEDICAL NEGLIGENCE IS BARRED BY THE LAPSE OF MORE THAN THREE YEARS BETWEEN THE DATE OF INJURY AND THE DATE OF FILING THE COMPLAINT.

A. Statutory Limitations Period. [*See § 175.37, Paragraph A.*]

B. Commencement of Limitations Period. The three-year statute of limitations period provided by *Section 340.5 of the Code of Civil Procedure* provides the outer limit that terminates all medical malpractice liability and commences to run when the patient is aware of the physical manifestation of his or her injury without regard to awareness of the negligent cause, except when tolled by any of three situations enumerated in the statute (*Garabet v. Superior Court (2007) 151 Cal. App. 4th 1538, 1545, 1549-1551, 60 Cal. Rptr. 3d 800* ; *Hills v. Aronsohn (1984) 152 Cal. App. 3d 753, 760-762, 199 Cal. Rptr. 816*).

C. Both One and Three-Year Statute of Limitation Provisions Must Be Satisfied. Both the one-year and three-year statute of limitations periods provided by *Section 340.5 of the Code of Civil Procedure* must be satisfied to bring a medical malpractice action. Thus, if the action is brought within one year of reasonable discovery by the plaintiff, it is nonetheless barred if the three-year period is not also satisfied (*Hills v. Aronsohn (1984) 152 Cal. App. 3d 753, 757-758, 199 Cal. Rptr. 816*).

[*Optional*] **D. Foreign Body Tolling Provision Not Applicable to Substance Intentionally Introduced for Therapeutic Purpose.** The three-year statute of limitations period provided by *Section 340.5 of the Code of Civil Procedure* may be tolled by any of the exceptional circumstances enumerated in the statute, including the presence of foreign body in the person injured. However, the foreign body tolling provision was not intended to cover situations when a foreign substance was intentionally introduced into the patient's body. Moreover, this provision is expressly

inapplicable in a situation when the foreign body was introduced for a therapeutic or diagnostic purpose or effect (*Hills v. Aronsohn (1984) 152 Cal. App. 3d 753, 763-765, 199 Cal. Rptr. 816*).

[*Optional*] **E. Foreign Body Tolling Provision Only Applicable to Medically Inserted Objects.** The foreign-body exception of *Section 340.5 of the Code of Civil Procedure* applies only to medically inserted objects that have no therapeutic or diagnostic purpose and that are left in the patient's body. It does not apply to fragments of objects left in a patient's body after operations for their removal (*Wallace v. Hibner (1985) 171 Cal. App. 3d 1042, 1047, 217 Cal. Rptr. 748*).

[*Optional*] **F. Intentional Concealment Tolling Provision Not Applicable to Lack of Informed Consent or Mere Continuation of Prior Nondisclosure of Information.** Intentional concealment requires more than either a lack of informed consent or a mere continuation of prior nondisclosure of information (*Trantafello v. Medical Ctr. of Tarzana (1986) 182 Cal. App. 3d 315, 321, 227 Cal. Rptr. 84*).

[*Optional*] **G. Intentional Concealment Required to Be That of Health-Care Provider.** In order to toll the three-year period because of intentional concealment, the intentional concealment must be by the health-care provider (*Aronson v. Superior Court (1987) 191 Cal. App. 3d 294, 296 fn. 2, 236 Cal. Rptr. 347*).

[*Optional*] **H. Action Against Public Entity Must Meet Three-Year Time Limitation.** A plaintiff suing a public entity or employee for medical malpractice must meet the three-year limitations period of *Code Civ. Proc. § 340.5*, and failure to do so will provide a limitations defense for the defendant even if the plaintiff's action is otherwise timely under the Government Claims Act (*Roberts v. County of Los Angeles (2009) 175 Cal. App. 4th 474, 481, 96 Cal. Rptr. 3d 60*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that plaintiff's complaint for medical negligence is barred by the statute of limitations set forth by *Code Civ. Proc. § 340.5* based on the expiration of the three-year period from the date of plaintiff's injury. The form includes an optional paragraph for use in support of a contention that the foreign-body exception enumerated by *Code Civ. Proc. § 340.5*, which tolls the three-year period, does not apply to a substance intentionally introduced for a therapeutic purpose (Paragraph D), an optional paragraph for use in support of a contention that the foreign-body exception does not apply when the foreign body is a fragment of objects left in a patient's body after operations for their removal (Paragraph E), and an optional paragraph for use in support of a contention that the intentional concealment exception of *Code Civ. Proc. § 340.5* does not apply when the alleged concealment was merely a failure to obtain informed consent or a continuation of a prior nondisclosure of information (Paragraph F).

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion that demonstrates that plaintiff's injury was apparent more than three years before the filing of the action.

[c] Separate Trial of Statute of Limitations Defense

Any party, or the court itself, may move for a separate trial of the defense that an action is barred by a statute of limitations if the defense is pleaded in the answer. If the issue is resolved in favor of the plaintiff, the remaining issues are then tried [*Code Civ. Proc. § 597.5*].

[d] Related Pleading and Practice Forms

For pleading and practice forms relating to the defense that an action is barred by the statute of limitations and to a motion for a separate trial of a statute of limitations defense, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* (Matthew Bender).

[e] Related Points and Authorities

For memoranda of points and authorities supporting the contention that an action isbarred by the statute of limitations and supporting a motion for separate trial of the statute of limitations defense, see Ch. 143, *Limitation of Actions* .

[3] Discussion of Authorities

[a] Commencement of Limitations Period

In *Garabet v. Superior Court (2007) 151 Cal. App. 4th 1538, 60 Cal. Rptr. 3d 800* , plaintiff underwent LASIK eye surgery on the advice of an eye clinic after undergoing a thorough eye examination, at which time he was diagnosed with astigmatism. Almost immediately after the surgery, plaintiff began to experience a number of complications, although all of the symptoms plaintiff experienced had been described to plaintiff before the surgery as potential risks. Although plaintiff was assured that the symptoms were normal, plaintiff continued to see the surgeon for approximately two-and-a-half years in an attempt to have the complications corrected, but without success. Plaintiff ceased his treatment with the surgeon and resorted to corrective lenses. Approximately four years later, plaintiff was examined by a different eye doctor, who told plaintiff that his recurring vision problems were caused by the original surgery. This doctor told plaintiff that he should not have been considered a candidate for the LASIK procedure because of the shape of his cornea. Until that time, plaintiff had believed that his problems were caused by his astigmatism. Plaintiff sued the surgeon and the eye clinic for medical malpractice. Defendants argued on motion for summary judgment that the lawsuit was barred by the three-year limitations period of *Code Civ. Proc. § 340.5*. The trial court denied defendants' motion and they filed a petition for writ of mandate.

The court of appeal granted the petition and ordered the trial court to grant summary judgment in favor of defendants. Because plaintiff's suit was filed seven-and-a-half years after his surgery and his injury manifested almost immediately thereafter, the court held that the action was barred by limitations. The court noted that under *Code Civ. Proc. § 340.5*, the maximum limitations period for a medical malpractice action is three years from the date of injury, unless tolled for fraud, intentional concealment, or the presence of nontherapeutic and nondiagnostic foreign bodies. For these purposes, the limitations period begins to run once there is a manifestation of injury in some significant way (*151 Cal. App. 4th 1538, 1545)* . The court noted that plaintiff in the present case was alleging only medical misfeasance, not a lack of informed consent, fraud, intentional concealment, or the presence of nontherapeutic and nondiagnostic foreign bodies. Because plaintiff experienced the damaging effects of the alleged malpractice almost immediately after the surgery, and in fact complained to defendants about the symptoms at that time and for several years after, plaintiff was required to bring his malpractice action within three years after first experiencing these problems (*151 Cal. App. 4th 1538, 1549-1550)* . Plaintiff argued that, under existing case law, because the symptoms he experienced had been described prior to surgery as possible side effects, the limitations period was not triggered by these symptoms. The court of appeal rejected this argument, however, noting that this rule applied only in cases alleging failure to obtain informed consent. The rule did not apply in other types of malpractice cases, such as plaintiff's claim that he was negligently diagnosed as a candidate for LASIK surgery (*151 Cal. App. 4th 1538, 1551)* .

In ***Hills v. Aronsohn*** *(1984) 152 Cal. App. 3d 753, 199 Cal. Rptr. 816* , plaintiff filed a medical malpractice action for injuries resulting from defendant physician's alleged negligent injection of liquid silicone in plaintiff's breasts. Defendant, who had administered the injections almost eight years before the action was filed, was granted summary judgment on the ground that the action was time barred. Plaintiff appealed the summary judgment.

The court of appeal affirmed, concluding that the action had not, as a matter of law, been filed within three years after the date of injury, as required under *Code Civ. Proc. § 340.5* (*152 Cal. App. 3d 753, 756-757, 760-763)* . The court stated that the three-year limitations period of *Code Civ. Proc. § 340.5* provides an outer limit that terminates all medical malpractice liability and held that it commences to run when the patient is aware of the physical manifestation of his or her injury without regard to awareness of the negligent cause (*152 Cal. App. 3d 753, 760)* . In so holding, the court construed the statutory time for commencement--that is, "date of injury"--to be not the date of the wrongful act, but the date that the injury or damaging effect of the wrongful act became apparent to the person injured (*152 Cal. App. 3d 753, 762)* . The court reasoned that, whereas the one-year limitation period of *Code Civ. Proc. § 340.5* commences when the patient knows or should know of both the resulting injury and the negligent cause, the three-year period, as the outside limitation of the statute, commences when the patient discovers the resulting harm, regardless of when he or she becomes aware of the negligent cause (*152 Cal. App. 3d 753, 759, 760-762)* . The summary judgment was therefore proper in that plaintiff had admitted that she became aware of her injury four years before filing the action when she first experienced soreness and lumps in her breasts and sought consultation (*152 Cal. App. 3d 753, 762-763)* .

NOTE:

At least one court of appeal has disagreed with *Hills,* to the extent that *Hills* suggests that there is a correlation between *manifestation* of damage, triggering the three-year period, and the plaintiff's *discovery* of the damage. In that case, the court of appeal held that damage is manifested, and the three-year period triggered, when damage becomes evidenced in some significant fashion, "whether or not the patient/plaintiff actually becomes aware of the injury." The court determined that the three-year limitations period under *Code Civ. Proc. § 340.5* had run when the manifestations of plaintiff's injury from prior sexual abuse by a psychotherapist became apparent to hersubsequent treating physician at least four years before the filing of the complaint, even though the plaintiff herself apparently did not recognize or understand her injury until a later time, within three years of her filing of the complaint [*Marriage & Family Ctr. v. Superior Court (1991) 228 Cal. App. 3d 1647, 1654-1655, 279 Cal. Rptr. 475]* .

[b] Both One and Three-Year Statute of Limitation Provisions Must Be Satisfied

The facts and procedural background of ***Hills v. Aronsohn*** *(1984) 152 Cal. App. 3d 753, 199 Cal. Rptr. 816* , are discussed in *§ 175.38[3][a]*. The court of appeal began its discussion in that case by stressing the point that to be timely, a medical malpractice action must satisfy both the one-year and the three-year limitations periods under *Code Civ. Proc. § 340.5* (*152 Cal. App. 3d 753, 758)* . The court then determined that the present action was not, as a matter of law, barred by the one-year limitation period. The court reasoned that this period commences to run only when the plaintiff discovers or reasonably should have discovered both the injury and the negligent cause, and evidence in the present case disclosed a triable issue of fact as to whether the plaintiff had reasonably discovered the negligent cause, that is, defendant's manner of silicone injection, less than one year before she filed the action (*152 Cal. App. 3d 753, 759-760)* . However, because both limitations provisions must be satisfied, the court nonetheless affirmed the summary judgment, after holding that action failed, as a matter of law, to also satisfy the three-year limitation period (*152 Cal. App. 3d 753, 762)* .

[c] Foreign Body Tolling Provision Not Applicable to Substance Intentionally Introduced for Therapeutic Purpose

The facts and procedural background of ***Hills v. Aronsohn*** *(1984) 152 Cal. App. 3d 753, 199 Cal. Rptr. 816* , are discussed in *§ 175.38[3][a]*. Plaintiff argued that her action was not barred by the three-year limitation period provided by *Code Civ. Proc. § 340.5* because that period is expressly tolled by the presence of a foreign body in the person injured, and in her case the silicone injections qualified as such a "foreign body" (*152 Cal. App. 3d 753, 763)* . The

court rejected this contention, noting that the foreign body tolling provision was not intended to cover situations when a substance was, as here, intentionally introduced into a body, but rather those situations involving negligent failure to remove a foreign body (*152 Cal. App. 3d 753, 764-765)* . The court also held that the exception expressly applied only to foreign bodies having no therapeutic or diagnostic purpose or effect, whereas here the silicone had been injected for a therapeutic purpose (*152 Cal. App. 3d 753, 765)* .

[d] Foreign Body Tolling Provision Only Applicable to Medically Inserted Objects

In ***Wallace v. Hibner*** *(1985) 171 Cal. App. 3d 1042, 217 Cal. Rptr. 748* , plaintiff consulted defendant physician for treatment of a puncture wound caused by a sewing needle that was traumatically imbedded in her foot. Defendant inadvertently failed to remove the entire needle during the operation. Plaintiff discovered defendant's negligence thirteen years later, and filed a medical malpractice action against defendant. Defendant filed a motion for judgment on the pleadings on the ground that the action was barred by *Code Civ. Proc. § 340.5*. The trial court granted the motion. Plaintiff appealed, contending that the needle fragment was a foreign body within the meaning of *Code Civ. Proc. § 340.5*, and therefore the statute of limitations was tolled.

The court of appeal affirmed, holding that the legislature intended the foreign body exception to apply only to medically inserted objects that have no therapeutic or diagnostic purpose and that are left in the patient's body (*171 Cal. App. 3d 1042, 1047)* . The court noted that by requiring the foreign body to be one that "has no therapeutic or diagnostic purpose or effect" in order to toll the statute, the legislature intended it to be an object that is surgically inserted or attached and allowed to remain (*171 Cal. App. 3d 1042, 1050)* .

[e] Intentional Concealment Tolling Provision Not Applicable to Lack of Informed Consent or Mere Continuation of Prior Nondisclosure of Information

In ***Trantafello v. Medical Ctr. of Tarzana*** *(1986) 182 Cal. App. 3d 315, 227 Cal. Rptr. 84* , defendant physician performed a cervical diskectomy on plaintiff. In order to maintain the space between two vertebrae where the disk was removed, defendant implanted an acrylic substance. Nine months after the surgery, plaintiff experienced a swelling in his neck and a choking sensation, together with difficulty swallowing. Subsequently, a physician other than defendant performed surgery on plaintiff for bone fusion and removal of the implant. Nearly five years after the diskectomy, plaintiff filed a complaint for medical malpractice against defendant. The trial court granted defendant's motion for summary judgment on the ground the action was barred by the three-year limitations period of *Code Civ. Proc. § 340.5*. Plaintiff appealed, contending that he raised a triable issue of fact as to whether the limitations period of *Code Civ. Proc. § 340.5* was tolled by the "intentional concealment" provision, because defendant physician did not advise him, prior to surgery, that the surgery wouldinvolve an acrylic implant rather than a bone fusion, and because defendant did not tell plaintiff after surgery that the implant was used.

The court of appeal rejected plaintiff's contention, finding that plaintiff failed to show that defendant concealed the existence of a cause of action for either negligence or lack of informed consent (*182 Cal. App. 3d 315, 322)* . Plaintiff failed to show, for example, that defendant made any affirmative misrepresentations concerning the implant. The court held that intentional concealment required something more than either a lack of informed consent or a mere continuation of the prior nondisclosure that the implant was used. Furthermore, the concealment had to have occurred either at or subsequent to the time the surgery was undertaken (*182 Cal. App. 3d 315, 321)* .

[f] Intentional Concealment Required to Be That of Health-Care Provider

In ***Aronson v. Superior Court*** *(1987) 191 Cal. App. 3d 294, 236 Cal. Rptr. 347* , a 14-year-old boy, born in 1971, sued a physician and a university for medical malpractice based on negligent prenatal and delivery care which caused the boy total paralysis and the inability to speak, through his aunt as guardian ad litem. The action was filed in 1985. Plaintiff alleged that his parents failed or refused to bring the action on his behalf. Defendants' demurrers to the complaint based

on the bar of the statute of limitations were overruled, and defendants petitioned the court of appeal for a writ of mandate.

In granting the writ, but stating that the trial court could grant plaintiff leave to amend the complaint on a proper showing that the case was within a tolling exception, the court said that the statutory period is subject to tolling under *Code Civ. Proc. § 340.5* for (1) fraudulent collusion of a parent with a health care provider [*see § 175.44*], (2) intentional concealment of injury by the health care provider, or (3) presence of a foreign body in the person of the victim (*191 Cal. App. 3d 294, 296)* . With respect to intentional concealment, the court explained that, while the statute does not expressly say so, the intentional concealment must be by the health care provider (*191 Cal. App. 3d 294, 296 n.2*).

[g] Action Against Public Entity Must Meet Three-Year Time Limitation

In ***Roberts v. County of Los Angeles*** *(2009) 175 Cal. App. 4th 474, 96 Cal. Rptr. 3d 60* , plaintiff suffered severe brain damage while receiving treatment at a county-owned hospital. The damage incapacitated her and necessitated that she remain hospitalized. Over three years later, plaintiff's parents were appointed conservators of the person of plaintiff. Less than three months after their appointment, they filed leave under the Government Claims Act to present a late claim for medical malpractice. This application was initially denied by the county, although the county later rescinded this denial. Thereafter, plaintiff, acting through her conservators, filed a lawsuit for medical malpractice against the county hospital. The lawsuit was filed more than four years after the incident that left plaintiff incapacitated, but within the six-month period for filing a lawsuit following acceptance of the late claim by the county, thus making the suit timely under the Government Claims Act. However, the trial court granted the county's motion for summary judgment on the grounds that the malpractice lawsuit was not filed within the three-year MICRA limitations period of *Code Civ. Proc. § 340.5*. Plaintiff appealed.

The court of appeal affirmed. The court held that the lawsuit was governed by both the time requirements of the Government Claims Act and the three-year MICRA time limitation of *Code Civ. Proc. § 340.5*. The court noted that the time period for filing a government claim had been tolled pending appointment of a conservator, making the suit timely under the Claims Act (*175 Cal. App. 4th 474, 479)* . However, plaintiff's malpractice suit was not filed within the three-year MICRA limitations period. The court concluded that the two statutory limitations period were not mutually exclusive and could both be applied when the defendant is a public entity or employee. The court construed the three-year MICRA period as an outer limit by which time a malpractice lawsuit must be brought, even against a public entity or employee, and claimants are capable of meeting that limit while simultaneously meeting the time requirements of the Government Claims Act. Moreover, the court noted that applying both statutes furthers both MICRA's goal of restricting the flow of stale malpractice claims and the Claims Act goals of limiting lawsuits against government entities through tightly controlled notice provisions (*175 Cal. App. 4th 474, 481)* . Moreover, the court noted that failing to apply the three-year MICRA limitations period because time for bringing the action was tolled under the Government Claims Act would violate the established rule that prohibits tolling of the MICRA limitations period based on reasons not included in *Code Civ. Proc. § 340.5* itself (*175 Cal. App. 4th 474, 484)* .

[4] Additional Authorities

[a] Commencement of Limitations Period

In *Arredondo v. Regents of Univ. of Cal. (2005) 131 Cal. App. 4th 614, 31 Cal. Rptr. 3d 800* , the plaintiff was a minor who was injured during brain surgery. The plaintiff, through her representatives, conceded that her injury manifested no later than June 23, 1998, but notice of an intent to sue was not filed until June 28, 2001, more than three years after the injury first manifested. The plaintiff argued that her cause of action did not accrue until July 1, 1998, when her mother allegedly discovered the negligent cause of the plaintiff's injury. The trial court granted judgment for the defendant on the grounds that the notice of intent to sue was not timely filed, and the court of appeals agreed. The court of appeals

held that both the plain language of *Code Civ. Proc. § 340.5* and the legislature's intent defeated the plaintiff's argument. The statute clearly stated that the action must be commenced no later than three years after the date of injury, regardless of the date of discovery. Moreover, the specific intent of the legislature in enacting the statute was to place a three-year outside limit on when actions could be brought, triggered by the date of injury, not by discovery of the negligent cause of the injury (*131 Cal. App. 4th 614, 618-619)* .

In *McNall v. Summers (1994) 25 Cal. App. 4th 1300, 30 Cal. Rptr. 2d 914* , the plaintiff sought damages for brain injuries that allegedly resulted from electroconvulsive therapy (ECT). The plaintiff experienced confusion and memory loss following the treatments but did not learn that she had suffered an embolic stroke and associated brain injuries until the stroke was diagnosed years later. The court of appeal held that the action was time-barred because the three-year limitations period set out in *Code Civ. Proc. § 340.5* commenced when the plaintiff experienced memory loss, even if she was not aware at that time of the actual organic injury that caused the memory loss or of the defendants' alleged negligence (*25 Cal. App. 4th 1300, 1311)* .

The facts and procedural background of *Steingart v. White (1988) 198 Cal. App. 3d 406, 243 Cal. Rptr. 678* , are discussed in *§ 175.37[4][a]*. Although the court of appeal reversed the summary judgment for defendant physician, the court, relying on *Hills v. Aronsohn (1984) 152 Cal. App. 3d 753, 758, 199 Cal. Rptr. 816* [*see § 175.37[3][a]*], *Larcher v. Wanless (1976) 18 Cal. 3d 646, 656 n.11, 135 Cal. Rptr. 75, 557 P.2d 507* , and *Brown v. Bleiberg (1982) 32 Cal. 3d 426, 437 n.8, 186 Cal. Rptr. 228, 651 P.2d 815* , held that the event that activates the three-year limitations period is the moment the plaintiff discovers the harm caused by the alleged negligence; that is, the period is activated on the date of the damaging effect of the wrongful act rather than on the date of the act itself (*198 Cal. App. 3d 406, 413)* .

[b] Both One- and Three-Year Statute of Limitations Provisions Must Be Satisfied

The facts and procedural background of *Steingart v. White (1988) 198 Cal. App. 3d 406, 243 Cal. Rptr. 678* , are discussed in *§ 175.37[4][a]*. Although the court of appeal reversed the summary judgment for defendant physician, the court said that *Code Civ. Proc. § 340.5* presents two limitation periods, before the end of which a plaintiff claiming medicalmalpractice must file a complaint: (1) within one year after the plaintiff discovers, or should have discovered, the injury and (2) within three years after the injury, unless one of the enumerated exceptions applies (*198 Cal. App. 3d 406, 412)* .

[c] Foreign Body Tolling Provision Not Applicable to Substance Intentionally Introduced for Therapeutic Purposes

The facts and procedural background of *Trantafello v. Medical Ctr. of Tarzana (1986) 182 Cal. App. 3d 315, 227 Cal. Rptr. 84* , are discussed in *§ 175.38[3][e]*. The plaintiff argued that the limitations period of *Code Civ. Proc. § 340.5* was tolled because the acrylic substance that defendant inserted between plaintiff's vertebrae constituted a "foreign body." The court of appeal affirmed on the ground that the "foreign body" provision of *Code Civ. Proc. § 340.5* applies only when a foreign body, such as a surgical sponge, is inadvertently left in a patient (*182 Cal. App. 3d 315, 319)* . Therefore, even though plaintiff's expert testified in a deposition that the acrylic implant had no therapeutic effect on plaintiff and, in fact, resulted in injury to plaintiff, the expert's concession that the purpose of the implant was therapeutic in that it was intended by defendant to maintain the space between two of plaintiff's vertebrae precluded the application of the foreign body exception (*182 Cal. App. 3d 315, 320)* .

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Volume 17 Chapters 170-179 PARTNERSHIPS---to---PREMISES LIABILITY
CHAPTER 175 PHYSICIANS AND SURGEONS: MEDICAL MALPRACTICE
PART II. FORMS

17-175 California Points & Authorities § 175.39

§ 175.39 Supporting Contention That Medical Malpractice Action Based on Professional Negligence Is Barred by Statute of Limitations [Code Civ. Proc. § 340.5]--Limitations Period Not Tolled if Notice of Intent Filed More Than 90 Days Before Expiration of One-Year Limitations Period [Code Civ. Proc. § 364(a), (d)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S ACTION BASED ON MEDICAL MALPRACTICE IS BARRED BY THE STATUTE OF LIMITATIONS BECAUSE PLAINTIFF FAILED TO COMMENCE THE ACTION BEFORE THE END OF THE ONE-YEAR LIMITATIONS PERIOD, AND THAT PERIOD WAS NOT TOLLED PURSUANT TO SECTION 364(a) OF THE CODE OF CIVIL PROCEDURE BECAUSE PLAINTIFF SERVED NOTICE UNDER THAT SECTION MORE THAN 90 DAYS BEFORE THE EXPIRATION OF THE APPLICABLE STATUTE OF LIMITATIONS.

A. Filing Notice of Intent More Than 90 Days Before Expiration of Limitations Period Does Not Toll One-Year Limitations Period. If a plaintiff in a medical malpractice action files the notice of intent to sue required by *Code of Civil Procedure Section 364(a)* before the last 90 days of the one-year limitations period, the plaintiff is not entitled to benefit from the 90-day tolling provided under *Code of Civil Procedure Section 364(d)*, and the action must be brought within the one-year limitations period under *Code of Civil Procedure Section 340.5* (*Woods v. Young (1991) 53 Cal. 3d 315, 319, 328, 279 Cal. Rptr. 613, 807 P.2d 455*).

[*Optional*] **B. Giving Second Notice of Intent Within Final 90 Days of Limitations Period Does Not Toll One-Year Limitations Period.** If a 90-day notice of intent to sue is given prior to the final 90 days of the limitations period, the plaintiff cannot toll the statute of limitations by giving a second notice of intent to sue within the final 90 days of the limitations period (*Bennett v. Shahhal (1999) 75 Cal. App. 4th 384, 390, 89 Cal. Rptr. 2d 272*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a defendant's contention that an action is barred by the statute of limitations. The argument is based on the ground that the one-year limitations period was not tolled under *Code Civ. Proc. § 364(d)* because plaintiff filed the notice of intent required by *Code Civ. Proc. § 364(a)* more than 90 days before the end of the one-year limitations period.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should specify (1) the date the cause of action accrued, (2) the date the notice of intent was filed, (3) the date the one-year limitations period elapsed, and (4) the date the complaint was filed. Counsel may combine the points and authorities in this form with those in § 175.37.

[c] Separate Trial of Statute of Limitations Defense

Any party, or the court itself, may move for a separate trial of the defense that an action is barred by the statute of limitations if the defense is pleaded in the answer. If the issue is resolved in favor of the plaintiff, the remaining issues are then tried [*Code Civ. Proc. § 597.5*].

[d] Related Pleading and Practice Forms

For pleading and practice forms relating to the defense that an action is barred by the statute of limitations and to forms relating to Code Civ. Proc. § 340.5, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* , and Ch. 415, *Physicians: Medical Malpractice* (Matthew Bender).

[e] Related Points and Authorities

For general forms of memoranda of points and authorities, see Ch. 143, *Limitation of Actions* .

[f] Opposing Points and Authorities

The points and *authorities in § 175.45* may be used in an appropriate case to oppose the contention supported by this memorandum.

[g] Related California Torts Chapters

For full discussion of the issues involved in medical malpractice actions, including the applicable statutes of limitation, see Levy, Golden, and Sacks, California Torts, Ch. 31 (Matthew Bender).

[3] Discussion of Authorities

[a] Filing Notice of Intent More Than 90 Days Before Expiration of Limitations Period Does Not Toll One-Year Limitations Period

In ***Woods v. Young*** *(1991) 53 Cal. 3d 315, 279 Cal. Rptr. 613, 807 P.2d 455* , plaintiff alleged that she discovered her injury on June 6, 1983. On February 17, 1984, plaintiff's attorney notified defendants of plaintiff's intent to file a malpractice action against them. On August 16, 1984, one year and three weeks after plaintiff's discovery of the injury, plaintiff filed a complaint alleging medical malpractice based on negligent examination, diagnosis, and treatment. Each defendant answered the complaint, and alleged as an affirmative defense that the complaint was barred by the one-year statute of limitations. Defendants subsequently moved for summary judgment on the ground that the filing of the complaint occurred after the statute of limitations had expired. The trial court granted the motions, and denied plaintiff's motion for reconsideration. Plaintiff appealed, and the court of appeal reversed. The court of appeal held that the statute

of limitations was tolled by the giving of the notice of intent to sue, regardless of when during the limitations period the notice was given. The court based its decision on *Code Civ. Proc. § 356*, providing that when the commencement of an action is stayed by statutory prohibition, the time of the statutory prohibition is not part of the time limited for commencement of the action. Although the court noted that the application of the provision to *Code Civ. Proc. § 364* was questionable, it decided to follow the existing published decisions that had applied *Code Civ. Proc. § 356* to *Code Civ. Proc. § 364*. Because plaintiff's complaint was filed within one year and 90 days of the date her cause of action accrued, the court of appeal reversed the judgment of the trial court.

The California Supreme Court affirmed (*53 Cal. 3d 315, 331)* . Rejecting statutory constructions offered in previous court of appeal cases applying *Code Civ. Proc. § 356*'s tolling provisions to *Code Civ. Proc. § 364*, the Court held that the applicable statute of limitations (*Code Civ. Proc. § 340.5*) is tolled 90 days when the plaintiff gives the notice of intent to sue in the last 90 days of the limitations period, but that the running of the statutory period is not otherwise affected by service of the notice (*53 Cal. 3d 315, 319, 328)* . The Court conceded that its new rule would prevent tolling in this case, because the plaintiff gave notice more than 90 days before the end of the one-year limitations period. However, the Court determined that considerations of fairness and public policy would preclude application of the new rule to this case, and would require prospective application of the holding to complaints filed more than 90 days after the April 4, 1991, decision became final (*53 Cal. 3d 315, 319, 331)* . Plaintiff, who brought suit within one year and 90 days of the date her cause of action accrued, was therefore able to proceed under the former rule permitting a 90-day extension of the one-year limitations period when the notice was filed more than 90 days before the end of the limitations period (*53 Cal. 3d 315, 330-331)* .

NOTE:

The prospectivity directive of *Woods* has been construed by one court of appeal to apply only to the primary holding in *Woods* that the extension allowed by *Code Civ. Proc. § 364(d)* is available only when the notice of intention to sue is served during the final 90 days of the applicable limitation period. Under this construction, the prospectivity directive does not apply to *Woods*' secondary holding limiting the maximum filing time to the period of limitations plus 90 days [*Barber v. Superior Court (1991) 234 Cal. App. 3d 1076, 1081-1082, 285 Cal. Rptr. 668* ; *see § 175.40*][3][a].

[b] Giving Second Notice of Intent Within Final 90 Days of Limitations Period Does Not Toll One-Year Limitations Period

In ***Bennett v. Shahhal*** *(1999) 75 Cal. App. 4th 384, 89 Cal. Rptr. 2d 272* , the defendant, a physician, allegedly injured the plaintiff by improperinsertion of a shunt into the plaintiff's brain that drained fluid into his abdomen. Unknown to the plaintiff, his attorney had filed a notice of intent to sue the defendant under *Code Civ. Proc. § 364(a)* prior to the final 90 days of the limitations period. The plaintiff then informed his attorney that he would not pursue the lawsuit. However, after undergoing further medical treatment, the plaintiff changed his mind and hired a second attorney to pursue legal action against the defendant. The second attorney then filed another 90-day notice of intent to sue with the defendant, unaware that the first attorney had already done so. Based on the tolling provision of *Code Civ. Proc. § 364(d)*, the plaintiff's suit was filed after expiration of the one-year limitations period. The defendant successfully moved for summary judgment on the ground that the second notice did not toll the statute of limitations and the action was thus time-barred. The plaintiff appealed.

The court of appeal affirmed. The court concluded that if a 90-day notice of intent to sue is given prior to the final 90 days of the limitations period, the plaintiff cannot toll the statute of limitations by giving a second notice of intent to sue within the final 90 days of the limitations period. In such a case, the original notice, although it does not extend the limitations period, fully achieves the legislative objective of providing time for the negotiated settlement of disputes (*75 Cal. App. 4th 384, 390)* . The fact that the plaintiff may have been unaware of the first attorney's actions was irrelevant, because an attorney's knowledge is imputed to the attorney's client (*75 Cal. App. 4th 384, 391 n.3*). The court further held that the second notice did not toll the limitations period even if the plaintiff may have experienced or

discovered additional injuries after the first notice was given, because the plaintiff had only one cause of action against the defendant with one accrual date (*75 Cal. App. 4th 384, 391-392)* .

[4] Additional Authorities

[a] Filing Notice of Intent More Than 90 Days Before Expiration of Limitations Period Does Not Toll One-Year Limitations Period

In *Derderian v. Dietrick (1997) 56 Cal. App. 4th 892, 65 Cal. Rptr. 2d 800* , plaintiffs sued a physician for the wrongful death of their mother. Plaintiffs sent a letter designed to notify defendant of their intent to sue to a post office box address listed on a bill they had received for the physician's services. The address to which the letter had been sent was for a billing service, for whom defendant had been working as an independent contractor at the time he treated plaintiffs' mother. Defendant never received the letter until he received the summons and complaint. The trial court granted summary judgment in favor of defendant concluding that the statute of limitations for plaintiffs to bring their professional negligence claim (*Code Civ. Proc. § 340.5*) was not tolled since plaintiffs failed to provide defendant with actual notice of their claim as required by *Code Civ. Proc. § 364(a),* and therefore the statute of limitations for filing the action expired three months before the complaint was served and filed. The court of appeal affirmed, holding that plaintiffs efforts to comply with the notice requirements of *Code Civ. Proc. § 364(a),* were deficient (*56 Cal. App. 4th 892, 899)* . The court determined that plaintiffs had not taken adequate steps which would be likely to result in actual notice to the defendant. For example, the court said that there was no reasonable explanation as to why plaintiffs did not check for defendant's address in public records available from the Medical Board of California. The court noted that while it concluded that plaintiffs' efforts to comply with *Code Civ. Proc. § 364(a)* were deficient, it did not conclude that resorting to public records was essential to fulfill the requirement for prefiling notice. Current written communications from a physician to a patient bearing a letterhead showing an address, a patient's firsthand knowledge based on visits to the physician's office, current listings and advertisements in professional and telephone directories and available on-line legal and medical research providers were, according to the court, all generally reliable sources for determining where *Code Civ. Proc. § 364(a)* notice may be directed (*56 Cal. App. 4th 892, 900)* .

In *Hanooka v. Pivko (1994) 22 Cal. App. 4th 1553, 28 Cal. Rptr. 2d 70* , the plaintiffs filed their medical malpractice action against three doctors on October 17, 1991, one year and twenty days after the death of their infant son. On July 31, 1991, the plaintiffs had prepared a notice of intention to sue pursuant to *Code Civ. Proc. § 364(d)* (extension of limitations period where notice of intent to sue served within last ninety days), but they served it on the hospital where the defendants had staff privileges, even though they knew the identities and locations of two of the defendants (*22 Cal. App. 4th 1553, 1559)* . The court affirmed summary judgment in favor of these two defendants, holding that plaintiffs did not comply with the provisions of *Code Civ. Proc. § 364(d)* in that they did not provide actual notice to these two defendants. The court further held that a plaintiff cannot rely on a hospital to forward such notices of intention to sue to individual physicians when the plaintiff has knowledge of the identity and location of the physicians (*22 Cal. App. 4th 1553, 1560)* .

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CHAPTER 175 PHYSICIANS AND SURGEONS: MEDICAL MALPRACTICE
PART II. FORMS

17-175 California Points & Authorities § 175.40

§ 175.40 Supporting Contention That Medical Malpractice Action Based on Professional Negligence Is Barred by Statute of Limitations [Code Civ. Proc. § 340.5]--Notice of Intent Filed Within 90 Days of Expiration of One-Year Limitation Period--Period Tolled for 90 Days Only [Code Civ. Proc. § 364(a), (d)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S ACTION BASED ON MEDICAL MALPRACTICE IS BARRED BECAUSE, ALTHOUGH PLAINTIFF SERVED NOTICE PURSUANT TO CODE OF CIVIL PROCEDURE *SECTION 364(a) WI*THIN 90 DAYS OF THE EXPIRATION OF THE ONE-YEAR STATUTE OF LIMITATIONS, HE/SHE NEVERTHELESS FAILED TO COMMENCE THE ACTION BEFORE THE LIMITATIONS PERIOD (INCLUDING THE 90-DAY PERIOD THAT WAS TOLLED) EXPIRED.

Notice Tolls One-Year Period of Limitations for 90 Days Only. When a plaintiff files the notice of intent to sue required by *Code of Civil Procedure Section 364(a)* in the last 90 days of the one-year limitations period, the applicable statute of limitations is tolled for 90 days only (*Woods v. Young (1991) 53 Cal. 3d 315, 319, 328, 279 Cal. Rptr. 613, 807 P.2d 455* ; *Barber v. Superior Court (1991) 234 Cal. App. 3d 1076, 1081-1082, 285 Cal. Rptr. 668*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a defendant's contention that an action is barred by the statute of limitations. The ground is that the one-year limitations period under *Code Civ. Proc. § 340.5* was tolled 90 days under *Code Civ. Proc. § 364(d)*, but that plaintiff failed nevertheless to timely commence the action.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should specify (1) the date the cause of action accrued, (2) the date the notice of intent was filed,

(3) the date the one-year limitations period elapsed, taking the 90-day tolling period into account, and (4) the date the complaint was filed. Counsel may combine the points and authorities in this form with those in § 175.37.

[c] Separate Trial of Statute of Limitations Defense

Any party, or the court itself, may move for a separate trial of the defense that an action is barred by the statute of limitations if the defense is pleaded in the answer. If the issue is resolved in favor of the plaintiff, the remaining issues are then tried [*Code Civ. Proc. § 597.5*].

[d] Related Pleading and Practice Forms

For pleading and practice forms relating to the defense that an action is barred by the statute of limitations and to forms relating to Code Civ. Proc. § 340.5, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* , Ch. 415, and *Physicians: Medical Malpractice* (Matthew Bender).

[e] Related Points and Authorities

For general forms of memoranda of points and authorities, see Ch. 143, *Limitation of Actions* .

[f] Opposing Points and Authorities

The points and *authorities in § 175.45* may be used in an appropriate case to oppose the contention supported by this memorandum.

[g] Related California Torts Chapters

For full discussion of the issues involved in medical malpractice actions, including the applicable statutes of limitation, see Levy, Golden, and Sacks, California Torts, Ch. 31 (Matthew Bender).

[3] Discussion of Authorities

[a] Notice Tolls One-Year Period of Limitations for 90 Days Only

The facts and procedural background of ***Woods v. Young*** *(1991) 53 Cal. 3d 315, 279 Cal. Rptr. 613, 807 P.2d 455* , are discussed in *§ 175.39[3][a]*. The California Supreme Court held that when a plaintiff gives the 90-day notice of intent to sue required by *Code Civ. Proc. § 364(a)* in the last 90 days of the applicable statute of limitations, that statute is tolled for 90 days under *Code Civ. Proc. § 364(d)* (*53 Cal. 3d 315, 319, 328)* . The Court illustrated the application of the rule with the following example: a plaintiff who serves the notice of the intent to sue on the last day of the limitationsperiod has one day after the 90-day waiting period to file the complaint (*53 Cal. 3d 315, 326 n.3*). The Court noted that because the law does not divide time periods into increments of less than one day and because tolling takes effect immediately, the day of service of the notice is not part of the time for commencement of the action (*53 Cal. 3d 315, 326 n.3*). The Court expressly disapproved several conflicting appellate cases that had concluded, relying on *Code Civ. Proc. § 356*, that service of the notice would extend the period of limitations for a period ranging from 90 to 180 days (*53 Cal. 3d 315, 323, 328 n.4*).

NOTE:

Woods has been construed as not giving prospective application to this holding [*see Barber v. Superior Court (1991) 234 Cal. App. 3d 1076, 1081-1082, 285 Cal. Rptr. 668]* . For further discussion of the prospective application of *Woods*, see *§ 175.39*[3][a].

In ***Barber v. Superior Court*** *(1991) 234 Cal. App. 3d 1076, 285 Cal. Rptr. 668* , defendant's alleged medical

malpractice occurred on August 22 or 23, 1989. Plaintiff served defendant with a notice of intention to sue on August 16, 1990. Plaintiff then filed the complaint on November 28, 1990, one year and 98 days after the alleged accrual of her cause of action. Defendant moved for summary judgment on the ground that the complaint was barred by the one-year limitation period of *Code Civ. Proc. § 340.5* The trial court denied the motion, and defendant sought and obtained peremptory writ review under *Code Civ. Proc. § 437c(l)*.

The court of appeal agreed that the complaint was not timely filed, and issued a writ of mandate directing the trial court to enter judgment in defendant's favor. In so ruling, the court rejected plaintiff's argument that, under the prospectivity provisions of *Woods v. Young (1991) 53 Cal. 3d 315, 279 Cal. Rptr. 613, 807 P.2d 455* , her complaint was not time-barred [*see Woods v. Young (1991) 53 Cal. 3d 315, 330-331, 279 Cal. Rptr. 613, 807 P.2d 455]* . The court held that the prospectivity directive of *Woods* applies only to *Woods*' primary holding that the 90-day extension allowed by *Code Civ. Proc. § 364(d)* is available only when the notice of intention to sue is served during the final 90 days of the applicable limitation period. However, the court also held that the prospectivity directive does not apply to *Woods*' secondary holding limiting the maximum filing period to the period of limitations plus 90 days. Therefore, plaintiff's complaint was time-barred because it was filed eight days after the applicable limitation period plus 90 days as permitted under the rule of *Woods* (*234 Cal. App. 3d 1076, 1081-1082)* .

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17-175 California Points & Authorities § 175.41

§ 175.41 Supporting Contention That Medical Malpractice Action Based on Professional Negligence Is Barred by Statute of Limitations [Code Civ. Proc. § 340.5]--Action for Injuries Sustained at Birth--MICRA Rather Than General Limitations Statute Applies

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S COMPLAINT IS TIME-BARRED UNDER CODE OF CIVIL PROCEDURE SECTION 340.5, WHICH IS CONTROLLING IN MEDICAL MALPRACTICE ACTIONS FOR INJURIES SUSTAINED AT BIRTH.

A. Later, More Specific Statute Controls. When two different statutes of limitations appear to govern an action, the later, more specific statute is controlling over the earlier statute, even though the earlier statute would by its terms cover the present action (*Young v. Haines (1986) 41 Cal. 3d 883, 894, 226 Cal. Rptr. 547, 718 P.2d 909*).

B. *Code of Civil Procedure Section 340.5* Rather Than *Code of Civil Procedure Section 340.4* Controls. Although *Code of Civil Procedure Section 340.4* governs actions for prenatal and birth injuries, *Code of Civil Procedure Section 340.5* is a later-enacted statute that was passed by the legislature with the intent to cover all personal injury claims arising from medical malpractice, and to respond to a major health care crisis in California attributable to skyrocketing malpractice premium costs. As such, *Code of Civil Procedure Section 340.5* is the later, more specific statute that is controlling over the earlier statute, *Code of Civil Procedure Section 340.4* (*Young v. Haines (1986) 41 Cal. 3d 883, 894, 226 Cal. Rptr. 547, 718 P.2d 909* (construing former Civ. Code § 29 (*now see Code Civ. Proc. § 340.4*)).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that plaintiff's complaint for medical negligence is barred by the statute of limitations set forth by *Code Civ. Proc. § 340.5*, even though thecomplaint would not be time-barred by former Civ. Code § 29 [*now see Code Civ. Proc. § 340.4*].

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion that demonstrates that the complaint is time-barred under *Code Civ. Proc. § 340.5*.

[c] Separate Trial of Statute of Limitations Defense

Any party, or the court itself, may move for a separate trial of the defense that an action is barred by a statute of limitations if the defense is pleaded in the answer. If the issue is resolved in favor of the plaintiff, the remaining issues are then tried [*Code Civ. Proc. § 597.5*].

[d] Related Pleading and Practice Forms

For pleading and practice forms relating to the defense that an action is barred by the statute of limitations and to a motion for a separate trial of a statute of limitations defense, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* (Matthew Bender).

[e] Related Points and Authorities

For memoranda of points and authorities supporting the contention that an action is barred by the statute of limitations and supporting a motion for separate trial of the statute of limitations defense, see Ch. 143, *Limitation of Actions* .

[3] Discussion of Authorities

[a] Later, More Specific Statute Controls

In ***Young v. Haines*** *(1986) 41 Cal. 3d 883, 226 Cal. Rptr. 547, 718 P.2d 909* , plaintiff sustained injuries during birth that were not discovered until shortly before her eighth birthday. Plaintiff filed a malpractice action against the health care providers, alleging negligence. The complaint was brought within the statutory time period of former Civ. Code § 29 [*now see Code Civ. Proc. § 340.4*], which governs actions for injuries incurred during birth and incorporates a "delayed discovery" rule that tolls the running of the statute until after discovery of the injury. Defendant demurred, however, on the grounds that the action was time-barred because it was not brought within the three-year statutory time period of *Code Civ. Proc. § 340.5*, which governs medical malpractice actions and does not incorporate a "delayed discovery" rule. The trial court agreed, sustained the demurrer, and dismissed the complaint.

The California Supreme Court reversed and remanded, holding that the action was controlled by *Code Civ. Proc. § 340.5* but would not be time-barred if plaintiff were allowed to amend her complaint to allege facts that would invoke a separate tolling provision of that statute. With regard to which statute of limitations was applicable to the action, the Court explained that at first glance, former Civ. Code § 29 [*now see Code Civ. Proc. § 340.4*] appeared to apply to the action, because it governs all actions for prenatal and birth injuries. However, the Court also explained that *Code Civ. Proc. § 340.5* is a later-enacted statute that was passed by the legislature with the intent of covering all personal injury claims arising from medical malpractice, and to respond to a major health care crisis in California attributable to skyrocketing malpractice premium costs. Thus, the legislature sought to change the rules applicable to personal injury actions by malpractice victims, and to treat all malpractice victims differently from other personal injury victims. Because *Code Civ. Proc. § 340.5* is part of an interrelated legislative scheme enacted to deal specifically with all medical malpractice claims, it is the later, more specific statute that must be found controlling over an earlier statute, even though the earlier statute would by its terms cover the present situation. Thus, *Code Civ. Proc. § 340.5* and not former Civ. Code § 29 [*now see Code Civ. Proc. § 340.4*] was controlling. However, the Court noted that the action in this case might not be time-barred under *Code Civ. Proc. § 340.5* if plaintiff were to allege intentional concealment of the injury, which would toll the limitations period under the statute of limitations. Thus, the case was remanded to give

plaintiff an opportunity to amend her complaint to allege concealment and avoid the time-bar of the statute (*41 Cal. 3d 883, 891-894, 901-902)* .

[b] Code of Civil Procedure Section 340.5 Rather Than Code of Civil Procedure Section 340.4 Controls

The facts and procedural background of ***Young v. Haines*** *(1986) 41 Cal. 3d 883, 226 Cal. Rptr. 547, 718 P.2d 909* , are discussed in *§ 175.41[3][a]*.

[4] Additional Authorities

[a] Code of Civil Procedure Section 340.5 Rather Than Code of Civil Procedure Section 340.4 Controls

Donabedian v. Manzer (1986) 187 Cal. App. 3d 1021, 232 Cal. Rptr. 325 , was a case with facts that were substantially similar to those in *Young v. Haines (1986) 41 Cal. 3d 883, 226 Cal. Rptr. 547, 718 P.2d 909* [*see § 175.41[3][a]*]. The court of appeal followed the *Young* opinion and its holding that *Code Civ. Proc. § 340.5* is a later, more specific statute that is controlling over the earlier statute, *Civ. Code § 29*. As with *Young*, however, the court of appeal reversed and remanded to give plaintiff anopportunity to amend his complaint to allege facts that would invoke a tolling provision of *Code Civ. Proc. § 340.5* (*187 Cal. App. 3d 1021, 1026-1027, 1029)* .

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17-175 California Points & Authorities § 175.42

§ 175.42 Supporting Contention That Medical Malpractice Action Based on Professional Negligence Is Barred by Statute of Limitations--Action Against Public Physician--Six-Month Limit After Claim Rejected [Gov. Code § 945.6]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

EVEN THOUGH PLAINTIFF'S ACTION WAS TIMELY FILED UNDER SECTION 340.5 OF THE CODE OF CIVIL PROCEDURE, IT IS NEVERTHELESS BARRED UNDER SECTION 945.6 OF THE GOVERNMENT CODE, WHICH STANDS ON EQUAL FOOTING WITH THE FORMER IN MEDICAL MALPRACTICE ACTIONS AGAINST PUBLIC ENTITIES.

A. *Section 945.6 of the Government Code* Bars Action. In medical malpractice actions against public entities, both *Section 945.6 of the Government Code* and *Section 340.5 of the Code of Civil Procedure* are given effect, thus barring an action that is timely brought under the latter but not under the former. Both statutes are parts of two separate legislative schemes that stand on equal footing, neither more specific than the other, addressing specific areas of the law, medical negligence liability and government tort liability. Although *Section 340.5 of the Code of Civil Procedure* was enacted after *Section 945.6 of the Government Code*, its failure to address the conflict with *Section 945.6 of the Government Code* implied an intent that the statutory period of *Section 945.6 of the Government Code* also remain in full force and effect, thus barring an action not timely brought under its provisions (*Anson v. County of Merced (1988) 202 Cal. App. 3d 1195, 1199, 1202, 249 Cal. Rptr. 457*).

[*Optional*] **B. Minor Plaintiff Must File Action Within Limitations Period of *Gov. Code § 945.6*.** When the malpractice plaintiff is a minor and a timely claim has been filed with and rejected by the public entity, the six-month period for filing a medical malpractice action under *Gov. Code § 945.6* applies even when a longer period for bringing the action against a non-public health care provider might be allowed under *Code Civ. Proc. § 340.5* (*Martell v. Antelope Valley Hosp. Med. Ctr. (1998) 67 Cal. App. 4th 978, 981-983, 79 Cal. Rptr. 2d 329*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that plaintiff's complaint for medical negligence that is brought against a public entity is barred by the statute of limitations in *Gov. Code § 945.6*, even though the complaint would not be time-barred by *Code Civ. Proc. § 340.5*. Optional Paragraph B may be added when the malpractice plaintiff is a minor.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion that demonstrates that plaintiff is time-barred under *Gov. Code § 945.6*.

[c] Separate Trial of Statute of Limitations Defense

Any party, or the court itself, may move for a separate trial of the defense that an action is barred by a statute of limitations if the defense is pleaded in the answer. If the issue is resolved in favor of the plaintiff, the remaining issues are then tried [*Code Civ. Proc. § 597.5*].

[d] Related Pleading and Practice Forms

For pleading and practice forms relating to the defense that an action is barred by the statute of limitations and to a motion for a separate trial of a statute of limitations defense, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* (Matthew Bender).

[e] Related Points and Authorities

For memoranda of points and authorities supporting the contention that an action is barred by the statute of limitations and supporting a motion for separate trial of the statute of limitations defense, see Ch. 143, *Limitation of Actions* .

[3] Discussion of Authorities

[a] Section 945.6 of the Government Code Bars Action

In ***Anson v. County of Merced*** *(1988) 202 Cal. App. 3d 1195, 249 Cal. Rptr. 457* , plaintiff served a claim for damages for medical negligence by county health care providers on the county's board of supervisors. The claim was rejected, and plaintiff served a notice of intention to file suit on defendants pursuant to *Code Civ. Proc. § 364*. Plaintiff filed a complaint within the one-year statute of limitations period of *Code Civ. Proc. § 340.5* for medical malpractice actions, but after the expiration of the six-month statutory period of *Gov. Code § 945.6* for filing an action against a public entity after a claim is rejected. Defendant demurred on statute of limitations grounds. Plaintiff unsuccessfully argued that the action was governed by *Code Civ. Proc. § 340.5* and not by *Gov. Code § 945.6*. The trial court disagreed, sustained the demurrer, and dismissed the action.

The court of appeal reversed, agreeing that *Gov. Code § 945.6* applied but also holding that the action was not time-barred under that statute because the filing of the notice of intention under *Code Civ. Proc. § 364* had been timely and had tolled the limitations period (*202 Cal. App. 3d 1195, 1204-1205)* . In reaching its conclusion that *Gov. Code § 945.6* applied, the court explained that both that statute and *Code Civ. Proc. § 340.5* are given effect. The court discussed both statutes as being parts of two separate legislative schemes (MICRA (Medical Injury Compensation Reform Act), and the Tort Claims Act) that stand on equal footing, neither being more specific than the other. Both address specific areas of the law, government tort liability and medical negligence liability. The medical negligence statute, *Code Civ. Proc. § 340.5*, enacted after *Gov. Code § 945.6*, was a response to a growing crisis over malpractice

insurance premiums, with the intent of limiting medical malpractice claims. Although *Code Civ. Proc. § 340.5* fails to address the conflict with *Gov. Code § 945.6*, an intent may be inferred that the statutory period of *Gov. Code § 945.6* remain in full force and effect. Thus, long-standing principles of statutory construction and the legislative intent behind both statutes to limit actions required the conclusion that both statutes be given effect, resulting in the shorter *Gov. Code § 945.6* period being applied as the controlling one (*202 Cal. App. 3d 1195, 1199-1202)* .

[b] Minor Plaintiff Must File Action Within Limitations Period of Gov. Code § 945.6

In ***Martell v. Antelope Valley Hospital Medical Center*** *(1998) 67 Cal. App. 4th 978, 981-985, 79 Cal. Rptr. 2d 329* , the plaintiffs were a minor, injured at birth allegedly due to the negligence of a public entity hospital, and his parents. In August 1989, plaintiffs filed a timely claim against the hospital pursuant to the Tort Claims Act, which was rejected by the hospital in October 1989. Plaintiffs then filed a timely lawsuit in February 1990, which was eventually dismissed without prejudice in 1992, apparently because the minor's young age prevented the extent of his injuries from being fully known. Five years later, in 1997, plaintiffs filed a second lawsuit with a complaint almost identical to the first. The hospital moved for summary judgment on the grounds that the plaintiffs had failed to file the second lawsuit within six months of rejection of the initial claim, as required by *Gov. Code § 945.6*. The trial court granted the motion for summary judgment.

The court of appeal affirmed, agreeing that the plain language of *Gov. Code § 945.6* required that "*any* suit brought against a public entity" must be brought no more than six months after rejection of the claim. Quoting language from earlier case law and the Law Revision Commission proposing the enactment of the Tort Claims Act limitations provisions, the court concluded that, in an action against a public entity, the provisions of the Tort Claims Act were intended to take precedence over the statutes of limitation that might apply to private defendants in a particular case. The court noted that prior court decisions, including *Anson v. County of Merced (1988) 202 Cal. App. 3d 1195, 249 Cal. Rptr. 457* [*see § 175.42[3][a]*], had uniformly held that statutes outside the Tort Claims Act did not extend the period for filing suit against a public entity.

In reaching its decision, the court rejected the plaintiffs' argument that the longer limitations period provided for minors under *Code Civ. Proc. § 340.5* should be given precedence as a matter of public policy disfavoring the use of limitation periods to bar a claim brought by a minor. The court noted instead that the legislature could have provided an exception to the Tort Claims Act for minors bringing a malpractice suit against a public entity when it enacted *Code Civ. Proc. § 340.5*, but failed to do so. The court also found that the public policy disfavoring the use of limitations periods to bar actions by a minor did not apply to actions brought against public entities, noting, for example, that the tolling provisions of *Code Civ. Proc. § 352* applicable in actions brought by minors were specifically made inapplicable to actions brought against a public entity. Finally, the court rejected plaintiffs' argument that applying the six-month filing period was unfair given their decision to dismiss without prejudice their first action, as well as plaintiffs' argument that equitable tolling principles ought to apply.

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17-175 California Points & Authorities § 175.42A

§ 175.42A Supporting Contention That Action Based on Professional Negligence of Physician Is Barred by Statute of Limitations [Code Civ. Proc. § 340.5]--MICRA Governs Action by Minor for Failing to Report Suspected Child Abuse

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S ACTION FOR A PHYSICIAN'S NEGLIGENT FAILURE TO REPORT SUSPECTED CHILD ABUSE IS BARRED BECAUSE IT WAS NOT BROUGHT WITHIN THREE YEARS AFTER THE INJURY OR PRIOR TO PLAINTIFF'S EIGHTH BIRTHDAY AS REQUIRED BY CODE OF CIVIL PROCEDURE SECTION 340.5.

MICRA Limitations Period Governs Action for Failure to Report Suspected Child Abuse. An action against a physician for the negligent failure to report suspected child abuse in violation of *Penal Code Section 11166 et seq.* is governed by the limitations period provided in *Code of Civil Procedure Section 340.5*, and as such must be brought within three years after the injury or, if the minor is under six years of age when injured, either within three years after the injury or prior to the minor's eighth birthday, whichever occurs later (*David M. v. Beverly Hosp. (2005) 131 Cal. App. 4th 1272, 1277-1279, 32 Cal. Rptr. 3d 649*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted by a physician who is the defendant in a professional negligence action stemming from the physician's alleged failure to report suspected child abuse. The form supports the contention that the action is barred by the limitations period provided by *Code Civ. Proc. § 340.5*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which these points are raised, such as a motion for summary judgment. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form showing the relationship between the facts of the case and the point of law stated. Thus, counsel should include facts showing the plaintiff's age and the date that the plaintiff was allegedly injured and tie this to the argument that the action was not timely because it was not filed within three years after that injury, or, if the plaintiff was under the age of six when injured, filed within three years after the injury or prior to the plaintiff's eighth birthday, whichever provides the longer period.

[3] Discussion of Authorities

[a] MICRA Limitations Period Governs Action for Failure to Report Suspected Child Abuse

In ***David M. v. Beverly Hosp.*** *(2005) 131 Cal. App. 4th 1272, 32 Cal. Rptr. 3d 649* , the plaintiff was a minor who brought a negligence suit against a physician and the hospital at which the physician practiced. The plaintiff alleged in his complaint that the physician had observed the plaintiff eleven years earlier when the plaintiff was four months old, and that the marks on the plaintiff's body should have caused the physician to have a reasonable suspicion that the plaintiff had been abused. After the plaintiff returned home, he was severely abused by his father and sustained permanent and serious medical problems. According to the plaintiff, the abuse would not have occurred if the physician had reported the suspected child abuse as required by statute. The defendants demurred on the grounds that the action was barred by the statute of limitations. They argued that any failure to report suspected child abuse arose out of the physician's professional duties and was governed by the MICRA limitations period of *Code Civ. Proc. § 340.5*, under which the plaintiff was required to file any action either within three years after the injury or prior to the plaintiff's eighth birthday, whichever was later. The plaintiff opposed the demurrer, arguing that because the requirement to report suspected abuse was a duty imposed by statute, the applicable limitations period was the three-year period of *Code Civ. Proc. § 338*, which could be tolled under *Code Civ. Proc. § 352* while the plaintiff was a minor. The trial court agreed with the defendants and sustained the demurrers. The plaintiff appealed.

The court of appeal affirmed, holding that the applicable limitations period was that found in *Code Civ. Proc. § 340.5* and therefore the plaintiff's action had to be filed prior to his eighth birthday. The court concluded that the action was one for professional negligence, which is specifically defined and encompassed by the limitations period in *Code Civ. Proc. § 340.5*, because the physician's failure to report any suspected child abuse was a negligent omission that occurred in the course of providing professional medical services to the plaintiff. Because *Code Civ. Proc. § 340.5* was the applicable statute of limitations, the tolling provisions of *Code Civ. Proc. § 352* did not apply (*131 Cal. App. 4th 1272, 1277-1278)* . The court noted that this conclusion was consistent with a CaliforniaSupreme Court decision [*Belton v. Bowers Ambulance Serv. (1999) 20 Cal. 4th 928, 86 Cal. Rptr. 2d 107, 978 P.2d 591]* , which held that no tolling provision outside of MICRA can extend the three-year maximum time period established by *Code Civ. Proc. § 340.5* (*131 Cal. App. 4th 1272, 1281)* .

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17-175 California Points & Authorities § 175.43

§ 175.43 Opposing Contention That Action Is Barred by Statute of Limitations--Plaintiff's Reliance on Defendant

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

AN ACTION IS NOT BARRED BY THE ONE-YEAR LIMITATIONS PERIOD WHEN PLAINTIFF WAS EXCUSED FROM INQUIRY BY RELIANCE ON DEFENDANT AND FAILED TO FILE SUIT DUE TO SUCH RELIANCE.

Continuance of Physician-Patient Relationship. A plaintiff's duty of diligence to discover the negligent cause of an injury is relaxed during the continuation of the physician-patient relationship (*Stafford v. Shultz (1954) 42 Cal. 2d 767, 778, 270 P.2d 1* ; *see* *Sanchez v. South Hoover Hosp. (1976) 18 Cal. 3d 93, 102, 132 Cal. Rptr. 657, 553 P.2d 1129*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a defendant's contention that an action is barred by the statute of limitations. The grounds of opposition are based on the rule that a plaintiff's duty to inquire is relaxed during the continuation of the physician-patient relationship.

In an appropriate case, this memorandum may be submitted in opposition to the contention that the action is barred by the statute of limitations supported by the points and *authorities in § 175.37*.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts that demonstrate the continuance of the physician-patient relationship

between plaintiff and defendant, plaintiff's reliance on defendant's advice regarding the injury, and any concealment by defendant of facts pertaining to negligence that discouraged plaintiff from seeking additional medical opinions. Further, counsel should discuss facts that demonstrate the absence of other sources of information regarding the injury and plaintiff's lack of awareness of negligence during the continuance of the professional relationship.

[c] Separate Trial of Statute of Limitations Defense

Any party, or the court itself, may move for a separate trial of the defense that an action is barred by the statute of limitations, if the defense is pleaded in the answer. If the issue is resolved in favor of the plaintiff, the remaining issues are then tried [*Code Civ. Proc. § 597.5*].

[d] Related Pleading and Practice Forms

For forms of pleading and practice relating to the defense that an action is barred by the statute of limitations, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* (Matthew Bender).

[e] Related Points and Authorities

For memoranda of points and authorities opposing the contention that an action is barred by the statute of limitations, see Ch. 143, *Limitation of Actions* .

[3] Discussion of Authorities

[a] Continuance of Physician-Patient Relationship

In ***Stafford v. Shultz*** *(1954) 42 Cal. 2d 767, 270 P.2d 1* , plaintiff brought a malpractice action based on negligent treatment of a leg wound which resulted in amputation. Plaintiff sued soon after he received reports from defendants indicating the negligent cause of the amputation, but the action was filed over one year from the occurrence of the negligence. Defendants demurred on the ground that the action was thus barred by the one-year statute of limitations period, and the trial court sustained the demurrer.

The Supreme Court reversed, holding that the rule that the limitations period commences when plaintiff either discovers or reasonably should have discovered the negligence is qualified by reliance on the defendant's fiduciary duty of disclosure. During continuation of the physician-patient relationship, the Court stated, plaintiff's duty to discover the cause of an injury is relaxed, and the failure to consult other physicians is excused by the reasonable reliance on a treating physician's judgment and care (*42 Cal. 2d 767, 777-778)* .

The defendants' concealment of facts relating to the negligent cause of the amputation during the course of their continued relationship withplaintiff thus excused him from inquiry, and the statute did not begin to run until plaintiff's discovery of the negligence through receipt of defendants' reports (*42 Cal. 2d 767, 779)* .

The facts and procedural background of ***Sanchez v. South Hoover Hosp.*** *(1976) 18 Cal. 3d 93, 132 Cal. Rptr. 657, 553 P.2d 1129* , are discussed in *§ 175.37[3][a]*. The Supreme Court held that the one-year statute of limitations period commences to run when a plaintiff either discovers the negligent cause of an injury or is put on notice of that cause, despite a defendant's nondisclosure regarding the negligence (*18 Cal. 3d 93, 101)* . In dicta, however, the Court acknowledged the rule that a plaintiff's duty of inquiry is reduced during the continuance of the physician-patient relationship with defendant (*18 Cal. 3d 93, 102)* . In this case, the rule did not relieve plaintiff of the statute of limitations bar because the professional relationship had ended prior to commencement of the limitations period, and plaintiff had conceded knowledge of the negligence during that relationship (*18 Cal. 3d 93, 102)* .

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Volume 17 Chapters 170-179 PARTNERSHIPS---to---PREMISES LIABILITY
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PART II. FORMS

17-175 California Points & Authorities § 175.43A

§ 175.43A Opposing Contention That Action Is Barred by Statute of Limitations--MICRA Limitations Period Inapplicable to Intentional Torts Not Based in Professional Negligence

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S ACTION ALLEGING INTENTIONAL TORTS AGAINST DEFENDANT HEALTH CARE PROVIDER IS NOT GOVERNED BY THE MICRA LIMITATIONS PERIOD PROVIDED IN CODE OF CIVIL PROCEDURE SECTION 340.5.

Action Alleging Intentional Torts Not Governed by MICRA Limitations Period. If the cause of action does not arise out of professional negligence, a plaintiff's action alleging an intentional tort against a health care provider is not governed by the limitations period provided in *Code Civ. Proc. § 340.5* (*Unruh-Haxton v. Regents of University of California (2008) 162 Cal. App. 4th 343, 353, 76 Cal. Rptr. 3d 146*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a plaintiff's cause of action alleging an intentional tort against a defendant health care provider is governed by the limitations period for professional negligence actions provided in *Code Civ. Proc. § 340.5*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the contention that *Code Civ. Proc. § 340.5* does not apply. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law

stated. Thus, counsel should include facts detailing the nature of the conduct supporting the intentional tort causes of action and argue that because this conduct is qualitatively different from mere professional negligence, *Code Civ. Proc. § 340.5* is inapplicable.

[3] Discussion of Authorities

[a] Action Alleging Intentional Torts Not Governed by MICRA Limitations Period

In ***Unruh-Haxton v. Regents of University of California*** *(2008) 162 Cal. App. 4th 343, 76 Cal. Rptr. 3d 146* , plaintiffs were seven married couples and one unmarried woman who brought suit against the Regents of the University of California and a medical center after doctors at an affiliated fertility clinic allegedly stole their human genetic materials that had been stored at the clinic. The female plaintiffs had all had their eggs harvested by clinic doctors in the late 1980s and alleged that their eggs and pre-embryos had been sold without authorization to other patients and for research purposes. This unauthorized use of genetic materials was the subject of almost a hundred newspaper articles from 1995 to 1999 published in Los Angeles and Orange County newspapers, although these particular plaintiffs did not learn that they may have been victimized by the clinic doctors until the early 2000s. Plaintiffs filed lawsuits within one year of gaining such knowledge, alleging causes of action for fraud, conversion, and intentional infliction of emotional distress. The trial court sustained defense demurrers, however, concluding that the actions were barred by the statute of limitations provided in *Code Civ. Proc. § 340.5* because plaintiffs had "constructive knowledge" of the wrongdoing in the mid-1990s, due to the widespread publicity generated by the media, and plaintiffs failed to bring suit within one year of such constructive discovery. Plaintiffs appealed.

The court of appeal reversed in part. The court noted that when a cause of action is asserted against a health care provider on a theory other than medical malpractice, the determination of whether MICRA applies depends on the particular cause of action and the particular MICRA provision at issue. The court then held that the statute of limitations provided in *Code Civ. Proc. § 340.5*, enacted as part of MICRA, did not apply to plaintiffs' causes of action alleging the intentional torts of fraud, conversion, and intentional infliction of emotional distress. The court, noting that the Legislature had specifically limited application of *Code Civ. Proc. § 340.5* to occasions of "professional negligence," concluded that the intentional and malicious conduct alleged by plaintiffs was qualitatively different from mere negligence (*162 Cal. App. 4th 343, 355-356)* . The court went on the reject the trial court's conclusion that "constructive knowledge" of wrongdoing was sufficient to trigger running of a statute of limitations when a plaintiff lacks actual knowledge sufficient to generate suspicion of wrongdoing (*162 Cal. App. 4th 343, 359-364)* . Applying the relevant limitations periods, the court concluded that all claims against the Regents were brought within the appropriate time periods, although certain claims against the medical center were untimely (*162 Cal. App. 4th 343, 356-357)* .

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17-175 California Points & Authorities § 175.44

§ 175.44 Opposing Contention That Medical Malpractice Action Based on Professional Negligence Is Barred by Statute of Limitations [Code Civ. Proc. § 340.5]--Action by Minor

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S ACTION BASED ON MEDICAL NEGLIGENCE IS NOT BARRED BECAUSE _____ [*specify reasons, e.g.,* THE ACTION WAS COMMENCED WITHIN THREE YEARS OF THE WRONGFUL ACT, REGARDLESS OF WHEN PLAINTIFF DISCOVERED THE INJURY *and/or* PLAINTIFF'S GUARDIAN AND DEFENDANT'S INSURER COMMITTED FRAUD AND COLLUSION IN FAILING TO BRING AN ACTION ON PLAINTIFF'S BEHALF IN A TIMELY FASHION].

A. Statutory Limitation Period. A medical malpractice action by a minor based on professional negligence must be commenced within three years from the date of the alleged wrongful act[, except that an action by a minor under the full age of six years must be commenced within three years or prior to his or her eighth birthday, whichever provides a longer period] (*Code Civ. Proc. § 340.5*).

[*Optional*] **B. Time Limitation Tolled for Fraud or Collusion.** The statutory limitation period for minors to commence a medical malpractice action is tolled for any period during which a parent or guardian and defendant's insurer or health care provider have committed fraud or collusion in the failure to bring an action on behalf of the injured minor for professional negligence (*Code Civ. Proc. § 340.5*).

C. Commencement of Limitations Period. The three-year period prescribed in the minor statute of limitations set forth in *Code Civ. Proc. § 340.5* begins to run on the date of the alleged wrongful act, regardless of the date of injury or when the plaintiff may have discovered the injury (*see Steketee v. Lintz, Williams & Rothberg (1985) 38 Cal. 3d 46, 54, 57, 210 Cal. Rptr. 781, 694 P.2d 1153*).

[*Optional*] **D. Determination of Plaintiff's Minority.** Whether a plaintiff is a minor or an adult for the purposes of *Code Civ. Proc. § 340.5* is determined by his or her age at the time of the alleged wrongful act (*see Steketee v. Lintz,*

Williams & Rothberg (1985) 38 Cal. 3d 46, 53, 210 Cal. Rptr. 781, 694 P.2d 1153).

[*Optional*] **E. Accrual on Date of Discovery.** A minor's medical malpractice cause of action accrues when the minor's parent or guardian knew or should have known that a negligent wrongful act of medical care caused the child's injuries (*Photias v. Doerfler (1996) 45 Cal. App. 4th 1014, 1021, 53 Cal. Rptr. 2d 202*).

[*Optional*] **F. Time for Filing Prior to Eighth Birthday Extended for Holiday.** The limitation period set forth in *Code of Civil Procedure Section 340.5* allowing a complaint to be filed prior to a child's eighth birthday is extended by *Code of Civil Procedure Section 12a* if the child's eighth birthday occurs on a day following a holiday (*Tran v. Fountain Valley Cmty. Hosp. (1997) 51 Cal. App. 4th 1464, 1466, 60 Cal. Rptr. 2d 91*).

G. Statute Tolled by Notice of Intent to Commence Action. Service of an intent to sue notice under *Code of Civil Procedure § 364(a)* during the last 90 days of the three-year limitation period applicable to minors tolls the statute of limitations for 90 days (*Newman v. Burnett (1997) 62 Cal. Rptr. 2d 175*).

[2] Comments

CAUTION:

Pending further clarification from the Supreme Court or the legislature, the points and authorities in this form should be usedwith caution. In *Torres v. County of Los Angeles (1989) 209 Cal. App. 3d 325, 257 Cal. Rptr. 211* , the court of appeal held that *Code Civ. Proc. § 340.5* violates a minor's right to equal protection because it contains different accrual dates for minors' and adults' causes of action, without a rational basis for so doing (*209 Cal. App. 3d 325, 334)* . The court's finding of unconstitutionality arose in a case involving the application of the accrual date in *Code Civ. Proc. § 340.5* to determine when the 90-day (now six-month) period for tort claims commenced against a governmental health care provider [*see Gov. Code § 911.2* (tort claim for injury must be brought within 6 months after accrual of cause of action); *see also Gov. Code § 901* (for determining time limit prescribed by *Gov. Code § 911.2*, date of accrual is date on which cause of action would be deemed to have accrued with meaning of statute of limitations that would be applicable if there were no special government tort claims requirement)]. The plaintiff in the case was a minor who allegedly suffered harm before and during childbirth.

It is somewhat unclear whether the court of appeal's finding of unconstitutionality concerning the different accrual dates would prevent a court from applying the accrual dates in a case directly involving *Code Civ. Proc. § 340.5*, rather than a government tort claims case. The Supreme Court denied review in the court of appeal case, and has in the past generally declined to address the issue of whether *Code Civ. Proc. § 340.5* unconstitutionally favors adults over minors [*see Young v. Haines (1986) 41 Cal. 3d 883, 897 n.10, 226 Cal. Rptr. 547, 718 P.2d 909* ; *Steketee v. Lintz, Williams & Rothberg (1985) 38 Cal. 3d 46, 54 n.4, 210 Cal. Rptr. 781, 694 P.2d 1153]* .

In a case involving a medical malpractice action against a blood bank and hospital on behalf of a minor alleging that the negligence by the hospital and blood bank resulted in his infection with the HIV virus as a result of a blood transfusion, the Ninth Circuit Court of Appeals stated its belief that the California courts, after *Torres*, would hold that the "wrongful act" point of accrual under *Code Civ. Proc. § 340.5* is invalid and that an "injury" point of accrual must be applied with regard to minors [*see Katz v. Children's Hosp. of Orange County (9th Cir. 1994) 28 F.3d 1520, 1529, 1533]* . The court reasoned that, under an "injury" point of accrual, minors would receive at least as much protection as adults, thus solving the equal protection problems identified in *Torres* [*Katz v. Children's Hosp. of Orange County (9th Cir. 1994) 28 F.3d 1520, 1529, 1533]* .

[a] Use of Form

This form of points and authorities may be submitted in opposition to a contention that plaintiff's complaint for medical negligence is barred by the statute of limitations period of *Code Civ. Proc. § 340.5* applicable to minors. The ground for opposition is that plaintiff may commence the action at any time within three years after the wrongful act, regardless of when plaintiff may have discovered the injury. The optional bracketed language in Paragraph A may be used if the action is being maintained by a minor under the age of six years, in which case the action must be commenced within three years of the wrongful act or prior to the minor's eighth birthday, whichever provides a longer period. Optional Paragraph B may be used to support the contention that the limitation period was tolled due to fraud or collusion between a parent or guardian and defendant's insurer or health care provider. Optional Paragraph D may be used in support of a contention that the plaintiff comes within the statute of limitations period of *Code Civ. Proc. § 340.5* applicable to minors because, regardless of when the plaintiff attained the age of majority, he or she was a minor at the time of the alleged wrongful act.

[b] Argument

Counsel should insert argument in the form showing the relationship between the facts of the case and the point of law stated. Thus, counsel should include a discussion that demonstrates that the alleged wrongful act occurred when plaintiff was a minor, and that the three-year period had not expired prior to commencement of the action, regardless of when plaintiff may have discovered the injury.

[c] Separate Trial of Statute of Limitations Defense

Any party, or the court itself, may move for a separate trial of the defense that an action is barred by the staute of limitations if the defense is pleaded in the answer. If the issue is resolved in favor of the plaintiff, the remaining issues are then tried [*Code Civ. Proc. § 597.5*].

[d] Related Pleading and Practice Forms

For pleading and practice forms relating to the statute of limitations defense set forth in Code Civ. Proc. § 340.5 and to a motion for a separate trial of a statute of limitations defense, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* , and Ch. 415, *Physicians: Medical Malpractice* (Matthew Bender).

[e] Related Points and Authorities

For memoranda of points and authorities supporting the contention that an action is barred by the statute of limitations and supporting a motionfor separate trial of the statute of limitations defense, see Ch. 143, *Limitation of Actions* .

[f] Related California Torts Chapters

For full discussion of the issues involved in medical malpractice actions, including the applicability of the statute of limitations of *Code Civ. Proc. § 340.5*, see Levy, Golden, and Sacks, California Torts, Ch. 31 (Matthew Bender).

[3] Discussion of Authorities

[a] Commencement of Limitations Period

In ***Steketee v. Lintz, Williams & Rothberg*** *(1985) 38 Cal. 3d 46, 210 Cal. Rptr. 781, 694 P.2d 1153* , plaintiff retained defendant attorneys to represent him in a claim for damages for medical malpractice that occurred when plaintiff was approximately 16 years, 11 months of age, in September or October 1976. Defendants were retained in January 1978. One year later, in January 1979, defendants ceased representing plaintiff without filing an action on plaintiff's behalf. Plaintiff thereafter sought to recover from defendants for legal malpractice, on the ground that defendants allowed the

statute of limitations to run on his medical malpractice claim before they ceased to represent him. The trial court granted summary judgment in defendants' favor, after concluding that the statute of limitations had not run on plaintiff's medical malpractice claim until after defendants had ceased to represent plaintiff.

The Supreme Court affirmed. The Court first held that plaintiff was subject to the limitation period of *Code Civ. Proc. § 340.5* applicable to minors (*38 Cal. 3d 46, 53)* . The Court then held that this three-year period began to run on the date of the alleged "wrongful act," regardless of when plaintiff discovered the "injury" or negligent cause and damaging effect of the wrongful act (*38 Cal. 3d 46, 54, 57)* . The Court concluded that defendants did, in fact, cease to represent plaintiff before the expiration of three years from the date of the alleged wrongful act. The statute did not run on plaintiff's cause of action until September 1979, but the attorney-client relationship was terminated several months earlier in January 1979 (*38 Cal. 3d 46, 57)* .

[b] Determination of Plaintiff's Minority

The facts and procedural background of ***Steketee v. Lintz, Williams & Rothberg*** *(1985) 38 Cal. 3d 46, 210 Cal. Rptr. 781, 694 P.2d 1153* , are discussed in *§ 175.44[3][a]*. Plaintiff argued that the limitation period of *Code Civ. Proc. § 340.5* applicable to adults began to run at the time that he became 18 years old. The Supreme Court rejected this argument, and held that a plaintiff was a "minor" within the meaning of *Code Civ. Proc. § 340.5* if he or she was a minor at the time of the alleged wrongful act (*38 Cal. 3d 46, 53)* .

[c] Accrual on Date of Discovery

In ***Photias v. Doerfler*** *(1996) 45 Cal. App. 4th 1014, 53 Cal. Rptr. 2d 202* , plaintiff filed an action for failure to treat or remedy a medical problem identified at his birth, nineteen years earlier. Defendant moved for summary judgment on the ground that the action was barred by the statute of limitations under *Code Civ. Proc. § 340.5*. The trial court agreed with the defendant, and granted summary judgment.

The court of appeal reversed, finding that it was a denial of equal protection under the law to consider that plaintiff's cause of action accrued under *Code Civ. Proc. § 340.5* on the date of the wrongful act. The court reasoned that allowing adult causes of action to accrue on the date of injury or the date upon which the injury reasonably should have been discovered, but requiring minors' causes of action to accrue on the date of the wrongful act treats minors more harshly in some circumstances. Thus, by defining the actions of adults and minors to accrue differently, *Code Civ. Proc. § 340.5* violates the minors' right to the law's equal protection (*45 Cal. App. 4th 1014, 1020-1021)* . The court concluded that the trial court erred in ruling that plaintiff's cause of action accrued on the date of the wrongful act, and reversed the judgment for defendant.

[d] Time for Filing Prior to Eighth Birthday Extended for Holiday

In ***Tran v. Fountain Valley Cmty. Hosp.*** *(1997) 51 Cal. App. 4th 1464, 60 Cal. Rptr. 2d 91* , plaintiff filed an action for medical malpractice on his eighth birthday, which occurred on a Monday. Defendants demurred on the ground that the complaint was not filed prior to the minor's eighth birthday. The trial court agreed, and dismissed the complaint.

The court of appeal reversed, holding that *Code Civ. Proc. § 12a*, which provides for an extension for the day of performance if the last day to act falls on a holiday, applies to the requirement of *Code Civ. Proc. § 340.5*, allowing the filing of a complaint prior to plaintiff's eighth birthday. The court noted that cases declining to extend the time within which an action must be performed involved situations in which the last day on which to act was a specified number of days before a date certain. The court distinguished those cases on the ground that they deal with statutes requiring a calculation from a given date (*51 Cal. App. 4th 1464, 1467)* . The court concluded that there was no reason why plaintiff should not have the benefit of *Code Civ. Proc. § 12a*, and reversed the judgment dismissing the complaint.

[e] Statute Tolled by Notice of Intent to Commence Action

In ***Newman v. Burnett*** *(1997) 62 Cal. Rptr. 2d 175* ; a doctor performed surgery on plaintiff who was 16 years old at the time of the operation. Plaintiff served his notice of intent to sue one day short of the third anniversary of his. Less than 90 days later, plaintiff filed his complaint against defendants. The trial court granted defendants motion for summary judgment on the ground that the complaint was not timely filed. Plaintiff appealed.

The court of appeal reversed, holding that since plaintiff's service of an intent to sue notice under *Code of Civil Procedure § 364(a)* during the last 90 days of the three-year limitation period applicable to minors tolled the statute of limitations for 90 days, the trial court erred in granting defendants summary judgment based on the statute of limitations (Cal. App. 4th 722, 728). Defendant argued that under *Rewald v. San Pedro Peninsula Hosp. (1994) 27 Cal. App. 4th 480, 32 Cal. Rptr. 2d 411* , the 90 day tolling provision of *Code of Civil Procedure § 364(d)* was not applicable to the three year statute of limitations. The court determined that the holding in *Rewald* was inapplicable and instead found that by following the plain language of *Code of Civil Procedure § 364(d)* and tolling the three-year statute it reconciled two important legislative goals of MICRA: giving minor plaintiffs a full three years in which to file their claims and the legislative objective of allowing time for negotiations without the formal initiation of legal proceedings during the 90 day notice period (*54 Cal. App. 4th 722, 728)* .

NOTE:

The California Supreme Court has disapproved *Rewald v. San Pedro Peninsula Hospital (1994) 27 Cal. App. 4th 480, 32 Cal. Rptr. 2d 411* [*Russell v. Stanford Univ. Hosp. (1997) 15 Cal. 4th 783, 785, 791 n.2, 64 Cal. Rptr. 2d 97, 937 P.2d 640* ; *see § 175.47*].

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17-175 California Points & Authorities § 175.45

§ 175.45 Opposing Contention That Action Is Barred by Statute of Limitations--One-Year Period of Limitation Tolled for 90 Days by Notice of Intent to Commence Action [Code Civ. Proc. § 364(a), (d)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S ACTION BASED ON MEDICAL MALPRACTICE IS NOT BARRED BECAUSE PLAINTIFF SERVED NOTICE PURSUANT TO SECTION 364(a) OF THE CODE OF CIVIL PROCEDURE WITHIN 90 DAYS BEFORE THE EXPIRATION OF THE ONE-YEAR STATUTE OF LIMITATIONS, AND PLAINTIFF TIMELY COMMENCED HIS/HER ACTION AFTER THE NOTICE PERIOD EXPIRED.

A. One-Year Period of Limitation Is Tolled for 90 Days. When a plaintiff files the notice of intent to sue required by *Code of Civil Procedure Section 364(a)* in the last 90 days of the one-year limitations period, the one-year statute of limitations is tolled for 90 days (*Woods v. Young (1991) 53 Cal. 3d 315, 319, 328, 279 Cal. Rptr. 613, 807 P.2d 455*).

[*Optional*] **B. Actual Notice of Intent to Sue Not Required When Timely Notice Served by Mail.** A plaintiff giving notice to a particular defendant under *Code Civ. Proc. § 364* tolls the statute of limitations for 90 days when he or she complies with statutory requirements governing the service of process by mail prior to expiration of the limitations period, and actual notice to the defendant within the limitations period is not required (*Silver v. McNamee (1999) 69 Cal. App. 4th 269, 280, 285-286*).

[*Optional*] **C. Hospital-Based Negligence Claim is Action for Professional, Not Ordinary, Negligence.** A tort claim based on failure to supervise or protect the safety of a patient in a hospital or other health care facility is an action for professional negligence within the meaning of *Code of Civil Procedure Section 340.5(2)*, not an action for ordinary negligence; therefore, the tolling provision of *Code of Civil Procedure Section 364* applies (*Bellamy v. Appellate Dep't (1996) 50 Cal. App. 4th 797, 809, 57 Cal. Rptr. 2d 894*).

[*Optional*] **D. 90-Day Tolling Applies to Defendant Given Notice Who is Substituted in for Doe Defendant.** If a

defendant is actually known to the plaintiff and is served with a notice of intent to sue, the limitations period is extended by 90 days even if that defendant is not named in the original complaint but is instead subsequently substituted in for a Doe defendant. If the amendment naming that defendant is made before expiration of the limitations period as extended by the 90 days, the amendment is timely as to that defendant (*Davis v. Marin (2000) 80 Cal. App. 4th 380, 386-387, 94 Cal. Rptr. 2d 896*).

[*Optional*] **E. Compliance With Service Statutes Not Mandatory.** When serving a notice of intent to sue, compliance with *Code of Civil Procedure Sections 1010 et seq.* is not mandatory, and it is sufficient that a plaintiff who does not comply with these provisions show that the defendant received actual notice (*Jones v. Catholic Healthcare West (2007) 147 Cal. App. 4th 300, 307-308, 54 Cal. Rptr. 3d 148* ; *see Code Civ. Proc. § 364(c)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a defendant's contention that an action is barred by the statute of limitations. The ground for opposition is that the one-year limitations period was tolled for 90 days under *Code Civ. Proc. § 364(d)* because plaintiff filed the notice of intent required by *Code Civ. Proc. § 364(a)* within 90 days of the end of the one-year limitations period.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated, Thus, counsel should specify (1) the date the cause of action accrued, (2) the date the notice of intent was filed, (3) the date the complaint was filed, and (4) the date the one-year limitations period elapsed, taking the 90-day tolling period into account.

[c] Separate Trial of Statute of Limitations Defense

Any party, or the court itself, may move for a separate trial of the defense that an action is barred by the statute of limitations if the defense is pleaded in the answer. If the issue is resolved in favor of the plaintiff, the remaining issues are then tried [*Code Civ. Proc. § 597.5*].

[d] Related Pleading and Practice Forms

For pleading and practice forms relating to the defense that an action is barred by the statute of limitations relating to Code Civ. Proc. § 340.5, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* , and Ch. 415, *Physicians: Medical Malpractice* (Matthew Bender).

[e] Related Points and Authorities

For general forms of memoranda of points and authorities, see Ch. 143, *Limitation of Actions* .

[f] Opposing Points and Authorities

The points and *authorities in § 175.37*.6 or § 175.37.7 may be used in an appropriate case to oppose the contention supported by this memorandum.

[g] Related California Torts Chapters

For full discussion of the issues involved in medical malpractice actions, including the applicable statutes of limitation,

see Levy, Golden, and Sacks, California Torts, Ch. 31 (Matthew Bender).

[3] Discussion of Authorities

[a] One-Year Period of Limitation Is Tolled for 90 Days

The facts and procedural background of ***Woods v. Young*** *(1991) 53 Cal. 3d 315, 279 Cal. Rptr. 613, 807 P.2d 455* , are discussed in *§ 175.39[3][a]*. The California Supreme Court held that when a plaintiff gives the 90-day notice of intent to sue required by *Code Civ. Proc. § 364(a)* in the last 90 days of the applicable statute of limitations, that statute of limitations is tolled for 90 days under *Code Civ. Proc. § 364(d)* (*53 Cal. 3d 315, 319, 328)* . The Court illustrated the application of the rule with the following example: A plaintiff who serves the notice of the intent to sue on the last day of the limitations period has one day after the 90-day waiting period to file the complaint (*53 Cal. 3d 315, 326 n.3*). The Court noted that because the law does not divide time periods into increments of less than one day and because tolling takes effect immediately, the day of service of the notice is not part of the time for commencement of the action (*53 Cal. 3d 315, 326 n.3*). The Court expressly disapproved several conflicting appellate cases that had concluded, relying on *Code Civ. Proc. § 356*, that service of the notice would extend the period of limitations for a period ranging from 90 to 180 days (*53 Cal. 3d 315, 323, 328 n.4*).

The Supreme Court, citing public policy concerns, gave its opinion some prospective application (*53 Cal. 3d 315, 330-331)* .

NOTE:

One court of appeal has subsequently construed the prospectivity directive of *Woods* to apply only to the primary holding in *Woods* that the extension allowed by *Code Civ. Proc. § 364(d)* is available only when the notice of intention to sue is served during the final 90 days of the applicable limitation period. Under this construction, the prospectivity directive does not apply to *Woods*' secondary holding limiting the maximum filing time to the period of limitations plus 90 days [*Barber v. Superior Court (1991) 234 Cal. App. 3d 1076, 1081-1082, 285 Cal. Rptr. 668* ; *see § 175.39* [3][a]].

[b] Actual Notice of Intent to Sue Not Required When Timely Notice Served by Mail

In ***Silver v. McNamee*** *(1999) 69 Cal. App. 4th 269* , plaintiff in a medicalmalpractice action against a physician attempted to serve notice of intent to sue three days prior to expiration of the one-year limitations period by mailing two notices to defendant's Ohio residential address, one by regular mail and one by certified mail. The notices were properly addressed and had sufficient postage. The notice sent by regular mail was not returned to plaintiff and the Post Office made three unsuccessful attempts to deliver the certified notice. Defendant asserted he did not receive actual notice of the intent to sue until two months later, when he allegedly first received the notice sent through regular mail. The malpractice lawsuit was filed two-and-a-half months after the notices were mailed. Defendant successfully moved for summary judgment on the grounds that the action was time-barred under *Code Civ. Proc. § 340.5*, and plaintiff appealed.

The court of appeal reversed. Noting first the established rule that giving a notice of intent to sue within the last 90 days of the one-year statute of limitations tolls the limitations period for 90 days, the court held that the notice of intent to sue was effective when the notices were placed in the mail in strict compliance with the statutes governing service by mail and that the risk of failure of the mail falls on the addressee (*69 Cal. App. 4th 269, 280)* . The court also rejected the conclusion of the trial court that, pursuant to *Code Civ. Proc. § 1013(a)*, the effective date of the notice was delayed by 10 days and hence was untimely. *Code Civ. Proc. § 1013(a)* provides in part that "any period of notice and any right or duty to do any act or make any response within any period or on a date certain after the service of the document, which time period or date is prescribed by statute or rule of court, shall be extended ... 10 days if the place of address is outside the State of California but within the United States ... ." The court of appeal held that interpreting this provision to delay the effective date of service and preclude application of the 90-day tolling period of *Code Civ. Proc. § 364(d)*

contravened the very language of *Code Civ. Proc. § 1013(a)*, which otherwise provided that service by mail is "complete" when the notice is deposited in the mail (*69 Cal. App. 4th 269, 280)* . The court also ruled that, under the circumstances, actual notice to the defendant within the limitations period was not required, distinguishing other court of appeal decisions that had required actual notice prior to expiration of the limitations period. In those prior decisions, the issue of lack of actual notice arose in the context of whether service on a defendant's purported principal constituted notice to the defendant, while in the case before the court, plaintiff had strictly complied with the statutes governing service and notice was sent directly to the individual defendant (*69 Cal. App. 4th 269, 283-286)* .

[c] Hospital-Based Negligence Claim Is Action for Professional, Not Ordinary, Negligence

In ***Bellamy v. Appellate Dep't*** *(1996) 50 Cal. App. 4th 797, 57 Cal. Rptr. 2d 894* , plaintiff filed a complaint against a hospital for injuries she sustained when she fell off a rolling X-ray table onto her head. The action was described as one for personal injury and medical malpractice. The hospital demurred on the ground that the action was barred by the one-year statute of limitations for personal injury actions. Plaintiff opposed the demurrer, arguing that she was subject to the notice requirement for professional negligence actions against health care providers, that she served the required notice within 90 days of expiration of the limitations period, that her time for filing suit was thus extended 90 days after service of the notice, and that her complaint was timely filed under *Code Civ. Proc. § 364(d)*. In rebuttal, the hospital contended that plaintiff's action was one based on ordinary negligence, not professional negligence, thus *Code Civ. Proc. § 364(d)* was inapplicable. The municipal court sustained the hospital's demurrer. Plaintiff appealed to the superior court from the subsequent judgment dismissing the action. The appellate department of the superior court affirmed the municipal court decision. Plaintiff then petitioned the court of appeal for a writ of mandate.

The court of appeal held that plaintiff's complaint sufficiently alleged facts amounting to professional negligence, bringing it within *Code Civ. Proc. § 364* and other MICRA provisions (*50 Cal. App. 4th 797, 809)* . The court initially stated that the classification of similar hospital-based negligence was the subject of some conflict in the courts of appeal. One line of authority, based on *Gopaul v. Herrick Mem'l Hosp. (1974) 38 Cal. App. 3d 1002, 113 Cal. Rptr. 811* , holds that the test for determining whether an action is based in professional negligence is whether the negligence occurred within the scope of the skill, prudence, and diligence commonly exercised by practitioners of the profession. The other line of cases is based on the definition of professional negligence found in *Code Civ. Proc. § 340.5(2)*, and applied in *Murillo v. Good Samaritan Hosp. (1979) 99 Cal. App. 3d 50, 160 Cal. Rptr. 33* . Under that definition, the test is not whether the situation calls for a high or a low level of skill, or whether a high or low level of skill was actually employed, but rather, whether the negligent act occurred in the rendering of services for which the health care provider is licensed.

The court then examined the allegations in plaintiff's complaint applying the *Murillo* test, and construed them to mean that prior to her injury, plaintiff was on the X-ray table for the rendering of some professional service. This was, according to the court, a sufficient allegation of facts amounting to professional negligence, bringing it within the tolling provisions of *Code Civ. Proc. § 340.5(2)*. The court rejected the rationale advanced by the hospital, that if the need for restraint on an X-ray table or gurney was obvious to all, the failure to restrain was ordinary negligence. The court found that this standard was incompatible with the subsequently enacted statutory definition of professional negligence in *Code Civ. Proc. § 340.5(2)* (*50 Cal. App. 4th 797, 808)* .

[d] 90-Day Tolling Applies to Defendant Given Notice Who is Substituted in for Doe Defendant

In ***Davis v. Marin*** *(2000) 80 Cal. App. 4th 380, 94 Cal. Rptr. 2d 896* , the plaintiff was burned on December 6, 1996, while undergoing treatment using a muscle stimulator machine administered by her chiropractor. She told the chiropractor about the burns the next day, and she decided to bring a lawsuit within two or three days after suffering the burns. The plaintiff's attorney sent the chiropractor a notice of intent to sue on December 1, 1997. On December 2, 1997, the plaintiff's attorney filed the lawsuit, identified as an action for products liability and medical malpractice. However, the complaint listed only Doe defendants in the medical malpractice action. On February 24, 1998, an

amendment to the complaint was filed naming the chiropractor as a defendant. The chiropractor filed a motion for summary judgment alleging that the action against her was barred by the statute of limitations. The chiropractor argued that because the plaintiff knew the chiropractor's identity when the complaint was filed, the amendment to the complaint did not relate back to the original filing and the action against the chiropractor was thus barred by limitations. The chiropractor also argued that the 90-day tolling period was inapplicable because *Code Civ. Proc. § 364*, by its own terms, does not apply to any defendant whose name was unknown to the plaintiff and who was identified by a fictitious name. The trial court granted the chiropractor's motion for summary judgment.

The court of appeal reversed. The court agreed with the plaintiff that because a timely notice of intent to sue was given to the chiropractor, the plaintiff had until the first week of March 1998 to file a timely complaint against her. Because the amendment naming the chiropractor was filed in February 1998, the chiropractor was brought into the lawsuit in a timely fashion (*80 Cal. App. 4th 380, 386)* . The court rejected the chiropractor's argument that the 90-day tolling period was inapplicable because *Code Civ. Proc. § 364* does not apply to any defendant whose name was unknown to the plaintiff and who was identified by a fictitious name, because the chiropractor's identity was known to the plaintiff, and timely notice of intent to sue was given (*80 Cal. App. 4th 380, 386)* . In addition, because the plaintiff had tolled the statute of limitations as to the chiropractor and the amendment adding the chiropractor as a named defendant was therefore filed prior to expiration of the applicable limitations period, the question of whether the amendment "related back" to the original complaint was irrelevant (*80 Cal. App. 4th 380, 386-387)* .

[e] Compliance With Service Statutes Not Mandatory

In *Jones v. Catholic Healthcare West (2007) 147 Cal. App. 4th 300, 54 Cal. Rptr. 3d 148* , plaintiff was injured when she fell in her hospital room the day after undergoing hip replacement surgery. Some 11-and-a-half months later, her attorney sent a letter to the president of the hospital, describing the circumstances of the injury and asking the hospital to assume financial responsibility. Two weeks later, the attorney faxed to the president a tolling agreement extending the period for serving a notice of intent to sue for three additional months. The president signed this agreement, as well as two subsequent agreements faxed to the president, also extending the time for filing a notice of intent to sue. However, the president did not sign a fourth tolling agreement. On the last day on which to file a notice of intent to sue pursuant to the third tolling agreement, plaintiff's attorney faxed to the president a notice of intent to sue. Slightly less than 90 days later, plaintiff filed suit against the hospital. The trial court granted summary judgment for the defendants after finding that the notice of intent to sue did not toll the statute of limitations because it failed to comply with *Code Civ. Proc. § 1010 et seq.*, which generally requires that effective service by fax requires a written agreement between the parties. Plaintiff appealed.

The court of appeal reversed. The court noted that *Code Civ. Proc. § 364(c)* states that the notice of intent to sue "may" be served in the manner prescribed by *Code Civ. Proc. § 1010 et seq.*, and that use of the word "may" suggests that compliance with those provisions for service is discretionary. Thus, the court concluded that when serving a notice of intent to sue, compliance with *Code of Civil Procedure Sections 1010 et seq.* is not mandatory. To buttress its conclusion, the court noted that other provisions of the same statute use the word "shall" to indicate when compliance is mandatory, and the statute specifically states that "no particular form of notice is required" (*147 Cal. App. 4th 300, 307)* . The court went on to state, however, that a plaintiff who does not comply with the provisions of *Code Civ. Proc. § 1010 et seq.* must show that defendant received actual notice of the intent to sue to toll the limitations period for 90 days. The court concluded that the plaintiff had established through evidence of past course of conduct between the parties that plaintiff's attorney could reasonably rely on defendant receiving actual notice by faxing the notice to the hospital president. As such, the notice provided by plaintiff's attorney was effective to extend the limitations period and the suit was timely filed (*147 Cal. App. 4th 300, 308-309)* .

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17-175 California Points & Authorities § 175.46

§ 175.46 Opposing Contention That Action Is Barred by Statute of Limitations [Code Civ. Proc. § 340.5]--Statutory Tolling Provisions Not Found in MICRA Apply to One-Year Period of Limitation

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S MEDICAL MALPRACTICE ACTION IS NOT BARRED BY THE ONE-YEAR LIMITATIONS PERIOD OF CODE OF CIVIL PROCEDURE SECTION 340.5 BECAUSE THAT LIMITATIONS PERIOD WAS TOLLED BY_____ [*specify tolling statute, e.g.,* CODE OF CIVIL PROCEDURE SECTION 352.1].

A. One-Year Limitations Period May Be Tolled by Non-MICRA Tolling Provisions. The one-year limitations period of *Code of Civil Procedure Section 340.5* may be tolled by statutory tolling provisions that are found outside of MICRA (*see Belton v. Bowers Ambulance Serv. (1999) 20 Cal. 4th 928, 930-935, 86 Cal. Rptr. 2d 107, 978 P.2d 591* ; *Alcott Rehab. Hosp. v. Superior Court (2001) 93 Cal. App. 4th 94, 101, 112 Cal. Rptr. 2d 807*).

[*Optional*] **B. One-Year Period of Limitations Is Tolled by Incarceration.** Pursuant to *Code of Civil Procedure Section 352.1,* the one-year limitations period of *Code of Civil Procedure Section 340.5* may be tolled for up to two years while the plaintiff is incarcerated, if the cause of action for professional negligence accrued while the plaintiff was imprisoned on a criminal charge or in execution of a criminal sentence for a term less than life (*Belton v. Bowers Ambulance Serv. (1999) 20 Cal. 4th 928, 930-935, 86 Cal. Rptr. 2d 107, 978 P.2d 591*).

[*Optional*] **C. One-Year Period of Limitations Is Tolled by Insanity.** The tolling provision for insanity found in *Code of Civil Procedure Section 352* applies to the one-year limitations period of *Code of Civil Procedure Section 340.5* (*Alcott Rehab. Hosp. v. Superior Court (2001) 93 Cal. App. 4th 94, 101, 112 Cal. Rptr. 2d 807*).

[*Optional*] **D. One-Year Period Tolled by Defendant's Absence From State.** The tolling provision of *Code of Civil Procedure Section 351* applicable when a defendant is out of the state applies to the one-year limitations period of *Code of Civil Procedure Section 340.5* (*Kaplan v. Mamelak (2008) 162 Cal. App. 4th 637, 643, 75 Cal. Rptr. 3d 861*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to a defendant's contention that an action for medical malpractice is barred by the statute of limitations. The ground for opposition is that the one-year limitations period of *Code Civ. Proc. § 340.5* was tolled under an applicable tolling provision found outside MICRA.

[b] Argument

Counsel should add argument linking the point of law stated with the facts of the case. Thus, counsel should provide facts showing the applicability of a statutory tolling provision. Counsel should be aware that the three-year maximum limitations period of *Code Civ. Proc. § 340.5* is unaffected by tolling provisions found in another statute.

[c] Related Pleading and Practice Forms

For forms relating to the statute of limitations defense, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* (Matthew Bender). For discussion, forms, and procedures relating to the statute of limitations defense in medical malpractice actions, see California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice* (Matthew Bender).

[d] Related Points and Authorities

For memoranda of points and authorities relating to statutes of imitations generally, see Ch. 143, *Limitation of Actions* .

[3] Discussion of Authorities

[a] One-Year Limitations Period May Be Tolled by Non-MICRA Tolling Provisions

Belton v. Bowers Ambulance Serv. *(1999) 20 Cal. 4th 928, 86 Cal. Rptr. 2d 107, 978 P.2d 591* , is discussed in *§ 175.46[3][b]*.

Alcott Rehab. Hosp. v. Superior Court *(2001) 93 Cal. App. 4th 94, 112 Cal. Rptr. 2d 807* , is discussed in *§ 175.46[3][c]*.

[b] One-Year Period of Limitations Is Tolled by Incarceration

In ***Belton v. Bowers Ambulance Serv.*** *(1999) 20 Cal. 4th 928, 86 Cal. Rptr. 2d 107, 978 P.2d 591* , the plaintiff, a federal prison inmate, brought an action for professional negligence against an ambulance service for injuries allegedly sustained when the plaintiff was transported from prison to a hospital. The action was filed one year and one week after the alleged injury. The defendant demurred to the action, arguing that it was barred by *Code Civ. Proc. § 340.5* since it was filed more than one-year after the plaintiff discovered the injury, which all parties agreed was the day the injury allegedly occurred. The trial court sustained the demurrer, but the court of appeal reversed.

The Supreme Court affirmed the judgment of the court of appeal reversing the trial court's ruling. The Court agreed with the court of appeal that *Code Civ. Proc. § 352.1*, which provides for up to a two-year extension for filing a suit that accrues while a plaintiff is incarcerated, applies to the one-year limitations period of *Code Civ. Proc. § 340.5*. The Court recognized that under the plain language of the statute, the three-year limitations period of *Code Civ. Proc. § 340.5* may only be tolled by resort to one of the three specified tolling provisions of that statute, but that there was no similar restriction on the tolling of the one-year limitations period. The Court noted that there was nothing in the language of either *Code Civ. Proc. § 340.5* or *Code Civ. Proc. § 352.1*, nor in the policy underlying MICRA, that prevented applying the tolling provision for incarceration to the one-year limitations period, so long the action was filed within the three-year maximum limitations period for professional negligence actions against a health care provider. In reaching its

decision, the Court specifically disapproved the contrary holding of *Hollingsworth v. Kofoed (1996) 45 Cal. App. 4th 423, 52 Cal. Rptr. 2d 808* , which had held that *Code Civ. Proc. § 352.1* did not apply to either limitations period of *Code Civ. Proc. § 340.5* (*20 Cal. 4th 928, 930-935)* .

[c] One-Year Period of Limitations Is Tolled by Insanity

In ***Alcott Rehab. Hosp. v. Superior Court*** *(2001) 93 Cal. App. 4th 94, 112 Cal. Rptr. 2d 807* , the plaintiff was a mentally incompetent woman who brought suit, through a guardian ad litem, against a nursing facility for medical malpractice basedon allegations that the facility severely neglected the plaintiff while she was a patient, resulting in conditions that necessitated amputation of both the plaintiff's legs. The suit was filed almost 14 months after the plaintiff ordered copies of her medical records. The defendant filed a motion for summary adjudication, arguing that the one-year limitations began to run when the plaintiff ordered her medical records, which would have put a reasonable person on notice of potential wrongdoing by the facility. Therefore, according to the defendant, the plaintiff could not recover for any alleged wrongdoing that took place before the records were received. Although both parties agreed that the applicable limitations period was that found in *Code Civ. Proc. § 340.5*, the plaintiff argued that the one-year limitations period was tolled under *Code Civ. Proc. § 352* because she was insane. The defendant argued that the one-year limitations period could not be tolled under *Code Civ. Proc. § 352*. The trial court agreed with the plaintiff and denied the defendant's motion for summary adjudication. The defendant petitioned for writ of mandate.

The court of appeal denied the petition. Noting that the defendant did not dispute whether the plaintiff was "insane" under *Code Civ. Proc. § 352*, the court of appeal reviewed the Supreme Court's decision in *Belton v. Bowers Ambulance Serv. (1999) 20 Cal. 4th 928, 86 Cal. Rptr. 2d 107, 978 P.2d 591* [*see § 175.46[3][b]*]. Under the holding and rationale of *Belton*, the court of appeal held that the one-year limitations period of *Code Civ. Proc. § 340.5* may be tolled by a general tolling statute and is tolled pursuant to *Code Civ. Proc. § 352* if the plaintiff is insane (*93 Cal. App. 4th 94, 101-104)* . The court rejected a contrary holding provided by an earlier court of appeal decision that clearly seemed inconsistent with the Supreme Court's analysis in *Belton* (*93 Cal. App. 4th 94, 104-105)* .

[d] One-Year Period Tolled by Defendant's Absence From State

In ***Kaplan v. Mamelak*** *(2008) 162 Cal. App. 4th 637, 75 Cal. Rptr. 3d 861* , plaintiff suffered a back injury and underwent surgery on his spine to repair a herniated disk. After recovery from surgery, plaintiff continued to have pain and an MRI revealed that the surgeon had operated on the wrong disk. On September 11, 2002, the surgeon discussed this at a meeting with the plaintiff, and a second surgery was scheduled for later in the month. The surgeon again operated on the wrong disk. A third surgery was performed by a different surgeon to correct the herniated disk. On September 17, 2003, plaintiff filed a notice of intent to sue the original surgeon for medical malpractice, and suit was filed less than 90 days later on December 15, 2003. Trial was bifurcated in order to adjudicate first defendant's claim that the lawsuit was untimely because the notice of intent to sue was not filed within one year of the date of the meeting at which defendant admitted he had operated on the wrong disk. During pretrial discovery, plaintiff sought to discover whether facts existed that would toll the one-year limitations period of *Code Civ. Proc. § 340.5* pursuant to *Code Civ. Proc. § 351* due to defendant's absence from the state. However, the court ruled that *Code Civ. Proc. § 351* did not apply to medical malpractice actions and denied plaintiff the discovery he sought. The jury returned a special verdict finding that plaintiff was on notice of wrongdoing on September 11, 2002, and the trial court entered judgment in favor of the surgeon. Plaintiff appealed.

The court of appeal reversed. Citing the Supreme Court's holding in *Belton v. Bowers Ambulance Service*, discussed in [b], *above*, the court held that *Code Civ. Proc. § 351* did apply to the one-year limitations period of *Code Civ. Proc. § 340.5*. Recognizing that the Court in *Belton* had been applying a different tolling statute, the court of appeals noted that the Supreme Court's holding had been based on a careful reading of the statute of limitations language in the MICRA statute, rather than on the non-MICRA tolling provision being applied. Thus, the court of appeal concluded that the Supreme Court's rationale applied equally to application of the non-MICRA tolling provision of *Code Civ. Proc. § 351* (

162 Cal. App. 4th 637, 642-643) . Although defendant testified that he was outside California no more than three days during the relevant limitations period, the court of appeal held that the trial court erred in not allowing plaintiff to pursue pre-trial discovery that might have led to facts sufficient to toll the limitations period for a total of six days, which would have been sufficient to render the action timely (*162 Cal. App. 4th 637, 644-645)* .

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17-175 California Points & Authorities § 175.47

§ 175.47 Opposing Contention That Medical Malpractice Action Based on Professional Negligence Is Barred by Statute of Limitations--Three Year Period of Limitation Tolled for 90 Days by Notice of Intent to Commence Action [Code Civ. Proc. §§ 340.5, 364(a), (d)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S MEDICAL MALPRACTICE ACTION IS NOT BARRED BECAUSE PLAINTIFF SERVED NOTICE PURSUANT TO CODE OF CIVIL PROCEDURE *SECTION 364(a) WI*THIN 90 DAYS OF THE EXPIRATION OF THE THREE YEAR STATUTE OF LIMITATIONS, AND THAT NOTICE TOLLED THE LIMITATION PERIOD.

Three Year Period of Limitation Is Tolled for 90 Days. When a plaintiff files a notice of intent to sue required by to *Code of Civil Procedure Section 364(a)* in the last 90 days of a three-year limitations period, the three-year statute of limitations is tolled for 90 days (*Russell v. Stanford Univ. Hosp. (1997) 15 Cal. 4th 783, 785, 791, 64 Cal. Rptr. 2d 97, 937 P.2d 640*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a defendant's contention that an action for medical malpractice is barred by the statute of limitations. The ground for opposition is that the three-year limitations period was tolled for 90 days under *Code Civ. Proc. § 364(d)* because plaintiff filed a notice of intent required by *Code Civ. Proc. § 364(a)* within 90 days of the end of the three-year limitations period.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his orher case. For example, counsel should provide facts showing (1) the date the cause of action accrued, (2) the date the notice of intent was filed, (3) the date the complaint was filed, and (4) the date the three-year limitations period elapsed, taking the 90 day tolling period

into account.

[c] Related Pleading and Practice Forms

For forms relating to the statute of limitations defense, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* (Matthew Bender). For discussion, forms, and procedures relating to the statute of limitations defense in medical malpractice actions, see California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice* (Matthew Bender).

[d] Related Points and Authorities

For a memorandum of points and authorities opposing a one-year statute of limitations defense on the same grounds, see *§ 175.45*. For memoranda of points and authorities relating to statutes of limitations generally, see Ch. 143, *Limitation of Actions* .

[3] Discussion of Authorities

[a] Three Year Period of Limitation Is Tolled for 90 Days.

In ***Russell v. Stanford Univ. Hosp.*** *(1997) 15 Cal. 4th 783, 64 Cal. Rptr. 2d 97, 937 P.2d 640* , plaintiff received surgical treatment from defendants for a work-related injury to her wrist and thumb. Over two years later she allegedly discovered that defendants had acted negligently, causing disfigurement, and an inability to use her hand. Fifty-one days before the expiration of the three year statute of limitations for commencing medical malpractice actions plaintiff served defendants with notice of intention to commence an action. 90 days after service of the notice of intention, and more than three years after the date of injury she filed the complaint. Defendants moved for summary judgment on the ground that the action was untimely under *Code Civ. Proc. § 340.5*, because it was commenced more than three years after the date of injury. Plaintiff opposed the motion, arguing that the action was timely because the statute of limitations was tolled by her notice of intent to sue. The trial court granted the motion, bound by the appellate decision in *Rewald v. San Pedro Peninsula Hosp. (1994) 27 Cal. App. 4th 480, 32 Cal. Rptr. 2d 411* , which held that the three-year limitations period is not tolled by service of the notice of intention to sue. Judgment was entered in favor of defendants and plaintiffappealed. Declining to follow *Rewald*, the court of appeal reversed. The Supreme Court granted review in order to resolve the conflict.

The Supreme Court affirmed the decision of the court of appeal, holding that the three-year statute of limitations, *Code Civ. Proc. § 340.5*, is "tolled" rather than "extended" for 90 days when the plaintiff gives notice of intent to sue in the last 90 days of the statutory period (*15 Cal. 4th 783, 791)* . Accordingly, the Court disapproved *Rewald* to the extent it was inconsistent with the holding in this case. In *Woods v. Young (1991) 53 Cal. 3d 315, 279 Cal. Rptr. 613, 807 P.2d 455* [*see § 175.45[3][a]*], the Supreme Court had previously held that the one-year statute of limitations was "tolled" rather than "extended" for 90 days when a plaintiff gives notice of intent to sue in the last 90 days of the statutory period. The *Russell* court concluded that the same rule applies to the three year statute of limitations as applies to the one year statute both as a matter of statutory construction, and for the reasons expressed in *Woods* (*15 Cal. 4th 783, 788)* .

First, the Court explained the statutory conflict before it; *Code Civ. Proc. § 364* extends--that is, as construed in *Woods*, tolls--the time for commencing a medical malpractice action for 90 days while *Code Civ. Proc. § 340.5* purports to limit plaintiffs in such actions only to the tolling provisions set forth in the statute. Next it applied the following rules of statutory construction to the conflicting MICRA provisions: (1) wherever possible, potentially conflicting provisions should be reconciled in order to carry out the overriding legislative purpose, and (2) if conflicting provisions of a statute cannot be harmonized, then, the provision that is positioned later in the statute normally controls the earlier provision. Guided by these principles, the Court concluded that *Code Civ. Proc. § 364* applies equally to the one-year and three-year statutes of limitations for medical malpractice actions (*15 Cal. 4th 783, 789)* .

According to the Court, this construction of *Code Civ. Proc. § 364(d)* effectuates the legislative purpose of the provision, reducing the cost and increasing the efficiency of medical malpractice litigation by, encouraging negotiated resolution of disputes, and avoids the possibility that plaintiffs' attorneys will confront the professional dilemma addressed in *Woods*, i.e. a choice between preserving the plaintiff's cause of action by violating the 90-day notice period under *Code Civ. Proc. § 364(d)*, thereby invoking potential disciplinary proceedings by the State Bar, and forfeiting the client's cause of action, without significant impact on the legislative goal of establishing a strict outside time limit for commencing negligence actions against health care providers. While the court acknowledged that one effect of this decision might conceivably be to extend the time for commencing a claim 90 days beyond the three year statute of limitations, it ruled that on balance the legislative interest in promoting negotiated resolution of medical malpractice disputes, must be deemed overriding [*15 Cal. 4th 783, 790]* .

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17-175 California Points & Authorities § 175.48

§ 175.48 Opposing Contention That Medical Malpractice Action Based on Professional Negligence Is Barred by Statute of Limitations--One-Year Limit After Discovery of Nontherapeutic Foreign Body in Plaintiff's Body Regardless of When Injury Commenced

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S ACTION BASED ON MEDICAL NEGLIGENCE IS NOT BARRED, BECAUSE DEFENDANT INTRODUCED A FOREIGN BODY INTO PLAINTIFF'S BODY THAT WAS THE NEGLIGENT CAUSE OF PLAINTIFF'S INJURY AND PLAINTIFF'S ACTION WAS BROUGHT WITHIN ONE YEAR OF PLAINTIFF'S DISCOVERY OF THE FOREIGN BODY.

A. Three-Year Limitation Period. A medical malpractice action based on professional negligence generally must be commenced within three years from the date of the alleged wrongful act. However, this period may be tolled by the presence of a foreign body in the person injured, provided that such body has no therapeutic or diagnostic purpose or effect (*Code Civ. Proc. § 340.5*).

B. One-Year Discovery Limitation Period Delayed Under Foreign Body Exception. The foreign body exception to *Code Civ. Proc. § 340.5* delays the start of the statute's one-year discovery limitation period until plaintiff discovers or through reasonable diligence would have discovered that the the foreign body was the negligent cause of his or her injuries (*Ashworth v. Memorial Hosp. (1988) 206 Cal. App. 3d 1046, 1054, 254 Cal. Rptr. 104*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that plaintiff's complaint for medical malpractice is barred by the statute of limitations period of *Code Civ. Proc. § 340.5*. The ground for opposition is that when the negligent cause of the plaintiff's injuries is a foreign body introduced by defendant, the plaintiff may commence the action at any time within one year of discovery of the object, or within one year of the time when

plaintiff reasonably should have discovered the object.

In an appropriate case, this memorandum may be submitted in opposition to the contention that the action is barred by the statute of limitations supported by the points and *authorities in § 175.37*.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the circumstances surrounding the initial placement of the foreign object(s) in plaintiff's body. In addition, counsel should discuss facts that demonstrate that, during the tolling of the statute, plaintiff was unaware of the foreign object(s) and their relationship to his or her injuries. Counsel should also discuss the nontherapeutic, nondiagnostic nature of the foreign object(s).

[c] Separate Trial of Statute of Limitations Defense

Any party, or the court itself, may move for a separate trial based on the defense that an action is barred by the statute of limitations, if the defense is pleaded in the answer. If the issue is resolved in favor of the plaintiff, the remaining issues are then tried [*Code Civ. Proc. § 597.5*].

[d] Related Pleading and Practice Forms

For forms of pleading and practice relating to the statute of limitations defense set forth in Code Civ. Proc. § 340.5 and to a motion for a separate trial of a statute of limitations defense, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* , and Ch. 415, *Physicians: Medical Malpractice* (Matthew Bender).

[e] Related Points and Authorities

For memoranda of points and authorities supporting the contention that an action is barred by the statute of limitations and supporting a motion for separate trial of the statute of limitations defense, see Ch. 143, *Limitation of Actions* .

[f] Related California Torts Chapters

For full discussion of the issues involved in medical malpractice actions, including the applicability of the statute of limitations of *Code Civ. Proc. § 340.5*, see Levy, Golden, and Sacks, California Torts, Ch. 31 (Matthew Bender).

[3] Discussion of Authorities

[a] One-Year Discovery Limitation Period Delayed Under Foreign Body Exception

The plaintiffs in ***Ashworth v. Memorial Hosp.*** *(1988) 206 Cal. App. 3d 1046, 254 Cal. Rptr. 104* , a patient and her husband, filed a lawsuit for medical malpractice and loss of consortium in November 1977, after kidney surgery by defendants had resulted in an infectious abscess and other serious complications. This lawsuit was dismissed, without prejudice, in late 1982 for failure to prosecute. In November 1983, another physician operated on plaintiff and discovered two sponges near her left kidney. After this physician removed the sponges, the patient no longer suffered from the abscess. The physician told the patient that there was a high degree of medical probability that the sponges were a major causal factor in her infection, and that failure by the defendants to remove the sponges constituted negligence. In November 1985, plaintiffs filed another lawsuit against defendants, alleging medical malpractice and loss of consortium, citing the negligent failure to remove the sponges as the act of malpractice that proximately caused the injuries. In March 1987, defendants filed a summary judgment motion. The trial court found there was a triable issue of whether the sponges had a therapeutic purpose and effect, but nevertheless issued a minute order granting summary judgment for defendants. The court held that the dismissal of the first case barred the second case, evidently on grounds

of res judicata or collateral estoppel. Judgment was entered, and plaintiffs appealed.

The court of appeal reversed. On appeal, defendants conceded that the trial court erred when it apparently grounded summary judgment on res judicata/collateral estoppel grounds; the dismissal of the 1977 case was without prejudice, and therefore did not bar the 1984 case. However, the defendants argued an alternative ground for sustaining the summary judgment: that the plaintiffs' 1984 complaint was not timely filed under *Code Civ. Proc. § 340.5*. Defendants contended that the patient discovered her malpractice action no later than 1977, and that, consequently, the statute of limitations expired in 1978. Defendants asserted that the filing of the 1977 case constituted irrefutable evidence that the plaintiffs had discovered their malpractice cause of action against defendants by that time. The court of appeal rejected defendants' arguments. It noted that under *Code Civ. Proc. § 340.5*, the plaintiff generally must file within one year after he or she discovers the injury and the negligent cause of that injury, and plaintiff must file within three years after he or she first experiences harm from the injury. However, the three-year period is tolled with respect to "the presence of a foreign body, which has no therapeutic or diagnostic purpose or effect, in the person of the injured person" (*206 Cal. App. 3d 1046, 1054)* . The court held that this "foreign body exception"also delays the start of the one-year discovery limitation period of *Code Civ. Proc. § 340.5* until plaintiff discovers or through reasonable diligence would have discovered the foreign body as the negligent cause of his or her injuries (*206 Cal. App. 3d 1046, 1058)* . The court concluded that the patient did not discover that the sponges were the proximate cause of her infectious abscess until her November 1983 operation, when her new doctor discovered them (*206 Cal. App. 3d 1046, 1062-1063)* . From that date, plaintiffs had one year to file a complaint (*206 Cal. App. 3d 1046, 1063)* . The court found it irrelevant that the plaintiffs were generally aware of the patient's injury in 1977 when they filed the first lawsuit; tolling under the "foreign body exception" continues until the patient discovers, or through reasonable diligence would have discovered, the foreign body itself and the role the foreign body played in the patient's suffering (*206 Cal. App. 3d 1046, 1064)* . The court concluded that summary judgment was inappropriate concerning the cause of action for injuries proximately caused by the sponges, since triable issues remained concerning whether the sponges were nontherapeutic in purpose and effect by the time they were removed, and whether, later than one year before she filed the second action, the patient discovered or should have discovered that the sponges existed in her body and were the negligent cause of her injury (*206 Cal. App. 3d 1046, 1065)* .

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Volume 17 Chapters 170-179 PARTNERSHIPS---to---PREMISES LIABILITY
CHAPTER 175 PHYSICIANS AND SURGEONS: MEDICAL MALPRACTICE
PART II. FORMS

17-175 California Points & Authorities § 175.49

§ 175.49 Opposing Contention That Medical Malpractice Action Based on Professional Negligence Is Barred by Statute of Limitations [Code Civ. Proc. § 340.5]--Action for Failure to Obtain Informed Consent

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S ACTION BASED ON MEDICAL NEGLIGENCE IS NOT BARRED, BECAUSE THE ACTION FOR FAILURE TO OBTAIN INFORMED CONSENT WAS FILED WITHIN ONE YEAR OF THE MANIFESTATION OF AN UNDISCLOSED COMPLICATION.

A. Applicable Limitation Period. A medical malpractice action based on professional negligence generally must be commenced within three years from the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered the injury, whichever time period expires first (*Code Civ. Proc. § 340.5*).

B. Cause of Action Accrues When Undisclosed Complication Occurs. An action for failure to obtain informed consent accrues on the occurrence of the undisclosed, not disclosed complication (*Warren v. Schecter (1997) 57 Cal. App. 4th 1189, 1202, 67 Cal. Rptr. 2d 573*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that plaintiff's complaint for medical malpractice is barred by the statute of limitations period of *Code Civ. Proc. § 340.5*. The ground for opposition is that the action for failure to obtain informed was filed within one year of the manifestation of an undisclosed complication and this action accrues on the occurrence of the undisclosed, not the disclosed complication.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel

should discuss the circumstances surrounding the initial disclosure by the physician, show facts demonstrating that plaintiff filed the action within one year of the first manifestation of undisclosed complications, and argue that the action was therefore not barred by the statute of limitations.

[c] Related Pleading and Practice Forms

For discussion, forms, and procedures relating to the statute of limitations in medical malpractice actions, see California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice* (Matthew Bender). For discussion, forms, and procedures relating to statutes of limitation generally, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* (Matthew Bender).

[d] Related Points and Authorities

For memoranda of points and authorities relating to the statutes of limitation generally, see Ch. 143, *Limitation of Actions* .

[3] Discussion of Authorities

[a] Cause of Action Accrues When Undisclosed Complication Occurs

In ***Warren v. Schecter*** *(1997) 57 Cal. App. 4th 1189, 67 Cal. Rptr. 2d 573* , plaintiff, a woman with a stomach ulcer, consulted defendant surgeonabout the surgical removal of the portions of her stomach containing the ulcer. Although one of the well-known significant risks of gastric surgery is decreased calcium absorption, leading to early and severe metabolic bone disease, the surgeon did not discuss these risks with plaintiff prior to surgery. Defendant did advise plaintiff that she might experience bowel obstruction and also informed her of other risks, including "dumping syndrome," nausea and the slight risk of death from the administering of anesthesia. Based on the limited risks disclosed, plaintiff consented to the surgery. Following the surgery, plaintiff developed "dumping syndrome" and "alkaline reflux gastritis." Three years after the initial surgery, plaintiff returned to the surgeon who recommended a second surgery to relieve the pain and discomfort from the first surgery. While the second surgery enhanced the risk of bone disease, defendant again failed to advise plaintiff of this risk. Plaintiff experienced the first manifestation of bone disease nearly eight years after her first surgery and almost five years after the second surgery, when she fractured her back by turning over in bed. Plaintiff was taken to the emergency room where she first learned that severe metabolic bone disease was a common side effect of the surgeries she had undergone. Plaintiff then sued defendant for medical negligence arguing that defendant was liable under an informed consent theory for performing surgery without advising her of the risk of bone disease. The action was bifurcated and the first phase involved the statute of limitations defense. The jury returned a special verdict finding that plaintiff had filed her action in a timely fashion under *Code Civ. Proc. § 340.5*.

The court of appeal affirmed. On appeal, defendant contended that the action was time-barred because it was filed more than three years after plaintiff admitted she suffered serious medical complications as a result of the defendant's alleged negligence. Specifically, the surgeon argued that the cause of action accrued on the occurrence of the disclosed complications, such as dumping syndrome. The court dismissed this argument as meritless, because an action for failure to obtain informed consent lies where an undisclosed inherent complication occurs, not where a disclosed complication occurs. Since the complications which did occur more than three years before plaintiff filed suit, such as the dumping syndrome, were complications of which she had previously been warned, the appearance of those complications did not give rise to a cause of action for failure to obtain informed consent (*57 Cal. App. 4th 1189, 1202)* .

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17-175 California Points & Authorities § 175.50

§ 175.50 Supporting Contention That Res Ipsa Loquitur Doctrine Is Applicable to Medical Malpractice Action--Evidence Supports Inference of Defendant's Negligence as Cause of Injury

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE DOCTRINE OF RES IPSA LOQUITUR MAY BE APPLIED IN A MEDICAL MALPRACTICE ACTION WHEN THE EVIDENCE SUPPORTS A FINDING THAT PLAINTIFF'S INJURY WAS MORE PROBABLY THAN NOT THE RESULT OF DEFENDANT'S NEGLIGENCE.

A. Res Ipsa Loquitur Doctrine. A presumption of negligence affecting the burden of producing evidence arises when plaintiff establishes (1) that the injury that occurred is the kind that does not ordinarily occur in the absence of negligence; (2) that the injury was caused by an agency or instrumentality in the exclusive control of defendant; and (3) that the injury was not due to any voluntary action or contribution on the part of plaintiff (*Ybarra v. Spangard (1944) 25 Cal. 2d 486, 489, 154 P.2d 687* ; *see also* Cal. L. Rev. Comm. Comment to *Evid. Code § 646*).

B. Sufficiency of Evidence to Support Doctrine. The res ipsa loquitur doctrine is applicable in a medical malpractice case when the evidence supports a finding that the injury is the type that would not ordinarily occur in the absence of negligence and that defendant is probably the responsible person (*Kerr v. Bock (1971) 5 Cal. 3d 321, 324, 95 Cal. Rptr. 788, 486 P.2d 684*).

C. Inference Based on Common Knowledge. If the medical procedure at issue is commonplace and simple, a jury may properly rely on its common knowledge in determining whether the accident is the type that would ordinarily not occur in the absence of negligence (*Bardessono v. Michels (1970) 3 Cal. 3d 780, 790, 91 Cal. Rptr. 760, 478 P.2d 480*).

D. Evidence Viewed in Favor of Proponent. In determining whether plaintiff is entitled to application of the res ipsa loquitur doctrine, the evidence must be viewed in the light most favorable to plaintiff (*Kerr v. Bock (1971) 5 Cal. 3d 321, 324, 95 Cal. Rptr. 788, 486 P.2d 684*).

[Optional] **E. Presumption May Be Applied to Surgeon for Violation of Nondelegable Duty.** A surgeon cannot escape application of the res ipsa loquitur doctrine by arguing that a nurse assisting with surgery was responsible for violating a duty that is ultimately the surgeon's responsibility (*Baumgardner v. Yusuf (2006) 144 Cal. App. 4th 1381, 1390-1395, 51 Cal. Rptr. 3d 277*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a plaintiff's contention that the doctrine of res ipsa loquitur should be applied to the case when the evidence supports an inference that the injury more probably than not resulted from defendant's negligence. This argument would arise in a medical malpractice action when plaintiff is unable to offer direct proof that defendant's negligence is the cause of the injuries.

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the res ipsa loquitur doctrine. If appropriate, counsel should also add points and authorities supporting the contention that a new trial should be granted for failure to give a res ipsa loquitur jury instruction. These points and authorities may also be adapted for use in an appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts that demonstrate that the evidence in the case was sufficient to support an inference that plaintiff's injury was more likely than not the result of defendant's negligence. When appropriate, counsel should discuss facts demonstrating the commonplace and relatively simple nature of the medical procedure involved in order to support the contention that the jury could infer negligence from common knowledge.

[c] Related Pleading and Practice Forms

For forms of complaints based on the doctrine of res ipsa loquitur, see California Forms of Pleading and Practice, Ch. 295, *Hospitals* , and Ch. 415, *Physicians: Medical Malpractice* (Matthew Bender).

For a general form of motion for a new trial, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[d] Opposing Points and Authorities

The points and *authorities in § 175.51* may be used in an appropriate case to oppose the contention supported by this memorandum that the res ipsa loquitur doctrine is applicable.

[3] Discussion of Authorities

[a] Res Ipsa Loquitur Doctrine

In ***Ybarra v. Spangard*** *(1944) 25 Cal. 2d 486, 154 P.2d 687* , a medical malpractice action brought for injuries suffered while the patient was unconscious during surgery, the Supreme Court allowed the plaintiff to invoke the doctrine of res ipsa loquitur in order to raise a rebuttable presumption of defendants' negligence upon his establishment of three conditions: (1) that the accident which occurred was of the kind that ordinarily does not occur in the absence of someone's negligence; (2) that it was caused by an agency or instrumentality within the exclusive control of the defendant; and (3) that it was not due to any voluntary action or contribution on the part of the plaintiff (*25 Cal. 2d*

486, 489) .

[b] Sufficiency of Evidence to Support Doctrine

In ***Kerr v. Bock*** *(1971) 5 Cal. 3d 321, 95 Cal. Rptr. 788, 486 P.2d 684* , plaintiff's leg was broken when she lifted it following surgery in which defendant had removed a portion of the bone. Plaintiff requested a res ipsa loquitur instruction that was refused by the trial court, after which the jury held for defendant.

The Supreme Court reversed the verdict, finding that plaintiff had presented sufficient evidence to support an inference of negligence from defendant's failure to instruct her regarding postoperative use of her leg. The application of the res ipsa loquitur doctrine in medical malpractice cases, held the Court, is appropriate when plaintiff has presented sufficient evidence to support a jury's inference that the injury was probably the result of negligence and that defendant is probably the responsible person (*5 Cal. 3d 321, 324)* . In this case, the Court found that common sense alone would support a finding that defendant's failure to instruct plaintiff not to lift her leg horizontally until after the bone had healed constituted negligence (*5 Cal. 3d 321, 324-325)* .

[c] Inference Based on Common Knowledge

In ***Bardessono v. Michels*** *(1970) 3 Cal. 3d 780, 91 Cal. Rptr. 760, 478 P.2d 480* , a malpractice action based on negligently administered injections, the trial court instructed the jury on the doctrine of res ipsa loquitur, telling them that they could rely on both expert testimony and their own common knowledge about the injury to infer negligence by defendant. The jury held for plaintiff, and defendant moved for a new trial, partially on the ground that the res ipsa loquitur instruction was inappropriate.

The Supreme Court affirmed the verdict and approved the trial court's jury instruction. In a lengthy discussion of the res ipsa loquitur doctrine in the medical malpractice context, the Court noted the divergence regarding the requirementthat such an instruction be supported by expert testimony on the issue of negligence. In cases involving complex or uncommon procedures, held the Court, the trier of fact must rely on expert testimony as to whether the physician's negligence caused the injury. However, the jury may infer negligence from the fact of the accident alone based solely on its common knowledge when the medical procedure involved is commonplace or relatively simple. The Court noted numerous injection cases in which courts had held the procedure to be simple, commonplace, and comprehensible to a jury as a matter of common knowledge and personal experience (*3 Cal. 3d 780, 790-791)* . Evidence had been presented in this case that the injections given to plaintiff were a common treatment for his condition, and usually caused no untoward results. Hence, the procedure at issue could be considered a relatively simple matter from which a jury could infer negligence based on common knowledge, and the res ipsa instruction was therefore proper (*3 Cal. 3d 780, 793)* .

[d] Evidence Viewed in Favor of Proponent

The facts and procedural background of ***Kerr v. Bock*** *(1971) 5 Cal. 3d 321, 95 Cal. Rptr. 788, 486 P.2d 684* , are discussed in *§ 175.50[3][b]*. The Supreme Court upheld the use of the res ipsa loquitur doctrine, stating that in determining whether plaintiff was entitled to the benefit of the doctrine, the evidence must be viewed in the light most favorable to her (*5 Cal. 3d 321, 323)* .

[e] Presumption May Be Applied to Surgeon for Violation of Nondelegable Duty

In ***Baumgardner v. Yusuf*** *(2006) 144 Cal. App. 4th 1381, 51 Cal. Rptr. 3d 277* , plaintiff suffered injuries caused by a sponge that was left in her leg during surgery. She sued the hospital and the operating surgeon. The hospital settled and the suit against the surgeon went to trial. The surgeon argued that he was not negligent because the hospital's protocol placed responsibility for counting and monitoring sponges during surgery on the hospital's nursing staff, and the surgeon checked with the nursing staff before finishing the surgery and was told that the sponges had all been removed.

In addition, the surgeon visually checked the patient's body and saw no remaining sponges. The trial court refused to instruct the jury on the res ipsa loquitur doctrine, the nondelegable duty of a surgeon, or the "captain of the ship" doctrine, and the jury returned a verdict for the surgeon. Plaintiff appealed.

The court of appeal reversed. The court held that a surgeon cannot escape application of the res ipsa loquitur doctrine by arguing that a nurse assisting with surgery was responsible for violating a duty that is ultimately the responsibility of the surgeon. The court noted that under established law, a surgeon has a nondelegable duty to ensure that all sponges and other foreign objects are removed from a patient before a surgery is completed (*144 Cal. App. 4th 1381, 1393-1395)* . The court concluded that because the surgeon has ultimate responsibility to control the details of a surgery, application of the res ipsa loquitur doctrine is appropriate in a suit against the surgeon when a sponge or other foreign object is inadvertently left in a patient's body after surgery (*144 Cal. App. 4th 1381, 1390-1392)* . Although the hospital's own protocol may have placed responsibility for monitoring this part of the surgery on the hospital's nursing staff, the surgeon remained responsible for ensuring that no foreign objects were left in the patient, even if the surgeon checked with the nursing staff before completing the surgery (*144 Cal. App. 4th 1381, 1399, 51 Cal. Rptr. 3d 277*).

[4] Additional Authorities

[a] Res Ipsa Loquitur Doctrine

In *Blackwell v. Hurst (1996) 46 Cal. App. 4th 939, 54 Cal. Rptr. 2d 209* , a wrongful death action was brought against a dentist based on alleged negligence in not taking reasonable precautions to prevent the patient from aspirating an object dropped by the dentist into the patient's mouth. The dentist had dropped a temporary crown on the patient's tongue, and she aspirated the crown into her lung. The patient subsequently died of complications from the medical procedures to retrieve the crown. Plaintiff requested jury instructions on res ipsa loquitur. The trial court refused the requested instructions, and the jury returned a defense verdict. The court of appeal noted that evidence of rarity, coupled with some other evidence indicating negligence, may warrant a res ipsa loquitur instruction. Since plaintiff's expert had testified that aspiration of an object is a rarity, and that failure to take precautions is negligence, this case was appropriate for such an instruction. Furthermore, the court found that the use of the res ipsa loquitur doctrine is especially suited to a medical or dental malpractice setting in which the unwitting and often unconscious or semiconscious patient is at an evidentiary disadvantage because of an inability to demonstrate what occurred in the hospital or surgical room setting (*46 Cal. App. 4th 939, 945)* . The court thus reversed the judgment for the defendant because of the failure to provide the requested res ipsa loquitur instruction.

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17-175 California Points & Authorities § 175.51

§ 175.51 Opposing Contention That Res Ipsa Loquitur Doctrine Is Applicable to Action--Plaintiff Failed to Produce Expert Testimony on Issue of Negligence as Probable Cause of Injury

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE DOCTRINE OF RES IPSA LOQUITUR MAY NOT BE APPLIED IN A MEDICAL MALPRACTICE ACTION BASED ON NEGLIGENCE WHENPLAINTIFF FAILS TO PRODUCE EXPERT TESTIMONY ON THE ISSUE OF DEFENDANT'S NEGLIGENCE AS THE PROBABLE CAUSE OF THE INJURY ALLEGED.

Requirement of Expert Testimony. In medical malpractice cases, when the circumstances are not a matter of common lay knowledge, the plaintiff must support application of the res ipsa loquitur doctrine with expert testimony demonstrating that the alleged injury does not ordinarily occur in the absence of negligence in rendering the medical services involved in the particular case (*Contreras v. St. Luke's Hosp. (1978) 78 Cal. App. 3d 919, 930-931, 144 Cal. Rptr. 647*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to a plaintiff's contention that the doctrine of res ipsa loquitur be applied to the case. The ground of opposition set forth is plaintiff's failure to produce the required expert testimony on the issue of whether the alleged injury is the type that does not normally occur in the absence of medical negligence.

This form of points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the inapplicability of the res ipsa loquitur doctrine. In addition, if appropriate, counsel should add pointsand authorities supporting the contention that a new trial should be granted for giving a res ipsa loquitur instruction not warranted by the evidence. These points and authorities may also be adapted for use in an appellate brief.

In an appropriate case, this memorandum may be submitted in opposition to the contention that the doctrine of res ipsa loquitur should be applied to the case supported by the points and *authorities in § 175.50*.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should demonstrate that plaintiff has failed to produce expert testimony regarding whether the injury alleged in the action is the type that does not ordinarily occur in the absence of medical negligence. Counsel should support this contention with facts demonstrating that the injury is not within lay understanding and that expert testimony is required in order to analyze the probability of negligence as a cause.

[c] Relating Pleading and Practice Forms

For discussion and forms involving the application of the res ipsa loquitur doctrine in medical malpractice cases, see California Forms of Pleading and Practice, Ch. 295, *Hospitals* , and Ch. 415, *Physicians: Medical Malpractice* (Matthew Bender).

For a general form of notice of intention to move for a new trial, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[3] Discussion of Authorities

[a] Requirement of Expert Testimony

In ***Contreras v. St. Luke's Hosp.*** *(1978) 78 Cal. App. 3d 919, 144 Cal. Rptr. 647* , plaintiff brought a malpractice action based on allegedly negligent medical treatment resulting in a knee infection following surgery. At trial, plaintiff presented no expert testimony other than that of an intern who had not been present during the operation and who was not questioned regarding the possibility of negligence. The trial court granted defendants' motions for nonsuit, and plaintiff appealed.

Plaintiff contended that the evidence presented to the trial court was sufficient to support a judgment in his favor under the doctrine of res ipsa loquitur. The court of appeal rejected this contention and affirmed the judgment on the ground that plaintiff had presented no expert testimony regarding defendants' negligence. The use of the res ipsa loquitur doctrine in medical malpractice cases, held the court, requires that the likelihood of negligence be established by expert evidence when the matter is not within the common knowledge of laymen (*78 Cal. App. 3d 919, 930)* . Plaintiff had produced no expert testimony to the effect that a knee infection after his type of surgery did not ordinarily occur in the absence of negligence, and the medical issue involved was not within common knowledge. The court stated that in the absence of such testimony, it could not properly find for the existence of such a probability and thus could not apply the doctrine of res ipsa loquitur (*78 Cal. App. 3d 919, 931)* .

[4] Additional Authorities

[a] Requirement of Expert Testimony

In *Curtis v. Santa Clara Valley Med. Ctr. (2003) 110 Cal. App. 4th 796, 2 Cal. Rptr. 3d 73* , the plaintiff underwent spinal surgery requiring him to lie on his stomach for over six hours, with his head supported on a foam pillow that had cutouts for his eyes and nose. Following surgery, the plaintiff's shoulders, neck, and face became severely swollen, a complication often caused by a prolonged period in the prone position used in the surgery. Because of these complications, the plaintiff sustained blindness in one eye and significant visual impairment in the other eye. The plaintiff sued the medical center and the affiliated county for malpractice, intending to rely on the res ipsa loquitur

doctrine to establish negligence without the use of expert medical testimony. The trial court granted nonsuit for the defendants, and the court of appeal affirmed. The court held that expert testimony was required to establish that the defendants were negligent during the spinal surgery. Although a lay person might think that negligence could be presumed, given the type of complication that developed from the spinal surgery, the court noted that the plaintiff's resulting blindness is a known, albeit rare, complication that may occur from such surgery, even in the absence of negligence. As such, negligence could not be presumed merely from the fact of blindness, and the plaintiff was required to offer expert testimony showing that the defendants breached the applicable standard of care during surgery. Because the plaintiff proffered no such evidence, nonsuit in favor of the defendants was appropriate (*110 Cal. App. 4th 796, 802-803)* .

In *Elcome v. Chin (2003) 110 Cal. App. 4th 310, 1 Cal. Rptr. 3d 631* , the plaintiff, who had undergone pelvic surgery, awoke from the anesthesia and found herself suffering from pain in her right arm that she had not experienced before the surgery. She sued the surgeon, the assisting surgeon, and the hospital, arguing that under the doctrine of res ipsa loquitur, they were liable for negligence even though she could not prove exactly what caused her post-surgery pain. The assisting surgeon and the hospital were granted summary judgment after each produced expert declarations supporting their arguments that they were not negligent inperforming their duties. The court of appeal affirmed. The court held that the plaintiff had failed to raise a triable issue of fact as to whether those defendants were negligent or had caused the injuries. The defendants' declarations shifted the burden to the plaintiff to provide either evidence of negligence and causation or evidence of the three elements of the res ipsa loquitur doctrine. The plaintiff made no attempt to provide evidence of negligence and causation and failed to provide sufficient evidence to proceed under a theory of res ipsa loquitur. The plaintiff offered no expert witness declarations on the cause of her injury, but merely her own lay testimony that she did not have the pain before surgery. She offered one expert declaration, although the expert did not offer an opinion on the cause of the plaintiff's pain, but merely provided an opinion that the pain about which the plaintiff complained would not normally follow pelvic surgery. The court noted that this declaration did not rule out other potential causes of the plaintiff's pain that could be unrelated to the surgery and that could be just as probable a cause as negligence. In the absence of any expert evidence on the cause of her pain, the plaintiff failed to carry her burden to prove both that the injury was of a kind that normally would not occur in the absence of negligence and that the injury was caused by an instrumentality in the exclusive control of the defendants. Therefore, summary judgment was proper (*110 Cal. App. 4th 310, 318-321)* .

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17-175 California Points & Authorities § 175.52

§ 175.52 Opposing Contention That Res Ipsa Loquitur Doctrine Is Applicable to Action--Inference of Defendant's Negligence Rebutted--Absence of Defendant's Negligence or Proximate Cause Between Negligence and Injury

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE RES ISPA LOQUITUR PRESUMPTION HAS BEEN REBUTTED IN THIS CASE BECAUSE DEFENDANT HAS PRODUCED EVIDENCE SUFFICIENT TO SUPPORT A FINDING THAT _____ [HE/SHE WAS NOT NEGLIGENT IN TREATING PLAINTIFF *and/or* DEFENDANT'S NEGLIGENCE WAS NOT THE PROXIMATE CAUSE OF PLAINTIFF'S INJURY].

Evidence Sufficient to Support Finding of Absence of Negligence or Proximate Cause. In medical malpractice cases, the defendant need only produce evidence sufficient to support a finding that he or she was not negligent or that any negligence was not a proximate cause of the injury in order to negate consideration of the res ipsa loquitur presumption (*Frantz v. San Luis Med. Clinic (1978) 81 Cal. App. 3d 34, 42-43, 146 Cal. Rptr. 146* ; *see also Evid. Code § 646(c)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a plaintiff's contention that the doctrine of res ipsa loquitur be applied to the case. The ground of opposition is based on the production of evidence by defendant sufficient to support a finding either that defendant has not been negligent in treating plaintiff or that any negligence by defendant is not a proximate cause of plaintiff's injuries.

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the inapplicability of the res ipsa loquitur doctrine. In addition, if appropriate, counsel should add points and authorities supporting the contention that a new trial should be

granted for giving a res ipsa loquitur instruction not warranted by the evidence. These points and authorities may also be adapted for use in an appellate brief.

In an appropriate case, this memorandum may be submitted in opposition to the contention that the doctrine of res ipsa loquitur should be applied to the case supported by the points and *authorities in § 175.50*.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should demonstrate that defendant's evidence supports a finding either that defendant was not negligent in treating plaintiff or that any negligence by defendant was not a proximate cause of plaintiff's injuries.

[c] Related Pleading and Practice Forms

For discussion and forms involving the application of the res ipsa loquitur doctrine in medical malpractice cases, see California Forms of Pleading and Practice, Ch. 295, *Hospitals* , and Ch. 415, *Physicians: Medical Malpractice* (Matthew Bender).

For a general form of notice of intention to move for a new trial, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[3] Discussion of Authorities

[a] Evidence Sufficient to Support Finding of Absence of Negligence or Proximate Cause

In ***Frantz v. San Luis Med. Clinic*** *(1978) 81 Cal. App. 3d 34, 146 Cal. Rptr. 146* , a medical malpractice action based on a negligently administered injection, res ipsa loquitur instructions were given to the jury resulting in a verdict against defendants. The court of appeal reversed the verdict on the ground that the res ipsa loquitur instructions were erroneous and misleading. On plaintiff's request, a modified version of the instruction was given that erroneously imposed on defendants the burden of rebutting the inference of negligence by a preponderance of the evidence. As the court stated, the proper operation of the res ipsa loquitur doctrine is to create a presumption affecting the burden of producing evidence rather than the burden of proof (*81 Cal. App. 3d 34, 42)* . Under the proper burden, defendant need only produce evidence sufficient to sustain a finding that he or she was not negligent or that the negligence was not a proximate cause of the injury in order to rebut and remove the presumption of negligence (*81 Cal. App. 3d 34, 43)* .

In this case, the court found that defendants had produced expert testimony regarding other possible causes of plaintiff's injury, and that the evidence produced by plaintiff did not overwhelm such testimony. Thus, the erroneous instruction was held to have had the probable effect of misleading the jury and therefore constituted reversible error (*81 Cal. App. 3d 34, 47)* .

[4] Additional Authorities

[a] Evidence Sufficient to Support Finding of Absence of Negligence or Proximate Cause

Elcome v. Chin (2003) 110 Cal. App. 4th 310, 1 Cal. Rptr. 3d 631 , is discussed in *§ 175.51[3][a]*.

California Points & Authorities

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Volume 17 Chapters 170-179 PARTNERSHIPS---to---PREMISES LIABILITY
CHAPTER 175 PHYSICIANS AND SURGEONS: MEDICAL MALPRACTICE
PART II. FORMS

17-175 California Points & Authorities § 175.53

§ 175.53 Supporting Contention That Defendant Is Not Liable for Breach of Medical Services Contract--Lack of Express Promise of Particular Result

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS NOT LIABLE FOR BREACH OF CONTRACT IN A MEDICAL MALPRACTICE ACTION IN THE ABSENCE OF AN EXPRESS CONTRACT IN WHICH HE/SHE PROMISED A PARTICULAR RESULT AND ON WHICH THE PATIENT RELIED IN GIVING CONSENT TO TREATMENT.

Express Promise of Particular Result. To recover for breach of contract in a medical malpractice case, there must be proof of an express contract by which the physician clearly promises a particular result and the patient consents to treatment in reliance on that promise (*McKinney v. Nash (1981) 120 Cal. App. 3d 428, 442, 174 Cal. Rptr. 642*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of defendant's contention that he or she is not liable for breach of contract in rendering medical treatment. The ground of support is based on the absence of an express contract by which the defendant promised a particular result and on which the plaintiff relied in consenting to treatment.

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the absence of the express contract. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts that demonstrate the absence of an express contract by which the

defendant promised a particular result of treatment and the lack of the patient's reliance on any such promise in consenting to treatment. For example, the absence of any comment by the physician other than a generalized reassurance that the treatment will have a good result counters a finding of the requisite specific promise [*McKinney v. Nash (1981) 120 Cal. App. 3d 428, 442, 174 Cal. Rptr. 642]* . Similarly, a physician's statement that a treatment usually has a certain result does not constitute an express promise as to that result [*Depenbrok v. Kaiser Foundation Health Plan, Inc. (1978) 79 Cal. App. 3d 167, 171, 144 Cal. Rptr. 724]* .

[c] Related Points and Authorities

For points and authorities relating to breach of contract actions generally, see Ch. 50, *Contracts* .

[3] Discussion of Authorities

[a] Express Promise of Particular Result

In ***McKinney v. Nash*** *(1981) 120 Cal. App. 3d 428, 174 Cal. Rptr. 642* [also discussed in *§ 175.31[3][a]*], plaintiff sought damages from two physicians for negligent performance of hernia surgery that resulted in impotence and testicular atrophy. One of the counts alleged in the action was the physicians' breach of contract in performing the surgery. The trial court ordered a directed verdict in favor of defendants, and plaintiff appealed.

The court of appeal reversed the judgment as to one defendant on the negligence count, but rejected plaintiff's claim of breach of contract. The court stated the rule that in a medical malpractice action, there can be no recovery based on breach of contract without proof of an express contract by which the physician clearly promises a particular result and the patient consents to treatment in reliance on that promise (*120 Cal. App. 3d 428, 442)* . In the present case, the surgeon had merely commented to plaintiff that the operation would be simple and without difficulty. Although such comments may have given rise to a negligence action for the physician's failure to inform of material risks, it did not support a breach of contract action. A generalized statement that the result of treatment will be good, held the court, does not constitute the requisite promise of a particular result (*120 Cal. App. 3d 428, 442)* .

[4] Additional Authorities

[a] Express Promise of Particular Result

In *Jamison v. Lindsay (1980) 108 Cal. App. 3d 223, 166 Cal. Rptr. 443* , plaintiff appealed from a verdict for defendants in a malpractice action based on negligence and breach of contract. The court of appeal affirmed the judgments on both theories, finding that the defendants' statements to plaintiff that her tumor was benign did not constitute an express promise as to that fact as required to support a breach of contract action. Furthermore, the court found, the statements had been made after treatment, refuting the requisite factor of reliance on the physician's promise in consenting to treatment (*108 Cal. App. 3d 223, 234)* .

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17-175 California Points & Authorities § 175.54

§ 175.54 Supporting Contention That In Informed Consent Cases Plaintiff Is Entitled to Recover Damages for Undisclosed and Disclosed Complications

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

IN A MEDICAL MALPRACTICE ACTION BASED ON THE PHYSICIAN'S FAILURE TO DISCLOSE THE MATERIAL RISKS OF TREATMENT, PLAINTIFF IS ENTITLED TO RECOVER DAMAGES FOR THE UNDISCLOSED AS WELL AS DISCLOSED COMPLICATIONS.

A. Measure of Damages. For the breach of an obligation not arising from contract, the measure of damages is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not (*Civ. Code § 3333*).

B. Damages for Disclosed as Well as Undisclosed Complications Recoverable. In a medical malpractice action based on the physician's failure to disclose the material risks of treatment, plaintiff is entitled to recover not only for the undisclosed complications but also for the disclosed complications (*Warren v. Schecter (1997) 57 Cal. App. 4th 1189, 1204, 67 Cal. Rptr. 2d 573*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that in a medical malpractice action based on the physician's failure to disclose the material risks of treatment, plaintiff is entitled to recover not only for the undisclosed complications but also for the disclosed complications.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel

should discuss the physician's failure to disclose the material risk of treatment, show facts demonstrating the manifestation of disclosed and undisclosed complications, and argue that since both complications were the proximate result of defendant's negligence, both are recoverable in damages.

[c] Related Pleading and Practice Forms

For discussion, forms, and procedures relating to damages in medical malpractice actions, see California Forms of Pleading and Practice, Ch.415, *Physicians: Medical Malpractice* (Matthew Bender). For discussion, forms, and procedures relating to tort damages generally, see California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender).

[d] Related Points and Authorities

For memoranda of points and authorities relating to tort damages generally, see Ch. 64, *Damages: Tort* .

[3] Discussion of Authorities

[a] Damages for Disclosed as Well as Undisclosed Complications Recoverable

In ***Warren v. Schecter*** *(1997) 57 Cal. App. 4th 1189, 67 Cal. Rptr. 2d 573* , a woman with a stomach ulcer consulted defendant surgeon about the surgical removal of the portions of her stomach containing the ulcer. Although one of the well-known significant risks of gastric surgery is decreased calcium absorption, leading to early and severe metabolic bone disease, the surgeon did not discuss these risks with plaintiff prior to surgery. Defendant did advise plaintiff that she might experience bowel obstruction and also informed her of other risks, including "dumping syndrome," nausea and the slight risk of death from the administering of anesthesia. Based on the limited risks disclosed, plaintiff consented to the surgery. Following the surgery, plaintiff developed "dumping syndrome" and "alkaline reflux gastritis." Three years after the initial surgery, plaintiff returned to the surgeon who recommended a second surgery to relieve the pain and discomfort from the first surgery. While the second surgery enhanced the risk of bone disease, defendant again failed to advise plaintiff of this risk. Plaintiff experienced the first manifestation of bone disease nearly eight years after her first surgery and almost five years after the second surgery, when she fractured her back by turning over in bed. Plaintiff was taken to the emergency room where she first learned that severe metabolic bone disease was a common side effect of the surgeries she had undergone. Plaintiff then sued defendant for medical negligence arguing that defendant was liable under an informed consent theory for performing surgery without advising her of the risk of bone disease. The action was bifurcated; the first phase involved the statute of limitations defense and the second concerned the issues of liability and damages. The jury found for plaintiff and apportioned the damages 65 percent to metabolic bone disease, and 35 percent to other complications. Defendant appealed.

The court of appeal affirmed, rejecting defendant's contention that the 35 percent of damages the jury attributed to post-surgery complications other than bone disease should be stricken from the judgment. The surgeon reasoned that because plaintiff was informed of, and consented to, the risk she would experience these complications, she should not collect damages for them. The court found this argument unpersuasive, citing statutory and case authority to the contrary. *Civ. Code § 3333*, for example, provides that for the breach of an obligation not arising from contract, the measure of damages is the amount which will compensate for all detriment proximately caused thereby, whether it could have been anticipated or not. Here, the evidence established that plaintiff would not have consented to either operation if the risk of bone disease had been disclosed. Accordingly, plaintiff was entitled to recover not only for the undisclosed complications but also for the disclosed complications, because she would not have consented to any surgery had the true risk been disclosed, and therefore would not have suffered those complications either (*57 Cal. App. 4th 1189, 1203-1204)* .

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§ 175.55 Supporting Contention That Punitive Damages Claim Restricted in Action Against Health Care Provider for Professional Negligence [Code Civ. Proc. § 425.13]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PUNITIVE DAMAGES MAY NOT BE REQUESTED IN THE ORIGINAL COMPLAINT IN AN ACTION BASED ON A HEALTH CARE PROVIDER'S PROFESSIONAL NEGLIGENCE BUT, INSTEAD, MAY ONLY BE REQUESTED AFTER A COURT ORDER ALLOWS AN AMENDED COMPLAINT THAT INCLUDES A CLAIM FOR PUNITIVE DAMAGES.

A. Order Permitting Amended Pleading as Prerequisite to Punitive Damages Claim. In an action for damages arising out of the professional negligence of a health care provider, no claim for punitive damages may be included in a complaint or other pleading until the court enters an order allowing an amended pleading that includes a claim for punitive damages to be filed (*Code Civ. Proc. § 425.13(a)*).

B. Statutory Requirements Apply If Injury Caused by Conduct Directly Related to Rendition of Professional Services. Whenever an injured party seeks punitive damages for an injury that is directly related to the professional services provided by a health care provider acting in its capacity as such, then the action is one "arisingout of the professional negligence of a health care provider," and the party must comply with *Code of Civil Procedure Section 425.13* (*Central Pathology Serv. Med. Clinic, Inc. v. Superior Court (1992) 3 Cal. 4th 181, 191-192, 10 Cal. Rptr. 2d 208, 832 P.2d 924*).

[*Optional*] **C. Statutory Requirements Applicable to Action Based on Intentional Tort Theory.** An action against a health care provider based on an intentional tort theory is subject to *Code of Civil Procedure Section 425.13* if the nature and cause of the plaintiff's injury is directly related to the manner in which professional services were provided (*Central Pathology Serv. Med. Clinic, Inc. v. Superior Court (1992) 3 Cal. 4th 181, 192, 10 Cal. Rptr. 2d 208, 832 P.2d 924*).

[*Optional*] **D. Standard of Proof for Amending Complaint to Include Punitive Damages Claim.** A plaintiff may not amend the complaint to include a punitive damages claim unless he or she states a legally sufficient claim for punitive damages and provides evidence that reveals the actual existence of a triable claim (*College Hosp., Inc. v. Superior Court (1994) 8 Cal. 4th 704, 719, 34 Cal. Rptr. 2d 898, 882 P.2d 894*).

[*Optional*] **E. Statutory Requirements Applicable to Actions for Sexual Battery Occurring in Course of Gynecological Exams.** An allegation of sexual battery in the course of rendering gynecological services is directly related to the manner in which the gynecological services were rendered, thus *Code of Civil Procedure Section 425.13* requires a motion for leave to amend supported by evidence before a claim for punitive damages may be pleaded (*Cooper v. Superior Court (1994) 56 Cal. App. 4th 744, 751-752, 65 Cal. Rptr. 2d 674*).

[*Optional*] **F. Statutory Requirements Applicable to Wrongful Life Action Brought Against Sperm Bank and Screening Physicians.** Plaintiffs asserting claims against a sperm bank and the physicians who performed genetic screening for the bank, based on allegations that improper screening resulted in the resulting child being born with birth defects, must comply with *Code of Civil Procedure Section 425.13* prior to asserting a claim for punitive damages against those parties (*Johnson v. Superior Court (2002) 101 Cal. App. 4th 869, 885-886, 124 Cal. Rptr. 2d 650*).

[*Optional*] **G. Statutory Requirements Applicable to Claims Made Against Medical Group Providing Utilization Review Services to Health Care Service Plan.** *Code Civil Procedure Section 425.13* applies to claims made against a medical group composed of licensed physicians who provide health facility outpatient services under contract with a health care service plan, even if the allegedly actionable conduct occurs while the medical group is reviewing the medical necessity of a request for health care services in its capacity as a provider of utilization review services (*Palmer v. Superior Court (2002) 103 Cal. App. 4th 953, 966-967, 972, 127 Cal. Rptr. 2d 252*).

[*Optional*] **H. Statutory Requirements Applicable to Action Against Tissue Bank.** The requirements of *Code of Civil Procedure Section 425.13* are applicable to an action against a tissue bank based on the bank's provision of professional services (*Cryolife, Inc. v. Superior Court (2003) 110 Cal. App. 4th 1145, 1159-1160, 2 Cal. Rptr. 3d 396*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a plaintiff must follow the requirements of *Code Civ. Proc. § 425.13* for seeking punitive damages in an action against a health care provider for professional negligence.

Counsel should insert argument in this form showing the relationship between the facts of the particular case and the points of law stated.

[3] Discussion of Authorities

[a] Statutory Requirements Apply If Injury Caused by Conduct Directly Related to Rendition of Professional Services

In ***Central Pathology Serv. Med. Clinic, Inc. v. Superior Court*** *(1992) 3 Cal. 4th 181, 10 Cal. Rptr. 2d 208, 832 P.2d 924* , plaintiff patient sued a physician and a pathology clinic asserting a cause of action for medical negligence. Approximately two months before the scheduled trial date, plaintiff moved for leave to file an amended complaint seeking to add causes of action for fraud and intentional infliction of emotional distress. The new causes of action alleged that the physician performed a pap smear on plaintiff, which was sent to the pathology clinic for analysis. It was further alleged that despite the presence of abnormal cells, pathology clinic and physician failed to notify plaintiff that

she was developing cancer; that the clinic, after being ordered to retest all persons tested in the past five years, intentionally failed to notify plaintiff that she should be retested; and that the physician denied using the clinic in an effort to cover up her ownmedical negligence. The cause of action for intentional infliction of emotional distress alleged that defendants acted in an outrageous manner with the intent to cause severe emotional distress. Plaintiff sought punitive damages under the new causes of action. The clinic opposed the motion to amend, asserting that the proffered amendment failed to meet the requirements of *Code Civ. Proc. § 425.13(a)*, because the amendment was untimely and because plaintiff would be unable to show there was a substantial probability of prevailing on the claim for punitive damages. The physician likewise argued that the motion was untimely. In response, plaintiff contended that *Code Civ. Proc. § 425.13(a)* did not apply to the proposed amendments. The trial court granted plaintiff's motion to amend, concluding that the statute, though applicable to professional negligence causes of action, did not apply to actions for fraud and intentional infliction of emotional distress. Defendants petitioned for a writ of mandate, which was denied by the Court of Appeal. The Supreme Court granted review, issuing an alternative writ of mandate.

The Supreme Court discharged the writ of mandate, concluding that the court of appeal erred in summarily denying defendants' petition for a writ of mandate (*3 Cal. 4th 181, 193)* . The Court held that whenever an injured party seeks punitive damages for an injury that is directly related to the professional services provided by a health care provider acting in its capacity as such, then the action is one "arising out of the professional negligence of a health care provider," and the party must comply with *Code Civ. Proc. § 425.13(a)* (*3 Cal. 4th 181, 191-192)* . In this case, plaintiff's cause of action for fraud was directly related to the manner in which defendants provided professional services. The claim emanated from the manner in which defendants performed and communicated the results of medical tests, a matter that is an ordinary and usual part of medical professional services; therefore, *Code Civ. Proc. § 425.13(a)* governed the claim. Plaintiff's cause of action for intentional infliction of emotional distress was predicated on the same alleged acts as the fraud claim; therefore, it too was directly related to defendant's performance of professional services and was governed by *Code Civ. Proc. § 425.13(a)* (*3 Cal. 4th 181, 192-193)* .

NOTE:

The *Central Pathology* ruling was subsequently applied to an action alleging that a physician committed fraud by conspiring with an employer to deprive employees of workers' compensation benefits by providing substandard medical treatment and advice. In this later case, the court reasoned that the alleged fraud related directly to the manner in which the physician rendered professional services [*Davis v. Superior Court (1994) 27 Cal. App. 4th 623, 629, 33 Cal. Rptr. 2d 6* ; *see also § 175.55*[3]]d]].

[b] Statutory Requirements Applicable to Action Based on Intentional Tort Theory

The facts and procedural background of ***Central Pathology Serv. Med. Clinic, Inc. v. Superior Court*** *(1992) 3 Cal. 4th 181, 10 Cal. Rptr. 2d 208, 832 P.2d 924* , are discussed in *§ 175.55[3][a]*. The California Supreme Court noted that identifying a cause of action as an "intentional tort" as opposed to "negligence" does not itself remove the claim from the requirements of *Code Civ. Proc. § 425.13(a)*. The allegations that identify the nature and cause of plaintiff's injury must be examined to determine whether each is directly related to the manner in which professional services were provided. Furthermore, *Code Civ. Proc. § 425.13(a)* applies regardless of whether the complaint purports to state a single cause of action for an intentional tort or also states a cause of action for professional negligence (*3 Cal. 4th 181, 192)* .

[c] Standard of Proof for Amending Complaint to Include Punitive Damages Claim

In ***College Hosp., Inc. v. Superior Court*** *(1994) 8 Cal. 4th 704, 719, 34 Cal. Rptr. 2d 898, 882 P.2d 894* , the California Supreme Court articulated the standard of proof for a plaintiff to amend a complaint to state a punitive damages claim under *Code Civ. Proc. § 425.13(a)*. According to the Court, the plaintiff must state facts in the proposed amended complaint that are legally sufficient to support a punitive damages claim and must produce evidence in the form of supporting affidavits that reveals the actual existence of a triable claim. The Court further stated that

substantiation of a proposed punitive damages claim occurs only when the factual recitals are made under penalty of perjury and set forth competent admissible evidence within the personal knowledge of the declarant. The Court noted that its approach was largely consistent with the "prima facie" approach formulated by the courts of appeal in *Hung v. Wang (1992) 8 Cal. App. 4th 908, 931, 11 Cal. Rptr. 2d 113* , and other cases that have followed its analysis (*8 Cal. 4th 704, 719-720 n.6*).

[d] Statutory Requirements Applicable to Actions for Sexual Battery Occurring in Course of Gynecological Exams

In ***Cooper v. Superior Court*** *(1994) 56 Cal. App. 4th 744, 65 Cal. Rptr. 2d 674* , plaintiff sued a doctor alleging that the doctor committed a sexual battery by touching and manipulating plaintiff's genitalia, in the course of rendering gynecological services. Plaintiff did not make a motion pursuant to *Code Civ. Proc. § 425.13*, instead she simply filed her punitive damage claim. The doctor moved to strike the punitive damage allegations for failure to comply with *Code Civ. Proc. § 425.13*. The trial court deniedthe motion, ruling that *Code Civ. Proc. § 425.13* did not apply to the type of allegations advanced by plaintiff. The doctor then filed a writ petition.

The question on appeal was whether *Code Civ. Proc. § 425.13* applied to plaintiff's allegation of sexual battery occurring in the course of a gynecological exam. The court of appeal first determined that under the rule articulated in *Central Pathology Serv. Med. Clinic, Inc. v. Superior Court (1992) 3 Cal. 4th 181, 10 Cal. Rptr. 2d 208, 832 P.2d 924* [*see § 175.55[3][a]*], plaintiff's allegations were indisputably "directly related" to the rendition of health care, thus making the motion requirement of *Code Civ. Proc. § 425.13* applicable. However the court's inquiry did not end there. The court next reconciled this holding with dictum appearing in *Central Pathology*. In discussing the scope of *Code Civ. Proc. § 425.13* the Supreme Court in *Central Pathology* stated that identifying a cause of action as an intentional tort as opposed to negligence did not itself remove the claim from the requirements of *Code Civ. Proc. § 425.13(a)*. It went on to say that the allegations that identify the nature and cause of plaintiff's injury must be examined to determine whether each was directly related to the manner in which professional services were provided. Then the *Central Pathology* Court offered the following example: a cause of action against a health care provider for sexual battery would not, in most instances, fall within the statute because the defendant's conduct would not be directly related to the manner in which professional services were rendered (*3 Cal. 4th 181, 192)* .

Based on this dictum plaintiffs have argued and some courts have agreed that no *Code Civ. Proc. § 425.13* is ever needed when plaintiff pleads a claim of sexual battery. The court of appeal ruled that this was not the meaning of the passage in *Central Pathology*. The court agreed that "in most instances" a claim of sexual battery would not be related to the manner in which professional services were rendered, as most types of health care services did not involve genitalia. Thus, for example if a podiatrist, ophthalmologist or dentist touches or manipulates a patient's genitalia, there would usually be no arguable connection between the conduct and the rendition of legitimate health care. By contrast, a doctor rendering gynecological care, cannot render the full panoply of gynecological services without touching, probing or otherwise manipulating a woman's genitalia. Therefore, according to the court, when a gynecologist is accused of committing a sexual batter in the course of rendering gynecological services, that accusation is necessarily directly related to the manner in which the gynecological services were rendered (*56 Cal. App. 4th 744, 751)* . The court reasoned that a different construction of *Code Civ. Proc. § 425.13* would de facto constitute a blanket exclusion of gynecological services from the protections of that statute, and would revert the field of gynecology back to the posture all branches of medicine were in before the Civil Liability Reform Act of 1987 was passed, plaintiffs would have carte blanche discretion to plead punitive damages against doctors rendering gynecological services whenever they wished, without prior judicial review, simply by characterizing the doctor's inevitable contact with the woman's genitalia as "sexual battery." The court found no indication of a legislative intent that gynecological medical services be singled out for exclusion from the protections of *Code Civ. Proc. § 425.13*. Concluding that when improprieties of the sort claimed by plaintiff allegedly occur in the course of gynecological services, *Code Civ. Proc. § 425.13* requires a motion for leave to amend supported by evidence before a claim for punitive damages may be pleaded, the court issued a writ of mandate directing that the punitive damage claim be stricken, with the proviso that the order was without prejudice to a

properly noticed and supported motion pursuant to *Code Civ. Proc. § 425.13* (*56 Cal. App. 4th 744, 747)* .

[e] Statutory Requirements Applicable to Wrongful Life Action Brought Against Sperm Bank and Screening Physicians

In ***Johnson v. Superior Court*** *(2002) 101 Cal. App. 4th 869, 124 Cal. Rptr. 2d 650* , the plaintiffs were a couple and their minor daughter who brought suit against a sperm bank and two physicians who performed genetic screening for the bank. The plaintiffs alleged that the physicians' failure to properly screen the sperm used in their artificial insemination caused their daughter to be born with a serious kidney disease, and that evidence of the donor's family medical history known to the physicians when the sperm donor was screened should have led the physicians to investigate whether the donor carried this genetic trait. They also alleged that if they had been provided with this information, they would have selected a different donor. The trial court ruled that the defendants were health care providers and that the plaintiffs must therefore comply with the procedural requirements of Code Civ. Proc. § 245.13 prior to asserting a claim for punitive damages. The plaintiffs filed a petition for writ of mandate, arguing that the sperm bank was not a health care provider for purposes of the statute and that neither the sperm bank nor the physicians were acting as health care providers at the time they performed the services described in the complaint.

The court of appeal denied the petition. The court reviewed the history and purposes of Code Civ. Proc. § 245.13 and noted that a health care provider includes "any clinic, health dispensary, or health facility" licensed pursuant to Division 2 of the Health and Safety Code. The court also concluded that because the same language is used in MICRA, the legislature intended that the definition of "health care provider" would be the same under both MICRA and Code Civ. Proc. § 245.13 (*101 Cal. App. 4th 869, 877-879)* . The court then reviewed existing case law holding that a blood bank was a "health dispensary" under MICRA because a blood bankdispenses a product and provides a service inextricably identified with human health. Analogizing that rationale to this case, the court concluded that a sperm bank also met the definition of a "health dispensary"--that is, because healthy sperm is vital to the birth of a healthy child, a sperm bank dispenses a product and provides a service that is inextricably identified with human health (*101 Cal. App. 4th 869, 880-883)* . The court also concluded that the physicians who performed genetic screening for the sperm bank were providing professional services while doing so, because the process requires the physician to apply all gathered information to the physician's medical knowledge of genetics and disease states and thereby determine whether a potential donor poses a risk to offspring. Therefore, despite the absence of an actual doctor-patient relationship between the screening physicians and the couple seeking artificial insemination, a screening physician is acting in the capacity of a health care provider when performing genetic screening. Therefore, the plaintiffs were required to comply with Code Civ. Proc. § 245.13 prior to adding a claim for punitive damages against the defendants (*101 Cal. App. 4th 869, 883-886)* .

[f] Statutory Requirements Applicable to Claims Made Against Medical Group Providing Utilization Review Services to Health Care Service Plan

In ***Palmer v. Superior Court*** *(2002) 103 Cal. App. 4th 953, 127 Cal. Rptr. 2d 252* , the plaintiff suffered from a bacterial disease that caused him to lose both legs below the knees, necessitating the use of leg prosthetics to walk. Several years later, when his prosthetist determined that he needed new prosthetics, a request for newly-available, ultra-light prosthetics was submitted to the plaintiff's primary care provider, a medical group composed of licensed physicians who provided medical services to the members of a health care service plan, including the plaintiff. In addition to providing health care for plan members, the medical group also provided utilization review services for the health plan, including reviewing the medical necessity of requested services. Acting in this capacity, the medical group determined that the plaintiff's requested prosthetics were not a medical necessity, and the plaintiff pursued an appeal of this decision through the review procedures provided by the health care service plan. Subsequently, one of the group's physicians contacted the plaintiff and told him that he was being pressured by the plan and the medical group to deny the medical necessity of the new prosthetics because their cost would exceed the amount that the group received from the service plan for treating the plaintiff. This physician also told the plaintiff that if the plaintiff did not dismiss his

appeal, the physician was under instructions to send a letter to the plaintiff's disability insurer questioning whether the plaintiff was actually disabled. The health care service plan upheld the denial of the plaintiff's requested prosthetics, but authorized revisions to his current prosthetics. After exhausting internal review procedures, the plaintiff filed suit against the health care plan, the medical group, and the individual physician that had contacted the plaintiff, although the claims against the individual physician were subsequently dismissed. The plaintiff's claims against the medical group, which included intentional and negligent infliction of emotional distress, were based generally on his claim that the medical group intentionally found that the prosthetics were not medically necessary although they actually were, and on the associated threat to send a letter to the plaintiff's disability insurer. The medical group filed a motion to strike allegations for punitive damages made against it on the grounds that the plaintiff had failed to obtain an order allowing an amended pleading under *Code Civ. Proc. § 425.13(a)*. The trial court granted the motion, and the plaintiff filed a petition for writ of mandate.

The court of appeal denied the writ request. The court first determined that the medical group, which was a corporation composed of physician/shareholders that provided clinic or health facility outpatient services, was a health care provider under MICRA. Because no patient-physician relationship was necessary, under existing case law, to apply the statutory requirements of MICRA, the court concluded that it made no difference whether the medical group was acting on behalf of the health care service plan, rather than the plaintiff, when the group denied the medical necessity of the new prosthetics (*103 Cal. App. 4th 953, 963-967)* . Addressing the plaintiff's argument that the medical group's conduct did not arise out of professional negligence because it was performing purely administrative duties as a utilization review organization for the health care service plan at the time, the court noted that the medical group was required to exercise medical judgment and apply clinical standards when performing those duties. As such, the claims against the medical group were subject to *Code Civ. Proc. § 425.13(a)* (*103 Cal. App. 4th 953, 972)* . In addition, although the individual physician was no longer a party to the action, to the extent that the plaintiff was attempting to hold the medical group vicariously liable for that physician's actions, those claims would also be subject to the statutory requirements, because any claims made directly against the physician would have been subject to the statutory requirements (*103 Cal. App. 4th 953, 972)* .

[g] Statutory Requirements Applicable to Action Against Tissue Bank

In ***Cryolife, Inc. v. Superior Court*** *(2003) 110 Cal. App. 4th 1145, 2 Cal. Rptr. 3d 396* , the plaintiff underwent knee surgery that required a tendon graft with tissue obtained from a human cadaver and supplied by the defendant, a tissue bank. The plaintiff's knee pain increased after the surgery, and the graft eventually had to be removed because it was infectedwith bacteria. Based on alleged misrepresentations about the safety and sterility of the defendant's tissue products, the plaintiff sued the defendant for negligence, strict product liability, fraud, and negligent misrepresentation, and sought compensatory and punitive damages. The defendant sought to strike the punitive damages claim, in part on the grounds that the plaintiff had failed to comply with the procedural requirements of *Code Civ. Proc. § 425.13*. The trial court denied the motion to strike, as well as demurrers filed by the defendant, and the defendant petitioned for a writ of mandate.

The court of appeal issued the writ. The court first held that the tissue bank could not be liable for strict products liability because, pursuant to *Health & Safety Code § 1635.2*, the collection, processing, and storage of human tissue for transplanting is deemed to be a service, rather than the provision of a product (*110 Cal. App. 4th 1145, 1152-1157)* . The court then held that the requirements of *Code Civ. Proc. § 425.13* are applicable to an action against a tissue bank based on the bank's provision of professional services, because a tissue bank constitutes a "health dispensary" under that statute. A issue bank dispenses human tissue for transplantation, and the services of a tissue bank are inextricably identified with the health of humans. Because the plaintiff failed to comply with *Code Civ. Proc. § 425.13*, the trial court should have struck the claim for punitive damages (*110 Cal. App. 4th 1145, 1159-1160)* .

[4] Additional Authorities

[a] Statutory Requirements Apply If Injury Caused by Conduct Directly Related to Rendition of Professional Services

In *United W. Med. Ctrs. v. Superior Court (1996) 42 Cal. App. 4th 500, 49 Cal. Rptr. 2d 682* , plaintiff sued a hospital for negligence after she was allegedly sexually assaulted by two hospital employees while she was a patient recovering from a traumatic brain stem injury. The complaint sought punitive damages, and the hospital filed a motion to strike the punitive damage claim on the ground that plaintiff failed to comply with *Code Civ. Proc. § 425.13*. The trial court denied the motion on the basis that the allegations of the complaint did not pertain to "professional services." The court of appeal disagreed, stating that the professional duty of a hospital is primarily to provide a safe environment within which diagnosis, treatment, and recovery can be carried out. The plaintiff's only relationship with the hospital was as a patient. Because her claim arose out of the hospital's alleged failure to adequately protect her, she must abide by *Code Civ. Proc. § 425.13* before pursuing a punitive damage claim (*42 Cal. App. 4th 500, 504)* .

In *Williams v. Superior Court (1994) 30 Cal. App. 4th 318, 36 Cal. Rptr. 2d 112* , a non-employee phlebotomist who was allegedly injured while drawing blood from a patient of a hospital brought suit against the hospital. The plaintiff alleged that the hospital personnel knew that the patient posed a risk of danger to her but failed to warn her of this, and that this failure to warn constituted ordinary rather than professional negligence due to her status as a business invitee onto the premises. The trial court disagreed, however, granting the hospital's motion to strike a claim for punitive damages on the grounds that the claim was made in violation of *Code Civ. Proc. § 425.13*. The plaintiff sought a writ of mandate from the court of appeals (*30 Cal. App. 4th 318, 321)* . The court of appeal agreed with the trial court, holding that the test for determining whether professional negligence is at issue, and thus whether MICRA applies, is whether the negligence occurred while rendering services for which the health care provider is licensed (*30 Cal. App. 4th 318, 324-325)* .

[b] Standard of Proof for Amending Complaint to Include Punitive Damages Claim

In *United W. Med. Ctrs. v. Superior Court (1996) 42 Cal. App. 4th 500, 49 Cal. Rptr. 2d 682* , the facts and procedural background of which are discussed in *§ 175.55[4][a]*, the court stated that a plaintiff must make an evidentiary showing of a "substantial probability" of prevailing on a punitive damage claim before such a claim may be included in the pleading.

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17-175 California Points & Authorities § 175.56

§ 175.56 Supporting Contention That Amendment Adding Punitive Damages Claim in Action Against Health Care Provider for Professional Negligence Is Untimely [Code Civ. Proc. § 425.13]

[1] FORM

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

PLAINTIFF'S MOTION TO ALLOW THE FILING OF AN AMENDED PLEADING THAT INCLUDES A PUNITIVE DAMAGES CLAIM SHOULD BE DENIED BECAUSE THIS IS AN ACTION AGAINST A HEALTH CARE PROVIDER FOR PROFESSIONAL NEGLIGENCE AND PLAINTIFF'S MOTION WAS NOT FILED _____ [*specify earlier of following dates:* WITHIN TWO YEARS AFTER THE _____ (COMPLAINT *or other initial pleading*) WAS FILED *or* NOT LESS THAN NINE MONTHS BEFORE THE DATE THE MATTER WAS FIRST SET FOR TRIAL].

A. Time for Filing Amended Pleading. In an action for damages arising out of the professional negligence of a health care provider, the court may not grant a motion allowing the filing of an amended pleading that includes a claim for punitive damages if the motion for such an order is not filed (1) within two years after the complaint or initial pleading is filed or (2) not less than nine months before the date the matter is set for trial, whichever is earlier (*Code Civ. Proc. § 425.13(a)*).

[*Optional*] **B. End of Nine-Month Statutory Period Is Actual Trial Date.** For purposes of *Code of Civil Procedure Section 425.13*, setting forth the requirements for seeking punitive damages in certain actions against health care providers, the requirement that any motion to amend a complaint to add a punitive damages claim be made not less than nine months before "the date the matter is set for trial" means that the motion to amend must be made at least nine months before the actual date of trial (*Brown v. Superior Court (1990) 224 Cal. App. 3d 989, 992-994, 274 Cal. Rptr. 442*).

[*Optional*] **C. Applicability of Restrictions in Fast-Track Cases.** *Code of Civil Procedure Section 425.13(a)*, setting forth the requirements for seeking punitive damages in certain actions against health care providers, is applicable in fast-track cases assigned to delay reduction programs under the Trial Court Delay Reduction Act (*Brown v. Superior*

Court (1990) 224 Cal. App. 3d 989, 993).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a defendant's contention that a motion to amend a pleading to add a punitive damages claim is untimely. The argument is based on the ground that the plaintiff's motion to amend his or her complaint did not occur within the timeframes required by *Code Civ. Proc. § 425.13(a)*.

The points and *authorities in § 175.57* may be used in an appropriate case to oppose the contention that *Code Civ. Proc. § 425.13* restricts the plaintiff's ability to seek punitive damages.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should specify the date the complaint or initial pleading was filed. If the trial date has been set, it should also be specified [*see Code Civ. Proc. § 425.13(a)*].

[3] Discussion of Authorities

[a] End of Nine-Month Statutory Period Is Actual Trial Date

Brown v. Superior Court *(1990) 224 Cal. App. 3d 989, 274 Cal. Rptr. 442* , was a professional negligence case that had been assigned to San Diego County's fast-track program. Approximately four months before the date set for trial, the plaintiff moved to amend the complaint to add a claim for punitive damages. Plaintiff argued that *Code Civ. Proc. § 425.13*, which prohibits an amendment to include punitive damages not less than nine months before "the date the matter is first set for trial," requires plaintiffs to add punitive damages claims at least nine months before the trial setting date, thus making statutory compliance impossible in fast-track cases, in which trial setting is expedited. The trial court issued an order permitting the amendment. The defendant petitioned for a writ of mandate directing the trial court to vacate the part of its order concerning the addition of the punitive damages claim.

The court of appeal granted the defendant's writ petition, holding that plaintiff's punitive damages motion was untimely under *Code Civ. Proc. § 425.13(a)*. The court held that the phrase "the date the matter is first set for trial" refers to the actual trial date, not the date on which the trial date is set. Under the facts of the case, the plaintiff had ample reason to move to amend her complaint before the nine-month statutory deadline, but failed to amend her complaint in a timely manner; consequently, the trial court's granting of plaintiff's motion to amend was in error (*224 Cal. App. 3d 989, 992-994)* .

[b] Applicability of Restrictions in Fast-Track Cases

The facts and procedural background of ***Brown v. Superior Court*** *(1990) 224 Cal. App. 3d 989, 274 Cal. Rptr. 442* , are discussed in *§ 175.56[3][a]*. The court of appeal rejected the plaintiff's suggestion that *Code Civ. Proc. § 425.13* did not apply in cases assigned to local fast-track programs under the Trial Court Delay Reduction Act (*224 Cal. App. 3d 989, 993)* .

[4] Additional Authorities

[a] Applicability of Restrictions in Fast-Track Cases

In ***Freedman v. Superior Court*** *(2008) 166 Cal. App. 4th 198, 82 Cal. Rptr. 3d 563* , plaintiff brought an action for

malpractice against a surgeon who accidentally left a surgical towel inside plaintiff's body cavity, resulting in a second surgery that required removal of one of plaintiff's kidneys. After suit was filed, the court held a case management conference at which it set a date for trial to begin 11 months later, leaving plaintiff two months to add a claim for punitive damages. However, plaintiff conducted no discovery in the next few months and failed to add a punitive damages claim. After the date for adding the punitive damages claim passed, plaintiff changed attorneys and within weeks the new attorney began discovery. Approximately six months later, plaintiff filed a motion for leave to amend to add a punitive damages claim, and the trial court granted the motion. However, the court of appeals granted defendant's writ to vacate that order. The court recognized that in *Goodstein v. Superior Court (1996) 42 Cal. App. 4th 1635, 50 Cal. Rptr. 2d 459* , discussed in *§ 175.59[3][a]*, the court of appeals had created a five-step exception to the nine-month-before-trial deadline for seeking leave to add a punitive damages claim applicable in "fast-track cases." However, even assuming that the *Goodstein* exception was applicable to this case, the court concluded that plaintiff failed to meet the first two requirements, that is, that plaintiff was unaware of facts or evidence necessary to make a proper motion under *Code Civ. Proc. § 425.13* more than nine months prior to the first trial date, and that plaintiff had made a diligent, reasonable, and good-faith effort to discover such necessary facts or evidence more than nine months prior to the first assigned trial date. The court concluded instead that plaintiff knew most of the relevant facts within days of his surgery, and he failed to conduct any discovery in the two months between the time the trial date was set and the deadline for seeking to add a punitive damages claim. As such, plaintiff's claim was subject to the deadline imposed by *Code Civ. Proc. § 425.13*, a deadline which he failed to meet. The fact that the attorney's second attorney may have acted diligently after being hired as counsel did not alter this result (*166 Cal. App. 4th 198, 206-207)* .

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17-175 California Points & Authorities § 175.57

§ 175.57 Opposing Contention That Punitive Damages Claim Barred by Failure to Amend Pleading [Code Civ. Proc. § 425.13]

[1] FORM

[*The following may be included in a memorandum or points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S FAILURE TO MOVE TO AMEND THE PLEADING TO MAKE A CLAIM FOR PUNITIVE DAMAGES PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 425.13 SHOULD NOT PREVENT AN AWARD OF PUNITIVE DAMAGES BECAUSE _____ [*specify, e.g.,* DEFENDANT WAIVED THE RIGHT TO THE STATUTORY PROTECTION BY FAILING TO TIMELY RAISE THE ISSUE].

A. **Statutory Protection Waived If Not Timely Raised.** The bar of a punitive damages award for a plaintiff's failure to comply with the requirements of Civ. Code § 425.13 is waived if the issue is not raised in a timely fashion (*Vallbona v. Springer (1996) 43 Cal. App. 4th 1525, 1534, 51 Cal. Rptr. 2d 311*).

[*Optional*] B. **Claim Seeking Recovery for Purely Economic Injury Not Subject to MICRA Requirements.** *Code Civ. Proc. § 425.13* only applies when the claim seeks damages for personal injury or wrongful death, and "personal injury" covers only injury that impairs the well-being or mental or physical health of the plaintiff and does not cover purely economic injury (*Vazquez de Mercado v. Superior Court (2007) 148 Cal. App. 4th 711, 715-716, 55 Cal. Rptr. 3d 889*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a plaintiff's contention in an action against a health care provider for professional negligence that punitive damages should be allowed even though plaintiff failed to comply with the requirements of Civ. Code § 425.13.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context

in which counsel wishes to raise the substantive issue that defendant has waived the protection against punitive damages provided by Civ. Code § 425.13.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, for example, counsel should discuss the time line of the lawsuit, showing the point at which plaintiff indicated an intention to seek punitive damages, and should argue that the failure of the defendant to object or otherwise raise the issue of plaintiff's lack of compliance with Civ. Code § 425.13 resulted in a waiver to the statutory protection against punitive damages.

[c] Opposing Points and Authorities

If appropriate, the points and *authorities in § 175.55* may be used to oppose these points and authorities.

[3] Discussion of Authorities

[a] Statutory Protection Waived If Not Timely Raised

In ***Vallbona v. Springer*** *(1996) 43 Cal. App. 4th 1525, 51 Cal. Rptr. 2d 311* , plaintiffs filed a lawsuit for intentional and negligent misrepresentation based on defendants' claims regarding a low-level laser procedure to remove cellulite. Prior to trial defendants brought an in limine motion to preclude plaintiffs from requesting punitive damages. Defendants contended that plaintiffs were impermissibly attempting to recast a potential medical malpractice action into a fraud and tort case with the possibility of punitive damages, and asserted that plaintiffs' failure to comply with Civ. Code § 425.13 barred any recovery for punitive damages. The trial court denied the motion, the matter proceeded to trial, and the jury assessed punitive damages.

The court of appeal affirmed the denial of the in limine motion, holding that the defendant's waived the benefit of Civ. Code § 425.13. The court noted that the original complaint contained claims for punitive damages, without court permission as required by Civ. Code § 425.13. Defendants did not demur or move to strike the punitive damages allegations, but instead answered the complaint without challenging the punitive damage claim. Defendants' waited until the outset of trial before raising the issue of plaintiffs' noncompliance with Civ. Code § 425.13. The court concluded that by not raising the issue earlier, defendants waived any rights they might have had under the statute (*43 Cal. App. 4th 1525, 1534)* .

[b] Claim Seeking Recovery for Purely Economic Injury Not Subject to MICRA Requirements

In *Vazquez de Mercado v. Superior Court (2007) 148 Cal. App. 4th 711, 55 Cal. Rptr. 3d 889* , plaintiffs had purchased a horse to use as a jumper for their daughter. Prior to making the purchase, they hired a veterinarian to examine the horse, who reported that, while it had slight arthritis in one leg, the horse met plaintiffs' requirements. After the purchase, however, they discovered the horse had a progressive degenerative condition that made it unsuitable to use as a jumper. Plaintiffs sued the veterinarian for fraud, negligent misrepresentation, and suppression of fact. Plaintiffs sought punitive damages, but did not seek an order before filing the complaint as would be required under *Code Civ. Proc. § 425.13* in an action against a health care provider for professional negligence. The veterinarian demurred on the grounds that the action was barred by the one-year limitations period set out in *Code Civ. Proc. § 340.5*, applicable to actions against health care providers, and also filed a motion to strike the punitive damages claim for failure to comply with *Code Civ. Proc. § 425.13*. The trial court overruled the demurrer and denied the motion to strike. The veterinarian filed a petition for writ of mandate.

The court of appeal denied the petition. While recognizing that veterinarians are health care providers covered by MICRA, the court held that plaintiffs were not required to seek a court order before filing a claim for punitive damages

in this particular case. The court noted that professional negligence, for purposes of establishing the applicability of MICRA, is a "negligent act or omission ... which ... is the proximate cause of a personal injury or wrongful death." For these purposes, "personal injury" is an injury that impairs the well-being or the mental or physical health of the victim. However, plaintiffs sought only damages for the purchase price of the horse and the costs of its care, which were economic damages not covered by the definition of personal injury. Thus, plaintiffs' complaint seeking punitive damages was not subject to the MICRA pre-filing order requirement (*148 Cal. App. 4th 711, 715-716)* . The court also held that the MICRA limitations period of *Code Civ. Proc. § 340.5* was also inapplicable for the same reasons. Thus, the correct limitations period on the fraud and misrepresentation claims was the three-year period of *Code Civ. Proc. § 338(d)* (*148 Cal. App. 4th 711, 716)* .

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17-175 California Points & Authorities § 175.58

§ 175.58 Opposing Contention That Amendment Adding Punitive Damages Claim in Action Against Health Care Provider for Professional Negligence Is Untimely [Code Civ. Proc. § 425.13]--Exception for Trial Preference

[1] FORM

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

PLAINTIFF'S MOTION TO ALLOW THE FILING OF AN AMENDED PLEADING TO INCLUDE A PUNITIVE DAMAGES CLAIM AGAINST DEFENDANT HEALTH CARE PROVIDER SHOULD BE GRANTEDBECAUSE THERE IS AN IMPLIED EXCEPTION TO THE NINE-MONTH LIMITATION OF CODE OF CIVIL PROCEDURE SECTION 425.13 WHEN PLAINTIFF HAS OBTAINED A PREFERENTIAL TRIAL DATE AND DEFENDANT HAS HAD A REASONABLE OPPORTUNITY TO CONDUCT DISCOVERY REGARDING THE PUNITIVE DAMAGES CLAIM.

Implied Exception to Protect Right to Preferential Trial Date. There is an implied exception to the nine-month limitation of *Code of Civil Procedure Section 425.13* when it is necessary to protect a plaintiff's right to a preferential trial date, and the defendant received or had a reasonable opportunity to conduct discovery regarding the punitive damages claim (*Looney v. Superior Court (1993) 16 Cal. App. 4th 521, 536, 20 Cal. Rptr. 2d 182*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to a defendant's contention that a motion to amend a pleading to add a punitive damages claim is untimely. The opposition argument is based on an implied exception to protect a plaintiff's preferential date when applicable.

This form of points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the absence of the express contract. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Implied Exception to Protect Right to Preferential Trial Date

In ***Looney v. Superior Court*** *(1993) 16 Cal. App. 4th 521, 20 Cal. Rptr. 2d 182* , plaintiffs brought suit against physicians and a medical center alleging malpractice and punitive damages. Defendants moved to strike the punitive damages claims asserting that plaintiffs failed to seek leave to assert such allegations as required by *Code of Civ. Proc. § 425.13*. The trial court originally denied the motion based on the then-current interpretation of *Code of Civ. Proc. § 425.13*. However, when the interpretation of the relevant code section changed, defendants' renewed motion to strike was granted. When plaintiffs sought leave to amend their complaint to add punitive damages claims, the motion was denied on the ground that it was untimely. Due to the health of plaintiffs, a preferential trial date had already been set pursuant to *Code Civ. Proc. § 36*. Consequently, the trial date was within nine months of the motion to amend the complaint.

In reversing the ruling of the trial court, the appellate court held that there is an implied exception to the nine-month limitation of *Code of Civ. Proc. § 425.13* when it is necessary to protect a plaintiff's right to a preferential trial date, and the defendant received or had a reasonable opportunity to conduct discovery regarding the punitive damages claim (*16 Cal. App. 4th 521, 536)* .

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17-175 California Points & Authorities § 175.59

§ 175.59 Opposing Contention That Amendment Adding Punitive Damages Claim in Action Against Health Care Provider for Professional Negligence Is Untimely [Code Civ. Proc. § 425.13]--Compliance Not Reasonable Due to Fast Track Trial Setting

[1] FORM

[*The following may be included in a memorandum or points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S MOTION TO ALLOW THE FILING OF AN AMENDED PLEADING TO INCLUDE A PUNITIVE DAMAGES CLAIM AGAINST DEFENDANT HEALTH CARE PROVIDER SHOULD BE GRANTED BECAUSE THE COURT HAS INHERENT POWER TO MAKE AN APPROPRIATE ORDER TO AVOID INJUSTICE AND UNFAIRNESS WHEN A PLAINTIFF IS PLACED IN A POSITION BY VIRTUE OF FAST TRACK TRIAL SETTING PRACTICES WHERE COMPLIANCE WITH CIVIL PROCEDURE CODE SECTION 425.13 IS NOT REASONABLE.

Court Should Avoid Injustice When Compliance Is Not Reasonable. A plaintiff may be relieved from the time limitation of *Code of Civil Procedure Section 425.13* when compliance is not reasonably possible due to the quick trial setting practices of "fast track" courts (*Goodstein v. Superior Court (1996) 42 Cal. App. 4th 1635, 1645, 50 Cal. Rptr. 2d 459*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a defendant's contention that a motion to amend a pleading to adda punitive damages claim is untimely. The opposition argument is based on the trial court's inherent power to make an appropriate order to avoid injustice or unfairness.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that compliance with the statutory time limits was not reasonably possible, for example in a motion for summary judgment. These points and authorities may also be adapted for use in a trial or

appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss how the local "fast track" trial setting practice rendered timely compliance unreasonable [*see Goodstein v. Superior Court (1996) 42 Cal. App. 4th 1635, 1645, 50 Cal. Rptr. 2d 459]* .

[3] Discussion of Authorities

[a] Court Should Avoid Injustice When Compliance Is Not Reasonable

In ***Goodstein v. Superior Court*** *(1996) 42 Cal. App. 4th 1635, 50 Cal. Rptr. 2d 459* , due to successful demurrers requiring the filing of amended complaints, plaintiff's complaint for medical malpractice was not "at issue" until almost nine months after the initial filing. In the meantime, prior to the case being "at issue," a status conference was held, and a trial date was set for a date less than nine months from the time when the case would become "at issue." Plaintiff subsequently moved to amend the complaint to allege a claim for punitive damages. Although the motion did not satisfy the nine-month limitation period of *Code Civ. Proc. § 425.13*, the trial court granted the motion because plaintiff had never had a full nine months to bring the motion following the setting of the trial date.

The court of appeal held that when a plaintiff, by virtue of the quick trial setting practices of "fast track" courts, is placed in a position where compliance with the time limits of *Code Civ. Proc. § 425.13* is not reasonable, then courts retain the inherent power and authority to make an appropriate order to avoid injustice or unfairness. The court then delineated the appropriate burden of proof to be eligible for such an order, stating that a plaintiff must show that: (1) plaintiff was unaware of the facts or evidence necessary to make a timely motion under *Code Civ. Proc. § 425.13*; (2) plaintiff made reasonable efforts to discover the necessary facts or evidence more than nine months prior to the first assigned trial date; (3) after assignment of the trial date, plaintiff made reasonable efforts to complete the necessary discovery; (4) plaintiff filed the *Code Civ. Proc. § 425.13* motion as soon as reasonably practicable; and (5) defendant will suffer no surprise or prejudice by reason of any shortened time period (*42 Cal. App. 4th 1635, 1645)* . Stating that it could not tell from the record whether plaintiff could satisfy these criteria, the court ordered the trial court to vacate its order granting plaintiff's motion and to conduct further proceedings.

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17-175 California Points & Authorities § 175.60

§ 175.60 Supporting Contention That Money Damages for Future Damages Must Be Paid by Periodic Payments [Code Civ. Proc. § 667.7]

[1] FORM

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

MONEY DAMAGES MUST BE PAID FOR FUTURE DAMAGES BY PERIODIC PAYMENTS RATHER THAN BY A LUMP-SUM PAYMENT BECAUSE THE ACTION IS AGAINST A PROVIDER OF HEALTH CARE SERVICES FOR INJURY OR DAMAGES, THE AWARD _____ [EQUALS *or* EXCEEDS] $50,000, AND _____ [*specify party, e.g.,* DEFENDANT] REQUESTED PERIODIC PAYMENTS.

A. Payment of Future Damages by Periodic Payments. In any action for injury or damages against a provider of health care services, a superior court shall, at the request of either party, enter a judgment ordering that money damages or its equivalent for future damages of the judgment creditor be paid in whole or in part by periodic payments other than by a lump-sum payment if the award equals or exceeds $50,000 in future damages (*Code Civ. Proc. § 667.7(a)*).

B. Periodic Payment Provision Constitutional. The provision for payment of money damages for future damages by periodic payments, pursuant to *Code of Civil Procedure Section 667.7*, does not violate constitutional guarantees of due process, equal protection, and right to jury trial (*American Bank & Trust Co. v. Community Hosp. (1984) 36 Cal. 3d 359, 368-377, 204 Cal. Rptr. 671, 683 P.2d 670*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that money damages for future damages must be paid by periodic payments in an action for injury or damages against a health care provider after one of the parties has requested payment by periodic payments [*see Code Civ. Proc. § 667.7*; *American Bank & Trust Co. v. Community Hosp. (1984) 36 Cal. 3d 359, 368-377, 204 Cal. Rptr. 671, 683 P.2d 670]* .

This form of points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that money damages for future damages must be paid by periodic payments. For example, these points and authorities may be used in support of a request to enter a judgment providing for the periodic payment of future damages in excess of $50,000. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should discuss facts showing that the action was one for injury or damages against a health care provider, the award equaled or exceeded $50,000, and one of the parties duly requested periodic payments.

[c] Related Pleading and Practice Forms

For forms relating to procedures for obtaining a judgment ordering that future damages be paid in periodic payments, see California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice* (Matthew Bender).

[d] Related Points and Authorities

For points and authorities for use in actions and proceedings involving tort damages generally, see Ch. 64, *Damages: Tort* . For points and authorities for use in actions involving limitation on contingent fee contracts for a medical malpractice plaintiff's attorney under the Medical Injury Compensation Reform Act of 1975, see Ch. 25, *Attorney's Fees* .

[3] Discussion of Authorities

[a] Periodic Payment Provision Constitutional

American Bank & Trust Co. v. Community Hosp. *(1984) 36 Cal. 3d 359, 204 Cal. Rptr. 671, 683 P.2d 670* , was an action brought by a patient against a hospital to recover damages for burn injuries incurred while she was taking a shower in the hospital. The jury rendered a general verdict for plaintiff, and defendant moved for an order of periodic payment of future damages pursuant to *Code Civ. Proc. § 667.7*. The trial court denied defendant's motion on the ground that the provision unconstitutionally denied guarantees of equal protection, due process, and right to jury trial. The trial court entered a lump-sum judgment in favor of plaintiff in the amount of the verdict. Defendant appealed.

The Supreme Court dismissed the appeal from the order denying the motion for periodic payments, remanded the matter to the trial court for reduction of the judgment pursuant to a stipulation of the parties, and affirmed the judgment in all other respects (*36 Cal. 3d 359, 378)* . The Court first noted that *Code Civ. Proc. § 667.7* was enacted as part of the Medical Injury Compensation Reform Act of 1975 (MICRA), a lengthy statute designed to remedy the rising cost of medical malpractice insurance premiums (*36 Cal. 3d 359, 363)* . Plaintiff contended that *Code Civ. Proc. § 667.7* violates the due process rights of medical malpractice victims by diminishing the value of their malpractice actions without providing them an adequate quid pro quo (*36 Cal. 3d 359, 368)* . The Court held that it need not attempt to balance the relative benefits and detriments of the legislation, and that the appropriate test was whether the measure is rationally related to a legitimate state interest. The Legislature could legitimately determine that the public interest would be served by limiting a defendant's obligation to those future damages actually incurred, thereby preventing the plaintiff's heirs from inheriting the "windfall" lump-sum judgment intended to compensate the injured person for losses never sustained (*36 Cal. 3d 359, 369)* . Plaintiff alternatively argued that *Code Civ. Proc. § 667.7* violates the due process rights of a malpractice victim's spouse by authorizing the termination of a portion of the future damage award on the death of plaintiff. The Court held, however, that the spouse has no vested right in a particular measure of damages, and therefore has no greater constitutional right than the victim to a damages award that continues beyond the

victim's life (*36 Cal. 3d 359, 369-370)* . Plaintiff also contended that *Code Civ. Proc. § 667.7* denies equal protection to persons injured by medical malpractice by withholding from them the benefits of lump-sum damages awards that are available to other injury victims (*36 Cal. 3d 359, 370)* . However, there as a rational and legitimate basis for the legislature's decision to attempt to reduce medical malpractice insurance costs, and *Code Civ. Proc. § 667.7* is rationally related to that objective. Consequently, the legislature did not violate equal protection principles in limiting the application of *Code Civ. Proc. § 667.7* to medical malpractice actions (*36 Cal. 3d 359, 373)* . Plaintiff contended that *Code Civ. Proc. § 667.7* impinges on the jury's province to make special findings on subsidiary issues affecting the award of future damages. The statute does not clarify whether the jury or the court should specify the future damagesportion of the overall award (*36 Cal. 3d 359, 375)* . The Court concluded that when *Code Civ. Proc. § 667.7* is interpreted to require the jury to specify the amount of future damages that is subject to periodic payments, the section does not conflict with the constitutional right to jury trial (*36 Cal. 3d 359, 377)* .

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§ 175.61 Supporting Contention That Periodic Payment of Future Damages Must Be Based on Present Value of Award at Time of Judgment

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

WHEN FUTURE DAMAGES WILL BE PAID OVER TIME IN PERIODIC INSTALLMENTS, PLAINTIFF IS ENTITLED TO PAYMENTS TOTALING THE EQUIVALENT IN CURRENT DOLLARS OF THE AMOUNT PLAINTIFF WOULD HAVE RECEIVED IN AN IMMEDIATE LUMP-SUM AWARD AT THE TIME OF JUDGMENT, INCLUDING THE AMOUNT THE AWARD WOULD HAVE YIELDED IF PRUDENTLY INVESTED.

A. Periodic Payments are Based on Value of Future Damages Award at Time of Judgment. When future damages will be paid through a periodic payment schedule, the plaintiff is entitled to receive, over time, the equivalent in current dollars of the amount plaintiff would have received in an immediate lump-sum award at the time of judgment, including the amount the award would have yielded if prudently invested (*Salgado v. County of Los Angeles (1998) 19 Cal. 4th 629, 646, 80 Cal. Rptr. 2d 46, 967 P.2d 585*).

[*Optional*] **B. Trial Court May Not Disregard Jury Valuation.** When the jury specifically provides the present cash value of an award of future damages, the trial court may not fashion a periodic payment schedule based on a different present value than that found by the jury (*Salgado v. County of Los Angeles (1998) 19 Cal. 4th 629, 649, 80 Cal. Rptr. 2d 46, 967 P.2d 585*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that money damages for future damages to be paid by periodic payments in an action for injury or damages against a health care provider must be based on the equivalent in current dollars of the amount plaintiff would have received in an immediate lump-sum award at the time

of judgment, including the amount the award would have yielded if prudently invested [*see Code Civ. Proc. § 667.7*; *Salgado v. County of Los Angeles (1998) 19 Cal. 4th 629, 646, 80 Cal. Rptr. 2d 46, 967 P.2d 585]* . Optional paragraph B may be used to argue that the trial court does not have the authority to disregard a jury finding as to the present cash value of an award for future damages. Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should discuss the substance of the judgment regarding the award of future damages, the present value of the award at the time of judgment, and the value of the award if prudently invested over the life of the payment period, if known.

[b] Related Pleading and Practice Forms

For forms relating to the periodic payment of future damages, see California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice* (Matthew Bender).

[c] Related Points and Authorities

For points and authorities for use in actions and proceedings involving tort damages generally, see Ch. 64, *Damages: Tort* .

[3] Discussion of Authorities

[a] Periodic Payments are Based on Value of Future Damages Award at Time of Judgment

In ***Salgado v. County of Los Angeles*** *(1998) 19 Cal. 4th 629, 80 Cal. Rptr. 2d 46, 967 P.2d 585* , plaintiff was injured at birth through the negligence of the delivering physicians, resulting in long-term disability to his right arm. Plaintiff brought a medical malpractice suit against the County of Los Angeles, the owner of the hospital at which he was born. Following a jury trial, plaintiff was awarded, for noneconomic injuries, $10,000 for past and $550,000 for future pain and suffering, reduced by the trial court to $250,000 pursuant to the statutory cap on noneconomic damages found in *Civ. Code § 3333.2(b)*. As to the $240,000 allocated to future pain and suffering, the trial court, pursuant to defendant's request under *Code Civ. Proc. § 667.7(a)*, ordered the sum to be paid on a periodic basis in equal installments over the course of plaintiff's life expectancy of 66.8 years, funded by a $61,785 annuity purchased by the defendant. The court of appeal affirmed the periodic payment award set by the trial court.

The Supreme Court reversed the periodic payment award for future noneconomic damages. The Court noted that the stated legislative purposein allowing for periodic payment of future damages in such cases was to provide courts with a means "to provide compensation sufficient to meet the needs of an injured plaintiff ... while eliminating the potential windfall from a lump-sum recovery which was intended to provide for the care of an injured plaintiff over an extended period who then dies shortly after the judgment is paid" (*see Code Civ. Proc. § 667.7(f)*). The court then reviewed the principles that it had earlier articulated in *American Bank & Trust Co. v. Community Hosp. (1984) 36 Cal. 3d 359, 204 Cal. Rptr. 671, 683 P.2d 670* , including the constitutional validity of *Code Civ. Proc. § 667.7* as a rational means to the legitimate objective of reducing malpractice insurance costs by permitting insurers to retain fewer liquid reserves and to increase investments. The Court then noted a court of appeal holding that, in order to fully compensate the plaintiff for future losses, the periodic payment schedule is based upon the *gross* amount of an award of future damages. The Supreme Court agreed that, if the award for future noneconomic damages is to be paid out periodically, the plaintiff is entitled to receive, over time, the equivalent of the immediate lump-sum award at the time of judgment, capped at $250,000 pursuant to *Civ. Code § 3333.2(b)* if otherwise exceeding that amount. Thus, the total of the periodic payments must include the amount that the award would have yielded if invested prudently at the time of judgment, ensuring that a plaintiff receiving periodic payments will receive the same economic value, in current dollars, as a plaintiff who receives an award of noneconomic damages in an immediate lump sum at the time of judgment, and that a defendant will pay the same amount in current dollars regardless of whether periodic payment is utilized or not. The Court noted that the statute was not intended to provide an unfair benefit to a defendant by reducing its obligation to less than the equivalent of a lump sum award received at the time of the judgment (*19 Cal. 4th 629, 636-646)* .

In reaching its decision, the Court also reviewed relevant case law and concluded that, since a jury award for future pain and suffering has generally been regarded as the jury's rough estimate of the amount of money paid at the time of judgment that would compensate the plaintiff for all future pain and suffering, the statutory cap of $250,000 for noneconomic damages was intended to apply to a lump sum paid at the time of the judgment, or to the present value of periodic future payments, but not to the gross sum of such future payments. Thus, the cap does not prevent a defendant from paying more than $250,000 over time when a periodic payment schedule is used (*19 Cal. 4th 629, 636-646)* .

Applying these legal principles to the facts of the case before it, the Court concluded that, since the jury instructions made no express reference to present value, the jury understood its award of $550,000 for future noneconomic damages to be the *current* value of the award, rather than the gross amount of these future damages. Thus, although the trial court correctly reduced the award to $240,000 pursuant to *Civ. Code § 3333.2(b)* ($250,000 minus the $10,000 award for past noneconomic damages), the trial court erred when, in selecting a payment period of 66.8 years, it reduced the stream of payments to an amount that would total only $61,785 if paid in an immediate lump sum at the time of judgment (*19 Cal. 4th 629, 636-646)* .

[b] Trial Court May Not Disregard Jury Valuation

The facts and procedural background of ***Salgado v. County of Los Angeles*** *(1998) 19 Cal. 4th 629, 80 Cal. Rptr. 2d 46, 967 P.2d 585* , are discussed in *§ 175.61[3][a]*. As part of its verdict, the jury also awarded $125,000 for future medical care, specifically finding pursuant to jury instructions that the present cash value of that award was $50,000. However, the trial court ordered periodic payment of the $125,000 award over the life expectancy of plaintiff to be funded by an annuity at the present cost of $32,179. The Supreme Court agreed with plaintiff that, given that the issue of present value was submitted to the jury after each party was afforded the opportunity to present expert testimony on valuation, the trial court erred in disregarding the jury's valuation and creating a periodic payment schedule based on a different valuation. However, the Court also reaffirmed its earlier holding from *American Bank & Trust Co. v. Community Hosp. (1984) 36 Cal. 3d 359, 204 Cal. Rptr. 671, 683 P.2d 670* , that it is not a violation of the right to a jury trial for the trial court to submit only the issue of the gross amount of future economic damages to the jury, with the timing of periodic payments and their present value to be set by the court in its exercise of sound discretion (*19 Cal. 4th 629, 649)* .

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17-175 California Points & Authorities § 175.62

§ 175.62 Opposing Contention That Money Damages for Future Damages Must Be Paid by Periodic Payments [Code Civ. Proc. § 667.7]--Lost Years Earnings as Properly Awarded in Lump Sum

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DAMAGES FOR FUTURE LOSS OF EARNINGS ATTRIBUTABLE TO THE PERIOD OF TIME DURING WHICH PLAINTIFF'S LIFE EXPECTANCY WAS DIMINISHED AS A RESULT OF DEFENDANT'S NEGLIGENCE MAY BE AWARDED IN A LUMP SUM, RATHER THAN BY PERIODIC PAYMENTS.

A. Lost Years Earnings Awardable in Lump Sum. A court is not required to order periodic payments under *Code Civ. Proc. § 667.7* when the damages are for future loss of earnings attributable to the period during which plaintiff's life expectancy was diminished as result of defendant's negligence. The court may order such damages to be paid in a lump sum (*Hurlbut v. Sonora Cmty. Hosp. (1989) 207 Cal. App. 3d 388, 405-406, 254 Cal. Rptr. 840*).

[*Optional*] **B. All Future Loss of Earnings Damages Payable in Lump Sum in Absence of Special Finding on Apportionment.** When a jury awards damages to a medical malpractice plaintiff for future lost earnings, and the defendant has failed to secure a special finding on apportionment of future lost earnings between lost years payments and lifetime disability, the court may order the entire award for future loss of earnings paid in a lump sum (*Hurlbut v. Sonora Cmty. Hosp. (1989) 207 Cal. App. 3d 388, 405-406, 254 Cal. Rptr. 840*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that periodic payments for future loss of earnings under *Code Civ. Proc. § 667.7* should be awarded for lost years earnings. The ground for opposition is that lost years earnings may be compensable in a lump sum, rather than by periodic payments.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should discuss the extent to which plaintiff's work-life expectancy has been shortened by the defendant's negligence. If the plaintiff has no dependents, counsel may also wish to discuss that fact; courts may be inclined to award periodic payments, rather than a lump sum, if future lost earnings damages are likely to be spent in support of plaintiff's dependents [*see Fein v. Permanente Med. Group (1985) 38 Cal. 3d 137, 156-157, 211 Cal. Rptr. 368, 695 P.2d 665]* .

[c] Lost Years Earnings Distinguished From Other Future Earnings

"Lost years" earnings are those earnings which hypothetically would have been earned by the plaintiff during the years "lost" as a result of the defendant's negligence. For example, if a 12-year old plaintiff's expected work life, without injury, would be from ages 18 to 65 years, and the negligence of the defendant shortens the plaintiff's life expectancy to 30 years, the plaintiff's expected work life would be shortened to ages 18 to 30 years. The "future loss of earnings" damages for years 31 to 65 would be "lost years" damages compensable in a lump sum [*see Hurlbut v. Sonora Cmty. Hosp. (1989) 207 Cal. App. 3d 388, 406, 254 Cal. Rptr. 840]* . The remaining "future loss of earnings damages," those arising from the ages of 18 to 30 years, however, would be subject to periodic payments [*see Hurlbut v. Sonora Cmty. Hosp. (1989) 207 Cal. App. 3d 388, 406, 254 Cal. Rptr. 840]* .

[3] Discussion of Authorities

[a] Lost Years Earnings Awardable In Lump Sum

In ***Hurlbut v. Sonora Cmty. Hosp.*** *(1989) 207 Cal. App. 3d 388, 254 Cal. Rptr. 840* , plaintiffs, a child and her parents, brought an action against defendant hospital for medical malpractice in failing to perform a timely caesarean section procedure. The hospital's failure resulted in the child being born with severe brain damage. The jury rendered a special verdict in favor of the plaintiffs in the amount of $350,000 for future loss of earnings. After the special verdict was returned, the trial court instructed the parties to submit a proposed judgment. Defendant requested that the $350,000 be distributed to plaintiff in periodic payments, rather than a lump sum. However, the court entered judgment in the lump sum of $350,000. Defendant's motion for judgment notwithstanding the verdict was denied in its entirety and defendant's motion for new trial was conditionally granted. The defendants appealed the trial court's orders on the motions, and plaintiff's cross appealed.

The court upheld the lump sum award of $350,000 for future lost earnings. It noted that ordinarily under *Code Civ. Proc. § 667.7,* when a medical malpractice action results in an award for future damages, the trial court must order periodic payments on request. The court stated, however, that a limited exception to the rule applies to damages for future loss of earnings (*207 Cal. App. 3d 388, 405)* . Following *Fein v. Permanente Medical Group (1985) 38 Cal. 3d 137, 211 Cal. Rptr. 368, 695 P.2d 665* , the court indicated that in the absence of special findings regarding apportionment, a court could award damages in a lump sum for loss of earnings attributable to the period of time during which the plaintiff's life expectancy was diminished as a result of defendant's negligence (*207 Cal. App. 3d 388, 406-407)* .

[b] All Future Loss of Earnings Damages Payable in Lump Sum in Absence of Special Finding on Apportionment

The facts and procedural background of ***Hurlbut v. Sonora Cmty. Hosp.*** *(1989) 207 Cal. App. 3d 388, 254 Cal. Rptr. 840* , are discussed in *§ 175.62[3][a]*. The court of appeal noted that it is the defendant's burden to propose special findings apportioning damages for lost earnings between (1) disability during the plaintiff's lifetime and (2) lost years damages. The court stated that no evidence was presented, nor were special findings sought concerning apportionment of the $350,000 in future lost earnings. The trial court, therefore, had no way to apportion the award between lost years and lifetime disability in order to structure an appropriate judgment for periodic payments. In the absence of sufficient

special findings proposed by the defendant, the court of appeal concluded that the trial court properly ordered the entire $350,000 award for future loss of earnings paid in a lump sum under the judgment (*207 Cal. App. 3d 388, 407)* .

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17-175 California Points & Authorities § 175.63

§ 175.63 Opposing Contention That Money Damages for Future Damages Must Be Paid by Periodic Payments [Code Civ. Proc. § 667.7]--Periodic Payments May Not Be Ordered After Entry of Judgment for Lump Sum Amount

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS PRECLUDED FROM OBTAINING AN ORDER TO AWARD PERIODIC PAYMENTS FOR FUTURE DAMAGES, SINCE JUDGMENT HAS ALREADY BEEN ENTERED FOR A LUMP SUM AMOUNT.

Periodic Payments Not Available After Judgment for Lump Sum Amount Entered. A party's request for periodic payments for future damages under *Section 667.7 of the Code of Civil Procedure* must be made prior to the entry of any judgment in the action (*Craven v. Crout (1985) 163 Cal. App. 3d 779, 784, 209 Cal. Rptr. 649*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that periodic payments for future damages under *Code Civ. Proc. § 667.7* should be awarded. The ground for opposition is that a lump sum judgment had already been entered, and thus the request is untimely filed and must be denied [*Craven v. Crout (1985) 163 Cal. App. 3d 779, 784, 209 Cal. Rptr. 649]* .

These points and authorities may be combined, when appropriate, with points and authorities relating to other grounds denying post-judgment relief [*see, e.g.,* Ch. 131, *Judgments* , for points and authorities opposing a motion to vacate judgment]. The points and authorities in this form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of

law stated. Counsel should therefore discuss facts concerning the substance of the judgment with respect to a lump-sum damages award, and the time sequence in which the judgment and the request for payments were filed [*see Craven v. Crout (1985) 163 Cal. App. 3d 779, 783-784, 209 Cal. Rptr. 649]* .

[c] Related Points and Authorities

For additional points and authorities relating to post-judgment relief generally, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] Periodic Payments Not Available After Judgment for Lump Sum Amount Entered

In ***Craven v. Crout*** *(1985) 163 Cal. App. 3d 779, 209 Cal. Rptr. 649* , the jury rendered a special verdict for a medical malpractice plaintiff, and the trial court ordered entry of judgment in favor of plaintiff and against defendants in a certain lump-sum amount, after which notice of entry of judgment was filed. Almost two months later, defendant filed a request for an order that future damages be paid by periodic payments pursuant to *Code Civ. Proc. § 667.7*. After hearing, the trial court granted the request, ordering payment of a certain portion of the damages over a period of nine and a half years (*163 Cal. App. 3d 779, 781)* .

The court of appeal, in reversing the order, held that the trial court had no jurisdiction to render a new judgment ordering periodic payments after an initial lump-sum judgment had been entered, and concluded that a party's request for periodic payment of future damages must be made prior to entry of any judgment in the action (*163 Cal. App. 3d 779, 784)* . Moreover, the court held that in a jury trial, the trial court cannot formulate a periodic payment schedule pursuant to *Code Civ. Proc. § 667.7* unless the jury has designated the portion of its verdict intended to compensate the plaintiff for future damages, and that amount equals or exceeds $50,000 (*163 Cal. App. 3d 779, 784-785)* . In sum, the trial court's order constituted a second, different judgment contravening *Code Civ. Proc. § 473*, which sets forth procedures for amending, correcting, and settingaside judgments, and thus was void and of no effect (*163 Cal. App. 3d 779, 785)* .

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17-175 California Points & Authorities § 175.64

§ 175.64 Supporting Contention That Collateral Source of Benefits Cannot Recover Expenses From Medical Malpractice Defendant [Civ. Code § 3333.1(b)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Name of collateral source*], AS A SOURCE OF COLLATERAL BENEFITS TO PLAINTIFF, CANNOT RECOVER ITS EXPENSES FROM _____ [*name of defendant health care provider*], BECAUSE THE ACTION IS FOR PERSONAL INJURY AGAINST A HEALTH CARE PROVIDER BASED ON PROFESSIONAL NEGLIGENCE.

A. Source of Collateral Benefits Cannot Recover Expenses. No source of collateral benefits introduced pursuant to *Section 3333.1(a) of the Civil Code* shall recover any amount against the plaintiff nor shall it be subrogated to the rights of the plaintiff against a defendant (*Civ. Code § 3333.1(b)*).

B. Bar to Recovery of Source of Collateral Benefits Constitutional. The provision precluding a collateral source of benefits to plaintiff from obtaining reimbursement from a defendant health care provider, pursuant to *Section 3333.1(b) of the Civil Code*, does not violate constitutional guarantees of due process and equal protection (*Barme v. Wood (1984) 37 Cal. 3d 174, 180-182, 207 Cal. Rptr. 816, 689 P.2d 446*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a collateral source of benefits to a medical malpractice plaintiff cannot obtain reimbursement from a defendant in an action for personal injury against a health care provider based on professional negligence [*see Civ. Code § 3333.1(b)*; *Barme v. Wood (1984) 37 Cal. 3d 174, 180-182, 207 Cal. Rptr. 816, 689 P.2d 446]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context

in which counsel wishes to raise the issue that a collateral source of benefits to a medical malpractice plaintiff cannot obtain reimbursement from a defendant health care provider. For example, these points and authorities may be used by a defendant health care provider in support of a motion for summary judgment against a collateral source that filed a complaint in intervention to obtain reimbursement from defendant in an underlying medical malpractice action. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should discuss facts showing that the action is for personal injury against a health care provider, as defined in *Civ. Code § 3333.1(c)(1)*, based on professional negligence, as defined in *Civ. Code § 3333.1(c)(2)*, and that the person or entity seeking to obtain reimbursement for expenses is a collateral source of benefits as defined in *Civ. Code § 3333.1(a)*.

[c] Related Points and Authorities

For points and authorities for use in actions and proceedings involving tort damages generally, see Ch. 64, *Damages: Tort* . For points and authorities for use in actions involving limitation on contingent fee contracts for a medical malpractice plaintiff's attorney under the Medical Injury Compensation Reform Act of 1975, see Ch. 25, *Attorney's Fees* .

[3] Discussion of Authorities

[a] Bar to Recovery of Source of Collateral Benefits Constitutional

Barme v. Wood *(1984) 37 Cal. 3d 174, 207 Cal. Rptr. 816, 689 P.2d 446* , was an action brought against health care providers to recover damages for personal injuries sustained while plaintiff underwent surgery. Plaintiff, a police officer, suffered a heart attack while on duty, and subsequently sustained brain damage during open heart surgery. Plaintiff brought an action against the hospital as well as individual health care providers, alleging professional negligence. Plaintiff's employer, as a self-insured workers' compensation carrier, filed a complaint in intervention against defendants, seeking to recover the expenses incurred in providing benefits to plaintiff. The trial court granted defendants' motion for summary judgment with respect to the complaint in intervention on the ground that recovery was precluded by *Civ. Code § 3333.1(b)*. Intervenor appealed.

The Supreme Court affirmed, upholding the constitutionality of *Civ. Code § 3333.1(b)* (*37 Cal. 3d 174, 180-182)* . The Court first noted that theMedical Injury Compensation Reform Act of 1975 (MICRA), of which *Civ. Code § 3333.1(b)* is part, was intended to address a medical malpractice "crisis" by reducing the cost of medical malpractice insurance (*37 Cal. 3d 174, 178-179)* . Intervenor contended that *Civ. Code § 3333.1(b)* arbitrarily eliminates an employer's right to seek reimbursement from a third party for workers' compensation benefits that the employer is legally obligated to provide. The Court held, however, that the legislature was within its province to determine, in light of the pertinent facts, that reducing the cost of medical malpractice insurance would serve the state. *Civ. Code § 3333.1(b)* is rationally related to that objective in that it reduces the potential liability of health care providers, and therefore does not violate due process. Intervenor alternatively contended that *Civ. Code § 3333.1(b)* denies equal protection by affording medical malpractice defendants benefits not afforded to other tort defendants, and imposing a burden only on those employers that provide benefits to victims of medical malpractice (*37 Cal. 3d 174, 181-182)* . However, the legislature did not violate equal protection principles because the provision was intended to alleviate a problem solely in the area of medical malpractice (*37 Cal. 3d 174, 182)* .

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17-175 California Points & Authorities § 175.65

§ 175.65 Opposing Contention That Plaintiff in Medical Malpractice Action Cannot Prove Recoverable Damages if All Damages Suffered Were Paid by Collateral Source [Civ. Code § 3333.1]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

SUMMARY JUDGMENT FOR DEFENDANT IN A MEDICAL MALPRACTICE ACTION IS INAPPROPRIATE IF BASED SOLELY ON THE GROUNDS THAT THE EVIDENCE SHOWS THAT ALL OF THE DAMAGES CLAIMED BY THE PLAINTIFF WERE PAID BY A COLLATERAL SOURCE.

Jury Must Decide How to Apply Evidence of Collateral Source Payments. Evidence presented by a defendant under *Civil Code Section 3333.1* that all of the plaintiff's claimed damages were paid by a collateral source does not constitute summary judgment proof that the plaintiff sustained no damages such that the plaintiff may not prosecute the action; instead, it is for the jury to decide how to apply the evidence of collateral payments in calculating damages (*Hernandez v. California Hosp. Med. Ctr. (2000) 78 Cal. App. 4th 498, 506, 93 Cal. Rptr. 2d 97*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that summary judgment may be granted to a defendant in a medical malpractice action based merely on the grounds that the proof shows that all of the plaintiff's claimed damages were paid by a collateral source. The grounds for opposition are that it is the province of the finder of fact to determine how to apply a defendant's evidence of payment by a collateral source presented under *Civ. Code § 3333.1*.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In response to the defendant's claim that the plaintiff received collateral source payments for the injuries claimed,

the plaintiff's counsel should discuss the facts showing that the plaintiff has suffered at least some damages for which recovery may be sought in a medical malpractice action and argue that the finder of fact is the appropriate body to determine how to apply evidence of collateral source payments.

[3] Discussion of Authorities

[a] Jury Must Decide How to Apply Evidence of Collateral Source Payments

In ***Hernandez v. California Hosp. Med. Ctr.*** *(2000) 78 Cal. App. 4th 498, 93 Cal. Rptr. 2d 97* , the plaintiff brought a survival action against a hospital for medical malpractice. The plaintiff sought to recover for bedsores suffered by his deceased father that were allegedly caused by the negligent care the hospital provided while the plaintiff's father was hospitalized approximately a year before his death. The plaintiff's father's death was not related to the hospital's alleged negligence. The hospital moved for summary judgment on the ground that the plaintiff could not establish any recoverable damages, because all of the medical bills related to treatment for the bedsores had been paid by Medi-Cal or Medicare, and the only other claimed damages were burial expenses that were unrelated to the defendant's alleged negligence. The trial court granted the motion for summary judgment and the plaintiff appealed.

The court of appeal reversed. The court noted first that the sole basis for granting the motion for summary judgment was the lack of proof of recoverable damages and that the motion did not challenge any issues of negligence or causation. Therefore, the only issue was whether the fact of payment by Medicare and Medi-Cal of the decedent's medical expensesprecluded the plaintiff as a matter of law from recovering damages for allegedly negligent treatment. After noting the general principles of the collateral source rule and the exception provided for medical malpractice defendants under *Civ. Code § 3333.1,* the court held that the statute did not preclude recovery of damages if payment has been made by a collateral source, but rather left to the jury to decide how to apply the defendant's evidence of collateral source payments in calculating damages. Therefore, the trial court erred in granting summary judgment (*78 Cal. App. 4th 498, 504-506)* . In addition, the court noted that the Medi-Cal program, unlike most collateral sources, was excepted from the application of *Civ. Code § 3333.1(b)* [*see § 175.64*] and had a statutory right to recover from third-party tortfeasors. Therefore, summary judgment was also granted in error to the extent that any of the damages had been paid by that program (*78 Cal. App. 4th 498, 506)* .

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17-175 California Points & Authorities § 175.66

§ 175.66 Supporting Contention That Noneconomic Damages From Medical Malpractice Are Limited by Statute [Civ. Code § 3333.2]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

IN AN ACTION FOR INJURY AGAINST A HEALTH CARE PROVIDER BASED ON PROFESSIONAL NEGLIGENCE, THE AMOUNT OF DAMAGES FOR NONECONOMIC LOSSES MAY NOT EXCEED $250,000.

A. Availability of Noneconomic Damages. In any action for injury against a health care provider based on professional negligence, the injured plaintiff is entitled to recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, and other nonpecuniary damage; such damages, however, may not exceed $250,000 (*Civ. Code § 3333.2(a), (b)*).

[*Optional*] **B. Action Based on Breach of Hospital's Duty to Use Reasonable Care in Reviewing Competence of Its Medical Staff.** *Section 3333.2 of the Civil Code*, limiting recovery for noneconomic losses to $250,000 in any action for injury against a health care provider based on professional negligence, applies to an action for breach of a hospital's duty to exercise reasonable care in reviewing the competence of its medical staff (*Bell v. Sharp Cabrillo Hosp. (1989) 212 Cal. App. 3d 1034, 1037, 1051, 260 Cal. Rptr. 886*).

[*Optional*] **C. Wrongful Death Actions.** The limitation on noneconomic damages set forth in *Section 3333.2 of the Civil Code* applies in wrongful death actions based on medical malpractice (*Yates v. Pollock (1987) 194 Cal. App. 3d 195, 199, 239 Cal. Rptr. 383*).

[*Optional*] **D. Limitation Applies Regardless of Number of Plaintiffs.** The limitation on noneconomic damages set forth in *Section 3333.2 of the Civil Code* is a limitation on the maximum recovery in a single medical malpractice action; there fore, if there are multiple plaintiffs in one action, the aggregate amount recoverable by the plaintiffs is $250,000 (*see* *Yates v. Pollock (1987) 194 Cal. App. 3d 195, 200, 239 Cal. Rptr. 383*).

[*Optional*] **E. Reduction of Award to Reflect Other Tortfeasor's Negligence.** With respect to awards of noneconomic

damages exceeding $250,000 in professional negligence actions involving multiple health care providers, reduction of the total award to $250,000, pursuant to *Civ. Code § 3333.2*, must precede several apportionment of noneconomic damages between multiple defendants pursuant to Proposition 51 (*Gilman v. Beverly Cal. Corp. (1991) 231 Cal. App. 3d 121, 126-130, 283 Cal. Rptr. 17*).

[*Optional*] **F. Limitation Applies to Indemnity Actions.** A health care provider may invoke *Civil Code Section 3333.2(b)*'s $250,000 limit on noneconomic damages in an action for partial equitable indemnity based on professional negligence (*Western S.S. Lines, Inc. v. San Pedro Peninsula Hosp. (1994) 8 Cal. 4th 100, 111, 32 Cal. Rptr. 2d 263, 876 P.2d 1062*).

[*Optional*] **G. Limitation Applies to Action for Failure to Provide Stabilizing Treatment Under *42 U.S.C.S. § 1395dd*.** An action for failure to provide stabilizing medical treatment brought under the federal Emergency Medical Treatment and Active Labor Act, *42 U.S.C.S. § 1395dd*, is an action for professional negligence subject to the $250,000 limit on noneconomic damages of *Civ. Code § 3333.2* (*Barris v. County of Los Angeles (1999) 20 Cal. 4th 101, 116-117, 83 Cal. Rptr. 2d 145, 972 P.2d 966*).

[*Optional*] **H. Limitation Applies to Damages Awarded Against Vicariously Liable Employer.** If an entity, such as a medical partnership group, is vicariously liable for the professional malpractice of a physician employed by the entity, the cap on noneconomic damages applies to any damages awarded against the entity (*Lathrop v. HealthCare Partners Med. Group (2004) 114 Cal. App. 4th 1412, 1424, 8 Cal. Rptr. 3d 668*).

[*Optional*] **I. Constitutionality of Limitation.** The limitation on damages for noneconomic losses in *Section 3333.2 of the Civil Code* does not violate constitutional guarantees of due process and equal protection and does not unconstitutionally abridge the right to jury trial (*Fein v. Permanente Med. Group (1985) 38 Cal. 3d 137, 157-164, 211 Cal. Rptr. 368, 695 P.2d 665* ; *Yates v. Pollock (1987) 194 Cal. App. 3d 195, 200, 239 Cal. Rptr. 383*).

[2] Comments

[a] Use of Form

These points and authorities may be used in support of the contention that damages for noneconomic losses in an action against a health care provider based on professional negligence are limited to $250,000 [*see Civ. Code § 3333.2*].

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should discuss facts showing that the underlying action is one involving an action for "professional negligence" [*see Civ. Code § 3333.2(c)(2)*] against a "health care provider" [*see Civ. Code § 3333.2(c)(1)*]. If a court has awarded damages in violation of *Civ. Code § 3333.2*, counsel should discuss facts showing that the improper damages were awarded for noneconomic losses; that is, to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, and other nonpecuniary damages [*see Civ. Code § 3333.2(a)*].

[c] Limitation Does Not Preclude Award of Punitive Damages

Although *Civ. Code § 3333.2* limits an award of compensatory damages for professional negligence of a health care provider to $250,000, the section will not bar an award of punitive damages exceeding $250,000 in cases based on fraud, willful neglect, or malicious acts [*see Baker v. Sadick (1984) 162 Cal. App. 3d 618, 626-627, 208 Cal. Rptr. 676* ; *see also Civ. Code § 3294* (circumstances in which punitive damages may be recovered)].

[d] Calculation of Damages When Plaintiff Comparatively Negligent

When applying the damage limitations set forth in *Civ. Code § 3333.2* to a particular case, the trier of fact must first find the entire amount of the plaintiff's noneconomic damages. The amount is then reduced by the percentage of the plaintiff's comparative fault, if any. If what remains exceeds $250,000, the award is further reduced to that amount [*see Atkins v. Strayhorn (1990) 223 Cal. App. 3d 1380, 1391-1393, 273 Cal. Rptr. 231* ; *McAdory v. Rogers (1989) 215 Cal. App. 3d 1273, 1276-1281, 264 Cal. Rptr. 71]* .

[e] Related Points and Authorities

For points and authorities for use in actions and proceedings involving tort damages generally, see Ch. 64, *Damages: Tort* .

[3] Discussion of Authorities

[a] Action Based on Breach of Hospital's Duty to Use Reasonable Care in Reviewing Competence of Its Medical Staff

In ***Bell v. Sharp Cabrillo Hosp.*** *(1989) 212 Cal. App. 3d 1034, 260 Cal. Rptr. 886* , the mother of a minor whose death resulted from surgery performed at a hospital sued both the hospital and the physician who performed the surgery for negligence. The plaintiff charged that the hospital breached its duty to exercise reasonable care in reviewing the surgeon's competence when the surgeon applied for renewal of his staff privileges. The jury's special verdict found that the hospital's negligence in evaluating and reviewing the surgeon's staff privileges was a legal cause of the child's death, and it awarded $100,000 in economic damages and $500,000 in noneconomic damages to plaintiff. The trial court reduced plaintiff's recovery for noneconomic damages to $250,000 pursuant to *Civ. Code § 3333.2*. On appeal, plaintiff contended that the court erred in reducing the award of economic damages to $250,000.

The court of appeal affirmed the judgment (*212 Cal. App. 3d 1034, 1052)* . It noted that "professional negligence" is defined within *Civ. Code § 3333.2(c)(2)* as a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital (*212 Cal. App. 3d 1034, 1049)* . The court noted that because a hospital's effectiveness in selecting and periodically reviewing the competency of its medical staff is a necessary predicate to delivering quality health care, its inadequate fulfillment of that responsibility constitutes "professional negligence" involving conduct necessary to the rendering of professional services within the scope of the services a hospital is licensed to provide (*212 Cal. App. 3d 1034, 1051)* . The court noted that in light of the comprehensive legislative scheme regulating the quality ofhealth care provided by contemporary hospitals, the ability of a medical malpractice victim to recover all economic, pecuniary damages resulting from an injury, and other social and economic pressures on hospitals to remain competitive in the health-care marketplace, it (the court) was confident that its holding would not encourage hospitals to become less responsible in monitoring the competency of their medical staffs (*212 Cal. App. 3d 1034, 1052)* .

[b] Wrongful Death Actions

Yates v. Pollock *(1987) 194 Cal. App. 3d 195, 239 Cal. Rptr. 383* , was a wrongful death action brought by a deceased patient's spouse and children against a surgeon who performed gallbladder surgery on the patient. During the surgery, the defendant ligated the patient's common bile duct; this resulted in the obstruction of the duct and the development of abscesses and infections that resulted in the patient's death. At trial, the jury awarded noneconomic damages to plaintiffs exceeding $1,000,000; defendant contended on appeal that this award was contrary to *Civ. Code § 3333.2*.

The court of appeal affirmed the judgment against defendant, but reduced the noneconomic damages to $250,000. Plaintiffs maintained that *Civ. Code § 3333.2* had no applicability to wrongful death actions because *Civ. Code § 3333.2(a)* refers only to actions for "injury" rather than "injury or wrongful death." The court noted that this argument

ignores the fact that wrongful death claims are for "injuries" suffered by the heirs of medical malpractice victims. Plaintiffs also argued that inasmuch as survivors may not recover for "pain, suffering, inconvenience, physical impairment, disfigurement, and other nonpecuniary damage" under *Civ. Code § 3333.2(a)*, the legislature must have intended to exclude wrongful death actions from the reach of the statute. The court disagreed, noting that *Civ. Code § 3333.2(a)* does not purport to set forth a comprehensive catalog of the types of losses to which the statute is applicable; it simply identifies certain of the more common types of noneconomic damages that arise in malpractice actions. The court added that the statute's reference to "nonpecuniary damage" is not fatal to its application in the wrongful death context. Although California law indicates that only "pecuniary" losses are compensable in wrongful death suits, damage awards in such cases, in fact, have never been restricted to those elements having an ascertainable economic value (*194 Cal. App. 3d 195, 199-200)* .

[c] Limitation Applies Regardless of Number of Plaintiffs

The facts and procedural background of ***Yates v. Pollock*** *(1987) 194 Cal. App. 3d 195, 239 Cal. Rptr. 383* , are discussed in *§ 175.66[3][b]*. The plaintiffs (the decedent's wife and five adult children) asserted that the $250,000 damages limitation in *Civ. Code § 3333.2* should be applied to each plaintiff individually and not to all plaintiffs in the aggregate. The court of appeal disagreed. It stated that *Civ. Code § 3333.2* makes it clear that while each injured plaintiff is entitled to seek noneconomic damages, the maximum recovery permitted in any single medical malpractice action is $250,000, regardless of the number of plaintiffs involved. The court surmised that the legislature, when drafting the statute, was aware that case precedent has consistently held that only one action can be brought for the wrongful death of a person, and that the cause of action for wrongful death has been consistently characterized as a joint one, a single one, and an indivisible one. The court concluded that the legislature's use of the word "action" in *Civ. Code § 3333.2* represented its (the legislature's) conscious decision to limit the total recovery for noneconomic loss in wrongful death suits to $250,000 (*194 Cal. App. 3d 195, 200-201)* .

NOTE:

In *Atkins v. Strayhorn (1990) 223 Cal. App. 3d 1380, 273 Cal. Rptr. 231* , the court of appeal clarified that *Civ. Code § 3333.2* does not limit all noneconomic damages arising from a single act of professional negligence to $250,000, but instead limits the aggregate noneconomic damages to $250,000 for each separate and independent claim for personal injury based on a single act of professional negligence. In *Atkins*, a claim for loss of consortium was joined with a spouse's claim for physical injuries in an action for medical malpractice, and the court held that each spouse was entitled to recover up to $250,000 for his or her separate noneconomic losses. The court distinguished *Yates*, in which the appellate court placed an aggregate limit on recovery by wrongful death plaintiffs, noting that wrongful death is a joint, single and indivisible action, merely derivative of the deceased patient's claim for personal injuries, while loss of consortium is a separate and independent claim from a spouse's claim for personal injury [*Atkins v. Strayhorn (1990) 223 Cal. App. 3d 1380, 1394-1396, 273 Cal. Rptr. 231]* .

[d] Reduction of Award to Reflect Other Tortfeasor's Negligence

Gilman v. Beverly Cal. Corp. *(1991) 231 Cal. App. 3d 121, 283 Cal. Rptr. 17* , was a wrongful death action involving tortious conduct by a nursing facility and a nonparty physician. The jury, finding for plaintiffs, awarded plaintiffs $400,000 in noneconomic damages against the facility. The trial court reduced the jury's award to $250,000, pursuant to *Civ. Code § 3333.2*, and then reduced the award by another 10 percent, pursuant to Proposition 51 [*Civ. Code § 1431.2(a)*], to reflect the fact that 10 percentof fault was attributed to the nonparty physician. On plaintiffs' cross appeal, plaintiffs contended that the court should have applied Proposition 51's proportionate fault reduction to the $400,000 award before reducing the noneconomic damages to the MICRA cap of $250,000.

The court of appeal affirmed the noneconomic damage award, upholding the trial court's method of calculation (*231 Cal. App. 3d 121, 129)* . It noted that the method of calculation requested by plaintiffs would defeat the stated purposes

of Proposition 51 (*Civ. Code § 1431.1 et seq.*)--to limit the potential liability of an individual defendant for noneconomic damages to a proportion commensurate with that defendant's personal share of fault (*231 Cal. App. 3d 121, 128)* .

NOTE:

In a subsequent case, the court of appeal noted that the approach of the court in *Gilman v. Beverly California Corp.* was correct if the nonparty assigned a proportion of the fault was also a health care provider subject to MICRA. However, the court held that in adjusting damages to account for the comparative fault of nonparties who are not subject to MICRA, a noneconomic damages award must be reduced prior to applying the $250,000 cap [*Francies v. Kapla (2005) 127 Cal. App. 4th 1381, 1387-1389, 26 Cal. Rptr. 3d 501]* .

[e] Limitation Applies to Indemnity Actions

In ***Western S.S. Lines, Inc. v. San Pedro Peninsula Hosp.*** *(1994) 8 Cal. 4th 100, 32 Cal. Rptr. 2d 263, 876 P.2d 1062* , a purser who worked for Western Steamship Lines (Western) became ill while at sea; when the ship reached port, she was taken unconscious to San Pedro Peninsula Hospital (Hospital). At the Hospital, she suffered cardiac arrest, and never regained consciousness. Her guardian brought suit against Western in Florida under federal maritime law, and Western settled for $6 million after a judgment of $7.75 million. Western sued Hospital for indemnification; based on a finding that Hospital's fault was 30 percent, the trial court entered judgment against Hospital in the amount of $1.8 million (30 percent of $6 million). Hospital appealed, arguing that *Civ. Code § 3333.2(b)* applied to limit the amount of its liability; the court of appeal affirmed on the ground that the payment was entirely economic in nature, making § 3333.2(b) inapplicable. The Supreme Court granted review and reversed the court of appeal, holding that the damage limitation in *Civ. Code § 3333.2* applies to an action for equitable indemnity brought against a health care provider by a concurrent tortfeasor (*8 Cal. 4th 100, 104)* .

The Court discussed the policies underlying the doctrine of equitable indemnity and its general goal of equitable allocation of loss, and the qualifications to the right to indemnity that can be imposed on grounds of public policy (*8 Cal. 4th 100, 108-110)* . The Court also examined the public policy that is served by the Medical Injury Compensation Reform Act (MICRA), especially the goals of controlling or redistributing liability for damages, and reasoned that the legislative goals of containing malpractice insurance rates by limiting the size of unpredictable jury awards, would be undermined if health care providers were subject to unlimited liability in third-party indemnity actions (*8 Cal. 4th 100, 112)* .

The Court also found support for its conclusion by analyzing the nature of *Civ. Code § 3333.2* in terms of a limitation on liability. By precluding recovery for noneconomic damages against health care providers in excess of $250,000, it also limits their joint liability irrespective of proportionate fault. Thus, concurrent tortfeasors have no right to indemnification beyond this amount (*8 Cal. 4th 100, 116)* . Because a health care provider cannot be liable for noneconomic damages in excess of $250,000, a concurrent tortfeasor that satisfies a judgment or settles with the injured party for a greater amount has not been "compelled to pay" on behalf of another who would have otherwise incurred the loss, and the provider is not unjustly enriched by the payment of damages for which it is not legally obligated (*8 Cal. 4th 100, 116-117)* .

[f] Limitation Applies to Action for Failure to Provide Stabilizing Treatment Under 42 U.S.C.S. § 1395dd

In ***Barris v. County of Los Angeles*** *(1999) 20 Cal. 4th 101, 83 Cal. Rptr. 2d 145, 972 P.2d 966* , plaintiff had taken her 18-month-old daughter to the emergency room of a county hospital when her daughter was experiencing episodes of vomiting, diarrhea, lethargy, breathing difficulties, and high fever. Although the examining physician at the county hospital suspected sepsis, a life-threatening bacterial infection detectable through a blood culture and treatable with antibiotics, the doctor believed that permission from plaintiff's health plan was required before blood tests could be

performed. Upon contacting the health plan, the examining physician was denied permission to perform the blood tests, which were instead to be performed at a health plan hospital following transfer of the child. Although the examining doctor at the county hospital was concerned that the blood tests should not be delayed and again contacted the health plan unsuccessfully for permission, tests were not performed by the county hospital. When the child suffered a seizure, the examining physician at the county hospital treated the symptoms but antibiotics were not administered. Approximately an hour after the seizure, the child was finally transferred by ambulance to a health plan hospital, where within 15 minutes she suffered cardiac arrest and died. The death certificate listed sepsis as the cause of the cardiac arrest. Plaintiff brought an action against the county hospital, plaintiff's health plan, and doctors at each, alleging professional negligenceand violations of the federal Emergency Medical Treatment and Active Labor Act, *42 U.S.C.S. § 1395dd* (EMTALA). The claims under EMTALA alleged that the county had failed to provide an appropriate medical screening and that the county failed to stabilize the infant's emergency medical condition prior to transferring her to another hospital, both of which are grounds for recovery of civil damages under the statute [*see 42 U.S.C.S. § 1395dd(a)-(c), (d)(2)(A)*].

At trial, the county moved for nonsuit on the claims brought under EMTALA. The trial court granted nonsuit on the failure to screen claim only, and thereafter the jury returned a verdict for the plaintiff on the claims for professional negligence and for failure to stabilize under EMTALA. The jury award included $1.35 million in noneconomic damages, although the trial court reduced these damages to $250,000, ruling that the noneconomic damages cap of *Civ. Code § 3333.2* applied to the EMTALA claim as well as the professional negligence claim. Plaintiff appealed the application of *Civ. Code § 3333.2*. The court of appeal affirmed, concluding that *Civ. Code § 3333.2* applies broadly to any cause of action against a health care provider that is directly related to the professional services provided.

The Supreme Court affirmed the judgment, although on narrower grounds than the court of appeal. The Supreme Court noted that when a successful suit is brought under EMTALA, the statute specifically provides for recovery of "those damages available for personal injury under the law of the State in which the hospital is located" (*see 42 U.S.C.S. § 1395dd(d)(2)(A)*. Based on this damage provision, the intent of Congress when passing the statute, and the opinions of courts in other jurisdictions that had faced the analogous question, the Court held that the cap on noneconomic damages of *Civ. Code § 3333.2* applies to actions brought under EMTALA when the cap would apply if the claim were brought under state law. Since a plaintiff bringing a failure to stabilize claim under EMTALA must necessarily prove that "the hospital did not, within its available staff and facilities, provide a patient known to be suffering from an emergency medical condition with medical treatment necessary to assure, within reasonable medical probability, that no deterioration of the condition would likely occur," these claims are "based on professional negligence" and therefore subject to the provisions of *Civ. Code § 3333.2*. The Court cautioned, however, that its holding did not limit *all* awards of noneconomic damages for violations of EMTALA, but only for those violations that would constitute "professional negligence" under state law (*20 Cal. 4th 101, 114, 116)* .

[g] Limitation Applies to Damages Awarded Against Vicariously Liable Employer

In ***Lathrop v. HealthCare Partners Med. Group*** *(2004) 114 Cal. App. 4th 1412, 8 Cal. Rptr. 3d 668* , the plaintiffs were a patient and her husband who sued several physicians and an unincorporated medical group that employed the physicians. The suit alleged medical malpractice in the physicians' negligent failure to timely diagnose and treat the patient for breast cancer. The physicians examined the patient for a lump in her breast, but no mammograms or biopsies were performed because the doctors concluded the lump was a benign cyst. At trial against the defendants, the jury awarded damages, including noneconomic damages, to the plaintiffs. The trial court rejected the claim of the unincorporated medical group that its liability for noneconomic damages was limited to $250,000 for each of the judgments entered in favor of the two plaintiffs. The medical group appealed.

The court of appeal reversed. The court held, first, that the group did not meet the statutory definition of a "health care provider" under MICRA. The group itself was not a licensed medical practitioner, because only individual persons may be so licensed, and because the group had abandoned any argument that it met the definition of a licensed facility, the

court of appeal declined to address the issue of whether the group was a licensed facility. Therefore, application of the MICRA damages limitation could not be justified on the grounds that the medial group was itself a health care provider (*114 Cal. App. 4th 1412, 1419-1421)* . However, the court went on to note that under the legal theories and evidence advanced at trial, the liability imposed on the medical group was vicarious liability based on the negligence of the individual physicians employed by the group, rather than direct liability for conduct taken by the group itself. The court noted that under the doctrine of respondeat superior, regardless of whether the employee is also sued, the vicarious liability of the employer is wholly derived from the liability of the employee, and that any defenses available to the employee also inure to the benefit of the employer. The court saw no reason to deviate from this established principle in the application of the MICRA damages limitation, and therefore the court held that the trial court erred in refusing to reduce the noneconomic damage awards to $250,000, because any judgments against the physicians themselves would clearly be governed by this cap (*114 Cal. App. 4th 1412, 1421-1424)* .

[h] Constitutionality of Limitation

Fein v. Permanente Med. Group *(1985) 38 Cal. 3d 137, 211 Cal. Rptr. 368, 695 P.2d 665* , involved a medical malpractice action brought against a hospital based on the hospital's alleged failure to diagnose the plaintiff's impending heart attack. The jury awarded plaintiff over $1,000,000 in damages, including $500,000 for "noneconomic damages," to compensate for pain, suffering, inconvenience, physical impairment and other intangible damages sustained by plaintiff from the time of the injury until his death. After the verdict was returned, defendant hospital requested the court to reduce the noneconomic damages award to $250,000 pursuantto *Civ. Code § 3333.2*. The trial court, which had rejected the plaintiff's constitutional challenge to *Civ. Code § 3333.2* in a pretrial ruling, reduced the noneconomic damages to $250,000. On appeal from the judgment, plaintiff contended that *Civ. Code § 3333.2*: (1) violates due process because it limits the potential recovery of medical malpractice claimants without providing them an adequate quid pro quo; (2) violates the *equal protection clause* because it impermissibly discriminates between medical malpractice victims and other tort victims; and (3) violates the *equal protection clause* because it improperly discriminates within the class of medical malpractice victims, denying a complete recovery of damages only to those malpractice plaintiffs with noneconomic damages exceeding $250,000.

The Supreme Court affirmed the reduction by the trial court of the noneconomic damage award (*38 Cal. 3d 137, 164)* . It rejected plaintiff's due process claim, noting that a plaintiff has no vested property right in a particular measure of damages, and that the legislature possesses broad authority to modify the scope and nature of damages (*38 Cal. 3d 137, 157)* . *Civ. Code § 3333.2*, said the Court, is rationally related to the legitimate state interest of reducing the costs of malpractice defendants and their insurers (*38 Cal. 3d 137, 158-159)* . Rejecting plaintiffs' equal protection arguments, the Court noted that *Civ. Code § 3333.2* bears a rational relationship to a legitimate legislative purpose, and therefore meets the traditional, "rational relationship" equal protection standard (*38 Cal. 3d 137, 162-163)* . The Court stated that there was no merit to plaintiff's claim that *Civ. Code § 3333.2* violates equal protection principles because it obtains cost savings through a $250,000 limit on noneconomic damages, rather than, for example, through the complete elimination of all noneconomic damages; if the across-the-board limit were unconstitutional, noted the Court, then a complete elimination of noneconomic damages would also violate equal protection, since abolition would impose greater monetary losses on those plaintiffs who would have obtained larger damage awards than on those who would have recovered lesser amounts (*38 Cal. 3d 137, 162)* . Although the legislature could have realized its hoped-for cost savings by mandating a fixed-percentage reduction of all noneconomic damage awards, the Court stated that the legislature may have had several valid reasons for setting an absolute limit, all of which would provide a sufficient rationale for the $250,000 limit: (1) the legislature could reasonably have determined that an across-the-board limit would provide a more stable base on which to calculate insurance rates; (2) the legislature could reasonably have felt that the fixed $250,000 limit would promote settlements by eliminating the unknown possibility of phenomenal awards for pain and suffering; and (3) the legislature could have felt that it was fairer to malpractice plaintiffs in general to reduce only the very large noneconomic damage awards, rather than to diminish the more modest recoveries for pain and suffering and the like in the great bulk of cases (*38 Cal. 3d 137, 162-163)* . The Supreme Court concluded that *Civ. Code § 3333.2* is constitutional, and that the trial court did not err in reducing the noneconomic damages award

pursuant to its terms (*38 Cal. 3d 137, 164)* .

The facts and procedural background of ***Yates v. Pollock*** *(1987) 194 Cal. App. 3d 195, 239 Cal. Rptr. 383* , are discussed in *§ 175.66[3][b]*. The plaintiffs contended on appeal that *Civ. Code § 3333.2* unconstitutionally abridges the right to jury trial guaranteed by *Cal. Const. art. I, § 16*. The court disagreed, finding this argument nothing but an indirect attack on the legislature's power to place a cap on damages. The court noted that while *Civ. Code § 3333.2* will, in some cases, result in the recovery of a lower judgment than would have been obtained before the enactment of the statute, the legislature retains broad control over the measure as well as the timing of damages that a defendant is obligated to pay, and a plaintiff is entitled to receive, and that it may expand or limit recoverable damages so long as its action is rationally related to a legitimate government interest. The court noted that, while the general propriety of noneconomic damages is firmly imbedded in common law jurisprudence, no California case has ever suggested that the right to recover for such noneconomic injuries is constitutionally immune from legislative limitation or revision (*194 Cal. App. 3d 195, 200)* .

[4] Additional Authorities

[a] Reduction of Award to Reflect Other Tortfeasor's Negligence

In *Mayes v. Bryan (2006) 139 Cal. App. 4th 1075, 44 Cal. Rptr. 3d 14* , plaintiffs were the husband and children of a woman who died two months after surgery to have her stomach stapled. Plaintiffs sued several doctors and related entities for malpractice in failing to properly diagnose and treat a bowel obstruction that occurred the day after the surgery, which eventually caused the woman's death. The case went to trial and plaintiffs settled with all defendants except one doctor. The jury returned a verdict in favor of plaintiffs, awarded economic damages of $1,366,357 and noneconomic damages of $3,000,000, and allocated 20 percent of total fault to the nonsettling doctor. In calculating this doctor's share of liability, the trial court first reduced the economic damage award to $817,107 to offset for the amount of economic damages recovered in settlements with the other defendants. The court then reduced the noneconomic damage award to $250,000 pursuant to MICRA and allocated 20 percent of that amount to the nonsettling doctor, to arrive at a total liability of $867,107. Plaintiff appealed this allocation, arguing that it was unfair to reduce the noneconomic damage award to $250,000 before further reducing it to account for the jury's allocation of fault. The court of appeal rejected this argument, following the logic and analysis set out in *Gilman v. Beverly Cal. Corp. (1991) 231 Cal. App. 3d 121, 283 Cal. Rptr. 17* , discussed in [3][d], *above*. The court noted that this was not a case in which the plaintiff's own comparative fault was an issue, and all of the settling defendants werephysicians also subject to the MICRA cap on noneconomic damages. Thus, it was proper for the trial court to cap noneconomic damages at $250,000 before allocating responsibility for that amount among the various tortfeasors. The court noted that it was up to plaintiffs to ensure that their settlements with more culpable defendants before trial resulted in recovery of an appropriate share of noneconomic damages to reflect the culpability of those defendants (*139 Cal. App. 4th 1075, 1098-1103)* .

California Points & Authorities

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CHAPTER 175 PHYSICIANS AND SURGEONS: MEDICAL MALPRACTICE
PART II. FORMS

17-175 California Points & Authorities § 175.67

§ 175.67 Supporting Contention That Statutory Cap on Noneconomic Damages in Medical Malpractice Actions [Civ. Code § 3333.2] Applies to Present Value of Periodic Payment of Future Damages [Code Civ. Proc. § 667.7]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

WHEN FUTURE NONECONOMIC DAMAGES WILL BE PAID OVER TIME IN PERIODIC INSTALLMENTS, THE $250,000 STATUTORY CAP ON THESE DAMAGES APPLIES ONLY TO THE PRESENT VALUE OF THE FUTURE DAMAGES AWARD AT THE TIME OF JUDGMENT.

Statutory Cap on Noneconomic Damages Award Applies to Present Value of Awards for Future Damages. If the award of noneconomic damages includes future noneconomic damages to be paid according to a periodic payment schedule, the statutory cap applies only to the present value of the award for future damages at the time of judgment (*Salgado v. County of Los Angeles (1998) 19 Cal. 4th 629, 643, 80 Cal. Rptr. 2d 46, 967 P.2d 585*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a contention that if an award of noneconomic damages in a medical malpractice case includes future noneconomic damages to be paid according to a periodic payment schedule under *Code Civ. Proc. § 667.7*, the statutory cap on noneconomic damages of *Civ. Code § 3333.2* applies only to the present value of the award for future damages at the time of judgment.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should include discussion of the award for future noneconomic damages, the present value of the award at the time of judgment, and the periodic payment schedule.

[c] Related Pleading and Practice Forms

For forms relating to the periodic payment of future damages, see California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice* (Matthew Bender).

[d] Related Points and Authorities

For points and authorities for use in actions and proceedings involving tort damages generally, see Ch. 64, *Damages: Tort* .

[3] Discussion of Authorities

[a] Statutory Cap on Noneconomic Damages Award Applies to Present Value of Awards for Future Damages

The facts and procedural background of ***Salgado v. County of Los Angeles*** *(1998) 19 Cal. 4th 629, 641-643, 80 Cal. Rptr. 2d 46, 967 P.2d 585* , are discussed in *§ 175.67[3][a]*. In reaching its decision, the California Supreme Court reviewed relevant case law and concluded that, since a jury award for future pain and suffering has generally been regarded as the jury's rough estimate of the amount of money paid at the time of judgment that would compensate the plaintiff for all future pain and suffering, the statutory cap of $250,000 for noneconomic damages was intended to apply to a lump sum paid at the time of the judgment, or to the present value of periodic future payments, but not to the gross sum of such future payments. Thus, the cap does not prevent a defendant from paying more than $250,000 over time when a periodic payment schedule is used.

California Points & Authorities

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CHAPTER 175 PHYSICIANS AND SURGEONS: MEDICAL MALPRACTICE
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17-175 California Points & Authorities § 175.68

§ 175.68 Opposing Contention That Noneconomic Damages From Medical Malpractice Are Limited by Statute [Civ. Code § 3333.2]--Damages Limitation Does Not Apply to Common Law Battery Action

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE $250,000 LIMIT ON THE RECOVERY OF NONECONOMIC DAMAGES IN AN ACTION FOR MEDICAL MALPRACTICE DOES NOT APPLY TO A CAUSE OF ACTION FOR COMMON LAW BATTERY.

Damages Cap Inapplicable to Common Law Battery Claim. The $250,000 limit on noneconomic damages imposed by *Civil Code Section 3333.2* in medical malpractice cases does not apply if a plaintiff recovers for a common law battery based on the physician's performing a surgery to which the plaintiff expressly did not consent (*Perry v. Shaw (2001) 88 Cal. App. 4th 658, 661, 668-670, 106 Cal. Rptr. 2d 70*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to the contention that the plaintiff may not recover noneconomic damages in excess of $250,000. The basis for the opposition is that the $250,000 noneconomic damages cap of *Civ. Code § 3333.2* does not apply to a cause of action for the common law intentional tort of battery, such as an action in which the plaintiff proves that the physician performed a type of surgery to which the plaintiff expressly did not consent.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should include facts showing that the action is not an action for negligence, but is instead an action for common law battery--for example, by showing that the plaintiff expressly refused to consent to the treatment or surgery performed by the physician.

[c] Related Pleading and Practice Forms

For discussion relating to claims for battery against a physician, see California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice* (Matthew Bender).

[d] Opposing Points and Authorities

For points and authorities supporting the claim that the noneconomic damages limitation applies, see *§ 175.66*.

[e] Related Points and Authorities

For points and authorities for use in actions and proceedings involving tort damages generally, see Ch. 64, *Damages: Tort* .

[3] Discussion of Authorities

[a] Damages Cap Inapplicable to Common-Law Battery Claim

The plaintiff in ***Perry v. Shaw*** *(2001) 88 Cal. App. 4th 658, 106 Cal. Rptr. 2d 70* , had lost a substantial amount of weight and subsequently agreed to have surgery to remove excess skin from her arms, back, thighs, and stomach. During two office visits prior to the surgery, the plaintiff's physician discussed the possibility of breast augmentation in addition to the skin removal procedure, but the plaintiff expressly told her physician that she was not interested. At the hospital on the day of surgery, the plaintiff twice refused to sign a form consenting to breast augmentation surgery, although she apparently "changed her mind" after she was medicated, taken to the operating room, and reassured by the doctor that he would not perform breast surgery. The plaintiff woke up after the surgery to find that in addition to the skin removal, the physician had made her breasts substantially larger by moving tissue flaps from the side of her chest into her breasts. The plaintiff brought suit against the physician and his employer, alleging both negligence and battery, although the case was tried entirely on the theory of battery. The jury found that the physician was both negligent and had committed a battery and awarded $59,000 for medical expenses and $1,030,000 for past and future noneconomic damages. The trial court refused to reduce the noneconomic damages award to $250,000 pursuant to *Civ. Code § 3333.2*, and the defendants appealed.

The court of appeal affirmed. The court first noted that *Civ. Code § 3333.2* applies only to actions based on professional negligence, defined as "a negligent act or omission to act by a health care provider in the rendering of professional services." The court then discussed *Cobbs v. Grant (1972) 8 Cal. 3d 229, 104 Cal. Rptr. 505, 502 P.2d 1* , which established that common law battery is proven if a physician obtains consent from a patient to perform one type of treatment and subsequently performs a substantially different treatment for which consent was not obtained (*88 Cal. App. 4th 658, 663-664)* . The court then analyzed the legislative history and past applications of *Civ. Code § 3333.2* and found nothing to suggest that the legislature intended to extend the noneconomic damages cap to the intentional tort of battery. At the time *Civ. Code § 3333.2* was enacted, the legislature knew that case law had recognized a species of battery by a health care practitioner that was not negligence, and yet the legislature chose to use the word "negligence" in defining the scope of the statute (*88 Cal. App. 4th 658, 668-669)* . The court then rejected the physician's claim that the noneconomic damages award should be allocated between the negligence and battery causes of action. Although the jury had expressly found that the physician was both negligent and had committed a battery, the court noted that the case at trial had been prosecuted entirely on the theory that a battery had been committed, not that the surgery had been performed negligently, and that the noneconomic damages award was for the emotional distress caused by the unwanted breast enlargement, which was the basis for the battery claim (*88 Cal. App. 4th 658, 669-670* & n.5).

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Volume 17 Chapters 170-179 PARTNERSHIPS---to---PREMISES LIABILITY
CHAPTER 175 PHYSICIANS AND SURGEONS: MEDICAL MALPRACTICE
PART II. FORMS

17-175 California Points & Authorities § 175.69

§ 175.69 Supporting Contention That Expert Medical Witness Lacking Experience in Emergency Medical Care Is Not Qualified to Testify in Medical Malpractice Action--Action Is for Alleged Medical Malpractice Arising Out of Emergency Medical Coverage [Health & Safety Code § 1799.110(c)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE EXPERT MEDICAL WITNESS _____ [WHO TESTIFIED *or* WHOSE TESTIMONY _____ (WAS *or* WILL BE) PROFFERED] BY _____ [*specify party, e.g.,* PLAINTIFF] AT THE TRIAL OF THIS ACTION _____ [IS *or* WAS] NOT QUALIFIED TO TESTIFY BECAUSE THIS ACTION AROSE OUT OF [ALLEGED] MEDICAL MALPRACTICE IN PROVIDING EMERGENCY MEDICAL COVERAGE, AND THE WITNESS _____ [LACKS *or* LACKED] THE REQUIRED EXPERIENCE TO QUALIFY AS AN EXPERT IN SUCH A CASE.

A. Required Qualifications of Expert Medical Witness in Medical Malpractice Action Arising Out of Emergency Medical Care. In any action for damages involving a claim of negligence againsta physician and surgeon providing emergency medical coverage for a general acute care hospital emergency department, the court "shall" admit expert medical testimony only from physicians and surgeons who have had substantial professional experience within the last five years while assigned to provide emergency medical coverage in a general acute care hospital emergency department (*Health & Safety Code § 1799.110(c)*; *Zavala v. Board of Trs. (1993) 16 Cal. App. 4th 1755, 1762-1763, 20 Cal. Rptr. 2d 768* ; *Sigala v. Goldfarb (1990) 222 Cal. App. 3d 1450, 1455-1456, 266 Cal. Rptr. 96*).

B. Determination of Substantial Professional Experience. For the purposes of *Health and Safety Code Section 1799.110(c)*, substantial professional experience "shall" be determined by the custom and practice in which emergency medical coverage is provided in general acute care hospital emergency departments in the same or similar localities where the alleged negligence occurred (*Health & Safety Code § 1799.110(c)*).

C. Meaning of "Shall" as Used in Code. The word "shall," as used in the Health and Safety Code, indicates mandatory compliance (*Health & Safety Code § 16*).

D. "Emergency Medical Coverage" Defined. Although the term "emergency medical coverage" is not defined in *Health and Safety Code Section 1799.110(c),* the term has been held to mean providing treatment to a patient in a general acute care hospital emergency department, regardless of whether the physician was actually providing "emergency medical services," as that term is defined in *Health and Safety Code Section 1799.110(b),* at the time of the alleged negligence (*James v. St. Elizabeth Cmty. Hosp. (1994) 30 Cal. App. 4th 73, 79-80, 35 Cal. Rptr. 2d 372*).

[*Optional*] **E. Applicability of Statute.** *Health and Safety Code Section 1799.110(c)* applies to any suit involving a claim of negligent treatment by a hospital emergency room physician, whether or not that physician is named as a defendant (*Jutzi v. County of Los Angeles (1987) 196 Cal. App. 3d 637, 646-647, 649-651, 242 Cal. Rptr. 74*).

[*Optional*] **F. "On Call" Emergency Room Physician Does Not Provide "Emergency Medical Coverage."** A specialist who is "on call" to the emergency room to consult and treat injuries within his or her specialty is not an emergency room physician providing "emergency medical coverage," and is thus not qualified to provide expert medical testimony under *Health and Safety Code Section 1799.110(c)* (*Miranda v. National Emergency Servs., Inc. (1995) 35 Cal. App. 4th 894, 907, 41 Cal. Rptr. 2d 593*).

[*Optional*] **G. Experience "Within Last Five Years" Means Within Five Years Before Date of Malpractice.** The requirement of *Health & Safety Code Section 1799.110(c)* that a testifying medical expert have substantial experience in emergency medical coverage within the "last five years" is measured from the date of the alleged malpractice, not from the date of trial (*Petrou v. South Coast Emergency Group (2004) 119 Cal. App. 4th 1090, 1094, 15 Cal. Rptr. 3d 64*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that to qualify as a medical expert witness in a medical malpractice action arising out of emergency medical coverage, the witness must be experienced in the field of emergency medical coverage. Optional Paragraph E should be included if the negligent physician is not named as a defendant in the lawsuit.

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the expert medical witness's qualifications to testify. For example, counsel may wish to raise the issue in support of a motion for new trial when unqualified medical experts were allowed, over objection, to testify for the adverse party; in support of a motion in limine made before trial; or in support of an oral objection at trial to the witness's testifying. The points and authorities in this form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing how the facts of the case demonstrate that, under the circumstances, the action arose out of emergency medical coverage and the witness's lack of the required experience in this field.

[c] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 175.70* may be used to oppose the contention supported by the points and authorities in this form.

[3] Discussion of Authorities

[a] Required Qualifications of Expert Medical Witness in Medical Malpractice Action Arising Out of Emergency Medical Care

In ***Zavala v. Board of Trs.*** *(1993) 16 Cal. App. 4th 1755, 20 Cal. Rptr. 2d 768* , plaintiff alleged that defendant physician failed to properly diagnose and treat her during her visit to an emergency room. As part of her case, plaintiff intended to introduce the testimony of an expert witness. However, the expert witness was not an emergency room physician, nor had he acted as such within the last five years. Consequently, the trial court granted defendant's motion in limine to exclude the testimony of plaintiff's expert on the grounds that he did not qualify pursuant to *Health & Safety Code § 1799.110*. Since plaintiff did not have expert testimony to support her claims, the trial court granted a nonsuit in favor of defendant.

In affirming the trial court's ruling, the appellate court noted that it was undisputed that defendant was responsible for providing emergency medical services and was acting in that capacity at the time she treated plaintiff. Further, *Health & Safety Code § 1799.110* precludes expert testimony by a witness who has not had substantial experience as an emergency room physician in the last five years (*16 Cal. App. 4th 1755, 1762-1763)* .

In ***Sigala v. Goldfarb*** *(1990) 222 Cal. App. 3d 1450, 266 Cal. Rptr. 96* , a medical malpractice action, the trial court granted a motion in limine by defendant doctor to preclude testimony by plaintiffs' designated expert witness. This witness was, according to plaintiffs, a nationally recognized expert in the field of trauma care. However, it was undisputed that the witness did not meet the experience requirements set forth in *Health & Safety Code § 1799.110(c)*. The court of appeal affirmed, rejecting a contention by plaintiff that allowing the testimony would have provided the jury with the type of expert testimony that the statute seeks to ensure. The court noted that it was obligated to follow the plain and literal meaning of the statute, and that its construction of *Health & Safety Code § 1799.110(c)* would not result in absurdity or contravene the statute's purpose (*222 Cal. App. 3d 1450, 1455-1456)* .

[b] "Emergency Medical Coverage" Defined

In ***James v. St. Elizabeth Cmty. Hosp.*** *(1994) 30 Cal. App. 4th 73, 35 Cal. Rptr. 2d 372* , the plaintiff brought a medical malpractice action against a hospital and physician based on allegedly negligent treatment provided by the physician. The action stemmed from treatment received when the plaintiff went to the hospital's emergency room to have rings cut off from her left ring finger. The plaintiff had injured the finger a day earlier, but the initial treatment provided by a local clinic had not prevented the finger from swelling to the point that the rings had to be removed to alleviate the pain. After other emergency room personnel removed the plaintiff's rings, which provided immediate relief to the plaintiff from the pain, the defendant physician requested and received the plaintiff's consent to examine the finger. The doctor had X-rays taken, which subsequently revealed a small break in the knuckle not previously detected. The physician and a nurse then reapplied the straight splint that had earlier been used by the clinic to immobilize the finger and told the plaintiff to leave the splint on until returning to her own doctor in three or four weeks. Four weeks later, the splint was removed and the plaintiff was unable to bend her fingers. Plaintiff underwent physical therapy for approximately a year and apparently still suffered residual effects at the time of trial. At trial, plaintiff was unable to provide an expert medical witness that met the qualification requirements of *Health & Safety Code § 1799.110(c)*, but she argued that the section did not apply to her case because the defendant physician was not providing "emergency medical care" at the time of the allegedly-negligent treatment. In support of her proposition she cited *Jutzi v. County of Los Angeles (1987) 242 Cal. Rptr. 74* [*see § 175.69[3][c]*], in which the court had noted that "emergency medical coverage" under the statute was apparently the same as "emergency medical services" as defined in *Health & Safety Code § 1799.110(b)*, and as such the need for immediate treatment was essential for the statutory provision to apply. The trial judge disagreed, and granted a motion for nonsuit brought by the defendants.

The court of appeal upheld the trial court's ruling. The court of appeal concluded that the structure of the statute and language used indicated that the legislature must have intended that a different, broader meaning be given to "emergency medical coverage" than to "emergency medical services." Thus, given the common meaning of the words

used, the statutory requirements for expert witnesses in these cases must apply whenever the physician treated the patient in a general acute care hospital emergency department, regardless of whether the treatment at issue met the statutory definition of "emergency medical services" (*30 Cal. App. 4th 73, 79-80)* . The court also noted that the purpose of the provisions at issue was improving accessibility to emergency medical treatment by reducing lawsuits based on the alleged negligence of emergency room physicians. The court concluded that the broader reading of when the provisions apply was consistent with the purpose of the statute, since all doctors working in the emergency room setting, whether actually providing emergency treatment or not, work without the benefit of the time, medical histories, and prior relationships that are generally characteristic of medical decisions outside of that setting (*30 Cal. App. 4th 73, 81-82)* . Finally, the court rejected as being too inefficient the interpretation of the statute suggested by the earlier court in the *Jutzi* decision. If the provisions at issue wereto apply only when "emergency medical services" were provided, there would be the need to determine early on in the proceedings whether the services were actually "emergency" in nature and whether the negligence in fact arose out of those particular services. These determinations would themselves often require expert medical testimony, merely to determine what type of expert medical testimony would be required in order to go forward with a trial on the merits of the case (*30 Cal. App. 4th 73, 83)* .

[c] Applicability of Statute

Jutzi v. County of Los Angeles *(1987) 196 Cal. App. 3d 637, 242 Cal. Rptr. 74* , was an action against a county for alleged medical malpractice at its county hospital in rendering emergency medical services to plaintiff for a broken ankle. Plaintiff had first been taken to a private hospital where X-rays and a physical examination revealed the fracture in the ankle joint, and that the fracture was displaced (bones had come apart and the ankle was deformed). The emergency room physician determined that plaintiff had good circulation in her left foot and had suffered no other apparent injuries. He gave her a painkiller but, not considering himself qualified to give orthopedic care, did not attempt to treat the fracture. About four hours after she had arrived at the hospital, she was transferred to the county hospital. Although he was not an orthopedic specialist and such specialists were available, the county hospital's emergency room physician treated plaintiff when she arrived. However, he had on prior occasions treated between 50 and 60 broken ankles similar to plaintiff's. The physician brought the broken bones back into proper alignment and applied a full-leg cast. A subsequent X ray showed that the alignment was good. He gave her a prescription for painkillers and a sedative. She was issued crutches and released to go home, with an appointment to return to the hospital in 24 hours. She was also given an instruction sheet that explained how to care for the leg, warned of the danger signs of complications, and advised her to return to the hospital if complications occurred. The following day plaintiff's mother phoned the hospital and said she could not bring plaintiff in. She was told to bring plaintiff in when she could. On the fourth day after her injury, plaintiff slipped and fell in the kitchen of her home, as a result of which she suffered great pain. But she did not return to the hospital until the following day, by which time the circulation in her leg had become impaired and the damage to the tissues was irreversible. Gangrene developed and 15 days later her leg was amputated below the knee. Pursuant to *Health & Safety Code § 1799.110(c)* [*see § 175.69[1*], Paragraph A], the trial court precluded plaintiff's expert medical witnesses, who did not have recent experience working in a hospital emergency room, from testifying that the emergency room physician in treating plaintiff's injury fell below the required standard of care. Judgment was entered for the defendant, and plaintiff appealed, contending that *Health & Safety Code § 1799.110(c)* applies only to suits against physicians whereas the instant action was brought against the county. Plaintiff drew this conclusion from the initial phrase of *Health & Safety Code § 1799.110(c)*, "In any action for damages involving a claim of negligence against a physician and surgeon providing emergency medical coverage ... " Plaintiff read this as limiting the scope of the section to (1) an "action ... against a physician" "involving a claim of negligence," rather than (2) an "action ... involving a claim of negligence against a physician" (*196 Cal. App. 3d 637, 649)* .

In affirming the judgment for defendant, the court of appeal first said that *Health & Safety Code § 1799.110(c)* applies to any suit involving a claim of negligent treatment by a hospital emergency room physician whether or not that physician is named as a defendant (*196 Cal. App. 3d 637, 646-647)* . The court rejected plaintiff's reading of *Health & Safety Code § 1799.110(c)*, explaining that, while not a model of clarity, *Health & Safety Code § 1799.110(c)* appears to refer to actions for damages that involve a claim of negligence against a physician or, in other words, actions that arise

from a claim that a physician was negligent in providing emergency medical care (*196 Cal. App. 3d 637, 650)* . The court said that this interpretation has the benefit of hinging application of the section on the relevant consideration of the nature of the claim involved, rather than on the fortuitous circumstance of which particular parties have been named in the suit and that it is difficult to assume that the legislature intended to condition the statutory furtherance of the public policy (encouraging the provision of emergency medical services by insulating the providers of such services from assertions of negligence made by expert witnesses who lack expertise in hospital emergency room care) on whether or not a plaintiff, for considerations such as amenability to service of process, likelihood of recovery on a judgment, or trial strategy, is willing or able to include a physician among the parties defendant in his medical malpractice suit (*196 Cal. App. 3d 637, 650)* . To support its conclusion, the court traced the legislative history of *Health & Safety Code § 1799.110* (*196 Cal. App. 3d 637, 650-651)* and concluded that *Health & Safety Code § 1799.110(c)* applies to actions for damages involving negligence alleged to have been committed by a hospital emergency room physician providing emergency care, whether or not the physician has been named as a defendant (*196 Cal. App. 3d 637, 651)* .

[d] "On Call" Emergency Room Physician Does Not Provide "Emergency Medical Coverage"

In ***Miranda v. National Emergency Servs., Inc.*** *(1995) 35 Cal. App. 4th 894, 41 Cal. Rptr. 2d 593* , plaintiff filed a medical malpractice action based on treatment he received during visits to a hospital emergency room. At trial, the court granted defendant's in limine motion to bar plaintiff's designated expert from testifying about relevant standard of care issues on the ground that the expert did not meet the qualifications for expert witnesses set by *Health & Safety Code § 1799.110(c)*. The plaintiff's expertserved as a consultant to an emergency room. He was not an "emergency room physician" but was an orthopedic specialist called to the emergency room to take care of orthopedic problems. When the plaintiff said that he could not satisfy his burden of proof without the expert's testimony, the trial court granted defendant's motion for dismissal.

Although ultimately reversing the judgment for reasons expressed in an unpublished part of its opinion, the court of appeal agreed with the trial court that plaintiff's offer of proof was insufficient to support a conclusion that the proposed expert was qualified to provide expert medical testimony under *Health & Safety Code § 1799.110(c)* (*35 Cal. App. 4th 894, 907)* . The court first stated that "emergency medical coverage" means treatment provided in the emergency department of a general acute care hospital by a physician who is "on-duty" in the emergency department at the time (*35 Cal. App. 4th 894, 900)* . The court then reasoned that the language of *Health & Safety Code § 1799.110(c)* suggests that the intended focus of the phrase "emergency medical coverage" is those physicians who work as the on-duty professional staff of an emergency room rather than those specialist who provide services in an emergency room only on an "as needed, as called" basis (*35 Cal. App. 4th 894, 902)* . Thus, a proposed expert witness satisfies the statutory standard only if he or she is a physician who has had substantial professional experience within the five years preceding the trial as an emergency room physician (*35 Cal. App. 4th 894, 905)* . Since the plaintiff's proposed expert was not an emergency room physician, he was not qualified to provide expert testimony under the statute (*35 Cal. App. 4th 894, 907)* .

[e] Experience "Within Last Five Years" Means Within Five Years Before Date of Malpractice

In ***Petrou v. South Coast Emergency Group*** *(2004) 119 Cal. App. 4th 1090, 15 Cal. Rptr. 3d 64* , the plaintiffs' medical malpractice action was dismissed because the court ruled that their medical expert failed to meet the requirements of *Health & Safety Code § 1799.110(c)* and therefore could not testify, precluding the plaintiffs from proving the applicable standard of care. The plaintiffs' designated expert witness was board certified as an emergency room physician from July 1977 through March 1998, but the court ruled that the physician did not have the requisite substantial experience in emergency medical coverage within the five years immediately prior to the start of trial in late 2002. After granting a motion in limine to exclude the physician's testimony, the trial court granted the defendants' motion to dismiss the case. The plaintiffs appealed.

The court of appeal reversed. The court noted that the statute was ambiguous as to whether the substantial professional

experience must have been within five years before the date of the alleged malpractice or within five years before the date of trial. However, the court concluded that the legislature intended the five-year period to be measured from the date of the alleged malpractice. Because the relevant standard of care in a medical malpractice action is the standard existing at the time of the alleged malpractice, the court concluded that it was logical to assume that the statute required expert witnesses to have substantial professional experience at the time of the treatment in question. Noting that the plaintiffs' expert had three-and-a-half-years experience in the five-year period prior to the alleged malpractice, the court of appeal held that the trial court should not have excluded the expert's testimony (*119 Cal. App. 4th 1090, 1094-1095)*
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CHAPTER 175 PHYSICIANS AND SURGEONS: MEDICAL MALPRACTICE
PART II. FORMS

17-175 California Points & Authorities § 175.70

§ 175.70 Opposing Contention That Expert Medical Witness Lacking Experience in Emergency Medical Care Is Not Qualified to Testify in Medical Malpractice Action--No Allegation of Negligent Care Implicating Performance of Emergency Physician [Health & Safety Code § 1799.110(c)]

[1] FORM

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

_____ [*name of witness*] SHOULD BE PERMITTED TO TESTIFY AS AN EXPERT WITNESS IN THIS ACTION BECAUSE THE CRITERIA FOR ADMISSION OF EXPERT MEDICAL TESTIMONY IN LAWSUITS AGAINST EMERGENCY PHYSICIANS, SET FORTH IN HEALTH AND SAFETY CODE SECTION 1799.110(c), DO NOT APPLY IN AN ACTION IN WHICH THERE IS NO ALLEGATION OF NEGLIGENT CARE IMPLICATING THE PERFORMANCE OF AN EMERGENCY PHYSICIAN. FURTHERMORE, _____ [*name of witness*] IS OTHERWISE QUALIFIED TO TESTIFY AS AN EXPERT WITNESS ON THE SUBJECT OF _____ [*specify*].

Applicability of Statute Limited to Cases Implicating Performance of Treating Physician. *Health and Safety Code Section 1799.110(c)*, setting forth the criteria for admission of expert medical testimony in lawsuits against emergency physicians, does not apply when there is no allegation in the action of negligent care by an emergency physician (*Baxter v. Alexian Bros. Hosp. (1989) 214 Cal. App. 3d 722, 726, 262 Cal. Rptr. 867*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that an expert witness need not meet the qualifications set forth in *Health & Safety Code § 1799.110* (*see § 175.69*) when the action does not allege negligent care by an emergency physician [*see Baxter v. Alexian Bros. Hosp. (1989) 214 Cal. App. 3d 722, 726, 262 Cal. Rptr. 867]* .

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific

procedural context in which counsel wishes to raise the issue of the expert medical witness's qualifications to testify. The points and authorities in this form may also be adapted for use in a trial or appellate brief.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 175.69*.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing that the action does not implicate the performance of a treating physician.

[3] Discussion of Authorities

[a] Applicability of Statute Limited to Cases Implicating Performance of Treating Physician

Baxter v. Alexian Bros. Hosp. *(1989) 214 Cal. App. 3d 722, 262 Cal. Rptr. 867* , involved an action for negligence and emotional distress against a hospital that was based on the hospital's alleged failure to provide a backup surgical team and an anesthesiologist. The trial court, citing *Health & Safety Code § 1799.110*, refused to allow testimony by plaintiffs' expert witness on the ground that the witness did not have five years of experience as an emergency room physician. It granted a motion by defendant for nonsuit, based on lack of evidence of standard of care, and entered judgment for defendant. On appeal, plaintiffs challenged the court's construction of *Health & Safety Code § 1799.110*, arguing that *Health & Safety Code § 1799.110* was inapplicable.

The court of appeal reversed, holding that *Health & Safety Code § 1799.110* was inapplicable. Defendant cited *Jutzi v. County of Los Angeles (1987) 196 Cal. App. 3d 637, 649-651, 242 Cal. Rptr. 74* (*see § 175.69[3][c]*] for the proposition that the relevant consideration in applying *Health & Safety Code § 1799.110* is the nature of the claim, not the identity of the defendants. The *Jutzi* court found that *Health & Safety Code § 1799.110* would apply in any suit involving a claim of negligent treatment by a hospital emergency room physician whether or not that physician is named as defendant. The *Baxter* court, however, distinguished *Jutzi*, noting that this case did not involve an allegation of negligence by the emergency room physician who treated plaintiff; instead, the case involved a claim that the defendant hospital failed to provide essential hospital services. Quoting from *Jutzi*, the court noted that the legislative purpose underlying *Health & Safety Code § 1799.110* is the encouragement of provision of emergency medical care by preventing malpractice claims based on the assertion that an emergency room physician fell below the standard of care that would have been provided by a specialist in the particular field acting under nonemergency conditions. This purpose, the court stated, would not be furthered by restricting claims against a hospital that do not implicate the performance of the treating physician. The court concluded that the trial court erred in applying *Health & Safety Code § 1799.110* because there was no allegation of negligent care by an emergency physician (*214 Cal. App. 3d 722, 725-727)* .

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CHAPTER 176 PHYSICIANS AND SURGEONS: LICENSING AND PROFESSIONAL DISCIPLINE

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§ 176.syn Synopsis to Chapter 176: PHYSICIANS AND SURGEONS: LICENSING AND PROFESSIONAL DISCIPLINE

§ 176.01 Scope of Chapter

§ 176.02 Governing Laws

§ 176.03 Review on Mandamus

[1] Availability

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§ 176.04 Reorganization of Applicable Law

§ 176.05 How to Use Forms in This Chapter

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§ 176.06 Related Discussion and Forms

[1] Related Pleading and Practice Forms

[2] Related Points and Authorities

§§ 176.07-176.19 [Reserved]

§ 176.20 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523]--Discipline for Unprofessional Conduct--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Unprofessional Conduct

[c] Independent Review Is Not Trial De Novo

[d] Restricted Standard of Review for Penalty Imposed

[e] Related Pleading and Practice Forms

[f] Related Points and Authorities

[3] Discussion of Authorities

[a] Mandate Is Proper Procedure

[b] Independent Judgment Test Applicable

[c] Right to Practice Medicine Is Protected Property Right

§ 176.21 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523]--Regarding License [Bus. & Prof. Code § 2087]--Denial of License or of Admission to Licensing Examination--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Restricted Standard of Review

[i] Existence of Moral Turpitude as Question of Law

[c] Unprofessional Conduct

[d] Related Pleading and Practice Forms

[e] Related Points and Authorities

[3] Discussion of Authorities

[a] Mandate Is Proper Procedure

§ 176.22 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523]--Finding of Unprofessional Conduct [Bus. & Prof. Code § 2220 et seq.]--Failure to Show Relation of Alleged Offense to Fitness to Practice Medicine

[1] FORM

[2] Comments

[a] Use of Form

[b] Applicability to License Denial

[c] Determining Unfitness to Practice Medicine

[d] Limits of Nexus Requirement

[e] Finding Based on Another State's Consent Decree

[3] Discussion of Authorities

[a] Respondent May Not Use Professional Discipline to Punish Petitioner

[b] Finding of Unfitness Required to Sustain Finding of Unprofessional Conduct

§ 176.23 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523]--Finding of Unprofessional Conduct [Bus. & Prof. Code § 2220 et seq.]--Defense of Entrapment

[1] FORM

[2] Comments

[a] Use of Form

[b] Limits to Entrapment Defense

[i] Prior Criminal Conviction

[ii] Preexisting Intent

[c] Previously Successful Entrapment Defense Must Be Relitigated

[d] Defense Must Address Specific Misconduct Proscribed

[3] Discussion of Authorities

[a] Entrapment Is Defense to Accusation of Unprofessional Conduct

[b] Origin of Intent

§ 176.24 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523]--Finding of Unprofessional Conduct [Bus. & Prof. Code § 2220 et seq.]--Employing or Aiding and Abetting Unlicensed Person in Practice of Medicine or other Healing Art [Bus.

& Prof. Code § 2264]--Accused Had No Guilty Knowledge

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Guilty Knowledge and Willful Intent Required

§ 176.25 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523]--Finding of Unprofessional Conduct [Bus. & Prof. Code § 2220 et seq.]--Employing or Aiding or Abetting Unlicensed Person in Practice of Medicine or Other Healing Art [Bus. & Prof. Code § 2264]--No Proof That Accused Had Ownership or Control of Premises or Equipment

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Ownership or Control of Premises and Equipment Is Necessary Element of Offense

§ 176.26 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523]--Finding of Unprofessional Conduct [Bus. & Prof. Code § 2220 et seq.]--Willful Violation of Patient Confidence [Bus. & Prof. Code § 2263]--Disclosure Did Not Show Conscious Infraction of Duty or Cause Harm

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Only Disclosures Implying Actual, Conscious Infraction of Duty Constitute Willful Violation of Professional Confidence

§ 176.27 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523]--Finding of Unprofessional Conduct [Bus. & Prof. Code § 2220 et seq.]--Statute Phrased in General Terms--Failure to Allege Specific Act of Misconduct

[1] FORM

[2] Comments

[a] Use of Form

[b] Objection to Sufficiency of Accusation Must Have Been Made Within 15 Days of Service

[c] General Statutes

[d] Specific Statutes

[3] Discussion of Authorities

[a] Sufficiency of Accusation Is a Jurisdictional Requirement

[b] An Accusation Under a General Statute Must Specify the Misconduct Complained of

§ 176.28 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523]--Finding of Unprofessional Conduct [Bus. & Prof. Code § 2220 et seq.]--License Obtained by Fraud or Misrepresentation Bus. & Prof. Code § 2235]--Failure to Allege Fact Constituting Fraud or Misrepresentation

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Facts Constituting Fraud or Misrepresentation Must Be Alleged

§ 176.29 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523]--Discipline for Unprofessional Conduct [Bus. & Prof. Code § 2220 et seq.]--Remand for Redetermination of Penalty When Finding of Unprofessional Conduct Found Partially Valid

[1] FORM

[2] Comments

[a] Use of Form

[b] No Right to Remand If Separate Penalty Imposed for Each Count

[3] Discussion of Authorities

[a] Remand Proper When Respondent's Decision Partially Overturned

§ 176.30 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523]--Discipline for Unprofessional Conduct [Bus. & Prof. Code § 2220 et seq.]--Penalty Too Severe for Offense

[1] FORM

[2] Comments

[a] Use of Form

[b] Standard of Review

[3] Discussion of Authorities

[a] Remand Proper When Penalty Shows Abuse of Discretion

§ 176.31 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523]--Discipline for Unprofessional Conduct [Bus. & Prof. Code § 2220 et seq.]--Two Acts of Repeated Negligence Are Sufficient to Constitute Unprofessional Conduct [Bus. & Prof. Code § 2234(c)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Repeated Negligent Acts as Unprofessional Conduct

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] In General

§ 176.32 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086, 1094.5] to Compel Medical Board to Approve School From Which Petitioner Received Professional Degree [Bus. & Prof. Code § 2087]

[1] FORM

[2] Comments

[a] Use of Form

[b] Graduation From Approved School as Requisite to Obtaining Certificate

[c] Requirements for Approval

[d] Standard of Review

[3] Discussion of Authorities

[a] Action for Mandate to Approve School Inures to Graduate

[b] Discrimination Against Particular Schools Prohibited

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17-176 California Points & Authorities § 176.01

§ 176.01 Scope of Chapter

This chapter contains points and authorities supporting petitions for writ of mandate to review actions by the Medical Board of California against medical licensees or applicants for medical licensing. It does not contain memoranda for use in opposing petitions for writ of mandate filed by a medical licensee or applicant for licensing, forms concerning criminal or other charges for practicing medicine without a license, or forms concerning healing arts other than the medical profession. Included are a general form for use in supporting a petition for writ of mandate to review the administrative decision to discipline a medical licensee for alleged unprofessional conduct [*see § 176.20*] and a general memorandum for use in supporting a petition for writ of mandate to review an administrative decision to deny a medical license or to deny an applicant admission to the licensing examination [*see § 176.21*]. This chapter also includes specific forms for use, when appropriate, in conjunction with the general forms relating to rights and defenses of licensees or applicants for licensing accused of unprofessional conduct [*see §§ 176.22 -176.29*]. Finally, this chapter contains a form for use in supporting a petition for writ of mandate to compel the Medical Board to approve the medical school or osteopathic college from which the petitioner graduated [*see § 176.32*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesMandamusGovernmentsState & Territorial GovernmentsLicensesHealthcare LawBusiness Administration & OrganizationLicensesGeneral Overview

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17-176 California Points & Authorities § 176.02

§ 176.02 Governing Laws

The medical profession is regulated generally by *Bus. & Prof. Code §§ 2000-2515*, which are known and may be cited as the Medical Practice Act [*see Bus. & Prof. Code § 2000*]. Disciplinary procedure for physicians is governed by Bus. & Prof. Code *§ 2220 et seq. Bus. & Prof. Code* § 2230(a) provides that disciplinary procedure is to be governed according to *Gov. Code § 11500 et seq.* (governing administrative trials, except as provided in that chapter). Disciplinary penalties that may be imposed on a physician are set forth in *Bus. & Prof. Code §§ 2227-2229*. Instances of unprofessional conduct for which discipline may be imposed are set forth in *Bus. & Prof. Code §§ 2234-2306*. Actions that a licensing agency may take in case a licensed practitioner of the healing arts becomes mentally ill are set forth in *Bus. & Prof. Code §§ 820-828*. Provisions for reinstatement or modification of disciplinary penalty are set forth in *Bus. & Prof. Code § 2307*. Provisions for reinstatement or modification of attenuation of a physician's right to practice because of mental illness are set out in *Bus. & Prof. Code § 823*.

Requirements for licensure as a physician are set forth in *Bus. & Prof. Code §§ 2080-2099*. Effective January 1, 2008, both the Division of Medical Quality and the Division of Licensing were abolished. As now used in California statutes, "Division of Medical Quality" and "Division of Licensing" refer to the California Medical Board [Bus. & Prof. Code § 2002] (hereafter referred to as simply the "Medical Board"). *Bus. & Prof. Code § 2221* provides that the Division of Licensing may deny a physician's and surgeon's license to any applicant guilty of unprofessional conduct or of any cause that would subject a licensee to revocation or suspension of his or her license or may issue a probationary license to an applicant subject to terms and conditions, including specified conditions of probation. *Bus. & Prof. Code § 2082* provides that any applicant for licensure as a physician must have graduated from a medical school approved by the Division of Licensing. Requirements for approval of medical schools are set forth in *Bus. & Prof. Code § 2089*. *Bus. & Prof. Code § 2084* provides that the Division of Licensing may approve every school that substantially complies with the requirements of the Medical Practice Act [*Bus. & Prof. Code § 2084*; *see Lopez v. Medical Board (1992) 6 Cal. App. 4th 693, 696-697, 8 Cal. Rptr. 2d 22* (under *Bus. & Prof. Code § 2084*, Department of Licensing may but is not required to approve substantially complying school)]. Graduates of medical schools approved under Section 2084 must be deemed to meet the medical training requirements of the Act [*Bus. & Prof. Code § 2084*; *see Bus. & Prof. Code § 2089*]. Nothing in *Bus. & Prof. Code § 2080 et seq.* prohibits the Division of Licensing from considering the quality of resident courses of instruction required for certification [*Bus. & Prof. Code § 2084*].

Penal Code §§ 1000-1000.75 establish a diversion program for persons charged with drug possession, and provide that on successful completion of a diversion program the arrest on which the diversion was based is deemed to have never occurred [*Penal Code § 1000.5 et seq.*]. However, regardless of the divertee's successful completion of diversion, the arrest on which the diversion was based may be disclosed by the Department of Justice in response to any peace officer application request made within five years of the arrest. The divertee is not relieved of the obligation to disclose the arrest in response to any direct question contained in any questionnaire or application for a position as a peace officer, as defined by *Penal Code § 830*, made within five years of the arrest [*Penal Code § 1000.5 et seq.*]. Successful completion of a drug diversion program does not prohibit any agency established under *Bus. & Prof. Code § 500 et seq.*, including the Medical Board of California, from taking disciplinary action against a licensee or from denying a license for professional misconduct, even though evidence of that misconduct appears in a record pertaining to that arrest [*see Bus. & Prof. Code § 492*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsLicensesHealthcare LawBusiness Administration & OrganizationLicensesGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesRequirementsHealthcare LawBusiness Administration & OrganizationLicensesRevocation & SuspensionHealthcare LawBusiness Administration & OrganizationWrongful TerminationDue Process

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17-176 California Points & Authorities § 176.03

§ 176.03 Review on Mandamus

[1] Availability

It is now well established that a petition for writ of mandate is the proper procedure for seeking judicial review of the decision by either the Medical Board to impose discipline or to refuse to grant a license or approve a school [*see Dare v. Bd. of Medical Examiners (1943) 21 Cal. 2d 790, 795, 136 P.2d 304* ; *Grant v. Board of Medical Examiners (1965) 232 Cal. App. 2d 820, 826, 43 Cal. Rptr. 270] . Gov. Code § 11523*, which is expressly made applicable to disciplinary proceedings against licensees and to denial of a license for unprofessional conduct by *Bus. & Prof. Code § 2230(a)* (*see § 176.02*), provides that review of an adjudicatory decision by an administrative agency may be had by filing for petition for writ of mandate according to the provisions of the Code of Civil Procedure [*see Bus. & Prof. Code § 2230(a)*; *Gov. Code § 11523*].

The Code of Civil Procedure explicitly provides for review on mandamus of decisions of administrative agencies [*see Code Civ. Proc. § 1094.5*]. The provisions of *Code Civ. Proc. § 1094.5* are further made explicitly applicable to court review of the decisions by the Medical Board to deny admission to the licensing examination, refuse to approve a school, or deny a license for unprofessional conduct by the Business and Professions Code [*Bus. & Prof. Code § 2087*].

Bus. & Prof. Code § 2337 makes a petition for an extraordinary writ the only method for obtaining appellate review of superior court decisions in administrative mandate proceedings reviewing physician discipline decisions by the Medical Board of California [*Bus. & Prof. Code § 2337*; *Leone v. Medical Board of California (2000) 22 Cal. 4th 660, 663-664, 94 Cal. Rptr. 2d 61, 995 P.2d 191* (*Bus. & Prof. Code § 2337* does not violate *Cal. Const., art. VI, § 11*)].

[2] Standards of Review

In a mandate proceeding to review the initial decision of the Medical Board to impose discipline on a person who already holds a license, the trial court is required to exercise its independent judgment on the evidence [*see Yakov v. Board of Medical Examiners (1968) 68 Cal. 2d 67, 69, 71, 64 Cal. Rptr. 785, 435 P.2d 553]* . However, once the decision to impose discipline has been made and upheld, the actual penalty imposed lies within the discretion of the Medical Board and will not be overturned by the court unless a manifest abuse of discretion is shown [*see Windham v. Board of Medical Quality Assurance (1980) 104 Cal. App. 3d 461, 473, 163 Cal. Rptr. 566]* . By contrast, the decision

of the Medical Board not to grant a license to a person who has not yet received one in California is reviewable on mandamus only under the substantial evidence test [*see Bus. & Prof. Code § 2087*; *Savelli v. Board of Medical Examiners (1964) 229 Cal. App. 2d 124, 131-132, 40 Cal. Rptr. 171* ; *see also Bixby v. Pierno (1971) 4 Cal. 3d 130, 146, 93 Cal. Rptr. 234, 481 P.2d 242]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesMandamusAdministrative LawJudicial ReviewStandards of ReviewAbuse of DiscretionAdministrative LawJudicial ReviewStandards of ReviewDe Novo ReviewAdministrative LawJudicial ReviewStandards of ReviewSubstantial EvidenceGovernmentsState & Territorial GovernmentsLicensesHealthcare LawBusiness Administration & OrganizationLicensesGeneral Overview

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17-176 California Points & Authorities § 176.04

§ 176.04 Reorganization of Applicable Law

The statutory provisions governing the licensing and regulation of physicians have been amended numerous times and have been completely reorganized on two separate occasions. The original provisions governing the licensing and conduct of physicians were contained in the Medical Practice Act. These provisions were reorganized and transferred to Chapter 5 of the Business and Professions Code in 1937. Chapter 5 of the Business and Professions Code was reorganized and the sections contained in it were extensively renumbered in 1980. Although a number of new provisions were added with the 1980 reorganization, most of the provisions already contained in earlier organizations of the governing law have remained substantially unchanged throughout the various reorganizations. The Medical Practice Act was significantly amended again in 1993 by Stats. 1993, ch. 1267.

Many of the cases cited and discussed in this part were decided before the latest reorganization of the governing law, under statutory provisions that are nevertheless identical or substantially the same as the current provisions. Such provisions are cited as "former Bus. & Prof. Code § _____" or "former Medical Practice Act § _____ (*now see* Bus. & Prof. Code § _____)" when referred to in the forms.

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawBusiness Administration & OrganizationLicensesGeneral Overview

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17-176 California Points & Authorities § 176.05

§ 176.05 How to Use Forms in This Chapter

[1] Page Limits on Points and Authorities

One of the more significant drafting requirements to keep in mind are page limits: supporting and opposing memoranda filed in discovery motion proceedings may not exceed 15 pages. A reply or closing memorandum may not exceed 10 pages. Exhibits, declarations, attachments, the table of contents, the table of authorities, and the proof of service are excluded from these page limits. Any party must obtain leave of court to file a longer memorandum [*Cal. Rules of Ct., Rule 3.1113(d)*]. These and other drafting requirements are discussed in further detail in Ch. 1, *Writing Legal Memoranda and Briefs* .

[2] Using the Forms to Build a Draft Memorandum

The forms in this part are for use by a licensee or applicant for licensing in mandate proceedings to review or compel certain actions of the Medical Board of California. Thus, the points and authorities contained in these forms are cited to support a contention that the action of the division that is the subject of the proceeding was erroneous and should be overturned by the court. Authorities that limit the scope of those authorities cited to support contentions of error are cited and discussed in the comments to the individual supporting forms.

Counsel should be aware that in general the cases upholding the actions and decisions of the Medical Board are far more numerous than those overturning such decisions. Some of the authorities cited in this part to support contentions of error ultimately uphold the decision of the respondent division, either on other grounds or because the court, after stating a rule that could support a contention of error, found that the rule was not applicable to the facts of the case before it. Thus, counsel should carefully compare the facts in such cases with those of his or her case to determine the applicability of the cited case.

The forms contained in this part are meant to be used as research tools and format outlines, and not as completed attorney work products that may be filed without modification or addition. Thus, before using any of these forms, counsel should insert facts and arguments showing how the points of law stated in the forms apply to the facts of the particular case.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesMandamusCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaHealthcare LawBusiness Administration & OrganizationLicensesGeneral Overview

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17-176 California Points & Authorities § 176.06

§ 176.06 Related Discussion and Forms

[1] Related Pleading and Practice Forms

For a discussion and forms for pleadings for use in cases involving licensing of physicians and regulation of physicians' professional conduct, see Ch. 414, *Physicians: Licensing and Discipline* in California Forms of Pleading and Practice (Matthew Bender). For discussion and forms relating to administrative adjudicatory hearings and judicial review of such hearing, see Ch. 472B, *Review of Agency Rulemaking* , Ch. 473F, *Agency Adjudication Hearings* , and Ch. 474, *Availability of Judicial Review of Agency Decisions* in California Forms of Pleading and Practice (Matthew Bender). For discussion and forms relating to mandate generally, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender). For a discussion and forms for pleadings for use in actions involving licensing and regulation of dentists, see Ch. 209, *Dentists* in California Forms of Pleading and Practice (Matthew Bender).

[2] Related Points and Authorities

For points and authorities for use in mandate proceedings to review administrative adjudicatory decisions, see Ch. 195, *Public Administrative Law* . For memoranda for use in mandate proceedings generally, see Ch. 150, *Mandate and Prohibition* . For forms related to medical malpractice actions, see Ch. 175, *Physicians and Surgeons: Medical Malpractice* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesMandamusAdministrative LawJudicial ReviewRemediesProhibitionHealthcare LawActions Against Healthcare WorkersDoctors & PhysiciansHealthcare LawActions Against Healthcare WorkersSurgeonsHealthcare LawBusiness Administration & OrganizationLicensesGeneral OverviewTortsMalpractice & Professional LiabilityHealthcare Providers

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17-176 California Points & Authorities §§ 176.07-176.19

[Reserved]

§§ 176.07[Reserved]

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PART II. FORMS

17-176 California Points & Authorities § 176.20

§ 176.20 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523]--Discipline for Unprofessional Conduct--General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM OF
_____ [*name*],	)	IN SUPPORT
Petitioner,	)	OF PETITION FOR WRIT OF MANDATE
vs.	)	
_____ [*name*],	)	Date: _____
Respondent.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]
	)	

_____

A PETITION FOR WRIT OF MANDATE IS THE PROPER PROCEDURE FOR SEEKING JUDICIAL REVIEW OF THE ADMINISTRATIVE DECISION OF THE OF MEDICAL BOARD TO IMPOSE DISCIPLINE ON A PHYSICIAN FOR ALLEGED UNPROFESSIONAL CONDUCT.

A. Mandate Is Proper Procedure. Administrative mandamus is the proper remedy for judicial review of

administrative action by the Medical Board to impose professional discipline (see *Bus. & Prof. Code § 2230*; *Gov. Code § 11523*; *Code Civ. Proc. § 1094.5*; *Dare v. Board of Medical Examiners (1943) 21 Cal. 2d 790, 795, 136 P.2d 304* ; *Grant v. Board of Medical Examiners (1965) 232 Cal. App. 2d 820, 826, 43 Cal. Rptr. 270*).

B. Independent Judgment Test Applicable. In a mandate proceeding to review the decision of the Medical Board, the trial court is authorized by law to exercise its independent judgment on the evidence and holds the ultimate power of decision as to whether a licensee should be disciplined (*Yakov v. Board of Medical Examiners (1968) 68 Cal. 2d 67, 69, 71, 64 Cal. Rptr. 785, 435 P.2d 553* ; *Dresser v. Board of Medical Quality Assurance (1982) 130 Cal. App. 3d 506, 510, 181 Cal. Rptr. 797* ; *see Code Civ. Proc. § 1094.5(c)*).

C. Scope of Inquiry in Mandate Proceeding. The inquiry in a mandate proceeding to review a final administrative adjudicatory order or decision extends to the questions of whether the agency has proceeded without or in excess of jurisdiction, whether there was a fair trial, and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the agency did not proceed in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence (*Code Civ. Proc. § 1094.5(b)*).

D. Right to Practice Medicine Is Protected Property Right. The right to practice medicine, once granted, is a property right of the highest order and is sufficiently precious to be surrounded with a panoply of legal protections (see *Yakov v. Board of Medical Examiners (1968) 68 Cal. 2d 67, 75, 64 Cal. Rptr. 785, 435 P.2d 553* ; *Barrett v. Board of Osteopathic Examiners (1935) 4 Cal. App. 2d 135, 139, 40 P.2d 923*).

[*Add points and authorities relating to specific reasons why decision to impose discipline was improper under the facts of the case (see, e.g., §§ 176.22 -176.30).*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition to the superior court for a writ of mandate to review a final order or decision of the Division of Medical Quality to impose discipline on a physician for unprofessional conduct.

To complete this memorandum, counsel should include additional paragraphs discussing specific points in which findings did not support the decision, or the evidence did not support the findings of the division, or in which the Medical Board failed to comply with petitioner's due process rights in conducting its disciplinary proceedings [*see Code Civ. Proc. § 1094.5* (defining scope of review on mandamus; *see* Paragraph B)]. See *§§ 176.22 -176.30* for points and authorities supporting specific allegations of improper action by the division.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Unprofessional Conduct

Specific instances of unprofessional conduct for which the Medical Board may impose discipline on the holder of a medical certificate are set out in *Bus. & Prof. Code §§ 2234-2291*. It should be noted, however, that *Bus. & Prof. Code*

§ 2234 provides that the grounds for imposing discipline on a medical licensee are not limited to those defined explicitly by the Business and Professions Code. Action that may be taken by the agency that licensed a practitioner of the healing arts in case of incapacitating mental illness is set out in *Bus. & Prof. Code §§ 820-828*. Note also that the Board may discipline a physician who gives court testimony as an expert witness, on behalf of a plaintiff or defendant, as to the appropriate standard of medical care and whether the defendant has breached that standard *[87 Cal. Ops. Atty. Gen. 48 (2004)]* .

[c] Independent Review Is Not Trial De Novo

Although it is the duty of the trial court to exercise its independent judgment on the evidence in reviewing the decision of the Medical Board on mandamus, the scope of this mandamus review is not equivalent to that of an unqualified trial de novo. The accused is not entitled to withhold evidence or to make only a skeleton showing at the hearing and thereafter obtain an unlimited new trial on expanded issues in the reviewing court [*Dare v. Board of Medical Examiners (1943) 21 Cal. 2d 790, 795, 136 P.2d 304* ; *Shakin v. Board of Medical Examiners (1967) 254 Cal. App. 2d 102, 111, 62 Cal. Rptr. 274]* . Thus, for an accused to be entitled to introduce additional evidence for the court's consideration in a mandamus proceeding, it must appear that the accused could not in the exercise of reasonable diligence have obtained and introduced such evidence at the hearing or that the evidence was improperly excluded at the hearing [*Code Civ. Proc. § 1094.5(e)*; *see Dare v. Board of Medical Examiners (1943) 21 Cal. 2d 790, 799, 136 P.2d 304* ; *Shakin v. Board of Medical Examiners (1967) 254 Cal. App. 2d 102, 110-111, 62 Cal. Rptr. 274]* .

[d] Restricted Standard of Review for Penalty Imposed

The trial court's authorization to conduct an independent review of the evidence is limited to findings that would justify the division's imposing discipline in the first place. The appropriateness of the penalty imposed, once discipline of some sort has been found to be warranted, is vested in the sound discretion of the division and will be overturned only in cases of manifest abuse [*Windham v. Board of Medical Quality Assurance (1980) 104 Cal. App. 3d 461, 473, 163 Cal. Rptr. 566* ; *see Magit v. Board of Medical Examiners (1961) 57 Cal. 2d 74, 78, 17 Cal. Rptr. 488, 366 P.2d 816]* .

See *§§ 176.29* and *176.30* for points and authorities in support of a prayer for remand to the accusing division for redetermination of penalty when all or some of the findings of unprofessional conduct have been upheld by the court.

[e] Related Pleading and Practice Forms

For a form for a petition for writ of mandate to review the decision of the Medical Board to impose discipline for unprofessional conduct, see Ch. 414, *Physicians: Licensing and Discipline* , in California Forms of Pleading and Practice (Matthew Bender).

[f] Related Points and Authorities

For other memoranda supporting petitions for writ of mandate to review administrative adjudicatory decisions, see Ch. 195, *Public Administrative Law* . For memoranda of points and authorities supporting petitions for writs of mandate generally, see Ch. 150, *Mandate and Prohibition* .

[3] Discussion of Authorities

[a] Mandate Is Proper Procedure

Bus. & Prof. Code § 2230 provides that except as provided in *Bus. & Prof. Code § 2220 et seq.*, the conduct of disciplinary proceedings against the holder of a physician's and surgeon's certificate is governed by the provisions of *Gov. Code §§ 11500-11528*, which govern administrative trials. *Gov. Code § 11523* provides that review of an administrative adjudicatory decision made pursuant to *Gov. Code §§ 11500-11528* may be had by filing a petition for a

writ of mandate in accordance with the Code of Civil Procedure, subject to statutes regulating the particular agency. *Code Civ. Proc. § 1094.5(a)* provides explicitly for review of a final administrative order or decision made as the result of a proceeding in which a hearing is required to be given.

In ***Dare v. Board of Medical Examiners*** *(1943) 21 Cal. 2d 790, 136 P.2d 304* , petitioner, a licensed drugless practitioner, was found guilty by respondent of using the prefix Dr. without specifying the type of certificate he held, in violation of former Bus. & Prof. Code § 2409 (now see *Bus. & Prof. Code § 2278*). Petitioner filed a petition for writ of mandate with the superior court. At the hearing before the superior court, petitioner refused to produce the record of the hearing before respondent or to stipulate to the introduction of evidence taken before respondent or rulings made by respondent. Petitioner maintained that he was entitled to a trial de novo before the superior court, that he was not bound by the record of the hearing before respondent, and that he had participated in the hearing before respondent on that theory. The trial court refused to grant the writ of mandate, and petitioner appealed.

The Supreme Court upheld the trial court. In framing the main issue that it had to decide in reviewing the case, the Court reviewed earlier cases that had held that certiorari was not the appropriate method of reviewing the action of an administrative entity such as the Board of Medical Examiners, since such an entity does not have the power to exercise judicial functions unless authorized to do so by the Constitution. The Court stated that since no other legal remedy was available, a physician aggrieved by a decision made by respondent that would deprive him of a constitutional right of either liberty or property had a right to have respondent's decision inquired into by a court of justice by means of a mandamus proceeding (*21 Cal. 2d 790, 795)* .

The Court then stated that although in such a proceeding the trial court may make an independent judgment on all of the competent evidence before it and is not confined to the record before respondent [*see § 176.20[3][b]*], the scope of review on mandamus is not equivalent to the unqualified or unlimited trial de novo to which a litigant is entitled in the superior court on appeal from a decision of a municipal or justice court, wherein the litigant may present a skeleton showing in the lower court and reserve the real showing on the merits for the trial in the superior court (*21 Cal. 2d 790, 795)* . The Court concluded that the trial court was not required to reiterate all of the competent evidence that had been presented before respondent, and that respondent should have introduced the record of the hearing before respondent if he wished to attack the sufficiency of that record (*21 Cal. 2d, 790, 794, 799, 801)* . The Court also ruled against petitioner on questions of law unrelated to the propriety of the mandamus proceeding (*21 Cal. 2d 790, 801-802)* .

In ***Grant v. Board of Medical Examiners*** *(1965) 232 Cal. App. 2d 820, 43 Cal. Rptr. 270* , petitioner was licensed to practice medicine, inter alia, in California and Arkansas. After Arkansas revoked petitioner's license, proceedings were brought in California to discipline petitioner. At the hearing, evidence was presented that petitioner had permitted an unlicensed person to do clinical psychology tests for him and the unlicensed person continued to use petitioner's office, apartment, and telephone number after petitioner left Arkansas, and that while petitioner's Arkansas license had initially been revoked on charges stemming from petitioner's conduct, it had subsequently been restored to him. The hearing officer found that petitioner was guilty of unprofessional conduct as defined by former Bus. & Prof. Code §§ 2363 (*now see Bus. & Prof. Code § 2305*; revocation of suspension of license in another state or by agency of federal government is grounds for discipline in California), 2378 (repealed) and 2392 (*now see Bus. & Prof. Code § 2264*; aiding and abetting unlicensed person in practice of medicine is unprofessional conduct), but that disciplinary action against petitioner was not in the public interest. Based on these findings, the hearing officer proposed that the charges against petitioner be dismissed, and the board adopted the hearing officer's proposed decision. Petitioner filed a petition for a writ of mandate in the superior court, and that court upheld the decision of the board. Petitioner appealed the trial court's decision.

The court of appeal upheld the trial court's decision. The court stated that the passing of *Code Civ. Proc. § 1094.5* was a ratification by the Legislature of the judicially developed doctrine of administrative mandate, and that after the passing of this section it was no longer open to question that administrative mandamus is a proper remedy for judicial review of

administrative action (*232 Cal. App. 2d 820, 826)* . The court also held that an action for declaratory judgment is not appropriate for the purpose of reviewing final orders and decisions of an administrative agency, but that such an action may be treated as a petition for a writ of mandate (*232 Cal. App. 2d 820, 826)* .

However, the court held that administrative mandamus did not acquire a separate and distinct legal personality from mandamus generally through the enactment of *Code Civ. Proc. § 1094.5* (*232 Cal. App. 2d 820, 826)* . Thus, the court stated that the requirement for mandamus generally that the party seeking relief be beneficially interested in the relief he or she seeks was still a requirement of administrative mandamus and that generally speaking, a party not aggrieved is not beneficially interested (*232 Cal. App. 2d 820, 827)* . The court further held that the board's adoption of the hearing officer's proposed decision to dismiss the charges against petitioner was analogous to an entry of a voluntary dismissal by the board and left petitioner as if no charges had been filed against him (*232 Cal. App. 2d 820, 828)* . Thus, the court concluded that petitioner was not aggrieved by the board's action and administrative mandamus was therefore not appropriate on the facts of the case (*232 Cal. App. 2d 820, 827)* .

[b] Independent Judgment Test Applicable

In ***Yakov v. Board of Medical Examiners*** *(1968) 68 Cal. 2d 67, 64 Cal. Rptr. 785, 435 P.2d 553* , petitioner was convicted on nine counts of violating *Bus. & Prof. Code § 4227* (furnishing dangerous drugs without a prescription). Following these convictions, disciplinary proceedings were initiated against petitioner by the Board of Medical Examiners. After a hearing on the disciplinary charges, the hearing officer filed a proposed decision finding inter alia that petitioner was guilty of conduct involving moral turpitude, and that petitioner's license should be revoked. The proposed decision was adopted by the board.

Petitioner filed a petition for a writ of mandate with the superior court, which concluded that the board's finding of moral turpitude was not sustained by the weight of the evidence. Stating that it was impossible to determine the extent to which the board's finding that petitioner had shown moral turpitude had contributed to its decision to revoke petitioner's license, the trial court annulled the board's order and remanded the case for redetermination of penalty. The board appealed.

The Supreme Court upheld the trial court's decision. In making its decision, the Court applied what it termed the settled rule of *Moran v. Board of Medical Examiners (1948) 32 Cal. 2d 301, 308, 196 P.2d 20* , that in an action for administrative mandate the trial court is authorized by law to exercise its independent judgment on the evidence, and that the ultimate power of decision rests with the trial court (*68 Cal. 2d 67, 71-72)* . The Court also stated that the determination of whether an act involves moral turpitude is an ultimate conclusion to be drawn from undisputed facts and is therefore a question of law in the sense that it is to be decided by the appellate court (*68 Cal. 2d 67, 74)* .

In ***Dresser v. Board of Medical Quality Assurance*** *(1982) 130 Cal. App. 3d 506, 181 Cal. Rptr. 797* , the board revoked the accused's license to practice psychology on the basis of its finding that the accused's conduct of engaging in sexual intercourse with two clients whom the accused was treating for sexual problems constituted gross negligence in violation of former Bus. & Prof. Code § 2960(i) (now see *Bus. & Prof. Code § 2960(j)*; gross negligence is ground for professional discipline of psychologist). The accused filed a petition for writ of mandate, alleging a variety of errors in the board's decision. The superior court denied the petition.

The court of appeal affirmed the superior court's denial of the petition. In regard to the applicable standard of review, the court cited *Yakov v. Board of Medical Examiners (1968) 68 Cal. 2d 67, 69, 64 Cal. Rptr. 785, 435 P.2d 553* , for the rule that in cases involving the board's decision to revoke a professional license, the independent judgment standard is the standard to be used by the superior court except as to the determination of the penalty imposed (*130 Cal. App. 3d 506, 510)* .

[c] Right to Practice Medicine Is Protected Property Right

The facts and procedural background of ***Yakov v. Board of Medical Examiners*** *(1968) 68 Cal. 2d 67, 64 Cal. Rptr. 785, 435 P.2d 553* , are *set forth in § 176.20[3][b]*. In that case, the Supreme Court concluded its opinion by noting that the right to practice one's profession is sufficiently precious to surround it with a panoply of legal protection (*68 Cal. 2d 67, 75)* .

The facts and procedural background of ***Barrett v. Board of Osteopathic Examiners*** *(1935) 4 Cal. App. 2d 135, 40 P.2d 923* , are *set out in § 176.24[3][a]*. In that case, the court was called upon to interpret former Section 14(7a) of the Medical Practice Act (*now see Bus. & Prof. Code § 2264*), which declared the aiding or abetting of an unlicensed person in the practice of any system or mode of treating the sick or afflicted to be unprofessional conduct. The court stated as a principle governing its interpretation of the statute that the right to practice medicine, once granted, becomes a property right and that the Legislature's right to prescribe grounds for which a license may be revoked does not extend so far as to authorize the prescribing of grounds that are capricious and bear no relation to the qualifications of the licensee or to the proper conduct of his or her professional duties (*4 Cal. App. 2d 135, 139)* . Under this principle, the court held itself compelled to interpret the statute so as to require guilty knowledge or willful intent on the part of the accused as a necessary element of a violation, even though this did not follow from the literal wording of the statute (*4 Cal. App. 2d 135, 138-139)* . The court stated that an interpretation of the statute that did not thus include guilty knowledge or willful intent as a necessary element would render the statute nugatory as an unwarranted assumption of legislative authority (*4 Cal. App. 2d 135, 139)* .

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CHAPTER 176 PHYSICIANS AND SURGEONS: LICENSING AND PROFESSIONAL DISCIPLINE
PART II. FORMS

17-176 California Points & Authorities § 176.21

§ 176.21 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523]--Regarding License [Bus. & Prof. Code § 2087]--Denial of License or of Admission to Licensing Examination--General Form

[1] FORM

[*Caption. See § 176.20.*]

A PETITION FOR A WRIT OF MANDATE IS THE PROPER PROCEDURE FOR SEEKING JUDICIAL REVIEW OF THE ADMINISTRATIVE DECISION OF THE MEDICAL BOARD TO DENY A PHYSICIAN'S LICENSE OR TO REJECT AN APPLICATION FOR ADMISSION TO THE LICENSING EXAMINATION.

A. Mandate Is Proper Procedure. Mandate is appropriate for reviewing an administrative order by the Medical Board (*Grant v. Board of Medical Examiners (1965) 232 Cal. App. 2d 820, 826, 43 Cal. Rptr. 270* ; *Savelli v. Board of Medical Examiners (1964) 229 Cal. App. 2d 124, 142, 40 Cal. Rptr. 171 , cert. denied, 380 U.S. 934, 85 S. Ct. 940, 13 L. Ed. 2d 821* ; *see Code Civ. Proc. § 1094.5*; *Bus. & Prof. Code §§ 2087, 2221, 2230*; *Gov. Code § 11523*).

B. Scope of Inquiry in Mandate Proceeding. [*See § 176.20, Paragraph C.*]

C. Respondent Required to Admit Every Qualified Applicant. The Medical Board must admit every applicant to the examination who complies with the requirements provided by the Business and Professions Code for certification as a physician and surgeon (*Bus. & Prof. Code § 2084*).

[*Add points and authorities relating to specific reasons why respondent's denial of a license to petitioner or rejection of petitioner's application for admission to the licensing examination was improper* (*see, e.g., §§ 176.22 -176.30*)].
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition to the superior court for a writ of mandate for review of a final order or decision of Medical Board of Licensing rejecting an application for admission to the licensing examination or denying a physician's and surgeon's certificate for unprofessional conduct.

To complete the memorandum, counsel should include additional points and authorities supporting petitioner's contention that the findings did not support the decision, that the evidence did not support the findings of the Board, or that the Board failed to comply with petitioner's due process rights in conducting its disciplinary proceedings [*see Code Civ. Proc. § 1094.5(b)* (defining scope of review on mandamus); *see also §§ 176.22 -176.28* for points and authorities supporting specific allegations of improper action by the division].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Restricted Standard of Review

The standard applied by the courts in reviewing a decision by Medical Board not to grant a license is apparently stricter than the standard applied by the courts in reviewing a decision of the Medical Board to discipline a licensee once a license has been granted. *Bus. & Prof. Code § 2087*, which provides for court review by administrative mandamus for an applicant who has been denied admission to the physician's licensing examination [*see* discussion of *Bus. & Prof. Code § 2087* in § 176.20[3][a]], also provides that the court may not exercise independent judgment on the evidence in such an action. Thus, in actions brought *Bus. & Prof. Code § 2087*, the trial court must apply the substantial evidence test in the same manner as that test is applied by an appellate court [*Savelli v. Board of Medical Examiners (1964) 229 Cal. App. 2d 124, 131-132, 40 Cal. Rptr. 171 , cert. denied, 380 U.S. 934]* . Although the wording of *Bus. & Prof. Code § 2087* is somewhat ambiguous, it appears that it also covers actions brought by an applicant who has not been denied admission to the examination, but has been denied a license for unprofessional conduct [*see* discussion of *Bus. & Prof. Code § 2087* in § 176.21[3][a]]. In any event, the courts generally have applied the substantial evidence test in reviewing the initial determination of an agency as to whether a person is qualified to enter a profession or trade [*see Bixby v. Pierno (1971) 4 Cal. 3d 130, 146, 93 Cal. Rptr. 234, 481 P.2d 242]* .

In contrast, once a license has been granted, the trial court is required to independently reweigh the evidence in reviewing a decision of the Medical Board to discipline the licensee [*Yakov v. Board of Medical Examiners (1968) 68 Cal. 2d 67, 69, 72, 64 Cal. Rptr. 785, 435 P.2d 553]* . Counsel should be aware of this difference in standards of review in applying case law on discipline of physicians for unprofessional conduct to a case in which petitioner has been denied a license or denied admission to the examination for unprofessional conduct [*see* discussion § 176.21[2][c]].

[i] Existence of Moral Turpitude as Question of Law

The Supreme Court has held that whether an accused has shown moral turpitude in engaging in his or her alleged unprofessional conduct is a question of law to be answered from the facts on the record and not a question of fact. Thus, the court of appeal must independently determine the existence of moral turpitude from the record, despite the fact that it is bound by the restricted substantial evidence test in reviewing the fact findings of the trial court [*see Yakov v. Board of Medical Examiners (1968) 68 Cal. 2d 67, 74-75, 64 Cal. Rptr. 785, 435 P.2d 553]* . Although *Yakov* does not deal with the point explicitly, this rule is probably also applicable to the trial court's review on mandamus of a finding of moral turpitude by the Medical Board.

Although the Medical Practice Act no longer contains any provisions requiring a finding of moral turpitude to support a finding of unprofessional conduct, a finding of moral turpitude may still support a finding of unprofessional conduct by showing the accused's unfitness to practice medicine, thereby establishing a nexus between the accused's conduct and his or her qualifications to practice. Such a finding of nexus is a constitutional requirement and also a statutory requirement for imposing discipline under *Bus. & Prof. Code § 2236* (crime substantially related to practice of medicine is unprofessional conduct) [*see Windham v. Board of Medical Quality Assurance (1980) 104 Cal. App. 3d 461, 469-470, 163 Cal. Rptr. 566* ; *Matanky v. Board of Medical Examiners (1978) 79 Cal. App. 3d 293, 305, 144 Cal. Rptr. 826* ; *see also* §§ 176.21[2][c], 176.22[2], for a discussion of the general constitutional requirement of a showing of unfitness to practice medicine to support a finding of unprofessional conduct].

A finding of moral turpitude may also be relevant in determining the appropriate penalty once unprofessional conduct has been found [*see Matanky v. Board of Medical Examiners (1978) 79 Cal. App. 3d 293, 302, 144 Cal. Rptr. 826* ; *see also Yakov v. Board of Medical Examiners (1968) 68 Cal. 2d 67, 69, 75, 64 Cal. Rptr. 785, 435 P.2d 553]* .

[c] Unprofessional Conduct

The Medical Board may deny or restrict a license, or it may condition the granting of a license on the meeting of certain requirements, for unprofessional conduct or for any cause that would subject a person already holding a physician's and surgeon's certificate to discipline [*see Bus. & Prof. Code § 2221*]. *Bus. & Prof. Code § 2087*, which provides for court action in case the division has either denied a license or denied admission to the licensing examination, provides that if such denial is for unprofessional conduct, *Bus. & Prof. Code § 2220 et seq.* (defining unprofessional conduct and setting forth disciplinary procedure) applies to the case [*Bus. & Prof. Code § 2087*; *see § 176.21[3][a]*]. *Bus. & Prof. Code § 2230* provides that except as provided in *Bus. & Prof. Code § 2220 et seq.*, the conduct of proceedings to determine whether a person has been guilty of unprofessional conduct is governed by *Gov. Code § 11500 et seq.* (administrative trials). Instances of unprofessional conduct for which the division may deny an applicant's license include, but are not limited to, all of the instances defined by *Bus. & Prof. Code §§ 2234-2306* [*see Bus. & Prof. Code § 2234*]. Actions which the Medical Board may take against a licensee in case of incapacitating mental illness are set out in *Bus. & Prof. Code §§ 820-828* [*see Bus. & Prof. Code § 825* (panel of Board is licensing agency authorized to take action under *Bus. & Prof. Code §§ 820-828*)]. See *§§ 176.22 -176.28* for points and authorities discussing specific instances of unprofessional conduct as defined in the Business and Professions Code.

[d] Related Pleading and Practice Forms

For a form of petition for writ of mandate to review the decision of the Medical Board to deny an application for certification, see Ch. 414, *Physicians: Licensing and Discipline* , in California Forms of Pleading and Practice (Matthew Bender).

[e] Related Points and Authorities

For other memoranda of points and authorities supporting petitions for writ of mandate to review administrative decisions, see Ch. 195, *Public Administrative Law* . For memoranda of points and authorities supporting petitions for writs of mandate generally, see Ch. 150, *Mandate and Prohibition* .

[3] Discussion of Authorities

[a] Mandate Is Proper Procedure

Bus. & Prof. Code § 2087 provides in pertinent part that a court action by an applicant for admission to the medical licensing examination who has been rejected by the Medical Board to compel the Board to admit the applicant to the examination, approve the school from which the applicant graduated, or seek any other appropriate relief, is governed by *Code Civ. Proc. § 1094.5* (providing for judicial review of final administrative order or decision by means of

administrative mandate), except that the court may not exercise its independent judgment on the evidence. Although the first sentence of *Bus. & Prof. Code § 2087* refers only to court action by an applicant who has been denied admission to the examination, the second sentence provides that the provisions of the Business and Professions Code applicable to discipline for unprofessional conduct apply to the court action authorized by the statute when an applicant has been denied admission to the examination or denied a certificate on the grounds of unprofessional conduct. *Bus. & Prof. Code § 2087* also provides that an applicant may seek to compel admission to the examination, or any other appropriate relief through such court action. Thus, although the language of the statute is somewhat ambiguous on the point, *Bus. & Prof. Code § 2087* probably applies to all applicants who have been denied a license for unprofessional conduct, whether or not the applicant was admitted to the examination.

Bus. & Prof. Code § 2230 also supports the proposition that administrative mandate is the proper procedure to be applied on review of a decision to deny a physician's license. That section provides that except as provided in *Bus. & Prof. Code § 2220 et seq.*, conduct of disciplinary proceedings against physicians is governed by *Gov. Code § 11500 et seq.* (administrative trials) [*Bus. & Prof. Code § 2230*; *see Bus. & Prof. Code §§ 2087, 2221* (provisions governing disciplinary procedure, including *Bus. & Prof. Code § 2230*, are applicable to license denial for unprofessional conduct)]. *Gov. Code § 11523* provides that mandate is the proper procedure for judicial review of administrative decisions made after a hearing.

The facts and procedural background of ***Grant v. Board of Medical Examiners*** *(1965) 232 Cal. App. 2d 820, 43 Cal. Rptr. 270* , are *set out in § 176.20[3][a]*.

In ***Savelli v. Board of Medical Examiners*** *(1964) 229 Cal. App. 2d 124, 40 Cal. Rptr. 171 , cert. denied 380 U.S. 934, 85 S. Ct. 940, 13 L. Ed. 2d 821* , petitioner had applied for admission to the examination required for certification as a physician and was rejected because the school from which he graduated had been disapproved by respondent. After a hearing held at petitioner's request, respondent affirmed its decision not to admit petitioner to the examination. Petitioner filed a petition for a writ of mandamus in the superior court pursuant to former Bus. & Prof. Code § 2174 [now *see Bus. & Prof. Code § 2087* (discussed *above*)], and the superior court upheld respondent's decision. Petitioner appealed.

The court of appeal also upheld respondent's decision. In reaching its decision, however, the court stated that since petitioner's action proceeded under *Code Civ. Proc. § 1094.5* by virtue of the provisions of former Bus. & Prof. Code § 2174 [*now see Bus. & Prof. Code § 2087*], mandamus was appropriate for reviewing respondent's order (*229 Cal. App. 2d 124, 142)* .

The court also stated that while an action for declaratory relief is not appropriate for reviewing an administrative order, the complaint in such an action may be treated as a petition for writ of mandate (*229 Cal. App. 2d 124, 142)* . The court added in dictum that it did not believe that language in former Bus. & Prof. Code § 2174 [*now see Bus. & Prof. Code § 2087*], providing that an action under its terms could seek "any other appropriate relief," created a right to seek declaratory judgment in an applicant who had been denied admission to the licensing examination (*229 Cal. App. 2d 124, 142)* .

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17-176 California Points & Authorities § 176.22

§ 176.22 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523]--Finding of Unprofessional Conduct [Bus. & Prof. Code § 2220 et seq.]--Failure to Show Relation of Alleged Offense to Fitness to Practice Medicine

[1] FORM

[*The following may be combined when appropriate with a general memorandum in support of a petition for writ of mandate to review an administrative decision of the Medical Board to impose discipline on a physician for unprofessional conduct, such as the memorandum set out in § 176.20, or of to deny a physician's certificate or reject an application for admission to the licensing examination, such as the memorandum set forth in § 176.21.*]

RESPONDENT'S FINDING THAT PETITIONER IS GUILTY OF UNPROFESSIONAL CONDUCT IS IMPROPER BECAUSE THERE WAS NO _____ [SHOWING *or* FINDING] THAT THE CONDUCT WITH WHICH PETITIONER WAS CHARGED WOULD RENDER HIM/HER UNFIT TO PRACTICE MEDICINE.

A. Respondent May Not Use Professional Discipline to Punish Petitioner. The purpose of seeking revocation of a physician's license or exclusion of a person from the medical profession is to protect the public, not to punish the physician. The Medical Board of California can achieve a legitimate punitive purpose only through criminal prosecution (*see Yakov v. Board of Medical Examiners (1968) 68 Cal. 2d 67, 73, 64 Cal. Rptr. 785, 435 P.2d 553* ; *see also Hallinan v. Committee of Bar Examiners (1966) 65 Cal. 2d 447, 462, 55 Cal. Rptr. 228, 421 P.2d 76*).

B. Finding of Unfitness Required to Sustain Finding of Unprofessional Conduct. Private acts of a physician or applicant for a physician's certificate are his or her own business and may not be the basis of discipline or exclusion from the medical profession unless such acts affect the physician's professional achievement or place the patient community in jeopardy (*Grannis v. Board of Medical Examiners (1971) 19 Cal. App. 3d 551, 561, 96 Cal. Rptr. 863* ; *see also Hallinan v. Committee of Bar Examiners (1966) 65 Cal. 2d 447, 462, 55 Cal. Rptr. 228, 421 P.2d 76*).

[2] Comments

[a] Use of Form

These points and authorities may be combined with a general form of memorandum in support of a petition for writ of mandate to review the administrative decision of the Medical Board to impose discipline on a physician for unprofessional conduct § 176.20 or to deny a physician's certificate or reject an application for admission to the licensing examination § 176.21. The form sets forth the requirement that there be a showing of a nexus between the physician's alleged misconduct and the physician's fitness to practice medicine before discipline may be imposed for the alleged misconduct.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Such facts should show why the evidence does not show that petitioner's alleged conduct was related to petitioner's fitness to practice medicine.

[b] Applicability to License Denial

The cases that set forth the requirement that a finding of unprofessional conduct be supported by a finding of unfitness to practice medicine before action may be taken against the accused all speak in terms of discipline imposed on a person who already holds a license, and do not discuss situations in which a person has been denied a physician's license for unprofessional conduct [*see, e.g.,* *Yakov v. Board of Medical Examiners (1968) 68 Cal. 2d 67, 64 Cal. Rptr. 785, 435 P.2d 553* ; *Grannis v. Board of Medical Examiners (1971) 19 Cal. App. 3d 551, 96 Cal. Rptr. 863* ; *see* § 176.22[3][a], [b]]. However, the Supreme Court has held that an application for certification to practice law may not be denied for reasons that are not related to the applicant's fitness to practice law [*Hallinan v. Committee of Bar Examiners (1966) 65 Cal. 2d 447, 460, 462, 55 Cal. Rptr. 228, 421 P.2d 76]* . In *Hallinan*, the Court additionally held at page 462 that criminal prosecution and not exclusion from the bar is the appropriate means of punishing offenders who have violated the law. This holding by the *Hallinan* Court was later cited by the Supreme Court as part of its basis for holding that revocation of a physician's license may not be used to punish an offending licensee [*see* *Yakov v. Board of Medical Examiners (1968) 68 Cal. 2d 67, 72, 64 Cal. Rptr. 785, 435 P.2d 553]* . Thus, it appears that the requirement that an accused's unprofessional conduct be related to fitness to practice medicine applies to the decision to deny a physician's license as well as to the decision to discipline a person who already holds a license.

[c] Determining Unfitness to Practice Medicine

In *Morrison v. State Board of Education (1969) 1 Cal. 3d 214, 229, 82 Cal. Rptr. 175, 461 P.2d 375* , which dealt with the revocation of a teaching credential for alleged immoral and unprofessional conduct, the Supreme Court held that in determining whether a teacher's conduct indicates unfitness to teach so as to warrant revocation of the credential, the Board of Education may consider the following factors:

- The likelihood that the conduct may have adversely affected students or fellow teachers.
- The proximity or remoteness in time of the conduct.
- The extenuating or aggravating circumstances, if any, surrounding the conduct.
- The likelihood of the recurrence of the questioned conduct.
- The praiseworthiness or blameworthiness of the motives resulting in the conduct.
- The extent to which disciplinary action may inflict an adverse impact on the constitutional rights of the teacher involved or those of other teachers.

The Court also stated that the board may consider the degree of adversity anticipated and the type of teaching certificate held by the accused. *Morrison* is the leading case for the requirement of relation to fitness to practice for professional

discipline [*see* § 176.22[3][b]. Furthermore, the factors set out by the Court were taken from statute and prior case law governing the requirements for professional discipline in various regulated professions, including medicine [*see* citations in *Morrison v. State Board of Education (1969) 1 Cal. 3d 214, 229, 82 Cal. Rptr. 175, 461 P.2d 375]* . Thus, these factors may also be helpful to the courts in determining whether an act of alleged unprofessional conduct affects the accused's fitness to practice medicine.

[d] Limits of Nexus Requirement

The requirements for making a showing that a physician's alleged misconduct affects the physician's fitness to practice medicine so as to warrant the imposition of discipline or denial of license have been liberalized considerably by the courts of appeal. Fitness to practice medicine for purposes of the requirement does not mean merely competence or skill, but may encompass other factors as well [*Matanky v. Board of Medical Examiners (1978) 79 Cal. App. 3d 293, 305, 144 Cal. Rptr. 826* ; *Weissbuch v. Board of Medical Examiners (1974) 41 Cal. App. 3d 924, 929, 116 Cal. Rptr. 479]* . Thus, it has been held that when a physician is accused of having been convicted of a law or regulation governing dangerous drugs or narcotics, no independent showing of nexus between the conviction and the accused's fitness to practice medicine need be made to warrant imposing discipline [*see Weissbuch v. Board of Medical Examiners (1974) 41 Cal. App. 3d 924, 929, 116 Cal. Rptr. 479]* . The court in *Weissbuch* stated that in view of the central role played by physicians in the state's drug regulating scheme, the Legislature had the constitutional authority to determine that conviction of a physician of a dangerous drug or narcotics violation in itself constitutes sufficient danger to the public to warrant imposing sanctions. Although the *Weissbuch* case dealt specifically with a violation of former Bus. & Prof. Code § 2844 (*now see Bus. & Prof. Code § 2237*; violation of any law governing dangerous drugs or controlled substances as unprofessional conduct), the language of the case is broad enough to cover any unprofessional conduct involving drug violations [*see Bus. & Prof. Code §§ 2237-2239* (violation of drug laws and misuse of specified substances as unprofessional conduct)].

However, the Court of Appeal has held that a "logical connection" or nexus exists between two or more misdemeanor convictions involving the consumption of alcoholic beverages and a physician's fitness to practice medicine, so that imposing discipline on a physician's license pursuant to *Bus. & Prof. Code § 2239(a)* does not violate the due process and *equal protection clauses* of the state and federal constitutions. Further, because a rational connection exists between the convictions and fitness to practice medicine, the conclusive presumption of unprofessional conduct from those convictions in *Bus. & Prof. Code § 2239(a)* does not violate the licensee's right to due process of law [*Griffiths v. Superior Court (2002) 96 Cal. App. 4th 757, 779, 117 Cal. Rptr. 2d 445]* .

Similarly, the Supreme Court's rule that a finding of moral turpitude must be supported by evidence that the accused's fitness to practice medicine is affected does not mean that a physician can never be subject to discipline solely because of moral unfitness to practice medicine. Because the physician-patient relationship is based on the utmost confidence in the physician's honesty and integrity, conviction of a crime involving fraud or intentional dishonesty for personal gain shows unfitness to practice medicine [*Windham v. Board of Medical Quality Assurance (1980) 104 Cal. App. 3d 461, 470, 163 Cal. Rptr. 566* ; *see Yakov v. Board of Medical Examiners (1968) 68 Cal. 2d 67, 73, 64 Cal. Rptr. 785, 435 P.2d 553* (showing of unfitness is required for finding of moral turpitude; *see* § 176.23[3][b])].

A physician may be subject to discipline when his conduct or condition raises the possibility that his or her fitness to practice medicine may be impaired at some future time, even when no past or present impairment of competence is shown [*Grannis v. Board of Medical Examiners (1971) 19 Cal. App. 3d 551, 563, 96 Cal. Rptr. 863* ; *see § 176.22[3][b]*].

[e] Finding Based on Another State's Consent Decree

The broad language of *Bus. & Prof. Code § 2305* does not limit its application only to professional discipline imposed after a full hearing on the merits. The statue applies by its terms to any discipline imposed by another state on the holder

of a license or certificate to practice medicine issued by that state, and thus includes acquiescence by signing a consent decree to disciplinary action without any admission of the charges brought by the foreign jurisdiction [*Marek v. Board of Podiatric Medicine (1993) 16 Cal. App. 4th 1089, 1096, 20 Cal. Rptr. 2d 474* (discipline based on Nevada consent decree)].

Bus. & Prof. Code § 141, which permits a California licensing agency to consider disciplinary action based on the discipline of a licensee by another state, a federal agency or another country, was not impliedly repealed by *Bus. & Prof. Code § 2305*, and can be the basis of discipline when § 2305 does not apply, such as when out-of-state discipline would not be the basis for discipline in California, as required by § 2305 [*Medical Board v. Superior Court (2001) 88 Cal. App. 4th 1001, 106 Cal. Rptr. 2d 381]* .

[3] Discussion of Authorities

[a] Respondent May Not Use Professional Discipline to Punish Petitioner

The facts and procedural background of ***Yakov v. Board of Medical Examiners*** *(1968) 68 Cal. 2d 67, 64 Cal. Rptr. 785, 435 P.2d 553* , are *set forth in § 176.20[3][b]*. In that case, the Supreme Court upheld the trial court's determination that the board's finding of moral turpitude was not supported by the weight of the evidence. The Court, citing *Hallinan v. Committee of Bar Examiners (1966) 65 Cal. 2d 447, 462, 55 Cal. Rptr. 228, 421 P.2d 76* , stated that the purpose of seeking revocation of a physician's certificate is not to punish the physician but rather to protect the public, despite the fact that revocation of a certificate works an unavoidable punitive effect, and that a legitimate punitive purpose could be achieved by the board only through criminal prosecution (*68 Cal. 2d 67, 73)* .

The facts and procedural background of ***Hallinan v. Committee of Bar Examiners*** *(1966) 65 Cal. 2d 447, 55 Cal. Rptr. 228, 421 P.2d 76* , are set out under § 176.22[3][b]. In that case, the Supreme Court overturned the respondent Committee of Bar Examiners' finding that petitioner did not show good moral character, as required for admission to the bar by former Bus. & Prof. Code § 6060(c) (*now see Bus. & Prof. Code § 6060(b)*), based primarily on petitioner's record of extensive acts of civil disobedience. The Supreme Court held that to the extent that acts of civil disobedience involve violations of the law it is altogether necessary and proper that the violators be punished, but that criminal prosecution, not exclusion from the bar, is the appropriate means of punishing such offenders (*65 Cal. 2d 447, 462)* .

[b] Finding of Unfitness Required to Sustain Finding of Unprofessional Conduct

In ***Grannis v. Board of Medical Examiners*** *(1971) 19 Cal. App. 3d 551, 96 Cal. Rptr. 863* , petitioner had been convicted of two counts of driving while under the influence of alcohol. Subsequently, the board found petitioner guilty under former Bus. & Prof. Code § 2390 (*now see Bus. & Prof. Code § 2239*), inter alia, for becoming intoxicated to such an extent as to become dangerous to others. At the hearing, petitioner's psychiatrist testified to the effect that petitioner was an alcoholic, whose reaction to alcohol was such that after ingestion of only minute quantities of alcohol he lost the ability to judge any impairment in his thinking or motor function that resulted from his drinking. The board revoked petitioner's license, but suspended the revocation and placed petitioner on probation for five years, subject to specified conditions. Petitioner filed a petition for writ of mandate with the superior court, which sustained the decision of the board.

The court of appeal upheld the trial court's decision. The court acknowledged that the rule handed down by the *Supreme Court in Morrison v. State Board of Education (1969) 1 Cal. 3d 214, 224, 82 Cal. Rptr. 175, 461 P.2d 375* , that the power of the state to regulate professions and the conditions of public employment must not arbitrarily impair the right of the individual to live his or her private life apart from the job as he or she deems fit was also applicable to state regulation of the practice of medicine (*19 Cal. App. 3d 551, 561)* . The court stated that the private conduct of a person who is also a physician is a proper concern to those who license him or her only to the extent that such conduct marks him or her as a physician, and that such private acts could be the basis of discipline only when the physician's

professional achievement is affected or the patient community is placed in jeopardy (*19 Cal. App. 3d 551, 561)* . The court held that this limitation applied not only to statutes that authorized the imposition of discipline for general causes such as moral turpitude, unprofessional conduct, or immorality, but also to statutes that declare specific acts to constitute unprofessional conduct (*19 Cal. App. 3d 551, 562)* . The court further rejected the suggestion that a physician should be considered on the job 24 hours a day (*19 Cal. App. 3d 551, 561)* .

However, the court declined to hold that former Bus. & Prof. Code § 2390 was unconstitutional per se because it did not explicitly require a nexus between the proscribed conduct and the accused's fitness to practice medicine. Rather, the court cited *Morrison* in holding that the language in the statute referring to use of alcoholic beverages by a physician to the extent dangerous to himself, to any person, and to the public, was only an abstraction until given content by reference to fitness for the performance of the vocation of medicine (*19 Cal. App. 3d 551, 561-562)* . Thus, the court concluded that the applicable language of former Bus. & Prof. Code § 2930 could constitutionally be applied to petitioner if evidence showed that the conduct of which petitioner was accused showed unfitness to practice medicine (*19 Cal. App. 3d 551, 562)* .

The court concluded that such evidence of unfitness to practice was shown by the testimony of petitioner's psychiatrist as to petitioner's alcoholic condition. Since petitioner's condition raised the possibility that petitioner's ability to respond professionally might be impaired at some future time after consuming a minimal amount of alcohol, it showed unfitness to practice medicine despite the trial court's finding that consumption of alcohol had at no time in the past impaired petitioner's professional judgment (*19 Cal. App. 3d 551, 563)* .

In ***Hallinan v. Committee of Bar Examiners*** *(1966) 65 Cal. 2d 447, 55 Cal. Rptr. 228, 421 P.2d 76* , respondent Committee of Bar Examiners refused to certify petitioner for admission to the bar, despite the fact the petitioner had been admitted to and had passed the bar examination, on the ground that petitioner had not satisfied the requirement of former Bus. & Prof. Code § 6060(c) (*now see Bus. & Prof. Code § 6060(b)*) that he be of good moral character. The committee's findings were based primarily on petitioner's record of civil disobedience in connection with the civil rights movement and other political protest movements, which included numerous arrests, two misdemeanor convictions in the United States, and one misdemeanor conviction in England. Respondent also cited a number of instances in which petitioner had been involved in fistfights and two minor failures by petitioner to disclose relevant information on his application for admission to the bar to support its findings.

The Supreme Court reversed respondent's decision and ordered respondent to admit petitioner to the bar. The Court cited *Schware v. Board of Bar Examiners (1957) 353 U.S. 232, 239, 77 S. Ct. 752, 1 L. Ed. 2d 796* , for the rule that a state can require high standards of qualification, such as good moral character or proficiency in its law before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law (*65 Cal. 2d 447, 461-462)* . The Court held that the purpose of investigation by the bar into an applicant's moral character should be limited to assurance that, if admitted, the applicant will not obstruct the administration of justice or otherwise act unscrupulously in his or her capacity as an officer of the court (*65 Cal. 2d 447, 462)* . The Court also stated that despite certain distinctions between admission proceedings and disciplinary proceedings, the test for admission and the test for discipline is the same (*65 Cal. 2d 447, 451-452)* . The Court stated that situations involving admission and those involving discipline both involved the same fundamental question of whether the accused is a fit and proper person to be permitted to practice law (*65 Cal. 2d 447, 453)* . Thus, the Court concluded that in considering the kinds of acts that would justify excluding a candidate for admission to the bar it may look to acts that have been relied on to sustain decisions to disbar or suspend persons previously admitted to practice (*65 Cal. 2d 447, 453)* .

After extensively reviewing the record concerning petitioner's past acts of civil disobedience, the Court concluded that petitioner's participation in such civil disobedience cannot be characterized as involving moral turpitude and that the crimes with which the petitioner had been charged or convicted in connection with his acts of civil disobedience, considered together with the surrounding circumstances, were not analogous to the type of criminal charges or other

acts that have been held to justify denial of admission to the bar in previous cases (*65 Cal. 2d 447, 462)* .

The Court also extensively reviewed the record concerning numerous instances in which petitioner had been involved in fistfights, on occasions not involving activities of civil disobedience. The Court concluded that the nature of petitioner's acts in such cases, while sometimes inexcusable, did not bear a direct relationship to petitioner's fitness to practice law (*65 Cal. 2d 447, 471)* . In support of its conclusion, the Court noted that virtually all of the admission and disciplinary cases in which it had upheld decisions of the state bar adverse to an applicant or attorney have involved acts that bear on the accused's manifest dishonesty and thereby provide a reasonable basis for the conclusion that the applicant or attorney cannot be relied on to fulfill the moral obligations incumbent on members of the legal profession (*65 Cal. 2d 447, 471)* .

Finally, the Court concluded that two instances of failure by the petitioner to disclose relevant facts on his application must be regarded as de minimis in the circumstances in which they occurred, and were too attenuated as evidence to justify respondent's finding that petitioner lacks candor and truthfulness (*65 Cal. 2d 447, 473)* .

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Volume 17 Chapters 170-179 PARTNERSHIPS---to---PREMISES LIABILITY
CHAPTER 176 PHYSICIANS AND SURGEONS: LICENSING AND PROFESSIONAL DISCIPLINE
PART II. FORMS

17-176 California Points & Authorities § 176.23

§ 176.23 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523]--Finding of Unprofessional Conduct [Bus. & Prof. Code § 2220 et seq.]--Defense of Entrapment

[1] FORM

[*The following may be combined when appropriate with a general memorandum in support of a petition for writ of mandate to review an administrative decision of the to impose discipline on a physician for unprofessional conduct, such as the memorandum set out in § 176.20, or of the Medical Board to deny a physician's certificate or to reject an application for admission to the licensing examination, such as the memorandum set out in § 176.21.*]

RESPONDENT'S FINDING THAT PETITIONER IS GUILTY OF PROFESSIONAL MISCONDUCT IS IMPROPER BECAUSE PETITIONER ENGAGED IN THE ACTS OF WHICH HE/SHE WAS ACCUSED ONLY BECAUSE OF ENTRAPMENT.

A. Entrapment Is Defense to Accusation of Unprofessional Conduct. A person accused of unprofessional conduct in a medical disciplinary proceeding may raise the defense of entrapment, unless the person has been accused under a statute that provides that a criminal conviction itself is a sufficient basis for disciplinary action (*Patty v. Board of Medical Examiners (1973) 9 Cal. 3d 356, 364-365, 107 Cal. Rptr. 473, 508 P.2d 1121* ; *Lax v. Board of Medical Quality Assurance (1981) 116 Cal. App. 3d 669, 675, 172 Cal. Rptr. 258*).

B. Origin of Intent. Entrapment occurs if the intent to commit the act of which a person is accused originated in the mind of the entrapping officer rather than in the mind of the accused (*Patty v. Board of Medical Examiners (1973) 9 Cal. 3d 356, 368, 107 Cal. Rptr. 473, 508 P.2d 1121*).

[2] Comments

[a] Use of Form

These points and authorities may be combined with a general memorandum in support of a petition for writ of mandate to review the administrative decision of the Medical Board to impose discipline on a physician for unprofessional

conduct § 176.20, or deny a physician's certificate or to reject an application for admission to the licensing examination § 176.21. The form sets forth case law applicable to the defense of entrapment. It should be noted that there are limitations to entrapment as a defense to professional disciplinary proceedings [*see § 176.23[2][b]*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. The facts should show how the conduct of state agents and officers, the conduct of the accused, and other surrounding circumstances of the case meet the criteria for entrapment specified by the case law set out in this form.

[b] Limits to Entrapment Defense

[i] Prior Criminal Conviction

The accused may not impeach the judgment of a conviction at a disciplinary hearing by raising the entrapment defense if the statute under which he or she is accused provides that a conviction constitutes sufficient basis for administrative disciplinary action [*Lax v. Board of Medical Quality Assurance (1981) 116 Cal. App. 3d 669, 675, 172 Cal. Rptr. 258]* . In *Lax*, the court held that a physician accused under former Bus. & Prof. Code § 2384 (*now see Bus. & Prof. Code § 2237*), which declares conviction of a drug offense to be unprofessional conduct and provides that the record of conviction is conclusive evidence of unprofessional conduct, was not entitled to raise the defense of entrapment. *Bus. & Prof. Code § 2239(a)* likewise provides that the record of conviction of a felony or more than one misdemeanor involving the use, consumption, or self-administration of specified drugs or alcohol is conclusive evidence of unprofessional conduct. Thus, although there is no case directly on point, a person accused on the basis of the provisions of *Bus. & Prof. Code § 2239* is probably also precluded from raising the defense of entrapment.

By contrast, *Bus. & Prof. Code § 2236(a)*, which declares conviction of any crime substantially related to the qualifications, functions, and duties of a physician to be unprofessional conduct, provides that the record of conviction is conclusive evidence only of the fact that the conviction occurred. *Bus. & Prof. Code § 2236(c)* provides that the division may inquire into the circumstances surrounding the commission of the crime to fix the degree of discipline or to determine if the offense meets the substantial relatedness requirement. However, such an inquiry should not form the basis of impeaching a prior conviction [*see Matanky v. Board of Medical Examiners (1978) 79 Cal. App. 3d 293, 302, 144 Cal. Rptr. 826]* . In *Matanky*, proceedings were brought against the accused under former Bus. & Prof. Code § 2383, which declared any felony conviction to constitute unprofessional conduct and provided for inquiry into the circumstances of the committing of the crime to fix the degree of discipline and to determine if the crime involved moral turpitude. The court of appeal in *Matanky* stated that the offense of which the accused had been convicted did not necessarily show moral turpitude (*79 Cal. App. 3d 293, 302)* . However, the court concluded from the recitation of the circumstances of the offense in the indictment that the accused's conduct in committing the offense showed moral turpitude (*79 Cal. App. 3d 293, 303-304)* . The court held that the accused's own testimony as to the circumstances of the offense, which substantially contradicted the allegations made in the indictment, was an impermissible attempt to impeach the judgment of conviction, under the guise of offering mitigating evidence (*79 Cal. App. 3d 293, 302)* . The court reasoned that in finding the accused guilty in the criminal proceeding, the jury had found the facts alleged in the indictment to be true, and that the testimony reiterated a defense that the appeals court had already apparently rejected in holding that the judgment of conviction was supported by substantial evidence, so that by implication, the accused's testimony amounted to an attempt to impeach the jury and appeals court in the prior criminal proceedings [*see Matanky v. Board of Medical Examiners (1978) 79 Cal. App. 3d 293, 302, 144 Cal. Rptr. 826]* .

Under *Bus. & Prof. Code § 2236* and *Matanky*, a person who is accused under *Bus. & Prof. Code § 2236* cannot raise the entrapment defense to impeach the conviction on which the accusation is based. In light of the *Matanky* holding, it is not clear to what extent a person accused under *Bus. & Prof. Code § 2236* would be able to present evidence of entrapment to shed light on the circumstances surrounding the committing of the offense, especially if the defense requires contradicting allegations in the indictment or if it has already been rejected in the prior criminal proceeding [*see Matanky v. Board of Medical Examiners (1978) 79 Cal. App. 3d 293, 302, 144 Cal. Rptr. 826]* .

The doctrine of collateral estoppel does not apply to professional disciplinary proceedings such as those before the Medical Board. Thus, regardless of the effect of the statute under which an accusation is brought on the availability of the entrapment defense, the fact that the accused has already tried unsuccessfully to raise the defense in a prior criminal proceeding should not by itself cause the defense to be barred by collateral estoppel [*see Lax v. Board of Medical Quality Assurance (1981) 116 Cal. App. 3d 669, 675, 172 Cal. Rptr. 258]* .

It should be noted that *Bus. & Prof. Code §§ 2236, 2237,* and *2239* are the only sections contained in the Medical Practice Act that require a criminal conviction for a finding of unprofessional conduct [*see Bus. & Prof. Code §§ 2234-2306* (unprofessional conduct)]. Thus, for example, a person who has not been convicted of a drug violation in criminal proceedings nevertheless may be found to have committed a drug violation constituting unprofessional conduct under *Bus. & Prof. Code § 2238,* which declares violation of any law regulating dangerous drugs or controlled substances to be unprofessional conduct. Depending on the nature of the offense, a person may also be found guilty of unprofessional conduct under *Bus. & Prof. Code § 2241* (providing or offering to provide dangerous drugs or controlled substances to addict except in specified circumstances is unprofessional conduct) or 2242 (prescribing, dispensing, or furnishing dangerous drugs without prior examination or medical indication is unprofessional conduct) without having been criminally convicted of a drug violation. Similarly, under *Bus. & Prof. Code § 2239,* criminal conviction of an offense or offenses involving dangerous drugs, controlled substances, or alcohol is specified as only one possible ground for a finding of unprofessional conduct. Under this section, a person may be found to have committed unprofessional conduct, even in the absence of a criminal conviction, for the use, self-prescription, or self-administration of the drugs specified above, and for the use of any such drugs or alcohol to an extent as to be dangerous to the user or any member of the public or to impair the user's ability to practice medicine safely [*Bus. & Prof. Code § 2239*].

Since there is no statutory provision or case law that limits the right of an accused to raise the entrapment defense unless the accusation is based on a prior criminal conviction that is declared by a section of the Business and Professions Code to constitute unprofessional conduct, either per se or under specified conditions, an accused who has been charged under any section of the Business and Professions Code except *Bus. & Prof. Code § 2236* or *2237,* or those provisions of *Bus. & Prof. Code § 2239,* that require a criminal conviction, may apparently raise the defense.

[ii] Preexisting Intent

Entrapment does not occur when the accused harbored a preexisting intent to commit the crime and committed the crime because of solicitation by a decoy [*Patty v. Board of Medical Examiners (1973) 9 Cal. 3d 356, 368, 107 Cal. Rptr. 473, 508 P.2d 1121* ; *see* 176.23[3][b]; *Kolnick v. Board of Medical Quality Assurance (1980) 101 Cal. App. 3d 80, 86, 161 Cal. Rptr. 289]* . The accused's own conduct in response to solicitation by a decoy may be evidence of a preexisting intent to commit the crime [*Kolnick v. Board of Medical Quality Assurance (1980) 101 Cal. App. 3d 80, 86, 161 Cal. Rptr. 289* (ready compliance with request of decoy together with actions, such as use of false name and date on prescription, designed to avoid detection by authorities)].

[c] Previously Successful Entrapment Defense Must Be Relitigated

Neither the double jeopardy provisions of the *Fifth Amendment* nor the doctrine of collateral estoppel apply to medical disciplinary proceedings [*Lax v. Board of Medical Quality Assurance (1981) 116 Cal. App. 3d 669, 675, 172 Cal. Rptr. 258* (collateral estoppel does not apply); *see Petrucci v. Board of Medical Examiners (1975) 45 Cal. App. 3d 83, 88, 117 Cal. Rptr. 735* (double jeopardy does not apply)]. When the statute under which the proceedings are brought does not require a criminal conviction, the fact that a person has been acquitted on criminal charges in a prior proceeding does not bar disciplinary proceedings against the person on similar charges [*see Stuck v. Board of Medical Examiners (1949) 94 Cal. App. 2d 751, 757-758, 211 P.2d 389]* . Thus, although there are no cases on point, it would appear that an accused who had previously been acquitted on criminal charges because of a successful entrapment

defense and is subsequently charged with unprofessional conduct based on the same alleged events will have to relitigate his or her entrapment defense at the hearing before the division which brought the charges without the division's being bound by the fact that the defense had been accepted in the prior proceeding.

[d] Defense Must Address Specific Misconduct Proscribed

One court of appeal has held that entrapment to violation of former Bus. & Prof. Code § 2399.5 (prescribing dangerous drugs without prior examination or medical indication; *now see Bus. & Prof. Code § 2242*) did not occur when operatives solicited only the prescription of certain drugs; whereas, the failure to conduct a prior examination and not the prescription of the drugs itself constituted violation of the statute [*Whitlow v. Board of Medical Examiners (1967) 248 Cal. App. 2d 478, 489-490]* .

[3] Discussion of Authorities

[a] Entrapment Is Defense to Accusation of Unprofessional Conduct

Patty v. Board of Medical Examiners *(1973) 9 Cal. 3d 356, 107 Cal. Rptr. 473, 508 P.2d 1121* , involved charges of unprofessional conduct against petitioner growing out of petitioner's having on several occasions prescribed dangerous drugs without prior medical investigation to operatives employed by the Board of Medical Examiners. The operatives had been sent to petitioner's office to request prescriptions for a variety of dangerous drugs after the board had received a complaint that petitioner had prescribed unusually large amounts of narcotics to an elderly patient. This complaint subsequently proved to be false. In administrative proceedings, the board rejected petitioner's defense of entrapment and suspended petitioner's license. The trial court, after independently reviewing the evidence, overturned the board's decision and restored petitioner's license, and the board appealed.

The Supreme Court upheld the trial court's determination. The Court held that an accused was entitled to raise the defense of entrapment in an administrative proceeding to revoke or suspend a license (*9 Cal. 3d 356, 362)* . After reviewing criminal cases explaining the defense of entrapment, the Court stated that sound policy and good morals are incompatible with entrapment of an innocent person into committing a crime in order to revoke his or her professional license as clearly as they are incompatible with entrapment in order to obtain a criminal conviction (*9 Cal. 3d 356, 364)* . The Court stated further that the defense of entrapment is particularly important in a case in which a single agency combines both investigative and adjudicatory powers, as does the Board of Medical Examiners, since rejection of the entrapment defense by an agency in effect authorizes its investigators to entrap and encourages a shift of resources from the detection of illegal acts to the promotion of such acts, and furthermore invites the appearance and danger of discrimination (*9 Cal. 3d 356, 365)* .

In ***Lax v. Board of Medical Quality Assurance*** *(1981) 116 Cal. App. 3d 669, 172 Cal. Rptr. 258* , petitioner, after a hearing, was found guilty of unprofessional conduct in violation of *Bus. & Prof. Code § 2237* (conviction of federal or state dangerous drug or controlled substance violation is unprofessional conduct), based on petitioner's prior criminal conviction of four felony counts of possessing and distributing cocaine. The trial court declined to issue a peremptory writ of mandate restoring petitioner's license, and petitioner appealed.

The court of appeal upheld the trial court's determination. Among other points, the court discussed petitioner's contention that he had improperly been prevented by the board from presenting evidence supporting his claim that he had been entrapped into committing the drug violations of which he was convicted. The court cited *Patty v. Board of Medical Examiners (1973) 9 Cal. 3d 356, 362, 107 Cal. Rptr. 473, 508 P.2d 1121* in stating that entrapment is a defense to charges of unprofessional conduct under certain circumstances (*116 Cal. App. 3d 669, 675)* . However, the court noted that petitioner's claim of entrapment appeared to be an attempt to impeach the federal judgment of conviction on which the unprofessional conduct charge against him was based and that former Bus. & Prof. Code § 2384 (*now see Bus. & Prof. Code § 2237*), under which petitioner was accused, made the record of conviction of a narcotics offense

(now states the record of conviction of dangerous drug or controlled substance offense) conclusive evidence of unprofessional conduct. The court stated that the accused in a disciplinary hearing may not impeach a judgment of conviction against him or her when the statute on which the accusation is based provides that the conviction constitutes a sufficient basis for administrative disciplinary action (*116 Cal. App. 3d 669, 675)* .

[b] Origin of Intent

The facts and procedural background of ***Patty v. Board of Medical Examiners*** *(1973) 9 Cal. 3d 356, 107 Cal. Rptr. 473, 508 P.2d 1121* , are *discussed under § 176.23[3][a]*. In *Patty*, the California Supreme Court applied the rule taken from criminal cases that the defense of entrapment is commonly formulated as dependent on whether the intent to commit the crime originated in the mind of the defendant or in the mind of the entrapping officer (*9 Cal. 3d 356, 368)* . Thus entrapment occurs if the accused is lured into committing the crime by persuasion or deceitful representation, but entrapment does not occur if the accused harbored a preexisting criminal intent and committed the crime because of solicitation by a decoy (*9 Cal. 3d 356, 368)* . The Court further stated that the showing in the record that petitioner had readily complied with the requests of the operatives for dangerous drug prescriptions was not sufficient in itself to support a holding that entrapment had not occurred as a matter of law. Rather, the Court adopted the criminal rule that it was for the trier of fact to determine what inference should be drawn from the accused's ready compliance with a solicitation to illegal conduct (*9 Cal. 3d 356, 368)* .

The Court concluded that the trial court could properly have inferred that petitioner had entertained no preexisting intent to engage in the sale of restricted drugs from the following: (1) prior to the solicitation by the board's operatives, petitioner's record had been unblemished; (2) the complaint that had triggered the investigation in the first place had proved false; (3) petitioner did not even know the vernacular names of the restricted drugs for which the board operative who first approached him requested prescriptions; and (4) instructions that the board investigator had given the operatives who solicited prescriptions from petitioner were almost a directive to entrap. The Court also noted that the record showed that petitioner was probably ill at the time that he was being investigated and was practicing against the advice of his own physician and commented that the employment of young women to obtain illegally prescribed drugs from elderly male physicians is not a new tactic to agents of the board (*9 Cal. 3d 356, 369)* .

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CHAPTER 176 PHYSICIANS AND SURGEONS: LICENSING AND PROFESSIONAL DISCIPLINE
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17-176 California Points & Authorities § 176.24

§ 176.24 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523]--Finding of Unprofessional Conduct [Bus. & Prof. Code § 2220 et seq.]--Employing or Aiding and Abetting Unlicensed Person in Practice of Medicine or other Healing Art [Bus. & Prof. Code § 2264]--Accused Had No Guilty Knowledge

[1] FORM

[*The following may be combined when appropriate with a general memorandum in support of a petition for writ of mandate to review an administrative decision of the Medical Board to impose discipline on a physician for unprofessional conduct, such as the memorandum set out in § 176.20, or to either deny a physician's certificate or reject an application for admission to the licensing examination, such as the memorandum set out in § 176.21.*]

PETITIONER IS NOT GUILTY OF EMPLOYING OR AIDING AND ABETTING AN UNLICENSED PERSON IN THE PRACTICE OF MEDICINE OR OTHER HEALING ART BECAUSE PETITIONER HAD NO GUILTY KNOWLEDGE OF THE CONDUCT OF THE UNLICENSED PERSON EMPLOYED BY HIM/HER.

Guilty Knowledge and Willful Intent Required. A licensee may not be disciplined for an employee's conduct in performing acts that the employee is not licensed or qualified to perform when the employee was not hired to perform such acts and knowledge of the employee's conduct was not brought home to the licensee in such manner as to impute to him or her consent or acquiescence to such conduct (*Barrett v. Board of Osteopathic Examiners (1935) 4 Cal. App. 2d 135, 140, 40 P.2d 923*).

[2] Comments

[a] Use of Form

These points and authorities may be combined when appropriate with a general memorandum in support of a petition for writ of mandate to review the administrative decision of the Medical Board to impose discipline on a physician § 176.20, to deny a physician's certificate, or to reject an application for admission to the licensing examination § 176.21. This form sets out the point that a physician whose employee has engaged in acts constituting the practice of medicine or other healing arts without a license cannot be disciplined for employing, aiding, or abetting an unlicensed person in

the practice of medicine unless the physician had knowledge of the employee's conduct.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Guilty Knowledge and Willful Intent Required

In ***Barrett v. Board of Osteopathic Examiners*** *(1935) 4 Cal. App. 2d 135, 40 P.2d 923* , petitioner, a licensed osteopath, was the manager of a health spa that legally employed physicians, surgeons, and other health personnel. Evidence showed that one of the masseurs employed by the spa had performed spinal adjustments on patients, provided patients with herbal medicines, and made a diagnosis on one patient's eye condition, in addition to performing the simple massages that he was hired to perform. Petitioner was thereupon charged with employing an unlicensed person to practice medicine and was found guilty by respondent. Petitioner filed a petition for writ of certiorari with the superior court, which found that respondent's order revoking petitioner's license was not supported by the evidence. Respondent appealed.

The court of appeal upheld the trial court's decision and incorporated relevant portions of the trial court's opinion as its own. The court noted that former Section 14(7a) of the Medical Practices Act (*now see Bus. & Prof. Code § 2264*) defined as unprofessional conduct the aiding or abetting of any unlicensed person to practice any system or mode of treating the sick or afflicted, and that the word aid imputes no knowledge of the unlawful act or purpose, while the word abet presupposes a guilty knowledge on the part of the person accused. Thus, the court acknowledged that a literal interpretation of the statute, which used the words "aiding" and "abetting" in the disjunctive, would permit finding a physician guilty of violating the statute even though he or she had no guilty knowledge of an employee's conduct (*4 Cal. App. 2d 135, 138-139)* . However, the court also noted that the right to practice medicine, once granted, becomes a property right and that the Legislature's right to prescribe grounds for which a license may be revoked does not extend so far as to authorize the prescribing of grounds that are capricious and bear no relation to the qualifications of the licensee or to the proper conduct of his or her professional duties (*4 Cal. App. 2d 135, 139)* . Thus, the court stated that an interpretation of the statute that would permit a person who has no guilty knowledge or willful intent to be found guilty of a violation would render the provision nugatory as an unwarranted and arbitrary assumption of legislative authority (*4 Cal. App. 2d 135, 139)* . Therefore, the court held that it must be assumed that the Legislature did not intend to make the mere aiding in the practice of medicine a violation unless the aid was wrongfully and knowingly extended, and that consequently a violation of the law by an employee without the knowledge or consent and against the express instruction and wishes of the employer furnishes no ground for the revocation of the employer's license (*4 Cal. App. 2d 135, 139-140)* .

The court concluded that respondent had overlooked the facts that the employee had not been hired to perform acts that he was not licensed or qualified to perform, and that knowledge of the employee's conduct was not brought home to petitioner in such manner as to impute to him knowledge of or acquiescence in such conduct by the employee (*4 Cal. App. 2d 135, 140)* .

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17-176 California Points & Authorities § 176.25

§ 176.25 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523]--Finding of Unprofessional Conduct [Bus. & Prof. Code § 2220 et seq.]--Employing or Aiding or Abetting Unlicensed Person in Practice of Medicine or Other Healing Art [Bus. & Prof. Code § 2264]--No Proof That Accused Had Ownership or Control of Premises or Equipment

[1] FORM

[*The following may be combined when appropriate with a general memorandum in support of a petition for writ of mandate to review an administrative decision of the Medical Board to impose discipline on a physician for unprofessional conduct, such as the memorandum set out in § 176.20, or to either deny a physician's certificate or reject an application for admission to the licensing examination, such as the memorandum set out in § 176.21].*

RESPONDENT'S FINDING THAT PETITIONER AIDED AND ABETTED AN UNLICENSED PERSON IN THE PRACTICE OF MEDICINE OR A HEALING ART BY PERMITTING SUCH PERSON TO USE CERTAIN _____ [OFFICE SPACE *and/or* EQUIPMENT] IS IMPROPER BECAUSE THERE WAS NO _____ [FINDING *or* SHOWING] THAT PETITIONER HAD OWNERSHIP OR CONTROL OVER THE _____ [PREMISES *and/or* EQUIPMENT] USED.

Ownership or Control of Premises and Equipment Is Necessary Element of Offense. To sustain an accusation under *Section 2264 of the Business and Professions Code* that a licensee committed unprofessional conduct by permitting a person to use an office or equipment to practice one of the healing arts for which the person is not licensed, the Medical Board must prove that the accused owned or otherwise had control over the premises or equipment used by the unlicensed person (*see Bley v. Board of Dental Examiners (1932) 120 Cal. App. 426, 431, 7 P.2d 1053*).

[2] Comments

[a] Use of Form

These points and authorities may be combined when appropriate with a general memorandum in support of a petition for writ of mandate to review the administrative decision of the Medical Board to impose discipline on a physician § 176.20, or to deny a physician's certificate or to reject an application for admission to the licensing examination §

176.21. The form sets out the point that when a licensee is accused of aiding and abetting an unlicensed person in the practice of a healing art by permitting an unlicensed person to use an office or equipment, ownership or control by the accused of the premises and equipment is a necessary element of the offense and must be proven at the accused's hearing or trial.

Counsel should insert argument in the form to show how the facts of the particular case relate to the points of law stated, including discussion showing that petitioner lacked the requisite ownership and control over the premises or equipment.

See *§ 176.24* for points and authorities supporting the contention that a licensee accused of aiding or abetting an unlicensed person in practicing a healing art must be shown to have had guilty knowledge.

[3] Discussion of Authorities

[a] Ownership or Control of Premises and Equipment Is Necessary Element of Offense

In ***Bley v. Board of Dental Examiners*** *(1932) 120 Cal. App. 426, 7 P.2d 1053* , petitioner was accused of permitting an unlicensed person to have the use of a certain dental office and of certain dental equipment in order to practice dentistry, on a specified date in a specified city, thereby aiding and abetting the unlicensed person in the practice of dentistry. Petitioner was found guilty by respondent Board of Dental Examiners of violating former Dental Act § 13 that declared the aiding or abetting of an unlicensed person to practice dentistry unlawfully to be unprofessional conduct. Petitioner filed a petition for a writ of prohibition, which was granted by the trial court. Respondent appealed.

The court of appeal upheld the trial court's decision to grant the writ of prohibition. Noting preliminarily that a writ of prohibition was appropriate under then existing law only when a subordinate tribunal had acted without jurisdiction, the court held that respondent had had no jurisdiction to hear the charge of unprofessional conduct, since the accusation had not stated facts sufficient to constitute unprofessional conduct (*120 Cal. App. 426, 428)* . The court held that the accusation against petitioner was fatally defective in that it did not include three essential allegations; (1) that petitioner owned or had any control of the dental office and equipment used by the unlicensed person, (2) that petitioner owned or had leased the building or premises in which the office was located, and (3) that petitioner knew or had any information that the person using the office and equipment was not licensed as a dentist (*120 Cal. App. 426, 429)* .

Addressing the necessity of ownership or control as an element of the misconduct charged, the court stated that in the case at bar respondent would certainly have had to prove that petitioner owned or had some right of control over the equipment that he was accused of permitting an unlicensed person to use, and noted that a fact that must be proved must be alleged (*120 Cal. App. 426, 431)* .

Addressing the sufficiency of the accusation, the court acknowledged that both the phrase "aided and abetted" and the term "permitted" as used in the accusation could be so read as to imply knowledge by petitioner. However, the court observed that petitioner was not merely being charged with having knowledge of another person's default and stated that nothing in the accusation could be construed to allege the equivalent of ownership, control, or the right of control by respondent over the dental equipment (*120 Cal. App. 426, 430)* .

The court rejected respondent's argument that the accusation was sufficient because it was phrased in the wording of the statute under which it was brought, pointing out that former Dental Act § 13 does not anywhere use the term permitted. The court stated in dictum, however, that if the term permitted had been omitted from the accusation and the accusation had merely followed the language of the statute, the use of the terms aid and abet might have rendered the accusation sufficient. However, the court concluded that since the accusation alleged specific acts, followed by the statement that petitioner thereby aided and abetted an unlicensed person in the practice of dentistry, the scope of the words aided and abetted was expressly limited to the acts alleged (*120 Cal. App. 426, 429)* .

The court stated in conclusion that, despite the liberal rules of pleading in a disciplinary case such as the one before it, the dictates of fair dealing between a state and its citizens require that when the facts are known and are the basis of a charge there should be a complete and plain statement made before the citizen is brought to trial, in view of the fact that the agencies of the state are well equipped for investigation and prosecution (*120 Cal. App. 426, 430, 431)* .

Although this case was decided under former Dental Act § 13, the language of *Bus. & Prof. Code § 2264*, which is found in Chapter 5 of the Business and Professions Code, regulating medicine, is parallel to that of former Dental Act § 13. Former Dental Act § 13 provided that aiding or abetting an unlicensed person in the practice of medicine is unprofessional conduct, while *Bus. & Prof. Code § 2264* provides that the aiding or abetting of an unlicensed person in the practice of medicine or any other mode of treating the sick or afflicted is unprofessional conduct. Like former Dental Act § 13, *Bus. & Prof. Code § 2264* does not use the term permit or permitted. Thus, the rule stated in the *Bley* case is almost certainly applicable to physicians as well as dentists.

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17-176 California Points & Authorities § 176.26

§ 176.26 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523]--Finding of Unprofessional Conduct [Bus. & Prof. Code § 2220 et seq.]--Willful Violation of Patient Confidence [Bus. & Prof. Code § 2263]--Disclosure Did Not Show Conscious Infraction of Duty or Cause Harm

[1] FORM

[*The following may be combined when appropriate with a general memorandum in support of a petition for writ of mandate to review an administrative decision to impose discipline on a physician for unprofessional conduct, such as the memorandum set out in § 176.20.*]

PETITIONER'S ALLEGED CONDUCT DID NOT AMOUNT TO WILLFUL VIOLATION OF PROFESSIONAL CONFIDENCE BECAUSE THE INFORMATION DISCLOSED WAS HARMLESS, AND THE DISCLOSURE DID NOT SHOW AN ACTUAL AND CONSCIOUS INFRACTION OF DUTY.

Only Disclosures Implying Actual, Conscious Infraction of Duty Constitute Willful Violation of Professional Confidence. The prohibition against willful violation of professional confidence set out in *Section 2263 of the Business and Professions Code* was not intended to prohibit any and all disclosures regardless of harmlessness or to embrace facts not connected with the practice of the profession, but was intended to apply only to disclosures implying an actual and conscious infraction of duty, and a purpose or design to cause harm or wanton disregard of possible harm (*see McPheeters v. Board of Medical Examiners (1930) 103 Cal. App. 297, 300-301, 284 P. 938* ; *Bus. & Prof. Code § 2263*).

[2] Comments

[a] Use of Form

These points and authorities may be combined with a general memorandum in support of a petition for writ of mandate to review the administrative decision to impose discipline for unprofessional conduct § 176.20. The form sets out the criteria for establishing willfulness on the part of the accused, which is an essential element of a violation of *Bus. & Prof. Code § 2263,* which prohibits willful, unauthorized violation of professional confidence [*see Bus. & Prof. Code §*

2263].

Counsel should insert argument in this form showing the relationship between the facts of the particular case and the points of law stated.

[3] Discussion of Authorities

[a] Only Disclosures Implying Actual, Conscious Infraction of Duty Constitute Willful Violation of Professional Confidence

In ***McPheeters v. Board of Medical Examiners*** *(1930) 103 Cal. App. 297, 284 P. 938* , petitioner was accused of a willful betrayal of professional secrets in violation of former Medical Practices Act § 14(2) (*now see Bus. & Prof. Code § 2263* (declaring willful violation of professional confidence to be unprofessional conduct)) after certain letters petitioner had written to a former office assistant and personal, intimate acquaintance came into respondent's hands. Some of these letters discussed certain of petitioner's patients, with whom the receiver of the letters was already familiar, mentioning that petitioner had performed certain ordinary operations on some of the patients and that one of the patients, who was contemplating marriage, had asked petitioner certain questions about sex relations generally, with which the patient was apparently unfamiliar. The accusations were not initiated by the patients who had been discussed in the letters, and it was stipulated that these patients would not make any objections to the disclosures if called to testify. Respondent ordered petitioner's license revoked. The superior court granted petitioner's petition for writ of mandate and annulled respondent's order. Respondent appealed.

The court of appeal upheld the trial court's decision. The court stated that the statute under which petitioner was accused was penal in character and was therefore required to be interpreted strictly in favor of the accused, and that a statute under which a physician could lose his or her license could be sustained only under the Legislature's police power to provide reasonable regulations that may necessarily affect the public health, safety, and morals, which power may be conferred only under provisions of law that are reasonable and declared with such certainty and definiteness that a physician may know exactly what they are (*103 Cal. App. 297, 300)* . The court stated that the Legislature's use of the word "willful" in the statute showed that the statutory restriction was not meant to apply to all disclosures of information by a physician, regardless of their harmless character, and that the statute was not meant to embrace facts not connected with the practice of the profession (*103 Cal. App. 297, 300, 301)* . The court cited several definitions of the term willful from case law.

These definitions stated that willfulness entails such things as some deliberate intent or purpose, a design to do injury, mere wantonness or lawlessness, or some wrongful motive with the direct effect of injuring another. Another definition required that the act involve an intentional failure, for which no reasonable excuse could be given, to do something or refrain from doing something that good faith in the performance of a duty requires (*103 Cal. App. 297, 300-301)* . In the context of the particular statute in question in the case before it, the court stated that in using the word willful, the Legislature undoubtedly intended to refer to an act that implied an actual and conscious infraction of duty (*103 Cal. App. 297, 300)* . The court concluded that under a reasonable construction of the statute the acts that petitioner was accused of did not fall within its ban (*103 Cal. App. 297, 301)* .

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17-176 California Points & Authorities § 176.27

§ 176.27 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523]--Finding of Unprofessional Conduct [Bus. & Prof. Code § 2220 et seq.]--Statute Phrased in General Terms--Failure to Allege Specific Act of Misconduct

[1] FORM

[*The following may be combined when appropriate with a general memorandum in support of a petition for writ of mandate to review an administrative decision of the Medical Board to impose discipline on a physician for unprofessional conduct, such as the memorandum set out in § 176.20, or to either deny a physician's certificate or reject an application for admission to the licensing examination, such as the memorandum set out in § 176.21.*]

RESPONDENT DID NOT ACQUIRE JURISDICTION OVER PETITIONER BECAUSE RESPONDENT'S ACCUSATION WAS PHRASED ONLY IN TERMS OF THE GENERAL ENABLING STATUTE UNDER WHICH THE ACCUSATION WAS BROUGHT AND DID NOT IDENTIFY THE SPECIFIC MISCONDUCT OF WHICH PETITIONER WAS ACCUSED.

A. Sufficiency of Accusation Is a Jurisdictional Requirement. An accusation must be sufficient in its statement of facts to allege actual unprofessional conduct by the accused, or it will not give the accusing agency jurisdiction or power to revoke the accused's certificate (*Dyment v. Board of Medical Examiners (1922) 57 Cal. App. 260, 266, 207 P. 409* (opinion of Supreme Court on denying hearing); *Bley v. Board of Dental Examiners (1932) 120 Cal. App. 426, 430, 7 P.2d 1053*).

B. An Accusation Under a General Statute Must Specify the Misconduct of Which It Complains. A physician accused under a statute that is general in nature is entitled to a specific charge that identifies the particular act of which he or she is accused in addition to a charge phrased in the language of the statute (*see Bernstein v. Board of Medical Examiners (1962) 204 Cal. App. 2d 378, 382, 22 Cal. Rptr. 419* ; *see also Bus. & Prof. Code § 2236*).

[2] Comments

[a] Use of Form

These points and authorities may be combined with a general memorandum in support of a petition for writ of mandate to review the administrative decision of the Medical Board to impose discipline on a physician for unprofessional conduct § 176.20, or to either deny a physician's certificate or to reject an application for admission to the licensing examination § 176.21. The form states the point that a licensee accused under a statute that is general in nature is entitled to a specific charge reciting the misconduct complained of to complement the general charge of having violated the statute. It should be noted that when the accusation is brought under a statute that specifically describes the misconduct it prohibits, an accusation phrased in the language of the statute itself is sufficient [*see § 176.27[2][d]*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. The facts should show that the accusation was issued pursuant to a general statute, and that the conduct of which petitioner was accused was not set out with sufficient specificity to enable petitioner to understand the charges against him or her.

[b] Objection to Sufficiency of Accusation Must Have Been Made Within 15 Days of Service

Within 15 days of service on him or her of the accusation, the person accused may file with the agency a notice of defense in which he or she may, inter alia, object to the form of the accusation on the ground that it is so indefinite or uncertain that the accused cannot identify the transaction or prepare his or her defense. Unless objection is taken within the 15-day limit, all objections to the form of the accusation are deemed waived [*see Gov. Code § 11506(a)(3), (c)*]. Thus, an accused who has not made a timely objection to the accusation on the ground of insufficiency before the administrative hearing as provided in *Gov. Code § 11506* is precluded from raising the insufficiency of the accusation on petition for writ of mandate [*see Shea v. Board of Medical Examiners (1978) 81 Cal. App. 3d 564, 576, 146 Cal. Rptr. 653* ; *Collins v. Board of Medical Examiners (1972) 29 Cal. App. 3d 439, 444, 105 Cal. Rptr. 634* (both cases decided on alternate grounds that there was no timely objection and accusation was sufficiently definite in any case)].

[c] General Statutes

Although *Bernstein v. Board of Medical Examiners (1962) 204 Cal. App. 2d 378, 382, 22 Cal. Rptr. 419* , which sets out the rule that accusations under general statutes must include a specific charge stating the conduct of which the accused is charged deals with former Bus. & Prof. Code § 2383 (*now see Bus. & Prof. Code § 2236*, conviction of crime substantially related to practice of medicine is unprofessional conduct), the language of the court is broad enough to apply to any statute that is as general in nature as *Bus. & Prof. Code § 2236* [*see § 176.27[3][b]*].

Sections of the Business and Professions Code that define unprofessional conduct in general terms include: *Bus. & Prof. Code § 2234* (general definition of unprofessional conduct); *Bus. & Prof. Code § 2237* (conviction of violating any law regulating dangerous drugs or controlled substances is unprofessional conduct); *Bus. & Prof. Code § 2238* (violation of any law regulating dangerous drugs or controlled substances, not requiring conviction); *Bus. & Prof. Code § 2239(a)* (more than one misdemeanor or any felony involving use, consumption, or self administration of any dangerous drug or controlled substance is unprofessional conduct); *Bus. & Prof. Code § 2250* (willful failure to comply with the requirements of *Welf. & Inst. Code §§ 14191-14194*, relating to informed consent for sterilization procedures, is unprofessional conduct); *Bus. & Prof. Code § 2252* (violation of any provision of *Health & Safety Code § 1700 et seq.*, relating to treatment of cancer, or violation of any injunction or cease and desist order under these provisions is unprofessional conduct); *Bus. & Prof. Code § 2255* (violation of *Health & Safety Code §§ 1400-1404*, relating to unlawful referral of patients to extended care facilities, is unprofessional conduct); and *Bus. & Prof. Code § 2256* (intentional violation of *Welf. & Inst. Code §§ 5326.2-5326.8*, relating to rights of involuntarily confined inpatients, is unprofessional conduct). Arguably, an accusation brought under *Bus. & Prof. Code § 822*, which specifies action the Medical Board is authorized to take if a licensee becomes mentally ill to such an extent as to affect his or her ability to practice medicine safely, would also be required to include a more specific charge than one merely framed in the language of the statute.

[d] Specific Statutes

An accusation brought under a statute whose language is sufficiently explicit to advise the accused of the particular kind of unprofessional conduct that the accusing agency proposes to prove against him or her is sufficient if expressed in the language of the statute [*Smulson v. Board of Dental Examiners (1941) 47 Cal. App. 2d 584, 589, 118 P.2d 483]* . *Smulson* was decided before the enactment of *Gov. Code § 11503*, which provides that an accusation involving action against a license holder may not consist merely of charges phrased in the language of the statute under which the accusation is brought. However, *Gov. Code § 11503* also provides that the accusation must be a written statement of charges setting forth in ordinary and concise language the acts or omissions with which the licensee is charged, to the end that the licensee will be able to prepare his or her defense. An accusation that informs the accused of the substance of the charge against him or her is sufficient to satisfy the requirements of the liberal rules of administrative pleading [*see* *Shea v. Board of Medical Examiners (1978) 81 Cal. App. 3d 564, 576, 146 Cal. Rptr. 653]* . Thus, it appears that when the language of a statute is sufficiently explicit to inform an accused of the conduct with which he is charged, as required by *Smulson*, it is also sufficiently explicit to satisfy the pleading requirements of *Gov. Code § 11503*.

An accusation charging the licensee with violating the statutory prohibition against procuring, aiding, or abetting, or attempting or agreeing to or offering to procure an illegal abortion under *Bus. & Prof. Code § 2253* need not make all of the allegations that would be required in a criminal proceeding. The accusation is sufficient if it is phrased in the language of *Bus. & Prof. Code § 2253* [*see* *Suckow v. Alderson (1920) 182 Cal. 247, 250-251, 187 P. 965* ; *Tapley v. Abbott (1931) 111 Cal. App. 397, 399* (both decided under former Medical Practices Act of 1913, pertinent substance of which is now contained in *Bus. & Prof. Code § 2253*)]. Similarly, the terms aid and abet as used in the statutory prohibition against employing, aiding, or abetting an unlicensed person in the practice of medicine or other modes of treating the sick or afflicted, set out in *Bus. & Prof. Code § 2264*, are sufficiently fixed in their meaning to render an accusation phrased in the language of *Bus. & Prof. Code § 2264* sufficient [*see* *Anderson v. Board of Medical Examiners (1931) 117 Cal. App. 113, 116, 3 P.2d 344* (decided under former Medical Practices Act of 1912, pertinent substance of which is now contained in *Bus. & Prof. Code § 2264*)].

[3] Discussion of Authorities

[a] Sufficiency of Accusation Is a Jurisdictional Requirement

The facts and jurisdictional background to ***Dyment v. Board of Medical Examiners*** *(1922) 57 Cal. App. 260, 207 P. 409* (opinion of Supreme Court on denying hearing) are *set out in § 176.28[3][a]*. In its opinion refusing hearing the case, the Supreme Court stated that the accusation in a medical disciplinary proceeding must be sufficient in its statement of facts to show actual unprofessional conduct by the person charged, or it will not give the Board of Medical Examiners power or jurisdiction to revoke the accused's certificate (*57 Cal. App. 260, 266)* .

The facts and procedural background to ***Bley v. Board of Dental Examiners*** *(1932) 120 Cal. App. 426, 7 P.2d 1053* , are *set forth in § 176.25[3][a]*. In support of its conclusion that implications in an accusation do not compensate for lack of alleged facts, the court of appeal in *Bley* cited the rule set out in *Dyment v. Board of Medical Examiners (1922) 57 Cal. App. 260, 266, 207 P. 409* that an accusation in a disciplinary proceeding must allege facts sufficient to show actual unprofessional conduct in order to give the board power or jurisdiction to revoke an accused's license (*120 Cal. App. 426, 430)* .

[b] An Accusation Under a General Statute Must Specify the Misconduct Complained of

In ***Bernstein v. Board of Medical Examiners*** *(1962) 204 Cal. App. 2d 378, 22 Cal. Rptr. 419* , petitioner, a licensed psychiatrist, was charged with statutory rape for having had sexual relations with a 16-year-old girl he had been treating for sexual promiscuity. Respondent initiated disciplinary proceedings under former Bus. & Prof. Code § 2383 (*now see Bus. & Prof. Code § 2236*, conviction of crime substantially related to practice of medicine is unprofessional conduct).

At his administrative hearing, petitioner was found guilty, and his license was ordered revoked. Petitioner filed a petition for writ of mandate with the superior court, and the superior court denied the writ. Petitioner appealed.

The court of appeal upheld the ruling of the superior court sustaining respondent's revocation of petitioner's license. The court stated that since an accused has the right to know the charges to which he or she must answer, and because the statute under the authority of which the disciplinary action was taken in this case, former Bus. & Prof. Code § 2383, is general in nature, the statute must be complemented by a specific charge in the accusation issued pursuant to the statute (*204 Cal. App. 2d 378, 383)* . However, the court noted that the accusation filed against petitioner included both a general accusation phrased in the language of former Bus. & Prof. Code § 2383 and a statement reciting the conviction for statutory rape that petitioner had sustained and gave a brief description of the charge pursuant to which petitioner was convicted (*204 Cal. App. 2d 378, 382)* . The court held that this accusation was sufficiently specific to enable petitioner to understand the nature of the charges against him (*204 Cal. App. 2d 378, 382-383)* . The court stated that the critical facts in the accusation were that at the time the accusation was served petitioner had been arrested, that petitioner had been tried by a jury and convicted of statutory rape of his minor patient, that the judgment had been affirmed on appeal, and that petitioner had been sentenced and the sentence had been executed (*204 Cal. App. 2d 378, 382)* . The court stated that the fact that the accusation mistakenly stated the age of the victim to be 15 rather than 16 did not render the accusation insufficient since both ages were well under the statutory age of 18, and the physician-patient relationship is not changed in the least by the disparity of reported ages (*204 Cal. App. 2d 378, 382)* .

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17-176 California Points & Authorities § 176.28

§ 176.28 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523]--Finding of Unprofessional Conduct [Bus. & Prof. Code § 2220 et seq.]--License Obtained by Fraud or Misrepresentation Bus. & Prof. Code § 2235]--Failure to Allege Fact Constituting Fraud or Misrepresentation

[1] FORM

[*The following may be combined when appropriate with a general memorandum in support of a petition for writ of mandate to review an administrative decision of the Medical Board to impose discipline on a physician for unprofessional conduct, such as the memorandum set out in § 176.20, or to either deny a physician's certificate or reject an application for admission to the examination, such as the memorandum set out in § 176.21.*]

RESPONDENT DID NOT ACQUIRE JURISDICTION OVER PETITIONER BECAUSE RESPONDENT'S ACCUSATION FAILED TO ALLEGE FACTS THAT CONSTITUTED ANY FRAUD OR MISREPRESENTATION ON PETITIONER'S PART IN PROCURING HIS/HER LICENSE.

A. Sufficiency of Accusation Is a Jurisdictional Requirement. [*See § 176.27, Paragraph A.*]

B. Facts Constituting Fraud or Misrepresentation Must Be Alleged. An accusation that charges a licensee with having procured his or her license by means of fraud or misrepresentation under *Section 2235 of the Business and Professions Code* must allege the specific acts that constitute the alleged fraud or misrepresentation in order to secure the jurisdiction of the division that issued the accusation (*Dyment v. Board of Medical Examiners (1922) 57 Cal. App. 260, 264-265, 207 P. 409*).

[2] Comments

[a] Use of Form

These points and authorities may be combined with a general memorandum in support of a petition for writ of mandate to review the administrative decision of the Medical Board to impose discipline on a physician for unprofessional conduct [*see § 176.20*], or to either deny a physician's certificate or reject an application for admission to the licensing

examination [*see § 176.21*]. The form states the point that a licensee accused under *Bus. & Prof. Code § 2235* of having secured his or her license by means of fraud or misrepresentation is entitled to a specific allegation of the acts constituting the fraud of which he or she is accused.

Counsel should insert argument in this form showing how the points of law stated apply to the facts of the particular case. Thus, counsel should show that the accusation alleged fraud, but did not set out the acts of petitioner that allegedly constituted fraud with sufficient specificity to enable petitioner to understand the charges against him or her and to prepare a defense.

[3] Discussion of Authorities

[a] Facts Constituting Fraud or Misrepresentation Must Be Alleged

In ***Dyment v. Board of Medical Examiners*** *(1922) 57 Cal. App. 260, 207 P. 409* , petitioner, who had received his physician's certificate based on reciprocity, was charged with having procured his certificate by means of fraud or misrepresentation. The accusation was phrased in the language of former Medical Practices Act § 14 (*now see Bus. & Prof. Code § 2235*), which authorized respondent to revoke any certificate that had been procured by means of fraud or misrepresentation. Petitioner responded with a letter stating that he demurred to the complaint because it failed to specify the sort of unprofessional conduct of which he was accused, but did not appear at his hearing. Respondent did not pass on petitioner's demurrer, but proceeded to try the charges against petitioner as on a default and ordered petitioner's license revoked. Petitioner applied to the superior court for a writ of review, which the superior court denied. Petitioner appealed.

The court of appeal overruled the decision of the superior court and ordered the case remanded to respondent to proceed according to the views expressed in its opinion.

The court stated that despite the well-established rule that pleadings and evidence before respondent need not be marked by the refinements and subtleties characteristic of criminal proceedings, a complaint before respondent board must give the accused such notice of the nature of the charge as will enable him or her to formulate a defense (*57 Cal. App. 260, 265)* . The court then stated that it is probably not possible to conceive of the many different practices by means of which a person might fraudulently procure a physician's certificate, and stated that a complaint against a person for having brought such an attempt to fruition ought to notify him or her of the specific acts which he or she is alleged to have committed in the attempt (*57 Cal. App. 260, 265)* . Thus, the court held that the accusation was not sufficient to state a violation of the statute under which it was brought (*57 Cal. App. 260, 265)* .

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Volume 17 Chapters 170-179 PARTNERSHIPS---to---PREMISES LIABILITY
CHAPTER 176 PHYSICIANS AND SURGEONS: LICENSING AND PROFESSIONAL DISCIPLINE
PART II. FORMS

17-176 California Points & Authorities § 176.29

§ 176.29 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523]--Discipline for Unprofessional Conduct [Bus. & Prof. Code § 2220 et seq.]--Remand for Redetermination of Penalty When Finding of Unprofessional Conduct Found Partially Valid

[1] FORM

[*The following may be combined when appropriate with a general memorandum in support of a petition for writ of mandate to review an administrative decision to impose discipline on a physician for unprofessional conduct, such as the memorandum sent out in § 176.20.*]

IF SOME BUT NOT ALL OF THE FINDINGS OF THE MEDICAL BOARD CONCERNING PETITIONER'S ALLEGED UNPROFESSIONAL CONDUCT ARE PROPER, THE CASE SHOULD BE REMANDED TO THE BOARD FOR REDETERMINATION OF PENALTY BECAUSE IT IS NOT POSSIBLE TO DETERMINE TO WHAT EXTENT THE IMPROPER FINDINGS INFLUENCED THE BOARD'S PENALTY DETERMINATION.

Remand Proper When Respondent's Decision Partially Overturned. A case should be remanded to the Medical Board for redetermination of penalty when some of the counts of unprofessional conduct of which respondent had found petitioner guilty, or any other finding by respondent that might have been a factor in respondent's determination of the penalty, are found to be improper by the court and it is not possible to determine to what extent such improper action by respondent influenced respondent's determination of the penalty (*O'Reilly v. Board of Medical Examiners (1967) 66 Cal. 2d 381, 389, 58 Cal. Rptr. 7, 426 P.2d 167 , cert. denied 390 U.S. 944, 88 S. Ct. 1019, 19 L. Ed. 2d 1132* ; *Cooper v. State Board of Medical Examiners (1950) 35 Cal. 2d 242, 252, 217 P.2d 630* ; *see also Yakov v. Board of Medical Examiners (1968) 68 Cal. 2d 67, 69, 74-75, 64 Cal. Rptr. 785, 435 P.2d 553*).

[2] Comments

[a] Use of Form

These points and authorities may be combined with a general memorandum in support of a petition for writ of mandate to review the administrative decision to impose discipline on a physician for unprofessional conduct [*see § 176.20*].

This form may be used to support a contention that the case should be remanded to the Medical Board for redetermination of the penalty when the Board has imposed a single penalty for several counts of unprofessional conduct and some but not all of the counts have been overturned by the trial court, or if any finding by the Board on which the Board could have relied in determining its penalty is overturned by the court, although the Board's basic finding of unprofessional conduct is not being attacked.

Counsel may make an argument attacking the Board basic finding that the petitioner was guilty of unprofessional conduct and use this form to support an alternative argument that even if the basic finding of unprofessional conduct is upheld, the penalty should be reconsidered when some of the Board's findings have been overturned.

Counsel should insert argument in this form showing how the points of law stated relate to the facts of the case.

[b] No Right to Remand If Separate Penalty Imposed for Each Count

Petitioner is not entitled to a remand of his or her case to the Medical Board for a reconsideration of the penalty, even if one or more of a group of counts of unprofessional conduct of which petitioner was found guilty is overturned by the trial court, if the Board assessed a separate penalty for each individual count [*Grannis v. Board of Medical Examiners (1971) 19 Cal. App. 3d 551, 563, 96 Cal. Rptr. 863]* .

[3] Discussion of Authorities

[a] Remand Proper When Respondent's Decision Partially Overturned

In ***O'Reilly v. Board of Medical Examiners*** *(1967) 66 Cal. 2d 381, 58 Cal. Rptr. 7, 426 P.2d 167 , cert. denied 390 U.S. 944, 88 S. Ct. 1019* , petitioner was found guilty by respondent of two counts of employing or aiding and abetting unlicensed persons in the practice of medicine in violation of former Bus. & Prof. Code § 2392 (*now see Bus. & Prof. Code § 2264*). On the first count, petitioner was found guilty of aiding and abetting two graduates of foreign medical schools who were not licensed to practice in California, whom petitioner had allowed to assist him pursuant to a federally-sponsored exchange program. On the second count, petitioner was found guilty of employing a person who had graduated from a California medical school but was not licensed to practice, who had made a diagnosis of a patient's knee injury after consulting with petitioner. The penalty imposed by respondent included a 90-day suspension of petitioner's license. Petitioner filed a petition for writ of mandate, and the trial court upheld respondent's decision.

The Supreme Court upheld the trial court's holding, but ordered the case remanded to respondent for redetermination of the penalty. The Court held that the 90-day suspension of petitioner's license was excessive for the conduct of which petitioner had been found guilty under count one (*66 Cal. 2d 381, 388)* [*see § 176.30[3][a]*]. The Court further stated that since respondent had imposed a single penalty for both violations and there was no way of determining to what extent respondent had relied on the first violation in imposing the 90-day suspension, the case must be remanded for reconsideration of the penalty (*66 Cal. 2d 381, 389)* .

In ***Cooper v. Board of Medical Examiners*** *(1950) 35 Cal. 2d 242, 217 P.2d 630* , petitioner, a certified drugless practitioner, was found guilty by respondent of using the prefix Dr. and of penetrating tissue incidental to giving a blood transfusion without a physician's and surgeon's certificate [*see* former Bus. & Prof. Code § 2500 (drugless practitioner's certificate authorizes holder to treat and diagnose without using drugs, medical preparation, or severing human tissue); former Bus. & Prof. Code § 2502 (abolishing classification of drugless practitioner but allowing holders of existing certificates to continue to practice)]. Respondent ordered petitioner's license as drugless practitioner revoked. Petitioner petitioned for a writ of mandate, and the trial court upheld respondent's decision. Petitioner appealed.

The Supreme Court reversed the finding that petitioner had committed unprofessional conduct in using the prefix Dr., holding that the statutes under which petitioner had been charged did not forbid the use of such a prefix to the holder of

a valid certificate in the healing arts (*35 Cal. 2d 242, 248)* . However, the Court upheld the finding that petitioner had committed unprofessional conduct in penetrating human tissue incident to performing a blood transfusion (*35 Cal. 2d 242, 249)* .

The Court ordered the trial court to remand the case to respondent for reconsideration of the penalty, noting that respondent had made only a single order of license revocation based on both violations with which petitioner had been charged, that license revocation was in any case a severe penalty, and that it was impossible to determine whether respondent would have imposed so severe a penalty for the one violation alone of which petitioner had been validly found guilty (*35 Cal. 2d 242, 252)* .

The facts and procedural background of ***Yakov v. Board of Medical Examiners*** *(1968) 68 Cal. 2d 67, 64 Cal. Rptr. 785, 435 P.2d 553* , are *set out in § 176.20[3][b]*. In that case, the trial court determined that respondent's finding that petitioner was guilty of unprofessional conduct was supported by the weight of the evidence, but that an additional finding by the board that petitioner had shown moral turpitude by his actions was not. Since it was impossible to determine to what extent the board's finding of moral turpitude had influenced its decision to revoke petitioner's license, the trial court ordered the case remanded to the board for redetermination of the penalty (*68 Cal. 2d 67, 69)* . The Supreme Court upheld the trial court's decision annulling the board's decision and ordered the case remanded (*68 Cal. 2d 67, 74-75)* .

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17-176 California Points & Authorities § 176.30

§ 176.30 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523]--Discipline for Unprofessional Conduct [Bus. & Prof. Code § 2220 et seq.]--Penalty Too Severe for Offense

[1] FORM

[*The following may be combined when appropriate with a general memorandum in support of a petition for writ of mandate to review an administrative decision to impose discipline on a physician for unprofessional conduct, such as the memorandum set out in § 176.20.*]

EVEN IF THE FINDING BY THE MEDICAL BOARD THAT PETITIONER IS GUILTY OF UNPROFESSIONAL CONDUCT IS PROPER, THE CASE SHOULD NEVERTHELESS BE REMANDED TO THE BOARD FOR REDETERMINATION OF THE PENALTY BECAUSE THE BOARD ABUSED ITS DISCRETION BY IMPOSING A PENALTY THAT IS EXCESSIVE IN LIGHT OF THE OFFENSE.

A. Respondent Required to Give Priority to Rehabilitative Action. In exercising its disciplinary authority, the Medical Board is required whenever possible to take such action as is calculated to aid in the rehabilitation of the licensee. The Medical Board should give priority to measures such as further education or restrictions on practice that will remove any deficiency in competence that was the basis for imposing discipline (*see Bus. & Prof. Code § 2229*).

B. Remand Proper When Penalty Shows Abuse of Discretion. A case should be remanded to the Medical Board for redetermination of penalty when the Board showed manifest abuse of discretion in imposing a penalty that is excessive in light of the conduct of which the physician was found guilty (*see O'Reilly v. Board of Medical Examiners (1967) 66 Cal. 2d 381, 388, 58 Cal. Rptr. 7, 426 P.2d 167 , cert. denied 390 U.S. 944, 88 S. Ct. 1019, 19 L. Ed. 2d 1132*).

[2] Comments

[a] Use of Form

These points and authorities may be combined with a general memorandum in support of a petition for writ of mandate to review the administrative decision of the Medical Board to impose discipline on a physician for unprofessional

conduct [*see § 176.20*]. This form may be used when the basic decision that petitioner has been guilty of unprofessional conduct so as to warrant some form of discipline is not being attacked, to support a contention that the case should be remanded to the Board for redetermination of the penalty because the penalty is so excessive in relation to the offense as to amount to an abuse of discretion.

Counsel may also make a direct attack on the finding that petitioner was guilty of unprofessional conduct and use this form to support an alternative argument that even if the finding of unprofessional conduct is upheld, the case should be remanded for reconsideration of the penalty because the penalty imposed was excessive.

Counsel should insert argument in the form, showing how the points of law stated relate to the facts of the case, including argument showing why the penalty imposed by respondent was so severe as to amount to an abuse of discretion.

[b] Standard of Review

The trial court's mandate to make an independent judgment on the evidence in reviewing a decision by the Medical Board to impose discipline is limited to a review of findings that would justify discipline in the first instance. The propriety of the penalty imposed once discipline has been found to be justified is vested in the discretion of the Board and may be overturned only in case of manifest abuse [*Windham v. Board of Medical Quality Assurance (1980) 104 Cal. App. 3d 461, 472, 163 Cal. Rptr. 566* ; *see Magit v. Board of Medical Examiners (1961) 57 Cal. 2d 74, 78, 17 Cal. Rptr. 488, 366 P.2d 816]* .

[3] Discussion of Authorities

[a] Remand Proper When Penalty Shows Abuse of Discretion

The facts and procedural background of ***O'Reilly v. Board of Medical Examiners*** *(1967) 66 Cal. 2d 381, 58 Cal. Rptr. 7, 426 P.2d 167* , cert. denied *390 U.S. 944, 88 S. Ct. 1019, 19 L. Ed. 2d 1132* , are discussed in *§ 176.29[3][a]*. In that case, the Supreme Court rejected petitioner's argument that former Bus. & Prof. Code § 2396 (now see *Bus. & Prof. Code § 2275*), which forbids a physician to employ or aid and abet an unlicensed person in the practice of medicine, could not be applied to petitioner's employment of two foreign practitioners without California physician's certificates because that section was preempted under the supremacy clause of the United States Constitution by the federal exchange and visitor's program under which petitioner employed the two practitioners (*66 Cal. 2d 381, 386)* . The Court stated that it could not be assumed lightly that in establishing the exchange program Congress intended to deprive California patients of the protection of state regulation, and that Congress would have provided an effective alternative to protect patients of visiting physicians if it had intended to preempt the protective mechanisms of the state regulatory schemes (*66 Cal. 2d 381, 387)* . The Court noted, however, that although good faith is not a defense to the charges against petitioner, the uncertainty surrounding the question of federal preemption and petitioner's apparent good faith in allowing the foreign physicians to assist him precluded any sanctions against petitioner more severe than probation (*66 Cal. 2d 381, 388)* . Thus, the court implicitly accepted petitioner's contention that a 90-day suspension of petitioner's license was excessive for this particular violation.

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17-176 California Points & Authorities § 176.31

§ 176.31 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523]--Discipline for Unprofessional Conduct [Bus. & Prof. Code § 2220 et seq.]--Two Acts of Repeated Negligence Are Sufficient to Constitute Unprofessional Conduct [Bus. & Prof. Code § 2234(c)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF PETITION
Petitioner,	)	FOR WRIT OF MANDATE
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Respondent.	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

RESPONDENT'S FINDING THAT PETITIONER IS GUILTY OF UNPROFESSIONAL CONDUCT IS PROPER BECAUSE THERE WAS A _____ [SHOWING *or* FINDING] THAT PETITIONER COMMITTED TWO [OR MORE] REPEATED NEGLIGENT ACTS.

A. Repeated Negligent Acts Are Unprofessional Conduct. The Medical Board must take action against a licensee who is charged with unprofessional conduct, including repeated negligent acts [*Bus. & Prof. Code § 2234(c)*].

B. Two Negligent Acts Are Sufficient to Constitute "Repeated" Negligent Acts. *Business and Professions Code*

Section 2234(c) requires only two repeated acts to constitute "repeated" negligent acts [*Zabetian v. Medical Board (2000) 80 Cal. App. 4th 462, 466-468, 94 Cal. Rptr. 2d 917]* .
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a petition to the superior court for a writ of mandate to review a final order or decision of the Medical Board to impose discipline for unprofessional conduct. Counsel should include additional paragraphs discussing specific points in which findings support the decision, or the evidence supporting the findings of the Board.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Repeated Negligent Acts as Unprofessional Conduct

Repeated negligent acts are unprofessional conduct as a ground for imposing discipline on a medical licensee. To be repeated, there must be two or more negligent acts or omissions. Repeated negligent acts include an initial negligent act or omission followed by a separate and distinct departure from the applicable standard of care [*Bus. & Prof. Code § 2234(c)*].

[c] Related Pleading and Practice Forms

For a form for a petition for writ of mandate to review the decision of the Medical Board to impose discipline for unprofessional conduct, see Ch. 414, *Physicians: Licensing and Discipline* , in California Forms of Pleading and Practice (Matthew Bender).

[d] Related Points and Authorities

For other memoranda opposing petitions for writ of mandate to review administrative adjudicatory decisions, see Ch. 195, *Public Administrative Law* . For memoranda opposing petitions for writs of mandate generally, see Ch. 150, *Mandate and Prohibition* .

[3] Discussion of Authorities

[a] In General

In ***Zabetian v. Medical Board*** *(2000) 80 Cal. App. 4th 462, 94 Cal. Rptr. 2d 917* , the Medical Board of California disciplined a physician for repeated negligent acts based on two acts of negligence involving the same patient, leaving the area without securing coverage for the patient who was in intensive care, and failing to correctly diagnose the patient as having peritonitis and failing to perform surgery. The Board placed the physician on probation for two years. The physician petitioned the superior court for a writ of mandate to set aside the Board's order, which the trial court denied.

Although the physician appealed from the trial court's judgment, which is prohibited by *Bus. & Prof. Code § 2337*, the Court of Appeal treated the appeal as an application for writ of mandate and denied the petition. The court held that it may treat an improper appeal as a petition for an extraordinary writ in unusual circumstances, including when review by writ is the statutorily prescribed mode of review, as in this case (*80 Cal. App. 4th 462, 466)* . The court then held that "repeated" negligent acts sufficient to constitute unprofessional conduct under *Bus. & Prof. Code § 2234(c)* requires two or more repeated acts, not more than two repeated acts (*80 Cal. App. 4th 462, 466-468)* .

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17-176 California Points & Authorities § 176.32

§ 176.32 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086, 1094.5] to Compel Medical Board to Approve School From Which Petitioner Received Professional Degree [Bus. & Prof. Code § 2087]

[1] FORM

[*Caption. See § 176.20*].

A PETITION FOR A WRIT OF MANDATE IS THE PROPER PROCEDURE TO COMPEL RESPONDENT MEDICAL BOARD TO APPROVE THE PROFESSIONAL SCHOOL FROM WHICH PETITIONER GRADUATED.

A. Action for Mandate to Approve School Inures to Graduate. A person whose application for admission to the examination for certification as a physician and surgeon has been rejected because the professional school from which he or she graduated has not been approved by the Medical Board may petition for a writ of mandate to compel respondent to approve the school as of the date on which the applicant received a degree from the school (*see Bus. & Prof. Code § 2087*; *Code Civ. Proc. § 1094.5(a)*; *Mann v. Board of Medical Examiners (1947) 31 Cal. 2d 30, 41-42, 187 P.2d 1* ; *Lay v. Board of Osteopathic Examiners (1960) 179 Cal. App. 2d 356, 358-359, 3 Cal. Rptr. 727* ; *see also Code Civ. Proc. § 1094.5*).

B. Respondent May Approve Every Qualified School. The Medical Board may approve every school that complies with the requirements set forth in the Business and Professions Code for resident courses of professional instruction (*Bus. & Prof. Code § 2084*).

[*Optional*] **C. Discrimination Against Particular Schools Prohibited.** The provisions of the Business and Professions Code governing the licensing and regulation of physicians, including those provisions by which the Medical Board is empowered to make its administrative decisions, may not be construed so as to discriminate against any particular school of medicine or any other treatment (*see Bus. & Prof. Code § 2063*; *see also D'Amico v. Board of Medical Examiners (1974) 11 Cal. 3d 1, 24, 112 Cal. Rptr. 786, 520 P.2d 10*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]

By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a petition for writ of mandate to compel the Medical Board to approve an unapproved medical or osteopathic school as a resident course of professional instruction for a physician when petitioner is a graduate of the school and petitioner's application for admission to the licensing examination was rejected because the school has not been approved. The form sets out the law establishing a rejected applicant's right to bring an action to compel approval of the school from which he or she graduated and the Board's duty to approve all schools that meet the requirements for approval.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated, including arguments showing that the medical or osteopathic school from which petitioner graduated meets the statutory requirements for approval for a resident course of professional instruction for physicians.

[b] Graduation From Approved School as Requisite to Obtaining Certificate

Bus. & Prof. Code § 2082 provides that every applicant for certification as a physician must provide evidence of having graduated from an approved medical school [*see Bus. & Prof. Code § 2082*]. The Medical Board has responsibility for approving undergraduate and graduate medical education programs [Bus. & Prof. Code § 2004(f)].

[c] Requirements for Approval

The requirements for approval for a resident course of instruction of physicians are set out in *Bus. & Prof. Code § 2089*. The curriculum must extend over a period of at least four academic years, or 32 months of actual instruction, with a minimum of 4,000 course hours and a requirement of at least 80 percent actual attendance [*Bus. & Prof. Code § 2089(a)*]. The list of courses that must be included in the curriculum if the school is to be approved is set out in *Bus. & Prof. Code § 2089(b)* and qualified in *Bus. & Prof. Code § 2089(c)* (limiting applicability of requirement that applicant successfully complete medical curriculum that provides instruction in pain management and end-of-life care to person entering medical school on or after June 1, 2000). The Medical Board may consider the quality of these required courses in determining whether to approve a school [*see Bus. & Prof. Code § 2084*]. A showing that the quality of the courses is adequate means that the school is adequately staffed and equipped in addition to giving all of the required courses [*Lay v. Board of Medical Examiners (1960) 179 Cal. App. 2d 356, 357, 3 Cal. Rptr. 727]* .

[d] Standard of Review

Bus. & Prof. Code § 2087, which provides for court action governed by *Code Civ. Proc. § 1094.5* (administrative mandamus) to compel the Medical Board to approve an unapproved school, provides that the trial court may not exercise its independent judgment on the evidence in reviewing the administrative decision of the Medical Board [*Bus. & Prof. Code § 2087*; *see Savelli v. Board of Medical Examiners (1964) 229 Cal. App. 2d 124, 131-132, 40 Cal. Rptr. 171]* .

[3] Discussion of Authorities

[a] Action for Mandate to Approve School Inures to Graduate

Bus. & Prof. Code § 2087 provides, in pertinent part, that if any medical school is not approved by the Division of

Licensing or any applicant for examination is rejected by it, then the school or the applicant may commence an action against the division to compel it to approve the school or to admit the applicant to the examination or for any other appropriate relief. The court must proceed under *Code Civ. Proc. § 1094.5*, except that the court may not exercise an independent judgment on the evidence.

Code Civ. Proc. § 1094.5 provides that when the writ of mandate is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence must be taken and discretion in determination of the facts is vested in the inferior tribunal, corporation, board or officer the case must be heard by the court sitting without a jury [*Code Civ. Proc. § 1094.5(a)*; *see Code Civ. Proc. §§ 1085, 1086* (power and duty of the court to issue writ of mandate, generally)]. The inquiry extends to the questions of whether the respondent proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence [*Code Civ. Proc. § 1094.5(b)*].

In ***Mann v. Board of Medical Examiners*** *(1947) 31 Cal. 2d 30, 187 P.2d 1* , petitioner, who was already licensed to practice medicine in Illinois and Massachusetts, had applied for a reciprocity certificate in California based on his Illinois license. Respondent declined to grant petitioner the certificate on the ground that it had not approved the medical school from which respondent graduated. Respondent affirmed its decision after a hearing held at respondent's request. Petitioner filed a petition for writ of mandate with the superior court, which ruled in petitioner's favor and ordered respondent to grant petitioner a reciprocity certificate. Respondent appealed.

The Supreme Court overturned the trial court's decision and remanded the case to the superior court for further proceedings in accordance with its holdings. The Court noted that evidence established that the medical school from which petitioner had graduated had been expressly disapproved by respondent. The Court rejected petitioner's argument that respondent's past conduct of occasionally accepting applications from individual graduates of petitioner's medical school, generally on showing of special circumstances, established a de facto approval of petitioner's school by respondent (*31 Cal. 2d 30, 38-39)* . The Court held that formal and deliberate action in disapproving a school could not be nullified by less formal or deliberate action, and that nullification of the action could only be established by a clear, convincing, and unequivocal showing (*31 Cal. 2d 30, 39)* . The Court also noted that respondent had discontinued its administrative practice of accepting applications from individual graduates of unapproved medical schools who had shown exceptional qualifications before petitioner made his application, and that in any case petitioner had not shown that he had exceptional qualifications so as to make respondent's denial of petitioner's application an abuse of discretion (*31 Cal. 2d 30, 41)* . Furthermore, the Court stated that respondent did not have the power to admit a graduate of an unapproved medical school by reciprocity, regardless of individual qualifications. The Court based this holding on former Bus. & Prof. Code § 2168.5 (*now see Bus. & Prof. Code § 2082*), which requires every applicant for a certificate to prove that he or she graduated from an approved medical school and former Bus. & Prof. Code § 2316.5 (*now see Bus. & Prof. Code § 2142*), which requires that graduation from an approved medical school have been a condition precedent to petitioner's receiving the out-of-state license on which an application for the reciprocity certificate is based. In applying the latter statute, the Court noted that petitioner's Illinois license, on which his application for a California reciprocity certificate was based, was not granted to petitioner on a showing that petitioner had graduated from an approved medical school (*31 Cal. 2d 30, 41)* .

The Court concluded by saying that petitioner should have brought his action under former Bus. & Prof. Code § 2174 (*now see Bus. & Prof. Code § 2087*), which provides for an action in superior court to compel respondent to approve a medical school that it has not approved, and ordered the action continued under former Section 2174 with permission for petitioner to amend his pleadings accordingly (*31 Cal. 2d 30, 41-42)* . The Court stated that if after a full hearing the trial court adjudged that petitioner's school should have been approved by respondent as of the date on which petitioner graduated from it, petitioner should have the opportunity to prove that he met the additional requirements for a reciprocity certificate (*31 Cal. 2d 30, 42)* .

In ***Lay v. Board of Osteopathic Examiners*** *(1960) 179 Cal. App. 2d 356, 3 Cal. Rptr. 727* , petitioner had graduated from a college of osteopathy that was approved shortly after her graduation. The order of approval specifically stated that it was made as of the date on which the order was issued and thereafter. At the time that petitioner attended the school, the school's normal four-year program had been accelerated into a three-year program, as required by wartime regulations. The acceleration of the program did not, however, involve a reduction in the number of subjects required by the course of training. Respondent rejected petitioner's application to take the examination for certification as a physician and surgeon of osteopathy because petitioner had not graduated from a school that respondent had approved. Petitioner filed a petition for a writ of mandate with the superior court, which found for petitioner and ordered respondent to permit petitioner to take the licensing examination. Respondent appealed.

The court of appeal upheld the trial court's decision. The court applied the rule of *Mann v. Board of Medical Examiners (1947) 31 Cal. 2d 30, 42, 187 P.2d 1* that a graduate of an unapproved medical school may bring an action in court to compel respondent to approve the school if he or she had been denied admission to the licensing examination because the school was unapproved. The court noted that although due to a change in former Bus. & Prof. Code § 2174 (*now see Bus. & Prof. Code § 2087*), which provided for court action to compel respondent to approve an unapproved school, the trial court was no longer permitted to independently reweigh the evidence in such an action, as it had been when *Mann* was decided; the provisions of the statute on which the *Mann* decision has rested remained substantively unchanged (*179 Cal. App. 2d 356, 359)* .

The court noted that it was made to appear to respondent at petitioner's hearing by admissions in the pleadings and stipulations that petitioner had taken all of the courses required for admission to the examination while attending her school and that the quality of these courses met the requirements for approval of the school, which meant that the school was adequately staffed and equipped in addition to giving all of the required courses (*179 Cal. App. 2d 356, 357)* . The court stated that since petitioner had completed all of the required courses, the fact that the time given for the courses had been shortened from four to three years due to wartime regulations was immaterial (*179 Cal. App. 2d 356, 357-358)* . The court concluded that under this evidentiary showing, petitioner's school had been entitled to approval under former Bus. & Prof. Code § 2173 (*now see Bus. & Prof. Code § 2084*; respondent as required to approve every school that meets with the requirements for approval) at the time when petitioner was matriculated at the school (*179 Cal. App. 2d 356, 359)* . The court stated that it followed from this that the trial court was correct in concluding that respondent had prejudicially abused its discretion in that respondent's finding that petitioner's school had not been approved when petitioner attended it, without more, did not support respondent's decision in view of the evidentiary showing made at the hearing (*179 Cal. App. 2d 356, 359)* . Thus, the court held that the trial court had the power to order respondent to admit petitioner to the examination (*179 Cal. App. 2d 356, 359)* .

[b] Discrimination Against Particular Schools Prohibited

In ***D'Amico v. Board of Medical Examiners*** *(1974) 11 Cal. 3d 1, 112 Cal. Rptr. 786, 520 P.2d 10* , petitioners who were graduates of out-of-state colleges of osteopathy petitioned for writs of mandamus ordering respondents Board of Medical Examiners and Board of Osteopathic Examiners to license petitioners as physicians, either in the manner for licensing new physicians or in the manner for licensing physicians based on reciprocity. The Osteopathic Act of 1962 had barred either of the respondent boards from licensing graduates of osteopathic colleges as physicians, regardless of the graduates' individual qualifications.

The trial court initially interpreted the Osteopathic Act of 1962 as not prohibiting respondent Board of Medical Examiners from licensing graduates of colleges of osteopathy as new physicians and deferred consideration of the fact that respondent Board of Medical Examiners had no procedures for approving colleges of osteopathy or any other schools other than professional schools for a later proceeding. With respect to the issuing of reciprocity certificates, the trial court held that former Bus. & Prof. Code § 2310 (*now see Bus. & Prof. Code § 2135*), which provides that only persons holding an M.D. degree are eligible for a reciprocity certificate, did not deny equal protection of the law to

graduates of osteopathic colleges. However, the court of appeal held that the Osteopathic Act of 1962 did prohibit the medical board from licensing graduates of colleges of osteopathy as new physicians, and that the reasonable result of the Act was to eliminate the licensing of new osteopaths as physicians in California. The court of appeal remanded the case to the trial court for determination of whether there are facts that would justify a classification that differentiates graduates of medical schools from graduates of osteopathic schools. On remand, respondents admitted in response to interrogatories and requests for admissions that in recent years osteopathy had developed into a full school of medicine whose practitioners in those jurisdictions that give full practicing powers to osteopathic physicians and surgeons generally integrate all accepted methods of treatment of disease, that the public can be protected by the proper screening of all applicants for licensing, and that the laws provided for screening. The trial court granted petitioners' motion for summary judgment and held that both the Osteopathic Act of 1962 and former Bus. & Prof. Code § 2310 violated equal protection. The Board of Medical Examiners appealed.

The Supreme Court affirmed the trial court. The Court stated that the effect of the Osteopathic Act of 1962 was to bar either of the respondent boards from licensing graduates of osteopathic colleges as either new physicians or on the basis of reciprocity, regardless of a graduate's individual qualifications (*11 Cal. 3d 1, 19-20)* . Applying the rational relation test, the Court held that this invidiously denied equal protection of the law to graduates of osteopathic colleges and that the Osteopathic Act of 1962 was therefore unconstitutional (*11 Cal. 3d 1, 23)* . The Court noted that admissions on discovery by respondent Board of Medical Examiners showed that osteopathy is a complete school of medicine whose practitioners successfully engage in the full range of activities commonly thought of as constituting medical science and that there exists the technical and administrative machinery to screen osteopathic applicants for licensing, just as there exists similar machinery to screen applicants who hold an M.D. degree, to insure that the public will be protected from incompetent and unqualified practitioners (*11 Cal. 3d 1, 22-23)* . The Court concluded that petitioners were entitled to be licensed as new physicians, or on the basis of reciprocity, according to the provisions of the Osteopathic and Medical Practice Acts that were applicable immediately prior to the enactment of the Osteopathic Act of 1962 (*11 Cal. 3d 1, 24)* .

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[2] Comments

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[b] Argument

[c] Related Pleading and Practice Forms

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[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Points and Authorities

[3] Discussion of Authorities

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[2] Comments

[a] Use of Form

[b] Argument

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[2] Comments

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[2] Comments

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[b] Argument

[c] Opposing Points and Authorities

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[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

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[a] Fixed Look at Walkway and Constant Lookout for Danger Not Required

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[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Critical Examination Not Required

[4] Additional Authorities

[a] Critical Examination Not Required

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

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[b] Foreseeability Considered With Burden and Consequence of Duty to Remedy

[4] Additional Authorities

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[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

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[2] Comments

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[b] Argument

[3] Discussion of Authorities

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[4] Additional Authorities

[a] Secondary Assumption of Risk of Dangerous Conditions Does Not Bar Recovery

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

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[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Liability of Former Owner or Possessor for Dangerous Condition

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Liability of Former Owner or Possessor and Summary Judgment

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Liability of Former Owners or Possessor for Dangerous Conditions

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Status as Licensee

[b] Status as Trespasser

[4] Additional Authorities

[a] Status as Licensee

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] No Control Over Means of Ingress or Egress

[4] Additional Authorities

[a] No Control Over Means of Ingress or Egress

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Points and Authorities

[3] Discussion of Authorities

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[a] No Duty to Protect Users of Adjacent Property Not Controlled by Defendant

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

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[3] Discussion of Authorities

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[4] Additional Authorities

[a] No Liability for Obvious Danger

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] No Liability If No Special use or Contributing Act

[b] Any Benefit Owner Derived From Construction or Alteration Is Not Exclusive

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[a] No Liability If No Special Use or Contributing Act

[b] Any Benefit Owner Derived From Construction or Alteration Is Not Exclusive

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

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[b] Statutory Limitation on Liability Not Restricted to Injuries Caused by Physical Conditions or Uses of Property

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[1] FORM

[2] Comments

[a] Use of Form

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Nonowner of Dog Liable Only When Dog's Dangerous Propensities or Vicious Nature Are Known

[b] Bank Whose Right to Property Is Contested Owes No Duty to Third Party Attacked by Possessor's Dogs Absent Knowledge of Danger and Ability to Prevent Attack

[c] Propensities of Dog Breed Insufficient to Establish Actual Knowledge of Particular Dog's Vicious Propensities

[d] Property Owner Not Vicariously Liable Based on CC&Rs

[4] Additional Authorities

[a] Nonowner of Dog Liable Only When Dog's Dangerous Propensities or Vicious Nature Are Known

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[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] No Duty to Warn Prospective Tenant About Dangerous Dog in Neighborhood

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] No Liability for Trivial Defect

[4] Additional Authorities

[a] No Liability for Trivial Defect

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Strict Liability Does Not Apply to Commercial Landlords

[4] Additional Authorities

[a] Strict Liability Does Not Apply to Commercial Landlords

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

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[3] Discussion of Authorities

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[1] FORM

[2] Comments

[a] Use of Form

[b] Liability of Former Owner or Possessor and Summary Judgment

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Nonliability of Predecessor Owners or Possessors

[4] Additional Authorities

[a] Nonliability of Predecessor Owners or Possessors

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

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[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

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[b] Factors Considered in Determining Existence of Duty

[c] Duty of Business Proprietor

[d] Injury on Adjacent Property Controlled by Defendant

[e] Duty to Provide Security Guards Because of Occurrence of Prior Similar Incidents

[f] Duty to Protect Existed Despite Absence of Prior Incidents

[g] Duty to Take Minimal Measures to Assist Against Presently-Occurring Criminal Conduct

[h] Security Guard Owes Duty of Protection to Invitees

[i] Proof of Causation

[4] Additional Authorities

[a] Duty to Protect Against Wrongful Conduct of Third Persons

[b] Duty of Business Proprietor

[c] Duty to Provide Security Guards Because of Occurrence of Prior Similar Incidents

[d] Duty to Protect Exists Despite Absence of Prior Similar Incidents

[e] Security Guard Owes Duty of Protection to Invitees

[f] Proof of Causation

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[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

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[3] Discussion of Authorities

[a] Risk Not One of Common Knowledge

[4] Additional Authorities

[a] Risk Not One of Common Knowledge

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[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Liability of Tenants in Common for Torts in Common Areas

[4] Additional Authorities

[a] Liability of Tenants in Common for Torts in Common Areas

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[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] No Duty to Control or Prevent Conduct of Third Persons That Is Not Reasonably Foreseeable

[b] Landlord Has No Duty to Prevent Consequences of Tenant's Negligence

[4] Additional Authorities

[a] No Duty to Control or Prevent Conduct of Third Persons That Is Not Reasonably Foreseeable

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[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

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[b] No Duty to Provide Increased Security Without Occurrence of Prior Similar Incidents

[c] Underground Parking Garage Not Inherently Dangerous

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[a] No Duty to Provide Increased Security Without Occurrences of Prior Similar Incidents

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[d] Related Pleading and Practice Forms

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[a] Special Relationship Needed

[4] Additional Authorities

[a] Special Relationship Needed

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[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

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[2] Comments

[a] Use of Form

[3] Discussion of Authorities

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[b] Special Relationship Is Not Created Merely by Fact That Theft Occurs in Defendant's Premises

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[2] Comments

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[b] Argument

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[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[d] Assumption of Risk

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[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

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[2] Comments

[a] Use of Form

[b] Argument

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[c] Opposing Points and Authorities

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[a] Peculiar Risk of Harm

[4] Additional Authorities

[a] Peculiar Risk of Harm

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

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[4] Additional Authorities

[a] Nondelegable Duty to Maintain Premises in Safe Condition

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[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Collateral Negligence

[4] Additional Authorities

[a] Collateral Negligence

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Employee of Independent Contractor Cannot Recover Under Peculiar Risk Doctrine

[4] Additional Authorities

[a] Employee of Independent Contractor Cannot Recover Under Peculiar Risk Doctrine

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[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

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[4] Additional Authorities

[a] Patent Defects Caused by Contractor's Negligence

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

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[c] Rule Applies to Volunteer as Well as Paid Firefighters

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[e] No Nexus Required Between Presence at Scene and Law Enforcement Employment

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[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Hazard Encountered by Chance Not Independent Act of Misconduct

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Recovery for Injury From Independent Act of Misconduct Not Barred

[4] Additional Authorities

[a] Recovery for Injury From Independent Act of Misconduct Not Barred

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

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[4] Additional Authorities

[a] Recovery by Private Safety Employee for Negligence of Third Party Not Barred

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Conduct Causing Injury Occurred After Plaintiff's Presence Known

[b] Conduct Causing Injury Occurred After Plaintiff Had Undertaken Duties

[4] Additional Authorities

[a] Conduct Causing Injury Occurred After Plaintiff's Presence Known

§ 178.115 Opposing Contention That Firefighter's Rule Bars Recovery for Injury--Statutory Exception to Rule Under Civ. Code § 1714.9--Conduct Causing Injury Violates Statute

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Conduct Causing Injury Occurred After Plaintiff's Presence Known

[b] Conduct Causing Injury Occurred After Plaintiff Had Undertaken Duties

§ 178.116 Opposing Contention That Firefighter's Rule Bars Recovery for Injury--Statutory Exception to Rule Under Civ. Code § 1714.9--Conduct Causing Injury Was Intended to Injure Plaintiff

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

§ 178.117 Opposing Contention That Firefighter's Rule Bars Recovery for Injury--Statutory Exception to Rule Under Civ. Code § 1714.9--Conduct Causing Injury Was Arson

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[d] Opposing Points and Authorities

§§ 178.118-178.129 [Reserved]

§ 178.130 Supporting Contention That Recreational User of Real Property Is Barred From Recovery for Injuries Sustained Thereon [Civ. Code § 846]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] No Liability to Recreational User

[b] Statutory List Is Only Illustrative

[c] Suitability of Property for Recreational Use Does Not Affect Applicability of Immunity

[d] Immunity Not Qualified by Public Trust Doctrine If No Affirmative Acts Impede Public's Use of Water

[e] Immunity Extends to Negligent Conduct of Persons

[f] Employer/Landowner Protected From Liability For Injury-Causing Conduct of Employee

[g] Express Invitation by Landowner Does Not Extinguish Immunity of Other Estate Owners

[h] Immunity Applies to Claims of Negligence Per Se

[i] Homeowner's Driveway Right-of-Way Over Public Trail Is Protected Property Interest

[4] Additional Authorities

[a] No Liability to Recreational User

[b] Recreational Purpose

[c] Statutory List Is Only Illustrative

[d] Suitability of Property for Recreational Use Does Not Affect Applicability of Immunity

[e] Immunity Extends to Negligent Conduct of Persons

§ 178.131 Opposing Contention That Recreational User of Real Property Barred From Recovery for Injuries

Sustained Thereon--User Expressly Invited [Civ. Code § 846]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Express Invitation Need Not Be Invitation to Engage in Recreational Activity

[4] Additional Authorities

[a] Defendant Liable to Recreational User Expressly Invited Onto Premises

§ 178.132 Opposing Contention That Recreational User of Real Property Barred From Recovery for Injuries Sustained Thereon--Consideration Received [Civ. Code § 846]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Nature of Consideration

[4] Additional Authorities

[a] Defendant Liable to Recreational User Expressly Invited Onto Premises

[b] Nature of Consideration

§ 178.133 Opposing Contention That Recreational User of Real Property Barred From Recovery for Injuries Sustained Thereon--Malicious or Willful Failure to Warn or Guard [Civ. Code § 846]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Willful Misconduct

[4] Additional Authorities

[a] Willful or Malicious Failure to Warn or Guard

[b] Willful Misconduct

§ 178.134 Opposing Contention That Civ. Code § 846 Bars User of Real Property From Recovery for Injuries Sustained Thereon--Use Not Recreational [Civ. Code § 846]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Purpose Must Be Recreational

[b] Purpose of Use at Time of Entry on Land Controlling

[4] Additional Authorities

[a] Purpose Must Be Recreational

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17-178 California Points & Authorities § 178.01

§ 178.01 Scope of Chapter

This chapter contains memoranda of points and authorities relating to the liability of a possessor of real property to persons on and off the premises for conditions existing on the premises. It includes points and authorities relating to the general liability of an owner or possessor of premises to persons on and off the premises [*see §§ 178.20 -178.45*], and pertaining to the duty of an owner or possessor to control the conduct of third persons [*see §§ 178.60 -178.70*]. Points and authorities dealing with an owner's or possessor's liability for acts of an independent contractor [*see §§ 178.90 -178.93*], pertaining to the firefighter's rule [*see §§ 178.110 -178.117*], and concerning the liability of a landowner to recreational users [*see §§ 178.130 -178.134*] are also included.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPremises Liability & PropertyGeneral Premises LiabilityActivities & ConditionsGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityDefensesFirefighter's RuleTortsPremises Liability & PropertyGeneral Premises LiabilityDefensesIndependent ContractorsTortsPremises Liability & PropertyGeneral Premises LiabilityDuties of CareDuty off PremisesGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityDuties of CareDuty on PremisesGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesRecreational FacilitiesGeneral Overview

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17-178 California Points & Authorities § 178.02

§ 178.02 Governing Law

The liability of every person for harm to others occasioned by his or her want of ordinary care is set forth in *Civ. Code § 1714(a)*. The liability of an owner or possessor of premises to persons on the premises is governed by the principles set forth in *Rowland v. Christian* [*Rowland v. Christian (1968) 69 Cal. 2d 108, 119, 70 Cal. Rptr. 97, 443 P.2d 561]* . The liability of an owner of real property for injuries to recreational users is set forth in *Civ. Code § 846*. The liability of an owner or possessor of premises to persons outside the premises is governed by the principles set forth in *Sprecher v. Adamson Cos.* [*Sprecher v. Adamson Cos. (1981) 30 Cal. 3d 358, 371-372, 178 Cal. Rptr. 783, 636 P.2d 1121]* . The scope and extent of the firefighter's rule is generally set forth in *Lipson v. Superior Court* [*Lipson v. Superior Court (1982) 31 Cal. 3d 362, 378-379, 182 Cal. Rptr. 629, 644 P.2d 822]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPremises Liability & PropertyGeneral Premises LiabilityDefensesFirefighter's RuleTortsPremises Liability & PropertyGeneral Premises LiabilityDuties of CareDuty off PremisesGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityDuties of CareDuty on PremisesGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityDuties of CareDuty on PremisesReasonable CareTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesRecreational FacilitiesGeneral Overview

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17-178 California Points & Authorities § 178.03

§ 178.03 Liability to Persons on Premises

[1] Former Duties of Owner or Possessor

Prior to the Supreme Court decision of *Rowland v. Christian* [*Rowland v. Christian (1968) 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561]* , the extent of the duty of an owner or a possessor of real property to persons on the premises depended on the status of the person on the premises as an invitee, licensee, or trespasser [*see § 178.03[2]*].

The duties toward an invitee were the highest in the hierarchy. These duties were to use reasonable care not to injure the invitee by any negligent activity, to make the premises reasonably safe by inspecting the premises to discover any dangerous condition and to remedy it or warn the invitee of any unknown dangerous condition, and to control the conduct of third persons on the premises [*Chance v. Lawry's, Inc. (1962) 58 Cal. 2d 368, 373-374, 24 Cal. Rptr. 209, 374 P.2d 185* ; *Wingard v. Safeway Stores, Inc. (1981) 123 Cal. App. 3d 37, 41, 176 Cal. Rptr. 320]* .

Licensees and trespassers, on the other hand, were obliged to take the premises as they found them. Any liability for injuries caused by a dangerous condition was only based on willful or wanton conduct, or, in the case of licensees, if the dangerous condition amounted to a trap. In addition, the owner or possessor had a duty toward licensees to use reasonable care in active operations [*Rowland v. Christian (1968) 69 Cal. 2d 108, 114-115, 70 Cal. Rptr. 97, 443 P.2d 561]* .

[2] Definitions of Invitee, Licensee, and Trespasser

An invitee is either a business visitor or a public invitee. A business visitor is a person who is invited or permitted to enter or remain on the premises of the owner or possessor for a purpose directly or indirectly connected with the business dealings between them. A public invitee is a person who is invited to enter or remain on the premises as a member of the public for a purpose for which the land is held open to the public [*O'Keefe v. South End Rowing Club (1966) 64 Cal. 2d 729, 737-739, 51 Cal. Rptr. 534, 414 P.2d 830]* .

A licensee is a person such as a social guest who is not an invitee but is privileged to enter and remain on the premises by virtue of the owner's or possessor's consent [*Rowland v. Christian (1968) 69 Cal. 2d 108, 113, 70 Cal. Rptr. 97, 443 P.2d 561]* .

A trespasser is one who enters or remains on the premises without the express or implied consent of the owner or possessor [*Hamakawa v. Crescent Wharf & Warehouse Co. (1935) 4 Cal. 2d 499, 501-503, 50 P.2d 803]* .

[3] Negligence Standard Since *Rowland*

The Supreme Court in *Rowland v. Christian* [*Rowland v. Christian (1968) 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561]* adopted a single negligence standard for determining the liability of an owner or possessor of premises towards persons on the premises. The Court held that the proper test to determine the liability of an owner or possessor of premises is whether or not he or she has acted as a reasonable person in the management of his or her property in light of the probability of injury to others. This test is in accordance with the fundamental principle codified in Civ. Code§ 1714(a) that every person is liable for injury to another by his or her want of ordinary care [*Rowland v. Christian (1968) 69 Cal. 2d 108, 118, 70 Cal. Rptr. 97, 443 P.2d 561]* . Factors to be considered in applying this test are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of burden to the defendant and the consequences to the community in imposing a duty and liability for breach, and the availability, cost, and prevalence of insurance for the risk involved [Rowland v. Christian (1968) 69 Cal. 2d l08, 112-113, *70 Cal. Rptr. 97, 443 P.2d 561]* .

Although the California Supreme Court at one time held that a residential landlord could be held strictly liable for injuries caused by certain defects in the rented premises [*see Becker v. IRM Corp. (1985) 38 Cal. 3d 454, 464, 213 Cal. Rptr. 213, 698 P.2d 116]* , the Court subsequently overruled that holding, limiting recovery to cases in which it is proven that the landlord (or hotel proprietor) has breached the applicable standard of care [*Peterson v. Superior Court (1995) 10 Cal. 4th 1185, 1210, 43 Cal. Rptr. 2d 836, 899 P.2d 905]* .

[4] Relationship Between Former Duties and Negligence Standard

Since *Rowland*, the extent of the general duty of an owner or possessor of premises is no longer determined by the status of the plaintiff at the time of injury, rather it is controlled by the foreseeability of the risk created by the conduct of the owner or possessor in the management of his or her property [Beard v. Atchison, Topeka & Santa Fe Ry. Co. (1970) 4 Cal. App. 3d l29, 136, *84 Cal. Rptr. 449]* . However, while the status of the plaintiff is not determinative, it has some bearing on the question of liability [Rowland v. Christian (1968) 69 Cal. 2d l08, 119, *70 Cal. Rptr. 97, 443 P.2d 561]* . In determining whether or not a duty is owed in a particular situation, the established duties toward invitees that existed prior to *Rowland* are especially pertinent. Because these legal duties were the highest imposed on an owner or possessor of land, the decision in *Rowland* did not jettison them but held that persons lacking invitee status were, under appropriate circumstances, entitled to the same protection [*Jamison v. Mark C. Bloome Co. (1980) 112 Cal. App. 3d 570, 576, 169 Cal. Rptr. 399* ; *Beauchamp v. Los Gatos Golf Course (1969) 273 Cal. App. 2d 20, 26, 77 Cal. Rptr. 914]* .

Thus, the common law definitions of invitee, licensee, and trespasser, as well as prior case law defining the duties owed to invitees, are relevant to any determination of duty after *Rowland*. Accordingly, the specific duties discussed in this chapter are those duties that were imposed on owners or possessors toward invitees before *Rowland*. If the status of the person injured is other than an invitee, counsel should not only look to these duties but should consider the factors set forth in *Rowland* [*see § 178.03[3]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPremises Liability & PropertyGeneral Premises LiabilityDuties of CareDuty on PremisesGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityDuties of CareDuty on PremisesInviteesGeneral

OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityDuties of CareDuty on PremisesLicenseesTortsPremises Liability & PropertyGeneral Premises LiabilityDuties of CareDuty on PremisesReasonable CareTortsPremises Liability & PropertyGeneral Premises LiabilityDuties of CareDuty on PremisesTrespassersGeneral Overview

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17-178 California Points & Authorities § 178.04

§ 178.04 Liability to Persons off Premises

The liability of an owner or possessor of premises to persons off the premises for conditions existing thereon no longer depends on the distinction between artificial and natural conditions but is also governed by the test of whether or not the owner or possessor of the premises, in the management of his or her property, has acted as a reasonable person in view of the probability of injury to others [*Sprecher v. Adamson Cos. (1981) 30 Cal. 3d 358, 371-372, 178 Cal. Rptr. 783, 636 P.2d 1121* ; *Alcaraz v. Vece (1997) 14 Cal. 4th 1149, 60 Cal. Rptr. 2d 448]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPremises Liability & PropertyGeneral Premises LiabilityDangerous ConditionsArtificial ConditionsTortsPremises Liability & PropertyGeneral Premises LiabilityDangerous ConditionsNatural ConditionsTortsPremises Liability & PropertyGeneral Premises LiabilityDuties of CareDuty off PremisesGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityDuties of CareDuty on PremisesReasonable Care

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17-178 California Points & Authorities § 178.05

§ 178.05 Persons Liable

Liability to persons injured due to the condition of the premises extends to owners as well as to those persons in possession or occupation of the premises who have the right to control the property. In determining who is liable in a specific situation, the crucial factor is the element of control [*Schwartz v. Helms Bakery Ltd. (1967) 67 Cal. 2d 232, 239, 60 Cal. Rptr. 510, 430 P.2d 68* ; *Marshall v. United Airlines (1973) 35 Cal. App. 3d 84, 88, 110 Cal. Rptr. 416]* . Tenants in common who delegate control and management of property to a separate legal entity, including condominium unit owners regarding common areas, will be liable to third parties for torts arising in common areas [*see Davert v. Larson (1985) 163 Cal. App. 3d 407, 412, 209 Cal. Rptr. 445]* . For further discussion, see California Forms of Pleading and Practice, Ch. 421, *Premises Liability* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPremises Liability & PropertyLessees & LessorsLiabilities of LessorsNegligenceCommon Areas

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17-178 California Points & Authorities § 178.06

§ 178.06 Related Pleading and Practice Chapters

For a more detailed discussion of premises liability and for forms of complaints for use in actions based on premises liability, see California Forms of Pleading and Practice, Ch. 421, *Premises Liability* (Matthew Bender). For a discussion and forms of complaints in negligence actions, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

For a discussion and forms relating to liability of an owner or possessor of property to persons on the premises in specific contexts, see the following chapters in California Forms of Pleading and Practice:

- Ch. 18, *Alcoholic Beverage Licenses*.
- Ch. 110, *Churches and Religious Organizations*.
- Ch. 244, *Elevators and Escalators*.
- Ch. 274, *Garages and Gas Stations*.
- Ch. 297, *Hotels and Motels*.
- Ch. 330, *Landlord and Tenant*.
- Ch. 464-468, *Public Entities and Officers*.
- Ch. 572, *Schools*.
- Ch. 525, *Slip and Fall*.
- Ch. 547, *Theaters, Shows, and Amusement Places*.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPremises Liability & PropertyGeneral Premises LiabilityGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityActivities & ConditionsSlip & Fall InjuriesGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesElevators & EscalatorsTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesHotelsTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesRecreational FacilitiesGeneral Overview

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17-178 California Points & Authorities § 178.07

§ 178.07 Related Points and Authorities Chapters

For a memorandum of points and authorities relating to an action against a tavern proprietor by a patron for personal injuries due to an assault by an intoxicated patron, see Ch. 15A, *Alcoholic Beverages: Civil Liability for Furnishing* .

For memoranda of points and authorities relating to negligence actions generally, see Ch. 165, *Negligence* .

For memoranda of points and authorities relating to the liability of a public entity for a dangerous condition of public property, see Ch. 196, *Public Entities* .

For discussion of the format requirements governing memoranda generally, including page limits, discussion on how to use the forms of this set to build a memorandum of points and authorities, and forms including a skeletal form of overall memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceActionsGeneral OverviewTortsNegligenceDutyAlcohol ProvidersGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityDangerous ConditionsGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesRestaurants & TavernsTortsPublic Entity LiabilityLiabilityState Tort Claims ActsGeneral Overview

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17-178 California Points & Authorities §§ 178.08-178.19

[Reserved]

§§ 178.08[Reserved]

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PART II. FORMS
A. General Liability of Owner or Possessor

17-178 California Points & Authorities § 178.20

§ 178.20 Supporting Contention That Owner or Possessor of Premises Is Liable--General Form

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS LIABLE AS A[N] _____ [OWNER *and/or* POSSESSOR] OF THE PREMISES IN THAT DEFENDANT FAILED TO ACT AS A REASONABLE PERSON IN THE MANAGEMENT OF DEFENDANT'S PROPERTY IN VIEW OF THE PROBABILITY OF INJURY TO PLAINTIFF.

[*EITHER, if person was on premises at time of incident*]

A. Liability to Persons on Premises. The proper test for determining the liability of an owner or possessor of land in accordance with *Section 1714(a) of the Civil Code* is whether or not he or she has acted as a reasonable person in the management of his or her property in view of the probability of injury to others (*Rowland v. Christian (1968) 69 Cal. 2d 108, 119, 70 Cal. Rptr. 97, 443 P.2d 561*).

[*OR, if incident occurred off premises due to condition existing on premises*]

A. Liability to Persons off Premises for Condition Existing on Premises. The proper test for determining the liability of an owner or possessor of land in accordance with *Section 1714(a) of the Civil Code* for conditions existing on the premises, whether artificial or natural, is whether or not he or she has acted as a reasonable person in the management of his or her property in view of the probability of injury to others (*Sprecher v. Adamson Cos. (1981) 30 Cal. 3d 358, 371-372, 178 Cal. Rptr. 783, 636 P.2d 1121*).

B. Factors Applied in Determining Owner's or Possessor's Liability. Factors to be considered in determining an owner's or possessor's liability are the foreseeability of harm to the plaintiff,the degree of certainty that the plaintiff

suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and the consequences to the community in imposing a duty and liability for breach, and the availability, cost, and prevalence of insurance for the risk involved (*Rowland v. Christian (1968) 69 Cal. 2d 108, 112-113, 119 , 70 Cal. Rptr. 97, 443 P.2d 561*).

C. Status of Person on Premises Not Determinative of Owner's or Possessor's Liability. In view of the fundamental policy codified in *Section 1714(a) of the Civil Code* that everyone is liable for harm occasioned to another due to his or her lack of due care, the status of a person on the premises at the time of injury is not determinative of the owner's or possessor's liability (*Rowland v. Christian (1968) 69 Cal. 2d 108, 118-119, 70 Cal. Rptr. 97, 443 P.2d 561*).

[*Optional*] **D. Status of Person on Premises as Relevant to Determination of Owner's or Possessor's Liability.** Although the status of a person on the premises at the time of injury is not controlling, it is relevant in determining the liability of an owner or possessor (*Rowland v. Christian (1968) 69 Cal. 2d 108, 119, 70 Cal. Rptr. 97, 443 P.2d 561*).

[*Optional*] **E. Status of Person on Premises as Affecting Foreseeability of Risk.** The question of whether or not the owner or possessor owes a duty to the person on the premises depends on the foreseeability of the risk (*Barker v. Wah Low (1971) 19 Cal. App. 3d 710, 719-722, 97 Cal. Rptr. 85*). Thus, whether or not the owner or possessor of premises acted as a reasonable person in view of the probability of injury to the person on the premises depends in part on the circumstances under which that person was on the premises (*Beauchamp v. Los Gatos Golf Course (1969) 273 Cal. App. 2d 20, 25, 77 Cal. Rptr. 914*).

[*Optional*] **F. Duties Owed to Invitees.** In the exercise of ordinary care, the owner or possessor of premises owes to an invitee a duty to make the property reasonably safe for the intended use and a duty to warn of concealed dangers known to the possessor or which could have been discovered in the exercise of ordinary care (*Chance v. Lawry's, Inc. (1962) 58 Cal. 2d 368, 373, 24 Cal. Rptr. 209, 374 P.2d 185* ; *Beauchamp v. Los Gatos Golf Course (1969) 273 Cal. App. 2d 20, 27, 77 Cal. Rptr. 914*).

[*Optional*] **G. Duties to Invitee Consonant With *Civil Code Section 1714(a)*.** The duties existing in favor of an invitee are consonant with the principle of *Civil Code Section 1714(a)* that everyone is responsible for injury occasioned to another by his or her want of ordinary care (*Beauchamp v. Los Gatos Golf Course (1969) 273 Cal. App. 2d 20, 25-27, 77 Cal. Rptr. 914*). The decision in *Rowland v. Christian (1968) 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561* , did not abrogate these duties owed to invitees; rather it subsumed the duties under the more comprehensive duty of reasonable care and held that persons lacking invitee status are, under appropriate circumstances, entitled to the same protection (*see* *Wingard v. Safeway Stores, Inc. (1981) 123 Cal. App. 3d 37, 41, 176 Cal. Rptr. 320* ; *Jamison v. Mark C. Bloome Co. (1980) 112 Cal. App. 3d 570, 576, 169 Cal. Rptr. 399*).

[*Optional*] **H. Business Visitor.** An invitee is a business visitor who comes on the premises of the owner or possessor for some purpose connected with the business conducted thereon (*Oettinger v. Stewart (1944) 24 Cal. 2d 133, 136, 148 P.2d 19*).

[*Optional*] **I. Public Invitee.** A public invitee is a person who is invited to enter or remain on the premises as a member of the public for a purpose for which the land is held open to the public (*O'Keefe v. South End Rowing Club (1966) 64 Cal. 2d 729, 737-739, 51 Cal. Rptr. 534, 414 P.2d 830*).

[*Optional*] **J. Liability of Owner Not in Possession.** As an owner of property, a lessor out of possession must exercise due care and must act reasonably toward the tenant as well as toward unknown third persons (*Krongos v. Pacific Gas & Elec. Co. (1992) 7 Cal. App. 4th 387, 392, 9 Cal. Rptr. 2d 124*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of plaintiff's contention that an owner or possessor of premises is liable for failing in the management of his or her property to act as a reasonable person in view of the probability of injury to others.

If the incident causing injury occurred on the premises, the first Paragraph A should be used. If the incident occurred off the premises as a result of a condition on the premises, the second Paragraph A should be used. Optional Paragraphs D--G are used when plaintiff wants to demonstrate that his or her status at the time of injury, although not controlling, is relevant to the determination of the foreseeability of harm occasioned by defendant's conduct. If appropriate, plaintiff may use optional ParagraphH or I to indicate his or her status as a business visitor or public invitee when this status will help in demonstrating the foreseeability of harm occasioned by defendant's conduct. For further discussion of the relevance of a person's status at the time of injury, see *§ 178.03[4]*.

If the owner was not in possession of the premises at the time of the injury, Optional Paragraph J should be used to contend that the owner, notwithstanding the fact that another person was in possession, owed a duty of care toward the plaintiff.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which the issue of defendant's liability for the unreasonable management of his or her property arises. These points and authorities may also be adapted for use in a trial or appellate brief.

These points and authorities may be combined with other forms in this chapter, as appropriate.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the reasonableness of defendant's conduct in view of the probability of injury to others and show how the facts relate to the factors discussed in Paragraph B. If appropriate, counsel should also show how plaintiff's status made the harm occasioned by defendant's conduct foreseeable.

[c] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 178.33* may be used to oppose the contention supported by these points and authorities that the risk of harm was foreseeable due to plaintiff's status on the premises.

[3] Discussion of Authorities

[a] Liability to Persons on Premises

In ***Rowland v. Christian*** *(1968) 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561* , plaintiff, a social guest of defendant tenant, was injured by a broken faucet that the defendant was aware of and knew was about to be used by plaintiff. A summary judgment was granted in favor of defendant and against plaintiff.

Since a social guest was considered to be a licensee, the trial court applied the common law rules provided that plaintiff was obliged to take the premises as they were and the duties of the owner or possessor of the premises were limited to reasonable care in active operations, a duty to warn of a concealed condition that amounted to a trap, and a duty to refrain from willful and wanton conduct (*69 Cal. 2d 108, 114-115)* . The Supreme Court reversed the summary judgment and held that the proper test to be applied in the future to the liability of an owner or a possessor of premises

was whether or not, in the management of his or her property, the possessor acted as a reasonable person in view of the probability of injury to others (*69 Cal. 2d 108, 119)* . The Court stated that the common law duties of an owner or possessor that were determined by the status of the person on the premises at the time of the injury were no longer justified in view of the fundamental policy codified in *Civ. Code § 1714(a)* that everyone is responsible for an injury occasioned to another by his or her failure to exercise ordinary care (*69 Cal. 2d 108, 118-119)* .

[b] Liability to Persons off Premises for Condition Existing on Premises

In ***Sprecher v. Adamson Cos.*** *(1981) 30 Cal. 3d 358, 178 Cal. Rptr. 783, 636 P.2d 1121* , cross defendants were the owners of a piece of unimproved real property that contained part of an active landslide. Following a period of heavy rains, the slide moved and caused the residence of defendant and cross complainant to rotate and press against the home of plaintiff. Plaintiff brought suit to enjoin the encroachment, and defendant cross complained against the owners of the unimproved property for damages to his residence. The trial court granted summary judgment in favor of cross defendants and against defendant and cross complainant. The summary judgment was based on the common law rule that the liability of a possessor of premises to persons outside the premises for harm due to a condition on the premises rested on the distinction between artificial and natural conditions. If the harm was caused by an artificial condition, the liability was determined in accordance with the ordinary principles of negligence. If it was caused by a natural condition, the possessor had absolute immunity (*30 Cal. 3d 358, 362)* .

The Supreme Court reversed the summary judgment and held that the liability of an owner or possessor should be determined with reference to ordinary principles of negligence, not with reference to the origin of the condition that caused the harm (*30 Cal. 3d 358, 371-372)* .

[c] Factors Applied in Determining Owner's or Possessor's Liability

The facts and procedural background of ***Rowland v. Christian*** *(1968) 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561* , are discussed in *§ 178.20[3][a]*. The Supreme Court stated that the determination of whether or not to impose liability in accordance with the negligencestandard enunciated in *Civ. Code § 1714(a)* involves the balancing of a number of factors, including the foreseeability of harm to plaintiff, the degree of certainty that plaintiff suffered injury, the closeness of the connection between defendant's conduct and the injury suffered, the moral blame attached to defendant's conduct, the policy of preventing future harm, the extent of the burden to defendant and the consequences to the community in imposing a duty and liability for breach, and the availability, cost, and prevalence of insurance for the risk involved (*69 Cal. 2d 108, 112-113, 119)* .

[d] Status of Person on Premises Not Determinative of Owner's or Possessor's Liability

The facts and procedural background of ***Rowland v. Christian*** *(1968) 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561* , are discussed in *§ 178.20[3][a]*. The Supreme Court stated that although the plaintiff's status as a invitee, licensee, or trespasser may in the light of the facts giving rise to such status have some bearing on the question of liability, the status is not determinative (*69 Cal. 2d 108, 119)* .

[e] Status of Person on Premises as Relevant to Determination of Owner's or Possessor's Liability

Rowland v. Christian *(1968) 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561* , is discussed in *§ 178.20[3][d]*.

[f] Status of Person on Premises as Affecting Foreseeability of Risk

The facts and procedural background of ***Barker v. Wah Low*** *(1971) 19 Cal. App. 3d 710, 97 Cal. Rptr. 85* , are discussed in *§ 178.60[4]*, Absence of Prior Accidents. The court reversed summary judgment for defendant and stated that because the issue of a duty of a possessor of premises to a person thereon involves the question of foreseeability, it was, in this instance, a mixed question of law and fact, and when reasonable minds can differ on the question of

foreseeability, it could not be the subject of a summary judgment (*19 Cal. App. 3d 710, 719-723)* .

In ***Beauchamp v. Los Gatos Golf Course*** *(1969) 273 Cal. App. 2d 20, 77 Cal. Rptr. 914* , plaintiff was injured while walking from her car in the parking lot of a golf course to the starting area. She passed over a concrete veranda in her golf shoes and slipped and fell. At the conclusion of plaintiff's case, a nonsuit was granted, apparently on the basis that there was no defect on the surface of the veranda and plaintiff's knowledge of the obvious risk of walking on cement with golf shoes. The nonsuit was granted a year before the decision in *Rowland,* discussed in *§ 178.20[3][a],* and the court of appeal analyzed the effect of that decision on the case in point. The court reversed on the ground that the obvious nature of the risk did not, as a matter of law, abrogate the duty of care owed to the plaintiff. The court stated that the terms invitee, licensee, and trespasser have not been abandoned but are relevant to the question of liability. Whether or not the possessor acted as a reasonable person in view of the probability of injury to others depends, in part, on the circumstances under which the person injured comes on the premises (*273 Cal. App. 2d 20, 25)* .

[g] Duties Owed to Invitees

The facts and procedural background of ***Chance v. Lawry's, Inc.*** *(1962) 58 Cal. 2d 368, 24 Cal. Rptr. 209, 374 P.2d 185* , are discussed in *§ 178.27[3][a]*. The Supreme Court affirmed a jury verdict for plaintiff for damages incurred when plaintiff fell into an open planter box in the crowded foyer of defendant's restaurant. The Court stated that a proprietor who knows of, or by the exercise of reasonable care could discover, an artificial condition on the premises that he or she should foresee exposes his or her business visitors to an unreasonable risk, and who has no basis for believing that they will discover the condition or realize the risk involved, is under a duty to exercise ordinary care either to make the condition reasonably safe for their use or to give a warning adequate to enable them to avoid the harm (*58 Cal. 2d 368, 373)* .

Beauchamp v. Los Gatos Golf Course *(1969) 273 Cal. App. 2d 20, 77 Cal. Rptr. 914* , is discussed in *§ 178.20[3][e]*. The court reversed a nonsuit in an action in which a woman golfer slipped on a cement veranda and held that *Rowland v. Christian* [*Rowland v. Christian (1968) 69 Cal. 2d 108, 118, 70 Cal. Rptr. 97, 443 P.2d 561]* mandated that the question of obvious danger is a question for the trier of fact. The court examined the duties owed to an invitee. It stated that in the exercise of reasonable care, the owner or possessor of property owes a duty to an invitee to make the property reasonably safe for the intended use by the intended user and warn of latent or concealed dangers. In addition, the duty to warn extends not only to conditions known to the possessor to be dangerous but also to conditions that could have been found to be dangerous by the exercise of ordinary care (*273 Cal. App. 2d 20, 27)* .

[h] Duties to Invitee Consonant With Civil Code Section 1714(a)

Beauchamp v. Los Gatos Golf Course *(1969) 273 Cal. App. 2d 20, 77 Cal. Rptr. 914* , which is discussed in *§ 178.20[3][e],* also discussed the effect of *Rowland* on the common law duties to an invitee. The court of appeal held that they were not jettisoned by that decision, but were generally consonant with the principle set forth in *Civ. Code § 1714(a)* that everyone is responsible for injury occasioned to another by his or her wantof ordinary care in the management of his or her property or person (*273 Cal. App. 2d 20, 26)* .

The facts and procedural background of ***Wingard v. Safeway Stores, Inc.*** *(1981) 123 Cal. App. 3d 37, 176 Cal. Rptr. 320* , are discussed in *§ 178.63[4][a]*. The court of appeal affirmed summary judgment for defendant on the ground that defendant could not reasonably foresee the criminal attack against plaintiff while plaintiff was employed as a security guard at defendant's warehouse. In reviewing duties owed to invitees prior to *Rowland,* the court stated that a proprietor owes a general duty to business invitees, including a workman brought on the premises to perform work there, to exercise care to avoid injury to them. This duty includes not only the duty to inspect the premises in order to uncover dangerous conditions, but also the duty to take affirmative action to control the wrongful acts of third persons that threaten invitees when the occupant has reasonable cause to anticipate the acts and the probability of injury resulting from them. The court stated that *Rowland* did not abolish this duty but subsumed it under a more comprehensive duty to

all those coming on the owner's land to act as a reasonable person in the management of his or her property in view of the probability of danger to others that might relate to the status of the invitee (*123 Cal. App. 3d 37, 41)* .

The facts and procedural background of ***Jamison v. Mark C. Bloome Co.*** *(1980) 112 Cal. App. 3d 570, 169 Cal. Rptr. 399* , are discussed in *§ 178.63[4][a]*. The court of appeal affirmed the grant of nonsuit for defendant on the ground that defendant did not breach any duty toward plaintiffs by preventing vandals from spilling oil on defendant's premises that caused plaintiffs to slip on the sidewalk as they walked past defendant's premises. Before reaching its decision, the court summarized the holding in *Rowland* that an owner or possessor must act as a reasonable person in the management of his or her property in view of the probability of injury to others. The court stated that in eliminating limitations on the owner's or possessor's duty to act as a reasonable person based on noninvitee status, the Supreme Court in *Rowland* did not suggest any departure from existing rules defining the duty of care toward invitees. At most, it held that persons lacking that status were, under appropriate circumstances, entitled to the same protection (*112 Cal. App. 3d 570, 575-576)* .

[i] Business Visitor

In ***Oettinger v. Stewart*** *(1944) 24 Cal. 2d 133, 148 P.2d 19* , plaintiff, an elderly woman, was leaving an apartment building after inquiring about the availability of an apartment. Plaintiff had just been to see defendants, the owners and operators of the apartment building, who used the apartment near the entrance of the building for their office and living quarters and designated this use with a sign marked "office" in the hallway near the apartment. In front of the building was a porch and three or four steps leading to the sidewalk. From the testimony at trial, it appeared that plaintiff was standing on a walkway between the last step and the adjoining public sidewalk, and was therefore on defendants' premises at the time of injury. One of the defendants followed plaintiff out to the porch, lost her balance, and fell down the steps and into plaintiff. Judgment was entered in favor of defendants on a jury verdict and plaintiff appealed, contending that a number of jury instructions were improper.

The Supreme Court reversed the judgment, stating that the instructions given the jury as to the duties of care owed licensees and trespassers should not have been given as plaintiff was an invitee (*24 Cal. 2d 133, 136-137)* . The Court pointed out that plaintiff had come on the premises as a prospective tenant, which was a purpose connected with the business conducted thereon, and thus she was a business visitor (*24 Cal. 2d 133, 136)* .

[j] Public Invitee

In ***O'Keefe v. South End Rowing Club*** *(1966) 64 Cal. 2d 729, 51 Cal. Rptr. 534, 414 P.2d 830* , the Supreme Court adopted the definition of an invitee that was set forth in Restatement (Second) of Torts § 332, which defined an invitee as either a business visitor or a public invitee (*64 Cal. 2d 729, 739)* . The Court, citing prior case law, stated that prior to this time courts had more frequently invoked the business invitee definition set forth in Restatement (Second) of Torts § 332, which was based on the "economic benefit" theory (*64 Cal. 2d 729, 735)* . However, the Court pointed out that a second theory of "public invitation" had coexisted with the economic benefit theory. According to the "public invitation" theory, the basis of liability is not an economic benefit but an implied representation when an owner or possessor encourages others to enter the premises to further the possessor's own purpose that reasonable care has been taken to make the premises safe for their use (*64 Cal. 2d 729, 736)* .

The Court sustained a nonsuit in the action in which a 15-year-old boy was injured when he hit an obstacle in the water while diving off defendant's pier into San Francisco Bay. The Court held that plaintiff was not an invitee under the public invitation test since the premises were not held out to the public and there was no general invitation to use them (*64 Cal. 2d 729, 740)* .

[k] Liability of Owner Not in Possession

Krongos v. Pacific Gas & Elec. Co. *(1992) 7 Cal. App. 4th 387, 9 Cal. Rptr. 2d 124* , involved a wrongful death action by the wife and children of the decedent against the lessor of a construction yard and a public utility company. The decedent was killed when a cable he was holding touchedan overhead high voltage line. Both defendants brought motions for summary judgment, which the trial court granted. The plaintiffs appealed.

The court of appeal reversed the summary judgment in favor of the landowner and affirmed the summary judgment in favor of the utility. With regard to the summary judgment in favor of the landowner, the court stated that although it was unlikely a jury would find that the landowner breached the duty of due care, such a duty nevertheless did exist. In *Rowland v. Christian (1968) 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561* , discussed in *§ 178.20[3][a]*, the Supreme Court repudiated the common classification system and substituted the basic approach of foreseeability of injury to others, holding that the proper test is whether in the management of his or her property he or she has acted as a reasonable person in view of the probability of injury to others. Although the defendant in *Rowland* was an occupier of land, the court of appeal cited *Becker v. IRM Corp.* [*Becker v. IRM Corp. (1985) 38 Cal. 3d 454, 467, 213 Cal. Rptr. 213, 698 P.2d 116]* and observed that the general duty of care established in that case has been extended to lessors who are not in possession of the leased premises. Hence, as an owner of property, a lessor out of possession must exercise due care and must act reasonably toward the tenant as well as toward unknown third persons (*7 Cal. App. 4th 387, 392)* .

[4] Additional Authorities

[a] Liability to Persons off Premises for Condition Existing on Premises

Lompoc Unified Sch. Dist. v. Superior Court (1993) 20 Cal. App. 4th 1688, 26 Cal. Rptr. 2d 122 , is discussed in *§ 178.35[3][b]*. The court rejected the argument that a property owner has a duty not to distract passing motorists, finding that a football game on defendant's property could not be a basis for liability to a motorist who alleged that the presence of the football game was a cause of the accident in which he was injured (*20 Cal. App. 4th 1688, 1694-1695)* .

[b] Factors Applied in Determining Owner's or Possessor's Liability

In *Salinas v. Martin (2008) 166 Cal. App. 4th 404, 82 Cal. Rptr. 3d 735* , a homeowner who was having remodeling work done on his home was held to have a duty of care to protect a construction worker from attack by pit bulls owned by another worker on the premises. While the homeowner was not at home at the time of the attack, he had specifically given the owner of the dogs permission to let the dogs roam free in his backyard. The owner had also given permission to plaintiff to retrieve boards that he had stored in that yard. The court of appeal analyzed the *Rowland v. Christian* factors, specifically the foreseeability of harm and the burden of the duty to be imposed, and concluded that the homeowner owed a duty of care. The court noted that while defendant may not have had knowledge of prior attacks by these dogs, there was evidence that the homeowner knew that the dogs were guard dogs and that plaintiff had previously communicated his fear that the dogs looked dangerous and ferocious. These conditions were sufficient to charge defendant with awareness of the risk of harm to other workers, including plaintiff, and it was undisputed that defendant could easily have required that the dogs be kept in their owner's van as they had been in the past (*166 Cal. App. 4th 404, 415-416)* .

In *Barnes v. Black (1999) 71 Cal. App. 4th 1473, 84 Cal. Rptr. 2d 634* , the defendant was the owner of an apartment complex that had a private sidewalk adjacent to a steeply sloped driveway that emptied into a busy street. The sidewalk was not surrounded by a fence or other safeguard, although it was known to be used by children in the complex to ride bikes and other wheeled toys. One such child lost control of his "big wheel" toy and rolled down the driveway and into the street, where he was struck and killed by a passing vehicle. At trial, summary adjudication was granted to the defendant based solely on the grounds that the danger that killed the child was the passing traffic in the public street, which was off-premises and not under the defendant's control. The court of appeal reversed, concluding that the defendant had failed to negate the existence of a duty of care under the particular circumstances. The court stressed that

determining whether a duty of care existed required consideration of the factors articulated in *Rowland* and that the defendant had failed to offer any evidence to counter the imposition of a duty under those factors (*71 Cal. App. 4th 1473, 1479-1480)* .

[c] Business Visitor

In *Austin v. Riverside Portland Cement Co. (1955) 44 Cal. 2d 225, 282 P.2d 69* , plaintiffs, two employees of an independent contractor, were injured while doing alteration and construction work at defendant's cement manufacturing plant. Plaintiffs were injured when one of them grabbed a hook attached to a boom on a crane that was charged with electricity from overhead electrical wires, electrocuting both of them. The electricity had not been shut off even though men were working in the vicinity of the overhead wires and the work was being done at night with insufficient lighting. The jury returned a verdict for plaintiffs against defendant owner and operator of the plant, but held for the owner of the electrical wires against plaintiffs. Defendant owner and operator appealed and the Supreme Court affirmed the judgment, citing, among other reasons, the sufficiency of the evidence to support the verdict of negligence. The Court pointed out that the care required of defendant must be measured by the hazard inherent in highly charged wires together with the duty owed to invitees or business visitors rather than licensees or trespassers because plaintiffs' status as invitees was clear (*44 Cal. 2d 225, 232)* .

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CHAPTER 178 PREMISES LIABILITY
PART II. FORMS
A. General Liability of Owner or Possessor

17-178 California Points & Authorities § 178.21

§ 178.21 Supporting Contention That Owner or Possessor of Premises Is Liable--Premises With Respect to Which Owner or Possessor Owes Duty of Care Includes Means of Ingress and Egress That Person Is Led to Employ

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE PREMISES WITH RESPECT TO WHICH DEFENDANT OWES A DUTY OF DUE CARE TO PERSONS THEREON INCLUDES ANY MEANS OF INGRESS AND EGRESS THAT PLAINTIFF WAS LED TO EMPLOY.

Premises as Including Means of Ingress and Egress. The duty of an owner or possessor of premises to exercise reasonable care toward persons thereon extends to any reasonable means of ingress and egress either on or off the premises as that person is led to employ by allurement, inducement, or otherwise (*Johnston v. De La Guerra Props., Inc. (1946) 28 Cal. 2d 394, 399, 170 P.2d 5*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that the duty of an owner or possessor of premises to exercise reasonable care towards persons on the premises extends to the area either on or off the premises that the person has been led to use as a means of ingress or egress.

For a discussion of the use of case law defining duties owed to invitees that predate the decision in *Rowland v. Christian* [Rowland v. Christian (1968) 69 Cal. 2d l08, *70 Cal. Rptr. 97, 443 P.2d 561]* , see *§ 178.03[4]*.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the property encompassed by the term "premises." They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should describe the area of ingress or egress where plaintiff was injured, the reason for plaintiff's presence in the area, and the conduct of defendant that led plaintiff to use the area (for example, an "entrance" or "exit" sign or light), and, if appropriate, the degree of control defendant maintained over the area.

[c] Related Pleading and Practice Forms

For discussion and forms regarding the liability of an owner or possessor of premises, see California Forms of Pleading and Practice, Ch. 421, *Premises Liability* (Matthew Bender).

[d] Opposing Points and Authorities

If appropriate, the points and *authorities in § 178.34* may be used to oppose these points and authorities.

[3] Discussion of Authorities

[a] Premises as Including Means of Ingress and Egress

In ***Johnston v. De La Guerra Props., Inc.*** *(1946) 28 Cal. 2d 394, 170 P.2d 5* , plaintiff, a prospective patron of defendant restaurant, was injured while approaching the restaurant. She was walking in the dark from her car that was parked on the adjoining premises not owned or operated by either the defendant restaurant or the defendant owner of the property on which the restaurant stood. The adjoining premises were occupied by an oil company. It had been used as a parking lot by patrons of the restaurant and other businesses on the property who were allowed to park free of charge pursuant to arrangements between the owner of the property and the oil company. Although these arrangements had been terminated at the time of plaintiff's accident, it was common knowledge that many patrons continued to park on the adjacent property. A private walkway ran the length of the building on the restaurant property and adjoined the neighboring premises. Three doors opened onto the walkway and one of them led to a passageway used as a side entrance by customers of the restaurant. The adjoining property had previously sloped down to the private walkway. To level off its property, the oil company had constructed a concrete wall that abutted and ran the entire length of the walkway. The wall varied in height from approximately six inches above the walk at the easterly end to two feet at the westerly end. On a previous visit to the restaurant, plaintiff had parked in the adjoining lot near the easterly end of the wall, and had stepped from the wall down to the walkway. On the night of the accident, however, plaintiff parked closer to the westerly end of the wall. Not realizing the height of the wall above the walkway at that end of the wall, plaintiff stepped from the wall where it was approximately 18 inches above the walkway and fell and broke her hip. Plaintiff sued both the owner of the property on which the restaurant stood and the operator of the restaurant. A nonsuit was granted at the conclusion of the evidence and plaintiff appealed.

The Supreme Court reversed. The Court held that the duty of reasonable care was sufficiently extensive to protect an invitee or business visitor in his or her use of such a means of ingress or egress as that visitor is led to employ by inducement or allurement, express or implied (*28 Cal. 2d 394, 399)* . The Court stated that the evidence was sufficient to support a finding of negligence on the part of the owner of the premises in that the owner encouraged patrons of its tenants to park on the adjoining property and approach by way of the private walk, had knowledge of the condition that caused the accident, and should have foreseen that a patron attempting to discover the ramp leading to the private walkway at night might step at a dangerous place (*28 Cal. 2d 394, 400)* .

As to the operator of the restaurant, the portion of the premises on which the accident happened was not within the premises leased by him.However, the Court held that the tenant had exercised sufficient control over the common passageway to become liable for the dangerous condition as there was evidence that the operator had installed a light above the door opposite the concrete ramp leading to the side entrance of the restaurant with a sign bearing the name of

the restaurant (*28 Cal. 2d 394, 401)* .

[4] Additional Authorities

[a] Premises as Including Means of Ingress and Egress

In *Schwartz v. Helms Bakery Ltd. (1967) 67 Cal. 2d 232, 60 Cal. Rptr. 510, 430 P.2d 68* , the Supreme Court reversed a nonsuit granted in favor of the owner of a street vendor bakery truck. Plaintiff, a four-year-old child, was hit by a car while running to buy a doughnut from the driver. The Court stated that the physical area encompassed by the term "premises" could be greater or less than the area to which the invitor possesses title or a lease and includes such means of ingress and egress as a customer may reasonably be expected to use (*67 Cal. 2d 232, 239)* .

In *Ross v. Kirby (1967) 251 Cal. App. 2d 267, 59 Cal. Rptr. 601* , plaintiff was injured while approaching a restaurant owned by defendants when she tripped over a drainage berm in a private walkway running from an adjacent parking lot to the back door of the restaurant. The berm was constructed by the city and ran along the property line owned by defendants, half on the restaurant premises and half on the parking lot. Defendants appealed a judgment entered on a jury verdict. The court of appeal affirmed the judgment. The court held that defendants assumed and exercised control over that portion of the berm not located on the premises because of the berm's location near the back door and the implied invitation to the public (*251 Cal. App. 2d 267, 271)* .

In *Ellis v. Trowen Frozen Prods., Inc. (1968) 264 Cal. App. 2d 499, 70 Cal. Rptr. 487* , the court of appeal reversed a nonsuit granted in favor of a street vendor. Plaintiff, a five-year-old child, was hit by a car while running to purchase ice cream. The court, in refusing to limit the term "premises" to the truck, relied on *Schwartz v. Helms Bakery Ltd.* [*Schwartz v. Helms Bakery Ltd. (1967) 67 Cal. 2d 232, 60 Cal. Rptr. 510, 430 P.2d 68]* and stated that an invitor has a duty to warn an invitee of a dangerous condition existing on a public street or sidewalk adjoining his or her business, which, because of the invitor's special benefit, convenience, or use of the public way, creates a danger (*264 Cal. App. 2d 499, 503)* .

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Volume 17 Chapters 170-179 PARTNERSHIPS---to---PREMISES LIABILITY
CHAPTER 178 PREMISES LIABILITY
PART II. FORMS
A. General Liability of Owner or Possessor

17-178 California Points & Authorities § 178.22

§ 178.22 Supporting Contention That Owner or Possessor of Premises Is Liable--Duty of Care Extends to Adjacent Property Under Control of Owner or Possessor

[1] FORM

[*The following may be included in a memorandum or points and authorities, or in a trial or appellate brief.*]

DEFENDANT _____ [OWNER or POSSESSOR] IS LIABLE FOR THE HARM TO PLAINTIFF BECAUSE DEFENDANT'S DUTY OF DUE CARE EXTENDS TO ADJACENT PROPERTY OVER WHICH DEFENDANT EXERCISES CONTROL.

Duty to Protect Users of Adjacent Property Controlled by Defendant. An owner or possessor of property who exercises control over adjacent property has a duty of care to users of that property to warn of or protect from a hazard on the adjacent property (*Alcaraz v. Vece (1997) 14 Cal. 4th 1149, 1153, 60 Cal. Rptr. 2d 448*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a plaintiff's contention that the duty of an owner or possessor of premises towards persons on the premises extends to adjacent premises over which the defendant has exercised control.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that defendant owed a duty to plaintiff based on defendant's control of premises adjacent to premises owned or possessed by defendant. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence of defendant's control over the property as well as defendant's knowledge of the hazard on the property, and should argue that the extent of defendant's control of the property gave rise to a duty to warn or protect users of the property with regard to that known hazard.

[c] Related Pleading and Practice Forms

For discussion and forms regarding the liability of an owner or possessor of premises, see California Forms of Pleading and Practice, Ch. 421, *Premises Liability* (Matthew Bender).

[d] Opposing Points and Authorities

If appropriate, the points and *authorities in § 178.35* may be used to oppose these points and authorities.

[3] Discussion of Authorities

[a] Duty to Protect Users of Adjacent Property Controlled by Defendant

In ***Alcaraz v. Vece*** *(1997) 14 Cal. 4th 1149, 60 Cal. Rptr. 2d 448* , plaintiff brought an action for injuries he received when he stepped into a utility meter box embedded in the lawn in front of defendants' building. Plaintiff alleged that defendants had actual notice that the cover to the utility box either was broken or missing. Defendants filed a motion for summary judgment, asserting that they owed no duty to plaintiff because they did not own either the meter box or the land upon which it was located. The box was located within a 10-foot strip of land owned by the city, extending from the curb to defendants' property line. In his opposition to the motion for summary judgment, plaintiff contended that defendants were responsible for his injuries because they maintained and controlled the property on which he was injured. The trial court granted defendants' motion for summary judgment. The court of appeal reversed, reasoning that the fact that defendants maintained the lawn completely surrounding the meter box gave rise to an issue of fact as to whether defendants' actual or apparent control over the premises created a duty to protect or warn plaintiff.

The Supreme Court affirmed the court of appeal, first stating that the circumstance that defendants did not own or exercise control over the meter box itself did not entitle them to judgment as a matter of law (*14 Cal. 4th 1149, 1155)* . The court then held that the circumstance that defendants did not own the land on which the meter box was located also did not entitle them to judgment as a matter of law, because the issue remained of whether defendants exercised control over the land (*14 Cal. 4th 1149, 1157)* . Based on evidence that defendants maintained the lawn that covered the area surrounding the meter box, and that after plaintiff's injury defendants constructed a fence that enclosed the entire lawn, the court concluded that a reasonable trier of fact could infer that defendants exercised control over the property (*14 Cal. 4th 1149, 1162)* . Since a triable issue of fact existed concerning whether defendants exercised control over the land adjacent to their property so as to give rise to a duty to protect or warn persons entering the land, summary judgment should not have been granted.

[4] Additional Authorities

[a] Duty to Protect Users of Adjacent Property Controlled by Defendant

In *Alpert v. Villa Romano Homeowners Assn. (2000) 81 Cal. App. 4th 1320* , the plaintiff tripped over an upturned, jagged piece of sidewalk that ran adjacent to the defendant's condominium. At the conclusion of the plaintiff's case-in-chief, the trial court granted the defendant's motion for nonsuit, concluding that the plaintiff had failed to prove what caused the defect in the sidewalk and that the city, rather than the adjacent property owner, owed the applicable duty of care to maintain sidewalks. The court of appeal reversed, finding that it was error to grant nonsuit if the evidence was viewed most favorably to the plaintiff. The court of appeal reviewed case law establishing that a property owner owes a duty of care to protect pedestrians from harm caused by a dangerous condition on an adjacent public

sidewalk if the damage to the sidewalk was created by the property owner. The court also relied in part on the rule established in *Alcarez v. Vece* [*see § 178.22[3][a]*], that a landowner may be liable for an injury sustained on adjacent property if the landowner exercises sufficient control over the adjacent land. The plaintiff's evidence showed that the defendant had planted and maintained all of the trees and vegetation on both sides of the sidewalk, that the defendant had installed sprinklers on both sides of the sidewalk, that the damage to the sidewalk was caused by a tree on the lawn in front of the condominium, and that the defendant had prior knowledge of the sidewalk damage. Therefore, the plaintiff had presented evidence showing that the defendant owed pedestrians on the sidewalk a duty of care sufficient to withstand a motion for nonsuit (*81 Cal. App. 4th 1320, 1334-1337)* .

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Volume 17 Chapters 170-179 PARTNERSHIPS---to---PREMISES LIABILITY
CHAPTER 178 PREMISES LIABILITY
PART II. FORMS
A. General Liability of Owner or Possessor

17-178 California Points & Authorities § 178.23

§ 178.23 Supporting Contention That Owner or Possessor of Premises Is Liable--Failure to Discover Dangerous Condition Brought About by Third Person or Ordinary Wear and Tear

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT _____ [OWNER *or* POSSESSOR] IS LIABLE FOR PLAINTIFF'S HARM CAUSED BY A DANGEROUS CONDITIONBROUGHT ABOUT BY _____ [A THIRD PERSON *or* ORDINARY WEAR AND TEAR] BECAUSE, ALTHOUGH DEFENDANT HAD NO ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF THE CONDITION, HE OR SHE FAILED TO EXERCISE REASONABLE CARE TO DISCOVER THE CONDITION.

A. Ordinary Care to Discover Unknown Condition Required. An owner or possessor of premises is liable for harm due to a dangerous condition brought about by a third party or ordinary wear and tear if the condition, although unknown to the owner or possessor, could have been discovered in the exercise of reasonable care (*Bridgman v. Safeway Stores, Inc. (1960) 53 Cal. 2d 443, 447, 2 Cal. Rptr. 146, 348 P.2d 696* ; *see also Portillo v. Aiassa (1994) 27 Cal. App. 4th 1128, 1135-1136, 32 Cal. Rptr. 2d 755*).

[*Optional*] **B. Reasonable Inspections Required.** An owner or possessor of premises must make reasonable inspections of portions of the premises open to the public. The absence of inspections within a period of time prior to an accident may warrant an inference that the condition could have been discovered in the exercise of ordinary care (*Ortega v. Kmart Corp. (2001) 26 Cal. 4th 1200, 1210, 114 Cal. Rptr. 2d 470, 36 P.3d 11* ; *Olsen v. Roos-Atkins (1962) 208 Cal. App. 2d 259, 263, 25 Cal. Rptr. 190* ; *see also Portillo v. Aiassa (1994) 27 Cal. App. 4th 1128, 1135-1136, 32 Cal. Rptr. 2d 755*).

[*Optional*] **C. Commercial Landowner Cannot Abrogate Duty by Signing Lease.** A commercial landowner cannot totally abrogate its landowner responsibilities merely by signing a lease. A lessor out of possession has a duty to exercise due care and act reasonably toward the tenant as well as unknown third persons (*Lopez v. Superior Court*

(1996) 45 Cal. App. 4th 705, 715, 52 Cal. Rptr. 2d 821).

[*Optional*] **D. Landlord With Unlawful Detainer Judgment Owes Duty to Inspect.** A landlord that has instituted a successful unlawful detainer action has a duty to inspect the property that attaches upon entry of judgment in the unlawful detainer action, even if the tenant has not yet vacated the premises, and includes a duty to make subsequent inspections at reasonable intervals (*Stone v. Center Trust Retail Prop., Inc. (2008) 163 Cal. App. 4th 608, 613, 77 Cal. Rptr. 3d 556*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of plaintiff's contention that defendant owner or possessor is liable for failure to exercise ordinary care to discover a dangerous condition brought about either by ordinary wear and tear or by a third person. The situation that frequently arises is a customer in a store being injured by a condition brought about either by a person other than the possessor or his or her employee, or by ordinary wear and tear (for example, produce spilled on the floor by customers in a grocery store). In this case, the inquiry focuses on whether or not the condition could have been discovered in the exercise of reasonable care. Optional Paragraph B should be used if the absence or infrequency of inspections creates an inference that the condition could have been discovered in the exercise of ordinary care.

For a discussion of the use of case law defining duties owed to invitees that predate the decision in *Rowland v. Christian* [Rowland v. Christian (1968) 69 Cal. 2d l08, *70 Cal. Rptr. 97, 443 P.2d 561]* , see *§ 178.03[4]*.

These points and authorities may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of liability for a dangerous condition brought about by ordinary wear and tear or third parties. They may also be adapted for use in a trial or appellate brief.

If appropriate, this form may be combined with the points and *authorities in § 178.20* concerning the test of liability of an owner or possessor of premises.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the lack of ordinary care on the part of the possessor to discover the condition, including the length of time the condition existed prior to the accident and, if relevant, the absence or frequency of inspections.

[c] Related Pleading and Practice Forms

For discussion and forms regarding persons injured by a dangerous condition on premises, see California Forms of Pleading and Practice, Ch. 421, *Premises Liability* (Matthew Bender).

[d] Opposing Points and Authorities

If appropriate, the points and *authorities in § 178.40* may be used to oppose these points and authorities.

[3] Discussion of Authorities

[a] Ordinary Care to Discover Unknown Condition Required

In ***Bridgman v. Safeway Stores, Inc.*** *(1960) 53 Cal. 2d 443, 2 Cal. Rptr. 146, 348 P.2d 696* , plaintiff was injured when she was knocked down by a stack of pumpkins falling from a produce stand in defendant's market. She had just taken a pumpkin from the stand, weighed it, and replaced it. The jury returned a verdict for defendant and plaintiff appealed, contending that the court erred in giving certain jury instructions. The trial court had instructed the jury that the defendant would be liable for the mishandling of the pumpkins by a customer if there was actual knowledge of the poorly stacked pumpkins or if the condition existed for such a period of time so as to charge the defendant with notice. The Supreme Court stated that the instruction was incomplete in that it said nothing about the duty of the defendant to exercise ordinary care to discover the dangerous condition and make reasonable inspections of the premises (*53 Cal. 2d 443, 447)* . Notwithstanding this error, the Court held that as another instruction aptly covered the matters omitted, the erroneous instruction did not result in a miscarriage of justice and affirmed the judgment (*53 Cal. 2d 443)* .

In ***Portillo v. Aiassa*** *(1994) 27 Cal. App. 4th 1128, 32 Cal. Rptr. 2d 755* , plaintiff was attacked by a dog owned by defendant's commercial tenant while he was making a delivery to the tenant's liquor store. Before renewing the tenant's lease nearly a year before the attack on plaintiff, defendant had not conducted an inspection of thepremises, but knew that the tenant was keeping the dog at the store. A sign in the store warned of a guard dog on the premises and a copy of a newspaper article about the dog's recent attack on a robber and its "rotten disposition" was posted near the door of the store. In plaintiff's action against defendant, the jury awarded damages to plaintiff. Defendant appealed, contending that a landlord owes a duty of care to third parties injured by a tenant's dog only if the landlord has actual knowledge that the dog is dangerous.

The court of appeal affirmed, holding that actual knowledge is not required. To meet the duty of care to both tenants and the general public to provide and maintain safe premises, a landlord must inspect leased premises to ascertain their condition. Therefore, if a landlord would have discovered a dangerous condition on the premises by exercise of reasonable care, lack of actual knowledge is not a defense to liability (*27 Cal. App. 4th 1128, 1134)* . The court acknowledged that no court had considered a landlord's duty of care in circumstances similar to the case before it. However, applying the factors that generally determine whether an individual owes a duty, the court found that defendant owed a duty to exercise reasonable care in inspecting his commercial property and removing or restraining the tenant's dog, because it was reasonably foreseeable that a guard dog such as the tenant's would injure someone, injuries inflicted by these dogs are frequently serious, the failure to require the tenant to remove the dog was closely connected with plaintiff's injuries, there was moral blame attached to defendant's failure to inspect, requiring reasonable inspections does not impose a significant burden on landlords, the risk of harm to the public outweighs the benefit of having a particular tenant, and insurance is available to cover any liability landlords may have to third parties for injuries suffered on the premises (*27 Cal. App. 4th 1128, 1135)* . The court rejected defendant's argument that imposition of a duty was too burdensome, pointing out that defendant would have learned about the dog's dangerous propensities merely by asking about the dog's history and training, why the sign had been posted, whether the newspaper article was accurate, whether the dog could be insured, or whether anyone other than the tenant and his family could attest to the dog's behavior. The court also distinguished the case before it from earlier cases finding that a landlord had no duty to inspect rented premises for the purpose of discovering the existence of a tenant's dangerous dog and would not be liable to third parties injured by the dog unless the landlord had previous knowledge of the dog's vicious nature [*see, e.g.,* *Lundy v. California Realty (1985) 170 Cal. App. 3d 813, 821, 216 Cal. Rptr. 575* ; *Uccello v. Laudenslayer (1975) 44 Cal. App. 3d 504, 514, 118 Cal. Rptr. 741]* , because those cases involved family pets kept in single-family residences. The risk of injury from a guard dog in a store open to the public is far greater; moreover, although they may be necessary in some neighborhoods, guard dogs, unlike family pets, cannot be classified as "an important part of our way of life" (*27 Cal. App. 4th 1128, 1137-1138)* . Finally, the court rejected defendant's argument that imposition of a duty to inspect premises for dangerous animals would make a landlord strictly liable. The court noted that there are numerous scenarios in which a landlord exercising reasonable care to inspect would not necessarily discover the animal's presence (for example, the tenant's concealment of the animal) and therefore would not be held liable for injuries caused by the animal (*27 Cal. App. 4th 1128, 1138)* .

[b] Reasonable Inspections Required

In ***Ortega v. Kmart Corp.*** *(2001) 26 Cal. 4th 1200, 114 Cal. Rptr. 2d 470, 36 P.3d 11* , the plaintiff was a customer in the defendant's store who slipped on a puddle of milk adjacent to a refrigerator. The plaintiff sued the defendant. At trial, although the plaintiff could not prove how the milk puddle originated or how long it had been on the floor, he did provide evidence that the defendant's employees probably did not inspect the aisle prior to the accident for 15 to 30 minutes at minimum, and possibly for as long as two hours. The plaintiff argued that because the evidence showed that the defendant had not inspected the premises for a reasonable period of time before the accident, it was proper to infer that the puddle was on the floor long enough for employees to have discovered and remedied it. The jury agreed and returned a verdict for the plaintiff. The defendant appealed, the court of appeal affirmed, and the defendant appealed again.

The Supreme Court affirmed. Relying in large part on its analysis in an earlier case [*Bridgman v. Safeway Stores, Inc. (1960) 53 Cal. 2d 443, 2 Cal. Rptr. 146, 348 P.2d 696* ; *see § 178.23[3][a]*], the Court reaffirmed that if a plaintiff relies on the failure to correct a dangerous condition to prove a property owner's negligence, the plaintiff has the burden of proving that the owner had notice of the defect with sufficient time to correct it. However, the Court also reaffirmed that the plaintiff need not show actual knowledge of the dangerous condition if evidence suggests that the condition was present for a sufficient period of time to charge the owner with constructive knowledge of its existence (*26 Cal. 4th 1200, 1206-1207)* . Moreover, a plaintiff may rely on circumstantial evidence to establish constructive knowledge. Therefore, the Court held that if a plaintiff can show that a property owner did not make an inspection within a time period that was reasonable under the circumstances, the plaintiff could raise an inference that the defective condition existed long enough that failure to discover it was not reasonable (*26 Cal. 4th 1200, 1210)* . The Court also reaffirmed that it was for the jury to decide, under all of the circumstances of the particular case, whether the lack of inspection within the time period of the case was sufficient to infer that the defective condition existed long enough for a reasonable owner to have discovered and corrected the defect (*26 Cal. 4th 1200, 1213)* . In this particular case, the evidence of the defendant's failure to inspect the premises for at least 15 to 30 minutes, and possibly for as long as two hours prior to the accident, was indicative of the defendant's negligence and created a reasonable inference that the dangerous condition existed long enough for the defendant to discover it (*26 Cal. 4th 1200, 1210-1211)* .

In ***Olsen v. Roos-Atkins*** *(1962) 208 Cal. App. 2d 259, 25 Cal. Rptr. 190* , plaintiff was a maintenance man employed by a maintenance service and assigned to defendant's store to work the night shift. He was injured when he slipped and fell in the store on a piece of a banana peel. There was evidence that the banana peel was dry and brown around the edges and that the spot on the floor beneath it was dried up and gluey. In addition, there was no regular janitorial service during the daytime hours although employees were told to keep the floors clean. The jury returned a verdict forplaintiff, but defendant was granted a judgment notwithstanding the verdict. The court, in reversing the judgment, held that there was sufficient evidence to support the finding of negligence on the part of defendant. The evidence was sufficient to support a finding that the banana peel had remained on the premises long enough for a person exercising ordinary care to discover it and, in addition, the absence of inspections of the stairway since plaintiff quit his work the evening before warranted an inference that the condition existed long enough to have been discovered in the exercise of reasonable care (*208 Cal. App. 2d 259, 262-265)* .

Portillo v. Aiassa *(1994) 27 Cal. App. 4th 1128, 32 Cal. Rptr. 2d 755* , is discussed in *§ 178.23[3][a]*.

[c] Commercial Landowner Cannot Abrogate Duty by Signing Lease

In ***Lopez v. Superior Court*** *(1996) 45 Cal. App. 4th 705, 52 Cal. Rptr. 2d 821* , a plaintiff who slipped and fell on a grape at a produce stand sued the owners of the stand as well as the owner and lessor of the property on theories of negligence and premises liability. Plaintiffs' complaint alleged among other things that defendants failed to repair, investigate, inspect or make the fruit stand safe, and that defendants negligently maintained the premises because the floors were slippery and littered with produce which defendants knew or should have known constituted a dangerous condition. Defendant landowner filed a motion for summary judgment contending that as a lessor out of possession, it

was entitled to summary judgment because (1) there was no evidence that defendant had actual notice of the dangerous condition of the floor, (2) the condition was not created by any employee of defendant's, (3) there was no evidence of any prior slip and fall, (4) there was insufficient evidence to support a claim of constructive notice, and (5) there was no reasonable inspection that defendant could have performed which would have revealed the dangerous condition. The trial court granted the motion and plaintiff appealed.

The court of appeal reversed, finding defendant's showing insufficient to meet its burden because it did not show that at the time the lease was executed and renewed there was an inspection, nor were facts presented bearing upon the necessity for an inspection, or facts which showed that any inspection conducted was reasonable under the circumstances (*45 Cal. App. 4th 705, 717)* . The court explained its holding by outlining the duties of a commercial lessor/landowner. The court found that because there was no dispute that defendant was the owner of the leased premises, defendant had a duty to exercise due care to protect third persons such as plaintiff who came to the premises. The court added that a commercial landowner could not totally abrogate its landowner responsibilities by signing a lease. Rather, as the owner of property, a lessor out of possession must exercise due care and must act reasonably toward the tenant as well as to unknown third persons. Specifically, at the time the lease is executed and upon renewal a landlord has the right to reenter the property, has control of the property and must inspect the premises to make them reasonably safe from dangerous conditions (*45 Cal. App. 4th 705, 715)* .

[d] Landlord With Unlawful Detainer Judgment Owes Duty to Inspect

In ***Stone v. Center Trust Retail Properties, Inc.*** *(2008) 163 Cal. App. 4th 608, 77 Cal. Rptr. 3d 556* , plaintiff was a restaurant customer who was injured when she slipped on water that had accumulated on the floor of a restaurant, allegedly because of a water leak. Although the restaurant was still in operation at the time of the accident, the restaurant was in default on its rent payments to the landlord and the landlord had filed a successful unlawful detainer action and been issued a writ of possession for the property. Plaintiff sued both the restaurant owner and the landlord, although the restaurant owner was eventually dismissed from the suit. The suit against the landlord went to trial and the jury found the landlord 19 percent at fault and awarded economic and noneconomic damages to plaintiff. The landlord appealed.

The court of appeal reversed and remanded for a new trial only on the issue of liability. The court recognized that the duty of a landlord to ameliorate dangerous conditions when a tenant is in possession of the property is generally limited to those conditions about which the landlord has actual knowledge, if accompanied by the right and ability to cure the condition. However, the court also noted that in situations in which a tenant in possession has defaulted on a lease, the tenant may lack the incentive to maintain the property in a safe condition. In recognition of this problem, the court held that a landlord that has instituted a successful unlawful detainer action has a duty to inspect the property, and this duty attaches upon entry of judgment in the unlawful detainer action, even if the tenant has not yet vacated the premises. This duty also includes a duty to make subsequent inspections at reasonable intervals (*163 Cal. App. 4th 608, 613)* . Because the parties at trial did not have proper court guidance on a landlord's duty to inspect under the circumstances, the court of appeal remanded for a new trial on the issue of liability, at which time the parties would be allowed to present evidence on the timing of the defendant's duty to inspect, the nature of any inspections due, and whether reasonable inspections would have revealed the water leak in time to prevent the injury to plaintiff (*163 Cal. App. 4th 608, 614)* .

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A. General Liability of Owner or Possessor

17-178 California Points & Authorities § 178.24

§ 178.24 Supporting Contention That Owner or Possessor of Premises Is Liable--Knowledge of Dangerous Condition Imputed to Owner or Possessor

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

KNOWLEDGE OF THE DANGEROUS CONDITION ON THE PREMISES SHOULD BE IMPUTED TO DEFENDANT _____ [OWNER *or* POSSESSOR] BECAUSE IT WAS BROUGHT ABOUT BY _____ [HIS/HER NEGLIGENCE *or* THE NEGLIGENCE OF HIS/HER EMPLOYEES].

Knowledge of Dangerous Condition Imputed to Owner or Possessor. If a dangerous or defective condition of premises that causes an injury is brought about by the negligence of the owner or possessor or his or her employee acting within the scope of the employment, knowledge of the dangerous or defective condition is imputed to the owner or possessor (*Hatfield v. Levy Bros. (1941) 18 Cal. 2d 798, 806, 117 P.2d 841*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of plaintiff's contention that knowledge of a dangerous condition on defendant owner's or possessor's premises should be imputed to defendant because the condition was brought about by the negligence of defendant or of his or her employees.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the knowledge of the condition. These points and authorities may also be adapted for use in a trial or appellate brief.

[a] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the negligence of the owner or possessor or the employee that created the dangerous condition and, in the case of the negligence of the employee, counsel should describe how the employee was acting within the course and scope of employment.

[3] Discussion of Authorities

[a] Knowledge of Dangerous Condition Imputed to Owner or Possessor

Plaintiff in ***Hatfield v. Levy Bros.*** *(1941) 18 Cal. 2d 798, 117 P.2d 841* , was a woman shopper who was injured in a fall on the waxed wooden floor in defendant's store. Plaintiff and her husband sued the owner of the store, the applicator of the wax, the cashier, and the president and manager of the store. The evidence disclosed that the floor had just been waxed by an employee of defendant who testified that the floor was slippery where the wax had been applied. There was also evidence that the coat plaintiff was wearing that day had wax on it. The jury returned a verdict in favor of plaintiffs and against all defendants. A motion for a new trial was made by all four defendants and denied except as to the cashier. Defendants appealed, contending among other things that there was insufficient evidence to establish that they had actual or constructive knowledge of the dangerous condition of the floor.

The Supreme Court affirmed the judgment. The Court stated that there was sufficient evidence of knowledge and pointed out that the employee who applied the wax knew that the floor was slippery and dangerous. In addition, the employee's negligence had brought about the condition. The Court stated that when the dangerous or defective condition of the property that causes the injury is created by the negligence of the owner of the property or his or her employee acting within the scope of the employment, the owner of the property cannot be permitted to assert that there was no notice or knowledge of the defective or dangerous condition since the knowledge is imputed to the owner under these circumstances (*18 Cal. 2d 798, 806)* .

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17-178 California Points & Authorities § 178.25

§ 178.25 Supporting Contention That Owner or Possessor of Premises Is Liable--Harm Due to Obvious Danger--Attention Diverted From Danger

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE OBVIOUSNESS OF THE DANGER DOES NOT RELIEVE DEFENDANT _____ [OWNER *or* POSSESSOR] FROM LIABILITY BECAUSE PLAINTIFF'S ATTENTION WAS LIKELY TO BE, AND ACTUALLY WAS, DISTRACTED FROM IT.

A. Distraction of Attention. When the attention of a person approaching an obvious danger is likely to be distracted, the danger, although obvious, does not relieve the possessor from liability (*Henderson v. McGill (1963) 222 Cal. App. 2d 256, 260, 34 Cal. Rptr. 897*).

[*Optional*] **B. Attention to Work.** When a person must work in a position of possible danger, the amount of care that he or she is bound to exercise for his or her own safety may well be less byreason of the necessity of the worker's giving attention to his or her work than would otherwise be the case. Thus, an obvious or apparent risk of danger does not automatically absolve a defendant of liability for injury that the danger has caused. [In such cases, the jury is entitled to balance the plaintiff's necessity against the danger, even if it be assumed that it was an apparent one] (*Osborn v. Mission Ready Mix (1990) 224 Cal. App. 3d 104, 118-119, 273 Cal. Rptr. 457*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted by plaintiff in support of his or her contention that although a danger existing on the premises was obvious, defendant is still liable for the injury resulting to plaintiff from the danger because plaintiff's attention was distracted from it.

Optional Paragraph B is provided for use in cases in which the plaintiff is a worker who was injured on the defendant's premises while engaged in a task for which he or she was hired.

For a discussion of the use of case law defining duties owed to invitees that predate the decision in *Rowland v. Christian* [*Rowland v. Christian (1968) 69 Cal. 2d 108 , 70 Cal. Rptr. 97, 443 P.2d 561]* , see *§ 178.03[4]*.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel is contending that plaintiff's attention was distracted from an obvious danger. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss how plaintiff's attention was distracted from the danger (for example, because plaintiff was looking at the window displays in the shopping center and did not see the hole in the concrete walkway).

[c] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 178.36* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Distraction of Attention

In ***Henderson v. McGill*** *(1963) 222 Cal. App. 2d 256, 34 Cal. Rptr. 897* , plaintiff, a business invitee, was injured when he tripped over a faucet while leaving defendants' coffee shop in the rain. The faucet was located on a strip of concrete adjacent to the building and between the building and the parking lot. The strip of concrete was covered with an overhang and was used by persons entering and exiting the coffee shop. The faucet was in front of a large glass window and a table was located directly inside. There was also a waist-high water tank beyond the window that protruded out from the wall. The jury returned a verdict in favor of plaintiff and defendants appealed, contending that the faucet was obvious and, therefore, as a matter of law defendants were not liable.

The court of appeal affirmed. The court stated that a possessor is not relieved from liability when the danger, although obvious, was in a place where a person's attention was likely to be diverted from it (*222 Cal. App. 2d 256, 260)* . The court held that the faucet was not so obvious as a matter of law that it could be reasonably assumed that a person would necessarily see it. The factors militating against observation of the danger were the attention-distracting window with the table just inside, the water heater that a person would try to avoid, and the fact that because the covered strip would most likely be used in the event of rain, the attention of the user would probably be diverted from the pavement (*222 Cal. App. 2d 256, 261)* .

[b] Attention to Work

In ***Osborn v. Mission Ready Mix*** *(1990) 224 Cal. App. 3d 104, 273 Cal. Rptr. 457* , a worker and his spouse brought an action for damages for personal injuries and loss of consortium after the worker was injured when he fell on a construction site owned and controlled by the defendant. After trial, during which the defendant took as a position that it had not been negligent because the allegedly dangerous condition of the property was open and obvious, the jury returned a special verdict stating that the defendant had not been negligent in the management of the premises and judgment in favor of the defendant was entered. Plaintiffs moved for new trial, which was denied and appealed.

The court of appeal reversed. An issue considered on appeal was whether an instruction given to the jury was erroneous

and prejudicial. The instruction stated that "a business proprietor is not the insurer of the safety of the employees of a supplier and cannot be held liable for an injury resulting from a danger which was obvious or should have been observed in the exercise of ordinary care" (*224 Cal. App. 3d 104, 117)* . The instruction wasbased on a statement made in an earlier case [*Elder v. Pacific Tel. & Tel. Co. (1977) 66 Cal. App. 3d 650, 651-662, 136 Cal. Rptr. 203]* , which the court concluded was erroneous dicta (*224 Cal. App. 3d 104, 118)* . The court pointed out that a worker on the job, doing the job he or she was hired to do, is not required to exercise the same quantum of care that may be required of other invitees. A jury is entitled to balance the plaintiff's necessity against the danger, even if it be assumed that it was an apparent one. This is a factual issue. Thus, the court stated, under certain circumstances, an obvious or apparent risk of danger does not automatically absolve a defendant of liability for injury caused thereby (*224 Cal. App. 3d 104, 118-119)* , although the obvious nature of a danger may negate any duty to warn (*224 Cal. App. 3d 104, 119)* . Having concluded that the instruction was erroneous, the court also determined that the instruction was prejudicial because the record demonstrated that the jury was troubled by the instruction that there could be no liability (*224 Cal. App. 3d 104, 124)* .

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17-178 California Points & Authorities § 178.26

§ 178.26 Supporting Contention That Owner or Possessor of Premises Is Liable--Harm Due to Obvious Danger--Person Not Required to Look Fixedly at Walkway

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF, WHILE MAKING USE OF THE WALKWAY ON WHICH HE/SHE WAS INJURED, DID NOT HAVE TO KEEP HIS/HER EYES FIXED ON THE GROUND IN FRONT OF HIM/HER OR BE ON THE CONSTANT LOOKOUT FOR DANGER.

Fixed Look at Walkway and Constant Lookout for Danger Not Required. A person exercising ordinary care and making normal use of a walkway has the right to assume it is in safe condition, and the exercise of ordinary care does not require that the person keep his or her eyes fixed on the ground in front of him or her or be on the constant lookout for danger (*Peters v. City & County of San Francisco (1953) 41 Cal. 2d 419, 424, 260 P.2d 55*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of plaintiff's contention that although a danger existing on a walkway on, or adjoining to, defendant's premises was obvious, defendant is still liable because plaintiff was not required to look fixedly at the walkway or be on the constant lookout for danger.

For a discussion of the use of case law defining duties owed to invitees that predate the decision in *Rowland v. Christian* [Rowland v. Christian (1968) 69 Cal. 2d l08, *70 Cal. Rptr. 97, 443 P.2d 561]* , see *§ 178.03[4]*.

These points and authorities may be combined with a form of a memorandum of points and authorities relating to the specific procedural context in which counsel is contending that although the danger was obvious, plaintiff did not have to look fixedly at the walkway or be on the constant lookout for danger. These points and authorities may also be

adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss plaintiff's normal use of the walkway and exercise of ordinary care as well as the position of the danger (for example, plaintiff was walking slowly along the middle of the walkway leading to defendant's store and making normal use of the path when plaintiff tripped over a hole in the walkway).

[c] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 178.36* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Fixed Look at Walkway and Constant Lookout for Danger Not Required

In ***Peters v. City & County of San Francisco*** *(1953) 41 Cal. 2d 419, 260 P.2d 55* , plaintiff, an elderly lady, was injured in a fall while walking along a sidewalk abutting defendants' property. Plaintiff sued the property owners and the city of San Francisco. The sidewalk area on which the accident occurred was directly in front of the driveway on the abutting property. The driveway sloped downhill toward the garage and the slope extended out from the building to a point halfway across the sidewalk. Plaintiff was walking along the sidewalk, did not see the depression, and fell. The jury returned a verdict for plaintiff and against the city, but held for the owners of the property against plaintiff. Both plaintiff and the city appealed.

The Supreme Court reversed the judgment as to the owners of the property and affirmed as to the city. The Court held that a misleadinginstruction on the liability of abutting landowners for conditions on sidewalks had been given which, in light of the verdict against the city, was in all probability the reason for the incongruous decision (*41 Cal. 2d 419, 424)* . The abutting owners argued that even if the instruction was misleading, they were relieved of liability in that the evidence established that plaintiff was negligent in not seeing the depression. The Court responded that it was well settled that in the absence of knowledge to the contrary, a pedestrian making normal use of a public walkway has the right to assume that it is in reasonably safe condition, and that while a pedestrian must use ordinary care, he or she is not required to keep his or her eyes fixed on the ground or be on constant lookout for danger (*41 Cal. 2d 419, 424)* .

[4] Additional Authorities

[a] Fixed Look at Walkway and Constant Lookout for Danger Not Required

In *Milton v. Montgomery Ward & Co., Inc. (1973) 33 Cal. App. 3d 133, 108 Cal. Rptr. 726* , the jury returned a verdict in favor of plaintiff who slipped on some transparent grease or oil on the floor of defendant's auto service center. Defendant appealed and the court of appeal affirmed. One of defendant's contentions was that the trial court erred in instructing the jury that a person using a walkway is not required in the exercise of ordinary care to look fixedly at the walk in front of him or her or be on the constant lookout for danger, but has the right to assume it is in reasonably safe condition in the absence of knowledge to the contrary. The court held that the instruction was not improper because it was approved for sidewalk cases [*see Peters v. City & County of San Francisco (1953) 41 Cal. 2d 419, 424-425, 260 P.2d 55]* , and defendant should be held to a standard no lower than that applicable to a city for a public sidewalk (*33 Cal. App. 3d 133, 142)* .

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Volume 17 Chapters 170-179 PARTNERSHIPS---to---PREMISES LIABILITY
CHAPTER 178 PREMISES LIABILITY
PART II. FORMS
A. General Liability of Owner or Possessor

17-178 California Points & Authorities § 178.27

§ 178.27 Supporting Contention That Owner or Possessor of Premises Is Liable--Harm Due to Obvious Danger--Person Not Required to Make Critical Examination of Premises

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF WAS NOT REQUIRED TO MAKE A CRITICAL EXAMINATION OF THE PREMISES, BUT HAD THE RIGHT TO ASSUME THAT REASONABLE INSPECTIONS HAD BEEN MADE AND PROPER PRECAUTIONS HAD BEEN TAKEN BY DEFENDANT _____ [OWNER *or* POSSESSOR].

Critical Examination Not Required. A person on the premises is not obliged to make a critical examination of the surroundings he or she is about to enter, but has the right to assume that the owner or possessor of the premises has exercised due care in the matter of inspection and in taking proper precautions for the safety of persons entering the premises (*Chance v. Lawry's, Inc. (1962) 58 Cal. 2d 368, 373-374, 24 Cal. Rptr. 209, 374 P.2d 185*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of plaintiff's contention that although the danger on defendant's premises was obvious, defendant is still liable because plaintiff was not required to make a critical examination of the surroundings and had the right to assume that defendant had inspected the premises and taken proper precautions for the safety of persons entering the premises.

For a discussion of the use of case law defining duties owed to invitees that predate the decision in *Rowland v. Christian* [Rowland v. Christian (1968) 69 Cal. 2d l08, *70 Cal. Rptr. 97, 443 P.2d 561]* , see *§ 178.03[4]*.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel is contending that defendant is liable because he or she failed to inspect his

or her premises and to take proper precautions for the safety of persons entering the premises. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the danger and the fact that it was not obvious to a person not making a critical examination of the premises.

[c] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 178.36* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Critical Examination Not Required

In ***Chance v. Lawry's, Inc.*** *(1962) 58 Cal. 2d 368, 24 Cal. Rptr. 209, 374 P.2d 185* , plaintiff was injured in a fall into an open planter box in the crowded foyer of defendant's restaurant. The foyer was in the process of being remodeled and the planter box was part of this undertaking. Plaintiff sued the owner and manager of the restaurant, as well as the contractor working on the premises. The jury returned a verdict in favor of plaintiff and all three defendants appealed.

The Supreme Court affirmed the judgment. Defendant restaurant argued on appeal that there was no duty to warn of the planter box because it was so obvious that it could reasonably have been anticipated that a patron would see and apprehend the danger and plaintiff was guilty of contributory negligence as a matter of law. The Court held that the question of the obviousness of the danger was a jury question and that plaintiff could not be held to be contributorily negligent as a matter of law (*58 Cal. 2d 368, 374)* . The Court stated that a business invitee is not obliged to make a critical examination of the surroundings he or she is about to enter, but has the right to assume that those in charge have exercised due care in the matter of inspection, have taken proper precautions for the safety of the patrons, and will use reasonable care in guarding against injury (*58 Cal. 2d 368, 373-374)* .

[4] Additional Authorities

[a] Critical Examination Not Required

In *Celli v. Sports Car Club of Am., Inc. (1972) 29 Cal. App. 3d 511, 105 Cal. Rptr. 904* , three plaintiffs were injured at defendant's sports car racing event by a car that left the track and skidded into the infield of the track where plaintiffs were watching. All three held "pit passes" that allowed them to be in the infield area that was separated from the track by a row of cars parked at right angles to it. The persons holding pit passes watched the race from atop the automobiles or in front of them. The jury returned a verdict in favor of all three plaintiffs, and defendant appealed. The court of appeal affirmed. One of the contentions on appeal was that the trial court refused a proffered instruction on contributory negligence, in that the jury should have been permitted to determine whether or not, in the exercise of ordinary care, the danger should have been discovered. The court stated that defendant's contention overlooked the fact that the patron at a recreation facility is not obliged to make a critical examination of the area he or she is about to use, but has the right to assume that those in charge have exercised due care in the matter of inspections and have taken proper precautions (*29 Cal. App. 3d 511, 523)* .

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A. General Liability of Owner or Possessor

17-178 California Points & Authorities § 178.28

§ 178.28 Supporting Contention That Owner or Possessor of Premises Is Liable--Harm Due to Obvious Danger--Practical Necessity to Encounter Obvious Danger

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT OWED A DUTY OF CARE TO PLAINTIFF BECAUSE IT WAS FORESEEABLE THAT EVEN AN OBVIOUS DANGER MAY CAUSE INJURY, IN THAT THE PRACTICAL NECESSITY OF ENCOUNTERING THE DANGER, WHEN WEIGHED AGAINST THE APPARENT RISK, WAS SUCH THAT UNDER THE CIRCUMSTANCES, A PERSON MIGHT CHOOSE TO ENCOUNTER THE DANGER.

A. Obvious Danger May Foreseeably Injure When There Is Practical Necessity to Encounter Danger. It is foreseeable that even an obvious danger may cause injury if the practical necessity of encountering the danger, when weighed against the apparent risk involved, is such that under the circumstances, a person might choose to encounter the danger (*Reyes v. Kosha (1998) 65 Cal. App. 4th 451, 461, 76 Cal. Rptr. 2d 457* ; *Osborn v. Mission Ready Mix (1990) 224 Cal. App. 3d 104, 118-119, 273 Cal. Rptr. 457*).

B. Foreseeability Considered With Burden and Consequence of Duty to Remedy. The foreseeability of injury based on a choice to encounter an obvious danger because of practical necessity, when considered along with various other policy considerations such as the extent of the burden to the defendant and consequences to the community of imposing a duty to remedy such danger, may lead to a legal conclusion that the defendant owes a duty of care to all persons who are foreseeably endangered by his or her conduct, with respect to all risks that make the conduct unreasonably dangerous (*Reyes v. Kosha (1998) 65 Cal. App. 4th 451, 461-462, 76 Cal. Rptr. 2d 457* ; *Osborn v. Mission Ready Mix (1990) 224 Cal. App. 3d 104, 118-119, 273 Cal. Rptr. 457*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a plaintiff's contention that, despite the fact that the plaintiff encountered an obvious danger that caused his or her injuries, the defendant had a duty of careto safeguard the plaintiff against the risk because it was foreseeable that a person under the circumstance may choose to encounter the danger because of practical necessity.

For a discussion of the policy considerations applicable in determining whether a defendant owes a duty of care to an injured party, see *§ 178.03[3]*.

This form may be combined with points and authorities pertaining to the specific procedural context in which the issue of an owner's or possessor's duty to a person who was injured by a dangerous condition on the premises is brought before the court. It may be used in a memorandum of points and authorities in connection with a pretrial motion, such as a demurrer or motion for summary judgment or summary adjudication, or in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. That is, counsel should identify facts indicating: (1) the practical necessity that could lead a person such as the plaintiff to encounter the obvious risk; and (2) that the choice to do so and resulting injury was foreseeable under the circumstances (Paragraph A). In addition, counsel should also identify facts indicating a relatively light burden on the defendant and the community of imposing a duty to remedy the danger (as well as any facts pertaining to other relevant policy considerations), when balanced with the foreseeability of injury (Paragraph B).

[c] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 178.36* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Obvious Danger May Foreseeably Injure When There Is Practical Necessity to Encounter Danger

In ***Reyes v. Kosha*** *(1998) 65 Cal. App. 4th 451, 76 Cal. Rptr. 2d 457* , plaintiffs were a migrant farm worker and the surviving widow and children of a deceased second farm worker, while defendant was the employing farmer who permitted his workers to live rent-free in an encampment on the farm in shacks constructed of discarded materials. Plaintiffs brought suit seeking damages for injuries sustained following a fire within the encampment. The plaintiffs alleged, inter alia, general negligence, premises liability, and negligence per se. The trial court granted summary judgment for defendant, finding that, as to the actions for negligence and premises liability, the farmer owed no common-law duty of care to warn about or make safe the conditions at the encampment, because the workers voluntarily chose to reside there and the dangers were obvious.

The court of appeal reversed the summary judgment, holding that defendant owed a common-law duty of care to provide reasonably safe housing for his employees under the circumstances. The court of appeal found that the risk of fire was highly foreseeable, given that the workers lived in highly flammable structures and used an open flame for lighting and heating. In addition to the foreseeability of the risk, the court applied the *Rowland* factors and found that each of the factors militated in favor of imposing a duty of care under the circumstances (*65 Cal. App. 4th 451, 458-459)* . The court distinguished prior cases in which the farmer either had no knowledge of an encampment or was only an adjoining landowner without sufficient control over the camp (*65 Cal. App. 4th 451, 459-461)* . Addressing the issue of the obviousness of the risk of fire, the court recognized the general rule a landowner owes no duty to remedy or warn of obvious dangers on the property, but also restated the exception that, if the practical necessity of encountering the danger, when weighed against the apparent risk, is such that a person under the circumstances might choose to encounter the danger, a duty may exist (*65 Cal. App. 4th 451, 461)* .

The facts and procedural background of ***Osborn v. Mission Ready Mix*** *(1990) 224 Cal. App. 3d 104, 273 Cal. Rptr. 457* , are discussed in *§ 178.25[3][b]*. The court of appeal, in holding that the trial court's instruction to the effect that a contractor or possessor of land cannot be liable for an injury caused by an obvious or observable danger was erroneous and prejudicial, stated that it is foreseeable that even an obvious danger may cause injury, if the practical necessity of encountering the danger, when weighed against the apparent risk involved, is such that under the circumstances, a person might choose to encounter the danger (*224 Cal. App. 3d 104, 121)* .

[b] Foreseeability Considered With Burden and Consequence of Duty to Remedy

The facts and procedural background of ***Reyes v. Kosha*** *(1998) 65 Cal. App. 4th 451, 76 Cal. Rptr. 2d 457* , are discussed in *§ 178.28[3][a]*. In concluding that a duty to provide reasonably safe housing could be imposed on the farmer under the circumstances, the court recognized the practical necessity to the workers of living rent-free in the encampment, and that when weighed against the apparent risk involved, it was reasonably foreseeable that the workers would choose to encounter the danger. This foreseeability, combined with the other policy considerations embodied in the *Rowland* factors, led to the legal conclusion that the farmerowed a duty in spite of the obviousness of the danger (*65 Cal. App. 4th 451, 461-462)* .

The facts and procedural background of ***Osborn v. Mission Ready Mix*** *(1990) 224 Cal. App. 3d 104, 273 Cal. Rptr. 457* , are discussed in *§ 178.25[3][b]*. The court of appeal held that the foreseeability of injury (based on a choice to encounter an obvious danger because of practical necessity), when considered along with various other policy considerations such as the extent of the burden to the defendant and consequence to the community of imposing a duty to remedy such danger, may lead to the legal conclusion that the defendant owes a duty of care to all persons who are foreseeably endangered by his or her conduct, with respect to all risks that make the conduct unreasonably dangerous (*224 Cal. App. 3d 104, 121)* .

[4] Additional Authorities

[a] Obvious Danger May Foreseeably Injure if There Is Practical Necessity to Encounter Danger

In *Martinez v. Chippewa Enters., Inc. (2004) 121 Cal. App. 4th 1179, 18 Cal. Rptr. 3d 152* , the plaintiff slipped and fell in water that had gathered on the sidewalk and driveway leading into a commercial building. the plaintiff sued the landowner, but the trial court granted summary judgment for the defendant on the grounds that the danger from the water was open and obvious. The court of appeal reversed. The court held that even though the parties agreed that the danger from the water was obvious, this only relieved the defendant of the duty to warn and did not necessarily relieve defendant of the duty to remedy the danger. The court noted, for example, that it appeared from pictures that the wet pavement may have provided a primary or even sole means of entering the building, and under the circumstances it may have been foreseeable that despite the hazard, people such as the plaintiff would still have attempted to cross the wet pavement out of necessity. Given this possibility for finding that a duty of care still existed, and unresolved issues such as the defendant's knowledge of the hazard and the source of the water, the trial court erred in granting summary judgment to the defendant (*121 Cal. App. 4th 1179, 1184-1185)* .

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17-178 California Points & Authorities § 178.29

§ 178.29 Supporting Contention That Owner or Possessor of Premises Is Liable--Dangerous Condition on Abutting Public Sidewalk That Was Altered or Constructed for Benefit of Property and Independent Use

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT _____ [OWNER *or* POSSESSOR] IS LIABLE FOR THE INJURIES TO PLAINTIFF RESULTING FROM THE DANGEROUS CONDITION ON THE PUBLIC SIDEWALK ABUTTING DEFENDANT'S PROPERTY BECAUSE THE SIDEWALK WAS _____ [ALTERED *or* CONSTRUCTED] FOR THE PROPERTY'S BENEFIT AND SERVES A USE INDEPENDENT FROM THE ORDINARY USE OF A SIDEWALK.

A. Liability for Dangerous Condition of Abutting Sidewalk. An abutting owner or possessor may be held liable for the dangerous condition of portions of the public sidewalk that have been altered or constructed for the benefit of his or her property and that serve a use independent from the ordinary and accustomed use for which sidewalks are designed (*Peters v. City & County of San Francisco (1953) 41 Cal. 2d 419, 423, 260 P.2d 55*).

[*Optional*] **B. Duty to Maintain Runs With Land.** The duty to maintain portions of a sidewalk that have been altered for the benefit of the property runs with the land, and the owner or possessor cannot escape liability if the dangerous condition was created by his or her predecessors in title (*Peters v. City & County of San Francisco (1953) 41 Cal. 2d 419, 423, 260 P.2d 55*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of plaintiff's contention that defendant owner or possessor is liable for an injury resulting from a dangerous condition on a sidewalk abutting defendant's property when the sidewalk was altered or constructed for the property's benefit and serves a use independent from the ordinary use for sidewalks.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of liability for a dangerouscondition of an abutting sidewalk. Optional Paragraph B should be used when the alteration or construction was made at the request of a predecessor in title to the present possessor.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts that show that the construction or alteration of the portion of the sidewalk on which the accident occurred benefits the property, and that the use served is not the customary and ordinary use made of a sidewalk.

[c] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 178.37* may be submitted in opposition to the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Liability for Dangerous Condition of Abutting Sidewalk

The facts and procedural background of ***Peters v. City & County of San Francisco*** *(1953) 41 Cal. 2d 419, 260 P.2d 55* , are discussed in *§ 178.26[3][a]*. The Supreme Court reversed a judgment entered against plaintiff and in favor of the owners of property abutting a public sidewalk. Plaintiff was injured when she fell into a depression in the sidewalk that was an extension of the driveway constructed by the owners' predecessors in interest. The driveway sloped down from street level because the level of the garage was below the street. The slope of the driveway extended out to the middle of the sidewalk. The Court stated that an abutting landowner may be held liable for the dangerous condition of portions of the public sidewalk that have been altered or constructed for the benefit of his or her property and that serve a use independent from the ordinary and accustomed use for which sidewalks are designed. The Court held that the jury instructions given were erroneous in that they implied that only the property owner who created a dangerous condition was liable. The Court stated that the duty to maintain portions of a sidewalk that have been altered for the benefit of the property runs with the land, and a property owner cannot avoid liability on the ground that the condition was created by, or at the request of, his or her predecessors in title (*41 Cal. 2d 419, 423)* .

[b] Duty to Maintain Runs With Land

Peters v. City & County of San Francisco *(1953) 41 Cal. 2d 419, 260 P.2d 55* , is discussed in *§ 178.29[3][a]*.

[4] Additional Authorities

[a] Liability for Dangerous Condition of Abutting Sidewalk

In *Sexton v. Brooks (1952) 39 Cal. 2d 153, 245 P.2d 496* , plaintiff was injured in a fall in front of a building located on property owned by defendant, of which a portion extending from the building line to the street had been dedicated for public use prior to defendant's ownership. The city had constructed a sidewalk along the street, but had left an unpaved 18-inch strip between the building line and the sidewalk. Plaintiff tripped on a portion of the strip that was not level with the sidewalk. The jury returned a verdict for plaintiff and the Supreme Court reversed the judgment on the basis of error in jury instructions, partly because there were no instructions dealing with the duty of an abutting landowner for a dangerous condition of a public sidewalk (*39 Cal. 2d 153, 158)* . In the absence of a statute, the Court stated that there is no duty on the part of a landowner to maintain in a safe condition a public street abutting the

property. However, an abutting owner is liable for the condition of portions of the public sidewalk that he or she has altered or constructed for the benefit of the property and that serve a use independent from the ordinary and accustomed use for which sidewalks are designed (*39 Cal. 2d 153, 157)* .

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17-178 California Points & Authorities § 178.30

§ 178.30 Supporting Contention That Owner or Possessor of Premises Is Liable--Injury Resulted From Plaintiff's Use of Premises Known to Be Dangerous--Plaintiff's Secondary Assumption of Risk Does Not Bar Recovery

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S CHOOSING TO ENCOUNTER THE RISK OF USING A PORTION OF THE PREMISES THAT PLAINTIFF KNEW TO BE DANGEROUS DOES NOT RELIEVE DEFENDANT _____ [OWNER *or* POSSESSOR] FROM LIABILITY BECAUSE DEFENDANT'S DUTY OF CARE TO PLAINTIFF TO ELIMINATE THE DANGER, AND BREACH OF THAT DUTY OF CARE, MAKES PLAIN TIFF'S ACTIONS SECONDARY ASSUMPTION OF RISK AT MOST, WHICH DOES NOT BAR RECOVERY.

Secondary Assumption of Risk of Dangerous Conditions Does Not Bar Recovery. A plaintiff who uses a portion of the defendant's property that both the plaintiff and the defendant know to be dangerous is not barred from recovery under the doctrine of primary assumption of risk because the defendant has a duty of care to the plaintiff to eliminate dangers on its property and has breached that duty by maintaining a portion of its property in a dangerous condition; under these circumstances, the plaintiff's conduct is, at most, secondary assumption of risk, and plantiff's damages would be apportioned on a comparative fault basis (*Curties v. Hill Top Developers, Inc. (1993) 14 Cal. App. 4th 1651, 1655-1656, 18 Cal. Rptr. 2d 445*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a defendant owner or possessor is liable for an injury resulting from a dangerous condition on its premises, despite the plaintiff's knowing about the risk but choosing to encounter it by using that portion of the premises. Under the doctrine of secondary assumption of risk, a plaintiff who assumes a known risk is not barred from recovery if the defendant breached a duty of care owed to the

plaintiff, such as the duty to eliminate dangerous conditions on the defendant's premises. Instead, the plaintiff's damages would be apportioned on a comparative fault basis [*see Curties v. Hill Top Developers, Inc. (1993) 14 Cal. App. 4th 1651, 1655-1656, 18 Cal. Rptr. 2d 445]* .

These points and authorities would be submitted along with appropriate points and authorities supporting the contention that the defendant was liable to the plaintiff because the defendant had a duty of care and breached that duty of care [*see, e.g., §§ 178.20, 178.23*]. Thus, they would support the contention that any fault by the plaintiff in assuming the risk would not result in the elimination of that liability but would instead be treated as comparative negligence.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of secondary assumption of risk. For example, this form may be used to oppose a defendant's motion for summary judgment [*see Code. Civ. Proc. § 437c*]. It may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should assert facts tending to establish that other persons had previously suffered injuries caused by the dangerous condition, that the defendant knew about these incidents, and that the defendant had taken no steps to remove the danger.

[3] Discussion of Authorities

[a] Secondary Assumption of Risk of Dangerous Conditions Does Not Bar Recovery

Curties v. Hill Top Developers, Inc. *(1993) 14 Cal. App. 4th 1651, 18 Cal. Rptr. 2d 445* , was an action brought by a resident of an apartment complex against the owner of the apartment complex for damages for personal injuries suffered when the resident slipped and fell on a sloping lawn between his apartment and the complex's garbage dumpster. Both the plaintiff and the defendant knew that other people had previously slipped and fallen on the lawn, but the defendant had not taken any steps to change the slope. After the trial court instructed the jury regarding reasonable implied assumption of risk, the jury determined that the plaintiff assumed the risk of injury, and the trial court entered judgment for the defendant.

Plaintiff appealed and the court of appeal reversed, holding that the jury had been improperly instructed. Following the lead opinion in *Knight v. Jewett* [*Knight v. Jewett (1992) 3 Cal. 4th 296, 314-315, 11 Cal. Rptr. 2d 2, 834 P.2d 696* ; *see § 178.36[2][b]*], the court of appeal held that implied assumption of the risk would not apply to bar the plaintiff's recovery completely because the plaintiff's case fell into the secondary assumption of risk category. The court noted that the evidence showed and the jury found that the defendant had a duty of care to the plaintiff to eliminate dangerous conditions on its property and breached that duty by maintaining the sloping lawn despite reports of earlier accidents, and the plaintiff knowingly proceeded to encounter the risk created by the defendant (*14 Cal. App. 4th 1651, 1656)* .

[4] Additional Authorities

[a] Secondary Assumption of Risk of Dangerous Conditions Does Not Bar Recovery

In *Bush v. Parents Without Partners (1993) 17 Cal. App. 4th 322, 21 Cal. Rptr. 2d 178* , the court of appeal reversed summary judgment for defendants in an action for personal injuries brought by plaintiff againstthe sponsor of a dance and the owners of the premises at which the dance took place. Soap flakes had been applied to the dance floor to make it easier for dancers' feet to slide, and the plaintiff waited until the floor had been swept before attempting to dance. However, some of the flakes remained on the floor. The court applied the doctrine of secondary assumption of risk, analogizing this situation to the example used by the Supreme Court in *Knight v. Jewett* [*Knight v. Jewett (1992) 3*

Cal. 4th 296, 315-316, 11 Cal. Rptr. 2d 2, 834 P.2d 696] of a ski resort that has no duty to remove moguls from a ski run, because the moguls are an inherent part of the sport of skiing, but does have a duty to maintain its tow ropes in safe working condition. The court held that the defendants had no legal duty to protect the plaintiff against the inherent risks of social dancing, which may include falling, but they did have a duty to use due care not to increase the risk by making the floor too slippery (*17 Cal. App. 4th 322, 329)* .

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17-178 California Points & Authorities § 178.31

§ 178.31 Supporting Contention That Former Owner or Possessor of Premises Is Liable--Concealment of or Failure to Disclose Dangerous Condition

[1] FORM

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

DEFENDANT IS LIABLE AS THE FORMER _____ [OWNER *or* POSSESSOR] OF THE PREMISES BECAUSE DEFENDANT, AS VENDOR, _____[CONCEALED *or* FAILED TO DISCLOSE] TO HIS/HER/ITS VENDEE A CONDITION INVOLVING UNREASONABLE RISK TO PERSONS ON THE PREMISES, THE VENDEE DID NOT KNOW OR HAVE REASON TO KNOW OF THE CONDITION OR THE RISK INVOLVED, AND DEFENDANT KNEW OR HAD REASON TO KNOW OF THE CONDITION, REALIZED OR SHOULD HAVE REALIZED THE RISK INVOLVED, AND HAD REASON TO BELIEVE THAT THE VENDEE WOULD NOT DISCOVER THE CONDITION OR REALIZE THE RISK.

A. Liability of Former Owner or Possessor for Dangerous Condition. A former owner or possessor of premises is liable for physical harm that was caused by a condition on the premises and that occurred after the former owner or possessor had relinquished ownership, possession, and control, if: (1) the former owner or possessor, as vendor of the premises, concealed or failed to disclose to the vendee a condition that involved unreasonable risk to persons on the premises; (2) the vendee did not know or have reason to know of the condition or risk involved; and (3) the former owner or possessor knew or had reason to know of the condition and realized or should have realized the risk involved, and had reason to believe that the vendee would not discover the condition or realize the risk (*Lorenzen-Hughes v. MacElhenny, Levy & Co. (1994) 24 Cal. App. 4th 1684, 1688-1689, 30 Cal. Rptr. 2d 210*).

B. Duration of Liability. If the vendor actively conceals the condition, liability continues until the vendee discovers and has reasonable opportunity to take effective precautions against it; otherwise, liability continues only until the vendee has had reasonable opportunity to discover the condition and take such precautions (*Lorenzen-Hughes v. MacElhenny, Levy & Co. (1994) 24 Cal. App. 4th 1684, 1688-1689, 30 Cal. Rptr. 2d 210*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of plaintiff's contention that a former owner or possessor of premises is liable for injuries to plaintiff caused by a dangerous condition on the premises because defendant, as vendor of the premises, knew about the condition and the risk it entailed, knew that the vendee was unaware of the condition or the risk and unlikely to discover the condition or realize the risk, and concealed or failed to disclose the condition to the vendee.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which the issue of defendant's liability arises, or combined with other forms in this chapter, as appropriate. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the particular condition, the risk it involved, defendant's knowledge of the condition and risk, defendant's knowledge of the vendee's ignorance of the condition and risk, defendant's reason for believing that the vendee would not discover the condition or realize the risk, defendant's concealment or failure to disclose the condition, and when the vendee discovered or had reasonable opportunity to discover the condition and take effective precautions against it.

[c] Liability of Former Owner or Possessor and Summary Judgment

Ownership, possession, or control is a fundamental requirement for ascribing liability to a defendant for the defective or dangerous condition of property. Therefore, summary judgment is proper if defendant has unequivocally established the absence of ownership, possession, and control [*Preston v. Goldman (1986), 42 Cal. 3d 108, 119, 227 Cal. Rptr. 817, 720 P.2d 476]* . However, once the burden of proof has shifted to plaintiff [*see Code Civ. Proc. § 437c(n)(2)*], plaintiff may defeat the motion for summary judgment if plaintiff can prove that defendant either was the builder, contractor, or developer of the entire property [*see § 178.32*] or that defendant deliberately concealed, or failed to disclose, the dangerous condition [*Lorenzen-Hughes v. MacElhenny, Levy & Co. (1994) 24 Cal. App. 4th 1684, 1687-1689, 30 Cal. Rptr. 2d 210]* .

[d] Related Pleading and Practice Forms

For forms and discussion regarding premises liability generally, see California Forms of Pleading and Practice, Ch. 421, *Premises Liability* (Matthew Bender).

[3] Discussion of Authorities

[a] Liability of Former Owner or Possessor for Dangerous Condition

In ***Lorenzen-Hughes v. MacElhenny, Levy & Co.*** *(1994) 24 Cal. App. 4th 1684, 30 Cal. Rptr. 2d 210* , plaintiff was injured at work when a cabinet fell from the wall. The cabinet had been installed years before by a contractor doing a minor remodeling project for defendant, the previous tenant, who had transferred its assets and lease to plaintiff's employer a few years after the remodeling was completed. Plaintiff brought suit against defendant, who moved for summary judgment on the grounds that it had relinquished possession and control of the premises years before the accident occurred. The trial court granted defendant's motion, and plaintiff appealed.

The court of appeal affirmed, holding that a transferor of an interest in real property is not liable for latent defects in the property that the transferor did not know about and had no reason to believe existed (*24 Cal. App. 4th 1684, 1685)* . The court noted that nearly all states, including California, follow the rule of *caveat emptor* (buyer beware) and absolve

predecessor owners of liability for negligent improvements made to the property once they have relinquished ownership and control of the property (*24 Cal. App. 4th 1684, 1687)* . The court acknowledged two exceptions to this general rule: first, the liability of a predecessor owner, such as a commercial developer, who was the contractor or builder of the entire property, and second, the provisions of Restatement (Second) of Torts, § 353, which subject a vendor to liability for injuries caused by a dangerous condition after the vendee takes possession if the vendor conceals or fails to disclose the condition, the vendee does not know or have reason to know of the condition or the risk it involves, and the vendor knows or has reason to know of the condition, realizes or should realize the risk involved, and has reason to believe the vendee will not discover the condition or realize the risk. In this case, the defendant merely had a cabinet installed and did not develop the entire property. By the plaintiff's own admission, no one could have known that the cabinet had not been properly attached to the wall until it fell. Therefore, neither exception applied to defendant and defendant could not be liable (*24 Cal. App. 4th 1684, 1688-1689)* .

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A. General Liability of Owner or Possessor

17-178 California Points & Authorities § 178.32

§ 178.32 Supporting Contention That Former Owner or Possessor of Premises Is Liable--Contractor or Builder of Entire Property

[1] FORM

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

DEFENDANT IS LIABLE AS THE FORMER _____ [OWNER *or* POSSESSOR] OF THE PREMISES BECAUSE HE/SHE/IT WAS THE _____[CONTRACTOR *or* BUILDER *or* DEVELOPER] OF THE ENTIRE PROPERTY.

Liability of Former Owner or Possessor for Dangerous Condition. A predecessor owner or possessor of premises may be liable for physical harm that is caused by a condition on the land and that occurs after the predecessor owner has relinquished possession and control, if the predecessor owner or possessor was the contractor or builder of the entire property (*see Lorenzen-Hughes v. MacElhenny, Levy & Co. (1994) 24 Cal. App. 4th 1684, 1687-1689, 30 Cal. Rptr. 2d 210*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of plaintiff's contention that a former owner or possessor of premises is liable for injuries to plaintiff caused by a dangerous condition on the premises because defendant was the contractor, builder, or developer of the entire property.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which the issue of defendant's liability arises, or combined with other forms in this chapter, as appropriate. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss defendant's role as contractor, builder, or developer of the entire property, as well as the particular dangerous condition resulting in plaintiff's injuries.

[c] Liability of Former Owner or Possessor and Summary Judgment

Ownership, possession, or control is a fundamental requirement for ascribing liability to a defendant for the defective or dangerous condition of property. Therefore, summary judgment is proper if defendant has unequivocally established the absence of ownership, possession, and control [*Preston v. Goldman (1986), 42 Cal. 3d 108, 119, 227 Cal. Rptr. 817, 720 P.2d 476]* . However, once the burden of proof has shifted to plaintiff [*see Code Civ. Proc. § 437c(n)(2)*], plaintiff may defeat the motion for summary judgment if plaintiff can prove that defendant either the defendant deliberately concealed, or failed to disclose, the dangerous condition [*see § 178.31*] or was the builder, contractor, or developer of the entire property [*Lorenzen-Hughes v. MacElhenny, Levy & Co. (1994) 24 Cal. App. 4th 1684, 1688-1689, 30 Cal. Rptr. 2d 210]* .

[d] Related Pleading and Practice Forms

For forms and discussion regarding premises liability generally, see California Forms of Pleading and Practice, Ch. 421, *Premises Liability* (Matthew Bender).

[3] Discussion of Authorities

[a] Liability of Former Owners or Possessor for Dangerous Conditions

Lorenzen-Hughes v. MacElhenny, Levy & Co. *(1994) 24 Cal. App. 4th 1684, 30 Cal. Rptr. 2d 210* , is discussed in *§ 178.31[3][a]*.

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17-178 California Points & Authorities § 178.33

§ 178.33 Opposing Contention That Owner or Possessor of Premises Is Liable--Status of Person on Premises Shows Risk Not Foreseeable

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief* .]

DEFENDANT _____ [OWNER *or* POSSESSOR] IS NOT LIABLE FOR THE HARM TO PLAINTIFF BECAUSE PLAINTIFF'S STATUS ON THE PREMISES AT THE TIME OF INJURY SHOWS THAT THE RISK OF HARM WAS NOT FORESEEABLE BY DEFENDANT.

A. Status of Person on Premises as Relevant to Determination of Owner's or Possessor's Liability. [*See § 178.20, Paragraph D.*]

B. Status of Person on Premises as Affecting Foreseeability of Risk. [*See § 178.20, Paragraph E.*]

[*Optional*] **C. Status as Licensee.** A licensee is a person such as a social guest who is not an invitee and who is privileged to enter and remain on the premises only with the owner's or possessor's consent (see *Rowland v. Christian (1968) 69 Cal. 2d 108, 113, 70 Cal. Rptr. 97, 443 P.2d 561*).

[*Optional*] **D. Status as Trespasser.** A trespasser is a person who enters or remains on the premises of the possessor without the express or implied consent of the possessor (*Hamakawa v. Crescent Wharf & Warehouse Co. (1935) 4 Cal. 2d 499, 501-503, 50 P.2d 803* ; see *Bisetti v. United Refrigeration Corp. (1985) 174 Cal. App. 3d 643, 648-651, 220 Cal. Rptr. 209*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that defendant failed to act as a reasonable

person in the management of his or her property in light of the probability of injury to others. This form is based on the ground that the harm to plaintiff was not foreseeable in light of plaintiff's status on the premises at the time of injury. For example, while it appears that there is a duty to warn a licensee of a known concealed danger that the possessor knows the licensee is about to encounter [*Rowland v. Christian (1968) 69 Cal. 2d 108, 119, 70 Cal. Rptr. 97, 443 P.2d 561]* , the duty on the part of a landlord owed to an invitee, protecting the invitee from the criminal conduct of third personshas not been extended to a licensee [*Totten v. More Oakland Residential Hous., Inc. (1976) 63 Cal. App. 3d 538, 544-546, 134 Cal. Rptr. 29* (discussed in *§ 178.33[4*][a])].

For a discussion of the use of case law defining duties owed to persons on premises that predates the decision in *Rowland v. Christian (1968) 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561* , see *§ 178.03[4]*.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel is responding to the contention that the harm to plaintiff was foreseeable in light of plaintiff's status on the premises at the time of injury. These points and authorities may also be adapted for use in a trial or appellate brief.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 178.20* that the harm to plaintiff was foreseeable.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts relating to the status of plaintiff on the premises at the time of injury, including the circumstances surrounding plaintiff's entry on the premises or a certain portion thereof, and should show how the plaintiff's injury was not foreseeable in light of these facts.

[3] Discussion of Authorities

[a] Status as Licensee

The facts and procedural background of ***Rowland v. Christian*** *(1968) 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561* , are discussed in *§ 178.20[3][a]*. The Supreme Court reversed a summary judgment in favor of a tenant who failed to warn a social guest of a broken faucet. Plaintiff was classified as a licensee, a person to whom a duty to warn of a known concealed danger had previously not been owed. In discussing the classifications of persons on the premises, the Court stated that a licensee is a person like a social guest who is not an invitee and who is privileged to enter or remain on the premises by virtue of the possessor's consent (*69 Cal. 2d 108, 113)* .

[b] Status as Trespasser

In ***Hamakawa v. Crescent Wharf & Warehouse Co.*** *(1935) 4 Cal. 2d 499, 50 P.2d 803* , plaintiff was injured while walking on a balcony of a warehouse toward a ship that was docked at a municipal pier. Plaintiff had been invited by a crew member of the ship to come aboard to look at some fish. Defendant was a stevedoring company loading cargo from the balcony of the warehouse to the ship. Plaintiff was injured when an empty sling on the cable being used to load the ship hit a bale of paper on the balcony that in turn fell on plaintiff. The evidence at trial disclosed that defendant had permission from the corporation in control of the docks to load the material, that defendant had no knowledge of plaintiff's presence, that all visitors to the ship were required to obtain a permit from the office of the corporation, and that visitors who obtained a permit were conducted to the ship by way of a route that did not pass through the territory occupied by defendant. The jury returned a verdict for plaintiff, and defendant moved for a judgment notwithstanding the verdict. Defendant's motion was denied, and defendant appealed. The Supreme Court reversed the order denying defendant's motion.

The Court concluded that since plaintiff wandered into a portion of the premises where he had no right to be, he was a trespasser on the portion of the premises occupied by defendant (*4 Cal. 2d 499, 503)* . No consent was given by defendant to plaintiff to be where he was at the time of injury, and plaintiff was there for a private purpose having nothing to do with the business of defendant or the ship (*4 Cal. 2d 499, 501)* . Since plaintiff was a trespasser, the defendant owed plaintiff a duty to refrain from willful or wanton conduct and to conduct its activities with reasonable care after knowledge of plaintiff's presence or knowledge of facts from which defendant should have known of plaintiff's presence (*4 Cal. 2d 499, 501-502)* . Based on the facts in evidence, the Court stated that plaintiff was not entitled to recover for negligence (*4 Cal. 2d 499, 503)* .

In ***Bisetti v. United Refrigeration Corp.*** *(1985) 174 Cal. App. 3d 643, 220 Cal. Rptr. 209* , plaintiff illegally entered land owned by defendant landlord and leased to defendant tenant by climbing through a hole in the fence surrounding the premises. While on the premises, plaintiff climbed onto a plywood platform covering a vat of caustic chemicals and was severely burned when the board broke and he fell into the vat. Plaintiff brought an action for damages against both defendants. The trial court granted summary judgment in favor of defendant landlord. Plaintiff appealed.

The court of appeal affirmed. The court relied on the standards of landlord liability for injuries on leased property articulated in *Uccello v. Laudenslayer (1975) 44 Cal. App. 3d 504, 118 Cal. Rptr. 741* . When the landlord retains a recognizable degree of control over a dangerous condition on the premises, the landlord has the duty to use ordinary care to eliminate the condition and may be liable for injury caused by failure to act. The injured party's status as a trespasser does not in and of itself preclude liability, although that status is a proper consideration in determining liability. Plaintiff was unable to show either that existence of the vats on the property or the existence of the hole in the fence was adangerous condition or defendant landlord's knowledge of them. There was nothing to indicate that any person would have been endangered by the vats unless that individual came close enough to them so as to touch and come in contact with their contents (*174 Cal. App. 3d 643, 647-651)* .

[4] Additional Authorities

[a] Status as Licensee

Totten v. More Oakland Residential Hous., Inc. (1976) 63 Cal. App. 3d 538, 134 Cal. Rptr. 29 , is discussed in *§ 178.65[3][a]*. The court held that there was no duty on the part of the landlord to protect plaintiff, a social guest of a tenant who was a licensee, from the criminal conduct of third persons (*63 Cal. App. 3d 538, 545-546)* . In doing so, the court pointed out that plaintiff was not a public invitee since the premises was not open to the public and was not a business visitor because she was not entering the premises at the invitation of defendant for any purpose connected with business dealing (*63 Cal. App. 3d 538, 543)* .

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17-178 California Points & Authorities § 178.34

§ 178.34 Opposing Contention That Owner or Possessor of Premises Is Liable--Duty of Care Does Not Extend to Means of Ingress and Egress Over Which Owner or Possessor Has No Control

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT _____ [OWNER'S *or* POSSESSOR'S] DUTY OF DUE CARE OVER THE PREMISES DOES NOT EXTEND TO THE MEANS OF INGRESS AND EGRESS OVER WHICH DEFENDANT HAS NO CONTROL.

No Control Over Means of Ingress or Egress. An owner's or a possessor's duty of care toward persons on the premises does not extend to the means of ingress and egress that the persons are led to employ if the owner or possessor has no control over the avenues of approach (*Nevarez v. Thriftmart, Inc. (1970) 7 Cal. App. 3d 799, 804, 806, 87 Cal. Rptr. 50*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted by defendant owner or possessor in opposition to plaintiff's contention that defendant's duty to exercise reasonable care towards persons on the premises extends to an area either on or off the premises that plaintiff was led to utilize as a means of ingress or egress. This form is based on the ground that defendant had no control over such means of approach.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel is responding to the contention that defendant's duty of care extends to the means of ingress and egress. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss how and why the element of control over the means of ingress and egress was lacking. The element of control is more likely to be found lacking if the means of ingress and egress is not on the premises possessed by defendant [*see, e.g., Nevarez v. Thriftmart, Inc. (1970) 7 Cal. App. 3d 799, 804, 806, 87 Cal. Rptr. 50* ; *see also § 178.34[3][a]*]. Indeed, it may be unlikely that a party can successfully contend that the party had no control over his or her own premises unless the party is a landlord out of possession and the area is not a common area [*see, e.g., Johnston v. De La Guerra Props., Inc. (1946) 28 Cal. 2d 394, 399, 170 P.2d 5* ; *see also § 178.21[3][a]*].

[c] Opposing Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in §§ 178.20* and *178.21*.

[3] Discussion of Authorities

[a] No Control Over Means of Ingress or Egress

In ***Nevarez v. Thriftmart, Inc.*** *(1970) 7 Cal. App. 3d 799, 87 Cal. Rptr. 50* , the court of appeal reversed a judgment entered in favor of plaintiff following a jury trial and directed entry of a judgment notwithstanding the verdict in favor of defendant. Plaintiff, a three-year-old boy, had been hit by a car while running across the street in front of a shopping center to an opening day carnival being held by defendant in the center.

The court of appeal, in reversing the judgment, held that the duty on the part of defendant toward the child did not extend to neighboring streets over which it had no control (*7 Cal. App. 3d 799, 805)* . The court distinguished the cases that held that street vendors owed a duty to a patronto guard against dangerous conditions on public streets [*see, e.g., Schwartz v. Helms Bakery Ltd. (1967) 67 Cal. 2d 232, 239-243, 60 Cal. Rptr. 510, 430 P.2d 68* ; *Ellis v. Trowen Frozen Prods., Inc. (1968) 264 Cal. App. 2d 499, 503, 70 Cal. Rptr. 487* ; *see also § 178.21[4][a]*] (*7 Cal. App. 3d 799, 805-806)* . Unlike defendant, a street vendor invites people to do business with him or her on the public street and the patrons arrive along reasonably predictable routes. In addition, even though there is no control over traffic on a public street, there is control over the avenues of approach to the street vendor's business, in that a street vendor can control his or her movement and where he or she will stop and do business (*7 Cal. App. 3d 799, 805)* .

[4] Additional Authorities

[a] No Control Over Means of Ingress or Egress

In *Gray v. America W. Airlines, Inc. (1989) 209 Cal. App. 3d 76, 256 Cal. Rptr. 877* , plaintiff was an airline passenger who was injured when she tripped over a box left by a fellow passenger in the concourse area adjacent to the airline ticket counter. She sued the airline and the port district for her personal injuries based on premises liability. The trial court granted defendant airline's motion for summary judgment and plaintiff appealed. The court of appeal held that the trial court correctly ruled as a matter of law that the airline owed no duty to the plaintiff to protect her against a risk obvious to both the plaintiff and the airline, as the showing of the extent of the airline's control over the concourse area did not justify the imposition of a duty based on foreseeability of this type of accident. The court stated that, because of the transient nature of the event, some percentage of passengers can be expected to handle their belongings negligently and because of the obvious burden that would be placed on an airline to prevent all such instances of future harm to its customers were such a duty imposed, no duty can be imposed on the businesses serving travelers to safeguard them from tripping on another's luggage in busy common areas like an airport concourse. The area, according to the court, was more analogous to a public street or sidewalk than to the premises of a private business (*209 Cal. App. 3d 76, 84-85)* .

In *Donnell v. California W. Sch. of Law (1988) 200 Cal. App. 3d 715, 246 Cal. Rptr. 199* , plaintiff law student, after leaving the school's library at night and attempting to intercept an auto break-in, was criminally assaulted and stabbed on the city-owned sidewalk bordering the school. He sued the school for actual and punitive damages based on negligence, "conscious disregard of safety," and negligent infliction of emotional distress. His wife sued for damages for loss of consortium. Plaintiffs contended that the school had a duty to take reasonable steps to protect its invitees from foreseeable criminal assaults on sidewalks giving immediate access to its building (*200 Cal. App. 3d 715, 720)* . The trial court granted defendant's motion for summary judgment, and plaintiffs appealed. The court of appeal affirmed. The court said that a defendant cannot be held liable for the defective or dangerous condition of property which it does not own, possess, or control, and that summary judgment is proper if absence of ownership, possession, or control has been unequivocally established (*200 Cal. App. 3d 715, 720)* . The court further stated that the law of premises liability does not extend so far as to hold the school liable merely because its property adjoins dangerous property and it took no action to influence or affect the condition of the adjoining property (*200 Cal. App. 3d 715, 720)* . The court distinguished those cases imposing liability when the defendant's business activities affirmatively created a dangerous physical condition on the sidewalk, when the sidewalk was modified or built specifically to benefit the defendant's property, when the defendant assumed responsibility for or exercised any control over the sidewalk, and when the defendant's activity created the dangerous condition on adjoining property which was within the range of the defendant's reasonable supervision and control (*200 Cal. App. 3d 715, 720-723)* . The court concluded tht premises liability is based on ownership, possession, or control, that the mere possibility of influencing or affecting the condition of property owned or possessed by others does not constitute control of such property, and that the existing standard for premises liability, based on ownership, possession, or control, provides predictability and reasonably clear limits (*200 Cal. App. 3d 715, 725-726)* .

Steinmetz v. Stockton City Chamber of Commerce (1985) 169 Cal. App. 3d 1142, 214 Cal. Rptr. 405 , was a wrongful death action in which the decedent was murdered on returning to her car, which she had left in a parking area of an industrial park that was not part of the premises leased by defendant. Plaintiffs contended that defendants breached a duty owing to the decedent as a business invitee in failing to provide a safe place for her to park her car while she was on defendant's premises, and that the lack of safety precautions in the parking areas contributed to decedent's death. The trial court granted defendants' motion for summary judgment, and the court of appeal affirmed, holding that defendants did not owe any duty of care to an invitee to prevent an injury occurring on premises they neither owned, possessed, nor controlled (*169 Cal. App. 3d 1142, 1147-1148)* .

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17-178 California Points & Authorities § 178.35

§ 178.35 Opposing Contention That Owner or Possessor of Premises Is Liable--Duty of Care Does Not Extend to Adjacent Property Not Under Control of Owner or Possessor

[1] FORM

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

DEFENDANT _____ [OWNER *or* POSSESSOR] IS NOT LIABLE FOR THE HARM TO PLAINTIFF BECAUSE DEFENDANT'S DUTY OF DUE CARE DOES NOT EXTEND TO ADJACENT PROPERTY OVER WHICH THE DEFENDANT EXERCISES NO CONTROL.

A. No Duty to Protect Users of Adjacent Property Not Controlled by Defendant. An owner or possessor of property has no duty of care to keep adjacent premises safe for users of that adjacent property, if the owner or possessor exercises no actual or apparent control of the adjacent property, and if the owner did not create the condition making the adjacent property unsafe (*Swann v. Olivier (1994) 22 Cal. App. 4th 1324, 1329-1330, 28 Cal. Rptr. 2d 23* ; *disapproved on other grounds, Alcaraz v. Vece (1997) 14 Cal. 4th 1149, 60 Cal. Rptr. 2d 448* ; *see Lucas v. George T.R. Murai Farms, Inc. (1993) 15 Cal. App. 4th 1578, 1587-1590, 19 Cal. Rptr. 2d 436*).

[*Optional*] **B. No Duty to Protect Users of Adjacent Public Streets From Distractions.** An owner or possessor of property has no duty of care to ensure that persons using adjacent public streets are not distracted by activities occurring on the property, either by not holding activities that would distract passing motorists or by erecting and maintaining a barrier to shield the activities from the view of passing motorists (*Lompoc Unified Sch. Dist. v. Superior Court (1993) 20 Cal. App. 4th 1688, 1694, 1697, 26 Cal. Rptr. 2d 122*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted by defendant owner or possessor in opposition to plaintiff's contention that defendant's duty to exercise reasonable care towards persons on the premises extends to property adjoining

defendant's premises. This form is based on the grounds that defendant exercised no control over the adjacent property, derived no special commercial benefit from the adjacent property, and did not create the conditions that made the adjacent property unsafe. Optional Paragraph B should be used if plaintiff contends that defendant had a duty to users of adjacent streets either to refrain from holding activities on defendant's premises that could distract passing motorists or to erect and maintain a distraction barrier to screen those activities from view.

These points and authorities may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the substantive issue of defendant's lack of duty to make adjoining premises safe. For example, this form may be used to support defendant's motion for summary judgment [*see Code Civ. Proc. § 437c*]. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should assert facts establishing that defendant's actions with respect to the adjacent property did not constitute control over that property or create the conditions that made that property unsafe and that defendant derived no special commercial benefit from that property.

[c] Related Pleading and Practice Forms

For discussion and forms relating to the duty of care of the owner or possessor of premises, see California Forms of Pleading and Practice, Ch. 421, *Premises Liability* (Matthew Bender).

[d] Opposing Points and Authorities

If appropriate, the points and *authorities in § 178.22* may be used to oppose these points and authorities. In an appropriate case, these points and authorities may be used to oppose the contention supported by the points and *authorities in §§ 178.20* and *178.60*.

[3] Discussion of Authorities

[a] No Duty to Protect Users of Adjacent Property Not Controlled by Defendant

In ***Swann v. Olivier*** *(1994) 22 Cal. App. 4th 1324, 28 Cal. Rptr. 2d 23* , plaintiff attended a party held at a residential community that included a private beach. Plaintiff was injured in the ocean surf beyond the high tide line that marked the border of the community's private property. The community's rules and regulations included a provision cautioning residents and guests of the absence of lifeguards and the presence of ripcurrents. Plaintiff brought suit against the community's homeowners' association for failing to warn him of the hazards of the ocean surf. The trial court granted summary judgment in favor of defendant, and plaintiff appealed.

The court of appeal upheld the trial court, holding that the owners of a private beach are not responsible for injuries taking place in the ocean because a premises owner is not liable for the defective or dangerous condition of property that the owner does not own, possess, or control (*22 Cal. App. 4th 1324, 1326)* . The court noted that the general rule of nonliability for adjacent premises one does not own or possess has only two exceptions--first, liability because one has both received a special commercial benefit from the adjacent property and has had direct or de facto control over it, and second, liability for dangers on the adjacent property that one has actually created (*22 Cal. App. 4th 1324, 1329-1330)* . Neither exception applied to plaintiff's situation, because defendants had not created the hazards of the ocean surf and any thought that anyone could control the ocean was out of the question and ludicrous (*22 Cal. App. 4th 1324, 1333)* . The fact that defendant may have known of the hazards of the ocean surf did not oblige it to warn plaintiff; defendants' situation was analogous to that of homeowners whose land borders a busy street and who have no duty to warn their guests of that fact (*22 Cal. App. 4th 1324, 1333 n. 11*).

NOTE:

Swann has been criticized by the Supreme Court's decision in *Alcaraz v. Vece* [*Alcaraz v. Vece (1997) 14 Cal. 4th 1149, 60 Cal. Rptr. 2d 448]* , in which the Court stated that if a visitor is injured on property controlled by a defendant, liability does not depend upon whether the defendant derived a commercial benefit from the property. The Court specifically disapproved of any language to the contrary in *Swann*.

Lucas v. George T.R. Murai Farms, Inc. *(1993) 15 Cal. App. 4th 1578, 19 Cal. Rptr. 2d 436* , was an action for personal injuries and wrongful death brought by migrant workers and their decedents against several farm owners, one of which employed the workers. The workers were living in makeshift housing that they lighted with candles, despite knowing that this practice was dangerous. They were injured and killed when their makeshift housing, which was part of a migrant workers' camp located on property adjacent to the farms, caught fire. The trial court granted summary judgment in favor of defendants. Plaintiffs appealed to the court of appeal.

The court of appeal affirmed, holding that defendants had no duty to make the premises where the fire occurred safe because they neither owned nor possessed this property and they had no actual or apparent control over this adjacent property (*15 Cal. App. 4th 1578, 1587-1590)* . One defendant did not even know about the existence of the camp (*15 Cal. App. 4th 1578, 1588)* . Although a security service hired by defendants regularly patrolled the camp as well as defendants' property, defendants had never requested it to patrol the camp (*15 Cal. App. 4th 1578, 1588)* . Allowing the workers to use water and toilet facilities and receive mail at their property was not enough to impose a duty on the defendants (*15 Cal. App. 4th 1578, 1589)* . The court distinguished the facts in this case from those in *Southland Corp. v. Superior Court* [*Southland Corp. v. Superior Court (1988) 203 Cal. App. 3d 656, 660-661, 250 Cal. Rptr. 57* ; *see § 178.60[3][d]*], noting that plaintiffs were not business patrons and were injured not by the criminal acts of third parties, but by a danger of which plaintiffs were fully aware (*15 Cal. App. 4th 1578, 1590)* . The court instead applied language from *Donnell v. California Western School of Law* [*Donnell v. California W. Sch. of Law (1988) 200 Cal. App. 3d 715, 720, 246 Cal. Rptr. 199]* asserting that a landowner is not liable merely because its property exists next to adjoining dangerous property and the landowner took no action to influence or affect the condition of that adjacent property (*15 Cal. App. 4th 1578, 1590)* .

[b] No Duty to Protect Users of Adjacent Public Streets From Distractions

Lompoc Unified Sch. Dist. v. Superior Court *(1993) 20 Cal. App. 4th 1688, 26 Cal. Rptr. 2d 122* , was an action brought by a bicyclist against a school district. Plaintiff, who was struck by a motor vehicle on the public road adjacent to the school district's property, claimed that the collision and his resulting injuries occurred because a football game in progress on that property and its attendant crowd of spectators had distracted the motorist who struck him. The trial court denied defendant's motion for summary judgment, and defendant sought a writ of mandate to set aside the trial court's judgment on the grounds that it owed no duty to plaintiff.

The court of appeal, although normally reluctant to use extraordinary writs to review the denial of summary judgment, granted the writ because the issue was one of first impression in California (*20 Cal. App. 4th 1688, 1692)* . The court held that an occupier of real property has a duty to maintain the premises so as not to injure the users of abutting streets, but that an occupier of property is not liable for the defective or dangerous condition of property that he or she does not own, possess, or control (*20 Cal. App. 4th 1688, 1693)* . Therefore, the court followed decisions in other states and concluded that occupiers of property have no legal duty either to refrain from holding activities on their premises that would distract passing motorists or to provide and maintain a distraction barrier to prevent passing motorists from seeing or hearing those activities (*20 Cal. App. 4th 1688, 1694-1695*). It is the duty of the motorists not to allow their attention to be so distracted as to interfere with the safe operation of their vehicles (*20 Cal. App. 4th 1688, 1697-1698*).

[4] Additional Authorities

[a] No Duty to Protect Users of Adjacent Property Not Controlled by Defendant

In *Contreras v. Anderson (1997) 59 Cal. App. 4th 188, 69 Cal. Rptr. 2d 69* , plaintiff appealed from a summary judgment for defendant dismissing her premises liability complaint against defendants. Plaintiff alleged that defendants were liable for the injuries she suffered when she fell on a brick walkway contained in a city-owned planting strip in front of their property. On appeal, plaintiff contended that the evidence was sufficient to raise a triable issue of fact whether defendant's controlled the public planting strip and, thus, owed her a duty of care under *Alcaraz v. Vece* [*Alcaraz v. Vece (1997) 14 Cal. 4th 1149, 60 Cal. Rptr. 2d 448, 929 P.2d 1239]* . The Supreme Court held that a landowner who exercises control over an adjoining strip of land has a duty to protect or warn others entering the adjacent land of a known hazard there. This duty arises even if the person does not own or exercise control over the hazard and even if the person does not own the abutting the property on which the hazard is located. The court of appeal held as a matter of law that the defendants did not owe a duty to warn or prevent harm to plaintiff under the rule of *Alcaraz* (*59 Cal. App. 4th 188, 201)* . The court determined that the evidence showing that defendants regularly trimmed the tree and swept fallen leaves off the brick path, suggested nothing more than neighborly maintenance of the city-owned planting strip and that standing alone, this evidence could not support a finding of control over the property. According to the court what was missing was evidence that the defendant took affirmative action to preclude or limit the adjoining landowner's control or, or ability to control, its own property and a notorious and open public display of control over the property (*59 Cal. App. 4th 188, 201)* .

In *Princess Hotels Int'l, Inc. v. Superior Court (1995) 33 Cal. App. 4th 645, 39 Cal. Rptr. 2d 457* , plaintiffs sued a hotel for negligence in failing to warn them of the dangers of swimming in the ocean adjacent to the hotel. Defendant moved for summary judgment on the question of whether a hotel has a duty to warn guests of the dangers of ocean swimming. The trial court denied the motion, premising a duty to warn on the fact that the hotel benefitted commercially from the adjacent beach. The court of appeal reversed, stating that the two exceptions to the rule that a defendant cannot be held liable for the condition of property it does not control are (1) when the landowners impose or create some external effect on the area where the plaintiff is injured, and (2) when the landowner receives a special commercial benefit from the area of the injury and had direct or de facto control of the area (*33 Cal. App. 4th 645, 649)* . The court stated that the argument that defendant owed a duty because it received commercial benefit ignored the rule that control as well as a commercial benefit were required for an exception to the rule of no liability, and concluded that defendant had no duty to warn because the ocean is not within the control of humankind (*33 Cal. App. 4th 645, 652)* .

NOTE:

Princess Hotels has been criticized by the Supreme Court in *Alcaraz v. Vece* [*Alcaraz v. Vece (1997) 14 Cal. 4th 1149, 60 Cal. Rptr. 2d 448]* , in which the Court stated that if a visitor is injured on property controlled by a defendant, liability does not depend upon whether the defendant derived a commercial benefit from the property. The Court specifically disapproved of any language to the contrary in *Princess Hotels*.

Southland Corp. v. Superior Court (1988) 203 Cal. App. 3d 656, 250 Cal. Rptr. 57 , is discussed in *§ 178.60[3][b]*.

Donnell v. California W. Sch. of Law (1988) 200 Cal. App. 3d 715, 246 Cal. Rptr. 199 , was an action for personal injuries brought by a law student against the law school he attended and its employees. As plaintiff was on the city-owned sidewalk alongside the law school building, he was attacked and injured by an unknown person who had been breaking into a car as plaintiff approached. The court of appeal affirmed the trial court's grant of summary judgment in favor of defendants, holding that defendant was not liable for any dangerous or defective condition on property that it did not own, possess, or control. Rejecting defendant's argument that defendant had the power to control the sidewalk by installing lights or exterior monitors as an attempt to expand the concept of control over property to include the mere ability to influence or affect property, the court ruled that expanding the concept of control to this extent would undermine the predictability and reasonably clear limits presently applicable to premises liability (*200*

Cal. App. 3d 715, 720, 725-726) . The court concluded that defendant could not be liable merely because its property existed next to a dangerous area and it took no action to influence or affect the condition of that area. The court distinguished cases in which defendant's activities affirmatively created a dangerous condition on adjacent premises, defendants received a special benefit from adjacent premises, or defendants actually had and exercised some right of control over adjacent premises (*200 Cal. App. 3d 715, 720-725)* .

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CHAPTER 178 PREMISES LIABILITY
PART II. FORMS
A. General Liability of Owner or Possessor

17-178 California Points & Authorities § 178.36

§ 178.36 Opposing Contention That Owner or Possessor of Premises Is Liable--Harm Due to Obvious Danger

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT _____ [OWNER *or* POSSESSOR] IS NOT LIABLE FOR PLAINTIFF'S INJURIES BECAUSE THE INJURIES RESULTED FROM A DANGER ON THE PREMISES THAT _____ [WAS OBVIOUS *or* SHOULD HAVE BEEN OBSERVED BY PLAINTIFF IN THE EXERCISE OF REASONABLE CARE].

No Liability for Obvious Danger. There is no liability on the part of an owner or possessor of premises for injuries resulting from dangers that are obvious or should have been observed in the exercise of reasonable care (*Holcombe v. Burns (1960) 183 Cal. App. 2d 811, 815, 7 Cal. Rptr. 366*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted by defendant owner or possessor in opposition to plaintiff's contention that defendant is liable for harm to plaintiff due to an obvious danger. The form is based on the ground that the danger was obvious or should have been observed in the exercise of reasonable care. The decision in *Rowland v. Christian* [*Rowland v. Christian (1968) 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561]* mandates that the question of the obviousness of the danger is a question of fact and can no longer be said per se to derogate the duty of the possessor so as to make the question of liability solely one of law to be determined in a nonsuit [*Beauchamp v. Los Gatos Golf Course (1969) 273 Cal. App. 2d 20, 33, 77 Cal. Rptr. 914* (discussed in *§ 178.36[4*][a]); *see also Osborn v. Mission Ready Mix (1990) 224 Cal. App. 3d 104, 119, 273 Cal. Rptr. 457* (discussed in *§ 178.28[3][a]*)].

This memorandum of points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the substantive issue of the obviousness of

the danger. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the nature of the particular danger and why it was obvious and therefore avoidable in the exercise of ordinary care (for example, because a loose tile was not concealed in any way and was plainly visible to a person exercising ordinary care in watching where he or she was walking).

[c] Opposing Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposition to the contentions supported by the points and *authorities in §§ 178.25 -178.27*.

[d] Effect of Comparative Negligence

In *Li v. Yellow Cab Co.* [*Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226]* , the Supreme Court replaced the all-or-nothing rule of contributory negligence with a rule of comparative negligence under which liability for damages is apportioned in accordance with the fault of the persons whose negligence caused the injuries. Under comparative negligence, a plaintiff's contributory negligence does not bar recovery, but damages awarded must be diminished in proportion to the amount of negligence attributable to plaintiff [*Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226]* . Assumption of risk, as a variant of contributory negligence, has been subsumed under the general process of assessing liability in proportion to fault. It exists when plaintiff unreasonably undertakes to encounter a specific known risk imposed by a defendant's negligence. Plaintiff's conduct, although he or she may encounter that risk in a prudent manner, is in reality a form of contributory negligence [*Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 824, 826, 119 Cal. Rptr. 858, 532 P.2d 1226]* . Before *Li*, courts viewed the failure of a user of premises to exercise ordinary care to discover obvious dangers as contributory negligence, and the act of a user who encountered a risk although he or she knew of the risk and appreciated its magnitude as assumption of the risk [*see Beauchamp v. Los Gatos Golf Course (1969) 273 Cal. App. 2d 20, 33-34, 77 Cal. Rptr. 914]* . After *Li*, courts of appeal have disagreed regarding the proper application of assumption of risk principles in light of the adoption of comparative fault [*compare Ordway v. Superior Court (1988) 198 Cal. App. 3d 98, 107, 243 Cal. Rptr. 3d 536* (doctrine of reasonable implied assumption of risk provides complete defense to action for personal injuries); *with Segoviano v. Housing Auth. (1983) 143 Cal. App. 3d 162, 164* (reasonable implied assumption of risk is not a defense to liability nor does it reduce plaintiff's recovery under comparative fault principles)].

In *Knight v. Jewett (1992) 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2, 834 P.2d 696* , the Supreme Court undertook to resolve the question, but rendered a decision without a clear majority. The lead opinion in *Knight* held thatin cases in which defendant has breached no duty of care toward the plaintiff, the plaintiff is barred from recovery under "primary assumption of risk." In cases in which the defendant has breached a duty toward the plaintiff, the plaintiff's damages are apportioned by comparative fault principles under "secondary assumption of risk" [*Knight v. Jewett (1992) 3 Cal. 4th 296, 314-315, 11 Cal. Rptr. 2d 2, 834 P.2d 696* (George, J.; Lucas, C.J., and Arabian, J. concurring in analysis; Mosk, J. concurring "generally" with lead's approach)]. Three justices who did not join in the lead opinion (Kennard, J., Baxter, J., and Panelli, J.) supported an implied consent approach based on the subjective knowledge of the plaintiff. Under this approach, a plaintiff would be barred from recovery if plaintiff is shown to have "truly appreciated and voluntarily consented to the risk" and made a "considered and deliberate choice" to encounter the risk. If the plaintiff was "merely careless and could not have truly appreciated and voluntarily consented to the risk," the plaintiff's damages would be reduced in proportion to the amount of negligence attributable to the plaintiff [*see Knight v. Jewett (1992) 3 Cal. 4th 296, 332, 11 Cal. Rptr. 2d 2, 834 P.2d 696* (Kennard, J.,dissenting)]. At least one court of appeal has followed the lead opinion in *Knight* and applied secondary assumption of risk in a case involving the liability of the owner of an apartment complex for the injuries of a tenant who slipped and fell on a sloping lawn [*Curties v. Hill Top Developers,*

Inc. (1993) 14 Cal. App. 4th 1651, 1655-1656, 18 Cal. Rptr. 2d 45 ; *see § 178.30[3]* [a]; *see also Lucas v. Fresno Unified Sch. Dist. (1993) 14 Cal. App. 4th 866, 872-873, 18 Cal. Rptr. 2d 79]* .

[e] Related Pleading and Practice Forms

For a form of affirmative defense allegation based on the plaintiff's comparative negligence due to assumption of risk, see California Forms of Pleading and Practice, Ch. 421, *Premises Liability* (Matthew Bender).

[f] Related Points and Authorities

For a memorandum of points and authorities supporting the contention that plaintiff was comparatively negligent, see Ch. 165, *Negligence* .

[3] Discussion of Authorities

[a] No Liability for Obvious Danger

In ***Holcombe v. Burns*** *(1960) 183 Cal. App. 2d 811, 7 Cal. Rptr. 366* , plaintiff, a resident of defendant's trailer park, was injured while checking on the mail for the residents of the trailer park while defendant was away. She opened the door to a tool room next to defendant's office in the park to see about the mail, and then backed out of the doorway at the same time she closed the door. In stepping back, she struck the wheel of a lawnmower leaning against the outside wall of the tool room. The evidence disclosed that the plaintiff, in walking to the tool room, walked past the wall on which the mower was leaning and noticed the handle of the mower as she opened the door. There was also testimony that it was common practice for tenants in the trailer park to use the owner's tools and replace them by leaning them against the wall. The jury returned a verdict in favor of plaintiff and a judgment notwithstanding the verdict was entered. Plaintiff appealed.

The court of appeal affirmed the judgment. The court stated that there is no liability for injury to an invitee that results from a condition that is obvious or should have been observed in the exercise of ordinary care (*183 Cal. App. 2d 811, 815)* .

[4] Additional Authorities

[a] No Liability for Obvious Danger

The facts and procedural background of *Beauchamp v. Los Gatos Golf Course (1969) 273 Cal. App. 2d 20, 77 Cal. Rptr. 914* , are discussed in *§ 178.20[3][f]*. The court of appeal stated that there is no liability on the part of the possessor of premises for harm due to a condition that was obvious or should have been observed in the exercise of reasonable care (*273 Cal. App. 2d 20, 27)* . However, the court held that the decision in *Rowland v. Christian* [*Rowland v. Christian (1968) 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561]* mandates that the obviousness of the danger can no longer per se derogate the duty of care so as to make the possessor's liability solely a matter of law to be determined in a nonsuit (*273 Cal. App. 2d 20, 33)* .

In *Dixon v. St. Francis Hotel Corp. (1969) 271 Cal. App. 2d 739, 77 Cal. Rptr. 201* , the court of appeal affirmed the trial court's grant of a new trial based on the insufficiency of evidence to justify the verdict in favor of plaintiff, in that the danger causing harm to plaintiff was obvious and thus negated the foreseeability necessary to establish negligence (*271 Cal. App. 2d 739, 743*). Plaintiff tripped over a painting contractor's stacked equipment in a hotel lobby. There was evidence that the lobby was well lighted, that plaintiff saw the equipment, and that she walked around it, apparently tripping over the edge of the stack, all warranting a determination that the equipment was plainly visible to one exercising due care (*271 Cal. App. 2d 739, 740-741)* .

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17-178 California Points & Authorities § 178.37

§ 178.37 Opposing Contention That Owner or Possessor of Premises Is Liable--No Special Use or Affirmative Act Contributing to Defective Condition of Abutting Public Sidewalk

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT _____ [OWNER *or* POSSESSOR] IS NOT LIABLE FOR THE INJURIES TO PLAINTIFF RESULTING FROM THE DEFECTIVE CONDITION ON THE PUBLIC SIDEWALK ABUTTING DEFENDANT'S PROPERTY BECAUSE THERE IS NO SPECIAL USE OF THE SIDEWALK AND NO AFFIRMATIVE ACT BY DEFENDANT CONTRIBUTING TO THE DEFECTIVE CONDITION.

A. No Liability If No Special Use or Contributing Act. If a sidewalk is used only for normal sidewalk purposes and has no constructional defects created to fit the peculiar needs of the abutting property, no liability attaches to an abutting owner or possessor because of defects in the sidewalk in the absence of some affirmative act by the owner or possessor contributing to the defective condition (*Jones v. Deeter (1984) 152 Cal. App. 3d 798, 803-804, 199 Cal. Rptr. 825* ; *Winston v. Hansell (1958) 160 Cal. App. 2d 570, 576, 325 P.2d 569*).

[*Optional*] **B. Any Benefit Owner Derived From Construction or Alteration Is Not Exclusive.** If any special benefit derived from an improvement to abutting public property is not exclusive in character, the benefit to the landowner is not sufficient to impose on the landowner a duty to maintain the improvement in a reasonably safe condition (*see Seaber v. Hotel Del Coronado (1991) 1 Cal. App. 4th 481, 491, 2 Cal. Rptr. 2d 405*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted by defendant, an owner or possessor of land abutting a public sidewalk, in opposition to plaintiff's contention that defendant is liable for injuries resulting from a defect in the sidewalk. This form is based on the ground that defendant has no special use for the sidewalk and has not performed any affirmative

act contributing to the sidewalk's defective condition.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel is responding to the contention that defendant owner or possessor is liable for the defective condition of a sidewalk. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the fact that there is no special use being made of the sidewalk, and that no act on the part of defendant contributed to the defect.

[c] Opposing Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 178.29*.

[3] Discussion of Authorities

[a] No Liability If No Special use or Contributing Act

In ***Jones v. Deeter*** *(1984) 152 Cal. App. 3d 798, 199 Cal. Rptr. 825* , plaintiff fell on a sidewalk broken by tree roots, and sued the city and the abutting landowner. The abutting landowner owned the sidewalk although he had dedicated it to the city for public use. Defendant landowner obtained summary judgment in his favor and plaintiff appealed. The court of appeal affirmed, noting that the abutting landowner had a general duty under *Sts. & Hy. Code § 5610* to repair defects in the sidewalk, even though he had dedicated the sidewalk to the city (*152 Cal. App. 3d 798, 802-803)* . However, the court stated that a breach of this duty gave rise to tort liability to persons injured by a dangerous condition on the sidewalk only if the condition was attributable to negligence on the part of the landowner (*152 Cal. App. 3d 798, 803)* . In this case there was no dispute that the defect was caused by trees planted and habitually maintained by the city (*152 Cal. App. 3d 798, 804-806)* . The court held that the landowner was therefore not liable, because the city had exclusively assumed the duty of maintaining the trees, and the defect could not be attributed to the landowner (*152 Cal. App. 3d 798, 805-806)* .

In ***Winston v. Hansell*** *(1958) 160 Cal. App. 2d 570, 325 P.2d 569* , plaintiff fell on an allegedly cracked and broken portion of the sidewalk that was also used by the abutting owners as a driveway. Plaintiff sued both the owners and the city. The complaint alleged that defendant owners made a special use of the sidewalk as a driveway for automobiles, and that the sidewalk was maintained in a defective and dangerous condition. Ademurrer to the cause of action against the owners contained in plaintiff's second amended complaint was sustained without leave to amend and a judgment of dismissal was entered. Plaintiff appealed from the judgment.

The court of appeal affirmed the judgment and stated that if a sidewalk is used only for normal sidewalk purposes and has no constructional defects created to fit the peculiar needs of the abutting property, no liability attaches for defects in the sidewalk unless the owner does some affirmative act contributing to the condition (*160 Cal. App. 2d 570, 576)* . The court stated that the use of a sidewalk as a driveway to abutting property is not a peculiar or unusual use of a sidewalk but, on the contrary, it is one of the ordinary and accustomed uses for which sidewalks are designed (*160 Cal. App. 2d 570, 576-577)* .

[b] Any Benefit Owner Derived From Construction or Alteration Is Not Exclusive

In ***Seaber v. Hotel Del Coronado*** *(1991) 1 Cal. App. 4th 481, 2 Cal. Rptr. 2d 405* , decedent's surviving wife and

children brought an action for wrongful death against the defendant hotel after the decedent was struck and killed by a car as he was crossing in a marked crosswalk adjacent to defendant's property. The hotel moved for summary judgment and the motion was granted. The plaintiffs appealed from the judgment.

The court of appeal affirmed the judgment. The plaintiffs cited *Sexton v. Brooks* [*Sexton v. Brooks (1952) 39 Cal. 2d 153, 157-158, 245 P.2d 496]* and contended that a reasonable trier of fact could find a dangerous crosswalk was installed on the property abutting the hotel at the hotel's request to specifically benefit the hotel by its convenient location and that it served a use separate from the ordinary use because of its close proximity to the hotel. The court of appeal concluded, however, that *Sexton* did not control the case (*1 Cal. App. 4th 481, 490)* . The court granted that a trier of fact could reasonably find that a dangerous crosswalk was reinstalled by CalTrans on public property abutting the hotel at the hotel's request for its nonexclusive, special benefit in light of its convenient location, and that the hotel specially benefitted by the location of the crosswalk. However, the court noted that the crosswalk was available and presumably used by the general public at large, by anyone who wished to cross the highway. Consequently, any special benefit derived from the crosswalk by the hotel was not exclusive in character. The significance of the degree of exclusivity is that proportionately, the greater the exclusivity of use, the more an improvement benefits solely the adjoining property and the more reasonable it is to impose on the landowner a duty to maintain the improvement in a reasonably safe condition (*1 Cal. App. 4th 481, 491)* .

[4] Additional Authorities

[a] No Liability If No Special Use or Contributing Act

The facts and procedural background of *Seaber v. Hotel Del Coronado (1991) 1 Cal. App. 4th 481, 2 Cal. Rptr. 2d 405* , are discussed in *§ 178.37[3][b]*. The court of appeal affirmed the trial court's judgment granting defendant hotel owner summary judgment. The court observed that the crosswalk abutting the hotel in which the plaintiffs' decedent was struck and killed did not serve a use independent and apart from the ordinary use for which crosswalks are designed for public streets. It simply served its designed, common use. The court stated that the requirement of a special use is essential because it guarantees that before determining whether to shift the burden to the landowner of warning others of a hazard, the variable of whether the modification and resulting risk is latent and unsuspecting in character to the passerby is considered. Further, it evinces a reasonable policy determination to hold liable an adjoining landowner for an improvement, the use of which is foreign to the common use of the public street or sidewalk, that directly benefits the landowner's adjoining property. Accordingly, if the improvement or modification does not serve such a foreign use, it is unreasonable to impose on the landowner any duty to maintain it in a reasonably safe condition (*1 Cal. App. 4th 481, 491)* .

[b] Any Benefit Owner Derived From Construction or Alteration Is Not Exclusive

In *Contreras v. Anderson (1997) 59 Cal. App. 4th 188, 69 Cal. Rptr. 2d 69* , plaintiff appealed from a summary judgment for defendant dismissing her premises liability complaint against defendants. Plaintiff alleged that defendants were liable for the injuries she suffered when she fell on a brick walkway contained in a city-owned planting strip in front of their property. On appeal, she contended that the evidence was sufficient to raise a triable issue of fact whether an alteration was made on the planting strip that specially benefitted defendants' property so as to give rise to a duty. The court of appeal's analysis began with the applicable rule: that an abutting owner was liable for the condition of portions of the public sidewalk which he or she has altered for the benefit of his or her property and which serve a use independent of and apart from the ordinary use for which sidewalks are designed. This duty usually arises in cases involving traps on sidewalks, including coal holes, meter boxes, and other similar devices located in the sidewalk which benefit the abutting owner and are located where the general public is likely to walk.

The court of appeal applied this rule to the facts of the case and found that the alleged hazard was not any kind of trap but was the condition of the brick walkway itself, namely, it was allegedly too slippery. More importantly stated the

court, although it would be possible for a reasonabletrier of fact to conclude that the brick walkway conferred a benefit on defendants by providing access from the curb to their property, this benefit was not exclusive since the public had access to it as well. Furthermore, the brick path did not serve a use independent of and apart from the ordinary and accustomed use for which it was designed, namely, as a public walkway between the curb and the sidewalk. Thus, without evidence of an exclusive and uncommon use of the brick path by defendants, the court ruled that plaintiff had failed to raise any triable issue of fact whether defendants owed her a duty (*59 Cal. App. 4th 188, 203)* .

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17-178 California Points & Authorities § 178.38

§ 178.38 Opposing Contention That Owner or Possessor of Premises Is Liable--Person on Premises Was Committing or Had Committed Felony on Property [Civ. Code § 847(a)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT OWNER IS NOT LIABLE FOR THE INJURIES TO PLAINTIFF, BECAUSE PLAINTIFF'S CONDUCT IN FURTHERANCE OF THE COMMISSION OF A FELONY SPECIFIED IN SECTION 847(a) OF THE CIVIL CODE WAS THE PROXIMATE CAUSE OF PLAINTIFF'S INJURY.

A. No Liability Toward Person Injured When Conduct in Furtherance of Felony Proximate Cause of Injury. An owner of property is not liable to any person for any injury or death that occurs on that property during the course of or after the commission of any of the felonies set forth in *Section 847(b) of the Civil Code* by the injured or deceased person when the conduct in furtherance of the felony proximately caused the injury or death (*Civ. Code § 847(a), (d)*).

[*Optional*] **B. Statutory Limitation on Liability Not Restricted to Injuries Caused by Physical Conditions or Uses of Property.** This statutory limitation on liability is not restricted merely to injuries related to the physical conditions, uses, structures, or activities of the property (*Calvillo-Silva v. Home Grocery (1998) 19 Cal. 4th 714, 735, 80 Cal. Rptr. 2d 506, 968 P.2d 65*).

[*Optional*] **C. Intentional Conduct Must Be Wrongful to Meet Requirements of Exception From Limitation on Liability.** The exception of *Civil Code Section 847(f)* for "willful" or "wanton" conduct applies to intentional conduct only when that conduct is wrongful, that is, done either with a knowledge that serious injury to another will probably result or with a wanton and reckless disregard of the possible results (*Calvillo-Silva v. Home Grocery (1998) 19 Cal. 4th 714, 735, 80 Cal. Rptr. 2d 506, 968 P.2d 65* ; *see Civ. Code § 847(f)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted by defendant, an owner of any estate in real property, in opposition to plaintiff's contention that defendant is liable for injuries or death occurring on the property. This form is based on the ground that defendant is not liable for injuries or death occurring on the property that are proximately caused by the injured or deceased person's conduct in furtherance of specified felonies [*Civ. Code § 847(a)*]. Optional Paragraph B may be used when the injury was unrelated to the physical conditions, uses, structures, or activities of the property. Optional Paragraph C may be used when the injury was allegedly caused by an intentional act, but the intentional act was not wrongful.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel is responding to the contention that defendant owner is liable for the injury or death occurring on his or her property. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should discuss the facts showing that plaintiff was injured while on the property and that plaintiff's conduct in furtherance of the commission of the felony was the proximate cause of his or her injury or death [*see Civ. Code § 847(c), (d)*]. Additionally, counsel should refer to the criminal action in which plaintiff was convicted of the felony (or a lesser included crime arising from the charged felony) [*see Civ. Code § 847(e)*].

[c] Opposing Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 178.20*.

[3] Discussion of Authorities

[a] No Liability Toward Person Injured When Conduct in Furtherance of Felony Proximate Cause of Injury

An owner, including but not limited to a public entity as defined in *Gov. Code § 811.2*, of any estate or any other interest in real property, whether possessory or nonpossessory, is not liable to any person for any injury or death that occurs on that property during the course of or after the commission of any of the felonies set forth in *Civ. Code § 847(b)* by the injured or deceased person [*Civ. Code § 847(a)*]. The limitation on liability conferred by *Civ. Code § 847(a)* arises at the moment the injured or deceased person commences the felony or attempted felony and extends to the moment the injured or deceased person is no longer on the property [*Civ. Code § 847(c)*]. The limitation also arises only on the charge of a felony listed in *Civ. Code § 847(b)* and the subsequent conviction for that felony or a lesser included felony or misdemeanor arising from a charge of a felony listed in *Civ. Code § 847(b)*. During the pendency of any such criminal action, a civil action alleging this liability is abated and the statute of limitations on the civil cause of action is tolled [*Civ. Code § 847(e)*]. The limitation on liability provided by *Civ. Code § 847(a)* is in addition to any other available defense [*Civ. Code § 847(g)*].

The limitation on liability conferred by *Civ. Code § 847(a)* applies only when the injured or deceased person's conduct in furtherance of the commission of a felony listed in *Civ. Code § 847(b)* proximately or legally causes the injury or death [*Civ. Code § 847(d)*]. Additionally, *Civ. Code § 847(a)* does not limit the liability of an owner or an owner's agent that otherwise exists for willful, wanton, or criminal conduct, or for willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity [*Civ. Code § 847(f)*].

[b] Statutory Limitation on Liability Not Restricted to Injuries Caused by Physical Conditions or Uses of Property

In ***Calvillo-Silva v. Home Grocery*** *(1998) 19 Cal. 4th 714, 725-727, 735, 80 Cal. Rptr. 2d 506, 968 P.2d 65* , plaintiff, who was shot by a grocery store employee during a robbery at the store, brought a personal injury action against the store, its owners, two employees, and the lessor of the property. While plaintiff insisted he was not one of the perpetrators of the robbery, he pleaded no contest to criminal charges of attempted grand theft as part of a plea bargain to try and avoid a prison sentence. In answering the complaint, defendants asserted several defenses, including contributory negligence, self-defense, and defense of property. The lessor of the property brought a summary judgment motion, arguing that he owed no duty to the plaintiff. Following a request by the trial court for briefing on the potential applicability of *Civ. Code § 847*, the court granted the summary judgment motion for the lessor. The remaining defendants then moved for summary judgment based on the limitation of liability found in *Civ. Code § 847*. The trial court granted summary judgment for the remaining defendants, finding no triable issue of fact as to the applicability of *Civ. Code § 847*. The court of appeal reversed. While the court of appeal rejected plaintiff's argument that *Civ. Code § 847* only applied to injuries caused by dangerous conditions or uses of an owner's land, it determined that the statute only immunized negligent conduct and did not protect the intentional use of deadly or injurious force. Defendants appealed.

The Supreme Court affirmed the court of appeal's decision to reverse the summary judgments, although disagreeing with part of the court of appeal's analysis. Although the primary issue was the applicability of *Civ. Code § 847(f)*, which contains an exception to the statutory immunity of *Civ. Code § 847* when the injury is caused by "willful, wanton, or criminal" conduct [*see § 178.38[3][a]*], the Supreme Court as a preliminary matter addressed plaintiff's argument that *Civ. Code § 847* only applied to conduct that is related to physical conditions or uses of an owner's property. The Court noted that, while no language in the statute explicitly stated that immunity is available for conduct unrelated to conditions or uses of property, *Civ. Code § 847(a)* declared that immunity is available "for any injury or death that occurs upon that property during the course of or after the commission of" any of the listed felonies. Further, *Civ. Code § 847(f)* specified two exceptions to the immunity for particular types of conduct, which, according to the Court, necessarily implied that conduct not falling within the two exceptions was immunized when the statutory elements are otherwise met. As the Court also noted, only one of the two exceptions listed in *Civ. Code § 847(f)* referred to a "dangerous condition, use, structure, or activity," while the other exception for "willful, wanton, or criminal conduct" did not appear to bear any relationship to the conditions or uses of the premises. Thus, the Court concluded that, if the statutory conditions are otherwise met, the immunity of *Civ. Code § 847* is not restricted to conduct relating solely to physical conditions or uses of the land, a reading of the statute that conformed with the stated legislative purpose of protecting landowners and possessors from lawsuits brought by persons injured on the property during the commission of a crime.

[c] Intentional Conduct Must Be Wrongful to Meet Requirements of Exception From Limitation on Liability

The factual and procedural background of ***Calvillo-Silva v. Home Grocery*** *(1998) 19 Cal. 4th 714, 728-732, 735-737, 80 Cal. Rptr. 2d 506, 968 P.2d 65* , is discussed in *§ 178.38[3][b]*. The primary issue facing theCourt was whether *Civ. Code § 847* limits liability only for negligence, or whether it also limits liability for injuries caused by the intentional use of deadly force when the person injured is later convicted of one of the statutorily enumerated felonies. *Civ. Code § 847(f)* contains an exception to the statutory immunity of *Civ. Code § 847* if the injury is caused by "willful, wanton, or criminal" conduct [*see § 178.38[3][a]*]. Although the court of appeal equated "willful" conduct with any intentional conduct, the Supreme Court disagreed.

The Supreme Court noted that the concept of "willful" conduct appears in many common-law and statutory contexts, and that in the context of tort liability, the usual meaning is that "the actor has intentionally done an act of unreasonable character in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow." The Court extracted three general principles from cases addressing the issue of liability for willful or wanton behavior. First, willful and wanton misconduct is separate and

distinct from negligence, involving different principles of liability and different defenses, and unlike negligence, willful conduct implies an intent that relates not merely to the doing of an act, but an intent that relates to misconduct. Second, willfulness is generally characterized by actual or constructive knowledge of peril, actual or constructive knowledge that injury is a probable, not just possible, result of the danger, and a conscious failure to act to avoid the peril. Third, acts intended or likely to cause serious injury are not categorically wrongful in character and do not inevitably result in liability, as for example when a person uses justifiable force in self-defense. The Court concluded that if the legislature had these "well established" principles in mind when enacting *Civ. Code § 847*, then the intentional actions not protected by the statute are intentional wrongful acts committed either with knowledge that serious injury to another will probably result, or with a wanton and reckless disregard of the possible results. The Court also concluded that although the Penal Code defines willful behavior as simply the purpose or willingness to commit an act, the legislature probably had tort principles in mind when drafting the tort liability statute.

Although the Supreme Court held that intentional conduct that is not wrongful may be subject to immunity under the statute, the Court upheld the court of appeal reversal of summary judgment in the face of conflicting evidence in the record as to whether the force used by the store employees against the plaintiff was justifiable under the circumstances.

California Points & Authorities

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Volume 17 Chapters 170-179 PARTNERSHIPS---to---PREMISES LIABILITY
CHAPTER 178 PREMISES LIABILITY
PART II. FORMS
A. General Liability of Owner or Possessor

17-178 California Points & Authorities § 178.39

§ 178.39 Opposing Contention That Owner or Possessor of Premises Is Liable--Person on Premises Was Gleaning Agricultural or Farm Products [Civ. Code § 846.2]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT OWNER IS NOT LIABLE FOR THE INJURIES TO PLAINTIFF, BECAUSE PLAINTIFF HAD BEEN INVITED ONTO DEFENDANT'S PROPERTY TO GLEAN _____ [AGRICULTURAL *or* FARM] PRODUCTS FOR CHARITABLE PURPOSES.

No Liability Toward Person Injured While Gleaning Agricultural or Farm Products. An owner, tenant, or lessee of land or premises is not liable for injuries to any person expressly invited onto that property to glean agricultural or farm products for charitable purposes (*Civ. Code § 846.2*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted by the defendant, an owner, tenant, or lessee of real property, in opposition to the plaintiff's contention that the defendant is liable for injuries occurring on the property. This form is based on the ground that the defendant is not liable for injuries occurring to any person who has been expressly invited onto his or her property to glean agricultural or farm products for charitable purposes [*Civ. Code § 846.2*]. This immunity is not applicable if the owner, tenant, or lessee received any consideration for permitting the gleaning activity. Nor is it available to immunize the owner from injuries caused by his or her gross negligence or willful and wanton misconduct [*Civ. Code § 846.2*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel is responding to the contention that the defendant owner is liable for the injury occurring on his or her property. These points and authorities may also be adapted for used in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

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Volume 17 Chapters 170-179 PARTNERSHIPS---to---PREMISES LIABILITY
CHAPTER 178 PREMISES LIABILITY
PART II. FORMS
A. General Liability of Owner or Possessor

17-178 California Points & Authorities § 178.40

§ 178.40 Opposing Contention That Owner or Possessor of Premises Is Liable--No Liability for Injury Caused by Dog When Owner or Possessor of Premises Does Not Own Dog and Has No Previous Knowledge of Dog's Dangerous Propensities or Vicious Nature

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT _____ [OWNER *or* POSSESSOR] IS NOT LIABLE FOR PLAINTIFF'S INJURIES BECAUSE DEFENDANT DOES NOT OWN THE DOG THAT CAUSED PLAINTIFF'S INJURIES, AND DEFENDANT HAD NO PREVIOUS KNOWLEDGE OF THE DOG'S DANGEROUS PROPENSITIES OR VICIOUS NATURE.

A. Nonowner of Dog Liable Only When Dog's Dangerous Propensities or Vicious Nature Are Known. To impose liability on one other than the owner of a dog for injury inflicted by the dog on a third party, defendant must have had previous knowledge of the dog's dangerous propensities or vicious nature (*Lundy v. California Realty (1985) 170 Cal. App. 3d 813, 821, 216 Cal. Rptr. 575*).

[*Optional*] **B. Bank Whose Right to Property Is Contested Owes No Duty to Third Party Attacked by Possessor's Dogs Absent Knowledge of Danger and Ability to Prevent Attack.** A bank that has purchased property at a foreclosure sale owes no duty to a third party attacked by dogs on the property if, at the time of the dog attack, the possessors of the property have refused to vacate the property, the possessors of the property were contesting the bank's unlawful detainer proceeding, and the bank lacked both actual knowledge of the dangerous nature of the dogs and the ability to control the dogs (*Martinez v. Bank of Am. (2000) 82 Cal. App. 4th 883, 890-894, 98 Cal. Rptr. 2d 576*).

[*Optional*] **C. Propensities of Dog Breed Insufficient to Establish Actual Knowledge of Particular Dog's Vicious Propensities.** Evidence that a particular breed of dog generally has certain characteristics, by itself, does not establish that a landlord had actual knowledge that a tenant's dog had any dangerous propensities (*Chee v. Amanda Goldt Property Management (2006) 143 Cal. App. 4th 1360, 1371-1372, 50 Cal. Rptr. 3d 40*).

[*Optional*] **D. Property Owner Not Vicariously Liable Based on CC&Rs.** In the absence of actual knowledge of the danger posed by a tenant's dog, a landlord cannot be held vicariously liable in tort for an injury caused by the dog merely because the covenants, conditions, and restrictions (CC&Rs) governing the residence purport to make the landowner responsible for the acts and omissions of the owner's delegates (*Chee v. Amanda Goldt Property Management (2006) 143 Cal. App. 4th 1360, 1375-1376, 50 Cal. Rptr. 3d 40*).

[2] Comments

CAUTION:

At least one decision has imposed liability on an owner or possessor of premises who was not the owner of a dog kept on the premises and who had no actual knowledge of the dog's dangerous propensities [*see Portillo v. Aiassa (1994) 27 Cal. App. 4th 1128, 1133, 32 Cal. Rptr. 2d 755* ; *see also § 178.23[3][a]*]. The court distinguished between cases involving a family pet kept at a single-family residence, in which nonliability is the rule, and cases in which the dog is a guard dog kept by a tenant on commercial premises open to the public, the landlord is aware that the tenant keeps the dog on the premises, and the landlord has not inspected the premises to determine if the dog's presence and temperament creates a dangerous condition. In the latter situation, a landlord cannot claim lack of actual knowledge of the dog's dangerous or vicious propensities as a defense to liability [*Portillo v. Aiassa (1994) 27 Cal. App. 4th 1128, 1136-1137, 32 Cal. Rptr. 2d 755]* .

[a] Use of Form

These points and authorities may be submitted by defendant owner or possessor in opposition to plaintiff's contention that defendant is liable for injury inflicted on plaintiff by a dog on the owner's or possessor's premises, if the owner or possessor did not own the dog and had no previous knowledge of its dangerous propensities or vicious nature. Optional Paragraph B may be added if the defendant is a bank that has purchased the property at a foreclosure sale and has not taken possession of the property at the time of the dog attack because the possessors of the property refused to vacate and the bank's action for unlawful detainer had not yet been adjudicated. Optional Paragraph C may be used if the plaintiff attempts to establish actual knowledge of a dog's vicious propensities by showing that the particular breed of dog generally has certain characteristics. Optional Paragraph D may be used if the plaintiff tries to impose vicarious liability on a property owner for injuries caused by the dog of a tenant based on terms of CC&Rs (Covenants, Conditions, and Restrictions).

This memorandum of points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the substantive issue of the liability of the owner or possessor of the premises for plaintiff's injury. For example, these points and authorities may be used to support defendant's motion for summary judgment on the issue of liability [*see Lundy v. California Realty (1985) 170 Cal. App. 3d 813, 816, 216 Cal. Rptr. 575]* . They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship betweenthe facts of the case and the points of law stated. In particular, counsel should insert argument showing that defendant is not the owner of the dog that inflicted the injuries on plaintiff and that defendant had no knowledge, prior to the dog's attack on plaintiff, of the dog's dangerous propensities or vicious nature.

[c] Opposing Points and Authorities

If appropriate, the points and authorities in this form may be used to oppose the points and *authorities in § 178.23*.

[d] Related Pleading and Practice Forms

For discussion of and forms of complaints for use in negligence actions by persons injured by dogs, see California Forms of Pleading and Practice, Ch. 23, *Animals: Civil Liability* (Matthew Bender). For discussion of and forms of complaints for use in premises liability actions in general, see California Forms of Pleading and Practice, Ch. 421, *Premises Liability* (Matthew Bender).

[3] Discussion of Authorities

[a] Nonowner of Dog Liable Only When Dog's Dangerous Propensities or Vicious Nature Are Known

In ***Lundy v. California Realty*** *(1985) 170 Cal. App. 3d 813, 216 Cal. Rptr. 575* , plaintiff was injured when he jumped headlong over a fence to avoid a German shepherd dog who was attacking him. The attack occurred at the residence of the dog's owner, who was renting the residence from the owners of the property on which it was located. Plaintiff filed an action for damages for his personal injuries against the tenant and the property owners. In the count of his complaint seeking recovery from the tenant, plaintiff alleged that the tenant owned a large German shepherd dog that was possessed of vicious and dangerous propensities, and inclined to attack and bite people. Plaintiff alleged that the tenant kept the dog in an unfenced backyard without posting a sign to warn of the dog's presence. As a result, while on the property for the purpose of conducting a study preliminary to the installation of cable television lines, plaintiff was attacked and bitten by the dog, and suffered personal injuries and other damages. In the count of his complaint against the property owners, plaintiff alleged that they rented the property to the tenant with knowledge of the dog's alleged dangerous propensities, and with knowledge that the dog would be kept on the premises. Plaintiff alleged that the property owners negligently caused plaintiff's injuries by: (1) renting the property to defendant tenant with knowledge that the dog would be kept on the premises; (2) allowing defendant tenant, together with her dog, to remain on the premises; (3) failing to enclose the backyard; and (4) failing to post a sign or signs warning of the dog's presence. Defendant property owners moved for summary judgment, asserting they had neither knowledge nor notice of any dangerous propensities of the dog and therefore neither owed nor breached any duty to plaintiff. After considering the several declarations, partial depositions, and answers to interrogatories filed in support of and in opposition to the motion, the trial court granted the motion, and entered summary judgment in favor of defendant property owners. Plaintiff appealed from the judgment, contending that whether defendant property owners exercised reasonable care in the circumstances constituted a triable issue of fact.

The court of appeal affirmed the judgment of the trial court. The court noted that the crucial question was whether defendant property owners had a legal duty to plaintiff to do any of the things plaintiff asserted they should have done. The court then held that the property owners had no duty to: (1) refuse to rent to the tenant; (2) evict the tenant; (3) post signs warning of the dog's presence, or require the tenant to do so; or (4) fence the backyard, or require the tenant to do so (*170 Cal. App. 3d 813, 820)* . Relying on *Uccello v. Laudenslayer (1975) 44 Cal. App. 3d 504, 513-514, 118 Cal. Rptr. 741* , the court held that a duty of care could not be imposed on a landlord without proof that he or she knew of the dog and its dangerous propensities. The court noted that, under *Civ. Code § 3342*, an owner of a dog may be held liable for injuries inflicted by the dog on another person without any showing that the dog had any especially dangerous propensities or that the owner knew of the dangerous propensities. However, to impose liability on someone other than the owner, previous knowledge of the dog's vicious nature must appear (*170 Cal. App. 3d 813, 821)* . The court also found that the facts before the trial court showed that defendant property owners knew virtually nothing about the dog, apart from its existence and its name. Defendants' knowledge of the latter was evidenced by the rental agreement between tenant and property owners, which provided that no animal should be kept on or about the premises without prior written consent "except Shepard [*sic*] Dog Named Thunder." Additionally, the court found nothing in the facts indicating that the property owners knew either the dog's size or age. Thus, for all defendants knew, the dog might have been a playful pup. Furthermore, the court refused to grant plaintiff's request that it take judicial notice that all German shepherds are dangerous. Finally, the court disagreed with plaintiff's contention that defendant property owners could infer a dangerous propensity of the dog simply because they knew his name was Thunder. By way of example, the court noted that it was not uncommon for an owner of a St. Bernard or Great Dane to name the dog Tiny. In sum, the court

found that the facts before the trial court fell far short of creating a triable issue of fact as to defendant property owners' knowledge of any dangerous propensities on the part of defendant tenant's dog (*170 Cal. App. 3d 813, 822)* .

NOTE:

The holding in *Lundy* was distinguished in *Portillo v. Aiassa* [*Portillo v. Aiassa (1994) 27 Cal. App. 4th 1128, 1137-1138, 32 Cal. Rptr. 2d 755* ; *see § 178.23* [3][a]]. In *Portillo,* the court found the lessor of commercial premises liable for injuries to a member of the public, caused by the commercial tenant's guard dog; the court found the risk of injury to members of the public sufficient to impose on the landlord a duty to inspect the premises to ensure that an animal known to be on the premises is not an unreasonable danger to the public.

[b] Bank Whose Right to Property Is Contested Owes No Duty to Third Party Attacked by Possessor's Dogs Absent Knowledge of Danger and Ability to Prevent Attack

In ***Martinez v. Bank of Am.*** *(2000) 82 Cal. App. 4th 883, 98 Cal. Rptr. 2d 576* , the plaintiffs were the parents of a boy who died after being attacked by dogs on the property adjacent to their own. The dogs were owned by the possessors of the adjacent property. The property on which the attack occurred had recently been purchased by a bank at a foreclosure sale, although at the time of the attack the bank had not yet taken possession of the property because the possessors refused to vacate and were disputing the bank's action for wrongful detainer. The plaintiffs filed a tort action against the dog owners and the bank. The bank successfully moved for summary judgment on the grounds that it owed no duty to the plaintiffs because it could not be held liable for dangerous conditions on property to which it had not yet established a right to possession. The plaintiffs appealed.

The court of appeal affirmed. Recognizing that no actual landlord-tenant relationship existed, but analogizing to existing dog-bite cases, the court concluded that to establish the bank's liability, the plaintiffs would have to show that the bank had actual knowledge of the dangerous dogs and had the ability to prevent foreseeable harm that the dogs might cause. Under the undisputed facts in the record before it, the court concluded that the bank lacked actual knowledge of the danger posed by the dogs. A bank real estate manager had submitted an uncontradicted declaration that she was unaware of any violent acts committed by the dogs or that they had bitten any person or might be inclined to attack children (*82 Cal. App. 4th 883, 891-892)* . Moreover, the bank also lacked the ability to prevent the attack, because the bank had no lease with the possessors to use in leveraging removal of the dogs by their owners and would not obtain the right to directly and promptly control the premises until a judgment was obtained in the unlawful detainer action (*82 Cal. App. 4th 883, 892-893)* . The court also concluded that the bank owed no duty of care after consideration of the factors enunciated by *Rowland v. Christian*, especially in light of the fact that the plaintiffs had submitted no evidence to support a finding that the attack was reasonably foreseeable by the bank (*82 Cal. App. 4th 883, 894-897)* .

[c] Propensities of Dog Breed Insufficient to Establish Actual Knowledge of Particular Dog's Vicious Propensities

In *Chee v. Amanda Goldt Property Management (2006) 143 Cal. App. 4th 1360, 50 Cal. Rptr. 3d 40* , plaintiff was a 71-year-old woman who was injured after being knocked down by a dog owned by the tenant who was leasing a condominium that was adjacent to plaintiff's condominium. Plaintiff sued the tenant, who was dismissed after declaring bankruptcy, as well as the adjacent condominium owner, the property management company he hired, and the condominium homeowners association. Plaintiff asserted premises liability and related negligence claims based on allegations that defendants knew or should have known of the dog's dangerous propensities. The trial court granted summary judgment for the defendants based in part on the lack of evidence that defendants had any prior knowledge that the dog was dangerous. Plaintiff appealed.

The court of appeal affirmed. The court reaffirmed the established rule that a landlord does not owe a duty of care to

protect a third party from a tenant's dog unless the landlord has both actual knowledge of the dog's dangerous propensities and the ability to control or prevent the harm. The undisputed facts showed that prior to plaintiff's injury, defendants had never seen the dog displaying any dangerous propensities and had never received any reports or complaints about the dog suggesting that the dog posed a danger. In addition, the dog's owner declared that the dog had never bitten or jumped on anyone prior to the incident with plaintiff (*143 Cal. App. 4th 1360, 1369-1370)* . Plaintiff had also presented the declaration of an expert addressing the characteristics of that breed of dog, a Jack Russell Terrier, in which the expert suggested that the particular type of dog was not recommended for apartments or condominiums because the dogs will try to escape, jump and leap, and otherwise be "dangerously playful." The court of appeal concluded, however, that evidence that a particular breed of dog generally has certain characteristics, by itself, does not establish that a landlord had actual knowledge that a tenant's dog had any dangerous propensities (*143 Cal. App. 4th 1360, 1370-1371)* .

[d] Property Owner Not Vicariously Liable Based on CC&Rs

The factual and procedural background of *Chee v. Amanda Goldt Property Management (2006) 143 Cal. App. 4th 1360, 50 Cal. Rptr. 3d 40* , is described in [c], *above*. Plaintiff in that case also argued that the owner of the adjacent condominium could be held vicariously liable for the actions of the tenant's dog based on language in the condominium complex's covenants, conditions, and restrictions (CC&Rs), or that the CC&Rs imposed a nondelegable duty to protect plaintiff from the dog. Plaintiff relied on two provisions in the CC&Rs to support her argument. The first stated that while an owner may delegate his right to enjoy the common the common areas to tenants, the owner remained "fully responsible for all acts or omissions of his delegates." The second required all pet owners to assure that their pets are restrained at all times while in the common areas and that they cause no waste or other disturbance while in these areas. Plaintiff argued that these provisions in combination meant that a condominium owner could be heldvicariously liable in tort if their tenant fails to properly restrain a pet and the pet causes harm.

However, the court of appeal rejected this argument. In the absence of actual knowledge of the danger posed by a tenant's dog, the court held that these CC&R provisions did not create a basis for imposing vicarious liability on a neighboring owner. The court noted that vicarious liability is imposed by operation of law, without regard to fault, only in certain established situations. For example, an employer may be held vicariously liable for the torts of an employee acting in the course of his or her employment, or a principal may be vicariously liable for the torts of an agent. Under settled law, however, the negligence of a tenant cannot be imputed to a landlord. Plaintiff had offered no authority for the proposition that CC&Rs, which are private recorded restrictions on the use of property, could operate as a legal basis for expanding the duty of care owed by a property owner to protect others from harm caused by a dog owned and controlled by a tenant, and the court declined to accept this novel proposition (*143 Cal. App. 4th 1360, 1375-1376)* . The court noted that the doctrine of nondelegable duty was merely a species of vicarious liability, and that doctrine did not create a duty of care where no duty was otherwise owed. If the owner lacked actual knowledge of the danger posed by the tenant's dog, the owner owned no duty in the first instance (*143 Cal. App. 4th 1360, 1375)* . Finally, the court rejected plaintiff's argument that the CC&Rs created a contract of indemnity among the homeowners the breach of which could be enforced by another homeowner (*143 Cal. App. 4th 1360, 1376-1377)* .

[4] Additional Authorities

[a] Nonowner of Dog Liable Only When Dog's Dangerous Propensities or Vicious Nature Are Known

In *Yuzon v. Collins (2004) 116 Cal. App. 4th 149, 10 Cal. Rptr. 3d 18* , the plaintiff was a minor who was attacked by a pit bull dog belonging to residents of a house owned by the defendant. The tenants' lease authorized them to have a springer spaniel on the property, but the spaniel had died several years earlier. The defendant had not been informed of the spaniel's death, nor of the tenants' subsequent acquisition of two other dogs, a Dalmatian and the pit bull. Although the defendant may have had actual knowledge that there were dogs on the premises, the dogs were kept indoors and the defendant spoke with the tenants in person only a few times a year, apparently always outside the house. There were no

prior incidents of the pit bull attacking anyone. The trial court granted summary judgment for the defendant, and the court of appeal affirmed. The court of appeal held that the defendant could not be liable because there was no evidence that the defendant had actual knowledge of the pit bull's alleged vicious propensities. The most that the plaintiff could show was that neighbors may have been scared once when the dog ran out of the house while they were walking by with their own dog on a leash, and that the tenants' dogs barked and yelped when people came to the front door. Even assuming that the defendant knew of this conduct, the court considered this to be normal behavior by a dog and insufficient evidence to put the defendant on notice of an actual problem. Evidence that the defendant had once asked the tenants to confine the dogs while an insurance inspector looked in the backyard did not support an inference that the defendant had actual knowledge of a pit bull that was vicious (*116 Cal. App. 4th 149, 164-166)* .

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Volume 17 Chapters 170-179 PARTNERSHIPS---to---PREMISES LIABILITY
CHAPTER 178 PREMISES LIABILITY
PART II. FORMS
A. General Liability of Owner or Possessor

17-178 California Points & Authorities § 178.41

§ 178.41 Opposing Contention That Owner or Possessor of Premises Is Liable--No Duty to Warn Prospective Tenant of Presence of Dangerous Dog in Neighborhood

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT _____ [OWNER *or* POSSESSOR] IS NOT LIABLE FOR PLAINTIFF'S INJURIES BECAUSE DEFENDANT HAD NO DUTY TO WARN PLAINTIFF ABOUT THE PRESENCE IN THE NEIGHBORHOOD OF THE DOG THAT CAUSED PLAINTIFF'S INJURIES.

No Duty to Warn Prospective Tenant About Dangerous Dog in Neighborhood. A landlord has no duty to warn a prospective tenant of the presence of a vicious dog in the neighborhood (*Wylie v. Gresch (1987) 191 Cal. App. 3d 412, 414, 236 Cal. Rptr. 552*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted by defendant landlord in opposition to plaintiff tenant's contention that defendant is liable for injury inflicted on plaintiff by a neighbor's dog.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel is responding to the contention that defendant landlord is liable for plaintiff's injury. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] No Duty to Warn Prospective Tenant About Dangerous Dog in Neighborhood

In ***Wylie v. Gresch*** *(1987) 191 Cal. App. 3d 412, 236 Cal. Rptr. 552* , members of plaintiff family brought a negligence action against their landlords for damages resulting from an attack on one of the family's children by a dog owned by neighbors living next door to the rented premises. Plaintiffs alleged that the landlords had actual and constructive knowledge of the dog's vicious propensities, yet failed to warn the tenants about the dog or take other appropriate action. The trial court sustained the landlords' demurrer without leave to amend and dismissed the action. Plaintiffs appealed.

The court of appeal affirmed. It noted that the principal question in the case focused on the "duty" element of negligence (*191 Cal. App. 3d 412, 416)* . The court could find no case imposing a duty on a landlord to protect against dangerous conditions off the premises over which the landlord has no control and that come onto the property in a location or manner over which the owner has no control (*191 Cal. App. 3d 412, 419)* . It concluded that the complaint alleged no facts that would give rise to liability under *Civ. Code § 1714* or the cases construing it. The court also found that plaintiffs failed to establish that the landlords violated the common-law duty to warn (*191 Cal. App. 3d 412, 420)* . The court noted that there was no indication that defendants created a dangerous situation or that plaintiffs relied on defendants to warn them of any possible danger (*191 Cal. App. 3d 412, 423)* . Quoting from Restatement 2d of Torts § 358, com. b, the court stated that the lessor is under no duty to warn the lessee of a condition that the lessor reasonably believes that the lessee will discover, or of the extent of the risk involved in an obvious condition, unless the lessor would realize that the lessee is unlikely to appreciate it (*191 Cal. App. 3d 412, 423)* . Here, the court found that the landlords could reasonably have expected the tenants to discover the presence of the dog themselves. Also, the court noted that it would be unreasonable to require landlords to warn prospective tenants of every potential danger in the neighborhood (*191 Cal. App. 3d 412, 424)* .

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CHAPTER 178 PREMISES LIABILITY
PART II. FORMS
A. General Liability of Owner or Possessor

17-178 California Points & Authorities § 178.42

§ 178.42 Opposing Contention That Owner or Possessor of Premises Is Liable--No Liability for Injury Caused by Trivial Defect on Property

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT _____ [OWNER *or* POSSESSOR] IS NOT LIABLE FOR PLAINTIFF'S INJURIES BECAUSE THE INJURIES RESULTED FROM A TRIVIAL DEFECT ON THE PREMISES.

No Liability for Trivial Defect. There is no liability on the part of an owner or possessor of premises for injuries resulting from a trivial defect on the premises (*Ursing v. Big Boy Rests. (1987) 192 Cal. App. 3d 394, 397-399, 237 Cal. Rptr. 413*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted by defendant owner or possessor in opposition to plaintiff's contention that defendant is liable for injuries resulting from a trivial defect on defendant's property. This form is based on the ground that the defect was so minor that liability should not be imposed on defendant.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel is responding to the contention that defendant owner or possessor is liable for a defect on his or her property. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should state facts showing that the defect was minor. For example, if plaintiff's injury arose

from a structural defect on defendant's property, counsel may wish to show that the defect was small in size.

[3] Discussion of Authorities

[a] No Liability for Trivial Defect

In ***Ursing v. Big Boy Rests.*** *(1987) 192 Cal. App. 3d 394, 237 Cal. Rptr. 413* , plaintiff brought an action against defendant restaurant for injuries she suffered on the restaurant premises. While leaving the restaurant, plaintiff tripped and fell on a walkway. One of the sections of this walkway had a raised edge, but the edge was no more than three-fourths of an inch higher than the adjoining section. As an affirmative defense, defendant argued that the trial court, as a matter of law, was empowered to dismiss the action if it found the height differential between the two sections of sidewalk amounted only to a trivial defect. The parties agreed to have the "trivial defect" defense determined before the trial by way of motion for summary judgment. The trial court found that the defense applied, and granted summary judgment to defendant. Plaintiff appealed.

The court of appeal affirmed. After reviewing pictures of the sidewalk, it found that reasonable minds could not differ and that the defect was in fact trivial (*192 Cal. App. 3d 394, 397)* . The court held that the trivial defect defense may be asserted by nongovernmental as well as governmental entities. It also found that it was proper for the trial court to determine that the defense applied as a matter of law. In summary, the court stated that persons who maintain walkways are not required to maintain them in an absolutely perfect condition. The duty of care imposed on a property owner, even one with actual notice, does not require the repair of minor defects (*192 Cal. App. 3d 394, 398)* .

[4] Additional Authorities

[a] No Liability for Trivial Defect

In *Caloroso v. Hathaway (2004) 122 Cal. App. 4th 922, 19 Cal. Rptr. 3d 254* , the plaintiffs were a husband and wife who sued a homeowner after the wife tripped over a crack in a walkway in front of the defendant's home. The undisputed evidence showed that the crack created a rise in the cement that was less than half an inch at its highest point, and that the weather was dry and sunny at the time of the accident. The court of appeal affirmed summary judgment for the defendant, agreeing that the walkway crack was a trivial defect as a matter of law. The court held that the trial court did not abuse its discretion by disallowing the plaintiff's expert evidence on the dangerous nature of the crack, concluding that expert evidence was not required to evaluate the danger caused by the size and shape of the crack. The court noted that minor defects such as this crack in the walkway were inevitable and that the continued existence of such defects without warning or repair was not unreasonable. Therefore, the defendant could not be liable regardless of whether the defendant knew of the walkway crack (*122 Cal. App. 4th 922, 927-929)* .

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17-178 California Points & Authorities § 178.43

§ 178.43 Opposing Contention That Owner or Possessor of Premises Is Liable--Commercial Landlord Is Not Strictly Liable for Injury to Commercial Invitees of Lessee

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT _____ [OWNER *or* POSSESSOR] IS NOT STRICTLY LIABLE FOR PLAINTIFF'S INJURIES BECAUSE THE DOCTRINE OF STRICT LIABILITY DOES NOT APPLY TO INJURIES SUFFERED BY COMMERCIAL INVITEES OF THE LESSEE.

Strict Liability Does Not Apply to Commercial Landlords. With respect to premises liability, the proper test to be applied is whether the landowner in the management of his or her property has acted as a reasonable person in view of the probability of injury to others. A commercial landlord who is holding his or her premises open to the public is not strictly liable for injuries suffered by commercial invitees (*Ernest W. Hahn, Inc. v. Superior Court (1991) 1 Cal. App. 4th 1448, 1452, 3 Cal. Rptr. 2d 502*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted by defendant owner or possessor in opposition to plaintiff's contention that a commercial landlord defendant should be held strictly liable for injuries suffered by a commercial invitee on the landlord's premises.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel is responding to the contention that defendant owner orpossessor is liable for a defect on his or her property. For example, this form may be used in support of a demurrer to a complaint. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel would refer to facts that demonstrate that the defendant is a commercial landlord holding his or her business open to the public, rather than a person who is engaged in the business of leasing residential property.

[3] Discussion of Authorities

[a] Strict Liability Does Not Apply to Commercial Landlords

In ***Ernest W. Hahn, Inc. v. Superior Court*** *(1991) 1 Cal. App. 4th 1448, 3 Cal. Rptr. 2d 502* , the plaintiffs brought an action against the owner of a commercial plaza for personal injuries sustained while they were seated at a table outside a farmer's market in the courtyard of a commercial plaza. The injuries occurred when a tree fell on them as they ate lunch purchased from the plaza. The plaintiffs filed a first amended complaint adding a cause of action for strict liability, to which defendant demurred. The trial court overruled the demurrer and the defendant sought a peremptory writ of mandamus to compel the court to vacate its order denying the demurrer.

The court of appeal granted the petition and issued a writ directing the trial court to vacate its order overruling the defendant's demurrer to the strict liability cause of action and to issue a new order sustaining the demurrer without leave to amend. The court stated that traditionally, the doctrine of strict liability has been applied to producing and marketing enterprises responsible for placing products in the stream of commerce. With respect to premises liability, however, the court stated that the proper test to be applied is whether the landowner in the management of his or her property has acted as a reasonable person in view of the probability of injury to others. Insofar as an invitee is concerned, the applicable general principle is that the possessor of the property is not an insurer of the invitee's safety, but must use reasonable care to keep the premises in a reasonably safe condition and warn of any latent or concealed peril (*1 Cal. App. 4th 1448, 1450)* . The court distinguished *Becker v. IRM Corp.* [*Becker v. IRM Corp. (1985) 38 Cal. 3d 454, 464, 213 Cal. Rptr. 213, 698 P.2d 116]* , which held a residential landlord strictly liable for injuries suffered by a latent defect in the leased premises, on the ground that the extension of strict liability to owners of residential housing was founded on the theory of an implied warranty of habitability and the need to provide safe, urban housing to the public. The defendant, however, was not in the business of leasing residential property to the public. Nor was it a producer or distributor of goods, placing its product in the stream of commerce. Instead, observed the court, the defendant was a commercial landlord holding its premises open to the public (*1 Cal. App. 4th 1448, 1452)* . The court held that *Becker* neither required nor portended a change in the law as significant as one that would eliminate the traditional requirement of fault for imposition of liability (*1 Cal. App. 4th 1448, 1452)* .

[4] Additional Authorities

[a] Strict Liability Does Not Apply to Commercial Landlords

In *Moore v. Wal-Mart Stores, Inc. (2003) 111 Cal. App. 4th 472, 3 Cal. Rptr. 3d 813* , the plaintiff slipped and fell on a french fry in a department store. The plaintiff sued the department store, which leased space to a fast food restaurant and did not prevent patrons from bringing bring food and drinks from the restaurant into the store. Because the store adopted a business model that allowed food to be brought into the store, increasing the risk of the type of injury that occurred, the trial court did not instruct the jury that it could not impose liability unless it found that the store had actual or constructive knowledge of the french fry in time to prevent the injury. The jury returned a verdict for the plaintiff, but the court of appeal reversed. The court of appeal held that the trial court erred in refusing to instruct the jury that actual or constructive knowledge of the french fry was required. By adopting the plaintiff's argument that liability could be imposed based on the defendant's choice of a business model even in the absence of the defendant's knowledge of the actual danger that harmed the plaintiff, the trial court was effectively making the store strictly liable for the injury to the plaintiff, which was not the law in California (*111 Cal. App. 4th 472, 478-479)* .

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17-178 California Points & Authorities § 178.44

§ 178.44 Opposing Contention That Owner of Premises Is Liable--Commercial Landlord Is Not Liable for Injury to Tenant's Employee Caused by Tenant's Business Practices

[1] FORM

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

DEFENDANT LANDOWNER IS NOT LIABLE FOR THE HARM TO PLAINTIFF, WHO IS THE TENANT'S EMPLOYEE, FOR AN INJURY THAT OCCURRED DURING THE PLAINTIFF'S EMPLOYMENT ANDWAS CAUSED BY THE WORKING CONDITIONS CREATED BY THE TENANT'S BUSINESS.

Commercial Landowner Not Liable for Injury Caused to Tenant's Employee by Working Conditions of Tenant. A commercial landlord is not liable for an injury to a tenant's employee that was sustained during the course of employment and caused by the working conditions created by the tenant, at least absent any evidence that the landowner had a right to inspect for, discover, and correct hazards in the tenant's workplace (*Laico v. Chevron U.S.A., Inc. (2004) 123 Cal. App. 4th 649, 670, 20 Cal. Rptr. 3d 307*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a commercial landlord, merely by virtue of ownership of the land, may be liable for an injury sustained during the course of employment by an employee of the business that leases the land, if that injury is caused by working conditions created by the tenant's business, rather than by any preexisting condition of the premises.

These points and authorities may be combined with a memorandum of points and authorities relating to the specific procedural context in which counsel is responding to the contention that a landowner may be liable for an injury to a tenant's employee. For example, they may be used in support of a demurrer to a complaint or in a motion for summary judgment. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law raised. Thus, counsel should include facts showing that the defendant was the owner of the land, but exercised no control over the tenant's business, had no right or duty to inspect the working conditions of the tenant's business, and had no knowledge of the dangerous working conditions that allegedly caused the injury.

[3] Discussion of Authorities

[a] Commercial Landowner Not Liable for Injury Caused to Tenant's Employee by Working Conditions of Tenant

In ***Laico v. Chevron U.S.A., Inc.*** *(2004) 123 Cal. App. 4th 649, 20 Cal. Rptr. 3d 307* , the plaintiff was employed by a facility that performed tests on the gasoline of the landowner, a large petroleum company. The plaintiff was diagnosed with a serious blood disorder, allegedly caused by exposure to benzene and other toxic chemicals associated with the gasoline supplied by the petroleum company while performing his testing work with the facility. The plaintiff performed his work without using protective respiratory gear, and the levels of benzene present were higher than the amounts allowed by Cal-OSHA. The plaintiff sued the petroleum company under a theory of products liability, arguing that the petroleum company was liable for supplying the gasoline tested without also providing notice to the plaintiff of the dangerous nature of the product. The plaintiff also argued that the petroleum company was liable as the landowner under a theory of premises liability for failing to discover and correct a dangerous condition on its property. The jury rejected the products liability theory, but found for the plaintiff on the premises liability theory. The trial court rejected various motions for judgment notwithstanding the verdict and for a new trial, and the defendant appealed.

The court of appeal reversed. The court held that the petroleum company could not be liable for failing to take steps to prevent the dangerous condition that caused the plaintiff's illness, a dangerous condition that did not exist independent of the tenant's business. The court pointed to the lack of evidence that the landowner had any control over the property at the time of the injury, had any knowledge of the dangerous testing methods used, had any right to inspect the premises or testing procedures, or had any ability to discover and remedy the hazard that caused the plaintiff's illness (*123 Cal. App. 4th 649, 670)* . A contrary result would, according to the court, be the equivalent of imposing strict liability on the defendant based solely on status as a landowner and its knowledge that the tenant's business posed special risks to the tenant's employees, which the court refused to do (*123 Cal. App. 4th 649, 661)* . The court also noted that a contrary result would appear to be at odds analytically with California Supreme Court precedent holding that employees of independent contractors who are injured while performing their work may not recover from the person who hires the independent contractor, at least if the hirer does not exercise actual control over the work activities. The court noted sufficient similarities between the situation of the non-negligent hirer of the independent contractor in those cases and the landowner in this particular case (*123 Cal. App. 4th 649, 666-669)* .

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17-178 California Points & Authorities § 178.44A

§ 178.44A Opposing Contention That Owner or Possessor of Premises is Liable--No Duty of Sports Facility to Notify Invitees of Availability of Automatic External Defibrillator

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT OWED NO DUTY TO NOTIFY INVITEES TO DEFENDANT'S SPORTS FACILITY OF THE PRESENCE AND AVAILABILITY OF AN AUTOMATIC EXTERNAL DEFIBRILLATOR FOR USE DURING AN EMERGENCY.

No Duty to Notify of Presence of Defibrillator. Sports facility operators do not owe a duty to sports participants to provide advance notice of the availability of an automatic external defibrillator at the facility for use should a medical emergency arise (*Rotolo v. San Jose Sports & Entertainment, LLC (2007) 151 Cal. App. 4th 307, 323, 334-335, 59 Cal. Rptr. 3d 770*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the owner of a sports facility owes a duty to sports participants utilizing the facility to provide advance notice of the availability of an automatic external defibrillator at the facility.

These points and authorities may be combined with points and authorities relating to the specific procedural context in which the issue of defendant's liability arises, or combined with other forms in this chapter, as appropriate. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law stated.

[c] Related Pleading and Practice Forms

For forms and discussion regarding liability for injuries sustained during sporting activities, see California forms of Pleading and Practice, Ch. 273, *Games, Sports and Athletics* (Matthew Bender). For forms and discussion regarding premises liability generally, see California forms of Pleading and Practice, Ch. 421, *Premises Liability* (Matthew Bender).

[3] Discussion of Authorities

[a] No Duty to Notify of Presence of Defibrillator

In *Rotolo v. San Jose Sports & Entertainment, LLC (2007) 151 Cal. App. 4th 307, 59 Cal. Rptr. 3d 770* , plaintiffs were the parents of a 17-year-old boy who suffered sudden cardiac arrest and died while playing ice hockey. When the boy collapsed, two bystanders with medical training performed CPR, and two different persons, one apparently an employee of the sports facility, made immediate 9-1-1 calls. Nonetheless, the boy died. Plaintiffs sued the business entities responsible for operating the ice hockey facility, which was open to the general public, youth hockey clubs, and professional teams. Plaintiffs argued that the defendants had acquired and placed an automatic external defibrillator (AED) close enough to the rink for use, but failed to provide advance notice to anyone associated with the hockey teams of the defibrillator's availability. Because of this failure, neither the bystanders who performed CPR nor other bystanders were aware that a defibrillator was nearby, use of which may have saved the boy's life. Plaintiffs alleged that defendants owed a duty to provide advance notice to league officials and coaches, based on an alleged special relationship between defendants and the invitees on their premises. The trial court sustained defendants' demurrer and entered judgment in their favor. Plaintiffs appealed.

The court of appeal affirmed. The court noted that under *Health & Safety Code § 1797.196(b)* and *(f)*, building owners and operators are under no duty to acquire and install an AED, and those who do make a defibrillator available are generally provided with immunity for its use during emergencies, so long as certain statutory conditions are met. The court held that these statutory requirements, which are intended to encourage the voluntary provision of defibrillators, occupy the field of liability for use or provision of these medical devices, and the courts are not free to impose an additional duty to notify sports participants or other invitees of the existence or location of such a device. The court concluded that imposition of an additional duty of notice not found in the statute would actually discourage the voluntary provision of AEDs, defeating the purpose of the statutory provisions (*151 Cal. App. 4th 307, 322-324, 338)* . The court went on to note that while the common law placed a limited duty on proprietors to provide a reasonable response when an invitee is faced with a medical emergency, defendants met that duty by placing an immediate 9-1-1 call. The common law, the court concluded, had never been extended to impose an affirmative duty on a landlord to give advance notice to prospective invitees of the existence and location of a medical device (*151 Cal. App. 4th 307, 327-332)* . The court also noted that the defendants did nothing to cause the cardiac arrest or increase the risks inherent in the sport of ice hockey and rejected the proposition that a sports facility operator owed a duty to reduce the effects of an injury that was an inherent risk of the sport (*151 Cal. App. 4th 307, 334-335)* . The court rejected application of the negligent undertaking doctrine as well, finding it inapplicable under the facts of the case (*151 Cal. App. 4th 307, 335-336)* .

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17-178 California Points & Authorities § 178.45

§ 178.45 Opposing Contention That Former Owner or Possessor of Premises Is Liable--Ownership, Possession, or Control As Fundamental to Liability

[1] FORM

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

DEFENDANT IS NOT LIABLE FOR THE HARM TO PLAINTIFF BECAUSE DEFENDANT HAD RELINQUISHED ALL OWNERSHIP, POSSESSION, ANDCONTROL OF THE PREMISES BEFORE PLAINTIFF SUSTAINED THE INJURIES OF WHICH PLAINTIFF COMPLAINS.

Nonliability of Predecessor Owners or Possessors. A defendant who is the former owner of property cannot be held liable for injuries that are sustained due to a dangerous condition on the property but that occur after defendant has relinquished all ownership, possession, and control of that property (*Preston v. Goldman (1986) 42 Cal. 3d 108, 110, 227 Cal. Rptr. 817, 720 P.2d 476* ; *Lorenzen-Hughes v. MacElhenny, Levy & Co. (1994) 24 Cal. App. 4th 1684, 1687-1688, 30 Cal. Rptr. 2d 210*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to plaintiff's contention that a former owner or possessor of premises is liable for injuries to plaintiff caused by a dangerous condition on the premises. The basis of opposition is that ownership, possession, and control of premises is a fundamental requirement to ascribing premises liability.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which the issue of defendant's liability arises, or combined with other forms in this chapter, as appropriate. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law

stated.

[b] Liability of Former Owner or Possessor and Summary Judgment

Ownership, possession, or control is a fundamental requirement for ascribing liability to a defendant for the defective or dangerous condition of property. Therefore, summary judgment is proper if defendant has unequivocally established the absence of ownership, possession, and control [*Preston v. Goldman (1986), 42 Cal. 3d 108, 119, 227 Cal. Rptr. 817, 720 P.2d 476]* . However, once the burden of proof has shifted to plaintiff [*see Code Civ. Proc. § 437c(p)(2)*], plaintiff may defeat the motion for summary judgment if plaintiff can establish either of the two exceptions to this rule: (1) defendant was the builder, contractor, or developer of the entire property; or (2) defendant deliberately concealed, or failed to disclose, the dangerous condition [*Lorenzen-Hughes v. MacElhenny, Levy & Co. (1994) 24 Cal. App. 4th 1684, 1688-1689, 30 Cal. Rptr. 2d 210* ; *see §§ 178.31, 178.32*].

[c] Related Pleading and Practice Forms

For forms and discussion regarding premises liability generally, see California Forms of Pleading and Practice, Ch. 421, *Premises Liability* (Matthew Bender).

[3] Discussion of Authorities

[a] Nonliability of Predecessor Owners or Possessors

In ***Preston v. Goldman*** *(1986), 42 Cal. 3d 108, 227 Cal. Rptr. 817, 720 P.2d 476* , defendants built a pool in their backyard and later sold the property. The new owner entered into a lease-option with a family who took possession of the property, made alterations to the wall surrounding the pool, and were aware of the pool's depth and configuration. Plaintiff, a very young child who was visiting the family, fell into the pool and was severely injured. Plaintiff's father filed a complaint on his behalf against defendants, among other parties. A jury determined in a special verdict that defendants were not negligent, and plaintiff appealed.

The court of appeal reversed, holding that a vendor who negligently creates an unreasonably dangerous condition on his or her property is liable in the same manner as a nonvendor because the vendor's liability arises from his or her status as the creator of the condition rather than as the owner of the land. Defendant petitioned the Supreme Court for review.

The Supreme Court reversed the court of appeal. The Court noted the development of three separate approaches to premises liability of predecessor owners: (1) the doctrine of *caveat emptor* (buyer beware), under which liability terminates once ownership or control is transferred; (2) a more expansive view that permits liability if the vendor has failed to disclose hidden defects to the vendee or if the property's condition when transferred involves an unreasonable risk of harm to persons outside the premises; and (3) the view that the mere transfer of title is insufficient to shiftresponsibility for dangers created by a vendor's negligence (*42 Cal. 3d 108, 114-115)* . Nearly all other jurisdictions have adhered to the *caveat emptor* approach in cases involving private property (*42 Cal. 3d 108, 116)* , and the Court adopted this view (*42 Cal. 3d 108, 118)* . In an earlier decision involving injuries to persons outside the premises [*Sprecher v. Adamson Cos. (1981) 30 Cal. 3d 358, 368-370, 178 Cal. Rptr. 783, 636 P.2d 1121]* , the Court emphasized that the duty to protect persons coming onto premises is grounded in possession of the premises and the right to control and manage them. The Court reiterated that ownership and control is a fundamental requirement for ascribing premises liability (*42 Cal. 3d 108, 118-119)* . Applying the balance of factors analysis mandated by *Rowland v. Christian* [*Rowland v. Christian (1968), 69 Cal. 2d 108, 112-113, 70 Cal. Rptr. 97, 443 P.2d 561*], the Court concluded that the defendants should not be held liable. The Court cited the lack of a close connection between defendants' conduct and plaintiff's injuries, the burden on defendants and the consequences to the community of imposing liability on a former owner because persons the former owner has no control over use the improvements the former owner made years before, and the unavailability of insurance for this type of risk (*42 Cal. 3d 108, 125-126)* .

Lorenzen-Hughes v. MacElhenny, Levy & Co. *(1994) 24 Cal. App. 4th 1684, 30 Cal. Rptr. 2d 210* , is discussed in *§ 178.31[3][a]*.

[4] Additional Authorities

[a] Nonliability of Predecessor Owners or Possessors

In *Lewis v. Chevron USA Inc. (2004) 119 Cal. App. 4th 690, 14 Cal. Rptr. 3d 636* , a copper pipe flowing with hot water burst while the plaintiff was working as a subcontractor on an electrical job. The plaintiff sued the corporation that had sold the building to the current owner approximately eight years earlier. The defendant successfully moved for summary judgment, and the court of appeal affirmed. Noting the earlier decisions in *Preston v. Goldman* and *Lorenzen-Hughes v. MacElhenny, Levy & Co.,* the court of appeal recognized that the general rule that prior owners are not liable was settled. In this particular case, the prior owner had no ability to inspect the pipes or warn workers about the pipes. It could not obtain insurance for property it did not own or take precautions to prevent injuries after it had given up ownership and the ability to control the property (*119 Cal. App. 4th 690, 697)* . The court also rejected the argument that the rule of *Preston* did not apply because the defect to the pipes was latent. In the absence of evidence that the prior owner knew of the latent defect and deliberately concealed it, the prior owner could not be liable (*119 Cal. App. 4th 690, 698)* .

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17-178 California Points & Authorities § 178.46

§ 178.46 Opposing Contention That Owner of Easement Rights May Be Liable For Injury Occurring on Property--Easement Rights Unrelated to Injury-Causing Danger

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT'S EASEMENT RIGHTS IN THE PROPERTY ON WHICH THE INJURY OCCURRED DO NOT CREATE A DUTY OF CARE TO PLAINTIFF TO GUARD AGAINST THE INJURY SUSTAINED, BECAUSE THE PARTICULAR EASEMENT RIGHTS ARE UNRELATED TO THE DANGER THAT CAUSED PLAINTIFF'S INJURY.

Easement Rights Must Be Related to Source of Injury. The right of control that accompanies an easement interest in property is narrower than the right of control that accompanies fee ownership of real property, and the corresponding duty to third parties in managing the property interest imposed on an easement holder is also narrower in scope and must be related to the reason that the easement is granted (*Cody F. v. Falletti (2001) 92 Cal. App. 4th 1232, 1246, 112 Cal. Rptr. 2d 593*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to the contention that an owner of easement rights in property on which the plaintiff's injury occurred owed a duty of care to the plaintiff. The grounds of the opposition are that the defendant's particular easement rights were unrelated to the danger that caused the injury.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which these points are raised. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should include facts or documentation showing the scope of the easement and explain how those easement rights were unrelated to the danger that caused the plaintiff's injury.

[3] Discussion of Authorities

[a] Easement Rights Must Be Related to Source of Injury

In ***Cody F. v. Falletti*** *(2001) 92 Cal. App. 4th 1232, 112 Cal. Rptr. 2d 593* , the plaintiffs brought an action against property owners and members of a subdivision association, alleging that dogs had escaped from the yard of one property owner in the subdivision and attacked one of the plaintiffs. The plaintiffs alleged that the defendants were negligent in failing to prevent the dog owner from violating association rules governing the presence of dogs on the property lots by allowing the dogs to escape and cause the injury. The plaintiffs argued that a duty to protect the plaintiffs could be imposed on members of the subdivision association based on the facts that the injury occurred on a subdivision road and that the association was granted a right-of-access easement over all subdivision roads. The defendants successfully demurred to the complaint, arguing that neither association membership nor individual interest in the easement over the private road where the attack occurred supported creation of a duty to the plaintiffs. The plaintiffs appealed.

The court of appeal affirmed. Recognizing the general proposition that an easement owner has the same duties and responsibilities to third persons who enter the premises as any other property owner, the court also noted that the right of control that accompanies an easement interest is narrower than the right of control that accompanies fee ownership of real property. Thus, the corresponding duty to third parties in managing the property interest imposed on an easement holder is also narrower in scope and must have a relationship to the degree of control conferred by the scope of the easement interest (*92 Cal. App. 4th 1232, 1240-1243)* . The court noted, for example, that premises liability may be imposed on an electric utility company based on an easement granted specifically to maintain and operate power lines, if the injury in question is caused by the presence of those electrical fixtures. However, in this particular case, the defendants were not liable for the dog attack that occurred on one of the subdivision's streets, because the easement, which conferred a right of access over those streets, had no relationship to the danger that caused the injury--namely, the danger of vicious dogs escaping from a yard and attacking pedestrians on the street (*92 Cal. App. 4th 1232, 1242-1244)* .

The court also noted that the association's right to control the presence of dogs in the subdivision did not include a duty to exercise those rights. In addition, individual association members, who were merely residents of the subdivision, had no authority to control the dogs or their owner, and each member had only a single vote on matters affecting association affairs. Thus, individual association members could not be liable merely on the grounds that the association failed to enforce association rules that could have eliminated the dogs' presence in the subdivision (*92 Cal. App. 4th 1232, 1245-1246)* .

California Points & Authorities

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Volume 17 Chapters 170-179 PARTNERSHIPS---to---PREMISES LIABILITY
CHAPTER 178 PREMISES LIABILITY
PART II. FORMS
A. General Liability of Owner or Possessor

17-178 California Points & Authorities §§ 178.47-178.59

[Reserved]

§§ 178.47[Reserved]

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Volume 17 Chapters 170-179 PARTNERSHIPS---to---PREMISES LIABILITY
CHAPTER 178 PREMISES LIABILITY
PART II. FORMS
B. Conduct of Third Persons

17-178 California Points & Authorities § 178.60

§ 178.60 Supporting Contention That Person Who Owns, Possesses, or Controls Premises Is Liable for Harm Caused by Foreseeable Wrongful Acts of Third Persons

[1] FORM

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

DEFENDANT IS LIABLE FOR THE HARM TO PLAINTIFF BECAUSE PLAINTIFF WAS INJURED BY THE WRONGFUL ACT OF A THIRD PARTY ON PREMISES THAT THE DEFENDANT OWNED, POSSESSED, OR CONTROLLED, AND THE PERSON WHO OWNS, POSSESSES, OR CONTROLS PREMISES OWES A DUTY TO INVITEES TO PROTECT THEM AGAINST THE CONDUCT OF THIRD PERSONS ON THE PREMISES WHEN THE CONDUCT THREATENS THE SAFETY OF INVITEES AND THE CONDUCT AND ACCOMPANYING HARM ARE FORESEEABLE.

A. Duty to Protect Against Wrongful Conduct of Third Persons. An owner or possessor of premises owes a duty to invitees to take affirmative actions to protect them against the wrongful conduct of third persons that threaten their safety when such conduct and accompanying harm are foreseeable (*Frances T. v. Village Green Owners Ass'n (1986) 42 Cal. 3d 490, 499-503, 229 Cal. Rptr. 456, 723 P.2d 573* ; *Taylor v. Centennial Bowl, Inc. (1966) 65 Cal. 2d 114, 121, 52 Cal. Rptr. 561, 416 P.2d 793*).

B. Factors Considered in Determining Existence of Duty. The factors that must be weighed in considering whether one owes another a duty of care include the following: (1) the foreseeability of harm to the plaintiff; (2) the degree of certainty that the plaintiff suffered injury; (3) the closeness of the connection between the defendant's conduct and the injury suffered; (4) the moral blame attached to the defendant's conduct; (5) the policy of preventing future harm; (6) the extent of the burden to the defendant with resulting liability for breach; and (7) the availability, cost, and prevalence of insurance for the risk involved (*Southland Corp. v. Superior Court (1988) 203 Cal. App. 3d 656, 664, 250 Cal. Rptr. 57*).

[*Optional*] **C. Duty of Business Proprietor.** A business proprietor owes a clear duty of care to his or her customers or

business invitees to protect them when they come on his or her land, even from the wrongful acts of third persons that the proprietor has reasonable cause to anticipate (*Southland Corp. v. Superior Court (1988) 203 Cal. App. 3d 656, 664, 250 Cal. Rptr. 57*).

[*Optional*] **D. Injury on Adjacent Property Controlled by Defendant.** The existence of a business proprietor's duty of care with respect to patrons injured by the criminal acts of third persons that occur on property adjacent to the business premises, which is neither owned nor controlled by the proprietor, depends on the proprietor's actual or apparent control of the adjacent property (*Morris v. De La Torre (2005) 36 Cal. 4th 260, 274, 30 Cal. Rptr. 3d 173, 113 P.3d 1182* ; *Southland Corp. v. Superior Court (1988) 203 Cal. App. 3d 656, 662, 250 Cal. Rptr. 57*).

[*Optional*] **E. Duty to Provide Security Guards Because of Occurrence of Prior Similar Incidents.** The fact that the owner or possessor of the property is on notice that prior similar incidents of wrongful conduct had occurred makes the wrongful conduct highly foreseeable. The owner or possessor therefore has a duty to provide security guards on its premises to deter and protect against such wrongful conduct (*see* *Ann M. v. Pacific Plaza Shopping Ctr. (1993) 6 Cal. 4th 666, 679-680, 25 Cal. Rptr. 2d 137, 863 P.2d 207*).

[*Optional*] **F. Duty to Protect Exists Despite Absence of Prior Similar Incidents.** Even if no prior similar incidents of wrongful conduct have occurred, the owner or possessor of the property nonetheless has a duty to protect against foreseeable wrongful conduct by means less burdensome than providing security guards. If protection against wrongful conduct can be provided by simpler measures, prior similar incidents are not required to establish the foreseeability of the conduct and the duty to take these measures (*Delgado v. Trax Bar & Grill (2005) 36 Cal. 4th 224, 243-244* & n.24, *30 Cal. Rptr. 3d 145, 113 P.3d 1159* ; *Ann M. v. Pacific Plaza Shopping Ctr. (1993) 6 Cal. 4th 666, 678-679, 25 Cal. Rptr. 2d 137, 863 P.2d 207*).

[*Optional*] **G. Duty to Take Minimal Measures to Assist Against Presently-Occurring Criminal Conduct.** To protect invitees from criminal conduct that is presently occurring or about to occur, store or restaurant employees may have a duty to take reasonable and minimally burdensome measures, such as issuing a warning orcalling 911 for assistance, if those measures can be undertaken without increasing the risk of harm to the employees or other persons (*Morris v. De La Torre (2005) 36 Cal. 4th 260, 277-278, 30 Cal. Rptr. 3d 173, 113 P.3d 1182*).

[*Optional*] **H. Security Guard Owes Duty of Protection to Invitees.** When a security service contracts with the owner or possessor of business premises to provide security, a special relationship is created between the security guard and the business's customers. This relationship, in and of itself, is sufficient to impose on the guard the obligation to act affirmatively to protect those customers while they are on the premises (*Marois v. Royal Investigation & Patrol, Inc. (1984) 162 Cal. App. 3d 193, 199-200, 208 Cal. Rptr. 384*).

[*Optional*]. **I. Proof of Causation.** In an action to recover for the failure to provide adequate security measures to prevent a criminal attack by a third party, proof that the failure was the actual cause of the injury requires only a showing by the plaintiff that the security measures proposed would more likely than not have prevented the attack, not a showing that they would have absolutely prevented the attack. (*Sandoval v. Bank of Am. (2002) 94 Cal. App. 4th 1378, 1387, 115 Cal. Rptr. 2d 128*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that the person who owned, possessed, or controlled premises had a duty to plaintiff, an invitee, to protect him or her from harm due to the foreseeable wrongful conduct of a third person or persons. Optional Paragraph C may be included if the defendant is a business proprietor. Optional Paragraph D may be included if the injury occurred not on defendant's property but on property

adjacent to it and defendant, although he or she neither owned nor possessed the adjacent property, had control over it.

Optional Paragraph E may be included if the plaintiff's contention is that the defendant was negligent in failing to provide security guards on its premises to protect the plaintiff. Optional Paragraph F may be included in reply to argument by the defendant (for example, in a motion for summary judgment) that it had no duty to protect the plaintiff because of the absence of prior similar incidents [*see, e.g., § 178.64*].

Optional Paragraph G may be included if the plaintiff contends that the defendant or the defendant's employee failed to take reasonable and minimally burdensome measures to aid against third-party criminal conduct as it was occurring.

Optional Paragraph H may be used if the possessor of the premises hires a security service in at least partial fulfillment of its obligation to protect its customers. Although the paragraph is specific to the duty owed by the security service, it is also pertinent to an action against the possessor, because the special duty is owed to customers on the premises, and any action against the security service would most likely be combined with an action against the possessor. The owner or possessor may also be vicariously liable for a breach of the duty by the security guard.

Optional Paragraph I may be used to state the proper burden of proof by a plaintiff in an action to recover for the failure to provide adequate security measures to prevent a criminal attack by a third party.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of failure of the owner or possessor to protect a person on the premises from third-party conduct. The argument supported by this memorandum may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing the wrongful third-party conduct and harm caused by it, as well as facts showing how the third-party conduct was foreseeable, thereby bringing the defendant under a duty to protect the person injured.

[c] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 178.63 -178.70* may be used to oppose the contention supported by these points and authorities, and this form may be combined with the points and *authorities in § 178.20* concerning the test of liability of an owner or possessor of premises.

[3] Discussion of Authorities

[a] Duty to Protect Against Wrongful Conduct of Third Persons

In ***Frances T. v. Village Green Owners Ass'n*** *(1986) 42 Cal. 3d 490, 229 Cal. Rptr. 456, 723 P.2d 573* , plaintiff was robbed and raped in her condominium by an assailant who entered her dwelling under the coverof darkness. Plaintiff brought a negligence action against the condominium association for negligently failing to provide adequate lighting in the common areas that it controlled and for wrongfully ordering her to remove the additional lighting she had provided on her own initiative. The trial court sustained defendant's demurrer to plaintiff's cause of action.

The Supreme Court reversed. The Court initially held that defendant condominium association was under the same duty to maintain the common areas as that of a landlord (*42 Cal. 3d 490, 499-501)* . The Court held that under this standard, the association was potentially liable for failure to take steps to protect plaintiff from the criminal acts of third parties. In her negligence cause of action, plaintiff alleged that defendant knew that the lighting around her unit was inadequate

and also knew that a number of crimes had been committed in the area as a result of the poor lighting. The Court found that these allegations, if proven, would support a finding of negligence, and that the negligence was a legal cause of her injuries (*42 Cal. 3d 490, 503)* .

In ***Taylor v. Centennial Bowl, Inc.*** *(1966) 65 Cal. 2d 114, 52 Cal. Rptr. 561, 416 P.2d 793* , plaintiff was drinking with two companions in the cocktail lounge of an all-night bowling center. She was seated within hearing distance of a man employed as a bouncer by the owner of the center. Two times during the course of the four-hour evening a patron approached the plaintiff and asked the plaintiff to go to bed with him. Plaintiff told the patron to go away on both occasions and reported to the bouncer that the patron was being offensive to her. When plaintiff was preparing to leave, the bouncer told her not to go outside to her car because the "goofball" was out in the parking lot. Plaintiff replied that she needed to get home and the bouncer told her to be careful. On entering the parking lot, the patron assaulted plaintiff with a knife and seriously injured her. At the trial, a directed verdict was granted in favor of defendant based on the theory that no duty on the part of defendant was violated in that the warning was sufficient in and of itself to discharge any duty to protect a patron from the wrongful conduct of a third party. The court also refused to allow the testimony of two police officers, one of whom was to testify that he had frequently been called to the bowling center to quell disturbances.

The Supreme Court reversed the judgment and stated that there was sufficient evidence to support a verdict in favor of plaintiff that the warning was inadequate to protect plaintiff (*65 Cal. 2d 114, 124-125)* .

[b] Factors Considered in Determining Existence of Duty

Southland Corp. v. Superior Court *(1988) 203 Cal. App. 3d 656, 250 Cal. Rptr. 57* , was a mandate proceeding arising out of an action for damages against the owners of a convenience store by a customer who, after leaving the defendants' premises, was criminally assaulted as he was walking to his car parked on a vacant, unpaved lot adjacent to the store. Defendants neither owned nor leased the adjacent lot but knew its patrons utilized the lot for parking. Defendants' motion for summary judgment was denied, and they petitioned the court of appeal for a writ of mandate to compel the trial court to grant their motion.

In denying a peremptory writ and discharging the alternative writ on the ground that there were issues of fact to be tried with respect to whether the defendants had control over the adjacent lot and whether harm to plaintiff was foreseeable, the court of appeal said that it has long been recognized that a possessor of land who holds it open to the public for entry for business purposes is subject to liability to members of the public while they are on the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons and by the failure of the possessor to exercise reasonable care either to (1) discover that such acts are being done or are likely to be done, or (2) give a warning adequate to enable the visitors to avoid the harm, or otherwise protect them against it. Liability will normally be imposed when the possessor has reasonable cause to anticipate the misconduct of third persons (*203 Cal. App. 3d 656, 663)* . The court explained that although a landowner is not an insurer of the safety of persons on his or her property, he or she does have a duty to take reasonable steps to protect invitees from foreseeable injury, even to the extent of controlling the conduct of third parties, and that a possessor of land may be liable for foreseeable injuries caused by the accidental, negligent, or intentionally harmful acts of third persons (*203 Cal. App. 3d 656, 668)* .

The court said that in considering whether one owes another a duty of care, several factors must be weighed, including: (1) the foreseeability of harm to the plaintiff; (2) the degree of certainty that the plaintiff suffered injury; (3) the closeness of the connection between the defendant's conduct and the injury suffered; (4) the moral blame attached to the defendant's conduct; (5) the policy of preventing future harm; (6) the extent of the burden to the defendant with resulting liability for breach; and (7) the availability, cost, and prevalence of insurance for the risk involved (*203 Cal. App. 3d 656, 664)* .

[c] Duty of Business Proprietor

The facts and the procedural background of ***Southland Corp. v. Superior Court*** *(1988) 203 Cal. App. 3d 656, 250 Cal. Rptr. 57* , are discussed in *§ 178.60[3][b]*. In denying a peremptory writ of mandate and discharging the alternative writ, the court of appeal said that a business proprietor owes a clear duty of care to his or her customers (his or her business invitees) to protect them when they come on his or her land, even from the wrongful acts of third persons which the proprietor has reasonable cause to anticipate (*203 Cal. App. 3d 656, 664)* .

[d] Injury on Adjacent Property Controlled by Defendant

In ***Morris v. De La Torre*** *(2005) 36 Cal. 4th 260, 30 Cal. Rptr. 3d 173, 113 P.3d 1182* , the plaintiff and his friends were attacked late at night by two gang members in a parking lot in front of an all-night restaurant located in a strip mall. After arriving at the restaurant, the plaintiff and two of his friends had waited in the parking lot while two other friends went inside to purchase food. The plaintiff was a regular customer at the restaurant, although he did not purchase food on that particular night. While the plaintiff and his friends were waiting, two members of a local street gang arrived and started a fight with the plaintiff. After punching the plaintiff, one of the attackers went inside the restaurant and obtained a knife from the kitchen area behind the counter. Although his friends tried to aid him, the plaintiff was stabbed multiple times during the attack in the parking lot, and after he tried to flee down a neighboring street, his attackers followed him and stabbed him several more times. One of the plaintiff's friends eventually went into a nearby business where he was able to use a phone to call 911. The police arrived approximately four minutes after that call was made. At no time during the assault did anyone employed at the restaurant attempt to aid the plaintiff or his friends by calling for the police, even though the front of the restaurant had a large window, and everyone inside the restaurant witnessed the fight as it was developing. Furthermore, none of the employees made any attempt to stop the attacker from retrieving a knife from the kitchen. In addition, the restaurant had a phone right behind the counter that was below counter height, and arguably an employee could have called 911 without being spotted by the gang members. Nonetheless, the employees told police they were too frightened by the gang members to call for help, although evidence suggested that the real reason the police were not called was because many of the employees were in the country illegally. In addition, the restaurant owner later claimed that the phone behind the counter was not working on the date of the assault, although he was unable to provide proof of this claim, and the phone company had no records of a service request. The plaintiff sued the restaurant for failing to take any action to aid the plaintiff during the attack, but the trial court granted summary judgment for the defendant. The plaintiff appealed, and the court of appeal reversed. The court of appeal held that a special relationship existed between the restaurant and the plaintiff, which imposed a duty on the restaurant to take reasonable action to protect the plaintiff under the circumstances, and that a triable issue of fact existed as to whether the restaurant breached that duty. The restaurant appealed.

The California Supreme Court affirmed the court of appeal's decision, thereby reversing the trial court's grant of summary judgment. The Court agreed that the restaurant had a special relationship with the plaintiff that placed a duty on the restaurant's employees to take reasonable action under the circumstances to assist the plaintiff, including a duty to call 911 if they could do so without increasing the danger to themselves (*36 Cal. 4th 260, 277-278)* . In the course of its decision, the Court rejected the restaurant's argument that no special relationship existed between the restaurant and the plaintiff because plaintiff was not a customer at the time of the attack, but was merely waiting in front of the restaurant with friends in a parking lot that was not under the restaurant's exclusive control. The Court held that even though he was not a customer at the time, the plaintiff was still an invitee of the business because he arrived there with friends who did intend to purchase food. Moreover, the plaintiff, who had eaten at the restaurant before, was a potential future customer and was within the "class of persons a merchant normally desires to have observe and inspect [his or her] merchandise, whether or not [that person] was in a position to make a purchase on the particular evening" (*36 Cal. 4th 260, 271-273)* . Addressing the fact that the injuries occurred on adjacent property, the Court reaffirmed that a proprietor's duty based on a special relationship extends beyond the structure to adjacent areas within the proprietor's control. The Court found sufficient control in this particular case because customers and other invitees regularly used the parking lot while patronizing the restaurant, the restaurant was aware of this and posted on the window to advertise to those in the parking lot, the fight occurred in the area of the parking lot immediately in front of the restaurant, the

restaurant's lease gave to it nonexclusive use of the parking lot, and the restaurant realized a significant commercial benefit from its customers' use of the lot. In addition, no other store was open in the strip mall at the time of the attack, effectively giving the restaurant sole use and control of the lot (*36 Cal. 4th 260, 274)* .

The facts and the procedural background of ***Southland Corp. v. Superior Court*** *(1988) 203 Cal. App. 3d 656, 250 Cal. Rptr. 57* , are discussed in *§ 178.60[3][b]*. In denying a peremptory writ of mandate and discharging the alternative writ, the court of appeal said that the existence of a business proprietor's duty of care with respect to patrons injured by the criminal acts of third persons that occur on property adjacent to the business premises that is neither owned nor possessed by the proprietor, depends on the proprietor's actual or apparent control of the adjacent property (*203 Cal. App. 3d 656, 662)* . The court explained that, although it is true that a landowner has a special duty to protect his or her invitees from the conduct of third persons, the imposition of liability on this ground, subject to a number of exceptions not relevant to the case before it, is limited to those cases where the plaintiff is injured on premises which are owned, possessed, or *controlled* by the defendant (*203 Cal. App. 3d 656, 664)* . The court said that, although the question of the extent of the use of the adjacent property by defendants and the consequent control over it which they apparently exercised was far from clear, the record reflected evidence, and legitimate inferences therefrom, that could support a jury's conclusionthat the defendants did exercise sufficient control over the lot so as to legally permit the imposition of a duty to those customers using the lot (*203 Cal. App. 3d 656, 666)* . The court said that when there is evidence that defendants received a commercial advantage from property they apparently had a leasehold right to use (which use by their customers they at least passively encouraged) and where their business was itself the attraction for both customers and loiterers, it is overly simplistic for the issue of control to be resolved solely by reference to a property boundary line and the fortuitous cirumstance that the attack on the plaintiff too place just 10 feet beyond it. The court said that it could not conclude that these circumstances establish that defendants did exercise control over the adjacent lot, but it found they were sufficient to raise an issue of fact that must be resolved by a jury (*203 Cal. App. 3d 656, 667)* .

[e] Duty to Provide Security Guards Because of Occurrence of Prior Similar Incidents

In ***Ann M. v. Pacific Plaza Shopping Ctr.*** *(1993) 6 Cal. 4th 666, 25 Cal. Rptr. 2d 137, 863 P.2d 207* , plaintiff, an employee at a photo service store in the shopping mall owned by defendant, was raped and robbed in the store by an armed intruder. Violent crimes had previously occurred in the area where the mall was located, and transients had been loitering in the common areas of the mall. However, criminal activity at the mall itself prior to the rape of plaintiff was limited to bank robberies, purse snatchings, and assaults, and plaintiff presented no evidence that defendant had knowledge of these crimes. Defendant moved for summary judgment on the grounds that it owed no legal duty to plaintiff because the rape was unforeseeable. Plaintiff argued that the presence of transients made the attack foreseeable and that providing security patrols would have fulfilled defendant's duty to protect her. The trial court granted defendant's motion, and the court of appeal affirmed the trial court, but on the grounds that defendant's duty to take reasonable precautions did not extend to hiring security guards. Plaintiff appealed.

The Supreme Court affirmed, holding that "refinement" of the decision in *Isaacs v. Huntington Memorial Hospital* [*Isaacs v. Huntington Mem'l Hosp. (1985) 38 Cal. 3d 112, 211 Cal. Rptr. 356, 695 P.2d 653]* was necessary in light of the increase in violent crime in today's society and the public policy against making landowners the insurers of public safety. The Court revived the "prior similar incidents" rule rejected in *Isaacs* and replaced by *Isaacs* with the "totality of the circumstances" rule. The Court held that, in determining the scope of a landowner's duty, the foreseeability of the harm to be prevented must be balanced against the burdensomeness of the security measures provided by the landowner. Expensive measures require a high degree of foreseeability, which rarely, if ever, can be proven in the absence of prior similar incidents. Therefore, evidence of prior similar incidents is required to establish that third-party crime on a landowner's premises was so highly foreseeable that the landowner had a duty of care to provide security guards. Applying this rule, the Court concluded that the crimes that had previously occurred in the mall were not similar to the violent rape suffered by the plaintiff, and that evidence of the presence of transients in the mall and a high statistical crime rate in the surrounding area also did not qualify as evidence of prior similar incidents (*6 Cal. 4th 666, 678-680)* .

[f] Duty to Protect Existed Despite Absence of Prior Incidents

In ***Delgado v. Trax Bar & Grill*** *(2005) 36 Cal. 4th 224, 30 Cal. Rptr. 3d 145, 113 P.3d 1159* , the plaintiff was attacked in the parking lot of a bar. The plaintiff had arrived at the bar with his wife and some friends. While drinking, the plaintiff had noticed another patron and his friends staring at the plaintiff, and he stared back. Eventually, the plaintiff's wife told the security guard stationed inside the bar about the situation, fearing that there could be a fight. Determining that it would be easier to ask the plaintiff to leave than to confront the other group of men, the security guard did so, and the plaintiff agreed to leave to avoid any trouble. The plaintiff, his wife, and his friends left the bar and went to their car in the parking lot, but they were followed by the other group of men. As they got to their car, 12 to 20 other men jumped out from behind cars and a dumpster and attacked the plaintiff. Another security guard, who was normally stationed in the parking lot, but was absent when the fight started, called 911 during the ensuing fight. The police arrived and arrested the man who instigated the attack on the plaintiff, and this man was later convicted on felony charges. The plaintiff sued the bar on a premises liability theory, and after trial, the jury found in the plaintiff's favor and awarded economic damages. The defendant moved for a new trial on the grounds that it owed no duty to protect the plaintiff because there was no evidence of prior similar criminal assaults on the premises or in the vicinity, and therefore the attack was unforeseeable as a matter of law. The trial court denied the motion, and the defendant appealed. The court of appeal reversed the judgment for the plaintiff, concluding that because the type of coordinated attack that occurred in this case was not foreseeable, the defendant had no duty to employ guards to protect the plaintiff. The plaintiff appealed.

The California Supreme Court reversed the court of appeal and remanded for further proceedings. The Court summarized the principles that had been established in its past decisions concerning the degree of foreseeability necessary to impose a duty of care on a business proprietor to take steps to protect patrons or invitees from third-party criminal conduct. The Court noted that the degree of foreseeability needed to impose a particular duty to prevent harm varies depending on the burden of imposing thepreventative measures suggested by the plaintiff in the particular case. A heightened degree of foreseeability is necessary to impose a duty on a defendant to take great or onerous preventative security measures, including but not limited to a duty to provide security guards. To establish this heightened degree of foreseeability, a plaintiff must provide evidence of prior similar criminal incidents or other indications of a reasonably foreseeable risk of violent criminal assaults in that location. By contrast, a lesser degree of foreseeability, one not requiring evidence of prior similar incidents on or near the premises, is all that is required if the plaintiff seeks to impose a duty to take preventative measures that are simple or create only a minimal burden on the defendant (*36 Cal. 4th 224, 243-244* & n.24). In this particular case, the Court held that given the absence of prior similar incidents, the plaintiff failed to show the degree of heightened foreseeability that would be necessary to impose a duty on the defendant to take burdensome advance measures, such as employing additional security guards (*36 Cal. 4th 224, 245)* . However, the Court held that the record supported a finding that the defendant had a duty to take some less burdensome action to protect the plaintiff, given the actual advance warning provided by the plaintiff's wife that trouble was imminent. For example, the interior security guard at the bar might have been able to forestall trouble by trying to dissuade the attackers that had been inside the bar from leaving the bar after the plaintiff and his wife and friends left. Alternatively, the interior guard could have checked to see that the exterior guard was posted in the parking lot and alerted to the potential for a fight (*36 Cal. 4th 224, 245-247)* . Therefore, the court of appeal erred in finding that the defendant owed no duty to the plaintiff, and the Supreme Court remanded to that court to address whether sufficient evidence existed in the record to support the jury's finding that the defendant breached its duty of care and that any breach was the cause of the plaintiff's injury (*36 Cal. 4th 224, 250)* .

The facts and procedural background of ***Ann M. v. Pacific Plaza Shopping Ctr.*** *(1993) 6 Cal. 4th 666, 25 Cal. Rptr. 2d 137, 863 P.2d 207* , are discussed in *§ 178.60[3][e]*. Defendant argued, and the Court agreed, that, in the absence of prior incidents of violent crime, defendant had no duty to plaintiff, who was raped on defendant's premises, to provide security guards. The Court held that the scope of an owner's or possessor's duty is determined partly by balancing the foreseeability of harm against the burdensomeness of the security measures the owner or possessor is required to provide. When the burden is great, such as the expense of security guards, a high degree of foreseeability is required and

cannot be established without proof of prior similar incidents. However, if harm can be prevented by simpler and less expensive measures, an owner or possessor has the duty to provide them even if the harm is less foreseeable, presumably because of the absence of prior similar incidents (*6 Cal. 4th 666, 678-679)* .

[g] Duty to Take Minimal Measures to Assist Against Presently-Occurring Criminal Conduct

The facts and procedural background of ***Morris v. De La Torre*** *(2005) 36 Cal. 4th 260, 30 Cal. Rptr. 3d 173, 113 P.3d 1182* , are discussed in *§ 178.60[3][d]*. The Supreme Court held that to protect invitees from criminal conduct that is presently occurring or about to occur, store or restaurant employees may have a duty to take reasonable and minimally burdensome measures to assist, if those measures can be undertaken without increasing the risk of harm to the employees or other persons. Such minimally burdensome measures could include issuing a warning or calling 911 for assistance. However, the Court stopped short of placing an absolute duty to call 911 under all circumstances, and held that in this particular case, there was a triable issue of fact as to whether the restaurant employees involved acted reasonably under the circumstances (*36 Cal. 4th 260, 277-278)* .

[h] Security Guard Owes Duty of Protection to Invitees

In ***Marois v. Royal Investigation & Patrol, Inc.*** *(1984) 162 Cal. App. 3d 193, 208 Cal. Rptr. 384* , defendant, a private security service, contracted to provide security for a fast food restaurant. While plaintiff was in his car at the drive-up window, two men were vandalizing a photo service kiosk in the same parking lot. Plaintiff approached the scene and was later assaulted by one vandal who had not been persuaded by defendant guards' verbal attempts to prevent the attack. Plaintiff brought suit against the assailant, the restaurant, and defendants. After the restaurant settled out of court, the trial court granted defendants' motion for nonsuit. Plaintiff appealed.

The court of appeal reversed. In its analysis the court discussed the concept of duty and the relationship between landowners and invitees. The court found the relationship between a business and its customers to be a special relationship, requiring the business to take affirmative action to control the wrongful acts of third persons that threaten invitees when it has reasonable cause to anticipate those acts and the probability of resultant injury. Just as a business may be liable for failure to take reasonable precautions to protect its customers, a security guard hired by the business should be liable to an injured customer when the guard fails to act as would a reasonable security guard under similar circumstances and that failure causes the customer's injury. By contracting with the business to provide security, the security service creates a special relationship between itself and the business's customers. This relationship, in and of itself, is sufficient to impose on the guard the obligation to act affirmatively to protect the customers while they are on the business premises (*162 Cal. App. 3d 193, 199-200)* .

NOTE:

Because of the procedural posture of this case, the court had no occasion to discuss the effect of the guard's liability on the liability of the business that hired the guard. Presumably, in a case in which the business is still a defendant, the business could be held vicariously liable for the negligence of the guard.

[i] Proof of Causation

In ***Sandoval v. Bank of Am.*** *(2002) 94 Cal. App. 4th 1378, 115 Cal. Rptr. 2d 128* , the plaintiffs brought a wrongful death action against a bank after their decedent was shot and killed while attempting to resist an assailant in the bank's parking lot. The plaintiffs alleged that the bank, which had only one unarmed security guard in the interior of the bank, was negligent in failing to provide adequate security measures to prevent the attack. The plaintiffs' expert testified at trial that the attack would have been prevented had the bank stationed two armed security guards in the parking lot. During deliberations, in response to a written question from the jury, the trial court instructed the jury that a special verdict question that asked the jury to decide whether the criminal assault would have been prevented if the defendant had not been negligent meant that the jury must decide whether the attack would absolutely have been prevented if the defendant had not been negligent. The jury then went on to find that the defendant was negligent, but that the attack

would not have been prevented even if the defendant had acted without negligence. Judgment was entered for the defendant, and the plaintiff appealed, arguing that the trial court's answer to the jury's question effectively established an erroneous "absolute" standard of causation.

The court of appeal reversed the judgment. After reviewing applicable case law, the court concluded that the applicable standard of causation in these cases was the "substantial factor" standard. Under this standard, a plaintiff in an action to recover for the failure to provide adequate security measures to prevent a criminal attack by a third party need only show that the defendant's negligence was a substantial factor in bringing about the injury. In other words, the plaintiff is required to show by a preponderance of the evidence that the proposed security measures would more likely than not have prevented the attack, not that they would have absolutely prevented the attack (*94 Cal. App. 4th 1378, 1385-1387)* . Therefore, the trial court's answer to the jury's question was error in that it suggested to the jury that the plaintiff was required to show that the attack definitely would not have occurred if the bank had not been negligent. Because the trial court's error was prejudicial to the plaintiff, the judgment for defendant was reversed (*94 Cal. App. 4th 1378, 1388-1389)* .

[4] Additional Authorities

[a] Duty to Protect Against Wrongful Conduct of Third Persons

In *Tan v. Arnel Management Co. (2009) 170 Cal. App. 4th 1087, 88 Cal. Rptr. 3d 754* , plaintiff was seriously injured when he was shot in the neck during an attempted car jacking in an ungated parking lot adjacent to the leasing office of a large apartment complex at which plaintiff was a tenant. The trial court granted judgment on the pleadings in favor of the apartment owners, but the court of appeal reversed. The court of appeal held that the owners had a duty of care to either move existing security gates so that they provided protection around the leasing office and its adjacent parking lot, which was used as an overflow lot for nightly parking by tenants, or otherwise install a very similar gate around that area, which according to the existing evidence would require a minor gate extension over a small area (*170 Cal. App. 4th 1087, 1098-1100)* . Because the court concluded that these security measures proposed by plaintiff would not be very burdensome, the court held that heightened foreseeability of the attempted car jacking that resulted in serious injury to plaintiff was not required. Therefore, evidence of three violent assaults in ungated parking areas on the apartment grounds in the two years prior to plaintiff's assault was sufficient to meet plaintiff's burden of showing a reasonably foreseeable risk of violent criminal assaults on the property, even though his attack involved a gun and the other violent assaults did not (*170 Cal. App. 4th 1087, 1099-1101)* .

In *Barber v. Chang (2007) 151 Cal. App. 4th 1456, 60 Cal. Rptr. 3d 760* , plaintiff was the former tenant of an apartment fourplex who was shot by a current tenant with a shotgun. Plaintiff sued the owner of the apartment on the grounds that the owner knew that the tenant posed a risk to other persons, and specifically to plaintiff, but failed to take any steps to reduce the danger. Plaintiff introduced evidence that plaintiff's companion had visited the apartments about three weeks before the shooting, at which time the tenant had pointed a shotgun at her, threatened plaintiff with harm should he return, and also pointed the shotgun at plaintiff's companion's mother, who still lived at the apartments. His companion's mother sent a certified letter the next day to the owner describing the incident in detail and expressing her fear that she and others were in danger from this tenant. Upon receipt of the letter, the landlord advised the mother that he could do nothing unless she filed a police report or obtained a restraining order. Nothing further was done, however, and the shooting took place a few weeks later when plaintiff returned to the apartments on an errand. The trial court granted summary judgment for the apartment owner, but the court of appeal reversed. The court held that the apartment owner owed a duty of care to plaintiff to take reasonable measures to prevent the shooting. The letter provided sufficient advance knowledge that the tenant had a dangerous firearm and had been threatening specific persons with harm while brandishing that firearm. The threat of harm to plaintiff or another was sufficiently foreseeable to impose a duty of care under those circumstances. While the landlord based his defense almost entirely on the lack of a duty to provide a security guard for the complex, the court of appeal noted that the plaintiff was not arguing that the duty owed by the defendant extended to the duty to provide a security guard, merely that a duty was owed to take some preventive

measures, even minimally burdensome measures such as calling the police (*151 Cal. App. 4th 1456, 1466-1468*). The court remanded to the trial court for a determination of what measures would have been reasonable for the landlord to take under the circumstances and for a determination of whether the landlord violated his duty of care and whether that violation caused plaintiff's harm (*151 Cal. App. 4th 1456, 1468-1470)* .

In *Madhani v. Cooper (2003) 106 Cal. App. 4th 412, 130 Cal. Rptr. 2d 778* , the plaintiff was a tenant in an apartment building owned by the defendants. Another tenant threw the plaintiff down a set of stairs in the building. Prior to this incident, the plaintiff had reported to the building manager numerous other incidences of physical and verbal abuse by the assailant, but no steps had been taken to protect the plaintiff from the other tenant. The court of appeal held that the defendants owed a duty of care to protect the plaintiff from the assault. The court concluded that the threat of harm to the plaintiff was clearly foreseeable, given the repeated reports to the building manager of the other tenant's prior abuse. The court also briefly applied the other *Rowland* factors and concluded that they all supported finding a duty of care (*106 Cal. App. 4th 412, 415-416)* . The court then concluded that triable issues of fact existed as to whether the defendants breached the duty of care and whether any breach was a legal cause of the plaintiff's injuries (*106 Cal. App. 4th 412, 417-418)* .

In *Cantwell v. Peppermill, Inc. (1994) 25 Cal. App. 4th 1797, 31 Cal. Rptr. 2d 246* , plaintiffs were a married couple who were dining at the restaurant, bar, and lounge (at which alcoholic beverages were served) operated by defendants. Another patron who had been furnished alcoholic beverages by defendants assaulted and stabbed the husband. Plaintiffs filed an action for personal injuries and loss of consortium, alleging premises liability because defendants had known for three years about assaults committed on the premises, but had failed to warn or otherwise protect its patrons. Thetrial court sustained defendants' demurrer based on *Bus. & Prof. Code § 25602(b)*, which provides that a furnisher of alcoholic beverages to intoxicated persons is not civilly liable to any injured person for injuries resulting from the intoxication of the consumer of the alcoholic beverages. The trial court then granted judgment of dismissal, and plaintiffs appealed. The court of appeal reversed and remanded, holding that *Bus. & Prof. Code § 25602* does not preclude all actions against innkeepers merely because they furnish alcohol. A proprietor has a duty of care to protect patrons from the reasonably foreseeable criminal or tortious conduct of third persons, whether or not these third persons purchased or consumed alcohol on the proprietor's premises (*25 Cal. App. 4th 1797, 1801)* . The court held that the purpose of *Bus. & Prof. Code § 25602* was to immunize defendants from liability to plaintiffs injured by the intoxicated drivers to whom defendants had furnished alcoholic beverages, not to immunize innkeepers who encourage or permit their patrons to become so drunk and belligerent that they assault other patrons (*25 Cal. App. 4th 1797, 1802-1803)* .

In *Cohen v. Southland Corp. (1984) 157 Cal. App. 3d 130, 203 Cal. Rptr. 572* , plaintiff was injured by a person robbing the all-night convenience store plaintiff was patronizing. A summary judgment was entered against him in his action against the store, and he appealed. The court of appeal held that the store had a duty to take reasonable measures to protect its patrons against robberies, because the store had previously been robbed, uncontroverted statistics showed that a robbery was forseeable and the harm was foreseeable (*157 Cal. App. 3d 130, 137-141)* . The court also held that the reasonableness of defendant's protective measures was an issue of fact (*157 Cal. App. 3d 130, 137-143)* . Therefore, the court reversed the summary judgment.

[b] Duty of Business Proprietor

Cantwell v. Peppermill, Inc. (1994) 25 Cal. App. 4th 1797, 31 Cal. Rptr. 2d 246 , is discussed in *§ 178.60[4][a]*.

[c] Duty to Provide Security Guards Because of Occurrence of Prior Similar Incidents

In *Claxton v. Atlantic Richfield Co. (2003) 108 Cal. App. 4th 327, 133 Cal. Rptr. 2d 425* , the plaintiff was an African-American man who was assaulted by an Hispanic gang member in a racially-motivated attack at a gas station. The plaintiff sued the owners and operators of the station, arguing that the amount of prior criminal conduct on the premises imposed on them a duty to provide security guards or take other protective measures to protect patrons. The

trial court granted the defendants' motion for nonsuit, but the court of appeal reversed. The court of appeal held that the plaintiff had provided substantial evidence of prior violent crime on the premises, even though his assault was racially motivated and the earlier criminal activity may not have been. The evidence showed that the station had been the site of many recent robberies and attacks and that violent gang activity was rampant on the premises and in the neighborhood. Despite the lack of evidence showing that the earlier crimes were specifically racially motivated, the court noted that all that is required is proof of prior similar incidents, not proof of prior identical incidents (*108 Cal. App. 4th 327, 338-339)* .

[d] Duty to Protect Exists Despite Absence of Prior Similar Incidents

In *Ambriz v. Kelegian (2007) 146 Cal. App. 4th 1519, 53 Cal. Rptr. 3d 700* , plaintiff brought a malpractice case against her former attorneys for negligence in prosecuting plaintiff's premises liability lawsuit against her landlord. The premises liability lawsuit stemmed from plaintiff's rape in her apartment complex by a known transient who, plaintiff argued, gained entrance to the complex through outer gates that were not maintained in working order. The trial court in the malpractice action granted summary judgment for the attorneys after concluding that plaintiff could not show that she would have succeeded in the underlying premises liability action because she could not show causation. The court of appeal in the malpractice action reversed. The court held that plaintiff could have established in the underlying lawsuit that her landlord owed her a duty of care, specifically that the landlord owed a duty to maintain the outer doors and locks in working condition, and that the breach of that duty was a substantial factor in causing the rape. Tenants had complained to the security guard, who had in turn notified the landlord, that many of the outer doors were not closing or locking properly, or were being left open, and that unauthorized men were gaining access to the complex. Given this knowledge, the risk of harm should have been foreseeable to the landlord. The court concluded that requiring an apartment complex owner to maintain existing outside gates and locks in working condition imposed a minimal burden on the landlord, especially given that the landlord originally installed the locks and gates as security measures to limit access (*146 Cal. App. 4th 1519, 1534-1535)* .

In *Vasquez v. Residential Invs., Inc. (2004) 118 Cal. App. 4th 269, 12 Cal. Rptr. 3d 846* , the plaintiffs brought a wrongful death action against the defendant, their landlord, based on the defendant's failure to replace a missing glass pane in the door to their apartment, which allowed the decedent's estranged boyfriend to enter the apartment and murder her. The trial court granted summary judgment for the defendant, but the court of appeal reversed. The court of appeal imposed a duty on the defendant to replace the glass pane in the front door of the apartment after determining that the burden to make the replacement was minimal and the risk of harm sufficiently foreseeable. The court noted that in determining whether to impose a duty of care in a particular case, a lesser degree of foreseeability is required if the harm can be prevented by simple means (*118 Cal. App. 4th 269, 286)* . The plaintiffs had previously complained to the defendant that the missing pane was a security risk, at least one aborted attempt by an intruder to enter the apartment had occurred, and there had been other reported assaults in other apartments in the apartment building (*118 Cal. App. 4th 269, 286-287)* . Although the court imposed a duty in this case, there remained triable issues as to whether the defendant's failure to replace the pane was a legal cause of the murder (*118 Cal. App. 4th 269, 288-289)* .

In *Robison v. Six Flags Theme Parks, Inc. (1998) 64 Cal. App. 4th 1294, 75 Cal. Rptr. 2d 838* , plaintiffs were injured when an out-of-control automobile struck their picnic area, which was located in the middle of the parking area of defendant's amusement park. The trial court granted summary judgment for defendant, agreeingthat the absence of prior similar incidents foreclosed the imposition of a duty on defendant to prevent such accidents. The court of appeal reversed the summary judgment. The court of appeal held that the owners of the amusement park had a duty to take reasonable measures to protect patrons utilizing the picnic area from a runaway car, since the configuration of the lot was such that the danger was readily apparent even without prior similar incidents. The court noted that automobiles using one lane of the lot would be headingstraight toward the picnic table if they failed to stop as marked on the pavement and make a 90-degree turn at the perimeter of the picnic area, the posted speed limit was 25 miles an hour, there was no barrier or curb separating the lot from the picnic area, and automobiles only had to travel over 40 feet of grass once leaving the parking lot before striking the picnic table. In finding that a duty existed, the court stressed the

lack of a barrier and the fact that the location of the picnic table invited patrons to place themselves in a fixed area in the direct line of traffic (*64 Cal. App. 4th 1294, 1301-1303)* .

In *Musgrove v. Ambrose Props. (1978) 87 Cal. App. 3d 44, 150 Cal. Rptr. 722* , plaintiff was injured after being hit by a bicycle rider on a passageway of a shopping center. The passageway was located between the sidewalk that ran in front of the shops and the parking lot. Judgment was entered in favor of plaintiff and the insurance carrier against the owner of the shopping center. Judgments were also entered in favor of the bicycle rider and his mother. Judgments notwithstanding the verdict were entered on the grounds that it was against the law and there was insufficient evidence to support the verdict. The court's reasoning was that the owner of a shopping center owed no duty to pedestrians to control bicycle riding. The court of appeal reversed. Defendant knew that bicycles were ridden at the shopping center and that pedestrians were also present on the premises. In light of these facts, the court stated that it could not be said as a matter of law that the possibility of a bicyclist striking a pedestrian was so remote and unexpected that an ordinary man should not reasonably have foreseen it, and the fact that no similar accident had occurred did not render an accident between a pedestrian and a bicyclist unforeseeable (*87 Cal. App. 3d 44, 52)* .

[e] Security Guard Owes Duty of Protection to Invitees

In *Mata v. Mata (2003) 105 Cal. App. 4th 1121, 130 Cal. Rptr. 2d 141* , the plaintiffs brought actions for negligence and wrongful death against the proprietor of a bar and the owner of the property. The lawsuit stemmed from an incident in which a former patron, who had previously been banned from the bar, was told to leave the bar, did so, but immediately fired gunshots into the bar from outside the front door. For general security at the bar, the proprietor had previously hired a security guard and taken other measures to protect patrons at the bar. However, at the time of the shooting, the regular security guard had taken a break and asked the proprietor's brother to assume his duties. The trial court granted summary judgment for the defendants on the grounds that the shootings were unforeseeable. The court of appeal affirmed the summary judgment for the property owner, who was not in possession of the property and had no knowledge of a dangerous condition, but reversed the summary judgment for the proprietor. The court noted that regardless of the foreseeability of the shooting, the proprietor assumed a duty to protect patrons by hiring a guard. Therefore, the proprietor could be liable if the proprietor was negligent in hiring, retaining, or training the guard, or if the guard acted unreasonably under the circumstances. The court then held that a triable issue of fact existed as to whether the guard or the proprietor acted unreasonably (*105 Cal. App. 4th 1121, 1129)* .

In *Trujillo v. G.A. Enterprises, Inc. (1995) 36 Cal. App. 4th 1105, 43 Cal. Rptr. 2d 36* , plaintiff was injured in a fight inside a McDonald's restaurant, in the presence of a security guard who was hired by the restaurant to protect its patrons. Plaintiff sued the management company that supervised the property and the McDonald's franchise, claiming that the security guard left the scene, failed to fulfill his duty of preventing trouble, and that defendants failed to hire competent security despite their knowledge of crime problems. The trial court granted a summary judgment for the defense on the grounds that defendants owed no duty to prevent the third party criminal attack because it was unforeseeable, and that defendants had no notice of prior similar incidents occurring on the premises. The court of appeal reversed, holding that the restaurant had a duty to protect its patron, and there was a triable issue of fact as to whether the security guard acted reasonably under the circumstances (*36 Cal. App. 4th 1105, 1108-1109)* .

[f] Proof of Causation

In *Raven H. v. Gamette (2007) 157 Cal. App. 4th 1017, 68 Cal. Rptr. 3d 897* , plaintiff was raped in her apartment by a non-tenant of the apartment complex, and the assailant was subsequently apprehended and convicted. While plaintiff did not know exactly how the assailant gained access to the apartment complex, he entered her apartment through a window in her dining area after he removed the window screen. Plaintiff admitted that she left the window open that night because it was hot and the apartment had no air conditioning. The trial court granted summary judgment for the apartment owner on the grounds of lack of causation, but the court of appeal reversed, finding triable issues of fact. The court noted that there was no evidence of forced entry into the complex, and the apartment manager admitted that

tenants sometimes left the pedestrian gates propped open. In addition, at least one side wall was short enough for a person to climb. Despite uncertainty as to how the assailant gained access to the complex, however, plaintiff had also argued that the landlord's negligence in securing plaintiff's specific apartment was a substantial factor in causing the assault, and the court of appeal agreed that the evidence was sufficient to support such a finding. Plaintiff alleged that the landlord had failed to take the same measures to secure her apartment that had been taken to secure other first-story apartments in the complex. Specifically, the landlord failed to provide her with security bars on the windows or locks that would have allowed her to open her windows a safe amount while allowing ventilation. Plaintiff also alleged that the landlord failed to keep the vegetation at her windows trimmed and the lighting in front of the apartment turned on, and these failures allowed the assailant to enter the apartment under cover of darkness and shrouded in secrecy. Although plaintiff's own conduct may have contributed to the assailant gaining access to the apartment, the court of appeal held that this evidence would be sufficient to support a jury finding that the landlord's actions were also a substantial factor in causing plaintiff's injury (*157 Cal. App. 4th 1017, 1027-1028)* .

The background of *Ambriz v. Kelegian (2007) 146 Cal. App. 4th 1519, 53 Cal. Rptr. 3d 700* , is discussed in *§ 178.60[4][d]*. The court of appeal in that case also held that plaintiff, who was raped in her apartment complex by a known transient, had provided sufficient evidence in her premises liability action to show a triable issue of fact on causation. In that particular case, while there was no conclusive evidence as to how the rapist gained access to the complex, the evidence showed that a number of entry gatesto the complex were not closing properly or not locking, tenants had complained about it to the complex's security guard, and it had been reported to management. In addition, there were numerous prior reports of unauthorized male intruders gaining access to the complex, apparently through these gates, and the rapist himself had been reported on the grounds numerous times. Given that the rapist was known to be an unauthorized transient, and there was no evidence of a forced entry anywhere on the premises at the time of the rape, the court held that a reasonable person could conclude that it was more likely than not that the rapist used the malfunctioning gates to gain access to the complex (*146 Cal. App. 4th 1519, 1536-1538)* .

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CHAPTER 178 PREMISES LIABILITY
PART II. FORMS
B. Conduct of Third Persons

17-178 California Points & Authorities § 178.61

§ 178.61 Supporting Contention That Proprietor of Sports Facility Is Liable for Injury to Spectator Caused by Risk Inherent in Game When Risk Not Common Knowledge

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT PROPRIETOR IS LIABLE FOR THE HARM TO PLAINTIFF SPECTATOR BECAUSE A PROPRIETOR OF A SPORTS FACILITY IS LIABLE TO A SPECTATOR FOR HARM DUE TO RISKS OF INJURY INHERENT IN THE GAME THAT ARE NOT COMMON KNOWLEDGE.

Risk Not One of Common Knowledge. A proprietor of a sports facility is liable for injury to a spectator if the risk that resulted in the injury, although inherent in the game, is not one of common knowledge (*Goade v. Benevolent & Protective Order of Elks (1963) 213 Cal. App. 2d 189, 194, 28 Cal. Rptr. 669* ; *Thurman v. Ice Palace (1939) 36 Cal. App. 2d 364, 368, 97 P.2d 999*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that a proprietor of a sports facility is liable for injury to a spectator. The contention may be used if the harm caused to plaintiff was due to a risk that was not one of common knowledge.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel is responding to the contention that a proprietor of a sports facility is not liable for injury to a spectator. It should be noted that cases that hold that a proprietor may be liable if the risk that resulted in the injury is not a matter of common knowledge have done so in the context of deciding whether the spectator is held to assume the risk as a matter of law. These cases have held that because the risk is not a matter of common knowledge the spectator cannot be held to have assumed the riskas a matter of law and that the question is one

of fact [*see, e.g., Goade v. Benevolent & Protective Order of Elks (1963) 213 Cal. App. 2d 189, 194, 28 Cal. Rptr. 669* ; *Shurman v. Fresno Ice Rink (1949) 91 Cal. App. 2d 469, 476-477, 205 P.2d 77* (discussed in *§ 178.61[4*][a]); *Thurman v. Ice Palace (1939) 36 Cal. App. 2d 364, 368, 97 P.2d 999* (discussed in *§ 178.61[3][a]*)]. These cases were decided against the pre-comparative negligence backdrop when assumption of the risk as a variant of contributory negligence was a separate defense [*see § 178.69[2]*].

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the nature of the risk which resulted in the injury and whether or not it is a matter of common knowledge.

[c] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 178.69* may be used to oppose the contention supported by these points and authorities.

[d] Assumption of Risk

Cases holding that a proprietor of a sports facility may be liable if the risk resulting in the injury is not a matter of common knowledge have done so in the context of deciding whether the spectator assumed the risk as a matter of law. These cases have held that because the particular risk was not a matter of common knowledge, the spectator did not assume the risk as a matter of law and that therefore the question is one of fact [*see, e.g., Goade v. Benevolent & Protective Order of Elks (1963) 213 Cal. App. 2d 189, 194, 28 Cal. Rptr. 669* ; *Shurman v. Fresno Ice Rink (1949) 91 Cal. App. 2d 469, 476-477, 205 P.2d 77* (discussed in *§ 178.61[4*][a]); *Thurman v. Ice Palace (1939) 36 Cal. App. 2d 364, 366-368, 97 P.2d 999* (discussed in *§ 178.61[3][a]*)]. These cases were decided before contributory negligence was abolished in favor of the doctrine of comparative negligence and therefore while assumption of risk was still a separate defense as a variant of contributory negligence [*see Li v. Yellow Cab (1975) 13 Cal. 3d 804, 824, 119 Cal. Rptr. 858, 532 P.2d 1226]* .

However, common knowledge of risk may no longer be relevant in determining whether a plaintiff's recovery is barred by assumption of risk, according to the lead opinion of the California Supreme Court in *Knight v. Jewett* [*Knight v. Jewett (1992) 3 Cal. 4th 296, 316, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* . Instead, resolution of the issue appears to turn on whether the defendant's conduct breached a legal duty of care to the plaintiff, not on the plaintiff's subjective knowledge or the reasonableness of the plaintiff's undertaking a known risk [*see Knight v. Jewett (1992) 3 Cal. 4th 296, 314-317, 11 Cal. Rptr. 2d 2, 834 P.2d 696* ; *but see* dissenting opinions by Kennard, J., Baxter, J., and Panelli, J., advocating an approach based on plaintiff's subjective knowledge].

Although the Court has not yet ruled on the assumption of risk doctrine in the specific context of injury to a spectator at a sporting event, the Court in *Knight* did address the question of the proper analysis of implied assumption of risk in the context of participants in active sports. The lead opinion concluded that the determination of whether a plaintiff is barred from recovery, on the one hand, or subject to application of comparative fault principles, on the other hand, turns on whether the defendant had a legal duty to avoid certain conduct or to protect the plaintiff against a particular risk of harm [*see Knight v. Jewett (1992) 3 Cal. 4th 296, 314-317, 11 Cal. Rptr. 2d 2, 834 P.2d 696* ; *see also Ford v. Gouin (1992) 3 Cal. 4th 339, 342, 11 Cal. Rptr. 2d 30, 834 P.2d 724]* . In determining the duty of a defendant in a particular factual situation, the nature of a defendant's duty in the sports context depends heavily on the nature of the sport itself, and the scope of the legal duty owed by a defendant frequently will also depend on the defendant's role in, or relationship to, the sport. The Court pointed out that cases have analyzed the duty of sports facility owners with regard to spectators not only by virtue of the nature of the sport itself, but also by reference to steps a sponsoring business entity reasonably should be obligated to take in order to minimize risks without altering the nature of a sport [

see Knight v. Jewett (1992) 3 Cal. 4th 296, 317-318, 11 Cal. Rptr. 2d 2, 834 P.2d 696] .

In a case relying on the assumption of risk analysis of *Knight v. Jewett,* the court of appeal held that a professional hockey club, the league, and the owners and operators of the hockey arena owed no duty to a spectator to protect her from being hit in the face by a flying puck during pregame warm-ups, which the court noted, and the spectator conceded, was an inherent risk of attending a hockey game [*Nemarnik v. Los Angeles Kings Hockey Club (2002) 103 Cal. App. 4th 631, 643, 127 Cal. Rptr. 2d 10]* . The court refused to impose a duty to eliminate the danger of flying pucks, concluding that to do so would force the defendants either to provide a floor-to-ceiling protective screen around the rink, which would reduce the quality of everyone's view, or to raise the cost of tickets to cover the increased liability costs, which would make ticket prices too costly for some potential spectators [*Nemarnik v. Los Angeles Kings Hockey Club (2002) 103 Cal. App. 4th 631, 641, 127 Cal. Rptr. 2d 10]* .

For further discussion of the assumption of risk doctrine as it applies to injuries to spectators at sporting events, see *§ 178.69*. For forms and discussion relating to assumption of risk generally, see Ch. 165, *Negligence* .

[3] Discussion of Authorities

[a] Risk Not One of Common Knowledge

In ***Goade v. Benevolent & Protective Order of Elks*** *(1963) 213 Cal. App. 2d 189, 28 Cal. Rptr. 669* , plaintiff attended sports car races being held by defendant at a fairgrounds. Plaintiff did not know that a grandstand was available and watched the races along with many other spectators from behind a "snow fence," which separated the spectators from the race course and was approximately 100 feet from the track itself. Plaintiff was injured when a sports car went out of control and crashed through the "snow fence" into the crowd behind it. The trial court granted judgment for nonsuit to defendant at the close of plaintiff's case, and plaintiff appealed to the court of appeal.

The court of appeal reversed, holding that the evidence presented did not establish that plaintiff had assumed the risk as a matter of law and therefore that the question should have gone to the jury. The court noted that cases involving spectators at baseball games have ruled that a spectator assumes the risk of being hit by a fly ball, a common and expected event and therefore a matter of common knowledge, but not the risk of being hit by a flying baseball bat thrown into the stands by a player, which is not. The court held that the risk of a car in a sports car race being driven off the track and through a fence into the spectators is so unexpected and infrequent that it could not be a matter of common knowledge (*213 Cal. App. 2d 189, 194)* .

In ***Thurman v. Ice Palace*** *(1939) 36 Cal. App. 2d 364, 97 P.2d 999* , plaintiff, an 18-year-old girl was injured by a flying hockey puck while watching her first ice hockey game from an unscreened box seat. The seats surrounding the ice rink were unscreened except for the sections behind the goals at each end. The unscreened box seats were separated from the rink by a wooden wall. Plaintiff sued the players, the owner of the ice rink, and the manager of the student body of the school sharing the proceeds of the concessions. A directed verdict was granted in favor of defendants and plaintiff appealed. The court of appeal held that a spectator who voluntarily selects an unscreened seat at a hockey game cannot be held as a matter of law to assume the risk of being hit by a puck (*36 Cal. App. 2d 364, 366)* . In doing so, the court distinguished the case before it from those dealing with baseball games and the risks of harm from thrown or batted balls by stating that the average person of ordinary intelligence is not as familiar with the game of hockey and its attendant risks as the game of baseball, and it is not common knowledge that pucks are liable to be batted into the section occupied by spectators (*36 Cal. App. 2d 364, 368)* .

[4] Additional Authorities

[a] Risk Not One of Common Knowledge

In *Shurman v. Fresno Ice Rink (1949) 91 Cal. App. 2d 469, 205 P.2d 77* , plaintiff was injured while sitting in an

unscreened seat and watching her first ice hockey game. Defendant appealed a judgment entered on a jury verdict and a grant of a new trial on the damage issue alone. Although the court of appeal reversed and held that the new trial should have been granted without limitation, the court stated that it could not be held as a matter of law that the general public had become so familiar with the sport of hockey and its attendant hazards so as to bring them within the common knowledge rule and under the doctrine of assumption of risk (*91 Cal. App. 2d 469, 477)* .

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17-178 California Points & Authorities § 178.62

§ 178.62 Supporting Contention That Tenant in Common Is Liable for Negligence of Separate Legal Entity to Which Control and Management of Property Has Been Delegated

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT OWNER, AS A TENANT IN COMMON, IS LIABLE FOR THE INJURIES SUSTAINED BY PLAINTIFF IN THE COMMONLY HELD AREAS OF THE PROPERTY, ALTHOUGH ALL THE TENANTS IN COMMON DELEGATED THE CONTROL AND MANAGEMENT OF THE COMMON AREAS TO A SEPARATE LEGAL ENTITY.

Liability of Tenants in Common for Torts in Common Areas. A tenant in common of real property is liable for harm caused by the negligent failure to maintain common areas in a reasonably safe condition, notwithstanding that the tenant in common may have only a small interest in the property as a whole and that the control and management of the area had been delegated by the tenants in common to a separate legal entity (*Davert v. Larson (1985) 163 Cal. App. 3d 407, 412, 209 Cal. Rptr. 445*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that tenants in common who delegate the control andmanagement of common areas of the property to a separate legal entity are not immunized from liability for the negligent failure to maintain the common areas in a reasonably safe condition.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the point of law stated. Thus counsel should assert the nature of the defendant's interest as a tenant in common, the delegation of control

and management of common areas of the property to a separate legal entity, the unsafe condition that proximately caused the injuries complained of, and the failure of the separate legal entity to maintain the common areas in a safe condition.

[3] Discussion of Authorities

[a] Liability of Tenants in Common for Torts in Common Areas

In ***Davert v. Larson*** *(1985) 163 Cal. App. 3d 407, 209 Cal. Rptr. 445* , plaintiffs were injured when an automobile collided with livestock alleged to have escaped through a gap in the fence surrounding property owned by defendant and others that was adjacent to the highway. Defendant owned a 1/2500 interest in the property and argued that he owed no duty of care to plaintiffs as a landowner, because he took title subject to a recorded declaration delegating exclusive control over the property to a specified owners association. The trial court granted defendant's motion for summary judgment, and plaintiff appealed.

The court of appeal reversed. Observing that California law does not require insurance to protect third parties in the case of common-area torts, the court stated that relieving individual owners in common of liability would eliminate any motivation on the part of any party to exercise due care in the management and control of commonly owned property, and could leave third parties with no remedy at law. The court held, therefore, that tenants in common of real property who delegate the control and management of the property to a separate legal entity should not be immunized from liability to third parties for tortious conduct (*163 Cal. App. 3d 407, 412)* .

[4] Additional Authorities

[a] Liability of Tenants in Common for Torts in Common Areas

In *Ruoff v. Harbor Creek Cmty. Ass'n (1992) 10 Cal. App. 4th 1624, 13 Cal. Rptr. 2d 755* , individual condominium owners obtained a summary judgment on a complaint against them for damages based on injuries suffered when plaintiff fell backward down stairs in a common area. The trial court concluded that as a matter of law the individual owners could not be held liable. This conclusion was apparently based on three findings. First, the managing association had a $1 million liability insurance policy. Second, the association could assess individual owners a pro-rata contribution in the event a judgment exceeded policy limits. Third, the individual owners had delegated control over the common areas to the managing association. The owners argued that they should be immune from liability under *Civ. Code § 1365.7*. The court of appeal rejected the owners' argument and reversed. The statute expressly immunizes only volunteer directors and officers of the managing association from cure tort liability when acting within the scope of their duties as directors and officers. It does not apply to individual owners as such, who are liable according to the common law rule [*see Davert v. Larson (1985) 163 Cal. App. 3d 407, 412, 209 Cal. Rptr. 445* ; *see also § 178.62[3][a]*] (*10 Cal. App. 4th 1624, 1628-1630)* .

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California Points & Authorities

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Volume 17 Chapters 170-179 PARTNERSHIPS---to---PREMISES LIABILITY
CHAPTER 178 PREMISES LIABILITY
PART II. FORMS
B. Conduct of Third Persons

17-178 California Points & Authorities § 178.63

§ 178.63 Opposing Contention That Owner or Possessor of Premises Is Liable for Harm Caused by Wrongful Acts of Third Persons--No Duty if Acts Not Reasonably Foreseeable

[1] FORM

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

DEFENDANT _____ [OWNER *or* POSSESSOR] IS NOT LIABLE FOR THE HARM TO PLAINTIFF BECAUSE AN OWNER OR POSSESSOR OF PREMISES HAS NO DUTY TO PROTECT THOSE ON THE PREMISES FROM THE CONDUCT OF THIRD PERSONS ON THE PREMISES THAT IS NOT REASONABLY FORESEEABLE.

A. No Duty to Control or Prevent Conduct of Third Persons That Is Not Reasonably Foreseeable. The duty of an owner or possessor of premises to maintain those premises in a safe condition does not extend to protecting those on the premises from the conduct of third persons that is not reasonably foreseeable; to be legally foreseeable, an act must be likely, not simply imaginable or conceivable (*Sturgeon v. Curnutt (1994) 29 Cal. App. 4th 301, 306, 308, 34 Cal. Rptr. 2d 498* ; *Jefferson v. Quik Korner Mkt., Inc. (1994) 28 Cal. App. 4th 990, 996, 34 Cal. Rptr. 2d 171*).

[*Optional*] **B. Landlord Has No Duty to Prevent Consequences of Tenant's Negligence.** While a landlord arguably may foresee thathis tenants might carelessly leave their small children unattended and exposed to dangers, a landlord has no duty of care to assure that his tenant's children do not fall out of ordinary second story windows (*Pineda v. Ennabe (1998) 61 Cal. App. 4th 1403, 1409, 72 Cal. Rptr. 2d 206*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that the owner or possessor of premises had a duty to protect those on the premises from, or control the conduct of, a third person. The basis of opposition is that the third person's conduct was not reasonably foreseeable.

These points and authorities may be combined, if appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to raise the liability of the owner or possessor. The points and authorities in this form may also be adapted for use in a trial or appellate brief. The issue of whether or not the conduct of the third party was foreseeable, thus imposing a duty on the owner or possessor to control that conduct, may be the subject of a summary judgment [*see, e.g., Riley v. Marcus (1981) 125 Cal. App. 3d 103, 109, 177 Cal. Rptr. 827]* . The question of duty is a matter of law [*Jamison v. Mark C. Bloome Co. (1980) 112 Cal. App. 3d 570, 575, 169 Cal. Rptr. 399]* . The question of foreseeability in the context of determining the existence and scope of duty is a question of law to be decided by the court and not a question of fact reserved for the jury [*Ann M. v. Pacific Plaza Shopping Ctr. (1993) 6 Cal. 4th 666, 678, 25 Cal. Rptr. 2d 137, 863 P.2d 207 , disapproving Isaacs v. Huntington Mem'l Hosp. (1985) 38 Cal. 3d 112, 126, 127, 130, 211 Cal. Rptr. 356, 695 P.2d 653* ; *see § 178.60[3][e]*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the foreseeability of the conduct in question.

If appropriate, these points and authorities may be submitted in opposition to the points and *authorities in § 178.60*.

[b] Related Pleading and Practice Forms

For forms and discussion regarding the liability of an owner or possessor of premises for the conduct of third persons, see California Forms of Pleading and Practice, Ch. 421, *Premises Liability* (Matthew Bender).

[3] Discussion of Authorities

[a] No Duty to Control or Prevent Conduct of Third Persons That Is Not Reasonably Foreseeable

In ***Sturgeon v. Curnutt*** *(1994) 29 Cal. App. 4th 301, 34 Cal. Rptr. 2d 498* , defendants rented a house to their son; they knew he had a drinking problem and that he kept firearms in the house. While under the influence of alcohol, the son accidentally fired a gun and shot plaintiff, a visitor at the house. Plaintiff filed suit against defendants for negligence. Defendants moved for nonsuit on the basis that plaintiff's injury was unforeseeable. Plaintiff argued in response that a landlord is liable for injuries caused by a tenant who is an alcoholic and has firearms, because such a tenant is a dangerous condition similar to a tenant's keeping a dangerous dog on the premises. The trial court granted the motion for nonsuit, and plaintiff appealed.

The court of appeal affirmed, noting that a landlord has no duty to protect persons on the premises from injuries that are not *reasonably* foreseeable (*29 Cal. App. 4th 301, 306)* . The court held that plaintiff's injury was not reasonably foreseeable because, contrary to plaintiff's analogy to a vicious dog with a history of attacking and biting people, plaintiff's opening statement offered no evidence that defendants' son had ever harmed anyone due to either his drinking problem or his possession of firearms and no evidence that the son handled firearms unsafely while drunk (*29 Cal. App. 4th 301, 307)* . Although the combination of drinking and firearms raises the logical possibility of harm to visitors, the court found that nothing put defendants on notice that visitors to the premises were in danger, and therefore they had no duty of care to protect plaintiff from injury (*29 Cal. App. 4th 301, 308)* .

In ***Jefferson v. Quik Korner Mkt., Inc.*** *(1994) 28 Cal. App. 4th 990, 34 Cal. Rptr. 2d 171* , defendant owned and operated a convenience store that had a sidewalk six feet wide in front, with a raised curb of more than six inches. At the end of each parking space perpendicular to that sidewalk was a concrete wheelstop that was three feet wide, six inches high, and eight inches deep. Plaintiff made a purchase at the convenience store and was standing outside on the sidewalk. As a vehicle was pulling into a parking space, the driver's foot slipped and hit the accelerator; the vehicle jumped both the curb and the concrete wheelstop, hitting and injuring plaintiff. Plaintiff's guardian ad litem brought suit on his behalf, alleging that defendant was negligent because defendant had failed to install metal posts at the ends of the

parking spaces to prevent the vehicle from reaching the sidewalk. Defendant moved for summary judgment, presenting evidence that its parking lot design and construction met or exceeded all city codes and regulations and that there had been no previous incidents ofvehicles striking pedestrians at the store. The trial court granted defendant's motion for summary judgment, and plaintiff appealed.

The court of appeal affirmed, holding that defendant was not required to take more extensive measures to protect customers because the accident was not sufficiently likely to happen and therefore was not reasonably foreseeable (*28 Cal. App. 4th 990, 993)* . The court noted that very little California case law deals with cars negligently coming onto the sidewalks of businesses, but that the majority of courts in other states that have considered this scenario have concluded that there is no liability because it is insufficiently likely as a matter of law (*28 Cal. App. 4th 990, 993)* . With one exception, none of the minority of cases holding that liability was a question of fact for the jury involved facts similar to those before the court; in those cases, either defendant provided customers no protection whatever from encroaching vehicles, or defendant had knowledge of prior similar incidents, or defendant's building design required customers to wait for service by standing near a parking lot or driveway (*28 Cal. App. 4th 990, 994-995)* . The court found the lone exception unpersuasive, although its facts were substantially similar, because the decision did not explain why the accident (the only one in 8 years at any of defendant's 20 stores) was foreseeable (*28 Cal. App. 4th 990, 995)* . The court concluded that imposing a duty on defendant to protect its customers from every imaginable incident would be an unreasonable burden, noting that an impregnable barrier would be necessary because a motorcycle can pass between metal posts and a large truck can break through a cement wall (*28 Cal. App. 4th 990, 996)* .

Pamela W. v. Millsom (1994) 25 Cal. App. 4th 950, 30 Cal. Rptr. 2d 690 , is discussed in *§ 178.64[3][b]*. The court noted that the plaintiff's injuries were caused by a third party who stalked her and that the defendant had no prior knowledge of the likelihood of that conduct (*25 Cal. App. 4th 950, 959-960)* .

[b] Landlord Has No Duty to Prevent Consequences of Tenant's Negligence

In ***Pineda v. Ennabe*** *(1998) 61 Cal. App. 4th 1403, 72 Cal. Rptr. 2d 206* ; a minor plaintiff sued her mother's landlord for the personal injuries she sustained when she fell out the second story window of her home, knocking out the screen as she fell. Plaintiff's mother had placed a bed directly under the window and plaintiff was bouncing on the bed without adult supervision shortly before the accident. The trial court granted summary judgment for the landlord stating: "In viewing the photographs of the window and considering the height of the window, the fact that the bed was placed under the window and the minor plaintiff was left unattended, that defendant had met all Building and Safety Code requirements, that there were no prior incidents of injury regarding the windows or screens in the building, it was not foreseeable that a person, especially a minor, would fall out and as such there was no duty on defendant to take protective measures for the window and it was not negligence as a matter of law."

The court of appeal affirmed, holding that the landlord has no duty of care to assure that his tenant's children do not fall out of ordinary second story windows (*61 Cal. App. 4th 1403, 1409)* . The court applied the factors stated in *Rowland v. Christian* [*Rowland v. Christian (1968) 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561]* in determining that: (1) The harm to the plaintiff was not foreseeable. The predominant cause of plaintiff's accident was careless parental placement of a bed under the window, followed by parental negligence in leaving the five-and-a-half-year-old plaintiff unattended and unsupervised. According to the court, while a landlord arguably may foresee that his tenants might carelessly leave their small children unattended and exposed to dangers, he or she was not required to forestall the foreseeable consequences of others' negligence--only his or her own; (2) The degree of certainty that an injury would occur was small; (3) The connection between the landlord's conduct and any such injury was slight; (4) Little moral blame, if any, attached to the landlord's failure to place warning labels, latches, or bars on the window, since reasonable landlords could properly assume that parents would take precautions to supervise their children and prevent them from falling out windows; (5) The policy of preventing future harm would not likely be significantly advanced by imposing a duty here; for while a legally imposed duty to install bars might reduce the risk of falling out, it might create a new, serious risk of trapping occupants during a fire; (6) In light of the millions of apartment windows in the state, the

consequences to the community of imposing a new duty of care to prevent children from falling out, would be far reaching. Moreover, such a duty logically would extend as well to other apartment hazards posed by lack of parental supervision; for example protecting unsupervised children from burning themselves on the stove or causing a fire (*61 Cal. App. 4th 1403, 1408)* .

According to the court, the purpose for requiring a duty as a precondition to negligence liability, was to avoid the extension of liability to every conceivably foreseeable accident, without regard to common sense or good policy. Common sense and good policy in this case militated against requiring landlords to provide a safety net to reduce risks caused by careless parents (*61 Cal. App. 4th 1403, 1409)* .

[4] Additional Authorities

[a] No Duty to Control or Prevent Conduct of Third Persons That Is Not Reasonably Foreseeable

In *Melton v. Boustred (2010) 183 Cal. App. 4th 521, 107 Cal. Rptr. 3d 481* , plaintiffs were three guests at a residential party who were assaulted at the party by unknown assailants. Plaintiffs sued the host for negligence and premises liability for failing to protect against the assaults. They argued that because defendant posted an open invitation for the party on his Internet page at social networking site MySpace.com, and indicated that the party would have alcohol and live music, defendant should have known that guests would face an unreasonable risk of bodily harm from others attending the party and taken steps to protect such guests. The court of appeal affirmed the trial court's sustaining of defendant's demurrer. The court held that defendant did not owe a duty of care to protect against a third-party criminal assault perpetrated by unknown assailants. The court concluded that defendant host did not take any action that increased the risk of harm to plaintiffs and was not in a special relationship with plaintiffs that would give rise to a duty to protect against third-party criminal conduct (*183 Cal. App. 4th 521, 533-536)* . The court also concluded that the criminal assault was not reasonably foreseeable merely by virtue of the public notice about the party posted on the Internet. The court noted the absence of knowledge by defendant of prior similar incidents of violent crime on the property and rejected plaintiffs' argument that "common sense" should have told defendant that his actions created a peril to his guests (*183 Cal. App. 4th 521, 536-539)* . Finally, the court concluded that the burden of providing security guards or limiting the guest list outweighed the relatively low foreseeability of this type of criminal assault by unknown assailants (*183 Cal. App. 4th 521, 539-541)* .

In *Garcia v. Paramount Citrus Assn., Inc. (2008) 164 Cal. App. 4th 1448, 80 Cal. Rptr. 3d 512* , plaintiff farm worker was injured while riding in a van on a public road adjacent to orchards owned by defendant. Another driver who was using an intersecting private farm road on defendant's property without authorization failed to recognize the transition to the public road, drove from the farm road to the public road at an excessive rate of speed, and caused a collision with plaintiff's vehicle. The court of appeal held that the defendant owed no duty to post a warning sign at the spot that the private farm road intersected the public road, concluding that the accident-causing conduct of the third party was not reasonably foreseeable. The court noted that reasonable drivers using such a farm road bordered by rows of trees that could restrict visibility would normally drive cautiously due to the dangers of farm equipment or workers emerging from between the rows of trees. The court also noted that unless the owner's workers were using the farm road, access to the farm road was usually barred by a cable, there was no evidence that unauthorized drivers were using the farm road generally, let alone at unsafe speeds, and the owner's vegetation did not encroach on the right-of-way for the public road. According to the court, imposing a duty to place warning signs on defendant would essentially impose a duty to post warning signs on all such farm roads and require rural landowners to engage in constant monitoring to ensure the signs remained in place, thus placing a huge burden on rural landowners generally (*164 Cal. App. 4th 1448, 1456-1460)* .

In *Ericson v. Federal Express Corp. (2008) 162 Cal. App. 4th 1291, 77 Cal. Rptr. 3d 1* , a truck driver who worked for an independent contractor was assaulted and robbed in the early morning hours next to the parking space assigned to him at the terminal facility at which he worked. The particular parking lot was located at the far rear of the large facility,

was not lit, and was unfenced. The facility itself was surrounded on three sides by undeveloped, unfenced canyon areas. While one security guard was positioned at a guardhouse on the side of the facility over 400 feet from plaintiff's parking space, the view from the guardhouse to plaintiff's parking space was obstructed by parked trailers. Plaintiff sued the shipping service that hired his employer and controlled the terminal facility for premises liability, arguing that they owed him a duty to take simple steps to prevent the assault he sustained, such as allowing him to park near the buildings where regular employees of the shipping company parked. Defendant argued that the attack was not reasonably foreseeable, andthe court of appeal agreed. Defendant provided evidence of all calls made to the police over a five-year period relating to possible criminal activity at the facility, and the majority of the calls concerned false burglary alarms. Others concerned a personal dispute between employees, a misplaced vehicle, and an employee accused of theft. Beyond that, plaintiff attempted to build his case largely on the presence of transients on or near the unfenced property, although none of the evidence provided by plaintiff indicated that the transients had engaged in violent or threatening conduct or that plaintiff had felt threatened by their presence. The court concluded that a few prior sightings of nonthreatening transients on or near the property were insufficient to establish the reasonable foreseeability of plaintiff's assault, even if the security measures advocated by plaintiff would not have been unduly burdensome (*162 Cal. App. 4th 1291, 1305-1307)* .

In *Roe v. McDonald's Corp. (2005) 129 Cal. App. 4th 1107, 29 Cal. Rptr. 3d 127* , the court of appeal held that the defendants were not liable to theplaintiff, a customer at a fast-food restaurant located in a shopping mall. While waiting in line at the restaurant, the plaintiff reported to a clerk employed at the restaurant, and to a mall security guard who was standing in line with her, that a man outside the restaurant had been eying her and making allegedly suggestive facial expressions. When the security guard and the clerk looked toward where the man had been, however, the man could not be seen in the area. Subsequently, the man sexually assaulted the plaintiff in the restaurant's rest room. The court of appeal concluded that in the absence of a more definite threat beyond the plaintiff's vague suspicions, the defendants could not have foreseen the sexual assault and were under no duty to take further steps to protect the plaintiff under the circumstances (*129 Cal. App. 4th 1107, 1119)* .

In *Alvarez v. Jacmar Pac. Pizza Corp. (2002) 100 Cal. App. 4th 1190, 122 Cal. Rptr. 2d 890* , the court of appeal held that a restaurant had no duty to protect against a murder that took place on its premises, despite the fact that earlier in the evening the murderer had gotten into a fight on the premises with the patron that he eventually killed. In this case, the murderer and his companions had left the restaurant after making vague threats about returning, and the court held that it was unforeseeable that the earlier verbal and physical altercation would lead to the departed party returning with a gun to shoot the other patron. Under these facts, the court concluded that any duty owed to the decedent was fulfilled when the restaurant called the police, who subsequently arrived at the scene and left when it was determined that the fight was over. The court also concluded that three earlier violent incidents on the premises in the previous two and a half years did not constitute prior similar incidents, because those incidents were dissimilar in nature to the attack on the decedent (*100 Cal. App. 4th 1190, 1210-1212)* . The court also held that the requirements for establishing premises liability based on the foreseeability of third-party criminal conduct could not be avoided by recasting the claim as one based on another theory of negligence liability, such as an action for negligent failure to properly train employees (*100 Cal. App. 4th 1190, 1212)* .

Pamela W. v. Millsom (1994) 25 Cal. App. 4th 950, 30 Cal. Rptr. 2d 690 , is discussed in the main text in § 178.64[3][b]. The court noted that plaintiff's injuries were caused by a third party who stalked her, and that defendant had no prior knowledge of the likelihood of that conduct (*25 Cal. App. 4th 950, 959-960)* .

In *Gray v. Kircher (1987) 193 Cal. App. 3d 1069, 236 Cal. Rptr. 891* , plaintiff had been shot at a hotel where he was a resident. Plaintiff brought an action against the hotel proprietor, alleging that the proprietor negligently failed to protect him against the attacker, who was also a resident of the hotel. The trial court granted defendant's motion for nonsuit and plaintiff appealed. The court of appeal affirmed, finding that the attack was unforeseeable as a matter of law. It noted that prior to the shooting, there had been nothing to put the hotel on notice that the attacker would be dangerous to other residents (*193 Cal. App. 3d 1069, 1074-1075)* . The court also found that the proprietor's conduct was without moral

blame, and that it would be against public policy to impose a duty on the proprietor (*193 Cal. App. 3d 1069, 1075)* .

In *Lopez v. McDonald's Corp. (1987) 193 Cal. App. 3d 495, 238 Cal. Rptr. 436* , survivors and surviving family members of victims of the 1984 massacre at a McDonald's restaurant in San Ysidro, California, appealed a summary judgment in favor of McDonald's corporation and one of its franchises. Plaintiffs challenged a trial court determination that as a matter of law McDonald's had no duty to provide protection against mass murderous assaults. Affirming the trial court judgment, the court of appeal concluded that such an event constituted a hazard outside the boundaries of a restaurant's general duty to protect its patrons from reasonable foreseeable criminal acts of third parties (*193 Cal. App. 3d 495, 509-512)* .

In *Gregorian v. National Convenience Stores, Inc. (1985) 174 Cal. App. 3d 944, 220 Cal. Rptr. 302* , plaintiff was severely injured after being attacked and beaten by a gang of youths while shopping at defendants' convenience store. Plaintiff commenced an action against defendants for damages for personal injuries sustained in the attack. On defendants' motion for summary judgment, the trial court found there was no triable issue of fact because, as a matter of law, the court found defendants owed no duty of care to protect plaintiff from an unforeseeable criminal attack by a third party. The trial court then granted summary judgment for defendants and entered a judgment of dismissal against plaintiff. Plaintiff appealed from the judgment of dismissal.

The court of appeal affirmed the trial court's judgment, holding that, as a matter of law, plaintiff's action was without merit and defendants were therefore entitled to summary judgment (*174 Cal. App. 3d 944, 951)* . The court found it beyond dispute that defendants were under no duty to protect plaintiff from the sudden attack of a ruthless youth gang. The facts as alleged in the complaint, in combination with plaintiff's deposition testimony and the declaration of defendants' risk manager were insufficient to establish that defendants could reasonably foresee or anticipate the criminal conduct and the possibility of injury resulting from it. Not only were there no allegations of prior similar incidents occurring at the market, there were no facts that indicated the store was located in an area where gang activity and criminal assaults are common. Taken as a whole, there was nothing in the record to support the claim that defendants possessed knowledge of criminal activities any more precise than the knowledge of any citizen residing and working in the large metropolitan county in which the attack occurred (*174 Cal. App. 3d 944, 949)* . Furthermore, nothing in the record supported plaintiff's argument that defendants' market created an especial temptation and opportunity for the type of sudden, vicious, andintentional conduct that occurred. Distinguishing *Cohen v. Southland Corp.* [*Cohen v. Southland Corp. (1984) 157 Cal. App. 3d 130, 203 Cal. Rptr. 572]* from this case, the court found that while the proprietor of an all-night convenience store such as that in *Cohen* may, in this day and age, reasonably anticipate that his or her place of business will be the target of armed robbers, the same could not be said for a crime resulting from gang violence, especially when the premises had never been the focal point of gang activity. Plaintiff's injuries were the result of an extraordinarily malicious criminal act that, based on defendants' past experience and knowledge, could not have been anticipated (*174 Cal. App. 3d 944, 950-951)* .

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CHAPTER 178 PREMISES LIABILITY
PART II. FORMS
B. Conduct of Third Persons

17-178 California Points & Authorities § 178.64

§ 178.64 Opposing Contention That Owner or Possessor of Premises Is Liable for Harm Caused by Wrongful Acts of Third Persons--No Duty to Provide Security Guards or Increased Security Measures if Harm Was Not Foreseeable Because of Absence of Prior Similar Incidents

[1] FORM

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

DEFENDANT _____ [OWNER OR POSSESSOR] IS NOT LIABLE FOR THE HARM TO PLAINTIFF BECAUSE AN OWNER OR POSSESSOR OF PREMISES HAS NO DUTY TO A PERSON ON THE PREMISES TO PROVIDE _____ [SECURITY GUARDS *or* INCREASED SECURITY MEASURES] TO PROTECT AGAINST THE CRIMINAL CONDUCT OF THIRD PERSONS IN THE ABSENCE OF PRIOR SIMILAR INCIDENTS THAT WOULD HAVE MADE THAT CONDUCT HIGHLY FORESEEABLE.

[*EITHER*]

A. Prior Similar Incidents Needed to Impose Duty of Providing Security Guards. The duty of an owner or possessor of premises to protect persons on the premises from the criminal conduct of third persons does not include the hiring of security guards unless that conduct is highly foreseeable because of the occurrence of prior similar incidents (*Ann M. v. Pacific Plaza Shopping Ctr. (1993) 6 Cal. 4th 666, 679-680, 25 Cal. Rptr. 2d 137, 863 P.2d 207*).

[*OR*]

A. No Duty to Provide Increased Security Without Occurrence of Prior Similar Incidents. An owner or possessor of premises does not have a duty to provide increased security measures to protect persons on the premises from the criminal acts of third parties unless prior similar incidents have made those acts so highly foreseeable as to justify the burden of providing that increased security (*Wiener v. Southcoast Childcare Ctrs., Inc. (2004) 32 Cal. 4th 1138,*

1149-1151, 12 Cal. Rptr. 3d 615, 88 P.3d 517 ; *Pamela W. v. Millsom (1994) 25 Cal. App. 4th 950, 958-959, 30 Cal. Rptr. 2d 690*).

[*CONTINUE*]

[*Optional*] **B. Underground Parking Garage Not Inherently Dangerous.** Underground parking garages are not so inherently dangerous that a duty of care to provide security measures exists even in the absence of prior similar incidents or other indications of a reasonably foreseeable risk of violent criminal assaults in that particular garage (*Drummond v. Desmarais (2009) 176 Cal. App. 4th 439, 450, 98 Cal. Rptr. 3d 183*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that an owner or possessor of the premises had a duty to provide security guards or increased security measures to protect against the criminal conduct of third persons.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel is responding to the contention that there was a duty to provide security guards or increased security measures to protect against the criminal conduct of third persons. The question of whether or not a duty exists on the part of an owner or possessor of the premises, and what the scope of that duty is, may be the subject of a demurrer or summary judgment [*see, e.g., Drummond v. Desmarais (2009) 176 Cal. App. 4th 439, 459, 98 Cal. Rptr. 3d 183* (summary judgment)].

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion of the type of conduct that injured the plaintiff and distinguish it from any prior incidents (for example, plaintiff was raped violently at knife-point, but the only prior criminal incidents on thepremises were loitering, purse-snatching, bank robbery, and simple assaults, none of which involved any injuries or violence).

[c] Opposing Points and Authorities

If appropriate, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 178.60*.

[d] Related Pleading and Practice Forms

For forms and discussion relating to a landowner's duty to protect against acts of third persons, see California Forms of Pleading and Practice, Ch. 421, *Premises Liability* (Matthew Bender).

[3] Discussion of Authorities

[a] Prior Similar Incidents Needed to Impose Duty of Providing Security Guards

In ***Ann M. v. Pacific Plaza Shopping Ctr.*** *(1993) 6 Cal. 4th 666, 25 Cal. Rptr. 2d 137, 863 P.2d 207* , plaintiff, an employee at a photo service store in the shopping mall owned by defendant, was raped and robbed in the store by an armed intruder. Violent crimes had previously occurred in the area where the mall was located, and transients had been

loitering in the common areas of the mall. However, criminal activity at the mall itself prior to the rape of plaintiff was limited to bank robberies, purse snatchings, and assaults, and plaintiff presented no evidence that defendant had knowledge of these crimes. Defendant moved for summary judgment on the grounds that it owed no legal duty to plaintiff because the rape was unforeseeable. Plaintiff argued that the presence of transients made the attack foreseeable and that providing security patrols would have fulfilled defendant's duty to protect her. The trial court granted defendant's motion, and the court of appeal affirmed the trial court, but on the grounds that defendant's duty to take reasonable precautions did not extend to hiring security guards. Plaintiff appealed.

The Supreme Court affirmed, holding that "refinement" of the decision in *Isaacs v. Huntington Memorial Hospital* [*Isaacs v. Huntington Mem'l Hosp. (1985) 38 Cal. 3d 112, 211 Cal. Rptr. 356, 695 P.2d 653]* was necessary in light of the increase in violent crime in today's society and the public policy against making landowners the insurers of public safety. The Court revived the "prior similar incidents" rule rejected in *Isaacs* and replaced by *Isaacs* with the "totality of the circumstances" rule. The Court held that, in determining the scope of a landowner's duty, the foreseeability of the harm to be prevented must be balanced against the burdensomeness of the security measures provided by the landowner. Expensive measures require a high degree of foreseeability, which rarely, if ever, can be proven in the absence of prior similar incidents. Therefore, evidence of prior similar incidents is required to establish that third-party crime on a landowner's premises was so highly foreseeable that the landowner had a duty of care to provide security guards. Applying this rule, the Court concluded that the crimes that had previously occurred in the mall were not similar to the violent rape suffered by the plaintiff, and that evidence of the presence of transients in the mall and a high statistical crime rate in the surrounding area also did not qualify as evidence of prior similar incidents (*6 Cal. 4th 666, 678-680)* .

[b] No Duty to Provide Increased Security Without Occurrence of Prior Similar Incidents

In ***Wiener v. Southcoast Childcare Ctrs., Inc.*** *(2004) 32 Cal. 4th 1138, 12 Cal. Rptr. 3d 615, 88 P.3d 517* , the plaintiffs were the parents of two young children who were killed when a man intentionally drove his automobile through a chain link fence surrounding the playground of a child care center and into a group of children. In addition to suing the man, who was convicted of murder for his conduct, the plaintiffs also sued the child care center and the premises owner. The plaintiffs alleged that these defendants were aware that the chain link fence provided inadequate protection for the children from the hazards of the adjacent road. Evidence indicated that there had been a few non-injury accidents in the roadway near the property in the past, and one freak incident in which a mail truck escaped from its driver, went through a fence on the property, and crashed into a tree; however, all of these accidents had occurred before the child care center opened on the property. Despite the lack of prior criminal conduct such as occurred when the children were killed, the plaintiffs argued that the defendants owed a duty to provide a sturdier barrier that would have prevented the man from driving his car into the playground. The defendants countered that the chain link fence that was provided met all code and safety requirements and was sufficient to stop traffic from entering the property in most cases, under reasonably foreseeable circumstances. The trial court granted summary judgment for the defendants on the grounds that the plaintiffs had failed to provide evidence of prior similar incidents of violent crime or other criminal acts sufficient to impose a duty on the defendants. The plaintiffs appealed. The court of appeal reversed, holding that because it was reasonably foreseeable that an errant car could careen through the fence and cause injury, the defendants owed a duty of care even though the actual injury-causing conduct was criminal in nature. The defendants appealed.

The California Supreme Court reversed the court of appeal and affirmed the trial court's grant of summary judgment in favor of the defendants. The Court reviewed the basic principles of *Ann M. v. Pacific Plaza Shopping Center* [*Ann M. v. Pacific Plaza Shopping Ctr. (1993) 6 Cal. 4th 666, 25 Cal. Rptr. 2d 137, 863 P.2d 207* ; *see § 178.64[3][a]*], and *Sharon P. v. Arman, Ltd.* [***Drummond v. Desmarais*** *(2009) 176 Cal. App. 4th 439, 98 Cal. Rptr. 3d 183* ; *see § 178.64[3][c]*]. The Court then held that the foreseeability of the injury-causing conduct in this case must be analyzed under the *Ann M.* test for determining the foreseeability of third-party criminal conduct, and not under the less stringent test for foreseeability that would be used in a case of ordinary negligence involving a "curb-jumping" accident. Under

the *Ann M.* standard, the Court concluded that the criminal assault that occurred was unforeseeable, given the absence of any prior acts of violence at the child care center, or at any other similar business in the area, and the complete impossibility of anticipating the driver's outrageous conduct (*32 Cal. 4th 1138, 1149-1150)* . In the absence of the requisite foreseeability, the defendants were under no duty to provide more security than that provided by the chain link fence (*32 Cal. 4th 1138, 1151)* .

In ***Pamela W. v. Millsom*** *(1994) 25 Cal. App. 4th 950, 30 Cal. Rptr. 2d 690* , plaintiff was the tenant of one condominium unit of a four-unit, two-building project. Plaintiff was raped in her dwelling by an intruder who called her by name and told her he had been watching her. Plaintiff filed an action for negligence against the owners of her condominium unit and the condominium association. Neither plaintiff nor defendants was aware of any specific prior criminal acts in the vicinity of the condominium project except for one daytime burglary. Defendants moved for summary judgment on the ground that they had no duty to plaintiff to have protected her from the rape, because the rape was not reasonably foreseeable in the absence of any prior similar incidents. The trial court granted the motion, and plaintiff appealed.

The court of appeal affirmed, relying heavily on *Ann M. v. Pacific Plaza Shopping Center* [*Ann M. v. Pacific Plaza Shopping Ctr. (1993) 6 Cal. 4th 666, 25 Cal. Rptr. 2d 137, 863 P.2d 207* ; *see § 178.64[3][a]*] to rule that defendants did not owe plaintiff a duty to make her condominium entry-proof to protect her from criminal conduct because, in the absence of any prior similar incidents, that conduct was not highly foreseeable (*25 Cal. App. 4th 950, 958-959)* . Although the plaintiff in *Ann. M.* claimed that defendant had a duty to provide security guards and plaintiff in this case claimed that defendants had a duty merely to improve or increase the physical security of the premises, the court noted that doing the latter would be just as onerous a burden to small landlords as providing security guards would be to the owner of a large shopping center (*25 Cal. App. 4th 950, 957-958)* . The court also found it unreasonable to expect defendants in this case to have prevented the rape because the rapist apparently had been stalking plaintiff, and thus would not have been deterred by anything short of armed guards (*25 Cal. App. 4th 950, 959)* .

[c] Underground Parking Garage Not Inherently Dangerous

In ***Sharon P. v. Arman, Ltd.*** *(1999) 21 Cal. 4th 1181, 91 Cal. Rptr. 2d 35, 989 P.2d 121* , the plaintiff operated an accounting business in a Los Angeles office building and paid a monthly fee to park in an assigned space in the underground parking garage reserved for tenants of the building. One morning as she was preparing to leave her car in the parking garage, she was forced at gunpoint back into the car by an unknown assailant and sexually assaulted. She brought suit against the building owner and the company that managed the garage, alleging that the defendants' failure to provide adequate security for users of the garage resulted in her assault. After discovery was conducted, the defendants moved for summary judgment on the basis that neither owed a duty to make the garage more secure than it was because the attack on the plaintiff was not reasonably foreseeable. The evidence before the court showed that no assaults had occurred in the parking garage in the preceding ten years, which approximated the time period that the current owner owned the building. However, numerous armed robberies had occurred in the bank on the ground floor of the building in the two years prior to the attack on the plaintiff, with one physical injury. In addition, the plaintiff provided police statistics of criminal activity, including sexual assaults, in the surrounding 50-block area for the 15 months prior to the attack. The plaintiff also submitted evidence of the deteriorating physical condition of the garage, including evidence that the garage was not clean or well lit. Security cameras installed in the garage had not functioned for several months prior to the attack on the plaintiff. The defendants also submitted a declaration from a private security consultant stating that the lighting in the garage was sufficient to see from one side of the garage to the other in any direction and opining that requiring a security guard or a monitored security camera in that particular garage would be an unreasonable burden, given the size, condition, and history of the particular garage. Because of the absence of evidence that crimes had occurred within the garage itself, the trial court granted the defendants' motions for summary judgment based on the foreseeability analysis of *Ann M. v. Pacific Plaza Shopping Center* [*Ann M. v. Pacific Plaza Shopping Ctr. (1993) 6 Cal. 4th 666, 25 Cal. Rptr. 2d 137, 863 P.2d 207* ; *see § 178.64[3][a]*].

A divided court of appeal reversed, with the majority concluding that *Ann M.* was not controlling because commercial parking structures are "inherently dangerous," facilitate the commission of crime, and increase its likelihood. Therefore, according to the court of appeal, criminal assaults on garage patrons were highly foreseeable as a matter of law, notwithstanding the absence of prior similar incidents of sexual assault in the particular garage at issue.

The Supreme Court reversed the court of appeal and remanded to the trial court with directions to enter judgment for the defendants, holding as a matter of law that the defendants were not required to secure the garage against violent criminal assaults in the absence of any prior similar incidents or other indications of a reasonably foreseeable risk of violent criminal assaults at that particular garage. Relying extensively on their earlier opinion in *Ann M.*, the Court noted that no assaults had occurred in the parking garage in the preceding ten years, and although numerous bank robberies had occurred in the bank on the ground floor of the building, the Court concluded that these incidents were not sufficiently similar to the sexual assault suffered by the plaintiff to establish the requisite foreseeability. In addition, although the plaintiff provided police statistics of criminal activity, including sexual assaults, in the surrounding 50-block area for the 15 months prior to the attack, she provided no evidence showing the proximity of these crimes to the parking garage (*21 Cal. 4th 1181, 1191, 1198)* .

The Court also specifically rejected the argument that underground parking garages were so inherently dangerous that a duty of care to provide security measures exists even in the absence of prior similar incidents. In reaching this conclusion, the Court first noted the absence of evidence or authority from which they might confidently conclude that underground parking garages, regardless of individual physical characteristics and locations, are prone to violence and therefore inherently dangerous (*21 Cal. 4th 1181, 1192)* . The Court then specifically rejected the argument that an earlier court of appeal opinion [*Gomez v. Ticor (1983) 145 Cal. App. 3d 622, 193 Cal. Rptr. 600]* could support such a broad rule of liability. In that earlier case, the court of appeal had noted certain features of parking garages that seemed to make them especially attractive to criminals, but under the facts of that case, in which the plaintiff had been shot when he inadvertently interrupted a robbery that was in progress, liability was imposed because there were prior similar incidents of theft and vandalism in the underground garage (*21 Cal. 4th 1181, 1193)* . The Court also sought to avoid "virtually limitless" litigation over what other types of property could arguably be characterized as "inherently dangerous." Finally, the Court concluded that an "inherently dangerous" rule of law would impose an undue burden on garage owners even if, as in the case before it, there was no evidence that prior criminal assaults had occurred in the garage (*21 Cal. 4th 1181, 1194-1195)* .

In holding for the defendants, the Supreme Court concluded not only that the defendants had no duty to provide burdensome measures such as a security guard, but also that lesser measures such as monitored security cameras and walk-throughs by existing personnel might have been equally burdensome and were not legally required in light of the fact that the parking garage at issue had been free of crime for a substantial period of years (*21 Cal. 4th 1181, 1199)* . The Court also refused to impose a duty to provide improved lighting and maintenance, questioning the efficacy of "adequate lighting" as a crime prevention measure and noting that the plaintiff had failed to present any evidence that her attacker used a darkened area to facilitate his attack (*21 Cal. 4th 1181, 1196-1197, 1197 n.5*).

[4] Additional Authorities

[a] No Duty to Provide Increased Security Without Occurrences of Prior Similar Incidents

The factual and procedural background of *Melton v. Boustred (2010) 183 Cal. App. 4th 521, 107 Cal. Rptr. 3d 481* , is described in § 178.63[4][a]. In rejecting the argument that the host of a residential party owed a duty to his guests to protect against a criminal assault committed by unknown assailants, the court of appeal concluded that the assault was not reasonably foreseeable and defendant had no knowledge of prior similar acts of violent crime on the property (*183 Cal. App. 4th 521, 536-539)* . The court then concluded that, in light of the low foreseeability of the attack, the security measures proposed by plaintiffs would have been unduly burdensome. To the extent plaintiffs were proposing that security guards should have been employed, the court concluded that the facts of the case did not support such an

extreme measure, especially given the absence of prior similar incidents of violent crime at the residence (*183 Cal. App. 4th 521, 539)* . The court also rejected as unduly burdensome the plaintiffs' suggestion that the defendant had a duty to restrict the guest list. The court concluded that the plaintiffs' proposal for restricting the guest list was vague, might have been ineffective in preventing the harm, given that the assailants were never identified and thus could have been members of any controlled guest list, and was socially burdensome, given that a limited guest list would have effectively prevented defendant from the social and professional networking that he desired (*183 Cal. App. 4th 521, 540)* .

In *Rinehart v. Boys & Girls Club of Chula Vista (2005) 133 Cal. App. 4th 419, 34 Cal. Rptr. 3d 677* , the plaintiff, a minor, was struck by a rock while playing in the yard of an after-school club. The rock was thrown by an unidentified person who was not a member of the club. The playground of the club was located at the base of a hill just below a park with baseball fields where other children played. A fence ran across the top of the hill, and persons who were not club members could walk across the top of the hill next to the fence, but no one had ever reported seeing anyone throw rocks from the area on the hill to the playground below. In the incident in which the plaintiff was struck, it was believed that a total of four rocks had been thrown. Although she did not see the rocks being thrown, one staff member at the club admitted to being present in the playground at the time providing general supervision. Nonetheless, the plaintiff sued the club for providing inadequate supervision. The court affirmed summary judgment for the club. On the issue of the foreseeability of the attack, the court analyzed the case under the "prior similar incidents" rule applicable to third-party criminal assault cases. Undisputed evidence showed that the club was only aware of a few prior rock-throwing incidents, all of which involved club members in the playground throwing stones at the basketball hoop or some other object and none of which involved injuries. In addition, no staff member had ever seen any non-member throw or roll anything down the hill toward the playground. As such, the court concluded that the incident that injured plaintiff was not reasonably foreseeable and that the club had no duty to provide additional supervision (*133 Cal. App. 4th 419, 434-435)* . The court also concluded that even if the attack were foreseeable, the plaintiff could not show that additional supervision would have prevented the attack of an unknown assailant, and the court considered evidence to the contrary presented by the plaintiff's witness as pure speculation (*133 Cal. App. 4th 419, 435)* .

In *Lopez v. Baca (2002) 98 Cal. App. 4th 1008, 120 Cal. Rptr. 2d 281* , the plaintiff was a patron at a nightclub that engaged in the illegal practice of paying commissions to women hired to entice men in the club to buy drinks for them at inflated prices in exchange for their company. Whenthe plaintiff refused to buy a drink for one such woman, she cursed at him and returned to her male companion. This companion soon left the club, returned with a gun, and, without warning, shot the plaintiff in the head. Although the club employed a security guard on weekends to check patrons for weapons, the assault on the plaintiff occurred on a Tuesday evening when no guard was present. The plaintiff sued the owner of the club for negligence, arguing that the club unreasonably failed to provide security guards to protect patrons from attack. The defendant filed a motion for summary judgment on the grounds that in the absence of prior similar incidents, the assault was unforeseeable and no duty was owed. The plaintiff tried to present evidence in the form of police printouts showing extensive calls to that address in the five years prior to the attack on the plaintiff, but the trial court excluded this evidence because the printouts did not provide descriptive accounts of why police were called to the address, or whether police attention was needed inside or outside the nightclub, and therefore they were not proof of prior similar incidents. With this evidence excluded, the defendant was granted summary judgment, and the court of appeal affirmed. The court of appeal first concluded that the plaintiff had abandoned on appeal the argument that the nightclub had notice of prior similar incidents on the premises sufficient to impose a duty to provide adequate security measures to protect patrons (*98 Cal. App. 4th 1008, 1015)* . The court then rejected the plaintiff's claim that bars and nightclubs, including those violating statutes prohibiting the payment for solicitation of beverages, are inherently dangerous, because the plaintiff failed to support his assertion with any evidence or authority (*98 Cal. App. 4th 1008, 1017)* . The court also rejected the plaintiff's unsupported assertion that the nightclub's decision to provide a security guard on weekend nights placed them under a legal duty to provide a security guard on weeknights as well, at least in the absence of prior acts of violence on the premises that would warrant imposing such a duty (*98 Cal. App. 4th 1008, 1017-1018* & n.8). Finally, the court held that plaintiff had not properly pleaded the argument that the nightclub's illegal conduct in paying women to solicit drinks from patrons was negligence per se, and that the argument would fail even if

properly presented, because the violated statutes were morals statutes aimed at prohibiting the encouragement of alcohol purchases in exchange for a women's hospitality and were not intended to protect against the injury suffered by the plaintiff (*98 Cal. App. 4th 1008, 1019-1020)* .

In *Hassoon v. Shamieh (2001) 89 Cal. App. 4th 1191, 107 Cal. Rptr. 2d 658* , the plaintiff was standing inside the defendant's grocery store when he was shot and wounded by someone sitting in a car parked on the street next to the store. The shots were apparently fired as part of an altercation outside of the store. During this altercation, a group of men were beating another man, until he was rescued by a store clerk, who dragged the man into the store while other armed store employees prevented the assailants from entering the store after the man. In rejecting the plaintiff's contention that the store owed a duty of care to him, the court of appeal placed primary emphasis on the complete absence of prior similar incidents at the store. In the absence of such incidents, the shooting could not be considered to be foreseeable. Because it was not a foreseeable occurrence, the store was under no duty of care running to plaintiff to take measures to protect plaintiff (*89 Cal. App. 4th 1191, 1195)* . The court went on the explain that no duty should be imposed under the circumstances because the person who fired the shot was not on the store's premises (*89 Cal. App. 4th 1191, 1197)* . Finally, the court concluded that it would be bad policy to hold the store liable merely because the store clerk made the decision to attempt a rescue of the man being beaten outside the store, even though that decision may have increased the danger to persons inside the store, such as the plaintiff (*89 Cal. App. 4th 1191, 1199)* .

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CHAPTER 178 PREMISES LIABILITY
PART II. FORMS
B. Conduct of Third Persons

17-178 California Points & Authorities § 178.64A

§ 178.64A Opposing Contention That Owner or Possessor of Premises is Liable for Harm Caused by Wrongful Acts of Third Persons--Heightened Foreseeability Required to Hold Landlord Liable for Failing to Prevent Gang Violence

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT OWED NO DUTY TO _____ [REFUSE TO RENT TO *or* EVICT] A SUSPECTED GANG MEMBER BECAUSE THE THREAT OF VIOLENCE CAUSED BY THE TENANT WAS NOT _____ [EXTRAORDINARILY FORESEEABLE *or* HIGHLY FORESEEABLE].

A. No Duty Not to Rent to Suspected Gang Member Absent Extraordinary Foreseeability of Harm. Absent circumstances showing extraordinary foreseeability, a landlord owes no duty to existing tenants not to rent to suspected gang members, nor to screen the criminal records of suspected gang members before renting (*Castaneda v. Olsher (2007) 41 Cal. 4th 1205, 1216-1217, 63 Cal. Rptr. 3d 99, 162 P.3d 610*).

B. No Duty to Evict Suspected Gang Member Absent High Foreseeability of Harm. While a landlord may have a duty to evict a suspected gang member, such a duty may only be imposed when the potential for violence caused by that tenant is highly foreseeable (*Castaneda v. Olsher (2007) 41 Cal. 4th 1205, 1221, 63 Cal. Rptr. 3d 99, 162 P.3d 610*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a landlord may be held liable for choosing to rent to a suspected gang member, or having rented to a suspected gang member, for failing to evict that tenant.

These points and authorities may be combined with points and authorities relating to the specific procedural context in

which the issue of defendant's liability arises, or combined with other forms in this chapter, as appropriate. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law stated. Thus, counsel should include facts showing that the landlord, or his or her agents, lacked the requisite knowledge to meetthe heightened standard of foreseeability required to hold the landlord liable for failing to prevent violence caused by a suspected gang member.

[3] Discussion of Authorities

[a] No Duty Not to Rent to Suspected Gang Member Absent Extraordinary Foreseeability of Harm

In *Castaneda v. Olsher (2007) 41 Cal. 4th 1205, 63 Cal. Rptr. 3d 99, 162 P.3d 610* , plaintiff was the tenant of a mobilehome park who was shot when gang-related violence broke out in front of the mobilehome lot across from his own lot. Plaintiff sued the owner of the park, arguing that the owner owed a duty not to rent to the tenant in the adjacent lot because he was a known gang member, or having rented to the tenant, owed a duty to evict him. The trial court granted defendant's motion for nonsuit based on plaintiff's failure to show that the shooting was highly foreseeable. The court of appeal reversed, holding that plaintiff had shown that the landlord knew he was renting to a gang member and that there had been sufficient gang-related conduct occurring on or near the premises to place a duty on the landlord to take additional security measures to protect residents from potential violence. Defendant appealed.

The California Supreme Court reversed the court of appeal and affirmed the grant of nonsuit. The Court held that absent circumstances showing extraordinary foreseeability, a landlord owes no duty to existing tenants not to rent to suspected gang members, nor to screen the criminal records of suspected gang members before renting. The Court concluded that recognition of such a duty would place landlords in a position in which they would tend to deny rentals to those who fit a perceived profile for gang membership, likely leading to potential liability for racial, ethnic, or other types of illegal discrimination (*41 Cal. 4th 1205, 1216-1217)* . While the Court did not provide a definitive standard for determining what evidence would support a showing of "extraordinary foreseeability," the Court concluded that the evidence in the instant case showed only that the landlord's agent had a suspicion that the potential renter was a gang member when the lot was rented to him, and this was insufficient to provide extraordinary foreseeability of harm (*41 Cal. 4th 1205, 1218)* .

[b] No Duty to Evict Suspected Gang Member Absent High Foreseeability of Harm

The factual and procedural background of *Castaneda v. Olsher (2007) 41 Cal. 4th 1205, 63 Cal. Rptr. 3d 99, 162 P.3d 610* , is described in [a], *above.* The Supreme Court held in that case that having rented to a tenant who is suspected of being a gang member, a landlord may have a duty to evict, but only when the threat of violence is highly foreseeable. The Court stressed that a plaintiff would have to establish that it was highly foreseeable that the particular tenant sought to be evicted, or guests of that tenant, would commit violence against other tenants, as demonstrated by the behavior of that particular tenant as reported to or observed by the landlord or his or her agents. Plaintiff's evidence in the instant case failed to meet that burden. While two previous shootings had occurred on or adjacent to the mobilehome park, no evidence connected either shooting to the tenant who was a suspected gang member. The evidence showed merely that another park resident had complained to the manager that occupants of the mobilehome with the suspected gang member had harassed her and her children by causing a pit bull to growl at them, that someone living at that mobilehome or another one had broken windows in her car, and that men gathered at that mobilehome had whistled and hooted at another female occupant of the park. The Court concluded that this evidence, even when combined with the manager's belief that the resident in that mobilehome was a gang member, was insufficient to establish a high foreseeability of gun violence and impose a duty to evict on the landlord (*41 Cal. 4th 1205, 1221)* .

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CHAPTER 178 PREMISES LIABILITY
PART II. FORMS
B. Conduct of Third Persons

17-178 California Points & Authorities § 178.65

§ 178.65 Opposing Contention That Owner or Possessor of Premises Is Liable for Harm Caused by Wrongful Acts of Third Persons--No Duty If No Special Relationship

[1] FORM

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

DEFENDANT _____ [OWNER *or* POSSESSOR] IS NOT LIABLE FOR THE HARM TO PLAINTIFF BECAUSE AN OWNER OR POSSESSOR OF PREMISES OWES NO DUTY TO A PERSON ON THE PREMISES TO CONTROL THE CONDUCT OF THIRD PERSONS WHEN THERE IS NO SPECIAL RELATIONSHIP BETWEEN THE PERSON ON THE PREMISES AND THE OWNER OR POSSESSOR.

Special Relationship Needed. In the absence of a special relationship between the person injured on the premises and the owner or possessor of the premises, the owner or possessor has no duty to protect that person from the wrongful conduct of third persons (*Totten v. More Oakland Residential Hous., Inc. (1976) 63 Cal. App. 3d 538, 541-543, 134 Cal. Rptr. 29*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that an owner or a possessor of the premises had a duty to control the conduct of a third person on the premises.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel is responding to the contention that the owner or possessor had a duty to control the conduct of third persons. The question of whether or not the owner or possessor of premises has a duty may be the subject of a demurrer or a summary judgment [*see, e.g.,* *Totten v. More Oakland Residential Hous., Inc. (1976) 63 Cal. App. 3d 538, 547, 134 Cal. Rptr. 29* (demurrer)].

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion of the status of the person on the premises (for example, because plaintiff was not a tenant in defendant's building but was waiting in the laundry room of the apartment complex for a friend and was not an invitee as to defendant landlord, no special relationship existed between plaintiff and defendant and defendant had no corresponding duty to protect plaintiff from the acts of third persons).

[c] Opposing Points and Authorities

If appropriate, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 178.60*.

[d] Related Pleading and Practice Forms

For forms and discussion relating to a landowner's duty to protect against acts of third persons, see California Forms of Pleading and Practice, Ch. 421, *Premises Liability* (Matthew Bender).

[3] Discussion of Authorities

[a] Special Relationship Needed

In ***Totten v. More Oakland Residential Hous., Inc.*** *(1976) 63 Cal. App. 3d 538, 134 Cal. Rptr. 29* , plaintiff was a guest of a tenant of the apartment complex owned by defendant. She was sitting in the laundry room waiting for her friend when two strangers ran into the laundry room and one opened fire on the other. Several of the shots hit plaintiff and she was injured. The complaint alleged that defendants owed a duty to plaintiff to protect her from the criminal conduct of third persons and the duty was breached by failing to provide a security guard or supervision of the premises. A demurrer to the second amended complaint was sustained without leave to amend and plaintiff appealed.

The court of appeal affirmed and held that the imposition of a duty in the instant case would be entirely unwarranted (*63 Cal. App. 3d 538, 541)* . The court stated that the basic principle involved was that in the absence of a special relationship, a private person has no duty to protect another from a criminal attack by a third person (*63 Cal. App. 3d 538, 541)* . A special relationship, the court pointed out, exists between a landowner and an invitee and the body of case law dealing with this relationship focuses on either a patron at a business establishment or a tenant or an employee (*63 Cal. App. 3d 538, 542)* . The court, in support of the proposition that a special relationship is needed to impose a duty, cited to Restatement (Second) of Torts § 344 that provides that a possessor of land who holds it open to the public for entry for his or her business purposes is subject to liability to members of the public while they are on the land for that purpose for physical harm caused by accidental, negligent, or intentionally harmful acts of third persons (*63 Cal. App. 3d 538, 542)* .

The court noted that plaintiff, a licensee, was not owed this duty under the traditional common-law rules. Although *Rowland v. Christian* [*Rowland v. Christian (1968) 69 Cal. 2d 108, 118, 70 Cal. Rptr. 97, 443 P.2d 561]* held that the proper test to be applied to the liability of a possessor of premises is whether or not the possessor acted as a reasonable person in view of the probability of injury to others, the Supreme Court clearly indicated that the status of the person on the premises is still relevant to the question of liability (*63 Cal. App. 3d 538, 544)* . In addition, *Rowland* dealt with a defective condition on the premises that caused the injury and not the conduct of third persons (*63 Cal. App. 3d 538, 544)* .

[4] Additional Authorities

[a] Special Relationship Needed

In *Eric J. v. Betty M. (1999) 76 Cal. App. 4th 715, 90 Cal. Rptr. 2d 549* , a child was sexually molested by his mother's boyfriend while visiting the boyfriend's relatives. These relatives had failed to warn the mother that her boyfriend had in the past been convicted for child molestation. Suit was brought on behalf of the child against the relatives under general premises liability and negligence principles. After the trial court granted nonsuit to the defendants, the court of appeals held that under the circumstances of the case, the relatives could not be liable under either general premises liability or negligence principles. The relatives had no knowledge that the boyfriend was molesting the child, and even thoughsome of the molestations took place at their residences when the boyfriend was able to be alone with the child, the relatives did nothing to facilitate the molestations and made no representations as to the safety of the child if left alone with the boyfriend. The court concluded that the premises liability argument failed because there was no relationship between the harm suffered and any premises owned by the relatives. The boyfriend's prior convictions did not mean that for purposes of tort liability he should be treated as the functional equivalent of a dangerous animal, because he had been released from prison under a parole program that had as its premise the belief that rehabilitation was possible (*76 Cal. App. 4th 715, 725-726)* . The court also noted that the facts did not support any of the other traditional bases for imposing premises liability, such as the nature of the activity conducted on the property or any relationship of entrustment of the child (*76 Cal. App. 4th 715, 727)* . Finally, the court concluded that, in accordance with long-standing principles of tort law, the relatives could not be held liable under general negligence principles for their failure to warn the child's mother of the convictions, absent a special relationship that wold create a duty to take action (*76 Cal. App. 4th 715, 727-729)* .

The facts and procedural background of *Ann M. v. Pacific Plaza Shopping Ctr. (1993) 6 Cal. 4th 666, 25 Cal. Rptr. 2d 137, 863 P.2d 207* , are discussed in *§ 178.64[3][a]*. The plaintiff, an employee of a photo servicing store in a shopping mall owned by the defendant, was raped by an armed intruder in the store. The plaintiff filed an action against the defendant on the grounds that the defendant breached its duty to keep its premises in a reasonably safe condition by failing to provide security guards to patrol the mall's common areas. The defendant argued that its duty to its patrons and tenants did not extend to plaintiff. The Court held that this duty did indeed extend to employees of the defendant's tenants, pointing out that commercial tenants generally are not natural persons and therefore act through their employees (*6 Cal. 4th 666, 675)* .

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17-178 California Points & Authorities § 178.66

§ 178.66 Opposing Contention That Owner or Possessor of Premises Is Liable for Harm Caused by Wrongful Acts of Third Persons--No Duty to Comply With Robber's Demand for Money

[1] FORM

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

DEFENDANT _____ [OWNER *or* POSSESSOR] IS NOT LIABLE FOR THE HARM TO PLAINTIFF, BECAUSE THE DUTY OF AN OWNER OR POSSESSOR OF PREMISES TO CONTROL THE CONDUCT OF THIRD PERSONS DOES NOT REQUIRE THE OWNER OR POSSESSOR TO COMPLY WITH A ROBBER'S DEMAND FOR MONEY.

A. No Duty to Comply With Robber's Demand for Money. An owner or possessor of premises has no duty to comply with a robber's demand for money even if that demand is coupled with a threat of harm to a third person (*Vandermost v. Alpha Beta Co. (1985) 164 Cal. App. 3d 771, 779-780, 210 Cal. Rptr. 613*).

B. Refusal to Obey Robber's Demand Without Active Resistance Is No Breach of Duty to Third Persons. A shopkeeper who refuses to obey a robber's unlawful demand for money but does not actively resist the robbery does not breach any duty to third persons on the premises (*Kentucky Fried Chicken of Cal., Inc. v. Superior Court (1997) 14 Cal. 4th 814, 829, 59 Cal. Rptr. 2d 756*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that an owner or possessor of property is liable for injury suffered because of an asserted breach of a duty to control the conduct of a third person by complying with a robber's demand for money.

These points and authorities may be combined, if appropriate, with points and authorities relating to the specific

procedural context in which counsel wishes to oppose the contention that the owner or possessor of premises was required to comply with a robber's demand for money. The points and authorities in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the point of law stated.

[b] Related Pleading and Practice Forms

For forms and discussion relating to a landowner's duty to protect against acts of third persons, see California Forms of Pleading and Practice, Ch. 421, *Premises Liability* (Matthew Bender).

[3] Discussion of Authorities

[a] No Duty to Comply With Robber's Demand for Money

In ***Vandermost v. Alpha Beta Co.*** *(1985) 164 Cal. App. 3d 771, 779-780, 210 Cal. Rptr. 613* , plaintiff was dining at a restaurant owned by defendant when he heard a commotion coming from the area where the cash registerwas located. He left his seat and went to investigate. He heard a man say to the cashier "give me money or I am going to shoot someone," and saw the man fire a handgun into the ceiling. The cashier closed the cash register, thereby locking it, and fled into the kitchen. After unsuccessfully attempting to open the cash register, the man approached plaintiff and demanded money. Plaintiff replied that he had no money, and the man shot plaintiff in the upper arm. A jury granted a verdict for plaintiff, but the trial court granted defendant's motion for judgment notwithstanding the verdict and entered judgment for defendant. Plaintiff appealed.

The court of appeal affirmed. The court first distinguished two earlier cases [*Taylor v. Centennial Bowl, Inc. (1966) 65 Cal. 2d 114, 52 Cal. Rptr. 561, 416 P.2d 793* ; *Winn v. Holmes (1956) 143 Cal. App. 2d 501, 299 P.2d 994]* as displaying closer connections between defendants' failures to act and plaintiffs' injuries, as involving situations in which the third party had much earlier focused attention on the plaintiff with the knowledge of the occupier of the premises or its employee (for example, a bouncer), and as imposing a less burdensome duty on defendant (*164 Cal. App. 3d 771, 777-778)* . The court noted that no California case had considered the duty to pay money to a robber, but discussed a case in which the Illinois Supreme Court opined that the imposition of such a duty would inure only to the benefit of robbers and might well encourage the use of hostages. Because of the weak evidence of foreseeability, the tenuous connection between defendant's conduct and plaintiff's injury, the lack of any moral blame attached to defendant's conduct, and the strong public policy against imposing a duty in this setting, the court of appeal refused to find that defendant breached any duty owed to plaintiff to pay money to a robber in order to protect a customer, and affirmed the trial court's judgment (*164 Cal. App. 3d 771, 780)* .

[b] Refusal to Obey Robber's Demand Without Active Resistance Is Not Breach of Duty to Third Persons

In ***Kentucky Fried Chicken of Cal., Inc. v. Superior Court*** *(1997) 14 Cal. 4th 814, 59 Cal. Rptr. 2d 756* , plaintiff, a customer in a restaurant operated by defendant, was seized and held at gunpoint by a robber. Plaintiff complied with the robber's demands and surrendered her cash and wallet to him immediately. The robber then demanded that a store clerk open the cash register and give him all of the money. The clerk refused saying that she would have to go to the back of the restaurant for a key. The robber became extremely agitated, shoved his gun harder into plaintiff's back, and told the employee he would shoot plaintiff if the employee did not comply. Plaintiff screamed at the clerk to open the drawer and give the money to the robber, at which point the clerk complied and opened the cash register drawer. The robber seized the money and fled. Plaintiff sued defendant restaurant for negligence. Defendant claimed it had no duty to plaintiff to comply with the robber's unlawful demands. Defendant moved for summary judgment and the trial court denied the motion. The court of appeal ruled that under the circumstances defendant did owe a duty to plaintiff to comply with the armed robber's demand for money in order to avoid increasing the risk of harm to patrons. The court

reasoned that there was a high degree of certainty that the plaintiff suffered injury, that the injury was closely connected with the defendant's conduct, and that the burden on defendant of avoiding the injury by complying with the robber's demand was slight. Defendant appealed, arguing that the decision of the court of appeal conflicted with that in *Vandermost v. Alpha Beta Co.* [*Vandermost v. Alpha Beta Co. (1985) 164 Cal. App. 3d 771, 210 Cal. Rptr. 613]* , in which the court of appeal concluded that no duty to comply with a robber's demands should be imposed because adverse consequences to the public would result.

The Supreme Court reversed, holding that a shopkeeper had no duty to comply with a robber's unlawful demand for the surrender of property, and that simple refusal to obey did not breach any duty to third persons present on the premises (*14 Cal. 4th 814, 829)* . The court dismissed plaintiff's argument that when a patron is held hostage by an armed robber, a shopkeeper should have a duty to comply with the robber's demands in order to prevent possible injury to the patron. Instead the Court embraced the reasoning in *Vandermost*, that there is never a duty to comply with the demands of a robber even when the robber is holding and threatening a hostage because there is no basis for assuming that complying with a robber's demands would guarantee the safety of the hostage. Furthermore, recognizing a duty to comply with an unlawful demand to surrender property would be inconsistent with the public policy reflected in both *Cal. Const. art. I, § 1* and *Civ. Code § 50*, which recognize the right of persons to defend property with reasonable force. The public interest would not be served by recognition of a duty to comply with a robber's demands because it is possible for persons who commit armed robbery to become aware of and be encouraged by the existence of such a duty. The Court concluded by acknowledging the narrowness of its holding. Because it was not faced in this case with a situation in which defendant's employee had engaged in active resistance to the robbery, the Court did not decide if the right to defend property with reasonable force was qualified by a duty to avoid injury to third persons, or if a duty existed to avoid physical resistance that might provoke a robber into carrying out a threat to harm third persons (*14 Cal. 4th 814, 829)* .

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17-178 California Points & Authorities § 178.67

§ 178.67 Opposing Contention That Owner or Possessor of Premises Is Liable for Harm Caused by Wrongful Acts of Third Persons--No Duty to Victim to Allow Use of Telephone to Report Theft on Premises in Absence of Special Relationship Between Parties

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT _____ [OWNER *or* POSSESSOR] IS NOT LIABLE FOR REFUSING PLAINTIFF THE USE OF ITS TELEPHONE TO REPORT A THEFT OF PLAINTIFF'S PROPERTY ON DEFENDANT'S PREMISES BY A THIRD PERSON BECAUSE THERE WAS NO SPECIAL RELATIONSHIP BETWEEN PLAINTIFF AND DEFENDANT GIVING RISE TO A DUTY ON DEFENDANT'S PART TO TAKE AFFIRMATIVE ACTION TO ASSIST OR PROTECT PLAINTIFF.

A. No Duty in Absence of Special Relationship. As a rule, absent a special relationship giving rise to a duty to act, a person is under no duty to take affirmative action to assist or protect another, no matter how great the danger in which the other is placed, or how easily he or she could be rescued (*Stangle v. Fireman's Fund Ins. Co. (1988) 198 Cal. App. 3d 971, 974, 244 Cal. Rptr. 103*).

B. Special Relationship Is Not Created by Mere Fact That Theft Occurs on Defendant's Premises. No special relationship is created between the plaintiff and the possessor of the business premises in which plaintiff's property was stolen by a third person, because neither of them had any relationship to the possessor of the premises that would impose on him or her an affirmative duty to aid the plaintiff in summoning help. Hence, the refusal of the possessor of the premises to allow the plaintiff's agent to use the company's telephone to report the theft is not negligence on the possessor's part (*Stangle v. Fireman's Fund Ins. Co. (1988) 198 Cal. App. 3d 971, 974, 244 Cal. Rptr. 103*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that, because the theft of plaintiff's property occurred on the defendant's premises, the defendant is liable for the loss for refusing to allow the plaintiff the use of its phone to report the theft.

The points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to oppose the contention that the owner or possessor of premises was required to aid plaintiff in summoning help. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] No Duty in Absence of Special Relationship

In ***Stangle v. Fireman's Fund Ins. Co.*** *(1988) 198 Cal. App. 3d 971, 244 Cal. Rptr. 103* , plaintiff had purchased a sapphire ring in Honolulu to sell for profit. When his efforts to sell the ring in Seattle proved unsuccessful, he asked a former girlfriend to try to sell the ring in San Francisco and gave her custody of it. A purported prospective buyer responded to her newspaper ad. They agreed on a price. The prospective buyer told the custodian to take the ring the next day to the defendant insurance company's offices, which were on the 14th floor of a building, where the sale would take place because "the person he represented wanted the ring photographed and insured before he left the premises with it." The next day the custodian took the ring to the defendant's offices and was joined by the purported buyer. It was lunchtime and most of the employees were gone. The custodian and prospective buyer sat at an empty desk and, while the custodian wrote out a bill of sale, the prospective buyer asked for the ring to have it photographed. He left with the ring and was not seen again. Defendant's receptionist refused the custodian's request to use the phone to call for assistance. The custodian explained that her ring had just been stolen, but the receptionist told her the phone was for building use only. The custodian took the elevator to the lobby, reported the theft to security, and the police were called. However, it was too late to apprehend the thief. Neither defendant nor its employees were parties to the crime. The ring's owner sued the insurance company, claiming that defendant could have prevented the theft by making a telephone available to summon help. Judgment was for the defendant, and plaintiff appealed.

In affirming the judgment, the court of appeal said that whether a duty exists is primarily a question of law and that, as a general rule, absent a special relationship giving rise to a duty to act, a person is under no duty to take affirmative action to assist or protect another, no matter how great the danger in which the other is placed, or how easily he or she could be rescued (*198 Cal. App. 3d 971, 974)* .

The court acknowledged the existence of a narrow exception to this "harsh" rule when physical violence is threatened, but held that the exception did not apply to this particular case (*198 Cal. App. 3d 971, 974)* .

[b] Special Relationship Is Not Created Merely by Fact That Theft Occurs in Defendant's Premises

The facts and procedural background of ***Stangle v. Fireman's Fund Ins. Co.*** *(1988) 198 Cal. App. 3d 971, 244 Cal. Rptr. 103* , are discussed in *§ 178.67[3][a]*. In affirming the judgment for the defendant, the court held that no special relationship existed between the custodian of the ring and the defendant that would impose on the defendant an affirmative duty to aid the custodian in summoning help (*198 Cal. App. 3d 971, 974-975)* . The court explained that special relationships, which remove bystander status and invoke a duty to rescue or protect, are often based on economic considerations. Some examples would include a common carrier to its passengers, an innkeeper to his or her guest, possessors of land who hold it open to the public, or one who has a custodial relationship to another (*198 Cal. App. 3d 971, 975)* .

In addition to holding that there was no duty to rescue or protect, the court also held that defendant's conduct in refusing the use of the telephone was not the proximate cause of the loss. The court pointed out that the custodian's inability to gain immediate access to a telephone became inconsequential in light of the testimony of the building's director of security that he would not have detained anyone on the basis of a phone call, but would require that the incident be personally reported (*198 Cal. App. 3d 971, 975)* . The proximate cause of the loss, as set forth in the trial court's intended decision, was the negligent conduct of the custodian of the ring in the manner in which she handled the sale and the plaintiff's negligence in entrusting the ring to an inexperienced agent without security or insurance (*198 Cal. App. 3d 971, 974)* .

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17-178 California Points & Authorities § 178.68

§ 178.68 Opposing Contention That Owner or Possessor of Premises Is Liable for Harm Caused by Wrongful Acts of Third Persons--Causation Not Established

[1] FORM

[*The following may be included in a memorandum or points and authorities, or in a trial or appellate brief.*]

DEFENDANT _____ [OWNER *or* POSSESSOR] IS NOT LIABLE FOR THE HARM TO PLAINTIFF AS A RESULT OF THE CONDUCT OF A THIRD PERSON WHEN THERE IS NO CAUSATION BETWEEN THE ACT OF THE THIRD PERSON AND THE CONDUCT OF THE OWNER OR POSSESSOR.

Causation Must Be by Substantial Evidence. When causation is shown by circumstantial evidence, the inferences from those circumstances must be more reasonable or probable than other inferences (Saelzler v. Advanced Group 400 *(2001) 25 Cal. 4th 763, 775-776, 107 Cal. Rptr. 2d 617, 23 P.3d 1143* ; *Leslie G. v. Perry & Associates (1996) 43 Cal. App. 4th 472, 483, 50 Cal. Rptr. 2d 785* ; *Rosenbaum v. Security Pac. Corp. (1996) 43 Cal. App. 4th 1084, 1093, 50 Cal. Rptr. 2d 917*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a party's contention that an alleged breach of duty by an owner or a possessor of the premises was a cause of plaintiff's injuries by a third person.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that there is no causal connection between the conduct of a third party in causing injury and the conduct of an owner or a possessor of premises. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence of the conduct of the third party and the alleged breach of duty of the owner or possessor of the premises, and should argue that there is no causal connection between the alleged breach and the third party's conduct causing injury [*see Leslie G. v. Perry & Assocs. (1996) 43 Cal. App. 4th 472, 483, 50 Cal. Rptr. 2d 785]* .

[c] Related Pleading and Practice Forms

For forms and discussion relating to a landowner's duty to protect against acts of third persons, see California Forms of Pleading and Practice, Ch. 421, *Premises Liability* (Matthew Bender).

[3] Discussion of Authorities

[a] Causation Must Be by Substantial Evidence

In **Saelzler v. Advanced Group 400** *(2001) 25 Cal. 4th 763, 107 Cal. Rptr. 2d 617, 23 P.3d 1143* , the plaintiff was attempting to deliver a package to the resident of a large apartment complex during the daytime when three unknown men assaulted and attempted to rape her in the commons area of the complex. She suffered serious injuries, and the assailants were never identified or apprehended. Although the owners of the apartment complex provided nighttime security personnel and daytime inspections to ensure that security gates were operating properly, at least one gate had been propped open when the plaintiff arrived. The plaintiff filed suit against the property owners, alleging that although they knew that dangerous persons frequented the complex, which was in a high crime area, they failed to maintain the premises in a safe condition, failed to provide adequate security in the form of daytime security guards, and failed to warn others of the unsafe conditions. The trial court granted summary judgment for the defendants, finding that the plaintiff had failed to establish a reasonably probable causal connection between the defendants' failure to provide better security and the plaintiff's assault. The plaintiff appealed, the court of appeal reversed, and the defendants appealed.

The California Supreme Court reversed the court of appeal and agreed with the trial court. Assuming for the sake of analysis that the apartment owners may have breached a duty to provide reasonable security measures, the Court concluded that the plaintiff could not prove that this breach was an actual cause of her injuries. The plaintiff admitted that she could not prove the identity or background of the three men who assaulted her nor how they got on the apartment premises. Despite evidence that at least one gate was propped open at the time of the assault, there was no evidence that the assailants entered the premises through that gate. Moreover, the Court noted that there had been a substantial number of criminal incidents involving the tenants of the complex and that the plaintiff's attackers could have been residents as well. Absent any evidence that the unknown attackers were unauthorized intruders, rather than authorized residents, or that it was more probable than not the attack would not have occurred if there had been an increased security presence, the Court held that the plaintiff could not prove that any breach of duty on the part of the defendants actually caused the plaintiff's harm (*25 Cal. 4th 763, 775-777)* . According to the Court, the opinion testimony of the plaintiff's expert that the attack would not have occurred if the defendants had provided daytime security guards and made a better effort to maintain the security gates in proper working condition was speculation and did not raise a triable issue of fact on causation (*25 Cal. 4th 763, 781)* .

In ***Leslie G. v. Perry & Assocs.*** *(1996) 43 Cal. App. 4th 472, 50 Cal. Rptr. 2d 785* , a tenant in a supposedly "secure" apartment building sued the building's owners after she was raped in the garage of the building. Plaintiff contended that the owners were negligent because they failed to repair a broken security gate, and that this negligence caused her rape. The rapist was not caught, and there was no direct evidence regarding how the rapist got into the garage. Plaintiff offered opinion evidence through a security expert that the rapist was attracted to and entered the garage because of the broken gate. The trial court granted a summary judgment motion by the owners on the ground that the incident was not foreseeable.

The court of appeal affirmed, although on grounds of causation rather than foreseeability. The court held that when a plaintiff seeks to prove an essential element by circumstantial evidence, the inferences which are consistent with plaintiff's theory from those circumstances must be more reasonable or probable than those inferences which are not consistent with the theory imposing liability. Since there was no direct evidence that the rapist entered or departed through the broken gate, or even that the broken gate was the only way he could have entered or departed, it was not sufficient for plaintiff to establish only that it was possible that he might have entered through the broken gate (*43 Cal. App. 4th 472, 483)* . Holding that a tenant's negligence action for injuries immediately caused by a third person must be supported by evidence that the injuries would not have occurred but for the landlord's negligence, the court affirmed the summary judgment for the owners (*43 Cal. App. 4th 472, 488)* .

In ***Rosenbaum v. Security Pac. Corp.*** *(1996) 43 Cal. App. 4th 1084, 50 Cal. Rptr. 2d 917* , plaintiff brought a negligence action against her landlord after she was robbed and severely injured on the street in front of her apartment building. Plaintiff never used her garage because she did not believe it was safe as a result of inadequate lighting. Plaintiff contended that if she had been in her garage she would not have been attacked, so it was the dangerous condition of the apartment garage which caused her to park on the street and become vulnerable to the attack which injured her. After a jury verdict granting a substantial award to plaintiff, defendant moved for judgment notwithstanding the verdict and for a new trial. The trial court granted both motions, stating its opinion that there was no duty on the part of the landlord regarding off-premises security, and that there was no causal nexus between any failure to light the garage and plaintiff's injury. The court of appeal affirmed, stating that the theory that a plaintiff could establish a landowner's liability by establishing the existence of a dangerous condition and then letting the doctrines of foreseeability and proximate cause do the rest was rejected in an earlier case [*Medina v. Hillshore Partners (1995) 40 Cal. App. 4th 477, 46 Cal. Rptr. 2d 871]* . In that case, the court had concluded that there was an insufficient causal nexus between an unsafe condition and an independent act injuring the plaintiff. The court in this case found liability similarly attenuated because it could not be argued that the dangerous condition the landlord createdon the premises spilled over into the public streets and caused plaintiff's injury (*43 Cal. App. 4th 1084, 1093)* .

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17-178 California Points & Authorities § 178.69

§ 178.69 Opposing Contention That Proprietor of Sports Facility Is Liable for Injury to Spectator--Harm Due to Obvious Risk Usually Incident to Game

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT PROPRIETOR IS NOT LIABLE FOR THE HARM TO PLAINTIFF SPECTATOR, BECAUSE A PROPRIETOR OF A SPORTS FACILITY IS NOT LIABLE TO A SPECTATOR FOR HARM FROM A RISK THAT IS OBVIOUS AND USUALLY INCIDENT TO AND INHERENT IN THE GAME.

A. No Liability for Obvious and Usually Inherent Risks of Game. The proprietor of a sports facility owes a duty of reasonable care to a spectator, but there is no liability for harm from risks that are obvious and should have been observed in the exercise of due care and that are usually incident to and inherent in the game (*Brown v. San Francisco Ball Club (1950) 99 Cal. App. 2d 484, 486-487, 222 P.2d 19*); *see also Neinstein v. Los Angeles Dodgers, Inc. (1986) 185 Cal. App. 3d 176, 184, 229 Cal. Rptr. 612*).

B. Primary Assumption of Risk Provides Defense for Injuries Caused by Risks Inherent in Attending Game. Sports teams, leagues, and owners and proprietors of sports arenas owe no duty to spectators to eliminate risks of injury that are inherent in attending that particular type of sporting event (*see Nemarnik v. Los Angeles Kings Hockey Club (2002) 103 Cal. App. 4th 631, 643, 127 Cal. Rptr. 2d 10* (no duty to eliminate risk that spectator at hockey game might be hit by errant puck)).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that a proprietor of a sports facility is liable for harm to a spectator. The argument may be used when the harm to the spectator was due to a risk that was obvious and usually incident to and inherent in the game.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific context in which counsel wishes to raise the issue of the liability of a proprietor of a sports stadium for harm from obvious and usually inherent risks of a game. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the inherent nature of the risk. Counsel should also discuss knowledge of the risk on the part of the person injured and any prior experience in confronting the risk (for example, the plaintiff was a baseball fan who had been to 10 games in the past year alone and knew that baseballs occasionally flew up into the stands), although the plaintiff's subjective knowledge of the risk is not important when applying the primary assumption of risk doctrine. Also, the proprietor's exercise of reasonable care should be discussed (for example, defendant screened a reasonable number of seats behind home plate).

[c] Opposing Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 178.61*.

[d] Assumption of Risk

Cases holding that a proprietor of a sports facility is not liable if the risk resulting in the injury is a matter of common knowledge have done so in the context of deciding whether the spectator assumed the risk as a matter of law. These cases have held that the obviousness of the danger negated the proprietor's liability to the spectator as a matter of law [*see, e.g., Morton v. California Sports Car Club (1958) 163 Cal. App. 2d 685, 689, 329 P.2d 967* ; *Brown v. San Francisco Ball Club (1950) 99 Cal. App. 2d 484, 486-487, 222 P.2d 19* , discussed in *§ 178.69[3][a]*]. Most of these cases were decided before contributory negligence was abolished in favor of the doctrine of comparative negligence and therefore while assumption of risk was still a separate defense as a variant of contributory negligence [*see Li v. Yellow Cab (1975) 13 Cal. 3d 804, 824, 119 Cal. Rptr. 858, 532 P.2d 1226]* .

However, common knowledge of risk may no longer be relevant in determining whether a plaintiff's recovery is barred by assumption of risk, according to the lead opinion of the California Supreme Court in *Knight v. Jewett* [*Knight v. Jewett (1992) 3 Cal. 4th 296, 316, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* . Instead, resolution of the issue appears to turn onwhether the defendant's conduct breached a legal duty of care to the plaintiff, not on the plaintiff's subjective knowledge or the reasonableness of the plaintiff's undertaking a known risk [*see Knight v. Jewett (1992) 3 Cal. 4th 296, 314-317, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* .

Although the Supreme Court has not yet ruled on the assumption of risk doctrine in the specific context of injury to a spectator at a sporting event, the Court in *Knight* did address the question of the proper analysis of implied assumption of risk in the context of participants in active sports. The lead opinion concluded that the determination of whether a plaintiff is barred from recovery, on the one hand, or subject to application of comparative fault principles, on the other hand, turns on whether the defendant had a legal duty to avoid certain conduct or to protect the plaintiff against a particular risk of harm [*see Knight v. Jewett (1992) 3 Cal. 4th 296, 314-317, 11 Cal. Rptr. 2d 2, 834 P.2d 696* ; *see also Ford v. Gouin (1992) 3 Cal. 4th 339, 342, 11 Cal. Rptr. 2d 30, 834 P.2d 724]* . In determining the duty of a defendant in a particular factual situation, the nature of a defendant's duty in the sports context depends heavily on the nature of the sport itself, and the scope of the legal duty owed by a defendant frequently will also depend on the defendant's role in, or relationship to, the sport. The Court pointed out that cases have analyzed the duty of sports facility owners with regard to spectators not only by virtue of the nature of the sport itself, but also by reference to steps a sponsoring business entity reasonably should be obligated to take in order to minimize risks without altering the

nature of a sport [*see* *Knight v. Jewett (1992) 3 Cal. 4th 296, 317-318, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* .

The court of appeal has applied the *Knight v. Jewett* primary assumption of risk analysis to an injury suffered by a spectator at a sporting event [*Nemarnik v. Los Angeles Kings Hockey Club (2002) 103 Cal. App. 4th 631, 127 Cal. Rptr. 2d 10]* , and Paragraph B of this form is based on that approach. That analysis seems to be in accord with the earlier cases that held generally that defendants had no duty to protect spectators from risks inherent in attending a sporting event, although under the modern primary assumption of risk doctrine, the spectator's subjective knowledge of and familiarity with the risk is not relevant, if the risk that caused the injury is inherent in the sport.

For forms and discussion relating to assumption of risk generally, see Ch. 165, *Negligence* .

[3] Discussion of Authorities

[a] No Liability for Obvious and Usually Inherent Risks of Game

In ***Brown v. San Francisco Ball Club*** *(1950) 99 Cal. App. 2d 484, 222 P.2d 19* , plaintiff, a middle-aged woman, was injured by what both parties assumed was a baseball that was being thrown from second base to first base and bounced off the first baseman's glove. She was sitting in an unscreened portion of the stadium although there was a screened portion that seated approximately 5,000 people and that was not filled to capacity. Tickets to the game were sold by section, the screened portion being sold separately. Plaintiff sued defendant owner and operator of the stadium and a directed verdict was granted in favor of defendant. Plaintiff appealed.

The court of appeal affirmed and held that plaintiff had assumed the risk of her injury, that there was no negligence on the part of defendant, and that both questions were proper questions for the court to consider on a motion for a directed verdict (*99 Cal. App. 2d 484, 492)* . The court stated that the owner of property is not an insurer of the safety of an invitee but must use due care to keep the premises in reasonably safe condition and warn of latent perils. Notwithstanding this, the court observed that an owner is not liable for injury to an invitee, resulting from a danger that is obvious or should have been observed in the exercise of reasonable care (*99 Cal. App. 2d 484, 486)* . Applying these principles to baseball, the court stated that a patron participates in baseball as a spectator and in doing so subjects himself or herself to certain risks necessarily and usually incident to and inherent in the game that are obvious and should be observed in the exercise of reasonable care. Thus, the duty of a proprietor of a sports stadium is to exercise reasonable care and the proprietor is not required to insure, nor does he or she undertake to insure, patrons from injury from batted or thrown balls, and the exercise of reasonable care mandates that only a reasonable number of all seats be screened (*99 Cal. App. 2d 484, 487)* . Plaintiff attempted to take the case out of the assumption of the risk arena by contending that she was ignorant of the game of baseball and the risks. However, the court stated that she was a mature person in possession of her faculties and nothing about her required a lower standard of self-protection from obvious and inherent risks than the other spectators (*99 Cal. App. 2d 484, 488-489)* .

In ***Neinstein v. Los Angeles Dodgers, Inc.*** *(1986) 185 Cal. App. 3d 176, 184, 229 Cal. Rptr. 612* , plaintiff attended a baseball game at defendant's stadium where she occupied a seat in an unscreened area on the first base side and was struck by a batted foul ball. Plaintiff sued defendant for personal injuries and the trial court granted summary judgment to defendant. Plaintiff appealed to the court of appeal.

The court of appeal affirmed, holding that plaintiff had assumed the risk of her injuries by voluntarily choosing a seat that was clearly unprotected by screening and that was in an area where foul balls were likely to enter the stands. The court ruled that plaintiff was sufficiently warned of these risks by common knowledge of the nature of baseball, and that defendant had met its duty of reasonable care to spectators by providing a warning about foul balls on the back of each ticket and by making screened seats available (*185 Cal. App. 3d 176, 184)* .

[b] Primary Assumption of Risk Provides Defense for Injuries Caused by Risks Inherent in Attending Game

In ***Nemarnik v. Los Angeles Kings Hockey Club*** *(2002) 103 Cal. App. 4th 631, 127 Cal. Rptr. 2d 10* , the plaintiff was sitting in the stands during pre-game warm-ups for a professional hockey game when she was hit in the face with an errant puck. She brought suit against the professional hockey club, the league, and the owners and operators of the hockey arena, arguing that the defendants were negligent in failing to prevent spectators from milling around the ice where they were not supposed to be, which obstructed her view and prevented her from seeing the puck in time to take evasive action. The trial court granted the defendants' motion for nonsuit at the beginning of trial, and the plaintiff appealed.

The court of appeal affirmed. Relying on the analysis of *Knight v. Jewett* [*Knight v. Jewett (1992) 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2, 834 P.2d 696* ; *see § 178.69[2][b]*], the court of appeal held that the defendants owed no duty to the plaintiff to eliminate the risk of her injury (*103 Cal. App. 4th 631, 643)* . The court noted, and the plaintiff conceded, that the risk of being hit with a flying puck was an inherent risk of attending a hockey game. Despite the plaintiff's argument that her injury was caused by the failure of the arena staff to prevent an unusually large number of spectators from congregating between her and the ice, which was in violation of arena policies and increased the risks inherent in attending the game, the court concluded that obstructions of view caused by the unpredictable movements of other fans are also an inherent and unavoidable part of attending a sporting event (*103 Cal. App. 4th 631, 638)* . Moreover, the court noted that the plaintiff failed to allege that she would have been able to avoid the puck had the crowd not congregated, and therefore the court considered the issue to be whether the defendants owed a duty to eliminate the risk of injuries caused by flying pucks, rather than whether they owed a duty to provide better crowd control (*103 Cal. App. 4th 631, 640)* . The court refused to impose a duty to eliminate the danger of flying pucks, concluding that to do so would force the defendants either to provide a floor-to-ceiling protective screen around the rink, which would reduce the quality of everyone's view, or to raise the cost of tickets to cover the increased liability costs, which would make ticket prices too costly for some potential spectators (*103 Cal. App. 4th 631, 641)* .

[4] Additional Authorities

[a] No Liability for Obvious and Usually Inherent Risks of Game

In *Quinn v. Recreation Park Ass'n (1935) 3 Cal. 2d 725, 46 P.2d 144* , plaintiff, a 14-year-old girl, was injured by a foul ball while sitting in an unscreened seat waiting for a screened seat in the same section although screened seats were available in another section. The trial court granted a directed verdict in favor of the manager of the park, the owners of the two ball clubs, and the foul ball hitter. The Supreme Court affirmed the judgment and adopted the opinion of the court of appeal which stated that the management of a ballpark is not required to screen all seats in the exercise of ordinary care and that one who chooses to occupy unscreened seats assumes the risk of being struck by thrown or batted balls, a risk of common knowledge (*3 Cal. 2d 725, 729-730)* .

In *Harrold v. Rolling J Ranch (1993), 19 Cal. App. 4th 578, 23 Cal. Rptr. 2d 671* , plaintiff was injured at a resort while horseback riding when she attempted to remove her coat, the horse spooked, and plaintiff was thrown to the ground. The riding stable knew, but did not tell plaintiff, that the horse had once before spooked and thrown a rider when the rider took off and waved a hat. The court of appeal affirmed summary judgment for defendants, holding that primary assumption of the risk as defined under *Knight v. Jewett* [*Knight v. Jewett (1992) 3 Cal. 4th 296, 314-315, 11 Cal. Rptr. 2d 30, 834 P.2d 724* ; *see § 178.30[3][a]*] applied to bar plaintiff's recovery (*19 Cal. App. 4th 578, 581)* . Defendants had no duty to provide their customers with ideal horses that would never spook or throw a rider; imposing such a duty would impose strict liability on commercial providers of horse-riding facilities with the probable result of driving all such providers out of business. Although defendants did have a duty to warn their customers of the dangerous propensities of their horses, the one prior incident was not enough to establish a dangerous propensity (*19 Cal. App. 4th 578, 588)* .

In *Morton v. California Sports Car Club (1958) 163 Cal. App. 2d 685, 329 P.2d 967* , plaintiff was injured while

watching a car race sponsored by defendant when a wheel flew off a car rounding a turn. Plaintiff had chosen to watch the race from a vantage point near one of the turns on the course, rather than from the grandstand or from behind one of the hay bales scattered around the course. The court of appeal affirmed a directed verdict in favor of defendant, holding that plaintiff had assumed the risk of his injuries by choosing to watch the race from that particular location. The court ruled that it was common knowledge that accidents during sports car races kill and injure both drivers and spectators every year and that most of these accidents occur on the turns (*163 Cal. App. 2d 685, 688)* .

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Volume 17 Chapters 170-179 PARTNERSHIPS---to---PREMISES LIABILITY
CHAPTER 178 PREMISES LIABILITY
PART II. FORMS
B. Conduct of Third Persons

17-178 California Points & Authorities § 178.70

§ 178.70 Opposing Contention That Owner or Possessor of Premises Is Liable for Harm Caused by Criminal Acts of Third Persons--Failure to Provide Additional or Different Security Measures Was Not Cause of Harm

[1] FORM

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

DEFENDANT _____ [OWNER *or* POSSESSOR] IS NOT LIABLE FOR THE HARM TO PLAINTIFF, BECAUSE ADDITIONAL OR DIFFERENT SECURITY MEASURES ON DEFENDANT'S PREMISES WOULD NOT HAVE PREVENTED THE CRIMINAL ACT BY A THIRD PARTY THAT INJURED PLAINTIFF AND THEREFORE ANY NEGLIGENCE ON THE PART OF DEFENDANT IN NOT PROVIDING ADDITIONAL OR DIFFERENT SECURITY MEASURES WAS NOT THE CAUSE OF THE HARM CAUSED PLAINTIFF BY THAT CRIMINAL ACT.

Failure to Provide Adequate Security Not Cause of Harm If Increased Security Would Not Have Prevented Criminal Act of Third Party. A defendant is not liable for the injuries of a plaintiff who is a victim of crime by a third party on the defendant's premises and claims that the defendant's security measures were inadequate if there is no proof that additional or different security measures would have prevented the crime, because the defendant's failure to provide these increased security precautions is not the cause of the plaintiff's injuries (Saelzler v. Advanced Group 400 *(2001) 25 Cal. 4th 763, 775-777, 107 Cal. Rptr. 2d 617, 23 P.3d 1143* ; *see Nola M. v. University of S. Cal. (1993) 16 Cal. App. 4th 421, 435-437, 20 Cal. Rptr. 2d 97*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a defendant owner or possessor is not liable for injuries resulting from the criminal acts of a third party occurring on the defendant's premises, despite the plaintiff's claim that the defendant's security measures were inadequate, if there is no proof that any additional or different security measures would have prevented the criminal acts against the plaintiff. In this situation, the defendant's

failure to provide increased security is not the cause of the plaintiff's injuries.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of lack of cause. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should argue that any testimony, expert or otherwise, regarding security measures and operations did not establish that use of particular measures would have prevented the particular crime that caused the plaintiff's injuries.

[3] Discussion of Authorities

[a] Failure to Provide Adequate Security Not Cause of Harm If Increased Security Would Not Have Prevented Criminal Act of Third Party

Saelzler v. Advanced Group 400 *(2001) 25 Cal. 4th 763, 107 Cal. Rptr. 2d 617, 23 P.3d 1143* , is discussed in *§ 178.68[3][a]*.

Nola M. v. University of S. Cal. *(1993) 16 Cal. App. 4th 421, 435, 20 Cal. Rptr. 2d 97* , was an action for personal injuries brought against a university by a woman who was raped by an unknown assailant on the university campus. The attack occurred at night near a building surrounded by trees and shrubs. The plaintiff produced expert testimony at trial that criticized the university's security department for, among other deficiencies, having too few officers and using patrol cars rather than foot patrols. This expert also testified that the high foliage and inadequate lighting in the area where the rape occurred prevented security officers and others from determining whether anyone was loitering nearby. The jury granted a verdict for the plaintiff.

The court of appeal reversed, holding that the expert's testimony did not, and could not, prove that the rape would not have occurred if the university had taken the security precautions that he recommended. The court noted that reasonable protective measures cannot stop wanton violence and even significant increases in police personnel cannot prevent all crime or any particular crime. The court concluded that a defendant cannot be the cause of a physical assault it could not reasonably have prevented, and that characterizing a landowner's failure to deter a third person's wanton act of violence as the cause of the plaintiff's injuries would make the landowner the insurer of the absolute safety of everyone entering the landowner's premises (*16 Cal. App. 4th 421, 435-437)* .

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[Reserved]

§§ 178.71[Reserved]

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C. Independent Contractors

17-178 California Points & Authorities § 178.90

§ 178.90 Supporting Contention That Owner or Possessor of Premises Liable for Negligence of Independent Contractor--Work Creates Peculiar Risk of Harm

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT _____ [OWNER *or* POSSESSOR] IS LIABLE FOR THE NEGLIGENCE OF DEFENDANT'S INDEPENDENT CONTRACTOR BECAUSE AN OWNER OR POSSESSOR OF PREMISES WHO EMPLOYS AN INDEPENDENT CONTRACTOR, WHOSE WORK ON THE PREMISES IS LIKELY TO CREATE A PECULIAR RISK OF HARM TO PERSONS THEREON UNLESS PRECAUTIONS ARE TAKEN, IS LIABLE FOR THE NEGLIGENCE OF THE CONTRACTOR IN FAILING TO TAKE SUCH PRECAUTIONS.

Peculiar Risk of Harm. An owner or a possessor of premises who employs an independent contractor to do work on the premises that the employer should recognize as likely to create during its progress a peculiar risk of harm to others unless special precautions are taken is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions (*Aceves v. Regal Pale Brewing Co. (1979) 24 Cal. 3d 502, 509, 156 Cal. Rptr. 41, 595 P.2d 619*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that an owner or possessor of premises and employer of the independent contractor is liable for the negligence of the independent contractor when there was a failure to take precautions against a peculiar risk.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the applicability of the peculiar risk doctrine. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the fact that the risk of harm was peculiar to the work being done and arose out of its nature and character and that the possessor of the premises should have realized that the work was likely to create this risk of harm. In addition, counsel should discuss facts tending to show that the failure to take precautions proximately caused the injuries complained of.

[b] Employee of Independent Contractor Cannot Recover Under Peculiar Risk Doctrine

Beginning with the case of *Woolen v. Aerojet General Corp.* [*Woolen v. Aerojet Gen. Corp. (1962) 57 Cal. 2d 407, 410-411, 20 Cal. Rptr. 12, 369 P.2d 708]* , California followed the rule that an employee of an independent contractor, injured because of the negligence of the independent contractor, was entitled to recover from the hirer of the independent contractor pursuant to the peculiar risk doctrine [*see* *Privette v. Superior Court (1993) 5 Cal. 4th 689, 696, 21 Cal. Rptr. 2d 72, 854 P.2d 721]* . However, the Supreme Court has now reconsidered that line of cases and held that the compensability under the workers' compensation laws of an employee's injury in those circumstances supports a rule that the injured employee is not entitled to recover from the hirer under the peculiar risk doctrine [*Privette v. Superior Court (1993) 5 Cal. 4th 689, 696-702, 21 Cal. Rptr. 2d 72, 854 P.2d 721]* . Therefore, this form should not be used to support the contention that an employee of the independent contractor is entitled to recover from the hirer based on the peculiar risk doctrine. However, the hirer may still be liable to the injured employee under some other theory of liability, such as the hirer's own negligence [*cf.* *Privette v. Superior Court (1993) 5 Cal. 4th 689, 702, 21 Cal. Rptr. 2d 72, 854 P.2d 721* (plaintiff-employee had abandoned cause of action based on hirer's negligence)]. For points and authorities supporting the contention that the hirer of an independent contractor is directly liable to an employee of the independent contractor for the hirer's own negligent acts and omissions, see Ch. 100A, *Employer and Employee* .

[c] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 178.92* may be submitted in opposition to the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Peculiar Risk of Harm

In ***Aceves v. Regal Pale Brewing Co.*** *(1979) 24 Cal. 3d 502, 156 Cal. Rptr. 41, 595 P.2d 619* , plaintiff was an employee of an independent contractor hired by defendants to demolish their building. Plaintiff was trying to dislodge a steel panel that blocked removal of a door and was injured when a bulldozer simultaneously pushing the door from the outside caused the door to give way and the panel to strike plaintiff. Plaintiff sued the owners of the building, and the worker's compensation carrier of the employer intervened in the action, seeking reimbursement for benefits paid to plaintiff. The jury returned a general verdict in favor of plaintiff and responded to special interrogatories dealing with the allocation of the negligence of plaintiff, the employer, and defendants. The court rendered judgment, adjusting the award with the jury's allocation of negligence in response to the special interrogatories. Plaintiff appealed the computation and allocation of the award. Defendants cross appealed on the basis that the evidence was insufficient to support the verdict against them under the peculiar risk doctrine.

The Supreme Court modified the judgment as to the computation and allocation of the award and affirmed the judgment as modified. In doing so, the Court stated that one who employs an independent contractor to do work that the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to take precautions (*24 Cal. 3d 502, 509)* . The Court went on to state that the evidence in the case was sufficient to support a finding that the demolition work involved a recognizable danger of risk of harm from falling structures unless special

precautions were taken (*24 Cal. 3d 502, 510)* . Quoting from an earlier case [*Griesel v. Dart Indus. (1979) 23 Cal. 3d 578, 586, 153 Cal. Rptr. 213, 591 P.2d 503]* , the Court further explained the nature of a peculiar risk as one that is peculiar to the work being done, that arises out of its character or the place where it is to be done, and against which a reasonable person would recognize the necessity of taking precautions (*24 Cal. 3d 502, 509)* .

NOTE:

Although *Aceves* involved an action brought by an employee of the independent contractor, such an action is no longer available under California law; workers' compensation is the only remedy for the employee's injury in such a case [*Privette v. Superior Court (1993) 5 Cal. 4th 689, 702, 21 Cal. Rptr. 2d 72, 854 P.2d 721]* .

[4] Additional Authorities

[a] Peculiar Risk of Harm

In *Griesel v. Dart Indus. (1979) 23 Cal. 3d 578, 153 Cal. Rptr. 213, 591 P.2d 503* , plaintiff, an employee of an independent contractor hired by defendants who were owners, developers, and general contractors of a residential development, was injured when a trench that he was working in collapsed. The judgment entered on a verdict for defendants was reversed on the basis that after substitution of an alternate juror the court should have instructed the jury to disregard previous deliberations and begin anew (*23 Cal. 3d 578, 584-585)* . However, the Supreme Court, in discussing the benefit of a retrial of plaintiff's contention of error in the jury instructions on the peculiar risk doctrine, stated that the instructions as given were erroneous and quoted Restatement (Second) of Torts § 416 as stating the applicable law that one who employs an independent contractor to do work that the employer should recognize as likely to create a peculiar risk of harm to others is subject to liability for a contractor's failure to take such precautions (*23 Cal. 3d 578, 585)* .

In *Jimenez v. Pacific Western Construction Co. (1986) 185 Cal. App. 3d 102* , two employees of a company that was hired by defendant general contractor to install pipes were injured (one fatally) when a trench they were working on collapsed. The general contractor's president was aware that a permit was needed for the installation project and that there were applicable industry safety instructions that would need to be followed. The trial court concluded that the peculiar risk doctrine applied as a matter of law. The jury, finding that the pipe installation company was negligent, found defendant vicariously liable for the injuries under the peculiar risk doctrine. Defendant contended on appeal that the trial court erred when it ruled that the peculiar risk doctrine was applicable as a matter of law. The court of appeal affirmed, stating that because of the nature of the work performed by the injured workers' employer and defendant's recognition that special precautions would have to be taken, the peculiar risk doctrine applied as a matter of law (*185 Cal. App. 3d 102, 110-111)* .

In *Mackey v. Campbell (1980) 101 Cal. App. 3d 774, 162 Cal. Rptr. 64* , the court of appeal affirmed a judgment entered on a jury verdict in favor of plaintiff employee of a subcontractor on a construction project and against the owners and the general contractors. Plaintiff was injured by a scaffold when it was being moved at the construction site. Defendants contended that the peculiar risk doctrine did not apply as a matter of law. In holding that it did apply the court stated that under the peculiar risk doctrine, liability is placed on those who directly or indirectly employ independent contractors to do work that the employer should recognize as likely to create during its progress some peculiar, unreasonable risk of harm to others unless special precautions are taken and the employer failsto provide these precautions or fails to see that the subcontractor provides precautions (*101 Cal. App. 3d 774, 784)* .

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17-178 California Points & Authorities § 178.91

§ 178.91 Supporting Contention That Owner or Possessor of Premises Liable for Negligence of Independent Contractor--Nondelegable Duty to Maintain Premises in Safe Condition

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT _____ [OWNER *or* POSSESSOR] IS LIABLE FOR THE NEGLIGENCE OF DEFENDANT'S INDEPENDENT CONTRACTOR IN FAILING TO MAINTAIN THE PREMISES IN SAFE CONDITION BECAUSE THE DUTY OF AN OWNER OR POSSESSOR OF A PREMISES TO MAINTAIN THE PREMISES IN SAFE CONDITION IS NONDELEGABLE.

Nondelegable Duty to Maintain Premises in Safe Condition. The duty of the owner or possessor of premises to maintain them in a reasonably safe condition is nondelegable and if an independent contractor is employed to perform it, the possessor is liable for harm caused by the negligent failure of the contractor to do so (*Brown v. George Pepperdine Found. (1943) 23 Cal. 2d 248, 260, 143 P.2d 929*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that an owner or a possessor of premises is liable for the negligence of an independent contractor in failing to maintain the premises in a safe condition.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the liability of the possessor for the failure of an independent contractor to maintain the premises in a safe condition. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the unsafe condition that proximately caused the injuries complained of and the failure of the independent contractor to maintain the premises in a safe condition.

[c] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 178.92* may be submitted in opposition to the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Nondelegable Duty to Maintain Premises in Safe Condition

In ***Brown v. George Pepperdine Found.*** *(1943) 23 Cal. 2d 256* , plaintiff, a five-year-old girl, was injured in a fall down an elevator shaft in an apartment building owned by one of the defendants. The other defendant was an elevator maintenance business that had a contract with the owner to inspect the elevator on a weekly basis. The plaintiff and her mother were tenants in the building and the mother testified that although she saw the elevator door being opened by her daughter she did not see how the accident happened. Judgment was rendered against plaintiff and in favor of both defendants on a jury verdict and plaintiff's motion for a new trial was granted on the ground of error in jury instructions. The owner of the building appealed.

The Supreme Court affirmed the granting of a new trial and cited the jury instruction given that stated that the negligence of the independent contractor could not be imputed to the owner as one example of an erroneous jury instruction. Quoting from the Restatement of Torts § 422, the Court stated that the general rule is that the duty a possessor of premises owes to others to maintain the premises in a safe condition is nondelegable. Thus, if an independent contractor is hired by the possessor to perform the maintenance, the possessor is liable for the failure of the contractor to put or maintain the buildings and structures in a reasonably safe condition (*23 Cal. 2d 248, 260)* .

[4] Additional Authorities

[a] Nondelegable Duty to Maintain Premises in Safe Condition

In *O'Gan v. King City Joint Union High Sch. Dist. (1970) 3 Cal. App. 3d 641, 83 Cal. Rptr. 795* , the court of appeal reversed a judgment in favorof the school district and against a student who was injured when a bathroom sink she was resting her hands on broke loose from the wall. The court agreed with plaintiff's contention on appeal that it was error not to instruct the jury on the liability of the school district for the negligent acts of an independent contractor. It stated that a possessor of land is answerable for the negligent failure of an independent contractor to construct or maintain structures in a reasonably safe condition (*3 Cal. App. 3d 641, 646)* .

In *Lilienthal v. Hastings Clothing Co. (1955) 131 Cal. App. 2d 343, 280 P.2d 824* , a judgment against plaintiff who slipped on a waxed floor in defendant's store was reversed based, in part, on the erroneous instructions given as to the liability of defendant for the negligence of the independent contractor who waxed the floor. An instruction was given to the effect that the employer of an independent contractor is not liable for any act done by the contractor. The court, relying on prior case law, stated that the correct statement of the law in the case was that the storeowner does not discharge his or her duty to an invitee by delegating it to an independent contractor, but rather a possessor of land is answerable for the negligent failure of an independent contractor to put or maintain buildings and structures in reasonably safe condition (*131 Cal. App. 2d 343, 347)* .

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17-178 California Points & Authorities § 178.92

§ 178.92 Opposing Contention That Owner or Possessor of Premises Liable for Negligence of Independent Contractor--Negligence Collateral

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT _____ [OWNER *or* POSSESSOR] IS NOT LIABLE FOR THE NEGLIGENCE OF _____[DEFENDANT'S INDEPENDENT CONTRACTOR *or* THE EMPLOYEE OF DEFENDANT'S INDEPENDENT CONTRACTOR] BECAUSE AN OWNER OR POSSESSOR IS NOT LIABLE FOR HARM RESULTING FROM NEGLIGENCE THAT IS COLLATERAL OR CASUAL.

Collateral Negligence. Liability of an owner or a possessor of premises for the negligence of an independent contractor or his or her employee does not extend to collateral negligence. Collateral negligence is negligence in the operative detail of the work that is unusual or foreign to the normal contemplated risks of doing the work (*Salinero v. Pon (1981) 124 Cal. App. 3d 120, 137-138, 177 Cal. Rptr. 204*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that the possessor of the premises who employs an independent contractor to work thereon is liable under the peculiar risk doctrine when the negligence of the contractor or employee is collateral.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel is responding to the contention that the possessor is liable under the peculiar risk doctrine. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss how and why the negligence causing the injury is collateral negligence by showing that the negligence was in the operative detail of the work and that it was not normally inherent in the work itself or contemplated by it.

[c] Opposing Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in §§ 178.90* and *178.91*.

[3] Discussion of Authorities

[a] Collateral Negligence

In ***Salinero v. Pon*** *(1981) 124 Cal. App. 3d 120, 177 Cal. Rptr. 204* , plaintiff was an employee of an independent contractor hired by defendants to clean the windows on defendants' apartment building. It was agreed between defendants and the independent contractor that the windows would be washed from the outside by means of a ladder extended over the roof of the building from which plaintiff would be suspended. Plaintiff was injured when a fellow worker, in attempting to move the weights anchoring his ladder, mistakenly moved the weights anchoring plaintiff's ladder, causing plaintiff to fall. A motion for nonsuit was granted and plaintiff appealed.

The court of appeal affirmed and held that the facts of the case took the case out of the peculiar risk doctrine because the harm to plaintiff was caused by the collateral negligence of his fellow employee (*124 Cal. App.3d 120, 139)* . The court stated that the "peculiar risks" of window washing do not include the danger associated with the negligence of a fellow employee in removing the window washer's means of attachment to the building in that a risk like this cannot be reasonably foreseen by the landowner and is outside the scope of those dangers associated with window washing and collateral to the risks that normally arise (*124 Cal. App. 3d 120, 137)* .

The court noted that collateral negligence has sometimes been described as negligence in the operative detail of the work, as distinguished from the general plan or method to be followed. However, the distinction is not essentially one between operative detail and general method. It is rather one of negligence which is unusual or abnormal, or foreign to the normal or contemplated risks of doing the work, as distinguished from negligence which creates only the normal or contemplated risk (*124 Cal. App. 3d 120, 137-138)* .

[4] Additional Authorities

[a] Collateral Negligence

In *Stark v. Weeks Real Estate (1979) 94 Cal. App. 3d 965, 156 Cal. Rptr. 701* , an employee of an independent contractor was constructing homes on defendant's property when he fell on the blade of a hand-held circular power saw that was equipped with a spring-activated guard preventing exposure of the blade when it was not actually cutting. However, in this case, the guard was propped open as were many of the other guards on saws on the site. The court of appeal affirmed the summary judgment in favor of defendant and stated that defendant could not be held liable under the peculiar risk doctrine as the doctrine could not be extended to the use or misuse of hand tools by the independent contractor or its employees (*94 Cal. App. 3d 965, 972)* .

In *Smith v. Lucky Stores (1976) 61 Cal. App. 3d 826, 132 Cal. Rptr. 628* , the court of appeal affirmed a judgment in favor of defendant and against plaintiff who was injured while walking on the sidewalk in front of defendant's store. Defendant had hired an independent contractor to take down a sign on the store. After having taken down a six-foot letter in the sign, one of the contractor's employees leaned it against the contractor's truck but a gust of wind blew the

sign over just as plaintiff was passing by. The court agreed with the trial court's conclusion that the negligence of the employee was collateral (*61 Cal. App. 3d 826, 830)* .

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17-178 California Points & Authorities § 178.93

§ 178.93 Opposing Contention That Owner or Possessor of Premises Liable for Negligence of Independent Contractor--Employee of Independent Contractor Cannot Recover Under Peculiar Risk Doctrine

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF CANNOT RECOVER DAMAGES FROM DEFENDANT _____ [OWNER *or* POSSESSOR] UNDER THE PECULIAR RISK DOCTRINE FOR THE NEGLIGENCE OF THE INDEPENDENT CONTRACTOR, BECAUSE AS AN EMPLOYEE OF THE INDEPENDENT CONTRACTOR, PLAINTIFF CANNOT RECOVER DAMAGES BEYOND WORKERS' COMPENSATION BENEFITS.

Employee of Independent Contractor Cannot Recover Under Peculiar Risk Doctrine. The peculiar risk doctrine does not provide a basis for an employee of a negligent independent contractor to recover tort damages from the person who hired the contractor but did not cause the injuries (*Privette v. Superior Court (1993) 5 Cal. 4th 689, 702, 21 Cal. Rptr. 2d 72, 854 P.2d 721*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that an owner or possessor of premises is liable for damages caused by the negligence of the independent contractor, based on the peculiar risk doctrine. The basis of opposition is that the plaintiff is an employee of the independent contractor, making the peculiar risk doctrine inapplicable and limiting the employee to recovery of workers' compensation benefits [*Privette v. Superior Court (1993) 5 Cal. 4th 689, 702, 21 Cal. Rptr. 2d 72, 854 P.2d 721]* .

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the applicability of the peculiar risk doctrine. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counselshould discuss facts showing that plaintiff was an employee of the independent contractor and that the negligence of the contractor was the cause of plaintiff's injuries.

[3] Discussion of Authorities

[a] Employee of Independent Contractor Cannot Recover Under Peculiar Risk Doctrine

In ***Privette v. Superior Court*** *(1993) 5 Cal. 4th 689, 21 Cal. Rptr. 2d 72, 854 P.2d 721* , a homeowner hired a roofing contractor to install a new roof. During the work, an employee of the contractor was injured when he fell off a ladder while carrying a bucket of hot tar. The employee sought workers' compensation benefits for his injuries and also sued the homeowner, alleging negligence in the selection of the contractor and that the homeowner was liable under the peculiar risk doctrine. After the employee abandoned the negligent hiring cause of action, the homeowner moved for summary judgment on the peculiar risk cause of action; the trial court denied the motion, and the court of appeal denied relief. The Supreme Court granted the petition for review and issued an alternative writ to determine the applicability of the doctrine under the circumstances.

The Court reversed, ordering the court of appeal to grant the petition for a writ of mandate ordering the trial court to enter judgment for the homeowner (*5 Cal. 4th 689, 702)* . The Court traced the history of the peculiar risk doctrine generally, noting that the doctrine arose to ensure that a landowner could not avoid liability to innocent third parties, injured because of dangerous work conducted on the premises, merely by hiring someone else to do the dangerous work (*5 Cal. 4th 689, 693-696)* . The Court also noted the expansion of this peculiar risk doctrine to permit recovery by employees of the contractor, as well as by innocent third parties, which began with the case of *Woolen v. Aerojet General Corp.* [*Woolen v. Aerojet Gen. Corp. (1962) 57 Cal. 2d 407, 410-411, 20 Cal. Rptr. 12, 369 P.2d 708]* . However, the Court also noted the criticism of that expansion and stated that the cases permitting employees of the contractor to recover had not discussed the effect of workers' compensation laws on that liability. The Court was persuaded that the policies underlying the workers' compensation exclusive-remedy doctrine, which precludes tort recovery from an employer for injury suffered in the course of employment (and which also precludes any recovery of indemnity from the negligent contractor-employer), justify a rule that employees of the independent contractor cannot recover tort damages from the hirer under the peculiar risk doctrine (*5 Cal. 4th 689, 696-702)* .

[4] Additional Authorities

[a] Employee of Independent Contractor Cannot Recover Under Peculiar Risk Doctrine

In *Smith v. ACandS, Inc. (1994) 31 Cal. App. 4th 77, 37 Cal. Rptr. 2d 457* , plaintiff, who had worked as a pipe fitter for 30 years, sued various defendants, including a utility company that built power plants using asbestos insulation. The jury found the utility company vicariously liable under the peculiar risk doctrine, which allows a person who hires an independent contract to perform work that is inherently dangerous to be held liable when the contractor's negligent performance of the work causes injuries. The court of appeal reversed, noting that in *Privette v. Superior Court* [*Privette v. Superior Court (1993) 5 Cal. 4th 689, 21 Cal. Rptr. 2d 72, 854 P.2d 721]* , the boundaries of the doctrine of peculiar risk had recently been narrowed (*31 Cal. App. 4th 77, 94)* . Plaintiff argued that *Privette* does not prevent tort recovery against nonnegligent landowners by a hired contractor's employee who is injured by the negligence of another contractor working on the premises. However, the court of appeal held that a landowner that hires several independent contractors to work simultaneously on a project on its land is not vicariously liable under the doctrine of peculiar risk for the negligence of any of the hired contractors that injures any of the contractors' employees (*31 Cal. App. 4th 77, 95)* .

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17-178 California Points & Authorities § 178.94

§ 178.94 Opposing Contention That Contractor or Subcontractor Is Liable for Negligence Harm Due to Obvious Danger Patent Defect Caused by Contractor but Discovered by Owner After Acceptance

[1] FORM

[*The following may be included in a memorandum or points and authorities, or in a trial or appellate brief.*]

[CONTRACTOR *and/or* SUBCONTRACTOR] ARE NOT LIABLE FOR INJURIES TO PLAINTIFF RESULTING FROM NEGLIGENT CONSTRUCTION BECAUSE THE DEFECT WAS PATENT AND [OWNER *or* POSSESSOR] DISCOVERED THE DANGEROUS CONDITION AFTER ACCEPTING THE STRUCTURE.

Patent Defects Caused by Contractor's Negligence. A contractor is not liable to third persons injured by dangerous conditions resulting from the contractor's negligent construction where the owner discovers the defect after accepting the structure and wherethe defect is patent rather than latent (*Sanchez v. Swinerton & Walberg Co. (1996) 47 Cal. App. 4th 1461, 1471, 55 Cal. Rptr. 2d 415*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a plaintiff's contention that a contractor or subcontractor of premises is liable for injuries to plaintiff caused by a patent construction defect on the premises.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a contractor or subcontractor of premises is not liable for injuries to plaintiff caused by a patent construction defect on the premises, because the owner or possessor discovered the condition after accepting the structure from the negligent contractor, for example in a motion for summary judgment. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the particular condition, the risk it involved, the owner's knowledge of the condition and risk, the owner's failure to take precautions once aware of the danger, and the owner's failure to mention condition or risk to contractor.

[c] Related Pleading and Practice Forms

For forms and discussion regarding premises liability generally, see California Forms of Pleading and Practice, Ch. 421, *Premises Liability* (Matthew Bender).

[3] Discussion of Authorities

[a] Patent Defects Caused by Contractor's Negligence

In ***Sanchez v. Swinerton & Walberg Co.*** *(1996) 47 Cal. App. 4th 1461, 55 Cal. Rptr. 2d 415* , plaintiff suffered injuries when he slipped and fell on pooled water at a Los Angeles Times Olympic Production Facility. The facility was constructed by a general contractor and a concrete subcontractor two years prior to the accident. Upon completion of the project the facility was accepted by the owner. For some time prior to plaintiff's accident, employees and agents of the owner had noticed that whenever it rained, water accumulated on the landing, which sloped toward the building entrance. The water formed ponds with depths of one-half inch. The water also tended to run toward the entrance. In an effort to divert the water, sandbags were placed along the landing. Nonetheless, water sometimes migrated into the entryway. None of the owner's employees or agents informed either defendant of this problem. Plaintiff sued the contractor and subcontractor and the trial court granted summary judgment in favor of defendants.

The court of appeals affirmed, holding that the contractor and subcontractor were not liable to third persons injured by a patently defective condition after the owner's acceptance of the structure (*47 Cal. App. 4th 1461, 1471)* . In arriving at its decision, the court traced the history of the law in the area of post-owner-acceptance third party liability, and concluded that it was the latency of the defect which was essential to the contractor's negligent-construction liability after the owner had accepted the structure. The defect asserted by plaintiff in this case was that defective construction of the landing allowed water to pool on the landing and to drain into the transportation office, thus creating a dangerous condition. According to the court, this dangerous condition: (1) would have been obvious and apparent to any reasonably observant person, as would the danger that the water might create slippery surfaces and cause one to slip and fall; (2) was patent as a matter of law, since it would be discovered by the inspection an owner would make in the exercise of ordinary care and prudence; and (3) was observed by the owner's agents, and the risk it entailed appreciated, on several occasions preceding plaintiff's accident. The court noted that even if the defect initially could have been considered latent, once it was discovered, it became patent. The fact that the owner failed to take precautions until after plaintiff was injured did not change the nature of the defect (*47 Cal. App. 4th 1461, 1471)* .

[4] Additional Authorities

[a] Patent Defects Caused by Contractor's Negligence

In **Drummond v. Desmarais** (2009) 176 Cal. App. 4th 439, 98 Cal. Rptr. 3d 183, plaintiff, an employee of the Transportation Security Administration at Los Angeles International Airport, was injured when he tripped over mounting bolts that secured an explosive detection system machine. He sued the contractors who installed the machine for negligence. The trial court granted summary judgment for defendants and the court of appeal affirmed. The court held that, based on the "completed and accepted" doctrine as described in *Sanchez v. Swinerton & Walberg Co. (1996) 47 Cal. App. 4th 1461, 55 Cal. Rptr. 2d 415* , discussed in [3][a], *above*, defendants could not be held liable under the facts of the case. The court noted that the evidence showed that prior to plaintiff's injury, the anchors had been installed on the machine and the machine had been put into service by plaintiff's employer in an area reserved for its employees.

Moreover, no evidence indicated that defendants performed work on the machine after the anchors had been installed, nor retained any control over the machine, although they may have had other work to perform on other areas of their project. The court concluded that under the doctrine described in *Sanchez*, liability for the safety of the contractors' work shifted to the owner upon examination and acceptance of the work and subsequent use of the machine. In the instant case, it was undisputed that the alleged defect, the hazard created by the protruding anchor bolts, were patently obvious and known to the plaintiff and his employer. As such, defendants could not be held liable for plaintiff's injury (176 Cal. App. 4th 439, 450).

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[Reserved]

§§ 178.95[Reserved]

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D. Firefighter's Rule

17-178 California Points & Authorities § 178.110

§ 178.110 Supporting Contention That Firefighter's Rule Bars Recovery for Injury--No Duty of Care to Protect From Risk Necessitating Presence

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT _____ [OWNER *or* POSSESSOR] IS NOT LIABLE FOR THE HARM TO PLAINTIFF _____[POLICE OFFICER *or* FIREFIGHTER] BECAUSE AN OWNER OR POSSESSOR OF PREMISES IS NOT LIABLE TO A _____ [POLICE OFFICER *or* FIREFIGHTER] FOR INJURY RESULTING FROM NEGLIGENCE OR WILLFUL MISCONDUCT IF THE INJURY IS DUE TO THE SPECIFIC RISK THAT NECESSITATED HIS/HER PRESENCE ON THE PREMISES.

A. No Liability for Injury From Risk Necessitating Presence. The owner or possessor of premises is not liable for injury to a police officer or firefighter resulting from negligence or willful misconduct in creating the risk that necessitated his or her presence if the injury suffered is a result of that very risk (*Walters v. Sloan (1977) 20 Cal. 3d 199, 202, 142 Cal. Rptr. 152, 571 P.2d 609* ; *see also Baker v. Superior Court (1982) 129 Cal. App. 3d 710, 713, 181 Cal. Rptr. 311*).

B. Rule Applies to Off-duty Sheriff Who Assumes Responsibility for Apprehending Criminal Suspect on Defendant's Premises. The firefighter's rule bars recovery of damages from property owners for personal injuries suffered by an off-duty deputy sheriff who assumes responsibility for apprehending a criminal suspect on defendant's premises; defendants owe no duty of care to protect a deputy sheriff from the very danger that he was employed to confront (*Hodges v. Yarian (1997) 53 Cal. App. 4th 973, 981, 62 Cal. Rptr. 2d 130*).

C. Rule Applies to Volunteer as Well as Paid Firefighters. Application of the firefighter's rule is not strictly limited to cases in which the particular risk was assumed for compensation (*Hodges v. Yarian (1997) 53 Cal. App. 4th 973, 982, 62 Cal. Rptr. 2d 130*).

D. Rule Applies to Public Versus Private Safety Employees. Public safety officers are employed by and at the expense of the class of individuals whose negligence creates the occasion for the performance of their services. Because of the relationship between the public, the law enforcement officer, and those who require the services of the officer, the individual's usual duty of care towards the officer is replaced by the individual's contribution to tax-supported compensation for the officer (*Hodges v. Yarian (1997) 53 Cal. App. 4th 973, 984, 62 Cal. Rptr. 2d 130*).

E. No Nexus Required Between Presence at Scene and Law Enforcement Employment. No nexus is required between a law enforcement officer's presence at the scene and his or her law enforcement employment. A public safety officer's original reason for being on the premises is irrelevant; the firefighter's rule is triggered because the officer reacted as a police officer to the disturbance and deliberately encountered the danger (*Hodges v. Yarian (1997) 53 Cal. App. 4th 973, 984, 62 Cal. Rptr. 2d 130*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that there is no liability on the part of an owner or a possessor of premises for injury to a police officer or fire fighter called to the scene.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the application of the firefighter's rule, sometimes still referred to as the fireman's" rule, precluding recovery for injuries. The issue may be properly raised in a motion for summary judgment [*see, e.g., Baker v. Superior Court (1982) 129 Cal. App. 3d 710, 722, 181 Cal. Rptr. 311]* . These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the relationship between the risk necessitating the presence of the police officer or firefighter and the cause of the injury complained of.

[c] Related Pleading and Practice Forms

For forms and discussion regarding the firefighter's rule, see California Forms of Pleading and Practice, Ch. 380, *Negligence* , and Ch. 421, *Premises Liability* (Matthew Bender).

[d] Related Points and Authorities

For forms and discussion relating to the firefighter's rule in cases involving negligence of defendants who are not owners or possessors of property, see Ch. 165, *Negligence* .

[e] Opposing Points and Authorities

If appropriate, the points and *authorities in §§ 178.112 -178.117* may be submitted in opposition to the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] No Liability for Injury From Risk Necessitating Presence

Walters v. Sloan *(1977) 20 Cal. 3d 199, 202, 142 Cal. Rptr. 152, 571 P.2d 609* , was an action brought by a police

officer against defendants who left their home in the charge of their teenage daughter. Acting with their knowledge, she hosted a large party at which alcohol and drugs were available and disorder eventually developed. Plaintiff, who was on duty, was sent to defendants' residence where he was attacked while trying to arrest various guests for being drunk in public. The trial court entered a judgment of dismissal, and plaintiff appealed to the Supreme Court.

The Court affirmed, rejecting the argument that the firefighter's rule, which applies to police officers as well as firefighters, should be abolished (*20 Cal. 3d 199, 202)* . The Court noted that the rule, which precludes firefighters and police officers from "complain[ing] of negligence in the creation of the very occasion for [their] engagement," is based not only on fundamental tort principles denying recovery to anyone who knowingly and voluntarily confronts a hazard, but also on modern public policy (*20 Cal. 3d 199, 204-205)* . Because most fires are attributable to negligence, it would be too burdensome to impose liability for firefighters' injuries on everyone who carelessly caused or failed to prevent a fire. The Court also pointed out that firefighters and police officers are paid to face the hazards of their professions and are provided special benefits for being injured on duty that are in addition to the usual workers' compensation benefits (*20 Cal. 3d 199, 205-206)* .

In ***Baker v. Superior Court*** *(1982) 129 Cal. App. 3d 710, 181 Cal. Rptr. 311* , plaintiffs were two paid-call members of a fire department who were injured while fighting a fire at defendant owners' ranch. As paid-call firefighters, plaintiffs were volunteers who could choose to respond to fires and if they responded, were paid $5 per fire. One of the plaintiffs was a full-time cook and the other a homemaker. The injuries occurred when plaintiffs jumped from a truck and the truck rolled over on them. Plaintiffs sued the owners and selected employees of the ranch alleging negligence, violations of statutes, ordinances, and regulations, and willful misconduct in setting the fire and failing to control it. Defendants petitioned for mandate after the trial court denied their motion for summary judgment, apparently on the ground that the firefighter's rule was inapplicable to volunteer firefighters.

The court of appeal issued a writ of mandate ordering the trial court to vacate its order denying the motion and enter an order granting the motion and dismissing the action. The court held that the firefighter's rule that precluded recovery for injuries suffered by firefighters in attempting to put out a fire was applicable to volunteer firefighters. In doing so, the court observed that the primary basis for the rule was the fundamental principle that one who has knowingly and voluntarily confronted a hazard cannot recover for injuries sustained thereby (*129 Cal. App. 3d 710, 713-714)* . The court held that the type of assumption of the risk underlying the firefighter's rule continued to be viable as a separate defense negating a defendant's duty of care after the advent of the concept of comparative negligence ushered in by the decision of *Li v. Yellow Cab Co.* [*Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 826, 119 Cal. Rptr. 858, 532 P.2d 1226]* (*129 Cal. App. 3d 710, 720-721)* .

[b] Rule Applies to Off-duty Sheriff Who Assumes Responsibility for Apprehending Criminal Suspect on Defendant's Premises

In ***Hodges v. Yarian*** *(1997) 53 Cal. App. 4th 973, 62 Cal. Rptr. 2d 130* , an off-duty deputy sheriff confronted and struggled with, then shot and killed, a suspected burglar who had broken into the garage of the apartment building where the deputy lived. Plaintiff subsequently sued the owners and managers of the apartment building for damages suffered in connection with the confrontation and shooting of the suspect, alleging negligent failure to address certain security and maintenance problems with the building. Defendants moved for summary judgment contending that plaintiff was barred from recovery by the firefighter's rule and the trial court agreed. Plaintiff appealed.

The court of appeal affirmed. The case presented the court with a question of first impression in California: whether the firefighter's rule barred recovery of damages for personal injuries suffered by an off-duty deputy sheriff when he confronted and struggled with, then shot and killed, a suspected burglar who had broken into the garage of the apartment building where the deputy lived. The court looked to the California Supreme Court's decision in *Neighbarger v. Irwin Industries* [*Neighbarger v. Irwin Indus., Inc. (1994) 8 Cal. 4th 532, 34 Cal. Rptr. 2d 630, 882 P.2d 347]* for both the public policy behind the firefighter's rule as well as theproper methodology for determining whether the rule

applied to bar plaintiff's recovery in the factual circumstances in this case. The Supreme Court in *Neighbarger* articulated two public policy bases for the firefighter's rule: precluding recovery for those who are injured by the very hazard they have been employed to confront, and precluding taxpayers from paying twice for injuries suffered by public safety employees, once in special public compensation systems and a second time in individual liability. *Neighbarger* also directed the court to examine whether the policy reasons offered for the firefighter's rule, applied in the novel factual circumstances of this case and to keep in mind the nature of the defendants activities and the relationship of the plaintiff and the defendants to that activity to decide whether, as a matter of public polity, the defendants should owe plaintiff a duty of care. Under this standard of review the court concluded as a matter of law that the firefighter's rule barred plaintiff's claims for damages against defendants (*53 Cal. App. 4th 973, 980)* . The court reasoned that plaintiff: (1) acted in response to suspected criminal activity in the garage; (2) acted as a peace officer, using his professional training to confront and subdue the intruder; (3) specifically and repeatedly asserted his authority as a peace officer while attempting to effectuate an arrest of the suspect; and (4) exercised his statutory authority to use force, in this case deadly force, to arrest the intruder. These activities were inherently part of the job of a deputy sheriff, and precisely the types of hazards that plaintiff had been trained and was employed to confront. Furthermore, plaintiff did not dispute that he received or was eligible for special public compensation for confronting the dangers posed by the defendant's negligence. Since defendant property owners, had already been taxed to provide these special benefits fr deputy sheriffs such as plaintiff, they were entitled to the benefit of the cost-spreading aspect of the public compensation system and should not have to pay again for injuries that were compensable in that system (*53 Cal. App. 4th 973, 982)* .

In so holding, the court dismissed plaintiff's argument that the application of the firefighter's rule to off duty peace officers punished and unfairly discriminated against them, denying them rights other tenants enjoy as against their landlords with respect to unsafe conditions on leased premises. The court felt that peace officers and ordinary tenants are not similarly situated when it comes to handling the type of risk plaintiff confronted. An ordinary tenant, for example, was neither trained nor under any duty to apprehend a criminal suspect. According to the court, those are the types of public functions the taxpayers expect, pay and equip California peace officers to perform. Therefore, when a peace officer assumes responsibility for performing such functions and is injured in the process, his or her recourse is in the public system of "special public benefits" established to compensate the officer for such injuries.

[c] Rule Applies to Volunteer as Well as Paid Firefighters

The facts and procedural background of ***Hodges v. Yarian*** *(1997) 53 Cal. App. 4th 973, 62 Cal. Rptr. 2d 130* ; are discussed in *§ 178.110[3][b]*. In affirming the ruling of the trial court, the court of appeal said that application of the firefighter's rule is not strictly limited to cases in which the particular risk was assumed for compensation (*53 Cal. App. 4th 973, 982)* . Relying on *Neighbarger v. Irwin Industries, Inc.* [*Neighbarger v. Irwin Indus., Inc. (1994) 8 Cal. 4th 532, 34 Cal. Rptr. 2d 630, 882 P.2d 347]* , the court ruled that although peace officers are entitled to special public compensation for undertaking the hazards peculiar to their line of work, it is not the fact or amount of compensation that determines the applicability of the firefighter's rule in these circumstances. Plaintiff performed a public service when he entered the garage out of concern for his fellow tenants and pointed to no material difference between the service he would have performed if on duty and the service he performed in this case (*53 Cal. App. 4th 973, 983)* .

[d] Rule Applies to Public Versus Private Safety Employees

The facts and procedural background of ***Hodges v. Yarian*** *(1997) 53 Cal. App. 4th 973, 62 Cal. Rptr. 2d 130* , are discussed in *§ 178.110[3][b]*. In affirming the ruling of the trial court, the court of appeal dismissed plaintiff's argument that he should be treated like a private safety employee and be allowed to proceed against defendants for the injuries he sustained. Plaintiff relied on *Neighbarger v. Irwin Industries, Inc.* [*Neighbarger v. Irwin Indus., Inc. (1994) 8 Cal. 4th 532, 34 Cal. Rptr. 2d 630, 882 P.2d 347]* , in which the Supreme Court held that the firefighter's rule did not bar recovery by private safety employees- who had special training in petroleum firefighting and whose duties as employees of oil refinery included fire suppression - for injuries suffered when they tried to put out a fire started by refinery employees. The court of appeal agreed with *Neighbarger*, that private employees did not stand in the same relationship

to the defendant as public safety officers do with respect to members of the general public. Public safety officers are employed by and at the expense of the class of individuals whose negligence creates the occasion for the performance of their services. Because of the relationship between the public, the law enforcement officer, and those who require the services of the officer, the individual's usual duty of care towards the officer is replaced by the individual's contribution to tax-supported compensation for the officer (*Hodges v. Yarian (1997) 53 Cal. App. 4th 973, 984, 62 Cal. Rptr. 2d 130*).

[e] No Nexus Required Between Presence at Scene and Law Enforcement Employment

The facts and procedural background of ***Hodges v. Yarian*** *(1997) 53 Cal. App. 4th 973, 62 Cal. Rptr. 2d 130* ; are discussed in *§ 178.110[3][b]*. Inaffirming the ruling of the trial court, the court of appeal dismissed plaintiff's argument that there was no nexus between his presence at the scene and his law enforcement employment, and that there was a triable issue of fact whether he entered the garage as private citizen or as a police officer. The court ruled that no such nexus is required. A public safety officer's original reason for being on the premises is irrelevant; the firefighter's rule is triggered because the officer reacted as a police officer to the disturbance and deliberately encountered the danger (*53 Cal. App. 4th 973, 984)* .

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D. Firefighter's Rule

17-178 California Points & Authorities § 178.111

§ 178.111 Supporting Contention That Firefighter's Rule Bars Recovery for Injury--Hazard Encountered by Chance While on Duty Not Independent Act of Misconduct

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS NOT LIABLE UNDER THE FIREFIGHTER'S RULE FOR THE HARM SUFFERED BY PLAINTIFF _____[FIREFIGHTER *or* POLICE OFFICER] BECAUSE A HAZARD THAT A _____[FIREFIGHTER *or* POLICE OFFICER] RESPONDS TO IN HIS/HER PROFESSIONAL CAPACITY WHILE ON DUTY IS NOT AN INDEPENDENT ACT OF MISCONDUCT MERELY BECAUSE HE/SHE ENCOUNTERED THAT HAZARD BY CHANCE.

Hazard Encountered by Chance Not Independent Act of Misconduct. Firefighters or police officers who have not been called to the scene of a fire or other emergency, but who have been injured while responding to a hazard that they encounter by chance while on duty, are barred from recovery by the firefighter's rule, because their presence at a particular location for reasons unrelated to the hazard to which they responded does not make the hazard an independent act of misconduct (*Kelhi v. Fitzpatrick (1994) 25 Cal. App. 4th 1149, 1158-1160, 31 Cal. Rptr. 2d 182* ; *see Seibert Sec. Servs., Inc. v. Superior Court (1993) 18 Cal. App. 4th 394, 411, 22 Cal. Rptr. 2d 514*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the firefighter's rule, sometimes still called the fireman's" rule, bars a firefighter or police officer from recovering for injuries suffered due to a hazard that he or she encountered by chance while on duty, because this type of hazard is not an independent act of misconduct that would permit recovery.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the

specific procedural context in which counsel wishes to raise the issue of the firefighter's rule precluding recovery for injuries suffered due to a hazard encountered by chance. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the hazard that the firefighter or police officer encountered by chance while on duty, the firefighter's or police officer's response to that hazard in his or her professional capacity, and the relationship between that hazard and the cause of the injury complained of by the firefighter or police officer.

[c] Related Pleading and Practice Forms

For forms and discussion regarding the firefighter's rule, see California Forms of Pleading and Practice, Ch. 380, *Negligence* , and Ch. 421, *Premises Liability* (Matthew Bender).

[d] Related Points and Authorities

For forms and discussion relating to the firefighter's rule in cases involving negligence of defendants who are not owners or possessors of property, see Ch. 165, *Negligence* .

[e] Opposing Points and Authorities

If appropriate, the points and *authorities in § 178.112* may be submitted in opposition to the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Hazard Encountered by Chance Not Independent Act of Misconduct

In ***Kelhi v. Fitzpatrick*** *(1994) 25 Cal. App. 4th 1149, 31 Cal. Rptr. 2d 182* , plaintiff was a highway patrol officer in uniform who was driving to work on his official motorcycle when he saw tires break off a pickup truck on the highway ahead of him. Plaintiff responded by turning on his flashers, checking traffic behind him to ensure that no vehicles ran intothe tires, and asking the truck's driver to move onto the shoulder. After plaintiff moved around the truck to look for the tires, which were rolling down the highway, they veered, bounced off a retaining wall, and hit him. Plaintiff brought an action for personal injury against the driver and owner of the truck and several other defendants. The trial court granted defendants' motion for summary judgment, which was based on the firefighter's rule, and plaintiff appealed.

The court of appeal affirmed, rejecting plaintiff's argument that the firefighter's rule did not apply to bar his recovery because his presence at the accident scene was fortuitous and unrelated to the hazard that injured him. The court acknowledged that plaintiff's situation was unlike the classic scenario in which the risk that causes injury is the very reason a police officer or firefighter is summoned to the scene (*25 Cal. App. 4th 1149, 1158)* . The risk that caused plaintiff's injuries, the runaway tires, was not the conduct that brought him to that highway at that moment; however, the runaway tires were the risk that prompted his response as a police officer. His actions were the same as those he would have taken had he been summoned to the scene, and an officer called to the scene would have been barred from recovery by the firefighter's rule for a similar injury; therefore, the exception for unrelated or independent acts did not apply to allow his recovery for any negligence that caused the tires to come off the truck (*25 Cal. App. 4th 1149, 1158-1160)* .

The facts and procedural background of ***Seibert Sec. Servs., Inc. v. Superior Court*** *(1993) 18 Cal. App. 4th 394, 22 Cal. Rptr. 2d 514* , are discussed in *§ 178.114[3][b]*. One basis for the trial court's denial of the defendant's motion for summary judgment was that a triable issue of fact existed as to whether the negligence of defendant's employees was an

independent act of misconduct. In issuing a writ of mandate ordering the trial court to vacate its order denying the motion and to enter a new order granting the motion, the court of appeal held that no independent act of misconduct occurred as a matter of law. Although the conduct of defendant's employees may have been independent of and unrelated to the conduct that originally brought plaintiff to the hospital, that conduct was the immediate cause of plaintiff's being asked to respond and assist in subduing the violent patient (*18 Cal. App. 4th 394, 410-411)* .

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CHAPTER 178 PREMISES LIABILITY
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D. Firefighter's Rule

17-178 California Points & Authorities § 178.112

§ 178.112 Opposing Contention That Firefighter's Rule Bars Recovery for Injury--Injury Due to Independent Act of Misconduct

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT _____ [OWNER *or* POSSESSOR] IS LIABLE FOR THE HARM TO PLAINTIFF _____ [POLICE OFFICER *or* FIREFIGHTER] BECAUSE THE FIREFIGHTER'S RULE DOES NOT BAR RECOVERY FOR INJURIES DUE TO ACTS OF MISCONDUCT INDEPENDENT FROM THE ACT THAT CREATED THE EMERGENCY TO WHICH THE FIREFIGHTER OR POLICE OFFICER RESPONDED.

Recovery for Injury From Independent Act of Misconduct Not Barred. The firefighter's rule does not prohibit a firefighter or police officer from recovering damages from a possessor of premises for injuries caused by acts of misconduct independent from the act that created the emergency to which the firefighter or police officer responded (*Lipson v. Superior Court (1982) 31 Cal. 3d 362, 378, 182 Cal. Rptr. 629, 644 P.2d 822* ; *see also Donohue v. San Francisco Hous. Auth. (1993) 16 Cal. App. 4th 658, 663, 20 Cal. Rptr. 2d 148*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that the firefighter's rule shields an owner or possessor of premises from liability for injuries incurred by a firefighter or police officer if the injuries are caused by acts independent of the risk creating the necessity of his or her presence.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel is responding to the contention that the firefighter's rule bars recovery. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss how the act that caused the injuries complained of wasindependent from the act that created the emergency to which the firefighter or police officer responded.

[c] Related Pleading and Practice Forms

For forms and discussion regarding the firefighter's rule, see California Forms of Pleading and Practice, Ch. 380, *Negligence* , and Ch. 421, *Premises Liability* (Matthew Bender).

[d] Related Points and Authorities

For forms and discussion relating to the firefighter's rule in cases involving negligence of defendants who are not owners or possessors of property, see Ch. 165, *Negligence* .

[e] Opposing Points and Authorities

If appropriate, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 178.110*.

[3] Discussion of Authorities

[a] Recovery for Injury From Independent Act of Misconduct Not Barred

In ***Lipson v. Superior Court*** *(1982) 31 Cal. 3d 362, 378, 182 Cal. Rptr. 629, 644 P.2d 822* , plaintiff, a firefighter, was injured while in the process of containing a boilover at defendants' chemical plant that was caused by defendants' negligence. Plaintiff alleged that his injury was caused by the negligent or intentional misrepresentation of the nature of the hazard, in that defendants told him when he arrived at the plant that the boilover did not involve toxic chemicals when in fact it did. Plaintiff complained of injury suffered because of exposure to the toxic chemicals that would not have occurred if he had been informed of their nature. Plaintiff also alleged that his injury was caused by defendants' maintenance of an ultrahazardous activity on the premises.

Defendants moved for summary judgment based on the ground that plaintiff's action was barred by the firefighter's rule. The motion was denied and defendants sought and obtained from the court of appeal a peremptory writ of mandate compelling the trial court to grant the motion and dismiss the action. The Supreme Court granted plaintiff's request for a hearing and held that the trial court was correct in refusing to grant the summary judgment motion.

In holding that the firefighter's rule did not bar recovery for plaintiff's injuries, the Court reaffirmed the continued existence of the rule but stated that its narrow parameters do not prohibit a firefighter from recovering damages if the act that results in his or her injury is independent from the act that created the emergency to which the firefighter responded. Thus, a defendant is liable for failing to warn of a known, hidden danger on his or her premises or for misrepresenting the nature of the hazard, if such misconduct caused the injuries (*31 Cal. 3d 362, 378)* . The Court also stated that if the maintenance of an ultrahazardous activity on the premises produces an injury separate from the injuries caused by the risk creating the emergency a firefighter may seek recovery on the basis of strict liability (*31 Cal. 3d 362, 376-379)* .

In ***Donohue v. San Francisco Hous. Auth.*** *(1993) 16 Cal. App. 4th 658, 20 Cal. Rptr. 2d 148* , plaintiff was a firefighter who came to defendant's apartment building to inspect for fire code violations, including a locked penthouse door opening onto the roof. The concrete stairs leading to the penthouse door did not have skid-resistant treads and had just been hosed down. Plaintiff was injured when he slipped on these steps and fell. The trial court granted summary

judgment in favor of defendant on the ground that the firefighter's rule barred plaintiff's recovery. Plaintiff appealed to the court of appeal.

The court of appeal reversed, holding that the firefighter's rule did not apply in this case because plaintiff's injuries were caused, not by the hazard that required his presence on the premises, but by an entirely independent negligent act. Plaintiff was not on the premises to inspect the slipperiness of the steps. Therefore, even though plaintiff was injured in the regular course of his duties and the hazard of slippery steps was one he would normally encounter as part of his job, plaintiff was not barred from recovery for his injuries (*16 Cal. App. 4th 658, 663)* .

[4] Additional Authorities

[a] Recovery for Injury From Independent Act of Misconduct Not Barred

In *Boon v. Rivera (2000) 80 Cal. App. 4th 1322, 96 Cal. Rptr. 2d 276* , the plaintiff was a police officer who responded to an emergency call at the defendant's residence, where the defendant's husband had barricaded himself in the house. The defendant advised the plaintiff and other officers that her husband was not violent. However, she knew but did not disclose that there was an M-16 rifle and a gun safe in the house, that her husband had previously been diagnosed as a danger to himself and others, that her husband had threatened to kill her and their child, and that her husband had threatened to kill the first police officer who arrived at the residence. Based on the defendant's information that her husband was not violent, the plaintiff responded with non-lethal force and was shot by the defendant's husband. The plaintiff alleged that if he had known the truth aboutthe husband's violent nature, he would have responded differently. The trial court sustained the defendant's demurrer, finding that the action against the defendant was barred by the firefighter's rule and that the defendant owed no duty to the plaintiff. The court of appeal reversed, concluding that the facts were analogous to those in *Lipson v. Superior Court*, described in § 178.112[3][a]. The court concluded that the firefighter's rule was not a defense to the action brought against the defendant. Although a police officer may expect to encounter force when responding to an emergency call of a barricaded man, the risk that someone at the scene would deceive the officer as to the nature of the man's violent tendencies was not an inherent risk of the situation. Instead, the defendant's misrepresentation was an independent act of misconduct occurring after the plaintiff arrived on the scene (*80 Cal. App. 4th 1322, 1328-1330)* .

In *Terhell v. American Commonwealth Assocs. (1985) 172 Cal. App. 3d 434, 218 Cal. Rptr. 256* , plaintiff firefighter fell through an unguarded opening in the roof of defendants' building while fighting a fire on the premises. In his complaint, plaintiff alleged that defendants negligently maintained the roof in a manner that created a concealed opening that was hazardous to anyone on the roof and that defendants knew of the opening and its hazard but failed to warn plaintiff of its existence. The court of appeal reversed the trial court's judgment of dismissal, holding that it did not appear on the face of plaintiff's complaint that his action was barred by the firefighter's rule (*172 Cal. App. 3d 434, 437)* . The court held that the unguarded hole in the roof was not the cause of plaintiff's presence at the scene, and that negligence that did not cause the fire is not subject to the rule. The court noted that the situation most frequently confronted by the courts has been the failure of a landowner or occupier to warn a firefighter of a known hidden danger on the premises. Virtually all jurisdictions that have considered this factual situation have allowed recovery if the failure to warn ultimately resulted in an injury to the firefighter (*172 Cal. App. 3d 434, 440)* .

In *Kocan v. Garino (1980) 107 Cal. App. 3d 291, 165 Cal. Rptr. 712* , a police officer was injured while pursuing a suspect onto defendant's property when a dilapidated fence on the property gave way. Defendant's demurrer to the complaint was sustained without leave to amend on the basis that the firefighter's rule barred plaintiff's recovery. The court of appeal reversed the order dismissing the complaint and held that because defendant's negligence, if any, did not create the risk to which plaintiff responded, the test of liability rested on those considerations that generally govern the relationship between a possessor of property and persons injured thereon (*107 Cal. App. 3d 291, 296)* .

In *Bartholomew v. Klingler Co. (1975) 53 Cal. App. 3d 975, 126 Cal. Rptr. 191* , the court of appeal reversed a

judgment on the pleadings in favor of defendant and against plaintiff police officer that was granted on the ground that the firefighter's rule precluded recovery for injuries sustained in falling through a weak ceiling on defendant's premises while responding to a burglar alarm and searching for intruders (*53 Cal. App. 3d 975, 981)* . The court, in recognizing that a possessor of premises has a duty to maintain the premises in safe condition and warn of any known hidden defects, stated that the proper test of liability to be applied to defendant is that of reasonableness as enunciated in *Rowland v. Christian* [*Rowland v. Christian (1968) 69 Cal. 2d 108, 118-119, 70 Cal. Rptr. 97, 443 P.2d 561]* and was a question of fact (*53 Cal. App. 3d 975, 981)* .

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17-178 California Points & Authorities § 178.113

§ 178.113 Opposing Contention That Firefighter's rule Bars Recovery for Injury--Rule Inapplicable to Private Safety Employee Injured by Negligence of Third Party

[1] FORM

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

DEFENDANT IS LIABLE FOR HARM TO PLAINTIFF BECAUSE PLAINTIFF IS A PRIVATE SAFETY EMPLOYEE, NOT A PUBLICLY EMPLOYED FIREFIGHTER, AND THE FIREFIGHTER'S RULE DOES NOT BAR RECOVERY BY A PRIVATE SAFETY EMPLOYEE FOR INJURIES CAUSED BY THE NEGLIGENCE OF A THIRD PARTY, WHO IS NOT PLAINTIFF'S EMPLOYER, IN STARTING A FIRE.

Recovery by Private Safety Employee for Negligence of Third Party Not Barred. The firefighter's rule does not preclude a private safety employee from stating a cause of action against a third party, not the employer, for injuries caused by the third party's negligence in starting a fire (*Neighbarger v. Irwin Indus., Inc. (1994) 8 Cal. 4th 532, 547, 34 Cal. Rptr. 2d 630, 882 P.2d 347*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the firefighter's rule applies to private safety employees and precludes them from stating a cause of action against a third party, not the employer, for injuries caused by the third party's negligence in starting a fire.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel is responding to the contention that the firefighter's rule bars recovery. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the status of the plaintiff as a private safety employee, rather than a publicly employed firefighter, the defendant's status as a third party and not plaintiff's employer, and the negligence of defendant in starting the fire that resulted in plaintiff's injuries.

[c] Related Pleading and Practice Forms

For forms and discussion relating to the firefighter's rule, see California Forms of Pleading and Practice, Ch. 380, *Negligence* , and Ch. 421, *Premises Liability* (Matthew Bender).

[d] Related Points and Authorities

For forms and discussion relating to the firefighter's rule in cases involving negligence of defendants who are not owners or possessors of property, see Ch. 165, *Negligence* .

[e] Opposing Points and Authorities

If appropriate, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 178.110*.

[3] Discussion of Authorities

[a] Recovery by Private Safety Employee for Negligence of Third Party Not Barred

Neighbarger v. Irwin Indus., Inc. *(1994) 8 Cal. 4th 532, 34 Cal. Rptr. 2d 630, 882 P.2d 347* , was an action for personal injuries brought by two safety employees of an oil company who were injured by liquid petroleum that ignited and burned when employees of defendant, a company that contracted to provide maintenance services to the oil company, negligently unplugged a valve on the oil company's premises. The trial court granted summary judgment to defendant on the basis of the firefighter's rule. The court of appeal upheld the order, ruling that private safety employees assume the risk of injury that may occur when they respond to emergencies on the job and therefore that defendant owed plaintiffs no duty of care. Plaintiffs appealed to the Supreme Court, which reversed.

The Court distinguished between publicly employed firefighters and private safety employees and held that the firefighter's rule does not preclude a private safety employee from stating a cause of action against a third party who is not his or her employer for injuries caused by that third party's negligence in starting a fire (*8 Cal. 4th 532, 546-547)* . The Court reasoned that by establishing fire departments and taxing themselves to pay for their services, the public in effect has purchased exoneration from the duty of care and does not have to pay twice, through taxation and individual liability, for those services (*8 Cal. 4th 532, 542-543)* . Because of this relationship between the public, the firefighter, and the individual members of the public who require the firefighter's services, the individual's duty of care towards the firefighter is replaced by the individual's contribution to tax-supported compensation for the firefighter (*8 Cal. 4th 532, 546)* . In contrast, a defendant whose negligence injures private safety employees employed by another does not have the same relationship with those private safety employees as a member of the public has with publicly employed firefighters, because the defendant has not paid in any way to be relieved of the duty of care owed toward the private employees (*8 Cal. 4th 532, 543)* . Another consideration supporting the distinction between publicly employed firefighters and private safety employees is that actions by publicly employed firefighters would involve costly litigation over subrogation that would ultimately be financed by the public and that would not benefit the firefighter, who receives retirement or workers' compensation benefits, whereas actions by private safety employees shift the loss from the innocent employees and their employer to the third party whose negligence caused the injuries (*8 Cal. 4th 532, 543)* .

The Court observed that the firefighter's rule is not actually a separate concept, but rather is an example of the application of the primary versus secondary assumption of risk doctrine set forth in *Knight v. Jewett* [*Knight v. Jewett (1992) 3 Cal. 4th 296, 313, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* , which is a legal determination of whether, based on the nature of the activity involved and the relationship of the parties to that activity, defendant owed plaintiff a duty of care (*8 Cal. 4th 532, 538-539)* . The Court held that the proper basis for the rule is not, as had been held before *Knight,* a plaintiff's voluntary acceptance of a known risk of injury in the course of employment, but rather a public policy determination that a person who negligently starts a fire does not owe a duty of care to protect the responding firefighter from the very danger that requires the firefighter's presence (*8 Cal. 4th 532, 537-538)* .

NOTE:

In drawing this distinction between publicly employed firefighters and private safety employees, the Court rejected the reasoning of a court of appeal decision [*Holland v. Crumb (1994) 26 Cal. App. 4th 1844, 1852, 32 Cal. Rptr. 2d 366]* , which applied the firefighter's rule to preclude recovery by a privately-employed tow truck driver who was struck by traffic while preparing to tow a disabled vehicle. The Court observed that the court of appeal had based its decision on the theory that the driver had assumed the foreseeable risk of his hazardous employment; noting that private employees do not assume all the foreseeable risks of their employment, the Court held that application of the firefighter's rule requires a closer analysis focusing on the relationship of the parties and the defendant's duty of care (*8 Cal. 4th 532, 545 n.4*).

[4] Additional Authorities

[a] Recovery by Private Safety Employee for Negligence of Third Party Not Barred

In *Marquez v. Mainframe (1996) 42 Cal. App. 4th 881, 50 Cal. Rptr. 2d 34* , plaintiff, a private security guard, slipped and fell while patrolling a building operated and maintained by defendants. In plaintiff's action for personal injury, the trial court granted a summary judgment for defendants on the basis that the claim was barred by the firefighter's rule of the doctrine of assumption of the risk, as stated in *Knight v. Jewett* [*Knight v. Jewett (1992) 3 Cal. 4th 296, 11 Cal. Rptr. 2d. 2, 834 P.2d 696]* . The court of appeal reversed, following the analysis of *Neighbarger v. Irwin Industries, Inc.* [*Neighbarger v. Irwin Indus., Inc. (1994) 8 Cal. 4th 532, 34 Cal. Rptr. 2d. 630, 882 P.2d 347]* . The court began with the general principle that an owner or occupier of property owes a duty of reasonable care to maintain the premises in a safe condition (*42 Cal. App. 4th 881, 886)* . With regard to the firefighter's rule, the court noted that the plaintiff was not a public employee; there was no special relationship between the parties suggesting that the normal duty of care was waived, particularly since plaintiff was not hired by defendants but by a private company; and the security guard received no special financial reward for engaging in hazardous work. The court concluded that application of the key *Neighbarger* factors showed that plaintiff, as a private security guard, should not be barred from recovery by the firefighter's rule (*42 Cal. App. 4th 881, 886)* .

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17-178 California Points & Authorities § 178.114

§ 178.114 Opposing Contention That Firefighter's Rule Bars Recovery for Injury--Statutory Exception to Rule Under Civ. Code § 1714.9--Conduct Causing Injury Occurs After Plaintiff's Presence Known and Plaintiff Has Undertaken Duties

[1] FORM

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

DEFENDANT _____ [OWNER *or* POSSESSOR] IS LIABLE UNDER SECTION 1714.9 OF THE CIVIL CODE FOR THE HARM TO PLAINTIFF _____ [PEACE OFFICER *or* FIREFIGHTER *or* EMERGENCY MEDICAL PERSONNEL EMPLOYED BY A PUBLIC ENTITY] BECAUSE THE CONDUCT CAUSING PLAINTIFF'S INJURY OCCURRED AFTER DEFENDANT KNEW OR SHOULD HAVE KNOWN OF PLAINTIFF'S PRESENCE AND AFTER PLAINTIFF HAD UNDERTAKEN HIS OR HER DUTIES AS _____ [A PEACE OFFICER *or* A FIREFIGHTER *or* EMERGENCY MEDICAL PERSONNEL EMPLOYED BY A PUBLIC ENTITY].

A. Conduct Causing Injury Occurred After Plaintiff's Presence Known. A defendant is liable for willful and negligent conduct causing injury to a peace officer, a firefighter, or emergency medical personnel employed by a public entity if the conduct causing the injury occurs after the defendant knows or should have known of the presence of the peace officer, firefighter, or emergency medical personnel (*Civ. Code § 1714.9(a)(1)*).

B. Conduct Causing Injury Occurred After Plaintiff Had Undertaken Duties. A defendant is liable under *Civ. Code § 1714.9(a)(1)* only for conduct that occurs after the plaintiff has undertaken his or her duties as a peace officer, a firefighter, or emergency medical personnel (*Seibert Sec. Servs., Inc. v. Superior Court (1993) 18 Cal. App. 4th 394, 408-409, 22 Cal. Rptr. 2d 514*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that the firefighter's rule shields an owner or possessor of premises from liability for injuries incurred by a peace officer, a firefighter, or emergency medical personnel. The basis of opposition is that the willful or negligent conduct causing the injuries occurred after the owner orpossessor knew or should have known of the presence of the peace officer, firefighter, or emergency medical personnel, and after the peace officer, firefighter, or emergency medical personnel had undertaken his or her duties.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel is responding to the contention that the firefighter's rule bars recovery. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should state facts showing plaintiff's status as a peace officer, a firefighter, or emergency medical personnel employed by a public entity, the conduct causing the plaintiff's injury, and the occurrence of that conduct after defendant knew or should have known of plaintiff's presence and after plaintiff had undertaken his or her duties.

[c] Related Pleading and Practice Forms

For forms and discussion relating to the firefighter's rule, see California Forms of Pleading and Practice, Ch. 380, *Negligence* , , and Ch. 421, *Premises Liability* (Matthew Bender).

[d] Related Points and Authorities

For forms and discussion relating to the firefighter's rule in cases involving negligence of defendants who are not owners or possessors of property, see Ch. 165, *Negligence* .

[e] Opposing Points and Authorities

If appropriate, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 178.110*.

[3] Discussion of Authorities

[a] Conduct Causing Injury Occurred After Plaintiff's Presence Known

The facts and procedural background of ***Seibert Sec. Servs., Inc. v. Superior Court*** *(1993) 18 Cal. App. 4th 394, 22 Cal. Rptr. 2d 514* , are discussed in *§ 178.114[3][b]*. The court held that the behavior of defendant's employees during the struggle with the patient was not behavior coming within the exception created by *Civ. Code § 1714.9(a)(1)*, because neither the refusal of one guard to participate in subduing the patient nor the allegedly ineffective assistance of another was the conduct that caused plaintiff's injury (*18 Cal. App. 4th 394, 416)* .

[b] Conduct Causing Injury Occurred After Plaintiff Had Undertaken Duties

In ***Seibert Sec. Servs., Inc. v. Superior Court*** *(1993) 18 Cal. App. 4th 394, 22 Cal. Rptr. 2d 514* , plaintiff was a police officer who brought an arrested suspect to a hospital for examination of possible injuries. While he was at the hospital completing paperwork on the suspect, a mental patient became abusive and tried to grab a baton held by a hospital security guard employed by defendant security company. Plaintiff helped the guard subdue the patient, who was handcuffed and put in an isolation cell, and plaintiff returned to his paperwork. Sometime later, another hospital security guard also employed by defendant decided to remove the patient's handcuffs, and the patient then attacked this guard.

Plaintiff responded to the guard's call for help and was injured while subduing the patient. During the struggle, the guard who had been attacked dropped back and did not assist plaintiff but another of defendant's employees also attempted to subdue the patient. Plaintiff sued defendant security company for the negligence of its employee in removing the patient's handcuffs. Defendant moved for summary judgment on the basis of the firefighter's rule. The trial court denied the motion, and defendant petitioned for review.

The court of appeal issued a writ of mandate ordering the trial court to vacate its order denying defendant's motion for summary judgment and to enter a new order granting the motion. The court held that the firefighter's rule barred plaintiff's recovery, and that the statutory exception under *Civ. Code § 1714.9(a)(1)* did not apply despite defendant's employee's knowledge of plaintiff's presence when he removed the patient's handcuffs. The court ruled that this exception applies only to conduct occurring after peace officers, firefighters, or emergency medical personnel have undertaken their duties. In this case, plaintiff was not performing any duties as a police officer when the guard removed the patient's handcuffs. The court noted that ruling otherwise and permitting the exception to apply merely because a police officer was present would lead to absurd results (*18 Cal. App. 4th 394, 408-409)* . For example, a person standing on a city street may observe a patrolling police officer nearby. The person, feeling safe due to the officer's presence, allows a valuable camera to hang loosely from his or her arm, and a passing thief is thereby encouraged to grab it. If the officer responds and is injured in a struggle with the thief, the victim was no doubt negligent but should not be liable in tort to the officer (*18 Cal. App. 4th 394, 409)* . The court held that applying the statutory exception to conduct occurring before peace officers, firefighters, or emergency medical personnel had undertaken their duties would lead to inequitabledistinctions by allowing recovery to officers, such as plaintiff, who happened to be at the scene when a negligently caused incident occurred, but denying recovery to officers who responded to a radio call (*18 Cal. App. 4th 394, 410)* .

[4] Additional Authorities

[a] Conduct Causing Injury Occurred After Plaintiff's Presence Known

The facts and procedural background of *Boon v. Rivera (2000) 80 Cal. App. 4th 1322, 96 Cal. Rptr. 2d 276* , are described in § 178.112[4][a]. In addition to ruling that the action against the defendant was not barred by the firefighter's rule, the court also held that, under the facts of that particular case, *Civ. Code § 1714.9(a)* established a duty by those present at the scene of the emergency to refrain from misstating material facts concerning the nature of the emergency to those public safety officials called to the scene. Therefore, the wife of the man who shot the plaintiff had a duty under that statute not to misrepresent affirmatively the nature of the hazard faced by the plaintiff (*80 Cal. App. 4th 1322, 1330-1333)* .

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17-178 California Points & Authorities § 178.115

§ 178.115 Opposing Contention That Firefighter's Rule Bars Recovery for Injury--Statutory Exception to Rule Under Civ. Code § 1714.9--Conduct Causing Injury Violates Statute

[1] FORM

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

DEFENDANT _____ [OWNER *or* POSSESSOR] IS LIABLE UNDER SECTION 1714.9 OF THE CIVIL CODE FOR THE HARM TO PLAINTIFF _____ [PEACE OFFICER *or* FIREFIGHTER *or* EMERGENCY MEDICAL PERSONNEL EMPLOYED BY A PUBLIC ENTITY] BECAUSE THE CONDUCT CAUSING PLAINTIFF'S INJURY VIOLATED A _____[STATUTE *or* ORDINANCE *or* REGULATION] AND THAT CONDUCT WAS NOT ITSELF THE EVENT THAT PRECIPITATED EITHER THE RESPONSE OR THE PRESENCE OF THE _____ [PEACE OFFICER *or* FIREFIGHTER *or* EMERGENCY MEDICAL PERSONNEL].

Violation of Statute, Ordinance, or Regulation. A defendant is liable for willful and negligent conduct causing injury to a peace officer, a firefighter, or emergency medical personnel employed by a public entity if the conduct causing the injury violates a statute, ordinance, or regulation, and if that conduct was not itself the event that precipitated either the response or the presence of the peace officer, firefighter, or emergency medical personnel (*Civ. Code § 1714.9(a)(2)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that the firefighter's rule shields an owner or possessor of premises from liability for injuries incurred by a peace officer, a firefighter, or emergency medical personnel. The basis of opposition is that the willful or negligent conduct causing the injuries: (1) violated a statute, ordinance, or regulation; and (2) was not itself the event that precipitated either the response or the presence of the peace officer, firefighter, or emergency medical personnel.

These points and authorities may be combined with a memorandum of points and authorities relating to the specific procedural context in which counsel is responding to the contention that the firefighter's rule bars recovery. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should state facts showing that plaintiff was a peace officer, a firefighter, or emergency medical personnel employed by a public entity, that defendant's conduct violated a statute, ordinance, or regulation, and that this conduct was not itself the event that precipitated either the response or the presence of the plaintiff.

[c] Related Pleading and Practice Forms

For forms and discussion relating to the firefighter's rule, see California Forms of Pleading and Practice, Ch. 380, *Negligence* , and Ch. 421, *Premises Liability* (Matthew Bender).

[d] Related Points and Authorities

For forms and discussion relating to the firefighter's rule in cases involving negligence of defendants who are not owners or possessors of property, see Ch. 165, *Negligence* .

[e] Opposing Points and Authorities

If appropriate, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 178.110*.

[3] Discussion of Authorities

[a] Conduct Causing Injury Occurred After Plaintiff's Presence Known

Seibert Sec. Servs., Inc. v. Superior Court *(1993) 18 Cal. App. 4th 394, 22 Cal. Rptr. 2d 514* , is discussed in *§ 178.114[3][a]*.

[B] Conduct Causing Injury Occurred After Plaintiff Had Undertaken Duties

Seibert Sec. Servs., Inc. v. Superior Court *(1993) 18 Cal. App. 4th 394, 22 Cal. Rptr. 2d 514* , is discussed in *§ 178.114[3][b]*.

California Points & Authorities

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Volume 17 Chapters 170-179 PARTNERSHIPS---to---PREMISES LIABILITY
CHAPTER 178 PREMISES LIABILITY
PART II. FORMS
D. Firefighter's Rule

17-178 California Points & Authorities § 178.116

§ 178.116 Opposing Contention That Firefighter's Rule Bars Recovery for Injury--Statutory Exception to Rule Under Civ. Code § 1714.9--Conduct Causing Injury Was Intended to Injure Plaintiff

[1] FORM

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

DEFENDANT _____ [OWNER *or* POSSESSOR] IS LIABLE UNDER SECTION 1714.9 OF THE CIVIL CODE FOR THE HARM TO PLAINTIFF _____ [PEACE OFFICER *or* FIREFIGHTER *or* EMERGENCY MEDICAL PERSONNEL EMPLOYED BY A PUBLIC ENTITY] BECAUSE THE CONDUCT CAUSING PLAINTIFF'S INJURY WAS INTENDED TO INJURE PLAINTIFF.

Conduct Causing Injury Intended to Injure Plaintiff. A defendant is liable for willful and negligent conduct causing injury to a peace officer, a firefighter, or emergency medical personnel employed by a public entity, if the conduct causing the injury was intended to injure the peace officer, firefighter, or emergency medical personnel (*Civ. Code § 1714.9(a)(3)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that the firefighter's rule shields an owner or possessor of premises from liability for injuries incurred by a peace officer, a firefighter, or emergency medical personnel. The basis of opposition is that the willful or negligent conduct causing the injuries was intended to injure the peace officer, firefighter, or emergency medical personnel.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel is responding to the contention that the firefighter's rule bars recovery. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should state facts showing that the plaintiff was a peace officer, a firefighter, or emergency medical personnel employed by a public entity, and that the defendant intended his or her conduct to injure plaintiff.

[c] Related Pleading and Practice Forms

For forms and discussion relating to the firefighter's rule, see California Forms of Pleading and Practice, Ch. 380, *Negligence* , and Ch. 421, *Premises Liability* (Matthew Bender).

[d] Related Points and Authorities

For forms and discussion relating to the firefighter's rule in cases involving negligence of defendants who are not owners or possessors of property, see Ch. 165, *Negligence* .

[e] Opposing Points and Authorities

If appropriate, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 178.110*.

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17-178 California Points & Authorities § 178.117

§ 178.117 Opposing Contention That Firefighter's Rule Bars Recovery for Injury--Statutory Exception to Rule Under Civ. Code § 1714.9--Conduct Causing Injury Was Arson

[1] FORM

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

DEFENDANT _____ [OWNER *or* POSSESSOR] IS LIABLE UNDER SECTION 1714.9 OF THE CIVIL CODE FOR THE HARM TO PLAINTIFF _____ [PEACE OFFICER *or* FIREFIGHTER *or* EMERGENCY MEDICAL PERSONNEL EMPLOYED BY A PUBLIC ENTITY] BECAUSE THE CONDUCT CAUSING PLAINTIFF'S INJURY WAS ARSON AS DEFINED IN SECTION 451 OF THE PENAL CODE.

Conduct Causing Injury Was Arson. A defendant is liable for willful and negligent conduct causing injury to a peace officer, a firefighter, or emergency medical personnel employed by a public entity if the conduct causing the injury was arson as defined in *Penal Code § 451* (*Civ. Code § 1714.9(a)(4)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that the firefighter's rule shields an owner or possessor of premises from liability for injuries incurred by a peace officer, a firefighter, or emergency medical personnel. The basis of opposition is that the willful or negligent conduct causing the injuries was arson as defined in *Penal Code § 451*.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel is responding to the contention that the firefighter's rule bars recovery. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should state facts showing that plaintiff was a peace officer, a firefighter, or emergency medical personnel employed by a public entity, and that defendant's conduct was arson as defined by *Penal Code § 451*.

[c] Related Pleading and Practice Forms

For forms and discussion relating to the firefighter's rule, see California Forms of Pleading and Practice, Ch. 380, *Negligence* , and Ch. 421, *Premises Liability* (Matthew Bender).

[d] Related Points and Authorities

For forms and discussion relating to the firefighter's rule in cases involving negligence of defendants who are not owners or possessors of property, see Ch. 165, *Negligence* .

[d] Opposing Points and Authorities

If appropriate, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 178.110*.

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17-178 California Points & Authorities §§ 178.118-178.129

[Reserved]

§§ 178.118[Reserved]

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CHAPTER 178 PREMISES LIABILITY
PART II. FORMS
E. Recreational Users

17-178 California Points & Authorities § 178.130

§ 178.130 Supporting Contention That Recreational User of Real Property Is Barred From Recovery for Injuries Sustained Thereon [Civ. Code § 846]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT OWNER IS NOT LIABLE FOR THE HARM TO PLAINTIFF RECREATIONAL USER, BECAUSE, EXCEPT AS PROVIDED IN SECTION 846 OF THE CIVIL CODE, THERE IS NO LIABILITY ON THE PART OF AN OWNER OF AN ESTATE OR ANY OTHER INTEREST IN REAL PROPERTY FOR INJURIES INCURRED THEREON BY A RECREATIONAL USER.

A. No Liability to Recreational User. Except as provided in *Section 846 of the Civil Code*, an owner of any estate or any other interest in real property owes no duty to keep the premises safe for use by others for any recreational purpose or warn of any hazardous condition, use, structure, or activity thereon (*Civ. Code § 846*).

B. Recreational Purpose. A "recreational purpose" as used in *Section 846 of the Civil Code* includes such activities as fishing, hunting, camping, water sports, hiking, spelunking, sport parachuting, riding, including animal riding, snowmobiling, and all other types of vehicular riding, rock collecting, sightseeing, picnicking, nature study, nature contacting, recreational gardening, gleaning, hang gliding, winter sports, and viewing or enjoying historical, archaeological, scenic, natural, or scientific sites (*Civ. Code § 846*).

[*Optional*] **C. Statutory List Is Only Illustrative.** By stating that a recreational purpose "includes such activities as" those listed therein, *Section 846 of the Civil Code* indicates that the list is merely illustrative of the activities which constitute a recreational purpose within the meaning of the statute. Under the usual, ordinary import of the plain meaning of the section, other recreational uses similar to those listed fall within the purview of the statute (*Ornelas v. Randolph (1993) 4 Cal. 4th 1095, 1100-1101, 17 Cal. Rptr. 2d 594, 847 P.2d 560* ("recreational purpose" includes playing on farm equipment); *Valladares v. Stone (1990) 218 Cal. App. 3d 362, 369, 267 Cal. Rptr. 57* ("recreational purpose" includes tree climbing)).

[*Optional*] **D. Suitability of Property for Recreational Use Does Not Affect Applicability of Immunity.** Whether the property is or is not suitable for recreational use is not an issue with respect to the application of *Civil Code Section 846*. The public policy balance achieved by the statute is clear: landowners are broadly encouraged to allow access to their property; recreational users who take advantage of this access waive the right to sue for ordinary negligence. The determination of whether the land is suitable for recreation is placed on the user, not on the courts (*Ornelas v. Randolph (1993) 4 Cal. 4th 1095, 1106, 17 Cal. Rptr. 2d 594, 847 P.2d 560*).

[*Optional*] **E. Immunity Not Qualified by Public Trust Doctrine If No Affirmative Acts Impede Public's Use of Water.** The immunity provisions of *Civil Code Section 846* are qualified by the public trust doctrine only when the landowner has performed an affirmative act tending to obstruct or impede the public's free use of navigable waters (*Charpentier v. Von Geldern (1987) 191 Cal. App. 3d 101, 108-110, 236 Cal. Rptr. 233*).

[*Optional*] **F. Immunity Extends to Negligent Conduct of Persons.** The protection afforded to landowners under *Civil Code Section 846* is not limited to dangers presented by the premises per se, but extends to the negligent conduct of persons, including dangers presented by negligent drivers (*Shipman v. Boething Treeland Farms, Inc. (2000) 77 Cal. App. 4th 1424, 1427-1431, 92 Cal. Rptr. 2d 566 , overruled in part, Klein v. United States of America (2010) 50 Cal. 4th 68, 81, 112 Cal. Rptr. 3d 722, 235 P.3d 42*).

[*Optional*] **G. Employer/Landowner Protected From Liability for Injury-Causing Conduct of Employee.** A plaintiff may not escape the immunity conferred on a landowner by *Civil Code Section 846* by arguing that the landowner may nonetheless be liable as an employer if the injury is caused by the negligent conduct of an employee or the employer's negligent supervision of an employee (*Shipman v. Boething Treeland Farms, Inc. (2000) 77 Cal. App. 4th 1424, 1431, 92 Cal. Rptr. 2d 566 , overruled in part, Klein v. United States of America (2010) 50 Cal. 4th 68, 81, 112 Cal. Rptr. 3d 722, 235 P.3d 42*).

[*Optional*] **H. Express Invitation by Landowner Does Not Extinguish Immunity of Other Estate Owners.** An express invitation from the fee owner of property extinguishes the recreational use immunity of the fee owner, but does not extinguish the immunity of other owners of estates in the land (*Jackson v. Pacific Gas & Elec. Co. (2001) 94 Cal. App. 4th 1110, 1116-1119, 114 Cal. Rptr. 2d 831*).

[*Optional*] **I. Immunity Applies to Claims of Negligence Per Se.** The immunity granted by *Civil Code Section 846* is not limited toimmunity from claims based on simple negligence, but also applies to shield a defendant from liability for negligence per se--that is, negligence presumed to exist by virtue of the defendant's violation of a statute, ordinance, or regulation (*Jackson v. Pacific Gas & Elec. Co. (2001) 94 Cal. App. 4th 1110, 1121, 114 Cal. Rptr. 2d 831*).

[*Optional*] **J. Homeowner's Driveway Right-of-Way Over Public Trail Is Protected Property Interest.** The property interests protected by *Civil Code Section 846* are broad, and a homeowner's right of way to construct a driveway over an adjacent public trail fits within the definition of an "interest in real property" under the statute if an injury is sustained by a person using the trail at the point where it intersects the driveway (*Miller v. Weitzen (2005) 133 Cal. App. 4th 732, 738-739, 35 Cal. Rptr. 3d 73*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that an owner of an estate or any other interest in real property is not liable to a person injured thereon while using the land for a recreational purpose when liability cannot be predicated on the exceptions in *Civ. Code § 846*.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of liability to a recreational user. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the fact that the use of the real property was for a recreational purpose. Counsel should also point out that none of the exceptions to the grant of immunity that are set out in *Civ. Code § 846* apply (the user was not expressly invited or consideration was not paid for permission to enter on the premises, and there was no willful or malicious failure to warn the recreational user).

[c] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 178.131 -178.34* may be submitted in opposition to the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] No Liability to Recreational User

Civ. Code § 846 provides that an owner of an estate or of any interest in real property who gives permission to enter for a recreational purpose does not: (1) extend any assurances that the premises are safe for that purpose; (2) constitute that the person to whom permission has been given has the legal status of an invitee or licensee to whom a duty of care is owed; or (3) assume responsibility for or incur liability for any injury to person or property caused by any act of such person to whom permission has been granted.

The immunity provisions of *Civ. Code § 846* do not limit the liability that would otherwise exist if: (1) the user was expressly invited rather than merely permitted to come on the premises; (2) permission to enter on the land for the recreational purpose was granted for a consideration other than that paid by the state, or consideration was received from others for the same purpose; or (3) the willful or malicious failure to warn or guard against a dangerous condition, use, or structure was willful or malicious. For contentions opposing the application of *Civ. Code § 846* on the basis of these exceptions, see *§§ 178.131 -178.134*.

[b] Statutory List Is Only Illustrative

In ***Ornelas v. Randolph*** *(1993) 4 Cal. 4th 1095, 17 Cal. Rptr. 2d 594, 847 P.2d 560* , the plaintiff, an eight-year-old boy, went onto the defendant's farm property, adjacent to the subdivision where the child lived, and was injured while there. A piece of pipe was dislodged by other children playing there, and it struck the plaintiff. It was not clear whether the plaintiff entered the property with the other children for the purpose of playing there or merely tagged along to observe. When the injury occurred, the plaintiff was sitting on the ground and was playing with a hand-held toy. The trial court granted the defendant's motion for summary judgment, but the court of appeal reversed. The Supreme Court, however, agreed with the trial court that the defendant was immune from liability under *Civ. Code § 846*. Regarding that section's list of examples of recreational purposes, the Court observed that the list does not effectively limit the meaning of "recreational purpose" in the statute, citing the *Valladares* case (*4 Cal. 4th 1095, 1100-1101)* . Regarding the plaintiff's subjective purpose, the Court stated that "whether plaintiff entered the property to play on the equipment, or merely accompanied the other children at play, is immaterial. In either case, his presence was occasioned by the recreational use of the property, and his injury was the product thereof. We discern no meaningful distinction, for purposes of [*Civ. Code § 846*], between the passive spectator and the active participant. Both take advantage of the recreational opportunities offered by the property; neither, therefore, maybe heard to complain when injury results therefrom" (*4 Cal. 4th 1095, 1102)* .

In ***Valladares v. Stone*** *(1990) 218 Cal. App. 3d 362, 267 Cal. Rptr. 57* , a four-year-old child was injured after falling from a tree while playing on defendant's vacant lot and brought an action through his guardian ad litem alleging that the injury was the proximate result of the defendant's negligence in maintaining and supervising his property. Defendant successfully moved for summary judgment on the basis that the plaintiff's recovery is barred by *Civ. Code § 846*. Plaintiff appealed, arguing that the child's use of the defendant's property was not one of the recreational activities included within the purview of the statute.

The court of appeal affirmed the judgment. The court stated that there is no ambiguity in *Civ. Code § 846*, and therefore, the plain meaning of the statute must prevail. By stating that a recreational purpose "includes such activities as" those listed therein, the section indicates that the list is merely illustrative of the activities which constitute a recreational purpose within the meaning of the statute. Under the usual, ordinary import of the plain meaning of the section, other recreational uses similar to those listed fall within the purview of the statute. The court stated that a recreational purpose is one intended to refresh the body or mind by diversion, amusement or place and concluded that climbing a tree for play is, as a matter of law, a recreational purpose within the meaning of the statue. Certainly, the court further concluded, tree climbing is a form of "nature contacting" contemplated by the statute (*218 Cal. App. 3d 362, 369)* .

[c] Suitability of Property for Recreational Use Does Not Affect Applicability of Immunity

The facts and procedural background of ***Ornelas v. Randolph*** *(1993) 4 Cal. 4th 1095, 17 Cal. Rptr. 2d 594, 847 P.2d 560* , are discussed in *§ 178.130[3][b]*. The Supreme Court reviewed a line of cases from the court of appeal, beginning with *Paige v. North Oaks Partners* [*Paige v. North Oaks Partners (1982) 134 Cal. App. 3d 860]* , in which a so-called suitability exception was developed. Those cases held that the legislature did not intend to grant immunity under *Civ. Code § 846* to owners of land that was not suitable for recreational purposes. The Supreme Court rejected this construction of the statute and concluded that "the plain language of the statute admits of *no* exceptions, either for property 'unsuitable' for recreational use or otherwise" (*4 Cal. 4th 1095, 1105* ; emphasis in original). The immunity extends to any owner of any interest in any land that is used for a recreational purpose, without exception. "The determination as to whether the land is 'suitable' for recreation is placed on the user, not the courts" (*4 Cal. 4th 1095, 1106)* .

[d] Immunity Not Qualified by Public Trust Doctrine If No Affirmative Acts Impede Public's Use of Water

In ***Charpentier v. Von Geldern*** *(1987) 191 Cal. App. 3d 101, 236 Cal. Rptr. 233* , after entering defendant's land to reach a river, plaintiff was injured while diving. Plaintiff brought an action against defendant, alleging she had willfully and maliciously failed to guard or warn against the dangerous condition of the river. Defendant asserted the immunity of *Civ. Code § 846* as an affirmative defense and moved for summary judgment. The motion was granted and the action dismissed by the trial court. Plaintiff appealed.

The court of appeal affirmed. Plaintiff argued that the public's right to the free and unimpeded use of navigable waterways, constitutionally protected by *Cal. Const. art. X, § 4*, qualified defendant's immunity under *Civ. Code § 846*. The court disagreed that the qualification was applicable, and in its decision explained and distinguished *Pacific Gas & Elec. Co. v. Superior Court (1983) 145 Cal. App. 3d 253, 193 Cal. Rptr. 336* . It noted that *Civ. Code § 846* does not protect a landowner when there has been no entry on or use of the land for a recreational purpose. The court explained that the *Civ. Code § 846* immunity is qualified by the public trust doctrine only when the landowner has performed an affirmative act tending to obstruct or impede the public's free use of navigable waters (*191 Cal. App. 3d 101, 108-109)* . The court found that plaintiff had entered defendant's land, making the immunity applicable, and that defendant had made no affirmative act in the use of her property tending to obstruct or impede use of the river, making the qualification inapplicable (*191 Cal. App. 3d 101, 109-110)* . The court also noted that there is no legal obligation on the part of a landowner subject to the public trust doctrine to inspect or warn of natural hazards in navigable waters

subject to recreational use abutting the property, or to make that water safe for recreational uses by trespassers or those on the water by means other than access over the abutting land (*191 Cal. App. 3d 101, 111)* . It concluded that the only duty owed plaintiff by defendant under *Civ. Code § 846* was to refrain from willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity (*191 Cal. App. 3d 101, 113)* .

[e] Immunity Extends to Negligent Conduct of Persons

In ***Drummond v. Desmarais*** *(2009) 176 Cal. App. 4th 439, 98 Cal. Rptr. 3d 183* , the plaintiff was a trespasser who drove his all-terrain vehicle onto private property owned by a tree-farming corporation to look at a pond. While driving on the corporation's property, the plaintiff's vehicle was struck by a vehicle driven by an employee of the corporation. The employee was leaving work because of an eye injury. Theplaintiff brought suit against the corporation and the employee for negligent operation of a motor vehicle and premises liability. The trial court granted motions for summary judgment brought by both defendants on the grounds that *Civ. Code § 846* provided immunity because the plaintiff's injuries were suffered during recreational use of private property. The plaintiff appealed.

The court of appeal affirmed, agreeing that *Civ. Code § 846* protected the defendants from liability. The court rejected the plaintiff's argument that the statute only protects private landowners from dangers presented by the premises per se. Instead, the court held that the protections afforded by *Civ. Code § 846* are "extremely broad," protect the landowner from liability for conduct that constitutes ordinary negligence, and extend to dangers presented by the drivers of vehicles. Therefore, because the conditions for immunity under *Civ. Code § 846* were otherwise present, immunity for the injuries was properly granted (*77 Cal. App. 4th 1424, 1427-1430)* . The court also held that *Veh. Code § 17150*, which generally makes the owner of a motor vehicle liable for injuries caused by the negligent operation of the vehicle by another, was inapplicable to the facts of the case (*77 Cal. App. 4th 1424, 1430-1431)* .

[f] Employer/Landowner Protected From Liability For Injury-Causing Conduct of Employee

The facts and procedural background of ***Shipman v. Boething Treeland Farms, Inc.*** *(2000) 77 Cal. App. 4th 1424, 92 Cal. Rptr. 2d 566 , overruled in part, Klein v. United States of America (2010) 50 Cal. 4th 68, 81, 112 Cal. Rptr. 3d 722, 235 P.3d 42* , are discussed in *§ 178.130[3][e]*. The court of appeal also rejected the plaintiff's argument that his claim of negligent supervision of the employee by the corporate defendant survived the immunity provisions of *Civ. Code § 846*. The court held that, even assuming the employer negligently permitted the employee to drive, the employer was still immune because the plaintiff was injured when engaging in a recreational activity expressly covered by *Civ. Code § 846*. The court concluded that holding an employer liable under general principles that govern the liability of employers for injuries caused by the conduct of their employees would thwart the purpose of *Civ. Code § 846* if that statute otherwise provided immunity (*77 Cal. App. 4th 1424, 1431)* .

[g] Express Invitation by Landowner Does Not Extinguish Immunity of Other Estate Owners

In ***Jackson v. Pacific Gas & Elec. Co.*** *(2001) 94 Cal. App. 4th 1110, 114 Cal. Rptr. 2d 831* , the plaintiff was a minor who was visiting the home of a friend. He and the friend went out into the yard to fly a kite, at the suggestion of the friend's mother. The kite eventually blew onto the adjacent property, which was owned by the friend's grandmother, and became entangled in power lines belonging to the defendant, a utility company. The plaintiff was trying to retrieve the kite, using an aluminum pole, when the pole touched an electrical line. An action alleging negligence and negligence per se was filed on the plaintiff's behalf against the defendant. The trial court granted summary judgment for the defendant on the grounds that the action was barred by *Civ. Code § 846*, and the plaintiff appealed.

The court of appeal affirmed. The plaintiff argued that summary judgment was improper because his friend's mother had expressly invited him to play on the two adjacent properties, extinguishing the recreational user immunity pursuant to the express invitation exception of *Civ. Code § 846* (discussed in *§ 178.131*). The defendant, by contrast, argued that only an express invitation from it could extinguish its immunity, which extends to the owner of easement rights in the

land. Although noting that a factual issue remained as to whether the plaintiff received an express invitation to enter the adjacent property owned by his friend's grandmother, the court concluded that this issue was irrelevant to resolving the legal issue of whether the express invitation exception applies to the immunity of an easement holder (*94 Cal. App. 4th 1110, 1116-1117)* . The court agreed with the plaintiff that the "landowner" that may extend an express invitation onto the premises under the statute refers only to the owner of the fee--in this case, the plaintiff's friend's mother or grandmother--because an easement holder cannot "expressly invite" persons onto the premises (*94 Cal. App. 4th 1110, 1118)* . The court also held, however, that an express invitation from the fee owner, while extinguishing the recreational use immunity of the fee owner, does not extinguish the immunity of other owners of estates in the land. Therefore, the recreational use immunity of the defendant, which existed by virtue of its easement rights for purposes of maintaining the power lines, was not extinguished by an express invitation onto the land extended by the owner of the real property (*94 Cal. App. 4th 1110, 1118-1119)* .

[h] Immunity Applies to Claims of Negligence Per Se

The factual and procedural background of ***Jackson v. Pacific Gas & Elec. Co.*** *(2001) 94 Cal. App. 4th 1110, 114 Cal. Rptr. 2d 831* , is provided in § 178.130[3][g]. After concluding that the immunity conferred on the defendant by *Civ. Code § 846* was not extinguished by the express invitation of the landowner, the court addressed the plaintiff's claim that this statutory immunity did not protect the defendant from negligence per se liability predicated on the defendant's alleged violation of provisions of the Public Utilities Code. Assuming that the plaintiff had not waived the claim by failing to properly argue it before the trial court, the court held that *Pub. Util. Code § 2106,* which the plaintiff relied on and which generally provides for the liability of a utility for all loss or damage caused by its wrongful acts, does not impose absolute liability on utilities regardless ofother contrary statutes or rules (*94 Cal. App. 4th 1110, 1119-1120)* . The court then held that the immunity granted by *Civ. Code § 846* is not limited to immunity from claims based on simple negligence, but also applies to shield a defendant from liability for negligence per se--that is, negligence presumed to exist by virtue of the defendant's violation of a statute, ordinance, or regulation (*94 Cal. App. 4th 1110, 1120-1121)* .

[i] Homeowner's Driveway Right-of-Way Over Public Trail Is Protected Property Interest

In ***Miller v. Weitzen*** *(2005) 133 Cal. App. 4th 732, 35 Cal. Rptr. 3d 73* , the horse that the plaintiff was riding fell as they were crossing a private driveway that intersected a public trail. The homeowners had recently resurfaced the driveway, and prior to the plaintiff's accident another horse had recently fallen in the same spot while crossing the driveway. The organization responsible for maintaining the public trail had placed signs on both sides of the driveway warning riders of the slippery conditions, although the plaintiff claimed not to have seen the signs. The plaintiff sued the homeowners who had constructed the driveway, as well as the organization responsible for maintaining the trail. At trial, the court determined that *Civ. Code § 846* applied to both the organization and the homeowners, and the jury was instructed that the homeowners could be liable only if the jury found that the homeowners' failure to warn or prevent the plaintiff's injury was willful or malicious. The jury found the organization liable for 60 percent of the plaintiff's injury, found the plaintiff liable for the other 40 percent, and found the homeowners not liable. The plaintiff appealed the judgment as it applied to the homeowners.

The court of appeal affirmed. The court rejected the plaintiff's argument that the recreational use immunity statute did not apply to the homeowners because they did not own the public trail on which the accident occurred. The court noted that the property interests protected by *Civ. Code § 846* are exceptionally broad, because the statute applies to protect any "owner of any estate or any other interest in real property, whether possessory or nonpossessory." As homeowners, these defendants held an encroachment permit that enabled them to construct a driveway to cross the trail to the road, as well as the right to enter and exit their property by way of that driveway. The court held that a homeowner's right of way to construct a driveway over an adjacent public trail clearly fit within the definition of any "interest in real property" under the statute, and therefore the statute was properly applied to those defendants (*133 Cal. App. 4th 732, 738-739)* .

[4] Additional Authorities

[a] No Liability to Recreational User

In *Mattice v. United States of Am., Dep't of Interior (9th Cir. 1992) 969 F. 2d 818* , the Ninth Circuit upheld the federal district court's grant of summary judgment to defendant United States government, based on a landowner's immunity for negligence under the recreational use statute [*Civ. Code § 846*]. Immunity applied to an accident occurring on a paved public road within a national park, because the national park was the premises to which the statute applied and including the road as part of that premises serves the statute's purpose of encouraging the federal government to keep its park land open for recreational use (*969 F.2d 818, 822)* .

In *Mansion v. United States (9th Cir. 1991) 945 F. 2d 1115* , the Ninth Circuit upheld the federal district court's grant of summary judgment to defendant United States government, based on a landowner's immunity for negligence under the recreational use statute [*Civ. Code § 846*]. Immunity applied even though the property in question, a park located entirely within the grounds of a military facility, was not open to the general public. The legislative goal of encouraging property owners to open their land to the public does not mean that immunity applies only to land owners who allow anyone and everyone free access to their property. Indeed, *Civ. Code § 846* does not use the word "public" or any equivalent synonym (*945 F.2d 1115, 1117-1118)* .

In *Bacon v. Southern Cal. Edison Co. (1997) 53 Cal. App. 4th 854, 62 Cal. Rptr. 2d 16* , the court of appeal affirmed the trial court's grant of summary judgment for defendant, based on the immunity provision of *Civ. Code § 846*. The trial court ruled that plaintiff failed to show an issue of fact as to whether defendant willfully and maliciously failed to maintain an electrical transmission tower or warn or guard against a dangerous condition of the tower where plaintiff, a thirteen year old boy was injured by the shock he received after climbing to the top of the tower. The court of appeal found that defendant had refuted plaintiff's allegation of willful or malicious conduct by presenting evidence that it placed barbed wire and a warning sign at the tower and that the sign and barriers were extant at the time plaintiff climbed the tower. Although plaintiff argued that the warning sign and barriers were in a state of disrepair, the court determined that the evidence showed, at most, that defendant's conduct was negligent and negligence was insufficient to overcome *Civ. Code § 846* immunity (*53 Cal. App. 4th 854, 859)* .

In *Collins v. Tippet (1984) 156 Cal. App. 3d 1017, 203 Cal. Rptr. 366* , the court of appeal upheld the trial court's judgment for defendant, based on the immunity of landowners for negligence to trespassers or licensees recreating on their property free of charge. The immunity applied eventhough defendant's beach property had become subject to a public easement for recreational use, and the injury was caused by concrete material falling from defendant's overlooking cliff, which was not subject to easement (*156 Cal. App. 3d 1017, 1020)* .

[b] Recreational Purpose

In *Mattice v. United States of Am., Dep't of Interior (9th Cir. 1992) 969 F. 2d 818* , the Ninth Circuit upheld the federal district court's grant of summary judgment to defendant United States government, based on a landowner's immunity for negligence under the recreational use statute [*Civ. Code § 846*]. Plaintiff had gathered with friends at a picnic area in a national park and offered to drive a friend home after the party because he had been drinking. The friend took her on a test drive to be sure she could operate his car, and she was injured when she drove off a park road. Although plaintiff was not engaged in a recreational activity at the time of the accident, immunity applied because plaintiff had entered the premises for a recreational purpose (*969 F.2d 818, 821)* .

[c] Statutory List Is Only Illustrative

The factual and procedural background of *Jackson v. Pacific Gas & Elec. Co. (2001) 94 Cal. App. 4th 1110, 114 Cal. Rptr. 2d 831* , is provided in § 178.130[3][g]. In that case, the court concluded that the flying of a kite is indisputably a

recreational activity under *Civ. Code § 846*. In addition, consistent with the statute's broad language, the steps that a kite flier takes to retrieve a wayward kite are included as well, because the risk that the wind will blow the kite in an unintended direction or to an undesired location are inherent in the nature of the activity (*94 Cal. App. 4th 1110, 1115)* .

[d] Suitability of Property for Recreational Use Does Not Affect Applicability of Immunity

In *Ravell v. United States (9th Cir. 1994) 22 F.3d 960* , plaintiff attended an air show at a military base that was normally closed to the general public. During the air show, which was open to the general public and widely publicized, members of the public, including plaintiff, were allowed onto the flight line, where aircraft are parked and tied down to large metal hooks embedded in the concrete. Plaintiff was injured when she tripped over one of these hooks and fell. In plaintiff's action for negligence against the United States, the court of appeals affirmed the district court's grant of summary judgment to defendant. The court rejected plaintiff's argument that the federal government was not entitled to immunity under *Civ. Code § 846* because the flight line was not suitable for recreational use, noting that the *California Supreme Court in Ornelas v. Randolph (1993) 4 Cal. 4th 1095, 1108, 7 Cal. Rptr. 2d 594, 847 P.2d 560* (discussed in *§ 178.130[3][c]*), has held that there is no suitability exception to the recreational use statute (*22 F.3d 960, 962)* .

[e] Immunity Extends to Negligent Conduct of Persons

In *Manuel v. Pacific Gas & Electric Co. (2009) 173 Cal. App. 4th 927, 93 Cal. Rptr. 3d 9* , a 14-year-old girl was killed after she was electrocuted when she climbed an electric utility tower. Her parents brought suit against the electric company, but the trial court granted summary judgment for the defendant based on recreational-use immunity under *Civ. Code § 846*. The court of appeal affirmed, agreeing that the willful misconduct exception of *Civ. Code § 846* did not abrogate the company's immunity. After reviewing the relevant case law, the court of appeal concluded that there are three essential elements that must be present to raise a negligent act to the level of willful misconduct: (1) actual or constructive knowledge of the peril, (2) actual or constructive knowledge that injury is a probable, rather than merely a possible, result of the danger, and (3) a conscious failure to act by the defendant to avoid the peril (*173 Cal. App. 4th 927, 945)* . The court concluded that the plaintiffs had failed to show that it was probable, rather than merely possible, that someone would climb the tower and get electrocuted, or that defendant consciously failed to act to avoid the peril. The court noted that the electric company had placed anti-climbing guards on the electric tower, which was located in a remote, isolated location, although there was evidence that at least one of the vertical anti-climbing guards was installed incorrectly and no horizontal guards had been installed. According to the court, however, this evidence demonstrated at most that the electric company had been negligent in placing the anti-climbing guards on the tower, and this conduct did not rise to the level of willful misconduct sufficient to abrogate the immunity for negligent conduct that the company was otherwise granted by *Civ. Code § 846*. Conceding that there may have been a factual dispute as to whether written warning signs had been present on the tower at the time of the injury, the court concluded that the jagged metal anti-climbing devices also served as a warning of the danger and, under such circumstances, no sign was necessary (*173 Cal. App. 4th 927, 946-948)* .

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17-178 California Points & Authorities § 178.131

§ 178.131 Opposing Contention That Recreational User of Real Property Barred From Recovery for Injuries Sustained Thereon--User Expressly Invited [Civ. Code § 846]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT OWNER IS LIABLE FOR THE HARM TO PLAINTIFF BECAUSE PLAINTIFF WAS A RECREATIONAL USER OF DEFENDANT'S PREMISES WHO WAS EXPRESSLY INVITED BY DEFENDANT TO COME ON THE PREMISES

A. Defendant Liable to Recreational User Expressly Invited Onto Premises. The immunity provisions of *Section 846 of the Civil Code* do not limit the liability on the part of an owner of an interest or estate in real property that might otherwise exist for injuries to a recreational user who was expressly invited by the landowner to come on the premises rather than merely permitted (*Civ. Code § 846*).

[*Optional*] **B. Express Invitation Need Not Be Invitation to Engage in Recreational Activity.** To fall under the express invitation exception to the immunity provisions of *Civil Code Section 846*, the injured person need not have been invited expressly for the purpose of engaging in the recreational activity (*Calhoon v. Lewis (2000) 81 Cal. App. 4th 108, 114, 96 Cal. Rptr. 2d 394*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that a recreational user is barred from recovery for injuries incurred on the premises if the recreational user was expressly invited by the landowner to come on the premises. If the recreational user was expressly invited, then liability for negligence on the part of the landowner is not precluded by *Civ. Code § 846*.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel is responding to the contention that a recreational user is barred from recovery for injuries. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the express invitation given by the landowner that makes the immunity provisions of *Civ. Code § 846* inapplicable.

[c] Opposing Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by § 178.130.

[3] Discussion of Authorities

[a] Express Invitation Need Not Be Invitation to Engage in Recreational Activity

In ***Calhoon v. Lewis*** *(2000) 81 Cal. App. 4th 108, 96 Cal. Rptr. 2d 394* , the plaintiff, at the invitation of a friend, arrived at his friend's parents' home to pick up his friend so that the two could drive downtown to visit the friend's girlfriend. The plaintiff, who began skateboarding in the driveway while he waited for his friend to get ready, fell and impaled himself on a pipe inside a planter located in the driveway. The plaintiff sued the owners of the home, alleging negligence and premises liability. The trial court granted summary judgment to the defendants on the grounds that *Civ. Code § 846* provided immunity from liability. The plaintiff appealed.

The court of appeal affirmed the summary judgment on the basis of primary assumption of the risk, but held that the trial court erred in granting summary judgment based on *Civ. Code § 846*. The court of appeal concluded that the facts fell under the express invitation exception to immunity from liability under *Civ. Code § 846*. The court rejected the defendants' argument that the exception did not apply because the plaintiff was not invited onto the property expressly for the purpose of skateboarding. The court noted that the statutory language does not require that the invitation be for a recreational purpose, but merely distinguishes between a person who is expressly invited onto the property and one who is merely permitted to come onto the property (*81 Cal. App. 4th 108, 114)* .

[4] Additional Authorities

[a] Defendant Liable to Recreational User Expressly Invited Onto Premises

The facts and procedural background of *Johnson v. Unocal Corp. (1933) 21 Cal. App. 4th 310, 26 Cal. Rptr. 2d 148* , are discussed in *§ 178.132[3][a]*. The court of appeal affirmed the trial court's award of summary judgment in defendant's favor, holding that defendant, who permitted plaintiff's employer to use its picnic grounds without fee for its annual picnic, was immune under *Civ. Code § 846* from liability for plaintiff's injuries at the picnic because plaintiff was a recreational user of defendant's property. The court rejected plaintiff's argument that his employer's signing of the agreement required by defendant for use of the property made defendant liable to him under the exception for persons expressly invited by defendant to come on the premises. The court held that the execution of the agreement was not a direct, personal request from defendant to plaintiff to attend the picnic (*21 Cal. App. 4th 310, 317*).

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17-178 California Points & Authorities § 178.132

§ 178.132 Opposing Contention That Recreational User of Real Property Barred From Recovery for Injuries Sustained Thereon--Consideration Received [Civ. Code § 846]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT OWNER IS LIABLE FOR THE HARM TO PLAINTIFF BECAUSE _____ [PLAINTIFF PAID DEFENDANT A CONSIDERATION FOR PERMISSION TO ENTER HIS/HER PREMISES FOR A RECREATIONAL PURPOSE *or* DEFENDANT RECEIVED CONSIDERATION FROM OTHERS FOR PERMISSION TO ENTER HIS/HER PREMISES FOR THE SAME RECREATIONAL PURPOSE AS PLAINTIFF]

[*EITHER, if consideration was paid by user*]

A. Permission to Enter Granted for Consideration. The immunity provisions of *Section 846 of the Civil Code* do not limit the liability on the part of an owner of an interest or estate in real property that might otherwise exist for injuries suffered in any case where permission to enter for a recreational purpose was granted for a consideration other than that paid by the state (*Civ. Code § 846*).

[*OR, if consideration received by others*]

A. Consideration Received From Others for Same Purpose. The immunity provisions of *Section 846 of the Civil Code* do not limit the liability on the part of an owner of an interest or estate in real property that might otherwise exist for injuries in any case where consideration has been received from others for permission to enter on the premises for the same purpose (*Civ. Code § 846*).

[*AND*]

B. Nature of Consideration. The consideration required by the exception to the immunity provisions of *Section 846 of the Civil Code* must be some immediate and reasonably direct advantage, usually in the form of an entrance fee; it cannot be merely a potential reimbursement, but must be a present actual benefit bestowed on the property owner (*Johnson v. Unocal Corp. (1933) 21 Cal. App. 4th 310, 316-317, 26 Cal. Rptr. 2d 148*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that a recreational user is barred from recovery for injuries incurred on the premises if consideration was paid for permission to enter on the premises for a recreational purpose by the user or by others for the same purpose. If consideration was paid or received for permission to enter, liability for negligence on the part of the landowner is not precluded by *Civ. Code § 846*. If the consideration was paid by the user, then the first paragraph should be used. If the consideration was paid by others for the same purpose, then the second paragraph should be used. The third paragraph should be used in either case.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel is responding to the contention that a recreational user is barred from recovery for injuries. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, if the first paragraph is used, counsel should discuss the fact that permission was granted for a consideration. If the second paragraph is used, counsel should discuss the fact that consideration was paid by another and that it was paid for the same recreational purpose. In either case, counsel should discuss the nature of the consideration, showing that it consisted of some immediate and reasonably direct advantage.

[c] Opposing Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 178.130*.

[3] Discussion of Authorities

[a] Nature of Consideration

In ***Johnson v. Unocal Corp.*** *(1933) 21 Cal. App. 4th 310, 26 Cal. Rptr. 2d 148* , defendant granted plaintiff's employer permission to use defendant's picnic grounds for the employer's annual company picnic. Defendant required the employer to execute a form agreement setting forth various rules and regulations for use of the grounds, but charged no fee for use of the property. The agreement contained a hold harmless provision under which plaintiff's employer agreed to indemnify defendant against all claims in connection with the use of defendant's property, including any costs incurred by defendant in connection with those claims. Plaintiff was injured at the picnic and sued defendant. The trial court granted summary judgment in defendant's favor on the grounds of immunity from liability to recreational users under *Civ. Code § 846*, and plaintiff appealed.

The court of appeal affirmed, rejecting plaintiff's argument that defendant was not immune from liability because the hold harmless agreement was consideration paid by his employer for use of defendant's property (*21 Cal. App. 4th 310, 312*). The court refused to engraft onto *Civ. Code § 846* the broad definition of "good consideration" found in *Civ.*

Code § 1605, holding that exceptions to the recreational use statute's immunity from liability must be construed narrowly to effect the legislature's intention to encourage landowners to permit recreational use of their property (*21 Cal. App. 4th 310, 314-315*). The court concluded that the consideration that defeats immunity may be slight, but must be more than the mere potential for reimbursement for defense costs offered by the hold harmless provision signed by plaintiff's employer. The consideration must be, at minimum, some present actual benefit; the exception to immunity for consideration does not apply unless the landowner gains some immediate and reasonably direct advantage, generally, but not necessarily, taking the form of an entrance fee (*21 Cal. App. 4th 310, 316-317*).

[4] Additional Authorities

[a] Defendant Liable to Recreational User Expressly Invited Onto Premises

In *Ravell v. United States (9th Cir. 1994) 22 F.3d 960* , the plaintiff was injured while attending an air show at a military base that was normally closed to the general public. The show had been widely publicized in newspapers, and the plaintiff attended as a member of the general public, although her son, who was stationed at the base, also asked her to attend. In the plaintiff's action for negligence against the United States, the court of appeals affirmed the district court's grant of summary judgment to the defendant. The court rejected the plaintiff's argument that the federal government was not entitled to immunity under *Civ. Code § 846* because she was an express invitee. Relying on *Johnson v. Unocal Corp.* [*Johnson v. Unocal Corp. (1993) 21 Cal. App. 4th 310, 317, 26 Cal. Rptr. 2d 148]* , the court held that an invitation to the general public was not an express invitation to the plaintiff because it was not a direct, personal request from the federal government to the plaintiff. Also, the plaintiff presented no evidence that her son, who invited her to the show, was authorized to make express invitations on behalf of the federal government that went beyond the advertised invitation to the general public (*22 F.3d 960, 963)* .

[b] Nature of Consideration

In *Mansion v. United States (9th Cir. 1991) 945 F.2d 1115* , the plaintiff was a retired Navy civilian employee who was injured at an annual picnic held on a military facility by an unofficial organization of former Navy civilian employees. The federal district court granted summary judgment to defendant United States government, holding that defendant was a landowner immune from liability under the recreational use statute [*Civ. Code § 846*]. On appeal, plaintiff claimed that statutory immunity did not apply because his attendance at the picnic conferred the benefit of improved labor relations on his former employer and this benefit was a consideration he had paid for entering the premises. The Ninth Circuit affirmed the district court, holding that this interpretation of what constitutes a valid consideration was too broad and adopting it would allow an exception to swallow the rule of the statute (*945 F.2d 1115, 1118-1119)* .

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17-178 California Points & Authorities § 178.133

§ 178.133 Opposing Contention That Recreational User of Real Property Barred From Recovery for Injuries Sustained Thereon--Malicious or Willful Failure to Warn or Guard [Civ. Code § 846]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT OWNER IS LIABLE FOR THE HARM TO PLAINTIFF ALTHOUGH PLAINTIFF WAS A RECREATIONAL USER OF DEFENDANT'S PREMISES BECAUSE A RECREATIONAL USER OF REAL PROPERTY IS NOT BARRED FROM RECOVERY FOR INJURIES SUSTAINED THEREON WHEN THE OWNER WILLFULLY OR MALICIOUSLY FAILS TO WARN OF OR GUARD AGAINST A DANGEROUS _____ [CONDITION *or* USE *or* STRUCTURE *or* ACTIVITY].

A. Willful or Malicious Failure to Warn or Guard. The immunity provisions of *Section 846 of the Civil Code* do not limit the liability of an owner of an interest or estate in real property that might otherwise exist for injuries to recreational users incurred on the premises for willful or malicious failure to warn or guard against a dangerous condition, use, structure, or activity (*Civ. Code § 846*).

B. Willful Misconduct. Willful or wanton misconduct is intentional wrongful conduct, done either with knowledge that serious injury to another will probably result or with a wanton and reckless disregard of the possible results. Negligence becomes willful misconduct if there is actual or constructive knowledge of the peril to be apprehended, actual or constructive knowledge that injury is a probable rather than possible result of the danger, and conscious failure to act to avoid the peril (*Nazar v. Rodeffer (1986) 184 Cal. App. 3d 546, 552, 229 Cal. Rptr. 209* ; *Lostritto v. Southern Pac. Transp. Co. (1977) 73 Cal. App. 3d 737, 744, 140 Cal. Rptr. 905*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that a recreational user is barred

from recovery for injuries incurred on the premises when an injury was due to a willful or malicious failure to warn or guard against a dangerous condition, use, structure, or activity. The recreational user need not be a paying or invited guest in orderto take advantage of this exception to the immunity provisions of *Civ. Code § 846*.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to respond to the contention that *Civ. Code § 846* bars recovery for injuries to a recreational user. They also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the failure to warn or guard that resulted in the injuries complained of and the willful or malicious nature of the failure (for example, defendant knew that persons using the property had previously been seriously injured by the dilapidated bridge and knew that persons using the property would be unaware of the dangerous condition of the bridge but failed to post any warning signs).

[c] Opposing Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 178.130*.

[3] Discussion of Authorities

[a] Willful Misconduct

In ***Nazar v. Rodeffer*** *(1986) 184 Cal. App. 3d 546, 229 Cal. Rptr. 209* , plaintiff was injured in a motorcycle accident on defendants' property, which was a vacant lot containing a concrete drainage ditch obscured by weeds and vegetation. Plaintiff had entered the property for the recreational purpose of riding motorcycles and was injured when he drove his motorcycle into the ditch. Plaintiff's complaint alleged negligence by defendants in failing to warn of the existence and location of the ditch. The trial court granted defendants' motion for summary judgment on the ground that *Civ. Code § 846* immunized them from liability. Plaintiff appealed to the court of appeal, claiming that a triable issue of fact existed regarding whether defendants' failure to warn was willful misconduct making immunity under *Civ. Code § 846* inapplicable.

The court of appeal reversed the judgment, holding that plaintiff's conclusory general statement that defendants acted willfully and maliciously was not sufficient to establish willful misconduct. The court held that willful misconduct has a well-established definition in California: namely, intentional wrongful conduct done either with a knowledge that serious injury to another will probably result or with a wanton and reckless disregard of the possible results. The three elements that must be present to raise a negligent act to the level of willful misconduct are actual or constructive knowledge of the peril to be apprehended, actual or constructive knowledge that injury is a probable rather than possible result of the danger, and conscious failure to act to avoid the peril (*184 Cal. App. 3d 546, 552-553)* .

In ***Lostritto v. Southern Pac. Transp. Co.*** *(1977) 73 Cal. App. 3d 737, 140 Cal. Rptr. 905* , plaintiff, a 16-year-old boy, broke his neck when he dove into a stream from a trestle owned by defendant. The depth of the stream fluctuated with the tides of the ocean. The complaint alleged negligence and willful misconduct on the part of defendant in failing to warn of the danger in diving off the trestle into the stream or to take measures to prevent persons from diving off the trestle. The trestle was located near a popular swimming hole and there was easy access to the trestle from the beaches bordering the stream. There was evidence that defendant's employees and defendant's lawyer were told of the practice of diving off the trestle and that an accident in which a person was killed diving off the bridge had previously occurred. The jury returned a verdict for plaintiff on the willful misconduct issue. The trial court granted a motion for a new trial based on newly discovered evidence that plaintiff was warned by two young men that the water was not deep enough

but denied defendant's motion for judgment notwithstanding the verdict on the issue of willful misconduct. The court also granted a judgment notwithstanding the verdict on the negligence count on the basis that plaintiff was guilty of contributory negligence as a matter of law.

Defendant appealed from the judgment and the denial of its motion for a judgment notwithstanding the verdict on the ground that there was no evidence to support the jury's finding of willful misconduct on the part of Southern Pacific. The court of appeal affirmed the granting of the new trial on the basis of newly discovered evidence and affirmed the denial of defendant's motion for judgment notwithstanding the verdict on the willful misconduct issue (*73 Cal. App. 3d 737, 750)* . As to the judgment notwithstanding the verdict on the negligence count, the court stated that it was unnecessary to discuss and dismissed the negligence count because a defendant is not liable for negligence under *Civ. Code § 846* (*73 Cal. App. 3d 737, 746)* .

In doing so, the court stated that the willful misconduct is intentional wrongful conduct, done either with knowledge that serious injury to another will probably result, or with a wanton and reckless disregard of the possible results. The court held that based on the facts of the case the necessary elements of willful misconduct could be found (*73 Cal. App. 3d 737, 744)* .

[4] Additional Authorities

[a] Willful or Malicious Failure to Warn or Guard

In *Mattice v. United States of Am., Dep't of Interior (9th Cir. 1992) 969 F.2d 818* , plaintiff was injured when she drove a car through a wooden guardrail on a winding road in a national park. Signs on the road indicated curves ahead and advised a speed of 15 miles per hour. Plaintiff claimed that defendant's use of wooden, rather than metal, guardrails and its failure to provide additional reflectors and warning signs and a permanent center and shoulder line were willful misconduct that deprived defendant of statutory immunity for negligence under *Civ. Code § 846*. The Ninth Circuit disagreed, holding that the dangers of the road were obvious and involved no hidden peril and therefore that defendant had no reason to think drivers would not take geographic conditions into consideration when driving on this road. Failure to take additional precautions was at most negligence and not a conscious failure to act to avoid the danger of driving off the road (*969 F.2d 818, 822-823)*

In *Termini v. United States (9th Cir. 1992) 963 F.2d 1264* , plaintiff entered a national forest to sightsee, drove along a dirt road that ended without warning in a steep cliff, and was seriously injured when his vehicle rolled over the cliff. The Ninth Circuit held that immunity from liability under *Civ. Code § 846* did not apply due to defendant United States government's willful and malicious behavior. Applying the standard of *New v. Consolidated Rock Prods. Co. (1985) 171 Cal. App. 3d 681, 689, 217 Cal. Rptr. 522* (discussed in *§ 178.133[4][b]*), the court ruled that defendant had constructive knowledge that injury due to the construction of this road was probable, rather than merely possible, because any reasonable person would have recognized that accidents were probable on a road leading directly and without warning to the edge of a cliff (*963 F.2d 1264, 1268)* .

[b] Willful Misconduct

In *New v. Consolidated Rock Prods. Co. (1985) 171 Cal. App. 3d 681, 217 Cal. Rptr. 522* , plaintiffs were injured when they rode their motorcycles over a cliff created by defendant on its property. Defendant appealed the judgment entered after a jury verdict in plaintiff's favor, contending that the jury was given an erroneous instruction as to defendant's duty of care under *Civ. Code § 846* because the instruction allowed the jury to find liability regardless of defendant's actual state of mind. The court of appeal affirmed, holding that the instruction correctly stated that to prove willful misconduct it is sufficient to establish that a reasonable person under the same or similar circumstances would be aware of the dangerous character of the conduct (*171 Cal. App. 3d 681, 688)* . The court held that the well-established, well-defined meaning of willful misconduct in California law is intentional wrongful conduct, done either with a

knowledge that serious injury to another will probably result, or with a wanton and reckless disregard of the probable results. To raise a negligent act to the level of willful misconduct, there must be actual or constructive knowledge of the peril, actual or constructive knowledge that injury is a probable result of the peril, and conscious failure to act to avoid the peril (*171 Cal. App. 3d 681, 689-690)* . The court held that constructive knowledge is measured by an objective standard, and the test is whether a reasonable person under the same or similar circumstances would be aware of the dangerous character of his or her conduct (*171 Cal. App. 3d 681, 690)* . The court also held that *Civ. Code § 846* is not intended to limit liability to situations where a defendant acts with a subjectively culpable state of mind simply because it uses the phrase willful or malicious, but that an objective standard is used here, as it is throughout tort law (*171 Cal. App. 3d 681, 691-692)* .

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§ 178.134 Opposing Contention That Civ. Code § 846 Bars User of Real Property From Recovery for Injuries Sustained Thereon--Use Not Recreational [Civ. Code § 846]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT OWNER IS LIABLE FOR THE HARM TO PLAINTIFF USER OF REAL PROPERTY BECAUSE A USER OF REAL PROPERTY IS NOT BARRED FROM RECOVERY FOR INJURIES SUSTAINED THEREON BY *CIVIL CODE SECTION 846* WHEN THE USE OF THE PROPERTY WAS NOT RECREATIONAL IN NATURE WITHIN THE MEANING OF THE STATUTE.

A. Purpose Must Be Recreational. The immunity provisions of *Civil Code Section 846* apply only if the use of the property at the time of the accident was recreational in nature within the meaning of the statute (*Gerkin v. Santa Clara Valley Water Dist. (1979) 95 Cal. App. 3d 1022, 1026, 157 Cal. Rptr. 612*).

[*Optional*] **B. Purpose of Use at Time of Entry on Land Controlling.** Whether or not *Civil Code Section 846* applies depends on the purpose of the use of the land at the time of entry and not on the underlying purpose for the entire trip (*Smith v. Scrap Disposal Corp. (1976) 96 Cal. App. 3d 525, 529, 158 Cal. Rptr. 134*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that *Civ. Code § 846* operates to preclude liability for injuries sustained when the use being made of the property was not recreational in nature within the meaning of the statute. Optional Paragraph B should be used when the underlying trip was recreational in nature but the use of the particular property during the course of the trip was not.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the

specific context in which counsel is responding to the issue of the applicability of *Civ. Code § 846*. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the nature of the use of the land as not being recreational at the time of entry.

[c] Opposing Points and Authorities

In an appropriate case, these and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 178.130*.

[3] Discussion of Authorities

[a] Purpose Must Be Recreational

In ***Gerkin v. Santa Clara Valley Water Dist.*** *(1979) 95 Cal. App. 3d 1022, 157 Cal. Rptr. 612* , plaintiff was injured when she fell from a bridge that crossed a creek to which defendant owned easement rights. Plaintiff was walking across the bridge to get to a market to use the telephone and buy a candy bar. Summary judgment was granted in favor of defendants on the ground that plaintiff was engaged in conduct specified in *Civ. Code § 846* in that she was hiking.

The court of appeal reversed the summary judgment and held that there existed a triable issue of fact as to whether plaintiff was hiking on the property because such a determination must be made through a consideration of the totality of facts and circumstances, including the path taken, the length and purpose of the journey, the topography of the property in question, and the prior use of the land (*95 Cal. App. 3d 1022, 1027)* . In doing so the court countered the contention that hiking was to be equated with walking by stating that a purely literal interpretation of *Civ. Code § 846* would not prevail over the purpose of the legislation, which was to encourage landowners to keep their property open to the public for recreational activities by limiting their liability for injuries sustained in the course of those activities. The court went on to say that both the language and historical background of *Civ. Code § 846* compel the conclusion that the legislature did not intend to immunize landowners from liability for all permissive or nonpermissive use of their properties, but only those uses that could justifiably be characterized as recreational in nature (*95 Cal. App. 3d 1022, 1026)* .

[b] Purpose of Use at Time of Entry on Land Controlling

In ***Smith v. Scrap Disposal Corp.*** *(1979) 96 Cal. App. 3d 525, 158 Cal. Rptr. 134* , plaintiff was returning from fishing in the San Diego Bay off the National City Marine Terminal when plaintiff followed one of his companions who jumped out of the car and ran onto a portion of the terminal over which defendant held an easement for the storage and stockpiling of metals. While plaintiff was standing on the bulldozer, his friends pressed some of the buttons that started the bulldozer. Plaintiff fell off and the bulldozer fell on his stomach causing injuries. Plaintiff testified in his deposition that he entered the property to stop his companion from riding the bulldozer. Summary judgment was granted in favor of defendant and plaintiff appealed.

The court of appeal reversed, holding that plaintiff did not enter defendant's property to fish and whether or not he entered for the purpose of vehicular riding or to stop his companion from riding the bulldozer was a triable question of fact (*96 Cal. App. 3d 525, 527-528)* . The court stated that the underlying purpose of the trip could not be used to shield defendant from liability if plaintiff entered defendant's property for a nonrecreational purpose (*96 Cal. App. 3d 525, 529)* .

[4] Additional Authorities

[a] Purpose Must Be Recreational

In *Gordon v. Havasu Palms, Inc. (2001) 93 Cal. App. 4th 244, 112 Cal. Rptr. 2d 816* , the passenger of a small, private aircraft that crashed while trying to land at a small dirt airstrip sued the pilot for negligence. The pilot filed a cross-complaint against the owner of the airstrip owner, alleging that the landing strip did not comply with relevant California regulations. The airstrip owner filed a successful motion for summary judgment. The airstrip owner asserted that it was immune under *Civ. Code § 846*, although the trial court granted summary judgment for the airstrip owner on the basis that its actions did not contribute to the crash and did notaddress the immunity claim. The court of appeal reversed the trial court's ruling, finding that there were triable issues of fact surrounding the cause of the crash. The court then addressed the claim that the airstrip owner could nonetheless be immune under *Civ. Code § 846*. The airstrip owner had asserted that the pilot was entering the property for several alleged recreational purposes, although the court of appeal concluded that the only purpose that could potentially trigger immunity under the statute was the plaintiff's stated intention to have lunch at a nearby restaurant. After reviewing the "recreational purposes" listed in the statute, the court concluded that eating lunch in a restaurant, while arguably recreational in nature, is not a recreational purpose under the statute, because this activity was dissimilar to the activities listed in the statute. The court noted that a contrary conclusion would immunize all restaurant owners from liability for injuries to customers, which could not have been intended by the legislature (*93 Cal. App. 4th 244, 256-257)* .

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California Points & Authorities

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California Points & Authorities

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Volume 18 Chapters 180-189 PRETRIAL PROCEEDINGS---to---PROBATE OF WILLS
CHAPTER 180 PRETRIAL PROCEEDINGS

18-180 California Points & Authorities 180.syn

§ 180.syn Synopsis to Chapter 180: PRETRIAL PROCEEDINGS

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§ 180.02 Governing Law

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§ 180.04 Related Discussion and Forms

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§§ 180.05-180.09 [Reserved]

§ 180.10 Supporting Motion to Amend Pleading and Case Management Order--Amendment Is in Furtherance of Justice [Code Civ. Proc. § 576]

[1] FORM

[2] Comments

[a] Use of Form

[b] Initial Case Management Review

[c] Setting a Case Management Conference

[d] Subjects to Be Considered at the Case Management Conference

[e] Case Management Statement

[f] Case Management Order

[g] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Amendments in Furtherance of Justice

[b] Amendment of Conference Order as Subject to Same Standard of Judicial Discretion as Amendment of Pleading

[c] Amendment of Conference Order to Reinstate Fictitiously Named Defendants as Parties

[d] Discretion of Court to Permit Amendments During Trial

[e] Oral Amendment of Conference Order During Trial

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[g] Combined Motion to Amend Pleading and Conference Order

§§ 180.11-180.19 [Reserved]

§ 180.20 Opposing Motion to Amend Pleading and Case Management Order on Ground Amendment Is in Furtherance of Justice [Code Civ. Proc. § 576]--Affirmative Defense That Plaintiff Failed to Comply With Procedural Condition to Commencement of Action as Waived by Prejudicial Delay in Assertion

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Statutory Conditions to Maintenance of Action on Recorded Payment Bond as Procedural Only

[b] Defense of Noncompliance With Procedural Condition to Commencement of Action as Waived If Not Timely Pleaded

[c] Belated Motion to Amend as Properly Denied When Prejudicial

§§ 180.21-180.29 [Reserved]

§ 180.30 Supporting Contention That Sanctions May Be Imposed for Failure to Comply With State or Local Rules or Court Order Relating to Court Conferences or to Participate in Good Faith in Required Conferences [Cal. Rules of Ct., Rule 2.30]

[1] FORM

[2] Comments

[a] Use of Form

[b] Alternative Provisions

[c] Conduct Warranting Sanctions and Procedure for Imposition

[d] Related Pleading and Practice Forms

[e] Related Points and Authorities

[3] Discussion of Authorities

[a] Effect of Judicial Council's Rules

[b] Duties of Persons With Respect to Pretrial Conference

[c] Cal. Rules of Ct., Rule 2.30 as Not Constituting Impermissible Attempt by Judicial Council to Legislate

[d] Violation of Rules of Practice Adopted by Judicial Council as Contempt of Court

§ 180.31 Supporting Contention That Discovery Sanctions May Be Imposed for Failure of Person to Comply With Case Management Order With Respect to Discovery

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Power of Court to Impose Sanctions for Violation of Pretrial Conference Order

[b] Power to Impose Sanction for Failure to Obey Discovery Order

[c] Imposition of Discovery Sanctions Against Party Failing to Comply With Discovery Orders in Pretrial Conference Order

§§ 180.32-180.39 [Reserved]

§ 180.40 Opposing Contention That Sanctions May Be Imposed for Failure to Comply With State or Local Rules or Court Order Relating to Court Conferences or to Participate in Good Faith in Required Conferences [Cal. Rules of Ct., Rule 2.30]--Excessive Sanction for Failure to Attend Settlement Conference

[1] FORM

[2] Comments

[a] Use of Form

[b] Applicability of Form to Pretrial and Trial Setting Conferences

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Insufficient Notice

[b] Ultimate Sanction Inappropriate in First Instance

§ 180.41 Opposing Contention That Sanctions May Be Imposed for Failure to Comply With State or Local Rules or Court Order Relating to Court Conferences or to Participate in Good Faith in Required Conferences [Cal. Rules of Ct., Rule 2.30]--Settlement Conference Was Voluntary Rather Than Required

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Sanction Through Contempt Power Is Inapplicable to Voluntary Settlement Conference

[b] Order of Payment Is Inapplicable to Voluntary Settlement Conference

§§ 180.42-180.49 [Reserved]

§ 180.50 Supporting Motion for Order Granting Preference [Code Civ. Proc. § 36]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Cases Entitled to Priority

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

§§ 180.51-180.54 [Reserved]

§ 180.55 Supporting Motion to Advance, Reset, or Specially Set Case Management Conference or Trial Date [Cal. Rules of Ct., Rules 3.723, 3.1335(b)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Good Cause

[c] Related Pleading and Practice Forms

§ 180.56 Supporting Motion to Advance, Reset, or Specially Set Case Management Conference or Trial Date [Cal. Rules of Ct., Rules 3.723, 3.1335(b)]--Advancement Based on Party's Age and Physical Infirmity

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Advancement Is Required by Age and Infirmity

§ 180.57 Supporting Motion to Advance, Reset, or Specially Set Case Management Conference or Trial Date [Cal. Rules of Ct., Rules 3.723, 3.1335(b)]--Advancement Based on Priority of Case--Eminent Domain Proceeding [Code Civ. Proc. § 1260.010]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Advancement Is Proper in Eminent Domain Proceeding

§§ 180.58-180.59 [Reserved]

§ 180.60 Supporting Contention That Case Is Entitled to Priority--Action Is by Taxpayer to Enjoin Public Improvement Project [Code Civ. Proc. § 526a]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

§ 180.61 Supporting Contention That Case Is Entitled to Priority--Action Is for Declaratory Relief [Code Civ. Proc. § 1062.3(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

§ 180.62 Supporting Contention That Case Is Entitled to Priority--Proceeding Is in Unlawful Detainer [Code Civ. Proc. § 1179a]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Precedence of Unlawful Detainer Proceeding

§ 180.63 Supporting Contention That Case Is Entitled to Priority--Party Is Over 70 Years of Age or Not Expected to Survive Beyond Six Months [Code Civ. Proc. § 36(a), (d)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Setting for Trial

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Moving Party Reached 70 Years of Age

[b] "Shall" Is Mandatory

[c] Party Not Expected to Survive Beyond Six Months

[d] Motion Based on Ill Health of Adverse Party

§ 180.64 Supporting Contention That Case Is Entitled to Priority--Party Under 14 Years of Age in Wrongful Death or Personal Injury Action [Code Civ. Proc. § 36(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Moving Party Under 14 Years of Age in Wrongful Death or Personal Injury Action

[b] "Shall" Is Mandatory

§ 180.65 Supporting Contention That Case Is Entitled to Priority--Priority Is Required in Interests of Justice [Code Civ. Proc. § 36(e)]--To Avoid Mandatory Dismissal for Failure to Bring Action to Trial [Code Civ. Proc. §§ 583.310, 583.360]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Cause for Granting Preference Is Shown When Preference Is Necessary to Avoid Mandatory Dismissal of Case and Other Factors Weigh in Favor of Trial on Merits

[b] Motion to Specially Set After Trial Court Failed to Recalendar Case After Judicial Arbitration

§§ 180.66-180.69 [Reserved]

§ 180.70 Opposing Motion for Order Granting Preference [Code Civ. Proc. § 36]--Action Seeks Relief in Addition to Declaration of Rights and Duties of Parties [Code Civ. Proc. § 1062.3(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Action for Declaratory Relief Neither Necessary nor Proper

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Precedence of Declaratory Relief Action Seeking Additional Relief as Conditional Only

§§ 180.71-180.74 [Reserved]

§ 180.75 Opposing Motion to Advance, Reset, or Specially Set Trial Date [Cal. Rules of Ct., Rules 3.723, 3.1335(b)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Advancement Is Not Matter of Right

[b] Financial Condition Alone Does Not Constitute Good Cause for Advancement

[c] Grant of Motion Will Leave Opposing Party With Inadequate Time to Prepare

§§ 180.76-180.79 [Reserved]

§ 180.80 Opposing Contention That Case Is Entitled to Priority--Party Entitled to Priority Does Not Have Substantial Interest in Case [Code Civ. Proc. § 36(a), (b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

§ 180.81 Opposing Contention That Case Is Entitled to Priority--Priority in Interests of Justice [Code Civ. Proc. § 36(e)]--Good Cause Is Not Established Solely by Fact That Priority Is Necessary to Avoid Mandatory Dismissal for Failure to Bring Action to Trial [Code Civ. Proc. §§ 583.310, 583.360]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Cause Justifying Preference Is Not Established Solely by Fact That Preference Is Necessary to Avoid Mandatory Dismissal

[b] Motion Raises Same Issues as Motion for Discretionary Dismissal for Delay in Prosecution

[c] Guiding Policies

[d] Motion to Specially Set After Trial Court Failed to Recalendar Case After Judicial Arbitration

California Points & Authorities

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Volume 18 Chapters 180-189 PRETRIAL PROCEEDINGS---to---PROBATE OF WILLS
CHAPTER 180 PRETRIAL PROCEEDINGS
PART I. INTRODUCTION

18-180 California Points & Authorities § 180.01

§ 180.01 Scope of Chapter

This chapter includes points and authorities relating to pretrial proceedings. Forms in Part II include the following:

- Subpart A has points and authorities supporting [§ 180.10] and opposing [§ 180.20] a motion to amend a pleading and a case management order.

- Subpart B has points and authorities supporting [§§ 180.30, 180.31] and opposing [§§ 180.40, 180.41] sanctions imposed with respect to the pretrial and settlement conferences.

- Subpart C has points and authorities supporting [§ 180.50] and opposing [§ 180.70] a motion for an order establishing the priority of a case or for an order granting a preference in setting the case for a case management conference or a trial. It also includes memoranda of points and authorities supporting [§§ 180.55-180.57] and opposing [§ 180.75] a motion to advance, reset, or specially set a case for a case management conference or trial date. Additional memoranda of points and authorities are included for use in connection with either motion, supporting [§§ 180.60-180.65] and opposing [§§ 180.80, 180.81] the contention that a case is entitled to priority.

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18-180 California Points & Authorities § 180.02

§ 180.02 Governing Law

[1] Trial Court Delay Reduction Act

Trial courts in all California counties are required to implement delay reduction programs [*Gov. Code §§ 68605.5, 68620*]. *Gov. Code § 68616* restricts some time limits that can be imposed by local rules in cases assigned to delay reduction programs. Among other limitations, no status conference, or similar event, other than a challenge to the court's jurisdiction, may be required to be conducted sooner than 30 days after service of the first responsive pleadings, or no sooner than 30 days after expiration of any stipulated continuance made under *Gov. Code § 68616(d)* (allowing single stipulated continuance to be made within 30 days of service of the responsive pleadings) [*Gov. Code § 68616(e)* (this limitation inapplicable in "complex cases" as defined in rules of court); *see Cal. Rules of Ct., Rules 3.502, 3.400 et seq.* (defining "complex case")]. Nonetheless, case management conferences are significantly affected by the local court rules applicable to trial court delay reduction program cases [*see, e.g.,* Orange Co. Super. Ct. Rules, Rule 450 (governing issue conference/case management conference)].

[2] Case Management Conference

Case management conferences are governed by *Cal. Rules of Ct., Rules 3.720-3.730*, and by local court rules. *Cal. Rules of Ct., Rule 1.5(b)*, provides that the word "must" as used in *Cal. Rules of Ct., Rule 2.1 et seq.*, is mandatory. Amendment of a case management conference order in furtherance of justice is authorized by *Code Civ. Proc. § 576*. The California Rules of Court on trial court management were adopted to advance the goals set forth in the California Standards of Judicial Administration.

These goals are as follows:

- Unlimited Civil Cases: 75 percent disposed of within 12 months; 85 percent disposed of within 18 months; 100 percent disposed of within 24 months.

- Limited Civil Cases: 90 percent disposed of within 12 months; 98 percent disposed of within 18 months; 100 percent disposed of within 24 months.

[*Cal. Rules of Ct., Rule 3.713*; *see* Cal. Rules of Ct., Stds. Jud. Admin., Std. 2.2; *Cal. Rules of Ct., Rule 10.900* requires each court to adopt a case management and calendaring system.

[3] Sanctions

The authority of trial courts to adopt local court rules and provide for penalties for failure to comply with them is covered in *Code Civ. Proc. §§ 575.1* and *575.2* and *Cal. Rules of Ct., Rule 2.30* [*see Annex British Cars, Inc. & Williams v. Parker-Rhodes (1988) 198 Cal. App. 3d 788, 792, 244 Cal. Rptr. 48* ; *State of California ex rel. Public Works Bd. v. Bragg (1986) 183 Cal. App. 3d 1018, 1022-1030, 228 Cal. Rptr. 576]* . In addition, *Gov. Code § 68608(b)* expressly confers power on judges to impose sanctions to enforce trial court delay reduction rules [*see Tliche v. Van Quathem (1998) 66 Cal. App. 4th 1054, 1060-1061, 78 Cal. Rptr. 2d 458]* .

Sanctions for frivolous or dilatory tactics in actions filed before January 1, 1995, are governed by *Code Civ. Proc. § 128.5*. Sanctions for papers presented to the court for improper purposes or that are not warranted under the law and facts are governed by *Code Civ. Proc. § 128.7*, which applies to actions filed on or after January 1, 1995. For forms of memoranda relating to Section 128.5 and 128.7 sanctions, see Ch. 60, *Costs* , Pt. II, and for further discussion, see California Forms of Pleading and Practice, Ch. 510, *Sanctions* .

The power of the court to punish for contempt is provided for in *Code Civ. Proc. § 1209* and *Penal Code § 166*.

[4] Motions for Precedence or Preference and Motions to Advance, Reset, or Specially Set

Motions to advance, reset, or specially set a case for case management conference or for trial are governed by *Cal. Rules of Ct., Rules 3.723, 3.1335* [*see §§ 180.55 -180.57, 180.75*].

Code Civ. Proc. § 36 specifies instances in which a case is entitled to preference on the motion of a party and provides the procedure for these motions [*see §§ 180.50, 180.63 -180.65, 180.80, 180.81*].

Numerous actions or proceedings are given precedence in trial setting by the specific statutes applicable to those particular actions or proceedings. Important examples include:

- *Code Civ. Proc. § 35* (case involving voter registration or certification of candidates or ballot measures, and election contests).
- *Code Civ. Proc. § 37* (action for damages resulting from commission of felony).
- *Code Civ. Proc. § 460.5* (defamation action in which likelihood of continuous publication is shown).
- *Code Civ. Proc. § 526a* (taxpayer's action to enjoin public improvement project; *see § 180.60*).
- *Code Civ. Proc. § 1062.3(a)* (declaratory relief action; *see § 180.61*).
- *Code Civ. Proc. § 1141.20* (trial de novo after judicial arbitration).
- *Code Civ. Proc. § 1179a* (proceeding in unlawful detainer, forcible entry, or forcible detainer; *see § 180.62*).
- *Code Civ. Proc. § 1260.010* (eminent domain proceeding; *see § 180.57*).
- *Gov. Code § 66499.37* (action to attack, review, set aside, void, or annul decision of advisory agency

[defined in *Gov. Code § 66415*], appeal board [defined in *Gov. Code § 66416*], or legislative body under Subdivision Map Act).

- *Gov. Code § 83121* (judicial review of action of Fair Political Practices Commission relating to pending election).

- *Health & Safety Code § 42404* (action by State to recover penalties for air pollution).

- *Pub. Res. Code § 21167.1* (actions or proceedings under *Pub. Res. Code §§ 21167, 21168,* and *21168.5* to enforce compliance with the California Environmental Quality Act).

- *Rev. & Tax. Code § 5149* (action to recover, or for refund of, property taxes or assessments).

Code Civ. Proc. § 527, relating to pendente lite injunctive relief, provides that on the day on which the order to show cause is made returnable, the hearing shall take precedence over all other matters on the calendar of the day, except older matters of the same character, and matters to which special precedence may be given by law [*Code Civ. Proc. § 527(e)*]. This provision applies only to the time for hearing specified in an order to show cause issued on ex parte application. If the plaintiff proceeds by noticed motion for pendente lite injunctive relief, the motion is heard at a time pursuant to the statutes and rules governing motions [*Mobil Oil Corp. v. Superior Court (1978) 79 Cal. App. 3d 486, 495, 145 Cal. Rptr. 17]* . *Code Civ. Proc. § 527(e)* further provides that when the cause is at issue, it must be set for trial at the earliest possible date and shall take precedence over all other cases, except older matters of the same character, and matters to which special precedence may be given by law.

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CHAPTER 180 PRETRIAL PROCEEDINGS
PART I. INTRODUCTION

18-180 California Points & Authorities § 180.03

§ 180.03 How to Use the Forms in This Chapter

[1] Page Limits on Points and Authorities

One of the more significant drafting requirements to keep in mind are the page limits: supporting and opposing memoranda except in a summary judgment or summary adjudication motion, must not exceed 15 pages. A reply or closing memorandum may not exceed 10 pages. Exhibits, declarations, attachments, a table of contents, a table of authorities, and the proof of service are excluded from these page limits. Any party must obtain leave of court to file a longer memorandum [*see Cal. Rules of Court, Rule 3.1113(d)*]. These and other drafting requirements are discussed in further detail in Ch. 1, *Writing Legal Memoranda and Briefs* .

[2] Using the Forms to Build a Draft Memorandum

The forms in this chapter are designed to be included in a memorandum supporting or opposing a particular motion, such as a motion to advance a case for trial based on a party's age. It may also be appropriate to modify the points and authorities in this chapter for use in a different procedural context, such as in a trial appellate brief or office memoranda.

For a detailed discussion on how to select and use the forms in the publication to build a draft memorandum and complete the draft, with detailed discussion of all drafting requirements and strategic or stylistic considerations, see Ch. 1, *Writing Legal Memoranda and Briefs* . For a skeletal form of memorandum for use in creating a properly formatted outline in which to compile relevant forms form this publication, see also Ch. 1, *Writing Legal Memoranda and Briefs* .

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CHAPTER 180 PRETRIAL PROCEEDINGS
PART I. INTRODUCTION

18-180 California Points & Authorities § 180.04

§ 180.04 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

For a discussion and forms for use in pretrial proceedings, for setting a case for trial, and for use on motions to establish the precedence or preference of a case, see California Forms of Pleading and Practice, Ch. 425, *Pretrial Proceedings* (Matthew Bender). That chapter also contains further discussion of priority in setting, and forms of a notice of motion to establish the precedence or preference of a case, a supporting declaration, and an order granting the motion, as well as a discussion and forms for use in moving to advance, reset, or specially set a case.

For a discussion and forms for use in contempt proceedings, see California Forms of Pleading and Practice, Ch. 135, *Contempt* (Matthew Bender). In that set, for a discussion and forms for use in obtaining sanctions for frivolous actions and delaying tactics, see Ch. 510, *Sanctions* , and for discussion and forms relating to the award of sanctions in deposition proceedings, see Ch. 192, *Discovery: Sanctions for Discovery Misuse* .

For a discussion, a procedural checklist, and forms of notices of motion and related forms for use in moving to continue a hearing or trial, see California Forms of Pleading and Practice, Ch. 136, *Continuances* (Matthew Bender). For a general discussion of motion procedure, a procedural guide, and general forms of notices of motion and related forms, see Ch. 372, *Motions and Orders* , in that publication.

For a discussion and forms for use in taxpayers' actions under Code Civ. Proc. § 526a and for use in declaratory relief actions under Code Civ. Proc. § 1060, see Ch. 469, *Public Entities and Officers: Conflicts of Interest* , and Ch. 182, *Declaratory Relief* , respectively, in California Forms of Pleading and Practice (Matthew Bender). For forms of complaints and related forms for use in proceedings in unlawful detainer, see California Forms of Pleading and Practice Ch. 333, *Landlord and Tenant: Eviction Actions* .

[2] Related Points and Authorities

For a discussion of how to use the forms in this chapter to draft a complete memorandum of points and authorities or a trial or appellate brief, and for an illustration of a complete memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For memoranda of points and authorities for use generally in attacking the sufficiency of an affidavit or declaration charging an indirect contempt, see *Ch. 47, Contempt, § 47.30* et seq. For memoranda of points and authorities for use in obtaining sanctions for frivolous actions and delaying tactics, see Ch. 60, *Costs* , Pt. II. For memoranda of points and authorities relating to the award of sanctions in deposition proceedings, see Ch. 82, *Discovery: Sanctions for Discovery Misuse* .

For memoranda of points and authorities generally supporting and opposing a motion to continue a case, see Ch. 48, *Continuance of Proceedings* .

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18-180 California Points & Authorities §§ 180.05-180.09

[Reserved]

§§ 180.05[Reserved]

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CHAPTER 180 PRETRIAL PROCEEDINGS
PART II. FORMS
A. Case Management Order

18-180 California Points & Authorities § 180.10

§ 180.10 Supporting Motion to Amend Pleading and Case Management Order--Amendment Is in Furtherance of Justice [Code Civ. Proc. § 576]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF MOTION TO
Plaintiff,	)	AMEND [_____ (*specify pleading, e.g.,* COMPLAINT) AND] CASE MANAGEMENT ORDER
vs.	)	
_____ [*name*],	)	
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THIS MOTION TO AMEND THE [_____ (*specify pleading, e.g.,* COMPLAINT) AND] CASE MANAGEMENT ORDER IN THIS CASE SHOULD BE GRANTED BECAUSE THE AMENDMENT IS IN FURTHERANCE OF JUSTICE.

A. Amendments in Furtherance of Justice. At any time before or after commencement of trial, the judge may, in the furtherance of justice, allow the amendment of any pleading or pretrial conference order on such terms as may be proper (*see Code Civ. Proc. §§ 473(a), 576*).

B. Amendment of Case Management Order as Subject to Same Standard of Judicial Discretion as Amendment of Pleading. Amendments in the furtherance of justice, as this phrase is used in *Code of Civil Procedure Section 576*, are controlled by the same standard of judicial discretion that applies to the amendment of pleadings in furtherance of justice under *Section 473 of the Code of Civil Procedure* (*see Gonzales v. Brennan (1965) 238 Cal. App. 2d 69, 75, 47 Cal. Rptr. 501*).

[*Optional*] **C. Amendment of Case Management Order to Reinstate Fictitiously Named Defendants as Parties.** The amendment of a case management order to reinstate as parties to the action fictitiously named defendants dismissed by the order is authorized under *Code of Civil Procedure Section 576* (*see Gilmore v. Lick Fish & Poultry, Inc. (1968) 265 Cal. App. 2d 106, 110-111* ; *Santa Catalina Island Co. v. Superior Court (1967) 248 Cal. App. 2d 729, 731, 56 Cal. Rptr. 876*).

[*Optional*] **D. Discretion of Court to Permit Amendments During Trial.** The allowance or disallowance of amendments during trial rests largely in the discretion of the trial court, and the trial court has a wide discretion in such matters when the purpose of the amendment is to raise new issues after the pleadings have been settled and the trial commenced (*Hansen v. Matich Corp. (1965) 234 Cal. App. 2d 129, 131-132, 44 Cal. Rptr. 149*).

[*Optional*] **E. Oral Amendment of Case Management Order During Trial.** The trial court has discretion to allow an oral amendment to a case management order at any time during trial if the adverse party is not prejudiced by it (*see Robinson v. Thornton (1969) 271 Cal. App. 2d 605, 615, 76 Cal. Rptr. 835*).

[*Optional*] **F. Amendment of Pleading to Conform to Proof.** A pleading may be amended to conform to proof even though a case management order has been filed in the case (*see Hansen v. Matich Corp. (1965) 234 Cal. App. 2d 129, 131-132, 44 Cal. Rptr. 149* ; *Atkins v. Atkins (1960) 177 Cal. App. 2d 207, 211, 2 Cal. Rptr. 104* ; *Lieberman v. Aetna Ins. Co. (1967) 249 Cal. App. 2d 515, 530, 57 Cal. Rptr. 453* ; *Texaco, Inc. v. Robinson (1962) 209 Cal. App. 2d 450, 452, 25 Cal. Rptr. 923* ; *Rocky Mountain Export Co. v. Colquitt (1960) 179 Cal. App. 2d 204, 206, 3 Cal. Rptr. 512*).

[*Optional*] **G. Combined Motion to Amend Pleading and Case Management Order.** When a party moves to amend a pleading after a case management order has been filed, he or she should also move to amend the case management order so that the advantages of the case management conference in clearly defining the issues and eliminating unnecessary and time consuming allegations of fact might be preserved (*see Posz v. Burchell (1962) 209 Cal. App. 2d 324, 335, 25 Cal. Rptr. 896*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion to amend a case management order and, if appropriate, a pleading [*see Code Civ. Proc. § 576*]. Section 576 refers to the "pretrial" conference order, but the case management order now results from a case management conference rather than a pretrial conference [*see Cal. Rules of Ct., Rule 3.728*].

In addition to Paragraphs A and B, any combination of the optional Paragraphs C-G may be used if applicable to the facts of the case. For additional points and authorities relating to the amendment of pleadings which counsel may wish to incorporate in this memorandum when the motion seeks leave to amend both a pleading and the case management order, see *Ch. 16, Amended and Supplemental Pleadings, § 16.30* et seq.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. The supporting affidavits or declarations [*see Code Civ. Proc. §§ 2009, 2015.5*], to which reference may be made in the points and authorities, should set forth probative facts within the personal knowledge of the affiant or declarant showing that the granting of the motion would be in furtherance of justice.

[b] Initial Case Management Review

No later than 180 days after the filing of the initial complaint, the court must review every general civil case except the following [*Cal. Rules of Ct., Rule 3.721*]: complex cases, cases designated as "uninsured motorist" or included in a petition for coordination [*Cal. Rules of Ct., Rule 3.712(b), (c)*], cases involving exceptional circumstances, or uncomplicated cases [*Cal. Rules of Ct., Rule 3.714(c), (d)*], and short cause cases [*Cal. Rules of Ct., Rule 3.735*].

[c] Setting a Case Management Conference

In each general civil case, except for complex cases and cases specifically exempted, the court must set an initial case management conference to review the case [*Cal. Rules of Ct., Rule 3.722(a)*]. Notice of the date of the case management conference must be given to all parties no later than 45 days before the conference, unless otherwise ordered by the court. The court may provide by local rule for the time and manner of giving notice to the parties [*Cal. Rules of Ct., Rule 3.722(b)*]. At the initial conference, the court must review the case comprehensively and must, among other things, decide whether to assign the case to an alternative dispute resolution process and whether to set the case for trial. The initial case management conference should generally be the first case management event conducted by court order in each case, except for orders to show cause [*Cal. Rules of Ct., Rule 3.722(a)*]. At the conference, counsel for each party and each self-represented party must appear by telephone or personally, must be familiar with the case, and must be prepared to discuss and commit to the party's position on the issues [*Cal. Rules of Ct., Rule 3.722(c)*], unless exempted by local rule in limited civil cases [*Cal. Rules of Ct., Rule 3.722(e)*], or unless the court, based on its review of written submissions of the parties and other information, determines that appearances are not necessary [*Cal. Rules of Ct., Rule 3.722(d)*]. In the latter instance, the court may issue a case management order and notify the parties that no appearance is required [*Cal. Rules of Ct., Rule 3.722(d)*].

The court on its own motion may order, or a party or parties may request, that a case management conference be held at any time [*Cal. Rules of Ct., Rule 3.723*].

[d] Subjects to Be Considered at the Case Management Conference

At a case management conference, the parties must address, if applicable, and the court may take appropriate action with respect to the following pursuant to *Cal. Rules of Ct., Rule 3.727*:

- Whether there are any related cases.

- Whether all parties named in the complaint or cross-complaint have been served, have appeared, or have been dismissed.

- Whether any additional parties may be added or the pleadings may be amended.

- Whether, if the case is a limited civil case, the economic litigation procedures under *Code of Civil*

Procedure section 90 et seq. will apply to it or the party intends to bring a motion to exempt the case from these procedures.

- Whether any other matters (e.g., the bankruptcy of a party) may affect the court's jurisdiction or processing of the case.

- Whether the parties have stipulated to, or the case should be referred to, judicial arbitration or any other form of alternative dispute resolution.

- Whether an early settlement conference should be scheduled and, if so, on what date.

- Whether discovery has been completed and, if not, the date by which it will be completed.

- What discovery issues are anticipated.

- Whether the case should be bifurcated or a hearing set for a motion to bifurcate.

- Whether there are any cross-complaints that are not ready to be set for trial and, if so, whether they should be severed.

- Whether the case is entitled to any statutory preference and, if so, the statute granting the preference.

- Whether a jury trial is demanded, and if so, the identity of each party requesting a jury trial.

- If the trial date has not been previously set, the date by which the case will be ready for trial and the available trial dates.

- The estimated length of trial.

- The nature of the injuries.

- The amount of damages, including any special or punitive damages.

- Any additional relief sought.

- Whether there are any insurance coverage issues that may affect the resolution of the case.

- Any other matters that should be considered by the court.

In addition, in courts having a judicial arbitration program under *Code Civ. Proc. § 1141.11*, the court at the case management conference must determine if the case is suitable for judicial arbitration [*Cal. Rules of Ct., Rule 3.727(6)*].

Cal. Rules of Ct., Rule 3.724 requires that no later than 30 calendar days before the date set for the case management conference the parties must meet and confer, in person or by telephone, to consider each of the issues to be discussed at the case management conference, and to consider:

- Resolution of discovery disputes and setting a discovery schedule.

- Identifying and, if possible, informally resolving any anticipated motions.

- Identifying the facts and issues in the case that are uncontested and may be the subject of stipulation.
- Identifying the facts and issues in the case that are in dispute.
- Determining whether the issues in the case can be narrowed by eliminating any claims or defenses by means of motion or otherwise.
- Possible settlement.
- Identifying the dates on which all parties and their attorneys are available or not available for trial, including the reasons for unavailability.
- Any issues relating to the discovery of electronically stored information.
- Other relevant matters.

[e] Case Management Statement

No later than 15 calendar days before the date set for the case management conference or review, each party must file a case management statement. Two or more parties may file a joint statement. If all parties agree to use an alternative dispute resolution (ADR) process, they must jointly complete and file an ADR stipulation form [*Cal. Rules of Ct., Rule 3.725, 3.726*; *see Cal. Rules of Ct., Rule 3.221(a)(4)* (ADR stipulation form to be included in ADR information package)].

[f] Case Management Order

The case management conference must be conducted in the manner provided by local rule. The court must enter a case management order setting a schedule for subsequent proceedings and otherwise providing for the management of the case. The order should include such provisions as may be appropriate pursuant to *Cal. Rules of Ct., Rule 3.728*, including:

- Referral of the case to judicial arbitration or some other form of alternative dispute resolution.
- A date for completion of the arbitration process or other form of alternative dispute resolution process if the case has been referred to such a process.
- In the event that a trial date has not previously been set, a date certain for trial if the case is ready to be set for trial.
- Whether the trial will be a jury or a nonjury trial.
- The identity of each party demanding a jury trial.
- The estimated length of trial.
- Whether all parties necessary to the disposition of the case have been served or have appeared.
- The dismissal or severance of unserved or not-appearing defendants from the action.
- The names and addresses of the attorneys who will try the case.

- The date, time and place for a mandatory settlement conference [*see Cal. Rules of Ct., Rule 3.1380*].

- The date, time, and place for the final case management conference before trial if such a conference is required by the court or the judge assigned to the case.

- The date, time and place of any further case management conference or review.

- Any additional orders that may be appropriate.

The case management order controls the subsequent course of the action or proceeding unless it is modified by a subsequent order [*Cal. Rules of Ct., Rule 3.730*].

[g] Related Pleading and Practice Forms

For forms of a notice of motion for an order amending a case management order, a form of supporting declaration, and a form of order granting the motion, see *California Forms of Pleading and Practice, Ch. 425, Pretrial Proceedings, § 425.121*. For forms for use in amending a pleading, see Ch. 21, *Amended and Supplemental Pleadings* , in that publication.

[3] Discussion of Authorities

[a] Amendments in Furtherance of Justice

Code Civ. Proc. § 473(a), provides in part that the court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading by adding or striking out the name of any party, or by correcting a mistake in the name of any party, or a mistake in any other respect. The court may likewise, in its discretion and after notice to the adverse party, allow on such terms as may be just an amendment to any pleading in other particulars.

[b] Amendment of Conference Order as Subject to Same Standard of Judicial Discretion as Amendment of Pleading

Gonzales v. Brennan *(1965) 238 Cal. App. 2d 69, 47 Cal. Rptr. 501* , was an action for medical malpractice against a physician employed by a county hospital. The complaint did not allege that a claim had been filed with the physician as required by former Gov. Code §§ 801 and 803. The pretrial conference order recited that the issues were negligence, contributory negligence, proximate cause, and damages and made no mention of the claim. On the day of trial, defendant moved to amend the pretrial conference order to state that no claim had been filed and for leave to amend his answer to plead the failure to file the claim as an affirmative defense. The motion was granted. In a subsequent hearing plaintiff stipulated that no claim had been filed, and defendant's motion for summary judgment on this ground was granted. Plaintiff appealed, contending that the trial court abused its discretion in granting leave to amend the pretrial conference order because defendant had made no showing that the amendment was necessary to prevent manifest injustice, as required by former Cal. Rules of Ct., Rule 216.

The court of appeal affirmed. The court held that leave to amend the answer was properly granted, that the amendment of pleadings, when leave is required, is a matter committed to the sound discretion of the trial court, and that, although plaintiff suffered detriment by the granting of the motion, he was not "prejudiced" by it within the meaning of that term (*238 Cal. App. 2d 69, 75-76)* . With respect to the amendment of the pretrial conference order, the court said the only case brought to its attention which attempted to define "manifest injustice" as used in former Cal. Rules of Ct., Rule 216, was *Feykert v. Hardy (1963) 213 Cal. App. 2d 67, 28 Cal. Rptr. 510* , which held that the principles governing judicial discretion in allowing amendments to pleadings apply with respect to amendments of pretrial orders (*238 Cal. App. 2d 69, 74-75)* . Any other interpretation, the court said, would lead to complete chaos. The court pointed out that

Code Civ. Proc. § 576, permitting amendments of pleadings and pretrial conference orders in the furtherance of justice, had been added by 1963 legislation and that former Cal. Rules of Ct., Rule 216, still spoke of manifest injustice. If there were a difference between allowing modifications or amendments in the furtherance of justice, as provided in *Code Civ. Proc. § 576* and which has always been the language of *Code Civ. Proc. § 473*, situations might arise where a court might allow a modification under *Code Civ. Proc. § 576* which must be disallowed under former Cal. Rules of Ct., Rule 216. Although defendant's motion to amend was made before *Code Civ. Proc. § 576* went into effect, the section was designed to clarify the law and give statutory support to the rule of *Feykert*, not to change it. The court held that cases decided under *Code Civ. Proc. § 473* were therefore on point (*238 Cal. App. 2d 69, 75)* .

[c] Amendment of Conference Order to Reinstate Fictitiously Named Defendants as Parties

Gilmore v. Lick Fish & Poultry, Inc. *(1968) 265 Cal. App. 2d 106, 72 Cal. Rptr. 212* , was an action for damages for personal injuries allegedly sustained on defendant's business premises. The pretrial conference order dismissed the complaint as to the fictitiously named defendants. Plaintiff's subsequent motion for an order modifying the pretrial conference order to reinstate the fictitiously named defendants and for permission to amend the complaint to substitute Lick Fish and Poultry, Inc. for one of the fictitiously named defendants was granted. The newly named defendant filed a general demurrer to the complaint, which was sustained without leave to amend on the grounds that the fictitiously named defendants had been dismissed from the action by the pretrial conference order, that notice of the motion to amend the pretrial conference order was not served on the newly named defendant, and that the action was barred by the statute of limitations. Plaintiff appealed the judgment of dismissal in favor of the newly named defendant.

The court of appeal reversed. It held that amendment of the pretrial conference order was authorized by *Code Civ. Proc. § 576*. There was no requirement that the originally named parties stipulate to the amendment of the pretrial conference order as was done in *Santa Catalina Island Co. v. Superior Court (1967) 248 Cal. App. 2d 729, 56 Cal. Rptr. 876* , discussed *below*, nor was there any requirement that the newly named party be given notice of the motion to amend the pretrial conference order and complaint. Finally, the action was not barred by the statute of limitations (*265 Cal. App. 2d 106, 110-115)* .

Santa Catalina Island Co. v. Superior Court *(1967) 248 Cal. App. 2d 729, 56 Cal. Rptr. 876* , was a mandate proceeding to compel the trial court in the underlying case to quash service of summons for lack of jurisdiction. In the underlying case, the pretrial conference order had dismissed all fictitiously named defendants named in the complaint. Over six months later, the order was amended, by stipulation of plaintiff and the named defendants, so as to reinstate Doe I and Doe II. Santa Catalina Island Co. was then served with a summons and complaint as a doe defendant. The company made a special appearance to move to quash service for lack of jurisdiction, and, on denial of the motion, petitioned for writ of mandate. Petitioner contended that the order setting aside the dismissal of the fictitiously named defendants was void because it was not sought within six months following the dismissal, as assertedly required by *Code Civ. Proc. § 473*, authorizing relief from orders taken through mistake, inadvertence, surprise, or excusable neglect on application made within a reasonable time and no later than six months after the order was made.

The court of appeal rejected the contention and denied the peremptory writ. The court held that since dismissal was part of the pretrial conference procedure and not accomplished by plaintiff's independent written request, the case was controlled by *Code Civ. Proc. § 576*, not by *Code Civ. Proc. § 473*, and that, under *Code Civ. Proc. § 576*, the trial court was authorized to amend the original pretrial conference order with the order reinstating Does I and II (*248 Cal. App. 2d 729, 730-731)* .

[d] Discretion of Court to Permit Amendments During Trial

Hansen v. Matich Corp. *(1965) 234 Cal. App. 2d 129, 44 Cal. Rptr. 149* , was an action for damages for personal injuries sustained in a single car accident allegedly caused by a defect in the roadway which defendant contractor was reconstructing under contract with the state. The complaint alleged an excavation or depression extending across the

entire roadway of a width of about six feet and a depth of about six inches, at a point approximately 150 feet west of a named road, and that defendant negligently created the excavation. The pretrial conference order specified as an issue the alleged negligence of defendant in creating an excavation, in permitting the excavation to exist, and in failing to warn of it. During trial it came out that the scene of the accident was some distance from that alleged, and testimony as to the condition of the roadway varied from the allegations of the complaint. Plaintiff was granted permission to amend her complaint to conform to proof. The pretrial order was likewise amended to conform. Judgment was for plaintiff, and defendant appealed.

The court of appeal found no error in the trial court's having granted permission to amend and it affirmed the judgment. Citing *Feykert v. Hardy (1963) 213 Cal. App. 2d 67, 75, 28 Cal. Rptr. 510* , the court said that the allowance or disallowance of amendments to pleadings during the course of a trial rests largely in the discretion of the trial court. The trial court's ruling will not be disturbed unless it clearly appears that such discretion has been abused, and the trial court has a wide discretion in such matters when the purpose of the amendment is to raise new issues after the pleadings have been settled and the trial has commenced (*234 Cal. App. 2d 129, 131-132)* .

[e] Oral Amendment of Conference Order During Trial

Robinson v. Thornton *(1969) 271 Cal. App. 2d 605, 76 Cal. Rptr. 835* , was an action for damages for breach of a written repurchase agreement of plaintiff's interest in a natural gas lease and for recovery on a promissory note for the repurchase price which had been executed by defendant in plaintiff's favor. At the conclusion of the trial the judge called plaintiff's attention to the failure of the pretrial conference order to specifically mention the issue of nonpayment of the promissory note as alleged in plaintiff's fourth cause of action and gave plaintiff permission to amend the order to include the issue. Plaintiff won the judgment for the amount of the promissory note, and defendant appealed.

The court of appeal affirmed. The court held that trial courts have discretion to allow oral amendments to pretrial conference orders at any time during trial provided the adverse party is not prejudiced by them (*271 Cal. App. 2d 605, 615)* . The court concluded that there was no prejudice to defendant because the case had been fully tried on the basis that the issue had been properly raised. It pointed out that without objection plaintiff had testified to the execution of the note, the consideration given for it, and defendant's failure to pay, that defense counsel had cross examined plaintiff on these matters, and that defendant had testified that he executed the note and failed to pay it and explained the circumstances surrounding its execution and the purpose for which it was given (*271 Cal. App. 2d 605, 615-616)* .

[f] Amendment of Pleading to Conform to Proof

The facts and procedural background of ***Hansen v. Matich Corp.*** *(1965) 234 Cal. App. 2d 129, 44 Cal. Rptr. 149* , are discussed in [d], *above*. In affirming the judgment for plaintiff, the court of appeal said that the trial court did not err in granting leave to amend to conform to proof, since all the evidence was before the jury, defendant was not taken by surprise, and no new cause of action was stated (*234 Cal. App. 2d 129, 131)* .

Atkins v. Atkins *(1960) 177 Cal. App. 2d 207, 2 Cal. Rptr. 104* , was an action to set aside a deed and to quiet title to real property, or, in the alternative, to recover its value, and was so described in the pretrial conference order. After the trial and over defendant's objection, the court permitted amendment of the complaint to conform to proof. Plaintiffs added a cause of action alleging that the deed was executed to secure an indebtedness due defendant from plaintiffs in a specified sum. Defendant's own testimony at trial established that the deed was given as security. The trial court declared the deed, which was absolute in form, to be a mortgage and entered judgment for plaintiffs. Defendant appealed, contending that the amendment stated a new cause of action outside the issues framed by the pretrial conference order and that the trial court had erred in permitting the amendment after the pretrial conference order was issued.

The court of appeal rejected the contention and affirmed the judgment. The court pointed out that under the rules

[former Cal. Rules of Ct., Rule 216], the pretrial conference order becomes part of the record when filed and usually controls the subsequent course of the case, even when inconsistent with the pleadings. However, the court did not believe that it was intended that the pretrial order should do away with the trial court's power to permit amendments to conform to proof unless the order were modified. Justice may sometimes require that the effect of a pretrial order be not so restrictive even when the order is not modified (*177 Cal. App. 2d 207, 211)* .

Lieberman v. Aetna Ins. Co. *(1967) 249 Cal. App. 2d 515, 57 Cal. Rptr. 453* , was an action against an insurance company to recover the amount of a default judgment secured against defendant's insured in a personal injury action. Defendant cross complained to have the default judgment set aside and moved during trial to amend the pretrial conference order to include extrinsic mistake as an issue, and the motion was granted. Cross defendant appealed from the judgment for cross complainant, and the court of appeal affirmed. The court held that there was no error in granting the motion to amend the pretrial conference order. The court quoted *Code Civ. Proc. § 576* and added that a pretrial conference order does not do away with the power of a trial court to permit amendments to conform to proof (*249 Cal. App. 2d 515, 530)* . *Texaco, Inc. v. Robinson (1962) 209 Cal. App. 2d 450, 25 Cal. Rptr. 923* , was an action to recover an amount owed for merchandise sold to defendant's decedent after denial of a claim presented to the estate. The complaint alleged that the merchandise had been sold to decedent at a specified address. At trial it was shown that merchandise had been delivered to decedent both at the address specified in the complaint and at another address to which he'd moved, and the court granted plaintiff's motion to amend the complaint to add the omitted address. From a judgment for plaintiff, defendant appealed, contending that the trial court erred in permitting the amendment and that judgment should have been limited to the amount owing for merchandise delivered to decedent at the address originally specified, which had been carried over into the pretrial conference order. The court of appeal rejected the contention and affirmed the judgment. The court acknowledged that a pretrial conference order under the predecessor rule to former Cal. Rules of Ct., Rule 216, superseded the pleadings when inconsistent with them. However, the court said it did not believe that it was intended that the pretrial order should do away with the power of the trial court to permit amendments to conform to proof and that justice may sometimes require that the effect of a pretrial order be not so restrictive even when the order is not modified (*209 Cal. App. 2d 450, 452)* .

In ***Rocky Mountain Export Co. v. Colquitt*** *(1960) 179 Cal. App. 2d 204, 3 Cal. Rptr. 512* , the court of appeal affirmed judgment for defendant in an action to recover an unpaid balance due on a promissory note given in payment for a portable drilling rig. The trial court had granted defendant's motion to amend his answer to conform to proof by adding a defense setting up plaintiff's failure to comply with the law regarding repossession and sale of mortgaged chattels. Plaintiff contended on appeal that the trial court had no authority to allow the amendment and that under a then existing rule the issues determined by the pretrial conference order were final. The court of appeal rejected the contention. The court stated that it was not intended that the pretrial order should do away with the power of the trial court to permit amendments to conform to proof and that justice may sometimes require that the effect of a pretrial order be not so restrictive even when the order is not modified. The purpose of pretrial proceedings is to expedite and not to obstruct the administration of justice (*179 Cal. App. 2d 204, 206)* .

[g] Combined Motion to Amend Pleading and Conference Order

Posz v. Burchell *(1962) 209 Cal. App. 2d 324, 25 Cal. Rptr. 896* , was an action for damages for breach of warranty and negligence under an oral agreement to sell boysenberry vines, three-fourths of which died. On the first day of trial, plaintiff moved for leave to amend the complaint but did not move to amend the pretrial conference order. As a condition to allowing the amendment, the trial court required that plaintiff stipulate that all matters contained in the amended complaint be deemed denied. Plaintiff did so and the motion was granted.

The court of appeal reversed the subsequent judgment for plaintiff on the ground that the wrong measure of damages had been applied. However, the court held that permitting amendment of the complaint was proper, notwithstanding the provisions of former Cal. Rules of Ct., Rule 216, which provided in part that when filed the pretrial conference order became a part of the record in the case and, when inconsistent with the pleadings, controlled the subsequent course of

the case. It has been established that the mere amendment of the pleadings in and of itself is to be considered an amendment of the pretrial conference order (*209 Cal. App. 2d 324, 334-335)* . However, the court suggested that, in connection with any future last-minute amendments of the pleadings, it would be advisable for counsel also to move for an amendment of the pretrial conference order so that the advantages of the pretrial conference in clearly defining the issues and in eliminating unnecessary and time-consuming allegations of fact might be preserved (*209 Cal. App. 2d 324, 335)* .

It should be noted that the court's reasoning would appear to apply to any motion to amend a pleading made after the pretrial conference order is filed and not merely to last-minute amendments of the pleadings.

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Volume 18 Chapters 180-189 PRETRIAL PROCEEDINGS---to---PROBATE OF WILLS
CHAPTER 180 PRETRIAL PROCEEDINGS
PART II. FORMS
A. Case Management Order

18-180 California Points & Authorities §§ 180.11-180.19

[Reserved]

§§ 180.11[Reserved]

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Volume 18 Chapters 180-189 PRETRIAL PROCEEDINGS---to---PROBATE OF WILLS
CHAPTER 180 PRETRIAL PROCEEDINGS
PART II. FORMS
A. Case Management Order

18-180 California Points & Authorities § 180.20

§ 180.20 Opposing Motion to Amend Pleading and Case Management Order on Ground Amendment Is in Furtherance of Justice [Code Civ. Proc. § 576]--Affirmative Defense That Plaintiff Failed to Comply With Procedural Condition to Commencement of Action as Waived by Prejudicial Delay in Assertion

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN OPPOSITION TO MOTION
vs.	)	TO AMEND ANSWER AND CASE MANAGE-
_____ [*name*],	)	MENT ORDER
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

DEFENDANT'S BELATED MOTION IN THIS CASE FOR AN ORDER AMENDING THE ANSWER AND CASE MANAGEMENT ORDER TO SET UP THE AFFIRMATIVE DEFENSE OF NONCOMPLIANCE WITH THE REQUIREMENTS OF _____ [*specify, e.g.,* SECTION 3242 OF THE CIVIL CODE] SHOULD BE DENIED BECAUSE COMPLIANCE WITH THIS STATUTE IS A MERE PROCEDURAL CONDITION TO THE MAINTENANCE OF THE ACTION AND DEFENDANT'S DELAY IN ASSERTING IT HAS PREJUDICED PLAINTIFF.

A. _____ [*Set forth point and authority establishing that condition to maintenance of action is merely a procedural condition and not a substantive right, e.g.:* **Statutory Conditions to Maintenance of Action on Recorded Payment Bond as Procedural Only**]. The *Civil Code Section 3242* requirement that notice be given in order to enforce a claim on any payment bond given in connection with a private work is in the nature of a procedural condition to commencement of an action on substantive rights already in existence (*see Permalab-Metalab Equipment Corp. v. Maryland Cas. Co. (1972) 25 Cal. App. 3d 465, 468, 102 Cal. Rptr. 26* (construing former Civ. Code § 1200.1).

B. Defense of Noncompliance With Procedural Condition to Commencement of Action as Waived If Not Timely Pleaded. Noncompliance with a procedural condition to the commencement of an action on substantive rights already in existence is an affirmative defense that may be, and is, waived if not timely pleaded (*see Permalab-Metalab Equipment Corp. v. Maryland Cas. Co. (1972) 25 Cal. App. 3d 465, 468-470, 102 Cal. Rptr. 26*).

C. Belated Motion to Amend as Properly Denied When Prejudicial. A motion to amend an answer and case management order to set up the affirmative defense of noncompliance with a procedural condition to the maintenance of the action is properly denied when the motion is untimely and prejudices the plaintiff's rights (*see Permalab-Metalab Equipment Corp. v. Maryland Cas. Co. (1972) 25 Cal. App. 3d 465, 470-472, 102 Cal. Rptr. 26*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion to amend an answer and case management order made on the ground the amendment is in furtherance of justice [*see Code Civ. Proc. § 576* (referring to the "pretrial" conference order; under *Cal. Rules of Ct., Rule 3.728*, an order now results from a case management conference rather than a pretrial conference)]. The ground of opposition is that permission to amend the answer would not be in furtherance of justice. The amendment's purpose is to set up the defense of noncompliance with a mere procedural condition to the commencement of the action on substantive rights already in existence. In addition, defendant's delay in seeking the amendment has prejudiced plaintiff's rights.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. The supporting declaration should recite the relevant facts from the court's records and file in the case (*e.g.,* the dates the answer was filed, the case management order was made, and the motion to amend was filed) and should set forth probative facts within the declarant's personal knowledge establishing the prejudice to plaintiff. These facts may be referred to in counsel's argument in the points and authorities. An example of prejudice might consist of the following: (1) there has been an unreasonably long delay between the time the answer was filed and the motion to amend the answer and case management order was made; (2) if the amendment is allowed, defendant will be able to escape liability, which it would not be able to do were the amendment to be denied; and (3) between the time the answer was filed and the motion to amend was made, plaintiff lost the right to pursue his or her remedy against others because of the bar of the statute of limitations or because such other persons have become insolvent, and this right would not have been lost had the defense been timely pleaded. For other fact situations that have been held sufficient to support the trial court's denial of a belated motion to amend, see *Hulsey v. Koehler (1990) 218 Cal. App. 3d 1150, 1159, 267 Cal. Rptr. 2d 523* (denial of belated motion to amend answer to assert *Code Civ. Proc. § 426.30* as affirmative defense);

Mobil Oil Corp. v. Handley (1978) 76 Cal. App. 3d 956, 967, 143 Cal. Rptr. 321 (denial of belated motion in unlawful detainer proceeding to amend affirmative defenses in answer to allege waiver by plaintiff in accepting rent); *Young v. Berry Equipment Rentals, Inc. (1976) 55 Cal. App. 3d 35, 38-40, 127 Cal. Rptr. 200* (denial of belated motion in action for damages for personal injuries to amend complaint to allege new theory of liability against negligent employee's employer after plaintiff was granted new trial on issue of damages only); and *Rogers v. Ulrich (1975) 52 Cal. App. 3d 894, 899, 12 Cal. Rptr. 306* (denial of belated motion in action for damages for recording phone conversation without other party's knowledge to amend complaint immediately before trial and after close of plaintiff's case to allege violation of nonpleaded statute).

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 180.10*.

[b] Related Pleading and Practice Forms

For forms of a case management order, a notice of motion to amend a case management order, a supporting declaration, and an order granting the motion, see California Forms of Pleading and Practice, Ch. 425, *Pretrial Proceedings*, §§ 425.119, *425.121*. For forms of amended and amendments to pleadings, see Ch. 21, *Amended and Supplemental Pleadings* , in that publication. For forms of complaints, other pleadings, and related forms for use in actions involving mechanics' liens, stop notices, and payment bonds, see Ch. 361, *Mechanics' Liens* , and for forms of complaints, other pleadings, and related forms for use in actions involving public works contracts, stop notices, and actions on payment bonds, see Ch. 481, *Public Works* , in that publication. For a table of general affirmative defenses, see Ch. 26, *Answers* , in that publication.

[c] Related Points and Authorities

For memoranda of points and authorities generally supporting and opposing motions to amend a pleading and generally supporting and opposing demurrers and various motions in actions involving mechanics' liens, see Ch. 16, *Amended and Supplemental Pleadings* , and Ch. 152, *Mechanics' Liens* , respectively.

[3] Discussion of Authorities

[a] Statutory Conditions to Maintenance of Action on Recorded Payment Bond as Procedural Only

Permalab-Metalab Equipment Corp. v. Maryland Cas. Co. *(1972) 25 Cal. App. 3d 465, 102 Cal. Rptr. 26* , was an action by a subcontractor against the contractor and its surety for money claimed due on the job against which the surety's bond had been written and recorded. Former Code Civ. Proc. § 1200.1(d) provided in part that if the bond was recorded, no action could be maintained on it unless either a mechanic's lien had been filed or written notice containing specified matter had been given to the surety before expiration of the time prescribed for filing a mechanic's lien. Plaintiff did neither of these, and its action was commenced after the time for filing the lien or giving the notice had expired. The complaint was silent as to the filing of the lien or the giving of notice. The surety's answer failed to plead as an affirmative defense plaintiff's failure to do either of the foregoing; rather, it admitted execution of the bond and pleaded that plaintiff had not performed in accordance with the terms of the contract. Some three years later, shortly before trial was to commence, the surety served and filed a notice of motion to amend its answer to set up as an affirmative defense plaintiff's failure to have complied with the foregoing conditions on the ground that facts material to the case were discovered after the original complaint had been filed. The motion was heard on the day trial was to commence. The surety conceded at the hearing that the contractor had gone out of business the year before. The trial court stated that plaintiff had lost certain ancillary remedies (pretrial attachment and garnishment) it could have pursued against the contractor had the defense been timely raised and that plaintiff was therefore prejudiced by the delay. It denied the motion. Judgment was for plaintiff, and the surety appealed.

The court of appeal affirmed. The court said that the mechanic's lien or notice requirement of former Code Civ. Proc. §

1200.1(d) was in the nature of a procedural condition to commencement of an action on substantive rights already in existence (*25 Cal. App. 3d 465, 468)* .

The present statute, *Civ. Code § 3242*, is significantly different from former Section 1200.1, but still sets up a notice requirement in order to enforce a claim.

[b] Defense of Noncompliance With Procedural Condition to Commencement of Action as Waived If Not Timely Pleaded

The facts and procedural background of ***Permalab-Metalab Equipment Corp. v. Maryland Cas. Co.*** *(1972) 25 Cal. App. 3d 465, 102 Cal. Rptr. 26* , are discussed in [a], *above*. In affirming the judgment for plaintiff, the court held that noncompliance with a procedural condition to commencement of an action on substantive rights already in existence is not a jurisdictional prerequisite to maintenance of the action but an affirmative defense that can be and is waived if not timely asserted (*25 Cal. App. 3d 465, 468-470)* .

[c] Belated Motion to Amend as Properly Denied When Prejudicial

The facts and procedural background of *Permalab-Metalab Equipment Corp. v. Maryland Cas. Co. (1972) 25 Cal. App. 3d 465, 102 Cal. Rptr. 26* , are discussed in [a], *above*. In affirming the judgment for plaintiff, the court of appeal quoted the trial court's statements summarizing the prejudice (*25 Cal. App. 3d 465, 471)* . The court restated the established rule that trial courts will ordinarily exercise liberality in permitting amendments to pleadings, particularly amendments to answers, but added (1) whether an amendment will be allowed rests in the sound discretion of the trial court, and (2) trial courts are much more critical of proposed amendments to answers when offered after a long unexplained delay or on the eve of trial, when there is a lack of diligence, or when there is prejudice to the other party. The court held that guided by these rules the trial court's ruling on the motion to amend was not an abuse of discretion and was without error (*25 Cal. App. 3d 465, 472)* .

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Volume 18 Chapters 180-189 PRETRIAL PROCEEDINGS---to---PROBATE OF WILLS
CHAPTER 180 PRETRIAL PROCEEDINGS
PART II. FORMS
A. Case Management Order

18-180 California Points & Authorities §§ 180.21-180.29

[Reserved]

§§ 180.21[Reserved]

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Volume 18 Chapters 180-189 PRETRIAL PROCEEDINGS---to---PROBATE OF WILLS
CHAPTER 180 PRETRIAL PROCEEDINGS
PART II. FORMS
B. Sanctions with Respect to Pretrial, Trial Setting, and Settlement Conferences

18-180 California Points & Authorities § 180.30

§ 180.30 Supporting Contention That Sanctions May Be Imposed for Failure to Comply With State or Local Rules or Court Order Relating to Court Conferences or to Participate in Good Faith in Required Conferences [Cal. Rules of Ct., Rule 2.30]

[1] FORM

[*The following may be included in a memorandum or in a trial or appellate brief.*]

THE IMPOSITION OF SANCTIONS AGAINST _____ [*identify person, e.g.,* PLAINTIFF'S COUNSEL] FOR HIS/HER FAILURE _____ [TO COMPLY WITH _____ (RULE _____ OF THE CALIFORNIA RULES OF COURT *or identify local court rule*) *or* COMPLY WITH THE ORDER OF THIS COURT MADE AND ENTERED ON _____ (*date*), ORDERING _____ (*specify*) *or* TO PARTICIPATE IN GOOD FAITH IN THE _____ (CASE MANAGEMENT or TRIAL SETTING or SETTLEMENT) CONFERENCE IN THIS CASE] IS EXPRESSLY AUTHORIZED BY SECTION 227 OF THE CALIFORNIA RULES OF COURT.

A. Constitutional Power of Judicial Council to Adopt Rules. The Judicial Council of California has been granted express power by the California Constitution to adopt rules for court administration, practice, and procedure, not inconsistent with statute, and perform other functions prescribed by statute (*Cal. Const., art. VI, § 6*).

[*Optional*] **B. Legislative Confirmation of Power.** The California Legislature has expressly confirmed the power of the Judicial Council of California to adopt rules governing pretrial conferences, and their time, manner, and nature, in civil cases at issue, or in one or more classes of civil cases, in superior courts (*Code Civ. Proc. § 575*).

C. Effect of Judicial Council's Rules. The rules of practice and procedure adopted by the Judicial Council of California pursuant to the power granted to it by the California Constitution, [and such rules as have been adopted by it pursuant to specific statutory mandate], to the extent such rules do not transcend legislative enactments, have the force of positive law (*Paul D. v. Superior Court (1984) 158 Cal. App. 3d 838, 841, 205 Cal. Rptr. 77* ; *Cantillon v. Superior Court (1957) 150 Cal. App. 2d 184, 187, 309 P.2d 890*).

[*EITHER, if case management conference involved, and sanctions are sought for violation of local court rule*]

D. Duties of Persons With Respect to Case Management Conference. *Cal. Rules of Ct., Rule 3.722(c)* expressly imposes a duty upon counsel for each party and each self-represented party to appear by telephone or personally, to be familiar with the case, and to be prepared to discuss and commit to the party's position on the issues listed in *Cal. Rules of Ct., Rule 3.724* and *3.727*, unless otherwise notified or excused by the court. This rule is not inconsistent with any statutory law and therefore has the force of law as they apply to the duties to _____ [*specify, e.g.*, participate in good faith in the conference] (*see Cantillon v. Superior Court (1957) 150 Cal. App. 2d 184, 187, 309 P.2d 890*).

[*OR, if settlement conference involved*]

D. Duties of Persons With Respect to Settlement Conference. Trial counsel, parties, and persons with full authority to settle the case must personally attend the settlement conference, unless excused by the court for good cause. If any consent to settle is required for any reason, the party with that consensual authority must be personally present at the conference (*Cal. Rules of Ct., Rule 3.1380(b)*). [Each _____ (plaintiff *or* defendant) must, no later than five court days before the date set for the conference, submit to the court and serve on each party a mandatory settlement conference statement containing a good faith _____ (settlement demand and an itemization of economic and noneconomic damages *or* offer of settlement). The statement must set forth and discuss in detail all facts and law pertinent to the issues of liability and damages involved in the case as to that party and comply with any additional requirement imposed by local rule (*Cal. Rules of Ct., Rule 3.1380(c)*). (Local rule provides _____ [*specify.*])]

[*CONTINUE*]

E. Sanctions With Respect to Conferences. In addition to any other sanctions permitted by law, the court may order a person, after written notice and an opportunity to be heard, to pay reasonable monetary sanctions to the court or an aggrieved person, or both, for failure to comply with the California Rules of Court, Rule _____ (*3.722 or 3.1380*), unless good cause is shown (*Cal. Rules of Ct., Rule 2.30*).

[*Optional*] **F. Enforcement of Local Rules.** Local rules promulgated pursuant to *Code of Civil Procedure Section 575.1* may provide that if any counsel, a party represented by counsel, or a party if in pro se, fails to comply with any of the requirements thereof, the court on motion of a party or on its own motion may strike out all or any part of any pleading of that party, or, dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party, or impose other penalties of a lesser nature as otherwise provided by law, and may order that party or his or her counsel to pay to the moving party the reasonable expenses in making the motion, including reasonable attorney fees (*Code Civ. Proc. § 575.2(a)*; *see Code Civ. Proc. § 575.1* (authority to enact local rules)).

[*Optional*] **G. Enforcement of Trial Delay Reduction Rules.** Judges shall have all the powers to impose sanctions authorized by law, including the power to dismiss actions or strike pleadings, if it appears that less severe sanctions would not be effective after taking into account the effect of previous sanctions or previous lack of compliance in the case. Judges are encouraged to impose sanctions to achieve the purposes of the Trial Court Delay Reduction Act (*Gov. Code § 68608(b)*).

H. *Cal. Rules of Ct., Rule 2.30* as Not Constituting Impermissible Attempt by Judicial Council to Legislate. The rule of practice and procedure duly adopted by the Judicial Council of California and set forth as *Rule 2.30 of the California Rules of Court* is not an impermissible attempt by the Judicial Council to legislate in the area of substantive

law (*see Cantillon v. Superior Court (1957) 150 Cal. App. 2d 184, 187, 309 P.2d 890* , applying predecessor to Cal. Rules of Ct., Rule 227, which is now *Cal. Rules of Ct., Rule 2.30*).

[*Optional*] **I. Violation of Rules of Practice Adopted by Judicial Council as Contempt of Court.** An inexcusable failure of a person to comply with a rule of practice adopted by the Judicial Council is a contempt of court and punishable as such (*see Cantillon v. Superior Court (1957) 150 Cal. App. 2d 184, 187-188, 309 P.2d 890*).

[*Add paragraphs as necessary to set forth provisions of any additional relevant local rule, policy, or court order not complied with and cite rule, policy, or order.*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that, in the absence of a showing of good cause, sanctions may be imposed for the failure of a person to comply with the California Rules of Court, local court rule, or a court order, or to participate in good faith in any conference required by those rules or order [*see Cal. Rules of Ct., Rule 2.30*].

Optional Paragraph B should be included if the sanctions were imposed or are sought to be imposed with respect to a pretrial conference.

One of the two alternatives of Paragraph D should be used depending on whether a case management or settlement conference is involved.

Optional Paragraph I should be included if the sanctions were imposed or are sought to be imposed for contempt of court.

The purpose of the points and authorities in this form is to establish the power of the Judicial Council to adopt the rule imposing sanctions and its legally binding effect.

These points and authorities may be used alone or combined with a memorandum relating to the specific procedural context in which counsel wishes to raise the issue as to the propriety of sanctions against a person for failing without good cause to comply with the California Rules of Court, local court rule, or a court order, or failing to participate in good faith in any conference required by those rules or court order. For example, the points and authorities may be combined with a memorandum in support of a motion for the imposition of sanctions and an award of reasonable expenses and counsel fees pursuant to *Cal. Rules of Ct., Rule 2.30*. The points and authorities may also be cited in a contempt proceeding arising out of the person's failure to comply with the California Rules of Court or local court rules or court order regarding the duties of parties and counsel with respect to the case management, trial setting, or settlement conference, or to participate in good faith in any such conference, or they may be combined with points and authorities in opposition to a petition for writ of certiorari to review the contempt adjudication. They may also be cited in an appellate brief on appeal from the judgment in the action in which the sanctions were imposed or in any other proceeding in which the issue may arise.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. The argument will depend on the specific procedural context in which the issue arises. For example, if the contention is made in support of a motion to impose sanctions, the probative facts not appearing in the court's records or file of the case which establish the ground or grounds for imposing sanctions should be set forth in an accompanying affidavit, or declaration under penalty of perjury [*see Code Civ. Proc. §§ 2009, 2015.5*]. Counsel should request the court to take judicial notice of any additional facts supporting the imposition of sanctions that appear in the court's

records [*see Evid. Code §§ 452(d), 453*; *cf. Code Civ. Proc. § 430.70* (relating to demurrers)]. Counsel may refer to these facts in the memorandum and argue their effect as showing that the person failed without good cause to comply with an applicable rule or court order or to participate in good faith in the conference. With respect to the person's failure to participate in good faith at the conference, this fact would be apparent to the judge and would not normally be required to be established by facts set forth in an affidavit or declaration; the person's failure to appear at the conference would, of course, be obvious, and the burden would be on the person to establish good cause for his or her absence.

[b] Alternative Provisions

Counsel seeking an award of expenses and fees for a person's failure to participate in good faith in a case management or settlement conference should also consider the availability of sanctions under *Code Civ. Proc. § 128.7* (papers presented to court for improper purpose or not warranted on law or facts if the action was filed on or after January 1, 1995) or *Code Civ. Proc. § 128.5* (frivolous actions and delaying tactics if the action was filed before January 1, 1995). For forms of memoranda based on these statutes, see Ch. 60, *Costs* . Counsel should additionally consider *Code Civ. Proc. §§ 177.5* (sanctions imposed notwithstanding any other provision of law for violation of lawful court order) and 1218 (punishment imposed for contempt of court).

[c] Conduct Warranting Sanctions and Procedure for Imposition

In addition to any other sanctions permitted by law, the court may order a person, after written notice and an opportunity to be heard, to pay reasonable monetary sanctions to the court or an aggrieved person, or both, for failure to comply with the rules in Title Two of the California Rules of Court, unless good cause is shown. "Person" includes a party, a party's attorney, witness, and an insurer or any other individual or entity whose consent is necessary for the disposition of the case. If a failure to comply with the rule is the responsibility of counsel and not of the party, any penalty must be imposed on counsel and must not adversely affect the party's cause of action or defense [*Cal. Rules of Ct., Rule 2.30(b)*].

If a party moves for sanctions, sanctions cannot be imposed under *Cal. Rules of Ct., Rule 2.30* except upon notice in the party's motion papers which must set forth the applicable rule that has been violated, describe the specific conduct that is alleged to have violated the rule, and identify the attorney, law firm, party, witness or other person against whom sanctions are sought [*Cal. Rules of Ct., Rule 2.30(c)*]. In addition to sanctions, the court may order the person who has violated a rule in Title Two to pay to the party aggrieved by the violation that party's reasonable expenses, including reasonable attorney fees and costs, incurred in connection with the sanctions motion [*Cal. Rules of Ct., Rule 2.30(d)*].

An unlawful interference with the proceedings of the court is also a contempt of court [*Code Civ. Proc. § 1209(a)(8)*]. Punishment that may be imposed for contempt of court is set forth in *Code Civ. Proc. §§ 1218, 1219.*

[d] Related Pleading and Practice Forms

For forms for use in contempt proceedings, see California Forms of Pleading and Practice, Ch. 135, *Contempt* . For a discussion and forms for use in obtaining sanctions for frivolous actions and delaying tactics, see *Ch. 174, Costs and Attorney's Fees, § 174.50* et seq., in that publication.

[e] Related Points and Authorities

For memoranda for use generally in attacking the sufficiency of an affidavit or declaration charging an indirect contempt, see *Ch. 47, Contempt, § 47.30* et seq. For memoranda generally supporting and opposing a petition for writ of certiorari, see Ch. 205, *Review (Certiorari), Writ of.*

[3] Discussion of Authorities

[a] Effect of Judicial Council's Rules

Cantillon v. Superior Court *(1957) 150 Cal. App. 2d 184, 309 P.2d 890* , was a proceeding in certiorari to review a superior court order holding a law firm in contempt of court for its conduct with respect to a pretrial conference in a civil case. The pretrial conference order, among other things, stated that (1) the law firm neither prepared for pretrial nor conferred with counsel for plaintiff or codefendant prior to pretrial as required; (2) the attorney sent by the law firm to the conference was not familiar with either the facts or law of the case and was without adequate knowledge or authority to proceed; (3) another attorney in the firm was the lawyer who was familiar with the matter; (4) counsel for plaintiff and counsel for codefendant advised the court that they had not been able to make arrangements with the law firm for pretrial conferences and that their phone calls had not been answered; and (5) the matter obviously was not ready for pretrial hearing. The court ruled that the law firm violated former Superior Court Rules, Rule 8.2 (relating to pretrial conferences) and former Superior Court Rules, Rule 8.9 (a predecessor to *Cal. Rules of Ct., Rule 2.30*) and thereby committed an unlawful interference with the proceedings of the court and was in contempt of court. The order added that no good cause was shown by the law firm for the violations and directed the firm to pay a fine. The attorney who was stated to have been familiar with the case petitioned for a writ of certiorari, challenging the power of the trial court to make a contempt finding based on former Superior Court Rules, Rule 8.2.

The court of appeal annulled and vacated the contempt order on the ground that criminal contempts consisting of acts done in disrespect of the authority of a court are necessarily acts or omissions of an individual or individuals, as distinguished from acts or omissions of the firm or association of which the individuals are members, and that the court knew of no authority by which it could impose a fine on a firm or association for a personal contempt committed by one of its members. The court nevertheless upheld the power of the trial court to impose contempt sanctions pursuant to former Code Civ. Proc. §§ 128(3) and 1209(8) [*now see Code Civ. Proc. §§ 128(a)(3)* and *1209(a)(8)*] and what today is *Cal. Rules of Ct., Rule 2.30*. The court said that former Cal. Const, art. VI, § 1a [*now see Cal. Const., art. VI, § 6*] vests in the Judicial Council power to adopt rules of practice and procedure for the courts not inconsistent with laws. It is well settled that, under this constitutional grant of power, the rules of practice and procedure adopted by the Judicial Council, including rules adopted under specific statutory mandate, and which do not transcend legislative enactments, have the force of positive law (*150 Cal. App. 2d 184, 187-188)* .

In ***Paul D. v. Superior Court*** *(1984) 158 Cal. App. 3d 838, 205 Cal. Rptr. 77* , the court of appeal held the Los Angeles County probation department's policy of refusing to consider a minor for informal supervision under *Welf. & Inst. Code § 654* when the minor denied the charge was illegal. The court explained that the factors to be considered by the probation officer in determining eligibility for that supervision were specified in former Cal. Rules of Ct., Rule 1307(e), that the rule did not transcend any legislative enactments, and that the rule had the force of law (*158 Cal. App. 3d 838, 841)* . Since admission of guilt was not a factor specified in the rule, the department abused its discretion in refusing to consider petitioner for section 654 supervision on grounds that he denied the charge against him of misdemeanor battery (*158 Cal. App. 3d 838, 842)* .

[b] Duties of Persons With Respect to Pretrial Conference

The facts and procedural background of ***Cantillon v. Superior Court*** *(1957) 150 Cal. App. 2d 184, 309 P.2d 890* , are discussed in [a], *above*. The court said the duties of attorneys in respect to pretrial conferences are set forth in former Superior Court Rules, Rule 8.2. This rule required the attendance at the conference by counsel, if any, who will have a thorough knowledge of the case and be prepared to discuss it. The court said that, manifestly, there can be no pretrial conference without conferees, and no effective pretrial conference without participation predicated on preparation. The court held the rule was not inconsistent with any statutory law and therefore had the force of law as it applied to the duties of attorneys to prepare for, attend, and participate in a pretrial conference (*150 Cal. App. 2d 184, 187)* .

[c] Cal. Rules of Ct., Rule 2.30 as Not Constituting Impermissible Attempt by Judicial Council to Legislate

The facts and procedural background of ***Cantillon v. Superior Court*** *(1957) 150 Cal. App. 2d 184, 309 P.2d 890* , are discussed in [a], *above*. Petitioner contended that former Superior Court Rules, Rule 8.9 [*now see Cal. Rules of Ct., Rule 2.30*], by designating certain acts and omissions as contempts of court, constituted an attempt by the Judicial Council both to encroach unconstitutionally on the power of the Legislature to legislate in the field of substantive law and to entrench on a field of law preempted by the Legislature.

The court of appeal rejected both contentions. The court said that former Code Civ. Proc. § 1209, defined with some particularity various types of acts or omissions that constitute contempts of the authority of the court. However, former Code Civ. Proc. § 1209(8) [*now see Code Civ. Proc. § 1209(a)(8)*], by its terms, embraces any other acts not otherwise described which result in the unlawful interference with the process or proceedings of a court. The court explained that, manifestly, a specific enumeration of every act or omission which may unlawfully interfere with the proceedings of the court is impractical, if not impossible, and held that the clear purpose of former Code Civ. Proc. § 1209(8) was to include, within the definition of contempt, acts or omissions not previously specified but which in fact result in an unlawful interference with the proceedings of the court. The court explained that the rule delineated certain omissions by an attorney as constituting an unlawful interference with the proceedings of the court in a pretrial conference and did not attempt to define any new or distinct act of contempt (*150 Cal. App. 2d 184, 188)* . The court held that the rule was neither an encroachment on the legislative authority to enact substantive law or an attempt by the Judicial Council to entrench on a field of law preempted by the Legislature (*150 Cal. App. 2d 184, 188-189)* .

[d] Violation of Rules of Practice Adopted by Judicial Council as Contempt of Court

The facts and procedural background of ***Cantillon v. Superior Court*** *(1957) 150 Cal. App. 2d 184, 309 P.2d 890* , are discussed in [a], *above*. The court said that it is a well-recognized principle that courts have inherent power to enforce the effective conduct of judicial proceedings in order to insure orderly administration of justice and that the Legislature has in former Code Civ. Proc. § 128(3) [*now see Code Civ. Proc. § 128(a)(3)*] codified this principle by granting power to every court to provide for the orderly conduct of proceedings before it (*150 Cal. App. 2d 184, 187)* . The court, citing former Code Civ. Proc. § 1209(8) [*now see Code Civ. Proc. § 1209(a)(8)*], said that an inexcusable failure to comply with the rules or orders made by a court pertaining to the orderly conduct of judicial proceedings before it constitutes an unlawful interference with the proceedings of the court, and by appropriate proceedings is punishable as a contempt of the authority of the court (*150 Cal. App. 2d 184, 187-188)* . The court held that a rule of procedure adopted by the Judicial Council within its constitutional or statutory grant of power for the conduct of a judicial proceeding before a court is a rule of the court within the purview of former Code Civ. Proc. § 128(3) and that an inexcusable failure of an attorney to prepare for, appear at, and participate in a pretrial conference is, by appropriate proceedings, subject to the punitive power of the court (*150 Cal. App. 2d 184, 188)* .

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Volume 18 Chapters 180-189 PRETRIAL PROCEEDINGS---to---PROBATE OF WILLS
CHAPTER 180 PRETRIAL PROCEEDINGS
PART II. FORMS
B. Sanctions with Respect to Pretrial, Trial Setting, and Settlement Conferences

18-180 California Points & Authorities § 180.31

§ 180.31 Supporting Contention That Discovery Sanctions May Be Imposed for Failure of Person to Comply With Case Management Order With Respect to Discovery

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

DISCOVERY SANCTIONS AGAINST _____ [*identify party, e.g.,* PLAINTIFF] FOR HIS/HER FAILURE TO HAVE COMPLIED WITH THE PROVISIONS OF THE CASE MANAGEMENT ORDER MADE AND FILED IN THIS CASE ORDERING HIM/HER TO _____ [*specify*], ALTHOUGH NOT EXPRESSLY AUTHORIZED BY STATUTE OR BY THE CALIFORNIA RULES OF COURT, MAY BE IMPOSED UNDER THE COURT'S INHERENT POWER.

A. Implied Powers to Effectuate Conferred Powers. When jurisdiction is conferred on a court or judicial officer by the California Constitution, the Code of Civil Procedure, or any other statute, all the means necessary to carry it into effect are also given; in the exercise of this jurisdiction, if the course of proceeding is not specifically pointed out by the Code of Civil Procedure or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the Code of Civil Procedure (*Code Civ. Proc. § 187*).

B. Power of Court to Impose Sanctions for Violation of Case Management Order. The court has inherent power to implement and enforce effective conduct of judicial proceedings held pursuant to the pretrial rules promulgated by the Judicial Council and they have inherent power, as well as power under *Section 187 of the Code of Civil Procedure* to adopt any suitable method of practice, both in ordinary actions and special proceedings, if the procedure is not specified by statute or by rules adopted by the *Judicial Council (Mellone v. Lewis (1965) 233 Cal. App. 2d 4, 12, 43 Cal. Rptr. 412*).

C. Power to Impose Sanction for Failure to Obey Discovery Order. If a party fails to obey a discovery order, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction against that party. In lieu of or in addition to this sanction, the court may impose a monetary sanction against the disobedient party (*see Code Civ. Proc. §§ 2023.030, 2025.450, 2025.480, 2030.290, 2030.300,*

2031.300, 2031.310, 2031.320, 2032.240, 2032.610-620, and *2032.640-650*; *Mellone v. Lewis (1965) 233 Cal. App. 2d 4, 13, 43 Cal. Rptr. 412* (decided under predecessor to Code Civ. Proc. § 2023).

D. Imposition of Discovery Sanctions Against Party Failing to Comply With Discovery Orders in Case Management Order. Although Section 2023 of the Code of Civil Procedure (*Code Civ. Proc. § 2023.010-2023.040* operative July 1, 2005), defining misuse of the discovery process and listing available sanctions for such misuse, is not made specifically applicable to case management orders, it does provide a suitable method of practice harmonious with the purposes of implementing and enforcing the portions of a case management order relating to evidence and discovery (*Mellone v. Lewis (1965) 233 Cal. App. 2d 4, 13, 43 Cal. Rptr. 412* (decided under predecessor to Code Civ. Proc. § 2023).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that a court has inherent power to impose discovery sanctions for a party's failure to have complied with the discovery provisions of a case management order. These points and authorities may be used alone or combined with a memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue. For example, the points and authorities may be combined with a memorandum in support of a pretrial motion in limine for an order excluding the otherwise relevant testimony or evidence. They might also be cited in support of an objection at trial to the introduction of that testimony or evidence. The points and authorities may also be included in a trial or appellate brief or in any other proceeding in which the issue may arise.

Counsel should consider additional grounds for sanctions when using this form. At the time *Mellone v. Lewis (1965) 233 Cal. App. 2d 4, 43 Cal. Rptr. 412* , was decided, former Cal. Rules of Ct., Rule 217 did not provide for sanctions for noncompliance with a court order [*see Mellone v. Lewis (1965) 233 Cal. App. 2d 4, 12, 43 Cal. Rptr. 412] . Cal. Rules of Ct., Rule 2.30*, which has replaced Rule 227, does allow the imposition of sanctions for violation of court orders. Thus, this form should be combined with the points and authorities *set forth in § 180.30[1]*.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. The argument will depend on the specific procedural context in which the issue arises. For example, if the contention is made in support of a motion in limine, counsel should identify the precise orders that were disobeyed and either state (or present in the form of an affidavit or declaration under penalty of perjury [*see Code Civ. Proc. §§ 2009, 2015.5*]) the facts constituting the failure to obey, suggest the nature of the sanction to be imposed, and cite the specific statutory sanction the imposition of which would be most conformable to the spirit of the Code of Civil Procedure.

[b] Related Pleading and Practice Forms

For general forms of notices of motion and supporting papers, see California Forms of Pleading and Practice, Ch. 372, *Motions and Orders* , (Matthew Bender). For a form of motion in limine and a form of order granting the motion, see Ch. 373, *Motions in Limine* in that publication.

[3] Discussion of Authorities

[a] Power of Court to Impose Sanctions for Violation of Pretrial Conference Order

Mellone v. Lewis *(1965) 233 Cal. App. 2d 4, 43 Cal. Rptr. 412* , was an action by multiple plaintiffs against a food caterer of a wedding for damages allegedly resulting from food poisoning. At the pretrial conference, which lasted three days, detailed and comprehensive orders relative to parties, issues, and procedure were made. One part of the pretrial order was entitled "Evidence, Discovery and Law and Motion." Under this heading, a number of orders were set forth.

These orders detailed the procedure for submission by plaintiffs to defendant of itemized claims for their medical expenses and loss of earnings, required that the itemized claims be submitted at least 90 days before trial, set a time limit (at least 30 days before trial) within which defendant might conduct medical examinations and audits to verify the claims so presented, and required that deposition and interrogatory matters were to be completed 60 days before trial. The issues of liability and damages were bifurcated for trial. The liability issue was tried first, and the jury returned a verdict in favor of plaintiffs on this issue. The trial then proceeded before the same jury as to the issue of damages. At this trial, plaintiff's counsel, seeking to establish special damages, called as a witness a doctor and asked whether he had rendered a bill to one of the plaintiffs. Defendant objected to the question on the ground plaintiffs had failed to comply with the pretrial conference order requiring that such a bill be submitted to counsel for defendant at least 90 days before trial. Plaintiffs asserted they furnished the information seven days prior to trial. The objection was sustained. Plaintiffs' counsel in chambers made an offer of proof and moved to be relieved from the provisions of the pretrial order. The motion was denied. Plaintiffs' subsequent motion for reconsideration was also denied. Plaintiffs' third motion for permission to present evidence regarding the items of special damages as to which the court had excluded the evidence was also denied. The jury returned a verdict for plaintiffs awarding each a different but nominal sum. Plaintiffs appealed, contending the trial court lacked authority to exclude the evidence and that they should have been relieved from their noncompliance with the pretrial conference order.

The court of appeal rejected the contentions and affirmed the judgment. The court pointed out that former Cal. Rules of Ct, Rule 217 [*now see Cal. Rules of Ct., Rule 2.30*], provided for sanctions with respect to a pretrial conference, but that none of the rules promulgated by the Judicial Council with reference to pretrial proceedings expressly provided sanctions or procedures to be followed in the event of noncompliance by a party with a pretrial order. Nevertheless, citing *Cantillon v. Superior Court (1957) 150 Cal. App. 2d 184, 187, 309 P.2d 890* (discussed in *§ 180.30[3][a]*), and former Code Civ. Proc. § 128(3), *(4)* [*now see Code Civ. Proc. § 128(a)(3), (4)*] relating to the powers of courts, the court said that it has the inherent power to implement and enforce effective conduct of judicial proceedings held pursuant to the pretrial rules promulgated by the Judicial Council. Citing *Tide Water Ass'n Oil Co. v. Superior Court (1955) 43 Cal. 2d 815, 825, 279 P.2d 35* , the court also stated that courts have inherent power, as well as power under *Code Civ. Proc. § 187*, to adopt any suitable method of practice, both in ordinary actions and special proceedings, if the procedure is not specified by statute or by rules adopted by the Judicial Council (*233 Cal. App. 2d 4, 12)* . It is not only proper but at times may be necessary for a court to follow provisions of the Code of Civil Procedure which are harmonious with the objects and purposes of the proceeding although those provisions are not specifically made applicable by the statute that creates the proceeding (*233 Cal. App. 2d 4, 12-13)* .

[b] Power to Impose Sanction for Failure to Obey Discovery Order

The facts and procedural background of ***Mellone v. Lewis*** *(1965) 233 Cal. App. 2d 4, 43 Cal. Rptr. 412* , are discussed in [a], *above*. The court, which decided the case under former Code Civ. Proc. § 2034 (*now see* Code Civ. Proc. § 2023(b) (*Code Civ. Proc. § 2023.030* operative July 1, 2005)), pointed out that it provided that if any party fails to obey a discovery order, the court may make those orders as are just in regard to the refusal, including an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him or her from introducing in evidence designated documents, things, or items of testimony (*233 Cal. App. 2d 4, 13)* .

Counsel should note that although *Mellone* specifically mentioned only the issue and evidence sanctions, additional sanctions, in the form of monetary, terminating, or contempt, may also be available [*see* Code Civ. Proc. § 2023(b)(1), (4), (5) (*Code Civ. Proc. § 2023.030(a), (d), (e)* operative July 1, 2005)].

[c] Imposition of Discovery Sanctions Against Party Failing to Comply With Discovery Orders in Pretrial Conference Order

The facts and procedural background of ***Mellone v. Lewis*** *(1965) 233 Cal. App. 2d 4, 43 Cal. Rptr. 412* , are discussed in [a], *above*. In rejecting plaintiffs' contentions, the court of appeal, after pointing out that former Code Civ. Proc. §

2034 (*now see* Code Civ. Proc. § 2023(b)(2) (*Code Civ. Proc. § 2023.030(b)* operative July 1, 2005)), provides for sanctions that may be imposed for disobedience of discovery orders, said that, although this section is not made specifically applicable to pretrial orders, it does provide a suitable method of practice harmonious with the purposes of implementing and enforcing the portions of the present pretrial order relating to evidence and discovery. The relevant portions of the pretrial order were made pursuant to consent of the parties, pertained to evidence and discovery matters, appeared under a subheading of the order entitled "Evidence, Discovery and Law and Motion," and were made pursuant to the express authorization of the rules then promulgated by the Judicial Council relating to pretrial proceedings. The court said that in view of the pretrial rules, code sections, and case law applicable to them, the trial court had authority to exclude evidence of claimed special damages that was not submitted in compliance with the order (*233 Cal. App. 2d 4, 13)* . The court further rejected plaintiffs' additional argument that exclusion of the evidence on the ground of plaintiffs' noncompliance with the pretrial order and the trial court's refusal to relieve plaintiffs from their noncompliance constituted an abuse of discretion (*233 Cal. App. 2d 4, 13-16)* .

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B. Sanctions with Respect to Pretrial, Trial Setting, and Settlement Conferences

18-180 California Points & Authorities §§ 180.32-180.39

[Reserved]

§§ 180.32[Reserved]

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18-180 California Points & Authorities § 180.40

§ 180.40 Opposing Contention That Sanctions May Be Imposed for Failure to Comply With State or Local Rules or Court Order Relating to Court Conferences or to Participate in Good Faith in Required Conferences [Cal. Rules of Ct., Rule 2.30]--Excessive Sanction for Failure to Attend Settlement Conference

[1] FORM

[*The following may be included in a memorandum or in a trial or appellate brief.*]

THE COURT _____ [SHOULD VACATE AND SET ASIDE THE ORDER *or* PROPERLY VACATED AND SET ASIDE THE ORDER *or* ERRED IN] _____ [*specify ordered sanction other than monetary sanction, e.g.,* STRIKING THE DEFENDANT'S ANSWER AND ENTERING DEFENDANT'S DEFAULT] AS A SANCTION FOR FAILING TO APPEAR AT THE SETTLEMENT CONFERENCE BECAUSE THE SANCTION IS EXCESSIVE.

[*EITHER*]

A. Insufficient Notice. A sanction that deprives the defendant of its day in court without sufficient notice is excessive (*Sigala v. Anaheim City School Dist. (1993) 15 Cal. App. 4th 661, 673, 19 Cal. Rptr. 2d 38*).

[*AND/OR*]

B. Ultimate Sanction Inappropriate in First Instance. The ultimate sanction of _____ [*specify sanction that terminates the case, e.g.,* striking the answer] is rarely, if ever appropriate in the first instance (*Sigala v. Anaheim City School Dist. (1993) 15 Cal. App. 4th 661, 673-674, 19 Cal. Rptr. 2d 38*).

[*AND/OR*]

C. Ultimate Sanction Is Inappropriate Because Failure to Attend Was Responsibility of Counsel Not Defendant. If a failure to comply with a rule in Title Two of the California Rules of Court is the responsibility of counsel and not of the party, any penalty must be imposed on counsel and must not adversely affect the party's cause of action or defense thereto (*Cal. Rules of Ct., Rule 2.30(b)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to plaintiff's contention that a sanction terminating the case may be or was properly ordered as a sanction for defendant having failed to appear at a settlement conference. The ground of opposition is that the sanction was excessive. These points and authorities may be used alone or combined with a memorandum relating to the specific procedural context in which counsel wishes to raise the issue as to the propriety of the sanction imposed or sought to be imposed. For example, the points and authorities may be combined with a memorandum in support of a motion by defendant for reconsideration of an order granting plaintiff's motion for an order striking the answer and entering defendant's default, or in support of a motion under *Code Civ. Proc. § 473(d)*, to set aside and vacate the default and default judgment on the ground the default and judgment are void. They may also be cited in an appellate brief, or in any other proceeding in which the issue may arise.

Counsel should insert argument showing the relationship between the facts of the case and the points of law stated. For example, facts showing defendant did not have notice of the hearing or that the notice did not show that such a severe sanction might be ordered should be added to Paragraph A. If using Paragraph B, counsel should show that defendant had not refused to comply with earlier court orders and that no previous, lesser sanctions (for example, monetary) had been ordered. If using Paragraph C, counsel should show that the responsibility of the failure to attend the settlement conference rested solely with counsel.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 180.30[1]*.

[b] Applicability of Form to Pretrial and Trial Setting Conferences

These points and authorities would appear to apply, by analogy, to the dismissal of an action as a sanction for the failure of plaintiff to appear at a case management or other pretrial conference because neither *Cal. Rules of Ct., Rule 2.30*, authorizing sanctions, nor *Sigala v. Anaheim City School Dist. (1993) 15 Cal. App. 4th 661, 673-674, 19 Cal. Rptr. 2d 38* , overturning an excessive sanction, is limited to settlement conferences.

[c] Related Pleading and Practice Forms

For general forms of notices of motion, renewed motions, and motions to reconsider, and supporting papers, see California Forms of Pleading and Practice, Ch. 372, *Motions and Orders* , and Ch. 374, *Motions to Reconsider and Renewed Motions* (Matthew Bender). For forms of notices of motion and related papers for use in moving for relief under Code Civ. Proc. § 473(d), relating to void judgments and orders, see Ch. 489, *Relief From Judgments and Orders* , in that publication. For forms for use on appeal, see Ch. 50, *Appeal: Briefs* , and Ch. 345A, *Limited Civil Cases* , in that publication.

[d] Related Points and Authorities

For memoranda generally supporting and opposing a motion to vacate and set aside a default and default judgment, see Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders* .

[3] Discussion of Authorities

[a] Insufficient Notice

Sigala v. Anaheim City School Dist. *(1993) 15 Cal. App. 4th 661, 19 Cal. Rptr. 2d 38* , involved an action by a student against a school district for damages plaintiff sustained in a playground injury when she was grabbed by another student and fell from "monkey bars." After plaintiff was awarded $20,250 in arbitration, the defendants moved for trial de novo. At the first mandatory settlement conference, defense counsel and the defendants' representative (actually a representative of a statutorily-authorized joint power authority (JPA) made up of self-insuring public entities including the defendant, which had control over settlement of any suits against its members) indicated that the defendants' decision was to offer nothing. The judge indicated that the case had value and asked the representative to so inform the JPA. At the continued conference, the representative reaffirmed the JPA's no offer position.

At a subsequent mandatory settlement conference before a different judge, the JPA's representative again had no authority to settle. The judge continued the conference to the same afternoon, ordered that all 15 members of the JPA board be present, and announced that a sanctions hearing, to be held pursuant to former Cal. Rules of Ct., Rules 222 and 227 (*now see Cal. Rules of Ct., Rules 3.1380* and 2.30), *Code Civ. Proc. § 128.5*, and local rules, would immediately follow the continued settlement hearing. No member of the JPA board appeared, and the court announced a tentative ruling to strike the request for a trial de novo.

At the ensuing show cause hearing the JPA president, in a declaration, outlined the JPA's position, including the point that once the JPA board voted to defend the case, there was no one individual who could have authorized settlement and that the board could not have legally met at the settlement conference due to the open meeting laws requiring 72-hour notice of meetings. The court struck the request for trial de novo and entered judgment on the arbitration award because of defendants' failure to attend any of the conferences or to explain why they would not come. The defendants appealed.

The court of appeal first strongly condemned the failure to appear at the conferences, rejecting the defendant's arguments that the structure of the JPA made compliance impossible (*15 Cal. App. 4th 661, 668-673)* . The court then stated that Cal. Rules of Ct., Rule former 227 (now see *Rule 2.30*), former Gov. Code § 68609 (*now see Gov. Code § 68608(b)*), and local rules could provide a basis for imposing the ultimate sanction, such as striking the answer (*15 Cal. App. 4th 661, 673)* . However, the court went on to hold that the sanction imposed, striking the request for trial de novo, deprived the defendants of their day in court without sufficient notice. One reason for the holding was that the defendants had been informed that the hearing would involve the plaintiff's attorney's fees and that the sanctions hearing would be held pursuant to Cal. Rules of Ct., Rules former 222 and 227 (now see *Rules 3.1380* and *2.30*), *Code Civ. Proc. § 128.5*, and two specified Orange County Rules. Although Rule former 227 (now see *Rule 2.30*) clearly provides for monetary sanctions, the court noted that there was no indication that the dismissal sanction should be available unless there were earlier refusals to comply with court orders or prior sanctions imposed. Thus the court held that the defendants were entitled to another chance to have the JPA comply with the law and court orders (*15 Cal. App. 4th 661, 673-674)* . The court reversed the order striking the request for trial de novo and directed the trial court to set a hearing to impose monetary sanctions (*15 Cal. App. 4th 661, 674)* .

The concurring opinion discusses how public entity litigants can effectively work cooperatively with the courts in regard to settlement conferences (*15 Cal. App. 4th 661, 674-676)* .

[b] Ultimate Sanction Inappropriate in First Instance

Sigala v. Anaheim City School Dist. *(1993) 15 Cal. App. 4th 661, 19 Cal. Rptr. 2d 38* , is discussed in [a], *above*.

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18-180 California Points & Authorities § 180.41

§ 180.41 Opposing Contention That Sanctions May Be Imposed for Failure to Comply With State or Local Rules or Court Order Relating to Court Conferences or to Participate in Good Faith in Required Conferences [Cal. Rules of Ct., Rule 2.30]--Settlement Conference Was Voluntary Rather Than Required

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE COURT _____ [SHOULD VACATE AND SET ASIDE THE ORDER *or* PROPERLY VACATED AND SET ASIDE THE ORDER *or* ERRED IN] IMPOSING SANCTIONS FOR FAILURE TO HAVE APPEARED AT THE SETTLEMENT CONFERENCE BECAUSE THE ORDER WAS BEYOND THE COURT'S JURISDICTION IN THAT THE CONFERENCE WAS VOLUNTARY.

A. Sanction Through Contempt Power Is Inapplicable to Voluntary Settlement Conference. A voluntary settlement conference is not subject to *Cal. Rules of Ct., Rule 3.1380* or Rule 2.30, nor is it a "process" or "proceeding" as referred to in *Code of Civil Procedure Section 1209* in its explanation of the court's contempt authority, and thus, a court order imposing sanctions based on a voluntary settlement conference is in excess of that court's jurisdiction (*Raygoza v. Betteravia Farms (1987) 193 Cal. App. 3d 1592, 1595-1596, 239 Cal. Rptr. 188*).

[*Optional*] **B. Order of Payment Is Inapplicable to Voluntary Settlement Conference.** When the parties hold a voluntary settlement conference that is not required by the rules or by court order, the court has no authority to make an order of reimbursement or payment to the county pursuant to *Cal Rules of Ct., Rule 2.30* (*see Raygoza v. Betteravia Farms (1987) 193 Cal. App. 3d 1592, 1595, 239 Cal. Rptr. 188*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that sanctions should be imposed against a party who did not participate in good faith in a settlement conference by sending a representative lacking

sufficient settlement authority. The ground of opposition is that the conference was a voluntary settlement conference rather than one that is required by the California Rules of Court, local court rule, or statute, and that the imposition of sanctions is, therefore, beyond the jurisdiction of the court. These points and authorities may be used alone or combined with a memorandum relating to the specific procedural context in which counsel wishes to raise the issue regarding the propriety of the sanction imposed or sought to be imposed. For example, the points and authorities may be combined with a memorandum in opposition to a motion by the plaintiff for an order striking the defendant's answer and entering the defendant's default. They may also be cited in an appellate brief, or in any other proceeding in which the issue may arise.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. The argument will depend on the specific procedural context in which the issue arises.

[b] Related Pleading and Practice Forms

For forms for use in contempt proceedings, see California Forms of Pleading and Practice, Ch. 135, *Contempt* (Matthew Bender). For general forms of notice of motions, see Ch. 372, *Motions and Orders* , in that publication. For forms for use on appeal, see Ch. 45, *Appeal: Motion Procedure* , and Ch. 345A, *Limited Civil Cases* , in that publication.

[c] Related Points and Authorities

For memoranda for use generally attacking the sufficiency of an affidavit or declaration charging an indirect contempt, see Ch. 47, *Contempt* . For memoranda generally opposing a petition for writ of certiorari, see Ch. 205, *Review (Certiorari), Writ of.*

[3] Discussion of Authorities

[a] Sanction Through Contempt Power Is Inapplicable to Voluntary Settlement Conference

Raygoza v. Betteravia Farms *(1987) 193 Cal. App. 3d 1592, 239 Cal. Rptr. 188* , was an action arising out of an automobile accident. The parties agreed to have a voluntary settlement conference before a retired superior court judge, whose fees would be split between the parties. Because at the conference the judge suggested a settlement figure that exceeded the settlement authority of the representative of defendant's insurance company, the voluntary settlement conference was continued. Shortly thereafter, plaintiffs' attorney notified defendant she would not attend any further voluntary settlement conferences because of the representative's lack of sufficient settlement authority, and filed a motion for sanctions seeking attorney's fees and costs. Defendant's offer to resolve the motion for sanctions and pay the judge's fees was accepted by plaintiffs, and the parties agreed to take the motion for sanctions off the court calendar. The matter was not removed, and when counsel for defendant heard the motion called, he requested the matter be taken off calendar. The court denied the request, continued the matter, and ordered defendant to show cause why additional sanctions should not be imposed. After the hearing, the trial court ordered defendant to pay to the county $500 for failing to participate in good faith at the voluntary settlement conference. Defendant appealed.

The court of appeal reversed, finding that the trial court acted in excess of its jurisdiction (*193 Cal. App. 3d 1592, 1595)* . Initially the court said that if a voluntary settlement conference, not required by the rules or by court order, is held by the parties, the court has no authority to make an order of reimbursement or payment to the county pursuant to former Cal. Rules of Ct., Rule 227 (now see Rule 2.30). The court then went on to explain that former Cal. Rules of Ct., Rule 222 (now see Rule 3.1380) pertains only to mandatory or voluntary settlement conferences supervised by the court. It does not apply to a voluntary settlement conference before a private person arranged by the parties without request of or notice to the court, when it was not on the court calendar and when the parties were not requested to and did not file settlement conference statements, and was held without use of the court's facilities and at no cost to the county (*193 Cal. App. 3d 1592, 1595-1596)* . The court found that the power of the court to impose sanctions is not

limitless, but extends only as allowed by its power to punish for contempt or pursuant to authorization by statute or rule of court. It analyzed terms "process" and "proceedings" as used in *Code Civ. Proc. § 1209*, which sets forth the court's contempt authority, and said they refer to something done or to be done in a court of justice or before a judicial officer. Thus, the court concluded that the order imposing sanction was not authorized because the voluntary settlement conference did not involve any court order or proceeding (*193 Cal. App. 3d 1592, 1596)* .

[b] Order of Payment Is Inapplicable to Voluntary Settlement Conference

The facts and procedural background of ***Raygoza v. Betteravia Farms*** *(1987) 193 Cal. App. 3d 1592, 239 Cal. Rptr. 188* , are set forth in [a], *above*.

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18-180 California Points & Authorities §§ 180.42-180.49

[Reserved]

§§ 180.42[Reserved]

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18-180 California Points & Authorities § 180.50

§ 180.50 Supporting Motion for Order Granting Preference [Code Civ. Proc. § 36]--General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION FOR ORDER THAT CASE _____ IS ENTITLED TO PREFERENCE IN SETTING IT FOR _____ [A CASE MANAGEMENT CONFERENCE *or* TRIAL]
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THE MOTION FOR AN ORDER THAT THIS CASE HAS PRIORITY IN SETTING IT FOR _____ [A CASE MANAGEMENT CONFERENCE *or* TRIAL] SHOULD BE GRANTED BECAUSE THE CASE IS _____ [GIVEN PRECEDENCE *or* ENTITLED TO A PREFERENCE] BY LAW.

A. Requirement That Priority Be Given in Setting Case for Trial. A civil case shall be entitled to preference on a

party's motion for preference that satisfies the conditions set forth in section 36 _____ ((a) and (c) *or* (b) and (c) *or* (d) *or* (e)) (*see Code Civ. Proc. § 36(f)*). On the granting of such a motion for preference, the clerk shall set the case for trial not more than 120 days from that date (*Code Civ. Proc. § 36(f)*).

B. Party May Request Case Management Conference at Any Time. A party may request that a case management conference be held at any time (*see Cal. Rules of Ct., Rule 3.723*).

[*Add additional supporting points and authorities stating nature of case or party that entitles case to precedence or a preference in setting it for trial, and cite specific statutory and/or case authority establishing that it is so entitled (see, e.g., §§ 180.60 -180.65)*].

Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for an order that a case has precedence or is entitled to a preference in setting it for a case management conference or trial. The form should be combined with additional points and authorities showing the particular legal basis for precedence or preference. In an appropriate case, the points and authorities *set out in §§ 180.57* and *180.60 -180.62*, showing entitlement to precedence, and the points and authorities *set out in §§ 180.63 -180.65*, showing entitlement to preference, may be combined with this form to establish good cause. For additional statutory bases for priority, which may be used in an appropriate case to establish precedence, see *§ 180.02[4]*. The matter of whether an action is entitled to precedence or preference is generally addressed at the initial case management conference. [*see Cal. Rules of Ct., Rule 3.722*]. An additional case management conference may be held at any time; however, a party should be required to appear at an additional conference only if an appearance is necessary for the effective management of the case [*Cal. Rules of Ct., Rule 3.723*].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. For example, if the case is entitled to an absolute precedence by statute, counsel should argue facts showing that case comes within the statutory provision. If the case is entitled to a precedence or preference that is conditional or discretionary with the court, counsel should argue that the facts set out in the supporting declaration or affidavit show that the condition has been met or that the court should exercise its discretion by granting the motion.

[b] Cases Entitled to Priority

A case may be entitled to priority because (1) of the nature of the case [*see, e.g., §§ 180.57, 180.60 -180.62*], (2) of the age or physical condition of a party [*see §§ 180.56, 180.63, 180.64*], or (3) the interests of justice require it [*see § 180.65*]. A mere statement of the nature of the case will frequently reveal whether the case is entitled to legal precedence. If it is clear that the case is so entitled, a motion to establish it is normally unnecessary. However, if evidence outside the court's records is required to establish that the case has precedence or is entitled to a preference, counsel may wish to move by noticed motion for an order establishing it. In certain cases in which a preference or a precedence is sought, a motion is expressly required by statute [*see, e.g., Code Civ. Proc. §§ 36* (*see § 180.70*), 1062.3(b) (*see §§ 180.60 -180.65*)].

The precedence or preference granted a case may be absolute in the sense that a statute provides that the case takes precedence over all other civil cases except older matters of the same character and matters or actions to which special precedence is given by law [*see, e.g., Code Civ. Proc. §§ 527(e)* (injunction actions), 1179a (proceedings in unlawful detainer, forcible entry, or forcible detainer to recover possession of real property; *see § 180.62*)]. Or, the precedence or preference may be conditional or discretionary with the court [*see, e.g., Code Civ. Proc. §§ 36(e)* (interests of justice served by granting preference; *see § 180.65*), 1062.3(b) (precedence of action seeking relief in addition to declaratory relief; *see § 180.70*)].

Facts necessary to enable the court to determine whether the precedence or preference is absolute or whether, in the case of a conditional precedence or preference, the condition has been met, or to enable the court to exercise its discretion in granting or denying the precedence or preference may not appear in the court's records or file in the case. If they don't, such facts should be set forth in an accompanying affidavit or declaration under penalty of perjury, to which counsel may refer in the memorandum of points and authorities.

[c] Related Pleading and Practice Forms

For a form of notice of motion for an order establishing the precedence or preference of *California Forms of Pleading and Practice, Ch. 425, Pretrial Proceedings, § 425.140* (Matthew Bender).

[d] Related Points and Authorities

For a form of points and authorities supporting a motion under *Cal. Rules of Ct., Rule 3.1335*, to advance, reset, or specially set a case for trial date, see *§ 180.55*.

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18-180 California Points & Authorities §§ 180.51-180.54

[Reserved]

§§ 180.51[Reserved]

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18-180 California Points & Authorities § 180.55

§ 180.55 Supporting Motion to Advance, Reset, or Specially Set Case Management Conference or Trial Date [Cal. Rules of Ct., Rules 3.723, 3.1335(b)]--General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF MOTION TO
Plaintiff,	)	_____ [ADVANCE *or* RESET
vs.	)	*or* SPECIALLY SET] [CASE MANAGEMENT
_____ [*name*],	)	CONFERENCE *or* TRIAL] DATE
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE MOTION OF _____ [*specify, e.g.,* PLAINTIFF] TO _____ [ADVANCE *or* RESET or SPECIALLY SET] THE [CASE MANAGEMENT CONFERENCE *or* TRIAL] DATE SHOULD BE GRANTED BECAUSE _____ [*specify good cause for granting motion, e.g.,* THE ACTION IS ENTITLED TO STATUTORY PREFERENCE].

[*EITHER, if motion is directed to case management conference*]

A. Judicial Power to Advance, Reset, or Specially Set Case Management Conference. The court on its own motion may order, or a party or parties may request, that an additional case management conference be held at any time (*Cal. Rules of Ct., Rule 3.723*).

[*OR, if motion is directed to trial date*]

A. Judicial Power to Advance, Reset, or Specially Set Trial Date. A motion to advance, reset, or specially set a case for trial must be made before _____ [the presiding judge or the presiding judge's designee, unless the case has previously been assigned for all purposes to a specific judge or department *or* the _____ (judge to whom or department to which) the case has been assigned for all purposes]. The motion may be granted on notice, on the filing of a declaration showing good cause, and on the appearance by the moving party at the hearing on the motion (*Cal. Rules of Ct., Rule 3.1335*).

[*Add additional points and authorities citing specific statutory and/or case authority that supports the proposition that under the circumstances good cause exists for advancing, resetting, or specially setting the case for a case management conference or for trial (see, e.g., §§ 180.56, 180.57, 180.60 -180.65)*].

Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion to advance, reset, or specially set a case for case management conference or for trial. The memorandum should include points and authorities establishing that good cause exists for granting the motion under the circumstances of the particular case [*see Cal. Rules of Ct., Rule 3.1335(b)*]. *Cal. Rules of Ct., Rule 3.723* does not expressly require good cause for granting a request for a case management conference. However, a party should be required to appear at an additional conference only if an appearance is necessary for the effective management of the case. In determining whether to hold an additional conference, the court will consider each case individually on its own merits [*Cal. Rules of Ct., Rule 3.723*]. Thus, it would be good practice to support the motion with good cause. In an appropriate case, the points and authorities *set out in §§ 180.56, 180.57, 180.60 -180.65* may be combined with this form to establish good cause. For additional statutory bases for priority, which may be used in an appropriate case to establish good cause, see *§ 180.02[4]*.

With appropriate modifications, the form may also be used to oppose a motion to continue a trial [*see Cal. Rules of Ct., Rules 3.723, 3.1332*; *see also* Ch. 48, *Continuance of Proceedings*].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. In addition, the moving party must attach affidavits or declarations stating any facts relied on for a showing of good cause in support of a motion to advance, reset, or specially set a trial date [*Cal. Rules of Ct., Rule 3.1335(b)*]. *Cal. Rules of Ct., Rule 3.723* does not expressly require affidavits or declarations in support of a request for a case management conference. However, a party should be required to appear at an additional conference only if an appearance is necessary for the effective management of the case [*Cal. Rules of Ct., Rule 3.723*]. Therefore, it would be

good practice to submit affidavits or declarations when requesting to advance, reset, or specially set the conference.

[b] Good Cause

A motion to advance, reset, or specially set a case for trial will be granted only on a showing of good cause [*see Cal. Rules of Ct., Rule 3.1335(b)*]. *Cal. Rules of Ct., Rule 3.723* does not expressly require good cause for granting a request for a case management conference. However, a party should be required to appear at an additional conference only if an appearance is necessary for the effective management of the case [*Cal. Rules of Ct., Rule 3.723*]. Thus, it would be good practice to support the motion with good cause when requesting to advance, reset, or specially set the conference. Good cause usually consists of entitlement to precedence or preference. For example, a plaintiff may seek to have his or her case set specially for trial in order to avoid mandatory dismissal under *Code Civ. Proc. §§ 583.310, 583.360*, by attempting to show a preference in the interests of justice under *Code Civ. Proc. § 36(e)* [*see Dick v. Superior Court (1986) 185 Cal. App. 3d 1159, 1164-1168, 230 Cal. Rptr. 297* (discussed in *§ 180.65[3*][a])].

[c] Related Pleading and Practice Forms

For forms of a notice of motion, supporting declaration, and order for use in a proceeding to advance, reset, or specially set a case for a case management trial, see *California Forms of Pleading and Practice, Ch. 425, Pretrial Proceedings §§ 425.160 -425.163* (Matthew Bender).

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18-180 California Points & Authorities § 180.56

§ 180.56 Supporting Motion to Advance, Reset, or Specially Set Case Management Conference or Trial Date [Cal. Rules of Ct., Rules 3.723, 3.1335(b)]--Advancement Based on Party's Age and Physical Infirmity

[1] FORM

[*Caption. See § 180.55[1].*]

THE MOTION OF _____ [*specify moving party, e.g.,* PLAINTIFF] TO _____ [ADVANCE *or* RESET or SPECIALLY SET] THE [CASE MANAGEMENT CONFERENCE *or* TRIAL] DATE SHOULD BE GRANTED BECAUSE OF THE AGE AND PHYSICAL INFIRMITY OF _____ [*specify party, e.g.,* PLAINTIFF].

A. Judicial Power to Advance, Reset, or Specially Set Case Management Trial Date. [*See § 180.55[1], Paragraph A.*]

B. Advancement Is Required by Age and Physical Infirmity of Party. Good cause exists for advancing a case on the calendar when the action is for damages based on negligence and when a party's ability to present the case on the merits may, in the event of delay, be adversely affected by his or her advanced age and physical infirmity (*see Moffitt v. Ford Motor Co. (1931) 115 Cal. App. 499, 500-501, 1 P.2d 994*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion to advance, reset, or specially set a case for case management conference or for trial, on the ground that the advanced age and physical infirmity of the moving party may adversely affect that party's ability to present his or her case in the event of a delay [*cf. Code Civ. Proc. § 36(a), (d)*; *see also § 180.63*]. With appropriate modifications, the form may also be used to oppose a motion for continuance of trial [*see Cal. Rules of Ct., Rule 3.1332(a)*; *see also* Ch. 48, *Continuance of Proceedings*].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. In addition, the moving party must attach affidavits or declarations stating any facts relied on for a showing of good cause in support of a motion to advance, reset, or specially set a trial date [*Cal. Rules of Ct., Rule 3.1335(b)*]. *Cal. Rules of Ct., Rule 3.723* does not expressly require affidavits or declarations in support of a request for a case management conference. However, a party should be required to appear at an additional conference only if an appearance is necessary for the effective management of the case [*Cal. Rules of Ct., Rule 3.723*]. Therefore, it would be good practice to submit affidavits or declarations when requesting to advance, reset, or specially set the conference.

[b] Related Pleading and Practice Forms

For forms of a notice of motion, supporting declaration, and order for use in a proceeding to advance, reset, or specially set a case for case management trial, see *California Forms of Pleading and Practice, Ch. 425, Pretrial Proceedings §§ 425.160 -425.163* (Matthew Bender).

[3] Discussion of Authorities

[a] Advancement Is Required by Age and Infirmity

In ***Moffitt v. Ford Motor Co.*** *(1931) 115 Cal. App. 499, 1 P.2d 994* , plaintiff sued defendant for damages arising from personal injuries. Prior to trial, the trial court made a ruling that was favorable to plaintiff and defendant appealed. Plaintiff requested the court of appeal to either affirm the judgment of the trial court or advance the hearing of the appeal. The court denied the motion to affirm judgment, but decided that good cause existed to advance the case to the next regular calendar. The court reasoned that plaintiff was elderly and in poor health, and that, therefore, the appeal should be determined speedily so that if a trial was necessary, it could take place while plaintiff was still in a good enough physical and mental condition to present her case (*115 Cal. App. 499, 500-501)* .

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18-180 California Points & Authorities § 180.57

§ 180.57 Supporting Motion to Advance, Reset, or Specially Set Case Management Conference or Trial Date [Cal. Rules of Ct., Rules 3.723, 3.1335(b)]--Advancement Based on Priority of Case--Eminent Domain Proceeding [Code Civ. Proc. § 1260.010]

[1] FORM

[*Caption. See § 180.55[1].*]

THE MOTION OF _____ [*specify moving party, e.g.,* PLAINTIFF] TO _____ [ADVANCE *or* RESET *or* SPECIALLY SET] THE [CASE MANAGEMENT CONFERENCE *or* TRIAL] DATE SHOULD BE GRANTED BECAUSE THE CASE IS ENTITLED TO STATUTORY PRIORITY UNDER SECTION 1260.010 OF THE CODE OF CIVIL PROCEDURE.

A. Judicial Power to Advance, Reset, or Specially Set Case Management Conference or Trial Date. [*See § 180.55[1], Paragraph A.*].

B. Precedence of Eminent Domain Proceedings. Eminent domain proceedings under *Sections 1230.010 through 1273.050 of the Code of Civil Procedure* take precedence over all other civil actions in the matter of setting the same for hearing or trial in order that such proceedings shall be quickly heard and determined (*Code Civ. Proc. § 1260.010*).

C. Advancement Is Proper in Eminent Domain Proceeding. An advancement in an eminent domain proceeding to obtain trial within one year is proper because under *Section 1260.010 of the Code of Civil Procedure*, eminent domain proceedings must be given precedence over all other civil actions (*Swartzman v. Superior Court (1964) 231 Cal. App. 2d 195, 199, 41 Cal. Rptr. 721*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion to advance, reset, or specially set a case for case management trial, on the ground that the case is entitled to priority under *Code Civ. Proc. § 1260.010*. With appropriate modifications, the form may also be used to oppose a motion to continue a case management conference or trial [*see Cal. Rules of Ct., Rule 3.1332(b)*; *see also* Ch. 48, *Continuance of Proceedings*].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. In addition, the moving party must attach affidavits or declarations stating any facts relied on for a showing of good cause in support of a motion to advance, reset, or specially set a trial date [*Cal. Rules of Ct., Rule 3.1335(b)*]. *Cal. Rules of Ct., Rule 3.723* does not expressly require affidavits or declarations in support of a request for a case management conference. However, a party should be required to appear at an additional conference only if an appearance is necessary for the effective management of the case [*Cal. Rules of Ct., Rule 3.723*]. Therefore, it would be good practice to submit affidavits or declarations when requesting to advance, reset, or specially set the conference.

[b] Related Pleading and Practice Forms

For forms of a notice of motion, supporting declaration, and order for use in a proceeding to advance, reset, or specially set a case for trial, see *California Forms of Pleading and Practice, Ch. 425, Pretrial Proceedings §§ 425.160 -425.163* (Matthew Bender). For discussion and forms relating to eminent domain proceedings generally, see Ch. 247, *Eminent Domain* in that publication.

[c] Related Points and Authorities

For forms of points and authorities relating to eminent domain proceedings generally, see Ch. 95, *Eminent Domain* .

[3] Discussion of Authorities

[a] Advancement Is Proper in Eminent Domain Proceeding

Swartzman v. Superior Court *(1964) 231 Cal. App. 2d 195, 41 Cal. Rptr. 721* , arose out of a proceeding in eminent domain brought by the state on October 3, 1963. On July 15, 1964, the state filed a motion to set the date of pretrial proceedings and trial prior to October 1, in an attempt to advance the proceeding to take advantage of the former rule that if an eminent domain case is tried within one year, the value of the property is its value on the date of summons [*see* former Code Civ. Proc. § 1249 (repealed and reenacted as *Code Civ. Proc. § 1263.120*, which assigns the date of commencement of the proceeding as the date of valuation)]. The trial court granted the motion and set pretrial hearings for August 19 and September 18 and the trial for September 30. Defendant petitioned for a writ of prohibition and other relief.

The court of appeal affirmed the trial court's grant of the advancement, holding that advancement is an appropriate means to accelerate eminent domain proceedings under former Code Civ. Proc. § 1264 (repealed and substantially reenacted as *Code Civ. Proc. § 1260.010*)]. The court pointed out that in another eminent domain case, *County of San Mateo v. Bartole (1960) 184 Cal. App. 2d 422, 437, 7 Cal. Rptr. 569* , trial settings that allowed only 31 days in which to hold pretrial and begin the trial were held proper on appeal, whereas in the instant case defendants had 59 days after the setting to prepare for pretrial and 71 to prepare for trial. The court of appeal held that the special setting procedures of former Cal. Rules of Ct., Rules 209(a) and 225 [*see now Cal. Rules of Ct., Rules 3.723, 3.1335*], provided an appropriate means to fulfill statutory requirements that certain proceedings be given preference over other civil actions

where, under the circumstances, the time available to defendant to prepare is adequate (*231 Cal. App. 2d 195, 199)* .

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18-180 California Points & Authorities §§ 180.58-180.59

[Reserved]

§§ 180.58[Reserved]

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18-180 California Points & Authorities § 180.60

§ 180.60 Supporting Contention That Case Is Entitled to Priority--Action Is by Taxpayer to Enjoin Public Improvement Project [Code Civ. Proc. § 526a]

[1] FORM

[*The following may be combined with the points and authorities in § 180.50[1] or § 180.55[1].*]

THIS IS AN ACTION BY A TAXPAYER TO ENJOIN A PUBLIC IMPROVEMENT PROJECT AND PURSUANT TO SECTION 526a OF THE CODE OF CIVIL PROCEDURE IS ENTITLED TO SPECIAL PRECEDENCE IN SETTING IT FOR TRIAL.

A. Precedence of Taxpayer's Action to Enjoin Public Improvement. An action to enjoin a public improvement project pursuant to *Section 526a of the Code of Civil Procedure*, relating to taxpayers' actions to restrain and prevent any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city, or city and county of California, is entitled to special precedence over all civil matters on the calendar of the court except those matters to which equal precedence on the calendar is granted by law (*Code Civ. Proc. § 526a*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the action is entitled to precedence on the court's calendar and may be submitted in combination with the points and authorities *set out in § 180.50[1]* or *§ 180.55[1]*. The form sets out the point that a taxpayer's action brought under *Code Civ. Proc. § 526a* to enjoin a public improvement project is entitled pursuant to that section to precedence in setting for a trial setting conference or trial.

These points and authorities may also be combined with a memorandum of points and authorities in other procedural contexts in which counsel wishes to make the contention that the case is entitled to a precedence, for example, in support of a petition for writ of mandate to compel the trial court to grant a precedence which it has improperly refused.

Counsel should insert facts showing that the case comes within the provisions of *Code Civ. Proc. § 526a*.

[b] Related Pleading and Practice Forms

For forms of complaints for use in taxpayers' actions under Code Civ. Proc. § 526a, see California Forms of Pleading and Practice, Ch. 466, *Public Entities and Officers: Taxpayer's Actions* . For forms of notices of motion and related forms for use in moving to establish the precedence of a case, or to advance, reset, or specially set a case, see *Ch. 425, Pretrial Proceedings, §§ 425.140* and 425.141 in that publication.

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18-180 California Points & Authorities § 180.61

§ 180.61 Supporting Contention That Case Is Entitled to Priority--Action Is for Declaratory Relief [Code Civ. Proc. § 1062.3(a)]

[1] FORM

[*The following may be combined with the points and authorities in § 180.50[1] or § 180.55[1].*]

THIS IS AN ACTION FOR DECLARATORY RELIEF IN WHICH NO RELIEF IN ADDITION TO A DECLARATION OF THE RIGHTS AND DUTIES OF THE PARTIES IS SOUGHT. IT IS, THEREFORE, ENTITLED BY LAW TO SPECIAL PRECEDENCE IN SETTING IT FOR TRIAL.

A. Precedence of Declaratory Relief Action. Except as provided in *Section 1062.3(b) of the Code of Civil Procedure*, relating to actions seeking relief in addition to a declaration of the rights and duties of the parties, an action for declaratory relief is required to be set for trial at the earliest possible date and takes special precedence over all other cases, except older matters of the same character and matters to which special precedence may be given by law (*Code Civ. Proc. § 1062.3(a)*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the action is entitled to precedence on the court's calendar and may be submitted in combination with the points and *authorities in § 180.50[1]* or *§ 180.55[1]*. The form sets out the point that an action for declaratory relief that seeks no relief in addition to a declaration of the rights and duties of the parties is entitled under *Code Civ. Proc. § 1062.3(a)* to precedence in setting for trial. This form may also be combined with a memorandum of points and authorities in other procedural contexts in which counsel wishes to make the contention that the case is entitled to a precedence, for example, in support of a petition for writ of mandate to compel the trial court to grant a precedence which it has improperly refused.

Counsel should insert facts showing that the case is one for declaratory relief under *Code Civ. Proc. § 1060* and comes

within the provisions of *Code Civ. Proc. § 1062.3(a)*.

[b] Related Pleading and Practice Forms

For forms of complaints for use in declaratory relief actions, see California Forms of Pleading and Practice, Ch. 182, *Declaratory Relief* . For forms of notices of motion and related forms for use in moving to establish the precedence of a case, or to advance, reset, or specially set a case, see Ch. 425, *Pretrial Proceedings* , in that publication.

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18-180 California Points & Authorities § 180.62

§ 180.62 Supporting Contention That Case Is Entitled to Priority--Proceeding Is in Unlawful Detainer [Code Civ. Proc. § 1179a]

[1] FORM

[*The following may be combined with the points and authorities in § 180.50[1] or § 180.55[1].*]

THIS IS A PROCEEDING IN UNLAWFUL DETAINER TO RECOVER THE POSSESSION OF REAL PROPERTY. IT IS, THEREFORE, ENTITLED BY LAW TO PRECEDENCE IN SETTING IT FOR TRIAL.

A. Precedence of Unlawful Detainer Proceeding. A proceeding in unlawful detainer to recover possession of real property is entitled to precedence over all other civil actions, except actions to which special precedence is given by law, in the matter of setting the proceeding for hearing or trial, and in hearing the same, to the end that all such actions shall be quickly heard and determined (*Code Civ. Proc. § 1179a*; *see Mobil Oil Corp. v. Superior Court (1978) 79 Cal. App. 3d 486, 494, 145 Cal. Rptr. 17* ; *Lori, Ltd., Inc. v. Superior Court (1946) 74 Cal. App. 2d 442, 442-443, 168 P.2d 982* ; *Cohen v. Superior Court (1967) 248 Cal. App. 2d 551, 554, 56 Cal. Rptr. 813* ; *Kartheiser v. Superior Court (1959) 174 Cal. App. 2d 617, 621-622, 345 P.2d 135*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the case is entitled to precedence on the court's calendar and may be submitted in combination with the points and *authorities in § 180.50[1]* or *§ 180.55[1]*. The form sets out the point that an unlawful detainer proceeding is entitled under *Code Civ. Proc. § 1179a* to precedence in setting for a trial and trial. These points and authorities may also be combined with a memorandum of points and authorities in other procedural contexts in which counsel wishes to make the contention that the case is entitled to a precedence, for example, in support of a petition for writ of mandate to compel the trial court to grant a precedence which it has improperly refused.

Counsel should insert argument showing the relationship between the facts of the case and the point of law stated. That is, counsel should argue facts showing that the case is one for unlawful detainer and comes within the provisions of *Code Civ. Proc. § 1179a*.

[b] Related Pleading and Practice Forms

For forms of complaints and related forms for use in proceedings in unlawful detainer, see California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions* (Matthew Bender). For forms of notices of motion and related forms for use in moving to establish the precedence of a case, or to advance, reset, or specially set a case, see Ch. 425, *Pretrial Proceedings* , in that publication.

[3] Discussion of Authorities

[a] Precedence of Unlawful Detainer Proceeding

Mobil Oil Corp. v. Superior Court *(1978) 79 Cal. App. 3d 486, 145 Cal. Rptr. 17* , was a proceeding in mandate to compel the trial court to vacate its order staying a proceeding in unlawful detainer brought by the lessor against the lessee to recover possession of a gasoline service station after termination of the lease. The trial court, on motion of the lessee, had stayed the unlawful detainer proceeding pending determination of a prior action brought in the same court by the lessee against the lessor in which the lessee sought to establish his rights to continue operation of the service station on the leased premises and in which the complaint included causes of action for declaratory relief and for unfair trade practices. At the time of the hearing on the motion to stay, the lessee's action for unfair trade practices requested relief on behalf of all of the lessor's service station operators. After the petition for writ of mandate had been filed, the lessee filed a third amended complaint which, among other things, requested the court to enjoin the lessor from unlawfully terminating the franchise or from filing a proceeding in unlawful detainer for such purpose.

The court of appeal held that the trial court's order staying the unlawful detainer proceeding constituted an abuse of discretion in that there were no facts presented to the trial court that would justify the granting of a stay and ordered issuance of a peremptory writ of mandate (*79 Cal. App. 3d 486, 495)* . The court, citing *Code Civ. Proc. § 1179a* and *Lori, Ltd., Inc. v. Superior Court (1946) 74 Cal. App. 2d 442, 443, 168 P.2d 982* (discussed *below*), pointed out that as part of the general statutory plan to provide for speedy disposition of unlawful detainer proceedings the case was entitled to unqualified preference in trial setting (*79 Cal. App. 3d 486, 494)* .

Neither the statement in *Mobil Oil* that an unlawful detainer proceeding is entitled to precedence, based as it is on statute, nor the holding that staying an unlawful detainer proceeding pending determination of another action is an abuse of discretion in the absence of a proper showing justifying the stay has been expressly repudiated by the Supreme Court or by other courts of appeal. Nevertheless, doubt has been cast on the case insofar as it held the showing there made was insufficient. In *Asuncion v. Superior Court (1980) 108 Cal. App. 3d 141, 166 Cal. Rptr. 306* , the court of appeal said it was unclear why the *Mobil Oil* court reached the conclusion it did but that the court apparently relied on a combination of the following factors: (1) the need to preserve the summary nature of unlawful detainer; (2) the lessee's failure to seek a preliminary injunction in his action against the lessor; and (3) the lessee's lengthy and complex representative action, which imposed a heavy burden on the evicting franchiser by delaying its action.

Asuncion did not directly involve the issue as to the precedence of an unlawful detainer proceeding on the trial calendar. Rather, it involved the issue as to whether the municipal or superior court had subject matter jurisdiction of an unlawful detainer proceeding involving residential property. The proceeding had been brought by a corporation which had acquired title to the homeowners' property through a loan transaction after the homeowners had defaulted on a prior loan. The proceeding had been commenced in a municipal court and transferred to the superior court on the homeowners' motion on the ground that title to real property worth more than the jurisdictional maximum of the municipal court was in issue. Also, the homeowners had filed an action in the superior court against plaintiff

corporation to quiet title to the same property and for other relief based on fraud, usury, and other causes. The superior court, on the corporation's motion, retransferred the unlawful detainer proceeding to the municipal court. The homeowners then sought a writ of mandate to compel the superior court to take jurisdiction. The court of appeal ordered issuance of a peremptory writ of mandate directing the superior court to take and retain jurisdiction over the matter so long as substantive issues of ownership remained to be litigated (*108 Cal. App. 3d 141, 147)* . The court said it was generally recognized that the summary unlawful detainer proceeding is not a suitable vehicle to try complicated ownership issues involving assertions of fraud and deceptive practices (*108 Cal. App. 3d 141, 144)* . However, the court held that the homeowners could not be evicted, consistent with due process guarantees, without being permitted to raise the affirmative defenses which, if proved, would maintain their possession and ownership. The court accordingly held that title to the property was inevitably in issue in the unlawful detainer proceeding, and the proceeding was not within the subject matter jurisdiction of the municipal court (*108 Cal. App. 3d 141, 146)* . The court said it would be premature for it to determine the effect of its decision on the homeowners' right to a stay of the unlawful detainer proceeding. Nevertheless, the court noted that *Mobil Oil* involved a commercial, rather than a residential, eviction, that insofar as the preliminary injunction question was concerned, the homeowners had not yet had the opportunity to present facts in the trial court warranting either an injunction or a stay, and that in *Mobil Oil* the stay had already been issued on a record the appellate court perceived as inadequate (*108 Cal. App. 3d 141, 146-147 fn. 1*).

The reasoning of *Asuncion* was followed in *Mehr v. Superior Court (1983) 139 Cal. App. 3d 1044* , l89 Cal. Rptr. 138. This was a mandate proceeding by defendant homeowners in an unlawful detainer proceeding under *Code Civ. Proc. § 1161a* to compel the trial court to stay execution pending determination of their appeal from the judgment in favor of plaintiff. Plaintiff claimed ownership of the house by virtue of his purchase of it at a trustee's sale. After the complaint was filed, the homeowners initiated a separate action against plaintiff to set aside the trustee's deed on the ground of fraud, and asserted a similar claim by way of affirmative defense in the unlawful detainer proceeding. The unlawful detainer proceeding was transferred to superior court, where the homeowners' motion to consolidate was denied. Their motion for a continuance of the unlawful detainer proceeding so that they might seek a writ from a higher court was also denied. Judgment was entered for plaintiff in the unlawful detainer proceeding and plaintiff was awarded the sum of $950 per month up until the date of judgment. The trial court denied defendants' motion for a stay pending appeal. The court of appeal denied the petition for writ of mandate, but the Supreme Court granted a hearing, retransferred the case to the court of appeal with directions to issue an alternative writ of mandate, and ordered that the stay, issued by the Supreme Court pending determination of the petition for hearing and requiring defendants to continue paying plaintiff $950 per month, remain in effect pending final determination of the matter. The court of appeal examined the affirmative defenses raised in the unlawful detainer proceeding and concluded that the appeal from the judgment presented a substantial question as to the alleged fraudulent acquisition of title. It appeared from the record that the homeowners had shown a substantial question would be raised on the appeal, that they would suffer irreparable injury by an eviction from their home prior to the determination of the appeal, and that plaintiff would not be sorely prejudiced if protected by a monthly payment from defendants in an amount equal to the rental value of the premises. The court held that the trial court had abused its discretion in denying defendants' motion for a stay of execution pending appeal, and directed that a writ of mandate be issued to compel the trial court to set aside its order denying the motion and to grant the motion under such conditions as the trial court might deem proper (*139 Cal. App. 3d 1044, 1050)* .

Lori, Ltd., Inc. v. Superior Court *(1946) 74 Cal. App. 2d 442, 168 P.2d 982* , was a proceeding in mandate to compel the trial court to grant precedence to an unlawful detainer proceeding. The trial court had signified its intention to continue the trial of the case beyond the date to which it was previously assigned abiding final judgment in a reformation action between the parties. The court of appeal quoted the provisions of *Code Civ. Proc. § 1179a*, providing that proceedings brought to recover possession of real property are entitled to precedence, and directed issuance of the peremptory writ (*74 Cal. App. 2d 442, 443)* .

Cohen v. Superior Court *(1967) 248 Cal. App. 2d 551, 56 Cal. Rptr. 813* , was a mandate proceeding brought by the plaintiff in an unlawful detainer proceeding to compel the trial court to give precedence to the case on the pretrial calendar in order to expedite setting it for trial. Plaintiff's motion to advance the case on the pretrial calendar had been

denied by the trial court on defendants' representation that they had surrendered possession of the premises and that the only issue was damages. Plaintiff claimed the tenants' failure to remove their equipment from the premises deprived her of possession. The court of appeal granted a peremptory writ of mandate directing respondent court to vacate and set aside orders entered on petitioner's motions to advance and to comply with the provisions of *Code Civ. Proc. § 1179a* in setting the action on the pretrial calendar and thereafter for trial (*248 Cal. App. 2d 551, 554)* . The court said the issue of possession could be resolved only by a determination of the disputed question of the title to the property that remained in the premises and, if it were found to belong to the tenants, the additional question of whether their failure to remove it constituted an unwarranted interference with the landlord's right to possession. The court held the case was entitled to precedence for trial of the continuing issue of whether plaintiff's right to possession was being violated, and to that end should receive precedence on the pretrial calendar (*248 Cal. App. 2d 551, 554)* .

In ***Kartheiser v. Superior Court*** *(1959) 174 Cal. App. 2d 617, 345 P.2d 135* , the court of appeal issued a writ of mandate directing the trial court to vacate its order continuing an unlawful detainer proceeding arising out of the holding over of property after sale under a power of sale in a trust deed and notice to quit pending determination by the Supreme Court of an appeal from an adverse judgment in a declaratory relief action brought by the trustor to determine the validity of the trustee's sale. The court held that plaintiff's failure to invoke *Code Civ. Proc. § 1166a* (which at the time provided that plaintiff could obtain immediate possession of the premises by satisfying the court that defendant was insolvent and had no property sufficient to satisfy plaintiff's damages and on giving a sufficient undertaking) did not destroy or affect his right to priority under *Code Civ. Proc. § 1179a* (*174 Cal. App. 2d 617, 621-622)* .

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Volume 18 Chapters 180-189 PRETRIAL PROCEEDINGS---to---PROBATE OF WILLS
CHAPTER 180 PRETRIAL PROCEEDINGS
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18-180 California Points & Authorities § 180.63

§ 180.63 Supporting Contention That Case Is Entitled to Priority--Party Is Over 70 Years of Age or Not Expected to Survive Beyond Six Months [Code Civ. Proc. § 36(a), (d)]

[1] FORM

[*The following may be combined with the points and authorities in § 180.50[1] or § 180.55[1].*]

THE CASE IS ENTITLED TO A PREFERENCE BECAUSE _____ [_____ (*moving party, e.g.,* PLAINTIFF) HAS REACHED 70 YEARS OF AGE *or* _____ (*identify party, e.g.,* DEFENDANT) IS NOT, AS A RESULT OF HIS/HER CONDITION, EXPECTED TO SURVIVE BEYOND SIX MONTHS AND THE INTERESTS OF JUSTICE WILL BE SERVED BY GRANTING THE PREFERENCE].

[*EITHER, if moving party has reached 70 years of age*]

A. Moving Party Reached 70 Years of Age. A civil action is entitled to preference on the motion of any party to that action who has reached the age of 70 years, if the court finds both (1) that the party has a substantial interest in the action as a whole and (2) that the health of the party is such that a preference is necessary to prevent prejudicing the party's interest in the litigation (*Code Civ. Proc. § 36(a)*; *Rice v. Superior Court (1982) 136 Cal. App. 3d 81, 84-89, 185 Cal. Rptr. 853* ; *Vinokur v. Superior Court (1988) 198 Cal. App. 3d 500, 503, 243 Cal. Rptr. 683* ; *Koch-Ash v. Superior Court (1986) 180 Cal. App. 3d 689, 694, 225 Cal. Rptr. 657*).

B. "Shall" Is Mandatory. As used in *Code Civ. Proc. § 36(a),* "shall" is mandatory and not merely directory (*Sprowl v. Superior Court (1990) 219 Cal. App. 3d 777, 780, 268 Cal. Rptr. 592* ; *Swaithes v. Superior Court (1989) 212 Cal. App. 3d 1082, 1086, 261 Cal. Rptr. 41* ; *Koch-Ash v. Superior Court (1986) 180 Cal. App. 3d 689, 694, 225 Cal. Rptr. 657* ; *Rice v. Superior Court (1982) 136 Cal. App. 3d 81, 86-87, 185 Cal. Rptr. 853*).

[*OR, if moving party is not expected to survive beyond six months*]

A. Party Not Expected to Survive Beyond Six Months. In its discretion, the court may grant a motion for preference served with the memorandum to set or the at-issue memorandum and accompanied by clear and convincing medical documentation which concludes that one of the parties suffers from an illness or condition raising substantial medical doubt of survival of that party beyond six months, and which satisfies the court that the interests of justice will be served by granting the preference (*Code Civ. Proc. § 36(d)*; *see Rice v. Superior Court (1982) 136 Cal. App. 3d 81, 93, 185 Cal. Rptr. 853*).

[*Optional*] **B. Motion Based on Ill Health of Adverse Party.** A motion for trial preference under *Code of Civil Procedure Section 36(d)* may be based on the ill health of the adverse party (*Heda v. Superior Court (1990) 225 Cal. App. 3d 525, 527-528, 275 Cal. Rptr. 136*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the case is entitled to a preference on the court's calendar and may be submitted in combination with the points and *authorities in § 180.50[1]* or *§ 180.55[1]*. The form sets out the points that a case is entitled to, or may be granted, a preference on motion of a party showing that the moving party has reached 70 years of age, has a substantial interest in the action as a whole, and is in a state of health that makes a preference necessary to prevent prejudicing his or her interest in the litigation, or showing that a party suffers from an illness or condition raising substantial medical doubt of survival beyond six months and satisfying the court that the interests of justice will be served by granting a preference [*see Code Civ. Proc. § 36(a), (d)*].

The probative facts establishing those conclusions should be set forth in a supporting affidavit or declaration under penalty of perjury [*see Code Civ. Proc. §§ 2009, 2015.5*]. In the case of a motion for preference under *Code Civ. Proc. § 36(a)* (party over 70 years of age), the affidavit or declaration may be signed by the attorney for the party seeking preference based on information and belief as to the medical diagnosis and prognosis of any party. That declaration is not admissible for any purpose other than a motion for preference under *Code Civ. Proc. § 36(a)* [*Code Civ. Proc. § 36.5*].

These points and authorities may also be combined with a memorandum of points and authorities in other procedural contexts in which counsel wishes to make the contention that the case is entitled to a preference, for example, in support of a petition for writ of mandate to compel the trial court to grant a preference which it has improperly refused.

Counsel should insert argument showing the relationship between the facts of the case and the point of law stated. Thus, counsel should argue that the facts set forth in the accompanying affidavit or declaration show that the required conditions have been met (moving party is 70 years of age or older, has a substantial interest in the action as a whole, and is in a state of health that requires the preference in order to prevent prejudicing his or her interest in the litigation, or a party is not expected to survive beyond six months and interests of justice will be served by granting preference, or, although party is not 70 or over or terminally ill or injured and case is not entitled to a statutory precedence, interests of justice will be served by granting it a preference).

[b] Setting for Trial

On the granting of a motion for preference, the clerk must set the case for trial not more than 120 days from that date and there may be no continuance beyond 120 days from the granting of the motion for preference except for physical disability of a party or a party's attorney, or on a showing of good cause stated in the record. No continuance may be for more than 15 days, nor may more than one continuance for physical disability be granted to any party [*Code Civ. Proc. § 36(f)*; *see Sprowl v. Superior Court (1990) 219 Cal. App. 3d 777, 780, 268 Cal. Rptr. 592* (as used in *Code Civ. Proc. § 36*, "shall" is mandatory)].

[c] Related Pleading and Practice Forms

For forms of notices of motion and related forms for use in moving to establish the preference of a case, or to advance, reset, or specially set a case, see California Forms of Pleading and Practice, Ch. 425, *Pretrial Proceedings* (Matthew Bender).

[3] Discussion of Authorities

[a] Moving Party Reached 70 Years of Age

Rice v. Superior Court *(1982) 136 Cal. App. 3d 81, 185 Cal. Rptr. 853* , was a mandate proceeding by which petitioner, an 80-year-old woman, sought to compel the trial court in the underlying personal injury action, in which she was plaintiff, to allow her trial preference pursuant to *Code Civ. Proc. § 36(a)*. The trial court had denied her motion for preference on the ground that she had obtained a preferential trial date in her prior, identical action, but had relinquished it when her counsel dismissed that action, filed the present action, and sought trial preference solely to circumvent the refusal of the master calendar judge in the prior action to grant a one-week continuance until petitioner's physical condition improved sufficiently for her to be present at trial. The court of appeal ordered issuance of a peremptory writ of mandate directing the trial court to grant immediately the motion for preference. The court quoted the provisions of *Code Civ. Proc. § 36(a)* and concluded that the plaintiff satisfied both conditions of the statute entitling her to preference (*136 Cal. App. 3d 81, 86)* and held that the statute was mandatory (*136 Cal. App. 3d 81, 86-87)* . Note that *Rice* was decided prior to the 1990 amendments that added the third requirement, namely that the moving party's health be such as to require the preference in order to prevent prejudicing his or her interest in the litigation [*see Code Civ. Proc. § 36(a)(2)*; Stats. 1990, ch. 428].

Vinokur v. Superior Court *(1988) 198 Cal. App. 3d 500, 503, 243 Cal. Rptr. 683* , was a mandate proceeding in which the 75-year-old plaintiff sought to compel the superior court to grant her motion for trial preference made pursuant to *Code Civ. Proc. § 36(a)*. The lower court had denied plaintiff's request and instead ordered the matter submitted to arbitration pursuant to *Code Civ. Proc. § 1141.11(a)*, which provided at that time that actions must be submitted to arbitration if the amount in controversy did not exceed $25,000. The lower court acknowledged a conflict between the provisions of the two statutes, but determined that *Code Civ. Proc. § 1141.11(a)* controlled over *Code Civ. Proc. § 36(a)*, and denied the request for preferential setting on that basis. The court of appeal granted the writ, holding that *Code Civ. Proc. § 36(a)* is "mandatory and absolute in its application" (citing *Rice v. Superior Court (1982) 136 Cal. App. 3d 81, 185 Cal. Rptr. 853* , discussed in [a], *above*) and is unquestionably the controlling authority over the arbitration statute, which was intended principally as a device for easing a growing burden on the courts (*198 Cal. App. 3d 500, 503)* .

In *Koch-Ash v. Superior Court (1986) 180 Cal. App. 3d 689, 225 Cal. Rptr. 657* , numerous actions were filed and consolidated on behalf of several hundred plaintiffs; one action was severed to be tried as a test case, and petitioners' actions were severed to allow a preferential trial date pursuant to *Code Civ. Proc. § 36(a)*. Defendants successfully moved to stay petitioners' trial on grounds, inter alia, that resolution of issues on appeal in the test action would by operation of collateral estoppel resolve issues common to petitioners' action, and that the trial court has inherent administrative power to regulate its trial calendar. The court of appeal issued a writ of mandate preventing the trial court from denying petitioners' preferential trial date, and held that *Code Civ. Proc. § 36(a)* is mandatory and absolute in its application and does not allow a trial court to exercise the inherent or statutory general administrative authority it would otherwise have (*180 Cal. App. 3d 689, 694)* .

[b] "Shall" Is Mandatory

In ***Sprowl v. Superior Court*** *(1990) 219 Cal. App. 3d 777, 780, 268 Cal. Rptr. 592* , an action for personal injuries against an asbestos manufacturer, the trial court, after having granted plaintiff preference under *Code Civ. Proc. § 36(a)*

and having set a trial date, repeatedly would vacate the date because of its extensive criminal case load and equally heavy backlog of asbestos personal injury cases, and set a new trial date. When the latest trial date was also vacated, almost a year and a half after the first trial date, plaintiff moved for reconsideration, objected to further continuance, and requested a trial date in accordance with *Code Civ. Proc. § 36(f)*. The court denied the motion, and plaintiff petitioned for a write of mandate to compel the trial court to set an immediate date for trial. In granting the writ, the court said that the word "shall," as used in *Code Civ. Proc. § 36(a)* and *(f)*, is mandatory (*219 Cal. App. 3d 777, 780)* .

Swaithes v. Superior Court *(1989) 212 Cal. App. 3d 1082, 261 Cal. Rptr. 41* , was a mandate proceeding arising out of a will contest in which the trial court had denied a motion for an order setting a trial date in accordance with *Code Civ. Proc. § 36(a)*. The court held that the provisions of *Code Civ. Proc. 36(a)* applied to will contests by virtue of *Code Civ. Proc. § 34* (now repealed, but formerly relating to the commencement and prosecution of, and the practice, procedure, and enforcement of judgments and decrees in, actions and proceedings in trial courts, except when special provision is made for particular courts, or when a general provision is not applicable by reason of jurisdictional limitations) and *Prob. Code § 1000* (providing that except to the extent that the Probate Code provides applicable rules, the rules of practice applicable to civil actions apply to, and constitute the rules of practice in, proceedings under the Probate Code) (*212 Cal. App. 3d 1082, 1084, 1086-1089)* . In granting the writ directing the trial court to vacate its order denying the motion for preference and to grant the motion, the court of appeal said the clear intent of the Legislature is to safeguard litigants who qualify under Code Civ. Proc. § 36(a) against the acknowledged risk that death or incapacity might deprive them of the opportunity to have their case effectively tried and to obtain the appropriate recovery (*212 Cal. App. 3d 1082, 1085)* . The court said that (1) application of the statute does not violate the power of trial courts to regulate the order of their business; (2) mere inconvenience to the court or to other litigants is irrelevant; (3) failure to complete discovery or other pretrial matters does not affect the absolute substantive right to trial preference for those litigants who qualify for preference under *Code Civ. Proc. § 36(a)*; (4) the trial court has no power to balance the differing interests of opposing litigants in applying the provision; and (5) the express legislative mandate for trial preference is a substantive public policy concern which supersedes such considerations (*212 Cal. App. 3d 1082, 1085-1086)* . The court concluded that, accordingly, *Code Civ. Proc. § 36(a)* is mandatory and absolute in its application in civil cases whenever the litigants are 70 (or more) years old (*212 Cal. App. 3d 1082, 1086)* .

Note that *Swaithes* was decided prior to the 1990 amendments that added the requirement that the moving party's health be such as to require the preference in order to prevent prejudicing his or her interest in the litigation [*see Code Civ. Proc. § 36(a)(2)*; Stats. 1990, ch. 428].

Koch-Ash v. Superior Court *(1986) 180 Cal. App. 3d 689, 225 Cal. Rptr. 657* , arose out of consolidated actions against various governmental entities for damages for injuries to residential properties resulting from landslides in which the actions of 12 plaintiffs over the age of 70 were severed from other actions and set for preferential trial date pursuant to *Code Civ. Proc. § 36(a)*. The defendants' subsequent motion to stay the preferential trial on the ground that a related action was tried as a test case and appealed, and that the appeal would resolve numerous liability issues involved in the present actions was granted. In granting a writ of mandate directing the trial court to vacate the order staying the actions and to set them for trial, the court of appeal pointed out that *Rice v. Superior Court (1982) 136 Cal. App. 3d 81, 86-87, 185 Cal. Rptr. 853* (discussed in [a], *above*), had held that *Code Civ. Proc. § 36*, is mandatory and absolute in its terms, and said that the trial court's authority and jurisdiction was limited by *Code Civ. Proc. § 36(a)* and *(e)* to setting trial for a date within 120 days of granting the preference motion (*180 Cal. App. 3d 689, 694, 698)* .

The facts and procedural background of *Rice v. Superior Court (1982) 136 Cal. App. 3d 81, 185 Cal. Rptr. 853* , are discussed in [a], *above*. In granting a writ of mandate directing the trial court to immediately grant the motion for preference, the court of appeal held that the Legislature intended the provisions of *Code Civ. Proc. § 36(a)* to be mandatory (*136 Cal. App. 3d 81, 86-87)* and that the statute does not impermissibly infringe on the administrative power of trial courts (*136 Cal. App. 3d 81, 93)* .

[c] Party Not Expected to Survive Beyond Six Months

The facts and procedural background of ***Rice v. Superior Court*** *(1982) 136 Cal. App. 3d 81, 185 Cal. Rptr. 853* , are discussed in [a], *above*. Although holding that the granting of a preference under *Code Civ. Proc. § 36(a)* is mandatory, the court of appeal noted that the granting of a preference under former Code Civ. Proc. § 36(c) [*now see Code Civ. Proc. § 36(d)*] is discretionary. The court said it was true that *Code Civ. Proc. § 36(a)*, like former Code Civ. Proc. § 36(c), is intended to protect the same substantive right of litigants to have a trial and the opportunity to recover the just measure of their injuries, yet former Code Civ. Proc. § 36(c) expressly grants discretion to the trial court. The court said that this disparate treatment was readily explained by recognizing that the age of a litigant is a fact easily established as a certainty while the degree of a party's physical disability and relationship to imminence of death is not, that courts should have discretion to review and reject sham medical reports that exaggerate the imminence of the death of a litigant to obtain trial preference, and that the statute confers that discretion (*136 Cal. App. 3d 81, 93)* .

It could be argued that the implication of the court's explanation is that if the medical report is not a sham and does not exaggerate the imminence of the litigant's death, and concludes, based on clear and convincing medical documentation, that the party suffers from an illness or condition raising a substantial medical doubt of survival of that party beyond six months, the motion for a preference should be granted, or, conversely stated, that the denial of the motion would be an abuse of discretion.

[d] Motion Based on Ill Health of Adverse Party

In ***Heda v. Superior Court*** *(1990) 225 Cal. App. 3d 525, 275 Cal. Rptr. 136* , a medical malpractice action, plaintiff obtained an order directing defendant to answer plaintiff's interrogatories seeking information about doctors' diagnoses of defendant and to furnish health records to plaintiff. Plaintiff needed this information to support a motion for trial preference under *Code Civ. Proc. § 36(d)* based on defendant's ill health. Defendant petitioned the court of appeal for a writ of mandate seeking to compel the trial court to vacate the order. Although the court of appeal granted the writ on the ground the information sought was protected under the privacy provision of the state constitution [*Cal. Const., art. I, § 1*], the court rejected defendant's argument that *Code Civ. Proc. § 36(d)* only authorizes preference based on the moving party's ill health (*225 Cal. App. 3d 525, 527)* . The court quoted *Code Civ. Proc. § 36(d)*, and stated that if the subdivision stood alone, defendant's interpretation would be doubtful at best. But when that subdivision is read in conjunction with *Code Civ. Proc. § 36(a)* (*see* [1], first Paragraph A, *above*), it shows that the Legislature knew how to restrict preference to a showing of the moving party's condition and that *Code Civ. Proc. § 36(d)* was not so restricted. The court concluded that plaintiff could move for preference based on the defendant's ill health (*225 Cal. App. 3d 525, 528)* .

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18-180 California Points & Authorities § 180.64

§ 180.64 Supporting Contention That Case Is Entitled to Priority--Party Under 14 Years of Age in Wrongful Death or Personal Injury Action [Code Civ. Proc. § 36(b)]

[1] FORM

[*The following may be combined with the points and authorities in § 180.50[1] or § 180.55[1].*]

THE CASE IS ENTITLED TO PREFERENCE BECAUSE IT IS AN ACTION TO RECOVER DAMAGES FOR _____ [WRONGFUL DEATH *or* PERSONAL INJURY] AND _____ [*moving party, e.g.,* PLAINTIFF] IS UNDER 14 YEARS OF AGE.

A. Moving Party Under 14 Years of Age in Wrongful Death or Personal Injury Action. A civil action to recover damages for wrongful death or personal injury shall be entitled to preference upon the motion of any party to the action who is under the age of 14 years (*Code Civ. Proc. § 36(b)*; *see Peters v. Superior Court (1989) 212 Cal. App. 3d 218, 222-223, 260 Cal. Rptr. 426*).

B. "Shall" Is Mandatory. "Shall," as used in *Section 36(b) of the Code of Civil Procedure*, is mandatory (*Peters v. Superior Court (1989) 212 Cal. App. 3d 218, 224, 260 Cal. Rptr. 426*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the case is entitled to preference on the court's calendar, and may be submitted in combination with the points and *authorities in § 180.50[1]* or *§ 180.55[1]*. The ground for the contention is that the moving party is under 14 years of age and the suit is to recover damages for wrongful death or personal injury [*see Code Civ. Proc. § 36(b)*]. A civil case subject to *Code Civ. Proc. § 36(a)* (moving party is 70 years of age or older), however, is given preference over cases subject to *Code Civ. Proc. § 36(b)*. The probative facts establishing those conclusions should be set forth in a supporting affidavit or declaration under penalty of perjury [*see Code Civ. Proc. §§ 2009, 2015.5*]. These points and authorities may also be combined with a

memorandum of points and authorities in other procedural contexts in which counsel wishes to contend that the case is entitled to preference, for example, in support of a petition for writ of mandate to compel the trial court to grant preference that it has improperly refused [*see Peters v. Superior Court (1989) 212 Cal. App. 3d 218, 221, 227, 260 Cal. Rptr. 426]* .

Counsel should insert argument showing the relationship between the facts of the case and the point of law stated. Thus, counsel should argue that the facts set forth in the accompanying affidavit or declaration show that the required conditions have been met (moving party is under 14 years of age and the suit is to recover damages for wrongful death or personal injury).

[b] Related Pleading and Practice Forms

For forms of notice of motion and related forms for use in moving to establish the preference of a case, or to advance, reset, or set a case specially, see California Forms of Pleading and Practice, Ch. 425, *Pretrial Proceedings* (Matthew Bender).

[3] Discussion of Authorities

[a] Moving Party Under 14 Years of Age in Wrongful Death or Personal Injury Action

Peters v. Superior Court *(1989) 212 Cal. App. 3d 218, 260 Cal. Rptr. 426* , was a proceeding in mandate arising out of an action by a three-month-old child by his mother as guardian ad litem, and the child's parents, against a county and others for damages for medical malpractice. The child, who had been born at a county facility, suffered severe neurological birth injuries. The complaint was filed September 21, 1987. An at-issue memorandum was filed March 25, 1988, and, on February 17, 1989, plaintiffs moved for trial setting preference pursuant to *Code Civ. Proc. § 36(b), (f)*. The motion was denied, and the child petitioned the court of appeal for a writ of mandate to compel the trial court to grant the motion. In granting the writ, the court of appeal quoted the provisions of *Code Civ. Proc. § 36(b)* (*212 Cal. App. 3d 218, 222-223)* .

[b] "Shall" Is Mandatory

The procedural background of *Peters v. Superior Court (1989) 212 Cal. App. 3d 218, 260 Cal. Rptr. 426* , is discussed in [a], *above*. In granting the writ, the court of appeal, after pointing out that there was no dispute that petitioner was under 14 years of age and had a substantial interest in the case as a whole [*see § 180.60*], held that "shall," as used in *Code Civ. Proc. § 36(b)* is mandatory (*212 Cal. App. 3d 218, 223-224)* . The court further held that *Code Civ. Proc. § 36(b)* does not violate the separation of powers doctrine [*see Cal. Const., art. III, § 3*] (*212 Cal. App. 3d 218, 224-225)* or the equal protection guaranties of the federal and state constitutions [*see U.S. Const., Amend. XIV*; *Cal. Const., art. I, § 7*] (*212 Cal. App. 3d 218, 225-226)* , and that, because the real parties in interest (defendants) had not claimed in the trial court that they would have inadequate time to prepare for trial if the motion were granted, they lacked standing to raise the argument that *Code Civ. Proc. § 36(b)* and *(f)* violated due process [*see U.S. Const., Amend. XIV*; *Cal. Const., art. I, § 7*] because it deprived a defendant of adequate time to prepare for trial (*212 Cal. App. 3d 218, 227)* .

NOTE:

Code Civ. Proc. § 36(f) provides that on the granting of the motion for preference, the clerk shall set the case for trial not more than 120 days from that date and there shall be no continuance beyond 120 days from the granting of the motion for preference, except in the situations specified in the section. In 1989 the Legislature added *Code Civ. Proc. § 36(g)*, which provides that, on the granting of a motion for preference pursuant to *Code Civ. Proc. § 36(b)*, a party in an action based on a health provider's alleged professional negligence, as defined in *Code Civ. Proc. § 364*, shall receive a trial date not sooner than six months and not later than nine months from the date that the motion is granted (Stats. 1989, ch. 913).

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18-180 California Points & Authorities § 180.65

§ 180.65 Supporting Contention That Case Is Entitled to Priority--Priority Is Required in Interests of Justice [Code Civ. Proc. § 36(e)]--To Avoid Mandatory Dismissal for Failure to Bring Action to Trial [Code Civ. Proc. §§ 583.310, 583.360]

[1] FORM

[*The following may be combined with the points and authorities in § 180.50[1] or § 180.55[1].*]

THE CASE IS ENTITLED TO PREFERENCE BECAUSE THE INTERESTS OF JUSTICE WILL BE SERVED BY GRANTING SUCH PREFERENCE, IN THAT _____ [*specify*].

A. Interests of Justice Will Be Served. Notwithstanding any other provision of law, the court may in its discretion grant a motion for preference served with the memorandum to set or the at-issue memorandum and accompanied by a showing of cause that satisfies

the court that the interests of justice will be served by granting the preference (*Code Civ. Proc. § 36(e)*).

B. Cause for Granting Preference Is Shown When Preference Is Necessary to Avoid Mandatory Dismissal of Case and Other Factors Weigh in Favor of Trial on Merits. When a grant of preference is necessary to avoid mandatory dismissal of the case under *Sections 583.310, 583.360 of the Code of Civil Procedure*, and the party seeking the preference has shown reasonable diligence in prosecuting the action, while the opposing party has made no showing of prejudice, the possibility of mandatory dismissal is sufficient consideration to compel granting of relief under *Code of Civil Procedure Section 36(e)*, and refusal to do so constitutes an abuse of discretion (*Schmitt v. Superior Court (1989) 216 Cal. App. 3d 453, 456, 264 Cal. Rptr. 806* ; *National Secretarial Service, Inc. v. Froehlich (1989) 210 Cal. App. 3d 510, 520-521, 258 Cal. Rptr. 506* ; *Dick v. Superior Court (1986) 185 Cal. App. 3d 1159, 1164-1168, 230 Cal. Rptr. 297* (construing former Code Civ. Proc. § 36(d) [*now see Code Civ. Proc. § 36(e)*])).

[*Optional*] **C. Motion to Specially Set After Trial Court Failed to Recalendar Case After Judicial Arbitration.** When a motion to specially set is made after the trial court has failed to fulfill its duty under *Code of Civil Procedure Section 1141.20* to calendar a trial de novo after judicial arbitration, the preference for disposition of an action on the

merits incorporated in *Code of Civil Procedure Section 583.130* is reinforced by Section 1141.20's mandate that plaintiffs not be penalized for undergoing arbitration (*Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 441-442, 41 Cal. Rptr. 2d 362, 895 P.2d 469*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the case is entitled to preference on the court's calendar on the ground that, for cause shown, the interests of justice will be served by granting the preference [*Code Civ. Proc. § 36(e)*]. The particular cause shown is that a grant of preference is necessary to avoid mandatory dismissal for failure to bring the action to trial [*see Code Civ. Proc. §§ 583.310, 583.360*], and the moving party has shown reasonable diligence in prosecuting the action, while the opposing party has made no showing of prejudice [*see Dick v. Superior Court (1986) 185 Cal. App. 3d 1159, 1164-1168, 230 Cal. Rptr. 297]* .

These points and authorities may be submitted in combination with the general points and *authorities in § 180.50[1]* or *§ 180.55[1]*, and, in an appropriate case, may also be combined with the more specific grounds for granting preference that are set out in §§ 180.54[1] and *180.55[1]*. The probative facts establishing the foregoing conclusions should be set forth in a supporting affidavit or declaration under penalty of perjury [*see Code Civ. Proc. §§ 2009, 2015.5*]. These points and authorities may also be combined with a memorandum of points and authorities in other procedural contexts in which counsel wishes to contend that the case is entitled to preference, for example, in support of a petition for writ of mandate to compel the trial court to grant preference that it has improperly refused.

Counsel should insert argument in the form showing the relationship between the facts of the case and the point of law stated. Thus, counsel should argue that the facts set forth in the accompanying affidavit or declaration show that interests of justice will be served by granting preference.

If these points and authorities are combined with the general points and *authorities in § 180.55[1]*, that is, in support of a motion to advance, reset, or specially set the case for trial, the court, in ruling on the motion, must consider the same factors that apply in ruling on a motion for discretionary dismissal for delay in prosecution [*see Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 440 n.6, 440-441, 41 Cal. Rptr. 2d 362, 895 P.2d 469* ; *see also Code Civ. Proc. §§ 583.410-583.430*; *Cal. Rules of Ct., Rule 3.1342* (governing motions for discretionary dismissal for delay in prosecution)].

Optional Paragraph C may be used when the motion to specially set is made in connection with setting a trial de novo after judicial arbitration under *Code Civ. Proc. § 1141.10 et seq. Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 41 Cal. Rptr. 2d 362, 895 P.2d 469* , provides an additional consideration that weighs in favor of granting the motion. However, the result in *Howard* was adverse to the party who would be using this form. It is essential that counsel, in adding argument and facts to this paragraph of the form, point to facts showing plaintiff's diligence in seeking to have the trial de novo set. Minimal diligence requires the plaintiff to point out the impending five-year deadline at the time of the trial de novo request or shortly thereafter [*Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 434-435, 41 Cal. Rptr. 2d 362, 895 P.2d 469]* . Counsel should also argue the plaintiff's pre-arbitration diligence and the absence of any actual prejudice to the defendant, which are other factors the court may consider in determining whether or not to grant the motion [*see Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 442-443, 41 Cal. Rptr. 2d 362, 895 P.2d 469]* .

For discussion and forms of memoranda relating generally to motions for discretionary dismissal for delay of prosecution, see Ch. 90, *Dismissal* .

[b] Related Pleading and Practice Forms

For forms of notice of motion and related forms for use in moving to establish the preference of a case, or to advance, reset, or set a case specially, see California Forms of Pleading and Practice, Ch. 425, *Pretrial Proceedings* (Matthew Bender). For discussion and forms relating generally to mandatory and discretionary dismissal for delay in prosecution, see Ch. 212, *Dismissal* , in that publication.

[c] Related Points and Authorities

For memoranda of points and authorities relating generally to dismissal for failure to bring an action to trial under *Code Civ. Proc. §§ 583.310, 583.360,* see Ch. 90, *Dismissal* .

[3] Discussion of Authorities

[a] Cause for Granting Preference Is Shown When Preference Is Necessary to Avoid Mandatory Dismissal of Case and Other Factors Weigh in Favor of Trial on Merits

Schmitt v. Superior Court *(1989) 216 Cal. App. 3d 453, 264 Cal. Rptr. 806* , was a mandate proceeding arising out of the denial of a motion to restore a case to the active list and specially set it for trial on a date prior to the expiration of the five-year period set forth in *Code Civ. Proc. § 583.310* for bringing an action to trial. Plaintiff's failure to bring the action to trial earlier was the result of a series of errors of commission and omission by the superior court. The court of appeal ordered issuance of a peremptory writ of mandate directing the trial court to vacate its order of denial and to grant the motion. After pointing out that granting or denying a motion under *Code Civ. Proc. § 36* for trial preference lies in the sound discretion of the trial court, and the trial court does not have a mandatory duty to grant a motion for preferential trial setting solely to avoid the expiration of the five-year period, the court said that, nonetheless, the approach of the five-year limit is "a critical consideration" which here, in view of petitioner's reasonable diligence, the respondent's serious mishandling of the matter, and the absence of a showing of prejudice to the defendant of an accelerated trial date, compelled it to grant relief (*216 Cal. App. 3d 453, 456)* .

In ***National Secretarial Service, Inc. v. Froehlich*** *(1989) 210 Cal. App. 3d 510, 258 Cal. Rptr. 506* , an action by a secretarial firm against an attorney personally and the attorney as a professional corporation to recover payment for secretarial services rendered, the appellate court said that the trial court may, in its discretion, grant a motion for special setting of a case for trial, citing *Code Civ. Proc. § 36(e)* (*210 Cal. App. 3d 510, 521)* . In affirming the judgment for plaintiff, the court held that the trial court did not abuse its discretion in granting plaintiff's motion to set the case specially for trial, which plaintiff made after the three-year discretionary dismissal period specified in *Code Civ. Proc. § 583.420* had expired and about 10 weeks before the five-year period specified in *Code Civ. Proc. § 583.310* would have expired, when there was no showing that the defendants were in any way prejudiced by the ruling and when practically all of the delay was caused either by the acts of the defendants themselves or clerical errors by the trial court over which the plaintiff had no control (*210 Cal. App. 3d 510, 520-521, 521 n.11*). The court further imposed sanctions against the defendants in the sum of $3,500, in addition to costs, payable to the plaintiff, for prosecuting a frivolous appeal, and, as required by former Bus. & Prof. Code § 6089(b) (*now see Bus. & Prof. Code § 6086.7(a)(3)*), stated it would forward a copy of its opinion to the State Bar.

Dick v. Superior Court *(1986) 185 Cal. App. 3d 1159, 230 Cal. Rptr. 297* , was a mandate proceeding in which petitioners sought to compel the lower court to set their case specially for trial before the expiration of the five-year period for bringing an action to trial [*see Code Civ. Proc. §§ 583.310, 583.360*]. During the last year before the period expired, a trial-setting conference was scheduled, but because of plaintiff's failure to notify all the parties, no trial was set. Plaintiff, who had already conducted discovery, filed a new at-issue memorandum and subsequently reached a tentative settlement agreement with some of the defendants. Forty-three days before the five-year period was to expire, plaintiff made a motion for trial preference, and the court, while finding that plaintiff had acted diligently in prosecuting the action up to that point, denied the motion, on the ground that it was filed too late and the court calendar was too

congested. After a motion to reconsider was denied, plaintiff petitioned for mandate.

The court of appeal granted the writ, finding that the trial court had not applied the criteria set out in *Salas v. Sears, Roebuck & Co. (1986) 42 Cal. 3d 342, 228 Cal. Rptr. 504, 721 P.2d 590* (discussed in *§ 180.81[3][a]*) to determine whether a trial preference served the interests of justice under former Code Civ. Proc. § 36(d) (*now see Code Civ. Proc. § 36(e)*) (*185 Cal. App. 3d 1159, 1164-1165)* . The court also found that plaintiff had diligently prosecuted the action up to the point of the motion for trial preference (*185 Cal. App. 3d 1159, 1165-1166)* . In addition, the party opposing the motion had made no showing of prejudice (*185 Cal. App. 3d 1159, 1166-1167)* . The court held that calendar congestion alone is no reason to deny a motion for trial preference (*185 Cal. App. 3d 1159, 1167)* . When plaintiff's motion is supported by a showing of diligence, the court went on to hold, and the party opposing the motion makes no showing of prejudice, the possibility of mandatory dismissal is sufficient consideration to compel granting of relief, and refusal to do so constitutes an abuse of discretion (*185 Cal. App. 3d 1159, 1167-1168)* .

[b] Motion to Specially Set After Trial Court Failed to Recalendar Case After Judicial Arbitration

The facts and procedural background of ***Howard v. Thrifty Drug & Discount Stores*** *(1995) 10 Cal. 4th 424, 41 Cal. Rptr. 2d 362, 895 P.2d 469* , are discussed in *§ 180.81[3][a]*.

In affirming the trial court's denial of the plaintiff's motion to specially set to avoid the five-year mandatory dismissal deadline, the Court indicated that when a motion to specially set is made after the trial court has failed to fulfill its *Code of Civil Procedure Section 1141.20* duty to calendar a trial de novo after judicial arbitration, the *Code Civ. Proc. § 583.130* preference for disposition of an action on the merits is reinforced by *Code Civ. Proc. § 1141.20*'s mandate that plaintiffs not be penalized for undergoing arbitration. The Court also held, however, that the trial court nonetheless retains discretion to deny a motion to specially set made by a plaintiff who has failed to promptly request a timely trial date in the post-arbitration period (*10 Cal. 4th 424, 442-443)* .

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C. Motions for Precedence or Preference and Motions to Advance, Reset, or Specially Set

18-180 California Points & Authorities §§ 180.66-180.69

[Reserved]

§§ 180.66[Reserved]

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18-180 California Points & Authorities § 180.70

§ 180.70 Opposing Motion for Order Granting Preference [Code Civ. Proc. § 36]--Action Seeks Relief in Addition to Declaration of Rights and Duties of Parties [Code Civ. Proc. § 1062.3(b)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff, vs. _____ [*name*], Defendant.	)))))))))	NO. _____ MEMORANDUM IN OPPOSITION TO MOTION FOR ORDER THAT CASE _____ IS ENTITLED TO PREFERENCE IN SETTING IT FOR _____ [A CASE MANAGEMENT CONFERENCE *or* TRIAL] Date: _____ Time: _____ Location: _____ [Judge: _____] Date Action Filed: _____ [Trial Date: _____]

_____

THE MOTION FOR AN ORDER ESTABLISHING THAT THIS ACTION FOR DECLARATORY RELIEF HAS PRECEDENCE SHOULD BE DENIED BECAUSE THE COMPLAINT SEEKS RELIEF IN ADDITION TO A DECLARATION OF THE RIGHTS AND DUTIES OF THE PARTIES AND THERE IS NO SHOWING THAT A SPEEDY TRIAL IS REQUIRED.

A. Precedence of Declaratory Relief Action Seeking Additional Relief Is Conditional Only. The trial-setting precedence for a declaratory relief action that seeks relief in addition to a declaration of rights and duties is not absolute but conditional only on the making of the showing required by *Section 1062.3(b) of the Code of Civil Procedure* (*Mobil Oil Corp. v. Superior Court (1978) 79 Cal. App. 3d 486, 494, 145 Cal. Rptr. 17*).

B. Need for Speedy Trial Is Required to Be Shown. An action for declaratory relief in which the plaintiff seeks any relief in addition to a declaration of rights and duties takes precedence only on noticed motion and a showing that the action requires a speedy trial (*Code Civ. Proc. § 1062.3(b)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion to establish the precedence of a declaratory relief action under *Code Civ. Proc. § 1062.3(a)* in setting it on the calendar. The ground of opposition is that the case is not entitled to precedence because relief in addition to declaratory relief is sought and the moving party has failed to show that the case requires a speedy trial, as required by *Code Civ. Proc. § 1062.3(b).*

These points and authorities may also be combined with a memorandum in other procedural contexts in which counsel wishes to oppose the contention that the case is entitled to a precedence, for example, in opposition to a petition for writ of mandate that seeks to compel the trial court to grant a precedence which it has refused. They may also be combined with points and authorities in any other proceeding in which the special precedence of the case is an issue, for example, in a memorandum in support of a motion under *Cal. Rules of Ct., Rule 3.1332(b),* for a continuance or in opposition to a motion under *Cal. Rules of Ct., Rule 3.1335* to advance, reset or specially set the case for trial on the ground it is entitled to a preference [*see § 180.75*].

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion of the evidence, if any, in the affidavit or declaration submitted in support of the contention that the case is entitled to precedence and refer to any additional evidence in the counteraffidavit or counterdeclaration submitted in opposition showing that a speedy trial is not required.

[b] Action for Declaratory Relief Neither Necessary nor Proper

If the action for declaratory relief is neither necessary nor proper under the circumstances, the court may refuse to render a declaratory judgment. In that case, counsel may wish to attack the pleading in a summary manner. The courts should not temporize with the improper use of the declaratory procedure to gain a preferred position on the trial calendar, and undeserving cases should be disposed of in a summary manner as on demurrer or a motion for summary judgment [*Travers v. Louden (1967) 254 Cal. App. 2d 926, 932, 62 Cal. Rptr. 654]* . For memoranda of points and authorities supporting and opposing a demurrer or motion for summary judgment on this ground, see Ch. 182, *Declaratory Relief* .

[c] Related Points and Authorities

For memoranda of points and authorities generally supporting and opposing a motion to continue a case, see Ch. 48, *Continuance of Proceedings* .

[3] Discussion of Authorities

[a] Precedence of Declaratory Relief Action Seeking Additional Relief as Conditional Only

The facts and procedural background of ***Mobil Oil Corp. v. Superior Court*** *(1978) 79 Cal. App. 3d 486, 145 Cal. Rptr.*

17 , are discussed in *§ 180.62[3][a]*. The lessee contended that his action against the lessor was also entitled to statutory precedence. The court of appeal said the fact that the lessor's unlawful detainer proceeding was entitled to unqualified preference in trial setting should, in determining the propriety of the trial court's stay order, be balanced against the statutory priorities of the causes of action alleged in the lessee's complaint against the lessor. Of the eight causes of action alleged in that complaint, a claim of trial priority was asserted only as to two, the cause of action for declaratory relief and the cause of action for unfair trade practices. With respect to the first of these, the court of appeal said that the trial setting preference for declaratory relief actions is not absolute. The Legislature chose to limit the preference in 1976 when it added subdivision (b) to former Code Civ. Proc. § 1062a [*now see Code Civ. Proc. § 1062.3(b)*], and this resulted in the present policy of this state to provide only a conditional priority to causes of action for declaratory relief when the cause of action is combined with other requests for relief (*79 Cal. App. 3d 486, 494)* . The court concluded that a stay of the lessor's proceeding in unlawful detainer on the ground that one of the causes of action alleged in the lessee's complaint was for declaratory relief would ignore the express conditions which the Legislature deemed necessary to include in former Code Civ. Proc. § 1062a(b) [*now see Code Civ. Proc. § 1062.3(b)*] and, in effect, would treat the cause of action for declaratory relief seeking relief in addition to a declaration of rights and duties as though it were given an absolute priority for trial, which it was not (*79 Cal. App. 3d 486, 494-495)* .

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18-180 California Points & Authorities §§ 180.71-180.74

[Reserved]

§§ 180.71[Reserved]

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18-180 California Points & Authorities § 180.75

§ 180.75 Opposing Motion to Advance, Reset, or Specially Set Trial Date [Cal. Rules of Ct., Rules 3.723, 3.1335(b)]--General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN OPPOSITION TO MOTION
Plaintiff,	)	TO _____ [ADVANCE *or* RE-
vs.	)	SET *or* SPECIALLY SET] TRIAL DATE
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE MOTION TO _____ [ADVANCE *or* RESET *or* SPECIALLY SET] THIS CASE FOR TRIAL SHOULD BE DENIED BECAUSE NO GOOD CAUSE FOR IT HAS BEEN SHOWN.

A. Conditions for Granting Motion to Advance, Reset, or Specially Set Trial Date. A motion to advance, reset, or specially set a case for trial may not be granted except on notice, on the filing of a declaration showing good cause, and on the appearance by the moving party at the hearing on the motion (*Cal. Rules of Ct., Rule 3.1335*).

[*Optional*] **B. Advancement Is Not Matter of Right.** There is no legal right to an advancement; the granting or

denying of a motion for advancement rests in the sound discretion of the trial court (*General Ins. Co. v. Superior Court (1966) 245 Cal. App. 2d 366, 372, 53 Cal. Rptr. 777*).

[*Optional*] **C. Financial Condition Alone Does Not Constitute Good Cause for Advancement.** The financial condition of a party and the fact that the party is depending on recovery in the case for money to pay obligations is no ground, in and of itself, for an advancement of a case on the calendar (*see* *Moffitt v. Ford Motor Co. (1931) 115 Cal. App. 499, 500, 1 P.2d 994*).

[*Optional*] **D. Grant of Motion Will Leave Opposing Party With Inadequate Time to Prepare.** A request to advance a case for trial may be denied when granting the request would leave the opposing party with an inadequate opportunity to prepare (*see* *Swartzman v. Superior Court (1964) 231 Cal. App. 2d 195, 199, 41 Cal. Rptr. 721*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion to advance, reset, or specially set a case for trial. Paragraph A sets forth the conditions that must be satisfied before the court may grant the motion, foremost of which is a showing of good cause by the moving party. Optional Paragraph B may be used specifically in opposition to a motion to advance; it states the rule that an advancement is not a matter of right but rests within the court's discretion.

Additional points and authorities should be added to indicate the specific ground for opposition. In particular, additional points and authorities should be added, if possible, citing specific authority for the proposition that the moving party's showing does not constitute good cause for granting the motion. Optional Paragraphs C and D are examples. With appropriate modifications, this form may also be used to support a motion to continue a case management conference or a trial [*see Cal. Rules of Ct., Rules 3.723, 3.1332(b)*; *see also* Ch. 48, *Continuance of Proceedings*].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. In addition, counsel may attach affidavits or declarations stating any facts relied on to oppose the motion.

These points and authorities may be used in an appropriate case to oppose a motion supported by the points and authorities *set out in § 180.55*.

[3] Discussion of Authorities

[a] Advancement Is Not Matter of Right

General Ins. Co. v. Superior Court *(1966) 245 Cal. App. 2d 366, 53 Cal. Rptr. 777* , arose out of a property damage dispute. Plaintiff insurance company filed an action for property damage due to fire loss on October 10, 1961. Defendant answered on October 28, 1961, and a memorandum to set was filed on November 10, 1961. Four continuances followed, and on March 19, 1964, plaintiff had the case taken off the calendar. Plaintiff's attorney prepared a new memorandum to set on April 8, 1966, but did not take steps to finalize it until July 27, 1966. A pretrial conference was scheduled for September 22. On September 12, plaintiff's attorney filed a notice of motion to be heard on September 22 to specially set the case for trial before October 10. The trial court denied the motion and plaintiff petitioned for a writ of mandate ordering the trial court to either set the cause of action for trial prior to October 10 or permit, at least, the swearing of one witness prior to that date.

The court of appeal denied the petition. On appeal, plaintiff contended that mandate is appropriate because the trial court had a duty to advance the trial or swear a witness. However, the court of appeal responded that such a writ is appropriate only if there is a clear legal right to be enforced or a clear legal duty to be performed. These rights and duties do not exist in the instant case. The granting or denying of a motion for advancement rests in the sound discretion

of the trial court (*245 Cal. App. 2d 366, 372)* .

[b] Financial Condition Alone Does Not Constitute Good Cause for Advancement

The factual background of ***Moffitt v. Ford Motor Co.*** *(1931) 115 Cal. App. 499, 1 P.2d 994* , is discussed in *§ 180.56[3][a]*. In that case, respondent argued that her financial condition constituted good cause for granting her motion to advance, in that she was depending on recoveries in the case for money to pay her obligations. Although the court of appeal granted the motion to advance on other grounds, it suggested that financial condition, by itself, did not constitute good cause for advancement; this was a ground that could be argued by most litigants who have a judgment in their favor or have hopes of obtaining one (*115 Cal. App. 499, 500)* .

[c] Grant of Motion Will Leave Opposing Party With Inadequate Time to Prepare

The factual background of ***Swartzman v. Superior Court*** *(1964) 231 Cal. App. 2d 195, 41 Cal. Rptr. 721* , is discussed in *§ 180.57[3][a]*. In that case, the court of appeal upheld the trial court's advancement of an eminent domain proceeding. In evaluating the action of the trial court, the court of appeal emphasized that the opposing party had both notice of the final pretrial and trial dates more than two months in advance of trial and exact knowledge of the extent and nature of the property involved for a longer period. Thus, the court concluded, there was ample time to prepare (*231 Cal. App. 2d 195, 199)* .

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18-180 California Points & Authorities §§ 180.76-180.79

[Reserved]

§§ 180.76[Reserved]

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18-180 California Points & Authorities § 180.80

§ 180.80 Opposing Contention That Case Is Entitled to Priority--Party Entitled to Priority Does Not Have Substantial Interest in Case [Code Civ. Proc. § 36(a), (b)]

[1] FORM

[*The following may be combined with the points and authorities in § 180.70 or § 180.75.*]

THE CASE IS NOT ENTITLED TO A PREFERENCE BECAUSE _____ [*specify moving party*] DOES NOT HAVE A SUBSTANTIAL INTEREST IN THE CASE AS A WHOLE.

[*EITHER, when moving party has reached age 70*]

A. When Preference Based on Seniority Is Not Required. An action is not entitled to preference in trial setting on the ground that a party has reached 70 years of age, if the court finds that that party does not have a substantial interest in the action as a whole or that the health of that party is not such that a preference is necessary to prevent prejudicing his or her interest in the litigation (*Code Civ. Proc. § 36(a)*).

[*OR, when moving party is under age 14 in action to recover damages for personal injury or wrongful death*]

B. When Preference Based on Minority Is Not Required. An action is not entitled to preference in trial setting on the ground that it is an action to recover damages for _____ [wrongful death *or* personal injury] and a party is under 14 years of age, if the court finds that that party does not have a substantial interest in the action as a whole (*Code Civ. Proc. § 36(b)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the case is entitled to preference in setting for trial on the ground that the moving party is either 70 years of age or older, or is under 14 years of age in an action to recover damages for wrongful death or personal injury. The ground of opposition is that the moving party does not have a substantial interest in the case as a whole, or in the case of a person over the age of 70, that his or her health is not such that a preference is necessary to prevent prejudicing his or her interest in the litigation, and, consequently, the case is not entitled to preference under *Code Civ. Proc. § 36(a), (b)*. This form may be submitted in combination with general points and authorities opposing a motion for a grant of a preference [*see § 180.70*]. It may also be submitted with the points and *authorities in § 180.75*, opposing a motion to advance, reset, or specially set a case for a trial setting conference or for trial.

These points and authorities may also be combined with a memorandum of points and authorities in other procedural contexts in which counsel wishes to oppose the contention that the case is entitled to a preference, for example, in opposition to a petition for writ of mandate that seeks to compel the trial court to grant a preference which it has refused.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should argue the facts showing that the moving party does not have a substantial interest in the case as a whole, or in the case of a person over the age of 70, that the party's health is not such that a preference is necessary to prevent prejudicing his or her interest in the litigation. The party's lack of a substantial interest in the case as a whole may appear from the pleadings themselves, or from probative facts set forth in the supporting affidavit or declaration. The fact that the health of a party who is over 70 years of age is such that the party does not require a preference is likely to be established by deficiencies in the medical professional's declaration or other declarations in support of the motion [*see Code Civ. Proc. § 36.5* (affidavit in support of motion for preference under *Code Civ. Proc. § 36(a)* may be signed by moving party's attorney on information and belief as to party's medical diagnosis and prognosis)], or in some cases, from separate declarations opposing the motion.

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18-180 California Points & Authorities § 180.81

§ 180.81 Opposing Contention That Case Is Entitled to Priority--Priority in Interests of Justice [Code Civ. Proc. § 36(e)]--Good Cause Is Not Established Solely by Fact That Priority Is Necessary to Avoid Mandatory Dismissal for Failure to Bring Action to Trial [Code Civ. Proc. §§ 583.310, 583.360]

[1] FORM

[*The following may be combined with the points and authorities in § 180.70 or § 180.75.*]

A PLAINTIFF IS NOT AUTOMATICALLY ENTITLED TO PREFERENTIAL TRIAL SETTING IN ORDER TO AVOID THE FIVE-YEAR MANDATORY DISMISSAL DEADLINE. FURTHERMORE, THE COURT SHOULD DENY PLAINTIFF'S MOTION TO SPECIALLY SET THE ACTION FOR TRIAL BECAUSE PLAINTIFF HAS NOT OTHERWISE SHOWN JUSTIFICATION FOR HIS/HER/ITS DELAY IN PROSECUTION.

A. Cause Justifying Preference Is Not Established Solely by Fact That Preference Is Necessary to Avoid Mandatory Dismissal. A plaintiff is not automatically entitled to a preferential trial setting under *Code of Civil Procedure Section 36(e)* merely because a failure to specially set would lead to expiration of the five-year period within which the case must be brought to trial (*Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 440, 41 Cal. Rptr. 2d 362, 895 P.2d 469* ; *Salas v. Sears Roebuck & Co. (1986) 42 Cal. 3d 342, 346, 349, 228 Cal. Rptr. 504, 721 P.2d 590* ; *Nye v. 20th Century Ins. Co. (1990) 225 Cal. App. 3d 1041, 1045-1046, 275 Cal. Rptr. 319*). In exercising it discretion under *Code of Civil Procedure Section 36(e)*, a trial court must take the "total picture" into account, including the condition of the court calendar, dilatory conduct by plaintiff, prejudice to defendant of an accelerated trial date, and the likelihood of eventual mandatory dismissal if the early trial date is denied. Although the interests of justice weigh against disposing of litigation on procedural grounds, the general policy in favor of trial on the merits will necessarily prevail only if a plaintiff makes some showing of excusable delay (*Salas v. Sears, Roebuck & Co. (1986) 42 Cal. 3d 342, 346-349, 228 Cal. Rptr. 504, 721 P.2d 590* ; *San Bernardino City Unified School Dist. v. Superior Court (1987) 190 Cal. App. 3d 233, 238-240, 235 Cal. Rptr. 356*).

B. Motion Raises Same Issues as Motion for Discretionary Dismissal for Delay in Prosecution. In assessing the "total picture," the factors to be taken into account are essentially the ones prescribed when a court is considering a motion for a discretionary dismissal for delay in prosecution under *Code of Civil Procedure Sections 583.410* and

583.420 and *Cal. Rules of Ct., Rule 3.1342(e)* (*Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 441, 41 Cal. Rptr. 2d 362, 895 P.2d 469* ; *Biondi, Flemming & Gonzales v. Braham (1990) 218 Cal. App. 3d 842, 847, 267 Cal. Rptr. 365*).

C. Relevant Criteria. In ruling on a motion for discretionary dismissal for delay in prosecution, the court must consider all matters relevant to a proper determination of the motion, including the following (*Cal. Rules of Ct., Rule 3.1342(e)*):

1. The court's file in the case and the affidavits and declarations and supporting data submitted by the parties and, where applicable, the availability of the moving party and other essential parties for service of process.

2. The diligence in seeking to effect service of process.

3. The extent to which the parties engaged in any settlement negotiations or discussions.

4. The diligence of the parties in pursuing discovery or other pretrial proceedings, including any extraordinary relief sought by either party.

5. The nature and complexity of the case.

6. The law applicable to the case, including the pendency of other litigation under a common set of facts or determinative of the legal or factual issues in the case.

7. The nature of any extensions of time or other delay attributable to either party.

8. The condition of the court's calendar and the availability of an earlier trial date if the matter was ready for trial.

9. Whether the interests of justice are best served by dismissal or trial of the case.

10. Any other fact or circumstance relevant to a fair determination of the issue.

D. Guiding Policies. The court is also to be guided by the policies set forth in *Code of Civil Procedure Section 583.130*, which in part requires that the plaintiff proceed with reasonable diligence in the prosecution of the action (*Cal. Rules of Ct., Rule 3.1342(e)*).

[*Optional*] **E. Motion to Specially Set After Trial Court Failed to Recalendar Case After Judicial Arbitration.** When a motion to specially set is made after the trial court has failed to calendar a trial de novo after judicial arbitration pursuant to *Code of Civil Procedure Section 1141.20*, the preference for disposition of an action on the merits incorporated in *Code of Civil Procedure Section 583.130* is reinforced by Section 1141.20's mandate that plaintiffs not be penalized for undergoing arbitration. Nonetheless, the trial court still retains discretion to deny a motion to specially set made by a plaintiff who has failed to promptly request a timely trial date in the post-arbitration period. A plaintiff who waits an unreasonably long time in acting to correct the court's failure to recalendar the case may be unable to claim "excusable delay" and therefore may be subject to dismissal (*Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 442, 41 Cal. Rptr. 2d 362, 895 P.2d 469*). Although the trial court can use a plaintiff's motion to specially set the case for trial as an opportunity to correct its own failure to calendar or recalendar the case after arbitration, these considerations can be outweighed by the plaintiff's unreasonable delay before or after arbitration, as well as by prejudice to the defendant from an accelerated trial date (*Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 443, 41 Cal. Rptr. 2d 362, 895 P.2d 469*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the case is entitled to preference in setting for trial on the ground that the interests of justice require the preference so that the case will not be subject to mandatory dismissal for delay in bring the action to trial or retrial [*see Code Civ. Proc. §§ 36(e), 583.310-583.360*]. The ground of opposition is that the court is not required to grant such preference absent a showing by plaintiff of reasonable excuse for the delay [*see Salas v. Sears, Roebuck & Co. (1986) 42 Cal. 3d 342, 346-347, 228 Cal. Rptr. 504, 721 P.2d 590]* .

The form may be submitted in combination with general points and authorities opposing a motion for a grant of a preference [*see § 180.70*]. It may also be submitted with the points and *authorities in § 180.75*, opposing a motion to advance, reset, or specially set a case for a trial setting conference or for trial. Conversely, they may be included in a memorandum of points and authorities in support of a motion to set specially when the factors listed show that the moving party has exercised diligence throughout to bring the case to trial and a consideration of the other factors listed favor the granting of the motion. These points and authorities may also be combined with a memorandum in other procedural contexts in which counsel wishes to oppose the contention that the case is entitled to a preference, for example, in opposition to a petition for writ of mandate to compel the trial court to grant a preference that it has refused.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should argue that the facts set forth in the accompanying affidavit or declaration show that the party seeking preference to avoid mandatory dismissal of his or her case has not demonstrated reasonable excuse for his or her delay in bringing the action to trial, and that other factors, such as those set forth in Paragraphs A and C of the form, weigh against granting the preference.

[c] Related Points and Authorities

For memoranda relating generally to mandatory and discretionary dismissal for delay in prosecution, see Ch. 90, *Dismissal* .

[3] Discussion of Authorities

[a] Cause Justifying Preference Is Not Established Solely by Fact That Preference Is Necessary to Avoid Mandatory Dismissal

The sequence of events in ***Howard v. Thrifty Drug & Discount Stores*** *(1995) 10 Cal. 4th 424, 41 Cal. Rptr. 2d 362, 895 P.2d 469* , was as follows:

- On September 21, 1991, a judicial arbitration award became final when the defendant failed to request trial de novo.

- On October 1, the court entered judgment for plaintiff pursuant to the award.

- On November 7, the defendant moved to vacate the judgment and to allow a request for trial de novo, based on defendant's attorney's statement of his own neglect (renewing a defective motion first made October 11 that was denied without prejudice).

- On November 27, the court granted the motion, subject to payment of sanctions to plaintiff.

- On December 4, the defendant requested trial de novo.

- On December 31, defendant paid the sanctions.

- On July 7, 1992, the court granted plaintiff an order shortening time so that plaintiff could schedule a motion to specially set the case for trial on July 10.

The court denied the motion to specially set, finding that the five years to bring the case to trial had already elapsed, requiring dismissal under *Code Civ. Proc. § 583.310*. Moreover, the court held that if, as plaintiff contended, 44 days remained within that period, plaintiff's lack of activity since the request for trial de novo made denial of the motion appropriate on discretionary grounds under *Code Civ. Proc. § 583.410*. The court of appeal affirmed the dismissal on discretionary grounds.

The Supreme Court affirmed based on the trial court's discretionary power under *Code Civ. Proc. § 583.410*, but first held that the court erred in dismissing the case on mandatory grounds under *Code Civ. Proc. § 583.310*.

In discussing *Code Civ. Proc. § 1141.20* tolling of the mandatory period for bringing the case to trial when the trial court fails, after timely request, to calendar a trial de novo so that a plaintiff obtains his or her pre-arbitration place in the calendar, the Court stated that a plaintiff who benefits from that tolling may still be subject to discretionary dismissal if the plaintiff would have been subject to discretionary dismissal before arbitration (*10 Cal. 4th 424, 435)* .

In later addressing the discretionary dismissal, the Court first noted that a plaintiff is not automatically entitled to a preferential trial setting under *Code Civ. Proc. § 36(e)* merely because failure to specially set would lead to expiration of the five-year statute (*10 Cal. 4th 424, 440)* .

Salas v. Sears, Roebuck & Co. *(1986) 42 Cal. 3d 342, 228 Cal. Rptr. 504, 721 P.2d 590* , was a personal injury action in which, less than one year before expiration of the mandatory five-year period for bringing the action to trial under former Code Civ. Proc. § 583 [*now see Code Civ. Proc. § 583.310*], plaintiffs failed to notify all parties of the trial-setting conference and the case was removed from the civil active list. For the next 10 months, plaintiffs did nothing to restore their case to the civil active list nor did they initiate any discovery. Forty days before the five-year period was to elapse, plaintiffs brought a motion under former Code Civ. Proc. § 36(d) (*now Code Civ. Proc. § 36(e)*), on the ground that the imminent expiration of the five-year limit required preferential trial setting in the interests of justice. The trial court denied the motion, because of plaintiffs' failure to offer any justification for their delay in prosecuting the action, and subsequently dismissed the case pursuant to former Code Civ. Proc. § 583. The court of appeal affirmed.

The Supreme Court also affirmed, holding that the denial of trial preference was proper. Disapproving prior case law in *Campanella v. Takaoka (1984) 160 Cal. App. 3d 504, 206 Cal. Rptr. 745* , and *Kotoff v. Efseaff (1985) 172 Cal. App. 3d 991, 218 Cal. Rptr. 499* , the Court rejected plaintiffs' contention that "cause" under former Code Civ. Proc. § 36(d) is established as a matter of law when preferential setting is necessary to avoid dismissal under the five-year bar (*42 Cal. 3d 342, 346)* . The Court stated that in exercising its discretion under former Code Civ. Proc. § 36(d) (*now see Code Civ. Proc. § 36(e)*), a trial court must take the "total picture" into account, including the condition of the court calendar, dilatory conduct by plaintiff, prejudice to defendant of an accelerated trial date, and the likelihood of eventual mandatory dismissal if the early trial date is denied (*42 Cal. 3d 342, 349)* . The Court held that although the interests of justice weigh heavily against disposing of litigation on procedural grounds, the general policy in favor of trial on the merits will necessarily prevail only if a plaintiff makes some showing of excusable delay (*42 Cal. 3d 342, 347)* . Plaintiffs' failure to justify their delay, coupled with their failure to initiate discovery or restore the case to the civil active list after more than four years and 10 months after filing the complaint, was sufficient to find that the trial court did not abuse its discretion in denying the trial preference (*42 Cal. 3d 342, 349-350)* .

Nye v. 20th Century Ins. Co. *(1990) 225 Cal. App. 3d 1041, 275 Cal. Rptr. 319* , was an action by an insured against her insurance company resulting from the insurer's refusal to replace the engine in plaintiff's car, which had been damaged in an automobile accident. The action was filed September 12, 1984, and an amended complaint was filed December 28, 1984. Defendant answered January 17, 1985. Two and a half years later plaintiff, on August 24, 1987, filed an at-issue memorandum. Defendant's motion for summary adjudication of issues filed on October 11, 1988, was granted November 9, 1988. On August 2, 1989, 41 days before the five-year period would have expired, plaintiff's attorney called the calendar clerk to learn the status of the case, learned that no status conference had been set, and that it was unlikely one could be set before expiration of the five-year period. Plaintiff moved for an order to specially set, and defendant countered with a motion to dismiss. Plaintiff's motion was denied, and defendant's motion was granted. The court of appeal affirmed. The appellate court said that, under Cal. Rules of Ct., Rule 375(b) [*now see Cal. Rules of Ct., Rule 3.1335*], a motion to specially set requires a showing of good cause, that the only showing made by the plaintiff was that the statutory period would run unless the case were specially set, and that this was not enough to compel a trial court to grant the motion (*225 Cal. App. 3d 1041, 1045)* . The court further pointed out that absence of prejudice to the defendant by the delay would neither compel the trial court to grant a motion to specially set nor prevent it from granting a motion to dismiss (*225 Cal. App. 3d 1041, 1046)* .

San Bernardino City Unified School Dist. v. Superior Court *(1987) 190 Cal. App. 3d 233, 235 Cal. Rptr. 356* , was a mandate proceeding in which petitioners sought to compel the lower court to set their case specially for trial before the imminent expiration of the three-year period allowed under *Code Civ. Proc. § 583.320(a)(3)* (actions in which new trial granted). The trial court had denied their motion for preference, on the ground of petitioners' lack of diligence, coupled with an insufficient showing of excusable delay in prosecution of the action. The court of appeal refused to issue a writ of mandate, holding that the trial court properly exercised its discretion by taking into account (1) petitioners' diligence or lack thereof; (2) prejudice to real parties in interest of an accelerated trial date; (3) the condition of the court's calendar; and (4) the likelihood of eventual mandatory dismissal if the early trial date were denied (*190 Cal. App. 3d 233, 238)* . The court rejected petitioners' argument that their attempts to negotiate a settlement excused their lack of diligence, stating in dictum that delay in bringing a case to trial might be excusable when it results from a reasonable belief, induced by mutual bona fide settlement negotiations, that a trial could probably be avoided (*190 Cal. App. 3d 233, 239)* . The court found that petitioners' inexcusable delay, coupled with some prejudice to the opposing party, outweighed the other factors even though the result would be mandatory dismissal of the action (*190 Cal. App. 3d 233, 240)* .

[b] Motion Raises Same Issues as Motion for Discretionary Dismissal for Delay in Prosecution

The facts and procedural background of ***Howard v. Thrifty Drug & Discount Stores*** *(1995) 10 Cal. 4th 424, 41 Cal. Rptr. 2d 362, 895 P.2d 469* , are discussed in [a], *above*. In affirming the dismissal, the Court noted that because the same standards apply to a motion to preferentially set under *Code Civ. Proc. § 36(e)* to avoid the five-year statute and a motion to dismiss on discretionary grounds under *Code Civ. Proc. § 583.410*, they can be considered as merely two sides of the same determination (*10 Cal. 4th 424, 440 n.6*). The Court held that the factors the trial court is to take into account in assessing the total picture in ruling on the motion are the ones prescribed when a court is considering a motion for discretionary dismissal under Cal. Rules of Ct., Rule 373(e) (now see Rule 3.1342(e)) (*10 Cal. 4th 424, 441)* .

The Court then held that the trial court had not abused its discretion in denying the motion to specially set the case for trial and exercising its discretion to dismiss. The facts the Court looked to were as follows (*10 Cal. 4th 424, 443)* :

- A three-year, seven-month lapse between the filing of the complaint and the first at-issue memorandum, during which the only activity was two discovery requests.

- The lack of evidence of active settlement negotiations or delay by the defendant.

- Post-arbitration delay of six months after defendant's request for trial de novo to bring to the court's attention a lack of a trial date (at which time it was less than two months before expiration of the five-year mandatory dismissal deadline).

Biondi, Flemming & Gonzales v. Braham *(1990) 218 Cal. App. 3d 842, 267 Cal. Rptr. 365* , was an action for breach of contract and fraud regarding a sale of real estate by one of the defendants, a joint venture, and for an injunction to prevent foreclosure, in which the joint venture filed both an answer and a cross complaint against plaintiff and others. Discovery was undertaken, an arbitration conference was held, and a substitution of attorney was filed substituting plaintiff in propria persona. On two occasions the cross complainant filed an at-issue memorandum, and each time the court clerk mailed plaintiff a notice of the trial setting conference, directing plaintiff to inform the other parties, and stating that if the complaint had been filed more than two years before the conference date and plaintiff did not appear at the conference, the court would dismiss the action for lack of prosecution. On the second occasion the notice was returned to the court clerk as undeliverable, and the clerk resent it to plaintiff's former counsel. Neither plaintiff nor plaintiff's former attorney notified the other parties of the conferences. Each time none of the parties appeared at the conference, and the at-issue memorandum was vacated. Fearing the five-year period would expire, the cross complainant filed a motion to specially set, which the trial court denied. The cross complaint was dismissed for failure to bring it to trial within five years, and the cross complainant appealed. In reversing the order of dismissal on the ground that under the facts of the case as shown by the record the cross complainant had acted diligently to bring the case to trial, the court of appeal made the statement set forth in Paragraph B of the form (*218 Cal. App. 3d 842, 847)* .

[c] Guiding Policies

Code Civ. Proc. § 583.130 provides that it is the policy of the state that a plaintiff shall proceed with reasonable diligence in the prosecution of the action but that all parties cooperate in bringing the action to trial or other disposition, and that, except as otherwise provided by statute or by rule of court adopted pursuant to statute, the policy favoring the right of parties to make stipulations in their own interests and the policy favoring trial or other disposition of an action on the merits are generally to be preferred over the policy that requires dismissal for failure to proceed with reasonable diligence in the prosecution of an action in construing the provisions of *Code Civ. Proc. § 583.110 et seq.*

[d] Motion to Specially Set After Trial Court Failed to Recalendar Case After Judicial Arbitration

The facts and procedural background of ***Howard v. Thrifty Drug & Discount Stores*** *(1995) 10 Cal. 4th 424, 41 Cal. Rptr. 2d 362, 895 P.2d 469* , are discussed in [a], *above*.

In affirming the discretionary dismissal, the Court indicated that when a motion to specially set is made after the trial court has failed to fulfill its *Code Civ. Proc. § 1141.20* duty to calendar a trial de novo after judicial arbitration, the *Code Civ. Proc. § 583.130* preference for disposition of an action on the merits is reinforced by *Code Civ. Proc. § 1141.20*'s mandate that plaintiffs not be penalized for undergoing arbitration. The Court also held, however, that the trial court nonetheless retains discretion to deny a motion to specially set made by a plaintiff who has failed to promptly request a timely trial date in the post-arbitration period (*10 Cal. 4th 424, 442-443)* .

California Points & Authorities

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[1] Related Pleading and Practice Forms

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§§ 182.13-182.29 [Reserved]

§ 182.30 Supporting Contention That Actual Agency [Civ. Code § 2299] Created--Express Agreement of Parties

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Creation of Agency by Express Agreement

[4] Additional Authorities

[a] Creation of Agency by Express Agreement

§ 182.31 Supporting Contention That Actual Agency [Civ. Code § 2299] Created--Conduct of Parties Manifests Agency

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Agency Contract May Be Implied From Conduct of Parties

[b] Agency Based on Conduct Manifesting Acceptance of Relationship

[4] Additional Authorities

[a] Agency Contract May Be Implied From Conduct of Parties

§ 182.32 Supporting Contention That Actual Agency [Civ. Code § 2299] Exists--Principal's Right to Control Agent Need Not Be Exercised

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Right to Control Acts of Another Shows That Agency Exists

[b] Agency Does Not Depend on Principal's Exercise of Control

[4] Additional Authorities

[a] Right to Control Acts of Another Shows That Agency Exists

§ 182.33 Supporting Contention That Agent Had Actual Authority [Civ. Code § 2316]--Conduct of Principal Led Agent Reasonably to Believe in Authority

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] When Agent's Actual Authority Arises

[4] Additional Authorities

[a] When Agent's Actual Authority Arises

§ 182.34 Supporting Contention That Agent Acted Within Scope of Authority--Agent's Acts Were Within Implied Authority [Civ. Code § 2319]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Agent's Implied Authority

[b] Agent's Authority to Act in Unexpected Situations

§ 182.35 Supporting Contention That Actual Agency [Civ. Code § 2299] or Actual Authority [Civ. Code § 2316] Created by Principal's Ratification [Civ. Code § 2307] of Agent's Acts--Principal Accepted Benefits of Act

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Ratification by Voluntary Adoption of Act

[b] Ratification by Implication Based on Principal's Conduct

[c] Principal's Acceptance of Benefits Ratifies Entire Transaction

[d] Principal May Ratify Without Full Knowledge of Facts

§ 182.36 Supporting Contention That Actual Agency [Civ. Code § 2299] or Actual Authority [Civ. Code § 2316] Created by Principal's Ratification [Civ. Code § 2307] of Agent's Acts--Principal's Ratification of Part of Transaction Constitutes Ratification of Whole

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Ratification of Part of Transaction Ratifies Whole

[b] Closely Related Transactions Treated as One

[c] Lawsuit to Enforce Agent's Unauthorized Act May Constitute Ratification

[4] Additional Authorities

[a] Ratification of Part of Transaction Ratifies Whole

§ 182.37 Opposing Contention That Actual Agency [Civ. Code § 2299] Created--Principal and Agent Did Not Agree to Create Agency

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Burden of Proof of Agency

[b] No Presumption of Agency

[c] Both Agent and Principal Must Agree to Create Actual Agency

[4] Additional Authorities

[a] Both Principal and Agent Must Agree to Create Actual Agency

§ 182.38 Opposing Contention That Actual Agency [Civ. Code § 2299] Created--Alleged Principal Had No Right to Control Alleged Agent

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Right to Control Prerequisite to Finding of Actual Agency

[4] Additional Authorities

[a] Right to Control Prerequisite to Finding of Actual Agency

§ 182.39 Opposing Contention That Actual Agency [Civ. Code § 2299] Exists--Agency Was Terminated by Mutual Abandonment

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Mutual Abandonment Terminates Actual Agency Relationship

[b] Abandonment May Be Implied by Conduct

§ 182.40 Opposing Contention That Agent Had Actual Authority [Civ. Code § 2316]--Alleged Agent Did Not Actually Believe That Authority Existed

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Belief of Agent Is Essential to Finding of Actual Authority

§ 182.41 Opposing Contention That Agent Had Actual Authority [Civ. Code § 2316]--Agent's Belief Was Not Based on Principal's Conduct

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Agent's Belief Must Be Based on Conduct of Principal

§ 182.42 Opposing Contention That Actual Agency [Civ. Code § 2299] or Actual Authority [Civ. Code § 2316] Created by Principal's Ratification [Civ. Code § 2307] of Agent's Acts--Principal Cannot Ratify Unauthorized Act of Agent to Prejudice of Third Party Without Third Party's Consent

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Ratification Cannot Prejudice Third Parties Without Their Consent

[4] Additional Authorities

[a] Ratification Cannot Prejudice Third Parties Without Their Consent

§ 182.43 Opposing Contention That Actual Agency [Civ. Code § 2299] or Actual Authority [Civ. Code § 2316] Created by Principal's Ratification [Civ. Code § 2307] of Agent's Acts--No Ratification Unless All Material Facts Known to Principal

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Principal Must Have Knowledge of All Material Facts to Ratify Unauthorized Transaction

§§ 182.44-182.59 [Reserved]

§ 182.60 Supporting Contention That Principal May Not Terminate Agency--Power of Agent Is Coupled With Interest in Subject of Agency

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Agency Coupled With Interest Is Not Terminable by Principal

[b] Agency Created as Security for Loans to Principal Is Coupled With Interest

§ 182.61 Supporting Contention That Agent May Recover Damages [Civ. Code § 3300] for Principal's Breach of Agency Contract--Principal Wrongfully Terminated Agency

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Damages Recoverable When Agency Wrongfully Terminated

[b] Agent With Notice of Wrongful Discharge Need Not Tender Service or Stay Ready to Perform

[4] Additional Authorities

[a] Damages Recoverable When Agency Wrongfully Terminated

§ 182.62 Supporting Contention That Agent May Recover Damages [Civ. Code § 3300] for Principal's Breach of

Agency Contract--Principal Interfered With Agent's Exclusive Sales Agency

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Agent May Recover Damages for Breach of Exclusive Agency Contract

§ 182.63 Supporting Contention That Agent Is Entitled to Indemnity From Principal--Agent Held Personally Liable on Contract Undertaken for Principal

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Agent's Right to Indemnification From Principal

§ 182.64 Opposing Contention That Principal May Not Terminate Agency--Power of Agent Is Not Coupled With Interest in Subject of Agency When Agent's Interest Can Be Obtained Only by Exercise of Agency

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Requirements for Power Coupled With Interest

[b] Agency Not Coupled With Interest When Interest Is Gained by Exercise of Agency

[c] Compensation of Agent Is Not Interest

§ 182.65 Opposing Contention That Principal May Not Terminate Agency--Power of Agent Is Not Coupled With Interest in Subject of Agency When Interest in Agency Did Not Exist at Time Agency Was Created

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Agency Must Be Created at Same Time as Interest to Be Coupled With Interest

§§ 182.66-182.79 [Reserved]

§ 182.80 Supporting Contention That Principal May Set Aside Agent's Transaction--Agent Concluded Transaction With Self Without Principal's Knowledge

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Agent's Duty Toward Principal

[b] Principal May Set Aside Agent's Transaction With Self

§ 182.81 Supporting Contention That Principal May Recover Secret Profits From Agent--Agent's Secret Profits Obtained From Agency Belong to Principal

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Agent May Not Make Secret Profit

[b] Principal May Recover Agent's Secret Profit

[4] Additional Authorities

[a] Principal May Recover Agent's Secret Profit

§ 182.82 Supporting Contention That Principal Is Entitled to Accounting From Agent--Agent Liable to Principal for Undetermined Amounts Received in Fiduciary Capacity [and Agent Has Burden of Proving Proper Disposal of Property Received for Principal]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Agent Must Account to Principal

[b] Agent's Burden in Accounting Action

[4] Additional Authorities

[a] Agent Must Account to Principal

§ 182.83 Supporting Contention That Principal May Recover Tort Damages [Civ. Code § 3333] for Agent's Breach of Fiduciary Duty--Agent Did Not Use Reasonable Care in Carrying Out Agency

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Agent's Fiduciary Duty Toward Principal

[b] Agent Is Liable for Breach of Fiduciary Duty

[4] Additional Authorities

[a] Agent Is Liable for Breach of Fiduciary Duty

§ 182.84 Supporting Contention That Principal May Recover Tort Damages [Civ. Code § 3333] for Agent's Breach of Fiduciary Duty--Failure to Disclose Material Facts to Principal

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Agent Liable for Failure to Disclose Material Facts to Principal

[b] Agent's Burden of Proof

[c] Disclosure Duty Applies to Gratuitous Agents

[4] Additional Authorities

[a] Agent Must Disclose Material Facts to Principal

§ 182.85 Supporting Contention That Principal Is Entitled to Indemnity From Agent--Principal Held Liable for Agent's Tort Solely Because of Agency Relationship [Civ. Code § 2338] Is Entitled to Indemnity

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Principal and Agent Liable for Tort of Agent

[b] Principal's Right to Indemnity From Agent

§ 182.86 Opposing Contention That Principal May Set Aside Agent's Transaction--Principal Ratified Agent's Self-Dealing Transaction With Knowledge of Agent's Interest

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Principal's Ratification With Knowledge of Agent's Self-Dealing

§ 182.87 Opposing Contention That Principal May Set Aside Agent's Transaction--Agent May Acquire Property for Self If All Material Facts Are Disclosed to Principal

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Agent May Act on Own Behalf With Disclosure to Principal

§§ 182.88-182.99 [Reserved]

§ 182.100 Supporting Contention That Third Party May Recover Damages [Civ. Code § 3318] From Agent for Breach of Warranty of Authority [Civ. Code § 2342]--Agent Represented by Actions That Authority Existed When Authority Did Not in Fact Exist

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Breach of Warranty May Arise From Agent's Conduct

[b] Interest on Judgment Proper If Proper Against Principal

§ 182.101 Supporting Contention That Third Party May Recover Damages for Breach of Contract [Civ. Code § 3300] From Agent as Principal [Civ. Code § 2343]--Third Party Gave Credit to Agent Personally With Agent's Consent

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Agent Liable as Principal When Personal Credit Given Agent

§ 182.102 Supporting Contention That Third Party May Recover Damages for Breach of Contract [Civ. Code § 3300] From Agent as Principal [Civ. Code § 2343]--Agent Entered Into Written Contract in Principal's Name Without Good Faith Belief in Authority to Do So

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Agent Liable as Principal When Agent Acts Without Belief in Authority

[4] Additional Authorities

[a] Agent Liable as Principal When Agent Acts Without Belief in Authority

§ 182.103 Supporting Contention That Third Party May Recover Tort Damages [Civ. Code § 3333] From Agent as Principal [Civ. Code § 2343]--Agent's Acts Were Wrongful in Nature

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Agent Liable as Principal When Acts Wrongful in Nature

[b] Agent Liable Regardless of Principal's Liability

§ 182.104 Supporting Contention That Third Party May Recover Damages for Breach of Contract [Civ. Code § 3300] From Agent as Principal--Principal Only Partially Disclosed

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Person Purporting to Contract With Third Party for Partially Disclosed Principal as Party to Contract

§ 182.105 Opposing Contention That Third Party May Recover Damages [Civ. Code § 3318] From Agent for Breach of Warranty of Authority [Civ. Code § 2342]--Agent Acted Within Authority

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Breach of Warranty of Authority Requires Agent's Unauthorized Act

§ 182.106 Opposing Contention That Third Party May Recover Damages [Civ. Code § 3318] From Agent for Breach of Warranty of Authority [Civ. Code § 2342]--Third Party Was Cognizant of Facts Concerning Agent's Authority

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Breach of Warranty of Authority Requires Third Party's Ignorance of Agent's Lack of Authority

§ 182.107 Opposing Contention That Third Party May Recover Tort Damages [Civ. Code § 3333] From Agent as Principal [Civ. Code § 2343]--Agent Not Liable for Failure to Perform Duty Owed Solely to Principal

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Agent Not Liable to Third Party for Failure to Perform Duty Owed Solely to Principal

§§ 182.108-182.119 [Reserved]

§ 182.120 Supporting Contention That Ostensible Agency [Civ. Code § 2300] Created--Principal's Conduct Caused Third Party to Believe Agency Existed

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Ostensible Agency Created

[b] Third Party Has No Duty to Inquire

[4] Additional Authorities

[a] Ostensible Agency Created

§ 182.121 Supporting Contention That Agent Acted Within Ostensible Authority [Civ. Code § 2317]--Ostensible Authority Exists When Third Party Reasonably Relies on Principal's Conduct

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Agent's Ostensible Authority Based on Third Party's Reasonable Belief

[b] Principal Need Not Have Direct Contact With Third Person

[c] Third Party's Reliance on Representations to Public May Suffice

[4] Additional Authorities

[a] Agent's Ostensible Authority Based on Third Party's Reasonable Belief

[b] Principal Need Not Have Direct Contact With Third Person

§ 182.122 Supporting Contention That Notice to or Knowledge of Agent Imputed to Principal [Civ. Code § 2332]--Principal Chargeable With Facts Known to Agent Within Scope of Agency

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Principal Chargeable With and Bound by Knowledge of or Notice to Agent

[b] Knowledge or Notice Imputed Although No Actual Communication

[c] Knowledge of Authorized Subagent Imputed to Principal

[d] Principal Charged With Agent's Knowledge Acquired Before Agency

§ 182.123 Supporting Contention That Third Party May Recover Tort Damages [Civ. Code § 3333] From Principal for Acts of Agent--Agent Committed Wrongful Act

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Principal Liable for Wrongful Acts of Agent in Transacting Business

[b] Principal Liable for Agent's Authorized or Ratified Wrongful Acts

[c] Determining Whether or Not Act Committed During Course of Agency

[d] Wrongful Act May Be Within Scope of Agency Although in Excess of Authority

[e] Exemplary Damages When Principal Has Knowledge of Agent's Unfitness

[f] Exemplary Damages When Principal Authorizes Wrongful Act

[g] Exemplary Damages When Principal Personally Guilty of Malice

[h] Corporate Liability Depends on Act by Officer, Director, or Managing Agent

[4] Additional Authorities

[a] Principal Liable for Wrongful Acts of Agent in Transacting Business

[b] Determining Whether or Not Act Committed During Course of Agency

[c] Exemplary Damages When Principal Authorizes Wrongful Act

§ 182.124 Supporting Contention That Third Party May Recover Tort Damages [Civ. Code § 3333] From Principal for Acts of Agent--Principal Ratified Wrongful Act of Agent

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Third Party May Recover Damages for Agent's Wrongful Act Ratified by Principal

[b] Failure to Discharge Agent May Constitute Ratification

[c] Exemplary Damages When Principal Ratifies Wrongful Act

[4] Additional Authorities

[a] Exemplary Damages When Principal Ratifies Wrongful Act

§ 182.125 Supporting Contention That Third Party May Recover Damages for Fraud [Civ. Code §§ 1709, 3333, 3343; Com. Code § 2721] From Principal for Fraud of Agent--Agent Committed Fraud in Course of Agency

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Agency Issues

[c] Procedural Issues

[d] Related Pleading and Practice Forms

[e] Related Points and Authorities

[3] Discussion of Authorities

[a] Liability of Principal for Fraud of Agent

[b] Principal's Liability Not Based on Fault

[4] Additional Authorities

[a] Liability of Principal for Fraud of Agent

§ 182.126 Supporting Contention That Third Party May Enforce Contract Entered Into by Agent for Principal--Agent Has Implied Authority [Civ. Code § 2319] to Bind Principal to Arbitration Clause in Medical

Insurance Contract

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Third Party May Enforce Arbitration Provision Against Principal

§ 182.127 Supporting Contention That Third Party May Enforce Contract Entered Into by Agent for Principal--Disclosed Principal Liable on Contract in Name of Agent When Intent to Bind Principal Inferable From Face of Instrument

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Contract in Agent's Name Binding on Disclosed Principal

[b] Contract With Agent Is Not Election to Exonerate Disclosed Principal

[c] Unsatisfied Judgment Against Agent Does Not Discharge Disclosed Principal

§ 182.128 Supporting Contention That Third Party May Enforce Contract Entered Into by Agent for Principal--Undisclosed Principal Liable on Contract Entered Into by Authorized Agent

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Undisclosed Principal Liable for Contracts Executed by Authorized Agent

§ 182.129 Opposing Contention That Agent Acted Within Ostensible Authority [Civ. Code § 2317]--Agent Has No Authority to Perpetrate Fraud on Principal [Civ. Code § 2306]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

§ 182.130 Opposing Contention That Agent Acted Within Ostensible Authority [Civ. Code § 2317]--Third Party's Reliance on Principal's Conduct Was Negligent

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Third Person's Duty of Inquiry Regarding Authority of Agent

[b] Third Person's Negligent Reliance Precludes Recovery Based on Ostensible Authority

[4] Additional Authorities

[a] Third Person's Duty of Inquiry Regarding Authority of Agent

§ 182.131 Opposing Contention That Agent Acted Within Ostensible Authority [Civ. Code § 2317]--Third Party Did Not Rely on Acts of Principal

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Reliance of Third Party Necessary for Ostensible Authority to Exist

§ 182.132 Opposing Contention That Agent Acted Within Ostensible Authority [Civ. Code § 2317]--Agent's Authority to Draw and Endorse Checks Does Not Confer Ostensible Authority to Create Overdraft

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Collecting Agent Not Ostensibly Authorized to Create Overdraft

§ 182.133 Opposing Contention That Knowledge of or Notice to Agent Imputed to Principal [Civ. Code § 2332]--Principal Not Chargeable With Knowledge or Notice of Agent Regarding Matters Not Within Agent's Authority

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Knowledge or Notice Imputed Only Regarding Matters Within Scope of Agency

[4] Additional Authorities

[a] Knowledge or Notice Imputed Only Regarding Matters Within Scope of Agency

§ 182.134 Opposing Contention That Knowledge of or Notice to Agent Imputed to Principal [Civ. Code § 2332]--Knowledge or Notice Not Imputed When Third Party Did Not Deal With Principal Through Agent or Otherwise

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Knowledge or Notice Imputed Only When Third Party Deals With Principal Through Agent

§ 182.135 Opposing Contention That Third Party May Recover Tort Damages [Civ. Code § 3333] From Principal for Acts of Agent--Agent's Wrongful Act Was Not Within Scope of Agency or Authorized or Ratified by Principal

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Third Party May Not Recover From Principal When Agent's Act Not Within Scope of Employment

[b] Third Party May Not Recover From Principal When Agent's Act Not Authorized or Ratified

[4] Additional Authorities

[a] Third Party May Not Recover From Principal When Agent's Act Not Within Scope of Employment

[b] Third Party May Not Recover From Principal When Agent's Act Not Authorized or Ratified

§ 182.136 Opposing Contention That Plaintiff May Recover Exemplary Damages [Civ. Code § 3294] From

Principal for Acts of Agent--Retention of Agent With Special Skills and Experience Does Not Constitute Ratification

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Retention of Agent With Special Skills Does Not Constitute Ratifaction

§ 182.137 Opposing Contention That Third Party May Enforce Contract Entered Into by Agent for Principal--Undisclosed Principal Not Liable on Contract Entered Into by Agent When Third Party Granted Exclusive Credit to Agent and Principal Paid Agent in Good Faith

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Undisclosed Principal Exonerated When Exclusive Credit Granted to Agent

§ 182.138 Opposing Contention That Third Party May Enforce Contract Entered Into by Agent for Principal--Undisclosed Principal Not Liable Under Contract Entered Into by Agent With Third Party Unless Actual Agency [Civ. Code § 2299] Exists

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Undisclosed Principal Not Liable Unless Actual Agency Exists

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18-182 California Points & Authorities § 182.01

§ 182.01 Scope of Chapter

This chapter contains memoranda of points and authorities relating to principals and agents. The chapter includes the following forms:

- Points and authorities supporting [*see §§ 182.30 -182.32*] and opposing [*see §§ 182.37 -182.39*] general contentions that an actual agency has been created.

- Points and authorities supporting [*see §§ 182.33, 182.34*] and opposing [*see §§ 182.40, 182.41*] general contentions that an actual authority has been conferred.

- Points and authorities supporting [*see §§ 182.35, 182.36*] and opposing [*see §§ 182.42, 182.43*] general contentions that an agency was created or an authority conferred by a principal's ratification.

- Points and authorities supporting [*see §§ 182.60 -182.63*] and opposing [*see §§ 182.64, 182.65*] an agent's actions for damages against the principal.

- Points and authorities supporting [*see §§ 182.80 -182.85*] and opposing [*see §§ 182.86 -182.87*] the contention that a principal may recover damages in actions against an agent.

- Points and authorities supporting [*see §§ 182.100 -182.103*] and opposing [*see §§ 182.105 -182.107*] the contention that a third party may recover damages from an agent in actions for breach of contract, breach of warranty of authority, and for the agent's torts.

- Points and authorities supporting [*see §§ 182.120, 182.121*] and opposing [*see §§ 182.130 -182.132*] the contention that an ostensible agency or ostensible authority was created by conduct of a principal

- Points and authorities supporting [*see §§ 182.123 -182.128*] and opposing [*see §§ 182.135 -182.138*] the contention that a third party may recover damages from a principal for acts committed in the course of the agency or that a third party may enforce against a principal a contract entered by an agent.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActActual AuthorityExpress AuthorityBusiness & Corporate LawAgency RelationshipsAuthority to ActActual AuthorityImplied AuthorityConduct of PartiesBusiness & Corporate LawAgency RelationshipsAuthority to ActApparent AuthorityConduct of PartiesBusiness & Corporate LawAgency RelationshipsCauses of Action & RemediesGeneral OverviewBusiness & Corporate LawAgency RelationshipsRatificationGeneral Overview

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18-182 California Points & Authorities § 182.02

§ 182.02 Governing Statutes

The relationship between principal and agent, and the effect of that relationship on the rights and duties of third persons who deal with one or both of the parties in an agency relationship, are governed by *Civ. Code §§ 2019-2030* and *2295 et seq.* [*see also Prob. Code § 16000 et seq.* (provisions governing duties of trustees)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActActual AuthorityImplied AuthorityConduct of PartiesBusiness & Corporate LawAgency RelationshipsAuthority to ActApparent AuthorityConduct of PartiesBusiness & Corporate LawAgency RelationshipsCauses of Action & RemediesGeneral OverviewBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesThird Parties

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18-182 California Points & Authorities § 182.03

§ 182.03 Types of Agency

An agency is either actual or ostensible [*Civ. Code § 2298*]. An agency is actual when the agent is really employed by the principal [*Civ. Code § 2299*]. An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third party to believe another to be his or her agent who is not really employed by the principal [*Civ. Code § 2300*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsGeneral OverviewBusiness & Corporate LawAgency RelationshipsAuthority to ActActual AuthorityGeneral OverviewBusiness & Corporate LawAgency RelationshipsEstablishmentEstoppel, Ostensible Agency & NecessityOstensible AgencyBusiness & Corporate LawAgency RelationshipsTypesGeneral Overview

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18-182 California Points & Authorities § 182.04

§ 182.04 Ostensible Agency Based on Estoppel

The liability of a principal for the acts of an ostensible agent rests on the doctrine of estoppel, and its essential elements are representations by the principal, justifiable reliance thereon by the third party, and change of position or injury resulting from the reliance [*Kelley v. R.F. Jones Co. (1969) 272 Cal. App. 2d 113, 120-121, 77 Cal. Rptr. 170]* . The requirement of reliance by a third party makes the concept of ostensible agency relevant only insofar as a third party seeks to impose liability on a principal or agent in the conduct of an ostensible agency, which by definition can exist only when no actual agency exists [*see Civ. Code § 2300*]. Thus, contentions regarding an ostensible agency are contained in § 182.120 et seq., covering actions by third parties against a principal, rather than in § 182.30 et seq., covering general agency allegations, because an ostensible agency is not created by the actions of a principal and agent alone but depends on some act by the principal that leads a third party reasonably to believe that an agency or authority exists [*see Civ. Code §§ 2300* (defining ostensible agency in terms of third party's belief), 2334 (limitation on principal's liability for acts under agent's ostensible authority); *Kelley v. R.F. Jones Co. (1969) 272 Cal. App. 2d 113, 120-121, 77 Cal. Rptr. 170]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActActual AuthorityGeneral OverviewBusiness & Corporate LawAgency RelationshipsEstablishmentEstoppel, Ostensible Agency & NecessityAgency by EstoppelBusiness & Corporate LawAgency RelationshipsEstablishmentEstoppel, Ostensible Agency & NecessityOstensible AgencyBusiness & Corporate LawAgency RelationshipsTypesGeneral Overview

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18-182 California Points & Authorities § 182.05

§ 182.05 Authority of Agent

[1] Actual

An agent has the authority that the principal actually or ostensibly confers on him or her [*Civ. Code § 2315*]. Actual authority is that which a principal intentionally confers on the agent, or intentionally or by want of ordinary care allows the agent to believe he or she possesses [*Civ. Code § 2316*]. The actual authority created when the principal intentionally or by want of ordinary care permits an agent to believe that he or she possesses a specific authority, also called implied actual authority, depends on the belief of the agent that he or she has an authority [*Columbia Outfitting Co. v. Freeman (1950) 36 Cal. 2d 216, 219, 223 P.2d 21]* . The agent's belief must also be engendered by the conduct of the principal [*South Sacramento Drayage Co. v. Campbell Soup Co. (1963) 220 Cal. App. 2d 851, 856, 34 Cal. Rptr. 137]* . It appears that the belief of the agent in his or her authority must also be reasonable, although apparently the precise issue has not been addressed by a California appellate court [*see South Sacramento Drayage Co. v. Campbell Soup Co. (1963) 220 Cal. App. 2d 851, 856, 34 Cal. Rptr. 137]* . For forms supporting and opposing the contention that an actual authority was conferred, see *§ 182.30* et seq.

[2] Ostensible

Ostensible authority is that which a principal, intentionally or by want of ordinary care, causes or allows a third party to believe the agent to possess [*Civ. Code § 2317*; *see, e.g., C.A.R. Transp. v. Darden Rests., Inc. (9th Cir. 2000) 213 F.3d 474, 479-481* (finding truck drivers had ostensible authority to sign waivers of right to payment from shipper)]. As the conduct of the principal may create a belief in authority in both the agent and a third party, the same conduct by a principal may create both an actual and an ostensible authority [*see Tomerlin v. Canadian Indem. Co. (1964) 61 Cal. 2d 638, 644-645, 39 Cal. Rptr. 731, 394 P.2d 571]* .

A principal is bound by the acts of an agent under a merely ostensible authority only to those persons who have, in good faith and without want of ordinary care, incurred a liability or parted with value on the faith of that authority [*Civ. Code § 2334*; *see Mejia v. Community Hosp. of San Bernardino (2002) 99 Cal. App. 4th 1448, 1456-1457, 122 Cal. Rptr. 2d 233* (injured patient argued there was sufficient evidence that negligent physician was ostensible agent of hospital to survive motion for nonsuit)]. For a third person to recover from a principal for the act of an agent under an ostensible agency, the third person must believe in the agent's authority, the belief must be reasonable, the belief must be generated

by some act or neglect of the principal sought to be charged, and the third person must not be guilty of negligence in relying on the agent's apparent authority [*Associated Creditors' Agency v. Davis (1975) 13 Cal. 3d 374, 399, 118 Cal. Rptr. 772, 530 P.2d 1084* ; *see Saks v. Charity Mission Baptist Church (2001) 90 Cal. App. 4th 1116, 1137-1140, 110 Cal. Rptr. 2d 45* (in real estate investor's action for breach of contract and fraud, church held not liable on promissory notes signed by pastor, under doctrines of respondeat superior, ostensible authority, or equitable estoppel, when plaintiff acquiesced in scheme to wrongfully use church's name to obtain financial benefit for himself and his partners); *see also § 182.129*]. A person cannot become the agent of another merely by representing himself or herself as such [*see Pagarigan v. Libby Care Ctr., Inc. (2002) 99 Cal. App. 4th 298, 301-302, 120 Cal. Rptr. 2d 892* (nursing home's attempt to enforce arbitration agreement signed by daughters of deceased resident was unsuccessful when resident did not sign arbitration agreement, was mentally incompetent when her daughters signed agreement, and had not signed power of attorney; fact that daughters may have represented themselves as having power to sign agreement for resident was irrelevant)]. For forms supporting and opposing the contention that an ostensible authority was conferred, see *§ 182.120* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActActual AuthorityGeneral OverviewBusiness & Corporate LawAgency RelationshipsAuthority to ActActual AuthorityExpress AuthorityBusiness & Corporate LawAgency RelationshipsAuthority to ActActual AuthorityImplied AuthorityGeneral OverviewBusiness & Corporate LawAgency RelationshipsEstablishmentEstoppel, Ostensible Agency & NecessityOstensible AgencyBusiness & Corporate LawAgency RelationshipsTypesGeneral Overview

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18-182 California Points & Authorities § 182.06

§ 182.06 Ratification

An agency may be created, and an authority may be conferred, by a precedent authorization or a subsequent ratification [*Civ. Code § 2307*]. A ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified, or when an oral authorization would suffice, by accepting or retaining the benefit of the act, with notice thereof [*Civ. Code § 2310*]. For forms to be used when a written authorization is required by *Civ. Code § 2309*, and discussion of the equal dignities rule codified by *Civ. Code § 2309*, see Ch. 216, *Statute of Frauds* .

When no issue as to the need for a written authorization exists, ratification is defined as the voluntary election by a person to adopt in some manner as his or her own act an act that was purportedly done on his or her behalf by another person. When an act is ratified, the act is treated, as to some or all persons, as if originally authorized. A purported agent's act may be adopted expressly or it may be adopted by implication based on conduct of the purported principal from which an intention to consent to or adopt the act may be fairly inferred, including conduct that is inconsistent with any reasonable intention on his or her part, other than the intent to approve and adopt it [*Rakestraw v. Rodrigues (1972) 8 Cal. 3d 67, 73, 104 Cal. Rptr. 57, 500 P.2d 1401* ; *see* *Fretland v. County of Humboldt (1999) 69 Cal. App. 4th 1478, 1489-1491, 82 Cal. Rptr. 2d 359* (in tort action against employer county, former employee failed to produce evidence that employer ratified conduct of fellow employee who assaulted plaintiff by promoting and condoning work environment in which such conduct was tolerated)]. A principal cannot split an agency transaction and accept the benefits without the burdens [*Reusche v. California Pac. Title Ins. Co. (1965) 231 Cal. App. 2d 731, 737, 42 Cal. Rptr. 262]* . Thus, the issues in a case involving an alleged ratification generally include whether or not the principal retained a benefit of a transaction with knowledge of the source of the benefit, and the extent of the transaction ratified by the retention of the benefit when the principal's knowledge is shown [*see* *Navrides v. Zurich Ins. Co. (1971) 5 Cal. 3d 698, 703-704, 97 Cal. Rptr. 309, 488 P.2d 637* ; *Reusche v. California Pac. Title Ins. Co. (1965) 231 Cal. App. 2d 731, 737, 42 Cal. Rptr. 262* ; *see also Civ. Code § 2311* (ratification of part of indivisible transaction as ratification of whole)]. For forms for contentions supporting and opposing ratification generally, see *§ 182.30* et seq. For forms for contentions supporting and opposing a principal's liability for an agent's act based on the principal's ratification of the act, see *§ 182.120* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsRatificationExpress & Implied RatificationBusiness & Corporate LawAgency RelationshipsRatificationIllegal ActsBusiness & Corporate LawAgency RelationshipsRatificationLiabilitiesBusiness & Corporate LawAgency RelationshipsRatificationProofBusiness & Corporate LawAgency RelationshipsTypesGeneral Overview

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18-182 California Points & Authorities § 182.07

§ 182.07 Termination

[1] In General

An agency is terminated, as to every person having notice thereof, by any of the events specified in *Civ. Code § 2355*. For example, an agency is terminated by the agent's renunciation of the agency [*Civ. Code § 2355(d)*]. Unless the power of an agent is coupled with an interest in the subject of the agency, it is also terminated by any of the following [*Civ. Code § 2356(a)*]:

- Its revocation by the principal;
- The death of the principal; or
- The incapacity of the principal to contract.

[2] Contractual Provisions Limiting Termination

While the termination of an agency by the act or condition of the principal is limited somewhat by the provisions of *Civ. Code § 2356(b)-(e)*, the power of a principal to revoke the agency is not limited by contractual provisions, such as an agreement that the agency shall continue for a definite time [*see Stoll v. Stoll (1936) 5 Cal. 2d 687, 690, 56 P.2d 226* ; *see Woolley v. Embassy Suites, Inc. (1991) 227 Cal. App. 3d 1520, 1530, 278 Cal. Rptr. 719]* . However, courts have distinguished between a principal's power to terminate an agency and his or her right to do so without becoming liable to the agent for damages caused by wrongful termination of the agency. Thus, a contract may limit the right of the principal to terminate the agency, and a termination of the agency in violation of the agent's rights under a contract may be the basis of an agent's action for damages for breach of contract. But unless the agency is coupled with an interest, the agent cannot prevent the principal from terminating the agency [*see Stoll v. Stoll (1936) 5 Cal. 2d 687, 690, 56 P.2d 226]* . For forms supporting a contention that an agency was wrongfully terminated, see *§§ 182.61* and *182.62*.

[3] Power of Agent Coupled With Interest

Unless the power of an agent is coupled with an interest in the subject of the agency, the agency is terminated by its

revocation by the principal, the death of the principal, or the incapacity of the principal to contract [*see Civ. Code § 2356(a)*]. For an agency agreement to be coupled with an interest, it must be (1) held for the benefit of the agent rather than the principal, (2) created to secure the performance of a duty to the agent or to protect a title in the agent, and (3) created at the same time that the duty or title is created or be created for consideration [*Becket v. Welton Becket & Assocs. (1974) 39 Cal. App. 3d 815, 820, 114 Cal. Rptr. 531]* . When the agent must exercise his or her power as agent to acquire the interest, the agency is not coupled with an interest [*see Jay v. Dollarhide (1970) 3 Cal. App. 3d 1001, 1023, 84 Cal. Rptr. 538* ; *see also* California Forms of Pleading and Practice, Ch. 427, *Principal and Agent* (Matthew Bender)]. For forms supporting and opposing a contention that the power of an agency was coupled with an interest in the subject of the agency, see *§ 182.100* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsTerminationsGeneral OverviewBusiness & Corporate LawAgency RelationshipsTerminationsAccomplishment of PurposeBusiness & Corporate LawAgency RelationshipsTerminationsConsentBusiness & Corporate LawAgency RelationshipsTerminationsNotice RequirementsBusiness & Corporate LawAgency RelationshipsTerminationsOperation of Law

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18-182 California Points & Authorities § 182.08

§ 182.08 Principal's Liability for Wrongful Acts of Agent

Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his or her agent in the transaction of the business of the agency, including wrongful acts committed by the agent in and as a part of the transaction of the business of the agency, and for the agent's willful omission to fulfill the obligations of the principal [*Civ. Code § 2338*] *Civ. Code § 2338* codifies the common-law doctrine of respondeat superior and applies to both principal-agent relationships and employer-employee relationships [*Spradlin v. Cox (1988) 201 Cal. App. 3d 799, 808-809, 247 Cal. Rptr. 347* ; *Johnson v. Monson (1920) 183 Cal. 149, 151-152, 190 P. 635* ; *Tighe v. Ad Chong (1941) 44 Cal. App. 2d 164, 168, 112 P.2d 20]* . Thus, the cases analyzing the liability of a principal or an employer often use the terms "agency" or "employment" interchangeably, and for the purposes of respondeat superior liability there seems to be no distinction between them.

Even if a principal is not liable for the wrongs of his or her agent under *Civ. Code § 2338*, a third party may recover damages from a principal for the wrongful acts of an agent if the principal authorized or ratified the agent's acts [*see Civ. Code § 2339*; *Maberto v. Wolfe (1930) 106 Cal. App 202, 206, 289 P. 218* ; *see also Shultz Steel Co. v. Hartford Accident & Indem. Co. (1986) 187 Cal. App. 3d 513, 523, 231 Cal. Rptr. 715* (finding no ratification)]. In such a case, it is not necessary that the agent's acts were done while transacting the business of the agency [*see Civ. Code § 2339*]. For forms supporting and opposing the contention that a third person may recover damages from a principal for an agent's wrongful act, see *§ 182.120* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsDuties & LiabilitiesNegligent Acts of AgentsActs Outside Scope of AuthorityBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesNegligent Acts of AgentsJoint & Several LiabilityBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesNegligent Acts of AgentsLiability of PrincipalsBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesNegligent Acts of AgentsReleases From LiabilityBusiness & Corporate LawAgency RelationshipsRatificationIllegal Acts

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18-182 California Points & Authorities § 182.09

§ 182.09 Agent's Liability to Third Party

One who assumes to act as an agent thereby warrants to all who deal with him or her in that capacity that he or she has the authority that he or she assumes [*Civ. Code § 2342*]. An agent who breaches his or her warranty of authority is liable to the third party for damages caused by the breach under *Civ. Code § 3318*. An agent may also be liable as a principal to a third party when he or she is given credit personally in a transaction, when he or she enters into a written contract in the principal's name without a good-faith belief in his or her authority, and when the agent's acts are wrongful in their nature [*see Civ. Code § 2343*]. For forms of contentions supporting and opposing a a third person's recovery from an agent, see *§ 182.100* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsDuties & LiabilitiesGeneral OverviewBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesNegligent Acts of AgentsGeneral OverviewBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesNegligent Acts of AgentsLiability of PrincipalsBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesThird Parties

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18-182 California Points & Authorities § 182.10

§ 182.10 Agent's Knowledge Imputed to Principal

Both a principal and his or her agent are deemed to have notice of whatever either has notice of and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other [*see Civ. Code § 2332*]. The principal is charged with, and is bound by, the knowledge of or notice to his or her agent when it is received while the agent is acting within the scope of his or her authority and is in reference to a matter over which the authority extends [*Trane Co. v. Gilbert (1968) 267 Cal. App. 2d 720, 727, 73 Cal. Rptr. 279]* . This general rule, however, does not apply when the principal is required to have actual knowledge. For example, the 90-day limitations period specified in *Code Civ. Proc. § 1094.6* for filing a petition for review of local agency decisions applies only if the required notice is sent *to the party*, and sending that notice to an agent of the party (the party's attorney) has been held not to trigger the 90-day period [*Herman v. Los Angeles County Metro. Transp. Auth. (1999) 71 Cal. App. 4th 819, 828-830, 84 Cal. Rptr. 2d 144* ; *see § 182.133[4]*].

For forms supporting and opposing the contention that a principal is charged with and bound by the knowledge of, or notice to, an agent, see *§ 182.120* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsDuties & LiabilitiesKnowledge & NoticeGeneral OverviewBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesKnowledge & NoticeAgent KnowledgeBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesNegligent Acts of AgentsLiability of AgentsBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesNegligent Acts of AgentsLiability of PrincipalsBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesThird Parties

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18-182 California Points & Authorities § 182.11

§ 182.11 Use of This Chapter

This chapter is divided into parts based on the party who is most likely to be seeking the relief to which a contention relates. However, contentions regarding certain issues may be appropriate for use by a party other than the party for whom a particular form was designed. For example, a guardian of an incompetent principal may wish to contend that an agency was coupled with an interest and therefore not terminable, in which case the contentions in § 182.60 may be used on behalf of the principal. In such situations, counsel should adapt the contentions for use in the particular context in which counsel desires to present the contentions. The contentions in the various forms may also be combined when appropriate. For example, a third party seeking to hold a principal liable for the acts of an agent may wish to present other issues, such as creation of the agency, whether or not an authority was conferred, and whether or not the principal ratified the agent's acts if no agency was created by a prior grant of authority. In this example, counsel may wish to combine the contentions supported by the points and *authorities in §§ 182.30, 182.33, 182.35,* and *182.123* to cover all of the issues raised.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsGeneral OverviewBusiness & Corporate LawAgency RelationshipsAuthority to ActGeneral OverviewBusiness & Corporate LawAgency RelationshipsCauses of Action & RemediesGeneral OverviewBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesAuthorized Acts of AgentsGeneral OverviewBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesNegligent Acts of AgentsGeneral Overview

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18-182 California Points & Authorities § 182.12

§ 182.12 Related Discussion and Forms

[1] Related Pleading and Practice Forms

For a discussion and forms relating to principal and agent law, see California Forms of Pleading and Practice, Ch. 427, *Principal and Agent* (Matthew Bender).

For a discussion and forms relating to brokers, see California Forms of Pleading and Practice, Ch. 103, *Brokers* (Matthew Bender).

For discussion and forms for use in specific actions in which agency principles may be relevant, see the following chapters in California Forms of Pleading and Practice:

- Ch. 7, *Accounting, Action for*.
- Ch. 20, *Allegations Commonly Used*.
- Ch. 140, *Contracts*.
- Ch. 160, *Corporations*.
- Ch. 177, *Damages*.
- Ch. 182, *Declaratory Relief*.
- Ch. 248, *Employer's Liability for Employee's Torts*.
- Ch. 380, *Negligence*.
- Ch. 402, *Partnerships: Actions Between General Partners or Partnership and Third Parties.*

[2] Related Points and Authorities

For memoranda of points and authorities relating to the requirements of the statute of frauds, including the equal dignities rule requiring written authorization to enter into a contract required by law to be in writing, see Ch. 216, *Statute of Frauds* in this publication. For memoranda of points and authorities relating to the specific relationship of broker and principal, see Ch. 31, *Brokers and Salespersons* in this publication. Related memoranda of points and authorities that may be useful in particular cases involving agency may be found in the following chapters in this publication:

- Ch. 12, *Accounting*.
- Ch. 67, *Declaratory Relief.*
- Ch. 100A, *Employer and Employee: Respondeat Superior*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsGeneral OverviewBusiness & Corporate LawAgency RelationshipsAuthority to ActStatutes of FraudsBusiness & Corporate LawAgency RelationshipsTypesEmployee & EmployerBusiness & Corporate LawAgency RelationshipsTypesInsurance Agent & Insurance Company

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18-182 California Points & Authorities §§ 182.13-182.29

[Reserved]

§§ 182.13[Reserved]

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18-182 California Points & Authorities § 182.30

§ 182.30 Supporting Contention That Actual Agency [Civ. Code § 2299] Created--Express Agreement of Parties

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. When appropriate, the points and authorities in §§ 182.31 -182.36 may be combined with the contention supported by the following points and authorities.*]

AN ACTUAL AGENCY WAS CREATED BETWEEN _____ [PLAINTIFF *or* DEFENDANT], THE ALLEGED PRINCIPAL, AND _____ [DEFENDANT *or* PLAINTIFF], THE ALLEGED AGENT, BECAUSE AN AGENCY MAY BE CREATED BY EXPRESS AGREEMENT OF THE PARTIES.

A. Actual Agency. An agency is either actual or ostensible, and an agency is actual when the agent is really employed by the principal (*Civ. Code §§ 2298, 2299*).

B. Creation of Agency by Express Agreement. An agency may be created by an express agreement of the parties (*see Zalk v. General Exploration Co. (1980) 105 Cal. App. 3d 786, 793-794, 164 Cal. Rptr. 647* ; *Brand v. Mantor (1935) 6 Cal. App. 2d 126, 130, 44 P.2d 390*).

[*Optional*] **C. No Consideration Necessary for Binding Authority.** A consideration is not necessary to make an authority, whether precedent or subsequent, binding on the principal (*Civ. Code § 2308*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that an agency was created by an express agreement between the principal and agent. This argument may be used in any action in which a party contends an agency was created by an express agreement between the principal and the agent.

The points and *authorities in § 182.31* may be combined with these points and authorities when counsel wishes to contend alternatively that an agreement was created by conduct of parties. The points and *authorities in § 182.32* may be combined with these points and authorities when an agreement provides that the principal has the right to control the actions of the agent, although an agency is not expressly created by the agreement and the principal has not exercised the control granted by the agreement. The points and *authorities in §§ 182.33* and *182.34* may be combined with these points and authorities as appropriate when the actual authority of the agent is disputed, as will often be the case when the very existence of an agency is disputed. The points and *authorities in §§ 182.35* and *182.36* may be combined with these points and authorities as appropriate when counsel wishes to contend alternatively that an agency was created by the principal's ratification.

An agency is either actual or ostensible, and this form does not deal with ostensible agency, which arises when a principal intentionally or by want of ordinary care causes or allows a third party to believe another to be his or her agent who is not really employed by the principal [*Civ. Code §§ 2298, 2300*]. This form is for use only when the issue is whether or not there was an actual agency, and not when the belief of a third person is at issue.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that an agency was created by an express agreement between the principal and the agent. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that the parties expressly agreed to create an agency. For example, when a written agreement defines the rights and obligations of the parties, counsel should argue that the agreement created an agency.

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 182.37 -182.39* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Creation of Agency by Express Agreement

Zalk v. General Exploration Co. *(1980) 105 Cal. App. 3d 786, 164 Cal. Rptr. 647* , was an action to recover finder's fees allegedly due plaintiff under an agreement with defendant. Plaintiff was an experienced inspector of mining properties and agreed to work full time for defendant, locating properties for acquisition by defendant. Plaintiff put defendant in contact with the owners of five companies that were for sale, and defendant purchased the companies but refused to pay a commission to plaintiff. Plaintiff argued that his agreement with defendant constituted an agency, entitling him to compensation, and the trial court agreed and entered judgment for plaintiff. Defendant appealed.

The court of appeal affirmed, holding that the agreement obligated plaintiff to bring to defendant's attention every prospect of the sort defendant was seeking, creating a principal-agent relationship between plaintiff and defendant (*105 Cal. App. 3d 786, 793-794)* . The court held that by creating in plaintiff the duties of an agent, the agreement created an agency relationship, obligating defendant to compensate plaintiff for the services rendered by plaintiff (*105 Cal. App. 3d 786, 793-794)* .

Brand v. Mantor *(1935) 6 Cal. App. 2d 126, 44 P.2d 390* , was an action to recover secret profits retained by defendant in the course of an agency to buy real estate for plaintiffs. Plaintiffs met defendant at the home of a mutual friend, and defendant represented that he could make money for them by investing a cash inheritance in real estate.

Plaintiffs agreed to do so, and defendant sold them property he had already contracted to buy, at a profit to defendant. Defendant argued that no agency was created, and therefore he had no duty to plaintiffs. The trial court entered judgment for plaintiffs, and defendant appealed.

The court of appeal affirmed, holding that the trial court's finding of agency was supported by sufficient evidence (*6 Cal. App. 2d 126, 130)* . The court quoted from a treatise on agency to the effect that an agent may be appointed by written instrument or by word of mouth (*6 Cal. App. 2d 126, 130)* . The court noted that an agency may also be implied from the conduct of the parties and did not clearly base its holding on either the alleged agreement or the subsequent conduct of the parties (*6 Cal. App. 2d 126, 130-131)* .

[4] Additional Authorities

[a] Creation of Agency by Express Agreement

Nichols v. Arthur Murray, Inc. (1967) 248 Cal. App. 2d 610, 56 Cal. Rptr. 728 , is discussed in *§ 182.32[3][a]*. The plaintiff brought an action against defendant, as undisclosed principal of the contracting party, for the amount of money paid for dance lessons that were never provided. The contracting party was a franchisee of defendant, and the franchise agreement allegedly provided sufficient control over the franchisee to create an agency relationship. The court of appeal affirmed the trial court's judgment for plaintiff, holding that the agreement showed an intention on the part of defendant and the franchisee to create an agency (*248 Cal. App. 2d 610, 612-613)* .

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18-182 California Points & Authorities § 182.31

§ 182.31 Supporting Contention That Actual Agency [Civ. Code § 2299] Created--Conduct of Parties Manifests Agency

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. When appropriate, the points and authorities in §§ 182.30 and 182.32 -182.36 may be combined with the contentions supported by the following points and authorities.*]

AN ACTUAL AGENCY WAS CREATED BETWEEN _____ [PLAINTIFF *or* DEFENDANT], THE ALLEGED PRINCIPAL, AND _____ [DEFENDANT *or* PLAINTIFF], THE ALLEGED AGENT, BECAUSE AN AGENCY IS CREATED BY CONDUCT OF A PRINCIPAL AND AN AGENT MANIFESTING ACCEPTANCE OF AN AGENCY RELATIONSHIP.

A. Actual Agency. [*See § 182.30[1], Paragraph A.*]

B. Agency Contract May Be Implied From Conduct of Parties. A contract of agency may be implied by the conduct of the parties (*Pollack v. Lytle (1981) 120 Cal. App. 3d 931, 940, 175 Cal. Rptr. 81*).

C. Agency Based on Conduct Manifesting Acceptance of Relationship. No particular words are necessary, nor need there be consideration, for an agency relationship to be found; all that is required is conduct by each party manifesting acceptance of a relationship whereby one of them is to perform work for the other under the latter's direction (*Malloy v. Fong (1951) 37 Cal. 2d 356, 231 P.2d 241*).

[*Optional*] **D. No Consideration Necessary for Binding Authority.** [*See § 182.30[1], Paragraph C.*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that an actual agency was created by the conduct of the alleged principal and agent [*see Civ. Code § 2299*]. This argument may be used whenever there was no express agency agreement, but a party allegedly acted as though an agency had been formed with another, thereby creating an implied-in-fact agency contract. For example, a third party who seeks to hold a principal liable for the acts of an alleged agent would use this argument to establish that an agency was created between defendant and the person responsible for plaintiff's injury. In addition, a principal who alleges that his or her agent breached the fiduciary duty owed toward the principal may use this contention to establish the creation of an agency, which is required before an agent's fiduciary duty arises.

The points and authorities in this form may be combined with the points and *authorities in § 182.30* when counsel wishes to make the alternative argument that an actual agency was created by the conduct of the parties if not by express agreement. The points and *authorities in § 182.32* may be combined with these points and authorities when the agreement provides that the principal has the right to control the actions of the agent, although an agency is not expressly created by the agreement and the principal has not exercised the control granted by the agreement. The points and *authorities in §§ 182.33* and *182.34* may be combined with these points and authorities as appropriate when the actual authority of the agent is disputed, as it often will be when the existence of an agency is disputed. The points and *authorities in §§ 182.35* and *182.36* may be combined with these points and authorities as appropriate when counsel wishes to contend alternatively that an agency was created by the principal's ratification.

An agency is either actual or ostensible, and this form does not deal with ostensible agency, which arises when a principal intentionally or by want of ordinary care causes or allows a third party to believe another to be his or her agent who is not really employed by the principal [*Civ. Code §§ 2298, 2300*]. This form is for use only when the issue is whether or not there was an actual agency, and not when the belief of a third person is at issue.

These points and authorities may be combined with points and authorities pertaining to the specific context in which counsel wishes to raise the substantive issue that an actual agency was created by the conduct of the principal and agent. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing that the principal and agent acted in a manner manifesting their acceptance of an agency relationship between them. For example, counsel should include facts showing their respective positions of employment and the manner in which they acted as principal and agent in carrying out their respective duties.

[b] Related Pleading and Practice Forms

For a form of allegation for use in a complaint alleging that an agency relationship exists, see California Forms of Pleading and Practice, Ch. 427, *Principal and Agent* (Matthew Bender).

[c] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 182.37 -182.39* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Agency Contract May Be Implied From Conduct of Parties

In ***Pollack v. Lytle*** *(1981) 120 Cal. App. 3d 931, 175 Cal. Rptr. 81* , plaintiff, an attorney, sought damages and declaratory relief against another attorney for breach of fiduciary duty, fraud, breach of contract, and legal malpractice.

Plaintiff alleged that defendant had breached these duties while acting as plaintiff's agent in prosecuting a malpractice action. Plaintiff also contended that he had engaged defendant to prepare and try the malpractice action, based on defendant's false representation that defendant was experienced in malpractice actions, and that he promised to keep plaintiff informed of the conduct of the action but failed to do so despite repeated requests by plaintiff. The trial court sustained defendant's demurrer to the complaint, and plaintiff appealed from the order of dismissal.

The court of appeal reversed, holding that plaintiff had alleged sufficient facts to establish that defendant acted as plaintiff's agent in the prosecution of the malpractice matter (*120 Cal. App. 3d 931, 940)* . The court noted that it is well settled that a contract of agency may be implied from the conduct of the parties. The court relied on the allegations that plaintiff engaged defendant to conduct trial preparation and try the action, that defendant promised to keep plaintiff informed of the conduct of the action, that plaintiff relied on defendant's representations and recommendations in advising his client, and that plaintiff repeatedly requested written reports, to conclude that the complaint raised a clear inference of agency (*120 Cal. App. 3d 931, 940)* .

CAUTION:

Although the general agency principles articulated by the court of appeal in *Pollack v. Lytle (1981) 120 Cal. App. 3d 931, 175 Cal. Rptr. 81* , are probably still valid, the *Supreme Court in Beck v. Wecht (2002) 28 Cal. 4th 289, 297-298, 121 Cal. Rptr. 2d 384, 48 P.3d 417* , overruled *Pollack* to the extent that it held that one attorney may sue another attorney for breach of fiduciary duty for actions taken by the latter during joint representation of a client that reduce or eliminate the fees that the former would have received from the underlying representation.

[b] Agency Based on Conduct Manifesting Acceptance of Relationship

Malloy v. Fong *(1951) 37 Cal. 2d 356, 231 P.2d 241* , was an action for personal injuries brought against the driver of the automobile in which plaintiff was riding and against parties for whom the driver allegedly acted as agent. Plaintiff, a student at vacation Bible school, alleged that he was injured as a result of the negligence of the agents of defendant church, which ran the school. Plaintiff's teacher and a divinity student who taught the class during the teacher's illness were allegedly the agents of the church in that the teacher was appointed and could be terminated by the church, and the teacher had appointed the student as his temporary replacement. The jury entered verdicts for plaintiff against all parties except the driver of the car that struck plaintiff, but the trial court granted a judgment notwithstanding the verdict to the church organization and a new trial to the pastor. Plaintiff appealed.

The Supreme Court reversed the judgment notwithstanding the verdict, holding that the evidence supported the jury's determination that defendant church organization was the principal of both the pastor and the divinity student and responsible for their negligence (*37 Cal. 2d 356, 372-373)* . The Court held that no particular words are necessary and that consideration is not necessary for an agency to be created. The Court held that conduct by each party manifesting acceptance of a relationship whereby one of them is to perform work for the other under the latter's direction is all that is required to create an agency (*37 Cal. 2d 356, 372)* . The Court found that the student was the agent of the pastor under this test, because the student performed duties that the pastor was responsible for while the latter was ill, and that the duties were subject to the supervision and control of the pastor (*37 Cal. 2d 356, 373-374)* . The Court also held that, as the student was the authorized subagent of the pastor, under *Civ. Code § 2351* the student also represented the church to the same extent as the pastor, the original agent (*37 Cal. 2d 356, 372)* .

[4] Additional Authorities

[a] Agency Contract May Be Implied From Conduct of Parties

Thayer v. Pacific Elec. Ry. Co. (1961) 55 Cal. 2d 430, 11 Cal. Rptr. 560, 360 P.2d 56 , was an action for damages to freight of which defendant was the terminal carrier. The trial court returned a judgment for plaintiff, holding that the action of defendant's agent in noting plaintiff's claim of damage on the bill of lading was sufficient written notice to

defendant to comply with defendant's notice requirement for claims. The court of appeal affirmed, holding as an alternative ground for the result that substantial evidence supported the trial court's finding that defendant's agent in making the notation on the bill had acted as plaintiff's agent, and that such conduct was sufficient to create a limited agency so that plaintiff would be held to have made the claim personally (*55 Cal. 2d 430, 438)* .

Frank Pisano & Assocs. v. Taggart (1972) 29 Cal. App. 3d 1, 105 Cal. Rptr. 414 , was an action against a husband and wife to enforce a mechanics' lien for engineering services on property owned by the wife of the party who authorized the work. The court of appeal reversed the portion of the trial court's judgment that denied the enforcement of the lien, holding that the husband and wife had acted as though the husband had the authority to act on behalf of the wife, and that the existence of an actual agency could be implied from the conduct of the parties (*29 Cal. App. 3d 1, 15)* .

In *Housewright v. Pacific Far E. Line, Inc. (1964) 229 Cal. App. 2d 259, 40 Cal. Rptr. 208* , plaintiff brought an action against the person who allegedly acted as plaintiff's employer's principal in conducting a test of machinery in which plaintiff was injured. The court of appeal reversed the trial court's entry of a directed verdict in favor of defendant, rejecting the trial court's conclusion that the employer was an independent contractor as a matter of law and holding instead that the jury should have been allowed to decide on the true relationship among the defendants. The question of whether an agency relationship had been created was held to be one of fact, to be determined by the relations of the parties as they existed in fact under their agreement or activities (*229 Cal. App. 2d 259, 265)* .

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18-182 California Points & Authorities § 182.32

§ 182.32 Supporting Contention That Actual Agency [Civ. Code § 2299] Exists--Principal's Right to Control Agent Need Not Be Exercised

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. The following should be combined with the points and authorities in §§ 182.30 and 182.31 as appropriate, and when appropriate the points and authorities in §§ 182.33 -182.36 may be combined with the contention supported by the following points and authorities.*]

AN ACTUAL AGENCY EXISTS BETWEEN _____ [PLAINTIFF *or* DEFENDANT], THE ALLEGED PRINCIPAL, AND _____ [DEFENDANT *or* PLAINTIFF], THE ALLEGED AGENT, BECAUSE AN AGENCY EXISTS WHEN THE PRINCIPAL HAS THE RIGHT TO CONTROL THE ACTIONS OF THE AGENT, NOTWITHSTANDING THE PRINCIPAL'S FAILURE TO EXERCISE THAT CONTROL OVER THE AGENT.

A. Right to Control Acts of Another Shows That Agency Exists. If, in practical effect, one of the parties has the right to exercise complete control over the other party's actions, an agency relationship exists, with the former as principal and the latter as agent (*Nichols v. Arthur Murray, Inc. (1967) 248 Cal. App. 2d 610, 613, 56 Cal. Rptr. 728*).

B. Agency Does Not Depend on Principal's Exercise of Control. It is not essential that the principal's right of control be exercised or that there be actual supervision of the agent's work, because the existence of the right of control and supervision establishes an agency relationship (*Malloy v. Fong (1951) 37 Cal. 2d 356, 370, 231 P.2d 241* ; *Stevens v. Roman Catholic Bishop of Fresno (1975) 49 Cal. App. 3d 877, 884, 123 Cal. Rptr. 171*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that an actual agency existed between the alleged principal and agent, either because of an express agreement or because of the conduct of the principal and agent, even though the principal did not exercise his or her right to control the activities of the agent. This argument may be used whenever a party contends that an agency did not exist because the alleged principal did not actually exercise his or her right to control the alleged agent.

These points and authorities should be used in conjunction with those in § 182.30 when the agency was created by an express agreement, or in conjunction with those in § 182.31 when the agency was created by the conduct of the parties. The points and *authorities in §§ 182.33* and *182.34* may be combined with these points and authorities as appropriate when the actual authority of the agent is disputed, as it often will be when the existence of an agency is disputed. The points and *authorities in §§ 182.35* and *182.36* may be combined with these points and authorities as appropriate when counsel wishes to contend alternatively that an agency was created by the principal's ratification.

An agency is either actual or ostensible, and this form does not deal with ostensible agency, which arises when a principal intentionally or by want of ordinary care causes or allows a third party to believe another to be his or her agent who is not really employed by the principal [*Civ. Code §§ 2298, 2300*]. This form is for use only when the issue is whether or not there was an actual agency, and not when the belief of a third person is at issue.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that an agency relationship exists. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing that the principal had the right to control the activities of the agent, such as facts showing the existence of an employer-employee relationship.

[b] Related Pleading and Practice Forms

For a form of allegation for use in a complaint alleging that an agency relationship exists, see California Forms of Pleading and Practice, Ch. 427, *Principal and Agent* (Matthew Bender).

[c] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 182.37 -182.39* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Right to Control Acts of Another Shows That Agency Exists

Nichols v. Arthur Murray, Inc. *(1967) 248 Cal. App. 2d 610, 56 Cal. Rptr. 728* , was an action to recover prepaid fees for dancing lessons that were never furnished. Plaintiff had contracted for lessons with a dance school that operated under a franchise agreement with defendant. Plaintiff argued that under the franchise agreement, defendant had the right to exercise complete control over the school's activities and that defendant should therefore be held liable as the undisclosed principal of the school for breach of the contract for lessons. The trial court entered judgment against defendant as the undisclosed principal of the franchisee school, and defendant appealed.

The court of appeal affirmed, holding that the evidence supported the trial court's implied finding that defendant had sufficient control over the franchisee to have created an agency relationship between them (*248 Cal. App. 2d 610, 614)* . The court held that the determination of whether or not an agency exists depends on the right of the alleged principal to control the other party's operation of the business. The court noted that if, in practical effect, one of the parties has the

right to exercise complete control over the operation by the other, an agency relationship exists (*248 Cal. App. 2d 610, 613)* . The right to control in this case was found in the franchise agreement, which provided numerous strict restrictions on the activities of the franchisee (*248 Cal. App. 2d 610, 617)* .

[b] Agency Does Not Depend on Principal's Exercise of Control

The facts and procedural background of ***Malloy v. Fong*** *(1951) 37 Cal. 2d 356, 231 P.2d 241* , are discussed in *§ 182.31[3][b]*. The Supreme Court ruled that it is not essential that the principal's right of control be exercised or that there be actual supervision of the work of the agent for an agency to be found (*37 Cal. 2d 356, 370)* . The Court held that the power of a church to control the activities of a pastor and to discharge him at will established that the pastor was an agent of the church (*37 Cal. 2d 356, 370-371)* . The church had argued that the pastor was an independent contractor, but the Court held that the jury could have properly rejected that argument. Even if the right to supervise was not exercised, the existence of the right was held sufficient to establish the agency relationship (*37 Cal. 2d 356, 370)* .

Stevens v. Roman Catholic Bishop of Fresno *(1975) 49 Cal. App. 3d 877, 123 Cal. Rptr. 171* , was a wrongful death action brought by the heirs of two decedents who were killed in an automobile collision between their car and one driven by a priest. The complaint named as defendants the priest and the bishop, a corporation. The bishop was sued on the theory that the priest was acting as its agent at the time of the accident, and both parties introduced expert testimony on the effect of Canon Law on the relationship between the priest, his home diocese in France, and the bishop. The jury returned verdicts against both defendants, and the bishop appealed.

The court of appeal affirmed, holding that substantial evidence supported the jury's determination that the priest was the agent of the bishop (*49 Cal. App. 3d 877, 884)* . The court relied on the rule that it is the right of the principal to control the agent, and not the exercise of that right, that establishes the existence of an agency relationship (*49 Cal. App. 3d 877, 884)* . While the expert testimony was in conflict, evidence that the priest was under the control of the bishop for at least some purposes was held sufficient to support the jury's finding of agency (*49 Cal. App. 3d 877, 887)* .

[4] Additional Authorities

[a] Right to Control Acts of Another Shows That Agency Exists

Souza v. Corti (1943) 22 Cal. 2d 454, 139 P.2d 645 , was an action by a passenger against a car owner's son for damages suffered in an automobile accident. The accident occurred while a friend of the son was driving the car to a night club at the son's request. The son went to the club in a different car. The judgment of the trial court holding that the son was not liable for the acts of his friend was reversed by the court of appeal on the ground that the friend was acting on behalf and under the direction of the son and therefore was acting as the son's agent in driving the car (*22 Cal. 2d 454, 461)* .

In *Johnson v. Peterson (1974) 38 Cal. App. 3d 619, 113 Cal. Rptr. 445* , plaintiff brought against the parents of a minor child an action for damages for injuries sustained in a collision with an automobile driven by their 16-year-old daughter, who was driving her younger sister to the store to buy shoes at the suggestion of their mother. Plaintiff alleged that the daughter was acting as her parents' agent. The court of appeal reversed the part of the judgment limiting damages to the amount provided by *Veh. Code § 17709* and held that the daughter who was driving was acting as the agent for her parents. Therefore, the court concluded, the parents could be held vicariously liable for the acts of the daughter (*38 Cal. App. 3d 619, 623)* . The court based its conclusion on the control that parents have over their minor children and the fact that the daughter was buying clothes for another minor child, a task ordinarily performed by parents (*38 Cal. App. 3d 619, 623)* .

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A. Actions Involving General Agency Questions

18-182 California Points & Authorities § 182.33

§ 182.33 Supporting Contention That Agent Had Actual Authority [Civ. Code § 2316]--Conduct of Principal Led Agent Reasonably to Believe in Authority

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. When appropriate, the points and authorities in §§ 182.30 -182.32 and §§ 182.34 and 182.36 may be combined with the contentions supported by these points and authorities.*]

_____ [DEFENDANT *or* PLAINTIFF] AGENT HAD ACTUAL AUTHORITY TO _____ [*specify acts performed, e.g.,* NEGOTIATE CONTRACTS], BECAUSE ACTUAL AUTHORITY IS CREATED WHEN THE CONDUCT OF THE PRINCIPAL LEADS THE AGENT REASONABLY TO BELIEVE THAT THE PRINCIPAL CONSENTS TO THE AGENT'S EXECUTION OF AN ACT.

A. Actual Authority Defined. Actual authority is such as a principal intentionally confers on the agent, or intentionally or by want of ordinary care allows the agent to believe himself or herself to possess (*Civ. Code § 2316*).

B. When Agent's Actual Authority Arises. Actual authority arises as a consequence of conduct of the principal that causes an agent reasonably to believe that the principal consents to the agent's execution of an act on behalf of the principal (*Tomerlin v. Canadian Indem. Co. (1964) 61 Cal. 2d 638, 643, 39 Cal. Rptr. 731, 394 P.2d 571*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that an agent had actual authority to perform certain acts based on the conduct of the principal. This argument may be used whenever the authority of an agent is at issue between the parties. For example, a third party might use this argument in an action against a principal for the authorized acts of an agent, or an agent might use the argument in an action for indemnification from the principal for

liabilities incurred while acting in the scope of his or her authority.

The points and authorities in this form may be combined with the points and *authorities in § 182.30* when counsel wishes to contend alternatively that an actual agency was created by the conduct of the parties if not by express agreement. The points and authorities in this form may be combined with the points and *authorities in § 182.30* when counsel wishes to contend that the agency was created by express agreement. The points and authorities in this form may be combined with the points and *authorities in § 182.31* when counsel wishes to contend alternatively that an agreement was created by conduct of parties. The points and authorities in this form may be combined with the points and *authorities in § 182.32* when the agreement provides that the principal has the right to control the actions of the agent, although an agency is not expressly created by the agreement and the principal has not exercised the control granted by the agreement. The points and *authorities in § 182.34* may be combined with the points and authorities in this form when an issue exists regarding the implied authority of the agent. The points and *authorities in §§ 182.35* and *182.36* may be combined with these points and authorities as appropriate when counsel wishes to contend alternatively that an authority was conferred by the principal's ratification.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a principal's conduct created an agent's actual authority to perform certain acts. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing that the principal acted as though the agent had the authority exercised, and that the principal's conduct caused the agent reasonably to believe that he or she had that authority.

[b] Related Pleading and Practice Forms

For an allegation for use in a complaint alleging that a principal's conduct conferred actual authority, see California Forms of Pleading and Practice, Ch. 427, *Principal and Agent* (Matthew Bender).

[c] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 182.40* and *182.41* may be used to oppose the contention supported by the points and authorities in this form.

[3] Discussion of Authorities

[a] When Agent's Actual Authority Arises

Tomerlin v. Canadian Indem. Co. *(1964) 61 Cal. 2d 638, 39 Cal. Rptr. 731, 394 P.2d 571* , was an action seeking a judicial declaration that defendant was estopped from denying coverage under an insurance policy issued to plaintiff. Plaintiff alleged that the representations of an attorney retained by defendant to defend plaintiff in an action for assault and negligence filed by a third party had caused plaintiff to believe that defendant would not rely on an agreement under which defendant reserved its right to deny coverage for plaintiff's assault under a policy exclusion. Only after a large judgment was entered in the third-party action did the attorney tell plaintiff that defendant would deny coverage because of the policy exclusion. Plaintiff argued that the attorney's representations that defendant would not rely on the reservation of rights agreement were within the authority of the attorney as the agent of defendant, and that defendant should be bound thereby. The trial court agreed and entered judgment for plaintiff, and defendant appealed.

The Supreme Court affirmed, holding that defendant's counsel had actual authority to bind defendant insurer with regard to the policy coverage (*61 Cal. 2d 638, 643)* . The Court stated that actual authority arises from conduct of the principal that causes the agent reasonably to believe that the principal consents to the agent's execution of an act on behalf of the principal. The Court noted that the principal's consent need not be express (*61 Cal. 2d 638, 643-644)* .

The Court held that, given the lack of any limitations on the authority of defendant's counsel, even after defendant was notified that its counsel had concerned himself with the scope of the policy's coverage and the effectiveness of the reservation of rights, defendant's counsel could reasonably have believed that he had authority to represent defendant in its dealings with plaintiff (*61 Cal. 2d 638, 644)* . This belief was held sufficient to establish the actual authority of its counsel to act for defendant in regard to the policy coverage (*61 Cal. 2d 638, 646)* .

[4] Additional Authorities

[a] When Agent's Actual Authority Arises

In *Jacoves v. United Merch. Corp. (1992) 9 Cal. App. 4th 88, 11 Cal. Rptr. 2d 468* , parents sued a psychiatric hospital for wrongful death and negligent infliction of emotional distress alleging that the hospital, through its agents and employees, had negligently treated and released their suicidal son. Shortly after the son was released into the custody of his parents, he killed himself. The hospital sought, and the trial court granted, summary judgment on the plaintiffs' second amended complaint. The court of appeal reversed on the ground that trial issues of fact existed, including whether the son's treating doctor acted as the hospital's actual agent in the course and scope of his duties as director of the hospital's adolescent psychiatric unit. The court noted that *Civ. Code §§ 2295* and *2299* provide that actual agency is established when an agent is employed by the principal. In this case, the hospital had not presented any facts that conclusively established that the son's treating doctor was not employed by the hospital. The hospital did not establish that the doctor held his position as director of the adolescent unit on a voluntary basis, did not define the duties of that position, and did not explain why the doctor's releases from liability were obtained through the hospital. The facts that the doctor billed for his service separately from the hospital, maintained staff privileges at other hospitals, and had no office at hospital were not dispositive of the physician-hospital agency issue (*9 Cal. App. 4th 88, 103-104)* .

In *Ripani v. Liberty Loan Corp. (1979) 95 Cal. App. 3d 603, 157 Cal. Rptr. 272* , plaintiff sought to recover monies due under a lease of office space negotiated by defendant's agent on behalf of defendant. Defendant argued that the agent was not authorized to bind it to the lease, but the trial court found that defendant was bound by the lease and the court of appeal affirmed. The court held that an agent's actual authority is such as a principal intentionally confers on an agent, or intentionally or by want of ordinary care allows the agent to believe he or she possesses and may be implied by the facts of a particular case (*95 Cal. App.3d 603, 611)* . The court relied on the agent's position as branch manager of defendant's office, and the agent's superior's actions concerning the proposed lease, to conclude that the agent had actual authority to execute the lease (*95 Cal. App. 3d 603, 611-612)* .

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A. Actions Involving General Agency Questions

18-182 California Points & Authorities § 182.34

§ 182.34 Supporting Contention That Agent Acted Within Scope of Authority--Agent's Acts Were Within Implied Authority [Civ. Code § 2319]

[1] FORM

[*These points and authorities may be included in a memorandum of points and authorities, or in a trial or appellate brief. When appropriate, the points and authorities in §§ 182.30 -182.33, 182.35, and 182.36 may be combined with the contentions supported by these points and authorities.*]

_____ [DEFENDANT *or* PLAINTIFF] AGENT ACTED WITHIN THE SCOPE OF HIS/HER IMPLIED AUTHORITY IN _____ [*specify acts performed, e.g.,* NEGOTIATING ANCILLARY CONTRACTS] BECAUSE AN AGENT IS AUTHORIZED TO TAKE ACTION THAT WILL ACHIEVE THE PURPOSE OF THE AGENCY AND THAT IS REASONABLE [IN THE FACE OF UNEXPECTED CONDITIONS].

A. Agent's Implied Authority. An agent has authority to do everything necessary or proper and usual, in the ordinary course of business, for effecting the purpose of the agency, and implied authority to use any means that are incidental to and reasonably proper in the performance of an assigned task (*Civ. Code § 2319(1)*; *Leno v. Young Men's Christian Ass'n (1971) 17 Cal. App. 3d 651, 658, 95 Cal. Rptr. 96*).

[*Optional*] **B. Agent's Authority to Act in Unexpected Situations.** An agent does not lose the authority to act whenever he or she encounters unexpected conditions but may proceed in a manner that appears to be reasonably appropriate, as long as it is subordinate to or pertinent to an act that the agent is employed to perform, it is within the ultimate objective of the principal, and it is an act that an agent would not be unlikely to perform (*Garber v. Prudential Ins. Co. (1962) 203 Cal. App. 2d 693, 702-703, 22 Cal. Rptr. 123*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a particular action of an agent was

within the scope of his or her implied authority. This argument may be used whenever an agent allegedly acted within his or her implied authority. For example, an issue of an agent's implied authority might arise in an action by a third party against a principal for damages resulting from an act of an agent when the agent's act or omission was outside the scope of the agent's express authority but was necessary under the circumstances to effect the purpose of the agency. The optional paragraph may be used when the agent went beyond his or her express authority in attempting to carry out the purpose of his or her agency in the face of unexpected conditions, and the actions taken by the agent were reasonable, taken in good faith, and with the sole purpose of achieving the interests of the principal [see *Garber v. Prudential Ins. Co. (1962) 203 Cal. App. 2d 693, 702-703, 22 Cal. Rptr. 123]* .

The points and authorities in this form may be combined with the points and *authorities in § 182.30* when counsel wishes to contend that the agency was created by express agreement. The points and authorities in this form may be combined with the points and *authorities in § 182.31* when counsel wishes to contend alternatively that an agreement was created by conduct of parties. The points and authorities in this form may be combined with the points and *authorities in § 182.32* when the agreement provides that the principal has the right to control the actions of the agent, although an agency is not expressly created by the agreement and the principal has not exercised the control granted by the agreement. The points and authorities in this form may be combined with the points and *authorities in § 182.33* when the actual authority of the agent is disputed. The points and *authorities in §§ 182.35* and *182.36* may be combined with these points and authorities as appropriate when counsel wishes to contend alternatively that an authority was conferred by the principal's ratification.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a particular action was within an agent's implied authority. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that the action taken by the agent was necessary, or proper and usual, in the ordinary course of business, to effect the purpose of the agency. If the optional paragraph is used, counsel should discuss facts showing that the agent faced an unusual or unexpected situation and that the agent acted in a manner reasonably calculated to further the purpose of the agency given the unusual or unexpected situation.

[3] Discussion of Authorities

[a] Agent's Implied Authority

Leno v. Young Men's Christian Ass'n *(1971) 17 Cal. App. 3d 651, 95 Cal. Rptr. 96* , was a wrongful death action brought by the parents of the deceased, who drowned during the ocean checkout of a scuba diving course offered under the auspices of defendant. The course consisted of sessions at defendant's pool, followed by an ocean checkout. At the ocean checkout, the course instructor took along an assistant instructor for each student, including decedent, to check out the student's equipment and to accompany the student in the water. The decedent had trouble with his equipment, became entangled in kelp, and drowned, allegedly because of the negligence of the instructors and their principal, defendant. Plaintiff argued that defendant was liable for the acts of the instructor and the assistant because the instructor, as agent of defendant, acted within his authority to teach the course in retaining an assistant and conducting the ocean checkout of the students. The trial court granted defendant's motion for a nonsuit on the ground that there was no evidence that the instructor was acting as defendant's agent at the ocean checkout, and plaintiffs appealed.

The court of appeal reversed, holding that there was sufficient evidence to submit the issue of defendant's liability to the jury (*17 Cal. App. 3d 651, 657)* . The court held that an agent has implied authority to use any means that are incidental to and reasonably proper in the performance of an assigned task, including the appointment of a subagent (*17 Cal. App. 3d 651, 658)* . The court held that defendant's clear links with the course, including the use of its facilities and its receipt of the fee for the course, could reasonably have led the students to assume that the instructor was the

agent of defendant (*17 Cal. App. 3d 651, 658)* . Given the prima facie case that an agency existed, the court held that the question of whether or not the specific acts of the parties involved in decedent's death were within the scope of the authority of the agents should have been decided by a jury rather than on a motion for nonsuit (*17 Cal. App. 3d 651, 659)* .

[b] Agent's Authority to Act in Unexpected Situations

Garber v. Prudential Ins. Co. *(1962) 203 Cal. App. 2d 693, 22 Cal. Rptr. 123* , was a wrongful death action brought by the heirs of the decedent alleging that defendant was responsible as principal for the negligence of its agents that caused decedent's death. The decedent, a photographer who had in the past taken photographs for defendant's company magazine, was approached by an employee of defendant with a proposal to photograph two company employees while scuba diving. The decedent was willing but had never scuba dived, so the employees undertook to train him, and the company rented a watertight camera case for use in the project. Decedent encountered some difficulty because of a weight belt that was apparently too heavy, and drowned before he could reach the shore. The jury entered a verdict for plaintiff, and defendant appealed, arguing that its agents exceeded their authority in trying to train decedent in scuba diving.

The court of appeal affirmed, holding that substantial evidence supported the findings of the jury that defendant's employees acted within their authority as agents of defendant (*203 Cal. App. 2d 693, 703)* . The court held that an agent has implied authority to use any means incidental to and reasonably proper in the performance of an assigned task. The court also stated that an agent otherwise not bound by specific instructions may exercise discretion regarding the time, place, and manner of performing his or her duties (*203 Cal. App. 2d 693, 701-702)* . The court noted that the employee in charge of the magazine had no specific limits on her authority, and was found to have acted reasonably, in good faith, and with the sole purpose of advancing the interests of her employer in achieving the result that was the purpose of her employment. The court emphasized that, as long as an agent is engaged strictly in an endeavor to bring about a result for which his or her services were engaged, an agent has the authority to act reasonably and in good faith when faced with unusual and unexpected situations. The court held that in such a case, whether or not the agent exceeded his or her authority because of actions taken in response to unusual and unexpected circumstances is a question for the jury (*203 Cal. App. 2d 693, 703)* .

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18-182 California Points & Authorities § 182.35

§ 182.35 Supporting Contention That Actual Agency [Civ. Code § 2299] or Actual Authority [Civ. Code § 2316] Created by Principal's Ratification [Civ. Code § 2307] of Agent's Acts--Principal Accepted Benefits of Act

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. When appropriate, the points and authorities in §§ 182.30 -182.34 and 182.36 may be combined with the contentions supported by these points and authorities.*]

_____ [AN AGENCY WAS CREATED BETWEEN _____ (DEFENDANT *or* PLAINTIFF), THE ALLEGED AGENT, AND _____ (PLAINTIFF *or* DEFENDANT), THE ALLEGED PRINCIPAL, *and/or* AUTHORITY WAS CONFERRED ON _____ (DEFENDANT *or* PLAINTIFF), THE ALLEGED AGENT, BY _____ (PLAINTIFF *or* DEFENDANT), THE ALLEGED PRINCIPAL], BECAUSE A PRINCIPAL'S RATIFICATION, BY VOLUNTARILY ADOPTING THE ACT OF ANOTHER WHO IS PURPORTEDLY ACTING AS AN AGENT, AUTHORIZES THE PURPORTED AGENT'S ACT AS IF IT WERE ORIGINALLY AUTHORIZED BY THE PRINCIPAL.

A. Agency Created or Authority Conferred by Precedent Authorization or Subsequent Ratification. An agency may be created, and an authority may be conferred, by a precedent authorization or a subsequent ratification (*Civ. Code § 2307*).

B. Requisites for Ratification. A ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified, or when an oral authorization would suffice, by accepting or retaining the benefit of the act, with notice thereof (*Civ. Code § 2310*).

C. Ratification by Voluntary Adoption of Act. Ratification is the voluntary election by a person to adopt in some manner as his or her own an act that was purportedly done on his or her behalf by another person as an agent; the ratified act is treated as if originally authorized by the principal (*Rakestraw v. Rodrigues (1972) 8 Cal. 3d 67, 73, 104*

Cal. Rptr. 57, 500 P.2d 1401).

[*Optional*] **D. Ratification by Implication Based on Principal's Conduct.** A purported agent's act may be adopted by implication based on conduct of the purported principal from which an intention to consent to or adopt the act may be fairly inferred, including conduct that is inconsistent with any reasonable intention on the principal's part, other than that the principal intended approving and adopting it (*Rakestraw v. Rodrigues (1972) 8 Cal. 3d 67, 73, 104 Cal. Rptr. 57, 500 P.2d 1401* ; *Streetscenes LLC v. ITC Entm't Group, Inc. (2002) 103 Cal. App. 4th 233, 242-243, 126 Cal. Rptr. 2d 754*).

[*Optional*] **E. Principal's Acceptance of Benefits Ratifies Entire Transaction.** Ratification is the subsequent adoption by one claiming the benefits of an act that, without authority, another has voluntarily done while ostensibly acting as the agent of the person who affirms the act and who had the power to confer authority (*Civ. Code § 2311*; *Reusche v. California Pac. Title Ins. Co. (1965) 231 Cal. App. 2d 731, 737, 42 Cal. Rptr. 262*).

[*Optional*] **F. Principal May Ratify Without Full Knowledge of Facts.** Although the law ordinarily requires that a principal be apprised of all the facts surrounding a transaction before the principal will be held to have ratified an agent's unauthorized acts, when ignorance of the facts arises from the principal's own failure to investigate and the circumstances are such as to put a reasonable person on inquiry, the principal may be held to have ratified despite lack of full knowledge (*Reusche v. California Pac. Title Ins. Co. (1965) 231 Cal. App. 2d 731, 737, 42 Cal. Rptr. 262*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that an agency was created and/or that authority was conferred because defendant principal ratified the purported agent's act or acts. This argument may be used whenever a party claims that an agency was created or an authority was conferred by a principal's ratification of an act by one who purported to act as the agent of the principal. For example, the argument supported by this form may be used in an action by a third party to recover tort damages from a principal for the act of an agent. As another example, this argument may be used by an agent as a defense to a principal's action to recover damages sustained as a result of the agent's allegedly unauthorized act.

Optional Paragraph D may be used when the principal did not expressly ratify the purported agent's act, but acted in a manner that implied that he or she ratified the act. Optional Paragraph E may be used when the principal has ratified the purported agent's act by accepting the benefits. Optional Paragraph F is for use when counsel anticipates an opposing contention that defendant principal did not know of the character of the agent's act and therefore should not be held to have ratified the act.

These points and authorities may be combined with the points and *authorities in § 182.30* when counsel wishes to make the alternative argument that an actual agency was created by express agreement, or with the points and *authorities in § 182.31* when counsel wishes to contend alternatively that an agency was created by conduct of parties. They may be combined with the points and *authorities in § 182.32* when an alleged agreement provides that the principal has the right to control the actions of the agent, although an agency is not expressly created by the agreement and the principal has not exercised the control granted by the agreement. These points and authorities may be combined with the points and *authorities in §§ 182.33* and *182.34* when counsel wishes to contend that an agent has actual authority to perform certain acts. They may be combined with the points and *authorities in § 182.36* when counsel wishes to contend that an agency was created or an authority was conferred because a principal ratified part of an indivisible transaction.

In addition, these points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that an agency was created or an authority

conferred by a principal's ratification of a purported agent's act. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Specifically, counsel should discuss facts showing that the principal voluntarily adopted the act of the purported agent. Counsel should also discuss facts appropriate to the optional paragraphs used, if any. Counsel may discuss facts showing that the principal acted in a manner that implied his or her adoption of the act of the purported agent, or facts showing that the principal retained the benefits of the agent's act with knowledge of the material facts of the unauthorized transaction [*see Bate v. Marsteller (1959) 175 Cal. App. 2d 573, 582-583, 346 P.2d 903]* .

[3] Discussion of Authorities

[a] Ratification by Voluntary Adoption of Act

Rakestraw v. Rodrigues *(1972) 8 Cal. 3d 67, 104 Cal. Rptr. 57, 500 P.2d 1401* , was an action to enforce a promissory note in the name of cross complainant principal. The principal cross complained against the agent who forged the principal's signature on the note and against the party who falsely procured an acknowledgment of the principal's signature. After the note was executed, the principal discovered the forgery and demanded a role in the business that was financed by the loan proceeds. Only when the note became delinquent three years later did the principal complain of the forgery, seeking reimbursement from the agent and the other party. The trial court entered judgment for cross plaintiff principal, and cross defendant appealed.

The Supreme Court reversed, holding that cross plaintiff had ratified the forgery (*8 Cal. 3d 67, 72)* . The Court defined ratification as the voluntary election by a person to adopt in some manner as his or her own an act that was purportedly done on his or her behalf by another person, the effect of which, as to some or all persons, is to treat the act as if originally authorized by him or her (*8 Cal. 3d 67, 73)* . The Court held that cross plaintiff principal's election not to rescind the transaction when she could have done so, and knew of the nature of the forgery, constituted a ratification of the transaction (*8 Cal. 3d 67, 75)* .

[b] Ratification by Implication Based on Principal's Conduct

The facts and procedural background of ***Rakestraw v. Rodrigues*** *(1972) 8 Cal. 3d 67, 104 Cal. Rptr. 57, 500 P.2d 1401* , are discussed in *§ 182.35[3][a]*. The Supreme Court noted that a ratification may occur expressly or by implication. The Court defined a ratification by implication as conduct of the purported principal from which an intention to consent to or adopt the act may be fairly inferred, including conduct that is inconsistent with any reasonable intention on his or her part, other than his or her intention to approve and adopt the act (*8 Cal. 3d 67, 73)* .

In ***Streetscenes LLC v. ITC Entm't Group, Inc.*** *(2002) 103 Cal. App. 4th 233, 126 Cal. Rptr. 2d 754* , a movie production company hired an executive to look for projects, with the company having the right of "first refusal" to any projects that he found. The producer worked in the movie production offices like an executive producer of the company. The producer found investors for a movie and promised big profits, but then fraudulently converted over $1 million from the investors. The investors brought an action for fraud against the company, which disavowed the producer's actions and claimed he was an independent producer. The jury found that he was an agent, and awarded damages in money invested and lost in addition to lost profits and punitive damages. On appeal, agency and lost profits were disputed, while the producer's fraud was not disputed. With respect to agency, the court of appeal held that the evidence was sufficient to establish that the movie production company ratified or authorized the movie producer's wrongful conduct. The court noted that the company's failure to repudiate the producer's acts was itself evidence of ratification. Further, its explanation that the producer had a "special relationship" that allowed him to be an executive producer of the company but allowed him space to do his own deals could also be found to be evidence of ratification. A jury could determine that the relationship was created in order to give the company deniability for the producer's acts; i.e.,

allowing him to practice low-level fraud while allowing the company to claim high-level ignorance (*103 Cal. App. 4th 233, 242-243)* .

[c] Principal's Acceptance of Benefits Ratifies Entire Transaction

The facts and procedural background of ***Reusche v. California Pac. Title Ins. Co.*** *(1965) 231 Cal. App. 2d 731, 42 Cal. Rptr. 262* , are discussed in *§ 182.125[3][a]*. Plaintiff principal received a check for part of the proceeds of a loan obtained by her agent, who forged plaintiff's signature, and plaintiff retained the money even after she learned of the forgery. The court held that a principal's retention of the benefits of an agent's unauthorized transaction may constitute a ratification of the agent's act (*231 Cal. App. 2d 731, 737-738)* .

[d] Principal May Ratify Without Full Knowledge of Facts

The facts and procedural background of ***Reusche v. California Pac. Title Ins. Co.*** *(1965) 231 Cal. App. 2d 731, 42 Cal. Rptr. 262* , are discussed in *§ 182.125[3][a]*. Plaintiff principal argued that because she did not know the true source of the wrongfully obtained funds when she accepted them she could not have ratified the agent's forgery. The court held that although the law ordinarily requires that a principal be apprised of all the facts surrounding a transaction before the principal will be held to have ratified an agent's unauthorized acts, when ignorance of the facts arises from the principal's own failure to investigate and the circumstances are such as to put a reasonable person on inquiry, the principal may be held to have ratified despite lack of full knowledge (*231 Cal. App. 2d 731, 737)* . The court held that plaintiff's inaction after she learned of the forgery, and her retention of the funds that she knew were the result of the forgery, constituted a ratification of the loan transaction (*231 Cal. App. 2d 731, 738)* .

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Volume 18 Chapters 180-189 PRETRIAL PROCEEDINGS---to---PROBATE OF WILLS
CHAPTER 182 PRINCIPAL AND AGENT
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A. Actions Involving General Agency Questions

18-182 California Points & Authorities § 182.36

§ 182.36 Supporting Contention That Actual Agency [Civ. Code § 2299] or Actual Authority [Civ. Code § 2316] Created by Principal's Ratification [Civ. Code § 2307] of Agent's Acts--Principal's Ratification of Part of Transaction Constitutes Ratification of Whole

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [PLAINTIFF *or* DEFENDANT], THE ALLEGED PRINCIPAL, RATIFIED THE ENTIRE TRANSACTION CONCLUDED BY _____ [DEFENDANT *or* PLAINTIFF], THE ALLEGED AGENT, BECAUSE A PRINCIPAL WHO RATIFIES PART OF A TRANSACTION IS DEEMED TO HAVE RATIFIED THE ENTIRE TRANSACTION.

A. Ratification of Part of Transaction Ratifies Whole. A principal is not allowed to ratify the unauthorized acts of an agent to the extent that they are beneficial, and disavow them to the extent that they are damaging and thus, if a principal ratifies part of a transaction, he or she is deemed to ratify the whole of it (*Civ. Code § 2311*; *Navrides v. Zurich Ins. Co. (1971) 5 Cal. 3d 698, 704, 97 Cal. Rptr. 309, 488 P.2d 637* ; *Price v. McConnell (1960) 184 Cal. App. 2d 660, 666, 7 Cal. Rptr. 695*).

[*Optional*] **B. Closely Related Transactions Treated as One.** Separate transactions may be so closely related that a principal may not retain the benefits of one and deny that it ratified another (*Vanciel v. Kumle (1945) 26 Cal. 2d 732, 735, 160 P.2d 802*).

[*Optional*] **C. Lawsuit to Enforce Agent's Unauthorized Act May Constitute Ratification.** A principal may ratify the unauthorized act of an agent by bringing suit to enforce part of the agent's unauthorized transaction (*Navrides v. Zurich Ins. Co. (1971) 5 Cal. 3d 698, 704, 97 Cal. Rptr. 309, 488 P.2d 637* ; *Price v. McConnell (1960) 184 Cal. App. 2d 660, 666, 7 Cal. Rptr. 695*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that defendant principal is liable for the act of his or her agent, although not authorized by a prior grant of authority, because defendant principal ratified the entire transaction by ratifying part of it. These points and authorities should be combined with the appropriate points and *authorities in § 182.35*. They may be used when the principal has ratified part of a transaction and the partial ratification is claimed to constitute a ratification of the entire transaction. For example, they may be used in an action to recover tort damages from a principal for the act of an agent, when the principal has accepted a benefit of the agent's act but refuses to accept the responsibility for the damages caused by the act. Optional Paragraph B is for use when the transactions by the agent are so closely related that ratification of one should constitute ratification of all of the transactions. Optional Paragraph C is for use when the act of the principal that constitutes the ratification is a lawsuit based on part of the agent's unauthorized transaction.

These points and authorities should be combined with the points and *authorities in § 182.35*, and when appropriate, the points and *authorities in §§ 182.30 -182.34* may be combined with the contention supported by these points and authorities. These points and authorities may be combined with the points and *authorities in § 182.30* when counsel wishes to make the alternative argument that an actual agency was created by express agreement or with the points and *authorities in § 182.31* when counsel wishes to contend alternatively that an agency was created by conduct of parties. These points and authorities may be combined with the points and *authorities in § 182.32* when an alleged agreement provides that the principal has the right to control the actions of the agent, although an agency is not expressly created by the agreement and the principal has not exercised the control granted by the agreement. These points and authorities may be combined with the points and *authorities in §§ 182.33* and *182.34* when counsel wishes to contend that an agent has actual authority to perform certain acts.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a principal's ratification of part of a transaction constitutes ratification of the entire transaction. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that defendant principal ratified part of the transaction, and that another part of the transaction has not been expressly ratified. If there is an issue concerning the connection between the parts of the transaction, counsel should discuss facts showing that the apparently unrelated transactions are in fact a single transaction.

[3] Discussion of Authorities

[a] Ratification of Part of Transaction Ratifies Whole

Navrides v. Zurich Ins. Co. *(1971) 5 Cal. 3d 698, 704, 97 Cal. Rptr. 309, 488 P.2d 637* , was an action by plaintiff principal to recover the benefits of a settlement agreement negotiated by her agent attorney with defendant. Plaintiff principal had retained an attorney to represent her in an action against an insured of defendant. The attorney negotiated a settlement of the action, but plaintiff rejected the offer. The attorney falsely represented to defendant that plaintiff principal accepted the offer, and the attorney accepted a draft from defendant. The attorney forged plaintiff principal's indorsement on the draft and absconded with the funds. Plaintiff then brought this action to recover the amount of defendant's settlement offer. The trial court entered judgment for plaintiff principal, and defendant appealed.

The Supreme Court reversed. The Court held that the action to recover the amount of the settlement offer necessarily constituted a ratification of the agreement negotiated by the attorney (*5 Cal. 3d 698, 704)* . The Court relied on *Civ. Code § 2311* to hold that a principal who ratifies part of a transaction is deemed to ratify the whole of it (*5 Cal. 3d 698, 704)* . The Court held that plaintiff principal, by ratifying the agreement, also ratified the attorney's act of receiving the

settlement draft and could not proceed against defendant to recover the amount of the draft that defendant had already delivered to plaintiff's agent (*5 Cal. 3d 698, 704-705)* .

Price v. McConnell *(1960) 184 Cal. App. 2d 660, 7 Cal. Rptr. 695* , involved a cross complaint seeking specific performance of an oral contract for the sale of purebred cattle, which provided for the delivery of their registration papers and records. Plaintiff had brought the action seeking recovery of the purchase price of the cattle that the complaint alleged had been delivered to defendant. Defendant then filed the cross complaint alleging that plaintiff's agent agreed to sell the cattle to defendant and represented that for an additional $25 the agent agreed to deliver the registration papers and records. The trial court entered judgment for defendant on the cross complaint, and plaintiff appealed.

The court of appeal affirmed, holding that when plaintiff filed suit on the express oral contract of the agent, he ratified the agent's unauthorized acts of including the records and registration papers as part of the contract of sale (*184 Cal. App. 2d 660, 665)* . The court held that a principal may ratify an agent's unauthorized act by bringing suit thereon (*184 Cal. App. 2d 660, 665-666)* . Plaintiff's ratification of part of the transaction was held to constitute a ratification of the entire transaction (*184 Cal. App. 2d 660, 666)* .

[b] Closely Related Transactions Treated as One

In ***Vanciel v. Kumle*** *(1945) 26 Cal. 2d 732, 160 P.2d 802* , plaintiffs brought an action to recover royalty payments due under a mining lease. Plaintiffs had assigned all royalties due them under the lease to defendant principal, a bank, to secure a loan made by defendant principal. The lease provided for payments of advance royalty payments by the lessees, with the amounts paid to be credited against future royalties when accrued. After the lessee defendants were given notice of the assignment, they made some payments of advance royalties provided for under the lease to plaintiff. An agent of defendant principal consented to the first payment of advance royalties to plaintiff and did not object to the next 13 payments. The agent received a statement from plaintiffs detailing the 12 payments that had then been made, and the agent prevailed on the lessee defendants to increase their monthly payments to defendant principal, which the lessee defendants did. In the current action, defendant principal filed a pleading seeking recovery of the payments paid to plaintiffs, which plaintiffs opposed on the ground that defendant principal had ratified the agent's conduct in not seeking recovery of the advance royalty payments. The trial court entered judgment for defendant principal in the amount of those payments, and plaintiffs appealed.

The Supreme Court reversed, holding that by agreeing to the increased payments after it knew of the payments to plaintiff, defendant principal ratified both transactions (*26 Cal. 2d 732, 735)* . The Court held that a principal may not retain the benefits of one transaction and deny that it ratified another when the transactions are closely related (*26 Cal. 2d 732, 735)* . The Court reasoned that defendants would not have increased their payments had the previous payments to plaintiffs been objectionable, and that the separate agreements were so closely related that the ratification of the increased payments constituted a ratification of the payments to plaintiff as well (*26 Cal. 2d 732, 735)* .

[c] Lawsuit to Enforce Agent's Unauthorized Act May Constitute Ratification

The facts and procedural background of ***Navrides v. Zurich Ins. Co.*** *(1971) 5 Cal. 3d 698, 97 Cal. Rptr. 309, 488 P.2d 637* , are discussed in *§ 182.36[3][a]*. The Supreme Court held that a principal who brings a lawsuit to enforce part of an agent's unauthorized transaction thereby ratifies the entire transaction. Thus, the Court held that by bringing suit to enforce the settlement agreement negotiated by her attorney, plaintiff ratified the entire transaction (*5 Cal. 3d 698, 704)* .

The facts and procedural background of ***Price v. McConnell*** *(1960) 184 Cal. App. 2d 660, 7 Cal. Rptr. 695* , are discussed in *§ 182.36[3][a]*. The court held that an action to enforce an agent's unauthorized act is a ratification of that act, and that the ratification of part of the transaction is a ratification of the whole. Thus, the court held that by bringing

suit to enforce the oral contract entered into by the agent, plaintiff principal ratified the entire contract, including the promise to deliver the records and registration papers of the cattle (*184 Cal. App. 2d 660, 666)* .

[4] Additional Authorities

[a] Ratification of Part of Transaction Ratifies Whole

Friddle v. Epstein (1993) 16 Cal. App. 4th 1649, 21 Cal. Rptr. 2d 85 , involved a sale of property to defendants under an agreement that referred to another document regarding an agreement to pay a broker's commission to plaintiff. The defendants refused to pay the commission, and the trial court found for defendant on this point, on the ground that because the separate agreement was not signed by defendants it did not satisfy the statute of frauds. The court of appeal reversed this determination, holding that the defendants' ratification of the purchase agreement also constituted a ratification of the commission agreement under the rule of *Civ. Code § 2311* that ratification of part of an agreement is a ratification of the whole (*16 Cal. App. 4th 1649, 1656)* . The court restated the rule that a party may not split the agency transaction into separate parts, and take the benefits without the burdens (*16 Cal. App. 4th 1649, 1656)* .

In *Warshauer v. Bauer Constr. Co. (1960) 179 Cal. App. 2d 44, 3 Cal. Rptr. 570* , plaintiff sued to recover a down payment on a house paid to the agent of defendant principal. Plaintiff agreed to purchase a house from defendant principal and was permitted by defendant's agent to move into the house before plaintiff's loan was approved on the condition that rent was paid. The agent also demanded a check for the down payment agreed on between plaintiff and defendant principal, and plaintiff gave the agent a check in the amount of the down payment plus two months' rent that the agent absconded with. The court of appeal reversed a judgment for defendant principal, holding that a principal's ratification of part of a transaction constitutes a ratification of the entire transaction (*179 Cal. App. 2d 44, 51-52)* . Defendant's lawsuit for the amount of the rent was held to be a ratification of the entire transaction with the agent, although defendant never received the down payment or the rent, on the ground that defendant's ratification of part of the agreement necessarily ratified the entire transaction and entitled plaintiff to the return of the down payment (*179 Cal. App. 2d 44, 51-52)* .

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18-182 California Points & Authorities § 182.37

§ 182.37 Opposing Contention That Actual Agency [Civ. Code § 2299] Created--Principal and Agent Did Not Agree to Create Agency

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. When appropriate, the points and authorities in §§ 182.38 -182.43 may be combined with the contentions supported by the following points and authorities.*]

AN ACTUAL AGENCY WAS NOT CREATED BETWEEN _____ [PLAINTIFF *or* DEFENDANT], THE ALLEGED PRINCIPAL, AND _____ [DEFENDANT *or* PLAINTIFF], THE ALLEGED AGENT, BECAUSE BOTH PRINCIPAL AND AGENT MUST AGREE TO THE CREATION OF THE AGENCY BY WORDS OR CONDUCT.

A. Actual Agency. [*See § 182.30[1], Paragraph A.*]

B. Burden of Proof of Agency. The burden of proving agency is on the party asserting its existence (*K. King and G. Shuler Corp. v. King (1968) 259 Cal. App. 2d 383, 393, 66 Cal. Rptr. 330*).

C. No Presumption of Agency. The law indulges in no presumption that an agency exists but instead presumes that a person is acting for himself or herself and not as an agent for another (*K. King and G. Shuler Corp. v. King (1968) 259 Cal. App. 2d 383, 393, 66 Cal. Rptr. 330*).

D. Both Agent and Principal Must Agree to Create Actual Agency. Formation of an agency relationship is a bilateral matter, with words or conduct by both principal and agent necessary to create the relationship (*Hanks v. Carter & Higgins of Cal., Inc. (1967) 250 Cal. App. 2d 156, 163, 58 Cal. Rptr. 190*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that an actual agency was created either by agreement or by the conduct of the alleged principal and agent. This contention may be used when it is alleged that no actual agency existed between the alleged principal and alleged agent because they did not both agree, either expressly or by their conduct, to create the relationship. For example, the argument supported by this memorandum might be raised by a defendant who allegedly acted as principal in his or her dealings with an alleged agent, when the alleged agent's act or omission caused plaintiff's injuries that form the basis for the action. As another example, this argument might be raised as a defense in an action for compensation by an alleged agent against the alleged principal.

The points and *authorities in § 182.38* may be combined with these points and authorities when counsel wishes to contend alternatively that no agency was created because the alleged principal did not have the right to control the alleged agent. The points and *authorities in § 182.39* may be combined with these points and authorities when counsel wishes to contend alternatively that any agency that was created was terminated by mutual abandonment. The points and *authorities in §§ 182.40* and *182.41* may be combined with these points and authorities when counsel also wishes to contend that an agent did not have actual authority to perform certain acts. The points and *authorities in §§ 182.42* and *182.43* may be combined with these points and authorities when counsel wishes to contend alternatively that an agency was not created, or actual authority was not conferred, because there was no ratification by the principal.

An agency is either actual or ostensible, and this form does not deal with ostensible agency, which arises when a principal intentionally or by want of ordinary care causes or allows a third party to believe another to be his or her agent who is not really employed by the principal [*Civ. Code §§ 2298, 2300*]. This form is for use only when the issue is whether or not there was an actual agency, and not when the belief of a third person is at issue. For forms of points and authorities for use in opposing the contention that an ostensible authority was created because a third party was led to believe an agency was created by the conduct of the principal, see *§ 182.121*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that no actual agency was created because both parties failed to assent, expressly or through their conduct, to the alleged agency agreement. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing that one of the parties to the purported agency relationship neither agreed to the creation of the agency nor acted as though an agency had been created.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in §§ 182.30 -182.32*.

[3] Discussion of Authorities

[a] Burden of Proof of Agency

K. King and G. Shuler Corp. v. King *(1968) 259 Cal. App. 2d 383, 66 Cal. Rptr. 330* , was an action for accounting and fraud against defendant, who was allegedly the agent of plaintiff. Plaintiff was a corporation formed to acquire and operate a business, and was in debt to the previous owner of the business. Defendant married one of the principal shareholders of plaintiff, and eventually agreed with the owners of plaintiff's stock to purchase the business. The owners allowed defendant to operate the business under this agreement, and the business lost money until the obligations to the former owner were in default. The former owner enforced his lien on defendant's stock, reacquiring control, and then brought this action. Plaintiff argued that defendant was acting as an agent of plaintiff in operating the business and therefore should be held liable for losses resulting from defendant's lack of care. The trial court held that no agency

existed, and plaintiff appealed.

The court of appeal affirmed, holding that substantial evidence supported the trial court's finding that plaintiff had not proved that defendant was its agent (*259 Cal. App. 2d 383, 394)* . The court based its finding on the principle that the law indulges in no presumption that an agency exists, but instead presumes that a person is acting for himself or herself and not as agent for another. The burden of proof of agency was therefore held to be on plaintiff, who contended that the agency existed (*259 Cal. App. 2d 383, 393)* . Under the circumstances, plaintiff was held not to have met its burden of proving the agency relationship necessary to impose on defendant the fiduciary duties that defendant allegedly breached (*259 Cal. App. 2d 383, 396)* .

[b] No Presumption of Agency

K. King and G. Shuler Corp. v. King (1968) 259 Cal. App. 2d 383, 66 Cal. Rptr. 330 , is discussed in *§ 182.37[3][a]*.

[c] Both Agent and Principal Must Agree to Create Actual Agency

In *Hanks v. Carter & Higgins of Cal., Inc. (1967) 250 Cal. App. 2d 156, 58 Cal. Rptr. 190* , defendants in an action for indemnity based on an indemnity agreement cross complained against the company that had written the bonds. Cross complainants alleged that cross defendant was cross complainants' agent, and was negligent in not revoking cross complainants' indemnity agreements when instructed to do so. When defendants-cross complainants first sought bonds through cross defendant, they were required to execute indemnity agreements in favor of plaintiffs, in whose name the bonds were written. Cross complainants later sent revocations of the indemnity agreements to cross defendant, although the agreements provided for another specific method of revocation. The trial court found that cross defendant was the agent of defendants-cross complainants and was negligent in its conduct of the agency, and cross defendant appealed.

The court of appeal reversed, holding that the formation of an agency is a bilateral matter, with words or conduct of both parties necessary to create the relationship. The court held that no evidence had been introduced to show that cross defendants had agreed to represent defendants in their relationship with the bonding company, and therefore no actual agency existed between defendants and cross defendants (*250 Cal. App. 2d 156, 164)* . The court refused to hold that the silence of cross defendants at the time the indemnity agreement was delivered constituted an offer of agency, because such a holding would mean that an agent becomes the agent of an opposing contracting party unless that intention is expressly disavowed (*250 Cal. App. 2d 156, 164)* .

An agency is either actual or ostensible [*Civ. Code § 2298*] *Hanks* did not deal with the issue of ostensible agency, because there were no allegations of representations, express or implied, by the principal to a third party who dealt with the agent [*see Civ. Code § 2300*]. Therefore, the points in this form may be used only when counsel wishes to establish that an actual agency agreement was or was not reached between the principal and the agent.

[4] Additional Authorities

[a] Both Principal and Agent Must Agree to Create Actual Agency

In *Universal Bank v. Lawyers Title Ins. Corp. (1997) 62 Cal. App. 4th 1062, 73 Cal. Rptr. 2d 196* , a bank sued a title insurance company for breach of title company instructions, fraud, and negligence based on alleged misconduct during the escrow process of the title insurance company's issuing agent. The trial court found that the issuing agent was only an agent for the purpose of issuing the title insurance policy and there was no evidence the title insurance company allowed the issuing agent to be an agent in any escrow capacity. The trial court granted summary judgment in favor of the title insurance company. The bank appealed and the court of appeal affirmed. The court found that the underwriting agreement between the title insurance company and the issuing agent revealed the parties' intent as to the nature of the agency relationship. The unambiguous terms of the agreement specifically excluded sub-escrow activities from the scope of the agency. Further, neither the title insurer's advertising brochures nor its internal documents established that

the issuing agent was acting as the insurer's sub-escrow agent as to the insured lender's real estate closing (*62 Cal. App. 4th 1062, 1066-1068)* .

Violette v. Shoup (1993) 16 Cal. App. 4th 611, 20 Cal. Rptr. 2d 358 , involved a plaintiff who had asked defendant, a life insurance salesman, for a referral to a financial planner. Defendant mentioned the name of an acquaintance, and introduced plaintiff to the acquaintance. Defendant had not made any representations about the planner or her competency. Plaintiff named defendant in the action to recover damages suffered when plaintiff's investment was lost, arguing that the planner's payment of a commission to defendant created an agency relationship. The court of appeal affirmed the trial court's grant of summary judgment in defendant's favor, holding that there was no evidence that defendant had acted as an agent (of either the planner or plaintiff) in making the referral, but was instead doing so as a mere personal favor. Quoting from *Edwards v. Freeman (1949) 34 Cal. 2d 589, 591-592, 212 P.2d 883* , the court held that a person does not become another's agent simply by offering help or making a suggestion. In such a situation, the person is not subject to any legal duty of service, and has not assented to any right of control (*16 Cal. App. 4th 611, 620)* .

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18-182 California Points & Authorities § 182.38

§ 182.38 Opposing Contention That Actual Agency [Civ. Code § 2299] Created--Alleged Principal Had No Right to Control Alleged Agent

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. When appropriate, the points and authorities in §§ 182.37 and 182.39 -182.43 may be combined with the contentions supported by the following points and authorities.*]

AN ACTUAL AGENCY WAS NOT CREATED BETWEEN _____ [PLAINTIFF *or* DEFENDANT], THE ALLEGED PRINCIPAL, AND _____ [DEFENDANT *or* PLAINTIFF], THE ALLEGED AGENT, BECAUSE A PRINCIPAL MUST HAVE THE RIGHT TO CONTROL THE AGENT'S CONDUCT FOR AN ACTUAL AGENCY TO EXIST.

A. Actual Agency. [*See § 182.30[1], Paragraph A.*]

B. Burden of Proof of Agency. [*See § 182.37[1], Paragraph B.*]

C. No Presumption of Agency. [*See § 182.37[1], Paragraph C.*]

D. Right to Control Prerequisite to Finding of Actual Agency. The right of the alleged principal to control the alleged agent is an essential element that must be factually present in order to establish the existence of actual agency (*DeSuza v. Andersack (1976) 63 Cal. App. 3d 694, 699, 133 Cal. Rptr. 920*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that an agency was created either by

agreement or by the conduct of the alleged principal and agent. The contention may be used when the alleged principal did not have the right to control the activities of the alleged agent, and therefore no agency existed. For example, the argument supported by the memorandum might be raised by a defendant who allegedly acted as principal in his or her dealings with an alleged agent, when the alleged agent's act or omission caused plaintiff's injuries that form the basis for the action.

These points and authorities may be combined with the points and *authorities in § 182.37* when counsel wishes to contend alternatively that the principal and agent did not agree to create an actual agency. The points and *authorities in § 182.39* may be combined with the points and authorities when counsel wishes to contend alternatively that any agency that was created was terminated by mutual abandonment. The points and *authorities in §§ 182.40* and *182.41* may be combined with these points and authorities when counsel also wishes to contend that an agent did not have actual authority to perform certain acts. The points and *authorities in §§ 182.42* and *182.43* may be combined with these points and authorities when counsel wishes to contend alternatively that an agency was not created, or actual authority was not conferred, because there was no ratification by the principal.

An agency is either actual or ostensible. This form does not deal with ostensible agency, which arises when a principal intentionally or by want of ordinary care causes or allows a third party to believe another to be his or her agent who is not really employed by the principal [*see Civ. Code §§ 2298, 2300*]. The form is for use when the issue is whether or not an agency was created because of an agreement between or conduct by the alleged principal and alleged agent, and not when the belief of a third person is at issue. For points and authorities for use in opposing the contention that an ostensible authority was created because a third party was led to believe an agency was created by the conduct of the principal, see *§ 182.121*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that an agency was not created because the alleged principal lacked the right to control the activities of the alleged agent. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing that the alleged principal had no right of control over the alleged agent. For example, if the alleged agent was doing a favor for the alleged principal without any agreement that the latter could control the manner in which the favor was done, counsel should include a discussion of facts showing the lack of any agreement, express or implied, regarding control.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in §§ 182.30 -182.32*.

[3] Discussion of Authorities

[a] Right to Control Prerequisite to Finding of Actual Agency

DeSuza v. Andersack *(1976) 63 Cal. App. 3d 694, 133 Cal. Rptr. 920* , was an action for personal injuries suffered by plaintiff when the motorcycle she was driving was struck by a car in which defendant was a passenger. Defendant and her husband were eating at a cafe operated by friends before leaving their vacation home for their residence in Los Angeles when defendant remembered she had left some apricots in the vacation house. One of the owners of the cafe offered to drive defendant to the house to pick up the apricots and a sweater that had been left there by the cafe owner. While driving an automobile registered to her daughter, the cafe owner collided with plaintiff's motorcycle. Plaintiff's action alleged that the cafe owner was acting as defendant's agent, and that defendant was therefore vicariously responsible for the negligence of the alleged agent. Summary judgment was granted for defendant, and plaintiff appealed, arguing that the facts supported a finding that the driver had been acting as defendant's agent and that

defendant was therefore vicariously liable for plaintiff's damage.

The court of appeal affirmed, holding that the evidence did not establish any type of relationship from which an agency could be inferred (*63 Cal. App. 3d 694, 700)* . The court emphasized that the right of the alleged principal to control the behavior of the alleged agent is an essential element that must be factually present in order to establish an agency (*63 Cal. App. 3d 694, 699)* . The court characterized the errand as one in which both defendant and the cafe owner had an interest, and neither asserted the right to control the actions of the other (*63 Cal. App. 3d 694, 699-700)* . The evidence was held susceptible of only one inference, i.e., the absence of agency, and therefore no triable issue of fact existed (*63 Cal. App. 3d 694, 700)* . While the court did not specify that it was dealing with actual agency, the court's examination of the lack of any agreement between the alleged principal and agent, without any examination of plaintiff's belief in the existence of agency at the time of the accident, makes clear that the court was discussing the existence of actual, rather than ostensible, agency [*see Civ. Code §§ 2298, 2299, 2300*].

[4] Additional Authorities

[a] Right to Control Prerequisite to Finding of Actual Agency

In *Kaplan v. Coldwell Banker Residential Affiliates, Inc. (1997) 59 Cal. App. 4th 741, 69 Cal. Rptr. 2d 640* ; plaintiff, a superior court judge, sued his real estate broker, a Coldwell Banker franchisee, for fraud and named Coldwell Banker as a defendant on a respondeat superior theory. The franchisee independently owned and operated his real estate franchise, and the franchise agreement required the franchisee to hold himself out to the public as an independent contractor. The evidence was undisputed that Coldwell did not control the day-to-day operation of its franchisee's real estate office. The trial court granted Coldwell Banker's motion for summary judgment. The court of appeal affirmed this ruling, holding that plaintiff produced no evidence showing that Coldwell Banker controlled or had the right to control the day-to-day operations of the office. Therefore it was not liable for franchisee's acts or omissions as a real estate broker on a true agency respondeat superior theory. However, because it determined that there was a triable issue of fact present with respect to ostensible agency, it ultimately reversed. As to the right to control issue the court stated that even though Coldwell Banker received a royalty based on the franchisee's gross receipts no true agency relationship was established where the undisputed evidence showed that the franchisee had independently owned and operated the franchise, hired and fired employees, set office wages and commissions, determined business hours, and had business cards and letterhead printed with a standard disclaimer that his office was independently owned and operated (*59 Cal. App. 4th 741, 746)* .

Flores v. Brown (1952) 39 Cal. 2d 622, 248 P.2d 922 , was an action against the driver of a truck and the owner of the trailer pulled by the truck for damages resulting from a collision between the truck and plaintiffs' vehicle. The action sought damages from the owner of the trailer on the ground that the truck's driver was acting as the trailer owner's agent. The jury found for plaintiffs in four of the consolidated actions and for defendants in one, but the trial court ordered a new trial in all actions, and all parties appealed. The court of appeal reversed the judgments against the owner of the trailer on the ground that no evidence existed that the truck owner was subject to the control of the trailer owner and therefore no agency relationship existed between them (*39 Cal. 2d 622, 628)* .

In *Edwards v. Freeman (1949) 34 Cal. 2d 589, 212 P.2d 883* , plaintiff sought damages from the driver of an automobile that struck plaintiff's son's car while plaintiff was a passenger. Plaintiff had asked her son to take her to town the next time he went, and the collision occurred on the trip. Defendant contended that plaintiff was a principal and her son an agent, permitting her son's contributory negligence to be imputed to her and barring her recovery (this case arose before *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226* , which held that contributory negligence is not a complete bar to recovery and adopted a system of pure comparative negligence). The Supreme Court reversed a judgment for defendant entered after the trial court instructed the jury on defendant's theory. The Court held that the evidence did not support an inference of agency given plaintiff's lack of control over her son's conduct (*34 Cal. 2d 589, 592)* .

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CHAPTER 182 PRINCIPAL AND AGENT
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A. Actions Involving General Agency Questions

18-182 California Points & Authorities § 182.39

§ 182.39 Opposing Contention That Actual Agency [Civ. Code § 2299] Exists--Agency Was Terminated by Mutual Abandonment

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. When appropriate, the points and authorities in §§ 182.37 and 182.38 and §§ 182.40 -182.43 may be combined with the contentions supported by the following points and authorities.*]

AN ACTUAL AGENCY DOES NOT EXIST BETWEEN _____ [PLAINTIFF *or* DEFENDANT], THE ALLEGED PRINCIPAL, AND _____ [DEFENDANT *or* PLAINTIFF], THE ALLEGED AGENT, BECAUSE AN ACTUAL AGENCY MAY BE TERMINATED BY THE MUTUAL ABANDONMENT OF THE PRINCIPAL AND AGENT [AS EVIDENCED BY THEIR CONDUCT].

A. Actual Agency. [*See § 182.30[1], Paragraph A.*]

B. Burden of Proof of Agency. [*See § 182.37[1], Paragraph B.*]

C. No Presumption of Agency. [*See § 182.37[1], Paragraph C.*]

D. Mutual Abandonment Terminates Actual Agency Relationship. A mutual abandonment of an actual agency terminates the relationship between the parties (*Preszler v. Dudley (1957) 153 Cal. App. 2d 120, 124, 314 P.2d 138*).

[*Optional*] **E. Abandonment May Be Implied From Conduct.** Abandonment is a matter of intent to be ascertained from the circumstances of a case and may be implied from the acts of the parties (*Preszler v. Dudley (1957) 153 Cal. App. 2d 120, 124, 314 P.2d 138*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that an actual agency exists. This contention may be raised when the parties to an agency have terminated their agreement by mutual abandonment. For example, this contention may be raised by an agent as a defense to a principal's action for the alleged agent's breach of fiduciary duties. In addition, these points and authorities may be used by a principal as a defense to an agent's action for compensation, or in any other action in which the existence of an agency relationship is at issue. The optional paragraph may be used when contending that the agency was abandoned impliedly by the parties' conduct rather than expressly.

These points and authorities may be combined with the points and *authorities in § 182.37* when counsel wishes to contend alternatively that the principal and agent did not agree to create an actual agency. These points and authorities may be combined with the points and *authorities in § 182.38* when counsel wishes to contend alternatively that no actual agency was created because the alleged principal had no right to control the alleged agent. The points and *authorities in §§ 182.40* and *182.41* may be combined with these points and authorities when counsel also wishes to contend that an agent did not have actual authority to perform certain acts. The points and *authorities in §§ 182.42* and *182.43* may be combined with these points and authorities when counsel wishes to contend alternatively that an agency was not created, or actual authority was not conferred, because there was no ratification by the principal.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that an actual agency does not exist because it was terminated by the mutual abandonment of the parties. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing that the agency was abandoned by both parties, including, when appropriate, facts showing that the agency was impliedly abandoned because the parties acted as though the agency relationship no longer existed.

In an appropriate case, these points and authorities may be submitted in opposition to the points and *authorities in §§ 182.30 -182.32*.

[3] Discussion of Authorities

[a] Mutual Abandonment Terminates Actual Agency Relationship

Preszler v. Dudley *(1957) 153 Cal. App. 2d 120, 314 P.2d 138* , was an action for damages alleging that defendants had purchased stock as plaintiff's agents and had not delivered the stock to plaintiff. One of the defendants desired to withdraw from a corporation in which he owned stock, and the other defendants approached defendant about buying into the company. An agreement for the purchase of the stock was arranged in which defendants would advance the bulk of the money if plaintiff would work for the company and repay the money advanced. Plaintiff worked for the company for a few months, but then quit despite defendants' warning that employment was necessary for plaintiff's continued participation. Defendants then paid the balance due on the stock and took the stock in their own names. Plaintiff argued that defendants were acting on plaintiff's behalf in buying the stock, but the trial court found for defendants and plaintiff appealed.

The court of appeal affirmed, holding that the trial court's finding that the agency was abandoned by mutual consent of the parties was supported by substantial evidence (*153 Cal. App. 2d 120, 124)* . While mutual abandonment is not one of the methods of termination enumerated in *Civ. Code §§ 2355* and *2356*, the court pointed out that an agency usually depends on the assent of both parties (*153 Cal. App. 2d 120, 123)* . The court held that even when an agency may not be terminated by the act of one party, both parties may agree to rescind or cancel the contract between them (*153 Cal.*

App. 2d 120, 123-124) . The court also held that mutual abandonment of an agency terminates the relationship between the parties (*153 Cal. App. 2d 120, 124)* . Finally, the court held that in this case substantial evidence supported the conclusion of the trial court that plaintiff's act of leaving the corporation and the lack of any attempt to reimburse defendants for the money they expended constituted an intent to abandon the agency, and that defendants consented thereto (*153 Cal. App. 2d 120, 124)* .

NOTE:

Although the court in *Prezler* did not expressly refer to the agency as an actual agency, *Civ. Code § 2298* provides that an agency is either actual or ostensible. An ostensible agency arises when the principal intentionally, or by want of ordinary care, causes a third person to believe that another person is the principal's agent [*see Civ. Code § 2300*]. The issue of a third party's belief in the agency did not arise with regard to the agency that was mutually abandoned in *Prezler*. For forms of points and authorities for use in opposing the contention that an ostensible authority was created because a third party was led to believe an agency was created by the conduct of the principal, see *§§ 182.130* and *182.131*.

[b] Abandonment May Be Implied by Conduct

The facts and procedural background of ***Preszler v. Dudley*** *(1957) 153 Cal. App. 2d 120, 314 P.2d 138* , are discussed in *§ 182.39[3][a]*. The court held that an abandonment is a matter of intent, to be ascertained from the facts and circumstances surrounding the alleged abandonment, and that an abandonment may be implied from the acts of the parties (*153 Cal. App. 2d 120, 124)* .

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18-182 California Points & Authorities § 182.40

§ 182.40 Opposing Contention That Agent Had Actual Authority [Civ. Code § 2316]--Alleged Agent Did Not Actually Believe That Authority Existed

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. When appropriate, the points and authorities in §§ 182.37 -182.39 and 182.41 -182.43 may be combined with the contentions supported by the following points and authorities.*]

_____ [DEFENDANT *or* PLAINTIFF] AGENT DID NOT HAVE ACTUAL AUTHORITY TO _____ [*specify acts performed, e.g.,* NEGOTIATE CONTRACTS], BECAUSE TO HAVE ACTUAL AUTHORITY BASED ON THE INTENTIONAL OR NEGLIGENT CONDUCT OF A PRINCIPAL, AN AGENT MUST ACTUALLY BELIEVE THAT THE AUTHORITY EXISTS.

A. Actual Authority Defined. [*See § 182.32[1], Paragraph A.*]

B. Belief of Agent Is Essential to Finding of Actual Authority. An agent has actual authority because the principal has intentionally, or by want of ordinary care, allowed the agent to believe he or she has that authority, only if the agent actually believes that he or she has the authority (*Civ. Code § 2316*; *Columbia Outfitting Co. v. Freeman (1950) 36 Cal. 2d 216, 218-219, 223 P.2d 21*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that an agent had actual authority to perform certain acts. This argument may be used whenever the contention that an actual authority existed because the principal intentionally or by want of ordinary care allowed the agent to believe that he or she had authority is opposed on the ground that the agent did not actually believe that he or she possessed the alleged authority [*see Civ. Code § 2316*

]. For example, the argument supported by this memorandum may be raised by a defendant principal who has been sued by a third party damaged by an agent's unauthorized act, when the evidence suggests that the agent knew that he or she did not have the authority to do the act that damaged the third party.

These points and authorities may be combined with the points and *authorities in § 182.37* when counsel wishes to contend alternatively that the principal and agent did not agree to create an actual agency. These points and authorities may be combined with the points and *authorities in § 182.38* when counsel wishes to contend alternatively that no actual agency was created because the alleged principal had no right to control the alleged agent. These points and authorities may be combined with the points and *authorities in § 182.39* when counsel wishes to contend alternatively that if an agency was created and an authority was conferred, the agency was terminated by mutual abandonment. The points and *authorities in § 182.41* may be combined with these points and authorities when counsel wishes to contend alternatively that no actual authority was conferred on the agent, or that a specific authority was not conferred on the agent, because the agent's belief in his or her authority was not based on conduct of the principal. The points and *authorities in §§ 182.42* and *182.43* may be combined with these points and authorities when counsel wishes to contend alternatively that an agency was not created, or actual authority was not conferred, because there was no ratification by the principal.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that an agent did not have actual authority to perform certain acts because the agent did not believe that he or she had the claimed authority. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing that the agent did not believe that he or she actually had the authority claimed by the opposing party. For example, if the position occupied by the agent is one in which most decisions must be cleared with a higher official, counsel should discuss facts showing that the agent failed to inform the higher official of the act at issue or that the agent attempted to keep the higher official from learning of the act at issue.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 182.33*.

[3] Discussion of Authorities

[a] Belief of Agent Is Essential to Finding of Actual Authority

In ***Columbia Outfitting Co. v. Freeman*** *(1950) 36 Cal. 2d 216, 223 P.2d 21* , plaintiff brought an action to compel defendant to return accounts that had been recalled, and defendant cross complained to enforce his right to compensation for recalled accounts. Defendant had collected on delinquent accounts under an oral contract with plaintiff that paid defendant one half of all collections and allowed plaintiff to recall any account at any time without compensation to defendant. When plaintiff hired a new credit manager, defendant drafted a written contract for collections providing that defendant would be paid the same commission on all accounts, whether recalled by plaintiff or collected. The credit manager signed the contract on behalf of plaintiff without notifying anyone and kept the contract in his desk. Defendant argued that the credit manager did not have express authority to bind defendant to the contract and that the manager could not have believed that he had such authority given the office procedures that required him to obtain approval before authorizing the recall of accounts and other actions regarding collection of delinquent accounts. The trial court entered judgment for plaintiff on the cross complaint on the ground that the credit manager was not authorized to make the contract with defendant, and defendant appealed.

The Supreme Court affirmed, holding that the credit manager did not have authority to bind plaintiff to the written contract with defendant (*36 Cal. 2d 216, 219)* . The Court explained that the actual authority provided for by *Civ. Code*

§ 2316 is divided into express authority that a principal intentionally confers on the agent, and implied authority that a principal intentionally, or by want of ordinary care, allows the agent to believe he or she possesses (*36 Cal. 2d 216, 218)* . The Court noted that there was no evidence that plaintiff expressly or intentionally conferred on the credit manager the authority to agree to the contract with defendant (*36 Cal. 2d 216, 218-219)* . The Court also held that implied authority depends on the belief of the agent that such authority exists. The Court examined the evidence concerning the credit manager's conduct in executing the contract with defendant and concluded that the credit manager's failure to inform others in plaintiff company of the contract and his prior clearance of other credit arrangements with his superiors constituted substantial evidence that he did not believe that he had the actual authority to bind plaintiff to the contract at issue (*36 Cal. 2d 216, 219)* .

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18-182 California Points & Authorities § 182.41

§ 182.41 Opposing Contention That Agent Had Actual Authority [Civ. Code § 2316]--Agent's Belief Was Not Based on Principal's Conduct

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. When appropriate, the points and authorities in §§ 182.37 -182.40, and 182.42 and 182.43 may be combined with the contentions supported by the following points and authorities.*]

_____ [DEFENDANT *or* PLAINTIFF] AGENT DID NOT HAVE ACTUAL AUTHORITY TO _____ [*specify acts performed, e.g.,* NEGOTIATE LONG-TERM CONTRACTS], BECAUSE FOR AN AGENT TO HAVE ACTUAL AUTHORITY, THE AGENT'S BELIEF IN HIS/HER AUTHORITY MUST BE BASED ON THE PRINCIPAL'S INTENTIONAL OR NEGLIGENT CONDUCT.

A. Actual Authority Defined. [*See § 182.32[1], Paragraph A.*]

B. Agent's Belief Must Be Based on Conduct of Principal. The fact of an agent's belief in actual authority is not enough to establish his or her actual authority; it must be shown that the belief was engendered by conduct of the principal (*South Sacramento Drayage Co. v. Campbell Soup Co. (1963) 220 Cal. App. 2d 851, 856, 34 Cal. Rptr. 137*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that an agent had actual authority to perform certain acts. This argument may be used whenever the contention that an actual authority existed because the principal intentionally or by want of ordinary care allowed the agent to believe that he or she had authority is opposed on the ground that the agent's belief was not based on the principal's conduct. For example, the argument supported by

this memorandum may be raised by a principal who has been sued by a third party for the act of an agent, when the principal did not expressly authorize the act and the agent's belief that the authority existed was not derived from conduct of the principal.

These points and authorities may be combined with the points and *authorities in § 182.37* when counsel wishes to contend alternatively that the principal and agent did not agree to create an actual agency. These points and authorities may be combined with the points and *authorities in § 182.38* when counsel wishes to contend alternatively that no actual agency was created because the alleged principal had no right to control the alleged agent. These points and authorities may be combined with the points and *authorities in § 182.39* when counsel wishes to contend alternatively that if an agency was created and an authority was conferred, the agency was terminated by mutual abandonment. These points and authorities may be combined with the points and *authorities in § 182.40* when counsel wishes to contend alternatively that no actual authority was conferred on the agent, or that a specific authority was not conferred on the agent, because the agent did not believe that he or she was authorized by the principal. The points and *authorities in §§ 182.42* and *182.43* may be combined with these points and authorities when counsel wishes to contend alternatively that an agency was not created, or actual authority was not conferred, because the principal did not ratify the agent's acts.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that an agent did not have actual authority to perform certain acts because the agent's belief in his or her authority was not based on the principal's conduct. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing that the agent did not base his or her belief in the disputed authority on the conduct of the principal. Counsel should also discuss facts showing that the principal did not engage in conduct that could provide the basis of a reasonable belief in authority by an agent.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 182.33*.

[3] Discussion of Authorities

[a] Agent's Belief Must Be Based on Conduct of Principal

South Sacramento Drayage Co. v. Campbell Soup Co. *(1963) 220 Cal. App. 2d 851, 34 Cal. Rptr. 137* , was an action to enforce an oral contract entered into by plaintiff and the traffic manager at defendant's Sacramento plant that granted plaintiff an exclusive right to transport defendant's goods to specified locations for 15 years. Plaintiff had dealt with the agent of defendant who executed the contract in the past, and previous contracts that had granted exclusive rights for a specified term had been approved by the agent's superiors. Plaintiff negotiated the 15-year contract with the agent alone, who had not sent the contract to his superiors for approval. When defendant assigned trucking jobs in violation of the contract, plaintiff brought this action. Defendant argued that the agent did not have the authority to execute the contract on defendant's behalf. The trial court granted defendant's motion for nonsuit, and plaintiff appealed.

The court of appeal affirmed, holding that when authority has not expressly been conferred, actual authority can exist only if the agent believes that he or she is authorized, and the belief is engendered by conduct of the principal (*220 Cal. App. 2d 851, 856)* . The court held that there was no evidence that defendant expressly authorized its agent to execute a 15-year hauling contract nor was there evidence that defendant intentionally or carelessly created in the agent the belief that such authority existed (*220 Cal. App. 2d 851, 856)* . The court noted that the agent had previously contracted for hauling only on day-by-day or load-by-load basis, and the only term contracts for hauling had been executed by officials in New Jersey. Even assuming that the agent believed that he had the authority to enter into such a contract, the court held that the belief had to be engendered either by the principal's expressed intention or because the

principal so carelessly conducted its affairs as to reasonably create such a belief in the mind of the agent (*220 Cal. App. 2d 851, 856)* . No conduct that could reasonably create that belief was shown (*220 Cal. App. 2d 851, 856)* .

The court in *South Sacramento Drayage* did not specifically address the question whether or not the agent's belief in his or her authority must be reasonable, given the conduct of the principal. However, it appears from the court's use of the term "reasonably" that the belief of an agent in his or her authority must be reasonable to support a finding of actual authority [see *South Sacramento Drayage Co. v. Campbell Soup Co. (1963) 220 Cal. App. 2d 851, 856, 34 Cal. Rptr. 137]* .

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18-182 California Points & Authorities § 182.42

§ 182.42 Opposing Contention That Actual Agency [Civ. Code § 2299] or Actual Authority [Civ. Code § 2316] Created by Principal's Ratification [Civ. Code § 2307] of Agent's Acts--Principal Cannot Ratify Unauthorized Act of Agent to Prejudice of Third Party Without Third Party's Consent

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. When appropriate, the points and authorities in §§ 182.37 -182.41 and 182.43 may be combined with the contentions supported by the following points and authorities.*]

_____ [AN AGENCY WAS NOT CREATED BETWEEN _____ (DEFENDANT *or* PLAINTIFF), THE ALLEGED AGENT, AND _____ (PLAINTIFF *or* DEFENDANT), THE ALLEGED PRINCIPAL, *and/or* AN AUTHORITY WAS NOT CONFERRED ON _____ (DEFENDANT *or* PLAINTIFF), THE ALLEGED AGENT, BY _____ (PLAINTIFF *or* DEFENDANT), THE ALLEGED PRINCIPAL], BECAUSE A PRINCIPAL CANNOT RATIFY AN AGENT'S UNAUTHORIZED ACT TO THE PREJUDICE OF THIRD PERSONS WITHOUT THEIR CONSENT.

Ratification Cannot Prejudice Third Parties Without Their Consent. An agent's unauthorized act cannot be made valid retroactively by ratification to the prejudice of third persons without their consent (*Civ. Code § 2313*; *Hooker v. American Indem. Co. (1936) 12 Cal. App. 2d 116, 123, 54 P.2d 1128*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that an agency was created and/or that authority was conferred because defendant principal subsequently ratified the purported agent's act or acts. The ground of opposition set forth in this form is that a principal's purported ratification of an agent's unauthorized act is ineffective

because it prejudices the rights of a third party without the third party's consent. This argument may be used, for example, in an action on a contract, especially an insurance contract, when defendant principal attempts to ratify an agent's unauthorized repudiation of a contract before becoming liable under the terms of the contract but after the liability became apparent.

These points and authorities may be combined with the points and *authorities in § 182.37* when counsel wishes to contend alternatively that the principal and agent did not agree to create an actual agency. These points and authorities may be combined with the points and *authorities in § 182.38* when counsel wishes to contend alternatively that no actual agency was created because the alleged principal had no right to control the alleged agent. These points and authorities may be combined with the points and *authorities in § 182.39* when counsel wishes to contend alternatively that if an agency was created and an authority was conferred, the agency was terminated by mutual abandonment. The points and authorities may be combined with the points and *authorities in §§ 182.40* and *182.41* when counsel wishes to contend that actual authority was not conferred on the agent. The points and *authorities in § 182.43* may be combined with these points and authorities when counsel wishes to contend that purported ratification was not effective because it was not made with full knowledge of the material facts of the transaction.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that defendant principal may not ratify an unauthorized act to the prejudice of a third person without the consent of plaintiff. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that the act sought to be ratified was unauthorized, that the act if ratified would prejudice plaintiff, and that plaintiff did not consent to the ratification.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in §§ 182.35* and *182.36*, as appropriate.

[3] Discussion of Authorities

[a] Ratification Cannot Prejudice Third Parties Without Their Consent

In ***Hooker v. American Indem. Co.*** *(1936) 12 Cal. App. 2d 116, 54 P.2d 1128* , plaintiffs were the heirs of a decedent who had recovered a judgment in a wrongful death action against an insured of defendant. Defendant principal refused to satisfy the judgment, alleging that the truck that killed the decedent was not covered by insurance because defendant's agent had terminated the insurance without authority to do so. Defendant principal argued that it ratified the agent's termination and therefore was not liable on the policy. The trial court entered judgment for plaintiffs, and defendant principal appealed.

The court of appeal affirmed, holding that defendant principal could not ratify the unauthorized act of its agent in cancelling the insurance policy without the consent of plaintiffs, the beneficiaries of the insurance policy (*12 Cal. App. 2d 116, 123)* . Relying on *Civ. Code § 2313*, which provides that no unauthorized act may be made valid retroactively, to the prejudice of third persons, without their consent, the court held that once plaintiffs' cause of action accrued, defendant principal could not thereafter deprive them of the cause of action by ratifying the alleged policy cancellation (*12 Cal. App. 2d 116, 123)* .

[4] Additional Authorities

[a] Ratification Cannot Prejudice Third Parties Without Their Consent

Dominguez v. Superior Court (1983) *139 Cal. App. 3d 692, 189 Cal. Rptr. 5* , arose from an action challenging the

takeover of plaintiff bank under *Fin. Code § 3101*. A major shareholder, who was the sole member of the board of directors of plaintiff, filed the action on behalf of plaintiff within 10 days of the taking as required by *Fin. Code § 3101*, but the filing was not ratified by a vote of a complete board as required by *Corp. Code §§ 300* and *307(a)(8)* until after the 10 days had elapsed. The trial court found that the ratification was sufficient to make the action timely filed and granted plaintiff's motion for summary judgment. The court of appeal, however, issued a writ of mandate ordering the trial court to grant a summary judgment to defendant, because under *Civ. Code § 2313* the board could not deprive defendant of the right to obtain a dismissal of the action by ratifying the director's ineffective filing (*139 Cal. App. 3d 692, 695)* .

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18-182 California Points & Authorities § 182.43

§ 182.43 Opposing Contention That Actual Agency [Civ. Code § 2299] or Actual Authority [Civ. Code § 2316] Created by Principal's Ratification [Civ. Code § 2307] of Agent's Acts--No Ratification Unless All Material Facts Known to Principal

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. When appropriate, the points and authorities in §§ 182.37 -182.42 may be combined with the contentions supported by the following points and authorities.*]

_____ [AN AGENCY WAS NOT CREATED BETWEEN _____ (DEFENDANT *or* PLAINTIFF), THE ALLEGED AGENT, AND _____ (PLAINTIFF *or* DEFENDANT), THE ALLEGED PRINCIPAL, *and/or* AN AUTHORITY WAS NOT CONFERRED ON _____ (DEFENDANT *or* PLAINTIFF), THE ALLEGED AGENT, BY _____ (PLAINTIFF *or* DEFENDANT), THE ALLEGED PRINCIPAL], BECAUSE A PRINCIPAL IS NOT BOUND BY A RATIFICATION UNLESS IT IS DONE WITH KNOWLEDGE OF ALL MATERIAL FACTS INVOLVED IN THE UNAUTHORIZED TRANSACTION.

Principal Must Have Knowledge of All Material Facts to Ratify Unauthorized Transaction. A principal is not bound by ratification unless he or she acts with knowledge of all the material facts involved in the unauthorized transaction, particularly with knowledge of the acts of the person who assumed to act as agent; this knowledge is equally necessary whether the ratification is express or implied (*Bate v. Marsteller (1959) 175 Cal. App. 2d 573, 582, 346 P.2d 903*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that an agency was created and/or that

authority was conferred because defendant principal subsequently ratified the purported agent's act or acts. The ground of opposition set forth is that defendant principal did not have knowledge of all the material facts involved in the unauthorized transaction. For example, this argument may be used as a defense by the principal in an action to enforce a contract entered into by the agent on behalf of defendant principal. As another example, this argument may be used as a defense by the principal in an action seeking to hold defendant principal liable for an agent's wrongful act.

These points and authorities may be combined with the points and *authorities in § 182.37* when counsel wishes to contend alternatively that the principal and agent did not agree to create an actual agency. These points and authorities may be combined with the points and *authorities in § 182.38* when counsel wishes to contend alternatively that no actual agency was created because the alleged principal had no right to control the alleged agent. These points and authorities may be combined with the points and *authorities in § 182.39* when counsel wishes to contend alternatively that if an agency was created and an authority was conferred, the agency was terminated by mutual abandonment. These points and authorities may be combined with the points and *authorities in §§ 182.40* and *182.41* when counsel wishes to contend that an actual authority was not conferred on the agent. These points and authorities may be combined with the points and *authorities in § 182.42* when counsel wishes to contend alternatively that a purported ratification was not effective because it prejudiced a third person without his or her consent.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that an agency was not created, or an authority was not conferred, by a principal's ratification. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that when defendant principal allegedly ratified the agent's unauthorized act, he or she did not have knowledge of some fact involving the unauthorized transaction, and that the fact was material to defendant principal's decision whether or not to ratify the unauthorized act.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in §§ 182.35* and *182.36*.

[3] Discussion of Authorities

[a] Principal Must Have Knowledge of All Material Facts to Ratify Unauthorized Transaction

Bate v. Marsteller *(1959) 175 Cal. App. 2d 573, 346 P.2d 903* , was an action by plaintiffs, owners of an apartment building, to recover damages for fraud from defendants, a real estate broker and its agents. Plaintiffs had listed the building for sale with defendants, and a sale that defendants represented to plaintiffs as being made to a third party for $37,000 in fact conveyed a seven-eighths interest to the agents and only one-eighth to the third party. When plaintiffs learned that the title to the property was in the name of one of the agents, they requested an extension of the lease to the apartment that they had been allowed as a part of the sale agreement, but defendants refused. Plaintiffs brought this action when they learned of defendants' true role in the transaction, and defendants argued that plaintiffs-principals ratified the self-dealing transaction by seeking the extension with knowledge that the property was in the agent's name. The trial court entered judgment for defendants, and plaintiffs appealed.

The court of appeal reversed, holding that there was no evidence that the request for a lease extension was made with a full knowledge of the material facts of the transaction (*175 Cal. App. 2d 573, 582-583)* . The court held that ratification is a matter of assent, and for a principal to be bound by a ratification he or she must act with knowledge of all the material facts involved in the unauthorized transaction, particularly with knowledge of the acts of the person who assumed to act as the agent (*175 Cal. App. 2d 573, 582)* . The court held that plaintiffs' knowledge that the title to the building had been put in the name of the agent was not knowledge of all of the agents' activities in the sale, and therefore no ratification of the sale could properly have been found by the trial court (*175 Cal. App. 2d 573, 582-583)* .

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Volume 18 Chapters 180-189 PRETRIAL PROCEEDINGS---to---PROBATE OF WILLS
CHAPTER 182 PRINCIPAL AND AGENT
PART II. FORMS
A. Actions Involving General Agency Questions

18-182 California Points & Authorities §§ 182.44-182.59

[Reserved]

§§ 182.44[Reserved]

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CHAPTER 182 PRINCIPAL AND AGENT
PART II. FORMS
B. Actions by Agent Against Principal

18-182 California Points & Authorities § 182.60

§ 182.60 Supporting Contention That Principal May Not Terminate Agency--Power of Agent Is Coupled With Interest in Subject of Agency

[1] FORM

[*The following may be combined with the contentions supported by the points and authorities set forth in §§ 182.30 -182.32 and 182.35 -182.36 as appropriate and may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [DEFENDANT *or* PLAINTIFF] PRINCIPAL MAY NOT TERMINATE THE AGENCY WITH _____ [PLAINTIFF *or* DEFENDANT] AGENT BECAUSE THE POWER OF AN AGENT THAT IS COUPLED WITH AN INTEREST IN THE SUBJECT OF THE AGENCY IS NOT TERMINATED BY THE DEATH OR INCAPACITY OF, OR REVOCATION BY, THE PRINCIPAL [AND AN AGENCY GRANTED AS SECURITY FOR LOANS MADE BY AN AGENT IS AN AGENCY COUPLED WITH AN INTEREST].

A. Agency Coupled With Interest Is Not Terminable by Principal. The power of an agent that is coupled with an interest in the subject of the agency is not terminated by the death or incapacity of, or revocation by, the principal (*Civ. Code § 2356(a)*; *Lane Mortgage Co. v. Crenshaw (1928) 93 Cal. App 411, 427, 269 P. 672*).

[*Optional*] **B. Agency Created as Security for Loans to Principal Is Coupled With Interest.** A person who is given the management of a business as security for loans made is granted an agency coupled with an interest, which is not terminable by the principal (*MacDonald v. Rosenfeld (1948) 83 Cal. App. 2d 221, 236, 188 P.2d 519*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the principal may not terminate the power of an agent that is coupled with an interest in the subject of the agency [*see Civ. Code § 2356(a)*]. This

contention may be used, for example, in a declaratory relief action by the agent to establish the irrevocability of the agency, or in an action by the agent contesting an attempted revocation of the agency. The optional paragraph should be used when the principal created an agency to manage a business as security for loans made by the agent to the owners of the business. Such an agency is coupled with an interest [*see MacDonald v. Rosenfeld (1948) 83 Cal. App. 2d 221, 236, 188 P.2d 519]* .

If the existence of the agency is disputed, these points and authorities may be combined with the points and *authorities in §§ 182.30 -182.32*, as appropriate. If the agency or authority is alleged to have arisen because of the principal's ratification, these points and authorities may be combined with the points and *authorities in §§ 182.35 -182.36*, as appropriate.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the principal may not terminate an agency because it is coupled with an interest. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that the agent's power was coupled with an interest in the subject of the agency. When using the optional paragraph, counsel should discuss facts showing that the agency was held for the benefit of the agent, to protect the agent's interest in the principal's repayment of the loan, and that the agency was created at the same time as the loan was made or for a separate consideration.

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 182.64* and *182.65* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Agency Coupled With Interest Is Not Terminable by Principal

Lane Mortgage Co. v. Crenshaw *(1928) 93 Cal. App. 411, 269 P. 672* , was an action for injunctive and declaratory relief to prevent defendant from interfering with plaintiff's rights under a lease providing that plaintiff would be the sole and exclusive agent for the management of the building to which the leasehold interest applied. The lease had been executed by the lessee of the property on which the building was erected in consideration of the efforts of plaintiff in procuring the ground lease, plaintiff's financing of the construction of the building, and $10. The lease provided that plaintiff should have the second floor of the building for 20 years in addition to its agency for management of the building. The original lessee assigned its ownership interest in the building and its leasehold interest in the land to defendant after the building was completed, and defendant then began to disregard plaintiff's rights under the lease. Plaintiff argued that the agency to manage the building was coupled with its interest under the lease, and therefore could not be terminated. The trial court denied relief, concluding that the lease merely granted plaintiff an agency that was revocable at will of the lessor, and plaintiff appealed.

The court of appeal reversed, holding that the agency was coupled with the 20-year leasehold interest (*93 Cal. App. 411, 428)* . The court held that a power is coupled with an interest when it forms part of a contract and is a security for money or for the performance of a valuable act (*93 Cal. App. 411, 428)* . The court noted that the lease plaintiff helped procure for the original ground lessee could have been breached by the lessee in a number of ways, and such a breach would have adversely affected plaintiff's interest in its lease of the second floor of the building (*93 Cal. App. 411, 426)* . The court also noted that to protect against just such an occurrence, as a part of the lease transaction between the original lessee and plaintiff, plaintiff was granted the exclusive agency to manage the building, giving plaintiff the ability to protect against violations of the ground lease, as well as the ability to collect rents in the building and apply

them to the extinguishment of the obligations under the ground lease (*93 Cal. App. 411, 426-427)* . The court held that the agreement was therefore an agency coupled with an interest and irrevocable by defendant principal (*93 Cal. App. 411, 428)* .

NOTE:

In discussing termination, *Civ. Code § 2356(a)* speaks of the power of an agent coupled with an interest in the subject of the agency. Courts that interpret whether or not agencies are covered by the limitations on termination of powers of agents coupled with an interest often use the term "power" rather than "agency." There appears to be no substantive difference, however, between the terms power and agency used in discussions of agencies coupled with interests [*see Jay v. Dollarhide (1970) 3 Cal. App. 3d 1001, 1023, 84 Cal. Rptr. 538* (using both terms in discussing tests for agencies coupled with interests)].

[b] Agency Created as Security for Loans to Principal Is Coupled With Interest

MacDonald v. Rosenfeld *(1948) 83 Cal. App. 2d 221, 188 P.2d 519* , was an action for an accounting by plaintiffs, the owners of a trucking business, against the managing trustee of the business. The action also sought an injunction preventing defendant from exercising any control over the business. When the business was in need of operating capital, defendant had advanced money and was appointed managing trustee of the business as consideration for the advancement of further funds. The agreement provided that defendant would be entitled to a specified percentage of the profits of the company until such time as defendant recouped his investment, at which time the percentage would decrease, until all payments agreed on were made to defendant. Defendant disputed the complaint's allegations of the amounts paid and due and argued that he should be allowed to retain control until he had been completely reimbursed because his position with the business constituted an agency coupled with an interest. The trial court found that defendant was entitled to continue as manager until the contractual obligations of plaintiff were satisfied, and plaintiff appealed.

The court of appeal affirmed, holding that the evidence supported the conclusion of the trial court that defendant was granted an agency coupled with an interest in that he was given the management of the business as security for the loans he had made (*83 Cal. App. 2d 221, 236)* .

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CHAPTER 182 PRINCIPAL AND AGENT
PART II. FORMS
B. Actions by Agent Against Principal

18-182 California Points & Authorities § 182.61

§ 182.61 Supporting Contention That Agent May Recover Damages [Civ. Code § 3300] for Principal's Breach of Agency Contract--Principal Wrongfully Terminated Agency

[1] FORM

[*The following may be combined with the contentions supported by the points and authorities set forth in §§ 182.30 -182.32 and 182.35 -182.36 as appropriate and may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF AGENT MAY RECOVER DAMAGES FROM DEFENDANT PRINCIPAL FOR DEFENDANT PRINCIPAL'S REVOCATION OF THE AGENCY IN BREACH OF THE PARTIES' CONTRACT BECAUSE A PRINCIPAL MAY AGREE BY CONTRACT TO CURTAIL THE RIGHT TO REVOKE AN AGENCY AND WILL BE HELD LIABLE FOR THE DIRECT AND PROXIMATE DAMAGES IF THAT CONTRACT IS BREACHED.

A. Damages Recoverable When Agency Wrongfully Terminated. When a contract curtailing the principal's right to revoke an agency is supported by a valuable consideration and the power to revoke is exercised contrary to the right, the principal is liable for the direct and proximate damages caused by revoking the authority of the agent in breach of the parties' contract (*Stoll v. Stoll (1936) 5 Cal. 2d 687, 690, 56 P.2d 226*).

[*Optional*] **B. Agent With Notice of Wrongful Discharge Need Not Tender Service or Stay Ready to Perform.** When an agent has notice of his or her wrongful discharge, it is not necessary for the agent to tender service or stay ready to perform; all that is necessary is that the agent was ready and willing to continue in the employment at the time of the discharge (*Alderson v. Houston (1908) 154 Cal. 1, 10-11, 96 P. 884*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that an agent may recover damages from a principal who has revoked an agency despite a provision in the agency contract limiting the principal's right to revoke

the agency. This argument may be used whenever a principal has exercised his or her power to revoke an agency despite a contract limiting the right to do so. This argument would most likely arise in a breach of contract action by an agent for the principal's wrongful termination.

If the existence of the agency is disputed, these points and authorities may be combined with the points and *authorities in §§ 182.30 -182.32*, as appropriate. If the agency is alleged to have arisen because of the principal's ratification, these points and authorities may be combined with the points and *authorities in §§ 182.35 -182.36*, as appropriate.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that an agent may recover damages for breach of contract from a principal who has revoked an agency despite a provision in the agency contract limiting the principal's right to revoke. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss any contractual provisions that curtail the right of the principal to revoke the agency, such as a provision that the agency will last for a specified period of time. Counsel should also discuss facts showing that the principal exercised his or her power to revoke the agency contrary to the contract, for example by revoking the agency before the time specified in the contract.

[b] Related Pleading and Practice Forms

For forms of complaints alleging wrongful termination generally, see California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline* (Matthew Bender).

[c] Related Points and Authorities

For forms of points and authorities for use in wrongful termination actions generally, see Ch. 100, *Employer and Employee: Wrongful Termination and Discipline* .

[3] Discussion of Authorities

[a] Damages Recoverable When Agency Wrongfully Terminated

Stoll v. Stoll *(1936) 5 Cal. 2d 687, 56 P.2d 226* , was an action for breach of an agency contract. Plaintiff had entered into a contract with his father to manage the latter's business in exchange for a salary that was to continue until the father's estate was finally distributed. When the father was adjudged incompetent, the agency terminated, and this action followed. Plaintiff argued that the contract was not terminated, and that he was entitled to the payments called for in the contract on a showing that the contract was made for consideration and that he was willing to perform. The trial court granted defendant's demurrer without leave to amend, and plaintiff appealed the judgment of dismissal.

The Supreme Court reversed, holding that the contract was not terminated merely because the agency was terminated (*5 Cal. 2d 687, 690)* . The Court stated that while the agency may be terminated as long as it was not coupled with an interest, the principal may still agree not to revoke the agency for a definite time, or for a reasonable time that is ascertainable (*5 Cal. 2d 687, 690)* . The Court held that when a contract curtailing the principal's right to revoke an agency is supported by a valuable consideration and the power to revoke is exercised contrary to the contractual limits on the right, the principal is liable for the direct and proximate damages caused by revoking the authority of the agent (*5 Cal. 2d 687, 690)* . The Court also held that the fact that the agency terminated by operation of law rather than by revocation of the principal did not affect the result as long as the contract was one that would survive the death or incapacity of the principal, which was held to be the case here (*5 Cal. 2d 687, 692)* .

[b] Agent With Notice of Wrongful Discharge Need Not Tender Service or Stay Ready to Perform

Alderson v. Houston *(1908) 154 Cal. 1, 96 P. 884* , was an action for breach of a contract that gave plaintiffs an exclusive right to sell specific lots of real property for 18 months. The contract provided that plaintiffs would be entitled to a commission only if all the lots were sold in the 18 months, and plaintiffs demanded an extension after defendant had been unable to provide clear title to some of the lots. Defendant offered to attach checks in the amount of the outstanding liens to the deeds, although the lienholders apparently had to consent to any attempt to clear the title. When defendant refused to grant the extension, plaintiffs brought this action. The trial court entered judgment for defendant on the ground that any hindrance of plaintiffs' sales was remedied by defendant's offer to clear the titles, and plaintiffs appealed.

The Supreme Court reversed, holding that defendant prevented plaintiffs from performing their contractual obligations by refusing to provide the title required by the contract (*154 Cal. 1, 10)* . The Court held that the acts of defendant constituted a wrongful discharge of plaintiffs as agents and entitled plaintiffs to treat the contract of employment as continuing, although broken by the principal, and to sue for damages on the breach (*154 Cal. 1, 10)* . The Court held that when an agent has notice of his or her wrongful discharge, it is not necessary that the agent tender service or stay in readiness to perform; all that is necessary is that the agent was ready and willing to continue in the employment at the time of the discharge (*154 Cal. 1, 11)* . Thus, in the case before it, the Court held that because defendant had breached a material part of the contract, plaintiffs were not obligated to accept defendant's belated offer to comply with the contract, and plaintiffs could still sue for the breach of contract after the time specified in the contract had elapsed (*154 Cal. 1, 14)* .

[4] Additional Authorities

[a] Damages Recoverable When Agency Wrongfully Terminated

Long Beach Drug Co. v. United Drug Co. (1939) 13 Cal. 2d 158, 89 P.2d 698 , was an action brought to enjoin defendant from terminating the exclusive agency granted to plaintiff by a written agreement between the parties. The Supreme Court reversed the injunctive relief granted by the trial court and held that equitable relief was not available to the parties, but on rehearing noted that plaintiff could amend its complaint to recover damages for the wrongful termination of the agency on the ground that defendant did not have the right to terminate (*13 Cal. 2d 158, 173-174)* .

In *Roth v. Moeller (1921) 185 Cal. 415, 197 P. 62* , plaintiff had been granted an agency to exchange real property for defendant, and by its terms the agency was not revocable for 10 days. Plaintiff sued after defendant revoked the agency the next day and refused to pay any commission. The Supreme Court held that a principal who curtails his or her right to revoke an authority may be liable for damages if he or she revokes the authority within the designated period in violation of the agent's rights under the contract (*185 Cal. 415, 418-419)* . However, the Court affirmed the trial court's granting of a nonsuit against plaintiff on the ground that the agreement not to terminate the agency was not supported by the consideration necessary to make such an agreement binding on the principal (*185 Cal. 415, 419)* .

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B. Actions by Agent Against Principal

18-182 California Points & Authorities § 182.62

§ 182.62 Supporting Contention That Agent May Recover Damages [Civ. Code § 3300] for Principal's Breach of Agency Contract--Principal Interfered With Agent's Exclusive Sales Agency

[1] FORM

[*The following may be combined with the contentions supported by the points and authorities set forth in §§ 182.30 -182.32 and 182.35 -182.36 as appropriate and may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF AGENT MAY RECOVER DAMAGES FROM DEFENDANT PRINCIPAL CAUSED BY DEFENDANT PRINCIPAL'S BREACH OF THE PARTIES' EXCLUSIVE AGENCY SALES CONTRACT BECAUSE AN AGENT UNDER AN EXCLUSIVE AGENCY SALES CONTRACT IS ENTITLED TO THE PROFITS HE OR SHE WOULD HAVE MADE ON SALES IN THE AMOUNT OF THOSE MADE BY THE PRINCIPAL IN VIOLATION OF THE CONTRACT.

Agent May Recover Damages for Breach of Exclusive Agency Contract. The principal's breach of an exclusive sales agency contract entitles the agent to the profits that he or she would have made on sales in the amount of those made by the principal in violation of the contract (*Hacker Pipe & Supply Co. v. Chapman Valve Mfg. Co. (1936) 17 Cal. App. 2d 265, 267-268, 61 P.2d 944*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that an agent may recover damages from a principal who has breached an exclusive sales agency contract by making sales in violation of the contract. This contention may be used, for example, in an action by the agent for breach of contract when the agent alleges that the principal had breached the contract by violating a provision granting the exclusive right to perform some act. For example, a contract granting the agent an exclusive right to sell in a specified territory may be breached when the principal makes direct sales in the territory.

If the existence of the agency is disputed, these points and authorities may be combined with the points and *authorities in §§ 182.30 -182.32*, as appropriate. If the agency is alleged to have arisen because of the principal's ratification, these points and authorities may be combined with the points and *authorities in §§ 182.35 -182.36*, as appropriate.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the agent may recover damages for the principal's breach of an exclusive sales agency contract. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that contractual provisions granted an exclusive sales agency, that the principal made sales in violation of the contract provisions, and the amount of sales made by the principal in violation of the contract.

[3] Discussion of Authorities

[a] Agent May Recover Damages for Breach of Exclusive Agency Contract

Hacker Pipe & Supply Co. v. Chapman Valve Mfg. Co. *(1936) 17 Cal. App. 2d 265, 61 P.2d 944* , was an action for breach of contract by which plaintiff was appointed the exclusive jobber for the products of defendant in the territory of southern California. Plaintiff alleged that defendant made direct sales in the territory, depriving plaintiff of the profits it would have made if it handled the sales as jobber. Defendant admitted the direct sales, but argued that plaintiff was limited to recovering the amount by which the sales made by defendant exceeded the price that plaintiff would have had to pay for the goods sold. The trial court instead computed the profit percentage plaintiff had made on its previous sales and applied this figure to the total amount of direct sales made by defendant, and defendant appealed.

The court of appeal affirmed, holding that the breach of an exclusive sales agency contract entitles the agent to the profits that he or she would have made on sales in the amount of those made by the principal in violation of the contract (*17 Cal. App. 2d 265, 267-268)* . The court held that it was proper for the trial court to assume that plaintiff would have been able to conduct the business of the agency in the usual manner if defendant had not interfered (*17 Cal. App. 2d 265, 268)* . The court refused to accept the argument of defendant that plaintiff suffered no damage if defendant sold at prices that would not have resulted in a profit to plaintiff because such a result would allow a principal to breach an exclusive sales agency contract with impunity by selling in the agent's territory at the prices it charged the agent (*17 Cal. App. 2d 265, 270)* . The court held the finding of the trial court sufficient (that plaintiff could have made defendant's sales) to support the implication that the sales could have been made at a price that would have allowed plaintiff its normal profit margin, and the award of damages made by the trial court was held proper (*17 Cal. App. 2d 265, 272)* .

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B. Actions by Agent Against Principal

18-182 California Points & Authorities § 182.63

§ 182.63 Supporting Contention That Agent Is Entitled to Indemnity From Principal--Agent Held Personally Liable on Contract Undertaken for Principal

[1] FORM

[*The following may be combined with the contentions supported by the points and authorities set forth in §§ 182.30 -182.36 as appropriate and may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [PLAINTIFF *or* DEFENDANT] AGENT IS ENTITLED TO INDEMNITY FROM DEFENDANT PRINCIPAL BECAUSE AN AGENT IS ENTITLED TO INDEMNIFICATION FROM THE PRINCIPAL FOR ANY DAMAGE INCURRED FROM THE PRINCIPAL'S BREACH OF A CONTRACT THAT WAS UNDERTAKEN FOR THE PRINCIPAL, WHILE THE AGENT WAS PURSUING THE INSTRUCTIONS OF THE PRINCIPAL AND ACTING WITHIN THE SCOPE OF THE AGENT'S AUTHORITY.

Agent's Right to Indemnification From Principal. An agent pursuing the instructions of his or her principal and acting within the scope of his or her authority who then becomes personally liable for the performance of the contract made for the principal can look to the principal for indemnity for the damage sustained (*Sunset-Sternau Food Co. v. Bonzi (1964) 60 Cal. 2d 834, 837, 36 Cal. Rptr. 741, 389 P.2d 133* ; *Rimington v. General Accident Group of Ins. Cos. (1962) 205 Cal. App. 2d 394, 397, 23 Cal. Rptr. 40* ; *see Fidelity Mortgage Trustee Service, Inc. v. Ridgegate East Homeowners Assn. (1994) 27 Cal. App. 4th 503, 509-511*).

[2] Comments

CAUTION:

The legal principles set forth in this form are still valid. However, in *Far W. Fin. Corp. v. D & S Co. (1988) 46 Cal. 3d 796, 251 Cal. Rptr. 202, 760 P.2d 399* , the California Supreme Court held that all rights of indemnity except those created by express contractual provisions are subject to comparative principles. Thus, total or partial indemnity may be awarded depending on the facts and circumstances of the case. Further, the indemnitee's indemnity rights are terminated under *Code Civ. Proc. §§ 877(b)* and

877.6(c) by a good-faith settlement between the indemnitor and the plaintiff in the underlying action. All pre-1988 cases finding a right of total indemnity must be considered in light of the principles set forth in *Far West.* For more detailed discussion, see Ch. 115, *Indemnity and Contribution* .

[a] Use of Form

These points and authorities may be submitted in support of the contention that an agent is entitled to indemnification from the principal. The contention may be made by an agent who has been held liable for breach of a contract that he or she entered on behalf of his or her principal while pursuing the instructions of the principal and acting in the scope of his or her authority. The argument may be used in an action by an agent for implied contractual indemnity, or in an agent's cross complaint against his or her principal in the breach of contract action instituted by a third party. The argument may also arise in an action by the agent seeking declaratory relief that the principal must indemnify the agent for any damages awarded against the agent.

If the existence of the agency is disputed, these points and authorities may be combined with the points and *authorities in §§ 182.30 -182.32,* as appropriate. If the extent of an agent's authority is disputed, these points and authorities may be combined with the points and *authorities in §§ 182.33 -182.34,* as appropriate. If the agency or authority is alleged to have arisen because of the principal's ratification, these points and authorities may be combined with the points and *authorities in §§ 182.35 -182.36,* as appropriate.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the agent is entitled to indemnification from the principal because the agent was held personally liable on a contract undertaken for the principal. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing that the contract was entered into on behalf of the principal, at the direction of the principal, and within the scope of the agent's authority.

[b] Related Pleading and Practice Forms

For a form of complaint for use by an agent seeking implied contractual indemnity from his or her principal, see California Forms of Pleading and Practice, Ch. 427, *Principal and Agent* (Matthew Bender). For discussion and forms relating to implied indemnity generally, see California Forms of Pleading and Practice, Ch. 300, *Indemnity and Contribution* (Matthew Bender).

[3] Discussion of Authorities

[a] Agent's Right to Indemnification From Principal

Sunset-Sternau Food Co. v. Bonzi *(1964) 60 Cal. 2d 834, 36 Cal. Rptr. 741, 389 P.2d 133* , was an action for indemnity by plaintiff agent against defendant principal. Plaintiff and defendant had entered into an oral agreement that plaintiff would procure a buyer for defendant's apricot kernels. The agreement provided that plaintiff would act in its own name, which was well known in the field. Plaintiff entered into a written contract to sell kernels to a third party at a price agreed to by defendant. Thereafter, but before the delivery date, the price of apricot kernels rose sharply, and defendant sold the kernels at the higher price and refused to deliver the kernels plaintiff had contracted to deliver. The third party sued plaintiff for breach and obtained a judgment that plaintiff satisfied after an unsuccessful appeal. Plaintiff then instituted the instant action, based on an implied promise of indemnity and reimbursement from defendant principal for plaintiff agent's liability incurred as a result of the performance of the agency agreement. The trial court granted judgment to plaintiff and defendant appealed.

The Supreme Court affirmed, holding at page 837 that an agent who becomes personally liable for the performance of a contract that he or she has undertaken for the principal may normally hold the principal liable for indemnity for damages sustained because of a breach of that contract [relying on *Rimington v. General Accident Group of Ins. Cos. (1962) 205 Cal. App. 2d 394, 23 Cal. Rptr. 40* (discussed *below*)]. The Court did not go into detail in its analysis of this point, but instead concentrated on the main holding of the case, that a principal cannot rely on the equal dignities rule of *Civ. Code § 2309* to prohibit the enforcement of an oral agreement between the principal and the agent (*60 Cal. 2d 834, 842)* . However, the Court did hold that the cause of action does not arise until the agent had actually paid the obligation to the third party (*60 Cal. 2d 834, 843)* .

Rimington v. General Accident Group of Ins. Cos. *(1962) 205 Cal. App. 2d 394, 23 Cal. Rptr. 40* , was a cross complaint for declaratory relief by an agent of cross defendants. A third party had sued cross plaintiff and cross defendants, alleging that cross plaintiff had acted as agent for cross defendants and had agreed to insure the third party's corn crop, with the amount of the policy to be apportioned among cross defendants. The crop was destroyed, and the third party's complaint sought a determination of the rights and liabilities of the parties. Cross plaintiff alleged that he was entitled to indemnification from cross defendants, as principals, for any personal liability that might be imposed on him. Cross defendants' motion to strike the cross complaint was granted, and their demurrer to the cross complaint was sustained without leave to amend. Cross plaintiff appealed from the orders.

The court of appeal reversed, holding that the cross complaint stated a cause of action (*205 Cal. App. 2d 394, 397)* . The court held that an agent pursuing the instructions of his or her principal and acting within the scope of his or her authority who then becomes personally liable for the performance of the contract made for the principal can look to the principal for indemnity for the damage sustained (*205 Cal. App. 2d 394, 397)* . The court held that the cross complaint alleged the existence of an actual controversy supporting an action for declaratory relief. The court held that the issue of possible indemnification was a justiciable controversy, concerning the legal relations and rights arising out of the transaction of the main action (*205 Cal. App. 2d 394, 397)* .

In ***Fidelity Mortgage Trustee Service, Inc. v. Ridgegate East Homeowners Assn.*** *(1994) 27 Cal. App. 4th 503* , a homeowners' association and its property management company hired a foreclosure trustee to foreclose on a lien for unpaid homeowners' fees against a condominium unit. The unit owner brought an action against all three entities for various alleged wrongs committed in the course of the foreclosure. The management company prevailed on summary judgment, and the association and trustee won a complete defense jury verdict at trial. The foreclosure trustee then brought an indemnity action against the association and management company for reimbursement of its costs and attorney's fees incurred in defending the underlying action (*27 Cal. App. 4th 503, 506-507)* .

The trial court summarily adjudicated that there was no right to indemnity for attorney's fees under *Code Civ. Proc. § 1021.6* because the prospective indemnitee (forclosure trustee) had not tendered the defense of the underlying action to the alleged indemnitors (association and management company) [*see Code Civ. Proc. § 1021.6(b)*]. In reversing, the court of appeal found the potential right to indemnity in agency law principles rather than in the statute. It assumed for purposes of the appeal that the trustee was the agent of both indemnitors (*see 27 Cal. App. 4th 503, 508 n.6*). It cited the general agency rule that an agent is entitled to indemnification by its principal for losses incurred by the agent in the execution of the agency [*see* Restatement (Second) of Agency, § 438]. For example, an agent that becomes personally liable for the performance of a contract entered into for its principal is entitled to indemnification by the principal for damages sustained because of the breach of that agreement (*27 Cal. App. 4th 503, 509* , citing *Sunset-Sternau Food Co. v. Bonzi (1964) 60 Cal. 2d 834, 837, 36 Cal. Rptr. 741, 389 P.2d 133* , and *Rimington v. General Accident Group of Ins. Cos. (1962) 205 Cal. App. 2d 394, 397, 23 Cal. Rptr. 40* , discussed *above*).

The court also cited the agency rule that a principal has a duty to its agent, who is not barred by the illegality of his or her conduct, to indemnify the agent for expenses of defending actions by third persons brought because of the agent's authorized conduct [*see* Restatement (Second) of Agency, § 439(d)]. It held that the scope of indemnity recoverable extended to attorney's fees incurred, and that the agent's failure to notify the principal and tender the defense to the

principal meant only that the agent was required to prove that he had made a reasonable defense (*27 Cal. App. 4th 503, 510-511)* .

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B. Actions by Agent Against Principal

18-182 California Points & Authorities § 182.64

§ 182.64 Opposing Contention That Principal May Not Terminate Agency--Power of Agent Is Not Coupled With Interest in Subject of Agency When Agent's Interest Can Be Obtained Only by Exercise of Agency

[1] FORM

[*The following may be combined with the contentions supported by the points and authorities set forth in §§ 182.37 -182.39 as appropriate and may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [DEFENDANT *or* PLAINTIFF] PRINCIPAL MAY TERMINATE THE AGENCY WITH _____ [PLAINTIFF *or* DEFENDANT] AGENT BECAUSE THE POWER OF AN AGENT IS NOT COUPLED WITH AN INTEREST IN THE SUBJECT OF THE AGENCY.

A. Agency Coupled With Interest Is Not Terminable by Principal. [*See § 182.60[1], Paragraph A.*]

B. Requirements for Power Coupled With Interest. For a power to be coupled with an interest so as to be irrevocable there must be a specific, present, and coexisting interest in the subject of the power or agency, independent of the power conferred (*O'Connell v. Superior Court (1935) 2 Cal. 2d 418, 422, 41 P.2d 334* ; *Jay v. Dollarhide (1970) 3 Cal. App. 3d 1001, 1023, 84 Cal. Rptr. 538*).

C. Agency Not Coupled With Interest When Interest Is Gained by Exercise of Agency. The power of an agent is not coupled with an interest in the subject of the agency when the interest can be gained only by an exercise of the power conferred on the agent (*Jay v. Dollarhide (1970) 3 Cal. App. 3d 1001, 1023, 84 Cal. Rptr. 538*).

D. Compensation of Agent Is Not Interest. Monetary compensation does not create a power coupled with an interest that would make the agency irrevocable (*Woolley v. Embassy Suites, Inc. (1991) 227 Cal. App. 3d 1520, 1532, 278 Cal. Rptr. 719*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that a principal may not terminate an agency because the power of an agent is coupled with an interest in the subject of the agency. This argument may be used whenever it is argued that the principal may terminate the agency because an interest that can be gained only by the exercise of the power conferred on the agent is not coupled with an interest. For example, this argument might be raised by the principal in defending an agent's declaratory relief action seeking a declaration that a purported termination by the principal is ineffective. It might also be raised in an action by the principal to quiet title in the subject property as against the agent and/or his or her vendees.

If the existence of the agency is disputed, these points and authorities may be combined with the points and *authorities in §§ 182.37 -182.39*, as appropriate.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the principal may terminate the agency because an interest that can be gained only by the exercise of the power conferred on the agent is not coupled with an interest. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing that the interest is one that can only be gained by the exercise of the power granted the agent. For example, when an attorney is the agent who claims that his or her agency is coupled with an interest in the proceeds of a lawsuit that he or she has been retained to prosecute, counsel should point out that the proceeds can only be obtained through the agent's exercise of the power conferred by the client-principal.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 182.60*.

[b] Related Pleading and Practice Forms

For a form of complaint seeking declaratory relief that an agency is not terminable by the principal because the agency is coupled with an interest, see California Forms of Pleading and Practice, Ch. 427, *Principal and Agent* (Matthew Bender).

[3] Discussion of Authorities

[a] Requirements for Power Coupled With Interest

O'Connell v. Superior Court *(1935) 2 Cal. 2d 418, 41 P.2d 334* , was an application for a writ of mandate compelling the respondent court to grant a motion for substitution of attorneys in a pending action by petitioner. Before the complaint in the action was filed, petitioner and counsel executed a written agreement for the employment of counsel, in which petitioner agreed to pay the attorney one half of all that was collected or recovered by suit or compromise. After a suit was filed, petitioner moved for a substitution of attorneys, but counsel refused to join in a stipulation of substitution and opposed the motion on the ground that the agreement had created an irrevocable agency coupled with an interest. The trial court denied the motion for substitution and this writ proceeding followed.

The Supreme Court granted the writ, holding that the agency was not coupled with an interest and therefore was terminable by the petitioner principal (*2 Cal. 2d 418, 424)* . The Court held that an agent's power is coupled with an interest only when there is a specific, present, and coexisting interest in the subject of the power or agency (*2 Cal. 2d 418, 424)* . The Court held that the agreement at issue did not grant an interest in the proceeds independently of the exercise of the power, because the attorney was not entitled to any proceeds until he had discharged his responsibilities (

2 Cal. 2d 418, 424) .

Jay v. Dollarhide *(1970) 3 Cal. App. 3d 1001, 84 Cal. Rptr. 538* , was an action to quiet title to a parcel of land and to recover damages for trespass to the land. Plaintiff was the administrator of the estate of a person who had conveyed land to the United States under an act of Congress that permitted the owner of land within a forest reservation to convey the land to the United States in exchange for other land. The land that was to be received in exchange, known as in lieu land, was not conveyed to the decedent, and the United States later conveyed the property back to the heirs of the decedent, represented by plaintiff as administrator. Defendants claimed the right to the land through powers of attorney executed by the decedent in favor of an agent who was authorized to convey any in lieu land selected and to select the in lieu land to be obtained. Defendants eventually obtained the powers of attorney, filled in with the description of the original land, and argued that the powers of attorney created an irrevocable agency coupled with an interest in the land. The trial court quieted title to the land in plaintiff's name, and defendants appealed.

The court of appeal affirmed, holding that the powers of attorney executed by the decedent did not survive his death because the power conferred through the powers of attorney was not coupled with an interest in the original parcel of land (*3 Cal. App. 3d 1001, 1023)* . The court held that an agency is coupled with an interest only if the agent has an interest or estate in the subject matter of the agency independently of the power conferred (*3 Cal. App. 3d 1001, 1023)* . The powers of attorney provided that any interest in the land to which they related could only be gained by exercise of the power conferred by the powers of attorney. Thus, the agency was not coupled with an interest and the power was therefore terminated by the death of the principal, even if the power purported to be irrevocable (*3 Cal. App. 3d 1001, 1023)* .

NOTE:

In discussing termination, *Civ. Code § 2356(a)* speaks of the power of an agent coupled with an interest in the subject of the agency. Courts that interpret whether or not agencies are covered by the limitations on termination of powers of agents coupled with an interest often use the term power rather than agency. There appears to be no substantive difference, however, between the terms "power" and "agency" as used in discussions of agencies coupled with interests [*see* *Jay v. Dollarhide (1970) 3 Cal. App. 3d 1001, 1023, 84 Cal. Rptr. 538* (using both terms in discussing tests for agencies coupled with interests)].

[b] Agency Not Coupled With Interest When Interest Is Gained by Exercise of Agency

The facts and procedural background of ***Jay v. Dollarhide*** *(1970) 3 Cal. App. 3d 1001, 84 Cal. Rptr. 538* , are discussed in *§ 182.64[3][a]*. The court held that if an interest to which an agency relates can only be gained by the exercise of the power conferred on the agent, the agent's power is not coupled with an interest (*3 Cal. App. 3d 1001, 1023)* .

[c] Compensation of Agent Is Not Interest

Woolley v. Embassy Suites, Inc. *(1991) 227 Cal. App. 3d 1520, 278 Cal. Rptr. 719* , involved a dispute between the owners of certain hotels (principals) and the corporation (agent) that had entered into a contract with the owners to manage the hotels. The principals terminated the management contract on the ground that the agent had breached the agreement by making expenditures in excess of budget allocations. The management contract provided for binding arbitration to resolve disputes between the parties. Principals brought suit against agent in California seeking damages, rescission, declaratory relief and accounting. Agent responded by filing actions in Texas seeking declaratory and injunctive relief, and demanding arbitration under the contract. A Texas court found the dispute arbitrable. The California court then issued a preliminary injunction enjoining principals from terminating the agency until arbitration was completed.

The court of appeal reversed the award of injunctive relief. It noted the general rule that, except in the case of an agency

coupled with an interest, a principal has the power to revoke an agent's authority at any time before the agent has completed performance [*Civ. Code § 2356(a)(1)*] (*227 Cal. App. 3d 1520, 1529)* . Although the agent cannot prevent the termination of the agency, the agent's remedy for wrongful termination is damages, as in any other breach of contract action (*see § 182.61*). Thus, the arbitration clause was ineffective to compel principals to retain agent (*227 Cal. App. 3d 1520, 1530-1531)* .

The court also rejected agent's argument that the management contract created an agency coupled with an interest. The court noted that for an agency to be coupled with an interest, the agent must have a specific, present, and coexisting beneficial interest in the subject matter of the agency. The agency must be created for the benefit of the agent in order to protect some title or right in the subject of the agency or secure some performance due to the agent. Here, the sole interest of agent in the management contract was a management fee of 5 percent of gross revenue from the hotels. The court held that monetary compensation, in whatever form it may take, does not create a power coupled with an interest that would make the agency irrevocable. As the agent had no present property interest in the hotels, the agency was not irrevocable (*227 Cal. App. 3d 1520, 1532-1533)* .

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18-182 California Points & Authorities § 182.65

§ 182.65 Opposing Contention That Principal May Not Terminate Agency--Power of Agent Is Not Coupled With Interest in Subject of Agency When Interest in Agency Did Not Exist at Time Agency Was Created

[1] FORM

[*The following may be combined with the contentions supported by the points and authorities set forth in §§ 182.37 -182.39 as appropriate and may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [DEFENDANT *or* PLAINTIFF] PRINCIPAL MAY TERMINATE THE AGENCY WITH _____ [PLAINTIFF *or* DEFENDANT] AGENT BECAUSE THE POWER OF AN AGENT IS NOT COUPLED WITH AN INTEREST IN THE SUBJECT OF THE AGENCY, AND THUS IS TERMINATED BY THE DEATH OR INCAPACITY OF, OR REVOCATION BY, THE PRINCIPAL, WHEN THE AGENCY CREATED TO SECURE THE PERFORMANCE OF A DUTY TO THE AGENT OR TO PROTECT A TITLE IN THE AGENT WAS NOT CREATED AT THE SAME TIME THAT THE DUTY OR TITLE WAS CREATED.

A. Agency Coupled With Interest Is Not Terminable by Principal. [*See § 182.60[1], Paragraph A.*]

B. Requirements for Power Coupled With Interest. [*See § 182.64[1], Paragraph B.*]

C. Agency Must Be Created at Same Time as Interest to Be Coupled With Interest. To be coupled with an interest, an agency must be created to secure the performance of a duty to the agent or to protect a title in the agent and must be created at the same time that the duty or title is created (*Becket v. Welton Becket & Assocs. (1974) 39 Cal. App. 3d 815, 820, 114 Cal. Rptr. 531*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a principal may not terminate an

agency because the power of an agent is coupled with an interest in the subject of the agency. This argument may be used whenever it is argued that the principal may terminate an agency because it is not coupled with an interest, since the agency was not created at the same time as the interest in the agent or the duty owed to the agent. This argument may be used by a principal, for example, in defending an agent's action for declaratory relief that a purported termination by the principal is ineffective. This argument may also be used in any action seeking to invalidate an agent's action taken after the agency was terminated by the principal [*see Jay v. Dollarhide (1970) 3 Cal. App. 3d 1001, 1023, 84 Cal. Rptr. 538* (action to quiet title in real property allegedly conveyed by agent)].

If the existence of the agency is disputed, these points and authorities may be combined with the points and *authorities in §§ 182.37 -182.39*, as appropriate.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the principal may terminate the agency because it is not coupled with an interest in the subject of the agency since the interest was not created at the same time as the agency was created. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that the interest was not created at the same time as the agency was created. For example, when an agent has acquired an interest in the subject of the agency after the creation of the agency, counsel should discuss the facts showing the creation of the agency, the agent's acquisition of the interest, and the lapse of time between the creation of the agency and the agent's acquisition of the interest.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 182.60*.

[b] Related Pleading and Practice Forms

For a form of complaint for declaratory relief that an agency is not terminable by the principal on the ground that the agency is coupled with an interest, see California Forms of Pleading and Practice, Ch. 427, *Principal and Agent* (Matthew Bender).

[3] Discussion of Authorities

[a] Agency Must Be Created at Same Time as Interest to Be Coupled With Interest

Becket v. Welton Becket & Assocs. *(1974) 39 Cal. App. 3d 815, 114 Cal. Rptr. 531* , was an action for injunctive relief, damages for breach of contract, and for other relief against the architectural firm at which plaintiff had been employed as an architect for many years. At the death of plaintiff's father, who had been the owner of all defendant's stock, plaintiff was appointed co-executor of the estate and became a member of the board of directors of defendant in his father's place. When plaintiff brought an action against other members of the board, alleging breach of fiduciary duties, corporate waste, and improper usurpation of corporate control, one of the members of the board threatened plaintiff with termination from his employment unless the action was dropped. Plaintiff argued that his employment was coupled with his interest in the firm that he had acquired from his father and could not be terminated by defendant principal. Defendant's demurrer was sustained without leave to amend, and plaintiff appealed the judgment of dismissal.

The court of appeal affirmed, holding that plaintiff's employment was not an agency coupled with an interest in defendant (*39 Cal. App. 3d 815, 820-821)* . The court held that for an agency to be coupled with an interest, the agency must be created to secure the performance of a duty to the agent or to protect a title in the agent, and must be created at the same time that the duty or title is created (*39 Cal. App. 3d 815, 820)* . The court held that, as plaintiff had been employed by defendant before he had an ownership interest in the company, the employment of plaintiff was not an

agency coupled with an interest (*39 Cal. App. 3d 815, 820-821)* .

The court also stated in dictum that an agency may be coupled with an interest even though it was not created at the same time as the interest, if it is created for consideration (*39 Cal. App. 3d 815, 820)* . However, consideration was not an issue in this case, and the court did not elaborate on when an agency created for consideration satisfies the requirements for creating an agency coupled with an interest.

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[Reserved]

§§ 182.66[Reserved]

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C. Actions by Principal Against Agent

18-182 California Points & Authorities § 182.80

§ 182.80 Supporting Contention That Principal May Set Aside Agent's Transaction--Agent Concluded Transaction With Self Without Principal's Knowledge

[1] FORM

[*The following may be combined with the contentions supported by the points and authorities set forth in §§ 182.30 -182.32 and 182.35 -182.36 as appropriate and may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

_____ [PLAINTIFF *or* DEFENDANT] PRINCIPAL MAY SET ASIDE THE TRANSACTION ENTERED INTO BY _____ [DEFENDANT *or* PLAINTIFF] AGENT WITH HIMSELF/HERSELF BECAUSE A PRINCIPAL MAY SET ASIDE AN AGENT'S SELF-DEALING TRANSACTION THAT WAS CONCLUDED WITHOUT THE KNOWLEDGE OF THE PRINCIPAL, DESPITE THE ABSENCE OF ANY FRAUD OR UNFAIRNESS IN THE TRANSACTION.

A. Agent's Duty Toward Principal. When an agent concludes a transaction with himself or herself, the burden is on the agent to show affirmatively that he or she acted in the highest good faith and without concealment (*Batson v. Strehlow (1968) 68 Cal. 2d 662, 675, 68 Cal. Rptr. 589, 441 P.2d 101*).

B. Principal May Set Aside Agent's Transaction With Self. When an agent concludes a transaction with himself or herself without the knowledge of the principal, such a transaction may always be set aside at the option of the principal, despite the absence of any fraud or unfairness in the transaction (*Sands v. Eagle Oil & Refining Co. (1948) 83 Cal. App. 2d 312, 320, 188 P.2d 782* ; *Petray v. First Nat'l Bank (1928) 92 Cal. App 86, 90, 267 P. 711*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a principal may set aside a transaction that the agent entered into on his or her own behalf without the principal's knowledge of the agent's personal interest,

despite the absence of any fraud or unfairness in the transaction. For example, the argument supported by these points and authorities may be used in a principal's action for declaratory relief seeking a declaration that he or she is not bound by a contract because of the agent's personal interest. This argument may also be used as a defense by the principal in an agent's action against the principal to enforce the transaction.

If the existence of the agency is disputed, these points and authorities may be combined with the points and *authorities in §§ 182.30 -182.32*, as appropriate. If the agency is alleged to have arisen because of the principal's ratification, these points and authorities may be combined with the points and *authorities in §§ 182.35* and *182.36*, as appropriate.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that an agent's transaction on his or her own behalf may be set aside by a principal who had no knowledge of the agent's personal interest. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing that the agent entered into the transaction on his or her own behalf, and that the principal did not know of the agent's personal involvement in the transaction.

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 182.86* and *182.87* may be used to oppose the contention supported by these points and authorities.

[c] Related Points and Authorities

For forms of points and authorities for use in declaratory relief actions generally, see Ch. 67, *Declaratory Relief* .

[3] Discussion of Authorities

[a] Agent's Duty Toward Principal

Batson v. Strehlow *(1968) 68 Cal. 2d 662, 68 Cal. Rptr. 589, 441 P.2d 101* , was an action by the executrix of a principal to recover a commission paid to a real estate broker for the sale of a principal's property. Defendant had received a listing published by a bank acting as guardian of the estate of the incompetent principal soliciting bids for a parcel of property. A corporation in which defendant and his wife owned all the stock responded by letter signed by defendant as president of the corporation, offering to purchase the property through defendant as broker, and when the offer turned out to be the highest bid, the bank prepared a document in the form of an offer by the corporation to purchase the property, subject to confirmation by the superior court. The offer was returned signed by defendant as president, and the escrow instructions prepared by the bank provided for a commission to be paid to defendant out of the sale proceeds. This action was brought after the sale to the corporation was confirmed, when plaintiff learned that defendant had purchased the property for himself. A judgment was entered in plaintiff's favor, and defendant appealed.

The Supreme Court affirmed, holding that defendant had violated his fiduciary duties as a real estate agent by failing to disclose fully all of the material facts of the transaction (*68 Cal. 2d 662, 676)* . The Court recognized that once a principal questions the acts done by the agent in the course of the agency, the burden is on the agent to prove that he or she acted with the utmost good faith toward the principal and that prior to the transaction he or she made a full disclosure of all the facts relating to the acts under attack (*68 Cal. 2d 662, 675)* . Thus, the Court held that an agent to sell property who buys the property has the burden to show affirmatively that he or she acted in good faith and without concealment. The Court noted that this rule applies not only to a direct purchase by the agent, but to indirect or collusive sales as well (*68 Cal. 2d 662, 675)* . The Court concluded that defendant had not met his burden of proof because the extent of his interest in the corporation was never disclosed nor was the fact disclosed that the corporation

was not the actual purchaser (*68 Cal. 2d 662, 674-675)* .

[b] Principal May Set Aside Agent's Transaction With Self

Sands v. Eagle Oil & Refining Co. *(1948) 83 Cal. App. 2d 312, 188 P.2d 782* , was an action to recover rent due to plaintiff under a written lease of a gas station. Defendant cross complained for damages and rescission of the lease against the agent who negotiated the lease, arguing that the agent secretly acted on behalf of plaintiff although the agent was also defendant's agent. The rent was to be paid in care of the agent at his home address. When the estimate of the parties as to the amount of gas that would be sold proved to be overly optimistic, the station was closed but the rent continued to be paid until 14 months after the execution of the lease, when defendant stopped paying rent. When defendant contacted plaintiff to obtain a release from the lease, defendant learned that plaintiff did not own the property, and never had, but that the agent owned it himself. The trial court ruled that plaintiff take nothing and pay damages to defendant, and plaintiff appealed.

The court of appeal affirmed, holding that a real estate transaction concluded by an agent on his or her own behalf without the knowledge of the principal is always set aside at the option of the principal (*83 Cal. App. 2d 312, 320)* . The court held that lack of actual fraud, undue advantage for the agent, or injury to the principal, is immaterial; the rule is intended to prevent temptation and the possibility of wrong (*83 Cal. App. 2d 312, 320)* . Only ratification by the principal after full knowledge of all the facts can defeat the right to avoid the transaction (*83 Cal. App. 2d 312, 320)* .

Petray v. First Nat'l Bank *(1928) 92 Cal. App 86, 267 P. 711* , was an action to recover the amount of a bank account that an employee of defendant had taken in his capacity as plaintiff's agent. The agent was authorized to loan the amount in the account on receipt of good security, but the agent loaned the money to himself and gave plaintiff an unsecured note. The trial court entered judgment in favor of defendant, and plaintiff appealed.

The court of appeal affirmed, holding that plaintiff ratified the transaction (*92 Cal. App 86, 90-91)* . The court noted that a transaction by which an agent undertakes to deal with himself or herself in the matter of the agency without the knowledge of the principal is not void but is voidable (*92 Cal. App 86, 90)* .

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C. Actions by Principal Against Agent

18-182 California Points & Authorities § 182.81

§ 182.81 Supporting Contention That Principal May Recover Secret Profits From Agent--Agent's Secret Profits Obtained From Agency Belong to Principal

[1] FORM

[*The following may be combined with the contentions supported by the points and authorities set forth in §§ 182.30 -182.36 as appropriate and may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

PLAINTIFF PRINCIPAL MAY RECOVER SECRET PROFITS MADE BY DEFENDANT AGENT FROM THE SUBJECT OF THE AGENCY, BECAUSE ALL BENEFITS AND ADVANTAGES ACQUIRED BY AN AGENT AS AN OUTGROWTH OF THE AGENCY, EXCLUSIVE OF THE AGENT'S AGREED COMPENSATION, ARE DEEMED TO HAVE BEEN ACQUIRED FOR THE BENEFIT OF THE PRINCIPAL AND ARE RECOVERABLE BY THE PRINCIPAL.

A. Agent May Not Make Secret Profit. An agent may not make any secret profit out of the subject of the agency (*Savage v. Mayer (1949) 33 Cal. 2d 548, 551, 203 P.2d 9*).

B. Principal May Recover Agent's Secret Profit. All benefits and advantages acquired by the agent as an outgrowth of the agency, exclusive of the agent's agreed compensation, are deemed to have been acquired for the benefit of the principal, and the principal may recover such benefits in an appropriate action (*Savage v. Mayer (1949) 33 Cal. 2d 548, 551, 203 P.2d 9*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the principal may recover from his or her agent all secret profits acquired by the agent as an outgrowth of the agency. It appears that such an argument may be raised by the principal in either an action for money had and received or in an action for fraud [*see Crogan v. Metz (1956) 47 Cal. 2d 398, 404, 303 P.2d 1029* (money had and received); *Bate v. Marsteller (1965) 232 Cal. App. 2d 605,*

616-617, 43 Cal. Rptr. 149 (fraud)]. Counsel should note that in an action for money had and received, any damages that would be recoverable in a tort action are waived by the pleading of a common count for money had and received [*Crogan v. Metz (1956) 47 Cal. 2d 398, 404, 303 P.2d 1029]* . A principal may also recover secret profits made by an agent in an action for an accounting [*see Kritzer v. Lancaster (1950) 96 Cal. App. 2d 1, 7, 214 P.2d 407]* .

If the existence of the agency is disputed, these points and authorities may be combined with the points and *authorities in §§ 182.30 -182.32*, as appropriate. If the extent of an agent's authority is disputed, these points and authorities may be combined with the points and *authorities in §§ 182.33* and *182.34*, as appropriate. If the agency or authority is alleged to have arisen because of the principal's ratification, these points and authorities may be combined with the points and *authorities in §§ 182.35* and *182.36*, as appropriate.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a principal may recover from the agent all secret profits acquired by the agent from the subject of the agency. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing that the agent acquired profits without the knowledge of the principal, and that the profits were acquired as an outgrowth of the agency.

[b] Related Points and Authorities

For forms of points and authorities supporting and opposing the contention that an owner of real estate may recover secret profits obtained by a real estate broker, see Ch. 31, *Brokers and Salespersons* .

[3] Discussion of Authorities

[a] Agent May Not Make Secret Profit

In ***Savage v. Mayer*** *(1949) 33 Cal. 2d 548, 203 P.2d 9* , plaintiff principal sued to recover profits made by defendant agent in purchases of stock made on plaintiff's behalf. Defendant agent offered to purchase stock for plaintiff principal and for himself, in conjunction with another's purchases, and thereby acquire control of the company. Plaintiff agreed, and defendant eventually bought 9,000 shares at what defendant represented as a price of $20 per share. In fact, defendant had purchased the stock from the other prospective partner at $17 per share, and kept the difference. Plaintiff sued for the return of defendant's secret profits. The trial court found that defendant had been plaintiff's agent and that defendant had fraudulently misrepresented the nature of the transaction to plaintiff, and awarded judgment in the amount of defendant's profit. Defendant appealed, contending that the damages should have been limited by *Civ. Code § 3343*, which limits the damages recoverable for fraud to the difference between the actual value of that which the defrauded party parted with and the actual value of what was received. Defendant argued that as no evidence of the value of the stock was introduced, no damages should have been awarded.

The Supreme Court affirmed the judgment, holding that *Civ. Code § 3343* does not limit the recovery of an agent's secret profits because the principal's recovery does not depend on any deceit of the agent (*33 Cal. 2d 548, 551)* . The Court held that an agent is not permitted to make any secret profit out of the subject of the agency; all benefits and advantages acquired by the agent as an outgrowth of the agency, except for the agent's agreed compensation, are deemed to have been acquired for the benefit of the principal (*33 Cal. 2d 548, 551)* . The Court based its holding on the implied promise by one in the capacity of agent to pay monies received to the principal on demand and noted that the principal's right to recover is based on the duties incident to the agency relationship, not the deceit of the agent (*33 Cal. 2d 548, 551)* . The Court held that *Civ. Code § 3343*, defining the damages recoverable by one defrauded in the purchase, sale, or exchange of property, was not applicable in an action to recover secret profits because no fraud is

necessary for a case of action to exist in favor of the principal (*33 Cal. 2d 548, 551)* .

[b] Principal May Recover Agent's Secret Profit

The facts and procedural background of ***Savage v. Mayer*** *(1949) 33 Cal. 2d 548, 203 P.2d 9* , are discussed in *§ 182.81[3][a]*. The Court held that a principal is entitled to recover all benefits and advantages acquired by the agent as an outgrowth of the agency, exclusive of the agent's agreed compensation (*33 Cal. 2d 548, 551)* .

[4] Additional Authorities

[a] Principal May Recover Agent's Secret Profit

Crogan v. Metz (1956) 47 Cal. 2d 398, 303 P.2d 1029 , arose from a three-way exchange of property arranged by defendant real estate agent in which plaintiff paid $115,000 for a property that its owner had asked $100,000 for, but that defendant represented was firmly listed at $115,000 so defendant would be able to receive a commission on the exchange. When plaintiff principal discovered these facts, she sued for the return of the $15,000 profit, and the trial court granted the relief. The Supreme Court affirmed, holding that an agent's secret profits may be recovered by a common count for money had and received maintained by the principal, but that such an action waives any tort damages that plaintiff might have been entitled to recover (*47 Cal. 2d 398, 404)* .

Store of Happiness v. Carmona & Allen (1957) 152 Cal. App. 2d 266, 312 P.2d 1104 , was an action in assumpsit seeking the return of secret profits retained by defendant agent during the course of its agency relationship with plaintiff principal. Defendant had been retained to procure television advertising time for plaintiff, and it did so, but did not pass on to plaintiff a frequency discount that the television station gave defendant. The court of appeal affirmed a judgment for plaintiff, holding that a principal is entitled to recover any secret profit made by the agent in the course of the agency, even though the agent quotes a flat price for a service and the principal agrees to pay that price. The court based its conclusion on the basic duty of loyalty owed by an agent to his or her principal (*152 Cal. App. 2d 266, 272)* .

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CHAPTER 182 PRINCIPAL AND AGENT
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C. Actions by Principal Against Agent

18-182 California Points & Authorities § 182.82

§ 182.82 Supporting Contention That Principal Is Entitled to Accounting From Agent--Agent Liable to Principal for Undetermined Amounts Received in Fiduciary Capacity [and Agent Has Burden of Proving Proper Disposal of Property Received for Principal]

[1] FORM

[*The following may be combined with the contentions supported by the points and authorities set forth in §§ 182.30 -182.36 as appropriate and may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

PLAINTIFF PRINCIPAL IS ENTITLED TO AN ACCOUNTING FROM DEFENDANT AGENT BECAUSE AN AGENT MUST ACCOUNT TO THE PRINCIPAL WHEN THE AGENT HAS ACTED IN A FIDUCIARY CAPACITY AND HAS BECOME LIABLE TO THE PRINCIPAL FOR AMOUNTS THAT CANNOT BE DETERMINED WITHOUT AN ACCOUNTING, [AND AN AGENT HAS THE BURDEN IN AN ACCOUNTING ACTION OF PROVING THAT MONEY OR PROPERTY RECEIVED FOR THE PRINCIPAL WAS PAID TO THE PRINCIPAL OR DISPOSED OF IN ACCORDANCE WITH THE AGENT'S AUTHORITY].

A. Agent Must Account to Principal. An agent must account to the principal when the agent has acted in a fiduciary capacity and has become liable to the principal for amounts that cannot be determined without an accounting, (*San Pedro Lumber Co. v. Reynolds (1896) 111 Cal. 588, 595, 44 P. 309*).

[*Optional*] **B. Agent's Burden In Accounting Action.** An agent has the burden in an accounting action of proving that he or she paid to the principal or otherwise properly disposed of the money or other thing that he or she is proved to have received for the principal (*Kennard v. Glick (1960) 183 Cal. App. 2d 246, 251, 7 Cal. Rptr. 88*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that an agent must account to the principal when the agent has acted in a fiduciary capacity and has become liable to the principal for amounts that cannot be

determined without an accounting. When appropriate, optional Paragraph B of this contention may be used to support the contention that the agent has the burden of proving that he or she paid to the principal or otherwise properly disposed of money or other things that the agent received for the principal. This contentions may be used, for example, in an accounting action by a principal against his or her agent when the agent admits responsibility for some, but not all, of the funds claimed due.

If the existence of the agency is disputed, these points and authorities may be combined with the points and *authorities in §§ 182.30 -182.32*, as appropriate. If the extent of an agent's authority is disputed, these points and authorities may be combined with the points and *authorities in §§ 182.33* and *182.34*, as appropriate. If the agency or authority is alleged to have arisen because of the principal's ratification, these points and authorities may be combined with the points and *authorities in §§ 182.35* and *182.36*, as appropriate.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that an agent must account to his or her principal. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that an unspecified amount of the money or other things came into the hands of the agent in the course of the agency, and that the agent has failed to account for the money or things.

[b] Related Pleading and Practice Forms

For forms of complaints for accounting actions generally, see California Forms of Pleading and Practice, Ch. 7, *Accounting, Action for* (Matthew Bender). For a complaint for an accounting action between a principal and an agent, see California Forms of Pleading and Practice, Ch. 427, *Principal and Agent* (Matthew Bender).

[c] Related Points and Authorities

For points and authorities for use in accounting actions generally, see Ch. 12, *Accounting* .

[3] Discussion of Authorities

[a] Agent Must Account to Principal

San Pedro Lumber Co. v. Reynolds *(1896) 111 Cal. 588, 44 P. 309* , was an action to foreclose a lien on stock pledged as security by defendant agent in an amount to be determined after an accounting against defendant. Plaintiff principal alleged that defendant agent had received considerable sums of money for the use and benefit of plaintiff that defendant did not account for or pay over to plaintiff, and that the amount of the funds not accounted for were unknown but believed to be $65,000. The trial court entered judgment for plaintiff, and defendant appealed, claiming that its demurrer to the complaint should have been sustained.

The Supreme Court affirmed the judgment, holding that an agent who has acted in a fiduciary capacity and who has become liable to the principal in amounts that cannot be determined without an accounting must account to the principal (*111 Cal. 588, 595)* . The Court held that the complaint was sufficient in that it alleged that defendant acted in a fiduciary capacity as plaintiff's agent, and that by defendant's misconduct he caused losses and became liable to plaintiff in an amount that could not be determined without an accounting (*111 Cal. 588, 595)* . The court also held that the fiduciary nature of the agency relationship brought the accounting action within the equitable jurisdiction of the court (*111 Cal. 588, 596)* .

[b] Agent's Burden in Accounting Action

Kennard v. Glick *(1960) 183 Cal. App. 2d 246, 7 Cal. Rptr. 88* , was an action by the owners of a bird store seeking an accounting from defendant, who had acted as their agent in managing the business. Defendant admitted depositing $452 in checks made out to the store in his own account, and argued that no proof of any other amount could be sustained. An accountant retained by the parties concluded that in the period in which defendant was in charge of the business, the amount available for deposit exceeded the amount actually deposited by defendant by over $4,500, although the books were "a mess" and the exact figure was incapable of exact determination. Judgment was entered in plaintiffs' favor in that amount, and defendant appealed.

The court of appeal affirmed, rejecting defendant's contention that the burden was on plaintiffs to establish the amount that defendant misappropriated (*183 Cal. App. 2d 246, 250)* . Relying on the Restatement 2nd of Agency, §§ 382 and 399, the court held that an agent not only has the duty to state the amount due to the principal, but also to keep an accurate record of the persons involved, of the dates and amounts of things received, and of payments made. The court further held that if the principal proves or the agent admits that the agent has come into possession of money or any other thing for the principal, the agent has the burden of proving that he or she has paid it to the principal or disposed of it in accordance with his or her authority (*183 Cal. App. 2d 246, 251)* . The court held that defendant did not sustain this burden, and that substantial evidence supported the judgment (*183 Cal. App. 2d 246, 254)* .

[4] Additional Authorities

[a] Agent Must Account to Principal

In *Whann v. Doell (1923) 192 Cal. 680, 221 P. 899* , plaintiff sought an accounting from defendant, plaintiff's partner in an enterprise, and the trial court entered a judgment for plaintiff distributing to her one half of the partnership's profits. The Supreme Court affirmed, holding that the complaint was sufficient to compel an accounting in that it alleged the existence of a relationship that requires an accounting and that some balance was due plaintiff (*192 Cal. 680, 684)* .

In *Mendoza v. Continental Sales Co. (2006) 140 Cal. App. 4th 1395* , an agricultural producer engaged a commission merchant that, in turn, hired selling agents on re-consignment. Those agents converted some of the proceeds that belonged to the producer, and the producer sued those agents for conversion on a theory of subagency and breach of an agent's (the commission merchant's) fiduciary duty. The court concluded that the ruling in *Fischer v. Machado (1996) 50 Cal. App. 4th 1069* , below, should be extended to subagents that are engaged by a commission merchant pursuant to authority in the commission merchant's contract with a producer. Thus, the subagents could be liable, to the same extent as the commission merchant, for conversion of sale proceeds (*140 Cal. App. 4th 1395, 1404-1405*).

In *Fischer v. Machado (1996) 50 Cal. App. 4th 1069, 58 Cal. Rptr. 2d 213* , plaintiff farmers signed an agreement that defendants would act as sales agent for plaintiff's small fruit packing company. The agent sold plaintiffs' fruit and placed the proceeds into an account that was used for its company expenses. The agent then filed for bankruptcy and the farmers were never paid. The farmers filed an action based on alter ego and conversion. The trial court found for plaintiffs and the agents appealed. Defendants contended that they could not have converted the funds because plaintiffs were not entitled to exercise dominion and control over any specific funds. The court of appeals held that because defendants did not dispute their agency or the fact that they received the proceeds from plaintiffs' consigned farm products and commingled the funds with their general corporate account, there was sufficient evidence to support the trial court's finding of conversion, which was predicated on fundamental principles of conversion and agency (*50 Cal. App. 4th 1069, 1073-1074)* . The court held further that federal and state law governing commodities and agricultural products did not preclude the common law action for conversion (*50 Cal. App. 4th 1069, 1074-1075)* .

Kritzer v. Lancaster (1950) 96 Cal. App. 2d 1, 214 P.2d 407 , was an action alleging that defendant stockbroker had agreed to invest plaintiff's funds in a safe manner, but in fact had invested them in speculative ventures and had made secret profits therefrom while representing to plaintiff that losses had resulted from the investments. Plaintiff appealed a

judgment of dismissal entered after defendant's demurrer was sustained, and the court of appeal reversed. The court held that plaintiff's complaint essentially alleged the existence of a confidential agency relationship, in which defendant would invest in sound securities, and a loss the amount of which could be determined only by an accounting. The court held that these allegations were sufficient to support a cause of action for an accounting (*96 Cal. App. 2d 1, 7)* .

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18-182 California Points & Authorities § 182.83

§ 182.83 Supporting Contention That Principal May Recover Tort Damages [Civ. Code § 3333] for Agent's Breach of Fiduciary Duty--Agent Did Not Use Reasonable Care in Carrying Out Agency

[1] FORM

[*The following may be combined with the contentions supported by the points and authorities set forth in §§ 182.30 -182.32, 182.35, and 182.36 as appropriate and may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

PLAINTIFF PRINCIPAL MAY RECOVER TORT DAMAGES FROM DEFENDANT AGENT FOR BREACH OF FIDUCIARY DUTY BECAUSE AN AGENT WHO DOES NOT EXERCISE REASONABLE CARE, SKILL, AND DILIGENCE IS LIABLE FOR ANY LOSSES SUSTAINED BY THE PRINCIPAL AS THE RESULT OF THE AGENT'S NEGLIGENCE OR BREACH OF DUTY.

A. Agent's Fiduciary Duty Toward Principal. An agent must use reasonable care, skill, and diligence in the performance of the object of the agency (*Pollack v. Lytle (1981) 120 Cal. App. 3d 931, 940, 175 Cal. Rptr. 81*).

B. Agent Is Liable for Breach of Fiduciary Duty. A principal may recover damages for an agent's breach of the fiduciary duty to use reasonable care, skill, and diligence that will compensate the principal for all the detriment proximately caused thereby (*Civ. Code § 3333*; *Pollack v. Lytle (1981) 120 Cal. App. 3d 931, 941, 175 Cal. Rptr. 81* ; *Timmsen v. Forest E. Olson, Inc. (1970) 6 Cal. App. 3d 860, 871, 86 Cal. Rptr. 359*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a principal may recover damages from an agent for breach of fiduciary duty when the agent has failed to use reasonable care, skill, and diligence in the performance of the object of the agency. This argument may be used, for example, in an action by the principal after the agent's act or omission has caused the principal damage and may also be used in a cross complaint to an agent's action

for compensation from the principal. If the existence of the agency is disputed, these points and authorities may be combined with the points and *authorities in §§ 182.30 -182.32*, as appropriate. If the agency is alleged to have arisen because of the principal's ratification, these points and authorities may be combined with the points and *authorities in §§ 182.35* and *182.36*, as appropriate.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a principal may recover damages for an agent's breach of fiduciary duty in failing to use reasonable care, skill, and diligence in performing the object of the agency. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing that defendant agent did not use reasonable care, skill, and diligence in performing the object of the agency and facts showing the principal's damages caused by the agent's breach.

[b] Related Pleading and Practice Forms

For discussion and forms relating to causes of action for negligence generally, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[3] Discussion of Authorities

[a] Agent's Fiduciary Duty Toward Principal

The facts and procedural background of ***Pollack v. Lytle*** *(1981) 120 Cal. App. 3d 931, 175 Cal. Rptr. 81* , are discussed in *§ 182.31[3][a]*. The court held that an agent is a fiduciary with the same obligations of faithful service as a trustee, including the duty to use reasonable care, skill, and diligence in the performance of the object of the agency (*120 Cal. App. 3d 931, 940)* . The court held that plaintiff's complaint alleged a breach of this duty by alleging that defendant, who claimed to have experience in the area of medical malpractice actions, negligently performed his duties to plaintiff's damage (*120 Cal. App. 3d 931, 940)* .

Pollack was decided under former Civ. Code § 2322(3), which provided that an agent's authority did not include the authority to do an act that a trustee would be forbidden to do by *any of the laws* governing trustee obligations, including the law requiring a trustee to use at least ordinary care and diligence in the execution of his or her trust [*see* former Civ. Code § 2322(3); *see also* former Civ. Code § 2259]. Legislation amending former Civ. Code § 2322(3) has altered the statutory application of trust law to agents [*see* Stats. 1986 ch. 820, § 9; Stats. 1988 ch. 113, § 5]. Under *Civ. Code § 2322(c)*, the successor of former Civ. Code § 2322(3), an agent's authority does not include the authority to violate a duty to which a trustee is subject under *Prob. Code §§ 16002* (duty of loyalty), 16004 (duty to avoid conflict of interest), 16005 (duty not to undertake adverse trust), or 16009 (duty to keep trust property separate and identified) [*see Civ. Code § 2322(c)*]. Not listed in *Civ. Code § 2322(c)* is *Prob. Code § 16040*, which governs a trustee's general standard of care and diligence; consequently, it would appear that there is no longer direct statutory authority for the proposition that an agent must use the ordinary care and diligence required of a trustee. Nevertheless, the amendment of *Civ. Code § 2322* would not appear to invalidate the rule in *Pollack* that an agent must use reasonable care, skill, and diligence in the performance of the object of an agency.

CAUTION:

Although the general agency principles articulated by the court of appeal in *Pollack v. Lytle (1981) 120 Cal. App. 3d 931, 175 Cal. Rptr. 81* , are probably still valid, the *Supreme Court in Beck v. Wecht (2002) 28 Cal. 4th 289, 297-298, 121 Cal. Rptr. 2d 384, 48 P.3d 417* , overruled *Pollack* to the extent that it had held that one attorney may sue another attorney for breach of fiduciary duty for actions taken by the latter during joint representation of a client that reduce or eliminate the fees that the former would have received from the underlying representation.

[b] Agent Is Liable for Breach of Fiduciary Duty

The facts and procedural background of ***Pollack v. Lytle*** *(1981) 120 Cal. App. 3d 931, 175 Cal. Rptr. 81* , are discussed in *§ 182.31[3][a]*. The court held that an agent is a fiduciary with the same obligations of faithful service as a trustee, including the duty to use reasonable care, skill, and diligence in the performance of the object of the agency (*120 Cal. App. 3d 931, 940)* . The court also held that the breach of a fiduciary duty is tortious, entitling the principal to recover the damages defined in *Civ. Code § 3333* (*120 Cal. App. 3d 931, 941)* .

Former Civ. Code § 2322(3) (applying duties of trustee to agents), under which *Pollack* was decided, was amended in 1986 and 1988 [*see* Stats. 1986 ch. 820, Stats. § 9; 1988 ch. 113, § 5]. These amendments apparently would not invalidate the general rule that an agent has a duty to use reasonable care, skill, and diligence in the performance of the object of the agency [*see § 182.83[3][a]*].

CAUTION:

Although the general agency principles articulated by the court of appeal in *Pollack v. Lytle (1981) 120 Cal. App. 3d 931, 175 Cal. Rptr. 81* , are probably still valid, the *Supreme Court in Beck v. Wecht (2002) 28 Cal. 4th 289, 297-298, 121 Cal. Rptr. 2d 384, 48 P.3d 417* , overruled *Pollack* to the extent that it had held that one attorney may sue another attorney for breach of fiduciary duty for actions taken by the latter during joint representation of a client that reduce or eliminate the fees that the former would have received from the underlying representation.

In ***Timmsen v. Forest E. Olson, Inc.*** *(1970) 6 Cal. App. 3d 860, 86 Cal. Rptr. 359* , plaintiff principals sued a real estate agent for damages suffered as a result of defendant's alleged negligence in setting up a sale of plaintiffs' house. Plaintiff principals were a married couple in their sixties and inexperienced in real estate matters, who went to defendant agent's office to see about selling their home. An employee of defendant prepared a listing agreement that committed plaintiffs "to subordination," of which neither the employee nor plaintiffs knew the meaning. A party offered to buy the house on terms very favorable to the buyer and detrimental to plaintiffs' interests. Defendant's employees pressed plaintiffs to accept the offer, brushing aside their concerns about the subordination clause with representations that they had bound themselves to the provision by their listing, and convinced plaintiffs to submit a counteroffer that merely increased the selling price. The buyer accepted the counteroffer, but plaintiffs refused to sign the escrow instructions on the advice of an attorney they had consulted. The buyer obtained a judgment decreeing that the buyer was entitled to specific performance of the sale agreement, but settled for a cash payment. Plaintiffs then brought the instant action to recover from the agents the payment made to the buyer, attorneys' fees in the specific performance action, and damages for anxieties, nervousness, embarrassment, and mental strain. Plaintiffs appealed from the judgment of nonsuit entered in favor of defendants.

The court of appeal reversed, holding that plaintiffs' opening statement and the inferences deducible therefrom would have been sufficient to support a judgment in plaintiffs' favor, so a nonsuit was improper (*6 Cal. App. 3d 860, 872)* . The court held that an agent who violates his or her duty to use reasonable care, skill, and diligence is liable for any damages that the principal may sustain as the result of the agent's negligence or breach of duty (*6 Cal. App. 3d 860, 871)* . The court held that plaintiffs may recover the damages that are the natural and proximate result of the negligence, and that the measure of damages is the loss or injury actually sustained by the principal as the result of the negligence (*6 Cal. App. 3d 860, 871)* . The court pointed out that an agent may be liable to his or her principal for assuming a position adverse to the principal, failing to disclose material facts to the principal, or for negligence in carrying out the agency, and that, depending on the findings of fact reached by the trial court, a judgment for plaintiffs on one of those theories was possible (*6 Cal. App. 3d 860, 871-872)* .

[4] Additional Authorities

[a] Agent Is Liable for Breach of Fiduciary Duty

In *Michelson v. Hamada (1994) 29 Cal. App. 4th 1566, 36 Cal. Rptr. 2d 343* , plaintiff, an orthopedic surgeon, contracted with defendant's professional corporation (another orthopedic surgeon) for billing and collection services, in addition to office space. Defendant was to receive all fees payable to plaintiff, keep full and accurate records and books of accounts showing plaintiff's billings and collections, deduct fees required to be made to defendant under the agreement, and remit the balance to plaintiff. After a number of years, plaintiff learned that he had not received the income due him and that he had been overcharged in other matters. He sued defendant for breach of contract, breach of fiduciary duty, and fraud (*29 Cal. App. 4th 1566, 1574-1579)* .

The court of appeal upheld the trial court's denial of defendant's motion for nonsuit, and the jury's verdict with respect to the cause of action for breach of fiduciary duty. The court found that the relationship between the parties constituted an agency, in which defendant represented plaintiff in his relationship with third persons, his patients. As such, defendant owed a fiduciary duty to plaintiff, the breach of which supported both an award of compensatory damages under *Civ. Code § 3333* and punitive damages (*29 Cal. App. 4th 1566, 1579-1582)* .

In *Cecka v. Beckman & Co. (1972) 28 Cal. App. 3d 5, 104 Cal. Rptr. 374* , plaintiff sued to recover losses sustained as a result of the negligence of defendant agent in a commodities transaction. The negligence allegedly consisted of the agent's failure to discover that a commodities transaction was larger than plaintiff's authorization, resulting in a loss to plaintiff when plaintiff did not advance additional money demanded by defendant and defendant sold the commodities contract at a loss. The court held that the negligence of an agent in following the instructions of the principal may lead to a cause of action in favor of the principal against the agent (*28 Cal. App. 3d 5, 13)* . The court held that the judgment was sustainable on the ground that defendant was negligent in not knowing of the changes in weight and price of the commodities contract and that the negligence was the cause of plaintiff's loss (*28 Cal. App. 3d 5, 13-14)* .

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18-182 California Points & Authorities § 182.84

§ 182.84 Supporting Contention That Principal May Recover Tort Damages [Civ. Code § 3333] for Agent's Breach of Fiduciary Duty--Failure to Disclose Material Facts to Principal

[1] FORM

[*The following may be combined with the contentions supported by the points and authorities set forth in §§ 182.30 -182.32, 182.35, and 182.36 as appropriate and may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

PLAINTIFF PRINCIPAL MAY RECOVER TORT DAMAGES FOR BREACH OF FIDUCIARY DUTY FROM DEFENDANT AGENT BECAUSE AN AGENT HAS THE DUTY TO FULLY DISCLOSE ALL MATERIAL FACTS CONCERNING A TRANSACTION THAT MIGHT AFFECT THE PRINCIPAL'S DECISION AND IS LIABLE FOR DAMAGES FOR THE FAILURE TO DISCLOSE.

A. Agent's Fiduciary Duty Toward Principal. [*See § 182.83[1], Paragraph A.*]

B. Agent Liable for Failure to Disclose Material Facts to Principal. An agent must make the fullest disclosure of all material facts that might affect his or her principal's decision making and a principal may recover tort damages in the amount that will compensate for all the detriment proximately caused by the agent's breach of fiduciary duty (*Civ. Code § 3333*; *Batson v. Strehlow (1968) 68 Cal. 2d 662, 675, 68 Cal. Rptr. 589, 441 P.2d 101* ; *Pollack v. Lytle (1981) 120 Cal. App. 3d 931, 940-941, 175 Cal. Rptr. 81*).

[*Optional*] **C. Agent's Burden of Proof.** When the acts of an agent have been questioned by his or her principal and the fiduciary relationship has been established, the burden is cast on the agent to prove that he or she acted with the utmost good faith toward the principal and that he or she made a full disclosure prior to the transaction of all the facts relating to the transaction under attack (*Timmsen v. Forest E. Olson, Inc. (1970) 6 Cal. App. 3d 860, 871, 86 Cal. Rptr. 359*).

[*Optional*] **D. Disclosure Duty Applies to Gratuitous Agents.** The rule requiring disclosure applies to gratuitous

agents as well as compensated agents (*St. James Armenian Church of L.A. v. Kurkjian (1975) 47 Cal. App. 3d 547, 551, 121 Cal. Rptr. 214*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a principal may recover tort damages for an agent's breach of his or her fiduciary duty toward the principal by failing to disclose a material fact concerning a transaction that might have affected the principal's decision making. This argument may be used, for example, in an action for damages by the principal after the agent's failure to disclose has resulted in damages to the principal. This argument may also be used in a cross complaint to the agent's action for compensation from the principal. If the existence of the agency is disputed, these points and authorities may be combined with the points and *authorities in §§ 182.30 -182.32*, as appropriate. If the agency is alleged to have arisen because of the principal's ratification, these points and authorities may be combined with the points and *authorities in §§ 182.35* and *182.36*, as appropriate.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a principal may recover tort damages because an agent failed to disclose a material fact or facts that might have affected the principal's decision making in a transaction in which the agent was involved. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that material facts were not disclosed by the agent and the potential relevance of those facts to the decision made by the principal. Counsel should also discuss facts showing the lack of total disclosure if some, but not all, facts were disclosed to the principal.

[3] Discussion of Authorities

[a] Agent Liable for Failure to Disclose Material Facts to Principal

The facts and procedural background of ***Batson v. Strehlow*** *(1968) 68 Cal. 2d 662, 68 Cal. Rptr. 589, 441 P.2d 101* , are discussed in *§ 182.80[3][a]*. The court held that defendant agent violated his fiduciary duty to plaintiff by not fully disclosing the extent of his interest in the corporation that purchased plaintiff's property and the fact that the corporation was not furnishing any part of the consideration for the property. The court held that plaintiff was entitled to recover the amount of the commission paid to defendant, which was the only relief sought by plaintiff (*68 Cal. App. 2d 657)* .

The facts and procedural background of ***Pollack v. Lytle*** *(1981) 120 Cal. App. 3d 931, 175 Cal. Rptr. 81* , are discussed in *§ 182.31[3][a]*. The court held that an agent has a duty to make the fullest disclosure of all material facts that might affect the principal's decision making. The court held that a principal who proves that his or her agent breaches the duty of disclosure may recover damages under *Civ. Code § 3333* in the amount that will compensate for all the detriment proximately caused thereby (*120 Cal. App. 3d 931, 941)* .

CAUTION:

Although the general agency principles articulated by the court of appeal in *Pollack v. Lytle (1981) 120 Cal. App. 3d 931, 175 Cal. Rptr. 81* , are probably still valid, the *Supreme Court in Beck v. Wecht (2002) 28 Cal. 4th 289, 297-298, 121 Cal. Rptr. 2d 384, 48 P.3d 417* , overruled *Pollack* to the extent that it had held that one attorney may sue another attorney for breach of fiduciary duty for actions taken by the latter during joint representation of a client that reduce or eliminate the fees that the former would have received from the underlying representation.

[b] Agent's Burden of Proof

The facts and procedural background of ***Timmsen v. Forest E. Olson, Inc.*** *(1970) 6 Cal. App. 3d 860, 86 Cal. Rptr. 359* , are discussed in *§ 182.83[3][b]*. The court of appeal, quoting from *Bate v. Marsteller (1959) 175 Cal. App. 2d 573, 581, 346 P.2d 903* , held that when the acts of the agent have been questioned by the principal and the fiduciary relationship has been established, the burden is on the agent to prove that he or she acted with the utmost good faith toward the principal and that he or she made a full disclosure of all facts relating to the transaction under attack prior to the transaction (*6 Cal. App. 3d 860, 871)* . The court held that the facts presented by plaintiffs' opening statement were sufficient standing alone to support a judgment in their favor and therefore precluded a nonsuit against plaintiffs (*6 Cal. App. 3d 860, 872)* .

[c] Disclosure Duty Applies to Gratuitous Agents

In ***St. James Armenian Church of L.A. v. Kurkjian*** *(1975) 47 Cal. App. 3d 547, 121 Cal. Rptr. 214* , plaintiff principal sued to recover the amount of secret commissions made on two property sales by a friend of defendant agent. Plaintiff had owned property that it wished to sell, and defendant was chairman of a committee to advise plaintiff concerning the sale and the acquisition of new property. A friend of defendant, a licensed broker, assisted defendant in negotiations with the ultimate purchaser of the property and its broker. The friend obtained a commission on the two transactions. Defendant did not inform plaintiff of either commission agreement, misrepresenting that his friend had acted without compensation. When plaintiff learned of the commissions, it instituted the instant action to recover from defendant the commissions paid. The trial court granted judgment for plaintiff, and defendant appealed.

The court of appeal affirmed, holding that substantial evidence supported the conclusion of the trial court that defendant had breached the fiduciary duty of disclosure (*47 Cal. App. 3d 547, 551)* . The court held that the rule requiring disclosure of all material facts applies to gratuitous agents as well as compensated agents (*47 Cal. App. 3d 547, 552)* . The court also rejected defendant's contention that he could not be held liable because he did not receive any profit. The court held that when a fiduciary causes secret profits to flow to a third party in breach of the duty of disclosure, the fiduciary may be held liable for those profits even though he or she did not personally receive any part of them (*47 Cal. App. 3d 547, 553)* .

[4] Additional Authorities

[a] Agent Must Disclose Material Facts to Principal

In *Rookard v. Mexicoach (9th Cir. 1982) 680 F.2d 1257* , plaintiffs were injured in a bus accident in Mexico and sought to hold defendant, the California travel agent that sold them their tickets, liable for their injuries on the ground that defendant had not warned them of the dangers of bus travel in Mexico. The trial court granted summary judgment for defendant, but the court of appeal reversed. Applying California law, the appellate panel held that an agent has the duty to disclose to his or her principal all material facts concerning the transaction in question that might affect the principal's decision (*680 F.2d 1257, 1262)* . The court held that a triable issue of fact existed as to whether or not defendant had acted as plaintiffs' agent, and that if an agency was found, defendant would have had the duty to warn plaintiffs of any dangers known to defendant and could be liable for damages caused by the breach of that duty (*680 F.2d 1257, 1261-1262)* .

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18-182 California Points & Authorities § 182.85

§ 182.85 Supporting Contention That Principal Is Entitled to Indemnity From Agent--Principal Held Liable for Agent's Tort Solely Because of Agency Relationship [Civ. Code § 2338] Is Entitled to Indemnity

[1] FORM

[*The following may be combined with the contentions supported by the points and authorities set forth in §§ 182.30 -182.32, 182.35, and 182.36, and 182.40 -182.43 as appropriate and may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

_____ [PLAINTIFF *or* DEFENDANT] PRINCIPAL IS ENTITLED TO INDEMNITY FROM DEFENDANT AGENT BECAUSE A PRINCIPAL WHO IS HELD LIABLE FOR THE TORTS OF AN AGENT SOLELY BECAUSE OF THE AGENCY RELATIONSHIP IS ENTITLED TO INDEMNITY FROM THE CULPABLE AGENT.

A. Principal and Agent Liable for Tort of Agent. A principal whose agent has committed a tort in the transaction of the business of the agency is jointly and severally liable to an injured party (*Cahill Bros., Inc. v. Clementina Co. (1962) 208 Cal. App. 2d 367, 388, 25 Cal. Rptr. 301* ; *see Civ. Code § 2338*).

B. Principal's Right to Indemnity From Agent. If the liability of the principal is based not on any fault on the part of the principal but solely on the fault of the agent and the existence of the agency relationship, the principal is entitled to indemnity from the agent at fault (*Herrero v. Atkinson (1964) 227 Cal. App. 2d 69, 77, 38 Cal. Rptr. 490* ; *see Fireman's Fund Ins. Co. v. Haslam (1994) 29 Cal. App. 4th 1347, 1353-1356, 35 Cal. Rptr. 2d 135*).

[2] Comments

CAUTION:

The legal principles set forth in this form are still valid. However, in *Far W. Fin. Corp. v. D & S Co. (1988) 46 Cal. 3d 796, 251 Cal. Rptr. 202, 760 P.2d 399* , the California Supreme Court held that all rights of indemnity except those created by express contractual provisions are subject to comparative principles. Thus, total or partial indemnity may be awarded depending on the facts and circumstances of

the case. Further, the indemnitee's indemnity rights are terminated under *Code Civ. Proc. §§ 877(b)* and *877.6(c)* by a good-faith settlement between the indemnitor and the plaintiff in the underlying action. All pre-1988 cases finding a right of total indemnity must be considered in light of the principles set forth in Far West. For more detailed discussion, see Ch. 115, *Indemnity and Contribution* .

[a] Use of Form

These points and authorities may be submitted in support of the contention that a principal is entitled to indemnity from an agent whose tort has subjected the principal to tort liability solely because of his or her status as principal. The argument may be used, for example, in an independent action for indemnity instituted after the principal has been held liable to a third party for a tort of his or her agent. They might also be used in a cross complaint against the agent in an action by a third party seeking damages from both the principal and the agent for the agent's acts or omissions.

If the existence of the agency is disputed, these points and authorities may be combined with the points and *authorities in §§ 182.30 -182.32*, as appropriate. If the agency is alleged to have arisen because of the principal's ratification, these points and authorities may be combined with the points and *authorities in §§ 182.35* and *182.36*, as appropriate. If counsel anticipates that the principal's authorization or ratification of the agent's acts will be disputed, these points and authorities may be combined with the points and *authorities in §§ 182.40 -182.43*, as appropriate.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a principal is entitled to indemnity from an agent whose tort has subjected the principal to tort liability solely because of his or her status as principal. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that the principal was held liable for the tort of the agent solely because of the agency relationship and not because the acts or omissions of the agent were authorized or ratified by the principal.

[b] Related Pleading and Practice Forms

For a form of complaint alleging that a principal held liable to a third party for the acts or omissions of an agent is entitled to implied equitable indemnity from the agent, see California Forms of Pleading and Practice, Ch. 427, *Principal and Agent* (Matthew Bender). For forms relating to indemnity actions generally, see California Forms of Pleading and Practice, Ch. 300, *Indemnity and Contribution* (Matthew Bender).

[c] Related Points and Authorities

For points and authorities for use in indemnity actions generally, see Ch. 115, *Indemnity and Contribution* in this publication.

[3] Discussion of Authorities

[a] Principal and Agent Liable for Tort of Agent

Cahill Bros., Inc. v. Clementina Co. *(1962) 208 Cal. App. 2d 367, 25 Cal. Rptr. 301* , was an action for indemnity by plaintiff principal against defendant agent. Plaintiff and defendant entered into an oral contract providing that defendant would demolish a building owned by the son of the head of plaintiff corporation. As was usual, employees of plaintiff were temporarily employed by defendant under the supervision and direction of defendant's managing officer. Pursuant to that direction, employees were ordered to erect barricades around the site to protect pedestrians. Despite the existence of the barricades, a pedestrian was injured when he fell into an excavation at the site, and he recovered tort damages

from both companies, who satisfied the judgment at the rate of 50 percent each. A judgment was entered for plaintiff in this indemnity action, and defendant appealed.

The court of appeal reversed. The court held that a principal whose agent has committed a tort in the transaction of the business of the agency is jointly and severally liable to an injured party (*208 Cal. App. 2d 367, 388)* .

[b] Principal's Right to Indemnity From Agent

In ***Herrero v. Atkinson*** *(1964) 227 Cal. App. 2d 69, 38 Cal. Rptr. 490* , a defendant in a wrongful death action cross complained against codefendants who were alleged to have directly caused the death of the decedent. The decedent was injured in an automobile accident and died when a blood transfusion was allegedly performed in a negligent manner. The cross complaint, filed by a doctor who alleged that the negligent doctors were his agents, sought indemnity on the ground that any liability would be based solely on the agency relationship and not on any wrongdoing on cross complainant's part. The trial court sustained a demurrer to the cross complaint without leave to amend, and the cross complainant appealed from the resulting dismissal.

The court of appeal reversed the dismissal of the cross complaint, holding that it stated a cause of action for indemnification (*227 Cal. App. 2d 69, 77)* . The court held that a principal is entitled to indemnity from a negligent agent when the principal is liable solely because of the relationship of principal and agent (*227 Cal. App. 2d 69, 77)* .

Fireman's Fund Ins. Co. v. Haslam *(1994) 29 Cal. App. 4th 1347, 1353-1356, 35 Cal. Rptr. 2d 135* , involved an action for indemnity by an insurance company against one of its agents. A dispute between the insurer and an insured under a fire insurance policy arose from the agent's errors in filling out both the original application for insurance, which contained the wrong address of the insured property, and in filling out a notice of cancellation on discovering the first error, which notice did not have the date of cancellation properly entered. The insurer settled the underlying action with its insured for the $250,000 policy limits and an additional amount of $800,000 in consideration of the insurer's potential liability for bad faith practices (*29 Cal. App. 4th 1347, 1350-1353)* .

On trial of the indemnity action, the jury allocated 100 percent of the insurer's loss to the agent and entered a judgment of indemnity for the total amount of $1,050,000. On appeal, the agent sought to overturn only that part of the judgment that represented the $800,000 paid on account of possible exposure for bad faith claims practices. However, the judgment was affirmed in its entirety. The court rejected the argument that an agent should not be liable, as a matter of law, for damages that represent the insurer's bad faith. It upheld the jury instruction that allowed the insurer to recover all damages in indemnity for which the agent was the legal cause. The agent's liability arose not from the insurer's bad faith, but from his own negligence (*29 Cal. App. 4th 1347, 1354)* .

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18-182 California Points & Authorities § 182.86

§ 182.86 Opposing Contention That Principal May Set Aside Agent's Transaction--Principal Ratified Agent's Self-Dealing Transaction With Knowledge of Agent's Interest

[1] FORM

[*The following may be combined with the contentions supported by the points and authorities set forth in §§ 182.35, 182.36, and 182.37 -182.39 as appropriate and may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

_____ [PLAINTIFF *or* DEFENDANT] PRINCIPAL MAY NOT SET ASIDE THE TRANSACTION ENTERED INTO BY _____ [DEFENDANT *or* PLAINTIFF] AGENT WITH HIMSELF/HERSELF BECAUSE A PRINCIPAL WHO RATIFIES AN AGENT'S SELF-DEALING TRANSACTION WITH KNOWLEDGE OF THE ROLE OF THE AGENT MAY NOT SET ASIDE THE TRANSACTION.

Principal's Ratification With Knowledge of Agent's Self-Dealing. A transaction by which an agent deals with himself or herself without the consent of the principal in a matter in which he or she is employed as an agent may be ratified by the principal with full knowledge of all the facts and may not be set aside by the principal thereafter (*Petray v. First Nat'l Bank (1928) 92 Cal. App 86, 90, 267 P. 711* ; *see Sands v. Eagle Oil & Refining Co. (1948) 83 Cal. App. 2d 312, 321, 188 P.2d 782*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a principal may set aside a transaction that an agent entered into on his or her own behalf. They oppose the contention on the ground that the principal later ratified the transaction with knowledge of the true role of the agent. This argument may be used, for example, as a defense by an agent to an equitable action by the principal to set aside the transaction in which the agent allegedly dealt on his or her own behalf without the knowledge of the principal at the time of the transaction. These points and authorities may also be used in an action by the agent to enforce the transaction when the principal argues

that the transaction is unenforceable because of the agent's self-dealing. In addition, this argument may be used by an agent as a defense in a declaratory relief action alleging that a principal is not bound by a contract entered into by a self-dealing agent.

If the existence of the agency is disputed, these points and authorities may be combined with the points and *authorities in §§ 182.37 -182.39* opposing the existence of an agency, as appropriate. Such an argument negates the existence of a self-dealing relationship, because if no agency exists, the alleged agent violates no duty to the alleged principal. If ratification by the principal is disputed, these points and authorities may be combined with the points and *authorities in §§ 182.35* and *182.36*, as appropriate.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a principal may not set aside an agent's self-dealing transaction because the principal ratified the transaction with knowledge of the agent's role. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing that the principal ratified the transaction, and that the ratification was made with full knowledge of the facts of the transaction, especially those relating to the agent's role in the transaction.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 182.80*.

[3] Discussion of Authorities

[a] Principal's Ratification With Knowledge of Agent's Self-Dealing

The facts and procedural background of ***Petray v. First Nat'l Bank*** *(1928) 92 Cal. App 86, 267 P. 711* , are discussed in *§ 182.80[3][b]*. The court held that an agent's self-dealing transaction is merely voidable and may be ratified by the principal on full knowledge of the facts (*92 Cal. App 86, 90)* . The court held that the acts of plaintiff in taking the note from defendant, demanding payment from the agent, and then waiting to demand payment from defendant, constituted an implied ratification of the loan (*92 Cal. App 86, 90-91)* . The court held further that plaintiff was not entitled to repudiate the loan transaction once she had ratified it (*92 Cal. App 86, 90-91)* .

The facts and procedural background of ***Sands v. Eagle Oil & Refining Co.*** *(1948) 83 Cal. App. 2d 312, 188 P.2d 782* , are discussed in *§ 182.80[3][b]*. The court held that an agent's self-dealing transaction made without the knowledge of the principal could be set aside at the option of the principal unless the principal ratifies the transaction with full knowledge of all facts (*83 Cal. App. 2d 312, 320)* . The court found no ratification, however. The court held that under the circumstances, the transaction was void without a formal rescission, because defendant principal had not consented to the transaction (*83 Cal. App. 2d 312, 321)* .

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18-182 California Points & Authorities § 182.87

§ 182.87 Opposing Contention That Principal May Set Aside Agent's Transaction--Agent May Acquire Property for Self If All Material Facts Are Disclosed to Principal

[1] FORM

[*The following may be combined with the contentions supported by the points and authorities set forth in §§ 182.35, 182.36, and 182.37 -182.39 as appropriate and may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

_____ [PLAINTIFF *or* DEFENDANT] PRINCIPAL MAY NOT SET ASIDE THE TRANSACTION ENTERED INTO BY _____ [DEFENDANT *or* PLAINTIFF] AGENT WITH HIMSELF/HERSELF BECAUSE AN AGENT MAY ACQUIRE PROPERTY FROM HIS/HER PRINCIPAL PROVIDED A FULL DISCLOSURE OF ALL MATERIAL FACTS IS MADE.

Agent May Act on Own Behalf With Disclosure to Principal. An agent may acquire property from his or her principal provided he or she makes a full disclosure of all material facts concerning the transaction that might affect the principal's decision, and the transaction will not be set aside if full disclosure was made (*Estate of Baldwin (1973) 34 Cal. App. 3d 596, 606, 110 Cal. Rptr. 189* ; *Helbing v. Helbing (1948) 89 Cal. App. 2d 224, 227, 230, 200 P.2d 560*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a principal may set aside a transaction that an agent entered into on his or her own behalf. They oppose the contention on the ground that the agent made a full disclosure of all material facts concerning the transaction that might have affected the principal's decision. This argument may be used, for example, as a defense by an agent in the principal's equitable action to set aside a transaction in which the agent dealt on his or her own behalf or in an action by the agent to enforce a self-dealing transaction that the principal argues is unenforceable. This argument may also be used as a defense by an agent in a principal's declaratory relief action alleging that a principal is not bound by a contract because of the agent's

self-dealing.

If the existence of the agency is disputed, these points and authorities may be combined with the points and *authorities in §§ 182.37 -182.39* opposing the existence of an agency, as appropriate. Such an argument would negate the existence of a self-dealing relationship, because if no agency existed, the alleged agent violated no duty to the alleged principal. If ratification by the principal is disputed, these points and authorities may be combined with the points and *authorities in §§ 182.35* and *182.36*, as appropriate.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a principal may not set aside a transaction that an agent entered into on his or her own behalf because the agent made a full disclosure of all material facts to the principal. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing that the agent disclosed all material facts to the principal, especially the fact that the agent was purchasing the property himself or herself and the facts surrounding the agent's transaction.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 182.80*.

[3] Discussion of Authorities

[a] Agent May Act on Own Behalf With Disclosure to Principal

Estate of Baldwin *(1973) 34 Cal. App. 3d 596, 110 Cal. Rptr. 189* , was an action to recover a commission paid to an agent who agreed to purchase a parcel of property from the estate. The co-executrices of the estate, facing an imminent deadline for the payment of a federal estate tax installment, notified several prospective purchasers of a private sale. The broker involved attended the sale and agreed to purchase the property subject to court confirmation of the sale, and the attorney for the co-executrices prepared a petition for confirmation agreeing to pay a commission to the broker's firm. At the court hearing, another prospective buyer appeared, as did the broker and the co-executrices. The fact that the broker sought to buy the property and receive a commission was brought to the attention of the court, but the sale was allowed to proceed, with the broker being outbid. The sale was confirmed, and the trial court awarded a commission to the broker in one half the amount originally sought, and to the broker of the ultimate purchaser based on one half of the commission that would have been awarded at the same percentage as the first broker, adjusted for the higher price at which the property was purchased. The trial court expressly found that the original sale had been brought about by the original broker, who had fully disclosed the nature of his participation and was therefore entitled to a commission as originating broker. The other parties involved appealed the order.

The court of appeal affirmed the orders, holding that the broker had not acted improperly in bidding for the property himself (*34 Cal. App. 3d 596, 606)* . The court held that while an agent owes a duty of acting in the highest good faith toward the principal, the agent may nonetheless acquire property from the principal, provided that he or she makes a full disclosure of all material facts concerning the transaction that might affect the principal's decision (*34 Cal. App. 3d 596, 606)* . The court also relied on public policy considerations to allow agents to act in a dual capacity as long as full disclosure is made (*34 Cal. App. 3d 596, 606)* . Because the finding that full disclosure was made was supported by documentary evidence, the court upheld the order of the trial court awarding the commission (*34 Cal. App. 3d 596, 606)* .

In ***Helbing v. Helbing*** *(1948) 89 Cal. App. 2d 224, 200 P.2d 560* , plaintiff brought an action to set aside transfers of property she made to her son and daughter-in-law on the ground that her son had been her agent in the management of

her property and had acquired the property through undue influence. Plaintiff owned and had managed several parcels of property, and had made defendant her agent in the management of some of the properties to the exclusion of plaintiff's other children. After plaintiff had sold two parcels to defendant, she sued to set aside the transfers, but the trial court found that the transactions were fair and made after a full disclosure to plaintiff. Plaintiff appealed from the judgment in favor of defendant.

The court of appeal affirmed the trial court's judgment, holding that substantial evidence supported the trial court's finding that defendant agent had acted in perfect good faith and concealed no material facts from his mother (*89 Cal. App. 2d 224, 230)* . The court held that an agent is not precluded from acquiring property from his or her principal (*89 Cal. App. 2d 224, 227)* . The court held that an agent may acquire property from a principal as long as the agent establishes that he or she acted in perfect good faith, revealed all material facts, and paid an adequate consideration (*89 Cal. App. 2d 224, 227)* . The court examined the transactions involved and held that the trial court's conclusion that the transactions were fair was justified by the evidence (*89 Cal. App. 2d 224, 230-231)* .

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[Reserved]

§§ 182.88[Reserved]

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18-182 California Points & Authorities § 182.100

§ 182.100 Supporting Contention That Third Party May Recover Damages [Civ. Code § 3318] From Agent for Breach of Warranty of Authority [Civ. Code § 2342]--Agent Represented by Actions That Authority Existed When Authority Did Not in Fact Exist

[1] FORM

[*The following may be combined with the contentions supported by the points and authorities set forth in §§ 182.40 -182.43 as appropriate and may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF MAY RECOVER DAMAGES FROM DEFENDANT AGENT FOR BREACH OF DEFENDANT AGENT'S WARRANTY OF AUTHORITY BECAUSE AN AGENT WHOSE ACTIONS REPRESENT THAT AN AUTHORITY EXISTS IS LIABLE FOR THE BREACH OF THE WARRANTY OF AUTHORITY IF THE AUTHORITY DOES NOT IN FACT EXIST.

A. Agent's Warranty of Authority. One who assumes to act as an agent thereby warrants, as to all who deal with him or her in that capacity, that he or she has the authority assumed (*Civ. Code § 2342*).

B. Breach of Warranty May Arise From Agent's Conduct. A third party may recover damages for an agent's breach of the implied warranty of authority when the agent represents by his or her actions that an authority exists but the authority does not in fact exist (*Cheda v. Grandi (1950) 97 Cal. App. 2d 513, 518-519, 218 P.2d 97*).

[*Optional*] **C. Measure of Damages for Breach of Warranty of Authority.** The detriment caused by the breach of a warranty of an agent's authority is deemed to be the amount that could have been recovered and collected from the principal if the warranty had been complied with, and the reasonable expenses of legal proceedings taken in good faith to enforce the act of the agent against his or her principal (*Civ. Code § 3318*).

[*Optional*] **D. Interest on Judgment Proper If Proper Against Principal.** If the third party would have been entitled to a definite and fixed recovery from the principal had the agent had the authority warranted, entitling the third party to

interest from the time the right of recovery became vested, judgment may be entered against the agent for interest from that time (*Kohlberg v. Havens (1919) 41 Cal. App 222, 226, 182 P. 467* ; *see Civ. Code §§ 3318, 3287*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a third party may recover damages from an agent for breach of the agent's warranty of authority because the agent's actions represented that an authority existed when in fact the authority did not exist. This argument may be used, for example, in an action against the agent after an action against the principal resulted in a finding that the principal is not bound to the third party because the agent lacked authority. As another example, this contention may be raised in a third party's action against both the agent and the principal, when the third party alternatively argues that if the agent was not authorized, he or she breached a warranty of authority. Optional Paragraph C may be used when the issue of the measure of damages appropriate under *Civ. Code § 3318* is disputed or when counsel anticipates such a dispute. Optional Paragraph D may be used when the obligation that the principal would have had to fulfill had the agent been authorized would have been subject to an award of interest under *Civ. Code § 3287*, and the complaint seeks interest on the amount sought from the unauthorized agent.

The contention supported by these points and authorities may be used whenever a third person suffered damages because of reliance on the authority of an agent who in fact lacked authority. In such a case, the measure of damages is set out in *Civ. Code § 3318*. This contention should be contrasted with the contention supported by the points and *authorities in § 182.102*; in § 182.102, rather than seeking damages for an agent's breach of a warranty, the third person seeks to hold the agent liable as a principal on a written agreement. This form and § 182.102 may be combined when counsel wishes to contend alternatively that the agent did not believe he or she had the authority to bind the principal to a written contract.

If the extent of an agent's authority is disputed, these points and authorities may be combined with the points and *authorities in §§ 182.40* and *182.41*, as appropriate. If the agency or authority is alleged to have arisen because of the principal's ratification, these points and authorities may be combined with the points and *authorities in §§ 182.42* and *182.43*, as appropriate.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a third party may recover damages from an agent for breach of the agent's warranty of authority because an agent's actions represented that an authority existed when in fact the authority did not exist. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing that the actions of the agent led the third party to believe that authority existed, and the facts showing that no such authority actually existed. If the use of optional Paragraph C is appropriate, counsel should also discuss facts showing the amount that could have been recovered from the principal had the warranty been complied with, and the amount of any reasonable legal proceedings taken to enforce the act of the agent against his or her principal. If the use of optional Paragraph D is appropriate, counsel should also discuss the facts showing that plaintiff was entitled to a sum certain or capable of calculation, and the date thereof, to establish the right to interest under *Civ. Code § 3287*.

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 182.105* and *182.106* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Breach of Warranty May Arise From Agent's Conduct

In ***Cheda v. Grandi*** *(1950) 97 Cal. App. 2d 513, 218 P.2d 97* , plaintiff sought a declaration that a lease naming plaintiff as lessee was valid. In the alternative, plaintiff prayed for a money judgment from defendant, as agent of the lessor, for breach of a warranty of authority. Plaintiff had rented a garage for years on a month to month basis and sought to improve the building if he could obtain a lease. The owner of the garage, defendant agent's brother, had suffered mental deterioration from a stroke some time before plaintiff sought the lease and was declared incompetent after the lease was signed by plaintiff. After the stroke, defendant assumed to act as agent for his brother concerning the garage, and plaintiff approached him regarding his proposal for a lease. Plaintiff and defendant agreed to a lease, but neither defendant nor his brother signed the lease. However, defendant acted as though a lease existed and allowed plaintiff an adjustment in the lease terms. After the death of the brother, defendant sold the garage to a party who believed the lease was unenforceable because it was not signed by the owners, and the rent was increased immediately. The trial court held that the lease was invalid but awarded damages to plaintiff for defendant's breach of warranty of authority, and defendant appealed.

The court of appeal affirmed, holding that a breach of the warranty of authority under *Civ. Code § 2342* was established (*97 Cal. App. 2d 513, 519)* . The court held that an agent who represents by his or her actions that an authority exists may be held liable for a breach of the implied warranty of authority under *Civ. Code § 2342* if the authority does not in fact exist (*97 Cal. App. 2d 513, 519)* . The court held that defendant held himself out as more than merely an agent with authority to negotiate terms, as evidenced by the language of the letter in which defendant set out a proposed lease that he had apparently decided would be appropriate (*97 Cal. App. 2d 513, 518)* . The court also noted that the subsequent actions of defendant in adjusting the terms of the lease supported the conclusion that defendant held himself out to be an agent with power to execute the lease on behalf of his brother (*97 Cal. App. 2d 513, 518-519)* .

[b] Interest on Judgment Proper If Proper Against Principal

Kohlberg v. Havens *(1919) 41 Cal. App 222, 182 P. 467* , was an action to recover damages from defendant agent for breach of defendant's warranty of authority. Plaintiff entered into a contract with defendant on behalf of the company of which defendant was president. The contract provided that plaintiff would obtain a certain lessee for the company's property, in return for which plaintiff would receive $2,500. When plaintiff produced the lessee, the company denied the authority of defendant agent to execute the contract, and in an action by plaintiff to enforce the contract the company obtained a nonsuit on the ground that the agent was unauthorized. Rejecting the defense that plaintiff had not performed his obligations under the contract, the trial court entered judgment for plaintiff in the amount of $2,500 plus interest from the date that plaintiff obtained the lessee. Defendant appealed, arguing that the contract had not been completed as a matter of law and that plaintiff was not entitled to interest.

The court of appeal affirmed, holding that substantial evidence supported the trial court's finding that plaintiff had performed according to the contract and that defendant had breached the warranty of authority created by his conduct in assuming to act for the company (*41 Cal. App 222, 225-226)* . The court, citing *Civ. Code §§ 3287* and *3318*, held that if a third party would have been entitled to a definite and fixed recovery from the principal had the agent possessed the authority warranted, entitling the third party to interest from the time the right of recovery became vested, judgment may be entered against the agent from that time (*41 Cal. App 222, 226)* . The court concluded that the award of interest against defendant agent was justified because plaintiff would have been entitled to interest from the principal (*41 Cal. App 222, 226)* .

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CHAPTER 182 PRINCIPAL AND AGENT
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D. Actions by Third Party Against Agent

18-182 California Points & Authorities § 182.101

§ 182.101 Supporting Contention That Third Party May Recover Damages for Breach of Contract [Civ. Code § 3300] From Agent as Principal [Civ. Code § 2343]--Third Party Gave Credit to Agent Personally With Agent's Consent

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF MAY RECOVER DAMAGES FOR BREACH OF CONTRACT FROM DEFENDANT AGENT BECAUSE ONE WHO ASSUMES TO ACT AS AN AGENT IS RESPONSIBLE TO THIRD PERSONS AS A PRINCIPAL FOR OBLIGATIONS ENTERED INTO WHEN, WITH HIS/HER CONSENT, CREDIT IS GIVEN TO HIM OR HER PERSONALLY IN A TRANSACTION.

Agent Liable as Principal When Personal Credit Given Agent. One who assumes to act as an agent is responsible to third persons as a principal for obligations entered into when, with his or her consent, credit is given to him or her personally in a transaction (*Civ. Code § 2343(1)*; *Duncan v. Dormer (1928) 94 Cal. App 218, 221, 270 P. 1003*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a third party may recover damages for breach of contract from an agent as a principal. This argument may be used whenever a third party extended credit to an agent personally, with the agent's consent, and the third party seeks to recover damages for breach of contract from the agent. For example, such a contention may arise in an action to enforce a contractual or quasi-contractual obligation against the agent when the agent's representative capacity was not disclosed to the third party, and the third party dealt with the agent as an individual.

These points and authorities need not be combined with other forms, such as §§ 182.30-182.32 contending that an actual agency exists, because the third person's recovery depends only on the extension of credit to the agent personally

and the agent's consent thereto. Thus, the agent cannot avoid liability by, for example, denying the fact of agency.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a third party may recover damages from an agent as a principal for a breach of an obligation entered into when credit is given to the agent personally, with his or her consent, in a transaction. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that defendant acted as an agent in a transaction and that the third party extended credit to defendant agent personally, with the consent of the agent.

[3] Discussion of Authorities

[a] Agent Liable as Principal When Personal Credit Given Agent

Duncan v. Dormer *(1928) 94 Cal. App 218, 270 P. 1003* , was an action to recover the value of labor performed and materials furnished by plaintiff. Plaintiff had agreed with defendant, who was the agent of a trust but did not disclose the fact of the agency to plaintiff, to provide materials and labor for the operation of a mine. The action was instituted when defendant did not pay all the money due under the agreement and the action was brought against the trust as well as against the agent individually. The trial court held that plaintiff had been paid in full for his services, and plaintiff appealed.

The court of appeal reversed, holding that uncontradicted testimony by defendant showed that a balance was still owing plaintiff (*94 Cal. App 218, 221)* . The court further held that under *Civ. Code § 2343*, an agent who obtains personal credit is personally liable for such obligations (*94 Cal. App 218, 221)* . The court concluded that defendant was personally liable to plaintiff because defendant obtained personal credit for the purchase of materials and the performance of labor, without disclosing the existence of the trust or his agency therefor (*94 Cal. App 218, 221)* .

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18-182 California Points & Authorities § 182.102

§ 182.102 Supporting Contention That Third Party May Recover Damages for Breach of Contract [Civ. Code § 3300] From Agent as Principal [Civ. Code § 2343]--Agent Entered Into Written Contract in Principal's Name Without Good Faith Belief in Authority to Do So

[1] FORM

[*The following may be combined with the contentions supported by the points and authorities set forth in §§ 182.37 -182.43 as appropriate and may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF MAY RECOVER DAMAGES FOR BREACH OF CONTRACT FROM DEFENDANT AGENT BECAUSE AN AGENT WHO ENTERS INTO A WRITTEN CONTRACT IN THE NAME OF THE PRINCIPAL WITHOUT BELIEVING IN GOOD FAITH THAT AUTHORITY TO DO SO EXISTS IS LIABLE AS A PRINCIPAL.

Agent Liable as Principal When Agent Acts Without Belief in Authority. One who assumes to act as an agent is responsible to third persons as a principal for his or her acts in the course of the agency when the agent enters into a written contract in the name of the principal without believing, in good faith, that authority to do so exists (*Civ. Code § 2343(2)*; *Borton v. Barnes (1920) 48 Cal. App 589, 594, 192 P. 307*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a third party may recover damages for breach of contract from an agent as a principal. The contention is based on the rule that an agent who entered into a written contract in the name of the agent's principal, without believing in good faith that he or she had the authority to do so, is liable as a principal [*Civ. Code § 2343(2)*]. This argument may be used whenever a third party seeks recovery from an agent for the agent's unauthorized written contract in the name of the principal when the agent did not have a good faith belief in his or her authority. For example, this argument may be used by a third party in an action against the

agent for damages for breach of contract, as an alternate cause of action when combined with an action against the principal in whose name the contract was executed. As another example, this argument may also be used in a separate action after the agent's lack of authority to bind the principal has been determined.

These points and authorities are for use when a third person seeks to recover from defendant agent as a party to the contract entered into in the principal's name, that is, to hold the agent liable as a principal [*see Civ. Code § 2343(2)*]. This contention should be contrasted with that supported by the points and *authorities in § 182.100*; in § 182.100, rather than seeking to hold the agent liable as a principal on a written agreement, the third person seeks damages for the agent's breach of warranty. This form may be combined with § 182.100 when counsel wishes to contend alternatively that the agent breached a warranty of authority.

If the existence of the agency is disputed, these points and authorities may be combined with the points and *authorities in §§ 182.37 -182.39*, as appropriate. If the extent of an agent's authority is disputed, these points and authorities may be combined with the points and *authorities in §§ 182.40* and *182.41*, as appropriate. If the agency or authority is alleged to have arisen because of the principal's ratification, these points and authorities may be combined with the points and *authorities in §§ 182.42* and *182.43*, as appropriate.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a third party may recover damages for breach of contract from an agent who entered into a written contract in the name of his or her principal without a good faith belief in the authority to do so. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that the agent entered into a written contract in his or her principal's name and that the agent did not have a good faith belief that he or she had authority to enter into the contract.

[3] Discussion of Authorities

[a] Agent Liable as Principal When Agent Acts Without Belief in Authority

Borton v. Barnes *(1920) 48 Cal. App 589, 192 P. 307* , was an action by plaintiff third party to recover the reasonable value of services allegedly rendered under a written contract entered into by defendant agent in the name of defendant's principal. The contract provided that plaintiff would be entitled to a real estate commission if he procured a purchaser willing and able to buy a parcel of land owned by the principal. When a prospective purchaser made an offer to purchase the property, defendant told plaintiff that the agreement was fulfilled and that he would present the facts to the company at its board meeting. Defendant did not have the authority to enter into such a contract, and the company disavowed the agreement and refused to pay any commission to plaintiff. The trial court found that defendant had entered into the contract without believing in good faith, at any time, that he had the authority from the corporation to make the agreement, and entered judgment in plaintiff's favor in the full amount of the specified commission. Defendant appealed from the judgment.

The court of appeal affirmed, rejecting defendant's contention that he could be held personally liable on the contract only if the contract contained words to charge him personally (*48 Cal. App 589, 591)* . The court held that under *Civ. Code § 2343*, a third party may recover from an agent as a principal if the agent enters into a written contract in the name of the principal knowing that he or she had no authority to do so (*48 Cal. App 589, 594)* . The court held that the plaintiff in such an action may recover the reasonable value of the services rendered under the contract in the same manner as he or she could have done had defendant agent been the real principal in the transaction (*48 Cal. App 589, 594)* .

[4] Additional Authorities

[a] Agent Liable as Principal When Agent Acts Without Belief in Authority

In *Nichols Grain & Milling Co. v. Jersey Farm Dairy Co. (1933) 134 Cal. App 126, 24 P.2d 925* , plaintiff sued to recover on a written guarantee of hay sales executed by an agent of one of the defendants. The trial court found that the agent was not authorized to execute the agreement and did not believe in good faith that he was so authorized. The trial court entered judgment against the agent but in favor of all other defendants, and the court of appeal affirmed. The court held that under *Civ. Code § 2343* a third party may recover damages for breach of a written contract from an agent who did not believe in good faith that he or she had the authority to contract for the principal. The court held that the third party may recover from the agent to the same extent that he or she could recover had the agent been the real principal in the transaction (*134 Cal. App 126, 130)* .

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18-182 California Points & Authorities § 182.103

§ 182.103 Supporting Contention That Third Party May Recover Tort Damages [Civ. Code § 3333] From Agent as Principal [Civ. Code § 2343]--Agent's Acts Were Wrongful in Nature

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF MAY RECOVER TORT DAMAGES FROM DEFENDANT AGENT BECAUSE ONE WHO ASSUMES TO ACT AS AN AGENT IS LIABLE AS A PRINCIPAL FOR DAMAGES TO THIRD PERSONS WHO ARE INJURED BY THE ASSUMED AGENT'S ACTS, IN THE COURSE OF THE AGENCY, THAT ARE WRONGFUL IN THEIR NATURE.

A. Agent Liable as Principal When Acts Wrongful in Nature. One who assumes to act as an agent is responsible as a principal for damages to third persons who are injured by the assumed agent's acts in the course of the agency that are wrongful in their nature (*Civ. Code § 2343(3)*; *Bayuk v. Edson (1965) 236 Cal. App. 2d 309, 319-320, 46 Cal. Rptr. 49*).

[*Optional*] **B. Agent Liable Regardless of Principal's Liability.** An agent is liable for his or her own wrongful acts, regardless of whether or not the principal is liable or amenable to judicial action (*James v. Marinship Corp. (1944) 25 Cal. 2d 721, 742-743, 155 P.2d 329* ; *Bayuk v. Edson (1965) 236 Cal. App. 2d 309, 320, 46 Cal. Rptr. 49*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a third party may recover tort damages from an agent as a principal for his or her wrongful acts committed in the course of the agency. This argument may be used, for example, when the third party damaged by the agent's wrongful act sues both the agent and the principal for the tort damages suffered because the third party does not know whether the principal can be held liable for the tort of the agent. The optional paragraph should be used when the third party anticipates the argument that the agent is not

liable for his or her wrongful act because the principal is liable, because the principal has already been held not liable for the agent's act, or because the principal is not, or cannot be, sued for the wrongful acts of his or her agent.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a third party may recover tort damages from an agent as a principal for the agent's acts that are wrongful in their nature. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that the agent acted wrongfully, and that plaintiff sustained tort damages under *Civ. Code § 3333* as a result of the agent's wrongful acts. Counsel should note, however, that if the agent was merely guilty of nonfeasance, as opposed to misfeasance, in failing to fulfill a duty owed solely to the principal, the agent will not be held liable to the third party [*Mears v. Crocker First Nat'l Bank (1950) 97 Cal. App. 2d 482, 485-486, 218 P.2d 91* ; *see § 182.107*].

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 182.107* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Agent Liable as Principal When Acts Wrongful in Nature

In ***Bayuk v. Edson*** *(1965) 236 Cal. App. 2d 309, 46 Cal. Rptr. 49* , plaintiff third party sued both a principal and his agent for tort damages allegedly caused by defendants' negligence in the planning and design of a house. Plaintiff had planned to build a house and sought the services of an architect who would work for less than the standard fee for architects. Defendant principal referred plaintiff to defendant agent, who defendant principal said was employed as an architect. Defendant agent planned the house and supervised the construction, with some participation in the planning by defendant principal. The trial court entered judgment in plaintiff's favor against both defendants, and defendants appealed.

The court of appeal affirmed the judgment, holding that substantial evidence supported the finding of the trial court that defendant agent had been negligent in his design and supervision of the building of the house (*236 Cal. App. 2d 309, 320)* . The court held that under *Civ. Code § 2343(3)*, an agent is liable to third persons for his or her wrongful acts (*236 Cal. App. 2d 309, 319-320)* .

NOTE:

In *Otanez v. Blue Skies Mobile Home Park (1991) 1 Cal. App. 4th 1521, 3 Cal. Rptr. 2d 210* , the plaintiff-tenant tried to hold the property managers liable for the landlord's wrongful termination of utility service under *Civ. Code § 789.3*. Presumably, the managers had been responsible for the actual termination of the service. In finding only the landlord liable, the court construed the phrase "wrongful in nature" in *Civ. Code § 2343(3)* as not encompassing conduct made wrongful only by statute (*1 Cal. App. 4th 1521, 1526)* .

[b] Agent Liable Regardless of Principal's Liability

James v. Marinship Corp. *(1944) 25 Cal. 2d 721, 155 P.2d 329* , was an action for injunctive relief restraining defendants, a corporation and a local of an international union, from discharging or causing the discharge of plaintiff and other black employees. Defendant agent, the local, argued that injunctive relief against it was inappropriate because it was following the rules set forth by its principal, the international union that was outside the court's jurisdiction.

Defendant agent argued that it could not be held liable for wrongful acts when the principal was not held liable. The trial court issued a preliminary injunction preventing any discharge, and defendants appealed.

The Supreme Court affirmed. The Court held that an agent is liable for his or her acts, regardless of whether the principal is liable or amenable to judicial action (*25 Cal. 2d 721, 742-743)* . The Court reasoned that the fact that such conduct might have been committed in accordance with the regulations of an association beyond the jurisdiction of the court cannot deprive the court of power to prevent the continuance of wrongful acts by those agents within the jurisdiction (*25 Cal. 2d 721, 742)* .

The facts and procedural background of ***Bayuk v. Edson*** *(1965) 236 Cal. App. 2d 309, 46 Cal. Rptr. 49* , are discussed in *§ 182.103[3][a]*. The court held in *Bayuk* that the fact that the principal may also be liable to the third person for the agent's torts does not exonerate the agent (*236 Cal. App. 2d 309, 320)* .

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18-182 California Points & Authorities § 182.104

§ 182.104 Supporting Contention That Third Party May Recover Damages for Breach of Contract [Civ. Code § 3300] From Agent as Principal--Principal Only Partially Disclosed

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF MAY RECOVER DAMAGES FOR BREACH OF CONTRACT FROM DEFENDANT AGENT BECAUSE A PERSON PURPORTING TO MAKE A CONTRACT WITH ANOTHER FOR A PARTIALLY DISCLOSED PRINCIPAL IS A PARTY TO THE CONTRACT.

Person Purporting to Contract With Third Party for Partially Disclosed Principal as Party to Contract. Unless otherwise agreed, a person purporting to make a contract with another for a partially disclosed principal is a party to the contract. The principal is partially disclosed if the other party has notice that the agent is or may be acting for a principal, but the other party has no notice of the principal's identity (G.W. Anderson Constr. Co. v. Mars Sales (1985) *164 Cal. App. 3d 326, 331, 210 Cal. Rptr. 409*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a third party may recover damages for breach of contract from an agent as principal. This argument may be used whenever an agent gave notice of the existence of the agency but did not sufficiently disclose the identity of the principal.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a third party may recover from the agent as a principal.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should discuss facts showing that plaintiff had notice of defendant's status as an agent but did not

have notice of the identity of the principal.

[3] Discussion of Authorities

[a] Person Purporting to Contract With Third Party for Partially Disclosed Principal as Party to Contract

In **G.W. Anderson Constr. Co. v. Mars Sales** (1985) *164 Cal. App. 3d 326, 210 Cal. Rptr. 409* , plaintiff building construction company brought an action for breach of contract against defendants, a corporation and its two owners, who were husband and wife. The trial court held, inter alia, that the owners, as distinguished from the corporation, were not liable in that the contract was with the corporation.

The court of appeal reversed the judgment in part, holding that the finding that the husband owner was not liable as a party was contrary to clear and undisputed evidence (*164 Cal. App. 3d 326, 333, 339)* . The court noted that, unless otherwise agreed, a person purporting to make a contract with another for a partially disclosed principal is a party to the contract, and that a principal is only partially disclosed if the other party has notice that the agent is or may be acting for a principal, but has no notice of the principal's identity (*164 Cal. App. 3d 326, 331)* . The agent can protect himself or herself from personal liability by clearly disclosing the fact of agency and the identity of the principal, but failing that, the other party is entitled to rely on the liability of the person with whom he or she dealt. The duty is on the agent to disclose, not on the other party to investigate (*164 Cal. App. 3d 326, 332)* . The undisputed evidence showed that the husband owner acted as agent for the corporation in the transaction, but referred to the principal only by its trade name and did not otherwise disclose its true name or corporate status. The court held that use of a trade name is not sufficient disclosure of the identity of the principal to protect the agent from personal liability when, as in this case, the other party did not otherwise know the identity of the principal (*164 Cal. App. 3d 326, 332-333)* .

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18-182 California Points & Authorities § 182.105

§ 182.105 Opposing Contention That Third Party May Recover Damages [Civ. Code § 3318] From Agent for Breach of Warranty of Authority [Civ. Code § 2342]--Agent Acted Within Authority

[1] FORM

[*The following may be combined with the contentions supported by the points and authorities set forth in §§ 182.33 -182.36 as appropriate and may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF MAY NOT RECOVER DAMAGES FROM DEFENDANT AGENT FOR THE ALLEGED BREACH OF WARRANTY OF AUTHORITY BECAUSE AN AGENT BREACHES A WARRANTY OF AUTHORITY ONLY WHEN THE AGENT ACTS WITHOUT AUTHORITY OR IN EXCESS OF HIS/HER AUTHORITY.

A. Agent's Warranty of Authority. [*See § 182.100[1], Paragraph A.*]

B. Breach of Warranty of Authority Requires Agent's Unauthorized Act. An agent breaches an implied warranty of authority only when the agent acts without authority or in excess of his or her authority (*Tri-Delta Eng'g, Inc. v. Insurance Co. of N. Am. (1978) 80 Cal. App. 3d 752, 760, 146 Cal. Rptr. 14*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that a third party may recover damages from an agent for an alleged breach of a warranty of authority. The ground of opposition set forth is that defendant agent had the authority to perform the act that allegedly breached the warranty of authority. This argument may be used, for example, by an agent in defending a third party's action against both the agent and the principal, when the plaintiff alternatively argues that if the agent was not authorized, he or she breached a warranty of authority.

If the extent of an agent's authority is disputed, these points and authorities may be combined with the points and

authorities in §§ 182.33 and *182.34*, as appropriate. If the authority is alleged to have arisen because of the principal's ratification, these points and authorities may be combined with the points and *authorities in §§ 182.35* and *182.36*, as appropriate.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a third party may not recover damages from defendant agent for an alleged breach of a warranty of authority. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that the agent was authorized to perform the act or acts that allegedly breached the warranty of authority or that the principal ratified the agent's acts.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 182.100*.

[3] Discussion of Authorities

[a] Breach of Warranty of Authority Requires Agent's Unauthorized Act

Tri-Delta Eng'g, Inc. v. Insurance Co. of N. Am. *(1978) 80 Cal. App. 3d 752, 146 Cal. Rptr. 14* , was an action for breach of contract, negligent misrepresentation, fraud, and breach of duty of good faith and fair dealing brought against defendant principal, defendant agent who was authorized to write insurance on behalf of defendant principal, and an individual employee of the agent. The employee contacted plaintiff to determine if plaintiff was interested in insurance for its machine shop, and plaintiff requested a quote. The employee phoned defendant principal seeking a quote for "all risk" insurance, but there was a conflict in the evidence of whether or not defendant informed the employee that the all risk policy did not cover theft. The employee showed plaintiff a worksheet listing the aspects of coverage, including theft, and a policy was issued that excluded theft. After plaintiff's shop was burglarized and the employee filed a claim that was rejected by defendant, the employee read the policy and discovered that coverage for theft was excluded. Plaintiff filed the instant action, and the jury returned a verdict holding defendant principal liable for compensatory and punitive damages, and also holding defendant agent and its employee liable for compensatory damages. Defendant agent and its employee appealed.

The court of appeal reversed, holding that the jury verdict could not be reconciled with the evidence in accordance with any theory of law (*80 Cal. App. 3d 752, 759)* . The court held that a breach of a warranty of authority requires that the agent acted without authority or in excess of his or her authority (*80 Cal. App. 3d 752, 760)* . The court held that implicit in the verdict against defendant was a finding that the policy covered the theft from plaintiff, and that therefore the employee must have had actual or ostensible authority to bind defendant for theft coverage under the contract. The court held that under the circumstances, the employee could not have breached a warranty of authority (*80 Cal. App. 3d 752, 760)* .

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18-182 California Points & Authorities § 182.106

§ 182.106 Opposing Contention That Third Party May Recover Damages [Civ. Code § 3318] From Agent for Breach of Warranty of Authority [Civ. Code § 2342]--Third Party Was Cognizant of Facts Concerning Agent's Authority

[1] FORM

[*The following may be combined with the contentions supported by the points and authorities set forth in §§ 182.33 -182.36 as appropriate and may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF MAY NOT RECOVER DAMAGES FROM DEFENDANT AGENT FOR THE ALLEGED BREACH OF A WARRANTY OF AUTHORITY BECAUSE IF THE THIRD PARTY WAS FULLY COGNIZANT OF THE FACTS CONCERNING THE AGENT'S AUTHORITY THE AGENT IS NOT LIABLE.

Breach of Warranty of Authority Requires Third Party's Ignorance of Agent's Lack of Authority. If the third party who dealt with an agent was fully cognizant of all the facts touching the agent's authority, the latter will not be liable for breach of the warranty of authority (*Yoakum v. Tarver (1967) 256 Cal. App. 2d 202, 206, 64 Cal. Rptr. 7*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a third party may recover damages from an agent for an alleged breach of a warranty of authority. The ground of opposition set forth is that the third party who dealt with defendant agent was aware of the limitations on the agent's authority. Such a contention may be raised, for example, by an agent as a defense to an action by a third party for damages for breach of the agent's warranty of authority.

If the extent of an agent's authority is disputed, these points and authorities may be combined with the points and *authorities in §§ 182.33* and *182.34*, as appropriate. If the authority is alleged to have arisen because of the principal's

ratification, these points and authorities may be combined with the points and *authorities in §§ 182.35* and *182.36*, as appropriate.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a third party may not recover damages from defendant agent for an alleged breach of a warranty of authority. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that plaintiff third party was aware that defendant agent's authority to act for his or her principal was limited, and that defendant agent did not warrant that he or she had authority beyond the limitations.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 182.100*.

[3] Discussion of Authorities

[a] Breach of Warranty of Authority Requires Third Party's Ignorance of Agent's Lack of Authority

Yoakum v. Tarver *(1967) 256 Cal. App. 2d 202, 64 Cal. Rptr. 7* , was an action by a third party to recover a commission that plaintiff would have earned had defendant agent been authorized to sell a motel owned by the principal. Defendant and another were the sole investors in the corporation, the motel was the only asset, and the other investor had filed an action to dissolve the corporation before the events that led to the instant lawsuit. Defendant agent signed a listing agreement after emphasizing that any agreement depended on the other investor's concurrence, and eventually opened an escrow at the urging of plaintiff. When the other investor refused to go through with the sale, plaintiff instituted this action. The trial court entered judgment for defendant on the ground that defendant had not warranted that he had authority to sell the motel without the concurrence of the other investor, and plaintiff appealed.

The court of appeal affirmed, holding that defendant had disclosed to plaintiff the limitations on his authority at their first meeting and had never warranted that he had authority to act for the corporation (*256 Cal. App. 2d 202, 205)* . Relying on out-of-state precedent, the court concluded that a third party cannot recover from an agent based on a breach of a warranty of authority when the third party is fully cognizant of the facts concerning the agent's authority, as when the agent indicates that he or she is not sure of his or her authority or specifically discloses the limitations thereon (*256 Cal. App. 2d 202, 206-207)* . The court agreed with the trial court that the evidence provided no basis for recovery for breach of a warranty of authority because plaintiff knew of the limitation on defendant agent's authority (*256 Cal. App. 2d 202, 206)* .

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D. Actions by Third Party Against Agent

18-182 California Points & Authorities § 182.107

§ 182.107 Opposing Contention That Third Party May Recover Tort Damages [Civ. Code § 3333] From Agent as Principal [Civ. Code § 2343]--Agent Not Liable for Failure to Perform Duty Owed Solely to Principal

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF MAY NOT RECOVER TORT DAMAGES FROM DEFENDANT AGENT BECAUSE AN AGENT IS NOT LIABLE TO A THIRD PARTY AS A PRINCIPAL FOR FAILURE TO PERFORM A DUTY THAT THE AGENT OWES SOLELY TO THE PRINCIPAL.

Agent Not Liable to Third Party for Failure to Perform Duty Owed Solely to Principal. An agent is not liable to a third party as a principal for the failure to perform a duty owed solely to his or her principal (*Mears v. Crocker First Nat'l Bank (1950) 97 Cal. App. 2d 482, 491, 218 P.2d 91*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that a third party may recover tort damages from an agent as a principal for his or her wrongful acts committed in the course of the agency. The ground of opposition set forth is that the agent is not liable to a third party for the agent's failure to perform his or her duties owed solely to the principal. The argument supported by this memorandum may be used, for example, as a defense in an action by a third party seeking to hold the agent liable for tort damages on the theory that the agent's acts were wrongful in their nature. The defense in this example would be based on the argument that the third party's damages were caused by defendant agent's failure to perform a duty owed solely to the principal, such as a duty of a transfer agent not to delay the conversion of stock from one type to another [*see Mears v. Crocker First Nat'l Bank (1950) 97 Cal. App. 2d 482, 485-490, 218 P.2d 91]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context

in which counsel wishes to raise the substantive issue that a third party may not recover tort damages from an agent as a principal. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that defendant agent's only wrongful acts consisted of a failure to perform a duty owed solely to the principal. Counsel should emphasize the nature of the duty, and establish clearly that it was owed only to the principal and not to the third party plaintiff.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 182.103*.

[3] Discussion of Authorities

[a] Agent Not Liable to Third Party for Failure to Perform Duty Owed Solely to Principal

Mears v. Crocker First Nat'l Bank *(1950) 97 Cal. App. 2d 482, 218 P.2d 91* , was an action in conversion instituted by the owner of stock in a Phillipine company against the company's agent in San Francisco. The company had two types of stock outstanding: one of Phillipine registry; and the other, block shares, equal to 20 shares of the Phillipine registry stock. Only the block shares could be listed on the San Francisco stock exchange. By rule of the exchange, the company was required to have a transfer office or agency in San Francisco, and defendant was their agent for the purpose of converting the Phillipine stock for block shares. Plaintiff sought to convert 20,000 shares to block shares, but defendant agent delayed the transfer while awaiting instructions from the company's parent office as to any claims on the stock that might have been made during World War II. Judgment was entered for plaintiff, and defendant appealed.

The court of appeal reversed, holding that defendant, as transfer agent, owed a duty not to delay a transfer of stock only to its principal and not to a third party such as plaintiff (*97 Cal. App. 2d 482, 485-490)* . The fact that the duty was owed to the principal alone, plus the fact that the breach alleged of defendant was one of nonfeasance, persuaded the court that under the common law an agent would not have been held liable for nonfeasance regarding a duty to the principal alone (*97 Cal. App. 2d 482, 491)* . The court concluded that *Civ. Code § 2343(3)* merely restated the common law rule that an agent may be liable to a third party for misfeasance, and did not alter the common law rule that an agent is not liable to third parties for failure to perform his or her duties to the principal (*97 Cal. App. 2d 482, 491)* .

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18-182 California Points & Authorities §§ 182.108-182.119

[Reserved]

§§ 182.108[Reserved]

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18-182 California Points & Authorities § 182.120

§ 182.120 Supporting Contention That Ostensible Agency [Civ. Code § 2300] Created--Principal's Conduct Caused Third Party to Believe Agency Existed

[1] FORM

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

AN OSTENSIBLE AGENCY WAS CREATED BETWEEN DEFENDANT, THE ALLEGED PRINCIPAL, AND [DEFENDANT], THE ALLEGED AGENT, BECAUSE AN OSTENSIBLE AGENCY IS CREATED WHEN A THIRD PARTY DEALING WITH THE ALLEGED AGENT HAS A REASONABLE BELIEF IN THE AGENT'S AUTHORITY, THE BELIEF IS GENERATED BY SOME ACT OR NEGLECT OF THE PRINCIPAL SOUGHT TO BE CHARGED, AND THE THIRD PARTY IS NOT GUILTY OF NEGLECT, [AND ONCE ALL OF THE NECESSARY ELEMENTS OF OSTENSIBLE AGENCY ARE ESTABLISHED, THERE IS NO ADDITIONAL DUTY IMPOSED ON THE THIRD PARTY TO INVESTIGATE THE EXISTENCE AND SCOPE OF THE ALLEGED AGENT'S AUTHORITY].

A. Ostensible Agency Created. An ostensible agency is created when a third party dealing with the alleged agent has a reasonable belief in the agent's authority, the belief is generated by some act or neglect by the principal sought to be charged, and the person relying on the agent's apparent authority is not guilty of neglect (*Civ. Code §§ 2300, 2334*; *Mejia v. Community Hosp. of San Bernardino (2002) 99 Cal. App. 4th 1448, 1456-1457, 122 Cal. Rptr. 2d 233* ; *Hartong v. Partake, Inc. (1968) 266 Cal. App. 2d 942, 960, 72 Cal. Rptr. 722*).

[*Optional*] **B. Third Party Has No Duty to Inquire.** Once all the necessary elements of ostensible agency are established, there is no additional duty imposed on the third party to investigate the existence and scope of the alleged agent's authority (*Beck v. Arthur Murray, Inc. (1966) 245 Cal. App. 2d 976, 981, 54 Cal. Rptr. 328*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that an ostensible agency was created between defendant principal and his or her apparent agent because a third party dealing with the alleged agent has a reasonable belief in the agent's authority, the belief is generated by some act or neglect by the principal sought to be charged, and the third party relying on the agent's apparent authority is not guilty of neglect. An agency is either actual or ostensible. It is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another, who is not really employed by the principal, to be his or her agent [*Civ. Code §§ 2298, 2300*].

A contention that an ostensible agency was created by the conduct of the principal may be used in any action between a third party who dealt with an apparent agent and a principal who denies that an actual agency existed. The optional paragraph may be used when counsel anticipates an opposing contention, such as that contained in § 182.130, to the effect that plaintiff was under a duty of inquiry as to the existence of the agency relationship, or when such an opposing contention has already been made.

These points and authorities may be combined with the points and *authorities in §§ 182.30 -182.36* as appropriate, and when appropriate the points and *authorities in §§ 182.121* and *182.123 -182.128* may be combined with the contentions supported by these points and authorities.

The contention supported by this form is for use to support the existence of an ostensible agency relationship, and not for use when supporting the agent's alleged ostensible authority to perform a certain act. If alleging that an agent had ostensible authority to perform a particular act, counsel should use the contention in § 182.121. When counsel also alleges the existence of an actual agency, these points and authorities may be combined with the points and *authorities in §§ 182.30 -182.32*, as appropriate [*see Tomerlin v. Canadian Indem. Co. (1964) 61 Cal. 2d 638, 644, 39 Cal. Rptr. 731, 394 P.2d 571* (evidence may support findings of actual and ostensible agency)]. If alleging that an agent had actual authority to perform certain acts, counsel may combine the points and *authorities in §§ 182.33* and *182.34*, as appropriate, with these points and authorities. When alleging that the agency or authority arose because of the principal's ratification of the agent's acts, the points and *authorities in §§ 182.35* and *182.36*, as appropriate, should be combined with these points and authorities. The points and *authorities in §§ 182.123 -182.128* may be combined with these points and authorities whenever a third party seeks recovery against the principal based on the agent's alleged ostensible authority.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that an ostensible agency was created. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that defendant principal acted or failed to act in some manner that caused plaintiff reasonably to believe that the agent had authority to act on behalf of defendant principal, that plaintiff believed that the agent was so authorized, and that plaintiff was not guilty of neglect in relying on the apparent authority of the agent.

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 182.130 -182.132* may be used to oppose the contention supported by these points and authorities. When a third party contends that an ostensible agency has been created, as in this form, defendant principal need not argue in opposition that an agency was not created, but only that the agent's acts were not ostensibly authorized. Thus, the opposing forms, §§ 182.130-182.132, oppose the contention that an agent had ostensible authority and not the contention that an ostensible agency was created.

[c] Related Pleading and Practice Forms

For a form of allegation for use in a complaint alleging that an ostensible agency or authority existed in a given case, see California Forms of Pleading and Practice, Ch. 427, *Principal and Agent* (Matthew Bender).

[3] Discussion of Authorities

[a] Ostensible Agency Created

In ***Mejia v. Community Hosp. of San Bernardino*** *(2002) 99 Cal. App. 4th 1448, 122 Cal. Rptr. 2d 233* , an injured patient brought a medical malpractice action against a radiologist, a hospital, and others, alleging negligence on the part of the radiologist. The hospital successfully moved for a nonsuit immediately after the close of plaintiff's case. On appeal, plaintiff argued that the hospital--which was not the radiologist's employer--was not entitled to a nonsuit because there was a triable issue as to whether the negligent radiologist was the ostensible agent of respondent. The court of appeal agreed and reversed, concluding that a nonsuit on the issue of ostensible agency was improper because plaintiff sought treatment at the hospital and there was no evidence that she should have known that the negligent physician was not an agent of the hospital. The court first reviewed the elements of ostensible agency set forth in *Civ. Code § 2300, 2317,* and *2334*. It noted that in the context of hospitals, the requirements in essence are (1) conduct by the hospital that would cause a reasonable person to believe there was an agency relationship, and (2) reliance on that apparent agency relationship by the plaintiff (*99 Cal. App. 4th 1448, 1456-1457)* . The court stated that when applying the nonsuit standard in the hospital context, it would be difficult for a hospital to obtain a nonsuit based on the lack of ostensible agency. Effectively, all a patient needs to show is that he or she sought treatment at the hospital. Unless the evidence conclusively indicates that the patient should have known that the treating physician was not the hospital's agent, the issue of ostensible agency must be left to the trier of fact. The court found that none of the facts raised by the hospital to show that plaintiff failed to prove ostensible agency, such as the fact that plaintiff was initially unaware of the radiologist's involvement in her care, were relevant (*99 Cal. App. 4th 1448, 1458-1460)* . It concluded that absence evidence that plaintiff should have known that the radiologist was not an agent of the hospital, plaintiff alleged sufficient evidence to get to the jury merely by claiming that she sought treatment at the hospital (*99 Cal. App. 4th 1448, 1460)* .

Hartong v. Partake, Inc. *(1968) 266 Cal. App. 2d 942, 72 Cal. Rptr. 722* , was an action for fraud against defendant principal, based on the misrepresentations of the individual defendants, purported agents of defendant principal. The individual defendants, defendant principal's area director for four California counties and his associate, entered into a partnership for the manufacture and sale of goods under the name of Western (later Pacific) Way. The individual defendants advertised for distributors of their products, representing that distributors would make a specified minimum net income, and plaintiffs answered the advertisements and became distributors. The individual defendants dealt with plaintiffs in the individual defendants' office, which was nominally that of defendant principal, and represented that their partnership was a subsidiary of defendant principal and would be backed by defendant principal's national organization. After defendant principal severed the individual defendants' relationship, plaintiffs discovered the lack of any connection between defendant principal and the partnership. Plaintiffs then brought this action, arguing that the individual defendants were the ostensible agents of defendant principal, and that the latter was therefore liable for the fraudulent misrepresentations made by the individual defendants. The trial court entered judgment for plaintiffs, and defendant principal appealed.

The court of appeal affirmed, holding that substantial evidence supported the finding of the trial court that defendant's conduct had created an ostensible agency (*266 Cal. App. 2d 942, 961)* . The court, citing *Civ. Code §§ 2300* and *2334*, held that ostensible agency rests on the doctrine of estoppel, and that the essential elements of ostensible agency are representations by the principal, justifiable reliance thereon by a third party, and change of position or injury resulting from such reliance (*266 Cal. App. 2d 942, 960)* . The court held that before a third party may recover against the principal for the acts of the ostensible agent, the third person dealing with the agent must do so with a reasonable belief in the agent's authority, and the belief must be generated by some act or neglect by the principal sought to be charged. The court also stated that the person relying on the agent's apparent authority must not be guilty of neglect (*266 Cal.*

App. 2d 942, 960) . Examining the record, the court of appeal held that the existence of an ostensible agency was supported by defendant principal's recognition that the individual defendants were using defendant principal's name and materials to sell unauthorized franchise packages to plaintiffs and the failure to take action to stop the unauthorized sales or to recover defendant principal's materials in the hands of the individual defendants (*266 Cal. App. 2d 942, 961)* .

[b] Third Party Has No Duty to Inquire

Beck v. Arthur Murray, Inc. *(1966) 245 Cal. App. 2d 976, 54 Cal. Rptr. 328* , was an action to hold defendant liable as principal for the actual damages caused by the violation of the Dance Act [*see Civ. Code § 1812.50 et seq.*] committed by its licensee, alleged to be defendant's ostensible agent. Defendant was a corporation that licensed dance studios around the country to use its name and methods under licensing agreements that obligated the licensee to use certain methods and to pay a percentage of gross profits to defendant. The license agreement required the licensee to post a notice stating that the licensee is responsible for all obligations respecting the business of the studio, but plaintiff did not see any such disclaimer. Plaintiff purchased a dance course from the licensee, who absconded shortly thereafter. Plaintiff was granted judgment against defendant, who appealed.

The court of appeal affirmed, holding that the finding that the licensee was the ostensible agent of defendant was supported by substantial evidence, specifically the prominent use of defendant's name and reputation as an inducement toward the public and the failure of the licensee to mention any disclaimer (*245 Cal. App. 2d 976, 979)* . The court also rejected defendant's contention that plaintiff was under a duty to investigate the authority of the licensee to act for defendant, holding that once a third party reasonably relies on the acts or neglect of a principal, and the elements of an ostensible agency are established, there is no duty on the third party to investigate further (*245 Cal. App. 2d 976, 981)* .

[4] Additional Authorities

[a] Ostensible Agency Created

In *Ermoian v. Desert Hospital (2007) 152 Cal. App. 4th 475, 61 Cal. Rptr. 3d 754* , plaintiff was a child who had been born with severe brain abnormalities that would cause her to be severely mentally retarded for her entire life. Through her mother as guardian ad litem, plaintiff brought a wrongful life suit against the hospital and affiliated perinatal clinic, a nurse employed by the hospital, and two physicians who provided care as independent contractors of the clinic. Plaintiff argued that the physicians and nurse breached a duty of care by negligently failing to advise plaintiff's mother of the possibility of plaintiff being born with severe birth defects, as suggested by a series of ultrasounds, in time for plaintiff's mother to elect to abort the pregnancy. Plaintiff eventually settled with the physicians and went to a bench trial against the nurse and hospital, at which trial plaintiff attempted to hold the hospital vicariously liable for the negligence of the settling physicians. The trial court entered judgment for the defendants. The court of appeal affirmed the judgment, although held that no substantial evidence supported the trial court's finding that the physicians were not ostensible agents of the hospital. The court noted that the hospital held out the clinic and clinic personnel to be part of the hospital and concluded that it was objectively reasonable for plaintiff's mother to believe that the physicians were employees of the hospital. The clinic was located across the street from the hospital and used the same name, labeled itself an outpatient clinic, and was staffed by many hospital employees. Plaintiff's mother was initially referred to the clinic and to these specific physicians after visiting the hospital emergency room. She was aware that the clinic was staffed with hospital employees, and all of her contacts with these physicians were at the hospital-run clinic. During all of the interactions between the hospital or clinic and plaintiff's mother, there were no indications to suggest to plaintiff's mother that the physicians were not employees of the hospital (*152 Cal. App. 4th 475, 506-510)* . Although the physicians were ostensible agents of the hospital as a matter of law, the court went on to hold that substantial evidence existed in the record to support the trial court's findings that neither the physicians nor other hospital staff were negligent (*152 Cal. App. 4th 475, 510-516)* .

In *Preis v. American Indem. Co. (1990) 220 Cal. App. 3d 752, 269 Cal. Rptr. 617* , the issue was whether an insurer was bound by the acts of an insurance agent (Schlom) who allegedly had no actual authority to issue certificates of insurance. The insurer's general agent had provided Schlom with the insurer's certificate forms. The court of appeal held that this act gave rise to a question of fact concerning whether the insurer and the agent knew or should have known that Schlom was holding himself out to the public as having certain powers to act on their behalf (*220 Cal. App. 3d 752, 762)* .

The facts and procedural background of *Tomerlin v. Canadian Indem. Co. (1964) 61 Cal. 2d 638, 39 Cal. Rptr. 731, 394 P.2d 571* , are discussed in *§ 182.33[3][a]*. The Supreme Court held that an ostensible agency under *Civ. Code § 2300* arises as a result of conduct of the principal that causes the third party reasonably to believe that the agent possesses authority to act on the principal's behalf (*61 Cal. 2d 638, 643)* . The Court held that the conduct of an insurer that remained silent despite its knowledge that the attorney it had retained for its client had made representations regarding the scope of the insurer's coverage was sufficient to establish an ostensible agency with the attorney acting as the insurer's agent for coverage matters (*61 Cal. 2d 638, 645)* .

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18-182 California Points & Authorities § 182.121

§ 182.121 Supporting Contention That Agent Acted Within Ostensible Authority [Civ. Code § 2317]--Ostensible Authority Exists When Third Party Reasonably Relies on Principal's Conduct

[1] FORM

[*The following points and authorities may be included in a memorandum of points and authorities or in a trial or appellate brief. The following may be combined with the points and authorities in §§ 182.30 -182.36 and 182.120, as appropriate, and when appropriate the points and authorities in §§ 182.123 -182.128 may be combined with the contentions supported by the following points and authorities.*]

_____ [DEFENDANT *or* PLAINTIFF] AGENT HAD OSTENSIBLE AUTHORITY TO _____ [*specify acts performed, e.g.,* NEGOTIATE CONTRACTS] AS AGENT FOR _____ [DEFENDANT *or* PLAINTIFF] PRINCIPAL BECAUSE OSTENSIBLE AUTHORITY EXISTS WHEN A PRINCIPAL'S CONDUCT CAUSES A THIRD PARTY REASONABLY TO BELIEVE THE AGENT IS AUTHORIZED TO ACT FOR THE PRINCIPAL AND THE THIRD PARTY INCURS LIABILITY OR PARTS WITH VALUE IN GOOD FAITH AND WITHOUT WANT OF ORDINARY CARE ON THE FAITH THEREOF, [AND A PRINCIPAL NEED NOT BE IN DIRECT CONTACT WITH THE THIRD PARTY FOR THE THIRD PARTY REASONABLY TO CONCLUDE THAT AN AUTHORITY EXISTS].

A. Agent's Ostensible Authority Based on Third Party's Reasonable Belief. Ostensible authority arises as a result of conduct of the principal that causes the third party reasonably to believe that the agent possesses the authority to act on the principal's behalf and to incur a liability or part with value in good faith, and without want of ordinary care, on the faith thereof (*Civ. Code §§ 2317, 2334*; *Tomerlin v. Canadian Indem. Co. (1964) 61 Cal. 2d 638, 643, 39 Cal. Rptr. 731, 394 P.2d 571*).

[*Optional*] **B. Principal Need Not Have Direct Contact With Third Person.** Although ostensible authority can be created only by the acts or declarations of the principal, the principal need not have been in direct contact with the third party; the manifestation of the principal may be to the community at large and may consist of appointing the agent to a particular position (*Meyer v. Ford Motor Co. (1969) 275 Cal. App. 2d 90, 102, 79 Cal. Rptr. 816*).

[*Optional*] **C. Third Party's Reliance on Representations to Public May Suffice.** In order to show ostensible agency a plaintiff must prove that he or she justifiably relied on a representation made by the principal. However, as long as plaintiff relied on the representation, it may have been made to plaintiff personally or to the public in general (*Kaplan v. Coldwell Banker Residential Affiliates, Inc. (1997) 59 Cal. App. 4th 741, 747, 69 Cal. Rptr. 2d 640*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that an agent had ostensible authority to perform certain acts on behalf of defendant principal and that the principal therefore should be bound by the agent's acts done within that ostensible authority. This argument may be used in any action in which the authority of an agent must be established in order to bind a principal for the authorized acts of his or her agent. For example, the argument may be used in a tort action seeking to hold the principal liable for damages caused by the agent's wrongful act. This argument may also be used in a third party's action to recover damages from a principal for breach of a contract entered into by an agent on behalf of the principal. The optional paragraph may be used when plaintiff third party anticipates a contention that no ostensible authority was conferred because plaintiff had no direct contact with defendant principal.

The contention supported by these points and authorities is for use when supporting the agent's alleged ostensible authority to perform a certain act. If alleging that an ostensible agency was created, counsel should use the contention in § 182.120. When the existence of an actual agency is also alleged, these points and authorities may be combined with the points and *authorities in §§ 182.30 -182.32*, as appropriate [*see Tomerlin v. Canadian Indem. Co. (1964) 61 Cal. 2d 638, 644, 39 Cal. Rptr. 731, 394 P.2d 571* (evidence may support findings of actual and ostensible agency)]. If alternatively alleging that an agent had actual authority to perform certain acts, counsel may combine the points and *authorities in §§ 182.33* and *182.34*, as appropriate, with these points and authorities. When alternatively alleging that the agency or authority arose because of the principal's ratification of the agent's acts, the points and *authorities in §§ 182.35* and *182.36*, as appropriate, should be combined with these points and authorities. The points and *authorities in §§ 182.123 -182.128* may be combined with these points and authorities whenever a third party seeks recovery against the principal based on the agent's alleged ostensible authority.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that an agent acted within an ostensible authority created by a third party's reliance on the principal's conduct. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel should discuss facts showing that defendant principal acted in a manner that caused plaintiff to believe that the agent was authorized to act as he or she did, that plaintiff's reliance was reasonable under the circumstances, and that plaintiff incurred a liability or parted with value in good faith and without ordinary care.

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 182.130 -182.132* may be used to oppose the contention supported by these points and authorities.

[c] Related Pleading and Practice Forms

For an allegation for use in a complaint alleging that an ostensible agency or authority existed in a given case, see California Forms of Pleading and Practice, Ch. 427, *Principal and Agent* (Matthew Bender).

[3] Discussion of Authorities

[a] Agent's Ostensible Authority Based on Third Party's Reasonable Belief

The facts and procedural background of ***Tomerlin v. Canadian Indem. Co.*** *(1964) 61 Cal. 2d 638, 39 Cal. Rptr. 731, 394 P.2d 571* , are discussed in *§ 182.33[3][a]*. The Supreme Court held that ostensible authority arises as a result of conduct of the principal that reasonably causes a third party to believe that the agent possesses authority to act on the principal's behalf, citing *Civ. Code § 2317* (*61 Cal. 2d 638, 643)* . The Court stated that if a principal by his or her acts has led others to believe that he or she has conferred authority on an agent, the principal cannot be heard to assert as against third parties who have relied thereon in good faith that he or she did not intend to confer that power (*61 Cal. 2d 638, 644)* . The Court held that defendant insurer had conferred ostensible authority on the attorney it retained to represent plaintiff by its silence in the face of its actual knowledge of the attorney's participation in coverage problems (*61 Cal. 2d 638, 644-645)* .

[b] Principal Need Not Have Direct Contact With Third Person

Meyer v. Ford Motor Co. *(1969) 275 Cal. App. 2d 90, 79 Cal. Rptr. 816* , was an action by a former Ford dealer for damages for fraud and breach of an agreement to assist plaintiff in selling the assets of his dealership. Plaintiff's sales performance had been below defendant's criteria for some time when defendant's district sales manager, in charge of defendant's sales in northern California, told plaintiff that the manager would recommend to defendant's regional sales manager that the agreement be terminated. Plaintiff then met with three subordinates of the district manager, who told plaintiff that defendant would assist in the sale of the franchise, and that the price could be worked out with the buyer, an important concession to plaintiff who sought to recover the investment he had made in the dealership. The subordinates later told plaintiff that plaintiff could not exceed a specified price that would not allow a return of the investment, and the dealership agreement would be terminated unless a sale at that price was made. Plaintiff sued after the dealership was terminated, and the jury found that the subordinates were ostensibly authorized to represent that plaintiff would not be financially hurt by the sale, and that defendant's agents made the representation without the intent to perform its obligations. Defendant appealed the judgment in favor of plaintiff.

The court of appeal affirmed, holding that the subordinates had the ostensible authority to make representations as to the price at which the dealership could be sold (*275 Cal. App. 2d 90, 103)* . The court recognized that ostensible authority is based on representations of the principal rather than of the agent, but held that it is unnecessary that the principal have direct contact with the third party; the manifestation of the principal may be to the community at large and may consist of appointing the agent to a particular position (*275 Cal. App. 2d 90, 102)* . The court held that an agent put in charge of a business as the apparent manager appears to have authority to do all things essential to the conduct of business at that place, and third persons acting in good faith, without notice of or reason to suspect any limitations on the authority, are entitled to rely on the appearance of authority, and that when a third party reasonably relies on that appearance, an ostensible authority in the agent exists (*275 Cal. App. 2d 90, 102)* . The court held that the promise to allow plaintiff and the prospective buyer to determine the price at which the dealership would be sold was within the scope of the ostensible authority of the subordinates, given their authority to assist in the sale of the dealership. The court held that defendant could not now claim that it could not have anticipated that its agents would not represent that plaintiff would be able to recoup his losses by selling at a price high enough to recoup the losses (*275 Cal. App. 2d 90, 103)* .

[c] Third Party's Reliance on Representations to Public May Suffice

In ***Kaplan v. Coldwell Banker Residential Affiliates, Inc.*** *(1997) 59 Cal. App. 4th 741, 69 Cal. Rptr. 2d 640* ; plaintiff, a superior court judge, sued his real estate broker, a Coldwell Banker franchisee, for fraud. Coldwell Banker was named as a defendant on a respondeat superior theory. Plaintiff alleged that he placed great faith and trust in defendants because the franchisee was part of the Coldwell Banker organization, which had an established reputation for honesty, integrity and expertise. Although the franchisee independently owned and operated his real estate office and the

franchisee's advertising included disclaimer language to that effect, plaintiff testified that he "went for the Coldwell Banker sign," did not notice the disclaimer and trusted defendant because they were a large reputable company. The trial court granted Coldwell Banker's motion for summary judgment. The court of appeal reversed, holding that plaintiff had presented a triable issue of fact with respect to ostensible agency. Citing *Preis v. American Indem. Co. (1990) 220 Cal. App. 3d 752, 761, 269 Cal. Rptr. 617* , the court stated that the essential elements of an ostensible agency theory were representations made by the principal, justifiable reliance by a third party, and a change in position from such reliance resulting in injury. Here, the court found that while Coldwell Banker had made no specific representations to plaintiff, it had made representations to the public in general, upon which plaintiff relied. It said that it understood why plaintiff and members of the general public might have believed that Coldwell Banker stood behind its franchisee's realty company; the venerable name, the advertising campaign, and the logo were all designed to bring customers into Coldwell Banker franchises. This evidence raised a triable issue of fact on an ostensible agency theory, sufficient to withstand summary judgment (*59 Cal. App. 4th 741, 748*).

[4] Additional Authorities

[a] Agent's Ostensible Authority Based on Third Party's Reasonable Belief

C.A.R. Transp. v. Darden Rests., Inc. (9th Cir. 2000) 213 F.3d 474 arose from a dispute over payment of freight charges incurred when Trans-Pac Foods arranged to send three truckloads of shrimp to Darden Restaurants. Trans-Pac arranged for transportation through broker GAP, which contracted with broker C.A.R., which in turn arranged to have three motor carriers transport the shrimp. The carriers' drivers each signed a "waiver of claim by subcontractor," waiving any claim the carriers had against Trans-Pac and Darden for payment of the shipping charges. The shipments were transported and delivered in good order. Trans-Pac paid GAP for the shipping charges and C.A.R. billed GAP for the freight charges. GAP, however, never paid and later filed a Chapter 11 bankruptcy proceeding (*213 F.3d 474, 476-477)* . C.A.R. filed suit against Trans-Pac and Darden, claiming they must pay it for the freight charges generated by the three shipments. It eventually alleged that it had an assignment of rights from the carriers. Trans-Pac and Darden moved for summary judgment. The district court held that the waivers signed by the carriers' drivers could lawfully allocate liability for freight charges under the Interstate Commerce Act and that the drivers had ostensible authority to sign the waivers on behalf of their principals (*213 F.3d 474, 477)* . The court of appeal affirmed. It stated that California law controlled the issue of whether the drivers had ostensible authority to sign the waivers and cited *Civ. Code § 2317*. It held that Trans-Pac and Darden came forward with sufficient evidence of ostensible authority to entitle them to a directed verdict if the evidence went uncontroverted at trial, and that C.A.R.'s evidence did not set forth specific facts showing there was a genuine issue for trial (*213 F.3d 474, 479-481)* .

The facts and procedural background of *Jacoves v. United Merch. Corp. (1992) 9 Cal. App. 4th 88, 11 Cal. Rptr. 2d 468* , are discussed in *§ 182.33[4][a]*. Reversing a summary judgment for defendant hospital, the Court of Appeal held that triable issues of fact existed, including whether the parents reasonably believed that their son's doctor acted as the hospital's agent in his treatment and supervision of their son at the hospital.

The court cited *Civ. Code §§ 2300, 2317* as providing that ostensible agency is created when a principal intentionally, or by want of ordinary care, causes a third party to believe that another is an agent. In this case, the court noted that the hospital designated the son's doctor as director of its adolescent psychiatric unit and obtained releases for him on its admissions forms. The court concluded that these facts created, and the hospital failed to negate, a reasonable inference that the hospital intentionally or unintentionally caused the parents to rely on its implied representations that the doctor was the hospital's ostensible agent. It was also reasonable to infer that the parents based their decision to admit their son to the hospital at least in part on the doctor's position with the hospital (*9 Cal. App. 4th 88, 103-104)* .

Myers v. Stephens (1965) 233 Cal. App. 2d 104, 43 Cal. Rptr. 420 , was an action for conversion by plaintiff, who claimed that defendant principal sold plaintiff a house through defendant's agent, and then sold it to another party. The agent talked to defendant principal on the phone during the negotiations, and defendant principal rejected plaintiff's first

offer because it would not take effect soon enough. The court of appeal affirmed the judgment of the trial court awarding damages to plaintiff, holding that the trial court's finding that the agent had ostensible authority under *Civ. Code § 2317* was supported by plaintiff's reasonable belief, based on the agent's phone conversation, that the agent was authorized to accept an offer addressing defendant principal's concern regarding the time of the transaction. The court held that if a principal by his or her acts has led others to believe that he or she has conferred an authority on an agent, the principal will not be heard to assert, as against third persons who have relied thereon in good faith, that he or she did not intend to confer that power (*233 Cal. App. 2d 104, 114-115)* .

[b] Principal Need Not Have Direct Contact With Third Person

In *Leavens v. Pinkham & McKevitt (1912) 164 Cal. 242, 128 P. 399* , plaintiffs sued to recover the price of fruit that defendant refused to pay because defendant's agent was unauthorized to purchase fruit. Defendant had for many years operated packing houses at which it received citrus fruits for packing and shipping to market, and employed a general manager at one such house who had in the past purchased fruit from plaintiffs as well as taken fruit on consignment. The Supreme Court affirmed the judgment for plaintiff, holding that the conduct of defendant in putting the manager in charge of the business at the packing house apparently gave the manager authority to buy fruit for his principal, and that plaintiffs acted in good faith and without negligence in relying on that apparent authority. The Court held that an ostensible authority therefore was conferred on the manager to purchase fruit (*164 Cal. 242, 248-249)* .

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CHAPTER 182 PRINCIPAL AND AGENT
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E. Actions by Third Party Against Principal

18-182 California Points & Authorities § 182.122

§ 182.122 Supporting Contention That Notice to or Knowledge of Agent Imputed to Principal [Civ. Code § 2332]--Principal Chargeable With Facts Known to Agent Within Scope of Agency

[1] FORM

[*The following may be combined with the contentions supported by the points and authorities set forth in §§ 182.30 -182.36, 182.120, and 182.121, as appropriate, and may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

DEFENDANT PRINCIPAL IS CHARGEABLE WITH, AND BOUND BY, THE KNOWLEDGE OF OR NOTICE TO THE [DEFENDANT] AGENT BECAUSE A PRINCIPAL IS CHARGEABLE WITH, AND BOUND BY, THE KNOWLEDGE OF OR NOTICE TO AN AGENT THAT IS RECEIVED WHILE THE AGENT IS ACTING WITHIN THE SCOPE OF HIS/HER AUTHORITY AND THAT IS IN REFERENCE TO A MATTER OVER WHICH THE AUTHORITY EXTENDS.

A. Notice to Either Principal or Agent Imputed to Both. As against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought in good faith and the exercise of ordinary care and diligence to communicate to the other (*Civ. Code § 2332*).

B. Principal Chargeable With and Bound by Knowledge of or Notice to Agent. A principal is chargeable with, and is bound by the knowledge of, or notice to, his or her agent received while the agent is acting within the scope of his or her authority and in reference to a matter over which the authority extends (*Trane Co. v. Gilbert (1968) 267 Cal. App. 2d 720, 727, 73 Cal. Rptr. 279* ; *Columbia Pictures Corp. v. DeToth (1948) 87 Cal. App. 2d 620, 630, 197 P.2d 580*).

[*Optional*] **C. Knowledge or Notice Imputed Although No Actual Communication.** The fact that an agent may or may not have reported information to the principal is immaterial when the agent was acting in the course of his or her employment and the information was acquired by the agent in the transaction of the principal's business (*Trane Co. v. Gilbert (1968) 267 Cal. App. 2d 720, 727, 73 Cal. Rptr. 279*).

[*Optional*] **D. Knowledge of Authorized Subagent Imputed to Principal.** The doctrine of imputed knowledge applies in the relationship of principal and subagent when the latter's employment is authorized or ratified by the principal (*Northern Natural Gas Co. v. Superior Court (1976) 64 Cal. App. 3d 983, 993, 134 Cal. Rptr. 850* ; *Trane Co. v. Gilbert (1968) 267 Cal. App. 2d 720, 727, 73 Cal. Rptr. 279*).

[*Optional*] **E. Principal Charged With Agent's Knowledge Acquired Before Agency.** A principal is charged with knowledge acquired by the agent before the commencement of the agency relationship, if that knowledge can reasonably be said to be present in the mind of the agent while acting for the principal (*O'Riordan v. Federal Kemper Life Assurance Co. (2005) 36 Cal. 4th 281, 288-289, 30 Cal. Rptr. 3d 507, 114 P.3d 753*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that defendant principal is chargeable with, and is bound by, the knowledge of or notice to his or her agent received while the agent was acting within the scope of his or her authority and in reference to a matter over which the authority extends. This argument may be used whenever a third party must establish that a principal had knowledge or notice of some fact that allegedly was communicated to an agent. Optional Paragraph C may be used when counsel anticipates the argument that the agent did not communicate the knowledge or notice to the principal. Optional Paragraph D may be used when the knowledge or notice of a subagent is to be charged to the principal. Optional Paragraph E may be used when the agent's knowledge that is sought to be charged to the principal was acquired by the agent before the agency was created but was used by the agent while acting for the principal.

If the existence of the agency is disputed, these points and authorities may be combined with the points and *authorities in §§ 182.30 -182.32* and *182.120*, as appropriate. If the extent of an agent's authority is disputed, these points and authorities may be combined with the points and *authorities in §§ 182.33*, *182.34*, and *182.121*, as appropriate. If the agency or authority is alleged to have arisen because of the principal's ratification, these points and authorities may be combined with the points and *authorities in §§ 182.35* and *182.36*, as appropriate.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that defendant principal is chargeable with, and is bound by, notice to or knowledge of his or her agent. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that defendant principal's agent received the knowledge or notice while acting within the scope of his or her authority, and that the knowledge or notice was in reference to a matter over which the authority extended. When appropriate, counsel should also include facts relevant to optional paragraphs used by counsel.

[b] Related Pleading and Practice Forms

For a form of allegation that knowledge of, or notice to, an agent should be imputed to defendant principal, see California Forms of Pleading and Practice, Ch. 427, *Principal and Agent* (Matthew Bender).

[3] Discussion of Authorities

[a] Principal Chargeable With and Bound by Knowledge of or Notice to Agent

Trane Co. v. Gilbert *(1968) 267 Cal. App. 2d 720, 73 Cal. Rptr. 279* , was an action to recover from defendant

principal, the developer of a building, the price of a motor installed in the building by plaintiff. Defendant principal admitted that the motor had not been paid for, but alleged that the motor was a replacement for one installed three years previously that had burned out in violation of a warranty. The trial court entered judgment for plaintiff on the ground that an agent of defendant principal had received a copy of an express warranty that was limited by its terms to one year and that precluded any inconsistent warranty. Defendant principal appealed the judgment.

The court of appeal affirmed, holding that under Civ. Code § 2332a principal is chargeable with, and bound by, the knowledge of or notice to an agent received while the agent is acting within the scope of his or her authority and in reference to a matter over which the authority extends (*267 Cal. App. 2d 720, 727)* . The court held that the agent to whom the warranty material was given was the proper person for such knowledge, being the engineer in charge of the system the motor was for use in, and defendant principal was therefore held charged with knowledge of the warranty's one-year limit (*267 Cal. App. 2d 720, 727-728)* .

Columbia Pictures Corp. v. DeToth *(1948) 87 Cal. App. 2d 620, 197 P.2d 580* , was an action seeking declaratory relief as to defendant principal's obligations under an oral contract of employment between plaintiff and defendant principal. Defendant principal's agent had negotiated a contract with plaintiff for defendant principal's employment by plaintiff, and defendant principal orally agreed to sign the contract. The agent knew the terms and conditions in the contract prepared by plaintiff, but defendant principal refused to sign it because of the length of the term specified in the contract that he claimed to have been unaware of. The trial court rejected defendant principal's contention that he did not know the terms of the contract, and entered judgment in plaintiff's favor declaring that defendant principal was bound by the terms of the contract. Defendant principal appealed the judgment.

The court of appeal affirmed, holding that the agent's knowledge of the content of the contract was imputed to defendant principal (*87 Cal. App. 2d 620, 630)* . The court stated the proper rule to be that a principal is chargeable with and is bound by the knowledge of, or notice to, an agent received while the agent is acting within the scope of his or her authority and that is in reference to a matter over which the authority extends (*87 Cal. App. 2d 620, 630)* . The court concluded that the agent knew and had in mind the terms of the standard form of director's contract used by plaintiff, and defendant principal was chargeable with knowledge of the terms and provisions of the contract (*87 Cal. App. 2d 620, 631)* .

[b] Knowledge or Notice Imputed Although No Actual Communication

The facts and procedural background of ***Trane Co. v. Gilbert*** *(1968) 267 Cal. App. 2d 720, 73 Cal. Rptr. 279* , are discussed in *§ 182.122[3][a]*. The court of appeal court dismissed the contention that the agent had not informed plaintiff that the warranty was limited to one year, holding that the fact that the agent may or may not have reported the information was immaterial, for he was acting in the course of his employment and the principal was charged with knowledge of information acquired in the transaction of the principal's business (*267 Cal. App. 2d 720, 727)* .

[c] Knowledge of Authorized Subagent Imputed to Principal

In ***Northern Natural Gas Co. v. Superior Court*** *(1976) 64 Cal. App. 3d 983, 134 Cal. Rptr. 850* , plaintiff brought an action alleging that defendant principal had defrauded plaintiff through its agents, who allegedly represented that defendant principal and its subsidiary had entered into a joint venture to market a product. The chairman of the board of the subsidiary was also the president of defendant principal, a corporation that otherwise had no connections with the state of California. Defendant principal moved to quash service of process on the ground of lack of jurisdiction. Plaintiff argued that defendant principal had knowledge of the misrepresentations because of the knowledge of the subsidiary's chairman and that jurisdiction should be found because of defendant principal's participation in the fraud. The motion was denied, and defendant principal petitioned for a writ of mandate.

The court of appeal refused to issue the writ as to defendant principal, holding that the chairman of the board was

chargeable with knowledge of the representations, acts, and conduct of the employees of that company (*64 Cal. App. 3d 983, 992)* . The court also held that inasmuch as the chairman of the board of the subsidiary was also the president of defendant principal, defendant principal was chargeable with the same knowledge (*64 Cal. App. 3d 983, 993)* . The court held that the doctrine of imputed knowledge applies in the relationship of principal and subagent when the subagent's employment by the agent is authorized or ratified. The court also held that the trial court had a right to conclude that defendant principal, as stockholder of the subsidiary, elected its president as president of the subsidiary so that the president would be fully aware of the subsidiary's actions (*64 Cal. App. 3d 983, 993)* .

The facts and procedural background of ***Trane Co. v. Gilbert*** *(1968) 267 Cal. App. 2d 720, 73 Cal. Rptr. 279* , are discussed in *§ 182.122[3][a]*. The court relied on *Civ. Code § 2351,* providing that a lawfully appointed subagent represents the principal in like manner with the original agent, to conclude that the engineer in charge of planning the air-conditioning system was the agent of plaintiff because the engineer's employment by plaintiff's agent was authorized by plaintiff, and that the knowledge of the authorized subagent was imputable to, and was the equivalent of, notice to the principal (*267 Cal. App. 2d 720, 727)* .

[d] Principal Charged With Agent's Knowledge Acquired Before Agency

In ***O'Riordan v. Federal Kemper Life Assurance Co.*** *(2005) 36 Cal. 4th 281, 30 Cal. Rptr. 3d 507, 114 P.3d 753* , the insurance company had issued a nonsmoker-rated life insurance policy and subsequently denied the beneficiary's claim on the ground that the insured had concealed her usage of cigarettes during the 36-month period before the policy was issued. In fact the insured had revealed her cigarette usage to her insurance broker. The broker was not an agent of the company when he obtained the policy on her behalf, but he applied to become an agent, and the company accepted him as an agent, in connection with the application for and issuance of the policy. The Supreme Court held that the broker's knowledge of the insured's cigarette usage was imputed to the company because of the broker's status as the company's agent and because his knowledge of the insured's smoking could reasonably be said to have been present in his mind while he was acting as the company's agent. The Court cited *Columbia Pictures Corp. v. DeToth (1948) 87 Cal. App. 2d 620, 197 P.2d 580* , discussed in *§ 182.122[3][a]*, for the rule that the principal is charged with knowledge acquired by the agent before the commencement of the agency relationship, if that knowledge can reasonably be said to be present in the mind of the agent while acting for the principal (*36 Cal. 4th 281, 288-289)* .

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18-182 California Points & Authorities § 182.123

§ 182.123 Supporting Contention That Third Party May Recover Tort Damages [Civ. Code § 3333] From Principal for Acts of Agent--Agent Committed Wrongful Act

[1] FORM

[*The following may be combined with the contentions supported by the points and authorities set forth in §§ 182.30 -182.36, 182.120, and 182.121, as appropriate and may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

PLAINTIFF MAY RECOVER TORT DAMAGES FROM DEFENDANT PRINCIPAL FOR THE WRONGFUL ACTS OF THE [DEFENDANT] AGENT BECAUSE A PRINCIPAL IS LIABLE FOR TORT DAMAGES FOR A WRONGFUL ACT COMMITTED BY AN AGENT _____ [IN TRANSACTING THE PRINCIPAL'S BUSINESS REGARDLESS OF WHETHER OR NOT THE ACT WAS AUTHORIZED OR RATIFIED BY THE PRINCIPAL *and/or* WHEN THE ACT WAS AUTHORIZED OR RATIFIED BY THE PRINCIPAL].

[*EITHER*]

A. Principal Liable for Wrongful Acts of Agent in Transacting Business. Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of the agent in transacting the business of the agency, including wrongful acts committed by the agent in and as a part of the transaction of such business, regardless of whether or not the wrong is authorized or ratified by the principal, and for the agent's willful omission to fulfill the obligations of the principal (*Civ. Code § 2338*; *Hudson v. Nixon (1962) 57 Cal. 2d 482, 484, 20 Cal. Rptr. 620, 370 P.2d 324*).

[*AND/OR*]

B. Principal Liable for Agent's Authorized or Ratified Wrongful Acts. A principal is responsible for no wrongs

committed by his or her agent other than those set out in *Section 2338 of the Civil Code*unless the principal has authorized or ratified the acts, even though they are committed while the agent is engaged in the principal's service (*Civ. Code § 2339*; *see Maberto v. Wolfe (1930) 106 Cal. App 202, 206, 289 P. 218* ; *Benson v. Southern Pac. Co. (1918) 177 Cal. 777, 779-780, 171 P. 948*).

[*Optional*] **C. Determining Whether or Not Act Committed During Course of Agency.** The determination of whether or not an act was committed during the course of an agency turns on whether or not (1) the act performed was either required or incident to the duties of the agent, or (2) the misconduct could be reasonably foreseen by the principal in any event (*see Clark Equip. Co. v. Wheat (1979) 92 Cal. App. 3d 503, 520, 154 Cal. Rptr. 874*).

[*Optional*] **D. Wrongful Act May Be Within Scope of Agency Although in Excess of Authority.** The fact that an agent acts in excess of his or her authority or contrary to instructions is not inconsistent with an inference that he or she was acting within the scope of his or her employment (*Clark Equip. Co. v. Wheat (1979) 92 Cal. App. 3d 503, 520, 154 Cal. Rptr. 874*).

[*Optional*] **E. Exemplary Damages When Principal Has Knowledge of Agent's Unfitness.** A principal may be liable for exemplary damages based on the acts of an agent if the principal had advance knowledge of the unfitness of the agent and employed him or her with a conscious disregard of the rights or safety of others (*Civ. Code § 3294(b)*; *see* Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 822, 157 Cal. Rptr. 482, 598 P.2d 452).

[*Optional*] **F. Exemplary Damages When Principal Authorizes Wrongful Act.** A third party may recover exemplary damages from an employer for a wrongful act by an employee done in the usual performance of his or her duties and expressly authorized by the employer (*Civ. Code § 3294(b)*; *Schanafelt v. Seaboard Fin. Co. (1951) 108 Cal. App. 2d 420, 423-424, 239 P.2d 42*).

[*Optional*] **G. Exemplary Damages When Principal Personally Guilty of Oppression.** A third party may recover exemplary damages from a principal based on the acts of an agent if the principal was personally guilty of oppression (*Civ. Code § 3294(b)*).

[*Optional*] **H. Exemplary Damages When Principal Personally Guilty of Malice.** Exemplary damages may be awarded against a principal who is personally guilty of malice (*Civ. Code § 3294(b)*; *see Nolin v. National Convenience Stores, Inc. (1979) 95 Cal. App. 3d 279, 289, 157 Cal. Rptr. 32*).

[*Optional*] **I. Corporate Liability Depends on Act by Officer, Director, or Managing Agent.** For an award of exemplary damages to be imposed on a corporate employer, the advance knowledge and conscious disregard, authorization, ratification, or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation (*Civ. Code § 3294(b)*; *White v. Ultramar, Inc. (1999) 21 Cal. 4th 563, 573, 88 Cal. Rptr. 2d 19, 981 P.2d 944*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a third party may recover from a principal the tort damages caused by the wrongful act or omission of the principal's agent. For example, such a contention may be used in an action for damages brought against the agent and the principal, or against the principal alone. The argument supported by Paragraph A of this form is for use when the act of the agent was committed during his or her transaction of the business of the agency. This argument does not depend on a showing that the act was within the agent's authority, but only a showing of the fact of agency [*see Hudson v. Nixon (1962) 57 Cal. 2d 482, 484, 20 Cal. Rptr. 620, 370 P.2d 324* ; *Clark Equip. Co. v. Wheat (1979) 92 Cal. App. 3d 503, 520, 154 Cal. Rptr. 874]* . The argument supported

by Paragraph B of the form memorandum is for use when the agent's act was not committed in and as a part of the transaction of the business of the agency but was authorized or ratified by the principal, and thus the third party may recover damages from the principal [*Civ. Code §§ 2338, 2339*; *see Maberto v. Wolfe (1930) 106 Cal. App 202, 206, 289 P. 218* ; *Benson v. Southern Pac. Co. (1918) 177 Cal. 777, 779-780, 171 P. 948]* . Both Paragraphs A and B may be used when the third party argues that the respective liabilities of *Civ. Code §§ 2338* and *2339* apply in the alternative, or because the agent's act was both committed in the transaction of the business and ratified or authorized by the principal. Optional Paragraph C may be used when counsel anticipates an opposing contention that the agent's act was not within the scope of the agency. Optional Paragraph D may be used when counsel anticipates an opposing contention that the agent's act was not not authorized by defendant principal. Optional Paragraphs E-I may be used, as appropriate, when the third party seeks exemplary damages from defendant principal based on the agent's acts.

If the existence of the agency is disputed, the above points and authorities may be combined with the points and *authorities in §§ 182.30 -182.32* and *182.120*, as appropriate. If the extent of an agent's authority is disputed, these points and authorities may be combined with the points and *authorities in §§ 182.33, 182.34*, and *182.121*, as appropriate. If the agency or authority is alleged to have arisen because of the principal's ratification, the above points and authorities may be combined with the points and *authorities in §§ 182.35* and *182.36*, as appropriate.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a third party may recover tort damages from a principal for the wrongful act or omission of the principal's agent. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the above form, showing the relationship between the facts of the case and the points of law stated. Thus, if Paragraph A is used, counsel should discuss facts showing that the agent was conducting the business of the agency when he or she committed the wrongful act causing damage to plaintiff third party. If Paragraph B is used, counsel should discuss facts showing that defendant principal ratified or authorized the agent's wrongful act, as appropriate. If appropriate, counsel should also insert facts showing that the wrongful act was a reasonably foreseeable risk of the business of the agency [*see Rodgers v. Kemper Constr. Co. (1975) 50 Cal. App. 3d 608, 618-619, 124 Cal. Rptr. 143]* . If counsel includes optional Paragraphs E-I, counsel should include facts showing that exemplary damages are proper.

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 182.135* and *182.136* may be used to oppose the contention supported by the above points and authorities.

[c] Related Pleading and Practice Forms

For a form of allegation for use in a complaint against a principal for the wrongful act of his or her agent, see California Forms of Pleading and Practice, Ch. 427, *Principal and Agent* (Matthew Bender). For a form of allegation for use in alleging that a plaintiff may recover exemplary damages from a principal for the act of an agent, see California Forms of Pleading and Practice, Ch. 427, *Principal and Agent* (Matthew Bender). For forms of complaint for use in seeking exemplary damages generally, see *California Forms of Pleading and Practice, Ch. 177, Damages § 177.40 et seq.* (Matthew Bender).

[d] Related Points and Authorities

For alternative points and authorities for use in alleging that exemplary damages may be recovered, see Ch. 64, *Damages: Tort* and Ch. 65, *Damages: Contract* .

[3] Discussion of Authorities

[a] Principal Liable for Wrongful Acts of Agent in Transacting Business

Hudson v. Nixon *(1962) 57 Cal. 2d 482, 20 Cal. Rptr. 620, 370 P.2d 324* , was an action to recover damages under the Hawkins Act [former Health & Safety Code §§ 35700-35741], alleging that defendants had refused to rent an apartment to plaintiffs because of their race. Plaintiffs obtained a judgment in the trial court, and defendants appealed, arguing that defendant principal could not be held liable for the acts of defendant agent in discriminating against plaintiffs.

The Supreme Court affirmed the judgment, holding that the Act provided for compensatory, rather than penal, damages, and that a principal is liable for compensatory damages for the wrong committed by an agent in transacting the principal's business regardless of whether or not the wrong is authorized or ratified by the principal (*57 Cal. 2d 482, 484)* .

[b] Principal Liable for Agent's Authorized or Ratified Wrongful Acts

In ***Maberto v. Wolfe*** *(1930) 106 Cal. App 202, 289 P. 218* , plaintiff was injured when she was struck by an automobile driven by defendant agent and owned by defendant principal. Defendant agent was driving the car at the request of defendant principal to transport the car to San Francisco, where the accident took place. The jury held defendant principal liable for plaintiff's damages, and defendant principal appealed from the judgment.

The court of appeal affirmed, holding that defendant principal was liable independently of the doctrine of respondeat superior (*106 Cal. App. 202, 206)* . The court held that defendant principal was liable under the principle qui facit per alium facit per se (who acts through another acts himself) (*106 Cal. App. 202, 206)* . Quoting from a South Carolina case, the court noted the distinction between respondeat superior liability, when a servant acts in the scope of his or her employment but without direction of the principal and the principal is held liable on public policy grounds for injury resulting from the agent's act, and qui facit liability, when the servant causes injury in doing the very thing the master directs the servant to do, and the master is held responsible for his or her own act (*106 Cal. App. 202, 206)* . The court held that the qui facit doctrine was the basis for the liability of defendant principal (*106 Cal. App. 202, 206)* .

Benson v. Southern Pac. Co. *(1918) 177 Cal. 777, 171 P. 948* , was an action to recover damages for the death of plaintiff's child caused by a train of defendant company. The complaint named as defendants the company and the engineer of the train, and alleged that defendants were negligent in operating the train at an excessive speed in a crowded thoroughfare. At trial plaintiff introduced evidence that the train was operated on a schedule, at a rate of speed predetermined by defendant company. The jury returned a verdict in favor of plaintiff against defendant company, but was silent as to defendant engineer, and the trial court entered judgment accordingly. Defendant appealed from the judgment and the denial of its motion for a new trial.

The Supreme Court affirmed the judgment, holding that the failure to find against the engineer did not prejudice defendant company because the verdict could stand without a finding that defendant engineer was negligent (*177 Cal. 777, 780)* . The Court distinguished between liability based on respondeat superior, when an employer is held liable for the acts of an employee without any fault of the employer, and the joint liability that results when the employer directs the employee to maintain a negligent speed (*177 Cal. 777, 779)* . The Court held that when the employee acts at the direction of the principal, the negligence of the employer is not based on respondeat superior but on the negligent participation of the employer, and the failure to find a verdict against the employee did not prejudice the verdict against defendant company (*177 Cal. 777, 780)* .

The Court noted that *Bradley v. Rosenthal (1908) 154 Cal. 420, 424-425, 97 P. 875* , which had held that a verdict purporting to exonerate an agent but hold a principal liable could not be reconciled, was based on the explicit finding that the principal in that case did not direct or participate in the acts of the agent that damaged the plaintiff. The Court in *Bradley* had pointed out the distinction between negligent acts of the servant done at the direction of the principal and

negligent acts done on the agent's own initiative (*177 Cal. 777, 780)* . The *Benson* Court's reliance on *Bradley* apparently shows that the Court did not distinguish the liability between principal and agent on the one hand from the liability between employer and employee on the other.

[c] Determining Whether or Not Act Committed During Course of Agency

In ***Clark Equip. Co. v. Wheat*** *(1979) 92 Cal. App. 3d 503, 154 Cal. Rptr. 874* , defendant cross complained against plaintiff principal in an action to enforce an installment sales contract for a forklift purchased by defendant. The cross complaint alleged that plaintiff had committed fraud through its agents' misrepresentations as to the capabilities of the defective lift and as to defendant's obligations of payment on the defective lift. The lift sold to defendant was incapable of meeting defendant's needs, and after repairs were unsuccessful a salesman of plaintiff principal persuaded defendant to purchase a more expensive lift and represented that payments on the defective lift need not be made if the new lift were bought. The trial court entered judgment for defendant on the cross complaint, and plaintiff appealed.

The court of appeal affirmed, holding that plaintiff was properly held liable under the doctrine of respondeat superior for the misrepresentations of its agents (*92 Cal. App. 3d 503, 522)* . The court held that the determination of whether an employee committed a tort during the course of his or her employment turns on whether or not (1) the act performed was either required or incident to his or her duties, or (2) the employee's misconduct could be reasonably foreseen in any event (*92 Cal. App. 3d 503, 520)* . The court concluded that the misrepresentations were made in the course and scope of the agents' employment because they were incidental to their respective duties and could reasonably be foreseen by plaintiff (*92 Cal. App. 3d 503, 521-522)* . The court distinguished between foreseeability as a test for negligence and foreseeability in the context before it. The court noted that in the context of respondeat superior liability, foreseeable means merely that in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among the other costs of the employer's business (*92 Cal. App. 3d 503, 522)* . In discussing the doctrine of respondeat superior, the court drew on precedent dealing with both principal-agent and employer-employee situations, without making any clear distinction between them. The court held that plaintiff was liable for the wrongful acts of its employees and its agents, but it appears that the court used the term "employment" to include the scope of an agency (*92 Cal. App. 3d 503, 519-520)* . The court examined the rationale of the doctrine of respondeat superior and held that the purpose of the doctrine was to allocate the risk of loss from the tort of an employee or agent to the enterprise he or she acts for as a required cost of doing business [quoting from *Hinman v. Westinghouse Elec. Co. (1970) 2 Cal. 3d 956, 959-960, 88 Cal. Rptr. 188, 471 P.2d 988]* (*92 Cal. App. 3d 503, 520)* .

[d] Wrongful Act May Be Within Scope of Agency Although in Excess of Authority

The facts and procedural background of ***Clark Equip. Co. v. Wheat*** *(1979) 92 Cal. App. 3d 503, 154 Cal. Rptr. 874* , are discussed in *§ 182.123[3][c]*. The court held that the fact that an agent or employee acts in excess of his or her authority or contrary to instructions is not inconsistent with an inference that he or she was acting within the scope of his or her employment (*92 Cal. App. 3d 503, 520)* .

[e] Exemplary Damages When Principal Has Knowledge of Agent's Unfitness

Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 157 Cal. Rptr. 482, 598 P.2d 452 , was an action against defendant and its agents who handled plaintiff's claim, seeking compensatory and exemplary damages for the bad faith breach of a health and disability insurance policy. The trial court directed verdict for plaintiff on the ground that the failure to have plaintiff examined by a doctor of defendant's choice or to consult with plaintiff's treating physicians before denying plaintiff's claims for benefits under the policy constituted a breach of the duty of good faith and fair dealing. The jury awarded plaintiff compensatory and exemplary damages, and defendant appealed.

The Supreme Court affirmed the award of exemplary damages against defendant as principal, holding that California

follows the rule of Restatement 2d of Torts § 909 regarding assessment of punitive damages against a principal. The Court noted that § 909 permits an award of exemplary damages if, but only if, (1) the principal authorized the doing and the manner of the act, (2) the agent was unfit and the principal was reckless in employing him or her, (3) the agent was employed in a managerial capacity and was acting in the scope of employment, or (4) the principal or a managerial agent of the principal ratified or approved the act (*24 Cal. 3d 809, 822)* . The ground that the agent was unfit and the principal reckless in employing the agent has apparently been carried over into *Civ. Code § 3294(b)*, which was amended after *Egan* and now provides that an employer may be held liable for exemplary damages based on the act of an employee if the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others [*Civ. Code § 3294(b)*].

[f] Exemplary Damages When Principal Authorizes Wrongful Act

Schanafelt v. Seaboard Fin. Co. *(1951) 108 Cal. App. 2d 420, 239 P.2d 42* , was an action to recover compensatory and exemplary damages for a false imprisonment perpetrated by an employee of defendant. An agent of defendant principal had refused to let plaintiff leave her house for over two hours, until a truck arrived to repossess plaintiff's furniture. The agent talked to defendant principal on the telephone before he told plaintiff to remain indoors, and the agent testified that his actions were authorized by defendant principal. This action followed, and the jury awarded plaintiff compensatory and exemplary damages against defendant. Defendant appealed from the judgment.

The court of appeal affirmed, holding that the evidence was sufficient to support a finding that the agent acted within his authorization from defendant principal (*108 Cal. App. 2d 420, 423)* . In concluding that the award of exemplary damages was proper, the court relied on the evidence that the employee was authorized to take the steps necessary to repossess the furniture, that all the employee did was in the usual performance of his duties, and that defendant had authorized the acts in the phone conversation with the employee (*108 Cal. App. 2d 420, 423-424)* .

[g] Exemplary Damages When Principal Personally Guilty of Malice

Nolin v. National Convenience Stores, Inc. *(1979) 95 Cal. App. 3d 279, 157 Cal. Rptr. 32* , was an action for personal injuries brought by plaintiff after she was injured in a slip and fall at one of defendant's stores. Plaintiff presented evidence that defendant's employees were aware of the dangerous conditions around the store's self-service gas pumps, where the accident occurred, but that their attempts to warn patrons of those dangers were thwarted by defendant's district representative on the ground that the warnings would be bad for defendant's "image." The jury awarded plaintiff compensatory and punitive damages, and defendant appealed from the judgment.

The court of appeal affirmed the judgment, holding that the trial court properly allowed plaintiff's exemplary damages claim to go to the jury (*95 Cal. App. 3d 279, 289)* . The court held that when a principal or employer is personally guilty of malice, plaintiff may be awarded exemplary damages aginst the principal or employer (*95 Cal. App. 3d 279, 289)* . The court rejected defendant's contention that it could not be held responsible for misconduct by minor employees, noting that the store where plaintiff was injured was supervised by an employee of defendant who was given the power and the responsibility for conveying company policy to the subordinate employees (*95 Cal. App. 3d 279, 289)* . The court held that the entire record, including the evidence that the supervisor did not allow the employees of the store to warn patrons of the known danger, disclosed the existence of defendant's conscious disregard for safety that constituted the ingredient of malice necessary for the imposition of exemplary damages (*95 Cal. App. 3d 279, 289)* .

Nolin was decided before the 1980 amendment to *Civ. Code § 3294*, which specified the conditions for an award of exemplary damages against an employer for the act of an employee. However, because *Civ. Code § 3294(b)* provides that an employer may be held liable in exemplary damages if personally guilty of oppression, fraud, or malice, or if an officer, director, or managing agent of a corporate employer is guilty of such an act, *Nolin* appears to be valid authority for the point cited when the requirements of *Civ. Code § 3294(b)* are met.

[h] Corporate Liability Depends on Act by Officer, Director, or Managing Agent

In ***White v. Ultramar, Inc.*** *(1999) 21 Cal. 4th 563, 88 Cal. Rptr. 2d 19, 981 P.2d 944* , an employee brought an action against his former employer, the operator of a convenience store, for wrongful termination in retaliation for testifying at the unemployment compensation hearing of defendant's former employee. The jury awarded plaintiff both compensatory and punitive damages. The court of appeal upheld the punitive damages award against the employer on the ground that the supervisory employee who was primarily responsible for plaintiff's retaliatory discharge was a managing agent under *Civ. Code § 3294(b)*, because she was the supervisor who ultimately fired him. The California Supreme Court granted the employer's petition for review, limiting its review to the punitive damages question and the construction of "managing agent" under *Civ. Code § 3294(b)*. The Court disagreed with the court of appeal's conclusion that the mere ability to hire and fire employees renders a supervisory employee a managing agent under § 3294(b). Instead, it examined the legislative history of that section and concluded that the Legislature intended the term "managing agent" to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy (*21 Cal. 4th 563, 573-577)* . Thus, supervisors who have broad discretionary powers and exercise substantial discretionary authority in the corporation could be managing agents. Conversely, supervisors who have no discretionary authority over decisions that ultimately determine corporate policy would not be considered managing agents even though they may have the ability to hire or fire other employees. In order to demonstrate that an employee is a true managing agent under *Civ. Code § 3294(b)*, a plaintiff seeking punitive damages must show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business (*21 Cal. 4th 563, 577)* . The scope of a corporate employee's discretion and authority under that test is therefore a question of fact for decision on a case-by-case basis. The Supreme Court, however, affirmed the court of appeal's judgment in plaintiff's favor after concluding that defendant's zone manager and the employee who fired plaintiff was a "managing agent" under the supreme court's construction of that term (*21 Cal. 4th 563, 577-578)* .

[4] Additional Authorities

[a] Principal Liable for Wrongful Acts of Agent in Transacting Business

In *Fields v. Sanders (1947) 29 Cal. 2d 834, 180 P.2d 684* , plaintiff alleged that he had been assaulted by defendant agent, who was a truck driver working for defendant principal, and sought tort damages from both defendants. The trial court entered judgment for plaintiff as prayed for, and the Supreme Court affirmed, holding that defendant principal was properly held liable for the damages resulting from the assault (*29 Cal. 2d 834, 840-841)* . The Court held that the trial court properly found the assault to have arisen from defendant agent's conduct of his employer's business, and that under *Civ. Code § 2338* the employer as principal was liable for the damages suffered by plaintiff (*29 Cal. 2d 834, 838-839, 843)* .

[b] Determining Whether or Not Act Committed During Course of Agency

In *Harris v. Trojan Fireworks Co. (1984) 155 Cal. App. 3d 830, 202 Cal. Rptr. 440* , defendant closed its plant at noon on Christmas Eve. One of its employees drank beer in defendant's parking lot after the plant closed and then drove a car and caused an accident. The court of appeal rejected the injured plaintiff's contention that the employee was acting within the scope of his employment when he was drinking in the parking lot, on the grounds that the employee's conduct was of no benefit to defendant and that defendant played no part in the employee's misconduct (*155 Cal. App. 3d 830, 835-837)* .

[c] Exemplary Damages When Principal Authorizes Wrongful Act

In *O'Hara v. Western Seven Trees Corp. (1977) 75 Cal. App. 3d 798, 142 Cal. Rptr. 487* , plaintiff sued defendant principal, the owner of the apartment building in which she was raped, for compensatory and exemplary damages for the misrepresentations as to the safety of the building made by defendant agent. The court of appeal reversed a dismissal

entered after the trial court sustained defendant principal's demurrer without leave to amend. The court held that the complaint sufficiently alleged that defendant principal authorized the misrepresentations and that a corporation is liable when it authorizes the wrongful act for which exemplary damages may be awarded (*75 Cal. App. 3d 798, 806)* .

NOTE:

O'Hara v. Western Seven Trees Corp. was decided before the 1980 amendment of *Civ. Code § 3294,* which expressly provided that the authorization of an employer can support an award of exemplary damages against the employer for the act of the employee. However, since the holding of *O'Hara* is essentially the same as the basis of liability for exemplary damages in *Civ. Code § 3294(b),* the court's reasoning apparently remains valid.

Hale v. Farmers Ins. Exch. (1974) 42 Cal. App. 3d 681, 117 Cal. Rptr. 146 , *overruled on other grounds,* Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 822 n.5, 157 Cal. Rptr. 482, 598 P.2d 452 , is discussed in *§ 182.124[3][c]*. The court held that the existence of a "usual procedure" followed by agents may support a jury determination that defendant principal authorized the usual procedures, because such procedures had to be known by those who dictated company policies (*42 Cal. App. 3d 681, 691)* . Counsel should also note that *Hale* was decided before *Civ. Code § 3294* was amended in 1980 to provide that the authorization of an employer can support an award of exemplary damages against the employer for the act of the employee. However, because the holding in *Hale* is essentially the same as the basis of liability for exemplary damages in *Civ. Code § 3294(b),* the court's reasoning apparently remains valid.

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Volume 18 Chapters 180-189 PRETRIAL PROCEEDINGS---to---PROBATE OF WILLS
CHAPTER 182 PRINCIPAL AND AGENT
PART II. FORMS
E. Actions by Third Party Against Principal

18-182 California Points & Authorities § 182.124

§ 182.124 Supporting Contention That Third Party May Recover Tort Damages [Civ. Code § 3333] From Principal for Acts of Agent--Principal Ratified Wrongful Act of Agent

[1] FORM

[*The following may be combined with the contentions supported by the points and authorities set forth in §§ 182.35 and 182.36 as appropriate and may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

PLAINTIFF MAY RECOVER TORT DAMAGES FROM DEFENDANT PRINCIPAL FOR THE WRONGFUL ACT OF THE [DEFENDANT] AGENT BECAUSE A PRINCIPAL IS LIABLE FOR THE WRONGFUL ACT OF AN AGENT WHEN THE PRINCIPAL HAS RATIFIED THE AGENT'S WRONGFUL ACT.

A. Principal Liable for Agent's Authorized or Ratified Wrongful Acts. [*See § 182.123[1], Paragraph B.*]

B. Third Party May Recover Damages for Agent's Wrongful Act Ratified by Principal. A third party may recover compensatory damages in tort from a principal for the wrongful act of an agent if the principal ratifies the agent's act (*see Spahn v. Guild Indus. Corp. (1979) 94 Cal. App. 3d 143, 156, 156 Cal. Rptr. 375* ; Coats v. Construction & Gen. Laborers Local No. 185 *(1971) 15 Cal. App. 3d 908, 914, 93 Cal. Rptr. 639*).

[*Optional*] **C. Failure to Discharge Agent May Constitute Ratification.** Failure of principal to discharge an employee or agent guilty of oppressive acts towards patrons of the employer is in itself sufficient evidence to show ratification (Coats v. Construction & Gen. Laborers Local No. 185 *(1971) 15 Cal. App. 3d 908, 914, 93 Cal. Rptr. 639* ; *McChristian v. Popkin (1946) 75 Cal. App. 2d 249, 256, 171 P.2d 85*).

[*Optional*] **D. Exemplary Damages When Principal Ratifies Wrongful Act.** Exemplary damages may be awarded against a principal because of an act by an agent if the employer or a manager of the employer ratified the agent's wrongful act (*Civ. Code § 3294(b)*; *Chodos v. Insurance Co. of N. Am. (1981) 126 Cal. App. 3d 86, 102, 178 Cal. Rptr. 831* ; *Hale v. Farmers Ins. Exch. (1974) 42 Cal. App. 3d 681, 691-692, 117 Cal. Rptr. 146 , overruled on other grounds,* Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 822 n.5, 157 Cal. Rptr. 482, 598 P.2d 452).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a third party may recover compensatory damages in tort and, in an appropriate case, exemplary damages from a principal for a wrongful act of an agent because the principal ratified the agent's act. Such a contention may be raised in an action for damages against the principal alone or against the principal and the agent. This argument may also be modified for use by an agent as a defense to a principal's action for implied equitable indemnification. For a related contention that would be appropriate in the context of an agent's defense of a principal's implied equitable indemnity action, see *§ 182.87*.

When the ratification by the principal is disputed, these points and authorities may be combined with the points and *authorities in §§ 182.35* and *182.36*, as appropriate.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a third party may recover tort damages from a principal for an agent's wrongful act. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that defendant principal ratified the acts of the agent, as well as facts showing that the agent committed a tort for which the third party may recover damages. If optional Paragraph C is used, counsel should include facts showing defendant principal's failure to discharge the agent after learning of the agent's wrongful acts. If optional Paragraph D is used, counsel should also discuss facts showing that plaintiff third party may recover exemplary damages under *Civ. Code § 3294(b)* for the agent's act.

[b] Related Pleading and Practice Forms

For a form of allegation for use in a complaint alleging that a plaintiff may recover exemplary damages from a principal for the act of an agent, see Ch. 427, *Principal and Agent* in California Forms of Pleading and Practice (Matthew Bender). For forms of complaint for use in seeking exemplary damages generally, see California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender).

[c] Related Points and Authorities

For alternative points and authorities for use in alleging that exemplary damages may be recovered, see Ch. 64, *Damages: Tort* and Ch. 65, *Damages: Contract* .

[3] Discussion of Authorities

[a] Third Party May Recover Damages for Agent's Wrongful Act Ratified by Principal

Spahn v. Guild Indus. Corp. *(1979) 94 Cal. App. 3d 143, 156 Cal. Rptr. 375* , was an action to recover compensatory and punitive damages from defendant principal for the fraud of defendant principal's agents. Defendant principal was a franchisor that solicited franchisees for the sale of its baby furniture products through its agent. The agent made numerous false representations to the potential franchisees, including plaintiffs, and was aided in those representations by materials furnished by defendant principal. Defendant principal's officers communicated with plaintiffs regarding the use of the sales techniques required by the agent, and defendant principal's officers also knew of the agent's representations to plaintiffs but nevertheless sold its furniture to plaintiffs. The trial court entered judgment in favor of plaintiffs and against defendant principal for the fraudulent representations of its agent, awarding both compensatory and punitive damages, and defendant principal appealed.

The court of appeal affirmed, holding that defendant principal was properly held liable for the fraud of its agent on various grounds, including its ratification of the acts of its agent (*94 Cal. App. 3d 143, 157)* . The court noted that a third party may recover compensatory and punitive damages from a principal for an agent's acts when the principal subsequently ratifies the agent's actions (*94 Cal. App. 3d 143, 156)* . The court found that defendant principal ratified the actions of its agent because defendant had knowledge of the agent's representations and defendant accepted the benefits of the representations by selling its goods to the franchisees (*94 Cal. App. 3d 143, 157)* .

In **Coats v. Construction & Gen. Laborers Local No. 185** *(1971) 15 Cal. App. 3d 908, 93 Cal. Rptr. 639* , plaintiff, a member of defendant principal, sued for tort damages for an assault committed by two assistant business representatives of defendant principal. After the assault, plaintiff reported the incident to defendant principal's officers, and although the president wanted to fire the assistants, defendant principal continued to employ them. The trial court entered judgment against defendant principal for compensatory and punitive damages, and defendant principal appealed.

The court of appeal affirmed, holding that substantial evidence supported the finding that defendant principal ratified the acts of the assistants who assaulted plaintiff (*15 Cal. App. 3d 908, 913)* . The court relied on the evidence that defendant principal did not repudiate the actions of the assistants when it was informed of them, in spite of the desire of the president of defendant principal to do so by discharging them (*15 Cal. App. 3d 908, 913)* . The court recognized that an employer is responsible for the willful and malicious acts of an employee ratified by the employer, and held that defendant principal was properly held liable for the assault of the assistants on plaintiff (*15 Cal. App. 3d 908, 914)* .

[b] Failure to Discharge Agent May Constitute Ratification

The facts and procedural background of **Coats v. Construction & Gen. Laborers Local No. 185** *(1971) 15 Cal. App. 3d 908, 93 Cal. Rptr. 639* , are discussed in *§ 182.124[3][a]*. In finding that defendant principal ratified the assistants' conduct, the court placed particular reliance on defendant principal's failure to discharge the assistants who assaulted plaintiff after defendant received knowledge of the assault (*15 Cal. App. 3d 908, 913-914)* .

McChristian v. Popkin *(1946) 75 Cal. App. 2d 249, 171 P.2d 85* , was an action for assault and battery brought against the owners of a theater, arising from a beating allegedly inflicted on plaintiff by a special officer employed at the theater, who ejected plaintiff from the theater. After the incident, plaintiff talked with the manager of the theater and related his version of the events, but defendants kept the officer in their employ thereafter. The jury awarded plaintiff damages against all defendants, and defendants appealed.

The court of appeal affirmed, holding that defendants' retention of the officer in the employ of the theater was sufficient evidence to support a finding that defendants ratified the officer's actions (*15 Cal. App. 3d 908)* . The court noted that failure to discharge an agent guilty of oppressive acts toward patrons of the employer is in itself evidence tending to show ratification, with the weight of the evidence dependent on the circumstances attending the retention (*15 Cal. App. 3d 908)* . The court held that under the circumstances before it, defendants' actions were sufficient to allow a jury to find ratification (*15 Cal. App. 3d 908)* .

[c] Exemplary Damages When Principal Ratifies Wrongful Act

Chodos v. Insurance Co. of N. Am. *(1981) 126 Cal. App. 3d 86, 178 Cal. Rptr. 831* , was an action to recover compensatory and punitive damages from defendant principal for the fraud and breach of the covenant of good faith and fair dealing committed by the agents of defendant principal. The agents refused to pay plaintiff the full amount due plaintiff under the insurance policy, a decision that was reaffirmed by the agent's superiors despite evidence that the position denying payment was untenable under the policy. Defendant principal continued to refuse to pay plaintiff, deciding instead to defend plaintiff's action at trial. The trial court awarded compensatory and punitive damages to plaintiff, and defendant principal appealed.

The court of appeal affirmed the judgment, holding that the award of exemplary damages against defendant principal for the acts of its agents was proper (*126 Cal. App. 3d 86, 102-103)* . The court found sufficient evidence to support the award of exemplary damages in the intentional concealment and/or misrepresentation by the agents (*126 Cal. App. 3d 86, 101)* . As to the imposition of those damages against defendant principal, the court noted the 1981 amendment to *Civ. Code § 3294*, providing the test for awarding exemplary damages against employers, and stated that the amendment was based on the rule previously applied in cases such as *Merlo v. Standard Life & Accident Ins. Co. (1976) 59 Cal. App. 3d 5, 18, 130 Cal. Rptr. 416* , which permitted an award of exemplary damages when the employer or a manager of the employer ratified or approved the agent's act (*126 Cal. App. 3d 86, 102)* . The court found sufficient evidence to support defendant principal's ratification of the agents' fraudulent acts in defendant principal's decision not to pay plaintiff after defendant principal knew of the circumstances of the case (*126 Cal. App. 3d 86, 102-103)* .

Hale v. Farmers Ins. Exch. *(1974) 42 Cal. App. 3d 681, 117 Cal. Rptr. 146* , *overruled on other grounds,* Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 822 n.5, 157 Cal. Rptr. 482, 598 P.2d 452 , was an action seeking compensatory and punitive damages from defendant principal for bad faith refusal to pay medical benefits due plaintiff under his automobile insurance policy. Plaintiff filed a proof of claim form on the day of a collision, embarked on a course of treatment for back injuries with one doctor, and was later referred to an orthopedist. When defendant learned of the referral, it refused to make further medical payments, although its agent was informed that plaintiff had undergone back surgery. The refusal to pay the benefits was based on the usual procedures of defendant principal in handling claims. The jury awarded plaintiff compensatory and punitive damages from defendant principal, but the trial court granted defendant's motions for judgment notwithstanding the verdict and a new trial on the ground that the award of exemplary damages was not supported by the evidence, and plaintiff appealed.

The court of appeal reversed the judgment notwithstanding the verdict as to defendant, holding that there was evidence from which the jury could have found that defendant had ratified the actions of its agent (*42 Cal. App. 3d 681, 692)* . The court held that the jury could have inferred that plaintiff's file was reviewed pursuant to defendant's usual practices and that the refusal to pay thereafter constituted an adoption of the agent's decision not to pay the claim (*42 Cal. App. 3d 681, 692)* . The court held that the ratification was sufficient to justify imposing exemplary damages on defendant under the guidelines of Restatement 2d of Torts, § 909, which the court held was the law in California (*42 Cal. App. 3d 681, 691)* .

NOTE:

Civ. Code § 3294(b) now expressly provides that an employer may be held liable for exemplary damages when the employer ratified the wrongful conduct for which the damages were awarded, in a manner similar to that applied by the court in *Hale v. Farmers Insurance Exchange.* Thus, it appears that the reasoning of the court in *Hale* as to ratification remains valid.

[4] Additional Authorities

[a] Exemplary Damages When Principal Ratifies Wrongful Act

Siva v. General Tire & Rubber Co. (1983) 146 Cal. App. 3d 152, 194 Cal. Rptr. 51 , was an action for compensatory and exemplary damages brought by an employee of defendant alleging that he was injured when he attempted to repair a defective tire that had been recapped by defendant. Plaintiff's action was based on the contention that the procedures used in recapping the tire had been done with a conscious disregard of the safety of others, and that the procedures had been ratified by defendant. The court of appeal affirmed the trial court's judgment awarding exemplary damages to plaintiff against defendant, holding that the conduct of the employees who had recapped the tire in violation of the tire's safety rating had been ratified by defendant in that an implicit agreement not to abide by the written ratings was evidenced by the conduct of defendant's managers (*146 Cal. App. 3d 152, 159)* .

Coats v. Construction & Gen. Laborers Local No. 185 *(1971) 15 Cal. App. 3d 908, 93 Cal. Rptr. 639* , is discussed in *§ 182.124[3][a]*.

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CHAPTER 182 PRINCIPAL AND AGENT
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18-182 California Points & Authorities § 182.125

§ 182.125 Supporting Contention That Third Party May Recover Damages for Fraud [Civ. Code §§ 1709, 3333, 3343; Com. Code § 2721] From Principal for Fraud of Agent--Agent Committed Fraud in Course of Agency

[1] FORM

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

PLAINTIFF MAY RECOVER DAMAGES FROM DEFENDANT PRINCIPAL FOR A FRAUD PERPETRATED BY [DEFENDANT], THE AGENT OF DEFENDANT PRINCIPAL, BECAUSE A PRINCIPAL IS LIABLE TO A THIRD PERSON FOR FRAUD WHEN THE PRINCIPAL PUTS AN AGENT IN A POSITION THAT ENABLES THE AGENT TO COMMIT A FRAUD ON THIRD PERSONS WHILE THE AGENT APPARENTLY ACTS WITHIN THE AGENT'S AUTHORITY.

A. Liability of Principal for Fraud of Agent. A principal who puts an agent in a position that enables the agent, while apparently acting within the agent's authority, to commit fraud on third persons is liable to those third persons for the fraud (*Rutherford v. Rideout Bank (1938) 11 Cal. 2d 479, 483-484, 80 P.2d 978* ; *Streetscenes LLC v. ITC Entm't Group, Inc. (2002) 103 Cal. App. 4th 233, 242-243, 126 Cal. Rptr. 2d 754* ; *Reusche v. California Pac. Title Ins Co. (1965) 231 Cal. App. 2d 731, 736, 42 Cal. Rptr. 262*).

[*Optional*] **B. Principal's Liability Not Based on Fault.** The principal may be held liable for a fraud perpetrated by his or her agent although the principal is entirely innocent, has received no benefit from the transaction, and although the agent acts solely for the agent's own purposes (*Rutherford v. Rideout Bank (1938) 11 Cal. 2d 479, 483-484, 80 P.2d 978* ; *Reusche v. California Pac. Title Ins Co. (1965) 231 Cal. App. 2d 731, 736, 42 Cal. Rptr. 262*).

[*Optional*] **C. Exemplary Damages When Principal Personally Guilty of Fraud.** A principal may be liable for exem plary damages based on the acts of an agent if the principal was personally guilty of fraud (*Civ. Code § 3294(b)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a third party may recover damages from defendant principal for a fraud perpetrated by an agent of defendant principal in the course of the agency. The argument may be used whether the damages are sought under *Civ. Code §§ 1709* (deceit generally), 3333 (tort damages generally), 3343 (fraud in sale, purchase, or exchange of property), or *Com. Code § 2721* (fraud in sale of goods). For example, these points and authorities may be used in an action for fraud brought against the principal. As another example, these points and authorities may be used by a third party in support of a cross complaint in an action brought by the principal to enforce a contract entered into by the agent and the third party when the third party alleges that the fraud of the agent induced the third party to enter into the contract.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that plaintiff had no reason to believe that the transactions in which the misrepresentations were made was improper, and that the agent appeared to be acting in the ordinary course of business confided to him or her, as well as facts showing that plaintiff may recover compensatory and, if appropriate, exemplary damages for fraud.

[b] Related Agency Issues

If the existence of the agency is disputed, these points and authorities may be combined with the points and *authorities in §§ 182.30 -182.32* and *182.120*, as appropriate. If the extent of an agent's authority is disputed, these points and authorities may be combined with the points and *authorities in §§ 182.33, 182.34*, and *182.121*, as appropriate. If the agency or authority is alleged to have arisen because of the principal's ratification, these points and authorities may be combined with the points and *authorities in §§ 182.35* and *182.36*, as appropriate.

[c] Procedural Issues

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a third party may recover damages for fraud from a principal for the fraud of an agent. They may also be adapted for use in a trial or appellate brief.

[d] Related Pleading and Practice Forms

For complaints for use in alleging a cause of action for fraud generally, see California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender).

[e] Related Points and Authorities

For memoranda of points and authorities supporting recovery in fraud actions generally, see Ch. 105, *Fraud and Deceit* in this publication.

[3] Discussion of Authorities

[a] Liability of Principal for Fraud of Agent

In ***Rutherford v. Rideout Bank*** *(1938) 11 Cal. 2d 479, 80 P.2d 978* , plaintiff sued to recover as damages under *Civ. Code § 3343* the difference between the sales price of properties and their market value from defendant principal. Plaintiff was the owner of two parcels of property that were security for separate debts that were overdue and unpaid at the time the acts complained of occurred. Plaintiff had relied on the advice of defendant agent in the transaction of her business and financial affairs, so when the agent told her that the mortgages would be foreclosed and that she should sell the properties to avoid any loss she agreed to do so. The agent represented that a proposed sale that he presented to plaintiff was fair in its consideration, when in fact it was well below market value for the properties and the purchaser

had agreed to pay the agent to obtain the deed to the properties for a price below market value. The trial court entered judgment for plaintiff in that amount, and defendant principal appealed.

The Supreme Court affirmed, holding that defendant principal was liable for the fraud of its agent because the principal gave the agent potential power that he could and did use in a coercive manner to accomplish a wrongful act under the color of the office he occupied (*11 Cal. 2d 479, 484)* . In reaching its conclusion, the Court adopted the reasoning of Restatement of Agency § 261, which provides that a principal who puts an agent in a position that enables the agent, while apparently acting within his or her authority, to commit a fraud on third persons is liable to those third persons for the fraud (*11 Cal. 2d 479, 484)* . The Court found convincing the illustrations to the restatement, which point out that the liability is based on the fact that the agent's position facilitates the consummation of the fraud. The Court held that a principal may be liable for the fraud of an agent when from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him or her (*11 Cal. 2d 479, 484)* .

The facts and procedural background of ***Streetscenes LLC v. ITC Entm't Group, Inc.*** *(2002) 103 Cal. App. 4th 233, 126 Cal. Rptr. 2d 754* , are discussed in *§ 182.35[3][b]*. Investors in a movie project who were defrauded by a producer brought an action for fraud against the production company, which disavowed the producer's actions and claimed he was an independent producer. The court held that the evidence was sufficient to establish that the production company ratified or authorized the producer's wrongful conduct (*103 Cal. App. 4th 233, 242-243)* .

Reusche v. California Pac. Title Ins Co. *(1965) 231 Cal. App. 2d 731, 42 Cal. Rptr. 262* , was an action by plaintiff principal to determine the validity of a promissory note and deed of trust forged by her agent, and a cross complaint by the trustee of the deed of trust contending that plaintiff principal was bound by the acts of the agent. Plaintiff had employed an agent for some time to assist her in the management and acquisition of several parcels of property, and the agent had helped plaintiff acquire an apartment building. Without plaintiff's knowledge, the agent had sought a loan in plaintiff's name, to be secured by a second mortgage on the apartment house, representing that he was authorized to act for plaintiff in the transaction. The loan was approved and the agent forged plaintiff principal's endorsement on the check and the other instruments. When plaintiff was contacted by the bank that loaned the money, plaintiff said that the transaction was regular as far as she was concerned. This action was instituted thereafter, and a judgment was entered in favor of defendants on their cross complaint seeking to enforce the note. The trial court granted plaintiff's motion for a new trial, and defendants appealed.

The court of appeal reversed, holding that the new trial order was improper because the judgment could have been sustained on various grounds, including that the agent had ostensible authority to act on plaintiff's behalf (*231 Cal. App. 2d 731)* . The court held that a principal who puts an agent in a position that enables the agent, while apparently acting within his or her authority, to commit a fraud on third persons is subject to liability to the third persons for the fraud (*231 Cal. App. 2d 731)* . The court noted that a basis of the rule is the fact that from the point of view of the third person, the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him or her, as was true in the case before the court (*23 Cal. App. 2d 731, 736-737)* .

[b] Principal's Liability Not Based on Fault

The facts and procedural background of ***Rutherford v. Rideout Bank*** *(1938) 11 Cal. 2d 479, 80 P.2d 978* , are discussed in *§ 182.125[3][a]*. The Court noted that the rationale of the rule holding a principal liable for the fraud of an agent applies although the principal is entirely innocent, although he or she has received no benefit from the transaction, and although the agent acts solely for his or her own purposes (*11 Cal. 2d 479, 484)* .

The facts and procedural background of ***Reusche v. California Pac. Title Ins Co.*** *(1965) 231 Cal. App. 2d 731, 42 Cal. Rptr. 262* , are discussed in *§ 182.125[3][a]*. Relying on *Rutherford v. Rideout Bank (1938) 11 Cal. 2d 479, 484, 80 P.2d 978* , the court in *Reusche* noted that the rationale of the rule that a principal is liable for the fraud of an agent

applies although the principal is entirely innocent, although he or she has received no benefit from the transaction, and although the agent acts solely for his or her own purposes (*11 Cal. 2d 479)* .

[4] Additional Authorities

[a] Liability of Principal for Fraud of Agent

The facts and procedural background of *Spahn v. Guild Indus. Corp. (1979) 94 Cal. App. 3d 143, 156 Cal. Rptr. 375* , are discussed in *§ 182.124[3][a]*. The court held that a principal may be held liable for the fraud of an agent when the agent's position facilitates the fraud (*94 Cal. App. 3d 143, 155-156)* . The court held, as an alternative basis for its decision, that when a principal actually or ostensibly authorizes representations about a matter related to the agent's duties, and the agent has knowledge of their falsity, this knowledge may be imputed to the principal, even if the agent is acting adversely to the principal (*94 Cal. App. 3d 143, 155)* .

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Volume 18 Chapters 180-189 PRETRIAL PROCEEDINGS---to---PROBATE OF WILLS
CHAPTER 182 PRINCIPAL AND AGENT
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E. Actions by Third Party Against Principal

18-182 California Points & Authorities § 182.126

§ 182.126 Supporting Contention That Third Party May Enforce Contract Entered Into by Agent for Principal--Agent Has Implied Authority [Civ. Code § 2319] to Bind Principal to Arbitration Clause in Medical Insurance Contract

[1] FORM

[*The following may be combined with the contentions supported by the points and authorities set forth in §§ 182.30 -182.36, and 182.120 and 182.121, as appropriate, and may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF THIRD PARTY MAY ENFORCE THE ARBITRATION PROVISION OF THE MEDICAL INSURANCE CONTRACT ENTERED INTO BY THE [DEFENDANT] AGENT ON BEHALF OF DEFENDANT PRINCIPAL BECAUSE AN AGENT EMPOWERED TO NEGOTIATE A GROUP MEDICAL CONTRACT HAS THE IMPLIED AUTHORITY TO AGREE TO THE INCLUSION OF AN ARBITRATION PROVISION AS A PROPER AND USUAL COURSE OF ACTION.

A. Agent's Implied Authority. [*See § 182.34[1], Paragraph A.*]

B. Third Party May Enforce Arbitration Provision Against Principal. An agent empowered to negotiate a group medical contract has the implied authority to agree to the inclusion of an arbitration provision as a proper and usual course of action, and a third party may enforce the arbitration provision against the principal (*Madden v. Kaiser Found. Hosps. (1976) 17 Cal. 3d 699, 706, 131 Cal. Rptr. 882, 552 P.2d 1178*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a third party may enforce an arbitration provision of a group medical contract against the principal because the principal's agent had implied authority to bind

his or her principal to an arbitration provision in a group medical contract that the agent was authorized to negotiate. This argument may be used whenever an agent with authority to negotiate a group medical contract allegedly exceeded his or her authority by agreeing to a clause requiring the principal to submit a malpractice claim to binding arbitration. For example, such an argument might be raised when the insurer with whom the contract was negotiated seeks to enforce the arbitration clause and a member of the group argues that the agent was not authorized to agree to an arbitration clause. The argument might also arise in an action by a principal, a member of the group, against the agent, alleging that the agent exceeded his or her authority to the damage of the principal. For a general form for a contention that an agent had implied authority to perform certain acts, see *§ 182.34*.

If the existence of the agency is disputed, these points and authorities may be combined with the points and *authorities in §§ 182.30 -182.32* and *182.120*, as appropriate. If the extent of an agent's authority is disputed, these points and authorities may be combined with the points and *authorities in §§ 182.33*, *182.34*, and *182.121*, as appropriate. If the agency or authority is alleged to have arisen because of the principal's ratification, these points and authorities may be combined with the points and *authorities in §§ 182.35* and *182.36*, as appropriate.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the agreement to include an arbitration provision was within an agent's authority to negotiate a group medical contract. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the facts showing the agent's authority to negotiate the group medical contract and the absence of any specific limitation on the authority regarding the arbitration clause.

[3] Discussion of Authorities

[a] Third Party May Enforce Arbitration Provision Against Principal

Madden v. Kaiser Found. Hosps. *(1976) 17 Cal. 3d 699, 131 Cal. Rptr. 882, 552 P.2d 1178* , was an action for malpractice by an employee covered by a group medical plan administered and provided by defendant insurer. Plaintiff suffered complications after a hysterectomy performed at defendant's hospital. Defendant moved to stay the proceedings and compel arbitration under a provision of the group medical care contract negotiated by the Board of Administration of the State Employees Retirement System under former Gov. Code § 22751 et seq. Plaintiff opposed the motion on the ground that she had no notice that the contract had been amended to require arbitration, and that the Board had no authority to bind her to the arbitration provision. The trial court denied defendant's motion to compel arbitration, and defendant appealed.

The California Supreme Court reversed, holding that arbitration is a proper and usual means of resolving malpractice disputes, and thus that an agent empowered to negotiate a group medical contract has the implied authority under *Civ. Code § 2319* to agree to the inclusion of an arbitration provision. The Court noted that *Civ. Code § 2319* authorizes a general agent to do everything necessary or proper and usual for effecting the purpose of the agency (*17 Cal. 3d 699, 706)* . The Court examined the judiciary's changing attitudes toward arbitration over the past century and concluded that arbitration is now accepted as a means of resolving otherwise justiciable controversies, and therefore is proper and usual within the meaning of *Civ. Code § 2319* (*17 Cal. 3d 699, 708-709)* .

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18-182 California Points & Authorities § 182.127

§ 182.127 Supporting Contention That Third Party May Enforce Contract Entered Into by Agent for Principal--Disclosed Principal Liable on Contract in Name of Agent When Intent to Bind Principal Inferable From Face of Instrument

[1] FORM

[*The following may be combined with the contentions supported by the points and authorities set forth in §§ 182.30 -182.36, and 182.120 and 182.121, as appropriate, and may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF MAY ENFORCE THE CONTRACT ENTERED INTO BY THE [DEFENDANT] AGENT ON BEHALF OF DEFENDANT PRINCIPAL BECAUSE A CONTRACT IN THE NAME OF AN AGENT BINDS A DISCLOSED PRINCIPAL WHEN THE INTENT TO DO SO IS INFERABLE FROM THE FACE OF THE INSTRUMENT.

A. Agent's Accrued Rights and Liabilities Accrue to Principal. An agent represents his or her principal for all purposes within the scope of the actual or ostensible authority, and all the rights and liabilities that would accrue to the agent from transactions within that limit, if they had been entered into on the agent's own account, accrue to the principal (*Civ. Code § 2330*).

B. Contract in Agent's Name Binding on Disclosed Principal. A disclosed principal is bound by a contract made solely in the name of an agent if the intent to bind the principal is clearly inferable from the face of the instrument (*Civ. Code § 2337*; *Sunset Milling & Grain Co. v. Anderson (1952) 39 Cal. 2d 773, 778, 249 P.2d 24* ; *Frank Pisano & Assocs. v. Taggart (1972) 29 Cal. App. 3d 1, 17, 105 Cal. Rptr. 414*).

[*Optional*] **C. Contract With Agent Is Not Election to Exonerate Disclosed Principal.** When no intent to give an agent exclusive credit is shown, a contract made in the name of the agent, knowing him or her to be an agent and with knowledge of the principal's identity, is in legal effect the contract of the principal when made within the scope of the agent's authority (*Geary S., P. & O. R. Co. v. Rolph (1922) 189 Cal. 59, 66, 207 P. 539*).

[*Optional*] **D. Unsatisfied Judgment Against Agent Does Not Discharge Disclosed Principal.** Recovery of judgment against the agent of a disclosed or partially disclosed principal for failure of performance of a contract to which the agent is a party does not thereby discharge the principal; only the satisfaction of a judgment against the agent terminates the liability of the principal (*Clifton Cattle Co. v. Thompson (1974) 43 Cal. App. 3d 11, 16, 117 Cal. Rptr. 500* ; *Zingheim v. Marshall (1967) 249 Cal. App. 2d 736, 747-748, 57 Cal. Rptr. 809*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a third party may enforce a contract entered into by an agent on behalf of defendant principal. They support this contention on the ground that the face of the instrument supports the inference that the agent intended to bind defendant principal and that the agent disclosed the existence of the principal to the third party. Such a contention may be used, for example, by a third party in support of an action seeking specific performance of a contract or damages for breach of contract from defendant principal. This contention may also be used by a third party seeking to raise the contract with the principal as a defense in an action by the principal. Optional Paragraph C is for use when counsel anticipates an opposing contention that plaintiff third party has elected to proceed against the agent only by allowing the agent to contract in his or her name. Optional Paragraph D is for use when plaintiff third party has obtained a judgment against the agent on the contract and anticipates an opposing contention that the judgment constitutes an election to proceed against the agent only.

If the existence of the agency is disputed, these points and authorities may be combined with the points and *authorities in §§ 182.30 -182.32, 182.120*, as appropriate. If the extent of an agent's authority is disputed, these points and authorities may be combined with the points and *authorities in §§ 182.30 -182.32, 182.120*, as appropriate. If the extent of an agent's authority is disputed, these points and authorities may be combined with the points and *authorities in §§ 182.33, 182.34, 182.121*, as appropriate. If the agency or authority is alleged to have arisen because of the principal's ratification of the agent's act, these points and authorities may be combined with the points and *authorities in §§ 182.35* and *182.36*, as appropriate.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a third party may enforce a contract entered into by an agent on behalf of defendant principal because the face of the instrument supports the inference that the agent intended to bind the disclosed principal to the contract. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that the instrument shows on its face that the agent intended to bind defendant principal to the contractual obligations and that the existence of the principal, or at least the fact of agency, was disclosed to plaintiff.

[3] Discussion of Authorities

[a] Contract in Agent's Name Binding on Disclosed Principal

Sunset Milling & Grain Co. v. Anderson *(1952) 39 Cal. 2d 773, 778, 249 P.2d 24* , was an action to enforce a series of promissory notes executed by defendant and not paid. In his defense, defendant introduced a written agreement signed by an agent of plaintiff that represented that defendant would not be responsible for the collection of feed bills that another person would execute in favor of plaintiff, nor for the promissory notes that plaintiff would require defendant to execute, because plaintiff would credit defendant's account in the amount of the promissory notes executed. The trial court entered a nonsuit in favor of defendant, and plaintiff appealed.

The Supreme Court reversed the judgment on the ground that the instrument was ambiguous in that it was not clearly linked to the notes that were the basis of the action, requiring a trial to resolve the disputed factual issue (*39 Cal. 2d 773, 780)* . However, the Court held that the instrument was binding on plaintiff, because a disclosed principal may be held liable on a contract made solely in the name of the agent (*39 Cal. 2d 773, 778)* . Relying as well on *Civ. Code § 2337*, providing that an instrument within the authority of the agent with which the agent intends to bind the principal is binding if the intent is plainly inferable from the instrument itself, the Court held that the instrument bound plaintiff to the promises in the instrument (*39 Cal. 2d 773, 778)* . Thus the Court held that, on retrial, plaintiff could not deny the agent's authority to bind it to the agreement (*39 Cal. 2d 773, 781)* .

Frank Pisano & Assocs. v. Taggart *(1972) 29 Cal. App. 3d 1, 105 Cal. Rptr. 414* , was an action to foreclose a mechanic's lien for engineering services performed by plaintiffs incident to the subdivision of property. Defendant had owned the property but later deeded it to his future wife, after which he acted as the owner of the property and represented that she held the property in trust for him. Plaintiffs' agreement was with defendant, although his wife was present during their discussions. The trial court found that the lien was invalid because, among other reasons, the wife did not receive a prelien notice, and entered judgment accordingly. Plaintiffs appealed.

The court of appeal reversed, holding that the lien on the property had been created by defendant as agent for his wife, the owner of the property, and therefore was valid (*29 Cal. App. 3d 1, 17)* . The court rejected defendant's contention that defendant's wife was entitled to a prelien notice, holding that as it was plainly inferable that defendant intended to bind his wife to the agreement, defendant as agent for his wife had contracted directly with plaintiffs on behalf of his wife, and therefore the wife was not entitled to a prelien notice (*29 Cal. App. 3d 1, 17)* .

[b] Contract With Agent Is Not Election to Exonerate Disclosed Principal

The facts and procedural background of ***Geary S., P. & O. R. Co. v. Rolph*** *(1922) 189 Cal. 59, 207 P. 539* , are discussed in *§ 182.128[3][a]*. The Supreme Court noted that when no intent to give the agent exclusive credit is shown, a contract made in the name of the agent, with knowledge of the agency and the identity of the principal, is in legal effect the contract of the principal when made within the scope of the agent's authority. Thus, the Court held for the purposes of retrial of the action that the knowledge of plaintiff that defendant was acting as agent for defendant principal would not preclude the liability of defendant principal as long as the circumstances of the case do not show that an exclusive credit was given to the agent (*189 Cal. 59, 66)* .

[c] Unsatisfied Judgment Against Agent Does Not Discharge Disclosed Principal

In ***Clifton Cattle Co. v. Thompson*** *(1974) 43 Cal. App. 3d 11, 117 Cal. Rptr. 500* , plaintiff sued to recover the contract price of cattle sold by plaintiff and received by defendant principal. Defendant principal had previously purchased cattle from plaintiff through an agent, and plaintiff had verified defendant principal's credit at that time. Thereafter, the agent purchased more cattle on consignment and plaintiff delivered the cattle to defendant principal, but plaintiff was not paid. Plaintiff brought an action against the agent and obtained a default judgment against him, and defendant principal argued that the judgment against the agent constituted an election by plaintiff to recover against the agent only. The trial court entered judgment in favor of plaintiff, and defendant principal appealed.

The court of appeal affirmed, rejecting the contention of defendant principal that plaintiff had elected to hold only the agent by obtaining a judgment against the agent (*43 Cal. App. 3d 11, 16)* . The court held that an election would be found only if the judgment against the agent was satisfied (*43 Cal. App. 3d 11, 16)* . The court distinguished the case before it, in which plaintiff knew the identity of defendant principal and the fact of the agency relationship, from the case of an undisclosed principal. The court held that when the principal is undisclosed, a judgment against the agent with knowledge of the agency will constitute a binding election to proceed against the agent alone, while in the case of a disclosed agency the third person has a contract with the principal unless he or she chooses the sole responsibility of the

agent at the time the contract is made (*43 Cal. App. 3d 11, 17)* .

In ***Zingheim v. Marshall*** *(1967) 249 Cal. App. 2d 736, 57 Cal. Rptr. 809* , plaintiff brought an action for breach of contract against defendant principal based on the failure to pay amounts due under a contract to purchase a radio station. Plaintiff had contracted to sell a Mexican radio station to defendant agent, acting for defendant principal, with the purchase price dependent in part on advertising revenues of the station. At all times in the transaction the status of defendant principal was known to all the parties. Plaintiff brought an action against defendant agent alleging that the contract was breached because the payments made on the contract were insufficient because of increased advertising revenues, but the trial court found for defendant agent on that point. When defendant principal stopped paying on the contract, plaintiff sued both defendants on the contract and recovered a judgment against both. Defendant appealed, arguing that plaintiff had elected to pursue only defendant agent by filing the first action against defendant agent alone.

The court of appeal affirmed, holding that plaintiff had not elected not to look to defendant principal (*249 Cal. App. 2d 736, 747)* . The court held that recovery of judgment against the agent of a disclosed or partially disclosed principal for failure of performance of a contract to which the agent is a party does not thereby discharge the principal (*249 Cal. App. 2d 736, 748)* . The court noted that the agent is ordinarily a surety for the principal, and that if the agent is separately liable, only the satisfaction of a judgment against the agent terminates the liability of the principal (*249 Cal. App. 2d 736, 748)* .

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18-182 California Points & Authorities § 182.128

§ 182.128 Supporting Contention That Third Party May Enforce Contract Entered Into by Agent for Principal--Undisclosed Principal Liable on Contract Entered Into by Authorized Agent

[1] FORM

[*The following may be combined with the contentions supported by the points and authorities set forth in §§ 182.30 -182.36 as appropriate and may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF MAY ENFORCE THE CONTRACT ENTERED INTO BY THE [DEFENDANT] AGENT ON BEHALF OF DEFENDANT PRINCIPAL BECAUSE AN UNDISCLOSED PRINCIPAL IS LIABLE FOR THE ACTS OF AN AGENT PERFORMED OR COMMITTED WITHIN THE SCOPE OF THE AGENT'S AUTHORITY.

Undisclosed Principal Liable for Contracts Executed by Authorized Agent. An undisclosed principal is liable for the acts of his or her agent performed or committed within the scope of the agent's authority, including ordinary contracts and obligations of his or her agent with third persons although made in the name of the agent and not purporting to be other than his or her own personal obligation or contract (*Shamlian v. Wells (1925) 197 Cal. 716, 721, 242 P. 483* ; *Geary S., P. & O. R. Co. v. Rolph (1922) 189 Cal. 59, 64, 207 P. 539*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a third party may enforce against an undisclosed principal a contract entered into by an agent in his or her own name with a third party when the agent acted within his or her authority. Such a contention may be used, for example, in an action by a third party to enforce a contract, such as an action for specific performance, an action for damages for breach of contract, or an action for declaratory relief regarding the rights and obligations of the parties.

If the existence of the agency is disputed, these points and authorities may be combined with the points and *authorities in §§ 182.30 -182.32*, as appropriate. If the extent of an agent's authority is disputed, these points and authorities may be combined with the points and *authorities in §§ 182.33* and *182.34*, as appropriate. If an agency or the agent's authority is alleged to have arisen because of the principal's ratification of the agent's act, these points and authorities may be combined with the points and *authorities in §§ 182.35* and *182.36*, as appropriate.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a third party may enforce against an undisclosed principal a contract entered into by an agent in his or her own name with a third party when the agent acted within the scope of his or her authority. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should discuss facts showing that the agent entered into the contract in his or her own name without disclosing the agency or the identity of the principal, and that the agent acted within the scope of his or her authority in entering into the contract.

[3] Discussion of Authorities

[a] Undisclosed Principal Liable for Contracts Executed by Authorized Agent

In ***Shamlian v. Wells*** *(1925) 197 Cal. 716, 242 P. 483* , plaintiff sued to recover the value of the use and possession of land wrongfully possessed by the agent of defendant principal. Plaintiff owned a parcel of vineyard land that he had entered into an agreement to sell to another, who assigned his rights under the contract of sale to defendant principal without the plaintiff's knowledge. The agreement to sell was terminated in early 1921, and plaintiff demanded possession, but defendant agent stayed in possession through the growing season, harvested the crops, and appropriated the crops for the benefit of defendant principal. The trial court found that defendant principal's right to possession of the crops grown on the parcel terminated with the sale agreement and awarded plaintiff the value of the use and possession of the land. Defendant principal appealed from the judgment, arguing that he should not be bound, because he was not a party to the contract.

The Supreme Court affirmed, holding that defendant principal was liable to plaintiff as the undisclosed principal of the party who was wrongfully in possession of plaintiff's land (*197 Cal. 716, 721-722)* . The Court held that under *Civ. Code § 2330*, which provides that the liabilities that would accrue to an agent acting on his or her own behalf accrue to the principal from transactions within the agent's authority, an undisclosed principal is liable for the authorized acts of his or her agent. The Court held that defendant principal was liable for the wrongful act of his agent in taking the crops from the land that the agent wrongfully possessed. The Court held that the agent would have been so liable had the acts been done in his own behalf, and the principal who retained the fruits of the agent's wrong could not escape liability therefor (*197 Cal. 716, 721)* .

Geary S., P. & O. R. Co. v. Rolph *(1922) 189 Cal. 59, 207 P. 539* , was an action by plaintiff to recover the amount due on an assessment for the unpaid portion of the subscription price of plaintiff's stock. The complaint alleged that the stock was registered in the name of defendant agent as trustee, but that defendant principal was the true owner of the stock, and that defendant agent had no interest in or title to the stock. The trial court found that plaintiff's books at all times listed defendant agent as the owner of the stock, and made no other finding on the issue of the ownership of the stock by defendant principal, despite the uncontradicted evidence that defendant agent endorsed all dividend checks to defendant principal. The trial court entered judgment for defendant principal, and plaintiff appealed.

The Supreme Court reversed, holding that defendant principal was liable for defendant agent's act in assuming the obligation to pay the balance remaining unpaid on the subscription price, because defendant agent assumed the obligation in carrying out the agency to hold the stock for the benefit of defendant principal (*189 Cal. 59, 64)* . The

Court held that a principal is responsible to third persons for the ordinary contracts and obligations of his or her agent made with third persons in the course of the business of the agency and within the scope of the agent's power as such, although made in the name of the agent and not purporting to be other than his or her own personal obligation or contract (*189 Cal. 59, 64)* .

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18-182 California Points & Authorities § 182.129

§ 182.129 Opposing Contention That Agent Acted Within Ostensible Authority [Civ. Code § 2317]--Agent Has No Authority to Perpetrate Fraud on Principal [Civ. Code § 2306]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Name of agent*] DID NOT HAVE OSTENSIBLE AUTHORITY TO _____ [*specify acts performed, e.g.,* NEGOTIATE THE CONTRACTS IN QUESTION] AS AGENT FOR _____ [DEFENDANT *or* PLAINTIFF] _____ [*name of principal*], BECAUSE AN AGENT CAN NEVER HAVE AUTHORITY, EITHER ACTUAL OR OSTENSIBLE, TO DO AN ACT WHICH IS, AND IS KNOWN OR SUSPECTED BY THE PERSON DEALT WITH TO BE, A FRAUD UPON THE PRINCIPAL.

Agent Has No Authority to Perpetrate Fraud on Principal. An agent can never have authority, either actual or ostensible, to do an act which is, and is known or suspected by the person with whom he or she deals with to be, a fraud upon the principal (*Civ. Code § 2306*; *Saks v. Charity Mission Baptist Church (2001) 90 Cal. App. 4th 1116, 1137-1140, 110 Cal. Rptr. 2d 45*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to the contention that an agent had ostensible authority to perform specified acts on behalf of the principal, and that the principal should therefore be bound to a third party by the agent's acts done within that ostensible authority, when the acts in question would constitute a fraud on the principal and the person seeking to hold the principal liable was aware or suspected that the act would constitute such a fraud [*see Civ. Code § 2306*]. For example, use of these points and authorities would be appropriate when seeking to relieve a principal of liability to a third party when there has been collusion between the principal's

agent and the third party to engage in acts detrimental to the principal.

When appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Counsel should combine these points and authorities with points and authorities supporting the contention that the acts in question did in fact constitute a fraud upon the principal. For points and authorities relating to fraud in general, see Ch. 105, *Fraud and Deceit* . For pleadings relating to actions for fraud, see California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender).

[3] Discussion of Authorities

In ***Saks v. Charity Mission Baptist Church*** *(2001) 90 Cal. App. 4th 1116, 110 Cal. Rptr. 2d 45* , an investor brought an action for breach of contract and fraud against a church, attempting to hold the church liable for promissory notes signed by its pastor. The pastor had been involved with a developer in various real estate schemes, and in the case at issue, signed two promissory notes made payable to plaintiff after he advanced money to purchase property in the church's name. The church contended in its defense that it was being used by the other parties as a conduit to obtain a loan or grant from a city agency, and that as soon as the anticipated loan was received, the parties planned to use the city's funds to repay plaintiff and immediately transfer the property to a partnership owned by the developer, the investor, and the pastor. The jury found that the church was liable on the promissory notes and the trial court entered judgment for plaintiff.

The court of appeal reversed, holding that the jury verdicts in favor of plaintiff were unsupported by the evidence. With respect to the fraud cause of action, the only misrepresentations attributable to the church were the pastor's statements to the effect that the notes would be paid off within 30 days. The court examined whether, due to the position of authority bestowed on the pastor by the church, the church should be held liable for the pastor's actions in encouraging the plaintiff to go through with the real estate transaction and assuring the plaintiff that the money was available and would be repaid within the time specified on the notes. The court noted that in an appropriate case, the doctrines of respondeat superior, ostensible authority, or equitable estoppel can provide a ground for imposition of liability on a fraud theory. However, the court concluded that pursuant to *Civ. Code § 2306*, an agent can never have authority to do an act which is, and is known to the person dealt with, to be a fraud on the principal. In this case, the developer told the plaintiff investor that the sole point of putting the property in the name of the church was to obtain funds from the public treasury, and that as soon as the funds were secured, title would be transferred to a private partnership. Although the plaintiff may have been unaware of the lawfulness or unlawfulness of the proposal to obtain money through a false front, he was not ignorant of the ultimate goal of the parties' arrangement: to benefit the individuals through use of the church's name. By his own admission, he acquiesced in a scheme to wrongfully use the name of an eleemosynary corporation to obtain financial benefit for himself and his partners. The mere fact that the plot was unsuccessful did not justify transferring the financial burden of the scheme to a charitable corporation which stood to gain nothing from it (*90 Cal. App. 4th 1116, 1137-1140)* .

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18-182 California Points & Authorities § 182.130

§ 182.130 Opposing Contention That Agent Acted Within Ostensible Authority [Civ. Code § 2317]--Third Party's Reliance on Principal's Conduct Was Negligent

[1] FORM

[*The following may be combined with the contentions supported by the points and authorities set forth in §§ 182.37 -182.43 and 182.131, as appropriate, and may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [DEFENDANT *or* PLAINTIFF] AGENT DID NOT HAVE OSTENSIBLE AUTHORITY TO _____ [*specify acts performed, e.g.,* NEGOTIATE CONTRACTS] AS AGENT FOR _____ [DEFENDANT *or* PLAINTIFF] PRINCIPAL, BECAUSE AN OSTENSIBLE AUTHORITY IS NOT CREATED IN AN AGENT WHEN A THIRD PARTY NEGLIGENTLY RELIES ON THE ACTS OR NEGLECT OF A PRINCIPAL.

A. Principal's Liability for Acts of Ostensible Agent. A principal is bound by the acts of an agent under a merely ostensible authority to those persons only who have in good faith, and without want of ordinary care, incurred a liability or parted with value, on the faith thereof (*Civ. Code § 2334*).

B. Third Person's Duty of Inquiry Regarding Authority of Agent. When the conduct of the principal warrants further inquiry or when the third party is dealing with an assumed agent and the elements of ostensible authority are not established, the third party is bound at his or her peril to ascertain not only the fact of the agency but the nature and extent of the authority, if the principal is to be held liable (*Ernst v. Searle (1933) 218 Cal. 233, 240, 22 P.2d 715* ; *United States Credit Bureau, Inc. v. Cheney (1965) 235 Cal. App. 2d 357, 361, 45 Cal. Rptr. 525*).

C. Third Person's Negligent Reliance Precludes Recovery Based on Ostensible Authority. For a third party to recover against the principal based on the act of an ostensible agent, the third person must not be guilty of negligence in relying on the agent's apparent authority (*Civ. Code § 2334*; *People v. Surety Ins. Co. (1982) 136 Cal. App. 3d 556,*

562, 186 Cal. Rptr. 385).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that an agent had ostensible authority to perform certain acts on behalf of defendant principal and that the principal should therefore be bound to a third party by the agent's acts done within that ostensible authority. The ground of opposition set forth is that the third party was negligent in relying on the acts of principal alleged to have been the basis for the creation of an ostensible authority in the agent. These points and authorities may also be used to oppose the contention that an ostensible agency was created, because the fact of the agency need not be opposed as long as the specific authority allegedly conferred is successfully opposed. The argument supported by this memorandum may be raised by a defendant principal who allegedly acted as though his or her alleged agent had a greater degree of authority than was actually the case, when plaintiff third party should have been able to ascertain in the exercise of ordinary care the true extent of the agent's authority. These points and authorities may be combined with the points and *authorities in § 182.131* when counsel wishes to contend alternatively that ostensible authority was not created, because the third party did not actually rely on any act of the principal.

When counsel also opposes the contention that an actual agency exists, these points and authorities may be combined with the points and *authorities in §§ 182.37 -182.39*, as appropriate [*see Tomerlin v. Canadian Indem. Co. (1964) 61 Cal. 2d 638, 644, 39 Cal. Rptr. 731, 394 P.2d 571* (evidence may support findings of actual and ostensible agency)]. If alternatively opposing the contention that an agent had actual authority to perform certain acts, counsel may combine the points and *authorities in §§ 182.40* and *182.41*, as appropriate, with these points and authorities. When alternatively opposing the contention that an agency or authority arose because of the principal's ratification of the agent's acts, the points and *authorities in §§ 182.42* and *182.43*, as appropriate, may be combined with these points and authorities. The points and *authorities in §§ 182.135 -182.138* may be combined with these points and authorities when counsel wishes to oppose a third party's recovery against the principal based on the agent's alleged ostensible authority.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that an agent did not have ostensible authority to act on behalf of defendant principal. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that plaintiff's reliance on the apparent authority of the agent allegedly conferred by the conduct of defendant was negligent, and the facts that were known to plaintiff that should have put him or her under a duty to inquire into the true extent of the agent's authority.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in §§ 182.120* and *182.121*.

[3] Discussion of Authorities

[a] Third Person's Duty of Inquiry Regarding Authority of Agent

Ernst v. Searle *(1933) 218 Cal. 233, 22 P.2d 715* , was an action to quiet title on a parcel of property that defendant Searle, plaintiff principals' agent, had purported to sell to defendant third party. The agent had suggested to plaintiff principals that they might want to exchange a parcel of property for another parcel, and plaintiff principals executed a written agreement to authorize the agent to negotiate the exchange. The agent interested defendant third party in the purchase of the property and executed an agreement of sale with defendant. The agent then obtained a deed from plaintiff principals by representing that defendant third party was the owner of property that would be exchanged and

that the deed was necessary to effect the exchange. The agent obtained the purchase price from the escrow company, cashed the check, and absconded. When plaintiff principals discovered these facts, they sued to quiet title on the San Francisco property on the ground that the deed to the property was not validly delivered. Defendant third party argued that the agent was ostensibly authorized to sell the property because he was entrusted with the deed and that therefore plaintiffs were bound by the sale. The trial court entered judgment for plaintiff principals, and defendant appealed.

The Supreme Court affirmed, holding that the agent did not have ostensible authority to deliver the deed (*218 Cal. 233, 236)* . The Court noted that under *Civ. Code § 2334*, ostensible authority is based on the doctrine of estoppel and requires a representation by the principal, justifiable reliance thereon by the third party, and change of position or injury resulting from the reliance. The Court also noted that the only representation made by plaintiff principals was their entrustment of the deed to their agent (*218 Cal. 233, 237)* . The Court held that the entrustment did not amount to a representation of any specific authority in the agent, save that an agency existed, and that it remained for the third party to inquire into the extent of the authority (*218 Cal. 233, 237)* . The Court held that, as a reasonable inquiry would have disclosed the limited authority granted to the agent, no ostensible authority to deliver the deed existed (*218 Cal. 233, 237-238)* . On rehearing, the Court expanded its discussion to note that persons dealing with an assumed agent are bound at their peril, if they would hold the principal, to ascertain not only the fact of the agency but the nature and the extent of the authority (*218 Cal. 233, 240)* .

United States Credit Bureau, Inc. v. Cheney *(1965) 235 Cal. App. 2d 357, 45 Cal. Rptr. 525* , was an action to recover the amount due under a contract to provide electricity to a ranch. Defendant principal's father had applied for electrical power to be supplied to a ranch owned by defendant principal, signing the application in defendant principal's name as his partner, without the knowledge or authorization of defendant principal. Eight months later the father applied for power for a ranch he leased individually and signed the application in both his name and defendant principal's. Defendant principal did not have any ownership interest in the second ranch and did not authorize his father to use his name in the application for the supply of power to it. When the power bills were not paid, plaintiffs brought this action as assignee of the power company against defendant principal, arguing that his father had ostensible authority to contract on behalf of defendant principal because of the prior application on defendant principal's behalf. The trial court found that defendant principal's father never had authority to bind defendant principal to the contract to supply power and entered judgment in favor of defendant principal, and plaintiff appealed.

The court of appeal affirmed, holding that the evidence supported the trial court's finding that plaintiff had acted at its peril in not inquiring into the nature and extent of the father's authority to act for defendant principal (*235 Cal. App. 2d 357, 361)* . The court noted that ostensible authority is established when a third party dealing with an agent reasonably or justifiably held a belief engendered by the conduct of the principal that the agent had the assumed authority (*235 Cal. App. 2d 357, 360)* . However, the court held that when the conduct of the principal warrants further inquiry, the third party is bound at his or her peril to ascertain the nature and extent of the authority if the principal is to be held liable (*235 Cal. App. 2d 357, 361)* . The court held that plaintiff should have inquired into defendant principal's father's authority regarding the second parcel, given the different manner in which the application was signed (*235 Cal. App. 2d 357, 361)* . The court refused to hold that plaintiff third party held a reasonable and justifiable belief in the father's authority to bind defendant principal as a matter of law. The court noted that while a prior act of an agent that was approved by the principal may establish ostensible authority, it does not conclusively establish it as a matter of law (*235 Cal. App. 2d 357, 361)* .

[b] Third Person's Negligent Reliance Precludes Recovery Based on Ostensible Authority

People v. Surety Ins. Co. *(1982) 136 Cal. App. 3d 556, 186 Cal. Rptr. 385* , arose from defendant principal's motion to vacate the order of the court forfeiting an appeal bond that had been posted with plaintiff third party. Defendant principal had executed a written power of attorney authorizing an agent to write bail bonds and appeal bonds on its behalf. In 1977, a revocation of the power of attorney was filed in the office of the Los Angeles County Clerk, acting for plaintiff third party. The revocation was notarized, with the notary's seal showing an expiration date of 1981. In 1979,

an appeal bond was posted for the release of a prisoner, with defendant principal listed as the surety, executed by the agent whose power of attorney had been revoked, and notarized by a seal showing a 1977 expiration date. When the prisoner failed to appear, the trial court ordered the bond forfeited and denied defendant's motion to vacate the forfeiture and exonerate the bond, and defendant appealed.

The court of appeal reversed, holding that defendant could not be held liable for the act of the former agent based on the agent's ostensible authority (*136 Cal. App. 3d 556, 562)* . The court held that before recovery may be had against a principal for the act of an ostensible agent, the third person must not be guilty of negligence in relying on the agent's apparent authority (*136 Cal. App. 3d 556, 562)* . The court held that plaintiff third party in accepting the bond had been guilty of negligence because it had on file the revocation of the agent's authority, and if the face of the bond had been examined it would have been clear that something was amiss because the notary's commission had expired two years before the bond was executed (*136 Cal. App. 3d 556, 562)* .

[4] Additional Authorities

[a] Third Person's Duty of Inquiry Regarding Authority of Agent

The facts and procedural background of *South Sacramento Drayage Co. v. Campbell Soup Co. (1963) 220 Cal. App. 2d 851, 34 Cal. Rptr. 137* , are discussed in *§ 182.41[3][a]*. Plaintiff third party contended that the local employee of defendant principal had the ostensible authority to enter into a contract with plaintiff for a 15-year period because the local employee had entered into other contracts with plaintiff. However, the court rejected this contention, noting that the only contracts entered into by the employee were for day-by-day or load-by-load contracts, and that the only other term contracts had been subject to the approval of company officials in New Jersey (*220 Cal. App. 2d 851, 857)* . The court held that plaintiff was under an obligation to inquire into the extent of the employee's authority if the principal was to be held liable for the acts of the agent under an ostensible authority, and plaintiff's failure to do so precluded a finding that ostensible authority existed (*220 Cal. App. 2d 851, 857-858)* .

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18-182 California Points & Authorities § 182.131

§ 182.131 Opposing Contention That Agent Acted Within Ostensible Authority [Civ. Code § 2317]--Third Party Did Not Rely on Acts of Principal

[1] FORM

[*The following may be combined with the contentions supported by the points and authorities set forth in §§ 182.37 -182.43 and 182.130, as appropriate. The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [DEFENDANT *or* PLAINTIFF] AGENT DID NOT HAVE OSTENSIBLE AUTHORITY TO _____ [*specify acts performed, e.g.,* NEGOTIATE CONTRACTS] AS AGENT FOR _____ [DEFENDANT *or* PLAINTIFF] PRINCIPAL, BECAUSE AN OSTENSIBLE AUTHORITY IS NOT CREATED IN AN AGENT WHEN A THIRD PARTY DOES NOT ACTUALLY RELY ON THE ACTS OF THE PRINCIPAL.

A. Principal's Liability for Acts of Ostensible Agent. [*See § 182.130[1], Paragraph A.*]

B. Third Person's Duty of Inquiry Regarding Authority of Agent. [*See § 182.130[1], Paragraph B.*]

C. Reliance of Third Party Necessary for Ostensible Authority to Exist. In order to prove a principal's liability under a theory of ostensible authority, the third party must have actually relied on the agent's ostensible authority (*Chartered Bank of London v. Chrysler Corp. (1981) 115 Cal. App. 3d 755, 764, 171 Cal. Rptr. 748*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that an agent had ostensible authority to perform certain acts on behalf of defendant principal and that the principal should therefore be bound by the agent's acts

done within that ostensible authority. The ground of opposition set forth is that the third party did not actually rely on the acts of defendant principal. The argument supported by this memorandum may be used by a defendant principal who allegedly acted in a manner that established an ostensible authority in his or her agent. These points and authorities may be combined with the points and *authorities in § 182.130* when counsel wishes to contend alternatively that ostensible authority was not created, because the third party was negligent in relying on the acts of the principal.

When counsel also opposes the contention that an actual agency exists, these points and authorities may be combined with the points and *authorities in §§ 182.37 -182.39*, as appropriate [*see Tomerlin v. Canadian Indem. Co. (1964) 61 Cal. 2d 638, 644, 39 Cal. Rptr. 731, 394 P.2d 571* (evidence may support findings of actual and ostensible agency)]. If alternatively opposing the contention that an agent had actual authority to perform certain acts, counsel may combine the points and *authorities in §§ 182.40* and *182.41*, as appropriate, with these points and authorities. When alternatively opposing the contention that an agency or authority arose because of the principal's ratification of the agent's acts, counsel may combine the points and *authorities in §§ 182.42* and *182.43*, as appropriate, with these points and authorities. The points and *authorities in §§ 182.135 -182.138* may be combined with these points and authorities when counsel wishes to oppose a third party's recovery against the principal based on the agent's alleged ostensible authority.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that an agent did not have ostensible authority to act on behalf of defendant principal. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that plaintiff third party did not rely on defendant's acts to establish the authority of defendant's agent. The absence of reliance by a third party may be shown, for example, when the third party either did not know of the acts of defendant principal or did not place any significance on defendant's acts in deciding to deal with the agent.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in §§ 182.120* and *182.121*.

[3] Discussion of Authorities

[a] Reliance of Third Party Necessary for Ostensible Authority to Exist

Chartered Bank of London v. Chrysler Corp. *(1981) 115 Cal. App. 3d 755, 171 Cal. Rptr. 748* , was an action for conversion in which plaintiff third party alleged that defendant principal wrongfully took possession of a boat that was subject to a security interest in favor of plaintiff. The security was allegedly created by a conditional sales agreement executed by a company that shared space with an agent of defendant principal who had possession of the boat. Neither the buyer of the boat nor the company ever had possession of the boat, and no payment was made to defendant or its agent. Plaintiff alleged that the company that shared space with defendant principal's agent had the ostensible authority to sell the boat to the buyer, but the buyer did not testify. The trial court found that no ostensible authority existed, and entered judgment for defendant. Plaintiff appealed.

The court of appeal affirmed, holding that plaintiff never had a security interest in the boat, because the debtor, the buyer of the boat, never obtained an ownership interest in the boat (*115 Cal. App. 3d 755, 760)* . The court rejected plaintiff's argument that the company that shared space with defendant principal's agent was defendant's ostensible agent, noting that ostensible authority depends on the third party's reliance on the principal's acts. The court held that plaintiff's failure to produce any evidence that the buyer relied on defendant's conduct precluded a finding of ostensible authority (*115 Cal. App. 3d 755, 764)* .

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18-182 California Points & Authorities § 182.132

§ 182.132 Opposing Contention That Agent Acted Within Ostensible Authority [Civ. Code § 2317]--Agent's Authority to Draw and Endorse Checks Does Not Confer Ostensible Authority to Create Overdraft

[1] FORM

[*The following may be combined with the contentions supported by the points and authorities set forth in §§ 182.37 -182.43, and 182.130 and 182.131, as appropriate, and may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [DEFENDANT *or* PLAINTIFF] AGENT DID NOT HAVE OSTENSIBLE AUTHORITY TO CREATE AN OVERDRAFT AS AGENT FOR _____ [DEFENDANT *or* PLAINTIFF] PRINCIPAL, BECAUSE THE AUTHORITY TO COLLECT MONEY AND DRAW AND ENDORSE CHECKS DOES NOT CONFER AN OSTENSIBLE AUTHORITY TO CREATE AN OVERDRAFT.

Collecting Agent Not Ostensibly Authorized to Create Overdraft. When a principal authorizes an agent to collect money and draw and endorse checks, such authorization does not confer ostensible authority on the agent to create an overdraft (*Torrance Nat'l Bank v. Enesco Fed. Credit Union (1955) 134 Cal. App. 2d 316, 320, 327, 285 P.2d 737*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that an agent had ostensible authority to create an overdraft in the principal's account. The ground of opposition set forth is that the ageny's authorization to collect money and draw and endorse checks on behalf of defendant principal did not create an ostensible authority to create an overdraft in defendant principal's account. This argument may be used, for example, as a defense by defendant principal in an action brought by a bank to recover the amount of the overdraft created by the agent.

These points and authorities may be combined with the points and *authorities in §§ 182.130* and *182.131* when counsel

wishes to contend alternatively that an agent did not have ostensible authority for the reasons set forth in those forms. When counsel also opposes the contention that an actual agency exists, these points and authorities may be combined with the points and *authorities in §§ 182.37 -182.39*, as appropriate [*see Tomerlin v. Canadian Indem. Co. (1964) 61 Cal. 2d 638, 644, 39 Cal. Rptr. 731, 394 P.2d 571* (evidence may support findings of actual and ostensible agency)]. If alternatively opposing the contention that an agent had actual authority to perform certain acts, counsel may combine the points and *authorities in §§ 182.40* and *182.41*, as appropriate, with these points and authorities. When alternatively opposing the contention that an agency or authority arose because of the principal's ratification of the agent's acts, counsel may combine the points and *authorities in §§ 182.42* and *182.43*, as appropriate, with these points and authorities. The points and *authorities in §§ 182.135 -182.138* may be combined with these points and authorities when counsel wishes to oppose a third party's recovery against the principal based on the agent's alleged ostensible authority.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that an agent did not have ostensible authority to create an overdraft in the principal's account. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should discuss the facts showing that the agent was authorized only to collect money and draw and endorse checks on behalf of the principal, and that defendant principal did not act as though the agent was authorized to create an overdraft.

[3] Discussion of Authorities

[a] Collecting Agent Not Ostensibly Authorized to Create Overdraft

Torrance Nat'l Bank v. Enesco Fed. Credit Union *(1955) 134 Cal. App. 2d 316, 285 P.2d 737* , was an action by plaintiff third party, a bank, to recover the amount of an overdraft created when the treasurer of defendant principal drew a check on defendant's account for more than the amount in the account. The treasurer had the express authority as agent to sign all checks and drafts of defendant principal and used this authority to conduct a check-cashing service for the employees of defendant despite defendant's direction that its funds not be used for cashing paychecks. In running the service, the agent had arranged with plaintiff that the check drawn by the agent would not be cashed but held in a teller's drawer until the checks that were cashed by the agent could be deposited to maintain defendant's balance. The agent was robbed of the $30,000 on the occasion at issue here, so plaintiff bank sued defendant to recover the amount of the overdraft created when the check was charged to defendant's account. Defendant cross complained for the amount that was in the account that was applied to the agent's check on the ground that the check was not drawn in an authorized manner and therefore should not have been cashed by plaintiff. The trial court entered judgment for plaintiff, and defendant principal appealed.

The court of appeal reversed, holding that the agent's authorization to sign checks and drafts did not empower him to create an overdraft in defendant's account (*134 Cal. App. 2d 316, 320)* . Citing *Civ. Code § 2317*, the court recognized that an ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third party to believe the agent to possess (*134 Cal. App. 2d 316, 321-322)* . The court noted that the authorization given plaintiff here contained no language authorizing the agent to borrow for the account of defendant and that there was no agreement by defendant to repay to plaintiff any overdraft created by the agent (*134 Cal. App. 2d 316, 321)* . The court also held that there was no evidence in the record tending to prove any act or omission on the part of defendant principal on which plaintiff could reasonably have based its belief that the agent had authority to overdraw defendant principal's account (*134 Cal. App. 2d 316, 325)* . As the check was unauthorized under either an actual or ostensible authority, the court held that defendant principal should not be held responsible for the whole or any part of the check (*134 Cal. App. 2d 316, 327, 328)* .

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18-182 California Points & Authorities § 182.133

§ 182.133 Opposing Contention That Knowledge of or Notice to Agent Imputed to Principal [Civ. Code § 2332]--Principal Not Chargeable With Knowledge or Notice of Agent Regarding Matters Not Within Agent's Authority

[1] FORM

[*The following may be combined with the contentions supported by the points and authorities set forth in §§ 182.37 -182.43, and 182.130 and 182.131, as appropriate, and may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT PRINCIPAL IS NOT CHARGEABLE WITH OR BOUND BY THE KNOWLEDGE OF OR NOTICE TO THE [DEFENDANT] AGENT, BECAUSE THE PRINCIPAL IS NOT CHARGEABLE WITH NOR BOUND BY THE KNOWLEDGE OF THE AGENT REGARDING MATTERS THAT ARE NOT WITHIN THE SCOPE OF THE AGENT'S AUTHORITY.

A. Notice to Either Principal or Agent Imputed to Both. [*See § 182.122[1], Paragraph A.*]

B. Knowledge or Notice Imputed Only Regarding Matters Within Scope of Agency. The knowledge of an agent is considered and imputed as the knowledge of the principal only when the agent acquires it in the course of the agency; the principal is not chargeable with or bound by knowledge of or notice to an agent regarding matters not within the scope of the agent's authority (*Redman v. Walters (1979) 88 Cal. App. 3d 448, 454, 152 Cal. Rptr. 42* ; *J.A. Eck Co. v. Coachella Valley Onion Growers' Ass'n (1929) 102 Cal. App 1, 9, 282 P. 408*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that notice to or knowledge of an agent may be imputed to the principal. The ground of opposition set forth is that a principal is not chargeable with or bound by the

knowledge of or notice to his or her agent regarding matters that are not within the scope of the agent's authority. Such a contention may be used when a third party seeks to impute to defendant principal some knowledge that is outside the scope of the agent's authority and that the agent would therefore have no duty or reason to communicate to defendant principal. For example, this contention may be used as a defense by a principal when a third party alleges that a principal had knowledge of the terms of a contract that an agent entered into without authority from the principal and that because of this knowledge, the principal should be bound by the contract [*see J.A. Eck Co. v. Coachella Valley Onion Growers' Ass'n (1929) 102 Cal. App 1, 9, 282 P. 408]* .

If also opposing the existence of an actual agency, counsel may combine these points and authorities with the points and *authorities in §§ 182.37 -182.39*, as appropriate. If opposing the existence of an agent's actual or ostensible authority to perform certain acts, counsel may combine these points and authorities with the points and *authorities in §§ 182.40* and *182.41*, and 130 and 131, as appropriate. If opposing the contention that an agency or authority allegedly arose because of the principal's ratification of the agent's acts, counsel may combine these points and authorities with the points and *authorities in §§ 182.42* and *182.43*, as appropriate.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that knowledge of or notice to an agent may not be imputed to the principal. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that the agent was not acting within the scope of his or her authority when the knowledge was acquired or the notice given.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 182.122*.

[3] Discussion of Authorities

[a] Knowledge or Notice Imputed Only Regarding Matters Within Scope of Agency

Redman v. Walters *(1979) 88 Cal. App. 3d 448, 152 Cal. Rptr. 42* , was an action for legal malpractice instituted after plaintiff's lawsuit was dismissed for failure to proceed to trial. Defendant had been a member of the firm that had represented plaintiff, but had never personally participated in plaintiff's lawsuit and had left the partnership well before plaintiff's action had been dismissed. However, no substitution of attorneys was ever filed, and plaintiff never consented to a change of attorneys. Defendant contended that plaintiff, as principal, should be charged with the knowledge of the remaining members of the firm that defendant had left the partnership. The trial court granted defendant's motion for summary judgment, and plaintiff appealed from the order dismissing the action regarding defendant.

The court of appeal reversed, rejecting the reasoning of the trial court that the remaining partners, as plaintiff's agents, had knowledge that defendant had left the partnership and that plaintiff as principal would possess imputed knowledge of that fact (*88 Cal. App. 3d 448, 452)* . The court held that the knowledge of the agent is imputed to the principal only if the agent acquires the knowledge in the course of the agency (*88 Cal. App. 3d 448, 454)* . The court held that the decision of the partnership to dissolve and continue plaintiff's representation by two of its members was not within the authority conferred by plaintiff (*88 Cal. App. 3d 448, 454)* . The court therefore concluded that a triable issue of fact existed concerning whether or not defendant was part of the partnership that plaintiff had retained (*88 Cal. App. 3d 448, 455)* .

J.A. Eck Co. v. Coachella Valley Onion Growers' Ass'n *(1929) 102 Cal. App 1, 282 P. 408* , was an action to recover damages for defendant's breach of a contract executed by defendant's agent. Plaintiff third party had before it the agent's written authorization to contract on behalf of defendant, and the contracts executed by the agent were in excess of the

written authority granted in that the price to be paid defendant was less than that authorized. Plaintiff argued that the agent's knowledge of the terms of the contract should be imputed to defendant, and that defendant should therefore be held to have ratified the contract by failing to repudiate it within a reasonable time. The trial court found the contract unenforceable, and entered judgment for defendant that plaintiff appealed.

The court of appeal affirmed, holding that the terms of the unauthorized contract could not be imputed to defendant, because the knowledge of the agent is not imputed to the principal regarding matters not within the scope of the agent's authority (*102 Cal. App. 1, 9)* . The court reasoned that to impute to a principal knowledge of the terms of an unauthorized contract and to infer a ratification from the failure to repudiate the contract would give an agent the power to bind the principal to any course of conduct outside the authority actually conferred (*102 Cal. App. 1, 9)* .

[4] Additional Authorities

[a] Knowledge or Notice Imputed Only Regarding Matters Within Scope of Agency

In *Herman v. Los Angeles County Metro. Transp. Auth. (1999) 71 Cal. App. 4th 819, 84 Cal. Rptr. 2d 144* , a county agency mailed a letter to a public employee's attorney indicating that the employee was being terminated. The letter contained a required warning that the employee had to file any petition seeking judicial review of his firing within 90 days of the date of mailing of the termination letter [*Code Civ. Proc. § 1094.6*]. The employee filed his administrative mandamus petition a few days beyond the 90-day limitations period. The employer demurred to the petition, arguing it was barred by the limitations period in *Code Civ. Proc. § 1094.6* because service on the lawyer satisfied the statute's service requirement. The employee contended that the statute requires the termination notice to be sent to the party, and that sending it to the party's lawyer could not be a substitute for service on the party. The trial court sustained the demurrer with leave to amend. When the employee could not amend his petition to demonstrate compliance with the statute, the trial court granted the employer's dismissal motion on the same ground and denied the petition.

The court of appeal reversed. It concluded that the 90-day limitations period applies only if the required notice is served on the party, and that service on the party's lawyer does not trigger the 90-day period. The court reviewed the general agency principle that an attorney is the client's agent, and that the agent's knowledge is imputed to the principal, but determined that it does not apply when the principal must have actual knowledge. The court concluded that the express language of *Code Civ. Proc. § 1094.6*, the overall statutory context, its legislative history, and the lack of burden, compelled the conclusion that service on the party's lawyer did not trigger the limitations period (*71 Cal. App. 4th 819, 828-830)* .

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18-182 California Points & Authorities § 182.134

§ 182.134 Opposing Contention That Knowledge of or Notice to Agent Imputed to Principal [Civ. Code § 2332]--Knowledge or Notice Not Imputed When Third Party Did Not Deal With Principal Through Agent or Otherwise

[1] FORM

[*These Points and Authorities may be combined with the contentions supported by the points and authorities set forth in §§ 182.37 -182.43, and 182.130 and 182.131, as appropriate, and may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT PRINCIPAL IS NOT CHARGEABLE WITH NOR BOUND BY THE KNOWLEDGE OF OR NOTICE TO THE [DEFENDANT] AGENT, BECAUSE THE RULE CHARGING THE PRINCIPAL WITH THE KNOWLEDGE OF OR NOTICE TO AN AGENT APPLIES ONLY TO THIRD PERSONS WHO HAVE DEALT WITH THE PRINCIPAL THROUGH HIS/HER AGENT OR OTHERWISE.

A. Notice to Either Principal or Agent Imputed to Both. [*See § 182.122[1], Paragraph A.*]

B. Knowledge or Notice Imputed Only If Third Party Deals With Principal Through Agent. The rule that a principal is chargeable with and bound by knowledge of or notice to an agent applies only to third persons who have dealt with the principal or his or her agent (*Hale v. Depaoli (1948) 33 Cal. 2d 228, 232, 201 P.2d 1* ; *Lucas v. Pollock (1992) 7 Cal. App. 4th 668, 674-675, 8 Cal. Rptr. 2d 918* ; *Redman v. Walters (1979) 88 Cal. App. 3d 448, 454, 152 Cal. Rptr. 42*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that a principal is chargeable with and bound by knowledge of or notice to an agent. The ground of opposition set forth is that the third party did not deal with the principal or his or her agent and therefore cannot take advantage of the rule imputing an agent's knowledge to the

principal. Such an argument may be used in any action in which an opposing party argues that the principal should be held to possess imputed knowledge of some fact. For example, it may be used as a defense by a principal if a third party seeks to hold the principal liable based on the principal's alleged imputed knowledge of an agent's actions.

If also opposing the existence of an actual agency, counsel may combine these points and authorities with the points and *authorities in §§ 182.37 -182.39*, as appropriate. If opposing the existence of an agent's actual or ostensible authority to perform certain acts, counsel may combine these points and authorities with the points and *authorities in §§ 182.40* and *182.41*, and *182.130* and *182.131*, as appropriate. If opposing the contention that an agency or authority allegedly arose because of the principal's ratification of the agent's acts, counsel may combine these points and authorities with the points and *authorities in §§ 182.42* and *182.43*, as appropriate.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that knowledge or notice of an agent is not charged to the principal when the party claiming that the principal is bound by the agent's knowledge has had no dealings with the principal through an agent or otherwise. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that the third party contending that the agent's knowledge should be imputed to the principal did not deal with the principal through an agent or otherwise.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 182.122*.

[3] Discussion of Authorities

[a] Knowledge or Notice Imputed Only When Third Party Deals With Principal Through Agent

Hale v. Depaoli *(1948) 33 Cal. 2d 228, 201 P.2d 1* , was an action to recover personal injury damages that resulted when plaintiff leaned against a porch railing that gave way, causing plaintiff to fall and injure herself. There were two causes of action, one for negligence in the construction of the railing, and the second for fraudulent concealment of a known defect. Defendant, as a partner in the firm that constructed the house, had sold it and then repurchased it and leased it to plaintiff's parents. The complaint alleged as the second cause of action that as lessor, defendant had a duty to warn plaintiff of known dangers, and that defendant should be held to have imputed knowledge of the unsafe construction techniques used in building the railing because of his status as principal to the agents who built the railing. The trial court granted a nonsuit, and plaintiff appealed.

The Supreme Court affirmed the nonsuit against defendant as to the second cause of action, holding that the knowledge of the agent builders could not be imputed to defendant as lessor, because defendant as builder had no dealings with plaintiff (*33 Cal. 2d 228, 232-233)* . The Court held that imputation of knowledge is based on the necessities of general commercial relationships and that when a principal acts through an agent, a third person dealing with the agent is entitled to rely on the agent's knowledge and notice and it binds the principal (*33 Cal. 2d 228, 232)* . However, the Court also held that while the principal may be bound by the knowledge of an agent when a third person has dealt with the principal or another agent, the principal cannot be so bound when the third person has had no dealings with the principal through an agent or otherwise (*33 Cal. 2d 228, 232)* . The Court held that defendant, in his capacity as builder, had no transactions or dealings with plaintiff, and that therefore defendant's knowledge as builder of the defect could not be the basis of plaintiff's action against defendant as lessor (*33 Cal. 2d 228, 232-233)* .

In ***Lucas v. Pollock*** *(1992) 7 Cal. App. 4th 668, 8 Cal. Rptr. 2d 918* , migratory farmworkers and their survivors attempted to hold a landowner liable for conditions on his property that allegedly had led to a fire in buildings in which

the workers were living while working on a nearby property. The landowner denied any knowledge of the presence of the farmworkers on his property. The plaintiffs argued that the owner's real estate agent knew of their presence and that this knowledge should be imputed to the owner.

The trial court and the court of appeal both rejected the argument. The rule of imputed knowledge from agent to principal is based on the necessities of general commercial relationships. If a principal acts through an agent, a third person who deals with the agent is entitled to rely on the agent's knowledge and notice, and that knowledge and notice binds the principal. The rule has never been applied to protect one who has had no dealings with the principal, through an agent or otherwise. As the farmworkers had had no dealings with the owner, there was no basis for imputing anything known by the real estate agent to the owner (*7 Cal. App. 4th 668, 674-675)* .

The facts and procedural background of ***Redman v. Walters*** *(1979) 88 Cal. App. 3d 448, 152 Cal. Rptr. 42* , are discussed in *§ 182.133[3][a]*. The court held that the rule charging the principal with the knowledge of or notice to an agent does not apply to protect one who has not dealt with the principal either directly or through an agent [quoting *Hale v. Depaoli (1948) 33 Cal. 2d 228, 232, 201 P.2d 1]* . The court held that defendant could not claim that plaintiff was charged with the other agents' knowledge that the partnership that had included defendant had been dissolved, because defendant was not a third person who had dealt with plaintiff principal (*88 Cal. App. 3d 448, 454)* .

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18-182 California Points & Authorities § 182.135

§ 182.135 Opposing Contention That Third Party May Recover Tort Damages [Civ. Code § 3333] From Principal for Acts of Agent--Agent's Wrongful Act Was Not Within Scope of Agency or Authorized or Ratified by Principal

[1] FORM

[*These Points and Authorities may be combined with the contentions supported by the points and authorities set forth in §§ 182.37 -182.43, 182.130, 182.131, 182.136, as appropriate, and may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF MAY NOT RECOVER TORT DAMAGES FROM DEFENDANT PRINCIPAL FOR THE WRONGFUL ACTS OF THE [DEFENDANT] AGENT, BECAUSE A PRINCIPAL IS NOT LIABLE FOR THE ACT OF AN AGENT UNLESS _____ [THE AGENT'S ACT WAS COMMITTED IN THE TRANSACTION OF THE BUSINESS OF THE AGENCY *and/or* THE AGENT'S ACT WAS AUTHORIZED OR RATIFIED BY DEFENDANT PRINCIPAL].

[*EITHER*]

A. Third Party May Not Recover From Principal When Agent's Act Not Within Scope of Employment. To recover tort damages from a principal for the acts of an agent when the principal has not authorized or ratified the agent's acts, it is necessary for plaintiff to establish that the act was done in the transaction of the business of the agency (*Civ. Code §§ 2338, 2339*; *Lane v. Bing (1927) 202 Cal. 577, 580-581, 262 P. 317*).

[*AND/OR*]

B. Third Party May Not Recover From Principal When Agent's Act Not Authorized or Ratified. A third party may not recover from a principal for wrongs committed by an agent other than those mentioned in *Civ. Code Section*

2338, unless the principal has authorized or ratified the acts, even though the wrongs are committed while the agent is engaged in his or her service (*Civ. Code § 2339*; *see Benson v. Southern Pac. Co. (1918) 177 Cal. 777, 779-780, 171 P. 948* ; *Maberto v. Wolfe (1930) 106 Cal. App 202, 206, 289 P. 218*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that a third party may recover from a principal the tort damages caused by the wrongful act or omission of the principal's agent. The grounds of opposition set forth are that the agent was not acting in the scope of his or her employment at the time of the wrongful act, and that the principal did not ratify or authorize the agent's act. Paragraph A may be used when opposing the third party's contention that the agent's act was committed in the transaction of the business of the agency. Paragraph B may be used when opposing the third party's contention that the agent's act was authorized or ratified by defendant principal. Either of these grounds alone is sufficient to bar a third party's recovery, and when appropriate, counsel may wish to use both Paragraphs A and B as alternative reasons for denying recovery. Such a contention may be used, for example, as a defense in an action by a third party to recover tort damages from defendant principal for the act or omission of an agent.

When a third party contends that defendant principal is liable for the wrongful act of an agent solely because of defendant principal's authorization or ratification of the agent's wrongful act, defendant principal may oppose that contention by combining Paragraph B of this form with the points and *authorities in §§ 182.40 -182.43*, and *182.130* and *182.131*, as appropriate, in the factual situation of the particular case. If also opposing the existence of an actual agency, counsel may combine these points and authorities with the points and *authorities in §§ 182.37 -182.39*, as appropriate. If the third party seeks recovery of exemplary damages from defendant principal based on defendant principal's alleged ratification of the agent's wrongful act, these points and authorities may be combined with the points and authorities opposing the recovery of exemplary damages in § 182.136, as appropriate.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a third party may not recover from a principal the tort damages caused by the wrongful act or omission of the principal's agent. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, when counsel uses Paragraph A, counsel should discuss facts showing that the agent was not transacting the business of the agency when he or she allegedly committed a wrongful act. When counsel uses Paragraph B, counsel should discuss facts showing that defendant principal did not authorize or ratify the agent's wrongful act.

[3] Discussion of Authorities

[a] Third Party May Not Recover From Principal When Agent's Act Not Within Scope of Employment

Lane v. Bing *(1927) 202 Cal. 577, 262 P. 317* , was an action brought by a pedestrian injured by an automobile accident between two cars to recover tort damages from the drivers of the cars and the owners of the cars. The action against one of the owners alleged that the driver, the stepdaughter of the owner, was employed as an accountant and had been taking lessons in accounting at her home. On the night of the accident, the instructor had come to her home, but the stepdaughter canceled the lesson and in driving the instructor to the train station had the accident that caused plaintiff's injuries. Plaintiff third party alleged that the stepdaughter was the agent of the defendant owner, and that defendant owner was therefore liable for the tort damages caused by the stepdaughter. The trial court entered a nonsuit in favor of the owner on the ground that it had not been established that the stepdaughter had acted within the scope of

her agency or employment, and plaintiff appealed.

The Supreme Court affirmed, holding that the evidence showed that the stepdaughter's action in driving the accountant to the train station was voluntary and unrelated to her employment (*202 Cal. 577, 580)* . The Court noted that a plaintiff seeking recovery from a principal for the tort of an agent based on the agent's act while transacting the business of the agency rather than on the principal's authorization or ratification of the wrongful act must establish the two distinct facts of the status of master and servant, and that the act was done within the scope of the servant's employment [quoting from *Kish v. California State Auto. Ass'n (1922) 190 Cal. 246, 251, 212 P. 27]* . The Court held that the stepdaughter's act in giving the accountant a ride was not connected with her employment, and that the owner of the car could not be held liable (*202 Cal. 577, 580)* .

[b] Third Party May Not Recover From Principal When Agent's Act Not Authorized or Ratified

The facts and procedural background of ***Benson v. Southern Pac. Co.*** *(1918) 177 Cal. 777, 171 P. 948* , are discussed in *§ 182.123[3][a]*. The Court distinguished liability under the doctrine of respondeat superior, which arises when the agent acts within the general scope of authority in transacting the principal's business, and the liability when the principal authorizes or ratifies the agent's act. The Court held that when the act that caused injury to plaintiff third party was authorized or ratified by defendant principal, the principal is liable for his or her own act of authorization or ratification (*177 Cal. 777, 779-780)* .

The facts and procedural background of ***Maberto v. Wolfe*** *(1930) 106 Cal. App. 202, 289 P. 218* , are discussed in *§ 182.123[3][b]*. The court held that a principal may be held liable for the acts of an agent that were not within the general course and scope of the agent's authority to transact business if the principal ratified or authorized the act (*106 Cal. App. 202, 206)* . The court found that the agent's act that injured plaintiff was authorized by defendant principal, and therefore plaintiff third party was entitled to recover damages from defendant principal (*106 Cal. App. 202, 210)* .

[4] Additional Authorities

[a] Third Party May Not Recover From Principal When Agent's Act Not Within Scope of Employment

In *Saks v. Charity Mission Baptist Church (2001) 90 Cal. App. 4th 1116, 110 Cal. Rptr. 2d 45* , the plaintiff was a doctor who had engaged in a series of business transactions with a developer and a church pastor. In the course of those transactions, the plaintiff had loaned $810,000 to purchase property in the church's name, with the understanding that the pastor or the church would repay the amount. Use of the church's name to purchase the property was necessary to obtain a public loan or grant, the proceeds from which would be used to repay the plaintiff. The plaintiff knew when he made the payments that use of the church's name was only necessary to obtain the public funds, and that after the funds were obtained, title to the property would be transferred to a partnership owned by the plaintiff, the developer, and possibly the pastor. Eventually, the public funding did not materialize, the transactions fell apart, and the plaintiff did not recover the money he had paid. The plaintiff sued, seeking in part to hold the church liable for the notes signed by the pastor on theories of breach of contract and fraud. After a jury verdict for the plaintiff, the court of appeal reversed. On the fraud cause of action, the court concluded that a principal may not be held vicariously liable if an agent is using the principal to obtain a benefit for the agent and other parties in a transaction in which the principal will ultimately not benefit. The plaintiff knew that the pastor was using the church's name only to secure public funding for the project, after which title for the purchased property would be transferred to the private partnership. With this knowledge, and in the absence of evidence that the church regularly engaged in real estate development transactions, the plaintiff had to know that the pastor's actions did not arise from the normal duties of the pastor on behalf of the church and could not be deemed to be foreseeable by the church (*90 Cal. App. 4th 1116, 1138-1139)* .

In *Asplund v. Selected Invs. in Fin. Equities, Inc. (2000) 86 Cal. App. 4th 26, 103 Cal. Rptr. 2d 34* , the plaintiffs were investors who brought suit against the defendant, a mutual fund broker-dealer, based on allegations that they were

defrauded when they purchased promissory notes from a registered representative of the broker-dealer. However, the written agency agreement between the representative and the defendant provided that the registered representative was an independent contractor whose relationship to the defendant was solely that of an agent for selling shares in the defendant's mutual fund. The promissory notes sold by the representative to the plaintiffs were unrelated to the defendant or to the representative's agency for the defendant. The trial court granted summary judgment for the defendant, and the court of appeal affirmed. The court concluded that the registered representative was an independent contractor, not an employee of the defendant, and had no actual or apparent authority from the defendant to sell the promissory notes at issue. In fact, the written agency agreement explicitly limited the scope of the representative's authority to act on behalf of the defendant. Therefore, because the representative's actions were not within the scope of the representative's agency relationship with the defendant, the defendant could not be held vicariously liable for the alleged fraud (*86 Cal. App. 4th 26, 45-49)* .

[b] Third Party May Not Recover From Principal When Agent's Act Not Authorized or Ratified

In *Shultz Steel Co. v. Hartford Accident & Indem. Co. (1986) 187 Cal. App. 3d 513, 231 Cal. Rptr. 715* , an insured under a liability insurance policy was sued by a third party for personal injury damages and then brought an action against his own broker, who was an agent of the insurer, and the insurer, seeking damages for indemnity and negligence, on the ground that the agent provided inadequate advice regarding coverage limits. The insurer defendant successfully brought a motion for summary judgment on the ground that, inter alia, it did not ratify the agent's advice, and plaintiff appealed. The court of appeal affirmed, noting that while the insurer was aware of the policy, it had no way of knowing whether the insured had collateral or excess coverage with another insurer, and no knowledge that the coverage under its policy was in fact inadequate. The court held, inter alia, that no triable issue existed with regard to ratification (*187 Cal. App. 3d 513, 523)* .

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18-182 California Points & Authorities § 182.136

§ 182.136 Opposing Contention That Plaintiff May Recover Exemplary Damages [Civ. Code § 3294] From Principal for Acts of Agent--Retention of Agent With Special Skills and Experience Does Not Constitute Ratification

[1] FORM

[*These points and authorities may be combined with the contentions supported by the points and authorities set forth in §§ 182.42 and 182.43, as appropriate, and may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF MAY NOT RECOVER EXEMPLARY DAMAGES FROM DEFENDANT PRINCIPAL FOR THE WRONGFUL ACT OF THE [DEFENDANT] AGENT BASED ON DEFENDANT PRINCIPAL'S ALLEGED RATIFICATION OF THE AGENT'S ACT, BECAUSE RETENTION OF AN AGENT OR EMPLOYEE WITH SPECIAL SKILL AND EXPERIENCE DOES NOT CONSTITUTE A RATIFICATION FOR PURPOSES OF IMPOSING EXEMPLARY DAMAGES.

Retention of Agent With Special Skills Does Not Constitute Ratification. When the actions of a principal or employer are merely negative, consisting of keeping skilled, experienced, and responsible agents or employees, it cannot be said, for the purposes of awarding exemplary damages, that the former ratified the conduct of the agents or employees and shared in their malicious motives (*Sullivan v. Matt (1955) 130 Cal. App. 2d 134, 144, 278 P.2d 499*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that a third party may recover exemplary damages from defendant principal or employer based on defendant's ratification of an agent or employee's wrongful act. The ground of opposition set forth is that defendant principal's retention of the agent or employee, standing alone, does not constitute a ratification for the purpose of imposing exemplary damages on the principal when the employee or agent is skilled and experienced at his or her position. Such a contention would be appropriate as a defense by the

principal, for example, when a third party seeking exemplary damages from the principal for an agent's wrongful act contends that defendant principal ratified the wrongful act by not discharging the agent after learning of the wrongful conduct. These points and authorities may be combined with the points and *authorities in §§ 182.42* and *182.43* opposing ratification generally, when appropriate.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the principal's mere retention of an agent or employee who has committed a wrongful act does not constitute a ratification of the wrongful act for the purpose of imposing exemplary damages on the principal, when the agent or employee possesses a special skill or experience in the service of defendant. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should discuss facts showing the special skill and/or experience possessed by the agent or employee, and the absence of any other facts tending to show the principal's ratification of the wrongful act.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities in Optional Paragraph C of § 182.124.

[3] Discussion of Authorities

[a] Retention of Agent With Special Skills Does Not Constitute Ratifaction

Sullivan v. Matt *(1955) 130 Cal. App. 2d 134, 144, 278 P.2d 499* , was an action for damages for personal injuries alleging that plaintiff was assaulted by defendant employees in the course of their employment. Plaintiff also sought exemplary damages from defendant company, the employer of defendant employees, on the ground that defendant company had ratified their wrongful conduct by retaining them after learning of the assault. The trial court entered judgment on a jury verdict awarding compensatory and exemplary damages to plaintiff against all defendants, and defendant company appealed.

The court of appeal reversed the award of exemplary damages against defendant company, holding that the evidence that the employees were retained by defendant company did not constitute a ratification of their tortious acts (*130 Cal. App. 2d 134, 144)* . The court held that the special skill and experience of the employees were necessary to defendant company, and that under the circumstances it would be unfair to require it to discharge them in order to disaffirm their conduct (*130 Cal. App. 2d 134, 144)* . The court held that when the actions of an employer are merely negative, consisting of keeping skilled, experienced, and responsible employees, it cannot be said that the employer ratified the conduct of the employees and shared in their malicious motives (*130 Cal. App. 2d 134, 144)* .

While the holding in *Sullivan* refers to employers, it appears to be equally applicable to principals, given the tendency of courts to apply the same tests to employer-employee situations and principal-agent situations [*see, e.g.,* Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 822-823, 157 Cal. Rptr. 482, 598 P.2d 452] .

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18-182 California Points & Authorities § 182.137

§ 182.137 Opposing Contention That Third Party May Enforce Contract Entered Into by Agent for Principal--Undisclosed Principal Not Liable on Contract Entered Into by Agent When Third Party Granted Exclusive Credit to Agent and Principal Paid Agent in Good Faith

[1] FORM

[*The following may be combined with the points and authorities in §§ 182.37 -182.43, as appropriate, and may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF MAY NOT ENFORCE THE CONTRACT ENTERED INTO BY THE [DEFENDANT] AGENT ON BEHALF OF DEFENDANT PRINCIPAL, BECAUSE WHEN A THIRD PARTY GIVES EXCLUSIVE CREDIT TO THE AGENT, THE UNDISCLOSED PRINCIPAL IS EXONERATED BY PAYMENT OR OTHER SATISFACTION MADE BY THE PRINCIPAL TO THE AGENT IN GOOD FAITH, BEFORE RECEIVING NOTICE OF THE CREDITOR'S ELECTION TO HOLD THE PRINCIPAL RESPONSIBLE.

Undisclosed Principal Exonerated When Exclusive Credit Granted to Agent. If exclusive credit is given to an agent by the person dealing with him or her, the undisclosed principal is exonerated by payment or other satisfaction made to the agent in good faith, before the principal receives notice of the creditor's election to hold the principal liable (*Civ. Code § 2335*; *Rigney v. De La Salle Inst. (1935) 10 Cal. App. 2d 492, 498, 52 P.2d 579*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that an undisclosed principal is liable on a contract entered into by an agent in his or her own name with a third party. The ground of opposition set forth is that when a third party gives exclusive credit to an agent, an undisclosed principal is exonerated by payment or other satisfaction made in good faith to the agent before the principal receives notice of the creditor's election to hold the principal responsible [*see Civ. Code § 2335*]. Such an argument might be raised, for example, by an undisclosed

principal when a third person has sued the principal for breach of a contract made in the name of an agent after the principal has paid the agent for undertaking the contractual obligation.

If also opposing the existence of an actual agency, counsel may combine these points and authorities with the points and *authorities in §§ 182.37 -182.39*, as appropriate. If opposing the existence of an agent's actual authority to perform certain acts, counsel may combine these points and authorities with the points and *authorities in §§ 182.40* and *182.41*, as appropriate. If opposing the contention that an agency or authority allegedly arose because of the principal's ratification of the agent's acts, counsel may combine these points and authorities with the points and *authorities in §§ 182.42* and *182.43*, as appropriate.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that an undisclosed principal is not liable on a contract entered into by an agent in his or her own name with a third party. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should discuss facts showing that plaintiff gave credit exclusively to the agent, and that defendant principal paid or otherwise satisfied the agent in good faith before receiving notice of plaintiff's election to hold defendant principal liable on the agent's obligation.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 182.128*.

[3] Discussion of Authorities

[a] Undisclosed Principal Exonerated When Exclusive Credit Granted to Agent

Rigney v. De La Salle Inst. *(1935) 10 Cal. App. 2d 492, 52 P.2d 579* , was an action to recover the value of labor and materials supplied in the construction of a building for defendant principal. Defendant principal had agreed with a contractor that the latter would act as general manager of construction and as agent in all matters concerning the proposed work. The contractor agent secured bids from the materialmen, and all contracts for labor and materials were made in the agent's name. As progress payments became due, the agent persuaded plaintiffs, the materialmen, to sign waivers of liens. Defendant principal accepted the waivers from the agent in exchange for the payments due and evidenced by the waivers. The agent did not pay all the money to plaintiffs, who brought the action against defendant principal after they discovered the agency relationship. The trial court awarded judgment to plaintiffs, and defendant appealed.

The court of appeal reversed, holding that defendant principal was exonerated under *Civ. Code § 2335* by its good-faith payment to its agent (*10 Cal. App. 2d 492, 498)* . The court relied for its holding on testimony of plaintiffs that they had extended credit to the agent based on their knowledge of his past performance as a contractor. The court also found persuasive the evidence that plaintiffs had executed waivers of liens (*10 Cal. App. 2d 492, 498)* . The lien rights of plaintiffs would have allowed them to proceed against defendant principal, the court held, and by waiving those claims and delivering the waivers to the agent, they accepted the exclusive credit of the agent for the payment of their indebtedness (*10 Cal. App. 2d 492, 498)* . The court recognized that without the executed waivers, defendant principal would not have paid the agent the amounts due as evidenced by the waivers and held that the payments brought the case within the provisions of *Civ. Code § 2335* (*10 Cal. App. 2d 492, 498)* .

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E. Actions by Third Party Against Principal

18-182 California Points & Authorities § 182.138

§ 182.138 Opposing Contention That Third Party May Enforce Contract Entered Into by Agent for Principal--Undisclosed Principal Not Liable Under Contract Entered Into by Agent With Third Party Unless Actual Agency [Civ. Code § 2299] Exists

[1] FORM

[*The following may be combined with the contentions supported by the points and authorities set forth in §§ 182.37 -182.43, as appropriate, and may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF MAY NOT ENFORCE THE CONTRACT ENTERED INTO BY [DEFENDANT], THE ALLEGED AGENT, ON BEHALF OF DEFENDANT, THE ALLEGED PRINCIPAL, BECAUSE A THIRD PARTY MAY NOT ENFORCE A CONTRACT AGAINST AN ALLEGEDLY UNDISCLOSED PRINCIPAL UNLESS AN ACTUAL AGENCY EXISTS.

Undisclosed Principal Not Liable Unless Actual Agency Exists. An actual agency relationship is required for a third party to recover from an undisclosed principal based on the acts of an alleged agent (*Associated Creditors' Agency v. Davis (1975) 13 Cal. 3d 374, 385, 118 Cal. Rptr. 772, 530 P.2d 1084*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that a third party may enforce against an alleged undisclosed principal a contract entered into with a third party by an alleged agent in his or her own name. The ground of opposition set forth is that an undisclosed principal is not liable under a contract between a third party and an alleged agent unless an actual agency existed between the alleged agent and the alleged undisclosed principal. This contention may also be raised as a defense by an alleged undisclosed principal, for example, in any action on the contract, such as an action seeking damages for breach of contract or an action for declaratory relief based on the

contract.

When opposing the existence of an actual agency, counsel may combine these points and authorities with the points and *authorities in §§ 182.37 -182.39*, as appropriate. If opposing the existence of an agent's actual or ostensible authority to perform certain acts, counsel may combine these points and authorities with the points and *authorities in §§ 182.40* and *182.41*, and *182.130* and *182.131*, as appropriate. If opposing the contention that an actual agency or actual authority allegedly arose because of the principal's ratification of the agent's acts, counsel may combine these points and authorities with the points and *authorities in §§ 182.42* and *182.43*, as appropriate.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a third party may not enforce against an alleged undisclosed principal a contract entered into with a third party by an alleged agent in his or her own name. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should discuss facts showing that the alleged agent contracted in his or her own name with plaintiff third party and that no actual agency existed between the alleged undisclosed principal and the alleged agent who contracted with plaintiff third party.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 182.124*.

[3] Discussion of Authorities

[a] Undisclosed Principal Not Liable Unless Actual Agency Exists

Associated Creditors' Agency v. Davis *(1975) 13 Cal. 3d 374, 385, 118 Cal. Rptr. 772, 530 P.2d 1084* , was an action brought by the assignee of several creditors who provided goods to a premises licensed in the name of defendants but operated by a concessionaire, who had no actual authority to obligate defendants on contracts for supplies. Defendants obtained a liquor license for a bar and restaurant. Defendants granted the exclusive rights to run the bar and restaurant to a concessionaire who ordered all the supplies and provisions for the business in his own name, including those that were unpaid and that plaintiff sought to recover in this action. Plaintiff brought the action after the concessionaire declared bankruptcy, and sought to recover from defendants on the ground, among others, that defendants were the undisclosed principal of the concessionaire. Plaintiff argued that defendants were required by the terms of the liquor license to run the bar themselves, and that the concessionaire could therefore only be an agent. The trial court entered judgment for defendants, and plaintiff appealed.

The Supreme Court affirmed, holding that plaintiff could not recover under the theory that defendants were acting as undisclosed principal with the concessionaire as agent (*13 Cal. 3d 374, 385)* . The Court held that a third party cannot recover from an allegedly undisclosed principal based on the acts of an alleged agent unless an actual agency relationship existed (*13 Cal. 3d 374, 385)* . The Court concluded that there was no actual agency between the concessionaire and defendant, and that therefore plaintiff could not recover from defendant as an undisclosed principal (*13 Cal. 3d 374, 385)* .

California Points & Authorities

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Volume 18 Chapters 180-189 PRETRIAL PROCEEDINGS---to---PROBATE OF WILLS
CHAPTER 183 PRIVACY: STATE CONSTITUTIONAL RIGHTS

18-183 California Points & Authorities 183.syn

§ 183.syn Synopsis to Chapter 183: PRIVACY: STATE CONSTITUTIONAL RIGHTS

§ 183.01 Scope of Chapter

§ 183.02 Governing Law

§ 183.03 Related Pleading and Practice Chapters

§ 183.04 Related Points and Authorities

§§ 183.05-183.19 [Reserved]

§ 183.20 Supporting Contention That Plaintiff Has State Constitutional Cause of Action for Invasion of Privacy--Balancing Test

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Defendant's Conduct Impacts a Legally Protected Privacy Interest

[b] Plaintiff Has Reasonable Expectation of Privacy

[c] Serious Invasion of Privacy Interest

[d] Balancing Test

[e] Rebuttal of Competing or Countervailing Interest

[f] Constitutional Right of Privacy Applies to Private Entities

[4] Additional Authorities

[a] Defendant's Conduct Impacts a Legally Protected Privacy Interest

[b] Plaintiff Has Reasonable Expectation of Privacy

[c] Serious Invasion of Privacy Interest

[d] Balancing Test

[e] Rebuttal of Competing or Countervailing Interest

§ 183.21 Supporting Contention That Statute Requiring Pregnant Minor to Secure Parental Consent Prior to Obtaining Abortion Violates Minor's Constitutional Right of Privacy

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Minors Possess Right of Privacy Under California Constitution

[b] Statute Implicates Protected Privacy Interest

[c] Pregnant Minors Have Reasonable Expectation of Privacy

[d] Statute Constitutes Serious Invasion of Privacy Interest

[e] Statute Evaluated Under Compelling Interest Standard

[f] Effect of Facial Challenge on Balancing Test

[g] Inadequate Justification for Intrusion

§ 183.22 Supporting Contention That Plaintiff Has State Constitutional Cause of Action for Invasion of Privacy--Criminal Defense Attorney's Unauthorized Reading and Dissemination of Victim's Confidential Mental Health

Records

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Invasion Based on Criminal Defense Attorney's Reading and Dissemination of Crime Victim's Mental Health Records

[b] Action Not Barred by Litigation Privilege

[4] Additional Authorities

[a] Action Not Barred by Litigation Privilege

§ 183.23 Supporting Contention That Plaintiff Has Stated Constitutional Cause of Action for Invasion of Privacy--Reasonable Cause Drug Testing by Private Employer

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Existence of Reasonable Cause Is Relevant to Determining Constitutionality of Employer's Drug Test Demand

§ 183.24 Opposing Contention That Plaintiff Has State Constitutional Cause of Action for Invasion of Privacy--Balancing Test

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Defendant's Conduct Does Not Impact a Legally Protected Privacy Interest

[b] Plaintiff Has No Reasonable or a Diminished Expectation of Privacy

[c] No Serious Invasion of Privacy Interest

[d] Balancing Test

[4] Additional Authorities

[a] Plaintiff Has No Reasonable or a Diminished Expectation of Privacy

[b] No Serious Invasion of Privacy Interest

[c] Balancing Test

§ 183.25 Opposing Contention That Plaintiff Has State Constitutional Cause of Action for Invasion of Privacy--Right to Privacy Waived

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Right to Privacy Waived by Voluntary Disclosure

[4] Additional Authorities

[a] Right to Privacy Waived by Voluntary Disclosure

§ 183.26 Supporting Contention That Defendant Invaded Plaintiff's Right to Privacy in Violation of California Constitution--Failure to Show Compelling Interest

[1] FORM

[2] Comments

[a] Use of Form

[b] Compelling Interest Standard Is Limited

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Compelling Interest Required to Justify Some Aspects of Right to Privacy Under California Constitution

[4] Additional Authorities

[a] Compelling Interest Required to Justify Some Aspects of Right to Privacy Under California Constitution

§ 183.27 Opposing Contention That Defendant Invaded Plaintiff's Right to Privacy in Violation of California Constitution--Compelling Interest Shown

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Compelling Interest Sufficient

[b] Interest in Truth in Legal Proceeding

[4] Additional Authorities

[a] Interest in Truth in Legal Proceeding

§ 183.28 Opposing Contention That Defendant Invaded Plaintiff's Right to Privacy in Violation of California Constitution--Compelling Interest Standard Not Applicable

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Compelling Interest Standard Not Applicable to All Aspects of Right to Privacy Under California Constitution

[b] Compelling Interest Standard Not Applicable to Member of Press

§ 183.29 Opposing Contention That Defendant Invaded Plaintiff's Right to Privacy in Violation of California Constitution--Corporation Has No State Constitutional Privacy Right

[1] FORM

[2] Comments

[a] Use of Form

[b] Corporation's General Right to Privacy

[3] Discussion of Authorities

[a] Corporations Not Protected by California Constitutional Privacy Provisions

§ 183.30 Opposing Contention That Defendant Invaded Plaintiff's Right to Privacy in Violation of California Constitution--Proper Police Investigative Activities Not Violation of State Constitutional Privacy Right

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Routine Police Investigation Does Not Violate State Privacy Right

[b] Justified Entrance Into House to Make Arrest

[c] No Duty to Protect Criminal Suspect's Identity

§ 183.31 Opposing Contention That Defendant Invaded Plaintiff's Right to Privacy in Violation of California Constitution--Judicial Oversight Over Release of Confidential Records Precludes Liability

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Judicial Oversight Over Release of Confidential Records Precludes Liability

§ 183.32 Opposing Contention That Plaintiff Has Stated Constitutional Cause of Action for Invasion of Privacy--Absolute Judicial Privilege Provides Complete Defense

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Judicial Privilege Applicable to Constitutional Privacy Cause of Action

§ 183.33 Opposing Contention That Plaintiff Has Stated Constitutional Cause of Action for Invasion of Privacy--Tort Claims Act Provides Statutory Immunity for Governmental Defendant

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Immunities

[a] Government Tort Immunities Applicable to Privacy Action Based on California Constitution

[b] Prosecutorial Immunity Applies to Constitutional Invasion of Privacy Action

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18-183 California Points & Authorities § 183.01

§ 183.01 Scope of Chapter

This chapter contains memoranda of points and authorities relating to the state constitutional provision guaranteeing the right of privacy. It includes a form supporting the contention that the plaintiff has established the essential elements of a state constitutional cause of action for invasion of privacy [*see § 183.20*], a form supporting the contention that a statute requiring a pregnant minor to secure parental consent prior to obtaining an abortion violates a minor's constitutional right of privacy [*see § 183.21*], a form supporting the contention that the plaintiff has established the essential elements of a state constitutional cause of action for invasion of privacy based on a criminal defense attorney's unauthorized reading and dissemination of the victim's confidential mental health records [*see § 183.22*], a form supporting the contention that the plaintiff has stated a constitutional cause of action for invasion of privacy based on a private employer's suspicionless demand that the employee take a drug test [*see § 183.23*], a form opposing the contention that the defendant invaded the plaintiff's right of privacy in violation of the California Constitution under the balancing test standard [*see § 183.24*], and a form opposing the contention that the defendant invaded the plaintiff's right of privacy in violation of the California Constitution on the grounds that the plaintiff waived the right to privacy [*see § 183.25*].

This chapter also includes forms supporting and opposing the contention that the defendant failed to show a compelling interest to justify an invasion of privacy since that standard still may apply to some obvious governmental invasions or the invasion of a vital privacy interest [*see §§ 183.26, 183.27*]. Forms also are included to contend that the compelling-interest standard is inapplicable [*see § 183.28*], that a corporation has no state constitutional privacy right [*see § 183.29*], that proper police activities do not violate state constitutional privacy rights [*see § 183.30*], that judicial oversight over the release of confidential records precludes the imposition of liability [*see § 183.31*], that the absolute judicial privilege of *Civ. Code § 47(b)* provides a defense to the privacy action [*see § 183.32*], and that the Tort Claims Act provides immunity from liability for a governmental defendant [*see § 183.33*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawSubstantive Due ProcessPrivacyGeneral OverviewConstitutional LawSubstantive Due ProcessPrivacyPersonal DecisionsConstitutional LawSubstantive Due ProcessPrivacyPersonal InformationFamily LawParental Duties & RightsConsentAbortionHealthcare LawTreatmentEnd-of-Life DecisionsAbortionRight to

PrivacyLabor & Employment LawEmployee PrivacyConstitutional ProtectionsTortsIntentional TortsInvasion of PrivacyGeneral Overview

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18-183 California Points & Authorities § 183.02

§ 183.02 Governing Law

The right of privacy is guaranteed by *Cal. Const. art. I, § 1*. In 1972, California voters amended *Cal. Const. art. I, § 1*, to include a right of privacy among the "inalienable rights" of the people. The California Supreme Court has noted that analysis and arguments contained in the official ballot pamphlet are indicia of the voters' intent in enacting the provision [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 16* ; *see also White v. Davis (1975) 13 Cal. 3d 757, 775 n.11, 120 Cal. Rptr. 94, 533 P.2d 222* (applying ballot argument in favor of amendment)]. The plaintiff must allege the following essential elements in an actionable cause of action for invasion of the state constitutional right of privacy [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 32-37, 39-40]* :

- A legally protected privacy interest;
- A reasonable expectation of privacy; and
- A serious invasion of the privacy interest.

The state constitutional right may be enforced against both private and government entities [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 38-39* (regarding NCAA drug-testing program for student athletes, but finding no violation); *see also Wilkinson v. Times Mirror Corp. (1989) 215 Cal. App. 3d 1034, 1040, 264 Cal. Rptr. 194* (regarding private employer's preemployment drug-testing program, but finding no violation)].

Until the California Supreme Court's decision in *Hill* [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1]* , courts generally used a "compelling interest" standard to determine whether an invasion of privacy violated the California Constitution [*see, e.g., Long Beach City Employees Ass'n v. City of Long Beach (1986) 41 Cal. 3d 937, 948* (dictum in case involving only government abuses); *White v. Davis (1975) 13 Cal. 3d 757, 775, 120 Cal. Rptr. 94, 533 P.2d 222]* . However, in *Hill*, the Court limited the use of the "compelling interest" standard to cases implicating either "obvious government action impacting freedom of expression and association" or an "obvious invasion of an interest fundamental to personal autonomy" [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 34]* . Otherwise, the standard for determining an unconstitutional invasion of privacy is a less stringent balancing test that compares a specifically identified privacy interest with competing and countervailing nonprivacy interests [*Hill v. National*

Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 37-38 (applying this test to NCAA drug testing program for student athletes and finding no violation)]. Consequently, the scope of the state constitutional right of privacy will vary from case to case depending on the circumstances, which the Court concludes will avoid "the continuing uncertainty and confusion inherent in the rigid application of a 'competing interest' test" [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 56-57]* .

The scope of the state constitutional right to privacy has been made clearer by the cases decided since *Hill*. In a 4 to 4 post-*Hill* decision, the California Supreme Court has ruled that a statute requiring a pregnant minor to secure parental consent or judicial authorization prior to obtaining an abortion violates the minor's constitutional right of privacy [*American Acad. of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 359, 66 Cal. Rptr. 2d 210, 940 P.2d 797]* . In that case, the Court conducted the *Hill* analysis and determined that: (1) the statute, which restricted a pregnant individual's ability to decide on her own whether to continue or to terminate her pregnancy unquestionably implicated a constitutionally protected privacy interest of a pregnant minor [*American Acad. of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 331-332, 337, 66 Cal. Rptr. 2d 210, 940 P.2d 797]* ; (2) because the parental consent requirement impinged on a fundamental autonomy privacy interest of pregnant minors protected by the state constitutional privacy clause, and because the statute applied to all such minors, the pregnant minors affected by the statute had a reasonable expectation of privacy [*American Acad. of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 338, 66 Cal. Rptr. 2d 210, 940 P.2d 797]* ; (3) the statute constituted a significant intrusion on a minor's protected privacy interest [*American Acad. of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 338-339, 66 Cal. Rptr. 2d 210, 940 P.2d 797]* ; (4) because the statute significantly intruded on a fundamental, autonomy privacy interest of a minor, proper respect for a minor's state constitutional right of privacy required a showing that the intrusion was necessary to further a compelling state interest [*American Acad. of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 340, 66 Cal. Rptr. 2d 210, 940 P.2d 797]* ; and (5) that although the state's asserted interests in protecting the health of minors and in preserving and fostering the parent-child relationship were compelling interests, the parental consent requirement at issue was not necessary to further either of these interests [*American Acad. of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 348-354, 66 Cal. Rptr. 2d 210, 940 P.2d 797]* .

Other circumstances have also justified an action for invasion of the constitutional right to privacy. In *Susan S. v. Israels (1997) 55 Cal. App. 4th 1290, 67 Cal. Rptr. 2d 42* , a court of appeal held that a crime victim has a cause of action for invasion of her constitutional right to privacy against a criminal defense attorney who, without authorization, reads and disseminates the victim's confidential mental health records, and in *Kraslawsky v. Upper Deck Co. (1997) 56 Cal. App. 4th 179, 65 Cal. Rptr. 2d 297* , an employee who claimed that she was required to comply with her employer's demand that she submit to a urinalysis drug/alcohol test, without reasonable cause to believe she was intoxicated, stated a cause of action for a violation of her constitutional right of privacy.

For related jury instructions, see *Judicial Council of California Civil Jury Instructions, CACI Nos. 1806, 1807* (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions.

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawSubstantive Due ProcessPrivacyGeneral OverviewConstitutional LawSubstantive Due ProcessPrivacyPersonal DecisionsHealthcare LawTreatmentEnd-of-Life DecisionsAbortionRight to PrivacyTortsPublic Entity LiabilityLiabilityFederal Tort Claims Act

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18-183 California Points & Authorities § 183.03

§ 183.03 Related Pleading and Practice Chapters

For a discussion and forms relating to invasion of privacy in general, see California Forms of Pleading and Practice, Ch. 429, *Privacy* (Matthew Bender).

For a discussion and forms relating to the right of privacy as it may be raised in civil discovery proceedings, see California Forms of Pleading and Practice, Ch. 190, *Depositions and Discovery* (Matthew Bender).

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18-183 California Points & Authorities § 183.04

§ 183.04 Related Points and Authorities

For memoranda of points and authorities relating to asserting and opposing the right of privacy in civil discovery proceedings, see Ch. 81, *Discovery: Privileges and Other Discovery Limitations* .

For memoranda of points and authorities relating to invasion of privacy, see Ch. 184, *Privacy: Invasion of Privacy* .

For memoranda of points and authorities relating to privacy of information, see Ch. 185, *Privacy: Collection, Dissemination and Inspection of Information* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryPrivileged MattersGeneral OverviewConstitutional LawSubstantive Due ProcessPrivacyPersonal DecisionsConstitutional LawSubstantive Due ProcessPrivacyPersonal InformationTortsIntentional TortsInvasion of PrivacyGeneral Overview

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18-183 California Points & Authorities §§ 183.05-183.19

[Reserved]

§§ 183.05[Reserved]

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18-183 California Points & Authorities § 183.20

§ 183.20 Supporting Contention That Plaintiff Has State Constitutional Cause of Action for Invasion of Privacy--Balancing Test

[1] FORM Supporting Contention That Plaintiff Has State Constitutional Cause of Action for Invasion of Privacy--Balancing Test

[*The following may be included in a memorandum or points and authorities, or in a trial or appellate brief.*]

DEFENDANT'S INVASION OF PLAINTIFF'S PRIVACY VIOLATED THE *CALIFORNIA CONSTITUTION, ARTICLE I, SECTION 1*, BECAUSE THE DEFENDANT'S CONDUCT IMPACTS ON A LEGALLY PROTECTED PRIVACY INTEREST OF _____ [*specify*], THE PLAINTIFF HAS A REASONABLE EXPECTATION OF PRIVACY, AND THE DEFENDANT'S INVASION IS SERIOUS. THE DEFENDANT HAS FAILED TO SHOW A COMPETING OR COUNTERVAILING INTEREST TO JUSTIFY THE INTRUSION.

A. Defendant's Conduct Impacts a Legally Protected Privacy Interest. An essential element of a state constitutional cause of action for invasion of privacy (*Cal. Const. art. I, § 1*) is that the defendant's conduct impacts a specific, legally protected interest, such as informational privacy or autonomy privacy [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 35]* .

B. Plaintiff Has Reasonable Expectation of Privacy. An essential element of a state constitutional cause of action for invasion of privacy (*Cal. Const. art. I, § 1*) is that the plaintiff has a reasonable expectation of privacy [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 36-37]* .

C. Serious Invasion of Privacy Interest. An actionable invasion of privacy under *Cal. Const. art. I, § 1*, must be sufficiently serious in its nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 37]* .

D. Balancing Test. When the defendant fails to show that a competing or countervailing privacy or nonprivacy interest outweighs the specifically identified privacy interest of the plaintiff, then there is a violation of the state constitutional right of privacy [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 40]* .

[*Optional*] **E. Rebuttal of Competing or Countervailing Interest.** When there are feasible and effective alternatives to defendant's conduct which have a lesser impact on privacy interests, defendant's conduct is actionable as a violation of plaintiff's right to privacy [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 40]* .

[*Optional*] **F. Constitutional Right of Privacy Applies to Private Entities.** *Cal. Const. art. I, § 1*, creates a right of action against private as well as government entities [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 38-39]* .

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the plaintiff has established the essential elements for a state constitutional cause of action for invasion of privacy, and that the defendant has failed to show that competing interests outweigh the the plaintiff's privacy interest [*see Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1]* . If the plaintiff wishes to argue that the defendant must justify the invasion of privacy by asserting a compelling interest, counsel should use the points and *authorities in § 183.26*, bearing in mind that the California Supreme Court has curtailed the circumstances in which this standard may apply.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raised the substantive issue of violation of the constitutional privacy right. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Whether a legally recognized privacy interest is present in a given case is a question of law. Whether a plaintiff has a reasonable expectation of privacy or whether the defendant's conduct constitutes a serious invasion of privacy are mixed questions of law and fact [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1]* . Application of the "balancing test" standard is illustrated by the California Supreme Court's decision in *Hill* [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1* ; *see § 183.20[3]*]. Because a challenge to conduct that significantly affects a privacy interest protected by the state Constitution may not be rejected without consideration of either the legitimacy or strength of the defendant's justification for the conduct, a complaint that on its face alleges a serious invasion of a protected privacy interest cannot be defeated by way of a demurrer that does not require the defendant to offer any justification for his or her conduct [Sheehan v. San Francisco 49ers, *Ltd. (2009) 45 Cal. 4th 992, 999, 89 Cal. Rptr. 3d 594, 201 P.3d 472]* .

[b] Opposing Points and Authorities

If appropriate, the points and *authorities in § 183.24* may be used to oppose these points and authorities.

[3] Discussion of Authorities

[a] Defendant's Conduct Impacts a Legally Protected Privacy Interest

In ***Hill v. National Collegiate Athletic Assn.*** *(1994) 7 Cal. 4th 1* the California Supreme Court articulated a new legal standard for assessing state constitutional claims for invasion of privacy. The case arose from an action by student athletes against the NCAA contending that its drug testing program violated their right to privacy under the California Constitution (*Cal. Const. art. I, § 1*). After a trial, the superior court found that the drug-testing program violated the plaintiffs' right of privacy and permanently enjoined its enforcement against the plaintiffs. The appellate court upheld the injunction, and the defendant appealed to the California Supreme Court. The Court applied a "balancing test" standard to determine that the NCAA drug testing program did not violate plaintiffs' state constitutional right of privacy,

and drastically curtailed the circumstances when the "compelling interest" standard applies (*7 Cal. 4th 1, 57-58)* .

The Court looked to the meaning of the word "privacy" in order to develop a "suitable legal standard" for interpreting the state constitutional right of privacy (*7 Cal. 4th 1, 20-27)* . From its examination of the common law, the Court found invaluable guidance in the notion that specific, identifiable privacy interests are granted legal protection after a process by which such interests are weighed and compared against other values (*7 Cal. 4th 1, 27)* . The "murky" federal constitutional analysis of the right of privacy taught the Court that the appropriate legal standard is best viewed flexibly and in context (*7 Cal. 4th 1, 31)* .

Whether the defendant's conduct impacts on a legally protected privacy interest is one of the three essential elements that a plaintiff must establish in a state constitutional action for invasion of privacy (*7 Cal. 4th 1, 35)* . Whether the plaintiff has a legally protected interest is a question of law, and the Court described two classes of privacy interests: informational privacy and autonomy privacy (*7 Cal. 4th 1, 35)* .

In this case, the defendant's drug testing program required the student athletes to provide urine samples under direct visual observation and to disclose medical information that could have caused embarrassment to individual athletes. The Court concluded that the student athletes' had asserted a protected privacy interest in not being observed during urination, and in the confidentiality of medical treatment and information (*7 Cal. 4th 1, 41-43, 52-53)* .

[b] Plaintiff Has Reasonable Expectation of Privacy

The facts and procedural background of ***Hill v. National Collegiate Athletic Assn.*** *(1994) 7 Cal. 4th 1* , are discussed in *§ 183.20[3][a]*. The plaintiff established a prima facie violation. Plaintiff's reasonable expectation of privacy is one of three essential elements that a plaintiff must establish in a state constitutional action for invasion of privacy (*7 Cal. 4th 1, 35)* . This element is a mixed question of fact and law because the reasonableness of a privacy interest depends on the circumstances, and on widely accepted community norms (*7 Cal. 4th 1, 35-36)* . The Court found it obvious that individuals have a reasonable expectation of privacy with respect to human excretory functions like urination. The athletes' particular expectation, however, was diminished by the athletic setting, advance notice, and the opportunity to withhold consent to test even though doing so would result in disqualification from competition (*7 Cal. 4th 1, 41-43)* .

[c] Serious Invasion of Privacy Interest

The facts and procedural background of ***Hill v. National Collegiate Athletic Assn.*** *(1994) 7 Cal. 4th 1* , are discussed in *§ 183.20[3][a]*. The plaintiff established a prima facie violation. Whether the defendant's intrusion is a serious invasion of privacy is one of the three essential elements that a plaintiff must establish in a state constitutional action for invasion of privacy (*7 Cal. 4th 1, 37)* . This element is a mixed question of fact and law because an actionable invasion of privacy must be sufficiently serious to constitute an egregious breach of the social norms underlying the privacy right (*7 Cal. 4th 1, 39-40)* . Consistent with prior California and federal case law [*see, e.g., Skinner v. Railway Labor Executives' Ass'n (1989) 489 U.S. 602, 616-617, 109 S. Ct. 1402, 103 L. Ed. 2d 639* ; *Wilkinson v. Times Mirror Corp. (1989) 215 Cal. App. 3d 1034, 1048, 264 Cal. Rptr 194]* , the California Supreme Court held that the collection and testing of urine intrudes on reasonable expectations of privacy, although the Court held that college athletes had a diminished expectation and found the defendant's intrusion justified upon further inquiry (*7 Cal. 4th 1, 39-40)* .

[d] Balancing Test

The facts and procedural background of ***Hill v. National Collegiate Athletic Assn.*** *(1994) 7 Cal. 4th 1* , are discussed in *§ 183.20[3][a]*. The California Supreme Court applied a "balancing test" standard to determine that the NCAA drug testing program did not violate plaintiffs' state constitutional right of privacy. The Court determined that the lower courts had applied the wrong standard to evaluate the constitutionality of the NCAA's drug testing program when they used the "compelling interest" standard. First, the language of the ballot argument did not require the use of this

standard. Second, that standard posed additional difficulties when applied to private entities.

The Court then synthesized a new "balancing test" standard to be applied to state constitutional claims for invasion of privacy, and limited the application of the "compelling interest" standard to cases that involve aspects of the state constitutional right of privacy that implicate an "obvious governmental action impacting freedom of expression and association," or an "obvious invasion of an interest fundamental to personal autonomy" (*7 Cal. 4th 1, 34)* .

The balancing test standard compares the specifically identified privacy interests of the plaintiff with legitimate, competing and countervailing, nonprivacy interests asserted by the defendant. The Court accepted that the following two competing interests justified NCAA's drug-testing program: (1) safeguarding the integrity of intercollegiate athletic competition; and (2) protecting the health and safety of student athletes.

The first interest was persuasive, "whatever the provable incidence of drug use," to combat the perception that the use of certain drugs may enhance athletic performance, and because of the practical realities of intercollegiate sports. The second interest exists for the benefit of all persons involved in sporting events, as well as the sport itself (*7 Cal. 4th 1, 45, 46)* .

The Court made it clear that the balancing test standard will apply in determining what requirements are imposed on private employers, and that the result will depend on the public interest, the employer's special interests and the employees' reasonable expectations of privacy in a particular employment setting (*7 Cal. 4th 1, 37-38, 40)* . The Court offered no analysis on the continuing vitality of employment-related cases decided before *Hill*, and noted that one court had erroneously applied the compelling interest standard [*see Luck v. Southern Pac. Transp. Co. (1990) 218 Cal. App. 3d 1, 267 Cal. Rptr. 618* (drug testing based on safety considerations unconstitutional when applied to nonsafety employee; court of appeal erroneously applied compelling-interest test); *see also Semore v. Pool (1990) 217 Cal. App. 3d 1087, 266 Cal. Rptr. 280* (pupillary eye test is intrusive); *Wilkinson v. Times Mirror Corp. (1989) 215 Cal. App. 3d 1034, 264 Cal. Rptr. 194* (drug testing of job applicants is constitutional)] (*7 Cal. 4th 1, 55-56 n.20*).

[e] Rebuttal of Competing or Countervailing Interest

The facts and procedural background of ***Hill v. National Collegiate Athletic Assn.*** *(1994) 7 Cal. 4th 1* , are discussed in *§ 183.20[3][a]*. The California Supreme Court applied a "balancing test" standard to determine that the NCAA drug testing program did not violate plaintiffs' state constitutional right of privacy. The plaintiff may rebut the assertion of a competing interest by showing that there are feasible and effective alternatives to the defendant's conduct that would have a lesser impact on privacy interests (*7 Cal. 4th 1, 38)* . There is no constitutional infringement of privacy if the invasion is justified by a competing interest. In this case, the Court found that uncontradicted evidence in the record demonstrated as a matter of law the constitutional validity of the NCAA's program. The plaintiffs failed to demonstrate with substantial evidence the presence of fully viable alternatives to monitoring. Instead of remanding the case on this issue, the Court left the consideration of less intrusive alternatives to the judgment and discretion of the NCAA, and then to future litigation, if any (*7 Cal. 4th 1, 57-58)* .

[f] Constitutional Right of Privacy Applies to Private Entities

The facts and procedural background of ***Hill v. National Collegiate Athletic Assn.*** *(1994) 7 Cal. 4th 1* , are discussed in *§ 183.20[3][a]*. The defendant, an athletic association comprised of colleges and universities, argued that the right of privacy only applied to governmental entities, and in the alternative that the right was inapplicable to private entities that were not businesses. The Court rejected both contentions. The Court noted that appellate court decisions have consistently reached the conclusion that the state constitutional right of privacy may be enforced against private parties (unlike the federal right) [*see, e.g., Wilkinson v. Times Mirror Corp. (1989) 215 Cal. App. 3d 1034, 264 Cal. Rptr. 194* (applicant drug-testing program of private employer held to constitutional standard; no violation)]. The ballot arguments contain persuasive evidence of drafter and voter intent to recognize a right of action for invasion of privacy against

private as well as governmental entities. References to business in the ballot measure were not limiting, but indicative of an intent to extend the right to the private sector generally (*7 Cal. 4th 1, 38-39)* .

[4] Additional Authorities

[a] Defendant's Conduct Impacts a Legally Protected Privacy Interest

In *Jeffrey H. v. Imai, Tadlock & Keeney (2000) 85 Cal. App. 4th 345, 101 Cal. Rptr. 2d 916* , the plaintiff was injured in an automobile accident and brought suit against the other driver and his employer. In preparation for defense of that suit, which was eventually referred to arbitration, the attorneys for the defendants, while obtaining copies of the plaintiff's medical records, also obtained copies of records with the plaintiff's HIV test results. Although the law firm was notified that those records had been improperly disclosed, were confidential, and should be returned to the plaintiff, the law firm attempted to use several of the records at the arbitration proceeding. In subsequent litigation, the plaintiff brought an action against the law firm and personnel at the firm, alleging invasion of the constitutional right to privacy. The trial court dismissed the suit after sustaining the defendants' demurrer, but the court of appeal reversed. The court of appeal concluded that the plaintiff had stated a legally protected privacy interest. The zones of privacy created by the California Constitution had long been held to encompass a person's medical history, and therefore the disclosure of HIV status was entitled to protection (*85 Cal. App. 4th 345, 353-354)* .

The factual and procedural background of *Pettus v. Cole (1996) 49 Cal. App. 4th 402, 57 Cal. Rptr. 2d 46* , is discussed in *§ 183.25[3][a]*. In initially determining that the disclosure by the defendant psychiatrists of their reports about plaintiff to his employer violated his constitutional right of privacy under *Cal. Const. art. I, § 1*, the court of appeal noted that in *Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1* , the elements of a claim for invasion of the state constitutional right of privacy were identified as: (1) a legally protected privacy interest, (2) a reasonable expectation of privacy in the circumstances, and (3) conduct by defendant constituting a serious invasion of privacy. With regard to whether plaintiff had established a legally protected privacy interest, the court stated that a review of defendants' written reports demonstrated the private nature of the information transmitted to plaintiff's employer. The court concluded that this was the type of "sensitive personal information" the California voters had in mind when they adopted the constitutional privacy guarantee (*49 Cal. App. 4th 402, 441)* . The court reversed the judgment for defendants, but as a result of evidence that plaintiff may have waived his constitutional claim, remanded the matter for further proceedings in the trial court.

[b] Plaintiff Has Reasonable Expectation of Privacy

The factual and procedural background of *Jeffrey H. v. Imai, Tadlock & Keeney (2000) 85 Cal. App. 4th 345, 101 Cal. Rptr. 2d 916* is discussed in *§ 183.20[4][a]*. After concluding that the plaintiff had a legally protected privacy interest in the results of his HIV test, the court of appeal found that the plaintiff also had a reasonable expectation that those test results would remain private. Although the plaintiff may have put his physical condition in issue by bringing the underlying personal injury suit, there was no evidence that the plaintiff's HIV status related in any way to the physical or emotional injuries for which the underlying suit was brought (*85 Cal. App. 4th 345, 354)* . Moreover, statutes protecting the confidentiality of HIV test results also served to confirm the plaintiff's reasonable expectations of privacy, and letters exchanged between the parties during preparation for the underlying suit may have provided the plaintiff with further assurance that his privacy interests would be protected (*85 Cal. App. 4th 345, 354)* .

The factual and procedural background of *Pettus v. Cole (1996) 49 Cal. App. 4th 402, 57 Cal. Rptr. 2d 46* , is discussed in *§ 183.25[3][a]*. With regard to whether plaintiff had established a reasonable expectation of privacy, the court stated that it is reasonable for employees to expect that details of their personal lives and thoughts will be shielded from scrutiny by their employers, and that there is no reason why an employer should be allowed access to detailed family or medical histories of its employees except with an individual employee's freely given consent (*49 Cal. App. 4th 402, 442)* . The court reversed the judgment for defendants, but as a result of evidence that plaintiff may have

waived his constitutional claim, remanded the matter for further proceedings in the trial court.

[c] Serious Invasion of Privacy Interest

The factual and procedural background of *Jeffrey H. v. Imai, Tadlock & Keeney (2000) 85 Cal. App. 4th 345, 101 Cal. Rptr. 2d 916* , is discussed in *§ 183.20[4][a]*. After concluding that the plaintiff had a legally protected privacy interest and reasonable expectation of privacy in the results of his HIV test, the court of appeal found that the defendants' conduct under the circumstances constituted a serious invasion of that privacy interest. Informational privacy is a core value protected by *Article I, Section 1, of the California Constitution*. Moreover, the unauthorized disclosure of HIV test results undermines the public interest in encouraging patients to submit to HIV testing and to make disclosures of positive status during medical treatment. Finally, the pleadings suggested that the disclosure in this case was made in a manner that tended to compromise the plaintiff's right of access to the courts, and such access should not include the risk of disclosures of embarrassing personal information having no connection with the dispute at issue (*85 Cal. App. 4th 345, 355)* .

The factual and procedural background of *Pettus v. Cole (1996) 49 Cal. App. 4th 402, 57 Cal. Rptr. 2d 46* , is discussed in *§ 183.25[3][a]*. With regard to whether plaintiff had established that defendants' conduct was a serious invasion of privacy, the court stated that plaintiff established that the revelation of some of the information, particularly regarding his drinking habits and his views about racism, was highly embarrassing to him (*49 Cal. App. 4th 402, 443)* . Furthermore, the court felt that employees should be allowed to maintain a wall of privacy from their employers around highly personal information about their other roles in life (*49 Cal. App. 4th 402, 445)* . The court reversed the judgment for defendants, but as a result of evidence that plaintiff may have waived his constitutional claim, remanded the matter for further proceedings in the trial court.

[d] Balancing Test

In *Sheehan v. San Francisco 49ers, Ltd. (2009) 45 Cal. 4th 992, 89 Cal. Rptr. 3d 594, 201 P.3d 472* , plaintiffs were season ticket holders of the San Francisco 49ers professional football team for the 2005 season. In conformity with new National Football League policy, the team in 2005 instituted a full-body pat down inspection of all patrons as a condition of entering the stadium to attend a game. Plaintiffs sued the team for violation of their privacy rights under the California Constitution, seeking injunctive and declaratory relief. With knowledge that this intrusion would be a condition for attending future games, however, plaintiffs renewed their season tickets for the 2006 season. The trial court sustained defendant's demurrer without leave to amend on the grounds that plaintiffs had consented to the searches by renewing their season tickets with knowledge that the searches would occur. The court of appeal affirmed, but the California Supreme Court reversed. Assuming that plaintiffs had alleged a serious invasion of their privacy rights, the Court noted that the case could not be decided on demurrer as defendant had not yet offered any explanation or reasoned justification for the searches. Thus, further factual development was required before the alleged invasion of plaintiffs' privacy interests could be balanced against the defendant's unstated interests (*45 Cal. 4th 992, 1000-1003*). The Court also stressed that defendant, on remand, would not be required to show that every measure implemented was absolutely necessary, merely that the measures implemented were reasonable under the circumstances, as private entities that present large public entertainment events necessarily retain primary responsibility for determining what security measures are appropriate to ensure the safety of patrons (45 Cal. 4th 992, 1002-1003).

The factual and procedural background of *Pettus v. Cole (1996) 49 Cal. App. 4th 402, 57 Cal. Rptr. 2d 46* , is discussed in *§ 183.25[3][a]*. The court of appeal initially determined that the disclosure by the defendant psychiatrists of their reports about plaintiff to his employer violated his constitutional right of privacy under *Cal. Const. art I, § 1*. With regard to whether justifications offered by defendants outweighed plaintiff's privacy interests, the court stated that although an employer may need to know certain medical information about its employees, that need is limited to the existence of a functional limitation and to the industrial versus nonindustrial nature of an injury. The court held that employers do not have a cognizable interest in dictating a course of medical treatment for employees who suffer

nonindustrial injuries (*49 Cal. App. 4th 402, 446)* . The court reversed the judgment for defendants, but as a result of evidence that plaintiff may have waived his constitutional claim, remanded the matter for further proceedings in the trial court.

[e] Rebuttal of Competing or Countervailing Interest

The factual and procedural background of *Pettus v. Cole (1996) 49 Cal. App. 4th 402, 57 Cal. Rptr. 2d 46* , is discussed in *§ 183.25[3][a]*. The court of appeal initially determined that the disclosure by the defendant psychiatrists of their reports about plaintiff to his employer violated his constitutional right of privacy under *Cal. Const. art I, § 1*. With regard to defendants' claims of countervailing interests, the court recognized that plaintiff's potential for violence towards a fellow employee raised both an interest in the employer to maintain a safe working environment and a duty to defendants to warn a potential victim if plaintiff presented a serious danger of violence. However, the court held that if plaintiff had posed a danger of violence, defendants would have been free to disclose that fact to the possible victim, but only that fact. Similarly, the employer's interest in a safe workplace would have been satisfied by defendants simply honoring their duties under existing law. There were thus less intrusive alternatives to full disclosure that would have equally well served the defendants' and the employer's interests (*49 Cal. App. 4th 402, 447)* . The court reversed the judgment for defendants, but as a result of evidence that plaintiff may have waived his constitutional claim, remanded the matter for further proceedings in the trial court.

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Volume 18 Chapters 180-189 PRETRIAL PROCEEDINGS---to---PROBATE OF WILLS
CHAPTER 183 PRIVACY: STATE CONSTITUTIONAL RIGHTS
PART II. FORMS

18-183 California Points & Authorities § 183.21

§ 183.21 Supporting Contention That Statute Requiring Pregnant Minor to Secure Parental Consent Prior to Obtaining Abortion Violates Minor's Constitutional Right of Privacy

[1] FORM Supporting Contention That Statute Requiring Pregnant Minor to Secure Parental Consent Prior to Obtaining Abortion Violates Minor's Constitutional Right of Privacy

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

THE STATUTE REQUIRING A PREGNANT MINOR TO SECURE PARENTAL CONSENT PRIOR TO OBTAINING AN ABORTION VIOLATES THE MINOR'S CONSTITUTIONAL RIGHT OF PRIVACY.

A. Minors Possess Right of Privacy Under California Constitution. There can be no question but that minors, as well as adults, possess a constitutional right of privacy under the *California Constitution (American Acad. of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 334, 66 Cal. Rptr. 2d 210, 940 P.2d 797*).

B. Statute Implicates Protected Privacy Interest. A statute that restricts a pregnant individual's ability to decide on her own whether to continue or to terminate her pregnancy unquestionably implicates a constitutionally protected privacy interest of a pregnant minor. The right to choose whether to continue or to terminate a pregnancy implicates a woman's fundamental autonomy privacy interest in the preservation of her personal health, her interest in retaining personal control over the integrity of her own body, and her interest in deciding for herself whether to parent a child (*American Acad. of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 331-332, 337, 66 Cal. Rptr. 2d 210, 940 P.2d 797*).

C. Pregnant Minors Have Reasonable Expectation of Privacy. Because the parental consent requirement impinges on a fundamental autonomy privacy interest of pregnant minors protected by the state constitutional privacy clause, and because the statute applies to all such minors, the pregnant minors affected by the statute have a reasonable expectation of privacy (*American Acad. of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 338, 66 Cal. Rptr. 2d 210, 940 P.2d 797*).

D. Statute Constitutes Serious Invasion of Privacy Interest. A statute requiring parental consent before a minor is able to obtain an abortion constitutes a significant intrusion on a minor's protected privacy interest (*American Acad.*

of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 338-339, 66 Cal. Rptr. 2d 210, 940 P.2d 797).

E. Statute Evaluated Under Compelling Interest Standard. When a statute significantly intrudes on a fundamental, autonomy privacy interest of a minor, proper respect for a minor's state constitutional right of privacy requires a showing that the intrusion is necessary to further a compelling i.e. an extremely important and vital state interest (*American Acad. of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 340, 66 Cal. Rptr. 2d 210, 940 P.2d 797*).

F. Effect of Facial Challenge on Balancing Test. When a statute broadly and directly impinges on the fundamental constitutional privacy rights of a substantial portion of those persons to whom the statute applies, the statute can be upheld only if those defending the statute can establish that, considering the statute's general and normal application, the compelling justifications for the statute outweigh the statute's impingement on constitutional privacy rights and cannot be achieved by less intrusive means (*American Acad. of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 343, 66 Cal. Rptr. 2d 210, 940 P.2d 797*).

G. Inadequate Justification for Intrusion. Although a state's interests in protecting the health of minors and in preserving and fostering the parent-child relationship are compelling interests, the parental consent requirement was not necessary to further either of these interests (*American Acad. of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 348-354, 66 Cal. Rptr. 2d 210, 940 P.2d 797*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a statute requiring a pregnant minor to secure parental consent prior to obtaining an abortion violates the minor's constitutional right of privacy.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should provide facts showing a pregnant minor's inability to obtain an abortion without parental consent and argue that imposition of this requirement is a violation of the minor's constitutional right to privacy.

[c] Related Pleading and Practice Forms

For discussion relating to privacy claims, see California Forms of Pleading and Practice, Ch. 429, *Privacy* (Matthew Bender).

[d] Related Points and Authorities

For points and authorities relating to claims of Constitutional Invasion of Privacy claims in general, see *§ 183.20*.

[3] Discussion of Authorities

[a] Minors Possess Right of Privacy Under California Constitution

American Acad. of Pediatrics v. Lungren *(1997) 16 Cal. 4th 307, 334, 66 Cal. Rptr. 2d 210, 940 P.2d 797* , was a facial constitutional challenge to a statutory provision that required a pregnant minor to secure parental consent or judicial authorization before she could obtain an abortion. The trial court, after a lengthy court trial concluded that the statute was unconstitutional, and the court of appeal unanimously agreed with that ruling and affirmed the judgment. The Supreme Court in a 4-3 decision concluded that both the trial court and the court of appeal correctly determined that the statute violated the right of privacy guaranteed by *Cal. Const. art. I, § 1*.

In the course of the ruling the Supreme Court stated in no uncertain terms that the constitutional right to privacy applied to minors as well as adults and cited the following in support: minors as well as adults are "persons" under the Constitution who are entitled to the protection provided by constitutional rights; *Cal. Const. art. I, § 1* specifically declares that *all people* are by nature free and independent and have inalienable rights, including the right to privacy; the ballot argument accompanying the measure that added the privacy clause in *Cal. Const. art. I, § 1* expressly confirms that the constitutional right of privacy afforded by this provision was intended to apply to every Californian, including every man, woman, and child in the state. Therefore, according to the California Supreme Court, there is no question that minors, as well as adults, possess a constitutional right of privacy under the California Constitution (*16 Cal. 4th 307, 334)* .

[b] Statute Implicates Protected Privacy Interest

The facts and procedural background of ***American Acad. of Pediatrics v. Lungren*** *(1997) 16 Cal. 4th 307, 66 Cal. Rptr. 2d 210, 940 P.2d 797* , are discussed in *§ 183.21[3][a]*. The Court examined the challenged statute under the standards and principles set forth in the court's prior decision in *Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1* . Thus, the Court first determined that the statute which restricted a pregnant individual's ability to decide on her own whether to continue or to terminate her pregnancy, implicated a constitutionally protected privacy interest of the pregnant minor. Specifically, it found that the right to choose whether to continue or to terminate a pregnancy implicated a woman's fundamental autonomy privacy interest in the preservation of her personal health, her interest in retaining personal control over the integrity of her own body, and her interest in deciding for herself whether to parent a child. In the course of this ruling the Court dismissed defendants contention that because the statute applied only to pregnant minors, it did not intrude on a protected privacy interest. The Court first found that there could be no question but that minors, as well as adults, possess a constitutional right of privacy under the California Constitution, and then concluded that because the decision whether to continue or terminate her pregnancy has such a substantial effect on a pregnant minor's control over her personal bodily integrity; has such serious long-term consequences in determining life choices, is so central to the preservation of her ability to define and adhere to her ultimate values regarding the meaning of human existence and life, and is a decision that cannot be postponed until adulthood, a minor who is pregnant has a protected privacy interest under the California Constitution in making the decision whether to continue or to terminate her own pregnancy (*16 Cal. 4th 307, 331-336, 337)* .

[c] Pregnant Minors Have Reasonable Expectation of Privacy

The facts and procedural background of ***American Acad. of Pediatrics v. Lungren*** *(1997) 16 Cal. 4th 307, 66 Cal. Rptr. 2d 210, 940 P.2d 797* , are discussed in *§ 183.21[3][a]*. The Court examined the challenged statute under the standards and principles set forth in the court's prior decision in *Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1* . The Court began its determination as to whether pregnant minors had a reasonable expectation of privacy by stating that this element contemplates an inquiry into whether there is something in the particular circumstances in which an alleged intrusion of privacy arises that demonstrates the plaintiff has no reasonable expectation of privacy in that context, so that the alleged intrusion would not violate the state Constitution even if there were no justification for the allegedly intrusive conduct (*16 Cal. 4th 307, 338*). Next it completed such an inquiry into the context surrounding a parental consent requirement for pregnant minors seeking an abortion. The Court found that the challenged statutory requirements applied to all pregnant minors and, unlike the drug testing program in *Hill*, were not confined to a specific setting or limited context. Because the requirement impinged on a fundamental autonomy privacy interest of pregnant minors protected by the state constitutional privacy clause, and because the statute applied to all such minors, there was, according to the Court, absolutely nothing in the circumstances of this case that would support a conclusion that the pregnant minors affected by this legislation did not have a reasonable expectation of privacy for purposes of the second element of the *Hill* test. Furthermore, the court found that neither the existence of other statutory provisions requiring parental consent for medical care nor the existence of numerous abortion/parental consent statutes in other states eliminated a minor's reasonable expectation of privacy in this context (*16 Cal. 4th 307, 338-339)* .

[d] Statute Constitutes Serious Invasion of Privacy Interest

The facts and procedural background of ***American Acad. of Pediatrics v. Lungren*** *(1997) 16 Cal. 4th 307, 66 Cal. Rptr. 2d 210, 940 P.2d 797* , are discussed in *§ 183.21[3][a]*. The Court examined the challenged statute under the standards and principles set forth in the court's prior decision in *Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1* . As to the third element under *Hill,* the Court held that a statute requiring parental consent before a minor is able to obtain an abortion constituted a significant intrusion on a minor's protected privacy interest (*16 Cal. 4th 307, 338-339)* . As explained in the lead opinion in *Loder v. City of Glendale (1997) 14 Cal. 4th 846, 895, n.22, 59 Cal. Rptr. 2d 696, 927 P.2d 1200* , this third element is intended to screen out intrusions on privacy that are de minimis or insignificant. According to the Court in this case, the effect of a statute requiring parental consent before a minor is able to obtain an abortion could not by any stretch of the imagination, properly be characterized as de minimis or insignificant. (*16 Cal. 4th 307, 338-339)* . The Court cited the following consequences as significant intrusions: that the statute would deny a pregnant minor control over her own destiny, would increase the health risks posed by an abortion, and could result in a minor terminating the pregnancy herself, seeking a "back-alley" abortion or bearing an unwanted child.

[e] Statute Evaluated Under Compelling Interest Standard

The facts and procedural background of ***American Acad. of Pediatrics v. Lungren*** *(1997) 16 Cal. 4th 307, 66 Cal. Rptr. 2d 210, 940 P.2d 797* , are discussed in *§ 183.21[3][a]*. The Court examined the challenged statute under the standards and principles set forth in the court's prior decision in *Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1* . In *Hill* the Supreme Court declined to hold that every assertion of a privacy interest under *Cal. Const. art. I, section 1* must be overcome by a compelling interest test, however, where a case involved an obvious invasion of an interest fundamental to personal autonomy, it determined that a compelling interest must be present to overcome the vital privacy interest. Applying this rule to the facts of the present case the Court determined that the parental consent statute unquestionably impinged on an interest fundamental to personal autonomy, indeed an interest that was clearly among the most intimate and fundamental of all constitutional rights. Therefore, statutory provisions that intrude or impinge on such a fundamental autonomy privacy interest properly must be evaluated under the compelling interest standard--that is, the defendant must demonstrate a compelling state interest which justifies the intrusion which cannot be served by alternative means less intrusive on fundamental rights. The court dismissed defendants argument that although the compelling interest may constitute the appropriate test for analyzing a statutory provision that impinges on a pregnant adults' constitutional right of choice, a less rigorous standard should apply to a statute such as this that affects the right of choice of a pregnant minor. It countered that when a statute significantly intrudes on a fundamental autonomy privacy interest of a minor, proper respect for a minor's state constitutional right of privacy requires a showing that the intrusion is necessary to further a compelling (an extremely important and vital) state interest (*16 Cal. 4th 307, 341)* .

[f] Effect of Facial Challenge on Balancing Test

The facts and procedural background of ***American Acad. of Pediatrics v. Lungren*** *(1997) 16 Cal. 4th 307, 66 Cal. Rptr. 2d 210, 940 P.2d 797* , are discussed in *§ 183.21[3][a]*. The defendants contended that because the case involved a facial challenge to the statute, their burden of justification could be satisfied simply by demonstrating that the provisions of the statute constitutionally could be applied in even a single circumstance covered by the statute. Thus, defendants maintained that the facial challenge to the statute must be rejected if they were able to establish, for example, that the statutory requirement for parental consent or judicial authorization was justified as applied to the relatively small subclass of pregnant minors who lacked the mental capacity to give informed consent to an abortion, even thought the statute was not limited to this class of minors, and even if the statute was invalid as to all other pregnant minors. The Court disagreed with this restrictive approach and determined instead that when a statute broadly and directly impinged on the fundamental constitutional privacy rights of a substantial portion of those persons to whom the statute applies, the statute can be upheld only if those defending the statute can establish that, considering the statute's general and

normal application, the compelling justifications for the statute outweigh the statute's impingement on constitutional privacy rights and cannot be achieved by less intrusive means (*16 Cal. 4th 307, 348)* .

[g] Inadequate Justification for Intrusion

The facts and procedural background of ***American Acad. of Pediatrics v. Lungren*** *(1997) 16 Cal. 4th 307, 66 Cal. Rptr. 2d 210, 940 P.2d 797* , are discussed in *§ 183.21[3][a]*. The Court determined that when a statute broadly and directly impinges on the fundamental constitutional privacy rights of a substantial portion of those persons to whom the statute applies, the statute can be upheld only if those defending the statute can establish that, considering the statute's general and normal application, the compelling justifications for the statute outweigh the statute's impingement on constitutional privacy rights and cannot be achieved by less intrusive means (*16 Cal. 4th 307, 348)* . The Court applied this rule and held that defendants failed to demonstrate adequate justification for the statute's intrusion on a minor's right of privacy under the California Constitution. In defending the challenged statutory provision defendants relied on two interests assertedly furthered by the state: protecting the physical, emotion and psychological health of minors and the preservation and promotion of the parent-child relationship. Although the Court agreed that a state's interests in protecting the health of minors and in preserving and fostering the parent-child relationship were compelling interests for purposes of constitutional analysis. it held that the parental consent requirement was not necessary to further either of these interests (*16 Cal. 4th 307, 348-354)* .

The Court reasoned that defendants' contention that the restrictions imposed by the statute on a minor's constitutionally protected right of privacy were necessary to protect the physical and emotional health of a pregnant minor was undermined by the fact that California law authorized a minor, without parental consent, to obtain medical care and make other important decisions in analogous contexts that posed at least equal or greater risks to the health of a minor and her child as those posed by the decision to terminate a pregnancy. Moreover, the existence in California of numerous other "limited medical emancipation" statutes that authorized minors, without parental consent, to obtain medical care in a variety of settings relating to sexual activity further undermined defendants' claim that the statute in this case was necessary to further defendants' asserted interests. The Court's conclusion was also supported by the overwhelming, uncontroverted evidence that was introduced at trial. This evidence showed that rather than protecting the state's interests, the legislation would in fact injure the health of the minors and the parent-child relationship. Lastly, the Court ruled that the statute could not be justified by the state's interest in ensuring that the determination whether a pregnant minor is sufficiently competent and mature to consent to an abortion was made in a fair and unbiased manner because nothing in the record justified an assumption that licensed health care providers could not be trusted to make an unbiased determination as to whether a minor was capable of giving informed consent to an abortion (*16 Cal. 4th 307, 357)* .

NOTE:

The decision in *American Academy*, a case involving an enormous number of attorneys and amicus curiae, reflects a sharply divided California Supreme Court. There were five separate opinions issued in the case. The lead opinion was written by Chief Justice George, with Justices Werdegar and Chin concurring. A concurring opinion was written by Justice Kennard, and three separate dissenting opinions were authored by Justices Mosk, Baxter, and Brown.

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Volume 18 Chapters 180-189 PRETRIAL PROCEEDINGS---to---PROBATE OF WILLS
CHAPTER 183 PRIVACY: STATE CONSTITUTIONAL RIGHTS
PART II. FORMS

18-183 California Points & Authorities § 183.22

§ 183.22 Supporting Contention That Plaintiff Has State Constitutional Cause of Action for Invasion of Privacy--Criminal Defense Attorney's Unauthorized Reading and Dissemination of Victim's Confidential Mental Health Records

[1] FORM Supporting Contention That Plaintiff Has State Constitutional Cause of Action for Invasion of Privacy--Criminal Defense Attorney's Unauthorized Reading and Dissemination of Victim's Confidential Mental Health Records

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT'S CONDUCT, READING AND DISSEMINATING A CRIME VICTIM'S CONFIDENTIAL MENTAL HEALTH RECORDS WITHOUT AUTHORIZATION, SUPPORTS A CAUSE OF ACTION FOR INVASION OF PLAINTIFF'S CONSTITUTIONAL RIGHT TO PRIVACY.

A. Elements of State Constitutional Right to Privacy Action. [*See § 183.20, Paragraphs A-D*].

B. Invasion Based on Criminal Defense Attorney's Reading and Dissemination of Crime Victim's Mental Health Records. A crime victim has a cause of action for invasion of her constitutional right to privacy against a criminal defense attorney who, without authorization, reads and disseminates the victim's confidential mental health records (*Susan S. v. Israels (1997) 55 Cal. App. 4th 1290, 1293, 67 Cal. Rptr. 2d 42*).

C. Action Not Barred by Litigation Privilege. The litigation privilege does not shield a criminal defense attorney from liability for reading and disseminating a crime victim's private mental health records for the purpose of gathering evidence to be used in the course of a criminal proceeding (*Susan S. v. Israels (1997) 55 Cal. App. 4th 1290, 1301, 67 Cal. Rptr. 2d 42*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that plaintiff crime victim has a state

constitutional cause of action for invasion of privacy based on a criminal defense attorney's unauthorized reading and dissemination of his or her confidential mental health records.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should provide facts showing that defendant read and disseminated plaintiff's confidential mental health records without authorization and argue that this conduct constituted a violation of plaintiff's constitutional right to privacy.

[c] Related Pleading and Practice Forms

For discussion relating to privacy claims, see California Forms of Pleading and Practice, Ch. 429, *Privacy* (Matthew Bender).

[d] Related Points and Authorities

For points and authorities relating to claims of constitutional invasion of privacy in general, see *§ 183.20*.

[3] Discussion of Authorities

[a] Invasion Based on Criminal Defense Attorney's Reading and Dissemination of Crime Victim's Mental Health Records

In ***Susan S. v. Israels*** *(1997) 55 Cal. App. 4th 1290, 67 Cal. Rptr. 2d 42* , a criminal defense attorney represented a client charged with the sexual battery of plaintiff. In the course of that representation the attorney served a subpoena duces tecum for the plaintiff's mental health records on a mental health treatment facility. The facility mistakenly sent plaintiff's records directly to the attorney instead of the trial court and the attorney, knowing the private and confidential nature of the documents, read them, transmitted them to the defense psychiatrist and used them in cross-examining plaintiff. Plaintiff sued the attorney and his client for invasion of privacy, *Cal. Const. art. I section 1*. The trial court sustained defendants' demurrer to the complaint with leave to amend. Plaintiff elected not to amend her complaint and her action was dismissed. Plaintiff appealed the judgment of dismissal.

The court of appeal reversed, holding that a criminal defense attorney's reading and dissemination of a crime victim's confidential mental health records violated the victim's constitutional right of privacy (*55 Cal. App. 4th 1290, 1294)* . The court began by stating the factors necessary for a plaintiff to allege a state constitutional invasion of privacy, as outlined in *Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 39-40* : a legally protected privacy interest, a reasonable expectation of privacy in the circumstances, and conduct by the defendant constituting a serious invasion of privacy.

The court first stated that it was undisputed that plaintiff had a legally protected privacy interest in her mental health records. It then found that plaintiff had a reasonable expectation of privacy in the circumstances and reasoned that plaintiff did not lose her right to privacy in her mental health records because she charged defendant with sexual battery, rather, defendant's entitlement to inspect plaintiff's records required a showing of good cause for their discovery and a balancing of defendant's *Sixth Amendment* right of cross examination against plaintiff's right to privacy in her medical records, none of which happened in this case. In addition, the court reasoned that the subpoena duces tecum procedure itself implicitly recognized an expectation of privacy on the part of the person whose records are subpoenaed. The court dismissed defendants' arguments that plaintiff could not have a reasonable expectation of privacy in her mental health records because those records would have been inevitably discovered during the course of litigation and that the very existence of disclosure procedures for these records foreclosed any reasonable expectation of privacy.

Lastly, the court determined that a stranger's unauthorized reading and dissemination of plaintiff's mental health records

was a serious invasion of her privacy. In doing so it dismissed both of defendants' arguments: that the criminal defense attorney's mere reading of plaintiff's medical records could not support her claim of serious invasion, and that there was no serious invasion because when a hearing eventually was held in the underlying criminal proceeding the trial court permitted the defense psychiatrist to testify based on what he read in plaintiff's records. The court concluded that plaintiff's complaint adequately alleged the serious invasion element. The complaint alleged that the criminal defense attorney read and disseminated her mental health records knowing the information contained in them could be highly sensitive and embarrassing to her, that she in fact was intimidated, embarrassed and humiliated, suffered severe emotional distress and that her mental condition was exacerbated as a result (*55 Cal. App. 4th 1290, 1299)* .

[b] Action Not Barred by Litigation Privilege

The facts and procedural background of ***Susan S. v. Israels*** *(1997) 55 Cal. App. 4th 1290, 67 Cal. Rptr. 2d 42* , are discussed in *§ 183.22[3][a]*. The defendants argued on appeal that they were immune from liability under the litigation privilege. The court rejected this argument, and found that the litigation privilege did not shield a criminal defense attorney from liability for reading and disseminating a crime victim's private mental health records for the purpose of gathering evidence to be used in the course of a criminal proceeding (*55 Cal. App. 4th 1290, 1301)* . The court stated that plaintiff's cause of action did not depend on the publication or broadcast of her mental health records but rested on the criminal defense attorney's conduct in reading those records.

NOTE:

In *Susan S.*, the defendants and their amici curiae expressed fear that upholding plaintiff's cause of action for invasion of privacy would interfere with a criminal defendant's right to confront and cross-examine the witnesses against him or her and chill counsel's zealous advocacy on the defendant's behalf. They argued that by upholding plaintiff's cause of action under the facts of this case, the court was subjecting criminal defense counsel to liability every time they opened their mail. One amicus curiae took the argument one step further and argued that the criminal defense attorney in this case had to read through all of plaintiff's medical records before he could determine that they were actually medical records. The court of appeal found these fears groundless and these arguments without merit. The court explained that the plaintiff in this case did not claim, nor did it hold, that the defense attorney invaded her privacy by opening an envelope addressed to him. Rather, the invasion of privacy took place when the attorney read the entire record contained in that envelope and then transmitted it to the defense psychiatrist [*Susan S. v. Israels (1997) 55 Cal. App. 4th 1290, 1301-1302, 67 Cal. Rptr. 2d 42]* . Despite the court's dismissal of defendants' fears in this regard, in light of the holding in this case, criminal defense attorneys would be wise to practice caution before subpoenaing, reading and disseminating a crime victim's confidential mental health records.

[4] Additional Authorities

[a] Action Not Barred by Litigation Privilege

In *Mansell v. Otto (2003) 108 Cal. App. 4th 265, 133 Cal. Rptr. 2d 276* , the plaintiff was a crime victim who brought an action for invasion of privacy under the California Constitution against the attorneys for the criminal defendant, based on their unauthorized reading of her confidential mental health records in preparation of their case. The trial court sustained the defendants' demurrer because of the judicial privilege of *Civ. Code § 47(b)*. However, based on the holding of *Susan S.*, the court of appeal held that the judicial privilege did not apply to the reading of the plaintiff's confidential records without her consent, because the act of reading the records was noncommunicative conduct (*108 Cal. App. 4th 265, 271-272)* . The court of appeal also held that the plaintiff could not state a cause of action under the circumstances because the defendants had obtained the records pursuant to a court order and because the records had been released to the defendants by the prosecutor after having been released to the court under seal (*108 Cal. App. 4th 265, 276-277)* .

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CHAPTER 183 PRIVACY: STATE CONSTITUTIONAL RIGHTS
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18-183 California Points & Authorities § 183.23

§ 183.23 Supporting Contention That Plaintiff Has Stated Constitutional Cause of Action for Invasion of Privacy--Reasonable Cause Drug Testing by Private Employer

[1] FORM Supporting Contention That Plaintiff Has Stated Constitutional Cause of Action for Invasion of Privacy--Reasonable Cause Drug Testing by Private Employer

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

AN EMPLOYER'S DEMAND THAT AN EMPLOYEE SUBMIT TO A URINALYSIS DRUG/ALCOHOL TEST MAY VIOLATE THE EMPLOYEE'S STATE CONSTITUTIONAL RIGHT TO PRIVACY IF THE DEFENDANT DID NOT HAVE REASONABLE CAUSE TO BELIEVE THE EMPLOYEE WAS INTOXICATED.

A. Elements of State Constitutional Right to Privacy Action. [*See § 183.20, Paragraphs A-D*].

B. Existence of Reasonable Cause Is Relevant to Determining Constitutionality of Employer's Drug Test Demand. In suspicion based drug test cases the issue of reasonable cause is relevant to determining the constitutionality of the employer's drug test demand (*Kraslawsky v. Upper Deck Co. (1997) 56 Cal. App. 4th 179, 188, 65 Cal. Rptr. 2d 297*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a plaintiff who alleges that his or her employer has demanded a drug test without reasonable cause has stated a constitutional cause of action for invasion of privacy.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should provide facts showing that the employer had no suspicion that plaintiff was intoxicated when it demanded a drug

test and argue that the lack of reasonable cause for the demand subjected plaintiff to a random drug test, thereby violating his or her right to privacy.

[c] Related Pleading and Practice Forms

For discussion relating to privacy claims, see California Forms of Pleading and Practice, Ch. 429, *Privacy* (Matthew Bender).

[d] Related Points and Authorities

For points and authorities relating to claims of constitutional invasion of privacy in general, see *§ 183.20*.

[3] Discussion of Authorities

[a] Existence of Reasonable Cause Is Relevant to Determining Constitutionality of Employer's Drug Test Demand

In ***Kraslawsky v. Upper Deck Co.*** *(1997) 56 Cal. App. 4th 179, 65 Cal. Rptr. 2d 297* , plaintiff, who was terminated after refusing to take a drug/alcohol test under defendant's reasonable cause drug testing program, sued her employer for violating her constitutional right to privacy under *Cal. Const. art. I, § 1*. Plaintiff did not challenge the constitutionality of her employer's suspicion-based testing program. Instead she contended that her employer's demand that she submit to a drug test violated her state constitutional right to privacy because the employer did not have reasonable cause to believe she was intoxicated. The defendant countered that (1) the existence of reasonable cause was not relevant to the constitutional privacy analysis and (2) plaintiff did not proffer sufficient evidence to create a triable issue of fact on the reasonable cause issue. The trial court granted summary judgment in favor of defendant and plaintiff appealed.

The court of appeal reversed, holding that summary judgment was improper because the existence of reasonable cause was relevant and plaintiff submitted evidence creating a triable issue of fact as to whether defendant had reasonable cause to believe she was under the influence of intoxicants (*56 Cal. App. 4th 179, 188)* . The thrust of defendants argument was that the existence of reasonable cause was not relevant here because its reasonable cause policy was constitutional; if an employer maintains a constitutionally valid suspicion-based testing policy, the fact that the suspicion did not actually exist does not matter. The court disagreed. It stated that under *Loder v. City of Glendale (1997) 14 Cal. 4th 846, 889-898, 59 Cal. Rptr. 2d 696, 927 P.2d 1200* , the constitutionality of a drug test under the California Constitution is evaluated by balancing the employee's reasonable expectation of privacy against the employer's legitimate interests in imposing the test. Stated the court, in the absence of reasonable cause for a particular urinalysis request, the outcome of this balancing test may be different. If a drug test is not triggered by a reasonable belief that the employee is intoxicated, the employee may have a stronger reason to expect to maintain his or her privacy and the employer may have less need to demand the test.

In applying these principles to this case, the court found that plaintiff, an executive secretary whose job duties were neither safety nor security sensitive, had a substantial expectation that she would not be required to take a random drug test. Further, there were no circumstances particular to defendants' working environment or plaintiff's job position that would have reduced her expectations of privacy in the context of a random drug test. By comparison, the court found that, absent reasonable cause, defendant's legitimate need to require the drug test was substantially reduced. Defendant's stated reasons for conducting employee drug tests were expressly premised on a reasonable cause program; it admitted it did not use, nor favor, random testing. Additionally, according to the court, there were other less intrusive ways defendant could have satisfied its objective of ensuring a drug-free workplace, rather than imposing random drug tests on existing employees. In concluding that the issue of reasonable cause was relevant to determining the constitutionality of defendant's drug test demand, the court reasoned that a contrary ruling would essentially give an employer with a constitutionally valid drug testing policy a free license to conduct random testing, regardless of the circumstances. This result would be inconsistent with the privacy rights protected by the California Constitution. In closing, the court noted

that in determining the constitutionality of a particular drug test demand (as opposed to a facial challenge), federal courts regularly conduct a factual analysis as to the extent to which the employer had reasonable cause to require the test (*56 Cal. App. 4th 179, 188)* .

NOTE:

In *Kraslawsky*, the defendant did not attempt to argue, nor did the court rule, that a random drug test would be consistent with the state Constitution's privacy provision. Instead, defendant maintained that the existence of reasonable cause was not relevant here because its reasonable cause policy was constitutional. In a footnote the court added that while a majority of the Supreme Court has yet to expressly reach the issue of random drug testing under the California Constitution, in the *Fourth Amendment* context courts generally hold a drug test of an existing employee without any individualized suspicion is unreasonable, unless the employee is in a safety or security sensitive position. Thus, it is uncertain how helpful this holding will be in random versus reasonable cause drug testing cases.

Also, *Kraslawsky* did not involve a facial challenge to the constitutionality of a particular drug test, but instead involved a constitutional challenge to the manner in which a drug testing program was applied. Therefore, the court did not rule on the constitutionality of the reasonable cause drug test used in this case. This case stands for the proposition that even if an employer's reasonable cause drug testing policy is constitutionally valid, an employer's demand that an employee submit to a drug/alcohol test without good cause or reason and at random may violate the employee's constitutional right to privacy [*see Kraslawsky v. Upper Deck Co. (1997) 56 Cal. App. 4th 179, 189, 65 Cal. Rptr. 2d 297* ; *see also Loder v. City of Glendale (1997) 14 Cal. 4th 846, 889-898, 59 Cal. Rptr. 2d 696, 927 P.2d 1200* (facial challenge to city employee drug testing program that tested job applicants and existing employees conditionally approved for promotion)].

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18-183 California Points & Authorities § 183.24

§ 183.24 Opposing Contention That Plaintiff Has State Constitutional Cause of Action for Invasion of Privacy--Balancing Test

[1] FORM Opposing Contention That Plaintiff Has State Constitutional Cause of Action for Invasion of Privacy--Balancing Test

[*The following may be included in a memorandum or points and authorities, or in a trial or appellate brief.*]

DEFENDANT DID NOT INVADE PLAINTIFF'S PRIVACY IN VIOLATION OF *CALIFORNIA CONSTITUTION, ARTICLE I, SECTION 1*, BECAUSE _____ [*specify any or all of the following,* THE DEFENDANT'S CONDUCT DOES NOT IMPACT ON A LEGALLY PROTECTED PRIVACY INTEREST *and/or* THE PLAINTIFF HAS NO REASONABLE EXPECTATION OF PRIVACY *and/or* THE DEFENDANT'S INVASION IS NOT SERIOUS *and/or* THE DEFENDANT HAS SHOWN A COMPETING OR COUNTERVAILING PRIVACY OR NON PRIVACY INTEREST THAT JUSTIFIES THE INTRUSION].

[*EITHER*]

A. Defendant's Conduct Does Not Impact a Legally Protected Privacy Interest. An essential element of a state constitutional cause of action for invasion of privacy (*Cal. Const. art. I, § 1*) is that the defendant's conduct impacts a specific, legally protected interest, such as informational privacy or autonomy privacy [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 35-36]* .

[*AND/OR*]

B. Plaintiff Has No Reasonable or a Diminished Expectation of Privacy. An essential element of a state constitutional cause of action for invasion of privacy (*Cal. Const. art. I, § 1*) is that the plaintiff has a reasonable expectation of privacy. Particular circumstances may diminish the plaintiff's expection of privacy [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 36-37]* .

[*AND/OR*]

C. No Serious Invasion of Privacy Interest. An actionable invasion of privacy under *Section 1, Article I, of the California Constitution*, must be sufficiently serious in its nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 37]* .

[*AND/OR*]

D. Balancing Test. When the defendant has shown that legitimate, competing or countervailing, privacy or nonprivacy interests outweigh the specifically identified privacy interest of the plaintiff, then there is no violation of the privacy right [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 37-38]* .

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff has a state constitutional cause of action for invasion of privacy, or to argue that the defendant has shown that competing interests outweigh the plaintiff's privacy interest [*see Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1]* . If the defendant must justify the invasion of privacy by asserting a compelling interest, counsel should use the points and *authorities in § 183.27*, bearing in mind that the California Supreme Court has curtailed the circumstances when this standard may apply.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raised the substantive issue of violation of the constitutional privacy right. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Whether a legally recognized privacy interest is present in a given case is a question of law. Whether a plaintiff has a reasonable expectation of privacy, whether the defendant's conduct constitutes a serious invasion of privacy, and whether the defendant has justifying competing interests are mixed questions of law and fact [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 40]* . Application of the "balancing test" standard is illustrated by the California Supreme Court's decision in *Hill v. NCAA* [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1* ; *see § 183.20[3]*].

[3] Discussion of Authorities

[a] Defendant's Conduct Does Not Impact a Legally Protected Privacy Interest

Hill v. National Collegiate Athletic Assn. *(1994) 7 Cal. 4th 1* , is discussed in *§ 183.20[3][a]*.

[b] Plaintiff Has No Reasonable or a Diminished Expectation of Privacy

Hill v. National Collegiate Athletic Assn. *(1994) 7 Cal. 4th 1* , is discussed in *§ 183.20[3][b]*.

[c] No Serious Invasion of Privacy Interest

Hill v. National Collegiate Athletic Assn. *(1994) 7 Cal. 4th 1* , is discussed in *§ 183.20[3][c]*.

[d] Balancing Test

Hill v. National Collegiate Athletic Assn. *(1994) 7 Cal. 4th 1* , is discussed in *§ 183.20[3][d]*.

[4] Additional Authorities

[a] Plaintiff Has No Reasonable or a Diminished Expectation of Privacy

In *Heller v. Norcal Mut. Ins. Co. (1994) 8 Cal. 4th 30, 32 Cal. Rptr. 2d 200, 876 P.2d 999* , plaintiff had instituted a medical malpractice action against her former physician. The physician's insurer defended that action, and discussed plaintiff's medical condition with an associate of the physician, who at the time was still treating plaintiff. Plaintiff sued the insurer and the associate, alleging that the disclosure violated her state constitutional right to privacy. Applying the analysis set forth in *Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 37-40* , the Court held that the facts as pled in the complaint did not, as a matter of law, support a conclusion that any expectation of privacy regarding plaintiff's medical condition would be reasonable under the circumstances of the case (*8 Cal. 4th 30, 43)* . The Court relied on the fact that plaintiff had put her medical condition at issue by filing the malpractice action; the information would have been discovered in the course of the action (*8 Cal. 4th 30, 43-44)* .

In *Barbee v. Household Auto. Fin. Corp. (2003) 113 Cal. App. 4th 525, 6 Cal. Rptr. 3d 406* , the plaintiff brought an action against his former employer for violation of the constitutional right to privacy after he was terminated for refusing to end an intimate relationship with a subordinate. The trial court granted summary judgment for the employer, and the court of appeal affirmed. The court of appeal assumed, without deciding, that the fired employee may have a legally protected privacy interest in pursuing an intimate sexual relationship. However, the court concluded that the employee did not have a reasonable expectation of privacy under the circumstances. Existing court decisions had already recognized the right of employers to restrict intimate relationships between employees if those relationships created potential conflicts of interest. In addition, the plaintiff's former employer had given advance notice to the plaintiff that the employer believed the relationship presented a potential conflict of interest. Without a reasonable expectation of privacy under the circumstances, the plaintiff could not establish a necessary element of his invasion of privacy claim (*113 Cal. App. 4th 525, 532-533)* .

In *People v. Martinez (2001) 88 Cal. App. 4th 465, 105 Cal. Rptr. 2d 841* , a state prisoner serving a sentence for failing to register as a sex offender was declared a sexually violent predator under *Welf. & Inst. Code § 6600* and committed for two years. The prisoner appealed the order of commitment in part on the grounds that the prosecutor's use of the prisoner's records of psychiatric treatment and evaluation violated his right to privacy under the California Constitution. The court of appeal sustained the order of commitment. Although the court recognized the settled principle that the privacy of a person's medical history and psychological records is constitutionally protected (*88 Cal. App. 4th 465, 474-475)* , the court concluded that the prisoner's expectation of privacy in his records and history was substantially diminished, if not completely eliminated. Not only did the Sexually Violent Predators Act expressly provide for the disclosure of all relevant records, but the prisoner was informed that any information given during the evaluations made prior to the commitment proceeding would be included in written reports and testimony, and the prisoner nonetheless signed consent forms for the evaluations (*88 Cal. App. 4th 465, 476-477)* .

In *Smith v. Fresno Irrigation Dist. (1999) 72 Cal. App. 4th 147, 84 Cal. Rptr. 2d 775* , plaintiff, who was terminated from his employment after failing a random drug test, brought suit against his former employer, alleging in part that the drug testing violated his privacy rights under the California Constitution and constituted an unreasonable search and seizure under the *Fourth Amendment of the Federal Constitution*. The trial court found for plaintiff, but the court of appeal reversed. In reaching its decision, the court of appeal noted that the employer had given all employees six months' notice before it implemented the drug testing policy. The court concluded that, while advance notice does not

automatically defeat an employee's argument that drug testing is unconstitutional, the advance warning diminished the employee's expectation of privacy (*72 Cal. App. 4th 147, 162)* .

[b] No Serious Invasion of Privacy Interest

In *Heller v. Norcal Mut. Ins. Co. (1994) 8 Cal. 4th 30, 32 Cal. Rptr. 2d 200, 876 P.2d 999* , discussed in *§ 183.24[4][a]*, the Court held that the inevitable disclosure of the plaintiff's medical condition in her pending medical malpractice action made the prior disclosure of that information insufficiently serious, as a matter of law, to support a finding of a violation of the state constitutional right to privacy (*8 Cal. 4th 30, 44)* .

In *People v. Martinez (2001) 88 Cal. App. 4th 465, 105 Cal. Rptr. 2d 841* , discussed in *§ 183.24[3][b]*, the court of appeal held that although the unauthorized disclosure and review of a person's medical records and psychological evaluations may be a serious invasion of privacy, in the context of a commitment proceeding under the Sexually Violent Predators Act, the defendant's mental state is the primary focus, and a prosecutor's examination of relevant psychological records that have already been disclosed, examined, relied on, and extensively summarized by nontreating doctors does not represent an egregious invasion of privacy (*88 Cal. App. 4th 465, 478)* .

[c] Balancing Test

In *In re Carmen M. (2006) 141 Cal. App. 4th 478, 46 Cal. Rptr. 3d 117* , a juvenile court ordered a dependent minor to submit to drug testing if the staff of the minor's group home believe the minor is under the influence of drugs. The minor filed a petition for writ of mandate opposing the order. The court of appeal upheld the juvenile court order. The court noted that the minor had a documented history of drug abuse and had been responding well to a treatment program that had included drug testing. The court also noted that the drug testing order in that case was narrowly tailored to require testing only if the staff suspected that the minor was under the influence. Applying a balancing test, the court of appeal concluded that the juvenile court's legitimate interest in monitoring the dependent minor's recovery justified the limited intrusion on the minor's privacy rights (*141 Cal. App. 4th 478, 494)* .

In *Ortiz v. Los Angeles Police Relief Assn. (2002) 98 Cal. App. 4th 1288, 1312-1313* , the plaintiff was employed by an association that administered police officer employee benefits and, in the course of her employment, she had access to confidential police officer personnel records. When she made known her intention to marry an incarcerated felon, her employer, concerned about protecting against the improper disclosure of police officer information to a convicted criminal, asked the plaintiff to reconsider her marriage plans or resign her employment with the association. She refused to do either and was fired. She sued the association for invasion of the state constitutional right to privacy. The trial court granted summary judgment for the employer, and the court of appeal affirmed. Recognizing the employee's fundamental privacy right to marry without interference from her employer, the court nonetheless balanced that right with the association's legitimate interests. The court concluded that the association's policy, which required the employee to choose between her employment with the association and her marriage to the incarcerated felon, was a rational means of pursuing its interest in protecting against the possible dissemination of confidential information to a convicted criminal (*98 Cal. App. 4th 1288, 1312-1313)* .

In *People v. Martinez (2001) 88 Cal. App. 4th 465, 105 Cal. Rptr. 2d 841* , discussed in *§ 184.24[3][b]*, the court of appeal held that any minimal invasion of privacy that may have occurred through the prosecutor's use of defendant's psychological records in a commitment proceeding brought under the Sexually Violent Predators Act was justified by the compelling state interest in protecting the public from sexually violent predators, who are likely to continue such conduct even after serving their criminal sentences. To decide whether to file a petition for commitment, the prosecutor must have access to and be able to review any psychological evaluations made of the alleged predator (*88 Cal. App. 4th 465, 479-480)* .

In *Smith v. Fresno Irrigation Dist. (1999) 72 Cal. App. 4th 147, 84 Cal. Rptr. 2d 775* , discussed in *§ 183.24[3][b]*, the

court of appeal, recognizing that the determination of whether a particular drug test is constitutional required employing a balancing test, held that the random drug testing of the plaintiff was constitutional. The court balanced the employer's legitimate safety concerns in minimizing the risk of injury to co-employees with the plaintiff's privacy interests, and held that the employer's safety interests outweighed the employee's privacy interests, especially in light of the diminished expectation of privacy the employees had after being given six-months' advance notice of the drug testing program (*72 Cal. App. 4th 147, 162-163)* . The court noted that the job duties and working environment of employees in the plaintiff's particular construction and maintenance position placed co-workers at risk, agreed that these conditions justified the safety-sensitive classification that the employer had bestowed on the position, and concluded that the employer's concerns for the safety of co-workers were sufficient to justify the random drug testing (*72 Cal. App. 4th 147, 163-167)* .

In *Gilbert v. National Enquirer, Inc. (1996) 43 Cal. App. 4th 1135, 51 Cal. Rptr. 2d 91* , plaintiff, a well-known actress, sought a preliminary injunction against her ex-husband and a newspaper to prevent them from disclosing allegedly defamatory statements regarding her sexual relationships and substance abuse. The paper had already published an interview with the husband which became the basis of a defamation action by plaintiff. Plaintiff then sought the injunction to prevent future revelations. The trial court issued the injunction, stating that plaintiff's right of privacy outweighed the ex-husband's right of free speech. The court of appeal disagreed, holding that the preliminary injunction was an unconstitutional prior restraint on the ex-husband's and the newspaper's *First Amendment* rights. The court stated that prior restraints are disfavored and presumptively invalid, and are not permitted to stop the publication of a defamatory statement (*43 Cal. App. 4th 1135, 1144)* . The court recognized that not all prior restraints are invalid, with exceptions for extraordinary circumstances. However, the court found that the injunction was too broad in applying to information obtained at any time in the course of the ex-husband's relationship to plaintiff. Furthermore, the court reasoned that heightened public interest in the personal activities of a well-known actor is a factor to be weighed in balancing the competing interests (*43 Cal. App. 4th 1135, 1145-1146)* . Concluding that plaintiff's right to privacy did not outweigh the ex-husband's right to express his uncensored opinion about her use of drugs and alcohol and her sexual relationships, so that the preliminary injunction was an invalid prior restraint, the court reversed the order issuing the preliminary injunction.

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18-183 California Points & Authorities § 183.25

§ 183.25 Opposing Contention That Plaintiff Has State Constitutional Cause of Action for Invasion of Privacy--Right to Privacy Waived

[1] FORM Opposing Contention That Plaintiff Has State Constitutional Cause of Action for Invasion of Privacy--Right to Privacy Waived

[*The following may be included in a memorandum or points and authorities, or in a trial or appellate brief.*]

PLAINTIFF IS NOT ENTITLED TO RECOVER FOR VIOLATION OF PRIVACY UNDER *CALIFORNIA CONSTITUTION, ARTICLE I, SECTION 1*, BECAUSE PLAINTIFF WAIVED ANY CONSTITUTIONAL CLAIM TO PRIVACY BY _____ [*specify acts or conduct constituting waiver*].

Right to Privacy Waived by Voluntary Disclosure. Plaintiff's right to recover in a state constitutional action for invasion of privacy (*Cal. Const. art. I, § 1*) is waived by plaintiff's voluntary disclosure of the information subsequently disclosed by defendant (*Pettus v. Cole (1996) 49 Cal. App. 4th 402, 448, 57 Cal. Rptr. 2d 46*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a defendant's contention in a state constitutional action for invasion of privacy that plaintiff waived the right to a recovery by voluntarily disclosing the information.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of waiver of a state constitutional action for invasion of privacy, for example in a motion for summary judgment. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence of voluntary statements by plaintiff disclosing the information which is the subject of the cause of action for invasion of privacy, and should argue that this disclosure was sufficient to waive plaintiff's right to recover in a cause of action for the disclosure of the same information by others.

[3] Discussion of Authorities

[a] Right to Privacy Waived by Voluntary Disclosure

In ***Pettus v. Cole*** *(1996) 49 Cal. App. 4th 402, 57 Cal. Rptr. 2d 46* , plaintiff, brought an action against two psychiatrists for invasion of his constitutional right of privacy [*Cal. Const. art. I, § 1*], for providing plaintiff's employer with a detailed report of their psychiatric examinations of plaintiff without written authorization for such disclosure. Subsequent to defendants' report, plaintiff's employer demanded that he enroll in an inpatient alcohol rehabilitation program. Plaintiff refused, and was discharged. At the close of plaintiff's case-in-chief the trial court granted defendants' motion for judgment, concluding that the disclosure was allowed under the Confidentiality of Medical Information Act [*Civ. Code § 56 et seq.*].

The court of appeal first considered the disclosure in light of the Confidentiality of Medical Information Act, and concluded that plaintiff's rights had been violated. The court then addressed the question of whether this conduct also constituted a violation of his state constitutional right of privacy under the standards of *Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1* , and concluded that it did. However, the evidence indicated that in conversations with his employer prior to his meetings with defendants, plaintiff had voluntarily disclosed at least some of the sensitive personal and medical information which was subsequently wrongfully transmitted by defendants to plaintiff's employer. The court reasoned that if plaintiff had already disclosed the damaging information which he claimed defendants revealed, then he might not be able to claim any legally protected privacy interest with respect to that information, or to prove the reasonableness of his expectation that defendants would maintain the confidentiality of information already known by his employer (*49 Cal. App. 4th 402, 448)* . Thus, although the court reversed the judgment for defendants, it remanded the matter for further proceedings in the trial court as a result of the evidence that plaintiff may have waived his constitutional claim.

[4] Additional Authorities

[a] Right to Privacy Waived by Voluntary Disclosure

In *Garrett v. Young (2003) 109 Cal. App. 4th 1393, 1 Cal. Rptr. 3d 134* , the plaintiff brought an action against a doctor for violation of the Confidentiality of Medical Information Act, *Civ. Code § 56 et seq.*, and for invasion of privacy. The action was based on the doctor's providing the plaintiff's supervisor at work with general information about the plaintiff's medical condition, which consisted of an itch and rash apparently brought on by work stress, and mentioning that the plaintiff was not ready to return to work. The trial court granted directed verdicts for the defendant on both causes of action, and the court of appeal affirmed. The court of appeal held that the information was the type of general information permitted to be disclosed under the Confidentiality of Medical Information Act (*109 Cal. App. 4th 1393, 1406-1409)* . The court also held that as to her invasion of privacy claim, the plaintiff had no reasonable expectation of privacy in the information conveyed by the doctor to her supervisor. The plaintiff had herself told her supervisor about the rash and itching, asked him for advice about where to go for medical treatment, and had also mentioned the possibility of diagnostic testing. She had also repeatedly complained to other workers about what she perceived as intolerable work conditions, which included unfair demands, harassment, and persecution, such that she could not support a claim of invasion of privacy based on the doctor's mere mention of the fact that she suffered from work-related stress (*109 Cal. App. 4th 1393, 1412)* .

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18-183 California Points & Authorities § 183.26

§ 183.26 Supporting Contention That Defendant Invaded Plaintiff's Right to Privacy in Violation of California Constitution--Failure to Show Compelling Interest

[1] FORM Supporting Contention That Defendant Invaded Plaintiff's Right to Privacy in Violation of California Constitution--Failure to Show Compelling Interest

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

DEFENDANT'S INVASION OF PLAINTIFF'S PRIVACY VIOLATED THE *CALIFORNIA CONSTITUTION, ARTICLE I, SECTION 1*, BECAUSE THE DEFENDANT HAS FAILED TO SHOW A COMPELLING INTEREST SUFFICIENT TO JUSTIFY AN _____ [*either* OBVIOUS GOVERNMENT ACTION IMPACTING FREEDOM OF EXPRESSION AND ASSOCIATION *and/or* OBVIOUS INVASION OF AN INTEREST FUNDAMENTAL TO PERSONAL AUTONOMY].

Compelling Interest Required to Justify Some Aspects of Right to Privacy Under California Constitution. The use of the "compelling interest" standard is required to justify aspects of the right of privacy under *Cal. Const. art. I, § 1*, that implicate obvious government action impacting freedom of expression or an obvious invasion of an interest fundamental to personal autonomy [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1* ; *see White v. Davis (1975) 13 Cal. 3d 757, 775, 120 Cal. Rptr. 94, 533 P.2d 222]* .

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that defendant has invaded plaintiff's privacy in violation of *Cal. Const. art. I, § 1*, because defendant has failed to show a compelling interest sufficient to justify the invasion. In *Hill v. NCAA*, the Court limited the use of the "compelling interest" standard to cases implicating either "obvious government action impacting freedom of expression and association" or an "obvious invasion of an interest fundamental to personal autonomy" [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1]* . Otherwise, the standard for determining an unconstitutional invasion of privacy is a less stringent balancing test that compares a specifically identified privacy interest with competing and countervailing nonprivacy interests [*Hill v. National*

Collegiate Athletic Assn. (1994) 7 Cal. 4th 1 (applying this test to NCAA drug-testing program for student athletes and finding no violation); *see § 183.20*].

The plaintiff should use the applicable portions of the points and *authorities in § 183.20* with these points and authorities to support the contention that the essential elements for a constitutional cause of action for invasion of privacy have been met. These elements also apply under the compelling interest standard. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Compelling Interest Standard Is Limited

In *Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1* [*see § 183.20[3]*], the California Supreme Court rejected the blanket use of the compelling-interest standard, and limited its use to aspects of the right of privacy under *Cal. Const. art. I, § 1*, that implicate obvious government action, impacting freedom of expression or an obvious invasion of an interest fundamental to personal autonomy. *Hill* culminates a trend that makes it clear that "not every act which has some impact on personal privacy invokes the protections of the state's Constitution and requires such justification" [*Wilkinson v. Times Mirror Corp. (1989) 215 Cal. App. 3d 1034, 1046-1048, 264 Cal. Rptr. 194]* .

Some appellate decisions have applied a less rigorous standard with regard to a minor's right to privacy in sexual matters, holding that these matters are governed by the "significant state interest" test, rather than the compelling-interest standard, on the basis of the state's greater latitude to regulate the conduct of children [*People v. Stockton Pregnancy Control Med. Clinic, Inc. (1988) 203 Cal. App. 3d 225, 241, 249 Cal. Rptr. 762* ; *Planned Parenthood Affiliates v. Van de Kamp (1986) 181 Cal. App. 3d 245, 277-281, 226 Cal. Rptr. 361* (both cases regarding criminal child-abuse reporting statutes)]. Another case has held, however, that the compelling-interest test does apply in those matters, noting that a compelling interest may justify enacting a statute to afford minors special protections even though the same statute, if applied to adults, would be unconstitutional [*American Acad. of Pediatrics v. Van de Kamp (1989) 214 Cal. App. 3d 831, 844-845, 263 Cal. Rptr. 46* (upholding preliminary injunction against enforcement of *Civ. Code § 34.5*, which prohibits therapeutic abortions on unemancipated minors absent parental consent or court order)]. After *Hill*, the vitality of both lines of decisions is in doubt since the California Supreme Court made it clear that the *Hill* standard will apply to future claims for invasion of the state constitutional right to privacy. The Court offered no analysis on the continuing vitality of cases decided before *Hill*.

[c] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 183.27* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Compelling Interest Required to Justify Some Aspects of Right to Privacy Under California Constitution

Hill v. National Collegiate Athletic Assn. (1994) *7 Cal. 4th 1* , is discussed in *§ 183.20[3][d]*. The California Supreme Court rejected the blanket use of the compelling interest standard. The Court analyzed its decision in *White v. Davis* [*White v. Davis (1975) 13 Cal. 3d 757*], as only applying to some aspects of the right of privacy under *Cal. Const. art. I, § 1*, such as those that implicate obvious government action impacting freedom of expression. The Court also suggested that the compelling interest standard is applicable in cases that involve an obvious invasion of an interest fundamental to personal autonomy, such as freedom to from involuntary fertilization or the freedom to pursue consensual familial relationships. If the privacy right is less central, then the "balancing test" standard applies [*see § 183.20*], and this test is less stringent than the compelling interest standard (*7 Cal. 4th 1, 34-35)* .

White v. Davis *(1975) 13 Cal. 3d 757, 120 Cal. Rptr. 94, 533 P.2d 222* , was an action by a taxpayer to enjoin the expenditure of public funds as violative of state and federal constitutional guarantees of freedom of privacy, speech, assembly, and due process of law. The funds were spent in connection with police covert intelligence gathering operations that included posing as students, recording university classroom discussions, and compiling dossiers on students and professors. The operations were conducted even though no illegal activity was reported. Defendant's demurrer was sustained, and plaintiff appealed.

The Supreme Court reversed, holding that the police activities constituted a violation of the provision of *Cal. Const. art. I, § 1*, guaranteeing the right of privacy (*13 Cal. 3d 757, 776, 777)* . The Court identified the types of conduct at which the constitutional provision was directed: (1) "government snooping" and secret gathering of personal information; (2) overbroad collection and retention of unnecessary personal information by government and business interests; (3) improper use of information properly obtained for a specific purpose; and (4) lack of a reasonable check on the accuracy of existing records. The constitutional provision does not prohibit all incursion into individual privacy, the Court held, but rather requires that any infringement be justified by a compelling interest (*13 Cal. 3d 757, 775)* . The Court also ruled that the police activities violated the freedoms of speech and assembly guaranteed by the state and federal constitutions (*13 Cal. 3d 757, 772-773)* .

[4] Additional Authorities

[a] Compelling Interest Required to Justify Some Aspects of Right to Privacy Under California Constitution

In *Roman Catholic Bishop v. Superior Court (1996) 42 Cal. App. 4th 1556, 50 Cal. Rptr. 2d 399* , a minor plaintiff claimed she was sexually abused by her parish priest, and brought an action against the church for negligent hiring. The trial court denied the church's motion for summary judgment, concluding that a triable issue existed whether the church breached its duty of care to discover the priest's unfitness as an employee. The court of appeal disagreed, noting that there was nothing in the record to indicate that the priest had a criminal history or had been previously implicated in sexual abuse of a minor. Plaintiff contended that the church was negligent in failing to ask the priest if he had problems with his vows of celibacy. However, the court held that the duty plaintiff sought to impose on the church as an employer would violate the employee's privacy rights explicitly guaranteed under the California Constitution. Stating that the right to privacy encompasses privacy in one's sexual matters and is not limited to the marital relationship, the court also held that there was no compelling state interest to require the employer to investigate the sexual practices of its employee. Furthermore, the court noted that the employer who queries employees on sexual behavior is subject to claims for invasion of privacy and sexual harassment (*42 Cal. App. 4th 1556, 1567)* .

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18-183 California Points & Authorities § 183.27

§ 183.27 Opposing Contention That Defendant Invaded Plaintiff's Right to Privacy in Violation of California Constitution--Compelling Interest Shown

[1] FORM Opposing Contention That Defendant Invaded Plaintiff's Right to Privacy in Violation of California Constitution--Compelling Interest Shown

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT DID NOT INVADE PLAINTIFF'S PRIVACY IN VIOLATION OF *CALIFORNIA CONSTITUTION, ARTICLE I, SECTION 1*, BECAUSE DEFENDANT HAS SHOWN A COMPELLING INTEREST SUFFICIENT TO JUSTIFY AN INTRUSION INTO PLAINTIFF'S PRIVACY.

A. Compelling Interest Sufficient. A compelling interest may justify an intrusion into a person's privacy [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 33-34]* .

[*Optional*] **B. Interest in Truth in Legal Proceeding.** The state's interest in ascertaining the truth in connection with a legal proceeding may be a sufficiently compelling interest to justify an intrusion into a person's privacy (*Morales v. Superior Court (1979) 99 Cal. App. 3d 283, 290, 160 Cal. Rptr. 194* ; *Fults v. Superior Court (1979) 88 Cal. App. 3d 899, 152 Cal. Rptr. 210*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that defendant has invaded plaintiff's privacy in violation of *Cal. Const. art. I, § 1*, because defendant has shown a compelling interest sufficient to justify an intrusion into plaintiff's privacy. Counsel should note, however, that intrusions into an individual's privacy need not always be justified by a compelling state interest, but may be subject to a less rigorous test, according to the circumstances [*see § 183.26[2][a]*]. The defendant should use the points and *authorities in § 183.24* with these points and authorities to oppose the contention that the plaintiff has established the essential elements for an actionable constitutional cause of action for invasion of privacy. These elements also apply under the compelling interest standard.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of compelling interest. For example, this form may be used to oppose plaintiff's motion for a protective order to prevent the disclosure of information sought during civil discovery proceedings [*see Britt v. Superior Court (1978) 20 Cal. 3d 844, 143 Cal. Rptr. 695, 574 P.2d 766* ; for forms relating to civil discovery, see Ch. 80, *Discovery: Scope, Regulation, and Timing* , through Ch. 89A, *Discovery: Review of Discovery Orders*]. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion establishing that a sufficiently compelling interest existed for defendant's alleged infringement of plaintiff's privacy. If optional Paragraph B is used, counsel should show that the incursion into plaintiff's privacy facilitates the ascertainment of the truth in a legal proceeding.

[3] Discussion of Authorities

[a] Compelling Interest Sufficient

Hill v. National Collegiate Athletic Assn. *(1994) 7 Cal. 4th 1* , is discussed in *§ 183.20[3][d]*. The California Supreme Court rejected the blanket use of the compelling interest standard. The Court analyzed its decision in *White v. Davis (1975) 13 Cal. 3d 757* [*see § 183.26[3][a]*], as only applying to some aspects of the right of privacy under *Cal. Const. art. I, § 1*, such as those that implicate obvious government action impacting freedom of expression. The Court also suggested that the compelling-interest standard is applicable in cases that involve an obvious invasion of an interest fundamental to personal autonomy, such as freedom to from involuntary fertilization or the freedom to pursue consensual familial relationships. If the privacy right is less central, then the "balancing test" standard applies [*see § 183.20*], which is less stringent than the compelling-interest test (*7 Cal. 4th 1, 33-34)* .

[b] Interest in Truth in Legal Proceeding

Morales v. Superior Court *(1979) 99 Cal. App. 3d 283, 160 Cal. Rptr. 194* , arose out of a wrongful death action by a father and his three minor children for the death of the wife and mother. Defendant, real party in interest, propounded interrogatories requesting information about plaintiff father's extramarital sexual activities during his marriage to the decedent. Plaintiff father objected to the questions on the grounds of relevancy and the right to privacy. The interrogatories were limited by judicial order to a time period of two years before decedent's death. Plaintiff father sought a writ of mandate to compel the trial court to vacate its order.

The court of appeal denied the writ in part, holding that there was a compelling interest justifying the infringement on plaintiff father's right of privacy (*99 Cal. App. 3d 283, 291-292)* . The right of privacy, the court ruled, is not absolute, but may be intruded on when a compelling interest exists. The compelling interest here was the state's interest in facilitating the ascertainment of truth in connection with a legal proceeding (*99 Cal. App. 3d 283, 290)* . However, the interrogatories were overbroad. Accordingly, the writ was granted in part by modifying the order to protect from disclosure the names of any other persons involved in the father's extramarital activities (*99 Cal. App. 3d 283, 291-292)* .

Fults v. Superior Court *(1979) 88 Cal. App. 3d 899, 152 Cal. Rptr. 210* , concerned a paternity action filed by the district attorney on behalf of plaintiff against defendant, real party in interest. Defendant propounded interrogatories, two of which asked plaintiff about her sexual activities. Plaintiff objected to the questions on the grounds of relevancy and invasion of privacy. The court limited the scope of the interrogatories to a time period of one year before and after the likely date of conception. Plaintiff sought a writ of mandate.

The court of appeal ruled that there was a compelling interest justifying the intrusion into plaintiff's right of privacy, that

is, the historically important state interest in facilitating the ascertainment of truth in connection with legal proceedings (*88 Cal. App. 3d 899, 904)* . However, the interrogatories here were overbroad in asking about plaintiff's sexual life during times totally removed from the possible period of conception (*88 Cal. App. 3d 899, 904-905)* . Accordingly, a peremptory writ was issued directing the court to vacate its order with respect to the time period unrelated to the possible period of conception (*88 Cal. App. 3d 899, 905)* .

[4] Additional Authorities

[a] Interest in Truth in Legal Proceeding

County of Alameda v. Superior Court (1987) 194 Cal. App. 3d 254, 239 Cal. Rptr. 400 , was a personal injury action in which plaintiff sought to discover the identity of a person who allegedly raped her while she was under the control of defendant county's mental health facility. Defendant refused disclosure on the ground that the alleged rapist was another patient whose identity was protected under the psychotherapist-patient privilege and the constitutional right of privacy. When the trial court ordered disclosure, defendant sought a writ of mandate to challenge that order. In refusing the writ, the court of appeal held that the particular facts justified limited disclosure of the patient's identity to plaintiff, who otherwise could not pursue her case. The court reasoned in part that the right of privacy is not absolute, and that state's interest in ascertaining the truth in connection with legal proceedings is substantial enough to compel disclosure of a wide variety of confidential material, including psychotherapist-patient communications (*194 Cal. App. 3d 254, 260-261)* .

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18-183 California Points & Authorities § 183.28

§ 183.28 Opposing Contention That Defendant Invaded Plaintiff's Right to Privacy in Violation of California Constitution--Compelling Interest Standard Not Applicable

[1] FORM Opposing Contention That Defendant Invaded Plaintiff's Right to Privacy in Violation of California Constitution--Compelling Interest Standard Not Applicable

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT DID NOT VIOLATE PLAINTIFF'S RIGHT TO PRIVACY UNDER *SECTION 1, ARTICLE I OF THE CALIFORNIA CONSTITUTION* BECAUSE THE DEFENDANT DOES NOT HAVE TO JUSTIFY THE INVASION OF PRIVACY WITH A COMPELLING INTEREST.

A. Compelling Interest Not Applicable to All Aspects of Right to Privacy Under California Constitution. The use of the "compelling interest" standard is not required to justify all aspects of the right of privacy under *Section 1, Article I, of the California Constitution*. The standard only applies to privacy interests that implicate obvious government action impacting freedom of expression or an obvious invasion of an interest fundamental to personal autonomy (*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 33-34*).

[*Optional*] **B. Compelling Interest Standard Not Applicable to Member of Press.** The compelling interest standard is not applicable when defendant is a member of the press publishing newsworthy information (*Diaz v. Oakland Tribune, Inc. (1983) 139 Cal. App. 3d 118, 127, 188 Cal. Rptr. 762*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that defendant invaded plaintiff's right to privacy because defendant is not required to meet the compelling interest standard in order to justify the intrusion into plaintiff's privacy.

A competing interest may justify an intrusion into an individual's privacy under the less rigorous "balancing test"

standard. The use of the compelling interest standard is limited [*see § 183.26*]. The defendant should use the applicable portions of the points and *authorities in § 183.24* with these points and authorities to oppose the contention that the plaintiff has established the essential elements for an actionable constitutional cause of action for invasion of privacy, or to argue that the invasion is justified under the "balancing test" standard.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of application of the compelling interest standard. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion showing that defendant is a member of the press and that the disclosure in question concerned newsworthy information.

[3] Discussion of Authorities

[a] Compelling Interest Standard Not Applicable to All Aspects of Right to Privacy Under California Constitution

Hill v. National Collegiate Athletic Assn. *(1994) 7 Cal. 4th 1* , is discussed in *§ 183.20[3][d]*. The California Supreme Court rejected the blanket use of the compelling interest standard. The Court analyzed its decision in *White v. Davis (1975) 13 Cal. 3d 757* [*see § 183.26[3][a]*], as only applying to some aspects of the right of privacy under *Cal. Const. art. I, § 1*, such as those that implicate obvious government action impacting freedom of expression. The Court also suggested that the compelling interest standard is applicable in cases that involve an obvious invasion of an interest fundamental to personal autonomy, such as freedom from involuntary fertilization or the freedom to pursue consensual familial relationships. If the privacy right is less central, then the "balancing test" standard applies (*see § 183.20*), which is less stringent than the compelling interest test (*7 Cal. 4th 1, 33-34)* .

[b] Compelling Interest Standard Not Applicable to Member of Press

Diaz v. Oakland Tribune, Inc. *(1983) 139 Cal. App. 3d 118, 188 Cal. Rptr. 762* , involved an action for invasion of privacy based on a newspaper columnist's disclosure that plaintiff, a student body president of a local community college, was a transsexual. A jury awarded judgment to plaintiff, and defendants appealed.

The court of appeal reversed, finding prejudicial error in two of the jury instructions. One of the instructions stated, in language taken from *White v. Davis (1975) 13 Cal. 3d 757, 120 Cal. Rptr. 94, 533 P.2d 222* [*see § 183.26[3][a]*], that the right of privacy "should be abridged only when there is a compelling public need." The court distinguished *White* on the grounds that it involved governmental interference with the right of privacy. The present defendant, the court ruled, had the right to publish newsworthy information as part of the constitutional guarantees of free speech and press. Therefore, the court held, defendant did not have to meet the "compelling public need" standard (*139 Cal. App. 3d 118, 127)* .

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18-183 California Points & Authorities § 183.29

§ 183.29 Opposing Contention That Defendant Invaded Plaintiff's Right to Privacy in Violation of California Constitution--Corporation Has No State Constitutional Privacy Right

[1] FORM Opposing Contention That Defendant Invaded Plaintiff's Right to Privacy in Violation of California Constitution--Corporation Has No State Constitutional Privacy Right

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

DEFENDANT DID NOT VIOLATE PLAINTIFF'S RIGHT TO PRIVACY UNDER *SECTION 1, ARTICLE I OF THE CALIFORNIA CONSTITUTION* BECAUSE THE PLAINTIFF IS A CORPORATION AND THE RIGHT TO PRIVACY SET OUT IN THIS PROVISION APPLIES ONLY TO NATURAL PERSONS.

Corporations Not Protected by California Constitutional Privacy Provisions. The right to privacy set out in *Section 1, Article I, of the California Constitution* applies only to natural persons and does not apply to corporations (*Roberts v. Gulf Oil Corp (1983) 147 Cal. App. 3d 770, 791, 794, 195 Cal. Rptr. 421*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a party's privacy rights set out in *Cal. Const. art. I, § 1*, have been or are threatened to be violated. The ground for opposition is that a corporation may not rely on the privacy rights set out in *Cal. Const. art. I, § 1* [*Roberts v. Gulf Oil Corp (1983) 147 Cal. App. 3d 770, 791, 794]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the nonapplicability of *Cal. Const. art. I, § 1*, to corporations. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion showing that the party seeking to raise privacy rights under the

state constitution is a corporation rather than a natural person.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in §§ 183.20* and *183.26*.

[b] Corporation's General Right to Privacy

Although a corporation does not have a right to privacy under Cal. Const. art. I, § 1, or a constitutional right to privacy in the fundamental sense, it may have a general right to privacy under some combination of the *Fourth*, *Fifth*, and *Fourteenth Amendments to the United States Constitution*. Two critical factors in determining whether a corporation's general constitutional privacy rights apply are (1) the strength of the nexus between the artificial entity and human beings, and (2) the context in which the controversy arises [*Roberts v. Gulf Oil Corp (1983) 147 Cal. App. 3d 770, 797* (minimal requirements for tax assessor to overcome taxpaying corporation's right to privacy regarding relevant information); *see § 183.29[3][a]*]. However, the *Roberts* court found defendant corporation's general constitutional privacy rights not applicable under the facts of the case [*Roberts v. Gulf Oil Corp (1983) 147 Cal. App. 3d 770, 798-801]* .

[3] Discussion of Authorities

[a] Corporations Not Protected by California Constitutional Privacy Provisions

In ***Roberts v. Gulf Oil Corp*** *(1983) 147 Cal. App. 3d 770* , plaintiff county tax assessor secured a subpoena duces tecum compelling defendant corporation to appear in court and answer questions and procure records pertaining to certain properties. The trial court ordered defendant to produce some of the documents requested. Defendant appealed with respect to certain documents among those ordered to be disclosed, citing its purported right to privacy under *Cal. Const. art. I, § 1*.

The court of appeal affirmed the order of disclosure. The court held that *Cal. Const. art. I, § 1*, simply does not apply to corporations (*147 Cal. App. 3d 770, 790-791)* . In supporting its conclusion, the court noted as significant that the secretary of state's argument in favor of the ballot proposition by which *Cal. Const. art. I, § 1*, was enacted spoke in terms relevant to natural persons, and that section itself refers to "people" rather than "persons" (*147 Cal. App. 3d 770, 791-793)* . The court went on to hold that although a corporation does not have a right to privacy under *Cal. Const. art. I, § 1*, it may have a general right to privacy under some combination of the *Fourth*, *Fifth*, and *Fourteenth Amendments to the United States Constitution* (*147 Cal. App. 3d 770, 795-797)* . The court held, however, that a corporation's privacy rights are not fundamental so as to require application of a compelling interest test (*147 Cal. App. 3d 770, 794)* . Under the more liberal test applied by the court, the court concluded that plaintiff assessor was entitled to disclosure of the information sought (*147 Cal. App. 3d 770, 799-800)* .

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18-183 California Points & Authorities § 183.30

§ 183.30 Opposing Contention That Defendant Invaded Plaintiff's Right to Privacy in Violation of California Constitution--Proper Police Investigative Activities Not Violation of State Constitutional Privacy Right

[1] FORM Opposing Contention That Defendant Invaded Plaintiff's Right to Privacy in Violation of California Constitution--Proper Police Investigative Activities Not Violation of State Constitutional Privacy Right

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT DID NOT VIOLATE PLAINTIFF'S RIGHT TO PRIVACY UNDER *SECTION 1, ARTICLE I OF THE CALIFORNIA CONSTITUTION* BECAUSE A ROUTINE POLICE INVESTIGATION IN RESPONSE TO A COMPLAINT DOES NOT VIOLATE THE CONSTITUTIONAL PRIVACY RIGHTS OF THE ALLEGED PERPETRATOR BEING INVESTIGATED.

A. Routine Police Investigation Does Not Violate State Privacy Right. A routine police investigation in response to a complaint does not constitute an invasion of the privacy of the alleged perpetrator of the conduct complained of (*Mann v. Mack (1984) 155 Cal. App. 3d 666, 673, 202 Cal. Rptr. 296*).

[*Optional*] **B. Justified Entrance Into House to Make Arrest.** Entrance into a private house by a police officer to arrest persons living in the house when the police officer has probable cause for the arrest and reason to believe that the persons to be arrested are attempting to evade him or her does not constitute an invasion of privacy of the persons living in the house (*Mann v. Mack (1984) 155 Cal. App. 3d 666, 674, 202 Cal. Rptr. 296*).

[*Optional*] **C. No Duty to Protect Criminal Suspect's Identity.** A law-enforcement agency does not owe a constitutional duty to a criminal suspect to protect that person's identity, and the release of information in public records relating to a criminal investigation is not an intrusion on the suspect's constitutional right to privacy (*Alarcon v. Murphy (1988) 201 Cal. App. 3d 1, 6-7, 248 Cal. Rptr. 26*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a party's privacy rights under *Cal. Const. art. I, § 1,* have been violated. The ground for opposition in this form is that a routine police investigation in response to a complaint does not violate the constitutional privacy rights of the alleged perpetrator being investigated [*Mann v. Mack (1984) 155 Cal. App. 3d 666, 673, 202 Cal. Rptr. 296]* . Optional Paragraph B may be used to support the point that a police officer's justified entry into a private house to arrest persons living there does not violate the persons' privacy rights under *Cal. Const. art. I, § 1* [*Mann v. Mack (1984) 155 Cal. App. 3d 666, 674, 202 Cal. Rptr. 296]* . Optional Paragraph C may be used to support the contention that a police agency's failure to bar disclosure of information in a public record regarding a suspect's identity is not a violation of the suspect's right to privacy (*see Alarcon v. Murphy (1988) 201 Cal. App. 3d 1, 6-7, 248 Cal. Rptr. 26*).

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the permissibility under *Cal. Const. art. I, § 1,* of routine police investigations and other proper police conduct. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion showing that police were conducting a routine investigation in response to a complaint. If optional Paragraph B is used, counsel should include discussion showing that police officers were justified in entering the house of the person arrested.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in §§ 183.20* and *183.26*.

[3] Discussion of Authorities

[a] Routine Police Investigation Does Not Violate State Privacy Right

Mann v. Mack *(1984) 155 Cal. App. 3d 666, 202 Cal. Rptr. 296* , was an action against a police officer and his municipal employer for invasion of privacy. In that case, defendant officer was dispatched with a partner to investigate a complaint from one of plaintiffs' neighbors regarding excessive noise being made by an amateur rock band that was rehearsing in plaintiffs' garage. The officers asserted that the noise complained of was extremely loud, that other neighbors besides the complaining neighbor considered the noise to be excessively loud, and that the police had on numerous previous occasions stopped at plaintiffs' house in response to complaints by neighbors regarding noise made by the band. The officers initiated contact with the members of the band and placed one of them under arrest. Plaintiffs subsequently initiated the present action. The trial court found for defendants and plaintiffs appealed.

The court of appeal upheld the trial court's finding. The court stated that it was clear that plaintiffs had not presented enough evidence to sustain their allegations that the police action in investigating plaintiffs' neighbors' complaints of excessive noise violated plaintiffs' privacy rights under *Cal. Const. art. I, § 1* (*155 Cal. App. 3d 666, 673)* . The court held that routine investigation of a neighborhood disturbance does not constitute an invasion of privacy rights of the perpetrator of the disturbance (*155 Cal. App. 3d 666, 673-674)* .

[b] Justified Entrance Into House to Make Arrest

The facts and procedural background for ***Mann v. Mack*** *(1984) 155 Cal. App. 3d 666, 202 Cal. Rptr. 296* , are discussed in *§ 183.30[3][a]*. The plaintiffs charged that defendant police officer's conduct in entering plaintiffs' house to place one of plaintiffs under arrest constituted a violation of plaintiffs' privacy rights under *Cal. Const. art. I, § 1*. The court of appeal upheld the trial court's finding that defendant officer had not violated any of plaintiffs' rights. The court noted that defendant and his partner, who were responding to a complaint from a neighbor regarding excessive noise made by a band playing in plaintiffs' garage, had told the plaintiff ultimately placed under arrest to bring the band

members out of the house to talk to the officers, that all of the band members except plaintiffs had appeared, and that defendant had walked through the open door of plaintiffs' house to make the arrest when plaintiff himself did not appear with the rest of the band (*155 Cal. App. 3d 666, 672)* . The court stated that a police officer may enter a house to make an arrest without a warrant when he or she has probable cause for the arrest and when the arrest is necessary to forestall an imminent escape of a suspect. In the situation before it, the court held that defendant officer had probable cause for the arrest because he himself had heard that the noise was so loud as to constitute a violation of local ordinance. The court further held that plaintiff's failure to appear with the rest of the band was sufficient to convince defendant that plaintiff was attempting to evade him, and therefore justified his walking through the open door of the house to make the arrest. Thus, the court concluded that defendant's conduct had not violated any of plaintiffs' constitutional rights (*155 Cal. App. 3d 666, 674-675)* .

[c] No Duty to Protect Criminal Suspect's Identity

In ***Alarcon v. Murphy*** *(1988) 201 Cal. App. 3d 1, 248 Cal. Rptr. 26* , local police authorities, acting on information given by an eyewitness, obtained an arrest warrant for plaintiff, and a search warrant for his house and vehicle, in connection with the investigation of a murder. After consulting with the local prosecuting authority, a police officer released plaintiff's name to the news media, which publicized it. Ultimately, another person confessed to the crime. Plaintiff brought an action against the local municipality and various law-enforcement officers connected with the investigation. The trial court granted defendants' motion for summary judgment, and plaintiff appealed.

The court of appeal affirmed, holding that the municipality owed plaintiff no constitutional duty to protect his identity (*201 Cal. App. 3d 1, 7)* . It rejected plaintiff's contention that the municipality had a constitutional duty not to identify him to the media as a murder suspect until it had probable cause to arrest him for that offense (*201 Cal. App. 3d 1, 4-5)* . The constitutional protection of privacy does not prohibit all incursion into individual privacy, but provides that any intervention of that nature must be justified by a compelling interest. It is therefore necessary to determine whether plaintiff's personal and objectively reasonable expectation of privacy had been infringed by an unreasonable government intrusion (*201 Cal. App. 3d 1, 5)* . Generally, the facts and circumstances surrounding an arrest must be made public, pursuant to *Gov. Code § 6254(f)(1).* An affidavit supporting the issuance of arrest and search warrants is public record, by virtue of being part of a court file (*201 Cal. App. 3d 1, 6)* . Inasmuch as the disclosure of plaintiff's name was not a revelation of confidential information, but part of a public record, plaintiff had no objectively reasonable expectation that the information would not be disclosed by police (*201 Cal. App. 3d 1, 6-7)* . The court rejected plaintiff's contention that the contents of the affidavit should not have been released until the affidavit itself was available to the public, several days after the disclosure to the media. The lack of actual public access to the affidavit until the searching officers filed the warrant return does not make the affidavit any less of a public document. The issue is not when the public had access to the record, but rather whether a public right of access existed. Inasmuch as the municipality owed no constitutional duty to plaintiff, the trial court properly granted summary judgment. There was no intrusion on plaintiff's constitutional right to privacy; therefore, the municipality need not have justified its act by demonstrating a compelling interest to support its disclosure (*201 Cal. App. 3d 1, 7)* .

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Volume 18 Chapters 180-189 PRETRIAL PROCEEDINGS---to---PROBATE OF WILLS
CHAPTER 183 PRIVACY: STATE CONSTITUTIONAL RIGHTS
PART II. FORMS

18-183 California Points & Authorities § 183.31

§ 183.31 Opposing Contention That Defendant Invaded Plaintiff's Right to Privacy in Violation of California Constitution--Judicial Oversight Over Release of Confidential Records Precludes Liability

[1] FORM Opposing Contention That Defendant Invaded Plaintiff's Right to Privacy in Violation of California Constitution--Judicial Oversight Over Release of Confidential Records Precludes Liability

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT DID NOT VIOLATE PLAINTIFF'S RIGHT TO PRIVACY UNDER *SECTION 1, ARTICLE I, OF THE CALIFORNIA CONSTITUTION* BY READING PLAINTIFF'S CONFIDENTIAL MEDICAL RECORDS, BECAUSE THE RECORDS WERE RELEASED TO DEFENDANT PURSUANT TO A COURT ORDER.

Judicial Oversight Over Release of Confidential Records Precludes Liability. A plaintiff does not state a cause of action for invasion of privacy in violation of the California Constitution if the underlying conduct consists of the defendant's reading of the plaintiff's confidential medical records and if those records were released pursuant to a court order, sent to the court under seal, and then released by the court to the defendant (*Mansell v. Otto (2003) 108 Cal. App. 4th 265, 273-277, 133 Cal. Rptr. 2d 276*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff has a cause of action for invasion of privacy under *Section 1 of Article I of the California Constitution* based on a defendant's conduct in reading the plaintiff's confidential medical records. The grounds for the opposition are that the records were released pursuant to a court order, sent to the court under seal, and only then released to the defendant.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that liability is precluded due to court oversight over the release of the plaintiff's records. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include facts showing the court procedures that were used to obtain the records and argue that those procedures preclude liability in this case.

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 183.20* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Judicial Oversight Over Release of Confidential Records Precludes Liability

In ***Mansell v. Otto*** *(2003) 108 Cal. App. 4th 265, 133 Cal. Rptr. 2d 276* , the plaintiff was a victim of a criminal assault and battery. In preparing to defend their client, the attorneys for the criminal defendant sought from a hospital all of the plaintiff's medical and psychological records dating back to 1976. When the hospital indicated it could only release the records pursuant to a court order, the attorneys sought and obtained a court order for release of the records. Upon receipt of the court order, the hospital sent the requested records under seal to the court. The court then released the records to the prosecution, who in turn made copies for the defense attorneys. The attorneys read the records and disseminated them to other members of the defense team. The prosecution subsequently moved successfully to have the records returned to the court. Based on the unauthorized reading of her mental health records, the plaintiff then brought an action against the criminal defendant and his attorneys for invasion of privacy based on a violation of *Section 1, Article I, of the California Constitution*. The trial court sustained the defendants' demurrer, on the grounds that the defendants' conduct was privileged under the litigation privilege of *Civ. Code § 47(b)*, and the plaintiff appealed.

The court of appeal affirmed, but not on the grounds relied on by the trial court. The court first held that the litigation privilege did not apply to the defendants' conduct, because the privilege only protects communicative conduct and the act of reading the records was noncommunicative in nature (*108 Cal. App. 4th 265, 271-272)* . However, the court concluded that an actionable claim for invasion of privacy could not be premised on the mere reading of confidential or privileged material. After reviewing prior cases dealing with invasion of privacy based on such noncommunicative conduct, the court noted that in the cases finding potential liability, the offending party did not make an attempt to obtain prior judicial review or approval prior to reading or disseminating the records (*108 Cal. App. 4th 265, 272-276)* . By contrast, in this case, the defendants sought and received a court order for release of the records. The records were delivered by the hospital, not to defendants, but to the court under seal, and only provided to the defendants after being released by the court to the prosecutors, who provided copies to the defendants. Moreover, under current law, it was the prosecutors' duty to protect the plaintiff's right to privacy in her confidential records, and the prosecutors failed to do so. Under those circumstances, the defendants could not be liable to the plaintiff for an invasion of privacy (*108 Cal. App. 4th 265, 276-279)* .

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CHAPTER 183 PRIVACY: STATE CONSTITUTIONAL RIGHTS
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18-183 California Points & Authorities § 183.32

§ 183.32 Opposing Contention That Plaintiff Has Stated Constitutional Cause of Action for Invasion of Privacy--Absolute Judicial Privilege Provides Complete Defense

[1] FORM Opposing Contention That Plaintiff Has Stated Constitutional Cause of Action for Invasion of Privacy--Absolute Judicial Privilege Provides Complete Defense

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE ABSOLUTE JUDICIAL PRIVILEGE OF *CIVIL CODE SECTION 47(b)* PROVIDES DEFENDANT WITH A COMPLETE DEFENSE TO PLAINTIFF'S CAUSE OF ACTION FOR INVASION OF THE RIGHT TO PRIVACY PROVIDED BY THE CALIFORNIA CONSTITUTION.

Judicial Privilege Applicable to Constitutional Privacy Cause of Action. The absolute judicial privilege of *Civ. Code § 47(b)* applies to invasion of privacy actions based on the guarantee of privacy in the *California Constitution (Jacob B. v. County of Shasta (2007) 40 Cal. 4th 948, 961, 56 Cal. Rptr. 3d 477, 154 P.3d 1003* ; *see Cal. Const. art. I, § 1*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a plaintiff's claim for invasion of the privacy rights provided by *Section 1 of Article I of the California Constitution*. The grounds for the opposition are that the defendant's conduct was absolutely privileged under the judicial privilege of *Civ. Code § 47(b)*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the defense of the absolute judicial privilege. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law stated. Thus, counsel should describe the underlying communications that plaintiff alleged violated the constitutional right to privacy and describe how those communications are protected by the judicial privilege of *Civ. Code § 47(b)*.

[3] Discussion of Authorities

[a] Judicial Privilege Applicable to Constitutional Privacy Cause of Action

In *Jacob B. v. County of Shasta (2007) 40 Cal. 4th 948, 56 Cal. Rptr. 3d 477, 154 P.3d 1003* , plaintiff, in 1993 when he was 15 years old, had been accused by his brother and sister-in-law of molesting plaintiff's then-five-year-old nephew. The sheriff's office investigated and while it was believed that a molestation did occur, the case was not prosecuted because of the victim's young age and inability to communicate adequately. The victim's mother did, however, apply for and receive counseling compensation on behalf of her son from the county victim witness program on the basis of their conclusion that a crime had in fact occurred. The victim witness program also made an entry into the statewide victims-of-crime database (VOX) under which the victim and plaintiff, as the perpetrator of the molestation, were both identified. Plaintiff's brother and sister-in-law were eventually divorced, and their marriage dissolution decree prohibited contact between their son and plaintiff. Plaintiff's brother remarried, and he and his new wife, who had three sons from a previous marriage, became dissatisfied with the dissolution decree prohibiting contact with plaintiff, resulting in an ongoing dispute in a family law proceeding between plaintiff's brother's new wife and her ex-husband. In 2003, the victim's mother, now remarried herself, went to the county victim witness program office distraught over the possibility that the no-contact dissolution order might be lifted in the pending family law proceeding. She asked the office staff to help her by writing to the court, which they did. Obtaining information from the VOX database, staff members in the office prepared a letter stating that the victim's mother had come to the office in 1993 on behalf of her son, established a claim that plaintiff had molested her son, and received counseling funds. This letter was taken to the family law proceeding, and a copy was eventually provided to plaintiff. Plaintiff sued the county and the office staff member who signed the letter, asserting invasion of the constitutional right to privacy and other causes of action. A trial followed and defendants moved for nonsuit on the basis of the absolute judicial privilege of *Civ. Code § 47(b)*. The trial court dismissed all causes of action except the invasion of privacy action, and the jury eventually rendered a verdict for plaintiff. Defendants appealed, and the court of appeal held that the litigation privilege protected the letter against all causes of action, including the one based on the constitutional right to privacy. Plaintiff appealed.

The California Supreme Court affirmed the court of appeal decision. The Court first held that the letter was a communication otherwise protected by the judicial privilege (*40 Cal. 4th 948, 957-959)* . Noting that the judicial privilege had previously been applied to privacy actions, the Court then held that the judicial privilege remains an absolute privilege even as to invasion of privacy actions based on the guarantee of privacy in the California Constitution. The Court noted that the constitutional right of privacy is subject to a balancing of interests and has never been absolute. The Court also found nothing in the ballot materials or history of the 1972 initiative adding the constitutional right of privacy to suggest that the right was intended to prevail over the preexisting statutory litigation privilege. Although earlier court of appeal decisions in *Jeffrey H. v. Imai, Tadlock & Keeney (2000) 85 Cal. App. 4th 345, 101 Cal. Rptr. 2d 916* , and *Cutter v. Brownbridge (1986) 183 Cal. App. 3d 836, 228 Cal. Rptr. 545* , had applied a balancing test to determine whether the judicial privilege prevailed over a constitutional privacy claim, the Court specifically disapproved of this case-by-case balancing approach (*40 Cal. 4th 948, 961-962)* .

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CHAPTER 183 PRIVACY: STATE CONSTITUTIONAL RIGHTS
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2-183 California Points & Authorities § 183.33

§ 183.33 Opposing Contention That Plaintiff Has Stated Constitutional Cause of Action for Invasion of Privacy--Tort Claims Act Provides Statutory Immunity for Governmental Defendant

[1] FORM Opposing Contention That Plaintiff Has Stated Constitutional Cause of Action for Invasion of Privacy--Tort Claims Act Provides Statutory Immunity for Governmental Defendant

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE CALIFORNIA TORT CLAIMS ACT PROVIDES DEFENDANT WITH A COMPLETE DEFENSE TO PLAINTIFF'S CAUSE OF ACTION FOR INVASION OF THE RIGHT TO PRIVACY PROVIDED BY THE CALIFORNIA CONSTITUTION.

A. Government Tort Immunities Applicable to Privacy Action Based on California Constitution. Notwithstanding that the constitutional right to privacy was designed to protect against some forms of governmental intrusion, this right to privacy does not limit the scope of statutory immunities that existed under the California Tort Claims Act when the right to privacy was added in 1972 (*Richardson-Tunnell v. Schools Ins. Program for Employees (SIPE) (2007) 157 Cal. App. 4th 1056, 1066, 69 Cal. Rptr. 3d 176*).

[*Optional*] **B. Prosecutorial Immunity Applies to Constitutional Invasion of Privacy Action.** *Government Code Section 821.6*, which immunizes a governmental employee for injury caused by instituting or prosecuting any judicial or administrative proceeding within the scope of his or her employment, regardless of malice or lack of probable cause, extends to investigatory activities and may be used to defeat a claim for damages for violation of the constitutional right to privacy (*Richardson-Tunnell v. Schools Ins. Program for Employees (SIPE) (2007) 157 Cal. App. 4th 1056, 1062, 1066, 69 Cal. Rptr. 3d 176*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted by a governmental defendant in opposition to a plaintiff's claim for invasion of the privacy rights provided by *Section 1 of Article I of the California Constitution*. The grounds for the

opposition are that the California Tort Claims Act provides a specific immunity from liability for defendant's conduct.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the defense of governmental immunity. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law stated. Thus, counsel should describe the underlying conduct upon which plaintiff bases the invasion of privacy action and argue that the conduct comes under a specific immunity provided by the California Tort Claims Act.

[3] Discussion of Immunities

[a] Government Tort Immunities Applicable to Privacy Action Based on California Constitution

In *Richardson-Tunnell v. Schools Ins. Program for Employees (SIPE) (2007) 157 Cal. App. 4th 1056, 69 Cal. Rptr. 3d 176* , plaintiff was a teacher who suffered an injury at work while employed by a public school district. Plaintiff was married while on disability leave, and her school district and its public entity insurer hired a private investigator to videotape her surreptitiously at her wedding and on her honeymoon, apparently to determine if they had a claim for workers' compensation fraud. Plaintiff sued the school district and the insurer, among others, for invasion of privacy and negligence, including claims for damages under both the constitutional right to privacy provided by the California Constitution and the statutory protection provided by *Civ. Code § 1708.8*, the anti-paparazzi statute. The trial court granted judgment on the pleadings in favor of the public entity defendants after concluding that the claims against these entities were barred by governmental immunity provided for prosecutorial investigations under *Gov. Code § 821.6*. Plaintiff appealed.

The court of appeal affirmed. The court first held that the conduct alleged by plaintiff was covered by the immunity of *Gov. Code § 821.6*, a provision of the California Tort Claims Act which generally immunizes a governmental employee, and thus a public entity, for injury caused by instituting or prosecuting any judicial or administrative proceeding within the scope of his or her employment, regardless of malice or lack of probable cause, and such immunity extends to investigatory activities (*157 Cal. App. 4th 1056, 1062-1063)* . The court concluded that this immunity provided a defense to the statutory cause of action otherwise created by *Civ. Code § 1708.8* (*157 Cal. App. 4th 1056, 1063-1065)* . The court then held that this statutory immunity also provided a complete defense to plaintiff's cause of action seeking damages under the California Constitution for invasion of privacy. Assuming without deciding that plaintiff could seek damages for violation of the constitutional right to privacy, the court noted that the *California Supreme Court in Jacob B. v. County of Shasta (2007) 40 Cal. 4th 948, 56 Cal. Rptr. 3d 477, 154 P.3d 1003* , discussed in *§ 183.32[3][a]*, had concluded that the constitutional right to privacy, as adopted by the electorate in 1972, contains within it limitations based on statutes existing at the time. While the Supreme Court's holding in that case applied specifically to the litigation privilege of *Civ. Code § 47(b)*, the court of appeal concluded that the same logic applied to immunities provided by the existing California Tort Claims Act. As such, the prosecutorial immunity provided to public entity defendants under *Gov. Code § 821.6* provided a complete defense to plaintiff's damages claim brought under the California Constitution (*157 Cal. App. 4th 1056, 1066)* .

[b] Prosecutorial Immunity Applies to Constitutional Invasion of Privacy Action

Richardson-Tunnell v. Schools Ins. Program for Employees (SIPE) (2007) 157 Cal. App. 4th 1056, 69 Cal. Rptr. 3d 176 , is described in [a], *above.*

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§ 184.syn Synopsis to Chapter 184: PRIVACY: INVASION OF PRIVACY

§ 184.01 Scope of Chapter

§ 184.02 Governing Law

§ 184.03 Related Pleading and Practice Chapters

§ 184.04 Related Points and Authorities Chapters

§§ 184.05-184.19 [Reserved]

§ 184.20 Supporting Contention That Defendant Invaded Plaintiff's Right to Privacy--By Public Disclosure of Private Facts

[1] FORM

[2] Comments

[a] Use of Form

[b] Elements of Cause of Action

[c] Related Pleading and Practice Forms

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Right of Privacy

[b] Elements of Public Disclosure Tort

[c] Public Disclosure Defined

[d] Private Facts Defined

[e] Revelations About Decedent Family Member Invaded Privacy Rights of Survivors

[4] Additional Authorities

[a] Private Facts Defined

§ 184.21 Supporting Contention That Defendant Invaded Plaintiff's Right to Privacy--By Publicity Placing Plaintiff in False Light

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Right of Privacy

[b] Elements of False Light Publicity Tort

[c] Publicity Defined

[d] False Light Defined

[e] Malice Defined

[f] Demand for Retraction Requirements

[g] Special Damages Allegation Required When False Light Publication Also Defamatory But Not Libel on Its Face

§ 184.22 Supporting Contention That Defendant Invaded Plaintiff's Right to Privacy--By Appropriation of Name or Likeness--Under Common Law

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Right of Privacy

[b] Elements of Appropriation Tort

[c] Endorsement Not Required

[4] Additional Authorities

[a] Elements of Appropriation Tort

§ 184.23 Supporting Contention That Defendant Invaded Plaintiff's Right to Privacy--By Appropriation of Name, Voice, Signature, Photograph, or Likeness [Civ. Code § 3344]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

§ 184.24 Supporting Contention That Defendant Invaded Plaintiff's Right to Privacy--By Appropriation of Deceased Personality's Name, Voice, Signature, Photograph, or Likeness [Civ. Code § 3344.1]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

§ 184.25 Supporting Contention That Defendant Invaded Plaintiff's Right to Privacy--By Physical Intrusion

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Elements of Physical Intrusion Tort

[b] Right of Privacy

[c] Expectation of Privacy Need Not Be Expectation of Complete or Absolute Privacy

[d] Intruder's Motives Relevant to Offensiveness Determination

[e] No Broad Privilege for Intrusive Newsgathering

[f] Publication Not Required

[g] Unreasonably Intrusive Investigation

[h] Deceptive Investigation May Support Action for Intrusion

[4] Additional Authorities

[a] Elements of Physical Intrusion Tort

[b] Expectation of Privacy Need Not Be Expectation of Complete or Absolute Privacy

§ 184.25A Supporting Contention That Defendant Invaded Plaintiff's Right to Privacy--By Trespass, Use of Visual or Auditory Enhancement Equipment, or Assault, With Intent to Capture Image, Sound Recording, or Other Physical Impression of Plaintiff [Civ. Code § 1708.8]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

§ 184.26 Opposing Contention That Defendant Invaded Plaintiff's Right to Privacy--No Disclosure to Public

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Disclosure to Public Required

[b] Creditor Informing Employer Not Sufficient Public Disclosure

[4] Additional Authorities

[a] Disclosure to Public Required

§ 184.27 Opposing Contention That Defendant Invaded Plaintiff's Right to Privacy--First Amendment Concerns [U.S. Const. amends. I, XIV] Regarding Publication of Publicly Gathered Information Outweigh Any Right to Privacy With Respect to Facts in Public Domain

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] No Right of Privacy in Public Information

[b] Voluntarily Assumed Pose in Public Place

[c] No Liability for Publication of Truthful Information Released to Public in Court Records

[d] No Liability for Newspaper's Publication of Lawfully Obtained Truthful Information Absent State Interest of Highest Order

[4] Additional Authorities

[a] No Right of Privacy in Public Information

[b] No Liability for Publication of Truthful Information Released to Public in Court Records

§ 184.28 Opposing Contention That Defendant Invaded Plaintiff's Right to Privacy--Disclosure or Intrusion Not Offensive to Reasonable Person

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Disclosure Must Be Offensive

[b] Intrusion Must be Offensive

[c] No Reasonable Expectation of Privacy

[4] Additional Authorities

[a] Disclosure Must Be Offensive

[b] No Reasonable Expectation of Privacy

§ 184.29 Opposing Contention That Defendant Invaded Plaintiff's Right to Privacy--Constitutional Protection for Newsworthy Matters

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Constitutional Protection for Newsworthy Matters

[b] Criteria for Newsworthiness

[c] Proof of Newsworthiness

[d] Proof of Offensiveness

[e] Reports of Crimes

[f] Nexus Requirement for Disclosures Concerning Involuntary Public Figures

[4] Additional Authorities

[a] Criteria for Newsworthiness

[b] Nexus Requirement for Disclosures Concerning Involuntary Public Figures

§ 184.30 Opposing Contention That Defendant Invaded Plaintiff's Right to Privacy--Waiver of Right by Public Figure

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities Forms

[3] Discussion of Authorities

[a] Waiver of Right

[b] Public Figure

[c] Public Officials and Candidates

[d] Relative of Public Figure

[4] Additional Authorities

[a] Waiver of Right

§ 184.31 Opposing Contention That Defendant Invaded Plaintiff's Right to Privacy--Statutory Duty to Disclose Information

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Duty to Disclose

§ 184.32 Opposing Contention That Defendant Invaded Plaintiff's Right to Privacy by Unauthorized Use of Deceased Personality's or Plaintiff's Photograph--Deceased Personality or Plaintiff Not Readily Identifiable [Civ. Code §§ 3344(b), 3344.1(i)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

§ 184.33 Opposing Contention That Defendant Invaded Plaintiff's Right to Privacy by Unauthorized Use of Plaintiff's Photograph--Plaintiff Member of Definable Group [Civ. Code § 3344(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

§ 184.34 Opposing Contention That Defendant Invaded Plaintiff's Right to Privacy by Unauthorized Use of Plaintiff's Photograph or Likeness--Incidental Use of Employee's Photograph or Likeness [Civ. Code § 3344(c)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

§ 184.35 Opposing Contention That Defendant Invaded Plaintiff's Right to Privacy by Unauthorized Use of Deceased Personality's or Plaintiff's Name, Voice, Signature, Photograph, or Likeness--Exempted Uses [Civ. Code §§ 3344(d), 3344.1]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Limitation on News Exemption Under Civ. Code § 3344

[4] Additional Authorities

[a] Exempted Uses

[b] Limitation on News Exemption Under Civ. Code § 3344

§ 184.36 Opposing Contention That Defendant Invaded Plaintiff's Right to Privacy by Unauthorized Use of Deceased Personality's or Plaintiff's Name, Voice, Signature, Photograph, or Likeness--Use in Commercial Medium Not Directly Connected With Commercial Sponsorship or Paid Advertising [Civ. Code §§ 3344(e), 3344.1(k)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Use in Commercial Medium Not Directly Connected With Commercial Sponsorship or Paid Advertising

[b] Publisher's Decisions on Content and Placement of Advertisements Protected by First Amendment

§ 184.37 Opposing Contention That Defendant Invaded Plaintiff's Right to Privacy by Unauthorized Use of Deceased Personality's or Plaintiff's Name, Voice, Signature, Photograph, or Likeness--Lack of Knowledge of Advertising Medium Defendant [Civ. Code §§ 3344(f), 3344.1(l)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

§ 184.37A Scope

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Immunities

[a] Prosecutorial Immunity Provides Complete Defense to Statutory Intrusion Claim

§ 184.38 Opposing Contention That Defendant Invaded Plaintiff's Right to Privacy by Unauthorized Use of Deceased Personality's or Plaintiff's Likeness--Freedom of Expression

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Freedom of Expression Protects Use of Celebrity Likeness

[4] Additional Authorities

[a] Freedom of Expression Protects Use of Celebrity Likeness

§ 184.39 Opposing Contention That Defendant Invaded Plaintiff's Right to Privacy--Investigation Not Unreasonable

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Investigation Not Unreasonable

[4] Additional Authorities

[a] Investigation Not Unreasonable

§ 184.40 Supporting Contention That Plaintiff Lacks Standing--No Invasion of Plaintiff's Own Privacy or Statutory Requirements for Transfer or Descent of Deceased Personality's Rights Not Satisfied [Civ. Code § 3344.1]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Right of Privacy as Generally Personal Right

[b] Relative Has No Right

[c] Deceased Personality's Rights Transferable or Descendible Only According to Statutory Requirements

§ 184.41 Supporting Contention That Plaintiff Lacks Standing--Business Entity Has No Right of Privacy

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Business Entity Has No Right of Privacy

§ 184.42 Opposing Contention That Plaintiff Lacks Standing--Invasion of Plaintiff's Own Privacy or Statutory Requirements for Transfer or Descent of Deceased Personality's Rights Are Satisfied [Civ. Code § 3344.1]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Relative Has Standing When Own Right Invaded

[b] Right to Use of Deceased Personality's Name, Voice, Signature, Photograph, or Likeness Is Descendible and Transferable

§ 184.43 Opposing Contention That Plaintiff Lacks Standing--Business Entity Suffering Economic Damages Has Action for Invasion of Privacy

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Business Entity Suffering Economic Damages May Bring Action for Invasion of Privacy

§ 184.44 Opposing Contention That Plaintiff May Seek Multiple Awards of Statutory Damages for Single Cause of Action Under Civ. Code § 3344

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Recovery of Statutory Damages Limited to Single Award of $750

§ 184.45 Supporting Contention That Single-Publication Rule Applies to Cause of Action for Appropriation of Likeness

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Single-Publication Rule Applicable to Appropriation Cause of Action

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18-184 California Points & Authorities § 184.01

§ 184.01 Scope of Chapter

This chapter contains points and authorities relating to invasion of privacy under the four torts traditionally included under the rubric of common law invasion of privacy. These four torts are (1) public disclosure of private facts, (2) publicity that places a person in a false light in the public eye, (3) intrusion on a person's seclusion or solitude or into private affairs, and (4) appropriation of a person's name or likeness for the defendant's advantage [*see Lugosi v. Universal Pictures (1979) 25 Cal. 3d 813, 819, 160 Cal. Rptr. 323, 603 P.2d 425* (main point abrogated by subsequent enactment of *Civ. Code § 3344.1*); *see* Prosser, *Privacy, 48 Cal. L. Rev. 383 (1960)*]. This part includes points and authorities supporting the contention that defendant invaded plaintiff's right to privacy by public disclosure of private facts [*see § 184.20*], by publicity placing plaintiff in a false light in the public eye [*see § 184.21*], by appropriation of plaintiff's name or likeness under the common law [*see § 184.22*], by appropriation of plaintiff's name, voice, signature, photograph, or likeness under *Civ. Code § 3344* [*see § 184.23*], by appropriation of a deceased personality's name, voice, signature, photograph, or likeness under *Civ. Code § 3344.1* [*see § 184.24*], by physical intrusion on plaintiff's solitude or private affairs under the common law [*see § 184.25*], and by intrusion to capture an image, sound recording, or other physical impression of the plaintiff under *Civ. Code § 1708.8* [*see § 184.25A*].

In addition, this part sets forth points and authorities opposing the contention that defendant invaded plaintiff's right to privacy for general use in resisting any of the four common law torts [*see §§ 184.26 -184.31*], for use in resisting the statutory appropriation torts under *Civ. Code § 3344, 3344.1* [*see §§ 184.32 -184.38*], and for use in resisting the physical intrusion tort [*see § 184.39*]. It also includes forms supporting the affirmative defense that plaintiff lacks standing to sue [*see §§ 184.40, 184.41*], and opposing that defense [*see §§ 184.42, 184.43*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsInvasion of PrivacyGeneral OverviewTortsIntentional TortsInvasion of PrivacyAppropriationGeneral OverviewTortsIntentional TortsInvasion of PrivacyFalse Light PrivacyGeneral OverviewTortsIntentional TortsInvasion of PrivacyIntrusionGeneral OverviewTortsIntentional TortsInvasion of PrivacyPublic Disclosure of Private FactsGeneral Overview

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18-184 California Points & Authorities § 184.02

§ 184.02 Governing Law

The right of privacy under the four traditional torts is generally governed by case law. However, invasion by appropriation of a person's name or likeness is governed in part by *Civ. Code § 3344*, which authorizes a cause of action for the unauthorized commercial use of a person's name, voice, signature, photograph, or likeness. *Civ. Code § 3344.1* governs the use of a deceased personality's name, voice, signature, photograph, or likeness. The first case in California to recognize the right of privacy was *Melvin v. Reid (1931) 112 Cal. App 285, 297 P. 91* . The California Supreme Court followed suit in *Gill v. Curtis Publishing Co. (1952) 38 Cal. 2d 273, 239 P.2d 630* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsInvasion of PrivacyGeneral OverviewTortsIntentional TortsInvasion of PrivacyAppropriationGeneral OverviewTortsIntentional TortsInvasion of PrivacyAppropriationDefensesTortsIntentional TortsInvasion of PrivacyFalse Light PrivacyGeneral OverviewTortsIntentional TortsInvasion of PrivacyIntrusionGeneral OverviewTortsIntentional TortsInvasion of PrivacyPublic Disclosure of Private FactsGeneral Overview

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18-184 California Points & Authorities § 184.03

§ 184.03 Related Pleading and Practice Chapters

For a discussion and forms relating to invasion of privacy under the four common law torts, see California Forms of Pleading and Practice, Ch. 429, *Privacy* (Matthew Bender).

For a discussion and forms relating to the requirements of actual malice and demand for retraction under Civ. Code § 48a, see California Forms of Pleading and Practice, Ch. 340, *Libel and Slander* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsDefamationRemediesRetractionsTortsIntentional TortsInvasion of PrivacyGeneral OverviewTortsIntentional TortsInvasion of PrivacyAppropriationGeneral OverviewTortsIntentional TortsInvasion of PrivacyFalse Light PrivacyGeneral OverviewTortsIntentional TortsInvasion of PrivacyIntrusionGeneral OverviewTortsIntentional TortsInvasion of PrivacyPublic Disclosure of Private FactsGeneral Overview

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18-184 California Points & Authorities § 184.04

§ 184.04 Related Points and Authorities Chapters

For memoranda of points and authorities relating to invasion of privacy, see Ch. 184, *Privacy: State Constitutional Rights* .

For memoranda of points and authorities relating to privacy of information, see Ch. 185, *Privacy: Collection, Dissemination and Inspection of Information* .

For memoranda of points and authorities relating to statutory privileges, pursuant to *Civ. Code § 47*, for publishing certain types of information, and relating to the requirements of malice and demand for retraction under *Civ. Code § 48a*, see Ch. 142, *Libel and Slander (Defamation)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsInvasion of PrivacyGeneral OverviewTortsIntentional TortsInvasion of PrivacyAppropriationGeneral OverviewTortsIntentional TortsInvasion of PrivacyFalse Light PrivacyGeneral OverviewTortsIntentional TortsInvasion of PrivacyIntrusionGeneral OverviewTortsIntentional TortsInvasion of PrivacyPublic Disclosure of Private FactsGeneral Overview

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18-184 California Points & Authorities §§ 184.05-184.19

[Reserved]

§§ 184.05[Reserved]

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18-184 California Points & Authorities § 184.20

§ 184.20 Supporting Contention That Defendant Invaded Plaintiff's Right to Privacy--By Public Disclosure of Private Facts

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT SHOULD BE HELD LIABLE FOR INVASION OF PRIVACY BECAUSE DEFENDANT PUBLICLY DISCLOSED PRIVATE FACTS ABOUT PLAINTIFF THAT WOULD BE OFFENSIVE TO A REASONABLE PERSON.

A. Right of Privacy. The right of privacy encompasses the tort of public disclosure of private facts (*see Lugosi v. Universal Pictures (1979) 25 Cal. 3d 813, 819, 160 Cal. Rptr. 323, 603 P.2d 425* (main point now abrogated by *Civ. Code § 3344.1*).

B. Elements of Public Disclosure Tort. The tort of public disclosure of private facts consists of (1) a public disclosure (2) of private facts (3) that would be offensive and objectionable to a reasonable person (*see Forsher v. Bugliosi (1980) 26 Cal. 3d 792, 808-809, 163 Cal. Rptr. 628, 608 P.2d 716*).

C. Public Disclosure Defined. Public disclosure means a communication to the public in general or to a large number of people as distinguished from one individual or a few (*Kinsey v. Macur (1980) 107 Cal. App. 3d 265, 270, 165 Cal. Rptr. 608*).

D. Private Facts Defined. The facts disclosed must concern information that is private and not already in the public domain (*Diaz v. Oakland Tribune, Inc. (1983) 139 Cal. App. 3d 118, 131, 188 Cal. Rptr. 762*).

[*Optional*] **E. Revelations About Decedent Family Member Invaded Privacy Rights of Survivors.** The relatives of a decedent may state a cause of action for public disclosure of private facts based on revelations about a decedent family member when that conduct invades the privacy of those surviving relatives (*Catsouras v. Department of California Highway Patrol (2010) 181 Cal. App. 4th 856, 870-874, 104 Cal. Rptr. 3d 352*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that defendant should be held liable for invasion of privacy because defendant publicly disclosed private facts about plaintiff.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue covered. For example, this form may be used in opposition to a motion for summary judgment when defendant asserts that plaintiff has failed to allege or prove a cause of action for invasion of privacy. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion showing that the elements of the public disclosure tort were met: that the disclosure was to the public, that the facts disclosed were private, and that the disclosure was offensive and objectionable to a reasonable person of ordinary sensibilities.

[b] Elements of Cause of Action

The public disclosure of private facts tort is generally deemed to consist of public disclosure of private facts that are offensive and objectionable to a reasonable person [*Forsher v. Bugliosi (1980) 26 Cal. 3d 792, 808-809, 163 Cal. Rptr. 628, 608 P.2d 716]* . However, a fourth element of lack of legitimate public concern is sometimes considered part of the cause of action In such a case, legitimate public concern appears to be equivalent to newsworthiness [*Diaz v. Oakland Tribune, Inc. (1983) 139 Cal. App. 3d 118, 126, 188 Cal. Rptr. 762* ; *see § 184.29*].

[c] Related Pleading and Practice Forms

For a form of complaint for damages and injunctive relief for public disclosure of private facts and forms of affirmative defenses, see California Forms of Pleading and Practice, Ch. 429, *Privacy* (Matthew Bender).

[d] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 184.26 -184.31* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Right of Privacy

Lugosi v. Universal Pictures *(1979) 25 Cal. 3d 813, 160 Cal. Rptr. 323, 603 P.2d 425* , was an action brought by the widow and surviving son of actor Bela Lugosi for appropriation by defendant of the actor's likeness. The appropriation arose out of several licensing agreements made by defendant for the use of the character Count Dracula, as portrayed by Lugosi in the movie "Dracula." Plaintiffs sought to recover the profits made by defendant from the licensing agreements. The trial court ruled that Lugosi had a property or proprietary right in his name and likeness that descended to his heirs on his death. Defendant appealed.

The Supreme Court reversed, holding that the right to exploit name and likeness is personal to the artist and must be exercised, if at all, by him or her during his or her lifetime (*25 Cal. 3d 813, 824)* . The Court found that the essence of the action was appropriation of Lugosi's "right of value" in his name and/or likeness, which was a right protectable within the law of privacy (*25 Cal. 3d 813, 819)* . The Court stated that the right of privacy comprises four separate torts, which are: (1) public disclosure of private facts; (2) publicity which places a person in a false light in the public

eye; (3) intrusion on a person's seclusion or solitude or into private affairs; and (4) appropriation of a person's name or likeness for the defendant's advantage (*25 Cal. 3d 813, 819)* .

NOTE:

Although the Court's characterization of the four torts comprising the right of privacy remains valid, the actual holding of the case appears to have been abrogated by the enactment of former Civ. Code § 990 in 1984 [*now see Civ. Code § 3344.1*] concerning the use of a deceased personality's name, voice, signature, photograph, or likeness without consent [*see §§ 184.40, 184.42*].

[b] Elements of Public Disclosure Tort

Forsher v. Bugliosi *(1980) 26 Cal. 3d 792, 163 Cal. Rptr. 628, 608 P.2d 716* , was an action for invasion of privacy and libel and slander against the authors and publishers of the book "Helter Skelter," about the Manson Family, which referred to plaintiff in connection with an unsolved murder. Defendants' demurrer was sustained and a judgment of dismissal entered. Plaintiff appealed.

Although the Supreme Court affirmed, holding that the complaint failed to state a cause of action for invasion of privacy (*26 Cal. 3d 792, 807, 813)* , it listed the three required elements for the public disclosure tort, which are: (1) a public disclosure (2) of facts that are private and (3) which is offensive and objectionable to a reasonable person of ordinary sensibilities (*26 Cal. 3d 792, 808-809)* . Plaintiff's cause of action was deficient, the Court found, because it concerned information that was constitutionally protected as newsworthy (*26 Cal. 3d 792, 812-813)* .

[c] Public Disclosure Defined

Kinsey v. Macur *(1980) 107 Cal. App. 3d 265, 165 Cal. Rptr. 608* , was an action for invasion of privacy under both the public disclosure and the false light torts. The case concerned letters sent by defendant to plaintiff and his family, neighbors, and associates shortly after plaintiff ended his relationship with defendant. The letters questioned plaintiff's character and falsely accused him of murder and rape. Judgment was entered for plaintiff and defendant appealed.

The court of appeal affirmed, holding, among other things, that there was a sufficient disclosure to the public in the distribution of the letters to "perhaps twenty [people] at most" in several states who were unconnected either professionally or socially except for their acquaintance with plaintiff (*107 Cal. App. 3d 265, 272)* . The court stated that, except in the physical intrusion tort, all of the torts for invasion of privacy must be accompanied by publicity in the sense of a communication to the public in general or to a large number of persons (*107 Cal. App. 3d 265, 270)* .

[d] Private Facts Defined

The facts and procedural background of ***Diaz v. Oakland Tribune, Inc.*** *(1983) 139 Cal. App. 3d 118, 188 Cal. Rptr. 762* , are discussed in § 124.29. The court of appeal reversed a judgment for plaintiff, finding error in the jury instructions (*139 Cal. App. 3d 118, 127-128)* . However, the court went on to decide defendants' remaining contentions, which included the argument that plaintiff's original gender was a matter of public record. The court held that, generally speaking, material that is already in the public domain is not private, and its publication is protected (*139 Cal. App. 3d 118, 131)* . But the court found that plaintiff's sexual identity was not part of any public record and was in fact a private matter (*139 Cal. App. 3d 118, 132)* .

[e] Revelations About Decedent Family Member Invaded Privacy Rights of Survivors

In *Catsouras v. Department of California Highway Patrol (2010) 181 Cal. App. 4th 856, 104 Cal. Rptr. 3d 352* , plaintiffs were the parents and siblings of an 18-year-old girl who died when she was decapitated in an automobile accident. Officers of the California Highway Patrol investigated the accident, took control of the accident scene and decedent's remains, and took photographs of both. After the photographs were transmitted to the CHP computer system,

two officers e-mailed 9 of the photographs of the decedent to their friends and family members allegedly as a Halloween prank because of the gruesome nature of the photographs. This initial dissemination by the officers, which served no official investigative or public interest purpose but was done from sheer morbidity or gossip, started a chain reaction that resulted in thousands of Internet sites picking up the images and some of the plaintiffs receiving personal e-mails from strangers taunting them with the gruesome photographs. Plaintiffs sued the Highway Patrol and the two officers for various causes of action, including invasion of privacy based on public disclosure of private facts, negligence, and intentional infliction of emotional distress. The trial court sustained the officers' demurrer to all causes of action. Plaintiffs appealed.

The court of appeal reversed in part. The court of appeal held that plaintiffs had stated a cause of action for invasion of privacy based on the public disclosure of private facts. The court noted that under existing case law, as the right of privacy is a personal right, in cases in which the disclosure involves the details of the life of a person who is deceased, the right of privacy protected by the cause of action for public disclosure of private facts generally dies along with that person. However, the court concluded that the relatives of a decedent may be able to state a cause of action for revelations about a decedent family member when that conduct invades the privacy of those surviving relatives. In the case before it, the court held that the parents and siblings of the decedent had stated a cause of action against the CHP officers who e-mailed the photographs of the decedent taken at the accident scene to the officers' friends and family members as a Halloween prank. The court noted that dissemination of the pictures served no investigative or public interest purpose, but rather was done through sheer morbidity and sensationalism. Under these facts, the court concluded that plaintiffs, who had their own privacy rights in the death images of their family member, had stated a cause of action for invasion of privacy (*181 Cal. App. 4th 856, 870-874)* .

[4] Additional Authorities

[a] Private Facts Defined

In *M. G. v. Time Warner, Inc. (2001) 89 Cal. App. 4th 623, 107 Cal. Rptr. 2d 504* , former players and coaches on a Little League baseball team brought suit alleging invasion of privacy and other causes of action against media defendants for their use of a team photograph in their magazine and television stories concerning adult coaches who sexually molest youths playing team sports. Although this particular photograph was chosen because the team's manager had pleaded guilty to molesting five children he had coached, some team members and coaches shown in the photograph were not involved in the molestation, but had subsequently been subject to ridicule because the publication of the photograph identified them as members of the team. The defendants brought a special motion to strike pursuant to *Code Civ. Proc. § 425.16*. The court of appeal affirmed the trial court's denial of the motion to strike on the grounds that the plaintiffs had established a probability of success on the merits of the privacy claims. Although the defendants argued that the photograph showing the plaintiffs was not a private fact and met the test of newsworthiness, the court of appeal held that a trier of fact could find to the contrary. The identities of the plaintiff as coaches or players on the molesting manager's team had not been revealed in coverage of the molestation case until the publication of the photograph, which served to publicly link the plaintiffs with child molestation as either victims, perpetrators, or collaborators. Therefore, although the information provided by the photograph was not secret, the photograph was intended for private use, and the plaintiffs' membership on the team was a private fact that had not previously been made widely public (*89 Cal. App. 4th 623, 632-633)* . Moreover, because state law, public policy, and journalistic ethics protect the identities of minors and the victims of sex crimes, a trier of fact could find that the photograph was not newsworthy (*89 Cal. App. 4th 623, 635-636)* .

In *Times Mirror Co. v. Superior Court (1988) 198 Cal. App. 3d 1420, 244 Cal. Rptr. 556* , a witness to a murder brought an invasion-of-privacy action against a newspaper for publishing her name in the early stages of the criminal investigation, after efforts had been made by her and on her behalf to protect her identity. The court of appeal affirmed the trial court's denial of the defendant's motion for summary judgment, holding that a factual question remained regarding whether the plaintiff's identity was a private fact. Although names may appear in public records and are

normally public information, the media may not print names in connection with sensitive information with impunity. Even when particular facts about an individual can be printed, the person's identity may be treated separately and not be subject to publication (*198 Cal. App. 3d 1420, 1428)* .

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18-184 California Points & Authorities § 184.21

§ 184.21 Supporting Contention That Defendant Invaded Plaintiff's Right to Privacy--By Publicity Placing Plaintiff in False Light

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT SHOULD BE HELD LIABLE FOR INVASION OF PRIVACY BECAUSE DEFENDANT CREATED PUBLICITY THAT PLACED PLAINTIFF IN A FALSE LIGHT IN THE PUBLIC EYE.

A. Right of Privacy. The right of privacy encompasses the tort involving publicity that places a person in a false light in the public eye (*see Lugosi v. Universal Pictures (1979) 25 Cal. 3d 813, 819, 160 Cal. Rptr. 323, 603 P.2d 425* (main point now abrogated by *Civ. Code § 3344.1*).

B. Elements of False Light Publicity Tort. The tort of false light publicity, similar to an action for libel, consists of (1) publicity (2) which places a person in a false light in the public eye, (3) would be objectionable to a reasonable person, (4) was done with malice, and (5) when required, for which plaintiff has complied with the requirement of *Section 48a of the Civil Code* of a demand for retraction (*see Briscoe v. Reader's Digest Ass'n, Inc. (1971) 4 Cal. 3d 529, 543, 93 Cal. Rptr. 866, 483 P.2d 34* (malice; *Civ. Code § 48a* applicable); *Gill v. Curtis Publishing Co. (1952) 38 Cal. 2d 273, 280, 239 P.2d 630* (offensiveness); *Werner v. Times-Mirror Co. (1961) 193 Cal. App. 2d 111, 120-123, 14 Cal. Rptr. 208* (publicity; *Civ. Code § 48a* applicable)).

C. Publicity Defined. Publicity means a communication to the public in general or to a large number of people, rather than merely to a few individuals (*Kinsey v. Macur (1980) 107 Cal. App. 3d 265, 270, 165 Cal. Rptr. 608*).

D. False Light Defined. False light means a false but not necessarily defamatory position in the public's view (*Werner v. Times-Mirror Co. (1961) 193 Cal. App. 2d 111, 119, 14 Cal. Rptr. 208*).

E. Malice Defined. Malice means proof that defendant published the material with knowledge of its falsity or with reckless disregard for its truth (*see Cantrell v. Forest City Publ'g Co. (1974) 419 U.S. 245, 251-252, 95 S. Ct. 465, 42*

L. Ed. 2d 419 ; *Time v. Hill (1967) 385 U.S. 374, 386, 87 S. Ct. 534, 17 L. Ed. 2d 456*).

[*Optional*] **F. Demand for Retraction Requirements.** In actions concerning publications in a newspaper or by a radio broadcast, in order to recover more than special damages, plaintiff must make a written demand for a retraction within 20 days after knowledge of the offensive publication or broadcast. If a correction is demanded within that period and is not published or broadcast in substantially as conspicuous a manner in said newspaper or on said broadcasting station as were the offending statements, in a regular issue thereof published or broadcast within three weeks after service of the demand, plaintiff, if he or she pleads and proves such notice, demand, and failure to correct, and if his or her cause of action is maintained, may recover general and special damages and, on proof that defendant made the broadcast with actual malice, exemplary damages (*Civ. Code § 48a(1), (2)*; *see Briscoe v. Reader's Digest Ass'n, Inc. (1971) 4 Cal. 3d 529, 543, 93 Cal. Rptr. 866, 483 P.2d 34*).

[*Optional*] **G. Special Damages Allegation Required When False Light Publication Also Defamatory But Not Libel on Its Face.** The requirement under *Section 45a of the Civil Code* that special damages be pleaded and proven in actions involving defamatory language not libelous on its face applies to a false-light action based on a publication that is defamatory within the meaning of that statute (*Fellows v. National Enquirer, Inc. (1986) 42 Cal. 3d 234, 247-251, 228 Cal. Rptr. 215, 721 P.2d 97*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that defendant should be held liable for invasion of privacy because defendant created publicity that placed plaintiff in a false light in the public eye. Optional Paragraph F should be used if the action involves publication in a newspaper or radio broadcast to show the that plaintiff has satisfied the requirements of the retraction statute [*see Civ. Code § 48a*]. Optional Paragraph G should be used if the action involves a publication that is also defamatory.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue covered. For example, this form may be used in opposition to a motion for summary judgment when defendant asserts that plaintiff has failed to allege or prove a cause of action for invasion of privacy. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion showing that the elements of the false light publicity tort were met: that the disclosure was to the public, that the facts disclosed placed plaintiff in a false light, that the disclosure was offensive and objectionable to a reasonable person of ordinary sensibilities, and that defendant acted with malice. In addition counsel should show that the demand for retraction requirements are not applicable or if they do apply, either that plaintiff made a timely demand and that defendant failed to retract or that, if plaintiff failed to make the demand or if defendant did retract, plaintiff suffered special damages. If defendant failed to retract in response to plaintiff's timely request and exemplary damages are sought, counsel should also show actual malice on defendant's part in making the publication or broadcast [*see Civ. Code § 48a(2), (4)(d)*]. If the publication was also defamatory, counsel should also show either that the publication was libelous on its face (and that therefore special damages need not be alleged), or that plaintiff in fact alleged special damage as a proximate result of the publication [*Civ. Code § 45a*].

[b] Related Pleading and Practice Forms

For further discussion and forms relating to the elements of malice, compliance with the demand for retraction requirements, and special damage requirements, see California Forms of Pleading and Practice, Ch. 340, *Libel and Slander* (Matthew Bender).

[c] Related Points and Authorities

For other points and authorities relating to the elements of malice, compliance with the demand for retraction requirements, and special damage requirements, see Ch. 142, *Libel and Slander (Defamation)*.

[d] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 184.26 -184.31* may be used to oppose the contentions supported by these points and authorities. In addition, memoranda of points and authorities in Ch. 142, *Libel and Slander (Defamation)*, relating to the elements of malice, compliance with the demand for retraction requirements, and special damage requirements, may, with modifications, be used to oppose this form. Regarding the malice requirement, however, the distinction drawn in actions for defamation between private individual plaintiffs (need not prove malice) and public official or public figure plaintiffs (must prove malice) has not been held applicable to actions for invasion of privacy, in which all plaintiffs must prove malice [*see Cantrell v. Forest City Publ'g Co. (1974) 419 U.S. 245, 250-251, 95 S. Ct. 465, 42 L. Ed. 2d 419* (invasion of privacy action); *Gertz v. Welch (1974) 418 U.S. 323, 332, 347-349, 94 S. Ct. 2997, 41 L. Ed. 2d 789* (defamation action)].

[3] Discussion of Authorities

[a] Right of Privacy

The facts and procedural background of ***Lugosi v. Universal Pictures*** *(1979) 25 Cal. 3d 813, 160 Cal. Rptr. 323, 603 P.2d 425* , are discussed in *§ 184.20[3][a]*. The Court stated that the right of privacy comprises four separate torts, which are: (1) public disclosure of private facts; (2) publicity which places a person in a false light in the public eye; (3) intrusion on a person's seclusion or solitude or into private affairs; and (4) appropriation of a person's name or likeness for the defendant's advantage (*25 Cal. 3d 813, 819)* .

NOTE:

Although the Court's characterization of the four torts compromising the right of privacy remains valid, the actual holding of the case appears to have been abrogated by the enactment in 1984 of former Civ. Code § 990 [*now see Civ. Code § 3344.1*] concerning the use of a deceased personality's name, voice, signature, photograph, or likeness without consent [*see §§ 184.40, 184.42*].

[b] Elements of False Light Publicity Tort

Briscoe v. Reader's Digest Ass'n, Inc. *(1971) 4 Cal. 3d 529, 93 Cal. Rptr. 866, 483 P.2d 34* , was an action for invasion of privacy under both the public disclosure and the false light publicity torts. The case arose out of defendant's publication of an article in its magazine that identified plaintiff as a hijacker and did not indicate that the crime occurred 11 years earlier. Defendant's demurrer was sustained, and plaintiff appealed from the judgment entered.

The Supreme Court reversed, finding that plaintiff had stated a valid cause of action for the public disclosure tort, and could amend to state a cause of action for the false light tort (*4 Cal. 3d 529, 543-544)* . The Court found that a false light publicity cause of action is in substance equivalent to a libel claim and must meet the same requirements as a libel claim, including proof of malice and fulfillment of the demand for retraction requirements of *Civ. Code § 48a*. Because plaintiff had failed to comply with the requirements of *Civ. Code § 48a*, the Court ruled, he could amend his complaint to state a valid cause of action for false light publicity only if he alleged special damages (*4 Cal. 3d 529, 543)* . The case was remanded with directions to overrule the general demurrer and to rule on the special demurrer (*4 Cal. 3d 529, 544)* .

NOTE:

In *Gates v. Discovery Communications, Inc. (2004), 34 Cal. 4th 679, 692-696, 21 Cal. Rptr. 3d 663,*

101 P.3d 552 , relying on United States Supreme Court precedent, the California Supreme Court overruled *Briscoe* to the extent that *Briscoe* allowed an invasion of privacy action to be predicated on a media defendant's publication of true information obtained from official public records of a criminal proceeding. The Court in *Gates* also concluded that the passage of time did not lessen the constitutional protection afforded to the media's right to publish these facts [*Gates v. Discovery Communications, Inc. (2004), 34 Cal. 4th 679, 693-696, 21 Cal. Rptr. 3d 663, 101 P.3d 552* ; *see § 184.27*].

Gill v. Curtis Publishing Co. *(1952) 38 Cal. 2d 273, 239 P.2d 630* , was an action by a husband and wife against a magazine for invasion of privacy. The case concerned defendants' use of a photograph of plaintiffs with their arms around one another, taken in a public place, but without plaintiffs' knowledge or consent. Defendants used the photograph in an article about different kinds of love as an illustration of love at first sight, which it characterized as a bad risk based solely on sexual attraction and as the "wrong" kind of love. Defendants' motion for judgment on the pleadings was granted, and plaintiffs appealed.

The Supreme Court reversed, holding that the complaint stated a cause of action (*38 Cal. 2d 273, 281-282)* . The Court stated that liability for invasion of privacy is imposed only if defendant's conduct is offensive to persons of ordinary sensibilities (*38 Cal. 2d 273, 280)* . It is not unreasonable, the Court found, to believe that defendants' depiction of plaintiffs was seriously humiliating and disturbing to plaintiffs' sensibilities (*38 Cal. 2d 273, 280)* .

Werner v. Times-Mirror Co. *(1961) 193 Cal. App. 2d 111, 14 Cal. Rptr. 208* , was an action for invasion of privacy based on false and misleading statements about prior events in plaintiff's life that defendant published in a newspaper article announcing plaintiff's engagement to be married. Defendant's demurrer was sustained and a judgment of dismissal was entered. Plaintiff appealed.

On appeal, the court affirmed, holding that no cause of action was stated for invasion of privacy (*193 Cal. App. 2d 111, 123)* . In discussing the false light publicity tort, the court stated that it involves a publication that puts plaintiff in a false but not necessarily defamatory position in the public eye (*193 Cal. App. 2d 111, 119)* . The court noted that this tort requires publicity, like that required in the public disclosure tort (*193 Cal. App. 2d 111, 120)* . Plaintiff could not recover under the false light tort, the court ruled, because he had failed to comply with the demand for retraction requirements of *Civ. Code § 48a* (*193 Cal. App. 2d 111, 123)* . The court also found that plaintiff had failed to prove a cause of action under the public disclosure tort (*193 Cal. App. 2d 111, 118)* .

[c] Publicity Defined

The facts and procedural background of ***Kinsey v. Macur*** *(1980) 107 Cal. App. 3d 265, 165 Cal. Rptr. 608* , are discussed in *§ 184.20[3][c]*. The court ruled that except in the physical intrusion tort, all of the torts for invasion of privacy must be accompanied by publicity in the sense of a communication to the public in general or to a large number of persons (*107 Cal. App. 3d 265, 270)* .

[d] False Light Defined

The facts and procedural background of ***Werner v. Times-Mirror Co.*** *(1961) 193 Cal. App. 2d 111, 14 Cal. Rptr. 208* , are discussed in *§ 184.21[3][b]*. In that case, the court explained the nature of the false light in the false light publicity tort as a disclosure putting plaintiff in a false but not necessarily defamatory position in the public eye (*193 Cal. App. 2d 111, 119)* .

[e] Malice Defined

Cantrell v. Forest City Publ'g Co. *(1974) 419 U.S. 245, 95 S. Ct. 465, 42 L. Ed. 2d 419* , was an invasion of privacy action by a widow and her children for a newspaper article that placed them in a false light in the public eye through its

conceded inaccuracies and untruths. The story focused on the impact of the husband's death in a bridge collapse, falsely portraying the widow's reaction and the family's financial condition. The claims for punitive damages were struck, and the jury ultimately returned a verdict for plaintiffs. The court of appeal reversed, finding that the trial court's ruling that plaintiffs failed to prove the malice necessary for punitive damages--that is, hatred or ill will--was a finding that plaintiffs had failed to prove malice necessary for liability--that is, knowledge of falsity or reckless disregard for the truth.

The Supreme Court, on certiorari, reversed. The Court held that the malice necessary for liability in a false light invasion of privacy action is proof that defendants published the material with knowledge of its falsity or with reckless disregard for the truth, and that plaintiffs had proven this element (*419 U.S. 245, 251-253)* . The trial court's finding of no malice for punitive damages was limited to a determination that plaintiffs had failed to prove defendants' hatred or ill will toward plaintiffs (*419 U.S. 245, 251-252)* . The Court also found that the publisher was vicariously liable with the writer, and the judgment was reversed with directions to the court of appeal to enter a judgment affirming the trial court's judgment (*419 U.S. 245, 254)* .

Time v. Hill *(1967) 385 U.S. 374, 87 S. Ct. 534, 17 L. Ed. 2d 456* , was an action under a New York statute for a false light type of invasion of privacy. The case concerned an article in Life magazine that falsely reported that a new Broadway play portrayed plaintiff's family's experience in being held hostage by three escaped convicts. Judgment was awarded to plaintiff and several appeals followed. The judgment was ultimately affirmed by the court of appeal.

The Supreme Court reversed, holding that constitutional freedoms of speech and press precluded the application of the statute to redress false reports of matters of public interest in the absence of proof that defendant published the article with knowledge of its falsity or in reckless disregard of the truth (*385 U.S. 374, 387-388)* . Because the jury instructions did not predicate liability on this standard, the judgment was set aside and the case remanded (*385 U.S. 374, 394, 398)* .

[f] Demand for Retraction Requirements

The facts and procedural background of ***Briscoe v. Reader's Digest Ass'n, Inc.*** *(1971) 4 Cal. 3d 529, 93 Cal. Rptr. 866, 483 P.2d 34* , are discussed in *§ 184.21[3][b]*. In reversing the judgment entered after defendant's demurrer was sustained, the Supreme Court found that plaintiff had stated a valid cause of action for a public disclosure tort and could amend to state a cause of action for the false light tort (*4 Cal. 3d 529, 543-544)* . The Court found that a false light publicity cause of action is in substance equivalent to a libel claim and must meet the same requirements as a libel claim, including proof of malice and fulfillment of the demand for retraction requirements of *Civ. Code § 48a*. Because plaintiff had failed to comply with the requirements of *Civ. Code § 48a*, he could amend his complaint to state a valid cause of action for false light publicity only if he alleged special damages (*4 Cal. 3d 529, 543)* . The case was remanded with directions to overrule the general demurrer and to rule on the special demurrer (*4 Cal. 3d 529, 544)* .

The facts and procedural background of ***Kinsey v. Macur*** *(1980) 107 Cal. App. 3d 265, 165 Cal. Rptr. 608* are discussed in *§ 184.20[3][c]*. The court of appeal held that plaintiff was not required to comply with the demand for retraction requirements of *Civ. Code § 48a* when he based his action on both the public disclosure and false light publicity torts (*107 Cal. App. 3d 265, 275-276)* . The court found that subjecting the plaintiff to the retraction requirements would only have exacerbated the invasion of his privacy, given the nature of the disclosures and the manner of their distribution (*107 Cal. App. 3d 265, 276)* .

[g] Special Damages Allegation Required When False Light Publication Also Defamatory But Not Libel on Its Face

In ***Fellows v. National Enquirer, Inc.*** *(1986) 42 Cal. 3d 234, 228 Cal. Rptr. 215, 721 P.2d 97* , plaintiff, a film producer, brought an action against a newspaper for libel and false light invasion of privacy. Both causes of action

involved the publication of an article stating that plaintiff was dating an actress, which plaintiff alleged was defamatory based on facts extrinsic to the article, specifically that plaintiff was married, and therefore the article would be understood by those who knew of his marital status to mean that plaintiff was engaged in improper or immoral conduct. In the course of a series of amended complaints and demurrers based on the insufficiency of the special damages allegations for both the libel and false light counts, plaintiff conceded that no special damages had been suffered. In his final complaint, plaintiff did not reassert his cause of action for libel, but continued to allege false light invasion of privacy, maintaining that special damages were not a prerequisite to such an action. The trial court sustained a demurrer to the complaint and entered an order of dismissal. On appeal, the court of appeal reversed the dismissal order.

On review, the Supreme Court of California reversed the court of appeal. The Court observed that under *Civ. Code § 45a*, language that is defamatory only by reference to extrinsic facts is not actionable unless the plaintiff can prove special damages. The issue before the Court was whether the special damages rule of *Civ. Code § 45a* applies when a defamatory publication gives rise to an action for false light invasion of privacy rather than libel. The Court concluded that when a false light action is based on a publication that is defamatory within the meaning of *Civ. Code § 45a*, pleading and proof of special damages are required (*42 Cal. 3d 234, 236)* . In reaching its conclusion, the Court considered prior decisions holding that because a false light cause of action is in substance equivalent to a libel claim, it should be subject to the same restrictions and requirements of a libel claim (*42 Cal. 3d 234, 242-244)* . The Court observed that *Civ. Code § 45a* manifests a legislative determination that liability imposed for a publication that affords no warning of its defamatory nature, and has not caused actual pecuniary injury, would place too great a burden on the editorial process and would hamper the free dissemination of the news. The fact that plaintiff had deleted injury to reputation from the prayer and was seeking to recover only for injury to his or her sensibilities does not alter the legislative judgment that such injuries alone are inadequate to outweigh the burden on a free press (*42 Cal. 3d 234, 250)* .

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18-184 California Points & Authorities § 184.22

§ 184.22 Supporting Contention That Defendant Invaded Plaintiff's Right to Privacy--By Appropriation of Name or Likeness--Under Common Law

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT SHOULD BE HELD LIABLE FOR INVASION OF PRIVACY BECAUSE DEFENDANT APPROPRIATED PLAINTIFF'S NAME OR LIKENESS, WITHOUT PLAINTIFF'S CONSENT, FOR DEFENDANT'S ADVANTAGE.

A. Right of Privacy. The right of privacy encompasses the tort of unauthorized appropriation of a person's name or likeness for defendant's advantage (*see Lugosi v. Universal Pictures (1979) 25 Cal. 3d 813, 819, 160 Cal. Rptr. 323, 603 P.2d 425* (main point now abrogated by *Civ. Code § 3344.1*).

B. Elements of Appropriation Tort. At common law, the tort of appropriation of name or likeness consists of (1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury (*Eastwood v. Superior Court (1983) 149 Cal. App. 3d 409, 417, 198 Cal. Rptr. 342* ; *Williams v. Weisser (1969) 273 Cal. App. 2d 726, 742, 78 Cal. Rptr. 542*).

[*Optional*] **C. Endorsement Not Required.** The plaintiff is not required to show that his or her name or likeness was used to endorse defendant's product or service in order to state a cause of action for invasion of privacy by appropriation (*Eastwood v. Superior Court (1983) 149 Cal. App. 3d 409, 418-421, 198 Cal. Rptr. 342*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that defendant should be held liable for invasion of privacy under common law because defendant appropriated plaintiff's name or likeness, without plaintiff's consent, for defendant's advantage. Optional Paragraph C should be used when plaintiff's name or likeness has not been

used to endorse a product or service of defendant but has nevertheless been appropriated to defendant's advantage. Counsel may wish to combine these points and authorities with points and authorities supporting the liability of defendant for appropriation under *Civ. Code § 3344* [*see § 184.23*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue covered. For example, this form may be used in opposition to a motion for summary judgment when defendant asserts that plaintiff has failed to allege or prove a cause of action for invasion of privacy. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion showing that the elements of the appropriation tort were met: that defendant used plaintiff's name, likeness, or personality, without plaintiff's consent, for defendant's advantage, with resulting damage to plaintiff.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 184.26 -184.31* may be used to oppose the contentions supported by these points and authorities.

[3] Discussion of Authorities

[a] Right of Privacy

Lugosi v. Universal Pictures *(1979) 25 Cal. 3d 813, 160 Cal. Rptr. 323, 603 P.2d 425* , is discussed in *§ 184.20[3][a]*.

NOTE:

Although the Court's characterization of the four torts compromising the right of privacy remains valid, the actual holding of the case appears to have been abrogated by the enactment in 1984 of former Civ. Code § 990 [*now see Civ. Code § 3344.1*] concerning the use of a deceased personality's name, voice, signature, photograph, or likeness without consent [*see §§ 184.40, 184.42*].

[b] Elements of Appropriation Tort

Eastwood v. Superior Court *(1983) 149 Cal. App. 3d 409, 198 Cal. Rptr. 342* , was an action for invasion of privacy by appropriation under the common law and under *Civ. Code § 3344* (appropriation for purposes of advertising or soliciting purchases), and invasion by false light publicity. The case concerned the use by defendant, real party in interest, National Enquirer, of the name and photograph of plaintiff, actor Clint Eastwood. Plaintiff's name and photograph were used on the cover and in an article in defendant's magazine, and in related television advertisements for the magazine. The publication falsely reported plaintiff's love affairs with two other celebrities. Defendant's demurrer to the appropriation cause of action was sustained, and plaintiff sought a writ of mandate.

The court of appeal reversed, finding that plaintiff had stated a cause of action for appropriation of name or likeness under the common law and under *Civ. Code § 3344*. The court rejected defendant's contention that the appropriation tort requires a showing that defendant used plaintiff's name or likeness for an endorsement (*149 Cal. App. 3d 409, 418-421)* . The court held that California law does not impose any requirement that the unauthorized use or publication of a person's name or picture be suggestive of an endorsement or association with the injured person (*149 Cal. App. 3d 409, 418)* . The court held that the real party in interest had commercially exploited plaintiff's personality, relying on the real party in interest's use of plaintiff's personality and fame on the cover of the publication and in related telecast advertisements, which gained the real party in interest a commercial advantage to the extent that it attracted readers' attention. The court also relied on defendant's use of plaintiff's personality in the context of an alleged news account,

entitled in a manner to generate maximum curiosity and the necessary motivation to purchase the newspaper, and on defendant's use of plaintiff's personality in the context of an allegedly false news account that was presented as true, which provided the real party in interest with a ready-made "scoop," a commercial advantage over its competitors that it would otherwise not have (*149 Cal. App. 3d 409, 420)* .

Williams v. Weisser *(1969) 273 Cal. App. 2d 726, 78 Cal. Rptr. 542* , was an action by a college professor for copyright infringement and invasion of privacy by defendant selling class notes of plaintiff's lectures, using plaintiff's name, but without plaintiff's consent. Judgment was entered for plaintiff and defendant appealed.

The court of appeal affirmed, holding that defendant's conduct amounted to an unauthorized appropriation of plaintiff's name and personality for defendant's pecuniary gain (*273 Cal. App. 2d 726, 742)* . For this and other reasons the judgment was affirmed (*273 Cal. App. 2d 726, 744)* .

[c] Endorsement Not Required

Eastwood v. Superior Court *(1983) 149 Cal. App. 3d 409, 198 Cal. Rptr. 342* , is discussed in *§ 184.22[3][b]*.

[4] Additional Authorities

[a] Elements of Appropriation Tort

In *Wood v. Thomason (9th Cir. 1994) 22 F.3d 1455* , a singer-songwriter sued the producer of a television series, alleging that the use of his name as the name of a character in the series constituted appropriation. The court of appeal held that, without some evidence that the defendant drew attention to the fact that the character's name was the same as plaintiff's or that the character in some way resembled plaintiff, the mere use of the name was not a commercial purpose (*22 F.3d 1455, 1461)* . In addition, the court also held that there was no triable issue of fact on the issue of consent, given evidence that the plaintiff had written to the defendant concerning the use of his name, stating that he was flattered, and that plaintiff had not objected until the defendant declined to use music written by the plaintiff as the series' theme music (*22 F.3d 1455, 1461)* .

In *Fairfield v. American Photocopy Equip. Co. (1955) 138 Cal. App. 2d 82, 291 P.2d 194* , an action for invasion of privacy by appropriation of name or likeness when defendant circulated an advertisement among the legal profession falsely stating that plaintiff was a satisfied user of defendant's product, a judgment of nonsuit for defendant was reversed by the court of appeal. The court found that the unauthorized use of a person's name or the exploitation of someone's personality constitutes an actionable invasion of privacy (*138 Cal. App. 2d 82, 86)* . Defendant's advertisement amounted to an unauthorized and unwarranted appropriation of plaintiff's personality as a lawyer for pecuniary gain or profit (*138 Cal. App. 2d 82, 87)* .

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18-184 California Points & Authorities § 184.23

§ 184.23 Supporting Contention That Defendant Invaded Plaintiff's Right to Privacy--By Appropriation of Name, Voice, Signature, Photograph, or Likeness [Civ. Code § 3344]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT SHOULD BE HELD LIABLE FOR INVASION OF PRIVACY BECAUSE DEFENDANT KNOWINGLY APPROPRIATED PLAINTIFF'S _____ [NAME *or* VOICE *or* SIGNATURE *or* PHOTOGRAPH *or* LIKENESS], WITHOUT PLAINTIFF'S PRIOR CONSENT, _____ [ON OR IN PRODUCTS, MERCHANDISE, OR GOODS *or* FOR THE PURPOSE OF _____ (ADVERTISING *and/or* SELLING *and/or* SOLICITING PURCHASES OF) _____ (PRODUCTS *and/or* MERCHANDISE *and/or* GOODS *and/or* SERVICES)].

A. Unauthorized Use of Name, Voice, Signature, Photograph, or Likeness. Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of either advertising, selling, or soliciting purchases of products, merchandise, goods, or services, without such person's prior consent, [or in the case of a minor, the prior consent of his parent or legal guardian], shall be liable for any damages sustained by the person or persons injured as a result of the unauthorized use, as well as the greater of $750 or the actual damages suffered as a result of the unauthorized use, and any profits resulting from the unauthorized use not accounted for in computing actual damages (*Civ. Code § 3344(a)*).

[*Optional*] **B. Endorsement Not Required.** [*See § 184.22, Paragraph C.*]

[*Optional*] **C. Photograph Defined.** As used in *Civ. Code § 3344*, photograph means any photograph or photographic reproduction, still or moving, or any videotape or live television transmission, of any person, such that the person is readily identifiable (*Civ. Code § 3344(b)*).

[*Optional*] **D. Readily Identifiable Defined.** A person is deemed "readily identifiable" from a photograph when one who views the photograph with the naked eye can reasonably determine that the person depicted in the photograph is

the same person as the one complaining of its unauthorized use (*Civ. Code § 3344(b)(1)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that defendant should be held liable for invasion of privacy under *Civ. Code § 3344* because defendant knowingly appropriated plaintiff's name, voice, signature, photograph, or likeness, without plaintiff's prior consent, on or in products, merchandise, or goods, or for purposes of advertising, selling, or soliciting purchases of products, merchandise, goods, or services. Counsel may wish to combine these points and authorities with points and authorities supporting the liability of defendant for appropriation under the common law [*see § 184.22*].

These points and authorities may also be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue covered. For example, this form may be used in opposition to a motion for summary judgment when defendant asserts that plaintiff has failed to allege or prove a cause of action for invasion of privacy. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion showing that defendant knowingly used plaintiff's name, voice, signature, photograph, or likeness, that the use was on or in products, merchandise, or goods, or for advertising, selling, or soliciting purchases of products or services, and that defendant's use was without plaintiff's prior consent. In addition, if defendant's use involved plaintiff's photograph, counsel should establish that the photograph meets the definition of photograph in *Civ. Code § 3344(b)*, and that plaintiff is readily identifiable in the photograph.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 184.26 -184.37* may be used to oppose the contentions supported by these points and authorities.

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18-184 California Points & Authorities § 184.24

§ 184.24 Supporting Contention That Defendant Invaded Plaintiff's Right to Privacy--By Appropriation of Deceased Personality's Name, Voice, Signature, Photograph, or Likeness [Civ. Code § 3344.1]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT SHOULD BE HELD LIABLE FOR INVASION OF PRIVACY BECAUSE DEFENDANT KNOWINGLY APPROPRIATED THE _____ [NAME *or* VOICE *or* SIGNATURE *or* PHOTOGRAPH *or* LIKENESS] OF _____ [*name*], A DECEASED PERSONALITY, _____ [ON OR IN PRODUCTS, MERCHANDISE, OR GOODS *or* FOR THE PURPOSE OF _____ (ADVERTISING *and/or* SELLING *and/or* SOLICITING PURCHASES OF) _____ (PRODUCTS *and/or* MERCHANDISE *and/or* GOODS *and/or* SERVICES)], WITHOUT THE CONSENT OF PLAINTIFF WHO RECEIVED THESE RIGHTS BY _____ [TRANSFER *or* DESCENT] FROM _____ [*name of deceased personality*] PURSUANT TO SECTION 3344.1 OF THE CIVIL CODE.

A. Unauthorized Use of Name, Voice, Signature, Photograph, or Likeness of Deceased Personality. Any person who uses a deceased personality's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of either advertising, selling, or soliciting purchases of products, merchandise, goods, or services, without prior consent from the person or persons specified in *Section 3344.1(c) of the Civil Code*, shall be liable for any damages sustained by the person or persons injured as a result of the unauthorized use, as well as the greater of $750 or the actual damages suffered as a result of the unauthorized use, and any profits resulting from the unauthorized use not accounted for in computing actual damages (*Civ. Code § 3344.1(a)*).

[*Optional*] **B. "Deceased Personality" Defined.** The term "deceased personality" as used in *Section 3344.1 of the Civil Code* means any natural person whose name, voice, signature, photograph, or likeness has commercial value at the time of his or her death, or because of his or her death, whether or not during the lifetime of that natural person the person used his or her name, voice, signature, photograph, or likeness on or in products, merchandise, or goods, or for purposes of advertising or selling, or solicitation of purchase of, products, merchandise, goods, or service. A deceased personality

includes, without limitation, any such natural person who has died within 70 years prior to January 1, 1985 (*Civ. Code § 3344.1(h)*).

[*Optional*] **C. "Photograph" Defined.** As used in *Civ. Code § 3344.1*, "photograph" means any photograph or photographic reproduction, still or moving, or any video recording or live television transmission, of any person, such that the deceased personality is readily identifiable (*Civ. Code § 3344.1(i)*).

[*Optional*] **D. Readily Identifiable Defined.** A deceased personality is deemed "readily identifiable" from a photograph when one who views the photograph with the naked eye can reasonably determine who the person depicted in the photograph is (*Civ. Code § 3344.1(i)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that defendant should be held liable for invasion of privacy under *Civ. Code § 3344.1* because defendant knowingly appropriated a deceased personality's name, voice, signature, photograph, or likeness, without the prior consent of plaintiff who obtained use of these rights pursuant to *Civ. Code § 3344.1*. Counsel may wish to combine these points and authorities with points and authorities supporting the liability of defendant for appropriation under the common law [*see § 184.22*]. The requirements of standing established in *Civ. Code § 3344.1* are discussed in *§§ 184.40* and *184.42*.

These points and authorities may also be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue covered. For example, this form may be used in opposition to a motion for summary judgment when defendant asserts that plaintiff has failed to allege or prove a cause of action for invasion of privacy. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion showing that defendant used a deceased personality's name, voice, signature, photograph, or likeness, that the use was on or in products, merchandise, or goods, or for advertising, selling, or soliciting purchases of products or services, that defendant's use was without plaintiff's prior consent, and that plaintiff obtained the use of such rights pursuant to the provisions of *Civ. Code § 3344.1*. In addition, if defendant's use involved the deceased personality's photograph, counsel should establish that the photograph meets the definition of photograph in *Civ. Code § 3344.1(i)*, and that the deceased personality is readily identifiable in the photograph.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 184.26 -184.32* and *§§ 184.35 -184.37* may be used to oppose the contentions supported by these points and authorities.

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18-184 California Points & Authorities § 184.25

§ 184.25 Supporting Contention That Defendant Invaded Plaintiff's Right to Privacy--By Physical Intrusion

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT SHOULD BE HELD LIABLE FOR INVASION OF PRIVACY BECAUSE DEFENDANT PHYSICALLY INTRUDED ON PLAINTIFF'S _____ [SOLITUDE OR SECLUSION *or* PRIVATE AFFAIRS].

A. Elements of Physical Intrusion Tort. The tort of intrusion encompasses unconsented-to physical intrusion into the home, hospital room or other place the privacy of which is legally recognized, as well as unwarranted sensory intrusions such as eavesdropping, wiretapping, and visual or photographic spying. The action has two elements: (1) intrusion into a private place, conversation or matter; (2) in a manner highly offensive to a reasonable person (*Shulman v. Group W Prods., Inc. (1998) 18 Cal. 4th 200, 231, 74 Cal. Rptr. 2d 843, 955 P.2d 469*).

B. Right of Privacy. In order to prove actionable intrusion a plaintiff must show the defendant penetrated some zone of physical or sensory privacy surrounding, or obtained unwanted access to data about, the plaintiff. The tort is proven only if the plaintiff had an objectively reasonable expectation of seclusion or solitude in the place, conversation or data source (*Shulman v. Group W Prods., Inc. (1998) 18 Cal. 4th 200, 231, 74 Cal. Rptr. 2d 843, 955 P.2d 469* ; *see Hernandez v. Hillsides, Inc. (2009) 47 Cal. 4th 272, 288-294, 97 Cal. Rptr. 3d 274, 211 P.3d 1063*).

C. Expectation of Privacy Need Not Be Expectation of Complete or Absolute Privacy. An expectation of privacy need not be an expectation of complete or absolute privacy in order to be an objectively reasonable expectation of privacy for purposes of the tort of intrusion. The reasonableness of a person's expectation of visual or aural privacy depends not only on who might have been able to observe the relevant interaction, but also on the identity of the alleged intruder and the means of intrusion (*Sanders v. American Broad. Cos. (1999) 20 Cal. 4th 907, 915, 923, 85 Cal. Rptr. 2d 909, 978 P.2d 67*).

D. Intruder's Motives Relevant to Offensiveness Determination. All the circumstances of an intrusion, including the

motives or justification of the intruder, are pertinent to the offensiveness element. Motivation or justification becomes particularly important when the intrusion is by a member of the print or broadcast press in the pursuit of news material (*Shulman v. Group W Prods., Inc. (1998) 18 Cal. 4th 200, 236, 74 Cal. Rptr. 2d 843, 955 P.2d 469*).

E. No Broad Privilege for Intrusive Newsgathering. In contrast to the broad privilege the press enjoys for publishing truthful, newsworthy information in its possession, the press has no recognized constitutional privilege to violate generally applicable laws such as California's intrusion tort, in pursuit of material (*Shulman v. Group W Prods., Inc. (1998) 18 Cal. 4th 200, 242, 74 Cal. Rptr. 2d 843, 955 P.2d 469*).

F. Publication Not Required. Publication is not a required element of the physical intrusion tort (*Dietemann v. Time, Inc. (9th Cir. 1971) 449 F.2d 245, 247)* .

[*Optional*] **G. Unreasonably Intrusive Investigation.** An unreasonably intrusive investigation may constitute the tort of physical intrusion (*Noble v. Sears, Roebuck & Co. (1973) 33 Cal. App. 3d 654, 659-660, 109 Cal. Rptr. 269*).

[*Optional*] **H. Deceptive Investigation May Support Action for Intrusion.** An action for intrusion may lie against a party if that party obtains access to personal information about the plaintiff from the plaintiff's friends or relatives by utilizing improper and unanticipated means and the information could not otherwise have been obtained without resort to such means (*Taus v. Loftus (2007) 40 Cal. 4th 683, 731, 54 Cal. Rptr. 3d 775, 151 P.3d 1185*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that defendant should be held liable for invasion of privacy because defendant physically intruded on plaintiff's solitude or into plaintiff's private affairs.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue covered. For example, this form may be used in opposition to a motion for summary judgment when defendant asserts that plaintiff has failed to allege or prove a cause of action for invasion of privacy. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion showing that the elements of the physical intrusion tort were met: that the defendant intruded, that the intrusion was offensive and objectionable to a reasonable person of ordinary sensibilities, and that defendant's intrusion was into a place or thing that was private.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 184.26 -184.31* and *§ 184.39* may be used to oppose the contentions supported by these points and authorities.

[3] Discussion of Authorities

[a] Elements of Physical Intrusion Tort

In ***Shulman v. Group W Prods., Inc.*** *(1998) 18 Cal. 4th 200, 74 Cal. Rptr. 2d 843, 955 P.2d 469* , plaintiffs, a mother and her son were injured when their car went off the highway overturning and trapping them inside. A medical transport and rescue helicopter crew came to plaintiffs' assistance, accompanied on this occasion by a video camera operator employed by a television producer. The cameraman filmed plaintiffs' extrication from the car, the flight nurse and medic's efforts to give them medical care during the extrication, and their transport to the hospital in the helicopter. The

flight nurse wore a small microphone that picked up her conversations with other rescue workers and with one of the plaintiffs. This videotape and sound track were edited into a segment that was broadcast months later on a documentary show, On Scene: Emergency Response. Plaintiffs, who neither consented to the filming and recording nor to the broadcast, alleged that the television producers intruded into a realm of personal privacy and gave unwarranted publicity to private events of their lives. The trial court granted summary judgment for the producers on the ground that the events depicted in the broadcast were newsworthy and the producers' activities were therefore protected under the *First Amendment to the United States Constitution*. The court of appeal reversed, finding legal error on the trial court's part as to both plaintiff's intrusion claims. The California Supreme Court, in a plurality opinion, concluded that the court of appeal correctly found triable issues existed as to whether defendants invaded plaintiffs' privacy by accompanying plaintiffs in the helicopter. However, contrary to the court of appeals it also held that triable issues existed as to whether defendants tortiously intruded by listening to the plaintiff mother's confidential conversations with the flight nurse at the rescue scene without her consent. Moreover, it held defendants had no constitutional privilege to intrude on plaintiff's seclusion and private communications (*18 Cal. 4th 200, 214)* .

The Court began its analysis by stating that the tort of intrusion encompassed unconsented-to physical intrusion into the home, hospital room or other place the privacy of which is legally recognized, as well as unwarranted sensory intrusions such as eavesdropping, wiretapping, and visual or photographic spying. It then articulated the two elements of the tort: intrusion into a private place, conversation or matter; in a manner highly offensive to a reasonable person (*18 Cal. 4th 200, 231)* .

[b] Right of Privacy

The facts and procedural background of ***Shulman v. Group W Prods., Inc.*** *(1998) 18 Cal. 4th 200, 74 Cal. Rptr. 2d 843, 955 P.2d 469* , are discussed in *§ 184.25[3][a]*. In that case, the California Supreme Court, in a plurality opinion, stated that in order to prove actionable intrusion a plaintiff must show the defendant penetrated some zone of physical or sensory privacy surrounding, or obtained unwanted access to data about, the plaintiff. The tort is proven only if the plaintiff had an objectively reasonable expectation of seclusion or solitude in the place, conversation or data source.

In determining whether plaintiffs' privacy had been intruded under the facts of this case, the Court distinguished between the privacy due plaintiffs at the scene of the accident versus the interior of the rescue helicopter. It determined that the cameraman's mere presence at the accident scene and filming of the events there could not be deemed either a physical or sensory intrusion on plaintiff's seclusion because plaintiffs had no right of ownership, possession, or actual control of the property where the rescue took place. In addition, plaintiffs had no reasonable expectation that members of the media would be excluded or prevented from photographing the scene. However, two aspects of defendants' conduct did raise triable issues of intrusion on seclusion (*18 Cal. 4th 200, 232)* . First, a triable issue existed as to whether the plaintiffs had an objectively reasonable expectation of privacy in the interior of the rescue helicopter, which served as an ambulance. According to the Court, while the attendance of reporters and photographers at the scene of an accident was to be expected, it was aware of no law or custom permitting the press to ride in ambulances or enter hospital rooms during treatment without the patients consent. Second, the plaintiff mother was entitled to a degree of privacy in her conversations with the flight nurse and other medical rescuers at the accident scene, and in the nurse's conversations conveying medical information regarding the mother to the hospital base. According to the Court, while the cameraman may not have intruded into that zone of privacy merely by being present at a place where he could hear such conversations with unaided ears, by placing a microphone on the nurse's person, amplifying and recording what she said and heard, defendants may have listened in on conversations the parties could reasonably have expected to be private.

The Court acknowledged that a patient's conversation with a provider of medical care in the course of treatment, carried a well-established expectation of privacy. Moreover, that California's Invasion of Privacy Act (*Pen. Code § 632(a)*), prohibited the recording of any confidential communication without the consent of the parties. Whether the circumstances of plaintiff mother's extrication and helicopter rescue would reasonably have indicated to defendants, that

plaintiff would desire and expect her communications to the flight nurse or other rescuers to be heard by them alone, and therefore not to be electronically transmitted and recorded, was also a triable issue of fact in the case (*18 Cal. 4th 200, 235)* .

In ***Hernandez v. Hillsides, Inc.*** *(2009) 47 Cal. 4th 272, 288-294, 97 Cal. Rptr. 3d 274, 211 P.3d 1063* , the director at a facility for neglected and abused children placed a hidden camera and motion sensor in an office shared by two female employees in order to capture video evidence of which employee had been using one of the computers in that office late at night to view Internet pornography, conduct that violated employer policy and posed potential risk for the children housed at the facility. Although the two female employees were not told of the camera, the evidence indicated that the director activated the camera and sensor only three times over a three-week period and only after the women had left work for the day. Although it was possible that someone during the day could sneak into a nearby locked storage room where the monitor was located and activate the camera, there was no evidence that the camera was ever activated when the female employees were at work, nor that they were ever videotaped. When the camera was discovered by the women, the director was very forthright about why it was placed in their office and immediately showed the brief videotape that had been recorded during the nights it had been activated. The women nonetheless sued the employer for invasion of privacy. The trial court granted summary judgment for the employer, plaintiffs appealed, and the court of appeal reversed. Defendants appealed.

The California Supreme Court affirmed the trial court's grant of summary judgment, but held initially that the women had shown an intrusion into their shared office space, a place in which they had a reasonable expectation of privacy (*47 Cal. 4th 272, 294)* . The Court noted that the employer provided an enclosed office for the plaintiffs to share, with a door that could be shut and locked and window blinds that could be drawn, to allow the occupants to obtain some measure of privacy to focus on their work and escape visual and aural interruptions from other sources. The Court recognized that this protective setting generates legitimate expectations that not all activities performed behind closed doors would be work related, but might extend to grooming or hygiene activities or personal conversations. Moreover, employees who retreat into a shared office such as that would not reasonably expect to be the subject of televised spying and secret filming by the employer. The Court also noted that other court opinions had recognized the intrusive effect of hidden cameras and video recorders and the Legislature had enacted statutes in an attempt to prevent such covert monitoring and recording in certain settings (*47 Cal. 4th 272, 291-293)* . While the Court recognized that the intent of the director in placing the camera in the office, and the steps taken to prevent monitoring and recording of plaintiffs, was relevant to the offensiveness of the intrusion, this evidence did not bear on whether plaintiffs had stated an otherwise-actionable intrusion in the first instance. In addition to the relative seclusion of the semi-private office provided to plaintiffs, the Court also pointed to the fact that nothing in the employer's policies hinted to plaintiffs that they could be monitored by camera while working at their computers, only that the company computers could be monitored electronically for use of e-mail, messages, electronic files, and web site data (*47 Cal. 4th 272, 293-294)* . While plaintiffs had stated a viable intrusion, however, the Court also found that, under the facts of the case, the intrusion would not be considered utterly unjustified and highly offensive to a reasonable person, thus defeating plaintiffs' cause of action (*47 Cal. 4th 272, 295-299*).

[c] Expectation of Privacy Need Not Be Expectation of Complete or Absolute Privacy

In ***Sanders v. American Broad. Cos.*** *(1999) 20 Cal. 4th 907, 85 Cal. Rptr. 2d 909, 978 P.2d 67* , plaintiff, who was employed as a telepsychic, brought an action against a television network and its reporter for violations of *Pen. Code § 632*, which prohibits eavesdropping on or recording of confidential communications, and tortious invasion of privacy by intrusion. The action arose after the reporter, investigating a story on the telepsychic industry for network television, covertly videotaped and recorded her conversations with plaintiff while working undercover as a telepsychic for the plaintiff's employer. The conversations took place in front of the parties' cubicles in a large workplace filled with about 100 cubicles, created with five-foot-high partitions. While the conversations could have been overheard by coworkers, and in fact one conversation included other coworkers, the work area was generally off-access to members of the general public. Trial on the actions was bifurcated, and the jury first returned a special verdict on the action brought

under *Pen. Code § 632*, finding that the alleged intrusion was conducted "in circumstances in which the parties to the communication may reasonably have expected that the communications may have been overheard." Based on this finding, the trial court ordered judgment entered for the defendants on the action brought under *Pen. Code § 632*. Trial went forward on the cause of action for intrusion, and the jury eventually found for plaintiff, awarding compensatory and punitive damages. The court of appeal reversed the judgment for plaintiff on the intrusion cause of action and ordered judgment entered for defendants. The court of appeal reasoned that the jury finding on the action brought under *Pen. Code § 632*, that the conversations took place under circumstances in which the parties might reasonably have expected that they would be overheard, precluded recovery on the cause of action for intrusion, since recovery for the tort required an objectively reasonable expectation of confidentiality. The plaintiff appealed.

The Supreme Court reversed the court of appeal. After reiterating the elements of the intrusion tort as articulated by their opinion in *Shulman v. Group W Prods., Inc. (1998) 18 Cal. 4th 200, 74 Cal. Rptr. 2d 843, 955 P.2d 469* [*see § 184.25[3]*][a], [b]], the Court held that an expectation of privacy need not be an expectation of complete or absolute privacy in order to be an objectively reasonable expectation of privacy for purposes of the tort of intrusion. Citing numerous decisions from many jurisdictions supporting the notion that an expectation of privacy may be protected even though a limited expectation, the Court concluded that the reasonableness of a person's expectation of visual or aural privacy depends not only on who might have been able to observe the relevant interaction, but also on the identity of the alleged intruder and the means of intrusion (*20 Cal. 4th 907, 915-918, 923)* . In the case before it, the Court held that the fact that a workplace interaction could have been heard or witnessed by other workers on the premises, but not by the general public, would not necessarily preclude a finding that a participant had an objectively reasonable expectation that the conversation or interaction would not be secretly videotaped by an undercover television reporter for broadcast on a television program, at least when the workplace did not provide unfettered access to the general public and the intruder was posing as a coworker (*20 Cal. 4th 907, 911, 922-923)* . Thus, the court of appeal erred in concluding that the finding on the action brought under *Pen. Code § 632* necessarily barred recovery on the tort cause of action for intrusion (*20 Cal. 4th 907, 924-925)* .

However, the Court went on to distinguish the facts in the case at issue from interactions between a business proprietor and a customer, which might be characterized as public conversations between strangers and which might justify only lesser expectations of privacy (*20 Cal. 4th 907, 922)* . Moreover, the Court noted that while a limited expectation of privacy might be found under the circumstances, the particular invasion must still be found to be highly offensive to the reasonable person in order to sustain the intrusion cause of action, and the Court specifically noted that it was offering no opinion on that element of the tort in the case before it (*20 Cal. 4th 907, 911)* . In addition, the Court recognized that the standard might be different when the alleged intruder is a government entity investigating criminal activity, since constitutional rather than common-law privacy concerns would frame the analysis (*20 Cal. 4th 907, 919 n.3, 920)* .

[d] Intruder's Motives Relevant to Offensiveness Determination

The facts and procedural background of ***Shulman v. Group W Prods., Inc.*** *(1998) 18 Cal. 4th 200, 74 Cal. Rptr. 2d 843, 955 P.2d 469* , are discussed in *§ 184.25[3][a]*. The California Supreme Court stated that determining the offensiveness of an intrusion requires consideration of all the circumstances of the intrusion, including its degree and setting as well as the motives or justification of the intruder (*18 Cal. 4th 200, 237)* . Thus, in deciding whether a reporter's alleged intrusion into private matters is offensive and hence actionable as an invasion of privacy, courts must consider the extent to which the intrusion was, under the circumstances, justified by the legitimate motive of gathering the news. However, the mere fact that the intruder was in pursuit of a story does not generally justify an otherwise offensive intrusion; offensiveness depends as well on the particular method of investigation used.

A majority of the Supreme Court held that summary judgment for the defense was improper as to the plaintiffs' cause of action for intrusion (*18 Cal. 4th 200, 242-243)* . It found that on the summary judgment record, a jury could have found defendants' recording of plaintiff mother's communications to the flight nurse and other rescuers, and filming in

the air ambulance, to be highly offensive to a reasonable person. With regard to the depth of the intrusion, the Court determined that a reasonable jury could also have found highly offensive the placement of a microphone on a medical rescuer in order to intercept what would otherwise be private conversations with an injured patient. For much the same reason, a jury could have reasonably regarded entering and riding in an ambulance with two seriously injured patients to be an egregious intrusion into a place of expected seclusion. Nor could the Court say as a matter of law that defendants' motive, to gather usable material for a potentially newsworthy story, necessarily privileged their intrusive conduct as a matter of common law tort law liability (*18 Cal. 4th 200, 238)* .

[e] No Broad Privilege for Intrusive Newsgathering

The facts and procedural background of ***Shulman v. Group W Prods., Inc.*** *(1998) 18 Cal. 4th 200, 74 Cal. Rptr. 2d 843, 955 P.2d 469* , are discussed in *§ 184.25[3][a]*. the California Supreme Court, in a plurality opinion, held that in contrast to the broad privilege the press enjoys for publishing truthful, newsworthy information in its possession [*see § 184.29*], the press had no recognized constitutional privilege to violate generally applicable laws (such as California's intrusion tort and *Pen. Code § 632*, prohibiting the recording of confidential communications without the consent of all parties) in pursuit of material (*18 Cal. 4th 200, 242)* .

According to the Court, the reason that the constitutional protection accorded newsgathering, if any, is far narrower than the protection surrounding the publication of truthful material was simple. The intrusion tort, unlike that for publication of private facts, did not subject the press to liability for the contents of its publications. Newsworthiness, is a complete bar to liability for publication of private facts and is evaluated with a high degree of deference to editorial judgment. The same deference is not due, however, when the issue is not the media's right to publish or broadcast what they choose, but their right to intrude into the secluded areas or conversations in pursuit of publishable material. At most, said the Court, the Constitution might preclude tort liability that would place an impermissible burden on newsgatherers by depriving them of their indispensable tools; this was not the situation in this case. Defendants urged the court for a rule more protective of press investigative activity. Specifically, they requested the following holding: "when intrusion claims are brought in the context of newsgathering conduct, that conduct be deemed protected so long as (1) the information being gathered is about a matter of legitimate concern to the public and (2) the underlying conduct was lawful." The Court ruled that neither tort law nor constitutional precedent and policy supported such a broad privilege (*18 Cal. 4th 200, 240)* .

[f] Publication Not Required

In ***Dietemann v. Time, Inc.*** *(9th Cir. 1971) 449 F.2d 245* , plaintiff brought an action for invasion of privacy based on photographs of plaintiff and recordings of his conversation made in plaintiff's home/office by defendant's employees. Defendant's employees had gained entry by subterfuge and clandestinely photographed him and recorded his conversations without his consent. Defendant was helping the district attorney investigate plaintiff for practicing medicine without a license, for which he was ultimately arrested. Defendant later published an article mentioning plaintiff and including photographs of him. Judgment was awarded to plaintiff and defendant appealed.

On appeal, the court affirmed, concluding that California would recognize a cause of action for invasion of privacy based on plaintiff's claim and would allow recovery to plaintiff (*449 F.2d 245, 248)* . The court also stated that publication was not a necessary element of the tort of invasion by physical intrusion (*449 F.2d 245, 247, 249-250)* .

[g] Unreasonably Intrusive Investigation

Noble v. Sears, Roebuck & Co. *(1973) 33 Cal. App. 3d 654, 109 Cal. Rptr. 269* , was an action alleging, among other theories, an invasion of privacy. The invasion centered on the conduct of defendants' private investigator who gained admittance to plaintiff's hospital room and, by deception, secured information relating to a then pending personal injury action between the parties. Defendants' demurrers were sustained and an order of dismissal entered. Plaintiff appealed.

The court of appeal reversed as to the invasion of privacy cause of action, holding that an unreasonably intrusive investigation may violate a person's right to privacy (*33 Cal. App. 3d 654, 660, 663)* . The court ruled that, assuming plaintiff could prove that she had an exclusive right of occupancy in her hospital room, defendant's conduct would constitute an unreasonably intrusive investigation (*33 Cal. App. 3d 654, 660)* . The judgment was reversed as to one other cause of action and affirmed as to another (*33 Cal. App. 3d 654, 664)* .

[h] Deceptive Investigation May Support Action for Intrusion

In *Taus v. Loftus (2007) 40 Cal. 4th 683, 54 Cal. Rptr. 3d 775, 151 P.3d 1185* , plaintiff was an adult who, as a child, had been the subject of a scholarly case study dealing with the recovery of repressed memories of sexual abuse. The original study and publication referred to her only as Jane Doe, and while plaintiff consented to the subsequent use and dissemination of the published study, her identity remained protected. However, researchers intent on criticizing the results from the original study were eventually able to ascertain her true identity and they used this knowledge to investigate plaintiff's subsequent life. In the course of this investigation, one researcher interviewed plaintiff's former foster mother, who provided the researcher with personal information about plaintiff's private life, including that plaintiff had begun engaging in "self-destructive" conduct after the events of the original study. Although the circumstances surrounding this interview were hotly disputed, plaintiff alleged that the researcher deceived her foster mother into believing that the researcher was working with the psychiatrist who plaintiff had worked with and trusted from the original study, and the foster mother would not have shared plaintiff's personal information had she known the truth. Plaintiff sued the researchers for multiple privacy and related torts, including a cause of action for intrusion based on the deception used to gain personal information about plaintiff from her former foster mother. Defendants filed a motion to strike under the anti-SLAPP statute, *Code Civ. Proc. § 425.16*, which the trial court largely denied. Defendants appealed, and the court of appeal granted the motion to strike all but four causes of action. Defendants again appealed.

The California Supreme Court granted the motion to strike three of the four remaining causes of action, but refused to strike the cause of action for intrusion based on the alleged deception used to gain information from plaintiff's foster mother. As to that cause of action, the Court held that while a person generally has no right to sue a relative or close friend for voluntarily disclosing personal information about the person to another, an action for intrusion may lie against another party if that party obtains access to personal information about the plaintiff from the plaintiff's friends or relatives by utilizing improper and unanticipated means and the information could not otherwise have been obtained without resort to such means (*40 Cal. 4th 683, 731)* . The Court recognized that not all misrepresentations by a reporter, investigator, or scholar to obtain information would be sufficient to support an action for intrusion. However, the Court stressed that intentionally misrepresenting that one is a professional associate of a psychiatrist who has a close relationship with a person in order to obtain private information about that person is a particularly serious type of misrepresentation, especially in light of the confidentiality generally provided for information shared between persons and mental health professionals. The Court concluded that under the facts of the case, a jury could properly find that the scholar engaged in conduct that was highly offensive in order to gain access to information that plaintiff could reasonably believe would not be revealed in the manner in which it was (*40 Cal. 4th 683, 735-740)* .

[4] Additional Authorities

[a] Elements of Physical Intrusion Tort

In *Miller v. National Broad. Co. (1986) 187 Cal. App. 3d 1463, 232 Cal. Rptr. 668* , plaintiff brought an action for intrusion against a television broadcasting company and its employees. The action arose when defendant's film crew, while filming a documentary on emergency rescue paramedics, entered plaintiff's home with the paramedics who were responding to a call to administer aid to plaintiff's husband, who had suffered a heart attack. The court of appeal upheld plaintiff's action, finding that defendant's unauthorized entry into the privacy of plaintiff's home could constitute an

intrusion (*187 Cal. App. 3d 1463, 1483)* . The court also held that it was a jury issue whether the acts of defendant were sufficiently "highly offensive" to support recovery for the tort of intrusion (*187 Cal. App. 3d 1463, 1483-1484)* .

In *Emerson v. J. F. Shea Co. (1978) 76 Cal. App. 3d 579, 143 Cal. Rptr. 170* , defendant developer had attempted to learn plaintiff's occupation from a credit bureau after receiving a letter from plaintiff protesting a proposed development. Plaintiff brought suit against the developer and others for invasion of privacy and noncompliance with the Federal Fair Credit Reporting Act (*15 U.S.C.S. § 1681 et seq.*). Defendant's motion for partial summary judgment was granted and a stipulated judgment for plaintiff for $100 was entered. Plaintiff appealed.

In affirming, the court of appeal recognized that an unreasonably intrusive investigation is a tort for which damages are recoverable, and stated that the test is what is objectionable or offensive to a reasonable person. The court found, however, that because plaintiff indicated that he would have divulged the information defendant sought if asked directly for it, plaintiff in effect had admitted that defendant's acts were not objectionable or offensive (*76 Cal. App. 3d 579, 592*). The court also dismissed plaintiff's other arguments on the invasion of privacy issue (*76 Cal. App. 3d 579, 591-595*).

Vescovo v. New Way Enters., Ltd. (1976) 60 Cal. App. 3d 582, 130 Cal. Rptr. 86 , involved multiple causes of action for, among others, invasion of privacy by a wife, husband, and their minor child. Defendant published a lewd classified advertisement about plaintiff wife, resulting in many "unsavory characters" entering on the family's residential property and causing disturbances. The trial court sustained defendant's demurrer to all the causes of action on behalf of the child on the ground that no relational right of privacy exists. Plaintiffs appealed the judgment following the dismissal of these actions.

The court of appeal reversed the dismissals. As to the child's cause of action for invasion of privacy, the court held that plaintiffs adequately stated a cause of action for invasion of privacy involving intrusion of plaintiff child's physical solitude or seclusion. The child was not seeking to recover based on the derogatory information implied about the mother in the advertisement, but was seeking to recover for the physical intrusion on her own solitude in her own home (*60 Cal. App. 3d 582, 587-588)* .

[b] Expectation of Privacy Need Not Be Expectation of Complete or Absolute Privacy

In *Sanchez-Scott v. Alza Pharms. (2001) 86 Cal. App. 4th 365, 103 Cal. Rptr. 2d 410* , the plaintiff, a breast cancer patient, submitted to a breast examination by her oncologist, and the examination was attended by another man. Although the plaintiff knew that this other man was observing the examination, which required the plaintiff to remove her blouse and bra, the plaintiff was not informed that the man was a drug salesman and not medical personnel. The court of appeal reversed a judgment sustaining a demurrer, holding that a jury could find, under the circumstances, that the plaintiff had a reasonable expectation that the examination would not be witnessed by non-medical personnel (*86 Cal. App. 4th 365, 373-376)* . The court also held that, considering the totality of the circumstances, the allegations described conduct that would be highly offensive to a reasonable person (*86 Cal. App. 4th 365, 376-378)* .

California Points & Authorities

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Volume 18 Chapters 180-189 PRETRIAL PROCEEDINGS---to---PROBATE OF WILLS
CHAPTER 184 PRIVACY: INVASION OF PRIVACY
PART II. FORMS

18-184 California Points & Authorities § 184.25A

§ 184.25A Supporting Contention That Defendant Invaded Plaintiff's Right to Privacy--By Trespass, Use of Visual or Auditory Enhancement Equipment, or Assault, With Intent to Capture Image, Sound Recording, or Other Physical Impression of Plaintiff [Civ. Code § 1708.8]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS LIABLE FOR INVASION OF PRIVACY UNDER *CIVIL CODE SECTION 1708.8* BECAUSE DEFENDANT _____ [KNOWINGLY ENTERED WITHOUT CONSENT ONTO THE LAND OF ANOTHER PERSON *or* USED _____ (A VISUAL *or* AN AUDITORY) ENHANCEMENT DEVICE *or* COMMITTED AN ASSAULT] IN AN ATTEMPT TO CAPTURE A _____ [VISUAL IMAGE *or* SOUND RECORDING *or other type of physical impression*] OF PLAINTIFF ENGAGING IN A PERSONAL OR FAMILIAL ACTIVITY.

[*EITHER*]

A. Liability for Invasion of Privacy Through Trespass. A person is liable for physical invasion of privacy if that person knowingly enters onto the land of another person without permission, or otherwise commits a trespass, in order to physically invade the privacy of the plaintiff with the intent to capture any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity, and if the physical invasion occurs in a manner that is offensive to a reasonable person (*Civ. Code § 1708.8(a)*).

[*OR*]

A. Liability for Constructive Invasion of Privacy. A person is liable for constructive invasion of privacy if that person attempts to capture, in a manner that is offensive to a reasonable person, any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity under circumstances in

which the plaintiff had a reasonable expectation of privacy, through the use of a visual or auditory enhancing device, regardless of whether there is a physical trespass, if this image, sound recording, or other physical impression could not have been achieved without a trespass unless the visual or auditory enhancing device was used (*Civ. Code § 1708.8(b)*).

[*OR*]

A. Liability for Invasion of Privacy Through Assault. A person is liable for invasion of privacy if that person commits an assault with the intent to capture any type of visual image, sound recording, or other physical impression of the plaintiff (*Civ. Code § 1708.8(c)*).

[*AND*]

B. Damages Recoverable. A person who commits a violation of *Civil Code Section 1708.8* is liable for up to three times the amount of any general and special damages that are proximately caused by the violation. The person may also be liable for punitive damages, subject to proof according to *Civil Code Section 3294*. If the plaintiff proves that the invasion of privacy was committed for a commercial purpose, the defendant is also subject to disgorgement to the plaintiff of any proceeds or other consideration obtained as a result of the violation (*Civ. Code § 1708.8(d)*).

C. Equitable Relief Available. The court may grant equitable relief in an action brought under *Civil Code Section 1708.8*, including, but not limited to, an injunction or restraining order prohibiting further violations (*Civ. Code § 1708.8(h)*).

[*Optional*] **D. Liability of Instigator.** A person who directs, solicits, actually induces, or actually causes another person, regardless of whether there is an employer-employee relationship, to violate *Civil Code Section 1708.8(a), (b)*, or *(c)*, is liable for any general, special, and consequential damages resulting from each violation. In addition, the person who directs, solicits, instigates, induces, or otherwise causes a violation may be liable for punitive damages to the extent that an employer would be subject to punitive damages pursuant to *Civil Code Section 3294(b)* (*Civ. Code § 1708.8(e)*).

[*Optional*] **E. First Transaction After Capture May Constitute Violation.** The transmission, publication, broadcast, sale, offer for sale, or other use of any visual image, sound recording, or other physical impression that was taken or captured in violation of *Civil Code Section 1708.8(a), (b)*, or *(c)* may constitute a violation of the statute if the person, in the first transaction following the taking or capture of the image, recording, or physical impression, publicly transmitted, published, broadcast, sold or offered for sale, the image, recording, or physical impression with actual knowledge that it was taken or captured in violation of *Civil Code Section 1708.8(a), (b)*, or *(c)*, and provide compensation, consideration, or remuneration, monetary or otherwise, for the rights to the unlawfully obtained image, recording, or physical impression (*Civ. Code § 1708.8(f)(1)*). For these purposes, "actual knowledge" means actual awareness, understanding, and recognition, obtained prior to the time at which the person purchased or acquired the image, recording, or physical impression, that the image, recording, or physical impression was taken or captured in violation of *Civil Code Section 1708.8(a), (b)*, or *(c)* (*Civ. Code § 1708.8(f)(2)*).

[*Optional*] **F. Failure to Capture Image, Recording, or Impression Is Not Defense.** It is not a defense to an action brought under *Civil Code Section 1708.8* that no image, recording, or other physical impression of the plaintiff was actually captured or sold (*Civ. Code § 1708.8(j)*).

[*Optional*] **G. "Commercial Purpose" Defined.** As used in *Civil Code Section 1708.8*, "for a commercial purpose" means any act done with the expectation of a sale, financial gain, or other consideration, although a visual image, sound recording, or other physical impression was not, or was not intended to have been, captured for a commercial purpose unless it is intended to be, or was in fact, sold, published, or transmitted (*Civ. Code § 1708.8(k)*).

[*Optional*] **H. "Personal and Familial Activity" Defined.** As used in *Civil Code Section 1708.8*, "personal and familial activity" includes, but is not limited to, intimate details of the plaintiff's personal life, interactions with the plaintiff's family or significant others, or other aspects of the plaintiff's private affairs or concerns. "Personal and familial activity" includes the activities of victims of crime in circumstances in which either subsection (a) or subsection (b) of *Civil Code Section 1708.8*, or both, would apply, although it does not include illegal or otherwise criminal activity as described in *Civil Code Section 1708.8(f)* (*Civ. Code § 1708.8(l)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the defendant is liable for invasion of privacy under *Civ. Code § 1708.8*. That statute provides a cause of action for a physical or constructive invasion of privacy in any of the following circumstances:

- The defendant trespasses onto another person's property to obtain a visual image, sound recording, or other physical impression of the plaintiff engaging in personal or familial activity, if the invasion would be offensive to a reasonable person;

- The defendant does not trespass, but uses video or auditory enhancement equipment in an attempt to capture an image, recording, or other physical impression that could only be acquired through trespass if the enhancement equipment were not used; or

- The defendant commits an assault in an attempt to acquire an image, recording, or other physical impression of the plaintiff.

The statute also provides a cause of action against a defendant who directs, solicits, induces, or otherwise causes another person to violate the statute.

If necessary, these points and authorities may be combined with points and authorities dealing with the common law cause of action for intrusion [*see § 184.25*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issues covered. For example, this form may be used in opposition to a motion for summary judgment if the defendant asserts that the plaintiff has failed to allege or prove a cause of action for invasion of privacy brought under *Civ. Code § 1708.8*. These points and authorities may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, for example, counsel should include: facts showing the particular invasion alleged by the plaintiff, whether it be a trespass, a constructive invasion using a visual or auditory enhancement device, or an assault; facts showing the personal activity in which the plaintiff was engaged at the time of the invasion of privacy; and facts showing the offensiveness of the manner of the defendant's invasion of privacy.

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Volume 18 Chapters 180-189 PRETRIAL PROCEEDINGS---to---PROBATE OF WILLS
CHAPTER 184 PRIVACY: INVASION OF PRIVACY
PART II. FORMS

18-184 California Points & Authorities § 184.26

§ 184.26 Opposing Contention That Defendant Invaded Plaintiff's Right to Privacy--No Disclosure to Public

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT SHOULD NOT BE HELD LIABLE FOR INVASION OF PRIVACY BECAUSE THE DISCLOSURE THAT IS THE BASIS OF PLAINTIFF'S CLAIM WAS NOT A COMMUNICATION TO THE PUBLIC IN GENERAL OR TO A LARGE NUMBER OF PERSONS.

A. Disclosure to Public Required. Except in cases of physical intrusion, the tort of invasion of privacy must be accompanied by a public disclosure in the sense of a communication to the public in general or to a large number of persons as distinguished from one individual or a few (*Porten v. University of S.F. (1976) 64 Cal. App. 3d 825, 828, 134 Cal. Rptr. 839* ; *Mason v. Western Union Tel. Co. (1975) 52 Cal. App. 3d 429, 440, 125 Cal. Rptr. 53*).

[*Optional*] **B. Creditor Informing Employer Not Sufficient Public Disclosure.** A creditor or collection agent disclosing to a debtor's employer the existence of a debt owed by the debtor in order to collect it is not considered a disclosure to the public in general (*Timperley v. Chase Collection Serv. (1969) 272 Cal. App. 2d 697, 699-700, 77 Cal. Rptr. 782*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that defendant should be held liable for invasion of privacy because the disclosure that is the basis of the invasion was not a public disclosure. The form may be used in opposing liability for any of the torts for invasion of privacy except the tort of physical intrusion on privacy, and may be combined with other forms of points and authorities opposing the contention that defendant should be held liable for invasion of privacy [*see §§ 184.27 -184.37*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context

in which counsel wishes to raise the substantive issue that there has been no invasion of privacy because there was no disclosure to the public. For example, this form may be used in support of a demurrer or a motion for summary judgment when counsel wishes to assert that plaintiff failed to state a valid cause of action because plaintiff failed to allege disclosure to the public. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion showing that the disclosure in question was not made to the public or to a large number of people.

In an appropriate case, these points and authorities may be submitted in opposition to the contentions supported by the points and authorities *set out in §§ 184.20 -184.23*.

[3] Discussion of Authorities

[a] Disclosure to Public Required

Porten v. University of S.F. *(1976) 64 Cal. App. 3d 825, 134 Cal. Rptr. 839* , was an action for invasion of privacy based on defendant's disclosure, without plaintiff's consent, to the State Scholarship and Loan Commission of the grades plaintiff had received at the college he attended before transferring to defendant college. Defendant's demurrer was sustained and a judgment of dismissal was entered. Plaintiff appealed.

The court of appeal held that plaintiff had failed to state a cause of action for the public disclosure of private facts tort because the communication was not to the public in general or to a large number of people (*64 Cal. App. 3d 825, 828-829)* . The court ruled that public disclosure was a required element for invasion of privacy except under the physical intrusion tort (*64 Cal. App. 3d 825, 828)* . However, the court found that plaintiff had stated a cause of action for invasion of privacy under the state constitutional provision guaranteeing a right of privacy (*Cal. Const. art. I, § 1*), and reversed the judgment (*64 Cal. App. 3d 825, 832-833)* .

Mason v. Western Union Telegraph Co. *(1975) 52 Cal. App. 3d 429, 125 Cal. Rptr. 53* , concerned two related actions, tried together, against plaintiffs' former husband and a telegraph company alleging, among other things, invasion of privacy. The cases involved a series of derogatory "X-rated" telegrams concerning plaintiffs (the former wife, her attorney, and her friends) sent by defendant husband to several persons. Defendant telegraph company's demurrers were sustained to each cause of action and those actions were dismissed. Plaintiffs appealed.

The court of appeal held that plaintiffs had failed to state a cause of action for invasion of privacy. One of the two reasons given for the court's holding was that there was no communication by the telegraph company to the public in general. The court affirmed the remainder of the judgments (*52 Cal. App. 3d 429, 440)* .

[b] Creditor Informing Employer Not Sufficient Public Disclosure

Timperley v. Chase Collection Serv. *(1969) 272 Cal. App. 2d 697, 77 Cal. Rptr. 782* , was an action for invasion of privacy based on defendant collection service writing a letter to plaintiff's employer informing it of a debt that defendant was trying to collect from plaintiff. As a result, plaintiff was forced to resign from his job. Defendants' demurrer was sustained and a judgment of dismissal was entered. Plaintiff appealed.

The court of appeal affirmed, holding that a creditor or collection agency has a limited right to reveal to a few others, such as the debtor's employer, the existence of an obligation in order to collect it (*272 Cal. App. 2d 697, 699)* . One of the reasons for the rule, the court stated, was that except for the physical intrusion tort, an invasion of privacy must be accompanied by a disclosure to the public in general or to a large number of persons (*272 Cal. App. 2d 697, 700)* . There are a few exceptions to the creditor's rule, the court noted, such as the inclusion of defamatory or coercive matter,

unnecessary frequency or volume of correspondence, or malice, but plaintiff had failed to allege facts sufficient to prove one of those exceptions (*272 Cal. App. 2d 697, 700-701)* .

[4] Additional Authorities

[a] Disclosure to Public Required

In *Schwartz v. Thiele (1966) 242 Cal. App. 2d 799, 51 Cal. Rptr. 767* , an action for invasion for privacy resulting from defendant's submission of a letter to the office of mental health in the county superior court stating that plaintiff was mentally ill, the court of appeal affirmed a judgment of dismissal after defendant's demurrer was sustained without leave to amend. Among other points discussed, the court stated that an invasion of privacy, except for physical intrusion, must be accompanied by publicity in the sense of communication to the public in general. The content of the communication at issue was not published in this manner (*242 Cal. App. 2d 799,805-806*).

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Volume 18 Chapters 180-189 PRETRIAL PROCEEDINGS---to---PROBATE OF WILLS
CHAPTER 184 PRIVACY: INVASION OF PRIVACY
PART II. FORMS

18-184 California Points & Authorities § 184.27

§ 184.27 Opposing Contention That Defendant Invaded Plaintiff's Right to Privacy--First Amendment Concerns [U.S. Const. amends. I, XIV] Regarding Publication of Publicly Gathered Information Outweigh Any Right to Privacy With Respect to Facts in Public Domain

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT SHOULD NOT BE HELD LIABLE FOR INVASION OF PRIVACY BECAUSE THE PUBLICATION IN QUESTION CONCERNS FACTS IN THE PUBLIC DOMAIN, AND A BALANCING OF *FIRST AMENDMENT* GUARANTEES OF FREEDOM OF EXPRESSION IN THE PUBLIC INTEREST AGAINST THE RIGHT TO PRIVACY WEIGHS IN FAVOR OF PUBLICATION OF THOSE FACTS.

A. No Right of Privacy in Public Information. There is no right of privacy in material that is already in the public domain (*Gill v. Hearst Publ'g Co. (1953) 40 Cal. 2d 224, 230, 253 P.2d 441*).

[*Optional*] **B. Voluntarily Assumed Pose in Public Place.** The right to privacy is not invaded by a photograph of a pose that is voluntarily assumed in a public place (*Gill v. Hearst Publ'g Co. (1953) 40 Cal. 2d 224, 230, 253 P.2d 441*).

[*Optional*] **C. No Liability for Publication of Truthful Information Released to Public in Court Records.** There is no liability for the publication of truthful information that was obtained from official court records that were available to the public (*Cox Broad. Corp. v. Cohn (1975) 420 U.S. 469, 491, 95 S. Ct. 1029, 43 L. Ed. 2d 328* ; *Gates v. Discovery Communications, Inc. (2004) 34 Cal. 4th 679, 692-696, 21 Cal. Rptr. 3d 663, 101 P.3d 552*).

[*Optional*] **D. No Liability For Newspaper's Publication of Lawfully Obtained Truthful Information Absent State Interest of Highest Order.** When a newspaper publishes truthful information that it has lawfully obtained, punishment may be imposed, if at all, only when narrowly tailored to a state interest of the highest order (*Florida Star v. B.J.F. (1989) 491 U.S. 524, 532-534, 541, 109 S. Ct. 2603, 105 L. Ed. 2d 443*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that defendant should be held liable for invasion of privacy because the facts disclosed or intruded on were in the public domain, and a balance of *First Amendment* interests regarding free expression in the public interest against the right to privacy weighs in favor of publication of those facts [*see, e.g., Florida Star v. B.J.F. (1989) 491 U.S. 524, 530-541, 109 S. Ct. 2603, 105 L. Ed. 2d 443]* . The form may be used for any of the torts for invasion of privacy.

Optional Paragraph B is for use if the information in dispute is a published photograph that was taken in a public place. Optional Paragraph C is for use if the information was released to the public in official court records. Optional Paragraph D is for use if truthful information was published by a newspaper that obtained the information lawfully, and first-amendment concerns of free expression outweigh any state interest in punishing that particular disclosure. Paragraph D would most likely arise in the context of a *First Amendment* challenge to a statute prohibiting publication of particular information [*see, e.g., Florida Star v. B.J.F. (1989) 491 U.S. 524, 533-536, 109 S. Ct. 2603, 105 L. Ed. 2d 443* (challenging application of statute precluding publication of name of victim of sexual offense)].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that no invasion of privacy has been alleged or proven because the facts that are the basis of the claim were not private to begin with. For example, this form may be used in opposition to plaintiff's motion for summary judgment, when counsel wishes to assert that material issues of fact exist regarding liability for invasion of privacy because the balance of interests of first-amendment guarantees of free expression against the plaintiff's right to privacy need to be determined according to the particular facts of the case [*see, e.g., Cox Broad. Corp. v. Cohn (1975) 420 U.S. 469, 497, 95 S. Ct. 1029, 43 L. Ed. 2d 328* (reversing summary judgment for plaintiff on issue of liability)]. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion showing that the facts in question were already known to the public, and if appropriate, that they occurred in public or were a matter of public record.

In an appropriate case, these points and authorities may be submitted in opposition to the contentions supported by the points and authorities *set out in §§ 184.20 -184.24.*

[3] Discussion of Authorities

[a] No Right of Privacy in Public Information

Gill v. Hearst Publ'g Co. *(1953) 40 Cal. 2d 224, 253 P.2d 441* , was a case related to *Gill v. Curtis Publishing Co. (1952) 38 Cal. 2d 273, 239 P.2d 630* [*see § 184.21[3][b]*], involving the same publication of a photograph of plaintiffs in an affectionate pose at their place of business that was open to the public, but against different defendants. In *Gill v. Curtis Publishing Co.*, the Court had held that a cause of action was stated based on use of the photograph in connection with an article on love. The plaintiffs in *Gill* alleged that their privacy was invaded by the publication of the photograph with defendants' consent, but did not expressly allege that defendants consented to publication of the article, and defendants' demurrer was sustained without leave to amend. Judgment was entered accordingly, and plaintiffs appealed.

The Supreme Court reversed, holding that plaintiffs should have been allowed to amend their complaint. The Court held, however, that the mere publication of the photograph standing alone did not constitute an actionable invasion of privacy (*40 Cal. 2d 224, 228)* . The Court stated that there can be no privacy in that which is already public (*40 Cal. 2d 224, 230)* . More specifically, the Court stated that it could find no case in which the publication of a mere photograph taken in a pose voluntarily assumed in a public place and portraying nothing to shock the ordinary sense of decency or propriety was held to be an actionable invasion of privacy. The Court noted that to do so would preclude

publication of photographs of parades and street scenes, and also stressed that there was no contention that the photograph was used for advertising or trade purposes (*40 Cal. 2d 224, 231)* .

[b] Voluntarily Assumed Pose in Public Place

Gill v. Hearst Publ'g Co. *(1953) 40 Cal. 2d 224, 253 P.2d 441* , is discussed in *§ 184.27[3][a]*.

[c] No Liability for Publication of Truthful Information Released to Public in Court Records

Cox Broad. Corp. v. Cohn *(1975) 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328* , was an action for invasion of privacy brought by the parent of a murdered rape victim against the owner of a television station that broadcast the victim's name. A Georgia statute prohibited publication or broadcast of the name or identity of a rape victim, and provided that violation was punishable as a misdemeanor. In the course of the criminal court proceedings, a reporter asked for and received from the court clerk copies of the indictments, which contained the victim's name. No one attempted to withhold that information from the reporter, who subsequently broadcast a news report on television that revealed the victim's name. The victim's father brought an action in state court for damages against the broadcasting company and others, relying on the criminal statute, and claiming that his right to privacy had been invaded by the broadcast of his deceased daughter's name. The defendants admitted having aired the broadcasts, but claimed that they were privileged under state law and *U.S. Const. amends. I* and *XIV*. The trial court construed the criminal statute as extending a civil cause of action for invasion of privacy, and granted summary judgment for plaintiff with regard to liability, leaving the issue of damages for jury determination. The defendants appealed, and the state supreme court initially held that the trial court had erred in construing the state statute to extend a civil cause of action for invasion of privacy. It therefore did not consider the issue of the statute's constitutionality at that point. It further held that the complaint stated a cause of action for the invasion of the right of privacy, or for the tort of public disclosure, a common-law tort existing in that jurisdiction "without the help of the statute that the trial judge in this case relied on." The state supreme court noted that although the privacy invaded was not that of the deceased victim the father stated a claim for invasion of his own privacy by reason of the publication of his daughter's name. It held that liability did not follow as a matter of law, and that summary judgment was improper, in that whether the public disclosure of the name actually invaded the plaintiff's "zone of privacy," and if so, to what extent, were issues for determination by the trier of fact. That court also held that *U.S. Const. amends. I* and *XIV* did not, as a matter of law, require judgment for defendants. On motion for rehearing, that court did determine the constitutionality of the state criminal statute, and sustained it as a "legitimate limitation on the right of freedom of expression contained in the *First Amendment*." The court could discern "no public interest or general concern about the identity of the victim of such a crime as will make the right to disclose the identity of the victim rise to the level of *First Amendment* protection." The defendants invoked the appellate jurisdiction of the United States Supreme Court, and alternatively sought review through a petition for certiorari.

The United States Supreme Court reversed, holding that, at the very least, *U.S. Const. amends. I* and *XIV* will not allow exposing the press to liability for truthfully publishing information released to the public in official court records (*420 U.S. 469, 496)* . The Supreme Court noted that defendants clearly raised the issue of the constitutionality of the state criminal statute in their motion for rehearing in the state supreme court, and that that court made a determination of constitutional validity of the statute, invoking the United States Supreme Court's appellate jurisdiction (*420 U.S. 469, 476)* . The Court initially noted that powerful state-interest arguments had been raised in favor of the state criminal statute protecting the disclosure of the name of rape victims, based on important concerns regarding the right to privacy (*420 U.S. 469, 487-490)* . It further noted that "in this sphere of collision between claims of privacy and those of the free press, the interests on both sides are plainly rooted in the traditions and significant concerns of our society." Rather than address the broader question of whether truthful publications may ever be subjected to civil or criminal liability consistent with *U.S. Const. amends. I* and *XIV* (or, in other words, whether the state may ever define and protect an area of privacy free from unwanted publicity in the press), the Court noted that it was appropriate to focus on the narrower interface between press and privacy that the instant case presents: namely, whether the state may impose sanctions on

the accurate publication of the name of a rape victim obtained from public records, that is, specifically from judicial records that are maintained in connection with a public prosecution and that are open to public inspection (*420 U.S. 469, 491)* . The Court noted that the special protected nature of accurate reports of judicial proceedings has repeatedly been recognized, and that the developing law surrounding the tort of invasion of privacy recognizes a privilege in the press to report the events of judicial proceedings (*420 U.S. 469, 492)* . The prevailing law of invasion of privacy generally recognizes that the interests in privacy fade when the information involved already appears on the public record. The Court found that this conclusion is compelling when viewed in terms of *U.S. Const. amends. I* and *XIV*, and in light of the public interest in a vigorous press. The state cause of action for invasion of privacy through public disclosure of the name of a rape victim imposes sanctions on pure expression--the content of a publication--and not conduct or a combination of speech and nonspeech elements that might otherwise be open to regulation or prohibition. The publication of truthful information available on the public record contains none of the indicia of those limited categories of expression, such as "fighting" words, that "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." By placing the information in the public domain on official court records, the state must be presumed to have concluded that the public interest was being served. Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The Court noted that the freedom of the press to publish that information is of critical importance to a government in which the citizenry is the final judge of the proper conduct of public business (*420 U.S. 469, 495)* . In preserving that form of government, *U.S. Const. amends. I* and *XIV* command nothing less than that the states may not impose sanctions on the publication of truthful information contained in official court records open to public inspection (*420 U.S. 469, 495)* . The Court expressed reluctance to embark on a course that would make public records generally available to the media but forbid their publication if offensive to the sensibilities of the supposedly reasonable man. The Court noted that such a rule would make it very difficult for the media to inform citizens about the public business and yet stay within the law. The rule would invite timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be published and that should be made available to the public. At the very least, the Constitution will not allow exposing the press to liability for truthfully publishing information released to the public in official court records. If there are privacy interests to be protected in judicial proceedings, the states must respond by means that avoid public documentation or other exposure of private in formation. Their political institutions must weigh the interests in privacy with the interests of the public to know and of the press to publish. Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it. In this instance as in others, reliance must rest on the judgment of those who decide what to publish or broadcast. The Court noted that the plaintiff did not contend that the name was obtained in an improper fashion, or that it was not on an official court document open to public inspection. Under the given circumstances, the protection of freedom of the press provided by the *First* and *Fourth Amendments* bars the state from making the defendants' broadcast the basis of civil liability (*420 U.S. 469, 496)* .

In ***Gates v. Discovery Communications, Inc.*** *(2004) 34 Cal. 4th 679, 21 Cal. Rptr. 3d 663, 101 P.3d 552* , the plaintiff had served a three-year prison sentence after pleading guilty to being an accessory after the fact to a murder for hire that was committed in 1988. The defendants were television production and transmission companies that aired an account of the crime in 2001. The plaintiff, who alleged that since his release from prison he had led an obscure, productive, and lawful life, sued the defendants for defamation and invasion of privacy because of the television program. In support of the invasion of privacy claim, the plaintiff alleged that he was damaged by the revelation that he had pleaded guilty to being an accessory after the fact and by the airing of his photograph. Finding that the gist of the report was accurate, the trial court sustained the defendants' demurrer to the defamation cause of action, but overruled the demurrer as to the invasion of privacy action and also denied the defendants' motion to strike under *Code Civ. Proc. § 425.16*. The defendants appealed the denial of the motion to strike, and the court of appeal reversed. Relying on the United States Supreme Court's decision in *Cox Broadcasting Corp. v. Cohn*, the court of appeal held that as a matter of law, the plaintiff could not prevail on the privacy action, because the defendants' disclosures were of truthful information contained in the public official records of a judicial proceeding and were thus protected under the *First Amendment*.

The California Supreme Court affirmed the court of appeal's decision, agreeing that liability for invasion of privacy was precluded under the United States Supreme Court's analysis in *Cox* and its progeny, including *Florida Star v. B.J.F.* [*see § 184.27[3][d]*] (*34 Cal. 4th 679, 696)* . The California Supreme Court had overruled its pre-*Cox* decisions in *Briscoe v. Reader's Digest Ass'n, Inc. (1971) 4 Cal. 3d 529, 93 Cal. Rptr. 866, 483 P.2d 34* , to the extent that *Briscoe* held that a plaintiff had a cause of action for invasion of privacy based on the reckless, offensive, injurious publication of true, but not newsworthy, information concerning the criminal past of a rehabilitated convict. The Court recognized that this holding from *Briscoe* had effectively been overruled by the United States Supreme Court's subsequent opinions, at least with respect to information that a publisher obtains from public official records of judicial proceedings (*34 Cal. 4th 679, 692)* . The Court also rejected the argument that the passage of time could render actionable the publication of truthful facts obtained from public official court records, noting that nothing in *Cox* or any of the subsequent Supreme Court opinions suggested that the *First Amendment* protection afforded to the press under these circumstances would diminish through the passage of time (*34 Cal. 4th 679, 693)* .

[d] No Liability for Newspaper's Publication of Lawfully Obtained Truthful Information Absent State Interest of Highest Order

Florida Star v. B.J.F. *(1989) 491 U.S. 524, 109 S. Ct. 2603, 105 L. Ed. 2d 443* , was an action for invasion of privacy brought by a rape victim against a newspaper that published her name. Following the rape incident, the local law enforcement agency prepared a police report, which included the victim's name, and left a copy of the report in the press room of that agency, where members of the press had access to documents of that nature. A reporter-trainee for a community newspaper copied the report, and a reporter used that information, including the victim's name, in an article in the newspaper. In printing the victim's full name, the newspaper violated its internal policy of not publishing the names of sexual-offense victims. As a result of the publication, the victim and her family received threatening telephone calls, forcing her to seek protection and undergo mental health counseling. The plaintiff based her cause of action on a state criminal statute that made the publication of the name or other identifying information concerning a victim of any sexual offense a misdemeanor. The defendant put forth evidence indicating that the newspaper had learned the plaintiff's name from the incident report released by the law-enforcement agency, and that the newspaper's violation of its internal rule against publishing the names of sexual offense victims was inadvertent. Defendant twice moved for a directed verdict. The trial court denied the motions, finding the criminal statute constitutional because it reflected a proper balance between *U.S. Const. amend. I* and privacy rights, as it applied only to a narrow set of "rather sensitive ... criminal offenses." At the close of the newspaper's defense, the trial court granted plaintiff's motion for a directed verdict on the issue of negligence, finding the newspaper negligent per se based on its violation of the criminal statute. This ruling left the jury to consider only the questions of causation and damage. The trial court instructed the jury that it could award punitive damages if it found that the newspaper had "acted with reckless indifference to the rights of others." The jury awarded compensatory and punitive damages. (The complaint had also named the law-enforcement agency as a defendant; plaintiff and the agency entered into a pretrial settlement, and the award of compensatory damages was offset by the settlement.) The appellate court affirmed, and the state supreme court denied discretionary review. The defendant appealed to the United States Supreme Court.

The United States Supreme Court reversed, holding that when a newspaper publishes truthful information that it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order, and that no such interest is satisfactorily served by imposing liability under the criminal statute in question under the facts of the case (*491 U.S. 524, 541)* . The Supreme Court noted that the tension between the right that *U.S. Const. amend. I* accords to a free press on the one hand, and the protections that various statutes and common-law doctrines accord to personal privacy against the publication of truthful information on the other hand, is a subject it has addressed several times in recent years. It noted that its decisions have not exhaustively considered this conflict in cases involving government attempts to sanction the accurate dissemination of information as invasive of privacy. On the contrary, although its decisions have without exception upheld the press's right to publish, it has emphasized each time that it was resolving the conflict only as it arose in a discrete factual context (*491 U.S. 524, 530)*

. Defendant contended that the instant case is indistinguishable from *Cox Broad. Corp. v. Cohn (1975) 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328* [*see § 184.27[3][d]*]. Alternatively, defendant contended that the *First Amendment* compels the principle that the press may never be punished, civilly or criminally, for publishing the truth. Plaintiff urged that the opinion in *Cox* be overruled and replaced with a categorical rule that publication of the name of a rape victim never enjoys constitutional protection. The Court noted that, despite the strong resemblance of this case to *Cox*, that case cannot fairly be read as controlling under these facts. The name of the rape victim in that case was obtained from courthouse records that were open to public inspection, and *Cox* emphasized the importance of the role of the press in exposing trials to public scrutiny, a factor absent in this case (*491 U.S. 524, 531-532)* . The Court also rejected the plaintiff's invitation to prohibit categorically the publication of rape victims' names (*491 U.S. 524, 532-533)* . The Court stressed the necessity of relying on limited principles that sweep no more broadly than the appropriate context of this case, because of the sensitivity and significance of the interests presented in clashes between the *First Amendment* and privacy rights (*491 U.S. 524, 533)* . The Court noted that this case is appropriately analyzed with reference to the limited *First Amendment* principle articulated in *Smith v. Daily Mail Publ'g Co. (1979) 443 U.S. 97, 103, 99 S. Ct. 2667, 61 L. Ed. 2d 399* : "If a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." The Court then articulated the considerations underlying the holding in *Daily Mail*: (1) because the *Daily Mail* formulation only protects the publication of information that a newspaper has "lawfully obtained," the government retains ample means of safeguarding significant interests on which publication may impinge, including protecting a rape victim's anonymity; (2) punishing the press for its dissemination of information that is already publicly available is relatively unlikely to advance the interests in the service of which the state seeks to act (*491 U.S. 524, 533-535)* ; and (3) "timidity and self-censorship" may result from allowing the media to be punished for publishing certain truthful information (*491 U.S. 524, 535)* . The Court noted that a contrary rule would force on the media the onerous obligation of sifting through government press releases, reports, and pronouncements to prune out material arguably unlawful for publication. Applied to this case, the *Daily Mail* rule clearly requires reversal. The Court noted that the news article in question was undisputedly accurate. Moreover, the defendant obtained plaintiff's name lawfully. The Court rejected plaintiff's contention that, by virtue of a state law providing that the public is not entitled to inspect police reports revealing a rape victim's name, a newspaper may not lawfully receive that information when furnished by the government. The statute did not prohibit *receipt* of the information, and the news article concerned "a matter of public significance" within the meaning of *Daily Mail* (*491 U.S. 524, 536-537)* .

The Court then analyzed the facts of the case to determine whether imposing liability pursuant to the criminal statute serves a need to further a state interest of the highest order. The plaintiff contended that a rule punishing publication furthers three closely related interests: the privacy of victims of sexual offense; the physical safety of those victims; and the goal of encouraging rape victims to report the offense (*491 U.S. 524, 537)* . The Court concluded that imposing liability for publication under the circumstances of the case is too precipitous a means of advancing those interests for purposes of establishing a "need" within the meaning of *Daily Mail*, for the following reasons: (1) the defendant obtained the identifying information by reason of its placement in the public domain by the government; (2) the trial court applied a broadly sweeping negligence per se standard based on the underlying criminal statute, which required no finding under the particular facts that the disclosure was one that a reasonable person would find highly offensive; and (3) the facial underinclusiveness of the criminal statute raises serious doubts about whether the state is serving sufficiently significant state interests, that is, the statute prohibits conduct only by mass communication, and therefore does not punish the same conduct by any other class of persons (*491 U.S. 524, 537-540)* . With respect to the third concern stated above, the Court found that the state's selective ban on publication by the mass media does not satisfactorily accomplish its stated purpose, because it requires more careful and inclusive precautions against alternative forms of dissemination (*491 U.S. 524, 540-541)* .

The Court noted that its holding in this case is limited. It emphasized that it did not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the state may protect the individual from intrusion by the press, or even that a state may never punish publication of the name of a victim of a sexual offense. It concluded that when a newspaper publishes truthful information that it has lawfully obtained,

punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order, and that no such interest is satisfactorily served by imposing liability under the state criminal statute in question to the defendant under the facts of the instant case (*491 U.S. 524, 541)* .

[4] Additional Authorities

[a] No Right of Privacy in Public Information

In *Moreno v. Hanford Sentinel, Inc. (2009) 172 Cal. App. 4th 1125, 91 Cal. Rptr. 3d 858* , plaintiff wrote an article criticizing her hometown and its inhabitants and published it on her page of the highly-popular Internet site MySpace.com, making the article accessible to anyone with a computer connected to the Internet. Following plaintiff's initial publication, the principal of the high school in plaintiff's hometown provided a copy of the article to the local newspaper, which ran it without plaintiff's authorization as a "Letter to the Editor," complete with plaintiff's full name. In reaction to the letter, community members subjected plaintiff's family to death threats and other actions that forced plaintiff's family to close the family business and move. Plaintiff sued the newspaper and other parties for invasion of privacy based on the public disclosure of private facts. The trial court sustained defendants' demurrer to this cause of action and the court of appeal affirmed. The court of appeal held that the unauthorized republication in a newspaper of plaintiff's article was not an actionable public disclosure of private facts. As plaintiff herself made the information available to any person with a computer, the court concluded that no reasonable person would have maintained an expectation of privacy regarding the published material, regardless of the fact that plaintiff removed the article from the Internet site after only six days. The fact that the newspaper "letter" included plaintiff's full name, while the Internet article had only plaintiff's first name, was irrelevant, as plaintiff full name and identity was readily available from other information provided by plaintiff on her MySpace.com page (*172 Cal. App. 4th 1125, 1130-1131)* .

In *Gionfriddo v. Major League Baseball (2001) 94 Cal. App. 4th 400, 114 Cal. Rptr. 2d 307* , former professional baseball players brought suit against the defendants, asserting causes of action for statutory and common law appropriation based on the defendants' unauthorized use of the players' names, images, likenesses, and career statistics in game programs, Web sites, and documentaries. The court of appeal affirmed summary judgment for the defendants. Addressing the common law action, the court held that this use of the names, images, likenesses, and career statistics of the former players served a public interest. Professional baseball has millions of fans, and these fans have an abiding interest in the history of the game. Therefore, the uses at issue commanded a substantial public interest and were a form of expression to be afforded substantial constitutional protection (*94 Cal. App. 4th 400, 410-411)* . Moreover, the court rejected the plaintiffs' claim that these uses were commercial in nature and should be afforded reduced constitutional protection. Instead, the court concluded that this use of historical information was not a commercial use that could support an action for appropriation, even though this use may have provided some promotional benefit to the game of baseball, because the challenged use did not constitute an advertisement nor did it otherwise propose a commercial transaction. Given the significant public interest in the sport, the plaintiffs' negligible economic interests were far outweighed by the public interest in the free dissemination of the information (*94 Cal. App. 4th 400, 411-415)* .

[b] No Liability for Publication of Truthful Information Released to Public in Court Records

In *Green v. Uccelli (1989) 207 Cal. App. 3d 1112, 255 Cal. Rptr. 315* , plaintiff filed an action for invasion of privacy against the attorney who represented his wife in an underlying dissolution action. He vaguely alleged that the attorney had disclosed private facts about the dissolution case in violation of the dissolution court's order sealing the court file. The court of appeal affirmed dismissal of the complaint, holding that the vague allegations did not satisfy the elements of the tort: (1) public disclosure (2) of a private fact (3) that would be offensive and objectionable to the reasonable person and (4) that is not of legitimate public concern. The court noted that the plaintiff, himself an attorney, should have realized that when he filed his dissolution action, he was entering a public forum that would result in public disclosure of private facts, particularly because he had filed in the public record 50 pages of material relating to the dissolution (*207 Cal. App. 3d 1112, 1118-1120)* .

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Volume 18 Chapters 180-189 PRETRIAL PROCEEDINGS---to---PROBATE OF WILLS
CHAPTER 184 PRIVACY: INVASION OF PRIVACY
PART II. FORMS

18-184 California Points & Authorities § 184.28

§ 184.28 Opposing Contention That Defendant Invaded Plaintiff's Right to Privacy--Disclosure or Intrusion Not Offensive to Reasonable Person

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT SHOULD NOT BE HELD LIABLE FOR INVASION OF PRIVACY BECAUSE THE _____ [DISCLOSURE *or* INTRUSION] THAT IS THE BASIS OF PLAINTIFF'S COMPLAINT WAS NOT OFFENSIVE OR OBJECTIONABLE TO A REASONABLE PERSON OF ORDINARY SENSIBILITIES.

[*EITHER*]

A. Disclosure Must Be Offensive. In order to be an invasion of privacy, the disclosure in question must be offensive and objectionable to a reasonable person of ordinary sensibilities (*Forsher v. Bugliosi (1980) 26 Cal. 3d 792, 808-809, 163 Cal. Rptr. 628, 608 P.2d 716* ; *Gill v. Hearst Publ'g Co. (1953) 40 Cal. 2d 224, 229, 253 P.2d 441*).

[*OR*]

A. Intrusion Must be Offensive. In order to state an actionable intrusion, the intrusion must be highly offensive to a reasonable person and sufficiently serious and unwarranted as to constitute an egregious breach of the social norms (*Hernandez v. Hillsides, Inc. (2009) 47 Cal. 4th 272, 295, 97 Cal. Rptr. 3d 274, 211 P.3d 1063*).

[*CONTINUE*]

[*Optional*] **B. No Reasonable Expectation of Privacy.** Where there is no reasonable expectation of privacy, conduct is not sufficiently offensive to support an action for invasion of privacy (*Sacramento County Deputy Sheriffs' Assn. v.*

County of Sacramento (1996) 51 Cal. App. 4th 1468, 1487).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that defendant should be held liable for invasion of privacy because the disclosure or intrusion in question was not offensive and objectionable to a reasonable person of ordinary sensibilities. The form may be used in opposing liability for any of the torts for invasion of privacy.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the disclosure in question was not offensive. For example, this form may be used in support of a demurrer or a motion for summary judgment when counsel wishes to assert that plaintiff failed to state a valid cause of action because plaintiff failed to allege a disclosure or intrusion that is offensive and objectionable to a reasonable person. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion showing that the disclosure or intrusion in question was not offensive and objectionable to a reasonable person of ordinary sensibilities.

In an appropriate case, these points and authorities may be submitted in opposition to the contentions supported by the points and authorities *set out in §§ 184.20 -184.24.*

[3] Discussion of Authorities

[a] Disclosure Must Be Offensive

The facts and procedural background of ***Forsher v. Bugliosi*** *(1980) 26 Cal. 3d 792, 163 Cal. Rptr. 628, 608 P.2d 716* , are discussed in *§ 184.20[3][b]*. The Supreme Court set forth the elements of the public disclosure of private facts tort, including the requirement that the disclosure be offensive and objectionable to a reasonable person of ordinary sensibilities (*26 Cal. 3d 792, 808-809*). In holding that no cause of action was stated, the Court found that in the circumstances of the case the disclosure of plaintiff's name was not offensive because the clear import of the disclosure was to absolve plaintiff of any responsibility for an unsolved murder (*26 Cal. 3d 792, 812-813*).

The facts and procedural background of ***Gill v. Hearst Publ'g Co.*** *(1953) 40 Cal. 2d 224, 253 P.2d 441* , are discussed in *§ 184.27[3][a]*. The plaintiffs alleged that their privacy was invaded by publication of a photograph showing them in an affectionate pose at their place of business. On appeal by plaintiffs from the judgment entered after defendants' demurrer was sustained without leave to amend, the Supreme Court reversed, holding that plaintiffs should have been allowed to amend their complaint. The Court held, however, that the mere publication of the photograph standing alone did not constitute an actionable invasion of privacy (*40 Cal. 2d 224, 228)* . The right of privacy is determined by the norm of the ordinary person; that is, the alleged objectionable publication must appear offensive in light of ordinary sensibilities (*40 Cal. 2d 224, 229)* .

[b] Intrusion Must be Offensive

The factual and procedural background of ***Hernandez v. Hillsides, Inc.*** *(2009) 47 Cal. 4th 272, 97 Cal. Rptr. 3d 274, 211 P.3d 1063* , is provided in § 184.25[3][b]. In affirming summary judgment in favor of the employer on plaintiffs' claims for intrusion, the California Supreme Court held that while the plaintiffs had shown an intrusion into their shared office space, a place in which they had a reasonable expectation of privacy (*47 Cal. 4th 272, 294)* , they could not demonstrate under the circumstances that the intrusion would be considered utterly unjustified and highly offensive to a

reasonable person. The Court noted that the undisputed evidence demonstrated that the camera equipment was installed in order to confirm a strong suspicion, triggered by the facility's computer network tracking measures, that an employee within the facility, specifically a program director or other staff person with keys and access to the administration building, was engaging in unauthorized and inappropriate after-hours computer use that could conceivably subject the facility to legal liability or, should some of the facility children be exposed, cause harm to the children in their vulnerable states. Moreover, the facility director repeatedly assured that the equipment was installed only to acquire evidence of who was using the computer in such unauthorized fashion, an assurance that was corroborated by his subsequent actions in limiting use of the camera (*47 Cal. 4th 272, 298-299)* . The Court also noted that the office setting had been selected only after an attempt to monitor the computer lab had been fruitless, and the camera's rage of vision within the office was narrow, limited only to the desk and computer workstation that had been used to access the pornography (*47 Cal. 4th 272, 296)* .

[c] No Reasonable Expectation of Privacy

In ***Sacramento County Deputy Sheriffs' Assn. v. County of Sacramento*** *(1996) 51 Cal. App. 4th 1468, 1487* , county jail employees brought an action for invasion of privacy based on the placement of a video camera in the release office of the county jail. The County Sheriff's Department had experienced incidents of money missing from the release office area, and had placed the video surveillance camera as part of a criminal investigation. After discovering the camera, plaintiffs filed suit alleging physical intrusion into plaintiffs' seclusion. The trial court granted summary judgment for defendants on the ground that plaintiffs had no reasonable expectation of privacy under the circumstances.

The court of appeal affirmed, noting that under the Restatement (Second) of Torts, one is subject to liability for invasion of privacy only if the intrusion would be highly offensive to a reasonable person. The court stated that in determining the existence of offensiveness, courts consider the degree of intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder's motives and objectives, the setting into which he or she intrudes, and the expectations of those whose privacy is invaded. The court concluded that no offensive conduct had occurred because the intrusion took place in a nonprivate office in the booking area of a county jail, where plaintiffs had a diminished expectation of privacy (*51 Cal. App. 4th 1468, 1487)* .

[4] Additional Authorities

[a] Disclosure Must Be Offensive

In *Aisenson v. American Broad. Co. (1990) 220 Cal. App. 3d 146, 269 Cal. Rptr. 379* , a superior court judge brought an action against a television station that broadcast the results of an opinion poll it conducted among members of the criminal-law bar, concerning performance ratings of criminal-law judges; the complaint alleged defamation based on the plaintiff's receiving the worst overall rating of all the judges evaluated, and intrusion into plaintiff's privacy, based on a videotape that was shown during the program, depicting plaintiff outside his house. The court of appeal affirmed summary judgment for the defendant, holding that the right to be secure from intrusion is not absolute: one who intentionally intrudes, physically or otherwise, on the solitude or seclusion of another is subject to liability to the other for invasion of privacy, if the intrusion would be highly offensive to a reasonable person. There was no evidence in the case before the court that the defendant's conduct, in scrutinizing a public official, was sufficiently offensive to support that cause of action (*220 Cal. App. 3d 146, 162-163)* .

In *Warfield v. Peninsula Golf & Country Club (1989) 214 Cal. App. 3d 646, 262 Cal. Rptr. 890* , the trial court dismissed a complaint brought by a woman against a private social club, alleging several causes of action that arose from termination of her membership from the club after the dissolution of her marriage and that were based on a bylaw of the club that a family membership may only be issued to an adult male. In her cause of action for false light, the plaintiff alleged that an "account" published in the club's membership newsletter had the effect of casting her in a false light in the public eye. The court of appeal reversed with respect to the causes of action alleging civil rights violations,

but affirmed dismissal of the cause of action for false light, holding that the anonymously worded statement contained in the newsletter could not have been reasonably construed as "offensive and objectionable" (*214 Cal. App. 3d 646, 660)* .

[b] No Reasonable Expectation of Privacy

In *Wilkins v. National Broad. Co. (1999) 71 Cal. App. 4th 1066, 84 Cal. Rptr. 2d 329* , plaintiffs were two representatives of a company that leased and programmed 800- and 900-type telephone lines, and then sold them to investors. Defendants were two television producers who were investigating the practice of charging for services on so-called "toll-free" 800-type lines. Defendants had arranged to meet with plaintiffs to hear a sales presentation of their company's services, without informing plaintiffs of their true identities or that the meeting would be filmed by hidden cameras for later use on a network newsmagazine. The meeting was held in the middle of a crowded public restaurant within close proximity to other tables, while waiters were present at their table and with two other unidentified associates of the defendants in attendance, plaintiffs did not conduct themselves as though they were dispensing private information, and plaintiffs freely admitted that they provided the same sales information to hundreds of other potential investors. The court of appeal held that under those circumstances, there was no intrusion into a private place, conversation, or matter, the actions were not highly offensive to a reasonable person, and the plaintiffs had no objectively reasonable expectation of seclusion or solitude in the public restaurant (*71 Cal. App. 4th 1066, 1078-1079)* .

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CHAPTER 184 PRIVACY: INVASION OF PRIVACY
PART II. FORMS

18-184 California Points & Authorities § 184.29

§ 184.29 Opposing Contention That Defendant Invaded Plaintiff's Right to Privacy--Constitutional Protection for Newsworthy Matters

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT SHOULD NOT BE HELD LIABLE FOR INVASION OF PRIVACY BECAUSE THE DISCLOSURE BY DEFENDANT THAT IS THE BASIS OF PLAINTIFF'S ACTION IS CONSTITUTIONALLY PROTECTED NEWSWORTHY MATTER.

A. Constitutional Protection for Newsworthy Matters. A truthful publication is constitutionally protected if it is newsworthy and does not reveal facts so offensive as to shock the community's notions of decency (*see Briscoe v. Reader's Digest Ass'n, Inc. (1971) 4 Cal. 3d 529, 541, 93 Cal. Rptr. 866, 483 P.2d 34 , overruled on other grounds, Gates v. Discovery Communications, Inc. (2004) 34 Cal. 4th 679, 696-697* & n.9, *21 Cal. Rptr. 3d 663, 101 P.3d 552*).

B. Criteria for Newsworthiness. Among the factors to consider in determining whether a publication is newsworthy are the following: (1) the social value of the facts published; (2) the depth of the publication's intrusion into an individual's private affairs; (3) the extent to which the individual voluntarily acceded to a position of public notoriety; (4) the exact nature of the state's interest in preventing disclosure; (5) whether the information is a matter of public record; and (6) the lapse of time between the event and the publication (*Forsher v. Bugliosi (1980) 26 Cal. 3d 792, 810, 812, 163 Cal. Rptr. 628, 608 P.2d 716* ; *Kapellas v. Kofman (1969) 1 Cal. 3d 20, 36, 81 Cal. Rptr. 360, 459 P.2d 912*).

C. Proof of Newsworthiness. The burden of proving that a publication is not newsworthy is on the plaintiff (*Diaz v. Oakland Tribune, Inc. (1983) 139 Cal. App. 3d 118, 130, 188 Cal. Rptr. 762*).

D. Proof of Offensiveness. The plaintiff is required to prove that the publication was made with reckless disregard for its offensiveness (*see Briscoe v. Reader's Digest Ass'n, Inc. (1971) 4 Cal. 3d 529, 542-543, 93 Cal. Rptr. 866, 483*

P.2d 34 , overruled in part, Gates v. Discovery Communications, Inc. (2004) 34 Cal. 4th 679, 696-697 & n.9, *21 Cal. Rptr. 3d 663, 101 P.3d 552*).

[*Optional*] **E. Reports of Crimes.** In general, reports of recent crimes and the names of suspects and offenders, and reports of the facts but not the names concerning past crimes, are considered newsworthy matters (*see Briscoe v. Reader's Digest Ass'n, Inc. (1971) 4 Cal. 3d 529, 537, 93 Cal. Rptr. 866, 483 P.2d 34 , overruled on other grounds, Gates v. Discovery Communications, Inc. (2004) 34 Cal. 4th 679, 696-697* & n.9, *21 Cal. Rptr. 3d 663, 101 P.3d 552* ; *Kapellas v. Kofman (1969) 1 Cal. 3d 20, 38-39, 81 Cal. Rptr. 360, 459 P.2d 912*).

[*Optional*] **F. Nexus Requirement for Disclosures Concerning Involuntary Public Figures.** Where the facts disclosed about a limited involuntary public figure bear a logical relationship to the newsworthy subject of a news broadcast and are not intrusive in great disproportion to their relevance, the broadcast is newsworthy (*Shulman v. Group W Prods., Inc. (1998) 18 Cal. 4th 200, 228, 74 Cal. Rptr. 2d 843, 955 P.2d 469*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that defendant should be held liable for invasion of privacy on the ground that the disclosure in question is constitutionally protected because it concerns newsworthy matter. The form may be used in opposing liability for any of the torts for invasion of privacy.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of newsworthiness. For example, this form may be used in support of a demurrer or a motion for summary judgment when counsel wishes to assert that the disclosure that is the basis of plaintiff's action is constitutionally protected newsworthy matter, and thus plaintiff has failed to state a valid cause of action or the action has no merit. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion showing that the disclosure in question concerns newsworthy matter and is not offensive to the community's notions of decency, and that it meets some or all of the listed criteria for newsworthiness. If optional Paragraph E is used, the discussion should establish that the disclosure concerns a report of a recent crime, or facts but not names concerning a past crime. If optional paragraph F is used, counsel should first establish that the disclosure concerns a limited involuntary public figure (for example, an automobile accident victim) and then argue that: (1) the facts disclosed about that involuntary public figure bear a logical relationship to a newsworthy subject of a news broadcast (for example, automobile accidents and rescues); and (2) the facts disclosed are not intrusive in great disproportion to their relevance [*see Shulman v. Group W Prods., Inc. (1998) 18 Cal. 4th 200, 228, 74 Cal. Rptr. 2d 843, 955 P.2d 469]* .

In an appropriate case, these points and authorities may be submitted in opposition to the contentions supported by the points and authorities *set out in §§ 184.20 -184.24*.

[3] Discussion of Authorities

[a] Constitutional Protection for Newsworthy Matters

The facts and procedural background of ***Briscoe v. Reader's Digest Ass'n, Inc.*** *(1971) 4 Cal. 3d 529, 93 Cal. Rptr. 866, 483 P.2d 34* , are discussed in *§ 184.21[3][b]*. The Supreme Court reversed a judgment entered after defendant's general demurrer was sustained, and stated that plaintiff had stated a cause of action for the public disclosure tort, and could amend its complaint to state a cause of action for false light publicity. In examining the conflict between freedom

of the press and the right of privacy, the Court stated that a truthful publication is constitutionally protected if (1) it is newsworthy and (2) it does not reveal facts so offensive as to shock the community's notions of decency (*4 Cal. 3d 529, 541)* .

[b] Criteria for Newsworthiness

The facts and procedural background of ***Forsher v. Bugliosi*** *(1980) 26 Cal. 3d 792, 163 Cal. Rptr. 628, 608 P.2d 716* , are discussed in *§ 184.20[3][b]*. The Supreme Court affirmed a judgment of dismissal entered after defendants' general demurrer was sustained to plaintiff's actions for invasion of privacy, libel, and slander. Defendants had referred to plaintiff in a book in connection with an unsolved murder. In discussing plaintiff's action for public disclosure of private facts, the Court listed the factors that should be considered in determining whether or not a publication is constitutionally protected as newsworthy, including the social value of the facts published, the depth of the publication's intrusion into an individual's private affairs, the extent to which the individual voluntarily acceded to a position of public notoriety, the exact nature of the state's interest in preventing disclosure, whether the information is a matter of public record, and the lapse of time between the event and the publication (*26 Cal. 3d 792, 812)* . Applying these factors to the case before it, the Court held that plaintiff had failed to allege a cause of action for invasion of privacy (*26 Cal. 3d 792, 812)* .

Kapellas v. Kofman *(1969) 1 Cal. 3d 20, 81 Cal. Rptr. 360, 459 P.2d 912* , was an action for libel by a candidate for public office and for libel and invasion of privacy on behalf of her minor children against defendant newspaper. Defendant had run an editorial disclosing the criminal activities of plaintiff's children, and questioning her qualifications for public office. Defendant's demurrers to all the actions were sustained and the case was dismissed. Plaintiff appealed.

The Supreme Court affirmed the demurrer to the childrens' cause of action for invasion of privacy, but reversed as to the libel actions. As to the action for invasion of privacy, the Court stated that in determining whether a particular incident is newsworthy, the courts consider a variety of factors, including the social value of the facts published, the depth of the article's intrusion into ostensibly private affairs, and the extent to which the party voluntarily acceded to a position of public notoriety. If the information reported has previously become part of the public domain or the intrusion into an individual's private life is only slight, publication will be privileged even though its social utility may be minimal. On the other hand, when the legitimate public interest in the published information is substantial, a much greater intrusion into an individual's private life will be sanctioned, especially if the individual willingly entered into the public sphere (*1 Cal. 3d 20, 36)* . The Court held that the statements about the children were privileged as newsworthy information because of the great importance of disclosure of relevant information about candidates for public office and because the information was a matter of public record (*1 Cal. 3d 20, 38-39)* . The Court stated that the editorial purported to disclose only incidents that had initially been recorded on the police blotter, so they were already matters of public record (*1 Cal. 3d 20, 38)* .

[c] Proof of Newsworthiness

The facts and procedural background of ***Diaz v. Oakland Tribune, Inc.*** *(1983) 139 Cal. App. 3d 118, 188 Cal. Rptr. 762* , are discussed in *§ 184.29*. The court reversed because of errors in the jury instructions, one of which was an instruction that defendants had the burden of proving that the publication in dispute was newsworthy in order to prevail (*139 Cal. App. 3d 118, 127)* . The court held instead that plaintiff has the burden of proving that the publication is not newsworthy. Once plaintiff has made a prima facie case of non-newsworthiness, defendants may meet it with a showing that the information was newsworthy (*139 Cal. App. 3d 118, 130)* .

[d] Proof of Offensiveness

The facts and procedural background of ***Briscoe v. Reader's Digest Ass'n, Inc.*** *(1971) 4 Cal. 3d 529, 93 Cal. Rptr. 866, 483 P.2d 34* , are discussed in *§ 184.21[3][b]*. In reversing the judgment of dismissal and ordering that defendant's

general demurrer be overruled, the Supreme Court stated that, in order to protect *First Amendment* freedoms, plaintiff would be required to prove that the publisher invaded plaintiff's privacy with reckless disregard for the fact that reasonable men would find the invasion highly offensive (*4 Cal. 3d 529, 542-543)* . Plaintiff had complied with this initial requirement in this case by alleging malice and willfulness in his complaint (*4 Cal. 3d 529, 543 n.19*).

[e] Reports of Crimes

The facts and procedural background of ***Briscoe v. Reader's Digest Ass'n, Inc.*** *(1971) 4 Cal. 3d 529, 93 Cal. Rptr. 866, 483 P.2d 34* , are discussed in *§ 184.21[3][b]*. The Supreme Court reversed a judgment entered after defendant's general demurrer was sustained, and held that plaintiff had stated a cause of action for the public disclosure tort, and could amend its complaint to state a cause of action for false light publicity. In discussing the causes of action for invasion of privacy, the Court stated that truthful reports of recent crimes and the names of suspects or offenders are deemed newsworthy. Additionally, reports of the facts of past crimes are newsworthy but the identification of the actor in long past crimes usually does not serve a sufficient public interest to be considered newsworthy (*4 Cal. 3d 529, 537)* .

NOTE:

Regardless of whether the identity of a former criminal is still newsworthy, there are constitutional concerns that now preclude the imposition of liability for the publication of truthful information found in public court records [*see* *Cox Broad. Corp. v. Cohn (1975) 420 U.S. 469, 491-496, 95 S. Ct. 1029, 43 L. Ed. 2d 328* ; *Gates v. Discovery Communications, Inc. (2004), 34 Cal. 4th 679, 692-696, 21 Cal. Rptr. 3d 663, 101 P.3d 552]* . These constitutional issues are discussed in *§ 184.27*.

Kapellas v. Kofman *(1969) 1 Cal. 3d 20, 81 Cal. Rptr. 360, 459 P.2d 912* , is discussed in *§ 184.29[3][b]*.

[f] Nexus Requirement for Disclosures Concerning Involuntary Public Figures

In ***Shulman v. Group W Prods., Inc.*** *(1998) 18 Cal. 4th 200, 74 Cal. Rptr. 2d 843, 955 P.2d 469* , plaintiffs, a mother and her son were injured when their car went off the highway overturning and trapping them inside. A medical transport and rescue helicopter crew came to plaintiffs' assistance, accompanied on this occasion by a video camera operator employed by a television producer. The cameraman filmed plaintiffs' extrication from the car, the flight nurse and medic's efforts to give them medical care during the extrication, and their transport to the hospital in the helicopter. The flight nurse wore a small microphone that picked up her conversations with other rescue workers and with one of the plaintiffs. This videotape and sound track were edited into a segment that was broadcast months later on a documentary show, On Scene: Emergency Response. Plaintiffs, who neither consented to the filming and recording nor to the broadcast, alleged that the television producers intruded into a realm of personal privacy and gave unwarranted publicity to private events of their lives. The trial court granted summary judgment for the producers on the ground that the events depicted in the broadcast were newsworthy and the producers' activities were therefore protected under the *First Amendment to the United States Constitution*. The court of appeal reversed, finding triable issues of fact existed as to one plaintiff's claim for publication of private facts. Agreeing with some, but not all, of the court of appeal's analysis, a majority of the California Supreme Court concluded summary judgment was proper as to plaintiffs' cause of action for publication of private facts. The Court held that the material broadcast was newsworthy as a matter of law and, therefore, could not be the basis of tort liability under a private facts claim (*18 Cal. 4th 200, 213)* .

The Court began its analysis by stating the elements of the public disclosure tort: public disclosure, of a private fact, which would be offensive and objectionable to the reasonable person and which is not of legitimate public concern. It then stated that the element critical to this case was the presence or absence of legitimate public interest (newsworthiness) in the facts disclosed. The Court reviewed the decisional law regarding newsworthiness and initially concluded that lack of newsworthiness was an element of the private facts tort, making it a complete bar to common law liability. It further concluded that the analysis of newsworthiness inevitably involved accommodating conflicting

interests in personal privacy and in press freedom as guaranteed by the *First Amendment*, and that in the circumstances of this case, where the facts disclosed about a limited, involuntary public figure, bear a logical relationship to the newsworthy subject of the broadcast and are not intrusive in great disproportion to their relevance, the broadcast was of legitimate public concern, barring liability under the private facts tort (*18 Cal. 4th 200, 215)* .

In looking at the facts of this case, the Court first determined that the subject matter of the broadcast as a whole was of legitimate public concern in that automobile accidents as well as the rescue and medical treatment of accident victims were of great interest to much of the public. It then applied the analysis stated above and determined that (1) the plaintiff mother's appearance and words as she was extricated from the overturned car, placed in the helicopter and transported to the hospital were also of legitimate public concern, and that (2) the broadcast did not constitute a morbid and sensational prying into private lives for its own sake and was not so lurid and sensational in emotional tone, or so intensely personal in content as to make its intrusiveness disproportionate to its relevance (*18 Cal. 4th 200, 229)* . The Court found specifically that the broadcast video depicting the plaintiff mother's injured physical state and audio showing her disorientation and despair were substantially relevant to the segment's newsworthy subject matter because one of the dramatic and interesting aspects of the story as a whole was its focus on the flight nurse. Her work was portrayed as demanding and important and as involving a measure of personal risk. The broadcast made apparent that this type of emergency care required not only medical knowledge, concentration and courage, but an ability to talk and listen to severely traumatized patients. One of the challenges the nurse faced in assisting the plaintiff mother was the confusion, pain and fear that she understandably felt in the aftermath of the accident.

NOTE:

The *Shulman* opinion expressed the views of a majority of the court's members. Five justices concluded that summary judgment was proper on plaintiffs cause of action for publication of private facts because the facts disclosed were newsworthy, and thus protected by the *First Amendment*. In articulating the proper analysis to be applied in cases such as this, this Court as so many before it, wrestled with the conflicting interests of personal privacy and press freedom. In the end, the Court reasoned that the approach it had fashioned accorded with its own prior decisions, in that it balanced the public's right to know against the plaintiff's privacy interest by drawing a protective line at the point the material revealed ceases to have any substantial connection to the subject matter of the newsworthy report. The analysis also incorporated considerable deference to reporters and editors, avoiding the likelihood of unconstitutional interference with the freedom of the press to report truthfully on matters of legitimate public interest. As to this matter, the Court states in footnote 8 that although it believed its conclusions in this case accorded with the dictates of the federal Constitution, it could not be sure without clearer guidance from the United States Supreme Court. The Court acknowledges that unless it abandoned the private facts tort completely, it appeared to be at a theoretical risk of creating unconstitutional liability, since the high court has thus far declined to decide whether truthful publications may ever be subject to civil or criminal liability consistently with the *First* and *Fourteenth Amendments*, or to put it another way, whether the State may ever define and protect an area of privacy free from unwanted publicity in the press. In light of this footnote, it appears likely that at some point the United States Supreme Court will step in to provide guidance to the States on this Constitutional matter.

[4] Additional Authorities

[a] Criteria for Newsworthiness

The factual and procedural background of *Taus v. Loftus (2007) 40 Cal. 4th 683, 54 Cal. Rptr. 3d 775, 151 P.3d 1185* , is provided in § 184.25[3][h]. In that case, defendant scholar, while speaking at a conference dealing with repressed sexual abuse memories, had made comments about plaintiff, who had been the subject of a published and widely debated case study but whose identity was not widely known. In those comments, the scholar had said merely that the case study subject had engaged in unspecified "destructive behavior" in her teen years and was currently serving in the

Navy. The Supreme Court held that these comments, which were not of an intensely personal or intimate nature, were newsworthy within the debate about the reliability of repressed memory recovery. The Court noted that other commentators responding to the published case study had earlier remarked that it would be of interest from an academic standpoint to learn the effects of the events described in the case study on the subject's later development (*40 Cal. 4th 683, 719)* .

In *Morrow v. Los Angeles Unified School Dist. (2007) 149 Cal. App. 4th 1424, 57 Cal. Rptr. 3d 885* , a high school principal brought actions for defamation and invasion of privacy against his former school district, a local superintendent, and the district superintendent after a newspaper reported that plaintiff was being replaced six months before his planned retirement due to the perceived need for "stronger leadership" at the plaintiff's school in light of several recent outbursts of violence among the students. The report also indicated that the district superintendent stated that the principal's retirement plans "did not fit with the district's needs" and the principal's handling of the violence had "accelerated" the decision to replace plaintiff. The trial court granted a motion to strike the causes of action under *Code Civ. Proc. § 425.16*, the anti-SLAPP statute, and the court of appeal affirmed. The court of appeal held that the invasion of privacy action could not succeed because the statements made by the district superintendent to the newspaper reporter concerning the district's decision to replace plaintiff as part of the response to the school violence were relevant to that newsworthy subject, even if the disclosure included minimal and not particularly intrusive information about the principal's retirement plans (*149 Cal. App. 4th 1424, 1440)* .

[b] Nexus Requirement for Disclosures Concerning Involuntary Public Figures

In *Wilkins v. National Broad. Co. (1999) 71 Cal. App. 4th 1066, 84 Cal. Rptr. 2d 329* , plaintiffs were two representatives of a company that leased and programmed 800- and 900-type telephone lines, and then sold them to investors. Defendants were two television producers who were investigating the practice of charging for services on so-called "toll-free" 800-type lines. Defendants had arranged to meet with plaintiffs in the middle of a crowded public restaurant to hear a sales presentation of their company's services, without informing plaintiffs of their true identities or that the meeting would be filmed by hidden cameras for later use on a network newsmagazine. The court of appeal rejected plaintiffs' arguments that the use of their names, likenesses, and voices, and the fact that they worked for their particular company, could support an action for public disclosure of private facts. The court held that the growing practice of charging for so-called "toll-free" 800-type lines, often without the knowledge of the person billed for the services, was a subject matter of legitimate public interest and the use of the filmed footage made the report more concrete to the viewers. Thus, the broadcast material was newsworthy and was not so lurid or sensational or intensely personal in content as to make its intrusiveness disproportionate to its relevance (*71 Cal. App. 4th 1066, 1084-1087)* .

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18-184 California Points & Authorities § 184.30

§ 184.30 Opposing Contention That Defendant Invaded Plaintiff's Right to Privacy--Waiver of Right by Public Figure

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT SHOULD NOT BE HELD LIABLE FOR INVASION OF PRIVACY BECAUSE PLAINTIFF WAIVED HIS/HER RIGHT TO PRIVACY TO THE ISSUES IN QUESTION BY BEING A PUBLIC FIGURE.

A. Waiver of Right. A person who is a public figure waives a part of his or her right to privacy to the extent that the public has a legitimate interest in his or her activities (*Johnson v. Harcourt, Brace, Jovanovich, Inc. (1974) 43 Cal. App. 3d 880, 892, 118 Cal. Rptr. 370*).

B. Public Figure. A person may become a public figure either by achieving such pervasive fame or notoriety that he or she becomes a public personage for all purposes and in all contexts, or by voluntarily injecting himself or herself or by being drawn into a particular public controversy, in which case he or she becomes a public figure for the limited issues relating to the controversy (*see* *Kinsey v. Macur (1980) 107 Cal. App. 3d 265, 273, 165 Cal. Rptr. 608*).

[*Optional*] **C. Public Officials and Candidates.** Public officials and candidates for public offices are considered public figures (*Kapellas v. Kofman (1969) 1 Cal. 3d 20, 36, 81 Cal. Rptr. 360, 459 P.2d 912*).

[*Optional*] **D. Relative of Public Figure.** A person closely related to a public figure also waives his or her right of privacy to some extent (*Kapellas v. Kofman (1969) 1 Cal. 3d 20, 37-38, 81 Cal. Rptr. 360, 459 P.2d 912* ; *Johnson v. Harcourt, Brace, Jovanovich, Inc. (1974) 43 Cal. App. 3d 880, 891-892, 118 Cal. Rptr. 370*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that defendant should be held liable for

invasion of privacy because plaintiff waived his or her right to privacy by becoming a public figure. The form may be used in opposing liability for any of the torts for invasion of privacy.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of waiver by a public figure. For example, this form may be used in support of a demurrer or a motion for summary judgment when counsel wishes to assert that plaintiff failed to state a valid cause of action or the action has no merit because plaintiff waived his or her right to privacy by becoming a public figure. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion showing that the plaintiff is a public figure, either for all purposes or for a limited purpose related to the publication in question. If the optional Paragraph C is used, the discussion should establish that plaintiff is a public official or a candidate for public office. If optional Paragraph D is used, counsel should discuss the manner in which plaintiff is related to a public figure.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in §§ 184.20 -184.24*.

[b] Related Pleading and Practice Forms

For a form of affirmative defense relating to the public figure status of a plaintiff, see California Forms of Pleading and Practice, Ch. 429, *Privacy* (Matthew Bender). For additional pleading forms relating to plaintiff's status as a public figure in libel and slander actions, see California Forms of Pleading and Practice, Ch. 340, *Libel and Slander* (Matthew Bender).

[c] Related Points and Authorities Forms

For forms of points and authorities relating to plaintiff's status as a public official and the need to allege malice in such a case, see Ch. 142, *Libel and Slander (Defamation)*.

[3] Discussion of Authorities

[a] Waiver of Right

In ***Johnson v. Harcourt, Brace, Jovanovich, Inc.*** *(1974) 43 Cal. App. 3d 880, 118 Cal. Rptr. 370* , the plaintiff brought suit for invasion of privacy against defendant, who reprinted a magazine article in a textbook, reciting how one of the plaintiffs returned a sack of money he found lying on the street. Defendant's demurrer was sustained and plaintiffs appealed from the ensuing judgment.

The court of appeal affirmed (*43 Cal. App. 3d 880, 897)* . The court held that a person may, by his or her own activities or by the force of circumstances, become a public personage and thereby relinquish a part of his or her right of privacy to the extent that the public has a legitimate interest in his or her activities (*43 Cal. App. 3d 880, 892)* . Plaintiff had become such a public person and, therefore, had failed to state a cause of action for invasion of privacy (*43 Cal. App. 3d 880, 891-892)* .

[b] Public Figure

The facts and procedural background of ***Kinsey v. Macur*** *(1980) 107 Cal. App. 3d 265, 165 Cal. Rptr. 608* , are discussed in *§ 184.20[3][c]*. One of defendant's contentions was that she was not liable for invasion of privacy because plaintiff was a public figure by virtue of his service in the Peace Corps and his trial and acquittal for the murder of his first wife. On appeal, the court relied on the definition of public figure set forth in *Gertz v. Welch (1974) 418 U.S.*

323, 345, 94 S. Ct. 2997, 41 L. Ed. 2d 789 , regarding the two classes of public figure: those who achieve special prominence and are deemed public figures for all purposes, and those who thrust themselves into a particular controversy and become public figures for purposes of that incident (*107 Cal. App. 3d 265, 273)* . Under the facts in this case, the court decided that plaintiff was not a public figure (*107 Cal. App. 3d 265, 273-274)* .

[c] Public Officials and Candidates

The facts and procedural background of ***Kapellas v. Kofman*** *(1969) 1 Cal. 3d 20, 81 Cal. Rptr. 360, 459 P.2d 912* , are discussed in *§ 184.29[3][b]*. One count was a claim for invasion of privacy on behalf of the children of a candidate for public office. The trial court sustained a demurrer to the complaint, and plaintiff appealed. In affirming the judgment of dismissal as to the invasion of privacy count on the ground that the information disclosed was newsworthy, the Court stated that because of their public responsibilities, government officials and candidates for such offices are considered the paradigm case of public figures, and that a thorough scrutiny will be permitted of any facet of their lives that may relate to their fitness for office (*1 Cal. 3d 20, 36-37)* . Because the children were closely related to a candidate for public office, and the information disclosed about the children was from a police blotter, which is a matter of public record, the Court held that the statements were absolutely privileged as being newsworthy so that no cause of action for invasion of privacy was stated (*1 Cal. 3d 20, 39)* .

[d] Relative of Public Figure

The facts and procedural background of ***Kapellas v. Kofman*** *(1969) 1 Cal. 3d 20, 81 Cal. Rptr. 360, 459 P.2d 912* , are discussed in *§ 184.29[3][b]*. In discussing the action for invasion of privacy, the Supreme Court held that the children of a candidate for public office, as people closely related to a public figure, lost their right of privacy in reports of their criminal conduct because the information was relevant to the candidate's fitness for office (*1 Cal. 3d 20, 37-38)* .

The facts and procedural background of ***Johnson v. Harcourt, Brace, Jovanovich, Inc.*** *(1974) 43 Cal. App. 3d 880, 118 Cal. Rptr. 370* , are discussed in *§ 184.30[3][a]*. The court ruled that a necessary corollary to the rule that public figures lose their right of privacy is that people closely related to public figures also lose their right of privacy to some extent (*43 Cal. App. 3d 880, 892)* . Thus, the family of a man who found and returned almost a quarter of a million dollars could not state a cause of action for invasion of privacy (*43 Cal. App. 3d 880, 882-883, 891-892)* .

[4] Additional Authorities

[a] Waiver of Right

The facts and procedural background of *Briscoe v. Reader's Digest Ass'n, Inc. (1971) 4 Cal. 3d 529, 93 Cal. Rptr. 866, 483 P.2d 34* , are discussed in *§ 184.21[3][b]*. The Supreme Court held that the identification of plaintiff as a former hijacker stated a valid cause of action for invasion of privacy (*4 Cal. 3d 529, 543)* . The Court found that individuals involved in matters of public interest may become so fixed in the public's memory that they lose their right of privacy in that incident for all time, but that other persons may revert to an ordinary way of life after the incident and thereby regain their right to privacy (*4 Cal. 3d 529, 538-540)* . In this case, plaintiff had become a rehabilitated member of society, and thus was no longer a public figure (*4 Cal. 3d 529, 541-542)* .

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18-184 California Points & Authorities § 184.31

§ 184.31 Opposing Contention That Defendant Invaded Plaintiff's Right to Privacy--Statutory Duty to Disclose Information

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT SHOULD NOT BE HELD LIABLE FOR INVASION OF PRIVACY BECAUSE DEFENDANT HAD A STATUTORY DUTY TO DISCLOSE THE INFORMATION IN QUESTION.

Duty to Disclose. There is no invasion of privacy when defendant is required by law to disclose the information (*see Mason v. Western Union Tel. Co. (1975) 52 Cal. App. 3d 429, 440, 125 Cal. Rptr. 53* ; *Lehman v. City & County of San Francisco (1978) 80 Cal. App. 3d 309, 312-313, 314, 145 Cal. Rptr. 493*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that defendant should be held liable for invasion of privacy because defendant had a statutory duty to disclose the information in question. The form may be used in opposing liability for any of the torts for invasion of privacy.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of duty to disclose. For example, this form may be used in support of a demurrer or a motion for summary judgment when counsel wishes to assert that plaintiff failed to state a valid cause of action or the action has no merit because defendant had a statutory duty to disclose the information in question. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion showing that defendant was required by law to make the disclosure which forms the basis for plaintiff's complaint.

In an appropriate case, these points and authorities may be submitted in opposition to the contentions supported by the points and authorities *set out in §§ 184.20 -184.24*.

[b] Related Pleading and Practice Forms

For a form of affirmative defense based on the statutory duty to disclose information, see California Forms of Pleading and Practice, Ch. 429, *Privacy* (Matthew Bender).

[3] Discussion of Authorities

[a] Duty to Disclose

The facts and procedural background of ***Mason v. Western Union Tel. Co.*** *(1975) 52 Cal. App. 3d 429, 125 Cal. Rptr. 53* , are discussed in *§ 184.26[3][a]*. The court of appeal held that plaintiffs had failed to state a cause of action for invasion of privacy against defendant telegraph company for its delivery of several telegrams sent by another defendant. One of the two reasons given for the court's holding was that the transmission was required by law (*52 Cal. App. 3d 429, 440)* .

Lehman v. City & County of San Francisco *(1978) 80 Cal. App. 3d 309, 145 Cal. Rptr. 493* , was an action for violation of the right of privacy, freedom of association, and due process. The case concerned the disclosure by the jury commissioner of plaintiff's identity as a prospective juror to the litigants in a civil case. Defendant's demurrer was sustained, and plaintiff appealed from the judgment of dismissal subsequently entered.

The court of appeal affirmed the judgment. The court held that the statutorily required disclosure of the identity of prospective jurors [*see Gov. Code §§ 6250-6253*] did not violate any state or federal constitutional right of privacy (*80 Cal. App. 3d 309, 312-313)* .

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18-184 California Points & Authorities § 184.32

§ 184.32 Opposing Contention That Defendant Invaded Plaintiff's Right to Privacy by Unauthorized Use of Deceased Personality's or Plaintiff's Photograph--Deceased Personality or Plaintiff Not Readily Identifiable [Civ. Code §§ 3344(b), 3344.1(i)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT SHOULD NOT BE HELD LIABLE FOR INVASION OF PRIVACY UNDER SECTION _____ [3344 *or* 3344.1 OF THE CIVIL CODE] FOR USING _____ [*name of deceased personality or* PLAINTIFF'S] PHOTOGRAPH BECAUSE _____ [*name of deceased personality or* PLAINTIFF] IS NOT READILY IDENTIFIABLE IN THE PHOTOGRAPH.

A. _____ [Deceased Personality *or* Plaintiff] Must Be Readily Identifiable. There is no liability for the unauthorized use of a _____ [deceased personality's *or* person's] photograph for advertising or solicitation purposes unless the _____ [deceased personality *or* person complaining of the misappropriation] is readily identifiable in the photograph (*see Civ. Code § 3344(a), (b) or 3344.1(i)*).

B. Readily Identifiable Defined. A person is deemed "readily identifiable" from a photograph when one who views the photograph with the naked eye can reasonably determine that the person depicted in the photograph is _____ [deceased personality *or* the same person who is complaining of its unauthorized use] (*Civ. Code § 3344(b)(1) or 3344.1(i)*).

[*Optional*] **C. Photograph Defined.** As used in Section _____ [3344 *or 3344.1 of the Civil Code*], a photograph means any photograph or photographic reproduction, still or moving, or any video recording or live television transmission, of any person, such that the _____ [deceased personality *or* person] is readily identifiable [*Civ. Code § 3344(b) or 3344.1(i)*].

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that defendant should be held liable for invasion of privacy based on unauthorized use of a photograph because the deceased personality or plaintiff is not readily identifiable in the photograph [*see Civ. Code §§ 3344(b), 3344.1(i)*]. For further discussion on who has standing under *Civ. Code § 3344.1* to bring action for the unauthorized use of a deceased personality's name, voice, signature, photograph, or likeness, see *§§ 184.40* and *184.42*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of lack of identifiability. For example, this form may be used in support of a motion for summary judgment when counsel wishes to assert that an action for damages pursuant to *Civ. Code § 3344* has no merit because plaintiff is not readily identifiable in the photograph and thus there is no triable issue of material fact. These points and authorities may also be adapted for use in a trial or appellate brief.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 184.24*.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion establishing that the deceased personality or plaintiff is not readily identifiable in the photograph. If optional Paragraph C is used to show that the photographic reproduction in question comes within the definition of a photograph, counsel should discuss how the photograph meets the statutory definition.

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18-184 California Points & Authorities § 184.33

§ 184.33 Opposing Contention That Defendant Invaded Plaintiff's Right to Privacy by Unauthorized Use of Plaintiff's Photograph--Plaintiff Member of Definable Group [Civ. Code § 3344(b)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.]*

DEFENDANT SHOULD NOT BE HELD LIABLE FOR INVASION OF PRIVACY UNDER SECTION 3344 OF THE CIVIL CODE FOR UNAUTHORIZED USE OF PLAINTIFF'S PHOTOGRAPH BECAUSE PLAINTIFF IS REPRESENTED IN THE PHOTOGRAPH AS A MEMBER OF A DEFINABLE GROUP RATHER THAN AS AN INDIVIDUAL.

A. No Right for Member of Definable Group. If a photograph includes more than one person that is readily identifiable, then the person or persons complaining of the unauthorized use must be represented as individuals rather than solely as members of a definable group represented in the photograph (*Civ. Code § 3344(b)(2)*).

B. Readily Identifiable Defined. [*See § 184.32, Paragraph B.*]

C. Definable Group Defined. A definable group includes, but is not limited to, a crowd at any sporting event, a crowd in any street or public building, an audience at any theatrical or stage production, a glee club, or a baseball team (*Civ. Code § 3344(b)(2)*).

[*Optional*] **D. Member of Definable Group.** A person or persons are considered to be represented as members of a definable group if they are represented in the photograph solely as a result of being present when the photograph was taken and have not been singled out as individuals in any manner (*Civ. Code § 3344(b)(3)*).

[*Optional*] **E. Photograph Defined.** [*See § 184.32, Paragraph C.*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that defendant should be held liable for invasion of privacy by misappropriation under *Civ. Code § 3344* because plaintiff is represented in a photograph merely as a member of a definable group, rather than as an individual, as required.

They may also be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of membership in a definable group. For example, this form may be used in support of a motion for summary judgment when counsel wishes to assert that an action for damages pursuant to *Civ. Code § 3344* has no merit because plaintiff is pictured in a photograph merely as a member of a definable group instead of as a readily identifiable individual, and thus there is no triable issue of material fact. These points and authorities may also be adapted for use in a trial or appellate brief.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 184.24*.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion showing that plaintiff is depicted in the photograph only as a member of a definable group, and that the definable group in the picture meets the examples set forth in *Civ. Code § 3344(b)(2)* or is analogous to those examples. If optional Paragraph D is used, counsel should establish that plaintiff is depicted in the photograph solely as a result of being present when it was taken rather than being singled out as an individual. If optional Paragraph E is used, counsel should show that the photographic reproduction in question comes within the definition of a photograph.

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18-184 California Points & Authorities § 184.34

§ 184.34 Opposing Contention That Defendant Invaded Plaintiff's Right to Privacy by Unauthorized Use of Plaintiff's Photograph or Likeness--Incidental Use of Employee's Photograph or Likeness [Civ. Code § 3344(c)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT SHOULD NOT BE HELD LIABLE FOR INVASION OF PRIVACY UNDER SECTION 3344 OF THE CIVIL CODE FOR UNAUTHORIZED USE OF PLAINTIFF'S _____ [PHOTOGRAPH *or* LIKENESS] BECAUSE ITS USE WAS INCIDENTAL AND PLAINTIFF, AN EMPLOYEE OF DEFENDANT, HAS FAILED TO OVERCOME THE REBUTTABLE PRESUMPTION THAT THE INCIDENTAL USE OF PLAINTIFF'S _____ [PHOTOGRAPH *or* LIKENESS] WAS NOT A KNOWING USE.

Incidental Use of Employee's Photograph or Likeness. When a photograph or likeness of an employee of the person using the photograph or likeness appearing in an advertisement or other publication prepared by or on behalf of the user is only incidental, and not essential, to the purpose of the publication in which it appears, a rebuttable presumption arises affecting the burden of producing evidence that the failure to obtain the employee's consent was not a knowing use of the photograph or likeness (*Civ. Code § 3344(c)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that defendant, plaintiff's employer, should be held liable for invasion of privacy under *Civ. Code § 3344* for unauthorized use of plaintiff's photograph or likeness because plaintiff has failed to overcome the rebuttable presumption that the incidental use of his or her photograph or likeness is not a knowing use [*Civ. Code § 3344(c)*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of incidental use of an employee's photograph or likeness. For example, this form may be used to support a motion for a directed verdict for defendant [*see Frisk v. Merrihew (1974)*

42 Cal. App. 3d 319, 325, 116 Cal. Rptr. 781 ; *see also Evid. Code §§ 110, 550, 604* (burden of producing evidence)]. These points and authorities may also be adapted for use in a trial or appellate brief.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 184.24*.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion showing that plaintiff is an employee of defendant, that the use of plaintiff's photograph or likeness was only incidental to the purpose of the publication in which it appeared, and that plaintiff has failed to overcome the rebuttable presumption affecting the burden of producing evidence established by these facts.

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18-184 California Points & Authorities § 184.35

§ 184.35 Opposing Contention That Defendant Invaded Plaintiff's Right to Privacy by Unauthorized Use of Deceased Personality's or Plaintiff's Name, Voice, Signature, Photograph, or Likeness--Exempted Uses [Civ. Code §§ 3344(d), 3344.1]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT SHOULD NOT BE HELD LIABLE FOR INVASION OF PRIVACY UNDER SECTION _____ [3344 *or* 3344.1] OF THE CIVIL CODE FOR UNAUTHORIZED USE OF _____ [*name of deceased personality or* PLAINTIFF'S] _____ [NAME *and/or* VOICE *and/or* SIGNATURE *and/or* PHOTOGRAPH *and/or* LIKENESS] BECAUSE DEFENDANT'S USE OF _____ [IT *or* THEM] WAS IN CONNECTION WITH A _____ [NEWS BROADCAST *or* PUBLIC AFFAIRS BROADCAST *or* SPORTS BROADCAST *or* POLITICAL CAMPAIGN], AND THUS DOES NOT CONSTITUTE A USE FOR WHICH CONSENT IS REQUIRED.

A. Exempted Uses. The use of a _____ [deceased personality's *or* person's] name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, does not constitute a use for which consent is required (*Civ. Code § 3344(d) or 3344.1(j)*).

[*Optional*] **B. Limitation on News Exemption Under *Civ. Code § 3344*.** The exemption of *Section 3344(d) of the Civil Code* for news accounts does not apply to a publication made with actual malice, that is, with knowledge of its falsity or with reckless disregard for its truth (*Eastwood v. Superior Court (1983) 149 Cal. App. 3d 409, 425, 198 Cal. Rptr. 342*).

[*Optional*] **C. Exempted Uses Pursuant to *Civ. Code § 3344.1(a)(2)*.** The provisions of *Section 3344.1 of the Civil Code* governing the use of a deceased personality's name, voice, signature, photograph, or likeness do not apply to a use in a play, book, magazine, newspaper, musical composition, audiovisual work, radio or television program, single and original work of art, work of political or newsworthy value, or an advertisement or commercial announcement for any of these works, if the work in which the use occurs is fictional or nonfictional entertainment or a dramatic, literary, or

musical work (*Civ. Code § 3344.1(a)(2)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that defendant should be held liable for invasion of privacy for unauthorized use of a deceased personality's or plaintiff's name, voice, signature, photograph, or likeness because defendant's use of it or them was exempt from the requirement of consent. Uses exempt from the consent requirement include use in connection with any news, public affairs, or sports broadcast or account, or any political campaign [*see Civ. Code §§ 3344(d), 3344.1(j)*]. For further discussion on who has standing under *Civ. Code § 3344.1* to bring action for the unauthorized use of a deceased personality's name, voice, signature, photograph, or likeness, see *§§ 184.40, 184.42*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that *Civ. Code §§ 3344(d)* or *3344.1(j)* allowed the use of the name, voice, signature, photograph, or likeness in question without plaintiff's consent. For example, they may be combined with points supporting a motion for summary judgment by defendant based on the ground that the action has no merit because consent was not required for the use in question. These points and authorities may also be adapted for use in a trial or appellate brief.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 184.24*.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion showing that defendant's use of the deceased personality's or plaintiff's name, voice, signature, photograph, or likeness was in connection with a news, public affairs, or sports broadcast or account, or a political campaign.

[3] Discussion of Authorities

[a] Limitation on News Exemption Under Civ. Code § 3344

The facts and procedural background of ***Eastwood v. Superior Court*** *(1983) 149 Cal. App. 3d 409, 198 Cal. Rptr. 342* , are discussed in *§ 184.22[3][b]*. The court of appeal reversed judgment for defendant, finding that plaintiff had stated a cause of action for appropriation of name or likeness under the common law and under *Civ. Code § 3344*. In discussing the statutory action, the court held that the exception of *Civ. Code § 3344(d)* for news accounts does not provide an exemption for a publication made with actual malice--that is, with knowledge of its falsity or with reckless disregard for its truth (*149 Cal. App. 3d 409, 425)* .

[4] Additional Authorities

[a] Exempted Uses

In *Gionfriddo v. Major League Baseball (2001) 94 Cal. App. 4th 400, 114 Cal. Rptr. 2d 307* , former professional baseball players brought suit against the defendants, asserting causes of action for statutory and common law appropriation based on the defendants' unauthorized use of the players' names, images, likenesses, and career statistics in game programs, Web sites, and documentaries. The court of appeal affirmed summary judgment for the defendants. Addressing the statutory action, the court held that the use of the likenesses and information about the former players

fell within the exemption for uses in connection with "any news, public affairs, or sports broadcast or account" (*94 Cal. App. 4th 400, 415)* .

In *Dora v. Frontline Video, Inc. (1993) 15 Cal. App. 4th 536, 18 Cal. Rptr. 2d 790* , a former surfer brought an action against a documentary filmmaker, alleging common-law and statutory appropriation of name or likeness. The basis of the complaint was that the defendant, without the plaintiff's permission or knowledge, released a surfing documentary that included footage of the plaintiff taken in the 1950's, when he was well-known to surfing enthusiasts. The court of appeal affirmed summary judgment for the defendant, holding that the surfing documentary constituted "public affairs" within the meaning of *Civ. Code § 3344(d)* (*15 Cal. App. 4th 536, 544-546)* .

[b] Limitation on News Exemption Under Civ. Code § 3344

In *Maheu v. CBS, Inc. (1988) 201 Cal. App. 3d 662, 247 Cal. Rptr. 304* , a former aide of the celebrated recluse Howard Hughes sued several defendants alleging a cause of action under *Civ. Code § 3344* for the appropriation of the plaintiff's name, likeness, and personality. The trial court sustained demurrers, without leave to amend, to these causes of action, and the plaintiff appealed. The court of appeal affirmed. The court noted the exemption under *Civ. Code § 3344(d)* for such use in a news account (*201 Cal. App. 3d 662, 676)* . It cited *Eastwood v. Superior Court (1983) 149 Cal. App. 3d 409, 198 Cal. Rptr. 342* , for the proposition that this exemption does not apply to the publication of false matter with actual malice--that is, with knowledge or reckless disregard of its falsity. The court concluded, however, that the exemption under *Civ. Code § 3344(d)* did apply in this case, absent any allegations that the matter was false and was published with actual malice (*201 Cal. App. 3d 662, 677)* .

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18-184 California Points & Authorities § 184.36

§ 184.36 Opposing Contention That Defendant Invaded Plaintiff's Right to Privacy by Unauthorized Use of Deceased Personality's or Plaintiff's Name, Voice, Signature, Photograph, or Likeness--Use in Commercial Medium Not Directly Connected With Commercial Sponsorship or Paid Advertising [Civ. Code §§ 3344(e), 3344.1(k)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT SHOULD NOT BE HELD LIABLE FOR INVASION OF PRIVACY UNDER SECTION _____ [3344 *or* 3344.1] OF THE CIVIL CODE FOR UNAUTHORIZED USE OF _____ [*name of deceased personality or* PLAINTIFF]'S _____ [NAME *and/or* VOICE *and/or* SIGNATURE *and/or* PHOTOGRAPH *and/or* LIKENESS] BECAUSE DEFENDANT'S USE OF _____ [IT *or* THEM] WAS NOT SO DIRECTLY CONNECTED WITH THE COMMERCIAL SPONSORSHIP OR PAID ADVERTISING OF THE MATERIAL CONTAINING _____ [IT *or* THEM] SO AS TO CONSTITUTE A USE FOR WHICH CONSENT IS REQUIRED.

A. Use in Commercial Medium Not Directly Connected With Commercial Sponsorship or Paid Advertising. The use of a _____ [deceased personality's *or* person's] name, voice, signature, photograph, or likeness in a commercial medium does not constitute a use for which consent is required solely because the material in question is commercially sponsored or contains paid advertising. Rather it is a question of fact whether or not the use of the name, voice, signature, photograph, or likeness was so directly connected with the commercial sponsorship or with the paid advertising as to constitute a use for which consent is required (*Civ. Code § 3344(e) or 3344.1(k)*; *see Johnson v. Harcourt, Brace, Jovanovich, Inc. (1974) 43 Cal. App. 3d 880, 895, 118 Cal. Rptr. 370* (alleged violation of *Civ. Code § 3344*).

B. Uses for Which Consent Is Required. The uses of a name, voice, signature, photograph, or likeness for which consent is required are uses on or in products, merchandise, or goods, or for purposes of either advertising, selling, or soliciting purchases of products, merchandise, goods, or services (*see Civ. Code § 3344(a) or 3344.1(a)*).

[*Optional*] **C. Publisher's Decisions on Content and Placement of Advertisements Protected by *First Amendment.*** The constitutional right guaranteeing freedom of the press protects publishers from liability for decisions as to the content and placement of advertisements (*Stewart v. Rolling Stone LLC (2010) 181 Cal. App. 4th 664, 690-691, 105 Cal. Rptr. 3d 98*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that defendant should be held liable for invasion of privacy under *Civ. Code § 3344* or *3344.1* for unauthorized use of a deceased personality's or plaintiff's name, voice, signature, photograph, or likeness because defendant's use of it or them was not so directly connected with the commercial sponsorship or paid advertising of the commercial medium in which it or they appeared so as to constitute a use for which consent is required [*see Civ. Code §§ 3344(e), 3344.1(k)*]. For further discussion on who has standing under *Civ. Code § 3344.1* to bring action for the unauthorized use of a deceased personality's name, voice, signature, photograph, or likeness, see *§§ 184.40* and *184.42*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of lack of direct connection with a commercial purpose. For example, if there is no evidence of sufficient substantiality to show that defendant's use was so directly connected with the commercial sponsorship or paid advertising of the medium in question so as to require consent, these points and authorities may be combined with points and authorities supporting a motion for directed verdict by defendant at the conclusion of evidence [*see Frisk v. Merrihew (1974) 42 Cal. App. 3d 319, 325, 116 Cal. Rptr. 781]* . These points and authorities may also be adapted for use in a trial or appellate brief.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 184.24*.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion showing that defendant's use of the deceased personality's or plaintiff's name, voice, signature, photograph or likeness was not so directly connected with the commercial sponsorship or paid advertising of the medium in question so as to constitute a use for which consent is required. This would include showing that the use was not so directly connected with the commercial sponsorship or paid advertising so as to constitute a use on or in products, merchandise, or goods, or for purposes of either advertising, selling, or soliciting purchases of products, merchandise, goods, or services [*see Civ. Code §§ 3344(a), 3344.1(a)* (uses requiring consent)].

[3] Discussion of Authorities

[a] Use in Commercial Medium Not Directly Connected With Commercial Sponsorship or Paid Advertising

The facts and procedural background of ***Johnson v. Harcourt, Brace, Jovanovich, Inc.*** *(1974) 43 Cal. App. 3d 880, 118 Cal. Rptr. 370* , are discussed in *§ 184.30[3][a]*. The court of appeal affirmed the judgment of dismissal for defendant entered after the trial court sustained defendant's demurrer. The court held that the reprint in a textbook of a magazine article about plaintiff finding and returning almost a quarter of a million dollars was not so directly connected with the sale of the textbook as to constitute a commercial use prohibited by *Civ. Code § 3344(a)*. The article was not a primary reason for the textbook; nor was it a substantial factor in the students' purchase of the textbook (*43 Cal. App. 3d 880, 895)* .

[b] Publisher's Decisions on Content and Placement of Advertisements Protected by First Amendment

In *Stewart v. Rolling Stone LLC (2010) 181 Cal. App. 4th 664, 105 Cal. Rptr. 3d 98* , plaintiffs were musical groups whose names had been included in a magazine feature spotlighting independent rock bands that was published inside of a double-gatefold page layout the outside pages of which contained a multi-page cigarette advertisement. Plaintiffs sued the magazine for commercial misappropriation under both *Civ. Code § 3344* and the common law, arguing that the design of the feature used the names of the rock bands to sell the cigarettes in the advertisement and as such constituted commercial misappropriation of their names to sell a product. Defendant publisher filed a motion to strike the causes of action under *Code Civ. Proc. § 425.16*, the anti-SLAPP statute, but the trial court denied the motion after concluding that a trier of fact could conclude that the feature had been transformed by its layout into a 9-page cigarette advertisement. Defendant appealed.

The Court of Appeal reversed the order denying the motion to strike. The Court of Appeal ordered that the causes of action be struck under *Code Civ. Proc. § 425.16* on the grounds that the magazine feature at issue was noncommercial speech entitled to full *First Amendment* protection. The court disagreed with plaintiffs' argument that the integrated gatefold layout effectively constituted a unified advertisement for cigarettes. Noting that the design of the advertisement pages differed significantly from that of the pages with the magazine's feature on independent artists, the court concluded that the feature on independent artists was noncommercial speech despite the location of the advertisement on the outside pages of the gatefold. As noncommercial speech, plaintiffs were required to present evidence of actual malice on the part of defendant to overcome defendant's freedom of speech defense, a burden they failed to meet (*181 Cal. App. 4th 664, 683-689)* . The court also held that the constitutional right guaranteeing freedom of the press also barred plaintiffs from pursuing their causes of action, as that right traditionally protected publishers from liability for decisions as to the content and placement of advertisements. The court noted that while the gatefold layout may intensify a reader's exposure to an advertisement because the format requires the reader to lift the advertisement page rather than just skip over it mindlessly, the court could find no principled distinction between a page of editorial content that is preceded and followed by full-page advertisements and content that is covered under gate-folded advertisements (*181 Cal. App. 4th 664, 690-691)* .

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18-184 California Points & Authorities § 184.37

§ 184.37 Opposing Contention That Defendant Invaded Plaintiff's Right to Privacy by Unauthorized Use of Deceased Personality's or Plaintiff's Name, Voice, Signature, Photograph, or Likeness--Lack of Knowledge of Advertising Medium Defendant [Civ. Code §§ 3344(f), 3344.1(*l*)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT SHOULD NOT BE HELD LIABLE FOR INVASION OF PRIVACY UNDER SECTION _____ [3344 *or* 3344.1 OF THE CIVIL CODE] FOR UNAUTHORIZED USE OF _____ [*name of deceased personality or* PLAINTIFF]'S _____ [NAME *and/or* VOICE *and/or* SIGNATURE *and/or* PHOTOGRAPH *and/or* LIKENESS] BECAUSE DEFENDANT, AN _____ [OWNER *or* EMPLOYEE] OF AN ADVERTISING MEDIUM, _____ [PUBLISHED *or* DISSEMINATED] THE _____ [ADVERTISEMENT *or* SOLICITATION] WITHOUT KNOWLEDGE THAT IT INVOLVED THE UNAUTHORIZED USE.

A. Lack of Knowledge of Unauthorized Use by Owners or Employees of Advertising Medium. Section _____ [3344 *or 3344.1 of the Civil Code*] does not apply to an owner or employee of any medium used for advertising by whom any advertisement or solicitation in violation of this section is published or disseminated, unless it is established that the owners or employees had knowledge of the unauthorized use (*Civ. Code § 3344(f) or 3344.1*(*l*)).

B. Advertising Medium Defined. A medium used for advertising includes, but is not limited to, newspapers, magazines, radio and television networks and stations, cable television systems, billboards, and transit ads (*Civ. Code § 3344(f) or 3344.1*(*l*)).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that defendant should be held liable for

invasion of privacy for unauthorized use of a deceased personality's or plaintiff's name, voice, signature, photograph, or likeness on the ground that defendant, an owner or employee of an advertising medium, published or disseminated the material in question without knowledge that it involved the unauthorized use [*see Civ. Code §§ 3344(f), 3344.1*(*l*)]. For further discussion on who has standing under *Civ. Code § 3344.1* to bring action for the unauthorized use of a deceased personality's name, voice, signature, photograph, or likeness, see *§§ 184.40, 184.42*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of defendant's lack of knowledge. For example, if there is no evidence of sufficient substantiality to show that defendant had knowledge of the unauthorized use, these points and authorities may be combined with points and authorities supporting a motion for directed verdict by defendant at the conclusion of evidence [*see Frisk v. Merrihew (1974) 42 Cal. App. 3d 319, 325, 116 Cal. Rptr. 781]* . These points and authorities may also be adapted for use in a trial or appellate brief.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 184.24*.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion showing that defendant published or disseminated the advertisement or solicitation in question without knowledge that it involved the unauthorized use. In addition, counsel should establish that defendant is an owner or employee of an advertising medium enumerated or similar to those enumerated in *Civ. Code § 3344(f)* or *3344.1*(*l*).

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§ 184.37A

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE PROSECUTORIAL IMMUNITY OF GOVERNMENT CODE SECTION 821.6 PROVIDES DEFENDANT WITH A COMPLETE DEFENSE TO PLAINTIFF'S CAUSE OF ACTION FOR INVASION OF PRIVACY BROUGHT UNDER *CIVIL CODE SECTION 1708.8*.

Prosecutorial Immunity Provides Complete Defense to Statutory Intrusion Claim. *Civ. Code § 1708.8* cannot be used to impose liability on a public entity, or employee acting within the scope of his or her employment with a public entity, when a public employee is immune from liability for injury caused by instituting or prosecuting any judicial or administrative proceeding within the scope of his or her employment pursuant to *Gov. Code § 821.6* (*Richardson-Tunnell v. Schools Ins. Program for Employees (SIPE) (2007) 157 Cal. App. 4th 1056, 1064-1065, 69 Cal. Rptr. 3d 176*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted by a governmental defendant in opposition to a plaintiff's claim for invasion of the privacy rights provided by *Civ. Code § 1708.8*. The grounds for the opposition are that the California Tort Claims Act provides a specific immunity from liability for prosecutorial conduct.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the defense of governmental immunity. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law stated. Thus, counsel should describe the underlying conduct upon which plaintiff bases the invasion of privacy action and argue that the conduct comes under the specific immunity for prosecutorial conduct provided by *Gov. Code § 821.6*.

[3] Discussion of Immunities

[a] Prosecutorial Immunity Provides Complete Defense to Statutory Intrusion Claim

In *Richardson-Tunnell v. Schools Ins. Program for Employees (SIPE) (2007) 157 Cal. App. 4th 1056, 69 Cal. Rptr. 3d 176* , plaintiff was a teacher who suffered an injury at work while employed by a public school district. Plaintiff was married while on disability leave, and her school district and its public entity insurer hired a private investigator to videotape her surreptitiously at her wedding and on her honeymoon, apparently to determine if they had a claim for workers' compensation fraud. Plaintiff sued the school district and the insurer, among others, for invasion of privacy and negligence, including claims for damages under both the constitutional right to privacy provided by the California Constitution and the statutory protection provided by *Civ. Code § 1708.8*, the anti-paparazzi statute. The trial court granted judgment on the pleadings in favor of the public entity defendants after concluding that the claims against these entities were barred by governmental immunity provided for prosecutorial investigations under *Gov. Code § 821.6*. Plaintiff appealed.

The court of appeal affirmed. The court first held that the conduct alleged by plaintiff was covered by the immunity of *Gov. Code § 821.6*, a provision of the California Tort Claims Act which generally immunizes a governmental employee, and thus a public entity, for injury caused by instituting or prosecuting any judicial or administrative proceeding within the scope of his or her employment, regardless of malice or lack of probable cause, and such immunity extends to investigatory activities (*157 Cal. App. 4th 1056, 1062-1063)* . The court then concluded that this specific immunity provided a defense to the more general statutory cause of action for intrusion created by *Civ. Code § 1708.8*. The court noted that an immunity contained within the Tort Claims Act will override liability based on a statute outside the Tort Claims Act in the absence of an expression of legislative intent to the contrary. The court found no such expression of legislative intent in the language or legislative history of *Civ. Code § 1708.8*. The court rejected plaintiff's argument that *Civ. Code § 1708.8(g)* contained a statement of legislative intent to create liability for governmental investigations that are not supported by "articulable suspicion." The court concluded that *Civ. Code § 1708.8(g)* was merely an exemption provision for certain governmental activities and could not be used to impose liability on a public entity when immunity was otherwise provided under *Gov. Code § 821.6* (*157 Cal. App. 4th 1056, 1063-1065)* . The court went on to hold that this statutory immunity also provided a complete defense to plaintiff's cause of action seeking damages for invasion of privacy under the California Constitution (*157 Cal. App. 4th 1056, 1066)* .

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18-184 California Points & Authorities § 184.38

§ 184.38 Opposing Contention That Defendant Invaded Plaintiff's Right to Privacy by Unauthorized Use of Deceased Personality's or Plaintiff's Likeness--Freedom of Expression

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS NOT LIABLE FOR INVASION OF PRIVACY BASED ON THE UNAUTHORIZED USE OF _____ [*name of deceased personality or* PLAINTIFF]'S LIKENESS BECAUSE THE CELEBRITY-DEPICTING WORK CONTAINS SIGNIFICANT CREATIVE AND TRANSFORMATIVE ELEMENTS SUCH THAT THE WORK IS PRIMARILY THE DEFENDANT'S OWN EXPRESSION AND NOT MERELY A LIKENESS OF THE CELEBRITY AND IS THEREFORE CONSTITUTIONALLY PROTECTED UNDER THE *FIRST AMENDMENT*.

Freedom of Expression Protects Use of Celebrity Likeness. The freedom of expression protected by the *First Amendment* is a defense against a suit brought against an artist who has profited from creating a celebrity likeness, if the likeness contains significant creative and transformative elements such that the work is primarily the artist's own expression and not merely a likeness of the celebrity (*Comedy III Prods., Inc. v. Gary Saderup, Inc. (2001) 25 Cal. 4th 387, 405-407, 106 Cal. Rptr. 2d 126, 21 P.3d 797* ; *see also Winter v. DC Comics (2003) 30 Cal. 4th 881, 890, 134 Cal. Rptr. 2d 634, 69 P.3d 473*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to the contention that the defendant is liable for invasion of privacy for unauthorized use of the likeness of the plaintiff or of a deceased personality. The basis for the opposition is that the freedom of expression guaranteed by the *First Amendment* protects against a suit brought against an artist who has profited from creating a celebrity likeness, but only if the likeness is sufficiently creative and transformative so that the value of the work stems primarily from the artist's creativity. The defense will not generally be available if the depiction is so literal that the value of the work stems primarily from the fame of the celebrity

depicted.

Although the California Supreme Court's opinion in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, which forms the basis for this form, arose in the context of an action brought under former Civ. Code § 990, the predecessor to current *Civ. Code § 3344.1*, the Court's analysis would seem applicable regardless of whether the action for unauthorized appropriation of a likeness is brought under the statutory provisions of *Civ. Code §§ 3344* or *3344.1* or under the common law.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should include facts showing that the likeness is not a literal likeness of the celebrity depicted, but is sufficiently transformative so that the work derives its value from the creative efforts of the artist.

[c] Related Pleading and Practice Forms

For discussion relating to privacy claims, see California Forms of Pleading and Practice, Ch. 429, *Privacy* (Matthew Bender).

[d] Opposing Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposition to the contentions supported by the points and authorities set out in see *§§ 184.22, 184.23*, or *184.24*.

[3] Discussion of Authorities

[a] Freedom of Expression Protects Use of Celebrity Likeness

In ***Winter v. DC Comics*** *(2003) 30 Cal. 4th 881, 134 Cal. Rptr. 2d 634, 69 P.3d 473* , the plaintiffs were well-known musicians Johnny and Edgar Winter, who brought suit against a comic book publisher and other defendants for the unflattering depiction of fictional half-human, half-worm characters named "Johnny and Edgar Autumn" in a comic book series set in the old West. The trial court granted summary judgment for the defendants, the court of appeal affirmed, and the California Supreme Court granted review and eventually remanded for reconsideration in light of their opinion in *Comedy III Productions v. Gary Saderup, Inc*. The court of appeal subsequently held that triable issues of fact existed on the plaintiffs' claim for misappropriation of likenesses under *Civ. Code § 3344*, and the Supreme Court granted review again.

The Supreme Court reversed the court of appeal. Applying the test articulated in *Comedy III Productions*, the Court held that the fictionalized depiction of the plaintiffs in the comic book series was entitled to *First Amendment* protection, despite the fact that the plaintiffs obviously served as the template for the two characters in the story. The Court concluded that because the depictions were distorted for purposes of lampoon, parody, or caricature, sufficient transformative elements were present to warrant constitutional protection (*30 Cal. 4th 881, 890)* . The Court noted that for purposes of this test, it did not matter whether the work actually qualified as a parody rather than some other form of literary work, so long as the requisite transformative elements were present. In rejecting the plaintiffs' claim that the defendants could be liable because they used the plaintiffs' reputations to increase sales of the comic books, the Court also held that the marketing for the comic book was irrelevant to the application of the test (*30 Cal. 4th 881, 891)* .

In ***Comedy III Prods., Inc. v. Gary Saderup, Inc.*** *(2001) 25 Cal. 4th 387, 106 Cal. Rptr. 2d 126, 21 P.3d 797* , the plaintiff was the registered owner of all rights to the former comedy act known as the Three Stooges, all of whose members were deceased. The defendant was an artist who used his own charcoal drawing of the Three Stooges to create and sell lithographic prints and silk-screened images on T-shirts, without the authorization from the plaintiff to do so.

The plaintiff brought suit against the defendant for damages and injunctive relief under former Civ. Code § 990, the statutory predecessor to *Civ. Code § 3344.1*. The case was submitted to the trial court on stipulated facts, without a jury, and the court found for the plaintiff and entered judgment against the defendant for the amount of the profits on the sales from the lithographs and T-shirts, as well as for attorney's fees and costs. The court also issued a permanent injunction. The defendant appealed, arguing that his conduct did not violate the terms of the statute and that in any event his conduct was protected by the constitutional guaranty of freedom of speech. The court of appeal struck the injunction for being overly broad, but otherwise affirmed. The defendant again appealed.

A unanimous Supreme Court affirmed the awards of damages, fees, and costs. As a preliminary matter, the Court held that under the plain meaning of former Civ. Code § 990(a) [*now see Civ. Code § 3344.1(a)*], the defendant's use of the likenesses of the Three Stooges on the lithographs and T-shirts were uses "on or in products, merchandise, or goods," and thus fell within the scope of the statute (*25 Cal. 4th 387, 395)* . The Court then addressed the defendant's claim that enforcement of the judgment would violate his *First Amendment* freedom of speech and expression. The Court first noted the difficulty in balancing the right of publicity embodied in the statutory provisions with *First Amendment* concerns regarding preserving "an uninhibited marketplace of ideas" and fostering a "fundamental respect for individual development and self-realization" through the right to self-expression (*25 Cal. 4th 387, 396-400)* .

After reviewing other judicial attempts to balance the right of publicity with *First Amendment* concerns, the Court concluded that if artistic expression takes the form of a literal depiction or imitation of a celebrity for commercial gain, directly infringing on the right of publicity without adding significant self-expression by the artist, the interest in protecting the fruits of the work of the celebrity outweighs the right of self-expression of the imitating artist. Conversely, however, if an artist's work contains significant transformative elements--that is, elements that so transform the celebrity's likeness that it has become primarily the defendant's own expression rather than the celebrity's likeness--the work is especially worthy of *First Amendment* protection and is less likely to interfere with the economic interest protected by the right of publicity (*25 Cal. 4th 387, 405-406)* . The Court also noted that, in deciding whether a work is sufficiently transformative to justify *First Amendment* protection, a work that derives its marketability and economic value primarily from the fame of the celebrity depicted, rather than from the creativity, skill, and reputation of the artist who renders the likeness, is less likely to warrant *First Amendment* protection (*25 Cal. 4th 387, 407)* .

Applying these principles to the depiction of the Three Stooges at issue in the case before it, the Supreme Court first made clear that the trial court and court of appeal both erred in suggesting that only original works of art, and not reproductions, were entitled to *First Amendment* protection. However, after examining the defendant's depiction of the Three Stooges, the Court concluded that the likenesses, while undeniably the work of a skilled artist, were so literal as to contain no significant transformative or creative contribution, and the marketability and economic value of the work derived primarily from the fame of the comedians depicted. Therefore, the Court rejected the *First Amendment* defense in this particular case (*25 Cal. 4th 387, 408-411)* .

[4] Additional Authorities

[a] Freedom of Expression Protects Use of Celebrity Likeness

In *Kirby v. Sega of America, Inc. (2006) 144 Cal. App. 4th 47, 50 Cal. Rptr. 3d 607* , the court of appeal held that the *First Amendment* protected a video game maker from a suit for commercial appropriation of likeness brought by a singer with a distinctive stage persona. While the court agreed with plaintiff that there existed a triable issue of fact as to whether the use of a computer-generated character similar to plaintiff's stage persona in a video game constituted a commercial appropriation, the court concluded that there were sufficient transformative elements in the character such that the character was not a mere likeness or literal depiction of plaintiff. The computer-generated character had an extremely tall, slender physique not shared by plaintiff, the character's typical hairstyle and primary costume were different from plaintiff's, the game in which the character appeared was set in the 25th century, unlike plaintiff's "act," and the character's dance moves were noticeably different from those of the plaintiff (*144 Cal. App. 4th 47, 59)* .

Because the requisite transformative elements were present, the defendant's use of plaintiff's likeness was entitled to *First Amendment* protection regardless of whether the work possessed any elements of caricature, lampoon, parody, social commentary, or other specific form of expression (*144 Cal. App. 4th 47, 60)* .

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18-184 California Points & Authorities § 184.39

§ 184.39 Opposing Contention That Defendant Invaded Plaintiff's Right to Privacy--Investigation Not Unreasonable

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT SHOULD NOT BE HELD LIABLE FOR INVASION OF PRIVACY BECAUSE DEFENDANT'S INVESTIGATION REGARDING PLAINTIFF WAS NOT UNREASONABLE.

Investigation Not Unreasonable. An official investigation that is not conducted in an unreasonable manner does not constitute an invasion of privacy by physical intrusion (*see Solis v. Southern Cal. Rapid Transit Dist. (1980) 105 Cal. App. 3d 382, 392, 164 Cal. Rptr. 343*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that defendant should be held liable for invasion of privacy by physical intrusion because defendant's investigation concerning plaintiff was not done in an unreasonable manner.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of a reasonable investigation, such as in support of a demurrer to plaintiff's complaint. These points and authorities may also be adapted for use in a trial or appellate brief.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 184.24*.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion showing that defendant's conduct during the investigation was not unreasonable.

[3] Discussion of Authorities

[a] Investigation Not Unreasonable

Solis v. Southern Cal. Rapid Transit Dist. *(1980) 105 Cal. App. 3d 382, 164 Cal. Rptr. 343* , was an action for invasion of privacy and personal injuries arising out of a bus-pedestrian accident. The invasion of privacy allegedly occurred when, immediately after the accident in which plaintiff was hit by defendant's bus in an intersection, two of defendant's investigators went to the hospital and interviewed plaintiff while she was still being treated in the emergency room. A judgment of nonsuit was granted on the invasion of privacy action, and a jury verdict was awarded to defendant on the personal injuries action. Plaintiff appealed.

The court of appeal affirmed the judgment of nonsuit on the invasion of privacy action, finding that there was nothing unreasonable in the conduct of defendant's investigators. The court noted that the investigators received permission from the doctor and nurse on duty to talk to plaintiff, they did not engage in any deception, they wore uniforms and identified themselves, and their questioning of plaintiff was extremely brief (*105 Cal. App. 3d 382, 392)* .

[4] Additional Authorities

[a] Investigation Not Unreasonable

In *Comeaux v. Brown & Williamson Tobacco Co. (9th Cir. 1990) 915 F.2d 1264* , a federal court of appeals affirmed summary judgment in favor of the defendant in an action arising from the defendant's failure to hire the plaintiff based on an unauthorized investigation of the plaintiff's credit history. The court held that, although California recognizes the tort of "unreasonably intrusive" investigation as an invasion of privacy, under the circumstances the defendant, as well as the credit-reporting agency, used methods that were not unreasonably intrusive, even given the fact that the defendant deceived the credit agency with regard to its purpose for the request (*915 F.2d 1264, 1275)* .

In *Kemp v. County of Orange (1989) 211 Cal. App. 3d 1422, 260 Cal. Rptr. 131* , a county employee who filed a workers' compensation claim filed an invasion-of-privacy action against the county, the workers' compensation adjuster, and others, alleging that the private investigator hired by the workers' compensation insurance adjuster violated his right to privacy by failing to disclose the investigator's report to him. The court of appeal affirmed dismissal of the action, holding that the plaintiff could not state a cause of action for public disclosure of private facts under the circumstances; that the investigator had no duty under *15 U.S.C.S. § 1681* (Fair Credit Reporting Act, regarding duties of credit agencies) to disclose the report; and that plaintiff could not have based a cause of action on an unreasonably intrusive investigation, because the investigator's conduct in obtaining information from a credit-reporting agency, interviewing business associates, and writing a report, was reasonable (*211 Cal. App. 3d 1422, 1427-1428)* .

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18-184 California Points & Authorities § 184.40

§ 184.40 Supporting Contention That Plaintiff Lacks Standing--No Invasion of Plaintiff's Own Privacy or Statutory Requirements for Transfer or Descent of Deceased Personality's Rights Not Satisfied [Civ. Code § 3344.1]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF LACKS STANDING TO SUE FOR INVASION OF PRIVACY BECAUSE PLAINTIFF HAS FAILED TO ALLEGE ANY INVASION OF HIS/HER OWN PRIVACY [AND PLAINTIFF'S CAUSE OF ACTION DOES NOT SATISFY THE REQUIREMENTS OF SECTION 3344.1 OF THE CIVIL CODE FOR AN ACTION FOR APPROPRIATION OF THE NAME, VOICE, SIGNATURE, PHOTOGRAPH, OR LIKENESS OF A DECEASED PERSONALITY].

A. Right of Privacy as Generally Personal Right. The right of privacy is generally a purely personal right. It usually cannot be asserted by anyone other than the person whose privacy is invaded (*see Hendrickson v. California Newspapers, Inc. (1975) 48 Cal. App. 3d 59, 62, 121 Cal. Rptr. 429*).

[*Optional*] **B. Relative Has No Right.** There is no relational right of privacy. When plaintiff's only connection to the asserted invasion of privacy is that he or she is a relative of the victim of the invasion and was for this reason unwillingly brought into the limelight, no recovery is allowed (*Coverstone v. Davies (1952) 38 Cal. 2d 315, 323-324, 239 P.2d 876* ; *Hendrickson v. California Newspapers, Inc. (1975) 48 Cal. App. 3d 59, 62-63, 121 Cal. Rptr. 429*).

[*Optional*] **C. Deceased Personality's Rights Transferable or Descendible Only According to Statutory Requirements.** The successor in interest of a deceased personality's right to exclusive use of his or her name, voice, signature, photograph, or likeness for advertising or soliciting purposes, or the successor's licensee, may only recover for an unauthorized use if the successor or licensee has previously filed a statutory claim of rights and if the unauthorized use has occurred within 70 years of the decedent's death (*see Civ. Code § 3344.1(b)-(h)*; *see also Lugosi v. Universal Pictures (1979) 25 Cal. 3d 813, 820-822, 160 Cal. Rptr. 323, 603 P.2d 425* (right of privacy not descendible prior to 1984 enactment of former Civ. Code § 990 (*now see Civ. Code § 3344(d)*)).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that plaintiff lacks standing to sue for invasion of privacy when plaintiff has failed to allege an invasion of his or her own privacy. Optional Paragraph B may be used to contend that plaintiff lacks standing to sue for invasion of privacy because he or she has been brought into the public light merely because he or she is a relative of the victim of the alleged invasion. Optional Paragraph C may be used to contend that an alleged heir, devisee, or transferee of the rights to the use of a deceased personality's name, voice, signature, photograph, or likeness has not satisfied the minimum statutory requirements for obtaining these rights [*see Civ. Code § 3344.1(b)-(h)*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of lack of standing, such as in support of a demurrer to plaintiff's complaint. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion showing that plaintiff is suing for an alleged invasion of someone else's privacy. If plaintiff alleged that he or she possesses the right to exercise consent to the use of a deceased personality's name, voice, signature, photograph, or likeness, counsel should show that plaintiff has failed to satisfy the minimum requirements under *Civ. Code § 3344.1* for fixing such rights.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 184.42* may be used to oppose the contention supported by these points and authorities.

[c] Related Pleading and Practice Forms

For a form of affirmative defense based on lack of standing, see California Forms of Pleading and Practice, Ch. 429, *Privacy* (Matthew Bender).

[3] Discussion of Authorities

[a] Right of Privacy as Generally Personal Right

Hendrickson v. California Newspapers, Inc. *(1975) 48 Cal. App. 3d 59, 121 Cal. Rptr. 429* , was an action by a decedent's family members against a newspaper for publishing an obituary that revealed the prior criminal conviction of decedent. Defendant's demurrer was sustained and a judgment of dismissal entered. Plaintiffs appealed.

On appeal, the court of appeal affirmed. Citing *Coverstone v. Davies (1952) 38 Cal. 2d 315, 239 P.2d 876* [*see § 184.40[3][b]*], among other cases, the court held that it is well settled that the right of privacy is a purely personal right; it cannot be asserted by anyone other than the person whose privacy has been invaded, that is, plaintiff must plead and prove that his or her own privacy has been invaded (*48 Cal. App. 3d 59, 62)* .

[b] Relative Has No Right

Coverstone v. Davies *(1952) 38 Cal. 2d 315, 239 P.2d 876* , involved an action for invasion of privacy by the parents of one of two teenagers arrested for unlawful assembly during a hot rod race. The teenagers were subsequently acquitted. The parents sued the police, sheriff, and city manager, claiming that the publicity surrounding the arrest caused the parents' friends to shun them and the father's legal practice to close. Nonsuits were granted to defendants,

and plaintiffs appealed.

On appeal, the Supreme Court affirmed, holding that the right of privacy did not encompass the facts asserted by plaintiffs (*38 Cal. 2d 315, 322)* . The Court refused to extend liability for invasion of privacy to the situation in which plaintiffs' only connection to the asserted invasion of privacy is that they were related to the victim of the invasion and were therefore brought unwillingly into the limelight (*38 Cal. 2d 315, 323-324)* .

The facts and procedural background of ***Hendrickson v. California Newspapers, Inc.*** *(1975) 48 Cal. App. 3d 59, 121 Cal. Rptr. 429* , are *discussed under 184.40[3][a]*. The court of appeal rejected plaintiffs' contention that defendant's newspaper story directly invaded their privacy by mentioning them as survivors of the decedent, whose past criminal record was reported in the story. The court stated that the reference was purely relational and, as such, is not a basis for a cause of action for invasion of privacy (*48 Cal. App. 3d 59, 62-63)* . The court further held that the decedent's criminal record was not a family secret with respect to which plaintiffs had a right to privacy since it concerned the decedent's and not plaintiffs' own prior activities. Finally, courts have uniformly denied a cause of action for relatives for the invasion of privacy of another family member (*48 Cal. App. 3d 59, 63)* .

[c] Deceased Personality's Rights Transferable or Descendible Only According to Statutory Requirements

Unlike the other rights included under the rubric "right to privacy," survival of a personality's rights to exclusive use of his or her name, voice, signature, photograph, or likeness after the personality has died is now explicitly provided for by statute [*see Civ. Code § 3344.1(a)*]. The rights covered by *Civ. Code § 3344.1* may be transferred to other persons by the personality holding them, or they may pass according to a statutorily established scheme to the deceased personality's surviving spouse, surviving or nonsurviving children and grandchildren, and, in some cases, surviving parents [*see Civ. Code § 3344.1(b)-(d)*]. However, this statutory transferability or descendibility of covered rights is subject to certain conditions. Thus, a successor in interest to such rights or a licensee thereof may not recover damages for a use prohibited by *Civ. Code § 3344.1* that occurs before the successor in interest or licensee registers a claim of the rights with the Secretary of State pursuant to *Civ. Code § 3344.1(f)(2)* [*Civ. Code § 3344.1(f)(1)*]. Morevover, no action shall be brought under *Civ. Code § 3344.1* by reason of any use of a deceased personality's covered attributes occurring after the expiration of 70 years from the death of the deceased personality [*see Civ. Code § 3344.1(g)*; *see Civ. Code § 3344.1(h)* ("deceased personality" defined)].

The facts and procedural background of ***Lugosi v. Universal Pictures*** *(1979) 25 Cal. 3d 813, 160 Cal. Rptr. 323, 603 P.2d 425* , are discussed in *§ 184.20[3][a]*. In a case decided before the 1984 enactment of former Civ. Code § 990 [*now see Civ. Code § 3344(d)*], the widow and surviving son of the deceased brought an action for appropriation by defendant of the deceased's likeness. The Supreme Court restated the general rule that a person's right to privacy may not be asserted by a person other than the one whose own privacy has been invaded and held that the right to exploit name and likeness must be exercised, if at all, by the artist during his or her lifetime (*25 Cal. 3d 813, 824)* .

NOTE:

Because *Civ. Code § 3344.1* creates an exception to the general rule, it appears that the general rule as set out in *Lugosi* still applies to bar an action by a person other than the personality in all cases in which *Civ. Code § 3344.1* does not apply.

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18-184 California Points & Authorities § 184.41

§ 184.41 Supporting Contention That Plaintiff Lacks Standing--Business Entity Has No Right of Privacy

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF LACKS STANDING TO SUE FOR INVASION OF PRIVACY BECAUSE PLAINTIFF IS A BUSINESS ENTITY AND A BUSINESS ENTITY HAS NO RIGHT OF PRIVACY.

Business Entity Has No Right of Privacy. A business entity does not have a right of privacy and thus cannot sue for an alleged invasion of such a right (*Ion Equip. Corp v. Nelson (1980) 110 Cal. App. 3d 868, 878, 168 Cal. Rptr. 361*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that plaintiff lacks standing to sue for invasion of privacy when plaintiff is a business entity, which apparently does not have a right of privacy. However, at least one court of appeal has held that a partnership may sue for an invasion of privacy [*H & M Assocs. v. City of El Centro (1980) 109 Cal. App. 3d 399, 409-411, 167 Cal. Rptr. 392* ; *see § 184.43[3][a]*]. It appears that *Ion Equipment Corp. v. Nelson* may be distinguished from *H & M Associates v. City of El Centro* on the ground of whether or not economic damages have been alleged [*see § 184.41[3][a]*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of lack of standing, such as in support of a demurrer to plaintiff's complaint. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show that plaintiff is a business entity that is suing for a right of privacy, and also that plaintiff has not alleged any economic damages [*see* discussion in *§ 184.41[3][a]*].

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 184.43* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Business Entity Has No Right of Privacy

Ion Equip. Corp v. Nelson *(1980) 110 Cal. App. 3d 868, 168 Cal. Rptr. 361 (1st District)* , was an action by a corporation against a former employee for invasion of privacy allegedly caused by the former employee's secret recording of a telephone conversation with another employee of plaintiff. Defendant's demurrer to the privacy cause of action was sustained, a motion for judgment on the pleadings was granted, and a judgment of dismissal was entered. Plaintiff appealed.

The court of appeal held that the trial court properly sustained the demurrer because a corporation does not have a common law right to privacy and therefore cannot bring an action for invasion of privacy. A corporation is a fictitious person and has no "feelings" that can be injured in the sense of the tort of invasion of privacy (*110 Cal. App. 3d 868, 878)* . That part of the judgment was amended and affirmed.

NOTE:

Another court of appeal has held that a business entity in the form of a partnership could sue for invasion of privacy because it did not seek damages for hurt feelings, but instead for economic loss that resulted from defendant's disclosure of information [*H & M Assocs. v. City of El Centro (1980) 109 Cal. App. 3d 399, 409-411, 167 Cal. Rptr. 392 (4th District)* ; see *§ 184.43[3][a]*]. It appears that *Ion Equipment Corp.* may be distinguished from H & M Associates on the ground of whether or not economic damages have been alleged, but until this issue is clearly resolved by the Supreme Court, counsel should use *Ion Equipment Corp.* with caution.

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18-184 California Points & Authorities § 184.42

§ 184.42 Opposing Contention That Plaintiff Lacks Standing--Invasion of Plaintiff's Own Privacy or Statutory Requirements for Transfer or Descent of Deceased Personality's Rights Are Satisfied [Civ. Code § 3344.1]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF HAS STANDING TO SUE FOR INVASION OF PRIVACY BECAUSE _____ [PLAINTIFF HAS ALLEGED AN INVASION OF HIS/HER OWN PRIVACY *OR* THE RIGHTS TO USE A DECEASED PERSONALITY'S NAME, VOICE, SIGNATURE, PHOTOGRAPH, OR LIKENESS ARE DESCENDIBLE AND TRANSFERABLE, AND THE STATUTORY REQUIREMENTS FOR SUCH USE HAVE BEEN MET].

[*EITHER*]

Relative Has Standing When Own Right Invaded. If a person's own privacy is invaded along with a relative's privacy, that person may maintain a cause of action for the intrusion on his or her own privacy (*Vescovo v. New Way Enters., Ltd. (1976) 60 Cal. App. 3d 582, 588, 130 Cal. Rptr. 86*).

[*OR*]

Right to Use of Deceased Personality's Name, Voice, Signature, Photograph, or Likeness Is Descendible and Transferable. A deceased personality's right to exclusive use of his or her name, voice, signature, photograph, or likeness may descend to designated heirs of the personality or may be transferred by contract, trust, or testamentary documents by the holder of such rights, before or after the death of the deceased personality; persons to whom such rights have descended or been transferred may bring an action to recover damages for unauthorized use of the rights if the statutory requirements for fixing the rights have been satisfied (*see Civ. Code § 3344.1(b)-(h)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that plaintiff lacks standing to sue because the privacy rights of a person other than the defendant have been invaded. They set out as alternative contentions the points that plaintiff has standing to sue for invasion of privacy when his or her own privacy has been invaded in addition to a relative's privacy, and that the rights of a deceased personality may pass to specified heirs or be transferred or devised pursuant to *Civ. Code § 3344.1*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise or respond to the substantive issue of plaintiff's standing, such as in opposing a demurrer to plaintiff's complaint. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, if counsel is using the first alternative contention, counsel should include a discussion showing that plaintiff's own privacy was invaded. If counsel is using the second alternative contention, counsel should include a discussion showing that plaintiff is a transferee, devisee, or proper heir of the deceased person, and that he or she has satisfied the statutory requirements under *Civ. Code § 3344.1* for fixing these rights [*see § 184.42[3][b]*].

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 184.40*.

[b] Related Pleading and Practice Forms

For a form of affirmative defense based on lack of standing, see California Forms of Pleading and Practice, Ch. 429, *Privacy* (Matthew Bender).

[3] Discussion of Authorities

[a] Relative Has Standing When Own Right Invaded

Vescovo v. New Way Enters., Ltd. *(1976) 60 Cal. App. 3d 582, 130 Cal. Rptr. 86* , is discussed in *§ 184.25[3][a]*.

[b] Right to Use of Deceased Personality's Name, Voice, Signature, Photograph, or Likeness Is Descendible and Transferable

Any person who uses a deceased personality's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising, selling, or soliciting purchases of products, merchandise, goods, or services without prior consent from the successors in interest or their licensees of the relevant rights of the deceased person shall be liable for damages, disgorgement of profits, and other specified penalties and fees [*see Civ. Code § 3344.1(a)(1)*]. The rights recognized under *Civ. Code § 3344.1* are property rights, freely transferable, in whole or in part, by contract or by means of trust or testamentary documents [*see Civ. Code § 3344.1(b)*]. These rights are deemed to have existed at the time of death of any deceased personality who died prior to January 1, 1985, and except as noted in *Civ. Code § 3344.1(o)*, described *below*, vest in the persons entitled to these property rights under the testamentary instrument of the deceased personality effective as of the date of death [*Civ. Code § 3344.1(b)*]. In the absence of an express transfer in a testamentary instrument of the deceased personality's rights, a provision in the testamentary instrument that provides for the disposition of the residue of the deceased personality's assets is effective to transfer the rights recognized under *Civ. Code § 3344.1* in accordance with the terms of that provision. The rights established by this section are also freely transferable or descendible by contract, trust, or other testamentary instrument by any subsequent owner of the deceased personality's rights [*Civ. Code § 3344.1(b)*]. *Civ. Code § 3344.1* does not affect any contract entered into by a deceased personality during his or her lifetime by which the deceased assigned the rights, in whole or in part, to use his or her name, voice, signature, photograph or likeness [*Civ. Code § 3344.1(b)*].

The consent required by *Civ. Code § 3344.1* shall be exercisable by the person or person to whom such right of consent (or portion thereof) has been transferred in accordance with *Civ. Code § 3344.1(b)*, or if no such transfer has occurred, then by the person or persons to whom such right of consent (or portion thereof) has passed in accordance with *Civ. Code § 3344.1(d)* [*Civ. Code § 3344.1(c)*]. Subject to *Civ. Code § 3344.1(b)* and *(c)*, after the death of any person, the rights under *Civ. Code § 3344.1* shall belong to the following person or persons and be exercised on behalf of and for the benefit of all of those persons, by those persons who, in aggregate, are entitled to more than a one-half interest in such rights [*Civ. Code § 3344.1(d)(1)-(3)*]:

- The entire interest in those rights belong to the surviving spouse of the deceased personality unless there are any surviving children or grandchildren of the deceased personality, in which case one half of the entire interest in those rights belong to the surviving spouse;

- The entire interest in those rights belong to the surviving children of any dead child of the deceased personality unless the deceased personality has a surviving spouse, in which case the ownership of a one-half interest in rights is divided among the surviving children and grandchildren; and

- If there is no surviving spouse, and no surviving grandchildren, then the entire interest in those rights belong to the surviving parent or parents of the deceased personality.

The rights of the deceased personality's children and grandchildren are in all cases divided among them and exercisable in the manner provided in *Prob. Code § 240* according to the number of the decedent's children represented. The share of the children of a dead child of a deceased personality can be exercised only by the action of a majority of them [*Civ. Code § 3344.1(d)(4)*].

If an action was taken prior to May 1, 2007, to exercise rights recognized under *Civ. Code § 3344.1* relating to a deceased personality who died prior to January 1, 1985, by a person who acquired the rights through the statutory provisions of *Civ. Code § 3344.1(d)*, described *above*, other than a person who was disinherited by the deceased personality in a testamentary instrument, and the exercise of those rights was not challenged successfully in a court action by a person who acquired the rights through a testamentary transfer, that exercise of rights by the person who acquired the rights through the statutory provisions is unaffected by the testamentary transfer. In such a case, the rights that would otherwise vest in one or more persons through a testamentary transfer vest solely in the person or persons described in *Civ. Code § 3344.1(d)*, other than a person disinherited by the deceased personality in a testamentary instrument, for all future purposes [*Civ. Code § 3344.1(o)*].

For a discussion of some of the conditions limiting the rights of successors in interest to hold and enforce a deceased personality's name and likeness rights, see *§ 184.40[3][c]*.

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PART II. FORMS

18-184 California Points & Authorities § 184.43

§ 184.43 Opposing Contention That Plaintiff Lacks Standing--Business Entity Suffering Economic Damages Has Action for Invasion of Privacy

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF HAS STANDING TO SUE FOR INVASION OF PRIVACY BECAUSE A BUSINESS ENTITY SUFFERING ECONOMIC DAMAGES MAY BRING AN ACTION FOR INVASION OF PRIVACY.

Business Entity Suffering Economic Damages May Bring Action for Invasion of Privacy. A business entity that has suffered economic damages may sue for an invasion of privacy (*see H & M Assocs. v. City of El Centro (1980) 109 Cal. App. 3d 399, 409-411, 167 Cal. Rptr. 392*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that plaintiff lacks standing to sue for invasion of privacy when plaintiff is a business entity that has suffered economic damages as a result of an invasion of privacy. However, there appears to be some conflict in the cases as to whether a business entity may sue for invasion of privacy [*see Ion Equip. Corp v. Nelson (1980) 110 Cal. App. 3d 868, 878, 168 Cal. Rptr. 361* ; *see also § 184.43[3][a]*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of plaintiff's standing, for example, in opposition to a demurrer to plaintiff's complaint. These points and authorities may also be adapted for use in a trial or appellate brief.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 184.41*.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion showing that plaintiff is a business entity that is suing for a protected right of privacy, and that plaintiff has suffered economic damages.

[3] Discussion of Authorities

[a] Business Entity Suffering Economic Damages May Bring Action for Invasion of Privacy

H & M Assocs. v. City of El Centro *(1980) 109 Cal. App. 3d 399, 167 Cal. Rptr. 392 (4th District)* , was an action for invasion of privacy by defendants' action of terminating water service to an apartment complex owned by plaintiff, a partnership, divulging this information to plaintiff's mortgagees and the news media, and stating that the service would not be reinstated. As a result, plaintiff lost its tenants and the mortgages were ultimately foreclosed. Defendants' demurrer was sustained and a judgment of dismissal entered. Plaintiff appealed.

The court of appeal reversed, finding that a partnership may state a cause of action for invasion of privacy (*109 Cal. App. 3d 399, 409-410)* . The court noted that plaintiff was not seeking damages for "hurt feelings," but rather was seeking damages for economic loss, that is, the real property that was foreclosed (*109 Cal. App. 3d 399, 410)* .

NOTE:

Another court of appeal has held that a business entity in the form of a corporation that did not suffer an economic loss may not sue for common law invasion of privacy. In that case, the court noted that a corporation has no "feelings" that can be injured in the sense of the tort of invasion of privacy [*Ion Equip. Corp v. Nelson (1980) 110 Cal. App. 3d 868, 878, 168 Cal. Rptr. 361 (1st District)* ; *see § 184.41[3][a]*].

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18-184 California Points & Authorities § 184.44

§ 184.44 Opposing Contention That Plaintiff May Seek Multiple Awards of Statutory Damages for Single Cause of Action Under Civ. Code § 3344

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

IN THE ABSENCE OF PROOF OF A GREATER AMOUNT OF ACTUAL DAMAGES, PLAINTIFF'S RECOVERY OF STATUTORY DAMAGES UNDER *CIVIL CODE SECTION 3344* IS LIMITED TO A SINGLE PAYMENT OF $750 BECAUSE DEFENDANT'S ACTS OF APPROPRIATION GAVE RISE TO ONLY A SINGLE CAUSE OF ACTION.

Recovery of Statutory Damages Limited to Single Award of $750. If defendant has committed multiple related acts of appropriation, but these acts are taken with a common purpose or as part of a common plan and give rise to only a single cause of action, then plaintiff's compensatory damages are limited to a single payment of $750 unless plaintiff can prove actual damages of a greater amount (*Miller v. Collectors Universe, Inc. (2008) 159 Cal. App. 4th 988, 1008, 72 Cal. Rptr. 3d 194*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a plaintiff may be awarded $750 under *Civ. Code § 3344* for each separate act of appropriation by the defendant of plaintiff's name, voice, signature, photograph, or likeness. The basis for the opposition is that the defendant's acts were taken with a common purpose or as part of a common plan and give rise to only a single cause of action, thus justifying only a single award of statutory damages.

These points and authorities may be combined with points and authorities relating to the specific procedural context in which the issue of defendant's liability for statutory damages arises, or combined with other forms in this chapter, as appropriate. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law stated. Thus, counsel should describe the nature of the defendant's appropriation of plaintiff's name, voice, signature, photograph, or likeness, and argue that the conduct, if actionable, gives rise to only a single cause of action because the conduct consisted of multiple, but related, acts of appropriation taken with a common purpose or as part of a common plan.

[3] Discussion of Authorities

[a] Recovery of Statutory Damages Limited to Single Award of $750

In ***Miller v. Collectors Universe, Inc.*** *(2008) 159 Cal. App. 4th 988, 72 Cal. Rptr. 3d 194* , defendant was in the business of authenticating celebrity autographs and appropriated the name of plaintiff, a former employee, on 14,060 separate certificates of authenticity issued in the months immediately after plaintiff's employment with the company ended. All of the certificates were printed at the same time and were identical except for their serial numbers, although they were issued to customers separately over the course of several months. Plaintiff's name was listed on the certificates as a member of defendant's panel of authentication experts, although he did not consent to the use of his name on the certificates. Plaintiff brought suit against defendant for appropriation under *Civ. Code § 3344*. The trial court initially agreed with plaintiff that he could seek statutory damages of $750 for each certificate and, satisfied with the right to seek $750 for each offending certificate, plaintiff chose not to attempt to prove any actual damages. The jury found for plaintiff. The trial court, realizing the amount of statutory damages would be over $10,000,000 if it's initial ruling was upheld, tentatively decided to declare a mistrial on the amount of statutory damages. The parties stipulated to an immediate judgment of $0 in order to facilitate an appeal.

The court of appeal held that, in the absence of proof of actual damages, plaintiff could recover only a single payment of $750 under the statutory damages provision, rather than $750 for each certificate. The court concluded that plaintiff's injury, which was the worry and uncertainty regarding his reputation and his potential liability for improperly authenticated items, occurred when defendant knowingly issued the first certificate without plaintiff's consent. While the number of certificates issued might be relevant to plaintiff's actual damages, if any, and to punitive damages, the court held that plaintiff had only one cause of action for the certificates and was limited to a single payment of $750 as statutory damages (*159 Cal. App. 4th 988, 1008)* . The court reversed, instructing the trial court to allow plaintiff to elect either to accept an award of $14,060 in disgorged profits together with $750 in statutory penalty, or to retry the entire complaint, including any causes of action or damage claims plaintiff abandoned when the trial court initially ruled in his favor on the issue of statutory damages (*159 Cal. App. 4th 988, 1008-1009*).

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18-184 California Points & Authorities § 184.45

§ 184.45 Supporting Contention That Single-Publication Rule Applies to Cause of Action for Appropriation of Likeness

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE SINGLE-PUBLICATION RULE, AS CODIFIED IN *CIVIL CODE SECTION 3425.3*, APPLIES TO A CAUSE OF ACTION FOR THE UNAUTHORIZED COMMERCIAL USE OF LIKENESS.

Single-Publication Rule Applicable to Appropriation Cause of Action. The single-publication rule developed in the context of defamation actions and as codified in *Civ. Code § 3425.3* applies to a cause of action for unauthorized commercial use of likeness (*Christoff v. Nestle USA, Inc..(2009) 47 Cal. 4th 468, 476, 97 Cal. Rptr. 3d 798, 213 P.3d 132*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted by a defendant charged with the unauthorized commercial appropriation of likeness to argue that the cause of action is governed by the single-publication rule. This point is most likely to be relevant when asserting that the cause of action accrued earlier than contended by plaintiff and is barred by the statute of limitations. The single-publication rule is asserted most frequently in defamation actions, and points and authorities discussing the rule in that context are contained in Ch. 142, *Libel and Slander (Defamation)*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law stated. Thus, counsel should include facts detailing the nature of the publication that forms the basis for plaintiff's cause of action and explain how that publication constitutes a single integrated publication triggering application of the single-publication rule.

[3] Discussion of Authorities

[a] Single-Publication Rule Applicable to Appropriation Cause of Action

In ***Christoff v. Nestle USA, Inc.*** *(2009) 47 Cal. 4th 468, 97 Cal. Rptr. 3d 798, 213 P.3d 132* , plaintiff was a professional model who in 1986 was paid $250 to pose for a photograph that might be used in Canada on a label for bricks of coffee. Under his contract, in the event the photograph was actually used, plaintiff was to receive $2,000 plus an agency commission. Although plaintiff was never paid under his contract, the photograph was used on the label in Canada. In addition, beginning in 1997 the photograph was used in the United States and internationally without any authorization from plaintiff on labels for instant coffee and related advertisements. Plaintiff, however, did not learn of this unauthorized use until 2002 when he first saw his image on the instant coffee label. Plaintiff filed suit in 2003 against the U.S. corporation, alleging causes of action for unauthorized commercial use of his likeness in violation of *Civ. Code § 3344*, common-law appropriation of likeness, quantum meruit, and unjust enrichment. The trial court denied defendant's motion for summary judgment based on the statute of limitations after ruling that the single-publication rule did not apply to actions that were not based on defamation. Under that rule, as codified in *Civ. Code § 3425.3*, a person has only one cause of action for damages founded upon "any single publication or exhibition or utterance, such as any one issue of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture." Thereafter, the court also instructed the jury that the delayed-discovery rule could be applied to determine the timeliness of plaintiff's action if he proved that prior to discovery of the use of his picture, he did not previously suspect or have reason to suspect that his image was being so used. The jury found in favor of plaintiff and awarded over $15,000,000 in damages. Defendant appealed, and the court of appeal reversed and remanded, concluding that the single-publication rule applied to causes of action for appropriation and that whether the discovery rule delayed accrual of plaintiff's cause of action depended on whether defendant hindered plaintiff's discovery of the unauthorized use of his photograph. Another appeal followed.

The California Supreme Court reversed the decision of the court of appeal in part. The Supreme Court agreed that the single-publication rule, although developed in the context of defamation actions, applies as codified in *Civ. Code § 3425.3* to a cause of action for unauthorized commercial use of one's likeness, as by its own language the statute expressly applied to any action "for libel or slander or invasion of privacy or any other tort founded on any single publication" (*47 Cal. 4th 468, 476)* . However, because a cause of action governed by the single-publication rule accrues from the date of the first general distribution of the publication to the public, thus triggering the statute of limitations with respect to that publication, a court must first identify what constitutes a single integrated publication (*47 Cal. 4th 468, 477)* . The Court concluded that it could not determine these issues for the case before it under the current factual record, as the trial court's ruling that the single-publication rule did not apply prevented the parties from adequately developing the factual record on the nature and extent of the defendant's publications using plaintiff's likeness (*47 Cal. 4th 468, 482)* . In addition, consistent with the application of the single-publication rule in actions for libel, the Court held that the delayed-discovery rule does not apply to publications widely disseminated to the general public, such as those in books, magazines, and newspapers (*47 Cal. 4th 468, 482-483)* .

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CHAPTER 185 PRIVACY: COLLECTION, DISSEMINATION, AND INSPECTION OF INFORMATION

18-185 California Points & Authorities 185.syn

§ 185.syn Synopsis to Chapter 185: PRIVACY: COLLECTION, DISSEMINATION, AND INSPECTION OF INFORMATION

§ 185.01 Scope of Chapter

§ 185.02 Governing Statutes

§ 185.03 Use of Chapter

§ 185.04 Exhaustion of Administrative Remedies Required

§ 185.05 Related Pleading and Practice Chapters

§ 185.06 Related Points and Authorities Chapters

§§ 185.07-185.19 [Reserved]

§ 185.20 Supporting Contention That Federal Case Law Construing Privacy Act of 1974 [5 U.S.C.S. § 552a] Is Persuasive in State Action Under Information Practices Act of 1977 [Civ. Code §§ 1798-1798.78]

[1] FORM

[2] Comments

[a] Use of Form

[b] State Remedies Provisions More Comprehensive Than Federal

[3] Discussion of Authorities

[a] Federal Case Law Is Persuasive in Interpreting Identical State Provisions

§ 185.21 Supporting Contention That Government Agency Violated Privacy Act of 1974 [5 U.S.C.S. § 552a] or

Information Practices Act of 1977 [Civ. Code §§ 1798-1798.78]--Coverage of Act

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Agencies Covered by Privacy Act of 1974

[b] Records Covered by Privacy Act of 1974

[c] Individuals Covered by Privacy Act of 1974

[d] Individuals Covered by Information Practices Act of 1977

[e] Business as Well as Personal Information Covered

[f] Videotape Recording May Be a Record

[4] Additional Authorities

[a] Records Covered by Privacy Act of 1974

§ 185.22 Supporting Contention That Government Agency Improperly Refused Plaintiff Access to Personal Information [5 U.S.C.S. § 552a(d)(1); Civ. Code §§ 1798.30-1798.34]--Injunctive Relief to Compel Disclosure Available [5 U.S.C.S. § 552a(g)(1)(B), (3)(A); Civ. Code §§ 1798.46, 1798.47]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Right to Access to Personal Information in Federal Records

[b] Exemption From Freedom of Information Act Is Not Exemption From Privacy Act of 1974

[c] Exemption From Public Records Act Is Not Exemption From Information Practices Act of 1977

§ 185.23 Supporting Contention That Government Agency Improperly Refused Plaintiff Access to Personal Information [5 U.S.C.S. § 552a(d)(1); Civ. Code §§ 1798.30-1798.34]--Defendant Cannot Rely on Confidential Source

Exemptions to Deny Access [5 U.S.C.S. § 552a(k)(2), (5); Civ. Code § 1798.38]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Evidence Must Show Promise to Each Source

[b] Exemption Limited to Information Disclosing Source

§ 185.24 Supporting Contention That Defendant Agency Improperly Disclosed Information Concerning Plaintiff [5 U.S.C.S. § 552a(b); Civ. Code § 1798.24]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Privacy Act Subordinate to Freedom of Information Act

[c] Information Practices Act Subordinate to Public Records Act

[d] Dissemination of Information Already Publicly Known Not Improper Disclosure

[3] Discussion of Authorities

[a] Willfulness Requirement Does Not Include Malice

[b] Damages for Improper Disclosure

[c] Invasion of Privacy Causing Psychological Harm Constitutes Adverse Effect

§ 185.25 Supporting Contention That Defendant Agency Improperly Disclosed Information Concerning Plaintiff [5 U.S.C.S. § 552a(b); Civ. Code § 1798.24]--Disclosure Not Required Because It Entails an Unwarranted Invasion of Privacy [5 U.S.C.S. § 552(b)(6); Gov. Code § 6254(c)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Exemption for Disclosure of Investigatory Records

[3] Discussion of Authorities

[a] Disclosure of Information Prohibited When Not Required

[b] Clearly Unwarranted Invasion of Privacy Is Exempt From Freedom of Information Act

[c] Federal Case Law Illuminates Interpretation of Public Records Act Exemptions

[d] Exemption Covers Personal Information

[e] Scope of Exemption May Include Financial Information

[f] Balancing Test to Determine Clearly Unwarranted Invasion of Privacy

[g] De Novo Determination by Court

[h] Subject of Information May Intervene in Freedom of Information Act Action

[4] Additional Authorities

[a] Balancing Test to Determine Clearly Unwarranted Invasion of Privacy

§ 185.26 Supporting Contention That Defendant Agency Improperly Disclosed Information Concerning Plaintiff [5 U.S.C.S. § 552a(b); Civ. Code § 1798.24]--Disclosure Not Covered by Exemption for Routine Use or Necessary Inter-Agency Disclosure [5 U.S.C.S. § 552a(b)(3); Civ. Code § 1798.24(e)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Routine Use Must Be Noticed in Federal Register

[b] Published Use for Litigation Purposes Does Not Create Blanket Exemption

[c] Use of Information Must Be Compatible With Purpose for Which Information Was Collected

§ 185.27 Supporting Contention That Defendant Agency Improperly Disclosed Information Concerning Plaintiff [5 U.S.C.S. § 552a(b); Civ. Code § 1798.24]--Internal Agency Disclosure for Blacklisting Purposes Not Exempt From Privacy Act or Information Practices Act [5 U.S.C.S. § 552a(b)(1); Civ. Code § 1798.24(d)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Internal Disclosure for Blacklisting Prohibited

§ 185.28 Supporting Contention That Agency Improperly Disclosed Information Concerning Plaintiff [5 U.S.C.S. § 552a(b)]--Disclosure Not Exempted From Prohibition of Disclosure by Issuance of Subpoena in Discovery Proceedings Without Court Order [5 U.S.C.S. § 552a(b)(11)]

[1] FORM

[2] Comments

[a] Use of Form

[b] No State Action for Disclosure Pursuant to Subpoena

[3] Discussion of Authorities

[a] Subpoena Without Court Order Does Not Render Disclosure Exempt From Disclosure Prohibition

§ 185.29 Opposing Contention That Government Agency Improperly Refused Amendment or Expungement of Record under Privacy Act of 1974--Records Not Retrievable Under Requester's Name or Other Personal Identifier [5 U.S.C.S. § 552a(a)(5), (d)(2)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Records Must Be Retrievable Under Requestor's Name or Identifier

§ 185.30 Opposing Contention That Government Agency Violated Privacy Act of 1974 [5 U.S.C.S. § 552a(b)(1)] or Information Practices Act of 1977 [Civ. Code § 1798.24(d)]--Disclosure of Social Security Numbers to Department of Motor Vehicles Authorized [42 U.S.C.S. § 405(c)(2)(C)(i)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Exception to Privacy Act Authorizes Disclosure of Applicants Social Security Numbers to Department of Motor Vehicles on Drivers' License Applications.

§ 185.31 Improper Maintenance of Records [5 U.S.C.S. § 552a(e)(1), (5), (6); Civ. Code §§ 1798.14, 1798.15, 1798.18]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Damages for Improper Maintenance

[b] Information Must Be Relevant to Published Use

[c] Maintenance of Information in Private Notes Is Improper

§ 185.32 Improper Maintenance of Records--Collection and Maintenance of Information Describing Exercise of First Amendment Rights [5 U.S.C.S. § 552a(e)(7)]

[1] FORM

[2] Comments

[a] Use of Form

[b] No State Action

[3] Discussion of Authorities

[a] Detrimental Effect on Plaintiff

[b] Record Need Not Be Retrievable by Subject's Name

[c] Public Employee's Grievance

[4] Additional Authorities

[a] Record Need Not Be Retrievable by Subject's Name

§ 185.33 Amendment of Record at Subject's Request or Inclusion of Subject's Statement of Disagreement With Record [5 U.S.C.S. § 552a(d)(2)-(4) or Civ. Code §§ 1798.35-1798.37]

[1] FORM

[2] Comments

[a] Use of Form

[b] Use of Information in Official Determination Is Guiding Standard

[c] Record Must Be Retrievable by Requester's Name or Indentifier

[3] Discussion of Authorities

[a] Relief by Writ of Mandate for Abuse of Discretion

[b] Injunction Against Agency

[c] Amendment Is Proper Remedy for Improper Maintenance of Records

§ 185.34 Supporting Contention That Individual Agency Employee May Not Be Held Liable for Violating Privacy Act of 1974 (5 U.S.C.S. § 552a) or Information Practices Act (Civ. Code §§ 1798-1798.78) [5 U.S.C.S. § 552a(g); Civ. Code §§ 1798.45-1798.53]

[1] FORM

[2] Comments

[a] Use of Form

[b] Individual Officer May Be Named in Injunction Action

[c] Limited Use in State Action

[3] Discussion of Authorities

[a] No Action Against Individuals

[4] Additional Authorities

[a] No Action Against Individuals

§ 185.35 Supporting Contention That Private Medical Provider of Medi-Cal Services Is Not Government Agency Subject to Information Practices Act

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Private Medical Facility Not Government Agency

§ 185.36 Improper Disposal of Customer Records [Civ. Code § 1798.81]--General Form

[1] FORM

[2] Comments

[a] Use of Form

§ 185.37 Improper Disclosure of Breach of Data Security [Civ. Code §§ 1798.29, 1798.82]

[1] FORM

[2] Comments

[a] Use of Form

[b] Notification Delayed by Law Enforcement

[c] Specific Notice Requirements

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18-185 California Points & Authorities § 185.01

§ 185.01 Scope of Chapter

This chapter contains forms for use in actions by private individuals against federal agencies for violations of the Privacy Act of 1974 (*5 U.S.C.S. § 552a*) or against state and local agencies for violations of the Information Practices Act of 1977 (*Civ. Code §§ 1798-1798.78*), one form for use by an agency official in defending actions for violation of the Privacy Act, and one form for use by a private entity in defending a claim brought under the Information Practices Act. This part does not contain forms for use by agencies in actions for violations of the Privacy Act of 1974 or the Information Practices Act of 1977. Included in this chapter are a general form for use in actions against state and local agencies supporting the contention that federal case law is persuasive authority in interpreting the Information Practices Act of 1977 [*see § 185.20*] and a general form for use in actions against all agencies setting out the definitions of the Privacy Act of 1974 and Information Practices Act of 1977 relating to the coverage of those acts [*see § 185.21*]. The supporting forms in this chapter include forms supporting the contention that a government agency improperly refused a person who is the subject of information contained in the agency's records access to such records [*see §§ 185.22, 185.23*], forms supporting the contention that the agency improperly disclosed information concerning an individual from its records [*see §§ 185.24 -185.28*], forms supporting the contention that an agency's maintenance of its records violated requirements of the Privacy Act of 1974 or Information Practices Act of 1977 [*see §§ 185.31, 185.32*], and a form supporting the contention that an individual is entitled to either amendment of inaccurate information concerning him or her, or inclusion in the record of a statement of disagreement with the information [*see § 185.33*]. Also included are forms supporting the contention that a federal agency employee or officer may not be held liable in his or her individual capacity for violation of the Privacy Act of 1974 [*see § 185.34*], supporting the contention that an action cannot be brought under the Information Practices Act against a private medical facility that provides Medi-Cal services [*see § 185.35*], and supporting the contention that customer records containing personal information were improperly disposed of in violation of *Civ. Code § 1798.81* [*see § 185.36*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawGovernmental InformationPersonal InformationEnforcementGeneral OverviewConstitutional LawSubstantive Due ProcessPrivacyPersonal InformationGovernmentsFederal GovernmentClaims By & AgainstGovernmentsState & Territorial GovernmentsClaims By & AgainstTortsIntentional TortsInvasion of

PrivacyGeneral Overview

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18-185 California Points & Authorities § 185.02

§ 185.02 Governing Statutes

The rights of an individual on whom a federal agency maintains recorded information are set out in Privacy Act of 1974 (hereinafter Privacy Act) (*5 U.S.C.S. § 552a*). An analogous state statutory scheme covering state and local agencies is set out in the Information Practices Act of 1977 (hereinafter, Information Practices Act) (*Civ. Code §§ 1798-1798.78*).

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawGovernmental InformationPersonal InformationGeneral OverviewConstitutional LawSubstantive Due ProcessPrivacyPersonal InformationGovernmentsState & Territorial GovernmentsClaims By & AgainstTortsIntentional TortsInvasion of PrivacyGeneral Overview

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18-185 California Points & Authorities § 185.03

§ 185.03 Use of Chapter

The forms in this chapter may be adapted for use in federal actions involving federal agencies or, when state law provides a cause of action or defense, use in state actions involving state or local agencies. Each substantive form sets out federal and state statutory law in alternative format. The substantive case law in this chapter, however, consists entirely of federal case law interpreting federal statutes. § 185.20 sets out the points that federal case law is persuasive authority in interpreting state statutes when the state statutes are modeled on and comparable to federal statutes being interpreted by the federal cases and that the Information Practices Act of 1977 (*Civ. Code §§ 1798-1798.78*) is modeled on the Privacy Act of 1974 (*5 U.S.C.S. § 552a*). This form is designed for use in adapting the forms in this chapter to state law actions. Thus, in a federal action, counsel should simply use those paragraphs in each form used which set out pertinent federal statutory law together with those paragraphs which set out pertinent federal case law interpreting the federal statutes cited. In a state action, counsel should use those paragraphs setting out pertinent state statutory provisions, together with paragraphs setting out federal case law which interprets comparable federal provisions and with the points and *authorities in § 185.20*. The paragraphs setting out federal case law should contain additional language comparing the state and federal statutory provisions.

§ 185.21 sets out general definitions contained in the Privacy Act of 1974 and Information Practices Act of 1977 which are pertinent to all of the remaining forms in the part. Thus, all of the supporting forms following § 185.21 should be used in combination with § 185.21. The remaining substantive forms may be divided into forms setting out basic points and authorities regarding violations of the Privacy Act of 1974 or Information Practices Act of 1977 and forms setting out particular points regarding these basic points and authorities. The forms setting out basic points and authorities regarding violations of the Privacy Act of 1974 or Information Practices Act of 1977 may be used together with only § 185.21, and with § 185.20 if the action is against a state or local agency, or they may be used in combination with one or more of the specific forms. Specific forms should always be used in combination with a form setting out basic points and authorities as well as § 185.22 and with § 185.20 if the action is against a state or local agency.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawGovernmental InformationPersonal InformationGeneral OverviewConstitutional LawSubstantive

Due ProcessPrivacyPersonal InformationGovernmentsFederal GovernmentClaims By & AgainstGovernmentsState & Territorial GovernmentsClaims By & AgainstTortsIntentional TortsInvasion of PrivacyGeneral Overview

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18-185 California Points & Authorities § 185.04

§ 185.04 Exhaustion of Administrative Remedies Required

Exhaustion of administrative remedies provided by the defendant agency under the Privacy Act (*5 U.S.C.S. § 552a*) is a prerequisite to bringing an action in the federal district court [*Metadure Corp. v. United States (S.D.N.Y. 1980) 490 F. Supp. 1368, 1375]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawGovernmental InformationPersonal InformationEnforcementExhaustion of RemediesAdministrative LawJudicial ReviewReviewabilityExhaustion of RemediesConstitutional LawSubstantive Due ProcessPrivacyPersonal InformationGovernmentsState & Territorial GovernmentsClaims By & AgainstTortsIntentional TortsInvasion of PrivacyGeneral Overview

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18-185 California Points & Authorities § 185.05

§ 185.05 Related Pleading and Practice Chapters

For forms and a discussion relating to federal jurisdiction, see California Forms of Pleading and Practice, Ch. 265, *Federal Courts: Jurisdiction and Removal* (Matthew Bender).

For a discussion, a procedural checklist and forms regarding injunctive relief generally, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender).

For a discussion and forms of pleading to be used in actions concerning government records, see California Forms of Pleading and Practice, Ch. 429, *Privacy* (Matthew Bender).

For a discussion, procedural guides, and forms to be used in actions against public entities and officers generally, see California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Tort Claims Act* (Matthew Bender).

For a discussion, procedural guides, and forms for use in actions involving judicial review of state agency determinations, see California Forms of Pleading and Practice, Ch. 474C, *Procedures in Reviewing Agency Decisions* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureRemovalGeneral OverviewConstitutional LawSubstantive Due ProcessPrivacyPersonal InformationGovernmentsState & Territorial GovernmentsClaims By & AgainstTortsIntentional TortsInvasion of PrivacyGeneral Overview

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18-185 California Points & Authorities § 185.06

§ 185.06 Related Points and Authorities Chapters

For memoranda of points and authorities relating to invasion of privacy, see Ch. 183, *Privacy: State Constitutional Rights* , and Ch. 184, *Privacy: Invasion of Privacy* .

For forms of points and authorities for use in actions for injunctive relief, see Ch. 116, *Injunctions* .

For forms of points and authorities for use in actions for judicial review of state administrative action generally, see Ch. 195, *Public Administrative Law* .

For forms of points and authorities for use in actions against public entities and officers relating to the Tort Claims Act (*Gov. Code § 814*), see Ch. 196, *Public Entities* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesInjunctive ReliefConstitutional LawSubstantive Due ProcessPrivacyPersonal InformationGovernmentsState & Territorial GovernmentsClaims By & AgainstTortsIntentional TortsInvasion of PrivacyGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsRemedies

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18-185 California Points & Authorities §§ 185.07-185.19

[Reserved]

§§ 185.07[Reserved]

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18-185 California Points & Authorities § 185.20

§ 185.20 Supporting Contention That Federal Case Law Construing Privacy Act of 1974 [5 U.S.C.S. § 552a] Is Persuasive in State Action Under Information Practices Act of 1977 [Civ. Code §§ 1798-1798.78]

[1] FORM Supporting Contention That Federal Case Law Construing Privacy Act of 1974 [5 U.S.C.S. § 552a] Is Persuasive in State Action Under Information Practices Act of 1977 [Civ. Code §§ 1798-1798.78]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

FEDERAL CASE LAW INTERPRETING THE PRIVACY ACT OF 1974 IS PERSUASIVE IN A STATE ACTION AS TO INTERPRETATION OF COMPARABLE PROVISIONS OF CALIFORNIA'S INFORMATION PRACTICES ACT OF 1977.

Federal Case Law Is Persuasive in Interpreting Comparable State Provisions. Federal case law interpreting federal statutory provisions is unusually persuasive in a state action involving state statutory provisions whose language is identical, or practically identical, or comparable to the federal provisions read by the federal cases (*Scripps Mem'l Hosp. v. California Employment Comm'n (1944) 24 Cal. 2d 669, 677, 151 P.2d 109* ; *see American Civil Liberties Union Found. v. Deukmejian (1982) 32 Cal. 3d 440, 447, 186 Cal. Rptr. 235, 651 P.2d 822*).

[*Add points and authorities supporting the particular contention being made. See §§ 185.21 -185.34*].

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that federal case law may be relied on as persuasive authority in a state action based on state statutory provisions when the state statutory provisions are identical or nearly identical to the federal provisions relied on by the federal cases cited. The state statutory provisions governing state and local records containing information concerning particular persons are set out in the Information Practices Act (*Civ. Code §§ 1798-1798.78*), which is largely identical to the Privacy Act. Civil remedies against a state or local agency for violation of the Information Practices Act are set out in *Civ. Code §§ 1798.45-1798.49*. Specific substantive statutory provisions of the Information Practices Act are discussed in *§§ 185.21 -185.31*.

This form may be used together with one or more of the points and authorities in this chapter when counsel wishes to support a contention under California's Information Practices Act, which is set out in (*Civ. Code §§ 1798-1798.78*), by relying on federal case law which interprets identical provisions of the Federal Privacy Act set out in *5 U.S.C.S. § 552a*. In using federal cases to interpret state statutory provisions, counsel should cite the state provisions to be interpreted together with the comparable federal provisions and the case interpreting the federal provisions.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. The argument should note that the Information Practices Act was modeled after the Privacy Act [*see* Note, *California's Privacy Act: Controlling Government's Use of Information?, 32 Stan. L. Rev. 1001 (1980)*]. Counsel should also show that the particular provisions of the Information Practices Act to be applied in the case are identical or similar to the Privacy Act provisions applied by the federal cases on which counsel is relying [*see Wildlife Alive v. Chickering (1976) 18 Cal. 3d 190, 202, 132 Cal. Rptr. 377, 553 P.2d 537* (federal and state statutory law must be parallel)].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that federal case law interpreting the Privacy Act is persuasive authority in interpreting comparable provisions of the Information Practices Act. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] State Remedies Provisions More Comprehensive Than Federal

Unlike the damages provisions for violations of the Privacy Act set out in *5 U.S.C.S. § 552a(g)(4)*, the analogous provisions of the Information Practices Act do not require that plaintiff show willful and intentional conduct by defendant agency. Furthermore, the Information Practices Act explicitly provides that recoverable damages may include compensation for mental suffering [*see Civ. Code § 1798.48* (damages for information practice violations)].

Injunctive relief is apparently available for all violations of the Information Practices Act, and is not limited to refusal to disclose or amend, as is the case under the Privacy Act [*see Civ. Code § 1798.47* (injunctive relief under Information Practices Act); *see also 5 U.S.C.S. § 552a(g)* (remedies under Privacy Act)].

[3] Discussion of Authorities

[a] Federal Case Law Is Persuasive in Interpreting Identical State Provisions

Scripps Mem'l Hosp. v. California Employment Comm'n *(1944) 24 Cal. 2d 669, 677, 151 P.2d 109* , was an action to recover unemployment insurance contributions paid under protest. Plaintiff hospital claimed exemption from the obligation to make such contributions as a charitable institution pursuant to former Stats. 1935, ch 352 § 7(g) (*now see* Stats. 1953, ch. 308, § 634; "employment" for Unemployment Insurance Code not including employment with charitable institution). The trial court ruled in favor of plaintiff and defendant appealed.

The Supreme Court upheld the trial court's ruling. In interpreting the applicable state statute, the Court noted that the language of the statute was practically identical with comparable statutes in the federal act governing unemployment, which had been adopted from the same proposed unified unemployment system that had been the basis of the state act, and was precisely similar to language in other federal statutes that had been in effect for many years. The Court stated that for this reason the interpretation put on that language by federal and other courts was unusually persuasive in the case before it (*24 Cal. 2d 669, 677)* . The Court then cited a United States Supreme Court case and several cases from other states interpreting statutory language that was identical or similar to the California provisions in question as support for its own interpretation of the California statutory provisions (*24 Cal. 2d 669, 677-678)* .

In ***American Civil Liberties Union Found. v. Deukmejian*** *(1982) 32 Cal. 3d 440, 186 Cal. Rptr. 235, 651 P.2d 822* , plaintiff civil liberties organization brought an action against defendant state agency under California's Public Records Act (*Gov. Code §§ 6250-6265*) after defendant refused to disclose certain information to plaintiff. Defendant agency argued that the information sought by plaintiff was exempt from the public disclosure requirement of the Public Records Act under the exemption for law enforcement intelligence set out in *Gov. Code § 6254(f)*. The trial court held that the information should be disclosed and defendant appealed.

The Supreme Court affirmed in part and reversed in part. In analyzing the applicability of the disclosure exemption cited by defendants, the court noted that California's Public Records Act was modeled on the federal Freedom of Information Act (*5 U.S.C.S. § 552*), and stated that the judicial construction and legislative history of the federal act served to illuminate the interpretation of its California counterpart. The Court then proceeded to cite federal cases that had interpreted an exemption set out the Freedom of Information Act that was analogous to the Public Records Act exemption at issue in the case, in a manner that supported the interpretation of the exemption urged by defendants. The Court noted, however, that Congress had replied to these cases by enacting an amendment to the Freedom of Information Act that limited the scope of the exemption (*32 Cal. 3d 440, 448-449)* . The Court stated that since the California law was based on the original federal Act, the Court may use the amendments to guide construction of the California law (*32 Cal. 3d 440, 449)* . On the basis of this analysis, the Court rejected defendants' contention that the exemption was applicable to the information sought by plaintiff. The Court stated that accepting defendants' argument would in essence resurrect the federal judicial doctrine that Congress had repudiated, and that was never part of California law (*32 Cal. 3d 440, 449)* .

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18-185 California Points & Authorities § 185.21

§ 185.21 Supporting Contention That Government Agency Violated Privacy Act of 1974 [5 U.S.C.S. § 552a] or Information Practices Act of 1977 [Civ. Code §§ 1798-1798.78]--Coverage of Act

[1] FORM Supporting Contention That Government Agency Violated Privacy Act of 1974 [5 U.S.C.S. § 552a] or Information Practices Act of 1977 [Civ. Code §§ 1798-1798.78]--Coverage of Act

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. If the action is under state law, include introductory points and authorities showing that federal case law is persuasive authority in a state action. See § 185.20.*]

THE PLAINTIFF, THE DEFENDANT AGENCY, AND THE INFORMATION AND RECORDS IN ISSUE ARE COVERED BY _____ [THE PRIVACY ACT OF 1974 (*5 U.S.C.S. § 552a*) *or* THE INFORMATION PRACTICES ACT OF 1977 (*CIV. CODE §§ 1798-1798.78*)]

[*EITHER, if action is against federal agency*]

A. Agencies Covered by Privacy Act of 1974. The term "agency" for purposes of the Privacy Act of 1974 (*5 U.S.C.S. § 552a*) means each authority of the government of the United States, whether or not it is subject to review by another agency, including any executive department, military department, government corporation, government controlled corporation, or other establishment in the executive branch of the government (including the Executive Office of the President), or any independent regulatory agency (*see 5 U.S.C.S. §§ 551(1), 552(f), 552a(a)(1)*).

B. Records Covered by Privacy Act of 1974. The term "record," for purposes of the Privacy Act of 1974 (*5 U.S.C.S. § 552a*), means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, the individual's education, financial transactions, medical history, and criminal or employment history and that contains the individual's name or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print, or photograph. The term "system of records," for purposes of the Privacy Act of 1974 (*5 U.S.C.S. § 552a*) means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying particular assigned to the

individual (*5 U.S.C.S. § 552a(a)(4), (5)*).

C. Individuals Covered by Privacy Act of 1974. An "individual" for purposes of the Privacy Act of 1974 (*5 U.S.C.S. § 552a*) is a citizen of the United States or an alien lawfully admitted for permanent residence (*5 U.S.C.S. § 552a(a)(2)*).

[*OR, if action is against state or local agency*]

A. Agencies Covered by Information Practices Act of 1977. The term "agency" for purposes of the Information Practices Act of 1977 means every state office, officer, department, division, bureau, board, commission, or other state agency, with specified exceptions (*Civ. Code § 1798.3(b)*).

B. Records Covered by Information Practices Act of 1977. The term "record" for purposes of the Information Practices Act of 1977 means any file or grouping of information about an individual that is maintained by an agency by reference to an identifying particular such as the individual's name, photograph, finger or voice print, or a number or symbol assigned to the individual. The term "system of records" for purposes of the Information Practices Act of 1977 means one or more records, which pertain to one or more individuals, which is maintained by any agency, from which information is retrieved by the name of an individual or by some identifying number, symbol or other identifying particular assigned to the individual (*Civ. Code § 1798.3(g), (h)*).

C. Individuals Covered by Information Practices Act of 1977. The term "individual" for purposes of the Information Practices Act of 1977 means a natural person (*Civ. Code § 1798.3(d)*).

[*CONTINUE*]

[*Optional*] **D. Business as Well as Personal Information Covered.** The Privacy Act of 1974 (*5 U.S.C.S. § 552a*) applies to all information about an individual and does not distinguish between personal information about the individual and information about the individual's business affairs (*Florida Med. Ass'n v. Department of Health, Educ. & Welfare (M.D. Fla. 1979) 479 F. Supp. 1291, 1310 , vacated and remanded on other grounds, Florida Med. Ass'n v. Dept. of Health, Educ. & Welfare (5th Cir. 1979) 601 F.2d 199*). The Information Practice Act's definition of "individual" is comparable on this point to the Privacy Act's definition of "individual," on which *Florida Medical Association* is based (*compare Civ. Code § 1798.3(d) with 5 U.S.C.S. § 552a(a)(2)*).

[*Optional*] **E. Videotape Recording May Be a Record.** A videotape recording maintained by a government agency constitutes a record under *5 U.S.C.S. § 552a(a)(4)* if it contains a means of identifying an individual by picture or voice (*see Albright v. United States (D.C. Cir. 1980) 631 F.2d 915, 920)* . The Information Practice Act's definition of "record" includes any file or grouping of information about an individual that is maintained by an agency by reference to an identifying particular such as, among others, the individual's photograph or voice print (*Civ. Code § 1798.3(g)*).

[*Add additional points and authorities showing a particular violation or violations of the Privacy Act or Information Practices Act. See §§ 185.22 -185.33.*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that plaintiff, defendant agency, and the information being maintained by defendant agency are covered by the Privacy Act (*5 U.S.C.S. § 552a*), if the action is a federal action against a federal agency, or by the Information Practices Act (*Civ. Code §§ 1798-1798.78*), if the action is

a state action against a state or local agency. This form sets out the definitions, for purposes of the two acts, of the terms "agency" [*see 5 U.S.C.S. §§ 551(1), 552(f)* and *552a(a)(1)* (Privacy Act); *Civ. Code § 1798.3(b)* (Information Practices Act)], "record" and "system of records" [*see 5 U.S.C.S. § 552a(a)(4)* (Privacy Act); *Civ. Code § 1798.3(g), (h)* (Information Practices Act)], and "individual [*see 5 U.S.C.S. § 552a(a)(2)* (Privacy Act); *Civ. Code § 1798.3(d)* (Information Practices Act)]. Counsel should use the first alternative Paragraphs A through C in an action against federal agencies and use the second alternative Paragraphs A through C in an action against a state or local agency. This form also sets out in optional paragraphs the points that the Privacy Act covers business as well as personal information, and that the definition of the term "record" may include a video tape recording. If these paragraphs are used in a state action, they should include the optional language comparing or setting out the pertinent state and federal provisions.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that plaintiff, defendant, and the information in question are covered by the Privacy Act or Information Practices Act. This form should be combined with additional points and authorities showing a particular violation by defendant of the Privacy Act or the Information Practices Act [*see §§ 185.22 -185.32*]. If the form is used in connection with a state action, introductory points and authorities showing that federal case law is persuasive authority in interpreting state statutory provisions that are parallel to federal statutory provisions should be included [*see § 185.20*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Such argument should show that the plaintiff is an "individual," that defendant is an "agency," and that the information contained is contained in a "record" that is part of a "system of records," as these terms are defined in the relevant Act. With respect to the information in question, the argument should show that the information includes information by which plaintiff can be personally identified and that the record in which the information is maintained can be retrieved by a personal identifying characteristic of plaintiff.

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 185.34* may be used to oppose the contention supported by these points and authorities.

[c] Related Pleading and Practice Forms

For a discussion and forms of pleading to be used in actions concerning government records, see California Forms of Pleading and Practice, Ch. 429, *Privacy* (Matthew Bender).

[3] Discussion of Authorities

[a] Agencies Covered by Privacy Act of 1974

The term "agency" for purposes of *5 U.S.C.S. § 552a* does not include the Congress, the courts of the United States, the governments of the territories or possessions of the United States, agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them, courts martial and military commissions, military authority exercised in the field in time of war or in occupied territory, or specific function set out in *5 U.S.C.S. § 551(1)(H)* [*see 5 U.S.C.S. §§ 551(1)* (defining agency), 552(b), 552a(a)(1) (incorporating definition of agency into *5 U.S.C.S. § 552a*)].

[b] Records Covered by Privacy Act of 1974

The various individual requirements of the Privacy Act (*5 U.S.C.S. § 552a*) all refer to government "records" or information contained in government "records," as that term is defined in *5 U.S.C.S. § 552a(a)(4)* [*see 5 U.S.C.S. § 552a*]. Information that is not contained in records is not covered by the Privacy Act [*see Federal Deposit Ins. Corp. v.*

Dye (5th Cir. 1981) 642 F.2d 833, 836 (disparaging remarks by agency officer are not records)]. In addition, most of the provisions of the Privacy Act are limited in their coverage to records contained in "systems of records," as that phrase is defined in *5 U.S.C.S. § 552a(a)(5)*. Information that is not retrievable by the name or other identifying feature of the individual subject of the information is not considered to be maintained in a system of records as defined by the Privacy Act [*see 5 U.S.C.S. § 552a(a)(5)*]. For example, *5 U.S.C.S. § 552a* does not apply to a file relating to an agency's regional activities when the information is not keyed to the name or identifier of any particular agency employee or to a correspondence file that is maintained only chronologically [*Savarese v. United States Dep't of Health (N.D. Ga. 1979) 479 F. Supp. 304, 307 , aff'd, (5th Cir. 1980) 620 F.2d 298* ; *see 5 U.S.C.S. § 552a(a)(5)*].

NOTE:

In actions brought against California agencies, the Information Practices Act of 1977, *Civ. Code § 1798 et seq.*, applies only to institutional records that are preserved in the ordinary course of business by a single, central custodian. For example, in the university context, registration forms and transcripts would be examples of such records, while student exams not stored or maintained by the university in a central location would not [*Moghadam v. Regents of University of California (2008) 169 Cal. App. 4th 466, 480-483, 86 Cal. Rptr. 3d 739* (noting also that exams did not contain personal information that identified or described individual author)].

[c] Individuals Covered by Privacy Act of 1974

The individual provisions of the Privacy Act (*5 U.S.C.S. § 552a*) generally speak in terms of the rights of "individuals," as defined in *5 U.S.C.S. § 552a(a)(2)*. Entities that are not individuals within the statutory definition are not covered by the Privacy Act [*St. Michael's Convalescent Hospital v. State of Cal. (9th Cir. 1981) 643 F.2d 1369, 1373]* . Several types of persons or entities have been held not to be covered by the Privacy Act because they did not fall into the definition of "individual." Thus, for instance, foreign nationals and nonresident aliens are excluded from coverage of the Privacy Act (*5 U.S.C.S. § 552a*), since *5 U.S.C.S. § 552a(a)(2)* defines "individual" to mean only a citizen of the United States or an alien lawfully admitted for permanent residence. This exclusion does not violate the *Equal Protection clause of the United States Constitution* [*Raven v. Panama Canal Co. (5th Cir. 1978) 583 F.2d 169, 171* ; *see Mathews v. Diaz (1976) 426 U.S. 67, 78-79, 96 S. Ct. 1883, 48 L. Ed. 2d 478* (acts of Congress permitted to discriminate between aliens and citizens)].

Corporations, sole proprietorships, and labor unions are not individuals within the definition of "individual" covered by the Privacy Act (*5 U.S.C.S. § 552a*), as set out in *5 U.S.C.S. § 552a(a)(2)*, and therefore have no standing to initiate an action under that act [*St. Michael's Convalescent Hosp. v. State of California (9th Cir. 1981) 643 F.2d 1369, 1373* (sole proprietorships); *Parks v. United States Internal Revenue Serv. (10th Cir. 1980) 618 F.2d 677, 684* (unions); *Cell Assocs. v. National Insts. of Health (9th Cir. 1978) 579 F.2d 1155, 1157* (corporations)].

A corporation also lacks standing to litigate any claims that its employees might have under the Privacy Act [*Dresser Indus., Inc. (9th Cir. 1979) 596 F.2d 1231, 1238]* . An association, however, generally has standing to bring a suit on behalf of its members if (1) its members would otherwise have standing to sue in their own right, (2) the interests it seeks to protect are germane to the organization's purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit [*Hunt v. Washington State Apple Advertising Comm'n (1977) 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383* ; *but see Warth v. Seldin (1975) 422 U.S. 490, 515516, 95 S. Ct. 2197, 45 L. Ed. 2d 343* (representative action may be limited to injunction cases)]. A union, for example, might be permitted to initiate a representative action under the Privacy Act on behalf of its members when those conditions are met [*Parks v. United States Internal Revenue Serv. (10th Cir. 1980) 618 F.2d 677, 684-685* (dicta)].

[d] Individuals Covered by Information Practices Act of 1977

The definition of the term "individual" for purposes of Information Practices Act (*Civ. Code §§ 1798-1798.78*) is not

limited to United States residents, as is the definition of this term for purposes of the federal Privacy Act, which is set out in *5 U.S.C.S. § 552a(a)(2)* [*see Civ. Code § 1798.3(d)* (defining "individual")]. Thus, it appears that the federal case law excluding persons who are not legally resident aliens that is discussed in *§ 185.21[3][c]*, is not applicable to the Information Practices Act. However, the definition of "individual" in the Information Practices Act is limited to natural persons [*Civ. Code § 1798.3(d)*]. Thus, it appears that the fictional entities that are excluded from the Privacy Act by federal case law, discussed in *§ 185.21[3][c]*, are excluded from the Information Practices Act by explicit statutory authority.

[e] Business as Well as Personal Information Covered

The facts and procedural background of ***Florida Med. Ass'n v. Department of Health, Educ. & Welfare*** *(M.D. Fla. 1979) 479 F. Supp. 1291 , vacated and remanded on other grounds, Florida Med. Ass'n v. Department of Health, Educ. & Welfare (5th Cir. 1979) 601 F.2d 199* , are discussed in *§ 185.25[3][a]*. The information in question consisted of a recital of annual amounts of Medicare reimbursements to physicians that defendant agency proposed to disclose in a manner that individually identified the physicians receiving such reimbursements. In response to plaintiff physicians' request for an injunction against disclosure of this information, defendant agency argued that under the guidelines for implementing the Privacy Act promulgated by the Office of Management and Budget (OMB) pursuant to Pub. L. No. 93-579, 88 Stat. 1896, 1909-10 [*40 Fed. Reg. 28948, 28951]* and the corresponding regulation promulgated by defendant agency [45 C.F.R. § 5b1(e)], plaintiffs were excluded from the coverage of the Privacy Act (*479 F. Supp. 1291, 1307)* . Both of these regulations interpret the restricted definition of the term "individual" covered by the act set out in *5 U.S.C.S. § 552a(a)(2)* to mean that fictional persons such as sole proprietorships, partnerships, or corporations are not covered by the act. The OMB guidelines state that an individual bringing an action regarding information relating to his or her business affairs rather than his or her personal life is acting in an entrepreneurial rather than a personal role and is therefore not covered by the Privacy Act [*see 40 Fed. Reg. 28948, 28951]* .

The court held that this administratively defined distinction is not justified by either the terms of the Privacy Act or by the act's legislative history (*479 F. Supp. 1291, 1310)* . In its discussion, the court noted that one district court had upheld the distinction [*see Shermco Indus., Inc. v. Secretary of United States Air Force (N.D. Tex. 1978) 452 F. Supp. 306, 314-315 , rev'd on other grounds, Shermco Indus., Inc. v. Secretary of United States Air Force (5th Cir. 1980) 613 F.2d 1314*)], while another district court had declined to apply it [*see Zeller v. United States (E.D. N.Y. 1979) 467 F. Supp. 487, 499]* . The court further noted that the distinction had been extensively criticized in the literature, and cited a commentary that predicted that the distinction would be rejected by the courts. After its review of the cases and the literature the court accepted the holding of the *Zeller* court that the scope of information under the privacy act is defined not by the contents of the information, but by the retrieval system used in the agency's records. Thus, the court held, citing *Zeller*, that the Privacy Act extends to all information within an agency's system of records that pertains to an individual and can be retrieved by the individual's name or by some identifier assigned to him or her, without regard to whether the information pertains to the individual's business activities (*479 F. Supp. 1291, 1310)* . As shown by the Privacy Act's legislative history, fictional business entities were excluded from coverage. The Act was intended to protect the ability of the Congress and the Executive branch to gather and use information in implementing the Commerce Clause through economic regulation (*479 F. Supp. 1291, 1311)* .

In *Shermco*, whose holding regarding access to business information was rejected by the court in this case, the court held that the individual plaintiff did not have standing to initiate an action for access to certain government reports. Since he was seeking information in connection with a protest of a bid award involving the corporation of which he was president and major shareholder, he acted in an entrepreneurial capacity. *Shermco* also held, in a ruling not contradicted by other case law, that the corporation itself did not have standing to initiate the action since a corporation is not an individual for purposes of the Privacy Act (*452 F. Supp. 306, 315)* .

Unlike *Shermco*, this case did not involve an action by officers or major shareholders of a corporation suing with respect to information concerning the corporation's affairs when the corporation itself would not have had standing to

sue. Rather, this case involved persons suing with respect to information identifying them personally (*479 F. Supp. 1291, 1311)* . It is possible that the holding in *Shermco,* even if it is good law, is distinguishable on this point.

[f] Videotape Recording May Be a Record

The facts and procedural background of ***Albright v. United States*** *(D.C. Cir. 1980) 631 F.2d 915* , are discussed in *§ 185.32[3][b]*. The alleged record was a videotape recording of a meeting in which plaintiffs had participated. The court of appeal held that the videotape was a record for purposes of the Privacy Act, as defined in *5 U.S.C.S. § 552a(a)(4)*. The court stated that as long as the tape contains a means of identifying an individual by picture or voice, then it falls within the Privacy Act's definition of the term "record" (*631 F.2d 915, 920)* .

[4] Additional Authorities

[a] Records Covered by Privacy Act of 1974

In *White v. United States Civil Serv. Comm'n (D.C. Cir. 1979) 589 F.2d 713* , plaintiff initiated an action under *5 U.S.C.S. § 552a(g)(1)(C)* (action for failure to amend records; *see § 185.33*) to compel defendant agency to remove from its records five evaluations of plaintiff by plaintiff's former colleagues and supervisors, which defendant had solicited and received in connection with plaintiff's application for a position as an administrative law judge. The court of appeal reversed the lower court's holding that records pertaining to plaintiff's application were not records within the meaning of *5 U.S.C.S. § 552a(g)(4)*. The court noted that it is indisputable that plaintiff's application records comprised information about an individual that is maintained by an agency, including his or her employment history, and therefore fell precisely into the definition of the term "record" set out in *5 U.S.C.S. § 552a(g)(4)* (*589 F.2d 713, 715)* .

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CHAPTER 185 PRIVACY: COLLECTION, DISSEMINATION, AND INSPECTION OF INFORMATION
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18-185 California Points & Authorities § 185.22

§ 185.22 Supporting Contention That Government Agency Improperly Refused Plaintiff Access to Personal Information [5 U.S.C.S. § 552a(d)(1); Civ. Code §§ 1798.30-1798.34]--Injunctive Relief to Compel Disclosure Available [5 U.S.C.S. § 552a(g)(1)(B), (3)(A); Civ. Code §§ 1798.46, 1798.47]

[1] FORM Supporting Contention That Government Agency Improperly Refused Plaintiff Access to Personal Information [5 U.S.C.S. § 552a(d)(1); Civ. Code §§ 1798.30-1798.34]--Injunctive Relief to Compel Disclosure Available [5 U.S.C.S. § 552a(g)(1)(B), (3)(A); Civ. Code §§ 1798.46, 1798.47]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with the general points and authorities in § 185.21. If the action is under state law, it should also be combined with the points and authorities on use of federal authority in a state action in § 185.20.*]

THE COURT SHOULD ORDER DEFENDANT AGENCY TO PROVIDE PLAINTIFF WITH ACCESS TO THE AGENCY'S RECORDS CONTAINING PERSONAL INFORMATION ABOUT PLAINTIFF AS REQUESTED BY PLAINTIFF BECAUSE ACCESS IS REQUIRED BY THE _____ [PRIVACY ACT OF 1974 *or* INFORMATION PRACTICES ACT].

[*EITHER, if action is against federal agency*]

A. Right to Access to Personal Information in Federal Records. Every federal agency that maintains a system of records must on request by any individual to gain access to his or her records or to any information pertaining to him or her that is contained in the system, permit him or her and on his or her request, a person of his or her own choosing to accompany him or her, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him or her, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence (*5 U.S.C.S. § 552a(d)(1)*).

B. Injunctive Relief. In any suit brought against a federal agency for refusal of a request for access to personal information contained in the agency's records, the court may enjoin the federal agency from withholding the records and order the production to the complainant of any federal agency records improperly withheld from him or her (*5 U.S.C.S.*

§ 552a(g)(3)(A); *see 5 U.S.C.S. § 552a(g)(1)(B)*).

C. De Novo Hearing by Court. In any suit brought against a federal agency for refusal of a request for access to personal information contained in the agency's records, the court shall determine the matter de novo (*5 U.S.C.S. § 552a(g)(3)(A)*; *see 5 U.S.C.S. § 552a(g)(1)(B)*).

D. Defendant Has Burden of Proof. In any suit brought against a federal agency for refusal of a request for access to personal information contained in the agency's records the burden is on the federal agency to sustain its action (*5 U.S.C.S. § 552a(g)(3)(A)*; *see 5 U.S.C.S. § 552a(g)(1)(B)*).

[*Optional*] **E. Exemption From Freedom of Information Act Is Not Exemption From Privacy Act of 1974.** The fact that information is exempt from the public disclosure requirement of the Freedom of Information Act (*5 U.S.C.S. § 552*) does not exempt that information from the duty to provide access under the Privacy Act of 1974 to the individual who is the subject of the information (*5 U.S.C.S. § 552a(t)(1)*; *see Nemetz v. Department of Treasury (N.D. Ill. 1978) 446 F. Supp. 102, 104-105)* .

[*OR, if action is against state or local agency*]

A. Right to Access to Personal Information in State or Local Records. Each state or local agency must permit any individual and, if the individual so requests, another person of the individual's choosing, to inspect all the personal information in the record and to have an exact copy made of all or a portion of the records. Inspection must be permitted within 30 days of the agency's receipt of the request for active records, and within 60 days of the agency's receipt of the request for records that are geographically dispersed or that are inactive and in central storage. Copies must be provided within 15 days of inspection (*see Civ. Code §§ 1798.34* (inspection), 1798.35 (inspection and copying)).

B. Injunctive Relief. In any suit brought for failure to comply with an individual's lawful request for access to personal information, the court may enjoin the agency from withholding the records and order the production of any improperly withheld agency records to the complainant (*Civ. Code § 1798.46(a)*; *see Civ. Code §§ 1798.45* (civil action for violation of Information Practices Act (*Civ. Code §§ 1798-1798.78*), *Civ. Code § 1798.47* (injunctive relief against Information Practices Act violations generally)).

C. De Novo Hearing by Court. In a suit to enjoin a state or local agency from withholding personal information, the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld as being exempt from the individual's right of access (*Civ. Code § 1798.46(a)*).

D. Defendant Has Burden of Proof. In a suit to enjoin a state or local agency from withholding personal information, the agency has the burden of sustaining its action (*Civ. Code § 1798.46(a)*).

[*Optional*] **E. Exemption From Public Records Act Is Not Exemption From Information Practices Act of 1977.** The Information Practices Act of 1977 (*Civ. Code §§ 1798-1798.78*) supersedes any exemption in the Public Records Act (*Gov. Code §§ 6250-6265*) that authorizes a state or local agency to withhold information that is otherwise accessible under the Information Practices Act of 1977 (*see Civ. Code § 1798.70*; *Nemetz v. Department of Treasury (N.D. Ill. 1978) 446 F. Supp. 102, 104-105* (interpreting former 5 U.S.C.S. § 552a(q) (*now see 5 U.S.C.S. § 552a(t)(1)*), which is comparable to *Civ. Code § 1798.70*).

[*Add additional points and authorities, if appropriate, supporting the contention that the defendant agency improperly refused the plaintiff access to the records in question. See, e.g., § 185.23.*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a government agency refused an individual access to information about himself or herself contained in the agency's files in violation of *5 U.S.C.S. § 552a(d)(1)* or *Civ. Code §§ 1798.30-1798.34*. Counsel should use the first alternative Paragraphs A through D, and if appropriate, Paragraph E, in an action against federal agencies and use the second alternative Paragraphs A through D, and if appropriate, Paragraph E, in an action against a state or local agency. The legal points stated in the form may be raised in several procedural contexts in a civil action under *5 U.S.C.S. § 552a(g)(1)(B), (3)(A)* or *Civ. Code §§ 1798.45-1798.48* against the agency to require disclosure.

These points and authorities should be used in combination with introductory points and authorities showing that plaintiff, defendant, and the information in question are covered by the Privacy Act or Information Practices Act [*see § 185.21*]. If the action is a state action under the Information Practices Act, and counsel is using a paragraph of the form that includes federal case law, this form should be used in combination with introductory points and authorities showing that federal case law interpreting the Privacy Act is persuasive authority in interpreting parallel provisions of the Information Practices Act [*see § 185.20*]. Counsel should compare the analogous provisions of the Information Practices and the federal Privacy Act and note any differences in language when using the federal case law in this form as authority for an interpretation of the Information Practices Act.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of a government agency's improper refusal to provide an individual with access to information concerning him or her from the agency's records. These points and authorities may also be adapted for use in a trial or appellate brief.

When appropriate, this form may also be used in conjunction with a form of points and authorities supporting the substantive contention that the agency's refusal to provide access to information in question is not justified by the confidential source exemptions to the access requirement of *5 U.S.C.S. § 552a(d)(1)*, as set out in *5 U.S.C.S. § 552a(k)(2), (5)* or the confidential source exemptions to the corresponding access requirements of *Civ. Code §§ 1798.30-1798.34* as set out in *Civ. Code § 1798.38* [*see § 185.23*]. Counsel may also wish to add facts and argument, showing that the information in question is not covered by any of the other exemptions from the statutory access requirement of the Privacy Act or Information Practices Act [*see § 185.22[3][a]*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show that the information in question pertains to plaintiff, that defendant improperly refused plaintiff access to the information, and that none of the statutory exemptions to the statutory information access requirement apply [*see 5 U.S.C.S. § 552a(d)* (access requirement), (j), (k) (exemptions); *Civ. Code §§ 1798.30-1798.34* (access requirements)].

[3] Discussion of Authorities

[a] Right to Access to Personal Information in Federal Records

The head of any federal agency may promulgate rules, in accordance with general statutory requirements, to exempt from the personal access requirement set out in *5 U.S.C.S. § 552a(d)(1)* any of a number of specified types of systems of records [*see 5 U.S.C.S. § 552a(j), (k)* (exemptions)]. For a discussion of the types of records that may be exempted under *5 U.S.C.S. § 552a(j), (k)*, see California Forms of Pleading and Practice, Ch. 429, *Privacy* (Matthew Bender).

Points and authorities relating to the confidential source exemptions for law enforcement and employment evaluation

information provided for in *5 U.S.C.S. § 552a(k)(2), (5)* are *set out in § 185.23*.

[b] Exemption From Freedom of Information Act Is Not Exemption From Privacy Act of 1974

The facts and procedural background of ***Nemetz v. Department of Treasury*** *(N.D. Ill. 1978) 446 F. Supp. 102* , are discussed in *§ 185.23[3][b]*. The defendants' arguments against disclosure included the contention that the identities of the individual sources of the information are protected by the "privacy" exemptions to the Freedom of Information Act (*5 U.S.C.S. § 552*) set out in former version of 5 U.S.C.S. § 552a(b)(6) (amended in 1984) and 5 U.S.C.S. § 552a(b)(7)(C). The court stated, however, that former 5 U.S.C.S. § 552a(q) [*now see 5 U.S.C.S. § 552a(t)(1)*] specifically provides that no agency shall rely on any exemption from the Freedom of Information Act to withhold from an individual any record that is otherwise accessible to such individual under the Privacy Act. The court stated that in light of this statutory directive, defendants must meet the requirements of the Privacy Act exemption for confidential sources in order to justify withholding information identifying sources (*446 F. Supp. 102, 104-105)* .

[c] Exemption From Public Records Act Is Not Exemption From Information Practices Act of 1977

Nemetz v. Department of Treasury *(N.D. Ill. 1978) 446 F. Supp. 102* , is discussed in *§ 185.22[3][b]*.

NOTE:

Although the language of *Civ. Code § 1798.70*, which states that the access requirement of the Information Practices Act supersedes any exemption from the disclosure requirement of the Public Records Act, is cast in somewhat different language than former 5 U.S.C.S. § 552a(q) (*now see 5 U.S.C.S. § 552a(t)(1)*), on which *Nemetz* relied in making a comparable holding for the Privacy Act and the Freedom of Information Act, the effect of the two provisions is comparable and it appears that *Nemetz* may be used as persuasive authority to buttress *Civ. Code § 1798.70* regarding exemptions from the Public Records Act in a state action. However, *Civ. Code § 1798.70* only subordinates exemptions from the Public Records Act to the Information Practices Act, and does not appear to affect any affirmative prohibitions on disclosure in the Public Records Act [*Civ. Code § 1798.70*; *Civ. Code § 1798.75* (Public Records Act supersedes Information Practices Act except as provided in *Civ. Code § 1798.70*)]. The Freedom of Information Act does not affirmatively prohibit any disclosures [*see 5 U.S.C.S. § 552*].

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18-185 California Points & Authorities § 185.23

§ 185.23 Supporting Contention That Government Agency Improperly Refused Plaintiff Access to Personal Information [5 U.S.C.S. § 552a(d)(1); Civ. Code §§ 1798.30-1798.34]--Defendant Cannot Rely on Confidential Source Exemptions to Deny Access [5 U.S.C.S. § 552a(k)(2), (5); Civ. Code § 1798.38]

[1] FORM Supporting Contention That Government Agency Improperly Refused Plaintiff Access to Personal Information [5 U.S.C.S. § 552a(d)(1); Civ. Code §§ 1798.30-1798.34]--Defendant Cannot Rely on Confidential Source Exemptions to Deny Access [5 U.S.C.S. § 552a(k)(2), (5); Civ. Code § 1798.38]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with the general points and authorities in §§ 185.21 and 185.22. If the action is under state law, it should also be combined with the points and authorities on use of federal authority in a state action in § 185.20.*]

DEFENDANT CANNOT RELY ON THE CONFIDENTIAL SOURCE EXEMPTIONS TO THE ACCESS REQUIREMENT OF _____[*5 U.S.C.S. § 552a(d) or CIV. CODE §§ 1798.30-1798.34*] SET OUT IN _____ [*5 U.S.C.S. § 552a(k) or CIV. CODE § 1798.38*] TO DENY PLAINTIFF ACCESS TO THE INFORMATION SOUGHT _____ [BECAUSE DEFENDANT HAS NOT SHOWN THAT PROMISES OF CONFIDENTIALITY WERE MADE TO SOURCES WHOSE IDENTITIES WOULD BE REVEALED BY DISCLOSURE TO THE INFORMATION *or* IF IN CAMERA INSPECTION OF THE MATERIALS SOUGHT SHOWS THAT THE INFORMATION SOUGHT WILL NOT REVEAL THE IDENTITIES OF CONFIDENTIAL SOURCES AFTER IDENTIFYING INFORMATION HAS BEEN DELETED].

[*EITHER, if action is against federal agency*]

A. Promise of Confidentiality to Source Required. The confidential source exemption to the disclosure requirement of *5 U.S.C.S. § 552a(d)* for investigatory material regarding law enforcement or employment determinations applies only if the information sought would reveal the identity of a source who furnished information to the government under a promise that the identity of the source would be kept confidential. The promise must have been express if the promise was given after the effective date of the Privacy Act (December 1, 1974), but may have been an implied promise if given before that date (*see 5 U.S.C.S. § 552a(k)(2), (5)*; *but see 5 U.S.C.S. § 552a(j)(2)* (certain law enforcement

information exempt regardless of effect on confidential source)).

[*OR, if action is against state or local agency*]

A. Promise to Confidential Source Required. The confidential source exemption to the disclosure requirement of *Civ. Code § 1798.24* for information compiled for the purpose of making determinations regarding employment, receipt of state contracts, licensing purposes, or status as adoptive parents applies only to information that would reveal the identity of a source who furnished information to the government under a promise, or before July 1, 1978, with the understanding that the identity of the source would be kept confidential (*see Civ. Code § 1798.38*).

[*CONTINUE*]

[*Optional*] **B. Evidence Must Show Promise to Each Source.** The fact that the defendant made an express or implied promise of confidentiality may not be inferred simply from the circumstance that the information was solicited by and given to a governmental agency; evidence based on personal experience that a promise was made must be presented, or an adequate basis for an implication of a promise must be shown, with respect to each allegedly confidential source (*Londrigan v. Federal Bureau of Investigation (D.C. Cir. 1981) 670 F.2d 1164, 1173* ; *Nemetz v. Department of Treasury (N.D. Ill. 1978) 446 F. Supp. 102, 105* (both construing *5 U.S.C.S. § 552a(k)(5)*, which is similar to *Civ. Code § 1798.38*).

[*Optional*] **C. Exemption Limited to Information Disclosing Source.** An agency that is able to show that disclosure of information would reveal a confidential source must nevertheless disclose any portions of the requested information that reasonably can be segregated and would not reveal the source (*Nemetz v. Department of Treasury (N.D. Ill. 1978) 446 F. Supp. 102, 105* (construing *5 U.S.C.S. § 552a(k)(5)*, which is similar to *Civ. Code § 1798.38*).

[*EITHER, if action is against federal agency*]

[*Optional*] **D. In Camera Inspection.** In any suit brought under *5 U.S.C.S. § 552a(g)(1)(B)* (civil action for refusal to provide access), the court may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under the exemptions set out in *5 U.S.C.S. § 552a(k)(2), (5)* (confidential source exemptions) (*5 U.S.C.S. § 552a(g)(3)(A)*).

[*OR, if action is against state or local agency*]

[*Optional*] **D. In Camera Inspection.** In any action brought under *Civ. Code § 1798.45(a)* (civil action for refusal to provide access) the court may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld as being exempt from the individual's right of access and the burden is on the agency to sustain its action (*Civ. Code § 1798.46(a)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that defendant agency cannot rely on the confidential source exemptions set out in *5 U.S.C.S. § 552a(k)(2), (5)* or *Civ. Code § 1798.38* to deny plaintiff access to information under *5 U.S.C.S. § 552a(d)* or *Civ. Code §§ 1798.30-1798.34*. *5 U.S.C.S. § 552a(k)* provides that

investigatory material compiled for law enforcement purposes, or compiled solely for the purpose of making determinations regarding federal employment, military service, federal contracts, or access to classified information, which would reveal the identity of a source who had been promised confidentiality may be exempted from the access requirement of *5 U.S.C.S. § 552a(d)* by rules promulgated by the head of any agency [*see 5 U.S.C.S. § 552a(k)(2), (5)*; *but see 5 U.S.C.S. § 552a(j)(2)* (certain law enforcement information exempt regardless of effect on confidential source)]. *Civ. Code § 1798.38* provides that when information compiled for the purpose of making determinations regarding employment, receipt of state contracts, licensing purposes, or status as adoptive parents was received by the agency with the promise or understanding that the source be kept confidential, information tending to reveal the identity of the source may be withheld despite the access requirement of *Civ. Code § 1798.30-1798.34*.

Counsel should use the first alternative Paragraph A in an action against a federal agency and the second alternative Paragraph A in an action against a state or local agency. Paragraphs B and C may be used in either a federal or a state action. However, if any paragraph setting federal case law is used in a state action, counsel should use the optional language comparing pertinent federal and state provisions. Paragraph B is for use when defendant seeks to claim the confidentiality exemption by inferring a promise of confidentiality from the mere circumstance that the information was solicited by and given to a governmental agency. Paragraph C is for use, together with the appropriate version of Paragraph D, to obtain in camera inspection of the record so that the parts of the record that can be segregated and will not reveal the identity of the confidential source may be revealed.

These points and authorities should be used in combination with introductory points and authorities showing that plaintiff, defendant, and the information in question are covered by the Privacy Act or Information Practices Act [*see § 185.21*]. If the action is a state action under the Information Practices Act, and counsel is using a paragraph of the form that includes federal case law, this form should be used in combination with introductory points and authorities showing that federal case law interpreting the Privacy Act is persuasive authority in interpreting parallel provisions of the Information Practices Act [*see § 185.20*]. Counsel should compare the analogous provisions of the Information Practices and the federal Privacy Act and note any differences in language when using the federal case law set out as authority for an interpretation of the Information Practices Act.

This form may be used in a variety of procedural contexts, when defendant agency has contended that it need not grant plaintiff access to records on the ground that the disclosure would reveal a confidential source.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the confidentiality exemptions set out in *5 U.S.C.S. § 552a(k)(2), (5)* or in *Civ. Code § 1798.38* do not apply to block plaintiff's access to the information in question. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Evidence Must Show Promise to Each Source

In ***Londrigan v. Federal Bureau of Investigation*** *(D.C. Cir. 1981) 670 F.2d 1164* , plaintiff initiated an action under the Privacy Act (*5 U.S.C.S. § 552a*) to obtain the names of persons who provided defendant agency with information about plaintiff when he was under investigation for a position as a Peace Corps volunteer. The information was actually provided to defendant agency in 1961, considerably before the effective date of the Privacy Act. The defendant agency moved for summary judgment, supported by an affidavit by one of the supervisors of defendant agency's Freedom of Information Act branch. The affidavit averred that persons interviewed by defendant agency assumed quite logically that the information they gave was only for official use by the agency and that their identities would not be exposed, and

that in conducting the background investigation on plaintiff, certain specified groups of informants were considered to be implied confidential sources. The affiant himself had not participated in the investigation of plaintiff and had not attempted to contact any of the agents of the agency who had done so. The district court granted summary judgment.

The court of appeal reversed. The court noted that the affidavit could be reduced in essence to the proposition that any background investigation prior to the effective date of the Privacy Act must be regarded as having been conducted under an implied promise of confidentiality (*670 F.2d 1164, 1168)* . The court held that confidentiality is not to be inferred simply from the circumstance that the information was solicited by a government agency, but that an adequate basis for implication of a promise of confidentiality must be shown (*670 F.2d 1164, 1173)* . In so holding, the court cited with approval the holding of *Nemetz v. Department of Treasury (N.D. Ill. 1978) 446 F. Supp. 102, 105* that there must be a finding of a promise of confidentiality as to each source sought to be withheld, and that evidence, based on personal experience, must be presented showing that such promises were expressly or implicitly given (*670 F.2d 1164, 1170)* . The court also cited passages from the House debate on the bill that was enacted as the Privacy Act in support of its position (*670 F.2d 1164, 1172-1173)* .

The court remanded the case for further investigation of the facts and circumstance of defendant agency's acquisition of the information. To facilitate the investigation, the court suggested the following steps: (1) a careful review of each document in the records in question to determine the nature of the source and whether any statement indicated an expectation of confidentiality, (2) possibly contacting at least some of the agents who conducted the investigation, and (3) possibly considering the policy of defendant agency at the time of the investigation, but with great care to avoid confusion of internal agency rules and actual practices pursued during the investigation. The court also said that other indicia may be found and weighed by the district court, but hastened to point out that the mere fact that the agency which conducted the investigation was the Federal Bureau of Investigation and that the information was of a personal nature does not dictate the result (*670 F.2d 1164, 1173-1174)* .

Nemetz v. Department of Treasury *(N.D. Ill. 1978) 446 F. Supp. 102* , involved an action for access to background information obtained by a federal agency pursuant to plaintiff's application for employment. Defendants had withheld certain material, claiming that it was exempt from disclosure under *5 U.S.C.S. § 552a(k)(5)* [*see § 185.23[2][a]*]. Defendants moved for summary judgment, and the district court denied the motion. The court noted that the only evidence presented by defendants that promises of confidentiality had been given to the sources of the information consisted of an affidavit by an officer of the agency averring generally that the information in question was obtained pursuant to an implied promise of confidentiality, and an answer to an interrogatory stating that prior to the effective date of the Privacy Act, it was the policy of the agency to assure individuals who were interviewed concerning applicants for employment that their responses would be confidential. The court held that such general averments of promises of confidentiality are insufficient to support an award of summary judgment (*446 F. Supp. 102, 105)* . The court stated that any exemptions to the access requirement of the Privacy Act must be narrowly construed and the requirements strictly met. The court held that this standard requires finding a promise of confidentiality as to each source to be withheld, from evidence based on personal knowledge that an express or implied promise was given to each source. The court stated that general allegations concerning policy are insufficient (*446 F. Supp. 102, 105)* . The court also noted that under the facts before it, it appeared that the agency had disclosed some documents that revealed the identity of their sources, without evidence that such sources had waived their confidentiality or other explanation why some sources had been revealed while others were withheld. The court concluded from this that the agency's averred general policy of offering confidentiality might not have been uniformly followed, and stated that the agency's disparate treatment of sources when only a general policy of confidentiality was asserted further indicated the need for evidence of individual promises (*446 F. Supp. 102, 105 n.3*). The court concluded that it would give defendants an opportunity to file supplemental affidavits stating the facts in support of their claim before deciding whether to release the information (*446 F. Supp. 102, 105)* .

NOTE:

Although the *Londrigan* court of appeal cites the district court's holding in *Nemetz* with approval, the

actual suggestions made by the *Londrigan* court as to what kind of evidence might be used to determine whether an implied promise was given appear to be much more lenient than the requirement of the *Nemetz* court that evidence based on personal knowledge be presented for every alleged promise. It is therefore not clear just how concrete the showing of a promise of confidentiality must be. The length of time since the information was collected might be a factor in imposing a more lenient requirement of showing with respect to implied promises [*see Diamond v. Federal Bureau of Investigation (S.D.N.Y. 1981) 532 F. Supp. 216, 233 , aff'd, 707 F.2d 75* (distinguishing *Nemetz*)]. It is not clear whether the standard for showing an express promise of confidentiality, such as is required if the promise was made after December 31, 1974, the effective date of the Privacy Act, is stricter than the standard for showing an implied promise, such as would be sufficient if the promise was made before December 31, 1974. The *Londrigan* opinion, which sets out a more lenient standard for showing that a promise was made than that set out in *Nemetz,* generally only discusses implied promises, while the *Nemetz* court, although dealing with information obtained before 1974, phrased its stricter rule to apply to express as well as implied promises.

[b] Exemption Limited to Information Disclosing Source

The facts and procedural background of ***Nemetz v. Department of Treasury*** *(N.D. Ill. 1978) 446 F. Supp. 102, 105* , are discussed in *§ 185.23[3][a]*. The defendants sought summary judgment against plaintiff in his action for disclosure of information, on the ground that the information had been obtained on a promise of confidentiality. In denying the motion, the court noted that defendant was withholding whole documents under claim of the confidential source exemption, without attempting to identify information within them that would reveal the identity of a confidential source.

The court stated that it is clear from the face of the statute that only information that would identify the source of confidential information may be exempted under *5 U.S.C.S. § 552a(k)(5)*. Thus, the court held that defendants had an obligation to produce all portions of the requested documents that reasonably can be segregated and were not covered by the exemption portions of the documents requested that were not covered by the exemption (*446 F. Supp. 102, 105)* . The court stated that if affidavits showed or proved Say showed that other requirements of *5 U.S.C.S. § 552a(k)(5)* were satisfied, it would order in camera inspection of the documents in question to determine whether the agency should have provided portions of the documents pertaining to plaintiff that do not reveal identities of the sources (*446 F. Supp. 102, 105-106)* .

NOTE:

If the action is against a state or local agency, counsel should cite provisions of *Civ. Code § 1798.38* (confidential source exemption) that explicitly state that information that may be withheld under that section is limited to information that would reveal the identity of a confidential source, along with *Nemetz*. *Civ. Code § 1798.38* states in particular that whatever method the agency used to provide access to information from records without revealing information disclosing identity of a confidential source, the agency must insure that full disclosure is made to the subject of any personal information that could reasonably in any way reflect or convey anything detrimental, disparaging, or threatening to an individual's reputation, rights, benefits, privileges, or qualifications [*see Civ. Code § 1798.38*].

California Points & Authorities

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Volume 18 Chapters 180-189 PRETRIAL PROCEEDINGS---to---PROBATE OF WILLS
CHAPTER 185 PRIVACY: COLLECTION, DISSEMINATION, AND INSPECTION OF INFORMATION
PART II. FORMS

18-185 California Points & Authorities § 185.24

§ 185.24 Supporting Contention That Defendant Agency Improperly Disclosed Information Concerning Plaintiff [5 U.S.C.S. § 552a(b); Civ. Code § 1798.24]--General Form

[1] FORM Supporting Contention That Defendant Agency Improperly Disclosed Information Concerning Plaintiff [5 U.S.C.S. § 552a(b); Civ. Code § 1798.24]--General Form

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with the general points and authorities in § 185.21. If the action is under state law, it should also be combined with the points and authorities on use of federal authority in a state action in § 185.20.*]

PLAINTIFF IS ENTITLED TO DAMAGES FOR DEFENDANT'S DISCLOSURE OF INFORMATION FROM DEFENDANT'S RECORDS CONCERNING PLAINTIFF WITHOUT PLAINTIFF'S CONSENT BECAUSE SUCH DISCLOSURE VIOLATED THE _____ [PRIVACY ACT OF 1974 *or* INFORMATION PRACTICES ACT OF 1977].

[*EITHER, if action is against federal agency*]

A. Jurisdiction. Whenever any federal agency fails to comply with any provision of the Privacy Act of 1974 (*5 U.S.C.S. § 552a*), or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual, the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of *5 U.S.C.S. § 552a(g)* (*5 U.S.C.S. § 552a(g)(1)(D)*).

B. Disclosure Without Consent Prohibited. No agency may disclose any record that is contained in a system of records by any means of communication to any person or to another agency, except pursuant to a written request by or with the prior written consent of the individual, unless specified exemptions to this prohibition of disclosure apply (*5 U.S.C.S. § 552a(b)*).

C. Damages for Willful Improper Disclosure. In any suit brought pursuant to *5 U.S.C.S. § 552a(g)(1)(D)* for failure to comply with the disclosure restrictions of *5 U.S.C.S. § 552a(b)*, if the court determines that the agency acted in a

manner that was intentional or willful, the United States shall be liable in an amount equal to the sum of (a) the actual damages sustained by the individual as a result of the failure to comply, but in no case less than $1,000; and (b) reasonable costs and attorney's fees (*see 5 U.S.C.S. § 552a(g)(4)*).

D. Willfulness Requirement Does Not Include Malice. The requirement set out in *5 U.S.C.S. § 552a(g)(4)* that the agency must have acted in a manner that was intentional or willful in order to be liable for violation of the Privacy Act (*5 U.S.C.S. § 552a*) is only somewhat greater than a requirement of gross negligence and does not appear to entail premeditated malice (*South v. Federal Bureau of Investigation (N.D. Ill. 1981) 508 F. Supp. 1104, 1107-1108* ; see *Parks v. United States Internal Revenue Serv. (10th Cir. 1980) 618 F.2d 677, 683)* .

[*OR, if action is against state or local agency*]

A. Civil Action. An individual may bring a civil action against an agency whenever the agency fails to comply with any provision of the Information Practices Act of 1977 (*Civ. Code §§ 1798-1798.78*) or any rule promulgated thereunder, in such a way as to have an adverse effect on the individual (*Civ. Code § 1798.45(c)*).

B. Disclosure Without Consent Prohibited. No agency may disclose personal information in a manner that would link the information disclosed to the individual to whom it pertains unless the disclosure of the information is covered by specified exemptions (*Civ. Code § 1798.24*).

C. Damages for Improper Disclosure. In any suit brought under the provisions of *Section 1798.45(c) of the Civil Code*, which establishes the right to a civil action for a violation of the Information Practices Act of 1977 causing an adverse effect, the agency shall be liable to the individual in an amount equal to the sum of actual damages sustained by the individual, including damages for mental suffering and the costs of the action together with reasonable attorney's fees as determined by the court (*Civ. Code § 1798.48*).

[*Optional*] **D. Injunctive Relief.** Any agency that fails to comply with any provision of the Information Practices Act of 1977 (*Civ. Code §§ 1798-1798.78*) may be enjoined by any court of competent jurisdiction. The court may make such order or judgment as may be necessary to prevent the use or employment by an agency of any practices that violate the Information Practices Act. Actions for injunction may be brought by a private individual acting on his or her own behalf (*see Civ. Code § 1798.47*).

[*CONTINUE*]

[*Optional*] **E. Invasion of Privacy Causing Psychological Harm Constitutes Adverse Effect.** In an action based on *5 U.S.C.S. § 552a(g)(1)(D)*, the jurisdictional requirement that the defendant's conduct have an adverse effect on the plaintiff is satisfied if the defendant's action constituted an invasion of the plaintiff's privacy, which has mental distress or embarrassment as a natural consequence (*Parks v. United States Internal Revenue Serv. (10th Cir. 1980) 618 F.2d 677, 682-683) . Civ. Code § 1798.45(c)*, which establishes a civil action for violations of the Information Practices Act of 1977 (*Civ. Code §§ 1798-1798.78*) is comparable to *5 U.S.C.S. § 552a(g)(1)(d)*.

[*Add additional points and authorities, if appropriate, supporting the contention that particular exemptions to the disclosure prohibition of the Privacy Act or Information Practices Act do not apply to the case. See, e.g., §§ 185.25 -185.27.*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that defendant agency disclosed information concerning plaintiff from its records in violation of the prohibition of disclosure set out in *5 U.S.C.S. § 552a(b)* or *Civ. Code § 1798.24*. This form sets out the points that plaintiff may be entitled to damages from a federal agency for a willful and intentional violation of *5 U.S.C.S. § 552a(b)* [*see 5 U.S.C.S. § 552a(g)(4)*] and that plaintiff may be entitled to damages or injunctive relief against a state or local agency for violation of *Civ. Code § 1798.24*, regardless of whether or not the violation involved willfulness or intent [*see Civ. Code §§ 1798.47* (injunctive relief), 1798.48 (damages)]. Counsel should use the first alternative paragraphs A through D in an action against federal agencies and use the second alternative paragraphs A through D in an action against a state or local agency. If optional Paragraph E is used in a state action, it should include the optional language comparing the pertinent state and federal provisions. This form may be used in a variety of procedural contexts.

These points and authorities should be used in combination with introductory points and authorities showing that plaintiff, defendant, and the information in question are covered by the Privacy Act or Information Practices Act [*see § 185.21*]. If the action is a state action under the Information Practices Act, and counsel is using a paragraph of the form that includes federal case law, this form should be used in combination with introductory points and authorities showing that federal case law interpreting the Privacy Act is persuasive authority in interpreting parallel provisions of the Information Practices Act [*see § 185.20*]. Counsel should compare the analogous provisions of the Information Practices and the federal Privacy Acts and note any differences in language when using the federal case law in this form as authority for an interpretation of the Information Practices Act.

This form may be used alone or together with points and authorities supporting the contention that the disclosure in question is not covered by one or more of the following statutory provisions that set out exemptions from the disclosure requirement of *5 U.S.C.S. § 552a(b)* or *Civ. Code § 1798.24*: (1) *5 U.S.C.S. § 552a(b)(2)* (disclosure required by the Freedom of Information Act (*5 U.S.C.S. § 552*) or *Civ. Code § 1798.24(g)* (disclosure required by Public Records Act (*Gov. Code §§ 6250-6265*) [*see § 185.25*]; (2) *5 U.S.C.S. § 552a(b)(3)* (routine use disclosure) or *Civ. Code § 1798.24(e)* (inter-agency disclosure) [*see § 185.26*]; (3) *5 U.S.C.S. § 552a(b)(1)* or *Civ. Code § 1798.24(d)* (internal agency communication required in performance of normal duties) [*see § 185.27*]; or (4) *5 U.S.C.S. § 552a(b)(11)* (disclosure required by court order) [*see § 185.28*]. Counsel may also wish to add points and authorities supporting the contention that the disclosure in question is not covered by other exemptions from the prohibition of disclosure set out in *5 U.S.C.S. § 552a(b)* or *Civ. Code § 1798.24* in addition to those enumerated above. For a full discussion of the exemptions to the disclosure prohibition set out in *5 U.S.C.S. § 552a(b)* and *Civ. Code § 1798.24*, see California Forms of Pleading and Practice, Ch. 429, *Privacy* (Matthew Bender).

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. If the action is against a federal agency, counsel should include facts showing that defendant's conduct was intentional and willful [*see 5 U.S.C.S. § 552a(g)(1)(D), (4)* (requirements for damages); *Albright v. United States (D.C. Cir. 1980) 631 F.2d 915, 921]* . In both federal and state actions counsel should include facts showing that plaintiff suffered an adverse effect as a result of the disclosure [*see 5 U.S.C.S. § 552a(g)(1)(D), (4)* (Privacy Act requirements for damages); *Civ. Code § 1798.48* (Information Practices Act requirements for damages)].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of defendant agency's improper disclosure of information concerning plaintiff. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Privacy Act Subordinate to Freedom of Information Act

Information that is required to be disclosed under the Freedom of Information Act (*5 U.S.C.S. § 552*; public disclosure of public records) is explicitly exempt from the prohibition of disclosure set out in *5 U.S.C.S. § 552a(b)* of the Privacy Act [*5 U.S.C.S. § 552a(b)(2)*]. Since virtually all of the types of information covered by the Privacy Act are also

covered by the very broad disclosure requirements of the Freedom of Information Act, the effect of *5 U.S.C.S. § 552a(b)(2)* appears to be that information is protected from disclosure under *5 U.S.C.S. § 552a(b)* only if (1) the conditions of the Privacy Act (*5 U.S.C.S. § 552a*) in general are met and (2) the information is also exempt under the Freedom of Information Act [*see 5 U.S.C.S. § 552(b)* (exemptions to Freedom of Information Act); (*Florida Med. Ass'n v. Department of Health, Educ. & Welfare (M.D. Fla. 1979) 479 F. Supp. 1291, 1305-1306)]* . Counsel should, therefore, be prepared to argue not only the applicability of the Privacy Act (*5 U.S.C.S. § 552a*) in general, but also to show the applicability of at least one of the exemptions to the Freedom of Information Act set out in *5 U.S.C.S. § 552(b)*, if defendant agency asserts that the disclosure in question was required by the Freedom of Information Act.

Counsel should consider in particular whether or not the exemption to the disclosure requirements of the Freedom of Information Act set out in *5 U.S.C.S. § 552(b)(6)* for medical, personnel, or similar files, disclosure of which would constitute a clearly unwarranted invasion of privacy [*see § 185.25*], is applicable to the information involved in the case, since requirements for that exemption appear to be similar to the basic requirements for recovering damages for violation of the prohibition of disclosure under *5 U.S.C.S. § 552a(b)* [*see 5 U.S.C.S. § 552(b)(6)* (exemption to Freedom of Information Act); *5 U.S.C.S. § 552a(g)(1)(D)* (action for improper disclosure); *Pacific Molasses Co. v. National Labor Relations Bd. Reg'l Office (5th Cir. 1978) 577 F.2d 1172, 1179* ; *Florida Med. Ass'n v. Department of Health, Educ. & Welfare (M.D. Fla. 1979) 479 F. Supp. 1291, 1303-1304* (applying *5 U.S.C.S. § 552(b)(6)*)].

[c] Information Practices Act Subordinate to Public Records Act

Information that is required to be disclosed under the Public Records Act (*Gov. Code §§ 6250-6265*) (public disclosure of state and local public records) is explicitly exempt from the prohibition of disclosure set out in *Civ. Code § 1798.24* of the Privacy Act [*Civ. Code § 1798.24(g)*]. The Public Records Act is modeled on the federal Freedom of Information Act (*5 U.S.C.S. § 552*) [*American Civil Liberties Union Found. v. Deukmejian (1982) 32 Cal. 3d 440, 447, 186 Cal. Rptr. 235, 651 P.2d 822]* . The relationship between the Information Practices Act and the Public Records Act appears to be similar to the relationship between the Privacy Act and the Freedom of Information Act. Thus, the rule of *Pacific Molasses Co. v. National Labor Relations Bd. Reg'l Office (5th Cir. 1978) 577 F.2d 1172, 1179* ; *Florida Med. Ass'n v. Department of Health, Educ. & Welfare (M.D. Fla. 1979) 479 F. Supp. 1291, 1303-1304* , which is discussed in *§ 185.24[2][b]* appears to be persuasive authority for the point that information must be both covered by the Information Practices Act and exempt from the disclosure requirement of the Public Records Act in order to be subject to the disclosure prohibition of *Civ. Code § 1798.24*. Counsel should, therefore, be prepared to argue not only the applicability of the Information Practices Act (*Civ. Code §§ 1798-1798.76*) in general, but also to show the applicability of at least one of the exemptions to the Public Records Act set out in *Gov. Code § 6254*, if defendant agency asserts that the disclosure in question was required by the Public Records Act.

Counsel should consider in particular whether or not the exemption to the disclosure requirements of the Public Records Act set out in *Gov. Code § 6254(c)* for medical, personnel, or similar files, disclosure of which would constitute an unwarranted invasion of privacy [*see § 185.25*], is applicable to the information involved in the case, since requirements for that exemption appear to be similar to the basic requirements for obtaining relief for violation of the prohibition of disclosure under *Civ. Code § 1798.24* [*see Gov. Code § 6254(c)* (exemption to Public Records Act); *Civ. Code §§ 1798.45-1798.48* (remedies for improper disclosure); *Pacific Molasses Co. v. National Labor Relations Bd. Reg'l Office (5th Cir. 1978) 577 F.2d 1172, 1179* ; *Florida Med. Ass'n v. Department of Health, Educ. & Welfare (M.D. Fla. 1979) 479 F. Supp. 1291, 1303-1304* (applying *5 U.S.C.S. § 552(b)(6)*, which is similar to *Gov. Code § 6254(c)*)].

[d] Dissemination of Information Already Publicly Known Not Improper Disclosure

Dissemination of information to particular persons or to the public is not a disclosure under the Privacy Act (*5 U.S.C.S. § 552a*) when the information was already known to the receivers of the information [*Federal Deposit Ins. Corp. v. Dye (5th Cir. 1981) 642 F.2d 833, 836]* . Since the disclosure prohibition set out in *Civ. Code § 1798.24* is comparable to the disclosure prohibition set out in *5 U.S.C.S. § 552a(b)*, *Federal Deposit Insurance Corp. v. Dye* also appears to be

persuasive authority in interpreting whether or not disclosure is prohibited under the Information Practices Act (*Civ. Code §§ 1798-1798.78*) [*see § 185.20*].

[3] Discussion of Authorities

[a] Willfulness Requirement Does Not Include Malice

In ***South v. Federal Bureau of Investigation*** *(N.D. Ill. 1981) 508 F. Supp. 1104* , defendant agency released certain records to a third party pursuant to the Freedom of Information Act (*5 U.S.C.S. § 552*). In releasing these records, defendant failed to excise plaintiff's name from a document that identified plaintiff as a potential security informant. Plaintiff alleged that when a newspaper article subsequently published the contents of the document, he was subject to public contempt and ridicule and to loss of dignity and self-respect. Defendant conceded that the disclosure of plaintiff's name was improper, but moved for dismissal for lack of subject matter jurisdiction. Defendant argued that its actions were not willful and intentional as required for recovery of damages by *5 U.S.C.S. § 552a(g)(4)*, and that the requirement of willfulness and intent set out in that subsection were jurisdictional. Plaintiff moved for partial summary judgment, arguing that defendant's actions were willful and intentional as those terms were defined for purposes of *5 U.S.C.S. § 552a(g)(4)*. The district denied defendant's motion to dismiss without holding whether the willfulness and intent requirement of *5 U.S.C.S. § 552a(g)(4)* was jurisdictional, holding instead that plaintiff had adequately pleaded a colorable claim under that requirement whether it was jurisdictional or merely an additional element required to recover damages (*508 F. Supp. 1104, 1106)* .

In determining the meaning of willful and intentional behavior for purposes of *5 U.S.C.S. § 552a(g)(4)*, the court reviewed case law construing the term "willful" in other contexts and concluded that the words "intentional or willful" are used as terms of art and are given broader scope by courts than the common definition would imply (*508 F. Supp. 1104, 1107)* . Citing a Congressional statement from the Congressional Record--Senate S. 21817 (Dec. 17, 1974), the court determined the legislative intent that, on a continuum between negligence and the very high standard of willful, arbitrary, or capricious conduct, the willfulness and intent standard is only somewhat greater than a gross negligence standard (*508 F. Supp. 1104, 1107)* . The court also reviewed cases holding variously that the standard did not appear to require premeditated malice, that it required a knowing release of documents, or that it required an intentional failure to comply with the terms of the Privacy Act (*508 F. Supp. 1104,1107-1108)* . The court concluded that the "only somewhat greater than gross negligence" standard was appropriate to the case before it and dismissed plaintiff's motion for partial summary judgment, stating that there were material issues of fact as to whether or not plaintiff had met that standard (*508 F. Supp. 1104, 1108)* .

In ***Parks v. United States Internal Revenue Serv.*** *(10th Cir. 1980) 618 F.2d 677* , defendant agency had used personnel files of its employees to identify employees who had not pledged to purchase savings bonds. Employees thus identified were pinpointed for a telephone campaign designed to encourage them to pledge to make such purchases. Plaintiffs filed an action against defendant agency, seeking damages under *5 U.S.C.S. § 552a(g)(4)*. The district court dismissed the case for reasons unrelated to the claim for damages.

The court of appeals reversed the dismissal. The defendant argued that plaintiffs' allegations were inadequate because they failed to allege the element of willfulness and intent necessary for monetary relief under *5 U.S.C.S. § 552a(g)(4)*. In response, the court noted that plaintiffs had alleged that the lists of employees who had not pledged to purchase savings bonds were published by defendant agency, and that the employees' supervisor knew of the lists and condoned their use for soliciting bond sales. The court held that these allegations served to fill in the gaps on the question of willfulness and intentional misconduct in that they showed that plaintiffs were not relying on negligent acts. The court further stated that it did not appear that premeditated malice was required to satisfy the requirement. The court concluded that, assuming that the failure to specifically allege intentional or willful misconduct did not preclude plaintiffs from proving it, the trial court should allow plaintiffs to amend their complaint to include such an allegation (*618 F.2d 677, 683)* . Finally, the court cited as noteworthy a statement from an analysis of House and Senate

compromise amendments to the Privacy Act (*5 U.S.C.S. § 552a*) at 120 Cong. Rec. 40405, 40406 (1974) stating that the willfulness and intent standard is viewed as only somewhat greater than gross negligence (*618 F.2d 677, 683)* .

[b] Damages for Improper Disclosure

Civ. Code § 1798.48 (damages for violation of Information Practices Act (*Civ. Code §§ 1798-1798.78*) differs from *5 U.S.C.S. § 552a(g)(4)* (damages for Privacy Act (*5 U.S.C.S. § 552a*) violation) in that the state statute does not require willfulness or intent by the agency as a condition of recovery and in that the state statute provides explicitly for damages for mental suffering [*see Civ. Code § 1798.48*].

[c] Invasion of Privacy Causing Psychological Harm Constitutes Adverse Effect

The facts and procedural background of ***Parks v. United States Internal Revenue Serv.*** *(10th Cir. 1980) 618 F.2d 677* , are discussed in *§ 185.24[3][a]*. The trial court had held that plaintiffs had failed to allege sufficiently that they had suffered an adverse effect or injury in fact from the disclosures in question. Reversing, the court of appeal noted that plaintiffs had alleged psychological harm from the illegal disclosure. The court stated that it appears from the Privacy Act that Congress was borrowing from the common law tort of invasion of privacy. The court noted that this tort was a wrong that results in injury to plaintiff's feelings and is actionable even though plaintiff suffered no pecuniary or physical harm. Thus, the court held that it is the invasion of the right to privacy that is the essence of the action, and mental distress or embarrassment would be a natural consequence of such an invasion (*618 F.2d 677, 683)* .

NOTE:

General psychological damages that are sufficient to satisfy the jurisdictional requirement of adverse effect may not be sufficient to satisfy the more stringent requirement for recovery of damages, particularly in an action against a federal agency. In *Fitzpatrick v. Internal Revenue Service (11th Cir. 1982) 665 F.2d 327, 331* , the court held that the Privacy Act's damage provisions set out in *5 U.S.C.S. § 552a(g)(4)(A)* permit recovery only for proven pecuniary losses and not for generalized mental injuries, loss of reputation, embarrassment, or other nonquantifiable injuries, although the court noted in dicta that a Privacy Act plaintiff might recover actual pecuniary losses resulting from a mental injury caused by unlawful disclosure. However, in a more recent opinion, the Ninth Circuit Court of Appeals has disagreed with that conclusion and held that Congress intended the term "actual damages" to include both pecuniary and nonpecuniary damages, thus permitting recovery of damages for mental suffering and similar injuries [*Cooper v. F.A.A., 596 F.3d 538, 549 (9th Cir. 2010)]* . The United States Supreme Court has recognized a split in authority among the circuits on the issue but has not resolved the conflict [*see Doe v. Chao, 540 U.S. 614, 627 n.12, 124 S. Ct. 1204, 157 L. Ed. 2d 1122 (2004)]* .

The issue is largely moot when a cause of action is brought under the California Information Practices Act, as *Civ. Code § 1798.48* (damages for violation of Information Practices Act (*Civ. Code §§ 1798-1798.78*) explicitly provides for recovery for mental suffering. However, the limitation of damages under *Civ. Code § 1798.48* to actual damages may nevertheless make the standard for recovering damages under that section more stringent than the standard for standing to bring a civil action in the first instance [*see Civ. Code §§ 1798.45* (civil action), 1798.48 (damages)].

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CHAPTER 185 PRIVACY: COLLECTION, DISSEMINATION, AND INSPECTION OF INFORMATION
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18-185 California Points & Authorities § 185.25

§ 185.25 Supporting Contention That Defendant Agency Improperly Disclosed Information Concerning Plaintiff [5 U.S.C.S. § 552a(b); Civ. Code § 1798.24]--Disclosure Not Required Because It Entails an Unwarranted Invasion of Privacy [5 U.S.C.S. § 552(b)(6); Gov. Code § 6254(c)]

[1] FORM Supporting Contention That Defendant Agency Improperly Disclosed Information Concerning Plaintiff [5 U.S.C.S. § 552a(b); Civ. Code § 1798.24]--Disclosure Not Required Because It Entails an Unwarranted Invasion of Privacy [5 U.S.C.S. § 552(b)(6); Gov. Code § 6254(c)]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with the general points and authorities in § 185.21 and with points and authorities supporting the basic contention that disclosure of information is prohibited by law as in § 185.24. If the action is under state law, it should also be combined with the points and authorities on use of federal authority in a state action in § 185.20.*]

DEFENDANT AGENCY'S DISCLOSURE _____ [IS *or* WAS] NOT EXEMPT FROM THE PROHIBITION OF DISCLOSURE IMPOSED BY THE _____ [PRIVACY ACT OF 1974 (*5 U.S.C.S. § 552a*) *or* INFORMATION PRACTICES ACT OF 1977 (*CIV. CODE § 1798 et seq.*)] AS A DISCLOSURE REQUIRED BY THE _____ [FREEDOM OF INFORMATION ACT (*5 U.S.C.S. § 552*) *or* PUBLIC RECORDS ACT (GOV. CODE § 6250 et seq.)], BECAUSE THE DISCLOSURE _____ [CONSTITUTES *or* CONSTITUTED] AN UNWARRANTED INVASION OF PRIVACY AND WAS THEREFORE SPECIFICALLY EXEMPT FROM DISCLOSURE REQUIREMENTS OF THE _____ [FREEDOM OF INFORMATION ACT UNDER *5 U.S.C.S. § 552(b)(6) or* PUBLIC RECORDS ACT UNDER GOV. CODE § 6254(c)].

A. Disclosure of Information Prohibited When Not Required. Disclosure of information prohibited by *5 U.S.C.S. § 552a(b)* but for the supervention of the Freedom of Information Act (*5 U.S.C.S. § 552*) is improper when the information is exempt from the Freedom of Information Act as a clearly unwarranted invasion of privacy under *5 U.S.C.S. § 552(b)(6)* (*Florida Med. Ass'n v. Department of Health, Educ. & Welfare (M.D. Fla. 1979) 479 F. Supp. 1291, 1305-1306)* . Provisions of the Privacy Act of 1974 and Freedom of Information Act interpreted by *Florida Medical Association* are comparable to pertinent provisions of the Information Practices Act of 1977 (*Civ. Code § 1798 et seq.*) and Public Records Act (*Gov. Code § 6250 et seq.*) (*compare 5 U.S.C.S. § 552a(b) with Civ. Code § 1798.24*;

compare 5 U.S.C.S. § 552(b)(6) with Gov. Code § 6254(c)).

[*EITHER, if action is against federal agency*]

B. Clearly Unwarranted Invasion of Privacy Is Exempt From Freedom of Information Act. Personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy, are exempt from the disclosure requirement set out in the Freedom of Information Act (*5 U.S.C.S. §§ 552, 552(b)(6)*; *United States Dep't of State v. Ray (1991) 502 U.S. 164, 173, 112 S. Ct. 541, 116 L. Ed. 2d 526*).

[*OR, if action is against state or local agency*]

B. Clearly Unwarranted Invasion of Privacy Is Exempt From Public Records Act. The Public Records Act (*Gov. Code § 6250 et seq.*) may not be construed to require disclosure of personnel, medical or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy (*Gov. Code § 6254(c)*).

C. Federal Case Law Illuminates Interpretation of Public Records Act Exemptions. The Public Records Act (*Gov. Code § 6250 et seq.*) was modeled on the Freedom of Information Act (*5 U.S.C.S. § 552*), and the judicial construction and legislative history of the Freedom of Information Act serve to illuminate the interpretation of its California counterpart (*American Civil Liberties Union Found. v. Deukmejian (1982) 32 Cal. 3d 440, 447, 186 Cal. Rptr. 235, 651 P.2d 822*).

[*CONTINUE*]

D. Exemption Covers Personal Information. Because the element shared by personnel and medical files, which are explicitly covered by the exemption set out in *5 U.S.C.S. § 552(b)(6)*, is the personal quality of the information, the test for determining whether or not the information is covered by the exemption as a "similar file" to personnel or medical files turns on whether or not the information is of a sufficiently personal nature, and also includes consideration of whether or not disclosure would cause the person whom the information concerns some special embarrassment (*Pacific Molasses Co. v. National Labor Relations Bd. Reg'l Office (5th Cir. 1978) 577 F.2d 1172, 1179* ; *Florida Med. Ass'n v. Department of Health, Educ. & Welfare (M.D. Fla. 1979) 479 F. Supp. 1291, 1303-1304)* . The provisions interpreted by *Pacific Molasses Co.* and *Florida Medical Association* are comparable to pertinent provisions of the Public Records Act (*Gov. Code § 6250 et seq.*) (*compare 5 U.S.C.S. § 552(b)(6) with Gov. Code § 6254(c)*).

[*Optional*] **E. Scope of Exemption May Include Financial Information.** Personal or personalized financial information may qualify under the "similar files" rubric of *5 U.S.C.S. § 552(b)(6)*, at least insofar as it contains embarrassing disclosures or involves sufficiently intimate details (*Florida Med. Ass'n v. Department of Health, Educ. & Welfare (M.D. Fla. 1979) 479 F. Supp. 1291, 1304)* . The provisions interpreted by *Florida Medical Association* are comparable to pertinent provisions of the Public Records Act (*Gov. Code § 6250 et seq.*) (*compare 5 U.S.C.S. § 552(b)(6) with Gov. Code § 6254(c)*).

F. Balancing Test to Determine Clearly Unwarranted Invasion of Privacy. After determining that the information in question is included within the scope of the *5 U.S.C.S. § 552(b)(6)* exemption to the Freedom of Information Act, the court must balance the individual's right to privacy against the objective of the Freedom of Information Act to contribute to public understanding of the operations or activities of government to determine if disclosure of the information would constitute a clearly unwarranted invasion of privacy (*Department of Def. v. Federal Labor Relations Auth. (1994) 510 U.S. 487, 494-496, 114 S. Ct. 1006, 127 L. Ed. 2d 325* ; *Dep't of the Air Force v. Rose (1976) 425 U.S. 352, 370, 380-381, 96 S. Ct. 1592, 48 L. Ed. 2d 11*) (*compare 5 U.S.C.S. § 552(b)(6) with Gov. Code §*

6254(c)).

[*If action is against federal agency, ADD*]

G. De Novo Determination by Court. The courts are vested with the responsibility to ultimately determine de novo any dispute concerning the proper invocation of the exemption set out in *5 U.S.C.S. § 552(b)(6)* (*5 U.S.C.S. § 552(a)(4)(B)*; *Dep't of the Air Force v. Rose (1976) 425 U.S. 352, 379-380, 96 S. Ct. 1592, 48 L. Ed. 2d 11*).

[*CONTINUE*]

[*Optional*] **H. Subject of Information May Intervene in Freedom of Information Act Action.** An individual may intervene in an action to compel disclosure under the Freedom of Information Act (*5 U.S.C.S. § 552*) in order to assert applicability of one or more exemptions to that Act and his or her own rights under the Privacy Act (*5 U.S.C.S. § 552a*) if the conditions for intervention are met (*Providence Journal Co. v. Federal Bureau of Investigation (D.R.I. 1978) 460 F. Supp. 762, 765-766 , rev'd on other grounds, (1st Cir. 1979) 602 F.2d 1010* . The provisions interpreted by *Providence Journal Co.* are comparable to pertinent state law provisions (*compare 5 U.S.C.S. § 552(b)(6) with Gov. Code § 6254(c)* (privacy exemptions from disclosure laws); *compare Fed. R. Civ. P., Rule 24(a), with Code Civ. Proc. § 387* (intervention)).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that defendant agency's disclosure was not exempt from the prohibition of disclosure imposed by the Privacy Act (*5 U.S.C.S. § 552a*) or *Civ. Code § 1798.24* as a disclosure required by the Freedom of Information Act (FOIA) (*5 U.S.C.S. § 552*) or the Public Records Act (*Gov. Code § 6250 et seq.*), on the ground that the disclosure was of personnel, medical, or similar files and constituted an unwarranted invasion of privacy and was therefore specifically exempt from disclosure requirements of the FOIA under *5 U.S.C.S. § 552(b)(6)* or of the Public Records Act under *Gov. Code § 6254(c)*. Counsel should use the first alternative Paragraph B and Paragraph G in an action against federal agencies. Counsel should use the second alternative Paragraph B in an action against a state or local agency. Paragraph G should not be used in an action against state or local agencies [*see § 185.25[3][g]*]. If the remaining paragraphs are used in a state action, they should include the optional language comparing the pertinent state and federal provisions.

These points and authorities should be used in combination with introductory points and authorities showing that plaintiff, defendant, and the information in question are covered by the Privacy Act or Information Practices Act [*see § 185.21*]. If the action is a state action under the Information Practices Act and if counsel is using a paragraph of the form that includes federal case law, this form should be used in combination with introductory points and authorities showing that federal case law interpreting the Privacy Act is persuasive authority in interpreting parallel provisions of the Information Practices Act [*see § 185.20*]. Counsel should compare the analogous provisions of the Information Practices Act and the federal Privacy Act and note any differences in language when using the federal case law set out as authority for an interpretation of the Information Practices Act.

This form should also be used in combination with a form of points and authorities setting out the contention that defendant agency's disclosure or proposed disclosure violates the prohibition of disclosure set out in *5 U.S.C.S. § 552a(b)* or *Civ. Code § 1798.24* [*see § 185.24*] when defendant agency has argued that release of the information in question is required by the public disclosure provisions of the Freedom of Information Act or Public Records Act [*see § 185.24[2][c]*].

Counsel may also wish to add points and authorities supporting the contention that the disclosure in question is covered by one or more of the other exemptions to the FOIA's disclosure requirement, which are set out in *5 U.S.C.S. § 552(b)*, or one or more of the other exemptions to the Public Records Act, which are set out in *Gov. Code §§ 6254, 6255* when the exemptions are applicable to the case. For a full discussion of the exemptions to the Freedom of Information Act, see California Forms of Pleading and Practice, Ch. 429, *Privacy* (Matthew Bender).

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include facts and arguments showing that the records in question constitute personnel or medical files, or are of such a personal nature as to be similar to personnel or medical files, and that the harm to plaintiff from disclosure of the files would outweigh the benefit to the public from disclosure. In discussing the balancing of interests, counsel should be sure to discuss the public interest in disclosure in terms of the core purpose of the FOIA: contributing significantly to public understanding of the operations or activities of the government [*United States DOD v. FLRA (1994) 510 U.S. 487, 114 S. Ct. 1006, 127 L. Ed. 2d 325, 334]* . The purpose of the FOIA is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct [*Department of Def. v. Federal Labor Relations Auth. (1994) 510 U.S. 487, 114 S. Ct. 1006, 127 L. Ed. 2d 325, 335* ; *Dep't of the Air Force v. Rose (1976) 425 U.S. 352, 360-361, 96 S. Ct. 1592, 48 L. Ed. 2d 11]* . Thus, the Supreme Court held in one case that the public interest in disclosure of federal employees' names and addresses to unions who represented those employees' bargaining unit was negligible, in that the disclosure would not reveal information about the employer-agency itself [*United States DOD v. FLRA (1994) 510 U.S. 487, 114 S. Ct. 1006, 127 L. Ed. 2d 325, 336* ; *see § 185.25[3][f]*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that information disclosed by defendant agency was exempt from the disclosure requirements of the FOIA or Public Records Act as an unwarranted invasion of privacy so that its disclosure violated the Privacy Act or Information Practices Act. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Exemption for Disclosure of Investigatory Records

Investigatory records compiled for law enforcement purposes are exempt from the disclosure requirement set out in *5 U.S.C.S. § 552a(b)* when production of records would clearly constitute an unwarranted invasion of privacy, in language identical to that used in the exemption set out in *5 U.S.C.S. § 552(b)(6)* for personnel, medical, and similar files [*see 5 U.S.C.S. §§ 552(b)(7)(C), 552a(b)(2)*]. Thus, if the action is against a federal agency, counsel may adapt this form to a case involving law enforcement information covered by *5 U.S.C.S. § 552(b)(7)* by adding argument that the case law cited in these points and authorities, with respect to information covered by *5 U.S.C.S. § 552(b)(6)*, may also be applied to law enforcement files covered by *5 U.S.C.S. § 552(b)(7)(C)*.

The exemption from the Public Records Act's disclosure requirement for investigative and law enforcement information, as set out in *Gov. Code § 6254(f)*, differs from the language of *5 U.S.C.S. § 552(b)(7)* and does not refer to disclosures that would constitute an invasion of privacy. Thus, it appears that these points and authorities could not be adapted for use in a case against a state or local agency that involves investigatory or law enforcement information.

[3] Discussion of Authorities

[a] Disclosure of Information Prohibited When Not Required

Florida Med. Ass'n v. Department of Health, Educ. & Welfare *(M.D. Fla. 1979) 479 F. Supp. 1291* , involved an action by individual physicians and organizations representing them against defendant Department of Health, Education, and Welfare (hereinafter defendant agency) for an injunction against publication by defendant agency of a

list of physicians receiving reimbursements for services provided under the federal Medicare program. The plaintiffs argued that disclosure of the information was prohibited under a number of federal laws, including the Privacy Act (*5 U.S.C.S. § 552a*). The district court held that none of the laws applied to the case except the Privacy Act.

The court stated preliminarily that the Freedom of Information Act (*5 U.S.C.S. § 552*) precluded prohibition of disclosure of the information, despite the absence of a request for the information by a particular individual, unless the disclosure fell into the scope of one of the FOIA's exceptions (*479 F. Supp. 1291, 1301)* . The court noted in particular that the Privacy Act defers to the Freedom of Information Act, since the prohibition of disclosure set out in the Privacy Act itself exempts information whose disclosure is required by the FOIA [*see 5 U.S.C.S. § 552a(b)(2)*] (*479 F. Supp. 1291, 1306)* . However, after reviewing the legislative history on the point, the court held that if release of the information would constitute a clearly unwarranted invasion of personal privacy so that the information would be exempt from the disclosure requirement of the FOIA under *5 U.S.C.S. § 552(b)(6)*, then disclosure of the information is forbidden by the Privacy Act (*479 F. Supp. 1291, 1306)* .

[b] Clearly Unwarranted Invasion of Privacy Is Exempt From Freedom of Information Act

In ***United States Dep't of State v. Ray*** *(1991) 502 U.S. 164, 112 S. Ct. 541, 116 L. Ed. 2d 526* , an attorney representing undocumented Haitian nationals seeking political asylum in the United States sought disclosure under the FOIA of government documents containing information about other Haitians who had been returned to Haiti involuntarily. In 1981, a large number of Haitians attempted to flee Haiti and emigrate to Florida without the permission of either government. The United States government deported almost all of them, over their protests that they would be persecuted if returned to Haiti. The United States Department of State obtained assurance from the Haitian government that the interdicted Haitians would not be subject to persecution for illegal departure. In order to monitor compliance with that assurance, State Department personnel subsequently conducted confidential interviews with a "representative sample" of unsuccessful emigrants. According to the government, all but one or two of the emigrants reported that they had not been harassed or prosecuted since their return. Plaintiffs were a Florida lawyer and his clients, several undocumented Haitian nationals seeking political asylum in the United States. In immigration proceedings, they attempted to prove that Haitians who immigrate illegally face a well-founded fear of persecution if they return, and therefore are refugees entitled to asylum in the United States. In order to test the accuracy of the government's assertion that undocumented Haitian nationals have not been persecuted on their return to Haiti, plaintiffs filed a series of FOIA requests seeking copies of the interview reports. In response, the State Department produced 25 documents, which described a number of interviews with specific returnees and summarized the information obtained during successive periods. In 17 of the documents, the information related to individual interviews, but the names and other identifying information had been redacted. Plaintiffs filed an action against the State Department, seeking to obtain disclosure of the redacted material. The government argued that production of the requested material was subject to the exemption under *5 U.S.C.S. § 552(b)(6)*, which provides that FOIA disclosure requirements do not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The federal district court ordered the State Department to produce the redacted information, after finding that any invasion of privacy from the mere act of disclosure of names and addresses would be de minimis and little more than speculation, and was clearly outweighed by the public interest in the safe relocation of returned Haitians. The court of appeals affirmed, although it disagreed with the district court's "de minimis" characterization of the privacy interests in two respects, noting that: (1) plaintiffs wanted the information in order to contact the interviewees directly and question them about their treatment; and (2) the returnees had been promised confidentiality. The United States Supreme Court granted certiorari.

The Supreme Court reversed (*502 U.S. 164, 179)* . The Court noted that the only issue before it was whether the redaction was lawful (*502 U.S. 164, 169)* . The Court stated that the FOIA was enacted to facilitate public access to government documents. The statute was designed to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny; and the strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents. That burden remains with the agency when it seeks to justify the

redaction of identifying information in a particular document, as well as when it seeks to withhold an entire document (*502 U.S. 164, 173)* . The Court noted that the redaction procedure is expressly authorized by FOIA (*5 U.S.C.S. § 552(a)(2), (b)*), and consequently that the question in the instant case is whether the government has discharged its burden of demonstrating that the disclosed information adequately served the statutory purpose, and that the release of the redacted material would constitute a clearly unwarranted invasion of privacy (*502 U.S. 164, 173-174)* .

The text of the exemption under *5 U.S.C.S. § 552(b)(6)* requires the Court to balance the individual's right of privacy against the basic policy of opening agency action to the light of public scrutiny. The Court stated that if the interview summaries were released without the names redacted, highly personal information regarding marital and employment status, children, living conditions, and attempts to enter the United States, would be linked publicly with particular, named individuals. It also stated that although disclosure of that personal information constitutes only a de minimis invasion of privacy when the identities of the interviewees are unknown, the invasion of privacy becomes significant when the personal information is linked to particular interviewees (*502 U.S. 164, 175-176)* . Moreover, disclosure of the unredacted interview summaries would publicly identify the interviewees as people who cooperated with a State Department investigation of the Haitian government's compliance with its promise to the United States government not to prosecute the returnees, which could subject the interviewees to "embarrassment in their social and community relationships." The Court also considered significant the United States government's promise of confidentiality to the interviewees, and the plaintiffs' stated intention to contact them (*502 U.S. 164, 176)* . The Court then balanced the importance of the public interest in disclosure against the privacy interests. It noted that the unredacted portions of the documents that had already been released to plaintiffs show the government's performance of its duty to monitor Haitian compliance with the promise not to prosecute the returnees; and reveal the number of interviewed returnees, dates and contents of the interviews, and details about the status of the interviewees. The asserted public interest on which plaintiffs rely, the Court stated, stems not from the disclosure of he redacted information itself, but rather from the hope that thy might use the information to obtain additional knowledge outside the government files. The government argued that this "derivative use" of requested documents is entirely beyond the purpose of the statute, urging the Court to adopt a categorical rule entirely excluding that type of use from the process of the balancing of interests. The Court declined to adopt "such a rigid rule," because there was nothing in the record to suggest that further interviews would produce any additional relevant evidence. The Court stated that mere speculation about hypothetical public benefits cannot outweigh a demonstrably significant invasion of privacy; accordingly, it declined to address the "derivative use" question (*502 U.S. 164, 177-178)* . The Court was "unmoved" by plaintiffs' asserted interest in ascertaining the veracity of the interview reports, stating that there is not a "scintilla of evidence, either in the documents themselves, or elsewhere in the record, that tends to impugn the integrity of the reports" (*502 U.S. 164, 178-179)* . The Court further stated that it generally accords government records and official conduct a presumption of legitimacy; if a totally unsupported suggestion that the interest in finding out whether government agents have been truthful justified disclosure of private materials, government agencies would have no defense against requests for production of private information. In conclusion, the Court expressed its satisfaction that the proposed invasion of the serious privacy interest of the Haitian returnees was clearly unwarranted, and reversed the judgment of the court of appeals (*502 U.S. 164, 179)* .

[c] Federal Case Law Illuminates Interpretation of Public Records Act Exemptions

In ***American Civil Liberties Union Found. v. Deukmejian*** *(1982) 32 Cal. 3d 440, 186 Cal. Rptr. 235, 651 P.2d 822* , plaintiff brought suit after defendant refused plaintiff's request under the Public Records Act (*Gov. Code § 6250 et seq.*) to inspect certain informational materials being maintained by defendant. After in camera inspection, the trial court ordered disclosure, with the exception of certain personal identifiers and other data that might reveal confidential sources. Defendant appealed this order.

The Supreme Court reversed. In framing its holding, the Court stated that the Public Records Act was modeled on the 1967 federal Freedom of Information Act (*5 U.S.C.S. § 552*) and that the judicial construction and legislative history of the federal act served to illuminate its California counterpart (*32 Cal. 3d 440, 447)* .

[d] Exemption Covers Personal Information

In ***Pacific Molasses Co. v. National Labor Relations Bd. Reg'l Office*** *(5th Cir. 1978) 577 F.2d 1172* , plaintiff employer sought to obtain copies of its employees' individual union authorization cards from defendant agency under the Freedom of Information Act (*5 U.S.C.S. § 552*) after the employees had rejected a union election bid. The employer brought an action in the district court after defendant agency refused to release the cards. The district court ordered that the cards be released and defendant agency appealed.

The court of appeals reversed the district court's holding with respect to release of the cards, holding that the cards were exempted from the public disclosure requirements of the Freedom of Information Act under *5 U.S.C.S. § 552(b)(6)* as files similar to personnel or medical files, the disclosure of which would constitute a clearly unwarranted invasion of privacy (*577 F.2d 1172, 1183)* . The court stated that since the files of defendant agency that were affected by this request could not be construed to be medical or personnel files, which are explicitly exempt from compelled disclosure under the FOIA pursuant to *5 U.S.C.S. § 552(b)(6)*, the court had to determine initially whether the files were "similar files" to medical or personnel files, which are also covered by *5 U.S.C.S. § 552(b)(6)* (*577 F.2d 1172, 1178-1179)* . Noting that the legislative history of *5 U.S.C.S. § 552(b)(6)* indicated that "medical" and "personnel" files were used as examples of the type of information that Congress felt was deserving of protection, the court reasoned that because the element shared by personnel and medical files is the personal quality of the information contained in them, the test for determining whether or not the information is a "similar file" for purposes of *5 U.S.C.S. § 552(b)(6)* must turn on whether the information is of a sufficiently personal nature (*577 F.2d 1172, 1179)* . The court additionally relied on *Dep't of the Air Force v. Rose (1976) 425 U.S. 352, 376, 96 S. Ct. 1592, 48 L. Ed. 2d 11* [*see § 185.25[3][f]*], in which the Supreme Court held that disclosure of disciplinary records of Air Force Academy cadets implicates similar privacy values as disclosure of personnel files in that it could result in embarrassment and disgrace as well as practical disadvantages for the individuals involved (*577 F.2d 1172, 1179-1180)* . The court summarized extensively various appellate court cases dealing with the question of what constitutes a "similar file" and stated that these cases had also placed primary emphasis on the personal nature of the information. The court concluded that the determining factor in deciding whether information contained in government files is protected from disclosure hinges on the personal nature of the information (*577 F.2d 1172, 1181)* . Applying this conclusion to the case before it, the court stated that the personal preference of employees with regard to whether or not they desire union representation is sufficiently personal in nature to fall within the definition of "similar files" (*577 F.2d 1172, 1181)* .

The facts and procedural background of ***Florida Med. Ass'n v. Department of Health, Educ. & Welfare*** *(M.D. Fla. 1979) 479 F. Supp. 1291* , are discussed in *§ 185.25[3][a]*. The information in question involved lists of physicians receiving reimbursements for services provided under Medicare, which plaintiffs were seeking under the Privacy Act of 1974 (*5 U.S.C.S. § 552a*) to prevent defendant agency from publishing. In determining whether the information to be published by defendant agency fell within the definition of "similar files," the court stated that the common denominator and pivotal characteristic of all information in which the term applies prima facie is the personal quality and nature of that information. Hence, the court stated, information identifiable as applying to some particular individual, and disclosure of which would cause some special embarrassment to that individual is presumptively included within the term "similar files" (*479 F. Supp. 1291, 1304)* . The court noted additionally that information that would otherwise be disclosible readily after redaction, deleting any personally identifying details that could cause embarrassment, is precisely what *5 U.S.C.S. § 552(b)(6)* was intended, at least presumptively, to cover (*479 F. Supp. 1291, 1304)* .

The court also noted that legislative history of the Freedom of Information Act shows that that act was intended by Congress to include within its scope information within various federal entities, including defendant HEW Department, but that in addition to this, the term "similar files" should be given a broad interpretative scope in order to protect the persons for whom it was designed and to trigger the second, more crucial, step in the court's analysis of the application of *5 U.S.C.S. § 552(b)(6)* [*see § 185.25[3][f]*]. The court stated that courts must look past mere appearance and mere labels, to the actual character of the material in question (*479 F. Supp. 1291, 1303)* .

Applying these guidelines to the facts before it, the court held that the list of physicians receiving reimbursements was information within the term "similar files" of *5 U.S.C.S. § 552(b)(6)*. The court noted particularly that defendant agency's unwillingness to disclose the information without personally identifying details emphasized the presumptive inclusion of the information within the term "similar files" (*479 F. Supp. 1291, 1304)* .

[e] Scope of Exemption May Include Financial Information

The facts and procedural background of ***Florida Med. Ass'n v. Department of Health, Educ. & Welfare*** *(M.D. Fla. 1979) 479 F. Supp. 1291* , are discussed in *§ 185.25[3][a]*. In that case, the information in question involved annual reimbursements to physicians for services rendered under Medicare, which defendant agency proposed to publish in a manner individually identifying physicians receiving the reimbursements. In discussing the criteria for determining whether the information in a particular case comes, as a prima facie matter, within the scope of the invasion of privacy exemption to the Freedom of Information Act set out in *5 U.S.C.S. § 552(b)(6)*, the court noted prior case authority stating that personal or personalized financial information may well qualify for the exemption set out in *5 U.S.C.S. § 552(b)(6)* under the "similar files" rubric of that exemption, at least insofar as it contains embarrassing disclosures or involves sufficiently intimate details. The court held that the lists of annual reimbursements came within the scope of the exemption (*479 F. Supp. 1291, 1304)* .

[f] Balancing Test to Determine Clearly Unwarranted Invasion of Privacy

In ***United States DOD v. FLRA*** *(1994) 510 U.S. 487, 114 S. Ct. 1006, 127 L. Ed. 2d 325* , the Federal Labor Relations Authority (FLRA) ordered various federal agencies to comply with two unions' requests for the names and home addresses of employees within the unions' respective bargaining units, pursuant to the Federal Service Labor-Management Relations Statute (*5 U.S.C.S. § 7101 et seq.*). The FLRA rejected the agencies' argument that disclosure was prohibited by the Privacy Act (*5 U.S.C.S. § 552a*), and a divided panel of the court of appeals agreed. The court of appeals recognized that *Department of Justice v. Reporters Comm. for Freedom of Press (1989) 489 U.S. 749, 109 S. Ct. 1468, 103 L. Ed. 2d 774* , had been interpreted by other courts as limiting the balancing of interests to the public interest in opening agency action to public scrutiny. However, the court was persuaded that the unions' reliance on the Labor Statute for their right to the information justified consideration of the public interests embodied in that statute, and that when so balanced the disclosure would not be a "clearly unwarranted invasion of personal privacy" for the purposes of *5 U.S.C.S. § 552(b)(6)*. The Supreme Court granted certiorari, and reversed the court of appeals.

The Court held that *5 U.S.C.S. § 7114(b)(4)*, relied on by the court of appeals, requires disclosure of information only to the extent that disclosure is not prohibited by law. Because the Privacy Act (*5 U.S.C.S. § 552a(b)(2)*) prohibits disclosure of records unless disclosure would be required under the FOIA, the proper analysis involves the applicability of the exemption set forth in *5 U.S.C.S. § 552(b)(6)* (*510 U.S. 487, 495)* . In this determination, the Court relied on *Department of Justice v. Reporters Comm. for Freedom of Press (1989) 489 U.S. 749, 109 S. Ct. 1468, 103 L. Ed. 2d 774* , for three basic principles concerning the FOIA. First, in evaluating whether a request for information lies within the scope of an FOIA exemption that bars disclosure if it would amount to an invasion of privacy that is to some degree "unwarranted," a court must balance the public interest in disclosure against the interest Congress intended the exemption to protect (*510 U.S. 487, 495)* . Second, the only relevant public interest in disclosure to be weighed in this balance is the extent to which disclosure would serve the core purpose of the FOIA, which is contributing significantly to public understanding of the operations or activities of the government; that interest is not served by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct (*510 U.S. 487, 495-496)* . Third, whether an invasion of privacy is "warranted" cannot turn on the purpose for which the request for information is made (*510 U.S. 487, 496)* .

Applying these rules to the facts before it, the Court held that the public interest in disclosure was negligible at best, because disclosure would not appreciably further the citizens' right to be informed about what their government is up to. The employees' privacy interest in nondisclosure of their home addresses, which the Court found it unnecessary to

quantify exactly, given the minimal interest that it must be weighed against, was held to be substantial enough to outweigh the unions' interest in disclosure (*510 U.S. 487, 498-501)* .

In ***Dep't of the Air Force v. Rose*** *(1976) 425 U.S. 352, 96 S. Ct. 1592, 48 L. Ed. 2d 11* , plaintiffs, who were editors of a law review journal researching disciplinary procedures at the military service academies, had been denied access by defendant agency to case summaries of honor and ethics hearings with personal references or other identifying information deleted, which were maintained in the United States Air Force Academy's files. Plaintiffs brought suit in district court to gain access to the records under the Freedom of Information Act (*5 U.S.C.S. § 552*). The district court granted summary judgment for defendants, holding that the information in question was exempt from the Freedom of Information Act under *5 U.S.C.S. § 552(b)(2)* as a matter related solely to the internal personnel rules and practices of an agency. The plaintiffs appealed. The court of appeals reversed the district court's ruling and held that (1) the exemption set out in *5 U.S.C.S. § 552(b)(2)* was not applicable, (2) the exemption for unwarranted invasion of privacy set out in *5 U.S.C.S. § 552(b)(6)* might be applicable, and (3) on remand defendant agency should produce the requested records for in camera inspection and cooperate with the district court in redacting the records in order to delete personal references and all other identifying information. The Supreme Court granted defendants petition for a writ of certiorari.

The Supreme Court affirmed the holding of the court of appeals. The Court held that the requested records were not personnel files, but were "similar files" for purposes of *5 U.S.C.S. § 552(b)(6)* (*425 U.S. 352, 376)* . The court stated that the Congress had not intended for *5 U.S.C.S. § 552(b)(6)* to mandate a blanket exemption for disclosure of personnel and similar files, but had sought through the requirement of an unwarranted invasion of privacy to construct an exemption that would require a balancing of the individual's right of privacy against the purpose of the FOIA to open agency action to the light of public scrutiny (*425 U.S. 352, 372)* . The Court held that Congress had charged the courts with applying this balancing procedure in the case of pure medical and personnel files as well as "similar files" covered by *5 U.S.C.S. § 552(b)(6)* (*425 U.S. 352, 372-373)* . The Court also stated that the legislative history of *5 U.S.C.S. § 552(b)(6)* clearly shows that it was not intended to protect mere possibilities of threats to privacy interests (*425 U.S. 352, 380*).

With regard to the information in the case before it, the Court concluded that plaintiffs' request for access to summaries with personal references or other identifying information deleted respected the confidentiality interests embodied in *5 U.S.C.S. § 552(b)(6)* (*425 U.S. 352, 380)* . The Court noted, however, that what constitutes identifying information must be weighed not only from the viewpoint of the public, but also from the vantage of persons who would come to have access to the information through the disclosures and who would have been familiar as fellow cadets or Academy staff with other aspects of the affected individuals' careers. Thus, the Court upheld the qualification that if deletion of personal references or other identifying information is not sufficient to safeguard privacy, then the information should not be disclosed (*425 U.S. 352, 380-381)* . The Court also stated, however, that in making its determination, the district court could discount the probability that disclosure of all or parts of the requested information will lead to an unwarranted invasion of privacy in light of the Academy's tradition of keeping identities confidential within the Academy (*425 U.S. 352, 381)* .

The Court concluded by noting that while redaction cannot eliminate all of the risks of identifiability, the exemptions under the Freedom of Information Act were meant to be practical concepts, and *5 U.S.C.S. § 552(b)(6)* does not protect against every incidental invasion of privacy, but only against clearly unwarranted invasions of privacy (*425 U.S. 352, 381-382)* .

Gov. Code § 6254(c), which sets out the invasion of privacy exemption to the disclosure requirement of the Public Records Act (*Gov. Code § 6250 et seq.*), generally tracks the language of *5 U.S.C.S. § 552(b)(6)* but differs from the federal statute in that it exempts disclosure that would constitute an unwarranted invasion of privacy without using the term "clearly" [*compare Gov. Code § 6254(c) with 5 U.S.C.S. § 552(b)(6)*]. It appears, therefore, that the language in *Department of Air Force* cited above that emphasizes the use of the term "clearly" in *5 U.S.C.S. § 552(b)(6)* is not persuasive authority in interpreting the Public Records Act. However, since the remaining language of *Gov. Code §*

6254(c) is nearly identical to the language of *5 U.S.C.S. § 552(b)(6)*, the basic points may be persuasive authority in interpreting the Public Records Act.

NOTE:

However, in a case involving a request to a city under the Public Records Act, *Gov. Code § 6250 et seq.*, for deposition transcripts from concluded lawsuits against the city, the court of appeal held that disclosure of the depositions was required by the Public Records Act and denied the city's petition for writ of mandate. The court of appeal rejected an argument by the city that the Civil Discovery Act, Code Civ. Proc. § 2016 et seq., exempts depositions from the definition of public records in the Public Records Act. The court then considered whether the public interest served by not making the record public outweighed the public interest served by disclosure of the record. The claim that discovery would undermine the adversarial system was not convincing. As for the public interest served by disclosure, the requested depositions all related to claims of excessive force in the use of police dogs by the city, thus addressing an issue of the policy adopted to establish how and when police dogs are used. The court concluded that disclosure would have the beneficial purpose of either effecting a change in an improper policy, or showing the public that the city's policies are not in violation of the law [*City of Los Angeles v. Superior Court (1996) 41 Cal. App. 4th 1083, 1087, 1090-1091, 49 Cal. Rptr. 2d 35]* . In a subsequent case, the court of appeal similarly held that the California Public Records Act required disclosure of the names of peace officers who fired shots at a citizen [*New York Times Co. v. Superior Court (1997) 52 Cal. App. 4th 97, 103-104, 60 Cal. Rptr. 2d 410]* .

[g] De Novo Determination by Court

The facts and procedural background of ***Dep't of the Air Force v. Rose*** *(1976) 425 U.S. 352, 96 S. Ct. 1592, 48 L. Ed. 2d 11* , are discussed in *§ 185.25[3][f]*. The defendant agency argued that a statement by the court of appeal, recognizing that some harm might result to the subjects of the information, already demonstrated the ineffectiveness of excising names and other identifying information from the materials in question as a means of preserving the confidentiality of persons named in the records, and therefore obviated the need for in camera inspection. The Supreme Court replied that Congress had vested the courts with the responsibility ultimately to determine de novo any dispute concerning whether or not the exemption to the Freedom of Information Act set out in *5 U.S.C.S. § 552(b)(6)* was properly invoked in order to constrain agencies from withholding nonexempt matters. The Court noted that no court had seen the records and stated that the function of examination must be discharged in the first instance by the district court on remand (*425 U.S. 352, 379-380)* .

NOTE:

Gov. Code §§ 6258 and *6259*, which set out remedies for violations of the Public Records Act (*Gov. Code § 6250 et seq.*), do not explicitly provide for de novo determination by the courts as does *5 U.S.C.S. § 552(a)(4)(B)*, which sets out remedies for violations of the Freedom of Information Act. Thus, it appears that *Department of Air Force v. Rose* is not persuasive authority in interpreting the Public Records Act.

[h] Subject of Information May Intervene in Freedom of Information Act Action

In ***Providence Journal Co. v. Federal Bureau of Investigation*** *(D.R.I. 1978) 460 F. Supp. 762* , plaintiff, a newspaper, brought an action against defendant agency to obtain disclosure of logs and memoranda derived from certain illegal wiretaps conducted by defendant agency. Defendant agency argued that disclosure of these materials was subject to *5 U.S.C.S. § 552(b)(7)*, which exempts from the FOIA information collected for law enforcement purposes, disclosure of which would constitute a clear invasion of privacy. The intervenor in the case, on whose premises the wiretaps had been conducted, moved to intervene under *Fed. R. Civ. P., Rule 24(a)* (intervention) in order to protect his privacy interest in the materials. The intervenor asserted applicability of the exemption to the Freedom of Information Act for medical, personnel, or similar files, disclosure of which would constitute a clearly unwarranted invasion of privacy set out in *5*

U.S.C.S. § 553(b)(6).

The district court held that the intervenor was entitled to intervene in the case, but ruled against him on the merits. The district court stated that the intervenor undoubtedly presented a colorable claim of interest in preserving the privacy of the materials in question as required by *Fed. R. Civ. P., Rule 24(a)*, and noted that the right of intervention in FOIA actions was well established (*460 F. Supp. 762, 765)* . Plaintiff argued that the intervention under *Fed. R. Civ. P., Rule 24(a)* was nevertheless precluded because defendant adequately represented the intervenor's interests. Against this argument, the court stated that *Fed. R. Civ. P., Rule 24(a)* requires no showing of actual inadequacy of representation (*460 F. Supp. 762, 766)* . In this case, the court stated after having been subjected to three years of electronic surveillance by defendant agency and having been successfully prosecuted by the government for various federal offenses, the intervenor need not now rely on any supposed community of interest between himself and the government in keeping the fruits of its electronic surveillance confidential (*460 F. Supp. 762, 766)* . The court stated further that the intervenor had a particular, unique interest with regard to the materials in question that was different from the more general interest of government in protecting privacy and fulfilling its obligations under the Freedom of Information Act. The court noted that no one can better assert an interest in personal privacy than the person whose privacy is at stake, and stated that the personal nature of the privacy interest makes intervention especially appropriate and denial of intervention with the resulting dependence on the government especially odious. The court also noted that the reasons, such as having a unified and coherent expression of the public interest, that might lead the court to rely exclusively on the government's advocacy of public interest are not involved in this case (*460 F. Supp. 762, 766)* . Under these circumstances, the court stated, there was no need for the intervenor to show that his claim under *5 U.S.C.S. § 552(b)(6)* was sufficiently different from the government's claim under *5 U.S.C.S. § 552(b) (7)* in order to establish inadequacy of representation (*460 F. Supp. 762, 766)* .

In answer to plaintiff's argument that even if the intervenor had standing under *Fed. R. Civ. P., Rule 24(a)*, he could not intervene because the court could not grant him relief, the court stated that a finding that one of the exemptions to the FOIA was applicable would entitle the intervenor to relief under the Privacy Act (*5 U.S.C.S. § 552a*) (*460 F. Supp. 762, 766-768)* .

[4] Additional Authorities

[a] Balancing Test to Determine Clearly Unwarranted Invasion of Privacy

The facts and procedural background of *Florida Med. Ass'n v. Department of Health, Educ. & Welfare (M.D. Fla. 1979) 479 F. Supp. 1291* , are discussed in *§ 185.25[3][a]*. After determining that the information in question was covered by the FOIA, the court balanced the competing public and private interests, that is, the public interest in knowing the amount of public funds spent in reimbursing Medicare providers, as contrasted to the privacy interests of individuals receiving Medicare reimbursements (*479 F. Supp. 1291, 1304)* . The court concluded that since public interest in disclosure of the amounts of Medicare reimbursements would not be furthered by individually identifying the recipients, defendant agency's proposed disclosure was subject to the exemption under *5 U.S.C.S. § 552(b)(6)* as a clearly unwarranted invasion of personal privacy, at least insofar as the disclosure would include personal identification (*479 F. Supp. 1291, 1306-1307)* .

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18-185 California Points & Authorities § 185.26

§ 185.26 Supporting Contention That Defendant Agency Improperly Disclosed Information Concerning Plaintiff [5 U.S.C.S. § 552a(b); Civ. Code § 1798.24]--Disclosure Not Covered by Exemption for Routine Use or Necessary Inter-Agency Disclosure [5 U.S.C.S. § 552a(b)(3); Civ. Code § 1798.24(e)]

[1] FORM Supporting Contention That Defendant Agency Improperly Disclosed Information Concerning Plaintiff [5 U.S.C.S. § 552a(b); Civ. Code § 1798.24]--Disclosure Not Covered by Exemption for Routine Use or Necessary Inter-Agency Disclosure [5 U.S.C.S. § 552a(b)(3); Civ. Code § 1798.24(e)]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with the general points and authorities in § 185.21, and with points and authorities supporting the basic contention that disclosure of the information in question is prohibited by law as set out in § 185.24. If the action is under state law, it should also be combined with the points and authorities on use of federal authority in a state action in § 185.20.*]

THE DEFENDANT'S DISCLOSURE OF INFORMATION CONCERNING THE PLAINTIFF FROM ITS RECORDS WAS NOT A _____ [ROUTINE USE OF THE INFORMATION EXEMPT FROM THE DISCLOSURE PROHIBITION OF THE PRIVACY ACT OF 1974 (*5 U.S.C.S. § 552a*) *or* NECESSARY INTER-AGENCY DISCLOSURE EXEMPT FROM THE DISCLOSURE PROHIBITION OF THE INFORMATION PRACTICES ACT OF 1977 (*CIV. CODE § 1798 et seq.*)].

[*EITHER, if action is against federal agency*]

A. Use of Information Must Be Compatible With Purpose for Which Information Was Collected. The Privacy Act (*5 U.S.C.S. § 552a*) defines routine use of a record for which information may be disclosed, despite the disclosure prohibition of *5 U.S.C.S. § 552a(b)*, as the use of such a record for a purpose that is compatible with the purpose for which it is collected (*5 U.S.C.S. § 552a(a)(7)*; *see 5 U.S.C.S. § 552a(b)(3)* (routine use exemption)).

B. Use of Information Must Have Been Published by Agency. In order to qualify as a routine use of information that is exempt from the prohibition of disclosure set out in *5 U.S.C.S. § 552a(b)*, the agency's use of the information must

have been published in the Federal Register in the agency's statutorily required notice of the records that it maintains, and additionally must have been published in the Federal Register 30 days before the annual notice if it is a new use (*Parks v. United States Internal Revenue Serv. (10th Cir. 1980) 618 F.2d 677, 681-682* ; *see 5 U.S.C.S. § 552a(e)(4)(D), (11)*).

[*Optional*] **C. Published Use for Litigation Purposes Does Not Create Blanket Exemption.** A routine use published by an agency authorizing disclosure during the course of litigation does not automatically exempt all information in the system of records from the prohibition of disclosure set out in *5 U.S.C.S. § 552a(b)* whenever litigation occurs, but applies only to the disclosure of an individual's otherwise protected file during the course of litigation with that specific individual (*Stiles v. Atlanta Gas Light Co. (N.D. Ga. 1978) 453 F. Supp. 798, 799-800)* .

[*OR, if action is against state or local agency*]

A. Use of Information Must Be Compatible With Purpose for Which Information Was Collected. To exempt a disclosure to a person or another agency when the disclosure is necessary for the transferee agency to perform its legal duties from the prohibition of disclosure set out in *Civ. Code § 1798.24*, the use for which the information is disclosed must be compatible with a purpose for which the information was collected (*Civ. Code § 1798.24(e)*).

[*Optional*] **B. Compatible Use With Regard to Law Enforcement or Regulatory Agency.** With respect to information transferred from a law enforcement or regulatory agency, or information transferred to another law enforcement or regulatory agency, a use is compatible if the use of the information requested is needed in an investigation of unlawful activity under the jurisdiction of the requesting agency or for licensing, certification, or regulatory purposes by that agency (*Civ. Code § 1798.24(e)*).

C. Use of Information Must Have Been Published by Agency or Accounted For. To exempt a disclosure to a person or another agency when the disclosure is necessary for the transferee agency to perform its legal duties from the prohibition of disclosure set out in *Civ. Code § 1798.24*, the use for which the information is disclosed must be one that was previously published by the disclosing agency with the Office of Information Practices or accounted for in accordance with *Civ. Code § 1798.25* (*Civ. Code § 1798.24(e)*; *see Civ. Code §§ 1798.9, 1798.10* (notice of use of information); *see also Civ. Code § 1798.25* (accounting of each disclosure)); *Parks v. United States Internal Revenue Serv. (10th Cir. 1980) 618 F.2d 677, 681-682* (interpreting *5 U.S.C.S. § 552a(e)(4)(D), (11)*, whose provisions are similar to notice requirements of *Civ. Code §§ 1798.9, 1798.10*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the routine use exemption to the disclosure prohibition of *5 U.S.C.S. § 552a(b)*, as set out in *5 U.S.C.S. § 552a(b)(3)*, or the necessary disclosure exemption to the disclosure prohibition of *Civ. Code § 1798.24*, as set out in *Civ. Code § 1798.24(e)* does not apply to plaintiff's case. Counsel should use the first alternative Paragraphs A through C in an action against federal agencies and use the second alternative Paragraphs A through C in an action against a state or local agency.

These points and authorities should be used in combination with introductory points and authorities showing that plaintiff, defendant, and the information in question are covered by the Privacy Act or Information Practices Act [*see § 185.21*], and with introductory points and authorities setting out the basic point that disclosure of information concerning plaintiff from an agency's records is prohibited by *5 U.S.C.S. § 552a(b)* or *Civ. Code § 1798.24* [*see § 185.24*].

If the action is a state action under the Information Practices Act, and counsel is using a paragraph of the form that includes federal case law, this form should be used in combination with introductory points and authorities showing that federal case law interpreting the Privacy Act is persuasive authority in interpreting parallel provisions of the Information Practices Act [*see § 185.20*]. Counsel should compare the analogous provisions of the Information Practices and the federal Privacy Acts and note any differences in language when using the federal case law in this form as authority for an interpretation of the Information Practices Act.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Such argument should show that the agency's disclosure was beyond the scope of any of the routine uses or anticipated disclosures for the information in question published by the agency pursuant to *5 U.S.C.S. § 552a(e)(4), (11)* or *Civ. Code §§ 1798.9, 1798.10*. Counsel may also wish to add argument supporting the contention that the published routine use or anticipated disclosure did not justify the disclosure because it was arbitrary or capricious when the facts warrant such a contention [*see Parks v. United States Internal Revenue Serv. (10th Cir. 1980) 618 F.2d 677, 682* (dicta); *see also § 185.26[3][a]*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of a government agency's improper disclosure of information concerning plaintiff. These points and authorities may also be adapted for use in a trial or appellate brief.

[3] Discussion of Authorities

[a] Routine Use Must Be Noticed in Federal Register

The facts and procedural background of ***Parks v. United States Internal Revenue Serv.*** *(10th Cir. 1980) 618 F.2d 677* , are discussed in *§ 185.24[3][a]*. The defendant agency argued that its disclosure to its own officers and employees of personnel information to pinpoint agency employees who had not pledged to buy savings bonds constituted a routine use of the information, which is exempt from the prohibition of disclosure set out in *5 U.S.C.S. § 552a(b)* under *5 U.S.C.S. § 552a(b)(3)*. The court of appeal noted that the former version of 5 U.S.C.S. § 552a(e) (amended in 1984) established notice and comment rulemaking procedures for determining what constitutes a routine use of information from agency record systems that required the agency to: (1) publish annually in the Federal Register a notice of the records and systems of records maintained by the agency including routine use of the information in the records, categories of users, and purpose of such use; (2) publish any new use or intended use of the information in the Federal Register 30 days before the annual notice; and (3) provide members of the public an opportunity to comment in writing on the proposed new uses (*618 F.2d 677, 681-682)* . The court stated that with these provisions, Congress had intended that each agency describe in advance of disclosure the uses of information that the agency considers routine. The court stated further that the courts may consider whether the agency acted arbitrarily and capriciously in designating certain uses as routine, but that it is the agency and not the courts that must make the determination at first (*618 F.2d 677, 682)* . Noting that defendant agency's published uses did not include the use at issue, the court concluded that plaintiffs had stated a cause of action based on disclosure of the information (*618 F.2d 677, 682)* .

[b] Published Use for Litigation Purposes Does Not Create Blanket Exemption

The facts and procedural background of ***Stiles v. Atlanta Gas Light Co.*** *(N.D. Ga. 1978) 453 F. Supp. 798* , are discussed in *§ 185.28[3][a]*. During litigation between plaintiffs and their employer, defendant employer had issued a subpoena to a third-party federal agency for production of certain records relating to plaintiffs. The agency resisted the subpoena on the grounds that producing the records would be a violation of the Privacy Act. In response, defendant argued that one of the routine uses for the requested materials that the agency had published included disclosures in the course of litigation or settlement negotiations, and that the materials requested in the present litigation were encompassed within this routine use. The court of appeal held that the agency's routine use exception did not mean that any time any case was in litigation, all files within that covered system of records would automatically lose their

protection under the Privacy Act. Rather, the court held that the exception applies only to the disclosure of an individual's otherwise protected file during the course of litigation with that specific individual (*453 F. Supp. 798, 799)* .

[c] Use of Information Must Be Compatible With Purpose for Which Information Was Collected

In addition to requiring that the purpose for a disclosure be compatible with a purpose for which the information was originally collected and that the disclosure have been noticed pursuant to *Civ. Code §§ 1798.9, 1798.10* (notice required to be filed with Office of Information Practices), or accounted for in accordance with *Civ. Code § 1798.25* (accounting of each disclosure), the exemption set out in *Civ. Code § 1798.24(e)* also restricts the disclosures it permits to disclosures to a person or another agency and requires that the disclosure or transfer be necessary for the transferee agency to perform its legal duties [*see Civ. Code § 1798.24(e)*]. No such restrictions or additional requirements are included in the exemption set out in *5 U.S.C.S. § 552a(b)(3)*. Thus, in applying federal case law to *Civ. Code § 1798.24(e)*, counsel should consider that the exemption in that statute appears to be more restrictive than the exemption in *5 U.S.C.S. § 552a(b)(3)*.

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18-185 California Points & Authorities § 185.27

§ 185.27 Supporting Contention That Defendant Agency Improperly Disclosed Information Concerning Plaintiff [5 U.S.C.S. § 552a(b); Civ. Code § 1798.24]--Internal Agency Disclosure for Blacklisting Purposes Not Exempt From Privacy Act or Information Practices Act [5 U.S.C.S. § 552a(b)(1); Civ. Code § 1798.24(d)]

[1] FORM Supporting Contention That Defendant Agency Improperly Disclosed Information Concerning Plaintiff [5 U.S.C.S. § 552a(b); Civ. Code § 1798.24]--Internal Agency Disclosure for Blacklisting Purposes Not Exempt From Privacy Act or Information Practices Act [5 U.S.C.S. § 552a(b)(1); Civ. Code § 1798.24(d)]

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief. It should be combined with the general points and authorities in § 185.21 and with points and authorities supporting the basic contention that disclosure of the information in question is prohibited by law, as set out in § 185.24. If the action is under state law, it should also be combined with the points and authorities on use of federal authority in a state action in § 185.20.*]

DEFENDANT AGENCY'S DISCLOSURE OF THE INFORMATION IN QUESTION WAS IMPROPER BECAUSE INTERNAL DISCLOSURE TO AGENCY EMPLOYEES OR OFFICERS TO BLACKLIST PEOPLE IS NOT PART OF THE OFFICERS' OR EMPLOYEES' NORMAL DUTIES AND THEREFORE IS NOT EXEMPT FROM THE DISCLOSURE PROHIBITION OF _____ [*5 U.S.C.S. § 552a(b) or CIV. CODE § 1798.24*].

Internal Disclosure for Blacklisting Prohibited. The prohibition on disclosure of information set out in *5 U.S.C.S. § 552a(b)* also applies to internal agency disclosures to officials or employees who do not need the information in the regular performance of their work, particularly when the information is being used to pressure employees who do not comply with the organizational norms and standards for some reason, such as not participating in savings bond drives or charity campaigns (*Parks v. United States Internal Revenue Serv. (10th Cir. 1980) 618 F.2d 677, 681* ; *see* S. Rep. No. 93-1183, 93d Cong., 2d Sess.). The provisions of *5 U.S.C.S. § 552a(b)* regarding internal agency disclosures interpreted by *Parks* are comparable to provisions regarding internal agency disclosures set out in *Civ. Code § 1798.24* (*compare 5 U.S.C.S. § 552a(b)(1) with Civ. Code § 1798.24(d)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that internal agency disclosures of information concerning plaintiff agency employee from the agency's files are not exempt from the prohibition of disclosure of such information set out in *5 U.S.C.S. § 552a(b)* or *Civ. Code § 1798.24* because the purpose of the disclosure was to enable the persons receiving it to improperly pinpoint plaintiff in order to pressure him or her to conform to certain agency norms, and this purpose was not a normal part of the duties of the persons receiving the disclosure. If the point in this form is used in a state action, it should include the optional language comparing the pertinent state and federal provisions. The form may be used together with points and authorities supporting the contention that defendant agency had disclosed information concerning plaintiff from its files [*see § 185.24*] when defendant agency has contended that the disclosure in question was exempt under *5 U.S.C.S. § 552a(b)(1)* as a disclosure to officers and employees or volunteers, or *Civ. Code § 1798.24(d)* as a disclosure to officers, employees, attorneys, agents, or volunteers of the disclosing agency that is necessary for the persons receiving the disclosure to perform their normal duties.

These points and authorities should be used in combination with introductory points and authorities showing that plaintiff, defendant, and the information in question are covered by the Privacy Act or Information Practices Act [*see § 185.21*]. If the action is a state action under the Information Practices Act, and counsel is using a paragraph of the form that includes federal case law, the form should be used in combination with introductory points and authorities showing that federal case law interpreting the Privacy Act is persuasive authority in interpreting parallel provisions of the Information Practices Act [*see § 185.20*]. Counsel should compare the analogous provisions of the Information Practices Act and the federal Privacy Act and should note any differences in language when using the federal case law in this form as authority for an interpretation of the Information Practices Act.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. The argument should show that the information was disclosed to officers, employees, attorneys, agents, or volunteers of defendant agency, as appropriate, to enable the recipients of the disclosure to pressure plaintiff into participating in activities sponsored by defendant, and that such pressuring was not properly a part of the recipients' duties.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the character of the internal disclosure as being beyond the scope of the duties of the agency employees receiving it. They may also be adapted for use in a trial or appellate brief.

[3] Discussion of Authorities

[a] Internal Disclosure for Blacklisting Prohibited

The facts and procedural background of ***Parks v. United States Internal Revenue Serv.*** *(10th Cir. 1980) 618 F.2d 677* , are discussed in *§ 185.24[3][a]*. This case involved disclosure to officers and employees of defendant agency itself of information from plaintiffs' personnel files showing that plaintiffs had not pledged to buy savings bonds. The court of appeals addressed the question of whether plaintiffs had stated a proper substantive claim under the Privacy Act (*5 U.S.C.S. § 552a*). The court noted that plaintiffs had alleged that the information disclosed by defendant agency was not needed by the officers and employees who received the disclosures in the regular performance of their duty. In a footnote, the court cited a senate report stating that one of the purposes of the Privacy Act is to halt the internal blacklisting that frequently occurs in federal agencies and on federal installations of persons who do not comply with the organizational norms and standards for some reason, such as not participating in savings bond drives or charity campaigns (*618 F.2d 677, 681 n.1*). The court stated that while it cannot be disputed that Congress has expressly held out nonparticipation in savings bond programs as an example of information not needed in the performance of federal employees' regular duties, the court was not saying that this prevented defendants from arguing to the contrary that disclosure of savings bond information was necessary to the performance of the duties of those employees receiving the

disclosure. The court noted that in so arguing, defendants relied on an executive order establishing an interdepartmental committee consisting of the heads of all federal executive-branch agencies and charged with formulating a plan of organization and sales promotion of savings bonds. The court held, however, that the order was at odds with the stated purpose of the Privacy Act and did not justify the use of information from the personnel files of agency employees in order to achieve its aims. Thus, the court concluded that the order would not be a ground for dismissal of the plaintiff's complaint (*618 F.2d 677, 681)* .

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18-185 California Points & Authorities § 185.28

§ 185.28 Supporting Contention That Agency Improperly Disclosed Information Concerning Plaintiff [5 U.S.C.S. § 552a(b)]--Disclosure Not Exempted From Prohibition of Disclosure by Issuance of Subpoena in Discovery Proceedings Without Court Order [5 U.S.C.S. § 552a(b)(11)]

[1] FORM Supporting Contention That Agency Improperly Disclosed Information Concerning Plaintiff [5 U.S.C.S. § 552a(b)]--Disclosure Not Exempted From Prohibition of Disclosure by Issuance of Subpoena in Discovery Proceedings Without Court Order [5 U.S.C.S. § 552a(b)(11)]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with the general points and authorities in § 185.21 and with points and authorities supporting the basic contention that disclosure of information is prohibited by law, as set out in § 185.24.*]

THE MERE ISSUANCE OF A SUBPOENA IN DISCOVERY PROCEEDINGS DOES NOT RENDER A DISCLOSURE OF INFORMATION CONCERNING THE PLAINTIFF EXEMPT FROM THE *5 U.S.C.S. § 552a(b)* PROHIBITION OF DISCLOSURE AS AN ALLOWABLE DISCLOSURE MADE PURSUANT TO COURT ORDER UNDER *5 U.S.C.S. § 552a(b)(11)*.

Subpoena Issued Without Court Order Does Not Exempt Disclosure From Disclosure Prohibition. Mere issuance in discovery proceedings of a subpoena, which is always subject to the power of the court to quash or limit, is not sufficient to exempt the information sought from the disclosure prohibition of the Privacy Act (*5 U.S.C.S. § 552a*) as a court-ordered disclosure allowed under *5 U.S.C.S. § 552a(b)(11)*, unless the court for compelling reasons issues an order for production (*Stiles v. Atlanta Gas Light Co. (N.D. Ga. 1978) 453 F. Supp. 798, 800)* .

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the issuance of a subpoena during discovery proceedings, without a court order compelling compliance, does not bring a disclosure within the exemption to the Privacy Act's prohibition of disclosure for disclosures made pursuant to court order, as set out in *5 U.S.C.S. § 552a(b)(11)*. These points and authorities may be used, in combination with introductory points and authorities showing

that plaintiff, defendant, and the information in question are covered by the Privacy Act [*see § 185.21*] and with points and authorities supporting the contention that defendant agency improperly disclosed information concerning plaintiff from its files under *5 U.S.C.S. § 552(b)* [*see § 185.24*], when defendant agency has contended that issuance of a subpoena caused the information in question to be exempt from the disclosure prohibition of *5 U.S.C.S. § 552a(b)* as a disclosure pursuant to a court order, under *5 U.S.C.S. § 552a(b)(11)*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the exemption to the disclosure prohibition for disclosures pursuant to court order does not apply when a subpoena has been issued in discovery proceedings but no court order compelling compliance has been obtained. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] No State Action for Disclosure Pursuant to Subpoena

Civ. Code § 1798.24(k) of the Information Practices Act (*Civ. Code §§ 1798-1798.78*) (apparent California equivalent of federal Privacy Act) provides that disclosure of information to any person pursuant to subpoena, court order, or other compulsory legal process is permitted if specified conditions are met. It therefore appears that these points and authorities cannot be used in a state action under the Information Practices Act.

[3] Discussion of Authorities

[a] Subpoena Without Court Order Does Not Render Disclosure Exempt From Disclosure Prohibition

Stiles v. Atlanta Gas Light Co. *(N.D. Ga. 1978) 453 F. Supp. 798* , involved an action under the Veterans' Reemployment Rights Act (*38 U.S.C.S. § 2021 et seq.*). Defendant issued a subpoena directing an officer of the Labor-Management Services Administration, a federal agency (hereinafter, the agency), to produce at a noticed deposition all documents relating to complaints or requests filed with the agency by individuals who had sought assistance from the agency pertaining to their rights under Veterans' Reemployment Rights Act, within a specified period. The agency moved to quash the subpoena, arguing that production of the requested documents was prohibited by *5 U.S.C.S. § 552a(b)* and that it had received no prior written consents from any persons whose records might be covered by the subpoena. Defendant argued that even if *5 U.S.C.S. § 552a* did cover the requested materials, its subpoena was an order of a court of competent jurisdiction that exempted the information from the disclosure prohibition of *5 U.S.C.S. § 552a(b)*, as a disclosure pursuant to court order, under *5 U.S.C.S. § 552a(b)(11)*.

The district court held that *5 U.S.C.S. § 552a(b)(11)* provides for those cases in which, for compelling reasons, the court specifically directs that a record be disclosed and that mere issuance in discovery proceedings of a subpoena, which is always subject to the power of the court to quash or limit, does not meet this standard. Thus, the court concluded that *5 U.S.C.S. § 552a* would prevent disclosure in the case before it unless the court specifically ordered the materials disclosed. The court finally held that under the facts of the case there were no compelling reasons for ordering disclosure (*453 F. Supp. 798, 800)* .

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18-185 California Points & Authorities § 185.29

§ 185.29 Opposing Contention That Government Agency Improperly Refused Amendment or Expungement of Record under Privacy Act of 1974--Records Not Retrievable Under Requester's Name or Other Personal Identifier [5 U.S.C.S. § 552a(a)(5), (d)(2)]

[1] FORM Opposing Contention That Government Agency Improperly Refused Amendment or Expungement of Record under Privacy Act of 1974--Records Not Retrievable Under Requester's Name or Other Personal Identifier [5 U.S.C.S. § 552a(a)(5), (d)(2)]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE COURT SHOULD NOT ORDER DEFENDANT AGENCY TO AMEND OR EXPUNGE THE RECORDS REQUESTED BY PLAINTIFF BECAUSE THE RECORDS ARE NOT RETRIEVABLE UNDER PLAINTIFF'S NAME OR OTHER PERSONAL IDENTIFIER, A REQUIREMENT UNDER THE PRIVACY ACT OF 1974.

Records Must Be Retrievable Under Requestor's Name or Identifier. Under the Privacy Act of 1974, records that are not retrievable under the requester's name or other personal identifier are not accessible to that requester, and Privacy Act remedies of amendment and expungement are inapplicable to a report that is not accessible under the Act (*5 U.S.C.S. § 552a(a)(5), (d)(2)*; *Baker v. Department of Navy (9th Cir. 1987) 814 F.2d 1381, 1383-1385)* .

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to the contention that a government agency improperly refused to allow an individual to amend or expunge a record concerning the requester contained in the agency's files, when the record was not retrievable under the requester's name or other personal identifier [*see 5 U.S.C.S. § 552a(a)(5)* (record must be retrievable by name or identifier), (d)(2) (access permitted from agency maintaining "system of records"); *see also Baker v. Department of Navy (9th Cir. 1987) 814 F.2d 1381, 1383-1385]* .

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should discuss evidence showing that the information requested could not be retrieved

through use of the requester's name or other personal identifier.

[3] Discussion of Authorities

[a] Records Must Be Retrievable Under Requestor's Name or Identifier

In ***Baker v. Department of Navy*** *(9th Cir. 1987) 814 F.2d 1381* , a civilian employee filed a civil suit against the Department of the Navy, alleging that the Navy violated the Privacy Act of 1974. While employed by the Navy as a supervisory psychologist, plaintiff supervised a certain researcher, who filed an administrative grievance against her based on her treatment of him. An investigator filed a report in the employee grievance file under the name of the researcher, without cross-referencing it to plaintiff's name or file. Plaintiff claimed that the report was used as the basis for several adverse personnel actions, including demotion, a letter of reprimand, and a "marginal" performance rating. Subsequently, the Navy restored her to her supervisory position, expunged the letter of reprimand, and raised her performance rating to "outstanding." However, fearing further adverse effects of the report, plaintiff submitted a request to receive a copy of the report under the Freedom of Information Act (*5 U.S.C.S. § 552*) and the Privacy Act (*5 U.S.C.S. § 552(a)*). She eventually gained access to an edited version of the report under the Freedom of Information Act, then submitted a request to expunge the report from the employee's file under the Privacy Act. The commanding officer denied her request on the ground that the record was not retrievable under her name, and therefore was not a record covered by the Privacy Act. The district court granted defendant's motion for summary judgment on the ground that the report does not qualify as a record within a "system of records" under the Privacy Act, and that the Privacy Act remedies of amendment and expungement are inapplicable to a report that is not accessible under the Act. Plaintiff appealed.

The United States Court of Appeal affirmed, holding that an individual's ability to obtain access to a record under the Freedom of Information Act, or because of personal knowledge of its existence in a certain file, will not provide that individual with access to the record or to any remedies under the Privacy Act (*814 F.2d 1381, 1385)* . Pursuant to *5 U.S.C.S. § 552a(d)(2)*, an individual is permitted to request amendment of a record pertaining to that individual from an agency that maintains a "system of records." *5 U.S.C.S. § 552a(a)(5)* defines a "system of records" as "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." The legislative history of the Privacy Act indicates that Congress was primarily concerned with the potential misuse of personally identifiable information stored in computers. Consequently, the definition of "system of records" makes coverage under the Act dependent on the method of retrieval of a record, rather than its substantive content. Although that narrow reach of accessibility has been criticized for undermining the congressional purpose of access to records an agency maintains on individuals, Congress has not responded to those criticisms. Accordingly, plaintiff is unable to sustain her claim of a right to amend or expunge the report on the ground that it is accessible under the Privacy Act. Moreover, an amendment to a record that is inaccessible under the Privacy Act cannot be made even if the record is otherwise accessible, such as in this particular case, under the Freedom of Information Act. The subsections that grant access to records (*5 U.S.C.S. § 552a(d)(1)*), permit requests for amendment (*5 U.S.C.S. § 552a(d)(2)*), and require that records used in making determinations about individuals are maintained in a reasonably accurate and complete manner (*5 U.S.C.S. § 552a(e)(5)*), all apply to an agency that "maintains a system of records" (*814 F.2d 1381, 1384)* . The statutory language therefore suggests that the scope of accessibilty and the scope of amendment are coextensive (*814 F.2d 1381, 1384-1385)* . Although plaintiff raised a legitimate concern that agencies can easily circumvent the Privacy Act by neglecting to index a file under a particular name, she failed to set forth any evidence to support an allegation of evasive tactics by the Navy that would substantiate the theory and preclude summary judgment (*814 F.2d 1381, 1385)* .

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18-185 California Points & Authorities § 185.30

§ 185.30 Opposing Contention That Government Agency Violated Privacy Act of 1974 [5 U.S.C.S. § 552a(b)(1)] or Information Practices Act of 1977 [Civ. Code § 1798.24(d)]--Disclosure of Social Security Numbers to Department of Motor Vehicles Authorized [42 U.S.C.S. § 405(c)(2)(C)(i)]

[1] FORM Opposing Contention That Government Agency Violated Privacy Act of 1974 [5 U.S.C.S. § 552a(b)(1)] or Information Practices Act of 1977 [Civ. Code § 1798.24(d)]--Disclosure of Social Security Numbers to Department of Motor Vehicles Authorized [42 U.S.C.S. § 405(c)(2)(C)(i)]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE DEPARTMENT OF MOTOR VEHICLE POLICY REQUIRING APPLICANTS FOR NEW OR RENEWAL LICENSES TO OBTAIN AND DISCLOSE SOCIAL SECURITY NUMBERS DOES NOT VIOLATE APPLICANT'S RIGHT TO PRIVACY UNDER THE FEDERAL PRIVACY ACT OF 1974 OR THE STATE INFORMATION PRACTICES ACT OF 1977.

A. Privacy Act of 1974. It is unlawful for any federal, tate or local government agency to deny any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his or her social security number (*5 U.S.C.S. § 552a*).

B. Exception to Privacy Act for Disclosure of Social Security. Any state may, in the administration of any tax, general public assistance, drivers' license or motor vehicle registration law within its jurisdiction, use the Social Security numbers issued by the Commissioner of Social Security for the purpose of establishing the identification of individuals affected by such law, and may require any individual who is or who appears to be so affected to furnish to the state agency having administrative responsibility for the law involved, the Social Security numbers issued to him or her (*42 U.S.C.S. § 405(c)(2)(C)(i)*).

C. Exception to Privacy Act Authorizes Disclosure of Applicants Social Security Numbers to Department of Motor Vehicles on Drivers' License Applications. Under *42 U.S.C.S. § 405(c)(2)(C)(i)*, the Department of Motor Vehicles may properly require applicants for new and renewal drivers' licenses to obtain and disclose their Social Security numbers to the Department (*Nowlin v. Department of Motor Vehicles (1997) 53 Cal. App. 4th 1529, 1536, 62*

Cal. Rptr. 2d 409).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the Department of Motor Vehicles violated the Privacy Act of 1974 [*5 U.S.C.S. § 552a(b)(1)*] or Information Practices Act of 1977 [*Civ. Code § 1798.24(d)*] by requiring applicants for new or renewal drivers' licenses to disclose their Social Security numbers to the Department [*42 U.S.C.S. § 405(c)(2)(C)(i)*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should provide facts showing that the Department of Motor Vehicles required applicants for new or renewal drivers' licenses to disclose their Social Security numbers to the Department and argue that the exception to the Privacy Act of 1974, *42 U.S.C.S. § 405(c)(2)(C)(i)*, authorizes the disclosure.

[c] Related Pleading and Practice Forms

For discussion relating to privacy claims, see California Forms of Pleading and Practice, Ch. 429, *Privacy* (Matthew Bender).

[d] Related Points and Authorities

For points and authorities relating to a government agency's right to refuse to amend or expunge record under the Privacy Act of 1974, see *§ 185.29*.

[3] Discussion of Authorities

[a] Exception to Privacy Act Authorizes Disclosure of Applicants Social Security Numbers to Department of Motor Vehicles on Drivers' License Applications.

In ***Nowlin v. Department of Motor Vehicles*** *(1997) 53 Cal. App. 4th 1529, 62 Cal. Rptr. 2d 409* plaintiff by administrative writ of mandate, requested the trial court to enjoin the Department of Motor Vehicles (DMV) from (1) refusing to accept plaintiffs; applications for noncommercial drivers' licenses, identification cards, or name changes, and (2) refusing to issue a drivers' license to plaintiffs. Plaintiffs alleged that they did not possess and have never possessed Social Security numbers (SSNs). The trial court held that the DMV was prohibited from requiring SSNs to be disclosed by applicants for new and renewal drivers' licenses and disclosing that information to other state agencies.

The court of appeal reversed, holding that although the Privacy Act of 1974 (*5 U.S.C.S. § 552a*) ordinarily precludes the collection of SSNs, under *42 U.S.C.S. § 405(c)(2)(C)(i)*, the Department of Motor Vehicles may properly require applicants for new and renewal drivers' licenses to obtain and disclose their SSNs to the DMV. This exception or alteration to the Privacy Act permits states to require persons to provide SSNs for tax, general public assistance, drivers' licenses and motor vehicle registration [*see Lauderbach v. Zolin (1995) 35 Cal. App. 4th 578, 585* (DMV is not only authorized, but obligated, to require applicants for original and renewal drivers' licenses, ID cards and vehicle registrations to supply their SSNs for identification purposes)]. The court further found that since the DMV required applicants to disclose SSNs on their applications, by inference, the DMV was entitled to require those who do not have SSNs to obtain them (*53 Cal. App. 4th 1529, 1536)* .

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18-185 California Points & Authorities § 185.31

§ 185.31 Improper Maintenance of Records [5 U.S.C.S. § 552a(e)(1), (5), (6); Civ. Code §§ 1798.14, 1798.15, 1798.18]--General Form

[1] FORM Improper Maintenance of Records [5 U.S.C.S. § 552a(e)(1), (5), (6); Civ. Code §§ 1798.14, 1798.15, 1798.18]--General Form

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with the general points and authorities in § 185.21. If the action is under state law, it should also be combined with the points and authorities on use of federal authority in a state action in § 185.20.*]

THE PLAINTIFF IS ENTITLED TO DAMAGES BECAUSE THE DEFENDANT HAS FAILED TO PROPERLY MAINTAIN ITS RECORDS WHICH CONTAIN INFORMATION CONCERNING THE PLAINTIFF.

[*EITHER, if action is against federal agency*]

A. Jurisdiction. An individual may bring a civil action against a federal agency in the federal district court whenever the agency fails to properly maintain records concerning the individual, which may be used as the basis of a determination concerning the individual, in such a way as to assure fairness to the individual in making the determination and consequently an adverse determination is made; or the agency fails to comply with any other provision of the Privacy Act (*5 U.S.C.S. § 552a*) or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual (*see 5 U.S.C.S. § 552a(g)(1)(C), (D)*).

[*EITHER*]

B. Agency's Duty to Properly Maintain Records. Each agency that maintains a system of records shall maintain all records that are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination (*5 U.S.C.S. § 552a(e)(5)*).

[*AND/OR*]

C. Agency's Duty to Assure Accuracy of Dissemination. Before disseminating any record about an individual to any person other than an agency, each agency that maintains a system of records shall make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes, unless the dissemination is required by the Freedom of Information Act (*5 U.S.C.S. § 552a(e)(6)*; *see 5 U.S.C.S. § 552a(b)(2)*).

[*AND/OR*]

D. Only Relevant Information May Be Maintained. An agency that maintains a system of records shall maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President (*5 U.S.C.S. § 552a(e)(1)*).

[*CONTINUE*]

E. Damages for Willful Improper Maintenance. In any civil action for improper maintenance of records used in a determination or other violations of the Privacy Act (*5 U.S.C.S. § 552a*) in which the court determines that the agency acted in a manner that was intentional or willful, the United States shall be liable for the actual damages sustained by the individual as a result of the violation, or $1,000, whichever is greater, plus reasonable costs and attorney's fees (*see 5 U.S.C.S. § 552a(g)(4)*).

[*Optional*] **F. Willfullness Requirement Does Not Include Malice.** [*See § 185.24, first alternative for Paragraph D.*]

[*Optional*] **G. Invasion of Privacy Causing Psychological Harm Constitutes Adverse Effect.** [*See § 185.24, Paragraph E.*]

[*OR, if action is against state agency*]

A. Civil Action. An individual may bring a civil action against an agency whenever the agency fails to maintain any record concerning any individual with such accuracy, relevancy, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, opportunities of, or benefits to the individual that may be made on the basis of such record, if, as a proximate result of the agency's failure, a determination is made that is adverse to the individual, or the agency fails to comply with any other provision of the Information Practices Act of 1977 (*Civ. Code §§ 1798-1798.78*), or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual (*Civ. Code § 1798.45*).

[*EITHER*]

B. Agency's Duty to Properly Maintain Records. Each agency shall maintain all records, to the maximum extent possible, with accuracy, relevance, timeliness, and completeness when the records are used to make any determination about the individual (*see Civ. Code § 1798.18*).

[*AND/OR*]

C. Agency's Duty to Assure Accuracy of Dissemination. When an agency transfers a record outside of state government, it shall correct, update, withhold, or delete any portion of the record that it knows or has reason to believe is inaccurate or untimely (*Civ. Code § 1798.18*).

[*AND/OR*]

D. Only Relevant Information May Be Maintained. Each agency shall maintain in its records only personal information that is relevant and necessary to accomplish a purpose of the agency required or authorized by the California Constitution or statute, or mandated by the federal government (*Civ. Code § 1798.14*).

[*CONTINUE*]

E. Damages for Improper Maintenance. In any suit brought for failure to properly maintain information used in a determination or other violation of the Information Practices Act (*Civ. Code §§ 1798-1798.78*), the agency shall be liable to the individual for the sum of actual damages sustained by the individual, including damages for mental suffering, and the costs of the action together with reasonable attorney's fees as determined by the court (*Civ. Code § 1798.48*).

[*CONTINUE, whether federal or state action*]

[*Optional*] **H. Information Must Be Relevant to Published Use.** Information maintained by an agency is not relevant and necessary to accomplish a legitimate agency purpose unless the fact that the agency is maintaining the records containing the information, the individuals about whom such records are maintained, and the routine uses to which the records are put are properly published in the Federal Register *(Chapman v. National Aeronautics & Space Admin. (5th Cir. 1982) 682 F.2d 526, 530)* . The provisions of the Privacy Act interpreted by *Chapman* are comparable to analogous provisions of the Information Practices Act (*compare 5 U.S.C.S. § 552a(e)(4)(C), (D),* and *(I), with* former Civ. Code § 1798.10(b), *(c)* (*now see Civ. Code § 1798.10*).

[*Optional*] **I. Maintenance of Information in Private Notes Is Improper.** A supervisor's private notes reflecting negative evaluations of a federal employee's performance may not be used as a basis of an adverse determination concerning the employee unless the notes have been timely included in the employee's records (*Chapman v. National Aeronautics & Space Admin. (5th Cir. 1982) 682 F.2d 526, 529)* . The provisions of the Privacy Act interpreted by *Chapman* are comparable to analogous provisions of the Information Practices Act (*compare 5 U.S.C.S. § 552a(e)(5) with Civ. Code § 1798.18*).

[*Counsel may add the points and authorities showing that plaintiff is entitled to amendment, alteration, or deletion of the improperly maintained information, as set out in § 185.33. If the action is against a federal agency, counsel may add the points and authorities showing improper maintenance of information describing plaintiff's exercise of First Amendment rights, as set out in § 185.32*].

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that plaintiff is entitled to damages because defendant agency has failed to comply with the requirements for maintaining records set out in *5 U.S.C.S. § 552a(e).*

Counsel should use the first alternative Paragraphs A through G in an action against a federal agency and use the second alternative Paragraphs A through E in an action against a state or local agency. If optional Paragraphs H and I, setting out federal court interpretations of statutory requirements regarding maintenance of records, are used in a state action, they should include the optional language comparing the pertinent state and federal provisions. This form may be used in a variety of procedural contexts.

These points and authorities should be used in combination with introductory points and authorities showing that plaintiff, defendant, and the information in question are covered by the Privacy Act or Information Practices Act [*see § 185.21*]. If the action is a state action under the Information Practices Act, and counsel is using a paragraph of the form that includes federal case law, this form should be used in combination with introductory points and authorities showing that federal case law interpreting the Privacy Act is persuasive authority in interpreting parallel provisions of the Information Practices Act [*see § 185.20*]. Counsel should compare the analogous provisions of the Information Practices and the federal Privacy Act and note any differences in language when using the federal case law in this form as authority for an interpretation of the Information Practices Act.

If the action is against a federal agency, this form may also be used together with points and authorities supporting the contention that the agency improperly maintained information in its records describing plaintiff's exercise of *First Amendment* rights [*see § 185.32*]. If, in addition to seeking damages for violation of *5 U.S.C.S. § 552a(e)* or *Civ. Code §§ 1798.14, 1798.15, 1798.18*, counsel is seeking amendment, alteration, or deletion of the improperly maintained records pursuant to *5 U.S.C.S. § 552a(d)(2), (3)* or *Civ. Code §§ 1798.35-1798.37*, this form may be used in combination with points and authorities supporting the contention that plaintiff is entitled to such amendment, alteration, or deletion [*see § 185.33*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. The argument should show that in maintaining the records defendant committed one of the violations of *5 U.S.C.S. § 552a(e)* or *Civ. Code §§ 1798.14, 1798.15, 1798.18*, set out in the alternatives for Paragraph B. If the action is against a federal agency, the argument should show that defendant's conduct was willful and intentional [*see 5 U.S.C.S. § 552a(g)(4)* (requirements for damages); *see also Edison v. Department of Army (11th Cir. 1982) 672 F.2d 840, 843* (defendant's maintenance must be unreasonable)]. If defendant violated *5 U.S.C.S. § 552a(e)(5)* or *Civ. Code § 1798.18* (records used in making determination), plaintiff should insert argument showing that an adverse determination against plaintiff actually resulted proximally from defendant's improper maintenance of the records [*see 5 U.S.C.S. § 552a(g)(1)(C)*; *Civ. Code § 1798.45(b)* (requirements for civil action); *Edison v. Department of the Army (11th Cir. 1982) 672 F.2d 840, 845* (adverse determination must be proximate result of violation)]. Whether or not defendant violated *5 U.S.C.S. § 552a(e)(5)*, counsel should insert argument showing some adverse effect as a result of defendant's conduct [*see 5 U.S.C.S. § 552a(g)(1)(D)*; *Civ. Code § 1798.45(c)* (requirements for civil action)].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of defendant's improper maintenance of its records. These points and authorities may also be adapted for use in a trial or appellate brief.

[3] Discussion of Authorities

[a] Damages for Improper Maintenance

Civ. Code § 1798.48 (damages for Information Practices Act violations) differs from *5 U.S.C.S. § 552(g)(4)* (damages for Privacy Act violations) on several points. Unlike 5 U.S.C.S. § 552a(g)(4), Civ. Code § 1798.48 does not set a minimum amount of damages to which a successful plaintiff is entitled. However, *Civ. Code § 1798.48* explicitly provides for damages for mental suffering, while federal case law interpreting *5 U.S.C.S. § 552a(g)(4)* is in disagreement over whether nonpecuniary damages such as damages for mental suffering may be recovered under the Privacy Act, although the Ninth Circuit is of the opinion that such damages may be recovered [*compare Cooper v.*

F.A.A., 596 F.3d 538, 549 (9th Cir. 2010) with [*Fitzpatrick v. Internal Revenue Service (6th Cir. 1982) 665 F.2d 327, 331*]. Finally, *Civ. Code § 1798.48* contains no requirement that the agency acted in an intentional and willful manner, as does *5 U.S.C.S. § 552a(g)(4)*.

[b] Information Must Be Relevant to Published Use

In ***Chapman v. National Aeronautics & Space Admin.*** *(5th Cir. 1982) 682 F.2d 526* , defendant federal agency terminated plaintiff from employment, relying on certain private notes made by plaintiff's supervisor, which reflected a negative evaluation of plaintiff's job performance. The notes were subsequently entered into plaintiff's administrative record, but their existence was not disclosed to plaintiff at the time when they were made. Periodic performance evaluations that were a normal part of plaintiff's record did not reflect the criticisms contained in the notes. Plaintiff filed an action against defendant agency, charging that defendant's use of the private notes violated the Privacy Act (*5 U.S.C.S. § 552a*). The district court denied relief on the Privacy Act claims, and plaintiff appealed.

The appellate court affirmed in part, but reversed with respect to the Privacy Act claim, and remanded the case for further consideration. The court stated that under *5 U.S.C.S. § 552a(e)(4)(C), (D),* and *(I)* (required publication of nature of and uses of records by agency) the fact that private notes about individual members of the agency would be maintained and used to contradict periodic public evaluations would have to be regularly published in the Federal Register. Without such publication, the court held, use of the notes was barred by *5 U.S.C.S. § 552a(e)(1),* that provides that only information relevant and necessary to a published agency purpose may be maintained (*682 F.2d 526, 530)* .

[c] Maintenance of Information in Private Notes Is Improper

The facts and procedural background of ***Chapman v. National Aeronautics & Space Admin.*** *(5th Cir. 1982) 682 F.2d 526* , are discussed in *§ 185.31[3][b]*. The information in question consisted of private notes on plaintiff's job performance made by plaintiff's supervisor, which were used by defendant agency in terminating plaintiff's employment with defendant. Existence of the notes was not disclosed to plaintiff at the time when they were made, and the notes were not included in plaintiff's administrative record until some 22 months later, shortly before plaintiff was notified of termination proceedings against him.

In reversing the district court's denial of relief under the Privacy Act, the court of appeal stated that when notes taken privately by an agency supervisor bear negatively on the employee's employment status or situation, they must be used in a manner consistent with the letter and spirit of the Privacy Act (*682 F.2d 526, 528-529)* . The court stated that the Privacy Act enables an individual to prevent records obtained by an agency for a particular purpose from being used for any other purpose, and that in order to give this right meaning, the Act grants the individual access to pertinent information in the agency's system of records (*682 F.2d 526, 528)* . Since the notes were not included in plaintiff's record until 22 months after they were made, the court stated that it could not accept the district court's conclusion that plaintiff had had an opportunity to refute or correct the evidence on which the agency relied in ordering plaintiff's removal. The court noted that if plaintiff had been apprised at the time when the notes were made that his work performance was considered unsatisfactory and that notes containing specific details to support that evaluation were being compiled, he would have had an opportunity to produce a refutation or to provoke a review and resolution of the impending difficulty when the memories of all parties were still fresher and more acute. The court held that absent actual notice or some reference to the existence of contents of the notes in plaintiff's file, it could not be said that the records were fairly or properly maintained. Under *5 U.S.C.S. § 552a(e)(5),* the court held, use of the personal notes lacked, at the very minimum, the timeliness of incorporation into the agency's records necessary in order to insure fairness (*682 F.2d 526, 529)* . The court concluded that private notes made by supervisors must remain private, serving only to refresh the memory of the maker, unless they are incorporated into the records at the time of he next evaluation or report on the employee's work status or performance.

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18-185 California Points & Authorities § 185.32

§ 185.32 Improper Maintenance of Records--Collection and Maintenance of Information Describing Exercise of First Amendment Rights [5 U.S.C.S. § 552a(e)(7)]

[1] FORM Improper Maintenance of Records--Collection and Maintenance of Information Describing Exercise of First Amendment Rights [5 U.S.C.S. § 552a(e)(7)]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with the general points and authorities in § 185.21. It should also be combined with points and authorities supporting the contention that the plaintiff is entitled to damages for the defendant's improper maintenance of records (see § 185.31), points and authorities supporting the contention that the plaintiff is entitled to have the information in question amended or deleted (see § 185.33), or both.*]

THE DEFENDANT AGENCY IS MAINTAINING INFORMATION IN ITS RECORDS DESCRIBING PLAINTIFF'S ACTIVITIES IN THE EXERCISE OF HIS/HER RIGHTS GUARANTEED BY THE *FIRST AMENDMENT*, IN VIOLATION OF *5 U.S.C.S. § 552a(e)(7).*

A. Maintenance of Information on *First Amendment* Activities Prohibited. An agency that maintains a system of records shall maintain no record describing how any individual exercises rights guaranteed by the *First Amendment* unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity (*see 5 U.S.C.S. § 552a(e)(7)*).

[*Optional*] **B. Detrimental Effect on Plaintiff.** Allegation of a system of independently unlawful intrusions, accumulation and dissemination of inaccurate information, damage to reputation and business are sufficient to establish that defendant's conduct had a detrimental effect on the plaintiff, so that a civil action regarding violation of *5 U.S.C.S. § 552a(e)(7)* may be maintained (*Jabara v. Kelley (E.D. Mich. 1979) 476 F. Supp. 561, 568, 580 , rev'd on other grounds, Jabara v. Webster (6th Cir. 1982) 691 F.2d 272, 280)* .

[*Optional*] **C. Record Need Not Be Retrievable by Subject's Name.** *5 U.S.C.S. § 552a(e)(7)* prohibits maintenance of records describing an individual's exercise of *First Amendment* rights even if the record is not part of a system of records from which the record is retrievable by the name or other identifying characteristic of the individual involved (

Albright v. United States (D.C. Cir. 1980) 631 F.2d 915, 918-919) .

[*Optional*] **D. Public Employee's Grievance.** Expression of disagreement with and complaining about an employer's policy decisions fall within the *First Amendment* rights of public employees (*Albright v. United States (D.C. Cir. 1980) 631 F.2d 915, 920-921)* .

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that defendant agency is violating *5 U.S.C.S. § 552a(e)(7)* by maintaining records that describe how plaintiff exercises his or her *First Amendment* rights. This form should be used in combination with introductory points and authorities showing that plaintiff, defendant, and the information in question are covered by the Privacy Act [*see § 185.21*] and in combination with points and authorities supporting the contention that defendant improperly maintained records concerning plaintiff [*see 5 U.S.C.S. § 552a(e)(1), (5), (6), (g)(1)(C)*; § 185.31]. This form may also be used in combination with a form of points authorities supporting the contention that plaintiff is entitled to an amendment, or deletion of the records in question [*see 5 U.S.C.S. § 552a(d)(3), (4), (g)(1)(A), (2)*; § 185.33].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the point that defendant is improperly maintaining records on plaintiff's *First Amendment* activities. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. The argument should show that plaintiff's activities about which defendant is maintaining records are protected by the *First Amendment*.

[b] No State Action

California's Information Practices Act (*Civ. Code §§ 1798-1798.78*) does not contain any provision comparable to *5 U.S.C.S. § 552a(e)(7)*. Thus, these points and authorities cannot be adapted for use in a state action.

[3] Discussion of Authorities

[a] Detrimental Effect on Plaintiff

Jabara v. Kelley *(E.D. Mich. 1979) 476 F. Supp. 561 rev'd on other grounds, Jabara v. Webster (6th Cir. 1982) 691 F.2d 272, 280* , was an action challenging various practices of federal law enforcement agencies in conducting an investigation of plaintiff, including the monitoring of and maintenance of records on the contents of various political speeches given by plaintiff. The plaintiff alleged violations of constitutional rights and of *5 U.S.C.S. § 552a(e)(7)*. The plaintiff alleged that defendants' conduct had resulted in his fearing to express his own political views, injury to plaintiff's reputation and law practice, deterrence of others from associating with plaintiff, and accumulation of false and misleading reports concerning plaintiff that were disseminated among federal agencies and foreign governments.

The court held that these allegations, including the allegations regarding the falsity of the information contained in defendants' files, stated sufficient harm to permit plaintiff to maintain an action under *5 U.S.C.S. § 552a(g)(1)* (civil action for violation of Privacy Act which had adverse effect on plaintiff). In reaching its holding, the court cited with approval an excerpt from the Senate Report accompanying an earlier version of the Privacy Act. The report, discussing the standard for standing to sue that was the predecessor of the current detrimental effect requirement set out in *5 U.S.C.S. § 552a(g)(1)(D)*, stated that the standard was intended to afford the widest possible standing consistent with the constitutional requirement of "case or controversy." The report also indicated that the provisions concerning

standing were designed to compensate for certain deficiencies in standing and ripeness found by the courts in earlier cases [*see, e.g., Laird v. Tatum (1972) 408 U.S. 1, 92 S. Ct. 2318, 33 L. Ed. 2d 154* (restricted scope of standing for actions directly under *First Amendment*)] (*476 F. Supp. 561, 580)* .

The court also held that plaintiff's allegations were sufficient to establish standing to sue directly for violation of *First Amendment* rights (*476 F. Supp. 561, 568)* .

[b] Record Need Not Be Retrievable by Subject's Name

In ***Albright v. United States*** *(D.C. Cir. 1980) 631 F.2d 915* , plaintiffs, who were employees of defendant agency, participated in a meeting with one of the agency officers to discuss a personnel policy that had resulted in plaintiffs being denied promotion. The meeting, which had included a heated exchange between plaintiffs and the officer, was recorded on videotape without the knowledge of plaintiffs or the officer. The agency stored the videotape in a sealed envelope. Plaintiffs brought an action for declaratory, monetary, and injunctive relief, alleging violation of the Constitution and of the *5 U.S.C.S. § 552a(e)(7)* prohibition of maintaining records about an individual's exercise of *First Amendment* rights. The district court ruled that plaintiffs had failed to state a cause of action with respect to the alleged privacy act violations and the plaintiffs appealed.

The court of appeal reversed the district court's ruling and remanded the case. The court noted the district court's finding that the videotape was never intended by defendant agency to be incorporated into a system of records where it would be indexed according to the names or other identifying characteristics of any of plaintiffs [*see 5 U.S.C.S. § 552a(a)(5)* (defining "system of records" as system from which records can be retrieved by subject's name or identifying characteristic)]. The court held that the prohibition of maintenance of records describing *First Amendment* activities set out in *5 U.S.C.S. § 552a(e)(7)* was not limited to records that were or were intended to be incorporated into systems of records in which the records are retrievable by the names or identifying characteristics of the individuals whose activities were described in the records (*631 F.2d 915, 918)* . In support of its holding, the court noted that the Privacy Act defines the term "maintain" to include "collect, use or disseminate" [*see 5 U.S.C.S. § 552a(a)(3)*]. In view of this definition, the court stated that *5 U.S.C.S. § 552a(e)(7)* includes a prohibition of collection of information on *First Amendment* activities in addition to a prohibition of maintenance, use, or dissemination of such information, and that this prohibition of mere collection of information is independent of the maintenance, use, or dissemination of the information thereafter. Thus, the court concluded that the prohibition set out in *5 U.S.C.S. § 552a(e)(7)* is not limited to collection of information describing *First Amendment* activities when the information was intended to be incorporated into a system of records after collection (*631 F.2d 915, 918)* . The court further stated that its reading of *5 U.S.C.S. § 552a(e)(7)* is consistent with what the court perceived to be the intent of Congress, in light of the special and sensitive treatment accorded *First Amendment* rights under the interpretive case law, the special concern shown in the legislative history of the Privacy Act of 1974 over the unwarranted collection of information as a separate harm in itself, and the danger that government inquiry into an individual's *First Amendment* activities may invade the penumbra that is accorded privacy protection by the Constitution (*631 F.2d 915, 918-919)* .

The court distinguished the case before it from an unreported case, Denson v. Alexander (N.D. Ala. 1977), which had held that the Privacy Act provisions entitling an individual to access to and amendment of records does not apply to records not maintained within a system of records when they were retrievable by the individual's name or identifying characteristic, on the ground that the Privacy Act provisions dealt with in *Denson* covered information properly in the possession of the agency, and not with a prohibition of collection of certain information (*631 F.2d 915, 920)* .

[c] Public Employee's Grievance

The facts and procedural background of ***Albright v. United States*** *(D.C. Cir. 1980) 631 F.2d 915* , are discussed in *§ 185.32[3][b]*. The court of appeal held that an expression of disagreement with and complaining about an employer's policy decisions fall within the *First Amendment* rights of public employees (*631 F.2d 915, 920-921)* .

[4] Additional Authorities

[a] Record Need Not Be Retrievable by Subject's Name

In *Clarkson v. Internal Revenue Serv. (11th Cir. 1982) 678 F.2d 1368* , plaintiff brought suit against defendant agency alleging that defendant agency had maintained files on certain activities of plaintiff protesting against defendant agency in violation of *5 U.S.C.S. § 552a(e)(7)* (prohibition of maintenance of information on *First Amendment* activities), and other subsections of *5 U.S.C.S. § 552a(e)*. Defendant agency asserted that the files in question were not incorporated in a system of records, as defined in *5 U.S.C.S. § 552a(a)(5)*, from which information could be retrieved by plaintiff's name or some other indicator by which plaintiff could be identified. The court of appeal held that the prohibition on federal agency maintenance of records describing *First Amendment* activities set out in *5 U.S.C.S. § 552a(e)(7)* was not limited to records contained within systems of records (*678 F.2d 1368, 1376-1377)* .

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18-185 California Points & Authorities § 185.33

§ 185.33 Amendment of Record at Subject's Request or Inclusion of Subject's Statement of Disagreement With Record [5 U.S.C.S. § 552a(d)(2)-(4) or Civ. Code §§ 1798.35-1798.37]

[1] FORM Amendment of Record at Subject's Request or Inclusion of Subject's Statement of Disagreement With Record [5 U.S.C.S. § 552a(d)(2)-(4) or Civ. Code §§ 1798.35-1798.37]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with the general points and authorities in § 185.21. If the action is under state law, it should also be combined with the points and authorities on use of federal authority in a state action in § 185.20.*]

THE COURT SHOULD ORDER DEFENDANT TO AMEND ITS RECORDS CONCERNING PLAINTIFF AS PLAINTIFF HAS REQUESTED [OR TO INCLUDE PLAINTIFF'S STATEMENT OF DISAGREEMENT WITH THE RECORDS WITHIN THE RECORDS IN QUESTION] BECAUSE PLAINTIFF IS ENTITLED TO SUCH AMENDMENT [OR INCLUSION OF A STATEMENT] UNDER THE _____ [PRIVACY ACT OF 1974] *or* [INFORMATION PRACTICES ACT OF 1977].

[*EITHER, if action is against federal agency*]

A. Request for Amendment of Record. Each agency that maintains a system of records must permit an individual to request amendment of a record pertaining to him or her, provide procedures for determining whether or not to make the requested amendment, including provisions for administrative review of a decision not to make the requested amendment, and, in case of a decision not to amend, in any dissemination of the record, clearly indicate the disputed portion of the records and include a concise statement of disagreement by the affected individual if the individual files such a statement (*see 5 U.S.C.S. § 552a(d)(2)-(4)*).

B. Jurisdiction. Whenever any agency makes a determination not to amend a record in accordance with the request of the individual to whom the record pertains or fails to make a review of the request as required by *5 U.S.C.S. § 552a(d)(3)*, the individual may bring a civil action against the agency in the federal district court (*5 U.S.C.S. § 552a(g)(1)(A)*).

C. Amendment by Order of Court. In any civil action brought against an agency for refusal to amend an individual's record at the individual's request, the court may order the agency to amend the individual's record in accordance with the individual's request or in such other way as the court may direct (*5 U.S.C.S. § 552a(g)(2)(A)*).

D. De Novo Determination by Court. In any civil action against an agency for refusal to amend a record at the individual's request, the court shall determine the matter de novo (*5 U.S.C.S. § 552a(g)(2)(A)*).

[*OR, if action is against state or local agency*]

A. Request for Amendment of Record. Each agency must permit an individual to request in writing an amendment of a record and shall within 30 days of receipt of such request make each correction in accordance with the individual's request, of any portion of a record that the individual believes is not accurate, relevant, timely, or complete, and inform the individual of the corrections made; or inform the individual of its reason for refusing to amend the record, and provide the individual with an opportunity to request review of the refusal. If, after review, the agency makes a final determination not to make the requested amendment, the agency shall permit the individual to file with the record a statement of disagreement and shall on any subsequent disclosure clearly note the disputed portion of the record, and make available to any receiving party both the individual's statement of disagreement and its own statement of its reasons for refusing to make the amendment (*see Civ. Code §§ 1798.35-1798.37*).

B. Relief by Writ of Mandate for Abuse of Discretion. A writ of mandate issued pursuant to *Code Civ. Proc. §§ 1085, 1086* is proper to control abuse of discretion by an administrative agency (*Manjares v. Newton (1966) 64 Cal. 2d 365, 370, 49 Cal. Rptr. 805, 411 P.2d 901* ; *see Code Civ. Proc. §§ 1085, 1086*).

C. Injunction Against Agency. Any agency that fails to comply with any provision of the Information Practices Act of 1977 (*Civ. Code §§ 1798-1798.78*) may be enjoined by any court of competent jurisdiction. The court may make such judgment or order as is necessary to prevent the use of or employment by an agency of any practices that violate the Information Practices Act of 1977. Actions for injunction may be brought by any individual acting in his or her own behalf (*Civ. Code § 1798.47*).

[*CONTINUE*]

E. Amendment Is Proper Remedy for Improperly Maintained Records. Although an agency is not required to amend its records merely because an individual requests it, an agency may be compelled to amend records used as a basis of a determination concerning the affected individual, including information that is not maintained with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in making the determination (*see Savarese v. United States Dep't of Health, Educ. & Welfare (N.D. Ga. 1979) 479 F. Supp. 304, 306-307 , aff'd, (5th Cir. 1980) 620 F.2d 298*). The provisions of the Privacy Act interpreted by *Savarese* are comparable to analogous provisions of the Information Practices Act (*compare 5 U.S.C.S. § 552a(d)(2), (3)* (amendment), (e)(5) (improper maintenance) *with Civ. Code §§ 1798.18* (improper maintenance), 1798.35-1798.37 (amendment).

[*Add additional points and authorities, if appropriate, showing that defendant improperly maintained the records in question. See § 185.31.*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that defendant agency should be ordered, pursuant to *5 U.S.C.S. § 552a(g)(1)(A), (2), Civ. Code § 1798.47*, or *Code Civ. Proc. § 1085* to amend its records concerning plaintiff in accordance with plaintiff's request for amendment pursuant to *5 U.S.C.S. § 552a(d)(2)* or *Civ. Code § 1798.35*, or to include within the records plaintiff's statement of disagreement with the information, as required by *5 U.S.C.S. § 552a(d)(3), (4)* or *Civ. Code §§ 1798.36, 1798.37*. Counsel should use the first alternative Paragraphs A through D in an action against federal agencies and use the second alternative Paragraphs A through C in an action against a state or local agency. If optional Paragraph E is used in a state action, it should include the optional language comparing the pertinent state and federal provisions.

These points and authorities should be used in combination with introductory points and authorities showing that plaintiff, defendant, and the information in question are covered by the Privacy Act or Information Practices Act [*see § 185.21*]. If the action is a state action under the Information Practices Act, and counsel is using a paragraph of the form that includes federal case law, this form should be used in combination with introductory points and authorities showing that federal case law interpreting the Privacy Act is persuasive authority in interpreting parallel provisions of the Information Practices Act [*see § 185.20*]. Counsel should compare the analogous provisions of the Information Practices and the federal Privacy Acts and note any differences in language when using the federal case law in this form as authority for an interpretation of the Information Practices Act [*see § 185.33[3][a]*].

This form may be used in connection with points and authorities supporting the contention that defendant agency has not properly maintained information in its records concerning plaintiff in accordance with *5 U.S.C.S. § 552a(e)(1), (5), (6)* or *Civ. Code §§ 1798.14, 1798.15, 1798.18* [*see § 185.31*]. If the action is against a federal agency and the facts of the case warrant it, this form may also be used in connection with points and authorities supporting the contention that defendant agency is maintaining information describing activities in which plaintiff was exercising *First Amendment* rights, in violation of *5 U.S.C.S. § 552a(e)(7)* [*see § 185.32*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. The argument should show that defendant has refused plaintiff's request to amend the record and has given no reason for such refusal or has given reasons that do not justify defendant's refusal. The argument should also show that the information is not accurate, relevant, timely, or complete and that there is no justifiable reason for defendant's refusal to amend or delete the information. If the action is for a writ of mandate under *Code Civ. Proc. § 1086* against a state agency, the argument should show that defendant's refusal constituted an abuse of discretion. For statutory provisions setting out specific requirements for proper maintenance of certain types of information, see *5 U.S.C.S. § 552a(e)(1), (2), (5), (6), (7)* and *Civ. Code §§ 1798.14, 1798.15, 1798.18*. If defendant has refused to include plaintiff's statement of disagreement in the record, counsel should also include argument showing that if the court does not order amendment or deletion, it should order inclusion of plaintiff's statement of disagreement.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that defendant should be ordered to amend agency records concerning him or her or to include a statement of disagreement in the record. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Use of Information in Official Determination Is Guiding Standard

The present accuracy of information in records of which an amendment has been requested must be considered in terms of the manner in which the information is being used by the agency to make decisions affecting the individual. Thus, a press release that was accurate and relevant to the agency's activities when made, need not be altered at a later date if it is not being used by the agency as the basis of any decision [*Zeller v. United States (E.D. N.Y. 1979) 467 F. Supp. 487, 502-503]* .

[c] Record Must Be Retrievable by Requester's Name or Indentifier

Pursuant to *5 U.S.C.S. § 552a(a)(5), (d)(2),* records that are not retrievable under the requester's name or other personal identifier are not accessible to that requester, and Privacy Act remedies of amendment and expungement are inapplicable to a report that is not accessible under the Act [*see 5 U.S.C.S. § 552a(a)(5)* (record must be retrievable by name or identifier), (d)(2) (access permitted from agency maintaining "system of records"; *see also Civ. Code § 1798.34* (records must be maintained by reference to identifying particular assigned to individual)]. In *Baker v. Department of Navy (9th Cir. 1987) 814 F.2d 1381* , the federal court of appeals held that an amendment to a record that is inaccessible under the Privacy Act cannot be made even if the record is otherwise accessible (for example, under the Freedom of Information Act (*5 U.S.C.S. § 552*). The federal statutes that grant access to records (*5 U.S.C.S. § 552a(d)(1)*), permit requests for amendment (*5 U.S.C.S. § 552a(d)(2)*), and require that records used in making determinations about individuals are maintained in a reasonably accurate and complete manner (*5 U.S.C.S. § 552a(e)(5)*), all apply to an agency that "maintains a system of records." The statutory language therefore suggests that the scope of accessibility and the scope of amendment are coextensive [*Baker v. Department of Navy (9th Cir. 1987) 814 F.2d 1381, 1383-1385]* .

[3] Discussion of Authorities

[a] Relief by Writ of Mandate for Abuse of Discretion

In ***Manjares v. Newton*** *(1966) 64 Cal. 2d 365, 49 Cal. Rptr. 805, 411 P.2d 901* , plaintiff parents sued defendant school district after defendant discontinued school bus transportation for their children. The trial court treated the complaint as one sounding in mandate, and granted a peremptory writ of mandate commanding defendant to provide the school bus transportation. Defendant appealed and the Supreme Court upheld the trial court's decision.

The court noted defendants' argument that under applicable law, defendants had discretion to determine whether transportation should be provided and that there was therefore neither a right by plaintiffs to such transportation nor a duty on defendants' part to provide it, as is required by *Code Civ. Proc. § 1085* for issuance of a writ of mandate. The court stated that defendant was, in effect, claiming that whenever an administrative body has been granted discretionary powers, the manner in which it exercises that discretion is beyond judicial review and concluded that this argument is clearly untenable. The court stated that the principle that mandate will lie whenever an administrative board has abused its discretion is a rule so well established as to be beyond question (*64 Cal. 2d 365, 370)* . On the facts of the case, the court upheld the trial court's conclusion that the reasons given by defendant for its action did not reasonably justify the action. The court held that defendant's action was unjustified in view of the fact it caused eight children to be denied the opportunity to attend school (*64 Cal. 2d 365, 373-374)* .

NOTE:

Unlike the Privacy Act (*5 U.S.C.S. § 552a*), the Information Practices Act (*Civ. Code §§ 1798-1798.78*) does not specifically provide for a civil action for refusal to amend a record pursuant to request, nor does it provide specifically for amendment by court order. Moreover, since *Civ. Code §§ 1798.35-1798.37* (right to request amendment) only require an agency to receive and respond to a request for an amendment, and to review a refusal to grant the request, but do not actually specify circumstances under which an agency would be required to grant such a request, it is not clear whether the general provisions of *Civ. Code §§ 1798.45(c)* (civil action for violations of Information Practices Act) and 1798.47 (injunction in case of failure to comply with Information Practices Act) [*see § 185.33[3][b]*] are sufficient by themselves to authorize a court to grant a request for amendment when the agency has refused to grant the request [*see Civ. Code §§ 1798.45(c), 1798.47*]. It might be argued, however, that the discretion granted an agency to determine whether or not to grant a request would be subject to mandamus review just as was the discretion of the defendant board in *Manjares*.

[b] Injunction Against Agency

It is not clear whether the general injunction provisions of Civ. Code § 1789.47 are by themselves sufficient to authorize a court to order amendment of records when the agency has refused to make such amendment [*see § 185.33[3][a]*]. It appears, however, that the court could order an amendment of records as requested by plaintiff on the authority of *Civ. Code § 1798.47* when the information in question violates *Civ. Code §§ 1798.14, 1798.15, 1798.18* (requirements regarding maintenance of information) or another provision of the Information Practices Act [*see Savarese v. United States Dep't of Health, Educ. & Welfare (N.D. Ga. 1979) 479 F. Supp. 304, 306 , aff'd, (5th Cir. 1980) 620 F.2d 298* (order of amendment is appropriate remedy for improper maintenance of records under federal law)]. For a discussion of the Information Practice Act's requirements regarding maintenance of information, see *§ 185.31*. It also appears that the courts are empowered to provide injunctive relief under Civ. Code § 1789.47 if the agency has violated any of the requirements regarding consideration and review of the request for amendment and inclusion of materials in the record in case of refusal, which are set out in *Civ. Code §§ 1798.35, 1798.36* (right to amendment or inclusion of statements of disagreement).

[c] Amendment Is Proper Remedy for Improper Maintenance of Records

Savarese v. United States Dep't of Health, Educ. & Welfare *(N.D. Ga. 1979) 479 F. Supp. 304 , aff'd, (5th Cir. 1980) 620 F.2d 298* , was an action brought by a former federal employee, charging that certain information used as a basis for terminating his federal employment was defective under the Privacy Act. In the action, plaintiff sought to have the district court order defendant agency to amend the allegedly defective portions of the agency's records on plaintiff. The district court granted summary judgment for defendant as to plaintiff's cause of action for maintenance of defective information and failure to amend, and plaintiff appealed.

The court of appeal reversed the district court's order granting summary judgment. The court stated that under *5 U.S.C.S. § 552a(d)(2)* (subject's right to request amendment of records) the agency is not required to either remove information from or to place information into its records simply because the subject of the information requests such action. The court noted, however, that the agency is bound by the requirement set out in *5 U.S.C.S. § 552a(e)(5)* to maintain records relied on in making a determination about an individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination (*479 F. Supp. 304, 306)* . The court cited prior authority stating that under *5 U.S.C.S. § 552a(e)(5)*, once the agency had done what is reasonable in assuring the accuracy of the records, no more is required (*479 F. Supp. 304, 306)* . Under the facts before it, however, the court held that there was a factual dispute, not only as to whether the information concerning plaintiff in defendant's files was true, but also as to whether the agency's determination was reasonably made so as to assure fairness to plaintiff (*479 F. Supp. 304, 306-307)* . The court noted that factual issues concerning reasonableness are not easily disposed of in summary judgment (*479 F. Supp. 304, 307)* .

NOTE:

Although the Privacy Act differs significantly from the Information Practices Act in that the latter act does not contain any provisions comparable to *5 U.S.C.S. § 552a(g)(1)(A), (2)(A)*, which provide for a civil action and court order for amendment when a federal agency has refused to make the amendment itself, *Savarese* did not rely on *5 U.S.C.S. § 552a(g)(1)(A), (2)(A)* in making its holding. Rather, the *Savarese* court relied on *5 U.S.C.S. § 552a(d)(2)* (amendment), and *5 U.S.C.S. § 552a(e)(5)* (improper maintenance), which are comparable to *Civ. Code §§ 1798.18* (improper maintenance), 1798.35, 1798.36 (amendment). Thus, it appears *Savarese* may be persuasive authority in interpreting these Information Practice Act provisions.

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§ 185.34 Supporting Contention That Individual Agency Employee May Not Be Held Liable for Violating Privacy Act of 1974 (5 U.S.C.S. § 552a) or Information Practices Act (Civ. Code §§ 1798-1798.78) [5 U.S.C.S. § 552a(g); Civ. Code §§ 1798.45-1798.53]

[1] FORM Supporting Contention That Individual Agency Employee May Not Be Held Liable for Violating Privacy Act of 1974 (5 U.S.C.S. § 552a) or Information Practices Act (Civ. Code §§ 1798-1798.78) [5 U.S.C.S. § 552a(g); Civ. Code §§ 1798.45-1798.53]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. If the action is under state law, the following should also be combined with the points and authorities on use of federal authority in a state action in § 185.20.*]

PLAINTIFF HAS NOT STATED A CAUSE OF ACTION AGAINST DEFENDANT _____ [*name of individual*] UNDER THE _____ [PRIVACY ACT OF 1974 *or* INFORMATION PRACTICES ACT] BECAUSE THAT ACT DOES NOT PROVIDE FOR AN ACTION AGAINST INDIVIDUALS.

No Action Against Individuals. The Privacy Act (*5 U.S.C.S. § 552a*) provides for civil remedies only against federal agencies and not against individuals (*Bruce v. United States (8th Cir. 1980) 621 F.2d 914, 916 n.2*). The remedies provisions of the Privacy Act of 1974 are comparable to the remedies provisions of the Information Practices of 1977 as they apply to the defendant (*compare 5 U.S.C.S. § 552a(g) with Civ. Code §§ 1798.45-1798.53*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that an individual officer or employee of a federal agency may be held liable for violation of the Privacy Act or that an agency employee may not be held liable for violation of the Information Practices Act. If the action is a state action, the optional language comparing pertinent federal and state provisions should be used. This may be used in a demurrer or in any other procedural context in which plaintiff contends that the individual defendant may be held liable for an alleged violation of the Privacy Act or Information Practices Act.

If the action is a state action under the Information Practices Act, and counsel is using a paragraph of the form that includes federal case law, this form should be used in combination with introductory points and authorities showing that federal case law interpreting the Privacy Act is persuasive authority in interpreting parallel provisions of the Information Practices Act [*see § 185.20*]. Counsel should compare the analogous provisions of the Information Practices and the federal Privacy Act and note any differences in language when using the federal case law in this form as authority for an interpretation of the Information Practices Act. Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the lack of a cause of action against an individual defendant under the Privacy Act. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Individual Officer May Be Named in Injunction Action

One district court has declined to dismiss the individual head of defendant agency as a defendant being sued in his official capacity as custodian of the records in question and head of the agency from an action for disclosure and amendment of records under the Privacy Act [*Nemetz v. Department of Treasury (N.D. Ill. 1978) 446 F. Supp. 102, 106]* . The court in *Nemetz* stated that the agency head had been named as a defendant because he is the individual responsible for the policy and decisions of defendant agency, and the final authority for administrating the Privacy Act within the department. The court concluded that it saw no reason for dismissing individual defendant from the action, and stated that it would follow earlier cases that have sustained cases against heads of agencies under the Privacy Act [*Nemetz v. Department of Treasury (N.D. Ill. 1978) 446 F. Supp. 102, 106]* . Although the court in *Nemetz* did not specifically refer to this point, actions for disclosure and actions for amendment of records under the Privacy Act are both ordinarily actions for injunctive relief [*see 5 U.S.C.S. § 552a(g)(1)(A), (B)(2), (3)*]. *5 U.S.C.S. § 702*, which provides generally for judicial review of any agency action adversely affecting an individual within the meaning of those terms in a relevant statute, requires that any mandatory or injunctive decree specify the federal officers personally responsible for compliance, and their successors in office, by name and title.

[c] Limited Use in State Action

The Information Practices Act (*Civ. Code §§ 1798-1798.78*) includes the term "officers" within its definition of the term "agency" [*see Civ. Code § 1798.3(b)*]. Since the civil remedies provisions of the Information Practices Act all speak in terms of actions against "agencies," it appears that these provisions also authorize actions against officers of agencies [*see Civ. Code §§ 1798.45-1798.53* (remedies)]. Moreover, California law expressly provides that a private person, other than an agency employee acting solely in his or her official capacity, who unlawfully discloses information concerning an individual from state or local records is subject to a civil action [*see Civ. Code § 1798.53*]. Thus, this form of points and authorities would appear to be effective under California law only if defendant is an employee rather than an officer of the agency and, in case of an action for improper disclosure, if defendant was acting solely in his or her official capacity in making or participating in the disclosure.

[3] Discussion of Authorities

[a] No Action Against Individuals

In ***Bruce v. United States*** *(8th Cir. 1980) 621 F.2d 914* , plaintiff brought an action against the United States, defendant federal agency, and the individual defendant, an officer of defendant agency, for the allegedly illegal release of plaintiff's military personnel and medical records to the state court in which plaintiff had been tried and convicted of murder. The district court dismissed the action for lack of subject matter jurisdiction and failure to state a cause of action.

The court of appeal affirmed the dismissal. With respect to the individual defendant, the court emphasized that the Privacy Act provides for civil remedies only against agencies, not against individuals. Accordingly, the court stated that the individual defendant was not a proper defendant in a civil action for damages under the Act (*621 F.2d 914, 916 n.2*).

[4] Additional Authorities

[a] No Action Against Individuals

In *Gonzalez v. Leonard (D. Conn. 1980) 497 F. Supp. 1058* , plaintiffs filed a complaint stating various causes of action, including violation of the Privacy Act of 1974 (*5 U.S.C.S. § 552a*) against several state and federal officials for damages allegedly caused by a telex message disseminated to various law enforcement agencies falsely accusing plaintiffs of plotting to commit murder. With respect to the Privacy Act allegations, the district court stated that *5 U.S.C.S. § 552a(g)(1)* provided for civil action against federal agencies by individuals aggrieved by a violation of the Privacy Act, and that the definition of the term "agency" set out in *5 U.S.C.S. § 552a(e)* did not include individual officers or employees of the agency (*497 F. Supp. 1058, 1075)* . The court concluded that although the federal agency, by which the individual defendants charged in the complaint with violations of the Privacy Act were employed, might be a proper party defendant in a case arising out of that agency's improper handling of records, the individual plaintiffs may not be sued under that statute (*497 F. Supp. 1058, 1076)* .

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18-185 California Points & Authorities § 185.35

§ 185.35 Supporting Contention That Private Medical Provider of Medi-Cal Services Is Not Government Agency Subject to Information Practices Act

[1] FORM Supporting Contention That Private Medical Provider of Medi-Cal Services Is Not Government Agency Subject to Information Practices Act

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE INFORMATION PRACTICES ACT IS INAPPLICABLE TO MEDICAL INFORMATION MAINTAINED BY A PRIVATE MEDICAL FACILITY, WHICH IS NOT A GOVERNMENT AGENCY FOR PURPOSES OF THE ACT EVEN IF THE FACILITY PARTICIPATES IN THE STATE MEDI-CAL PROGRAM.

Private Medical Facility Not Government Agency. The Information Practices Act is inapplicable to medical information maintained by a private medical facility, which is not a government agency for purposes of the Act even if the facility participates in the state Medi-Cal program (*Jennifer M. v. Redwood Women's Health Ctr. (2001) 88 Cal. App. 4th 81, 92, 105 Cal. Rptr. 2d 544*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to the contention that a private medical facility may be liable under the Information Practices Act merely because the facility participates in the state-run Medi-Cal program. The grounds for the opposition are that the Information Practices Act only applies to government agencies and participation in the Medi-Cal program does not transform a private medical provider into a state agency.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the lack of a cause of action against a private medical provider under the Information Practices Act. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should include facts showing that the defendant is a private medical provider and not a government agency.

[3] Discussion of Authorities

[a] Private Medical Facility Not Government Agency

The plaintiff in ***Jennifer M. v. Redwood Women's Health Ctr.*** *(2001) 88 Cal. App. 4th 81, 105 Cal. Rptr. 2d 544* , who was not married, but suspected that she had become pregnant by her boyfriend, took a pregnancy test at a private medical clinic. Several days later, a rumor became public that the plaintiff was pregnant, prompting the plaintiff to complain to the clinic that her confidential medical information had been disclosed. The office manager at the clinic investigated the allegations, but came up with no information showing that any employee had revealed the information. The plaintiff then filed suit against the clinic, alleging public disclosure of private facts and a statutory action for breach of the Information Practices Act. The clinic moved for summary judgment or summary adjudication. The trial court granted summary adjudication on the statutory action under the Information Practices Act on the grounds that the clinic was not an "agency" under the terms of the Act and therefore not covered by its provisions. The plaintiff stipulated to dismissal with prejudice on the action for public disclosure of private facts and then appealed the trial court's decision on the statutory cause of action.

The court of appeal affirmed. The court rejected the plaintiff's argument that a private clinic could be subject to the provisions of the Information Practices Act merely on the basis of the clinic's contracts with the California Department of Health Services to provide medical services pursuant to the Medi-Cal program and its actual provision of Medi-Cal services to the plaintiff. The court concluded that the Information Practices Act was not intended to cover private entities such as the defendant. The court noted that, on its face, the Act is aimed at barring or limiting the dissemination of confidential personal information, and preventing the misuse of such information, by government agencies. However, the defendant, as a privately owned medical clinic, was clearly not a government agency or entity as defined by *Civ. Code § 1798.3(b)*. Although the plaintiff cited ten separate provisions of the Act that she argued could be used to support application of the Act to the defendant, all of the provisions dealt with information maintained by "agencies" and were thus inapplicable to an action against a private clinic (*88 Cal. App. 4th 81, 88-90)* . The plaintiff also argued that *Civ. Code § 1798.19* supported the conclusion that the Act applied to every contractor and any employee of any contractor that maintains personal records as part of a contract to accomplish agency functions. The court rejected this contention, however, concluding that *Civ. Code § 1798.19* deals only with the obligations of a government agency that contracts with a private agency for maintenance of the records of the government agency (*88 Cal. App. 4th 81, 90-91)* . The court also rejected the plaintiff's argument that application of the Act could be predicated on a state regulation requiring Medi-Cal providers to maintain medical records of Medi-Cal patients and make such records available to Medi-Cal representatives for inspection (*88 Cal. App. 4th 81, 91)* .

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§ 185.36 Improper Disposal of Customer Records [Civ. Code § 1798.81]--General Form

[1] FORM Improper Disposal of Customer Records [Civ. Code § 1798.81]--General Form

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF IS ENTITLED TO DAMAGES BECAUSE DEFENDANT HAS FAILED TO PROPERLY DISPOSE OF ITS RECORDS THAT CONTAINED PERSONAL INFORMATION ABOUT PLAINTIFF, IN VIOLATION OF *CIVIL CODE SECTION 1798.81*.

A. Duty of Business to Dispose of Customer Records. A business must take all reasonable steps to dispose or arrange for the disposal of a customer's records within its custody or control that contain personal information that is no longer to be retained by the business by (1) shredding, (2) erasing, or (3) otherwise modifying the personal information in those records to make it unreadable or undecipherable through any means (*Civ. Code § 1798.81*).

B. Businesses Covered by *Civil Code § 1798.81*. The term "business" means a sole proprietorship, partnership, corporation, association, or other group, however organized and whether or not organized to operate at a profit, including a financial institution organized, chartered, or holding a license or authorization certificate. The term includes an entity that destroys records (*Civ. Code § 1798.80(a)*).

C. Records Covered by *Civil Code § 1798.81*. The term "records" means any material, regardless of the physical form, on which information is recorded or preserved by any means, including in written or spoken words, graphically depicted, printed, or electromagnetically transmitted. The term records does not include publicly available directories containing information an individual has voluntarily consented to have publicly disseminated or listed, such as name, address, or telephone number (*Civ. Code § 1798.80(b)*).

D. Customers Covered by *Civil Code § 1798.81*. "Customer" means an individual who provides personal information to a business for the purpose of purchasing or leasing a product or obtaining a service from the business (*Civ. Code § 1798.80(c)*).

E. Personal Information Covered by *Civil Code § 1798.81*. "Personal information" means any information that identifies, relates to, describes, or is capable of being associated with, a particular individual, including, but not limited to, his or her name, signature, social security number, physical characteristics or description, address, telephone number, passport number, driver's license or state identification card number, insurance policy number, education, employment, employment history, or bank account number, credit card number, debit card number, or any other financial information, medical information, or health insurance information. Information that is lawfully made available to the general public from federal, state, or local government records is not protected under these provisions (*Civ. Code § 1798.80(e)*).

F. Civil Action to Recover Damages. Any customer injured by a violation of *Civil Code § 1798.81* may institute a civil action to recover damages (*Civ. Code § 1798.84(b)*).

[*Optional*] **G. Injunctive Relief.** Any business that fails to comply with the provisions set out in *Civ. Code § 1798.81* may be enjoined (*Civ. Code § 1798.84(e)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the plaintiff is entitled to damages because the defendant has failed to comply with the requirements for disposal of personal information set out in *Civ. Code § 1798.81*.

These points and authorities may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue that the defendant's violation of *Civ. Code § 1798.81* entitles the plaintiff to damages. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include facts showing that the defendant did not take all reasonable steps to dispose or arrange for the disposal of records by shredding, erasing, or otherwise modifying the personal information in those records to make it unreadable or undecipherable through any means.

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18-185 California Points & Authorities § 185.37

§ 185.37 Improper Disclosure of Breach of Data Security [Civ. Code §§ 1798.29, 1798.82]

[1] FORM Improper Disclosure of Breach of Data Security [Civ. Code §§ 1798.29, 1798.82]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF IS ENTITLED TO DAMAGES BECAUSE DEFENDANT, _____ [AN AGENCY OWNING OR LICENSING *or* A PERSON OR BUSINESS CONDUCTING BUSINESS IN CALIFORNIA THAT OWNS OR LICENSES] COMPUTERIZED DATA THAT INCLUDES PERSONAL INFORMATION, FAILED TO NOTIFY PLAINTIFF, A RESIDENT OF CALIFORNIA, OF A BREACH OF THE SECURITY OF THE DEFENDANT'S SYSTEM FOLLOWING DISCOVERY OR NOTIFICATION OF A BREACH IN THE SECURITY OF THE DATA IN WHICH PLAINTIFF'S UNENCRYPTED PERSONAL INFORMATION WAS, OR IS REASONABLY BELIEVED TO HAVE BEEN, ACQUIRED BY AN UNAUTHORIZED PERSON, IN VIOLATION OF CIVIL CODE SECTION _____ [1798.29 *or* 1798.82].

[*EITHER*]

A. Duty to Disclose. Any agency that owns or licenses computerized data that includes personal information must disclose any breach of the security of the system following discovery or notification of the breach in the security of the data to any resident of California whose unencrypted personal information was, or is reasonably believed to have been, acquired by an unauthorized person. The disclosure must be made in the most expedient time possible and without unreasonable delay, consistent with the legitimate needs of law enforcement (*Civ. Code § 1798.29(a)*). Any agency that maintains computerized data that includes personal information that the person or business does not own must notify the owner or licensee of the information of any breach of the security of the data immediately following discovery, if the personal information was, or is reasonably believed to have been, acquired by an unauthorized person (*Civ. Code § 1798.29(b)*).

[*OR*]

A. Duty to Disclose. Any person or business that conducts business in California, and that owns or licenses computerized data that includes personal information, must disclose any breach of the security of the system following discovery or notification of the breach in the security of the data to any resident of California whose unencrypted personal information was, or is reasonably believed to have been, acquired by an unauthorized person. The disclosure must be made in the most expedient time possible and without unreasonable delay, consistent with the legitimate needs of law enforcement (*Civ. Code § 1798.82(a)*). Any person or business that maintains computerized data that includes personal information that the person or business does not own must notify the owner or licensee of the information of any breach of the security of the data immediately following discovery, if the personal information was, or is reasonably believed to have been, acquired by an unauthorized person (*Civ. Code § 1798.82(b)*).

[*EITHER*]

B. Breach of Security System. "Breach of the security of the system" means unauthorized acquisition of computerized data that compromises the security, confidentiality, or integrity of personal information maintained by the agency. Good faith acquisition of personal information by an employee or agent of the agency for the purposes of the agency is not a breach of the security of the system, if that the personal information is not used or subject to further unauthorized disclosure (*Civ. Code § 1798.29(d)*).

[*OR*]

B. Breach of Security System. "Breach of the security of the system" means unauthorized acquisition of computerized data that compromises the security, confidentiality, or integrity of personal information maintained by the person or business. Good faith acquisition of personal information by an employee or agent of the person or business for the purposes of the person or business is not a breach of the security of the system, if that the personal information is not used or subject to further unauthorized disclosure (*Civ. Code § 1798.82(d)*).

C. Personal Information. "Personal information" means an individual's first name or first initial and last name in combination with any one or more of the following data elements, if either the name or the data elements are not encrypted: social security number; driver's license number or California Identification Card number; account number, credit card, or debit card number, in combination with any required security code, access code, or password that would permit access to an individual's financial account; medical information; or health insurance information (*Civ. Code §§ 1798.29(e)* (agencies), 1798.82(e) (persons or businesses)).

D. Notice Required. Notice may be provided by one of the following methods: (1) written notice; (2) electronic notice, if the notice provided is consistent with the provisions regarding electronic records and signatures set forth in *Section 7001 of Title 15 of the United States Code*; or *(3)* substitute notice, if the cost of providing notice would exceed two hundred fifty thousand dollars ($250,000) or the affected class of subject persons to be notified exceeds 500,000, or defendant does not have sufficient contact information (*Civ. Code §§ 1798.29(g)* (agencies), 1798.82(g) (persons or businesses)).

E. Civil Action to Recover Damages. Anyone injured by a violation of *Civil Code Section 1798.29* or *Civil Code Section 1798.82* may institute a civil action to recover damages (*Civ. Code § 1798.84(b)*).

[*Optional*] **F. Injunctive Relief.** Any business that fails to comply with *Civil Code Section 1798.80 et seq.* may be enjoined (*Civ. Code § 1798.84(e)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the plaintiff is entitled to damages because the defendant has failed to comply with the notice requirements set out in *Civ. Code §§ 1798.29, 1798.82*.

These points and authorities may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue that the defendant's violation of *Civ. Code § 1798.29* or *Civ. Code § 1798.82* entitles the plaintiff to damages. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include facts showing that the defendant did not notify the plaintiff as required.

[b] Notification Delayed by Law Enforcement

The notification required by Civ. Code § 1789.29 or *Civ. Code § 1798.82* may be delayed if a law enforcement agency determines that the notification will impede a criminal investigation. The notification required must be made after the law enforcement agency determines that it will not compromise the investigation [*Civ. Code §§ 1798.29(c), 1798.82(c)*].

[c] Specific Notice Requirements

Notice may be provided by any of the following methods [*Civ. Code §§ 1798.29(g), 1798.82(g)*]:

- Written notice.

- Electronic notice, if the notice provided is consistent with the provisions regarding electronic records and signatures set forth in *15 U.S.C.S. § 7001*.

- Substitute notice, if the agency, person, or business demonstrates that the cost of providing notice would exceed two hundred fifty thousand dollars ($250,000), or that the affected class of subject persons to be notified exceeds 500,000, or the agency, person, or business does not have sufficient contact information. Substitute notice must consist of all of the following:

  - E-mail notice if the agency, person, or business has an e-mail address for the subject persons;

  - Conspicuous posting of the notice on the Web site page of the agency, person, or business, if the agency, person, or business maintains one; and

  - Notification to major statewide media.

However, an agency, person, or business that maintains its own notification procedures as part of an information security policy for the treatment of personal information, and is otherwise consistent with the timing requirements of this part, is deemed to be in compliance with the notification requirements described above if agency, person, or business notifies subject persons in accordance with its policies in the event of a breach of security of the system [*Civ. Code §§ 1798.29(h), 1798.82(h)*].

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CHAPTER 186 PROBATE OF WILLS

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§ 186.syn Synopsis to Chapter 186: PROBATE OF WILLS

§ 186.01 Scope of Chapter

§ 186.02 Governing Law

§ 186.03 Nature of Will Contests

§ 186.04 Contest of Will

[1] Before Probate

[a] Filing and Service of Objection

[b] Responsive Pleadings

[c] Trial of Contest and Entry of Judgment

[2] After Probate

[a] Time for Filing and Persons Permitted to File Petition for Revocation

[b] Contents of Petition

[c] Revocation Proceedings

[d] Effect of Revocation

§ 186.05 Effect of No Contest Clause in Will or Other Instrument

[1] Significance in Will Contest

[2] Nature and Validity

[3] Applicable Law

[4] Enforcement of No Contest Clause Under Probate Code

[a] Definitions of "No Contest Clause" and "Protected Instrument"

[b] Circumstances in Which No Contest Clause Is Enforceable

[c] Direct Contest

[d] Challenge to Transfer of Property

[e] Creditor's Claim

[f] Declaratory Relief Unavailable

[5] Enforcement of No Contest Clauses Under Common Law

[6] Strict Construction

§ 186.06 Requirements Governing Points and Authorities

§ 186.07 Related Pleading and Practice Chapters

§§ 186.08-186.19 [Reserved]

§ 186.20 Supporting Contest of Will--By Objection to Petition for Probate [Prob. Code §§ 1040, 1043(a), 8004(b), 8250(a)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Procedural Requirements for Objections

[c] Opposing Memoranda

[d] Related Pleading and Practice Forms

§ 186.21 Supporting Contest of Will--By Petition to Revoke Probate of Will [Prob. Code § 8270]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[c] Related Pleading and Practice Forms

§ 186.22 Supporting Contest of Will--Grounds for Contest--Will Was Improperly Executed [Prob. Code §§ 6110, 8252(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Witnesses Required

[b] Statutory Requirements Must Be Strictly Followed

[c] Presumption of Due Execution Inapplicable When Contrary Evidence Clear

[d] Signature by Mark Requires Formalities

[4] Additional Authorities

[a] Witnesses Required

§ 186.23 Supporting Contest of Will--Grounds for Contest--Holographic Will Was Improperly Executed--General Form [Prob. Code § 6111]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Holographic Will Must Be in Testator's Handwriting

[b] Holographic Will Must Contain Words Describing Property to Be Disposed of and Showing Intention to Dispose of That Property

[c] Proponent of Document Alleged to Constitute Holographic Will Has Burden of Showing That Document Describes Property to Be Disposed of and Shows Intent to Dispose of That Property

[d] Intention to Dispose of Property Must Be Shown by Words, Not by Symbol Without Fixed Meaning

[e] Holographic Will Must Evidence Present Intention to Dispose of Testator's Property, Not Intent to Make Will in Future

[f] Trend Towards Liberality Does Not Contravene Statutory Requirements

[g] Failed Formal Will Not Valid Holographic Will

[h] Extrinsic Evidence Admissible

[i] Holographic Will Revoked by Operation of Law

§ 186.24 Supporting Contest of Will--Grounds for Contest--Holographic Will Was Improperly Executed--Doctrine of Integration Inapplicable

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Testator Must Intend Two or More Separate Writings to Be Will

[b] Integrated Documents Must Be Holographic

[c] Invalid Codicil May Not Be Integrated

[d] Unrelated Document May Not Supply Testamentary Intent for Invalid Holographic Will

§ 186.25 Supporting Contest of Will--Grounds for Contest--Doctrine of Incorporation by Reference Inapplicable

[1] FORM

[2] Comments

[a] Use of Form

[b] Doctrine Applicable to Both Formal and Holographic Wills

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] When Incorporation by Reference Occurs

[b] Incorporated Document Must Be Clearly Identified and in Existence

[4] Additional Authorities

[a] When Incorporation by Reference Occurs

[b] Incorporated Document Must Be Clearly Identified and in Existence

§ 186.26 Supporting Contest of Will--Grounds for Contest--Testator Lacked Testamentary Intent

[1] FORM

[2] Comments

[a] Use of Form

[b] Testamentary Intent Issues and Formal Wills

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Testamentary Intent Required

[b] Testator Must Intend Specific Paper Offered to Be Will

[c] Testator Must Intend Revocable Disposition Effective on Death

[d] Burden of Proof

[e] Policy Favoring Testacy Inapplicable When Testamentary Intent at Issue

[f] Oral Declarations of Testator Admissible to Show Intent

[g] Evidence of Revocation of Former Will

[h] Will Conditioned on Additional Formalities Does Not Take Effect on Death

[i] Instruction for Will to Be Executed in Future Is Not a Will Absent Testamentary Intent

§ 186.27 Supporting Contest of Will--Grounds for Contest-- Testator Lacked Testamentary Capacity [Prob. Code § 6100.5]

[1] FORM

[2] Comments

[a] Use of Form

[b] Lack of Testamentary Capacity

[c] Attorney's Duty With Respect to Ascertaining Decedent's Testamentary Capacity

[d] Evidence of Deficit in Mental Functions

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Proof of Testamentary Incompetence by Prior or Subsequent Conduct

[b] Inference of Continuing Incompetency

[c] Personal Characteristics of Testator

[d] Physician's Testimony

[e] Refusal by Attorney to Make Will for Decedent

[f] Change From Previous Testament

[g] Proof of Hallucination or Delusion

§ 186.28 Supporting Contest of Will--Grounds for Contest-- Will Procured by Fraud [Prob. Code § 6104]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Will Ineffective to Extent It Is Procured by Fraud

[b] Only Portions of Will Affected by Fraud Need Be Revoked

§ 186.29 Supporting Contest of Will--Grounds for Contest--Will Procured by Undue Influence [Prob. Code § 6104]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] "Undue Influence" Defined

[b] Indicia of Undue Influence

[c] Circumstantial Evidence May Establish Active Participation in Procurement of Will

[d] Confidential or Fiduciary Relationship Creates Presumption of Undue Influence

[e] Benefit by Attorney Who Assists in Preparing Will Creates Presumption of Undue Influence

[f] Actual Presence of Party Who Exercised Influence Is Unnecessary

[g] Claim of Undue Influence May Be Supported in Whole or in Part by True Statements

§ 186.29A Supporting Contest of Will--Grounds for Contest--Gift Is Invalid Under Statute Prohibiting Gifts to Persons Having Specified Relationships to Testator [Prob. Code §§ 21350, 21351]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authority

[a] Testamentary Gifts to Specified Persons Are Presumptively Invalid

[b] "Relation by Blood or Marriage" Defined.

[c] Statutory Exceptions Inapplicable

[d] Transfer to Person Who Drafted Instrument Is Conclusively Presumed Invalid

[e] Meaning of Care Custodian

[4] Additional Authorities

[a] Meaning of Care Custodian

§ 186.30 Supporting Contest of Will--Grounds for Contest--Will Subject to Unfulfilled Condition [Prob. Code § 6105]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

§ 186.31 Supporting Contest of Will--Grounds for Contest--Will Revoked by Subsequent Will [Prob. Code § 6120(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Will May Be Revoked by Subsequent Will

[b] Will May Be Revoked by Holographic Clause

[c] Lost or Destroyed Second Will May Still Revoke First Will

§ 186.32 Supporting Contest of Will--Grounds for Contest--Will Revoked by Destruction, Mutilation, or Cancellation [Prob. Code § 6120(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Will in Testator's Possession That Is Lost at Time of His or Her Death Is Presumed Destroyed

[b] Unsigned Photocopy of Will Is Insufficient to Overcome Presumption of Revocation

§ 186.33 Supporting Contest of Will--Grounds for Contest--Will Revoked by Destruction, Mutilation or Cancellation of Duplicate [Prob. Code § 6121]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

§ 186.34 Supporting Contest of Will--Grounds for Contest--Will Revoked by Annulment or Dissolution of

Marriage [Prob. Code § 6122]

[1] FORM

[2] Comments

[a] Use of Form

[b] Nonapplicability to Pre-1985 Dissolutions and Annulments

[c] Change of Circumstances That Revoke Will

[3] Discussion of Authorities

[a] Annulment or Dissolution Revokes Will Provisions Relating to Former Spouse

[b] What Constitutes Dissolution or Annulment

[c] Annulment or Dissolution Revokes Will Provisions Relating to Children of Former Spouse

§ 186.35 Supporting Contest of Will--Grounds for Contest--Will Revoked by Termination of Domestic Partnership [Prob. Code § 6122.1]

[1] FORM

[2] Comments

[a] Use of Form

[b] Nonapplicability to Wills executed before January 1, 2002

[3] Discussion of Authorities

[a] What Constitutes Termination

§ 186.36 Supporting Contest of Will--Procedural Requirements--Petition to Revoke Probate of Will Is Timely Filed [Prob. Code § 8270]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Probate Order Procured by Extrinsic Fraud May Be Set Aside After Time Limit for Petition to Revoke

[b] Doubts Concerning Timeliness Should Be Resolved in Favor of Allowing Contest

§ 186.37 Supporting Contest of Will--Procedural Requirements--Contestant Has Standing to Contest Will [Prob. Code §§ 1043, 8004(b), 8250(a), 8270(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] "Interested Person" Defined

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] "Interested Person" Defined

[b] Heir at Law May Be "Interested Person"

[c] Beneficiary Under Prior Will May Be "Interested Person"

[d] Beneficiary Under Destroyed Will May Be "Interested Person"

[e] Beneficiary Under Later Will May Be "Interested Person"

[f] Executor May Contest Subsequent Will

[g] Interested Person's Personal Representative May Contest Will

[h] Heir's Judgment Lien Creditor May Contest Will

[4] Additional Authorities

[a] Heir at Law May Be "Interested Person"

[b] Beneficiary Under Prior Will May Be "Interested Person"

[c] Beneficiary Under Later Will May Be "Interested Person"

[d] Executor May Contest Subsequent Will

§§ 186.38-186.49 [Reserved]

§ 186.50 Opposing Contest of Will--By Demurrer to Objection or Petition Contesting Will [Prob. Code §§ 8251, 8271(b)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Will Contest Must State Cause of Action and Meet Pleading Requirements

§ 186.51 Opposing Contest of Will--By Demurrer to Objection or Petition Contesting Will [Prob. Code §§ 8251, 8271(b)]--Formal Will Was Properly Executed [Prob. Code § 6110]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Presumption of Due Execution

[b] Signature by Interested Witness Permissible

[c] Was Properly Executed Statutory Will

[d] Testimony of One Subscribing Witness Is Sufficient to Show Due Execution of Will

[4] Additional Authorities

[a] Statutory Will Was Properly Executed

§ 186.52 Opposing Contest of Will--By Demurrer to Objection or Petition Contesting Will [Prob. Code §§ 8251, 8271(b)]--Holographic Will Was Properly Executed [Prob. Code § 6111]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Will in Testator's Handwriting Is Valid

[b] Policy Favors Validity

[c] No Particular Words or Form Required

[d] Extrinsic Evidence Admissible

[e] Statement of Testamentary Intent May Be in Testator's Handwriting or Printed Form

[f] Validity Unaffected by Erasures, New Portions, and Deletions

[g] Signature at End of Document Is Not Required

[h] Witnesses' Signatures Do Not Invalidate Holographic Wills

§ 186.53 Opposing Contest of Will--By Demurrer to Objection or Petition Contesting Will [Prob. Code §§ 8251, 8271(b)]--Holographic Will Was Properly Executed [Prob. Code § 6111]--Doctrine of Integration Applicable

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Integration of Multiple Documents as One Holographic Will

§ 186.54 Opposing Contest of Will--By Demurrer to Objection or Petition Contesting Will [Prob. Code §§ 8251, 8271(b)]--Holographic Will Was Properly Executed [Prob. Code § 6111]--Doctrine of Incorporation by Reference Applicable [Prob. Code § 6130]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Incorporation of Nonholographic Writing

§ 186.55 Opposing Contest of Will--By Demurrer to Objection or Petition Contesting Will [Prob. Code §§ 8251, 8271(b)]--Testator Had Testamentary Intent

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Will Must Be Executed With Testamentary Intent

[b] Test for Determining Testamentary Intent

[c] Declarations of Testator Admissible

[d] Nontestamentary Provisions Do Not Affect Document's Testamentary Intent

[e] Interim Will May Be Admitted to Probate

§ 186.56 Opposing Contest of Will--By Demurrer to Objection or Petition Contesting Will [Prob. Code §§ 8251, 8271(b)]--Testator Had Testamentary Capacity [Prob. Code § 6100.5(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Evidence of Deficit in Mental Functions Required for Finding of Incapacity

[c] Effect of Criteria for Determining Capacity

[d] Attorney's Duty With Respect to Ascertaining Decedent's Testamentary Capacity

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Testamentary Capacity Defined

[b] Testamentary Capacity Determined at Time Will Executed

[c] Burden of Proof on Contestant

[d] Old Age and Forgetfulness Not Dispositive

[e] Appointment of Conservator Not Dispositive

[f] Ability to Transact Business Not Required

[g] Presumption That Will Made During Periods of Lucidity

[h] Mistaken Belief Is Not Delusion if Any Evidence Supports Belief

[i] Probate Code Section 6100.5 Closely Adheres to Common Law

§ 186.57 Opposing Contest of Will--By Demurrer to Objection or Petition Contesting Will [Prob. Code §§ 8251, 8271(b)]--Will Not Procured by Fraud

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Fraudulent Intent Necessary

[b] Only Portion Procured by Fraud Invalidated

§ 186.58 Opposing Contest of Will--By Demurrer to Objection or Petition Contesting Will [Prob. Code §§ 8251, 8271(b)]--Will Not Procured By Undue Influence

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Influence Must Destroy Testator's Free Agency

[b] Mere Opportunity to Influence Testator's Mind Insufficient

[c] Mere Kindness and Affection Toward Testator Insufficient

[d] Procurement of Attorney to Prepare Will Insufficient

[e] Presence at Execution of Will Insufficient

[f] Determination of Undue Profit Not Limited to Terms of Will

§ 186.58A Opposing Contest of Will--By Demurrer to or Objection or Petition Contesting Will--Gift to "Disqualified Person" Not Invalidated Under Prob. Code § 21350 Because Statutory Exception in Prob. Code § 21351 Applies

[1] FORM

[2] Comment

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Exception Exists When Court Determines That Transfer Was Not Product of Fraud, Menace, Duress, or Undue Influence

[b] Exception Exists for Transfers by Nonresidents

§ 186.58B Opposing Contest of Will--By Demurrer to or Objection or Petition Contesting Will--Gift Not Invalidated Under Prob. Code § 21350 Because Donee Did Not Transcribe Instrument or Cause It To Be Transcribed [Prob. Code § 21350(a)(4)]

[1] FORM

[2] Comment

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Fiduciary Must Direct Document to Be Written out in Final Form

[b] Providing Information, Assistance, and Encouragement Is Insufficient Basis for Disqualification

[c] Procuring Estate Planning Services Is Insufficient Basis for Disqualification

§ 186.59 Opposing Contest of Will--By Demurrer to Objection or Petition Contesting Will [Prob. Code §§ 8251, 8271(b)]--Will Not Subject to Unfulfilled Condition

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Whether Will Is Conditional Depends on Testator's Intent

[b] Expression of Inducement Distinguished From Condition

[c] Factors to Be Considered to Determine Whether Will Is Conditional

[d] Extrinsic Evidence Admissible to Determine Whether Will Conditional

§ 186.60 Opposing Contest of Will--By Demurrer to Objection or Petition Contesting Will [Prob. Code §§ 8251, 8271(b)]--Will Not Revoked by Subsequent Will

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Court May Preserve Prior Will Provisions That Are Consistent With Subsequent Will

[b] Prior Will Revoked to Give Effect to Subsequent Will Remains in Effect If Latter Will Ineffective

§ 186.61 Opposing Contest of Will--By Demurrer to Objection or Petition Contesting Will [Prob. Code §§ 8251, 8271(b)]--Will Not Revoked by Destruction, Mutilation, or Cancellation

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Contestant Must Prove Destruction by Decedent With Intent to Revoke

[b] Destruction by Third Person Without Decedent's Direction Does Not Revoke Will

[c] Presumption of Revocation Effects Only Burden of Producing Evidence

[d] No Presumption of Revocation by Mutilation If Testator Did Not Have Continuous Possession

§ 186.62 Opposing Contest of Will--Procedural Requirements--Petition to Revoke Probate of Will Is Not Timely Filed [Prob. Code § 8270]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

§ 186.63 Opposing Contest of Will--Procedural Requirements--Contestant Lacks Standing to Contest Will [Prob. Code §§ 1043, 8004(b), 8250(a), 8270(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Contestant Must Be Interested Person

[b] Contestant Must Benefit From Contest

[c] Heir Must Show That Revocation Will Result in Intestacy

[d] Omitted Heir Lacks Standing

[e] Beneficiary Under Unproven Lost Will Lacks Standing

[f] Executor Lacks Standing to Contest Codicil Naming Different Executor

[4] Additional Authorities

[a] Executor Lacks Standing to Contest Codicil Naming Different Executor

§ 186.64 Opposing Contest of Will--Will Made for Testator by Conservator of Estate Pursuant to Court Order [Prob. Code §§ 2580(b)(13), 6100.5(c)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Impact of Conservatorship on Testamentary Capacity

[c] Power of Conservator to Make Will for Conservatee

[d] Power of Conservatee to Amend, Revoke, or Make New Will

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Volume 18 Chapters 180-189 PRETRIAL PROCEEDINGS---to---PROBATE OF WILLS
CHAPTER 186 PROBATE OF WILLS
PART I. INTRODUCTION

18-186 California Points & Authorities § 186.01

§ 186.01 Scope of Chapter

This chapter contains memoranda of points and authorities for use in will contest proceedings. The chapter contains points and authorities supporting challenges to the will made by objection to the petition for probate filed under *Prob. Code §§ 1043, 8004(b),* and *8250(a)* [*see § 186.20*], or by petition to revoke probate filed under *Prob. Code § 8270* [*see § 186.21*]. It covers challenges based on improper execution of the will [*see §§ 186.22, 186.23*], inapplicability of the doctrines of integration [*see § 186.24*] or incorporation by reference [*see § 186.25*], the testator's lack of testamentary intent [*see § 186.26*] or capacity [*see § 186.27*], fraud [*see § 186.28*] or undue influence [*see § 186.29*] in the procurement of the will, unfulfilled conditions [*see § 186.30*], and revocation of the will [*see §§ 186.31 -186.35*]. Contentions concerning the timeliness of the contest [*see § 186.36*] and the contestant's standing to contest the will [*see § 186.37*] are also included.

The chapter also contains a basic memorandum for use in demurring or objecting to a will contest filed under *Prob. Code § 8251* or *8271* [*see § 186.50*], as well as individual contentions addressing the substantive [*see §§ 186.51 -186.61*] and procedural [*see §§ 186.62, 186.63*] aspects of the contest. Included are contentions that the will was properly executed [*see §§ 186.51, 186.52*], that the doctrines of integration [*see § 186.53*] and incorporation by reference [*see § 186.54*] are applicable, that the testator possessed testamentary intent [*see § 186.55*] and capacity [*see § 186.56*], that the will was not procured by fraud [*see § 186.57*] or undue influence [*see § 186.58*], that the will is not subject to an unfulfilled condition [*see § 186.59*], and that the will was not revoked [*see §§ 186.60, 186.61*], as well as objections based on the untimeliness of the contest [*see § 186.62*] and the contestant's lack of standing [*see § 186.63*]. Part II also includes a memorandum asserting the validity of a will made for a conservatee by a conservator in accordance with a court order [*see § 186.64*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawWill ContestsGeneral OverviewEstate, Gift & Trust LawWill ContestsStandingEstate, Gift & Trust LawWill ContestsTestamentary CapacityGeneral OverviewEstate, Gift & Trust LawWill ContestsTestamentary FormalitiesGeneral OverviewEstate, Gift & Trust LawWill ContestsTestamentary FormalitiesWitnessesAttestation & Subscription

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18-186 California Points & Authorities § 186.02

§ 186.02 Governing Law

The hearing of all matters under the Probate Code is governed by *Prob. Code § 1000 et seq.*, except when the statute that provides for the hearing of the matter prescribes a different procedure [*Prob. Code § 1040*]. *Prob. Code § 1043* governs the right of interested persons [*see Prob. Code § 48* ("interested person" defined); *see also § 186.37*] to object, orally or in writing, to matters being heard under the Probate Code. The procedure for will contests is set forth in *Prob. Code § 8250 et seq.* [*Prob. Code § 8004(b)*], and the procedure for revocation of probate is set forth in *Prob. Code § 8270 et seq.*

The capacity to make a will [*see Prob. Code § 88* ("will" includes codicil and any testamentary instrument that merely appoints executor or revokes or revises another will)] and the extent of a testator's power to dispose of property by will are governed by *Prob. Code § 6100 et seq.* The execution of wills is governed by *Prob. Code § 6110 et seq.*, and the revocation of wills is governed by *Prob. Code § 6120 et seq.* The administration of estates is governed generally by *Prob. Code § 7000 et seq.*

The current versions of *Prob. Code §§ 21310-21315* govern the enforcement of no contest clauses in wills and other instruments that are filed on or after January 1, 2010, whenever executed, provided that the instrument became irrevocable on or after January 1, 2001 [*Prob. Code § 21315*]. Common law governs no contest clauses in all other instruments [*Prob. Code § 21315*; *see § 186.05*]. Because the revisions effective in 2010 made significant changes in prior law, older cases dealing with no contest clauses should be reviewed carefully to make sure that they remain valid under the law applicable to the no contest clause in question before being relied upon by counsel.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawWill ContestsGeneral OverviewEstate, Gift & Trust LawWill ContestsStandingEstate, Gift & Trust LawWill ContestsTestamentary CapacityGeneral OverviewEstate, Gift & Trust LawWill ContestsTestamentary FormalitiesGeneral OverviewEstate, Gift & Trust LawWill ContestsTestamentary FormalitiesWitnessesAttestation & Subscription

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18-186 California Points & Authorities § 186.03

§ 186.03 Nature of Will Contests

Although the term "will contest" is used in the Probate Code to refer to a legal objection to the admission of a will to probate (i.e., a challenge before probate) [*see Prob. Code §§ 8004(b), 8250(a)*], the term as commonly used also encompasses attempts to revoke the probate of a will (i.e., a challenge after probate) [*see, e.g., Goodman v. Zimmerman (1994) 25 Cal. App. 4th 1667, 1670, 32 Cal. Rptr. 2d 419* ; *see also Prob. Code § 8270*]. To successfully contest a will either before or after probate--that is, to obtain a court order rejecting the will in whole or in part [*see Prob. Code § 8254*]--a contestant must prove (1) lack of testamentary intent or capacity, (2) undue influence, fraud, duress, or mistake, or (3) revocation [*see Prob. Code §§ 8252(a), 8272(a)*]. A contestant may also challenge a will for lack of due execution [*see Prob. Code § 6110 et seq.*], and the burden is on the proponent to establish proper execution [*see Prob. Code § 8252(a)*].

Will contests are proceedings in rem [*Estate of Sanderson (1960) 183 Cal. App. 2d 740, 742, 6 Cal. Rptr. 893]* . They are special proceedings created by statute [*Estate of Baker (1915) 170 Cal. 578, 585, 150 P. 989* ; *Estate of Getty (1978) 85 Cal. App. 3d 755, 761, 149 Cal. Rptr. 656]* . Like other proceedings concerning the administration of decedents' estates, will contests are heard in the superior court [*Prob. Code § 7050*]. The court in proceedings under the Probate Code is a court of general jurisdiction, and the court, or a judge of the court, has the same power and authority with respect to the proceedings as otherwise provided by law for a superior court, or a judge of the superior court [*Prob. Code § 800*; *see Code Civ. Proc. § 128* (statutory powers of court)].

There is no right to a jury trial in a will contest proceeding [*Prob. Code § 825*]. The rules of pleading and practice that govern civil cases generally apply to will contests [*Estate of Burton (1883) 63 Cal. 36, 37]* . For example, the rules set forth in the Code of Civil Procedure governing voluntary and mandatory dismissal of actions [*Code Civ. Proc. §§ 581, 583.110*] apply to will contests [*Estate of Daniels (1953) 120 Cal. App. 2d 284, 287, 260 P.2d 991* ; *Estate of Morrison (1932) 125 Cal. App. 504, 507, 14 P.2d 102]* .

In a will contest, the issues are limited to those concerning whether the purported will is the testator's duly executed, valid will [*Estate of Smith (1998) 61 Cal. App. 4th 259, 265, 71 Cal. Rptr. 2d 424]* . The court does not generally interpret the testamentary provisions or attempt to resolve inconsistencies in the disposition of property [*Estate of Smith (1998) 61 Cal. App. 4th 259, 265, 71 Cal. Rptr. 2d 424]* . The court construes the provisions of a will only if

necessary to determine the status of the will as a testamentary instrument, which depends on the testator's intent [*Estate of Smith (1998) 61 Cal. App. 4th 259, 265, 71 Cal. Rptr. 2d 424]* . Before an instrument may be probated as a will it must appear from its terms, viewed in light of the surrounding circumstances, that the testator executed it with testamentary intent, *i.e.*, the testator must have intended, by the instrument, to make a revocable disposition of his or her property to take effect on the testator's death [*Estate of Smith (1998) 61 Cal. App. 4th 259, 265, 71 Cal. Rptr. 2d 424]* . Regardless of the language used in the instrument, extrinsic evidence may be introduced to show that the testator did not intend the instrument to be effective as a will [*Estate of Smith (1998) 61 Cal. App. 4th 259, 265-266, 71 Cal. Rptr. 2d 424]* . For example, an instrument that clearly appears to be testamentary may be shown by extrinsic evidence to have been executed in jest, as a threat to induce action by an interested party, under the misapprehension that the instrument was a mortgage, to induce the legatee to engage in illicit relations with the testator, or to relieve the testator from annoyance by a would-be legatee [*Estate of Smith (1998) 61 Cal. App. 4th 259, 266, 71 Cal. Rptr. 2d 424]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawWill ContestsFraudEstate, Gift & Trust LawWill ContestsRevocationGeneral OverviewEstate, Gift & Trust LawWill ContestsStandingEstate, Gift & Trust LawWill ContestsTestamentary CapacityGeneral OverviewEstate, Gift & Trust LawWill ContestsTestamentary FormalitiesWitnessesAttestation & Subscription

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18-186 California Points & Authorities § 186.04

§ 186.04 Contest of Will

[1] Before Probate

[a] Filing and Service of Objection

An interested person who wishes to prevent the admission of a will to probate must file an objection to probate with the court clerk [*Prob. Code § 8250(a)*]. A summons must then be issued and a copy of the objection directed to each heir of the decedent, so far as known to or reasonably ascertainable, and each devisee, executor, and alternative executor named in the will, regardless of whether the devise or appointment is purportedly revoked in a subsequent instrument [*Prob. Code § 8250(a)*; *see Prob. Code § 8110*]. The summons must direct the persons summoned to file with the court a written pleading in response to the contest within 30 days [*Prob. Code § 8250(a)*].

[b] Responsive Pleadings

The person who petitioned for probate and any other interested person may jointly or separately answer or demur to the objection within 30 days after service of the summons [*Prob. Code §§ 8250(a), 8251(a)*; *see § 186.04[1][a]*]. Demurrer may be made on any of the grounds of demurrer available in a civil action. If the demurrer is sustained, the court may allow the contestant a reasonable time, not exceeding 15 days, within which to amend the objection. If the demurrer is overruled, the petitioner and other interested persons may answer the objection within 15 days after the ruling [*Prob. Code § 8251(b)*].

If a person fails to timely respond to the summons, the case is still at issue and may proceed on the petition and other documents filed by the time of the hearing without the necessity of further pleadings being filed [*Prob. Code § 8251(c)(1)*]. The person who failed to file a timely response may not participate further in the contest, but his or her interest in the estate is not otherwise affected and he or she is bound by the decision in the proceeding [*Prob. Code § 8251(c)(2)* (rule does not preclude further participation in contest by petitioner)].

A person named as executor in the will is under no duty to defend a will contest until the court appoints the person personal representative [*Prob. Code § 8250(b)*].

[c] Trial of Contest and Entry of Judgment

At the trial of the will contest, the court will determine any contested issue of fact that affects the validity of the will [*Prob. Code § 8252(b)*]. The court may make appropriate orders, including orders sustaining or denying objections, and must render judgment either admitting the will to probate or rejecting it, in whole or in part, and appointing a personal representative [*Prob. Code § 8254*].

The proponents of the will have the burden of proving that the will was duly executed [*Prob. Code § 8252(a)*]. "Duly executed" means executed according to *Prob. Code §§ 6110-6113* by a person having testamentary capacity [*see Estate of Gecht (1959) 165 Cal. App. 2d 431, 442, 331 P.2d 1019]* . The contestants of the will have the burden of proving each allegation raised by the contest, such as lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, or revocation [*Prob. Code § 8252(a)*; *Estate of Smith (1998) 61 Cal. App. 4th 259, 269, 71 Cal. Rptr. 2d 424]* . Each subscribing witness must be produced and examined, if available. If no subscribing witness is available [*see Evid. Code § 240* ("unavailability" defined)], the court may admit the evidence of other witnesses to prove the due execution of the will [*Prob. Code § 8253*]. If only one subscribing witness is available, his or her evidence alone may be sufficient to prove due execution and the unavailable witness is not necessary [*Estate of Burdette (2000) 81 Cal. App. 4th 938, 945, 97 Cal. Rptr. 2d 263]* .

[2] After Probate

[a] Time for Filing and Persons Permitted to File Petition for Revocation

Within 120 days after a will is admitted to probate, any interested person, other than a party to a will contest (i.e., a challenge before probate) and anyone who had actual notice of the will contest in time to have joined in it, may petition the court to revoke the probate of the will [*Prob. Code § 8270(a)*]. A person who was a minor or who was incompetent and had no guardian or conservator at the time the will was admitted to probate may petition the court to revoke the probate of the will at any time before entry of an order for final distribution [*Prob. Code § 8270(b)*].

[b] Contents of Petition

A petition to revoke the probate of a will must include objections setting forth written grounds of opposition [*Prob. Code § 8270(a)*]. The grounds for revocation of probate are the same as the grounds for denial of probate [*see §§ 186.03, 186.04*]. Thus, a petition to revoke the probate of a will is essentially the same as an objection to the admission of a will to probate. The only material difference between the two pleadings is that the petition for revocation must allege the date the will was admitted to probate [*Estate of Horn (1990) 219 Cal. App. 3d 67, 73, 268 Cal. Rptr. 41]* .

[c] Revocation Proceedings

Proceedings to revoke probate of a will are essentially the same as will contest proceedings [*see Prob. Code § 8271(b)*]. On the filing of the petition, a summons must be issued to the personal representative and to the heirs and devisees of the deceased, so far as known to the petitioner. The summons must be served with a copy of the petition and contain a direction that the persons summoned file with the court a written pleading in response to the petition within 30 days [*Prob. Code § 8271(a)*]. Failure to timely respond to the summons has the same effect as failure to timely respond to a summons issued in a will contest [*Prob. Code § 8271(a), (c)*; *see Prob. Code § 8251(c)*; *see also § 186.04[1][b]*].

[d] Effect of Revocation

If it appears on satisfactory proof that the will should be denied probate, the court must revoke probate of the will [*Prob. Code § 8272(a)*]. Revocation of probate terminates the powers of the personal representative. The personal representative is not liable for any otherwise proper act done in good faith before the revocation, nor is any transaction entered into with a third person dealing in good faith and for value void by reason of the revocation [*Prob. Code §*

8272(b)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateProcedures in ProbatePleadingsEstate, Gift & Trust LawWill ContestsFraudEstate, Gift & Trust LawWill ContestsStandingEstate, Gift & Trust LawWill ContestsTestamentary CapacityGeneral OverviewEstate, Gift & Trust LawWill ContestsTestamentary FormalitiesWitnessesAttestation & Subscription

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Volume 18 Chapters 180-189 PRETRIAL PROCEEDINGS---to---PROBATE OF WILLS
CHAPTER 186 PROBATE OF WILLS
PART I. INTRODUCTION

18-186 California Points & Authorities § 186.05

§ 186.05 Effect of No Contest Clause in Will or Other Instrument

[1] Significance in Will Contest

Attorneys contemplating bringing a will contest, or defending a contest, must consider the potential effect of any no contest clause in the will or any other estate planning instrument executed by the testator. The majority of wills and trusts contain some type of no contest clause. Under legislation operative January 1, 2010 [*see § 186.05[3], [4]*], the availability of declaratory relief to determine the effect of such a clause has been eliminated, thereby making a will contest in the face of such a clause potentially more risky than under former law. Now more than ever, attorneys need to evaluate the potential effect of a no contest clause before deciding whether to proceed with any proceeding that might be characterized as a will contest.

Typically, the no contest clause is not asserted as an affirmative defense in the contest itself, because the clause usually does not address the merits of the underlying claim (for example, in a contest based on capacity, a no contest clause in the will has no bearing on whether or not the testator had capacity to make a will). Rather, it is invoked at the time of distribution, which theoretically occurs after the contest has been concluded. If the contestant was unsuccessful, then the fiduciary seeks approval for a distribution in conformity with the application of the no contest clause. (If the contest is successful, of course, the document containing the no contest clause would not control the distribution in any case.)

[2] Nature and Validity

A no contest clause in a will or other dispositive instrument creates a condition on the gifts and dispositions provided for in the instrument [*Burch v. George (1994) 7 Cal. 4th 246, 254, 27 Cal. Rptr. 2d 165, 866 P.2d 92* ; *Estate of Lindstrom (1987) 191 Cal. App. 3d 375, 381, 236 Cal. Rptr. 376]* . In essence, a no contest clause in a will conditions the rights of the devisees named in the will to take the devises provided for in the will on their acquiescence in its terms. To the extent that a particular devisee acquiesces in those terms, the devisee is entitled to take the devise; to the extent that the devisee does not acquiesce, the devisee cannot take [*see Burch v. George (1994) 7 Cal. 4th 246, 254, 27 Cal. Rptr. 2d 165, 866 P.2d 92]* .

The purpose of a no contest clause is to discourage will contests by imposing a penalty of forfeiture against any beneficiary who challenges the will [Estate of Gonzalez (2002) *102 Cal. App. 4th, 1296, 1302, 126 Cal. Rptr. 2d 332]* .

A no contest clause also is known as an "in terrorem" clause.

No contest clauses are valid and enforceable in California [*Burch v. George (1994) 7 Cal. 4th 246, 254, 27 Cal. Rptr. 2d 165, 866 P.2d 92]* to the extent permitted under the governing law, as discussed *below*.

[3] Applicable Law

The rules governing no contest clauses were significantly revised effective January 1, 2010 [*Prob. Code § 21315*; *see Prob. Code §§ 21310-21315*]. The revised statute governs the enforcement of no contest clauses in "protected instruments" [*see* [c], *below*] that are filed on or after January 1, 2010, whenever executed, provided that the protected instrument became irrevocable on or after January 1, 2001 [*Prob. Code § 21315*].

Common law continues to govern no contest clauses in all other instruments [*Prob. Code § 21315*].

[4] Enforcement of No Contest Clause Under Probate Code

[a] Definitions of "No Contest Clause" and "Protected Instrument"

Under the Probate Code revision effective January 1, 2010, a no contest clause is a provision in a valid instrument which, if enforced, would penalize a beneficiary for filing a pleading in any court [*Prob. Code § 21310(c)*]. A pleading is a petition, complaint, cross-complaint, objection, answer, response, or claim [*Prob. Code § 21310(d)*].

The Probate Code allows the enforcement of a no contest clause only with respect to a "protected instrument" [*see Prob. Code §§ 21310, 21311*]. "Protected instrument" means the following [*Prob. Code § 21310(e)*]:

- The instrument containing the no contest clause; or

- An instrument that is in existence on the date the instrument containing the no contest clause is executed and is expressly identified in the no contest clause, either individually or as part of an identifiable class of instruments, as being governed by the no contest clause.

Since a no contest clause cannot apply to future instruments [*see Prob. Code § 21310(e)(2)*], each codicil to an existing will must contain its own no contest clause if one is desired. A statement in amendments that the testator confirms and ratifies the original will is inadequate to incorporate the no contest clause into the amendment [*see Prob. Code § 21310(e), see also Perrin v. Lee (2008) 164 Cal. App. 4th 1239, 79 Cal. Rptr. 3d 885]* .

It is also important to determine whether or not a testamentary trust created under a will that contains a no contest clause is subject to a no contest provision. Any no contest clause applicable to the trust should be separately contained in the trust terms as recited in the order for distribution entered in the probate proceeding [*Meyer v. Meyer (2008) 162 Cal. App. 4th 983, 76 Cal. Rptr. 3d 546* (no contest clause had not been incorporated by reference into the testamentary trust because the decrees of distribution specifying the terms of the testamentary trust did not include the will's no contest clause as one of those terms)].

[b] Circumstances in Which No Contest Clause Is Enforceable

Under the revised rules effective January 1, 2010, a no contest clause is only enforceable in three specific circumstances [*Prob. Code § 21311(a)*]:

- A direct contest brought without probable cause.

- A challenge to the transfer of property (provided the no contest clause provides).

- The filing of a creditor's claim (provided the no contest clause provides).

There is no opt-out provision in this statute. The provisions of *Prob. Code §§ 21310-21315* apply notwithstanding any contrary provisions in an instrument [*Prob. Code § 21314*].

[c] Direct Contest

A no contest clause is enforceable in a direct contest that is brought without probable cause [*Prob. Code § 21311(a)(1)*]. A direct contest is one that alleges the invalidity of a protected instrument or one or more of its terms based on any of the following [*Prob. Code § 21310(b)*]:

- Forgery.
- Lack of due execution.
- Lack of capacity.
- Menace, duress, fraud, or undue influence.
- Revocation of a will pursuant to *Prob. Code § 6120*, revocation of a trust pursuant to *Prob. Code § 15401*, or revocation of an instrument other than a will or trust pursuant to the procedure for revocation that is provided by statute or by the instrument.
- Disqualification of a beneficiary under *Prob. Code §§ 6112, 21350*.

Probable cause exists if, at the time of filing a contest, the facts known to the contestant would cause a reasonable person to believe that there is a reasonable opportunity for further investigation or discovery [*Prob. Code § 21311(b)*].

[d] Challenge to Transfer of Property

A no contest clause is enforceable against a pleading challenging the transfer of property on the grounds that it was not the transferor's property at the time of the transfer (a "forced election"), as long as the no contest clause expressly so provides [*Prob. Code § 21311(a)(2)*]. In this type of contest, probable cause is irrelevant, and the forced election may be applicable to anyone [*see Prob. Code § 21311(a)(2)*].

[e] Creditor's Claim

A no contest clause is enforceable against the filing of a creditor's claim or prosecution of an action based on it, as long as the no contest clause expressly provides for such an application of the clause [*Prob. Code § 21311(a)(3)*]. In this type of contest, probable cause is also irrelevant [*see Prob. Code § 21311(a)(3)*].

[f] Declaratory Relief Unavailable

Under former law, declaratory relief was available to determine whether a proposed challenge to an instrument violated a no contest clause [*see* former *Prob. Code § 21320*]. Such relief is no longer available under the revised statutes effective January 1, 2010 [*see Prob. Code §§ 21310-21315*].

The absence of declaratory relief injects a greater element of risk into commencing a possible contest in the face of a no contest clause. The attorney now must make his or own independent determination of whether or not such a proceeding will be deemed a "contest" under the revised statutes, and both attorney and client will have to live with the results in

the event that the attorney's determination is ultimately incorrect and the client does not prevail on the underlying substantive issues in the contest.

[5] Enforcement of No Contest Clauses Under Common Law

Contests involving wills and other instruments that became irrevocable prior to January 1, 2001, are governed by common law rather than the current Probate Code provisions [*Prob. Code § 21315*; *see 186.05[3]*]. Since a will does not become irrevocable until the testator's death, most proceedings going forward will be governed by the law effective as of January 1, 2010.

Under common law, whether there has been a "contest" within the meaning of the language of a no contest clause is to be determined according to the circumstances of each case and the language used [*Estate of Strader (2003) 107 Cal. App. 4th 996, 1003, 132 Cal. Rptr. 2d 649* ; *Nairne v. Jessop-Humblet (2002) 101 Cal. App. 4th 1124, 1128, 124 Cal. Rptr. 2d 726]* . Factors relevant to determining whether a claim involving the characterization, inclusion, or distribution of a certain item of property in a testamentary instrument is a contest include [*Nairne v. Jessop-Humblet (2002) 101 Cal. App. 4th 1124, 1129, 124 Cal. Rptr. 2d 726]* :

- The particular language of the no contest clause.
- Whether the instrument specifies the property and its distribution.
- Whether the instrument specifically characterizes the property, *e.g.*, as separate versus community property.
- Whether the challenge, if successful, would thwart the testator's intent.

For more detailed discussion of the construction and interpretation of no contest clauses under common law, including the issues of indirect attack in collateral proceedings, the enforcement of oral contracts in conflict with the will, and actions seeking judicial interpretations of wills or other instruments, see *California Forms of Pleading and Practice, Ch. 444, Probate: Will Contests, § 444.14[3]*.

[6] Strict Construction

The strict statutory rules regarding no contest clauses reflect the general doctrine that no contest clauses are disfavored by the public policy against forfeiture [*McIndoe v. Olivos (2005) 132 Cal. App. 4th 483, 487, 33 Cal. Rptr. 3d 689* ; *Estate of Richter (1993) 12 Cal. App. 4th 1361, 1367, 16 Cal. Rptr. 2d 108* ; *Scharlin v. Superior Court (1992) 9 Cal. App. 4th 162, 168-169, 11 Cal. Rptr. 2d 448]* . Accordingly, under both the Probate Code and common law, no contest clauses must be strictly construed and cannot be extended beyond what the testator clearly intended by the wording of the will [*see Prob. Code 21312*; *see also* *Meyer v. Meyer (2008) 162 Cal. App. 4th 983, 998, 76 Cal. Rptr. 3d 546* ; *Zwirn v. Schweizer (2005) 134 Cal. App. 4th 1153, 1159, 36 Cal. Rptr. 3d 527* ; *Nairne v. Jessop-Humblet (2002) 101 Cal. App. 4th 1124, 1128, 124 Cal. Rptr. 2d 726]* . Under the common law, a beneficiary will be found to have violated a no contest clause only if the beneficiary's action clearly falls within the terms of the clause, and the penalty will be imposed only if it is found that the beneficiary's act clearly was intended by the testator to require the imposition of the penalty [*Estate of Rossi (2006) 138 Cal. App. 4th 1325, 1338, 42 Cal. Rptr. 3d 244* ; *McIndoe v. Olivos (2005) 132 Cal. App. 4th 483, 487, 489, 33 Cal. Rptr. 3d 689* ; *Estate of Richter (1993) 12 Cal. App. 4th 1361, 1367, 16 Cal. Rptr. 2d 108]* .

However, when it is determined a beneficiary's act does fall within the scope of the clause, it will be enforced even in circumstances in which the result arguably is harsh. Thus, for example, a testator could permissively provide that three of his five children would *all* lose their testamentary gifts under a trust if any one of them contested it [Tunstall v. Wells

(2006) *144 Cal. App. 4th, 554, 557-558, 50 Cal. Rptr. 3d 468]* . The court concluded that the no contest clause did not violate public policy, and reasoned that the decedent's intentions to impose conditions on the gifts of the three children were within his rights as a testator [Tunstall v. Wells (2006) *144 Cal. App. 4th, 554, 557-558, 50 Cal. Rptr. 3d 468]* . Similarly, a no contest clause in a testamentary trust was upheld although it forced the settlor's former wife and their children to choose between enforcing their rights under an existing martial dissolution judgment by filing creditor's claims, or relinquishing those rights and taking the gifts provided for them in the settlor's trust [*Colburn v. Northern Trust Co. (2007) 151 Cal. App. 4th 439, 447, 59 Cal. Rptr. 3d 828]* . Also upheld was a clause in a trust instrument that applied to any attempt to "impair" the trust, which was held applicable to the trust beneficiary's adjustment petition under the California Uniform Principal and Income Act to reallocate principal and income, when the reallocation would have resulted in more income to the beneficiary than was allowed by the trust and the invasion of trust principal reserved to other beneficiaries [*McKenzie v. Vanderpoel (2007) 151 Cal. App. 4th 1442, 1454, 61 Cal. Rptr. 3d 129]* .

Extrinsic evidence on the testator's intended meaning of the no contest clause is admissible if it is relevant to show a meaning to which the language is reasonably susceptible [*Estate of Kaila (2001) 94 Cal. App. 4th 1122, 1132, 114 Cal. Rptr. 2d 865]* . However, consideration of extrinsic evidence does not necessarily require a determination of an action on the merits that would preclude relief [*Estate of Kaila (2001) 94 Cal. App. 4th 1122, 1136, 114 Cal. Rptr. 2d 865]* .

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18-186 California Points & Authorities § 186.06

§ 186.06 Requirements Governing Points and Authorities

Generally, any party filing a demurrer or notice of motion, must serve and file an accompanying memorandum. The absence of a memorandum may be construed by the court as an admission that the motion or special demurrer is not meritorious and cause for its denial and, in the case of a demurrer, as a waiver of all grounds not supported [Cal. Rules of Court, Rule 3.113(a)].

Generally, a memorandum may not exceed 15 pages in length, or in the case of a motion for summary judgment or summary adjudication, 20 page in length. A reply or closing memorandum may not exceed 10 pages in length [Cal. Rules of Ct., Rule 3.113(d)]. Any party who wants to file a longer memorandum must obtain leave of court [Cal. Rules of Ct., Rule 3.113(e)]. For further discussion of the basic requirements for memoranda, see *Ch. 1, Writing Legal Memoranda and Briefs, § 1.05*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDenialsEstate, Gift & Trust LawWill ContestsFraudEstate, Gift & Trust LawWill ContestsStandingEstate, Gift & Trust LawWill ContestsTestamentary CapacityGeneral Overview

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18-186 California Points & Authorities § 186.07

§ 186.07 Related Pleading and Practice Chapters

For further discussion and forms relating to will contests, see California Forms of Pleading and Practice, Ch. 444, *Probate: Will Contests* (Matthew Bender). For discussion and forms relating to probate of wills generally, see California Forms of Pleading and Practice, Chapters 440 through 458E (Matthew Bender).

For additional detailed coverage of the probate process, see California Probate Practice (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawWill ContestsGeneral OverviewEstate, Gift & Trust LawWill ContestsFraudEstate, Gift & Trust LawWill ContestsStandingEstate, Gift & Trust LawWill ContestsTestamentary CapacityGeneral Overview

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18-186 California Points & Authorities §§ 186.08-186.19

[Reserved]

§§ 186.08[Reserved]

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§ 186.20 Supporting Contest of Will--By Objection to Petition for Probate [Prob. Code §§ 1040, 1043(a), 8004(b), 8250(a)]--General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
Estate of _____ [*name*],	)	NO. _____
Deceased.	)	MEMORANDUM IN SUPPORT OF OBJECTION
_____ [*name*],	)	TO PETITION FOR PROBATE OF WILL
Contestant,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Petitioner and Respondent.	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

CONTESTANT _____ [*name*] IS _____ [*specify status as an "interested person," e.g.,* AN HEIR OF DECEDENT'S ESTATE], AND AS AN INTERESTED PERSON MAY OBJECT TO THE ADMISSION OF THE WILL OF _____ [*name of decedent*] TO PROBATE.

A. Interested Person May Object to Will. An interested person may appear and make an objection in writing at or before a hearing (*Prob. Code § 1043(a)*; *see Prob. Code § 48* (defining "interested person")).

B. Procedure for Objection. When a will is contested, the contestant must file an objection to the probate of the will and the clerk must issue a summons and a copy of the objection directed to each heir of the decedent, so far as known to or reasonably ascertainable by the contestant, and each devisee, executor, and alternative executor named in the will, regardless of whether the devise or appointment is purportedly revoked in a subsequent instrument (*Prob. Code § 8250(a)*; *see Prob. Code §§ 8004(b), 8110*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be used to support an objection to the admission of a will to probate [*Prob. Code §§ 8004(b), 8250(a)*]. The form is a general one that describes the contestant's standing to object to the will and sets forth the procedures for the objection.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, if counsel is arguing that the contestant has standing to challenge probate because the contestant is an heir, counsel should discuss facts showing that the contestant is a surviving spouse or other person who is entitled to take the decedent's property by intestate succession [*see Prob. Code §§ 44* ("heir" defined), 48 ("interested person" defined)].

This form may be combined with other forms discussing the substantive grounds for objecting to the probate of a will. For example, counsel may combine this form with a form raising the issues of improper execution of a will [*see § 186.22*] or undue influence [*see § 186.29*]. This form also may be adapted for use in a trial or appellate brief or in jury instructions.

Before initiating a proceeding that may constitute a "will contest" [*see Prob. Code § 21310(c)*; *see also § 186.05[4][a]*], the attorney should review the instrument in question, and other relevant instruments prepared by the testator, to see if they contain any no contest clauses and, if they do, should carefully review the law governing enforcement and effect of such clauses [*Prob. Code §§ 21310-21315*] before initiating a contest. For discussion, see *§ 186.05*.

[b] Procedural Requirements for Objections

A petition, objection, response, report, or account filed under the Probate Code must be in writing. The writing must be signed by all of the petitioners, objectors, or respondents, or by all of the persons making the report or account. It must be verified, and then filed with the court clerk [*Prob. Code §§ 1020, 1021(a)*]. An objection to admission of a will to probate must be verified by the objector or, if there are two or more parties joining in the objection, by any of them [*Prob. Code § 1021(b)(3)*]. If the objector is absent from the county, or for some other reason is unable to sign or verify the objection, his or her attorney may sign or verify the objection, unless the objector is a fiduciary appointed in the proceeding [*Prob. Code § 1023*].

[c] Opposing Memoranda

In an appropriate case, the *form in § 186.50* may be used to oppose the contention supported by this form.

[d] Related Pleading and Practice Forms

For further discussion and forms for use in will contest proceedings, see California Forms of Pleading and Practice, Ch. 444, *Probate: Will* Contests (Matthew Bender).

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PART II. FORMS
A. Supporting Will Contests

18-186 California Points & Authorities § 186.21

§ 186.21 Supporting Contest of Will--By Petition to Revoke Probate of Will [Prob. Code § 8270]--General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

Estate of _____ [*name*]	)	
Deceased.	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF PETITION TO
Petitioner,	)	REVOKE PROBATE OF WILL
vs.	)	Date: _____
_____ [*name*], as	)	Time: _____
_____ [*describe, e.g.,* Executor *or*	)	Location: _____
Administrator With Will Annexed and as Devisee],	)	[Trial Date: _____]
and	)	
_____ [*names*],	)	
Respondents.		

_____

PETITIONER _____ [*name*] IS/WAS _____ [*specify status as an "interested person," e.g.,* A/AN (MINOR *or* INCOMPETENT) HEIR OF DECEDENT'S ESTATE (WHEN THE _____ [WILL *or* CODICIL] OF DECEDENT _____ [*name*] WAS ADMITTED TO PROBATE)] AND NOT A PARTY TO A WILL CONTEST OR A PERSON WHO HAD ACTUAL NOTICE OF A WILL CONTEST IN TIME TO HAVE JOINED IN THE CONTEST, AND ACCORDINGLY MAY, _____ [*either* WITHIN 120 DAYS AFTER THE _____ (WILL *or* CODICIL) WAS ADMITTED TO PROBATE *or* AT ANY TIME BEFORE ENTRY OF AN ORDER FOR FINAL DISTRIBUTION OF

THE ESTATE OF DECEDENT _____ (*name*)], PETITION THE COURT TO REVOKE THE _____ [WILL *or* CODICIL].

A. Revocation of Probate of Will. Within 120 days after a will is admitted to probate, any interested person, other than (1) a party to a will contest, or (2) a person who had actual notice of a will contest in time to have joined in the contest, may petition the court to revoke the probate of the will. The petition must include objections setting forth written grounds of opposition (*Prob. Code § 8270(a)*; *see Prob. Code § 48* (defining "interested person")).

[*Optional*] **B. Revocation by Minor or Incompetent Person.** A person who was a minor or who was incompetent and had no guardian or conservator at the time a will was admitted to probate may petition the court to revoke the probate of the will at any time before entry of an order for final distribution (*Prob. Code § 8270(b)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be used to support a petition to revoke probate of a will [*Prob. Code § 8270*]. It is a general form for use in showing that a petitioner has standing to challenge probate, and that the petition to revoke probate is timely filed.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that the petitioner is an "interested person," such as an heir or devisee of the decedent [*see Prob. Code § 48* ("interested person" defined)], as well as facts showing that the petition was filed within 120 days after the will was admitted to probate [*Prob. Code § 8270(a)*]. If the petitioner was incompetent or a minor when the will was admitted to probate, counsel should discuss facts showing that the decedent's estate has not yet been distributed [*Prob. Code § 8270(b)*].

This form may be combined with other forms discussing the substantive grounds for revoking the probate of a will. Thus, counsel may combine this form with a form raising the issues of lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, or revocation [*see §§ 186.22 -186.37*]. This form also may be adapted for use in a trial or appellate brief or in jury instructions.

For a memorandum in support of an objection to a will that has not yet been admitted to probate, see *§ 186.20*.

[b] Opposing Memoranda

In an appropriate case, the points and authorities *set out in § 186.50* may be used to oppose the contention supported by this form.

[c] Related Pleading and Practice Forms

For further discussion and forms for use in petitions to revoke the probate of a will, see California Forms of Pleading and Practice, Ch. 444, *Probate: Will Contests* (Matthew Bender).

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A. Supporting Will Contests

18-186 California Points & Authorities § 186.22

§ 186.22 Supporting Contest of Will--Grounds for Contest--Will Was Improperly Executed [Prob. Code §§ 6110, 8252(a)]

[1] FORM

[*The following should be combined with a general memorandum supporting a will contest or a petition to revoke probate of a will (see §§ 186.20 and 186.21), or may be used in a trial or appellate brief.*]

THE _____ [WILL *or* CODICIL] OF DECEDENT _____ [*name*] IS INVALID BECAUSE IT WAS NOT EXECUTED IN SUBSTANTIAL COMPLIANCE WITH THE STATUTORY REQUIREMENTS FOR THE EXECUTION OF FORMAL WILLS.

A. Writing Required. A will must be in writing (*Prob. Code § 6110(a)*).

B. Signature Required. A will must be signed (1) by the testator, (2) by some other person signing in the testator's name and presence and by the testator's direction, or (3) by a conservator under a court order to make a will under *Prob. Code § 2580* (*Prob. Code § 6110(b)*).

C. Witnesses Required. A will must be witnessed by being signed by at least two persons generally competent to be witnesses, each of whom (1) being present at the same time, witnessed either the signing of the will or the testator's acknowledgment of the signature or the will and (2) understands that the instrument they sign is the testator's will (*Prob. Code §§ 6110(c), 6112(a)*). The subscription of a will by two witnesses must occur before the testator's death (*Prob. Code § 6110(c)(1), Estate of Saueressig (2006) 38 Cal. 4th 1045, 1057, 44 Cal. Rptr. 3d 672, 136 P.3d 201*).

D. Statutory Requirements Must Be Strictly Followed. Statutory requirements must be strictly followed in the execution of a will, and the testator's intention is not to be considered in determining whether the statutory requirements have been met (*Estate of Howell (1958) 50 Cal. 2d 211, 215, 324 P.2d 578* ; *Estate of Moore (1949) 92 Cal. App. 2d 120, 122, 206 P.2d 413*).

E. Presumption of Due Execution Inapplicable When Contrary Evidence Clear. A presumption that a will has been duly executed arises on proof of the signatures of the testator and the witnesses; however, the court is not required to find according to the presumption when contrary evidence is clear (*Estate of Fletcher (1958) 50 Cal. 2d 317, 319, 325 P.2d 103*).

[*Optional*] **F. Signature by Mark Requires Formalities.** If a testator signs a will by a mark placed near his or her written name, but the person who wrote the testator's name on the will is not present at the signing and does not sign his or her own name as a witness to the mark and no other competent witness signs the will as a witness to the mark, the formalities for signature by a mark are notsatisfied (*Estate of Mangeri (1976) 55 Cal. App. 3d 76, 81-83, 127 Cal. Rptr. 438* ; *see Civ. Code § 14*; *Code Civ. Proc. § 17*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a challenge to a will that is allegedly improperly executed [*see Prob. Code §§ 6110* (execution of wills), 6112 (witnessing of wills)]. Optional Paragraph F is for use when the will was signed by a mark, and the execution and witnessing formalities for signatures by mark were not satisfied. Essentially, a mark by a person who cannot write is a proper "signature," as long as the person's name is written near the mark by a signing witness [*see Civ. Code § 14*; *Code Civ. Proc. § 17*; *see also Prob. Code § 1000* (rules applicable in civil practice apply if Probate Code does not provide applicable rules); *but see Estate of McCabe (1990) 224 Cal. App. 3d 330, 333-334, 274 Cal. Rptr. 43* (substantial compliance with *Civ. Code § 14* and *Code Civ. Proc. § 17* is enough)].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel may attempt to rebut the presumption of due execution created by a signed will [*see Estate of Fletcher (1958) 50 Cal. 2d 317, 319, 325 P.2d 103]* by discussing facts showing clear evidence of coercion or lack of understanding by the testator or witnesses [*see Estate of Fletcher (1958) 50 Cal. 2d 317, 319, 325 P.2d 103]* . Like a complaint in a civil action, an objection to a will must allege ultimate facts rather than conclusions of law and evidentiary facts [*see Estate of Archer (1987) 193 Cal. App. 3d 238, 245, 239 Cal. Rptr. 137]* .

This memorandum may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of improper execution of a will. Thus, they may be combined with the points and authorities pertaining to an objection to the admission of a will to probate [*see § 186.20*] or a petition to revoke probate of a will [*see § 186.21*].

Before initiating a proceeding that may constitute a "will contest" [*see Prob. Code § 21310(c)*; *see also § 186.05[4][a]*], the attorney should review the instrument in question, and other relevant instruments prepared by the testator, to see if they contain any no contest clauses and, if they do, should carefully review the law governing enforcement and effect of such clauses [*Prob. Code §§ 21310-21315*] before initiating a contest. For discussion, see *§ 186.05*.

[b] Opposing Memoranda

In an appropriate case, the *form in § 186.51* may be used to oppose the contentions supported by these points and authorities.

[3] Discussion of Authorities

[a] Witnesses Required

In ***Estate of Saueressig*** *(2006) 38 Cal. 4th 1045, 44 Cal. Rptr. 3d 672, 136 P.3d. 201* , the decedent requested a notary to notarize his will. After the decedent's death, the will was submitted for probate and the trial court denied the

petition for probate on the grounds that the will did not qualify as holographic because its material terms were typed, nor did it qualify as a formal will because, having been signed by only one witness, it failed to meet the two-signature requirement of *Prob. Code § 6110*. Relying on *Estate of Eugene (2002) 104 Cal. App. 4th 907, 128 Cal. Rptr. 2d 622* , the executor appealed, and the Court of Appeal reversed, on the grounds that there was a second qualifying witness--the notary's husband--who, according to the husband's declaration, heard the decedent ask the notary to notarize the will, saw the decedent sign the document, and saw the will notarized.

The California Supreme Court affirmed the trial court decision that the will did not qualify as holographic because its material terms were typed, nor did it qualify as a formal will because, having been signed by only one witness, it failed to meet the two-signature requirement of *Prob. Code § 6110*. The Court held that the subscription of a will by two witnesses must occur prior to the testator's death, and a will that has not been subscribed by two witnesses at the time of the testator's death neither complies nor substantially complies with *Prob. Code § 6110* (*38 Cal. 4th 1045, 1051)* . The Court further reasoned that permitting witnesses to sign a will after the death of a testator would erode the efficacy of the witnessing requirement as a safeguard against fraud or mistake (*38 Cal. 4th 1045, 1052)]* .

NOTE:

In 2008, the California Legislature codified the California Supreme Court's holding in *Estate of Saueressig (2006) 38 Cal. 4th 1045, 44 Cal. Rptr. 3d 672, 136 P.3d. 201* in *Prob. Code § 6110(c)*, which requires that a will be witnessed by being signed during the testator's lifetime, but further provides that a will that was not executed in compliance with that requirement must be treated as if it was executed in compliance if the proponent of the will establishes by clear and convincing evidence that, at the time the testator signed the will, the testator intended the will to constitute the testator's will.

[b] Statutory Requirements Must Be Strictly Followed

Estate of Howell *(1958) 50 Cal. 2d 211, 324 P.2d 578* , involved a petition for revocation of probate. The document submitted to probate consisted of three written pages. The first page contained the heading "Last Will and Testament," followed by two testamentary provisions, a provision appointing an executor, an attestation clause signed by three witnesses, and the testator's signature. The second and third pages were both labeled at the top as "Last Will and Testament--Frances R. Howell," and numbered "Page Two" and "Page Three" respectively. Page two contained nine testamentary provisions followed by the testator's signature, and page three contained one testamentary provision followed by an empty space of more than seven inches and, at the bottom of the page, the testator's signature. The three pages were not attached together, and there was no evidence that they constituted a single document at the time they were signed by the testator.

The California Supreme Court held that the will was not properly executed and could not be probated. The Court observed that the witness signatures did not appear at the end of the document, and that it was doubtful that the testator's signature seven inches below the last testamentary provision constituted a signature "at the end" of the document as required by former Prob. Code § 50 (repealed effective January 1, 1985 by Stats. 1983, ch. 842, § 18). The Court expressly stated that proffered evidence that the testator intended the three pages to constitute a both single document and his will was not relevant to determining whether the statutory requirements had been satisfied (*50 Cal. 2d 211, 215)* .

In ***Estate of Moore*** *(1949) 92 Cal. App. 2d 120, 206 P.2d 413* , a niece with whom the decedent had lived found in the decedent's bible a document purporting to be the decedent's will. The document was offered for probate, and another niece contested it on the grounds that it was not properly executed. The document was entirely typewritten, with the decedent's name typewritten at the end. It was signed by three witnesses, and when the witnesses signed, the decedent personally wrote his name at the top of the document and stated that the document was his will. There was no evidence that the decedent typed the document, or even that he knew how to type. Nor was there any evidence concerning who typed the document or when it was typed. The trial court denied probate of the document, finding that the decedent's

typed name at the end did not qualify as a valid signature under former Prob. Code § 50 (repealed effective January 1, 1985, by Stats. 1983, ch. 842, § 18) (the niece who propounded the document for probate did not contend that the signature at the top of the document was satisfactory under former Prob. Code § 50). The proponent niece appealed.

The court of appeal affirmed, holding that former Prob. Code § 50 required subscription by handwritten signature or, at the very least, that a typewritten signature be typed by the testator or at the testator's direction and in his or her presence (*92 Cal. App. 2d 120, 123)* . In reaching its decision, the court of appeal considered both *Code Civ. Proc. § 17* and the definition of "subscribe" set forth in Webster's Dictionary. The court noted that the common meaning of "subscribe" does not include the typing of a name, and that *Code Civ. Proc. § 17* provides for subscription by mark as the exclusive alternative to handwritten subscription. It disregarded the testator's statements and intention as irrelevant to the statutory signature requirements (*92 Cal. App. 2d 120, 122)* .

[c] Presumption of Due Execution Inapplicable When Contrary Evidence Clear

In ***Estate of Fletcher*** *(1958) 50 Cal. 2d 317, 325 P.2d 103* , a typewritten document bearing the signatures of two witnesses and a signature purported to be that of the decedent was submitted for probate. Contestants alleged that at the time of the execution of the document, the decedent was not of sound and disposing mind, that the will was not signed by the decedent or executed with the required statutory formalities, and that the decedent was unduly influenced by the proponent of the will. At trial, the proponents offered proof of due execution. The signatures of the two witnesses were not disputed. One of the witnesses had died. The other testified that the recitals in the attestation clause were untrue and that the purported will was not executed with the formalities required by law. According to the witness, the decedent was in a coma at the time the will was executed. The will was signed by the proponent of the will by placing a pen in the decedent's hand and directing the decedent's signature by holding her hand in his. The decedent did not know what was happening, and did not in any manner declare the document to be her will. The trial court denied probate of the will, declaring that although the witness's signatures raised a presumption of due execution, the court was not required to find in accordance with the presumption when contrary evidence was presented. The proponents of the will appealed.

The court of appeal found that there was substantial evidence to show a lack of due execution of the will. It noted that the trial court has discretion to determine the order of proof, and that the trial court may require the proponent of a will to prove due execution before it proceeds with a will contest. The court of appeal stated that the clear and uncontradicted testimony of the remaining witness to the will conflicted with the presumption of due execution, leaving a question of fact that was properly determined by the trial court (*50 Cal. 2d 317, 320)* .

[d] Signature by Mark Requires Formalities

In ***Estate of Mangeri*** *(1976) 55 Cal. App. 3d 76, 127 Cal. Rptr. 438* , an attorney prepared a will for a hospitalized testator. The testator, who was too weak to write his name, signed the will with an "X" placed immediately above his name as typed at the end of the will by the attorney. Two witnesses signed the will, but no witness wrote the testator's name on the will or signed the will as a witness to the mark. The trial court granted a summary judgment motion by the executor, and dismissed the petition for admission of the will to probate, finding that the will was not executed in conformity with the statutory requirements for signatures by mark. The testator's stepdaughter and sister appealed, claiming that there had been substantial compliance with the requirements.

The court of appeal held that there was no substantial compliance with the requirements set forth in *Civ. Code § 14* and *Code Civ. Proc. § 17* for signatures by mark. These statutes provide that when a person signs or subscribes a document by a mark, his or her name must be written near the mark by a person who writes his or her own name as a witness. Citing *Estate of Dombrowski (1912) 163 Cal. 290, 125 P. 233* , and *Estate of Gooch (1962) 211 Cal. App. 2d 1, 26 Cal. Rptr. 835* , among other cases, the court stated that none of the approved cases had found the procedure followed in the case to substantially comply with the statutory requirements for a signature by mark (*55 Cal. App. 3d 76, 79-81)* .

The facts and procedural background of ***Estate of McCabe*** *(1990) 224 Cal. App. 3d 330, 274 Cal. Rptr. 43* , are discussed in *§ 186.51[3][b]*. In *McCabe*, the court held that a will was entitled to probate even though the witness failed to write the decedent's name near his mark, as provided in *Civ. Code § 14* and *Code Civ. Proc. § 17*. Because the decedent's mark was directly above his typewritten name on the line designated for signature, it was clear what name the mark was intended to represent, and because the mark was witnessed by someone other than the attesting witness, the opportunity for fraud was minimal. Thus, strict compliance with the statutory requirements in order to remove the opportunity for fraud was unnecessary (*224 Cal. App. 3d 330, 334)* .

[4] Additional Authorities

[a] Witnesses Required

In *Crook v. Contreras (2002) 95 Cal. App. 4th 1194, 116 Cal. Rptr. 2d 319* , the decedent executed two documents purporting to exercise a power of appointment over assets in a trust. Two witnesses saw the execution of the documents, but only one witness signed the documents before the decedent's death. Two years after the first document was executed, a year and a half after the second document was executed, and one month after the decedent's death, the other witness signed an attestation that was attached to the petition to admit the two documents to probate as codicils. The court held that the subscription of a will by two witnesses must occur before the testator's death, and that a will that has not been subscribed by two witnesses at the time of the testator's death neither complies nor substantially complies with the requirements of *Prob. Code § 6110(c)*. The court considered the decisions of courts in other jurisdictions, which provided substantial support for its conclusion. It also noted that to hold otherwise would invite fraud and subvert the intent of will authentication requirements by allowing the validity of a will to depend on the whim of a witness who could wait until after the testator's death to decide whether to subscribe his or her signature to the will (*95 Cal. App. 4th 1194, 1205)* .

In *Estate of Eugene (2002) 104 Cal. App. 4th 907* , the court held that *Prob. Code § 6110* does not require either witness to sign in the presence of the other or of the testator, or at any particular time. Thus, the court concluded that an attorney who prepared reciprocal wills and witnessed both testators' execution of their wills, but inadvertently failed to sign one will, was properly permitted to sign after the testator's death. The court disagreed with the conclusion of *Crook v. Contreras*, above, that the subscription of a will by the witnesses must always occur before the testator's death in order to substantially comply with *Prob. Code § 6110* (*104 Cal. App. 4th 907, 912-914)* . However, Estate of Eugene is no longer good law on this point in light of *Estate of Saueressig (2006) 38 Cal. 4th 1045* , discussed in*§ 186.22[3][a], above*, in which the California Supreme Court expressly repudiated this position.

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Volume 18 Chapters 180-189 PRETRIAL PROCEEDINGS---to---PROBATE OF WILLS
CHAPTER 186 PROBATE OF WILLS
PART II. FORMS
A. Supporting Will Contests

18-186 California Points & Authorities § 186.23

§ 186.23 Supporting Contest of Will--Grounds for Contest--Holographic Will Was Improperly Executed--General Form [Prob. Code § 6111]

[1] FORM

[*The following should be combined with a general memorandum of points and authorities supporting a will contest or a petition to revoke probate of a will (see §§ 186.20 and 186.21), or may be used in a trial or appellate brief.*]

THE PURPORTED HOLOGRAPHIC _____ [WILL *or* CODICIL] IS INVALID BECAUSE IT WAS NOT EXECUTED IN SUBSTANTIAL COMPLIANCE WITH THE STATUTORY REQUIREMENTS FOR THE EXECUTION OF HOLOGRAPHIC WILLS.

A. Holographic Will Must Be in Testator's Handwriting. A document is not a valid holographic will unless the signature and the material provisions are in the handwriting of the testator (*Prob. Code § 6111(a)*; *see Estate of Sola (1990) 225 Cal. App. 3d 241, 247, 275 Cal. Rptr. 98*).

B. Holographic Will Must Contain Words Describing Property to Be Disposed of and Showing Intention to Dispose of That Property. Although no particular words are required to create a will, a holographic will must contain words describing, or at least referring to, the property to be disposed of and showing an intention to dispose of the property (*Estate of Wong (1995) 40 Cal. App. 4th 1198, 1205, 47 Cal. Rptr. 2d 707*).

C. Proponent of Document Alleged to Constitute Holographic Will Has Burden of Showing That Document Describes Property to Be Disposed of and Shows Intent to Dispose of That Property. The proponent of an alleged holographic will has the burden of showing that the document describes the property to be disposed of and shows an intent to dispose of that property (*Estate of Wong (1995) 40 Cal. App. 4th 1198, 1205, 47 Cal. Rptr. 2d 707*).

[*Optional*] **D. Intention to Dispose of Property Must Be Shown by Words, Not by Symbol Without Fixed Meaning.** The intention of the author of a document offered as a holographic will to dispose of property identified in the document must be shown by words, and not by a symbol without fixed meaning (*Estate of Wong (1995) 40 Cal.*

App. 4th 1198, 1205, 47 Cal. Rptr. 2d 707).

[*Optional*] **E. Holographic Will Must Evidence Present Intention to Dispose of Testator's Property, Not Intent to Make Will in Future.** A writing signed by the testator will not qualify as a holographic will unless it evidences present testamentary intent; a writing that only states the writer's intention to make a will in the future is not a holographic will [*Estate of Southworth (1996) 51 Cal. App. 4th 564, 572, 59 Cal. Rptr. 2d 272]* .

[*Optional*] **F. Undated Holographic Will Invalid to Extent It Creates Inconsistency.** If a holographic will does not contain a statement as to the date of its execution, and if the omission results in doubt as to whether its provisions or the inconsistent provisions of another will are controlling, the holographic will is invalid to the extent of the inconsistency unless the time of its execution is established to be after the date of execution of the other will (*Prob. Code § 6111(b)(1)*).

[*Optional*] **G. Undated Holographic Will Invalid If Testator's Capacity at Issue.** If a holographic will does not contain a statement as to the date of its execution, and if it is established that the testator lacked testamentary capacity at any time during which the will might have been executed, the will is invalid unless it is established that it was executed at a time when the testator had testamentary capacity (*Prob. Code § 6111(b)(2)*).

[*Optional*] **H. Trend Towards Liberality Does Not Contravene Statutory Requirements.** The trend towards liberally interpreting the statutes governing the execution of wills does not permit the court to ignore clear and explicit statutory requirements such as the requirement that a holographic will be signed in the handwriting of the testator (*Estate of Wunderle (1947) 30 Cal. 2d 274, 279, 181 P.2d 874* ; *Estate of Twohig (1986) 178 Cal. App. 3d 555, 559, 223 Cal. Rptr. 352*).

[*Optional*] **I. Failed Formal Will Not Valid Holographic Will.** A formal will denied probate because of the false declarations made by each of its purported witnesses may not be given effect by treating it as if the testator had intended it to be a holographic instrument (*Estate of Brown (1985) 171 Cal. App. 3d 1064, 1066-1069, 218 Cal. Rptr. 108*).

[*Optional*] **J. Extrinsic Evidence Admissible.** Extrinsic evidence is admissible to determine whether a document constitutes a holographic will (*Prob. Code § 6111.5*.

[*Optional*] **K. Holographic Will Revoked by Operation of Law.** When a testator executes a holographic will before marriage naming as a beneficiary a person whom he or she later marries and divorces, *Probate Code Section 6122* applies to revoke the holographic will by operation of law (*Estate of Reeves (1991) 233 Cal. App. 3d 651, 654-655, 284 Cal. Rptr. 650*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a challenge to a purported holographic will. The form is a general one that may be used when a holographic will has not been properly executed in accordance with statutory requirements [*see Prob. Code § 6111*].

Optional Paragraph D may be used if the purported will contains symbols (such as arrows) other than words, that purportedly indicate the testamentary intent of the author of the document [*see, e.g.,* *Estate of Wong (1995) 40 Cal. App. 4th 1198, 1205, 47 Cal. Rptr. 2d 707]* . Optional Paragraph E may be used if there is an issue regarding whether a document evidences a present testamentary intent or merely an intention to make a will in the future. Optional Paragraphs F and G may be used when the holographic document is not dated and there is another, competing will or an issue concerning testamentary capacity, respectively. Optional Paragraph H is for use when the proponent of the will

argues that there has been substantial compliance with the statutory requirements for the execution of holographic wills. Optional Paragraph I may be used when the proponent of an invalid formal, witnessed will attempts to submit the document as a holographic will. Optional Paragraph J is for use if there is extrinsic evidence relevant to whether a document is a holographic will. Optional Paragraph K is for use when the testator executes a holographic will naming as beneficiary a person whom the testator later marries but subsequently divorces.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel may discuss facts showing that the testator's handwritten portions of a will, standing alone, are not material will provisions [*see, e.g., Estate of Sola (1990) 225 Cal. App. 3d 241, 247, 275 Cal. Rptr. 98* ; *Estate of Phifer (1984) 152 Cal. App. 3d 813, 816-818, 200 Cal. Rptr. 319]* .

This memorandum may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a proffered document is not a valid holographic will. Thus, it may be combined with the points and authorities pertaining to an objection to the admission of a will to probate [*see § 186.20*] or a petition to revoke probate of a will [*see § 186.21*].

[b] Opposing Memoranda

In an appropriate case, the points and authorities *set out in § 186.52* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Holographic Will Must Be in Testator's Handwriting

Estate of Sola *(1990) 225 Cal. App. 3d 241, 275 Cal. Rptr. 98* involved two purported wills--a formal, witnessed will and a document consisting of a partial copy of the formal will, on which the testator scratched out various provisions and made various handwritten notations. Specifically, the testator scratched out boilerplate clauses concerning the revocation of prior wills and the payment of debts and funeral expenses, as well as the names of three beneficiaries and language dealing with distribution in the event that one of the named beneficiaries predeceased testator. The testator also scratched out part of a no-contest clause, and omitted a clause appointing an executor and an attorney for the executor. In addition, the testator omitted an attestation clause, witness signatures, and the testator's signature. Among the many interlineations was a handwritten note stating "SIGNED IT ON PAGE 2 DESTROYED PAGE 2 *IT'S OUT* I Fred Sola where I *pencil* OUT IS OUT Fred Sola THIS IS ME TALKING 6/11/87 USE THIS WILL." The document also contained a handwritten interlineation appointing the testator's brother to "to take care of this will." At the bottom of the last page, testator had written "signed Fred Sola." The trial court held that this document was not a valid holographic will, denied probate of the document, and admitted the formal will. Testator's brother appealed.

The court of appeal affirmed, holding that the handwritten portions of the document, standing alone, lacked both testamentary intent and testamentary substance, and had meaning only in relationship to the printed portion of the document. The court declined to make the policy favoring validity of wills the sole basis for its determination, noting that the determination of whether a document constitutes a holographic will is governed by statute. Even under the liberal construction trend and the substantial compliance rule, the handwritten provisions could not be deemed to be "material" provisions [*see Prob. Code § 6111(a)*]. The words used by testator, along with arrows pointing to printed portions of the document, evidenced his intent that the typewritten and handwritten portions of the document be read as a whole. The court also rejected the alternative argument that the handwritten provisions constituted a valid holographic codicil. Unlike the situation in *Estate of Neilson (1980) 105 Cal. App. 3d 796, 165 Cal. Rptr. 319* , the handwritten provisions did not merely identify the provisions of the former will to be revoked or incorporated by reference. Rather, they could not be understood without reference to the typewritten words. Testator's intent was obviously to blend the handwritten and typewritten words into a new will (*225 Cal. App. 3d 241, 248)* .

[b] Holographic Will Must Contain Words Describing Property to Be Disposed of and Showing Intention to Dispose of That Property

In ***Estate of Wong*** *(1995) 40 Cal. App. 4th 1198, 47 Cal. Rptr. 2d 707* , a 44-year-old businessman with a history of good health suddenly became ill and died. Some time after his death, a sealed envelope was found in his office. The envelope contained a note on which there were nine handwritten words, one the word "all," three constituting the businessman's name, two the name of his girl friend, and the remaining three the words "my best half." An arrow, a date, and the businessman's initials were at the bottom of the note. The series of words contained no recognizable subject, verb, or object. The court held that the note did not qualify as a holographic will because it did not contain operative words legally sufficient to create a devise of property. Although no particular words are required to create a will, every will must contain words describing, or at least referring to, the property to be disposed of, and showing the intention of the alleged testator to dispose of that property. Since the handwritten note did not describe or refer to any property, and since it did not contain words showing the alleged testator's intention to dispose of any property on his death, it did not qualify as a holographic will. The arrow could not supply the required meaning, as an arrow is a symbol without a fixed meaning and cannot be used in place of a word evidencing an intention to "give," "bequeath," or "will" (*40 Cal. App. 4th 1198, 1208-1209)* .

[c] Proponent of Document Alleged to Constitute Holographic Will Has Burden of Showing That Document Describes Property to Be Disposed of and Shows Intent to Dispose of That Property

In ***Estate of Wong*** *(1995) 40 Cal. App. 4th 1198, 1205, 47 Cal. Rptr. 2d 707* , the contestants argued that a document offered as a holographic will did not qualify as a will because it did not describe or refer to any property and did not show the intention of the alleged testator to dispose of property by will. The proponent of the alleged will argued that the contestants had the burden of proving lack of testamentary intent, inasmuch as *Prob. Code § 8252* provides in pertinent part that, at the trial of a will contest, the proponents of the will have the burden of proof of due execution and the "contestants of the will have the burden of proof of lack of testamentary intent or capacity." The court rejected this argument, holding that *Prob. Code § 8252* applies only to documents that are clearly wills. The contestants of a document that appears to be a will and that exhibits testamentary intent must prove that testamentary intent was lacking. However, when the question is whether a document exhibits the required testamentary intent, this rule has no application, and the proponent has the burden of proving the required intent (*40 Cal. App. 4th 1198, 1205)* .

[d] Intention to Dispose of Property Must Be Shown by Words, Not by Symbol Without Fixed Meaning

In ***Estate of Wong*** *(1995) 40 Cal. App. 4th 1198, 47 Cal. Rptr. 2d 707* , a note containing nine handwritten words was offered as a holographic will. Although the words contained no recognizable subject, verb, or object, the proponent of the alleged will argued that an arrow appearing at the bottom of the note symbolized the alleged testator's intent to transfer property by the note. The trial court accepted this argument and admitted the note to probate as a will. The court of appeal reversed, holding that the intention of the author of a document offered as a holographic will to dispose of property identified in the document must be shown by words, not by a symbol without fixed meaning. An arrow is, at best, an indefinite symbol and cannot be interpreted as the equivalent of the verbs "give," "bequeath," or "will," or even as meaning that the testator wanted the alleged devisee to have certain property upon his death. The arrow does not have one meaning which allows it to be used in place of a word, and it may not be used to supply any meaning to the words around it (*40 Cal. App. 4th 1198, 1208)* .

[e] Holographic Will Must Evidence Present Intention to Dispose of Testator's Property, Not Intent to Make Will in Future

In ***Estate of Southworth*** *(1996) 51 Cal. App. 4th 564, 59 Cal. Rptr. 2d 272* , the decedent filled out a printed "donor card" prepared by an animal shelter. The card provided the donor with three options: (1) naming the animal shelter as beneficiary of a life insurance policy, (2) changing the donor's will to leave securities or cash to the shelter, or (3) not

taking "immediate action" but stating his or her future intentions. The decedent circled option (3) and in the blank space provided after it wrote "My entire estate is to be left to North Shore Animal League." The trial court ruled that the card qualified as a valid holographic will because the signature and the material provisions were in the decedent's handwriting (*see Prob. Code § 6111(a)*). The court of appeal disagreed, concluding that when the decedent selected option (3), she evidenced an intent not to take "immediate action," but to take some action in the future, and that her handwritten words evidenced an intent to make a will in the future. Since there was no present intent to make a will, the requirement of testamentary intent was not satisfied and the card did not qualify as a will (*51 Cal. App. 4th 564, 572)* .

[f] Trend Towards Liberality Does Not Contravene Statutory Requirements

In ***Estate of Wunderle*** *(1947) 30 Cal. 2d 274, 181 P.2d 874* , decedent duly executed a formal will in 1939 leaving his estate to his sister, BR, and FW, and appointing AW as executor. In 1943, the decedent signed another will, giving everything to his sister and appointing MD as executor, although the will was not properly executed and attested. A few days later, the decedent wrote a letter to his sister, enclosing a copy of the 1943 will. The letter referred to the will as "my testament," noted that the will did not mention AW, and hoped that AW would not find out about the will. The letter also stated that "a letter is ready" for AW, and instructed the sister to hand the described letter to AW when the decedent died. Shortly after the decedent's death, MD filed a petition for the probate, as a holographic will, of an undated written memorandum stating that the 1939 will was null and void, and that decedent's sister would be his sole heir under the "new will ... made on April 22, 1943." There was no evidence that the decedent included the memorandum with the letter or the will he sent to his sister in 1943, or that the memorandum was the letter that was "ready" for AW. Nor was there any evidence concerning the decedent's testamentary intentions. Three days after the memorandum was submitted, AW petitioned for admission of the 1939 will. The trial court admitted the 1939 will to probate, and denied probate of the memorandum, finding that the memorandum was void because it was not dated and not executed with testamentary intent. Decedent's sister appealed.

The Supreme Court affirmed, holding that the trend toward liberality in interpreting holographic will requirements did not excuse the requirement that a holographic will must be dated and signed by the testator [*see* former Prob. Code § 53]. The Court declared that the date of a holographic will cannot be supplied by a date not in the testator's handwriting, and no recourse may be had to a date appearing in the body of the holograph if it is obvious that the date was not intended to serve as the date of execution of the holograph (*30 Cal. 2d 274, 280)* . According to the Court, the "April 22, 1943" date on the face of the memorandum was intended only to refer to and identify the 1943 will. No other document could be used to supply the missing date, since there was nothing to indicate the decedent's intent that the memorandum be read together with any other document. Furthermore, the date of the ineffective 1943 will could not be used to supply the date of the memorandum because the 1943 will was not dated in the decedent's hand (*30 Cal. 2d 274, 283-284)* .

In ***Estate of Twohig*** *(1986) 178 Cal. App. 3d 555, 223 Cal. Rptr. 352* , the decedent's natural children petitioned for the admission to probate of a formal will and an unsigned codicil. The decedent had four children with his first wife, who died in 1958. In 1968, he married a woman who had two children from a prior marriage. In 1973, the decedent executed a formal will leaving his entire estate to the second wife. In the event she failed to survive him, he left the estate in equal shares to his four children and two stepchildren. The decedent's second wife died in 1982. In 1983, while the decedent was ill and living with his natural son, the son found the decedent's formal will in an envelope. Folded inside the will was a handwritten document entitled "Codicil to This Will Dated August 15, 1973." The codicil canceled and voided the fourth paragraph of the formal will, and substituted a fourth paragraph giving the decedent's entire estate in equal shares to his four natural children. It also appointed one of the children as executor of the estate. The codicil was undisputedly in the decedent's handwriting, but was unsigned. After the decedent died in 1984, the trial court admitted both documents to probate. The decedent's stepchildren appealed.

The court of appeal reversed, holding that although there is a trend toward liberality in construing holographic will statutes, this trend does not permit courts to ignore clear and explicit statutory requirements. The court noted that in a

case such as this one in which there is no extrinsic evidence and no conflict in the evidence, the court is not bound by a construction of a document based solely on the terms of the written instrument, but must determine the validity of the instrument entirely by reference to the applicable statutes and principles of law (*178 Cal. App. 3d 555, 559)* . The statutory requirements for both holographic and formal wills and codicils require such instruments to be signed by (or, in the case of formal wills, at the direction of) the testator. Therefore, a will or codicil cannot be held to be in substantial compliance with the statutory requirements when it is unsigned (*178 Cal. App. 3d 555, 560)* .

[g] Failed Formal Will Not Valid Holographic Will

In ***Estate of Brown*** *(1985) 171 Cal. App. 3d 1064, 218 Cal. Rptr. 108* , decedent's daughter lived with and cared for the decedent in the family home until early 1979. In February, 1979, the daughter decided to move out, thereby offending the decedent. About the same time, the decedent's sister visited the decedent from Louisiana. While the sister was visiting, the decedent composed both a formal will that left everything to the sister and a letter expressing the decedent's anger with her daughter and explaining why the decedent did not leave the daughter anything in her will. The will was not witnessed. The decedent's sister returned to Louisiana with the will and the letter, where she had three Louisiana residents falsely assert that they had been witnesses to the execution of the will. After the decedent's sister left, the decedent and her daughter made up, and the daughter continued to care for the decedent as before. The decedent died in December, 1979. The decedent's daughter was granted letters of administration. Four years later, just before the distribution of the decedent's estate, the decedent's sister offered the will for probate. The trial court admitted the will to probate as a holographic will.

The court of appeal reversed, holding that the will was invalid per se. The court declared that notwithstanding the substantial compliance doctrine, it was one thing to salvage a will that was clearly intended to be a holographic will, and quite another thing to convert a failed formal will into a valid holographic will (*171 Cal. App. 3d 1064, 1068)* . The court explained that from the face of the will (i.e., the will was not witnessed), it was clear that the testator had anticipated further formalities before the will would become effective. According to the court, the sister was obviously aware of this fact, since she caused the will to be falsely attested. The court distinguished *Estate of Black (1982) 30 Cal. 3d 880, 181 Cal. Rptr. 222, 641 P.2d 754* , in which rejection of a will would have had the unfortunate effect of passing an estate through the laws of intestacy to the daughter of a decedent's predeceased husband, who was a stranger to the decedent. In *Brown*, by contrast, rejection of the will would pass the estate to the daughter who cared for the decedent throughout the decedent's lifetime, instead of to the sister who lived in another state and merely chanced to visit during a period when the decedent was upset with her daughter (*171 Cal. App. 3d 1064, 1069)* .

[h] Extrinsic Evidence Admissible

In ***Estate of Brenner*** *(1999) 76 Cal. App. 4th 1298, 91 Cal. Rptr. 2d 149* , the testator asked his personal injury lawyer to prepare a new will to replace his existing formal will. The lawyer declined to prepare a new will, but made interlineations on a copy of the formal will, on which the testator had made handwritten changes. When the testator again asked the lawyer to prepare a new will, the lawyer declined and suggested that the testator prepare a holographic will. The testator then sent the lawyer a document that the testator said was his holographic will, and stated that he intended to revoke his formal will, giving several reasons for this action. The document consisted of a three page photocopy of a handwritten list of dispositions on which there were handwritten ink additions, including "my will of November 6, 1990 is void;" the signature "Morris Brenner;" and the statements "This is my new will," "my trustee and executor, lawyer James Osborne," and "Will of Nov. 6, 1990 is void. M.B." The holograph also contained an original ink notation "witness," and a signature. The lawyer subsequently prepared a draft of a new formal will and suggested that the testator take it to an estate planning specialist, which the testator did not do. Rather, the testator attempted to execute the will, did so erroneously, and thus invalidated it. At trial, both the original handwritten matter and the photocopy on which the testator had annotated were presented. A forensic expert testified that the photocopied and ink material in the holographic will, except for the notation "witness" and the witness' signature, was the testator's handwriting. The trial court held that the instrument did not qualify as a valid holographic will because the photocopy

did not contain the testator's original handwriting.

The court of appeal reversed, holding that *Prob. Code § 6111* is properly construed to allow photocopies of the testator's handwritten dispositions, properly authenticated, as well as original ink writings. In this case, substantial and uncontroverted extrinsic evidence confirmed that the testator's intent was to replace the formal will with the holographic will (*76 Cal. App. 4th 1298, 1303)* .

[i] Holographic Will Revoked by Operation of Law

In ***Estate of Reeves*** *(1991) 233 Cal. App. 3d 651, 284 Cal. Rptr. 650* , the court held that when a testator executes a holographic will before marriage naming as a beneficiary a person whom he or she later marries and divorces, *Prob. Code § 6122*, the "revocation by divorce" statute, applies to revoke the holographic will be operation of law. Under *Prob. Code § 6122(b)*, a holographic will may be revived only by the testator's remarriage to the former spouse. Evidence of statements the testator made to his former spouse that she should take the entire estate and evidence of the testator's continuing belief that his holographic will was still valid were irrelevant (*233 Cal. App. 3d 651, 654-655, 659)* .

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Volume 18 Chapters 180-189 PRETRIAL PROCEEDINGS---to---PROBATE OF WILLS
CHAPTER 186 PROBATE OF WILLS
PART II. FORMS
A. Supporting Will Contests

18-186 California Points & Authorities § 186.24

§ 186.24 Supporting Contest of Will--Grounds for Contest--Holographic Will Was Improperly Executed--Doctrine of Integration Inapplicable

[1] FORM

[*The following should be combined with a general memorandum of points and authorities supporting a will contest or a petition to revoke probate of a will (see §§ 186.20 and 186.21), or may be used in a trial or appellate brief.*]

THE DOCTRINE OF INTEGRATION IS INAPPLICABLE TO THE _____ [*describe documents sought to be integrated, e.g.,* SIGNED FORMAL WILL AND THE UNSIGNED HANDWRITTEN CODICIL], AND THUS MAY NOT BE USED TO BRING THE DOCUMENTS WITHIN THE STATUTORY REQUIREMENTS FOR HOLOGRAPHIC WILLS BECAUSE _____ [*specify, e.g.,* THE FORMAL WILL DID NOT BEAR ANY HOLOGRAPHIC NOTATIONS INDICATING THE TESTATOR INTENDED HIS SIGNATURE ON THE WILL AS AN EXECUTION OF THE CODICIL].

A. Testator Must Intend Two or More Separate Writings to Be Will. Integration occurs when there is no reference to a distinctly extraneous document, but it is clear that two or more separate writings are intended by the testator to be his or her will (*Estate of Wunderle (1947) 30 Cal. 2d 274, 281, 181 P.2d 874* ; *Estate of Twohig (1986) 178 Cal. App. 3d 555, 560, 223 Cal. Rptr. 352*).

[*Optional*] **B. Integrated Documents Must Be Holographic.** The doctrine of integration can only apply if all the writings to be integrated are holographic (*Estate of Twohig (1986) 178 Cal. App. 3d 555, 561, 223 Cal. Rptr. 352*).

[*Optional*] **C. Invalid Codicil May Not Be Integrated.** The doctrine of integration may not be utilized to alter the distributive portion of a valid will by way of an invalid codicil (*Estate of Twohig (1986) 178 Cal. App. 3d 555, 561, 223 Cal. Rptr. 352*).

[*Optional*] **D. Unrelated Document May Not Supply Testamentary Intent for Invalid Holographic Will.** The omission of a testamentary intent from an otherwise valid holographic will cannot be supplied by a separate document

or letter when there is nothing to indicate that the second document is to be read or construed with or as part of the holographic will (*Estate of Wunderle (1947) 30 Cal. 2d 274, 282, 181 P.2d 874*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a challenge to a purported holographic will when the party seeking probate attempts to use the integration doctrine to bring the document within the statute governing the execution of holographic wills [*see Prob. Code § 6111*; *Estate of Wunderle (1947) 30 Cal. 2d 274, 181 P.2d 874* ; *Estate of Twohig (1986) 178 Cal. App. 3d 555, 223 Cal. Rptr. 352]* . The issue of integration frequently arises in conjunction with the issue of incorporation by reference, discussed in *§ 186.25*.

Optional Paragraph B may be used when not all of the documents sought by the opposing party to be integrated are holographic documents. Optional Paragraph C may be used when integration of an invalid testamentary document is urged for the purpose of altering the distributive portions of a valid testamentary document. Optional Paragraph D may be used when one of the objections to the proposed integration is the lack of evidence that the testator intended to integrate the documents in question.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, to demonstrate that integration is improper because of the rule limiting the application of the doctrine to holographic documents [*see Estate of Twohig (1986) 178 Cal. App. 3d 555, 561, 223 Cal. Rptr. 352]* , counsel should discuss facts showing that one or more of the subject documents was not executed in the handwriting of the testator [*see Prob. Code § 6111(a)*].

This memorandum may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that proffered documents should not be integrated to form a valid holographic will. Thus, it may be combined with the points and authorities pertaining to an objection to the admission of a will to probate [*see § 186.20*] or a petition to revoke probate of a will [*see § 186.21*]. In addition, these points and authorities may be combined with points and authorities asserting that the purported holographic will was not executed in conformity with statutory requirements [*see § 186.23*].

[b] Opposing Memoranda

In an appropriate case, the points and authorities *set out in § 186.53* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Testator Must Intend Two or More Separate Writings to Be Will

The facts and procedural background of ***Estate of Wunderle*** *(1947) 30 Cal. 2d 274, 181 P.2d 874* , are discussed in *§ 186.23[3][f]*. In *Wunderle*, the California Supreme Court considered whether a requisite date or testamentary intent missing from a holographic memorandum purporting to revoke a valid 1939 will and referring to an invalid 1943 will could be derived from construing the memorandum together with the 1943 will and a handwritten letter referring to the will as "my testament" (*30 Cal. 2d 274, 281-282, 284)* . The Court observed that integration occurs when there is no reference to a distinctly extraneous document, but it is clear that two or more separate writings are intended by the testator to be his or her will. Thus, for example, documents may be connected by sequence of thought, folded together, or physically form one document (*30 Cal. 2d 274, 281)* . The Court noted that if there are not such indices (or extrinsic evidence) that a testator intended documents to be construed together, courts have refused to allow the lack of a date or testamentary intent in one document to be supplied by another totally disconnected instrument. The Court held that

there was nothing in the memorandum or the letter to indicate that the decedent intended them, as read together, to be his will (*30 Cal. 2d 274, 283)* .

The facts and procedural background of ***Estate of Twohig*** *(1986) 178 Cal. App. 3d 555, 223 Cal. Rptr. 352* , are discussed in *§ 186.23[3][f]*. In *Twohig*, the court of appeal held that an unsigned holographic codicil could not be admitted to probate with a valid formal will (*178 Cal. App. 3d 555, 560-562)* . The court rejected the respondents' argument that the codicil was integrated into a signed and dated will because the codicil was found folded inside the will. According to the court, integration occurs when there is no reference to a distinctly extraneous document, but it is clear that two or more documents are intended by the testator to constitute his or her will (*178 Cal. App. 3d 555, 560-561)* . The court distinguished *Estate of McCarty (1962) 211 Cal. App. 2d 23, 27 Cal. Rptr. 94* , which involved signed, holographic notations on a formal will that incorporated a holographic codicil executed on the same date as the notations. The court explained that in the case before it, there were no holographic markings on the formal will to indicate the decedent's intent to adopt his signature on the will as execution of an existing holographic codicil. To the contrary, the codicil and the formal will were clearly prepared at different times (*178 Cal. App. 3d 555, 561)* .

[b] Integrated Documents Must Be Holographic

The facts and procedural background of ***Estate of Twohig*** *(1986) 178 Cal. App. 3d 555, 223 Cal. Rptr. 352* , are discussed in *§ 186.23[3][f]*. In *Twohig*, the court of appeal held that an undated, unsigned, handwritten codicil could not be integrated into a formal will (*178 Cal. App. 3d 555, 560-562)* . In making that determination, the court considered, among other things, case law holding that for several writings to be deemed integrated, all of them must be holographs. The court noted that while the codicil was holographic, there were no holographic markings on the formal will indicating the testator's intent to integrate the codicil (*178 Cal. App. 3d 555, 561)* .

[c] Invalid Codicil May Not Be Integrated

The facts and procedural background of ***Estate of Twohig*** *(1986) 178 Cal. App. 3d 555, 223 Cal. Rptr. 352* , are discussed in *§ 186.23[3][f]*. According to *Twohig*, the doctrine of integration may allow two or more handwritten documents that refer to one another to be admitted to probate when it is clear that the testator intended them to be his will. However, an invalid codicil may not be integrated into a valid will to alter the distributive portion of the will (*178 Cal. App. 3d 555, 561)* . The codicil before the court was invalid because it was not signed (*178 Cal. App. 3d 555, 560-562)*

[d] Unrelated Document May Not Supply Testamentary Intent for Invalid Holographic Will

The facts and procedural background of ***Estate of Wunderle*** *(1947) 30 Cal. 2d 274, 181 P.2d 874* , are discussed in *§ 186.23[3][f]*. In *Wunderle*, the California Supreme Court held that an undated handwritten memorandum could not be integrated with an invalid 1943 will and a handwritten letter referring to the will as "my testament" to supply requisite testamentary intent and a date (*30 Cal. 2d 274, 282-284)* . The Court applied the rule that the omission of a testamentary intent or a date from an otherwise valid holographic will is not supplied by reference to a separate document or letter, when there is nothing to indicate that the second document is to be read or construed as part of a holographic will (*30 Cal. 2d 274, 282)* . The Court concluded that the memorandum could not be construed with the other documents to supply intent or a date, because there was nothing to indicate that the testator intended the documents to be so construed (*30 Cal. 2d 274, 283-284)* .

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Volume 18 Chapters 180-189 PRETRIAL PROCEEDINGS---to---PROBATE OF WILLS
CHAPTER 186 PROBATE OF WILLS
PART II. FORMS
A. Supporting Will Contests

18-186 California Points & Authorities § 186.25

§ 186.25 Supporting Contest of Will--Grounds for Contest--Doctrine of Incorporation by Reference Inapplicable

[1] FORM

[*The following should be combined with a general memorandum of points and authorities supporting a will contest or a petition to revoke probate of a will (see §§ 186.20 and 186.21), or may be used in a trial or appellate brief.*]

THE DOCTRINE OF INCORPORATION BY REFERENCE IS INAPPLICABLE TO THE _____ [*describe documents sought to be incorporated, e.g.,* WILL AND THE CODICIL] BECAUSE _____ [*specify, e.g.,* THE WILL DID NOT REFER TO THE CODICIL AND THE UNSIGNED CODICIL, WHICH REFERRED TO THE WILL, WAS NOT ITSELF A COMPLETE TESTAMENTARY INSTRUMENT].

A. When Incorporation by Reference Occurs. Incorporation by reference occurs when one writing that is a complete testamentary document in itself refers to another document in a manner clearly designed to incorporate it (*Estate of Wunderle (1947) 30 Cal. 2d 274, 281, 181 P.2d 874*).

[*Optional*] **B. Incorporated Document Must Be Clearly Identified and in Existence.** It is essential to a valid incorporation by reference that the incorporated document is clearly identified and in existence at the time the will refers to it (*Estate of Wunderle (1947) 30 Cal. 2d 274, 281-282, 181 P.2d 874*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a challenge to a purported testamentary instrument when the party seeking probate attempts to use the doctrine of incorporation by reference to bring the document within the statutes governing the execution of wills, or for adding material provisions to a will [*Estate of Wunderle (1947) 30 Cal. 2d 274, 181 P.2d 874* ; *Estate of Twohig (1986) 178 Cal. App. 3d 555, 223 Cal. Rptr. 352]* . Optional Paragraph B may be used when the doctrine is applied to an incorporated document the is not clearly identified and in existence at the time the will refers to it.

The issue of incorporation by reference frequently arises in conjunction with the issue of integration, discussed in *§ 186.24*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, to support an argument that one document may not incorporate another because the incorporating document is not a complete testamentary instrument, counsel may discuss facts showing that the terms of the incorporating document are not testamentary [*see Estate of McCarty (1962) 211 Cal. App. 2d 23, 27, 27 Cal. Rptr. 94]* .

This memorandum may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the doctrine of incorporation by reference does not apply to a purported testamentary instrument. Thus, it may be combined with the points and authorities pertaining to an objection to the admission of a will to probate [*see § 186.20*] or a petition to revoke probate of a will [*see § 186.21*]. This memorandum may also be combined with points and authorities challenging a purported will on the grounds that the will was not executed in conformity with statutory requirements [*see §§ 186.22, 186.23*].

[b] Doctrine Applicable to Both Formal and Holographic Wills

Unlike the doctrine of integration, which only applies when all of the instruments involved are holographs [*Estate of Twohig (1986) 178 Cal. App. 3d 555, 561, 223 Cal. Rptr. 352* ; *see § 186.24*], the doctrine of incorporation by reference may be applied to either holographic or formal testamentary instruments [*Estate of Smith (1948) 31 Cal. 2d 563, 567, 191 P.2d 413]* .

[c] Opposing Memoranda

In an appropriate case, the points and authorities *set out in § 186.54* may be used to oppose the contentions supported by these points and authorities.

[3] Discussion of Authorities

[a] When Incorporation by Reference Occurs

The facts and procedural background of ***Estate of Wunderle*** *(1947) 30 Cal. 2d 274, 181 P.2d 874* , are discussed in *§ 186.23[3][f]*. In *Wunderle*, the California Supreme Court held that a handwritten memorandum was not a holographic will because it was not dated as required by statute (*30 Cal. 2d 274, 284)* . The appellant pointed out that the memorandum referred to a formal, but invalid, will "made on April 22, 1943." She argued that reference to that date supplied the necessary date to the memorandum, or, in the alternative, if the date was used only to refer to the will, either the date of the 1943 will or the date of a letter accompanying the will supplied the necessary date (*30 Cal. 2d 274, 278)* . The Court disagreed, explaining that incorporation by reference occurs when one of two writings is a complete testamentary instrument, and refers to another in a manner clearly designed to incorporate it (*30 Cal. 2d 274, 281)* . The Court declared that the testator did not intend the "April 22, 1943" date in the memorandum to be the date of that instrument; rather, it was used only to refer to and identify the 1943 will (*30 Cal. 2d 274, 283)* . The Court added that there was nothing in the memorandum or letter to indicate that it was the decedent's purpose to incorporate one of those documents into the other (*30 Cal. 2d 274, 283-284)* . Furthermore, none of the documents--the 1943 will, the letter, or the memorandum--was a valid testamentary instrument (*30 Cal. 2d 274, 284)* .

[b] Incorporated Document Must Be Clearly Identified and in Existence

The facts and procedural background of ***Estate of Wunderle*** *(1947) 30 Cal. 2d 274, 181 P.2d 874* , are discussed in *§ 186.23[3][f]*. Essentially, *Wunderle* held, among other things, that an undated handwritten memorandum could not be

incorporated into an invalid will and a signed and dated letter accompanying the will to form a valid testamentary instrument (*30 Cal. 2d 274, 283-284)* . According to the Court, the requisites of a valid incorporation by reference are that the incorporated document is clearly identified and in existence at the time the will refers to it (*30 Cal. 2d 274, 281-282)* . Although the memorandum and the letter referred to the will, the letter did not clearly identify the memorandum, and the memorandum did not refer to the letter at all (*30 Cal. 2d 274, 284)* .

[4] Additional Authorities

[a] When Incorporation by Reference Occurs

The facts and procedural background of *Estate of Twohig (1986) 178 Cal. App. 3d 555, 223 Cal. Rptr. 352* , are discussed in *§ 186.23[3][f]*. In *Twohig*, the court of appeal refused to incorporate an unsigned holographic codicil into a valid formal, even though the codicil contained a heading stating "This Will dated August 15, 1973." According to the court, the codicil was not, in itself, a complete testamentary instrument because it lacked a signature (*178 Cal. App. 3d 555, 561)* .

[b] Incorporated Document Must Be Clearly Identified and in Existence

The facts and procedural background of *Estate of Twohig (1986) 179 Cal. App. 3d 555, 223 Cal. Rptr. 352* , are discussed in *§ 186.23[3][f]*. In refusing to incorporate a subsequent unsigned holigraphic codicil into a valid will, the *Twohig* court declared that wills cannot, by definition, incorporate future codicils (*178 Cal. App. 3d 555, 560)* .

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Volume 18 Chapters 180-189 PRETRIAL PROCEEDINGS---to---PROBATE OF WILLS
CHAPTER 186 PROBATE OF WILLS
PART II. FORMS
A. Supporting Will Contests

18-186 California Points & Authorities § 186.26

§ 186.26 Supporting Contest of Will--Grounds for Contest--Testator Lacked Testamentary Intent

[1] FORM

[*The following should be combined with a general memorandum of points and authorities supporting a will contest or a petition to revoke probate of a will (see §§ 186.20 and 186.21), or may be used in a trial or appellate brief.*]

THE PURPORTED _____ [WILL *or* CODICIL] IS INVALID BECAUSE IT WAS NOT EXECUTED WITH TESTAMENTARY INTENT, IN THAT _____ [*specify, e.g.,* IT WAS MERELY AN INSTRUMENT EXPLAINING HOW THE DECEDENT WISHED TO CHANGE HER FORMAL WILL].

A. Testamentary Intent Required. Before an instrument may be probated as a will or codicil it must appear from its terms, viewed in the light of the surrounding circumstances, that it was executed with testamentary intent (*Estate of Smith (1998) 61 Cal. App. 4th 259, 265, 71 Cal. Rptr. 2d 424*).

B. Testator Must Intend Specific Paper Offered to Be Will. When it is claimed that the intention of a deceased was that a paper should stand for a last will and testament, it must be plainly and satisfactorily apparent that the deceased intended the very paper to be his or her will (*Estate of Blain (1956) 140 Cal. App. 2d 917, 922, 295 P.2d 898* ; *Estate of Beebee (1953) 118 Cal. App. 2d 851, 858, 258 P.2d 1101*).

C. Testator Must Intend Revocable Disposition Effective on Death. The testator must have intended, by the particular instrument offered for probate, to make a revocable disposition of his or her property to take effect on his or her death (*Estate of Smith (1998) 61 Cal. App. 4th 259, 265, 71 Cal. Rptr. 2d 424*).

D. Burden of Proof on Proponents. The burden is on the proponents of an alleged will to prove that the decedent intended the writing to be his or her will (*Estate of Wong (1995) 40 Cal. App. 4th 1198, 1205, 47 Cal. Rptr. 2d 707* ; *Estate of Beebee (1953) 118 Cal. App. 2d 851, 861, 258 P.2d 1101*).

E. Policy Favoring Testacy Inapplicable When Testamentary Intent at Issue. The principle that the law favors

testacy over intestacy is usually only operative when the existence of testamentary intent has already been ascertained and the subject matter of the doubt is one of construction; when there is a doubt concerning the existence of the animus testandi, the rule in favor of testacy is inapplicable (*Estate of Blain (1956) 140 Cal. App. 2d 917, 922-923, 295 P.2d 898*).

F. Oral Declarations of Testator Admissible to Show Intent. Extrinsic evidence, including oral declarations of the testator before and after the execution of the instrument in question, is admissible, if offered for the purpose of ascertaining the intent with which the instrument was executed, and not for the purpose of proving the meaning the testator attributed to specific provisions of an admitted will (*Estate of Tillman (1955) 136 Cal. App. 2d 313, 316, 288 P.2d 892*).

[*Optional*] **G. Evidence of Revocation of Former Will Must Be Clear.** When there is a previously made and unrevoked will of the testator, a later holographic instrument claimed to be a will must be so phrased that there can be no doubt from its language that the intention of the testator was to make further testamentary provisions (*Estate of Tillman (1955) 136 Cal. App. 2d 313, 316, 288 P.2d 892*).

[*Optional*] **H. Will Conditioned on Additional Formalities Does Not Take Effect on Death.** If a testator does not intend the instrument in question to take effect as his or her will, but intends it to take effect only when additional formalities are completed, it will not be given effect (*Estate of Brown (1985) 171 Cal. App. 3d 1064, 1066-1069, 218 Cal. Rptr. 108*).

[*Optional*] **I. Instruction for Will to Be Executed in Future Is Not a Will Absent Testamentary Intent.** Instructions for a will to be drawn and executed in the future will not amount to a will, although they would be a valid will as far as execution is concerned if the testator had so intended (*Estate of Beebee (1953) 118 Cal. App. 2d 851, 860, 258 P.2d 1101*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a challenge to a purported testamentary instrument that was executed without testamentary intent [*see Estate of Smith (1998) 61 Cal. App. 4th 259, 265, 71 Cal. Rptr. 2d 424]* . Optional Paragraph G may be used when there is a previously made will that has not been formally revoked. Optional Paragraph H deals with documents that look like wills but are not because the decedent did not intend them to be effective as wills at the time he or she executed them. Optional Paragraph I deals with documents that were part of the testator's preparations to make a will rather than actual will documents.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that the required testamentary intent was lacking at the time the alleged will was written. For example, the discussion may include all of the relevant circumstances surrounding the writing of the alleged will or codicil, facts pertaining to the text of the document in which the allegedly testamentary language appears, the statements of the decedent concerning his or her testamentary plans, and the existence of other, more formal testamentary documents; should be discussed as evidence [*see Estate of Smith (1998) 61 Cal. App. 4th 259, 265, 71 Cal. Rptr. 2d 424]* . Regardless of the language used in the purported will, extrinsic evidence may be introduced to show that the testator did not intend the instrument to be effective as a will [*Estate of Smith (1998) 61 Cal. App. 4th 259, 265-266, 71 Cal. Rptr. 2d 424]* . For example, an instrument that clearly appears to be testamentary may be shown by extrinsic evidence to have been executed in jest, as a threat to induce action by an interested party, under the misapprehension that the instrument was a mortgage, to induce the legatee to engage in illicit relations with the testator, or to relieve the testator from annoyance by a would-be legatee [*Estate of Smith (1998) 61 Cal. App. 4th 259, 266, 71 Cal. Rptr. 2d 424]* .

This memorandum may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the purported testamentary instrument was not executed with testamentary intent. Thus, it may be combined with the points and authorities pertaining to an objection to the admission of a will to probate [*see § 186.20*] or a petition to revoke probate of a will [*see § 186.21*]. This memorandum may also be combined with points and authorities challenging a purported will on the grounds that the will was not executed in conformity with statutory requirements [*see §§ 186.22, 186.23*].

[b] Testamentary Intent Issues and Formal Wills

Most of the cases in which the sole or main issue is testamentary intent involve holographic documents. Except in cases in which lack of testamentary intent is asserted in connection with lack of capacity and undue influence or fraud [*see §§ 186.27 -186.29*], it is rarely asserted that a properly executed formal will was not intended by the testator to serve as his or her will.

[c] Opposing Memoranda

In an appropriate case, the points and authorities *set out in § 186.55* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Testamentary Intent Required

Estate of Smith *(1998) 61 Cal. App. 4th 259, 71 Cal. Rptr. 2d 424* , involved a will contest between the testator's surviving husband and the testator's daughter and granddaughter. The trial court denied the husband's petition to admit to probate the testator's statutory will that left the testator's estate to the husband, and instead admitted a previously executed holographic will that left the testator's estate to her daughter and granddaughter. The trial court found that the testator signed the statutory will by mistake and that the testator did not intend it to have testamentary effect because the testator did not intend to disinherit her daughter and granddaughter. The court of appeal reversed, finding that none of the extrinsic evidence considered by the trial court, *i.e.*, the terms of both wills, the instructions accompanying the statutory will, and the testimony of witnesses, tended to show that the testator did not intend the statutory will to be effective as a testamentary instrument (*61 Cal. App. 4th 259, 266)* . The court noted that extrinsic evidence is only relevant and admissible if offered for the purpose of ascertaining the intent with which the instrument was executed, and not for the purpose of proving the meaning the testator attributed to specific provisions of the instrument. Thus, the trial court's factual findings regarding the testator's intention to leave her estate to her daughter and granddaughter did not support its decision to deny the statutory will admission to probate (*61 Cal. App. 4th 259, 266)* . The trial court erroneously focused on the testator's intended disposition of her estate, instead of on her intent to execute a testamentary instrument (*61 Cal. App. 4th 259, 266)* .

The court of appeal also noted that a mistake by the testator does not preclude admission of a will to probate unless the mistake vitiates the execution of the will or the formation of testamentary intent (*61 Cal. App. 4th 259, 270)* . In this context, "testamentary intent" does not refer to the testator's intentions regarding particular dispositions of property, but means the testator's general intent to make a revocable disposition of his or her property, effective on the testator's death (*61 Cal. App. 4th 259, 270)* .

Estate of Tillman *(1955) 136 Cal. App. 2d 313, 288 P.2d 892* , involved a petition to probate a letter written by the decedent to his nephew, Spencer, inviting Spencer to "come on out hear [sic] I will pay your money back to you[,]" and stating that "what I have is for you and your family." Spencer testified that the decedent told him to take care of the letter because the letter was "willing you all of my property for you and your family." Spencer went to stay with the decedent, during which time the decedent made various statements as to the testamentary character of the letter and his

wish to leave his estate to Spencer. Spencer's aunt, who accompanied him on the visit, testified that the decedent made similar statements to her. In addition, two friends of the decedent testified that the decedent told them Spencer was his favorite nephew, that he was going to write him, and that he wanted to will him "all my things." However, the decedent's executor, his great niece, testified that prior to the date of the letter, the decedent took her to his safe deposit box, showed her his previously-executed formal will, introduced her to his attorney, and expressed his wish that the terms of the will be carried out on his death. The attorney testified that when he visited the decedent two weeks before the decedent's death, the decedent mentioned the formal will and his wish that it be carried out. He did not mention the letter he had written to Spencer. The trial court denied probate of the letter, declaring that it was not a valid holographic will because it was not signed or sent with testamentary intent.

The court of appeal affirmed, stating that when an instrument is offered for probate it must be plainly and satisfactorily apparent that the testator intended, by that particular instrument, to make a will; that is, to make a revocable disposition of his or her property to take effect on his or her death (*136 Cal. App. 2d 313, 315-316)* . The court noted that conflicting inferences could be drawn from the evidence offered concerning the decedent's intent in writing the letter, and that this was not a case in which the court had passed on uncontradicted evidence favorable to the proponent or made wrong deductions of law from it (*136 Cal. App. 2d 313, 322)* .

[b] Testator Must Intend Specific Paper Offered to Be Will

Estate of Blain *(1956) 140 Cal. App. 2d 917, 295 P.2d 898* , concerned a dispute between the decedent's granddaughter and the beneficiaries named in the will admitted to probate. The granddaughter, decedent's sole heir at law, claimed against the will as a pretermitted heir. The will consisted of seven separate sheets, each written, dated, and signed entirely in the decedent's hand. The sheets were found in the decedent's safe deposit box, folded together and enclosed in a sealed envelope on which the decedent had written "Last Will F.B." Three of the sheets were dated June 1, 1949, and four were dated April 9, 1952. The granddaughter was not mentioned in any of the seven sheets. The case turned on the issue of whether a slip of paper on which was written, in the decedent's hand, "to Sonia Lambert Frank Blain" (the name of the granddaughter) was a holographic codicil or otherwise incorporated into the will. This slip of paper was found wrapped around a ring that was enclosed in a small ring box also found in the decedent's safe deposit box. The paper was fatally defective as a holographic will or codicil, since it was neither dated nor signed by the testator. It was concededly admissible only if it could be integrated with the seven-page will. The trial court denied probate of the slip of paper, stating that the slip of paper was not testamentary in character, contained no testamentary disposition, exhibited no testamentary intent, and contained no description of any property. The beneficiaries named in the will appealed the order.

The court of appeal affirmed, holding that there was substantial evidence to support the trial court's findings. The court noted that a holographic instrument must be complete in itself, and cannot incorporate physical objects, such as a ring attached to the instrument, as part of its dispositive provisions. The court also noted that evidence had been introduced at trial to the effect that the ring already belonged to the granddaughter as part of an inheritance from her grandmother. In view of this evidence, the words on the slip of paper could reasonably be interpreted to mean "this belongs to Sonia; deliver it to her" (*140 Cal. App. 2d 917, 922)* . Furthermore, unlike the seven sheets of paper constituting the will, which were found in close physical proximity, were physically attached by being folded together, evidenced a sequence of thought and continuity of purpose, and were all together in a sealed envelope labeled as the decedent's will, the slip of paper was physically excluded from everything outside the ring box, was not attached in any way to the envelope containing the will, did not refer in any manner to the will, and was not referred to in any part of the will (*140 Cal. App. 2d 917, 924)* . The testimony of a friend of the decedent that the decedent showed her the ring and said he was going to leave it to his granddaughter was not dispositive on the issue of intent. It did not show an intent to make the slip of paper a testamentary instrument; rather, it merely showed the decedent's intention to make a will at some future time (*140 Cal. App. 2d 917, 923)* .

In ***Estate of Beebee*** *(1953) 118 Cal. App. 2d 851, 258 P.2d 1101* , the admission to probate of a valid will and codicil

was challenged by one of the decedent's two grandsons, who offered for probate a letter written by the decedent after the execution of the will and the codicil. The decedent executed the will in 1944 and then deposited it with a bank. In 1947, she executed a holographic codicil which she sent to the bank, asking that it be attached to the will. Three months before her death in 1950 the decedent wrote to the bank, saying that she wanted help revoking her will and leaving her entire estate to her son. After her death, a bank employee found in the decedent's home a letter that was similar to the one sent to the bank. The date of this document had been partially scratched out, and there was a dispute over whether this was an attempt by the decedent to change the date so as to be later than the date of the letter actually sent to the bank. The trial court accepted the proponents' argument that the document was a testamentary instrument executed by the decedent on the advice of an attorney given in response to the other letter. The document was admitted to probate as the decedent's will, and the probate of the earlier will and codicil was revoked. The order was appealed by the decedent's grandsons.

The court of appeal reversed, stating that the very form of the document argued against the idea advanced by the proponents. A physical examination of the document revealed that it was plainly a draft copy of the letter sent to the bank, not the specific paper intended by the decedent to serve as her will (*118 Cal. App. 2d 851, 858)* . The court noted that a friend of the decedent testified at trial that the decedent had said she would be afraid to make a will without an attorney's advice, and that the decedent always wrote drafts of important papers and then made appropriate changes in the final version. Furthermore, the idea that an attorney would advise the decedent to write such a letter in lieu of making formal changes to her will was not credible. Even if it was assumed that the letter was validly dated after the date of the first letter, there was no evidence that it was intended as a will (*118 Cal. App. 2d 851, 858-861)* .

[c] Testator Must Intend Revocable Disposition Effective on Death

Estate of Smith *(1998) 61 Cal. App. 4th 259, 71 Cal. Rptr. 2d 424* , is *discussed under § 186.26[3][a]*.

[d] Burden of Proof

In ***Estate of Wong*** *(1995) 40 Cal. App. 4th 1198, 47 Cal. Rptr. 2d 707* , the contestants argued that a document offered as a holographic will could not qualify as a will because it did not describe or refer to any property and did not show the intention of the alleged testator to dispose of property by will. The proponent of the alleged will argued that the contestants had the burden of proving lack of testamentary intent, inasmuch as *Prob. Code § 8252* provides in pertinent part that, at the trial of a will contest, the proponents of the will have the burden of proof of due execution and the "contestants of the will have the burden of proof of lack of testamentary intent or capacity." The court rejected this argument, holding that *Prob. Code § 8252* applies only to documents that are clearly wills. The contestants of a document that appears to be a will and that exhibits testamentary intent must prove that testamentary intent was lacking. However, when the question is whether a document exhibits the required testamentary intent, this rule has no application, and the proponent of the alleged will has the burden of proving it shows the required intent (*40 Cal. App. 4th 1198, 1205)* .

The facts and procedural background of ***Estate of Beebee*** *(1953) 118 Cal. App. 2d 851, 258 P.2d 1101* , are *discussed under § 186.26[3][b]*. In *Beebee*, the court of appeal held that the proponents of an alleged holographic will had the burden of proving that the document, a letter written by the decedent to the bank that maintained custody of her earlier will, was intended by the decedent to be a new will (*118 Cal. App. 2d 851, 861)* . In finding that the proponents failed to meet their burden, the court noted that it was evident from the language of the letter that its purpose was to explain to the bank how the decedent wished to change her will, and that decedent expected something more to be done before the testamentary plan outlined in the letter would become a will (*118 Cal. App. 2d 851, 860-861)* .

[e] Policy Favoring Testacy Inapplicable When Testamentary Intent at Issue

The facts and procedural background of ***Estate of Blain*** *(1956) 140 Cal. App. 2d 917, 295 P.2d 898*), are *discussed*

under § 186.26[3][b]. In *Blain*, the court of appeal held that the principle of law favoring testacy over intestacy usually only applies when the existence of testamentary intent has already been ascertained and the subject matter of the doubt is one of construction. When there is a doubt concerning the existence of the animus testandi, the rule is inapplicable. Since the testamentary character of the instrument in question, a slip of paper on which the decedent had written "to Sonia Lambert Frank Blain," was the main issue in the case, the court found that the principle favoring testacy was not applicable (*140 Cal. App. 2d 917, 922-923)* .

[f] Oral Declarations of Testator Admissible to Show Intent

The facts and procedural background of ***Estate of Tillman*** *(1955) 136 Cal. App. 2d 313, 288 P.2d 892* , are *discussed under § 186.26[3][a]*. In *Tillman*, the court of appeal held that the oral declarations of the decedent made before and after the date of a letter offered as a holographic will were admissible for the purpose of ascertaining the intent with which the letter was written. The trial court properly admitted statements made by the decedent to the effect that he intended to give his property to the nephew to whom the letter was written, that the nephew should keep the letter because it was a will, and other similar statements (*136 Cal. App. 2d 313, 315-316)* . However, those declarations, as well as other circumstantial evidence of the decedent's intent in writing the letter, were such that opposing inferences could be drawn from them. In finding that the letter was not a will, the court noted that this was not a case in which the court had passed on uncontradicted evidence favorable to the proponent or made wrong deductions of law from it (*136 Cal. App. 2d 313, 322)* .

[g] Evidence of Revocation of Former Will

The facts and procedural background of ***Estate of Tillman*** *(1955) 136 Cal. App. 2d 313, 288 P.2d 892* , are *discussed under § 186.26[3][a]*. In *Tillman*, the court of appeal held that since the decedent had executed and not explicitly revoked an earlier will, a purported holographic will could be admitted to probate only if it was so phrased that there could be no doubt from its language that the intention of the testator was to make further testamentary provisions (*136 Cal. App. 2d 313, 316)* . The court found that the phrasing of the purported holograph did not establish beyond a doubt the decedent's intent to make further testamentary provisions by it. Rather, the phrasing of the purported holograph, like the rest of the evidence concerning the decedent's intent, was subject to conflicting inferences. Therefore, the trial court properly rejected the purported holograph (*136 Cal. App. 2d 313, 322)* .

[h] Will Conditioned on Additional Formalities Does Not Take Effect on Death

The facts and procedural background of ***Estate of Brown*** *(1985) 171 Cal. App. 3d 1064, 218 Cal. Rptr. 108* , are discussed in *§ 186.23[3][g]*. In *Brown*, the appellate court held that a formal will that the testator left unattested by witnesses was ineffective as a holographic will, notwithstanding its satisfaction of the technical requirements of a holographic will. The court stated that testamentary intent was lacking, since it was obvious that the testator had anticipated further formalities (i.e., attestation by witnesses) before the will would become effective (*171 Cal. App. 3d 1064, 1068-1069)* .

[i] Instruction for Will to Be Executed in Future Is Not a Will Absent Testamentary Intent

The facts and procedural background of ***Estate of Beebee*** *(1953) 118 Cal. App. 2d 851, 258 P.2d 1101* , are *discussed under § 186.26[3][b]*. In *Beebee*, the court of appeal held that a draft copy of a letter written by the decedent to her bank, outlining desired changes to her will, was not admissible to probate as a valid will. The court found that the letter was plainly in the nature of an instrument explaining to the bank how the decedent wished to change her will. In rejecting the letter as a testamentary instrument, the court stated that instructions for a will to be drawn and executed in the future will not amount to a will, even if the instructions satisfy the technical requirements for execution of a will and would be admissible to probate if the testator had so intended (*118 Cal. App. 2d 851, 860)* .

California Points & Authorities

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Volume 18 Chapters 180-189 PRETRIAL PROCEEDINGS---to---PROBATE OF WILLS
CHAPTER 186 PROBATE OF WILLS
PART II. FORMS
A. Supporting Will Contests

18-186 California Points & Authorities § 186.27

§ 186.27 Supporting Contest of Will--Grounds for Contest-- Testator Lacked Testamentary Capacity [Prob. Code § 6100.5]

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities supporting a will contest (see § 186.20) or a petition to revoke probate of a will (see § 186.21) or may be used in a trial or appellate brief.*]

[*EITHER*]

THE [PURPORTED] _____ [WILL *or* CODICIL] IS INVALID BECAUSE THE TESTATOR LACKED TESTAMENTARY CAPACITY, IN THAT, AT THE TIME OF MAKING THE WILL, HE/SHE DID NOT HAVE SUFFICIENT MENTAL CAPACITY TO BE ABLE TO [*choose one of following:* UNDERSTAND THE NATURE OF THE TESTAMENTARY ACT *or* UNDERSTAND AND RECOLLECT THE NATURE AND SITUATION OF HIS/HER PROPERTY *or* REMEMBER AND UNDERSTAND HIS/HER RELATIONS TO LIVING DESCENDANTS, SPOUSE, AND PARENTS, AND THOSE WHOSE INTERESTS ARE AFFECTED BY THE WILL].

[*OR*]

THE [PURPORTED] _____ [WILL *or* CODICIL] IS INVALID BECAUSE THE TESTATOR LACKED TESTAMENTARY CAPACITY, IN THAT, AT THE TIME OF MAKING THE WILL, HE/SHE SUFFERED FROM A MENTAL DISORDER WITH SYMPTOMS INCLUDING DELUSIONS OR HALLUCINATIONS, WHICH DELUSIONS OR HALLUCINATIONS RESULTED IN HIS/HER DEVISING PROPERTY IN A WAY WHICH, EXCEPT FOR THE EXISTENCE OF THE DELUSIONS OR HALLUCINATIONS, THE INDIVIDUAL WOULD NOT HAVE DONE.

[*EITHER*]

A. Testamentary Capacity. An individual is not mentally competent to make a will if at the time of making the will the individual does not have sufficient mental capacity to be able to understand the nature of the testamentary act, understand and recollect the nature and situation of the individual's property, or remember and understand the individual's relations to living descendants, spouse, and parents, and those whose interests are affected by the will (*Prob. Code § 6100.5(a)(1)*).

[*OR*]

A. Testamentary Capacity. An individual is not mentally competent to make a will if at the time of making the will the individual suffers from a mental disorder with symptoms including delusions or hallucinations, which delusions or hallucinations result in the individual's devising property in a way which, except for the existence of the delusions or hallucinations, the individual would not have done (*Prob. Code § 6100.5(a)(2)*).

[*CONTINUE*]

[*Optional*] **B. Proof of Testamentary Incompetence by Prior or Subsequent Conduct.** Lack of testamentary competence on a given day may be proved by evidence of incompetence before or after the day in question (*Estate of Clegg (1978) 87 Cal. App. 3d 594, 600, 151 Cal. Rptr. 158* ; *Estate of Morgan (1964) 225 Cal. App. 2d 156, 168, 37 Cal. Rptr. 160* ; *Estate of Wolf (1959) 174 Cal. App. 2d 144, 148, 344 P.2d 37*).

[*Optional*] **C. Inference of Continuing Incompetency.** Once it is shown that testamentary incompetence exists and that it is caused by a mental disorder of a general and continuous nature, the inference is reasonable that the incompetence continues to exist (*Estate of Clegg (1978) 87 Cal. App. 3d 594, 600, 151 Cal. Rptr. 158*).

[*Optional*] **D. Personal Characteristics of Testator.** Evidence of a testator's appearance, conduct, habits, and conversation, both before and after the execution of a will, are admissible on the issue of testamentary capacity, as long as they have a reasonable tendency to indicate the testator's mental condition at the time the will was executed (*Estate of Wolf (1959) 174 Cal. App. 2d 144, 149, 344 P.2d 37*).

[*Optional*] **E. Physician's Testimony.** Testamentary incapacity may be established by the testimony of a physician based on personal observation of the testator (*Estate of Wolf (1959) 174 Cal. App. 2d 144, 150, 344 P.2d 37*).

[*Optional*] **F. Refusal by Attorney to Make Will for Decedent.** The fact that an attorney refused to prepare a will for the testator is entitled to serious consideration as proof of the testator's incompetence (*Estate of Morgan (1964) 225 Cal. App. 2d 156, 169, 37 Cal. Rptr. 160*).

[*Optional*] **G. Change From Previous Testament.** An unexplained, or poorly explained, change from a previous will, executed while the testator has recognized mental capacity, is an evidentiary fact that bears on the subject of unsoundness of mind, when considered with other evidence (*Estate of Morgan (1964) 225 Cal. App. 2d 156, 170, 37 Cal. Rptr. 160*).

[*Optional*] **H. Proof of Hallucination or Delusion.** Lack of testamentary capacity may be shown by evidence that establishes that the will was the creation or product of some hallucination or delusion suffered by the testator, that this hallucination or delusion bore directly on and influenced the creation and terms of the will, and that by reason of this

hallucination or delusion the testator devised or bequeathed his or her property in a way which, except for the existence of the hallucination or delusion, the testator would not have done (*Goodman v. Zimmerman (1994) 25 Cal. App. 4th 1667*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a challenge to a purported will or codicil when the basis of the challenge is that the testator lacked testamentary capacity at the time the instrument was executed [*see Prob. Code §§ 6100(a), 6100.5(a)(1), (2)*].

Additional arguments should be inserted in this form to show the relationship between the facts of the case and the points of law stated. If, for example, an attorney declined to prepare a will for the testator because the attorney believed that the testator did not have testamentary capacity, and if this incident occurred at or about the time the will in question was executed, that fact should be discussed.

[b] Lack of Testamentary Capacity

Paragraph A of this form is drawn from *Prob. Code § 6100.5(a)*, which states the circumstances under which a testator is deemed not to have testamentary capacity [*see Prob. Code § 6100.5(a)*]. Two alternative forms of Paragraph A are included. The first alternative is drawn from *Prob. Code § 6100.5(a)(1)*, and the second alternative is drawn from *Prob. Code § 6100.5(a)(2)*. The allegations and supporting statements that best fit the facts of the case should be chosen. In some cases, reliance on more than one ground for lack of capacity may be appropriate.

[c] Attorney's Duty With Respect to Ascertaining Decedent's Testamentary Capacity

An attorney preparing a will for a testator does not owe a duty to the beneficiary of the will or to the beneficiary under a prior will to ascertain and document the client's testamentary capacity. When the testator's testamentary capacity is the basis for a will challenge, the testator's true intent is the central question, and that intent cannot be ascertained from the will or other challenged estate plan document. The attorney who is persuaded of the client's testamentary capacity by the attorney's own observations and experience, and who drafts the will accordingly, fulfills the attorney's duty of loyalty to the testator. In doing so, the attorney should not be required to consider the effect of the new will on beneficiaries under a former will or beneficiaries of the new will. The beneficiaries do not have a cause of action against the attorney for malpractice. Their remedy is to contest the probate and challenge the will on the ground that the testator lacked testamentary capacity at the time of executing the will [*Moore v. Anderson Zeigler Disharoon Gallagher & Gray (2003) 109 Cal. App. 4th 1287, 1298-1307, 135 Cal. Rptr. 2d 888]* .

Following the principles set forth in *Moore*, a subsequent decision held that although an attorney who is retained to provide testamentary legal services to a testator may also have a duty to act with due care for the interests of an intended third-party beneficiary, the attorney's primary duty is owed to the testator-client, and the attorney's paramount obligation is to serve and carry out the testator's intentions. When there is a question about whether the third party was in fact the testator's intended beneficiary, and the third party claims that the attorney failed to adequately ascertain the testator's intent or capacity, the attorney is not liable to the third party. In such a case, the attorney's sole duty is to the testator, and the attorney does not owe a duty to the testator's beneficiaries to evaluate and ascertain the testator's capacity to make a new will. An attorney who is persuaded of the testator's intent to dispose of his or her property in a certain manner, and who drafts the will accordingly, fulfills his or her duty of loyalty to the client and is not required to urge the testator to consider an alternative plan to forestall a claim by someone thereby excluded from the will or included in the will but deprived of a specific asset that is devised to someone else. Any other conclusion would place the attorney in an untenable position of divided loyalty. As noted by the court in *Moore*, an intended beneficiary's remedy in such a case is to contest the will on the ground that the testator lacked testamentary capacity or intent [*Boranian v. Clark*

(2004) 123 Cal. App. 4th 1012, 1014, 20 Cal. Rptr. 3d 405] .

[d] Evidence of Deficit in Mental Functions

Prob. Code § 6100.5(a) states the statutory grounds under which a testator will be deemed to lack testamentary capacity. However, this section should be read in light of *Prob. Code §§ 810* and *811*, which also affect the ability of a court to find that a testator lacks the capacity to make a will.

Prob. Code § 810 states that a person who has a mental or physical disorder may still be capable of contracting, conveying, marrying, making medical decisions, executing wills or trusts, and performing other actions [*Prob. Code § 810(b)*]. It also states that a judicial determination that a person is totally without understanding, or is of unsound mind, or suffers from one or more mental deficits so substantial that, under the circumstances, the person should be deemed to lack the legal capacity to perform a specific act, should be based on evidence of a deficit in one or more of the person's mental functions rather than on a diagnosis of a person's mental or physical disorder [*Prob. Code § 810(c)*].

Prob. Code § 811 states that a determination that a person is of unsound mind or lacks the capacity to make a decision or do a certain act, including but not limited to the incapacity to execute a will, must be supported by evidence of a deficit in at least one of certain specified mental functions and that there must be evidence of a correlation between the deficit and the decision or act in question [*Prob. Code § 811(a)*]. *Prob. Code § 811* also states that the mere diagnosis of a mental or physical disorder will not be sufficient in and of itself to support a determination that a person is of unsound mind or lacks the capacity to do a certain act [*Prob. Code § 811(d)*].

Prob. Code § 811 does not alter the statutory grounds under which a testator will be deemed to lack testamentary capacity as stated in *Prob. Code § 6100.5*. Rather, it prescribes a minimum level of evidence that must be presented to support a determination that a testator lacked testamentary capacity, and the character of findings that must be made in support of that determination [*see Prob. Code § 811(e)*; *see also Prob. Code § 810(a)* (for purposes of determination of capacity, there exists rebuttable presumption affecting burden of proof that all persons have capacity to make decisions and be responsible for their acts or decisions)]. Whether the minimum level of evidence has been reached is an evidentiary question. Failure to meet the evidentiary standard may be raised by the proponent of a will in an effort to defeat a challenger's argument that the will is invalid by reason of lack of capacity. For a more detailed discussion of *Prob. Code § 811*, see *§ 186.56[2]*.

[e] Opposing Memoranda

In an appropriate case, the points and authorities *set out in § 186.56* may be used to oppose the contentions supported by the points and authorities in this form.

[3] Discussion of Authorities

[a] Proof of Testamentary Incompetence by Prior or Subsequent Conduct

In ***Estate of Clegg*** *(1978) 87 Cal. App. 3d 594, 151 Cal. Rptr. 158* , an executor, the administrator of a senior citizen's home, offered for probate a purported will executed by the testator immediately before she moved from the home to a convalescent hospital. Two physicians had examined the testator before she executed the will and described her physical and mental health as failing markedly. They found her to be suffering from reduced mental capacity and senile dementia, and as a result she was moved from the home to the hospital. The home administrator asked the testator if she wanted an attorney to take care of the legalities. She agreed, and the administrator then called his personal attorney, who was also the home's attorney. The attorney suggested a conservatorship (since the hospital required that patients be admitted by a responsible person), and the testator requested that the administrator and his secretary be appointed as her conservators. The attorney asked the testator if she had a will. She said no, although she had in fact executed a formal will 20 years earlier. The attorney explained the concept of escheat to her, although she told him she had living

relatives, and asked her to identify the beneficiaries of her property. The testator responded that the people at the home "had been real nice to her," and the attorney asked her if she wanted to leave her property to the home. The testator replied affirmatively, and the attorney then suggested naming the administrator as the executor of the will. The attorney's secretary typed a will naming the home as the testator's sole beneficiary, and the testator signed it and a document nominating a conservator, with the attorney and the secretary as witnesses. The home was the sole beneficiary of the purported will.

When the testator was admitted to the hospital the next day, Dr. Wardrip examined her and noted that she was suffering from severe congestive failure and cerebrovascular insufficiency, and was forgetful and unable to take care of herself. The nurse's notes also contained several references to the testator's "confusion" and "lack of orientation." A friend of the testator wrote to the testator's brother, stating that the testator's mind had begun to fail, that she was unable to look after herself, and that she hardly knew what was going on.

The testator's brother and sister were not notified of the conservatorship or the petition for probate, although the evidence showed that the administrator knew that the testator had a brother and sister living. The brother and sister contested the will on the grounds that the testator lacked testamentary capacity and was under home's undue influence when she executed the will. The trial court agreed, and issued an order revoking probate of the will.

The court of appeal affirmed, finding that although testamentary incapacity was not shown as of the date the will was executed, the evidence established the testator's lack of testamentary capacity prior to and after her execution of the will (*87 Cal. App. 3d 594, 601)* . In support of its order, the court stated the rule that testamentary incompetency on a given day may be proved by evidence of incompetency at other times (*87 Cal. App. 3d 594, 600)* .

In ***Estate of Morgan*** *(1964) 225 Cal. App. 2d 156, 37 Cal. Rptr. 160* , petitioner offered for probate a will executed one month before the decedent's death, which named petitioner as executor and as a primary and "preferred" beneficiary. During the last five years of her life, the decedent executed five wills and one codicil, not including the will in question. A missionary society was the residual beneficiary under each of the five wills, and other aspects of the testamentary plan were also similar under each of the wills. The will in question gave petitioner a $50,000 bequest that was specifically given preference over all other bequests. The missionary society was completely removed from the will, and a different charity and petitioner were made the residual beneficiaries. Petitioner was also named as executor of the will.

The decedent was a patient in a sanitarium when she died. Her attending physician testified that during the last few years of her life, the decedent was senile, confused, and of unsound mind. She also suffered from arteriosclerosis throughout her body, including her brain. Several sanitarium attendants, nurses, and decedent's acquaintances testified that decedent was senile during the last months of her life, that she suffered from hallucinations, and that she was generally confused and had very, very short periods of lucidity.

The decedent's attorney testified that he had prepared two previous wills and a codicil for the decedent. About a month before the execution of the will in question, petitioner told the attorney that decedent wished to change her will because, among other reasons, she didn't want to leave anything to the People's Republic of China. The attorney advised petitioner to have a nurse contact him, because he would not change it at the request of a beneficiary. When another of the decedent's friends called him with the same request two days later, threatening to find another attorney if he did not comply, the attorney agreed to visit the decedent. The attorney explained to the decedent that her current will gave nothing to the People's Republic of China and did not obligate the missionary society to use her gift in the People's Republic of China. At first, the decedent seemed to understand the will, but later stated that she wished to leave the residue to her sister, who had been dead for 10 years. As the decedent's understanding of the situation deteriorated, the attorney decided that she was incompetent to make a will at that time. He did not see the decedent again. The decedent then requested another attorney, met with him and his partner, and gave the attorney instructions for her new will. The next day, the decedent executed the will, and there was conflicting testimony concerning the decedent's level of

awareness and understanding during the execution of the will.

The decedent's heirs and the missionary society contested the will, alleging that the decedent lacked testamentary capacity and was acting under the undue influence of petitioner at the time the will was executed. The trial court denied probate of the will, and petitioner appealed.

The court of appeal affirmed, stating that there was sufficient evidence before the trial court to support a finding that the decedent was mentally incompetent to make a will at the time the will in question was executed. Several witnesses described her as deteriorating mentally and physically. The court stated that while hallucinations are not destructive of testamentary capacity unless they operate directly on the testamentary act, they are evidence of mental state and, in this case, supported the contestants' claims that the decedent suffered from a permanent and progressing mental disorder. Evidence of the decedent's hallucinations and of her testamentary incapacity before and after the execution of the will supported the finding that she lacked testamentary incapacity when the will was executed. The court also noted that decedent's insistence on a preference clause for a $50,000 gift to petitioner, when she had an estate of $600,000, indicated that she did not understand the nature of her estate (*225 Cal. App. 2d 156, 168-170)* .

Estate of Wolf *(1959) 174 Cal. App. 2d 144, 344 P.2d 37* , involved a purported holographic will offered for probate by the sole beneficiary named under it, a neighbor of the decedent who had cared for the decedent during the last months of her life. The decedent's heirs, the children of her predeceased brother, and some relatives of her predeceased husband opposed probate on the grounds of testamentary incapacity, lack of due execution, and undue influence. The decedent's personal physician testified that during the last five years of the decedent's life, the decedent suffered from arteriosclerosis, hypertension, and chronic myocarditis; that she was mentally incompetent; that she lost her memory several years before her death and was unaware from one moment to the next what was happening; and that she told him she had no money, her neighbors were stealing from her, and the medicines supplied by her druggist were poisonous. The doctor also testified that he examined the decedent the day before the purported holographic will was executed, and three other times during the same month, and that on those occasions the decedent did not know the natural objects of her bounty or the nature and extent of her property and lacked sufficient mental competency to dispose of her property in accordance with any rational plan. About four months before the decedent's death, the proponent of the will was appointed as her legal guardian over the objections of the contestants and other relatives of the decedent. The proponent/guardian moved the decedent into her home. She testified that while the decedent was under her care, she gave the proponent the purported holographic will. During the course of the guardianship proceedings, the trial judge went to the decedent's home and interviewed her. The decedent told the judge she had no will, although the purported holographic will had been executed two weeks earlier. The proponent heard this exchange, but did not mention the holograph. The trial court denied probate of the purported holographic will on the ground that the decedent lacked testamentary capacity and was unduly influenced at the time it was executed. The proponent appealed the order.

The court of appeal affirmed, finding that the evidence was more than adequate to sustain a finding of testamentary incapacity. The court noted testamentary incapacity on the specific day a purported will was executed may be inferred once it has been established that incompetency existed prior to that day and was caused by a mental disorder of a general and continuing nature (*174 Cal. App. 2d 144, 148)* . The court also noted that while the fact of a judicial determination of incompetency less than one month before the date of the purported will did not establish testamentary incapacity, it was evidence to be considered on the point, especially since there was no evidence that the decedent's mental state changed during that month (*174 Cal. App. 2d 144, 149)* .

[b] Inference of Continuing Incompetency

The facts and procedural background of ***Estate of Clegg*** *(1978) 87 Cal. App. 3d 594, 151 Cal. Rptr. 158* , are *discussed under § 186.27[3][a]*. In *Clegg*, the court of appeal held that it was reasonable to infer that the testator lacked testamentary capacity at the time her will was executed from the fact that testamentary incapacity existed prior to that

time and was caused by a mental disorder of a general and continuous nature. The court found that the inference that testamentary incompetence continues to exist once it is shown to exist was particularly strong in this case. It was supported by the statements of the testator's doctor, including testimony that the doctor doubted that the testator knew and understood the nature of the document she signed as her will or the nature and extent of her property, or remembered her living relatives (*87 Cal. App. 3d 594, 600-601)* . The inference was also supported by the letter written by the testator's friend, and by the nurse's notes from the day after the will was executed (*87 Cal. App. 3d 594, 601)* .

[c] Personal Characteristics of Testator

The facts and procedural background of ***Estate of Wolf*** *(1959) 174 Cal. App. 2d 144, 344 P.2d 37* , are *discussed under § 186.27[3][a]*. In *Wolf*, the court of appeal held that evidence of the decedent's appearance, conduct, habits, and conversation, both before and after the execution of the will, was admissible on the issue of testamentary capacity since it had a reasonable tendency to indicate her mental condition at the time the will was executed (*174 Cal. App. 2d 144, 149)* . The court found that the decedent lacked testamentary capacity at the time her will was executed, based partly on the testimony of her personal physician that she lost her memory several years before her death, was unaware from one moment to the next what was happening, and had said that her neighbors were stealing from her and the medicines supplied by her druggist were poisonous (*174 Cal. App. 2d 144, 146-147, 150)* .

[d] Physician's Testimony

The facts and procedural background of ***Estate of Wolf*** *(1959) 174 Cal. App. 2d 144, 344 P.2d 37* , are *discussed under § 186.27[3][a]*. In *Wolf*, the appellate court specifically found that the testimony of the decedent's personal physician, who was intimately familiar with the decedent's mental capacity and testified directly on that issue, could be used to establish the decedent's testamentary incapacity (*174 Cal. App. 2d 144, 150)* .

[e] Refusal by Attorney to Make Will for Decedent

The facts and procedural background of ***Estate of Morgan*** *(1964) 225 Cal. App. 2d 156, 37 Cal. Rptr. 160* , are *discussed under § 186.27[3][a]*. In *Morgan*, the court of appeal held that the fact that an attorney declined to make a will for the testator was entitled to "serious consideration" as proof of the testator's incompetency. The testimony of the attorney who did make the will was entitled to much weight but was not conclusive, especially since he was a relative stranger to the decedent (*225 Cal. App. 2d 156, 169)* .

[f] Change From Previous Testament

The facts and procedural background of ***Estate of Morgan*** *(1964) 225 Cal. App. 2d 156, 37 Cal. Rptr. 160* , are *discussed under § 186.27[3][a]*. In *Morgan*, the court of appeal held that the absence of testimony concerning a conversation between the decedent and her attorney in which the decedent gave instructions for the new will triggered application of the rule that an unexplained or poorly explained change from a previous will made when the testator had recognized mental capacity constitutes evidence as to soundness of mind, when considered with other evidence (*225 Cal. App. 2d 156, 170)* . The court found that the decedent lacked testamentary capacity when the will was executed, based partly on the will's unexplained elimination of a sizable charitable gift that had been included in five previous wills, and other unexplained changes from the consistent testamentary plan of the five previous wills (*225 Cal. App. 2d 156, 164-165)* .

[g] Proof of Hallucination or Delusion

In ***Goodman v. Zimmerman*** *(1994) 23 Cal. App. 4th 1667, 32 Cal. Rptr. 2d 419* , a son filed a petition for revocation of probate, alleging that his father lacked testamentary capacity because he suffered from a mental disorder within the meaning of *Prob. Code § 6100.5(a)(2)*. The court of appeal held that substantial evidence supported the trial court's

finding that the son had not met his burden of proving that the testator was delusional at the time of executing the will and that the alleged delusion caused the testator to devise his property in a way that he would not otherwise have done. There was evidence in support of the reasons given by the testator for the testamentary disposition to which the son objected, and evidence that the testator had reasons why he wanted his son to receive a disproportionately small share of the estate (*23 Cal. App. 4th 1662)* .

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Volume 18 Chapters 180-189 PRETRIAL PROCEEDINGS---to---PROBATE OF WILLS
CHAPTER 186 PROBATE OF WILLS
PART II. FORMS
A. Supporting Will Contests

18-186 California Points & Authorities § 186.28

§ 186.28 Supporting Contest of Will--Grounds for Contest-- Will Procured by Fraud [Prob. Code § 6104]

[1] FORM

[*The following should be combined with a general memorandum of points and authorities supporting a will contest or a petition to revoke probate of a will (see §§ 186.20 and 186.21), or may be used in a trial or appellate brief.*]

THE [PURPORTED] _____ [WILL *or* CODICIL] IS INVALID BECAUSE IT WAS PROCURED BY FRAUD IN THAT _____ [*specify facts showing that bequests were the direct result of fraud, e.g.* THE RESPONDENT DECEIVED THE TESTATOR BY INDUCING HER TO MARRY HIM WHEN HE WAS LEGALLY MARRIED TO ANOTHER WOMAN AT THE TIME, AND THROUGH THIS DECEPTION THE TESTATOR EXECUTED A WILL NAMING THE RESPONDENT AS HER HUSBAND AND LEAVING HER ESTATE TO RESPONDENT].

A. Will Ineffective to Extent It Is Procured by Fraud. The execution or revocation of a will or a part of a will is ineffective to the extent the execution or revocation was procured by fraud (*Prob. Code § 6104*; *Estate of Carson (1920) 184 Cal. 437, 442-443, 194 P. 5* ; *David v. Hermann (2005) 129 Cal. App. 4th 672, 685-686, 28 Cal. Rptr. 3d 622*).

[*Optional*] **B. Only Portions of Will Affected by Fraud Need Be Revoked.** If a will was procured by fraud, the court may separate the portions affected by the fraud from those unaffected, and revoke only the affected portions (*Estate of Carson (1920) 184 Cal. 437, 441, 194 P. 5*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a challenge to a purported testamentary instrument based on fraud in the procurement of the instrument [*see Prob. Code § 6104*]. The issue of fraud in the procurement of a will frequently arises in conjunction with the issue of undue influence, discussed in *§ 186.29* [*but see Estate of Carson (1920) 184*

Cal. 437, 440, 194 P. 5 (although husband deceived testator by inducing her to marry him when he was already married, there was no evidence that he subjugated testator's mind so that she was not acting freely on facts as she believed them to be)]. The theories of undue influence and fraud often rest on a similar factual basis, because contestants relying on a theory of undue influence may claim that the beneficiary of the will employed misrepresentations to pressure the testator into making the will. However, they are distinct grounds for a will contest [*David v. Hermann (2005) 129 Cal. App. 4th 672, 685, 28 Cal. Rptr. 3d 622]* .

Optional Paragraph B may be used when the contestant seeks to invalidate certain portions of the will, or to invalidate the will as to certain beneficiaries, rather than to invalidate the will in its entirety.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel may discuss facts showing that a bequest was procured as a direct result of false representations or deceit [*see Estate of Carson (1920) 184 Cal. 437, 439-442, 194 P. 5* ; *David v. Hermann (2005) 129 Cal. App. 4th 672, 686, 28 Cal. Rptr. 3d 622]* .

This memorandum may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the purported will was procured by fraud. Thus, it may be combined with the points and authorities pertaining to an objection to the admission of a will to probate [*see § 186.20*] or a petition to revoke probate of a will [*see § 186.21*]. This memorandum may also be combined with points and authorities challenging a purported will on the grounds that the will was not executed in conformity with statutory requirements [*see §§ 186.22, 186.23*].

[b] Opposing Memoranda

In an appropriate case, the points and authorities *set out in § 186.57* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Will Ineffective to Extent It Is Procured by Fraud

In ***Estate of Carson*** *(1920) 184 Cal. 437, 194 P. 5* , the testator left the bulk of her estate to Carson, a man she believed to be her husband. After the will was probated, certain of the testator's heirs petitioned to revoke probate on the grounds that the will was procured by undue influence and fraud, in that Carson was legally married to another woman or several other women at the time of his marriage to the testator. The evidence showed that the testator married Carson about a year before her death. She did so under the mistaken belief, induced by Carson, that he was free to marry. In fact, he was married to at least one other woman at the time. About a month after the marriage, the testator made the will in question. The trial court denied the petition for revocation of probate, and the contestants appealed the decision to the California Supreme Court.

The California Supreme Court reversed, holding that the will's provisions appointing Carson as executor and naming him as residuary beneficiary were invalid due to fraud. The Court first noted that neither the contestants' petition nor the evidence offered made out a case of undue influence. The facts concerning Carson's fraudulent acts and the testator's reliance on them did not establish any subjugation of the mind or the will of the testator to that of Carson, or that the testator was not acting freely on the facts as she believed them to be when she made the will (*184 Cal. 437, 440)* .

As to the fraud cause of action, the Court stated that the testator was clearly deceived concerning Carson's freedom to marry her, and that her bequests to Carson were clearly "the direct fruit" of this deceit (*184 Cal. 437, 443)* . This was not a case in which the testator knew of or had reason to suspect the fraud, but chose to enter into the marriage anyway, or a case in which the parties had lived happily together for many years. Although no direct evidence was offered to

show that the bequests were the result of the fraud, it was reasonable to draw that conclusion from the evidence that the will was made within a month after the marriage, described Carson as "my husband," and left him the bulk of the estate. It was not necessary to introduce evidence of the testator's views concerning the sanctity of marriage, her harmonious or other relations with Carson, or the strength of her affection for him (*184 Cal. 437, 444)* .

The Court found that the trial court erroneously excluded evidence consisting of statements made by the testator to others that showed she believed her marriage to be legal. Whenever the intention, feeling, belief, or other mental state of a person at a particular time is material to an issue under trial, evidence of the person's declarations at the time, indicative of his or her then mental state, are admissible in evidence.

The Court also found that other, similar statements made by the testator in Carson's presence, which were excluded on the theory that they were not competent against the other beneficiaries and should therefore not be admitted at all, should have been admitted. This evidence was not offered as admissions, but as evidence of the testator's belief, and its admissibility as to the other beneficiaries was irrelevant since the other beneficiaries were not interested parties. The Court was "at a loss to understand" the trial court's exclusion of statements made by Carson to the testator about his previous matrimonial experiences, and held that these statements, as well as other evidence concerning his previous marriages, were entitled to be heard and considered as evidence of the fraud (*184 Cal. 437, 446)* . Finally, evidence that the testator transferred her bank account into the joint names of herself and Carson shortly after their marriage should have been admitted.

Although the trial court's rejection of this evidence was "not particularly prejudicial," where one of the vital questions in the case was whether the bequest to Carson was induced by and based on the testator's belief that he was her lawful husband, "any evidence throwing light upon the relations of the parties, or upon her feelings toward him would have some bearing," and "very considerable latitude of examination should be permitted" (*184 Cal. 437, 447)* .

In ***David v. Hermann*** *(2005) 129 Cal. App. 4th 672, 28 Cal. Rptr. 3d 622* , the court noted that the elements of fraud in the procurement of a testamentary instrument are the same as those required to invalidate a contract. An intent to deceive the testator or to induce the testator to execute the will is a necessary element. Because proof of intent to deceive necessarily is largely or entirely circumstantial, a contestant is not confined to the bare facts, but is entitled to the benefit of all inferences that can legitimately be drawn from the established facts. Proof that the testator was induced by misrepresentations into making dispositions that the testator would not have made absent those misrepresentations constitutes fraud (*129 Cal. App. 4th 672, 686)* .

[b] Only Portions of Will Affected by Fraud Need Be Revoked

The facts and procedural background of ***Estate of Carson*** *(1920) 184 Cal. 437, 194 P. 5* , are *discussed under § 186.28[3][a]*. In *Carson*, the California Supreme Court held that the fact that certain portions of the testator's will were procured by fraud would not invalidate the provisions and bequests of the will not affected by the fraud. The whole will would be invalidated only if it were not possible to separate the portions affected by the fraud from those unaffected. Separating the portions of the will favoring the man who had fraudulently entered into a marriage with the testator from the other provisions of the will did not present such a problem (*184 Cal. 437, 441)* .

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Volume 18 Chapters 180-189 PRETRIAL PROCEEDINGS---to---PROBATE OF WILLS
CHAPTER 186 PROBATE OF WILLS
PART II. FORMS
A. Supporting Will Contests

18-186 California Points & Authorities § 186.29

§ 186.29 Supporting Contest of Will--Grounds for Contest--Will Procured by Undue Influence [Prob. Code § 6104]

[1] FORM

[*The following should be combined with a general memorandum of points and authorities supporting a will contest or a petition to revoke probate of a will (see §§ 186.20 and 186.21), or may be used in a trial or appellate brief.*]

THE [PURPORTED] _____ [WILL *or* CODICIL] IS INVALID BECAUSE IT WAS PROCURED BY UNDUE INFLUENCE IN THAT _____ [*specify conduct that subjugates the will of the testator to the will of another and causes the testator to dispose of his or her property differently than he or she would otherwise have done, e.g.,* (1) THE WILL WAS UNNATURAL AND CONTRARY TO THE TESTATOR'S PREVIOUSLY EXPRESSED INTENT TO LEAVE HIS/HER ESTATE TO HIS/HER SISTER; (2) THE TESTATOR'S MENTAL AND PHYSICAL CONDITION WERE SO DETERIORATED BY HIS/HER ILLNESS THAT RESPONDENT WAS ABLE TO SUBVERT HIS/HER WILL; (3) THE TESTATOR WAS DEPENDANT ON THE RESPONDENT'S CARE; AND (4) THE RESPONDENT WAS PRESENT DURING THE PREPARATION AND EXECUTION OF THE TESTATOR'S WILL].

A. Will Ineffective to Extent It Is Procured by Undue Influence. The execution or revocation of a will or a part of a will is ineffective to the extent the execution or revocation was procured by undue influence, and the courts have long held that a testamentary document may be set aside if it was procured by undue influence (*Prob. Code § 6104*).

B. "Undue Influence" Defined. Undue Influence is pressure brought to bear directly on the testamentary act, sufficient to overcome the testator's free will and amounting to coercion that destroys the testator's free agency (*Rice v. Clark (2002) 28 Cal. 4th 89, 96, 120 Cal. Rptr. 2d 522, 47 P.3d 300* ; *Estate of Baker (1982) 131 Cal. App. 3d 471, 480, 182 Cal. Rptr. 550*).

C. Indicia of Undue Influence. The recognized indicia of undue influence are: (1) the provisions of the will are unnatural; (2) the dispositions are at variance with the express intentions of the testator; (3) the relations between the

decedent and the chief beneficiary afforded the latter an opportunity to control the testamentary act; (4) the mental and physical condition of the decedent permitted a subversion of his or her will; and (5) the chief beneficiary was active in procuring the execution of the will (*Estate of Calway (1961) 196 Cal. App. 2d 268, 274, 16 Cal. Rptr. 462*).

D. Circumstantial Evidence May Establish Active Participation in Procurement of Will. Active participation in the preparation or procurement of execution of a purported will may be established by circumstantial evidence (*Estate of Baker (1982) 131 Cal. App. 3d 471, 481, 182 Cal. Rptr. 550*).

[*Optional*] **E. Confidential or Fiduciary Relationship Creates Presumption of Undue Influence.** A presumption of undue influence arises when there is: (1) a confidential or fiduciary relationship between the testator and the person alleged to have exerted the undue influence; (2) active participation by that person in preparation or execution of the will; and (3) an undue benefit to the person or another person under the will thus procured (*Estate of Baker (1982) 131 Cal. App. 3d 471, 480, 182 Cal. Rptr. 550* ; *Estate of Clegg (1978) 87 Cal. App. 3d 594, 602, 151 Cal. Rptr. 158*).

[*Optional*] **F. Benefit by Attorney Who Assists in Preparing Will Creates Presumption of Undue Influence.** When an attorney, by advice or action, takes part in the preparation or execution of a will, and the will benefits the attorney, there is a presumption of undue influence that shifts the burden to the attorney to prove that the will was not procured by his or her undue influence (*Estate of Auen (1994) 30 Cal. App. 4th 300, 311, 35 Cal. Rptr. 2d 557* ; *Estate of Clegg (1978) 87 Cal. App. 3d 594, 603, 151 Cal. Rptr. 158*).

[*Optional*] **G. Actual Presence of Party Who Exercised Influence Is Unnecessary.** The person exercising undue influence need not be present in person at the time of the execution of the testamentary document if the influence is present to constrain the party from exercising his or her free will; nonpresence at the execution does not alone, as a matter of law, overcome the inference of undue influence in procuring the will that may be drawn from other evidence (*Estate of Baker (1982) 131 Cal. App. 3d 471, 481, 483, 182 Cal. Rptr. 550*).

[*Optional*] **H. Claim of Undue Influence May Be Supported in Whole or in Part by True Statements.** Untrue statements are not essential to a claim of undue influence, which may be supported in whole or in part by proof of true statements [*Hagen v. Hickenbottom (1995) 41 Cal. App. 4th 168, 180-183, 48 Cal. Rptr. 2d 197]* .

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a challenge to a testamentary instrument based on undue influence in the procurement of the instrument [*see Prob. Code § 6104*]. The issue of undue influence frequently arises in conjunction with the issues of testamentary incapacity and fraud, discussed in *§§ 186.27* and *186.28*, respectively [*but see Estate of Carson (1920) 184 Cal. 437, 440, 194 P. 5* (although husband deceived testator by inducing her to marry him when he was already married, there was no evidence that he subjugated testator's mind so that she was not acting freely on facts as she believed them to be)]. The theories of undue influence and fraud often rest on a similar factual basis, because contestants relying on a theory of undue influence may claim that the beneficiary of the will employed misrepresentations to pressure the testator into making the will. However, they are distinct grounds for a will contest [*David v. Hermann (2005) 129 Cal. App. 4th 672, 685, 28 Cal. Rptr. 3d 622]* .

Optional Paragraphs E and F may be used when the facts of the case entitle the contestant to assert a presumption of undue influence and thereby shift the burden to the proponent to show that undue influence did not exist [*see Rice v. Clark (2002) 28 Cal. 4th 89, 96-97, 120 Cal. Rptr. 2d 522, 47 P.3d 300* (noting earlier appellate cases recognizing presumption)].

Optional Paragraph E concerns the general presumption. Optional paragraph F deals with application of the

presumption to the testator's attorney. In this regard, attorneys need to be aware that *Prob. Code § 21350* provides an additional and independent statutory basis for contesting a will that makes a gift to the drafting attorney. *Prob. Code § 21350* invalidates any donative transfers to the person who drafted the will or trust, or specified relatives and business associates of that person [*Prob. Code § 21350(a)*]. This general statutory rule of invalidity, however, does not apply if the transferor is related to or cohabiting with the transferee or the person who drafted the instrument [*Prob. Code § 21351(a)*]. Other significant exceptions as well [*see Prob. Code § 21351(b)-(i)*]. When *Prob. Code § 21350* applies, it may be easier for the party seeking to invalidate a gift to rely on that section than to try to prove traditional fraud, duress, menace, or undue influence. For additional discussion and a form, see *§ 186.29A*. If *Prob. Code § 21350* is inapplicable--for example, because the attorney who drafted the will was related to the testator [*see Prob. Code § 21351(a)*]--traditional fraud, duress, menace, or undue influence may be the only way to attack the will.

Optional Paragraph G may be used when the person exercising the undue influence was not actually present at the time the will or codicil was executed.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. For example, if the contestant is entitled to a presumption of undue influence, counsel should set out specific facts and arguments showing that the party alleged to have unduly influenced the testator had a confidential relationship with the testator, participated in the preparation or execution of the will, and is unduly benefitted by the will [*see Estate of Clegg (1978) 87 Cal. App. 3d 594, 602, 151 Cal. Rptr. 158]* .

This memorandum may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the purported will was procured by undue influence. Thus, this form may be combined with the points and authorities pertaining to an objection to the admission of a will to probate [*see § 186.20*] or a petition to revoke probate of a will [*see § 186.21*]. This memorandum may also be combined with points and authorities challenging a purported will on the grounds that the will was not executed in conformity with statutory requirements [*see §§ 186.22, 186.23*].

[b] Opposing Memoranda

In an appropriate case, the points and authorities *set out in § 186.58* may be used to oppose the contention supported by the points and authorities in this form.

[3] Discussion of Authorities

[a] "Undue Influence" Defined

Rice v. Clark *(2002) 28 Cal. 4th 89, 120 Cal. Rptr. 2d 522, 47 P.3d 300* , discussed in detail in *§ 186.58B[3][b]*, involved an action under *Prob. Code § 21350(a)(4)*, which includes in the category of presumptively disqualified persons any fiduciary who transcribes the testamentary instrument or causes it to be transcribed. In introductory discussion relating to the general nature of undue influence, the California Supreme Court stated that undue influence is "pressure brought to bear directly on the testamentary act, sufficient to overcome the testator's free will, amounting in effect to coercion destroying the testator's free agency" (*28 Cal. 4th 89, 96)* .

In ***Estate of Baker*** *(1982) 131 Cal. App. 3d 471, 182 Cal. Rptr. 550* , a testator's two heirs at law, a brother and an adoptive cousin, contested the testator's will leaving the bulk of her $73,000 estate to a psychic she had known since 1938. In 1975, the psychic told the testator that she had "visitations" from the testator's deceased mother and brother. The psychic claimed that the mother and brother wanted the testator to, among other things, go out more, spend more money, have more fun, get rid of "false friends," rent an apartment and give up her house, and that if the testator did not heed their advice and requests her mother and brother would be earthbound and unable to move to a "higher plane." The testator believed the psychic, and complied with her advice in almost every aspect of her life during the next two years.

Between 1975 and 1978, the testator gave the psychic over $60,000 in checks, free trips, and other benefits, and paid for stocks and a condominium in which the psychic was given a joint interest. In 1976, the testator executed the will in question, which was prepared by an attorney recommended by the psychic. The final message relayed by the psychic from the spirit world was that the testator's mother and brother wanted the testator to take a trip to Peru, and that if she did not do so they would not be able to move to a higher plane or continue to communicate with her. The psychic knew that the testator had suffered heart attacks previously and could have another heart attack on the trip. In spite of her physician's advice to the contrary, the testator and the psychic flew to South America and visited Peru and other countries in early 1978. The testator suffered a heart attack while on the trip, and died approximately a month later. The testator's heirs contested the will on the grounds of testamentary incapacity, undue influence, and fraud. The trial court agreed and denied probate of the provisions challenged by the contestants. The psychic and her grandson appealed.

The court of appeal affirmed, stating that undue influence consists of conduct that subjugates the will of the testator to the will of another and causes the testator to make a disposition of his or her property contrary to and different from that which he or she would have done if permitted to follow his or her own inclination or judgment (*131 Cal. App. 3d 471, 480)* . The court found that the evidence established that the psychic had exercised such influence over the testator by claiming to be a representative of the testator's deceased relatives. The court also stated that the judicial policy that a will must be construed according to the intention of the testator and so as to avoid intestacy is a rule of construction and, as such, had no bearing on the issue of whether certain parts of the will were procured by undue influence and fraud. The will's disinheritance clause was held not to apply to cause the estate to escheat. A disinheritance clause does not become effective unless the testator has made a valid disposition of his or her property, and even a fully effective disinheritance clause only prevents the heirs from taking under the will itself. Therefore, the testator's heirs were entitled to receive that portion of the estate that would have gone to the psychic and her grandson under the laws of intestacy (*131 Cal. App. 3d 471, 484)* .

[b] Indicia of Undue Influence

In ***Estate of Calway*** *(1961) 196 Cal. App. 2d 268, 16 Cal. Rptr. 462* , a testator's sister and sole heir at law contested a will leaving everything to the testator's live-in housekeeper of seven months. The will was made less than two weeks before the testator's death, late in the evening on the day the testator was admitted to the hospital for a strangulated hernia. About three hours after the testator was admitted, the attorney who prepared the will asked the attending physician if the testator was competent to make a will. The doctor said he was, and the attorney's secretary came to the hospital and wrote down the will as the attorney dictated it. She testified that the testator could only make "affirmative noises" when the will was read to him, that she couldn't understand what he was saying and relied on the attorney and the housekeeper for interpretation, that she did not hear the testator discuss his property, and that the housekeeper was present during the discussion and execution of the will and held the testator and the document while he signed it. The secretary's husband, who was the other witness to the will, testified that the testator looked weak and sick, and that he did not hear the testator discuss his property or relatives or indicate that the document was his will. By contrast, the attorney and the housekeeper testified that the testator was as mentally alert as he had been before he entered the hospital, that he was of sound mind, discussed his property and relatives, and expressed an intent to take care of the housekeeper, and specifically requested that a disinheritance clause be included in the will. However, two nurses who cared for the testator on the evening the will was executed testified that he was irrational, did not know or understand what was going on, and was physically restrained and given a "quieting drug" because he was fighting and trying to get out of bed. The hospital records corroborated this testimony, and indicated that the testator remained in a condition of near shock until about 1:00 a.m. The testator's physician testified that the testator was suffering from arteriosclerosis, which affected his brain, and that hallucinations and other outward manifestations of this illness had been apparent for some time before he testator was hospitalized. There was also evidence that the testator's memory deteriorated rapidly during the last year or two of his life, that he had considerable difficulty carrying on a coherent conversation, and that he could read and write only with difficulty. Several witnesses gave testimony in conflict with this evidence, to the effect that the testator was of sound mind during the months immediately preceding his death. Two witnesses stated that on two occasions the housekeeper had made unsolicited statements that the testator was "perfectly competent." Based on

the evidence described above, the trial court denied probate of the will on the grounds that the testator lacked testamentary capacity and was under the undue influence of the housekeeper when the will was executed. The housekeeper appealed.

The court of appeal affirmed, noting that its province was not to decide whether the testator was competent when he executed the will but merely to decide whether there was substantial evidence to support the trial court's decision. The court found that the evidence was sufficient to support a finding that the testator was unable to make a will on the date in question because of extreme mental and physical weakness (*196 Cal. App. 2d 268, 273-274)* . As to the undue influence issue, the court stated that the recognized indicia of undue influence in California are: (1) the provisions of the will are unnatural; (2) the dispositions are at variance with the express intentions of the testator; (3) the relations between the decedent and the chief beneficiary afforded the latter an opportunity to control the testamentary act; (4) the mental and physical condition of the decedent permitted a subversion of his will; and (5) the chief beneficiary was active in procuring the execution of the will (*196 Cal. App. 2d 268, 274)* . The court found ample evidence establishing all the indicia. The will in question was both unnatural and at variance with "the express intentions of the testator during the 80 or so years of his life before he met the appellant." There was no question that the testator's mental and physical condition were such as to permit a subversion of his will. The housekeeper's opportunity to control the testamentary act were established by a variety of circumstances, including the testator's dependency on the housekeeper, the housekeeper's attempts to keep an old friend from seeing the testator, and the housekeeper's failure to notify two friends of the testator's last illness although both of them had specifically asked her to do so. The attorney's secretary testified that the housekeeper was present during the preparation and execution of the will, and that she sat by the bed and held the testator's hand and interpreted his instructions about the will (*196 Cal. App. 2d 268, 275-276)* .

[c] Circumstantial Evidence May Establish Active Participation in Procurement of Will

The facts and procedural background of ***Estate of Baker*** *(1982) 131 Cal. App. 3d 471, 182 Cal. Rptr. 550* , are *discussed under § 186.29[3][a]*. In *Baker*, the court of appeal held that the will proponent's active participation in procuring the will could be established by circumstantial evidence. The circumstantial evidence used to establish the will proponent's active participation included the proponent's representations that she was in communication with the testator's dead relatives, the testator's belief in these claims and compliance with the proponent's instructions, and the proponent's successful efforts to alienate the testator from her friends, relatives, and business associates (*131 Cal. App. 3d 471, 481-482)* .

[d] Confidential or Fiduciary Relationship Creates Presumption of Undue Influence

The facts and procedural background of ***Estate of Baker*** *(1982) 131 Cal. App. 3d 471, 182 Cal. Rptr. 550* , are *discussed under § 186.29[3][a]*. In *Baker*, the court of appeal enumerated the elements that must concur to create a presumption of undue influence in the procurement of a will: (1) a confidential or fiduciary relationship between the testator and the person alleged to have exerted the undue influence; (2) active participation by that person in preparation or execution of the will; and (3) an undue benefit to such person or another person under the will thus procured (*131 Cal. App. 3d 471, 480)* . The court found that each element was present in the case before it. The will proponent testified that the testator had trust and confidence in her, which established a confidential or fiduciary relationship. The proponent clearly profited unduly from the will, since it gave her the bulk of the estate. Activity on the part of the proponent in procuring the will was established by circumstantial evidence that the psychic had power or ability to control the testamentary act (*131 Cal. App. 3d 471, 481-482)* .

The facts and procedural background of ***Estate of Clegg*** *(1978) 87 Cal. App. 3d 594, 151 Cal. Rptr. 158* , are discussed in *§ 186.27[3][a]*. In *Clegg*, the court of appeal upheld the trial court's finding that the will had been procured by undue influence, since all the elements required to raise a presumption of undue influence were present. The administrator and secretary of the nursing home that was the primary beneficiary under the will had a confidential relationship with the testator since they had been nominated as her conservators prior to the execution of the will. There

was circumstantial evidence that they had actively participated in the execution of the will, in that the administrator called his personal attorney and the attorney for the home to prepare the will, and the attorney explained escheat and suggested that the testator leave her property to the home in spite of the fact that she had living relatives. The administrator, the secretary, and the attorney unduly benefitted from the will, since they were all affiliated with and representatives of the church that sponsored the home. All three were members of the church. The administrator also served on the home's board of directors, the attorney was raised in the church and "paid them back" by performing legal services for the church (*87 Cal. App. 3d 594, 602)* .

[e] Benefit by Attorney Who Assists in Preparing Will Creates Presumption of Undue Influence

In ***Estate of Auen*** *(1994) 30 Cal. App. 4th 300, 35 Cal. Rptr. 2d 557* , the attorney had represented the client over a period of years, during the course of which she prepared and the client executed a will that named various charitable organizations as residuary devisees. Six months before the client's death, the first attorney asked a second attorney to prepare a new will for the client leaving the bulk of the client's estate to the first attorney. The second attorney, who was a friend of the first attorney and inexperienced in will drafting, spoke to the client briefly on the telephone, but received most of the information as to the form and contents of the new will from the first attorney, and the document was actually typed by the first attorney's secretary. After the client's death, the new will was offered for probate. In the ensuing contest, the court ruled that there was a presumption that the will was the product of undue influence, since the facts showed (1) there was an attorney-client relationship between the first attorney and the testator at the time the will was prepared and executed, (2) the first attorney actively participated in the preparation of the new will, and (3) the first attorney benefitted by the new will (*30 Cal. App. 4th 300, 311)* . It was not necessary to prove that the benefit to the first attorney was "undue," as any benefit other than compensation for legal services performed would be "undue" (*30 Cal. App. 4th 300, 310)* .

The facts and procedural background of ***Estate of Clegg*** *(1978) 87 Cal. App. 3d 594, 151 Cal. Rptr. 158* , are discussed in *§ 186.27[3][a]*. In *Clegg*, the court of appeal held that a presumption of undue influence arises when an attorney, by advice or action, takes part in the preparation or execution of a will, and the will benefits the attorney. To rebut the presumption, the attorney must show that he or she took no unfair advantage of the testator and reminded the testator of the natural objects of his or her bounty. The attorney in *Clegg* was held to benefit from the will since he was closely affiliated with the nursing home that was the sole beneficiary under the will (*87 Cal. App. 3d 594, 603)* .

NOTE:

Attorneys should be aware that *Prob. Code § 21350* provides an additional and independent basis for contesting a will that makes a gift to the drafting attorney. *Prob. Code § 21350* invalidates any donative transfers to the person who drafted the will or trust, or specified relatives and business associates of that person [*Prob. Code § 21350(a)*], subject to important exceptions [*see Prob. Code § 21351*]. For detailed discussion and a form, see *§ 186.29A*.

[f] Actual Presence of Party Who Exercised Influence Is Unnecessary

The facts and procedural background of ***Estate of Baker*** *(1982) 131 Cal. App. 3d 471, 182 Cal. Rptr. 550* , are *discussed under § 186.29[3][a]*. In *Baker*, the court of appeal held that the fact that the will proponent and primary beneficiary was not actually present at the execution of the will did not, as a matter of law, overcome the inference of undue influence raised by the other facts of the case. The jury had substantial evidence before it from which to conclude that the presumption was applicable and was not overcome, including evidence that the testator had complied with the proponent's instructions and advice in almost every aspect of her life during the last two years of her life, had given the proponent over $60,000 in checks, free trips, and other benefits, and had hired an attorney recommended by the proponent to prepare the will (*131 Cal. App. 3d 471, 483)* .

[g] Claim of Undue Influence May Be Supported in Whole or in Part by True Statements

In ***Hagen v. Hickenbottom*** *(1995) 41 Cal. App. 4th 168, 48 Cal. Rptr. 2d 197* , two grandchildren sought to set aside a revocable trust instrument executed by their deceased grandmother on the ground that one of the grandmother's cousins had unduly influenced her decision to leave almost none of her property to the grandchildren. The grandchildren were the sole descendants of the grandmother, who was over 90 years of age at the time she executed the trust. The cousin argued that the only facts alleged to constitute undue influence consisted of true statements made by the cousin to the grandmother about the grandchildren. In those statements, the cousin reminded the grandmother that one of the grandchildren was an adopted child and informed the grandmother that the other grandchild had become involved with drugs, had sought treatment in a rehabilitation center, had impregnated his girl friend, and then had paid for the girl friend to have an abortion. The grandchildren conceded that all of these statements were true. The cousin moved the court for summary judgment, arguing that truth was a complete defense to a claim of undue influence and that the *First Amendment* guarantee of free speech protected her from any liability for making admittedly true statements. The trial court granted the motion, but the Court of Appeal reversed, concluding that although undue influence often consists of untrue statements made to the testator for the purpose of overpowering the testator's free agency, untrue statements are not essential to undue influence. In fact, a claim of undue influence may be supported in whole or in part by proof of completely true statements. The court stated that it is essential to distinguish undue influence from fraud or misrepresentation. Falsity is an essential element of a claim for fraud or misrepresentation, but not of a claim for undue influence. Thus truth is not an absolute defense to a claim of undue influence, as it is to a claim for fraud or misrepresentation, although the truth of statements may tend to negate the inference that they had the effect of unduly influencing the testator (or, in this case, the settlor) (*41 Cal. App. 4th 168, 180-183)* .

California Points & Authorities

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Volume 18 Chapters 180-189 PRETRIAL PROCEEDINGS---to---PROBATE OF WILLS
CHAPTER 186 PROBATE OF WILLS
PART II. FORMS
A. Supporting Will Contests

18-186 California Points & Authorities § 186.29A

§ 186.29A Supporting Contest of Will--Grounds for Contest--Gift Is Invalid Under Statute Prohibiting Gifts to Persons Having Specified Relationships to Testator [Prob. Code §§ 21350, 21351]

[1] FORM

THE TESTAMENTARY GIFT TO _____ [*name of beneficiary*] IS INVALID BECAUSE _____ [*name of beneficiary*] IS _____ [*specify one of following:* (RELATED BY BLOOD OR MARRIAGE TO *or* A DOMESTIC PARTNER OF *or* A COHABITANT WITH *or* AN EMPLOYEE OF) THE PERSON WHO DRAFTED THE WILL *or* A _____ (PARTNER *or* SHAREHOLDER *or* EMPLOYEE) OF A LAW _____ (PARTNERSHIP *or* CORPORATION) IN WHICH THE PERSON WHO DRAFTED THE WILL HAS AN OWNERSHIP INTEREST *or* (RELATED BY BLOOD OR MARRIAGE TO *or* A DOMESTIC PARTNER OF *or* A COHABITANT WITH *or* AN EMPLOYEE OF) A PERSON WHO HAS A FIDUCIARY RELATIONSHIP WITH THE TRANSFEROR AND TRANSCRIBED THE WILL OR CAUSED IT TO BE TRANSCRIBED *or* (RELATED BY BLOOD OR MARRIAGE TO *or* A DOMESTIC PARTNER OF *or* A COHABITANT WITH *or* AN EMPLOYEE OF) A CARE CUSTODIAN OF THE TESTATOR, WHO IS A DEPENDANT ADULT] AND THE GIFT DOES NOT FALL WITHIN ANY OF THE APPLICABLE EXCEPTIONS TO THE STATUTORY PROVISIONS INVALIDATING TESTAMENTARY GIFTS TO SUCH PERSONS.

A. Testamentary Gifts to Specified Persons Are Presumptively Invalid. No provision or provisions of any instrument, including a will, are valid to make any donative transfer to specified categories of persons unless specific statutory exceptions apply. The specified classes of persons include anyone who is _____[*specify class or classes of person relevant to the particular case, e.g.:* (related by blood or marriage to *or* a domestic partner of *or* a cohabitant with *or* an employee of) the person who drafted the will *or* a _____ (partner *or* shareholder *or* employee) of a law _____ (partnership *or* corporation) in which the person who drafted the will has an ownership interest *or* (related by blood or marriage to *or* a domestic partner of *or* a cohabitant with *or* an employee of) a person who has a fiduciary relationship with the transferor and transcribed the will or caused it to be transcribed *or* (related by blood or marriage to *or* a domestic partner of *or* a cohabitant with *or* an employee of) a care custodian of a dependant adult testator] (*Prob. Code § 21350(a)*; *see Prob. Code § 45* ("instrument" includes will)).

[*Optional*] **B. "Relation by Blood or Marriage" Defined.** For purposes of the statutory provisions invalidating gifts to specified persons, the term "related by blood or marriage" includes (1) the person's spouse or predeceased spouse; (2) relatives within the third degree of the person and of the person's spouse; and (3) the spouse of any relative within the third degree of the person and of the person's spouse (*Prob. Code § 21350(b)*).

C. Statutory Exceptions Inapplicable. The statutory rule invalidating gifts to the classes of persons specified in *Probate Code § 21350* may be overcome only if the gift is subject to one or more of the statutory exceptions provided in *Probate Code § 21351*, and none of those exceptions is applicable in this case (*Prob. Code § 21350(a)*; *see Prob. Code § 21351*).

[*Optional; add if transfer in question was made to person who actually drafted the instrument:*] **D. Transfer to Person Who Drafted Instrument Is Conclusively Presumed Invalid.** A transfer that was made in an instrument executed after July 1, 1993, by a person who was a California resident at the time the instrument was executed, to a person who drafted the instrument and who does not qualify under the any of the statutory exceptions specified in *Probate Code § 21351* is conclusively presumed to be invalid, and the transferee cannot rebut the presumption by showing that the transfer was not the product of fraud, menace, duress, or undue influence (*Prob. Code §§ 21350(a)(1), 21351(d),(e)*; *Rice v. Clark (2002) 28 Cal. 4th 89, 98, 120 Cal. Rptr. 2d 522, 47 P.3d 300*).

[*Optional; add if beneficiary was a care custodian:*] **E. Meaning of "Care Custodian."** For purposes of the provisions invalidating gifts to specified persons, "care custodian" includes an administrator or employee of any public or private facility or agency specified in Welfare and Institutions Code § 15610.7, including _____ [*specify relevant type of facility or agency, e.g.,* adult day care centers *or* clinics *or* community care facilities *or* any persons providing health services or social services to elders or dependent adults *or other person or entity specified in Welf. & Inst. Code § 15610.17*]. The statutory definition of "care custodian" does not contain a professional or occupational limitation and does not provide any exception for a preexisting personal friendship (*Prob. Code § 21350(c)*; *Welf. & Inst. Code § 15610.17*; *Bernard v. Foley (2006) 39 Cal. 4th 794, 803, 47 Cal. Rptr. 3d 248*).

[2] Comments

[a] Use of Form

This form may be used in support of a will contest seeking to invalidate a testamentary gift to a particular donee on the ground that the person is a member of one of the classes of persons listed in *Prob. Code § 21350* [*see* [3][a], *below*]. Gifts made to such persons are invalid unless one of the exceptions specified in *Prob. Code § 21351* applies [*Prob. Code § 21350(a)*].

In general, the classes of persons enumerated in *Prob. Code § 21350* encompass many of the same types of persons who are often involved in traditional undue influence claims. However, because the statute creates a presumption of invalidity for gifts to the classes of specified persons, no affirmative showing of actual undue influence is required under these statutes--all that must be shown is that the donee is a member of a class specified in the statute, and that no exception applies. The donee then has the burden to show that the gift is made free of undue influence [*see* 3[b], *below*].

Counsel should combine this form with facts showing that (1) the person to whom the gift was made is a member of the class of persons to which *Prob. Code § 21350* applies; and (2) none of the exceptions in *Prob. Code § 21351* are available to validate the gift.

Paragraph A states the basic rule of *Prob. Code § 21350*. Counsel should complete this provision to specify the specific category or categories of disqualified persons under *Prob. Code § 21350(a)* that are applicable under the facts of the case--e.g., the drafter, a relative or business associate of drafter, a care custodian, and so on [*see* [3][a], *below*].

Optional Paragraph B may be included if the gift is invalidated because the donee is related by blood or marriage, within the meaning of *Prob. Code § 21350(b)*, to a person having the requisite relationship with the testator.

Paragraph C specifies that none of the statutory exceptions to *Prob. Code § 21351* applies. Counsel should add argument demonstrating that the facts of the case do not support application of any of these exceptions. For discussion and a list of these exceptions, see [3][c], *below; see also § 186.58A*.

Optional Paragraph D may be used if the donee is the person who actually drafted the instrument.

Optional Paragraph E may be used if the party seeking to invalidate the gift is claiming that the donee is a caregiver who qualifies as a "care custodian" under the statute [*see Prob. Code § 21350(a)(6), (c)*].

[b] Opposing Memoranda

In an appropriate case, the points and authorities *set out in § 186.58A* or *186.58B* may be used to oppose the contentions supported by these points and authorities.

[3] Discussion of Authority

[a] Testamentary Gifts to Specified Persons Are Presumptively Invalid

Prob. Code § 21350 invalidates gifts to the following classes of persons:

(1) The person who drafted the instrument.

(2) A person who is related by blood or marriage to, is a domestic partner of, is a cohabitant with, or is an employee of, the person who drafted the instrument.

(3) Any partner or shareholder of any law partnership or law corporation in which the person described in (1) has an ownership interest, and any employee of that law partnership or law corporation.

(4) Any person who has a fiduciary relationship with the transferor, including, but not limited to, a conservator or trustee, who transcribes the instrument or causes it to be transcribed.

(5) A person who is related by blood or marriage to, is a domestic partner of, is a cohabitant with, or is an employee of a person who is described in (4).

(6) A care custodian of a dependent adult who is the transferor [*but see* Estate of Pryor (2009) 177 Cal. App. 4th 1466, 1468, 1476, 99 Cal. Rptr. 3d 895 (care custodian who subsequently married the decedent could invoke spousal exception under *Prob. Code § 21351(a)*)].

(7) A person who is related by blood or marriage to, is a domestic partner of, is a cohabitant with, or is an employee of, a person who is described in (6).

[b] "Relation by Blood or Marriage" Defined.

Prob. Code § 21350(b) provides that a "person who is related by blood or marriage" to a person means all of the following:

(1) The person's spouse or predeceased spouse.

(2) Relatives within the third degree of the person and of the person's spouse.

(3) The spouse of any person described in (2).

[c] Statutory Exceptions Inapplicable

Prob. Code § 21350(a) states that except as provided in *Prob. Code § 21351*, no provision or provisions of any instrument will be valid to make any donative transfer to the classes of persons specified in that section. ***Prob. Code § 21351*** provides that *Prob. Code § 21350* does not apply (and the gift therefore is valid) if any of the following conditions are met:

- The transferor is related by blood or marriage to, is a cohabitant with, or is the registered domestic partner of, the transferee or the person who drafted the instrument, and the instrument became irrevocable on or after July 1, 1993 [*Prob. Code § 21351(a)*]. Note that this exception applies to a spouse who was a care custodian to the transferee prior to marriage [Estate of Pryor (2009) 177 Cal. App. 4th 1466, 1468, 1476, 99 Cal. Rptr. 3d 895 (decedent's spouse could invoke spousal exception under *Prob. Code § 21351(a)* despite her prior status as a care custodian before her marriage to decedent)].

- The instrument is reviewed by an independent attorney who (1) counsels the client (transferor) about the nature and consequences of the intended transfer, (2) attempts to determine if the intended consequence is the result of fraud, menace, duress, or undue influence, and (3) signs and delivers to the transferor an original certificate in substantially the form provided by statute, with a copy delivered to the drafter [*Prob. Code § 21351(b)*].

- After full disclosure of the relationships of the persons involved, the instrument is approved by court order under *Prob. Code § 2580 et seq.* [*Prob. Code § 21351(c)*].

- The court determines, on clear and convincing evidence, not based solely on the testimony of any person described *Prob. Code § 21350(a)*, that the transfer was not the product of fraud, menace, duress, or undue influence. If the court finds that the transfer was the product of fraud, menace, duress, or undue influence, the disqualified person will bear all costs of the proceeding, including reasonable attorney's fees [*Prob. Code § 21351(d)*]. This exception applies only if either (1) the transfer is to someone other than the person who actually drafted the instrument; or (2) the instrument was executed on or before July 1, 1993, by a person who was a California resident at the time the instrument was executed; or (3) the instrument was executed by a California resident who was not a resident at the time the instrument was executed. (Note that the effect of this provision is to establish a rebuttable presumption of invalidity except as to a person who actually drafted an instrument that was executed after July 1, 1993, by a California resident then residing in the state--as to the latter, the presumption is conclusive rather than rebuttable [*see* Prob. Code § 213151(d), (e) and *Rice v. Clark (2002) 28 Cal. 4th 89, 98, 120 Cal. Rptr. 2d 522, 47 P.3d 300* , discussed in more detail in [3][d], *below*].)

- The transferee is a federal, state, or local public entity, a tax-exempt entity [*see IRC § 501(c)(3),(19)*], or a trust holding an interest for such an entity, but only to the extent of the interest of the entity or the trustee of this trust, provided the instrument became irrevocable on or after July 1, 1993 [*Prob. Code § 21351(f)*].

- The transfer does not exceed $3,000, and the gross value of the estate's California property exceeds $100,000 [*Prob. Code § 21351(h)*; *see Prob. Code § 13100*].

- The transfer is made by an instrument executed by a nonresident of California who was not a

resident at the time the instrument was executed, and that was not signed within California [*Prob. Code § 21351(i)*; *see also Estate of Clementi (2008) 166 Cal. App. 4th 375, 383, 82 Cal. Rptr. 3d 685* (*Prob. Code, § 21351(i)* exempted testator's will from the prohibition in *Prob. Code, § 21350* against donative transfers to the drafter of the will, since testator was nonresident of California when he signed will, even though the testator was a resident of California at the time of his death)].

[d] Transfer to Person Who Drafted Instrument Is Conclusively Presumed Invalid

Prob. Code § 21351(d) provides that the general rule of invalidity specified in *Prob. Code § 21350* does not apply if the court determines, upon clear and convincing evidence that the transfer was *not* the product of fraud, menace, duress, or undue influence. However, under ***Prob. Code § 21351(e)*** , this latter exception applies *only to the following instruments*:

- Any instrument *other than one making a transfer to the person who drafted the instrument* [*Prob. Code § 21351(e)(1)*; *see Prob. Code § 21350(a)(1)*].

- Any instrument executed on or before July 1, 1993, by a person who was a California resident at the time the instrument was executed [*Prob. Code § 21351(e)(2)*].

- Any instrument executed by a California resident who was not a resident at the time the instrument was executed [*Prob. Code § 21351(e)(3)*].

Rice v. Clark *(2002) 28 Cal. 4th 89, 120 Cal. Rptr. 2d 522, 47 P.3d 300* , involved an action under *Prob. Code § 21350(a)(4)*, which includes in the category of presumptively disqualified persons any fiduciary who transcribes the testamentary instrument or causes it to be transcribed. In its analysis of the statutory scheme established by *Prob. Code §§ 21350* and *21351*, the California Supreme Court addressed the nature of the presumption of disqualification established by *Prob. Code § 21350*, and explained that *Prob. Code § 21351(e)(1)* makes the presumption conclusive as to a drafter-transferee. Thus, for example, if an attorney drafted a client's will so as to benefit himself or herself, assuming no other exception in *Prob. Code § 21351* applied, the attorney would be conclusively disqualified; whereas if the attorney drafted the will so as to benefit his or her relative or law partner, the presumption would be rebuttable, but only by clear and convincing evidence other than the drafter's testimony that the client freely chose that disposition. (*28 Cal. 4th 89, 98)* .

[e] Meaning of Care Custodian

Welf. & Inst. Code § 15610.17 specifies that "care custodian" means an administrator or an employee of any of the following public or private facilities or agencies, or persons providing care or services for elders or dependent adults, including members of the support staff and maintenance staff:

- Twenty-four-hour health facilities [*see Health & Saf. Code §§ 1250, 1250.2, 1250.3*].

- Clinics.

- Home health agencies.

- Agencies providing publicly funded in-home supportive services, nutrition services, or other home and community-based support services.

- Adult day health care centers and adult day care.

- Secondary schools that serve 18- to 22-year-old dependent adults and postsecondary educational institutions that serve dependent adults or elders.

- Independent living centers.

- Camps.

- Alzheimer's Disease day care resource centers.

- Community care facilities [*see Health & Saf. Code § 1502*] and residential care facilities for the elderly [*see Health & Saf. Code § 1569.2*].

- Respite care facilities.

- Foster homes.

- Vocational rehabilitation facilities and work activity centers.

- Designated area agencies on aging.

- Regional centers for persons with developmental disabilities.

- State Department of Social Services and State Department of Health Services licensing divisions.

- County welfare departments.

- Offices of patients' rights advocates and clients' rights advocates, including attorneys.

- The office of the long-term care ombudsman.

- Offices of public conservators, public guardians, and court investigators.

- Any protection or advocacy agency or entity that is designated by the Governor to fulfill the requirements and assurances of the federal Developmental Disabilities Assistance and *Bill of Rights* Act of 2000 [*see 42 U.S.C. § 15001 et seq.*] or the Protection and Advocacy for the Mentally Ill Individuals Act of 1986 [*see 42 U.S.C. § 10801 et seq.*], for the protection and advocacy of the rights of persons with mental illness.

- Humane societies and animal control agencies.

- Fire departments.

- Offices of environmental health and building code enforcement.

- Any other protective, public, sectarian, mental health, or private assistance or advocacy agency or person providing health services or social services to elders or dependent adults.

In ***Bernard v. Foley*** *(2006) 39 Cal. 4th 794, 47 Cal. Rptr. 3d 248* , relatives of the decedent appealed the trial court's denial of a petition which asserted that an amendment to a living trust, executed shortly before the decedent's death, was invalid on grounds of undue influence, specifically, that the amendment named the trustee and other caregivers as

residuary beneficiaries. The trustee and other caregivers were not health care professionals and had a preexisting personal friendship with the decedent. The California Supreme Court upheld the appellate court's reversal of the trial court's decision, holding that the term "care custodian" includes any person providing care of health services to a dependant adult, does not contemplate a professional or occupational limitation on the definition, and does not provide for a preexisting personal friendship exception (*39 Cal. 4th 794, 803)* . As such, the presumptive disqualification of care custodian to the donees was applicable.

[4] Additional Authorities

[a] Meaning of Care Custodian

In *Estate of Pryor (2009) 177 Cal. App. 4th 1466, 1468, 1476, 99 Cal. Rptr. 3d 895* , a California appellate court held that there was no support in the language of *Prob. Code § 21351(a)*, or its legislative history, to make the spousal exemption to the presumption of invalidity of a donative transfer unavailable to a spouse who, prior to marriage, was the decedent's care custodian. The court also rejected the petitioner's assertion that the decedent's marriage to his care custodian was the product of undue influence and fraud. The court acknowledged the risks of undue influence on an elder or dependant adult, but concluded that even though there is a possibility that unscrupulous care custodians may persuade a dependent adult to enter into marriage to avoid the presumption of *Prob. Code § 21350*, such a narrow construction of *Prob. Code § 21351* would lead to absurd or ridiculous consequences [*Estate of Pryor (2009) 177 Cal. App. 4th 1466, 1475, 99 Cal. Rptr. 3d 895]* .

In *Estate of Shinkle (2002) 97 Cal. App. 4th 990, 119 Cal. Rptr. 2d 42* , a former long-term care ombudsman at a skilled nursing facility appealed from a judgment after the trial court held that a trust instrument from which he had benefited was void under *Prob. Code § 21350*. Under that section, any instrument that makes a donative transfer to a "care custodian of a dependent adult" is invalid. The former ombudsman claimed the trust was valid because he was no longer the settlor's ombudsman when the trust was signed. The appellate court held that a long-term care ombudsman for a skilled nursing facility remains a care custodian even after his or her formal ombudsman relationship with a resident has ended, due either to a change in the ombudsman's facility assignment or the fact that the resident has left the facility when the ombudsman, as a result of his or her fiduciary relationship with the resident, develops a personal relationship with the resident and thereby acquires personal and financial information regarding the resident (*97 Cal. App. 4th 990, 1005-1006)* .

Note that *Conservatorship of McDowell (2004) 125 Cal. App. 4th 659, 23 Cal. Rptr. 3d 10* , and *Conservatorship of Davidson (2003) 113 Cal. App.4th 1035, 6 Cal. Rptr. 3d 702* and *Estate of Shinkle (2002) 97 Cal. App. 4th 990, 119 Cal. Rptr. 2d 42* discussed *above*, were disapproved in *Bernard v. Foley (2006) 39 Cal. 4th 794, 816, 47 Cal. Rptr. 3d 248, 139 P.3d 1196* , discussed in [3][d], *above*, to the extent they interpreted *Prob. Code § 21350* as allowing for a preexisting personal friendship exception that section's presumptive disqualification of care custodian donees.

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Volume 18 Chapters 180-189 PRETRIAL PROCEEDINGS---to---PROBATE OF WILLS
CHAPTER 186 PROBATE OF WILLS
PART II. FORMS
A. Supporting Will Contests

18-186 California Points & Authorities § 186.30

§ 186.30 Supporting Contest of Will--Grounds for Contest--Will Subject to Unfulfilled Condition [Prob. Code § 6105]

[1] FORM

[*The following should be combined with a general memorandum supporting a will contest (see § 186.20) or a petition to revoke probate of a will (see § 186.21), or may be used in a trial or appellate brief.*]

THE [PURPORTED] _____ [WILL *or* CODICIL] IS INVALID BECAUSE IT'S VALIDITY IS CONDITIONAL ON _____ [*specify condition(s) appearing on the face of the instrument*], AND THIS/THESE CONDITION[S] HAS/HAVE NOT BEEN FULFILLED.

Validity of Will May Depend on Condition in Its Terms. A will, the validity of which is made conditional on its own terms, will be admitted to probate, rejected, or denied effect after admission to probate in conformity with the condition (*Prob. Code § 6105*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a challenge to a will or codicil based on an allegation that the will or codicil is subject to unfulfilled conditions appearing on the instrument's face [*Prob. Code § 6105*].

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, the specific language in the will or codicil that makes the instrument's validity conditional should be set forth, as well as facts showing that the stated condition has not been fulfilled.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the will or codicil is subject to unfulfilled conditions appearing on its face. Thus, it may be combined with points and authorities pertaining to an objection to the admission of a will to probate [

see § 186.20] or a petition to revoke probate of a will [*see § 186.21*]. This form also may be combined with points and authorities challenging a purported will on the grounds that the will was not executed in conformity with statutory requirements [*see §§ 186.22, 186.23*].

[b] Opposing Memoranda

In an appropriate case, the *form in § 186.59* may be used to oppose the contention supported by this form.

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CHAPTER 186 PROBATE OF WILLS
PART II. FORMS
A. Supporting Will Contests

18-186 California Points & Authorities § 186.31

§ 186.31 Supporting Contest of Will--Grounds for Contest--Will Revoked by Subsequent Will [Prob. Code § 6120(a)]

[1] FORM

[*The following should be combined with a general memorandum supporting a will contest or a petition to revoke probate of a will (see §§ 186.20 and 186.21), or may be used in a trial or appellate brief.*]

THE [PURPORTED] _____ [WILL *or* CODICIL] IS INVALID BECAUSE IT WAS REVOKED BY _____ [*specify subsequent testamentary instrument revoking will or codicil, e.g.,* A SUBSEQUENT NOTATION ON THE FACE OF THE _____ (WILL *or* CODICIL), WRITTEN AND SIGNED BY THE DECEDENT IN HER OWN HANDWRITING, DECLARING THAT THE _____ (WILL *or* CODICIL) WAS REVOKED AND "NULL AND VOID"].

A. Will May Be Revoked by Subsequent Will. A will or any part thereof is revoked by a subsequent will that revokes the prior will or part expressly or by inconsistency (*Prob. Code § 6120(a)*). As a general rule, the presence of a revoking clause in a later will is accepted as conclusive proof of the decedent's intention to nullify the provisions of an earlier will (*Estate of Anderson (1997) 56 Cal. App. 4th 235, 242, 65 Cal. Rptr. 2d 307*).

[*Optional*] **B. Will May Be Revoked by Holographic Clause.** A will may be revoked by a self-contained holographic revocation clause written on the face of the will (*Estate of Smith (1948) 31 Cal. 2d 563, 567-568, 191 P.2d 413*).

[*Optional*] **C. Revocation of Second Will May Not Affect Revocation of First Will.** If a second will that, had it remained effective at death, would have revoked the first will in whole or in part, is thereafter revoked by acts under *Probate Code Section 6120* (revocation by subsequent will or act) or 6121 (revocation of will executed in duplicate), the first will is revoked in whole or in part if it is not evident from the circumstances of the revocation of the second will or from the testator's contemporary or subsequent declarations that the testator intended the first will to take effect as executed (*Prob. Code § 6123(a)*).

[*Optional*] **D. Lost or Destroyed Second Will May Still Revoke First Will.** A clause in a will expressly revoking a prior will must be given effect notwithstanding the second will's inadmissibility to probate when the sole reason the subsequent will cannot be probated is because it cannot be shown to have been in existence on the date of the testator's death (*Estate of Lopes (1984) 152 Cal. App. 3d 302, 308-309, 199 Cal. Rptr. 425*).

[*Optional*] **E. Third Will May Not Affect Revocation of First Will.** If a second will which, had it remained effective at death would have revoked the first will in whole or in part, is thereafter revoked by a third will, the first will is revoked in whole or in part, except to the extent it appears from the terms of the third will that the testator intended the first will to take effect (*Prob. Code § 6123(b)*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a challenge to a will that was allegedly revoked by a subsequent will [*see Prob. Code §§ 6120, 6123*]. Optional Paragraph B may be used when the revoking instrument is a holographic revocation appearing on the face of the will. Optional Paragraphs C through E may be used when there is more than one will under consideration, and the effect of the revocation, loss, or destruction of one of the wills on another of them is at issue.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. For example, if the revocation argument is based on inconsistencies between the two wills, the specific provisions of the prior will that are to be revoked, the specific provisions of the subsequent will that accomplish the revocation, and any extrinsic facts required to establish that the subsequent provisions are inconsistent with the prior ones should be set forth.

This memorandum may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the will or codicil was revoked by a subsequent will. Thus, they may be combined with points and authorities pertaining to an objection to the admission of a will to probate [*see § 186.20*] or a petition to revoke probate of a will [*see § 186.21*]. This memorandum may also be combined with points and authorities challenging a purported will on the grounds that the will was not executed in conformity with statutory requirements [*see §§ 186.22, 186.23*].

[b] Opposing Memoranda

In an appropriate case, the points and authorities *set out in § 186.60* may be used to oppose the contention supported by the points and authorities in this form.

[3] Discussion of Authorities

[a] Will May Be Revoked by Subsequent Will

In ***Estate of Anderson*** *(1997) 56 Cal. App. 4th 235, 65 Cal. Rptr. 2d 307* , a decedent executed a will in 1993 that expressly revoked all prior wills, but that inadvertently failed to exercise a power of appointment she had previously exercised in a 1982 will. After she died in 1995, one of the decedent's step-grandchildren filed a will contest. Applying the doctrine of dependent relative revocation, the trial court admitted to probate the 1993 will and the article of the 1982 will that exercised the power of appointment, finding that the 1993 will was not effective to revoke that article (*56 Cal. App. 4th 235, 237-242)* .

The court of appeal began by addressing the issue of whether a general revocation clause in a will can encompass a power of appointment exercised in a prior will, and held that it could. It noted that, as a general rule, the presence of a

revoking clause in a later writing is accepted as conclusive proof of an intention on the part of a decedent to nullify the provisions of an earlier instrument. In construing a general revocation clause, an exercise of a power of appointment in an earlier will is treated in the same manner as any other provision of that will. Thus, although the testator had to mention specifically the power of appointment in order to exercise it in the first will, she did not have to make a specific reference to that power in order to revoke it in the second will. The revocation clause in the second will, which revoked all prior wills, was sufficient to revoke the article of the first will that provided for the power, unless the doctrine of dependent relative revocation was applicable (*56 Cal. App. 4th 235, 242)* .

Under that doctrine, an earlier will, which is revoked only to give effect to a later one on the assumption that the later one will become effective, remains in effect to the extent that the later will proves ineffective (*56 Cal. App. 4th 235, 242-243)* . The doctrine is designed to carry out the testator's probable intention when there is no reason to assume that the testator intended to revoke the earlier will if the later will should become inoperative (*56 Cal. App. 4th 235, 243)* . The court of appeal went on to hold that the trial court properly applied the doctrine of dependent relative revocation, because the 1993 will purported to revoke the testator's prior exercise of the power of appointment, which resulted in substantial gifts to the testator's step-grandchildren contrary to her express intention to exercise the power solely for the benefit of her natural daughter (*56 Cal. App. 4th 235, 245)* . In determining whether a will has been revoked, a court may consider extrinsic evidence of the testator's intent (*56 Cal. App. 4th 235, 247)* . Extrinsic evidence was properly considered in determining whether the testator intended in the subsequent will to revoke the article of the earlier will that contained the power of appointment, because the two wills were facially inconsistent (*56 Cal. App. 4th 235, 248-249)* . Sufficient evidence was presented to support the court's determination that the revocation of the first will was conditioned on the exercise of the power of appointment--the attorney who supervised the drafting of the 1993 will stated that the failure to refer to the exercise of the power of appointment explicitly in that will was a drafting error (*56 Cal. App. 4th 235, 249-251)* .

[b] Will May Be Revoked by Holographic Clause

In ***Estate of Smith*** *(1948) 31 Cal. 2d 563, 191 P.2d 413* , a decedent executed a duly attested formal will in 1942, leaving her entire estate to a college. The decedent deposited the executed will with her attorney and retained an unexecuted carbon copy. She died in 1946 without having recalled the executed document from her attorney or making a new will. After her death, the unexecuted copy of the will was found among her effects. Across the face of each page of the document, the decedent had written, entirely in her own handwriting, "I Katherine Allen Smith do hereby revoke this will it is now null and void. Katherine Allen Smith July 10th 1945." A nephew of the decedent's former husband testified that about six months before the decedent died, he suggested to her that she reimburse members of his family who had helped her out financially over the years, to which she replied to the effect that she was leaving her estate to the college. After the date of the revocatory writing, the decedent told the nephew's mother that her will and other papers were in the custody of her attorney and that she would like the nephew and his mother to have her home. She also told the nephew's mother that she had made a will giving all her property to the college. About a month after the date of the revocatory writing, the decedent's attorney reminded her in a phone conversation that her papers were in his possession, and she replied "Yes, I know that." On the basis of this evidence, the trial court denied probate of the revocatory writing, admitted the will to probate, and issued letters of administration to the college treasurer. The decedent's aunt and uncle appealed.

The court of appeal reversed and granted the petition of the decedent's uncle for letters of administration. The court found that the revocatory instrument satisfied the statutory requirements for a holographic revocation. The mere writing of the revocation clause across the face of the typewritten will did not destroy the authenticity of the revocation clause. The revocation clause was a self-contained instrument and the typewritten portion had nothing to do with it. The court rejected the argument of the will proponents that the reference in the holograph to "this will" destroyed its validity as a self-contained holographic instrument. A holographic instrument may refer to and incorporate another testamentary instrument executed with different statutory formalities or an informal or unattested document, so long as the reference is unmistakable or with the aid of extrinsic proof can be made so. The words "this will" were but a substitute for a more

specific reference, and there was no doubt as to the instrument referred to (*31 Cal. 2d 563, 567-568)* . The court also found that the evidence received concerning the decedent's statements and conversations with her attorney could not overcome the valid express revocation. The declarations of a testator are not admissible to show that an express revocation clause was not intended to revoke a prior will (*31 Cal. 2d 563, 568)* . In addition, the rule disfavoring constructions that lead to total or partial intestacy was not applicable since there was no ambiguity or uncertainty in the language of the revocation (*31 Cal. 2d 563, 569)* .

[c] Lost or Destroyed Second Will May Still Revoke First Will

In ***Estate of Lopes*** *(1984) 152 Cal. App. 3d 302, 199 Cal. Rptr. 425* , the decedent's only child contested the admission to probate of the decedent's 1977 will on the ground that the will had been expressly revoked by a 1979 will executed by the decedent. The 1977 will was offered for probate by another relative who was the primary beneficiary under that will and who claimed that the revocation clause in the 1979 will could not be given effect because the 1979 will was not admissible to probate. The only issue at trial was whether the inadmissibility of the 1979 will to probate made the will inadmissible in evidence for the purpose of revoking the 1977 will. The facts were not in dispute. The 1979 will was drafted by an attorney who was deceased at the time of the decedent's death. It was stipulated that the original of the 1979 will had never been found, that there was no evidence tending to prove that it was ever in possession of anyone other than the attorney, and that the sole reason it could not be given testamentary effect was that it could not be shown to have been in existence on the date of the decedent's death and was therefore inadmissible as a lost or destroyed will. Based on these facts the trial court held that the 1977 will had been validly revoked by the 1979 will, and that the estate must pass by intestacy to the decedent's son. The proponent of the will appealed, arguing that the trial court had erred in taking cognizance of the revocation clause in the 1979 will.

The court of appeal affirmed. It stated that the proponent of the will erred in reading the statute governing the admission to probate of lost or destroyed wills as a general rule of evidence. In *Estate of Thompson (1921) 185 Cal. 763, 198 P. 795* , the authority urged in support of the proponent's position, only three of the judges opined that a will that cannot be given effect as a whole under the lost and destroyed wills statute cannot be given effect as a revoking instrument. The necessary concurring vote was cast by a judge who rejected this reasoning and relied on the doctrine of dependent relative revocation to deny effect to the revocation clause of the second will. The cases cited in *Thompson* also failed to support the general proposition that admission to probate is a condition precedent for introduction of evidence of the contents of a will (*152 Cal. App. 3d 302, 307)* . The court of appeal also noted that the revocation clause would be admissible and entitled to be given effect if the 1979 will could be proved to have been revoked, or if it could be proved not to have been revoked (*152 Cal. App. 3d 302, 309)* .

Counsel should note that *Lopes* was decided under former Prob. Code §§ 350 and 74, and that the current statutes governing lost and destroyed wills and revocation of wills (*see Prob. Code §§ 6120* and *8223*) are not identical to these former provisions.

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Volume 18 Chapters 180-189 PRETRIAL PROCEEDINGS---to---PROBATE OF WILLS
CHAPTER 186 PROBATE OF WILLS
PART II. FORMS
A. Supporting Will Contests

18-186 California Points & Authorities § 186.32

§ 186.32 Supporting Contest of Will--Grounds for Contest--Will Revoked by Destruction, Mutilation, or Cancellation [Prob. Code § 6120(b)]

[1] FORM

[*The following should be combined with general points and authorities supporting a will contest or a petition to revoke probate of a will (see §§ 186.20 and 186.21), or may be used in a trial or appellate brief.*]

THE [PURPORTED] _____ [WILL *or* CODICIL] IS INVALID BECAUSE IT WAS _____ [DESTROYED *or* MUTILATED *or* CANCELED] BY THE _____ [TESTATOR *or specify some other person who destroyed the will in the testator's presence and at the testator's direction*] WITH THE INTENTION OF REVOKING THE _____ [WILL *or* CODICIL].

A. Will May Be Revoked by Destruction. A will or any part thereof is revoked by being burned, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking it, by either the testator or another person in the testator's presence and by the testator's direction (*Prob. Code § 6120(b)*).

[*Optional*] **B. Will in Testator's Possession That Is Lost at Time of His or Her Death Is Presumed Destroyed.** If the testator's will was last in the testator's possession, the testator was competent until death, and neither the will nor a duplicate original of the will can be found after the testator's death, it is presumed that the testator destroyed the will with intent to revoke it; this presumption is a presumption affecting the burden of producing evidence (*Prob. Code § 6124*; *Estate of Obernolte (1979) 91 Cal. App. 3d 124, 128-129, 153 Cal. Rptr. 798*).

[*Optional*] **C. Unsigned Photocopy of Will Is Insufficient to Overcome Presumption of Revocation.** The term "duplicate original," as used in *Prob. Code § 6124*, does not include a photocopy of the will that has not been personally signed by the testator and the witnesses. Therefore, the presumption of revocation applies when this is the only copy of the will that can be produced. The fact that the testator preserved a photocopy of the will is not of sufficient significance to permit a court to infer that the testator would not have preserved the photocopy if he or she intended to revoke the will. (*Lauermann v. Superior Court (2005) 127 Cal. App. 4th 1327, 1333, 26 Cal. Rptr. 3d 258*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a challenge to a will that was allegedly revoked by destruction, mutilation, or cancellation [*Prob. Code § 6120(b)*]. Optional Paragraph B may be used when facts are present which give rise to a presumption that the will was destroyed by the testator with intention to revoke it. Revocation of a subsequent will by destruction, mutilation, or cancellation may raise an issue of the validity of an earlier will that was revoked by the subsequent will. For a discussion of this issue, see *§ 186.31*.

Optional Paragraph C can be used if the only copy of the will that can be located is a photocopy of the purported will that has not been personally signed by the testator and attending witnesses.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that the testator or someone in the testator's presence and at the direction of the testator destroyed the will or codicil with the intent of revoking it.

This memorandum may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the will or codicil was revoked by destruction, mutilation, or cancellation. Thus, it may be combined with the points and authorities pertaining to an objection to the admission of a will to probate [*see § 186.20*] or a petition to revoke probate of a will [*see § 186.21*]. This memorandum may also be combined with points and authorities challenging a purported will on the grounds that the will was not executed in conformity with statutory requirements [*see §§ 186.22, 186.23*].

[b] Opposing Memoranda

In an appropriate case, the contention *set out in § 186.61* may be used to oppose the contention supported by the points and authorities in this form.

[3] Discussion of Authorities

[a] Will in Testator's Possession That Is Lost at Time of His or Her Death Is Presumed Destroyed

The facts and procedural background of ***Estate of Obernolte*** *(1979) 91 Cal. App. 3d 124, 153 Cal. Rptr. 798* , are discussed in *§ 186.61[3][c]*. In *Obernolte*, the court of appeal held that the rebuttable presumption of revocation was applicable when the testator had the will in her possession prior to her death, she was competent until that time, and neither the will nor a duplicate original of the will could be found after her death (*91 Cal. App. 3d 124, 128)* . However, the presumption was rebutted by the evidence that the decedent expressed concern about the security of her will and that she did not tell her attorney or the attorney's secretary that she had destroyed it or planned to destroy it, or that she wanted to make a new will, when she visited them shortly before her death (*91 Cal. App. 3d 124, 130)* .

[b] Unsigned Photocopy of Will Is Insufficient to Overcome Presumption of Revocation

The issue before the court in ***Lauermann v. Superior Court*** *(2005) 127 Cal. App. 4th 1327, 26 Cal. Rptr. 3d 258* was whether the term "duplicate original" as used in *Prob. Code § 6124* includes a photocopy of the testator's will that has not been signed by the testator or the witnesses. The court concluded that it does not and that the presumption of revocation set forth in *Prob. Code § 6124* applies when the original of the will cannot be found after the testator's death and the unsigned photocopy is the only copy of the will that can be produced (*127 Cal. App. 4th 1327, 1333)* . In reaching this conclusion, the court noted that a testator might make several photocopies of his or her will to send to relatives or other beneficiaries, or to retain for the purpose of drafting possible changes, and that it would be unreasonable to expect a testator to track down and destroy all of these copies before giving effect to his or her intended

revocation of the will. It also noted that the simplicity of creating photocopies of the will stands in stark contrast to the considerable formalities required for the execution of a will. Given the importance placed on the creation and execution of an original will, it cannot be concluded that a reasonable testator would believe that a photocopy of his or her will would be legally effective in place of the original will and to realize that all copies would need to be destroyed before a revocation of the will could be effective (*127 Cal. App. 4th 1327, 1332)* . The preservation of a photocopy is not of sufficient significance to permit a court to infer that a testator would not have preserved the photocopy if he or she intended to revoke the will (*127 Cal. App. 4th 1327, 1333)* .

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CHAPTER 186 PROBATE OF WILLS
PART II. FORMS
A. Supporting Will Contests

18-186 California Points & Authorities § 186.33

§ 186.33 Supporting Contest of Will--Grounds for Contest--Will Revoked by Destruction, Mutilation or Cancellation of Duplicate [Prob. Code § 6121]

[1] FORM

[*The following should be combined with general points and authorities supporting a will contest or a petition to revoke probate of a will (see §§ 186.20 and 186.21), or may be used in a trial or appellate brief.*]

THE [PURPORTED] _____ [WILL *or* CODICIL] IS INVALID BECAUSE A COPY OF THE _____ [WILL *or* CODICIL] WAS _____ [DESTROYED *or* MUTILATED *or* CANCELED] BY THE _____ [TESTATOR *or specify some other person who destroyed the will in the testator's presence and at the testator's direction*] WITH THE INTENTION OF REVOKING THE _____ [WILL *or* CODICIL].

Will May Be Revoked by Destruction of Duplicate. A will executed in duplicate or any part thereof is revoked by being burned, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking it, by either the testator or by another person in the testator's presence and by the testator's direction (*Prob. Code § 6121*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a challenge to a will that was allegedly revoked by destruction, mutilation, or cancellation of a duplicate copy of the will [*Prob. Code § 6121*]. Revocation of a subsequent will by destruction, mutilation, or cancellation of a duplicate copy may raise an issue of the validity of an earlier will that was revoked by the subsequent will. For a discussion of this issue, see *§ 186.31*.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. In particular, facts showing the testator's revocatory intent in destroying or mutilating the duplicate should be set forth. It may be more difficult to prove such intent in a case involving a duplicate will or codicil than in one involving

an original document [*see § 186.32*]. People frequently treat duplicate documents more carelessly than original ones, and this tendency may be magnified by the fact that various and inexpensive methods of copying documents are now widely available. Clear statements of intent appearing on the face of the alleged cancellation, or facts showing that the testator could not obtain the original copy of the document, are especially relevant to a showing of intent.

This memorandum may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the will or codicil was revoked by destruction, mutilation, or cancellation of a duplicate copy of the will. Thus, it may be combined with the points and authorities pertaining to an objection to the admission of a will to probate [*see § 186.20*] or a petition to revoke probate of a will [*see § 186.21*]. This memorandum may also be combined with points and authorities challenging a purported will on the grounds that the will was not executed in conformity with statutory requirements [*see §§ 186.22, 186.23*].

[b] Opposing Memoranda

In an appropriate case, the points and authorities *set out in § 186.61* may be used to oppose the contention supported by these points and authorities.

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PART II. FORMS
A. Supporting Will Contests

18-186 California Points & Authorities § 186.34

§ 186.34 Supporting Contest of Will--Grounds for Contest--Will Revoked by Annulment or Dissolution of Marriage [Prob. Code § 6122]

[1] FORM

[*The following should be combined with general points and authorities supporting a will contest or a petition to revoke probate of a will (see §§ 186.20 and 186.21), or may be used in a trial or appellate brief.*]

THE [PROVISIONS IN THE] _____ [WILL *or* CODICIL] _____ [DEVISING PROPERTY TO THE TESTATOR'S FORMER SPOUSE *and/or* CONFERRING A _____ (GENERAL *or* SPECIAL) POWER OF APPOINTMENT IN THE TESTATOR'S FORMER SPOUSE *and/or* NOMINATING THE TESTATOR'S FORMER SPOUSE AS _____ (EXECUTOR *or* TRUSTEE *or* CONSERVATOR *or* GUARDIAN)] WAS/WERE REVOKED BY THE _____ [ANNULMENT *or* DISSOLUTION] OF THE TESTATOR'S MARRIAGE.

A. Annulment or Dissolution Revokes Will Provisions Relating to Former Spouse. Unless the will expressly provides otherwise, if after executing a will the testator's marriage is dissolved or annulled, the dissolution or annulment revokes: (1) any disposition or appointment of property made by the will to the former spouse; (2) any provision of the will conferring a general or special power of appointment on the former spouse; and (3) any provision of the will nominating the former spouse as executor, trustee, conservator, or guardian (*Prob. Code § 6122(a)*; *Estate of Coleman (2005) 129 Cal. App. 4th 380, 389, 28 Cal. Rptr. 3d 282* ; *Estate of Reeves (1991) 233 Cal. App. 3d 651, 655, 284 Cal. Rptr. 650*).

B. What Constitutes Dissolution or Annulment. Dissolution or annulment means any dissolution or annulment that would exclude the spouse as a surviving spouse within the meaning of *Probate Code Section 78* (*Prob. Code § 6122(d)*).

C. Property Passes as if Former Spouse Failed to Survive Testator. In case of revocation by dissolution or annulment, property prevented from passing to a former spouse because of the revocation passes as if the former spouse

failed to survive the testator (*Prob. Code § 6122(c)(1)*).

[*Optional*] **D. Provisions Conferring Power or Office on Former Spouse Interpreted as if Spouse Failed to Survive Testator.** In case of revocation by dissolution or annulment, provisions of the will conferring some power or office on the former spouse will be interpreted as if the former spouse failed to survive the testator (*Prob. Code § 6122(c)(2)*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a challenge to a purported testamentary instrument that was allegedly revoked in whole or in part by annulment or dissolution of the testator's marriage [*see Prob. Code § 6122(a)*]. Unlike some of the other grounds for contesting a will, revocation by annulment or dissolution of marriage is frequently stated as the sole ground for a will contest. Optional paragraph D may be used when the will contains provisions giving the spouse powers of appointment or nominating him or her as executor, trustee, conservator, or guardian.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that the will passes property to the testator's spouse or confers some power or office on the spouse, and that the testator's marriage has been dissolved or annulled.

This memorandum may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that to the extent that the will relates to the testator's spouse, it was revoked by dissolution or annulment of the testator's marriage. Thus, it may be combined with the points and authorities pertaining to an objection to the admission of a will to probate [*see § 186.20*] or a petition to revoke probate of a will [*see § 186.21*].

[b] Nonapplicability to Pre-1985 Dissolutions and Annulments

The provisions of *Prob. Code § 6122* relied on in this form do not apply to any case in which the final judgment of dissolution or annulment of marriage occurred before January 1, 1985. Those cases are governed by the law in effect prior to January 1, 1985 [*Prob. Code § 6122(f)*].

[c] Change of Circumstances That Revoke Will

Except as provided in *Prob. Code § 6122.1* regarding revocation of a will by termination of a domestic partnership (*see § 186.35*), no change of circumstances other than annulment or dissolution of marriage revokes a will (*Prob. Code § 6122(e)*).

[3] Discussion of Authorities

[a] Annulment or Dissolution Revokes Will Provisions Relating to Former Spouse

In ***Estate of Coleman*** *(2005) 129 Cal. App. 4th 380, 28 Cal. Rptr. 3d 282* , the decedent and his wife created a trust. The trust provided that on the death of the first spouse, the surviving spouse would become the sole trustee and the trust would be divided into a survivor's trust, consisting principally of the surviving spouse's interest in the community estate and his or her separate estate, and a residual trust, consisting of the balance of the trust estate. The surviving spouse was given the power to amend, revoke, or terminate the survivor's trust, but the residual trust could not be amended, revoked, or terminated. The trust also provided that the surviving spouse would receive the income from both trusts, and any requested principal, for his or her lifetime; on the death of the surviving spouse, the residual trust was to be distributed in equal shares to their daughters. The decedent's will gave all of his property to the trust. After execution of

the will and the trust, the decedent and his wife dissolved their marriage and divided the property held by the trust under a court order approving their marital settlement agreement. At the time of the marital settlement agreement, the trust property consisted of five parcels of real estate. Under the agreement, two parcels were transferred to the wife as her sole and separate property, and three parcels were transferred to the husband as his sole and separate property.

The decedent's daughters opposed probate of the decedent's will on the ground that it had been revoked by *Prob. Code § 6122*. The trial court denied the petition to admit the will to probate, finding that the will had the effect of making a disposition of the decedent's property to his ex-wife in contravention of *Prob. Code § 6122*. The court's order effectively transferred the properties from the trust to the separate property estate of each spouse, revoked the trust, and caused the devise to the trust to lapse under *Prob. Code § 6300* (*129 Cal. App. 4th 380, 386-387)* .

The court of appeal reversed the trial court's order. It held that the decedent and his ex-wife revoked the trust by conveying their interests in the trust property to each other individually, leaving no property in the trust. This revocation caused the decedent's devise to the trust to lapse under *Prob. Code § 6300*. However, a devise will not lapse under that section if the will provides otherwise. In this case, the decedent's will provided that in the event of a lapse of the devise to the trust, his estate was to be given to the trustee of the trust to be administered and distributed under the terms of the trust document, which was incorporated in the will. This provision had the effect of establishing a testamentary trust, the terms of which were identical to the revoked living trust. The trust terms, having been incorporated in the will, were subject to the restrictions set forth in *Prob. Code § 6122*. That section revokes only those provisions of the will that provide for a disposition of the property to the former spouse or that confer a special power or appointment on the former spouse. It provides a statutory method for distribution of the property: property prevented from passing to a former spouse because of the revocation passes as if the former spouse failed to survive the testator, and other provisions of the will conferring a power or office on the former spouse are to be interpreted as if the former spouse failed to survive the testator. In this case, the provisions of the trust appointing the ex-wife as trustee, granting her a power of appointment, or transferring any property or income from property to her were revoked by *Prob. Code § 6122*, because the terms of the trust incorporated in the will were required to be administered and distributed as if she had predeceased the decedent. The court directed the property to be distributed under the provision in the trust, incorporated in the will, requiring the property to be divided equally among the decedent's three daughters (*129 Cal. App. 4th 380, 388-389)* .

In ***Estate of Reeves*** *(1991) 233 Cal. App. 3d 651, 284 Cal. Rptr. 650* , the testator's second former wife petitioned for probate of the testator's holographic will. The testator's first former wife, as guardian ad litem for her two minor children by the testator, filed a contest based on the fact that the testator was divorced from the second wife at the time of his death. The testator began living with the will proponent in March 1983. A month later, he executed a holographic will leaving his entire estate to her. The proponent kept the will in her possession until the testator's death. She and the testator married in 1984, and subsequently divorced. The judgment of dissolution included a notice stating that the dissolution might automatically change any disposition made by will to a former spouse. After their divorce, the testator and the will proponent continued to live together, sometimes at his residence and sometimes at hers. In addition to keeping separate residences, they kept separate bank accounts. They experienced several periods of breakup and reconciliations. The proponent never showed the holographic will to the testator after she filed it away. She testified that she and the testator discussed having formal wills written, but never did so. The testator died in 1990. The proponent's petition for probate of the holographic will was denied by the trial court pursuant to *Prob. Code § 6122*, and the proponent appealed.

The court of appeal affirmed the trial court's order. The appellate court rejected the will proponent's argument that § 6122 applies only to a will drawn in favor of a person who was the testator's spouse at the time the will was drawn. The court noted that the language of the statute was clear and did not support such an interpretation, and that the statute was not, as asserted by the proponent, materially different from Unif. *Prob. Code § 2-508*, on which *Prob. Code § 6122* was modeled (*233 Cal. App. 3d 651, 656)* . The court rejected authority from other jurisdictions that would restrict the applicability of the statute in the manner urged by the proponent. The court noted that there was a division of authority

on the issue, and that California courts ordinarily adopt the construction given a uniform code section by other jurisdictions. It found, however, that the majority of courts which have addressed the question interpret the statute to revoke dispositions to former spouses regardless of whether the decedent was married to the former spouse when the will was executed, and that this was in its opinion the proper view (*233 Cal. App. 3d 651)* . The clear purpose of the statute is to provide an automatic revocation of provisions in a will in favor of a spouse after a marriage is dissolved. The legislature obviously recognized that due to the change in the family structure new moral duties and obligations may have evolved subsequent to the execution of the will, and that due to the turmoil of a dissolution an automatic revocation is in the best interest of the testator. The purpose of protecting the testator who neglects to change his or her will following a divorce or annulment is no less compelling where the decedent executes the will in question before the marriage (*233 Cal. App. 3d 651, 658)* . The court noted that the testator was given an opportunity to execute a will in favor of the proponent by the notice contained in the dissolution judgment, but chose not to do so (*233 Cal. App. 3d 651, 659)* .

[b] What Constitutes Dissolution or Annulment

The phrase "dissolution or annulment" as it is used in *Prob. Code § 6122* means any dissolution or annulment which would exclude the spouse as a surviving spouse within the meaning of *Prob. Code § 78* [*Prob. Code § 6122(d)*]. Under *Prob. Code § 78*, "surviving spouse" does not include any of the following:

- A person whose marriage to the decedent has been dissolved or annulled, unless, by virtue of a subsequent marriage, the person is married to the decedent at the time of death.

- A person who obtains or consents to a final decree or judgment of dissolution of marriage from the decedent or a final decree or judgment of annulment of their marriage, which decree or judgment is not recognized as valid in California, unless they subsequently participate in a marriage ceremony purporting to marry each to the other or subsequently live together as husband and wife.

- A person who, following a decree or judgment of dissolution or annulment of marriage obtained by the decedent, participates in a marriage ceremony with a third person.

- A person who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights.

A decree of legal separation which does not terminate the status of husband and wife is not a dissolution for purposes of *Prob. Code § 6122* [*Prob. Code § 6122(d)*].

[c] Annulment or Dissolution Revokes Will Provisions Relating to Children of Former Spouse

Although *Prob. Code § 6122* does not address the effect of dissolution on bequests to children of the former spouse, the courts have held that, unless a contrary intention is indicated in the will, it is generally presumed that a testator intends to exclude the children of an ex-spouse from taking under the will [*Estate of Jones (2004) 122 Cal. App. 4th 326, 332, 18 Cal. Rptr. 3d 637* (residuary bequest to adult step-daughter was revoked by her mother's dissolution from testator); *Estate of Hermon (1995) 39 Cal. App. 4th 1525, 1531-1532, 46 Cal. Rptr. 2d 577* (court called on legislature to adopt provision similar to that set forth in Uniform Probate Code, which provides that dissolution revokes not only testamentary bequests to former spouse but also bequests to former spouse's relatives)]. Evidence showing that the testator continued to have a relationship with the child of a former spouse following dissolution may show an intent by the testator to continue to have the child take under the will [*Estate of Jones (2004) 122 Cal. App. 4th 326, 332]* .

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California Points & Authorities

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Volume 18 Chapters 180-189 PRETRIAL PROCEEDINGS---to---PROBATE OF WILLS
CHAPTER 186 PROBATE OF WILLS
PART II. FORMS
A. Supporting Will Contests

18-186 California Points & Authorities § 186.35

§ 186.35 Supporting Contest of Will--Grounds for Contest--Will Revoked by Termination of Domestic Partnership [Prob. Code § 6122.1]

[1] FORM

[*The following should be combined with general points and authorities supporting a will contest or a petition to revoke probate of a will (see §§ 186.20 and 186.21), or may be used in a trial or appellate brief.*]

THE [PROVISIONS IN THE] _____ [WILL *or* CODICIL] _____ [DEVISING PROPERTY TO THE TESTATOR'S FORMER DOMESTIC PARTNER *and/or* CONFERRING A _____ (GENERAL *or* SPECIAL) POWER OF APPOINTMENT IN THE TESTATOR'S FORMER DOMESTIC PARTNER *and/or* NOMINATING THE TESTATOR'S FORMER DOMESTIC PARTNER AS _____ (EXECUTOR *or* TRUSTEE *or* CONSERVATOR *or* GUARDIAN)] WAS/WERE REVOKED BY THE TERMINATION OF THE TESTATOR'S DOMESTIC PARTNERSHIP.

A. Termination of Domestic Partnership Revokes Will Provisions Relating to Former Domestic Partner. Unless the will expressly provides otherwise, if after executing a will, the testator's domestic partnership is terminated, the termination revokes: (1) any disposition or appointment of property made by the will to the former domestic partner; (2) any provision of the will conferring a general or special power of appointment on the former domestic partner; and (3) any provision of the will nominating the former domestic partner as executor, trustee, conservator, or guardian (*Prob. Code § 6122.1(a)*).

[*Use if domestic partnership was terminated on or after Jan. 1, 2005, by filing a notice of termination in accordance with Fam. Code § 299(a)* :]

B. Domestic Partnership May Be Terminated By Filing Notice In Manner Required By Law. A domestic partnership may be terminated without filing a proceeding for dissolution of domestic partnership by the filing of a Notice of Termination of Domestic Partnership with the Secretary of State if all of the following conditions exist at the time of the filing:

(1) The Notice of Termination of Domestic Partnership is signed by both domestic partners.

(2) There are no children of the relationship of the parties born before or after registration of the domestic partnership or adopted by the parties after registration of the domestic partnership, and neither of the domestic partners, to their knowledge, is pregnant.

(3) The domestic partnership is not more than five years in duration.

(4) Neither party has any interest in real property wherever situated, with the exception of the lease of a residence occupied by either party that (a) does not include an option to purchase, and (b) terminates within one year from the date of filing of the Notice of Termination of Domestic Partnership.

(5) There are no unpaid obligations in excess of the amount described in *Family Code Section 2400(a)(6)*, as adjusted by *Family Code Section 2400(b)*, incurred by either or both of the parties after registration of the domestic partnership, excluding the amount of any unpaid obligation with respect to an automobile.

(6) The total fair market value of community property assets, excluding all encumbrances and automobiles, including any deferred compensation or retirement plan, is less than the amount described in *Family Code Section 2400(a)(7)*, as adjusted by *Family Code Section 2400(b)*, and neither party has separate property assets, excluding all encumbrances and automobiles, in excess of that amount.

(7) The parties have executed an agreement setting forth the division of assets and the assumption of liabilities of the community property, and have executed any documents, title certificates, bills of sale, or other evidence of transfer necessary to effectuate the agreement.

(8) The parties waive any rights to support by the other domestic partner.

(9) The parties have read and understand a brochure prepared by the Secretary of State describing the requirements, nature, and effect of terminating a domestic partnership.

(10) Both parties desire that the domestic partnership be terminated.

The domestic partnership is terminated effective six months after the date of filing of the Notice of Termination of Domestic Partnership with the Secretary of State. [*Fam. Code § 299(a), (b)*].

[*OR, if domestic partnership was terminated by a judicial proceeding, in accordance with Fam. Code § 299(d)* :]

B. Domestic Partnership May Be Terminated By Court Proceeding. The dissolution of a domestic partnership, nullity of a domestic partnership, or legal separation of partners in a domestic partnership follows the same procedures, and the partners have the same rights, protections, and benefits, and are subject to the same responsibilities, obligations, and duties, as apply to the dissolution of marriage, nullity of marriage, and legal separation of spouses in a marriage, respectively, [except that proceedings for dissolution, nullity, or legal separation of a domestic partnership registered in California may be filed in the superior courts of this state even if neither domestic partner is a resident of, or maintains a domicile in, the state at the time the proceedings are filed] [*Fam. Code § 299(d)*].

[*CONTINUE*]

C. Property Passes as if Former Domestic Partner Failed to Survive Testator. In case of revocation by termination

of domestic partnership, property prevented from passing to a former domestic partner because of the termination passes as if the former domestic partner failed to survive the testator (*Prob. Code § 6122.1(c)(1)*).

[*Optional*] **D. Provisions Conferring Power or Office on Former Domestic Partner Interpreted as if Domestic Partner Failed to Survive Testator.** In case of revocation by termination of domestic partnership, provisions of the will conferring some power or office on the former domestic partner will be interpreted as if the former domestic partner failed to survive the testator (*Prob. Code § 6122.1(c)(2)*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a challenge to a purported testamentary instrument that was allegedly revoked in whole or in part by termination of the testator's domestic partnership [*see Prob. Code § 6122.1(a)*]. Unlike some of the other grounds for contesting a will, revocation by termination of domestic partnership is likely to be stated as the sole ground for a will contest.

The two alternative versions of Paragraph B specify the valid statutory methods for termination of a domestic partnership, as set out in *Fam. Code § 299*. If the domestic partnership was terminated by filing a Notice of Termination with the Secretary of State, the first version, which states the statutory prerequisites for termination of a domestic partnership in this manner, should be used [*see Fam. Code § 299(a)*]. If the domestic partnership was not (or could not be) terminated by filing a Notice of Termination, it could be terminated only by a dissolution, annulment, or legal separation proceeding, in the same manner as a marriage [*Fam. Code § 299(d)*]. If the domestic partnership was terminated in the latter manner, the second alternative version of Paragraph B should be used. Both versions of Paragraph B assume that the termination occurred on or after January 1, 2005. If it occurred prior to that date, the requirements for termination are different and Paragraph B should be modified accordingly. The pre-2005 termination process, which is generally less formal, is *set out in § 186.35[3][a]*.

Optional paragraph D may be used when the will contains provisions giving the domestic partner powers of appointment or nominating him or her as executor, trustee, conservator, or guardian.

Counsel should insert argument showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that the will passes property to the testator's domestic partner or confers some power or office on the domestic partner, and that the testator's domestic partnership has been terminated in accordance with the statutory requirements of *Fam. Code § 299*.

This memorandum may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that to the extent that the will relates to the testator's domestic partner, it was revoked by termination of the testator's domestic partnership. Thus, it may be combined with the points and authorities pertaining to an objection to the admission of a will to probate [*see § 186.20*] or a petition to revoke probate of a will [*see § 186.21*].

[b] Nonapplicability to Wills executed before January 1, 2002

The provisions of *Prob. Code § 6122.1* relied on in this form do not apply to any will executed before January 1, 2002 [*Prob. Code § 6122.1(d)*].

[3] Discussion of Authorities

[a] What Constitutes Termination

Effective January 1, 2005, registered domestic partners have the same rights, protections, and benefits, and are subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed on spouses [*Fam. Code § 297.5(a)*; *see Koebke v. Bernardo Heights County Club (2005) 36 Cal. 4th 824, 837, 845, 31 Cal. Rptr. 3d 565, 115 P.3d 1212* (legislature has made clear its intention in domestic partnership law to substantially equalize status of registered domestic partners and spouses, finding that in light of domestic partnership law, Unruh Act requires businesses to treat registered domestic partners same as spouses); *Civ. Code § 51(b)* (prohibiting discrimination on basis of marital status or sexual orientation); *see also Knight v. Superior Court (2005) 128 Cal. App. 4th 14, 22-31, 26 Cal. Rptr. 3d 687* (domestic partner legislation is not improper legislative amendment of ballot initiative defining marriage as between a man and a woman); *Bouley v. Long Beach Memorial Medical Center (2005) 127 Cal. App. 4th 601, 25 Cal. Rptr. 3d 813* (domestic partner has right under *Code Civ. Proc. § 377.60* to bring wrongful death action for death of his or her partner); *Armijo v. Miles (2005) 127 Cal. App. 4th 1405, 1422-1424, 26 Cal. Rptr. 3d 623* (giving domestic partner right to bring wrongful death action for death of his or her partner does not violate *Fam. Code § 308.5*, which specifies that only marriage between a man and a woman is valid or recognized in California)]. A surviving registered domestic partner, following the other partner's death, has the same rights, protections, and benefits, and is subject to the same responsibilities, obligations, and duties under law, as are granted to and imposed on a widow or widower [*Fam. Code § 297.5(c)*]. To couples who meet the requirements of establishing a domestic partnership under the Domestic Partner Act and who have registered under that law, the legislature has granted legal recognition comparable to marriage, both procedurally and in terms of the substantive rights and obligations granted to and imposed on the partners, which are supported by policy considerations similar to those favoring marriage. These rights and responsibilities are not shared by couples who cohabit or who have not registered as domestic partners [*Koebke v. Bernardo Heights Country Club (2005) 36 Cal. 4th 824, 837, 845, 31 Cal. Rptr. 3d 565, 115 P.3d 1212]* .

However, the legislation granting these rights is not intended to repeal or adversely affect any other ways in which relationships between adults may be recognized or given effect in California, or the legal consequences of those relationships, including, among other things civil marriage, enforcement of palimony agreements, enforcement of powers of attorney, appointment of conservators or guardians, and petitions for second parent or limited consent adoption [Stats. 2003, Ch. 421, § 2].

As of January 1, 2005, a domestic partnership may be terminated by filing a Notice of Termination of Domestic Partnership with the Secretary of State, provided all of the conditions specified in the first alternative Paragraph B of this form exist at the time of the filing [*Fam. Code § 299(a)*]. A registered domestic partnership is terminated six months after the date the Notice of Termination is filed [*Fam. Code § 299(b)*].

After January 1, 2005, a domestic partnership that does not meet the conditions for filing a valid Notice of Termination may only be terminated by an action for dissolution of the domestic partnership, nullity of the domestic partnership, or legal separation of the partners [*Fam. Code § 299(c), (d)*].

Prior to January 1, 2005, a domestic partnership was terminated when any of the following occurred [*Fam Code § 299(a)*; *see Fam. Code § 299.3(a)* (notice regarding rights and responsibilities of domestic partners); Stats. 2003, ch. 421 § 14]:

- One partner gave or sent notice by certified mail to the other partner a written notice that he or she was terminating the partnership.

- One of the domestic partners died.

- One of the domestic partners married.

- The domestic partners no longer had a common residence.

On termination of a domestic partnership prior to January 1, 2005, at least one former partner was required to mail a completed Notice of Termination of Domestic Partnership to the Secretary of State by certified mail. If the domestic partnership was terminated because of the death or marriage of a domestic partner, the termination date of the domestic partnership was the date indicated on the Notice of Termination of Domestic Partnership form. Otherwise, the date on which the Notice of Termination of Domestic Partnership was received by the Secretary of State is deemed the actual termination date of the domestic partnership [*Fam. Code § 299(b)*].

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Volume 18 Chapters 180-189 PRETRIAL PROCEEDINGS---to---PROBATE OF WILLS
CHAPTER 186 PROBATE OF WILLS
PART II. FORMS
A. Supporting Will Contests

18-186 California Points & Authorities § 186.36

§ 186.36 Supporting Contest of Will--Procedural Requirements--Petition to Revoke Probate of Will Is Timely Filed [Prob. Code § 8270]

[1] FORM

[*The following should be combined with a general memorandum of points and authorities supporting a petition to revoke probate of a will (see § 186.21), or may be used in a trial or appellate brief.*]

THE PETITION TO REVOKE PROBATE WAS TIMELY FILED BECAUSE _____ [*specify, e.g.,* IT WAS FILED WITHIN 120 DAYS AFTER THE WILL WAS ADMITTED TO PROBATE].

A. Time Limit for Petition to Revoke. A person may petition to revoke a will within 120 days after the will has been admitted to probate (*Prob. Code § 8270(a)*).

[*Optional*] **B. Revocation by Minor or Incompetent Person.** [*See § 186.21, Paragraph B.*]

[*Optional*] **C. Probate Order Procured by Extrinsic Fraud May Be Set Aside After Time Limit for Petition to Revoke.** An order admitting a will to probate may be set aside after the 120-day period allowed for a petition to revoke (*see Prob. Code § 8270*) if there was extrinsic fraud in the procurement of the probate order (*Estate of Sanders (1985) 40 Cal. 3d 607, 613-614, 221 Cal. Rptr. 432, 710 P.2d 232* (construing former Prob. Code § 380); *see Prob. Code §§ 8007, 8226(a)*).

[*Optional*] **D. Doubts Concerning Timeliness Should Be Resolved in Favor of Allowing Contest.** Doubts concerning the timeliness of a petition to revoke, based on confusion as to the actual date the will was admitted to probate, should be resolved in favor of allowing the contest (*Wolfson v. Superior Court (1976) 60 Cal. App. 3d 153, 160, 131 Cal. Rptr. 265*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition to revoke probate of a will when the party seeking probate asserts that the petition was not timely filed [*see Prob. Code § 8270(a)*]. Optional Paragraph B should be used if the contest is brought by a minor or incompetent who had no guardian or conservator at the time the will was admitted to probate [*see Prob. Code § 8270(b)*]. Optional Paragraph C may be used if an order admitting a will to probate was the result of extrinsic fraud. Optional Paragraph D may be used if there is an issue concerning the actual date the will was admitted to probate.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. For example, if counsel wishes to argue that an order admitting a will to probate was procured by fraud, counsel should discuss facts showing that extrinsic and collateral fraud prevented the petitioner from presenting his or her case to the court at the hearing on the petition to administer the estate [*see Estate of Sanders (1985) 40 Cal. 3d 607, 614, 221 Cal. Rptr. 432, 710 P.2d 232]* .

This memorandum should be combined with the procedural points and authorities pertaining specifically to a petition to revoke probate of a will [*see § 186.21*]. This memorandum may also be combined with points and authorities setting forth one or more substantive grounds for challenging a purported will [*see §§ 186.22 -186.34*].

[b] Opposing Memoranda

In an appropriate case, the points and authorities *set out in § 186.62* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Probate Order Procured by Extrinsic Fraud May Be Set Aside After Time Limit for Petition to Revoke

In ***Estate of Sanders*** *(1985) 40 Cal. 3d 607, 221 Cal. Rptr. 432, 710 P.2d 232* , decedent, a conservatee, had a holographic will leaving her entire estate to her son, Gary, who was also decedent's conservator. After Gary subsequently died, his sons were entitled to receive decedent's estate by right of representation. Respondent, decedent's nephew, was appointed decedent's conservator and subsequently had decedent execute another will, leaving respondent an interest in real property that was the bulk of her estate and making him trustee of a testamentary trust for decedent's grandsons (Gary's sons). Respondent told petitioner (Gary's widow) that decedent had executed a new will, but stated that this was done only to put the old one in "proper legal form." After decedent died, respondent did not respond to petitioner's specific inquiries about decedent's estate, but repeatedly assured her that he would take care of everything. Decedent's will was admitted to probate and the 120-day period for contesting it expired [*see Prob. Code § 8270(a)*]. Thereafter, petitioner began receiving financial statements from a bank regarding the estate. Noticing that the statements did not list decedent's real property, petitioner attempted, unsuccessfully, to contact respondent. After receiving a notice of hearing on a petition for distribution, petitioner finally reached respondent, whereby respondent evaded her questions, assured her that there were "no problems" and that there was no need for her to attend the hearing, and eventually admitted that he had arranged for decedent to leave the property to him. Petitioner appeared at the hearing on the final distribution to orally contest the petition, arguing that respondent's misrepresentations and concealment constituted extrinsic fraud. The court rejected the contest, and entered a decree of final distribution awarding respondent an interest in the real property. Petitioner then moved to set aside the order, again claiming extrinsic fraud. The trial court denied the motion.

The California Supreme Court reversed, noting that although petitions to revoke must be brought within 120 days after the will is admitted to probate [*see Prob. Code § 8270(a)*], it is well settled that on proof of extrinsic and collateral fraud a plaintiff can secure equitable relief from a judgment admitting a will to probate. The Court stated that extrinsic fraud is "a broad concept that tends to encompass almost any set of extrinsic circumstances which deprive a party of a fair

adversary hearing" [*quoting* *In re Marriage of Modnick (1983) 33 Cal. 3d 897, 905, 191 Cal. Rptr. 629, 663 P.2d 187* ; *see also* *United States v. Throckmorton (1878) 98 U.S. 61, 65-66, 25 L. Ed. 93* (defining extrinsic fraud)]. It noted that the clearest examples of extrinsic fraud are in cases in which the aggrieved party is kept in ignorance of the proceeding or is in some other way induced not to appear (*40 Cal. 3d 607, 614)* . The Court added that relief from judgment is particularly likely when fraud is a violation of a special or fiduciary relationship (*40 Cal. 3d 607, 615)* . According to petitioner's uncontroverted affidavit, she and her sons relied on respondent to protect the their interests from the time respondent became decedent's conservator. The Court stated that petitioner's reliance was reasonable in light of the family relationship and respondent's repeated assurances that he was looking out for their interests. Furthermore, respondent also had a fiduciary duty to petitioner and her sons because he was executor of the estate. The Court found that respondent violated his confidential and fiduciary relationship through "a consistent course of concealment and misrepresentation." These actions, plus respondent's advice that petitioner need not become involved in the probate proceedings, clearly established extrinsic fraud (*40 Cal. 3d 607, 616-619)* .

[b] Doubts Concerning Timeliness Should Be Resolved in Favor of Allowing Contest

In ***Wolfson v. Superior Court*** *(1976) 60 Cal. App. 3d 153, 131 Cal. Rptr. 265* , on January 13, 1975, a court held a hearing on a petition for probate and issued a minute order on a printed form that was apparently prepared by one of the parties. The form contained five boxes, opposite five possible actions to be taken by the court. Handwritten check marks appeared in the three boxes labeled "petition granted," "will and codicils admitted," and "no bond." The form also set forth the title of the case, the nature of the proceedings, the names of the court personnel and of the petitioner and her attorneys, and the statement "order to be prepared by _____ attorney." The written order was filed on January 23, 1975, on another printed form. This form noted that the hearing was held on January 13, but did not indicate that any decision was announced or made on that date or on any other date except January 23. The letters testamentary, executed by the clerk on January 24, 1975, contained no indication of when the court admitted the will. Apparently, no minute entry was made to reflect the execution of the January 23 order. A petition to revoke the will was filed on May 14, 1975. The executor of the will demurred to the petition, on the ground that the petition was brought more than four months after the will was admitted to probate [*see* former Prob. Code § 380]. The trial court overruled the executor's demurrer, and the executor sought a writ of prohibition to restrain the trial court from hearing the contestant's petition.

The court of appeal denied the writ, relying on the rule that "when there exists a clear conflict between the permanent minutes of the court and a formal order issued by it relative to the date of an order denying a motion for a new trial, that conflict is to be resolved in favor of granting the right of appeal" [*quoting* Hollister Convalescent Hospital, Inc. v. Rico (975) *15 Cal. 3d 660, 665, 125 Cal. Rptr. 757, 542 P.2d 1349]* . The court stated that this language was applicable to petitions to revoke, since the time limit for such a petition and the time limit for filing an appeal are both jurisdictional matters (*60 Cal. App. 3d 153, 160)* . The court acknowledged that trial courts sometimes make minute entries which operate only as notice of an intended decision, but stated that it could not construe the January 13 minutes, which complied with statutory requirements for admitting a will to probate by minute order [*see* former Prob. Code §§ 332, 1221], as other than a record of a judicial decision that had been made on that day. However, the contestants were told by an order signed by the judge and filed by the court that the date of the order was January 23 (*60 Cal. App. 3d 153, 159)* . The use of the present tense, and the absence of any disclosure that the decision had actually been made and recorded in the January 13 minutes, necessarily implied that the crucial date was January 23 (*60 Cal. App. 3d 153, 159-160)* .

California Points & Authorities

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Volume 18 Chapters 180-189 PRETRIAL PROCEEDINGS---to---PROBATE OF WILLS
CHAPTER 186 PROBATE OF WILLS
PART II. FORMS
A. Supporting Will Contests

18-186 California Points & Authorities § 186.37

§ 186.37 Supporting Contest of Will--Procedural Requirements--Contestant Has Standing to Contest Will [Prob. Code §§ 1043, 8004(b), 8250(a), 8270(a)]

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities supporting a will contest or a petition to revoke probate of a will (see §§ 186.20 and 186.21), or may be used in a trial or appellate brief.*]

THE CONTESTANT HAS STANDING TO CONTEST THE WILL AS AN INTERESTED PERSON BECAUSE HE/SHE IS _____ [*specify, e.g.*, AN HEIR AT LAW OF THE DECEDENT].

A. Interested Person May Object to Will. [*See § 186.20, Paragraph A.*]

B. "Interested Person" Defined. An interested person is one who has an interest that may be impaired or defeated by the probate of the will, or benefitted by setting it aside (*Estate of Plaut (1945) 27 Cal. 2d 424, 425-426, 164 P.2d 765* ; *Estate of Lind (1989) 209 Cal. App. 3d 1424, 1430-1431, 257 Cal. Rptr. 853* ; *see Prob. Code § 48* (defining "interested person")).

[*Optional*] **C. Heir at Law May Be "Interested Person."** An heir at law of the decedent may contest a will if invalidating the will would provide the heir with an interest in the estate (*Estate of Powers (1979) 91 Cal. App. 3d 715, 719-720, 154 Cal. Rptr. 366* ; *see Prob. Code § 48(a)*).

[*Optional*] **D. Beneficiary Under Prior Will May Be "Interested Person."** A beneficiary under an earlier will that would be entitled to probate if the contested will is declared invalid is an interested party and may contest the later will without first obtaining probate of the earlier will (*Estate of Lane (1970) 7 Cal. App. 3d 402, 405-406, 86 Cal. Rptr. 620*).

[*Optional*] **E. Beneficiary Under Destroyed Will May Be "Interested Person."** The term "interested person" includes one interested under a prior will that has been fraudulently destroyed *Estate of Arbuckle (1950) 98 Cal. App. 2d 562,*

566, 220 P.2d 950).

[*Optional*] **F. Beneficiary Under Later Will May Be "Interested Person."** A beneficiary under a later will may be an interested party for the purposes of contest if the requisite impairment of, or benefit to, his or her interest has been established (*Estate of Powers (1979) 91 Cal. App. 3d 715, 722-726, 154 Cal. Rptr. 366*).

[*Optional* **G. Executor May Contest Subsequent Will.** An executor may contest a subsequent will, even if the executor does not have a beneficial interest in the estate (*Jay v. Superior Court (1970) 10 Cal. App. 3d 754, 758, 89 Cal. Rptr. 466*)].

[*Optional*] **H. Interested Person's Personal Representative May Contest Will.** A representative of the estate of a decedent who had grounds to contest a will may initiate a contest (*Prob. Code § 48(a)(3)*; *Estate of Field (1951) 38 Cal. 2d 151, 155, 238 P.2d 578*).

[*Optional*] **I. Heir's Judgment Lien Creditor May Contest Will.** A judgment lien creditor of an heir at law may bring a will contest (*Estate of Harootenian (1951) 38 Cal. 2d 242, 249, 238 P.2d 992* ; *see Prob. Code § 48(a)(1)*).

[2] Comments

[a] Use of Form

This memorandum may be used when the party seeking probate alleges that a person lacks standing to challenge a purported testamentary instrument [*see Prob. Code §§ 48, 1043(a)*]. Any or all of Optional Paragraphs C through I may be used, depending on who the contestant is.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing how a contestant stands to benefit from a successful contest of the will [*see Estate of Plaut (1945) 27 Cal. 2d 424, 425-426, 164 P.2d 765* ; *Estate of Lind (1989) 209 Cal. App. 3d 1424, 1430-1431, 257 Cal. Rptr. 853]* .

This memorandum may be combined with points and authorities pertaining to the specific procedural context in which the issue of standing arises. Thus, it may be combined with the points and authorities pertaining to an objection to the admission of a will to probate [*see § 186.20*] or a petition to revoke probate of a will [*see § 186.21*]. This memorandum also may be combined with points and authorities setting forth one or more substantive grounds for challenging a purported will [*see §§ 186.22 -186.34*].

[b] "Interested Person" Defined

An "interested person" includes any of the following [*Prob. Code § 48(a)*]:

- An heir, devisee, child, spouse, creditor, beneficiary, and any other person having a property right in or claim against a trust estate or the estate of a decedent which may be affected by the proceeding.
- Any person having priority for appointment as personal representative.
- A fiduciary representing an interested person.

The meaning of "interested person" as it relates to particular persons may vary from time to time, and provides that the meaning of the term will be determined according to the particular purposes of, and matter involved in, any proceeding [*Prob. Code § 48(b)*].

[c] Opposing Memoranda

In an appropriate case, the points and authorities *set out in § 186.63* may be used to oppose the contention supported by these points and authorities in this form.

[3] Discussion of Authorities

[a] "Interested Person" Defined

In ***Estate of Plaut*** *(1945) 27 Cal. 2d 424, 164 P.2d 765* , decedent's granddaughter contested decedent's will on the ground that a codicil leaving $15,000 to the decedent's nurse was obtained through undue influence. The nurse demurred on the ground that the granddaughter was not an interested person, and was therefore not entitled to contest the will. The nurse argued that a trust established by the will violated the rule against perpetuities because the trust income was to go to the decedent's daughter and sole heir during her life, then to her children after her death, and then the trust corpus was to go to the children in increments when they reached specified ages. The trial court dismissed the granddaughter's contest for lack of standing, and she appealed.

The California Supreme Court reversed, holding that a person who has an interest that may be impaired or defeated by the probate of the will, or benefitted by setting the will aside, is an interested person for the purpose of standing to contest a will (*27 Cal. 2d 424, 425-426)* . The Court explained that courts are ordinarily not to construe the will as a prerequisite to a will contest. It noted that if it were to do so in the instant case it would be determining the validity of the trust at the request of a person not interested in the trust (the nurse), without having heard all the persons interested in it (*27 Cal. 2d 424, 427)* . The Court found it unnecessary to pass on the validity of the trust to determine whether the granddaughter had a sufficient interest to contest the will. The situation was analogous to one in which a beneficiary under an earlier will contests a later one without first obtaining probate of the former. Several decisions had upheld the beneficiary's right to contest the second will in such a case on a prima facie showing of interest. The Court noted that a will contest is not an end in itself, but merely the first in a series of proceedings by which the contestant seeks to have his or her claim to all or part of the estate adjudicated. If the Court allowed the nurse to raise the issue of the validity of the trust, it would in effect prevent the granddaughter from initiating the first of these proceedings unless she established at the onset the very right she sought to establish in the final proceeding. Although courts should not be forced to adjudicate the rights of persons whose interests have not even the appearance of validity or substance, they should not deny a hearing to a person who has at least established a prima facie interest in an estate (*27 Cal. 2d 424, 427-428)* . To establish standing, a will contestant is not required to prove that his or her interest will in fact be impaired by probate of the will, but only that it may be (*27 Cal. 2d 424, 429)* .

In ***Estate of Lind*** *(1989) 209 Cal. App. 3d 1424, 257 Cal. Rptr. 853* , decedent's foster brother contested decedent's will on the ground that it had been obtained by the undue influence of decedent's attorney, who together with two of decedent's friends were the only beneficiaries named in the will. Decedent's parents took in the contestant shortly after his birth. The contestant lived with the parents until he joined the military at age 22. His relationship with the family continued throughout the parents' lifetimes, and the parents always referred to the contestant as their son. Around the time the contestant joined the military, the parents made an unsuccessful effort to formally adopt him. The nature of the legal barrier preventing the adoption was not known. The contestant stated that he had discovered only when he was about 60 that the adoption had never been completed. He produced two letters written by one of his foster siblings to another, in which the writer stated that the adoption had been completed. He also produced a sworn affidavit executed by the decedent five years before her death, in which she stated that her parents had made out some adoption papers around the time the foster brother was drafted, but that she didn't know "whether that was anything other than an affidavit or a court adoption." The attorney and the other proponents sought dismissal of the contest on the ground that the contestant lacked standing to contest the will. The trial court sustained the proponents' demurrer without leave to amend.

The court of appeal reversed, noting that the contestant had the burden of proving his standing to contest the will (*209 Cal. App. 3d 1424, 1435)* . The court held that the allegation that the decedent's parents would have adopted him but for a legal barrier was an allegation of ultimate fact and therefore sufficient to establish a prima facie case of standing (*209 Cal. App. 3d 1424, 1434)* . In addition, the court found that the doctrine of liberal construction of pleadings should be employed to aid the foster brother. Liberal allowances for pleading are especially appropriate when upholding a weak pleading will avoid a possible gross miscarriage of justice. According to the court, allowing an attorney without challenge to write himself into an elderly client's will as a major beneficiary and executor would be a possible gross miscarriage of justice (*209 Cal. App. 3d 1424, 1435)* . The court noted that the term "legal barrier" is not a term of art and carries no meaning beyond the plain meaning of the words. It stated that the term should therefore be interpreted broadly in the spirit of the policy that calls for a liberal interpretation of adoption laws in the best interests of the adopted person. Thus, the foster brother should be given an opportunity to present evidence to support his claim of standing. The court also noted that if the foster brother were able to demonstrate by clear and convincing evidence that the decedent's parents would have adopted him at the time when they prepared the adoption papers, the statutory prohibition against adult adoptions in effect at that time would constitute a sufficient legal barrier to the adoption (*209 Cal. App. 3d 1424, 1436)* .

[b] Heir at Law May Be "Interested Person"

In ***Estate of Powers*** *(1979) 91 Cal. App. 3d 715, 154 Cal. Rptr. 366* , the court noted that an heir-at-law of the decedent is an "interested person" for purposes of a will contest. However, an allegation that one is an heir is not enough to establish that one will be benefited if the will is set aside, unless it is also alleged in the pleadings or clear from the record that a successful attack on the purported will would result in intestacy (*91 Cal. App. 3d 715, 719-722)* .

[c] Beneficiary Under Prior Will May Be "Interested Person"

In ***Estate of Lane*** *(1970) 7 Cal. App. 3d 402, 86 Cal. Rptr. 620* , contestants, who were not related to the decedent nor to her predeceased husband, sought to establish standing to contest the will offered for probate by showing that they were the sole beneficiaries of a prior will executed by the decedent. The appellate court affirmed the trial court's order dismissing the will contest based on the contestants' admission that they could not produce the original will, but only a copy, and that they had no evidence that this will was in existence at the time of the decedent's death or that it had been lost or fraudulently destroyed during the decedent's lifetime. The court noted that because the contestants were not related to the decedent or to her precedeased husband, their standing as "interested persons" must rest on the prior will under which they were the sole beneficiaries. It also noted that a trial court may require proof of a contestant's interest or standing before proceeding with the trial of the contest. To establish status as "interested persons," with standing to contest the will offered for probate, the contestants were required to make a prima facie showing that they could prove the earlier will was lost or fraudulently destroyed. Because they could not produce the original will, could not prove the will was in existence at the time of the decedent's death, and could not establish that it was lost or fraudulently destroyed during the decedent's lifetime, the prior will could not be admitted to probate, was wholly inoperative, and cannot become the vehicle by which the contestants achieve standing to contest the later will (*7 Cal. App. 3d 402, 405-407)* .

[d] Beneficiary Under Destroyed Will May Be "Interested Person"

In ***Estate of Arbuckle*** *(1950) 98 Cal. App. 2d 562, 220 P.2d 950* , decedent's son-in-law filed a petition to revoke probate of a will on the grounds of testamentary incapacity and undue influence. The son-in-law was a beneficiary under an allegedly destroyed earlier will. The proponent of the will admitted to probate was decedent's niece and the sole beneficiary and executor named in that will. After the son-in-law's opening statement and before the presentation of any evidence, the niece moved to dismiss the proceeding on the ground that the son-in-law was not an interested person. The opening statement showed that the son-in-law was prepared to prove that the decedent duly executed an earlier will, which was prepared by a Mr. Bell, in 1933. The son-in-law was the primary beneficiary under the will prepared by Mr.

Bell. Mr. Bell kept the will, and a codicil executed about a year later, in his office. In 1939, decedent executed the will that was admitted to probate. At that time she was under the care of the niece and the niece's parents. Soon after the execution of the 1939 will, they notified Mr. Bell that his services as the decedent's manager were no longer needed. Four or five years later, Mr. Bell destroyed the earlier will as part of a routine cleaning out of his files. The decedent was by this time in a sanitarium, and Mr. Bell assumed that his relationship with her had been terminated. After hearing the son-in-law's opening statement, the trial court granted the motion for dismissal of the contest. The son-in-law appealed.

The court of appeal reversed, stating that the son-in-law made a sufficient showing in his opening statement that he was an interested person entitled to contest the later will. On the issue of the son-in-law's standing, the appellate court held that the term "interested person" includes one interested under a prior will which has been fraudulently destroyed. In a petition to revoke, the main issue to be adjudicated is the validity of the will admitted to probate, not the absolute validity of an earlier will under which the son-in-law claims. Therefore, a prima facie showing of the son-in-law's interest is sufficient to establish standing (*98 Cal. App. 2d 562, 566)* . When the son-in-law alleges that the prior will is destroyed, he or she must also make a prima facie showing that the will can be established as a destroyed will. The court noted that no inference regarding the destruction of the earlier will by the testator with intent to revoke was raised by the son-in-law's opening argument, since the will was not last seen or known to exist in the possession of the decedent. It was undeniable, on the facts stated, that the decedent did not destroy or direct the destruction of the earlier will. Destruction of a will by someone other than the testator, not done in the testator's presence, and done without the testator's direction, does not revoke the will. A duly executed will continues to exist as a will, regardless of the destruction of the paper it is written on, so long as it is not revoked in the manner and by the means prescribed by statute (*98 Cal. App. 2d 562, 567)* . Regarding the niece's contention that the will was not "fraudulently destroyed," the appellate court found that Mr. Bell's action in destroying the will without the knowledge and consent of the decedent amounted to actual fraud even though Mr. Bell was acting in good faith (*98 Cal. App. 2d 562, 568-569)* .

[e] Beneficiary Under Later Will May Be "Interested Person"

In ***Estate of Powers*** *(1979) 91 Cal. App. 3d 715, 154 Cal. Rptr. 366* , the court noted that a potential legatee or devisee under a valid will executed by the decedent before or after the will offered for probate has a sufficient interest in the probate to file a will contest. The court may require the contestant to demonstrate his or her interest in the estate before proceeding with the merits of the will contest. This demonstration should be made in a separate hearing on the issue or on a motion for summary judgment. The burden on the contestant in any hearing on the issue of standing is substantial (*91 Cal. App. 3d 715, 722-725)* .

[f] Executor May Contest Subsequent Will

In ***Jay v. Superior Court*** *(1970) 10 Cal. App. 3d 754, 89 Cal. Rptr. 466* , an executor named in the decedent's will filed a contest challenging a codicil to the will that named a different executor, but made no other change in the will. The alleged grounds for the contest were that at the time the codicil was executed the decedent was not of sound mind and was under the undue influence of various individuals. The will contest was dismissed on the ground that the executor was not an "interested person" and thus lacked standing to contest the will. The appellate court began its review of the trial court proceedings by noting that the right of an interested person to contest a will is fundamentally based on the loss of property or property rights resulting from the recognition of an invalid instrument. A will contest is essentially an action for the recovery of property unlawfully taken or about to be taken from the ownership of the contestant. The court noted that it is well settled that an executor who is named in a will that has been offered for probate has the right to oppose or resist a contest to this will. An executor may also contest a subsequent will even if the executor does not have a beneficial interest in the estate. This right is not based on any pecuniary interest of the executor in the distribution of the estate, but is instead based on the theory that the executor represents those who would be entitled to the estate under the will in which he or she is named as executor and, in a representative capacity, has the right to see that the testator's wishes are not thwarted by admission to probate of a testamentary instrument that is not genuine. In

this case, the contestant's only legal interest in the estate is serving as executor and receiving administration fees for such services; the contestant has not shown how the object and intent of the testator will be thwarted by the provisions of the codicil. Under court supervision, the testator's property must be distributed in accordance with the provisions of the will irrespective of who serves as executor. Therefore, the contestant is not an "interested person" for purposes of bringing a will contest (*10 Cal. App. 3d 754, 757-759)* .

[g] Interested Person's Personal Representative May Contest Will

In ***Estate of Field*** *(1951) 38 Cal. 2d 151, 238 P.2d 578* , a husband predeceased his wife by six months and the executor of the wife's estate filed a petition to revoke the husband's will based on nonexecution, testamentary incapacity, and undue influence. The will gave the husband's entire estate to the wife during her life, and after her death gave the house to two friends and the residue to the Shriners Hospital. The court sustained, without leave to amend, a demurrer to the contest made by the executor and beneficiaries named under the will on the ground that the executor of the wife's estate had no standing to contest the will. The executor of the wife's estate appealed.

The California Supreme Court held that the wife was an interested person entitled to contest the probate of her husband's will, that her right of contest survived her death, and that her personal representative had standing to prosecute the contest. The Court stated that the right of contest survives under the statutes of California since it is a thing in action arising out of the violation of a right of property. The right does not depend on the commencement of the contest during the contestant's life. So long as the right survives as a right of property, the result may not be made to depend on whether the contest was commenced before the owner of the right died (*246 Cal. 2d 151, 155)* .

[h] Heir's Judgment Lien Creditor May Contest Will

Estate of Harootenian *(1951) 38 Cal. 2d 242, 238 P.2d 992* , involved a petition to revoke by the separated spouse of one of the decedent's children. The spouse claimed an interest in the estate as a creditor of the decedent's son, her husband, against whom she had obtained a judgment for unpaid child support. The trial court sustained the demurrer of the decedent's children and dismissed the contest on certain procedural grounds. The spouse appealed.

The California Supreme Court reversed, stating that it was a settled point of law that an interested person is one who has an interest of a pecuniary nature which may be impaired or defeated by the probate of the will or benefitted by setting it aside. That interest is not necessarily confined to that of an heir who would take by succession if the will were set aside, nor is it necessary that the impairment or benefit be established as a certainty. The Court found that authorities generally agree that a general creditor of a disinherited heir has no sufficient interest to contest the will, and that there must have been created some right or interest in the creditor which will attach to the property on devolution to the heir if the will is declared invalid. Citing the "interested person" provisions of the Probate Code, as well as various treatises and out-of-state cases, the Court found that a judgment creditor who has perfected a lien at the time the property would devolve to the heir is an interested person who may contest the will. The Court noted that the decedent's estate included real property, and that a judgment lien may be established against real property by the filing and recording of an abstract of the judgment. Therefore, the spouse should be given an opportunity to amend her pleading to bring herself within the class of judgment lien creditors (*38 Cal. 2d 242, 249-251)* .

[4] Additional Authorities

[a] Heir at Law May Be "Interested Person"

In *Estate of Butzow (1937) 21 Cal. App. 2d 96, 68 P.2d 374* , a person claiming to be decedent's cousin and sole heir at law filed an after-probate will contest. Another person, who also claimed to be decedent's cousin and sole heir at law, obtained permission from the court to intervene in the contest. The executor and one of the beneficiaries under the will moved to strike the second contestant's pleading on the ground that it was sham and irrelevant, and demurred to both contestants' petitions on various grounds, including standing. The trial court granted the motions and sustained the

demurrers. The second contestant appealed.

The court of appeal reversed the trial court's order as to the demurrers, and ordered the trial court to determine whether the contestants were interested persons for purposes of contesting a will. Any person who institutes or attempts to join a will contest must be an interested person under the probate law, and the court may require a contestant to establish this fact before proceeding with the trial of the contest. However, as a matter of pleading, it is only necessary that the contestant allege that he or she is an heir at law of the decedent (*21 Cal. App. 2d 96, 99)* .

[b] Beneficiary Under Prior Will May Be "Interested Person"

In *Estate of Munfrey (1948) 61 Cal. App. 2d 565, 143 P.2d 414* , decedent's grandchildren filed a petition to revoke probate of decedent's will on the grounds of testamentary incapacity and undue influence. The grandchildren were not decedent's heirs at law since their father, decedent's son, was living. The petition to revoke alleged that the decedent had substantially provided for the contestants in an earlier will. It alleged that the exact date of the earlier will was not known, but that it was executed before the will that was admitted to probate and was in existence when decedent died. The contestants did not produce the earlier will or offer it for probate. The executor and certain beneficiaries under the will admitted to probate demurred to the contest. The trial court sustained their demurrers without leave to amend, and the grandchildren appealed.

The court of appeal reversed and directed the trial court to grant the contestants a reasonable time to amend their petition in order to cure certain uncertainties and other curable defects. The appellate court stated that there is no express provision in the Probate Code supporting the will proponents' argument that contestants may not rely on an earlier will under which they are beneficiaries to establish their interest to contest a later will without producing the earlier will and offering it for probate. Relying on *Estate of Phillips (1927) 202 Cal. 490, 498, 261 P. 709* , the court held that the will relied on by the contestants to establish their interest need not be produced by them and offered for probate as a condition to their right to contest the validity of the later will. The court explained that this rule protects the rights of the beneficiaries under an earlier will in cases in which the will was secreted or wrongfully withheld from them. It is possible that contestants who are unable to produce the earlier will at the time their contest is filed may, with the benefit of the process of the court to summon all necessary witnesses and compel the production of the earlier will, prove their interest under the earlier will at trial. The court also pointed out that since a demurrer admits all of the allegations of the petition, the will proponents were prevented from denying the grandchildren's claims concerning the earlier will in their demurrer (*61 Cal. App. 2d 565, 568)* .

[c] Beneficiary Under Later Will May Be "Interested Person"

Estate of O'Brien (1966) 246 Cal. App. 2d 788, 55 Cal. Rptr. 343 , involved a petition to revoke filed by a person who was neither an heir at law nor a beneficiary under the will admitted to probate. The contestant alleged that she was the sole beneficiary under a valid holographic will executed by the decedent after the date of the will admitted to probate, that the earlier will was executed under undue influence and without the required formalities, and that the earlier will had been revoked by the decedent. The alleged holographic will stated, in relevant part, "in the event anything happens to me on my way out to Calif. it is my wish that Mrs. L. McGruder [the contestant] receive all my personal holding such as money in commercial account, ring, badge, auto, travelers cheques or anything else she may wish. I fully intend to change will on my arrival there." A beneficiary named in the will admitted to probate, the decedent's sister and sole heir at law, who was the executor of the will, and others, demurred to the contest on various grounds including the contestant's lack of standing to contest the will. The trial court sustained the demurrer with leave to amend. It also sustained a demurrer to the contestant's amended petition, without leave to amend, finding that the contestant was not an interested person and lacked standing to contest the will. The contestant appealed.

The court of appeal reversed, holding that the contestant had established a prima facie showing of impairment of, or benefit to, her interest. Noting that the case was one of first impression in California, the court reviewed the cases

permitting beneficiaries under earlier wills to maintain will contests, and stated that there was "generally speaking no essential distinction" between situations involving earlier wills and situations involving later wills. The court stated that there is "no reason why a beneficiary under a later will may not be considered an interested party for purposes of contest if the requisite impairment of, or benefit to, his interest has been established." The court added that it is "obvious that a beneficiary under a later will normally has a pecuniary interest in the devolution of the estate" (*246 Cal. App. 2d 788, 793)* . By analogy to the cases involving earlier wills, such a contestant should be entitled to contest the earlier will without first offering the later will for probate but merely by making a prima facie showing of his or her interest (*246 Cal. App. 2d 788, 795)* .

[d] Executor May Contest Subsequent Will

In *Estate of Getty (1978) 85 Cal. App. 3d 755, 149 Cal. Rptr. 656* , a contingent trustee of a trust created under a will to hold the residue of the estate filed a petition contesting the final codicil of the will, which eliminated the trust as the recipient of the residue. The petition asserted that the testator lacked testamentary capacity when he executed the codicil or, in the alternative, that he executed the codicil under the undue influence of his close advisers. The appellate court affirmed the trial court's ruling that the contingent trustee under the will was not an "interested person" with standing to contest the validity of the codicil. The court noted that lack of a direct pecuniary interest does not absolutely foreclose an omitted trustee's right to contest the will. A testamentary trustee is the representative of the beneficiaries of the trust and the guardian of their interests and, when appropriate, the trustee may contest a subsequent testamentary instrument that impairs the beneficiaries' pecuniary interests in the estate property. Thus, a trustee's standing to contest a will does not depend strictly on a personal pecuniary interest in the bequeathed property under the prior instrument, but may be made determinate by impairment of the pecuniary rights of the beneficiaries by the probate of the subsequent testamentary document. However, in this case, the effect of the contested change on the beneficiary does not disclose any impairment of the beneficiary's interest as a result of the subsequent codicil. The sole effect of the codicil is to shift control of the assets from a trust under the will to the beneficiary's trustees, thereby enhancing the beneficiary's income by eliminating the sizeable trustee fees of the intermediate trust under the will, which, under earlier codicils, would become payable to the testamentary trustees. The right to control the trust property and to receive statutory fees for administration of the trust do not constitute a sufficient pecuniary interest to give standing to the omitted trustee to contest the codicil without reference to the effect of the subsequent codicil on the beneficiary (*85 Cal. App. 3d 755, 758-761)* .

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Volume 18 Chapters 180-189 PRETRIAL PROCEEDINGS---to---PROBATE OF WILLS
CHAPTER 186 PROBATE OF WILLS
PART II. FORMS
A. Supporting Will Contests

18-186 California Points & Authorities §§ 186.38-186.49

[Reserved]

§§ 186.38[Reserved]

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Volume 18 Chapters 180-189 PRETRIAL PROCEEDINGS---to---PROBATE OF WILLS
CHAPTER 186 PROBATE OF WILLS
PART II. FORMS
B. Opposing Will Contests

18-186 California Points & Authorities § 186.50

§ 186.50 Opposing Contest of Will--By Demurrer to Objection or Petition Contesting Will [Prob. Code §§ 8251, 8271(b)]--General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

Estate of _____ [*name*]	)	
Deceased.	)	
_____ [*name*],	)	NO. _____
Petitioner,	)	MEMORANDUM IN SUPPORT OF DEMURRER
vs.	)	TO _____ [OBJECTION TO PETI-
_____ [*name*],	)	TION FOR PROBATE OF WILL *or* PETITION TO
as _____ [*describe*,	)	REVOKE PROBATE OF WILL]
e.g., Executor *or* Administrator With Will Annexed	)	Date: _____
and as Devisee], and	)	Time: _____
_____ [*names*],	)	Location: _____
Respondents.	)	[Trial Date: _____]
	)	

_____ [*Name*] DEMURS TO THE _____ [OBJECTION TO THE PETITION FOR PROBATE *or* PETITION TO REVOKE PROBATE] OF THE _____ [WILL *or* CODICIL] OF _____ [*name of decedent*] BECAUSE _____ [*specify, e.g.*, THE FACTS SET FORTH IN THE (OBJECTION *or* PETITION TO REVOKE PROBATE) ARE NOT SUFFICIENT TO STATE A CAUSE OF ACTION].

A. Will Contest May Be Challenged by Demurrer. A will contest is subject to demurrer on any part of the grounds of demurrer available in civil actions (*Prob. Code §§ 8251(a), (b), 8271(b)*).

B. Will Contest Must State Cause of Action and Meet Pleading Requirements. A pleading initiating a contest will be subject to demurrer if it does not contain, in ordinary and concise language, a statement of facts sufficient to constitute a cause of action, and which answers all requirements of the general rules of pleading applicable to civil complaints (*Code Civ. Proc. § 430.10(e)*; *Estate of Marler (1957) 148 Cal. App. 2d 30, 36-37, 306 P.2d 105* ; *see Prob. Code §§ 8251(b), 8271(b)*).

[*Optional*] **C. Demurrer May Be Based on Contestant's Lack of Capacity.** A demurrer to a will contest may be based on the ground that the contestant lacks capacity to bring the contest (*Code Civ. Proc. § 430.10(b)*; *see Prob. Code §§ 8251(b), 8271(b)*).

[*Optional*] **D. Demurrer May Be Based on Uncertainty.** A demurrer to a will contest may be based on the ground that the _____ [objection to probate *or* petition to revoke probate] is uncertain, ambiguous, or unintelligible (*Code Civ. Proc. § 430.10(f)*; *see Prob. Code §§ 8251(b), 8271(b)*).

[*Add arguments supporting each ground for demurrer to objection to petition for probate or petition to revoke probate (see, e.g., §§ 186.51 -186.63).*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be used to support a demurrer to (1) an objection to a petition for probate of a will, or (2) a petition to revoke probate of a will, filed under *Code Civ. Proc. § 430.10* and *Prob. Code § 8251(b)* or *8271(b)*. The form is a general one that describes the statutory grounds for demurring to a will contest.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel may wish to show that the facts alleged in a pleading initiating a contest are not sufficient to state a cause of action [*see Code Civ. Proc. § 430.10(e)*; *Estate of Marler (1957) 148 Cal. App. 2d 30, 36-37, 306 P.2d 105]* .

This memorandum may be combined with points and authorities discussing the substantive grounds of the challenge to the will. For example, counsel may combine this form with points and authorities addressing the issues of improper execution of a will [*see §§ 186.51, 186.52*] or undue influence [*see § 186.58*]. This memorandum may also be adapted for use in a trial or appellate brief or in jury instructions.

For discussion of the effect of a no contest clause in the will, see *§ 186.05*.

[b] Opposing Memoranda

In an appropriate case, the *forms in §§ 186.20* or *186.21* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Will Contest Must State Cause of Action and Meet Pleading Requirements

Estate of Marler *(1957) 148 Cal. App. 2d 30, 306 P.2d 105* , involved two objections to a petition for probate (before-probate will contests). One contestant's pleading alleged that: (1) the purported will was not genuine and not the free and voluntary act of the decedent; (2) it was obtained by fraud and undue influence; and (3) the decedent was not of sound mind when the will was executed. The pleading did not mention the relationship of the contestant to the decedent or of the contestant's interest in the estate. The will proponents generally denied the allegations of the contest and particularly alleged that the contestant was not a party in interest or an heir at law of the decedent, but merely the nephew of the deceased husband of the decedent, and sought dismissal of the contest. On the date of the hearing, another contestant filed an answer and joined with the first contestant in contesting probate of the will. The second contestant's pleading was apparently served on the proponents several days earlier. Her grounds for contesting the will were similar to those advanced by the first contestant. The will proponents moved for judgment on the pleadings and to strike the answer of the second contestant, and the first contestant moved to amend his pleadings. The trial court denied the first contestant's motion, entered a judgment against him, and struck the answer of the second contestant.

The court of appeal affirmed the judgment on the pleadings as to the first contestant, but reversed the order striking the pleading of the second contestant. The court held that a will contest must contain a statement of facts constituting the contestant's cause of action in ordinary and concise language, and the statement of facts must answer all requirements of the general rules of pleading (*148 Cal. App. 2d 30, 36-37)* . The contestants claimed that: (1) the proponents waived the ground of lack of standing by not specifically demurring on that ground; (2) the proponents cured any defects in the first contestant's pleadings by answering the pleadings without demurring; (3) the court erred in granting judgment on the pleadings; and (4) the court abused its discretion by not allowing the first contestant to amend his pleading. The court disagreed, finding that: (1) the proponents' answer alleging the first contestant was not an interested party sufficiently raised the question of standing; (2) the burden of alleging sufficient facts as to standing was on the contestants; (3) the proponents' motion for judgment on the pleadings was properly granted since the first contestant's pleading lacked the essential allegation of standing; and (4) the first contestant was apprised of the fact that his interest in the contest was not sufficiently alleged, and took nine months to seek to amend his pleading. Furthermore, it did not appear that the pleading could be amended so as to establish his standing to contest the will. As to the second contestant's pleading, the court determined that the substance of the pleading showed it to be an independent will contest rather than an answer. The court found that the second contestant's pleading was defective in several particulars, including the allegation of legal conclusions rather than supporting facts, but that the provisions concerning undue influence and testamentary incapacity constituted a sufficient pleading. Under these circumstances, te trial court was not authorized to admit he will to probate before the determination of the issues presented (*148 Cal. App. 2d 30, 37)* .

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CHAPTER 186 PROBATE OF WILLS
PART II. FORMS
B. Opposing Will Contests

18-186 California Points & Authorities § 186.51

§ 186.51 Opposing Contest of Will--By Demurrer to Objection or Petition Contesting Will [Prob. Code §§ 8251, 8271(b)]--Formal Will Was Properly Executed [Prob. Code § 6110]

[1] FORM

[*The following should be combined with a general memorandum opposing a will contest or a petition to revoke probate of a will (see § 186.50), or may be used in a trial or appellate brief.*]

THE COURT SHOULD DISMISS THE _____ [OBJECTION TO THE PETITION FOR PROBATE *or* PETITION TO REVOKE PROBATE] OF THE _____ [WILL *or* CODICIL] OF _____ [*name of decedent*] BECAUSE THE _____ [WILL *or* CODICIL] WAS EXECUTED IN [SUBSTANTIAL] COMPLIANCE WITH THE STATUTORY REQUIREMENTS FOR THE EXECUTION OF FORMAL WILLS.

A. Writing Required. [*See § 186.22, Paragraph A.*]

B. Signature Required. [*See § 186.22, Paragraph B.*]

C. Witnesses Required. [*See § 186.22, Paragraph C.*]

D. Presumption of Due Execution. A presumption that a will has been duly executed arises on proof of the signatures of the testator and the witnesses *Estate of Burdette (2000) 81 Cal. App. 4th 938, 946, 97 Cal. Rptr. 2d 263* .

E. Extrinsic Evidence Admissible to Show Proper Execution. Extrinsic evidence is admissible to determine whether a will is properly executed under *Probate Code Section 6110* (*Prob. Code § 6111.5*).

[*Optional*] **F. Signing by Mark Permissible.** If the testator cannot write, the testator may sign the will by mark if the name of the testator is typewritten or handwritten near the mark by a witness and the name of the witness is added (*Civ.Code § 14*; *Code Civ. Proc. § 17*; *Prob. Code § 1000*; *Estate of McCabe (1990) 224 Cal. App. 3d 330, 333-334,*

274 Cal. Rptr. 43).

[*Optional*] **G. Signature by Interested Witness Permissible.** A will, or any provision of a will, is not invalid because the will is signed by an interested witness (*Prob. Code § 6112(b)*).

[*Optional*] **H. Statutory Will Was Properly Executed.** A statutory will is properly executed if the testator completes the appropriate blanks in the will form and signs the will, and each witness observes the testator's signing of the will and signs his or her name in the testator's presence (*Prob. Code § 6221*). [*Optional:* If a statutory will meets the requirements for execution of a formal will, *i.e.*, it is properly signed and witnessed, it must be admitted to probate even if the testator did not personally complete all of the blanks inthe form (*Estate of Perry (1996) 51 Cal. App. 4th 440, 444-446, 58 Cal. Rptr. 2d 797*)].

[*Optional*] **I. Testimony of One Subscribing Witness Is Sufficient to Show Due Execution of Will.** Due execution of the will may be shown by the testimony of one of the subscribing witnesses; the proponent of a will need not produce both subscribing witnesses to prove due execution (*Estate of Burdette (2000) 81 Cal. App. 4th 938, 945-946, 97 Cal. Rptr. 2d 263*).

[2] Comments

[a] Use of Form

This memorandum may be submitted to support a demurrer to (1) an objection to a petition for probate of a formal will or (2) a petition to revoke probate of a formal will, when the contestant alleges that the will was not properly executed [*see Prob. Code §§ 6110, 6112*]. Optional Paragraphs F and G may be used, respectively, when the will was signed by a mark or witnessed by an interested witness. Optional Paragraph H may be included when the will in question is a statutory will. Optional Paragraph I may be used if only one of the subscribing witnesses is available to testify regarding the execution of the will.

This memorandum may also be submitted to support a demurrer to an objection to a petition for probate of a statutory will [*Prob. Code § 6200 et seq.*], when the contestant alleges that the will was not executed in accordance with the statutory requirements.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, if substantial compliance with the statutory execution requirements is alleged [*see Prob. Code § 6110*], counsel should discuss facts showing both the execution procedure followed by the testator and the manner in which that procedure satisfies the policy considerations behind the requirement in question [*see Estate of McCabe (1990) 224 Cal. App. 3d 330, 333-334, 274 Cal. Rptr. 43]* .

This memorandum may be combined with points and authorities pertaining to the specific procedural context in which the issue of due execution of the will arises. Thus, it may be combined with the points and authorities pertaining to a demurrer to an objection or petition contesting a will [*see § 186.50*].

[b] Opposing Memoranda

In an appropriate case, the *form in § 186.22* may be used to oppose the contention supported by the points and authorities in this form.

[3] Discussion of Authorities

[a] Presumption of Due Execution

Estate of Burdette *(2000) 81 Cal. App. 4th 938, 97 Cal. Rptr. 2d 263* , states the general presumption that a will has been duly executed on proof of the signatures of the testator and the witnesses. This presumption can be used by the proponent of a will when the witnesses are dead, unavailable, unable to testify or recollect, or are adverse or corrupt. The court held that in this case the petitioner met the burden of establishing due execution by proving the decedent's signature and the signatures of the two witnesses on the will, and the circumstances under which they signed, through the testimony of one of the witnesses. It held that the testimony of the other witness, who no longer resided in California, was not necessary to prove due execution, but that the trial court could properly admit the sworn statement of this witness under *Prob. Code § 8224* (*81 Cal. App. 4th 938, 943-946)* .

[b] Signature by Interested Witness Permissible

In ***Estate of McCabe*** *(1990) 224 Cal. App. 3d 330, 274 Cal. Rptr. 43* , the decedent's widow contested the admission of the decedent's will to probate on the ground that the will, which was signed by a mark, was not executed with the required formalities for signatures by mark. The will was prepared by the decedent's attorney, and brought to the decedent in the hospital. The decedent signed the will by an "X" placed near his typewritten name on the will. The attorney witnessed the mark near the typewritten name, but did not write the testator's name again near the mark as required by *Civ. Code § 14* and *Code Civ. Proc. § 17*. The will itself was also properly witnessed by two witnesses. The trial court granted the widow's motion for summary judgment and denied probate of the will. The proponents appealed, alleging substantial compliance with the signature by mark requirements.

The court of appeal reversed and held that there was substantial compliance with the statutory requirements for signature by mark. The court noted that the policy of requiring strict compliance with the statutoryexecution requirements is ordinarily applied in situations where it serves the purpose of protecting the testator from fraud. The competing policy favoring validity of wills takes into account the purpose of the statutory requirements and the extent to which that purpose is satisfied in a particular case. The purpose of the requirement that the witness to the mark write the testator's name near the mark is to show what name the mark is intended to represent. This purpose was satisfied here by the fact that the testator's typewritten name appeared immediately below the mark. The mark was clearly intended to represent the typewritten name, and no sound purpose or policy would be served by invalidating the will for the attorney's failure to write the testator's name near the mark at the time he witnessed the mark. The opportunity for fraud was minimal, since there were two separate witnesses to the execution procedure (*224 Cal. App. 3d 330, 333-334)* .

[c] Was Properly Executed Statutory Will

Any individual, who is of sound mind and over 18 years of age, may execute a California statutory will (*Prob. Code § 6220*). This type of will must meet the following requirements for execution: (1) the testator must complete the appropriate blanks in the will form (*see Prob. Code § 6240*) and sign the will; and (2) each witness must observe the testator signing the will and each witness must sign his or her name in the testator's presence (*Prob. Code § 6221*). Notwithstanding the requirements for execution of a will set forth in *Prob. Code § 6110*, a document executed on a California statutory will form is valid as a will if all of the following requirements are shown to be satisfied by clear and convincing evidence: (1) the form is signed by the testator; (2) the court is satisfied that the testator knew and approved of the contents of the will and intended it to have testamentary effect; and (3) the maker's testamentary intent, as reflected in the document, is clear (*Prob. Code § 6226(c)*).

In ***Estate of Perry*** *(1996) 51 Cal. App. 4th 440, 58 Cal. Rptr. 2d 797* , the trial court granted summary judgment to contestants of a California statutory will on the ground that the requirements of *Prob. Code § 6221(a)* for execution of the will were not met because some of the blanks in the will form were not personally completed by the decedent or in his presence and at his direction. The court of appeal reversed the summary judgment, holding that a triable issue existed concerning whether the will was properly executed under *Prob. Code § 6110*, which the court held applies to a California statutory will. If the will meets the requirements of *Prob. Code § 6110*, *i.e.*, it was properly signed and witnessed, probate cannot be denied on the basis that the testator did not personally complete all of the blanks in the

form (*51 Cal. App. 4th 440, 444-446)* .

[d] Testimony of One Subscribing Witness Is Sufficient to Show Due Execution of Will

Estate of Burdette *(2000) 81 Cal. App. 4th 938, 97 Cal. Rptr. 2d 263* , is *discussed under § 186.51[3][a]*. In that case, the court held that the testimony of the second witness, who no longer resided in California, was not necessary to prove due execution, but that the trial court could properly admit the sworn statement of this witness under *Prob. Code § 8224* (*81 Cal. App. 4th 938, 943-946)* .

[4] Additional Authorities

[a] Statutory Will Was Properly Executed

In *Estate of Smith (1998) 61 Cal. App. 4th 259, 71 Cal. Rptr. 2d 424* , which involved a will contest concerning a properly witnessed statutory will with trust, the trial court erred in considering that it was bound by the requirements for reviewing the execution of statutory wills set forth in *Prob. Code § 6226(c)*. These requirements substantially alter the usual scope of inquiry in a will contest, but do not apply to a property witnessed statutory will or to any statutory will with a trust (*61 Cal. App. 4th 259, 266)* . The court of appeal held that the trial court should not have applied the standards set out in *Prob. Code § 6226(c)* because this provision's requirement of findings by clear and convincing evidence applies only to a statutory will that fails to meet the witness requirements of *Prob. Code § 6110* (*61 Cal. App. 4th 259, 268* ; following *Estate of Perry (1996) 51 Cal. App. 4th 440* , *discussed under § 186.51[4][a]*). A statutory will may qualify for probate under *Prob. Code § 6110* even if it is defective under *Prob. Code § 6221*, because *Prob. Code § 6113* provides that a written will is validly executed if its execution complies with *Prob. Code § 6110* or Chapter 6 (*Prob. Code § 6200 et seq* (California statutory will)) (*61 Cal. App. 4th 259, 269)* . Thus, the trial court should have accepted the contestants' concession that their objection based on a failure to comply with *Prob. Code § 6221* was unsupportable when they had claimed that the testator had failed to complete all of the appropriate blanks in the will by failing to specify a date or an executor; neither a date nor a designated executor is required for a will to be duly executed under *Prob. Code § 6110* (*61 Cal. App. 4th 259, 269)* .

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18-186 California Points & Authorities § 186.52

§ 186.52 Opposing Contest of Will--By Demurrer to Objection or Petition Contesting Will [Prob. Code §§ 8251, 8271(b)]--Holographic Will Was Properly Executed [Prob. Code § 6111]

[1] FORM

[*The following should be combined with a general memorandum opposing a will contest or a petition to revoke probate of a will (see § 186.50), or may be used in a trial or appellate brief.*]

THE COURT SHOULD DISMISS THE _____ [OBJECTION TO THE PETITION FOR PROBATE *or* PETITION TO REVOKE PROBATE] OF THE _____ [WILL *or* CODICIL] OF _____ [*name of decedent*] BECAUSE THE INSTRUMENT WAS A HOLOGRAPHIC DOCUMENT EXECUTED IN [SUBSTANTIAL] COMPLIANCE WITH THE STATUTORY REQUIREMENTS FOR THE EXECUTION OF HOLOGRAPHIC WILLS.

A. Will in Testator's Handwriting Is Valid. A will that does not comply with the execution requirements of *Probate Code Section 6110* is valid as a holographic will, whether or not witnessed, if the signature and the material provisions are in the handwriting of the testator (*Prob. Code § 6111(a)*). *Probate Code Section 6111* provides an exception to the formalities for a will specified in *Probate Code Section 6110*, and makes valid a holographic or handwritten will if the signature and the material provisions are in the testator's handwriting (*Estate of Brenner (1999) 76 Cal. App. 4th 1298, 1301, 91 Cal. Rptr. 2d 149*). *Probate Code Section 6111* gives validity to an unwitnessed handwritten will because of the "recognized difficulty of forging an entire handwritten instrument" (*Estate of Black (1982) 30 Cal. 3d 880, 888, 181 Cal. Rptr. 222, 641 P.2d 754*).

B. Policy Favors Validity. Both the courts and the legislature have shown a tendency toward liberality in accepting a writing as a holographic will. Substantial compliance with the statutory requirements, not absolute precision, is all that is necessary (*Estate of Black (1982) 30 Cal. 3d 880, 883-884, 181 Cal. Rptr. 222, 641 P.2d 754* ; *Estate of Brenner (1999) 76 Cal. App. 4th 1298, 1301, 91 Cal. Rptr. 2d 149*).

C. No Particular Words or Form Required. A holographic will requires no particular words of form, but need only

show that the maker intended by the writing to dispose of property after his or her death *Estate of Wong (1995) 40 Cal. App. 4th 1198, 1204-1205, 47 Cal. Rptr. 2d 707* ; *Estate of MacLeod (1988) 206 Cal. App. 3d 1235, 1240-1241, 254 Cal. Rptr. 156* .

D. Extrinsic Evidence Admissible. Extrinsic evidence is admissible to determine whether a writing is a will, or to determine the meaning of a will or a portion of a will if the meaning is unclear (*Prob. Code § 6111.5*). The court may look at extrinsic evidence to confirm the testator's intent (*Estate of Brenner (1999) 76 Cal. App. 4th 1298, 1302-1303, 91 Cal. Rptr. 2d 149*).

[*Optional*] **E. Statement of Testamentary Intent May Be in Testator's Handwriting or Printed Form.** Any statement of testamentary intent contained in a holographic will may be set forth either in the testator's own handwriting or as part of a commercially printed form will (*Prob. Code § 6111(c)*); *Estate of Black (1982) 30 Cal. 3d 880, 882, 885-886, 181 Cal. Rptr. 222, 641 P.2d 754*).

[*Optional*] **F. Validity Unaffected by Erasures, New Portions, and Deletions.** Erasures, new portions, or deletions done entirely by the hand of the testator with testamentary intent do not affect the validity of a holographic will (*Estate of Archer (1987) 193 Cal. App. 3d 238, 244, 239 Cal. Rptr. 137*).

[*Optional*] **G. Signature at End of Document Is Not Required.** A holographic will need not be signed at the end (*Estate of Black (1982) 30 Cal. 3d 880, 888, 181 Cal. Rptr. 222, 641 P.2d 754* ; *Estate of Williams (2007) 155 Cal. App. 4th 197, 207* ; *66 Cal. Rptr. 3d 34* ; *Estate of MacLeod (1988) 206 Cal. App. 3d 1235, 1242-1243, 254 Cal. Rptr. 156* ; *Estate of Archer (1987) 193 Cal. App. 3d 238, 244, 239 Cal. Rptr. 137*).

[*Optional*] **H. Witnesses' Signatures Do Not Invalidate Holographic Wills.** The presence of signatures of witnesses will not invalidate an otherwise effective holographic will, even though the testator believed the attestation essential and intended the execution to be in the attested form (*Estate of Archer (1987) 193 Cal. App. 3d 238, 242-243, 239 Cal. Rptr. 137*).

[*Optional*] **I. Holographic Will Is Not Required to Be Dated.** There is no requirement that a holographic will be dated (*see Prob. Code § 6111(b)*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a demurrer to (1) an objection to a petition for probate of a holographic will, or (2) a petition to revoke probate of a holographic will, when the contestant alleges that the will was not properly executed [*see Prob. Code § 6111*]. Optional Paragraph E may be used when the testator has written his or her holographic will on a commercial or other form that contains a printed statement of testamentary intent. Optional Paragraph F may be used when the testator has made erasures, additions, or deletions to the holograph. Optional Paragraph G may be used when the will is signed somewhere other than at the end, and Optional Paragraph H may be used when the will contains an attestation clause and witness signatures. Optional Paragraph I can be used if an issue arises with respect to a holographic will being undated.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, for example, counsel should discuss facts showing that the signature and the material provisions of the will are in the handwriting of the testator [*Prob. Code § 6111(a)*].

This memorandum may be combined with points and authorities pertaining to the specific procedural context in which the issue of due execution of the will arises. Thus, it may be combined with the points and authorities pertaining to a

demurrer to an objection or petition contesting a will [*see § 186.50*].

[b] Opposing Memoranda

In an appropriate case, the points and authorities *set out in § 186.23* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Will in Testator's Handwriting Is Valid

In ***Estate of Brenner*** *(1999) 76 Cal. App. 4th 1298, 91 Cal. Rptr. 2d 149* , the court held that photocopies of a testator's handwritten property dispositions, included in a holographic will, satisfy the statutory requirement that the material provisions of the will must be in the testator's handwriting, as along as the photocopies are properly authenticated. In this case, the purported holographic will was a three-page photocopy of a handwritten list of property dispositions, on which the testator had handwritten various additions, including that note "my will of November 6, 1990 is void," his signature, and the statements "This is my new will," "my trustee and executor, lawyer James Osborne," and "Will of Nov. 6, 1990 is void," followed by the testator's initials. The testator delivered this will to his attorney, James Osborne, and in several conversations with Osborne referred to it as "his holographic will." The trial court found that the testator had handwritten the text of the 1995 instrument, but that it did not qualify as a valid holographic will because the photocopy did not contain the testator's original handwriting. The court of appeal concluded that *Prob. Code § 6111* is properly construed to allow photocopies of the testator's handwritten dispositions, properly authenticated, as well as original ink writings, because photocopies of handwritten testamentary dispositions carry virtually the same assurance of authenticity as original ink. In both instances, the genuineness of the testamentary dispositions tends to be shown by the fact that the testator wrote them out (*76 Cal. App. 4th 1298, 1299, 1302)* .

Estate of Black *(1982) 30 Cal. 3d 880, 181 Cal. Rptr. 222, 641 P.2d 754* , is *discussed under § 186.52[3][e]*.

[b] Policy Favors Validity

In ***Estate of Black*** *(1982) 30 Cal. 3d 880, 181 Cal. Rptr. 222, 641 P.2d 754* , the Supreme Court held that an overly technical application by the courts of the holographic will statute to handwritten testamentary dispositions, which generally are made by people who have no legal training, would seriously limit the effectiveness of the legislative decision to authorize holographic wills (*30 Cal. 3d 880, 884)* .

In ***Estate of Nielson*** *(1980) 105 Cal. App. 3d 796, 165 Cal. Rptr. 319* , the decedent's uncle opposed the admission to probate of a formal will executed by the decedent, claiming that certain handwritten deletions and interlineations appearing on the face of the will revoked the will and were ineffective as a holographic will. The trial court admitted the will to probate over the uncle's objections, and he appealed.

The court of appeal reversed and remanded the case to the trial court to determine whether the handwritten changes on the face of the will were written by the testator. Employing the policy toward a construction favoring validity in determining whether a will has been properly executed, the court held that if the handwritten changes were determined to be in the testator's handwriting, they would constitute a valid holographic will. The typewritten words appearing on the face of the document (i.e., the provisions of the formal will) were not relevant to the substance of the holograph or essential to its validity. The handwriting reasonably compelled the conclusion that the testator intended to incorporate by reference those portions of the typewritten will not modified or revoked by the holograph, and to republish and give validity to those portions (*105 Cal. App. 3d 796, 804-806)* .

[c] No Particular Words or Form Required

In ***Estate of Wong*** *(1995) 40 Cal. App. 4th 1198, 47 Cal. Rptr. 2d 707* , the court stated the general rule that no particular words are required to create a holographic will; however, every holographic will must contain words describing or at least referring to, the property to be disposed of, and showing the testator's intention to dispose of that property (*40 Cal. App. 4th 1198, 1204-1205, 1208-1209)* .

In ***Estate of MacLeod*** *(1988) 206 Cal. App. 3d 1235, 254 Cal. Rptr. 156* , the testator's purported holographic will, which was written in several colors of ink and contained interlineations, corrections, and writing in the margins, was contested on the basis that it was not consistent with the testator's careful and meticulous habits and, therefore, indicated that she did not execute it with testamentary intent. The court of appeal noted that the document, on its face, was described as a will. The court also noted that it was a reasonable, non-eccentric, and complete instrument, which began with specific bequests and ended with a residuary clause. While the instrument may not have reflected the testator's usual care with important legal documents and may have been changed from time to time, even with the intent perhaps at some future time to formalize the will, this did not detract from the conclusion that the testator intended the instrument to be her will (*206 Cal. App. 3d 1235, 1240-1241)* .

[d] Extrinsic Evidence Admissible

In ***Estate of Brenner*** *(1999) 76 Cal. App. 4th 1298, 91 Cal. Rptr. 2d 149* , the court held that *Prob. Code § 6111.5*, which provides that extrinsic evidence is admissible to determine whether a writing claimed to be a will is in fact a will, expands the court's inquiry beyond merely determining if the statutory formalities for a traditional will or a holographic will are satisfied. The court may look at extrinsic evidence to confirm the testator's intent and to determine whether there is any danger of fraud. In this case, the extrinsic evidence consisted of the testimony of the testator's attorney that the testator had delivered the purported holographic will to him and several times referred to this document as "his holographic will." It also consisted of the testimony of a forensic document expert that the photocopied and ink handwriting on the holographic will was the testator's. The court of appeal concluded that this evidence was sufficient to show that the document was the testator's holographic will (*76 Cal. App. 4th 1298, 1302-1303)* .

[e] Statement of Testamentary Intent May Be in Testator's Handwriting or Printed Form

In ***Estate of Black*** *(1982) 30 Cal. 3d 880, 181 Cal. Rptr. 222, 641 P.2d 754* , the Supreme Court held that the testator's reference to a holographic instrument as her will and her statement that she hoped this writing would be given legal effect as a testamentary disposition of her property was sufficient evidence of the testator's intent to authenticate the document as her will (*30 Cal. 3d 880, 888)* . It held that an instrument handwritten on three pages of a partially preprinted stationer's form was a holographic will, because the printed language on the form incorporated in the will was not material to its substance or essential to its validity as a testamentary disposition (*30 Cal. 3d 880, 882, 885-886)* .

[f] Validity Unaffected by Erasures, New Portions, and Deletions

Estate of Archer *(1987) 193 Cal. App. 3d 238, 239 Cal. Rptr. 137* , involved a formal will, a holographic codicil, and an undated, unsigned addition to the holographic codicil. The codicil was entirely handwritten by the testator, and was also attested by two witnesses. The addition appeared on the back of the paper on which the codicil was written. The testator's niece, who claimed to be his sole heir at law, opposed the admission to probate of the addition to the codicil. She claimed that it was not intended as a testamentary document, and that it did not comply with the execution requirements for holographic wills. The decedent's cousin demurred to the contest on the ground that it failed to state a cause of action. The cousin was the sole beneficiary of the residue of the estate by the terms of the addition. Under the formal will, the residue was to be divided among the testator's heirs at law and those of his wife. The trial court sustained the demurrer to the contest without leave to amend, dismissed the contest, and admitted the formal will and both sides of the codicil to probate. The niece appealed.

The court of appeal held that the trial court properly sustained the demurrer without leave to amend as to the allegation that the addition to the codicil was invalid. The court stated that additions or alterations to a valid holographic will or codicil made after the date it is signed, when made in the testator's handwriting and with testamentary intent, adopt the old date and signature. It is not necessary to resort to the doctrine of integration or the doctrine of incorporation by reference to make such additions or alterations a part of the holographic will. These doctrines are not applicable, since such additions or alterations are part of the holographic instrument rather than separate writings (*193 Cal. App. 3d 238, 243-244)* .

[g] Signature at End of Document Is Not Required

In ***Estate of Black*** *(1982) 30 Cal. 3d 880, 181 Cal. Rptr. 222, 641 P.2d 754* , the Supreme Court held that the testator's signature need not be located at the end of the holographic will, but may appear in another part of the will, as long as the testator wrote his or her name there with the intention of authenticating or executing the instrument as his or her will. In this case, the fact that the testator wrote her name on each page of the holographic will was deemed a sufficient signature (*30 Cal. 3d 880, 888)* .

In ***Estate of Williams*** *(2007) 155 Cal. App. 4th 197, 207* ; *66 Cal. Rptr. 3d 34* , the court held that evidence supported the finding that decedent's handwritten document, which had his name written in block letters at the top, and which stated the disposition of some of his assets and included some language of testamentary intent, was a valid holographic will. The court further held that the Probate Code did not require that the holographic will be signed at the bottom provided the testator wrote his name on the document with the intent of authenticating or executing the instrument as his will (*155 Cal. App. 4th 197, 207)* .

In ***Estate of Macleod*** *(1988) 206 Cal. App. 3d 1235, 254 Cal. Rptr. 156* , the testator's purported holographic will was contested on the basis that the will was not signed. The court of appeal noted that while the will was "not the most presentable of documents, and while not dated or subscribed," it did contain a statement by the testator that it was her will and she did sign it, albeit at the beginning of the document, by setting forth at the top of the first page, "Being of sound mind I, Margaret Macleod Horwitz, declare the following to be my last will and testament" (*206 Cal. App. 3d 1235, 1238-1239, 1243)* .

In ***Estate of Archer*** *(1987) 193 Cal. App. 3d 238, 239 Cal. Rptr. 137* , the court of appeal held that a holographic will that appears to be a complete testamentary document is valid although signed elsewhere than at the end. Thus, an addition to a codicil, handwritten by the testator on the back of the original codicil and with testamentary intent, adopted the signature on the front of the codicil as a matter of law (*193 Cal. App. 3d 238, 244)* .

[h] Witnesses' Signatures Do Not Invalidate Holographic Wills

In ***Estate of Archer*** *(1987) 193 Cal. App. 3d 238, 239 Cal. Rptr. 137* , the court of appeal held that an otherwise valid holographic will was not invalidated by the fact that it contained an attestation clause and witness signatures. *Prob. Code § 6111* provides that a writing otherwise meeting the requirements for a holographic will is a valid holographic will whether or not it is witnessed (*193 Cal. App. 3d 238, 242-243)* .

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Volume 18 Chapters 180-189 PRETRIAL PROCEEDINGS---to---PROBATE OF WILLS
CHAPTER 186 PROBATE OF WILLS
PART II. FORMS
B. Opposing Will Contests

18-186 California Points & Authorities § 186.53

§ 186.53 Opposing Contest of Will--By Demurrer to Objection or Petition Contesting Will [Prob. Code §§ 8251, 8271(b)]--Holographic Will Was Properly Executed [Prob. Code § 6111]--Doctrine of Integration Applicable

[1] FORM

[*The following should be combined with a general memorandum opposing a will contest or a petition to revoke probate of a will (see § 186.50), or may be used in a trial or appellate brief.*]

THE COURT SHOULD DISMISS THE _____ [OBJECTION TO THE PETITION FOR PROBATE *or* PETITION TO REVOKE PROBATE] OF THE _____ [WILL *or* CODICIL] OF _____ [*name of decedent*] BECAUSE DECEDENT INTENDED THE _____ [*describe documents sought to be integrated, e.g.*, HOLOGRAPHIC WILL AND THE DECEDENT'S LETTER OF _____ (*date*)] TO BE HIS/HER WILL, AS EVIDENCED BY _____ [*specify, e.g.*, THE FACTS THAT DECEDENT CHARACTERIZED THE DOCUMENTS AS HIS/HER WILL AND THAT HE/SHE KEPT THEM FOLDED TOGETHER].

Integration of Multiple Documents as One Holographic Will. Under the doctrine of integration, two or more handwritten documents that do not refer to one another may be admitted to probate when it is clear that the testator intended them to be his or her will; such intent is evidenced when the several writings are connected by sequence of thought, folded together, or physically form one document (*Estate of Dumas (1949) 34 Cal. 2d 406, 411, 210 P.2d 697*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a demurrer to (1) an objection to a petition for probate of a holographic will, or (2) a petition to revoke probate of a holographic will, when the will proponent claims that two or more handwritten documents should be integrated to form a properly executed holographic will [*see Estate of Dumas (1949) 34 Cal. 2d 406, 411, 210 P.2d 697]* . They may also be adapted for use in a case in which the completeness or

validity of a holographic will is not in dispute and integration is urged merely to add material provisions contained in another document to the will. The issue of integration frequently arises in conjunction with the issue of incorporation by reference, discussed in *§ 186.54*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that two or more handwritten documents that do not refer to one another are clearly intended to be a will [*see Estate of Dumas (1949) 34 Cal. 2d 406, 411, 210 P.2d 697]* .

This memorandum may be combined with points and authorities pertaining to the specific procedural context in which the issue of due execution of the will arises. Thus, it may be combined with the points and authorities pertaining to a demurrer to an objection or petition contesting a will [*see § 186.50*].

[b] Opposing Memoranda

In an appropriate case, the points and authorities *set out in § 186.24* may be used to oppose the contention supported by the points and authorities in this form.

[3] Discussion of Authorities

[a] Integration of Multiple Documents as One Holographic Will

Estate of Dumas *(1949) 34 Cal. 2d 406, 210 P.2d 697* , involved three handwritten sheets of paper entirely in the decedent's handwriting that were offered for probate as an integrated holographic will. The decedent's niece, nephew, and brother-in-law opposed probate on the ground that the second and third sheets could were invalid holographic instruments. The second and third sheets were written nine years after the first. The second sheet contained no signature or date, and the third sheet contained a signature but no date. Both contained various testamentary gifts. The first sheet satisfied all the statutory requirements for a holographic will, but did not contain any testamentary gifts. In addition to recitals of soundness of mind, intent to make a will, and directions appointing executors, it contained the following statement: "The following bequests are to be given my friends herein named." The three sheets were in decedent's the possession until shortly before her death. Two of the beneficiaries visited her shortly before her death, and they asked her if she had a will. She nodded in response, and indicated a satchel in her closet. From the satchel she removed an envelope containing the three sheets, which were folded together, and indicated that they were her will. On her instructions, the sheets were delivered to a person who placed them in her safe deposit box. They remained there until her death. The trial court found that the three sheets formed an integrated holographic will, and admitted them to probate. The contestants appealed.

The California Supreme Court affirmed, holding that there were very pertinent indications that the three papers constituted the decedent's will and that she had properly adopted the date and signature of the first sheet for the rest, thereby re-executing and republishing the will (*34 Cal. 2d 406, 411)* . She declared the sheets to be her will, they were folded in proper and chronological sequence and placed in an envelope, and they remained in her possession until they were moved to a safe place shortly before her death and pursuant to her instructions. The decedent clearly indicated in the first sheet that a disposition of her property was to follow, and the other sheets carried out that intent. The continuity of the three sheets was manifest, as was the intent of the decedent that all the sheets were to be considered together as one continuous and complete document. That continuity was not destroyed by the time interval between the execution of the first and the second and third sheets (*34 Cal. 2d 406, 413-414)* . The Court also cited extensively from *Estate of Finkler (1935) 3 Cal. 2d 584, 46 P.2d 149* , for the rule that a testator may make valid holographic additions or alterations in a holographic will without signing or dating the changes (*34 Cal. 2d 406, 412-414)* .

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Volume 18 Chapters 180-189 PRETRIAL PROCEEDINGS---to---PROBATE OF WILLS
CHAPTER 186 PROBATE OF WILLS
PART II. FORMS
B. Opposing Will Contests

18-186 California Points & Authorities § 186.54

§ 186.54 Opposing Contest of Will--By Demurrer to Objection or Petition Contesting Will [Prob. Code §§ 8251, 8271(b)]--Holographic Will Was Properly Executed [Prob. Code § 6111]--Doctrine of Incorporation by Reference Applicable [Prob. Code § 6130]

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities opposing a will contest or a petition to revoke probate of a will (see § 186.50), or may be used in a trial or appellate brief.*]

THE COURT SHOULD DISMISS THE _____ [OBJECTION TO THE PETITION FOR PROBATE *or* PETITION TO REVOKE PROBATE] OF THE _____ [WILL *or* CODICIL] OF _____ [*name of decedent*] BECAUSE THE _____ [WILL *or* CODICIL] CLEARLY REFERRED TO _____ [*specify document to be incorporated, e.g.,* DECEDENT'S LETTER OF _____ (*date*)] AS PART OF DECEDENT'S WILL, AND THEREBY MANIFESTED AN INTENT TO INCORPORATE _____ [*specify document to be incorporated, e.g.,* THE LETTER] INTO THE WILL.

A. Will May Incorporate Existing Writing. A writing in existence when a will is executed may be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification (*Prob. Code § 6130*).

[*Optional*] **B. Incorporation of Nonholographic Writing.** A holographic will may properly incorporate by reference writings that are not holographic (*Estate of Nielson (1980) 105 Cal. App. 3d 796, 803, 165 Cal. Rptr. 319*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a demurrer to (1) an objection to a petition for probate of a holographic will, or (2) a petition to revoke probate of a holographic will, when the will proponent claims that the will

incorporates an existing writing [*see Prob. Code § 6130*]. It may be also be adapted for use in a case in which the completeness or validity of a holographic will is not in dispute and incorporation is urged merely to add material provisions contained in another document to the will. Optional Paragraph B may be used when the writing to be incorporated is not a holograph. The issue of incorporation by reference frequently arises in conjunction with the issue of integration, discussed in *§ 186.53*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing the existence of a separate document, and that the will manifests an intent to incorporate the document and describes the document sufficiently to permit its identification [*see Prob. Code § 6130*].

This memorandum may be combined with points and authorities pertaining to the specific procedural context in which the issue of due execution of the will arises. Thus, it may be combined with the points and authorities pertaining to a demurrer to an objection or petition contesting a will [*see § 186.50*].

[b] Opposing Memoranda

In an appropriate case, the points and authorities *set out in § 186.25* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Incorporation of Nonholographic Writing

The facts and procedural background of ***Estate of Nielson*** *(1980) 105 Cal. App. 3d 796, 165 Cal. Rptr. 319* , are discussed in *§ 186.52[3][b]*. In *Nielson*, the court of appeal held that a holographic will written on the face of a previously-executed formal will could incorporate by reference those portions of the formal, typewritten will not modified or revoked by the holograph, if that was the intention of the testator. The execution of the holograph republished and validated those portions of the formal will not modified or revoked by the holograph (*105 Cal. App. 3d 796, 804-806)* .

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CHAPTER 186 PROBATE OF WILLS
PART II. FORMS
B. Opposing Will Contests

18-186 California Points & Authorities § 186.55

§ 186.55 Opposing Contest of Will--By Demurrer to Objection or Petition Contesting Will [Prob. Code §§ 8251, 8271(b)]--Testator Had Testamentary Intent

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities opposing a will contest or a petition to revoke probate of a will (see § 186.50), or may be used in a trial or appellate brief.*]

THE COURT SHOULD DISMISS THE _____ [OBJECTION TO THE PETITION FOR PROBATE *or* PETITION TO REVOKE PROBATE] OF THE _____ [WILL *or* CODICIL] OF _____ [*name of decedent*] BECAUSE THE TERMS OF THE _____ [WILL *or* CODICIL], VIEWED IN LIGHT OF THE SURROUNDING CIRCUMSTANCES, SHOW THAT IT WAS EXECUTED WITH TESTAMENTARY INTENT.

A. Will Must Be Executed With Testamentary Intent. A will may not be admitted to probate unless it appears from its terms, viewed in light of the surrounding circumstances, that it was executed with testamentary intent (*Estate of Smith (1998) 61 Cal. App. 4th 259, 265, 71 Cal. Rptr. 2d 424*).

B. Test for Determining Testamentary Intent. The basic test of testamentary intent is whether the testator intended by the particular instrument offered for probate to create a revocable disposition of his or her property to take effect only on his or her death (*Estate of Smith (1998) 61 Cal. App. 4th 259, 265, 71 Cal. Rptr. 2d 424*).

[*Optional*] **C. Declarations of Testator Admissible.** Oral declarations, whether made at, before, or after the execution of the instrument, are admissible, if offered for the purpose of ascertaining the intent with which the instrument was executed, and not for the purpose of proving the meaning the testator attributed to specific provisions of an admitted will (*Estate of Sargavak (1950) 35 Cal. 2d 93, 96-97, 216 P.2d 850]* .

[*Optional*] **D. Nontestamentary Provisions Do Not Affect Document's Testamentary Intent.** If testamentary intent adequately appears, a document's testamentary character is not affected by the fact that it includes nontestamentary

matters (*Estate of Sargavak (1950) 35 Cal. 2d 93, 101, 216 P.2d 850*).

[*Optional*] **E. Interim Will May Be Admitted to Probate.** An interim will is admissible to probate even though the decedent expected to make a later will (*Estate of Crick (1964) 230 Cal. App. 2d 513, 517, 41 Cal. Rptr. 120*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a demurrer to (1) an objection to a petition for probate of a will, or (2) a petition to revoke probate of a will, when the contestant alleges that the will was not executed with testamentary intent [*see Estate of Smith (1998) 61 Cal. App. 4th 259, 265, 71 Cal. Rptr. 2d 424]* . Optional Paragraphs C may be used when the requisite testamentary intent is not clear from the face of the will and must be shown by other evidence. Optional Paragraph D may be used when the will is a letter or other document that discusses nontestamentary matters as well testamentary ones. Optional Paragraph E may be used when the will is an interim will.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss all of the relevant circumstances surrounding the writing of the alleged will or codicil, including the complete text of the document in which allegedly testamentary language appears, statements of the decedent concerning his or her testamentary plans, and the existence of other, more formal testamentary documents [*see Estate of Smith (1998) 61 Cal. App. 4th 259, 265, 71 Cal. Rptr. 2d 424]* .

This memorandum may be combined with points and authorities pertaining to the specific procedural context in which the issue of due execution of the will arises. Thus, it may be combined with the points and authorities pertaining to a demurrer to an objection or petition contesting a will [*see § 186.50*].

[b] Opposing Memoranda

In an appropriate case, the points and authorities *set out in § 186.26* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Will Must Be Executed With Testamentary Intent

In ***Estate of Sargavak*** *(1950) 35 Cal. 2d 93, 216 P.2d 850* , the decedent's attorney, J.O., offered for probate a purported holographic codicil to the decedent's formal will. The formal will left the decedent's entire estate to the contestants. The codicil left the estate to J.O. and S.M., the decedent's long-time friend and business advisor. However, S.M. was also the executor of the decedent's formal will, and he offered the will for probate. The contestants argued that the purported codicil was not executed with testamentary intent. The codicil contained, in relevant part, the following language: "She [the testator] leaves everything she has to her Boy S.M. and her lawyer J.O.--she gives them power of attorney to divide what is left of her belongings to them." The contestants produced evidence, including the testimony of S.M. as to declarations made by the decedent, that the allegedly dispositive provisions of the holographic writing were intended only as a statement that S.M. and J.O. were to dispose of the decedent's property according to the terms of her formal will. The contestants claimed that the decedent's purpose in writing the holograph was to assure the niece of her deceased husband and the niece's daughter that the decedent was not going to provide for them in her will and to authorize S.M. and J.O. to remove them from her home. The niece and her daughter had lived with the decedent on hostile terms, and had argued with the decedent on the day the holograph was written concerning the decedent's duty to provide for them in her will. The trial court admitted the holographic writing to probate, and the contestants appealed.

The California Supreme Court affirmed. The Court noted the rule that an instrument may not be admitted to probate

unless it appears from its terms, viewed in light of the surrounding circumstances, that it was executed with testamentary intent (*35 Cal. 2d 93, 95)* . Thus, it rejected J.O.'s argument that when a will is clear and unambiguous on its face extrinsic evidence cannot be admitted to show that it was not a will. However, the uncontradicted extrinsic evidence as to lack of testamentary intent was not so persuasive and unequivocal that it compelled the conclusion that the decedent did not intend to make the testamentary disposition of her property that the holograph dictated. It only created a conflict with other evidence introduced at the trial, and that other evidence was sufficient to support the trial court's judgment. Nothing in the evidence before the trial court clearly negated the testamentary implication carried by the words used in the holograph (*35 Cal. 2d 93, 101)* .

Estate of Smith *(1998) 61 Cal. App. 4th 259, 71 Cal. Rptr. 2d 424* , involved a will contest between the testator's surviving husband and the testator's daughter and granddaughter. The trial court denied the husband's petition to admit to probate the testator's statutory will that left the testator's estate to the husband, and instead admitted a previously executed holographic will that left the testator's estate to her daughter and granddaughter. The trial court found that the testator signed the statutory will by mistake and that the testator did not intend it to have testamentary effect because the testator did not intend to disinherit her daughter and granddaughter. The court of appeal reversed, finding that none of the extrinsic evidence considered by the trial court, *i.e.*, the terms of both wills, the instructions accompanying the statutory will, and the testimony of witnesses, tended to show that the testator did not intend the statutory will to be effective as a testamentary instrument (*61 Cal. App. 4th 259, 266)* . The court noted that extrinsic evidence is only relevant and admissible if offered for the purpose of ascertaining the intent with which the instrument was executed, and not for the purpose of proving the meaning the testator attributed to specific provisions of the instrument. Thus, the trial court's factual findings regarding the testator's intention to leave her estate to her daughter and granddaughter did not support its decision to deny the statutory will admission to probate (*61 Cal. App. 4th 259, 266)* . The trial court erroneously focused on the testator's intended disposition of her estate, instead of on her intent to execute a testamentary instrument (*61 Cal. App. 4th 259, 266)* .

The court of appeal also noted that a mistake by the testator does not preclude admission of a will to probate unless the mistake vitiates the execution of the will or the formation of testamentary intent (*61 Cal. App. 4th 259, 270)* . In this context, "testamentary intent" does not refer to the testator's intentions regarding particular dispositions of property, but means the testator's general intent to make a revocable disposition of his or her property, effective on the testator's death (*61 Cal. App. 4th 259, 270)* .

Estate of MacLeod *(1988) 206 Cal. App. 3d 1235, 254 Cal. Rptr. 156* , involved a purported holographic will that consisted of three undated handwritten pages found in the bedside table at the decedent's home after her death. The pages were written in several colors of ink and contained interlineations, corrections, and writing in the margin. At the top of the first page was the following sentence: "Being of sound mind I, Margaret MacLeod Horwitz, declare the following to be my last will and testament." The decedent's name was included in this sentence by use of a caret mark and superscription. The document went on to make various numbered bequests, and ended with a residuary bequest. No signature appeared at the end of the document. The trial court admitted the document as the decedent's last will. The decedent's stepson appealed, claiming that: (1) the purported will was not signed with the intent to authenticate it as a will; (2) it was executed without testamentary intent; and (3) it was not dated.

The court of appeal affirmed, noting that the contestant's argument that the decedent was a well-educated, formal, and punctilious woman who would not have intended the unsubscribed, scribbled, and interlineated document to be her will also supported the trial court's opposite conclusion that the decedent was not the type of person who would have chosen to die intestate. The court also noted that the document made a complete disposition of the decedent's property, and was organized like a will in that it began with a statement that it was a will and ended with a residuary clause. It was reasonable, noneccentric, and complete (*206 Cal. App. 3d 1235, 1240-1241)* . Although the document may have failed to reflect the decedent's usual care with important legal documents and may have been changed from time to time, maybe even with the intent to formalize it at some future time, this did not detract from the conclusion that the decedent intended it to serve as her will (*206 Cal. App. 3d 1235, 1241)* . The court pointed out that the holographic will statute

in effect when the decedent died did not require holographic wills to be signed at the end or dated. It appeared from the face of the will, the organization of the document as a will, and the terms of the will that the decedent wrote her name on it with the intention of authenticating or executing it as her will (*206 Cal. App. 3d 1235, 1243)* .

[b] Test for Determining Testamentary Intent

The facts and procedural background of ***Estate of Sargavak*** *(1950) 35 Cal. 2d 93, 216 P.2d 850* , are *discussed under § 186.55[3][a]*. In *Sargavak,* the California Supreme Court held that testamentary intent was demonstrated by the words "She [the testator] leaves everything she has to her Boy S.M. and her lawyer J.O.--she gives them power of attorney to divide what is left of her belongings to them." Applying the rule that the testator must have intended, by the particular instrument offered for probate, to make a revocable disposition of his or her property to take effect on his or her death, the Court found that these words were sufficient to show such intent (*35 Cal. 2d 93, 101)* .

[c] Declarations of Testator Admissible

The facts and procedural background of ***Estate of Sargavak*** *(1950) 35 Cal. 2d 93, 216 P.2d 850* , are *discussed under § 186.55[3][a]*. In *Sargavak,* the California Supreme Court held that regardless of the language of the allegedly testamentary instrument, extrinsic evidence, including declarations made by the decedent before, at, or after the execution of the instrument, may be introduced to show that it was not intended by the testator to be effective as a will (*35 Cal. 2d 93, 96-97)* . Even an instrument that clearly appears testamentary may nevertheless be shown by extrinsic evidence to have been executed for some other purpose (*35 Cal. 2d 93, 96)* . Thus, evidence that the decedent intended the words "She [the testator] leaves everything she has to her Boy S.M. and her lawyer J.O." merely as a statement that S.M. and J.O. were to dispose of her property according to the terms of her formal will and to authorize S.M. and J.O. to remove certain other persons from her home was admissible (*35 Cal. 2d 93, 96-97)* .

[d] Nontestamentary Provisions Do Not Affect Document's Testamentary Intent

The facts and procedural background of ***Estate of Sargavak*** *(1950) 35 Cal. 2d 93, 216 P.2d 850* , are *discussed under § 186.55[3][a]*. In *Sargavak,* the California Supreme Court held that a document clearly exhibiting testamentary intent was not invalidated as a testamentary document by the fact that it also covered nontestamentary matters (*35 Cal. 2d 93, 101)* . The Court found that testamentary purpose was clearly expressed by the terms of the instrument, and it was not negated by evidence that the decedent had an additional purpose in writing the instrument (*35 Cal. 2d 93, 98)* .

[e] Interim Will May Be Admitted to Probate

The facts and procedural background of ***Estate of Crick*** *(1964) 230 Cal. App. 2d 513, 41 Cal. Rptr. 120* , are discussed in *§ 186.52[3][c]*. In *Crick,* the court of appeal held that certain language in a holographic instrument indicating that the decedent intended to make a formal will at a later date did not destroy the instrument's character as a will (*230 Cal. App. 2d 513, 520)* . The court stated that it is immaterial to the validity of a will that the decedent intended, at the time the will was executed, to execute a superseding will at some future time (*230 Cal. App. 2d 513, 517)* .

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Volume 18 Chapters 180-189 PRETRIAL PROCEEDINGS---to---PROBATE OF WILLS
CHAPTER 186 PROBATE OF WILLS
PART II. FORMS
B. Opposing Will Contests

18-186 California Points & Authorities § 186.56

§ 186.56 Opposing Contest of Will--By Demurrer to Objection or Petition Contesting Will [Prob. Code §§ 8251, 8271(b)]--Testator Had Testamentary Capacity [Prob. Code § 6100.5(a)]

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities opposing a will contest or a petition to revoke probate of a will (see § 186.50), or may be used in a trial or appellate brief.*]

THE COURT SHOULD DISMISS THE _____ [OBJECTION TO THE PETITION FOR PROBATE *or* PETITION TO REVOKE PROBATE] OF THE _____ [WILL *or* CODICIL] OF _____ [*name of decedent*] BECAUSE DECEDENT HAD TESTAMENTARY CAPACITY, IN THAT DECEDENT (1) UNDERSTOOD WHAT HE/SHE WAS DOING WHEN HE/SHE EXECUTED THE _____ [WILL *or* CODICIL], (2) UNDERSTOOD AND RECOLLECTED THE NATURE AND SITUATION OF HIS/HER PROPERTY, AND (3) UNDERSTOOD AND REMEMBERED HIS/HER RELATIONS TO THE PERSONS WHO WERE THE NATURAL OBJECTS OF HIS/HER BOUNTY AND WHOSE INTERESTS WERE TO BE AFFECTED BY THE _____ [WILL *or* CODICIL].

A. Who May Make Will. [*see § 186.27, Paragraph A.*]

B. Testamentary Capacity Defined. A testator is competent to make a will if he or she has sufficient mental capacity to understand the nature of the testamentary act, to understand and recollect the nature and situation of his or her property, and to remember and understand his or her relations to the persons who are the natural objects of his or her bounty and whose interests are affected by the provisions of the instrument (*Estate of Fritschi (1963) 60 Cal. 2d 367, 372, 33 Cal. Rptr. 264, 384 P.2d 656* ; *Estate of Mann (1986) 184 Cal. App. 3d 593, 602, 229 Cal. Rptr. 225* ; *see Prob. Code § 6100.5(a)(1)*).

C. Testamentary Capacity Determined at Time Will Executed. Testamentary capacity must be determined at the time of execution of the will (*Estate of Fritschi (1963) 60 Cal. 2d 367, 372, 33 Cal. Rptr. 264, 384 P.2d 656*).

D. Burden of Proof on Contestant. The testator is presumed sane and competent and the burden rests on the contestant to show that the testator lacked testamentary capacity at the time he or she executed the will (*Estate of Fritschi (1963) 60 Cal. 2d 367, 372, 33 Cal. Rptr. 264, 384 P.2d 656* ; *see Goodman v. Zimmerman (1994) 25 Cal. App. 4th 1667, 1678, 32 Cal. Rptr. 2d 419* ; *see also Prob. Code § 810(a)*).

[*Optional*] **E. Old Age and Forgetfulness Not Dispositive.** Old age or forgetfulness, eccentricities, or mental feebleness or confusion at various times of a party making a will are not enough in themselves to warrant a holding that the testator lacked testamentary capacity (*Estate of Mann (1986) 184 Cal. App. 3d 593, 603, 229 Cal. Rptr. 225* ; *see Prob. Code §§ 810(b), 6100(b)*).

[*Optional*] **F. Appointment of Conservator Not Dispositive.** The mere fact that a conservator has been appointed for the testator during the testator's lifetime does not require a finding of testamentary capacity and does not shift the burden of proof from the contestants (*Estate of Mann (1986) 184 Cal. App. 3d 593, 603-604, 229 Cal. Rptr. 225* ; *see Prob. Code §§ 810(a), 6100(b)*).

[*Optional*] **G. Ability to Transact Business Not Required.** Inability to transact ordinary business does not establish testamentary incapacity (*Estate of Mann (1986) 184 Cal. App. 3d 593, 605, 229 Cal. Rptr. 225*).

[*Optional*] **H. Presumption That Will Made During Periods of Lucidity.** If a testator had a mental disorder in which there were lucid periods, it is presumed that the testator's will was made during a period of lucidity (*Estate of Mann (1986) 184 Cal. App. 3d 593, 604, 229 Cal. Rptr. 225*).

[*Optional*] **I. Mistaken Belief Is Not Delusion if Any Evidence Supports Belief.** Even if one's beliefs are inaccurate, a mistaken belief does not justify overturning a will where there is any evidence supporting the belief (*Goodman v. Zimmerman (1994) 25 Cal. App. 4th 1667, 1675-1676, 1678, 32 Cal. Rptr. 2d 419*).

[*Optional*] **J. *Probate Code Section 6100.5* Closely Adheres to Common Law.** The language and legislative history of *Probate Code Section 6100.5* demonstrate that the statute was intended to closely adhere to the common law as it pertained to testamentary capacity. Thus, to the extent the language of Section 6100.5 presents any ambiguity with respect to delusions and the level of proof required, prestatutory case law may be of guidance (*see Goodman v. Zimmerman (1994) 25 Cal. App. 4th 1667, 1676-1677, 32 Cal. Rptr. 2d 419*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a demurrer to (1) an objection to a petition for probate of a will, or (2) a petition to revoke probate of a will, when the contestant alleges that the testator lacked testamentary capacity at the time the will was executed [*see Prob. Code § 6100.5(a)(1)*; *Estate of Fritschi (1963) 60 Cal. 2d 367, 372, 33 Cal. Rptr. 264, 384 P.2d 656]* .

Optional Paragraphs E and F deal with various specific facts and items of evidence that do not, in themselves, establish testamentary incapacity. Optional Paragraph G may be used when the contest cites the testator's inability to transact business as evidence of his or her incapacity. Optional Paragraph H may be used when the testator had a mental disorder characterized by periods of lucidity and nonlucidity. Optional Paragraph I may be used when the contestant is relying on a narrow delusion regarding a particular subject matter, but there is evidence that supports the testator's belief. Optional Paragraph J may be used when counsel wishes to rely on case law consistent with, but predating, *Prob. Code § 6100.5*.

The issue of testamentary incapacity frequently arises in conjunction with the issue of undue influence, discussed in *§*

186.58.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. For example, counsel should discuss facts showing that the decedent understood the nature of the testamentary act, that the decedent understood the nature and situation of his or her property, and that the decedent remembered the persons who were the natural objects of the decedent's bounty and whose interests were to be affected by the decedent's will [*see Prob. Code § 6100.5(a)(1)*; *Estate of Fritschi (1963) 60 Cal. 2d 367, 372, 33 Cal. Rptr. 264, 384 P.2d 656* ; *Estate of Mann (1986) 184 Cal. App. 3d 593, 602, 229 Cal. Rptr. 225]* .

This memorandum may be combined with points and authorities pertaining to the specific procedural context in which the issue of due execution of the will arises. Thus, it may be combined with the points and authorities pertaining to a demurrer to an objection or petition contesting a will [*see § 186.50*].

[b] Evidence of Deficit in Mental Functions Required for Finding of Incapacity

The diagnosis of a mental or physical disorder will not be sufficient in and of itself to support a determination that a person is of unsound mind or lacks the capacity to make a will [*Prob. Code § 811(d)*; *see also Prob. Code § 810(b)* (legislative declaration)]. A determination that a person is of unsound mind or lacks the capacity to make a decision or do a certain act, including the incapacity to execute a will, must be supported by evidence of a deficit in at least one of the following mental functions [*Prob. Code § 811(a)*]:

(1) Alertness and attention, including, but not limited to:

(a) Level of arousal or consciousness.

(b) Orientation to time, place, person, and situation.

(c) Ability to attend and concentrate.

(2) Information processing, including, but not limited to:

(a) Short- and long-term memory, including immediate recall.

(b) Ability to understand or communicate with others, either verbally or otherwise.

(c) Recognition of familiar objects and familiar persons.

(d) Ability to understand and appreciate quantities.

(e) Ability to reason using abstract concepts.

(f) Ability to plan, organize, and carry out actions in one's own rational self-interest.

(g) Ability to reason logically.

(3) Thought processes. Deficits in these functions may be demonstrated by the presence of:

(a) Severely disorganized thinking.

(b) Hallucinations.

(c) Delusions.

(d) Uncontrollable, repetitive, or intrusive thoughts.

(4) Ability to modulate mood and affect. Deficits in this ability may be demonstrated by the presence of a pervasive and persistent or recurrent state of euphoria, anger, anxiety, fear, panic, depression, hopelessness or despair, helplessness, apathy or indifference, which is inappropriate in degree to the individual's circumstances.

A deficit in the mental functions listed above may be considered only if the deficit, by itself or in combination with one or more other mental function deficits, significantly impairs the person's ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question [*Prob. Code § 811(b); see also Prob. Code § 811(a)* (requiring evidence of correlation between deficit and act in question)]. In determining whether a person suffers from a deficit in mental function so substantial that the person lacks the capacity to do a certain act, the court may take into consideration the frequency, severity, and duration of periods of impairment [*Prob. Code § 811(c)*].

[c] Effect of Criteria for Determining Capacity

Prob. Code § 811 does not alter the statutory definition of the circumstances under which a person is deemed to lack the capacity to make a valid will as stated in *Prob. Code § 6100.5(a)* [*see § 186.27[2][b]*]. However, it does prescribe a minimum level of evidence that must be presented to support a determination that a testator lacked testamentary capacity, and the character of findings that must be made in support of that determination [*see Prob. Code § 811(e)*]. It follows from these requirements that if the evidence does not demonstrate the existence of a deficit in one of the specific mental functions specified above, or if there is an insufficient showing of a correlation between the deficit and the decedent's testamentary capacity, these facts may be raised by the party opposing a challenge to the will. Thus, for example, evidence that the testator was diagnosed to be suffering from a particular medical condition will be insufficient by itself to invalidate the will unless evidence of a deficit in one or more of the mental functions noted above is also presented.

[d] Attorney's Duty With Respect to Ascertaining Decedent's Testamentary Capacity

An attorney preparing a will for a testator does not owe a duty to the beneficiary of the will or to the beneficiary under a prior will to ascertain and document the client's testamentary capacity. When the testator's testamentary capacity is the basis for a will challenge, the testator's true intent is the central question, and that intent cannot be ascertained from the will or other challenged estate plan document. The attorney who is persuaded of the client's testamentary capacity by the attorney's own observations and experience, and who drafts the will accordingly, fulfills the attorney's duty of loyalty to the testator. In doing so, the attorney should not be required to consider the effect of the new will on beneficiaries under a former will or beneficiaries of the new will. These beneficiaries do not have a cause of action against the attorney for malpractice. Their remedy is to contest the probate and challenge the will on the ground that the testator lacked testamentary capacity at the time of executing the will [*Moore v. Anderson Zeigler Disharoon Gallagher & Gray (2003) 109 Cal. App. 4th 1287, 1298-1307, 135 Cal. Rptr. 2d 888]* .

Following the principles set forth in *Moore*, a subsequent decision held that although an attorney who is retained to provide testamentary legal services to a testator may also have a duty to act with due care for the interests of an intended third-party beneficiary, the attorney's primary duty is owed to the testator-client, and the attorney's paramount obligation is to serve and carry out the testator's intentions. When there is a question about whether the third party was in fact the testator's intended beneficiary, and the third party claims that the attorney failed to adequately ascertain the testator's intent or capacity, the attorney is not liable to the third party. In such a case, the attorney's sole duty is to the testator, and the attorney does not owe a duty to the testator's beneficiaries to evaluate and ascertain the testator's capacity to

make a new will. An attorney who is persuaded of the testator's intent to dispose of his or her property in a certain manner, and who drafts the will accordingly, fulfills his or her duty of loyalty to the client and is not required to urge the testator to consider an alternative plan to forestall a claim by someone thereby excluded from the will or included in the will but deprived of a specific asset that is devised to someone else. Any other conclusion would place the attorney in an untenable position of divided loyalty. As noted by the court in *Moore*, an intended beneficiary's remedy in such a case is to contest the will on the ground that the testator lacked testamentary capacity or intent [*Boranian v. Clark (2004) 123 Cal. App. 4th 1012, 1014, 20 Cal. Rptr. 3d 405]* .

[e] Opposing Memoranda

In an appropriate case, the points and authorities *set out in § 186.27* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Testamentary Capacity Defined

In ***Estate of Fritschi*** *(1963) 60 Cal. 2d 367, 33 Cal. Rptr. 264, 384 P.2d 656* , the decedent's ex-wife opposed probate of the decedent's will, on behalf of her children, on the grounds that (1) the decedent lacked testamentary capacity when the will was executed, and (2) the will was obtained by the undue influence of the decedent's girlfriend. The will was a formal, witnessed will, prepared by an attorney. It changed the terms of an earlier will by placing the proceeds of a life insurance policy in trust for the decedent's children, instead of giving the proceeds directly to the children, and by directing the payment of estate taxes entirely from the policy rather than by proration. This change benefitted the girlfriend, who was the residual legatee. The decedent executed the will while he was hospitalized with terminal cancer. Various medical and lay witnesses testified as to the decedent's "disturbed" attitude toward his children, the effect of the drugs he was given in the hospital on his competency, and his general soundness of mind during his hospitalization. Conflicting testimony was given concerning the girlfriend's presence at discussions concerning the will and at the execution of the will. The trial court found that the will had been executed without testamentary capacity and under undue influence, and denied probate. The girlfriend appealed.

The California Supreme Court reversed, holding that "without doubt," the record did not support a finding of testamentary incapacity (*60 Cal. 2d 367, 368)* . The determinants of testamentary capacity are whether the individual has sufficient mental capacity to be able to understand the nature of the testamentary act, to understand and recollect the nature and situation of his or her property, and to remember and understand his or her relations to the persons who have claims on his or her bounty and whose interests are affected by the provisions of the instrument (*60 Cal. 2d 367, 372)* . In reviewing the evidence that the testator had testamentary capacity when the will was executed, the Court called it "revealing" that the contestant asked none of the doctors whom they called as witnesses for an opinion of the decedent's competency (*60 Cal. 2d 367, 371)* .

In ***Estate of Mann*** *(1986) 184 Cal. App. 3d 593, 229 Cal. Rptr. 225* , the decedent's nephew, the primary beneficiary and proponent of the decedent's will, had been the decedent's conservator for six years. The proponent had been close to the decedent all his life, and she had helped raise him. The decedent's physician stated in the conservatorship proceeding that at that time the decedent was "unable to rationally and intelligently handle her own affairs." He stated that the decedent sometimes appeared very senile, and sometimes more oriented. Several other witnesses testified that the decedent was mentally competent and able to carry on a coherent conversation during the two-year period when the conservatorship proceedings and the execution of the will took place. The will was drawn about nine months after the conservatorship proceedings by an attorney who was a friend of the proponent. The proponent was on the premises but not immediately present when the attorney discussed the will with the decedent. All three witnesses to the will, the proponent, the decedent's physician, and the decedent's housekeeper, testified that at the time of the execution the decedent was alert and knew she was signing a will. Another nephew opposed probate of the decedent's will on the

grounds that (1) the proponent procured the will through undue influence, and (2) the decedent lacked testamentary capacity when the will was executed. The decedent's undisclosed gift of $10,000 to the proponent, shortly before the conservatorship proceedings, as well as the decedent's purchase after the conservatorship proceedings of a hot tub that was used mainly by the proponent and his friends were also issues at trial. The trial court found that the decedent was of unsound mind at the time she executed the will and that its execution was obtained through undue influence. The proponent appealed.

The court of appeal reversed. After considering the determinants of testamentary capacity and other matters [relying on *Estate of Fritschi (1963) 60 Cal. 2d 367, 372, 33 Cal. Rptr. 264, 384 P.2d 656]* , the court concluded that the record was "devoid of affirmative evidence of testamentary incapacity at the time decedent executed her will" (*184 Cal. App. 3d 593, 602-603)* .

[b] Testamentary Capacity Determined at Time Will Executed

The facts and procedural background of ***Estate of Fritschi*** *(1963) 60 Cal. 2d 367, 33 Cal. Rptr. 264, 384 P.2d 656* , are *discussed under § 186.56[3][a]*. In *Fritschi,* the California Supreme Court held that there was insufficient evidence to overcome the presumption that the testator had testamentary capacity at the time the will was executed, which is the time when testamentary capacity must be determined (*60 Cal. 2d 367, 372)* .

[c] Burden of Proof on Contestant

The facts and procedural background of ***Estate of Fritschi*** *(1963) 60 Cal. 2d 367, 33 Cal. Rptr. 264, 384 P.2d 656* , are *discussed under § 186.56[3][a]*. In *Fritschi,* the California Supreme Court stated the rule that a testator is presumed sane and competent and the burden rests on the contestant to overcome the presumption. The Court found that the contestant's evidence amounted "at most to speculation as to the possible effects of drugs" administered to the decedent during his last illness. The testimony of the contestant's witnesses merely set out the physical weaknesses of a man afflicted with a fatal illness, and described his minor irrational displays and certain personality quirks. This evidence, particularly in the light of the uncontradicted testimony of those present at the execution of the will that the decedent was of sound and disposing mind at that time, was not sufficient to overcome the presumption of sanity (*60 Cal. 2d 367, 372)* .

The facts and procedural background of ***Goodman v. Zimmerman*** *(1994) 25 Cal. App. 4th 1667, 32 Cal. Rptr. 2d 419* , are *discussed under § 186.56[3][h]*.

In *Goodman,* the court of appeal, affirming judgment against the contestant, stated that the contestant had the burden of proving the testator was delusional at the time of executing the will. The court proceeded to find that the trial court's finding that the testator was not delusional was supported by an abundance of competent evidence (*25 Cal. App. 4th 1667, 1678)* .

[d] Old Age and Forgetfulness Not Dispositive

The facts and procedural background of ***Estate of Mann*** *(1986) 184 Cal. App. 3d 593, 229 Cal. Rptr. 225* , are *discussed under § 186.56[3][a]*. In *Mann,* the court of appeal held that a 94-year-old testator who was placed under a conservatorship less than a year before executing her will was competent to make a will. In reaching this conclusion, the court stated that old age and forgetfulness, eccentricities, or mental feebleness or confusion at various times are not, in themselves, enough to warrant a holding of testamentary incapacity (*184 Cal. App. 3d 593, 603)* .

[e] Appointment of Conservator Not Dispositive

The facts and procedural background of ***Estate of Mann*** *(1986) 184 Cal. App. 3d 593, 229 Cal. Rptr. 225* , are *discussed under § 186.56[3][a]*. In *Mann,* the court of appeal held that the fact that the decedent had been placed under

a conservatorship prior to the execution of her will did not establish testamentary incapacity. Even if the decedent had been placed under a guardianship or found to be incompetent in the conservatorship proceedings, that adjudication of incompetence would only establish incapacity at the time of the proceeding. The court noted that not only was there no evidence that the decedent had been incompetent nine months after the conservatorship proceeding but, in fact, there was evidence that her physical and mental condition improved during that period (*184 Cal. App. 3d 593, 605)* .

[f] Ability to Transact Business Not Required

The facts and procedural background of ***Estate of Mann*** *(1986) 184 Cal. App. 3d 593, 229 Cal. Rptr. 225* , are *discussed under § 186.56[3][a]*. In *Mann,* the court of appeal held that the inability to transact ordinary business does not establish testamentary incapacity. Thus, the fact that the testator had been placed under a conservatorship due to her inability to manage her person and property, prior to the execution of her will, did not establish testamentary incapacity (*184 Cal. App. 3d 593, 605)* .

[g] Presumption That Will Made During Periods of Lucidity

The facts and procedural background of ***Estate of Mann*** *(1986) 184 Cal. App. 3d 593, 229 Cal. Rptr. 225* , are *discussed under § 186.56[3][a]*. In *Mann,* the court of appeal held that when one has a mental disorder in which there are lucid periods, it is presumed that the will was made during a time of lucidity. The testimony of the testator's personal physician that the testator sometimes appeared very senile, and sometimes more oriented, along with the testimony of other acquaintances of the testator that she was mentally competent and able to carry on a coherent conversation during the period when the will was executed, was sufficient to raise this presumption. Since the record was "devoid of affirmative evidence of testamentary incapacity at the time decedent executed her will," the presumption was not overcome (*184 Cal. App. 3d 593, 604)* .

[h] Mistaken Belief Is Not Delusion if Any Evidence Supports Belief

In ***Goodman v. Zimmerman*** *(1994) 25 Cal. App. 4th 1667, 32 Cal. Rptr. 2d 419* , a father first made a will in which his son and two daughters shared equally. Later he revoked the first will and made a new will in which the son received a sharply reduced share. After the father's death, the son filed a petition for revocation of probate of the later will, alleging, among other things, that at the time the later will was executed the father suffered from a mental disorder with a delusion that the son had not been loyal to him in personal and business matters. The trial court entered judgment against the son. The son appealed, limiting the appeal to the matter of testamentary capacity.

The court of appeal affirmed. The son contended that the trial court did not apply the correct statutory standard for lack of testamentary capacity under *Prob. Code § 6100.5*, and that even if it did apply the correct standard, substantial evidence did not support the judgment. The court of appeal held that, even though the trial court had used the outdated term "insane delusion" in the statement of decision, it had applied the correct standard. The references to "insane delusion" were to terminology used by courts before the statute was enacted (*25 Cal. App. 4th 1667, 1675)* . The court stated that the trial court did not err in citing prestatutory case law for the principle that even if one's beliefs are inaccurate, a mistaken belief does not justify overturning a will where there is any evidence supporting the belief. To the extent of any ambiguity in Section 6100.5 regarding delusions and the level of proof required, the statute basically tracks the law as applied in California before its enactment (*25 Cal. App. 4th 1667, 1676)* . Even though earlier cases use the term "insanity," a term not used in the statute, the test is the same, to determine whether a person suffers from delusions and hallucinations which result in the person dividing property in a way, except for the delusions and hallucinations, he or she would not have done (*25 Cal. App. 4th 1667, 1677)* . The court went on to hold that the judgment was supported by substantial evidence, and that the son had failed to prove that the alleged delusion caused the father to devise his property in a why which he otherwise would not have done (*25 Cal. App. 4th 1667, 1678)* .

[i] Probate Code Section 6100.5 Closely Adheres to Common Law

Goodman v. Zimmerman *(1994) 25 Cal. App. 4th 1667, 32 Cal. Rptr. 2d 419* , is *discussed under § 186.56[3][h]*.

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CHAPTER 186 PROBATE OF WILLS
PART II. FORMS
B. Opposing Will Contests

18-186 California Points & Authorities § 186.57

§ 186.57 Opposing Contest of Will--By Demurrer to Objection or Petition Contesting Will [Prob. Code §§ 8251, 8271(b)]--Will Not Procured by Fraud

[1] FORM

[*The following should be combined with a general memorandum of points and authorities opposing a will contest or a petition to revoke probate of a will (see § 186.50), or may be used in a trial or appellate brief.*]

THE COURT SHOULD DISMISS THE _____ [OBJECTION TO THE PETITION FOR PROBATE *or* PETITION TO REVOKE PROBATE] OF THE _____ [WILL *or* CODICIL] OF _____ [*name of decedent*] BECAUSE _____ [*specify person allegedly procuring will by fraud, e.g.,* DECEDENT'S SON] MADE NO FALSE REPRESENTATIONS _____ [WITH INTENT TO DECEIVE DECEDENT *or* WITH INTENT TO INDUCE DECEDENT TO EXECUTE THE _____ (WILL *or* CODICIL)].

A. Will Ineffective to Extent It Is Procured by Fraud. [*see § 186.28, Paragraph A.*]

B. Fraudulent Intent Necessary. A will may not be overturned on the ground that its execution was procured by fraud unless it is shown by the contestant that the person making the purportedly false representations either made them with intent to deceive the decedent or with intent to induce the decedent to execute the will (*Estate of Benton (1901) 131 Cal. 472, 478, 63 P. 775*).

[*Optional*] **C. Only Portion Procured by Fraud Invalidated.** Only the portions of a will or codicil affected by fraud should be revoked; as far as possible, the affected portions should be separated, and the rest of the document should continue as a valid testamentary instrument (*Estate of Carson (1920) 184 Cal. 437, 441, 194 P. 5*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a demurrer to (1) an objection to a petition for probate of a will, or (2) a petition to revoke probate of a will, when the contestant alleges that the will was procured by fraud [*see Prob. Code § 6104*]. Optional Paragraph C may be used when only part of the will is affected by the charges of fraud.

The issue of fraud in the procurement of a will frequently arises in conjunction with the issue of undue influence, discussed in *§ 186.58*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. For example, counsel may discuss facts showing false representations intended either to deceive the decedent or to induce the decedent to execute a will [*see Estate of Benton (1901) 131 Cal. 472, 478, 63 P. 775]* .

This memorandum may be combined with points and authorities pertaining to the specific procedural context in which the issue of due execution of the will arises. Thus, it may be combined with the points and authorities pertaining to a demurrer to an objection or petition contesting a will [*see § 186.50*].

[b] Opposing Memoranda

In an appropriate case, the points and authorities *set out in § 186.28* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Fraudulent Intent Necessary

In ***Estate of Benton*** *(1901) 131 Cal. 472, 63 P. 775* , the decedent's widow objected to a will offered for probate by the decedent's son from a previous marriage, on the grounds that the decedent lacked testamentary capacity and the son obtained the will by fraud. Apparently, the son told the decedent that his wife was stealing from him and using his property for the benefit of others, and made other, similar accusations. The trial court found that the decedent was competent at the time the will was executed, but denied probate of the will based on fraud in its procurement. The son appealed.

The California Supreme Court reversed. Although mindful of the rule that a fraud that will vitiate a contract will vitiate a will, the Court found no fraud sufficient to vitiate the will. The trial court's finding that the decedent was "actuated and controlled solely by representations" made by his son fell short of showing a case of actual fraud within the statutory meaning of the term. It was not shown that the son made the representations to deceive the decedent or to induce him to make a will. In addition, there was no showing that the representations were known by the son to be false. It would not be fraudulent for the son to seek to control the decedent in making his will, so long as the purpose and effect of the son's actions was proper (*131 Cal. 472, 478)* . The Court found similar problems with other findings of the trial court, in that none of the findings indicated that all the required elements of fraud had been shown (*131 Cal. 472, 479)* .

[b] Only Portion Procured by Fraud Invalidated

The facts and procedural background of ***Estate of Carson*** *(1920) 184 Cal. 437, 194 P. 5* , are discussed in *§ 186.28[3][c]*. In *Carson*, the California Supreme Court held that the fact that certain portions of the testator's will were procured by fraud would not invalidate the provisions and bequests of the will not affected by the fraud. This would be the case only if it were not possible to separate the portions affected by the fraud from those unaffected. Separating the portions of the will favoring the man who had fraudulently entered into a marriage with the testator from the other provisions of the will did not present such a problem (*184 Cal. 437, 441)* .

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CHAPTER 186 PROBATE OF WILLS
PART II. FORMS
B. Opposing Will Contests

18-186 California Points & Authorities § 186.58

§ 186.58 Opposing Contest of Will--By Demurrer to Objection or Petition Contesting Will [Prob. Code §§ 8251, 8271(b)]--Will Not Procured By Undue Influence

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities opposing a will contest or a petition to revoke probate of a will (see § 186.50), or may be used in a trial or appellate brief.*]

THE COURT SHOULD DISMISS THE _____ [OBJECTION TO THE PETITION FOR PROBATE *or* PETITION TO REVOKE PROBATE] OF THE _____ [WILL *or* CODICIL] OF _____ [*name of decedent*] BECAUSE _____ [*specify facts showing that respondent did not use his or her influence to destroy decedent's free will and to substitute his or her own, nor did respondent bring his or her influence to bear on the testamentary act, e.g.,* ALTHOUGH RESPONDENT HAD GENERAL INFLUENCE OVER DECEDENT BY VIRTUE OF HIS/HER CLOSE RELATIONSHIP WITH DECEDENT, HE/SHE DID NOT URGE DECEDENT TO MAKE A WILL, NOR WAS HE/SHE PRESENT WHEN DECEDENT SIGNED HIS/HER WILL].

A. Will Ineffective to Extent It Is Procured by Undue Influence. [*see § 186.29, Paragraph A.*]

B. Influence Must Destroy Testator's Free Agency. In order for a will to be set aside on the ground of undue influence, the influence must be such as to destroy the testator's free agency and substitute for his or her own another's will (*Rice v. Clark (2002) 28 Cal. 4th 89, 96, 120 Cal. Rptr. 2d 522, 47 P.3d 300*).

[*Optional*] **C. Mere Opportunity to Influence Testator's Mind Insufficient.** Mere proof of opportunity to influence a testator's mind, even when coupled with an interest or motive to do so, will not sustain a finding of undue influence, in the absence of testimony showing that there was pressure operating directly on the testamentary act (*Estate of Mann (1986) 184 Cal. App. 3d 593, 607, 229 Cal. Rptr. 225*).

[*Optional*] **D. Mere Kindness and Affection Toward Testator Insufficient.** Influence gained by kindness and

affection will not be regarded as undue if no imposition of fraud was practiced (*Estate of Mann (1986) 184 Cal. App. 3d 593, 607, 229 Cal. Rptr. 225*).

[*Optional*] **E. Procurement of Attorney to Prepare Will Insufficient.** The fact that the beneficiary procured an attorney to prepare the testator's will is insufficient to establish undue influence (*Estate of Mann (1986) 184 Cal. App. 3d 593, 608, 229 Cal. Rptr. 225*).

[*Optional*] **F. Presence at Execution of Will Insufficient.** The fact that a beneficiary was present at the execution of the will is insufficient to establish that the beneficiary exercised undue influence on the testator (*Estate of Mann (1986) 184 Cal. App. 3d 593, 608, 229 Cal. Rptr. 225*).

[*Optional*] **G. Determination of Undue Profit Not Limited to Terms of Will.** The determination of whether a beneficiary unduly profited by virtue of a will is not limited to the terms of the will itself; it entails a qualitative assessment of the relationship between the decedent and the beneficiary (*Estate of Sarabia (1990) 221 Cal. App. 3d 599, 607-608, 270 Cal. Rptr. 560*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a demurrer to (1) an objection to a petition for probate of a will, or (2) a petition to revoke probate of a will, when the contestant alleges that the will was procured by undue influence [*see Prob. Code § 6104*]. Optional Paragraph C may be used when the contestant has shown only the proponent's opportunity and motive to unduly influence the testator, and not that any actual pressure was brought to bear on the testamentary act. Optional Paragraph D may be used when the alleged undue influence was merely the natural and permissible influence gained by the proponent through his or her kindness and affection toward the testator; it may be used with Optional Paragraph G when the benefit to the proponent under the will is not "undue" in view of the nature of the relationship between the testator and the proponent. Optional Paragraphs E and F deal with activities that may be a part of a campaign of undue influence but do not, by themselves, establish such influence.

The issue of undue influence in the procurement of a will requently arises in conjunction with the issues of testamentary incapacity and fraud, discussed in *§§ 186.56* and *186.57*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel may discuss facts illustrating the closeness of the relationship between the decedent and the proponent accused of undue influence, and that a will favoring the proponent is a natural result of the proponent's kindness and affection rather than imposition or fraud [*see Estate of Mann (1986) 184 Cal. App. 3d 593, 607, 229 Cal. Rptr. 225]* .

This memorandum may be combined with points and authorities pertaining to the specific procedural context in which the issue of due execution of the will arises. Thus, it may be combined with the points and authorities pertaining to a demurrer to an objection or petition contesting a will [*see § 186.50*].

[b] Opposing Memoranda

In an appropriate case, the points and authorities *set out in § 186.29* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Influence Must Destroy Testator's Free Agency

The facts and procedural background of ***Estate of Fritschi*** *(1963) 60 Cal. 2d 367, 33 Cal. Rptr. 264, 384 P.2d 656* , are discussed in *§ 186.56[3][b]*. In *Fritschi*, the California Supreme Court held that to destroy a will's validity, undue influence must destroy the testator's free agency and must substitute another's will for his or her own (*60 Cal. 2d 367, 373)* . The Court found insufficient evidence of undue influence, namely that the decedent's girlfriend was active in procuring the execution of the decedent's will, to invalidate the will. Mere general influence is not sufficient to show such procurement, nor is evidence that the alleged influencer had the opportunity and motivation to unduly influence the testator. A contestant must show that the influence was brought directly to bear on the testamentary act (*60 Cal. 2d 367, 373-374)* . The Court noted that the courts stringently protect the testamentary disposition against attacks of undue influence. The Court also noted that reviewing courts are often called on to strike down attempts of juries to invalidate wills on the ground of undue influence in order to indulge their own concepts of how testators should have disposed of their property (*60 Cal. 2d 367, 373)* .

[b] Mere Opportunity to Influence Testator's Mind Insufficient

The facts and procedural background of ***Estate of Mann*** *(1986) 184 Cal. App. 3d 593, 229 Cal. Rptr. 225* are discussed in *§ 186.56[3][b]*. In *Mann*, the court of appeal held that there was insufficient evidence to support the finding of undue influence. The mere fact that the will proponent had a close relationship with the testator and an opportunity to influence the testator was not sufficient to sustain a finding of undue influence, absent testimony showing that there was pressure operating directly on the testamentary act. This was so even though an interest or motive to unduly influence the testator was shown (*184 Cal. App. 3d 593, 607)* .

[c] Mere Kindness and Affection Toward Testator Insufficient

The facts and procedural background of ***Estate of Mann*** *(1986) 184 Cal. App. 3d 593, 229 Cal. Rptr. 225* are discussed in *§ 186.56[3][b]*. In *Mann*, the court of appeal held that influence gained by kindness and affection is not regarded as "undue" if no imposition or fraud is present. The court noted that the will was not unnatural, that the decedent and the alleged undue influencer had been close during their entire mutual lives, and that the alleged undue influencer took care of the decedent in her old age and she accepted and relied on him as her conservator. Under these circumstances, it was natural that the will would favor the alleged undue influencer (*184 Cal. App. 3d 593, 607)* .

[d] Procurement of Attorney to Prepare Will Insufficient

The facts and procedural background of ***Estate of Mann*** *(1986) 184 Cal. App. 3d 593, 229 Cal. Rptr. 225* , are discussed in *§ 186.56[3][b]*. In *Mann*, the court of appeal held that the mere fact that the alleged undue influencer procured the attorney who prepared the will in question was not sufficient "activity" in the procurement of the will to bring the presumption of undue influence into play. Likewise, evidence that the alleged undue influencer urged the testator to make a will was irrelevant, since there was no evidence he urged her to make any particular disposition (*184 Cal. App. 3d 593, 608)* .

[e] Presence at Execution of Will Insufficient

The facts and procedural background of ***Estate of Mann*** *(1986) 184 Cal. App. 3d 593, 229 Cal. Rptr. 225* , are discussed in *§ 186.56[3][b]*. In *Mann*, the court of appeal held that the fact that a beneficiary was present at the execution of the will was insufficient to establish that he exercised undue influence on the testator (*184 Cal. App. 3d 593, 608)* .

[f] Determination of Undue Profit Not Limited to Terms of Will

Estate of Sarabia *(1990) 221 Cal. App. 3d 599, 270 Cal. Rptr. 560* , involved a will which left the decedent's entire estate to his manager/agent, with whom decedent had lived for the last seven years of his life. The estate was valued at

approximately $500,000, most of which was the decedent's share of his deceased mother's estate. The will was offered for probate by the manager/agent and contested by the decedent's brother, who claimed that it was obtained through the manager/agent's undue influence. During their deliberations, the jury requested a definition of the word "undue." Over the contestant's objection, the court instructed the jury that "generally it is something that's unwarranted, excessive, inappropriate, unjustifiable, or improper." Shortly after receiving this instruction, the jury returned its special verdict finding that although the manager/agent was in a confidential relationship with the decedent and was active in procuring the will, he was not unduly benefitted by the will. The contestant appealed, alleging that the court erred in not instructing the jury that "undue benefit" has a purely quantitative meaning.

The court of appeal affirmed, noting that, as a general proposition, California law allows a testator to dispose of property as he or she sees fit without regard to whether the disposition is appropriate or fair. It then went on to state that undue influence is "a concept with a very definite meaning" (*221 Cal. App. 3d 599, 604)* . It refers to a situation in which extraordinary and abnormal pressure subverts independent free will and diverts it from its natural course in accordance with the dictates of another person (*221 Cal. App. 3d 599, 605)* . Reviewing a line of cases cited by the contestant as authority for his argument that "unduly benefitted" means merely that the beneficiary takes substantially more under the will he or she procured than he or she would otherwise have taken, the court found that none of the cases held "in the abstract that sole beneficiary status amounts to undue profit as a matter of law" (*221 Cal. App. 3d 599, 606)* . The quantitative standard proposed by the contestant for measuring undue profit was unworkable because: (1) it failed to provide criteria for determining whether a beneficiary would take "substantially more" under the will than otherwise; (2) it presumed that the contestant had some entitlement to the decedent's estate; and (3) it assumed that the amount of that entitlement was somehow self-evident. For the trier of fact to decide what influence is "undue" clearly entails a qualitative assessment of the relationship between the decedent and the beneficiary. To determine if the beneficiary's profit is "undue," the trier of fact must necessarily decide what profit would be "due." These determinations cannot be made in an evidentiary vacuum, but must be made from evidence concerning the respective relative standings of the beneficiary and the contestant to the decedent (*221 Cal. App. 3d 599, 607)* . The contestant's desire to limit the inquiry of the trier of the facts to the terms of the will would "transplant the law of intestate succession as the litmus for undue profit." The appellate court also pointed out that the contestant was only a collateral heir to the decedent and thus not a "natural object" of the decedent's testamentary disposition (*221 Cal. App. 3d 599, 608)* .

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18-186 California Points & Authorities § 186.58A

§ 186.58A Opposing Contest of Will--By Demurrer to or Objection or Petition Contesting Will--Gift to "Disqualified Person" Not Invalidated Under Prob. Code § 21350 Because Statutory Exception in Prob. Code § 21351 Applies

[1] FORM

THE TRANSFER TO _____ [*name of transferee*] IS NOT INVALID UNDER PROB. CODE § 21350 BECAUSE _____ [*select appropriate alternative below*]

[*EITHER*]

_____ [*name of transferor/testator*] IS _____ [RELATED BY _____ (BLOOD *or* MARRIAGE) TO *or* A COHABITANT WITH *or* THE REGISTERED DOMESTIC PARTNER OF] THE _____ [TRANSFEREE or PERSON WHO DRAFTED THE WILL].

[*OR*]

THE WILL WAS REVIEWED BY AN INDEPENDENT ATTORNEY WHO (1) COUNSELED THE TESTATOR ABOUT THE NATURE AND CONSEQUENCES OF THE INTENDED TRANSFER, (2) ATTEMPTED TO DETERMINE IF THE INTENDED CONSEQUENCE IS THE RESULT OF FRAUD, MENACE, DURESS, OR UNDUE INFLUENCE, AND (3) SIGNED AND DELIVERED TO THE TESTATOR A CERTIFICATE OF INDEPENDENT REVIEW MEETING STATUTORY REQUIREMENTS.

[*OR*]

AFTER FULL DISCLOSURE OF THE RELATIONSHIPS OF THE PERSONS INVOLVED, THE INSTRUMENT WAS APPROVED PURSUANT TO AN ORDER OF COURT UNDER PROB. CODE § 2580.

[*OR*]

CLEAR AND CONVINCING EVIDENCE EXISTS THAT THE TRANSFER WAS NOT THE PRODUCT OF FRAUD, MENACE, DURESS, OR UNDUE INFLUENCE.

[*OR*]

THE TRANSFEREE, _____ [*name*], IS _____ [A _____ (FEDERAL *or* STATE *or* LOCAL) PUBLIC ENTITY *or* _____ (AN ENTITY *or* A TRUST HOLDING AN INTEREST FOR AN ENTITY) THAT QUALIFIES FOR AN EXEMPTION FROM TAXATION UNDER INTERNAL REVENUE CODE §_____ (501(c)(3) *or* 501(c)(19)].

[*OR*]

THE TRANSFER DOES NOT EXCEED THE SUM OF $3,000 AND THE VALUE OF _____ [*name of transferor/testator*]'S ESTATE EXCEEDS $100,000.

[*OR*]

_____ [*name of transferor/testator*] WAS A NONRESIDENT OF CALIFORNIA WHO WAS NOT A RESIDENT AT THE TIME THE WILL WAS EXECUTED, AND THE WILL WAS NOT SIGNED IN CALIFORNIA.

[*CONTINUE*]

A. Transfer Is Not Invalid Under *Prob. Code § 21350* if Statutory Exceptions Apply. A donative transfer to a person who is a member of a class listed in *Prob. Code § 21350* is not invalidated by that statute if any of the exceptions listed in *Prob. Code § 21351* apply (*Prob. Code § 21351*).

[*Select the appropriate alternative(s) from among the following optional provisions*]

B. Exception Exists for Relatives, Cohabitants, and Domestic Partners. *Probate Code § 21350* does not apply if the transferor is related by blood or marriage to, is a cohabitant with, or is the registered domestic partner, pursuant to Division 2.5 of the Family Code [*Fam. Code § 297 et seq.*], of the transferee or the person who drafted the instrument. For purposes of this section, "related by blood or marriage" includes persons within the fifth degree or heirs of the transferor (*Prob. Code § 21351(a), (g)*).

C. Exception Exists for Transfers Reviewed by Independent Counsel. *Probate Code § 21350* does not apply if the instrument is reviewed by an independent attorney who (1) counsels the client (transferor) about the nature and consequences of the intended transfer, (2) attempts to determine if the intended consequence is the result of fraud, menace, duress, or undue influence, and (3) signs and delivers to the transferor an original certificate of independent

review in substantially the form specified by law, with a copy delivered to the drafter (*Prob. Code § 21351(b)*).

D. Exception Exists for Court-Approved Acts by Conservator. *Probate Code § 21350* does not apply if, after full disclosure of the relationships of the persons involved, the instrument is approved pursuant to an order under Article 10 of Chapter 6 of Part 4 of Division 4, which authorizes a conservator or other interested person to file a petition for a court order authorizing or requiring the conservator to take a proposed action for specified purposes relating to the conservatorship, including the making of a will for a conservatee (*Prob. Code § 21351(c)*; *see Prob. Code § 2580 et seq.*).

E. Exception Exists When Court Determines That Transfer Was Not Product of Fraud, Menace, Duress, or Undue Influence. *Probate Code § 21350* does not apply if the court determines, upon clear and convincing evidence (not based solely upon the testimony of any person described in *Prob. Code § 21350(a)*), that the transfer was not the product of fraud, menace, duress, or undue influence, provided that the instrument either (1) does not make a transfer to a person who drafted the instrument; (2) was executed on or before July 1, 1993, by a person who was a California resident at the time the instrument was executed; or (3) was executed by California resident who was not a resident at the time the instrument was executed (*Prob. Code § 21351(d), (e)*; *see Rice v. Clark (2002) 28 Cal. 4th 89, 98, 120 Cal. Rptr. 2d 522, 47 P.3d 300*).

F. Exception Exists for Transfers to Public or Charitable Entities. *Probate Code § 21350* does not apply if the transferee is a federal, state, or local public entity, an entity that qualifies for an exemption from taxation under *Internal Revenue Code § 501(c)(3)* or *501(c)(19)*, or a trust holding an interest for this entity, but only to the extent of the interest of the entity, or the trustee of this trust (*Prob. Code § 21351(f)*).

G. Exception Exists for Transfers Under $3,000. *Probate Code § 21350* does not apply if the transfer does not exceed $3,000 and the total value of the estate exceeds $100,000 (*Prob. Code § 21351(h)*; *see Prob. Code § 13100*).

H. Exception Exists for Transfers by Nonresidents. *Probate Code § 21350* does not apply if transfer is made by an instrument executed by a nonresident of California who was not a resident at the time the instrument was executed, and that was not signed within California (*Prob. Code § 21351(i)*). [*Add if appropriate:* This exception exempts from *Prob. Code § 21350* donative transfers in instruments executed outside the State of California when the transferor was a nonresident of California at the time the instrument was signed, whether or not the transferor later becomes a resident of California (*Estate of Clementi (2008) 166 Cal. App. 4th 375, 383, 82 Cal. Rptr. 3d 685*).]

[2] Comment

[a] Use of Form

This form may be submitted in support of (1) a demurrer to an objection to a petition for probate of a will; (2) a petition to revoke probate of a will; or (3) any other situation in which the opposing party is seeking to invalidate a gift under *Prob. Code § 21350*. The grounds asserted are that one or more of the exceptions specified in *Probate Code § 21351* apply. If one or more of the statutory exceptions apply, *Prob. Code § 21350* is inapplicable to the transfer and the gift cannot be invalidated under that section [*Prob. Code §§ 21350(a), 21351*], although it still may be subject to attack under traditional grounds of fraud, duress, menace, or undue influence [*see §§ 186.28* (fraud), 186.29 (undue influence)].

Paragraph A of the form states the basic rule. Paragraphs B through H deal with the specific statutory exceptions to the rule of *Prob. Code § 21350*, and should be included as appropriate to the specific grounds being asserted. The corresponding introductory language for each of the statutory exceptions appears at the beginning of the form.

Paragraph B should be used if the ground being asserted is that the transferor is related by blood or marriage to, is a

cohabitant with, or is the registered domestic partner, of the transferee or the person who drafted the instrument [*Prob. Code § 21351(a)*]. For purposes of this exception "related by blood or marriage" includes persons within the fifth degree, or heirs of the transferor [*Prob. Code § 21351(g)*].

Paragraph C should be used if the ground being asserted is that the instrument has been reviewed by an independent attorney who has counseled the transferor about the nature and consequences of the intended transfer, attempted to determine if the intended consequence is the result of fraud, menace, duress, or undue influence, and executed a certificate of independent review meeting the statutory requirements [*Prob. Code § 21351(b)*].

Paragraph D should be used if the ground being asserted is that the instrument was approved pursuant to a court order under *Prob. Code § 2580 et seq.* (relating to petitions to authorize or require a conservator to perform specified actions) after full disclosure of the relationships of the persons involved [*Prob. Code § 21351(c)*].

Paragraph E should be used if the ground being asserted is that there is clear and convincing evidence that the transfer was not the product of fraud, menace, duress, or undue influence. When this ground is asserted, the defendant is required to present evidence sufficient to make such a showing, and the court's finding cannot be based solely on the testimony of any person who is a "disqualified person" in any of the categories listed in *Prob. Code § 21350(a)* [*Prob. Code § 21351(d)*; *see Rice v. Clark (2002) 28 Cal. 4th 89, 98, 120 Cal. Rptr. 2d 522, 47 P.3d 300]* . Thus, the memorandum should state the nature of the evidence that will be presented to the court. Note that a party cannot rely on this exemption if the transferee is also the person who drafted the instrument and the instrument was executed after July 1, 1993, by a person who was a resident of California at the time the instrument was executed. In the latter case, the presumption of invalidity is conclusive rather than rebuttable, and the transferee does not have the option of presenting contrary evidence [*Prob. Code § 21351(e)*; *see Rice v. Clark (2002) 28 Cal. 4th 89, 98, 120 Cal. Rptr. 2d 522, 47 P.3d 300]* .

Paragraph F should be used if the transferee is a governmental unit or a charitable entity [*Prob. Code § 21351(f)*].

Paragraph G should be used if the transfer does not exceed $3,000 and the total value of the estate exceeds $100,000 [*Prob. Code § 21351(h)*; *see Prob. Code § 13100*].

Paragraph H should be used if the transfer is made by an instrument executed by a nonresident of California who was not a resident at the time the instrument was executed, and that was not signed within California [*Prob. Code § 21351(i)*].

[b] Opposing Memoranda

This form is designed to oppose the *form in § 186.29A* in an appropriate case.

[3] Discussion of Authorities

[a] Exception Exists When Court Determines That Transfer Was Not Product of Fraud, Menace, Duress, or Undue Influence

Rice v. Clark *(2002) 28 Cal. 4th 89, 120 Cal. Rptr. 2d 522, 47 P.3d 300* , involved an action under *Prob. Code § 21350(a)(4)*, which includes in the category of presumptively disqualified persons any fiduciary who transcribes the testamentary instrument or causes it to be transcribed. In its analysis of the statutory scheme established by *Prob. Code §§ 21350* and *21351*, the California Supreme Court addressed the nature of the presumption of disqualification established by *Prob. Code § 21350*. The Court noted that *Prob. Code § 21350* applies to all donative transfers by instrument, not only to wills and other testamentary transfers, but it invalidates only gifts to drafters and to fiduciaries (and to persons close to them) who transcribe the instrument or cause it to be transcribed. The Court stated that unlike

the common law, *Prob. Code § 21350* does not require, as the predicate for a presumption of invalidity, that the transferee would receive an "undue" benefit. Rather, the transferee bears an elevated proof burden in rebutting the presumption: he or she must show the absence of undue influence, fraud or duress by clear and convincing evidence, and without reliance on the testimony of any presumptively disqualified person. The Court further noted that *Prob. Code § 21351(e)(1)* makes the presumption of disqualification conclusive as to a drafter-transferee. The Court stated, by way of example, that assuming no other exception in *Prob. Code § 21351* applied, an attorney drafted a client's will so as to benefit himself or herself would be conclusively disqualified, but if the same attorney drafted the will so as to benefit the attorney's relative or law partner, the presumption would be rebuttable, but only by clear and convincing evidence--other than the drafter's testimony--that the client freely chose that disposition (*28 Cal. 4th 89, 98)* .

[b] Exception Exists for Transfers by Nonresidents

In ***Estate of Clementi*** *(2008) 166 Cal. App. 4th 375, 383, 82 Cal. Rptr. 3d 685* , the testator executed his will while living in Philadelphia, but was a resident of California at the time of his death. The testator asked his accountant, who apparently was his only friend, to prepare a will, instead of having it prepared by an attorney. The accountant wrote out the will by hand and read it to the testator, who signed it in the presence of two witnesses. The will, among other provisions, gave $100,000 to the accountant outright, named him to administer the estate, and gave the residue of the estate to a charitable trust or foundation to be administered by the accountant. At the time of death the value of the estate was approximately $3 million. Relatives of the decedent filed a petition for revocation of the probate, damages for elder abuse and negligence, and for rescission, restitution, and an award of attorney fees. The probate court found that the will was valid, and the relatives appealed (*166 Cal. App. 4th 374, 378-379)* .

Prob. Code § 21351(i) exempts, from the general restrictions in *Prob. Code § 21350* on transfers for the benefit of will drafters, transfers executed by a nonresident of California who was not a resident at the time the instrument was executed and that was not signed within California. Appellants argued that this exception does not apply if the decedent was a resident of California at the time of death. However, after analyzing the legislative history of the statute, the court concluded that the legislature intended to exempt from *Prob. Code § 21350* all donative transfers in instruments executed outside California by persons who were not residents of California at the time of execution of the instrument. Accordingly, it held that *Prob. Code § 21351(i)* exempts donative transfers in instruments executed outside California when the transferor was a nonresident of California at the time the instrument was signed, *whether or not the transferor later becomes a resident of California*. Thus, even though the testator was a resident of California at the time of death, *Prob. Code § 21350* was inapplicable to his will, since he signed it in Pennsylvania while a Pennsylvania resident (*166 Cal. App. 4th 374, 383-384)* .

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18-186 California Points & Authorities § 186.58B

§ 186.58B Opposing Contest of Will--By Demurrer to or Objection or Petition Contesting Will--Gift Not Invalidated Under Prob. Code § 21350 Because Donee Did Not Transcribe Instrument or Cause It To Be Transcribed [Prob. Code § 21350(a)(4)]

[1] FORM

THE TRANSFER TO _____ [*name of transferee*] IS NOT INVALID UNDER PROB. CODE § 21350(a)(4) BECAUSE THE _____ [*state relationship to transferor-testator, e.g.,* CONSERVATOR *or* TRUSTEE *or specify other fiduciary relationship*], _____ [*name of fiduciary*], DID NOT TRANSCRIBE THE WILL OR CAUSE IT TO BE TRANSCRIBED.

A. Fiduciary Must Direct Document to Be Written Out in Final Form. To cause a document to be transcribed within the meaning of *Prob. Code § 21350(a)(4)*, which includes in the category of presumptively disqualified persons any fiduciary who transcribes the testamentary instrument or causes it to be transcribed, must necessarily involve directing the drafted document to be written out in its final form (*Estate of Swetmann (2000) 85 Cal. App. 4th 807, 102 Cal. Rptr. 2d 457*).

B. Providing Information, Assistance, and Encouragement Is Insufficient Basis for Disqualification. A person who merely provides information needed in the preparation of an instrument, and who encourages the donor to execute it, but does not direct or otherwise participate in the transcription of the instrument to final written form, is not a person who transcribes the instrument or causes it to be transcribed for purposes of *Prob. Code § 21350(a)(4)* (*Rice v. Clark (2002) 28 Cal. 4th 89, 101-105, 120 Cal. Rptr. 2d 522, 47 P.3d 300*).

C. Procuring Estate Planning Services Is Insufficient Basis for Disqualification. A fiduciary who procures estate planning services for the donor and pays for those services out of the donor's funds, but does not the drafted document to be written out in its final form, is not a person who transcribes the instrument or causes it to be transcribed for purposes of *Prob. Code § 21350(a)(4)* (*Estate of Swetmann (2000) 85 Cal. App. 4th 807, 819-820), 102 Cal. Rptr. 2d 457*).

[2] Comment

[a] Use of Form

This memorandum may be submitted in support of (1) a demurrer to an objection to a petition for probate of a will; (2) a petition to revoke probate of a will; or (3) any other situation in which the opposing party is seeking to invalidate a gift under *Prob. Code § 21350(a)(4)*, which invalidates donative transfers to any person who has a fiduciary relationship with the transferor (including but not limited to a conservator or trustee), who transcribes the instrument or causes it to be transcribed. The grounds asserted are that in order for a transfer to be invalidated on this basis, the fiduciary's participation must necessarily involve directing the drafted document to be written out in its final form, and that more indirect involvement, such as procuring estate planning services or providing information and encouragement to the transferor, is an insufficient basis for invalidating the gift.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the point of law stated. Specifically, counsel should explain the nature and extent of the fiduciary's participation in the preparation ofthe will, and show that this participation was ancillary to the preparation and execution of the will and did not direct the will to be written out in its final form.

[b] Opposing Memoranda

This form is designed to oppose the *form in § 186.29A* in an appropriate case.

[3] Discussion of Authorities

[a] Fiduciary Must Direct Document to Be Written out in Final Form

In ***Estate of Swetmann*** *(2000) 85 Cal. App. 4th 807, 102 Cal. Rptr. 2d 457* , a decedent left the residue of his estate to his conservator, who had procured for the decedent the estate planning company which produced the will, introduced the company representative to the decedent, and, in his capacity as conservator, paid for the services, but who had nothing to do with the contents of the will or its physical preparation. The trial court concluded that by virtue of those activities, the conservator "cause the will to be transcribed" within the meaning of *Prob. Code § 21350(a)(4)*.

The appellate court reversed. The court first observed that the dictionary meaning of "transcribe" mean to make a written copy of the material. In this case, the conservator neither copied the will nor reduced it to writing; the transcription was done elsewhere by employees of the estate planning company. The focal point of the dispute was whether the conservator had "caused" the will to be transcribed. The court stated that the latter phrase obviously encompasses efforts to have someone else do the transcribing. In this case, the trial court found that the conservator had called the estate planning firm and met with its representative, that he had brought the representative to the transferor's house, and that he wrote a check from the transferor's funds for the will and trust documents. The court stated that it was not persuaded that these activities fell within the meaning the statutory phrase (*85 Cal. App. 4th 807, 818)* . Although the word "cause" does not reveal what activities the Legislature intended to be disqualifying, the Legislature has obviously drawn a distinction between drafting an instrument and transcribing it. Thus, "transcribing" must be construed to mean something separate from the acts of creating or composing the contents of the document. In the court's view, transcribing is the act that follows the composition of the document and reduces the creation to its final, written form, and a "person who causes the document to be transcribed" is one who directs the drafted document to be written out in its final form. The court concluded that, as a matter of law, the conservator's acts did not cause the will or trust to be transcribed (*85 Cal. App. 4th 807, 819-820)*

[b] Providing Information, Assistance, and Encouragement Is Insufficient Basis for Disqualification

In ***Rice v. Clark*** *(2002) 28 Cal. 4th 89, 120 Cal. Rptr. 2d 522, 47 P.3d 300* , a fiduciary provided information needed in the preparation of a will and trust and encouraged the donor to execute it, but did not direct or otherwise participate in the transcription of the instrument to final written form. The trial court found that while a fiduciary relationship existed

and that the fiduciary was helpful to the testator, "was the closest human being in her life," and had exercised considerable influence over her, he did not meet the other criteria of *Prob. Code § 21350*. To cause an instrument to be transcribed within the meaning of *Prob. Code § 21350(a)(4)*, the trial court concluded, is to take an action "that leads directly, substantially, and uninterruptedly to the writing down or causing to be printed the words of another." While the fiduciary had taken part in "arranging for preparation" of the challenged instruments, he did not draft the instruments, transcribe them, or cause them to be transcribed because "he did none of the thinking or writing himself nor did he order or request any other person to do so" (*28 Cal. 4th 89, 95-96)* .

The Court of Appeal affirmed, rejecting the plaintiff's contention that the trial court's definition of "causes it to be transcribed" was too narrow. The appellate court conclude that although "[i]n the largest sense, anyone who encourages another to have a will or trust drafted can be said to be a cause of its ultimate transcription, the Legislature did not intend such a broad definition." The statute was never intended to apply to every circumstance in which a fiduciary may have improperly induced an elderly person to name him beneficiary of her estate," though in such cases a common law presumption of undue influence, not raised in this case, may arise (*28 Cal. 4th 89, 96)* . The Supreme Court granted the plaintiff's petition for review.

After discussing undue influence generally and the history of *Prob. Code § 21350 et seq.*, the court noted that the lower courts construed the meaning of "transcribe" in accordance with *Estate of Swetmann (2000) 85 Cal. App. 4th 807, 102 Cal. Rptr. 2d 457* , discussed in [3][a], *above*, as limited to direct involvement in the instrument's transcription, as by ordering another person to transcribe a document. After reviewing the legislative history and purpose of *Prob. Code § 21350*, the Supreme Court agreed with the *Swetmann* court's analysis. The court stated that while virtually anyone acquainted with a testator might in some circumstance use fraud, duress, or undue influence to obtain a testamentary gift, those who directly participate in the instrument's physical preparation, whether by drafting or transcribing it, are particularly well situated to insert gifts to themselves, their families, or business associates, and to secure the instrument's execution. Transcription--the process of reducing an instrument to final written form--obviously carries with it the opportunity to fraudulently alter the terms ofthe document to the transcriber's advantage. In the same manner, one who directs an instrument's transcription easily can cause the inclusion of provisions benefiting himself or herself, as can a person who drafts an instrument. "[O]nly as to this restricted class of persons directly involved in the donative instrument's physical preparation did the Legislature, in enacting [*Prob. Code § 21350 et seq.*], prohibit the receipt of gifts by a stricter standard than the preexisting law provided" (*28 Cal. 4th 89, 103-104)* .

The Court pointed out that in this case, the fiduciary did not direct or oversee, or otherwise participate directly in, transcription of the will or trust. Both instruments were transcribed by the secretary of the attorney who prepared the estate plan at the attorney's direction. The fiduciary facilitated preparation and execution of the instruments by giving the attorney's office a list of the testator's assets that were to be placed in the trust and by arranging appointments for the testator and driving her to them. The fiduciary urged the attorney's secretary to prepare the documents promptly, and encouraged the testator to execute the will and trust after she initially balked at doing so. The fiduciary also was present at meetings where the disposition of the estate was discussed, but he did not direct the attorney or anyone else to include any particular gifts or other provisions in the instruments. The Supreme Court concluded that the fiduciary materially assisted the testator to dictate the contents of her will and trust to an attorney and to execute the instruments drafted by the attorney, but did not himself directly participate in transcribing the instruments. For this reason he did not "cause" the instruments to be transcribed (*28 Cal. 4th 89, 105)* .

[c] Procuring Estate Planning Services Is Insufficient Basis for Disqualification

Estate of Swetmann *(2000) 85 Cal. App. 4th 807, 102 Cal. Rptr. 2d 457* , is discussed in [3][a], *above*.

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Volume 18 Chapters 180-189 PRETRIAL PROCEEDINGS---to---PROBATE OF WILLS
CHAPTER 186 PROBATE OF WILLS
PART II. FORMS
B. Opposing Will Contests

18-186 California Points & Authorities § 186.59

§ 186.59 Opposing Contest of Will--By Demurrer to Objection or Petition Contesting Will [Prob. Code §§ 8251, 8271(b)]--Will Not Subject to Unfulfilled Condition

[1] FORM

[*The following should be combined with a general memorandum opposing a will contest or a petition to revoke probate of a will (see § 186.50), or may be used in a trial or appellate brief.*]

THE COURT SHOULD DISMISS THE _____ [OBJECTION TO THE PETITION FOR PROBATE *or* PETITION TO REVOKE PROBATE] OF THE _____ [WILL *or* CODICIL] OF _____ [*name of decedent*] BECAUSE _____ [*specify language in the will alleged to be an unfulfilled condition, e.g.* THE LANGUAGE IN THE _____ (WILL *or* CODICIL) STATING THAT DECEDENT WISHED TO DISPOSE OF HIS/HER PROPERTY "IN CASE [HE/SHE] SHOULD HAVE A MISHAP AND DIE DUE TO SOME UNFORSEEN ACCIDENT" WAS ACTUALLY A STATEMENT OF DECEDENT'S MOTIVE FOR MAKING THE WILL RATHER THAN AN UNFULFILLED CONDITION].

A. Validity of Will May Depend on Condition in Its Terms. [*see § 186.30, Paragraph A.*]

B. Whether Will Is Conditional Depends on Testator's Intent. Whether an instrument is a conditional will depends on the language used by the decedent and his or her intention in using it; to establish a condition, the will must contain language that clearly indicates a purpose to limit its operation (*Estate of Desmond (1963) 223 Cal. App. 2d 211, 213-214, 35 Cal. Rptr. 737*).

[*Optional*] **C. Expression of Inducement Distinguished From Condition.** A will is not be regarded as conditional when it reasonably can be held that the testator was merely expressing his or her motive or inducement to make it (*Estate of Desmond (1963) 223 Cal. App. 2d 211, 214, 35 Cal. Rptr. 737*).

[*Optional*] **D. Factors to Be Considered to Determine Whether Will Is Conditional.** The circumstances that the court may take into consideration in determining whether the decedent regarded a contingency as relating to the motive

that induced the making of the will, rather than as a condition, include: (1) the language of the document in context; (2) the circumstances surrounding the execution of the document and its delivery; (3) the testator's state of health; (4) the testator's plans for the future; (5) the preservation of the document, particularly after the contingency has failed; (6) instructions on delivery; (7) subsequent declarations of the testator; (8) lack of a subsequent will; (9) lack of alternative disposition of the property; and (10) the amount of the estate disposed of by the instrument (*Estate of Desmond (1963) 223 Cal. App. 2d 211, 214, 35 Cal. Rptr. 737*).

[*Optional*] **E. Extrinsic Evidence Admissible to Determine Whether Will Conditional.** Extrinsic evidence, including declarations of the testator, is admissible to show that his or her intention was to make an absolute and not a conditional will (*Estate of Desmond (1963) 223 Cal. App. 2d 211, 214, 35 Cal. Rptr. 737*).

[2] Comments

[a] Use of Form

This form may be submitted in support of a demurrer to (1) an objection to a petition for probate of a will, or (2) a petition to revoke probate of a will, when the contestant alleges that the will is subject to unfulfilled conditions appearing on its face [*see Prob. Code § 6105*]. Optional Paragraph Cmay be used when the alleged conditional language is merely an expression of the inducement to make the will. Optional Paragraphs D and E may be used when the proponent seeks to introduce evidence of the surrounding circumstances or parol evidence, including declarations of the testator, to show that the testator's intent was not to make the will conditional.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus counsel should set forth the specific language in the will or codicil that indicates that the instrument's validity is not conditional; any language quoted by the contestant in abbreviated form that the contestant claims is a condition should be clarified and set forth in its proper context.

This memorandum may be combined with points and authorities pertaining to the specific procedural context in which the issue of due execution of the will arises. Thus, it may be combined with the points and authorities pertaining to a demurrer to an objection or petition contesting a will [*see § 186.50*].

[b] Opposing Memoranda

In an appropriate case, the points and authorities *set out in § 186.30* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Whether Will Is Conditional Depends on Testator's Intent

In ***Estate of Desmond*** *(1963) 223 Cal. App. 2d 211, 35 Cal. Rptr. 737* , two of decedent's children sought to revoke probate of decedent's will, which left most of decedent's property to the contestants' brother. The contestants claimed that the will was a conditional one. The decedent made it about eight years before her death, before she took a short cross-country trip. She gave the document to one of her daughters for safekeeping, and retrieved it from the daughter when she returned from the trip. Eight years later, just before leaving her residence for a convalescent hospital to recover from a heart attack, decedent placed the will in a safe in her bedroom. She placed it on its edge with the face of the envelope facing the door of the safe, in a striking, arresting position immediately observable to anyone opening the safe. The allegedly conditional language of the will read as follows: "The enclosed should convey my wishes of disposition to be made of any and all of my personal and tangible possessions in case I should have a mishap and not return due to some unforeseen accident" and "[m]y last will and testament before leaving on a short trip." The trial court heard testimony from various family members concerning statements made by the decedent in the years between the

execution of the will and her death, to the effect that she had made or was going to make another will. No other will was ever found. The trial court ruled that the decedent did not intend the language as a condition precedent to the effectiveness of the will, but as an expression of inducement. It denied the petition to revoke probate, and one of the contestants appealed.

The court of appeal affirmed, stating that whether an instrument is a conditional will depends on the language used by the testator and his or her intention in using it. To establish a condition, a will must contain language which clearly indicates a purpose to limit its operation (*223 Cal. App. 2d 211, 213-214)* . The court found that the by retaining the will for eight years after the trip that induced her to make it and by placing it in her safe before leaving for the convalescent home, decedent indicated that she considered the will to be effective notwithstanding the fact that it was written in contemplation of a long-ago trip (*223 Cal. App. 2d 211, 215-216)* .

[b] Expression of Inducement Distinguished From Condition

The facts and procedural background of ***Estate of Desmond*** *(1963) 223 Cal. App. 2d 211, 35 Cal. Rptr. 737* , are *discussed under § 186.59[3][a]*. In *Desmond*, the court of appeal distinguished between an expression of the inducement to make a will and a condition to the validity of the will. The court held that a will may not be deemed conditional if it can reasonably be held that the testator in using the language in question was merely expressing his or her motive or inducement to make the will (*223 Cal. App. 2d 211, 214)* . After considering the evidence and several specified circumstances for determining whether a will is conditional [*see § 186.59[3][c]*] the court held that there was substantial evidence to sustain the trial court's finding that decedent's will was unconditional (*223 Cal. App. 2d 211, 213-216)* .

[c] Factors to Be Considered to Determine Whether Will Is Conditional

The facts and procedural background of ***Estate of Desmond*** *(1963) 223 Cal. App. 2d 211, 35 Cal. Rptr. 737* , are *discussed under § 186.59[3][a]*. In *Desmond*, the court of appeal stated that the circumstances which the court may take into consideration in determining whether a contingency expressed in a will relates to the motive inducing the making of the will, rather than to a condition to the validity of the will, include: (1) the language of the document in context; (2) the circumstances surrounding the execution of the document and its delivery; (3) the testator's state of health; (4) his or her plans for the future; (5) the preservation of the document, particularly after the contingency has failed; (6) instructions on delivery; (7) subsequent declarations of the testator; (8) lack of a subsequent will; (9) lack of alternative disposition of the property; and (10) the amount of the estate disposed of by the instrument (*223 Cal. App. 2d 211, 214)* . After considering these circumstances in light of the evidence, the court held that there was substantial evidence to sustain the trial court's finding that decedent's will was unconditional (*223 Cal. App. 2d 211, 213-216)* .

[d] Extrinsic Evidence Admissible to Determine Whether Will Conditional

The facts and procedural background of ***Estate of Desmond*** *(1963) 223 Cal. App. 2d 211, 35 Cal. Rptr. 737* , are *discussed under § 186.59[3][a]*. In *Desmond*, the court of appeal held that extrinsic evidence is admissible to show whether the testator intended to make an absolute or conditional will (*223 Cal. App. 2d 211, 214)* . Thus, the court held that extrinsic evidence relating to the circumstances surrounding the making and retention of decedent's will was sufficient to sustain the trial court's finding that the will was unconditional (*223 Cal. App. 2d 211, 213-216)* .

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CHAPTER 186 PROBATE OF WILLS
PART II. FORMS
B. Opposing Will Contests

18-186 California Points & Authorities § 186.60

§ 186.60 Opposing Contest of Will--By Demurrer to Objection or Petition Contesting Will [Prob. Code §§ 8251, 8271(b)]--Will Not Revoked by Subsequent Will

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities opposing a will contest or a petition to revoke probate of a will (see § 186.50), or may be used in a trial or appellate brief.*]

THE COURT SHOULD DISMISS THE _____ [OBJECTION TO THE PETITION FOR PROBATE *or* PETITION TO REVOKE PROBATE] OF THE _____ [_____ (*specify, e.g.,* FIRST) WILL *or* CODICIL] OF _____ [*name of decedent*] BECAUSE _____ [*specify facts showing that the will or codicil was not revoked by a subsequent instrument, e.g.,* DECEDENT DID NOT INTEND TO REVOKE THE _____ (_____ [*specify, e.g.,* FIRST] WILL *or* CODICIL) BY THE (_____ [*specify, e.g.,* SECOND] WILL *or* CODICIL), AS MANIFESTED BY THE FACT THAT DECEDENT'S GENERAL TESTAMENTARY PLAN TO DIVIDE HIS/HER ESTATE BETWEEN HIS/HER SONS WAS SIMILARLY AND CLEARLY EXPRESSED IN BOTH INSTRUMENTS].

A. Will May Be Revoked by Subsequent Will. [*See § 186.31, Paragraph A.*]

[*Optional*] **B. Court May Preserve Prior Will Provisions That Are Consistent With Subsequent Will.** When there is doubt concerning the intent of the testator regarding the revocation of a prior will by a subsequent will, and the two wills are not wholly inconsistent, a court may preserve the provisions of the prior will that are not inconsistent with those of the subsequent will (*Estate of Johnson (1979) 91 Cal. App. 3d 800, 807, 154 Cal. Rptr. 586* (construing former Prob. Code §§ 72 and 101).

[*Optional*] **C. Prior Will Revoked to Give Effect to Subsequent Will Remains in Effect If Latter Will Ineffective.** Under the doctrine of dependent relative revocation, an earlier will, revoked only to give effect to a later one on the supposition that the later one becomes effective, remains in effect to the extent that the latter proves ineffective (*Estate of Anderson (1997) 56 Cal. App. 4th 235, 242-243, 65 Cal. Rptr. 2d 307*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a demurrer to (1) an objection to a petition for probate of a will, or (2) a petition to revoke probate of a will, when the contestant alleges that the will is revoked by a subsequent will [*see Prob. Code § 6120(a)*]. Optional Paragraph B may be used when the proponent's position is that only certain provisions of the prior will are inconsistent with the subsequent one and that the consistent provisions of the prior will should be permitted to stand. Optional Paragraph C may be used when the doctrine of dependent relative revocation is an issue in the case.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, in an appropriate case counsel may discuss facts showing that there are provisions in a prior will that should be preserved because they are consistent with provisions in a subsequent will [*see Estate of Johnson (1979) 91 Cal. App. 3d 800, 807, 154 Cal. Rptr. 586]* .

This memorandum may be combined with points and authorities pertaining to the specific procedural context in which the issue of due execution of the will arises. Thus, it may be combined with the points and authorities pertaining to a demurrer to an objection or petition contesting a will [*see § 186.50*].

[b] Opposing Memoranda

In an appropriate case, the points and authorities *set out in § 186.31* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Court May Preserve Prior Will Provisions That Are Consistent With Subsequent Will

Estate of Johnson *(1979) 91 Cal. App. 3d 800, 154 Cal. Rptr. 586* involved two wills. The children of the testator's predeceased daughter sought to invalidate the first will, under which they were disinherited, on the ground that it was inconsistent with the second will. Since the second will did not mention them, invalidating the first will would enable them to claim an intestate share of the estate as pretermitted heirs. The first will was a formal, witnessed will prepared by an attorney. It contained the usual preliminary recitals, directions for payment of expenses, and provisions concerning executors. It gave $10,000 to a charity, and divided the residue of the estate between the testator's two surviving children. The gift to one son was to go to the other son if the former did not survive the testator. The gift to the other son was to go to his children if he did not survive the testator. The second will, executed about three years after the first one, was a brief holographic instrument. It directed that the estate be divided equally between the two sons, and that if one of them predeceased the testator the other take the entire estate. Like the first will, it appointed the sons as co-executors of the estate. It omitted the bequest to the charity, and did not mention the grandchildren at all. No one questioned the validity of either instrument; the sole issue was whether the second will revoked the first. The trial court held that the second will was not wholly inconsistent with and therefore did not revoke the first will.

The court of appeal affirmed, stating that in cases in which the first and second will are not wholly inconsistent, the rule of construction is to preserve the contents of the prior will, wholly or in part, rather than declare a total revocation by inference (*91 Cal. App. 3d 800, 807)* . The court held the fact that a second will provides a complete disposition of the testator's property may be an important consideration in determining whether it revoked the first will, but is not necessarily controlling. There was no "implicit revocation" of the first will simply because the second will made a complete disposition of the estate (*91 Cal. App. 3d 800, 806)* . The omission of the charitable bequest and the direction that the survivor of the sons take the entire estate rather than the children of one of the sons taking his share constituted only minor inconsistencies between the two wills. The testator's general testamentary plan to divide her estate between

her two sons was similarly and clearly expressed in both wills (*91 Cal. App. 3d 800, 807)* .

[b] Prior Will Revoked to Give Effect to Subsequent Will Remains in Effect If Latter Will Ineffective

In ***Estate of Anderson*** *(1997) 56 Cal. App. 4th 235, 65 Cal. Rptr. 2d 307* , a decedent executed a will in 1993 that expressly revoked all prior wills, but that inadvertently failed to exercise a power of appointment she had previously exercised in a 1982 will. After she died in 1995, one of the decedent's step-grandchildren filed a will contest. Applying the doctrine of dependent relative revocation, the trial court admitted to probate the 1993 will and the article of the 1982 will that exercised the power of appointment, finding that the 1993 will was not effective to revoke that article (*56 Cal. App. 4th 235, 237-242)* .

The court of appeal began by addressing the issue of whether a general revocation clause in a will can encompass a power of appointment exercised in a prior will, and held that it could. It noted that, as a general rule, the presence of a revoking clause in a later writing is accepted as conclusive proof of an intention on the part of a decedent to nullify the provisions of an earlier instrument. In construing a general revocation clause, an exercise of a power of appointment in an earlier will is treated in the same manner as any other provision of that will. Thus, although the testator had to mention specifically the power of appointment in order to exercise it in the first will, she did not have to make a specific reference to that power in order to revoke it in the second will. The revocation clause in the second will, which revoked all prior wills, was sufficient to revoke the article of the first will that provided for the power, unless the doctrine of dependent relative revocation was applicable (*56 Cal. App. 4th 235, 242)* .

Under that doctrine, an earlier will, which is revoked only to give effect to a later one on the assumption that the later one will become effective, remains in effect to the extent that the later will proves ineffective (*56 Cal. App. 4th 235, 242-243)* . The doctrine is designed to carry out the testator's probable intention when there is no reason to assume that the testator intended to revoke the earlier will if the later will should become inoperative (*56 Cal. App. 4th 235, 243)* . The court of appeal went on to hold that the trial court properly applied the doctrine of dependent relative revocation, because the 1993 will purported to revoke the testator's prior exercise of the power of appointment, which resulted in substantial gifts to the testator's step-grandchildren contrary to her express intention to exercise the power solely for the benefit of her natural daughter (*56 Cal. App. 4th 235, 245)* . In determining whether a will has been revoked, a court may consider extrinsic evidence of the testator's intent (*56 Cal. App. 4th 235, 247)* . Extrinsic evidence was properly considered in determining whether the testator intended in the subsequent will to revoke the article of the earlier will that contained the power of appointment, because the two wills were facially inconsistent (*56 Cal. App. 4th 235, 248-249)* . Sufficient evidence was presented to support the court's determination that the revocation of the first will was conditioned on the exercise of the power of appointment--the attorney who supervised the drafting of the 1993 will stated that the failure to refer to the exercise of the power of appointment explicitly in that will was a drafting error (*56 Cal. App. 4th 235, 249-251)* .

In ***Estate of Cuneo*** *(1963) 60 Cal. 2d 196, 32 Cal. Rptr. 409, 384 P.2d 1* , three testamentary documents were offered for probate: a 1951 holographic will, a 1954 formal will, and a 1956 codicil to the 1954 will. The general plan evidenced by each of these documents was that the bulk of the estate was to go to two of the testator's six children, Clara and Julia. Clara was to care for Julia, who was incompetent and lived in a mental hospital. The 1951 will made small bequests to each of the other four children, and the 1954 will provided that the bulk of the estate was to be set aside for Julia until her death or marriage and then divided equally among all the children and a grandchild mentioned in the earlier will. The 1956 codicil gave the entire estate to Julia and Clara and did not mention the other four children. In 1957, the attorney named as executor under the 1954 will surrendered that will to the testator at her request. She stated that "this is not what I want," and that she intended to burn it. The 1954 will was not found among her possessions after her death. When the 1956 codicil was found after her death, it contained penciled strike outs of the parts stating that the 1954 will was in the possession of the attorney and directing it be obtained from him. Several petitions and contests concerning the three documents were consolidated for trial. One of them involved a claim by the four children not named in the 1956 codicil that they were pretermitted heirs and entitled to claim against that

instrument. The trial court ultimately found that the 1951 will had been revoked by the general revocation clause of the 1954 will; that the 1954 will was revoked by destruction; that the 1956 codicil was intended by the decedent to remain in effect as modified in 1957, and that it was legally sufficient to stand by itself. The 1956 codicil was thus admitted to probate, and various parties appealed.

The California Supreme Court reversed and ordered probate of the 1954 will and the 1956 codicil as republished by the 1957 strike outs. The Court noted that there were substantial differences between the 1954 will and the 1956 codicil, which could not, standing alone, show an intention on the part of the testator that the 1954 will was to continue in effect in the event the 1956 instrument could not, as a self-contained will, be given effect. The 1956 instrument in fact could not be given effect, since the pretermitted heirs would claim against that instrument if it alone was admitted to probate. The Court also stated that it was "significant" that the testator had said the 1954 will was not what she wanted and that she intended to burn it. However, the Court found good and substantial grounds for the application of the doctrine of dependent relative revocation to revive the 1954 will as modified by the 1956 codicil. When viewed as modified by that instrument, the 1954 will was not, of course, substantially different from the 1956 instrument. The Court found that when the testator republished the 1956 codicil in 1957, making it into her will, it was her intention that the 1954 will as modified in 1956 would be revived in the event that the 1957 will (previously the 1956 codicil) proved ineffective. When the 1954 will was admitted to probate as modified by the 1956 instrument as republished, the other four children were not pretermitted heirs (*60 Cal. 2d 196, 200-202)* . The Court rejected an argument by one of the contestants that the 1951 will, revoked by the 1954 will, was revived by the operation of the doctrine when the 1954 will was revoked and the testator made modifications to the 1956 codicil. The Court also rejected an argument by another contestant that the 1956 instrument was intended only as a codicil and was therefore revoked by reason of the destruction of the 1954 will. Merely because the 1956 instrument was intended as a codicil when first published did not compel its continuance as a codicil. A document, originally a codicil, that is a complete testamentary instrument is not dependent on the continued existence of its basic will to retain its testamentary character (*60 Cal. 2d 196, 202)* .

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CHAPTER 186 PROBATE OF WILLS
PART II. FORMS
B. Opposing Will Contests

18-186 California Points & Authorities § 186.61

§ 186.61 Opposing Contest of Will--By Demurrer to Objection or Petition Contesting Will [Prob. Code §§ 8251, 8271(b)]--Will Not Revoked by Destruction, Mutilation, or Cancellation

[1] FORM

[*The following should be combined with a general memorandum opposing a will contest or a petition to revoke probate of a will (see § 186.50), or may be used in a trial or appellate brief.*]

THE COURT SHOULD DISMISS THE _____ [OBJECTION TO THE PETITION FOR PROBATE *or* PETITION TO REVOKE PROBATE] OF THE _____ [WILL *or* CODICIL] OF _____ [*name of decedent*] BECAUSE _____ [*specify facts showing that the decedent did not destroy the will with the intent to revoke it, e.g.,* ALTHOUGH THE _____ (WILL *or* CODICIL) HAD BEEN TORN INTO SEVERAL PIECES, DECEDENT EXPRESSED NO INTENTION TO DESTROY IT, AND IN FACT HAD KEPT THE _____ (WILL *or* CODICIL) IN A PLACE ACCESSIBLE TO SEVERAL PERSONS WHO KNEW THAT IT EXISTED].

A. Will May Be Revoked by Destruction. [*see § 186.32, Paragraph A.*]

B. Contestant Must Prove Destruction by Decedent With Intent to Revoke. A contestant must prove the will was destroyed by the decedent and not by another, and that there was an accompanying intention to revoke it (*Estate of Holmes (1948) 88 Cal. App. 2d 360, 363, 198 P.2d 708*).

[*Optional*] **C. Destruction by Third Person Without Decedent's Direction Does Not Revoke Will.** Destruction of a will by someone other than the testator, not done in the testator's presence, and done without the testator' direction, does not revoke the will (*Estate of Arbuckle (1950) 98 Cal. App. 2d 562, 567, 220 P.2d 950*).

[*Optional*] **D. Presumption of Revocation Effects Only Burden of Producing Evidence.** The presumption of revocation that arises when (1) the will is in the testator's possession prior to her death, (2) the testator is competent until that time, and (3) the will cannot be found after the testator's death, affects the burden of producing evidence rather than

the burden of proof (*Estate of Obernolte (1979) 91 Cal. App. 3d 124, 128-129, 153 Cal. Rptr. 798* ; *see Prob. Code § 6124*).

[*Optional*] **E. No Presumption of Revocation by Mutilation If Testator Did Not Have Continuous Possession.** The presumption that a testator revoked his or her will by mutilation if the will was found (1) immediately on the death of the testator, among the testator's private papers or in the testator's depository, and (2) in a mutilated condition, is inapplicable if the will is not shown to have been continuously in the testator's possession (*Estate of Holmes (1948) 88 Cal. App. 2d 360, 364, 198 P.2d 708*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a demurrer to (1) an objection to a petition for probate of a will, or (2) a petition to revoke probate of a will, when the contestant alleges that the will was revoked by destruction, mutilation, or cancellation [*see Prob. Code § 6120(b)*]. Optional Paragraph C may be used when the will was destroyed by a person other than the testator and not in the testator's presence or by the testator's direction. Optional Paragraphs D and E deal with the presumption of revocation that arises when the will was in the testator's possession and after his or her death either cannot be found or is found in a mutilated condition.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel may discuss facts showing either that the decedent did not destroy or mutilate his or her will with the intent to revoke it, or, if a third party destroyed the will, that he or she did not do so at the decedent's direction [*see Prob. Code § 6120(b)*; *Estate of Arbuckle (1950) 98 Cal. App. 2d 562, 567, 220 P.2d 950* ; *Estate of Holmes (1948) 88 Cal. App. 2d 360, 363, 198 P.2d 708]* .

This memorandum may be combined with points and authorities pertaining to the specific procedural context in which the issue of due execution of the will arises. Thus, it may be combined with the points and authorities pertaining to a demurrer to an objection or petition contesting a will [*see § 186.50*].

[b] Opposing Memoranda

In an appropriate case, the points and authorities *set out in § 186.32* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Contestant Must Prove Destruction by Decedent With Intent to Revoke

In ***Estate of Holmes*** *(1948) 88 Cal. App. 2d 360, 198 P.2d 708* , decedent wrote a holographic will about six months before she died. After she died, two of the decedent's children and the executor appointed by the will offered the will for probate. The will was not contested. It left the decedent's estate in equal parts to three of her children and left two other children $1 each. It was found after the decedent's death in a drawer in her room, inside an envelope bearing the name of one of the decedent's daughters and the daughter's husband. The envelope had apparently been opened and resealed. The will had been torn into several pieces. Shortly after the will was written, the decedent had told her daughter that she had made the will and where it could be found. She also said she was going to see her attorney to find out if the will was correctly written. She later visited the attorney and told him the same thing, but never came back to the office with the will. About a month before her death, the decedent visited her daughter and stayed with her for three days. She then returned to her home and stayed there until six days before her death, when she was taken to the hospital by the daughter. At that time, the daughter asked her if she had seen her attorney regarding the will, and she replied that she had not but that she had written the will and it was in her drawer. Several other people, including one of the disinherited

daughters, lived in the decedent's home. Neither the bedroom nor the drawer where the will was found were ever locked. Based on this evidence, the trial court found that the will had been destroyed by the decedent with intent to revoke it, and that she had died intestate. The decedent's daughter appealed.

The court of appeal reversed, holding that in order to establish a revocation of the will it was necessary that there be proof that the will was destroyed by the decedent and not by another, and that there was an accompanying intention to revoke it (*88 Cal. App. 2d 360, 363)* . The court noted that during the six days between the time the decedent left her house for the last time after telling her daughter that the will was in the drawer, and the time of her death, and for the several months before, the will was in a place accessible to several persons, some of whom knew that the will had been written. It did not seem probable that the decedent, having written the will and placed it in a sealed envelope, would, or did, open the envelope, tear the will, place all the pieces back in the envelope, and reseal it. There was nothing in the record to indicate that the decedent intended to destroy her will or knew that it had been torn (*88 Cal. App. 2d 360, 364)* , and the evidence did not support a reasonable inference that the will was destroyed or revoked by the decedent (*88 Cal. App. 2d 360, 365)* .

[b] Destruction by Third Person Without Decedent's Direction Does Not Revoke Will

The facts and procedural background of ***Estate of Arbuckle*** *(1950) 98 Cal. App. 2d 562, 220 P.2d 950* , are discussed in *§ 186.37[3][d]*. In *Arbuckle*, the court of appeal held that a will destroyed by the testator's manager, without the testator's knowledge and not by the testator's direction, was not revoked. Destruction of a will by someone other than the testator, not done in the testator's presence, and done without the testator's direction, does not revoke the will. A duly executed will continues to exist as a will, regardless of the destruction of the paper it is written on, so long as it is not revoked in the manner and by the means prescribed by statute (*98 Cal. App. 2d 562, 567)* .

[c] Presumption of Revocation Effects Only Burden of Producing Evidence

Estate of Obernolte *(1979) 91 Cal. App. 3d 124, 153 Cal. Rptr. 798* , involved an attempt by the decedent's only child to revoke probate of the decedent's will. The will left the daughter one-sixth of the estate, and left the rest to five other relatives. The decedent executed the will in her attorney's office about two months before she died. She apparently took the original home with her and placed it in a locked chest in her bedroom, to which she and her sister had the only keys. The decedent was on poor terms with her family members, including the persons named in her will. Her contact with them was almost entirely by telephone. After making her will, she told at least two people that she was tearing it up and wouldn't leave anyone a thing. She was apparently unaware that her daughter would inherit her entire estate if she died without a will. However, during the same period she expressed concern about the security of the will in her apartment and considered moving the will to a cupboard. Eleven days before she died, the decedent visited her attorney and talked at length to both him and his secretary without ever mentioning that she had or planned to destroy her will, or wanted to write a new one. After the decedent's death, her daughter came immediately to the apartment and searched for the will. She claimed that she found the empty envelope inside the cedar chest, but never located the will. After the funeral, the decedent's attorney told her she had a duplicate of the will. The attorney stated that the daughter was "most unhappy and distressed" when she saw the duplicate. Aside from the daughter, the decedent's home was accessible to a handyman who lived with the decedent and maintained the apartment complex for her. The trial court found, among other things, that persons other than the decedent had access to the original copy of the will prior to her death, and that it was equally probable that if the will was destroyed, it was destroyed by someone other than the decedent. Accordingly, the trial court denied the petition to revoke probate. The decedent's daughter appealed.

The court of appeal affirmed. It found that the rebuttable presumption of revocation was applicable, since the decedent had the will in her possession prior to her death, she was competent until that time, and the will could not be found after her death (*91 Cal. App. 3d 124, 128)* . However, the presumption was rebutted by the evidence that the decedent expressed concern about the security of her will and did not tell her attorney or the attorney's secretary that she had destroyed it (*91 Cal. App. 3d 124, 130)* . Since the presumption is one affecting the burden of producing evidence

rather than the burden of proof, it can be rebutted by evidence showing that it is equally probable that the will was destroyed by a person other than the decedent or that it was not destroyed with evidence to revoke it (*91 Cal. App. 3d 124, 129)* .

[d] No Presumption of Revocation by Mutilation If Testator Did Not Have Continuous Possession

The facts and procedural background of ***Estate of Holmes*** *(1948) 88 Cal. App. 2d 360, 198 P.2d 708* , are *discussed under § 186.61[3][a]*. In *Holmes*, the court of appeal held that the presumption of destruction with intent to revoke was not applicable to a will that could not be found after the testator's death when the will was not shown to have been continuously in the testator's possession prior to her death (*88 Cal. App. 2d 360, 364)* . Although the will was kept in the testator's bedroom prior to her death, the evidence showed that several other people, including one of the disinherited daughters, lived in the testator's home, and that neither the bedroom nor the drawer where the will was found were ever locked (*88 Cal. App. 2d 360, 364-365)* .

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Volume 18 Chapters 180-189 PRETRIAL PROCEEDINGS---to---PROBATE OF WILLS
CHAPTER 186 PROBATE OF WILLS
PART II. FORMS
B. Opposing Will Contests

18-186 California Points & Authorities § 186.62

§ 186.62 Opposing Contest of Will--Procedural Requirements--Petition to Revoke Probate of Will Is Not Timely Filed [Prob. Code § 8270]

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities opposing a petition to revoke probate of a will (see § 186.50), or may be used in a trial or appellate brief.*]

THE COURT SHOULD DISMISS THE PETITION TO REVOKE PROBATE OF THE _____ [WILL *or* CODICIL] OF _____ [*name of decedent*] BECAUSE THE PETITION WAS NOT FILED WITHIN 120 DAYS AFTER THE _____ [WILL *or* CODICIL] WAS ADMITTED TO PROBATE.

A. Time Limit for Filing Petition to Revoke Probate. A petition to revoke probate of a will must be brought no later than 120 days after the will is admitted to probate, unless the contestant was a minor or was incompetent and had no guardian or conservator at the time the will was admitted (*Prob. Code § 8270*).

B. Admission of Will Is Conclusive if Uncontested. The admission of a will to probate is conclusive if: (1) no person contests the validity of a will or petitions to revoke probate of the will within 120 days after the will was admitted to probate; (2) there was no extrinsic fraud in the procurement of the court order admitting the will to probate; and (3) there was no erroneous determination of the decedent's death (*Prob. Code §§ 8007, 8226(a)*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a demurrer to a petition to revoke probate of a will when the petition is not timely filed [*Prob. Code § 8270*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Counsel should discuss facts showing that none of the contestants were minors or incompetents without

guardians or conservators at the time the will was admitted [*see Prob. Code § 8270(b)*], and that there was no extrinsic fraud in the procurement of the order admitting the will [*see Prob. Code § 8007*].

This memorandum may be combined with points and authorities pertaining to the specific procedural context in which the issue of due execution of the will arises. Thus, it may be combined with the points and authorities pertaining to a demurrer to an objection or petition contesting a will [*see § 186.50*].

[b] Opposing Memoranda

In an appropriate case, the points and authorities *set out in § 186.36* may be used to oppose the contention supported by these points and authorities.

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18-186 California Points & Authorities § 186.63

§ 186.63 Opposing Contest of Will--Procedural Requirements--Contestant Lacks Standing to Contest Will [Prob. Code §§ 1043, 8004(b), 8250(a), 8270(a)]

[1] FORM

[*The following should be combined with a general memorandum of points and authorities opposing a will contest or a petition to revoke probate of a will (see § 186.50), or may be used in a trial or appellate brief.*]

THE COURT SHOULD DISMISS THE _____ [OBJECTION TO THE PETITION FOR PROBATE *or* PETITION TO REVOKE PROBATE] OF THE _____ [WILL *or* CODICIL] OF _____ [*name of decedent*] BECAUSE _____ [*specify facts showing that contestant lacks standing to contest the will because he/she is not an "interested person," e.g.,* PETITIONER IS AN OMITTED HEIR WHOSE INTERESTS ARE INDEPENDENT OF AND UNAFFECTED BY THE WILL, AND THEREFORE HE/SHE LACKS STANDING TO CONTEST THE _____ (WILL *or* CODICIL)].

A. Contestant Must Be Interested Person. Only an interested person may contest a will, either before or after probate (*Prob. Code §§ 1043, 8004(b), 8250(a), 8270(a)*; *Estate of Lane (1970) 7 Cal. App. 3d 402, 405, 86 Cal. Rptr. 620* ; *see Prob. Code § 48* (defining "interested person")).

[*Optional*] **B. Contestant Must Benefit From Contest.** Because an "interested person" is a person who has such a pecuniary interest in the distribution of the testator's estate as would be impaired or defeated by the probate of the will or be benefited by setting it aside, a will contestant must show that his or her share of the distribution will be increased if the contest is successful (*Estate of Weber (1991) 229 Cal. App. 3d 22, 25 n.4, 280 Cal. Rptr. 22*).

[*Optional*] **C. Heir Must Show That Revocation Will Result in Intestacy.** An heir lacks standing to contest a will unless it is alleged in the pleadings, or clear from the record, that a successful attack on the will will result in intestacy (*Estate of Powers (1979) 91 Cal. App. 3d 715, 720, 154 Cal. Rptr. 366*).

[*Optional*] **D. Omitted Heir Lacks Standing.** An omitted heir lacks standing to contest a will because such an heir's

rights are independent of the will and are therefore unaffected by it (*Estate of Shimun (1977) 67 Cal. App. 3d 436, 440, 136 Cal. Rptr. 668*).

[*Optional*] **E. Party to Pre-Probate Contest Lacks Standing.** A party lacks standing to bring a will contest after probate if he or she was a party to a prior contest of the will, or had actual notice of a contest in time to have joined the contest (*Prob. Code § 8270(a)*).

[*Optional*] **F. Beneficiary Under Unproven Lost Will Lacks Standing.** Beneficiaries under an alleged prior lost will lack standing to contest a later will if they are unable to prove the alleged lost will (*Estate of Lane (1970) 7 Cal. App. 3d 402, 406-407, 86 Cal. Rptr. 620*).

[*Optional*] **G. Executor Lacks Standing to Contest Codicil Naming Different Executor.** An executor named in a will lacks standing to contest a codicil naming a different executor (*Jay v. Superior Court (1970) 10 Cal. App. 3d 754, 757-759, 89 Cal. Rptr. 466*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a demurrer to (1) an objection to a petition for probate of a will, or (2) a petition to revoke probate of a will, when the contestant lacks standing to contest the will because he or she is not an "interested person" [*see Prob. Code §§ 48, 1043, 8004(b), 8250(a), 8270(a)*; *see also* discussion in *§ 186.37[2][b]*]. Optional Paragraph C may be used when the contestant is an heir. If the contestant is an omitted heir, Optional Paragraph D may be used instead. Optional Paragraph E may be used when the contestant was a party to a prior contest, before or after probate, of the same will. Optional Paragraph F may be used when the contestant claims to be a beneficiary under an unproduced will that cannot be proven as a lost will.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. For example, in an appropriate case counsel may discuss facts showing that the contestant is an omitted heir, and that thus the contestant's rights are unaffected by the will [*see Estate of Shimun (1977) 67 Cal. App. 3d 436, 440, 136 Cal. Rptr. 668]* .

This memorandum may be combined with points and authorities pertaining to the specific procedural context in which the issue of due execution of the will arises. Thus, they may be combined with the points and authorities pertaining to a demurrer to an objection or petition contesting a will [*see § 186.50*].

[b] Opposing Memoranda

In an appropriate case, the points and authorities *set out in § 186.37* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Contestant Must Be Interested Person

In ***Estate of Lane*** *(1970) 7 Cal. App. 3d 402, 86 Cal. Rptr. 620* , two persons who were unrelated to the decedent petitioned to revoke probate of decedent's will on the ground of testamentary incapacity. They sought to establish standing to contest the will by showing that they were the sole beneficiaries under an earlier will executed by the decedent while she was competent to make a will. The contestants' written answers to interrogatories indicated that they could not produce the earlier will, although they had a copy furnished by the attorney who prepared it, and that they had no evidence to establish that the earlier will was in existence at the time of the decedent's death or that it had been lost

or destroyed fraudulently or through public calamity during her lifetime. The proponents submitted as evidence a declaration of a bank officer stating that the bank had custody of the earlier will for three years, from the year it was executed until the year before the later will was executed, and that it delivered the earlier will to the decedent at that time at her request. The declaration incorporated a receipt for the will signed by the decedent. Based on the interrogatories and the declaration, the trial court granted the summary judgment motion of the proponents and dismissed the contest. The contestants appealed.

The court of appeal affirmed, holding that only an interested person may contest a will before or after probate (*7 Cal. App. 3d 402, 405)* . In order to establish their status as interested persons with standing to contest the later will, the court explained, the contestants were required to make a prima facie showing that they could prove that the earlier will was lost or destroyed. Since the contestants admittedly could not produce the earlier will, could not prove it was in existence at the time of the decedent's death, and could not establish, and did not contend, that it had been lost or destroyed in her lifetime through fraud or public calamity, the will could not be admitted to probate, was wholly inoperative, and could not become the vehicle by which the contestants achieved standing to contest the later will (*7 Cal. App. 3d 402, 406-407)* .

[b] Contestant Must Benefit From Contest

In ***Estate of Weber*** *(1991) 229 Cal. App. 3d 22, 280 Cal. Rptr. 22* , the decedent's will divided her assets equally between her son and daughter. The son filed a will contest after the daughter petitioned for probate of the will, and the court sustained without leave to amend the daughter's demurrer to the son's complaint and opposition to probate of the will. The appellate court noted that the order sustaining the demurrer was properly entered. As in any other proceeding, a petitioner in a probate proceeding must have standing and, in the context of a will contest, the petition must allege sufficient facts to demonstrate the petitioner is an "interested person." An "interested person" is a person who has such a pecuniary interest in the distribution of the testator's' estate as would be impaired or defeated by the probate of the will or be benefited by setting it aside. Thus, a will contestant must show that his or her share of the distribution will be increased if the contest is successful. In this case, because the decedent did not leave a surviving spouse, her estate would be divided equally between her children if the will were set aside, which is the same distribution that would be made under the will. Thus, the decedent's son cannot benefit by pursuing the will contest (*229 Cal. App. 3d 22, 25 n.4*).

[c] Heir Must Show That Revocation Will Result in Intestacy

In ***Estate of Powers*** *(1979) 91 Cal. App. 3d 715, 154 Cal. Rptr. 366* , the decedent's widow sought probate of a concededly valid will executed by the decedent. A contestant claiming to be an heir of the decedent contested the will on the ground that the decedent had executed a later valid will, naming her as the primary beneficiary, which implicitly revoked the will offered by the widow. The facts concerning the later will were alleged on information and belief, and the contestant did not produce the later will or a copy of it. The trial court sustained a demurrer to the contestant's first amended contest and dismissed the contest on the ground that the contestant lacked standing to contest the will. The contestant appealed.

The court of appeal reversed and instructed the trial court to provide the contestant with an opportunity to present evidence to support her allegation that she was a person interested in the estate by virtue of her status as a legatee under the later will. As to the contestant's claim to be an heir of the decedent, the appellate court stated that an allegation that one is an heir is not enough to establish standing to contest a will unless it is also alleged, or clear from the record, that a successful attack on the purported will will result in intestacy (*91 Cal. App. 3d 715, 720)* . Since the contestant did not allege that the will offered for probate by the widow was invalid or that the estate would pass by intestacy, she did not make a prima facie case of entitlement to any part of the estate based on her heir status. If she successfully proved a valid later will, she would take under that will. If she could not establish that will, the will offered by the widow would be entitled to probate and the estate would pass under the terms of that will rather than under the law of intestacy.

Therefore, the trial court properly sustained the demurrer as to the contestant's standing as an heir (*91 Cal. App. 3d 715, 721-722)* . The appellate court found that the contestant did plead sufficient facts to establish standing as a beneficiary under the alleged later will. The will relied on by a contestant to establish his or her interest need not be produced and offered for probate as a condition to the contestant's right to contest an earlier will. Of course, the contestant would be required at trial to prove the terms and validity of the later will. However, at trial she would have the benefit of the process of the court to summon all necessary witnesses and compel the production of the earlier will (*91 Cal. App. 3d 715, 724-725)* .

[d] Omitted Heir Lacks Standing

In ***Estate of Shimun*** *(1977) 67 Cal. App. 3d 436, 136 Cal. Rptr. 668* , the decedent's brother offered for probate a will duly executed by the decedent prior to his marriage. The will named the brother as executor of the estate, and did not mention the wife or children of the decedent. The decedent's widow contested the admission of the will to probate on the ground that it was revoked in its entirety by operation of law since the entire estate would go to her and the children as the pretermitted heirs of the decedent. She also sought appointment as administrator of the estate, citing the above-described revocation by law and the ill feelings of the decedent's brother toward her. The trial court denied probate of the will, declared that the decedent died intestate, and appointed the widow as administrator. The brother appealed.

The court of appeal reversed and found that the fact that the widow and the children were omitted (pretermitted) heirs and would take against the will did not accomplish a revocation of the will. When a will is partially revoked by a subsequent marriage, the balance of the will remains effective. Therefore, the brother was entitled to be appointed executor since he was named as executor in the will (*67 Cal. App. 3d 436, 439-440)* . A person named as executor in a will has the right to so act in the absence of statutory disqualification, and the brother's ill feelings toward the widow did not constitute statutory grounds for denying his appointment (*67 Cal. App. 3d 436, 442)* . The appellate court also found that the widow and children lacked standing to contest the will. As omitted heirs, they would take their share of the estate independently of the will. Therefore, their interests were not affected by the will. Their claims could properly be made during the proceeding for distribution, but could not operate to prevent the will from being probated (*67 Cal. App. 3d 436, 440-441)* .

[e] Beneficiary Under Unproven Lost Will Lacks Standing

The facts and procedural background of ***Estate of Lane*** *(1970) 7 Cal. App. 3d 402, 86 Cal. Rptr. 620* , are *discussed under § 186.63[3][a]*. In *Lane*, the court of appeal held that beneficiaries under an alleged lost will that they could neither produce nor establish as a lost or destroyed will were not interested persons for the purpose of contesting a later will. Since the alleged lost will could not be admitted to probate, it could not become the vehicle by which the contestants achieved standing to contest the later will (*7 Cal. App. 3d 402, 406-407)* .

[f] Executor Lacks Standing to Contest Codicil Naming Different Executor

In ***Jay v. Superior Court*** *(1970) 10 Cal. App. 3d 754, 89 Cal. Rptr. 466* , an executor named in the decedent's will filed a contest challenging a codicil to the will that named a different executor, but made no other change in the will. The grounds alleged for the contest were that at the time the codicil was executed the decedent was not of sound mind and was under the undue influence of various individuals. The contest was dismissed on the ground that the executor was not an "interested person" and thus lacked standing to contest the will.

The appellate court began its review of the trial court proceedings by noting that the right of an interested person to contest a will is fundamentally based on the loss of property or property rights resulting from the recognition of an invalid instrument. A will contest is essentially an action for the recovery of property unlawfully taken or about to be taken from the ownership of the contestant. The court noted that it is well settled that an executor who is named in a will

that has been offered for probate has the right to oppose or resist a contest to this will. An executor also may contest a subsequent will even if the executor does not have a beneficial interest in the estate. This right is not based on any pecuniary interest of the executor in the distribution of the estate, but is instead based on the theory that the executor represents those who would be entitled to the estate under the will in which he or she is named as executor and, in a representative capacity, has the right to see that the testator's wishes are not thwarted by admission to probate of a testamentary instrument that is not genuine. In this case, the contestant's only legal interest in the estate was serving as executor and receiving administration fees for those services; the contestant did not show how the object and intent of the testator will be thwarted by the provisions of the codicil. Under court supervision, the testator's property must be distributed in accordance with the provisions of the will irrespective of who serves as executor. Therefore, the contestant is not an "interested person" for purposes of bringing a will contest (*10 Cal. App. 3d 754, 757-759)* .

[4] Additional Authorities

[a] Executor Lacks Standing to Contest Codicil Naming Different Executor

In *Estate of Getty (1978) 85 Cal. App. 3d 755, 149 Cal. Rptr. 656* , a contingent trustee of a trust created under a will to hold the residue of the estate filed a petition contesting the final codicil of the will, which eliminated the trust as the recipient of the residue. The petition asserted that the testator lacked testamentary capacity when he executed the codicil or, in the alternative, that he executed the codicil under the undue influence of his close advisers. The appellate court affirmed the trial court's ruling that the contingent trustee under the will was not an "interested person" with standing to contest the validity of the codicil. The court noted that lack of a direct pecuniary interest does not absolutely foreclose an omitted trustee's right to contest the will. A testamentary trustee is the representative of the beneficiaries of the trust and the guardian of their interests and, when appropriate, the trustee may contest a subsequent testamentary instrument that impairs the beneficiaries' pecuniary interests in the estate property. Thus, a trustee's standing to contest a will does not depend strictly on a personal pecuniary interest in the bequeathed property under the prior instrument, but may be made determinate by impairment of the pecuniary rights of the beneficiaries by the probate of the subsequent testamentary document. However, in this case, the effect of the contested change on the beneficiary did not disclose any impairment of the beneficiary's interest as a result of the subsequent codicil. The sole effect of the codicil was to shift control of the assets from a trust under the will to the beneficiary's trustees, thereby enhancing the beneficiary's income by eliminating the sizeable trustee fees of the intermediate trust under the will, which, under earlier codicils, would become payable to the testamentary trustees. The right to control the trust property and to receive statutory fees for administration of the trust did not constitute a sufficient pecuniary interest to give standing to the omitted trustee to contest the codicil without reference to the effect of the subsequent codicil on the beneficiary (*85 Cal. App. 3d 755, 758-761)* .

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CHAPTER 186 PROBATE OF WILLS
PART II. FORMS
B. Opposing Will Contests

18-186 California Points & Authorities § 186.64

§ 186.64 Opposing Contest of Will--Will Made for Testator by Conservator of Estate Pursuant to Court Order [Prob. Code §§ 2580(b)(13), 6100.5(c)]

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities opposing a will contest or a petition to revoke probate of a will (see § 186.50), or may be used in a trial or appellate brief.*]

THE COURT SHOULD DISMISS THE _____ [OBJECTION TO THE PETITION FOR PROBATE *or* PETITION TO REVOKE PROBATE] OF THE _____ [WILL *or* CODICIL] OF _____ [*name of testator*] BECAUSE THE _____ [WILL *or* CODICIL] WAS MADE FOR HIM/HER BY HIS/HER CONSERVATOR, _____ [*name of conservator*], PURSUANT TO COURT ORDER AND IN _____ [*name of conservator*]'S CAPACITY AS DULY AUTHORIZED AND APPOINTED CONSERVATOR OF THE ESTATE.

A. Will May Be Made for Conservatee by Conservator of Estate. If a person has a conservator of the estate, that conservator may make a will for the conservatee if the court first authorizes the action (*Prob. Code §§ 2580(b)(13), 6100(b), 6100.5(c)*; *see Prob. Code § 2400(a)* (as used in *Prob. Code § 2580(b)(13)*, "conservator" means conservator or limited conservator of the estate).

B. Conservatee's Lack of Testamentary Capacity Does Not Impair Power of Duly Authorized Conservator of Estate to Make Will for Conservatee. The power of a conservator of the estate to make a will for his or her conservatee does not rest on the conservatee's capacity to make the will, but flows from independent statutory authority and the authorization of the court (*Prob. Code §§ 2580(b)(13), 6100(b), 6100.5(c)*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a demurrer to an objection to a petition for probate of a will, or a

petition to revoke probate of a will, when the will was made by a conservator of the estate pursuant to court authorization and the contestant alleges that the testator lacked testamentary capacity at the time the will was made.

If it does not appear from the will or from other documents already on file in the estate proceeding that the will was made by the conservator of the estate pursuant to court authorization, a copy of the court order authorizing the conservator to make the will, together with an affidavit, declaration under penalty of perjury, or some other evidence showing that the will was made in this manner, should also be submitted to the court.

[b] Impact of Conservatorship on Testamentary Capacity

A person who is subject to a conservatorship is not necessarily incompetent to make a will [*Prob. Code § 1871(c)*]. A conservator of the person may be appointed for any person who is unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter, and a conservator of the estate may be appointed for a person who is substantially unable to manage his or her own financial resources or resist fraud or undue influence [*Prob. Code § 1802(a), (b)*]. Neither of these grounds is inconsistent with competence to make a will [*see Estate of Mann (1986) 184 Cal. App. 3d 593, 605, 229 Cal. Rptr. 225]* . Although the appointment of a conservator may have some bearing on the conservatee's testamentary capacity, the appointment in itself furnishes only a weak inference of lack of capacity [*Conservatorship of Bookasta (1989) 216 Cal. App. 3d 445, 450 n.5, 262 Cal. Rptr. 1]* .

[c] Power of Conservator to Make Will for Conservatee

A conservatee who is of sound mind may make a valid will [*Prob. Code § 1871(c)*; *see Prob. Code § 6100(a)*]. However, if a person has a conservator of the estate, that conservator may also make a will for the conservatee if the court first authorizes the action [*Prob. Code §§ 2580(b)(13), 6100(b), 6100.5(c)* (operative Jan. 1, 1996); *see Prob. Code § 2400(a)* (as used in *Prob. Code § 2580(b)(13)*, "conservator" means conservator or limited conservator of estate)]. A conservator of the estate might seek to do this if the conservator believes that the conservatee is not mentally competent to make the will [*see Prob. Code § 6100.5(a)*; *see also § 186.27[2]*], or if the conservatee is mentally competent to make the will but physically unable to do so.

The authority of a duly authorized conservator of the estate to make a will for the conservatee is not dependent on the conservatee's own capacity to make the will, but may be exercised in spite of the consevatee's lack of capacity [*Prob. Code §§ 2580(b)(13), 6100(b), 6100.5(c)* (operative Jan. 1, 1996)].

[d] Power of Conservatee to Amend, Revoke, or Make New Will

If a conservator of the estate has made a will for the conservatee, the conservatee may later revoke or amend the will, or make a new and inconsistent will, but only if the conservatee is then mentally competent to make a will [*Prob. Code § 6100(b)*]. The fact that the conservatorship might still be in existence would not prevent the conservatee from doing any of these things, providing the conservatee has the required mental competence [*see Prob. Code § 6100(b)*].

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Volume 19 Chapters 190-195 PRODUCTS LIABILITY---to---PUBLIC ADMINISTRATIVE LAW
CHAPTER 190 PRODUCTS LIABILITY

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[1] Page Limits on Points and Authorities

[2] Using the Forms to Build Draft Memorandum

§ 190.04 Related Pleadings and Practice Forms

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§ 190.06 Other Related Publications

§§ 190.07-190.19 [Reserved]

§ 190.20 Supporting Contention That Product Is Subject of Products Liability Action--Airport Approach Chart as Product

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Airport Approach Chart Is Product for Products Liability Purposes

§ 190.21 Supporting Contention That Product Is Subject of Products Liability Action--Real Estate Lot as Product

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Real Estate Lot as Product

[4] Additional Authorities

[a] Real Estate Lot as Product

§ 190.22 Supporting Contention That Product Is Subject of Products Liability Action--Real Estate Development as Product

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Strict Liability of Mass Producer and Seller of Homes

[b] Strict Liability of Developer

[c] Strict Liability Applies Regardless of Whether Defective Product Is Located on Plaintiff's Property

§ 190.22A Supporting Contention That Product Is Subject of Products Liability Action--Raw Asbestos as Product

[1] FORM

[2] Comment

[a] Use of Form

[3] Discussion of Authorities

[a] Raw Asbestos Is Product That May Have Design Defect

§ 190.23 Supporting Contention That Product is Subject of Products Liability Action--Injury Caused by Defective Electricity Occurred After Electricity Entered Stream of Commerce

[1] FORM

[2] Comments

[a] Use of Form

[b] Electricity Must Have Entered Stream of Commerce

[3] Discussion of Authorities

[a] Commercial Electricity Supplier Strictly Liable for Electricity in Stream of Commerce

§ 190.23A Supporting Contention That Product Is Subject of Products Liability Action--Product Still On the Market

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Strict Liability Broadly Extends to Products That Are Placed on Market

[b] Strict Liability Is Not Limited to Cases Arising After Retail Sale

[c] Application of Strict Liability Is Not Restricted to Injuries Caused by Consumer Use

§ 190.24 Opposing Contention That Product Is Subject of Products Liability Action--Provider of Service Not Subject to Strict Liability--In General

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Person Who Sells Service Is Not Manufacturer of Product

[b] Person Who Sells Service Is Not Subject to Strict Liability

[c] Entity Not Subject To Strict Liability When Dominant Purpose of Transaction Is Provision of Service

[4] Additional Authorities

[a] Person Who Sells Service Is Not Subject to Strict Liability

§ 190.25 Opposing Contention That Product Is Subject of Products Liability Action--Provider of Service Not Subject to Strict Liability--Supplying Blood Transfusion or Blood Product Is Service [Health & Safety Code § 1606]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Supplier of Blood Transfusion or Product Is Seller of Service Not Subject to Products Liability

[b] Hospital That Supplies Blood Transfusion Is Not Subject to Strict Liability

[c] Blood Bank That Supplies Blood Transfusion Is Not Subject to Strict Liability

[d] Manufacturer of Blood Product Is Not Subject to Strict Liability

§ 190.26 Opposing Contention That Product Is Subject of Products Liability Action--Provider of Service Not Subject to Strict Liability--Supplying Human Tissue Is Service [Health & Safety Code § 1635.2]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Supplier of Human Tissue Product Is Seller of Service Not Subject to Products Liability.

§ 190.27 Opposing Contention That Product Is Subject of Products Liability Action--Provider of Service Not Subject to Strict Liability--Travel Agency Arranging Package Tour Is Service

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Arranging Package Tour as Service

§ 190.28 Opposing Contention That Product Is Subject of Products Liability Action--Provider of Service Not Subject to Strict Liability--Architects and Civil Engineers Perform Service

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Architects and Civil Engineers Perform Service

[4] Additional Authorities

[a] Architects and Civil Engineers Perform Service

§ 190.29 Opposing Contention That Product Is Subject of Products Liability Action--Provider of Service Not Subject to Strict Liability--Supplier of Electricity Not Subject to Strict Liability if Electricity Defect and Injury Occurred Before Electricity Had Entered Stream of Commerce

[1] FORM

[2] Comments

[a] Use of Form

[b] Electricity Outside Stream of Commerce Not Subject to Strict Liability

[3] Discussion of Authorities

[a] Electricity is Service, Not Product, Until Metered

[b] Strict Liability Inapplicable to Defects Along Transmission Lines

[c] Strict Liability Inapplicable to Facilities Used by Public Utility for Transmission of Electricity

[d] Electric Transmission Facilities Not Placed in Stream of Commerce

§ 190.30 Opposing Contention That Product Is Subject of Products Liability Action--Residence Was Not Mass-Produced

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Strict Liability May Not Be Imposed Regarding Residences That Are Not Mass-Produced

§ 190.31 Opposing Contention That Product Is Subject of Products Liability Action--Object or Instrumentality Not "Product" as Defined or Contemplated by Law--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Plaintiff Must Show Existence of "Product"

[b] Existence of "Product" Is Question of Law

[c] Item Not Contemplated by Law to Be "Product" Cannot Be Subject of Strict-Liability Action

§§ 190.32-190.49 [Reserved]

§ 190.50 Supporting Contention That Plaintiff Is Person Who May Bring Products Liability Action--No Privity Required

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Duty Runs to All Who Are Injured

[b] Plaintiff Not Required to Have Privity of Contract

[c] Bystander May Bring Strict Liability Action

[d] Driver and Passenger of Automobile May Bring Strict Liability Action Against Manufacturer of Another Automobile

§ 190.51 Supporting Contention That Plaintiff Is Person Who May Bring Products Liability Action--Heirs of Decedent Killed by Defective Product May Assert Strict Products Liability Theory in Wrongful Death Action [Code Civ. Proc. § 377]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Heirs May Recover Under Strict Products Liability Theory

§ 190.52 Supporting Contention That Plaintiff Is Person Who May Bring Products Liability Action--Independent Cause Exception to Firefighter's Rule

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Firefighter's Rule Does Not Modify Broad Interpretation of Independent Cause Exception

[b] Firefighter's Rule Does Not Bar Claim Based on Allegation that Product's Malfunction Was Independent of Fire

§ 190.53 Opposing Contention That Plaintiff Is Person Who May Bring Products Liability Action--Commercial Purchaser Exception

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Commercial Purchaser May Not Bring Strict Liability Action

[4] Additional Authorities

[a] Commercial Purchaser May Not Bring Strict Liability Action

§§ 190.54-190.69 [Reserved]

§ 190.70 Supporting Contention That Defendant Is Person Who Is Subject to Strict Liability--Manufacturer Who Places Article on Market

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Manufacturer Is Strictly Liable for Placing Defective Article on Market That Injures Person

§ 190.71 Supporting Contention That Defendant Is Person Who Is Subject to Strict Liability--Person Who Is Part of Overall Producing and Marketing Enterprise--In General

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Strict Liability Extends to All Who Are Part of Producing and Marketing Enterprise

[b] One Who Plays More Than Random and Accidental Role in Marketing Enterprise Is Subject to Strict Liability

[4] Additional Authorities

[a] Strict Liability Extends to All Who Are Part of Producing and Marketing Enterprise

§ 190.72 Supporting Contention That Defendant Is Person Who Is Subject to Strict Liability--Person Who Is Part of Overall Producing and Marketing Enterprise--Retailer

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Retailer Is Part of Producing and Marketing Enterprise

§ 190.73 Supporting Contention That Defendant Is Person Who Is Subject to Strict Liability--Person Who Is Part of Overall Producing and Marketing Enterprise--Licensor of Chattel

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Licensor of Chattel Is Part of Overall Producing and Marketing Enterprise and Is Subject to Strict Liability

§ 190.73A Supporting Contention That Defendant Is Person Who Is Subject to Strict Liability--Defendant Is Bulk Supplier of Raw Asbestos Fiber Incorporated into Finished Product

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Bulk Supplier of Raw Asbestos Fiber Is Subject to Strict Products Liability

§ 190.74 Supporting Contention That Defendant Is Person Who Is Subject to Strict Liability--Defendant Is Manufacturer of Defective Component Part

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Manufacturer of Windows Can Be Strictly Liable for Harm to Other Property Resulting From Defects in Window

[b] Manufacturer of Defective Component Part Is Strictly Liable for Injuries Caused by Component Part

[c] Component Parts Manufacturer Defense Applies Only to Generic, "Off-the-Shelf" Components

§ 190.75 Supporting Contention That Defendant Is Person Who Is Subject to Strict Liability--Manufacturer of Complete Product Is Strictly Liable for Defect in Component Part Supplied by Another

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Manufacturer Strictly Liable Even if Defect Due to Component Part Supplied by Another

§ 190.75A Supporting Contention That Defendant Is Person Who Is Subject to Strict Liability--Defendant Is Manufacturer of Products Which, When Used For Their Intended Purpose, Resulted in Release of Toxins

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Manufacturer Strictly Liable For Product Designed For Only One Use, In Combination With Specified Equipment

§ 190.76 Supporting Contention That Defendant Is Person Who Is Subject to Strict Liability--Manufacturer Cannot Delegate Duty to Deliver Product to Purchaser Free From Dangerous Defects

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Manufacturer Is Strictly Liable Regardless of What Part of Manufacturing Process Was Delegated to Third Parties

[b] Manufacturer Cannot Delegate Duty to Deliver Product Free From Dangerous Defects

[c] Manufacturer Cannot Escape Liability Because of Dealer's Act or Failure to Act

§ 190.77 Supporting Contention That Defendant Is Person Who Is Subject to Strict Liability--Seller Who Alters Product

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Seller Who Alters Product Is Tantamount to Manufacturer

[4] Additional Authorities

[a] Seller Who Alters Product Is Tantamount to Manufacturer

§ 190.78 Supporting Contention That Defendant Is Person Who Is Subject to Strict Liability--Exception to General Rule of Successor Nonliability Applies

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Successor to Manufacturer May Be Strictly Liable for Defective Product if Exception to General Rule of Successor Nonliability Applies

§ 190.79 Supporting Contention That Defendant Is Person Who Is Subject to Strict Liability Under Product Line Theory--Successor to Manufacturer

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Successor to Manufacturer Is Strictly Liable for Defective Product Manufactured by Original Manufacturer

[b] Alad Is Not Given Narrow Construction

[c] Successor May Be Strictly Liable Even Though It Has Discontinued the Defective Product

[4] Additional Authorities

[a] Successor to Manufacturer Is Strictly Liable for Defective Product Manufactured by Original Manufacturer

[b] Alad Is Not Given Narrow Construction

§ 190.80 Supporting Contention That Defendant Is Person Who Is Subject to Strict Liability--Identity of Actual Manufacturer Unknown--Market Share Liability

[1] FORM

[2] Comments

[a] Use of Form

[b] Causes of Action Under Market Share Theory

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Manufacturers of Substantial Share of Market Liable Under Market Share Theory

[b] Each Defendant's Liability Proportional to Its Share of Market

[c] Market Share Liability Applicable to Manufacturer of Product Used for Unintended Purpose but With Manufacturer's Knowledge and Acquiescence

§ 190.80A Supporting Contention That Defendant Is Person Who Is Subject to Products Liability--Immunity Statute Applied to Tobacco Only During Ten-Year Period

[1] Form

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Tobacco Companies' Conduct Outside Statutory Immunity Period Is Determined by General Tort Principles

§ 190.81 Supporting Contention That Defendant Is Person Who Is Subject to Products Liability--Cigarette Manufacturer Manipulated Addictive Properties of Cigarettes Via Additives

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Immunity Statute's Protection Does Not Extend to Allegations that Tobacco Companies Used Additives that Exposed Smokers to Dangers Beyond Those Commonly Associated With Cigarette Smoking

§ 190.81A Supporting Contention That Defendant Is Person Who Is Not Subject to Strict Liability--Concert of Action Not Applicable

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Allegations Regarding Defendants' Inadequate Testing and Warnings and Their Reliance on Each Others' Marketing Techniques Do Not Establish Concert of Action

[b] Concert of Action Is Limited to Conduct by Small Number of Individuals and Injury to Single Plaintiff, With Substantial Involvement By Defendant

[c] Application of Concert of Action to Common Industry Situations Would Expand Doctrine Beyond Its Intended Scope

§ 190.82 Opposing Contention That Defendant Is Person Who Is Subject to Strict Liability--Defendant Played Random and Accidental Role in Distribution of Product

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Strict Liability Does Not Apply to Person Who Plays Random and Accidental Role in Distribution of Product

[b] Auctioneer Plays Random and Accidental Role in Distribution of Product and Is Not Strictly Liable

§ 190.83 Opposing Contention That Defendant Is Person Who Is Subject to Strict Liability--Defendant Played No Role in Design, Manufacture, Distribution, or Marketing of Product

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Defendant Played No Role In Design, Manufacture, Distribution, Or Marketing of Product That Injured Plaintiff

[b] Defendant's Historic Role in Development of Product Did Not Provide Basis for Products Liability Claims Against It

[c] Defendant Who Was Not Part of Product's Chain of Distribution Cannot Be Held Strictly Liable

[4] Additional Authorities

[a] Defendant Played No Role In Design, Manufacture, Distribution, or Marketing of Product That Injured Plaintiff.

§ 190.84 Opposing Contention That Defendant Is Person Who Is Subject to Strict Liability--Used Goods Dealer

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Used Goods Dealer Is Not Subject to Strict Liability

[b] Used Goods Dealer Is Not Required to Inspect or Repair Used Good

§ 190.85 Opposing Contention That Defendant Is Person Who Is Subject to Strict Liability--Defendant Is Manufacturer of Nondefective Component Part of Defective Product

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Manufacturer of Nondefective Component Part Is Not Strictly Liable for Defective Product

[b] Strict Liability for Defective Product Lies With Manufacturer of Finished Product and Not With Manufacturer of Nondefective Component Part

[c] Manufacturer of Noncomponent Part Has No Duty to Investigate Safety of Finished Product

[d] Fact that Manufacturer Produced Component Pursuant to Specifications Does Not Deprive It of Defense

§ 190.86 Opposing Contention That Defendant Is Person Who Is Subject to Strict Liability--Identity of Actual Manufacturer Unknown--Market Share Liability Not Applicable to Manufacturing Defect

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Market Share Liability Theory Does Not Apply to Manufacturing Defect

§ 190.87 Opposing Contention That Defendant Is Subject to Strict Liability--Identity of Actual Manufacturer Unknown--Injury Not Caused by Fungible Product

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Market Share Liability Does Not Apply When Injury Not Caused by Fungible Product

[4] Additional Authorities

[a] Market Share Liability Does Not Apply When Injury Not Caused by Fungible Product

§ 190.88 Opposing Contention That Defendant Is Person Who Is Subject to Strict Liability--Identity of Actual Manufacturer Unknown--Defendants Not Subject to Joint and Several Liability

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Joint and Several Liability Inapplicable to Market Share Theory Actions

§ 190.89 Opposing Contention That Defendant Is Person Who Is Subject to Strict Liability Under Product Line Theory--Defendant Not Liable as Successor

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Successor to Manufacturer Is Not Liable for Defective Product Manufactured by Original Manufacturer Unless

Three-Prong Test of Ray v. Alad Is Satisfied

[b] First Prong of Ray v. Alad Test Not Satisfied if Plaintiff's Remedies Not Destroyed by Defendant-Successor's Acquisition

[c] Second Prong of Ray v. Alad Test Not Satisfied if Defendant-Successor Not Able to Assume Risk-Spreading Role of Original Manufacturer

[d] Third Prong of Ray v. Alad Test Not Satisfied if Unfair to Require Defendant-Successor to Assume Responsibility for Defective Product Based on Successor's Use of Original Manufacturer's Good Will While Continuing Business

[4] Additional Authorities

[a] First Prong of Ray v. Alad Test Not Satisfied if Plaintiff's Remedies Not Destroyed by Defendant Successor's Acquisition

§ 190.90 Opposing Contention That Defendant Is Person Who Is Subject to Strict Liability--Defendant Is Manufacturer of Prescription Drug That Is Unavoidably Unsafe

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Strict Liability Inapplicable to Unavoidably Unsafe Prescription Drug Absent Faulty Warning or Packaging

[b] Unavoidably Unsafe Products Includes Prescription Drugs

[c] Defective Design Test Inapplicable to Prescription Drugs

§ 190.90A Opposing Contention That Defendant Is Person Who Is Subject to Strict Liability--Defendant Is Manufacturer of Implanted Medical Device That Was Properly Manufactured

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Manufacturer Cannot Be Held Strictly Liable for Properly Made Prescription Medical Product With Adequate

Warnings

§ 190.91 Opposing Contention That Defendant Is Person Who Is Subject to Strict Liability--Defendant Landlord Not Subject to Strict Liability

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Strict Liability Inapplicable to Landlords

[4] Additional Authorities

[a] Strict Liability Inapplicable to Landlords

§ 190.92 Opposing Contention That Defendant Is Person Who Is Subject to Strict Liability--Defendant Was Merely Intermediate Seller Not In Business of Selling Product

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Intermediate Seller Not Subject to Strict Products Liability

[b] Seller of Used Goods Not Subject to Strict Liability Based on Minor Modifications of Product

§ 190.93 Opposing Contention That Defendant Is Person Who Is Subject to Strict Liability--Defendant Was Merely Occasional Seller

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Strict Liability Inapplicable to Occasional Sale of Product

§ 190.94 Opposing Contention That Defendant Is Person Who Is Subject to Strict Liability--Defendant Was Employer

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Strict Liability Inapplicable to Employers Except Under Narrow Factual Circumstances Set Forth in Labor Code § 3602

§ 190.95 Opposing Contention That Defendant Is Person Who Is Subject to Strict Liability--Defendant Was Finance Lessor

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Strict Liability Inapplicable to Finance Lessors

§§ 190.96-190.109 [Reserved]

§ 190.110 Supporting Contention That Product Is Defective in Design--Dual Alternative Test

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Dual Test for Design Defect

[b] Dual Test Applied in the Alternative

[c] Satisfying Consumer Expectations Test

§ 190.111 Supporting Contention That Product Is Defective in Design--Risk-Benefits Test--Relevant Factors

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Relevant Factors to Be Considered by Jury in Applying Risk-Benefits Test

[4] Additional Authorities

[a] Relevant Factors to be Considered By Jury in Applying Risk-Benefits Test

§ 190.112 Supporting Contention That Product Is Defective in Design--Risk-Benefits Test--Shifting Burden of Proof--In General

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Shifting Burden of Proof Once Prima Facie Showing of Proximate Cause Is Made

[b] Burden of Proof Shifts, Not Simply Burden of Producing Evidence

[c] Plaintiff Need Only Show That Injury-Causing Design Existed When Product Left Defendant's Possession.

[4] Additional Authorities

[a] Shifting Burden of Proof Once Prima Facie Showing of Proximate Cause Is Made

§ 190.113 Supporting Contention That Product Is Defective in Design--Risk-Benefits Test--Shifting of Burden of Proof--Violation of Safety Statute, Regulation, or Ordinance as Sufficient Prima Facie Showing

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Violation of Statute, Regulation, or Ordinance as Prima Facie Showing of Causation

[b] Facts Sufficient for Showing

§ 190.114 Supporting Contention That Product Is Defective in Design--Risk-Benefits Test--Defendant Cannot Complain of Failure to Instruct

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Failure to Instruct

§ 190.115 Supporting Contention That Product Is Defective in Design--Consumer Expectation Test--Expert Testimony Not Necessary if Matter of Common Experience

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Expert Testimony on Consumer Expectations Not Necessary When Matter Is of Common Experience

[b] Evidence of Use, Injury, and Features of Product Is Sufficient for Consumer Expectation Test When Matter Is of Common Experience

[4] Additional Authorities

[a] Expert Testimony on Consumer Expectations Not Necessary When Matter Is of Common Experience

§ 190.116 Supporting Contention That Product Is Defective in Design--Consumer Expectation Test Can Apply Even if Matter Is Not of Common Experience

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Consumer Expectation Test Is Applicable Even if Matter Not of Common Experience

[b] Critical Question Involves Inquiry into Facts and Circumstances Of Product's Failure

[c] Consumer Expectation Test Is Not Foreclosed by Necessity of Expert Testimony to Explain Nature of Alleged Defect

[d] Fact That Expert Testimony Was Required to Establish Legal Causation Does Not Preclude Use of Consumer Expectations Test

[e] Consumer Expectations Test Applies to Strict Liability Actions Involving Asbestos-Containing Products

[f] Consumer Expectations Test Applies to Strict Liability Actions Involving Raw Materials

[4] Additional Authorities

[a] Consumer Expectations Test Is Applicable Even if Matter Not of Common Experience

§ 190.117 Supporting Contention That Product Is Defective in Design--Test for Defective Design Focuses on Adequacy of Product and Not on Manufacturer's Conduct

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Focus Is on Adequacy of Product and Not on Manufacturer's Conduct

[b] Reasonableness of Manufacturer's Conduct Is Irrelevant

[4] Additional Authorities

[a] Focus Is on Adequacy of Product and Not on Manufacturer's Conduct

§ 190.118 Supporting Contention That Product Is Defective in Design--Design Defect--Lack of Safety Device as Evidence of Defect

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Evidence That Plaintiff Used Product in Intended or Reasonably Foreseeable Manner and that Attempt to Avoid Injury Frustrated by Lack of Safety Device

[b] Case May Not Be Taken From Jury Because Only Evidence of Defect Is Lack of Safety Device

§ 190.119 Supporting Contention That Product Is Defective in Design--Product Itself Not Defective but Dangerous When Placed Adjacent to Machinery

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Design May Present Excessive Preventable Danger in Intended Use

[b] Less Safe Means of Using Product or Adjacent Machinery Should Be Taken Into Account by Designer of Product

§ 190.119A Supporting Contention That Finding of Strict Liability Is Supported--Defective Product Was Substantial Factor in Causing Injury

[1] Form

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Defendant Is Strictly Liable if Defendant's Asbestos Product Was Substantial Factor in Plaintiff's Risk of Developing Cancer

[b] Defendant Does Not Shift Burden of Product by Showing That Plaintiff Has No Personal Recall of Defendant's Product

§ 190.120 Opposing Contention That Product Is Defective in Design--Unavoidably Dangerous Product

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Strict Liability Inapplicable to Inherently Dangerous Product

[b] Prescription Drug Design Defect Claims Not Measured by Strict Liability Standards

[4] Additional Authorities

[a] Strict Liability Inapplicable to Inherently Dangerous Product

§ 190.121 Opposing Contention That Product Is Defective--Inherently Unsafe Common Consumer Product

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Strict Liability Based on Design Defect or Failure to Warn Prohibited if Product Is Inherently Unsafe Common Consumer Product

§ 190.122 Opposing Contention That Finding of Strict Liability Is Supported--Alleged Defects Did Not Cause or Contribute to Injury

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] No Strict Liability Based on Design Defect if Defect Did Not Cause Injury

[b] Required Allegations Regarding Causation

[c] Plaintiff Bears Burden of Proving Causation

[d] Plaintiff Must Prove That Defective Product Was Substantial Factor in Causing His or Her Injuries

[e] Mere Possibility of Exposure Does Not Create Triable Issue of Fact on Causation

[4] Additional Authorities

[a] No Strict Liability Based on Design Defect if Defect Did Not Cause Injury

§ 190.123 Opposing Contention That Finding of Strict Liability Is Supported--Particular Product Used by Plaintiff Not Shown to Be Defective--Product Has Not Malfunctioned

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Plaintiff Must Show Product Has Malfunctioned

§ 190.123A Opposing Contention That Finding of Strict Liability Is Supported--Product Not Shown to Be Defective Merely Because Plaintiff Collided With It

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Properly Functioning, Plainly Visibly Product Is Not Defective

§ 190.124 Opposing Contention That Finding of Strict Liability Is Supported--Lack of Factual Support for Inference That Design Did Not Meet Minimum Safety Expectations of Ordinary Users Precludes Finding of Defect Without Balancing of Risks and Benefits

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Circumstances of Product Failure Must Permit Inference That Consumer Expectations Were Not Met

[b] Expert Witnesses May Not Be Used When Product's Minimum Safety Is Within Lay Juror's Common Knowledge

§ 190.125 Opposing Contention That Product Is Defective in Design--Consumer Expectation Test Does Not Apply if Safety of Product Is Not Within Consumer's Everyday Experience

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Consumer Expectation Test Does Not Apply if Safety of Product Is Not Within Everyday Experience of Consumer

§ 190.126 Opposing Contention that Product Is Defective--Benefits of Design Outweigh Inherent Risks

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Aesthetics Is Proper Consideration in Risk-Benefit Analysis

[b] Opposing Points and Authorities

§§ 190.127-190.139 [Reserved]

§ 190.140 Supporting Contention That Product Is Defective in Manufacture--Definition of Manufacturing Defect

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Product Has Manufacturing Defect if It Comes off Assembly Line in Defective Condition

[4] Additional Authorities

[a] Product Has Manufacturing Defect When It Comes off Assembly Line in Defective Condition

§ 190.141 Opposing Contention That Product Is Defective in Manufacture--Product Does Not Differ From Manufacturer's Intended Result and Does Not Differ Significantly From Identical Units From Same Product Line

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Product Not Defectively Manufactured

§§ 190.142-190.159 [Reserved]

§ 190.160 Supporting Contention That Defendant Is Strictly Liable for Failure to Warn of Known or Knowable Potential Dangers That Render Product Unsafe for Intended or Reasonably Foreseeable Use--In General

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Manufacturer Is Strictly Liable for Failure to Warn

[b] Strict Liability Invoked for Warning Defects

[c] Liability for Failure to Warn Is Distinct From Consumer Expectations Test

[4] Additional Authorities

[a] Manufacturer Is Strictly Liable for Failure to Warn

[b] Strict Liability Invoked for Warning Defects

§ 190.161 Supporting Contention That Defendant Is Strictly Liable for Failure to Warn--Failure to Supply Adequate Assembly and Use Instructions That Warn of Danger of Improper Assemblage or Use

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Product Is Defective if Assembly and Use Instructions Do Not Adequately Warn of Danger of Improper Assembly or Use

§ 190.162 Supporting Contention That Defendant Is Strictly Liable for Failure to Warn--Plaintiff Not Required to Prove That He or She Was Unaware of Defect or to Show Avoidance of Assumption of Risk

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Product's User Is Not Required to Prove Nonawareness of Defect or Avoidance of Assumption of Risk

§ 190.163 Supporting Contention That Defendant Is Strictly Liable for Failure to Warn--Defendant Is Manufacturer of Prescription Drug That Is Unavoidably Unsafe

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Manufacturer of Prescription Drug Strictly Liable for Failure to Warn

[b] FDA Regulation Does Not Preempt Strict Liability for Failure to Warn

[4] Additional Authorities

[a] Manufacturer of Prescription Drug Strictly Liable for Failure to Warn

§ 190.164 Opposing Contention That Defendant Is Strictly Liable for Failure to Warn--No Showing of Defendant's

Knowledge of Potential Dangers

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Defendant's Knowledge of Danger Is Component of Failure-to-Warn Cause of Action

[b] State-of-the-Art Evidence Admissible

§ 190.165 Opposing Contention That Defendant Is Strictly Liable for Failure to Warn--No Duty to Warn of Unforeseeable Use of Product

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Product Must Be Used in Reasonably Foreseeable Manner

[b] No Duty to Warn of Use That Is Not Reasonably Foreseeable

§ 190.166 Opposing Contention That Defendant Is Strictly Liable for Failure to Warn--No Duty to Warn of Known and Recognized Danger

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Manufacturer or Retailer Has No Duty to Warn of Known and Recognized Danger

[4] Additional Authorities

[a] Manufacturer or Retailer Has No Duty to Warn of Known and Recognized Danger

§ 190.167 Opposing Contention That Defendant Is Strictly Liable for Failure to Warn--No Duty to Warn Every Ultimate User of Product When Person Controlling Product's Use Has Received Warning

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Manufacturer Has No Duty to Warn Every Ultimate User of Product of Its Dangers When Person Controlling Product's Use Has Received Adequate Warning

[b] Airplane Manufacturer Has Duty to Warn Pilot but Not Passengers of Plane's Dangers

[4] Additional Authorities

[a] Manufacturer Has No Duty to Warn Every Ultimate User of Product of Its Dangers When Person Controlling Product's Use Has Received Adequate Warning

§ 190.168 Opposing Contention That Defendant Is Strictly Liable for Failure to Warn--Bulk Manufacturer Has No Duty to Warn Ultimate Consumer of Product That Is Subsequently Repackaged by Distributor or Retailer

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Bulk Manufacturer Who Has Provided Adequate Warning in Bulk Sale of Product to Distributor Has No Duty to Warn Ultimate Consumer of Product's Dangers When Distributor Has Subsequently Repackaged, Relabeled, and Remarketed Product

§ 190.169 Opposing Contention That Defendant Is Strictly Liable for Failure to Warn--Manufacturer of Nondefective Component Part Has No Duty to Warn of Danger of Finished Product

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Duty to Warn Rests With Manufacturer of Finished Product and Not With Manufacturer of Nondefective Component Part

§ 190.170 Opposing Contention That Defendant Is Strictly Liable for Failure to Warn--Drug Manufacturer Has Duty to Warn Doctor but Not Patient

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Drug Manufacturer Has Duty to Warn Medical Profession but Not Patient

[4] Additional Authorities

[a] Drug Manufacturer Has Duty to Warn Medical Profession but Not Patient

§ 190.171 Opposing Contention That Defendant Is Strictly Liable for Failure to Warn--Manufacturer Has No Duty to Warn When Plaintiff Is Injured by Another Manufacturer's Product

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Manufacturer Has No Duty to Warn of Risks of Its Product if Product of Another Has Proximately Caused Plaintiff's Injuries

[b] Manufacturer Has No Duty to Warn of Risks of Another's Product

[4] Additional Authorities

[a] Manufacturer Has No Duty to Warn of Risks of Its Product When Product of Another Has Proximately Caused Plaintiff's Injuries

[b] Manufacturer Has No Duty to Warn of Risks of Another's Product

§ 190.172 Opposing Contention That Defendant Is Strictly Liable for Failure to Warn--Determining Existence of Defect Requires Weighing of Degrees of Danger

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Determination of Existence of Defect Requires Weighing of Degrees of Danger

[b] "Substantially Dangerous" Standard Appropriate to Determine Threshold Degree of Danger

§ 190.173 Opposing Contention That Defendant Is Strictly Liable for Failure to Warn--Manufacturer of Nonprescription Drug Has No Duty Beyond That Imposed by Statute and Regulation to Warn in Language Other Than English

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Nonprescription Drug Labeling Requirements Impose Proper Standard of Care

[b] Nonprescription Drug Manufacturers Have No Duty to Warn in Language Other Than English

§ 190.174 Opposing Contention That Defendant is Strictly Liable for Failure to Warn--Prescription Drug Manufacturer Is Not Liable for Failure to Give Warning Expressly Precluded by Food and Drug Administration (FDA)

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Prescription Drug Manufacturer Has No Duty to Give Warning Expressly Precluded by FDA

§ 190.175 Opposing Contention That Defendant Is Strictly Liable for Failure to Warn--Utility Company Has No Duty to Warn Customers of Dangers of Storing Volatile Substances Near Gas-Fired Heater

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Utility Has No Duty to Warn of Risks Associated with Storing Volatile Substances Near Gas-Fired Heaters

§ 190.176 Opposing Contention that Defendant Is Strictly Liable for Failure to Warn--Lack of Warning or Allegedly Inadequate Warning Did Not Proximately Cause Injury

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] No Strict Liability Based on Failure to Warn if Failure to Warn or Inadequate Warning Did Not Proximately Cause Injury

[b] No Proximate Cause When Prescribing Physician Did Not Read Warning

§§ 190.177-190.189 [Reserved]

§ 190.190 Supporting Contention That Defendant Is Liable for Negligence in Products Liability Action [Civ. Code § 1714(a)]--Plaintiff Is Person or Member of Class of Persons to Whom Defendant Owed Duty of Ordinary Care

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Persons to Whom Duty Owed

[b] Duty to Expected Users Unaware of Dangerous Propensities

[c] Duty to Foreseeable Nonusers

[d] Factors for Determining if Defendant Owed Duty to Plaintiff

[e] Developer Liable for Negligent Impairment of Lender's Security Interest

[4] Additional Authorities

[a] Factors for Determining if Defendant Owed Duty to Plaintiff

§ 190.191 Supporting Contention That Manufacturer Breached Duty of Ordinary Care [Civ. Code § 1714(a)]--Failure to Manufacture Product Carefully

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Duty to Manufacture Carefully

[b] Failure to Inspect or Test Product

[c] Failure to Conduct Tests Under Conditions Under Which Product Will Be Used

[d] Failure to Use Appropriate Tests to Reveal Defects

§ 190.192 Supporting Contention That Manufacturer Breached Duty of Ordinary Care [Civ. Code § 1714(a)]--Failure to Design Product Safely for Its Intended Use

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Standard of Care in Designing Product

[b] Evidence of Lack of Due Care in Designing Product

§ 190.193 Supporting Contention That Manufacturer or Seller Breached Duty of Ordinary Care [Civ. Code § 1714(a)]--Failure to Provide Any Warnings of Dangers Inherent in Use of Product

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Duty to Provide Appropriate Warning of Known Dangers That User Would Not Ordinarily Discover

[b] Exercise of Reasonable Care

[c] Knowledge of Dangerous Propensity of Product

[4] Additional Authorities

[a] Duty to Provide Appropriate Warning of Known Dangers That User Would Not Ordinarily Discover

§ 190.194 Supporting Contention That Manufacturer or Seller Breached Duty of Ordinary Care [Civ. Code § 1714(a)]--Failure to Provide Adequate Warnings of Dangers Inherent in Use of Product

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Duty to Provide Adequate Warning

[b] Failure to Warn of Particular Hazard

[c] Compliance With Regulations or Directives Insufficient

[d] Adequate Warning May Be Rendered Inadequate by Overpromotion

[e] Incomplete Warning

[4] Additional Authorities

[a] Duty to Provide Adequate Warning

§ 190.195 Supporting Contention That Seller of Product Breached Duty of Ordinary Care [Civ. Code § 1714(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Failure of Seller to Use Reasonable Care

[b] Seller's Performance of Auxiliary Functions

[c] Seller's Duty When Product Is Used or Second-Hand

§ 190.196 Supporting Contention That Lessor or Bailor Breached Duty of Ordinary Care [Civ. Code § 1714(a)]--Failure to Inspect and Furnish Reasonably Safe Chattel [Civ. Code § 1955]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Duty to Furnish Chattel Safe for Intended Use

[b] Duty to Inspect

§ 190.197 Supporting Contention That Endorser of Product Breached Duty of Ordinary Care [Civ. Code § 1714(a)]--Negligent Misrepresentation of Product

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Duty of Endorser to Exercise Ordinary Care in Endorsing Product to Public

§ 190.198 Supporting Contention That Lender Breached Duty of Ordinary Care to Third Person [Civ. Code § 1714(a)]--Lender Acted Outside Scope of Regular Activities or Was Party to Misrepresentation [Civ. Code § 3434]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Statutory Liability of Lender

§ 190.198A Supporting Contention That Name-Brand Drug Manufacturer Breached Duty of Care When Prescription Was Filled With Generic Drug--Negligent Misrepresentation

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Name-Brand Drug Manufacturer's Duty of Care in Disseminating Product Information Extends to Persons Injured by Generic Version When Physician Relied on Information in Prescribing Drug

§ 190.199 Supporting Contention That Seller of Services Breached Duty of Ordinary Care [Civ. Code § 1714(a)]--Seller of Services May Be Liable on Negligence Theory, Although Not Liable on Strict Products Theory

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Liability of Seller of Services

§ 190.199A Supporting Contention That Defendant Breached Duty of Ordinary Care [Civ. Code § 1714(a)]--Designing, Distribution, and Marketing of Firearms and Ammunition

[1] Form

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

§ 190.199B Opposing Contention That Defendant Is Liable for Negligence in Products Liability Action--Defendant Did Not Breach Duty of Ordinary Care

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Proof of Breach of Duty of Care Is Required Element of Negligence

§ 190.200 Opposing Contention That Manufacturer Breached Duty of Ordinary Care [Civ. Code § 1714(a)]--Defect Could Not Be Discovered by Reasonable Inspection

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Defect Must Be Discoverable

§ 190.201 Opposing Contention That Manufacturer Breached Duty of Ordinary Care [Civ. Code § 1714(a)]--Product Was Misused by User and Misuse Was Not Reasonably Foreseeable at Time Product Was Manufactured

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Misuse Not Foreseeable at Time of Manufacture

[b] No Duty to Repair or Recall Product if Manufactured According to Purchaser's Specifications and Not Dangerous When Properly Used

§ 190.202 Opposing Contention That Manufacturer Breached Duty of Ordinary Care [Civ. Code § 1714(a)]--No Duty to Warn During Declared State of Emergency

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] No Duty to Warn in Declared State of Emergency

§ 190.203 Opposing Contention That Manufacturer Breached Duty of Ordinary Care [Civ. Code § 1714(a)]--No Duty to Warn of Rare, Idiosyncratic, Hypersensitive, or Unusual Reactions

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] No Duty to Warn of Possibility of Rare, Idiosyncratic, or Unusual Reactions to Otherwise Safe and Useful

Product.

§ 190.204 Opposing Contention That Seller of Product Breached Duty of Ordinary Care [Civ. Code § 1714(a)]--Seller Had No Duty to Test or Inspect Product

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Defective Condition Could Not Be Discovered by Reasonable Inspection or Test

[b] No Duty to Inspect and Test When Nature of Product Precludes Inspection

[c] No Duty to Inspect Packaged Product

[d] No Duty to Inspect Vehicle Sold to Dealer

§ 190.204A Opposing Contention That Manufacturer or Seller Breached Duty of Ordinary Care--No Duty to Avoid Negligently Causing Emotional Distress to Product Owner Who Lends Defective Product to Family Member

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] No Duty to Avoid Negligently Causing Emotional Distress to Owners Who Lend Defective Products to Family Members

§ 190.205 Opposing Contention That Lender Breached Duty of Ordinary Care to Third Person [Civ. Code § 1714(a)]--Lender Did Not Act Outside Scope of Regular Activities and Was Not Party to Misrepresentation [Civ. Code § 3434]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Lender Did Not Act Outside Scope of Lender's Activities and Not Party to Any Misrepresentations.

[b] Intent of Legislature to Define Lender's Duty of Due Care

§ 190.206 Opposing Contention That Researcher Breached Duty of Ordinary Care to Third Person [Civ. Code § 1714(a)]--Research Activity For Manufacturer Does Not Create Duty Supporting Negligent Undertaking Claim

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Research Activity For Manufacturer Does Not Create Duty For Negligent Undertaking Claim

§ 190.207 Opposing Contention That Product Certifier Breached Duty of Care [Civ. Code § 1714(a)]--U.L Did Not Undertake to Test For and Certify Against Medical Risks of Asbestos

[1] FORM

[1] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Defendant Did Not Undertake to Guarantee Plaintiff's Safety From Cancer-Causing Asbestos By Testing and Certifying Appliances As Safe.

§ 190.208 Opposing Contention That Publisher Has Duty to Investigate Advertised Product--Publisher Did Not Endorse Product

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Nonendorsing Publisher Has No Duty to Investigate Advertised Product

[b] Mere Advertising Is Constitutionally Protected Activity

§§ 190.209-190.219 [Reserved]

§ 190.220 Supporting Contention That Plaintiff Is Entitled to Purely Economic Damages--Economic Damages Available on Negligence Theory if J'Aire Factors Met

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Economic Damages Are Recoverable in Negligence Action

[b] Six-Part Balancing Test for Determining Recoverability of Economic Damages

[4] Additional Authorities

[a] Economic Damages Are Recoverable in Negligence Action

§ 190.221 Supporting Contention That Plaintiff Is Entitled to Recover in Tort When Product Defect Causes Damage to "Other Property"--Economic Loss Rule Does Not Preclude Recovery for Damage to Another Part of Product

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Economic Loss Rule Allows Plaintiff to Recover in Strict Liability When Product Defect Causes Damage to Other Property

[b] Economic Loss Rule Does Not Necessarily Bar Recovery in Tort for Damage That Defective Product Causes to Other Portions of Larger Product

[c] Manufacturer of Defective Window May Be Strictly Liable for Damage Caused to Other Parts of Home

[d] Distinguishing Between "Other Property" and Defective Product Itself Requires Determination of Whether Defective Part Is Discrete Element

§ 190.222 Supporting Contention That Plaintiff Is Entitled to Recover in Tort--Economic Loss Rule Does Not Bar

Fraud or Intentional Misrepresentation Claims That Are Independent of Defendant's Breach of Contract

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Economic Loss Rule Does Not Necessarily Bar Recovery in Tort for Fraud and Misrepresentation Independent of Breach of Contract

[b] Economic Loss Rule Does Not Apply to Any Affirmative Fraud Action Where Plaintiff Can Establish That Fraud Exposed Plaintiff to Liability

§ 190.223 Supporting Contention That Plaintiff Is Entitled to Punitive Damages [Civ. Code § 3294]--Punitive Damages Available in Strict Products Liability Action

[1] FORM

[2] Comments

[a] Use of Form

[b] Effect of 1987 Amendment to Civ. Code § 1714

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Punitive Damages Available in Products Liability Action When Defendant Consciously Disregards Safety of Others

[b] Conscious Disregard of Probability of Injury to Consuming Public May Prove Conscious Disregard of Safety of Others

[4] Additional Authorities

[a] Punitive Damages Available in Products Liability Action When Defendant Consciously Disregards Safety of Others

§ 190.223A Supporting Contention That Amount of Punitive Damages Awarded Is Excessive--Constitutional Guideposts

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Review of Punitive Damages Award Encompasses Three Constitutional "Guideposts"

[b] Factors Guiding Determination of Degree of Reprehensibility

[c] U.S. Supreme Court Cases Do Not Preclude California From Considering Defendant's Recidivism In Assessing Culpability

[d] Factors to Consider in Determining Whether Punitive Damages Award Is Excessive

[e] Punitive Damages Previously Awarded For Same Conduct Are Relevant

[f] Due Process Clause Prohibits State From Using Punitive Damages to Punish Defendant for Injury It Inflicted Upon Nonparties

§ 190.223B Supporting Contention That Defendant May Not Apportion Fault to Entity That Lacked Legal "Fault"--Civ. Code § 1431.2

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Tobacco Companies Protected Under Former Civ. Code § 1714.45 Were Not Tortfeasors to Which Comparative Fault Could Be Assigned

[b] Party Absolved of Liability by Primary Assumption of Risk Is Not Subject to Allocation of Fault

§ 190.223C Supporting Contention That Defendant Is Jointly and Severally Liable for Noneconomic Damages [Civ. Code § 1431.2]--Proposition 51 Does Not Apply Where Plaintiff's Injuries Are Caused Solely by Defective Product

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Proposition 51 Does Not Apply Where Plaintiff's Injuries Were Caused Solely by Defective Product

§ 190.224 Opposing Contention That Plaintiff Is Entitled to Purely Economic Damages--Economic Damages Not Available in Strict Liability Action

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Economic Damages Alone Are Not Available in Strict Products Liability Action

[b] J'Aire Decision Does Not Extend to Strict Liability Action

[c] Expenses of Repairing Defect Are Purely Economic Damages for Which Recovery Is Not Available Under Strict Liability Theory

[d] Plaintiff Is Not Entitled to Economic Damages if Alleged Construction Defect Has Not Caused Any Personal Injury or Property Damage

[e] When Defect and Damage Are One and Same, Defect May Not Be Considered to Have Caused Physical Injury

[4] Additional Authorities

[a] Economic Damages Alone Are Not Available in Strict Products Liability Action

§ 190.225 Opposing Contention That Plaintiff Is Entitled to Purely Economic Damages--Purely Economic Damages Not Available in Negligence Action Absent Special Relationship Between Parties

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Economic Damages Alone Are Not Available in Negligence Action Unless Parties Have Special Relationship

[4] Additional Authorities

[a] Economic Damages Alone Are Not Available in Negligence Action Unless Parties Have Special Relationship

§ 190.226 Opposing Contention That Plaintiff Is Entitled to Punitive Damages [Civ. Code § 3294]--Punitive Damages Not Available in Strict Liability Action Based on Market-Share Liability Theory

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Punitive Damages Are Not Available in Market-Share Liability Case

[b] Punitive Damages Are Not Available Unless Plaintiff Identifies Actual Manufacturer and Proves Manufacturer Acted With Malice or Oppression

§ 190.227 Opposing Contention That Plaintiff is Entitled to Punitive Damages [Civ. Code § 3294]--Punitive Damages Not Available in Strict Products Liability Action When Plaintiff Suffers No Personal Injury

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Punitive Damages Are Not Available in Strict Products Liability Action Absent Proof That Plaintiff Suffered Personal Injuries

§ 190.228 Opposing Contention That Defendant Is Jointly and Severally Liable for Noneconomic Damages [Civ. Code § 1431.2]--Proposition 51 Requires Apportionment of Fault to Absent or Immune Tortfeasors

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Proposition 51 Contains No Exception for Damages Attributable to Fault of Persons Who Are Immune From Liability

§ 190.229 Opposing Contention That Defendant Is Jointly and Severally Liable for Noneconomic Damages [Civ. Code § 1431.2]--Proposition 51 Applies Where Plaintiff's Injuries Are Caused by Separate Products

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Proposition 51 Applies in Strict Liability Asbestos Case Where Multiple Products Caused Plaintiff's Injuries

§§ 190.230-190.239 [Reserved]

§ 190.240 Supporting Contention That Product Not Defective--Benefits of Its Design Outweigh Risks--Design Comported With State of the Art

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Evidence of Feasibility and Cost of Alternative Designs Is Relevant to Risk-Benefits Test

[b] Evidence of State of the Art Is Relevant to Feasibility and Cost of Alternative Designs

[c] Evidence of State of the Art Is Distinguishable From Evidence of Industry Custom and Usage, and Is Therefore Admissible

§ 190.241 Supporting Contention That Product Not Defective--Former Civ. Code § 1714.4(a) Bars Plaintiffs from Holding a Gun Manufacturer Liable on a Common Law Negligence Theory

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Former Civ. Code § 1714.4 Provides Protection From Liability for Gun Manufacturers on Common Law Negligence Claims

§ 190.242 Supporting Contention That Defendant Is Not Liable--Adequate Warning on Product

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Adequate Warning Is Sufficient Defense to Strict Products Liability Action

[b] Adequate Warning Is Warranty Disclaimer and Negates Negligence and Willful Misconduct

[c] Adequate Warning Is Given if Placed on Product or if Sent to Owners of Product

§ 190.243 Supporting Contention That Defendant Is Not Liable--Government Contractor Immunity

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Government Contractor Immunity Provides Protection From Liability for Design Defects

[b] Commercially Available Products Are Subject to Government Contractor Defense

[c] Government Contractor Defense Applies to Negligence Claims.

§ 190.244 Supporting Contention That Defendant Is Not Liable in Action Based on Negligence--Successor Manufacturer Not Liable for Product of Predecessor Absent Existence of Factors That Would Justify Liability

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Successor Corporation Not Liable for Negligence of Predecessor Under General Liability Theory Absent Existence of Factors That Would Justify Liability

[4] Additional Authorities

[a] Successor to Manufacturing Corporation Not Liable in Absence of Exception to General Rule of Successor Nonliability

§ 190.245 Supporting Contention That Comparative Indemnity Applies--Defendant Is Entitled to Comparative Apportionment of Liability

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Liability Is Apportioned in Conformity With Comparative Fault Findings

[b] Liability Is Apportioned Even When Liability of One Defendant Derives From Negligence While Liability of Other Derives From Strict Products Liability

[c] Liability Is Apportioned Between Strictly Liable Tortfeasors

[d] With Regard to Noneconomic Damages, Defendant's Percentage of Fault Must Be Compared to Fault of All Persons Who Contributed to Injury

[4] Additional Authorities

[a] Liability Is Apportioned Between Strictly Liable Tortfeasors

[b] With Regard to Noneconomic Damages, Defendant's Percentage of Fault Must Be Compared to Fault of All Persons Who Contributed to Injury

§ 190.245A Supporting Contention That Sophisticated User Defense Applies--Defendant Had No Duty to Warn

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[c] Opposing Points and Authorities

[3] Discussing of Authorities

[a] Manufacturer Not Liable If Sophisticated User Knew or Should Have Known of Risk

[b] Sophisticated User Defense Applies to Negligence and Strict Liability Causes of Action

[c] Relevant Time for Determining User Sophistication Is Time of Injury

[d] Sophisticated User Defense Applies to Failure-to-Warn Cause of Action on Negligence Per Se Theory

§ 190.246 Supporting Contention That Bulk Supplier and Sophisticated Buyer Defenses Apply

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Bulk Supplier of Raw Materials to Sophisticated Buyer Is Not Liable for Negligence

§ 190.247 Supporting Contention That Action for Personal Injuries Brought Under Market Share or Products Liability Theory Barred by Statute of Limitations [Code Civ. Proc. § 335.1; Note: Former Code Civ. Proc. § 340(3) provided for a one-year period]

[1] FORM

[2] Comments

[a] Use of Form

[b] Sindell Did Not Create New Tort With New Statute of Limitations

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Market Share Action For Personal Injuries Must Be Brought Within One Year After Accrual of Cause of Action Under Former Code Civ. Proc. § 340(3)

[b] Products Liability Action for Personal Injuries Must Be Brought Within Two Years After Accrual of Cause of Action Under Code Civ. Proc. § 335.1

[c] Statute Begins to Run When Plaintiff Has Information to Be Put on Inquiry of Wrongdoing

[d] Statute Begins to Run on Discovery of Facts, Not Their Legal Significance

[e] Discovery Rule Allows Accrual of Cause of Action if Plaintiff Has No Reason to Suspect Identity of Defendant

[f] Statute of Limitations Begins to Run Under Discovery Rule When Plaintiff Has Reason to Suspect Injury and Some Wrongful Cause, Unless Reasonable Investigation Would Not Have Revealed Cause of Action's Factual Basis

[4] Additional Authorities

[a] Statute Begins to Run on Discovery of Facts, Not Their Legal Significance

§ 190.248 Supporting Contention That Action in Strict Liability for Defects in Real Property Development or Improvement Barred by Statute of Limitations [Code Civ. Proc. §§ 337.1, 337.15]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Limitation on Action for Latent Defects in Real Property Development or Improvement

[b] Limitation Period for Latent Defects Applies to Strict Liability Action

[c] Limitation Period for Patent Defects Applies to Strict Liability Action

[4] Additional Authorities

[a] Limitation on Action for Latent Defects in Real Property Development or Improvement

§ 190.249 Supporting Contention That Products Liability Action Is Preempted by Federal Law

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Federal Preemption Requires Dismissal of State Products Liability Claim When Congress Intends to Supersede State Law

[b] State Products Liability Claim Is Preempted by Federal Railroad Legislation

[c] State Tort Claim Based on "No Air Bag" Design Defect Is Preempted

[d] FIFRA Preempts Rules Imposing Labeling Requirement That Diverge From Those In Federal Statute

[e] Federal Aviation Legislation Expressly Preempts State Law

[f] Savings Clause of FDA Modernization Act Does Not Entirely Exclude Conflict Preemption

[g] Warranty and Fraud Claims Are Not Saved From Preemption by Saving Clause of FDA Modernization Act

[h] MDA Preempts Fraud-on-FDA Claims

[i] Federal Safety Appliance Acts Preempts Certain State Law Claims Regarding Railroad Freight Cars

[j] Dormant Commerce Clause Preempts Laws That Impermissibly Burden Interstate Commerce

[k] MDA's Express Preemption Clause Bars Common Law Claims Regarding Safety or Effectiveness of Medical Device With Premarket Approval

[l] FMVSS 208 Preempts Claim Regarding Lap-Only Seatbelt

[4] Additional Authorities

[a] Federal Preemption Requires Dismissal of State Products Liability Claim When Congress Intends to Supersede State Law

§ 190.250 Opposing Contention That Product Not Defective Because Defendant Followed Industry Custom or Usage in Producing Product and Thus Defendant Not Strictly Liable--Evidence of Industry Custom or Usage Is Irrelevant

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Evidence of Industry Custom or Usage Is Irrelevant

[4] Additional Authorities

[a] Evidence of Industry Custom or Usage Is Irrelevant

§ 190.251 Opposing Contention That Product Not Defective Because Product's Design Complied With Owner Specifications--Compliance With Owner Specifications Is Irrelevant to Defect Issue and Risk-Benefits Test

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Evidence of Compliance With Owner Specifications Is Irrelevant

[b] Feasibility of Alternative Design Does Not Include Compliance With Owner Specifications

[c] Building Product in Accordance With Government Specifications Is Not a Defense

§ 190.252 Opposing Contention That Plaintiff Is Not Entitled to Recovery Because Plaintiff's Lack of Care Contributed to Injury--Error to Instruct Jury That Defendant Not Liable as Matter of Law for Injuries From Use of Broken Product After Plaintiff Became Aware of Damaged State

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Error to Instruct That Defendant Not Liable as Matter of Law for Injuries From Broken Product When Evidence Suggests That Product Was Initially Defective

§ 190.253 Opposing Contention That Plaintiff Is Not Entitled to Recovery Because Plaintiff's Lack of Care Contributed to Injury--Plaintiff's Comparative Negligence or Secondary Assumption of Risk Requires Reduction of Plaintiff's Recovery by Proportion of Fault but Does Not Bar Recovery

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Comparative Fault Applies to Strict Products Liability Cases

[b] Plaintiff's Recovery Is Reduced Only to Extent Plaintiff Contributed to Injury

[c] Assumption of Risk Requires Application of Comparative Fault Principles Rather Than Bar of Action if Defendant Owed Duty to Plaintiff

§ 190.254 Opposing Contention That Plaintiff Is Not Entitled to Recovery Because of Primary Assumption of Risk--Defendant Owes Duty to Participants Not to Increase Risk of Harm Over and Above That Inherent in Sport

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Defendant Owes Duty to Participants Not to Increase Risk of Harm Over and Above That Inherent in Sport

[b] Risk Is Inherent in Sport if Its Elimination Would Chill Vigorous Participation and Alter Fundamental Nature of Activity.

§ 190.255 Opposing Contention That Plaintiff Is Not Entitled to Recovery Because of Primary Assumption of Risk--Manufacturer Owes Duty to User of Its Product

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Manufacturer's Duty to Users of Product Under Strict Liability Makes Primary Assumption of Risk Inapplicable as Defense

[4] Additional Authorities

[a] Manufacturer's Duty to Users of Product Under Strict Liability Makes Primary Assumption of Risk Inapplicable as Defense

§ 190.256 Opposing Contention That Plaintiff Is Not Entitled to Recovery Because Plaintiff's Lack of Care Contributed to Injury--Plaintiff's Conduct Compared to Defendant's Product and Not to Defendant's Conduct

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Plaintiff's Conduct Compared to Defendant's Product and Not to Defendant's Conduct

§ 190.257 Opposing Contention That Government Contractor Immunity Is Applicable--No Government Specification

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Government Contractor Immunity Requires Specification by Government

§ 190.258 Opposing Contention That Government Contractor Immunity Is Applicable--No Significant Conflict Between Government Contractual Requirements and State Law

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] No Government Contractor Immunity When Significant Conflict Between Contractual Requirement and Law Has Not Been Established

§ 190.258A Opposing Contention That Government Contractor Immunity Is Applicable--Finding That Defense Applies to Design Defect Claim Does Not Necessarily Immunize Defendant on Failure-to-Warn Claim

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] No Government Contractor Immunity for Failure-to-Warn Claims Unless Federal Contract Includes Warning Requirements That Significantly Conflict With State Law

§ 190.259 Opposing Contention That Federal Preemption is Applicable

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Federal Preemption Inapplicable Absent Congressional Intent to Supersede State Law

[b] No Federal Preemption When Defendant Has Failed to Show Conflicting Statutory Specifications

[c] FDA Regulation Does Not Preempt Strict Liability for Failure to Warn

[d] No Federal Preemption of Design Claims Involving "Substantially Equivalent" Medical Device

[e] No Federal Preemption of Express Warranty Claims Regarding Cigarettes

[f] No Federal Preemption of Certain Fraud Claims Regarding Cigarettes

[g] FIFRA Does Not Preempt State Rule Unless It Satisfies Two Conditions

[h] State Law Labeling Requirement That Is Equivalent to and Consistent With FIFRA's Misbranding Provisions Is Not Preempted

[i] State Law Requirement Need Not Be Phrased in Identical Language to Corresponding FIFRA Requirement

[j] Claims Based on Oral Representations Are Outside Scope of FIFRA Preemption

[k] Express Warranty Claims Not Preempted if Defendant Voluntarily Warranted Product's Fitness for Particular Purpose

[l] Savings Clause of Federal Railroad Safety Act Permits State Regulation of Matter Not Covered by Federal Regulations or Orders

[m] Savings Clause of Federal Railroad Safety Act Permits State Regulation of Matters Covered by Federal Regulations if Law Meets Three Criteria

[n] FDA Labeling Regulation Does Not Preempt Warning Claim Against Generic Drug Manufacturer

[4] Additional Authorities

[a] No Federal Preemption When Defendant Has Failed to Show Conflicting Statutory Specifications

§ 190.260 Opposing Contention That Action for Personal Injuries Under Products Liability Theory Is Barred by Statute of Limitations

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Statute Does Not Begin to Run if Plaintiff Has Insufficient Information to Be Put on Inquiry of Wrongdoing

[b] Discovery Rule Delays Accrual if Diligent Investigation Discloses Only One Kind of Wrongdoing and Injury Was Caused by Wholly Different Kind of Wrongdoing

[c] Statute of Limitations Begins to Run Under Discovery Rule When Plaintiff Has Reason to Suspect Injury and Some Wrongful Cause, Unless Reasonable Investigation Would Not Have Revealed Cause of Action's Factual Basis

[d] Suspicion Required to Trigger Statute of Limitations May Not Be Imputed to Plaintiff

[e] Plaintiff Has No Obligation to Seek Out News of Drug's Dangerous Side Effects Through Media

[f] Media Reports of Hazardous or Toxic Substances Do Not, by Themselves, Put Reasonable Person on Inquiry Notice

[g] No Special Presumption Based on Common Knowledge That Smoking Is Addictive or Harmful

[h] Appreciable Harm Rule Does Not Apply When There Is Earlier Economic Injury and Later Physical Injury

§ 190.261 Opposing Contention That Action in Strict Liability or Negligence for Injury to Real or Personal Property Is Barred by Statute of Limitations

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Discovery Rule Applies to Negligence and Strict Liability Claims for Damage Caused by Product Defect to Real or Personal Property

[b] Economic Loss Alone Does Not Amount to Type of "Damage" That Causes Products Liability Cause of Action to Accrue

§ 190.262 Opposing Contention That Sophisticated User Defense Applies--Sophisticated User Defense Is Inapplicable to Strict Liability Design Defect Claim Under Risk-Benefit Analysis

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Sophisticated User Defense Is Inapplicable to Design Defect Cause of Action

§§ 190.263-190.279 [Reserved]

§ 190.280 Supporting Contention That Evidence Is Admissible in Strict Liability Action--Proof of Defect--Evidence of Remedial or Precautionary Measures Taken After Accident

[1] FORM

[2] Comments

[a] Use of Form

[b] Evidence Inadmissible When Remedial Measures Taken by Entity Not Strictly Liable

[3] Discussion of Authorities

[a] Evidence of Remedial or Precautionary Measures Is Admissible to Prove Defect

[4] Additional Authorities

[a] Evidence of Remedial or Precautionary Measures Is Admissible to Prove Defect

§ 190.281 Supporting Contention That Evidence Is Admissible in Strict Liability or Negligence Action--Proof of Defect, Knowledge, or Cause of Accident--Evidence of Other Accidents, Occurrences, or Failures

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Evidence Is Admissible to Prove Defective Condition, Knowledge, or Cause of Accident

[b] Evidence Is Admissible to Prove Defect

[c] Evidence Is Admissible to Show Defendant Had Notice of Dangerous Condition

[4] Additional Authorities

[a] Evidence is Admissible to Prove Defect

§ 190.282 Supporting Contention That Evidence Is Admissible in Strict Liability Action--Proof of Duty to Warn--Evidence of Post-Accident Warning

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Evidence of Post-Accident Warning Is Admissible in Strict Products Liability Action to Prove Duty to Warn

[4] Additional Authorities

[a] Evidence of Post-Accident Warning Is Admissible in Strict Products Liability Action to Prove Duty to Warn

§ 190.283 Supporting Contention That Evidence Is Admissible in Strict Liability Action--Proof of Duty to Warn--Evidence of FDA Action or Inaction

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Evidence of FDA Action or Inaction is Admissible in Failure-to-Warn Action to Show Risk.

[b] Evidence of FDA Action or Inaction May Be Considered in Design Defect Claim

§ 190.284 Supporting Contention That Evidence Is Admissible in Strict Liability or Negligence Action--Proof of Malice and Punitive Damages [Civ. Code § 3294]--Evidence of Failure to Change Known Defective Product or to Remove Product From Market

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Evidence of Failure to Change or Remove Product From Market Is Admissible on Issue of Malice and Punitive Damages

§ 190.285 Supporting Contention That Defect and Proximate Cause Resulting in Plaintiff's Injury May Be Proved by Circumstantial Evidence in Strict Liability or Negligence Action

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Plaintiff May Establish Defect by Circumstantial Evidence

[b] Plaintiff May Establish Proximate Cause by Circumstantial Evidence

[c] Plaintiff May Establish Proximate Cause by Showing Defect Was Substantial Factor for Injury

[d] Reasonable Inferences Are Available to Show Causation in Food Poisoning Cases

[e] Plaintiff Is Not Required to Exclude All Possibilities of Illness Other Than Defendant's Food

[4] Additional Authorities

[a] Plaintiff May Establish Defect by Circumstantial Evidence

§ 190.286 Supporting Contention That Evidence Is Sufficient to Be Submitted to Jury on Strict Liability Theory--Proof of Defect by Fact of Accident When Accident Shortly After Sale, Plaintiff Did Not Bring About Accident, and Expert Testimony Suggests Defect

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Evidence Sufficient to Show That Accident Occurred Shortly After Sale, Plaintiff Did Nothing to Bring About Accident, and Expert Testimony Indicates Defect Was Responsible for Accident

§ 190.287 Supporting Contention That Plaintiff Is Entitled to Res Ipsa Loquitur Instruction--Both Negligence and Strict Liability Alleged

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Plaintiff Entitled to Res Ipsa Loquitur Instruction When Warranted, Even if Plaintiff Has Also Alleged Strict Liability

§ 190.288 Opposing Contention That Evidence Is Sufficient to Be Submitted to Jury on Strict Liability Theory--Inference of Defect by Fact of Accident May Not Be Drawn--Res Ipsa Loquitur Not Applicable

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Plaintiff Must Affirmatively Establish Defect

[b] Jury May Not Infer Defect From Fact of Accident

[c] Res Ipsa Loquitur Is Not Applicable to Strict Liability Action

§ 190.289 Opposing Contention that Expert Opinion Is Admissible in Strict Liability or Negligence Action--Expert Opinion Must Be Based on Matter That Provides Reasonable Basis for Opinion [Evid. Code § 801]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Matter on Which Expert Relies Must Provide Reasonable Basis for Particular Opinion Offered.

§ 190.290 Opposing Contention That Defect and Proximate Cause May Be Proved Without Expert Testimony in Products Liability Action

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Expert Testimony Is Required to Establish Causation if Issue Is Complex

[b] Causation in Personal Injury Action Must Be Based on Expert Testimony

§ 190.291 Opposing Contention That Evidence Is Admissible in Strict Liability Action--Proof of Defect--Compliance With Industry Customs or Standards

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Evidence of Defendant's Compliance With Industry Custom or Standard Is Not Relevant to Issue of Defect

California Points & Authorities

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Volume 19 Chapters 190-195 PRODUCTS LIABILITY---to---PUBLIC ADMINISTRATIVE LAW
CHAPTER 190 PRODUCTS LIABILITY
PART I. INTRODUCTION

19-190 California Points & Authorities § 190.01

§ 190.01 Scope of Chapter

Subpart A of Part II of this chapter contains forms of points and authorities relating to the strict liability theory of recovery in a products liability action, including forms supporting [*see §§ 190.20 -190.23*] and opposing [*see §§ 190.24 -190.31*] the contention that the source of injury was a product rather than a service; forms supporting [*see §§ 190.50 -190.52*] and opposing [*see § 190.53*] the contention that the plaintiff may bring an action in strict liability; forms supporting [*see §§ 190.70 -190.81*] and opposing [*see §§ 190.82 -190.94*] the contention that an action in strict liability may be brought against the defendant; forms supporting [*see §§ 190.110 -190.119*] and opposing [*see §§ 190.120 -190.125*] the contention that the product is defective in design; forms supporting [*see § 190.140*] the contention that the product is defective in manufacture; and forms supporting [*see §§ 190.160 -190.163*] and opposing [*see §§ 190.164 -190.176*] the contention that the defendant is strictly liable for failure to warn.

Subpart B of Part II of this chapter contains forms of points and authorities for use in products liability actions based on the theory of negligence, including a general form supporting the contention that a defendant owed and breached a duty of due care to plaintiff in a products liability action [*see § 190.190*], forms supporting [*see § 190.191*] and opposing [*see § 190.200*] the contention that a defendant breached a duty to manufacture a product carefully, and forms supporting [*see § 190.192*] and opposing [*see § 190.201*] the contention that a defendant breached the duty to design a product safe for its intended use. It also contains forms for use in supporting the contentions that defendant failed to provide warnings [*see § 190.193*] or to provide adequate warnings [*see § 190.194*] of the dangers inherent in the use of a product. It contains a form opposing the contention that a defendant breached the duty of care by failing to provide adequate warnings [*see § 190.203*]. Finally, the part contains forms for use in supporting and opposing the contentions that certain classes of defendants owed and breached a duty to use reasonable care, specifically a seller [*see §§ 190.195, 190.204*], a lessor or bailor [*see § 190.196*], a product certifier [*see § 190.207*], an endorser of a product [*see §§ 190.197, 190.208*], a lending financial institution [*see §§ 190.198, 190.205*], and a provider of services [*see § 190.199*].

Because a products liability action may be brought under theories of strict liability, negligence, and warranty, the points and authorities contained in Subpart A of Part II may be used in conjunction with those relating to negligence in Subpart B of Part II as well as those relating to breach of warranty in Ch. 206, *Sales*, § 206.60 et seq.

Subpart C of Part II of this chapter contains memoranda of points and authorities for use in a products liability action

supporting [*see § 190.220*] and opposing [*see § 190.224*] the contention that plaintiff is entitled to economic damages, and supporting [*see § 190.223*] and opposing [*see § 190.226*] the contention that plaintiff is entitled to punitive damages.

The memoranda of points and authorities contained in the other Subparts of this chapter may be combined in appropriate cases with those contained in Subpart C. For example, if the plaintiff brings the action on a negligence theory, the points and *authorities in § 190.220* might be appropriately combined with the memoranda in Subpart B relating to negligence. If the plaintiff brings the action on a strict liability theory, the points and *authorities in §§ 190.223, 190.224*, and *190.226* might be appropriately combined with the memoranda in Subpart A.

Subpart D of Part II of this chapter contains memoranda of points and authorities relating to various defenses used in a products liability action, including forms supporting [*see §§ 190.240, 190.241*] and opposing [*see §§ 190.250, 190.251*] the contention that the product is not defective; supporting the contention that the defendant is not liable for an inadequate warning [*see § 190.242*]; supporting the contention that the defendant is not liable because successor liability does not apply [*see § 190.244*]; supporting the contentions that comparative indemnity [*see § 190.245*] and total equitable indemnity [*see § 190.246*] apply; supporting [*see §§ 190.245A, 190.246*] and opposing [*see § 190.262*] the contention that the sophisticated user or bulk supplier defense applies; supporting the contention that a market share theory action is barred by the statute of limitations [*see § 190.247*]; supporting the contention that a strict liability action in real property is barred by the statute of limitations [*see § 190.248*]; and opposing the contention that plaintiff's conduct bars recovery [*see §§ 190.252 -190.256*]. It also contains memoranda of points and authorities supporting [*see § 190.243*] and opposing [*see §§ 190.257, 190.258*] the contention that the defendant is protected by the government contractor immunity. Also included are memoranda of points and authorities supporting [*see § 190.249*] and opposing [*see § 190.259*] the contention that the action is preempted by federal law; and opposing the contention that an action is barred by the statute of limitations [*see §§ 190.260, 190.261*].

Subpart E of Part II of this chapter contains memoranda of points and authorities for use in a products liability action supporting the contention that certain evidence is admissible [*see §§ 190.280 -190.284*]; supporting the contention that defect and causation may be proved by circumstantial evidence [*see § 190.285*]; supporting the contention that certain evidence inferring defect is sufficient to be submitted to the jury [*see § 190.286*]; supporting [*see § 190.287*] and opposing [*see § 190.288*] contentions regarding res ipsa loquitur; and opposing the contention that expert opinion is admissible [*see § 190.289*].

The memoranda of points and authorities contained in the other Subparts of this chapter may be appropriately combined with those contained in Subparts D and E.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsProducts LiabilityGeneral OverviewTortsProducts LiabilityDesign DefectsTortsProducts LiabilityDuty to WarnTortsProducts LiabilityManufacturing DefectsTortsProducts LiabilityManufacturing DefectsTortsProducts LiabilityNegligenceTortsProducts LiabilityStrict Liability

California Points & Authorities

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19-190 California Points & Authorities § 190.02

§ 190.02 Governing Statutes

The law governing a strict products liability action has been mostly developed through case law. Many landmark cases in this area have established the general rules governing this action. In *Greenman v. Yuba Power Prods., Inc. (1963) 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897* , the Supreme Court first held that a manufacturer may be held liable under a theory of strict liability. The Court expanded on the theory in *Cronin v. J.B.E. Olson Corp. (1972) 8 Cal. 3d 121, 104 Cal. Rptr. 433, 501 P.2d 1153* , in which the Court held that a plaintiff need not prove that a product was unreasonably dangerous, but instead need only prove that the product was defective. In the most significant case in this field of law, the Court outlined a dual test for design defect in *Barker v. Lull Eng'g Co. (1978) 20 Cal. 3d 413, 143 Cal. Rptr. 225, 573 P.2d 443* .

Other landmark cases include the Supreme Court decision in *Daly v. General Motors Corp. (1978) 20 Cal. 3d 725, 144 Cal. Rptr. 380, 575 P.2d 1162* , that the principles of comparative negligence apply to a strict liability action; the court of appeal decision in *Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 174 Cal. Rptr. 348* , that punitive damages may be awarded in a strict products liability case; and the Supreme Court decision in *Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 163 Cal. Rptr. 132, 607 P.2d 924* , limited by *Brown v. Superior Court (1988) 44 Cal. 3d 1049, 245 Cal. Rptr. 412, 751 P.2d 470* , which provides that under certain circumstances, all major manufacturers of a product may be held liable in a products liability action under the market share theory, which enables the plaintiff to file an action without needing to name the particular manufacturer that manufactured the product.

Nevertheless, a few statutes govern specific aspects of strict products liability. Former Civ. Code § 1714.4, repealed in 2002, set limitations on a design defect theory if the product is a firearm or ammunition. *Civ. Code § 1714.45* limits liability when the product is inherently unsafe and is a common consumer product. *Veh. Code § 3064(a)* provides special rules to the obligation of a franchisee to a franchisor with regard to products liability concerning a new motor vehicle; and *15 U.S.C.S. § 3901 et seq.* governs products liability for risk retention groups.

Civ. Code § 1714(a) establishes the general duty of ordinary care that one person owes to another. *Civ. Code § 3434* governs the liability of a lender financing the design, manufacture, construction, repair, modification or improvement of real or personal property.

A products liability action is generally governed by case law. Among the many landmark cases in this area is *Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 174 Cal. Rptr. 348* , in which a California court first held that punitive damages may be awarded in a strict products liability case. Also discussed is *Romo v. Ford Motor Co. (2003) 113 Cal. App. 4th 738, 6 Cal. Rptr. 3d 793* , which reexamined the purpose and nature of punitive damages following remand from the U.S. Supreme Court.

A products liability action is generally governed by case law. The most significant of the landmark cases in this area is *Daly v. General Motors Corp. (1978) 20 Cal. 3d 725, 144 Cal. Rptr. 380, 575 P.2d 1162* , in which the Supreme Court ruled that the principles of comparative negligence apply to a strict liability action.

A products liability action, as any other court action, is governed by the provisions of the Evidence Code.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesPunitive DamagesGeneral OverviewTortsNegligenceDefensesComparative NegligenceIntentional & Reckless ConductTortsProducts LiabilityDesign DefectsTortsProducts LiabilityManufacturing DefectsTortsProducts LiabilityStrict Liability

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19-190 California Points & Authorities § 190.03

§ 190.03 How to Use Forms in This Chapter

[1] Page Limits on Points and Authorities

One of the more significant drafting requirements to keep in mind are page limits: supporting and opposing memoranda filed in discovery motion proceedings may not exceed 15 pages. A reply or closing memorandum may not exceed 10 pages. Exhibits, declarations, attachments, the table of contents, the table of authorities, and the proof of service are excluded from these page limits. Any party must obtain leave of court to file a longer memorandum [*see Cal. Rules of Ct., Rule 3.1113*]. These and other drafting requirements are discussed in further detail in Ch. 1, *Writing Legal Memoranda and Briefs* .

[2] Using the Forms to Build Draft Memorandum

The forms in each part may be combined with each other, depending on the facts and issues involved. All the forms in this chapter may also be combined with other forms found in California Points and Authorities relating to the particular procedural context in which the issues have arisen. For example, they may be combined with forms in Ch. 71, *Demurrers and Motions for Judgments on the Pleadings* , Ch. 90, *Dismissal* , Ch. 155, *Motions After Trial* , Ch. 160, *Motions to Strike* , or Ch. 221, *Summary Judgments* , if any of these procedures is involved. They may also be adapted for use in a trial or appellate brief, or be used to research office memoranda and jury instructions in products liability actions. No matter what procedural context or paper is involved, counsel should add argument to the points and authorities being used, showing the relationship between the facts of the case and the points of law stated.

For a discussion of how to use the forms in this chapter to draft a memorandum or a trial or appellate brief, and for a sample of a complete memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedureAppealsBriefsTortsProducts LiabilityStrict Liability

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19-190 California Points & Authorities § 190.04

§ 190.04 Related Pleadings and Practice Forms

For discussion and forms for use in a products liability action, see California Forms of Pleading and Practice, Ch. 460, *Products Liability* (Matthew Bender).

For discussion and forms for use in actions involving negligence in general, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender). For a discussion and forms for use in products liability actions based on strict liability, negligence, and breach of warranty, see California Forms of Pleading and Practice, Ch. 460, *Products Liability* (Matthew Bender).

For discussion and forms for use regarding damages, see California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender). For discussion and forms for use in a products liability action, see California Forms of Pleading and Practice, Ch. 460, *Products Liability* (Matthew Bender). For discussion and forms for use regarding indemnity and contribution, and subrogation, see California Forms of Pleading and Practice Ch. 300, *Indemnity and Contribution* , and Ch. 536, *Subrogation* (Matthew Bender).

For discussion and forms for use in a responsive pleading, see California Forms of Pleading and Practice, Ch. 26, *Answers* , and Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For discussion and forms for use in a dismissal motion, see California Forms of Pleading and Practice, Ch. 212, *Dismissal* (Matthew Bender).

For discussion and forms for use regarding discovery, see California Forms of Pleading and Practice, Chs. 190, *Discovery: Scope, Regulation, and Timing* , through Ch. 200, *Discovery: Review of Discovery Orders* (Matthew Bender). For discussion and forms for use regarding jury instructions, see California Forms of Pleading and Practice, Ch. 326, *Jury Instructions* (Matthew Bender). For discussion and forms for use regarding witnesses, see California Forms of Pleading and Practice, Ch. 551, *Trial* (Matthew Bender).

Legal Topics:

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

Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProceduresPretrial JudgmentsJudgment on the PleadingsTortsNegligenceActionsGeneral OverviewTortsProceduresMultiple DefendantsContributionParticular ActionsTortsProducts LiabilityGeneral OverviewTortsProducts LiabilityBreach of WarrantyTortsProducts LiabilityNegligenceTortsProducts LiabilityStrict Liability

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19-190 California Points & Authorities § 190.05

§ 190.05 Related Points and Authorities

For a discussion of how to use the forms in this chapter to draft a memorandum of points or authorities or a trial or appellate brief, and for a sample of a complete memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For points and authorities relating to actions for negligence in general, including comparative negligence and other defenses, see Ch. 165, *Negligence* .

For points and authorities relating to actions based on breach of warranty, see Ch. 206, *Sales* .

For discussion and forms for use regarding damages, see Ch. 64, *Damages: Tort* , and Ch. 65, *Damages: Contract* . For discussion and forms for use in actions involving the effects of the Fair Responsibility Act of 1986 (Proposition 51) on damages, see Ch. 115, *Indemnity and Contribution* .

For discussion and forms for use regarding subrogation, see Ch. 220, *Subrogation* .

For discussion and forms for use in a responsive pleading, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For discussion and forms for use in a dismissal motion, see Ch. 90, *Dismissal* .

For discussion and forms for use regarding discovery, see Ch. 80, *Discovery: Scope, Regulation, and Timing* , through Ch. 89A, *Discovery: Review of Discovery Orders* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePretrial JudgmentsJudgment on the PleadingsCivil ProcedureAppealsBriefsTortsDamagesGeneral OverviewTortsNegligenceDefensesComparative NegligenceGeneral OverviewTortsProducts LiabilityBreach of Warranty

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19-190 California Points & Authorities § 190.06

§ 190.06 Other Related Publications

For further discussion and forms relating to products liability actions, see the following publications:

Cotchett & Cartwright, California Products Liability Actions (Matthew Bender).

Frumer & Friedman, Products Liability (Matthew Bender).

Woodside, Drug Products Liability (Matthew Bender).

Vargo, Products Liability Practice Guide (Matthew Bender).

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19-190 California Points & Authorities §§ 190.07-190.19

[Reserved]

§§ 190.07[Reserved]

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A. Strict Liability
1. What Is a Product?

19-190 California Points & Authorities § 190.20

§ 190.20 Supporting Contention That Product Is Subject of Products Liability Action--Airport Approach Chart as Product

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product (see, e.g., §§ 190.50, 190.70, 190.71, 190.76)*].

THE AIRPORT APPROACH CHART PRODUCED BY DEFENDANT _____ [*name*] IS A PRODUCT THAT MAY BE THE SUBJECT OF A PRODUCTS LIABILITY ACTION.

Airport Approach Chart Is Product for Products Liability Purposes. An airport approach chart is a "product" that may be the subject of a products liability action. Although a chart is a sheet of paper, it is nevertheless a salable commodity with inherent lethal potential if, contrary to its own design standards, it fails to designate an essential item such as the highest land mass immediately surrounding a landing site (*Fluor Corp. v. Jeppesen & Co. (1985) 170 Cal. App. 3d 468, 475-476, 216 Cal. Rptr. 68*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that an airport approach chart is a product that may be the subject of a products liability action. The points and authorities may also be adapted for use if the product in question bears similarities to such a chart.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with

points and authorities supporting a motion for summary judgment or summary adjudication on the issue that defendant is strictly liable for plaintiff's injuries. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should include facts stating that the chart did not designate some important or critical item, such as the highest land mass in the geographical area, and that because that item was not designated, the pilot of the plane unknowingly steered the plane into that item during bad weather [*see, e.g., Fluor Corp. v. Jeppesen & Co. (1985) 170 Cal. App. 3d 468, 216 Cal. Rptr. 68]* .

[3] Discussion of Authorities

[a] Airport Approach Chart Is Product for Products Liability Purposes

In ***Fluor Corp. v. Jeppesen & Co.*** *(1985) 170 Cal. App. 3d 468, 216 Cal. Rptr. 68* , the pilot of an airplane, while attempting to land, crashed into a peak that was not shown on the airport approach chart. The owner of the jet brought an action in strict liability, negligence, and warranty against the producer and seller of the airport approach chart. In addition to arguing that the pilot and crew had been negligent, defendant argued that strict liability did not apply at all because the chart was not a product. The trial court refused to give the jury an instruction on products liability, and the jury rendered a verdict in favor of defendant. Plaintiff appealed.

The court of appeal reversed, holding that the chart was a product subject to the application of products liability theory, and that the jury should have been instructed on the theory. The court noted that, to further public policy, the defect or defectiveness concept has been expanded to embrace a great variety of injury-producing deficiencies, ranging from products that cause injury because they deviate from the manufacturer's intended result to products that, though perfectly manufactured, are unsafe because of the absence of a safety device, and including products that are dangerous because they lack adequate warnings or instructions (*170 Cal. App. 3d 468, 474-476)* .

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A. Strict Liability
1. What Is a Product?

19-190 California Points & Authorities § 190.21

§ 190.21 Supporting Contention That Product Is Subject of Products Liability Action--Real Estate Lot as Product

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product (see, e.g., §§ 190.22, 190.50, 190.70, 190.71, 190.76)*].

DEFENDANT _____ [*name*], AS THE MANUFACTURER OF THE LOT, MAY BE HELD STRICTLY LIABLE FOR DAMAGES PROXIMATELY CAUSED BY DEFECTS IN THE MANUFACTURING PROCESS OF THE LOT.

A. Real Estate Lot as Product. A lot is a product for products liability purposes when the lot is manufactured by cutting, grading, filling, compacting, or other such activity for the purpose of sale to the public and the construction of a house thereon (*see Avner v. Longridge Estates (1969) 272 Cal. App. 2d 607, 615, 77 Cal. Rptr. 633*).

B. Strict Liability of Manufacturer of Lot. The manufacturer of a lot may be held strictly liable in tort for damages suffered by the owner as a proximate result of any defects in the manufacturing process (*Avner v. Longridge Estates (1969) 272 Cal. App. 2d 607, 615, 77 Cal. Rptr. 633*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a real estate lot is a product that may be the subject of a products liability action. They may be combined with the points and *authorities in § 190.22* when counsel wishes to contend that a real estate development is a product.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary judgment or summary adjudication on the issue that defendant is strictly liable for plaintiff's injuries. The points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should set forth facts showing how the lot was defectively manufactured in its cutting, grading, filling, compacting, or other such activity, and that the lot was manufactured for the purpose of sale to the public and the construction of a house thereon [*see, e.g.,* *Avner v. Longridge Estates (1969) 272 Cal. App. 2d 607, 77 Cal. Rptr. 633* (developer did not adequately provide for drainage when cutting, grading, filling, and compacting lot, causing water to accumulate and damage property)].

[3] Discussion of Authorities

[a] Real Estate Lot as Product

In ***Avner v. Longridge Estates*** *(1969) 272 Cal. App. 2d 607, 77 Cal. Rptr. 633* , plaintiffs purchased a house and lot from its owner, who had developed the property on which the house and lot were located into a tract of residential lots. After a portion of the rear slope of the lot failed, plaintiffs brought an action in strict liability against the manufacturer and other defendants. The trial court sustained defendants' demurrers, and plaintiffs appealed.

The court of appeal reversed, holding that a manufacturer of a lot may be held strictly liable for damages that result from any defect in the manufacturing process. The court reasoned that a manufacturer should be subject to strict liability if it manufactures a lot for the purpose of selling it to the public and constructing a house on it, knowing that if the work was defective, it would cause damage to any improvements made on the house. The court relied on *Kriegler v. Eichler Homes, Inc. (1969) 269 Cal. App. 2d 224, 74 Cal. Rptr. 749* [*see § 190.22[3][a]*]. The court found the obligation of a manufacturer of a lot to a purchaser for defective subsurface conditions resulting from improper filling and grading that cause instability, as in this case, to be indistinguishable from the obligation of a builder to a purchaser for a defective radiant heating system installed in a cement floor slab, as was the case in *Kriegler* (*272 Cal. App. 2d 607, 609-615)* .

[4] Additional Authorities

[a] Real Estate Lot as Product

In *GEM Developers v. Hallcraft Homes of San Diego, Inc. (1989) 213 Cal. App. 3d 419, 261 Cal. Rptr. 626* , a condominium association brought an action in strict liability against the contractor of the condominium project, seeking damages arising from construction defects; the contractor sought comparative equitable indemnity in a cross complaint against the company that initially graded the lots. In reversing judgment for the cross defendant (and holding that joint tortfeasors subject to strict liability to a consumer may seek comparative equitable contribution from each other), the court of appeal also rejected the cross defendant's contention that it had not produced a "product." The court held that a developer that mass-grades land into finished lots for sale to the public for residential housing has produced a "product," and is strictly liable to the consumer for any defects in the design or manufacture of the lots (*213 Cal. App. 3d 419, 431)* .

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A. Strict Liability
1. What Is a Product?

19-190 California Points & Authorities § 190.22

§ 190.22 Supporting Contention That Product Is Subject of Products Liability Action--Real Estate Development as Product

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product (see, e.g., §§ 190.21, 190.50, 190.70, 190.71, 190.76).*]

AS THE DEVELOPER OF THE _____ [APARTMENT COMPLEX *or* HOUSING PROJECT], DEFENDANT _____ [*name*] IS THE DEVELOPER OF A PRODUCT AND MAY BE HELD SUBJECT TO STRICT LIABILITY FOR DAMAGES PROXIMATELY CAUSED BY ITS DEFECTS.

[*EITHER*]

A. Strict Liability of Mass Producer and Seller of Homes. The mass producer and seller of homes, like the mass producer and seller of automobiles, is a seller whose risk-creating conduct in any stage of the production and distribution of goods is subject to the strict liability doctrine (*Kriegler v. Eichler Homes, Inc. (1969) 269 Cal. App. 2d 224, 227, 74 Cal. Rptr. 749*).

[*OR*]

A. Strict Liability of Developer. A developer who is engaged in the business of developing and selling residential units [such as an apartment complex] is a seller in the production and distribution of goods to whom the doctrine of strict liability applies (*Del Mar Beach Club Owners Ass'n v. Imperial Contracting Co. (1981) 123 Cal. App. 3d 898,*

911-913, 176 Cal. Rptr. 886 ; *Kriegler v. Eichler Homes, Inc. (1969) 269 Cal. App. 2d 224, 227, 74 Cal. Rptr. 749*).

[*CONTINUE*]

[*Optional*] **B. Strict Liability Applies Regardless of Whether Defective Product Is Located on Plaintiff's Property.** A developer who installs a defective product to _____ [service *and/or* protect] a residential development is strictly liable for damages to a plaintiff's unit in the development that were proximately caused by the product. The strict liability applies regardless of whether the defective product was installed on or off the plaintiff's property (*Stuart v. Crestview Mut. Water Co. (1973) 34 Cal. App. 3d 802, 811, 110 Cal. Rptr. 543*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a real estate developer is the developer of a product that may be the subject of a products liability action. The first Alternative Paragraph A, which is specifically directed to a mass-produced home, should be used if the subject of the cause of action is a tract home [*see, e.g., Kriegler v. Eichler Homes, Inc. (1969) 269 Cal. App. 2d 224, 227, 74 Cal. Rptr. 749]* . The second Alternative Paragraph A, which is a more generalized description of the liability of a developer, should be used for a different type of development, such as an apartment complex. Optional Paragraph B should be used if plaintiff's property was damaged by some product installed by the developer on land other than plaintiff's real property. These contentions may be combined with the points and *authorities in § 190.21* when counsel wishes to contend that a real estate lot is a product.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary judgment or summary adjudication on the issue that defendant is strictly liable for plaintiff's injuries. The points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should include facts showing that defendant was a mass producer and seller of homes, or was the builder or developer of an apartment complex or other large complex, and showing how that development was defective [*see, e.g., Del Mar Beach Club Owners Ass'n v. Imperial Contracting Co. (1981) 123 Cal. App. 3d 898, 176 Cal. Rptr. 886* (developer of planned development project of residential units as strictly liable to plaintiff managerial association for damages to project from soil erosion); *Kriegler v. Eichler Homes, Inc. (1969) 269 Cal. App. 2d 224, 74 Cal. Rptr. 749* (mass producer of homes as strictly liable for damages to plaintiff's home from failure of heating system)].

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 190.31* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Strict Liability of Mass Producer and Seller of Homes

In ***Kriegler v. Eichler Homes, Inc.*** *(1969) 269 Cal. App. 2d 224, 74 Cal. Rptr. 749* , plaintiff's home suffered physical damage from the failure of its heating system. Plaintiff brought an action in strict liability against defendants, who were engaged in the mass production and sale of homes, one of which was the home purchased by plaintiff. Defendants cross

complained against suppliers and contractors. The jury rendered a verdict for plaintiff on the complaint, and for cross defendants on the cross complaint. Defendants appealed both verdicts.

The court of appeal affirmed the judgment, holding that defendants were subject to a strict liability cause of action, and that defendants failed to establish a cause of action on the cross complaint. In regard to the strict liability cause of action, the court specifically held that the doctrine of strict liability applies to any case of injury resulting from the risk-creating conduct of a seller in any stage of the production and distribution of goods. Because no meaningful distinctions exist between the mass production and sale of homes and the mass production and sale of automobiles, defendants were subject to strict liability (*269 Cal. App. 2d 224, 226-229)* .

[b] Strict Liability of Developer

The facts and procedural background of ***Kriegler v. Eichler Homes, Inc.*** *(1969) 269 Cal. App. 2d 224, 74 Cal. Rptr. 749* , are discussed in *§ 190.22[3][a]*.

In ***Del Mar Beach Club Owners Ass'n v. Imperial Contracting Co.*** *(1981) 123 Cal. App. 3d 898, 176 Cal. Rptr. 886* , plaintiff managerial association of a planned development project of residential units brought an action in strict liability against numerous defendants for damages to the real property of the project from soil erosion. Plaintiff alleged that the development had been defectively constructed and designed. Defendants demurred and moved for judgments on the pleadings, which were granted, and plaintiff appealed.

The court of appeal reversed the judgment as to the developer defendants, holding that such defendants were subject to a cause of action in strict liability. The court reasoned that an apartment complex was essentially no different from a mass-produced subdivision development, such as in *Kriegler,* and that its developers were engaged in the business of developing and selling residential units. Thus, the developers could be subject to a strict liability claim for damages resulting from the construction of a multi-unit residential project on the location of an unstable bluff (*123 Cal. App. 3d 898, 909-913)* .

[c] Strict Liability Applies Regardless of Whether Defective Product Is Located on Plaintiff's Property

In ***Stuart v. Crestview Mut. Water Co.*** *(1973) 34 Cal. App. 3d 802, 110 Cal. Rptr. 543* , plaintiffs' property was burned by fire. A defective water distribution system had been installed by the developer of the subdivision in which the property was located; the system itself, however, was not installed on plaintiffs' property. Plaintiffs brought an action in strict liability and negligence against numerous defendants, including the developer. The trial court dismissed the action as to each defendant on various demurrers, motions for judgments on the pleadings, and summary judgment motions. Plaintiffs appealed.

The court of appeal reversed the dismissal against the developer on both strict liability and negligence grounds; the court also affirmed in part and reversed in part as to the other defendants on various grounds. Specifically with regard to the strict liability claim, the court reasoned that the developer's liability was indistinguishable in principle from *Avner* and *Kriegler*. The court also found that the fact that plaintiffs had not alleged that the defective water system was on plaintiffs' properties was immaterial, as the purpose of the system was to help protect the properties in the subdivision in case of fire, and legally it made no difference whether the pipes, hydrants, and other installations were located on or off the lots. Furthermore, the court emphasized that strict liability extends to "bystanders" such as plaintiffs (*34 Cal. App. 3d 802, 809-811)* .

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19-190 California Points & Authorities § 190.22A

§ 190.22A Supporting Contention That Product Is Subject of Products Liability Action--Raw Asbestos as Product

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product.*]

DEFENDANT _____ [*name*], AS A COMMERCIAL SUPPLIER OF RAW ASBESTOS, IS SUBJECT TO A CAUSE OF ACTION IN STRICT LIABILITY BECAUSE RAW ASBESTOS IS A PRODUCT THAT MAY HAVE A DESIGN DEFECT.

A. Raw Asbestos Is Product That May Have Design Defect. Raw asbestos is a product that may have a design defect (*Garza v. Asbestos Corp. (2008) 161 Cal. App. 4th 651, 659, 74 Cal. Rptr. 3d 359* ; *Arena v. Owens-Corning Fiberglas Corp. (1998) 63 Cal. App. 4th 1178, 1191, 74 Cal. Rptr. 2d 580* ; *Jenkins v. T&N PLC (1996) 45 Cal. App. 4th 1224, 1231, 53 Cal. Rptr. 2d 642*).

[2] Comment

[a] Use of Form

These points and authorities may be submitted in support of the contention that a commercial supplier of raw asbestos incorporated into a finished product is strictly liable for injuries caused by exposure to the asbestos [*see, e.g.,* *Garza v. Asbestos Corp. (2008) 161 Cal. App. 4th 651, 659, 74 Cal. Rptr. 3d 359* ; *Arena v. Owens-Corning Fiberglas Corp. (1998) 63 Cal. App. 4th 1178, 1191, 74 Cal. Rptr. 2d 580*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with

points and authorities supporting a motion for summary judgment or summary adjudication on the issue that the defendant is strictly liable for plaintiff's injuries. These points and authorities may also be adopted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should include facts showing that defendant supplied raw asbestos to a producer of a finished product, that the plaintiff was exposed to asbestos supplied by the defendant, and that the plaintiff suffers from an asbestos-related injury.

[3] Discussion of Authorities

[a] Raw Asbestos Is Product That May Have Design Defect

Garza v. Asbestos Corp. *(2008) 161 Cal. App. 4th 651, 74 Cal. Rptr. 3d 359* , is discussed in *§ 190.73A[3][a]*.

Arena v. Owens-Corning Fiberglas Corp. *(1998) 63 Cal. App. 4th 1178, 74 Cal. Rptr. 2d 580* , is discussed in *§ 190.73A[3][a]*.

Jenkins v. T&N PLC *(1996) 45 Cal. App. 4th 1224, 1231, 53 Cal. Rptr. 2d 642* , is discussed in *§ 190.73A[3][a]*.

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19-190 California Points & Authorities § 190.23

§ 190.23 Supporting Contention That Product is Subject of Products Liability Action--Injury Caused by Defective Electricity Occurred After Electricity Entered Stream of Commerce

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product.*]

DEFENDANT _____ [*name*], AS A COMMERCIAL SUPPLIER OF ELECTRICITY, IS SUBJECT TO A CAUSE OF ACTION IN STRICT LIABILITY BECAUSE AT THE TIME THE INJURY OCCURRED, THE ELECTRICITY HAD ENTERED THE STREAM OF COMMERCE

A. Commercial Electricity Supplier Strictly Liable for Electricity in Stream of Commerce. A commercial supplier of electricity is subject to strict liability in tort for personal injuries caused by defective electricity that is in the stream of commerce, and expected to be at marketable voltage (*Pierce v. Pacific Gas & Elec. Co. (1985) 166 Cal. App. 3d 68, 83-84, 212 Cal. Rptr. 283*).

[*Optional*] **B. Commercial Electricity Supplier Strictly Liable for Delivering Electricity Made Dangerous by Defective Transformer.** A commercial supplier of electricity is subject to strict liability in tort for personal injuries caused by delivery of electricity at dangerously high voltage because of a defective transformer (*Pierce v. Pacific Gas & Elec. Co. (1985) 166 Cal. App. 3d 68, 83-84, 212 Cal. Rptr. 283*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a commercial supplier of electricity is strictly liable for injury caused by a defect in electricity after the electricity has been placed in the stream of commerce [

see, e.g., Pierce v. Pacific Gas & Elec. Co. (1985) 166 Cal. App. 3d 68, 212 Cal. Rptr. 283] .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary judgment or summary adjudication on the issue that defendant is strictly liable for plaintiff's injuries. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should set forth facts showing that the electricity had entered the stream of commerce at the time of the injury. For example, if appropriate, counsel should show that both the defect and injury occurred after the electricity was metered.

[b] Electricity Must Have Entered Stream of Commerce

Strict liability applies to electricity as a product only if the electricity is actually in the "stream of commerce." According to one court of appeal decision, the electricity must be expected to be at marketable voltage. In most cases, this means the electricity must be delivered to the consumer's premises, to the point at which it is metered. However, that court was reluctant to establish a definitive point at which the electricity enters the stream of commerce [*see Pierce v. Pacific Gas & Elec. Co. (1985) 166 Cal. App. 3d 68, 84, 212 Cal. Rptr. 283]* . Another court of appeal decision, however, clearly stated that electricity is a product once it has been metered for use by the consumer and not before that point [*Fong v. Pacific Gas & Elec. Co. (1988) 199 Cal. App. 3d 30, 38, 245 Cal. Rptr. 436* (defect and injury occurred adjacent to consumer's structure but before metering, and electricity held to be service, not product; *see § 190.29*, under § 190.29[3][a]]. Hence, if both the defect and the injury occurred after metering, the authority is consistent that the electricity has entered the stream of commerce, and counsel can argue that point. However, if some other chronology of events occurred, counsel should argue under *Pierce* that the many variations in electrical systems require a determination regarding stream of commerce on a case-by-case basis, and should set forth the particular facts of the case in detail, showing support for the contention that the electricity had entered the stream of commerce.

[3] Discussion of Authorities

[a] Commercial Electricity Supplier Strictly Liable for Electricity in Stream of Commerce

In ***Pierce v. Pacific Gas & Elec. Co.*** *(1985) 166 Cal. App. 3d 68, 212 Cal. Rptr. 283* , plaintiff suffered personal injuries when an electrical utility's transformer malfunctioned and sent high voltage into plaintiff's home. Plaintiff brought an action in strict liability and negligence against the utility company. The trial court granted defendant's motion for nonsuit on the products liability cause of action, and denied plaintiff's motion for directed verdict. The jury found by special verdict that defendant was not negligent on the remaining cause of action. The trial court denied plaintiff's motions for judgment notwithstanding the verdict and a new trial. Plaintiff appealed.

The court of appeal reversed the order granting nonsuit on the strict liability cause of action, but affirmed the judgment in all other respects. In reversing the order, the court discussed whether the furnishing of electricity is a product or a service. At the time, the issue was one of first impression in California. However, courts in other jurisdictions had concluded that electricity delivered to homes and businesses is a "product." Although the distribution may be a service, the electricity itself, in the contemplation of the ordinary user, is a consumable product (*166 Cal. App. 3d 68, 81-82)* . The court also noted policy justifications for imposing strict liability in tort, and set out the four main policy grounds for the doctrine: (1) to provide a "short cut" to liability when negligence may be present but is difficult to prove; (2) to provide an economic incentive for improved product safety; (3) to induce the reallocation of resources toward safer products; and (4) to spread the risk of loss among all who use the product. Proof of negligence in electricity cases requires a plaintiff to present to a jury evidence of the inner workings of an electrical power system of vast and complex

proportions, and competent expert witnesses are concentrated within the industry itself. In addition, when a huge surge of injury-causing electricity is traceable to a defective component in the utility's system, imposition of strict liability creates an incentive for utilities to *avoid* accidents before they occur, by investing in safer products. Moreover, strict liability in tort spreads the costs of personal injuries among millions of consumers of electricity instead of imposing those costs on blameless victims chosen by chance (*166 Cal. App. 3d 68, 83)* . The court concluded that defendant, as a commercial supplier of electricity, is subject to strict liability in tort for personal injuries caused by delivery of electricity at dangerously high voltage because of a defective transformer. Accordingly, the trial court's entry of nonsuit was error (*166 Cal. App. 3d 68, 83-84)* . The court emphasized that the holding is limited to cases in which the electricity is actually in the "stream of commerce," and expected to be at marketable voltage. The court noted that in most cases, this will mean the electricity must be delivered to the consumer's premises, to the point at which it is metered, although the many variations in electrical systems prevented its drawing a "bright line" at a particular point. The court concurred with other jurisdictions that have refused to impose strict liability in cases in which a utility consumer accidentally touches an antenna to a powerline, or accidentally touches a downed powerline, because in those cases, contact with the powerline comes at a point when the electricity is not in the stream of commerce or is not in marketable form. Moreover, in those cases, the utility generally cannot prevent the accident by using reasonably available means (*166 Cal. App. 3d 68, 84)* .

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19-190 California Points & Authorities § 190.23A

§ 190.23A Supporting Contention That Product Is Subject of Products Liability Action--Product Still On the Market

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum supporting the contention that defendant is liable for plaintiff's injuries caused by defendant's product.*]

DEFENDANT _____ [*specify manufacturer*] IS LIABLE FOR PLAINTIFF'S INJURIES CAUSED BY DEFENDANT'S PRODUCT AFTER IT LEFT DEFENDANT'S CONTROL AND WHILE IT WAS ON THE MARKET.

A. Strict Liability Broadly Extends to Products That Are Placed on Market. Strict liability broadly extends to products that have left the manufacturer's control and are placed on the market (*Nelson v. Superior Court (2006) 144 Cal. App. 4th 689, 694-695, 50 Cal. Rptr. 3d 684*).

B. Strict Liability Is Not Limited to Cases Arising After Retail Sale. The sale of a product is not necessary for the imposition of products liability (*Nelson v. Superior Court (2006) 144 Cal. App. 4th 689, 695, 50 Cal. Rptr. 3d 684*).

C. Application of Strict Liability Is Not Restricted to Injuries Caused by Consumer Use. The application of strict liability is not restricted to injuries caused by consumer use of the defective product (*Nelson v. Superior Court (2006) 144 Cal. App. 4th 689, 698, 50 Cal. Rptr. 3d 684*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of the contention that strict liability extends to products that have left

the control of the manufacturer and are placed on the market (*see Nelson v. Superior Court (2006) 144 Cal. App. 4th 689, 695, 50 Cal. Rptr. 3d 684*).

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary judgment or summary adjudication of the issue that defendant is strictly liable for plaintiff's injuries. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, and in any other relevant points and authorities combined with this form, to show the relationship between the facts of the case and the points of law stated. For example, counsel should state facts showing that the product that caused plaintiff's injury had left the control of the manufacturer and was placed on the market.

[3] Discussion of Authorities

[a] Strict Liability Broadly Extends to Products That Are Placed on Market

In ***Nelson v. Superior Court*** *(2006) 144 Cal. App. 4th 689, 50 Cal. Rptr. 3d 684* , the defendant refined MTBE-containing gasoline. The gasoline was supplied to gas stations located near plaintiff's groundwater wells. Gas stored at these stations leaked into the soil and contaminated plaintiff's water system with MTBE. Plaintiff brought a strict liability action alleging that MTBE was defective in design and manufacture, and that defendant failed to warn of its dangers. The trial court granted defendant's motion for judgment on the pleadings, holding that a bystander who is injured by a product not as a result of the use or possession of the product by a user or consumer may not recover under strict liability.

The appellate court issued a peremptory writ of mandate directing the trial court to vacate its order. It concluded that strict liability may apply to products that have left the control of the manufacturer and are still on the market. The court specifically rejected the contention that strict liability does not apply unless the plaintiff's injury was caused by an ultimate consumer's use of the product. Thus, plaintiff was not precluded from recovering for the MTBE contamination even though the injury had occurred while the product was still possessed and stored by participants in the stream of commerce, i.e., the gas stations. The court based its conclusion in part on the fact that bystanders to uses of a product while it is still on the market are in the same position vis-a-vis the manufacturer as bystanders to uses of the product by the ultimate consumer: both are powerless to protect themselves. Moreover, manufacturers are required to reasonably foresee misuse of a product by a user or third party in some circumstances. It was a natural extension for the court to require manufacturers to foresee normal uses of a product while it is still on the market (*144 Cal. App. 4th 689, 693-696)* .

[b] Strict Liability Is Not Limited to Cases Arising After Retail Sale

Nelson v. Superior Court *(2006) 144 Cal. App. 4th 689, 50 Cal. Rptr. 3d 684* , is discussed in *§ 190.23A[3][a]*.

[c] Application of Strict Liability Is Not Restricted to Injuries Caused by Consumer Use

Nelson v. Superior Court *(2006) 144 Cal. App. 4th 689, 50 Cal. Rptr. 3d 684* , is discussed in *§ 190.23A[3][a]*.

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19-190 California Points & Authorities § 190.24

§ 190.24 Opposing Contention That Product Is Subject of Products Liability Action--Provider of Service Not Subject to Strict Liability--In General

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product (see, e.g., §§ 190.25 -190.29)*].

DEFENDANT _____ [*name*] IS NOT SUBJECT TO STRICT LIABILITY BECAUSE DEFENDANT SOLD A SERVICE FOR THE GUIDANCE OF OTHERS IN _____ [ECONOMIC *and/or* FINANCIAL *and/or* PERSONAL] AFFAIRS, AND DID NOT PUT A PRODUCT ON THE MARKET.

[*or*]

DEFENDANT _____ [*name*] IS NOT SUBJECT TO STRICT LIABILITY BECAUSE THE DOMINANT PURPOSE OF ITS TRANSACTION WITH THE PLAINTIFF WAS TO PROVIDE A SERVICE.

A. Person Who Sells Service Is Not Manufacturer of Product. A person who sells a service for the guidance of others in their economic, financial, and personal affairs is not analogous to a manufacturer who places a product on the market and who is in the best position to spread the cost of injuries resulting from defective products (*Stuart v. Crestview Mut. Water Co. (1973) 34 Cal. App. 3d 802, 811, 110 Cal. Rptr. 543* ; *see Shepard v. Alexian Bros. Hosp. (1973) 33 Cal. App. 3d 606, 610-612, 109 Cal. Rptr. 132*).

B. Person Who Sells Service Is Not Subject to Strict Liability. A person who sells a service for the guidance of others in their economic, financial, and personal affairs is burdened only with a duty of reasonable performance under the circumstances and cannot be made liable in the absence of negligence or intentional misconduct (*Del Mar Beach*

Club Owners Ass'n v. Imperial Contracting Co. (1981) 123 Cal. App. 3d 898, 914, 176 Cal. Rptr. 886 ; *Shepard v. Alexian Bros. Hosp. (1973) 33 Cal. App. 3d 606, 613-614, 109 Cal. Rptr. 132*).

C. Entity Not Subject To Strict Liability When Dominant Purpose of Transaction Is Provision of Service. An entity is not subject to subject to strict liability when the dominant purpose of its transaction with the plaintiff is to provide a service, and it makes a product available to the plaintiff only as an incident to those services (*Ontiveros v. 24 Hour Fitness USA, Inc. (2008) 169 Cal. App. 4th 424, 434, 86 Cal. Rptr. 3d 767*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a defendant is subject to a products liability action. The ground of opposition set forth is that defendant is a seller of services rather than a manufacturer of a product, and as such cannot be held liable under a strict liability theory.

If relevant, these points and authorities should be combined with the points and authorities contained in any of §§ 190.25 through 190.29. In addition, these points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a demurrer or motion for summary judgment or summary adjudication on the issue that defendant is not strictly liable for plaintiff's injuries. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel could include facts demonstrating that defendant is a person who sold a service for the guidance of plaintiff in plaintiff's economic, financial, and personal affairs [*see, e.g.,* *Stuart v. Crestview Mut. Water Co. (1973) 34 Cal. App. 3d 802, 110 Cal. Rptr. 543* (engineers not subject to strict liability); *Shepard v. Alexian Bros. Hosp. (1973) 33 Cal. App. 3d 606, 109 Cal. Rptr. 132* (giving of blood transfusion as service rather than as sale of product)].

[3] Discussion of Authorities

[a] Person Who Sells Service Is Not Manufacturer of Product

The facts and procedural background of ***Stuart v. Crestview Mut. Water Co.*** *(1973) 34 Cal. App. 3d 802, 110 Cal. Rptr. 543* , are discussed in *§ 190.22[3][c]*. Although the court of appeal reversed the dismissal of the strict liability cause of action against the developer who had installed the defective water distribution system, the court affirmed the dismissal of the strict liability cause of action against the system's engineers. The court held that the engineers were not subject to an action based on strict liability, because they had merely rendered a professional service, and were not analogous to manufacturers who place products on the market and who are in the best position to spread the cost of injuries resulting from defective products. The court, relying on prior decisions, reiterated the long standing rule that one who renders a professional service is not subject to an action based on strict liability (*34 Cal. App. 3d 802, 810-812)* .

In ***Shepard v. Alexian Bros. Hosp.*** *(1973) 33 Cal. App. 3d 606, 109 Cal. Rptr. 132* , plaintiff suffered personal injuries after being given a blood transfusion that was contaminated with hepatitis. Plaintiff brought an action in strict liability and warranty against the hospital that had supplied the transfusion. Defendant's demurrer was sustained by the trial court, and the action was dismissed. Plaintiff appealed.

The court of appeal affirmed the judgment of dismissal, holding that because *Health & Safety Code § 1606* prescribes the giving of a blood transfusion as a service rather than as a sale of a product, and because the seller of a service is not

subject to a strict liability or warranty action, defendant could not be liable under the theories that had been presented. In so ruling, the court refused to break a long standing rule of law and extend the theory of strict liability to the seller of a service. The court reasoned that none of the policy reasons for imposing strict liability to the supplier of a service apply, because a supplier of a service does not put a product on the market, has no control over whether the subject of the service is safe, and does not play an integral part in an overall production and marketing enterprise (*33 Cal. App. 3d 606, 608-614)* .

[b] Person Who Sells Service Is Not Subject to Strict Liability

The facts and procedural background of **Del Mar Beach Club Owners Ass'n v. *Imperial Contracting Co.*** *(1981) 123 Cal. App. 3d 898, 176 Cal. Rptr. 886* , are discussed in *§ 190.22[3][b]*. Although the court of appeal reversed the judgment in favor of the developer of a residential development on the strict liability cause of action against the developer, the court nevertheless affirmed the judgment in favor of the engineers and the architect of the development on the strict liability cause of action against them. The court held that the engineers and the architect of the development had been sellers of services, and, relying on prior court of appeal decisions, as sellers of services were not subject to an action based on strict liability (*123 Cal. App. 3d 898, 909-914)* .

Shepard v. Alexian Bros. Hosp. *(1973) 33 Cal. App. 3d 606, 109 Cal. Rptr. 132* , is discussed in *§ 190.24[3][a]*.

[c] Entity Not Subject To Strict Liability When Dominant Purpose of Transaction Is Provision of Service

In ***Ontiveros v. 24 Hour Fitness USA, Inc.*** *(2008) 169 Cal. App. 4th 424, 86 Cal. Rptr. 3d 767* , the plaintiff was injured while exercising on a stairstep machine at defendant's fitness center. The trial court granted defendant's motion for summary judgment on her strict products liability claim on grounds that, *inter alia*, it provided "recreational services." The court of appeal affirmed, holding that the dominant purpose of plaintiff's membership agreement with the defendant was the provision of fitness services. The fact that she chose not to use the services did not alter the essential nature and purpose of the membership agreement. The agreement's terms, and not the plaintiff's subjective intentions, defined the dominant purpose of the transaction (*169 Cal. App. 4th 424, 434)* .

[4] Additional Authorities

[a] Person Who Sells Service Is Not Subject to Strict Liability

In *Ferrari v. Grand Canyon Dories (1995) 32 Cal. App. 4th 248, 38 Cal. Rptr. 2d 65* , the plaintiff brought an action in strict liability and negligence against a recreational raft transportation company seeking damages for injuries sustained during a commercial rafting trip sponsored and conducted by the company. The trial court granted summary judgment in favor of the defendant on the strict liability claim, holding that the rafting company supplied a service, not a product. The court of appeal affirmed. In a given transaction involving both products and services, liability depends on the defendant's role. In this case, the defendant was primarily providing a service: recreational raft transportation. Use of the raft was merely incidental to this service (*32 Cal. App. 4th 248, 258-259)* .

In *San Diego Hospital Assn. v. Superior Court (1994) 30 Cal. App. 4th 8* , a physician who was injured by a laser while performing surgery at a hospital sued the hospital for damages, alleging negligence, misrepresentation, and strict liability. The trial court issued an order that overruled the hospital's demurrer on the strict liability cause of action, and the court of appeal issued a writ of mandate directing the trial court to vacate its order. In so doing, the court of appeal characterized hospitals as providers of medical services not subject to strict tort liability, no matter whom is injured. The court rejected plaintiff's argument that while a hospital provides services to patients, it provides products in the form of equipment to staff physicians. Whether a physician, hospital employee, bystander, or patient is injured, does not alter the nature of the hospital's function as a provider of professional services (*30 Cal. App. 4th 8, 15-16)* .

In *Pierson v. Sharp Mem'l Hosp., Inc. (1989) 216 Cal. App. 3d 340, 264 Cal. Rptr. 673* , a person who was injured in a

fall while visiting a patient in a hospital room sued the hospital for damages, alleging negligence and strict liability, based on latent defects in the hospital premises. The trial court granted the defendant's motion to strike the strict liability cause of action, and the court of appeal affirmed, holding that a hospital is primarily a provider of services, rather than a producer or marketer of products. A patient's room is an integral component of the professional services hospitals provide; therefore, the law imposes only a standard of negligence rather than strict liability with regard to plaintiff's injuries (*216 Cal. App. 3d 340, 343-347)* .

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19-190 California Points & Authorities § 190.25

§ 190.25 Opposing Contention That Product Is Subject of Products Liability Action--Provider of Service Not Subject to Strict Liability--Supplying Blood Transfusion or Blood Product Is Service [Health & Safety Code § 1606]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with a general form contending a service is not subject to strict liability (see, e.g., § 190.24). The following may also be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product.*]

DEFENDANT _____ [*name*] IS NOT SUBJECT TO STRICT LIABILITY BECAUSE, IN _____ [SELLING *and/or* PROVIDING *and/or* SUPPLYING *and/or* MANUFACTURING] A BLOOD _____ [TRANSFUSION *and/or* PRODUCT], DEFENDANT PROVIDED A SERVICE FOR THE GUIDANCE OF OTHERS IN ECONOMIC, FINANCIAL, AND PERSONAL AFFAIRS.

A. Supplier of Blood Transfusion or Product Is Seller of Service Not Subject to Products Liability. The California legislature, by enacting *Section 1606 of the Health and Safety Code*, has expressed its intent and declared a clear legal policy that the transfusion of blood and blood product into the human body shall be construed for all purposes to be the rendition of a service and not a sale. Thus, the supplying or giving of a blood transfusion or blood product is regarded as a service, and as a matter of law the person rendering this service is not subject to an action based on strict liability for any damages resulting from that service (*McDonald v. Sacramento Med. Found. Blood Bank (1976) 62 Cal. App. 3d 866, 869-871, 133 Cal. Rptr. 444* ; *Shepard v. Alexian Bros. Hosp. (1973) 33 Cal. App. 3d 606, 609-610, 109 Cal. Rptr. 132*).

[*Optional*] **B. Hospital That Supplies Blood Transfusion Is Not Subject to Strict Liability.** A hospital, in supplying a blood transfusion to a patient, is rendering a service for which it may not be held strictly liable for any resulting damages (*see* *McDonald v. Sacramento Med. Found. Blood Bank (1976) 62 Cal. App. 3d 866, 869-871, 133 Cal. Rptr.*

444 ; Shepard v. Alexian Bros. Hosp. (1973) *33 Cal. App. 3d 606, 609-610, 109 Cal. Rptr. 132*).

[*Optional*] **C. Blood Bank That Supplies Blood Transfusion Is Not Subject to Strict Liability.** A blood bank, in supplying a blood transfusion to a medical patient, is rendering a service for which it may not be held strictly liable for any resulting damages (*see Klaus v. Alameda-Contra Costa Medical Assn. Blood Bank, Inc. (1976) 62 Cal. App. 3d 417, 418-420*).

[*Optional*] **D. Manufacturer of Blood Product Is Not Subject to Strict Liability.** A private manufacturer of pharmaceuticals that is engaged in the business of manufacturing and distributing a blood product, in placing the blood product on the market in order to profit therefrom, is rendering a service under the meaning of *Section 1606 of the Health and Safety Code*, and may not be held strictly liable for any resulting damages (*Hyland Therapeutics v. Superior Court (1985) 175 Cal. App. 3d 509, 513-514, 220 Cal. Rptr. 590* ; *Fogo v. Cutter Labs., Inc. (1977) 68 Cal. App. 3d 744, 752, 137 Cal. Rptr. 417*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a defendant supplier, distributor, or manufacturer of a blood transfusion or a blood product is subject to a products liability action. The ground of opposition set forth is that defendant is a seller of services rather than a manufacturer of a product, and as such cannot be held liable under a strict liability theory.

These points and authorities should be combined with the points and *authorities in § 190.24*, which set forth the more general applicable rules of law. These points and authorities may also be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a demurrer or motion for summary judgment or summary adjudication on the issue that defendant is not strictly liable for plaintiff's injuries. Finally, these points and authorities may be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should include facts showing that defendant supplied plaintiff with a blood transfusion or a blood product [*see, e.g., Hyland Therapeutics v. Superior Court (1985) 175 Cal. App. 3d 509, 220 Cal. Rptr. 590* (no strict liability when plaintiff's decedent contracted AIDS from blood clotting products); *McDonald v. Sacramento Med. Found. Blood Bank (1976) 62 Cal. App. 3d 866, 133 Cal. Rptr. 444* (no strict liability for giving blood transfusion contaminated with hepatitis)].

[3] Discussion of Authorities

[a] Supplier of Blood Transfusion or Product Is Seller of Service Not Subject to Products Liability

In ***McDonald v. Sacramento Med. Found. Blood Bank*** *(1976) 62 Cal. App. 3d 866, 133 Cal. Rptr. 444* , plaintiff's decedent was given a blood transfusion that caused the decedent to fatally contract hepatitis. Plaintiff brought an action for wrongful death against the doctors, the hospital, and other defendants. The trial court sustained defendants' demurrer to plaintiff's strict liability and breach of warranty causes of action, and the jury entered a verdict for defendants on the negligence cause of action. Plaintiff appealed.

The court of appeal upheld the sustaining of the demurrer. The court held that *Health & Safety Code § 1606* dictates that a blood transfusion must be construed as the rendition of a service and not a sale, and should not be interpreted otherwise. In rendering a service, defendants were not subject to either a strict liability or breach of warranty cause of action. The court further held that the statute is constitutional (*62 Cal. App. 3d 866, 869-873)* .

Shepard v. Alexian Bros. Hosp. *(1973) 33 Cal. App. 3d 606, 109 Cal. Rptr. 132* , is discussed in *§ 190.24[3][a]*.

[b] Hospital That Supplies Blood Transfusion Is Not Subject to Strict Liability

McDonald v. Sacramento Med. Found. Blood Bank *(1976) 62 Cal. App. 3d 866, 133 Cal. Rptr. 444* , is discussed in *§ 190.25[3][a]*.

Shepard v. Alexian Bros. Hosp. *(1973) 33 Cal. App. 3d 606, 109 Cal. Rptr. 132* , is discussed in *§ 190.24[3][a]*.

[c] Blood Bank That Supplies Blood Transfusion Is Not Subject to Strict Liability

In ***Klaus v. Alameda-Contra Costa Medical Assn. Blood Bank, Inc.*** *(1976) 62 Cal. App. 3d 417* , plaintiff became infected with hepatitis after receiving a blood transfusion. Plaintiff brought an action in strict liability against the blood bank that supplied the transfusion. The trial court dismissed the action, and plaintiff appealed.

The court of appeal affirmed the judgment of dismissal, holding that the statutory immunity afforded to hospitals extends to blood banks, and that as the blood bank, by statute, had rendered a service in supplying the transfusion, it could not be subject to strict liability (*62 Cal. App. 3d 417, 418-420)* .

[d] Manufacturer of Blood Product Is Not Subject to Strict Liability

In ***Hyland Therapeutics v. Superior Court*** *(1985) 175 Cal. App. 3d 509* , plaintiff's decedent contracted acquired immune deficiency syndrome (AIDS), and subsequently died, after being treated with blood clotting products manufactured by defendants. In addition, before the decedent died, he communicated AIDS to plaintiff, his wife. Plaintiff brought an action in negligence and strict products liability against defendants for wrongful death and personal injuries. Defendants demurred, but the demurrers were overruled. Defendants then sought review by extraordinary writ.

The court of appeal granted a peremptory writ of mandate directing the trial court to sustain the demurrers as to the strict products liability theories without leave to amend. The court held that defendants, as manufacturers of a blood product, were deemed under *Health & Safety Code § 1606* to have rendered a service in manufacturing the blood product, and may not be held strictly liable for any injuries that result from the rendering of that service (*175 Cal. App. 3d 509, 513-514)* .

In ***Fogo v. Cutter Labs., Inc.*** *(1977) 68 Cal. App. 3d 744, 137 Cal. Rptr. 417* , plaintiffs' decedent died from viral hepatitis after having been injected with a blood product. Plaintiffs brought an action in strict liability, negligence, and warranty against the blood product's manufacturer. The trial court instructed the jury on negligence, but refused to instruct the jury on the strict liability and warranty theories. The jury rendered a verdict in favor of defendant, and plaintiffs appealed.

The court of appeal affirmed, holding that defendant manufacturer was statutorily precluded from liability other than on a negligence or intentional tort theory. The court extended the immunity already established by prior appellate case law to hospitals and blood banks that supplied blood transfusions. The court held that, even though in practical terms defendant had manufactured the blood product for profit, under the terms of *Health & Safety Code § 1606* even the distribution of a blood product constitutes the rendition of a service, for which the distributor may not be held liable other than on a theory of negligence or intentional tort (*68 Cal. App. 3d 744, 750-761)* .

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19-190 California Points & Authorities § 190.26

§ 190.26 Opposing Contention That Product Is Subject of Products Liability Action--Provider of Service Not Subject to Strict Liability--Supplying Human Tissue Is Service [Health & Safety Code § 1635.2]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with a general form contending that a service is not subject to strict liability (see, e.g., § 190.24). The following may also be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product.*]

DEFENDANT _____ [*name*] IS NOT SUBJECT TO STRICT LIABILITY BECAUSE, IN [SELLING *and/or* PROVIDING *and/or* SUPPLYING] _____, A HUMAN TISSUE PRODUCT, DEFENDANT PROVIDED A SERVICE, NOT A PRODUCT.

Supplier of Human Tissue Product Is Seller of Service Not Subject to Products Liability. *Section 1635.2 of the Health and Safety Code* clearly and unambiguously provides that tissue banks provide a service for all purposes, despite the omission of the specific phrase "for all purposes" from its language. By including language in the statute expressly excluding application of the Commercial Code to the collection, processing, storage, and distribution of tissue, the California legislature implicitly excluded tissue-related activities from the purview of strict liability. Other statutory provisions, such as the Uniform Anatomical Gift Act (*Section 7155 of the Health and Safety Code*) and *Section 367f(c)(1) of the Penal Code*, demonstrate the legislature's broad intent that the provision of human tissue not be considered a sale of goods or products (*Cryolife, Inc. v. Superior Court (2003) 110 Cal. App. 4th 1145, 1153-1155, 2 Cal. Rptr. 3d 396*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a defendant supplier or distributor of

a human tissue product is subject to a products liability action. The ground of opposition set forth is that defendant is a seller of services rather than a manufacturer of a product, and as such cannot be held liable under a strict liability theory.

These points and authorities should be combined with the points and *authorities in § 190.24*, which set forth the more general applicable rules of law. These points and authorities may also be combined with points and authorities pertaining to the specific procedural context in which counsel wises to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a demurrer or motion for summary judgment or summary adjudication on the issue that defendant is not strictly liable for plaintiff's injuries. Finally, these points and authorities may be adopted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should include facts showing that defendant supplied a human tissue product that was used on plaintiff.

[3] Discussion of Authorities

[a] Supplier of Human Tissue Product Is Seller of Service Not Subject to Products Liability.

In ***Cryolife, Inc. v. Superior Court*** *(2003) 110 Cal. App. 4th 1145, 1153-1157, 2 Cal. Rptr. 3d 396* , the plaintiff underwent a surgical procedure which used an allograft consisting of a human cadaver patellar tendon. The allograft turned out to be infected with bacteria and was removed two months later. Plaintiff brought an action against the tissue bank alleging several causes of action, including strict liability. The trial court overruled the tissue bank's demurrer to the strict liability cause of action on the ground that *Health & Safety Code § 1635.2* did not immunize it from strict products liability because the statute does not expressly state that tissue banks provide a service "for all purposes."

The court of appeal issued a peremptory writ of mandate issue directing the court to vacate its order, determining that *Health & Safety Code § 1635.2* does provide statutory immunity for strict liability to tissue banks. The statute clearly and unambiguously provides that tissue banks provide a service for all purposes, despite the omission of the specific phrase "for all purposes" from its language. Moreover, by including language in the statute expressly excluding application of the Commercial Code to the collection, processing, storage, and distribution of tissue, the California legislature implicitly excluded tissue-related activities from the purview of strict liability. Other statutory provisions, such as the Uniform Anatomical Gift Act (*Section 7155 of the Health and Safety Code*) and *Section 367f(c)(1) of the Penal Code*, also demonstrate the legislature's broad intent that the provision of human tissue not be considered a sale of goods or products. Finally, the court could find no reason that the public policy rationale for exempting blood products from strict liability should not also apply to human tissue products.

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19-190 California Points & Authorities § 190.27

§ 190.27 Opposing Contention That Product Is Subject of Products Liability Action--Provider of Service Not Subject to Strict Liability--Travel Agency Arranging Package Tour Is Service

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with a general form contending a service is not subject to strict liability (see, e.g., § 190.24). The following may also be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product.*]

DEFENDANT _____ [*name*] IS NOT SUBJECT TO STRICT LIABILITY BECAUSE, AS A TRAVEL AGENCY ARRANGING A PACKAGE TOUR, DEFENDANT PROVIDED A SERVICE FOR THE GUIDANCE OF OTHERS IN ECONOMIC, FINANCIAL, AND PERSONAL AFFAIRS.

Arranging Package Tour as Service. A travel agency that arranges a package tour by selecting and coordinating transportation, accommodations, and meals for prospective travelers is performing a service for the guidance of others in their economic, financial, or personal affairs, and may not be held strictly liable for any injuries resulting from the package tour (*Pena v. Sita World Travel, Inc. (1978) 88 Cal. App. 3d 642, 644-645, 152 Cal. Rptr. 17*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that defendant travel agency may be held strictly liable for injuries that were inflicted on its client while its client was traveling on a package tour arranged by the travel agency. The ground of opposition set forth is that defendant is a seller of services rather than a manufacturer of a product, and as such cannot be held liable under a strict liability theory.

These points and authorities should be combined with the points and *authorities in § 190.24,* which set forth the more

general applicable rule of law. These points and authorities may also be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a demurrer or motion for summary judgment or summary adjudication on the issue that defendant is not strictly liable for plaintiff's injuries. Finally, these points and authorities may be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should include facts stating that defendant merely arranged the transportation, meals, and accommodations for the tour on which plaintiff suffered injuries [*see, e.g., Pena v. Sita World Travel, Inc. (1978) 88 Cal. App. 3d 642, 152 Cal. Rptr. 17* (defendant travel service not strictly liable for plaintiff's injuries from overturning of bus while plaintiff was on 10-day tour arranged by defendant)].

[3] Discussion of Authorities

[a] Arranging Package Tour as Service

In ***Pena v. Sita World Travel, Inc.*** *(1978) 88 Cal. App. 3d 642, 152 Cal. Rptr. 17* , plaintiff went on a 10-day tour of Mexico that had been arranged by defendant travel service. While traveling, plaintiff's bus overturned and she was injured. Plaintiff brought an action against numerous defendants, which included a strict liability cause of action against the travel service. The trial court sustained demurrers to the action, and plaintiff appealed.

The court of appeal affirmed, holding that the demurrers were properly sustained. Specifically as to the strict liability claim against the travel service, the court ruled that the travel service had merely performed a service rather than a sale, and that as such could not be subjected to strict liability (*88 Cal. App. 3d 642, 644-645)* .

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19-190 California Points & Authorities § 190.28

§ 190.28 Opposing Contention That Product Is Subject of Products Liability Action--Provider of Service Not Subject to Strict Liability--Architects and Civil Engineers Perform Service

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with a general form contending a service is not subject to strict liability (see, e.g., § 190.24). The following may also be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product.*]

DEFENDANT _____ [*name*] IS NOT SUBJECT TO STRICT LIABILITY BECAUSE, AS _____ [AN ARCHITECT *or* A CIVIL ENGINEER], DEFENDANT PROVIDED A SERVICE FOR THE GUIDANCE OF OTHERS IN ECONOMIC, FINANCIAL, AND PERSONAL AFFAIRS.

Architects and Civil Engineers Perform Service. _____ [An architect *or* A civil engineer], acting in that capacity, renders a service for the guidance of others in their economic, financial, and personal affairs, and may not be held strictly liable for injuries that result from his or her having acted in that capacity (*Huang v. Garner (1984) 157 Cal. App. 3d 404, 412 n.5, 203 Cal. Rptr. 800* ; *Del Mar Beach Club Owners Ass'n v. Imperial Contracting Co. (1981) 123 Cal. App. 3d 898, 914, 176 Cal. Rptr. 886*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that defendant architect or engineer may be held strictly liable for damages caused by a defect in the project on which he or she had worked. The ground of opposition set forth is that defendant is a seller of services rather than of a product, and as such cannot be held liable under a strict liability theory.

These points and authorities should be combined with the points and *authorities in § 190.24*, which set forth the more general applicable rule of law. These points and authorities may also be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a demurrer or motion for summary judgment or summary adjudication on the issue that defendant is not strictly liable for plaintiff's injuries. Finally, these points and authorities may be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should include facts stating that defendant had only been hired by a developer or like person to draft architectural plans or act as engineer for the development or project [*see, e.g.,* *Huang v. Garner (1984) 157 Cal. App. 3d 404, 203 Cal. Rptr. 800* (designer and engineer of apartment complex not subject to strict liability); *Del Mar Beach Club Owners Ass'n v. Imperial Contracting Co. (1981) 123 Cal. App. 3d 898, 176 Cal. Rptr. 886* (engineers and architect of project not subject to strict liability)].

[3] Discussion of Authorities

[a] Architects and Civil Engineers Perform Service

In ***Huang v. Garner*** *(1984) 157 Cal. App. 3d 404, 203 Cal. Rptr. 800* , plaintiffs purchased an apartment complex from one of the defendants whose construction company, also a named defendant, had constructed the complex on the real property. The owner defendant had hired a designer and a civil engineer, also defendants in the case. Plaintiffs brought an action in strict liability, negligence, and warranty against the defendants, alleging design defect and violation of numerous building codes in the construction. After plaintiffs rested their case, the trial court granted a nonsuit on all theories as to the designer and civil engineer defendants. The trial court also granted a nonsuit and a partial nonsuit as to the owner defendant and his construction company on various grounds. The jury rendered a verdict for plaintiffs and against the owner and his construction company. The owner and his construction company filed an appeal; plaintiffs filed an appeal and cross appeal from the nonsuit judgments.

The court of appeal reversed, holding that the trial court erred in granting nonsuits on the negligence claims against defendants. However, the court upheld the nonsuits as to the strict liability claims against the designer and the engineer. The court reiterated the rule that one who sells a service is not subject to a strict liability claim; the court also reiterated the rule that economic damages are not available on a strict liability claim (*157 Cal. App. 3d 404, 412 n.5*).

CAUTION:

In *Aas v. Superior Court (2000) 24 Cal. 4th 627, 645-646, 101 Cal. Rptr. 2d 718, 12 P.3d 1125* [*see § 190.224[3][a]*], the California Supreme Court determined that homeowners and a homeowners association could not recover in negligence from the developer, contractor, and subcontractors who built their dwellings for construction defects that have not caused property damage. The court expressly disapproved *Huang* to the extent it was inconsistent with the views set out in that opinion.

The facts and procedural background of ***Del Mar Beach Club Owners Ass'n v. Imperial Contracting Co.*** *(1981) 123 Cal. App. 3d 898, 176 Cal. Rptr. 886* , are discussed in *§ 190.22[3][b]*. In *Del Mar,* although the court of appeal reversed the judgment as to the developer defendants, the court nevertheless affirmed the judgment in favor of the engineers and the architect of the project, holding that those defendants were not subject to a cause of action in strict liability, because those defendants had merely sold their services (*123 Cal. App. 3d 898, 914)* .

[4] Additional Authorities

[a] Architects and Civil Engineers Perform Service

The facts and procedural background of *Stuart v. Crestview Mut. Water Co. (1973) 34 Cal. App. 3d 802, 110 Cal.*

Rptr. 543 , are discussed in *§ 190.22[3][c]*. In *Stuart*, although the court of appeal reversed that part of the judgment that had dismissed the negligence actions and the strict liability action against the developer, the court nevertheless affirmed the judgment of dismissal on the strict liability action against the engineers. The court held that the engineers had rendered a professional service, and in so doing could not be subject to an action in strict liability (*34 Cal. App. 3d 802, 811)* .

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19-190 California Points & Authorities § 190.29

§ 190.29 Opposing Contention That Product Is Subject of Products Liability Action--Provider of Service Not Subject to Strict Liability--Supplier of Electricity Not Subject to Strict Liability if Electricity Defect and Injury Occurred Before Electricity Had Entered Stream of Commerce

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with a general form contending a service is not subject to strict liability (see, e.g., § 190.24). The following may also be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product.*]

DEFENDANT _____ [*name*], AS A COMMERCIAL SUPPLIER OF ELECTRICITY, IS NOT SUBJECT TO A CAUSE OF ACTION IN STRICT LIABILITY BECAUSE THE ELECTRICITY HAD NOT YET ENTERED THE STREAM OF COMMERCE AT THE TIME OF THE INJURY, AND WAS THEREFORE A SERVICE AND NOT A PRODUCT

A. Electricity is Service, Not Product, Until Metered. While still in the distribution system, electricity is a service, not a product, and does not become a product, for purposes of strict liability, until it passes through the customer's meter and into the stream of commerce (*Fong v. Pacific Gas & Elec. Co. (1988) 199 Cal. App. 3d 30, 38, 245 Cal. Rptr. 436*).

B. Strict Liability Inapplicable to Defects Along Transmission Lines. Strict liability in tort does not apply to defective electric transmission lines or defects anywhere along the distribution lines (*Fong v. Pacific Gas & Elec. Co. (1988) 199 Cal. App. 3d 30, 36, 245 Cal. Rptr. 436*).

C. Strict Liability Inapplicable to Facilities Used by Public Utility for Transmission of Electricity. The doctrine of strict liability for placing defective products on the market is not applicable to facilities used by a public utility for the transmission of electricity energy (*United Pac. Ins. Co. v. Southern Cal. Edison Co. (1985) 163 Cal. App. 3d 700,*

706-710, 209 Cal. Rptr. 819).

D. Electric Transmission Facilities Not Placed in Stream of Commerce. High voltage electric transmission facilities are not placed in the stream of commerce, but, on the contrary, are retained in the ownership and control of the electricity supplier and used solely by it to transmit electricity to other facilities for ultimate delivery to customers. The products liability doctrine does not require a transfer of ownership, but does require that a product be marketed, or in some manner placed in the stream of commerce, which does not occur at a high voltage electric transmission line (*Fong v. Pacific Gas & Elec. Co. (1988) 199 Cal. App. 3d 30, 36, 245 Cal. Rptr. 436* ; *United Pac. Ins. Co. v. Southern Cal. Edison Co. (1985) 163 Cal. App. 3d 700, 707-708, 209 Cal. Rptr. 819*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that defendant public electrical utility may be held strictly liable for damages caused from its facilities or from the transmission of electricity prior to the point at which it had entered the stream of commerce. The ground of opposition set forth is that defendant is a seller of services rather than of a product, and as such cannot be held liable under a strict liability theory.

These points and authorities should be combined with the points and *authorities in § 190.24*, which set forth the more general applicable rule of law. These points and authorities may also be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a demurrer or motion for summary judgment or summary adjudication on the issue that defendant is not strictly liable for plaintiff's injuries. Finally, these points and authorities may be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should state that defendant is a commercial provider of electricity. Counsel should include facts regarding the location of the electricity when the injury occurred. For example, if appropriate, counsel should allege that the injury was directly caused by utility lines strung between utility poles, and therefore the electricity had not yet entered the stream of commerce [*see* *United Pac. Ins. Co. v. Southern Cal. Edison Co. (1985) 163 Cal. App. 3d 700, 209 Cal. Rptr. 819]* .

In an appropriate case, this points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 190.23*.

[b] Electricity Outside Stream of Commerce Not Subject to Strict Liability

A commercial supplier of electricity is not subject to strict liability in tort for an injury caused by defective electricity unless the electricity is deemed a product rather than a service [*Fong v. Pacific Gas & Elec. Co. (1988) 199 Cal. App. 3d 30, 38, 245 Cal. Rptr. 436]* . It is a product only after it has been metered for use by the consumer [*Fong v. Pacific Gas & Elec. Co. (1988) 199 Cal. App. 3d 30, 38, 245 Cal. Rptr. 436* ; *but see* *Pierce v. Pacific Gas & Elec. Co. (1985) 166 Cal. App. 3d 68, 212 Cal. Rptr. 283* (no definite point at which electricity becomes product, although usually occurs at meter)]. For example, if the injury is directly caused by a condition in powerlines strung between utility poles, the doctrine of strict liability does not apply [*see* *United Pac. Ins. Co. v. Southern Cal. Edison Co. (1985) 163 Cal. App. 3d 700, 705-710, 209 Cal. Rptr. 819]* . Further, if the wires are located close to the consumer's structure, but the defect and damage occur prior to metering, the doctrine also does not apply [*see* *Fong v. Pacific Gas & Elec. Co. (1988) 199 Cal. App. 3d 30, 245 Cal. Rptr. 436]* .

However, if a defect in the transmission equipment causes a surge of defective electricity to flow through the

consumer's meter, and injury occurs inside the premises, the defendant is subject to strict liability even though the defect originated before the electricity was metered [*see Pierce v. Pacific Gas & Elec. Co. (1985) 166 Cal. App. 3d 68, 212 Cal. Rptr. 283* (surge caused by defective transformer, which caused injury inside consumer's home); *see § 190.23[3][e]*].

Moreover, the court in *Pierce v. Pacific Gas & Elec. Co. (1985) 166 Cal. App. 3d 68, 212 Cal. Rptr. 283* [*see § 190.23[3][a]*], declined to set a definitive limitation on when electricity enters the stream of commerce. Although it acknowledged that in most cases the electricity must be delivered to the consumer's premises to the point at which it is metered, it does not state that metering must occur first. It also noted that the many variations in electrical systems prevented its drawing a "bright line" at a particular point. Consequently, under *Pierce,* an opponent of these points and authorities can continue to argue facts that fall between the powerline-and-kite example in *United Pacific* and the metered defective electricity in *Pierce.* Although the court in *Fong v. Pacific Gas & Elec. Co. (1988) 199 Cal. App. 3d 30, 245 Cal. Rptr. 436* , which held that electricity must be metered, discussed *Pierce* in its opinion [*see § 190.29[3][a]*], and implied that its holding followed from *Pierce,* the court in *Fong* did not align its decision squarely with *Pierce,* and opponents could conceivably argue the holdings of those respective cases on the same set of facts.

[3] Discussion of Authorities

[a] Electricity is Service, Not Product, Until Metered

In ***Fong v. Pacific Gas & Elec. Co.*** *(1988) 199 Cal. App. 3d 30, 245 Cal. Rptr. 436* , owners of a residential garage that was destroyed by an electrical fire brought an action against the utility company for strict liability in tort. The garage received its electricity from electrical lines that were installed, owned, and operated by defendant utility company. The lines attached in one corner of the building at a "weatherhead," a vertical steel conduit that supports and protects the wiring that enters the building. Plaintiffs alleged that three wires braided together, which formed a "triplex service," lost their insulation because of faulty installation, and as a result, the wires were allowed to contact each other, causing arcing of the electric current and heating of the wires. In turn, molten aluminum allegedly dropped onto the shingled roof of the garage, causing it to catch fire. From the point of connection with the defendant's wires, the consumer's wires entered the weatherhead service entrance and descended in the vertical conduit to an electric meter, belonging to the defendant, on the side of the garage. From the electric meter, the wires entered the garage and ran through a fuse box and a subpanel where the circuit breakers were located. The wires ended at plugs in the garage. Eyewitness testimony regarding whether the flames occurred inside or outside the garage was in conflict. Expert testimony conflicted regarding whether the fire was caused by a condition within the garage, or by defective insulation in the weatherhead. All evidence showed that the voltage of the lines was normal. The trial court delivered jury instructions on strict liability in tort due to defective electricity, and the jury returned a verdict for plaintiffs. Defendant appealed.

The court of appeal reversed and remanded with directions to enter judgment in favor of defendant, holding that until it is metered, electricity is a service, not a product, and strict liability does not apply to defects at that stage (*199 Cal. App. 3d 30, 38-39)* . The court reiterated the general rule set forth in *Greenman v. Yuba Power Prods., Inc. (1963) 59 Cal. 2d 57, 62, 27 Cal. Rptr. 697, 377 P.2d 897* , that a manufacturer is strictly liable in tort when an article it places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. Placing an article on the market under the *Greenman* test is the functional equivalent of putting a product "in the stream of commerce," as used in Restatement (Second) of Torts § 402A. *Pursuant to Pierce v. Pacific Gas & Elec. Co. (1985) 166 Cal. App. 3d 68, 83-84, 212 Cal. Rptr. 283* [*see § 190.23[3][a]*], it is now firmly settled that electricity can be a product within the meaning of *Greenman* and § 420A (*199 Cal. App. 3d 30, 35)* . The court in *Pierce* held that the utility company, as a commercial supplier of electricity, is subject to strict liability in tort for personal injuries caused by delivery of electricity at dangerously high voltage due to a defective transformer. However, in this case there was no evidence of a defect in the electricity itself, because the voltage lines were shown to be normal. The court discussed plaintiffs' contention that the incoming powerlines were defective because they lacked adequate

insulation. Plaintiff contended that *Pierce* compels the application of strict liability because the electricity was in a form not intended by the utility when it emerged from the power lines near the consumers' garage. The court disagreed, stating that ning in *Pierce* even hints that the court was interested in overturning what is settled law in California and in other jurisdictions: strict liability in tort does not apply to defective electric transmission lines or defects anywhere along the distribution lines. The court noted that *United Pac. Ins. Co. v. Southern Cal. Edison Co. (1985) 163 Cal. App. 3d 700, 209 Cal. Rptr. 819* , was more in line with this case than *Pierce* was, in holding that the electricity in lines strung between utility poles was not placed in the stream of commerce (*199 Cal. App. 3d 30, 36)* . The court also noted that other jurisdictions consistently hold that the presence of defects in power lines owned and operated by a public utility does not subject the utility to strict liability in tort. One reason is that the lines carrying the electrical current are not packaging of the current, and therefore are not part of the product being sold. Instead, the lines are merely a delivery system that remains owned by and under the control of the electric company. Another view, taken in *Pierce,* is that until the electricity is actually delivered to the home or the factory, it has neither been sold nor placed in the stream of commerce (*199 Cal. App. 3d 30, 37)* . The court rejected plaintiff's contention that the electricity in this case was in the stream of commerce because of the proximity of the wires to the consumers' home. The court noted that electricity has been deemed to enter the stream of commerce when it leaves the transmission lines and passes through the consumer's meter. The court in *Pierce* limited application of strict liability to cases in which the electricity is actually in the stream of commerce, and expected to be at marketable voltage. In most cases, that court stated, it means that the electricity must be delivered to the consumer's premises, to the point at which it is metered, although the many variations in electrical systems prevented its drawing a "bright line" at a particular point. A foreign state court held that while it is still in the distribution system, electricity is a service, not a product; electricity becomes a product, for purposes of strict liability, once it passes through the consumer's meter and into the stream of commerce. Therefore, electricity does not become a product once it is delivered to plaintiffs' premises--that is, the moment the wires cross plaintiffs' property line. Instead, the test is whether the electricity has been metered. In this case, the fire occurred before the electricity reached the meter. Therefore, the electricity, if defective, was still in the distribution line and not in the stream of commerce. Consequently, the court found no evidence to warrant application against defendant of strict liability in tort. The electricity was not defective at that point in time when the fire allegedly occurred. The electricity had not left the utility's control at that point, and therefore there was no product in the stream of commerce (*199 Cal. App. 3d 30, 38)* .

NOTE:

There is a difference between the stream-of-commerce standard set forth in *Fong and Pierce v. Pacific Gas & Elec. Co. (1985) 166 Cal. App. 3d 68, 83-84, 212 Cal. Rptr. 283* . Although *Fong* cited and quoted *Pierce,* its decision is more restrictive, in that *Pierce* refused to set a definitive point at which electricity enters the stream of commerce [*see § 190.29[2][b]*; *see also 190.23[3][a]*].

[b] Strict Liability Inapplicable to Defects Along Transmission Lines

Fong v. Pacific Gas & Elec. Co. *(1988) 199 Cal. App. 3d 30, 245 Cal. Rptr. 436* , is discussed in *§ 190.29[3][a]*.

[c] Strict Liability Inapplicable to Facilities Used by Public Utility for Transmission of Electricity

In ***United Pac. Ins. Co. v. Southern Cal. Edison Co.*** *(1985) 163 Cal. App. 3d 700, 209 Cal. Rptr. 819* , plaintiff's property was damaged in a fire that ignited when a kite became entangled in the conductors of a privately owned public utility that transmitted electricity. Plaintiff brought an action in strict products liability and negligence against the electrical utility. The trial court refused to instruct the jury on a strict liability theory, and submitted the case to the jury on a negligence theory only. The jury returned a verdict for defendant, and plaintiff appealed.

The court of appeal affirmed, holding that strict liability does not apply to defective electric transmission lines used by a public utility (*163 Cal. App. 3d 700, 706-710)* . that at the time, the case was one of first impression in *California. Pursuant to Greenman v. Yuba Power Prods., Inc. (1963) 59 Cal. 2d 57, 62, 27 Cal. Rptr. 697, 377 P.2d 897* , the manufacturer is strictly liable in tort when an article it places on the market, knowing that it is to be used without

inspection for defects, proves to have a defect that causes injury to a human being (*163 Cal. App. 3d 700, 706)* . The court noted that other jurisdictions have determined the doctrine to be inapplicable to defective electric transmission lines, because the electricity is not in a marketable state, and the doctrine was not intended to apply in those cases, and until actually delivered, the electricity has not been placed in the "stream of commerce" (*163 Cal. App. 3d 700, 706-707)* . The court rejected plaintiff's contention that defendant placed the transmission system in the stream of commerce by using the system itself. The court held that placing a product in the stream of commerce necessarily involves transfer of property or some property right. In this case, defendant merely used its own facilities to transmit its own energy for sale at a subsequent point (*163 Cal. App. 3d 700, 708)* . The court refused to extend the products liability doctrine to apply to the facts of the case, noting that defendant is a privately-owned public utility, which cannot raise rates without government approval. Consequently, the concept of risk-sharing underlying the products-liability doctrine is inapplicable (*163 Cal. App. 3d 700, 708-709)* . The court also found that, with respect to a regulated public utility, there is less need than in the case of an unregulated manufacturer to motivate safety precautions by the economic sanction of strict liability. Moreover, the plaintiff's burden of proving negligence regarding equipment open to public view is not great (*163 Cal. App. 3d 700, 709)* . The court concluded that the factors that gave rise to the doctrine of strict liability for placing defective products on the market are not so strong as to justify a major extension of the doctrine to high voltage electric transmission lines owned and operated by privately-owned public utilities (*163 Cal. App. 3d 700, 709-710)* .

[d] Electric Transmission Facilities Not Placed in Stream of Commerce

Fong v. Pacific Gas & Elec. Co. *(1988) 199 Cal. App. 3d 30, 245 Cal. Rptr. 436*), is discussed in *§ 190.29[3][a]*.

United Pac. Ins. Co. v. Southern Cal. Edison Co. *(1985) 163 Cal. App. 3d 700, 209 Cal. Rptr. 819*), is discussed in *§ 190.29[3][c]*.

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A. Strict Liability
1. What Is a Product?

19-190 California Points & Authorities § 190.30

§ 190.30 Opposing Contention That Product Is Subject of Products Liability Action--Residence Was Not Mass-Produced

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product.*]

DEFENDANT _____ [*name*], AS A CONTRACTOR ENGAGED ONLY IN _____ [THE OCCASIONAL CONSTRUCTION AND SALE OF RESIDENCES *or* THE ISOLATED CONSTRUCTION AND SALE OF PLAINTIFF'S RESIDENCE], DID NOT CONSTRUCT OR SELL PLAINTIFF'S RESIDENCE AS PART OF A MASS-PRODUCTION PLAN, AND THEREFORE CANNOT BE HELD STRICTLY LIABLE FOR DEFICIENCIES IN PLAINTIFF'S RESIDENCE.

Strict Liability May Not Be Imposed Regarding Residences That Are Not Mass-Produced. Strict liability may not be imposed regarding deficiencies in a residence that was not mass-produced, but that was rather constructed and sold by a contractor that was engaged only in the occasional or isolated construction and sale of a residence (*Oliver v. Superior Court (1989) 211 Cal. App. 3d 86, 89, 259 Cal. Rptr. 160*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that strict liability may be imposed regarding deficiencies of a residence that was not mass-produced [*see Oliver v. Superior Court (1989) 211 Cal. App. 3d 86, 259 Cal. Rptr. 160]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context

in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary adjudication [*see Code Civ. Proc. § 437c(f)*] of a cause of action for strict liability regarding damage to plaintiff's residence [*see Oliver v. Superior Court (1989) 211 Cal. App. 3d 86, 259 Cal. Rptr. 160]* . In addition, the points and authorities may be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. For example, counsel should include facts showing the number and location of residences that defendant constructed, to support the finding that defendant was not engaged in the mass-production of tract homes or any similar large-scale residential construction project.

In an appropriate case, the points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 190.22*.

[3] Discussion of Authorities

[a] Strict Liability May Not Be Imposed Regarding Residences That Are Not Mass-Produced

In ***Oliver v. Superior Court*** *(1989) 211 Cal. App. 3d 86, 259 Cal. Rptr. 160* , the owners of a single-family residence brought an action against the builder of their home, alleging causes of action in negligence, breach of implied warranty, strict liability, negligent misrepresentation, and fraud. Defendant moved for summary adjudication of issues, seeking to eliminate the cause of action for strict liability. (*Code Civ. Proc. § 437c* has subsequently been amended. Although *Code Civ. Proc. § 437c(f)* no longer provides for a motion for "summary adjudication of issues," it does provide for summary adjudication of "one or more causes of action," which was, in effect, the procedure used in this case.) The trial court granted the motion on the ground that the strict liability could be imposed on a developer and seller of residential housing only if the residences were mass-produced. The plaintiffs filed a petition for writ of mandate.

The court of appeal denied the petition, holding that the imposition of strict liability regarding the development of residential housing was applicable only to mass-produced residences (*211 Cal. App. 3d 86, 88)* . The court noted that *Kriegler v. Eichler Homes, Inc. (1969) 269 Cal. App. 2d 224, 74 Cal. Rptr. 749* [*see § 190.22[3][a]*], the seminal case that extended the doctrine of strict liability to real estate developers, analogized the mass-production of residential units to the production and sale of cars (*211 Cal. App. 3d 86, 87-88)* . Subsequently, the doctrine of strict liability in tort was held applicable to a developer of a housing tract consisting of an unspecified number of house lots, and to a developer of a multiunit complex. The court noted that in each instance in which the doctrine of strict liability was applied, the defendants were characterized as mass producers. The court rejected plaintiffs' contention that the "mass production" requirement should no longer apply to real estate, because it is no longer required regarding the manufacturers of products (*211 Cal. App. 3d 86, 88)* . The court noted that no case law supported imposition of strict liability on other than "mass-produced" homes. Whether a residence falls within the category of a mass-produced home is a question that must be determined on a case-by-case basis. In this case, defendant had built two homes, at two different times, in two different locations, evidencing occasional construction, not mass production. The court also determined that the policies underlying *Kriegler* do not compel the extension of the doctrine of strict liability to residences that are not mass-produced. A home purchase through an occasional construction and sale does not involve the buyer reliance attending sales based on an advertised model. Nor does it present a situation in which the builder may be protected from substantial financial loss by effectively spreading both the risk and actual costs of defective construction among a number of residences in a development. The court stated that, inasmuch as the rationale underlying the application of strict liability does not apply to the occasional or isolated construction and sale of a residence, it would not expand the concept beyond its current application, limited to mass-produced homes (*211 Cal. App. 3d 86, 89)* .

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A. Strict Liability
1. What Is a Product?

19-190 California Points & Authorities § 190.31

§ 190.31 Opposing Contention That Product Is Subject of Products Liability Action--Object or Instrumentality Not "Product" as Defined or Contemplated by Law--General Form

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product (see, e.g., §§ 190.25 -190.30).*]

DEFENDANT _____ [*name*] IS NOT SUBJECT TO STRICT LIABILITY, BECAUSE _____ [*specify object or instrumentality that is subject of strict liability cause of action*] IS NOT A PRODUCT WITHIN THE MEANING OF THE STRICT-LIABILITY DOCTRINE, IN THAT IT WAS NEITHER DEFINED OR CONTEMPLATED AS A PRODUCT BY THE RESTATEMENT OF TORTS, THE LEGISLATURE, OR CASE LAW.

A. Plaintiff Must Show Existence of "Product." As a condition precedent to successfully maintaining a products liability action, plaintiff must show that the object or instrumentality claimed to be defective was in fact a "product" as defined or contemplated by the Restatement of Torts, legislation, or case law (*Brooks v. Eugene Burger Mgmt. Corp. (1989) 215 Cal. App. 3d 1611, 1626, 264 Cal. Rptr. 756*).

B. Existence of "Product" Is Question of Law. Whether or not an object or instrumentality claimed to be defective is a "product" is a question of law for the trial court (*Brooks v. Eugene Burger Mgmt. Corp. (1989) 215 Cal. App. 3d 1611, 1626, 264 Cal. Rptr. 756*).

C. Item Not Contemplated by Law to Be "Product" Cannot Be Subject of Strict-Liability Action. An object or instrumentality that is not a "product" within the meaning of the strict-liability doctrine, as defined or contemplated by the Restatement of Torts, legislation, or case law, cannot be the subject of a strict-liability claim (*Brooks v. Eugene Burger Mgmt. Corp. (1989) 215 Cal. App. 3d 1611, 1626, 264 Cal. Rptr. 756*).

[2] Comments

[a] Use of Form

These memorandum of points and authorities may be submitted in opposition to the contention that a defendant is subject to a products liability action, on the ground that the object or instrumentality that is claimed to be defective is not a "product" within the meaning of the strict-liability doctrine [*see Brooks v. Eugene Burger Mgmt. Corp. (1989) 215 Cal. App. 3d 1611, 1626, 264 Cal. Rptr. 756]* .

These form may be used as a general form, either alone or in combination with other forms specifically setting forth the type of object or instrumentality in question, if that specific issue has already been determined [*see, e.g., §§ 190.24 -190.29*]. For example, if the plaintiff has brought a products liability action based on the allegation that electricity is a product, the relevant points in this form may be combined with the *form in § 190.29*. These points and authorities may also be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary judgment or summary adjudication of the issue that a particular item is not a product. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, and in any other relevant points and authorities combined with this form, to show the relationship between the facts of the case and the points of law stated. For example, if there is no precedent regarding the particular item in question, counsel should state that no statute, case law, or other legal authority has determined the item to be a product, and should further show that the item is either similar to other items previously found not to be products, or dissimilar from items that have been determined to be products.

[b] Related Pleading and Practice Forms

For discussion and forms relating to products liability generally, see California Forms of Pleading and Practice, Ch. 460, *Products Liability* (Matthew Bender).

[3] Discussion of Authorities

[a] Plaintiff Must Show Existence of "Product"

In ***Brooks v. Eugene Burger Mgmt. Corp.*** *(1989) 215 Cal. App. 3d 1611, 264 Cal. Rptr. 756* , a minor brought an action against the owner of an apartment complex, seeking damages arising from injuries incurred when he was hit by a vehicle while crossing the street adjacent to the complex. Plaintiff alleged causes of action in negligence, premises liability, and products liability. With regard to the products liability action, plaintiff asserted that the apartment complex was a "product" and was defectively designed and constructed in that it was not fenced, allowing the children in the complex to reach the road adjacent to it. Defendant successfully moved for summary judgment on the strict-liability cause of action, and plaintiff appealed.

The court of appeal affirmed, holding that an apartment complex is not a "product." The court noted that the basis of strict liability is the furnishing of defective goods. Restatement Second of Torts § 402A states the following:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to [his or her] property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in (1) applies although (a) the seller has exercised all possible care in the preparation and sale of [his or her] product, and (b) the user or consumer has not bought the product from or entered into any contractual relation

with the seller.

The court further noted that case law has established that a manufacturer or seller of a defectively designed or manufactured product may be held liable for resulting damages to the user by reason of the defect in design or manufacture without proving a duty or breach of duty. However, a products liability claimant must meet a condition precedent to successfully maintain the action: he or she must show that the object or instrumentality claimed to be defective was in fact a "product" as defined or contemplated by the Restatement of Torts, legislation, or case law (*215 Cal. App. 3d 1611, 1626)* .

[b] Existence of "Product" Is Question of Law

Brooks v. Eugene Burger Mgmt. Corp. *(1989) 215 Cal. App. 3d 1611, 264 Cal. Rptr. 756* , is discussed in *190.31[3][a]*. The court held that whether or not a product was defectively designed or manufactured is a factual issue to be determined by the trier of fact. However, whether or not the particular object or instrumentality is a "product" is a question of law for the trial court (and subject to de novo review by the court of appeal) (*215 Cal. App. 3d 1611, 1626)* .

[c] Item Not Contemplated by Law to Be "Product" Cannot Be Subject of Strict-Liability Action

Brooks v. Eugene Burger Mgmt. Corp. *(1989) 215 Cal. App. 3d 1611, 264 Cal. Rptr. 756* , is discussed in *§ 190.31[3][a]*. The court stated that the types of products that have been alleged to be defective include business and industrial machinery and equipment, chemicals, clothing, asbestos, drugs, food, and beverages, among others. The court held that there was no authority to the effect that an apartment complex may be considered a product for the purposes of products liability. The court noted that plaintiff did not contend that any of the buildings constructed on the complex, or the playground equipment or grounds, were defectively designed or constructed, but rather contended that the entire complex as an entity was defective in that it was not fenced. However, defendant was under no duty to fence its apartment complex, nor is it customary in the industry or in that geographical area to do so (*215 Cal. App. 3d 1611, 1626)* . Further, the ordinary builder of a dwelling or other structure has not been held strictly liable, and cases finding liability against builders have concerned a defective part of the building itself, or defects causing damage to the structures. The court concluded that summary judgment was properly granted on that cause of action (*215 Cal. App. 3d 1611, 1626-1627)* .

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[Reserved]

§§ 190.32[Reserved]

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2. Who May Be Plaintiff?

19-190 California Points & Authorities § 190.50

§ 190.50 Supporting Contention That Plaintiff Is Person Who May Bring Products Liability Action--No Privity Required

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product (see, e.g., §§ 190.70, 190.71).*]

PLAINTIFF IS NOT REQUIRED TO BE IN PRIVITY OF CONTRACT TO BRING THIS STRICT LIABILITY ACTION BECAUSE THE DUTY OF DEFENDANT MANUFACTURER, _____ [*name*], TO DELIVER A PRODUCT TO A USER FREE FROM DEFECTS EXTENDS TO ALL WHO ARE INJURED BY THE PRODUCT.

A. Duty Runs to All Who Are Injured. The manufacturer of a completed product has the nondelegable duty to have its product delivered to the ultimate user free from dangerous defects. This duty runs to all who are injured by a defective product, not just ultimate purchasers (*Hasson v. Ford Motor Co. (1982) 32 Cal. 3d 388, 405-406, 185 Cal. Rptr. 654, 650 P.2d 1171*).

B. Plaintiff Not Required to Have Privity of Contract. Recovery by a plaintiff under the doctrine of strict liability may not be restricted to a theory of privity of contract (*Elmore v. American Motors Corp. (1969) 70 Cal. 2d 578, 586, 75 Cal. Rptr. 652, 451 P.2d 84*).

[*Optional*] **C. Bystander May Bring Strict Liability Action.** Because no privity of contract is required, the doctrine of strict liability in tort is available in an action for personal injuries by a bystander against the manufacturer of a product (*Elmore v. American Motors Corp. (1969) 70 Cal. 2d 578, 587, 75 Cal. Rptr. 652, 451 P.2d 84*).

[*Optional*] **D. Driver and Passenger of Automobile May Bring Strict Liability Action Against Manufacturer of**

Another Automobile. The public policy that protects the driver and passenger of a defective automobile also protects the bystander. Thus, when a driver or passenger of another automobile is injured because of defects in the manufacture of the first automobile and without any fault of his or her own, he or she may recover from the manufacturer of the defective automobile (*Elmore v. American Motors Corp. (1969) 70 Cal. 2d 578, 586, 75 Cal. Rptr. 652, 451 P.2d 84*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a person other than the purchaser of a product may bring a products liability action against the product's manufacturer. If plaintiff is a bystander, counsel should add optional Paragraph C. If plaintiff is a driver or passenger of an automobile other than the vehicle that plaintiff claims is defective, counsel should use optional Paragraph D.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary judgment or summary adjudication on the issue that defendant is strictly liable for plaintiff's injuries. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should include facts showing plaintiff's status as user, purchaser, bystander, or other, and state that plaintiff need not be in privity of contract with defendant [*see, e.g.,* *Hasson v. Ford Motor Co. (1982) 32 Cal. 3d 388, 405-406, 185 Cal. Rptr. 654, 650 P.2d 1171* (automobile manufacturer strictly liable to nonpurchaser plaintiff who was riding in car when its brakes failed)].

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 190.53* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Duty Runs to All Who Are Injured

In ***Hasson v. Ford Motor Co.*** *(1982) 32 Cal. 3d 388, 185 Cal. Rptr. 654, 650 P.2d 1171* , plaintiff sustained personal injuries when the brakes on the automobile in which plaintiff was riding failed. Plaintiff brought an action in strict liability and negligence against the automobile's manufacturer. Initially, the jury awarded a verdict for plaintiff; however, because the trial court failed to instruct the jury on the defense of contributory negligence, that judgment was reversed in *Hasson v. Ford Motor Co. (1977) 19 Cal. 3d 530, 138 Cal. Rptr. 705, 564 P.2d 857* . On retrial, the jury returned a verdict for plaintiff in the amount of $7,570,719 in compensatory damages and $4,000,000 in punitive damages. The trial court found the award was excessive, and reduced it to $9,247,719, but rejected the other grounds raised by defendant for a new trial. Defendant appealed.

The Supreme Court affirmed the judgment, holding that the jury had been properly instructed, that the award was not excessive, that punitive damages were proper, and that the evidence sufficiently supported the judgment. In particular, the Court ruled that the jury had been properly instructed that the manufacturer had a nondelegable duty to deliver the product to its ultimate user free from dangerous defects. The Court explained that the manufacturer not only has such a duty, but that the duty extends to all who are injured by the product, not just its ultimate purchaser (*32 Cal. 3d 388, 405-406)* .

[b] Plaintiff Not Required to Have Privity of Contract

In ***Elmore v. American Motors Corp.*** *(1969) 70 Cal. 2d 578, 75 Cal. Rptr. 652, 451 P.2d 84* , plaintiffs were injured in an automobile collision caused by a defect in the other automobile involved in the crash. Plaintiffs brought an action in strict liability against the defective automobile's manufacturer and retailer. Defendants moved for nonsuit, which was granted. Plaintiffs appealed.

The Supreme Court reversed the judgment, holding that although plaintiffs were bystanders rather than purchasers or users of the defective automobile, they were nevertheless entitled to bring an action based on strict liability. The Court ruled that privity of contract was irrelevant in a strict liability case, regardless of whether the defendant is a manufacturer or a retailer. Thus, as bystanders, indeed as occupants of an automobile other than the defective automobile, plaintiffs were entitled to bring the action (*70 Cal. 2d 578, 583-587)* .

[c] Bystander May Bring Strict Liability Action

Elmore v. American Motors Corp. *(1969) 70 Cal. 2d 578, 75 Cal. Rptr. 652, 451 P.2d 84* , is discussed in *§ 190.50[3][b]*.

[d] Driver and Passenger of Automobile May Bring Strict Liability Action Against Manufacturer of Another Automobile

Elmore v. American Motors Corp. *(1969) 70 Cal. 2d 578, 75 Cal. Rptr. 652, 451 P.2d 84* , is discussed in *§ 190.50[3][b]*.

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2. Who May Be Plaintiff?

19-190 California Points & Authorities § 190.51

§ 190.51 Supporting Contention That Plaintiff Is Person Who May Bring Products Liability Action--Heirs of Decedent Killed by Defective Product May Assert Strict Products Liability Theory in Wrongful Death Action [Code Civ. Proc. § 377]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is liable in strict products liability for injuries caused by defendant's product (see, e.g., §§ 190.70, 190.71).*]

PLAINTIFFS ARE ENTITLED TO BRING THIS ACTION IN STRICT PRODUCTS LIABILITY BECAUSE THEY ARE THE HEIRS OF _____ [*name*], DECEDENT, WHO WAS KILLED BY A DEFECTIVE PRODUCT, NAMELY, _____ [*describe, e.g.,* THE EARTH MOVER DESCRIBED IN THE ABOVE-ENTITLED ACTION, WHICH WAS SOLD TO DECEDENT BY DEFENDANTS].

Heirs May Recover Under Strict Products Liability Theory. The heirs of a decedent killed by a defective product may recover on a strict products liability theory (*Barrett v. Superior Court (1990) 222 Cal. App. 3d 1176, 1191, 272 Cal. Rptr. 304*).

[2] Comments

[a] Use of Form

This form of memorandum of points and authorities may be submitted in support of the contention that the heirs of a person killed by a defective product may bring a wrongful death action, pursuant to *Code Civ. Proc. § 377*, based on a strict products liability theory [*see Barrett v. Superior Court (1990) 222 Cal. App. 3d 1176, 1191, 272 Cal. Rptr. 304]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of strict products liability. For example, they may be combined

with points and authorities in opposition to a defendant's motion for summary judgment in a wrongful death action, based on the theory of strict products liability, that asserts that plaintiffs, as heirs of a decedent killed by the product that is the subject of the action, cannot base a wrongful death action on that theory. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. For example, counsel should show that plaintiffs are heirs of the decedent who was killed by the product, and that the theory of strict products liability is applicable to the facts of the case.

[b] Related Pleading and Practice Forms

For discussion and forms relating to death actions generally, see California Forms of Pleading and Practice, Ch. 181, *Death and Survival Actions* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities related to death actions generally, see Ch. 66, *Death and Survival Actions* .

[3] Discussion of Authorities

[a] Heirs May Recover Under Strict Products Liability Theory

In ***Barrett v. Superior Court*** *(1990) 222 Cal. App. 3d 1176, 272 Cal. Rptr. 304* , the widow and minor child of a decedent killed while driving an earth mover brought an action against the owner and lessor, as well as the manufacturer, of the earth mover, asserting "causes of action" enumerated as (1) negligence, (2) strict liability, (3) breach of implied warranty, and (4) wrongful death. (The court of appeal later noted that more properly characterized, plaintiffs' suit consisted of only one true "cause of action," that is, for the injury they had suffered as a result of the wrongful death of the decedent, alleging four counts based on the same primary right of plaintiffs and the same primary duty of defendants, each of which merely alleged additional circumstances out of which the primary right and primary duty arose.) The decedent was killed when an earth mover he was driving off a trailer rolled off the trailer and rolled over, crushing him. The earth mover was leased to his employer. Plaintiffs asserted, supported by evidence admitted in the trial court, that the lessor-owner of the earth mover had negligently repaired it during the course of its ownership, had installed defective seat belts, and had negligently installed a "shade canopy"; that the earth mover had been originally manufactured and sold without a roll cage; and that at the time of the injury, a shade canopy, but no roll bar, was installed in it. With respect to the strict liability count, defendant lessor-owner brought a motion for judgment on the pleadings asserting that strict liability in tort will not support a cause of action for wrongful death. The trial court denied the motion in that respect. Both defendants later brought a motion for summary judgment on that count, on the grounds that: (1) plaintiffs had no standing to sue on a theory of strict liability; (2) strict liability in tort would not support a wrongful death cause of action; and (3) a distributor of secondhand or used machinery may not be held liable on a theory of strict liability in tort. The trial court granted the motion, and plaintiffs petitioned the court of appeal for a writ of mandate directing the trial court to vacate its order and enter a new order denying the motion.

The court of appeal issued an alternative writ, holding that the heirs of a decedent killed by a defective product may recover on a strict products liability theory (*222 Cal. App. 3d 1176, 1191)* . The court noted that the issue presented has never been the subject of a published opinion (although commentators and courts have assumed that heirs may recover on a strict products liability theory), and proceeded to analyze the application of the strict products liability theory to wrongful death actions, in lengthy detail (*222 Cal. App. 3d 1176, 1183-1196)* . The court rejected defendants' assertion that the term "wrongful act," as used in *Code Civ. Proc. § 377* (governing action for damages based on death of person caused by "wrongful act or neglect of another"), means an intentional or "fault-based" act, precluding its application to strict products liability. The court concluded that the term "wrongful act" within the meaning of that statute means any kind of "tortious act," which encompasses the act of placing a defective product on the market (*222*

Cal. App. 3d 1176, 1183-1191) .

The court first examined the public policy considerations behind the enactment of *Code Civ. Proc. § 377*, that is, the legislative creation of a cause of action for wrongful death: (1) compensation for survivors; (2) deterrence of conduct; and (3) the lack of limitation on the measure of damages (*222 Cal. App. 3d 1176, 1185)* . The court stated that its interpretation of the term "wrongful act" should be one that emphasizes the deterrent aspect of the statute, rather than one that emphasizes the aspect limiting recovery, and one that recognizes that only conduct that is subject to conscious control or improvement can be deterred by the risk of potential liability for damages (*222 Cal. App. 3d 1176, 1185-1186)* . The court phrased the question as follows: whether interpreting the term "wrongful act" to encompass the act of putting a defective product into the stream of commerce, so as to allow a decedent's heirs to recover damages under a theory of strict products liability (1) emphasizes the deterrent effect of the wrongful act, and (2) takes into account whether the placing of defective products into the stream of commerce is conduct that can be deterred. The court therefore considered: (1) the purpose behind the creation of strict products liability doctrine as a predicate for liability; (2) the effect of extending the use of the doctrine as a theory of recovery to persons other than the purchasers or users of the defective product; and (3) the nature of the conduct that forms the basis for liability for damages under that theory. The primary purpose of the doctrine, the court stated, is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put the products on the market rather than by the injured persons who are powerless to protect themselves. Other purposes are: (1) to provide a "short cut" to liability when negligence may be present but difficult to prove; (2) to provide an economic incentive for improved product safety; (3) to induce the reallocation of resources toward safer products; and (4) to spread the risk of loss among all who use the product (*222 Cal. App. 3d 1176, 1186)* .

With regard to the effect of extending the doctrine to heirs of the decedent, the court stated that to do so would serve the same purpose as extending the doctrine to bystanders, that is, it would deter foreseeable wrongful conduct and allocate the cost of injury among the industry (and ultimately consumers as a whole), rather than force innocent survivors to bear the burden alone. Furthermore, the court stated, failure to do so would have the anomalous effect of "rewarding" the manufacturer of a defective product that kills its user, rather than merely maiming him or her, by making it more difficult for the deceased user's heirs, who would no longer be able to use the "short cut" theory of strict products liability rather than negligence, to prove liability (*222 Cal. App. 3d 1176, 1187)* . The court rejected defendants' contention that the doctrine is imposed regardless of fault and therefore cannot be reconciled with the term "wrongful act" within the meaning of *Code Civ. Proc. § 377*. The court explained that although some cases state that strict products liability is imposed regardless of fault, that is only true if "fault" is equated with negligence. Rather, application of the doctrine requires a showing of "fault" defined as the responsibility for placing a defective product into the stream of commerce (*222 Cal. App. 3d 1176, 1188-1189)* . The court noted other indicators that the doctrine of strict products liability involves fault or wrongdoing: the award of punitive damages in some instances, and application of comparative-fault principles (*222 Cal. App. 3d 1176, 1189)* . The court also stated that the fact that there can be no recovery under the theory of strict products liability without some evidence of foreseeability demonstrates that allowing a plaintiff in a wrongful death action to proceed under a strict products liability theory furthers not only the policy of compensating survivors, but also the policy of deterring conduct that is susceptible to conscious control (*222 Cal. App. 3d 1176, 1190)* . The court also found that the juxtaposition of "wrongful act" with "neglect" within the statute supports the conclusion that "wrongful act" means "any tortious conduct" rather than a willful or intentional tort, as urged by defendants (*222 Cal. App. 3d 1176, 1190-1191)* . The court rejected defendants' argument that *Code Civ. Proc. § 377* excludes the theory of strict products liability because the statute was enacted prior to the development of that theory, holding that the term "wrongful act" may properly be expanded in that sense because to do so would not create a new right in plaintiffs or a new duty in defendants (*222 Cal. App. 3d 1176, 1192)* .

The court also rejected defendants' argument that *Ault v. International Harvester Co. (1974) 13 Cal. 3d 113, 117 Cal. Rptr. 812, 528 P.2d 1148* [*see § 190.280[3][a]*], compels the conclusion that "wrongful act" does not include the act of placing a defective product on the market. That opinion interpreted the phrase "to prove negligence or culpable conduct" as used in *Evid. Code § 1151* as not excluding evidence of subsequent remediation in strict products liability

cases. The court held that defendant "reads too much into that opinion" by asserting that *Ault* supports the conclusion that the term "wrongful act" under *Code Civ. Proc. § 377* does not include the act of placing a defective product on the market (*222 Cal. App. 3d 1176, 1192-1196)* . Rather, the court stated, *Ault* interpreted the Evidence Code provision in a way that comported with both the public policy behind that statute and the public policy behind the strict products liability doctrine, and consequently the actual holding in *Ault* and the considerations behind that holding are inapplicable in this case (*222 Cal. App. 3d 1176)* . Finally, the court rejected the contention that defendant lessor-owner was entitled to summary judgment on the ground that it was a mere "used machinery dealer" and therefore exempt from application of strict products liability. The court noted that defendant failed to produce any evidence that it was simply a dealer in used machinery, and that it was not responsible for any modification, dilapidation, or misuse that would have rendered the earth mover unreasonably unsafe for its intended use, in which case the exemption would not apply (*222 Cal. App. 3d 1176, 1196-1197)* .

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19-190 California Points & Authorities § 190.52

§ 190.52 Supporting Contention That Plaintiff Is Person Who May Bring Products Liability Action--Independent Cause Exception to Firefighter's Rule

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is liable in strict products liability for injuries caused by defendant's product.*]

PLAINTIFF [FIREFIGHTER *or* POLICE OFFICER *or* PUBLIC OFFICER] IS ENTITLED TO BRING THIS STRICT LIABILITY ACTION BECAUSE THE FIREFIGHTER'S RULE DID NOT APPLY TO BAR CLAIM.

A. Firefighter's Rule Does Not Modify Broad Interpretation of Independent Cause Exception. The statutory firefighter's rule does not modify the broad interpretation of the independent cause exception set forth in *Donohue v. San Francisco Housing Authority* (*Civ. Code § 1714.9(e)*; *Vasquez v. North County Transit Dist. (9th Cir. 2002) 292 F.3d 1049, 1056-1057)* .

B. Firefighter's Rule Does Not Bar Claim Based on Allegation That Product's Malfunction Was Independent of Fire. The firefighter's rule does not apply to conduct other than that which necessitated the summoning of the firefighter or police officer, and does not apply to independent acts of misconduct that are committed after the firefighter or police officer has arrived at the scene (*Stapper v. GMI Holdings, Inc. (1999) 73 Cal. App. 4th 787, 86 Cal. Rptr. 2d 688, 690)* .

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a firefighter, police officer, or other public officer is not barred by the firefighter's rule from bringing a products liability action.

[3] Discussion of Authorities

[a] Firefighter's Rule Does Not Modify Broad Interpretation of Independent Cause Exception

In ***Vasquez v. North County Transit Dist.*** *(9th Cir. 2002) 292 F.3d 1049* , applying California law, a railroad crossing gate broke and struck a police officer who had been dispatched to the crossing because the crossing gate arms were stuck in the "down" position. The officer alleged that the problem that necessitated his presence at the scene--that is, the cross-gate arms being stuck in the down position--was not same as the allegedly negligent act that caused the gate arm to fall sideways and strike him, i.e., the arm's attaching bolts being improperly designed. The district granted summary judgment in favor of the defendants on the ground of the firefighter's rule. The Ninth Circuit reversed. It explained that different courts have interpreted the independent cause exception to the firefighter's rule in different ways. It agreed with the plaintiff that benchmark interpretation was *Donohue v. San Francisco Hous. Auth. (1993) 16 Cal. App. 4th 658, 20 Cal. Rptr. 2d 148* , which held that the fact that a firefighter was injured while in the regular course of his duties and that the hazard was one normally encountered as part of his job, was not dispositive. The court concluded that *Civ. Code § 1714.9(e)*--which specifically mentions the independent cause exception--applied and supported *Donohue's* broad interpretation of the exception. Genuine issues of fact existed as to whether the independent cause exception applied (*292 F.3d 1049, 1056-1057)* .

[b] Firefighter's Rule Does Not Bar Claim Based on Allegation that Product's Malfunction Was Independent of Fire

In ***Stapper v. GMI Holdings, Inc.*** *(1999) 73 Cal. App. 4th 787, 86 Cal. Rptr. 2d 688* , a firefighter responded to a report of a fire at a residence. She found herself trapped in the garage when the door would not open. She sustained serious injuries, and brought a products liability action alleging that the garage door opener was defectively designed because the Genie device had a worm screw device that affixed down the door in a permanent condition. The trial court granted nonsuit on her claims, but the court of appeal reversed. The firefighter's rule did not bar her claim because she alleged that the garage door's malfunction was independent of the fire, not caused by the fire. Also, exonerating the manufacturer from any duty of care it might have owed the plaintiff would not further the policy considerations supporting the firefighter's rule. The manufacturer's argument that the firefighter's rule applied because the risk of a blocked exit is reasonably anticipated by firefighters was without merit. The underlying principle of the firefighter's rule is assumption of risk, and in making an assumption of the risk analysis, courts focus not the foreseeability of the hazard but on the defendant's duty of care and the relationship of the parties (*73 Cal. App. 4th 787, 791-797)* .

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19-190 California Points & Authorities § 190.53

§ 190.53 Opposing Contention That Plaintiff Is Person Who May Bring Products Liability Action--Commercial Purchaser Exception

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product (see, e.g., §§ 190.82 -190.94).*]

PLAINTIFF IS NOT ENTITLED TO BRING THIS STRICT LIABILITY ACTION BECAUSE PLAINTIFF IS A COMMERCIAL PURCHASER.

Commercial Purchaser May Not Bring Strict Liability Action. A plaintiff who is a commercial purchaser may not bring an action in strict liability against a defendant. A plaintiff is considered to be a commercial purchaser when, in purchasing the allegedly defective product, the plaintiff and defendant (1) deal in a commercial setting, (2) deal from positions of relatively equal economic strength, (3) bargain the specifications of the product, and (4) negotiate concerning the risk of loss from defects in it (*Kaiser Steel Corp. v. Westinghouse Elec. Corp. (1976) 55 Cal. App. 3d 737, 748, 127 Cal. Rptr. 838*).

NOTE:

Kaiser Steel Corp. v. Westinghouse Elec. Corp., discussed in *§ 190.53[3][a]*, was superseded by statute on other grounds as stated *in Barnett v. American-Cal Medical Services (1984) 156 Cal. App. 3d 260, 265, 202 Cal. Rptr. 735*

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a defendant is subject to a products

liability action. The ground of opposition set forth is that plaintiff is not entitled to bring the action because plaintiff is subject to the commercial purchaser exception outlined in *Kaiser Steel Corp. v. Westinghouse Elec. Corp. (1976) 55 Cal. App. 3d 737, 127 Cal. Rptr. 838* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a demurrer or a motion for summary judgment on the issue that plaintiff is not entitled to bring the action.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should set forth the factors showing that the parties dealt in a commercial setting, that they occupied positions of relatively equal economic strength, that they bargained for the specifications of the product, and that they negotiated concerning the risk of loss from defects in the product [*see, e.g., Kaiser Steel Corp. v. Westinghouse Elec. Corp. (1976) 55 Cal. App. 3d 737, 748, 127 Cal. Rptr. 838]* .

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 190.50*.

[3] Discussion of Authorities

[a] Commercial Purchaser May Not Bring Strict Liability Action

In ***Kaiser Steel Corp. v. Westinghouse Elec. Corp.*** *(1976) 55 Cal. App. 3d 737, 127 Cal. Rptr. 838 , superseded by statute on other grounds as stated in Barnett v. American-Cal Medical Services (1984) 156 Cal. App. 3d 260, 265, 202 Cal. Rptr. 735* , defendant, a commercial enterprise, sold an allegedly defective generator to plaintiff, another commercial enterprise. Plaintiff brought an action in strict liability, warranty, and negligence against defendant. Defendant sought summary judgment and nonsuit on the causes of action, all of which were granted by the trial court. Plaintiff appealed.

The court of appeal reversed the judgment as to the warranty and negligence causes of action, but affirmed that part of the judgment nonsuiting the strict liability cause of action. The court held that because both plaintiff and defendant were commercial enterprises contracting from positions of relatively equal bargaining power for a product designed to negotiable specifications and not furnished off the shelf, public policy would not be served by extending strict liability. Because the specifications of the product were negotiable, the tort doctrine of products liability as between the buyer and seller was no inducement to design and produce a safe product. And, because the manufacturer and buyer bargained in a commercial setting not only for the product but also for the measure and mode of reimbursement for defects in the product, any societal interest in loss shifting was absent. Thus, a plaintiff may not bring an action based in strict liability when the parties (1) deal in a commercial setting, (2) deal from positions of relatively equal economic strength, (3) bargain the specifications of the product, and (4) negotiate concerning the risk of loss from defects in it (*55 Cal. App. 3d 737, 746-748)* .

[4] Additional Authorities

[a] Commercial Purchaser May Not Bring Strict Liability Action

In *Appalachian Ins. Co. v. McDonnell Douglas Corp. (1989) 214 Cal. App. 3d 1, 262 Cal. Rptr. 716* , the purchaser of a telecommunications satellite brought an action in strict liability and negligence against the manufacturer and seller of the rocket that launched the satellite, arising from the failure of the satellite to reach the desired orbit. The court of appeal affirmed summary judgment in favor of the defendant, and held that the strict liability theory did not apply to a lawsuit over a defective product that arises in a commercial setting and involves only a business loss. The court stated that application of a strict liability theory would improperly invade rules of law adopted in the California Commercial

Code, which regulates the various aspects of plaintiff's purchase of the product from defendant, including liability for defects based on express and implied warranties (including disclaimers of warranties). Therefore, the contractual disclaimer controlled, precluding liability (*214 Cal. App. 3d 1, 32-33)* .

In *Gentry Constr. Co. v. Superior Court (1989) 212 Cal. App. 3d 177, 260 Cal. Rptr. 421* , a homeowner brought an action in strict liability against the contractor that built his home and the developer that graded the lots, based on the defective soil conditions. The contractor filed a cross complaint against the developer, from which it purchased the land, alleging causes of action, among others, for total indemnity based on strict liability, and for comparative indemnity. The court of appeal upheld the trial court's summary adjudication that the contractor could not, as a matter of law, maintain a cause of action for total indemnity based on strict liability against the developer, holding that a commercial plaintiff may not rely on the doctrine of strict liability to recover its losses (*212 Cal. App. 3d 177, 180)* . The court noted that this case involved losses incurred by a consumer who had a claim for strict liability, rather than losses occurring solely between commercial entities, and that the surviving cause of action in the cross complaint for comparative indemnity will allow strict liability damages to be apportioned between two strictly liable tortfeasors [*see § 190.245[3][c]*] (*212 Cal. App. 3d 177, 180, 182-183)* .

In *Southern Cal. Edison Co. v. Harnischfeger Corp. (1981) 120 Cal. App. 3d 842, 175 Cal. Rptr. 67* , the trial court granted a motion for summary judgment in favor of defendant manufacturer of a crane in an action brought by a power company for property damage caused by corrosion and breakage of the cable on the crane. The court of appeal affirmed the judgment as to the cause of action based on breach of warranty, but reversed the judgment as to the causes of action for strict liability and negligence, holding that material questions of fact remained as to causation. Defendant unsuccessfully argued that the *Kaiser* rule applied and that plaintiff was not entitled to bring the action. The court of appeal disagreed, finding that factual questions remained as to whether plaintiff had bargained for the crane's design specifications. Because this factor remained undetermined, not all the *Kaiser* criteria had been shown and the exception did not apply to preclude the application of products liability (*120 Cal. App. 3d 842, 855)* .

International Knights of Wine, Inc. v. Ball Corp. (1980) 110 Cal. App. 3d 1001, 168 Cal. Rptr. 301 , abrogated on other grounds by Sacramento Reg. Trans. Dist. v. Grumman Flxible (1984) 158 Cal. App. 3d 289, 204 Cal. Rptr. 736 , was an action in which plaintiff corporation had purchased bottled wine that was damaged by the corrosion of sealing caps from defendant winery. Although the trial court granted a directed verdict for plaintiff on a warranty theory, the court granted motions for judgment on the pleadings for defendants on a strict liability theory. The court of appeal reversed the judgment on the strict liability cause of action, holding that the facts of the case did not justify the imposition of the commercial purchaser exception to the strict liability rule, and that defendant winery was not exempted from the imposition of strict liability. Specifically, the court found that the record did not indicate anything about the parties' relative economic strength or ability to negotiate respecting risk of loss from a defective product. Because that element was missing, the *Kaiser* exception did not apply (*110 Cal. App. 3d 1001, 1005-1007)* .

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[Reserved]

§§ 190.54[Reserved]

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19-190 California Points & Authorities § 190.70

§ 190.70 Supporting Contention That Defendant Is Person Who Is Subject to Strict Liability--Manufacturer Who Places Article on Market

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product (see, e.g., §§ 190.71 -190.80).*]

DEFENDANT _____ [*name*] IS STRICTLY LIABLE BECAUSE, AS A MANUFACTURER, DEFENDANT PLACED A DEFECTIVE ARTICLE ON THE MARKET THAT CAUSED INJURY TO A HUMAN BEING.

Manufacturer Is Strictly Liable for Placing Defective Article on Market That Injures Human Being. A manufacturer is strictly liable in tort when an article he or she places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being (*Greenman v. Yuba Power Prods., Inc. (1963) 59 Cal. 2d 57, 62, 27 Cal. Rptr. 697, 377 P.2d 897* ; *Fluor Corp. v. Jeppesen & Co. (1985) 170 Cal. App. 3d 468, 474, 216 Cal. Rptr. 68*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a manufacturer is strictly liable for placing a defective product on the market that causes injury to a human being.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary judgment or summary adjudication on the issue that the

manufacturer was subject to strict liability. These points and authorities may also be adapted for use in a trial or appellate brief.

These points and authorities should be combined with points and authorities regarding the existence of a defect in the product placed on the market by manufacturer, and regarding the causation of plaintiff's injuries. Counsel should insert argument in this form, along with the other points and authorities combined with this form, to show the relationship between the facts of the case and the points of law stated. For example, counsel should show that the product placed on the market by manufacturer was defective and that the defect caused plaintiff's injuries, subjecting manufacturer to strict liability; in showing defect and causation, facts should be stated that show the relationship between a finding of defect and causation and the points and authorities relating to defect and causation.

In an appropriate case, the points and *authorities in §§ 190.82 -190.94* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Manufacturer Is Strictly Liable for Placing Defective Article on Market That Injures Person

In ***Greenman v. Yuba Power Prods., Inc.*** *(1963) 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897* , plaintiff was using a combination power tool to turn wood into a chalice when the wood flew out of the machine and struck him on the forehead. Plaintiff brought an action against the manufacturer and the retailer of the tool. The trial court refused to instruct the jury on negligence and express warranty theories against defendant retailer, and refused to instruct on an implied warranty theory against defendant manufacturer. Instead, the trial court only instructed the jury on an implied warranty theory against defendant retailer, and on a negligence and an express warranty theory against defendant manufacturer. The jury relieved defendant retailer of liability, but assessed $65,000 in damages against defendant manufacturer. Defendant manufacturer appealed the verdict on the theory that plaintiff had failed to give it timely notice of breach of warranty, while plaintiff appealed only the judgment against defendant retailer in the event that the judgment against defendant manufacturer was reversed.

The Supreme Court affirmed the judgment, holding that defendant manufacturer was strictly liable under the circumstances, and that warranty need not be established at all. Specifically, the Court held that strict liability may be imposed on any manufacturer who places a defective article on the market, knowing that it is to be used without inspection for defects, that proves to have a defect that causes injury to a human being. The Court based its decision on public policy, explaining that the purpose of imposing strict liability on manufacturers is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves (*59 Cal. 2d 57, 61-63)* .

The facts and procedural background of ***Fluor Corp. v. Jeppesen & Co.*** *(1985) 170 Cal. App. 3d 468, 216 Cal. Rptr. 68* , are discussed in *§ 190.20[3][a]*. In reversing the judgment, the court of appeal recited the fundamental policies underlying strict products liability. Its recitation included a quotation of prior case law, including language from *Greenman* (*170 Cal. App. 3d 468, 474)* .

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19-190 California Points & Authorities § 190.71

§ 190.71 Supporting Contention That Defendant Is Person Who Is Subject to Strict Liability--Person Who Is Part of Overall Producing and Marketing Enterprise--In General

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product (see, e.g., §§ 190.72 -190.74).*]

DEFENDANT _____ [*name*] IS SUBJECT TO STRICT LIABILITY BECAUSE DEFENDANT IS PART OF THE OVERALL PRODUCING AND MARKETING ENTERPRISE.

A. Strict Liability Extends to All Who Are Part of Producing and Marketing Enterprise. Strict liability extends to all those who are part of the overall producing and marketing enterprise that should bear the cost of injuries from defective products (*Vandermark v. Ford Motor Co. (1964) 61 Cal. 2d 256, 262, 37 Cal. Rptr. 896, 391 P.2d 168*).

[*Optional*] **B. One Who Plays More Than Random and Accidental Role in Marketing Enterprise Is Subject to Strict Liability.** A person who plays more than a random and accidental role in the overall marketing enterprise of a product is subject to strict liability for an injury proximately caused by a defect in that product (*Garcia v. Halsett (1970) 3 Cal. App. 3d 319, 326, 82 Cal. Rptr. 420*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a person who is a part of the overall producing and marketing enterprise is subject to strict liability.

These points and authorities may be combined with the points and authorities in any of §§ 190.72-190.74. These points

and authorities may also be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary judgment or summary adjudication on the issue that the manufacturer was subject to strict liability. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, and with any other relevant points and authorities combined with this form, to show the relationship between the facts of the case and the points of law stated. For example, counsel should show facts indicating that defendant played a substantial role in the producing or marketing of the defective product, and was part of the overall commercial marketing chain [*see, e.g., Garcia v. Halsett (1970) 3 Cal. App. 3d 319, 82 Cal. Rptr. 420* (licensor of chattel); *Vandermark v. Ford Motor Co. (1964) 61 Cal. 2d 256, 37 Cal. Rptr. 896, 391 P.2d 168* (retailer)].

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 190.82 -190.94* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Strict Liability Extends to All Who Are Part of Producing and Marketing Enterprise

In ***Vandermark v. Ford Motor Co.*** *(1964) 61 Cal. 2d 256, 37 Cal. Rptr. 896, 391 P.2d 168* , plaintiffs sustained personal injuries when the brakes failed in the automobile in which they were riding. Plaintiffs brought a negligence and warranty action against the manufacturer of the car and the retailer who sold the car. The trial court granted the manufacturer's nonsuit motion on all causes of action, and directed a verdict in favor of the retailer on the warranty causes of action. The jury returned a verdict for the retailer on the negligence causes of action. Plaintiffs appealed.

The Supreme Court affirmed the judgment in favor of the retailer on the negligence causes of action, but reversed the judgment in all other respects. The Court held that plaintiffs had presented prima facie cases of both strict liability and negligence. More importantly, however, the Court held that retailers, like manufacturers, are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products. Thus, the Court extended the strict liability doctrine to retailers and held that in this case, plaintiffs had established a prima facie case of strict liability against the retailer (*61 Cal. 2d 256, 260-263)* .

[b] One Who Plays More Than Random and Accidental Role in Marketing Enterprise Is Subject to Strict Liability

In ***Garcia v. Halsett*** *(1970) 3 Cal. App. 3d 319, 82 Cal. Rptr. 420* , plaintiff was injured when he attempted to remove clothing from a launderette's washing machine that continued to spin while its door was open. Plaintiff brought an action against the owner of launderette. At trial, the judge refused to instruct the jury on strict liability, and judgment was entered for defendant. Plaintiff appealed.

The court of appeal reversed the judgment, holding that the trial court erred in refusing to instruct on strict liability. The court held that defendant could be found strictly liable for injuries sustained from a defective washing machine that, although not manufactured or distributed by defendant, was provided by defendant to the public for use by the public. The court explained that in providing the machine to the public for use by the public, defendant played more than a random and accidental role in the overall marketing enterprise of the machine. Thus, a licensor of chattels, like a manufacturer, retailer, and lessor of chattels, is subject to strict liability (*3 Cal. App. 3d 319, 324-326)* .

[4] Additional Authorities

[a] Strict Liability Extends to All Who Are Part of Producing and Marketing Enterprise

In *Fortman v. Hemco, Inc. (1989) 211 Cal. App. 3d 241, 259 Cal. Rptr. 311* , a child was severely injured when she was ejected from a jeep, after a custom-made door, part of a fiberglass top that was sold as an after-market product, flew open while the vehicle was moving. She brought an action in strict liability, based on design defect, against various defendants involved in the design and marketing of the jeep top, all of whom settled, with the exception of the manufacturer of the fiberglass mold for the top. The court of appeal affirmed judgment for the plaintiff, holding that the defendant's participation in the overall production enterprise as the mold-maker is sufficient to warrant imposition of strict liability (*211 Cal. App. 3d 241, 251-255)* .

In *Bay Summit Cmty. Ass'n v. Shell Oil Co. (1996) 51 Cal. App. 4th 762, 59 Cal. Rptr. 2d 322* , plaintiffs brought an action for fraud and strict liability against a company that had supplied resin for an allegedly defective plumbing system that had been installed in their condominium complex. Although the trial court determined that the damages caused by defective fittings in the plumbing system were not made by the defendant, it instructed the jury that the company could be held strictly liable because it had been involved in marketing the plumbing system for a number of years. The jury concluded that the company had committed fraud and was thus strictly liable for damages caused by the plumbing system. The court of appeal reversed, holding that although the defendant was subject to strict liability as a result of its involvement in marketing the defective system, the trial court's jury instructions regarding the elements of strict liability were misleading. Specifically, the instruction failed to explain that the imposition of strict liability based on the marketing enterprise theory depends on whether the plaintiff can establish that (1) the defendant received a direct financial benefit from the sale of the product; (2) the defendant's role was a necessary factor in bringing the product to market; and (3) the defendant had control over, or a substantial ability to influence, the manufacturing or distribution process (*51 Cal. App. 4th 762, 775)* .

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19-190 California Points & Authorities § 190.72

§ 190.72 Supporting Contention That Defendant Is Person Who Is Subject to Strict Liability--Person Who Is Part of Overall Producing and Marketing Enterprise--Retailer

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with a general form regarding the liability of a person who is part of the overall producing and marketing enterprise (see, e.g., § 190.71). The following may also be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product.*]

DEFENDANT _____ [*name*] IS SUBJECT TO STRICT LIABILITY BECAUSE DEFENDANT IS A RETAILER AND AS SUCH IS PART OF THE OVERALL PRODUCING AND MARKETING ENTERPRISE.

Retailer Is Part of Producing and Marketing Enterprise. A retailer, like a manufacturer, is engaged in the business of distributing goods to the public, and as such is an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products (*Vandermark v. Ford Motor Co. (1964) 61 Cal. 2d 256, 262, 37 Cal. Rptr. 896, 391 P.2d 168*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a retailer is a part of the overall producing and marketing enterprise and is subject to strict liability.

These points and authorities should be combined with the points and *authorities in § 190.71*. These points and authorities may also be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and

authorities supporting a motion for summary judgment or summary adjudication on the issue that defendant retailer was subject to strict liability. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, and with any other relevant points and authorities combined with this form, to show the relationship between the facts of the case and the points of law stated. For example, counsel should show facts indicating that defendant stood in the position of a retailer and as such played a substantial role in the producing or marketing enterprise of the defective product [*see, e.g.,* *Vandermark v. Ford Motor Co. (1964) 61 Cal. 2d 256, 37 Cal. Rptr. 896, 391 P.2d 168]* .

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 190.82 -190.94* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Retailer Is Part of Producing and Marketing Enterprise

The facts and procedural background of ***Vandermark v. Ford Motor Co.*** *(1964) 61 Cal. 2d 256, 37 Cal. Rptr. 896, 391 P.2d 168* , are discussed in *§ 190.71[3][a]*. In reversing the judgment and extending strict liability to retailers, the Court explained that a retailer is an integral part of the overall producing and marketing enterprise, and may often be the only member of that enterprise who is reasonably available to the injured plaintiff. Furthermore, a retailer may often play a substantial part in insuring that the product is safe, and may be in a position to exert pressure on the manufacturer to insure that the product is safe. The Court found that imposing strict liability on a retailer as well as on a manufacturer would afford maximum protection to an injured plaintiff. In addition, the Court explained that retailers and manufacturers can adjust the costs of plaintiff protection between them in the course of their continuing business relationship (*61 Cal. 2d 256, 261-263)* .

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19-190 California Points & Authorities § 190.73

§ 190.73 Supporting Contention That Defendant Is Person Who Is Subject to Strict Liability--Person Who Is Part of Overall Producing and Marketing Enterprise--Licensor of Chattel

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with a general form regarding the liability of a person who is part of the overall producing and marketing enterprise (see, e.g., § 190.71). The following may also be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product.*]

DEFENDANT _____ [*name*] IS SUBJECT TO STRICT LIABILITY BECAUSE DEFENDANT IS A LICENSOR OF CHATTELS AND AS SUCH IS PART OF THE OVERALL PRODUCING AND MARKETING ENTERPRISE.

Licensor of Chattel Is Part of Overall Producing and Marketing Enterprise and Is Subject to Strict Liability. Although a licensor of a chattel is not engaged in the distribution of a product in the same manner as a manufacturer, retailer, or lessor, a licensor does provide the chattel to the public for use by the public, and consequently plays more than a random and accidental role in the overall marketing enterprise of the product in question. Thus, a licensor of a chattel is subject to strict liability for injuries proximately caused by a defect in the licensed chattel (*Garcia v. Halsett (1970) 3 Cal. App. 3d 319, 326, 82 Cal. Rptr. 420*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a licensor of chattel is a part of the overall producing and marketing enterprise and is subject to strict liability.

These points and authorities should be combined with the points and *authorities in § 190.71*. These points and authorities may also be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary judgment or summary adjudication on the issue that defendant licensor was subject to strict liability. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, and with any other relevant points and authorities combined with this form, to show the relationship between the facts of the case and the points of law stated. For example, counsel should show facts indicating that defendant stood in the position of a licensor of a chattel and as such played a substantial role in the producing or marketing enterprise of the defective product [*see, e.g., Garcia v. Halsett (1970) 3 Cal. App. 3d 319, 82 Cal. Rptr. 420* (launderette owner)].

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 190.82 -190.94* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Licensor of Chattel Is Part of Overall Producing and Marketing Enterprise and Is Subject to Strict Liability

The facts and procedural background of ***Garcia v. Halsett*** *(1970) 3 Cal. App. 3d 319, 82 Cal. Rptr. 420* , are discussed in *§ 190.71[3][b]*. In extending strict liability to the owner of a launderette who provided washing machines for use by the public, the court held that defendant was a part of a marketing chain and should bear the cost of injuries to plaintiff. The court explained that under the circumstances, plaintiff user of a licensed chattel was in an even worse position than a person who is a retail buyer, because plaintiff had no opportunity to inspect the licensed chattel as would a retail buyer, nor did plaintiff have any control over the licensed chattel. Rather, plaintiff's only choice was to pick, at random, a licensed chattel provided by defendant for use by the public (*3 Cal. App. 3d 319, 325-326)* .

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19-190 California Points & Authorities § 190.73A

§ 190.73A Supporting Contention That Defendant Is Person Who Is Subject to Strict Liability--Defendant Is Bulk Supplier of Raw Asbestos Fiber Incorporated into Finished Product

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with a general form regarding the liability of a person who is part of the overall producing and marketing enterprise (see, e.g., § 190.71). The following may also be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product.*]

DEFENDANT _____ [*name*] IS STRICTLY LIABLE FOR PLAINTIFF'S INJURIES BECAUSE A BULK SUPPLIER OF RAW ASBESTOS IS SUBJECT TO STRICT PRODUCTS LIABILITY.

Bulk Supplier of Raw Asbestos Is Subject to Strict Products Liability. A bulk supplier of raw asbestos incorporated into a finished product is subject to strict products liability to a person suffering from a disease caused by exposure to the supplier's asbestos (*Garza v. Asbestos Corp. (2008) 161 Cal. App. 4th 651, 659, 74 Cal. Rptr. 3d 359* ; *Arena v. Owens-Corning Fiberglas Corp. (1998) 63 Cal. App. 4th 1178, 1188-1191, 74 Cal. Rptr. 2d 580* ; *Jenkins v. T&N PLC (1996) 45 Cal. App. 4th 1224, 1227-1231, 53 Cal. Rptr. 2d 642*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a supplier of raw asbestos is subject to strict liability.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with

points and authorities supporting a motion for summary judgment or summary adjudication on the issue that the supplier is subject to strict liability for supplying raw asbestos fiber. The points and authorities may also be adopted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should describe how defendant's raw asbestos fibers were incorporated into the finished product, how the plaintiff was exposed to that product, and how the plaintiff was injured by defendant's raw fibers [*see, e.g.,* *Jenkins v. T&N PLC (1996) 45 Cal. App. 4th 1224, 53 Cal. Rptr. 2d 642]* .

[3] Discussion of Authorities

[a] Bulk Supplier of Raw Asbestos Fiber Is Subject to Strict Products Liability

In ***Garza v. Asbestos Corp.*** *(2008) 161 Cal. App. 4th 651, 74 Cal. Rptr. 3d 359* , the plaintiff was exposed to asbestos-containing cement while serving in the Navy as a boilerman. He was diagnosed with asbestos-related diseases and filed a suit against the supplier of the chrysotile asbestos used in the cement. The jury returned a special verdict in favor of the plaintiff.

The court of appeal affirmed. It rejected the defendant's argument that *Arena v. Owens-Corning Fiberglas Corp., below,* which held that raw asbestos is a product that may have a design defect and that strict liability can apply to the supplier of a defective raw material, was wrongly decided. *Arena's* holding is consistent with the law governing the liability of component manufacturers (*161 Cal. App. 4th 651, 659)* .

In ***Arena v. Owens-Corning Fiberglas Corp.*** *(1998) 63 Cal. App. 4th 1178, 74 Cal. Rptr. 2d 580* , the plaintiff was exposed to asbestos while working in a naval shipyard. He filed a personal injury complaint against several defendants, including the company that supplied asbestos fibers to the insulating cement manufacturer. The trial court ruled in favor of the plaintiff against two defendants.

The court of appeal agreed with *Jenkins v. T&N PLC, below,* that suppliers of raw asbestos can be held strictly liable for harm caused by the product. Raw asbestos fibers do not change when they become a component part of another asbestos product. This fact distinguished *Walker v. Stauffer Chem. Corp. (1971) 19 Cal. App. 3d 669, 96 Cal. Rptr. 803* , which refused to impose liability on a mere supplier of a standard chemical ingredient incorporated into a drain cleaning product. The fact that the design of the finished asbestos product was not the supplier's responsibility was irrelevant, because it was not the manufacturing process that created the dangerous propensity of the asbestos. The court also distinguished cases upholding the general rule of nonliabilty of ingredient suppliers. As in *Walker,* those cases involved ingredients such as solvents and chemicals that were substantially changed by their incorporation into finished products. *Restatement (Third) of Torts: Products Liability § 5,* providing that raw material sellers are not subject to liability for harm caused by defective design of the end product, was inapplicable to this case, because it was a defect in the raw asbestos itself that caused the injury. Nonetheless, the trial court erroneously failed to apply Proposition 51 to the case, requiring remand (*see § 190.229[3][a], below*) (*63 Cal. App. 4th 1178, 1188-1191)* .

In ***Jenkins v. T&N PLC*** *(1996) 45 Cal. App. 4th 1224, 53 Cal. Rptr. 2d 642* , the plaintiff was exposed to asbestos dust while serving in the Navy. He worked with pipe insulation as part of his duties. After being diagnosed with mesothelioma almost 40 years later, he filed suit against several defendants, including the supplier of the raw asbestos fibers in the pipe insulation. Judgment on a special verdict in favor of the plaintiff was entered.

The court of appeal affirmed, holding that as a matter of law, a bulk supplier of raw asbestos fiber incorporated into a finished product can be subject to strict products liability to a person suffering from a disease caused by the supplier's asbestos. The rule imposing liability on a component part manufacturer when the component part was defective when it left its control is applicable to component raw material incorporated into a finished consumer product. Furthermore, raw

asbestos fibers can constitute a "product" for strict liability purposes (*45 Cal. App. 4th 1224, 1227-1231)* .

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19-190 California Points & Authorities § 190.74

§ 190.74 Supporting Contention That Defendant Is Person Who Is Subject to Strict Liability--Defendant Is Manufacturer of Defective Component Part

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product (see, e.g., §§ 190.70 -190.73, 190.75 -190.77).*]

DEFENDANT, _____ [*specify name*], IS STRICTLY LIABLE FOR PLAINTIFF'S INJURIES CAUSED BY A DEFECT IN A COMPONENT PART MANUFACTURED BY THE DEFENDANT.

Manufacturer of Defective Component Part Is Strictly Liable for Injuries Caused by Component Part. A component part manufacturer may be held strictly liable for injuries caused by a defect if the part had a defect at the time it left the component part manufacturer's possession, and manufacturer had participated in and was responsible for testing the durability of the component part after installation in the finished product (*Garza v. Asbestos Corp. (2008) 161 Cal. App. 4th 651, 659, 74 Cal. Rptr. 3d 359* ; *Gonzalez v. Autoliv ASP, Inc. (2007) 154 Cal. App. 4th 780, 788, 64 Cal. Rptr. 3d 908* , *Springmeyer v. Ford Motor Co., (1998) 60 Cal. App. 4th 1541, 1552-1553, 71 Cal. Rptr. 2d 190* ; *Jenkins v. T&N PLC (1996) 45 Cal. App. 4th 1224, 1228, 53 Cal. Rptr. 2d 642*).

Manufacturer of Windows Can Be Strictly Liable for Harm to Other Property Resulting From Defects in Window. A manufacturer of windows installed in a mass-produced home can be strictly liable for harm resulting from defects in those windows (*Jimenez v. Superior Court (2002) 29 Cal. 4th 473, 481, 127 Cal. Rptr. 2d 614, 58 P.3d 450*).

Component Parts Manufacturer Defense Applies Only to Generic, "Off-the-Shelf" Components. The component parts manufacturer defense applies to generic or "off-the-shelf" components, not to components which are in reality a

separate product with a specific purpose and use (*Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzger Co. (2004) 129 Cal. App. 4th 577, 582, 28 Cal. Rptr. 3d 744* ; *Springmeyer v. Ford Motor Co. (1998) 60 Cal. App. 4th 1541, 1554, 71 Cal. Rptr. 2d 190*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a manufacturer of a defective component part may be held strictly liable for injuries caused by a defect. Under these circumstances, the "component parts manufacturer" defense is inapplicable.

The form may be combined with other points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a demurrer or motion for summary judgment or summary adjudication on the issue that defendant is subject to strict liability. The form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. For example, The component manufacturer is liable for defects that existed at the time the part left the manufacturer's possession, and when the manufacturer had participated in and was responsible for testing the durability of the component part after installation in the finished product [*Springmeyer v. Ford Motor Co., (1998) 60 Cal. App. 4th 1541, 1552-1553, 71 Cal. Rptr. 2d 190]* .

[b] Opposing Points and Authorities

In an appropriate case these points and authorities may be used to oppose the contention supported by the points and *authorities in § 190.85*.

[3] Discussion of Authorities

[a] Manufacturer of Windows Can Be Strictly Liable for Harm to Other Property Resulting From Defects in Window

In ***Jimenez v. Superior Court*** *(2002) 29 Cal. 4th 473, 127 Cal. Rptr. 2d 614, 58 P.3d 450* , owners of a mass-produced home in a development brought claims alleging that defective windows caused property damage. The California Supreme Court resolved a split among the courts of appeal and held that a manufacturer of windows installed in a mass-produced home during its construction can be strictly liable in tort for harm resulting from defects in those windows.

The court explicitly rejected the window manufacturers' contention that extending strict products liability to component manufacturers like themselves would not serve the purpose of strict products liability. The policies underlying the doctrine are equally applicable to component manufacturers and suppliers. Component manufacturers are an integral part of the overall producing and marketing enterprise, may be the only member of that enterprise reasonably available to an injured plaintiff, and may be in the best position to ensure product safety. Moreover, component part manufacturers can adjust the costs of liability in the course of their continuing business relationship with other participants in the overall manufacture and marketing enterprise.

The court next rejected the manufacturers' argument that subjecting them to strict liability would be improper because they had no physical control over the windows at the time of the alleged harm. Also, the fact that the windows were assembled and installed by other parties did not change the court's analysis, because the mere assembly of a product that is sold in parts is not a "substantial change" in the product within the meaning of § 402(1)(b) of Restatement (Second)

of Torts. Finally, the court was unconvinced that holding the window manufacturers subject to strict liability will "open the litigation floodgates."

The court explicitly disapproved *La Jolla Village Homeowners' Assn. v. Superior Court (1989) 212 Cal. App. 3d 1131, 1144-1146* , and *Casey v. Overhead Door Corp. (1999) 74 Cal. App. 4th 112, 87 Cal. Rptr. 2d 603* , to the extent they are inconsistent with the court's opinion (*29 Cal. 4th 473, 479-481)* .

[b] Manufacturer of Defective Component Part Is Strictly Liable for Injuries Caused by Component Part

Garza v. Asbestos Corp. *(2008) 161 Cal. App. 4th 651, 74 Cal. Rptr. 3d 359* , is discussed in *§ 190.73A[3][a]*.

In ***Gonzalez v. Autoliv ASP, Inc.*** *(2007) 154 Cal. App. 4th 780, 64 Cal. Rptr. 3d 908* , the plaintiff sustained injuries to her eye in an automobile accident. She brought an action against, *inter alia*, the manufacturer of the front airbag module, alleging that the front airbag system was defective because the airbag deployed with excessive force. The trial court granted the manufacturer's motion for summary judgment.

The court of appeal reversed. Although the manufacturer's expert opined that the airbag module deployed in accordance with its intended design, the manufacturer offered no evidence that the benefits of the design outweighed its risks, as it was required to do to meet its burden of showing the absence of a design defect. The fact that the defendant was a component part manufacturer did not change the court's conclusion. To avail itself of the component part manufacturer defense, the manufacturer would have had to show that its product--the front airbag module--was not defective. Restatement (Third) of Torts: Products Liability §§ 2(b) and (5), taken together, provided further support for the rule that a component part manufacturer may be held liable for a defect in a component (*154 Cal. App. 4th 780, 788-789)* .

In ***Springmeyer v. Ford Motor Co.****, (1998) 60 Cal. App. 4th 1541, 71 Cal. Rptr. 2d 190* , a mechanic was injured while working on an engine. A fan blade broke off and struck him causing severe personal injuries. The mechanic brought a products liability action against multiple defendants, including the automobile manufacturer and the manufacturer of the fan. A jury apportioned 50 percent of fault to the automobile manufacturer and 30 percent to the manufacturer of the fan.

Reversing in part because the two manufacturers were not deemed jointly liable for 80 percent of the damages awarded by the jury, the court of appeal held that the manufacturer of the fan component could not avail itself of the "component parts manufacturer" defense. Notwithstanding the arguments of the fan manufacturer, there was evidence that the manufacturer participated in and had responsibility for testing the fan in its engine environment. In addition, it was the fan that broke and not other parts of the engine, which distinguishes this case from ones involving the manufacturer of a nondefective component part. Finally, whether the fan was a generic or an off-the-shelf component was debatable. A jury could reasonably conclude that the fan was defective at the time it left the component part manufacturer's factory (*60 Cal. App. 4th 1541, 1552-1553)* .

Jenkins v. T&N PLC *(1996) 45 Cal. App. 4th 1224, 53 Cal. Rptr. 2d 642* , is discussed in *§ 190.73A[3][a]*.

[c] Component Parts Manufacturer Defense Applies Only to Generic, "Off-the-Shelf" Components

In ***Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzger Co.*** *(2004) 129 Cal. App. 4th 577, 28 Cal. Rptr. 3d 744* , plaintiff became ill from exposure to airborne toxins produced by grinders, sanders, and saws manufactured by defendants. He brought a negligence and strict liability action alleging that the tools were specifically designed to be used with abrasive wheels or discs and when used for their intended purpose, breathable metallic dust was generated. The trial court held that the complaint failed to state a cause of action.

The Court of Appeal reversed. Although the defendants claimed that they supplied generic, multi-use products, the

court found that the tools manufactured by defendants were specifically designed to be used with the abrasive wheels or discs for the intended purpose of grinding and sanding materials, that the wheels and discs were harmless without the power supplied by defendants' tools, and that when the tools were used for the purposed intended by defendants, harmful dust was released into the air. The policy reasons underlying the component parts defense did not apply to the instant case (e.g., defendants would not have to employ a huge variety of experts to provide warnings or incorporate safety features unnecessary for most uses, and there was no "finished product manufacturer" in a superior position to warn users). Unlike cases in which the component parts doctrine precluded liability (*see § 190.85*), the tools' hazard was not obvious, and the tools were designed to be used in only one "finished product" (i.e., in combination with the abrasive wheels and disc) (*129 Cal. App. 4th 577, 581-584)* .

Springmeyer v. Ford Motor Co. *(1998) 60 Cal. App. 4th 1541, 71 Cal. Rptr. 2d 190* , is discussed in *§ 190.74[3][b]*.

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19-190 California Points & Authorities § 190.75

§ 190.75 Supporting Contention That Defendant Is Person Who Is Subject to Strict Liability--Manufacturer of Complete Product Is Strictly Liable for Defect in Component Part Supplied by Another

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product (see, e.g., §§ 190.70 -190.74, 190.76, 190.77).*]

DEFENDANT _____ [*name*] IS STRICTLY LIABLE FOR PLAINTIFF'S INJURIES CAUSED BY THE _____ [*describe product*] MANUFACTURED BY DEFENDANT, EVEN THOUGH THE PRODUCT'S DEFECT WAS CONTAINED IN A COMPONENT PART SUPPLIED BY ANOTHER.

Manufacturer Strictly Liable Even if Defect Due to Component Part Supplied by Another. Strict liability encompasses defects regardless of their source. Thus, a manufacturer of a completed product cannot escape liability by tracing the defect to a component part supplied by another (*Vandermark v. Ford Motor Co. (1964) 61 Cal. 2d 256, 261, 37 Cal. Rptr. 896, 391 P.2d 168*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a manufacturer is strictly liable for plaintiff's injuries from the manufacturer's product, even though the defect in the product is due to a component part supplied to the manufacturer by another.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with

points and authorities supporting a motion for summary judgment or summary adjudication on the issue that the manufacturer is strictly liable. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should show that plaintiff was injured by manufacturer's product that contained a defect in one of its component parts supplied to manufacturer by another [*see, e.g.,* *Vandermark v. Ford Motor Co. (1964) 61 Cal. 2d 256, 37 Cal. Rptr. 896, 391 P.2d 168* (defective brakes as component part of automobile)].

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 190.82 -190.94* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Manufacturer Strictly Liable Even if Defect Due to Component Part Supplied by Another

The facts and procedural background of ***Vandermark v. Ford Motor Co.*** *(1964) 61 Cal. 2d 256, 37 Cal. Rptr. 896, 391 P.2d 168* , are discussed in *§ 190.71[3][a]*. In reversing the judgment, the Court held that defendant manufacturer could be strictly liable for injuries caused by its product, even though the defect in the product could be traced to a component part supplied to manufacturer by another. The Court explained that a manufacturer is strictly liable for a defective product that it produces, regardless of the source of the defect (*61 Cal. 2d 256, 261)* .

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19-190 California Points & Authorities § 190.75A

§ 190.75A Supporting Contention That Defendant Is Person Who Is Subject to Strict Liability--Defendant Is Manufacturer of Products Which, When Used For Their Intended Purpose, Resulted in Release of Toxins

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product (see, e.g., §§ 190.70, 190.77).*]

DEFENDANT _____ [*name*] IS STRICTLY LIABLE FOR PLAINTIFF'S INJURIES, BECAUSE IT MANUFACTURED PRODUCTS WHICH WERE SPECIFICALLY DESIGNED TO BE USED ONLY WITH CERTAIN EQUIPMENT, WHICH WAS HARMLESS WITHOUT THE POWER SUPPLIED BY DEFENDANT'S PRODUCTS, AND WHEN ITS PRODUCTS WERE USED FOR THE PURPOSE INTENDED BY DEFENDANT, TOXINS WERE RELEASED.

Manufacturer Strictly Liable For Product Designed For Only One Use, In Combination With Specified Equipment. A manufacturer is subject to strict liability when its product, which was specifically designed to be used only with certain equipment for one intended purpose, is used for that intended purpose and causes the generation and release of toxins from the equipment (*Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzger Co. (2004) 129 Cal. App. 4th 577, 583-585, 28 Cal. Rptr. 3d 744*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a manufacturer is strictly liable for plaintiff's injuries from the manufacturer's product, which is defective only when used in combination with certain other products.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary judgment or summary adjudication on the issue that the manufacturer is strictly liable. These points and authorities may also be adopted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should show that plaintiff was injured by exposure to toxic substances released from discs, belts and wheels used on defendant's tools [*see, e.g., Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzger Co. (2004) 129 Cal. App. 4th 577, 28 Cal. Rptr. 3d 744]* .

[3] Discussion of Authorities

[a] Manufacturer Strictly Liable For Product Designed For Only One Use, In Combination With Specified Equipment

The facts and procedural background of ***Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzger Co.*** *(2004) 129 Cal. App. 4th 577, 28 Cal. Rptr. 3d 744* , are discussed in *§ 190.74[3][c]*. The defendants argued on appeal that a manufacturer has no duty to warn of defects in another party's products. This argument missed the mark of plaintiffs' complaint, which was that defendants' tools (i.e., grinders, sanders, and saws) created the toxic dust, even if the dust did not come directly from the tools, and that the tools had no function without the abrasives which disintegrated into toxic dust (*129 Cal. App. 4th 577, 583-585)* .

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19-190 California Points & Authorities § 190.76

§ 190.76 Supporting Contention That Defendant Is Person Who Is Subject to Strict Liability--Manufacturer Cannot Delegate Duty to Deliver Product to Purchaser Free From Dangerous Defects

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product (see, e.g., §§ 190.70 -190.75, 190.77).*]

DEFENDANT MANUFACTURER, _____ [*name*], IS STRICTLY LIABLE EVEN THOUGH DEFENDANT DELEGATED A PART OF THE MANUFACTURING PROCESS TO A THIRD PARTY, BECAUSE A MANUFACTURER CANNOT DELEGATE ITS DUTY TO DELIVER THE PRODUCT TO THE PURCHASER FREE FROM DANGEROUS DEFECTS.

A. Manufacturer Is Strictly Liable Regardless of What Part of Manufacturing Process Was Delegated to Third Parties. Strict liability applies to the manufacturer of a completed product regardless of what part of the manufacturing process the manufacturer chooses to delegate to third parties (*Vandermark v. Ford Motor Co. (1964) 61 Cal. 2d 256, 261, 37 Cal. Rptr. 896, 391 P.2d 168*).

B. Manufacturer Cannot Delegate Duty to Deliver Product Free From Dangerous Defects. The manufacturer of a completed product cannot delegate its duty to have that product delivered to the ultimate purchaser free from dangerous defects (*Hasson v. Ford Motor Co. (1982) 32 Cal. 3d 388, 405-406, 185 Cal. Rptr. 654, 650 P.2d 1171* ; *Vandermark v. Ford Motor Co. (1964) 61 Cal. 2d 256, 261, 37 Cal. Rptr. 896, 391 P.2d 168*).

[*Optional*] **C. Manufacturer Cannot Escape Liability Because of Dealer's Act or Failure to Act.** The manufacturer of a defective product cannot escape liability on the ground that the defect in the product may have been caused by something one of its authorized dealers did or failed to do (*Vandermark v. Ford Motor Co. (1964) 61 Cal. 2d 256, 261, 37 Cal. Rptr. 896, 391 P.2d 168*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a manufacturer is strictly liable for plaintiff's injuries from manufacturer's product regardless of what part of the manufacturing process has been delegated to another party, because a manufacturer has the nondelegable duty to deliver its product to the ultimate purchaser free from dangerous defects. These points and authorities may also be submitted in support of the contention that a manufacturer cannot escape strict liability because its dealer created the defect in the product.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary judgment or summary adjudication on the issue that the manufacturer is strictly liable. The points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should describe the act or task performed by the dealer that created or added to the product's defect, and describe how that act or task was part of the manufacturing process as delegated by the manufacturer [*see, e.g., Vandermark v. Ford Motor Co. (1964) 61 Cal. 2d 256, 37 Cal. Rptr. 896, 391 P.2d 168* (defect in car may have been caused by something one of its authorized dealers did or failed to do)].

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 190.82 -190.94* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Manufacturer Is Strictly Liable Regardless of What Part of Manufacturing Process Was Delegated to Third Parties

The facts and procedural background of ***Vandermark v. Ford Motor Co.*** *(1964) 61 Cal. 2d 256, 37 Cal. Rptr. 896, 391 P.2d 168* , are discussed in *§ 190.71[3][a]*. In reversing the judgment, the Court held that defendant manufacturer could not escape strict liability merely because the defect in the car manufactured by defendant might have been caused by something one of the manufacturer's authorized dealers did or failed to do. Rather, the Court held that defendant manufacturer had a nondelegable duty to deliver its product to the ultimate purchaser free from dangerous defects, and would be held strictly liable for a defective product regardless of what part of the manufacturing process had been delegated to a third party (*61 Cal. 2d 256, 261)* .

[b] Manufacturer Cannot Delegate Duty to Deliver Product Free From Dangerous Defects

Vandermark v. Ford Motor Co. *(1964) 61 Cal. 2d 256, 37 Cal. Rptr. 896, 391 P.2d 168* , is discussed in *§§ 190.71[3][a]* and *190.76[3][a]*.

Hasson v. Ford Motor Co. *(1982) 32 Cal. 3d 388, 405-406, 185 Cal. Rptr. 654, 650 P.2d 1171* , is discussed in *§ 190.50[3][a]*.

[c] Manufacturer Cannot Escape Liability Because of Dealer's Act or Failure to Act

Vandermark v. Ford Motor Co. *(1964) 61 Cal. 2d 256, 37 Cal. Rptr. 896, 391 P.2d 168* , is discussed in *§§ 190.71[3][a]* and *190.76[3][a]*.

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19-190 California Points & Authorities § 190.77

§ 190.77 Supporting Contention That Defendant Is Person Who Is Subject to Strict Liability--Seller Who Alters Product

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product (see, e.g., §§ 190.70 -190.76).*]

DEFENDANT SELLER, _____ [*name*], IS STRICTLY LIABLE BECAUSE, BY ALTERING THE _____ [*describe product*], DEFENDANT IS TANTAMOUNT TO A MANUFACTURER.

Seller Who Alters Product Is Tantamount to Manufacturer. A seller who has made extensive modifications to the product it sells is tantamount to a manufacturer for purposes of strict liability (*Green v. City of Los Angeles (1974) 40 Cal. App. 3d 819, 838, 115 Cal. Rptr. 685*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a seller of a product, although not its original manufacturer, is strictly liable as a manufacturer because the seller made extensive modifications to the product.

These points and authorities may be combined with points and authorities pertaining to the specific procedural con text in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary judgment or summary adjudication on the issue that the seller is subject to strict liability for altering the product. The points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should describe the modifications made to the product by defendant seller, and how those modifications related to the product's defect [*see, e.g., Green v. City of Los Angeles (1974) 40 Cal. App. 3d 819, 115 Cal. Rptr. 685* (extensive modifications made by seller to crane boom)].

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 190.82 -190.94* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Seller Who Alters Product Is Tantamount to Manufacturer

In ***Green v. City of Los Angeles*** *(1974) 40 Cal. App. 3d 819, 115 Cal. Rptr. 685* , a plaintiff was injured and another plaintiff's decedent was killed in an accident when a crane boom fell and struck them while they were loading a ship. Plaintiffs brought an action based in strict liability, negligence, and warranty for personal injuries and wrongful death against numerous defendants, including the seller of the crane. Defendant seller had made extensive modifications of the crane prior to its sale. The trial court entered judgment against defendants, and the other defendants were allowed indemnity from defendant seller. Defendant seller appealed.

The court of appeal affirmed on various grounds, including holding that the other defendants were entitled to indemnity from defendant seller. The court also held that because defendant seller had made extensive modifications to the crane prior to its sale, the seller was tantamount to a manufacturer and subject to strict liability. Furthermore, defendant seller's actions made its liability the primary liability subject to indemnification (*40 Cal. App. 3d 819, 837-838)* .

[4] Additional Authorities

[a] Seller Who Alters Product Is Tantamount to Manufacturer

The facts and procedural background of *Barrett v. Superior Court (1990) 222 Cal. App. 3d 1176, 272 Cal. Rptr. 304* , are discussed in *§ 190.51[3][a]*. The court of appeal held that the heirs of a decedent killed by a defective product may recover on a strict products liability theory (*222 Cal. App. 3d 1176, 1183-1196)* . The court also rejected defendant's contention that it was a "used machinery dealer," and therefore exempt from liability under the theory of strict products liability. The court noted that the cases relied on by defendant all involved defendants who either sold used machinery without making any adjustments, repairs, or modifications to the machinery, or simply acted as auctioneers of the machinery. Moreover, in one of those cases, the court of appeal stated that it was not deciding whether the defendant might be liable under the theory of strict products liability if the defect proved is the result of subsequent modification, dilapidation, or misuse (*222 Cal. App. 3d 1176, 1196)* . The court noted that in this case, the defendant in its motion for summary judgment failed to produce any evidence that it was simply a dealer in used machinery, or that it was not responsible for any modification, dilapidation, or misuse that would have rendered the earth mover unreasonably unsafe for its intended use. Therefore, defendant was not entitled to summary judgment on that ground (*222 Cal. App. 3d 1176, 1197)* .

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19-190 California Points & Authorities § 190.78

§ 190.78 Supporting Contention That Defendant Is Person Who Is Subject to Strict Liability--Exception to General Rule of Successor Nonliability Applies

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product.*]

DEFENDANT _____ [*name*] IS STRICTLY LIABLE BECAUSE AN EXCEPTION TO THE GENERAL RULE OF SUCCESSOR NONLIABILITY EXISTS, BECAUSE _____ [THERE IS AN EXPRESS OR IMPLIED AGREEMENT OF ASSUMPTION *or* THE TRANSACTION AMOUNTS TO A CONSOLIDATION OR MERGER OF THE TWO CORPORATIONS *or* THE PURCHASING CORPORATION IS A MERE CONTINUATION OF THE SELLER *or*] THE TRANSFER OF ASSETS TO THE PURCHASER WAS FOR THE FRAUDULENT PURPOSE OF ESCAPING LIABILITY FOR THE SELLER'S DEBTS].

Successor to Manufacturer May Be Strictly Liable for Defective Product if Exception to General Rule of Successor Nonliability Applies. The general rule of successor nonliability does not apply if: (1) there is an express or implied agreement of assumption; (2) the transaction amounts to a consolidation or merger of the two corporations; (3) the purchasing corporation is a mere continuation of the seller; or (4) the transfer of assets to the purchaser is for the fraudulent purpose of escaping liability for the seller's debts (*Ray v. Alad Corp. (1977) 19 Cal. 3d 22, 28, 136 Cal. Rptr. 574, 560 P.2d 3* ; *Fisher v. Allis-Chalmers Corp. Prod. Liab. Trust (2002) 95 Cal. App. 4th 1182, 1188-1190, 116 Cal. Rptr. 2d 310*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a successor to the original manufacturer

of a defective product is strictly liable for injuries sustained from that product.

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 190.244* may be used to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Successor to Manufacturer May Be Strictly Liable for Defective Product if Exception to General Rule of Successor Nonliability Applies

Ray v. Alad Corp. *(1977) 19 Cal. 3d 22, 136 Cal. Rptr. 574, 560 P.2d 3* , is discussed in *§ 190.79[3][a]*.

In ***Fisher v. Allis-Chalmers Corp. Prod. Liab. Trust*** *(2002) 95 Cal. App. 4th 1182, 116 Cal. Rptr. 2d 310* , the decedent was fatally burned by hot oil expelled by a voltage regulator. The plaintiff brought a products liability claim against the manufacturer of the regulator and the purported successor in interest of the manufacturer. The trial court granted summary judgment in favor of the purported successor. The court of appeal reversed.

The purported successor had agreed to assume some of the products liability claims against the manufacturer through Subpara. 2.01C of the Transfer Agreement, which provided that the purchaser would assume "any and all claims or liabilities ... now in existence or hereafter arising from or relating to the conduct of the business ... . including but not limited to ..." The issue was whether the contractual assumption included the plaintiff's products liability claim.

The provisions of Subpara. 2.01C were not ambiguous on their face, and the phrases "any and all" and "of any kind or nature" did not exclude plaintiff's theory of products liability. Under a literal reading of Subpara. 2.01C, the purported manufacturer agreed to assume the liability represented by plaintiff's lawsuit. Thus, it was not entitled to summary judgment. However, on remand, the possibility remained that the purported successor could attack the broad assumption language contained in Subpara. 2.01C by proving that one of the exceptions contained in clauses (a)-(d) applied, or that the language of the Subpara. 2.01C was ambiguous (*95 Cal. App. 4th 1182, 1188-1190)* .

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19-190 California Points & Authorities § 190.79

§ 190.79 Supporting Contention That Defendant Is Person Who Is Subject to Strict Liability Under Product Line Theory--Successor to Manufacturer

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product (see, e.g., §§ 190.70 -190.77).*]

DEFENDANT _____ [*name*] IS STRICTLY LIABLE BECAUSE DEFENDANT IS THE SUCCESSOR TO THE MANUFACTURER OF _____ [*specify product*].

A. Successor to Manufacturer Is Strictly Liable for Defective Product Manufactured by Original Manufacturer. A person who acquires a manufacturing business and continues the output of its line of products is strictly liable in tort for defects in units of the same product line previously manufactured and distributed by the entity from which the business was acquired when (1) a plaintiff's remedies against the original manufacturer have been virtually destroyed by the successor's acquisition, (2) the successor is able to assume the original manufacturer's risk-spreading role, and (3) the successor enjoys the original manufacturer's good will (*Ray v. Alad Corp. (1977) 19 Cal. 3d 22, 31, 34, 136 Cal. Rptr. 574, 560 P.2d 3* ; *Sanders v. CEG Corp. (1979) 95 Cal. App. 3d 779, 786-787, 157 Cal. Rptr. 252*).

[*Optional*] **B. *Alad*** Is Not Given Narrow Construction. The rule announced in *Ray v. Alad Corp. (1977) 19 Cal. 3d 22, 31-34, 136 Cal. Rptr. 574, 560 P.2d 3* , imposing strict liability on a successor to the original manufacturer of a defective product, is not to be construed so narrowly as to create an exclusive exception to the general rule for successor liability permitting a similar result only in an *Alad* clone. It is essential to focus on the policy considerations underlying strict products liability rather than merely counting the factors mentioned in *Alad* and giving each equal weight (*Rawlings v. D.M. Oliver, Inc. (1979) 97 Cal. App. 3d 890, 900, 159 Cal. Rptr. 119*).

[*Optional*] **C. Successor May Be Strictly Liable Even Though It Has Discontinued the Defective Product.** In

determining whether a successor to the original manufacturer of a defective product is strictly liable for injuries sustained from that product, it is irrelevant to consider the manner in which the successor company elects to use the good will of its predecessor in marketing its products. Instead, the focus of the determination is on the business continued by the successor manufacturer in a general sense and its ability to spread the costs of injuries sustained as a result of defective products, and not merely whether a specific line of products was discontinued (*Rawlings v. D.M. Oliver, Inc. (1979) 97 Cal. App. 3d 890, 901, 159 Cal. Rptr. 119*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a successor to the original manufacturer of a defective product is strictly liable for injuries sustained from that product.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary judgment or summary adjudication on the issue that defendant is subject to strict liability. The points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should show facts indicating that defendant succeeded to the original manufacturer, that plaintiff has no remedy against the original manufacturer, that defendant is able to assume the original manufacturer's risk-spreading role, and that defendant is enjoying the original manufacturer's good will [*see, e.g.,* *Ray v. Alad Corp. (1977) 19 Cal. 3d 22, 31, 136 Cal. Rptr. 574, 560 P.2d 3* (successor to manufacturer of defective ladder); *Rawlings v. D.M. Oliver, Inc. (1979) 97 Cal. App. 3d 890, 900, 159 Cal. Rptr. 119* (successor to manufacturer of dryer); *Sanders v. CEG Corp. (1979) 95 Cal. App. 3d 779, 786-787, 157 Cal. Rptr. 252* (successor by merger to original manufacturer of hydrohammer)].

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 190.82 -190.94* may be used to oppose the contention supported by these points and authorities. The points and *authorities in § 190.89* specifically oppose the contentions supported by these points and authorities.

[c] Related Points and Authorities

In an appropriate case, the points and *authorities in § 190.244* may be added to support the contention that a successor corporation is liable for injuries caused by a predecessor's product under a strict liability theory.

[3] Discussion of Authorities

[a] Successor to Manufacturer Is Strictly Liable for Defective Product Manufactured by Original Manufacturer

In ***Ray v. Alad Corp.*** *(1977) 19 Cal. 3d 22, 136 Cal. Rptr. 574, 560 P.2d 3* , plaintiff fell from a ladder and was injured. Plaintiff brought an action in strict liability against a corporation that neither manufactured nor sold the ladder. Prior to plaintiff's injury, defendant had succeeded to the business of the ladder's manufacturer through a purchase of the manufacturer's assets for an adequate cash consideration. Defendant acquired manufacturer's plant, equipment, inventory, trade name, and good will. Defendant also continued to manufacture the same line of ladders as had the original manufacturer. Because defendant had not manufactured the ladder that injured plaintiff, however, defendant moved for summary judgment, which was granted. Plaintiff appealed.

The Supreme Court reversed the judgment, holding that under the circumstances defendant could be held strictly liable for plaintiff's injuries, and that plaintiff's claim was an exception to the general rule against imposition on a successor corporation of its predecessor's liabilities. The Court explained that justification of its imposition of strict liability rested on (1) the virtual destruction of plaintiff's remedies against the original manufacturer caused by the successor's acquisition of the business, (2) the successor's ability to assume the original manufacturer's risk-spreading role, and (3) the fairness of requiring the successor to assume a responsibility for defective products that was a burden necessarily attached to the original manufacturer's good will being enjoyed by the successor in the continued operation of the business. Thus, the Court concluded that a party that acquires a manufacturing business and continues the output of its line of products under such circumstances assumes strict tort liability for defects in units of the same product line previously manufactured and distributed by the entity from which the business was acquired (*19 Cal. 3d 22, 30-34)* .

In ***Sanders v. CEG Corp.*** *(1979) 95 Cal. App. 3d 779, 157 Cal. Rptr. 252* , plaintiff's decedent was killed when the hydrohammer that he was operating overturned. Plaintiff brought an action for wrongful death against the successor corporation to the original manufacturer of the hydrohammer. Defendant, served in Oklahoma, moved to quash service of process for lack of jurisdiction. The trial court granted the motion, and plaintiff appealed.

The court of appeal reversed, holding that California had personal jurisdiction over defendant because it was the successor to the manufacturer of a defective product that was sold in California. In reaching its conclusion, the court followed *Alad* in holding that defendant, by merging with the original manufacturer and becoming its successor, is subject to strict liability for a defective product manufactured by the original manufacturer (*95 Cal. App. 3d 779, 786-787)* .

[b] ***Alad*** Is Not Given Narrow Construction

In ***Rawlings v. D.M. Oliver, Inc.*** *(1979) 97 Cal. App. 3d 890, 159 Cal. Rptr. 119* , plaintiff injured her hand when a coemployee turned on a dryer that plaintiff was cleaning. Plaintiff brought an action in strict liability against the successor corporation that purchased the manufacturer. Defendant claimed that the facts of the case were distinguishable from *Alad* [*see § 190.79[3][a]*], because plaintiff was injured before the business had been sold, and because the predecessor was a sole proprietorship. Because the exact fact pattern in *Alad* did not exist, defendant claimed that the exception to the rule that successors are not liable for their predecessors' debts did not apply. On this ground, defendant moved for summary judgment. The trial court granted the motion, and plaintiff appealed.

The court of appeal reversed the summary judgment, holding that a successor to the original manufacturer could be held strictly liable for a product manufactured by the original manufacturer, even if the facts did not exactly follow the *Alad* facts. The court explained that *Alad* should not be construed narrowly, and that it is essential to focus on the policy considerations underlying strict products liability rather than merely counting the factors mentioned in *Alad* and giving each equal weight. The court then found that the *Alad* exception applied under the circumstances, and that defendant could be held strictly liable (*97 Cal. App. 3d 890, 900-902)* .

[c] Successor May Be Strictly Liable Even Though It Has Discontinued the Defective Product

The facts and procedural background of ***Rawlings v. D.M. Oliver, Inc.*** *(1979) 97 Cal. App. 3d 890, 159 Cal. Rptr. 119* , are discussed in *§ 190.79[3][b]*. In determining whether the *Alad* exception [*see § 190.79[3][a]*] applied, the court explained that considering the manner in which a successor uses its predecessor's good will is irrelevant. Instead, the determination should focus on the business continued by the successor manufacturer in a general sense and its ability to spread the costs of injuries sustained as a result of defective products, and not merely whether a specific line of products was discontinued (*97 Cal. App. 3d 890, 901)* .

[4] Additional Authorities

[a] Successor to Manufacturer Is Strictly Liable for Defective Product Manufactured by Original Manufacturer

In *Rosales v. Thermex-Thermatron, Inc. (1998) 67 Cal. App. 4th 187, 78 Cal. Rptr. 2d 861* (opinion on rehearing), a jury awarded the plaintiff damages against the successor to a manufacturer that had manufactured a defective heat sealing machine 24 years earlier. The jury found for the plaintiff. The court of appeal affirmed, finding that the elements necessary for imposing successor liability under the *Alad* "product-line" theory were satisfied in this case. First, the sale of the original manufacturer destroyed the plaintiff's remedies against it. Second, the successor had the ability to assume the risk-spreading role of the predecessor. Third, the successor corporation continued to benefit from the predecessor's good will, for example, by retaining its brands, and using its customer lists (*67 Cal. App. 4th 187, 194-195*).

[b] Alad Is Not Given Narrow Construction

In *Petrini v. Mohasco Corp. (1998) 61 Cal. App. 4th 1091, 71 Cal. Rptr. 2d 910* , a trial court granted the defendant's motion for summary judgment on the ground that the defendant was not a successor-in-interest liable for injuries caused by asbestos floor tiles manufactured by the disappearing corporation in a statutory merger. At the time of the merger the disappearing-predecessor corporation was a shell with no assets. The court of appeal reversed, noting that under *Alad* recognizes the consolidation and merger of two corporations as a basis for imposing successor liability. In this case, out-of-state statutes governing the merger provide that the survivor assumes the liabilities of the constituent corporations. This rule applies regardless of whether the disappearing corporation brings assets to the merger, or whether the successor corporation continues its predecessor's business (*61 Cal. App. 4th 1091, 1096)* .

In *Oliver Mach. Co. v. United States Fid. & Guar. Co. (1986) 187 Cal. App. 3d 1510, 232 Cal. Rptr. 691* , a court of appeal refused to extend the holding in *Alad* in the context of insurance defense, when the purchaser of a predecessor company's product contended that the successor company's insurer owed it a duty of defense. The successor company continued to manufacture a line of the predecessor's products but marketed them under its own name. It subsequently obtained liability insurance and included coverage for a particular vendor as an additional insured, for which the vendor paid the named insured, on the basis of an estimated purchase of a quantity of that particular product. The court held that coverage concerning the predecessor's products was excluded by a policy provision that stated that coverage extended only to the named insured's products. The court declined to extend what it called the "narrow exception for successor liability" under *Alad*, noting that under *Alad*, the successor corporation acquired the plant, equipment, inventory, trade name, and good will of the predecessor and gave no outward indication of any change in ownership (*187 Cal. App. 3d 1510, 1517)* .

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19-190 California Points & Authorities § 190.80

§ 190.80 Supporting Contention That Defendant Is Person Who Is Subject to Strict Liability--Identity of Actual Manufacturer Unknown--Market Share Liability

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product (see, e.g., § 190.50).*]

EACH DEFENDANT IS STRICTLY LIABLE FOR THE PERCENTAGE OF _____ [*specify product, e.g.,* DIETHYLSTILBESTEROL, OR DES] SOLD BY THAT DEFENDANT ON THE MARKET, EVEN THOUGH PLAINTIFF CANNOT IDENTIFY THE SPECIFIC DEFENDANT WHO ACTUALLY MANUFACTURED THE _____ [*specify product, e.g.,* DES] THAT INJURED PLAINTIFF, BECAUSE _____ [*specify product, e.g.,* DES] WAS MANUFACTURED FROM AN IDENTICAL FORMULA BY SEVERAL DIFFERENT MANUFACTURERS, PLAINTIFF CANNOT IDENTIFY THE SPECIFIC PRODUCT THROUGH NO FAULT OF PLAINTIFF'S OWN, AND DEFENDANTS ARE MANUFACTURERS REPRESENTING A SUBSTANTIAL SHARE OF THE MARKET OF _____ [*specify product, e.g.,* DES].

A. Manufacturers of Substantial Share of Market Liable Under Market Share Theory. When a product has been manufactured by several different manufacturers from an identical formula, but the manufacturer of the specific product that caused plaintiff's injuries cannot be identified through no fault of plaintiff, the plaintiff may bring a products liability action against the manufacturers of a substantial share of the market of that product at the time the product was sold to the plaintiff, if plaintiff joins in the action manufacturers constituting a substantial percentage of the market (*Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 611-612, 163 Cal. Rptr. 132, 607 P.2d 924*).

B. Each Defendant's Liability Proportional to Its Share of Market. Each defendant is held liable for the proportion of the judgment represented by its share of that market unless it demonstrates that it could not have made the product

that caused plaintiff's injuries (*Brown v. Superior Court (1988) 44 Cal. 3d 1049, 1074-1075, 245 Cal. Rptr. 412, 751 P.2d 470* ; *Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 612, 163 Cal. Rptr. 132, 607 P.2d 924*).

[*Optional*] **C. Market Share Liability Applicable to Manufacturer of Product Used for Unintended Purpose but With Manufacturer's Knowledge and Acquiescence.** Market share liability is not limited to only those manufacturers whose product was used only in accord with the purpose for which it was manufactured. Rather, market share liability extends to a manufacturer who reaped a market share of the product's use, despite its production for another purpose, when that manufacturer knew or should have known that its product was being used for that other purpose, yet did nothing to prevent such use, thereby acquiescing in such use and claiming for itself a share of the market (*Miles Labs., Inc. v. Superior Court (1982) 133 Cal. App. 3d 587, 595-596, 184 Cal. Rptr. 98*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the manufacturers of a substantial share of the market of a product may be held liable in a products liability action, each manufacturer being held liable for its percentage of the market of the product, even though the identity of the actual manufacturer of the product that injured plaintiff cannot specifically be identified. Counsel may also contend that a manufacturer is liable under the market share theory, even though that manufacturer produced the product for a purpose other than the one for which it was used, if that manufacturer knew of and acquiesced to that unintended use [*see* optional Paragraph C].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary judgment or summary adjudication on the issue that the manufacturers are strictly liable. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should describe the product and its formula, show that the same formula was generally used by the manufacturers of the product, show that the manufacturers joined in the action represent a substantial share of the market of that product at the time it was sold, and explain why plaintiff, through no fault of his or her own, cannot identify the specific manufacturer of the product that injured plaintiff [*see, e.g.,* *Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 611-612, 163 Cal. Rptr. 132, 607 P.2d 924* (DES manufactured from identical formula by 90 percent of joined defendants; years had passed since plaintiff's mother had ingested DES, and no records had been kept indicating specific manufacturer)].

[b] Causes of Action Under Market Share Theory

Although *Sindell* was brought under several theories of liability, including negligence, strict liability, and breach of warranty, and the market share concept was alleged as a separate cause of action, the California Supreme Court limited the permissible causes of action under the market share theory in *Brown v. Superior Court (1988) 44 Cal. 3d 1049, 245 Cal. Rptr. 412, 751 P.2d 470* [*see § 190.90[3][a]*]. The Court in *Brown* held that a manufacturer of prescription drugs is not strictly liable for injuries caused by a design defect that was neither known nor knowable at the time the drug was distributed, and that it can be held liable in strict liability only for failing to warn of known or knowable defects, or failure to provide the proper packaging [*Brown v. Superior Court (1988) 44 Cal. 3d 1049, 1069, 245 Cal. Rptr. 412, 751 P.2d 470]* . Consequently, there is no strict liability cause of action under the market share theory for defective design under *Barker v. Lull Eng'g Co. (1978) 20 Cal. 3d 413, 143 Cal. Rptr. 225, 573 P.2d 443* [*Brown v. Superior Court (1988) 44 Cal. 3d 1049, 1065, 245 Cal. Rptr. 412, 751 P.2d 470]* .

Furthermore, the Court in *Brown* held that a plaintiff in a market share action may not prosecute a cause of action for

fraud or breach of warranty. The Court cited problems of proof on a fraud claim, and the inconsistency of a warranty claim with its holding regarding strict liability [*Brown v. Superior Court (1988) 44 Cal. 3d 1049, 1069-1072, 245 Cal. Rptr. 412, 751 P.2d 470* ; *see § 190.90[3][a]*]. It therefore seems that the plaintiff in a market theory action is limited to a cause of action in strict liability, confined to issues of proper warning or packaging.

[c] Related Points and Authorities

For forms of memoranda supporting a concurrent causes or concert of action theory, see Ch. 165, *Negligence* .

[d] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 190.86* and *190.87* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Manufacturers of Substantial Share of Market Liable Under Market Share Theory

In ***Sindell v. Abbott Labs.*** *(1980) 26 Cal. 3d 588, 163 Cal. Rptr. 132, 607 P.2d 924* , plaintiff developed cancer later in life as a result of the ingestion of diethylstilbesterol (DES) by her mother during her pregnancy with plaintiff for the purpose of preventing miscarriage. In 1971, the Food and Drug Administration ordered DES removed from the market. Plaintiff brought a class action suit against eleven drug companies that had manufactured DES. Because many years had elapsed between the time the drug was taken and the manifestation of plaintiff's injuries, plaintiff was unable to specifically identify which of the defendants was the manufacturer of the DES actually ingested by her mother.

The complaint stated causes of action in negligence, strict liability, violation of express and implied warranties, false and fraudulent representations, misbranding of drugs in violation of federal law, conspiracy, and "lack of consent." A separate cause of action alleged that defendants were jointly liable regardless of which particular brand of DES was ingested by plaintiff's mother, because defendants collaborated in marketing, promoting, and testing the drug, relied on each other's tests, and adhered to an industry-wide safety standard. Plaintiff alleged that DES was produced from a common and mutually agreed-on formula as a fungible drug interchangeable with other brands of the same product, that defendants knew or should have known that it was customary for doctors to prescribe the drug by its generic rather than its brand name, and that pharmacists filled prescriptions from whatever brand of the drug that happened to be in stock. Defendants demurred to the complaint, which was sustained without leave to amend. Plaintiff appealed with regard to five of the named defendants.

The Supreme Court reversed, holding that a new concept was warranted under which plaintiff could state a cause of action by shifting the burden of proof of responsibility to defendants. The Court set forth the market share theory, holding that when all defendants produced a drug from an identical formula, and the plaintiff cannot identify the manufacturer of the specific product through no fault of plaintiff's, the plaintiff may state a cause of action by joining the manufacturers of a substantial share of the market (611-612). The Court considered application of *Summers v. Tice (1943) 33 Cal. 2d 80, 199 P.2d 1* [*see* Ch. 165, *Negligence*], in which plaintiff was injured when two hunters negligently shot in his direction, and the Court held that under those or similar circumstances, the burden of proving responsibility shifts to the defendants because they are in a better position to offer evidence to determine which one caused the injury (*26 Cal. 3d 588, 599)* . However, application of *Summers* would be inappropriate to shift the burden of proof of causation to defendants in this case because there is a possibility that none of the named defendants produced the particular drug, and that the responsible manufacturer would escape liability (*26 Cal. 3d 588, 611)* . Rather, the Court approached the issue of causation from a different perspective. The Court found it reasonable to measure the likelihood that any of the defendants supplied the product that allegedly injured plaintiff by the percentage that the DES sold by each of them bears to the entire production of the drug sold by all for that purpose. According to plaintiff's briefs, one named company and five or six others produced 90 percent of the DES marketed. The Court noted

that if that fact were proved at trial, there is a corresponding likelihood that that comparative handful of producers manufactured the DES that caused plaintiff's injuries, and only a 10 percent likelihood that the offending producer would escape liability. It stated that if plaintiff joins in the action the manufacturers of a substantial share of the DES that her mother might have taken, the injustice of shifting the burden of proof to defendants to demonstrate that they could not have made the substance that injured plaintiff is significantly diminished. Although 75 to 80 percent of the market was suggested as a requirement, the Court held only that a "substantial percentage" is required (*26 Cal. 3d 588, 611-612)* . The presence in the action of a substantial share of the appropriate market also provides a ready means to apportion damages among the defendants. Each defendant will be held liable for the proportion of the judgment represented by its share of that market unless it demonstrates that it could not have made the product that caused plaintiff's injuries. Under this approach, each manufacturer's liability would approximate its responsibility for the injuries caused by its own products. The Court noted that some minor discrepancy in the correlation between market share and liability is inevitable, and that a defendant may possibly be held liable for a somewhat different percentage of the damage than its share of the appropriate market would justify. It is probably impossible, with the passage of time, to determine market share with mathematical exactitude. However, the Court decided that the difficulty of apportioning damages among the defendant producers in exact relation to their market share does not seriously militate against that rule (*26 Cal. 3d 588, 612-613)* . The Court noted that there are practical problems involved in defining the market and determining market share, but stated that these are largely matters of proof that cannot properly be determined at the pleading stage of proceedings. The Court rejected defendants' contention that liability in the absence of proof of responsibility for the injury would be unfair and contrary to public policy, holding that each manufacturer's liability for an injury would be approximately equivalent to the damage caused by the DES it manufactured (*26 Cal. 3d 588, 613)* .

[b] Each Defendant's Liability Proportional to Its Share of Market

The facts and procedural background of ***Brown v. Superior Court*** *(1988) 44 Cal. 3d 1049, 245 Cal. Rptr. 412, 751 P.2d 470* , are discussed in *190.88[3][a]*. The Court held that imposition of joint liability on defendants in a market share action would be inconsistent with the rationale underlying the market share doctrine, because it would allow any defendant to be held responsible for the entire judgment even though its market share may have been comparatively insignificant. Liability would be measured not by the likelihood of responsibility for the plaintiff's injuries but by the financial ability of a defendant to undertake payment of the entire judgment or a large portion of it. A defendant that paid a larger percentage of the judgment than warranted by its market share would have the burden of seeking indemnity from other defendants, and it would bear the loss if producers of DES that might have been held liable in the action were not amenable to suit, or if a codefendant was bankrupt. Therefore, the imposition of joint liability among defendant manufacturers in a market share action would frustrate *Sindell*'s goal of achieving a balance between the interests of DES plaintiffs and manufacturers of the drug (*44 Cal. 3d 1049, 1075)* .

Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 163 Cal. Rptr. 132, 607 P.2d 924 , is discussed in *§ 190.80[3][a]*. The Court held that in the application of the market share theory, each defendant will be held liable for the proportion of the judgment represented by its share of that market unless it demonstrates that it could not have made the product that caused plaintiff's injuries (*26 Cal. 3d 588, 612)* .

[c] Market Share Liability Applicable to Manufacturer of Product Used for Unintended Purpose but With Manufacturer's Knowledge and Acquiescence

In ***Miles Labs., Inc. v. Superior Court*** *(1982) 133 Cal. App. 3d 587, 184 Cal. Rptr. 98* , plaintiff's mother had ingested diethylstilbesterol (DES) while pregnant with plaintiff. As a result, plaintiff later was required to have her reproductive organs surgically removed. Plaintiff brought an action based in strict liability against numerous manufacturers of DES. One of the manufacturers moved for summary judgment, claiming that it had only manufactured and marketed DES for use in treating prostate cancer in males, not for use to prevent miscarriages. The trial court denied the motion, and that defendant sought a writ of mandate.

The court of appeal denied the petition, holding that the declaration in support of the motion was inadmissible and failed to establish that defendant's product was not prescribed by physicians for use to prevent miscarriages. Further, the court held that the declaration missed the point of plaintiff's allegation that defendant knew or should have known that its drug was being prescribed to prevent miscarriages, that defendant did nothing to prevent that use, and that by acquiescing in that use defendant had claimed for itself a share of the market (*133 Cal. App. 3d 587, 593-596)* .

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19-190 California Points & Authorities § 190.80A

§ 190.80A Supporting Contention That Defendant Is Person Who Is Subject to Products Liability--Immunity Statute Applied to Tobacco Only During Ten-Year Period

[1] Form Supporting Contention That Defendant Is Person Who Is Subject to Products Liability--Immunity Statute Applied to Tobacco Only During Ten-Year Period

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is liable for plaintiff's injuries caused by defendant's product.*]

DEFENDANT _____ [*specify manufacturer*] IS LIABLE FOR PLAINTIFF'S INJURIES BECAUSE THE IMMUNITY STATUTE, *CIVIL CODE SECTION 1714.45*, SHIELDS TOBACCO COMPANIES IN PRODUCTS LIABILITY ACTIONS ONLY FOR CONDUCT THEY ENGAGED IN FROM JANUARY 1, 1988, THROUGH DECEMBER 31, 1997.

A. Tobacco Companies' Conduct Outside Statutory Immunity Period Is Determined by General Tort Principles. Amendments to *Civil Code Section 1714.45* restored general tort principles that had governed liability of tobacco companies before the former version of that statute, and tobacco companies are not shielded from liability for conduct before and after the 10-year immunity period between January 1, 1988, and December 31, 1997 (*Naegele v. R.J. Reynolds Tobacco Co. (2002) 28 Cal. 4th 856, 867, 123 Cal. Rptr. 2d 61, 50 P.3d 769* ; *Myers v. Philip Morris Co. (2002) 28 Cal. 4th 828, 841-848, 123 Cal. Rptr. 2d 40, 50 P.3d 751* ; *Boeken v. Philip Morris Inc. (2005) 127 Cal. App. 4th 1640, 1670, 26 Cal. Rptr. 3d 638*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a cigarette manufacturer is liable under general tort principles for its conduct before January 1, 1988, and after December 31, 1997.

[3] Discussion of Authorities

NOTE:
Former Civ. Code § 1714.45(a) included tobacco among the common consumer products immunized from most products liability claims. *Civ. Code § 1714.45* was amended effective January 1, 1998, so that tobacco is no longer included in its list of "inherently unsafe" products. Amended § 1714.45(b) also expressly provides that it does not exempt the manufacture or sale of tobacco products by tobacco manufacturers and their successors in interests from products liability actions.

[a] Tobacco Companies' Conduct Outside Statutory Immunity Period Is Determined by General Tort Principles

Naegele v. R.J. Reynolds Tobacco Co. *(2002) 28 Cal. 4th 856, 123 Cal. Rptr. 2d 61, 50 P.3d 769* , is discussed in *§ 190.81[3][a]*.

In ***Myers v. Philip Morris Co.*** *(2002) 28 Cal. 4th 828, 123 Cal. Rptr. 2d 40, 50 P.3d 751* , the plaintiff, who smoked from 1956 to 1997 and lived in smoke-filled environments until August 1998, was diagnosed with lung cancer in April 1998. The Ninth Circuit certified to the California Supreme Court a question asking whether amended *Civ. Code § 1714.45* applies to a claim that accrued after the effective date but which is based on conduct that occurred prior to the effective date. Applying the presumption against retroactivity of a statute, the California Supreme Court concluded that the repeal statute is prospective only, and that the immunity statute continues to shield tobacco companies in products liability actions for conduct they engaged in during the ten-year period ending January 1, 1998. Neither the language of § 1714.45(f) nor its legislative history constituted "clear indication" that the repeal statute was to apply retroactively, and constitutional considerations also reinforced the Court's construction of the statute as prospective only. As for the tobacco companies' conduct before the immunity period, however, liability must be determined by applying general tort principles. Although the repeal statute has no retroactive effect, it nonetheless removed the protection that the immunity statute conferred on tobacco companies for their conduct occurring before the immunity statute's effective date. A retroactive effect is one that impairs rights that a party possessed when he or she acted, and the repeal statute did not did not impair any rights that the tobacco companies possessed before the immunity period. On the contrary, by abrogating the immunity statute, the repeal statute restored the law governing products liability for tobacco products to what it had been before January 1, 1998 (*28 Cal. 4th 828, 841-848)* .

Boeken v. Philip Morris Inc. *(2005) 127 Cal. App. 4th 1640, 26 Cal. Rptr. 3d 638* , is discussed in *§ 190.81[3][a]*.

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19-190 California Points & Authorities § 190.81

§ 190.81 Supporting Contention That Defendant Is Person Who Is Subject to Products Liability--Cigarette Manufacturer Manipulated Addictive Properties of Cigarettes Via Additives

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is liable for plaintiff's injuries caused by defendant's product.*]

DEFENDANT _____ [*specify manufacturer*] IS LIABLE FOR PLAINTIFF'S INJURIES BECAUSE BETWEEN JANUARY 1, 1988, AND JANUARY 1, 1998, IT MANIPULATED THE ADDICTIVE PROPERTIES OF ITS CIGARETTES BY _____ [*describe manipulation, e.g.,* ADDING AMMONIA TO THE NICOTINE DELIVERY SYSTEM], THEREBY INCREASING ADDICTION AND DEPENDENCE AND EXPOSING PLAINTIFF TO A RISK OTHER THAN THOSE INHERENT IN ITS TOBACCO PRODUCT.

Immunity Statute's Protection Does Not Extend to Allegations that Tobacco Companies Used Additives that Exposed Smokers to Dangers Beyond Those Commonly Associated With Cigarette Smoking. The immunity statute, former Civ. Code § 1714.45(a), does not bar claims that tobacco companies manipulated the addictive properties of cigarettes via additives and controlled nicotine delivery through adding ammonia (*Naegele v. R.J. Reynolds Tobacco Co. (2002) 28 Cal. 4th 856, 862-867, 123 Cal. Rptr. 2d 61, 50 P.3d 769* ; *Boeken v. Philip Morris Inc. (2005) 127 Cal. App. 4th 1640, 1670, 26 Cal. Rptr. 3d 638, 662)* .

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a cigarette manufacturer is liable for exposing the plaintiff to a risk other than those inherent in its product between January 1, 1988 and January 1, 1998.

[3] Discussion of Authorities

NOTE:
Former Civ. Code § 1714.45(a) included tobacco among the common consumer products immunized from most products liability claims. *Civ. Code § 1714.45* was amended effective January 1, 1998, so that tobacco is no longer included in its list of "inherently unsafe" products. Amended § 1714.45(b) also expressly provides that it does not exempt the manufacture or sale of tobacco products by tobacco manufacturers and their successors in interests from products liability actions.

[a] Immunity Statute's Protection Does Not Extend to Allegations that Tobacco Companies Used Additives that Exposed Smokers to Dangers Beyond Those Commonly Associated With Cigarette Smoking

In ***Naegele v. R.J. Reynolds Tobacco Co.*** *(2002) 28 Cal. 4th 856, 123 Cal. Rptr. 2d 61, 50 P.3d 769* , the court addressed what forms of conduct during the 10-year immunity period fall within the protection conferred by the immunity statute. The court concluded that the statute's protection does not extend to allegations that the tobacco companies used additives that exposed smokers to dangers beyond those commonly known to be associated with cigarette smoking. Looking to the history and purpose of the immunity statute, the court found that it was intended to protect tobacco companies from liability for products containing pure and unadulterated tobacco, when the claim seeks damages for injuries or deaths resulting from risks that are commonly known to be inherent in tobacco products. Thus, the immunity statute did not bar claims that the defendants manipulated the addictive properties of cigarettes via additives and controlled nicotine delivery through adding ammonia. However, allegations that the defendants increased the nicotine content of their cigarettes through blended or high-nicotine tobacco, and lied about the addictive nature of smoking, fell squarely within the reach of the immunity statute (*28 Cal. 4th 856, 862-867)* .

In **Boeken v. Philip Morris Inc. (**2005) *127 Cal. App. 4th 1640, 26 Cal. Rptr. 3d 638* , the plaintiff began smoking the defendant's cigarettes in 1957 and was diagnosed with lung cancer in 1999. He filed suit in 2000, alleging negligence, strict products liability, and fraud. The jury determined that the cigarettes were defective either in design or failure to warn. On appeal, the manufacturer argued that the trial court erred in instructing the jury with *BAJI No. 9.00.5* instead of 9.00.6, which was derived from the former version of Civ. Code § 1714.45. Before the defendant filed its reply brief, *Naegele* and *Myers* were published. In its supplemental opening brief, the defendant claimed that it had requested a jury instruction that would have limited its liability for any wrongs committed during the 10-year immunity period (proposed special instruction "O"). However, the court of appeal was unable to find in the record any ruling by the trial court rejecting this instruction. The inference from the record was that the defendant's proposed instructions was either withdrawn or never proffered to the court.

The court of appeal further noted that proposed instruction "O" was incomplete because it did not incorporate the term "unadulterated" within its language. It rejected the defendant's argument that the omission was so minor that the trial court was required to modify the instruction. There was ample evidence that the defendnat incorporated additives that not only increased the risk of harm from nicotine, but also created harmful effects not inherent in smoking unadulterated tobacco, and that these additives contributed to the plaintiff's lung cancer. Thus, even if the defendant did not withdraw proposed instruction "O," and the trial court did refuse to give it, the trial court did not err (*127 Cal. App. 4th 1640, 1670)* .

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19-190 California Points & Authorities § 190.81A

§ 190.81A Supporting Contention That Defendant Is Person Who Is Not Subject to Strict Liability--Concert of Action Not Applicable

[1] FORM Supporting Contention That Defendant Is Person Who Is Not Subject to Strict Liability--Concert of Action Not Applicable

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is not strictly liable for plaintiff's injuries caused by a product.*]

DEFENDANT _____ [*name*] IS NOT SUBJECT TO STRICT LIABILITY UNDER THE CONCERT OF ACTION THEORY BECAUSE DEFENDANT _____ [*name*] PLAYED NO ROLE IN THE DESIGN, MANUFACTURE, DISTRIBUTION, OR SALE OF _____ [*specify product*].

A. Allegations Regarding Defendants' Inadequate Testing and Warnings and Their Reliance on Each Others' Marketing Techniques Do Not Establish Concert of Action. Allegations that two or more defendants failed to test their product adequately or to warn of its dangers, relied on tests performed by each other, and took advantage of each others' promotional and marketing techniques, do not establish concert of action liability (*Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 605, 163 Cal. Rptr. 132, 607 P.2d 924*).

B. Concert of Action Is Limited to Conduct by Small Number of Individuals and Injury to Single Plaintiff, With Substantial Involvement by Defendant. Application of the concert of action doctrine is limited to conduct by a small number of individuals whose actions resulted in a tort against a single plaintiff, usually over a short span of time, and to a defendant that either directly participated in the acts that caused the damage, or encouraged or assisted the person that directly caused the injuries by participating in a joint activity (*Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 605, 163 Cal. Rptr. 132, 607 P.2d 924* ; *Chavers v. Gatke Corp. (2003) 107 Cal. App. 4th 606, 615-616, 131 Cal. Rptr. 2d 198*).

C. Application of Concert of Action to Common Industry Situations Would Expand Doctrine Beyond Its

Intended Scope. Application of the concert of action doctrine to common industry practices would expand the doctrine beyond its intended scope, subjecting virtually any manufacturer to liability for the defective products of an entire industry, even if that manufacturer did not make the injury-causing product (*Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 605, 163 Cal. Rptr. 132, 607 P.2d 924* ; *Cadlo v. Owens-Ill., Inc. (2004) 125 Cal. App. 4th 513, 522, 23 Cal. Rptr. 3d 1 , modified, 2004 Cal. App. LEXIS 2260*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the defendant is not subject to liability in a products liability action under the concert of action theory, because the defendant played no role in the design, manufacture, distribution, or sale of the offending product.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a demurrer or a motion for summary judgment on the issue that the defendant may not be subjected to strict liability.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should set forth the facts indicating that the defendant's connection to the product, if any, was limited to relying on other manufacturers' or suppliers' testing and promotion methods [*see, e.g., Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 605, 163 Cal. Rptr. 132, 607 P.2d 924]* .

[3] Discussion of Authorities

[a] Allegations Regarding Defendants' Inadequate Testing and Warnings and Their Reliance on Each Others' Marketing Techniques Do Not Establish Concert of Action

In ***Sindell v. Abbott Labs.*** *(1980) 26 Cal. 3d 588, 163 Cal. Rptr. 132, 607 P.2d 924* , the plaintiff brought an action against 11 drug companies that were engaged in the business of manufacturing, promoting, and marketing DES between 1941 and 1971. The trial court dismissed the action on the ground that the plaintiff did not, and stated that she could not, identify which defendant had manufactured the drug responsible for her injuries. One of the theories on which the plaintiff relied was concert of action [*see* Restatement (Second) of Torts § 876]. Concert of action requires a common design by two or more tortfeasors to commit a tortious act. The theory may be used to impose liability on a person who did not personally cause harm to the plaintiff, but whose advice or encouragement to act operated as moral support to a tortfeasor. If the act encouraged is known to be tortious, it has the same effect on the liability of the adviser as participation or physical assistance. If the encouragement or assistance is a substantial factor in causing the resulting tort, the one giving it is also a tortfeasor and is responsible for the consequences of the other's act [*see* Restatement (Second) of Torts § 876].

The California Supreme Court rejected application of concert of action liability. It held that allegations that the defendants failed to adequately test the drug or to give sufficient warning of its dangers and that they relied on the tests performed by one another and took advantage of each others' promotional techniques were insufficient to satisfy the requirements of the theory. The Court noted that this sort of conduct is common practice in industry, and held that application of the concert of action theory to this situation would render virtually any manufacturer liable for the defective products of an entire industry. The Court also noted that cases supporting application of concert of action usually involved conduct by a small number of individuals whose actions resulted in a tort against a single plaintiff, usually over a short span of time (*26 Cal. 3d 588, 605)* .

[b] Concert of Action Is Limited to Conduct by Small Number of Individuals and Injury to Single Plaintiff, With Substantial Involvement By Defendant

Sindell v. Abbott Labs. *(1980) 26 Cal. 3d 588, 605, 163 Cal. Rptr. 132, 607 P.2d 924* , is discussed in *§ 190.81A[3][a]*.

In ***Chavers v. Gatke Corp.*** *(2003) 107 Cal. App. 4th 606, 131 Cal. Rptr. 2d 198* , the plaintiff contended that his mesothelioma was caused by inhalation of asbestos particles while repairing friction brakes over the course of several years. The plaintiff was unable to prove that he had ever worked with brake shoes manufactured by the defendant. Nevertheless, he contended that the defendant was liable under the concert of action theory, because in the 1930s the defendant had contributed to financing a private research laboratory to study the health effects of asbestos. The laboratory eventually reported the hazards of asbestos to its manufacturers, but the information was not made public for many years. The court of appeal held that as a matter of law, the trial court did not err in refusing to instruct on the concert of action theory. Applying concert of action to these sorts of industrywide circumstances would expand the doctrine far beyond its intended scope, and would render virtually any manufacturer liable for the defective products of an entire industry. The court also expressed its constitutional concerns over application of the concert of action theory, pointing out that requiring a manufacturer to stand trial predicated solely on its exercise of its *First Amendment* rights could have a chilling effect on participation in trade group activity (*107 Cal. App. 4th 606, 615-616)* .

[c] Application of Concert of Action to Common Industry Situations Would Expand Doctrine Beyond Its Intended Scope

Sindell v. Abbott Labs. *(1980) 26 Cal. 3d 588, 605, 163 Cal. Rptr. 132, 607 P.2d 924* , is discussed in *§ 190.81A[3][a]*.

In ***Cadlo v. Owens-Ill., Inc****. (2004) 125 Cal. App. 4th 513, 23 Cal. Rptr. 3d 1 , modified, 2004 Cal. App. LEXIS 2260* , the plaintiff, while serving in the U.S. Navy, was exposed to asbestos insulation, some of which may have been Kaylo. Any Kaylo to which he was exposed was manufactured by Owens-Corning Fiberglas Corp. (OCF), which had purchased the defendant's Kaylo division seven years before the plaintiff's first exposure. The trial court sustained the defendant's demurrer to plaintiff's concert of action cause of action, and the court of appeal affirmed. Allegations that OCF, with the defendant's approval and assistance, marketed the product by falsely representing its safe use and concealing its hazards, did not support a concert of action cause of action, because the plaintiff's injuries were not caused by any asbestos-containing material manufactured by the defendant, and because the plaintiff did not allege that the defendant continued to encourage its successor to make false representations about the product (*125 Cal. App. 4th 513, 522)* .

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19-190 California Points & Authorities § 190.82

§ 190.82 Opposing Contention That Defendant Is Person Who Is Subject to Strict Liability--Defendant Played Random and Accidental Role in Distribution of Product

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product (see, e.g., § 190.84).*]

DEFENDANT _____ [*name*] IS NOT SUBJECT TO STRICT LIABILITY BECAUSE DEFENDANT PLAYED ONLY A RANDOM AND ACCIDENTAL ROLE IN THE DISTRIBUTION OF _____ [*specify product*].

A. Strict Liability Does Not Apply to Person Who Plays Random and Accidental Role in Distribution of Product. Strict liability may not be imposed against a person who plays a random and accidental role in the distribution of a product (*Tauber-Arons Auctioneers Co. v. Superior Court (1980) 101 Cal. App. 3d 268, 277, 284, 161 Cal. Rptr. 789*).

[*Optional*] **B. Auctioneer Plays Random and Accidental Role in Distribution of Product and Is Not Strictly Liable.** In auctioning a product that he or she has not modified, altered, inspected, tested, or operated, an auctioneer plays only a random and accidental role in the distribution of that product and may not be held strictly liable for injuries caused by that product (*Brejcha v. Wilson Mach., Inc. (1984) 160 Cal. App. 3d 630, 637-640, 206 Cal. Rptr. 688* ; *Tauber-Arons Auctioneers Co. v. Superior Court (1980) 101 Cal. App. 3d 268, 277, 284, 161 Cal. Rptr. 789*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a defendant is subject to a products

liability action. The ground of opposition set forth is that defendant, as an auctioneer or any other person of similar or parallel stance, played only a random and accidental role in the distribution of the product, and as such is not subject to strict liability.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a demurrer or a motion for summary judgment on the issue that defendant may not be subjected to strict liability.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should set forth the factors indicating that defendant's role in the production or distribution chain was merely random and accidental rather than substantial [*see, e.g., Tauber-Arons Auctioneers Co. v. Superior Court (1980) 101 Cal. App. 3d 268, 161 Cal. Rptr. 789* (auctioneer plays random and accidental role)].

In an appropriate case, these points and authorities may be submitted in opposition to the contentions supported by the points and *authorities in §§ 190.70 -190.79*.

[3] Discussion of Authorities

[a] Strict Liability Does Not Apply to Person Who Plays Random and Accidental Role in Distribution of Product

In ***Tauber-Arons Auctioneers Co. v. Superior Court*** *(1980) 101 Cal. App. 3d 268, 161 Cal. Rptr. 789* , plaintiff was injured while operating a planer. Plaintiff brought an action in strict liability against the auctioneer who had sold the planer. Plaintiff moved for a ruling that defendant auctioneer was a seller subject to strict liability. The trial court entered an order determining that the issue was without substantial controversy, and defendant auctioneer sought a writ of mandate.

The court of appeal issued a peremptory writ of mandate directing the trial court to vacate its order and to enter an order denying plaintiff's motion. The court held that an auctioneer, as a matter of public policy, should not be strictly liable for a design defect created by the original manufacturer of an item that is auctioned. The court reasoned that because defendant auctioneer had only played a random and accidental role in the distribution of the planer, auctioneer could not be subject to strict liability (*101 Cal. App. 3d 268, 273-284)* .

[b] Auctioneer Plays Random and Accidental Role in Distribution of Product and Is Not Strictly Liable

In ***Brejcha v. Wilson Mach., Inc.*** *(1984) 160 Cal. App. 3d 630, 206 Cal. Rptr. 688* , plaintiff was injured while operating a rolling machine purchased from defendant at an auction. Plaintiff brought an action in strict liability, negligence, and warranty against defendant auctioneer. Defendant moved for summary judgment, which was granted by the trial court. Plaintiff appealed.

The court of appeal affirmed, holding that defendant was not subject to liability on any of the three theories set forth by plaintiff. In regard to the strict liability cause of action, the court held that, as a matter of law, defendant could not be held liable because defendant had sold the product at auction without warranty and "as is, where is," meaning that the item had not been modified, altered, inspected, tested, or operated by the auctioneer. As such, defendant auctioneer had only played a random and accidental role in the distribution of the product and could not be held strictly liable for injuries caused by the product (*160 Cal. App. 3d 630, 637-640)* .

Tauber-Arons Auctioneers Co. v. Superior Court *(1980) 101 Cal. App. 3d 268, 161 Cal. Rptr. 789* , is discussed in *§ 190.82[3][a]*.

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19-190 California Points & Authorities § 190.83

§ 190.83 Opposing Contention That Defendant Is Person Who Is Subject to Strict Liability--Defendant Played No Role in Design, Manufacture, Distribution, or Marketing of Product

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is strictly liable for plaintiff's injuries caused by a defective product (see, e.g., § 190.82).*]

DEFENDANT _____ [*name*] IS NOT SUBJECT TO STRICT LIABILITY BECAUSE DEFENDANT PLAYED NO ROLE IN THE DESIGN, MANUFACTURE, DISTRIBUTION, OR MARKETING OF THE PRODUCT THAT INJURED PLAINTIFF.

[*or*]

DEFENDANT _____ [*name*] IS NOT SUBJECT TO STRICT LIABILITY BECAUSE DEFENDANT WAS NOT PART OF THE CHAIN OF DISTRIBUTION OF THE ALLEGEDLY DEFECTIVE PRODUCT.

A. Defendant Played No Role In Design, Manufacture, Distribution, Or Marketing of Product That Injured Plaintiff. To hold a defendant liable for injuries caused by a product, the plaintiff must show, at least, that the plaintiff was exposed to the defendant's product (*Cadlo v. Owens-Ill., Inc. (2004) 125 Cal. App. 4th 513, 521-522, 23 Cal. Rptr. 3d 1*).

B. Defendant's Historic Role in Development of Product Did Not Provide Basis for Products Liability Claims Against It. A defendant's historic role in the design, manufacture, and marketing of an asbestos product does not support a plaintiff's liability claims against it in the absence of any allegation or evidence that defendant had actual

connection with the design, manufacture, or distribution of the asbestos product to which the plaintiff was exposed (*Cadlo v. Owens-Ill., Inc. (2004) 125 Cal. App. 4th 513, 521-522, 23 Cal. Rptr. 3d 1*).

C. Defendant Who Was Not Part of Product's Chain of Distribution Cannot Be Held Strictly Liable. A defendant cannot be held strictly liable if it was not part of the chain of distribution of the allegedly defective product that injured the plaintiff (*Taylor v. Elliott Turbomachinery Co. (2009) 171 Cal. App. 4th 564, 2009 Cal. App. LEXIS 214, at *24)* .

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a defendant is subject to a products liability action. The ground of opposition set forth is that the defendant had no connection with the design, manufacture, or distribution of the product to which the plaintiff was exposed.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a demurrer or a motion for summary judgment on the issue that defendant may not be subjected to strict liability.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should set forth facts showing that the product that caused the plaintiff's injuries was not manufactured, designed, or distributed by the defendant because the plaintiff's first contact with the allegedly defective product occurred several years after the defendant sold the product line or otherwise ceased all affiliation with the product.

[3] Discussion of Authorities

[a] Defendant Played No Role In Design, Manufacture, Distribution, Or Marketing of Product That Injured Plaintiff

In ***Cadlo v. Owens-Ill., Inc.*** *(2004) 125 Cal. App. 4th 513, 521-522, 23 Cal. Rptr. 3d 1 (2004)* , the defendant developed the asbestos product Kaylo in the 1930s and sold its Kaylo division to OCF in 1958. The plaintiff was first exposed to Kaylo in 1965, seven years after the defendant had ceased all affiliation with Kaylo. Any Kaylo with which the plaintiff came into contact was manufactured by OCF, not by the defendant. The plaintiff was diagnosed with mesothelioma in 2002 and brought a products liability action against the defendant. The trial court granted judgment as a matter of law in favor of the defendant, and the plaintiff appealed.

The court of appeal affirmed. The court held that to establish a defendant's liability for injuries caused by a product, the plaintiff must show, at least, that he or she was exposed to the defendant's product. In this case, it was undisputed that the plaintiff could not have come into contact with a product designed, manufactured, distributed, or marketed, because the plaintiff's first exposure to Kaylo was 1965, seven years after the defendant had ceased all affiliation with this product (*125 Cal. App. 4th 513, 523)* .

[b] Defendant's Historic Role in Development of Product Did Not Provide Basis for Products Liability Claims Against It

The facts and procedural background of ***Cadlo v. Owens-Ill., Inc.*** *(2004) 125 Cal. App. 4th 513, 521-522, 23 Cal. Rptr. 3d 1 (2004)* , are discussed in *§ 190.83[3][a]*. The court of appeal held that the defendant's historic role in the design, manufacture, and marketing of Kaylo, the allegedly defective product, did not support the plaintiff's products liability claims in the absence of any allegation or evidence that the defendant had actual connection with the design,

manufacture, or distribution of the product to which the plaintiff was exposed. The court distinguished *Fortman v. Hemco, Inc. (1989) 211 Cal. App. 3d 241, 259 Cal. Rptr. 311* , which held that an entity that was part of the "overall manufacturing enterprise" was subject to strict liability. In this case, although the defendant may have designed the original Kaylo, the plaintiff offered no evidence that the defendant was the designer of the Kaylo sold by another entity during the time of the plaintiff's exposure. Nor was there evidence that the defendant was the designer of an integral element in the manufacture of another product, by a different company, without which the Kaylo sold by this other entity could not have been produced (*125 Cal. App. 4th 513, 524-525)* .

[c] Defendant Who Was Not Part of Product's Chain of Distribution Cannot Be Held Strictly Liable

In *Taylor v. Elliott Turbomachinery Co. (2009) 171 Cal. App. 4th 564* , the decedent was exposed to asbestos-containing products while serving in the Navy. The defendants supplied the Navy with equipment used in the ship's propulsion system, some of which included asbestos-containing parts. The asbestos-containing parts to which the decedent was exposed were manufactured and supplied by third parties. The plaintiff nevertheless alleged that defendants breached their duty to warn the decedent of the risks inherent in the asbestos-containing materials supplied by other manufacturers. The trial court granted defendants' motions for summary judgment. The court of appeal affirmed. The defendants could not be held strictly liable because they were not part of the chain of distribution of the asbestos-containing parts to which the decedent was exposed (*171 Cal. App. 4th 564, 2009 Cal. App. LEXIS 214, at *22-*24)* .

[4] Additional Authorities

[a] Defendant Played No Role In Design, Manufacture, Distribution, or Marketing of Product That Injured Plaintiff.

In *Dicola v. White Bros. Performance Prods., Inc. (2008) 158 Cal. App. 4th 666, 69 Cal. Rptr. 3d 888* , a motorcycle driver and his wife were killed while riding on a motorcycle the driver built himself. Plaintiffs brought a wrongful death and products liability action alleging that the accident was caused when the motorcycle's side stand failed to retract upon coming into contact with the ground. The trial court granted summary judgment in favor the defendants on product identification grounds. On appeal, the plaintiffs contended that the defendants did not meet their initial summary judgment burden of showing that they did not manufacture or distribute the side stand.

The court of appeal affirmed, holding that the plaintiffs did not adequately preserve this argument on appeal. However, it would have rejected plaintiffs' arguments even if it had considered them on the merits. The defendants' expert evidence constituted sufficient prima facie evidence that they did not manufacture or distribute the side stand, and plaintiffs' evidence was insufficient to raise a triable issue of fact (*158 Cal. App. 4th 666, 678)* .

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19-190 California Points & Authorities § 190.84

§ 190.84 Opposing Contention That Defendant Is Person Who Is Subject to Strict Liability--Used Goods Dealer

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be com bined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product (see, e.g., § 190.82).*]

DEFENDANT _____ [*name*] IS NOT SUBJECT TO STRICT LIABILITY BECAUSE DEFENDANT SOLD THE _____ [*specify product*] IN THE CAPACITY OF A USED GOODS DEALER.

A. Used Goods Dealer Is Not Subject to Strict Liability. A used goods dealer may not be held strictly liable for damages or injuries from a defective used product that he or she buys and sells in the ordinary course of business without handling, modifying, repairing, or reconditioning (*Arriaga v. Citicapital Commercial Corp. (2008) 167 Cal. App. 4th 1527, 1540, 85 Cal. Rptr. 3d 143* ; *Wilkinson v. Hicks (1981) 126 Cal. App. 3d 515, 521, 179 Cal. Rptr. 5* ; *LaRosa v. Superior Court (1981) 122 Cal. App. 3d 741, 753-754, 176 Cal. Rptr. 224*).

[*Optional*] **B. Used Goods Dealer Is Not Required to Inspect or Repair Used Good.** A dealer in used goods may not be held strictly liable for failing to dismantle, inspect for latent defects, and repair or recondition the used good that he or she will sell, even if the dealer has the facilities and employees to do so. The dealer is not an insurer against defects that came into existence after the original chain of distribution and while the product was under the control of previous consumers (*Wilkinson v. Hicks (1981) 126 Cal. App. 3d 515, 521, 179 Cal. Rptr. 5*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a defendant is subject to a products

liability action. The ground of opposition set forth is that defendant is a used goods dealer and is not subject to strict liability for injuries from a used good that he or she sells.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a demurrer or a motion for summary judgment on the issue that defendant may not be subjected to strict liability.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should describe defendant's business as dealing in used goods, and should indicate that defendant did not repair, recondition, or otherwise handle the used good before its sale [*see, e.g., Wilkinson v. Hicks (1981) 126 Cal. App. 3d 515, 179 Cal. Rptr. 5* (used punch press sold by used goods dealer without repair or reconditioning)].

In an appropriate case, these points and authorities may be submitted in opposition to the contentions supported by the points and *authorities in §§ 190.70 -190.79*.

[3] Discussion of Authorities

[a] Used Goods Dealer Is Not Subject to Strict Liability

In ***Arriaga v. Citicapital Commercial Corp.*** *(2008) 167 Cal. App. 4th 1527, 85 Cal. Rptr. 3d 143* , the plaintiff's finger became entangled in a glue spreading machine from which a guard had been removed. The defendant's predecessor had financed the glue spreader through a finance lease for the buyer. It purchased the machine for, then rented it to, the buyer, but did not select, manufacture, or supply the machine. The buyer eventually sold the machine to plaintiff's employer.

The trial court granted the defendant's motion for summary judgment, holding that even assuming that defendant was a seller and not merely a financing company, it was not subject to strict liability. The court of appeal affirmed. Even if defendant was considered to be the seller of the glue spreading machine, its role was limited to selling a used product to which it had no connection other than having obtained bare legal title through the financing mechanism. As previous courts of appeal have held, a seller of used machinery is not strictly liable in tort unless it rebuilds the product and thus assumes a role analogous to that of a manufacturer. The risk-reduction rationale supporting the imposition of strict liability on retailers (e.g., their ability to exert pressure on manufacturers to ensure the safety of products) is inapplicable to used goods dealers (*Arriaga v. Citicapital Commercial Corp. (2008) 167 Cal. App. 4th 1527, 1540-1541, 85 Cal. Rptr. 3d 143*).

In ***Wilkinson v. Hicks*** *(1981) 126 Cal. App. 3d 515, 179 Cal. Rptr. 5* , plaintiff's hand was crushed while using a punch press sold by defendant, a dealer in used machinery, to plaintiff's employer. Plaintiff brought an action based in strict liability, negligence, and warranty against defendant. The trial court refused to submit the strict liability cause of action to the jury, and the jury returned a verdict for defendant on the negligence and warranty causes of action. Plaintiff appealed.

The court of appeal affirmed, holding that defendant could not be held strictly liable because defendant was a dealer in used machinery. The court followed the earlier decision of *LaRosa v. Superior Court*.

In ***LaRosa v. Superior Court*** *(1981) 122 Cal. App. 3d 741, 176 Cal. Rptr. 224* , plaintiff was injured while using a malfunctioning punch press. Plaintiff brought an action in strict liability and negligence against the used goods dealer from whom plaintiff's employer had purchased the press. Defendant moved for summary judgment. The trial court granted summary judgment on the strict liability theory, but denied summary judgment on the negligence theory.

Plaintiff sought a writ of prohibition or mandate to vacate the order granting partial summary judgment.

The court of appeal, after issuing an alternative writ of mandate, discharged the alternative writ and denied relief to plaintiff. The court ruled that as a used goods dealer, defendant was not subject to an action based in strict liability. The court reasoned that a used goods dealer was independent of the initial marketing and distribution enterprise, and when a plaintiff has not shown that the dealer caused or created the defect in the used product sold in the regular course of business, the dealer should not be held strictly liable for injury caused by the product. Because the dealer is not integrally involved in the initial manufacturing-marketing-distributing process, the dealer lacks the initial retailer's or distributor's ability to join other integral members of the initial process, and cannot require the retailer or distributor to adjust the costs of protecting injured parties. Additionally, the used goods dealer does not have a relationship with the unidentifiable prior misuser of the product that is akin to the relationship between an initial retailer and a manufacturer, thus the usual policy considerations behind strict liability do not apply (*122 Cal. App. 3d 741, 746-761)* .

[b] Used Goods Dealer Is Not Required to Inspect or Repair Used Good

The facts and procedural background of ***Wilkinson v. Hicks*** *(1981) 126 Cal. App. 3d 515, 179 Cal. Rptr. 5* , are discussed in *§ 190.84[3][a]*. In affirming the judgment, the court of appeal was not swayed by plaintiff's claims that defendant failed to dismantle, inspect for latent defects, and repair or recondition the punch press, although defendant had the facilities and employees to do so. The court held that defendant had no duty to dismantle, inspect, repair, or recondition the used goods that were sold, and that to impose strict liability for failure to routinely perform such tasks would effect a radical change in the used product market that the court declined to impose (*126 Cal. App. 3d 515, 519-522)* .

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19-190 California Points & Authorities § 190.85

§ 190.85 Opposing Contention That Defendant Is Person Who Is Subject to Strict Liability--Defendant Is Manufacturer of Nondefective Component Part of Defective Product

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product (see, e.g., § 190.169).*]

EVEN IF THE _____ [*specify product*] WERE FOUND TO BE DEFECTIVE, DEFENDANT _____ [*name*] IS NOT SUBJECT TO STRICT LIABILITY BECAUSE DEFENDANT MERELY SUPPLIED A NONDEFECTIVE COMPONENT PART AND DEFENDANT HAD NO ROLE IN DESIGNING THE FINISHED _____ [*specify product*].

A. Manufacturer of Nondefective Component Part Is Not Strictly Liable for Defective Product. A component part manufacturer may not be held strictly liable for injuries sustained from a defective product of which the component is a part, if the component part had no defect at the time it left the component part manufacturer's possession, and if the component part manufacturer had no role in designing the finished product (*Taylor v. Elliott Turbomachinery Co. (2009) 171 Cal. App. 4th 564, 2009 Cal. App. LEXIS 214, at *35* ; *Lee v. Electric Motor Div. (1985) 169 Cal. App. 3d 375, 386-387, 215 Cal. Rptr. 195* ; *Wiler v. Firestone Tire & Rubber Co. (1979) 95 Cal. App. 3d 621, 629, 157 Cal. Rptr. 248*).

B. Strict Liability for Defective Product Lies With Manufacturer of Finished Product and Not With Manufacturer of Nondefective Component Part. A component part manufacturer may reasonably rely on the manufacturer who designs and produces a finished product, of which the component is a part, to take appropriate measures to insure proper design and installation of the component part (*Lee v. Electric Motor Div. (1985) 169 Cal. App. 3d 375, 386-387, 215 Cal. Rptr. 195* ; *Wiler v. Firestone Tire & Rubber Co. (1979) 95 Cal. App. 3d 621, 629, 157 Cal. Rptr. 248*). Accordingly, if the component part is not defective but the finished product is defective, responsibility

for injuries from the finished product rests with the manufacturer of the finished product and not with the component part manufacturer (*Wiler v. Firestone Tire & Rubber Co. (1979) 95 Cal. App. 3d 621, 629-630, 157 Cal. Rptr. 248*).

[*Optional*] **C. Manufacturer of Noncomponent Part Has No Duty to Investigate Safety of Finished Product.** The manufacturer of a nondefective component part has no duty to investigate the safety of a finished product, of which the component is a part, that was solely designed and manufactured by another manufacturer (*Lee v. Electric Motor Div. (1985) 169 Cal. App. 3d 375, 387, 215 Cal. Rptr. 195*).

[*Optional*] **D. Fact that Manufacturer Produced Component Pursuant to Specifications Does Not Deprive It of Defense.** The fact that a manufacturer produced its component part pursuant to specifications, thereby arguably limiting the part's use, does not deprive the manufacturer of the component part defense (*Taylor v. Elliott Turbomachinery Co. (2009) 171 Cal. App. 4th 564, 2009 Cal. App. LEXIS 214, at *36-*37)* .

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a defendant is subject to a products liability action. The ground of opposition set forth is that defendant is not strictly liable because defendant merely manufactured a nondefective component part that was installed in the finished product by the manufacturer of the finished product.

If counsel seeks to oppose a contention that a component part manufacturer had a duty to warn of the dangers of the finished product, counsel should combine the points and authorities with those *set forth in § 190.169*. Counsel may also combine the points and authorities with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a demurrer or a motion for summary judgment on the issue that defendant may not be subjected to strict liability.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should state facts showing that the component part was not defective when it left defendant's possession, and that defendant had no control over the design of the ultimate product and installation of the component [*see, e.g.,* *Lee v. Electric Motor Div. (1985) 169 Cal. App. 3d 375, 215 Cal. Rptr. 195* (nondefective motor installed in defective meat grinder); *Wiler v. Firestone Tire & Rubber Co. (1979) 95 Cal. App. 3d 621, 157 Cal. Rptr. 248* (installation of defective valve system by automobile manufacturer on nondefective tire)].

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities may be submitted in opposition to the contentions supported by the points and *authorities in §§ 190.70 -190.79*.

[3] Discussion of Authorities

[a] Manufacturer of Nondefective Component Part Is Not Strictly Liable for Defective Product

In ***Taylor v. Elliott Turbomachinery Co.*** *(2009) 171 Cal. App. 4th 564* , the decedent was exposed to asbestos-containing products while serving in the Navy. The defendants supplied the Navy with equipment used in the ship's propulsion system, some of which included asbestos-containing parts. The asbestos-containing parts to which the decedent was exposed were manufactured and supplied by third parties. The plaintiff nevertheless alleged that defendants breached their duty to warn the decedent of the risks inherent in the asbestos-containing materials supplied by other manufacturers. The trial court granted defendants' motions for summary judgment. The court of appeal

affirmed. Under the component parts doctrine, the component part manufacturer is not liable for injuries caused by the finished product unless the component itself was defective at the time it left the manufacturer. The court rejected the plaintiff's argument that the component parts doctrine applies only to manufacturers of fungible, multi-use components. The fact that the defendants manufactured their equipment to Navy specifications did not deprive them of the component parts defense. Here, defendants were not liable because defendants' equipment did not release the asbestos that caused the decedent's injuries, and because they did not participate in the integration of their components into the design of the propulsion system (*171 Cal. App. 4th 564, 2009 Cal. App. LEXIS 214, at *35-*39)* .

In ***Lee v. Electric Motor Div.*** *(1985) 169 Cal. App. 3d 375, 215 Cal. Rptr. 195* , plaintiff was injured when her hand became caught in a meat grinder and its motor did not automatically shut off. Plaintiff brought an action in strict liability against the manufacturer of a motor used as a component part in the meat grinder. Plaintiff alleged that the product was defective because it had a manufacturing defect, a design defect, and no warning that the motor would not stop immediately. Plaintiff failed, however, to show that the motor came off the assembly line in a substandard condition. Plaintiff also did not sufficiently show that defendant had any role in the design of the meat grinder; instead, defendant had only been told to supply the grinder manufacturer with a standard motor. The trial court granted defendant's motion for summary judgment, and plaintiff appealed.

The court of appeal affirmed the judgment, holding first that plaintiff had failed to show a manufacturing defect. The court also held that the component manufacturer had no duty to warn that the motor did not stop immediately; rather, that duty rested with the manufacturer of the grinder, who was solely responsible for the packaging, labeling, and marketing of the final product. Most importantly, however, the court held that the component manufacturer could not be held liable for a defect in the completed product. The court reasoned that strict liability should not be imposed because defendant played no role in designing the grinder and had no duty to insure that the grinder's manufacturer properly installed the motor manufactured by defendant. The court also explained that defendant, as a manufacturer of a nondefective component part, had no duty to investigate the safety of the finished product that was solely designed and manufactured by another manufacturer (*169 Cal. App. 3d 375, 383-390)* .

In ***Wiler v. Firestone Tire & Rubber Co.*** *(1979) 95 Cal. App. 3d 621, 157 Cal. Rptr. 248* , plaintiff's decedent was killed in an automobile accident after a tire on the automobile in which decedent was riding deflated. Plaintiff brought an action in strict liability against the manufacturer of the tire. Defendant moved for summary judgment on the grounds that the only defect in the tire was from a valve stem manufactured and attached to it by the automobile manufacturer rather than defendant. The motion was granted and plaintiff appealed.

The court of appeal affirmed the judgment, holding that defendant may not be held strictly liable for a defect in a completed product when defendant merely manufactured a nondefective component part that was installed in that product. The court explained that, in dealing with an automotive manufacturer that designs and produces automotive products, defendant tire manufacturer could reasonably believe that the automobile manufacturer would take appropriate measures to insure proper design and installation of the valve stem. Thus, the court held that responsibility for the defective valve, as distinguished from the tire, rested with the automobile manufacturer and not with defendant tire manufacturer (*95 Cal. App. 3d 621, 629-630)* .

[b] Strict Liability for Defective Product Lies With Manufacturer of Finished Product and Not With Manufacturer of Nondefective Component Part

Lee v. Electric Motor Div. *(1985) 169 Cal. App. 3d 375, 215 Cal. Rptr. 195* , and ***Wiler v. Firestone Tire & Rubber Co.*** *(1979) 95 Cal. App. 3d 621 , 157 Cal. Rptr. 248* , are discussed in *§ 190.85[3][a]*.

[c] Manufacturer of Noncomponent Part Has No Duty to Investigate Safety of Finished Product

Lee v. Electric Motor Div. *(1985) 169 Cal. App. 3d 375, 215 Cal. Rptr. 195* , is discussed in *§ 190.85[3][a]*.

[d] Fact that Manufacturer Produced Component Pursuant to Specifications Does Not Deprive It of Defense

Taylor v. Elliott Turbomachinery Co. *(2009) 171 Cal. App. 4th 564* , is discussed in *§ 190.85[3][a]*.

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19-190 California Points & Authorities § 190.86

§ 190.86 Opposing Contention That Defendant Is Person Who Is Subject to Strict Liability--Identity of Actual Manufacturer Unknown--Market Share Liability Not Applicable to Manufacturing Defect

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product (see, e.g., § 190.226).*]

DEFENDANT _____ [*name*] IS NOT SUBJECT TO STRICT LIABILITY BECAUSE PLAINTIFF CANNOT PROVE THAT DEFENDANT'S PRODUCT CAUSED PLAINTIFF'S INJURIES AND PLAINTIFF ALLEGES A MANUFACTURING RATHER THAN DESIGN DEFECT.

Market Share Liability Theory Does Not Apply to Manufacturing Defect. The market share liability theory, under which each manufacturer of a substantial share of the market of a product becomes proportionately liable for injuries sustained from a defective product unless that manufacturer proves that its product could not possibly have caused the injuries, is not applicable in a case in which the plaintiff was injured by a product that, although individually defective in its manufacture, in general is not intrinsically defective for the purpose for which it was used. Thus, when a product has a manufacturing defect but not a design defect, a manufacturer may not be held strictly liable for injuries caused by the product if the plaintiff cannot prove that the manufacturer was the manufacturer of the product that injured the plaintiff (*Sheffield v. Eli Lilly & Co. (1983) 144 Cal. App. 3d 583, 593-594, 192 Cal. Rptr. 870*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a defendant is subject to a products liability action. The ground of opposition set forth is that because plaintiff has only alleged a manufacturing rather than a design defect in the product, and because a market share liability theory does not apply to such a case, defendant is not

strictly liable because plaintiff cannot prove that the product that caused plaintiff's injuries was in fact manufactured by defendant.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a demurrer or a motion for summary judgment on the issue that defendant may not be subjected to strict liability.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should state facts showing that the product had no design defect, and that plaintiff is unable to prove that defendant manufactured the product that actually injured plaintiff [*see, e.g., Sheffield v. Eli Lilly & Co. (1983) 144 Cal. App. 3d 583, 192 Cal. Rptr. 870* (deviant antipolio vaccine that was not intrinsically defective)].

In an appropriate case, these points and authorities may be submitted in opposition to the contentions supported by the points and *authorities in § 190.80*.

[3] Discussion of Authorities

[a] Market Share Liability Theory Does Not Apply to Manufacturing Defect

In ***Sheffield v. Eli Lilly & Co.*** *(1983) 144 Cal. App. 3d 583, 192 Cal. Rptr. 870* , plaintiff developed polio after having received antipolio vaccinations in 1956 and 1957. The antipolio vaccine that was administered in general at that time was not intrinsically defective; however, plaintiff was administered a vaccine that was individually deviant. Years later, plaintiff brought an action in strict liability against the five manufacturers who had manufactured all of the antipolio vaccine that was administered during both 1956 and 1957. Because plaintiff could not identify the specific manufacturer of the vaccine that plaintiff actually received, defendants moved for summary judgment. The trial court granted the motion, and plaintiff appealed.

The court of appeal affirmed, holding that the market share liability theory announced in *Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 611-612, 163 Cal. Rptr. 132, 607 P.2d 924* [*see § 190.80[3][a]*], did not apply to a manufacturing defect case. The court held that it would not be fair to shift the burden of proof of causation to defendants when the vaccine generally produced on the market was not defective, but that only the individual vaccine with which plaintiff had been inoculated contained a manufacturing defect. Unlike in *Sindell*, plaintiff's delay in discovering causation was in no way related to the nature of the defective product or any other act or omission of the unknown tortfeasor. More importantly, the deep pocket theory that all victims of a defective product should be compensated from an industry-wide fund would not be served because its indiscriminate application, as in this case, would penalize the careful and careless producer alike, and would fail to act as a deterrent to the careless producer or provide an incentive to product safety industry-wide. Even worse, application of the *Sindell* theory in a manufacturing defect case might result in keeping beneficial but potentially dangerous products off the market, inhibit drug research and development, and unreasonably raise the cost of health care. Finally, application of the doctrine would wrongly punish drug manufacturers who have not produced a defective product, while giving the tortfeasor who manufactured the defective vaccine an undeserved contribution (*144 Cal. App. 3d 583, 592-599)* .

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19-190 California Points & Authorities § 190.87

§ 190.87 Opposing Contention That Defendant Is Subject to Strict Liability--Identity of Actual Manufacturer Unknown--Injury Not Caused by Fungible Product

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It may be combined with other appropriate forms of memorandum or points and authorities opposing the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's products.*]

DEFENDANT _____ [*name*] IS NOT SUBJECT TO STRICT LIABILITY UNDER THE MARKET SHARE THEORY BECAUSE PLAINTIFF HAS NOT ALLEGED THAT INJURY WAS CAUSED BY A FUNGIBLE PRODUCT.

Market Share Liability Does Not Apply When Injury Not Caused by Fungible Product. A plaintiff must allege that his or her injury was caused by a fungible product in order to state a cause of action under the market share theory of liability (*Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 611, 163 Cal. Rptr. 132, 607 P.2d 924* ; *Setliff v. E.I. Du Pont de Nemours & Co. (1995) 32 Cal. App. 4th 1525, 1537, 38 Cal. Rptr. 2d 763*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a defendant was is subject to a strict products liability action on a market share liability theory. The ground for the contention is that the manufacturers did not make fungible goods.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to oppose strict liability under a market share theory. It may be used in connection with a pretrial motion, such as a demurrer, or motion for summary judgment. It may also be used in a trial or appellate brief.

In an appropriate case, this form may be submitted in opposition to the contention supported by the points and *authorities in § 190.80*.

[3] Discussion of Authorities

[a] Market Share Liability Does Not Apply When Injury Not Caused by Fungible Product

Sindell v. Abbott Labs. *(1980) 26 Cal. 3d 588, 163 Cal. Rptr. 132, 607 P.2d 924* , is discussed in *§ 190.80[3][a]*. In recognizing a new theory of liability known as market share liability, the California Supreme Court applied the theory to fungible goods--that is, a drug produced from an identical formula (*26 Cal. 3d 588, 611)* .

In ***Setliff v. E.I. Du Pont de Nemours & Co.*** *(1995) 32 Cal. App. 4th 1525, 1537, 38 Cal. Rptr. 2d 763* , the plaintiff brought a strict liability action under a market share theory against 40 named defendants, manufacturers of paints, solvents, strippers, and glue products, alleging that he was injured by these products while he had been an employee at a paint store. Nonsettling defendants demurred to the complaint, arguing that the plaintiff had failed to state a cause of action under any nonidentification theory of liability. The trial court agreed and granted judgments of dismissal in their favor.

The court of appeal affirmed, holding that allegations of "fungibility" are a prerequisite to the imposition of market share liability. In this case, the plaintiff merely identified the product as "paints, solvents, strippers and glue products" without identifying a common toxic chemical ingredient or other "fungible" agent common to all the products (*32 Cal. App. 4th 1525, 1537)* .

[4] Additional Authorities

[a] Market Share Liability Does Not Apply When Injury Not Caused by Fungible Product

In *Ferris v. Gatke Corp. (2003) 107 Cal. App. 4th 1211, 132 Cal. Rptr. 2d 819* , the decedent was exposed to asbestos while he was employed in naval shipyards, while he was employed as an upholsterer, and when he replaced the friction brake shoes on his and his neighbors' automobiles for nearly 40 years. The trial court granted defense motions in limine to exclude evidence supporting the theory of market share liability, and the court of appeal affirmed. Observing that it is unclear whether the "fungibility" exception set forth in *Wheeler v. Raybestos-Manhattan* [*Wheeler v. Raybestos-Manhattan (1992) 8 Cal. App. 4th 1152, 1155-1158, 11 Cal. Rptr. 2d 109]* remains viable in the 21st century, the court did not decide the validity of *Wheeler* because it had no application to this case. The decedent had been exposed to asbestos from several sources, and he was unable to identify two manufacturers to whose products he was exposed (*107 Cal. App. 4th 1211, 1220-1223)* .

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19-190 California Points & Authorities § 190.88

§ 190.88 Opposing Contention That Defendant Is Person Who Is Subject to Strict Liability--Identity of Actual Manufacturer Unknown--Defendants Not Subject to Joint and Several Liability

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product.*]

DEFENDANT _____ [*name*] IS NOT SUBJECT TO JOINT AND SEVERAL LIABILITY BECAUSE PLAINTIFF BROUGHT THE ACTION UNDER THE MARKET SHARE THEORY, AND DEFENDANT _____ [*name*] IS LIABLE ONLY FOR THAT PROPORTION OF THE JUDGMENT REPRESENTED BY ITS SHARE OF THE MARKET.

Joint and Several Liability Inapplicable to Market Share Theory Actions. Defendants in a market share theory action are not subject to joint and several liability (*Brown v. Superior Court (1988) 44 Cal. 3d 1049, 1074-1075*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a defendant that was joined with other defendants under a market share theory action is subject to joint and several liability [*see Brown v. Superior Court (1988) 44 Cal. 3d 1049, 1074-1075, 245 Cal. Rptr. 412, 751 P.2d 470]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary adjudication on the issue whether defendant is subject to joint and several liability. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. For example, counsel should state facts showing that the action was brought under the market share theory, and that each defendant is therefore liable only for that proportion of the judgment represented by its share of the market.

In an appropriate case, these points and authorities may be submitted in opposition to the contentions supported by the points and *authorities in § 190.80*.

[3] Discussion of Authorities

[a] Joint and Several Liability Inapplicable to Market Share Theory Actions

In ***Brown v. Superior Court*** *(1988) 44 Cal. 3d 1049, 245 Cal. Rptr. 412, 751 P.2d 470* , a woman who was injured because her mother had ingested the prescription drug diethylstilbesterol (DES) brought a market share theory action against DES manufacturers, relying on *Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 163 Cal. Rptr. 132, 607 P.2d 924* [*see § 190.80[3][a]*]. Numerous similar cases were consolidated for trial. The trial court made several pretrial rulings in favor of defendants: (1) that defendants cannot be held strictly liable for DES defects, but only for failure to warn of the drug's known or knowable side effects and failure to provide proper packaging; (2) that neither breach of warranty nor fraud will lie in an action based on the market share theory of *Sindell;* and (3) that defendants cannot be held jointly and severally liable for the entire amount of the judgment if plaintiff prevails, but that each defendant would be liable only for the proportion of the amount awarded that represented its share of the DES market. Plaintiff filed a petition for writ of mandate or prohibition. The court of appeal denied the writ, and plaintiff filed petition for hearing in Supreme Court.

The Supreme Court affirmed. With respect to the ruling regarding the apportionment of damages, the Court held that the imposition of joint liability on defendants in a market share action would be inconsistent with the rationale of *Sindell,* under which each defendant would be held liable for the proportion of the judgment represented by its market share (*44 Cal. 3d 1049, 1074-1075)* . The Court rejected plaintiff's argument that *Sindell* compels joint and several liability because defendants are ordinarily jointly and severally liable for a plaintiff's injuries, and the Court in *Sindell* did not specifically provide an exception (*44 Cal. 3d 1049, 1074)* . The Court noted that in *Sindell* it attempted to fashion a remedy for persons injured by a drug taken by their mothers a generation ago, making identification of the manufacturer impossible in many cases. In order to provide relief to an injured DES daughter faced with that dilemma, it realized that it would have to allow recovery of damages against some defendants that may not have manufactured the drug that caused the damage. To protect those defendants against excessive liability, it considered and rejected the theories of liability suggested by the plaintiff, and formulated, instead, the market share concept. Under that doctrine, to decrease the likelihood that a manufacturer of DES would be held liable for injuries caused by products that it did not make, and to achieve a reasonable approximation of its responsibility for injuries caused by the DES it produced, the plaintiff is required to join in the action the manufacturers of a substantial share of the relevant DES market. Once the manufacturers were joined, the injustice of shifting the burden of proof to defendants to exonerate themselves would be diminished. Each defendant would be held liable for the proportion of the judgment represented by its market share, and its overall liability for injuries caused by DES would approximate the injuries cause by the DES it manufactured. A DES manufacturer found liable under this approach would not be held responsible for injuries caused by other producer of the drug. The Court in *Sindell* acknowledged that only an approximation of a manufacturer's liability could be achieved by this procedure, but recognized that that result was preferable to denying recovery altogether to plaintiffs injured by DES (*44 Cal. 3d 1049, 1074-1075)* .

The Court in *Brown* stated that imposition of joint liability on defendants in a market share action would be inconsistent with this rationale, because it would allow any defendant to be held responsible for the entire judgment even though its market share may have been comparatively insignificant. Liability would be measured not by the likelihood of responsibility for the plaintiff's injuries but by the financial ability of a defendant to undertake payment of the entire

judgment or a large portion of it. A defendant that paid a larger percentage of the judgment than warranted by its market share would have the burden of seeking indemnity from other defendants, and it would bear the loss if producers of DES that might have been held liable in the action were not amenable to suit, or if a codefendant was bankrupt. Therefore, the imposition of joint liability among defendant manufacturers in a market share action would frustrate *Sindell's* goal of achieving a balance between the interests of DES plaintiffs and manufacturers of the drug. The Court also rejected plaintiff's alternative contention that each defendant's liability should be "inflated" in proportion to its market share in an amount sufficient to assure that plaintiff would recover the entire amount of the judgment. The Court found that approach a retreat from *Sindell's* attempt to achieve a close approximation between a DES manufacturer's liability for damages and its individual responsibility for the injuries caused by the products it manufactured (*44 Cal. 3d 1049, 1075)* .

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19-190 California Points & Authorities § 190.89

§ 190.89 Opposing Contention That Defendant Is Person Who Is Subject to Strict Liability Under Product Line Theory--Defendant Not Liable as Successor

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is strictly liable for plaintiff's injuries.*]

DEFENDANT _____ [*name*] IS NOT SUBJECT TO STRICT LIABILITY FOR PLAINTIFF'S INJURIES AS A SUCCESSOR TO THE INTERESTS OF THE ORIGINAL MANUFACTURER OF THE PRODUCT THAT INJURED PLAINTIFF BECAUSE DEFENDANT DOES NOT FIT WITHIN THE THREE-PRONG TEST OF *RAY V. ALAD.*

A. Successor to Manufacturer Is Not Liable for Defective Product Manufactured by Original Manufacturer Unless Three-Prong Test of *Ray v. Alad* Is Satisfied. An entity that succeeds to the interests of the original manufacturer of a product that has injured a plaintiff is not strictly liable as a successor unless each prong of the three-prong test established in *Ray v. Alad Corp. (1977) 19 Cal. 3d 22, 136 Cal. Rptr. 574, 560 P.2d 3* , is satisfied (*Chaknova v. Wilbur-Ellis Co. (1999) 69 Cal. App. 4th 962, 970-974, 81 Cal. Rptr. 2d 871* ; *Lundell v. Sidney Mach. Tool Co. (1986) 190 Cal. App. 3d 1546, 1556, 236 Cal. Rptr. 70*).

[*Optional*] **B. First Prong of *Ray v. Alad* Test Not Satisfied if Plaintiff's Remedies Not Destroyed by Defendant-Successor's Acquisition.** A successor to the interests of the original manufacturer of a product that has injured a plaintiff is not strictly liable to the plaintiff unless the successor's acquisition of the interests of the original manufacturer virtually destroyed the plaintiff's remedies (*Chaknova v. Wilbur-Ellis Co. (1999) 69 Cal. App. 4th 962, 971, 81 Cal. Rptr. 2d 871* ; *Lundell v. Sidney Mach. Tool Co. (1986) 190 Cal. App. 3d 1546, 1551-1553, 236 Cal. Rptr. 70*).

[*Optional*] **C. Second Prong of *Ray v. Alad* Test Not Satisfied if Defendant-Successor Not Able to Assume Risk-Spreading Role of Original Manufacturer.** A successor to the interests of the original manufacturer of a product that has injured a plaintiff is not strictly liable to the plaintiff unless the successor is able to assume the original manufacturer's risk-spreading role (*Chaknova v. Wilbur-Ellis Co. (1999) 69 Cal. App. 4th 962, 972-973, 81 Cal. Rptr. 2d 871* ; *Lundell v. Sidney Mach. Tool Co. (1986) 190 Cal. App. 3d 1546, 1553-1555, 236 Cal. Rptr. 70*).

[*Optional*] **D. Third Prong of *Ray v. Alad* Test Not Satisfied if Unfair to Require Defendant-Successor to Assume Responsibility for Defective Product Based on Successor's Use of Original Manufacturer's Good Will While Continuing Business.** A successor to the interests of the original manufacturer of a product that has injured a plaintiff is not strictly liable to the plaintiff unless it is fair to require the successor to assume responsibility for defective products in that this burden necessarily attached to the original manufacturer's good will being enjoyed by the successor in continuing the business (*Chaknova v. Wilbur-Ellis Co. (1999) 69 Cal. App. 4th 962, 973-974, 81 Cal. Rptr. 2d 871* ; *Lundell v. Sidney Mach. Tool Co. (1986) 190 Cal. App. 3d 1546, 1556, 236 Cal. Rptr. 70*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a defendant in a products liability action who is the successor to the original manufacturer of the defective product is strictly liable for the injuries sustained from the product.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which the issue is raised. For example, they may be combined with points and authorities in opposition to summary judgment or summary adjudication on the issue that defendant is subject to strict liability. They may also be adopted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

In the appropriate case, these points and authorities may be used to oppose the contentions supported by the points and *authorities in § 190.79*.

[b] Related Points and Authorities

In an appropriate case, the points and *authorities in § 190.244* may be added to these points and authorities to support the contention that a successor corporation is not liable for injuries caused by a predecessor's product.

[3] Discussion of Authorities

[a] Successor to Manufacturer Is Not Liable for Defective Product Manufactured by Original Manufacturer Unless Three-Prong Test of *Ray v. Alad* Is Satisfied

In ***Chaknova v. Wilbur-Ellis Co.*** *(1999) 69 Cal. App. 4th 962, 81 Cal. Rptr. 2d 871* , the decedent developed asbestosis as a result of exposure to asbestos-containing products distributed by a company later purchased the defendant. The circumstances of the purchase transaction differed significantly from *Ray v. Alad* and did not satisfy the three criteria necessary to support liability under the product line theory (*69 Cal. App. 4th 962, 970-974)* .

In ***Lundell v. Sidney Mach. Tool Co.*** *(1986) 190 Cal. App. 3d 1546, 236 Cal. Rptr. 70* , plaintiff was injured by a defective lathe and brought an action for strict products liability. The lathe was manufactured by the Sidney Machine Co., a business entity that no longer existed in its original form. Prior to plaintiff's injury, this company had changed

hands on three separate occasions. The company, in its various transmuted forms, had not manufactured lathes for 10 years prior to the time defendant acquired the assets of the machine company. Defendant operated under the name of the original manufacturer. However, the business was in no way similar to that of the original manufacturer. Defendant merely supplied replacement parts to repair the lathes that were still in operation. At trial, defendant's motion for summary judgment was granted on the grounds that defendant was not liable as the successor of the original manufacturer.

The court of appeal affirmed. The court applied the three-prong test, established in *Ray v. Alad Corp. (1977) 19 Cal. 3d 22, 136 Cal. Rptr. 574, 560 P.2d 3* [*see § 190.79*], to determine whether defendant had assumed the burden of strict successor products liability. The court noted that all three prongs of the *Ray v. Alad* test must be satisfied before successor liability may attach (*190 Cal. App. 3d 1546, 1556)* .

[b] First Prong of *Ray v. Alad* Test Not Satisfied if Plaintiff's Remedies Not Destroyed by Defendant-Successor's Acquisition

In ***Chaknova v. Wilbur-Ellis Co.*** *(1999) 69 Cal. App. 4th 962, 81 Cal. Rptr. 2d 871* , the decedent developed asbestosis as a result of exposure to asbestos-containing products distributed by a company later purchased the defendant. Plaintiff failed to establish the first factor of *Ray v. Alad*, because the corporate entity which had been the distributor continued to exist for 15 months after the sale, and had available $3.7 million available to satisfy asbestos claims (*69 Cal. App. 4th 962, 971, 81 Cal. Rptr. 2d 871*).

The facts and procedural background of ***Lundell v. Sidney Mach. Tool Co.*** *(1986) 190 Cal. App. 3d 1546, 236 Cal. Rptr. 70* , are discussed in *§ 190.89[3][a]*. The court held that plaintiff's remedies were not destroyed by defendant's acquisition of the business. Rather, the court found that the destruction of plaintiff's remedies had occurred long before defendant acquired the business. In this regard, the court relied on the fact that the nature of the business had changed from a lathe manufacturing concern to a small sole proprietorship supplying but not manufacturing parts (*190 Cal. App. 3d 1546, 1552-1553)* .

[c] Second Prong of *Ray v. Alad* Test Not Satisfied if Defendant-Successor Not Able to Assume Risk-Spreading Role of Original Manufacturer

In ***Chaknova v. Wilbur-Ellis Co.*** *(1999) 69 Cal. App. 4th 962, 81 Cal. Rptr. 2d 871* , the decedent developed asbestosis as a result of exposure to asbestos-containing products distributed by a company later purchased the defendant. Plaintiff failed to establish the second factor of *Ray v. Alad*, because the defendant sold its asbestos business 31 years before the decedent brought his action--that is, the "specter of asbestos-related injuries" did not appear for many years after the sale. Thus, the defendant had no way to calculate the health risks posed by asbestos and incorporate those risks into its pricing and insurance decisions (*69 Cal. App. 4th 962, 972-973)* .

The facts and procedural background of **Lundell v. Sidney Mach. Tool Co.** *(1986) 190 Cal. App. 3d 1546, 236 Cal. Rptr. 70* , are discussed in *§ 190.89[3][a]*. The court held, in applying the second prong of the *Ray v. Alad* test, that successor liability should not be imposed because there was no equivalence between the predecessor and successor's assets and resources, so that the successor did not have the ability to pass along to the purchasers of new products the costs of meeting the risk of claims from defects in previously manufactured products. The court also noted that factors to be used in determining this issue included (1) the reasonable commercial expectations of the successor, (2) the placing of the economic burdens of liability on those best able to pay for those costs, and (3) the degree of culpability of the successor (*190 Cal. App. 3d 1546, 1554-1555)* .

[d] Third Prong of *Ray v. Alad* Test Not Satisfied if Unfair to Require Defendant-Successor to Assume Responsibility for Defective Product Based on Successor's Use of Original Manufacturer's Good Will While Continuing Business

In ***Chaknova v. Wilbur-Ellis Co.*** *(1999) 69 Cal. App. 4th 962, 81 Cal. Rptr. 2d 871* , the decedent developed asbestosis as a result of exposure to asbestos-containing products distributed by a company later purchased the defendant. Plaintiff failed to establish the third factor of *Ray v. Alad*. Given the 35-year time lapse since the defendant had been engaged in the asbestos business, the short 39-month time period it spent in the business, the impossibility at the time of envisioning the need to spread such an enormous but unknown risk, the payment of adequate consideration for the business, and the fact that the distributor had continued as a corporate entity with substantial assets for 15 months after the sale, it would be unfair to impose product line liability on the defendant (*69 Cal. App. 4th 962, 973-974, 81 Cal. Rptr. 2d 871*).

The facts and procedural background of ***Lundell v. Sidney Mach. Tool Co.*** *(1986) 190 Cal. App. 3d 1546, 236 Cal. Rptr. 70* , are discussed in *§ 190.89[3][a]*. The court noted that under the third-prong of the *Ray v. Alad* test, successor liability may be imposed only if it is fair to require the successor to assume responsibility for defective products in that this burden necessarily attached to the original manufacturer's good will being enjoyed by the successor in continuing the business. Analyzing the *Ray v. Alad* case, the court suggested that it is fair to impose liability when the successor acquires the trade name, good will, and customer lists of the original manufacturer and exploits the good will of the original manufacturer. The court found, however, that because defendant-successor sold different products (replacement parts, not lathes) and conducted business on a smaller scale than the manufacturer, that this prong of the *Ray v. Alad* test was not satisfied (*190 Cal. App. 3d 1546, 1556)* .

[4] Additional Authorities

[a] First Prong of *Ray v. Alad* Test Not Satisfied if Plaintiff's Remedies Not Destroyed by Defendant Successor's Acquisition

In *Stewart v. Telex Communications, Inc. (1992) 1 Cal. App. 4th 190, 1 Cal. Rptr. 2d 669* , plaintiff was erecting an antenna for a citizen's band radio when the antenna touched an overhead power line, causing high-voltage electricity to surge through and severely burn plaintiff. The antenna had been manufactured by a company that declared bankruptcy. Defendant was the company that purchased the manufacturer from the bankruptcy trustee in the subsequent sale (*1 Cal. App. 4th 190, 193-194)* . The trial court held that successor liability did not apply because the bankruptcy proceeding, not defendant's acquisition of the assets, had destroyed plaintiff's remedy (*1 Cal. App. 4th 190, 195)* . The court of appeal affirmed, holding that successor liability is inappropriate unless the evidence shows that defendant was a cause in the bankruptcy (*1 Cal. App. 4th 190, 200)* .

In *Phillips v. Cooper Labs. (1989) 215 Cal. App. 3d 1648, 264 Cal. Rptr. 311* , a DES action brought under the market-share theory of liability, plaintiffs sued several entities involved in the purchase and reorganization of the predecessor manufacturer of the drug, including one company to which were transferred the predecessor's marketing and sales assets, including its goodwill, name, drug trademark, sales force, retail lists, and old inventories, for an adequate consideration. The court of appeal reversed the trial court's order that that corporation was potentially liable as successor in interest, because the criterion under *Ray v. Alad*, regarding the destruction of plaintiff's remedies, was absent, inasmuch as the predecessor company continued successfully for 10 years in a different line of business, and its eventual dissolution was unconnected to the successor's acquisition of the product in question (*215 Cal. App. 3d 1648, 1659)* .

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19-190 California Points & Authorities § 190.90

§ 190.90 Opposing Contention That Defendant Is Person Who Is Subject to Strict Liability--Defendant Is Manufacturer of Prescription Drug That Is Unavoidably Unsafe

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product.*]

DEFENDANT _____ [*name*] IS NOT SUBJECT TO STRICT LIABILITY BECAUSE DEFENDANT IS THE MANUFACTURER OF A PRESCRIPTION DRUG THAT IS INCAPABLE OF BEING MADE SAFE FOR ITS INTENDED AND ORDINARY USE, AND DEFENDANT PROVIDED PROPER WARNINGS AND PACKAGING OF THE DRUG.

A. Strict Liability Inapplicable to Unavoidably Unsafe Prescription Drug Absent Faulty Warning or Packaging. A manufacturer is not strictly liable for injuries caused by a prescription drug that is unavoidably unsafe as long as the drug was properly prepared and accompanied by warnings of its dangerous propensities that were either known or reasonably scientifically knowable at the time of distribution (*Brown v. Superior Court (1988) 44 Cal. 3d 1049, 1069, 245 Cal. Rptr. 412, 751 P.2d 470*).

B. Unavoidably Unsafe Products Include Prescription Drugs. Unavoidably unsafe products are products that, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use, which commonly includes drugs, vaccines, and new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety. Experience justifies the marketing and use of the drug notwithstanding a medically recognizable risk (*Brown v. Superior Court (1988) 44 Cal. 3d 1049, 1058, 245 Cal. Rptr. 412, 751 P.2d 470* ; *see also* Restatement (Second) of Torts § 402A, cmt. k).

[*Optional*] **C. Defective Design Test Inapplicable to Prescription Drugs.** A drug manufacturer's liability for injuries

caused by the defective design of a prescription drug is not measured by the standard applied in strict products liability actions to measure a design defect (*Brown v. Superior Court (1988) 44 Cal. 3d 1049, 1061-1065, 245 Cal. Rptr. 412, 751 P.2d 470*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a defendant is subject to a products liability action. The ground of opposition is that defendant is the manufacturer of a prescription drug that is incapable of being made safe for its intended and ordinary use [*see Brown v. Superior Court (1988) 44 Cal. 3d 1049, 1069, 245 Cal. Rptr. 412, 751 P.2d 470]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary judgment or summary adjudication on the issue that defendant is not strictly liable for plaintiff's injuries. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should set forth facts showing that the prescription drug in question is incapable of being made safe for its intended and ordinary use, and falls within the definition of "unavoidably unsafe" products described in Restatement (Second) of Torts § 402A, comment k [*see § 190.90[3][a]*].

[b] Related Points and Authorities

In an appropriate case, the points and *authorities in §§ 190.170, 190.173*, and *190.174* may be combined with the points and authorities in this form.

[c] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 190.163* may be used to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Strict Liability Inapplicable to Unavoidably Unsafe Prescription Drug Absent Faulty Warning or Packaging

The facts and procedural background of ***Brown v. Superior Court*** *(1988) 44 Cal. 3d 1049, 245 Cal. Rptr. 412, 751 P.2d 470* , are discussed in *§ 190.88[3][a]*. Regarding the issue of the applicability of strict products liability to prescription drugs, the Court held that a manufacturer is not strictly liable for injuries caused by a prescription drug as long as the drug was properly prepared and accompanied by warnings of its dangerous propensities that were either known or reasonably scientifically knowable at the time of distribution (*4 Cal. 3d 955, 1069)* . The Court noted conflicting court of appeal decisions regarding this issue, and summarized initially its three distinctive choices regarding strict liability of prescription drug manufacturers: (1) that the manufacturer is strictly liable for a defect in its product because it was defectively designed, as that term is defined in *Barker v. Lull Eng'g Co. (1978) 20 Cal. 3d 413, 143 Cal. Rptr. 225, 573 P.2d 443* [*see § 190.110[3][a]*], or because of a failure to warn of its dangerous propensities even though those dangers were neither known nor scientifically knowable at the time of distribution; (2) that liability attaches only if a manufacturer fails to warn of dangerous propensities of which it was or should have been aware, in conformity with Restatement (Second) of Torts § 402A, comment k; or (3) that strict liability for design defects should

apply to prescription drugs unless the particular drug that caused the injury is found to be "unavoidably dangerous." The Court adopted the Restatement approach, which states that there are some products that, in the present state of human knowledge, are incapable of being made safe for their intended and ordinary use, which commonly include drugs. For example, with respect to a vaccine for a serious disease, both the marketing and use of the product are fully justified, notwithstanding the unavoidable high degree of risk involved. That product, properly prepared, and accompanied by proper directions and warning, is neither defective nor unreasonably dangerous. Moreover, many new or experimental drugs, which lack assurances of safety due to urgency of need, are justifiably marketed and used notwithstanding a medically recognizable risk. If a drug of this type is properly prepared and marketed, and includes a proper warning, the seller is not held strictly liable for unfortunate consequences attending its use, merely because the seller has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk (*44 Cal. 3d 1049, 1058-1059)* . In adopting comment k, the Court rejected the contrary view that a drug manufacturer should be strictly liable for a defective product due to defective design as defined in *Barker*--that is, a product that is either "perfectly" manufactured but lacking a safety device, or lacking adequate warnings or instructions [*see § 190.110[3][a]*]. The Court noted that there is an important distinction between prescription drugs and other products, such as construction machinery, to which the *Barker* test apply. Other products are generally used to make work easier or to provide pleasure, while prescription drugs may be necessary to alleviate pain and suffering or to sustain life. Moreover, unlike other important medical products such as wheelchairs, harm to some users from prescription drugs is unavoidable. In addition, the Court noted the public policy considerations in support of rapid development and marketing of beneficial new drugs (*44 Cal. 3d 1049, 1063)* . The Court also rejected the imposition of liability based on failure to warn of the drug's dangerous propensities, even though the dangers were neither known nor scientifically knowable at time of distribution. Although some decisions apply strict liability principles to a failure-to-warn case by holding that it is irrelevant whether the manufacturer knew of the danger or should have known of it, most jurisdictions hold to the contrary (*44 Cal. 3d 1049, 1065)* . That is, liability is conditioned on the actual or constructive knowledge of the risk by the manufacturer as of the time the product was sold or distributed (*44 Cal. 3d 1049, 1065-1066)* . This rule is consistent with Restatement (Second) of Torts § 402A, comment j, which confines the duty to warn to a situation in which the seller "has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge of ... the danger." To hold the manufacturer liable for failure to warn of a danger of which it would be impossible to know, based on the present state of human knowledge, would make the manufacturer the virtual insurer of the product. The likelihood of the producer's liability would increase with significant advances in scientific knowledge, discouraging the development of new and improved drugs to combat disease. Thus, the Court disagreed with plaintiff's assertion that defendants should be held liable for failing to warn the physician who prescribed DES to plaintiff's mother of alleged defects in the drug that were neither known by defendants nor scientifically knowable at the time the drug was distributed (*44 Cal. 3d 1049, 1066)* . The Court also expressly disapproved the holding of *Kearl v. Lederle Labs. (1985) 172 Cal. App. 3d 812, 829-830, 218 Cal. Rptr. 453* , which stated that strict liability for design defects should apply to prescription drugs, unless the particular drug that caused the injury is found to be "unavoidably dangerous," pursuant to a preliminary "mini trial" by the trial judge, weighing the benefit and risk of that particular product (*44 Cal. 3d 1049, 1066-1067)* . The Court rejected the holding in *Kearl* on the grounds that it does not allow the manufacturer to predict the test by which its product will be ultimately evaluated, that it fosters different conclusions at the trial level for the same drug, and tat the judge and jury in the same case may render inconsistent findings (*44 Cal. 3d 1049, 1067-1068)* .

[b] Unavoidably Unsafe Products Includes Prescription Drugs

Brown v. Superior Court *(1988) 44 Cal. 3d 1049, 245 Cal. Rptr. 412, 751 P.2d 470* , is discussed in *§ 190.90[3][a]*.

[c] Defective Design Test Inapplicable to Prescription Drugs

Brown v. Superior Court *(1988) 44 Cal. 3d 1049, 245 Cal. Rptr. 412, 751 P.2d 470* , is discussed in *§ 190.90[3][a]*.

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2-190 California Points & Authorities § 190.90A

§ 190.90A Opposing Contention That Defendant Is Person Who Is Subject to Strict Liability--Defendant Is Manufacturer of Implanted Medical Device That Was Properly Manufactured

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product.*]

DEFENDANT _____ [*name*] IS NOT SUBJECT TO STRICT LIABILITY BECAUSE DEFENDANT IS THE MANUFACTURER OF AN IMPLANTED PRESCRIPTION MEDICAL PRODUCT WHICH WAS PROPERLY MADE, AND WHICH WAS DISTRIBUTED WITH ADEQUATE WARNINGS.

A. **Manufacturer Cannot Be Held Strictly Liable for Properly Made Prescription Medical Product With Adequate Warnings.** A manufacturer is not strictly liable for an implanted prescription medical product which was properly made, and distributed with warnings of the risks of which the manufacturer knew or should have known at the time (*Notmeyer v. Stryker Corp. (2007) 502 F. Supp. 2d 1051, 1058-1059* ; *Hufft v. Horowitz (1992) 4 Cal. App. 4th 8, 17, 5 Cal. Rptr. 2d 377*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a defendant is subject to a products liability design defect action. The ground of opposition is that defendant is the manufacturer of an implanted prescription medical product which was properly made and which was distributed with adequate warnings [*see Notmeyer v. Stryker Corp. (2007) 502 F. Supp. 2d 1051, 1058-1059* ; *Hufft v. Horowitz (1992) 4 Cal. App. 4th 8, 17, 5 Cal. Rptr. 2d 377*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary judgment or summary adjudication on the issue that defendant is not strictly liable for plaintiff's injuries. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should set forth facts showing that the implanted prescription product was properly manufactured in accordance with its specifications, and was distributed with warnings regarding risks of which the manufacturer knew or should have known at the time.

[3] Discussion of Authorities

[a] Manufacturer Cannot Be Held Strictly Liable for Properly Made Prescription Medical Product With Adequate Warnings

The facts and procedural background of ***Notmeyer v. Stryker Corp.*** *(N.D. Cal. 2007) 502 F. Supp. 2d 1051* , are discussed in *§ 190.259[4]*. Part of the plaintiff's prosthetic hip replacement system shattered, requiring revision surgery. The court granted the manufacturers' motion to dismiss the plaintiff's strict liability design defect claim, as California caselaw provides that manufacturers of implanted prescription medical devices cannot be held strictly liable for defective design [*502 F. Supp. 2d 1051, 1059]* .

In ***Hufft v. Horowitz*** *(1992) 4 Cal. App. 4th 8, 5 Cal. Rptr. 2d 377* , the plaintiff's inflatable penile prosthesis (IPP) caused him to experience a nearly constant erection. The device was removed after three unsuccessful surgical attempts to correct the problem. He brought several common law claims against the manufacturer. The trial court granted the manufacturer's motion for summary judgment.

The court of appeal first held that ***Brown v. Superior Court*** *(1988) 44 Cal. 3d 1049, 245 Cal. Rptr. 412, 751 P.2d 470* , which immunizes manufacturers of prescription drugs from strict liability for design defects, applies to manufacturers of implanted prescription medical devices as well. ***Brown v. Superior Court*** *(1988) 44 Cal. 3d 1049, 245 Cal. Rptr. 412, 751 P.2d 470* , is discussed in *§ 190.90[3][a]*. Accordingly, the court held that "a manufacturer is not strictly liable for injuries caused by an implantable prescription medical product which has been (1) properly made and (2) distributed with information regarding risks and dangers of which the manufacturer knew or should have known at the time" [*4 Cal. App. 4th 8, 20]* . However, the manufacturer was not entitled to summary judgment because it did not show that the warnings accompanying the IPP were adequate [*4 Cal. App. 4th 8, 23]* .

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19-190 California Points & Authorities § 190.91

§ 190.91 Opposing Contention That Defendant Is Person Who Is Subject to Strict Liability--Defendant Landlord Not Subject to Strict Liability

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is liable in strict products liability for injuries caused by defendant's product.*]

DEFENDANT _____ [*name*] IS NOT SUBJECT TO STRICT LIABILITY, BECAUSE PLAINTIFF'S ACTION IS BASED ON AN ALLEGED DEFECT IN A DWELLING LEASED BY DEFENDANT TO PLAINTIFF; LANDLORDS ARE NOT WITHIN THE CLASS OF PERSONS WHO MAY BE HELD STRICTLY LIABLE UNDER THE DOCTRINE OF PRODUCTS LIABILITY.

Strict Liability Inapplicable to Landlords. Strict tort liability for an injury caused by a defect in leased premises does not apply to landlords leasing residential property or hotel proprietors renting hotel rooms because they are not within the class of persons who may be held strictly liable under the doctrine of products liability (*Peterson v. Superior Court (1995) 10 Cal. 4th 1185, 1205-1210, 43 Cal. Rptr. 2d 836, 899 P.2d 905 , overruling Becker v. IRM Corp. (1985) 38 Cal. 3d 454, 213 Cal. Rptr. 213, 698 P.2d 116*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a defendant is subject to a products liability action. The ground of opposition is that defendant, as the lessor of real property, is not an entrepreneur who places his product in the chain of commerce and therefore cannot be held strictly liable for a defect in the dwelling.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context

in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities in support of a motion for summary judgment on the ground that defendant is not subject to strict liability.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. For example, counsel should set forth facts showing that defendant leased the premises in question as an isolated act; if appropriate, counsel could show that the leased residence is a single-family dwelling normally occupied by the defendant, and defendant owns no property specifically for leasing purposes.

[3] Discussion of Authorities

[a] Strict Liability Inapplicable to Landlords

In ***Peterson v. Superior Court*** *(1995) 10 Cal. 4th 1185, 43 Cal. Rptr. 2d 836, 899 P.2d 905* , a hotel guest brought an action against a hotel proprietor, seeking damages for injuries sustained when she slipped and fell in the bathtub while taking a shower. Before trial, the defendants filed a motion in limine to prevent the plaintiff from arguing that strict liability applied in this case. The trial court granted the motion, ruling as a matter of law that the California Supreme Court's decision in *Becker v. IRM Corp. (1985) 38 Cal. 3d 454, 213 Cal. Rptr. 213, 698 P.2d 116* , did not apply to hotel proprietors. Plaintiff filed a writ of mandate and/or prohibition in the court of appeal challenging the trial court's order, which the court of appeal summarily denied. The plaintiff filed a petition for review by the California Supreme Court, which was granted. The Supreme Court then transferred the case to the court of appeal with directions to vacate its earlier order and issue an alternative writ. The court of appeal issued a peremptory writ of mandate directing the trial court to permit the plaintiff to proceed on a strict liability theory pursuant to *Becker*. The defendants then petitioned for review.

The Supreme Court reversed, holding that *Becker* should be overruled because that decision constituted an unwarranted extension of the doctrine of products liability. The Court found that the circumstances of landlords and hotel proprietors leasing residential dwellings and hotel rooms to the public does not bring them within the class of persons who may properly be held strictly liable under the doctrine of products liability (*10 Cal. 4th 1185, 1188-1189, 1210)* .

The Supreme Court noted that its decision in *Becker* had received a chilly reception, and had been extensively criticized by commentators (*10 Cal. 4th 1185, 1192-1193)* . In reexamining *Becker*, the Court focused on the portion of the opinion addressing the products liability doctrine. First, the Court held that the rationales for applying strict liability to retailers and manufacturers who place products in the stream of commerce do not apply to landlords or hotel proprietors, at least when they do not also have the status of a builder (*10 Cal. 4th 1185, 1198-1200)* . Second, the Court concluded that the "implied representation of safety" justification for imposing strict liability was inapplicable insofar as this overstates the effect of the implied warranty of habitability. In brief, according to this Court, a tenant renting a dwelling does not have an expectation of safety similar to that of a consumer purchasing a new product (*10 Cal. 4th 1185, 1203-1206)* . Third, the Court determined that "loss spreading" did not justify the imposition of strict liability on landlords because it often would be unjust to hold a landlord strictly liable for a defect of which the landlord had no knowledge, and moreover, loss spreading is not the sole consideration for imposing strict liability (*10 Cal. 4th 1185, 1206-1208)* . Finally, the Court noted that landlords, unlike manufacturers, did not have any special knowledge of the product needed to mount a defense (*10 Cal. 4th 1185, 1209-1210)* .

[4] Additional Authorities

[a] Strict Liability Inapplicable to Landlords

In *McCarthy v. Martinson (1996) 51 Cal. App. 4th 632, 59 Cal. Rptr. 2d 149* , a tenant sustained injuries when she inadvertently walked through an untempered glass door in her apartment. She brought an action against her landlords for strict liability, negligence, and breach of implied habitability. A week before trial, the California Supreme Court

overruled *Becker v. IRM Corp. (1985) 38 Cal. 3d 454, 213 Cal. Rptr. 213* , which held that a residential landlord could be held strictly liable to a tenant for latent defects in an apartment [*see Peterson v. Superior Court (1995) 10 Cal. 4th 1185, 43 Cal. Rptr. 2d 836* ; *see also § 190.91[3][a]*]. The trial court excluded the strict liability count from trial because it gave retroactive effect to the Supreme Court's decision overruling *Becker*. The court of appeal affirmed, holding that although the public may have relied on *Becker* for almost 10 years, the case had merely added one cause of action to others that were already available to the plaintiff. Full retroactivity still allowed the plaintiff to proceed against the landlord under general tort principles (*51 Cal. App. 4th 632, 637-638)* . Further, the court determined that the parties would not have actually relied on Becker when entering into the apartment lease. It then found that the change in law was foreseeable, because Becker had not been applied in other jurisdictions and had been subject to consistent criticism (*51 Cal. App. 4th 632, 638)* .

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19-190 California Points & Authorities § 190.92

§ 190.92 Opposing Contention That Defendant Is Person Who Is Subject to Strict Liability--Defendant Was Merely Intermediate Seller Not In Business of Selling Product

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is liable in strict products liability for injuries caused by defendant's product.*]

DEFENDANT _____ [*name*] IS NOT SUBJECT TO STRICT LIABILITY BECAUSE DEFENDANT IS NOT IN THE BUSINESS OF SELLING _____ [*describe product, e.g.,* PLASTIC INJECTION MOLDING MACHINES], BUT WAS MERELY AN INTERMEDIATE SELLER OF THAT PRODUCT.

A. Intermediate Seller Not Subject to Strict Products Liability. An intermediate seller, not in the business of selling a product, is not subject to strict liability for injuries arising from the use of the product (*Ortiz v. HPM Corp. (1991) 234 Cal. App. 3d 178, 188-189, 285 Cal. Rptr. 728*).

[*Optional*] **B. Seller of Used Goods Not Subject to Strict Liability Based on Minor Modifications of Product.** A seller of used goods is not subject to strict liability based on modifications made to the product if the changes are not so extensive that they constitute a remanufacture of the product (*Ortiz v. HPM Corp. (1991) 234 Cal. App. 3d 178, 189, 285 Cal. Rptr. 728*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a defendant is subject to a products liability action. The ground of opposition is that defendant, as an intermediate seller that is not in the business of selling the product, is not subject to strict liability for injuries arising from the use of the product [*see* *Ortiz v. HPM Corp.*

(1991) 234 Cal. App. 3d 178, 188-189, 285 Cal. Rptr. 728] . Optional Paragraph B is for use if plaintiff asserts that defendant is tantamount to a manufacturer by reason of modifications made to the product before sale, and defendant wishes to assert that the modifications were not sufficiently extensive to constitute a remanufacture and thus to subject defendant to strict liability [*see Ortiz v. HPM Corp. (1991) 234 Cal. App. 3d 178, 189, 285 Cal. Rptr. 728]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities in support of a motion for nonsuit in a cause of action for strict liability.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. For example, counsel should set forth facts showing that defendant's role regarding the sale of the product was merely as an intermediate seller, and that defendant was not engaged in the business of selling that product. If the issue of modifications is raised, defendant should also describe any modifications made to the product prior to sale, and show that they were not so extensive that they constituted a remanufacture of the product.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 190.77*.

[3] Discussion of Authorities

[a] Intermediate Seller Not Subject to Strict Products Liability

In ***Ortiz v. HPM Corp.*** *(1991) 234 Cal. App. 3d 178, 285 Cal. Rptr. 728* , an employee in a manufacturing company fell into the mold area of a plastic injection molding machine, sustaining serious injuries. His wife, a fellow employee, observed the accident. They brought suit against their employer, the manufacturer of the machine, the original purchaser and user of the machine (hereafter referred to as the "intermediate seller"), and the used goods dealer that sold it to the employer. The husband sought damages on theories of strict liability, breach of warranty, and negligence; and the wife alleged causes of action for negligent infliction of emotional distress. The employer settled with plaintiffs and was dismissed from the action. The trial was bifurcated, and the liability and damages phases tried separately. The court granted motions for nonsuit brought by the intermediate seller and the used goods dealer, as well as the manufacturer's motion for nonsuit as to the wife. The jury returned a verdict on the liability phase of trial, finding negligence on the part of the manufacturer, but assessed comparative fault of 90 percent to plaintiff. Judgment was eventually entered against the manufacturer and damages awarded. Plaintiffs appealed, arguing that the motions for nonsuit should have been denied.

The court of appeal affirmed the judgment in all respects except with regard to the nonsuit on the cause of action for negligent infliction of emotional distress, and the judgment of nonsuit in favor of the intermediate seller on the cause of action for negligence (*234 Cal. App. 3d 178, 191)* . With respect to the cause of action in strict liability against the intermediate seller, the court initially noted that under the stream of commerce approach followed in California, strict liability in tort has been applied not only to manufacturers but to the various links in the commercial marketing chain, including retailers, wholesale-retail distributors, personal property lessors and bailors, and licensors of personalty. The rule of strict liability applies to any person engaged in the business of selling products for use or consumption. It therefore applies to any manufacturer of a product, and to any wholesale or retail dealer or distributor. It is not necessary that the seller be engaged solely in the business of selling those products. The rule does not, however, apply to the occasional seller of food or other products that is not engaged in that activity as a part of its business [*see* Restatement (Second) of Torts § 402A, cmt. f] (*234 Cal. App. 3d 178, 187)* . The court noted that the intermediate seller established at trial that it was not in the business of selling plastic injection molding machines, and successfully asserted that its one-time sale of the machines when it closed down its operation in southern California rendered it merely an occasional seller, not subject to strict products liability (*234 Cal. App. 3d 178, 188)* . The court noted several prior cases in which an intermediate owner-seller of equipment was held to be an occasional seller of an isolated sale of

discarded equipment and not engaged in the activity of selling the product as part of its business, and consequently not subject to strict products liability (*234 Cal. App. 3d 178, 188-189)* . The court stated that in this case, the evidence showed that the intermediate seller used the plastic injection molding machines in its own operation for several years, and then engaged in a one-time sale of the used equipment at the time it shut down its southern California operating facility. There was no evidence demonstrating that it was in the business of selling plastic injection molding machines (*234 Cal. App. 3d 178, 189)* .

[b] Seller of Used Goods Not Subject to Strict Liability Based on Minor Modifications of Product

The facts and procedural background of ***Ortiz v. HPM Corp.*** *(1991) 234 Cal. App. 3d 178, 285 Cal. Rptr. 728* , are discussed in *§ 190.92[3][a]*. The court of appeal held that an intermediate seller that is not is the business of selling a product, is not subject to strict liability for injuries arising from the use of the product (*234 Cal. App. 3d 178, 188-189)* . The plaintiffs argued that defendant intermediate seller made extensive modifications to the machines and should therefore be considered a remanufacturer subject to strict liability. The court noted that a seller of used goods that has made extensive modifications to a product prior to sale, has been considered tantamount to a manufacturer, and subject to strict products liability. The evidence at trial showed that when defendant purchased the machine from the manufacturer, it specified certain modifications to the original design, enabling it to use particular dies. Defendant also made the following modifications to accommodate its particular large dies: (1) modified the front safety gate guarding the mold area, moving it outward from the center of the machine, and increasing the unguarded area surrounding the machine; (2) further modified the safety gate, increasing the distance from the floor to the bottom of the gate by three inches; and (3) changed the rear safety gate. The court stated that the evidence fell far short of the virtual redesign and reconstruction of the product that would constitute remanufacture, such as that in *Green v. City of Los Angeles (1974) 40 Cal. App. 3d 819, 838, 115 Cal. Rptr. 685* , which supported treating the intermediate owner as a manufacturer [*see § 190.77[3][a]*].

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19-190 California Points & Authorities § 190.93

§ 190.93 Opposing Contention That Defendant Is Person Who Is Subject to Strict Liability--Defendant Was Merely Occasional Seller

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is liable in strict products liability for injuries caused by defendant's product.*]

DEFENDANT _____ [*name*] IS NOT SUBJECT TO STRICT LIABILITY FOR ANY ALLEGED DEFECT IN THE PRODUCT SOLD BY DEFENDANT, BECAUSE DEFENDANT IS NOT IN THE BUSINESS OF SELLING SUCH PRODUCTS, THE SALE WAS A ONE-TIME TRANSACTION, AND THE DEFENDANT MADE NO MAJOR MODIFICATIONS TO THE PRODUCT BEFORE THE SALE. DEFENDANT IS NOT A MANUFACTURER, DISTRIBUTOR, RETAILER OR OTHER PERSON PLACING A PRODUCT IN THE CHAIN OF COMMERCE, AS REQUIRED FOR A STRICT PRODUCTS LIABILITY ACTION.

Strict Liability Inapplicable to Occasional Sale of Product. A person who makes a one-time sale of a product to another is an occasional seller and is not subject to strict products liability. An isolated transaction is insufficient to impose strict liability against a seller who is not otherwise in the business of selling the product. An occasional seller also cannot be treated as a manufacturer, unless before the sale the seller altered the product to the extent that it was redesigned and reconstructed (*Ortiz v. HPM Corp. (1991) 234 Cal. App. 3d 178, 188-190*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a defendant is subject to a products liability action. The ground of opposition is that defendant, as an occasional seller, is not a manufacturer, distributor, or retailer who places the product in the chain of commerce. Therefore, defendant may not be held strictly liable for a

defect in the product [*see Oritz v. HPM Corp. (1991) 234 Cal. App. 3d 178, 188-190, 285 Cal. Rptr. 728]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities in support of a motion for summary judgment on the ground that defendant is not subject to strict liability.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. For example, counsel should set forth facts showing that defendant sold the product at issue as a one-time transaction, such as that defendant sold the item solely to liquidate another business, is employed in another occupation, and does not regularly sell such items.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in §§ 190.71*, *190.72*, and *190.77*.

[3] Discussion of Authorities

[a] Strict Liability Inapplicable to Occasional Sale of Product

In ***Oritz v. HPM Corp.*** *(1991) 234 Cal. App. 3d 178, 285 Cal. Rptr. 728* , a wife found her husband pressed between a cylinder and a stationary part of a plastic injection molding machine at their place of work. He sustained serious injuries. Their employer had purchased the machine from a used-machinery dealer, who had purchased it from the first owner. Plaintiffs sued all of these persons, plus the manufacturer of the machine. The trial court granted several nonsuit motions, including one for a cause of action for strict liability against the first owner of the machine. The jury verdict assessed comparative fault of 90 percent against the husband and 10 percent against the manufacturer. The plaintiffs appealed.

With respect to the strict products liability issues, the court of appeal affirmed the trial court's granting of a motion for nonsuit in favor of the first owner. The court held that strict liability is inapplicable to the occasional seller of a product who does not engage in that activity as part of his or her business (*234 Cal. App. 3d 178, 187)* . The court noted that the first owner had merely transferred the machine in a one-time transaction when it closed its operation. Therefore, defendant was merely an occasional seller and was not subject to strict products liability (*234 Cal. App. 3d 178, 189)* .

The court further held that minor alterations in the machines made by the first owner did not amount to a redesign and reconstruction of the machine. Therefore, the first owner was not tantamount to a manufacturer subject to strict liability (*234 Cal. App. 3d 178, 189-190)* .

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19-190 California Points & Authorities § 190.94

§ 190.94 Opposing Contention That Defendant Is Person Who Is Subject to Strict Liability--Defendant Was Employer

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is liable in strict products liability for injuries caused by defendant's product*].

DEFENDANT _____ [*name*] IS NOT SUBJECT TO STRICT LIABILITY, BECAUSE DEFENDANT WAS PLAINTIFF'S EMPLOYER, AND BECAUSE PLAINTIFF'S INJURY WAS NOT PROXIMATELY CAUSED BY A DEFECTIVE PRODUCT MANUFACTURED BY DEFENDANT, AND THE PRODUCT WAS NOT PROVIDED TO THE PLAINTIFF BY AN INDEPENDENT THIRD PERSON WHO OBTAINED THE PRODUCT FROM THE DEFENDANT FOR VALUABLE CONSIDERATION.

Strict Liability Inapplicable to Employers Except Under Narrow Factual Circumstances Set Forth in *Labor Code Section 3602*. Since the 1982 amendment of *Labor Code Section 3602*, the dual capacity exception to the general exclusivity of the workers' compensation remedy has been limited to the narrow factual circumstances presented where the employee's injury was caused by the employer's product, which itself was provided to the employee not be the employer, but by an independent third person who obtained the product from the employer for valuable consideration (*Ashdown v. Ameron Int'l Corp. (2000) 83 Cal. App. 4th 868, 875-878, 100 Cal. Rptr. 2d 20*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a defendant is subject to a products liability action. The ground of opposition is that California's workers' compensation law provides the exclusive remedy against defendant, the plaintiff's employer, for injury or death arising out of and in the course of employment [*Labor*

Code § 3600 et seq.], and that the narrow factual circumstances required for application of the dual capacity exception do not exist.

[3] Discussion of Authorities

[a] Strict Liability Inapplicable to Employers Except Under Narrow Factual Circumstances Set Forth in Labor Code § 3602

In ***Ashdown v. Ameron Int'l Corp.*** *(2000) 83 Cal. App. 4th 868, 100 Cal. Rptr. 2d 20* , the decedent was employed as a pipe inspector for defendant's predecessors from 1964 to 1966, during which time he was exposed to asbestos used in his employer's manufacture of pipes and other products. He became disabled in 1994. He was diagnosed with mesothelioma and died later that year. In the resultant action, the trial court granted defendant's motion for summary judgment on the ground of the exclusivity of the workers' compensation remedy. On appeal, plaintiffs argued that their causes of action accrued at the time of decedent's original exposure to asbestos between 1964 and 1966, and that the dual capacity exception in effect prior to the 1982 amendment of *Labor Code § 3602* was applicable.

The court of appeal affirmed, rejecting plaintiffs' contention that the causes of action accrued at the time of decedent's original exposure to asbestos. After analyzing *Buttram v. Owens-Corning Fiberglas Corp. (1997) 16 Cal. 4th 520, 66 Cal. Rptr. 2d 438, 941 P.2d 71* , and the statutory standards for determining when a workers' compensation claim accrues, the court concluded that for purposes of establishing whether the 1982 amendment applied, the appropriate test for determining when the causes of action accrued is by the date on which the decedent was first diagnosed with the asbetsos-related diseases for which damages were being sought, or when he otherwise first discovered that he had the disease. Thus, *Labor Code § 3602*, as amended in 1982, applied to plaintiffs' action. Since the 1982 amendment, the dual capacity exception has been limited to the narrow factual circumstances presented where the employee's injury was caused by the employer's product, which itself was provided to the employee not be the employer, but by an independent third person who obtained the product from the employer for valuable consideration. The doctrine did not apply to the facts of the case (*83 Cal. App. 4th 868, 875-878)* .

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3. Who May Be Defendant?

19-190 California Points & Authorities § 190.95

§ 190.95 Opposing Contention That Defendant Is Person Who Is Subject to Strict Liability--Defendant Was Finance Lessor

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is liable in strict products liability for injuries caused by defendant's product.*]

DEFENDANT _____ [*name*] IS NOT SUBJECT TO STRICT LIABILITY FOR AN ALLEGED DEFECT IN THE PRODUCT SOLD BECAUSE IT MERELY PROVIDED FINANCING FOR THE TRANSACTION AND WAS OUTSIDE THE DIRECT CHAIN OF DISTRIBUTION.

A. Strict Liability Inapplicable to Finance Lessors. A finance lessor is not subject to strict liability for injuries arising from the use of a product because it is outside the direct chain of distribution (*Arriaga v. Citicapital Commercial Corp. (2008) 167 Cal. App. 4th 1527, 1532, 85 Cal. Rptr. 3d 143]* .

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a defendant is subject to a products liability action. The ground of opposition is that defendant, as a finance lessor outside the direct chain of distribution, is not subject to strict liability for injuries arising from the use of the product [*see* *Arriaga v. Citicapital Commercial Corp. (2008) 167 Cal. App. 4th 1527, 1532, 85 Cal. Rptr. 3d 143]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities in support of a motion for summary judgment on the ground that defendant is not subject to strict

liability.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. For example, counsel should set forth facts showing that the defendant merely provided the financing for the transaction, and was not involved in any other activities such as manufacture or assembly that would subject it to strict liability.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in §§ 190.71*, *190.72*, and *190.77*.

[3] Discussion of Authorities

[a] Strict Liability Inapplicable to Finance Lessors

In ***Arriaga v. Citicapital Commercial Corp.*** *(2008) 167 Cal. App. 4th 1527, 85 Cal. Rptr. 3d 143* , the plaintiff's finger became entangled in a glue spreading machine from which a guard had been removed. The defendant's predecessor financed the glue spreader through a finance lease for the buyer. As a finance lessor, that company purchased the machine for, then rented it to, the buyer. It did not select, manufacture, or supply the machine. The buyer eventually sold the machine to plaintiff's employer.

The trial court granted the defendant's motion for summary judgment, because, among other reasons, it neither manufactured nor assembled the glue spreader. The court of appeal affirmed. Strict liability was inapplicable because as the entity that merely provided the financing, the defendant was outside the direct chain of distribution. The court explained that finance lessors perform a function similar to that performed by banks. However, rather than simply loaning money, the finance lessor "purchases" the equipment for the specific purpose of "renting" it to the user. Because it did not select the specific product involved in the litigation, a finance lessor does not maintain an ongoing relationship with a particular manufacturer. Unlike a retailer or a commercial lessor, it is not in a position to exert pressure on the manufacturer to improve the product's safety. Moreover, a finance lessor does not play an integral role in the "producing and marketing enterprise" of a product and is not strictly liable under a marketing or distribution theory. Imposing strict products liability on a finance lessor would not further the policy considerations underlying the strict products liability doctrine (*Arriaga v. Citicapital Commercial Corp. (2008) 167 Cal. App. 4th 1527, 1536-1539, 85 Cal. Rptr. 3d 143*).

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[Reserved]

§§ 190.96[Reserved]

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4. Design Defect

19-190 California Points & Authorities § 190.110

§ 190.110 Supporting Contention That Product Is Defective in Design--Dual Alternative Test

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product (see, e.g., §§ 190.111 -190.119).*]

THE _____ [*specify product, e.g.,* LAWNMOWER] IS DEFECTIVE IN ITS DESIGN BECAUSE _____ [IT FAILED TO PERFORM AS SAFELY AS AN ORDINARY CONSUMER WOULD EXPECT *and/or* IT CAUSED INJURIES TO PLAINTIFF AND DEFENDANT HAS FAILED TO SHOW THAT THE BENEFITS OF ITS DESIGN OUTWEIGH THE RISKS].

A. Dual Test for Design Defect. A product may be found defective in design, so as to subject a manufacturer to strict liability for resulting injuries, under either of two alternative tests. First, a product may be found defective in design if the plaintiff establishes that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. Second, a product may alternatively be found defective in design if the plaintiff demonstrates that the product's design proximately caused his or her injury and the defendant fails to establish, in light of the relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in the design (*Barker v. Lull Eng'g Co. (1978) 20 Cal. 3d 413, 432, 143 Cal. Rptr. 225, 573 P.2d 443* ; *Gonzalez v. Autoliv ASP, Inc. (2007) 154 Cal. App. 4th 780, 786, 64 Cal. Rptr. 3d 908*).

B. Dual Test Applied in the Alternative. The ordinary consumer expectation test and the risk-benefits tests are alternative tests (*Bracisco v. Beech Aircraft Corp. (1984) 159 Cal. App. 3d 1101, 1106 n.6, 206 Cal. Rptr. 431*). Thus, a product may be found defective in design, even if it satisfies ordinary consumer expectations, if through hindsight the jury determines that the product's design embodies excessive preventable danger, or, in other words, if the risk of danger inherent in the challenged design outweighs the benefits of such design (*Barker v. Lull Eng'g Co. (1978) 20 Cal. 3d 413, 430, 143 Cal. Rptr. 225, 573 P.2d 443*). On the other hand, if a jury were to find that the

benefits of the design of the defendant's product outweighed its risks, the jury would not be precluded from finding that the product was nevertheless defective because it did not perform as safely as an ordinary consumer would expect (*see Curtis v. State of California ex rel. Dept. of Transportation (1982) 128 Cal. App. 3d 668, 690-691*).

C. Satisfying Consumer Expectations Test. The consumer expectations test is satisfied if the evidence shows that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner (*Barker v. Lull Eng'g Co. (1978) 20 Cal. 3d 413, 429, 143 Cal. Rptr. 225, 573 P.2d 443* ; *Bullock v. Philip Morris USA, Inc. (2008) 159 Cal. App. 4th 655, 674* ; *Boeken v. Philip Morris Inc. (2005) 127 Cal. App. 4th 1640, 1668, 26 Cal. Rptr. 3d 638, 660)* .

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a product is defective in its design if either (1) it fails to perform as safely as an ordinary consumer would expect, or (2) if the product causes the injury and defendant fails to show that the product's benefits outweigh its risks.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary judgment or summary adjudication on the issue that the product was defective in design. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should show in what way the product did not operate as would be expected by an ordinary consumer, or, alternatively, should describe how the product caused injuries to plaintiff and explain how defendant has failed to show that the design's benefits outweigh its risks [*see, e.g., Curtis v. State of California ex rel. Dept. of Transportation (1982) 128 Cal. App. 3d 668* (defective truck design under consumer expectation test)].

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 190.120*, 190.126, and *190.240* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Dual Test for Design Defect

In ***Barker v. Lull Eng'g Co.*** *(1978) 20 Cal. 3d 413, 143 Cal. Rptr. 225, 573 P.2d 443* , plaintiff was operating a high-lift loader at a construction site when the loader began to tip. Plaintiff jumped off, was struck by a piece of falling lumber, and suffered serious injury. Plaintiff brought an action in strict liability against the manufacturer and the lessor of the loader, alleging that the product had been defectively designed. At trial, the jury was instructed that to be entitled to recovery under a strict liability theory, plaintiff must prove that the defective product was unreasonably dangerous. The jury returned verdict for defendants, and plaintiff appealed.

The Supreme Court reversed the judgment. The Court upheld its previous decision in *Cronin v. J.B.E. Olson Corp. (1972) 8 Cal. 3d 121, 104 Cal. Rptr. 433, 501 P.2d 1153* , in which the Court held that a plaintiff was not required to prove that a defective product was unreasonably dangerous in order to recover on a strict liability theory. The Court clarified *Cronin* by specifying that the plaintiff need not prove unreasonable danger, regardless of whether the defect was one in its manufacturing or in its design. More importantly, however, the Court took the opportunity to set forth a working definition of "design defect" by providing a dual alternative test. The first test, commonly known as the

"consumer expectation test," examines whether the product performed as safely as an ordinary consumer would expect when it is used in an intended or reasonably foreseeable manner. The second test, commonly known as the "risk-benefits test," asks whether the product's design proximately caused the plaintiff's injury, and whether the defendant has failed to show that, in light of the relevant factors, on balance, the benefits of the design outweigh the risk of danger inherent in the design (*20 Cal. 3d 413, 422-432)* .

Gonzalez v. Autoliv ASP, Inc. *(2007) 154 Cal. App. 4th 780, 64 Cal. Rptr. 3d 908* , is discussed in *§ 190.74[3][b]*.

[b] Dual Test Applied in the Alternative

In ***Bracisco v. Beech Aircraft Corp.*** *(1984) 159 Cal. App. 3d 1101, 206 Cal. Rptr. 431* , plaintiffs' decedent was killed in an airplane crash. Plaintiffs brought an action in strict liability and negligence against the airplane manufacturer and other defendants. The trial judge modified the standard design defect instruction, and in so doing merely listed the factors to be proven by plaintiffs on either theory without explaining to the jury which factors needed to be found for each test under the theory. The jury returned a verdict in favor of the defendants. Plaintiffs appealed.

The court of appeals reversed the judgment in favor of the manufacturer, holding that the trial court erred in modifying the standard design defect instruction. The court held that the instruction, as modified, erroneously imposed on plaintiffs the more onerous burden of proving each issue for both the consumer expectation test and the risk-benefits test. Instead, the trial court should have instructed the jury that plaintiffs needed to either prove each issue relevant to the consumer expectation test, or each issue relevant to the risk-benefits test, but not both (*159 Cal. App. 3d 1101, 1105-1107)* .

The facts and procedural background of ***Barker v. Lull Eng'g Co.*** *(1978) 20 Cal. 3d 413, 143 Cal. Rptr. 225, 573 P.2d 443* , are discussed in *§ 190.110[3][a]*. In setting forth the dual test, the Supreme Court specified that the tests were alternative to each other. For example, the Court pointed out that even if the product performed as safely as reasonably expected by a consumer, the product could nevertheless be found defective under the risk-benefits test (*20 Cal. 3d 413, 430)* .

In ***Curtis v. State of California ex rel. Dep't of Transp.*** *(1982) 128 Cal. App. 3d 668, 180 Cal. Rptr. 843* , plaintiff was driving a truck when he struck a cow on the freeway. Plaintiff's head struck a beam inside the truck, causing severe cervical fractures and permanent quadriplegic paralysis. Plaintiff brought an action in strict liability and negligence against the manufacturer of the truck and against the State of California. The strict liability cause of action alleged that the truck was defectively designed because the beam had been placed too close to the driver's head. At trial, the jury was instructed on alternate theories of strict liability and negligence. Although the jury returned a special verdict that the benefits of the design of the truck outweighed the risk of danger inherent in the design, they also returned special verdicts in favor of plaintiff and against defendants. The trial court reduced the amount of the verdict by deducting an amount equivalent to plaintiff's comparative negligence, sums received in settlement before trial, and workers' compensation benefits. Plaintiff appealed the reduction of the award. Defendant manufacturer cross appealed.

The court of appeal reversed the reduction and ordered the trial court to reinstate the original award. Among the many issues considered by the court was whether or not defendants could be liable in light of the special verdict by the jury that the benefits of the design outweighed its risks. The court held that such a special verdict does not preclude a finding of design defect under the consumer expectation test, or under a negligence theory. Thus, the original award was proper, even though the jury did not specify the theory on which liability was based (*128 Cal. App. 3d 668, 687-691)* .

[c] Satisfying Consumer Expectations Test

Barker v. Lull Eng'g Co. *(1978) 20 Cal. 3d 413, 429, 143 Cal. Rptr. 225, 573 P.2d 443* , is discussed in *§ 190.110[3][a]*.

The facts and procedural background of ***Bullock v. Philip Morris USA, Inc.*** *(2008) 159 Cal. App. 4th 655* , are discussed in *§ 190.223A[3][f]*. The court found no error with respect to the cigarette manufacturer's liability for design defect. Evidence of the manufacturer's extensive efforts to mislead the public about the dangers of smoking and to create a false controversy as to whether smoking causes lung cancer, together with evidence that smokers are particularly vulnerable to this type of manipulation, supported the jury's finding that the ordinary consumer was misled and unaware of the dangers of smoking (*159 Cal. App. 4th 655, 674)* .

In ***Boeken v. Philip Morris Inc.*** *(2005) 127 Cal. App. 4th 1640, 26 Cal. Rptr. 3d 638, 660* , the plaintiff filed suit alleging negligence, strict products liability, and fraud against a manufacturer of "light" cigarettes. The jury determined that the cigarettes were defective either in design or failure to warn. The court of appeal held that substantial evidence supported the finding that the "light" cigarettes were a defective product under the consumer expectations test. In so concluding, the court took into consideration expert testimony that "light" cigarettes actually delivered substantial nicotine and tar to smokers who "compensate"--that is, adjust how they smoke to obtain a satisfying amount of nicotine. This expert further testified that most smokers are unaware that they compensate, and that compensation draws carcinogens further into the lungs, increasing the risk of contracting a more aggressive type of cancer than the type that is more prevalent among smokers of regular-strength cigarettes (*127 Cal. App. 4th 1640, 1668)* .

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19-190 California Points & Authorities § 190.111

§ 190.111 Supporting Contention That Product Is Defective in Design--Risk-Benefits Test--Relevant Factors

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product (see, e.g., §§ 190.110, 190.112 -190.117).*]

THE _____ [*specify product*] IS DEFECTIVE IN ITS DESIGN BECAUSE AFTER CONSIDERING THE RELEVANT FACTORS THAT MAY BE CONSIDERED IN APPLYING THE RISK-BENEFITS TEST, THE RISKS INHERENT IN THE PRODUCT'S DESIGN OUTWEIGH THE BENEFITS OF THE DESIGN.

Relevant Factors to Be Considered by Jury in Applying Risk-Benefits Test. In evaluating the adequacy of a product's design pursuant to the risk-benefits test (in which the risks inherent in a product's design are weighed against the benefits of that design), a jury may consider the following, among other relevant factors: (1) the gravity of the danger posed by the challenged design; (2) the likelihood that such danger would occur; (3) the mechanical feasibility of a safer alternative design; (4) the financial cost of an improved design; and (5) the adverse consequences to the product and to the consumer that would result from an alternative design (*Barker v. Lull Eng'g Co. (1978) 20 Cal. 3d 413, 431, 143 Cal. Rptr. 225, 573 P.2d 443*).

[2] Comments

CAUTION:

Under former Civ. Code § 1714.4(a), which was repealed in 2002, in a products liability action based on injuries sustained from the discharge of a firearm or ammunition, the firearm or ammunition could not be deemed defective in design on the basis that its benefits did not outweigh the risk of injury posed by its potential to cause serious injury, damage, or death when discharged. However, former Civ. Code § 1714.4(c) did not affect a products liability action based on the improper selection of design alternatives

[*see § 190.241*].

[a] Use of Form

These points and authorities may be submitted in support of the contention that a product is defective in its design because the risks inherent in its design outweigh the benefits of that design.

These points and authorities should be combined with the points and *authorities in § 190.110*. These points and authorities may also be combined with the points and *authorities in §§ 190.112 -190.114*, and with other points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary judgment or summary adjudication on the issue that the product was defective in design. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should forth facts showing that the risks inherent in the product's design outweigh the benefits of that design; specifically, counsel should show (1) the gravity of the danger posed by the challenged design, (2) the likelihood that such danger would occur, (3) the mechanical feasibility of a safer alternative design, (4) the financial cost of an improved design, and (5) the adverse consequences to the product and to the consumer that would result from an alternative design [*see, e.g., Barker v. Lull Eng'g Co. (1978) 20 Cal. 3d 413, 431, 143 Cal. Rptr. 225, 573 P.2d 443]* .

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 190.126* may be used to oppose the contention supported by these points and authorities. In an appropriate case, the points and *authorities in §§ 190.120* and *190.240* may also be used to oppose the contention supported by these points and authorities. Such a situation may often arise, because the burden of proof on the risk-benefits test may often shift to the defendant in a design defect case, as discussed in *§ 190.112*.

[3] Discussion of Authorities

[a] Relevant Factors to Be Considered by Jury in Applying Risk-Benefits Test

The facts and procedural background of ***Barker v. Lull Eng'g Co.*** *(1978) 20 Cal. 3d 413, 143 Cal. Rptr. 225, 573 P.2d 443* , are discussed in *§ 190.110[3][a]*. The Supreme Court reversed the judgment for defendants, and held that the issue of whether a product's design is defective is determined under a dual alternative test. The second of these tests, the risk-benefits test, examines whether the risks inherent in the product's design outweigh its benefits. In enunciating this test, the Court explained that a jury, in evaluating the balancing of the risks and benefits of the product's design, may consider the following, among other relevant factors: (1) the gravity of the danger posed by the challenged design; (2) the likelihood that such danger would occur; (3) the mechanical feasibility of a safer alternative design; (4) the financial cost of an improved design; and (5) the adverse consequences to the product and to the consumer that would result from an alternative design (*20 Cal. 3d 413, 431)* .

[4] Additional Authorities

[a] Relevant Factors to be Considered By Jury in Applying Risk-Benefits Test

In *Hansen v. Sunnyside Prods., Inc. (1997) 55 Cal. App. 4th 1497, 65 Cal. Rptr. 2d 266* , a user of a household cleanser containing hydrofluoric acid brought a products liability action against the manufacturer after she sustained injuries while using the product. At trial, the jury returned a defense verdict finding no liability on the part of the defendant after defense counsel argued in closing argument that in determining whether there was a design defect under

the risk-benefit test, the jury could consider the warning label as part of the product. The trial court granted plaintiffs a partial judgment notwithstanding the verdict (JNOV) on the issues of liability and comparative fault, concluding that product warnings could not be considered in determining the existence of a design defect under the risk-benefit test. The court of appeal reversed, holding that the determination of a design defect requires a balancing of several factors, including the likelihood that the product will cause harm. The presence of package warnings is relevant to the likelihood that harm will occur, and to the ultimate inquiry of whether the design embodies excessive preventable danger (*55 Cal. App. 4th 1497, 1513-1517)* .

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19-190 California Points & Authorities § 190.112

§ 190.112 Supporting Contention That Product Is Defective in Design--Risk-Benefits Test--Shifting Burden of Proof--In General

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product (see, e.g., §§ 190.110, 190.111, 190.113 -190.119).*]

THE BURDEN HAS SHIFTED TO DEFENDANT _____ [*name*] TO PROVE THAT THE PRODUCT IS NOT DEFECTIVE BECAUSE PLAINTIFF MADE A PRIMA FACIE SHOWING THAT HIS/HER INJURIES WERE PROXIMATELY CAUSED BY THE PRODUCT'S DESIGN.

A. Shifting Burden of Proof Once Prima Facie Showing of Proximate Cause Is Made. In the determination of the adequacy of a products design under the risk-benefits standard, once the plaintiff makes a prima facie showing that his or her injury was proximately caused by the product's design, the burden shifts to the defendant to prove, in light of the relevant factors, that the product is not defective (*Campbell v. General Motors Corp. (1982) 32 Cal. 3d 112, 119, 184 Cal. Rptr. 891, 649 P.2d 224* ; *Barker v. Lull Eng'g Co. (1978) 20 Cal. 3d 413, 431, 143 Cal. Rptr. 225, 573 P.2d 443* ; *Gonzalez v. Autoliv ASP, Inc. (2007) 154 Cal. App. 4th 780, 786-787, 64 Cal. Rptr. 3d 908* ; *McCabe v. American Honda Motor Co. (2002) 100 Cal. App. 4th 1111, 1126, 123 Cal. Rptr. 2d 303*).

B. Burden of Proof Shifts, Not Simply Burden of Producing Evidence. The burden that is shifted to defendant in the risk-benefits determination is one affecting the burden of proof, rather than simply the burden of producing evidence (*Barker v. Lull Eng'g Co. (1978) 20 Cal. 3d 413, 432, 143 Cal. Rptr. 225, 573 P.2d 443* ; *Moreno v. Fey Mfg. Corp. (1983) 149 Cal. App. 3d 23, 27, 196 Cal. Rptr. 487* ; *see Evid. Code §§ 605, 606*).

[*Optional*] **C. Plaintiff Need Only Show That Injury-Causing Design Existed When Product Left Defendant's**

Possession. Once the burden has shifted in the risk-benefits determination, the plaintiff is not required to prove that a defect in design existed when the product left the defendant's possession. Instead, the plaintiff shows that the design of the product that injured the plaintiff was the same as the design of the product when it left the defendant's possession (*Lunghi v. Clark Equip. Co. (1984) 153 Cal. App. 3d 485, 497-498, 200 Cal. Rptr. 387*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that once plaintiff makes a prima facie showing that the product's design proximately caused his or her injuries, the burden of proof shifts to the defendant to prove that the product is not defective.

These points and authorities should be combined with the points and *authorities in §§ 190.110* and *190.111*, and may be combined with the points and *authorities in §§ 190.113* and *190.114*, if appropriate. These points and authorities may also be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary judgment or summary adjudication on the issue that the product was defective in design. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should include sufficient facts to make a prima facie showing that plaintiff's injury was proximately caused by the product's design [*see, e.g., Campbell v. General Motors Corp. (1982) 32 Cal. 3d 112, 184 Cal. Rptr. 891, 649 P.2d 224* (plaintiff established prima facie case of design defect in bus by showing that bus lacked appropriate handrail)].

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 190.120* and *190.240* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Shifting Burden of Proof Once Prima Facie Showing of Proximate Cause Is Made

In ***Campbell v. General Motors Corp.*** *(1982) 32 Cal. 3d 112, 184 Cal. Rptr. 891, 649 P.2d 224* , plaintiff sustained personal injuries when the bus in which she was riding made a sharp turn, and, having no handrail to grab, she was thrown to the floor. Plaintiff brought an action in strict liability against the bus manufacturer. Defendant moved for judgment of nonsuit, which was granted, and plaintiff appealed.

The Supreme Court reversed the judgment, holding that plaintiff had established a prima facie case of design defect in the bus by showing that that bus lacked an appropriate handrail, the lack of which substantially caused her injuries. The Court reiterated the risk-benefits test first set forth in *Barker v. Lull Eng'g Co. (1978) 20 Cal. 3d 413, 143 Cal. Rptr. 225, 573 P.2d 443* , as well as *Barker*'s rule that once a prima facie showing of causation is made, the burden of proof shifts to the defendant to prove that the product is not defective. Thus, because the prima facie case was set forth and the burden of proof had shifted, the trial court erred in granting a nonsuit to defendant (*32 Cal. 3d 112, 119-120)* .

The facts and procedural background of ***Barker v. Lull Eng'g Co.*** *(1978) 20 Cal. 3d 413* , *143 Cal. Rptr. 225, 573 P.2d 443* , are discussed in *§ 190.110[3][a]*. The Supreme Court reversed the judgment for defendants, and held that the issue of whether a product's design is defective is determined under a dual alternative test. The second of these tests, the risk-benefits test, examines whether the risks inherent in the product's design outweigh its benefits. The Court held that

once the plaintiff makes a prima facie showing that the product's design proximately caused his or her injuries, the burden shifts to the defendant to prove that the design is not defective. The Court based its holding on public policy grounds, reasoning that the burden should shift to the defendant because most of the evidentiary matters that may be relevant to the risk-benefits determination are similar to issues typically presented in a negligent design case and involve technical matters peculiarly within the knowledge of the manufacturer (*20 Cal. 3d 413, 431-432)* .

In ***Gonzalez v. Autoliv ASP, Inc.*** *(2007) 154 Cal. App. 4th 780, 64 Cal. Rptr. 3d 908* , the plaintiff sustained injuries to her eye in an automobile accident. She brought an action against, *inter alia,* the manufacturer of the front airbag module, alleging that the front airbag system was defective because the airbag deployed with excessive force. The trial court granted the manufacturer's motion for summary judgment.

The court of appeal reversed. Although the manufacturer's expert opined that the airbag module deployed in accordance with its intended design, the manufacturer offered no evidence that the benefits of the design outweighed its risks, as it was required to do to meet its burden of showing the absence of a design defect (*154 Cal. App. 4th 780, 788)* .

In ***McCabe v. American Honda Motor Co.*** *(2002) 100 Cal. App. 4th 1111, 123 Cal. Rptr. 2d 303* , the plaintiff's airbag failed to deploy in a collision. She brought an action against the air bag manufacturer, alleging that the air bag was defective in design as well as manufacture. The trial court granted summary judgment in favor of the manufacturer on the basis of its expert declaration that the air bag was not intended to inflate under the circumstances of the crash. The plaintiff appealed.

The court of appeal reversed, holding, *inter alia*, that the manufacturer failed to negate the risk benefit theory. Even if it demonstrated that the air bag performed in conformity with its design, that evidence, by itself, was not sufficient to negate the plaintiff's design defect theory under the risk benefit theory (Cal. App. 4th 1111, 1123-1127).

[b] Burden of Proof Shifts, Not Simply Burden of Producing Evidence

The facts and procedural background of ***Barker v. Lull Eng'g Co.*** *(1978) 20 Cal. 3d 413, 143 Cal. Rptr. 225, 573 P.2d 443* , are discussed in *§ 190.110[3][a]*. The California Supreme Court held that a product can be shown to be defective under a risk-benefits test, but once the plaintiff makes a prima facie showing that the product's design proximately caused his or her injuries, the burden shifts to the defendant to prove that the design is not defective. To emphasize its holding, the Court explicitly stated that the burden that shifts to defendant is one of proof, and not simply a burden of producing evidence. The Court explained that public policy dictates that the burden that shifts be one of proof because a manufacturer who seeks to escape liability for an injury proximately caused by its product's design on a risk-benefit theory should bear the burden of persuading the trier of fact that its product should not be judged defective (*20 Cal. 3d 413, 431-432)* .

In ***Moreno v. Fey Mfg. Corp.*** *(1983) 149 Cal. App. 3d 23, 196 Cal. Rptr. 487* , plaintiff, while riding a motorcycle, was sideswiped by a truck and the truck's bumper severed plaintiff's leg. Plaintiff brought an action in strict liability against the manufacturer of the truck for personal injuries. At trial, plaintiff submitted a proposed jury instruction that if he proved by a preponderance of the evidence that the bumper design was the proximate cause of his injury, defendant had the burden of proving by a preponderance of the evidence that the benefits of the design of the bumper outweighed its risks. The trial court rejected the instruction, and instead instructed the jury that the plaintiff had the burden of proving that the bumper was defective in design. In a special verdict, the jury found that the product did not have a design defect, and judgment was entered in favor of defendant. Plaintiff appealed.

The court of appeal reversed the judgment, holding that under *Barker*, plaintiff had made a prima facie showing of causation from the design, and that the burden of proof had shifted to defendant. The court further emphasized that the burden that shifted was one of proof and not simply one of producing evidence. Because the point was the crucial issue in the case, prejudicial error resulted requiring reversal of the judgment (*149 Cal. App. 3d 23, 26-28)* .

[c] Plaintiff Need Only Show That Injury-Causing Design Existed When Product Left Defendant's Possession.

In ***Lunghi v. Clark Equip. Co.*** *(1984) 153 Cal. App. 3d 485, 200 Cal. Rptr. 387* , plaintiffs' decedent was crushed to death by the descending boom and bucket of a front-end loader while trying to rescue a fellow employee trapped in the loader's framework. Plaintiffs brought an action for wrongful death against the loader manufacturer, based on strict liability and negligence. The jury returned a special verdict that the loader was not defective in design. Plaintiffs appealed.

The court of appeal reversed the judgment, holding that the trial court made certain evidentiary and instructional errors. In addition, the court held that the trial court erred in instructing the jury that the plaintiff had the burden of establishing that a defect in design existed when the product left the defendant's possession, because the burden of proof shifts to defendant once plaintiff establishes that the injury was proximately caused by the product's design. The court further stated that the focus of the jury instruction on this issue ought to be on plaintiffs' burden to show that the design of the product that injured plaintiff was the same as the design of the product when it left defendant's possession (*153 Cal. App. 3d 485, 489-498)* .

[4] Additional Authorities

[a] Shifting Burden of Proof Once Prima Facie Showing of Proximate Cause Is Made

In *Bresnahan v. Chrysler Corp. (1995) 32 Cal. App. 4th 1559, 38 Cal. Rptr. 2d 446* , the plaintiffs brought an action in strict liability against manufacturers of allegedly defective automobile air bags. The trial court granted defendant's motion for nonsuit, and the court of appeal held that the nonsuit was improper. The court of appeal found that the plaintiff had established a prima facie case of causation by offering proof that her injuries resulted from the impact of her arm with the windshield. That injury would not have occurred had the air bag not deployed. This prima facie showing of proximate cause shifted the burden of proof to the defendant on the "risk-benefit" issue. The defendant had the burden of proving that balance of risks and benefits inherent in the design of the air bags were of no consequence. The plaintiff was not required to present evidence on this issue in her prima facie case (*32 Cal. App. 4th 1559, 1565)* .

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19-190 California Points & Authorities § 190.113

§ 190.113 Supporting Contention That Product Is Defective in Design--Risk-Benefits Test--Shifting of Burden of Proof--Violation of Safety Statute, Regulation, or Ordinance as Sufficient Prima Facie Showing

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product (see, e.g., §§ 190.110 -190.112, 190.114 -190.119).*]

THE BURDEN TO PROVE THAT THE _____ [*specify product, e.g.,* LAWNMOWER] WAS NOT DEFECTIVE HAS SHIFTED TO DEFENDANT BECAUSE PLAINTIFF HAS SHOWN THAT DEFENDANT VIOLATED A _____ [SAFETY STATUTE *and/or* REGULATION *and/or* ORDINANCE] IN MANUFACTURING THE PRODUCT.

A. Violation of Statute, Regulation, or Ordinance as Prima Facie Showing of Causation. A showing that the defendant violated a safety statute, regulation, or ordinance in manufacturing the product may be a sufficient prima facie showing that the plaintiff's injury was proximately caused by the product's design, thereby shifting the burden to the defendant to prove, in light of the relevant factors, that the product is not defective (*see McGee v. Cessna Aircraft Co. (1983) 139 Cal. App. 3d 179, 187, 188 Cal. Rptr. 542*).

B. Facts Sufficient for Showing. Plaintiff makes a sufficient prima facie showing to shift the burden to defendant to prove that the product is not defective when plaintiff comes forward with evidence showing that (1) plaintiff used the product, (2) some occurrence caused the plaintiff's injuries, and (3) the occurrence could have happened because some objective feature of the product was not manufactured in compliance with a statute, regulation, or ordinance (*see McGee v. Cessna Aircraft Co. (1983) 139 Cal. App. 3d 179, 187-188, 188 Cal. Rptr. 542*).

[2] Comments

CAUTION:
Under former Civ. Code § 1714.4(a), which was repealed in 2002, in a products liability action based on injuries sustained from the discharge of a firearm or ammunition, the firearm or ammunition could not be deemed defective in design on the basis that its benefits did not outweigh the risk of injury posed by its potential to cause serious injury, damage, or death when discharged. However, former Civ. Code § 1714.4(c) did not affect a products liability action based on the improper selection of design alternatives [*see § 190.241*].

[a] Use of Form

These points and authorities may be submitted in support of the contention that plaintiff has made a sufficient prima facie showing that the product's design proximately caused plaintiff's injury, thus shifting the burden of proof of defective design to defendant, by showing that the design was manufactured in violation of a safety statute, regulation, or ordinance, and that such violation could have resulted in plaintiff's injuries.

These points and authorities should be combined with the points and *authorities in §§ 190.110 -190.112*, and may be combined with the points and *authorities in § 190.114*, if appropriate. These points and authorities may also be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary judgment or summary adjudication on the issue that the product was defective in design. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should describe how defendant violated a safety statute, regulation, or ordinance, and how that violation could have caused the accident that occurred [*see, e.g., McGee v. Cessna Aircraft Co. (1983) 139 Cal. App. 3d 179, 188 Cal. Rptr. 542* (fire could have entered plane's cockpit through its accumulator tank fittings, which were not built in compliance with federal aviation regulation requirements)].

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 190.120* and *190.240* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Violation of Statute, Regulation, or Ordinance as Prima Facie Showing of Causation

In ***McGee v. Cessna Aircraft Co.*** *(1983) 139 Cal. App. 3d 179, 188 Cal. Rptr. 542* , plaintiff was injured in a fire that occurred after the private airplane in which she was riding crashed. Plaintiff brought an action in strict liability and negligence against the airplane manufacturer. The court of appeal reversed the first verdict rendered in the case for defendant in *McGee v. Cessna Aircraft Co. (1978) 82 Cal. App. 3d 1005, 147 Cal. Rptr. 694* . On retrial, the trial court allowed plaintiff to present evidence that defendant had violated certain federal air safety regulations concerning the providing of aircraft firewalls and for protection of occupants in emergency landing conditions; however, the court refused to instruct the jury on shifting the burden of proof of causation to the manufacturer. The jury returned a verdict in favor of the manufacturer, and plaintiff appealed.

The court of appeal reversed, holding that the failure to give the proffered instruction was reversible error. The court held that the burden of proof may be shifted under such circumstances, under both the negligence and strict liability theories. More specifically, with regard to the strict liability theory, the court ruled that under the circumstances proximate cause may be inferred from the violation of the federal aviation regulation in the manufacturing of the plane. Thus, plaintiff had made a sufficient prima facie showing of causation to be entitled to a shifting of the burden of proof

on the issue of whether the product was defective (*139 Cal. App. 3d 179, 186-187)* .

[b] Facts Sufficient for Showing

The facts and procedural background of ***McGee v. Cessna Aircraft Co.*** *(1983) 139 Cal. App. 3d 179, 188 Cal. Rptr. 542* , are discussed in *§ 190.113[3][a]*. The court found that the evidence presented by plaintiff was sufficient to shift the burden of proof of defective design to the manufacturer because the plaintiff presented the following evidence: (1) plaintiff had been an occupant of the plane; (2) the fire had caused plaintiff's injuries; and (3) the fire could have entered the cockpit through the accumulator tank fittings that were not in compliance with specifications required by the federal aviation regulations (*139 Cal. App. 3d 179, 188)* .

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19-190 California Points & Authorities § 190.114

§ 190.114 Supporting Contention That Product Is Defective in Design--Risk-Benefits Test--Defendant Cannot Complain of Failure to Instruct

[1] FORM

[*The following may be included in an appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product (see, e.g., §§ 190.110 -190.113, 190.115 -190.119).*]

DEFENDANT _____ [*name*] CANNOT COMPLAIN ON APPEAL THAT THE TRIAL COURT FAILED TO INSTRUCT ON THE RISK-BENEFITS TEST.

Failure to Instruct. The risk-benefit test was formulated primarily to aid injured persons, and the defendant cannot on appeal complain of the trial court's failure to instruct the jury on the risk-benefit test (*Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 802, 174 Cal. Rptr. 348*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in an appellate brief in support of the contention that a defendant may not complain on appeal that the trial court failed to instruct the jury on the risk-benefit test. These points and authorities may be combined with the points and *authorities in §§ 190.110 -190.113*, if appropriate.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Failure to Instruct

In ***Grimshaw v. Ford Motor Co.*** *(1981) 119 Cal. App. 3d 757, 174 Cal. Rptr. 348* , one plaintiff suffered personal injuries and another plaintiff's decedent suffered fatal personal injuries when the automobile in which they were riding was rearended and burst into flames. Plaintiffs brought an action in strict liability against the automobile manufacturer, alleging design defect of the gas tank. The surviving plaintiff sought punitive damages under *Civ. Code § 3294* in addition to compensatory damages because defendant had tested the automobile and knew of the defect and danger, yet proceeded to market the product. The heirs of the driver who was killed in the accident sought but were denied leave to amend their complaint to seek punitive damages. The jury awarded both compensatory and punitive damages to the surviving plaintiff, and compensatory damages to the heirs of the deceased driver. The trial court reduced the amount of punitive damages awarded to the surviving plaintiff. All parties appealed.

The court of appeal affirmed the judgment. The court held that the trial court did not err by instructing the jury as to only one of the two-prongs of the *Barker* test, and in any event the defendant had no right to complain on appeal that the trial court had failed to instruct on the risk-benefits test. The court reasoned that the risk-benefits test was formulated to aid injured persons, not manufacturers. The court also ruled, among other issues, that punitive damages were available and substantial evidence supported their award (*119 Cal. App. 3d 757, 801-836)* .

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19-190 California Points & Authorities § 190.115

§ 190.115 Supporting Contention That Product Is Defective in Design--Consumer Expectation Test--Expert Testimony Not Necessary if Matter of Common Experience

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product (see, e.g., §§ 190.110 -190.114, and 190.116 -190.119).*]

PLAINTIFF DOES NOT NEED TO INTRODUCE EXPERT TESTIMONY AS TO CONSUMER EXPECTATIONS OF THE _____ [*specify product*] BECAUSE THE QUESTION IS A MATTER OF COMMON EXPERIENCE, AND PLAINTIFF HAS INTRODUCED EVIDENCE CONCERNING HIS/HER USE OF THE PRODUCT, THE CIRCUMSTANCES SURROUNDING HIS/HER INJURY, AND THE OBJECTIVE FEATURES OF THE PRODUCT THAT ARE RELEVANT TO AN EVALUATION OF ITS SAFETY.

A. Expert Testimony on Consumer Expectations Not Necessary When Matter Is of Common Experience. The determination of the consumer expectation test of *Barker v. Lull Eng'g Co. (1978) 20 Cal. 3d 413, 143 Cal. Rptr. 225, 573 P.2d 443* , involves the jurors' own sense of whether the product meets ordinary expectations regarding its safety under the circumstances presented by the evidence. When the question is a matter of common experience, no expert testimony is required to enable the jury to reach its decision (*Campbell v. General Motors Corp. (1982) 32 Cal. 3d 112, 126, 184 Cal. Rptr. 891, 649 P.2d 224* ; *Akers v. Kelley Co. (1985) 173 Cal. App. 3d 633, 650, 219 Cal. Rptr. 513*).

B. Evidence of Use, Injury, and Features of Product Is Sufficient for Consumer Expectation Test When Matter Is of Common Experience. For purposes of the consumer expectation test of *Barker v. Lull Eng'g Co. (1978) 20 Cal. 3d 413, 143 Cal. Rptr. 225, 573 P.2d 443* , if the product is one within the common experience of ordinary consumers, it is generally sufficient if the plaintiff provides evidence concerning (1) his or her use of the product, (2) the

circumstances surrounding the injury, and (3) the objective features of the product that are relevant to an evaluation of its safety (*Campbell v. General Motors Corp. (1982) 32 Cal. 3d 112, 126, 184 Cal. Rptr. 891, 649 P.2d 224*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that plaintiff does not need to introduce expert testimony to prove that the product fails to meet the ordinary expectations of a consumer because the matter is one of common experience and plaintiff has introduced evidence concerning (1) his or her use of the product, (2) the circumstances surrounding the injury, and (3) the objective features of the product that are relevant to an evaluation of its safety.

These points and authorities may be combined with the points and *authorities in § 190.110*. These points and authorities may also be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary judgment or summary adjudication on the issue that defendant is subject to strict liability. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, and with any other relevant points and authorities combined with this form, to show the relationship between the facts of the case and the points of law stated. For example, counsel should show facts indicating (1) that the comprehension of the product and its dangers is one of common experience, (2) the plaintiff's use of the product, (3) the circumstances surrounding the injury, and (4) the objective features of the product that are relevant to an evaluation of its safety [*see, e.g.,* *Campbell v. General Motors Corp. (1982) 32 Cal. 3d 112, 184 Cal. Rptr. 891, 649 P.2d 224* (public transportation as matter of common experience; sufficient to show use, injury, and features of product)].

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 190.120* and *190.240* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Expert Testimony on Consumer Expectations Not Necessary When Matter Is of Common Experience

The facts and procedural background of **Campbell v. General Motors Corp.** *(1982) 32 Cal. 3d 112, 184 Cal. Rptr. 891, 649 P.2d 224* , are discussed in *§ 190.112[3][a]*. In reversing the judgment for defendant, the Supreme Court held that plaintiff did not need to introduce expert testimony to prove that the bus failed to satisfy the ordinary consumer expectations as to safety. Thus, the bus was defective under the consumer expectation test as set forth in *Barker v. Lull Eng'g Co. (1978) 20 Cal. 3d 413, 143 Cal. Rptr. 225, 573 P.2d 443* [*see § 190.110[3][a]*]. In reaching its decision, the Court explained that public transportation is a matter of common experience, thus no expert testimony need be required to enable the jury to reach its determination (*32 Cal. 3d 112, 126)* .

In ***Akers v. Kelley Co.*** *(1985) 173 Cal. App. 3d 633, 219 Cal. Rptr. 513* , plaintiff sustained severe personal injuries when, four hours after the blade of a forklift truck struck the dockboard, the dockboard flew apart and struck plaintiff. Plaintiff brought an action in strict liability and negligence against the manufacturer of the dockboard. Defendant's experts testified that in their opinion, plaintiff had pulled the release cable, thus causing the dockboard to catapult. In a special verdict, the jury determined that the dockboard was defective in design and/or manufacture, that defendant had been negligent, and that plaintiff was without fault. The jury awarded plaintiff $3.5 million. Defendant moved for a new trial and judgment notwithstanding the verdict, both of which were denied. Defendant then appealed the judgment.

The court of appeal affirmed, holding that the jury had been properly instructed as to the consumer expectation test, and that the trial court had properly refused to give a risk-benefit test instruction. Further, the court held that the trial court had properly refused to give an instruction that defendant is not liable for injuries caused by a product when plaintiff knew that the product had been broken by a third party prior to the accident (*173 Cal. App. 3d 633, 645-652)* . In reaching its conclusion that the jury had been properly instructed concerning the consumer expectation test, the court rejected defendant's contention that the test was inapplicable because the dockboard and its dangers were not matters of common experience. The court rejected earlier views [*see Lunghi v. Clark Equip. Co. (1984) 153 Cal. App. 3d 485, 200 Cal. Rptr. 387* ; *Bates v. John Deere Co. (1983) 148 Cal. App. 3d 40, 195 Cal. Rptr. 637]* , and held that *Campbell* did not exclude the use of the consumer expectation test in cases in which the matter is not one of common experience. Rather, the court read *Campbell* as holding only that the plaintiff in that case was entitled to establish, and did establish, a prima facie case of failure to meet consumer expectations without the benefit of expert testimony, because public transportation is a matter of common experience (*173 Cal. App. 3d 633, 649-651)* .

[b] Evidence of Use, Injury, and Features of Product Is Sufficient for Consumer Expectation Test When Matter Is of Common Experience

The facts and procedural background of ***Campbell v. General Motors Corp.*** *(1982) 32 Cal. 3d 112, 184 Cal. Rptr. 891, 649 P.2d 224* , are discussed in *§ 190.112[3][a]*. In holding that expert testimony is not necessary for the consumer expectations test when the matter is of common experience, the Supreme Court held that it is generally sufficient for plaintiff to provide evidence concerning (1) his or her use of the product, (2) the circumstances surrounding the injury, and (3) the objective features of the product that are relevant to an evaluation of its safety (*32 Cal. 3d 112, 127)* .

[4] Additional Authorities

[a] Expert Testimony on Consumer Expectations Not Necessary When Matter Is of Common Experience

In *West v. Johnson & Johnson Prods., Inc. (1985) 174 Cal. App. 3d 831, 220 Cal. Rptr. 437* , plaintiff suffered from toxic shock syndrome after using defendant manufacturer's tampon. Plaintiff brought an action in strict liability against defendant on the theories of design defect and defect from failure to warn. At trial, the court instructed the jury on the consumer expectation test. The jury awarded a verdict for plaintiff, and defendant appealed. The court of appeal affirmed the judgment, holding that the consumer expectation test had been properly given. The court of appeal rejected the *Lunghi* rule that the consumer expectation test cannot be used in a case when expert testimony is presented. Instead, the court read *Campbell* as simply saying that plaintiff is entitled to establish a prima facie case of failure to meet consumer expectations without the benefit of expert testimony [*see § 190.115[3][a]*]. Thus, even though expert testimony had been admitted at trial, the facts of the case warranted giving the consumer expectation test instruction (*174 Cal. App. 3d 831, 865-866)* .

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19-190 California Points & Authorities § 190.116

§ 190.116 Supporting Contention That Product Is Defective in Design--Consumer Expectation Test Can Apply Even if Matter Is Not of Common Experience

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product (see, e.g., §§ 190.110 -190.115, 190.117 -190.119).*]

PLAINTIFF IS ENTITLED TO AN INSTRUCTION REGARDING THE CONSUMER EXPECTATION TEST, EVEN THOUGH THE _____ [*specify product*] AND ITS DANGERS MAY NOT BE A MATTER OF COMMON EXPERIENCE, BECAUSE THE FACTS SUPPORT AN INFERENCE THAT THE PRODUCT'S DESIGN VIOLATED MINIMUM SAFETY ASSUMPTIONS OF A REASONABLE CONSUMER.

A. Consumer Expectation Test Is Applicable Even if Matter Not of Common Experience. The consumer expectation test may be applicable in a strict products liability case, even if the question of the ordinary consumer expectations regarding safety is not necessarily a matter of common experience. The reasonable juror with no previous experience with the product may nevertheless be able to conclude from the nature of the incident that caused the injury alleged that the product did not meet ordinary consumer expectations as to its safety (*Akers v. Kelley Co. (1985) 173 Cal. App. 3d 633, 650-651, 219 Cal. Rptr. 513* ; *see Soule v. General Motors Corp. (1994) 8 Cal. 4th 548, 565-568, 34 Cal. Rptr. 2d 607, 882 P.2d 298*).

B. Critical Question Involves Inquiry Into Facts and Circumstances of Product's Failure. In assessing the applicability of the consumer expectations test, the critical question is whether the product, in the context of the facts and circumstances of its failure, is one about which ordinary consumers can form minimum safety expectations (*Soule v. General Motors Corp. (1994) 8 Cal. 4th 548, 568, 34 Cal. Rptr. 2d 607, 882 P.2d 298* ; *McCabe v. American Honda Co. (2002) 100 Cal. App. 4th 1111, 1124, 123 Cal. Rptr. 2d 303*).

C. Consumer Expectation Test Is Not Foreclosed by Necessity of Expert Testimony to Explain Nature of Alleged Defect. The consumer expectations test is not foreclosed simply because expert testimony may be necessary to explain the nature of the alleged defect or the mechanism of the product's failure (*Arnold v. Dow Chem. Co. (2001) 91 Cal. App. 4th 698*).

D. Fact That Expert Testimony Was Required to Establish Legal Causation Does Not Preclude Use of Consumer Expectations Test. The fact that expert testimony is required to establish legal causation does not mean that an ordinary user of the product is unable to form assumptions about the product's safety (*Jones v. John Crane, Inc. (2005) 132 Cal. App. 4th 990, 1003, 35 Cal. Rptr. 3d 144*).

E. Consumer Expectations Test Applies to Strict Liability Actions Involving Asbestos-Containing Products. Asbestos-containing products are subject to the consumer expectations test (*Morton v. Owens-Corning Fiberglas Corp. (1995) 33 Cal. App. 4th 1529, 1536, 40 Cal. Rptr. 2d 22* ; *Sparks v. Owens-Illinois, Inc. (1995) 32 Cal. App. 4th 461, 474-475, 38 Cal. Rptr. 2d 739*).

F. Consumer Expectations Test Applies to Strict Liability Actions Involving Raw Materials. Raw materials are subject to the consumer expectations test (*Garza v. Asbestos Corp. (2008) 161 Cal. App. 4th 651, 660, 74 Cal. Rptr. 3d 359* , *Arena v. Owens-Corning Fiberglas Corp. (1998) 63 Cal. App. 4th 1178, 1187, 74 Cal. Rptr. 2d 580*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that plaintiff is entitled to an instruction regarding the consumer expectation test, even though the product and its dangers are not matters of common experience.

These points and authorities may be combined with the points and *authorities in § 190.110*. They may also be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary judgment or summary adjudication on the issue that defendant is subject to strict liability. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form and with any other relevant points and authorities combined with this form, to show the relationship between the facts of the case and the points of law stated. For example, counsel should show facts indicating that the reasonable juror would be able to make conclusions regarding the ordinary consumer expectations of the safety of the product given the nature of the injury [*see, e.g.,* *Akers v. Kelley Co. (1985) 173 Cal. App. 3d 633, 650-651, 219 Cal. Rptr. 513* (reasonable juror with no previous experience of dockboards as able to conclude that dockboard failed to meet consumer expectations of safety given particular nature of incident); *cf.* *Soule v. General Motors Corp. (1994) 8 Cal. 4th 548, 565-570, 34 Cal. Rptr. 2d 607, 882 P.2d 298* (consumer expectations test can be submitted to jury only if facts permit inference that product's performance did not meet minimum safety expectations of ordinary users; test improperly given to jury in case involving technical, mechanical issues of automobile's crashworthiness)].

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 190.120, 190.124*, and *190.240* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Consumer Expectation Test Is Applicable Even if Matter Not of Common Experience

The facts and procedural background of ***Akers v. Kelley Co.*** *(1985) 173 Cal. App. 3d 633, 219 Cal. Rptr. 513* , are discussed in *§ 190.115[3][a]*. In affirming the judgment for plaintiff, the court of appeal rejected the notion raised in prior cases that the consumer expectation test may not be applied when the product is beyond the ken of the ordinary person on the street. Rather, the court viewed *Campbell v. General Motors Corp. (1982) 32 Cal. 3d 112, 184 Cal. Rptr. 891, 649 P.2d 224* , as saying simply that the plaintiff in that case was entitled to establish, and did establish, a prima facie case of failure to meet consumer expectations without the benefit of expert testimony, because public transportation is a matter of common experience. In the court of appeal's view, the consumer expectation test was entirely appropriate in a case such as the one at bar. The court reasoned that even in certain kinds of accidents in which fairly complex machinery is involved, the events may nevertheless be so bizarre that the average juror, on hearing the particulars, might reasonably think: "Whatever the user may have expected from that contraption, it certainly wasn't that." In this case, a dockboard flew apart and injured plaintiff. A reasonable juror with no previous experience of dockboards could conclude that the dockboard in question failed to meet consumer expectations as to its safety. Thus, the jury instruction on the test had been proper (*173 Cal. App. 3d 633, 649-651)* .

The facts and procedural background of ***Soule v. General Motors Corp.*** *(1994) 8 Cal. 4th 548, 34 Cal. Rptr. 2d 607, 882 P.2d 298* , are discussed in *§ 190.124[3][a]*. In holding that it was error to instruct the jury on the consumer expectation test, the Court held that the jury may be instructed on the test only if the facts actually permit an inference that the product's performance did not meet the minimum safety expectations of its ordinary users (*8 Cal. 4th 548, 568)* . The Court quoted from *Akers v. Kelley Co. (1985) 173 Cal. App. 3d 633, 219 Cal. Rptr. 513* , concerning the facts that case, in which the injury resulted from an accident that a reasonable juror could conclude was outside any consumer expectation as to the product's safety (*8 Cal. 4th 548, 565)* . The Court noted that the court in *Akers* declined to limit the consumer expectations test to products or accidents of common experience (*8 Cal. 4th 548, 565)* . However, the Court stated that a complex product, even when being used as intended, may cause injury in a way that does not engage its ordinary consumers' reasonable minimum assumptions about safe performance (*8 Cal. 4th 548, 566-567)* . For example, the ordinary consumer of an automobile has no idea how it should perform in all foreseeable situations, or how safe it should be made against all foreseeable hazards (*8 Cal. 4th 548, 567)* . In such a case, a design defect can be proved only under the risk-benefits test (*8 Cal. 4th 548, 568)* .

Although the Court did not overrule *Akers,* the Court held that it was error to instruct the jury on the consumer expectations test because the crashworthiness of the automobile under the particular circumstances that caused plaintiff's injury was outside the ordinary consumer's expectations (*8 Cal. 4th 548, 570)* . The cases may be reconciled as analyzing the expectations concerning the specific accident or injury, not those regarding the product generally. Thus, in a footnote, the Court noted that the consumer expectations test could be used to prove an automobile's design is defective, for example, if a design caused the vehicle to roll over and catch fire in a two-mile-per-hour collision (*8 Cal. 4th 548, 566 n.3*).

[b] Critical Question Involves Inquiry into Facts and Circumstances Of Product's Failure

Soule v. General Motors Corp. *(1994) 8 Cal. 4th 548, 568, 34 Cal. Rptr. 2d 607, 882 P.2d 298* , is discussed in *§ 190.116[3][a]*.

In ***McCabe v. American Honda Motor Co.*** *(2002) 100 Cal. App. 4th 1111, 123 Cal. Rptr. 2d 303* , plaintiff was injured when the driver's side air bag in her automobile failed to deploy in a frontal collision. In holding that triable issues of fact precluded a finding that the consumer expectations test was inapplicable as a matter of law, the court explained the apparent inconsistencies of *Pruitt v. General Motors Corp. (1999) 72 Cal. App. 4th 1480, 1483, 86 Cal. Rptr. 2d 4* [*see § 190.125[3][a]*], and *Bresnahan v. Chrysler Corp. (1995) 32 Cal. App. 4th 1559, 1568, 38 Cal. Rptr. 2d 446* . The three cases involved three factually distinct scenarios. Whether a product is susceptible to the consumer expectation analysis cannot be determined by looking at the product in isolation, but must be considered in the context

of the facts surrounding its failure. As the Supreme Court made clear in *Soule v. General Motors Corp. (1994) 8 Cal. 4th 548, 568-569, 34 Cal. Rptr. 2d 607, 882 P.2d 298* , the critical question is whether the circumstances of the product's failure permit an inference that the product's design performed below the legitimate, commonly accepted minimum safety assumptions of its ordinary consumers. Deciding whether the functioning of an air bag lends itself, in every circumstance, to the consumer expectation test would improperly focus on the nature of the product without regard to the circumstances of its purported failure. Issues of material fact existed as to the circumstances of the accident (speed and collision range), and plaintiff provided sufficient evidence for the jury to infer that nondeployment of air bag, in the context of a high-speed, head-on collision, violates minimum safety expectations of an ordinary consumer (*100 Cal. App. 4th 1111, 1122)* .

[c] Consumer Expectation Test Is Not Foreclosed by Necessity of Expert Testimony to Explain Nature of Alleged Defect

In ***Arnold v. Dow Chem. Co.*** *(2001) 91 Cal. App. 4th 698, 110 Cal. Rptr. 2d 722* , plaintiffs claimed that their children's injuries were caused by exposure to pesticide applied in their home. The court rejected defendants' contention that the consumer expectation test was inapplicable, holding that the case was more like *Sparks v. Owens-Ill., Inc. (1995) 32 Cal. App. 4th 461, 38 Cal. Rptr. 2d 739* , than *Soule v. General Motors Corp. (1994) 8 Cal. 4th 548, 568-569, 34 Cal. Rptr. 2d 607, 882 P.2d 298* (*91 Cal. App. 4th 698, 727)* .

[d] Fact That Expert Testimony Was Required to Establish Legal Causation Does Not Preclude Use of Consumer Expectations Test

In ***Jones v. John Crane, Inc.*** *(2005) 132 Cal. App. 4th 990, 35 Cal. Rptr. 3d 144* , the jury returned a special verdict in favor of the plaintiffs, finding that the defendant's valve packing and gaskets contained a design defect that caused the decedent to suffer injury. The court of appeal affirmed, holding that the consumer expectations was properly applied to the plaintiffs' products liability claims. The court rejected the defendant's contention that the many experts required to explain the "complex nature and behavior" of the defendant's products--in particular, measurements of the amounts of asbestos released during ordinary handling--rendered the test inapplicable. The court explained that the consumer expectations test does not require inquiry into how exposure to a particular level of asbestos may lead to the development of cancer. Instead, it merely asks whether the circumstances permit an inference that the product's design performed below the commonly accepted minimum safety assumptions of its ordinary consumer. The fact that expert testimony is required to establish legal causation does not mean that an ordinary user of the product is unable to form assumptions about the product's safety (*132 Cal. App. 4th 990, 1003)* .

[e] Consumer Expectations Test Applies to Strict Liability Actions Involving Asbestos-Containing Products

Morton v. Owens-Corning Fiberglas Corp. *(1995) 33 Cal. App. 4th 1529, 40 Cal. Rptr. 2d 22* , is discussed in *§ 190.116[4][a]*.

Sparks v. Owens-Illinois, Inc. *(1995) 32 Cal. App. 4th 461, 38 Cal. Rptr. 2d 739* , is discussed in *§ 190.116[4][a]*.

[f] Consumer Expectations Test Applies to Strict Liability Actions Involving Raw Materials

Garza v. Asbestos Corp. *(2008) 161 Cal. App. 4th 651, 74 Cal. Rptr. 3d 359* , is discussed in *§ 190.73A[3][a]*.

Arena v. Owens-Corning Fiberglas Corp. *(1998) 63 Cal. App. 4th 1178, 74 Cal. Rptr. 2d 580* , is discussed in *§ 190.116[4][a]*.

[4] Additional Authorities

[a] Consumer Expectations Test Is Applicable Even if Matter Not of Common Experience

In *Arena v. Owens-Corning Fiberglas Corp. (1998) 63 Cal. App. 4th 1178, 74 Cal. Rptr. 2d 580* , the plaintiffs brought an action against a manufacturer of asbestos insulation for injuries sustained due to occupational exposure to asbestos. The court of appeal rejected defendant's argument that the "consumer expectations" text did not apply. The court followed *Morton v. Owens-Corning Fiberglas Corp. (1995) 33 Cal. App. 4th 1529, 40 Cal. Rptr. 2d 22* , and *Sparks v. Owens-Ill., Inc. (1995) 32 Cal. App. 4th 461, 38 Cal. Rptr. 2d 739* , in applying the consumer expectations test to a supplier of raw asbestos. Whether the emission of asbestos-laden dust violates the common safety assumptions of the consumer is an appropriate method of determining if asbestos products are defective (*63 Cal. App. 4th 1178, 1182)* .

In *Morton v. Owens-Corning Fiberglas Corp. (1995) 33 Cal. App. 4th 1529, 40 Cal. Rptr. 2d 22* , the plaintiffs brought an action in strict liability against a manufacturer of asbestos insulation for injuries sustained due to exposure to the insulation while working in a shipyard. After a trial, the jury found the defendant liable and responsible for 12 percent of the plaintiff's damages. On appeal, the defendant objected to the plaintiff's "consumer expectations" theory, contending that the trial court should have granted its motion for nonsuit because "consumer expectations" did not apply as a matter of law. The court of appeal affirmed, holding that the use of the "consumer expectation test" is not precluded in complex cases involving expert testimony. In this case, the plaintiff presented several witnesses who testified that they had no expectation that exposure to the insulation was unsafe. The court cited *Sparks v. Owens-Ill., Inc. (1995) 32 Cal. App. 4th 461, 38 Cal. Rptr. 2d 739* , with approval. In addition, the court found that it was irrelevant under the "consumer expectation test" whether the scientific community was unaware of the dangers of asbestos because this did not relate to what an ordinary consumer expected in terms of safety (*33 Cal. App. 4th 1529, 1534-1536*).

In *Bresnahan v. Chrysler Corp. (1995) 32 Cal. App. 4th 1559, 38 Cal. Rptr. 2d 446* , the plaintiffs brought an action in strict liability against manufacturers of allegedly defective automobile air bags. The trial court granted defendant's motion for nonsuit, which barred the plaintiff from pursuing the consumer expectations test. The court of appeal reversed, holding that the "consumer expectations test" is not precluded whenever "crashworthiness" or other complex product or technical questions are at issue. In this case, plaintiff's theory did not pose any peculiar esoteric circumstances that would bar use of the consumer expectations test. An ordinary consumer is equipped to form an expectation regarding the measure of safety to expect from an air bag during a minor rear-end collision (*32 Cal. App. 4th 1559, 1567-1569)* .

In *Sparks v. Owens-Ill., Inc. (1995) 32 Cal. App. 4th 461, 38 Cal. Rptr. 2d 739* , the plaintiffs brought an action in strict liability against a manufacturer of asbestos insulation for injuries sustained due to exposure to the insulation while working on a ship. The trial court gave jury instructions specifying that the "consumer expectations test" be used to determine whether the insulation was defective, and the jury returned a verdict in favor of the plaintiff. The court of appeal affirmed, holding that the use of the "consumer expectation test" is not precluded in complex cases involving expert testimony. In this case, the plaintiff had every right to expect that the use of a seemingly innocuous product would not lead to a serious injury (*32 Cal. App. 4th 461, 475-476)* .

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19-190 California Points & Authorities § 190.117

§ 190.117 Supporting Contention That Product Is Defective in Design--Test for Defective Design Focuses on Adequacy of Product and Not on Manufacturer's Conduct

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product (see, e.g., §§ 190.110 -190.116, 190.118, 190.119).*]

EVIDENCE THAT DEFENDANT MANUFACTURER'S CONDUCT WAS REASONABLE IS IRRELEVANT BECAUSE THE DUAL ALTERNATIVE DESIGN DEFECT TEST FOCUSES ATTENTION ON THE ADEQUACY OF THE PRODUCT AND NOT WHETHER THE MANUFACTURER'S CONDUCT WAS REASONABLE.

A. Focus Is on Adequacy of Product and Not on Manufacturer's Conduct. The dual alternative design defect test explicitly focuses the trier of fact's attention on the adequacy of the product itself, rather than on the manufacturer's conduct, and places the burden on the manufacturer, rather than the plaintiff, to establish that because of the complexity of, and trade-offs implicit in, the design process, an injury-producing product should nevertheless not be found defective (*Barker v. Lull Eng'g Co. (1978) 20 Cal. 3d 413, 432, 143 Cal. Rptr. 225, 573 P.2d 443* ; *McLaughlin v. Sikorsky Aircraft (1983) 148 Cal. App. 3d 203, 208, 195 Cal. Rptr. 764*).

B. Reasonableness of Manufacturer's Conduct Is Irrelevant. Because the immediate focus in strict liability cases is on the product itself and not on the system that produced it, the fact that the manufacturer took reasonable precautions in an attempt to design a safe product or otherwise acted as a reasonably prudent manufacturer would have under the circumstances will not preclude the imposition of liability under strict liability principles if, on hindsight, the trier of fact concludes that the product's design is unsafe to consumers, users, or bystanders (*Barker v. Lull Eng'g Co. (1978) 20 Cal. 3d 413, 434, 143 Cal. Rptr. 225, 573 P.2d 443* ; *McLaughlin v. Sikorsky Aircraft (1983) 148 Cal. App. 3d 203, 208, 195 Cal. Rptr. 764*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the main focus in a design defect action is on the product itself, and thus evidence of the manufacturer's conduct in manufacturing the product is irrelevant.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary judgment or summary adjudication on the issue that defendant is strictly liable for plaintiff's injuries. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should argue that the main issue is whether the product is defective, and that defendant should not be permitted to introduce evidence that defendant took every precaution in manufacturing the product [*see, e.g., Barker v. Lull Eng'g Co. (1978) 20 Cal. 3d 413, 143 Cal. Rptr. 225, 573 P.2d 443* ; *McLaughlin v. Sikorsky Aircraft (1983) 148 Cal. App. 3d 203, 195 Cal. Rptr. 764* (evidence that defendant had complied with military specifications in designing aircraft as irrelevant in determining whether benefits of design outweigh risks)].

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 190.120* and *190.240* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Focus Is on Adequacy of Product and Not on Manufacturer's Conduct

The facts and procedural background of ***Barker v. Lull Eng'g Co.*** *(1978) 20 Cal. 3d 413, 143 Cal. Rptr. 225, 573 P.2d 443* , are discussed in *§ 190.110[3][a]*. The California Supreme Court reversed the judgment for defendants, and held that the issue of whether a product's design is defective is determined under a dual alternative test. In addition, the Court explicitly stated that in a design defect case, the main focus is on whether the product itself is defective, and not whether the manufacturer took reasonable precautions to attempt to design a safe product (*20 Cal. 3d 413, 432-434)* .

In ***McLaughlin v. Sikorsky Aircraft*** *(1983) 148 Cal. App. 3d 203, 195 Cal. Rptr. 764* , plaintiff members of the armed forces were injured when the combat and rescue helicopter in which they were riding while on active duty crashed. The plaintiffs brought an action in strict liability against the manufacturer of the helicopter. The trial court admitted evidence that defendant had complied with military specifications in designing the aircraft, but did not permit defendant to assert a defense of government contractor immunity. The jury returned a verdict for defendant, and plaintiffs appealed.

The court of appeal reversed the judgment, holding that it was prejudicial error to admit evidence that defendant had complied with military specifications in designing the aircraft, as that evidence was not relevant to the issue of whether the aircraft had a defect in design and manufacture. Furthermore, the court held that the trial court committed prejudicial error in refusing to instruct the jury that such evidence is irrelevant in determining whether the benefits of the design outweigh its inherent risks. In explaining its reasoning, the court cited *Barker* and stated that the focus in a design defect issue is on the product itself and not on the system that produced it. However, the court ruled that evidence that the design comported with the state of the art is relevant to the risk-benefits determination. The court also held that, on retrial, defendant would be entitled to establish a defense of government contractor immunity; the court indicated that the trial court should bifurcate the case and try the immunity issue first (*148 Cal. App. 3d 203, 207-212)* .

[b] Reasonableness of Manufacturer's Conduct Is Irrelevant

Barker v. Lull Eng'g Co. *(1978) 20 Cal. 3d 413, 143 Cal. Rptr. 225, 573 P.2d 443* , is discussed in *§ 190.110[3][a]*.

McLaughlin v. Sikorsky Aircraft *(1983) 148 Cal. App. 3d 203, 195 Cal. Rptr. 764* , is discussed in *§ 190.117[3][a]*.

[4] Additional Authorities

[a] Focus Is on Adequacy of Product and Not on Manufacturer's Conduct

The facts and procedural background of *Akers v. Kelley Co. (1985) 173 Cal. App. 3d 633, 219 Cal. Rptr. 513* , are discussed in *§§ 190.115[3][a]* and *190.116[3][a]*. In affirming the judgment for plaintiff, the court of appeal held that the trial court had properly rejected an instruction on the risk-benefits test that had been proffered by defendant. The court explained that the rejected instruction would have erroneously injected into the case notions of the reasonableness of the manufacturer's conduct, which is not relevant when applying the risk-benefits test (*173 Cal. App. 3d 633, 651-652)* .

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19-190 California Points & Authorities § 190.118

§ 190.118 Supporting Contention That Product Is Defective in Design--Design Defect--Lack of Safety Device as Evidence of Defect

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product (see, e.g., §§ 190.110 -190.117, 190.119).*]

PLAINTIFF MAY PROVE THE EXISTENCE OF A DESIGN DEFECT BY INTRODUCING EVIDENCE THAT PLAINTIFF USED THE _____ [*specify product*] IN AN INTENDED OR REASONABLY FORESEEABLE MANNER AND THAT PLAINTIFF'S ATTEMPT TO AVOID INJURY WAS FRUSTRATED BY THE ABSENCE OF A SAFETY DEVICE.

A. Evidence That Plaintiff Used Product in Intended or Reasonably Foreseeable Manner and That Attempt to Avoid Injury Frustrated by Lack of Safety Device. The plaintiff in a design defect action may properly introduce evidence that he or she was injured while using the product in an intended or reasonably foreseeable manner and an attempt to avoid injury was frustrated by the absence of a particular safety device. This is particularly true when the injury that occurred is precisely the sort that the safety device is designed to prevent (*Campbell v. General Motors Corp. (1982) 32 Cal. 3d 112, 126, 184 Cal. Rptr. 891, 649 P.2d 224* ; *see Titus v. Bethlehem Steel Corp. (1979) 91 Cal. App. 3d 372, 381, 154 Cal. Rptr. 122*).

[*Optional*] **B. Case May Not Be Taken From Jury Because Only Evidence of Defect Is Lack of Safety Device.** It is particularly appropriate that the jury be allowed to determine the inference to be drawn when the evidence indicates that a safety device, designed to prevent the very injury that occurred, was not present. To otherwise take the case from the jury simply because the plaintiff could not prove to a certainty that the device would have prevented the accident would erroneously enable the manufacturer to prevail on the basis of its failure to provide the safeguard (*Campbell v.*

General Motors Corp. (1982) 32 Cal. 3d 112, 121, 184 Cal. Rptr. 891, 649 P.2d 224).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a design defect may be established by showing that the product lacked a safety device that would have prevented or lessened the impact of the accident.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary judgment or summary adjudication on the issue that defendant is strictly liable for plaintiff's injuries, or supporting a motion for a new trial on the ground that the case should not have been taken from the jury. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should include facts showing that plaintiff was injured while using the product in an intended or reasonably foreseeable manner, that plaintiff attempted to avoid injury but was frustrated by the absence of a particular safety device, that had the safety device been present plaintiff would have avoided injury, and that the injury that occurred is precisely the sort that the safety device is designed to prevent [*see, e.g.,* *Campbell v. General Motors Corp. (1982) 32 Cal. 3d 112, 126, 184 Cal. Rptr. 891, 649 P.2d 224* (plaintiff had established prima facie case of design defect in bus by showing that bus lacked handrail as safety device)].

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 190.120* and *190.240* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Evidence That Plaintiff Used Product in Intended or Reasonably Foreseeable Manner and that Attempt to Avoid Injury Frustrated by Lack of Safety Device

The facts and procedural background of ***Campbell v. General Motors Corp.*** *(1982) 32 Cal. 3d 112, 184 Cal. Rptr. 891, 649 P.2d 224* , are discussed in *§ 190.112[3][a]*. The California Supreme Court reversed a judgment of nonsuit against plaintiff, holding that plaintiff had established a prima facie case of design defect in the bus by showing that the bus lacked an appropriate handrail as a safety device, and that the lack substantially caused her injuries. The Court ruled that a prima facie case of design defect may be shown by evidence that plaintiff was injured while using the product in an intended or reasonably foreseeable manner, and that plaintiff attempted to avoid injury but that attempt was frustrated by the lack of a safety device, especially when the injury is the sort that the safety device would be designed to prevent (*32 Cal. 3d 112, 121-126)* .

In ***Titus v. Bethlehem Steel Corp.*** *(1979) 91 Cal. App. 3d 372, 154 Cal. Rptr. 122* , plaintiff sustained personal injuries while playing on an oil well pumping unit. Plaintiff brought an action in strict liability against the manufacturer of the pumping unit. At trial, plaintiff attempted to prove that the unit was defective because it lacked a safety device; however, the trial court refused to instruct the jury that "defect" could include lack of a safety device. The jury rendered a special verdict that the product was not defective, and judgment was entered for defendant. Plaintiff appealed.

The court of appeal reversed the judgment, holding that the trial court erred in failing to give the instruction. The court explained that a product may be found defective if it does not include a safety device necessary for its reasonable safety (*91 Cal. App. 3d 372, 377-382)* .

[b] Case May Not Be Taken From Jury Because Only Evidence of Defect Is Lack of Safety Device

The facts and procedural background of ***Campbell v. General Motors Corp.*** *(1982) 32 Cal. 3d 112, 184 Cal. Rptr. 891, 649 P.2d 224* , are discussed in *§§ 190.112[3][a]* and *190.118[3][a]*. The trial court had erroneously taken the case from the jury and decided that as a matter of law, no design defect had been shown. The Supreme Court reversed, holding that the jury should have been allowed to draw their own inferences from the evidence that the product lacked a safety device designed to prevent the injury that occurred. The Court explained that public policy is not served in taking the case from the jury merely because the plaintiff could not prove to a certainty that the safety device, if installed, would have prevented the plaintiff's injuries (*32 Cal. 3d 112, 121)* .

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19-190 California Points & Authorities § 190.119

§ 190.119 Supporting Contention That Product Is Defective in Design--Product Itself Not Defective but Dangerous When Placed Adjacent to Machinery

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product (see, e.g., §§ 190.110 -190.118).*]

THE DESIGN OF THE _____ [*specify product*] WAS DEFECTIVE BECAUSE, EVEN THOUGH THE PRODUCT ITSELF IS NOT DEFECTIVE, IT PRESENTED AN EXCESSIVE PREVENTABLE DANGER WHEN PLACED IN CLOSE PROXIMITY TO OTHER MACHINERY.

A. Design May Present Excessive Preventable Danger in Intended Use. A defective design claim is not necessarily defeated when the product itself is not defective and its design does not result in the product being dangerous if the product does become dangerous when placed adjacent to other machinery. If the product is part of a network of equipment, and its intended use includes regular cleaning or other activity that may involve the use of adjacent machinery, the product's design could present an excessive preventable danger in its intended use because of its proximity to that machinery (*DeLeon v. Commercial Mfg. & Supply Co. (1983) 148 Cal. App. 3d 336, 343-344, 195 Cal. Rptr. 867*).

[*Optional*] **B. Less Safe Means of Using Product or Adjacent Machinery Should Be Taken Into Account by Designer of Product.** The excessive preventable danger in the intended use of the product due to its proximity to other machinery should be contemplated by the designer of the product. Although the designer may contemplate that a user of the product will employ a safe method in using the product, it may nevertheless be foreseeable that a user will resort to an alternative, less safe means of using the product or the adjacent machinery (*see DeLeon v. Commercial Manufacturing & Supply Co. (1983) 148 Cal. App. 3d 336, 343-344, 195 Cal. Rptr. 867*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a product is defective in its design because it presents an excessive preventable danger when placed adjacent to other machinery, even though the product itself is not defective.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary judgment or summary adjudication on the issue that defendant is strictly liable for plaintiff's injuries. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should set forth facts showing that the product became dangerous when placed adjacent to other machinery and, if appropriate, that the product was part of a network of equipment whose intended use included regular cleaning or other activity that involved the use of the adjacent machinery. Counsel should also demonstrate how the product's design presented an excessive preventable danger in its intended use because of its proximity to that machinery, and why it was foreseeable that a user would resort to an alternative, less safe means of using the product or the adjacent machinery [*see, e.g., DeLeon v. Commercial Mfg. & Supply Co. (1983) 148 Cal. App. 3d 336, 195 Cal. Rptr. 867* (placement of bin near conveyor belt and line shaft as presenting excessive preventable danger because one foreseeable method of cleaning bin was to stand on conveyor belt, which presented preventable danger of coming into contact with line shaft)].

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 190.120* and *190.240* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Design May Present Excessive Preventable Danger in Intended Use

In ***DeLeon v. Commercial Mfg. & Supply Co.*** *(1983) 148 Cal. App. 3d 336, 195 Cal. Rptr. 867* , plaintiff sustained personal injuries when plaintiff's arm came in contact with an exposed overhead line shaft. Plaintiff had been standing on a conveyor belt that was adjacent to a holding bin, in order to clean the bin. Plaintiff brought an action in strict liability and negligence against the manufacturer of the bin. Defendant moved for summary judgment, which was granted, and plaintiff appealed.

The court of appeal reversed. The court held that triable issues of fact existed as to whether the manufacturer was responsible for the design of the product, whether the plaintiff's accident was foreseeable, and whether the manufacturer had a duty to warn. The court explained that although the holding bin itself was not defective, and standing alone did not present any danger, its placement adjacent to the conveyor belt and line shaft as a part of a network of food processing equipment did present an excessive preventable danger in the intended use of the bin. Thus, the product might be found to be defective in design, even though the product itself, standing alone, contained no defect (*148 Cal. App. 3d 336, 342-344)* .

[b] Less Safe Means of Using Product or Adjacent Machinery Should Be Taken Into Account by Designer of Product

The facts and procedural background of ***DeLeon v. Commercial Mfg. & Supply Co.*** *(1983) 148 Cal. App. 3d 336, 195 Cal. Rptr. 867* , are discussed in *§ 190.119[3][a]*. In reversing the summary judgment for defendant, the court of appeal

held that a triable issue on design defect had been presented, even though the cleaning method employed by plaintiff was not the safest method. The court held that although plaintiff may not have used the product as intended by its designer when she stood on other equipment to clean it, the plaintiff's action may nevertheless have been a foreseeable one. The court explained that even though the designer of the bin may contemplate that its cleaning will be by a safe method built into the machinery, it may be foreseeable that workers will resort to alternative, less safe means because of the time or trouble involved using the safe way (*148 Cal. App. 3d 336, 344)* .

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19-190 California Points & Authorities § 190.119A

§ 190.119A Supporting Contention That Finding of Strict Liability Is Supported--Defective Product Was Substantial Factor in Causing Injury

[1] Form

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authority supporting the contention that defendant is strictly liable for plaintiff's injuries*].

DEFENDANT IS STRICTLY LIABLE FOR PLAINTIFF'S INJURIES BECAUSE DEFENDANT'S DEFECTIVE PRODUCT WAS A PROXIMATE CAUSE OF PLAINTIFF'S INJURIES.

A. Defendant Is Strictly Liable if Defendant's Asbestos Product Was Substantial Factor in Plaintiff's Risk of Developing Cancer. In an asbestos case, the plaintiff need not prove that fibers from the defendant's product were among the ones that actually began the process of malignant cellular growth, as long as the plaintiff can show that exposure to the defendant's product was in reasonable medical probability a substantial factor in the plaintiff's risk of developing cancer (*Rutherford v. Owens-Ill., Inc. (1997) 16 Cal. 4th 953, 982-983 Cal. Rptr. 2d 16, 941 P.2d 1203* ; *Jones v. John Crane Inc. (2005) 132 Cal. App. 4th 990, 999, 35 Cal. Rptr. 3d 144*).

B. Defendant Does Not Shift Burden of Production by Showing That Plaintiff Has No Personal Recall of Defendant's Product. The defendant does not shift the burden of production to the plaintiff by showing that the plaintiff has no personal recall of the defendant's product (*Weber v. John Crane, Inc. (2006) 143 Cal. App. 4th 1433, 1439, 50 Cal. Rptr. 3d 71*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that a finding of strict liability is

supported because defendant's defective product was a substantial factor in causing plaintiff's injuries.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary adjudication on the issue that the defective product was a proximate cause of the plaintiff's injury. These points and authorities may also be adopted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should include facts showing that the plaintiff's exposure to the defendant's asbestos products was a substantial factor contributing to the plaintiff's risk of developing lung cancer [*see, e.g., Jones v. John Crane Inc. (2005) 132 Cal. App. 4th 990, 999, 35 Cal. Rptr. 3d 144]* .

[c] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 190.122* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Defendant Is Strictly Liable if Defendant's Asbestos Product Was Substantial Factor in Plaintiff's Risk of Developing Cancer

Rutherford v. Owens-Ill., Inc. *(1997) 16 Cal. 4th 953, 982-983, 67 Cal. Rptr. 2d 16, 941 P.2d 1203* , is discussed in *§ 190.285*.

In ***Jones v. John Crane, Inc.*** *(2005) 132 Cal. App. 4th 990, 35 Cal. Rptr. 3d 144* **,** the plaintiffs' decedent was regularly exposed to asbestos products during his 27-year naval career. After being diagnosed with lung cancer, he brought a complaint against 46 defendants and settled with all but two of them. The jury returned a special verdict in favor of the plaintiffs, finding that the defendant's valve and pump packing were a substantial factor in causing the decedent's cancer. The court of appeal held that substantial evidence supported the verdict. The court rejected the defendant's contention that the decedent's total exposure to asbestos from its products was significantly less than a lifetime of exposure to ambient asbestos**.** Expert testimony supported the jury's finding that the decedent's exposure to the defendant's asbestos-containing products was a substantial factor contributing to the risk of his developing lung cancer--that is, that his lung cancer was caused by cumulative exposure, with each of many separate exposures having constituted substantial factors (*132 Cal. App. 4th 990, 999)* .

[b] Defendant Does Not Shift Burden of Product by Showing That Plaintiff Has No Personal Recall of Defendant's Product

In ***Weber v. John Crane, Inc.*** *(2006) 143 Cal. App. 4th 1433, 50 Cal. Rptr. 3d 71* , the decedent developed mesothelioma after nearly 40 years of workplace exposure to asbestos-containing products. The trial court granted the defendant's motion for summary judgment on the ground that there was no triable issue of fact that its product was a cause of plaintiff's disease. The appellate court reversed, clarifying that a defendant does not shift the burden of production to the plaintiff by showing that the plaintiff has no personal recall of the defendant's product. Rather, the defendant must make an affirmative showing that the plaintiff will be unable to prove his or her case by any means. The fact that the plaintiff was unable to recall whether he had worked around defendant's product over 40 years earlier did not mean that he would be unable to recognize defendant's product if shown its packaging or logo. Defendant's evidence did not support an inference that the plaintiff did not possess and could not reasonably obtain the requisite evidence.

Thus, the burden did not shift to plaintiff to make a prima facie showing of a triable issue of material fact regarding his exposure to defendant's product (*143 Cal. App. 4th 1433, 1439-1443)* .

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19-190 California Points & Authorities § 190.120

§ 190.120 Opposing Contention That Product Is Defective in Design--Unavoidably Dangerous Product

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product (see, e.g., §§ 190.82 -190.86, 190.164 -190.171).*]

DEFENDANT _____ [*name*] IS NOT SUBJECT TO A STRICT LIABILITY ACTION BASED ON DESIGN DEFECT BECAUSE THE _____ [*specify product*] THAT INJURED PLAINTIFF IS AN UNAVOIDABLY DANGEROUS PRODUCT.

A. Strict Liability Inapplicable to Inherently Dangerous Product. There is no strict liability when the product is fit to be sold and reasonably safe for use but has inherent dangers that no human skill or knowledge has yet been able to eliminate (*Garcia v. Joseph Vince Co. (1978) 84 Cal. App. 3d 868, 878, 148 Cal. Rptr. 843*).

B. Prescription Drug Design Defect Claims Not Measured by Strict Liability Standards. A manufacturer's liability for a defectively designed prescription drug is not measured by standards of strict liability, but by *Restatement (Second) of Torts* § 402A, comment k (*Brown v. Superior Court (1988) 44 Cal. 3d 1049, 1061, 245 Cal. Rptr. 412, 751 P.2d 470*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that defendant is subject to a products liability action based on design defect. The ground of opposition set forth is that the product that injured plaintiff is an unavoidably dangerous product, exempted from strict liability based on design defect. There is some overlap between

this form and the *form in § 190.121*, which opposes a strict products liability action on the ground that the product that damaged the plaintiff was a common consumer product, such as sugar or tobacco, used routinely by consumers with the knowledge that the product has some inherently unsafe aspects. For a form regarding the inapplicability of strict liability for design defects to manufacturers of "unavoidably unsafe" products, see *§ 190.90*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a demurrer or a motion for summary judgment on the issue that defendant is subject to strict liability. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should include facts showing that the product is fit to be sold and reasonably safe, but that it has inherent unavoidable dangers. For example, if the product is an article of sports equipment for use in a combat sport, such as a fencing mask, counsel should show that the product was safely made, but that its use is inherently dangerous due to the nature of the sport [*see, e.g., Garcia v. Joseph Vince Co. (1978) 84 Cal. App. 3d 868, 878, 148 Cal. Rptr. 843]* .

In an appropriate case, these points and authorities may be used to oppose the contention supported by the points and *authorities in §§ 190.110 -190.119*.

[3] Discussion of Authorities

[a] Strict Liability Inapplicable to Inherently Dangerous Product

In ***Garcia v. Joseph Vince Co.*** *(1978) 84 Cal. App. 3d 868, 148 Cal. Rptr. 843* , a fencer was injured when his opponent's saber broke through his mask during a college fencing meet. Evidence showed that the mask was penetrated by a defectively sharp and narrow blade. The participants used sabers produced by two different manufacturers, and after the injury occurred, the one that injured plaintiff was placed with all the other sabers and never specifically identified. Plaintiff brought an action against the manufacturer of the mask, and the two manufacturers of the sabers, one of which also manufactured the mask. The mask was produced at trial. The trial court entered judgment of nonsuit in favor of both defendants, and plaintiff appealed.

The court of appeal affirmed. With respect to the mask manufacturer, it held that there is no strict liability when the product is fit to be sold and reasonably safe for use, but has inherent dangers that no human skill or knowledge has yet been able to eliminate (*84 Cal. App. 3d 868, 878)* . The court noted that the case against each defendant presented different issues. With respect to the manufacturer of the saber, plaintiff could not sufficiently identify which defendant produced it, and therefore failed to meet his burden of proof on that issue. With regard to the manufacturer of the mask, the issue is whether evidence of an injury, received while engaged in an inherently dangerous sporting event that protective equipment was intended to guard against, establishes a prima facie case of strict liability for improper design against the manufacturer of the equipment (*84 Cal. App. 3d 868, 872)* . Under the general rule, a manufacturer is strictly liable in tort when an article placed on the market, with knowledge that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. There was no evidence whatsoever suggesting any defect in the manufacture of the mask (*84 Cal. App. 3d 868, 876)* . Plaintiff failed to establish a prima facie case in failing to prove that the mask was used as intended or in a reasonably foreseeable manner, and in failing to prove that the presence of a particular design feature about which he complained caused the injury. The court noted that the evidence was clear that the mask was not intended to be used against a sharp, pointed, or defective blade, and rejected plaintiff's contention that the use of defective blade is a foreseeable risk in a fencing match (*84 Cal. App. 3d 868, 877)* . The court also rejected plaintiff's contention that the mask was defective, because the evidence showed it to be adequate protection against the type of weapon appropriate for fencing. Considering that the rules required a rounded saber, the mask was subjected to a use for which it was not intended (*84 Cal. App. 3d 868, 878)* . Even assuming a

reasonably foreseeable use of the mark, plaintiff failed to present sufficient evidence of a design to go to the jury (*84 Cal. App. 3d 868, 879)* .

[b] Prescription Drug Design Defect Claims Not Measured by Strict Liability Standards

Brown v. Superior Court *(1988) 44 Cal. 3d 1049, 245 Cal. Rptr. 412, 751 P.2d 470* , is discussed in *§ 190.90[3][a]*.

[4] Additional Authorities

[a] Strict Liability Inapplicable to Inherently Dangerous Product

The facts and procedural history of *Johnson v. Honeywell Int'l Inc. (2009) 179 Cal. App. 4th 549, 101 Cal. Rptr. 3d 726* , are discussed in *§ 190.245A[3][a]*. On remand, the case proceeded against the manufacturers of the R-22 refrigerant. The plaintiff filed an amended complaint, bringing causes of action for, *inter alia*, strict liability on a design defect risk-benefit theory. The defendants successfully demurred to the complaint in part based on the sophisticated user defense.

The Court of Appeal reversed the judgment and remanded the case for further proceedings, holding that the sophisticated user defense did not apply to plaintiff's design defect cause of action. The defendants also argued that the important of commercial air conditioning in modern society warranted treating refrigerants as an unavoidably safe product. The Court of Appeal refused to do so. Comment k is based on public policy considerations, and the evidentiary record on demurrer was inadequate to analyze and decide the issue (*179 Cal. App. 4th 549, 562)* .

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19-190 California Points & Authorities § 190.121

§ 190.121 Opposing Contention That Product Is Defective--Inherently Unsafe Common Consumer Product

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate memorandum of points and authorities opposing the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product (see, e.g., §§ 190.82-190.86, 190.164-190.171).*]

DEFENDANT _____ [*name*] IS NOT SUBJECT TO A STRICT LIABILITY ACTION BASED ON _____ [*specify, e.g.,* DESIGN DEFECT *and/or* FAILURE TO WARN] BECAUSE THE _____ [*specify product*] THAT INJURED PLAINTIFF IS AN INHERENTLY UNSAFE COMMON CONSUMER PRODUCT WITHIN THE MEANING OF *CIVIL CODE SECTION 1714.45*.

Strict Liability Based on Design Defect or Failure to Warn Prohibited if Product Is Inherently Unsafe Common Consumer Product. In a products liability action, excepting actions based on manufacturing defects or breach of express warranty, a manufacturer or seller is not liable if the product is inherently unsafe and the product is known to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge common to the community and the product is a common consumer product intended for personal consumption, such as sugar, castor oil, alcohol, or butter (*Civ. Code § 1714.45*; *Richards v. Owens-Ill., Inc. (1997) 14 Cal. 4th 985, 1003, 60 Cal. Rptr. 2d 103, 928 P.2d 1181*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to the contention that defendant is subject to a strict products liability action based on any theory other than a manufacturing defect or breach of express warranty. The ground of opposition set forth is that the product that allegedly damaged the plaintiff is a common consumer product that is used routinely by consumers with the knowledge that it has some harmful aspects.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. For example, counsel should include facts showing that the defendant's product is known to be unsafe by the ordinary consumer, and that the ordinary consumer nonetheless consumes the product. Counsel should also attempt to argue that the defendant's product is a common consumer product intended for personal consumption, such as sugar. *Civ. Code § 1714.45* no longer exempts tobacco manufacturers and their successors from liability in products liability actions for the manufacture and sale of tobacco products. However, sellers or distributors of tobacco products remain exempt.

[b] Opposing Points and Authorities

In an appropriate case these points and authorities may be used to oppose the contention supported by the points and *authorities in §§ 190.110 -190.119*.

[3] Discussion of Authorities

[a] Strict Liability Based on Design Defect or Failure to Warn Prohibited if Product Is Inherently Unsafe Common Consumer Product

In ***Richards v. Owens-Ill., Inc.*** *(1997) 14 Cal. 4th 985, 60 Cal. Rptr. 2d 103, 928 P.2d 1181* , a retired employee for Mare Island Naval Shipyard sued Owens-Illinois, Inc. and numerous other manufacturers of asbestos products, claiming respiratory injury and fear of cancer arising from exposure to asbestos on the job. The complaint alleged causes of action based on negligence, strict liability for a "defective" product, and negligent and intentional infliction of emotional distress. Richard's case was consolidated for trial with similar claims of four other plaintiffs. Defendant sought permission to establish that, in addition to plaintiff's own "negligence" for smoking and the "fault assigned to other asbestos manufacturers and employers, cigarette manufacturers also shared "fault" for plaintiff's injuries because they supplied the harmful tobacco products that plaintiff had consumed. Defendant urged that, under Prop. 51 [*Civ. Code § 1431 et seq.*], its liability for plaintiff's noneconomic damages should be reduced by the proportionate fault to tobacco companies, even though the tobacco companies were immune from direct suit under former Civ. Code § 1714.45. The trial court ruled that "no tobacco company defense" could be presented and excluded all proffered evidence concerning the fault of tobacco manufacturers. It also refused to allow a verdict form in which fault could be apportioned to these entities. The jury returned a verdict for plaintiff and apportioned fault among plaintiff, defendant, and various other entities to which the jury was allowed to assign fault. Defendants appealed.

The court of appeals reversed the judgment, holding that the trial court's denial of the proffered "tobacco company defense" was prejudicial error. The court concluded that a defendant in an asbestos action may reduce its own liability for noneconomic damages by proving that tobacco suppliers share fault for lung injuries suffered by a plaintiff who smoked. Richards petitioned for review, raising only the "tobacco company defense" issue. Owens-Illinois also confined its answer to the "tobacco company defense" and the Supreme Court of California chose to confine their decision to the same issue.

The California Supreme Court reversed the judgment of the court of appeal and remanded for further proceedings. The Court concluded that to the extent former Civ. Code § 1714.45 afforded tobacco suppliers immunity from direct liability on the grounds that their immunized conduct breaches no duty and constitutes no tort, the statute also precludes indirect assignment of comparative fault to such entities for the purposes of Prop. 51, which abolished the system of joint and several liability (*14 Cal. 4th 985, 1001)* . In making this decision, the Court applied the legislative intent of several analogous and more expansive provisions and determined that the legislature intended that § 1714.45 abrogate existing tort rules governing the duty of care, causation, and fault. The premise underlying § 1714.45 is that suppliers of products that are inherently unsafe, but that the public wishes to have available despite awareness of their dangers, should not be responsible in tort for harm caused by their products (*14 Cal. 4th 985, 1002)* .

NOTE:

After the California Supreme Court's decision in *Richards*, *Civ. Code § 1714.45* was amended to remove tobacco manufacturers and their successors from its protections. However, the sale or distribution of tobacco products by persons other than manufacturers remains exempt under that statute.

Effective January 1, 1998, the California legislature amended § 1714.45 to read, "(b) This section does not exempt the manufacture or sale of tobacco products by tobacco manufacturers and their successors in interest from products liability actions ... ." The former version of § 1714.45(a)--known as the immunity statute--continues to shield tobacco companies in products liability actions for conduct they engaged in during the ten-year period ending Jan. 1, 1998. However, the immunity statute does not bar claims that tobacco companies manipulated the addictive properties of cigarettes via additives and controlled nicotine delivery through adding ammonia. As for the tobacco companies' conduct before the immunity period, however, liability is determined by applying general tort principles [*see §§ 190.80*, 190.81].

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§ 190.122 Opposing Contention That Finding of Strict Liability Is Supported--Alleged Defects Did Not Cause or Contribute to Injury

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is strictly liable for plaintiff's injuries (see, e.g., §§ 190.82 -190.90, 190.123, 190.124, 190.164 -190.171).*]

DEFENDANT CANNOT BE HELD STRICTLY LIABLE FOR PLAINTIFF'S INJURIES ON A DESIGN DEFECT THEORY BECAUSE THE DEFECT(S) ALLEGED WAS/WERE NOT THE PROXIMATE CAUSE OF PLAINTIFF'S INJURIES.

A. No Strict Liability Based on Design Defect if Defect Did Not Cause Injury. Total failure to show that a defect caused or contributed to the injury cannot support a finding of strict liability based on design defect (*Matthews v. Hyster Co. (9th Cir. 1988) 854 F.2d 1166, 1168-1169)* .

B. Required Allegations Regarding Causation. To sufficiently allege causation, the plaintiff must allege that: (1) the plaintiff was exposed to each of the products claimed to have caused a specific illness; (2) each product caused the injury; (3) as a result of the exposure, toxins entered the plaintiff's body; (4) the plaintiff suffered from a specific illness, and each toxin that entered the plaintiff's body was a substantial factor in bringing about, prolonging, or aggravating that illness; and (5) each toxin that was absorbed was manufactured or supplied by a named defendant (*Bockrath v. Aldrich Chem. Co. (1999) 21 Cal. 4th 71, 82, 86 Cal. Rptr. 2d 846, 980 P.2d 398*).

C. Plaintiff Bears Burden of Proving Causation. In products liability actions, the plaintiff must prove that the defective product supplied by the defendant was a substantial factor in bringing about his or her injury (*Rutherford v. Owens-Ill., Inc. (1997) 16 Cal. 4th 953, 968, 67 Cal. Rptr. 2d 16, 941 P.2d 1203*).

D. Plaintiff Must Prove That Defective Product Was Substantial Factor in Causing His or Her Injuries. California has adopted substantial factor test for cause-in-fact determinations (*Rutherford v. Owens-Ill., Inc. (1997) 16 Cal. 4th 953, 968, 67 Cal. Rptr. 2d 16, 941 P.2d 1203* ; *Whiteley v. Philip Morris, Inc. (2004) 117 Cal. App. 4th 635, 694-703, 11 Cal. Rptr. 3d 807* ; *Lineaweaver v. Plant Insulation Co. (1995) 31 Cal. App. 4th 1409, 1416, 37 Cal. Rptr. 2d 902*).

E. Mere Possibility of Exposure Does Not Create Triable Issue of Fact on Causation. The mere possibility of exposure to the defendant's product does not create a triable issue of fact on causation (*Andrews v. Foster Wheeler LLC (2006) 138 Cal. App. 4th 96, 108, 41 Cal. Rptr. 3d 229*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to the contention that defendant is subject to a products liability action based on design defect. The ground of opposition set forth is that plaintiff has failed to show that the alleged defect caused or contributed to the injury [*see Matthews v. Hyster Co. (9th Cir. 1988) 854 F.2d 1166, 1168-1169]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for directed verdict against the plaintiff [*see, e.g., Matthews v. Hyster Co. (9th Cir. 1988) 854 F.2d 1166, 1167]* .

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should include facts showing the lack of causation between the alleged defects and injury.

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 190.119A* may be used to oppose the contentions supported by these points and authorities.

[3] Discussion of Authorities

[a] No Strict Liability Based on Design Defect if Defect Did Not Cause Injury

In ***Matthews v. Hyster Co.*** *(9th Cir. 1988) 854 F.2d 1166* , a longshoreman brought a products liability action against the manufacturer of a forklift to recover damages for injuries that he incurred while operating the forklift. Plaintiff testified that he stepped on the brake while driving the forklift, and the forklift failed to stop. The forklift hit a truck, and plaintiff was consequently injured. Plaintiff alleged four separate design defects in the forklift: lack of a brake in the "inching pedal" (a type of clutch); lack of warning about the absence of that brake; defective design of the emergency brake; and failure of the vehicle manual to prescribe maintenance sufficient to prevent contaminants from entering the brake system. Defendant moved for directed verdict against the plaintiff on the ground that plaintiff failed to show that any of the alleged defects caused or contributed to his injuries. The district court granted the motion, and plaintiff appealed.

The federal court of appeals affirmed, holding that a total failure to show that the defect caused or contributed to the accident precludes a finding of strict products liability. The court noted that even if the forklift were defective for lack of a brake in the inching pedal, there was no evidence that the lack of that brake confused the plaintiff, or that the brake's absence was in any way the cause of the accident (*854 F.2d 1166, 1168)* . Inasmuch as plaintiff testified that he

did not think that the inching pedal contained a brake, and that he did not depress the inching pedal expecting it to stop, the lack of warning on the forklift about the presence of a brake in the inching pedal did not contribute to the accident. Plaintiff also testified that he did not attempt to use the emergency brake; and substantial evidence did not exist to prove that the design of the emergency brake caused or contributed to the accident. Finally, no evidence of defective maintenance, or of any contaminant in the brake system was produced. (The court also affirmed with respect to a negligence cause of action based on the same conduct underlying the strict liability cause of action, holding that causation must be proved to link the negligence to the accident that occurred.) (*854 F.2d 1166, 1169)* .

[b] Required Allegations Regarding Causation

In ***Bockrath v. Aldrich Chem. Co.*** *(1999) 21 Cal. 4th 71, 86 Cal. Rptr. 2d 846, 980 P.2d 398* , a plaintiff who contracted multiple myeloma brought a suit against at least 55 defendants, most of whom were manufacturers of products to which he was exposed during the course of his employment. His complaint included causes of action for negligence, strict liability, failure to warn, design defect, and fraudulent concealment. The court dismissed the complaint, and the court of appeal affirmed. The Supreme Court granted review to decide how a complaint alleging harmful long-term exposure to multiple toxins must plead causation.

The court explained that in *Rutherford v. Owens-Ill., Inc. (1997) 16 Cal. 4th 953, 67 Cal. Rptr. 2d 16* , it had addressed the question of proof of causation in the context of products liability actions, explaining that the "plaintiff must prove that the defective products supplied by the defendant were a substantial factor in bringing about his or her injury." In cases like the instant one, presenting complicated and possibly esoteric medical causation issues, the standard of proof ordinarily required is "a reasonable medical probability based upon competent expert testimony that the defendant's conduct contributed to [the] plaintiff's injuries." Again citing *Rutherford*, the court stated that "[t]he substantial factor standard is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical." The Supreme Court of California remanded the cause to give plaintiff the opportunity to allege that each defendant's product was a substantial factor, as that term was defined in *Rutherford*, in causing his multiple myeloma.

To allege that each defendant's product was a substantial factor in causing his disease, the plaintiff would have to: (1) allege that he was exposed to each of the toxic materials claimed to have caused a specific illness; (2) identify each product that allegedly caused the injury; (3) allege that as a result of the exposure, the toxins entered his body; (4) allege that he suffers from a specific illness, and that each toxin that entered his body was a substantial factor in bringing about, prolonging, or aggravating that illness; and (5) except in a case governed by market share liability, allege that each toxic he absorbed was manufactured or supplied by a named defendant (*21 Cal. 4th 71, 78-80, 86 Cal. Rptr. 2d 846, 980 P.2d 398*).

[c] Plaintiff Bears Burden of Proving Causation

In ***Rutherford v. Owens-Ill., Inc.*** *(1997) 16 Cal. 4th 953, 67 Cal. Rptr. 2d 16, 941 P.2d 1203* , the Supreme Court rejected an alternative-liability burden shifting instruction in asbestos cases and set forth the requirements of proof in asbestos actions. The court held that in a cause of action for asbestos-related injuries, the plaintiff must establish some threshold exposure to the defendant's defective asbestos-containing products, and must establish in a reasonable medical probability that a particular exposure or series of exposures was a "legal cause" of his or her injury--that is, was a substantial factor in bringing about the injury. In asbestos-related cancer cases, the plaintiff need not prove that fibers from defendant's product were the ones, or among the ones, that actually began the process of malignant cellular growth. Instead, the plaintiff may meet the burden of proving that exposure to defendant's product was a substantial factor causing the illness by showing that in reasonable medical probability it was a substantial factor contributing to the plaintiff's or decedent's risk of developing cancer.

The trial court had instructed the liability phase jury pursuant to Solano County Complex Asbestos Litigating General Order No. 21.000, which shifted the burden of proof to defendants in asbestos cases tried on a products liability theory

to prove that their products were not a legal cause of plaintiff's injuries, providing the plaintiff first established certain predicate facts.

The Supreme Court held that the instruction shifting the burden of proof to defendants is unnecessary and incorrect in cases of asbestos-related cancer. Although proof of causation in such cases always presents inherent practical difficulties, no insuperable barriers prevent an asbestos-related cancer plaintiff from demonstrating that exposure to defendant's asbestos product was, in reasonable medical probability, a substantial factor in causing or contributing to his or her risk of developing cancer. Thus, the fundamental justification for a burden shift on causation--that is, that without such a shift all defendants might escape liability and the plaintiff be left "remediless"--was lacking. Asbestos plaintiffs can met their burden of proving legal causation under traditional tort principles.

Next, the court explained that the standardized instructions defining cause-in-fact causation under the substantial factor test [*BAJI No. 3.76*] and the doctrine of concurrent proximate legal causation [*BAJI No. 3.77*] must be augmented by an additional instruction for asbestos-induced cancer cases. Four factors necessitated a departure from the standard instructions: (1) the scientific uncertainty regarding the biological mechanisms by which inhalation of asbestos fibers lead to lung cancer; (2) the uncertainty that frequently exists whether a plaintiff was even exposed to dangerous asbestos fibers produced by a particular defendant; (3) the question of whether the risk of cancer created by exposure to the particular asbestos-containing product was significant enough to be considered a legal cause of the disease; and (4) the "impossibility" of proving "the unknowable path of a given asbestos fiber."

To rectify the shortcomings in *BAJI Nos. 3.76* and *3.77*, the jury must also be instructed that "the plaintiff need not prove that fibers from the defendant's product were the ones or among the ones, that actually began the process of malignant cellular growth. Instead, the plaintiff may meet the burden of proving that exposures to defendant's product was a substantial factor causing the illness by showing that in reasonable medical probability it was a substantial factor contributing to plaintiff's or decedent's risk of developing cancer." However, the giving of the burden-shifting instruction in this case was harmless (*16 Cal. 4th 953, 957-958, 67 Cal. Rptr. 2d 16*).

[d] Plaintiff Must Prove That Defective Product Was Substantial Factor in Causing His or Her Injuries

Rutherford v. Owens-Ill., Inc. *(1997) 16 Cal. 4th 953, 67 Cal. Rptr. 2d 16, 941 P.2d 1203* , is discussed in *§ 190.122[3][c]*.

In ***Whiteley v. Philip Morris, Inc.*** *(2004) 117 Cal. App. 4th 635, 11 Cal. Rptr. 3d 807 (2004)* , the defendants conceded on appeal that the record contained substantial evidence that smoking their cigarettes caused plaintiff's lung cancer. However, they argued that the plaintiff failed to prove that any negligent design of the cigarettes was a cause of her injury.

The court of appeal agreed. Even accepting the plaintiff's argument that *Rutherford v. Owens-Illinois, Inc.* supplied the appropriate standard of causation, the plaintiff failed to produce sufficient evidence to satisfy the *Rutherford* formulation. That is, there was no substantial evidence from which the jury could conclude that the negligent design of cigarettes was "in reasonable medical probability" a "substantial factor" contributing to the plaintiff's risk of developing lung cancer. During the trial, the plaintiff had presented expert testimony that it was feasible to reduce the cancer-causing potential of cigarettes by removing carcinogens from the smoke. However, this evidence was insufficient to support the finding that such negligence was a "cause" of the plaintiff's injuries. The plaintiff's expert witnesses did not attempt to quantify the likelihood that the asserted design defects of cigarettes--as distinguished from smoking cigarettes in general--contributed to the plaintiff's developing lung cancer. Their testimony concerning nicotine addiction did not rise to the level of a "reasonable medical probability" that this negligent design was a substantial factor in causing the plaintiff's lung cancer. Nor did the plaintiff present evidence from which the jury could assume that if the suggested design changes had been made, the plaintiff would have smoked the safer cigarettes, smoked less, or quit altogether (*117 Cal. App. 4th 635, 694-703)* .

In ***Lineaweaver v. Plant Insulation Co.*** *(1995) 31 Cal. App. 4th 1409, 37 Cal. Rptr. 2d 902* , a negligence case, the court stated that in the context of asbestos litigation, a plaintiff must demonstrate exposure to defendant's product and biological processes from the exposure which result in disease. In evaluating whether exposure was a substantial factor in causing asbestos disease, the standard should be the same as used in other negligence cases: is there "is there a reasonable medical probability based upon competent expert testimony that the defendant's conduct contributed to plaintiff's injury" (*31 Cal. App. 4th 1409, 1416, 37 Cal. Rptr. 2d 902*).

[e] Mere Possibility of Exposure Does Not Create Triable Issue of Fact on Causation

In ***Andrews v. Foster Wheeler LLC*** *(2006) 138 Cal. App. 4th 96, 41 Cal. Rptr. 3d 229* , a sailor claimed he developed an asbestos-related disease after more than 20 years of workplace exposure to asbestos. He admitted in deposition that he did not know if he had ever been present when anyone was working with defendant's asbestos products. The defendant submitted plaintiffs' nonresponsive answers to special interrogatories designed to elicit information about the plaintiff's exposure to defendant's product. Specifically, the plaintiff submitted the names of coworkers and supervisors and provided a list of depositions, but did not disclose any facts known by those persons or contained in the documents. In light of the interrogatory questions, plaintiff's failure to provide any information admitted that he had no further information. The defendant thus met its initial burden of making a prima facie showing that a triable issue of fact did not exist regarding causation. Expert declarations submitted in response to defendant's summary judgment motion, suggesting that plaintiff could have been exposed to asbestos fibers released into the air from condensers many years before he came aboard, amounted to little more than speculation. The court affirmed the summary judgment granted in favor of the defendant (*138 Cal. App. 4th 96, 108)* .

[4] Additional Authorities

[a] No Strict Liability Based on Design Defect if Defect Did Not Cause Injury

In *Kennedy v. Southern Cal. Edison Co. (9th Cir. 2001) 268 F.3d 763* , the decedent developed chronic myelogenous leukemia. The plaintiffs claimed that decedent's husband had brought home microscopic particles of radioactive material, known as "fuel fleas," from a nuclear generating station. They alleged negligence on the part of the utility and brought a products liability claim alleging faulty production of nuclear fuel rods. After the California Supreme Court issued *Rutherford v. Owens-Illinois, Inc.* [*see § 190.122[3][c]*], the plaintiffs requested a *Rutherford* instruction. The court refused their requests, and the jury returned a verdict for both defendants. In its initial panel opinion, the Ninth Circuit expanded *Rutherford* to apply to single-defendant hazardous substances cases where the defense of alternative possible causes is raised. The court withdrew its opinion and granted rehearing. It then held that no reasonable jury could have found that fuel fleas were a substantial factor in causing decedent's leukemia. Thus, the district court's failure to give the *Rutherford* instruction was harmless error. The court explained that the plaintiff needed to prove by a preponderance of the evidence that radiation from the station was a substantial factor in causing the decedent's leukemia. In other words, all the jury need have concluded, if given a *Rutherford* instruction, was that it was more probable than not that in reasonable medical likelihood the radiation was a substantial factor in contributing to her risk of developing leukemia. The radiation could only have been a substantial factor if it played more than an "infinitesimal" or "theoretical" part in bringing about the disease. No reasonable juror, however, could have made this finding, because the defendant introduced uncontroverted expert testimony that, if decedent had been exposed to "fuel fleas" as under plaintiffs' scenario, there was only a one in 100,000 chance that her disease was caused by the exposure. The contribution of the fuel fleas, even assuming exposure and ingestion, only played in infinitesimal or theoretical part in bringing about her injury (*268 F.3d 763, 769-771)* .

The facts and procedural background of *Soule v. General Motors Corp. (1994) 8 Cal. 4th 548, 34 Cal. Rptr. 2d 607, 882 P.2d 298* , are discussed in *§ 190.124[3][a]*. The Court held that defendant's proffered instruction, that any design defect could not be a legal cause of plaintiff's injuries if the collision would have caused the same injuries regardless of

the defect, was a correct statement of the law (*8 Cal. 4th 548, 572)* . The trial court erred in refusing this instruction. However, the Court held that the error was harmless given counsel's arguments to the jury, and the other instructions on causation given by the trial court (*8 Cal. 4th 548, 582-583)* .

In *Hunter v. Pacific Mech. Corp. (1995) 37 Cal. App. 4th 1282, 44 Cal. Rptr. 2d 335* , the plaintiff, a bricklayer sued asbestos manufacturers and installers for alleged asbestos-related injuries suffered as a result of working at various jobsites. One defendant moved for summary judgment on the ground that there was insufficient evidence that defendant was at the same jobsite as the plaintiff. The trial court granted the defendant's motion. The court of appeal affirmed, holding that the bricklayer's deposition testimony failed to demonstrate a material issue of fact relating to causation. The mere fact that the defendant was potentially present at the jobsite was insufficient to present an issue of triable fact as to causation. Instead, the record "offers only speculation and conjecture" (*37 Cal. App. 4th 1282, 1289)* .

In *Visueta v. General Motors Corp. (1991) 234 Cal. App. 3d 1609, 286 Cal. Rptr. 402* , a wrongful death action was filed by the heirs of the victim whose car was struck by an oncoming truck. The truck owner and driver cross-complained against the truck manufacturer, but the trial court granted the manufacturer's motion for summary judgment. The trial court found that no causal relationship existed as a matter of law between the victim's death and a claimed design defect in the inaccessible placement of the emergency parking brake. The court of appeal affirmed, emphasizing evidence that the brake had not been maintained and was inoperable, and the driver's admission that he never used it (*234 Cal. App. 3d 1609, 1616-1617)* .

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19-190 California Points & Authorities § 190.123

§ 190.123 Opposing Contention That Finding of Strict Liability Is Supported--Particular Product Used by Plaintiff Not Shown to Be Defective--Product Has Not Malfunctioned

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is strictly liable for plaintiff's injuries (see, e.g., §§ 190.82 -190.90, 190.122, 190.124, 190.164 -190.171).*]

DEFENDANT CANNOT BE HELD STRICTLY LIABLE FOR PLAINTIFF'S INJURIES ON A DESIGN-DEFECT THEORY, BECAUSE PLAINTIFF HAS NOT PROVED THAT THE _____ [*describe product*] USED BY PLAINTIFF HAS MALFUNCTIONED, WHICH IS ESSENTIAL TO ESTABLISH LIABILITY FOR AN INJURY CAUSED BY THE ALLEGED DEFECT.

Plaintiff Must Show Product Has Malfunctioned. When a plaintiff alleges a product is defective, proof that the product has malfunctioned is essential to establish liability for an injury caused by the defect (*Khan v. Shiley Inc. (1990) 217 Cal. App. 3d 848, 855, 266 Cal. Rptr. 106*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to the contention that defendant is subject to a products liability action based on design defect. The ground of opposition set forth is that plaintiff has failed to show that the product malfunctioned and hence has failed to show that the injuries were caused by the defects alleged [*see Khan v. Shiley Inc. (1990) 217 Cal. App. 3d 848, 855, 266 Cal. Rptr. 106]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with

points and authorities supporting a motion for summary judgment or summary adjudication of the issue that a cause of action for strict liability based on design defect cannot lie if plaintiff fails to prove that the product has malfunctioned.

Counsel should insert argument in this form, and in any other relevant points and authorities combined with this form, to show the relationship between the facts of the case and the points of law stated. For example, counsel should state facts showing that plaintiff has failed to show that the particular product used has malfunctioned.

[3] Discussion of Authorities

[a] Plaintiff Must Show Product Has Malfunctioned

In ***Khan v. Shiley Inc.*** *(1990) 217 Cal. App. 3d 848, 266 Cal. Rptr. 106* , a heart patient brought an action against the manufacturer of a heart valve based on a defect in the valve. Two years after receiving a heart-valve implant, plaintiff learned from her surgeon that the heart-valve manufacturer was recalling those valves because of their propensity to fracture. Numerous malfunctions had been reported, resulting in the deaths of the patients in whom the valve had been implanted. She brought an action against the manufacturer, alleging negligence, fraud and misrepresentation, breach of warranty, strict liability in tort, and intentional infliction of emotional distress. The complaint acknowledged that plaintiff's heart valve had "not yet malfunctioned," but alleged that it was defective and likely to malfunction, the apprehension about which caused the plaintiff emotional distress. Defendant filed a motion for summary judgment, arguing that the action was premature because there was no indication that the particular valve in question had failed or would fail. The trial court granted the motion, and plaintiff appealed.

The court of appeal affirmed with respect to the causes of action in negligence, breach of warranty, and strict liability, and reversed with respect to the cause of action in fraud. Plaintiff contended that the trial court erred in finding that "malfunction" is an element in a products liability lawsuit, asserting instead that the owner of a product that functions as intended, but contains an inherent defect that may cause the product to fail in the future, has an action against the manufacturer. The court of appeal noted that regardless which theory of recovery is used, when a plaintiff alleges that a product is defective, proof that the product has malfunctioned is essential to establish liability for an injury caused by the defect (*217 Cal. App. 3d 848, 855)* . A manufacturer is strictly liable in tort when the manufacturer, knowing that an article is to be used without inspection for defects, places it on the market and it proves to have a defect that causes injury to a human being. The court stated that this essential element of causation was missing in this case. Plaintiff's alleged injury was not caused by any defect in the valve. Rather, it was caused, if at all, by the knowledge that the valve might, at some future time, fracture (*217 Cal. App. 3d 848, 855)* . The court rejected plaintiff's argument that the California Supreme Court's decision in *Molien v. Kaiser Found. Hosps. (1980) 27 Cal. 3d 916, 167 Cal. Rptr. 831, 616 P.2d 813* , entitled her to a jury determination of her claims for emotional injuries. In *Molien* [*see* Ch. 153, *Mental Suffering and Emotional Distress*], the Court stated that damages for emotional distress could be recovered, in the absence of physical injury, by an individual who is a direct victim of the defendant's negligent conduct, if it was foreseeable that serious emotional distress would result from the negligent conduct. The court of appeal noted, however, that negligent infliction of emotional distress is not an independent tort. Damages for severe emotional distress are recoverable in a negligence action when they result from the breach of a duty owed the plaintiff that is assumed by the defendant or imposed on the defendant as a matter of law, or that arises out of a relationship between the two. The court rejected plaintiff's contention that she was "the quintessential direct victim" as contemplated by *Molien*, holding that she "has not yet been victimized." In the absence of product malfunction, plaintiff cannot establish that defendant breached any duty to her. The court also rejected application of *Barth v. Firestone Tire and Rubber Co. (N.D. Cal. 1987) 673 F. Supp. 1466* , to this case. In *Barth*, a class-action suit, an employee exposed to industrial chemicals alleged both injury to his immune system, rendering him more susceptible to developing cancer, and injury through the increased risk of cancer (*217 Cal. App. 3d 848, 856)* . Thus, the emotional injuries alleged by the plaintiff in *Barth* constituted an element of damages for the underlying legal injury. By contrast, in this case, plaintiff's alleged emotional injuries are not a basis for recovery absent a ground for imposing liability pursuant to a recognized cause of action. The court held that as long as the valve continues to function, no cause of action exists under any product-liability theory. The court

also stated that the causes of action in negligence (failure to warn) and breach of warranty fail for the same reason--that is, they cannot be premised on the risk that the valve may malfunction in the future (*217 Cal. App. 3d 848, 857)* . The court proceeded to distinguish the cause of action in fraud, in that it involved the defendant's conduct rather than the safety of the product, and held that defendant failed to meet its burden to establish that there was no triable issue of material fact with respect to the fraud claim (*217 Cal. App. 3d 848, 857-858)* .

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19-190 California Points & Authorities § 190.123A

§ 190.123A Opposing Contention That Finding of Strict Liability Is Supported--Product Not Shown to Be Defective Merely Because Plaintiff Collided With It

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum supporting the contention that defendant is not strictly liable for plaintiff's injuries caused by a product.*]

DEFENDANT CANNOT BE HELD STRICTLY LIABLE FOR PLAINTIFF'S INJURIES ON A DESIGN-DEFECT THEORY, BECAUSE PLAINTIFF HAS NOT PROVED THAT THE _____ [*describe product*], WHICH WAS PROPERLY FUNCTIONING AND PLAINLY VISIBLE, WAS DEFECTIVE MERELY BECAUSE PLAINTIFF COLLIDED WITH IT.

A. Properly Functioning, Plainly Visibly Product Is Not Defective. A properly functioning, plainly visible product is not rendered defective simply because the plaintiff collided with it (*Souza v. Squaw Valley Ski Corp. (2006) 138 Cal. App. 4th 262, 271, 41 Cal. Rptr. 3d 389*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to the contention that defendant is subject to a products liability action based on design defect. The ground of opposition set forth is that plaintiff has failed to show that the product, which was properly functioning and plainly visible, was rendered defectively simply because plaintiff collided with it [*see Souza v. Squaw Valley Ski Corp. (2006) 138 Cal. App. 4th 262, 271, 41 Cal. Rptr. 3d 389]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with

points and authorities supporting a motion for summary judgment or summary adjudication of the issue that a cause of action for strict liability based on design defect cannot lie if plaintiff fails to prove that the product is defective.

[b] Argument

Counsel should insert argument in this form, and in any other relevant points and authorities combined with this form, to show the relationship between the facts of the case and the points of law stated. For example, counsel should state facts showing that the product was properly functioning and plainly visible at the time of the incident.

[3] Discussion of Authorities

[a] Properly Functioning, Plainly Visibly Product Is Not Defective

In ***Souza v. Squaw Valley Ski Corp.*** *(2006) 138 Cal. App. 4th 262, 41 Cal. Rptr. 3d 389* , the plaintiff collided with a snowmaking hydrant on a ski trail, injuring her mouth. The hydrant protruded about five feet above snow level and was plainly visible at the time of the accident. The plaintiff brought a product liability action alleging that the hydrant was defectively designed in that it was inadequately padded, located in the middle of the trail, and its nozzle was positioned in an uphill direction. The trial court granted summary judgment in favor of the defendant. The appellate court affirmed. It first pointed out that the plaintiff was neither a user of the hydrant nor a bystander to its use, and that the hydrant was properly functioning as snowmaking equipment and not being used as a product at the time of the accident. In the words of the trial court, a plainly visible and generally avoidable snowmaking hydrant is not defectively designed simply because a skier runs into it (*138 Cal. App. 4th 262, 271)* .

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19-190 California Points & Authorities § 190.124

§ 190.124 Opposing Contention That Finding of Strict Liability Is Supported--Lack of Factual Support for Inference That Design Did Not Meet Minimum Safety Expectations of Ordinary Users Precludes Finding of Defect Without Balancing of Risks and Benefits

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is strictly liable for plaintiff's injuries (see, e.g., §§ 190.82 -190.90, 190.122, 190.123, 190.125, 190.164 -190.171).*]

DEFENDANT CANNOT BE HELD STRICTLY LIABLE FOR PLAINTIFF'S INJURIES ON THE GROUND THAT THE PRODUCT WAS DEFECTIVE IN DESIGN BECAUSE IT DID NOT PERFORM AS SAFELY AS ITS ORDINARY CONSUMERS WOULD EXPECT, BECAUSE THE CIRCUMSTANCES OF THE PRODUCT'S FAILURE DO NOT PERMIT AN INFERENCE THAT THE REASONABLE MINIMUM SAFETY EXPECTATIONS OF THE PRODUCT'S ORDINARY CONSUMERS WERE VIOLATED.

Circumstances of Product Failure Must Permit Inference That Consumer Expectations Were Not Met. A defendant cannot be held strictly liable for a design defect based solely on the consumer expectations test if the circumstances of the product's failure do not permit an inference that the product's design performed below the legitimate, commonly accepted minimum safety assumptions of its ordinary consumers (*Soule v. General Motors Corp. (1994) 8 Cal. 4th 548, 568-569, 34 Cal. Rptr. 2d 607, 882 P.2d 298*).

Expert Witnesses May Not Be Used When Product's Minimum Safety Is Within Lay Juror's Common Knowledge. Expert witnesses may not be used to demonstrate what an ordinary consumer would or should expect when the minimum safety of a product is within the common knowledge of lay jurors (*Soule v. General Motors Corp. (1994) 8 Cal. 4th 548, 567, 34 Cal. Rptr. 2d 607* ; *Bell v. Bayerische Motoren Werke Aktiengesellschaft (2010) 181 Cal. App. 4th 1108, 1129)* .

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to the contention that the defendant is strictly liable for injuries allegedly caused by a design defect in a product when the theory of liability is the "consumer expectation" test. The ground of opposition is that the consumer expectation test cannot be the basis for strict liability because the circumstances of the product's failure do not permit an inference that the product's design performed below the legitimate, commonly accepted minimum safety assumptions of its ordinary consumers [*Soule v. General Motors Corp. (1994) 8 Cal. 4th 548, 568-569, 34 Cal. Rptr. 2d 607, 882 P.2d 298]* .

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts tending to show that the particular product failure involved could not have violated reasonable minimum assumptions about the safety of the product [*see* *Soule v. General Motors Corp. (1994) 8 Cal. 4th 548, 566-570, 34 Cal. Rptr. 2d 607, 882 P.2d 298* (alleged defect in design of automobile concerning crashworthiness of wheel assembly held outside safety assumptions of ordinary consumers)].

[b] Related Points and Authorities

In an appropriate case, the points and authorities in § 190.124A may be added to support the contention that a defendant is not liable under the consumer expectation test.

[c] Opposing Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposition to the contentions supported by the points and *authorities in §§ 190.115* and *190.116*.

[3] Discussion of Authorities

[a] Circumstances of Product Failure Must Permit Inference That Consumer Expectations Were Not Met

In ***Soule v. General Motors Corp.*** *(1994) 8 Cal. 4th 548, 34 Cal. Rptr. 2d 607, 882 P.2d 298* , plaintiff's ankles were severely injured when her car, manufactured by defendant, collided with another vehicle. Plaintiff sued, alleging that a defective design caused the left front wheel to break free in the collision, collapse rearward, and smash the floorboard into her feet. Defendant asserted that the design was not defective, and that in any event the force of the collision caused the injuries notwithstanding any defect. At trial, each party's position was supported by expert testimony. The trial court instructed the jury that defendant could be liable for injuries caused by the defective design of a product if either (1) the product failed to perform as safely as an ordinary consumer would expect, or (2) there is a risk of danger inherent in the design that outweighs the benefit of the design. The trial court also instructed the jury on legal cause, but refused defendant's proffered instruction that defendant was not liable if the injuries that plaintiff suffered would have occurred even without any improper design. The jury returned a verdict for plaintiff and the trial court entered judgment on that verdict. The court of appeal affirmed; the Supreme Court granted review and affirmed the judgment.

The Court held that the jury should not have been instructed on the consumer expectation test, because an ordinary consumer cannot reasonably expect that an automobile will be designed to remain intact in any and all collisions, nor can common experience inform consumers how safely an automobile's design should perform under the specific circumstances involved in this case (*8 Cal. 4th 548, 570)* . The Court held that unless the facts actually permit an inference that the product's performance did not meet the minimum safety expectations of its ordinary users, the jury must engage in the balancing of risks and benefits required by the second prong of the alternative test set out in *Barker v. Lull Eng'g Co. (1978) 20 Cal. 3d 413, 417-418, 435, 143 Cal. Rptr. 225, 573 P.2d 443* (*8 Cal. 4th 548, 568)* . The Court did not preclude the use of the consumer expectations test in all cases involving crashworthiness, complex

products, or technical causation questions. Instead, the Court defined the crucial question to be determined in each case as whether the circumstances of the product's failure permit an inference that the product's design performed below the legitimate, commonly accepted minimum safety assumptions of its ordinary consumers (*8 Cal. 4th 548, 568-569)* .

The Court held that the error was harmless, due to the extensive evidence regarding the dangers and benefits of the design, the arguments of counsel that focused on the risk-benefit test, and the absence of any indication that the jury relied on the consumer expectations test in reaching its verdict for plaintiff (*8 Cal. 4th 548, 570-571)* .

[b] Expert Witnesses May Not Be Used When Product's Minimum Safety Is Within Lay Juror's Common Knowledge

Soule v. General Motors Corp. *(1994) 8 Cal. 4th 548, 34 Cal. Rptr. 2d 607* , is discussed in *§ 190.123[3][a]*.

In ***Bell v. Bayerische Motoren Werke Aktiengesellschaft*** *(2010) 181 Cal. App. 4th 1108* , the plaintiff lost control of his vehicle and suffered severe injuries. He and his wife brought an action against the manufacturers, contending, *inter alia*, that an ordinary consumer would not have recognized the potential risk of sustaining a significant head or neck injury in a rollover accident in the vehicle. The jury returned a special verdict in favor of defendants on the negligence and products liability claims. The trial court granted plaintiffs' motion for a new trial but denied their motion for judgment notwithstanding the verdict.

On appeal, plaintiffs contended that the new trial order was proper because, *inter alia*, the evidence compelled the conclusion that an ordinary consumer would not have been aware of the potential risks. They claimed that the testimony of defendant's own engineers indicated that the vehicle's risks had not been apparent to them, and that if the risks were not apparent to automotive experts, they could not have been apparent to ordinary consumers.

The Court of Appeal disagreed, and reversed the order granting a new trial. The consumer expectations test focuses on the safety expectations of an ordinary consumer rather than those of an expert. Where the minimum safety of a product is within the common knowledge of lay jurors, expert witnesses may not be used to demonstrate what an ordinary consumer would or should expect. The plaintiffs did not contend the minimum safety of the vehicle was not within the common knowledge of lay jurors. The jury was thus entitled to disregard the testimony of the defendants' engineers in concluding that the potential risks would have been apparent to an ordinary consumer (*181 Cal. App. 4th 1108, 1129)* .

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19-190 California Points & Authorities § 190.125

§ 190.125 Opposing Contention That Product Is Defective in Design--Consumer Expectation Test Does Not Apply if Safety of Product Is Not Within Consumer's Everyday Experience

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product (see, e.g., §§ 190.120 -190.124).*]

THE SAFETY OF THE DESIGN OF THE _____ [*specify product*] THAT INJURED PLAINTIFF WAS NOT WITHIN THE EVERYDAY EXPERIENCE OF THE CONSUMER. THE CONSUMER EXPECTATION TEST IS THEREFORE INAPPLICABLE AND EXPERT TESTIMONY IS NECESSARY TO EVALUATE THE DESIGN'S RISKS AND BENEFITS.

Consumer Expectation Test Does Not Apply if Safety of Product Is Not Within Everyday Experience of Consumer. The consumer expectation test is reserved for cases in which the everyday experience of the product's users permits a conclusion that the product's design violated minimum safety assumptions, and is thus defective regardless of expert opinion about the merits of the design. If the issue of design defect goes beyond the common or everyday experience of the consuming public, then jurors need expert testimony to evaluate the risks and benefits of the challenged design (*Stephen v. Ford Motor Co. (2005) 134 Cal. App. 4th 1363, 1371, n.6, 37 Cal. Rptr. 3d 9* ; *Morson v. Superior Court (2001) 90 Cal. App. 4th 775, 109 Cal. Rptr. 2d 343* ; *Pruitt v. Gen. Motors Corp. (1999) 72 Cal. App. 4th 1480, 1483, 86 Cal. Rptr. 2d 4* ; *see also Soule v. General Motors Corp. (1994) 8 Cal. 4th 548, 567, 143 Cal. Rptr. 225, 573 P.2d 443*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that consumer expectation test applies in

determining the safety of the design of a product alleged to have caused injury, in that the safety of the product is not within the everyday experience of the consumer.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue. For example, they may be combined with points and authorities supporting a motion for summary adjudication on the issue of defendant's strict liability. They may also be adapted for use in a trial brief (for example, to oppose a jury instruction regarding the consumer expectation test) or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should include facts showing that the minimum safety standards of the product are not within the common knowledge of lay jurors [*see, e.g., Pruitt v. Gen. Motors Corp. (1999) 72 Cal. App. 4th 1480, 1483, 86 Cal. Rptr. 2d 4* (minimum air bag safety standards not within common knowledge of lay jurors); *see also Soule v. General Motors Corp. (1994) 8 Cal. 4th 548, 567, 143 Cal. Rptr. 225, 573 P.2d 443* (alleged defect in design of automobile concerning crashworthiness of wheel assembly was outside safety assumptions of ordinary consumers)].

[b] Related Points and Authorities

In an appropriate case, the points and *authorities in § 190.124* may be added to support the contention that a defendant is not liable under the consumer expectation test.

[c] Opposing Points and Authorities

In an appropriate case, these points and authorities may be used to oppose the contention supported by the points and *authorities in §§ 190.115 -190.116*.

[3] Discussion of Authorities

[a] Consumer Expectation Test Does Not Apply if Safety of Product Is Not Within Everyday Experience of Consumer

In ***Stephen v. Ford Motor Co.*** *(2005) 134 Cal. App. 4th 1363, 37 Cal. Rptr. 3d 9* , the tread separated from the rear tire of the plaintiff's Ford Explorer. The plaintiff brought an action against the manufacturers of the tire and the vehicle, alleging that they were defectively designed. The trial court excluded and limited the testimony of the plaintiff's experts and granted the defendants' motions for nonsuit. The court of appeal affirmed. The plaintiff was not entitled to prove by circumstantial evidence that there was a design defect because the tire and vehicle performed below the standard expected by an ordinary consumer when used in a reasonably foreseeable manner. The consumer expectation test does not apply in a case such as this one, in which an expert must balance the benefits of design against the risk of danger (*134 Cal. App. 4th 1363, 1371 n.6*).

In ***Pruitt v. Gen. Motors Corp.*** *(1999) 72 Cal. App. 4th 1480, 86 Cal. Rptr. 2d 4* , the plaintiff was driving her car when she collided with another car. Plaintiff was wearing her seatbelt and shoulder harness, and the air bag deployed. Plaintiff suffered jaw injuries. Plaintiff brought a products liability action against defendant manufacturer, alleging that the air bag deployment caused her injuries. At trial, the court granted plaintiff's motion to exclude expert testimony offered by defendant regarding ordinary consumer expectations but also granted defendant's motion to preclude plaintiff's testimony about her expectations concerning the safety of the airbag. Plaintiff did testify at trial, however, that she had not expected the air bag to injure her (*72 Cal. App. 4th 1480, 1482)* . The trial court instructed the jury on products liability, design defect, and on the elements of failure to warn. The plaintiff requested a jury instruction regarding the consumer expectation test. The trial court refused to give the instruction. The jury failed to find a defect in design or a failure to warn defect and rendered judgment for defendant. Plaintiff appealed, contending that the jury should have been instructed on the consumer expectation test.

The court of appeals affirmed. The court repeated the application of the consumer expectation test from *Soule v. General Motors Corp. (1994) 8 Cal. 4th 548, 567, 143 Cal. Rptr. 225, 573 P.2d 443* [*see § 190.124[3][a]*], which stated that the consumer expectation test was reserved for cases in which the everyday experience of the product's users permits a conclusion that the product's design violated minimum safety assumptions, and is thus defective regardless of expert opinion about the merits of the design (*72 Cal. App. 4th 1480, 1483)* . The court of appeal noted that the deployment of an air bag was not part of the everyday experience of the consuming public. Likewise, that minimum safety standards for air bags were not within the common knowledge of lay jurors. The court discussed some of the examples given in *Soule* for when the consumer expectation test would be appropriate: automobiles that explode while idling at a stoplight, or roll over and catch fire in a collision at two miles per hour. The court added its own example of air bags inflating for no apparent reason while one is cruising down the road at 65 miles per hour (*72 Cal. App. 4th 1480, 1484)* . The court held that jurors in this case were in need of expert testimony to evaluate the risks and benefits of the challenged design. Plaintiff's own expert had testified that in designing airbags there were tradeoffs involving complex technical issues. As a result, the court affirmed the trial court's decision not to give the consumer expectations instruction (*72 Cal. App. 4th 1480, 1484)* .

In ***Morson v. Superior Court*** *(2001) 90 Cal. App. 4th 775, 109 Cal. Rptr. 2d 343* , the plaintiffs claimed that the defendants manufactured and distributed latex gloves that contained chemical substances, including latex rubber, certain powders, or other substances that were of a toxic nature when used independently and or in combination with other such chemical substances. The plaintiffs claimed that improperly designed and manufactured latex gloves may cause latex allergy by allowing excessive levels of allergenic agents to remain present on the surface of the glove during manufacture (*90 Cal. App. 4th 775, 780)* . The plaintiffs requested a jury instruction regarding the consumer expectation test. The Superior Court of San Diego made a general court order restricting plaintiffs from seeking these instructions. The plaintiffs filed a writ of mandate to have the court order set aside.

The court of appeals affirmed finding that the trial court did not err in issuing a general order restricting plaintiffs from seeking jury instructions pursuant to the consumer expectation test of design defect. The alleged creation or exacerbation of allergies by the gloves were not subjects of commonly accepted minimum safety assumptions of an ordinary consumer (*90 Cal. App. 4th 775, 795)* .

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Volume 19 Chapters 190-195 PRODUCTS LIABILITY---to---PUBLIC ADMINISTRATIVE LAW
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A. Strict Liability
4. Design Defect

19-190 California Points & Authorities § 190.126

§ 190.126 Opposing Contention that Product Is Defective--Benefits of Design Outweigh Inherent Risks

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate memorandum of points and authorities opposing the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product (see, e.g., §§ 190.82-190.86, 190.164-190.171).*]

THE _____ [*specify product*] IS NOT DEFECTIVE IN ITS DESIGN BECAUSE AFTER CONSIDERING THE RELEVANT FACTORS THAT MAY BE CONSIDERED IN APPLYING THE RISK-BENEFITS TEST, THE BENEFITS OF THE PRODUCT'S DESIGN OUTWEIGH THE RISKS INHERENT IN ITS DESIGN.

Aesthetics Is Proper Consideration in Risk-Benefit Analysis. A jury may properly consider aesthetics in balancing the benefits of a challenged design against the risk of danger inherent in the design (*Bell v. Bayerische Motoren Werke Aktiengesellschaft (2010) 181 Cal. App. 4th 1108, 1131)* .

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to the contention that defendant is subject to strict products liability based on design defect. The ground of opposition set forth is that the benefits of the product's design outweigh the risks inherent in its design.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary adjudication on the issue of defendant's strict liability. They may also be adopted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the point of law stated. For example, counsel should argue that aesthetics is a proper consideration in the risk-benefit test; that the product at issue is not a strictly utilitarian product; and that much of the product's perceived benefit lies in its appearance [*see, e.g., Bell v. Bayerische Motoren Werke Aktiengesellschaft (2010) 181 Cal. App. 4th 1108, 1131]* .

[3] Discussion of Authorities

[a] Aesthetics Is Proper Consideration in Risk-Benefit Analysis

In ***Bell v. Bayerische Motoren Werke Aktiengesellschaft*** *(2010) 181 Cal. App. 4th 1108* , the plaintiff lost control of his vehicle and suffered severe injuries. He and his wife brought an action against the manufacturers. Plaintiffs requested that the trial court instruct the jury with CACI No. 1204, listing the factors for the jury to consider in deciding whether the benefits of the design outweighed the risks of the design. The court approved defendants' request to modify the instructions by including "aesthetics" as a relevant factor in the risk-benefit analysis. Plaintiffs then withdrew their proposed instruction. The court instructed the jury on, *inter alia*, design defect based on the consumer expectations test. The jury returned a special verdict in favor of defendants on the negligence and products liability claims. The trial court granted plaintiffs' motion for a new trial but denied their motion for judgment notwithstanding the verdict.

On appeal, plaintiffs contended that the new trial order was proper because, *inter alia*, the court's ruling on defendants' requested modification of CACI No. 1204 was error. The court of appealed disagreed, stating that aesthetics is a proper consideration in the risk-benefit analysis. It reasoned that "much of the perceived benefit of a car lies in its appearance," and that a car is not a strictly utilitarian product. The court reversed the order granting a new trial (*181 Cal. App. 4th 1108, 1130)* .

[b] Opposing Points and Authorities

In an appropriate case, these points and authorities may be used to oppose the contention supported by the points and *authorities in §§ 190.110 -190.111*.

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19-190 California Points & Authorities §§ 190.127-190.139

[Reserved]

§§ 190.127[Reserved]

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5. Manufacturing Defect

19-190 California Points & Authorities § 190.140

§ 190.140 Supporting Contention That Product Is Defective in Manufacture--Definition of Manufacturing Defect

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product (see, e.g., § 190.110).*]

DEFENDANT _____ [*name*] IS STRICTLY LIABLE BECAUSE DEFENDANT _____ [MANUFACTURED *or* SOLD] A PRODUCT THAT IS DEFECTIVE IN ITS MANUFACTURE.

Product Has Manufacturing Defect if It Comes off Assembly Line in Defective Condition. A product has a manufacturing defect if it differs from the manufacturer's intended result or from other ostensibly identical units of the same product line, as when it comes off the assembly line in a substandard condition (Notmeyer v. Stryker Corp . *(N.D. Cal. 2007) 502 F. Supp. 2d 1051, 1059* ; *Barker v. Lull Eng'g Co. (1978) 20 Cal. 3d 413, 429, 143 Cal. Rptr. 225, 573 P.2d 443*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a product has a manufacturing defect because it does not conform to the original plans for the product or it differs from other ostensibly identical units.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary judgment or summary adjudication on the issue that the product is defective. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, and with any other relevant points and authorities combined with this form, to show the relationship between the facts of the case and the points of law stated. For example, counsel should show facts indicating that the product that injured plaintiff differed from its original design or was substandard in its manufacture, and that variation caused plaintiff's injuries.

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 190.141* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Product Has Manufacturing Defect if It Comes off Assembly Line in Defective Condition

The facts and procedural background of ***Notmeyer v. Stryker Corp.*** *(N.D. Cal. 2007) 502 F. Supp. 2d 1051* , are discussed in *§ 190.259[4]*. The court held that the plaintiff presented sufficient circumstantial evidence to raise a triable issue of fact as to whether the femoral head to his hip replacement system contained a manufacturing defect (*502 F. Supp. 2d 1051, 1059-1060)* .

The facts and procedural background of ***Barker v. Lull Eng'g Co.*** *(1978) 20 Cal. 3d 413, 143 Cal. Rptr. 225, 573 P.2d 443* , are discussed in *§ 190.110[3][a]*. In reversing the judgment, the Court explained the difference between a manufacturing and a design defect. Specifically, the Court pointed out that a manufacturing defect is readily identifiable because the defective product differs from the manufacturer's intended result or from other ostensibly identical units of the same product line. For example, a product has a manufacturing defect when it comes off the assembly line in a substandard condition. A design defect, on the other hand, cannot be identified simply by comparing the injury-producing product with the manufacturer's plans or with other units of the same product line, because by definition the plans and all such units will reflect the same design. Rather, to have a design defect, the design from which all units are produced must itself be defective (*20 Cal. 3d 413, 429)* .

[4] Additional Authorities

[a] Product Has Manufacturing Defect When It Comes off Assembly Line in Defective Condition

In *Montez v. Ford Motor Co. (1980) 101 Cal. App. 3d 315, 161 Cal. Rptr. 578* , plaintiff brought an action in strict liability and negligence against the manufacturer of an automobile. Plaintiff had suffered serious injuries when she was ejected from the car after the driver failed to negotiate a sharp curve on the highway. The trial court instructed the jury solely on a strict liability theory, but failed to properly instruct the jury as to the definition of a manufacturing defect. Although the court of appeal affirmed the ensuing judgment for defendant on the grounds that this error was not prejudicial, the court stated that the proper manufacturing defect instruction should have been given. The court pointed out that a manufacturing defect is accurately defined as existing when the product differs from the manufacturer's intended result or differs from apparently identical products from the same manufacturer (*101 Cal. App. 3d 315, 320-322)* .

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19-190 California Points & Authorities § 190.141

§ 190.141 Opposing Contention That Product Is Defective in Manufacture--Product Does Not Differ From Manufacturer's Intended Result and Does Not Differ Significantly From Identical Units From Same Product Line

[1] FORM 190.141 Opposing Contention That Product Is Defective in Manufacture--Product Does Not Differ From Manufacturer's Intended Result and Does Not Differ Significantly From Identical Units From Same Product Line

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product.*]

DEFENDANT _____ [*name*] CANNOT BE HELD STRICTLY LIABLE FOR PLAINTIFF'S INJURIES ON A MANUFACTURING DEFECT THEORY BECAUSE DEFENDANT'S PRODUCT DID NOT DIFFER FROM DEFENDANT'S INTENDED RESULT OR HAVE MATERIALLY SIGNIFICANT DIFFERENCES FROM IDENTICAL UNITS FROM THE SAME PRODUCT LINE.

Product Not Defectively Manufactured. A product is not defectively manufactured if it does not differ from the manufacturer's intended result, and does not have materially significant differences among identical units from the same product line (*Gonzalez v. Autoliv ASP, Inc. (2007) 154 Cal. App. 4th 780, 792, 64 Cal. Rptr. 3d 908* ; *In re Coordinated Latex Glove Litig. (2002) 99 Cal. App. 4th 594, 613, 121 Cal. Rptr. 2d 301*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition of the contention that a product has a manufacturing defect because it does not conform to the original plans for the product or it differs from other ostensibly identical units.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context

in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary judgment or summary adjudication on the issue that the product is not defective. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should show facts indicating that the product that injured the plaintiff did not differ from its original design and was not substandard in its manufacture.

[c] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 190.140* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Product Not Defectively Manufactured

The facts and procedural background of ***Gonzalez v. Autoliv ASP, Inc.*** *(2007) 154 Cal. App. 4th 780, 64 Cal. Rptr. 3d 908* , are discussed in *§ 190.74[3][b]*. The court of appeal held that the plaintiff presented no evidence of a manufacturing defect. She did not even allege that the front airbag module of the vehicle in which she was a passenger performed differently from other identical units (*154 Cal. App. 4th 780, 792)* .

In ***In re Coordinated Latex Glove Litig.*** *(2002) 99 Cal. App. 4th 594, 121 Cal. Rptr. 2d 301* , the plaintiff claimed that defective natural rubber latex (NRL) gloves caused her to develop a life-threatening allergy to all forms of NRL by allowing excessive levels of latex proteins to remain present on the surface of the gloves during manufacture. It was undisputed that the allergic agents could be reduced or eliminated through washing and chlorinating procedures in the design and manufacture of the gloves. The plaintiff contended that the defendant "took too long" to make this its standard practice, in light of its knowledge and research. The court of appeal concluded that the plaintiff failed to show that the latex gloves--which were manufactured precisely as intended, complied with government standards, and fulfilled their primary barrier function--had manufacturing defects due to the existence of evidence of the manufacturer's improvement efforts, targets, and goals, at different times and locations, reflective of the available state of scientific knowledge regarding latex protein levels of exposure (*99 Cal. App. 4th 594, 613)* .

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19-190 California Points & Authorities §§ 190.142-190.159

[Reserved]

§§ 190.142[Reserved]

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6. Failure to Warn

19-190 California Points & Authorities § 190.160

§ 190.160 Supporting Contention That Defendant Is Strictly Liable for Failure to Warn of Known or Knowable Potential Dangers That Render Product Unsafe for Intended or Reasonably Foreseeable Use--In General

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product (see, e.g., §§ 190.61 -190.162)*]

DEFENDANT _____ [*name*] IS STRICTLY LIABLE BECAUSE DEFENDANT FAILED TO WARN [ADEQUATELY] OF THE POTENTIAL DANGERS INHERENT IN THE USE OF THE _____ [*describe product*] THAT WERE _____ [KNOWN TO DEFENDANT *or* KNOWABLE SCIENTIFICALLY], THAT IS, _____ [*describe potential danger in absence of adequate warning*], AND THE _____ [ABSENCE *or* INADEQUACY] OF THE WARNING RENDERED THE PRODUCT UNSAFE FOR ITS INTENDED OR REASONABLY FORESEEABLE USE.

A. Manufacturer Is Strictly Liable for Failure to Warn. A manufacturer is liable in strict products liability for injuries incurred because of a defect in a product caused by the manufacturer's failure to warn of known or scientifically knowable potential dangers that render the product unsafe for its intended or reasonably foreseeable use (*Carlin v. Superior Court (1996) 13 Cal. 4th 1104, 1109, 56 Cal. Rptr. 2d 162, 920 P.2d 134* ; *Anderson v. Owens-Corning Fiberglas Corp. (1991) 53 Cal. 3d 987, 995-1003, 281 Cal. Rptr. 528, 810 P.2d 549* ; *Jones v. John Crane, Inc. (2005) 132 Cal. App. 4th 990, 1004-1005, 35 Cal. Rptr. 3d 144*).

B. Strict Liability Invoked for Warning Defects. Strict liability has been invoked for three types of defects: manufacturing defects, design defects, and "warning defects" (inadequate warnings or failure to warn) (*Anderson v. Owens-Corning Fiberglas Corp. (1991) 53 Cal. 3d 987, 995, 281 Cal. Rptr. 528, 810 P.2d 549*).

C. Liability for Failure to Warn Is Distinct From Consumer Expectations Test. Products liability under a

failure-to-warn theory is a distinct cause of action from one under the consumer expectations test (*Boeken v. Philip Morris Inc. (2005) 127 Cal. App. 4th 1640, 1669, 26 Cal. Rptr. 3d 638, 660* ; *Arnold v. Dow Chem. Co. (2001) 91 Cal. App. 4th 698, 717, 110 Cal. Rptr. 2d 722*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a manufacturer may be held strictly liable for failing to warn of known or knowable potential dangers involved when a product is used for its intended purpose or in a reasonably foreseeable manner [*see Anderson v. Owens-Corning Fiberglas Corp. (1991) 53 Cal. 3d 987, 995-1003, 281 Cal. Rptr. 528, 810 P.2d 549]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary judgment, or summary adjudication regarding the existence of a cause of action for strict products liability [*see Code Civ. Proc. § 437c(f)*]. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, and with any other relevant points and authorities combined with this form, to show the relationship between the facts of the case and the points of law stated. For example, counsel should show that the plaintiff used the product in its intended or reasonably foreseeable manner, that the potential dangers were known or scientifically knowable to defendant at all relevant times, and either that no warning was given, or that the warning given was inadequate to prevent the potential danger.

[b] Related Points and Authorities

In an appropriate case, the points and *authorities in §§ 190.163* and *190.283* may be combined with the points and authorities in this form.

[c] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 190.164 -190.176* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Manufacturer Is Strictly Liable for Failure to Warn

The facts and procedural background of ***Carlin v. Superior Court*** *(1996) 13 Cal. 4th 1104, 56 Cal. Rptr. 2d 162, 920 P.2d 134* are discussed in *§ 190.163[3][a]*. The Court reaffirmed the strict liability standard of *Anderson v. Owens-Corning Fiberglas Corp. (1991) 53 Cal. 3d 987, 995-1003, 281 Cal. Rptr. 528, 810 P.2d 549* , and refused a defendant's invitation to adopt a new standard of simple negligence applicable only to the pharmaceutical industry. A manufacturer of prescription drugs is strictly liable for failing to warn of known or reasonably scientifically knowledgeable risks from prescription drugs (*13 Cal. 4th 1104, 1109)* .

Anderson v. Owens-Corning Fiberglas Corp. *(1991) 53 Cal. 3d 987, 281 Cal. Rptr. 528, 810 P.2d 549* , is discussed in *§ 190.164[3][a]*. In limiting the cause of action for strict products liability, based on the failure to warn, to cases in which the danger was known or knowable, the Court recognized that a failure to warn could support a strict liability cause of action if that knowledge existed (*53 Cal. 3d 987, 995-1000)* .

The Court also held that a defendant is required to warn of scientifically knowable dangers, and that the failure to provide this type of warning can also be a basis for strict products liability (*53 Cal. 3d 987, 1000)* .

In ***Jones v. John Crane, Inc.*** *(2005) 132 Cal. App. 4th 990, 35 Cal. Rptr. 3d 144* , the jury returned a special verdict in favor of the plaintiffs on their warning claim. The court of appeal affirmed, holding that substantial evidence supported the jury's finding that there was a scientifically known or knowable medical probability that the defendant's products would increase the risk of cancer at the time of the decedent's exposure. Scientific, medical, and historical articles regarding the causal connection between asbestos and lung cancer supported the jury's findings that the risks associated with the defendant's products were known or knowable at the time of the decedent's exposure. Moreover, articles published by 1950 connecting packing and gaskets with the risk of asbestos-related disease supported the jury's rejection of the defendant's claim that it had no reason to suspect any danger associated with its product (*132 Cal. App. 4th 990, 1004-1005)* .

[b] Strict Liability Invoked for Warning Defects

Anderson v. Owens-Corning Fiberglas Corp. *(1991) 53 Cal. 3d 987, 281 Cal. Rptr. 528, 810 P.2d 549* , is discussed in *§ 190.164[3][a]*. In the course of discussing the evolution of the failure-to-warn concept of strict products liability, the Supreme Court stated that strict liability has been invoked for three types of defects: manufacturing defects, design defects, and "warning defects" (inadequate warnings or failure to warn) (*53 Cal. 3d 987, 995)* .

[c] Liability for Failure to Warn Is Distinct From Consumer Expectations Test

In ***Boeken v. Philip Morris Inc.*** *(2005) 127 Cal. App. 4th 1640, 26 Cal. Rptr. 3d 638* , the plaintiff filed suit alleging negligence, strict products liability, and fraud against the manufacturer of "light" cigarettes. The jury determined that the cigarettes were defective either in design or failure to warn. On appeal, the defendant argued that the consumer expectations test is essentially one for failure to warn, and thus preempted by the federal Public Health Cigarette Smoking Act of 1968. The court of appeal disagreed, pointing out that products liability under a failure-to-warn theory is a distinct cause of action from one under the consumer expectations test (*127 Cal. App. 4th 1640, 1668)* .

In ***Arnold v. Dow Chem. Co.*** *(2001) 91 Cal. App. 4th 698, 110 Cal. Rptr. 2d 722* , plaintiffs alleged that exposure to the defendants' pesticide products caused them serious injuries. The trial court granted summary judgement for the defendants, ruling that the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) [*7 U.S.C.S. § 136 et seq.*] preempted the plaintiffs' state law claims. The court of appeal affirmed the judgment with respect to the failure to warn claim, but reversed and remanded with respect to the other causes of action. It concluded that the plaintiffs did not allege a failure-to-warn claim, but a design defect cause of action. The court rejected the defendants' contention that the plaintiffs' causes of actions were merely attempts to bypass FIFRA preemption through artful pleading, pointing out that the consumer expectations test is independent from a failure-to-warn cause of action (*91 Cal. App. 4th 698, 717)* .

[4] Additional Authorities

[a] Manufacturer Is Strictly Liable for Failure to Warn

Dosier v. Wilcox-Crittendon Co. (1975) 45 Cal. App. 3d 74, 119 Cal. Rptr. 135 , is discussed in *§ 190.165[3][a]*.

NOTE:
Although *Dosier* held in favor of the defendant, it is used in this form because it best defines the "foreseeability" component of the failure-to-warn cause of action.

[b] Strict Liability Invoked for Warning Defects

In *Bunch v. Hoffinger Indus., Inc. (2004) 123 Cal. App. 4th 1278, 20 Cal. Rptr. 3d 780* , the 11-year-old plaintiff dove

into an above-ground swimming pool that was four feet deep, struck the pool bottom, and was rendered a quadriplegic. In the plaintiff's suit against the pool's manufacturer, the jury awarded the plaintiff over $12 million in damages, and the defendant appealed. The court of appeal affirmed, rejecting the defendant's argument that it owed no duty to warn of possible injury from the obvious danger of diving into a shallow above-ground pool. The plaintiff had offered her own testimony that she thought that the homeowner was "just being a mom" when she told the plaintiff not to dive into the pool and that the sticker on the pool meant "not to do a pike dive." The plaintiff testified that a label warning of disabling dangers would have prevented her from diving on the day of the incident. She also presented expert testimony that young divers cannot necessarily appreciate the depth of above-ground pools, that warnings to children must spell out the dangers to be effective, and that the risk of paraplegia was not readily apparent to an 11-year-old child (*123 Cal. App. 4th 1278, 1303-1304)* . The court held that the lack of a label on the pool liner adequately warning of the dangers of diving into an above-ground pool was a substantial factor in causing the plaintiff's injuries, and that the danger of diving into a shallow above-ground pool was not open and obvious to an 11-year-old child as a matter of law (*123 Cal. App. 4th 1278, 1299-1300)* .

In *Livingston v. Marie Callenders, Inc. (1999) 72 Cal. App. 4th 830, 85 Cal. Rptr. 2d 528* , the plaintiff went to a restaurant and was interested in ordering the soup. He told the waitress he had asthma and asked if the soup contained monosodium glutamate (MSG). The waitress assured him it did not. Plaintiff ordered and ate the soup. In fact, the soup contained MSG. Plaintiff suffered MSG symptom complex, including respiratory arrest, hypoxia, cardiac arrest and brain damage. Plaintiff brought an action against the defendant restaurant for, among other causes of action, strict liability and negligence. He alleged that because the defendant's soup contained MSG, it was defective and unfit for human consumption. The trial court dismissed all causes of action except the negligence claim and all the defendants except the restaurant. The court concluded that there was nothing wrong with the soup, or the MSG in the soup. The case proceeded to trial on the negligence cause of action against the restaurant. The jury did not find the defendant negligent, and plaintiff appealed (*72 Cal. App. 4th 830, 833-834)* . The court of appeal held that a defendant restaurant may be strictly liable for failing to warn customers about additives in the food served. In the context of allergies [*see* Restatement (Second) of Torts § 402A, cmt. j], a duty to warn exists when the additives contain an ingredient to which a substantial number of the population is allergic, the ingredient is one whose danger is not generally known, or if known is not one which the customer would reasonably expect to find in the food served, and the restaurant knew or should have known that the ingredient was present and was dangerous (*72 Cal. App. 4th 830, 839)* . The court felt the trier of fact should determine those issues and held that the trial court erred in striking plaintiff's strict liability claim. Plaintiff was entitled to a trial on the theory that there was a failure to warn of an ingredient to which a substantial number of the population are allergic (*72 Cal. App. 4th 830, 840)* .

The facts and procedural background of *Lunghi v. Clark Equip. Co. (1984) 153 Cal. App. 3d 485, 200 Cal. Rptr. 387* , are discussed in *§ 190.112[3][c]*. The court of appeal reversed the judgment, despite a jury finding that the product was not defective, because the trial court refused to instruct the jury that failure to provide any warning or an adequate warning may constitute a design defect. Even though the mechanical design features were not defective, the court explained, a product may nevertheless have a "design defect" if the defendant had a duty to warn of known dangers (*153 Cal. App. 3d 485, 493-494)* .

In *Wright v. Stang Mfg. Co. (1997) 54 Cal. App. 4th 1218, 63 Cal. Rptr. 2d 422* , a city firefighter brought a strict products liability action for personal injuries when a deck gun and its attachments mounted on a fire truck broke loose and failed under pressure. The suit was brought against the alleged successors of the corporation that manufactured the deck gun. The trial court granted summary judgment for the defendants on the grounds that there was insufficient evidence of defect, and no duty to warn about a nondefective component part. The court of appeal reversed, holding that the plaintiff had asserted a triable strict liability action based on a warning defect theory. The defendants had failed to establish that the dangers of the deck gun were generally known, or that plaintiff was aware of the dangers or potential dangers associated with the use and operation of the deck gun (*54 Cal. App. 4th 1218, 1231)* .

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Volume 19 Chapters 190-195 PRODUCTS LIABILITY---to---PUBLIC ADMINISTRATIVE LAW
CHAPTER 190 PRODUCTS LIABILITY
PART II. FORMS
A. Strict Liability
6. Failure to Warn

19-190 California Points & Authorities § 190.161

§ 190.161 Supporting Contention That Defendant Is Strictly Liable for Failure to Warn--Failure to Supply Adequate Assembly and Use Instructions That Warn of Danger of Improper Assemblage or Use

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with a general form regarding failure to warn (see, e.g., § 190.160). The following may also be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product.*]

DEFENDANT _____ [*name*] IS STRICTLY LIABLE BECAUSE THE ASSEMBLY AND USE INSTRUCTIONS THAT WERE FURNISHED WITH _____ [*specify product*] WERE INADEQUATE AND DID NOT WARN PLAINTIFF OF THE DANGERS OF IMPROPER ASSEMBLY OR USE, THEREBY RENDERING THE PRODUCT DEFECTIVE.

Product Is Defective if Assembly and Use Instructions Do Not Adequately Warn of Danger of Improper Assembly or Use. A product requiring assembly and use in conformity with the supplier's directions is defective if the supplier fails to warn adequately of conditions and circumstances created by such assembly or use that would render the product dangerous to the user. Therefore, the supplier is strictly liable for any injury proximately resulting from composing and furnishing a set of instructions for assembly and use that does not adequately avoid the danger of injury (*Midgley v. S.S. Kresge Co. (1976) 55 Cal. App. 3d 67, 74, 127 Cal. Rptr. 217*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a product is defective and strict liability is thereby incurred if the supplier of the product fails to adequately warn of the danger of improper assembly or use in the assembly and use instructions [*see Midgley v. S.S. Kresge Co. (1976) 55 Cal. App. 3d 67, 74, 127 Cal. Rptr. 217]* .

These points and authorities should be combined with the points and *authorities in § 190.160*. These points and authorities may also be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities in opposition to defendant's motion for summary judgment [*see Code Civ. Proc. § 437c*]. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, and with any other relevant points and authorities combined with this form, to show the relationship between the facts of the case and the points of law stated. For example, counsel might show facts indicating that the product came with assembly and use instructions, but that those instructions did not adequately guide the user in assembling the product, and as a result, plaintiff erroneously assembled the product and was injured when the product failed to properly perform its function [*see, e.g., Midgley v. S.S. Kresge Co. (1976) 55 Cal. App. 3d 67, 127 Cal. Rptr. 217* (inadequate assembly instructions for unassembled telescope)].

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 190.164 -190.176* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Product Is Defective if Assembly and Use Instructions Do Not Adequately Warn of Danger of Improper Assembly or Use

In ***Midgley v. S.S. Kresge Co.*** *(1976) 55 Cal. App. 3d 67, 127 Cal. Rptr. 217* , plaintiff's eye sustained permanent damage after viewing through a telescope that he improperly assembled by following the telescope's inadequate assemblage directions. Plaintiff brought an action in strict liability, negligence, and warranty against the manufacturer of the unassembled telescope. Plaintiff claimed that defendant had failed to warn of the product's dangerous propensities. The trial court, however, instructed the jury only in terms of negligence on the warning issue, and refused to instruct in terms of strict liability on that issue. The jury returned a verdict for defendant, and plaintiff appealed.

The court of appeal reversed, holding that a warning instruction should have been given in terms of strict liability based on failure to warn. The court explained that a product requiring assembly and use in conformity with the supplier's directions is defective if the supplier fails to warn adequately of conditions and circumstances created by the assembly or use that would render the product dangerous to the user. Therefore, the supplier is strictly liable for injury proximately resulting from composing and furnishing a set of instructions for assembly and use that does not adequately avoid the danger of injury (*55 Cal. App. 3d 67, 74)* .

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19-190 California Points & Authorities § 190.162

§ 190.162 Supporting Contention That Defendant Is Strictly Liable for Failure to Warn--Plaintiff Not Required to Prove That He or She Was Unaware of Defect or to Show Avoidance of Assumption of Risk

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with a general form regarding failure to warn (see, e.g., § 190.160). The following may also be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product.*]

PLAINTIFF IS ENTITLED TO RECOVER EVEN IF PLAINTIFF DOES NOT PROVE THAT HE/SHE WAS NOT AWARE OF THE DEFECT IN _____ [*specify product*] OR THAT HE/SHE TOOK STEPS TO AVOID ASSUMING THAT PRODUCT'S RISK.

Product's User Is Not Required to Prove Nonawareness of Defect or Avoidance of Assumption of Risk. In proving that a product is defective because its manufacturer or supplier did not adequately warn of its dangers, a plaintiff is not required to prove that, as a user, he or she was not aware of the defect. Nor is the plaintiff required to make a showing that would avoid the defense of assumption of risk (*Burke v. Almaden Vineyards, Inc. (1978) 86 Cal. App. 3d 768, 772, 150 Cal. Rptr. 419*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that in proving failure to warn, plaintiff is not required to prove that he or she was unaware of the product's defect or that he or she took steps to avoid assuming the product's risk [*see Burke v. Almaden Vineyards, Inc. (1978) 86 Cal. App. 3d 768, 772, 150 Cal. Rptr. 419]* .

These points and authorities should be combined with the points and *authorities in § 190.160*. These points and

authorities may also be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary judgment or summary adjudication regarding the existence of a cause of action in strict products liability [*see Code Civ. Proc. § 437c(a), (f)*]. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, and with any other relevant points and authorities combined with this form, to show the relationship between the facts of the case and the points of law stated. For example, counsel should set forth facts indicating that he or she has established a cause of action based on a failure to warn [*see § 190.160*], and that no further showing, regarding nonawareness of the defect or avoidance of assumption of the risk, is required.

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 190.164 -190.176* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Product's User Is Not Required to Prove Nonawareness of Defect or Avoidance of Assumption of Risk

In ***Burke v. Almaden Vineyards, Inc.*** *(1978) 86 Cal. App. 3d 768, 150 Cal. Rptr. 419* , plaintiff was injured when the plastic cork of a champagne bottle spontaneously ejected and struck her eyeglass lens. Plaintiff brought an action in strict products liability against the manufacturer of the bottle, alleging the defendant failed to warn of the cork's potential danger. To prove that there was a failure to warn, plaintiff sought to introduce evidence that defendant placed a warning on the bottles four years after the accident. Defendant objected, but offered to stipulate that it would have been possible, feasible, and practicable to have attached the warning on the labels. The trial court ruled that the probative value of the evidence was outweighed by the risk of undue prejudice, but gave plaintiff the choice of accepting or rejecting the stipulation. Plaintiff accepted the stipulation on the condition that her objection would not be deemed waived. The jury found for the defendant, and plaintiff appealed.

The court of appeal reversed, holding that the trial court abused its discretion in excluding the evidence of the subsequent warning (*86 Cal. App. 3d 768, 772-775)* . In the context of determining the issue whether potential prejudice outweighs probative value for the purposes of *Evid. Code § 352*, the court stated that when a manufacturer or supplier of a product is or should have been aware that a product is unreasonably dangerous absent a warning and the warning is feasible, strict liability in tort will attach if appropriate and conspicuous warning is not given. The court also stated that liability does not attach if the dangerous propensity is either obvious or known to the injured person at the time he or she uses the product. Plaintiff had the burden of proving (1) that defendant knew or should have known of a hazard that required warning and (2) that it was feasible for defendant to have given it. Plaintiff was not required to prove that, as a user, she was unaware of the defect, or to make a showing that would avoid the defense of assumption of the risk (*86 Cal. App. 3d 768, 772)* . The court did not believe that the consuming public knows that the pressure of carbonation in a sparkling wine causes the cork to eject itself within a certain number of seconds after the wire seal is removed (*86 Cal. App. 3d 768, 772-773)* . The court therefore examined the evidentiary value of the subsequent warning and concluded that it afforded a reasonable, logical, and natural inference of the potential danger that requires a warning, and found that the probative value was not outweighed by the risk of prejudice (*86 Cal. App. 3d 768, 773-774)* . The court rejected defendant's argument that inasmuch as the plaintiff knew of the hazard, the absence of the warning was not the proximate cause of her injury, finding that the evidence of her knowledge of the particular hazard of spontaneous ejection of the cork was not conclusive (*86 Cal. App. 3d 768, 775)* .

NOTE:

The "unreasonably dangerous" aspect of the holding in *Burke v. Almaden Vineyards* has been modified [*see Cavers v. Cushman Motor Sales, Inc. (1979) 95 Cal. App. 3d 338, 157 Cal. Rptr. 142* ; *see also §*

190.172[3][a]].

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19-190 California Points & Authorities § 190.163

§ 190.163 Supporting Contention That Defendant Is Strictly Liable for Failure to Warn--Defendant Is Manufacturer of Prescription Drug That Is Unavoidably Unsafe

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product.*]

DEFENDANT _____ [*name*], THE MANUFACTURER OF THE PRESCRIPTION DRUG _____ [*specify drug, e.g.,* DES], IS SUBJECT TO STRICT LIABILITY BECAUSE DEFENDANT FAILED TO WARN OF THE DANGEROUS PROPENSITIES OF THAT DRUG THAT WERE EITHER KNOWN OR REASONABLY KNOWABLE SCIENTIFICALLY AT THE TIME OF DISTRIBUTION.

A. Manufacturer of Prescription Drug Strictly Liable for Failure to Warn. A manufacturer is strictly liable for injuries caused by a prescription drug that is unavoidably unsafe if the manufacturer failed to warn of its dangerous propensities that were either known or reasonably scientifically knowable at the time of distribution (*Carlin v. Superior Court (1996) 13 Cal. 4th 1104, 1109, 56 Cal. Rptr. 2d 162, 920 P.2d 134* ; *Brown v. Superior Court (1988) 44 Cal. 3d 1049, 1069, 245 Cal. Rptr. 412, 751 P.2d 470*).

B. FDA Regulation Does Not Preempt Strict Liability for Failure to Warn. Federal Food and Drug Administration (FDA) regulations do not expressly preempt common law tort remedies for failure to warn (*Carlin v. Superior Court (1996) 13 Cal. 4th 1104, 1113, 56 Cal. Rptr. 2d 162, 920 P.2d 134*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a defendant that is the manufacturer of a

prescription drug that is unavoidably unsafe is strictly liable for injuries resulting from its failure to warn of the dangerous propensities of the drug that were either known or reasonably scientifically knowable at the time of distribution [*see Brown v. Superior Court (1988) 44 Cal. 3d 1049, 1069, 245 Cal. Rptr. 412, 751 P.2d 470]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary judgment or summary adjudication on the issue that defendant is strictly liable for plaintiff's injuries. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should set forth facts showing that defendant knew of the dangerous propensities of the drug, or that those dangers were scientifically knowable at the time the drug was distributed, and that defendant failed to provide adequate warnings regarding those dangers to the physicians who prescribed the drug. In appropriate cases, federal Food and Drug Administration (FDA) action or inaction is admissible to show whether a risk was known or reasonably scientifically knowable [*Carlin v. Superior Court (1996) 13 Cal. 4th 1104, 1114, 56 Cal. Rptr. 2d 162, 920 P.2d 134* ; *see § 190.283*].

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 190.90, 190.170, 190.173*, and *190.174* may be combined with the points and authorities in this form.

[3] Discussion of Authorities

[a] Manufacturer of Prescription Drug Strictly Liable for Failure to Warn

In ***Carlin v. Superior Court,*** *(1996) 13 Cal. 4th 1104, 56 Cal. Rptr. 2d 162, 920 P.2d 1347* , the plaintiff sustained injuries from ingesting the drug Halcion, which was prescribed for her by a physician between 1987 and 1992. She brought suit against Upjohn, the manufacturer of the drug. The plaintiff sought damages on the theories of strict liability for failure to properly prepare and/or warn of the dangerous propensities of the drug and breach of warranty. The drug manufacturer demurred, alleging that under California law, no cause of action for strict liability or breach of warranty can be stated against a prescription drug manufacturer based on failure to warn. The trial court sustained the demurrer as to those causes of action without leave to amend. Plaintiff petitioned for a writ of mandate.

The court of appeal ordered issuance of a writ of mandate directing the trial court to vacate its order sustaining the demurrer to the cause of action for strict liability and breach of warranty and to enter a new order overruling the demurrer. The California Supreme Court granted review.

The Supreme Court affirmed the judgment of the court of appeal. Among the many issues considered by the court was whether the plaintiff had a cause of action for strict liability for defendant's failure to warn. The court relied on its previous decision in *Anderson v. Owens-Corning Fiberglas Corp. (1993) 53 Cal. 3d 987, 281 Cal. Rptr. 528, 810 P.2d 549* [*see § 190.160[3][a]*], in which the Court determined that manufacturers are strictly liable for injuries caused by their failure to give warning of dangers that were known to the scientific community at the time the product was manufactured and distributed (*13 Cal. 4th 1104, 1109)* . The Court held that *Anderson* applies to prescription drug manufacturers to the same extent as other manufacturers (*13 Cal. 4th 1104, 1110)* . The premise behind the strict liability standard is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves (*13 Cal. 4th 1104, 1110)* .

In adopting the strict liability standard, the Court rejected the defendant's argument that a strict liability standard for failure to warn about known or reasonably scientifically knowable risks from prescription drugs is inconsistent with federal regulatory policy (*13 Cal. 4th 1104, 1113)* . The Court also rejected the contention that applying strict liability for failure to warn will result in excessive labeling of risks. Application of the failure to warn theory requires factual determinations on whether a causal link exists between an alleged side effect and a prescription drug and decisions whether the risk is more than merely speculative or conjectural (*13 Cal. 4th 1104, 1116)* .

The facts and procedural background of ***Brown v. Superior Court*** *(1988) 44 Cal. 3d 1049, 245 Cal. Rptr. 412, 751 P.2d 470* , are discussed in *§ 190.88[3][a]*. The Supreme Court discussed at length the various theories under which a manufacturer of an "unavoidably unsafe" drug could be held strictly liable, and determined that the manufacturer is not strictly liable for a "design defect" as that term is defined and analyzed under *Barker v. Lull Eng'g Co. (1978) 20 Cal. 3d 413, 143 Cal. Rptr. 225, 573 P.2d 443* . Rather, the manufacturer is strictly liable only for failure to warn of the drug's dangerous propensities that were either known or reasonably knowable scientifically at the time of distribution, or for a failure to properly package the product (*44 Cal. 3d 1049, 1056-1069)* .

[b] FDA Regulation Does Not Preempt Strict Liability for Failure to Warn

The facts and procedural background of ***Carlin v. Superior Court*** *(1996) 13 Cal. 4th 1104, 56 Cal. Rptr. 2d 162, 920 P.2d 134* , are discussed in § 190.63[3][a]. In reaffirming that prescription drug manufacturers are strictly liable for failure to warn, the Court rejected the defendant's argument that federal Food and Drug Administration (FDA) drug labeling requirements are determinative of a manufacturer's liability under state law. While not irrelevant [*see § 190.283*], FDA regulations do not preempt common law tort remedies for failure to warn (*13 Cal. 4th 1104, 1113)* . Thus, the FDA's approval of a particular warning is not determinative of strict liability under state law. However, manufacturer may not be held liable for failing to give a warning expressly precluded by FDA regulation [*see § 190.174*] (*13 Cal. 4th 1104, 1115 n.4*).

In ***Motus v. Pfizer*** *(C.D. Cal. 2000) 127 F. Supp. 2d 1085* , the plaintiff's husband committed suicide while taking defendants drug in his treatment for depression. The plaintiff brought suit seeking recovery on strict liability for the pain, suffering and losses that her husband sustained while using defendants drug. The plaintiff alleged that defendant negligently failed to adequately warn the medical community, the general public and plaintiff's decedent of the dangers, contraindications and side effects of the drug' and that in the United States, the drug was not properly labeled by defendants, was not accompanied by proper warnings for safe, informed use, and that the labeling did not warn physicians in general and decedent in particular of the dangers inherent in its use, particularly that the drug can cause the user to become violent and suicidal (*127 F. Supp. 2d 1085, 1087)* . Defendant moved for partial summary judgment dismissing plaintiff's "inadequate warning" claims. Defendant sought an order that as a matter of law it may not be held liable for its failure to include in the labeling a warning of the risk of suicide. Defendant argued that under both California law and under the federal "conflict" preemption doctrine, plaintiff's state law claims based on defendant's failure to include a suicide warning in the drug's labeling were barred because the Food and Drug Administration (FDA) had already considered and rejected the inclusion of such a warning in the drug's labeling.

Partial summary judgment was denied to the defendant for the failure to establish that the FDA's approval of manufacturer's proposed warnings preempted plaintiff from asserting state law tort claims based on failure to warn of a suicide risk. The court held that: FDA requirements are minimum standards and that FDA approval is not a shield to liability; *21 C.F.R. § 314.70(c)(2)(i)* permits manufacturers to strengthen warning labels without prior FDA approval; Defendant had not limited its attack to any specific warnings; and finally the FDA had not made any statement that defendant could not include a strengthened suicide warning (*127 F. Supp. 2d 1085, 1096)* . In light of these factors, the court found that defendant had not established that it would be impossible to comply simultaneously with FDA requirements and with a state law or decision requiring a strengthened warning (*127 F. Supp. 2d 1085, 1096)* .

[4] Additional Authorities

[a] Manufacturer of Prescription Drug Strictly Liable for Failure to Warn

In *Rodriguez v. Superior Court (1990) 221 Cal. App. 3d 1371, 271 Cal. Rptr. 114* , a minor who contracted Reyes Syndrome sued the manufacturer of baby aspirin, alleging strict products liability arising from use of the aspirin in a reasonably foreseeable manner. The court of appeal reversed the trial court's grant of defendant's motion for judgment on the pleadings, holding that the plaintiff stated a cause of action pursuant to the requirements of *Brown v. Superior Court (1988) 44 Cal. 3d 1049, 245 Cal. Rptr. 412, 751 P.2d 470* , on the basis of pleadings providing that: (1) use of aspirin was reasonably foreseeable by defendant; (2) use involved substantial, foreseeable danger; and (3) adequate warnings were not given (*221 Cal. App. 3d 1371, 1374-1376)* .

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19-190 California Points & Authorities § 190.164

§ 190.164 Opposing Contention That Defendant Is Strictly Liable for Failure to Warn--No Showing of Defendant's Knowledge of Potential Dangers

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is liable in strict products liability for injuries caused by defendant's product (see, e.g., §§ 190.165 -190.172).*]

DEFENDANT _____ [*name*] IS NOT STRICTLY LIABLE FOR PLAINTIFF'S INJURIES, BECAUSE PLAINTIFF HAS MADE NO SHOWING THAT DURING THE RELEVANT PERIOD OF TIME, DEFENDANT HAD ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF THE POTENTIAL DANGERS INHERENT IN THE USE OF THE PRODUCT WITHOUT A WARNING.

A. Defendant's Knowledge of Danger Is Component of Failure-to-Warn Cause of Action. The defendant's actual or constructive knowledge of the potential dangers is a requisite element of a failure-to-warn cause of action in strict products liability (*Anderson v. Owens-Corning Fiberglas Corp. (1991) 53 Cal. 3d 987, 1000, 281 Cal. Rptr. 528, 810 P.2d 549* ; *Gonzalez v. Autoliv ASP, Inc. (2007) 154 Cal. App. 4th 780, 793, 64 Cal. Rptr. 3d 908*).

[*Optional*] **B. State-of-the-Art Evidence Admissible.** State-of-the-art evidence is admissible in a failure-to-warn cause of action in strict products liability (*Anderson v. Owens-Corning Fiberglas Corp. (1991) 53 Cal. 3d 987, 1004, 281 Cal. Rptr. 528, 810 P.2d 549*).

[2] Comments

[a] Use of Form

This form of memorandum of points and authorities may be submitted in opposition to the contention that a defendant is

strictly liable for failing to warn the user of the product's dangers. The ground of opposition is that plaintiff failed to show that the defendant had actual or constructive knowledge of the potential dangers during the relevant period of time [*see Anderson v. Owens-Corning Fiberglas Corp. (1991) 53 Cal. 3d 987, 281 Cal. Rptr. 528, 810 P.2d 549* ; *Gonzalez v. Autoliv ASP, Inc. (2007) 154 Cal. App. 4th 780, 793, 64 Cal. Rptr. 3d 908*]. The optional paragraph is for use to contend that state-of-the-art evidence is admissible in a failure-to-warn cause of action, that is, that the defendant may use state-of-the-art evidence to prove that the potential dangers asserted by plaintiff were scientifically unknown and unknowable during the relevant period of time.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue. For example, they may be combined with points and authorities in support of defendant's motion for summary judgment on the ground that there is no triable issue of fact regarding defendant's knowledge or knowability of the asserted potential dangers. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. For example, counsel should indicate plaintiff's failure to establish the existence of defendant's actual or constructive knowledge, and should also introduce evidence that the specific danger was not knowable at the relevant time.

[3] Discussion of Authorities

[a] Defendant's Knowledge of Danger Is Component of Failure-to-Warn Cause of Action

In ***Anderson v. Owens-Corning Fiberglas Corp.*** *(1991) 53 Cal. 3d 987, 281 Cal. Rptr. 528, 810 P.2d 549* , plaintiff brought an action against defendant manufacturers of asbestos products, asserting various theories of recovery, including strict products liability, and seeking damages for respiratory injuries he allegedly incurred because of exposure to the asbestos while working in his occupation as an electrician at a military facility over a period of some 30 years. Ultimately, the amended complaint alleged a cause of action in strict products liability for the manufacture and distribution of asbestos, and other products containing asbestos, which contained design and manufacturing defects that caused injury to users and consumers, including the plaintiff, while being used in a reasonably foreseeable manner. Another cause of action focused on punitive damages, but also included allegations of failure to warn, and alleged that defendants marketed their products with specific prior knowledge, from scientific studies and medical data, that there was a high risk of injury and death from exposure to asbestos or asbestos-containing products; that defendants knew consumers and members of the general public had no knowledge of the potentially injurious nature of asbestos; and that defendants failed to warn users of the risk of danger. Defendant's pleading raised the state-of-the-art defense, asserting that even those at the vanguard of scientific knowledge at the time the products were sold could not have known that asbestos was dangerous to users in the concentrations associated with defendant's products. Plaintiff moved before trial to prevent defendants from presenting state-of-the-art evidence. By that time, plaintiff had indicated that he was proceeding, concerning his assertion of defective design, only on the "consumer expectation" prong of the design defect test set out in *Barker v. Lull Eng'g Co. (1978) 20 Cal. 3d 413, 143 Cal. Rptr. 225, 573 P.2d 443* [*see § 190.110[3][a]*]. Accordingly, the argument of plaintiff's motion was directed primarily to the applicability of the state-of-the-art defense to that theory of strict liability.

The trial court granted the motion, on the ground that state-of-the-art evidence is irrelevant to any theory of strict liability. Defendants then moved to prevent plaintiff from proceeding on the failure-to-warn theory, arguing that plaintiff had waived the argument by striking his cause of action for punitive damages, and that it would be unfair to permit plaintiff to proceed. In response to the trial court's request for an offer of proof on the failure-to-warn allegations, plaintiff submitted evidence showing the initial absence of any warning, subsequent warnings that were inadequate during the relevant period, and the ultimate removal of the products from the market. Defendants argued that the state of the art, that is, what was scientifically knowable during the period of plaintiff's exposure to the asbestos, was their

obvious and only defense to any cause of action for failure to warn, and that, in view of the trial court's decision to exclude state-of-the-art evidence, fairness dictated that plaintiff be precluded from proceeding on that theory. The trial court granted defendants' motion without a statement of reasons and, at trial, refused plaintiff's request for jury instructions pursuant to *BAJI 9.00.7* (providing that a product is defective if the use of the product in a reasonably foreseeable manner by defendant involves a substantial danger not recognizable by the ordinary user, and the manufacturer fails to give adequate warning of the danger; also requiring adequate warning to the consumer of a product of potential risks or side effects that are known, or should have been known, which may follow the foreseeable use of the product). Following a jury verdict for defendants, including a special verdict that the products had no design defects, plaintiff moved for a new trial, asserting that the court erred in precluding proof of liability on a failure-to-warn theory, and that substantial evidence did not support the special verdict. The trial court granted the motion, agreeing with plaintiff that, with or without the state-of-the-art evidence, he was entitled to try the failure-to-warn cause of action. The court of appeal affirmed the order granting the new trial, on both grounds. The court of appeal stated that in strict liability asbestos cases, including those prosecuted on a failure-to-warn theory, state-of-the-art evidence is not admissible, because it focuses on the reasonableness of the defendant's conduct, which is irrelevant in strict liability.

The Supreme Court granted review and reversed, holding that actual or constructive knowledge of the potential dangers is a component of a failure-to-warn cause of action in strict products liability and, therefore, that state-of-the-art evidence is admissible (*53 Cal. 3d 987, 1000, 1004)* . The Court acknowledged that resolution of the evidentiary issue of whether state-of-the-art evidence is admissible requires a determination of whether knowledge (actual or constructive) is a component of strict liability on the failure-to-warn theory (*53 Cal. 3d 987, 990)* .

The Court traced the evolution of the failure-to-warn theory of strict products liability from the inception of the strict products liability doctrine in *Greenman v. Yuba Power Prods., Inc. (1963) 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897* [*see § 190.70[3][a]*], and its refinement of the design-defect test in *Barker v. Lull Eng'g Co. (1978) 20 Cal. 3d 413, 143 Cal. Rptr. 225, 573 P.2d 443* [*see § 190.110[3][a]*], through the line of cases, primarily at the appellate level, that have formulated the failure-to-warn theory (*53 Cal. 3d 987, 994-995)* . In *Cavers v. Cushman Motor Sales, Inc. (1979) 95 Cal. App. 3d 338, 157 Cal. Rptr. 142* [*see § 190.172[3][a]*], the first case in which failure to warn was the sole theory of liability, the court of appeal approved a jury instruction that the product (a golf cart), otherwise properly manufactured, could be defective if no warning was given of a dangerous propensity in the operation of the product, and the absence of the warning rendered the product "substantially dangerous" to the user. The Court noted that a number of cases recognized that a failure to give adequate warnings might subject a manufacturer or distributor to strict liability when it knew or should have known of the danger and the necessity of warnings to ensure safe use (*53 Cal. 3d 987, 996)* . However, the Court noted, these cases did not address the specific factual question whether or not the manufacturer or distributor knew or should have known of the risks involved in the products, either because the nature of the product or the risk involved made the discussion unnecessary or because the plaintiff limited the action to risks about which the defendant obviously knew or should have known. Moreover, the opinions did not discuss knowledge or knowability as a component of the failure-to-warn theory of strict liability.

The Court observed, however, that a knowledge or knowability component clearly was included as an implicit condition of strict liability, and in that regard, California was in accord with authorities in a majority of other states (*53 Cal. 3d 987, 997)* . The Court noted that *Oakes v. E.I. Du Pont de Nemours & Co., Inc. (1969) 272 Cal. App. 2d 645, 77 Cal. Rptr. 709* , was the first case to discuss knowledge or knowability as a condition of strict liability in the failure-to-warn context. In holding that the manufacturer of a weed-killing chemical did not have an obligation to warn a user of unknown or unknowable allergies to the product, *Oakes* accepted the premise that knowledge or knowability was a factor in the obligation to warn under Restatement (Second) of Torts § 402A, comment j (*53 Cal. 3d 987, 998)* . In *Brown v. Superior Court (1988) 44 Cal. 3d 1049, 245 Cal. Rptr. 412, 751 P.2d 470* [*see § 190.88[3][a]*], the Supreme Court held that a manufacturer is not strictly liable for injuries caused by a prescription drug so long as it was properly prepared and accompanied by warnings of its dangerous propensities that were either known or reasonably scientifically knowable at the time of distribution (*53 Cal. 3d 987, 999)* . The Court stated that *Brown* applied only to prescription drugs, but that its "logic and common sense" are not limited to drugs, and that *Brown* "clearly implied that knowledge is

also a component of strict liability for failure to warn in cases other than prescription drug cases." The Court concluded that knowledge, actual or constructive, is a requisite element for strict liability for failure to warn (*53 Cal. 3d 987, 1000)* .

The Court noted that one of the guiding principles of the strict liability doctrine was to relieve a plaintiff of the evidentiary burdens inherent in a negligence cause of action. Although, the Court observed, a minority view contends that the incorporation of the knowledge requirement improperly infuses negligence concepts into strict liability law, the claim that a particular component "ring of" negligence has not precluded its acceptance in the context of strict liability, pursuant to several of the Court's prior decisions. The Court cited as an example its opinion in *Barker*, in which it rejected the claim that the risk/benefit test was unacceptable because it introduced an element that "rings of negligence" (*53 Cal. 3d 987, 1001)* . The Court also stated that the "warning defect" theory is "rooted in negligence" to a greater extent than are the manufacturing- or design-defect theories, in that the warning defect relates to a failure extraneous to the product itself. Thus, while a manufacturing or design defect can be evaluated without reference to the conduct of the manufacturer, the giving of a warning cannot. The Court stated that if every product that has no warning were defective per se, and for that reason subject to strict liability, the mere fact of injury by an unlabeled product would automatically permit recovery, which is not the purpose and goal of the failure-to-warn theory of strict liability. Further, if a warning automatically precluded liability in every case, a manufacturer or distributor could easily escape liability with overly broad, and thus practically useless, warnings (*53 Cal. 3d 987, 1002)* .

Despite its roots in negligence, the Supreme Court stated, failure to warn in strict liability differs markedly from failure to warn in the negligence context. Negligence law requires a plaintiff to prove that a manufacturer or distributor did not warn of a particular risk for reasons that fell below the acceptable standard of care, that is, what a reasonably prudent manufacturer would have known and warned about. Strict liability is not concerned with the standard of due care or the reasonableness of a manufacturer's conduct. The rules of strict liability require a plaintiff to prove only that the defendant did not adequately warn of a particular risk that was known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture or distribution. Therefore, in strict liability, as opposed to negligence, the reasonableness of the defendant's failure to warn is immaterial (*53 Cal. 3d 987, 1002-1003)* . Stated another way, a reasonably prudent manufacturer that reasonably decides that the risk of harm is such as not to require a warning (for example, on the basis of the manufacturer's own testing showing results contrary to that of others in the scientific community), although possibly escaping liability under negligence principles, would be subject to strict products liability if it failed to give warning of dangers that were known to the scientific community at the time it manufactured or distributed the product. That is, whatever may be reasonable from the point of view of the manufacturer, the user of the product must be given the option either to refrain from using the product at all or to use it in such a way as to minimize the degree of danger (*53 Cal. 3d 987, 1003)* In conclusion, the Court recognized that an important goal of strict liability is to spread the risks and costs of injury to those most able to bear them, but that the drafters of the doctrine never intended to make the manufacturer or distributor the insurer of the safety of their products, or to impose absolute liability (*53 Cal. 3d 987, 1003-1004)* . The Court therefore also held that a defendant in a strict products liability action based on an alleged failure to warn of a risk of harm may present evidence of the state of the art, that is, evidence that the particular risk was neither known nor knowable by the application of scientific knowledge available at the time of manufacture, distribution, or both (*53 Cal. 3d 987, 1004)* .

The facts and procedural background of ***Gonzalez v. Autoliv ASP, Inc.*** *(2007) 154 Cal. App. 4th 780, 64 Cal. Rptr. 3d 908* , are discussed in *§ 190.74[3][b]*. The court of appeal held that the plaintiff failed to identify any particular risk known to the airbag module manufacturer for which it should have provided a warning (*154 Cal. App. 4th 780, 793)* .

[b] State-of-the-Art Evidence Admissible

Anderson v. Owens-Corning Fiberglas Corp. *(1991) 53 Cal. 3d 987, 281 Cal. Rptr. 528, 810 P.2d 549* , is discussed in *§ 190.164[3][a]*.

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19-190 California Points & Authorities § 190.165

§ 190.165 Opposing Contention That Defendant Is Strictly Liable for Failure to Warn--No Duty to Warn of Unforeseeable Use of Product

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product (see, e.g., §§ 190.164, 190.166 -190.171).*]

DEFENDANT _____ [*name*] IS NOT STRICTLY LIABLE FOR PLAINTIFF'S INJURIES BECAUSE _____ [*specify product*] WAS NOT USED IN A REASONABLY FORESEEABLE MANNER.

A. Product Must Be Used in Reasonably Foreseeable Manner. In order to invoke the doctrine of strict liability based on failure to warn, a plaintiff must prove that at the time of injury, the product was being used in a manner that the manufacturer is required to anticipate. The question of what a manufacturer is "required to anticipate" in connection with the use of a product is one of reasonable foreseeability (*Dosier v. Wilcox-Crittendon Co. (1975) 45 Cal. App. 3d 74, 78, 119 Cal. Rptr. 135*).

B. No Duty to Warn of Use That Is Not Reasonably Foreseeable. A manufacturer has no duty to warn against a use that is not reasonably foreseeable (*Dosier v. Wilcox-Crittendon Co. (1975) 45 Cal. App. 3d 74, 81, 119 Cal. Rptr. 135*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a defendant is strictly liable for

failing to warn the user of the product's dangers. The ground of opposition set forth is that defendant is not strictly liable for failing to warn against a use of its product that is not reasonably foreseeable.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a demurrer or motion for summary judgment or summary adjudication on the issue that the product is not defective. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. For example, counsel should state facts showing that plaintiff had been injured as a result of a use of the product that was not reasonably foreseeable [*see, e.g., Dosier v. Wilcox-Crittendon Co. (1975) 45 Cal. App. 3d 74, 119 Cal. Rptr. 135* (use of hook in airport maintenance plant not reasonably foreseeable use when hook intended to be used as bull tie, stallion chain, or cattle tie)].

In an appropriate case, these points and authorities may be used to oppose the contentions supported by the points and *authorities in §§ 190.160 -190.162*.

[3] Discussion of Authorities

[a] Product Must Be Used in Reasonably Foreseeable Manner

In ***Dosier v. Wilcox-Crittendon Co.*** *(1975) 45 Cal. App. 3d 74, 119 Cal. Rptr. 135* , plaintiff was injured while working at an airport maintenance plant when a cast iron hook, which was attached to a counterweight as a part of a rigging process, gave way, causing the counterweight to fall on his arm. The hook had been manufactured for use principally as a bull tie, stallion chain, or cattle tie. It was given to plaintiff by a plant foreman as part of a sling, and there was no marking on it regarding its content or lifting capacity. The hook had been purchased by the airline at a harness and saddlery wares outlet, from a display board containing harness equipment. At the time of purchase, there was no discussion regarding its intended use. Plaintiff brought an action based in strict liability against the manufacturers of the hook, claiming both defect (apparently design defect) and failure to warn. The trial court received evidence concerning the circumstances surrounding the purchase of the hook, and its use by the airline. The trial court entered judgment for defendants following a jury trial, and the plaintiff appealed.

The court of appeal affirmed, holding that the trial court properly allowed evidence of circumstances surrounding the purchase of the hook and its use by the airline, because it bore on the issue of the manufacturer's intended use for the product and, ultimately, on the issue of foreseeability (*45 Cal. App. 3d 74, 78-82)* . Plaintiff stated the issues on appeal as follows: (1) whether the hook was defective because defendants failed to provide warnings of its proper use and capacity; and (2) whether plaintiff's use of the hook for lifting was reasonably foreseeable by the manufacturer (*45 Cal. App. 3d 74, 77-78)* . The court noted that the one common element in both issues is whether the hook was being used in a way intended by the manufacturer, and that the main issue of the case was that of foreseeability of the product's use, because there is "no duty to warn against a use that is not reasonably foreseeable" (*45 Cal. App. 3d 74, 78, 81)* . In order to invoke the doctrine of strict liability, the court stated, the plaintiff must prove that the product was being used, at the time of injury, in a way the manufacturer intended it to be used. In applying this rule, courts have held that it should not be narrowly applied, and that even an "unusual use" that the manufacturer is required to anticipate should not relieve the manufacturer of liability in the absence of warnings against that use. The court stated that what a manufacturer is required to anticipate in connection with the use of a product is a question of reasonable foreseeability, and that foreseeability of the misuse of a product is a question of fact. Consequently, the court rejected plaintiff's assertion of prejudicial error based on admission of evidence concerning the circumstances surrounding the purchase of the hook, holding that that evidence bears directly on the issue of foreseeability (*45 Cal. App. 3d 74, 78)* .

[b] No Duty to Warn of Use That Is Not Reasonably Foreseeable

The facts and procedural background of ***Dosier v. Wilcox-Crittendon Co.*** *(1975) 45 Cal. App. 3d 74, 119 Cal. Rptr. 135* , are discussed in *§ 190.165[3][a]*.

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19-190 California Points & Authorities § 190.166

§ 190.166 Opposing Contention That Defendant Is Strictly Liable for Failure to Warn--No Duty to Warn of Known and Recognized Danger

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product (see, e.g., §§ 190.164, 190.165, 190.167 -190.171).*]

DEFENDANT _____ [*name*] IS NOT STRICTLY LIABLE BECAUSE PLAINTIFF SUSTAINED INJURIES FROM A KNOWN AND RECOGNIZED DANGER AND DEFENDANT HAD NO DUTY TO WARN OF THAT DANGER.

Manufacturer or Retailer Has No Duty to Warn of Known and Recognized Danger. A manufacturer or retailer has no duty to warn of a danger, or the potentiality of a danger, that is generally known and recognized (*Johnson v. American Standard, Inc. (2008) 43 Cal. 4th 56, 67, 74 Cal. Rptr. 3d 108, 179 P.3d 905* ; *Holmes v. J.C. Penney Co. (1982) 133 Cal. App. 3d 216, 220, 183 Cal. Rptr. 777* ; *Bojorquez v. House of Toys, Inc. (1976) 62 Cal. App. 3d 930, 933, 133 Cal. Rptr. 483*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a defendant is strictly liable for failing to warn the user of the product's dangers. The ground of opposition set forth is that defendant is not strictly liable for failing to warn of a known and recognized danger.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context

in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a demurrer or motion for summary judgment or summary adjudication on the issue that the product is not defective. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. For example, counsel should state facts showing that even if plaintiff had been injured by the product, the danger that resulted in the injury was one that was generally known and recognized [*see, e.g., Holmes v. J.C. Penney Co. (1982) 133 Cal. App. 3d 216, 183 Cal. Rptr. 777* (danger of harm from firing of pellet gun as obvious); *Bojorquez v. House of Toys, Inc. (1976) 62 Cal. App. 3d 930, 133 Cal. Rptr. 483* (danger of harm from slingshot as generally known and recognized)].

In an appropriate case, these points and authorities may be used to oppose the contentions supported by the points and *authorities in §§ 190.160 -190.162*.

[b] Related Points and Authorities

In an appropriate case, the points and *authorities in §§ 190.245A* and *190.246* may be combined with the points and authorities in this form.

[3] Discussion of Authorities

[a] Manufacturer or Retailer Has No Duty to Warn of Known and Recognized Danger

In ***Holmes v. J.C. Penney Co.*** *(1982) 133 Cal. App. 3d 216, 183 Cal. Rptr. 777* , plaintiff was struck and injured by a pellet fired from a pellet gun. The carbon dioxide cartridges powering the pellet gun had been bought from defendant retailer by a minor. Plaintiff brought an action in negligence and strict liability against defendant. The trial court sustained defendant's demurrer without leave to amend, and plaintiff appealed.

The court of appeal affirmed, holding that plaintiff had no cause of action in either negligence or strict liability. In regards to the latter, the court held that defendant had no duty to warn of the dangers of using the carbon dioxide cartridges to power pellet guns, because that danger was obvious. The court followed *Bojorquez v. House of Toys, Inc. (1976) 62 Cal. App. 3d 930, 133 Cal. Rptr. 483* , in holding that a seller does not need to warn of a danger or potentiality of danger that is generally known and recognized (*133 Cal. App. 3d 216, 220)* .

In ***Bojorquez v. House of Toys, Inc.*** *(1976) 62 Cal. App. 3d 930, 133 Cal. Rptr. 483* , plaintiff was hit in the eye by a projectile fired from a slingshot. Plaintiff brought an action in negligence and strict liability against the retailer and the wholesaler of the slingshot. Defendants moved for summary judgment, which was granted. Plaintiff appealed.

The court of appeal affirmed the judgment, holding that plaintiff had no cause of action against defendants in either negligence or strict liability. Specifically as to strict liability, the court held that defendants had no duty to warn of the danger of the slingshot, because a seller has no duty to warn of a danger or potentiality of danger that is generally known and recognized (*62 Cal. App. 3d 930, 933-934)* .

[4] Additional Authorities

[a] Manufacturer or Retailer Has No Duty to Warn of Known and Recognized Danger

In *Rosburg v. Minnesota Mining & Mfg. Co. (1986) 181 Cal. App. 3d 726, 226 Cal. Rptr. 299* , plaintiff brought a strict products liability action against the manufacturers of a breast implant device, alleging as a theory of recovery that the defendant had failed to warn her of the dangerous propensity of the product. The court of appeal held that failure to warn of the dangerous propensity of a product does not render the product defective unless the failure to warn was the

cause of the injury. The court then held that defendant could not be liable on a failure-to-warn theory because the injured party was in fact warned of the dangerous propensity of the product by her physician (*181 Cal. App. 3d 726, 734-735)* .

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19-190 California Points & Authorities § 190.167

§ 190.167 Opposing Contention That Defendant Is Strictly Liable for Failure to Warn--No Duty to Warn Every Ultimate User of Product When Person Controlling Product's Use Has Received Warning

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product (see, e.g., §§ 190.164 -190.166, 190.168 -190.171).*]

DEFENDANT _____ [*name*] IS NOT STRICTLY LIABLE FOR PLAINTIFF'S INJURIES BECAUSE, EVEN THOUGH DEFENDANT DID NOT WARN PLAINTIFF OF THE DANGERS OF _____ [*specify product*], DEFENDANT DID IN FACT ADEQUATELY WARN _____ [*specify person who controlled product's use*], WHO CONTROLLED THE USE OF _____ [*specify product*], OF THAT PRODUCT'S DANGERS.

A. Manufacturer Has No Duty to Warn Every Ultimate User of Product of Its Dangers When Person Controlling Product's Use Has Received Adequate Warning. A manufacturer or retailer discharges its duty to warn of the dangers of its products when it adequately warns the person who controls the use of that product. When that person has been adequately warned, the manufacturer or retailer has no further duty to warn any other ultimate user of the product who is not a person controlling or operating the product (*see Stevens v. Cessna Aircraft Co. (1981) 115 Cal. App. 3d 431, 433, 170 Cal. Rptr. 925*).

[*Optional*] **B. Airplane Manufacturer Has Duty to Warn Pilot but Not Passengers of Plane's Dangers.** An airplane manufacturer has the duty to warn the plane's pilot of the dangers of the plane. However, once the manufacturer has adequately warned the pilot, the manufacturer has no further duty to warn the passengers of the plane of the same dangers (*Stevens v. Cessna Aircraft Co. (1981) 115 Cal. App. 3d 431, 433-434, 170 Cal. Rptr. 925*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a defendant is strictly liable for failing to warn all ultimate users of the product's dangers. The ground of opposition set forth is that defendant is not strictly liable for failing to warn all ultimate users when defendant adequately warned the person controlling the use of the product of the product's dangers.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a demurrer or motion for summary judgment or summary adjudication on the issue that the product is not defective. The points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should state facts showing that defendant had issued adequate warnings to the person who controlled or operated the product [*see, e.g., Stevens v. Cessna Aircraft Co. (1981) 115 Cal. App. 3d 431, 170 Cal. Rptr. 925* (no duty to warn passengers of overload danger when plane's pilot had been adequately warned in owner's manual)].

In an appropriate case, the points and authorities may be used to oppose the contentions supported by the points and *authorities in §§ 190.160 -190.162*.

[3] Discussion of Authorities

[a] Manufacturer Has No Duty to Warn Every Ultimate User of Product of Its Dangers When Person Controlling Product's Use Has Received Adequate Warning

In ***Stevens v. Cessna Aircraft Co.*** *(1981) 115 Cal. App. 3d 431, 170 Cal. Rptr. 925* , plaintiff's decedent was killed in a four-passenger airplane crash. Plaintiff brought an action in strict liability against the plane's manufacturer, on the ground that defendant failed to post a warning to the passengers as to the plane's load capacity, and that the plane was subsequently overloaded, causing the crash. Defendant moved for summary judgment, which was granted by the trial court. Plaintiff appealed.

The court of appeal affirmed, holding that defendant had no duty to warn the passengers of the load capacity of the plane, because only the pilot has control of the plane and responsibility under federal regulations to determine the aircraft's weight prior to takeoff. Because the owner's manual for this type of plane contained the necessary information for use by the pilot, defendant's duty to warn only the pilot had been met. The court reasoned that in the airplane situation, the passenger necessarily depends on the skill and judgment of the pilot to determine the load capacity of the airplane in light of the flying conditions to be encountered. It would be impossible ultimately to provide meaningful information to the passenger, and in the long run a rule requiring the manufacturer to provide such information directly to the passenger would not be in the interests of passenger safety (*115 Cal. App. 3d 431, 433-434)* .

[b] Airplane Manufacturer Has Duty to Warn Pilot but Not Passengers of Plane's Dangers

Stevens v. Cessna Aircraft Co. *(1981) 115 Cal. App. 3d 431, 170 Cal. Rptr. 925* , is discussed in *§ 190.167[3][a]*.

[4] Additional Authorities

[a] Manufacturer Has No Duty to Warn Every Ultimate User of Product of Its Dangers When Person Controlling Product's Use Has Received Adequate Warning

In *Persons v. Salomon N. Am., Inc. (1990) 217 Cal. App. 3d 168, 265 Cal. Rptr. 773* , an action arising from a ski

accident in which the plaintiff's rented ski bindings failed to release after a fall, the plaintiff filed a motion for partial directed verdict against the manufacturer of the bindings, seeking to establish that the manufacturer was strictly liable for failure to warn her that the bindings were dangerous when used with the type of boots she rented (which were made of a certain plastic) unless the boots were first treated with silicone. The court of appeal affirmed the trial court's denial of the motion, holding that the manufacturer had a duty to warn only the supplier of the product, rather than the ultimate consumer, because once the product was distributed, the manufacturer had no practical way to provide an effective warning directly to the consumer, and analysis of the plastic composition of boots required calibration with a special instrument, which was properly done by the ski-shop technician. Once the manufacturer warned the supplier, the supplier had a duty to warn the ultimate consumer (*217 Cal. App. 3d 168, 176-178)* .

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19-190 California Points & Authorities § 190.168

§ 190.168 Opposing Contention That Defendant Is Strictly Liable for Failure to Warn--Bulk Manufacturer Has No Duty to Warn Ultimate Consumer of Product That Is Subsequently Repackaged by Distributor or Retailer

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product (see, e.g., §§ 190.164 -190.167, 190.169 -190.171).*]

DEFENDANT _____ [*name*] IS NOT STRICTLY LIABLE FOR PLAINTIFF'S INJURIES BECAUSE PLAINTIFF WAS INJURED BY A REPACKAGED PRODUCT AND DEFENDANT, AS BULK MANUFACTURER OF THE PRODUCT IN ITS ORIGINAL FORM, HAD INCLUDED ADEQUATE WARNINGS TO THE DISTRIBUTOR IN ITS BULK SALE AND THUS HAD NO DUTY TO WARN OF THE DANGERS OF THE PRODUCT AS SUBSEQUENTLY REPACKAGED BY THE DISTRIBUTOR.

Bulk Manufacturer Who Has Provided Adequate Warning in Bulk Sale of Product to Distributor Has No Duty to Warn Ultimate Consumer of Product's Dangers When Distributor Has Subsequently Repackaged, Relabeled, and Remarketed Product. A bulk manufacturer has no duty to warn the ultimate consumer of a product of that product's dangers when the product has been repackaged, relabeled, and remarketed by a distributor and the manufacturer has provided adequate warnings in its initial bulk sale to the distributor (*Groll v. Shell Oil Co. (1983) 148 Cal. App. 3d 444, 449, 196 Cal. Rptr. 52*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a defendant is strictly liable for failing to warn of the product's dangers. The ground of opposition set forth is that defendant is not strictly liable for

failing to warn the ultimate user of a product that has been repackaged, relabeled, and remarketed by a distributor, when defendant included adequate warnings in its initial bulk sale of the product to the distributor.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a demurrer or motion for summary judgment or summary adjudication on the issue that defendant is subject to strict liability. The points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. For example, counsel should state facts showing that defendant was a bulk manufacturer, that defendant had adequately warned the distributor of the product's dangers in the initial bulk sale, and that the distributor had subsequently repackaged and relabeled the product into the product's form at time of purchase by the ultimate consumer [*see, e.g., Groll v. Shell Oil Co. (1983) 148 Cal. App. 3d 444, 196 Cal. Rptr. 52* (bulk manufacturer of fuel had no duty to warn ultimate consumer of repackaged fuel)].

In an appropriate case, the points and authorities may be used to oppose the contentions supported by the points and *authorities in §§ 190.160 -190.162*.

[3] Discussion of Authorities

[a] Bulk Manufacturer Who Has Provided Adequate Warning in Bulk Sale of Product to Distributor Has No Duty to Warn Ultimate Consumer of Product's Dangers When Distributor Has Subsequently Repackaged, Relabeled, and Remarketed Product

In ***Groll v. Shell Oil Co.*** *(1983) 148 Cal. App. 3d 444, 196 Cal. Rptr. 52* , plaintiff was injured while using fuel to light a fireplace. Plaintiff brought an action in negligence, warranty, and strict liability based on failure to warn against the manufacturer of the fuel. Defendant manufacturer had sold the fuel in a bulk sale to a distributor. Defendant had included a data sheet warning of the fuel's dangerous propensities with the product in the bulk sale. The distributor, however, packaged the product in individual containers that warned only that the fuel was flammable and should be kept away from heat. Plaintiff had purchased the product from the distributor. Defendant manufacturer moved for nonsuit, and the trial court granted the motion. Plaintiff appealed.

The court of appeal affirmed, holding that plaintiff was not injured by inadequate warning, but rather by his own improper use of the product. The court also held that defendant manufacturer was absolved of its responsibility at the time it provided adequate warnings to the distributor who subsequently repackaged, relabeled, and marketed the product. The court explained that to hold otherwise would impose an onerous burden on a bulk sales manufacturer to inspect the subsequent labeling of the packaged product. In addition, a bulk manufacturer would have severe enforcement problems if the bulk product purchaser failed to adhere to the recommended warnings (*148 Cal. App. 3d 444, 448-449)* .

CAUTION:

The Supreme Court ordered depublished a case that is similar in facts and issues to *Groll v. Shell Oil Co. (1983) 148 Cal. App. 3d 444* , *196 Cal. Rptr. 52* . In *Pennwalt Corp. v. Superior Court (1985) 171 Cal. App. 3d 923, 218 Cal. Rptr. 675* , the court of appeal held that defendant bulk manufacturer had no duty to warn the ultimate consumer of the dangers of a chemical in its repackaged form. As in *Groll,* defendant had no control over the subsequent repackaging, relabeling, and combining of its product with other chemicals, nor any ability to monitor those actions. The Supreme Court ordered that *Pennwalt* be depublished on November 20, 1985.

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19-190 California Points & Authorities § 190.169

§ 190.169 Opposing Contention That Defendant Is Strictly Liable for Failure to Warn--Manufacturer of Nondefective Component Part Has No Duty to Warn of Danger of Finished Product

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product (see, e.g., § 190.85).*]

DEFENDANT _____ [*name*] IS NOT STRICTLY LIABLE FOR PLAINTIFF'S INJURIES BECAUSE DEFENDANT ONLY MANUFACTURED A NONDEFECTIVE COMPONENT PART OF THE PRODUCT THAT INJURED PLAINTIFF AND AS A RESULT HAD NO DUTY TO WARN PLAINTIFF OF THE DANGERS OF THE FINISHED PRODUCT.

Duty to Warn Rests With Manufacturer of Finished Product and Not With Manufacturer of Nondefective Component Part. The manufacturer of a nondefective component part who has no control over the design, manufacture, and packaging of a finished product has no duty to warn the consumer of that finished product of any danger that arises after the nondefective component part is installed in the finished product. Rather, the manufacturer of the finished product is in the best position to protect against and warn of the danger (*Lee v. Electric Motor Div. (1985) 169 Cal. App. 3d 375, 389, 215 Cal. Rptr. 195*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a defendant is strictly liable for failing to warn of the product's dangers. The ground of opposition set forth is that defendant is not strictly liable for failing to warn the user of a finished product if defendant has only manufactured a nondefective component part of that finished product.

These points and authorities may be combined with other points and authorities pertaining to component part manufacturers as *set forth in § 190.85*. These points and authorities may also be combined with other points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a demurrer or motion for summary judgment or summary adjudication on the issue that defendant is subject to strict liability. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. For example, counsel should state facts showing that defendant manufactured only a component part of the finished product, that the component part was not defective, and that defendant had no control over the design, manufacture, and packaging of the finished product [*see, e.g., Lee v. Electric Motor Div. (1985) 169 Cal. App. 3d 375, 215 Cal. Rptr. 195* (manufacturer of nondefective motor had no duty to warn of danger of meat grinder in which motor was installed)].

In an appropriate case, these points and authorities may be used to oppose the contentions supported by the points and *authorities in §§ 190.160 -190.162*.

[3] Discussion of Authorities

[a] Duty to Warn Rests With Manufacturer of Finished Product and Not With Manufacturer of Nondefective Component Part

The facts and procedural background of ***Lee v. Electric Motor Div.*** *(1985) 169 Cal. App. 3d 375, 215 Cal. Rptr. 195* , are discussed in *§ 190.85[3][a]*. In affirming the judgment, the court held that a manufacturer of a nondefective component part has no duty to warn of the dangers of the finished product in which the part is installed. In its reasoning, the court stressed the fact that defendant component manufacturer gave no input and had no control over the design, manufacture, and packaging of the finished product. Thus, the manufacturer of the finished product, and not the component manufacturer, is in the best position to protect against and warn of the danger that arises after the nondefective component part is installed in the finished product (*169 Cal. App. 3d 375, 389)* .

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19-190 California Points & Authorities § 190.170

§ 190.170 Opposing Contention That Defendant Is Strictly Liable for Failure to Warn--Drug Manufacturer Has Duty to Warn Doctor but Not Patient

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product (see, e.g., § 190.167).*]

DEFENDANT _____ [*name*] IS NOT STRICTLY LIABLE FOR PLAINTIFF'S INJURIES BECAUSE AS A DRUG MANUFACTURER, DEFENDANT HAD A DUTY TO WARN ONLY PLAINTIFF'S DOCTOR OF THE DANGERS OF _____ [*specify product*] AND DID NOT HAVE A DUTY TO WARN PLAINTIFF AS THE ULTIMATE USER OF THE DRUG.

Drug Manufacturer Has Duty to Warn Doctor but Not Patient. The duty of adequate warning by the manufacturer of an ethical drug is discharged by its warning of hazards to doctors who may in the exercise of their medical judgments decide to use the drug as a part of their chemotherapy. Absent special circumstances, known or foreseeable in the exercise of due care by the manufacturer, there is no duty to warn the patient (*Carlin v. Superior Court (1996) 13 Cal. 4th 1104, 1116, 56 Cal. Rptr. 2d 162, 920 P.2d 134* ; *Carmichael v. Reitz (1971) 17 Cal. App. 3d 958, 989, 95 Cal. Rptr. 381*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a defendant is strictly liable for failing to warn of the product's dangers. The ground of opposition set forth is that defendant drug manufacturer is not strictly liable for failing to warn a medical patient when defendant has adequately warned the physician who prescribed the drug to the patient.

These points and authorities may be combined with other points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a demurrer or motion for summary judgment or summary adjudication on the issue that defendant is subject to strict liability. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should state facts showing that defendant was a drug manufacturer who adequately warned the medical profession of the dangers of its drug [*see, e.g., Carmichael v. Reitz (1971) 17 Cal. App. 3d 958, 95 Cal. Rptr. 381* (manufacturer warned doctor but not patient of dangers of drug to treat endometriosis)].

In an appropriate case, these points and authorities may be used to oppose the contentions supported by the points and *authorities in §§ 190.160 -190.162*.

[3] Discussion of Authorities

[a] Drug Manufacturer Has Duty to Warn Medical Profession but Not Patient

The facts and procedural background of ***Carlin v. Superior Court*** *(1996) 13 Cal. 4th 1104, 56 Cal. Rptr. 2d 162, 920 P.2d 134* are discussed in *§ 190.163[3][a]*. In reaffirming that prescription drug manufacturers are strictly liable for failure to warn, the Court added that the duty to warn runs to the physician, not the patient. The physician who dispenses the drug to his or her patients is responsible for making sure that the warning reaches patients for whom the drug is prescribed (*13 Cal. 4th 1104, 1116)* .

In ***Carmichael v. Reitz*** *(1971) 17 Cal. App. 3d 958, 95 Cal. Rptr. 381* , plaintiff suffered pulmonary embolisms and thrombophlebitis after taking a drug for treatment of endometriosis. Plaintiff brought an action in strict liability and negligence against the manufacturer of the drug and the doctor who prescribed the drug to plaintiff. The trial court granted a nonsuit in favor of defendant doctor, and the jury returned a verdict in favor of defendant manufacturer. Plaintiff appealed.

The court of appeal affirmed the judgment as to each defendant. With regard to defendant manufacturer, the court held that defendant was not strictly liable under a duty to warn theory, because a drug manufacturer's duty to warn extends only to warning of the drug's hazards to doctors who may in the exercise of their medical judgments decide to use the drug as a part of their chemotherapy. Absent special circumstances, known or foreseeable in the exercise of due care by the manufacturer, there is no duty to warn the patient. The court reasoned that in reality, it is the prescribing doctor and not the patient who stands in the shoes of the ordinary consumer. The court did qualify its holding, however, by noting that if the promotional features of communications to the doctors by the manufacturer unfairly and unreasonably predominate, a warning otherwise adequate may become inadequate and the adequacy of the warning may present a jury question (*17 Cal. App. 3d 958, 989)* . However, such was not this case. In fact, plaintiff had actually become aware of the dangers of the drug after taking it, yet continued to take the drug even after acquiring such knowledge. Thus, assumption of the risk was an applicable defense under the circumstances (*17 Cal. App. 3d 958, 991-992)* .

[4] Additional Authorities

[a] Drug Manufacturer Has Duty to Warn Medical Profession but Not Patient

Finn v. G.D. Searle & Co. (1984) 35 Cal. 3d 691, 200 Cal. Rptr. 870, 677 P.2d 1147 , is discussed in *§ 190.193[4][a]*. Although the subject was not technically at issue in the case, a jury instruction that included language regarding the duty to warn the doctor, but not the patient was upheld. In a case involving both strict liability and negligence theories based on failure to warn, the Supreme Court affirmed a judgment for the defendant drug

manufacturer. At issue was a jury instruction that had been given on failure to warn. Specifically, the trial court had instructed the jury that the manufacturer of a drug is under a duty to exercise reasonable care to warn the medical profession of potential dangers reasonably foreseeable from use of its drug. The jury was further instructed that the duty of the drug manufacturer is to warn the medical profession, and that the manufacturer had no duty to insure that the warning reaches the patient for whom the drug is prescribed. In the appeal, plaintiff disputed the injection of "reasonable care" and "reasonable foreseeability" into the strict liability instruction, but did not dispute the latter phrase regarding the duty to warn the medical profession, but not the patient. The Court held that the instruction was not prejudicial (*35 Cal. 3d 691, 698-702)* .

NOTE:

It is unclear whether principles of negligence will be required to be injected in future duty to warn instructions. However, because the duty to warn a physician rather than a patient was not disputed in *Finn v. G.D. Searle & Co.*, that portion of the jury instruction appears to continue to be settled law.

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19-190 California Points & Authorities § 190.171

§ 190.171 Opposing Contention That Defendant Is Strictly Liable for Failure to Warn--Manufacturer Has No Duty to Warn When Plaintiff Is Injured by Another Manufacturer's Product

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product (see, e.g., §§ 190.164 -190.167).*]

DEFENDANT _____ [*name*] IS NOT STRICTLY LIABLE FOR PLAINTIFF'S INJURIES BECAUSE PLAINTIFF'S INJURIES WERE PROXIMATELY CAUSED BY A PRODUCT MANUFACTURED BY SOMEONE OTHER THAN DEFENDANT AND THEREFORE DEFENDANT DID NOT HAVE A DUTY TO WARN PLAINTIFF OF THE DANGERS OF EITHER DEFENDANT'S PRODUCT OR OF THE DANGERS OF THE PRODUCT THAT CAUSED PLAINTIFF'S INJURIES.

A. Manufacturer Has No Duty to Warn of Risks of Its Product if Product of Another Has Proximately Caused Plaintiff's Injuries. A manufacturer is not strictly liable for failing to warn of risks of using its product when it is shown that the proximate cause of injury to a plaintiff is not the manufacturer's product but rather is a product manufactured by someone else (*Powell v. Standard Brands Paint Co. (1985) 166 Cal. App. 3d 357, 362-363, 212 Cal. Rptr. 395* ; *Blackwell v. Phelps Dodge Corp. (1984) 157 Cal. App. 3d 372, 377-378, 203 Cal. Rptr. 706*).

B. Manufacturer Has No Duty to Warn of Risks of Another's Product. A manufacturer's duty to warn is restricted to warnings based on the characteristics of the manufacturer's own product. The manufacturer is not required to study and analyze the products of others and to warn users of risks of those products (*Taylor v. Elliott Turbomachinery Co. (2009) 171 Cal. App. 4th 564, 2009 Cal. App. LEXIS 214, at *25* ; *Powell v. Standard Brands Paint Co. (1985) 166 Cal. App. 3d 357, 364, 212 Cal. Rptr. 395* ; *Blackwell v. Phelps Dodge Corp. (1984) 157 Cal. App. 3d 372, 377-378, 203 Cal. Rptr. 706*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a defendant is strictly liable for failing to warn of a product's dangers. The ground of opposition set forth is that defendant manufacturer has no duty to warn of the dangers of its product when plaintiff's injuries are proximately caused by the product of another, and that defendant has no duty to warn of the dangers of the products of another.

These points and authorities may be combined with other points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a demurrer or motion for summary judgment or summary adjudication on the issue that defendant is subject to strict liability. The points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should state facts showing that plaintiff's injuries were not proximately caused by defendant's product but instead were caused by the product of another [*see, e.g., Powell v. Standard Brands Paint Co. (1985) 166 Cal. App. 3d 357, 212 Cal. Rptr. 395* (although plaintiff had been using defendant's thinner, plaintiff switched brands and was injured while using another manufacturer's thinner); *Blackwell v. Phelps Dodge Corp. (1984) 157 Cal. App. 3d 372, 203 Cal. Rptr. 706* (tank car and not defendant's acid that was loaded into tank car was allegedly defective for lack of warnings)].

In an appropriate case, the points and authorities may be used to oppose the contentions supported by the points and *authorities in §§ 190.160 -190.162*.

[3] Discussion of Authorities

[a] Manufacturer Has No Duty to Warn of Risks of Its Product if Product of Another Has Proximately Caused Plaintiff's Injuries

In ***Powell v. Standard Brands Paint Co.*** *(1985) 166 Cal. App. 3d 357, 212 Cal. Rptr. 395* , plaintiffs incurred injuries and damages from an explosion that occurred while plaintiffs were stripping a tile floor with a buffer and thinner. Plaintiffs brought an action in strict liability and negligence against various suppliers and manufacturers of buffers and thinners. One such defendant (respondent), moved for summary judgment. Respondent claimed that although plaintiffs had used its lacquer thinner product to begin a job, the accident had occurred the next day while plaintiffs used another manufacturer's lacquer thinner. Plaintiffs claimed that even though the accident occurred while using another manufacturer's thinner, respondent nevertheless breached its duty to warn of the product's highly flammable characteristics. The trial court disagreed, and granted respondent's motion. Plaintiffs appealed.

The court of appeal affirmed the summary judgment in favor of respondent, holding that respondent may not be held strictly liable for failing to warn of the risks of using its product when plaintiff's injury was proximately caused by a product manufactured by someone else. The court explained that respondent's failure to warn was simply not a legal proximate cause of plaintiffs' injuries (*166 Cal. App. 3d 357, 362-363)* . The court also held that respondent's duty to warn was restricted to warnings based on the characteristics of respondent's own product, and that the law did not require respondent to study and analyze the products of others and to warn users of risks of those products. The court explained that a manufacturer's decision to supply warnings, and the nature of any warnings, are based on and tailored to the risks of use of the manufacturer's own product. Thus, even when a manufacturer erroneously omits warnings, the most that manufacturer could reasonably foresee is that consumers might be subject to the risks of the manufacturer's own product, because those are the only risks that manufacturer is required to know (*166 Cal. App. 3d 357, 364)* . However, the court declined to rule on whether a manufacturer could be liable for failing to warn of its risks or the risks of another's product when another's product proximately causes a plaintiff's injuries, if the following circumstances

exist: (1) the product immediately causing injury (product B) is subject to the same generic description as the product previously used with inadequate warnings (product A); (2) product B is generally used for the same purposes as product A by consumers; (3) product B's warnings are inadequate; and (4) product B has risks of use identical to those of product A. The court commented that this theory of liability gains credence to the extent a generically identical product, with presumably identical risks of use, is made by a limited number of manufacturers in an industry, and there is an industry-wide practice of omitting warnings on the product. In such a situation, each manufacturer has reason to know the risks of the other products and that a consumer will receive no adequate warnings from the other products. However, the court stopped short of deciding whether liability would exist under such circumstances, because in this case plaintiffs' attorneys had not pleaded facts necessary to support such a legal theory (*166 Cal. App. 3d 357, 365)* . The case does leave open the possibility, however, that such a theory might constitute a viable cause of action in the future.

In ***Blackwell v. Phelps Dodge Corp.*** *(1984) 157 Cal. App. 3d 372, 203 Cal. Rptr. 706* , plaintiffs sustained personal injuries while attempting to unload a tank car filled with sulfuric acid. Plaintiffs brought an action in strict liability and negligence against various defendants, including the company that supplied and loaded the acid into the tank car. Plaintiffs contended that that company failed to warn plaintiffs of a possible accumulation of pressure within the tank, or to instruct them on how to unload the acid safely. Defendant successfully moved for summary judgment, and plaintiffs appealed.

The court of appeal affirmed, holding that defendant acid supplier was not subject to strict liability for failure to warn of the dangers of the product of another. Plaintiff had alleged that the tank car, and not the acid that defendant supplied and loaded into the tank car, was dangerous and defective. Thus, defendant incurred no liability to plaintiffs for its failure to warn them of danger from formation of pressure in the acid allegedly caused by defective design of the tank car, or to instruct them on how safely to unload the acid from the tank. Because defendant neither owned nor leased the tank car, defendant was without authority to put any warnings or instructions on the car, the absence of which allegedly made the car a defective product. Thus, as a matter of law, defendant could not be held strictly liable to plaintiffs for having failed to provide such warnings and instructions (*157 Cal. App. 3d 372, 378-380)* .

[b] Manufacturer Has No Duty to Warn of Risks of Another's Product

In ***Taylor v. Elliott Turbomachinery Co.*** *(2009) 171 Cal. App. 4th 564* , the decedent was exposed to asbestos-containing products while serving in the Navy. The defendants supplied the Navy with equipment used in the ship's propulsion system, some of which included asbestos-containing parts. The asbestos-containing parts to which the decedent was exposed were manufactured and supplied by third parties. The plaintiff nevertheless alleged that defendants breached their duty to warn the decedent of the risks inherent in the asbestos-containing materials supplied by other manufacturers. The trial court granted defendants' motions for summary judgment.

The court of appeal affirmed. The defendants had no duty to warn of the hazards of products made or supplied by other manufacturers and used in conjunction with the defendants' equipment. Although a manufacturer *may* owe a duty to warn when the use of its product in combination with the product of another creates a potential hazard, that duty arises only when the manufacturer's own product causes the risk of harm (*171 Cal. App. 4th 564, 2009 Cal. App. LEXIS 214, at *25-*33)* .

Powell v. Standard Brands Paint Co. *(1985) 166 Cal. App. 3d 357, 212 Cal. Rptr. 395* , is discussed in *§ 190.171[3][a]*.

Blackwell v. Phelps Dodge Corp. *(1984) 157 Cal. App. 3d 372, 203 Cal. Rptr. 706* , is discussed in *§ 190.171[3][a]*.

[4] Additional Authorities

[a] Manufacturer Has No Duty to Warn of Risks of Its Product When Product of Another Has Proximately

Caused Plaintiff's Injuries

In *Garman v. Magic Chef, Inc. (1981) 117 Cal. App. 3d 634, 173 Cal. Rptr. 20* , plaintiff's decedent was injured, and subsequently died, when she lit a cooking stove located adjacent to the propane gas system of her motor home. A copper tubing of the system had two gas leaks, and five minutes after the stove was lit, flammable vapor from the leaks contacted the flame and an explosion ensued. Plaintiff brought an action in strict liability against numerous defendants, including defendant manufacturer of the stove. As to the latter defendant, plaintiff claimed that, although the stove itself contained no physical defect, it came with a defective warning and installation instruction. The trial court granted a summary judgment in favor of this defendant, and plaintiff appealed.

The court of appeal affirmed the judgment, holding that as a matter of law the stove manufacturer had no duty to warn that a lighted but properly operating stove might ignite gas leaking from some other place. In other words, the absence of a warning by defendant stove manufacturer did not proximately cause the explosion. Thus, a manufacturer has no duty to warn when a person's injuries are not caused by any unreasonably dangerous condition or feature of that manufacturer's product. Nor may the maker of a product be liable for failing to warn of injury that may befall a person who uses that product in an unsafe place or in conjunction with another product that because of a defect or improper use is itself unsafe. Thus, defendant was under no duty to warn of the possible defect in the product of another and was not liable for failing to do so (*117 Cal. App. 3d 634, 637-639)* .

NOTE:

Another court of appeal disagreed with the holding in *Garman v. Magic Chef, Inc.* that the warning requirement is limited to unreasonably or unavoidably dangerous products. In that case, the court held that directions or warnings should be used if reasonably required to prevent the use of a product from becoming unreasonably dangerous. The court stated that it is the lack of such a warning that renders a product unreasonably dangerous and therefore defective [*Gonzales v. Carmenita Ford Truck Sales, Inc. (1987) 192 Cal. App. 3d 1143, 1151, 238 Cal. Rptr. 18]* .

[b] Manufacturer Has No Duty to Warn of Risks of Another's Product

Garman v. Magic Chef, Inc. (1981) 117 Cal. App. 3d 634, 173 Cal. Rptr. 20 , is discussed in *§ 190.171[4][a]*.

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19-190 California Points & Authorities § 190.172

§ 190.172 Opposing Contention That Defendant Is Strictly Liable for Failure to Warn--Determining Existence of Defect Requires Weighing of Degrees of Danger

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is liable in strict products liability for injuries caused by defendant's product (see, e.g., §§ 190.164 -190.171).*]

DEFENDANT _____ [*name*] IS NOT STRICTLY LIABLE FOR PLAINTIFF'S INJURIES, BECAUSE DEFENDANT'S PRODUCT IS NOT DEFECTIVE ON THE BASIS OF A WEIGHING OF THE DEGREES OF DANGER CAUSED BY THE _____ [ABSENCE *or* INADEQUACY] OF WARNING REGARDING THE FORESEEABLE USES OF THE PRODUCT.

A. Determination of Existence of Defect Requires Weighing of Degrees of Danger. The determination whether the absence of a warning renders a product defective requires a weighing of the degrees of danger, involving all relevant criteria, inherent in the foreseeable uses of the product (*Cavers v. Cushman Motor Sales, Inc. (1979) 95 Cal. App. 3d 338, 349, 157 Cal. Rptr. 142*).

[*Optional*] **B. "Substantially Dangerous" Standard Appropriate to Determine Threshold Degree of Danger.** The determination whether the absence of a warning renders a product defective is appropriately governed by the "substantially dangerous" standard when the term is adequately defined, and the determination is made from the evidence and measured in the light of all relevant criteria (*Cavers v. Cushman Motor Sales, Inc. (1979) 95 Cal. App. 3d 338, 349, 157 Cal. Rptr. 142*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a defendant is strictly liable for failure to warn the user of the dangerous propensities of a product that is otherwise faultlessly made. The ground of opposition is that a weighing of the degrees of danger inherent in the foreseeable use of the product without an adequate warning is necessary to determine the existence of a defect, and that under the facts, the threshold degree of danger was not evidenced, and therefore no defect exists in the product [*see Cavers v. Cushman Motor Sales, Inc. (1979) 95 Cal. App. 3d 338, 349, 157 Cal. Rptr. 142]* . The optional paragraph is for use if the "substantially dangerous" standard is used to determine the required threshold degree of danger under the circumstances.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of strict products liability. For example, they may be used in support of the use of jury instructions that require the jury to find that the absence of an adequate warning rendered the use of the product "substantially dangerous," in opposition to plaintiff's contention that the jury should not be allowed to consider the degrees of danger involved, nor be provided with any guidance regarding the definition of "danger" in a failure-to-warn case. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should show that the evidence and controlling criteria warrant the definition and explanation of the degree of danger required to be established to render the product defective for the purpose of imposing strict liability on the manufacturer because of its failure to warn of the dangerous propensities of the product [*see Cavers v. Cushman Motor Sales, Inc. (1979) 95 Cal. App. 3d 338, 349, 157 Cal. Rptr. 142* ("substantially dangerous" standard appropriate if term properly defined and explained)].

[3] Discussion of Authorities

[a] Determination of Existence of Defect Requires Weighing of Degrees of Danger

In ***Cavers v. Cushman Motor Sales, Inc.*** *(1979) 95 Cal. App. 3d 338, 157 Cal. Rptr. 142* , the lessee of a golf cart, who was injured while riding in the cart, brought an action against the manufacturer and lessor of the cart. The action alleged that defendants were strictly liable because of their failure to warn of the product's propensity to tip over while turning. Plaintiff, who rented the cart in conjunction with a business-related golf tournament, allowed an acquaintance to drive the cart while he rode as a passenger. While the driver attempted to negotiate a turn, the cart either tipped over or began to tip over, at which point plaintiff allegedly extended his leg out of the cart to brace himself, and incurred injuries. (Evidence conflicted regarding whether or not the cart actually tipped over, and the speed at which it was moving.) Plaintiff brought an action against the driver, her employer, the golf club that leased the cart, and the cart manufacturer. The jury returned a special verdict in favor of defendants, and plaintiff appealed.

The court of appeal affirmed (*95 Cal. App. 3d 338, 351)* . The court noted that the plaintiff's sole theory of recovery was strict liability in tort for failure to warn of the golf cart's propensity to tip while turning. Plaintiff contended that the trial court erred in giving the following jury instruction: "An article otherwise appropriately made and maintained is defective within the meaning of the instruction which I have just given if the manufacturer and/or lessor fails to adequately warn of dangerous propensities of such article which in the absence of an adequate warning renders the article substantially dangerous to the user." Plaintiff specifically contended that the trial court's use of the adverb "substantially" to modify the term "dangerous" is contrary to California law and prejudicially increased his burden of proof. The court noted that prior to *Cronin v. J.B.E. Olson Corp. (1972) 8 Cal. 3d 121, 104 Cal. Rptr. 433, 501 P.2d 1153* , the cases involving products liability actions required that a two-pronged test be met to establish liability. The claimant was required to prove (1) "a defective condition," and (2) that the defect was "unreasonably dangerous." In *Cronin*, the California Supreme Court eliminated the plaintiff's burden of establishing that a proved defect was also "unreasonably dangerous" (*95 Cal. App. 3d 338, 342)* . Plaintiff argued that the prohibition of *Cronin* against the use of the term "unreasonably dangerous" applies with equal force to failure-to-warn cases, and that the term "substantially

dangerous" is an equivalent term. The court of appeal concluded that *Cronin,* while eliminating in manufacturing-defect cases the dual burden of proving both the existence of a defect and a resultant unreasonable degree of danger, did not preclude weighing the degree of dangerousness in failure-to-warn cases (*95 Cal. App. 3d 338, 343)* . The court traced the development of the strict products liability from *Greenman v. Yuba Power Prods., Inc. (1963) 59 Cal. 2d 57, 62, 27 Cal. Rptr. 697, 377 P.2d 897* [*see § 190.70[3][a]*], through *Cronin* in relevant respects. The court stated that although the Supreme Court in *Cronin* abolished the Restatement's requirement that the product prove not only defective but also "unreasonably dangerous" as a result of the defect, it did not overrule or disapprove of any prior cases that gave meaning to the word "defect." Therefore, *Cronin* did not alter the standard for defectiveness set forth in *Canifax v. Hercules Powder Co. (1965) 237 Cal. App. 2d 44, 53, 46 Cal. Rptr. 552* , which is that a product otherwise free of defects in manufacture and design may become defective if it is "unreasonably dangerous to place [it] in the hands of the user without a suitable warning" (*95 Cal. App. 3d 338, 344)* . The court noted that appellate decisions in the wake of *Cronin* have not directly addressed the effect of *Cronin* on failure-to-warn cases, with the exception of *Dor v. Wilcox-Crittendon Co. (1975) 45 Cal. App. 3d 74, 81 n.3, 119 Cal. Rptr. 135* [*see § 190.165[3][a]*], which observed that "[t]he inclusion of the element of 'unreasonably dangerous' when applied to a duty to warn is entirely different than when applied to a defect in design or manufacture." Other cases either applied the *Canifax* formula without modification, applied that formula after deleting the term "unreasonably," or avoided discussion of degrees of danger altogether. The court stated that the problem lies in the absence of a precise or easily adaptable definition of "defect" (*95 Cal. App. 3d 338, 345)* . In *Barker v. Lull Eng'g Co. (1978) 20 Cal. 3d 413, 428, 143 Cal. Rptr. 225, 573 P.2d 443* [*see § 190.110[3][a]*], the Supreme Court recognized the need for "giving content to the defectiveness standard," and the danger of telling the jury that the plaintiff may recover for injury caused by "defects" without defining for them the meaning of the term (*95 Cal. App. 3d 338, 346)* .

The court also stated that the concept of defect, which "raises considerably more difficulties" in the design context than in the manufacturing or production context, is all the more elusive when applied to failure-to-warn cases (*95 Cal. App. 3d 338, 346-347)* . In those cases, the jury must decide whether a product flawlessly designed and produced may nevertheless possess such risks to the user without a suitable warning that it becomes "defective" simply by the absence of a warning. *Barker* held that a trial court may properly formulate instructions to elucidate the "defect" concept in varying circumstances, further explaining that *Cronin* was never meant to preclude a trial court from framing a definition of defect, appropriate to the circumstances of a particular case, to guide the jury regarding the standard to be applied in determining whether a product is defective or not (*95 Cal. App. 3d 338, 347)* . Applying the principles of *Barker* to failure-to-warn cases, the court held that in assisting the jury's determination of whether the absence of a warning makes a product defective, the trial court should focus on such relevant considerations as the normal expectations of the consumer regarding how the product will perform, degrees of simplicity or complication in the operation or use of the product, the nature and magnitude of the danger to which the user is exposed, the likelihood of injury, and the feasibility and beneficial effect of including a warning (*95 Cal. App. 3d 338, 347-348)* . The court disagreed with plaintiff's contention that he was entitled to an instruction that eliminated from jury consideration all references to degrees of danger. The court stated that when, as in this case, plaintiff is relieved of the burden of proving a defect in either manufacture or design, permitting recovery on proof that the product was merely "dangerous" would turn every manufacturer into an insurer as long as plaintiff could show that the product contained no warning and that he or she was injured while using it (*95 Cal. App. 3d 338, 348)* . The court held that elimination of any consideration of degrees of danger is also contrary to the principles of *Barker,* specifically, that the concept of "excessive preventable danger" and the balancing of risks must be employed because the term "defect" does not easily lend itself to definition (*95 Cal. App. 3d 338, 348-349)* .

The court recognized that a failure-to-warn instruction that predicates liability on a finding of "danger," without regard for degree or without consideration of relevant factors, does not accurately reflect existing case precedent. The court then examined the instructions on defect for failure to warn given by the trial court. The court felt that the trial court "wisely chose to omit the word 'unreasonably' from the original *Canifax* formulation," inasmuch as the Supreme Court has indicated that the word improperly introduces an element that rings of negligence in a strict liability case, and may tend to divert the jury's attention from the condition of the product to the conduct of the seller. Instead, the trial court

told the jurors that an otherwise faultlessly made article may be deemed defective if the manufacturer/lessor fails to warn of dangerous propensities that in the absence of an adequate warning render the article substantially dangerous to the user. The court stated that by using the adverb "substantially," the trial court appropriately indicated that a weighing of degrees of danger was necessarily involved in determining the existence of a defect. Moreover, the trial court gave the jury detailed guidance on the meaning of "substantial danger": "The term substantial danger as used in these instructions does not mean any danger, however remote, or a trivial danger nor conversely is the term synonymous with great or extreme danger. A substantial danger does not fall precisely in any specific area in the spectrum of danger. The term substantial danger means danger that is real and not insignificant. The word danger is to some extent self defining when one considers its antonym insubstantial. Whether a danger is substantial or insubstantial must be determined from the evidence and measured in the light of several criteria, none of which is totally controlling including the potential injurious consequences of such danger, the likelihood that injury might result, the quality and extent of anger to which the user is exposed, and whether a danger is latent or patent (patent means apparent and latent is its antonym)" (*95 Cal. App. 3d 338, 349)* . The court stated that when the instructions on the definition of "defect" are viewed as a whole, it is evident that they adequately focused the jury's attention on the relevant factors that must be considered in determining whether the magnitude of the danger inherent in the use of a product was sufficiently great as to require a warning. The court therefore stated that it could not conclude that the jurors were misled or confused as a result of the instruction given (*95 Cal. App. 3d 338, 350)* .

NOTE:

In *Anderson v. Owens-Corning Fiberglas Corp. (1991) 53 Cal. 3d 987, 1001, 281 Cal. Rptr. 528, 810 P.2d 549* [*see § 190.164[3][a]*], the Supreme Court cited *Cavers* with approval. The Court noted that "*Cavers* was principally concerned with the propriety of the term 'substantially dangerous' and concluded that it is necessary to weigh the degree of danger involved when determining whether a warning defect exists. The standard suggested in *Cavers* to govern this weighing process was similar to that provided for the jury's risk/benefit analysis in *Barker*" [*Anderson v. Owens-Corning Fiberglas Corp. (1991) 53 Cal. 3d 987, 995-1003, 281 Cal. Rptr. 528, 810 P.2d 549]* .

[b] "Substantially Dangerous" Standard Appropriate to Determine Threshold Degree of Danger

Cavers v. Cushman Motor Sales, Inc. *(1979) 95 Cal. App. 3d 338, 157 Cal. Rptr. 142* , is discussed in *§ 190.172[3][a]*.

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19-190 California Points & Authorities § 190.173

§ 190.173 Opposing Contention That Defendant Is Strictly Liable for Failure to Warn--Manufacturer of Nonprescription Drug Has No Duty Beyond That Imposed by Statute and Regulation to Warn in Language Other Than English

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other forms of memorandum of points and authorities opposing the contention that defendant is liable in strict products liability for injuries caused by defendant's product (see, e.g., §§ 190.164 -190.172.*]

DEFENDANT, AS A MANUFACTURER OF A NONPRESCRIPTION DRUG, HAD NO DUTY TO WARN OF DANGERS ASSOCIATED WITH ITS PRODUCT BEYOND THOSE WARNINGS REQUIRED BY STATUTE AND REGULATION, AND NO STATUTE OR REGULATION REQUIRES WARNINGS IN A LANGUAGE OTHER THAN ENGLISH.

A. Nonprescription Drug Labeling Requirements Impose Proper Standard of Care. The existing legislative and administrative standard of care concerning warnings and other label information required to accompany nonprescription drugs is also the proper standard applicable to tort actions (*Ramirez v. Plough, Inc. (1993) 6 Cal. 4th 539, 552-553, 25 Cal. Rptr. 2d 97, 863 P.2d 167*).

B. Nonprescription Drug Manufacturers Have No Duty to Warn in Language Other Than English. The legislative/regulatory standard of care, which mandates nonprescription drug package warnings in English only, precludes the imposition of any duty to warn in languages other than English *Ramirez v. Plough, Inc. (1993) 6 Cal. 4th 539, 555*).

[2] Comments

[a] Use of Form

This form of memorandum of points and authorities may be submitted in opposition to the contention that a defendant is strictly liable for failure to warn the user of a dangerous propensity of a product that is otherwise faultlessly made. The ground of opposition is that a manufacturer of nonprescription drug has only the duties to warn that are imposed by statute and regulation, and that the absence of any statute or regulation requiring warnings in a language other than English precludes the imposition in a tort action of a duty to warn in any other language [*Ramirez v. Plough, Inc. (1993) 6 Cal. 4th 539, 555, 25 Cal. Rptr. 2d 97, 863 P.2d 167]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue regarding the duty to warn of dangerous propensities of a product. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the regulations and statutes governing the defendant manufacturer, and the failure of those statutes and regulations to impose the duty to warn that plaintiff alleges [*see* *Ramirez v. Plough, Inc. (1993) 6 Cal. 4th 539, 554-555, 25 Cal. Rptr. 2d 97, 863 P.2d 167* (legislature and relevant administrative agencies have power to require warnings in other languages)].

[3] Discussion of Authorities

[a] Nonprescription Drug Labeling Requirements Impose Proper Standard of Care

In ***Ramirez v. Plough, Inc.*** *(1993) 6 Cal. 4th 539, 25 Cal. Rptr. 2d 97, 863 P.2d 167* , plaintiff's mother had administered a children's aspirin manufactured by Plough, Inc. (Plough) while plaintiff was suffering from an upper respiratory infection. The aspirin package warned that aspirin, given to children with flu or chicken pox, could cause Reye Syndrome in rare cases; the warning was in English, and because plaintiff's mother read only Spanish did not understand the warning. Plaintiff contracted Reye's Syndrome, and sued Plough alleging that it breached its duty to warn by not including Spanish-language warnings with its product. The trial court granted Plough's motion for summary judgment, stating that there was no duty to warn in a foreign language, and that there was no causal relationship between Plough's activities and plaintiff's injury. Plaintiff appealed, and the court of appeal reversed, holding that evidence of Plough's knowledge that its product was used by non-English-speaking consumers, and the lack of any evidence of the costs of Spanish-language labeling, made the reasonableness of Plough's failure to include a warning in Spanish a triable issue of fact.

The Supreme Court reversed. The Court held that the formulation of the standard of care is a question of law for the court, and that the legal issue before it was the nature and scope of Plough's conceded duty to warn (*6 Cal. 4th 539, 546)* . A standard of care can be based on statute, and although statutory standards of care are commonly invoked by plaintiffs to establish a breach of duty by a defendant [*see Evid. Code § 669*], the Court stated that there is some room in tort law for a defense of statutory compliance (*6 Cal. 4th 539, 547-548)* . The extensive regulation of labeling of nonprescription drugs by the federal government [*21 U.S.C.S. § 352*; 21 C.F.R. § 201 et seq.], under which manufacturers are not required to include warnings in languages other than English, persuaded the Court that any requirement that warnings be given in other languages should be imposed by legislative and administrative bodies rather than the courts (*6 Cal. 4th 539, 550-553)* . The Court concluded that the uniformity and clarity of the regulations setting forth the required warnings require the adoption of the legislative/regulatory standard of care that mandates nonprescription drug package warnings in English only (*6 Cal. 4th 539, 555)* .

[b] Nonprescription Drug Manufacturers Have No Duty to Warn in Language Other Than English

The facts and procedural background of ***Ramirez v. Plough, Inc.*** *(1993) 6 Cal. 4th 539 , 25 Cal. Rptr. 2d 97, 863 P.2d 167* , are discussed in *§ 190.173[3][a]*.

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19-190 California Points & Authorities § 190.174

§ 190.174 Opposing Contention That Defendant is Strictly Liable for Failure to Warn--Prescription Drug Manufacturer Is Not Liable for Failure to Give Warning Expressly Precluded by Food and Drug Administration (FDA)

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PRESCRIPTION DRUG MANUFACTURER IS NOT STRICTLY LIABLE FOR PLAINTIFF'S INJURIES FOR FAILING TO WARN OF _____ [*specify dangers*] BECAUSE THIS WARNING WAS EXPRESSLY PRECLUDED BY FDA REGULATION, SPECIFICALLY _____ [*specify applicable federal Food and Drug Administration (FDA) regulation*].

Prescription Drug Manufacturer Has No Duty to Give Warning Expressly Precluded by FDA. A prescription drug manufacturer is not strictly liable for failing to give warnings expressly precluded by the federal *Food and Drug Administration (Carlin v. Superior Court (1996) 13 Cal. 4th 1104, 1114-1115, 56 Cal. Rptr. 2d 162, 920 P.2d 134*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition of the contention that defendant is a prescription drug manufacturer strictly liable for failing to warn of known or reasonably scientifically knowable dangers. A prescription drug manufacturer is not strictly liable for failing to give warnings expressly precluded by the federal Food and Drug Administration (FDA). In appropriate cases, however, FDA action or inaction may be admissible to prove whether a risk was known or reasonably scientifically knowable [*Carlin v. Superior Court (1996) 13 Cal. 4th 1104, 1114, 56 Cal. Rptr. 2d 162, 920 P.2d 134* ; *see § 190.283*].

The form should be combined with other forms in this publication as necessary to complete argument as to all issues

and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be a motion by a defendant pharmaceutical manufacturer for summary judgment or opposition to such a motion by a plaintiff, when the evidentiary facts clearly support the contention and disclosing no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. In this context counsel would need to submit a statement of undisputed facts supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit. References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see Cal. Rules of Ct., Rule 3.1113(g)*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, in a particular case, it may be significant that the FDA precludes manufacturers from warning about theoretical hazards [*see 21 C.F.R. § 201.57(d), (e)*]. Under other circumstances, it may be significant that the FDA precludes warnings of adverse reactions that are subject to dispute in the medical community [*see 21 C.F.R. § 1.21(c)(1)*].

[b] Related Points and Authorities

In an appropriate case, the points and *authorities in §§ 190.90, 190.170, 190.173* may be combined with the points and authorities in this form.

[c] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 190.163* may be used to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Prescription Drug Manufacturer Has No Duty to Give Warning Expressly Precluded by FDA

The facts and procedural background of ***Carlin v. Superior Court*** *(1996) 13 Cal. 4th 1104, 56 Cal. Rptr. 2d 162, 920 P.2d 134* , are discussed in *§ 190.163[3][a]*. In reaffirming that prescription drug manufacturers are strictly liable for failure to warn, the Court rejected the plaintiff's argument that FDA regulations are essentially irrelevant to a strict liability action for failure to warn. Because strict liability under failure to warn is not absolute liability, drug manufacturers are not strictly liable for a risk that is not known or reasonably scientifically knowable. In this context, it is significant that the FDA precludes drug manufacturers from warning of every conceivable adverse reaction and warning of potential safety hazards when differences of opinion exist within the medical community with respect to potential adverse reactions (*13 Cal. 4th 1104, 1114)* .

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19-190 California Points & Authorities § 190.175

§ 190.175 Opposing Contention That Defendant Is Strictly Liable for Failure to Warn--Utility Company Has No Duty to Warn Customers of Dangers of Storing Volatile Substances Near Gas-Fired Heater

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product.*]

DEFENDANT, _____ [*specify name*], AS A SUPPLIER OF UTILITIES, IS NOT STRICTLY LIABLE FOR FAILURE TO WARN BECAUSE DEFENDANT HAS NO DUTY TO WARN PLAINTIFF OF THE DANGERS OF STORING VOLATILE SUBSTANCES NEAR GAS-FIRED HEATERS.

Utility Has No Duty to Warn of Risks Associated with Storing Volatile Substances Near Gas-Fired Heaters. A gas company has no duty to warn its customers of the dangers of storing or using flammable liquids near unelevated gas-fired water heaters when it learns that its customer has such a water heater. No duty of care extends to customers injured by an explosion caused when flammable materials stored or used near the heater (*Salazar v. Southern Cal. Gas. Co. (1997) 54 Cal. App. 4th 1370, 1385, 63 Cal. Rptr. 2d 522*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a utility supplier is strictly liable for failing to warn of a product's dangers. The ground of opposition set forth is that the supplier has no duty to warn of the dangers of its product when plaintiff's injuries are proximately caused by storing volatile substances near a gas-fired heater.

The form may be combined with other points and authorities pertaining to the specific procedural context in which

counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a demurrer or motion for summary judgment or summary adjudication on the issue that defendant is subject to strict liability. The form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. For example, counsel should state facts showing that defendant has no duty to warn plaintiff of the dangers of placing volatile substances near a gas fired heater [*see, e.g.,* *Salazar v. Southern Cal. Gas. Co. (1997) 54 Cal. App. 4th 1370, 1385, 63 Cal. Rptr. 2d 522]* .

[3] Discussion of Authorities

[a] Utility Has No Duty to Warn of Risks Associated with Storing Volatile Substances Near Gas-Fired Heaters

In ***Salazar v. Southern Cal. Gas Co.*** *(1997) 54 Cal. App. 4th 1370, 63 Cal. Rptr. 2d 522* , plaintiff incurred injuries from a flash fire that occurred when flammable material that plaintiff was using was ignited by the pilot light of an unelevated water heater in his garage. Plaintiff brought a products liability action against the gas company that supplied the gas to the water heater, alleging a duty based on supplying an inherently hazardous material and creation of a hidden danger. The trial court granted defendant's motion for summary judgment on the ground that the defendant owed the plaintiff no duty.

The court of appeal affirmed the summary judgment in favor of the defendant, holding that the defendant owed no duty on the theory it supplied an inherently dangerous gas. The court explained that a gas company that does not install or maintain gas lines in its customer's premises and is not responsible for their maintenance is not liable for injuries caused by leaks in the lines of which it has no knowledge. Although a gas company has a duty to make sure that gas lines are safe before turning the gas on, once the gas is turned on, it has no duty to inspect a customer's gas lines absent notice of a leak. If a gas company knows at the time it turns on the gas or becomes aware after turning on the gas that there are defects in the pipes, or if the company is in possession of facts that would suggest to a person of ordinary care and prudence that the pipes are leaking or are unsafe for the transportation of gas, it has a duty to inspect and insure the pipes are safe before it furnishes or continues to furnish gas through them. The court concluded that defendant did not breach any duty of care to the plaintiff for injuries incurred when the plaintiff used a flammable material near a gas-fired heater because the inherently dangerous gas did not cause the explosion, as there were no defective gas lines or valves to cause the gas to leak and result in the injury-causing explosion (*54 Cal. App. 4th 1370, 1377)* .

The court also held that the defendant did not create a hidden danger by supplying gas to an unelevated water heater and therefore had no duty to warn of the danger of the water heater or to disconnect the service, even though the defendant had placed on the water heater a warning not to store flammable liquids near the water heater. The court rejected the contention that elevated water heaters decrease the incidence of fires caused by vapors from flammable liquids coming into contact with the water heaters on the grounds that there was no certain connection between the elevation of gas-fired water heaters and decrease in incidences of such fires. In addition, defendant was not responsible for the positioning of the water heater. The water heater involved in plaintiff's injury was not dangerous or defective, and it was flammable materials used near the water heater, not the gas reacting with the unelevated water heater, that caused the explosion. The court concluded that a gas company has no duty to warn its customers of the dangers of storing or using flammable liquids near unelevated gas-fired water heaters even after learning that a customer has such a water heater, and has no duty to disconnect the customer's gas service if the customer fails to elevate the water heater (*54 Cal. App. 4th 1370, 1383-1385)* .

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19-190 California Points & Authorities § 190.176

§ 190.176 Opposing Contention that Defendant Is Strictly Liable for Failure to Warn--Lack of Warning or Allegedly Inadequate Warning Did Not Proximately Cause Injury

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is strictly liable for plaintiff's injuries.*]

DEFENDANT CANNOT BE HELD STRICTLY LIABLE FOR PLAINTIFF'S INJURIES BECAUSE ANY [*specify*] FAILURE TO WARN [*or*] ALLEGEDLY INADEQUATE WARNING WAS NOT THE PROXIMATE CAUSE OF PLAINTIFF'S INJURIES.

A. No Strict Liability Based on Failure to Warn if Failure to Warn or Inadequate Warning Did Not Proximately Cause Injury. Plaintiff asserting causes of action based on failure to warn must prove not only that no warning was provided or that the warning was inadequate, but also that the inadequacy or absence of warning caused his or her injury (*Motus v. Pfizer Inc. (C.D. Cal. 2001) 196 F. Supp. 2d 984, 994-995* ; *Conte v. Wyeth, Inc. (2008) 168 Cal. App. 4th 89, 112, 85 Cal. Rptr. 3d 299*).

B. No Proximate Cause When Prescribing Physician Did Not Read Warning. An inadequate warning that the prescribing physician did not read or rely upon cannot be the proximate cause of a plaintiff's injury (*Conte v. Wyeth, Inc. (2008) 168 Cal. App. 4th 89, 112, 85 Cal. Rptr. 3d 299*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to the contention that the defendant is subject to a products liability action based on failure to warn of a product's dangers.

[3] Discussion of Authorities

[a] No Strict Liability Based on Failure to Warn if Failure to Warn or Inadequate Warning Did Not Proximately Cause Injury

In ***Motus v. Pfizer Inc.*** *(C.D. Cal. 2001) 196 F. Supp. 2d 984* , the decedent committed suicide after being prescribed the drug Zoloft. Plaintiff brought a products liability action against the manufacturer, alleging that the Zoloft's package insert and marketing materials did not warn that the drug can cause suicide ideation. The court granted summary judgment in favor of the manufacturer on the ground that plaintiff was unable to create a genuine issue as to whether the manufacturer's alleged failure to provide an adequate warning causes her injuries.

The California Supreme Court has not adopted the rebuttable presumption adopted by many other states that had an adequate warning been given, the plaintiff would have heeded it. Because the presumption was not applicable, the manufacturer would be entitled to summary judgment if the plaintiff produced no evidence that the prescribing physician would have acted differently had the manufacturer provided an adequate warning about the risk of suicide associated with ingestion of Zoloft. The decedent had not disclosed any contraindications to the physician suggesting that he was not a good candidate for Zoloft; his symptoms had not worsened over a period of time; and plaintiff introduced no evidence that the non-disclosed risk was so high that it would have affected the physician's decision to prescribe the drug or that the physician actually relied on the manufacturer's statements. On the record, plaintiff failed to establish a question of fact on causation (*196 F. Supp. 2d 984, 995-997)* .

Conte v. Wyeth, Inc. *(2008) 168 Cal. App. 4th 89, 85 Cal. Rptr. 3d 299* , is discussed in *§ 190.176[3][b]*.

[b] No Proximate Cause When Prescribing Physician Did Not Read Warning

In ***Conte v. Wyeth, Inc.*** *(2008) 168 Cal. App. 4th 89, 85 Cal. Rptr. 3d 299* , the plaintiff developed tardive dyskinesia after taking metoclopramide, the generic version of the prescription drug Reglan, for almost four years. She filed suit against several defendants. Her claims against the generic manufacturers alleged that they knew or should have known of the widespread tendency among physicians to prescribe the drug for longer than one year, even though it is approved for only 12 weeks of use, and gave misleading or false warnings about the drug's side effects. The trial court granted summary judgment in favor of the generic manufacturers on grounds of preemption and plaintiff's lack of reliance on their warnings or product labeling.

The court of appeal affirmed the dismissal of the generic manufacturers. The plaintiff provided no evidence that the prescribing physician relied on any of their price lists or package inserts, the only product information they disseminated. The allegedly inadequate warnings thus could not have been the proximate cause of plaintiff's injury (*168 Cal. App. 4th 89, 112)* .

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[Reserved]

§§ 190.177[Reserved]

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B. Negligence

19-190 California Points & Authorities § 190.190

§ 190.190 Supporting Contention That Defendant Is Liable for Negligence in Products Liability Action [Civ. Code § 1714(a)]--Plaintiff Is Person or Member of Class of Persons to Whom Defendant Owed Duty of Ordinary Care

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It may be combined with forms supporting the contention that all the elements of actionable negligence exist (see Ch. 165, Negligence).*]

DEFENDANT SHOULD BE HELD LIABLE FOR NEGLIGENTLY _____ [MANUFACTURING *and/or* SELLING *and/or* SUPPLYING] _____ [*specify product*] BECAUSE PLAINTIFF IS _____ [A PERSON *or* A MEMBER OF A CLASS OF PERSONS] TO WHOM DEFENDANT OWED A DUTY OF CARE.

A. Persons to Whom Duty Owed. A manufacturer or supplier of a commodity that is or is likely to be dangerous for the use for which it is made or supplied owes a duty to exercise reasonable care to make it safe for those who will use it and those in whose vicinity it is to be used (*Pike v. Frank G. Hough Co. (1970) 2 Cal. 3d 465, 473, 85 Cal. Rptr. 629, 467 P.2d 229* ; *Gall v. Union Ice Co. (1951) 108 Cal. App. 2d 303, 309, 239 P.2d 48*).

[*EITHER*]

B. Duty to Expected Users Unaware of Dangerous Propensities. A manufacturer has the duty to use reasonable care to warn of a dangerous condition of its product or of facts that make it likely to be dangerous to expected users who may not realize the product's dangerous condition (*Putensen v. Clay Adams Inc. (1970) 12 Cal. App. 3d 1062, 1076, 91 Cal. Rptr. 319*).

[*OR*]

B. Duty to Foreseeable Nonusers. The duty to inspect a product extends not only to the user of the product but also to third persons who can reasonably be expected to be in the vicinity of the probable use of the product (*Benton v. Sloss (1952) 38 Cal. 2d 399, 405-406, 240 P.2d 575* ; *see Zucker v. Passetti Trucking Co. (1961) 191 Cal. App. 2d 260, 265, 12 Cal. Rptr. 692*).

[*CONTINUE*]

C. Factors for Determining if Defendant Owed Duty to Plaintiff. The factors to be considered in determining whether a defendant, in the absence of privity, owed a duty of reasonable care to the plaintiff are (1) the foreseeability of harm to the plaintiff, (2) the degree of certainty that the plaintiff suffered injury, (3) the closeness of the connection between the defendant's conduct and the injury suffered, (4) the moral blame attached to the defendant's conduct, (5) the policy of preventing future harm, (6) the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and (7) the availability, cost, and prevalence of insurance for the risk involved (*Connor v. Great W. Sav. & Loan Ass'n (1968) 69 Cal. 2d 850, 864-865, 870, 73 Cal. Rptr. 369, 447 P.2d 609* ; *U.S. Fin. v. Sullivan (1974) 37 Cal. App. 3d 5, 13, 112 Cal. Rptr. 18*).

[*Optional*] **D. Developer Liable for Negligent Impairment of Lender's Security Interest.** A developer, including those persons performing the excavation, grading, engineering, soil testing, construction, and other work involved in a development, may be held liable to a lender for negligent impairment of the lender's security interest (*U.S. Fin. v. Sullivan (1974) 37 Cal. App. 3d 5, 13, 112 Cal. Rptr. 18*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that defendant owed a duty of care to plaintiff and breached that duty. The first alternative Paragraph B should be used if defendant breached its duty to an expected user of the product; the second alternative Paragraph B should be used if defendant breached its duty toward a foreseeable nonuser. Optional Paragraph D should be used if defendant is a developer whose breach of duty impaired a lender's security interest. These contentions may arise in several procedural contexts, including opposing a demurrer or opposing a motion for nonsuit [*see, e.g., U.S. Fin. v. Sullivan (1974) 37 Cal. App. 3d 5, 112 Cal. Rptr. 18* (demurrer); *Pike v. Frank G. Hough Co. (1970) 2 Cal. 3d 465, 85 Cal. Rptr. 629, 467 P.2d 229* (nonsuit)].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the persons to whom defendant owes a duty of care in a products liability action. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel should show that plaintiff was a person or member of the class of persons to whom defendant owed a duty of care. For example, counsel should show that plaintiff was a foreseeable user of the product or was a nonuser reasonably expected to be in the vicinity of the area where the product was used.

[b] Related Pleading and Practice Forms

For a discussion and forms for use in actions involving negligence in general, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender). For a discussion and forms for use in products liability actions based on strict liability, see California Forms of Pleading and Practice, Ch. 460, *Products Liability* (Matthew Bender).

[c] Related Points and Authorities

For points and authorities relating to actions for negligence in general, see Ch. 165, *Negligence* .

[3] Discussion of Authorities

[a] Persons to Whom Duty Owed

In ***Pike v. Frank G. Hough Co.*** *(1970) 2 Cal. 3d 465, 85 Cal. Rptr. 629, 467 P.2d 229* , plaintiff's decedent was killed when he was struck while standing behind a paydozer that had no rearview mirrors and no audible or visible backup warning signal. Plaintiff sued the manufacturer for defective design of the paydozer on both a negligence and a strict liability theory. The trial court granted a nonsuit against plaintiff, and plaintiff appealed.

The Supreme Court reversed. Rejecting defendant's argument that it had no duty to install safety devices to protect against a patent peril of being struck by the paydozer, the Court noted that it was not obvious to bystanders that the operator is incapable of observing them in its direct path, and the manufacturer's duty of due care extends to all persons within the range of potential danger (*2 Cal. 3d 465, 473)* .

In ***Gall v. Union Ice Co.*** *(1951) 108 Cal. App. 2d 303, 239 P.2d 48* , defendants, the manufacturer and seller of a drum of sulphuric acid, were sued for damages for wrongful death of plaintiffs' decedent, who was killed when the drum exploded. Plaintiffs alleged that the manufacturer and seller violated their duty to warn the purchaser of the potential danger of the acid if certain precautions were not taken by not placing warning labels on the drum. The trial court ruled against both defendants and they appealed.

The court of appeal affirmed. The court relied on Rest Torts § 388 in setting forth the duty of a vendor or supplier of a potentially dangerous commodity. The court said that the duty imposed on a supplier of a chattel for another's use is to exercise reasonable care to give to those who are to use the chattel the information that the supplier possesses and that he should realize to be necessary to make its use safe for them and those in whose vicinity it is to be used (*108 Cal. App. 2d 303, 309)* .

[b] Duty to Expected Users Unaware of Dangerous Propensities

In ***Putensen v. Clay Adams Inc.*** *(1970) 12 Cal. App. 3d 1062, 91 Cal. Rptr. 319* , plaintiff brought an action against a manufacturer, a hospital, and a physician for damages for personal injuries suffered as a result of allegedly defective tubing used during a heart catheterization procedure. When inserted into plaintiff's artery, the tubing developed a kink and the physician had to perform heart surgery to remove it. The court granted a nonsuit in favor of defendant manufacturer and the jury returned a verdict in favor of defendant hospital and defendant physician. Plaintiff appealed.

The court of appeal affirmed the judgments in favor of defendant hospital and physician, and reversed the judgment in favor of the manufacturer. The court held that there was sufficient evidence of negligence on the part of the manufacturer to let the issue go to the jury. The court stated that the manufacturer was required to be reasonably careful to prevent dangerous conditions in the tubing from either a manufacturing or a design defect so that it was reasonably safe for its intended and reasonably foreseeable uses. Additionally, the manufacturer has a duty to use reasonable care to give warning of the dangerous condition of the product to those whom he should expect to use the product or be endangered by its probable use if the manufacturer has reason to believe that they will not realize its dangerous condition (*12 Cal. App. 3d 1062, 1076-1077)* .

[c] Duty to Foreseeable Nonusers

In ***Benton v. Sloss*** *(1952) 38 Cal. 2d 399, 240 P.2d 575* , defendant, a used car dealer, contracted with a minor for the sale of a used car. When he discovered that the buyer was a minor, he refused to complete the sale until the minor

secured written parental consent to the sale. The dealer allowed the minor to drive the car home. The minor's father would not consent to the sale and phoned the dealer, telling him to come and pick up the car. The dealer refused to do so. The minor then attempted to return the car but the dealer was not at the car lot. He then picked up three passengers, and engaged in a race with another vehicle. The brakes on the car failed, causing an accident that injured the passengers. The injured passengers then sued the minor and the minor's father, as well as the car dealer for negligently failing to inspect the brakes on the car. Judgment was entered in favor of defendant father and against defendant minor and defendant car dealer. The car dealer appealed.

The Supreme Court affirmed. The Court said that the dealer could reasonably foresee that the brakes would be used in emergency conditions arising under ordinary highway speeds, and the likelihood of negligent operation of the vehicle was one of the hazards the dealer could reasonably foresee. The possibility of a driver's negligently placing himself in a position from which he could not extricate himself without adequate brakes imposed on the dealer a duty to test and adjust the brakes, and prevent the car from endangering the lives of occupants, pedestrians, and other users of the highways. This duty extended to third persons who could reasonably be expected to be in the vicinity of the probable use of the automobile, as well as to the prospective buyer (*38 Cal. 2d 399, 405-406)* .

In ***Zucker v. Passetti Trucking Co.*** *(1961) 191 Cal. App. 2d 260, 12 Cal. Rptr. 692* , defendant driver was driving a dump truck owned by defendant trucking company, and towing a compressor rented from defendant rental company. There was no cotter pin in the hitch connecting the truck and the compressor, and the safety chain supplied by the rental company was defective. As a result, the compressor came loose from the truck and jack-knifed across the highway, colliding with plaintiffs' automobile. Plaintiffs sued the driver, the trucking company, and the rental company for injuries suffered in the accident. Judgment was for plaintiffs, and the rental company appealed.

The court of appeal affirmed. The court said that the rental company had a duty to inspect the safety chain for defects prior to renting the compressor, because it was established that the company knew the machine was being rented for the purpose of being used on the public highways. The duty did not arise merely from the contract of bailment, but was a general duty imposed by law on the company to refrain from putting on the highway an instrumentality that might reasonably be expected to cause harm not only to the bailee, but to third persons lawfully using the highway (*191 Cal. App. 2d 260, 265)* .

[d] Factors for Determining if Defendant Owed Duty to Plaintiff

In ***Connor v. Great W. Sav. & Loan Ass'n*** *(1968) 69 Cal. 2d 850, 73 Cal. Rptr. 369, 447 P.2d 609* , plaintiffs were purchasers of homes in a residential development, and cross complainants were holders of promissory notes secured by second deeds of trust on the property. The homes suffered serious damage from cracking caused by ill-designed foundations that could not withstand the expansion and contraction of adobe soil. Plaintiffs filed actions for negligent construction against the development company that developed and sold the homes, and against the savings and loan association that lent the money to finance the development on the ground that its participation brought it into a joint enterprise with the development company, making it vicariously liable, or on the ground that it breached an independent duty of care to plaintiffs. The lender's motion for nonsuit was granted, and plaintiffs appealed.

The Supreme Court reversed the motion for nonsuit. While the Court found that no joint venture or joint enterprise existed between the developer and the lender, and therefore the lender could not be held vicariously liable for the negligence of the developer, it did find that the lender was liable to the plaintiffs for its own negligence. The evidence at trial showed the following: that the lender had the right to exercise extensive control over the enterprise; that it received not only interest for its construction loans but substantial fees for making them, as well as a 20 percent capital gain for "warehousing" the land; and that the lender received protection from loss of profits in the event individual home buyers sought permanent financing elsewhere. The Court said that it was clear that the lender became an active participant in a home construction enterprise, rather than a mere lender content to lend money at interest on the security of real property. Noting that a duty of care may arise in the absence of privity if public policy dictates the existence of such a

duty, the Court found that a duty existed on the part of the lender toward the buyers of the homes. The Court considered the following factors in reaching their decision: (1) the extent to which the transaction was intended to affect plaintiff; (2) the foreseeability of harm to him; (3) the degree of certainty that plaintiff suffered injury; (4) the closeness of the connection between defendant's conduct and the injury suffered; (5) the moral blame attached to defendant's conduct; and (6) the policy of preventing future harm. However, when the Court applied these same factors to the cross complainants as pledgees of notes secured by second deeds of trust on the property, the Court found that the lender owed them no independent duty (*69 Cal. 2d 850, 864-865, 870)* .

In ***U.S. Fin. v. Sullivan*** *(1974) 37 Cal. App. 3d 5, 112 Cal. Rptr. 18* , plaintiff loan company had financed a real property development and taken a security interest in the developed property. When defects in the lots and homes were discovered, plaintiff sued the developer and others involved in the development for damages for impairment of its security. The trial court sustained demurrers with leave to amend to some of plaintiffs causes of action and sustained demurrers without leave to amend and subsequently dismissed others. Plaintiff appealed the judgment of dismissal.

Procedurally, the court of appeal held that because not all the counts had been dismissed, the entry of dismissal should not have been granted, and an appeal therefrom did not lie. However, the court agreed to accept the parties' stipulation that the record on appeal be treated as an application for a writ of mandate, and issued a writ ordering vacation of the judgment of dismissal. The court held that there is nothing in principle or public policy that militates against liability to a mortgagee or beneficiary of a deed of trust when negligent conduct has resulted in the impairment of the mortgagee's or beneficiary's security interest. Any exception to the general rule that everyone is responsible for his or her negligent acts (as codified in *Civ. Code § 1714*) involves balancing the following factors: (1) the foreseeability of harm to plaintiff; (2) the degree of certainty that the plaintiff suffered injury; (3) the closeness of the connection between the defendant's conduct and the injury suffered; (4) the moral blame attached to the defendant's conduct; (5) the policy of preventing future harm; (6) the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach; and (7) the availability, cost, and prevalence of insurance for the risk involved (*37 Cal. App. 3d 5, 13)* .

[e] Developer Liable for Negligent Impairment of Lender's Security Interest

U.S. Fin. v. Sullivan *(1974) 37 Cal. App. 3d 5, 112 Cal. Rptr. 18* , is discussed in *§ 190.190[3][d]*.

[4] Additional Authorities

[a] Factors for Determining if Defendant Owed Duty to Plaintiff

In *Biakanja v. Irving (1958) 49 Cal. 2d 647, 320 P.2d 16* , plaintiff heir sued defendant notary public for the difference between the value of the deceased's whole estate and the value plaintiff actually received because the will was denied probate due to an inadequate attestation. The Supreme Court affirmed judgment for plaintiff. The Court said that the determination in a specific case whether the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him or her, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm (*49 Cal. 2d 647, 650)* .

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Volume 19 Chapters 190-195 PRODUCTS LIABILITY---to---PUBLIC ADMINISTRATIVE LAW
CHAPTER 190 PRODUCTS LIABILITY
PART II. FORMS
B. Negligence

19-190 California Points & Authorities § 190.191

§ 190.191 Supporting Contention That Manufacturer Breached Duty of Ordinary Care [Civ. Code § 1714(a)]--Failure to Manufacture Product Carefully

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It may be combined with a general form of points and authorities supporting the contention that defendant owed and breached a duty to plaintiff (see, e.g., § 190.190), as well as with forms supporting the contention that all the elements of actionable negligence exist (see Ch. 165, Negligence).*]

DEFENDANT MANUFACTURER, _____ [*name*], SHOULD BE HELD LIABLE FOR PLAINTIFF'S INJURIES BECAUSE DEFENDANT NEGLIGENTLY MANUFACTURED _____ [*specify product*] [AND FAILED TO CONDUCT APPROPRIATE INSPECTIONS AND TESTS OF THE PRODUCT THAT WOULD HAVE REVEALED THE DEFECT(S)], RESULTING IN A DANGEROUS PRODUCT THAT INJURED PLAINTIFF WHILE IT WAS BEING USED FOR ITS INTENDED PURPOSE.

A. Duty to Manufacture Carefully. A manufacturer is required to be reasonably careful to prevent dangerous conditions in its product by a miscarriage in its manufacturing process so that the product is reasonably safe for the purposes for which it is intended, and for other uses that are reasonably foreseeable (*Putensen v. Clay Adams Inc. (1970) 12 Cal. App. 3d 1062, 1077, 91 Cal. Rptr. 319*).

[*Optional*] **B. Failure to Inspect or Test Product.** If the defective condition of the product could have been disclosed by a reasonable inspection and tests, and such inspection and tests had been omitted, the manufacturer has been negligent (*Sheward v. Virtue (1942) 20 Cal. 2d 410, 414, 126 P.2d 345* ; *Putensen v. Clay Adams Inc. (1970) 12 Cal. App. 3d 1062, 1078, 91 Cal. Rptr. 319*).

[*Optional*] **C. Failure to Conduct Tests Under Conditions Under Which Product Will Be Used.** The extent of a manufacturer's duty depends on the intended use of the product. If a manufacturer knows its product will be used under conditions involving a high risk of danger, the manufacturer is under a duty to conduct its testing of the product under

similar conditions. Failure to do so will be considered a breach of the duty to manufacture a product in a reasonably careful manner (*see Warner v. Santa Catalina Island Co. (1955) 44 Cal. 2d 310, 319-320, 282 P.2d 12*).

[*Optional*] **D. Failure to Use Appropriate Tests to Reveal Defects.** The knowledge of a known danger, on a known use, makes vigilance a duty. When the tests a manufacturer uses admittedly fail to reveal all defects in a product, it is for the jury to determine whether the manufacturer's failure to use other tests that are recognized as good and sound engineering procedures in the particular field constitutes negligence (*Edison v. Lewis Mfg. Co. (1959) 168 Cal. App. 2d 429, 442-443, 336 P.2d 286*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a manufacturer owed and breached the duty to manufacture its product carefully, resulting in a dangerous product. The duty to manufacture a product in a careful manner encompasses the duty to reasonably inspect and test the product for defects [*see* optional Paragraphs B-D]. This argument may arise in several different procedural contexts, including opposing a demurrer or a motion for nonsuit [*see, e.g., Warner v. Santa Catalina Island Co. (1955) 44 Cal. 2d 310, 319-320, 282 P.2d 12* (nonsuit)].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the failure of a manufacturer to carefully manufacture the product. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel should show that defendant was negligent in failing to manufacture its product safely. For example, counsel should show that defendant either failed to inspect the product, or in testing the product, did not use the accepted testing procedures in the particular industry that would reveal the particular defect that caused plaintiff's injuries.

[b] Related Pleading and Practice Forms

For a discussion and forms for use in actions involving negligence in general, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender). For a discussion and forms for use in products liability actions based on strict liability, see California Forms of Pleading and Practice, Ch. 460, *Products Liability* (Matthew Bender).

[c] Related Points and Authorities

For points and authorities relating to actions for negligence in general, see Ch. 165, *Negligence* .

[d] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 190.200* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Duty to Manufacture Carefully

The facts and procedural background of ***Putensen v. Clay Adams Inc.*** *(1970) 12 Cal. App. 3d 1062, 91 Cal. Rptr. 319* , are discussed in *§ 190.190[3][b]*. In reversing a judgment of nonsuit in favor of defendant, a manufacturer of tubing used in surgical procedures, the court of appeal held that a manufacturer is required to be reasonably careful to prevent

dangerous conditions in its product by a miscarriage in its manufacturing process so that the product is reasonably safe for the purposes for which it is intended, and for other uses that are reasonably foreseeable (*12 Cal. App. 3d 1062, 1077)* .

[b] Failure to Inspect or Test Product

In ***Sheward v. Virtue*** *(1942) 20 Cal. 2d 410, 126 P.2d 345* , plaintiff was injured when the chair she was sitting on in a beauty parlor collapsed, throwing her to the floor. She sued the manufacturer of the chair and the beauty shop for negligence. The jury returned verdicts against both defendants, and the trial judge granted defendant beauty shop's motion for a new trial. Plaintiffs appealed the order granting a new trial, and defendant manufacturer appealed the judgment against it.

The Supreme Court affirmed both the judgment against the manufacturer and the order granting the beauty operator a new trial. The Court rejected the manufacturer's contention that because no evidence was presented as to what tests other manufacturers performed to discover defects, it could not be held guilty of negligence for failing to perform tests. Noting that a manufacturer may not justify failure to use ordinary care by showing that others in the same business practiced a similar want of care, the Court held that if the defective condition of the product could have been disclosed by reasonable inspection and tests, defendant is negligent if such tests and inspections are omitted (*20 Cal. 2d 410, 413-414)* .

The facts and procedural background of ***Putensen v. Clay Adams Inc.*** *(1970) 12 Cal. App. 3d 1062, 91 Cal. Rptr. 319* , are discussed in *§ 190.190[3][b]*. The court of appeal pointed out that there was evidence that the manufacturer of the tubing did not conduct tests to determine its thickness and the uniformity and strength of its walls. The court held that when an article is such that it is reasonably certain, if negligently manufactured or designed, to place life and limb in peril, the manufacturer may be charged with negligence if the defective condition could be disclosed by a reasonable inspection and tests, and such inspection and tests are omitted (*12 Cal. App. 3d 1062, 1078)* .

[c] Failure to Conduct Tests Under Conditions Under Which Product Will Be Used

In ***Warner v. Santa Catalina Island Co.*** *(1955) 44 Cal. 2d 310, 282 P.2d 12* , plaintiff lost the sight in one eye in a shooting gallery when a bullet fired at a target ricocheted and struck him. After settling with the owners and operators of the gallery, he sued defendant manufacturer for negligence in the manufacture, testing, and inspection of the cartridges. The trial court granted the manufacturer's motion for nonsuit and plaintiff appealed.

The Supreme Court reversed. Extensive evidence had been presented at trial showing that while the cartridges were designed and sold for use in short range shooting galleries, none of the testing on the cartridges was done under actual shooting gallery conditions. The manufacturer sold its cartridges on the theory that when the bullets hit a metal surface, they disintegrated into powder or dust, although its testing showed that the cartridges actually ricocheted from 30 to 40 feet. From this evidence, the Court held that the jury could have inferred that defendant was guilty of negligence in manufacturing and inspecting a product dangerous to human life, and a judgment of nonsuit was improper (*44 Cal. 2d 310, 319-320)* .

[d] Failure to Use Appropriate Tests to Reveal Defects

In ***Edison v. Lewis Mfg. Co.*** *(1959) 168 Cal. App. 2d 429, 336 P.2d 286* , plaintiff's decedent was killed in a fall from an oil well derrick when a "D-ring" on his safety belt broke at the point it was welded. Plaintiffs sued the manufacturer for negligence in manufacturing and testing the D-ring. The jury returned a verdict against defendant and defendant appealed.

The court of appeal affirmed. There was conflicting evidence presented at trial as to whether more reasonably

practicable methods of testing were employed in the welding industry for discovering defects in safety rings than the ones defendant used. The court said that the knowledge of a known danger, on a known use, makes vigilance a duty. When the tests a manufacturer used admittedly failed to reveal all defects in the product, it is for the jury to determine whether the manufacturer's failure to use other tests that are recognized as good and sound engineering procedures in the particular field constitutes negligence (*168 Cal. App. 2d 429, 442-443)* .

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19-190 California Points & Authorities § 190.192

§ 190.192 Supporting Contention That Manufacturer Breached Duty of Ordinary Care [Civ. Code § 1714(a)]--Failure to Design Product Safely for Its Intended Use

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It may be combined with a general form of points and authorities supporting the contention that defendant owed and breached a duty to plaintiff (see, e.g., § 190.190), as well as with forms supporting the contention that all the elements of actionable negligence exist (see Ch. 165, Negligence).*]

DEFENDANT MANUFACTURER, _____ [*name*], SHOULD BE HELD LIABLE FOR PLAINTIFF'S INJURIES ON THE GROUND OF NEGLIGENCE BECAUSE DEFENDANT FAILED TO DESIGN _____ [*specify product*] SO THAT IT WOULD BE SAFE FOR ITS INTENDED USE.

A. Standard of Care in Designing Product. When a chattel is either inherently dangerous or when it is reasonably certain, if negligently designed or manufactured, to place life and limb in danger, the manufacturer is under a duty to use reasonable care to design his product so as to make it not accident-proof, but safe for the use for which it is intended. What is "reasonable care" involves a balancing of the likelihood of harm to be expected from a product with a given design, as well as the gravity of harm if the harm occurs, against the burden of the precaution that would be effective to avoid the harm (*Pike v. Frank G. Hough Co. (1970) 2 Cal. 3d 465, 470, 85 Cal. Rptr. 629, 467 P.2d 229* ; *Varas v. Barco Mfg. Co. (1962) 205 Cal. App. 2d 246, 257-258, 22 Cal. Rptr. 737*).

[*Optional*] **B. Evidence of Lack of Due Care in Designing Product.** For the purpose of showing that there has been a failure to comply with the standard of due care, it is proper to introduce evidence as to the necessity and feasibility of changes in the design of parts of a product so as to enhance the factor of safety. The standard of due care is not necessarily identical to the standard of care "usual and customary" in the particular community. Customary practice is not, in and of itself, ordinary care; it is only evidence of ordinary care (*Varas v. Barco Mfg. Co. (1962) 205 Cal. App. 2d 246, 259, 22 Cal. Rptr. 737*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that defendant was negligent in designing its product, making it unsafe for its intended use. Optional Paragraph B may be used to show that, while defendant's conduct was identical to that of other similarly situated defendants, this "usual and customary" standard of care fell below the standard of due care. These contentions may arise in several procedural contexts, including opposing a motion for nonsuit [*see, e.g., Varas v. Barco Mfg. Co. (1962) 205 Cal. App. 2d 246, 261, 22 Cal. Rptr. 737]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the duty of a defendant to use reasonable care in designing its product. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should show that plaintiff's injuries were caused by a defect in the design of defendant's product, that the product was being used in the manner in which it was intended, and what design changes were necessary to make the product safer.

[b] Related Pleading and Practice Forms

For a discussion and forms for use in actions involving negligence in general, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender). For a discussion and forms for use in products liability actions based on strict liability, see California Forms of Pleading and Practice, Ch. 460, *Products Liability* (Matthew Bender).

[c] Related Points and Authorities

For points and authorities relating to actions for negligence in general, see Ch. 165, *Negligence* .

[d] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 190.201* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Standard of Care in Designing Product

The facts and procedural background of ***Pike v. Frank G. Hough Co.*** *(1970) 2 Cal. 3d 465, 85 Cal. Rptr. 629, 467 P.2d 229* , are discussed in *§ 190.190[3][a]*. Quoting Restatement (Second) of Torts § 402A in defining the duty of a manufacturer with respect to the design of products, the Supreme Court said that a manufacturer of a chattel made under a plan or design that makes it dangerous for the uses for which it is manufactured is subject to liability to others whom the manufacturer should expect to use the chattel or to be endangered by its probable use for physical harm caused by the failure to exercise reasonable care in the adoption of a safe plan or design. The Court stated that what is "reasonable care" varies with the facts of each case, but involves a balancing of the likelihood of harm to be expected from a machine with a given design and the gravity of harm if it happens against the burden of the precaution which would be effective to avoid the harm (*2 Cal. 3d 465, 470)* .

In ***Varas v. Barco Mfg. Co.*** *(1962) 205 Cal. App. 2d 246, 22 Cal. Rptr. 737* , plaintiff was a machine operator who was injured when gas and oil leaking from the gas cap of the machine splashed onto his body and caught fire. Plaintiff sued the manufacturer for negligent design of the threads on the gas cap and for breach of warranty. The court granted defendant's motion for nonsuit on all causes of action, and plaintiff appealed the judgment of nonsuit on the negligence cause of action.

The court of appeal reversed the judgment of nonsuit on the negligence cause of action. In discussing the duty of a manufacturer with respect to the design of a product, the court stated that when a chattel is either inherently dangerous or when it is reasonably certain, if negligently designed or manufactured, to place life and limb in danger, the manufacturer owes a duty toward a user to use reasonable care to design the product so as to make it not accident-proof, but safe for the use for which it is intended (*205 Cal. App. 2d 246, 257-258)* .

[b] Evidence of Lack of Due Care in Designing Product

The facts and procedural background of ***Varas v. Barco Mfg. Co.*** *(1962) 205 Cal. App. 2d 246, 22 Cal. Rptr. 737* , are discussed in *§ 190.192[3][a]*. The trial court had prohibited plaintiff from introducing expert testimony on what type of remedies were available to prevent gas from leaking from a cap, unless plaintiff could first lay a foundation that the witness had knowledge of safety standards usual and customary in the community applicable to the particular machine in question or a similar one. The court ruled that exclusion of this testimony was error, noting that the standard of due care was not necessarily identical to the standard of care "usual and customary" in the particular community, and customary practice is only evidence of ordinary care. The court said that it is proper to introduce evidence as to the necessity and feasibility of changes in the design of parts of a machine so as to enhance the factor of safety for the purpose of showing that there has been a failure to comply with the standard of due care (*205 Cal. App. 2d 246, 258-259)* .

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B. Negligence

19-190 California Points & Authorities § 190.193

§ 190.193 Supporting Contention That Manufacturer or Seller Breached Duty of Ordinary Care [Civ. Code § 1714(a)]--Failure to Provide Any Warnings of Dangers Inherent in Use of Product

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It may be combined with a general form of points and authorities supporting the contention that defendant owed and breached a duty to plaintiff (see, e.g., § 190.190), as well as with forms supporting the contention that all the elements of actionable negligence exist (see Ch. 165, Negligence).*]

DEFENDANT _____ [*name*], A _____ [*specify status, e.g.,* MANUFACTURER], OWED A DUTY TO PLAINTIFF TO EXERCISE REASONABLE CARE IN WARNING OF THE DANGEROUS PROPENSITIES THAT DEFENDANT KNEW OR SHOULD HAVE KNOWN WERE INHERENT IN THE ANTICIPATED USE OF _____ [*specify product*] THAT A USER WOULD NOT ORDINARILY DISCOVER. DEFENDANT BREACHED THAT DUTY BY FAILING TO PROVIDE SUCH A WARNING.

A. Duty to Provide Appropriate Warning of Known Dangers That User Would Not Ordinarily Discover. A manufacturer or seller of a product must give an appropriate warning of any known dangers that the user of the product would not ordinarily discover. The likelihood of an accident taking place and the seriousness of the consequences are factors considered in determining whether the duty to warn has been breached (*Tingey v. E.F. Houghton & Co. (1947) 30 Cal. 2d 97, 102-103, 179 P.2d 807*).

B. Exercise of Reasonable Care. A manufacturer or seller of a commodity that is or is likely to be dangerous for the use for which it is made or supplied owes a duty to exercise reasonable care to make it safe for those who will use it and those in whose vicinity it is to be used. The duty is to exercise reasonable care to give the information that the manufacturer or seller possesses and which he or she should realize to be necessary to make its use safe (*Gall v. Union Ice Co. (1951) 108 Cal. App. 2d 303, 309-310, 239 P.2d 48*).

C. Knowledge of Dangerous Propensity of Product. One of the elements of liability for negligence for failure to

warn is that the manufacturer or seller knew or should have known of the dangerous character of the product that the user would not ordinarily discover (*see Briggs v. National Indus., Inc. (1949) 92 Cal. App. 2d 542, 546, 207 P.2d 110*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that defendant was negligent by not exercising reasonable care to provide plaintiff with a warning of the dangers that defendant knew or should have known were inherent in the use of the particular product defendant manufactured or supplied. The argument may arise in several procedural contexts, including opposing a motion for nonsuit and in opposing a demurrer to plaintiff's complaint [*see, e.g., Schwartz v. Helms Bakery Ltd. (1967) 67 Cal. 2d 232, 60 Cal. Rptr. 510, 430 P.2d 68* (nonsuit); *Brockett v. Kitchen Boyd Motor Co. (1968) 264 Cal. App. 2d 69, 70 Cal. Rptr. 136* (demurrer)].

For memoranda of points and authorities regarding a cause of action in strict products liability based on failure to warn, see Part I, Subpart F.

These points and authorities may be combined with a memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue that defendant breached its duty of reasonable care by failing to provide a warning of its product's dangerous propensities. For example, it may be used in opposition to a demurrer to the complaint [*see, e.g., Ch. 71, Demurrers and Motions for Judgment on the Pleadings, § 71.20* et seq.]. The points and authorities in this form may be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss either defendant's knowledge of the dangerous character of the product or the facts showing that defendant should have known of the dangerous character of the product, the fact that there was no warning given, facts showing why the particular danger was inherent in the use of the product, and facts showing that plaintiff would not ordinarily know of the danger.

[b] Related Pleading and Practice Forms

For a discussion and forms for use in actions involving negligence in general, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender). For a discussion and forms for use in products liability actions based on strict liability, see California Forms of Pleading and Practice, Ch. 460, *Products Liability* (Matthew Bender).

[c] Related Points and Authorities

For points and authorities relating to actions for negligence in general, see Ch. 165, *Negligence* .

[3] Discussion of Authorities

[a] Duty to Provide Appropriate Warning of Known Dangers That User Would Not Ordinarily Discover

In ***Tingey v. E.F. Houghton & Co.*** *(1947) 30 Cal. 2d 97, 102, 179 P.2d 807* , plaintiffs, the widow and children of a tool company employee, sought damages for the employee's death caused by an explosion of chemicals sold by defendant manufacturer to the tool company. The evidence at trial presented two possible explanations for the explosion: that it resulted from contamination by a foreign substance of one of the two chemicals supplied by the manufacturer, and that it was likely the chemical was contaminated before it left the manufacturer's plant, or that it resulted from an employee mixing the chemicals from the two drums together. Neither drum contained a warning label. The trial court found for plaintiff and defendant appealed, claiming the evidence was insufficient to support the implied

finding of negligence.

The Supreme Court affirmed. The Court said that if the jury accepted the theory that the explosion resulted from an employee mixing the two chemicals, it could have found that the mixing, with the resulting explosion, was a direct consequence of defendant's negligence in failing to give an adequate warning of the dangerous nature of its products (*30 Cal. 2d 97, 102)* . Noting that the manufacturer knew of all the perils involved in the use of the chemicals, the Court stated that it was for the jury to determine whether the manufacturer should have foreseen that an employee might not take precautions to avoid contamination in the absence of a warning to do so. In addition, it was proper for the jury to conclude that without a warning label an employee could not anticipate that mixing the two chemicals would cause an explosion, because they were both intended for the same method of use and for the same general purpose (*30 Cal. 2d 97, 103)* .

[b] Exercise of Reasonable Care

The facts and procedural background of ***Gall v. Union Ice Co.*** *(1951) 108 Cal. App. 2d 303, 239 P.2d 48* , are discussed in *§ 190.190[3][a]*. In affirming a judgment against the seller of a drum of sulphuric acid that exploded and killed plaintiffs' decedent, the Supreme Court stated that the duty imposed on a supplier of a chattel for another's use is to exercise reasonable care to give to those who are to use the chattel the information that the supplier possesses and that he or she should realize to be necessary to make its use safe for them and those in whose vicinity it is to be used (*108 Cal. App. 2d 303, 309-310)* .

[c] Knowledge of Dangerous Propensity of Product

In ***Briggs v. National Indus., Inc.*** *(1949) 92 Cal. App. 2d 542, 207 P.2d 110* , plaintiff brought an action against the manufacturer of a cold wave preparation, a beauty shop owner, and the operator in the shop who applied the preparation to plaintiff's hair. Some of the cold wave solution splashed on plaintiff's forehead, face, and arm, and within three days she suffered severe skin inflammation. Testimony at trial showed no other instances of injury resulting from the cold wave, and indicated that plaintiff was allergic to a substance in the preparation. Plaintiff alleged that the manufacturer was negligent in failing to warn the public and intended users that the product contained a toxin that might cause serious damage to users, and that great care should be taken in the application of the product. The jury returned a verdict in favor of defendants shop owner and operator, and against defendant manufacturer. The trial judge granted the manufacturer's motion for judgment notwithstanding the verdict, and entered judgment in favor of the manufacturer. Plaintiff appealed from the judgment entered in favor of the manufacturer.

The court of appeal affirmed. The court noted that the record showed extensive use of the cold wave preparation by both plaintiff and defendants with no evidence of injuries other than those alleged in this case. While deferring to the jury's finding that the beauty shop owner and operator were not liable for negligent application of the cold wave solution, the court pointed out that the manufacturer did include instructions with the solution stating that it was to be used on the hair and not the skin, and there was evidence that no injury would have occurred if these instructions had been followed. The court noted that the general rule is that a manufacturer must give an appropriate warning of any known dangers that the user of his or her product would not ordinarily discover, and that one of the essential elements of liability is knowledge on the part of the manufacturer of the dangerous character of the product. Because there was no evidence that the manufacturer had any such knowledge here, there was no liability for plaintiffs injuries (*92 Cal. App. 2d 542, 546)* .

[4] Additional Authorities

[a] Duty to Provide Appropriate Warning of Known Dangers That User Would Not Ordinarily Discover

In *Finn v. G.D. Searle & Co. (1984) 35 Cal. 3d 691, 200 Cal. Rptr. 870, 677 P.2d 1147* , plaintiff, a minor child who suffered blindness after prolonged usage of a drug prescribed for treatment of a serious, and often fatal, skin disease

sued the prescribing physician and the drug manufacturer. One of the theories of liability advanced by plaintiff at trial was that the manufacturer was liable because it failed to warn of potential dangers and possible side effects associated with use of the drug. The trial court modified one of plaintiff's proposed jury instructions from "The manufacturer of a prescription drug is under a duty to warn the medical profession of potential dangers from use of its drug ..." to "The manufacturer of a drug is under a duty to exercise reasonable care to warn the medical profession of potential dangers reasonably foreseeable from use of its drug ... ." Plaintiff objected to this modification on the grounds that it injected negligence concepts into the jury's consideration, thereby vitiating his strict liability claim. The jury returned a verdict in favor of both defendants and plaintiff appealed.

The Supreme Court affirmed. While acknowledging that it originally granted a hearing in the case to consider the application of strict liability principles to side effects produced by prescription drugs, after reviewing the record the Court declined to reach that issue. The Court noted that in duty-to-warn cases, under a negligence standard the jury must determine the reasonableness of the manufacturer's conduct when it failed to warn, while under a strict liability standard the determination is whether the product has been rendered defective because, applying an objective standard, and weighing the relevant costs and benefits, a warning was required. The Court found that the jury instructions as modified were appropriate, because plaintiff relied on cases emphasizing the overlap of negligence and strict liability principles, and failed to offer instructions calling for a jury to consider whether the benefit of a particular warning would outweigh its costs under *Barker v. Lull Eng'g Co. (1978) 20 Cal. 3d 413, 143 Cal. Rptr. 225, 573 P.2d 443* (*35 Cal. 3d 691, 699)* .

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Volume 19 Chapters 190-195 PRODUCTS LIABILITY---to---PUBLIC ADMINISTRATIVE LAW
CHAPTER 190 PRODUCTS LIABILITY
PART II. FORMS
B. Negligence

19-190 California Points & Authorities § 190.194

§ 190.194 Supporting Contention That Manufacturer or Seller Breached Duty of Ordinary Care [Civ. Code § 1714(a)]--Failure to Provide Adequate Warnings of Dangers Inherent in Use of Product

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It may be combined with a general form of points and authorities supporting the contention that defendant owed and breached a duty to plaintiff (see, e.g., § 190.190), as well as with forms supporting the contention that all the elements of actionable negligence exist (see Ch. 165, Negligence).*]

DEFENDANT _____ [*specify status, e.g.,* MANUFACTURER] _____ [*name*] WAS NEGLIGENT BECAUSE ALTHOUGH _____ [A WARNING *and/or* INSTRUCTIONS] WERE PROVIDED WITH THE _____ [*specify product*], THE _____ [WARNING *and/or* INSTRUCTIONS] WERE INADEQUATE.

A. Duty to Provide Adequate Warning. When a duty to warn exists, the warning must not only be complete, but must also be given in such a way as to call sufficient attention to it (*Larramendy v. Myres (1954) 126 Cal. App. 2d 636, 640-641, 272 P.2d 824* ; *Gall v. Union Ice Co. (1951) 108 Cal. App. 2d 303, 309, 239 P.2d 48*).

[*Optional*] **B. Failure to Give Special Warning of Particular Hazard.** A manufacturer must give adequate warning to the ultimate users of the product of any dangerous propensity that it knows or should have known would result in the type of accident that occurred. When there is evidence that the manufacturer was aware that its general warnings were often disregarded, it is a question of fact for the jury whether the manufacturer should have given special warnings regarding the particular hazard associated with the product (*Casetta v. United States Rubber Co. (1968) 260 Cal. App. 2d 792, 796, 67 Cal. Rptr. 645*).

[*Optional*] **C. Compliance With Regulations or Directives Insufficient.** A manufacturer's duty to warn may not be satisfied by compliance with industry regulations or directives if the manufacturer knows or has reason to know of greater dangers not included in the warnings (*Stevens v. Parke, Davis & Co. (1973) 9 Cal. 3d 51, 65, 69, 107 Cal.*

Rptr. 45, 507 P.2d 653).

[*Optional*] **D. Adequate Warning May Be Rendered Inadequate by Overpromotion.** An adequate warning may be eroded or even nullified by overpromotion of a product through a vigorous sales program that may have the effect of persuading the user or supplier to disregard the warning (*Stevens v. Parke, Davis & Co. (1973) 9 Cal. 3d 51, 69, 107 Cal. Rptr. 45, 507 P.2d 653* ; *Love v. Wolf (1964) 226 Cal. App. 2d 378, 395, 38 Cal. Rptr. 183*).

[*Optional*] **E. Incomplete Warning.** A manufacturer of a dangerous or potentially dangerous product has a duty to insure that an adequate warning is given to the public with respect to its use. It is a question for the trier of fact whether there is sufficient evidence to support a finding that a manufacturer has breached this duty if warnings are given for some, but not all, the dangers inherent in the use of the product (*Crane v. Sears Roebuck & Co. (1963) 218 Cal. App. 2d 855, 859, 32 Cal. Rptr. 754* ; *Larramendy v. Myres (1954) 126 Cal. App. 2d 636, 640-641, 272 P.2d 824*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that defendant was negligent by providing plaintiff with an inadequate warning of the dangers inherent in the use of the particular product defendant manufactured or supplied. The argument may arise in several procedural contexts, including opposing a motion for nonsuit and in opposing a demurrer to plaintiff's complaint [*see, e.g.,* *Schwartz v. Helms Bakery Ltd. (1967) 67 Cal. 2d 232, 60 Cal. Rptr. 510, 430 P.2d 68* (nonsuit); *Brockett v. Kitchen Boyd Motor Co. (1968) 264 Cal. App. 2d 69, 70 Cal. Rptr. 136* (demurrer)].

These points and authorities may be combined with a memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue that defendant provided an inadequate warning concerning the dangerous propensities of its product. For example, this form may be combined with general points and authorities opposing a demurrer to the complaint [*see, e.g., Ch. 71, Demurrers and Motions for Judgment on the Pleadings, § 71.20* et seq.]. The points and authorities in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the nature and extent of the warning that defendant did provide, and the facts showing why this warning was inadequate.

[b] Related Pleading and Practice Forms

For a discussion and forms for use in actions involving negligence in general, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender). For a discussion and forms for use in products liability actions based on strict liability, see California Forms of Pleading and Practice, Ch. 460, *Products Liability* (Matthew Bender).

[c] Related Points and Authorities

For points and authorities relating to actions for negligence in general, see Ch. 165, *Negligence* .

[3] Discussion of Authorities

[a] Duty to Provide Adequate Warning

In ***Larramendy v. Myres*** *(1954) 126 Cal. App. 2d 636, 272 P.2d 824* , plaintiff, a 12-year old girl, brought an action for damages against the manufacturer and supplier of a smoke-making device for injuries received when she used the device in her dance class and it set fire to her dress, causing her severe burns. The device contained instructions and

warnings of danger due to the smoke, but no mention of danger from fire. Defendants argued that they owed no duty to plaintiff and therefore could not be held liable. The trial court found for plaintiff and defendants appealed.

The court of appeal affirmed. The court said that a duty of care exists in the absence of privity not only when the article manufactured is inherently dangerous, but also when it is reasonable certain, if negligently manufactured or constructed, to place life and limb in peril. There was sufficient evidence to support the trial court's finding that defendants breached this duty by failing to reasonably warn of the dangerous propensities of the device, because the warnings given were incomplete and did not warn of the danger from fire (*126 Cal. App. 2d 636, 640-641)* .

The facts and procedural background of ***Gall v. Union Ice Co.*** *(1951) 108 Cal. App. 2d 303, 239 P.2d 48* , are discussed in *§ 190.190[3][a]*. There was considerable evidence presented at trial that defendants regularly inspected all drums for a proper label, that they sent warning letters to all purchasers, including the deceased's employer, and that their agents had given personal instructions in proper safety measures to their customers. However, there was also evidence that the particular drum that exploded did not have a warning label on it. Because defendant had a duty to make sure all drums were conspicuously labeled in a manner to call attention to the danger involved, defendant was not relieved of liability (*108 Cal. App. 2d 303, 309)* .

[b] Failure to Warn of Particular Hazard

In ***Casetta v. United States Rubber Co.*** *(1968) 260 Cal. App. 2d 792, 67 Cal. Rptr. 645* , plaintiff, a tire repairman, brought an action for damages against the manufacturer and distributor of a tire for injuries suffered when the tire exploded while he was mounting it on a tire rim. One of his theories of liability was that the manufacturer was negligent in failing to warn him of a particular hazard in mounting the tire on the particular type of safety rim involved in the accident. The trial court refused to instruct the jury on the failure to warn theory, either under principles of strict liability or negligence. The jury was instructed on the theory of strict liability of a manufacturer or distributor of a defective product and returned a verdict in favor of plaintiff. The trial court granted defendant's motion for judgment notwithstanding the verdict and entered judgment in favor of defendant. Plaintiff appealed from the judgment entered in favor of defendant, and also appealed the trial court's refusal to instruct the jury on its failure-to-warn theory.

The court of appeal held that the trial court properly determined that there was insufficient evidence to support a finding of a defect in the tire that would support a judgment against the manufacturer or distributor based on strict liability. However, the court of appeal reversed and remanded the case because there was substantial evidence to show that defendants failed to warn prospective users regarding the special hazards arising from mounting the tire on "safety" rims, and the trial court erred in withholding this issue from the jury. The court said that a manufacturer must give adequate warning to the ultimate users of the product of any dangerous propensity that it knows of should have known would result in the type of accident that occurred. While the defendants in this case distributed posters containing general instructions and warnings for the mounting of all tires, there was evidence that they were aware that these warnings were often disregarded. The court of appeal noted that it was a question of fact for the jury whether defendants should have given special warnings regarding the particular hazard associated with safety rims (*260 Cal. App. 2d 792, 796)* .

[c] Compliance With Regulations or Directives Insufficient

In ***Stevens v. Parke, Davis & Co.*** *(1973) 9 Cal. 3d 51, 107 Cal. Rptr. 45, 507 P.2d 653* , plaintiffs, the widower and surviving children of a woman who died allegedly from ingesting the drug chloromycetin, sued the manufacturer and the prescribing physician for damages for wrongful death. The complaint stated causes of action for breach of warranty, strict liability in tort, and negligence of the manufacturer for overpromotion of the drug and of the prescribing physician for lack of due care in prescribing it. The trial court granted the manufacturer's motion for nonsuit on the warranty and strict liability actions, but denied it on the negligence action, and denied the physician's motion for nonsuit. The jury returned a verdict against both defendants in the amount of $400,000 and the court ordered remittitur of the verdict on

the ground that the damages were excessive due to the prejudice and passion of the jury. Plaintiffs refused to consent to remittitur and the court granted defendant's motion for a new trial solely on the issue of damages.

The Supreme Court reversed the order granting a new trial and affirmed the judgment for plaintiffs. The order for new trial was reversed on the grounds that the trial judge failed to adequately specify his reasons in writing for the order, as is required by *Code Civ. Proc. § 657*. Regarding the manufacturer's contention that the record showed as a matter of law that it was not negligent, the Court noted that there was evidence of overpromotion of the drug to the medical community by the manufacturer's salespersons. Although the manufacturer complied with directives as to warnings issued by the United States Food and Drug Administration, its duty to warn was not fulfilled because it knew or should have known of greater dangers not included in the warnings. In rejecting the manufacturer's claim that it was insulated from liability because of the physician's intervening negligent act in prescribing the drug, the Court stated that an adequate warning to the medical profession may be eroded or even nullified by overpromotion of the drug through a vigorous sales program that may have the effect of persuading the physician to disregard the warning. Because it was reasonably foreseeable--indeed, the desired result of the extensive advertising and promotional campaign carried out by the manufacturer--that a physician might prescribe the drug despite its dangers, the manufacturer should not be relieved of liability (*9 Cal. 3d 51, 65, 69)* .

[d] Adequate Warning May Be Rendered Inadequate by Overpromotion

Stevens v. Parke, Davis & Co. *(1973) 9 Cal. 3d 51, 107 Cal. Rptr. 45, 507 P.2d 653* , is discussed in *§ 190.194[3][c]*.

In ***Love v. Wolf*** *(1964) 226 Cal. App. 2d 378, 38 Cal. Rptr. 183* , plaintiff filed suit against a prescribing physician and the manufacturer of the drug chloromycetin, for injuries she suffered after taking the drug. Plaintiff charged that the manufacturer was negligent in failing to provide adequate warning of known dangers of the drug. The jury returned a verdict in favor of plaintiffs and defendants appealed.

The court of appeal reversed and remanded for a new trial on the grounds that the misconduct of plaintiff's counsel resulted in an unfair trial. However, the court also held that the manufacturer's motion for nonsuit and directed verdict in its favor was properly denied. The evidence at trial indicated that defendant's salesmen, or "detail" men, promoted the virtues of the drug while minimizing its dangers, and that physicians were influenced by the persuasive advertising. The court held that because the manufacturer had watered down the warnings required by the Food and Drug Administration and had caused its detail men to promote a wider use of the drug by physicians than proper medical practice justified, the manufacturer must be retained as a defendant on retrial (*226 Cal. App. 2d 378, 395)* .

[e] Incomplete Warning

In ***Crane v. Sears Roebuck & Co.*** *(1963) 218 Cal. App. 2d 855, 32 Cal. Rptr. 754* , plaintiff brought an action for negligence and breach of warranty against the seller and manufacturer of a wall surface preparer for injuries she sustained as a result of a fire caused by the preparer exploding while she was using it. The warning label on the can cautioned against using the solution "near fire or flames," warned that it was an inflammable mixture, and cautioned about poisonous fumes. It did not mention that the mixture could be explosive or combustible. The trial court found in favor of plaintiff and defendants appealed.

The court of appeal affirmed. The court said that it was a question of fact for the jury whether the label contained an adequate warning. While defendant manufacturer maintained that it was not liable because it only mixed the ingredients for the preparer from the formula supplied them by defendant seller, the court concluded that a manufacturer of a dangerous product cannot claim exemption from liability from the use of the product when the label does not give appropriate warning to the purchasing public, thereby constituting in effect a "trap for the unwary." In view of the latent, dangerous qualities of the surface preparer, the manufacturer had a duty to insure that an adequate warning was

given to the public with respect to its use (*218 Cal. App. 2d 855, 859)* .

The facts and procedural background of ***Larramendy v. Myres*** *(1954) 126 Cal. App. 2d 636, 272 P.2d 824* , are discussed in *§ 190.194[3][a]*. The court of appeal stated that there was sufficient evidence for the trial court to find that defendants neglected to reasonably warn of the dangerous propensities of the device because the written directions did not include a warning that there was a danger from fire (*126 Cal. App. 2d 636, 641)* .

[4] Additional Authorities

[a] Duty to Provide Adequate Warning

In *Hernandez v. Badger Constr. Equip. Co. (1994) 28 Cal. App. 4th 1791, 34 Cal. Rptr. 2d 732* , a shipyard employee was injured on the job by a crane. His employer filed a complaint against the manufacturer of the crane to recover the amount of workers' compensation paid to the employee, proceeding on both a negligence theory for the manufacturer's failure to provide an adequate warning, and on a strict liability theory for design defect and failure to warn. The jury found that the manufacturer was negligent, but that the crane did not have a "design" defect. The court of appeal held that there was substantial evidence supporting the manufacturer's liability for plaintiffs' injuries. The jury's findings on the negligence and strict liability theories were not inconsistent. The fact that the cranes were not "defective" when initially made and sold, did not relieve the manufacturer of its duty to provide a complete warning. In this case, there was evidence that the manufacturer had begun to retrofit older cranes, and its failure to conduct an adequate campaign to warn against defects constituted negligence (*28 Cal. App. 4th 1791, 1827-1830)* .

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CHAPTER 190 PRODUCTS LIABILITY
PART II. FORMS
B. Negligence

19-190 California Points & Authorities § 190.195

§ 190.195 Supporting Contention That Seller of Product Breached Duty of Ordinary Care [Civ. Code § 1714(a)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It may be combined with a general form of points and authorities supporting the contention that defendant owed and breached a duty to plaintiff (see, e.g., § 190.190), as well as with forms supporting the contention that all the elements of actionable negligence exist (see Ch. 165, Negligence).*]

DEFENDANT SELLER _____ [*name*] SHOULD BE HELD LIABLE FOR PLAINTIFF'S INJURIES BECAUSE DEFENDANT WAS NEGLIGENT IN SELLING THE _____ [*specify product*] BY FAILING TO _____ [USE REASONABLE CARE *or* INSPECT AND TEST THE PRODUCT PRIOR TO SALE], CAUSING IT TO BE A DANGEROUS PRODUCT.

A. Failure of Seller to Use Reasonable Care. The duty imposed on a supplier of a chattel for another's use is to exercise reasonable care to give to those who are to use the chattel the information that the supplier possesses and that he or she should realize to be necessary to make its use safe for them and those in whose vicinity it is to be used. The supplier's duty is to exercise reasonable care to inform those for whose use the article is supplied of dangers that are peculiarly within the supplier's knowledge (*Gall v. Union Ice Co. (1951) 108 Cal. App. 2d 303, 306, 239 P.2d 48*).

[*Optional*] **B. Seller's Performance of Auxiliary Functions.** When a seller undertakes to perform functions auxiliary to the sale, such as preparation, installation, servicing, or repairing, in addition to merely selling the product, he has a duty to inspect or test the product for defects prior to the sale (*see, e.g., Green v. City of Los Angeles (1974) 40 Cal. App. 3d 819, 836 n.4, 837-838, 115 Cal. Rptr. 685*).

[*Optional*] **C. Seller's Duty When Product Is Used or Second-Hand.** The seller of a used or second-hand product, rather than manufacturer, has a duty to inspect and test the product prior to sale and will be held liable for injuries resulting from failure to do so (*see, e.g., Green v. City of Los Angeles (1974) 40 Cal. App. 3d 819, 836 n.4, 838, 115 Cal. Rptr. 685*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a seller of a product breached the duty to use reasonable care in selling the product. Optional Paragraph B may be used if defendant seller undertook auxiliary functions in the sale without inspecting or testing the product for defects. Optional Paragraph C may be used if defendant sold a used product without inspecting or testing it. These arguments may arise in several procedural contexts, including opposing a demurrer to a complaint, or opposing an appeal of a judgment against a defendant seller [*see, e.g., Green v. City of Los Angeles (1974) 40 Cal. App. 3d 819, 115 Cal. Rptr. 685]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue of a seller's liability for negligence in a products liability action. The points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should include facts showing that the product being sold was second-hand, the seller failed to test and inspect the product prior to sale, and that the defect causing plaintiff's injuries could have been discovered by reasonable inspection or tests.

[b] Related Pleading and Practice Forms

For a discussion and forms for use in actions involving negligence in general, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender). For a discussion and forms for use in products liability actions based on strict liability, see California Forms of Pleading and Practice, Ch. 460, *Products Liability* (Matthew Bender).

[c] Related Points and Authorities

For points and authorities relating to actions for negligence in general, see the Ch. 165, *Negligence*.

[d] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 190.204* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Failure of Seller to Use Reasonable Care

The facts and procedural background of ***Gall v. Union Ice Co.*** *(1951) 108 Cal. App. 2d 303, 239 P.2d 48* , are discussed in *§ 190.190[3][a]*. In affirming a judgment against the seller of a drum of sulphuric acid that exploded and killed plaintiffs' decedent, the Supreme Court stated that the duty imposed on a supplier of a chattel for another's use is to exercise reasonable care to give to those who are to use the chattel the information that the supplier possesses and that he should realize to be necessary to make its use safe for them and those in whose vicinity it is to be used (*108 Cal. App. 2d 303, 309)* .

[b] Seller's Performance of Auxiliary Functions

In ***Green v. City of Los Angeles*** *(1974) 40 Cal. App. 3d 819, 115 Cal. Rptr. 685* , plaintiffs were the family of a longshoreman who was killed, and another longshoreman who was injured, when a crane boom fell and struck them while they were loading a ship. Named as defendants were the city that operated the harbor, the lessor of the crane, the

seller of the crane, and the shipowner. Judgment was entered against the shipowner for breach of warranty and against the seller of the crane for negligence, breach of implied warranty, and strict liability. The shipowner was allowed to recover for indemnity against the city, the lessor, and the seller, while the city and the lessor, in turn, were allowed to recover in indemnity from the seller of the crane, resulting in the imposition of ultimate liability on the seller. All defendants appealed.

The court of appeal affirmed. The court stated that the evidence was sufficient to support the trial court's findings and these findings justified holding the seller liable on all three theories of liability. The trial court had found that in addition to selling the crane, the seller reassembled and reconditioned it, and made substantial modifications to the crane prior to acceptance by the city. The seller failed to inspect the crane or make tests to ascertain what effect the modifications had on its components. Furthermore, the seller had knowledge of a fracture in the crane and failed to conduct the visual and scientific tests that the court found were "proper practice" to conduct at the time and under the circumstances (*40 Cal. App. 3d 819, 836 n.4, 837-838)* .

[c] Seller's Duty When Product Is Used or Second-Hand

The facts and procedural background of ***Green v. City of Los Angeles*** *(1974) 40 Cal. App. 3d 819, 115 Cal. Rptr. 685* , are discussed in *§ 190.195[3][b]*. The court of appeal noted that under the findings by the trial court, which cited the extensive modifications the seller made to a used crane, the seller was tantamount to a manufacturer insofar as liability was concerned and had a duty to inspect and test the product prior to sale (*40 Cal. App. 3d 819, 836 n.4, 838)* .

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19-190 California Points & Authorities § 190.196

§ 190.196 Supporting Contention That Lessor or Bailor Breached Duty of Ordinary Care [Civ. Code § 1714(a)]--Failure to Inspect and Furnish Reasonably Safe Chattel [Civ. Code § 1955]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It may be combined with a general form of points and authorities supporting the contention that defendant owed and breached a duty to plaintiff (see, e.g., § 190.190), as well as with forms supporting the contention that all the elements of actionable negligence exist (see Ch. 165, Negligence).*]

DEFENDANT _____ [LESSOR *or* BAILOR] SHOULD BE HELD LIABLE FOR PLAINTIFF'S INJURIES BECAUSE HE/SHE/IT OWED AND BREACHED A DUTY TO INSPECT AND PROVIDE A REASONABLY SAFE CHATTEL TO _____ [LESSEE *or* BAILEE].

A. Duty to Furnish Chattel Safe for Intended Use. A lessor or bailor of personal property has a duty under *Section 1955 of the Civil Code* to furnish a reasonably safe chattel to the lessee or bailee, and is liable for injuries to users of the chattel that may result from his or her negligence; this duty is based on the duty to exercise ordinary care that is due everybody (*see Civ. Code § 1955*; *Holmes Packaging Mach. Corp. v. Bingham (1967) 252 Cal. App. 2d 862, 869, 60 Cal. Rptr. 769*).

B. Duty to Inspect. A lessor or bailor for hire of a chattel must use reasonable care to examine the chattel before letting it in order to make certain that it is fit for the use for which it is intended (*see Civ. Code § 1955*; *Zucker v. Passetti Trucking Co. (1961) 191 Cal. App. 2d 260, 265, 12 Cal. Rptr. 692*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a lessee or bailor of personal property owes a duty to the lessee or bailee to exercise reasonable care in inspecting the chattel to determine that it is reasonably

safe for its intended use, and is liable for injuries resulting from his or her negligent breach of that duty [*see Civ. Code § 1955*]. This argument may arise in several procedural contexts, including in an appeal from a judgment after trial [*see, e.g., Zucker v. Passetti Trucking Co. (1961) 191 Cal. App. 2d 260, 12 Cal. Rptr. 692]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue set forth in this form. The points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should discuss the facts that make defendant fall into the category of a bailor or lessor, as well as the specific manner in which defendant breached the duty to exercise reasonable care.

[b] Related Pleading and Practice Forms

For a discussion and forms for use in actions involving negligence in general, California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender). For a discussion and forms for use in products liability actions based on strict liability, see Ch. 460, *Products Liability* (Matthew Bender).

[c] Related Points and Authorities

For points and authorities relating to actions for negligence in general, see Ch. 165, *Negligence* .

[3] Discussion of Authorities

[a] Duty to Furnish Chattel Safe for Intended Use

In ***Holmes Packaging Mach. Corp. v. Bingham*** *(1967) 252 Cal. App. 2d 862, 60 Cal. Rptr. 769* , plaintiff machinery company brought an action for money due from a lessee for the rental of certain machinery. Defendant lessee contended that he was entitled to rescind the leases because plaintiff had breached an implied warranty that the property was of merchantable quality and fit for the purpose for which it was leased. The trial court ruled in favor of defendant and plaintiff appealed.

The court of appeal reversed on the ground that the disclaimer clause contained in the lease agreement excluded all implied warranties and precluded defendant from rescinding the lease. However, in discussing the duty of a bailor or lessor, the court stated that the duty of a bailor imposed under *Civ. Code § 1955*, that one who hires a chattel for the use of others ordinarily assumes a duty to furnish a proper and reasonably safe chattel, and that he or she is liable for injuries that may result from his or her negligence to one using the chattel, finds its basis in the duty to exercise ordinary care that is due everybody (*252 Cal. App. 2d 862, 869)* .

[b] Duty to Inspect

The facts and procedural background of ***Zucker v. Passetti Trucking Co.*** *(1961) 191 Cal. App. 2d 260, 12 Cal. Rptr. 692* , are discussed in *§ 190.190[3][c]*. The court of appeal affirmed a judgment for plaintiffs, who were injured when their automobile was struck by a compressor that was rented from defendants and broke loose from a truck because of a defective cotter pin and safety chain. The court stated that the bailor has a duty to inspect to discover defects. This is a general duty imposed by law on the bailor to refrain from putting on the highway an instrumentality that might reasonably be expected to cause harm not only to the bailee but to third persons lawfully using the highway (*191 Cal. App. 2d 260, 265)* .

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19-190 California Points & Authorities § 190.197

§ 190.197 Supporting Contention That Endorser of Product Breached Duty of Ordinary Care [Civ. Code § 1714(a)]--Negligent Misrepresentation of Product

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It may be combined with a general form of points and authorities supporting the contention that defendant owed and breached a duty to plaintiff (see, e.g., § 190.190, 130), as well as with forms supporting the contention that all the elements of actionable negligence exist (see Ch. 165, Negligence).*]

DEFENDANT ENDORSER OF _____ [*specify product*] SHOULD BE HELD LIABLE FOR PLAINTIFF'S INJURIES BECAUSE DEFENDANT NEGLIGENTLY MISREPRESENTED TO THE PUBLIC THAT _____ [*specify product*] WAS _____ [*describe nature of endorsement, e.g.,* SAFE FOR ITS INTENDED USE], PLAINTIFF RELIED ON THE ENDORSEMENT IN PURCHASING THE PRODUCT, AND PLAINTIFF WAS INJURED BECAUSE THE PRODUCT WAS DEFECTIVE AND NOT AS REPRESENTED IN THE ENDORSEMENT.

Duty of Endorser to Exercise Ordinary Care in Endorsing Product to Public. An endorser that voluntarily involves itself in the marketing process and, in effect, loans its reputation to promote and induce the sale of a product for its own economic gain has a duty to use ordinary care so that members of the consuming public who rely on the endorsement are not unreasonably exposed to a risk of harm (*Hanberry v. Hearst Corp. (1969) 276 Cal. App. 2d 680, 683-684, 81 Cal. Rptr. 519*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that defendant endorser breached its duty of ordinary care in misrepresenting a product to the public. For example, an endorser may be held liable for negligent misrepresentation if it fails to exercise reasonable care testing or inspecting a product, and a member of the public relies

on the endorsement in purchasing the product and is subsequently injured by the product because of its defective condition [*see, e.g.,* *Hanberry v. Hearst Corp. (1969) 276 Cal. App. 2d 680, 81 Cal. Rptr. 519]* . This argument may arise in several procedural contexts, including on appeal from a judgment of dismissal after sustaining of a demurrer without leave to amend [*see, e.g.,* *Hanberry v. Hearst Corp. (1969) 276 Cal. App. 2d 680, 81 Cal. Rptr. 519]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that defendant endorser breached its duty of ordinary care in endorsing a product. The points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should discuss the context in which defendant became an endorser of the product, the nature of the endorsement, facts showing that plaintiff relied on the endorsement, and facts showing why the endorsement was false.

[b] Related Pleading and Practice Forms

For a discussion and forms for use in actions involving negligence in general, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender). For a discussion and forms for use in products liability actions based on strict liability, see California Forms of Pleading and Practice, Ch. 460, *Products Liability* (Matthew Bender).

[c] Related Points and Authorities

For points and authorities relating to actions for negligence in general, see Ch. 165, *Negligence* .

[d] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 190.208* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Duty of Endorser to Exercise Ordinary Care in Endorsing Product to Public

In ***Hanberry v. Hearst Corp.*** *(1969) 276 Cal. App. 2d 680, 81 Cal. Rptr. 519* , plaintiff purchased a pair of shoes that had been advertised as meeting the "Good Housekeeping Consumer's Guaranty Seal," an endorsement of good quality given by defendant as publisher of the magazine Good Housekeeping. Plaintiff was injured when she slipped and fell on her vinyl floor while wearing the shoes, and she alleged that the shoes were defective in that they were slippery and unsafe on certain types of floor coverings. Plaintiff sued the retail store that sold her the shoes, the distributor of the shoes, and the publisher of Good Housekeeping magazine. Defendant publisher's demurrer to the third amended complaint was sustained without leave to amend and the action was dismissed as to the publisher. Plaintiff appealed the judgment of dismissal.

The court of appeal reversed. The court said that implicit in the Good Housekeeping seal and certification is the representation that the publisher has taken reasonable steps to make an independent examination of the product endorsed, with some degree of expertise, and found it satisfactory. The court concluded that one who endorses a product for his own economic gain, and for the purpose of inducing the public to buy it, may be liable to a purchaser who, relying on the endorsement, buys the product and is injured because it is defective and not as represented in the endorsement. In voluntarily assuming this business relationship, Good Housekeeping had placed itself in the position where public policy imposed on it the duty to use ordinary care in the issuance of its seal and certification of quality so that members of the consuming public who rely on its endorsement are not unreasonably exposed to the risk of harm (*276 Cal. App. 2d 680, 683-684)* .

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19-190 California Points & Authorities § 190.198

§ 190.198 Supporting Contention That Lender Breached Duty of Ordinary Care to Third Person [Civ. Code § 1714(a)]--Lender Acted Outside Scope of Regular Activities or Was Party to Misrepresentation [Civ. Code § 3434]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It may be combined with a general form of points and authorities supporting the contention that defendant owed and breached a duty to plaintiff (see, e.g., § 190.190), as well as with forms supporting the contention that all the elements of actionable negligence exist (see Ch. 165, Negligence)*].

DEFENDANT LENDER _____ [*name*] SHOULD BE HELD LIABLE FOR PLAINTIFF'S DAMAGES BECAUSE _____ [DEFENDANT'S ACTS WERE OUTSIDE THE SCOPE OF REGULAR ACTIVITIES OF A LENDER *or* DEFENDANT WAS A PARTY TO MISREPRESENTATIONS THAT LED TO PLAINTIFF'S INJURIES].

A. Factors for Determining if Defendant Owed Duty to Plaintiff. [*See § 190.190, Paragraph C.*]

B. Statutory Liability of Lender. A lender who loans money to a borrower, so that the borrower may finance the design, manufacture, construction, repair, modification, or improvement of real or personal property for the sale or lease to others, may be held liable to third persons for any loss or damage occasioned by any defect in the real or personal property or for any loss or damage resulting from the failure of the borrower to use due care in the design, manufacture, construction, repair, modification, or improvement of the property if the loss or damage is a result of an act of the lender outside the scope of the activities of a lender of money, or if the lender has been a party to misrepresentations with respect to the property (*see Civ. Code § 3434*; *see also Connor v. Great W. Sav. & Loan Ass'n (1968) 69 Cal. 2d 850, 864-865, 870, 73 Cal. Rptr. 369, 447 P.2d 609* (decided before 1969 enactment of *Civ. Code § 3434*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that defendant, as a lender of money for the design, manufacture, construction, repair, modification, or improvement of real or personal property, should be held liable for plaintiff's damages from defects in the property caused by defendant's failure to exercise reasonable care. This argument may arise in several procedural contexts, including an appeal from a judgment of nonsuit [*see, e.g., Connor v. Great W. Sav. & Loan Ass'n (1968) 69 Cal. 2d 850, 73 Cal. Rptr. 369, 447 P.2d 609]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that defendant lender is liable to plaintiff purchaser for loss or damage resulting from a defect in the purchased property. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should discuss the acts that defendant lender performed or the misrepresentations the lender made that plaintiff contends makes the lender liable under the provisions *Civ. Code § 3434*.

[b] Related Pleading and Practice Forms

For a discussion and forms for use in actions involving negligence in general, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender). For a discussion and forms for use in products liability actions based on strict liability, see California Forms of Pleading and Practice, Ch. 460, *Products Liability* (Matthew Bender).

[c] Related Points and Authorities

For points and authorities relating to actions for negligence in general, see Ch. 165, *Negligence* .

[d] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 190.205* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Statutory Liability of Lender

Connor v. Great W. Sav. & Loan Ass'n *(1968) 69 Cal. 2d 850, 73 Cal. Rptr. 369, 447 P.2d 609* , is discussed in *§ 190.190[3][d]*.

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19-190 California Points & Authorities § 190.198A

§ 190.198A Supporting Contention That Name-Brand Drug Manufacturer Breached Duty of Care When Prescription Was Filled With Generic Drug--Negligent Misrepresentation

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It may be combined with a general form of points and authorities supporting the contention that defendant owed and breached a duty to plaintiff (see, e.g., § 190.190), as well as with forms supporting the contention that all the elements of a negligent misrepresentation claim exist (see § 105.280).*]

DEFENDANT _____ [*name*], A NAME-BRAND DRUG MANUFACTURER, OWED A DUTY TO PROVIDE ADEQUATE WARNINGS TO PLAINTIFF, WHOSE PHYSICIAN FORESEEABLY RELIED ON DEFENDANT'S PRODUCT INFORMATION WHEN PRESCRIBING A DRUG THAT THAT WAS FILLED WITH A GENERIC EQUIVALENT. DEFENDANT BREACHED THAT DUTY, AND IS LIABLE FOR NEGLIGENT MISREPRESENTATION.

A. Name-Brand Drug Manufacturer's Duty of Care in Disseminating Product Information Extends to Persons Injured by Generic Version When Physician Relied on Information in Prescribing Drug. A name-brand drug manufacturer's duty to use due care when providing product warnings extends to persons whose physicians foreseeably rely on its product information when prescribing a medication, even if the prescription is filled with a generic equivalent (*Conte v. Wyeth, Inc.(2008) 168 Cal. App. 4th 89, 94-95, 85 Cal. Rptr. 3d 299*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a name-brand drug manufacturer owes a duty to a person whose physician relied on the manufacturer's warning in prescribing the drug, when the prescription was filled with a generic equivalent. The cause of action should be negligent misrepresentation, not strict liability, under which the manufacturer would have no duty to warn with respect to another manufacturer's product (*see § 190.171*).The

argument may arise in several procedural contexts, including an appeal from a judgment of dismissal after granting a motion for summary judgment [*see, e.g.,* *Conte v. Wyeth, Inc. (2008) 168 Cal. App. 4th 89, 94-95, 85 Cal. Rptr. 3d 299]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the defendant prescription drug manufacturer owed a duty of ordinary care with respect to a person who was injured by ingesting a generic version of the defendant's drug.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should describe the warning defendant provided for the drug, explain how plaintiff's physician relied on that warning when prescribing the drug, and discuss how plaintiff was injured by consuming a generic version of the drug.

[b] Related Points and Authorities

For points and authorities relating to negligent misrepresentation in general, see Ch. 105, *Fraud* .

[3] Discussion of Authorities

[a] Name-Brand Drug Manufacturer's Duty of Care in Disseminating Product Information Extends to Persons Injured by Generic Version When Physician Relied on Information in Prescribing Drug

In ***Conte v. Wyeth, Inc.*** *(2008) 168 Cal. App. 4th 89, 85 Cal. Rptr. 3d 299* , the plaintiff developed tardive dyskinesia after taking metoclopramide, the generic version of the prescription drug Reglan, for almost four years. She filed suit against several defendants. Her fraud by concealment and negligent misrepresentation claims against the name-brand manufacturer alleged that the defendant knew or should have known of the widespread tendency among physicians to prescribe the drug for longer than one year, even though it is approved for only 12 weeks of use, and gave misleading or false warnings about the drug's side effects. The trial court granted summary judgment in favor of the name-brand manufacturer on two grounds: (1) the plaintiff could not show that her physician relied upon the product labeling provided by the defendant, and (2) a name-brand manufacturer owes no duty to persons who take only generic versions of the drug.

The court of appeal reversed. It held that a name-brand drug manufacturer's duty to use due care when providing product warnings extends to persons whose physicians foreseeably rely on its product information when prescribing a medication, even if the prescription is filled with a generic version of the drug. The court further held that a material factual dispute existed as to whether the plaintiff's physician relied on the name-brand manufacturer's product information.

Although the physician stated in his declaration that he did not rely on any of the defendant's product information in formulating his course of treatment, he also testified that he "probably" read the defendant's monograph on Reglan during his residency and that he generally refers to the PDR when considering whether to prescribe Reglan. This was sufficient to create a factual dispute on the reliance element.

The court next rejected the defendant's contention that plaintiff's claim was in reality a strict products liability lawsuit disguised as a fraud and misrepresentation action, precluding recovery because the defendant did not manufacture or sell the drug that injured her. The plaintiff did not contend that inadequate warnings made the drug unreasonably dangerous. Rather, she claimed that defendant failed to use due care when disseminating its product information (Cal. App. 4th 89, 94-95).

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19-190 California Points & Authorities § 190.199

§ 190.199 Supporting Contention That Seller of Services Breached Duty of Ordinary Care [Civ. Code § 1714(a)]--Seller of Services May Be Liable on Negligence Theory, Although Not Liable on Strict Products Theory

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

ALTHOUGH DEFENDANT _____ [*name*], A SELLER OF SERVICES, MAY NOT BE HELD LIABLE UNDER A STRICT LIABILITY THEORY, DEFENDANT SHOULD BE HELD LIABLE FOR PLAINTIFF'S INJURIES CAUSED BY DEFENDANT'S _____ [NEGLIGENT *and/or* INTENTIONAL] ACTS.

Liability of Seller of Services. Although those who sell their services for the guidance of others in their economic, financial, or personal affairs may not be held strictly liable for resulting injuries, they may be held liable for negligence or intentional misconduct (*see Gagne v. Bertran (1954) 43 Cal. 2d 481, 487, 275 P.2d 15* ; *Carmichael v. Reitz (1971) 17 Cal. App. 3d 958, 978, 95 Cal. Rptr. 381*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a person engaged in selling services for the guidance of the economic, financial, or personal affairs of another may be held liable for negligent or intentional misconduct, although he or she cannot be held liable under a theory of strict liability. This form may be combined with general forms of contention supporting the existence of the elements of a negligence action [*see* Ch. 165, *Negligence*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a person engaged in selling services may be held liable for negligence or intentional acts. The argument may arise in several procedural contexts, including opposing a motion for nonsuit [*see, e.g., Carmichael v. Reitz (1971) 17 Cal. App. 3d 958, 95 Cal. Rptr. 381]* . These points and authorities

may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that defendant negligently performed services that were sold to the plaintiff, and that plaintiff was injured by defendant's negligent acts or omissions.

[b] Related Pleading and Practice Forms

For a discussion and forms for use in actions involving negligence in general, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender). For a discussion and forms for use in products liability actions based on strict liability, see California Forms of Pleading and Practice, Ch. 460, *Products Liability* (Matthew Bender).

[c] Related Points and Authorities

For points and authorities relating to actions for negligence in general, see Ch. 165, *Negligence* .

[3] Discussion of Authorities

[a] Liability of Seller of Services

In ***Gagne v. Bertran*** *(1954) 43 Cal. 2d 481, 275 P.2d 15* , plaintiff filed an action against defendant based on breach of warranty, deceit, and negligence. Plaintiff had hired defendant to perform soil tests on two unimproved lots that plaintiff had contracted to buy. Defendant reported concerning the amount of fill on the lots and plaintiff, in reliance on defendant's report, purchased the lots and began constructing a building on them. After construction was underway, plaintiff discovered that defendant's findings were incorrect. Plaintiff incurred increased construction costs as a result, and sued defendant to recover these costs. The trial court returned a judgment against defendant, and he appealed.

The Supreme Court reversed, holding that plaintiff had not proven any injuries resulting from defendant's report. Discussing the causes of action against defendant, the Court said that defendant could not be held liable under a theory of strict liability of a warranty because persons who sell their services for the guidance of others in their economic, financial, or personal affairs are not liable in the absence of negligence or intentional misconduct (*43 Cal. 2d 481, 487)* . The Court did hold, however, that the evidence at trial supported the causes of action for deceit and negligence (487-490).

Carmichael v. Reitz *(1971) 17 Cal. App. 3d 958, 95 Cal. Rptr. 381* , involved an action by a women against two doctors, a medical clinic and a drug manufacturer for damages for pulmonary embolisms and thrombophlebitis she suffered after taking the drug Enovid. The trial court granted a nonsuit as to the doctors and the medical clinic, and the jury returned a verdict in favor of the drug manufacturer. Plaintiff appealed the nonsuit in favor of one of the doctors, and the judgment in favor of the manufacturer.

The court of appeal affirmed. The court disagreed with plaintiff's theory that the doctor should be held strictly liable for her injuries as a retailer of the drug. Acknowledging that strict liability is no longer restricted to purely sales transactions, the court nevertheless held that a distinction must be made between a transaction in which the primary purpose is acquisition or use of a product, and one in which the primary purpose is to obtain services. The essence of the relationship between a physician and a patient is the physician's professional services. The court concluded that a person who sells services for the guidance of others will not be held liable in the absence of negligence or intentional misconduct (*43 Cal. 2d 481)* . The court held that there was insufficient evidence to go to the jury on the theory of negligence (*43 Cal. 2d 481)* .

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19-190 California Points & Authorities § 190.199A

§ 190.199A Supporting Contention That Defendant Breached Duty of Ordinary Care [Civ. Code § 1714(a)]--Designing, Distribution, and Marketing of Firearms and Ammunition

[1] Form

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It may be combined with a general form supporting the contention that defendant breached its duty of care (see, e.g., Ch. 165, Negligence).*]

DEFENDANT _____ [*name*] IS LIABLE FOR PLAINTIFF'S INJURIES BECAUSE DEFENDANT BREACHED THE DUTY TO USE ORDINARY CARE AND SKILL WITH RESPECT TO THE DESIGNING, DISTRIBUTION, OR MARKETING OF FIREARMS AND AMMUNITION.

Designing, Distribution, and Marketing of Firearms and Ammunition Are Not Exempt From Duty to Use Care. The designing, distribution, and marketing of firearms and ammunition are not exempt from the duty to use ordinary care and skill (*Civ. Code § 1714(a)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the defendant is liable for the plaintiff's damages as a result of the failure to exercise reasonable care with respect to the design, distribution, or marketing of firearms and ammunition.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the defendant is liable to the plaintiff for injuries resulting from firearms or ammunition. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should discuss the acts of the defendant with respect to the design, distribution, or marketing of firearms and ammunition that plaintiff contends makes the defendant liable under the provisions of *Civ. Code § 1714(a)*.

[c] Related Points and Authorities

For points and authorities related to former Civ. Code § 1714.4(a), see *§ 190.241*.

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2-190 California Points & Authorities § 190.199B

§ 190.199B Opposing Contention That Defendant Is Liable for Negligence in Products Liability Action--Defendant Did Not Breach Duty of Ordinary Care

[1] FORM

The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It may be combined with a general form opposing the contention that defendant breached its duty of care (see Ch. 165, Negligence).]

DEFENDANT SHOULD NOT BE HELD LIABLE FOR NEGLIGENTLY _____ [MANUFACTURING *and/or* SELLING *and/or* SUPPLYING] _____ [*specify product*] BECAUSE PLAINTIFF DID NOT SHOW THAT DEFENDANT BREACHED ITS DUTY OF CARE.

A. Proof of Breach of Duty of Care Is Required Element of Negligence. A plaintiff must show that the defendant breached its duty of care to prevail on a negligence claim (*Merrill v. Navegar, Inc. (2001) 26 Cal. 4th 465, 477, 110 Cal.Rptr. 2d 370, 28 P.3d 1161* ; *Gonzalez v. Autoliv ASP, Inc. (2007) 154 Cal. App. 4th 780, 793, 64 Cal. Rptr. 3d 908*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that defendant is liability in negligence in a products liability action.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the defendant is not liable in negligence. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the point of law stated. For example, counsel should show that the plaintiff did not identify any specific breach of a duty of care on the part of the defendant.

[3] Discussion of Authorities

[a] Proof of Breach of Duty of Care Is Required Element of Negligence

Merrill v. Navegar, Inc. *(2001) 26 Cal. 4th 465, 477, 110 Cal.Rptr. 2d 370, 28 P.3d 1161* is discussed in *§ 190.241[3][a]*.

The facts and procedural background of ***Gonzalez v. Autoliv ASP, Inc.*** *(2007) 154 Cal. App. 4th 780, 64 Cal. Rptr. 3d 908* , are discussed in *§ 190.74[3][b]*. The court of appeal held that the plaintiff did not identify a specific breach of duty of care on the part of the defendant to withstand summary judgment (*154 Cal. App. 4th 780, 793-794)* .

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CHAPTER 190 PRODUCTS LIABILITY
PART II. FORMS
B. Negligence

19-190 California Points & Authorities § 190.200

§ 190.200 Opposing Contention That Manufacturer Breached Duty of Ordinary Care [Civ. Code § 1714(a)]--Defect Could Not Be Discovered by Reasonable Inspection

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It may be combined with a general form opposing the contention that defendant breached its duty of care (see Ch. 165, Negligence).*]

DEFENDANT SHOULD NOT BE HELD LIABLE FOR FAILURE TO INSPECT ITS PRODUCT BECAUSE A REASONABLE INSPECTION WOULD NOT HAVE REVEALED THE DEFECT THAT CAUSED PLAINTIFF'S INJURIES.

Defect Must Be Discoverable. When there is no evidence that an examination or inspection of the product would have revealed the existence of any defect, the defendant will not be held liable. A defendant is not responsible for defects that cannot be found by a reasonable, practicable inspection (*Trust v. Arden Farms Co. (1958) 50 Cal. 2d 217, 220, 324 P.2d 583*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that defendant was negligent in manufacturing the product because he or she failed to make a reasonable inspection. The ground for the contention is that a reasonable inspection would not have revealed the defect. This argument may arise in several procedural contexts, including supporting a motion for nonsuit or a motion for summary judgment [*see, e.g.,* *Trust v. Arden Farms Co. (1958) 50 Cal. 2d 217, 324 P.2d 583* (nonsuit)].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue of no liability for failure to inspect a product if the defect causing plaintiff's

injuries could not have been discovered by a reasonable inspection. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should show that plaintiff has failed to present evidence showing that a defect existed in the product, or showing that a reasonable inspection would have revealed the defect that caused plaintiff's injuries.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 190.191*.

[b] Related Pleading and Practice Forms

For a discussion and forms for use in actions involving negligence in general, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender). For a discussion and forms for use in products liability actions based on strict liability, see California Forms of Pleading and Practice, Ch. 460, *Products Liability* (Matthew Bender).

[c] Related Points and Authorities

For points and authorities relating to actions for negligence in general, see Ch. 165, *Negligence* .

[3] Discussion of Authorities

[a] Defect Must Be Discoverable

In ***Trust v. Arden Farms Co.*** *(1958) 50 Cal. 2d 217, 324 P.2d 583* , plaintiff was injured when a milk bottle she was setting down on her drainboard broke, cutting her wrist. She filed suit against the manufacturer of the bottle and against the milk company that filled the bottle and delivered the milk to her. The trial court granted a nonsuit in favor of both defendants and plaintiff appealed.

The Supreme Court affirmed. Noting that the record showed there was a total absence of any evidence of negligence on the part of either defendant, the Court said that the mere breaking of the bottle cannot give rise to an inference that defendant was negligent in failing to discover the defect. In regard to the dairy's liability, the Court said that while it may have had a duty to examine the bottles, it was not responsible for defects that could not be found by a reasonable, practicable inspection (*50 Cal. 2d 217, 220)* .

California Points & Authorities

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19-190 California Points & Authorities § 190.201

§ 190.201 Opposing Contention That Manufacturer Breached Duty of Ordinary Care [Civ. Code § 1714(a)]--Product Was Misused by User and Misuse Was Not Reasonably Foreseeable at Time Product Was Manufactured

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It may be combined with a general form opposing the contention that defendant breached its duty of care (see Ch. 165, Negligence).*]

DEFENDANT _____ [*name*] SHOULD NOT BE HELD LIABLE FOR NEGLIGENTLY DESIGNING THE _____ [*specify product*] BECAUSE PLAINTIFF'S INJURIES WERE CAUSED BY THE MISUSE OF THE PRODUCT BY _____ [*name of user and/or third party*] AND THE MISUSE WAS NOT REASONABLY FORESEEABLE AT THE TIME THE PRODUCT WAS MANUFACTURED.

A. Misuse Not Foreseeable at Time of Manufacture. Although a manufacturer may have had knowledge at the time of an accident that its product was being misused, that fact cannot retroactively create a design defect in the product that was unforeseeable at the time of the original manufacture [and installation] (*Sanders v. Atchison, Topeka & Santa Fe Ry. Co. (1977) 65 Cal. App. 3d 630, 652, 135 Cal. Rptr. 555*).

[*Optional*] **B. No Duty to Repair or Recall Product if Manufactured According to Purchaser's Specifications and Not Dangerous When Properly Used.** In the absence of any proof that a manufacturer knew of possible misuse of a product at the time of its manufacture, when the product was made to the purchaser's specifications and those specifications called for a product that could only become inherently dangerous if not properly used, and when the purchaser installed, used, maintained, and repaired the product, the manufacturer did not have any duty to repair or recall the product (*Sanders v. Atchison, Topeka & Santa Fe Ry. Co. (1977) 65 Cal. App. 3d 630, 652, 135 Cal. Rptr. 555*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that defendant negligently designed a product, making it unsafe for its intended use, when plaintiff's injuries were caused by the unforeseeable misuse of the product by either the user or a third party. This argument may arise in several procedural contexts. For example, defendant might raise this argument in an appeal of a judgment against it, after its motion for nonsuit was denied [*see, e.g., Sanders v. Atchison, Topeka & Santa Fe Ry. Co. (1977) 65 Cal. App. 3d 630, 135 Cal. Rptr. 555]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue of unforeseeable misuse. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should present facts showing how the product was misused, the types of misuse defendant had protected against, and how the misuse involved was not foreseeable.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 190.192*.

[3] Discussion of Authorities

[a] Misuse Not Foreseeable at Time of Manufacture

In ***Sanders v. Atchison, Topeka & Santa Fe Ry. Co.*** *(1977) 65 Cal. App. 3d 630, 135 Cal. Rptr. 555* , plaintiff railroad employee was injured when the divider door on a boxcar he was unloading fell on him. Plaintiff filed suit for damages against the railroad that owned the boxcar and against the shipper. Plaintiff recovered damages of $250,000 against the shipper, and the shipper cross complained for indemnity against both the railroad and the manufacturer. After settling prior to trial, the railroad cross complained for indemnity against the manufacturer of the door. After trial on the principal action, the jury made a special finding that the shipper was guilty of passive negligence, and the court entered judgment based on that finding. The trial court also found that the railroad and manufacturer were actively negligent. Following trial on the cross complaints, the trial court entered judgment apportioning the amount of damages against the shipper between the shipper, the railroad, and the manufacturer. All defendants appealed.

The court of appeal reversed the judgment apportioning liability of the shipper, remanded for proceedings not inconsistent with its opinion, and dismissed appeals from the judgment entered on the special finding as nonappealable. The court further held that there was insufficient evidence to impose liability on the manufacturer of the door. The court noted that the door was manufactured to the railroad's specifications, and the railroad was responsible for installing, using, repairing, and maintaining it. Although there was evidence presented that the fall of the divider door resulted from the abuse to which it had been subjected over a period of time, and that at the time of the accident the manufacturer was aware of prior problems with the doors attributable to this abuse, the court held that this knowledge could not retroactively create a design defect in the product that was unforeseeable at the time of the original manufacture and installation (*65 Cal. App. 3d 630, 652)* .

[b] No Duty to Repair or Recall Product if Manufactured According to Purchaser's Specifications and Not Dangerous When Properly Used

The facts and procedural background of ***Sanders v. Atchison, Topeka & Santa Fe Ry. Co.*** *(1977) 65 Cal. App. 3d 630, 135 Cal. Rptr. 555* , are discussed in *§ 190.201[3][a]*. The court stated that in the absence of any proof of knowledge of misuse at the time of manufacture, when the product was made to the purchaser's specifications and those specifications called for a product that could only become inherently dangerous if not properly used, and when the

purchaser installed, used, maintained, and repaired the product, defendant had no duty to repair or recall its product (*65 Cal. App. 3d 630, 652)* .

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19-190 California Points & Authorities § 190.202

§ 190.202 Opposing Contention That Manufacturer Breached Duty of Ordinary Care [Civ. Code § 1714(a)]--No Duty to Warn During Declared State of Emergency

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It may be combined with a general form opposing the contention that defendant breached its duty of care (see Ch. 165, Negligence).*]

DEFENDANT _____ [*name*] SHOULD NOT BE HELD LIABLE FOR FAILURE TO PROVIDE ADEQUATE WARNINGS OF DANGERS INHERENT IN USE OF DEFENDANT'S PRODUCT BECAUSE THE GOVERNMENT DECLARED A STATE OF EMERGENCY PURSUANT TO GOVERNMENT CODE SECTION 8550 ET SEQ. AND A MANUFACTURER HAS NO DUTY TO WARN OR OTHERWISE INTERVENE IN A DECLARED STATE OF EMERGENCY.

No Duty to Warn in Declared State of Emergency. A manufacturer has no duty to warn, or otherwise intervene, in a declared state of emergency even after becoming aware of certain alleged deficiencies in the State's warnings (Macias v. *State of California (1995) 10 Cal. 4th 844, 856-858, 42 Cal. Rptr. 2d 592, 897 P.2d 530*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the defendant was negligent in manufacturing a product because of a failure to issue adequate warnings of dangers inherent in the manufacturer's product. The ground for the contention is that a manufacturer has no common-law duty to warn in a declared state of emergency.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue of no liability for failure to warn. It may be used in connection with a pretrial motion, such as a

demurrer, or motion for summary judgment. It may also be used in a trial or appellate brief.

In an appropriate case, this form may be submitted in opposition to the contention supported by the points and *authorities in § 190.193*.

[b] Related Pleading and Practice Forms

For a discussion and forms for use in actions involving negligence in general, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender). For a discussion and forms for use in products liability actions based on strict liability, see California Forms of Pleading and Practice, Ch. 460, *Products Liability* (Matthew Bender).

[c] Related Points and Authorities

For points and authorities relating to actions for negligence in general, see Ch. 165, *Negligence* .

[3] Discussion of Authorities

[a] No Duty to Warn in Declared State of Emergency

In ***Macias v. State of California*** *(1995) 10 Cal. 4th 844, 42 Cal. Rptr. 2d 592, 897 P.2d 530* , plaintiffs filed a suit against malathion manufacturers seeking damages for injuries allegedly sustained through helicopter spraying of the insecticide malathion based on the manufacturers' negligence in failing to provide a complete warning of dangers inherent in the use of this insecticide. The spraying was part of the State of California's effort to eradicate the Medfly after the Governor declared a state of emergency under the Emergency Services Act (*Gov. Code § 8550 et seq.*) due to the danger Medfly infestations posed for California's agricultural industry.

The trial court granted defendants' motion for summary judgment, holding that the manufacturers had no duty to warn the general public of risks because they reasonably relied on the State to provide warnings to residents of the area being sprayed. The court of appeal reversed because it determined that the question of whether the defendants "reasonably relied" on the State's warnings presented a material question of fact. Defendants' petitioned for review by the California Supreme Court.

The California Supreme Court reversed. The Court ruled that the court of appeal failed to consider the significance of the fact that the malathion was used by the State acting pursuant to a declared agricultural emergency. The Court found that *Gov. Code § 8550* envisions that the State centrally coordinate and command its response to a public emergency. To judicially impose a private duty to disseminate warnings that supplement those issued by the State would represent an unwarranted intrusion in the State's sovereign authority and could severely compromise the State's efforts to deal with the crisis. In addition, the manufacturers had no duty to second-guess the information conveyed by the State even after becoming aware of alleged problems with the State's warnings. The manufacturers were not negligent in that they had no duty to warn plaintiffs or otherwise intervene in the Medfly eradication project (*10 Cal. 4th 844, 856-860)* .

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19-190 California Points & Authorities § 190.203

§ 190.203 Opposing Contention That Manufacturer Breached Duty of Ordinary Care [Civ. Code § 1714(a)]--No Duty to Warn of Rare, Idiosyncratic, Hypersensitive, or Unusual Reactions

[1] FORM

[*The following may be included in a memorandum or points and authorities, or in a trial or appellate brief. It may be combined with a general form opposing the contention that defendant breached its duty of care (see Ch. 165, Negligence).*]

DEFENDANT _____ [*name*] SHOULD NOT BE HELD LIABLE FOR FAILURE TO PROVIDE ADEQUATE WARNINGS OF DANGERS INHERENT IN USE OF DEFENDANT'S PRODUCT BECAUSE THERE IS NO DUTY TO WARN OF THE POSSIBILITY OF RARE, IDIOSYNCRATIC, OR UNUSUAL REACTIONS TO AN OTHERWISE SAFE AND USEFUL PRODUCT.

No Duty to Warn of Possibility of Rare, Idiosyncratic, or Unusual Reactions to Otherwise Safe and Useful Product.

A defendant has no duty to warn of the possibility of rare, idiosyncratic, or unusual reactions to an otherwise safe and useful product (*Friedman v. Merck & Co. (2003) 107 Cal. App. 4th 454, 131 Cal. Rptr. 2d 885*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a product seller was negligent because of it failed to issue adequate warnings of dangers inherent in the product. The ground for the contention is that a seller has no common law duty to warn of the possibility of rare, idiosyncratic, hypersensitive, or unusual reactions to an otherwise safe and useful product.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue of no liability for failure to warn. It may be used in connection with a pretrial motion, such as a demurrer, or motion for summary judgment. It may also be used in a trial or appellate brief.

[b] Related Pleading and Practice Forms

For a discussion and forms for use in actions involving negligence in general, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender). For a discussion and forms for use in products liability actions based on strict liability, see Ch. 460, *Products Liability* (Matthew Bender).

[3] Discussion of Authorities

[a] No Duty to Warn of Possibility of Rare, Idiosyncratic, or Unusual Reactions to Otherwise Safe and Useful Product.

In ***Friedman v. Merck & Co.*** *(2003) 107 Cal. App. 4th 454, 131 Cal. Rptr. 2d 885* , plaintiff was required to undergo a TB test as a condition to his receiving employment. He told his prospective employer that he could not submit to the test if it contained animal products. The employer asked the defendants whether the TB test contained animal products. The defendants replied that the TB test was "Vegan safe," and this information was relayed to the plaintiff. After submitting to the TB test, the plaintiff learned that he had been injected with bovine serum as part of the test. Plaintiff brought an action claiming injuries to his nervous system and severe mental pain and anguish. The trial court sustained defendants' demurrers to plaintiff's negligence and negligent infliction of emotional distress causes of action, finding that defendants owed no duty to the plaintiff.

The court of appeal affirmed. It found that the TB test was a safe and useful product, and that this plaintiff's injury arose because of his particular sincerely held beliefs as a strict ethical vegan. Citing Restatement (Second) of Torts § 402A, comment j, the court noted that there is no duty to warn of the possibility of rare, idiosyncratic, or unusual reactions to an otherwise useful product. It concluded that the TB test distributor's negligent failure to warn that the test contained animal products was not sufficiently likely to result in serious harm to a sufficiently appreciable segment of the general public to justify the imposition of a duty to warn on the defendants. Nor did the defendants, by voluntarily responding to the employer's inquiry, assume a duty to exercise care for plaintiff's emotional condition. The plaintiff thus failed to state a cause of action for negligence or negligent infliction of emotional distress.

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19-190 California Points & Authorities § 190.204

§ 190.204 Opposing Contention That Seller of Product Breached Duty of Ordinary Care [Civ. Code § 1714(a)]--Seller Had No Duty to Test or Inspect Product

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It may be combined with a general form opposing the contention that defendant breached its duty of care (see Ch. 165, Negligence).*]

DEFENDANT _____ [*name*] IS NOT LIABLE FOR PLAINTIFF'S INJURIES BECAUSE DEFENDANT, AS SELLER OF THE _____ [*specify product*], _____ [ONLY HAD A DUTY TO CONDUCT REASONABLE INSPECTIONS AND TESTS OF THE PRODUCT, WHICH HE/SHE/IT PERFORMED *and/or* HAD NO DUTY TO CONDUCT AN INSPECTION WHEN THE NATURE OF THE PRODUCT PRECLUDED INSPECTION *and/or* HAD NO DUTY TO INSPECT A PACKAGED PRODUCT *and/or* HAD NO DUTY TO INSPECT A VEHICLE SOLD TO A DEALER].

A. Defective Condition Could Not Be Discovered by Reasonable Inspection or Test. Liability is imposed on a seller only if the defective condition of the part could have been discovered by reasonable inspection and tests (*Post v. Alameda Amusement Co. (1953) 117 Cal. App. 2d 588, 592, 256 P.2d 580*).

[*Optional*] **B. No Duty to Inspect and Test When Nature of Product Precludes Inspection.** The duty to use reasonable care in testing and inspecting a product depends on the circumstances of the particular case. A defendant will not be held liable for failure to conduct a reasonable inspection when the nature of the product precludes the inspection (*see, e.g.,* *Post v. Alameda Amusement Co. (1953) 117 Cal. App. 2d 588, 592, 256 P.2d 580*).

[*Optional*] **C. No Duty to Inspect Packaged Product.** The law does not impose a duty of inspection to discover latent defects on the wholesaler and retailer of packaged articles in which they deal (*Gobin v. Avenue Food Mart (1960) 178 Cal. App. 2d 345, 347, 2 Cal. Rptr. 822*).

[*Optional*] **D. No Duty to Inspect Vehicle Sold to Dealer.** A party is expressly relieved from the obligation to inspect or repair a new or used vehicle when the vehicle is sold to a dealer (*Veh. Code § 24007*; *see Fruehauf Corp. v. Lakeside Chevrolet Co. (1981) 117 Cal. App. 3d 783, 789, 173 Cal. Rptr. 55*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that defendant owed and breached the duty to test and inspect a product prior to sale. Optional Paragraphs B and C may be used if the nature of the particular product precludes a duty to inspect. These arguments may arise in several procedural contexts, including in opposition to an appeal by plaintiff from a summary judgment in favor of the seller [*see, e.g., Fruehauf Corp. v. Lakeside Chevrolet Co. (1981) 117 Cal. App. 3d 783, 173 Cal. Rptr. 55]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the seller did not have a duty to inspect or test the product. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. For example, counsel should discuss the nature of the product and the requisite duty defendant had to make a reasonable test or inspection of the product, and the facts showing that defendant satisfied that duty.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in §§ 190.190* and *190.195*.

[b] Related Pleading and Practice Forms

For a discussion and forms for use in actions involving negligence in general, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender). For a discussion and forms for use in products liability actions based on strict liability, see California Forms of Pleading and Practice, Ch. 460, *Products Liability* (Matthew Bender).

[c] Related Points and Authorities

For points and authorities relating to actions for negligence in general, see Ch. 165, *Negligence* .

[3] Discussion of Authorities

[a] Defective Condition Could Not Be Discovered by Reasonable Inspection or Test

In ***Post v. Alameda Amusement Co.*** *(1953) 117 Cal. App. 2d 588, 256 P.2d 580* , plaintiffs filed an action for damages against a drive-in theater and the manufacturer of an electric car heater for injuries sustained when the heater malfunctioned, causing electric shock and burns on plaintiffs' hands and legs. The evidence showed that the switches on the heaters were manufactured by various firms and assembled into the heater unit by defendant manufacturer, who tested them and then packaged and shipped the heaters to the theater. Each switch bore the approval of the Underwriters' Laboratories, Inc., meaning that it had been passed, checked and approved by the National Board of Fire Underwriters. The theater's electrical engineer prepared installation plans and their electrical contractor installed the heaters. The theater did not take the heaters apart to inspect the switches, as it was standard practice to rely on the Underwriters' label. There was evidence presented that the switch on the heater was defective and caused the accident. The jury returned verdicts in favor of defendant theater, and in favor of plaintiffs and against defendant manufacturer. Plaintiffs appealed.

The court of appeal affirmed. The court said that the evidence showed that the defective condition of the switch could not be dis covered except by opening the heater, which required a special key or screwdriver that only the manufacturer had. Liability is imposed if the defective condition of the part could have been discovered by reasonable inspection and tests. The reasonableness of the inspection and tests used must depend on the circumstances of the particular case. The court noted that the evidence showed that defendant gave the heater such inspection as was possible without taking the heater apart, and as a matter of law it could not be said that defendant theater did not exercise reasonable care (*117 Cal. App. 2d 588, 592)* .

[b] No Duty to Inspect and Test When Nature of Product Precludes Inspection

The facts and procedural background of ***Post v. Alameda Amusement Co.*** *(1953) 117 Cal. App. 2d 588, 256 P.2d 580* , are discussed in *§ 190.204[3][a]*. In affirming a verdict in favor of defendant theater, the court of appeal noted that the duty to use reasonable care in testing and inspecting a product depends on the circumstances of the particular case. A defendant will not be held liable for failure to conduct a reasonable inspection when the nature of the product precludes the inspection (*117 Cal. App. 2d 588, 592)* .

[c] No Duty to Inspect Packaged Product

In ***Gobin v. Avenue Food Mart*** *(1960) 178 Cal. App. 2d 345, 2 Cal. Rptr. 822* , plaintiffs were a 6-year old boy and his mother. The boy sued for injuries incurred when a plastic dart was ejected from its toy gun into his eye, and his mother sued for medical expenses. They sued the food market where the gun and dart were bought, the wholesale toy house that distributed the toy, and the manufacturer under negligence and breach of warranty theories. Plaintiffs' request for instructions as to all defendants on res ipsa loquitur were refused, and the jury returned a verdict in favor of all defendants. Plaintiffs appealed.

The court of appeal affirmed. The evidence showed that the dart and gun, when they left the manufacturer's hands, were attached to a piece of cardboard and wrapped in a plastic bag stapled at the top, and that there was no evidence that the plastic bag was ever opened or the gun and darts removed until after their purchase. Stating that there was nothing in the evidence to support a res ipsa loquitur instruction as to the wholesaler or retailer, the court concluded that the law does not impose a duty of inspection to discover latent defects on the wholesaler and retailer of packaged articles in which they deal. The court also rejected plaintiffs' reliance on *Ybarra v. Spangard (1944) 25 Cal. 2d 486, 154 P.2d 687* . In *Ybarra*, an unconscious surgery patient was injured by one of the medical defendants to whom he had entrusted his body, but there was no way the patient could prove which defendant had done the negligent act. The court declined to extend the *Ybarra* doctrine to a case in which a conscious person receives an injury from a known object in a known way (*178 Cal. App. 2d 345, 347)* .

[d] No Duty to Inspect Vehicle Sold to Dealer

In ***Fruehauf Corp. v. Lakeside Chevrolet Co.*** *(1981) 117 Cal. App. 3d 783, 173 Cal. Rptr. 55* , a used vehicle dealer was sued for damages for injuries caused by a trailer detaching from a towing vehicle and hitting plaintiffs' car. The trailer was sold by the dealer to a power tool supply company that owned and operated the trailer on the date of the accident. The dealer filed a cross complaint for indemnity and equitable contribution against the prior seller from whom the dealer had purchased the trailer. The prior seller moved for summary judgment, based in part on the provisions of *Veh. Code § 24007*, which exempts from its inspection and repair requirements any person who sells a vehicle to a dealer. The trial court granted the summary judgment motion and cross complainant appealed.

The court of appeal affirmed, stating that the prior seller was justified in relying on the provisions of *Veh. Code § 24007* to relieve it from liability. The intervention of the dealer relieved the prior seller of any liability to the consumer for negligence, breach of warranty or strict liability. The statute resulted in imposition of full responsibility on the dealer-purchaser for the condition of the vehicle at the time it was sold to the consuming public (*117 Cal. App. 3d 783,*

789) .

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19-190 California Points & Authorities § 190.204A

§ 190.204A Opposing Contention That Manufacturer or Seller Breached Duty of Ordinary Care--No Duty to Avoid Negligently Causing Emotional Distress to Product Owner Who Lends Defective Product to Family Member

[1] FORM

[*The following may be included in a memorandum or points and authorities, or in a trial or appellate brief. It may be combined with a general form opposing the contention that defendant breached its duty of care (see Ch. 165, Negligence).*]

DEFENDANT _____ [*name*] IS NOT LIABLE FOR PLAINTIFF'S EMOTIONAL DISTRESS BECAUSE DEFENDANT, AS MANUFACTURER/SELLER OF _____ [*specify product*], HAD NO DUTY TO AVOID NEGLIGENTLY CAUSING EMOTIONAL DISTRESS TO A PRODUCT OWNER WHO LENDS A DEFECTIVE, INJURY-CAUSING PRODUCT TO A FAMILY MEMBER.

No Duty to Avoid Negligently Causing Emotional Distress to Owners Who Lend Defective Products to Family Members. A manufacturer or seller has no duty to avoid negligently causing emotional distress to a product owner who lends a defective product to a family member, who is then injured out of the owner's presence using the defective product (*Gu v. BMW of N. Am., LLC (2005) 132 Cal. App. 4th 195, 206-210, 33 Cal. Rptr. 3d 617*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the defendant is liable for emotional distress caused by its breach of the duty to market and sell a product that is safe for its purchaser and foreseeable users.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the defendant owed no duty to avoid negligently causing emotional distress to the product owner. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. For example, counsel should discuss the nature of the product, the circumstances of the family member's accident and injury, and that the plaintiff did not witness the accident.

[c] Related Pleading and Practice Forms

For a discussion and forms for use in actions involving negligence in general, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For points and authorities relating to actions for negligence in general, see Ch. 165, *Negligence* .

[3] Discussion of Authorities

[a] No Duty to Avoid Negligently Causing Emotional Distress to Owners Who Lend Defective Products to Family Members

In ***Gu v. BMW of N. Am., LLC*** *(2005) 132 Cal. App. 4th 195, 33 Cal. Rptr. 3d 617* , the plaintiff's sister was involved in a fatal accident while driving the plaintiff's automobile. The plaintiff was not a passenger in the vehicle and did not witness the accident. Nevertheless, she brought a cause of action against the manufacturer of the automobile for negligent infliction of emotional distress. She claimed that she suffered emotional distress as the direct victim of the defendant's negligence in failing to use due care in the design and manufacture of the vehicle's head protection system. The trial court sustained the defendant's demurrer without leave to amend. The court of appeal affirmed, concluding that the defendant owed no duty to the plaintiff that would allow her to recover for emotional distress on the theory that she, as the owner of the vehicle, was the direct victim of the defendant's alleged negligence. The court rejected the plaintiff's contention that the defendant's relationship with the plaintiff as the purchaser of one of its automobiles gave rise to a duty of care to the plaintiff. Because the plaintiff had been outside the range of potential danger at the time of the accident, the defendant owed her no duty of care. Moreover, her lending the automobile to a family member did not constitute "use" of the automobile. The court also rejected the plaintiff's contention that a special relationship sufficient to give rise to a duty of care arose by virtue of the purchase agreement for the automobile. Nor did a duty not to cause plaintiff emotional distress arise under *Civ. Code § 1714*. Finally, the court pointed out that expanding liability of product manufacturers to the extent urged by the plaintiff would increase insurance costs and the demands for payment from the pool of available funds (*132 Cal. App. 4th 195, 206-210)* .

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19-190 California Points & Authorities § 190.205

§ 190.205 Opposing Contention That Lender Breached Duty of Ordinary Care to Third Person [Civ. Code § 1714(a)]--Lender Did Not Act Outside Scope of Regular Activities and Was Not Party to Misrepresentation [Civ. Code § 3434]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It may be combined with a general form opposing the contention that defendant breached its duty of care (see Ch. 165, Negligence).*]

DEFENDANT _____ [*name*], AS A LENDER OF MONEY TO _____ [*name*], THE BORROWER, SHOULD NOT BE HELD LIABLE TO PLAINTIFF(S) _____ [*name(s*)] FOR ANY DEFECTS IN THE _____ [REAL *and/or* PERSONAL] PROPERTY INVOLVED IN THIS ACTION THAT WAS _____ [DESIGNED *and/or* MANUFACTURED *and/or* CONSTRUCTED *and/or* REPAIRED *and/or* MODIFIED *and/or* IMPROVED] BY BORROWER THROUGH THE LOAN PROCEEDS BECAUSE PLAINTIFF'S LOSS OR DAMAGES DID NOT RESULT FROM AN ACT BY DEFENDANT OUTSIDE THE SCOPE OF THE ACTIVITIES OF A LENDER OF MONEY, AND BECAUSE DEFENDANT HAS NOT BEEN A PARTY TO ANY MISREPRESENTATIONS WITH RESPECT TO THE PROPERTY.

A. Lender Did Not Act Outside Scope of Lender's Activities and Not Party to Any Misrepresentations. A lender who makes a loan of money, the proceeds of which are used or may be used by the borrower to finance the design, manufacture, construction, repair, modification, or improvement of real or personal property for the sale or lease to others, shall not be held liable to third persons for any loss or damage occasioned by any defect in the real or personal property or for any loss or damage resulting from the failure of the borrower to use due care in the design, manufacture, construction, repair, modification, or improvement of the property, unless the loss or damage is a result of an act of the lender outside the scope of the activities of a lender of money, or unless the lender has been a party to misrepresentations with respect to the property (*Civ. Code § 3434*; *Fox & Carskadon Financial Corp. v. San Francisco Fed. Sav. & Loan Assn. (1975) 52 Cal. App. 3d 484, 489*).

B. Intent of Legislature to Define Lender's Duty of Due Care. It is the intent of the legislature in *Section 3434 of the Civil Code* to define when a duty of care is placed on a financial institution for failures on the part of borrowers, and it cannot be expanded to grant relief on a negligence theory (*Fox & Carskadon Financial Corp. v. San Francisco Fed. Sav. & Loan Assn. (1975) 52 Cal. App. 3d 484, 488*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a lender of money is liable for loss or damages to third persons resulting from the failure of a borrower to use due care in using loan proceeds to design, manufacture, construct, repair, modify, or improve real or personal property, or from any defect in such property. The ground for opposition is that the lender did not act outside the scope of the activities of a lender and has not been a party to misrepresentations regarding the property [*see Civ. Code § 3434*]. This argument may arise in several procedural contexts, including in responding to an appeal by plaintiff from a summary judgment for defendant [*see, e.g., Fox & Carskadon Financial Corp. v. San Francisco Fed. Sav. & Loan Assn. (1975) 52 Cal. App. 3d 484]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that a lender is not liable to third persons for loss or damages resulting from defects in real or personal property. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should discuss the acts that defendant lender performed, pointing out that all these acts were within the scope of a lender of money, and that none of these acts constitute a misrepresentation about the property [*see Civ. Code § 3434*].

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 190.198*.

[b] Related Pleading and Practice Forms

For a discussion and forms for use in actions involving negligence in general, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender). For a discussion and forms for use in products liability actions based on strict liability, see California Forms of Pleading and Practice, Ch. 460, *Products Liability* (Matthew Bender).

[c] Related Points and Authorities

For points and authorities relating to actions for negligence in general, see Ch. 165, *Negligence* .

[3] Discussion of Authorities

[a] Lender Did Not Act Outside Scope of Lender's Activities and Not Party to Any Misrepresentations.

In ***Fox & Carskadon Financial Corp. v. San Francisco Fed. Sav. & Loan Assn.*** *(1975) 52 Cal. App. 3d 484* , plaintiffs, a real estate brokerage corporation and a limited partnership formed by the brokerage corporation, brought an action against a savings and loan association alleging that the association owed them a duty of care in making a construction loan to an apartment building developer. Plaintiffs had agreed to buy the apartment project from the developer. When defendant foreclosed its trust deed securing the construction loan, plaintiffs lost their equity in the project. Defendant's motion for summary judgment was granted, and plaintiffs appealed.

The court of appeal affirmed, stating that *Civ. Code § 3434* could not be expanded to grant plaintiffs relief on a

negligence theory. In support of the holding that defendant owed plaintiffs no duty of care, the court noted that defendant's participation in the project was limited to that of a conventional construction lender with no interest in whether the project made a profit, that it could not foresee the harm to plaintiffs because it had previously done extensive business with the developer and had experienced no difficulty, that the connection between defendant's conduct and plaintiffs' injury was remote, and that there was no moral blame attached to defendant's actions as plaintiffs were in a position to protect themselves from the loss (*52 Cal. App. 3d 484, 489)* .

[b] Intent of Legislature to Define Lender's Duty of Due Care

The facts and procedural background of ***Fox & Carskadon Financial Corp. v. San Francisco Fed. Sav. & Loan Assn.*** *(1975) 52 Cal. App. 3d 484* , are discussed in *§ 190.205[3][a]*. In rejecting plaintiffs' assertion that its situation was analagous to the homeowners in *Connor v. Great W, Sav. & Loan Ass'n (1968) 69 Cal. 2d 850, 864-865, 870, 73 Cal. Rptr. 369, 447 P.2d 609* [*see § 190.191[3][d]*], the court of appeal noted that *Civ. Code § 3434* was enacted shortly after the *Connor* decision and that its intent is to define when a duty of care is placed on a financial institution for failures on the part of borrowers. The court ruled that to grant plaintiffs relief on a negligence theory would be to expand lender liability beyond the legislature's implied limit (*52 Cal. App. 3d 484, 488)* .

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19-190 California Points & Authorities § 190.206

§ 190.206 Opposing Contention That Researcher Breached Duty of Ordinary Care to Third Person [Civ. Code § 1714(a)]--Research Activity For Manufacturer Does Not Create Duty Supporting Negligent Undertaking Claim

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant breached its duty of care (see Ch. 165, Negligence).*]

DEFENDANT, _____ [*specify name*], SHOULD NOT BE HELD LIABLE FOR NEGLIGENTLY PERFORMING AN UNDERTAKING OWED THE PLAINTIFF BECAUSE DEFENDANT'S RESEARCH ACTIVITIES DO NOT CREATE A DUTY TO ENSURE SAFETY OF MANUFACTURER'S PRODUCTS.

Research Activity For Manufacturer Does Not Create Duty For Negligent Undertaking Claim. Those who perform research for a manufacturer do not owe a duty to third parties for injuries caused by the manufacturer's products (*Artiglio v. Corning Inc. (1998) 18 Cal. 4th 604, 618, 76 Cal. Rptr. 2d 479, 957 P.2d 1313*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a defendant researcher owes a duty of care to third parties injured by a manufacturer's product. The ground of opposition is that the plaintiffs will not be able to establish a negligent undertaking claim because the defendant's research activities do not create a duty of care towards the manufacturer's customers. The researcher did not undertake to ensure the safety of the manufacturer's products.

The form may be combined with other points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a demurrer or motion for summary judgment or summary adjudication on the issue that defendant

is subject to strict liability. The form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. For example, counsel should state facts showing that the risk of injury was unforeseeable, for example, because many years had elapsed between the research activities and the alleged injuries [*Artiglio v. Corning, Inc. (1998) 18 Cal. 4th 604, 618,6 Cal. Rptr. 2d 479, 957 P.2d 1313]* .

[3] Discussion of Authorities

[a] Research Activity For Manufacturer Does Not Create Duty For Negligent Undertaking Claim

In ***Artiglio v. Corning, Inc.*** *(1998) 18 Cal. 4th 604, 6 Cal. Rptr. 2d 479, 957 P.2d 1313* , plaintiffs alleged that they suffered personal injuries caused by silicone breast implants. The plaintiffs pleaded many causes of action, including negligence. The trial court granted defendant's motion for summary judgment on the negligence claim on the ground that the defendant owed plaintiffs no duty of care. The court of appeal affirmed, rejecting plaintiffs' argument that the defendant had engaged in an undertaking that created a duty of care (also known as the "Good Samaritan" doctrine). The plaintiffs had alleged that a subsidiary of the manufacturer (Dow Chemical) had assumed a duty of care by conducting silicone toxicology research in the 1940s and 1950s (*18 Cal. 4th 604, 612)* .

The Supreme Court affirmed. One of the key issues in a negligent undertaking claim is whether the activities of the defendant constitute an "undertaking" that produces a correlative duty of care owed to a third party. The "Good Samaritan" duty is limited and does not continue indefinitely. In this case, while the defendant (Dow Chemical) had performed silicone toxicology research for a manufacturer of medical products, which theoretically implicated the protection of third-party patients, the Court concluded that the research activities were too attenuated and remote to create a duty of care. Many years had elapsed between the research activities and the alleged injuries. In addition, trademark and trade name agreements did not constitute a general undertaking by Dow Chemical to guarantee the safety of the parent corporation's silicone product line (*18 Cal. 4th 604, 618)* .

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19-190 California Points & Authorities § 190.207

§ 190.207 Opposing Contention That Product Certifier Breached Duty of Care [Civ. Code § 1714(a)]--U.L Did Not Undertake to Test For and Certify Against Medical Risks of Asbestos

[1] FORM

[*The following may be included in a memorandum or points and authorities, or in a trial or appellate brief. It may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant breached its duty of care (see Ch. 165, "Negligence," Part 1).*]

DEFENDANT, _____[*specify name of product certifier*], SHOULD NOT BE HELD LIABLE FOR NEGLIGENTLY PERFORMING AN UNDERTAKING OWED TO THE _____ [*insert* PLAINTIFF *or* DECEDENT] BECAUSE BY TESTING _____ [*specify products*] AND CERTIFYING THEM AS SAFE, IT DID NOT UNDERTAKE TO GUARANTEE _____ [*insert* PLAINTIFF'S *or* DECEDENT'S] SAFETY FROM CANCER-CAUSING ASBESTOS.

Defendant Did Not Undertake to Guarantee Plaintiff's Safety From Cancer-Causing Asbestos By Testing and Certifying Appliances As Safe. A product certifier does not undertake to test for and certify safety from the medical risks of asbestos through its process of testing small appliances and certifying them as safe from injury from fire, electrical shock, or sharp objects (*Dekens v. Underwriters Labs. Inc. (2003) 107 Cal. App. 4th 1177, 132 Cal. Rptr. 2d 699, 704-707)* .

[1] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a defendant product certifier owes a duty of care to persons injured by a manufacturer's products. The ground of opposition is that the plaintiff is unable to establish a negligent undertaking claim because the product certifier did not undertake to test for and certify safety from the medical risks of asbestos through its process of testing small appliances and certifying them as safe from injury from fire, electrical shock, or sharp objects.

The form may be combined with other points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of negligence. For example, they may be combined with points and authorities supporting a demurrer or motion for summary judgment or summary adjudication on the issue that defendant is liable in negligence. The form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form showing a relationship between the facts of the case and the points of law stated. For example, counsel should state facts showing that the defendant never tested or certified appliances for medical risks associated with asbestos or represented that any appliance was safe from asbestos injuries.

[3] Discussion of Authorities

[a] Defendant Did Not Undertake to Guarantee Plaintiff's Safety From Cancer-Causing Asbestos By Testing and Certifying Appliances As Safe.

In ***Dekens v. Underwriters Labs. Inc.*** *(2003) 107 Cal. App. 4th 1177, 132 Cal. Rptr. 2d 699, 704-707* , the decedent developed mesothelioma after working for more than 35 years repairing small appliances, some of which contained asbestos. Plaintiffs brought a wrongful death action against several defendants, including Underwriters Laboratories Inc. (U.L.). The trial court granted U.L.'s motion for summary judgment on the ground that U.L. had certified the appliances for electrical safety and did not assume the responsibility of telling consumers whether the product was safe or unsafe because of asbestos.

The court of appeal affirmed, rejecting plaintiffs' claim that by testing small appliances and certifying them as safe, U.L. had undertaken to guarantee the decedent's safety from illness resulting from his exposure to asbestos while repairing those small appliances. U.L. successfully negated the element of an undertaking by presenting evidence that it testing and certified small appliances for safety from fire, shock, and injuries from sharp objects, not for the medical risks associated with asbestos. Moreover, it never made a representation that any small appliance was safe with respect to asbestos. Plaintiff's evidence--which included the depositions of former U.L. employees, a CPSC report listing hair dryers as containing asbestos, and pages from U.L.'s website--was insufficient to establish a triable issue as to whether U.L. tested or certified the medical safety of consumer products containing asbestos.

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19-190 California Points & Authorities § 190.208

§ 190.208 Opposing Contention That Publisher Has Duty to Investigate Advertised Product--Publisher Did Not Endorse Product

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant owed and breached a duty to plaintiff.*]

DEFENDANT _____ [*name*], AS A PUBLISHER, HAD NO DUTY TO INVESTIGATE THE ADVERTISED PRODUCT THAT CAUSED PLAINTIFF'S INJURIES BECAUSE DEFENDANT DID NOT ENDORSE THE PRODUCT FOR ECONOMIC GAIN NOR FOR THE PURPOSE OF INDUCING THE PUBLIC TO BUY IT.

A. Nonendorsing Publisher Has No Duty to Investigate Advertised Product. A publisher that advertises a product but in no way sponsors or endorses the product for its own economic gain or for the purpose of inducing the public to buy it, has no duty to investigate the product, and is not subject to a products liability action for injuries caused by use of the product (*Walters v. Seventeen Magazine (1987) 195 Cal. App. 3d 1119, 1121-1122, 241 Cal. Rptr. 101*).

B. Mere Advertising Is Constitutionally Protected Activity. Mere advertisement is protected commercial speech under the *First Amendment* (*Walters v. Seventeen Magazine (1987) 195 Cal. App. 3d 1119, 1121-1122, 241 Cal. Rptr. 101*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a defendant owes a duty to a plaintiff who was injured by a product that the defendant, as a publisher, advertised but did not endorse for its own economic gain or for the purpose of inducing the public to buy it [*see Walters v. Seventeen Magazine (1987) 195 Cal. App. 3d*

1119, 1121-1122, 241 Cal. Rptr. 101] .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that an advertiser is not liable to the user of a product that it did not endorse. For example, they may be combined with points and authorities supporting a demurrer to the complaint. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should set forth facts showing that defendant in no way endorsed the product, profited economically from it, nor induced the public to buy it.

In an appropriate case, the points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 190.197*.

[3] Discussion of Authorities

[a] Nonendorsing Publisher Has No Duty to Investigate Advertised Product

In ***Walters v. Seventeen Magazine*** *(1987) 195 Cal. App. 3d 1119* , *241 Cal. Rptr. 101* , a woman brought an action against a magazine publisher and its parent company for injuries sustained when she used a product advertised in the magazine. Plaintiff had read an advertisement for a particular tampon, used that product, and contracted toxic shock syndrome. The complaint alleged negligence, products liability, breach of warranty, conspiracy, fraudulent advertising, and associated theories. The defendants had not endorsed the product. Defendants demurred on the ground that a publisher does not warrant products it advertises, has no duty to investigate them, and cannot be held liable for defective products unless it endorses a product for economic gain and for the purpose of inducing the public to buy it. The defendant publisher also claimed protection for commercial speech under the *First Amendment*. Plaintiff appealed.

The court of appeal affirmed, holding that a publisher that in no way sponsors or endorses products, and does not represent the quality, promote, or attempt to induce the public to buy a product, is not subject to products liability for injuries caused by the product. The court distinguished the holding in *Hanberry v. Hearst Corp. (1969) 276 Cal. App. 2d 680, 81 Cal. Rptr. 519* , which stated that a publisher that endorsed a product in its magazine was liable for injuries caused by the use of the product [*see § 190.197[3][a]*]. In *Hanberry*, the publisher had endorsed the product for its own gain, and for the purpose of encouraging the public to buy it. It also in effect loaned its reputation to promote and induce the sale of the product (by affixing the "Good Housekeeping Seal" to the advertisement). In doing so, the publisher placed itself in the position in which public policy imposes on it the duty to use ordinary care in the issuance of its certification of quality so that members of the consuming public who rely on its endorsement are not unreasonably exposed to the risk of harm (*195 Cal. App. 3d 1119, 1121)* . The court noted that the court in *Hanberry* limited the plaintiff's cause of action to one for negligent misrepresentation, rejecting alternate theories of warranty and products liability, on the ground that those theories do not extend to one not directly involved in manufacturing products for, or supplying products to, the consuming public. The court found *Hanberry* inapposite because the publisher in the case before the court did not in any way sponsor or endorse the advertised product, and there was no representation of quality, no promotional effort, and no attempt to induce the public to buy the product beyond merely printing the advertisement. The court rejected plaintiff's argument that the advertisements were indistinguishable from feature articles, implying an endorsement to the immature reader. The court found that the advertisements were in fact easily distinguishable from feature articles. The court stated an unwillingness to create a new tort of negligent failure to investigate the safety of an advertised product. That tort would require publications to maintain huge staffs scrutinizing and testing each product offered. The enormous cost of testing, and skyrocketing insurance rates, would deter many magazines from accepting advertising, hastening their demise from lack of revenue. Publications that complied would need to raise their prices beyond the reach of the average consumer, or would fail because of tort judgments. The court noted that these reasons support the United States Supreme Court's vigilance about linking commercial speech to the

First Amendment (*195 Cal. App. 3d 1119, 1122)* .

[b] Mere Advertising Is Constitutionally Protected Activity

Walters v. Seventeen Magazine *(1987) 195 Cal. App. 3d 1119, 241 Cal. Rptr. 101* , is discussed in *§ 190.208[3][a]*.

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[Reserved]

§§ 190.209[Reserved]

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C. Damages

19-190 California Points & Authorities § 190.220

§ 190.220 Supporting Contention That Plaintiff Is Entitled to Purely Economic Damages--Economic Damages Available on Negligence Theory if *J'Aire* Factors Met

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is liable for plaintiff's injuries caused by defendant's product (see, e.g., § 190.223)*].

DEFENDANT _____ [*name*] IS LIABLE TO PLAINTIFF FOR PURELY ECONOMIC DAMAGES BECAUSE _____ [*specify transaction, intent of plaintiff in entering into transaction, and defendant's knowledge of plaintiff's intent, if applicable, e.g.,* PLAINTIFF PURCHASED CANS FROM DEFENDANT THAT DEFENDANT KNEW PLAINTIFF INTENDED TO USE AS CONTAINERS IN WHICH TO PACK PLAINTIFF'S FOODS FOR SALE TO A THIRD PARTY PURSUANT TO A BUSINESS CONTRACT]; DEFENDANT SHOULD HAVE REASONABLY FORESEEN THAT _____ [*specify result that was reasonably foreseeable, e.g.,* IF DEFENDANT DID NOT SUPPLY PLAINTIFF WITH THE CANS, PLAINTIFF WOULD NOT BE ABLE TO FULFILL ITS BUSINESS CONTRACT WITH THE THIRD PARTY AND THAT PLAINTIFF WOULD SUFFER ECONOMIC LOSSES]; PLAINTIFF IN FACT SUFFERED ECONOMIC LOSSES BECAUSE _____ [*specify cause of economic losses, e.g.,* THE CANS DELIVERED TO PLAINTIFF BY DEFENDANT HAD CORRODED AND WERE UNUSABLE]; DEFENDANT, AS _____ [*specify defendant's role in marketing chain, e.g.,* MANUFACTURER AND SELLER] OF THE DEFECTIVE _____ [*specify product, e.g.,* CANS], WAS CLOSELY CONNECTED TO PLAINTIFF'S ECONOMIC LOSS; DEFENDANT IS MORALLY TO BLAME BECAUSE _____ [*specify moral blame, e.g.,* IT SHIPPED DEFECTIVE GOODS That, HAD THEY BEEN USED AS CONTAINERS FOR PLAINTIFF'S FOODS, WOULD HAVE BEEN HAZARDOUS TO THE HEALTH OF THE ULTIMATE CONSUMERS OF PLAINTIFF'S PRODUCT]; AND PUBLIC POLICY WARRANTS IMPOSING LIABILITY BECAUSE _____ [*specify public policy reason for imposing liability, e.g.,* CONTAINER MANUFACTURERS SHOULD BEAR THE ECONOMIC LOSS OF DEFECTIVE AND POTENTIALLY DANGEROUS CANS THAT WOULD OTHERWISE BE USED TO PACK FOODS DESTINED TO BE

PURCHASED AND EATEN BY HAPLESS CONSUMERS].

A. Economic Damages Are Recoverable in Negligence Action. A plaintiff may bring an action based in negligence against a defendant to recover purely economic damages caused by a defective product, so long as the plaintiff is able to prove that the risk of harm was reasonably foreseeable and was closely connected with the defendant's conduct and that the damages were not wholly speculative, nor the injury part of the plaintiff's ordinary business risk (*Huang v. Garner (1984) 157 Cal. App. 3d 404, 420, 203 Cal. Rptr. 800* ; *see* *J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 808, 157 Cal. Rptr. 407, 598 P.2d 60*).

WARNING:

In *Aas v. Superior Court (2000) 24 Cal. 4th 627, 648-649, 101 Cal. Rptr. 2d 718, 12 P.3d 1125* [*see § 190.224[3][a]*], the Supreme Court expressly disapproved *Huang* to the extent it was inconsistent with the views set out in that opinion.

B. Six-Part Balancing Test for Determining Recoverability of Economic Damages. The six-part balancing test adopted in *J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 157 Cal. Rptr. 407, 598 P.2d 60* , from *Biakanja v. Irving (1958) 49 Cal. 2d 647, 320 P.2d 16* , is employed in a negligence action against a defendant to recover purely economic damages caused by a defective product, to determine whether the plaintiff is entitled to recover those damages. Specifically, the trial court will examine (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff would suffer injury, (4) the closeness of the connection between the defendant's conduct and the injury sustained, (5) the moral blame attaching to the defendant's conduct, and (6) the policy and need of preventing future harm (*Ales-Peratis Foods Int'l, Inc. v. American Can Co. (1985) 164 Cal. App. 3d 277, 286, 209 Cal. Rptr. 917* ; *Huang v. Garner (1984) 157 Cal. App. 3d 404, 423, 203 Cal. Rptr. 800* ; *see* *J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 804, 157 Cal. Rptr. 407, 598 P.2d 60* ; *Biakanja v. Irving (1958) 49 Cal. 2d 647, 650, 320 P.2d 16*).

WARNING:

In *Aas v. Superior Court (2000) 24 Cal. 4th 627, 648-649, 101 Cal. Rptr. 2d 718, 12 P.3d 1125* [*see § 190.224[3][a]*], the Supreme Court expressly disapproved *Huang* to the extent it was inconsistent with the views set out in that opinion.

[2] Comments

CAUTION:

One court of appeal has rendered a contrary decision, at least if the transaction involves merchants governed by the California Uniform Commercial Code [*see* *Sacramento Reg'l Transit Dist. v. Grumman Flxible (1984) 158 Cal. App. 3d 289, 204 Cal. Rptr. 736* ; *see also § 190.220[4][a]*].

CAUTION:

In *Aas v. Superior Court (2000) 24 Cal. 4th 627, 645-646, 101 Cal. Rptr. 2d 718, 12 P.3d 1125* , [*see § 190.224[3][a]*], the Supreme Court determined that homeowners and a homeowners association could not recover in negligence from the developer, contractor, and subcontractors who built their dwellings for construction defects that have not caused property damage. Focusing on the third factor in *J'Aire,* which looks to "the degree of certainty that the plaintiff suffered injury ...," the court noted that construction defects that have not ripened into property damage, or at least involuntary out-of-pocket losses, do not comfortably fit the definition of "appreciable harm"--an essential element of a negligence claim. The court further stated that it did not believe that the *J'Aire* court intended to dispense with the rule that appreciable, nonspeculative, present injury is an essential element of a tort cause of action.

However, effective January 1, 2003, there is a limited new cause of action in California for certain

specified housing defects, *Cal. Civ. Code § 895 et seq.* The Right to Repair Act (the Act) established building standards pertaining to new residential construction and provides homeowners with a cause of action against builders and individual product manufacturers for violation of those standards. *Cal. Civ. Code §§ 896, 936*.

A court of appeal stated that the Act abrogated the economic loss rule in such as case, thereby legislatively superseding *Aas. Greystone Homes, Inc. v. Midtec, Inc. (2008) 168 Cal. App. 4th 1194, 1202, 86 Cal. Rptr. 3d 196* .

[a] Use of Form

These points and authorities may be submitted in support of the contention that a defendant is liable under a negligence theory for purely economic damages suffered by plaintiff from a defect in defendant's product.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary judgment or summary adjudication on the issue that defendant is subject to negligence liability. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, and in any other relevant points and authorities combined with this form, to show the relationship between the facts of the case and the points of law stated. For example, counsel should show facts indicating (1) the extent to which the transaction was intended to affect plaintiff, (2) the foreseeability of harm to plaintiff, (3) the degree of certainty that plaintiff suffered injury, (4) the closeness of the connection between defendant's conduct and the injury suffered, (5) the moral blame attached to defendant's conduct, and (6) the policy and need of preventing future harm [*see, e.g.,* *Ales-Peratis Foods Int'l, Inc. v. American Can Co. (1985) 164 Cal. App. 3d 277, 209 Cal. Rptr. 917* (liability for economic damages suffered when plaintiff was unable to use defective cans purchased from defendant to package and sell plaintiff's seafood); *Huang v. Garner (1984) 157 Cal. App. 3d 404, 423, 203 Cal. Rptr. 800* (liability for economic damages suffered when plaintiff purchased defective apartment complex)].

[3] Discussion of Authorities

[a] Economic Damages Are Recoverable in Negligence Action

In ***J'Aire Corp. v. Gregory*** *(1979) 24 Cal. 3d 799, 157 Cal. Rptr. 407, 598 P.2d 60* , plaintiff entered into a contract with defendant to renovate and improve plaintiff's restaurant. Defendant failed to perform its contractual obligations within a reasonable time, and plaintiff suffered loss of business and loss of profits as a result. Plaintiff brought an action against defendant for economic damages, and defendant demurred to the complaint. The trial court sustained the demurrer without leave to amend, and dismissed the complaint. Plaintiff appealed.

The Supreme Court reversed the judgment of dismissal, holding that under the facts presented, a cause of action for negligent loss of expected economic advantage may be maintained. The Court stated that a plaintiff's interest in prospective economic advantage may be protected against injury occasioned by negligent as well as intentional conduct. Even when only an injury to prospective economic advantage is claimed, recovery is not foreclosed, so long as on balance, the facts indicate that recovery is appropriate. To determine the appropriateness of recovery, the Court applied the six-part balancing test as previously announced in *Biakanja v. Irving (1958) 49 Cal. 2d 647, 650, 320 P.2d 16* . Specifically, this test involves the examination of (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty the plaintiff would suffer injury, (4) the closeness of the connection between the defendant's conduct and the injury sustained, (5) the moral blame attaching to the defendant's conduct, and (6) the policy of preventing future harm. The Court explained that these factors, as applied in subsequent cases, will place a limit on recovery by focusing judicial attention on the foreseeability of the

injury and the nexus between defendant's conduct and plaintiff's injury. Thus, recovery for negligent interference with prospective economic advantage is limited to instances in which the risk of harm is foreseeable and is closely connected with defendant's conduct, and in which damages are not wholly speculative, and the injury is not part of plaintiff's ordinary business risk (*24 Cal. 3d 799, 803-808)* .

CAUTION:

One court of appeal has rendered a contrary decision, at least regarding transactions that involve merchants governed by the California Uniform Commercial Code (the UCC). In *Sacramento Reg'l Transit Dist. v. Grumman Flxible (1984) 158 Cal. App. 3d 289, 204 Cal. Rptr. 736* , plaintiff, who operated a fleet of buses as public mass transportation, purchased 103 new buses from defendant manufacturer. After delivery, plaintiff discovered that 26 of the buses had cracked fuel tank supports. Plaintiff also discovered that other parts of other buses were damaged. Plaintiff had the buses repaired and restored to service. Plaintiff then filed an action in strict liability and negligence against defendant. Defendant demurred, contending that plaintiff sought only economic damages, which were not recoverable under either theory. The trial court sustained the demurrer and dismissed the action, and plaintiff appealed. The court of appeal affirmed, holding that neither a strict liability nor a negligence action could be maintained for purely economic damages caused by a defective product. The court refused to apply the *J'Aire* balancing test, noting that transactions involving the construction or modification of structures, such as that involved in *J'Aire,* are generally not governed by the UCC, which applies to transactions involving movable goods. The court explained that the judicial creation of a tort remedy for economic loss caused by the negligence of a builder of a structure poses no conflict with the law of sales as set forth in the UCC, but that the creation of a tort remedy in a case in which the UCC does govern would pose a conflict with the purposes of that code. Thus, the court concluded that in this case, the provisions of the UCC rather than tort law should govern the commercial affairs of plaintiff and defendant merchants, including any economic loss caused by a defective product [*Sacramento Reg'l Transit Dist. v. Grumman Flxible (1984) 158 Cal. App. 3d 289, 298-300, 204 Cal. Rptr. 736* ; *see also § 190.224*].

[b] Six-Part Balancing Test for Determining Recoverability of Economic Damages

J'Aire Corp. v. Gregory *(1979) 24 Cal. 3d 799, 157 Cal. Rptr. 407, 598 P.2d 60* , is discussed in *§ 190.220[3][a]*.

In ***Biakanja v. Irving*** *(1958) 49 Cal. 2d 647, 320 P.2d 16* , defendant, a notary public, prepared a will for plaintiff's brother that was denied probate because it was not properly attested. Plaintiff, who would have received all of her brother's property under the will, received only one-eighth of the estate by intestate succession. Plaintiff brought an action against defendant based in negligence, even though plaintiff was not in privity of contract with defendant. The jury returned a verdict in favor of plaintiff, and defendant appealed.

The Supreme Court affirmed the judgment, holding that plaintiff was entitled to recovery despite the absence of privity. The Court explained that determining whether a defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him or her, the degree of certainty that plaintiff suffered injury, the closeness of the connection between defendant's conduct and the injury suffered, the moral blame attached to defendant's conduct, and the policy of preventing future harm (*49 Cal. 2d 647, 650-651)* .

In ***Ales-Peratis Foods Int'l, Inc. v. American Can Co.*** *(1985) 164 Cal. App. 3d 277, 209 Cal. Rptr. 917* , plaintiff, a buyer, packager, and seller of seafood, purchased cans manufactured by defendant for use in plaintiff's business. When the cans were delivered, plaintiff discovered that they had corroded and were not usable. As a result, plaintiff lost the opportunity to can a large quantity of abalone, and lost a contract for the sale of the abalone. Plaintiff then brought an action in negligence to recover economic losses suffered because of plaintiff's inability to use the cans. Defendant

moved for summary judgment, on the grounds that California law does not permit tort recovery for economic loss alone. The trial court granted the judgment, and plaintiff appealed.

The court of appeal reversed, holding that although it is unclear whether recovery for purely economic damages may still not be available in a strict liability cause of action, they may at least be available under certain circumstances in a negligence cause of action. Because plaintiff did not pursue recovery on a strict liability theory, the court did not reach the issue of whether *J'Aire* had also changed the rule prohibiting recovery for economic losses under a strict liability theory. However, the court held that the six-part balancing test of *J'Aire and Biakanja v. Irving (1958) 49 Cal. 2d 647, 320 P.2d 16* , may be applied in a products liability action based in negligence. Specifically, the six-part test examines (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty the plaintiff would suffer injury, (4) the closeness of the connection between the defendant's conduct and the injury sustained, (5) the moral blame attaching to the defendant's conduct, and (6) the need to prevent future harm. In applying the test to this case, the court found that: (1) plaintiff's contract with defendant was for defendant to supply plaintiff with cans that defendant knew plaintiff needed to execute a business contract to supply a product to be placed in the cans; (2) defendant could have reasonably foreseen that if it did not fulfill its contract with plaintiff, plaintiff could not fulfill its contract with a third party; (3) because defendant did not properly perform its contract with plaintiff, plaintiff was prevented from fulfilling its contract with the third party;, (4) the close connection between defendant's acts and the damages suffered was pleaded and patent; (5) moral blame attached to defendant because it shipped defective goods which, if plaintiff had used, would have been hazardous to the health of the ultimate consumers of plaintiff's product; and (6) cause of the close connection between plaintiff and defendant and the high degree of foreseeability of economic harm, public policy warranted imposing liability (*164 Cal. App. 3d 277, 281-291)* .

The facts and procedural background of ***Huang v. Garner*** *(1984) 157 Cal. App. 3d 404, 203 Cal. Rptr. 800* , are discussed in *§§ 190.28[3][a]* and *190.220[4][a]*. The court applied the six-part test of *J'Aire* and *Biakanja* and found that: (1) the developer owed a duty of reasonable care to those who subsequently purchased the defective housing structure, regardless of whether those purchasers lived in the building or used it for investment purposes; (2) it was foreseeable that construction defects would damage subsequent purchasers and residents of the property; (3) failure to comply with the building code presented potential risk of harm to later purchasers; (4) the defects caused the injuries suffered by plaintiffs; (5) the violation of building code standards involved sufficient moral blame; and (6) the public policy of preventing future harm would be served by penalizing the violation of the building code (*157 Cal. App. 3d 404, 424-425)* .

WARNING:

In *Aas v. Superior Court (2000) 24 Cal. 4th 627, 648-649, 101 Cal. Rptr. 2d 718, 12 P.3d 1125* [*see § 190.224[3][a]*], the Supreme Court expressly disapproved *Huang* to the extent it was inconsistent with the views set out in that opinion.

[4] Additional Authorities

[a] Economic Damages Are Recoverable in Negligence Action

In *Pisano v. American Leasing (1983) 146 Cal. App. 3d 194, 194 Cal. Rptr. 77* , plaintiff purchased a sanding machine to use in his cabinetmaking business. The sander was defective and damaged the wooden cabinets he had contracted to construct for a third party. Plaintiff brought an action in strict liability, negligence, and breach of warranty against the sander's manufacturer. Defendant moved for summary judgment, contending that plaintiff cannot recover damages for economic loss and that plaintiff could not recover under the warranty theory because plaintiff had not relied on any express warranties. The trial court granted the motion, and plaintiff appealed. The court of appeal affirmed the judgment with regard to the warranty cause of action but reversed with regard to the strict liability and negligence causes of action. The court held that because plaintiff's property had been damaged, those causes of action may be brought. The

court also held that under the negligence theory, plaintiff could seek recovery for both physical damage and economic losses. However, under the strict liability theory, plaintiff could seek recovery only for damages to his cabinet and could not seek damage for economic losses (*146 Cal. App. 3d 194, 196-197)* .

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19-190 California Points & Authorities § 190.221

§ 190.221 Supporting Contention That Plaintiff Is Entitled to Recover in Tort When Product Defect Causes Damage to "Other Property"--Economic Loss Rule Does Not Preclude Recovery for Damage to Another Part of Product

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is liable for plaintiff's injuries caused by defendant's product.*]

DEFENDANT _____ [*name*] IS STRICTLY LIABLE TO PLAINTIFF BECAUSE DEFECT IN DEFENDANT'S PRODUCT CAUSED DAMAGE TO "OTHER PROPERTY"--THAT IS, PROPERTY OTHER THAN THE PRODUCT ITSELF.

A. Economic Loss Rule Allows Plaintiff to Recover in Strict Products Liability When Product Defect Causes Damage to Other Property. The economic loss rule allows a plaintiff to recover in strict products liability in tort when a product defect causes damage to "other property"--that is, property other than the product itself (*Jimenez v. Superior Court (2002) 29 Cal. 4th 473, 481-484, 127 Cal. Rptr. 2d 614, 58 P.3d 450*).

B. Economic Loss Rule Does Not Necessarily Bar Recovery in Tort for Damage That Defective Product Causes to Other Portions of Larger Product. The economic loss rule does not necessarily bar recovery in tort for damage that a defective product, for example, a window, causes to other portions of a larger product, for example, a house (*Jimenez v. Superior Court (2002) 29 Cal. 4th 473, 481-484, 127 Cal. Rptr. 2d 614, 58 P.3d 450*).

C. Manufacturer of Defective Window May Be Strictly Liable for Damage Caused to Other Parts of Home. The manufacturer of a defective window installed in a mass-produced home may be strictly liable in tort for damage that the window's defect causes to other parts of the home in which it is installed (*Jimenez v. Superior Court (2002) 29 Cal. 4th 473, 483, 127 Cal. Rptr. 2d 614, 58 P.3d 450*).

D. Distinguishing Between "Other Property" and Defective Product Itself Requires Determination of Whether Defective Part Is Discrete Element. Distinguishing between "other property" and the defective product itself in a case involving component-to-component damage requires a determination of whether the defective part is a sufficiently discrete element of the larger product that it is not reasonable to expect that its failure will invariably damage other portions of the finished product (*KB Home v. Superior Court (2003) 112 Cal. App. 4th 1076, 1087, 5 Cal. Rptr. 3d 587*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the defendant is strictly liable for plaintiff's damages when defendant's product damages property other than the product itself.

[3] Discussion of Authorities

[a] Economic Loss Rule Allows Plaintiff to Recover in Strict Liability When Product Defect Causes Damage to Other Property

In ***Jimenez v. Superior Court*** *(2002) 29 Cal. 4th 473, 127 Cal. Rptr. 2d 614, 58 P.3d 450* , owners of a mass-produced home in a development brought claims alleging that defective windows caused property damage. The trial court granted the window manufacturers' motions for summary judgment. The court of appeal issued a writ directing the court to vacate its order.

The Supreme Court affirmed. After holding that manufacturers of windows installed in mass-produced home can be strictly liable for harm resulting from defects from the windows, the court held that the manufacturers may be strictly liable in tort for resulting physical damage to other parts of the house. It explained that the economic loss rule does not necessarily bar recovery in tort for damage that a defective product causes to other portions of a larger product into which the former had been incorporated. In construction cases, the rule does not bar recovery in tort if the plaintiff produces evidence of damage to other property, which may include other portions of the structure. In so holding, the court explicitly rejected the defense contention that the "product" was the entire house, and that damage caused to other parts of the house was damage to the product itself (*29 Cal. 4th 473, 481-484)* .

[b] Economic Loss Rule Does Not Necessarily Bar Recovery in Tort for Damage That Defective Product Causes to Other Portions of Larger Product

Jimenez v. Superior Court *(2002) 29 Cal. 4th 473, 127 Cal. Rptr. 2d 614, 58 P.3d 450* , is discussed in *§ 190.221[3][a]*.

[c] Manufacturer of Defective Window May Be Strictly Liable for Damage Caused to Other Parts of Home

Jimenez v. Superior Court *(2002) 29 Cal. 4th 473, 127 Cal. Rptr. 2d 614, 58 P.3d 450* , is discussed in *§ 190.221[3][a]*.

[d] Distinguishing Between "Other Property" and Defective Product Itself Requires Determination of Whether Defective Part Is Discrete Element

In ***KB Home v. Superior Court*** *(2003) 112 Cal. App. 4th 1076, 5 Cal. Rptr. 3d 587* , the plaintiff installed about 2,200 forced air furnaces manufactured by defendant in homes it built. Stainless steel NOx rods installed above the furnaces were defective and damaged other parts of the furnaces. After replacing the rods, plaintiff brought tort claims seeking to recover the cost of repairing and replacing the furnaces. The trial court ruled that the furnace was a single, integrated

product and that damage caused by its allegedly defective emissions control device to different component of furnace did not constitute damage to "other property," and that the economic loss rule accordingly barred plaintiff's tort claims. The plaintiff filed a petition for writ of mandate directing the court to vacate its orders. The court of appeal granted the petition, holding that the trial court's ruling deprived plaintiff of its right to have material issues of fact submitted to the jury.

The court explained that to determine the applicability of the economic loss rule, it first had to determine what the product at issue is. The Supreme Court, in *Jimenez v. Superior Court*, did not provide any direct guidance as to how to make this crucial evaluation. Distinguishing between "other property" and the defective product itself in a case involving component-to-component damage requires a determination whether the defective part is a sufficiently discrete element of the larger product that it is not reasonable to expect its failure invariably to damage other portions of the finished product. Factors that may be properly considered in determining what the product at issue is under that test include: (1) whether the defective component performs an integral function in the operation of the larger product; (2) whether the component has any independent use to the consumer; (3) how related the property damage is to the inherent nature of the defect in the component; and (4) whether the component itself or the larger product was placed into the stream of commerce. Resolution of the issue should be left to the trier of fact (*112 Cal. App. 4th 1076, 1087)* .

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19-190 California Points & Authorities § 190.222

§ 190.222 Supporting Contention That Plaintiff Is Entitled to Recover in Tort--Economic Loss Rule Does Not Bar Fraud or Intentional Misrepresentation Claims That Are Independent of Defendant's Breach of Contract

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that plaintiff is entitled to recover in tort (see, e.g., § 190.221).*]

PLAINTIFF IS ENTITLED TO RECOVER IN TORT FROM DEFENDANT _____ [*name*] BECAUSE DEFENDANT'S CONDUCT CONSTITUTED FRAUD _____ [AND *or* OR] INTENTIONAL MISREPRESENTATION THAT IS INDEPENDENT OF DEFENDANT'S BREACH OF CONTRACT.

A. Economic Loss Rule Does Not Necessarily Bar Recovery in Tort for Fraud and Misrepresentation Independent of Breach of Contract. The economic loss rule does not necessarily bar recovery in tort for damages that the plaintiff suffers due to a defective product, if the defendant's acts constituted fraud or intentional misrepresentation that was independent of the defendant's breach of contract (*Robinson Helicopter Co. v. Dana Corp. (2004) 34 Cal. 4th 979, 989-992, 22 Cal. Rptr. 3d 352, 102 P.3d 268*).

B. Economic Loss Rule Does Not Apply to Any Affirmative Fraud Action Where Plaintiff Can Establish That Fraud Exposed Plaintiff to Liability. The economic loss rule is inapplicable to any affirmative fraud action in which the plaintiff can establish that the fraud exposed the plaintiff to liability (*County of Santa Clara v. Atlantic Richfield Co. (2006) 137 Cal. App. 4th 292, 318, 40 Cal. Rptr. 3d 313 , review granted, depublished, 80 Cal. Rptr. 3d 629, 188 P.3d 579, 2008 Cal. LEXIS 9073*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a plaintiff is entitled to recover in tort because the economic loss rule does not preclude damages for fraud or intentional misrepresentation that is independent of the defendant's breach of contract.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting or opposing a motion for summary judgment or summary adjudication on the issue of whether the defendant's fraud or misrepresentation was independent of defendant's breach of contract. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form to show the relationship between the facts of the case and the points of law stated. For example, counsel should show facts indicating that the defendant made affirmative representations that the plaintiff relied on to the plaintiff's detriment.

[b] Related Points and Authorities

For points and authorities relating to the availability of tort damages generally, see Ch. 64, *Damages: Tort* . For points and authorities relating to fraud generally, see Ch. 105, *Fraud and Deceit* .

[c] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 190.224* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Economic Loss Rule Does Not Necessarily Bar Recovery in Tort for Fraud and Misrepresentation Independent of Breach of Contract

In ***Robinson Helicopter Co. v. Dana Corp.*** *(2004) 34 Cal. 4th 979, 22 Cal. Rptr. 3d 352, 102 P.3d 268* , the defendant manufactured sprag clutches for the plaintiff's helicopters. The aircraft's FAA type certificate required that each clutch be ground to a specified level of hardness. Without informing the plaintiff or the FAA, the defendant changed its grinding process to a different level, but the defendant continued to provide written certificates that the clutches had been manufactured in conformance with the plaintiff's specifications. The clutches that were ground at the nonconforming level of hardness resulted in several cases of cracked clutch assemblies, requiring the plaintiff to spend over $1.5 million in replacement costs. However, the nonconforming clutches did not result in any injury or property damage. The plaintiff filed suit, alleging fraud and misrepresentation. At trial, the jury found for the plaintiff, and the defendant appealed. The court of appeal applied the economic loss rule and held that the plaintiff could not recover in tort because the plaintiff had suffered only economic losses. The plaintiff sought review by the California Supreme Court, which reversed, holding the economic loss rule did not bar the plaintiff's claims of fraud and intentional misrepresentation and rejecting a broad interpretation of the economic loss rule that would bar tort recovery in every case in which only economic damages occur.

The Court focused its decision solely on the defendant's provision of the false certificates of conformance. It pointed to its previous decision, *Erlich v. Menezes (1999) 21 Cal. 4th 543* , in which it stated that conduct amounting to a breach of contract becomes tortious only if it also violates a duty independent of the contract arising from principles of tort law. Among the situations in which tort damages have been permitted in contract cases include a breach of duty that directly causes physical injury. A tortious breach of contract may also occur if the breach is accompanied by a traditional common law tort, such as fraud, or if one party intentionally breaches the contract knowing that the breach will cause severe harm, such as mental anguish, or substantial consequential damages (*34 Cal. 4th 979, 989)* .

According to the Court, the defendant's issuance of the false certificates of conformance unquestionably constituted affirmative misrepresentations that the plaintiff justifiably relief on to the plaintiff's detriment--that is, the elements of fraud. Therefore, the defendant's tortious conduct was separate from the breach itself (providing the nonconforming clutches). The defendant's provision of faulty clutches also exposed the plaintiff to liability for personal damages and to disciplinary action by the FAA. The Court held that the economic loss rule did not bar the plaintiff's fraud and intentional misrepresentation claims because they were independent of the defendant's breach of contract (*34 Cal. 4th 979, 990-991)* .

The Court noted that its holding was supported by California's public policy favoring a business climate free of deceptive practices. It dismissed concerns that its decision would open the floodgates to litigation, because the holding was narrow in scope and limited to a defendant's affirmative misrepresentations that a plaintiff relies on and that expose a plaintiff to liability for personal damages independent of the plaintiff's economic loss (*34 Cal. 4th 979, 992)* .

[b] Economic Loss Rule Does Not Apply to Any Affirmative Fraud Action Where Plaintiff Can Establish That Fraud Exposed Plaintiff to Liability

In ***County of Santa Clara v. Atlantic Richfield Co.*** *(2006) 137 Cal. App. 4th 292, 40 Cal. Rptr. 3d 313 , review granted, depublished, 80 Cal. Rptr. 3d 629, 188 P.3d 579, 2008 Cal. LEXIS 9073* , governmental entities filed a class action against lead paint and pigment manufacturers alleging, *inter alia*, fraud. The trial court granted summary judgment in favor of the manufacturers on the products liability and fraud causes of action on statute of limitations grounds. The Court of Appeal reversed.

The court first determined that ***Robinson Helicopter Co. v. Dana Corp.*** *(2004) 34 Cal. 4th 979, 22 Cal. Rptr. 3d 352, 102 P.3d 268* , discussed in *§ 190.222[3][a]*, precludes application of the economic loss rule to *any* intentional affirmative fraud action where the plaintiff can establish that the fraud exposed the plaintiff to liability, as opposed to only fraud actions that *also* accompany, but are independent of, breach of contract causes of action. The court found support for its conclusion in the structure of the *Robinson* opinion. Namely, it was only *after* the supreme court held that the defendant's conduct constituted a tort independent of its breach of contract that the court addressed the application of the economic loss rule. In the instant case, the municipalities alleged that the manufacturers made affirmative representations about the dangers of exposure to low levels of lead, causing them to delay making timely efforts to prevent and treat low-level lead exposure. This delay resulted in more people being exposed as well as increased the cost of treatment for those who had been exposed. These people might hold the plaintiffs liable for the permanent damage to their bodies. Thus, the plaintiffs' potential liability to persons exposed to lead in their buildings was independent of the economic harm to plaintiffs from the additional costs of prevention and treatment. Thus, the economic loss doctrine did not apply to plaintiffs' fraud cause of action.

The court next concluded that defendants failed to establish that the plaintiffs' fraud cause of action accrued more than three years prior to the filing of the complaint and was thus time-barred under *Code Civ. Proc. § 338(d)* (*137 Cal. App. 4th 292, 328-329)* .

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19-190 California Points & Authorities § 190.223

§ 190.223 Supporting Contention That Plaintiff Is Entitled to Punitive Damages [Civ. Code § 3294]--Punitive Damages Available in Strict Products Liability Action

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is liable for plaintiff's injuries caused by defendant's product* (*see, e.g., §§ 190.220, 190.284*)].

PLAINTIFF IS ENTITLED TO RECOVER PUNITIVE DAMAGES FROM DEFENDANT _____ [*name*] BECAUSE DEFENDANT ACTED DESPICABLY IN PLACING _____ [*specify product*] ON THE MARKET IN WILLFUL AND CONSCIOUS DISREGARD OF THE SAFETY OF OTHERS.

A. Punitive Damages Available in Products Liability Action When Defendant Consciously Disregards Safety of Others. A plaintiff may recover punitive damages under *Section 3294 of the Civil Code* in a strict products liability case [based on design defect] against a defendant who has acted despicably with a willful conscious disregard of the safety of others (*Civ. Code § 3294(a), (c)(1)*; *see Hasson v. Ford Motor Co. (1982) 32 Cal. 3d 388, 402-403, 185 Cal. Rptr. 654, 650 P.2d 1171* (decided under prior law); *Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 810, 174 Cal. Rptr. 348* (decided under prior law)). A defendant has acted with such conscious disregard when that defendant, aware of the probable dangerous consequences of his or her conduct, willfully and deliberately failed to avoid those consequences (*Hasson v. Ford Motor Co. (1982) 32 Cal. 3d 388, 402-403, 185 Cal. Rptr. 654, 650 P.2d 1171* (decided under prior law); *Hilliard v. A.H. Robins Co. (1983) 148 Cal. App. 3d 374, 395, 196 Cal. Rptr. 117* (decided under prior law)).

[*Optional*] **B. Conscious Disregard of Probability of Injury to Consuming Public May Prove Conscious Disregard of Safety of Others.** Evidence that a defendant's conduct constituted a conscious disregard of the probability of injury to members of the consuming public may prove that the defendant acted with a conscious disregard of the safety of others under the meaning of *Section 3294 of the Civil Code* (*Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 813, 174 Cal. Rptr. 348* (decided under prior law)).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that punitive damages should be imposed on defendant in a strict products liability case.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary judgment or summary adjudication on the issue that defendant is subject to punitive damages. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, and in any other relevant points and authorities combined with this form, to show the relationship between the facts of the case and the points of law stated. For example, counsel should show facts indicating that defendant was aware of the probable dangerous consequences of his or her conduct, and that he or she willfully and deliberately failed to avoid those consequences [*see, e.g., Hasson v. Ford Motor Co. (1982) 32 Cal. 3d 388, 185 Cal. Rptr. 654, 650 P.2d 1171* (decided under prior law; defendant placed automobile with defective brakes on market, knowing earlier identical models were defective); *Hilliard v. A.H. Robins Co. (1983) 148 Cal. App. 3d 374, 196 Cal. Rptr. 117* (decided under prior law; defendant had reports from employees about wicking hazard of *IUD); Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 174 Cal. Rptr. 348* (decided under prior law; defendant had conducted crash tests that showed dangers of automobile that it subsequently marketed)].

[b] Effect of 1987 Amendment to Civ. Code § 1714

The 1987 amended version of *Civ. Code § 3294(c)(1)* has changed the definition of malice that is applicable when a defendant's conduct was not intended to cause injury to the plaintiff. Prior to the amendment, such malice was defined as conduct that is carried on by the defendant with conscious disregard of the safety or rights of others. The 1987 amendment added the requirements that the defendant's conduct be "despicable" and that the conduct be carried out with a "willful" as well as conscious disregard of the safety or rights of others. Some of the cases discussed in this form are based on prior law under which the requirements for entitlement to punitive damages were less rigorous than under current law. Counsel should note that the earlier definition of malice is still applicable in any action in which the trial commenced prior to January 1, 1988 [*see Civ. Code § 3294(e)*].

[c] Related Points and Authorities

For points and authorities relating to the availability of punitive or exemplary damages generally, see Ch. 64, *Damages: Tort* . For points and authorities relating to the amount of punitive damages in products liability cases, see *§ 190.223A*.

[d] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 190.226* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Punitive Damages Available in Products Liability Action When Defendant Consciously Disregards Safety of Others

The facts and procedural background of ***Hasson v. Ford Motor Co.*** *(1982) 32 Cal. 3d 388, 185 Cal. Rptr. 654, 650 P.2d 1171* (decided under prior law), are discussed in *§ 190.50[3][a]*. The Supreme Court affirmed a judgment imposing punitive damages against an automobile manufacturer for personal injuries sustained by plaintiff when the

brakes of the automobile failed, holding that substantial evidence had been presented to support the award. The Court explained that punitive damages were available on a showing of a conscious disregard of the safety of others, which may constitute malice within the meaning of *Civ. Code § 3294*. The Court noted that in order to justify an award of punitive damages on this basis, plaintiff must establish that defendant was aware of the probable dangerous consequences of his or her conduct, and that he or she willfully and deliberately failed to avoid those consequences. In this case, the Court held that substantial evidence had been introduced that established that defendant had been aware of such consequences but had willfully and deliberately failed to avoid those consequences. Specifically, plaintiff had introduced evidence that defendant had marketed a nearly identical model of the automobile in 1965 that had numerous failures and was similarly defective, yet defendant proceeded to market the 1966 model despite its knowledge of those previous failures (*32 Cal. 3d 388, 402-403)* .

The facts and procedural background of ***Grimshaw v. Ford Motor Co.*** *(1981) 119 Cal. App. 3d 757, 174 Cal. Rptr. 348* (decided under prior law), are discussed in *§ 190.114[3][a]*. In affirming the judgment, the court of appeal held that punitive damages were properly imposed on the manufacturer of an automobile that had burst into flames when rear-ended, killing plaintiff's decedent. The court held that even though the case was based on a design defect theory of strict products liability, punitive damages were nevertheless available under *Civ. Code § 3294*. The court reasoned that the interpretation of the word "malice," as used in *Civ. Code § 3294*, encompassed conduct evincing the callous and conscious disregard of public safety by those who manufacture and market mass-produced articles, and that such an interpretation was consonant with and furthered the objectives of punitive damages. The court explained that governmental safety standards and the criminal law have failed to provide adequate consumer protection against the manufacture and distribution of defective products, and that punitive damages were the most effective remedy for consumer protection against defectively designed mass-produced articles (*119 Cal. App. 3d 757, 810)* .

In ***Hilliard v. A.H. Robins Co.*** *(1983) 148 Cal. App. 3d 374, 196 Cal. Rptr. 117* (decided under prior law), plaintiff suffered severe personal injuries when a Dalkon Shield intrauterine device (IUD), which had been inserted in her, migrated into her pelvic cavity and caused serious infection. Plaintiff brought an action in strict liability, warranty, and negligence against the manufacturer of the IUD and against other defendants. The trial court bifurcated the issue of punitive damages, and the jury returned a general verdict against the defendant manufacturer for general damages but exonerating the other defendants. Defendant manufacturer then moved for a directed verdict on the bifurcated punitive damage issue, which the trial court granted. Both plaintiff and defendant manufacturer appealed.

The court of appeal reversed the directed verdict on the punitive damages issue, but affirmed the remaining portion of the judgment. The court held that plaintiff had presented sufficient evidence of malice for the jury to consider awarding punitive damages, that the trial court erroneously excluded evidence proffered by plaintiff on the issue of punitive damages, and that no other reversible error had been committed. In discussing the punitive damages issue, the court reiterated prior appellate case law that punitive damages may be recovered in a products liability case. Additionally, the court stated that in order to justify an award of punitive damages on the basis of a conscious disregard of the safety of others, plaintiff must establish that defendant was aware of the probable dangerous consequences of its conduct and that it willfully and deliberately failed to avoid those consequences. In this case, plaintiff had presented substantial evidence to establish conscious disregard. Specifically, plaintiff presented evidence showing that defendant had reports from its own employees about a wicking hazard of the IUD, which had caused the migration of the device in plaintiff; that defendant had elected to continue to market the device without changing the product to reduce the wicking effect; that defendant knew of x-ray problems in showing where the IUD was located, such as those experienced by plaintiff, yet did nothing to change the product to alleviate the radiolucency problem; and that defendant knew of a large number of cases of pelvic inflammatory disease and other complications from use of the IUD, yet defendant continued to market the product (*148 Cal. App. 3d 374, 397-398)* .

[b] Conscious Disregard of Probability of Injury to Consuming Public May Prove Conscious Disregard of Safety of Others

The facts and procedural background of ***Grimshaw v. Ford Motor Co.*** *(1981) 119 Cal. App. 3d 757, 174 Cal. Rptr. 348* (decided under prior law), are discussed in *§§ 190.114[3][a]* and *190.223[3][b]*. The court of appeal found ample evidence to support a finding of malice to justify imposing punitive damages on defendant manufacturer. Specifically, defendant had conducted crash tests, the results of which showed that the automobile's fuel tank and rear structure would expose consumers to serious injury or death in a 20-30-miles-per-hour collision. Defendant knew of and could have corrected the hazardous design defects at minimal cost, but decided to defer correction of the shortcomings by engaging in a cost-benefit analysis balancing human lives and limbs against corporate profits. The court viewed defendant's institutional mentality as one of callous indifference to public safety. Because substantial evidence had been presented that defendant's conduct constituted conscious disregard of the probability of injury to members of the consuming public, malice under the meaning of *Civ. Code § 3294* had been shown and the imposition of punitive damages was proper (*119 Cal. App. 3d 757, 813)* .

[4] Additional Authorities

[a] Punitive Damages Available in Products Liability Action When Defendant Consciously Disregards Safety of Others

In *Vossler v. Richards Mfg. Co. (1983) 143 Cal. App. 3d 952, 192 Cal. Rptr. 219* (decided under prior law), plaintiff sustained personal injuries after being surgically implanted with a prosthetic device that, because of a manufacturing error, did not fit the template for which it was made. The device's manufacturing defect was known to the manufacturer at the time of sale, but was concealed from its sales personnel, the surgeon who designed it, and from the medical profession. Plaintiff brought an action in strict liability against the device's manufacturer. The jury awarded plaintiff both compensatory and punitive damages, and defendant appealed. The court of appeal affirmed the verdict. The court held that the trial court had not committed alleged errors in certain evidentiary rulings, and that jury instructions regarding compensatory and punitive damages were not erroneous. Further, the court held that the award of punitive damages was appropriate under the circumstances, even though the ratio of the punitive damages to the compensatory damages was 20 to 1. The court explained that the punitive damages award was justified because defendant had purposely concealed the discrepancy in size between the medium final component as originally designed and as later produced by defendant from the medical profession, from the device's inventor, and from its own sales personnel, solely to protect its market position. In addition, defendant had further attempted to capitalize on its concealment of its manufacturing error by marketing the originally designed medium-size components as a purportedly new size. The court expressed reservations about applying the "conscious disregard for the safety of others" standard in all products liability cases, because a manufacturer designing a product must take trade-offs in terms of product safety against cost and utility, and the imposition of such a standard may tend to discourage product development. However, the court held that such considerations were not relevant in this case, because the case did not involve a design defect but rather a manufacturing defect of which defendant was aware when it decided to continue to market the product (*143 Cal. App. 3d 952, 966-968)* .

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19-190 California Points & Authorities § 190.223A

§ 190.223A Supporting Contention That Amount of Punitive Damages Awarded Is Excessive--Constitutional Guideposts

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that the amount of punitive damages awarded is excessive (see § 190.223).*]

THE AMOUNT OF PUNITIVE DAMAGES AWARDED TO PLAINTIFF IS EXCESSIVE UNDER FEDERAL AND STATE CONSTITUTIONAL STANDARDS.

A. Review of Punitive Damages Award Encompasses Three Constitutional "Guideposts." A review of a punitive damages award encompasses the following three constitutional "guideposts": (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the actual harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases (*State Farm Mut. Auto. Ins. Co. v. Campbell (2003) 538 U.S. 408, 418, 123 S. Ct. 1513, 155 L. Ed. 2d 585* ; *BMW of N. Am., Inc. v. Gore (1996) 517 U.S. 559, 575, 116 S. Ct. 1589, 134 L. Ed. 2d 809* ; *Bullock v. Philip Morris USA, Inc. (2008) 159 Cal. App. 4th 655, 689)* .

B. Factors Guiding Determination of Degree of Reprehensibility. Factors that guide the determination of the degree of reprehensibility are: (1) whether the harm caused was physical as opposed to economic; (2) whether the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; (3) whether the target of the conduct was financially vulnerable; (4) whether the conduct involved repeated actions or was an isolated incident; and (5) whether the harm was the result of intentional malice, trickery, or deceit, or was mere accident (*State Farm Mut. Auto. Ins. Co. v. Campbell (2003) 538 U.S. 408, 419, 123 S. Ct. 1513, 155 L. Ed. 2d 585* ; *Bullock v. Philip Morris USA, Inc. (2008) 159 Cal. App. 4th 655, 690* ; *Boeken v. Philip Morris Inc. (2005) 127 Cal. App. 4th 1640, 1690, 26 Cal. Rptr. 3d 638, 677)* .

C. U.S. Supreme Court Cases Do Not Preclude California From Considering Defendant's Recidivism in Assessing Culpability. Due process concerns do not prohibit state courts, in awarding or reviewing punitive damages, from considering the defendant's illegal or wrongful conduct towards others that was similar to the conduct that injured the plaintiff (*Johnson v. Ford Motor Co. (2005) 35 Cal. 4th 1191, 29 Cal. Rptr. 3d 401, 113 P.3d 82*).

D. Factors to Consider in Determining Whether Punitive Damages Award Is Excessive. Three factors to consider in reviewing whether a punitive damages award is excessive are: (1) the reprehensibility of the acts of the defendant in light of the record as a whole; (2) the amount of compensatory damages awarded; and (3) the wealth of the particular defendant (*Boeken v. Philip Morris Inc. (2005) 127 Cal. App. 4th 1640, 1689, 26 Cal. Rptr. 3d 638, 676)* .

E. Punitive Damages Previously Awarded for Same Conduct Are Relevant. Punitive damages previously imposed against the defendant for the same conduct in other cases, as well as possible future awards, are relevant in determining the amount of punitive damages required to sufficiently punish and deter, as long as the other cases involve identical issues (*Boeken v. Philip Morris Inc. (2005) 127 Cal. App. 4th 1640, 1701, 26 Cal. Rptr. 3d 638, 685)* .

F. Due Process Clause Prohibits State From Using Punitive Damages to Punish Defendant For Injury It Inflicted Upon Nonparties. The Due Process Clause forbids a state to use a punitive damages award to punish a defendant for injury that it inflicted upon strangers to the litigation (*Philip Morris USA v. Williams (2007) 569 U.S. 346, 127 S. Ct. 1057, 1063, 166 L. Ed. 2d 940* ; *Bullock v. Philip Morris USA, Inc. (2008) 159 Cal. App. 4th 655, 692-694* .

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the punitive damages awarded to the plaintiff in a strict products liability case are excessive under federal and state constitutional standards.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of punitive damages. For example, they may be combined with points and authorities supporting a motion for a new trial on the issue of punitive damages. These points and authorities may also be adopted for use in an appellate brief.

[b] Argument

Counsel should insert argument in this form to show the relationship between the facts of the case and the points of law stated. For example, counsel should show facts indicating that the compensatory damages award was significant, that other punitive damages awards have previously been imposed against the defendant, and that there is the possibility of future punitive damages awards in cases with identical issues [*see, e.g.,* *Boeken v. Philip Morris Inc. (2005) 127 Cal. App. 4th 1640, 1692, 26 Cal. Rptr. 3d 638, 678]* .

[c] Related Points and Authorities

For points and authorities relating to the plaintiff's entitlement to punitive damages, see *§ 190.223*.

[3] Discussion of Authorities

[a] Review of Punitive Damages Award Encompasses Three Constitutional "Guideposts"

In ***State Farm Mut Auto. Ins. Co. v. Campbell*** *(2003) 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585* , the U.S. Supreme Court applied the factors set forth in *BMW of North America, Inc. v. Gore* [*BMW of N. Am., Inc. v. Gore (1996) 517 U.S. 559, 575, 116 S. Ct. 1589, 134 L. Ed. 2d 809]* , to reverse a $145 million punitive damages award in an

insurance bad faith case arising out of a fatal motor vehicle accident. The insurer had refused to settle the wrongful death and tort case against its insureds. The jury ultimately returned a judgment against the insureds for over three times the amount offered in settlement. The insurer at first refused to cover the excess liability, resulting in prolonged litigation among all the parties. The insureds then filed their bad faith, fraud, and emotional distress claim against the insurer. The Utah jury awarded $2.6 million in compensatory damages and $145 million in punitive damages, which the trial court reduced to $1 million and $25 million, respectively. Applying the *Gore* guideposts, the Utah Supreme Court then reinstated the $145 million punitive damages award.

In a 6 to 3 opinion authored by Justice Kennedy, the U.S. Supreme Court reversed. Reiterating principles set forth in earlier cases governing punitive damages, the Court again expressed its concern over the imprecise manner in which punitive damages systems are administered, especially if the decision maker is presented with irrelevant evidence or vague jury instructions. The Court concluded that this case was neither difficult nor close under the three *Gore* guideposts.

Addressing the first guidepost, the reprehensibility of the defendant's conduct, the Court found that a more modest punishment could have satisfied the state's legitimate objectives. Instead, the case was improperly used as a platform to expose and punish the perceived deficiencies in the defendant's operations throughout the country. As stated in *Gore*, the jury should be instructed that it may not use evidence of out-of-state conduct to punish a defendant for conduct that was lawful where it occurred. The Utah court also erred in awarding punitive damages to punish and deter conduct that bore no relation to the insureds' harm--for example, the defendant's investigation into the personal life of one of its employees (*538 U.S. 408, 419-424)* .

Turning to the second *Gore* guidepost, the disparity between the actual harm suffered by the plaintiff and the punitive damages award, the Court again declined to impose a bright-line ratio that a punitive damages award cannot exceed. It pointed out, however, that in practice, few awards exceeding a single-digit ratio between punitive damages and compensatory damages will satisfy due process. Noting that the case did not involve any physical assault or trauma, and that the compensatory damages award was substantial, the Court found that there was a presumption against the 145-to-1 ratio between the punitive damages and compensatory damages awards (*538 U.S. 408, 424-428)* .

The court only briefly addressed the third *Gore* guidepost, the difference between the punitive damages awarded and the civil penalties authorized in similar cases. The Court noted that a $10,000 fine for an act for fraud was the most relevant civil sanction, an amount that was dwarfed by the $145 million punitive damages award. The Court concluded that proper application of the *Gore* factors would likely justify a punitive damages award at or near the amount of compensatory damages (*538 U.S. 408, 428-429)* .

Bullock v. Philip Morris USA, Inc. *(2008) 159 Cal. App. 4th 655* , is discussed at *§ 190.223A[3][f]*.

[b] Factors Guiding Determination of Degree of Reprehensibility

State Farm Mut. Auto. Ins. Co. v. Campbell *(2003) 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585* , is discussed in *§ 190.223A[3][a]*.

Bullock v. Philip Morris USA, Inc. *(2008) 159 Cal. App. 4th 655* , is discussed at *§ 190.223A[3][f]*.

In ***Boeken v. Philip Morris Inc.*** *(2005) 127 Cal. App. 4th 1640, 26 Cal. Rptr. 3d 638* , the plaintiff, a smoker, brought an action against a cigarette manufacturer for injuries caused by its product. The jury awarded the plaintiff $5,539,127 in compensatory damages and $3 billion in punitive damages. The trial court reduced the punitive damages award to $100 million. The court of appeal initially reduced that award to $50 million. On rehearing, after extensive evaluation of the federal and state standards for review of punitive damages, the court of appeal affirmed the $50 million award.

In making its determination, the court pointed out that the plaintiff's injuries were physical, as opposed to merely economic, that he was physically and psychologically vulnerable, that the defendant knew that it was manufacturing a dangerous product, and in fact added chemicals to it to make it more addictive. Moreover, the defendant continued its conduct for nearly half a century with indifference to the safety of others (*127 Cal. App. 4th 1640, 1692)* . As for the ratio of compensatory damages to punitive damages, the court interpreted *State Farm's* language as being instructive, not binding (*127 Cal. App. 4th 1640, 1695-1696)* . The court next examined the defendant's wealth and accepted the trial court's finding of the defendant's value at between $30 and $35 million (*127 Cal. App. 4th 1640, 1697)* . The court found no analogous civil or criminal penalties against which to measure the award of punitive damages. Applying the law to the facts, the court found that the defendant's 40 years of fraud and continuing conscious disregard for the safety of consumers was "exceptionally extreme." At the same time, it acknowledged that the compensatory damages award of $5.5 million was significant. The court took into consideration previous punitive damages awards imposed against the defendant, as well as the possibility of future awards in cases with identical issues. The court concluded that more than a single digit multiplier was not justified, but that the extreme reprehensibility of defendant's conduct justified a ratio of at least 9 to 1 (*127 Cal. App. 4th 1640, 1700-1703)* .

[c] U.S. Supreme Court Cases Do Not Preclude California From Considering Defendant's Recidivism In Assessing Culpability

In ***Johnson v. Ford Motor Co.*** *(2005) 35 Cal. 4th 1191, 29 Cal. Rptr. 3d 401* , a fraud case that did not involve products liability, the California Supreme Court addressed the due process considerations of punitive damages awards. The plaintiffs alleged that the defendant, an automobile manufacturer, concealed their automobile's history of transmission work when reselling the car. The jury awarded the plaintiffs $17,811 in compensatory damages and $10 million in punitive damages. The court of appeal held that the defendant could constitutionally be punished only for its fraud on the plaintiffs and not for its overall course of conduct. It reduced the punitive damages award to $53,435, approximately three times the compensatory damages. The California Supreme Court reversed, holding that the court of appeal failed to adequately consider that the defendant's conduct was more reprehensible because it was part of a repeated corporate practice, rather than an isolated incident. After reviewing the U.S. Supreme Court's analyses in *Gore* and *State Farm*, the Court found that due process does not prohibit state courts, in awarding or reviewing punitive damages, from considering the defendant's wrongful conduct towards others that was similar to the tortious conduct that injured the plaintiff. It accordingly found that a civil defendant's recidivism remains pertinent to an assessment of culpability (*35 Cal. 4th 1191, 1196-1204)* . The Court criticized the approach to punitive damages taken by the court of appeal in *Romo v. Ford Motor Co.* [*Romo v. Ford Motor Co. (2003) 113 Cal. App. 4th 738, 749, 6 Cal. Rptr. 3d 793]* , as incorrectly suggesting that appellate review must be "blind to the state's interest in punishing and deterring a wrongful corporate practice." The Court found that California's policy of using punitive damages to deter continuation or imitation of a corporation's course of wrongful conduct in fact survived U.S. Supreme Court cases such as *Gore* and *State Farm*. However, the court disapproved of the plaintiffs' "aggregate disgorgement" theory of punitive damages (*35 Cal. 4th 1191, 1206)* .

[d] Factors to Consider in Determining Whether Punitive Damages Award Is Excessive

Boeken v. Philip Morris Inc. *(2005) 127 Cal. App. 4th 1640, 26 Cal. Rptr. 3d 638* , is discussed in *§ 190.223A[3][b]*.

[e] Punitive Damages Previously Awarded For Same Conduct Are Relevant

Boeken v. Philip Morris Inc. *(2005) 127 Cal. App. 4th 1640, 26 Cal. Rptr. 3d 638* , is discussed in *§ 190.223A[3][b]*.

[f] Due Process Clause Prohibits State From Using Punitive Damages to Punish Defendant for Injury It Inflicted Upon Nonparties

In *Philip Morris USA v. Williams (2007) 569 U.S. 346, 127 S. Ct. 1057, 166 L. Ed. 2d 940* , the U.S. Supreme Court struck down a $79.5 million punitive damage against a cigarette manufacturer, holding that an award based in part upon

the jury's desire to punish the defendant for harming persons not before the court would amount to a taking of "property" without due process.

The case began in an Oregon state court, where the jury awarded a smoker's estate $821,0000 in compensatory damages and $79.5 million in punitive damages. The award was initially reduced to $32 million, but was restored by the Oregon Court of Appeals. The Oregon Supreme Court found that the $79.5 million award was not grossly excessive. The U.S. Supreme Court granted certiorari to consider (1) the manufacturer's claim that Oregon had unconstitutionally permitted it to be punished for harming nonparty victims; and (2) whether Oregon had ignored the requirement that punitive damages be reasonably related to the plaintiff's harm.

Justice Breyer wrote the opinion of the Court, in which Chief Justice Roberts and Justices Kennedy, Souter, and Alito joined. It answered only the first of the two questions, limiting its consideration to the Constitution's procedural limitations. Without any introduction, the Court stated that the Due Process Clause prohibits a state from using a punitive damages award to punish a defendant for injury that it inflicts upon nonparties. It based its conclusion on three factors. First, the Due Process Clause prohibits a state from punishing an individual without providing that individual an opportunity to present every available defense. Second, permitting punishment for injuring a nonparty victim would open the door to limitless questions involving factors such as the number of other victims and the severity of their injuries, magnifying concerns of arbitrariness and uncertainty. Finally, the Court found no authority supporting the use of punitive damages awards for the purpose of punishing a defendant for harming others. It explained that its approval in *State Farm* of considering the potential harm the defendant's conduct could have caused referred to potential harm *to the plaintiff.*

Acknowledging that a plaintiff may show harm to others to demonstrate reprehensibility, the Court cautioned that a jury may not go beyond this and use the punitive damages award for the prohibited purpose described above. Thus, the Due Process Clause requires States to provide assurances that juries are not seeking merely to determine reprehensibility but also to punish for harm caused to strangers. As for the Oregon court's concern over how a jury can "consider" harm to others yet withhold that consideration from the punishment calculation, the Court held that where the risk of misunderstanding is significant, a court--upon request--must protect against that risk. In conclusion, the Oregon Supreme Court applied the wrong constitutional standard when considering the cigarette manufacturer's appeal. The Court vacated the judgment and remanded the case (*549 U.S. 346, 127 S. Ct. 1057*).

Justice Stevens, Justice Thomas, and Justice Ginsburg each wrote separate dissenting opinions.

In ***Bullock v. Philip Morris USA, Inc.*** *(2008) 159 Cal. App. 4th 655* , the trial court refused to give the cigarette manufacturer's requested jury instruction not to impose punishment for harms suffered by persons other than the plaintiff. The jury returned a special verdict finding in favor of the plaintiff on several counts and awarding her $850,000 in compensatory damages. The jury later awarded her $28 billion in punitive damages. The trial court subsequently remitted the punitive damages award to $28 million, an amount 33 times greater than the compensatory damages award. The California Supreme Court depublished and granted review [*48 Cal. Rptr. 3d 365, 141 P.3d 718]* , agreeing to defer further action pending the U.S. Supreme court's decision in **Philip Morris USA v. Williams.** ***Philip Morris USA v. Williams*** *(2007) 569 U.S. 346, 127 S. Ct. 1057, 166 L. Ed. 2d 940* , is discussed in *§ 190.223A[3][f]*. On remand, the appellate court concluded that the refusal to give the cigarette manufacturer's proposed instruction not to impose punishment for harm caused to nonparties to the litigation was error. The court ordered a new trial to determine the amount of punitive damages (*159 Cal. App. 4th 655, 692-694)* .

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19-190 California Points & Authorities § 190.223B

§ 190.223B Supporting Contention That Defendant May Not Apportion Fault to Entity That Lacked Legal "Fault"--Civ. Code § 1431.2

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum supporting the contention that defendant may not apportion fault to another entity.*]

DEFENDANT _____ [*name*] MAY NOT APPORTION FAULT UNDER *CIV. CODE § 1431.2* TO PARTY WHO LACKS LEGAL "FAULT."

A. Tobacco Companies Protected Under Former *Civ. Code § 1714.45* Were Not Tortfeasors to Which Comparative Fault Could Be Assigned. Tobacco companies protected by former Civ. Code § 1714.45 had no "fault" or responsibility, and could not be assigned comparative fault pursuant to Proposition 51 (*Richards v. Owens-Illinois, Inc. (1997) 14 Cal. 4th 985, 988-989, 60 Cal. Rptr. 2d 103, 928 P.2d 1181*).

B. Party Absolved of Liability by Primary Assumption of Risk Is Not Subject to Allocation of Fault. A party who has been granted summary judgment on the ground of primary assumption of risk is not subject to allocation of fault under *Civ. Code § 1431.2* **(** *Ford v. Polaris Indus., Inc. (2006) 139 Cal. App. 4th 755, 777-779, 43 Cal. Rptr. 3d 215*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of the contention that defendant may not apportion fault to an entity pursuant to *Civ. Code § 1431.2* because the entity lacks legal fault and is thus not a tortfeasor to whom comparative fault may be assigned.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with

points and authorities supporting a motion for summary judgment or summary adjudication of the issue that defendant may not apportion fault pursuant to *Civ. Code § 1431.2*.

[b] Argument

Counsel should insert argument in this form, and in any other relevant points and authorities combined with this form, to show the relationship between the facts of the case and the points of law stated.

[c] Related Points and Authorities

For memorandum opposing the contention that defendant is jointly and severally liable for noneconomic damages under *Civ. Code § 1431.2*, see *§ 190.228*.

[3] Discussion of Authorities

[a] Tobacco Companies Protected Under Former Civ. Code § 1714.45 Were Not Tortfeasors to Which Comparative Fault Could Be Assigned

In **Richards v. Owens-Illinois, Inc. (**1997) *14 Cal. 4th 985, 60 Cal. Rptr. 2d 103, 928 P.2d 1181* , the plaintiff was a smoker who brought a products liability action for asbestos-related injury. The defendant asbestos manufacturer contended that cigarette manufacturers shared fault for plaintiff's injuries because they provided an inherently unsafe product, and that defendant's liability for plaintiff's noneconomic damages should have been reduced accordingly. The trial court refused to allow a verdict form in which fault could be apportioned to the tobacco companies. The jury returned a verdict for plaintiff and apportioned fault among plaintiff, defendant, and several other entities. The Court of Appeal reversed, concluding that a defendant in an asbestos action could reduce its own liability for noneconomic damages by proving that tobacco companies shared fault.

The Supreme Court of California reversed. It held that *Civil Code § 1714.45*, as it appeared at the time, amounted to a legislative judgment that the tobacco companies had no legal fault or responsibility for harm caused by their products. The court concluded that under the conditions described in the statute, a tobacco supplier breached no duty and committed no tort against knowing and voluntary smokers by making cigarettes available to them. Thus, the tobacco companies were not tortfeasors to which comparative fault could be assigned for purposes of Proposition 51 (*14 Cal. 4th 985, 998-1001)* .

[b] Party Absolved of Liability by Primary Assumption of Risk Is Not Subject to Allocation of Fault

In ***Ford v. Polaris Indus., Inc.*** *(2006) 139 Cal. App. 4th 755, 43 Cal. Rptr. 3d 215* , the plaintiff sustained severe orifice injuries after falling off the rear of a personal watercraft. The trial court granted the operator's motion for summary judgment, concluding that the activity that she and the plaintiff were engaged in was subject to the doctrine of primary assumption of risk. The court then determined that the watercraft manufacturer was not entitled to summary judgment on assumption of risk grounds. It also denied the manufacturer's request to allocate fault to the operator pursuant to *Civil Code § 1431.2*. The jury returned a verdict for the plaintiff.

The appellate court held that the court properly denied the manufacturer's request for a jury form allocating some fault to the operator. The case was controlled by ***Richards v. Owens-Illinois, Inc.*** *(1997) 14 Cal. 4th 985, 60 Cal. Rptr. 2d 103, 928 P.2d 1181* . The judgment in the operator's favor on primary assumption of risk grounds constituted a judgment that as a matter of law; she therefore owed no duty to the plaintiff. Because she breached no duty and committed no tort, no degree of legal fault could be apportioned to her (*139 Cal. App. 4th 755, 777-779)* .

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19-190 California Points & Authorities § 190.223C

§ 190.223C Supporting Contention That Defendant Is Jointly and Severally Liable for Noneconomic Damages [Civ. Code § 1431.2]--Proposition 51 Does Not Apply Where Plaintiff's Injuries Are Caused Solely by Defective Product

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum supporting the contention that defendant is jointly and severally liable for noneconomic damages.*]

DEFENDANT _____ [*specify manufacturer*] IS JOINTLY AND SEVERALLY LIABLE FOR PLAINTIFF'S NONECONOMIC DAMAGES BECAUSE PROPOSITION 51 DOES NOT APPLY WHERE PLAINTIFF'S INJURIES WERE CAUSED SOLELY BY A DEFECTIVE PRODUCT.

A. Proposition 51 Does Not Apply Where Plaintiff's Injuries Were Caused Solely By Defective Product. Proposition 51 does not apply in a strict products liability case where the plaintiff's injuries were caused solely by a defective product and defendants are all in the same chain of distribution (*Bostick v. Flex Equipment Co. (2007) 147 Cal. App. 4th 80, 92* ; *Wimberly v. Derby Cycle Corp. (1997) 56 Cal. App. 4th 618, 65 Cal. Rptr. 2d 532*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of the contention that defendant is jointly and severally liable for plaintiff's noneconomic damages because *Civ. Code § 1431.2* is inapplicable (*Bostick v. Flex Equipment Co. (2007) 147 Cal. App. 4th 80, 92* ; *Wimberly v. Derby Cycle Corp. (1997) 56 Cal. App. 4th 618, 65 Cal. Rptr. 2d 532*).

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary judgment or summary adjudication of the issue that defendant

is jointly and severally liable for plaintiff's noneconomic damages.

[b] Argument

Counsel should insert argument in this form, and in any other relevant points and authorities combined with this form, to show the relationship between the facts of the case and the points of law stated. For example, counsel should state facts showing that plaintiff's injuries were caused solely by the defective product, and that the defendants were all in the same chain of distribution.

[c] Related Points and Authorities

For memorandum opposing the contention that defendant is jointly and severally liable for noneconomic damages under *Civ. Code § 1431.2*, see *§§ 190.228*, 190.229.

[3] Discussion of Authorities

[a] Proposition 51 Does Not Apply Where Plaintiff's Injuries Were Caused Solely by Defective Product

In ***Bostick v. Flex Equipment Co.*** *(2007) 147 Cal. App. 4th 80* , the plaintiff was injured while working out on weight-lifting equipment. He entered into a settlement with the gym for $7.3 million. In his product liability action against the equipment manufacturer, the jury awarded him $3.3 million in economic damages and $13 million in noneconomic damages. It apportioned 90 percent of the fault to the manufacturer, 10 percent to plaintiff, and zero percent to "other entities." The trial court concluded that the claimed liability common to the gym and the manufacturer was fully joint and several, and thus reduced plaintiff's award against the manufacturer by the full amount of his settlement with the gym.

On appeal, the plaintiff contended that Proposition 51 applied, and the manufacturer was only severally liable for his noneconomic damages. He further contended that the court erred in setting off the full amount of his $7.3 million settlement with the gym, because the setoff should have been limited to that portion of the settlement attributable to economic damages only.

The appellate court held that the court did not err in reducing plaintiff's award by the full amount of his settlement with the gym. It followed ***Wimberly v. Derby Cycle Corp****. (1997) 56 Cal. App. 4th 618, 65 Cal. Rptr. 2d 532* , which held that Proposition 51 does not apply in a strict products liability action involving a single indivisible injury because liability is imposed under this doctrine irrespective of fault. This plaintiff's injuries were caused by a single defective product, and the manufacturer was found liable under strict products liability. Thus, Proposition 51 was not triggered. To apportion noneconomic damages under Proposition 51 would result in the reduction or possible elimination of a plaintiff's recovery for noneconomic damages, thereby defeating the social justifications for strict products liability. Proposition 51 is not triggered in a strict products liability case where there is one defective product and all of the defendants are in the same chain of distribution. This is because Proposition 51 was intended to apply only when defendants' fault is comparable, and in a strict products liability case, there is no fault to compare (*147 Cal. App. 4th 80, 93-95)* .

In ***Wimberly v. Derby Cycle Corp****. (1997) 56 Cal. App. 4th 618, 65 Cal. Rptr. 2d 532* , the plaintiff was injured when the fork assembly of his bicycle broke. He brought a strict products liability action against several entities, including the designer, manufacturer, and seller of the fork assembly. He settled with several of the defendants and proceeded to trial against the distributor only. The jury returned a verdict in favor of the plaintiff. On appeal, the defendant contended that the court erred in refusing to apply Proposition 51 to require the jury the apportion fault among it and the other defendants in the chain of distribution.

The appellate court rejected this contention, ruling that Proposition 51 did not modify the common law rule that

defendants in an action for strict products liability who are in the chain of distribution of the same defective product are jointly and severally liable for all of plaintiff's economic and noneconomic damages. In reaching its conclusion, the court relied on prior case law holding that Proposition 51 does not relieve defendants whose liability is solely vicarious for all liability for noneconomic damages. Strict products liability is similar to vicarious liability, and to limit a defendant's responsibility in strict products liability cases for noneconomic damages to a proportionate share based on fault would defeat the policy reasons that supported the doctrine. Thus, Proposition 51 has no application in a strict products liability case where the plaintiff's injuries are caused solely by a defective product (*56 Cal. App. 4th 618, 630-633)* .

California Points & Authorities

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Volume 19 Chapters 190-195 PRODUCTS LIABILITY---to---PUBLIC ADMINISTRATIVE LAW
CHAPTER 190 PRODUCTS LIABILITY
PART II. FORMS
C. Damages

19-190 California Points & Authorities § 190.224

§ 190.224 Opposing Contention That Plaintiff Is Entitled to Purely Economic Damages--Economic Damages Not Available in Strict Liability Action

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is liable for plaintiff's injuries caused by defendant's product (see, e.g., § 190.226)*].

DEFENDANT _____ [*name*] IS NOT STRICTLY LIABLE TO PLAINTIFF, BECAUSE PLAINTIFF SUFFERED ONLY ECONOMIC DAMAGES, WITHOUT ADDITIONAL PHYSICAL HARM TO THE PROPERTY.

A. Economic Damages Alone Are Not Available in Strict Products Liability Action. A plaintiff is precluded from recovery on a theory of strict products liability when plaintiff's damages consist solely of economic losses (*Aas v. Superior Court (2000) 24 Cal. 4th 627, 636, 101 Cal. Rptr. 2d 718, 12 P.3d 1125* ; *Seely v. White Motor Co. (1965) 63 Cal. 2d 9, 18, 45 Cal. Rptr. 17, 403 P.2d 145* ; *Stearman v. Centex Homes (2000) 78 Cal. App. 4th 611, 623, 92 Cal. Rptr. 2d 761* ; *Sacramento Reg'l Transit Dist. v. Grumman Flxible (1984) 158 Cal. App. 3d 289, 293, 204 Cal. Rptr. 736*).

B. *J'Aire* Decision Does Not Extend to Strict Liability Action. Strict tort liability was not expanded by the decision of *J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 157 Cal. Rptr. 407, 598 P.2d 60* , to encompass recovery for economic damages (*Aas v. Superior Court (2000) 24 Cal. 4th 627, 644, 101 Cal. Rptr. 2d 718, 12 P.3d 1125* ; *Huang v. Garner (1984) 157 Cal. App. 3d 404, 423, 203 Cal. Rptr. 800*).

[*Optional*] **C. Expenses of Repairing Defect Are Purely Economic Damages for Which Recovery Is Not Available Under Strict Liability Theory.** The rule imposing strict liability in tort for damages to property presupposes (1) a defect and (2) further damage to the plaintiff's property caused by the defect. When the defect and the damage are one and the same, the defect may not be considered to have caused physical injury. Thus, the expenses of repairing the

property under these circumstances constitute purely economic damages for which plaintiff may not recover under a strict liability theory (*Sacramento Reg'l Transit Dist. v. Grumman Flxible (1984) 158 Cal. App. 3d 289, 294, 204 Cal. Rptr. 736* ; *see also* *County of Santa Clara v. Atlantic Richfield Co. (2006) 137 Cal. App. 4th 292, 321, 40 Cal. Rptr. 3d 313 , review granted, depublished,* *80 Cal. Rptr. 3d 629, 188 P.3d 579, 2008 Cal. LEXIS 9073* , *Stearman v. Centex Homes (2000) 78 Cal. App. 4th 611, 623, 92 Cal. Rptr. 2d 761*).

[*Optional*] **D. Plaintiff Is Not Entitled to Economic Damages if Alleged Construction Defect Has Not Caused Any Personal Injury or Property Damage.** If the defective product has not caused personal injury or property damage, then damages are not available in strict liability or negligence. The tort does not support recovery of damages representing the lost benefit of the bargain (*Aas v. Superior Court (2000) 24 Cal. 4th 627, 639-640, 101 Cal. Rptr. 2d 718, 12 P.3d 1125*).

[*Optional*] **E. When Defect and Damage Are One and Same, Defect May Not Be Considered to Have Caused Physical Injury.** When the defect and the damage are one and the same, the defect may not be considered to have caused physical injury (*County of Santa Clara v. Atlantic Richfield Co. (2006) 137 Cal. App. 4th 292, 321, 40 Cal. Rptr. 3d 313 , review granted, depublished,* *80 Cal. Rptr. 3d 629, 188 P.3d 579, 2008 Cal. LEXIS 9073*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a defendant is strictly liable for plaintiff's damages. The ground of opposition set forth is that plaintiff sustained only economic damages, for which defendant may not be held strictly liable.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a demurrer or motion for summary judgment or summary adjudication on the issue that defendant is subject to strict liability. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should state facts showing that plaintiff sustained neither personal injuries nor property damage yet, or no personal injury nor property damage beyond the defect itself, and that plaintiff's sole damages are economic in nature [*see, e.g.,* *Aas v. Superior Court (2000) 24 Cal. 4th 627, 639-640, 101 Cal. Rptr. 2d 718, 12 P.3d 1125* (no tort damages in absence of personal injury or damage to property); *Stearman v. Centex Homes (2000) 78 Cal. App. 4th 611, 623, 92 Cal. Rptr. 2d 761* (strict liability damages for construction defects because there was injury to property); *Sacramento Reg'l Transit Dist. v. Grumman Flxible (1984) 158 Cal. App. 3d 289, 204 Cal. Rptr. 736* (no strict liability for economic damages from purchase of buses with cracked fuel tank supports); *Huang v. Garner (1984) 157 Cal. App. 3d 404, 420, 423, 203 Cal. Rptr. 800* (no strict liability for economic damages from purchase of defective apartment complex)].

[3] Discussion of Authorities

[a] Economic Damages Alone Are Not Available in Strict Products Liability Action

NOTE:

Effective January 1, 2003, there is a limited new cause of action in California for certain specified housing defects, *Cal. Civ. Code § 895 et seq.* The Right to Repair Act (the Act) established building standards pertaining to new residential construction and provides homeowners with a cause of action against builders and individual product manufacturers for violation of those standards. *Cal. Civ. Code §§*

896, 936. In ***Greystone Homes, Inc. v. Midtec, Inc.*** *(2008) 168 Cal. App. 4th 1194, 1202, 86 Cal. Rptr. 3d 196* , the court of appeal stated that the Act abrogated the economic loss rule in such as case, thereby legislatively superseding *Aas v. Superior Court*, below.

In ***Aas v. Superior Court*** *(2000) 24 Cal. 4th 627, 639-640, 101 Cal. Rptr. 2d 718, 12 P.3d 1125* , plaintiffs owned single-family homes in a subdivision built by defendant developer and subcontractors. Plaintiff homeowners' association was responsible for managing and maintaining a condominium project of defendants. Plaintiffs alleged their dwellings suffered from a variety of construction defects affecting virtually all components and aspects of construction. Based on these defects, plaintiffs asserted causes of action for negligence, strict liability, and breaches of implied and express warranty and contract. In pretrial proceedings, defendants moved for orders in limine excluding evidence of those alleged construction defects that had not caused property damage. The trial court granted defendants' motions as to plaintiffs' tort claims. With the court's encouragement, plaintiffs sought review of the rulings in limine by petition for writ of mandate. The court of appeal denied the petitions.

The Supreme Court granted review of that decision and affirmed. The Court first evaluated the principles that hold that economic damages are not recoverable in strict liability. It phrased the question as whether plaintiffs could recover in negligence the cost of repair, or the diminished value attributable to, construction defects that have not caused property damage. Plaintiffs no long argued that strict liability provides a remedy for defects that have not caused property damage. Appreciable, nonspeculative, present injury was an essential element of a tort cause of action. Tort law provides a remedy for construction defects that cause property damage or personal injury. Focusing on the conduct of persons involved in the construction process, courts in this state have found such a remedy in the law of negligence. Viewing the home as a product, courts have also found a tort remedy in strict products liability, even when the property damage consists of harm to a sound part of the home caused by another, defective part. For defective products and negligent services that have caused neither property damage nor personal injury, however, tort remedies have been uncertain. Any construction defect can diminish the value of a house. But the difference between price paid and value received, and deviations from standards of quality that have not resulted in property damage or personal injury, are primarily the domain of contract and warranty law or the law of fraud, rather than of negligence. In actions for negligence, a manufacturer's liability is limited to damages for physical injuries; no recovery is allowed for economic loss alone (*24 Cal. 4th 627, 636)* . Whatever the product, whether homes or automobiles, strict liability affords a remedy only when the defective product causes property damage or personal injury. The tort does not support recovery of damages representing the lost benefit of a bargain, such as the cost of repairing a defective product or compensation for its diminished value (*24 Cal. 4th 627, 639)* .

The Court next evaluated plaintiffs claims, based on *J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 805, 157 Cal. Rptr. 407, 598 P.2d 60* [*see § 190.220[3][a]*], that where the risk of harm is foreseeable, an injury to the plaintiff's economic interests should not go uncompensated merely because it was unaccompanied by any injury to his person or property. The Court rephrased the question this way: Does the law of negligence protect plaintiffs' economic interests in having houses that fully comply with the building codes, measured by the cost of repairs or diminished value associated with noncompliance, even though the asserted harm to those interests is unaccompanied by any injury to person or property? The Court found that negligence did not provide such recovery. It did not matter in negligence whether or not the risk of harm was foreseeable because there was no actual harm (*24 Cal. 4th 627, 646)* . In conclusion, the Court, applying the *J'Aire* factors, did not find they justified a broad rule permitting recovery of repair costs unaccompanied by property damage or personal injury. The case was remanded for further proceedings (*24 Cal. 4th 627, 652)* .

In ***Seely v. White Motor Co.*** *(1965) 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 P.2d 145* , plaintiff purchased a truck manufactured by defendant. The truck bounced violently while being operated by plaintiff and overturned. Plaintiff was not personally injured, but the truck was damaged. Plaintiff brought an action in strict liability against defendant. The trial court found that defendant had breached its warranty to plaintiff but also found that plaintiff had not proved that an alleged defect in the truck had caused the accident. The trial court then awarded plaintiff $20,000 for payments on the purchase price and for lost profits, but refused to award damages for the repair of the truck. Both plaintiff and defendant

appealed.

The Supreme Court affirmed the judgment, holding that plaintiff had not proved that the defect had caused the damage to the truck. In reaching its decision, the Court concluded that physical damage to property, as well as personal injury, is recoverable under a strict liability theory. However, the Court indicated that recovery is limited to those two kinds of injury and does not extend to economic loss. In dicta, the Court also indicated that a plaintiff may not recover for economic loss alone in a negligence action as well as in a strict liability action (*63 Cal. 2d 9, 18)* .

NOTE:

The view expressed in the negligence dicta in *Seely v. White Motor Co.*, was modified by the Supreme Court's opinion in *J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 157 Cal. Rptr. 407, 598 P.2d 60* [*see § 190.220[3][a]*].

The facts and procedural background of ***Sacramento Reg'l Transit Dist. v. Grumman Flxible*** *(1984) 158 Cal. App. 3d 289, 204 Cal. Rptr. 736* , are discussed in *§ 190.220[3][a]*. The court of appeal held that defendant bus manufacturer may not be held strictly liable for the economic damages suffered by plaintiff from the delivery of buses that had cracked fuel tank supports and other defects. The court explained that when damage consists solely of economic losses, recovery on a theory of products liability is precluded. The court further explained that because both plaintiff and defendant were merchants, to impose strict liability under the circumstances of this case would improperly invade the rule of law adopted by the legislature in the California Uniform Commercial Code (*158 Cal. App. 3d 289, 294-295)* . The court rejected plaintiff's argument that it is anomalous to allow a consumer to sue on a theory of products liability when physical injury to a person has occurred but not when a defect is discovered that will ultimately cause the physical injury. The court concluded that the more reasonable view is that the merchant will repair the product as plaintiff did in this case. Because the question is not whether a defective product will be put in use, but rather who should bear the economic cost of repairs, the court chose not to disturb the allocation of those costs as agreed to by knowledgeable merchants (*158 Cal. App. 3d 289, 297-298)* .

[b] J'Aire Decision Does Not Extend to Strict Liability Action

The facts and procedural background of ***Huang v. Garner*** *(1984) 157 Cal. App. 3d 404, 203 Cal. Rptr. 800* , are discussed in *§§ 190.28[3][a]* and *190.220[3][a]*. Although the court of appeal allowed plaintiff to recover economic damages under a negligence theory, plaintiff was precluded from recovering such damages under a strict liability theory. The court relied on prior appellate case law in holding that a plaintiff is not entitled to recover economic damages in a strict liability action, and further held that the Supreme Court decision in *J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 157 Cal. Rptr. 407, 598 P.2d 60* [*see § 190.220[3][a]*], did not change this traditional rule with respect to strict liability (*157 Cal. App. 3d 404, 420)* .

WARNING:

In *Aas v. Superior Court (2000) 24 Cal. 4th 627, 648-649, 101 Cal. Rptr. 2d 718, 12 P.3d 1125* [*see § 190.224[3][a]*], the Supreme Court expressly disapproved *Huang* to the extent it was inconsistent with the views set out in that opinion.

[c] Expenses of Repairing Defect Are Purely Economic Damages for Which Recovery Is Not Available Under Strict Liability Theory

County of Santa Clara v. Atlantic Richfield Co. *(2006) 137 Cal. App. 4th 292, 40 Cal. Rptr. 3d 313 , review granted, depublished, 80 Cal. Rptr. 3d 629, 188 P.3d 579, 2008 Cal. LEXIS 9073* , is discussed in *§ 190.261[3][b]*.

The facts and procedural background of ***Sacramento Reg'l Transit Dist. v. Grumman Flxible*** *(1984) 158 Cal. App. 3d 289, 204 Cal. Rptr. 736* , are discussed in *§ 190.224[3][a]*. The court of appeal held that plaintiff could not recover the cost of repair of the cracked fuel tank supports of the buses that plaintiff had purchased from defendant. The court held

that the costs of repair were not recoverable, because plaintiff had failed to allege that the costs were due to a physical injury to the buses other than the defect itself. The court explained that the rule imposing strict liability in tort for damages to property presupposes (1) a defect and (2) further damage to plaintiff's property caused by the defect. When the defect and the damage are one and the same, the defect may not be considered to have caused physical injury. Thus, the court characterized the costs of repair as purely economic damages rather than physical damages, for which plaintiff could not recover (*158 Cal. App. 3d 289, 294)* .

[d] Plaintiff Is Not Entitled to Economic Damages if Alleged Construction Defect Has Not Caused Any Personal Injury or Property Damage

Aas v. Superior Court *(2000) 24 Cal. 4th 627, 101 Cal. Rptr. 2d 718, 12 P.3d 1125* , is discussed in *§ 190.224[3][a]*.

[e] When Defect and Damage Are One and Same, Defect May Not Be Considered to Have Caused Physical Injury

County of Santa Clara v. Atlantic Richfield Co. (2006) *137 Cal. App. 4th 292, 40 Cal. Rptr. 3d 313 , review granted, depublished, 80 Cal. Rptr. 3d 629, 188 P.3d 579, 2008 Cal. LEXIS 9073* , is discussed in *§ 190.261[3][b]*.

[4] Additional Authorities

[a] Economic Damages Alone Are Not Available in Strict Products Liability Action

In *Greystone Homes, Inc. v. Midtec, Inc. (2008) 168 Cal. App. 4th 1194, 86 Cal. Rptr. 3d 196* , a builder brought an action against the manufacturer of plumbing fittings, alleging that several homeowners had made claims against the builder for damage caused by the defective fittings. The trial court granted the manufacturer's motion for summary on the ground of the economic loss rule. It acknowledged that the Right to Repair Act (the Act), *Civ. Code § 895 et seq.* , provides an exception to the economic loss rule for actions brought under the Act by homeowners, but concluded that the builder was not entitled to pursue the statutorily created cause of action. The court of appeal reversed. It explained that the Act, effective January 1, 2003, established building standards pertaining to new residential construction and provides homeowners with a cause of action against builders and individual product manufacturers for violation of those standards. The Act abrogated the economic loss rule, thereby legislatively superseding *Aas v. Superior Court (2000) 24 Cal. 4th 627, 101 Cal. Rptr. 2d 718, 12 P.3d 1125* . A builder may recover from a product manufacturer for economic losses caused by the manufacturer's violations of the standards set forth in the Act through an equitable indemnity action. However, a builder may *not* recover for economic losses through a direct negligence claim based on the manufacturer's violations of the standards (Cal. App. 4th 1194, 1203).

In *Carrau v. Marvin Lumber & Cedar Co. (2001) 93 Cal. App. 4th 281, 112 Cal. Rptr. 2d 869* , the plaintiff could not recover under a strict products liability theory the costs of repairing or replacing defective windows he had purchased and incorporated into a residence he built. The only evidence of actual property damage to property other than the windows was several hundred dollars worth of damage to sheet rock and wallpaper, and the persons who purchased his house had paid the costs of repairing this damage. Nor could he recover damages based on diminution in value to the residence resulting from installation of the defective windows (*93 Cal. App. 4th 281, 112 Cal. Rptr. 2d 869, 877-878)* .

In *Stearman v. Centex Homes (2000) 78 Cal. App. 4th 611, 623, 92 Cal. Rptr. 2d 761* , Plaintiffs filed a strict liability action based on defendant's defective construction of the foundation of plaintiffs' tract home, resulting in severe slab movement and deformation, and causing extensive cracks throughout the interior and exterior surfaces of the home. The trial court entered judgment in favor of plaintiffs, defendant appealed, and plaintiffs cross-appealed the denial of their request for certain expert fees incurred. The court reversed the denial of recovery of the expert fees as damages and otherwise affirmed the judgment of the trial court. The court followed applicable precedent and held that the damage that plaintiffs sustained to their home was physical injury falling outside the parameters of economic loss, and was thus

compensable under strict liability in tort. The court also found that plaintiffs incurred the relevant expert fees in relation to the costs of repair and that such expenses were recoverable as damages in this construction defect case.

In *Fieldstone Co. v. Briggs Plumbing Prods., Inc. (1997) 54 Cal. App. 4th 357, 62 Cal. Rptr. 2d 701* , a developer brought an action for breach of express and implied warranties, implied equitable indemnity, strict liability, and declaratory relief against a manufacturer of bathroom sinks, which had been installed in plaintiff's real estate developments. Plaintiff sought to recover the costs for replacing the sinks. The trial court granted summary judgment for the defendants on the strict liability count, and the court of appeals affirmed. The defendants were not strictly liable because the plaintiff was merely seeking recovery of replacement costs when a poorly designed and built product failed to meet the plaintiff's expectations. Economic losses that are not recoverable in a strict liability action include damages for the costs of repair and replacement of a defective product. The court found there was no physical injury to plaintiff's property (*54 Cal. App. 4th 357, 363-364)* .

In *San Francisco Unified Sch. Dist. v. W.R. Grace & Co. (1995) 37 Cal. App. 4th 1318* , *44 Cal. Rptr. 2d 305* , a case decided after *J'Aire*, the plaintiff, a school district, owned buildings that contained asbestos and filed a cause of action for strict liability or negligence against asbestos manufacturers before asbestos contamination had occurred. The trial court dismissed the action on the ground that the action was barred by the statute of limitations. The court of appeal reversed the judgment, holding that the action was not barred by the statute of limitations because the owner of a building containing asbestos cannot state a cause of action in tort until physical injury (i.e., contamination) occurs. Recovery for a fully economic loss due to the mere presence of asbestos is not available in California (*37 Cal. App. 4th 1318, 1327-1328)* .

Pisano v. American Leasing (1983) 146 Cal. App. 3d 194, 194 Cal. Rptr. 77 , is discussed in *§ 190.220[4][a]*.

In *Rodrigues v. Campbell Indus. (1978) 87 Cal. App. 3d 494, 151 Cal. Rptr. 90* , a case decided before *J'Aire*, plaintiffs suffered losses in earnings when they were forced to return from the high seas to repair their fishing vessel that had been defectively constructed. Plaintiffs' action in strict liability, negligence, and warranty against the vessel's manufacturer was dismissed by the trial court, and plaintiffs appealed. The court of appeal reversed the judgment, holding that plaintiffs had stated a cause of action for negligence and strict liability under federal admiralty law. However, the court held that plaintiffs had not stated a cause of action under state law for either negligence or strict liability, because recovery for a pure economic loss is not available in California. Rather, recovery under state law is restricted to recovery for physical harm to person or property (*87 Cal. App. 3d 494, 498)* .

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Volume 19 Chapters 190-195 PRODUCTS LIABILITY---to---PUBLIC ADMINISTRATIVE LAW
CHAPTER 190 PRODUCTS LIABILITY
PART II. FORMS
C. Damages

19-190 California Points & Authorities § 190.225

§ 190.225 Opposing Contention That Plaintiff Is Entitled to Purely Economic Damages--Purely Economic Damages Not Available in Negligence Action Absent Special Relationship Between Parties

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It may be combined with a general form opposing the contention that defendant is liable for plaintiff's injuries caused by defendant's product (see, e.g., § 190.86).*]

DEFENDANT _____ [*name*] IS NOT LIABLE TO PLAINTIFF FOR PURELY ECONOMIC DAMAGES BECAUSE NO SPECIAL RELATIONSHIP EXISTS BETWEEN THE PARTIES TO THIS NEGLIGENCE ACTION AS REQUIRED BY THE *J'AIRE* DECISION, SPECIFICALLY _____ [*specify which of six J'Aire factors were not met: (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty of injury to the plaintiff, (4) the closeness of the connection between the defendant's conduct and plaintiff's injury, (5) the moral blame of defendant's conduct, and/or (6) the policy of preventing future harm, e.g.,* DEFENDANTS DID NOT INTEND THE TRANSACTION TO AFFECT PLAINTIFF BECAUSE THEY DID NOT RECOMMEND THE AUTOMATIC MILKING SYSTEM TO PLAINTIFF TO FULFILL ANY PARTICULAR NEED DISTINCT FROM THE NEEDS OF ALL POTENTIAL PURCHASERS OF THE EQUIPMENT].

Economic Damages Alone Are Not Available in Negligence Action Unless Parties Have Special Relationship. Economic damages, standing alone, are unavailable in a negligence action when the parties do not have a "special relationship." The presence or absence of a duty of care depends on an examination of the following six factors: (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty of injury to the plaintiff, (4) the closeness of the connection between the defendant's conduct and plaintiff's injury, (5) the moral blame attached to defendant's conduct, and (6) the policy and need of preventing future harm (*J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 804, 157 Cal. Rptr. 407, 598 P.2d 60* ; *Ott v. Alfa-Laval Agri, Inc. (1995) 31 Cal. App. 4th 1439, 1449-1456, 37 Cal. Rptr. 790*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition of the contention that the defendant is liable for purely economic damages in a negligence action. The ground for the contention is that the parties do not have a "special relationship" supporting such liability as required by *J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 157 Cal. Rptr. 407, 598 P.2d 60* .

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue of no liability for economic damages. It may be used in connection with a pretrial motion, such as a demurrer or a motion for summary judgment. It may also be used in a trial or appellate brief.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 190.224*.

[b] Related Pleading and Practice Forms

For a discussion and forms for use in actions involving negligence in general, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[c] Related Points and Authorities

For points and authorities relating to actions for negligence in general, see Ch. 165, *Negligence* .

[3] Discussion of Authorities

[a] Economic Damages Alone Are Not Available in Negligence Action Unless Parties Have Special Relationship

J'Aire Corp. v. Gregory *(1979) 24 Cal. 3d 799, 157 Cal. Rptr. 407, 598 P.2d 60* , is discussed in *§ 190.220[3][a]*.

In ***Ott v. Alfa-Laval Agri, Inc.*** *(1995) 31 Cal. App. 4th 1439, 1449-1456, 37 Cal. Rptr. 790* , plaintiffs brought a negligence action against milking machine manufacturers for lost profits caused by problems associated with an automatic milking system manufactured by the defendants. At the close of all evidence, the case was submitted to the jury on four counts, and the jury rendered a verdict for the plaintiffs on three counts and for the defendants on one count. The court then granted defendants' motion for judgment notwithstanding the verdict on one count, and granted defendant's motion for a new trial on the economic damages portion of another count entered for plaintiffs. Both parties appealed.

The court of appeal reversed the judgment in favor of the plaintiffs on two counts and the order for a new trial, and instead ordered the trial court to enter judgment notwithstanding the verdict for the defendants. In the published part of its opinion, the court held that the plaintiffs were not permitted to recover purely economic damages. Recovery of economic damages, standing alone and absent personal injury or property damage, is only available if the parties have a "special relationship" as required by *J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 157 Cal. Rptr. 407, 598 P.2d 60* .

The court rejected plaintiffs' argument that *J'Aire* focused on a foreseeability standard, and instead held that a six-part test needed to be applied in full to determine the presence or absence of a duty of care supporting an award of economic damages (*31 Cal. App. 4th 1439, 1454-1455)* . Specifically, the court held that the existence of a special relationship under *J'Aire* depends on the following six criteria: (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff would suffer injury, (4) the closeness of the connection of the defendant's conduct and plaintiff's injury, (5) the moral blame attached to defendant's conduct, and (6) the policy and need of preventing future harm (*31 Cal. App. 4th 1439, 1449)* .

The court concluded that the evidence did not support a finding of a "special relationship" between the parties. There was no evidence that the automatic milking system was intended to affect the plaintiffs in a particular way, as opposed to all potential purchasers of the equipment. Nor was injury to the plaintiffs reasonably foreseeable because the evidence showed that the decline in milk production was related to a problem that plaintiffs did not notice for some fifteen years (*31 Cal. App. 4th 1439, 1455-1456)* .

[4] Additional Authorities

[a] Economic Damages Alone Are Not Available in Negligence Action Unless Parties Have Special Relationship

In *Zamora v. Shell Oil Co. (1997) 55 Cal. App. 4th 204, 63 Cal. Rptr. 2d 762* , homeowners brought products liability actions against companies involved in the manufacture of defective pipes. At trial, one defendant, who had provided components for the pipes, was found to be negligent to each plaintiff, including 14 plaintiffs who had sustained no damage as a result of the pipes. The court of appeals affirmed in part and reversed in part. The court found that the parties did not have any special relationship to trigger application of the *J'Aire* exception to the general rule that economic loss alone is insufficient to state a negligence cause of action. Specifically, defendant's manufacturing of the component did not involve a transaction specifically intended to affect the particular needs of any of the 14 homeowners, and there was insufficient certainty that the 14 homeowners suffered any injury (*55 Cal. App. 4th 204, 212)* .

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19-190 California Points & Authorities § 190.226

§ 190.226 Opposing Contention That Plaintiff Is Entitled to Punitive Damages [Civ. Code § 3294]--Punitive Damages Not Available in Strict Liability Action Based on Market-Share Liability Theory

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is liable for plaintiff's injuries caused by defendant's product (see, e.g., § 190.86).*]

DEFENDANT _____ [*name*] IS NOT SUBJECT TO THE IMPOSITION OF PUNITIVE DAMAGES, BECAUSE PLAINTIFF HAS NOT IDENTIFIED DEFENDANT AS THE ACTUAL MANUFACTURER OF THE PRODUCT THAT INJURED PLAINTIFF BUT INSTEAD HAS BASED HIS/HER/ITS CLAIM ON A MARKET-SHARE LIABILITY THEORY.

A. Punitive Damages Are Not Available in Market-Share Liability Case. A plaintiff may not recover punitive damages from any defendant in a strict liability action if plaintiff's sole theory of liability is based on the market-share liability theory as announced in *Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588* , *163 Cal. Rptr. 132* , *607 P.2d 924* (*Magallanes v. Superior Court (1985) 167 Cal. App. 3d 878, 889-890, 213 Cal. Rptr. 547*).

B. Punitive Damages Are Not Available Unless Plaintiff Identifies Actual Manufacturer and Proves Manufacturer Acted With Malice or Oppression. A plaintiff may not recover punitive damages against a defendant manufacturer who participated in the marketing of a defective product unless plaintiff proves that (1) the defendant was the actual manufacturer of the defective product that injured plaintiff, and (2) the defendant acted with malice or oppression in placing the product on the market (*Magallanes v. Superior Court (1985) 167 Cal. App. 3d 878, 890, 213 Cal. Rptr. 547*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a defendant is subject to punitive damages. The ground of opposition set forth is that defendant may not be subject to punitive damages because plaintiff's claim is based solely on a market-share liability theory.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a demurrer, motion to strike, or motion for summary judgment or summary adjudication on the issue whether defendant is subject to punitive damages. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should state facts showing that plaintiff claims only that defendant manufacturer participated in the general marketing of a product that injured plaintiff, but that plaintiff has not claimed that defendant's product was the product that injured plaintiff, nor that defendant acted with malice or oppression in marketing its product [*see, e.g., Magallanes v. Superior Court (1985) 167 Cal. App. 3d 878, 213 Cal. Rptr. 547* (no punitive damages against manufacturer of DES if plaintiff bases claim solely on market-share liability theory and cannot prove that defendant's DES injured plaintiff or that defendant marketed DES with malice or oppression)].

In an appropriate case, these points and authorities may be used to oppose the contention supported by these points and *authorities in § 190.223*.

[b] Related Points and Authorities

For points and authorities relating to the availability of punitive or exemplary damages generally, see Ch. 64, *Damages: Tort* .

[3] Discussion of Authorities

[a] Punitive Damages Are Not Available in Market-Share Liability Case

In ***Magallanes v. Superior Court*** *(1985) 167 Cal. App. 3d 878, 213 Cal. Rptr. 547* , plaintiff's mother, while pregnant with plaintiff, had ingested the drug diethylstilbestrol (DES). As a result, plaintiff developed cancer later in life. Plaintiff brought an action in strict liability against the manufacturers and distributors of a substantial share of the DES available to plaintiff's mother at the time she ingested the DES. Plaintiff sought both compensatory and punitive damages. Defendants moved to strike the punitive damage allegations. The court granted the relief, and plaintiff sought a writ of mandate.

The court of appeal denied the petition for writ of mandate, holding that a defendant found liable under a market-share liability theory could not be liable for punitive damages. The court held that in order for punitive damages to be available against a defendant, that defendant must be identified as having supplied the user with the product, and that in so supplying the product the defendant was guilty of malice or oppression. Because under a market-share theory the identity of the actual supplier is not determined, defendants liable under the theory cannot be assessed with punitive damages. The court based its decision on public policy considerations. The court noted that the market-share rule of *Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 163 Cal. Rptr. 132, 607 P.2d 924* [*see § 190.80[3][a]*], provides a logical and reasonable basis for awarding and apportioning compensatory damages when a plaintiff cannot identify the producer who supplied the injury-causing substance. However, the court explained that significantly different considerations govern the imposition of punitive damages, which are an individualized punishment and deterrent imposed on a particular and identified defendant whose malicious or oppressive acts are the proximate cause of the injury sustained by plaintiff. The imposition of punitive damages is thus not intended to punish a defendant merely because it distributes its product in the marketplace. In fact, the court explained, to do so would be unfair. If a plaintiff

is permitted to seek punitive damages in a case in which liability for compensatory damages is based solely on participation in the market, some suppliers, who are not named as defendants, but who may have acted with malice in manufacturing and distributing DES, and one of which may have provided the specific substance ingested by plaintiff's mother, would fortuitously escape liability altogether. At the same time others, whose conduct was no more culpable, and who may have caused plaintiff no actual harm, but who have been named as defendants, would remain subject to the burden of punitive damages. Thus, the court precluded the award of punitive damages against any defendant in the case, unless plaintiff could (1) first identify that defendant as the one who supplied the DES that was ingested by plaintiff's mother, and (2) also prove that the defendant who supplied the DES acted with malice or oppression (*167 Cal. App. 3d 878, 886-890)* .

[b] Punitive Damages Are Not Available Unless Plaintiff Identifies Actual Manufacturer and Proves Manufacturer Acted With Malice or Oppression

Magallanes v. Superior Court *(1985) 167 Cal. App. 3d 878, 213 Cal. Rptr. 547* , is discussed in *§ 190.226[3][a]*.

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19-190 California Points & Authorities § 190.227

§ 190.227 Opposing Contention That Plaintiff is Entitled to Punitive Damages [Civ. Code § 3294]--Punitive Damages Not Available in Strict Products Liability Action When Plaintiff Suffers No Personal Injury

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that the defendant is liable for plaintiff's injuries caused by a defective product (see, e.g., § 190.86).*]

DEFENDANT _____ [*specify name*] IS NOT SUBJECT TO THE IMPOSITION OF PUNITIVE DAMAGES IN A STRICT PRODUCTS LIABILITY ACTION BECAUSE THE PLAINTIFF SUFFERED NO PERSONAL OR OTHER EGREGIOUS INJURY.

Punitive Damages Are Not Available in Strict Products Liability Action Absent Proof That Plaintiff Suffered Personal Injuries. A plaintiff may not recover punitive damages in a strict products liability action when the plaintiff suffered no personal or other egregious injury (*Gawara v. United States Brass Corp. (1998) 63 Cal. App. 4th 1341, 1363, 74 Cal. Rptr. 2d 663*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a defendant is subject to punitive damages in a strict products liability action. The ground of opposition is that a defendant may not be subject to punitive damages when a plaintiff suffers no personal or other egregious injury.

The form may be combined with other points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a demurrer or motion for summary judgment or summary adjudication on the issue that defendant is subject to punitive damages. The form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated, for example, that the plaintiff only suffered damage to property [*Gawara v. United States Brass Corp. (1998) 63 Cal. App. 4th 1341, 1360-1363, 74 Cal. Rptr. 2d 663]* .

In an appropriate case, this points and authorities may be used to oppose the contention supported by the points and *authorities in § 190.223*.

[3] Discussion of Authorities

[a] Punitive Damages Are Not Available in Strict Products Liability Action Absent Proof That Plaintiff Suffered Personal Injuries

In ***Gawara v. United States Brass Corp.*** *(1998) 63 Cal. App. 4th 1341, 74 Cal. Rptr. 2d 663* , the plaintiffs commenced a strict products liability action against manufacturers and sellers of plumbing parts on the ground that the defendants installed defective polybutylene plumbing in their homes. A jury awarded the plaintiffs both compensatory and punitive damages.

The court of appeal reversed the judgment in part, finding that the plaintiff was not entitled to recover punitive damages because the only damage suffered was damage to property. The plaintiffs cited no California strict products liability case in which punitive damages were awarded absent proof of personal injury. There was also no evidence that the defendant's violated "rights" of the plaintiffs sufficient to support an award of punitive damages. A plaintiff must suffer personal, or other egregious, injuries to merit an award of punitive damages in a strict products liability action (*63 Cal. App. 4th 1341, 1363)* .

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19-190 California Points & Authorities § 190.228

§ 190.228 Opposing Contention That Defendant Is Jointly and Severally Liable for Noneconomic Damages [Civ. Code § 1431.2]--Proposition 51 Requires Apportionment of Fault to Absent or Immune Tortfeasors

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that the defendant is liable for plaintiff's injuries caused by a defective product (see, e.g., § 190.86).*]

DEFENDANT _____ [*specify name*] IS NOT JOINTLY AND SEVERALLY LIABLE FOR PLAINTIFF'S NONECONOMIC DAMAGES BECAUSE PROPOSITION 51 REQUIRES ALLOCATION OF FAULT TO ALL TORTFEASORS, INCLUDING ABSENT OR IMMUNE TORTFEASORS.

Proposition 51 Contains No Exception for Damages Attributable to Fault of Persons Who Are Immune From Liability. Under Proposition 51, an award for noneconomic damages should be reduced by the amount attributable to the fault of plaintiff's employer, which is immune from liability for work-related injuries under the workers' compensation law [*DaFonte v. Up-Right, Inc. (1992) 2 Cal. 4th 593, 600, 7 Cal. Rptr. 2d 238, 828 P.2d 140* ; *Taylor v. John Crane Inc. (2003) 113 Cal. App. 4th 1063, 1068, 6 Cal. Rptr. 3d 695]* .

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a defendant is jointly and severally liable for an award for noneconomic damages. The ground of opposition is that Proposition 51 requires allocation of fault for noneconomic damages to all tortfeasors, including absent or immune tortfeasors.

The form may be combined with other points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated, for example, that the negligence of plaintiff's employer contributed to his injury [*DaFonte v. Up-Right, Inc. (1992) 2 Cal. 4th 593, 600, 7 Cal. Rptr. 2d 238, 828 P.2d 140]* .

[3] Discussion of Authorities

[a] Proposition 51 Contains No Exception for Damages Attributable to Fault of Persons Who Are Immune From Liability

In ***DaFonte v. Up-Right, Inc.*** *(1992) 2 Cal. 4th 593, 600, 7 Cal. Rptr. 2d 238, 828 P.2d 140* , the plaintiff was injured by equipment while on the job. The trial court reduced his award of noneconomic damages against the manufacturer by 45 percent, the amount attributable to the fault of the employer, which was immune from liability under the workers' compensation system. The Supreme Court held that this procedure was proper, explaining that there was no exception under Proposition 51 for damages attributable to the fault of persons who are immune from liability.

In ***Taylor v. John Crane Inc.*** *(2003) 113 Cal. App. 4th 1063, 1068, 6 Cal. Rptr. 3d 695* , the plaintiff was diagnosed with mesothelioma after years of working as a Navy machinist. He worked with asbestos products manufactured by the defendant as well by other manufacturers. The jury found that defendant was 31 percent liable for plaintiff's injuries and the Navy, which was not a party, was 16 percent liable. The court reduced the plaintiffs' noneconomic damages by the fault allocated to the Navy. The court of appeal affirmed. Even assuming that the Navy was immune under the *Feres/Stencel* rule, under Proposition 51, the court properly allowed the fault of the Navy to be taken into account in allocating responsibility for plaintiff's injuries.

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19-190 California Points & Authorities § 190.229

§ 190.229 Opposing Contention That Defendant Is Jointly and Severally Liable for Noneconomic Damages [Civ. Code § 1431.2]--Proposition 51 Applies Where Plaintiff's Injuries Are Caused by Separate Products

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum opposing the contention that defendant is liable for plaintiff's injuries caused by a defective product*].

DEFENDANT _____ [*specify name*] IS NOT JOINTLY AND SEVERALLY LIABLE FOR PLAINTIFF'S NONECONOMIC DAMAGES BECAUSE PROPOSITION 51, REQUIRING ALLOCATION OF FAULT TO ALL TORTFEASORS, APPLIES WHEN SEPARATE PRODUCTS CAUSED PLAINTIFF'S INJURIES.

A. Proposition 51 Applies in Strict Liability Asbestos Case Where Multiple Products Caused Plaintiff's Injuries. Proposition 51 is applicable in a strict liability asbestos exposure case where multiple products cause the plaintiff's injury and the evidence provides a basis to allocate liability for noneconomic damages between defective products (*Wilson v. John Crane, Inc. (2000) 81 Cal. App. 4th 847, 852, 97 Cal. Rptr. 2d 240* ; *Arena v. Owens-Corning Fiberglas Corp. (1998) 63 Cal. App. 4th 1178, 1198, 74 Cal. Rptr. 2d 580*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a defendant is jointly and severally liable for an award for noneconomic damages. The ground of opposition is that Proposition 51 is applicable in a strict liability where multiple products cause the plaintiff's injury.

The form may be combined with other points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability.

[b] Argument

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated, for example, that plaintiff's injuries were caused by multiple asbestos products and that there is a basis to apportion liability for noneconomic damages among the products (*see Arena v. Owens-Corning Fiberglas Corp. (1998) 63 Cal. App. 4th 1178, 1198, 74 Cal. Rptr. 2d 580*).

[c] Opposing Points and Authorities

For a memorandum supporting the contention that defendant is jointly and severally liable for noneconomic damages under *Civ. Code § 1431.2*, see *§ 190.223C*.

[3] Discussion of Authorities

[a] Proposition 51 Applies in Strict Liability Asbestos Case Where Multiple Products Caused Plaintiff's Injuries

In ***Wilson v. John Crane, Inc.*** *(2000) 81 Cal. App. 4th 847, 97 Cal. Rptr. 2d 240* , the plaintiff developed mesothelioma after working for 37 years at various power plants. He settled against all but one defendant and proceeded to trial against that defendant alone. The jury attributed 2.5 percent of the total fault to defendant. It awarded plaintiff $595,000 in economic damages and $3 million in noneconomic damages. The jury also awarded plaintiff's wife $1 million for loss of consortium. The trial court entered an amended judgment adjusting the net award to reflect a credit for plaintiff's settlement with other defendants. The effect was to fix defendant's liability for noneconomic damages according to its proportionate share of liability, thereby reducing them from $3 million to $75,000. The loss of consortium damages were likewise reduced from $1 million to $25,000. The appellate court held that *Civ. Code § 1431.2* was applicable by its terms (*81 Cal. App. 4th 847, 859)* .

In ***Arena v. Owens-Corning Fiberglas Corp.*** *(1998) 63 Cal. App. 4th 1178, 74 Cal. Rptr. 2d 580* , the plaintiff was exposed to asbestos for 30 years while working at a shipyard. He brought a product liability action against multiple defendants to recover for his injuries. All but two defendants settled. The trial court concluded that Proposition 51 did not apply and awarded joint and several damages of $388,820.

The appellate court held that Proposition 51 applies to cases based on strict liability. It held that ***Wimberly v. Derby Cycle Corp****. (1997) 56 Cal. App. 4th 618, 65 Cal. Rptr. 2d 532* , could be reconciled with the policies underlying Proposition 51 by requiring apportionment of noneconomic damages between separate products which have caused a plaintiff's injuries. The court interpreted ***DaFonte v. Up-Right, Inc.*** *(1992) 2 Cal. 4th 593, 7 Cal. Rptr. 2d 238, 828 P.2d 140* , as indicating the supreme court's unwillingness to base the application of Proposition 51 on either the status of the defendant or on the theory of defendant's liability. Neither principles of comparative fault nor the policy underlying Proposition 51 require the exclusion of its application in the strict liability context. The court concluded that Proposition 51 is applicable in a strict liability asbestos exposure case where multiple products cause the plaintiff's injuries and the evidence provides a basis to allocate liability for noneconomic damages between the defective products. The court remanded the action for the trial court to make the appropriate allocations pursuant to Proposition 51 (*63 Cal. App. 4th 1178, 1193-1198)* .

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19-190 California Points & Authorities §§ 190.230-190.239

[Reserved]

§§ 190.230[Reserved]

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19-190 California Points & Authorities § 190.240

§ 190.240 Supporting Contention That Product Not Defective--Benefits of Its Design Outweigh Risks--Design Comported With State of the Art

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is not liable for plaintiff's injuries caused by defendant's product (see, e.g., § 190.120).*]

THE BENEFITS OF THE DESIGN OF THE _____ [*specify product*] OUTWEIGH ITS RISKS, THUS RENDERING THE PRODUCT NOT DEFECTIVE, BECAUSE THE DESIGN COMPORTS WITH THE STATE OF THE ART AND AN ALTERNATIVE DESIGN IS _____ [TOO COSTLY *and/or* NOT FEASIBLE].

A. Evidence of Feasibility and Cost of Alternative Designs Is Relevant to Risk-Benefits Test. The feasibility and cost of alternative designs, which are peculiarly within the manufacturer's knowledge, are among the relevant factors of the risk-benefits test for a design defect that is set forth in *Barker v. Lull Eng'g Co. (1978) 20 Cal. 3d 413, 143 Cal. Rptr. 225, 573 P.2d 443* (*McLaughlin v. Sikorsky Aircraft (1983) 148 Cal. App. 3d 203, 210, 195 Cal. Rptr. 764*).

B. Evidence of State of the Art Is Relevant to Feasibility and Cost of Alternative Designs. Evidence that a product's design comported with the state of the art is relevant to a proper determination of the cost and feasibility of alternative designs of the product (*McLaughlin v. Sikorsky Aircraft (1983) 148 Cal. App. 3d 203, 210, 195 Cal. Rptr. 764*).

C. Evidence of State of the Art Is Distinguishable From Evidence of Industry Custom and Usage, and Is Therefore Admissible. Unlike evidence of industry custom and usage, which constitutes evidence of the customary practices of an industry, evidence of the state of the art of a product constitutes evidence of the capabilities of an industry. Thus, although evidence of industry custom and usage is irrelevant in a products liability action, evidence of the state of the art of product is admissible in such an action (*McLaughlin v. Sikorsky Aircraft (1983) 148 Cal. App. 3d*

203, 210, 195 Cal. Rptr. 764).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the product is not defective, because its design comported with the state of the art and alternative designs are too costly and not feasible, and thus its benefits outweigh its risks [*see Barker v. Lull Eng'g Co. (1978) 20 Cal. 3d 413, 432, 143 Cal. Rptr. 225, 573 P.2d 443* (risk-benefits test); *see also §§ 190.110 -190.114*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary judgment or summary adjudication on the issue that defendant is not strictly liable. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, and in any other relevant points and authorities combined with the fore going form, to show the relationship between the facts of the case and the points of law stated. For example, counsel should show facts indicating (1) the state of the art of the product at the time of its production, (2) the product's conformance with that state of the art, and (3) the excessive cost of an alternative design or the unfeasibility of an alternative design, or both if applicable [*see, e.g., McLaughlin v. Sikorsky Aircraft (1983) 148 Cal. App. 3d 203, 195 Cal. Rptr. 764* (state of art of manufacture of aircraft as admissible)]. This may be done by attaching affidavits or declarations under penalty of perjury from expert witnesses qualified to testify about the type of product in question [*see Code Civ. Proc. §§ 2002, 2003, 2015.5*].

In an appropriate case, these points and authorities may be used to oppose the contentions supported by the points and *authorities in §§ 190.110 -190.114*.

[3] Discussion of Authorities

[a] Evidence of Feasibility and Cost of Alternative Designs Is Relevant to Risk-Benefits Test

The facts and procedural background of ***McLaughlin v. Sikorsky Aircraft*** *(1983) 148 Cal. App. 3d 203, 195 Cal. Rptr. 764* , are discussed in *§ 190.117[3][a]*. Although the court of appeal reversed the judgment for defendant, the court nevertheless held that state-of-the-art evidence was relevant to the risk-benefits test of *Barker v. Lull Eng'g Co. (1978) 20 Cal. 3d 413, 432, 143 Cal. Rptr. 225, 573 P.2d 443* , and was therefore admissible. Specifically, the court explained that the feasibility and cost of alternative designs are among the relevant factors of the risk-benefits test, and that evidence that the product's design comported with the state of the art is relevant to a proper determination of these cost and feasibility factors. In reaching its conclusion, the court recognized the rule that evidence of industry custom and usage is irrelevant in a products liability case [*see § 190.251*]. However, the court distinguished evidence of the state of the art, which constitutes evidence of the capabilities of an industry, from evidence of industry custom and usage, which constitutes evidence of the customary practices of an industry. Thus, the court found no error in admitting the state-of-the-art evidence showing industry capability (*148 Cal. App. 3d 203, 210)* .

[b] Evidence of State of the Art Is Relevant to Feasibility and Cost of Alternative Designs

The facts and procedural background of ***McLaughlin v. Sikorsky Aircraft*** *(1983) 148 Cal. App. 3d 203, 195 Cal. Rptr. 764* , are discussed in *§§ 190.117[3][a]* and *190.240[3][a]*.

[c] Evidence of State of the Art Is Distinguishable From Evidence of Industry Custom and Usage, and Is Therefore Admissible

McLaughlin v. Sikorsky Aircraft *(1983) 148 Cal. App. 3d 203, 195 Cal. Rptr. 764* , is discussed in *§§ 190.117[3][a]* and *190.240[3][a]*.

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19-190 California Points & Authorities § 190.241

§ 190.241 Supporting Contention That Product Not Defective--Former Civ. Code § 1714.4(a) Bars Plaintiffs from Holding a Gun Manufacturer Liable on a Common Law Negligence Theory

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is not liable for plaintiff's injuries caused by defendant's product.*]

DEFENDANT _____ [*specify manufacturer*] MAY NOT BE HELD LIABLE IN A PRODUCTS LIABILITY ACTION ON THE BASIS THAT THE BENEFITS OF _____ [*specify product*] DO NOT OUTWEIGH THE RISK OF INJURY POSED BY THE WEAPON WHEN DISCHARGED.

Former Civil Code Section 1714.4 Provides Protection From Liability for Gun Manufacturers on Common Law Negligence Claims. Former Civil Code Section 1714.4(a) stated that in a products liability action, no firearm or ammunition shall be deemed defective in design on the basis that the benefits of the product do not outweigh the risk of injury posed by its potential to cause serious injury, damage, or death when discharged. Common law negligence claims based on the conduct of the manufacturer in designing the weapon are covered under Section 1714.4 and fall within the definition of a products liability action (*Merrill v. Navegar, Inc. (2001) 26 Cal. 4th 465, 110 Cal. Rptr. 2d 370, 28 P.3d 116*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that former Civ. Code § 1714.4(a) barred plaintiff(s) from holding a gun manufacturer liable on a common law negligence theory [*see Merrill v. Navegar, Inc. (2001) 26 Cal. 4th 465, 110 Cal. Rptr. 2d 370, 28 P.3d 116]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context

in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary judgment or summary adjudication on the issue that defendant is not strictly liable. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, and in any other relevant points and authorities combined with this form, to show the relationship between the facts of the case and the points of law stated.

[b] Related Points and Authorities

For points and authorities related to the duty to use ordinary care with respect to the design, distribution, or marketing of firearms and ammunition, see *§ 190.199A.*

[3] Discussion of Authorities

[a] Former Civ. Code § 1714.4 Provides Protection From Liability for Gun Manufacturers on Common Law Negligence Claims

In ***Merrill v. Navegar, Inc.*** *(2001) 26 Cal. 4th 465, 110 Cal. Rptr. 2d 370, 28 P.3d 116* , a gunman killed eight people and wounded six before turning a gun on himself during a shooting rampage at a high-rise office building. The gunman used two semiautomatic assault pistols produced by Navegar, Inc. Plaintiff's brought an action in negligence, negligence per se, and strict liability. In their common law negligence claim, plaintiff's alleged that the manufacturer acted negligently by manufacturing, marketing, and making these weapons available to the general public because the benefits did not outweigh the risk they might inflict serious injury or death when discharged. Navegar moved for summary judgment arguing in part that former Civ. Code § 1714.4 barred the plaintiffs' benefit-risk theory of negligence. Plaintiff's responded that former Civ. Code § 1714.4 had no application in this case because it was not a products liability action. The trial court granted Navegar's motion holding that courts have refused to impose a duty on a gun manufacturer not to sell their products because of the potential misuse of the product by a third party. However, the court rejected Navegar's reliance on former Civ. Code § 1714.4 in a footnote, finding the statute inapplicable because plaintiffs were not asserting a "products liability theory."

The plaintiffs appealed the trial court's decision. The court of appeal reversed the trial court's grant of summary judgment for Navegar on plaintiffs' common law negligence theory. The court concluded that Navegar had a legal duty not to manufacture, market and distribute the weapon in a manner that increases the risk of harm inherent in handguns. However, they agreed with the trial court that former Civ. Code § 1714.4 was inapplicable since it was not a products liability action.

On review, the Supreme Court reversed the court of appeals judgment with directions to affirm the summary judgment for Navegar. The Court held that the basis of plaintiffs' argument that they seek to hold Navegar liable for "negligent conduct, not for making a defective product," and that they "make no assertion that Navegar should be liable because the risks posed by the weapon outweigh its benefits," was not determinative. The Court had held previously in *Jiminez v. Sears, Roebuck & Co. (1971) 4 Cal. 3d 379, 387, 93 Cal. Rptr. 769, 482 P.2d 681* , that a plaintiff may premise a products liability action on the negligence of the defendant. The Court held that the plaintiff could not avoid the legislative policy reflected in former Civ. Code § 1714.4 by simply declining to use the word "defect" or "defective," or reformulating their claim to be negligent distribution to the general public. Plaintiffs' claim that Navegar's decision to distribute their product to the general public was negligent, given the weapon's particular design features, was simply a reformulated claim that the weapon, as designed, failed the risk/benefit test (*26 Cal. 4th 465, 481)* .

NOTE:

Civ. Code § 1714.4 was repealed in 2002, probably in response to the *Merrill* decision. That same year, the California legislature amended *Civ. Code § 1714(a)* to add that "[t]he design, distribution, or marketing of firearms and ammunition is not exempt from the duty to use ordinary care and skill that is

required by this section. ..."

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19-190 California Points & Authorities § 190.242

§ 190.242 Supporting Contention That Defendant Is Not Liable--Adequate Warning on Product

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is not liable for plaintiff's injuries caused by defendant's product (see, e.g., §§ 190.164 -190.171).*]

DEFENDANT _____ [*name*] IS NOT [STRICTLY] LIABLE TO PLAINTIFF, BECAUSE ADEQUATE WARNING WAS GIVEN TO USERS OF _____ [*specify product*].

[*EITHER*]

A. Adequate Warning Is Sufficient Defense to Strict Products Liability Action. An adequate warning of a product's dangers is a sufficient defense to a strict liability action for injuries sustained from the product (*Temple v. Velcro USA, Inc. (1983) 148 Cal. App. 3d 1090, 1094, 196 Cal. Rptr. 531*).

[*AND/OR*]

B. Adequate Warning Is Warranty Disclaimer and Negates Negligence and Wilful Misconduct. An adequate warning is a proper disclaimer to any express or implied warranties, and negates any negligence or willful misconduct (*Temple v. Velcro USA, Inc. (1983) 148 Cal. App. 3d 1090, 1094, 196 Cal. Rptr. 531*).

[*Optional*] **C. Adequate Warning Is Given if Placed on Product or if Sent to Owners of Product.** Warning of a product's dangers is adequate if it adequately informs the user of the danger and it is placed on the product or, if the dangerousness of the product is realized only after its sale, it is sent to each owner of the product (*Temple v. Velcro USA, Inc. (1983) 148 Cal. App. 3d 1090, 1094, 196 Cal. Rptr. 531*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the product is not defective, because it contained an adequate warning or because defendant sent adequate warning to each of its owners.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary judgment or summary adjudication on the issue that defendant is not strictly liable. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, and in any other relevant points and authorities combined with this form, to show the relationship between the facts of the case and the points of law stated. For example, counsel should state that warning was put on the product or, if the product's danger was realized only after its sale, was sent to each owner of the product. Counsel should further state the contents of the warning and show that the contents adequately warned the user of the product's danger [*see, e.g., Temple v. Velcro USA, Inc. (1983) 148 Cal. App. 3d 1090, 196 Cal. Rptr. 531* (adequate warning sent to each owner of closure on hot air balloon deflation panel)].

In an appropriate case, these points and authorities may be used to oppose the contentions supported by the points and *authorities in §§ 190.160 -190.162*.

[3] Discussion of Authorities

[a] Adequate Warning Is Sufficient Defense to Strict Products Liability Action

In ***Temple v. Velcro USA, Inc.*** *(1983) 148 Cal. App. 3d 1090, 196 Cal. Rptr. 531* , plaintiff's decedent was killed when the hot air balloon in which he was riding plummeted to the ground, because of the failure of a closure on the balloon's deflation panel. Plaintiff brought an action in strict liability, negligence, and warranty against the manufacturer of the closure. Defendant introduced evidence that after its product was on the market, it discovered that some owners were using it in hot air balloons, which was found to be inherently dangerous. Defendant had then sent a warning to all owners of balloons using its product, including plaintiff's decedent, who received his warning before his fatal accident. The warning informed each owner that the closure should not be used in hot air balloons, and that such use was inherently dangerous, was not designed for that purpose, and was improper. Defendant moved for summary judgment, which was granted. Plaintiff appealed.

The court of appeal affirmed, holding that an adequate warning is a sufficient defense to a strict liability action. The court noted that although the warning had not been placed on the product, because defendant did not realize its dangerousness until after the sale, warning was nevertheless eventually given, and plaintiff's decedent should have read its contents before further using the balloon. The court also stated that adequate warning is a proper disclaimer to any express or implied warranties and negates any negligence or willful misconduct. The court then examined the language of the warning and held that the trial court had properly found the language to be an adequate warning as a matter of law. Thus, summary judgment was proper (*148 Cal. App. 3d 1090, 1094-1095)* .

[b] Adequate Warning Is Warranty Disclaimer and Negates Negligence and Willful Misconduct

Temple v. Velcro USA, Inc. *(1983) 148 Cal. App. 3d 1090, 196 Cal. Rptr. 531* , is discussed in *§ 190.242[3][a]*.

[c] Adequate Warning Is Given if Placed on Product or if Sent to Owners of Product

Temple v. Velcro USA, Inc. *(1983) 148 Cal. App. 3d 1090, 196 Cal. Rptr. 531* , is discussed in *§ 190.242[3][a]*.

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19-190 California Points & Authorities § 190.243

§ 190.243 Supporting Contention That Defendant Is Not Liable--Government Contractor Immunity

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is not liable for plaintiff's injuries caused by defendant's product (see, e.g., §§ 190.164 -190.171).*]

DEFENDANT _____ [*name*] IS NOT [STRICTLY] LIABLE TO PLAINTIFF, BECAUSE THE _____ [*specify military equipment involved in injury, e.g.,* HELICOPTER] WAS DESIGNED BY DEFENDANT IN HIS/HER CAPACITY AS A GOVERNMENT CONTRACTOR AND THAT _____ [*specify military equipment, e.g.,* HELICOPTER] CONFORMED TO SPECIFICATIONS MADE BY THE UNITED STATES.

A. Government Contractor Immunity Provides Protection From Liability for Design Defects. The doctrine of government contractor immunity protects the contractor from liability for design defects in military equipment if: (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about dangers in the use of the equipment that were known to the supplier but not to the United States *Boyle v. United Techs. Corp. (1988) 487 U.S. 500, 108 S. Ct. 2510, 101 L. Ed. 2d 442, 458* ; *Oxford v. Foster Wheeler LLC (1990) 177 Cal. App. 4th 700, 708, 99 Cal. Rptr. 3d 418* ; *McKay v. Rockwell Int'l Corp. (9th Cir. 1983) 704 F.2d 444, 451)* .

B. Commercially Available Products Are Subject to Government Contractor Defense. The fact that a product is commercially available does not deprive its manufacturer of the government contractor defense (*Oxford v. Foster Wheeler LLC (1990) 177 Cal. App. 4th 700, 710, 99 Cal. Rptr. 3d 418* ; *Jackson v. Deft, Inc. (1990) 223 Cal. App. 3d 1305, 1319, 273 Cal. Rptr. 214*).

C. Government Contractor Defense Applies to Negligence Claims. The government contractor defense is not limited to products liability causes of action and applies to related negligence claims (*Oxford v. Foster Wheeler LLC*

(1990) 177 Cal. App. 4th 700, 710, 99 Cal. Rptr. 3d 418).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the defendant is not liable for any injuries to the plaintiff because the defendant was immunized by the government contractor immunity.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary judgment or summary adjudication on the issue that the defendant is not liable. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should attach copies of the government's detailed specifications, rather than merely alleging the general contract requirements, in order to show that the specifications were required by the government.

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 190.257,* 190.258, and 190.258.1 may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Government Contractor Immunity Provides Protection From Liability for Design Defects

In ***Boyle v. United Techs. Corp.*** *(1988) 487 U.S. 500, 108 S. Ct. 2510, 101 L. Ed. 2d 442* , a Marine helicopter copilot was killed when his helicopter crashed and he was unable to escape and drowned. The copilot's father sued defendant, builder of the helicopter. The district court's judgment in favor of plaintiff was reversed by the court of appeals. Plaintiff appealed.

The United States Supreme Court vacated the court of appeals judgment and remanded the case. The Court explained that a few areas, involving uniquely federal interests, are so committed by the Constitution and laws of the United States to federal control that state law is preempted and replaced, when necessary, by federal common law. The Court characterized the government contractor defense as involving two areas that involve such uniquely federal interests. The first is the obligations to and rights of the United States under its contracts. Although the issue involves an obligation to third persons under a government contract rather than to the United States, and may be classified as a tort, that liability arises out of performance of the contract. The second is the civil liability of federal officials for actions taken in the course of their duty. The Court observed that the federal contractor defense involves an independent contractor performing its obligation under a procurement contract, rather than an official performing his or her duty as a federal employee, but the same interest in getting the government's work done is obviously implicated (*487 U.S. 500)* . The Court explained that the federal government's interest in the procurement of equipment is implicated in this case even though the dispute is one between private parties. The imposition of liability on government contractors will directly affect the terms of government contracts: either the contractor will decline to manufacture the design specified by the government, or it will raise its price. Either way, the interests of the United States will be directly affected (*487 U.S. 500, 505)* . After finding that the procurement of equipment by the United States is an area of uniquely federal interest, the Court explained that displacement of state law is appropriate only when a significant conflict exists between an identifiable federal policy or interest and the operation of state law, or the application of state law would frustrate specific objeces of federal legislation (*487 U.S. 500, 505-507)* . It concluded that the state-imposed duty of care that is the asserted basis of defendant contractor's liability is precisely contrary to the duty imposed by the government contract

(the duty to manufacture and deliver helicopters with the sort of escape hatch mechanism shown by the specifications) (*487 U.S. 500, 509)* . The Court found a significant conflict between federal interests and state law in the context of government procurement. In the Federal Tort Claims Act, Congress authorized damages to be recovered against the United States for harm caused by the negligent or wrongful conduct of government employees, to the extent that a private person would be liable under the law of the place where the conduct occurred. However, excepted from this consent by *28 U.S.C.S. § 2680(a)* is any claim based on the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved be abused (*487 U.S. 500, 511)* . The Court said that the selection of the appropriate design for military equipment to be used by the armed forces is a discretionary function. It makes little sense to insulate the government against financial liability for the judgment that a particular feature of military equipment is necessary when the government produces the equipment itself, but not when it contracts for the production. The Court concluded that state law that holds government contractors liable for design defects in military equipment does in some circumstances present a significant conflict with federal policy and must be displaced (*487 U.S. 500, 510-513*). The Court held that liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about dangers in the use of the equipment that were known to the supplier but not to the United States. The Court said the first two of these conditions assure that the suit is within the area where the policy of the discretionary function would be frustrated, i.e., they assure that the design feature in question was considered by a government officer, and not merely by the contractor itself. The third condition is necessary because in its absence the displacement of state tort law would create some incentive for the manufacturer to withhold knowledge of risks (conveying that knowledge might disrupt the contract, but withholding it would produce no liability). The Court said it adopted the third condition to prevent its effort to protect discretionary functions from being impeded by cutting off information highly relevant to the discretionary decision (*487 U.S. 500, 512)* .

Oxford v. Foster Wheeler LLC *(1990) 177 Cal. App. 4th 700, 99 Cal. Rptr. 3d 418* , is discussed in *190.243[3][b]*.

In ***McKay v. Rockwell Int'l Corp.*** *(9th Cir. 1983) 704 F.2d 444* , two widows of Navy pilots whose husbands died in unrelated crashes of naval aircraft brought actions against defendant, manufacturer of the aircraft, seeking damages for the deaths of their husbands. The actions were consolidated. The district court rendered judgment for plaintiffs. Plaintiffs appealed the measure and amount of damages. Defendant also appealed, contending that military suppliers should not be liable to members of the armed forces for injuries caused by defects in military hardware.

The court of appeal reversed and remanded. The court initially explained that under the *Feres-Stencel* doctrine the United States is immune from liability for the deaths of the pilots. It then addressed the government contractor defense, explaining that the defense protects a government contractor from liability for acts done by him or her while complying with government specifications during execution of performance of a contract with the United States. The defense is applicable even when the United States is immune from suit. Historically, the government contractor defense was applied only to construction projects, but now applies to military equipment design defect cases (*704 F.2d 444, 448)* . The reasons for applying the government contractor defense to suppliers of military equipment with design defects approved by the government parallel those supporting the *Feres-Stencel* doctrine. First, the United States cannot be directly or indirectly liable to armed services personnel injured by defective military products. However, holding the suppliers liable in government contractor cases without regard to the extent of government involvement in fixing the product's design and specifications would subvert the *Feres-Stencel* rule, as suppliers would pass the cost of accidents on the to the United States through higher prices, despite the government's immunity. Second, to hold military suppliers liable for defective designs when the United States set or approved the design specifications would thrust the judiciary into the making of military decisions. Trials on design defects when government specifications are at issue would involve second guessing military orders, and would often require members of the Armed Services to testify regarding each other's decisions and actions. Third, in setting specifications for military equipment, the United States is required by the exigencies of defense efforts to push technology towards its limits and thereby to incur risks beyond those that would ordinarily be acceptable. A supplier is generally unable to negotiate the elimination of those risks. Finally, a

government contractor defense provides incentives for suppliers of military equipment to work closely with and to consult the military authorities in the development and testing of equipment. The defense thus encourages fixing the locus of responsibility for military equipment design with more precision than is possible under a system in which the defense is not allowed (*704 F.2d 444, 449-450)* . The court held that under the *Feres-Stencel* doctrine and the government contractor rule, a supplier of military equipment is not subject to strict liability for a design defect when: (1) the United States is immune from liability under *Feres* and *Stencel*; (2) the supplier proves that the United States established, or approved, reasonably precise specifications for the allegedly defective military equipment; (3) the equipment conformed to those specifications; and (4) the supplier warned the United States about patent errors in the government's specifications or about dangers involved in the use of the equipment that were known to the supplier but not to the United States. The court explained that the imposition of the duty to warn of known defects is necessary to enable the United States to balance the risks and benefits inherent in the use of the equipment. The court acknowledged the impreciseness of the term "military equipment." It did not define the term, but set forth its parameters as somewhere between an ordinary consumer product purchased by the armed forces and the escape system of a reconnaissance aircraft. It noted that the rule does not relieve suppliers of military equipment of liability for defects in the manufacture of an ordinary consumer product purchased by the armed forces. To hold otherwise would remove the incentive from manufacturers to use all cost-justified means to conform to government specifications in the manufacture of military equipment (*704 F.2d 444, 451)* .

[b] Commercially Available Products Are Subject to Government Contractor Defense

In ***Oxford v. Foster Wheeler LLC*** *(1990) 177 Cal. App. 4th 700, 99 Cal. Rptr. 3d 418* , the decedent was exposed to asbestos while working in the boiler repair shop on a navy vessel at various shipyards. Defendant had manufactured the boilers pursuant to detailed military specifications. Decedent developed mesothelioma many years later. His widow brought a wrongful death action alleging products liability and negligence. In a special verdict, the jury found against the plaintiff on her products liability claims for design defect and failure to warn, but in favor of plaintiffs on her negligence claim. The jury also found that the defendant had proven the three elements of the government contractor defense. The trial court found that the defense did not foreclose judgment against the defendant, reasoning that the defense verdict on the products liability claim did not subsume the jury's finding on negligent failure to warn, and that the government contractor defense does not apply to failure to warn claims.

The Court of Appeal reversed and remanded the action for a new trial, holding that the special verdict form was irreconcilability inconsistent. It did, however, agree with the trial court that jury's verdict on the government contractor defense did *not* entitle the defendant to judgment in its favor.

The court first agreed with *Jackson v. Deft, Inc., (1990) 223 Cal. App. 3d 1305, 273 Cal. Rptr. 214* , that commercial availability of a product is not the dispositive issue regarding the defense. Confining the defense to products made exclusively for the military would be "unduly confining." Rather, the focus is whether the area involves "uniquely federal interests," and if so, whether application of state law conflicts with federal policy. The court determined that substantial evidence supported each of the jury's findings regarding the three elements of the defense. Moreover, the defense applies to related negligence claims.

However, the government contractor defense does not immunize a defendant from *all* liability. The defense has limited application in failure-to-warn cases, coming into play only if the applicable federal contract includes warning requirements that significantly conflict with those that would be imposed under state law. The jury here had not been given a government contractor defense tailored to the failure-to-warn context. Although the jury's findings appeared to preclude liability for claims relating to the design of the boilers, the defense did not necessarily immunize defendant from liability on the failure-to-warn claims (*177 Cal. App. 4th 700, 709-710)* .

Jackson v. Deft, Inc. *(1990) 223 Cal. App. 3d 1305, 273 Cal. Rptr. 214* , is discussed in *190.258[3][a]*.

[c] Government Contractor Defense Applies to Negligence Claims.

Oxford v. Foster Wheeler LLC *(1990) 177 Cal. App. 4th 700, 99 Cal. Rptr. 3d 418* , is discussed in *190.243[3][b]*.

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19-190 California Points & Authorities § 190.244

§ 190.244 Supporting Contention That Defendant Is Not Liable in Action Based on Negligence--Successor Manufacturer Not Liable for Product of Predecessor Absent Existence of Factors That Would Justify Liability

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is not liable for plaintiff's injuries caused by defendant's product (see, e.g., §§ 190.89 and 190.164 -190.171).*]

DEFENDANT _____ [*name*] IS NOT LIABLE TO PLAINTIFF, BECAUSE THE _____ [*describe product, e.g.,* PRESCRIPTION DRUG DIETHYLSTILBESTROL] THAT WAS ALLEGEDLY PRODUCED NEGLIGENTLY AND THAT ALLEGEDLY CAUSED PLAINTIFF'S INJURIES WAS MANUFACTURED BY A PREDECESSOR CORPORATION OF DEFENDANT, AND DEFENDANT CORPORATION HAS INSUFFICIENT CONNECTIONS WITH THE PREDECESSOR CORPORATION TO WARRANT THE IMPOSITION OF LIABILITY ON IT.

Successor Corporation Not Liable for Negligence of Predecessor Under General Liability Theory Absent Existence of Factors That Would Justify Liability. A corporation that purchases the principal assets of another corporation does not assume the predecessor corporation's liabilities unless: (1) there is an express or implied agreement of assumption; (2) the transaction amounts to a consolidation or merger of the two corporations; (3) the purchasing corporation is a mere continuation of the seller; or (4) the transfer of assets to the purchaser is for the fraudulent purpose of escaping liability for the seller's debts (*Monarch Bay II v. Professional Serv. Indus., Inc. (1999) 75 Cal. App. 4th 1213, 89 Cal. Rptr. 2d 778* ; *Maloney v. American Pharm. Co. (1988) 207 Cal. App. 3d 282, 287, 255 Cal. Rptr. 1*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the defendant is not liable for any

injuries to the plaintiff because the product that allegedly caused the injuries was manufactured by a predecessor corporation, and defendant, as the successor corporation, did not purchase the business under circumstances that warrant imposition of liability on it [*see Monarch Bay II v. Professional Serv. Indus., Inc. (1999) 75 Cal. App. 4th 1213, 89 Cal. Rptr. 2d 778* ; *Maloney v. American Pharm. Co. (1988) 207 Cal. App. 3d 282, 287-290, 255 Cal. Rptr. 1]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary judgment.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should set forth the circumstances of the sale of the predecessor corporation's assets, and show that the requisite connections between the corporations are absent under the general theory of successor liability.

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 190.78* and *§ 190.79* may be used to oppose the contention supported by these points and authorities.

[c] Related Points and Authorities

In an appropriate case, the points and *authorities in § 190.89* may be added to to support the contention that a successor corporation is not liable for injuries caused by a predecessor's product.

[3] Discussion of Authorities

[a] Successor Corporation Not Liable for Negligence of Predecessor Under General Liability Theory Absent Existence of Factors That Would Justify Liability

In ***Monarch Bay II v. Professional Serv. Indus., Inc.*** *(1999) 75 Cal. App. 4th 1213, 89 Cal. Rptr. 2d 778* , an apartment complex was built on a site certified by a geotechnical firm. After the buildings were completed and occupied, the defendant corporation purchased all the assets of the geotechnical firm, including its goodwill. The defendant corporation also assumed all equipment and building leases, hired the predecessor's two shareholders and its employees, and both signed a covenant not to compete for two years (*75 Cal. App. 4th 1213, 1215*). In the meantime, Monarch Bay II had acquired the project from the original apartment complex owner. In 1992, the hillside under the project gave way, damaging two buildings and requiring their evacuation. Monarch Bay II sued all the parties involved in the geological investigation and construction of the project. The plaintiff named the successor corporation of the geotechnical engineering firm based on *Ray v. Alad Corp., (1977) 19 Cal. 3d 22, 136 Cal. Rptr. 574* . The trial court granted the defendant corporation's motion for summary judgment, finding that the *Ray* exception, which allows for a successor to be liable for the liabilities of its predecessor, applies only to strict products liability claims (*75 Cal. App. 4th 1213, 1216)* . On appeal, the court affirmed the judgment (*75 Cal. App. 4th 1213, 1219)* . The court of appeal rejected the plaintiff's contention that it had presented sufficient evidence to meet the exception for successor non-liability under a strict liability theory, based on *Ray v. Alad Corp. (1977) 19 Cal. 3d 22, 136 Cal. Rptr. 574, 560 P.2d 3* [*see § 190.79[3][a]*]. The court of appeal held that the exception that created successor liability was based entirely on the policies underlying strict liability claim and not the policies of general negligence (*75 Cal. App. 4th 1213, 1217)* . The court also disagreed with the plaintiff's contention that the factual distinctions in *Maloney v. American Pharmaceutical Co.* rendered that decision inapplicable, noting that the *Maloney* court's conclusion that *Ray* applied only to strict liability was unequivocal and had nothing to do with factual distinctions (*75 Cal. App. 4th 1213, 1217-1218)* . The court of appeal saw no policy reasons to extend the *Ray* exception to claims for general negligence, noting that such an extension would further complicate the transfer of assets, increase transaction costs, defeat the legitimate expectations of the parties to a negotiation and sale, and reduce the number of opportunities for a financially troubled company (*75 Cal. App. 4th 1213, 1218)* .

In ***Maloney v. American Pharm. Co.*** *(1988) 207 Cal. App. 3d 282, 255 Cal. Rptr. 1* , a manufacturer of diethylstilbestrol (DES) experienced financial difficulties. Its president assisted the principal secured creditor in liquidating the assets, and he subsequently formed the defendant corporation, which purchased from the creditor the predecessor's name, goodwill, and patents and trademarks, limited to nonprescription drug products only. The assets sold to defendant constituted approximately 10 percent of the total liquidated assets of the predecessor corporation, and did not include any machinery, equipment, buildings, inventory, stock, or accounts receivable. Defendant corporation never made or sold any prescription drugs, and in particular, never made or sold DES. Plaintiffs, a woman who ingested DES manufactured by the predecessor company and her daughter, allegedly suffered injuries caused by the drug. They brought an action against defendant corporation on theories of strict liability for a defective product, negligent manufacture, breach of implied warranty, breach of express warranty, and fraud. Defendant filed a motion for summary judgment on the ground that it was a mere successor corporation of the manufacturer of the product, and that it neither marketed nor manufactured the drug DES. The trial court granted the motion and entered a judgment of dismissal, and plaintiff appealed.

The court of appeal affirmed, holding that plaintiffs failed to show that defendant's connections with the predecessor corporation were sufficient to warrant the imposition of liability (*207 Cal. App. 3d 282, 287-290)* . The court initially noted that plaintiffs presently asserted liability on the sole theory of negligent manufacture of DES, and not for strict liability or breach of warranty, pursuant to retroactive application of *Brown v. Superior Court (1988) 44 Cal. 3d 1049, 1066, 1072, 245 Cal. Rptr. 412, 751 P.2d 470* , which held those theories inapplicable under the circumstances [*see § 190.90[3][a]*]. The usual rule of successor liability is that a corporation purchasing the principal assets of another corporation assumes the other's liabilities only if: (1) there is an express or implied agreement of assumption; (2) the transaction amounts to a consolidation or merger of the two corporations; (3) the purchasing corporation is a mere continuation of the seller; or (4) the transfer of assets to the purchaser is for the fraudulent purpose of escaping liability for the seller's debts. The court rejected plaintiffs' contention that defendant was liable for the predecessor's negligent acts on the third ground stated above, that is, that it was a mere continuation of the predecessor corporation. Before one corporation can be said to be a mere continuation or reincarnation of another, there must be insufficient consideration running from the new company to the old (*207 Cal. App. 3d 282, 287)* . In this case, there is no evidence of insufficient consideration for the sale. Although plaintiffs correctly stated that defendant corporation held itself out to customers as a continuation of the predecessor corporation, they failed to show inadequate consideration, an essential requirement in imposing liability. Additional factors negating plaintiffs' contention are that: (1) the two corporations shared only one officer, and mere continuation typically involves several common officers; (2) 10 percent of the liquidated assets do not constitute "principal assets"; and (3) the sale occurred from the predecessor's secured creditor to the successor corporation, and not directly from predecessor to successor corporation. The court rejected plaintiffs' contention that the criteria set forth in *Ray v. Alad Corp. (1977) 19 Cal. 3d 22, 136 Cal. Rptr. 574, 560 P.2d 3* should be applied in lieu of the general rule of successor liability [*see § 190.79[3][a]*]. The Court in *Ray* held that imposition of strict liability on a successor corporation theory should not be determined according to the general rule of successor liability, but rather required analysis under a discrete set of factors. Under *Ray,* imposition of strict liability on a successor to a manufacturer rests on: (1) the virtual destruction of the plaintiff's remedies against the original manufacturer caused bhe successor's acquisition of the business; (2) the successor's ability to assume the original manufacturer's risk-spreading role; and (3) the fairness of requiring the successor to assume a responsibility for defective products that was a burden necessarily attached to the enjoyment by the successor of the predecessor's good will. The court rejected plaintiffs' contention that *Ray* applies to negligence as well as strict liability theory, noting that *Ray* clearly states that it created an exception to the general rule of successor liability for the purpose of establishing a discrete rule for a strict liability cause of action (*207 Cal. App. 3d 282, 289)* . Inasmuch as plaintiffs were unable to allege a strict liability theory (pursuant to application of *Brown*), *Ray* is also inapplicable (*207 Cal. App. 3d 282, 289-290)* . Consequently, the court affirmed summary judgment for defendant and dismissal (*207 Cal. App. 3d 282, 290)* .

[4] Additional Authorities

[a] Successor to Manufacturing Corporation Not Liable in Absence of Exception to General Rule of Successor Nonliability

In *Franklin v. USX Corp. (2001) 87 Cal. App. 4th 615, 105 Cal. Rptr. 2d 11* , plaintiffs claimed that their decedent contracted cancer as a result of childhood exposure to asbestos carried home by her parents while working at a ship yard. They attempted to hold the defendant liable as the successor to the shipyard. However, the language of the purchasing agreement unambiguously showed that the successor did not assume the tort liabilities of its predecessor. Nor was there liability under the de facto merger, mere continuation, or product line exceptions (*87 Cal. App. 4th 615, 621-625, 105 Cal. Rptr. 2d 11*).

In *Chaknova v. Wilbur-Ellis Co. (1999) 69 Cal. App. 4th 962, 81 Cal. Rptr. 2d 871* , the decedent developed asbestosis as a result of exposure to asbestos-containing products distributed by a company later purchased the defendant. A letter written by defendant's attorney to the state Commissioner of Corporations, in which he discussed defendant's "assumption of the balance of [the distributor's] liabilities," did not amount to an assumption of liabilities for the distributor's tortious acts. Nor did defendant assume the distributor's tort liabilities when it merged with its wholly owned subsidiary to which had been transferred the right, title, and interest in the distributor's assets and business. Because nothing in the purchase agreement between the defendant and the distributor made defendant liable for any of the distributor's pre-sale tort liabilities, the subsidiary did not acquire those liabilities when it acquired the distributor's assets and was still not liable for them when it later merged with its parent (*69 Cal. App. 4th 962, 968-969, 81 Cal. Rptr. 2d 871*).

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Volume 19 Chapters 190-195 PRODUCTS LIABILITY---to---PUBLIC ADMINISTRATIVE LAW
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19-190 California Points & Authorities § 190.245

§ 190.245 Supporting Contention That Comparative Indemnity Applies--Defendant Is Entitled to Comparative Apportionment of Liability

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that other defendants are liable for plaintiff's injuries caused by a defective product (see, e.g., § 190.246).*]

LIABILITY FOR INJURIES CAUSED BY A DEFECTIVE PRODUCT MUST BE APPORTIONED BETWEEN/AMONG DEFENDANTS IN CONFORMITY WITH THE COMPARATIVE FAULT FINDINGS RENDERED BY THE JURY AT TRIAL.

A. Liability Is Apportioned in Conformity With Comparative Fault Findings. In an action for injuries caused by a defective product, liability is appropriately apportioned between or among the tortfeasors in conformity with the comparative fault findings rendered by the jury at trial (*Safeway Stores, Inc. v. Nest-Kart (1978) 21 Cal. 3d 322, 325, 146 Cal. Rptr. 550, 579 P.2d 441*).

[*Optional*] **B. Liability Is Apportioned Even When Liability of One Defendant Derives From Negligence While Liability of Other Derives From Strict Products Liability.** The comparative indemnity doctrine is a permissible basis for apportioning liability between tortfeasors when the liability of one defendant derives from negligence, while the liability of another defendant derives from strict products liability (*Safeway Stores, Inc. v. Nest-Kart (1978) 21 Cal. 3d 322, 325, 328, 146 Cal. Rptr. 550, 579 P.2d 441*).

[*Optional*] **C. Liability Is Apportioned Between Strictly Liable Tortfeasors.** Multiple tortfeasors who are strictly liable to the same plaintiff may seek comparative indemnity from each other (*Gentry Constr. Co. v. Superior Court (1989) 212 Cal. App. 3d 177, 182-183, 260 Cal. Rptr. 421*).

[*Optional*] **D. With Regard to Noneconomic Damages, Defendant's Percentage of Fault Must Be Compared to**

Fault of All Persons Who Contributed to Injury. Each defendant is liable only for the amount of noneconomic damages allocated to that defendant in direct proportion to that defendant's percentage of fault (*Civ. Code § 1431.2(a)*). To determine the defendant's share, the defendant's fault must be compared with all fault responsible for the plaintiff's injuries, even if the other persons responsible are not parties or are immune from tort liability (*DaFonte v. Up-Right, Inc. (1992) 2 Cal. 4th 593, 602-603, 7 Cal. Rptr. 2d 238, 828 P.2d 140* ; *Wilson v. John Crane, Inc. (2000) 81 Cal. App. 4th 847, 851-852, 97 Cal. Rptr. 2d 240*).

[2] Comments

CAUTION:

Special rules apply to the responsibility of a franchisee to a franchisor for products liability concerning a new motor vehicle [*see Veh. Code § 3064(a)*; *see also* California Forms of Pleading and Practice, Ch. 515, *Securities and Franchise Regulation* (Matthew Bender)].

[a] Use of Form

These points and authorities may be submitted in support of the contention that liability must be apportioned between or among defendants, regardless of whether liability is based on negligence or strict liability.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary judgment or summary adjudication on the issue that defendant is not solely liable for plaintiff's injuries. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form and in any other relevant points and authorities combined with the form, to show the relationship between the facts of the case and the points of law stated. For example, counsel should state the jury findings apportioning liability or, if the matter has not proceeded to trial, facts indicating a proper apportionment of liability [*see, e.g.,* *Safeway Stores, Inc. v. Nest-Kart (1978) 21 Cal. 3d 322, 146 Cal. Rptr. 550, 579 P.2d 441* (liability as apportioned on 80-to-20 basis to comport with jury findings)].

[b] Related Pleading and Practice Forms

For discussion and forms relating specifically to cross complaints for comparative indemnity regarding products liability, see California Forms of Pleading and Practice, Ch. 460, *Products Liability* (Matthew Bender). For discussion and forms relating to indemnity generally, see Ch. 300, California Forms of Pleading and Practice , *Indemnity and Contribution* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda of points and authorities related to indemnity in general, see Ch. 115, *Indemnity and Contribution* .

[3] Discussion of Authorities

[a] Liability Is Apportioned in Conformity With Comparative Fault Findings

In ***Safeway Stores, Inc. v. Nest-Kart*** *(1978) 21 Cal. 3d 322, 146 Cal. Rptr. 550, 579 P.2d 441* , plaintiff was seriously injured while in a supermarket when the shopping cart that she was using broke and fell on her foot. Plaintiff brought an action in strict liability and negligence against the supermarket and the manufacturer of the cart. The jury returned a verdict for plaintiff, indicating that defendant supermarket's liability was grounded on both negligence and strict liability principles, while defendant manufacturer's liability was grounded solely on strict liability principles. The jury found that

defendant supermarket's comparative fault was 80 percent, and that defendant manufacturer's was 20 percent. The trial court entered a judgment of $20,000, which defendants satisfied on an 80-to-20 percent basis. Defendant supermarket then moved for a judgment of contribution to require defendant manufacturer to pay an additional 30 percent of the judgment to defendant supermarket, to achieve an equal 50-to-50 apportionment. The trial court granted the motion, and defendant manufacturer appealed.

The Supreme Court reversed the order of a 50-to-50 apportionment between the two tortfeasors, holding that comparative fault principles dictated that the proper apportionment should reflect the jury finding of an 80-to-20 percent apportionment of fault. The Court held that comparative indemnity was to be used as the basis for apportioning liability between two tortfeasors, one whose liability rests on California's strict products liability doctrine and the other whose liability derives, at least in part, from negligence theory. The Court explained that the same basic equitable considerations that led to the adoption of the comparative apportionment rule of liability among multiple tortfeasors, as outlined in *American Motorcycle Assn. v. Superior Court of Los Angeles County (1978) 20 Cal. 3d 578* , applied equally to strictly liable defendants (*21 Cal. 3d 322, 327-332)* . The Court also held that *American Motorcycle* was retroactive to this case and to those cases in which the comparative indemnity question was properly preserved at trial and on appeal (*21 Cal. 3d 322, 334)* .

[b] Liability Is Apportioned Even When Liability of One Defendant Derives From Negligence While Liability of Other Derives From Strict Products Liability

Safeway Stores, Inc. v. Nest-Kart *(1978) 21 Cal. 3d 322, 146 Cal. Rptr. 550, 579 P.2d 441* , is discussed in *§ 190.245[3][a]*.

[c] Liability Is Apportioned Between Strictly Liable Tortfeasors

In ***Gentry Constr. Co. v. Superior Court*** *(1989) 212 Cal. App. 3d 177, 260 Cal. Rptr. 421* , a homeowner brought an action in strict liability against the contractor that built his house, the developer that graded the lots, and others, seeking damages arising from allegedly defective soil conditions. The contractor, which purchased the land from the developer, cross complained against the developer, stating causes of action, among others, for comparative indemnity as well as total indemnity based on the developer's strict liability. The trial court granted summary adjudication for the developer in holding that the contractor, as a matter of law, cannot maintain a cause of action in strict products liability against the developer. The contractor filed a petition for writ of mandate, requesting the court of appeal to direct the trial court to vacate its finding on that issue.

The court of appeal denied the petition (*212 Cal. App. 3d 177, 184)* . The court first noted that the contractor, as a commercial plaintiff, may not rely on the doctrine of strict liability to recover its losses (*212 Cal. App. 3d 177, 180)* . The court further noted that this case involved not simply losses incurred by a commercial enterprise, but rather losses incurred by a consumer who potentially had a claim for strict liability. The court stated that when two tortfeasors may both be strictly liable to a consumer, no authority prevents one of the tortfeasors from attempting to shift responsibility for the consumer's losses to the other tortfeasor by seeking comparative indemnity under the principles set forth in *American Motorcycle Assn. v. Superior Court of Los Angeles County (1978) 20 Cal. 3d 578* . The court noted that other jurisdictions have allowed indemnity between strictly liable tortfeasors, and that the *California Supreme Court, in Safeway Stores, Inc., v. Nest-Kart (1981) 21 Cal. 3d 322, 146 Cal. Rptr. 550, 579 P.2d 441* [*see § 190.245[3][a]*], suggested that indemnity is available in California under those circumstances (*212 Cal. App. 3d 177, 181)* .

The court noted that other cases that have created exceptions to the rule of comparative indemnity have done so only when, because of the particular factual context, fairness did not require that any part of the loss be shifted from a defendant to a third party, or when the loss-shifting would interfere in a special relationship between the plaintiff and the third party (*212 Cal. App. 3d 177, 181-182)* . Unlike those situations, in the case of two strictly liable tortfeasors, fairness dictates that the plaintiff's damages be allocated between the tortfeasors in proportion to their responsibility for

the plaintiff's injuries. The court held that multiple tortfeasors who are strictly liable to the same plaintiff may seek comparative indemnity from each other or from negligent tortfeasors (*212 Cal. App. 3d 177, 182-183)* .

The court stated, however, that absent a statute or agreement to the contrary, such defendants are not entitled to any type of indemnity other than the comparative indemnity available under *American Motorcycle*. The court noted that the *California Supreme Court, in Far W. Fin. Corp. v. D & S Co. (1988) 46 Cal. 3d 796, 251 Cal. Rptr. 202, 760 P.2d 399* , rejected a party's contention that its claim for total indemnity, rather than comparative indemnity, was not barred under *Code Civ. Proc. § 877.6(c)* by a good-faith settlement. In deciding that issue, the Supreme Court stated that there are not two separate equitable indemnity doctrines in California, but rather a single "comparative indemnity" doctrine that permits partial indemnification on a comparative fault basis in appropriate cases. Thus, the effect of "comparative" indemnity includes the complete range of proportional possibilities, from a complete shifting of responsibility for the loss to no shift at all (*212 Cal. App. 3d 177, 182-183)* .

The court then examined the facts of the case before it in light of the controlling law. The trial court's summary adjudication, narrowly interpreted, barred the contractor's strict-liability claims against the developer regarding losses that the contractor itself suffered. The court noted that a developer that has the ability to protect itself from the risks posed by defective products cannot recoup damage it suffers by way of a claim for strict liability in tort, and in that sense, the trial court's order was a correct statement of the law (*212 Cal. App. 3d 177, 183)* . However, the contractor made no such damage claim against the developer. Rather, the contractor sought to recover from the developer only the damages it might be required to pay to the plaintiff. In that light, the summary adjudication order was inconsistent with the ruling in *Safeway*, which suggests that strict liability may be equitably apportioned. The court stated that on that analysis alone it would be inclined to grant the petition for a writ of mandate. However, in making its motion for summary adjudication, the developer's attack was directed solely toward the contractor's cause of action for total indemnity based on strict liability. The effect of the order was to nullify that cause of action, which is supported by the holding of *Far West*. A surviving cause of action in the cross complaint, for comparative indemnity, was not the subject of the trial court's order. Under controlling case law, the contractor can seek no more than comparative indemnity. Therefore, the attack on the cause of action for total indemnity was well taken. If that cause of action had sought no more than comparative indemnity, it would be mere surplusage. On the other hand, if it was an attempt to allege more than comparative indemnity, that is, an equitable claim not subject to the good-faith settlement bar in *Code Civ. Proc. § 877.6(c)*, it contravened controlling authority. Accordingly, he court held that the trial court properly granted the order nullifying the cause of action for total indemnity (*212 Cal. App. 3d 177, 184)* .

[d] With Regard to Noneconomic Damages, Defendant's Percentage of Fault Must Be Compared to Fault of All Persons Who Contributed to Injury

In ***DaFonte v. Up-Right, Inc.*** *(1992) 2 Cal. 4th 593, 7 Cal. Rptr. 2d 238, 828 P.2d 140* , plaintiff was seriously injured when he was cleaning a moving conveyor belt of a mechanical grape harvester and his arm was pulled into it. He received workers' compensation benefits, and then sued the manufacturer of the harvester on negligence and product defect theories. The workers' compensation insurer also sought subrogation, and the two suits were consolidated (*2 Cal. 4th 593, 596)* . The jury allocated 15 percent fault to the plaintiff, 45 percent to the employer, and 40 percent to the manufacturer and awarded $355,000 in economic damages and $300,000 in noneconomic damages. The total damage award was reduced by 15 percent for the plaintiff's fault and by 45 percent of the noneconomic damages attributable to the employer. Thus, the trial court entered a judgment against the manufacturer for $421,750, plus costs. It refused to reduce the judgment by any amount of the workers' compensation benefits the plaintiff had received and denied any subrogation to the insurer (*2 Cal. 4th 593, 596-597)* .

The court of appeal reversed the judgment in part, finding that the manufacturer was entitled to a reduction for the full amount of the workers' compensation benefits received from the employer, whose proportionate share of fault exceeded the benefits paid. It also found that a full joint and several award of the noneconomic damages should have been made, except for the amounts representing the plaintiff's fault and the employer's fault to the extent of the compensation paid.

The court's rationale was that the employer was limited to payment of workers' compensation benefits and was immune from tort liability. Thus, the court entered a modified judgment of $533,074, plus costs (*2 Cal. 4th 593, 597)* .

The Supreme Court reversed, holding that a defendant's liability for noneconomic damages cannot exceed the defendant's proportionate share of fault as compared with all fault responsible for the plaintiff's injuries, regardless of whether the other tortfeasors are present in the lawsuit (*2 Cal. 4th 593, 603)* . It interpreted *Civ. Code § 1431.2* as limiting the joint liability of every defendant to economic damages and protecting every defendant from becoming liable for any share of noneconomic damages beyond that which is attributable to that defendant's own comparative fault. That is, the statute does not expressly provide that a defendant should be protected from such liability to co-defendants, but should remain jointly liable for noneconomic damages caused by nonparties (*2 Cal. 4th 593, 602)* .

[4] Additional Authorities

[a] Liability Is Apportioned Between Strictly Liable Tortfeasors

In *GEM Developers v. Hallcraft Homes of San Diego, Inc. (1989) 213 Cal. App. 3d 419, 261 Cal. Rptr. 626* , a condominium association brought an action in strict liability against the contractor of the condominium project, seeking damages arising from construction defects, and the contractor sought comparative equitable indemnity in a cross complaint against the company that initially graded the lots, which was not named as a defendant in the underlying complaint. The trial court entered judgment in favor of the cross defendant on the ground that the contractor could not seek comparative equitable indemnity on a strict liability theory in a commercial setting; the court of appeal reversed, holding that a defendant-indemnitee may in an action for indemnity seek apportionment of the loss on any theory that was available to the plaintiff on which the plaintiff would have been successful, including the doctrine of strict liability (*213 Cal. App. 3d 419, 426-430)* . The court also held that it was irrelevant that the cross defendant was not joined as a defendant in the underlying complaint (*213 Cal. App. 3d 419, 430-431)* .

[b] With Regard to Noneconomic Damages, Defendant's Percentage of Fault Must Be Compared to Fault of All Persons Who Contributed to Injury

In *Wilson v. John Crane, Inc. (2000) 81 Cal. App. 4th 847, 97 Cal. Rptr. 2d 240* , following a jury trial on plaintiffs' claims for personal injuries and loss of consortium arising from exposure to asbestos, the defendant corporation was ordered to pay damages. Defendant raised numerous challenges to the judgment. Plaintiffs cross-appealed from the judgment insofar as it limited their recovery of noneconomic damages to that proportion of such damages as the jury found attributable to this particular defendant. Finding no merit in either side's arguments, the court affirmed the judgment in its entirety. Under *Civ. Code § 1431.2*, in an action against multiple defendants, each defendant was liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault. Therefore, as set forth in *Civ. Code § 1431.2(a)*, defendant's liability was not joint, but severed. Plaintiffs' non-economic damages for loss of consortium were explicitly within the scope of *Civ. Code § 1431.2(b)(2)* (*81 Cal. App. 4th 847, 851-852)* .

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19-190 California Points & Authorities § 190.245A

§ 190.245A Supporting Contention That Sophisticated User Defense Applies--Defendant Had No Duty to Warn

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is not liable for plaintiff's injuries caused by defendant's product (see, e.g., § 190.89 and §§ 190.164-190.171).*]

THE SOPHISTICATED USER DEFENSE APPLIES AND RELIEVES THE DEFENDANT, _____ [*specify name*] OF LIABILITY FOR FAILURE TO WARN BECAUSE PLAINTIFF, AS A _____ [*specify occupation*], COULD REASONABLY BE EXPECTED TO KNOW OF THE DANGERS OF _____ *[specify defendant's product]*.

A. Manufacturer Not Liable If Sophisticated User Knew or Should Have Known of Risk. A manufacturer is not liable to a sophisticated user of its product for failing to warn of a danger if that user knew or should have known of the risk (*Johnson v. American Standard, Inc. (2008) 43 Cal. 4th 56, 71, 74 Cal. Rptr. 3d 108, 179 P.3d 905*).

B. Sophisticated User Defense Applies to Negligence and Strict Liability Causes of Action. The sophisticated user defense applies to both negligence and strict liability causes of action (*Johnson v. American Standard, Inc. (2008) 43 Cal. 4th 56, 71, 74 Cal. Rptr. 3d 108, 179 P.3d 905*).

C. Relevant Time for Determining User Sophistication Is Time of Injury. A sophisticated user's knowledge of a risk is measured from the time of his or her injury, not from the date of the product's manufacture (*Johnson v. American Standard, Inc. (2008) 43 Cal. 4th 56, 73-74, 74 Cal. Rptr. 3d 108, 179 P.3d 905*).

D. Sophisticated User Defense Applies to Failure-to-Warn Cause of Action on Negligence Per Se Theory. The sophisticated user defense applies to negligent failure-to-warn cause of action on a negligence per se theory (*Johnson v. Honeywell Int'l Inc. (2009) 179 Cal. App. 4th 549, 558, 101 Cal. Rptr. 3d 726*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that defendant is not liable for the plaintiff's injuries because the plaintiff was a sophisticated user who knew or should have known of the product's risk of danger [*see Johnson v. American Standard, Inc. (2008) 43 Cal. 4th 56, 71, 74 Cal. Rptr. 3d 108, 179 P.3d 905]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary judgment or summary adjudication. The points and authorities may also be adopted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should describe how persons working in the plaintiff's field could reasonably be expected to know of the hazard of the injury-causing product.

[b] Related Points and Authorities

In an appropriate case, the points and *authorities in §§ 190.166* and *190.246* may be combined with the points and authorities in this form.

[c] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 190.262* may be used to oppose the contention supported by these points and authorities.

[3] Discussing of Authorities

[a] Manufacturer Not Liable If Sophisticated User Knew or Should Have Known of Risk

In ***Johnson v. American Standard, Inc.*** *(2008) 43 Cal. 4th 56, 74 Cal. Rptr. 3d 108, 179 P.3d 905* , the plaintiff--an HVAC technician--was exposed to phosgene gas from decomposed refrigerant (R-22) while performing routine maintenance jobs. He developed pulmonary fibrosis and filed an action against numerous defendants, including the manufacturer of the air conditioning equipment. He alleged that the defendant failed to warn of the dangers of R-22 exposure. The trial court granted the defendant's motion for summary judgment. The Court of Appeal affirmed on the ground that the sophisticated user defense applies in California.

The Supreme Court of California affirmed. After giving an overview of the development of the sophisticated user doctrine in other jurisdictions and the obvious danger rule in California, the court explicitly adopted the sophisticated user defense. It next defined some of the parameters of the doctrine. First, it chose an objective standard and held that a manufacturer is not liable for risks about which the sophisticated user knew or should have known. Next, the court held that the sophisticated user defense applies to both negligence and strict liability causes of action. Finally, it concluded that the relevant time for determining user sophistication is when the user is injured, not the date of product manufacture.

Applying these rules to the facts of the case, the court concluded that sophisticated user defense applied because the defendant presented undisputed evidence that HVAC technicians should have known of the risk of phosgene gas (*43 Cal. 4th 56, 71-74)* .

[b] Sophisticated User Defense Applies to Negligence and Strict Liability Causes of Action

Johnson v. American Standard, Inc. *(2008) 43 Cal. 4th 56, 74 Cal. Rptr. 3d 108, 179 P.3d 905* , is discussed in *§ 190.245A[3][a]*.

[c] Relevant Time for Determining User Sophistication Is Time of Injury

Johnson v. American Standard, Inc. *(2008) 43 Cal. 4th 56, 74 Cal. Rptr. 3d 108, 179 P.3d 905* , is discussed in *§ 190.245A[3][a]*.

[d] Sophisticated User Defense Applies to Failure-to-Warn Cause of Action on Negligence Per Se Theory

The facts and procedural history of ***Johnson v. Honeywell Int'l Inc.*** *(2009) 179 Cal. App. 4th 549, 101 Cal. Rptr. 3d 726* , are discussed in *§ 190.245A[3][a]*. On remand, the case proceeded against the manufacturers of the R-22 refrigerant. The plaintiff filed an amended complaint, bringing causes of action for negligence on a negligence per se theory, and for strict liability on a design defect risk-benefit theory. The negligence per se claim alleged that the defendants violated statutes requiring them to provide direct purchasers with MSDS containing adequate warnings of their products' safety hazards. The trial court determined that the sophisticated user defense barred both causes of action and entered judgment for the defendants.

The Court of Appeal held that the sophisticated user defense applied to plaintiff's negligence cause of action, but not to his strict liability cause of action. It first rejected plaintiff's argument that application of the defense to his negligence per se theory would improperly absolve manufacturers of their statutory duties. Application of the doctrine only means that some plaintiffs cannot recover in tort if the law is broken; it does not give anyone permission to break the law.

However, the court determined that sophisticated user defense--a defense based on the need for a warning--does not apply to a design defect cause of action. The court reversed the judgment and remanded the case for further proceedings (*179 Cal. App. 4th 549, 557-559)* .

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19-190 California Points & Authorities § 190.246

§ 190.246 Supporting Contention That Bulk Supplier and Sophisticated Buyer Defenses Apply

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that the defendant is not liable for plaintiff's injuries caused by a defective product.*]

THE BULK SUPPLIER AND SOPHISTICATED BUYER DEFENSES RELIEVE THE DEFENDANT, _____ [*specify name*], OF LIABILITY FOR NEGLIGENCE BECAUSE _____ [*specify the raw material supplied*] WAS NOT INHERENTLY DANGEROUS, _____ [*specify name of purchaser of materials*] WAS A SOPHISTICATED BUYER THAT SUBSTANTIALLY CHANGED _____ [*specify the raw material supplied*] WHEN IT MANUFACTURED _____ [*specify product made from materials*], AND THE DEFENDANT HAD ONLY A LIMITED ROLE IN DEVELOPING AND DESIGNING _____ [*specify product*].

Bulk Supplier of Raw Materials to Sophisticated Buyer Is Not Liable for Negligence. A bulk supplier of raw materials that are not inherently dangerous is not liable for injuries caused by a product manufactured from these materials when the manufacturer is a sophisticated buyer with a duty to investigate the hazards of its own product, the manufacturer substantially changed the materials during manufacture of this product, and the bulk supplier only had a limited role in developing and designing the product (*Artiglio v. General Elec. Co. (1998) 61 Cal. App. 4th 830, 841, 71 Cal. Rptr. 2d 817*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a bulk supplier of raw materials is entitled to claim the bulk supplier and sophisticated buyer defenses.

The form may be combined with other points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a demurrer or motion for summary judgment or summary adjudication on the issue that defendant is liable for negligence. The form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. For example, the raw materials that were supplied are not inherently dangerous [*Artiglio v. General Elec. Co. (1998) 61 Cal. App. 4th 830, 841, 71 Cal. Rptr. 2d 817]* .

[3] Discussion of Authorities

[a] Bulk Supplier of Raw Materials to Sophisticated Buyer Is Not Liable for Negligence

In ***Artiglio v. General Elec. Co.*** *(1998) 61 Cal. App. 4th 830, 841, 71 Cal. Rptr. 2d 817* , the plaintiffs sued a supplier of silicone used in manufacturing breast implants for negligently failing to disclose information about the dangers of using silicone in medical products. The trial court granted the defendant's motion for summary judgment and dismissed the negligent failure-to-warn cause of action.

The court of appeal affirmed the judgment, finding that the defendant was entitled to claim the bulk supplier and sophisticated buyer defenses as a matter of law. The duty of a supplier of raw materials to warn about the hazards of its materials is more limited than the duty of the manufacturer using the materials in its end products. Raw material suppliers are not liable to ultimate consumers when (1) the material they supply are not inherently dangerous, (2) the material is sold in bulk to a sophisticated buyer, (3) the material is substantially changed during the manufacturing process, and (4) the supplier has a limited role in developing and designing the end product (*61 Cal. App. 4th 830, 840)* .

In this case, the court of appeal found that the defendant had established all elements of the bulk supplier/sophisticated buyer defenses. First, silicone is not inherently dangerous and only became potentially hazardous when it was used in a medical product. Second, there is no dispute that the implant manufacturers that purchased the silicone were sophisticated and had a duty to investigate the potential dangers of the breast implants. Third, the silicone was substantially changed because the manufacturers were responsible for "cooking" the silicone into silicone gel and silicone shells, injecting the gel into shells and packaging the implants. Fourth, while the defendant developed silicone to meet the specifications of implant manufacturers and consulted with them regularly, the defendant did not exercise any control over the design of the implants (*61 Cal. App. 4th 830, 841)* .

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19-190 California Points & Authorities § 190.247

§ 190.247 Supporting Contention That Action for Personal Injuries Brought Under Market Share or Products Liability Theory Barred by Statute of Limitations [Code Civ. Proc. § 335.1; Note: Former Code Civ. Proc. § 340(3) provided for a one-year period]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that the action is time-barred.*]

PLAINTIFF'S _____ [MARKET SHARE *or* PRODUCTS LIABILITY] ACTION IS BARRED BECAUSE IT WAS NOT FILED WITHIN [TWO YEARS *or* ONE YEAR] AFTER THE ACCRUAL OF THE CAUSE OF ACTION IN THAT PLAINTIFF HAD A SUSPICION OF WRONGDOING, AND DISCOVERED THE RELEVANT FACTS UNDERLYING PLAINTIFF'S CAUSE OF ACTION, MORE THAN [TWO YEARS *or* ONE YEAR] PRIOR TO FILING THE COMPLAINT.

[*EITHER*]

A. Market Share Action For Personal Injuries Must Be Brought Within One Year After Accrual of Cause of Action Under Former Code Civ. Proc. § 340(3). The one-year limitations period of former Code Civ. Proc. 340(3) applied to a case brought for personal injuries under the market share theory (*Jolly v. Eli Lilly & Co. (1988) 44 Cal. 3d 1103, 1109, 245 Cal. Rptr. 658, 751 P.2d 923* ; *see also Norgart v. Upjohn Co. (1999) 21 Cal. 4th 383, 87 Cal. Rptr. 2d 453, 981 P.2d 79*).

[*OR*]

A. Products Liability Action for Personal Injuries Must Be Brought Within Two Years After Accrual of Cause

of Action Under *Code Civ. Proc. § 335.1*. The two-year statute of limitation of *Code of Civil Procedure Section 335.1* applies to products liability claims (*Pooshs v. Altria Group (N.D. Cal. 2004) 331 F. Supp. 2d 1089, 1092)* .

[*CONTINUE*]

B. Statute Begins to Run When Plaintiff Has Information to Be Put on Inquiry of Wrongdoing. The statute of limitations begins once the plaintiff has a suspicion of wrongdoing, or has notice or information of circumstances to put a reasonable person on inquiry. A plaintiff need not be aware of the specific "facts" necessary to establish the claim (*Jolly v. Eli Lilly & Co. (1988) 44 Cal. 3d 1103, 1110-1111, 245 Cal. Rptr. 658, 751 P.2d 923*).

C. Statute Begins to Run on Discovery of Facts, Not Their Legal Significance. It is the discovery of facts, not their legal significance, that starts the statute of limitations (*Jolly v. Eli Lilly & Co. (1988) 44 Cal. 3d 1103, 1113, 245 Cal. Rptr. 658, 751 P.2d 923* ; *see also Norgart v. Upjohn Co. (1999) 21 Cal. 4th 383, 87 Cal. Rptr. 2d 453, 981 P.2d 79*).

D. Discovery Rule Allows Accrual of Cause of Action if Plaintiff Has No Reason to Suspect Identity of Defendant. The discovery rule allows accrual of a cause of action even if the plaintiff does not have reason to suspect the defendant's identity, because the identity of the defendant is not an element of a cause of action (*Fox v. Ethicon Endo-Surgery Inc. (2005) 35 Cal. 4th 797, 807, 27 Cal. Rptr. 3d 661, 110 P.3d 914*).

E. Statute of Limitations Begins to Run Under Discovery Rule When Plaintiff Has Reason to Suspect Injury and Some Wrongful Cause, Unless Reasonable Investigation Would Not Have Revealed Cause of Action's Factual Basis. Under the delayed discovery rule, a cause of action accrues and the statute of limitations begins to run when the plaintiff has reason to suspect an injury and some wrongful cause, unless the plaintiff pleads and proves that a reasonable investigation at that time would not have revealed a factual basis for that particular cause of action. In that case, the statute of limitations for that cause of action will be tolled until such time as a reasonable investigation would have revealed its factual basis (*Fox v. Ethicon Endo-Surgery Inc. (2005) 35 Cal. 4th 797, 803, 27 Cal. Rptr. 3d 661, 110 P.3d 914*).

F. Accrual of Personal Actions Arising From Exposure to Hazardous Material or Toxic Substance. In actions for illness or injury based on exposure to a hazardous material or toxic substance, the statute of limitations begins to run on the later of either the date of injury or the date on which the plaintiff becomes aware of, or reasonably should have become aware of, all of the following: (1) an injury; (2) the physical cause of that injury; and (3) sufficient facts to put a reasonably person on inquiry notice that the injury was caused or contributed to by the wrongful act of another (*Code Civ. Proc. § 340.8(a)*).

G. Accrual of Wrongful Death Actions Arising From Exposure to Hazardous Material or Toxic Substance. In actions for wrongful death based on exposure to a hazardous material or toxic substance, the statute of limitations begins to run on the later of either the date of the decedent's death or the date on which the plaintiff is aware of, or reasonably should have become aware of, the physical cause of death and sufficient facts to put a reasonable person on inquiry notice that the death was caused or contributed to by the wrongful act of another (*Code Civ. Proc. § 340.8(b)*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of the contention that a plaintiff's market share action or products liability action for personal injuries is barred by the two-year statute of limitations under *Code Civ. Proc. § 335.1* [*see Pooshs v. Altria Group (N.D. Cal. 2004) 331 F. Supp. 2d 1089, 1092]* or the one-year statute of limitations of former Code Civ. Proc. § 340(3) [*see Jolly v. Eli Lilly & Co. (1988) 44 Cal. 3d 1103, 1113, 245 Cal.*

Rptr. 658, 751 P.2d 923] .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the defense of the statute of limitations. For example, they may be combined with points and authorities supporting a motion for summary judgment or summary adjudication on the issue that plaintiff's action is time-barred. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should set forth facts showing that the cause of action accrued prior to one year before the filing of the action. Counsel should argue facts showing that plaintiff had notice of information sufficient to put a reasonable person on inquiry of a wrongdoing prior to that period, and that plaintiff discovered the necessary facts prior to that period, whether or not plaintiff was aware of their legal significance at the time.

[b] ***Sindell*** Did Not Create New Tort With New Statute of Limitations

The seminal market share theory action was *Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 611-612, 163 Cal. Rptr. 132, 607 P.2d 924* , which established that when a product has been produced by several different manufacturers from an identical formula, but the manufacturer of the specific product that caused the injuries cannot be identified through no fault of the plaintiff, the plaintiff may bring a products liability action against the manufacturers of a substantial share of the market of that product at the time the product was sold to the plaintiff [*see § 190.80*]. Consequently, *Sindell* permitted the bringing of an action that was previously impossible to pursue if the plaintiff could not identify the specific manufacturer of the precise drug that caused the injury. However, *Sindell* did not create a new tort with an independent starting date for purposes of the statute of limitations. Consequently, a person who was aware of injury and causation regarding a prescription drug must have filed the action within one year of that discovery, and cannot consider the filing of the *Sindell* decision as the accrual of the cause of action [*see Jolly v. Eli Lilly & Co. (1988) 44 Cal. 3d 1103, 1115-1118, 245 Cal. Rptr. 658, 751 P.2d 923]* .

[c] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 190.260* may be used to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Market Share Action For Personal Injuries Must Be Brought Within One Year After Accrual of Cause of Action Under Former Code Civ. Proc. § 340(3)

In ***Norgart v. Upjohn Co.*** *(1999) 21 Cal. 4th 383, 87 Cal. Rptr. 2d 453, 981 P.2d 79* , plaintiffs' married daughter committed suicide while being treated by a psychiatrist and taking the prescription drug Halcion. Shortly after their daughter's death, plaintiffs discovered that she had received psychiatric treatment and was taking this medication at the time of her death. Within a year after her death, her father suspected that an "individual or individuals" had done something wrong to his daughter that had caused her to take her own life. These individuals included her husband--whom he suspected of physical abuse--and the psychiatrist--whom he suspected of professional negligence. Over six years after the death, they sued the manufacturer of Halcion, alleging that it had not provided adequate warnings and that the drug was unreasonably dangerous. The California Supreme Court held that the complaint was untimely due to plaintiffs' earlier suspicions of wrongdoing by someone, putting them on notice of a potential claim. Under the discovery rule, plaintiffs' wrongful death action accrued when they came to suspect, or had reason to suspect, a factual basis for the cause of action. This would have occurred as early as their daughter's death, or shortly after, based on their investigation. In a footnote, the court disapproved of a portion of *Bristol-Myers Squibb Co. v. Superior Court (1995) 32 Cal. App. 4th 959, 38 Cal. Rptr. 2d 298* , to the extent that it read *Jolly* to require that a plaintiff must do more than suspect a factual basis for the elements of a cause of action in order to discover the cause of action. The court noted

that had plaintiffs brought one or more causes of action for wrongful death against their daughter's husband and psychiatrist by filing a "Doe" complaint within the limitations period, they could have amended that complaint to substitute the manufacturer for one of the Does within the three-year period effectively enlarging the limitations period. The amended complaint would have related back to the original one (*21 Cal. 4th 383, 408, 87 Cal. Rptr. 2d 453, 981 P.2d 79*).

In ***Jolly v. Eli Lilly & Co.*** *(1988) 44 Cal. 3d 1103, 245 Cal. Rptr. 658, 751 P.2d 923* , a woman who was injured because her mother had ingested the prescription drug diethylstilbesterol (DES) brought a market share theory action against DES manufacturers, pursuant to the creation of that theory under *Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 163 Cal. Rptr. 132, 607 P.2d 924* [*see § 190.80[3][a]*]. Plaintiff had known that she had been injured, and had suspected that DES had caused her injuries, more than one year prior to filing the complaint. However, she was unable to identify the particular manufacturer, and consequently was unable to state a cause of action until *Sindell* created the market share theory. She brought the action within one year after *Sindell* was filed. Defendants moved for summary judgment, asserting that the action was barred by former Code Civ. Proc. § 340(3), which provides a one-year statute of limitations period for an action "for injury ... caused by the wrongful act or neglect of another." The trial court granted defendants' motion. The court of appeal reversed, and defendants filed a petition for review.

The Supreme Court reversed the judgment of the court of appeal, holding that the action was barred by the one-year statute of limitations, which began to run when plaintiff suspected that defendants' conduct was wrongful, not when *Sindell* was filed (*44 Cal. 3d 1103, 1112-1118)* . Generally, ignorance of the legal significance of known facts or the identity of the defendant would not delay the running of the statute, but ignorance of a "critical fact" could have that effect. In reversing the trial court holding, the court of appeal had relied on the decision in *Kensinger v. Abbott Labs. (1985) 171 Cal. App. 3d 376, 217 Cal. Rptr. 313* , which held that the statute did not begin to run until the plaintiff knew or reasonably should have known of the facts constituting wrongful conduct, as well as the fact of her injury and its relation to DES. Relying on *Kensinger,* the court of appeal held that it could not be said that "as a matter of law" plaintiff was or should have been aware of *facts* establishing wrongdoing, e.g., "either failure to test or failure to warn," until within one year of the date she filed suit. The Supreme Court, however, disapproved the holding of *Kensinger,* stating that it goes too far. Under the discovery rule, the statute of limitations begins to run when the plaintiff suspects or should suspect that an injury was caused by wrongdoing, i.e., that someone has done something wrong to him or her (*44 Cal. 3d 1103, 1110)* . The limitations period begins once the plaintiff has notice or information of circumstances to put a reasonable person on inquiry (*44 Cal. 3d 1103, 1110-1111)* . A plaintiff need not be aware of the specific "facts" necessary to establish the claim, because that process is contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, he or she must decide whether to file suit or delay asserting his or her rights. As long as suspicion exists, it is clear that the plaintiff must find the facts, and cannot wait for the facts to find plaintiff (*44 Cal. 3d 1103, 1111)* . Plaintiff stated that as early as three years prior to filing the action, she was interested in "obtaining more information" about DES because she wanted to "make a claim"; she felt that someone had done something wrong to her concerning DES, that it was a defective drug, and that she should be compensated. Thus, by her own admission, she suspected that defendants' conduct was wrongful well over a year before she filed suit (*44 Cal. 3d 1103, 1112)* .

The Court rejected plaintiff's contention that the *Sindell* decision redefined "causation" and "wrongful," and provided the crucial "fact" necessary for her to suspect wrongdoing. It is the discovery of facts, not their legal significance, that starts the statute (*44 Cal. 3d 1103, 1113)* . Plaintiff contended that prior to *Sindell,* the defective "product" was defined as the specific DES pills her mother ingested, and consequently that she could not establish a causal link between any particular manufacturer and her injury. She argued that *Sindell* redefined the defective "product" as generic DES, making all manufacturers of DES contributors to her injury. She therefore claimed a new ability to establish a causal link between the harm suffered and defendants. Defendants contended that that effect was not contemplated by *Sindell,* but rather, that *Sindell* merely shifted the burden of proof of identifying the particular manufacturer (*44 Cal. 3d 1103, 1114)* . The Court noted that *Sindell* was more than a mere "burden shifting" case, because the actual manufacturer might possibly not be named in the suit (*44 Cal. 3d 1103, 1114-1115)* . However, *Sindell* did not create an entirely

new tort, nor identify a new "product." *Sindell* merely bridged the causal gap between DES manufacturers as a group and plaintiff's injury. *Sindell* did not provide plaintiff with the critical "fact" that started the limitations period. Nor did it create a new tort with an independent starting date for purposes of the statute of limitations. Rather, *Sindell* demonstrated the legal significance of facts already known to plaintiff (*44 Cal. 3d 1103, 1115)* .

The Court addressed plaintiff's concern that prior to *Sindell* she could not have stated a cause of action because under prior law, she was required to identify the precise manufacturer of the pills ingested by her mother (*44 Cal. 3d 1103, 1115-1116)* . However, a change in the law, either by statute or by case law, does not revive claims otherwise barred by the statute of limitations (*44 Cal. 3d 1103, 1116)* . The Court also stated that although resolution of the statute of limitations issue is normally a question of fact, when the uncontradicted facts established through discovery are susceptible of only one legitimate inference, summary judgment is proper (*44 Cal. 3d 1103, 1112)* .

[b] Products Liability Action for Personal Injuries Must Be Brought Within Two Years After Accrual of Cause of Action Under Code Civ. Proc. § 335.1

In ***Pooshs v. Altria Group*** *(N.D. Cal. 2004) 331 F. Supp. 2d 1089* , the plaintiff smoked cigarettes from 1953 through 1991. She was diagnosed with lung cancer in January 2003. She filed suit against several tobacco companies in January 2004. She contended that lung cancer is a disease separate and distinct from nicotine addiction and that under the discovery rule, the two-year statute of limitations of *Code Civ. Proc. § 335.1* did not begin to run until her lung cancer diagnosis in January 2003. The federal district court held that to the extent there was any conflict between the California court of appeal [*see* *Wagner v. Apex Marine Ship Mgmt. Corp. (2000) 83 Cal. App. 4th 1444, 1452-1454, 100 Cal. Rptr. 2d 533]* , and the Ninth Circuit, it was bound to follow the latter. In a case before the Ninth Circuit, in which the plaintiff alleged addiction as a specific injury, the Ninth Circuit barred application of the two-injury rule, finding that the plaintiff had constructive knowledge of the hazards of smoking from the date he reasonably should have known that he was addicted to nicotine [*Soliman v. Philip Morris, Inc. (9th Cir. 2002) 311 F.3d 966]* . That rule applied to this case, even though the plaintiff asserted that she did not claim addiction as part of her damages. The allegations that she had become addicted to nicotine and was injured by that addiction ran as a thread throughout the complaint, and the court dismissed her claim as time-barred (*331 F. Supp. 2d 1089, 1092)* .

[c] Statute Begins to Run When Plaintiff Has Information to Be Put on Inquiry of Wrongdoing

Jolly v. Eli Lilly & Co. *(1988) 44 Cal. 3d 1103, 245 Cal. Rptr. 658, 751 P.2d 923* , is discussed in *§ 190.247[3][a]*.

[d] Statute Begins to Run on Discovery of Facts, Not Their Legal Significance

Norgart v. Upjohn Co. *(1999) 21 Cal. 4th 383, 87 Cal. Rptr. 2d 453, 981 P.2d 79* , is discussed in *§ 190.247[3][a]*.

Jolly v. Eli Lilly & Co. *(1988) 44 Cal. 3d 1103, 245 Cal. Rptr. 658, 751 P.2d 923* , is discussed in *§ 190.247[3][a]*.

[e] Discovery Rule Allows Accrual of Cause of Action if Plaintiff Has No Reason to Suspect Identity of Defendant

Fox v. Ethicon Endo-Surgery, Inc*. (2005) 35 Cal. 4th 797, 807, 27 Cal. Rptr. 3d 661, 110 P.3d 914* , is discussed in *§ 190.247[3][f]*.

[f] Statute of Limitations Begins to Run Under Discovery Rule When Plaintiff Has Reason to Suspect Injury and Some Wrongful Cause, Unless Reasonable Investigation Would Not Have Revealed Cause of Action's Factual Basis

In ***Fox v. Ethicon Endo-Surgery, Inc.*** *(2005) 35 Cal. 4th 797, 27 Cal. Rptr. 3d 661, 110 P.3d 914* , the plaintiff's intestine was perforated during surgery, and she filed a medical malpractice complaint against the surgeon. During his

deposition the following year, the surgeon first raised the possibility that the perforation was caused by a malfunctioning stapler. The plaintiff then filed a first amended complaint adding the manufacturer of the stapler as a named defendant. The trial court sustained the manufacturer's demurrer to the products liability complaint, concluding that the statute of limitations barred the claim. The court of appeal reversed and remanded with directions to grant the plaintiff leave to amend to allege facts explaining why she did not have reason to discover earlier the factual basis of her products liability claim.

The California Supreme Court affirmed. Distinguishing both *Jolly* and *Norgart*, the court concluded that the plaintiff's claim was not necessarily time-barred. Under the delayed discovery rule, a cause of action accrues and the statute of limitations begins to run when the plaintiff has reason to suspect an injury and some wrongful cause, unless the plaintiff pleads and proves that a reasonable investigation at that time would not have revealed a factual basis for that particular cause of action. In that situation, the statute of limitations for that cause of action is tolled until such time as a reasonable investigation would have revealed its factual basis. The Court explained that to rely on the discovery rule, a potential plaintiff must specifically plead facts to show both (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence. To adequately allege facts supporting a theory of delayed discovery, the plaintiff must plead that despite diligent investigation of the circumstances of the injury, he or she could not have reasonably discovered facts supporting the cause of action within the applicable limitations period. The plaintiff in this case only partially met this requirement by alleging that there was no way "through which her reasonable diligence would have revealed, or through which she would have suspected" the stapler as a cause of her injury until August 13, 2001. She needed to allege specific facts supporting her allegations. She could have cured this defect by adding to her complaint the allegation that she did not suspect or have reason to discover facts supporting a products liability action against the manufacturer until after deposing her surgeon (*35 Cal. 4th 797, 807-809)* .

The Court specifically rejected the bright-line test of *Bristol-Myers Squibb v. Superior Court* [*Bristol-Myers Squibb v. Superior Court (1995) 32 Cal. App. 4th 959, 966, 38 Cal. Rptr. 2d 298]* , which held that if a plaintiff has cause to sue based on knowledge or suspicion of negligence, the statute of limitations starts to run as to all potential defendants. The Bristol-Myers Squibb court had failed to make the distinction between a plaintiff's ignorance of the identity of a particular defendant and ignorance that a product was the cause of the plaintiff's injury. The Court reiterated that although ignorance of the identity of the manufacturer is not an essential element of a products liability cause of action and therefore will not delay the running of the statute of limitations, a plaintiff's ignorance of wrongdoing involving a product's defect will usually delay accrual, because such wrongdoing is essential to that cause of action (*35 Cal. 4th 797, 812-814)* . A diligent plaintiff's investigation may only disclose an action for one type of tort (for example, medical malpractice), and facts supporting an entirely different type of tort action (for example, products liability) may, through no fault of the plaintiff, only come to light at a later date. Therefore, the rule in *Bristol-Myers Squibb* that all claims arising from any injury accrue simultaneously, even if based on distinct types of wrongdoing, is inconsistent with the generic elements approach set forth in Norgart (*35 Cal. 4th 797, 814-815)* .

[4] Additional Authorities

[a] Statute Begins to Run on Discovery of Facts, Not Their Legal Significance

In *Rivas v. Safety-Kleen Corp. (2002) 98 Cal. App. 4th 218, 119 Cal. Rptr. 2d 503* , plaintiff was exposed to various toxic chemicals at the workplace. He filed suit in 1998 against the chemical manufacturers and distributors. The court dismissed his suit on statute of limitations grounds, ruling that he had sufficient knowledge of injury and wrongdoing for purposes of the statute of limitations more than one year prior to the date the complaint was filed. The court of appeal affirmed. The plaintiff's being informed by physicians in 1991 that he was suffering from a serious condition and being asked to provide a list of all chemicals he came into contact with and to stay away from solvent was sufficient to arouse suspicion and lead to further investigation. Moreover, the fact that the plaintiff filed a workers' compensation claim in 1996 based on exposure to toxic chemicals was definitive proof that he had a suspicion that "someone had done something wrong to [him]" within the meaning of *Jolly* (*98 Cal. App. 4th 218, 119 Cal. Rptr. 2d 503, 511)* .

California Points & Authorities

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CHAPTER 190 PRODUCTS LIABILITY
PART II. FORMS
D. Defenses

19-190 California Points & Authorities § 190.248

§ 190.248 Supporting Contention That Action in Strict Liability for Defects in Real Property Development or Improvement Barred by Statute of Limitations [Code Civ. Proc. §§ 337.1, 337.15]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that the action is time-barred.*]

PLAINTIFF'S ACTION IN STRICT LIABILITY FOR _____ [LATENT *or* PATENT] DEFECTS IN REAL PROPERTY _____ [DEVELOPMENT *or* IMPROVEMENT] IS BARRED BECAUSE IT WAS BROUGHT MORE THAN _____ [*if latent defect*, TEN YEARS *or, if patent defect*, FOUR YEARS] AFTER THE SUBSTANTIAL COMPLETION OF THE DEVELOPMENT.

[*EITHER*]

A. Limitation on Action for Latent Defects in Real Property Development or Improvement. No action may be brought to recover damages from any person, or the surety of a person, who develops real property or performs or furnishes the design, specifications, surveying, planning, supervision, testing, or observation of construction or construction of an improvement to real property more than 10 years after the substantial completion of the development or improvement for any latent deficiency in the design, specification, surveying, planning, supervision, or observation of construction or construction of an improvement to, or survey of, real property, or injury to property, real or personal, arising out of any such latent deficiency (*Code Civ. Proc. § 337.15(a)*; *Lantzy v. Centex Homes (2003) 31 Cal. 4th 363, 366, 2 Cal. Rptr. 3d 655, 73 P.3d 517*).

B. Limitation Period for Latent Defects Applies to Strict Liability Action. The 10-year limitation provision of *Code of Civil Procedure Section 337.15* applies to a cause of action for a latent defect in real property development or improvement based on products liability (*Stoneson Dev. Corp. v. Superior Court (1987) 197 Cal. App. 3d 178, 181,*

242 Cal. Rptr. 721).

[*OR*]

A. Limitation on Action for Patent Defects in Real Property Development or Improvement. No action shall be brought to recover damages from any person performing or furnishing the design, specifications, surveying, planning, supervision or observation of construction or construction of an improvement to real property more than four years after the substantial completion of such improvement for any patent deficiency in the design, specifications, surveying, planning, supervision or observation of construction or construction of an improvement to, or survey of, real property, except as otherwise provided (*Code Civ. Proc. § 337.1(a)(1)*).

B. Limitation Period for Patent Defects Applies to Strict Liability Action. The four-year limitation provision of Section 317.1 of the Code of Civil Procedure applies to a cause of action for a patent defect in real property development or improvement based on products liability (*Mattingly v. Anthony Indus., Inc. (1980) 109 Cal. App. 3d 506, 512-513, 167 Cal. Rptr. 292*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of the contention that a plaintiff's strict-liability action for defects in real property development or improvement is time-barred, pursuant to *Code Civ. Proc. § 337.1* (patent defects) or *Code Civ. Proc. § 337.15* (latent defects) [*see* *Stoneson Development Corp. v. Superior Court (1987) 197 Cal. App. 3d 178, 181, 242 Cal. Rptr. 721* (latent defects); *Mattingly v. Anthony Indus., Inc. (1980) 109 Cal. App. 3d 506, 512-513, 167 Cal. Rptr. 292* (patent defects)]. The first alternative Paragraphs A and B are for use if the defect is latent; the second alternative Paragraphs A and B are for use if the defect is patent.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the defense of the statute of limitations. For example, they may be combined with points and authorities supporting a motion for summary judgment or summary adjudication on the issue that plaintiff's action is time-barred. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should set forth facts showing that the development or improvement was substantially completed more than four years, for patent defects, or ten years, for latent defects, prior to the filing of the action. If counsel is claiming applicability of the four-year statute, it may be appropriate to argue facts supporting the contention that the defect is patent.

[3] Discussion of Authorities

[a] Limitation on Action for Latent Defects in Real Property Development or Improvement

In ***Lantzy v. Centex Homes*** *(2003) 31 Cal. 4th 363, 2 Cal. Rptr. 3d 655, 73 P.3d 517* , the California Supreme Court concluded that the 10-year period set forth in *Code Civ. Proc. § 337.15* is not subject to equitable tolling while a potential defendant's promises or attempts to repair the defects are pending. The court held that a broad tolling-for-repairs rule would have contravened the legislature's clear intent to ensure a generous but firm cutoff date for latent-defects suits. The court also held that the homeowners failed to plead facts that would equitably estop the defendant from asserting the limitations period (*31 Cal. 4th 363, 383)* .

[b] Limitation Period for Latent Defects Applies to Strict Liability Action

In ***Stoneson Dev. Corp. v. Superior Court*** *(1987) 197 Cal. App. 3d 178, 242 Cal. Rptr. 721* , a homeowner brought a strict liability action against a real property developer, alleging that defendant's improper repair of mudslide damage to her property caused further damage in subsequent mudslides 10 years later. The homeowner brought an action one year after the damage. The developer moved to strike the second cause of action based on breach of implied warranty, and the third cause of action based on strict products liability. The homeowner contended that the 10-year statute of limitations pursuant to *Code Civ. Proc. § 337.15* did not bar the cause of action based on products liability. The trial court granted the motion to strike the second cause of action, and denied the motion to strike the cause of action in strict liability. The developer filed a petition for peremptory writ of mandate to direct the trial court to vacate its order regarding the cause of action in strict liability.

The court of appeal let the writ issue, holding that *Code Civ. Proc. § 337.15* applies to a strict liability action. Pursuant to *Code Civ. Proc. § 337.15(a)*, no action may be brought to recover damages from any person who develops real property or performs or furnishes the design, specifications, surveying, planning, supervision, testing, or observation of construction or construction of an improvement to real property more than 10 years after the substantial completion of the development or improvement for any of the following: (1) any latent deficiency in the design, specification, surveying, planning, supervision, or observation of construction or construction of an improvement to, or survey of, real property; or (2) injury to property, real or personal, arising out of any such latent deficiency (*197 Cal. App. 3d 178, 179-180)* . The parties did not dispute that *Code Civ. Proc. § 337.15* applied to an action for negligence or breach of contract, nor did they dispute that the homeowner had stated a cause of action for products liability. The only dispute was whether the provision in *Code Civ. Proc. § 337.15* that "no action" may be filed beyond the 10-year period includes an action based on products liability. The Court noted that nothing in the language of that statute suggests that products liability actions are exempt from its scope. The Court rejected the homeowner's argument, based on equity and public policy, that since the early 1980's, homeowners' insurance policies have been written so that there is no coverage for either earthslide or negligent construction, and that application of *Code Civ. Proc. § 337.15* essentially leaves the homeowner without a remedy (*197 Cal. App. 3d 178, 180)* . The Court noted that the same point could be made regarding a cause of action for negligence or brech of contract. Further, to construe the statute as not covering a cause of action for products liability would render illusory the protection the legislature intended to give the developer (*197 Cal. App. 3d 178, 180-181)* . The case is one of first impression in California. However, the court of appeal in *Mattingly v. Anthony Indus., Inc. (1980) 109 Cal. App. 3d 506, 512-513, 167 Cal. Rptr. 292* , held that *Code Civ. Proc. § 337.1*, which provides a limitation of four years on actions based on patent defects, applies to strict liability actions [*see § 190.248[3][c]*]. The Court concluded that inasmuch as the complaint in this case was filed more than 10 years after the developer completed its work on the property, *Code Civ. Proc. § 337.15* applies to bar the cause of action based on products liability (*197 Cal. App. 3d 178, 181)* .

[c] Limitation Period for Patent Defects Applies to Strict Liability Action

In ***Mattingly v. Anthony Indus., Inc.*** *(1980) 109 Cal. App. 3d 506, 167 Cal. Rptr. 292* , tenants of an apartment building brought an action against the swimming-pool contractor for negligence, strict liability, and attractive nuisance after plaintiffs' child fell into the swimming pool on the property. The complaint, which alleged that the absence of a fence or barrier around the pool caused the injury, was filed 14 years after the completion of the pool, and within one year of the injury. Defendant moved for summary judgment on the ground that the action was time-barred pursuant to *Code Civ. Proc. § 337.1*, which states that an action based on a patent deficiency in an improvement to real property is barred by a four-year procedural statute of limitations. *Code Civ. Proc. § 337.1(e)* provides that a "patent" deficiency is a deficiency that is apparent by reasonable inspection. The trial court granted defendant's motion, and plaintiff appealed.

The court of appeal affirmed, holding that *Code Civ. Proc. § 337.1* applies to a strict liability action. The Court first determined that the absence of fencing was a patent, rather than latent, defect, holding that the appropriate test is not subjective, but rather objective, based on the reasonable expectations of the average consumer (*109 Cal. App. 3d 506, 510-511)* . Moreover, if an unfenced swimming pool in a family apartment building is a deficiency in design, it was

deficient from the time it was constructed, and that deficiency is a patently obvious one (*109 Cal. App. 3d 506, 512)* . The court rejected plaintiff's contention that *Code Civ. Proc. § 340(3)* (one-year statute for personal injuries), rather than *Code Civ. Proc. § 337.1*, should apply because a swimming pool is a "product" for purposes of strict products liability actions. Whether a swimming pool is a product is irrelevant, because *Code Civ. Proc. § 337.1* is the appropriate statute even if the cause of action is in strict liability. Consequently, the statute had obviously run prior to plaintiff's injury (*109 Cal. App. 3d 506, 512)* . In enacting *Code Civ. Proc. §§ 337.1* and *337.15*, the legislature intended to protect contractors against liability extending for a potentially limitless period of time. The court cited statements from the California Supreme Court to the effect that a contractor is in the business of constructing improvements and must devote its capital to that end; the need to provide reserves against an uncertain liability extending indefinitely into the future could seriously impinge on the conduct of its enterprise. The Supreme Court concluded that the statute running from the date of construction was primary, and cut off all liability of the contractor [*see Regents of Univ. of Cal. v. Hartford Accident & Indem. Co. (1978) 21 Cal. 3d 624, 633]* . Therefore, whether or not the swimming pool is a product, it is unarguably an improvement to real property, and any action for a patently deficient or defective design must have been brought within four years of the date of completion of the pool (*109 Cal. App. 3d 506, 513)* .

[4] Additional Authorities

[a] Limitation on Action for Latent Defects in Real Property Development or Improvement

In ***Mills v. Forestex Co.*** *(2003) 108 Cal. App. 4th 625, 134 Cal. Rptr. 2d 273* , plaintiffs' contractor installed hardboard manufactured by the defendant on their house and garage. Within a year, the siding began to warp, and the nails eventually began to back out. The plaintiffs filed an action against the contractor and the manufacturer. The court held that *Code Civ. Proc. §§ 337.1* and *337.15*, which apply to actions against persons involved in construction of improvements to real property and establish statutes of limitations for patent and latent defects, did not apply to the manufacturer of the product incorporated into the improvement. However, plaintiffs' claims against the contractor were subject to *Code Civ. Proc. § 337.1*'s four-year limitation period. They began to run upon discovery of the defective siding. Plaintiffs' claims against the manufacturer were barred by *Comm. Code § 2725*'s four-year statute of limitations.

Assuming plaintiffs adequately stated a claim for strict products liability, the action against the contractor was subject to *Code Civ. Proc. 337.15*. Upon discovery of the latent defect, the action was governed by *Code Civ. Proc. § 338(b)*'s three-year statute of limitations, in that the defect caused an injury to real property. Their strict liability claim against the manufacturer was also governed by § 338(b), but without the prior intervention of § 337.15 (*108 Cal. App. 4th 625, 643)* .

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Volume 19 Chapters 190-195 PRODUCTS LIABILITY---to---PUBLIC ADMINISTRATIVE LAW
CHAPTER 190 PRODUCTS LIABILITY
PART II. FORMS
D. Defenses

19-190 California Points & Authorities § 190.249

§ 190.249 Supporting Contention That Products Liability Action Is Preempted by Federal Law

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is not liable for plaintiff's injuries caused by defendant's product.*]

PLAINTIFF'S PRODUCTS LIABILITY ACTION FOR DAMAGES CAUSED BY A _____ [DEFECT *and/or* FAILURE TO WARN ABOUT RISKS INHERENT] IN _____ [*specify product*] IS PREEMPTED BY FEDERAL LAW, SPECIFICALLY _____ [*specify applicable federal statute or regulation, e.g.,* TITLE *15 OF THE UNITED STATES CODE, SECTIONS 1381*-1431] BECAUSE OF THE CLEAR AND MANIFEST INTENT OF CONGRESS TO SUPERSEDE STATE LAW.

A. Federal Preemption Requires Dismissal of State Products Liability Claim When Congress Intends to Supersede State Law. Federal preemption applies when Congress intends for uniform federal requirements to supersede state law, either expressly or by implication (*Freightliner Corp. v. Myrick (1995) 514 U.S. 280, 287, 115 S. Ct. 1483, 131 L. Ed. 2d 385* ; *Carrillo v. ACF Indus., Inc. (1999) 20 Cal. 4th 1158, 86 Cal. Rptr. 832, 980 P.2d 386* ; *McGuan v. Endovascular Technologies, Inc. (2010) 182 Cal. App. 4th 974, 981* ; *Williamson v. Mazda Motor of Am., Inc. (2008) 167 Cal. App. 4th 905, 910, 84 Cal. Rptr. 3d 545 , modified and reh'g denied, 2008 Cal. App. LEXIS 2269* ; *Jessen v. Mentor Corp. (2007) 158 Cal. App. 4th 1480, 1487, n.5* ; *Frastaci v. Vapor Corp. (2007) 158 Cal. App. 4th 1389, 1394* ; *Burroughs v. Precision Airmotive Corp. (2000) 78 Cal. App. 4th 681, 699, 93 Cal. Rptr. 2d 124*).

[*Optional*] **B. State Products Liability Claim Is Preempted by Federal Railroad Legislation.** The Locomotive Boiler Inspection Act (BIA) (*49 U.S.C.S. § 20701 et seq.*) preempts a state claim based on products liability stemming from defects in railroad equipment, because Congress intended to occupy the entire field of regulation and federal standards displace all state requirements, notwithstanding a lack of conflict between the federal standards and state law (*Scheiding v. General Motors Corp. (2000) 22 Cal. 4th 471, 475, 93 Cal. Rptr. 2d 342, 993 P.2d 996* ; *Frastaci v. Vapor Corp. (2007) 158 Cal. App. 4th 1389, 1393-1404)* .

[*Optional*] **C. State Tort Claim Based on "No Air Bag" Design Defect Is Preempted.** The National Traffic and Motor Vehicle Safety Act of 1966 (*15 U.S.C.S. §§ 1381-1431*) preempts a state common-law tort action against an automobile manufacturer when the action alleges a design defect based on the manufacturer's failure to install air bags in the vehicle, when the vehicle complies with federal safety standards under the *Safety Act (Geier v. American Honda Motor Co. (2000) 529 U.S. 861, 866-867, 120 S. Ct. 1913, 146 L. Ed. 2d 914* ; *Nissan Motor Corp. v. Superior Court (1989) 212 Cal. App. 3d 980, 982-983, 261 Cal. Rptr. 80*).

[*Optional*] **D. FIFRA Preempts Rules Imposing Labeling Requirement That Diverge From Those In Federal Statute.** Section 136v(b) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) preempts statutory or common law rules that would impose a labeling requirement different from those set out in FIFRA and its regulations (*Bates v. Dow Agrosciences LLC (2005) 544 U.S. 431, 452, 125 S. Ct. 1788, 161 L. Ed. 2d 687*).

[*Optional*] **E. Federal Aviation Legislation Expressly Preempts State Law.** The General Aviation Revitalization Act of 1994 (GARA), 49 United States Code Service Section 40101 et seq., expressly preempts state law (*Burroughs v. Precision Airmotive Corp. (2000) 78 Cal. App. 4th 681, 690, 93 Cal. Rptr. 2d 124*).

[*Optional*] **F. Savings Clause of FDA Modernization Act Does Not Entirely Exclude Conflict Preemption.** The savings clause of the federal Food and Drug Administration Modernization Act of 1997, 21 United States Code Service Section 379r(d)(2), which was designed specifically to preserve Proposition 65, does not entirely exclude conflict preemption (*Gaeta v. Perrigo Pharmaceuticals. Co. (N.D. Cal. 2008) 562 F. Supp. 2d 1091, 1095* ; *Dowhal v. SmithKline Beecham Consumer Healthcare (2004) 32 Cal. 4th 910, 926, 12 Cal. Rptr. 3d 262, 88 P.3d 1*).

[*Optional*] **G. Warranty and Fraud Claims Are Not Saved From Preemption by Saving Clause of FDA Modernization Act.** Claims for breach of warranty and fraud are not actions under "products liability law" within the meaning of 21 United States Code Service Section 379r(e), the savings clause for products liability claims of the Food and Drug Administration Modernization Act's express preemption provision for over-the-counter (OTC) drugs (*Kanter v. Warner-Lambert Co. (2002) 99 Cal. App. 4th 780, 790-791, 122 Cal. Rptr. 2d 72*).

[*Optional*] **H. MDA Preempts Fraud-on-FDA Claims.** The federal Food, Drug, and Cosmetic Act, as amended by the Medical Device Amendments of 1976, preempts fraud-on-the-FDA claims (*21 U.S.C.S. § 301*; *Buckman v. Plaintiffs' Legal Comm. (2001) 531 U.S. 341, 343, 121 S. Ct. 1012, 148 L. Ed. 2d 854* ; *McGuan v. Endovascular Technologies, Inc. (2010) 182 Cal. App. 4th 974, 984)* .

[*Optional*] **I. Federal Safety Appliance Acts Preempts Certain State Law Claims Regarding Railroad Freight Cars.** The federal Safety Appliance Acts (SAA), 49 United States Code Service Section 20301 et. seq., preempts a common law cause of action alleging defective design of a rail car for failure to incorporate a safety appliance not prescribed by the SAA or its regulations (*Carillo v. ACF Indus., Inc. (1999), 20 Cal. 4th 1158, 1165, 86 Cal. Rptr. 832, 980 P.2d 386*).

[*Optional*] **J. Dormant *Commerce Clause* Preempts Laws That Impermissibly Burden Interstate Commerce.** The Dormant *Commerce Clause* preempts laws that jeopardize the welfare of the nation as a whole by placing an undue burden on interstate commerce (*Haynes v. AMTRAK (C.D. Cal. 2006) 423 F. Supp. 2d 1073, 1082)* .

[*Optional*] **K. MDA's Express Preemption Clause Bars Common Law Claims Regarding Safety or Effectiveness of Medical Device With Premarket Approval.** *21 U.S.C.S. § 360k(a)*, the express preemption clause of the Medical Device Amendments of 1976, bars common law claims challenging the safety or effectiveness of a medical device given FDA premarket approval, if (1) the government has established requirements applicable to the device; and (2) the common law claims are based upon state requirements with respect to the device that are "different from, or in addition to" the federal ones (*Riegel v. Medtronic, Inc. (2008) 552 U.S. 312, 128 S. Ct. 999, 1006-1008, 169 L. Ed. 2d 892* ;

McGuan v. Endovascular Technologies, Inc. (2010) 182 Cal. App. 4th 974, 982 ; *Jessen v. Mentor Corp. (2007) 158 Cal. App. 4th 1480, 1489-1490* ; *Blanco v. Baxter Healthcare Corp. (2008) 158 Cal. App. 4th 1039, 1052-1057, 70 Cal. Rptr. 3d 566*).

[*Optional*] **L. FMVSS 208 Preempts Claim Regarding Lap-Only Seatbelt.** FMVSS 208 preempts a common law claim alleging that an automobile with a lap-only seatbelt in the rear inboard seating position is defective (*Williamson v. Mazda Motor of Am., Inc. (2008) 167 Cal. App. 4th 905, 912-919, 84 Cal. Rptr. 3d 545* , *modified and reh'g denied, 2008 Cal. App. LEXIS 2269*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of the contention that the plaintiff's state common-law cause of action in tort for design defect, or failure to warn, is preempted by federal legislation, such as, for example, the National Traffic and Motor Vehicle Safety Act of 1966 (*15 U.S.C.S. §§ 1381-1431*) [*see Geier v. American Honda Motor Co. (2000) 529 U.S. 861, 868, 120 S. Ct. 1913, 146 L. Ed. 2d 914]* , the Medical Device Amendments of 1976 (*21 U.S.C.S. § 360k(a)* [*see Riegel v. Medtronic, Inc. (2008) 128 S. Ct. 999, 1006-1008*], or the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) (*7 U.S.C.S. § 136 et seq.*) [*see Bates v. Dow Agrosciences LLC (2005) 544 U.S. 431, 452, 125 S. Ct. 1788, 161 L. Ed. 2d 687]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of preemption of a products liability action. For example, they may be combined with points and authorities supporting a motion for summary judgment or summary adjudication of the issue that a state common-law action in tort for design defect is preempted by federal law. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, and in any other relevant points and authorities combined with this form, to show the relationship between the facts of the case and the points of law stated. For example, counsel should state facts showing that railroad equipment has been designed in compliance with federal safety standards, and that a plaintiff's claim of a design defect for lack of a guardrail is therefore contrary to federal law and preempted [*see Carrillo v. ACF Indus., Inc. (1999) 20 Cal. 4th 1158, 86 Cal. Rptr. 832, 980 P.2d 386]* .

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 190.259* may be used to oppose the points and authorities in this form.

[c] Related Pleading and Practice Forms

For discussion and forms relating to products liability generally, see California Forms of Pleading and Practice, Ch. 460, *Products Liability* (Matthew Bender).

[3] Discussion of Authorities

[a] Federal Preemption Requires Dismissal of State Products Liability Claim When Congress Intends to Supersede State Law

In ***Freightliner Corp. v. Myrick*** *(1995) 514 U.S. 280, 115 S. Ct. 1483, 131 L. Ed. 2d 385* , two lawsuits were consolidated involving essentially identical accidents in which 18-wheel tractor-trailers jackknifed into oncoming traffic. The suits were instituted under state tort law against the tractor-trailer manufacturers who moved for summary

judgment on the basis of the preemption of state claims by federal vehicle standards promulgated under the National Traffic and Motor Vehicle Safety Act. The district court granted summary judgment, and on appeal, the Eleventh Circuit reversed, holding that the state claims were not expressly preempted by federal statute. While the Supreme Court agreed that the specific situation at issue in this case did not require express preemption, the Court then addressed the issue of implied preemption, holding that an express preemption clause does not foreclose implied preemption of state claims when a conflicting state statute encroaches on an area that Congress intends to be regulated by uniform federal standards (*514 U.S. 280, 287)* .

In ***Carrillo v. ACF Indus., Inc.*** *(1999) 20 Cal. 4th 1158* , the plaintiff brought design defect and failure to warn claims against a railcar manufacturer after he fell from the top of a hopper car that had no guardrail. Neither the Federal Safety Appliance Act (SAA) [*49 U.S.C.S. § 20301 et seq.*], its regulations [*see* 49 C.F.R. § 231 et seq.], nor the Federal Railroad Safety Act (FRSA) [*49 U.S.C.S. § 20101 et seq.*] required this feature. A jury awarded the plaintiff $1.4 million in damages. The defendant sought a judgment notwithstanding the verdict on the ground that state tort remedies were preempted by the SAA and the FRSA. The trial court denied the motion. The court of appeal affirmed the judgment, holding that federal law did not preempt the plaintiff's action because neither statute specifically addressed the subject of guardrails on hopper cars. The Supreme Court granted the defendant's petition for review and reversed (*20 Cal. 4th 1158, 1161)* .

The Supreme Court held that the Federal Safety Appliance Act [*49 U.S.C.S. § 20301 et seq.*] reflected congressional intent to regulate railroad safety appliances, thus precluding state law tort claims based on design defects (*20 Cal. 4th 1158, 1170)* . Although hoppers were not specified in the statute, other railway freight cars were required to have guardrails. Hopper car guardrails served the same function as handholds, running boards or tank car guardrails and thus came within the broad category of safety appliances standardized by the SAA (*20 Cal. 4th 1158, 1165)* .

McGuan v. Endovascular Technologies, Inc. *(2010) 182 Cal. App. 4th 974* , is discussed in *§ 190.249[3][k]*.

Williamson v. Mazda Motor of Am., Inc. *(2008) 167 Cal. App. 4th 905, 84 Cal. Rptr. 3d 545 , modified and reh'g denied, 2008 Cal. App. LEXIS 2269* , is discussed in *§ 190.249[3][l]*.

Burroughs v. Precision Airmotive Corp. *(2000) 78 Cal. App. 4th 681, 93 Cal. Rptr. 2d 124* , is discussed in *§ 190.249[3][e]*.

Jessen v. Mentor Corp. *(2007) 158 Cal. App. 4th 1480* , is discussed in *§ 190.249[3][k]*.

Frastaci v. Vapor Corp. *(2007) 158 Cal. App. 4th 1389* , is discussed in *§ 190.249[3][b]*.

[b] State Products Liability Claim Is Preempted by Federal Railroad Legislation

In ***Scheiding v. General Motors Corp.*** *(2000) 22 Cal. 4th 471, 93 Cal. Rptr. 2d 342, 993 P.2d 996* , the plaintiffs, former railroad employees, their spouses and survivors, sued the defendant corporations for asbestos related injuries. The plaintiffs alleged that the defendant's locomotives and related equipment were defective because they contained asbestos materials. The plaintiffs alleged causes of action for negligence, strict liability and failure to warn. The trial court dismissed the claims, and the court of appeal affirmed, holding that the Locomotive Boiler Inspection Act (BIA) [*49 U.S.C.S. § 20701 et seq.*] preempted plaintiffs' claims based on strict products liability and other state common law claims. The Supreme Court granted review and affirmed (*22 Cal. 4th 471, 473)* .

The Court held that because the BIA extends to the design, the construction and the material of every part of the locomotive and all its appurtenances, Congress intended the BIA to occupy this field. It would be contrary to Congress' purpose of uniform national regulation to allow the states to reoccupy fields from which they had previously been displaced. Since Congress intended to occupy an entire field of regulation, such as locomotive equipment, then the

federal standards must displace all state requirements, notwithstanding a lack of conflict between that standard and state law (*22 Cal. 4th 471, 475)* . The Court noted the practical rationale for this determination was to ensure uniformity of railroad standards across state lines. To impose tort liability on railroad equipment manufacturers would force them to conform to design and construction standards imposed by the states, which was not what BIA intended (*22 Cal. 4th 471, 476)* . The Court also found that the plaintiffs' failure to warn claims were also preempted, despite the fact that the BIA did not address warning or instruction labels, because the subject of the label, locomotive insulation, fell under the BIA (*22 Cal. 4th 471, 484)* .

In ***Frastaci v. Vapor Corp.*** *(2007) 158 Cal. App. 4th 1389* , a locomotive repairman died of an asbestos-related disease. His wife and children brought an action against the locomotive manufacturer, alleging several common law causes of action. The trial court sustained the manufacturer's demurrer on the ground that the Locomotive Boiler Inspection Act (BIA) [*49 U.S.C.S. § 20701 et. seq.*] preempted the claims. Plaintiff appealed.

The court of appeal affirmed, holding that ***Scheiding v. General Motors Corp.*** *(2000) 22 Cal. 4th 471, 93 Cal. Rptr. 2d 342, 993 P.2d 996* , forecloses design defect claims against locomotive manufacturers, regardless of whether the locomotive was "in use" or off line in roundhouses and repair shops when the injury occurred. The fact that the Federal Employers' Liability Act [*45 U.S.C.S. § 51 et seq.*] requires a locomotive to be "in use" at the time of injury before BIA applies did not change the court's analysis. Nor was it persuaded that the presumption against preemption should apply. The court was unwilling to "second-guess Congress's decision to require national uniformity in the field of railroad safety" (*158 Cal. App. 4th 1389, 1393-1404)* .

[c] State Tort Claim Based on "No Air Bag" Design Defect Is Preempted

In ***Geier v. American Honda Motor Co.*** *(2000) 529 U.S. 861, 120 S. Ct. 1913, 146 L. Ed. 2d 914* , the U.S. Supreme Court held that a "no air bag" claim conflicts with the objectives of FMVSS 208 and is thus preempted by the National Traffic and Motor Vehicle Safety Act of 1966 (*529 U.S. 861, 868)*

In ***Nissan Motor Corp. v. Superior Court*** *(1989) 212 Cal. App. 3d 980, 261 Cal. Rptr. 80* , plaintiffs brought a wrongful-death action against an automobile manufacturer and others, alleging that the automobile was defective in that it failed to have an "automatic air bag," and that the three-point restraint system was defective. The defendant automobile manufacturer moved for summary adjudication of the issue that the "no air bag" claim is preempted by federal law. The trial court denied the motion, and the defendant filed a petition for writ of mandate.

The court of appeal let the writ of mandate issue, directing the trial court to vacate its order and to grant the defendant's motion for summary adjudication. In doing so, the court held that the National Traffic and Motor Vehicle Safety Act of 1966 [*15 U.S.C.S. §§ 1381-1431*] preempts a state common-law tort action against an automobile manufacturer when the action alleges a design defect based on the manufacturer's failure to install air bags in the vehicle, (*212 Cal. App. 3d 980, 983)* . The court noted that the Federal Motor Vehicle Safety Standard 208, revised by the United States Department of Transportation in 1972 to include passive restraints, established requirements for the occupant restraint system in the 1982 automobile in question, and required the three-point safety-belt system that the manufacturer installed, or an air bag; it never required air bags. *15 U.S.C.S. § 1392(d)* requires all state vehicle safety standards to be identical to federal vehicle safety standards. The court concluded that a state common-law requirement for air bags would be contrary to the federal requirements and, therefore, preempted. The court noted that federal law provides that compliance with any federal motor-vehicle safety standards does not exempt any person from common-law liability [*15 U.S.C.S. § 1397(c)*] and does not expressly exempt nonidentical state motor-vehicle safety standards.

[d] FIFRA Preempts Rules Imposing Labeling Requirement That Diverge From Those In Federal Statute

In ***Bates v. Dow Agrosciences LLC*** *(2005) 544 U.S. 431, 125 S. Ct. 1788, 161 L. Ed. 2d 687* Texas peanut farmers filed suit, alleging that the defendant's pesticide "Strongarm" severely damaged their crops. Strongarm's label stated,

"Use of Strongarm is recommended in all areas where peanuts are grown." When the plaintiffs applied Strongarm on soils with pH levels of 7.2 or higher, as is typical in western Texas, the pesticide severely damaged their peanut crops. The plaintiffs gave the defendant notice of their intent to bring suit, alleging that the defendant knew or should have known that Strongarm would stunt the growth of peanuts in soils with pH levels of 7.0 or greater. The defendant filed a declaratory judgment action contending that FIFRA expressly or impliedly preempted the plaintiffs' claims. The plaintiffs counterclaimed, asserting several state law claims. The federal district court granted the defendant's motion for summary judgment, rejecting one claim on state law grounds and dismissing the remainder as expressly preempted by *7 U.S.C.S. § 136v(b)*. The Fifth Circuit affirmed. It held that § 136v(b) preempts any state law claim in which a judgment against the defendant "would induce it to alter its product label." This decision was consistent with a majority of the federal courts, but conflicted with the decisions of other courts and with the views of the EPA. The U.S. Supreme Court granted certiorari to resolve the conflict.

In a 7 to 2 majority opinion written by Justice Stevens, the U.S. Supreme Court vacated the Fifth Circuit's decision and remanded. The Court rejected the plaintiffs' argument that FIFRA's express preemption does not apply to tort actions--that is, that the term "requirements" as used in § 136v(b) does not encompass tort actions. Although the Court pointed out that the Fifth Circuit was "quite wrong" in assuming that any event, such as a jury verdict, that might "induce" a pesticide manufacturer to change its label should be viewed as a requirement, the Court agreed that the term "requirements" in § 136v(b) reaches beyond positive enactments, such as statutes and regulations, to embrace common law duties (*544 U.S. 431, 443)* .

Next, the Court set forth its test to determine whether FIFRA preempts a particular state rule. First, the rule must be a requirement "for labeling or packaging." For example, rules governing the design of a product are not preempted. Second, the rule must impose a labeling or packaging requirement that is "in addition to or different from those required under this subchapter." As an example, a state regulation requiring the word "poison" to appear in red letters would not be preempted if an EPA regulation imposed the same requirement (*544 U.S. 431, 443)* .

The Court then pointed out that common law rules requiring manufacturers to design reasonably safe products, to use due care in testing their products, to market products free from defects, and to honor their express warranties, clearly did not satisfy the first condition of the test (these common law rules were not requirements "for labeling or packaging"). Thus, FIFRA did not preempt the plaintiffs' claims for defective design, defective manufacture, negligent testing, and breach of express warranty. The Court also noted that the plaintiffs' off-label claims (their warranty and fraud claims based on oral representations made by the defendant's agents) fell outside the text of § 136v(b) for another reason: FIFRA defines labeling by reference to "written, printed, or graphic matter" and not to oral representations. The Court expressly disapproved of the "effects-based" test used by many federal and state courts to determine whether a non-warning claim was preempted: that is, whether a judgment against a manufacturer would cause it to alter the pesticide label. This test was unsupported in the text of § 136v(b), which refers only to "requirements," and the test was overbroad because it would impeach many "genuine" design defect claims (*544 U.S. 431, 445)* .

The Court next turned to the plaintiffs' fraud and negligent-failure-to-warn claims--claims that virtually all prior federal and state courts had found preempted. Although agreeing that these claims were premised on common law rules that qualify as "requirements for labeling or packaging," thereby passing the first part of its test, the Court noted that some courts had "too quickly" concluded that failure-to-warn claims were preempted under FIFRA without weighing the obvious textual differences between the preemption clauses in FIFRA and the statutes at issue in those cases. Specifically, unlike the Smoking Act, § 136v(b) prohibits only state law labeling and packaging requirements that are "in addition to or different from" the labeling and packaging requirements under FIFRA. Consequently, § 136v(b) does not preempt a state law labeling requirement if that state law labeling requirement is equivalent to, and fully consistent with, FIFRA's misbranding provisions. The Court held that state law need not explicitly incorporate FIFRA's standards as an element of a cause of action to survive preemption, but left it to the Fifth Circuit to decide whether the particular common law duties in question were equivalent to FIFRA's misbranding standards (*544 U.S. 431, 447)* .

The Court went on to explain that the "parallel requirements" reading of § 136v(b) that it adopted found strong support in an earlier case [*Medtronic Inc. v. Lohr (1996) 518 U.S. 470, 116 S. Ct. 2240, 135 L. Ed. 2d 700]* , in which the Court had found that nothing in the preemption provision of the statute regulating medical devices denied the state of Florida the right to provide a traditional damages remedy for violations of common law duties that parallel federal requirements. The Court then rejected the defendant's argument that such a reading of parallel state requirements would establish a "crazy-quilt" of anti-misbranding requirements different from the requirement defined by FIFRA. Moreover, even if the defendant had offered a plausible reading of § 136v(b), the Court would still have had a duty to accept the reading that disfavored presumption. The Court also found the policy objections raised by the defendant against its reading of § 136v(b) to be unpersuasive (*544 U.S. 431, 447-449)* .

The Court concluded that § 136v(b) retains a narrow, but still important role. It preempts competing state labeling standards that would create significant inefficiencies for manufacturers, as well as any statutory or common law rule that would impose a labeling requirement that diverges from those set out in FIFRA. It does not, however, preempt any state rules that are fully consistent with federal requirements (*544 U.S. 431, 452)* .

Although the Court settled on its interpretation of § 136v(b), whether that provision preempted the plaintiffs' fraud and failure-to-warn claims remained undecided. Because the Court had not received sufficient briefing on this issue, it remanded it to the Fifth Circuit. The Court specifically emphasized that a state law labeling requirement must in fact be equivalent to a requirement under FIFRA to survive preemption. It cautioned that a state law requirement need not be phrased in language identical to FIFRA; general equivalence is sufficient (*544 U.S. 431, 453)* .

NOTE:

Bates overruled in part an earlier California Supreme Court decision, which had concluded that FIFRA preempts state law claims for failure to warn of the risks of using a pesticide, and that if a claim, however couched, boils down to an assertion that a pesticide's label failed to warn of the damage that the plaintiff allegedly suffered, it is preempted by FIFRA [*Etcheverry v. Tri-Ag Serv., Inc. (2000) 22 Cal. 4th 316, 93 Cal. Rptr. 2d 36, 993 P.2d 366]* .

[e] Federal Aviation Legislation Expressly Preempts State Law

In ***Burroughs v. Precision Airmotive Corp.*** *(2000) 78 Cal. App. 4th 681, 93 Cal. Rptr. 2d 124* , the plaintiffs suffered injuries in the crash of a light plane, allegedly due to a malfunction of the engine's carburetor. Defendant was the successor manufacturer to the original manufacturer of the carburator. The carburator was built and installed by the original manufacturer in 1968. Plaintiffs sued Defendant on a failure to warn theory. Defendant was granted summary adjudication finding that Defendant was a successor to the original manufacturer was entitled to the protections under § 2(A) of the General Aviation Revitalization Act of 1994 (GARA) [*49 U.S.C.S. § 40101*].

The court of appeals affirmed. The court found that GARA expressly preempted state law. In pertinent part, Section 2(a) of GARA provided that no civil action for damages or death or injury to persons or damage to property arising out of an accident involving a general aviation aircraft may be brought against the manufacturer of the aircraft or the manufacturer of any new component, system, subassembly, or other part of the aircraft, in its capacity as a manufacturer if the accident occurred ... [more than 18 years after the date of delivery of the aircraft and/or component to the first purchaser or lessee]. Section 2(d) provides that "[t]his section supersedes any State law to the extent that such law permits a civil action described in subsection (a) to be brought after the applicable limitation period for such civil action established by subsection (a)." The court evaluated whether Defendant, as a successor to the original manufacturer was took on the same duties and obligations imposed by GARA. The court and found that the Defendant did, and so was entitled to the protections of GARA. The court found the plaintiffs' claims preempted, and further, that the statute of repose contained within GARA also shielded Defendant from liability (*78 Cal. App. 4th 681, 689-690)* .

[f] Savings Clause of FDA Modernization Act Does Not Entirely Exclude Conflict Preemption

In ***Gaeta v. Perrigo Pharms. Co.*** *(N.D. Cal. 2008) 562 F. Supp. 2d 1091* , the minor plaintiff was given defendant's generic OTC ibuprofen for three days. He subsequently suffered liver failure and other complications. The plaintiffs brought a products liability alleging that the defendant failed to adequately warn of the risks of liver and renal failure associated with the use of OTC ibuprofen in children. The court granted the defendant's motion for summary judgment. Plaintiff's state-law claims were preempted, where FDA had once rejected a warning regarding the risks of liver injury associated with the drug. The defendant complied with the FDA's labeling requirements for OTC ibuprofen. The 1997 Modernization Act's savings clause, *21 U.S.C. § 379r(e)*, did not preclude the court's conflict preemption analysis (*562 F. Supp. 2d 1091, 1097)* .

In ***Dowhal v. SmithKline Beecham Consumer Healthcare*** *(2004) 32 Cal. 4th 910, 12 Cal. Rptr. 3d 262, 88 P.3d 1* , the plaintiff filed suit against the distributors of a nicotine replacement therapy (NRT) product, alleging violation of Proposition 65 [*Health & Safety Code § 25249.6*], which requires warnings that chemicals can cause reproductive toxicity. The FDA refused to allow the defendant to use the warning mandated by California's Proposition 65 warning, and instead required the defendant to use less broad language. The FDA had sent the defendant a letter rejecting the defendant's proposed "can harm your baby" warning and proposed instead that all nicotine replacement products bear uniform warnings advising pregnant women to consult their health care provider and try to stop smoking without using an NRT product.

The California Supreme Court first noted that *21 U.S.C.S. § 379r(d)(2)*, the savings clause of the preemption provision for over-the-counter drugs in the Food and Drug Modernization Act of 1997, was designed specifically to preserve California's Proposition 65. However, the Court held that the savings clause does not entirely exclude conflict preemption, and that notwithstanding language in the savings clause, the federal requirement prevails if the warning mandated by California law directly conflicts with the one required by the FDA. The Court noted that the FDA ruling reflected the agency's concern that the defendant's proposed Proposition 65 warning might discourage pregnant women from stopping smoking. It concluded that the letter established a federal policy prohibiting defendants from giving consumers any warning other than the one approved by the FDA, and that use of a Proposition 65 warning would conflict with that policy. Even though it is probably true that nicotine in the defendant's products can cause reproductive harm, the FDA has the authority to prohibit truthful statements on a product label if they are misleading. Therefore, this was a case of direct conflict, justifying preemption (*32 Cal. 4th 910)* .

[g] Warranty and Fraud Claims Are Not Saved From Preemption by Saving Clause of FDA Modernization Act

In ***Kanter v. Warner-Lambert Co.*** *(2002) 99 Cal. App. 4th 780, 122 Cal. Rptr. 2d 72* , the plaintiffs brought claims against three manufacturers of over-the-counter drugs for treatment of head lice. They claimed that the product labels contained false and misleading statements about the effectiveness of the drugs. The trial court granted summary judgment for the defendants, finding that the claims were preempted by *21 U.S.C.S. § 379r(a)*, the preemption provision of the Food and Drug Administration Modernization Act of 1997. The court of appeal affirmed, holding that the plaintiffs' claims for breach of warranty were not actions under "the products liability law" within the meaning of § 379r(e), the savings clause. The savings clause unambiguously states that the preemption provisions of the section do not affect "the products liability law of any State." Under California products liability law, injury to the plaintiff from a defective product is an essential element of a cause of action. The plaintiffs in this case acknowledged that their complaint did not allege any personal injury or property damage as a result of using the defendants' products. The court rejected the plaintiffs' contention that Congress intended the phrase "products liability law" in § 379r(e) to have a broader meaning, encompassing an expansive category of actions imposing liability on commercial sellers of products (*99 Cal. App. 4th 780, 790-791)* .

[h] MDA Preempts Fraud-on-FDA Claims

In ***Buckman v. Plaintiffs' Legal Comm.*** *(2001) 531 U.S. 341, 121 S. Ct. 1012, 148 L. Ed. 2d 854* , the U.S. Supreme Court held that plaintiffs' state law fraud-on-the-FDA claims conflicted with, and were therefore impliedly preempted by, the FDCA as amended by the MDA. In the late 1990's, thousands of plaintiffs across the country had brought fraud-on-the-FDA cases against bone screw device manufacturers, claiming that the FDA would not have approved the screws had defendants not made fraudulent representations regarding their intended use (*531 U.S. 341, 349-353)* .

The facts and procedural background of ***McGuan v. Endovascular Technologies, Inc.*** *(2010) 182 Cal. App. 4th 974* , are discussed in *§ 190.249[3][k]*. The court examined plaintiff's claims relating to defendants' alleged "withholding from the FDA, surgeons and public" reported failures of the device. Assuming that plaintiffs stated causes of action for fraud-on-the FDA, these claims were preempted under *Buckman*. Plaintiffs attempted to distinguish *Buckman* on the ground that FDA had not investigated the *Buckman* defendant for any alleged wrongdoing whereas it had taken "strong action" against the instant defendants. Plaintiffs argued that Justice Stevens' concurring opinion in *Buckman* was "an invitation" to bring a case involving fraud "policed" by the FDA. However, the circumstances referred to by Justice Stevens (i.e., FDA determining that a defendant committing fraud during the 510(k) process and taking steps to remove the device from the market) did not take place in the instant case.

The court next rejected plaintiffs' contention that *Buckman* does not apply to causes of action for fraud on patients and their physicians, and that these claims were permissible "parallel" claims under *Riegel v. Medtronic, Inc.* (discussed in *§ 190.249[3][k]*). Although plaintiffs' fraud claims were premised on violations of FDA regulations, this did not resolve the issue. Unlike *Riegel*, *Buckman* did not involve the MDA preemption provision, but relied on implied preemption principles. Those implied principles applied equally to claims involving defendants' misrepresentations to plaintiffs and their physicians. Allowing plaintiff to proceed with their state law fraud claim would also impermissibly conflict with FDA's responsibility to police fraud consistently with "the Administration's judgment and objectives" as stated by *Buckman* *(182 Cal. App. 4th 974, 985-986)* .

[i] Federal Safety Appliance Acts Preempts Certain State Law Claims Regarding Railroad Freight Cars

Carillo v. ACF Indus., Inc. *(1999), 20 Cal. 4th 1158, 1165*), is discussed in *§ 190.249[3][a]*.

[j] Dormant Commerce Clause Preempts Laws That Impermissibly Burden Interstate Commerce

In ***Haynes v. AMTRAK*** *(C.D. Cal. 2006) 423 F. Supp. 2d 1073* , the decedent died from deep vein thrombosis (DVT) after riding on an Amtrak train from Chicago to Los Angeles. The plaintiff brought an action alleging that the carrier violated common law and statutory duties. After finding that plaintiff's state law claims were not preempted by either the federal Amtrak Act or the Federal Railroad Safety Act, the court found that the claims regarding train seats and seating configurations were unduly burdensome on interstate commerce and were preempted by the *Commerce Clause*. The "Dormant *Commerce Clause*" prevents states from jeopardizing the welfare of the nation as a whole by placing undue burdens on the flow of interstate commerce. In other words, a state law may violate the *Commerce Clause*'s unwritten rules either by imposing an undue burden on producers engaged in interstate activities or by treating out-of-state producers less favorably than their location competitors. It would be unduly burdensome on the passenger train industry to require different standards regarding passenger seats, e.g., regarding leg room, as a train crossed state boundaries. The duty to warn passengers of the dangers of DVT, in contrast, was not unduly burdensome on commerce and not preempted (*423 F. Supp. 2d 1073, 1083-1084)* .

[k] MDA's Express Preemption Clause Bars Common Law Claims Regarding Safety or Effectiveness of Medical Device With Premarket Approval

In ***Riegel v. Medtronic, Inc.*** *(2008) 552 U.S. 312, 128 S. Ct. 999, 169 L. Ed. 2d 892* , the U.S. Supreme Court held that the MDA's preemption clause bars common law claims challenging the safety or effectiveness of a medical device given FDA premarket approval.

The case involved an Evergreen Balloon Catheter, a PMA-approved Class III device. The device was inserted into the decedent's coronary artery, despite the fact that it was contraindicated for patients such as the decedent. The decedent's physician inflated the catheter beyond its rated burst pressure despite the label's warning against doing so. The catheter ruptured, and the decedent developed a heart block and other complications. The decedent and his wife brought a products liability action against the manufacturer, raising several common law claims under New York law. The district court ruled that the MDA preempted most of the claims. The U.S. Court of Appeals for the Second Circuit affirmed, and the high Court granted certiorari.

The Court first set out to determine whether the federal government established requirements applicable to the catheter, because the MDA expressly preempts only state requirements "different from, or in addition to, any requirement applicable ... . to the device" under federal law [*21 U.S.C.S. § 360k(a)*]. The Court found that unlike the § 510(k) process analyzed in ***Medtronic v. Lohr*** *(1996) 518 U.S. 470, 116 S. Ct. 2240, 135 L. Ed. 2d 700* (discussed in *§ 190.259[3][a]*) premarket approval does impose "requirements" under the MDA. Premarket approval--in contrast to general labeling duties--*is* specific to individual devices. The Court specifically stated that premarket approval is focused on safety, not equivalence, unlike § 510(k), which the *Lohr* Court had found was focused on equivalence, not safety. The FDA grants premarket approval only after it determines that a device offers reasonable assurances of safety and effectiveness (*21 U.S.C.S. § 360e(d)*), unlike devices that enter the market through § 510(k). Moreover, the FDA requires a device that has received premarket approval to be made with almost no deviations from the specifications in its approval application. This is in direct contrast to a device entering the market as a substantial equivalent, which is not required to "take any particular form for any particular reason" (*128 S. Ct. 999, 1007)* .

The next part of the Court's preemption inquiry was to determine whether the plaintiffs' common law claims relied upon "any requirement" of New York law applicable to the catheter that was "different from, or in addition to" federal requirements and that related "to the safety or effectiveness of the device included in a requirement applicable to the device" (*21 U.S.C.S. § 360k(a)*). Again, the Court answered in the affirmative. It adhered to its view set forth in previous preemption cases that common-law causes of action for negligence and strict liability *do* impose "requirements." "Absent other indication," stated the Court, "reference to a State's 'requirements' includes its common-law duties" (*128 S. Ct. 999, 1007-1008)* . The Court posited that tort law, applied by a jury who sees "only the cost of a more dangerous design, and is not concerned with its benefits," is "less deserving of preservation" than a state statute or regulation (*128 S. Ct. 999, 1008)* .

The Court then addressed some of the dissent's points. The plain language of the MDA's preemption clause, wrote Justice Scalia, indicated that Congress intended to remove judicial recourse for consumers injured by FDA-approved devices, and it was not for the Court to speculate as to its motives. The lack of ambiguity in the MDA meant that the Court did not rely on the FDA's current view on the topic. If it had, however, the degree of deference accorded to the FDA's position might be reduced by the fact that the agency's earlier position had been different (*128 S. Ct. 999, 1009)* .

Next, the court rejected the plaintiffs' contention that the duties underlying their claims were not preempted--even if they imposed "requirements"--because general common-law duties are not requirements maintained "with respect to devices." The plain language of the statute--that no State "may establish or continue in effect *with respect to a device ... any requirement*" relating to safety or effectiveness--did not support their interpretation (*128 S. Ct. 999, 1010)* . The statute does not say that preempted state requirements must apply only to the device in question. *21 CFR § 808.1(d)(1)*, the FDA regulation relied on by the plaintiffs limiting the scope of preemption, did not change the Court's analysis (*128 S. Ct. 999, 1010-1011)* .

In conclusion, the Court pointed out that § 360k does not prevent a State from providing a damages remedy for claims premised on a violation of FDA regulations, in which case the state duties "parallel" rather than add to federal requirements. However, the *Riegel* plaintiffs did not raise such a claim in their briefs before the Second Circuit (*128 S.*

Ct. 999, 1010-1011) .

In ***McGuan v. Endovascular Technologies, Inc.*** *(2010) 182 Cal. App. 4th 974* , plaintiffs were injured after being implanted with a Class III medical device, the ANCURE Endograft System. They brought products liability actions against the designers, manufacturers, and distributors of the device. The trial court granted defendants' motion for summary judgment on grounds that the action was preempted by federal law.

The Court of Appeal affirmed. It began its opinion with a brief history of the problem-plagued device. Various negative reports came to the manufacturer's attention shortly after its approval, resulting in the initiation of an internal investigation and one by outside auditors. Defendant recalled the device, but in March 2001, it provided information to FDA which was at best "evasive." FDA re-approved the device five months later. A subsequent Department of Justice investigation found that the existence of the independent auditor reports had persuaded FDA not to impose additional regulatory measures beyond those proposed by the defendant. The defendant pled guilty to counts of shipping misbranded medical devices and making false statements arising from provision of incomplete information to FDA. The plea agreement stated that about 2,628 additional MDRs concerning the system had not been reported to FDA as required by law.

Riegel v. Medtronic, Inc., above, set forth a two-part test to determine whether the MDA's preemption provision, *21 U.S.C. § 360k(a)*, bars common law claims: (1) whether the federal government has established requirements "applicable to" the defendant's device; (2) and if so, whether the common law claims are based upon statement requirements that are "different from, or in addition to" the federal ones, and that relate to safety and effectiveness.

The first part of the test was clearly satisfied because *Riegel* made it clear that premarket approval imposes "federal requirements" applicable to a defendant's device. The second part of the test resulted in federal preemption for the following reason: Plaintiffs' complaints did *not* allege that defendants violated federal regulations. Because the FDA had re-approved the device prior to plaintiffs' surgeries, FDA gave its approval of the device's design, testing, intended use, manufacturing methods, performance standards, and labeling. Thus, to the extent that plaintiffs alleged that the device was unsafe and its warnings were inadequate, they sought to impose requirements that were "different from, or in addition to" the MDA. Their common law claims for strict product liability, negligence, breach of express and implied warranties, and violations of Consumer Legal Remedies Act were accordingly preempted.

The defendant's fraudulent conduct occurring after March 2001 (i.e., when it informed FDA that the company was not attempting to hide information from the agency) did not save the action from federal preemption. The complaint did *not* allege a cause of action for fraud-on-the-FDA or fraud and misrepresentation. Rather, it stated a cause of action for fraudulent concealment, which did not refer to FDA's re-approval of the device or allege that defendants violated any federal regulations or provided inaccurate information to FDA. To prevail on the fraudulent concealment cause of action, the jury would have to find that the FDA-approved warnings were inaccurate. This cause of action would also impose "requirements" that were "different from, or in addition to" those imposed by FDA, and was thus preempted (*182 Cal. App. 4th 974, 983-984)* .

In ***Jessen v. Mentor Corp.*** *(2007) 158 Cal. App. 4th 1480* , the plaintiff's testicular prosthesis became deformed and had to be replaced. The plaintiff filed an action against the manufacturer, claiming that the prosthesis was defective because it lacked a sufficient warning that it had to be filled prior to implantation. The trial court granted the manufacturer's motion for summary judgment on preemption grounds.

The court of appeal affirmed, holding that the common law tort claims relating to the safety or effectiveness of the PMA-approved device were preempted unless the plaintiff could demonstrate a triable issue of fact that the manufacturer failed to adhere to federal regulatory standards. The court then determined that the manufacturer met its burden of proving that the implant was designed, manufactured, and labeled according to FDA specifications (*158 Cal. App. 4th 1480, 1489-1491)* .

In ***Blanco v. Baxter Healthcare Corp.*** *(2008) 158 Cal. App. 4th 1039, 70 Cal. Rptr. 3d 566* , the heart valve implanted in the decedent 15 years earlier failed. The plaintiffs filed a complaint against the manufacturer asserting several state law causes of action. The trial court granted summary judgment in favor of the manufacturer on preemption grounds. Plaintiffs appealed.

The court of appeal affirmed, first concluding that PMA approval for the valve was a device-specific federal requirement that could preempt any conflicting state requirement. The next step was to compare the federal requirements with the state requirements to determine whether they fell within the preemptive scope of the statute and regulations. Examining the allegations made under each cause of action as well as the statement of facts and supporting evidence, the court determined that the plaintiffs' negligence and strict liability claims were preempted (*158 Cal. App. 4th 1039, 1052-1057)* .

[l] FMVSS 208 Preempts Claim Regarding Lap-Only Seatbelt

In ***Williamson v. Mazda Motor of Am., Inc.*** *(2008) 167 Cal. App. 4th 905, 84 Cal. Rptr. 3d 545 , modified and reh'g denied, 2008 Cal. App. LEXIS 2269* , the decedent was killed in a collision involving her family's minivan. She was seated in the inboard rear seat, which was equipped with a two-point (lap-only) seatbelt. Her family filed an action alleging that the vehicle was defective because the rear inboard seat should have had a three-point (lap/shoulder) seatbelt. The trial court granted the defendants' motion for judgment on the pleadings on the ground that federal law preempted the claim to the extent it was based on a lap-only seat belt claim. The parties ultimately stipulated to a dismissal of plaintiffs' remaining claims, and the court entered judgment for the defendants.

The court of appeal affirmed. It gave a brief history of FMVSS 208, which specifies performance requirements for crash protection of occupants. FMVSS 208 permits manufacturers to install lap-only seatbelts in the inboard seats. The court reviewed *Geier v. American Honda Motor Co. (2000) 529 U.S. 861, 866-874, 120 S. Ct. 1913, 146 L. Ed. 2d 814* , discussed in *§ 190.249[3][c]*, in which the U.S. Supreme Court held that a common law "no airbag" case conflicted with FMVSS 208 and was thus preempted. Although *Geier* involved airbags, not seatbelts, the court was persuaded by the reasoning of three courts from other jurisdictions which applied *Geier* to hold that similar claims were preempted. Thus, to the extent that plaintiffs based their theory of recovery on defendants' failure to install a lap/shoulder seatbelt in the middle row inboard seat, their claim was barred by the version of FMVSS 208 in effect at the time the minivan was manufactured (*167 Cal. App. 4th 905, 912-919)* .

[4] Additional Authorities

[a] Federal Preemption Requires Dismissal of State Products Liability Claim When Congress Intends to Supersede State Law

In *Papike v. Tambrands Inc. (9th Cir. 1997) 107 F.3d 737* , the plaintiff contracted Toxic Shock Syndrome (TSS) while using the defendant's tampons. The district court held that the MDA preempted the plaintiff's state law claim alleging failure to warn of the risk of TSS associated with tampon use. The Ninth Circuit affirmed. It explained that the FDA had promulgated a "device-specific" and "disease-specific" regulation in *21 C.F.R. § 801.430* mandating the specific content of the TSS warnings on tampon boxes. This fact distinguished the plaintiff's case from other MDA preemption cases, such as *Medtronic, Inc. v. Lohr (1996) 518 U.S. 470, 116 S. Ct. 2240, 135 L. Ed. 2d 700* [*see § 190.259[3][a]*]. The court concluded that preemption is triggered by, and the scope of preemption is limited to, instances in which specific FDA requirements apply to a particular device. Preemption was warranted in this case because the defendant's warnings tracked the language of the federal regulations almost verbatim. This result was completely consistent with *Medtronic,* which did not involve device-specific federal requirements (*107 F.3d 737, 740-742)* .

In *In re Tobacco Cases II (2007) 41 Cal. 4th 1257, 163 P.3d 106* , the Supreme Court of California was presented with

the issue of federal preemption of minors' unfair competition claims against the tobacco companies. The court ruled that the U.S. Supreme Court's decision in *Lorillard Tobacco Co. v. Reilly (2001) 533 U.S. 525, 121 S. Ct. 2404, 150 L. Ed. 2d 532* , which held that the cigarette Labeling Act preempted state regulations banning outdoor cigarette advertising within 1,000 feet of any school, park, or playground, was inconsistent with and impliedly disapproved the California court's previous decision, *Mangini v. R.J. Reynolds Tobacco Co. (1994) 7 Cal. 4th 1057, 31 Cal. Rptr. 2d 358, 875 P.2d 73* , holding that the Labeling Act did not preempt a similar claim. The court acknowledged that California's unfair competition law--a law of general application--was not preempted on its face by the Labeling Act. However, the plaintiffs' claim was also based on the penal law section prohibiting sales of tobacco products to minors, i.e., a statute based largely on health concerns. Their unfair competition claim sought to impose on the tobacco companies a duty not to advertise in a way that could encourage minors to smoke--a duty which the *Lorillard* Court determined was subjection to preemption. Moreover, plaintiffs' cause of action did not fall within the exception allowing states to prohibit activity that constitutes an inchoate crime (*41 Cal. 4th 1257, 1272)* .

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19-190 California Points & Authorities § 190.250

§ 190.250 Opposing Contention That Product Not Defective Because Defendant Followed Industry Custom or Usage in Producing Product and Thus Defendant Not Strictly Liable--Evidence of Industry Custom or Usage Is Irrelevant

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is not liable for plaintiff's injuries caused by defendant's product (see, e.g., § 190.251).*]

DEFENDANT _____ [*name*] MAY NOT INTRODUCE EVIDENCE OF INDUSTRY CUSTOM OR USAGE, BECAUSE THAT EVIDENCE IS IRRELEVANT TO THE ISSUE OF WHETHER THE _____ [*specify product*] IS DEFECTIVE.

Evidence of Industry Custom or Usage Is Irrelevant. In a strict products liability case, evidence of industry custom or usage is irrelevant to the issue of whether a product is defective (*Akers v. Kelley Co. (1985) 173 Cal. App. 3d 633, 652, 219 Cal. Rptr. 513 , disapproved on other grounds, People v. Nessler (1977) 16 Cal. 4th 561, 582* ; *Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 803, 174 Cal. Rptr. 348*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that defendant's product is not defective. The ground of opposition set forth is that defendant may not introduce evidence of industry custom or usage on the issue of defect, because such evidence is irrelevant to that issue.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities opposing a motion for summary judgment or summary adjudication on the issue that defendant is

not subject to strict liability. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should state that defendant's proffered evidence is of industry custom or usage, and is therefore inadmissible [*see, e.g.,* *Akers v. Kelley Co. (1985) 173 Cal. App. 3d 633, 219 Cal. Rptr. 513* (jury instruction to consider hazards recognized by industry as properly rejected); *Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 174 Cal. Rptr. 348* (refusal to instruct jury on custom and usage of automobile industry); *Titus v. Bethlehem Steel Corp. (1979) 91 Cal. App. 3d 372, 378, 154 Cal. Rptr. 122* (error to argue custom and practice in industry to offer safety guards as optional equipment)].

[3] Discussion of Authorities

[a] Evidence of Industry Custom or Usage Is Irrelevant

The facts and procedural background of ***Akers v. Kelley Co.*** *(1985) 173 Cal. App. 3d 633, 219 Cal. Rptr. 513* , are discussed in *§§ 190.115[3][a], 190.116[3][a],* and *190.117[4][a]*. In affirming the judgment for plaintiff, the court of appeal held that the trial court had properly rejected an instruction on the risk-benefits test that had been proffered by defendant that included as a relevant consideration whether the hazard was recognized by the industry. The court explained that the rejected instruction would have erroneously injected into the case notions of industry custom and usage, which are not relevant when applying the risk-benefits test (*173 Cal. App. 3d 633, 651-652)* .

The facts and procedural background of ***Grimshaw v. Ford Motor Co.*** *(1981) 119 Cal. App. 3d 757, 174 Cal. Rptr. 348* , are discussed in *§§ 190.114[3][a]* and *190.223[3][b]*. In affirming the judgment for plaintiff, the court of appeal held that the trial court did not err by refusing to instruct the jury to consider custom or usage in determining whether the automobile's design was defective. The court explained that in a strict products liability case, industry custom or usage is irrelevant to the issue of defect. The court pointed out that the Supreme Court's enumeration in *Barker v. Lull Eng'g Co. (1978) 20 Cal. 3d 413, 143 Cal. Rptr. 225, 573 P.2d 443* , of factors that may be considered under the risk-benefit test fails to mention custom or usage in the industry, and that the Court otherwise made clear by implication in *Barker* that they are inappropriate considerations (*119 Cal. App. 3d 757, 803)* .

[4] Additional Authorities

[a] Evidence of Industry Custom or Usage Is Irrelevant

The facts and procedural background of *Titus v. Bethlehem Steel Corp. (1979) 91 Cal. App. 3d 372, 154 Cal. Rptr. 122* , are discussed in *§ 190.118[3][a]*. In reversing the judgment for defendant, the court of appeal held that defendant had erred in maintaining throughout the trial and in final argument that it was custom and practice in the industry for manufacturers of oil well pumping units to offer security guards as optional equipment. The court explained that custom and usage is not a defense to a cause of action based on strict liability, because custom and usage is relevant only to whether defendant exercised reasonable care in producing the product, which is irrelevant to strict liability (*91 Cal. App. 3d 372, 378)* .

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19-190 California Points & Authorities § 190.251

§ 190.251 Opposing Contention That Product Not Defective Because Product's Design Complied With Owner Specifications--Compliance With Owner Specifications Is Irrelevant to Defect Issue and Risk-Benefits Test

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is not liable for plaintiff's injuries caused by defendant's product (see, e.g., § 190.250).*]

DEFENDANT _____ [*name*] MAY NOT INTRODUCE EVIDENCE THAT THE _____ [*specify product*] WAS DESIGNED ACCORDING TO OWNER SPECIFICATIONS, BECAUSE THAT EVIDENCE IS IRRELEVANT TO THE ISSUE OF WHETHER THE _____ [*specify product*] IS DEFECTIVE.

A. Evidence of Compliance With Owner Specifications Is Irrelevant. Evidence that the product's manufacturer followed owner specifications in creating the product's design is irrelevant in determining whether the product's design is defective (*McLaughlin v. Sikorsky Aircraft (1983) 148 Cal. App. 3d 203, 207-208, 195 Cal. Rptr. 764*).

B. Feasibility of Alternative Design Does Not Include Compliance With Owner Specifications. The feasibility of an alternative design, which is a factor considered in the risk-benefit test of *Barker v. Lull Eng'g Co. (1978) 20 Cal. 3d 413, 143 Cal. Rptr. 225, 573 P.2d 443* , allows a consideration of physical or mechanical feasibility rather than administrative or bureaucratic feasibility, and does not include the necessity to comply with owner specifications (*McLaughlin v. Sikorsky Aircraft (1983) 148 Cal. App. 3d 203, 209, 195 Cal. Rptr. 764*).

[*Optional*] **C. Building Product in Accordance With Government Specifications Is Not a Defense.** In a strict products liability case, a defendant may not assert in defense to the claim that the product is defective that the manufacturer built the product in accordance with government standards or specifications (*McLaughlin v. Sikorsky Aircraft (1983) 148 Cal. App. 3d 203, 209, 195 Cal. Rptr. 764*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that defendant's product is not defective. The ground of opposition set forth is that defendant may not introduce evidence that the manufacturer had designed the product in accordance with owner specifications, because that evidence is irrelevant to the issue of whether the product is defective.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities opposing a motion for summary judgment or summary adjudication on the issue that defendant is not subject to strict liability. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should state that defendant's proffered evidence merely shows that the product was designed in accordance with owner specifications, and that such evidence is irrelevant to the issue of whether the product is defective [*see, e.g., McLaughlin v. Sikorsky Aircraft (1983) 148 Cal. App. 3d 203, 195 Cal. Rptr. 764* (irrelevant that aircraft was designed in accordance with government specifications)].

[3] Discussion of Authorities

[a] Evidence of Compliance With Owner Specifications Is Irrelevant

The facts and procedural background of ***McLaughlin v. Sikorsky Aircraft*** *(1983) 148 Cal. App. 3d 203, 195 Cal. Rptr. 764* , are discussed in *§§ 190.117[3][a]* and *190.240[3][a]*. In reversing the judgment for defendant, the court of appeal held that evidence that the manufacturer had followed Navy specifications for the aircraft's design was irrelevant to the risk-benefits test of *Barker v. Lull Eng'g Co. (1978) 20 Cal. 3d 413, 432, 143 Cal. Rptr. 225, 573 P.2d 443* , and was therefore inadmissible [*see §§ 190.110 -190.114*]. Specifically, the court ruled that such evidence had been improperly introduced at trial, and that the trial court had improperly rejected a jury instruction proffered by plaintiff that would have instructed the jury not to consider such evidence as a defense to the claim that the product is defective. The court explained that the question of the feasibility of an alternative design, a factor described in the risk-benefits test of *Barker*, allows a consideration of physical or mechanical feasibility rather than administrative or bureaucratic feasibility, and does not include the necessity to comply with owner specifications. Because the evidence had been introduced, the trial court's refusal to instruct the jury on this essential point was prejudicial error and required reversal (*48 Cal. App. 3d 203)* .

[b] Feasibility of Alternative Design Does Not Include Compliance With Owner Specifications

McLaughlin v. Sikorsky Aircraft *(1983) 148 Cal. App. 3d 203, 195 Cal. Rptr. 764* , is discussed in *§ 190.251[3][a]*.

[c] Building Product in Accordance With Government Specifications Is Not a Defense

McLaughlin v. Sikorsky Aircraft *(1983) 148 Cal. App. 3d 203, 195 Cal. Rptr. 764* , is discussed in *§ 190.251[3][a]*.

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19-190 California Points & Authorities § 190.252

§ 190.252 Opposing Contention That Plaintiff Is Not Entitled to Recovery Because Plaintiff's Lack of Care Contributed to Injury--Error to Instruct Jury That Defendant Not Liable as Matter of Law for Injuries From Use of Broken Product After Plaintiff Became Aware of Damaged State

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is not liable for plaintiff's injuries caused by defendant's product (see, e.g., §§ 190.253, 190.256).*]

DEFENDANT _____ [*name*] IS NOT ENTITLED TO AN INSTRUCTION THAT DEFENDANT IS NOT LIABLE AS A MATTER OF LAW FOR PLAINTIFF'S INJURIES FROM THE USE OF A BROKEN PRODUCT AFTER PLAINTIFF HAD BECOME AWARE OF THE PRODUCT'S DAMAGED STATE, BECAUSE PLAINTIFF HAS INTRODUCED SUBSTANTIAL EVIDENCE THAT THE PRODUCT WAS INITIALLY DEFECTIVE IN _____ [DESIGN *and/or* MANUFACTURE].

Error to Instruct That Defendant Not Liable as Matter of Law for Injuries From Broken Product When Evidence Suggests That Product Was Initially Defective. It is error to instruct a jury that a manufacturer is not liable as a matter of law for injuries resulting from a plaintiff's use of a broken product after the plaintiff became aware of the fact that the product is in a broken or damaged state, when the plaintiff has introduced substantial evidence suggesting that the product was initially defective in _____ [design *and/or* manufacture]. The error of such an instruction is that it assumes that the product in question had no inbuilt defects when it left the hands of the manufacturer (*Akers v. Kelley Co. (1985) 173 Cal. App. 3d 633, 647, 219 Cal. Rptr. 513*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that plaintiff is not entitled to recovery. The ground of opposition set forth is that defendant is not entitled to an instruction that defendant is not liable as a

matter of law for injuries resulting from plaintiff's use of a broken product after plaintiff became aware of the fact that the product was in a broken or damaged state. Such an instruction is improper if plaintiff has introduced substantial evidence suggesting that the product was initially defective in design or manufacture or both.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities opposing a motion for summary judgment or summary adjudication on the issue that defendant is not strictly liable. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should state facts showing that the product was initially defective in either design or manufacture or both [*see, e.g., Akers v. Kelley Co. (1985) 173 Cal. App. 3d 633 , 219 Cal. Rptr. 513* (court properly refused instruction because plaintiff had introduced substantial evidence that dockboard was initially defective in both design and manufacture)].

[3] Discussion of Authorities

[a] Error to Instruct That Defendant Not Liable as Matter of Law for Injuries From Broken Product When Evidence Suggests That Product Was Initially Defective

The facts and procedural background of ***Akers v. Kelley Co.*** *(1985) 173 Cal. App. 3d 633, 219 Cal. Rptr. 513* , are discussed in *§ 190.115[3][a]*. In affirming the judgment for plaintiff, the court of appeal held that the trial court had properly refused to instruct the jury that a manufacturer is not liable as a matter of law for injuries resulting from plaintiff's use of a broken product after plaintiff became aware of the fact that the product was in a broken or damaged state. The court explained that the vice of the proffered instruction was that it assumed that the dockboard in question had no in-built defects when it left the manufacturer's factory. In this case, however, plaintiff had introduced substantial evidence suggesting that the dockboard was initially defective in both design and manufacture. Thus, the instruction was properly refused (*173 Cal. App. 3d 633, 647)* .

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19-190 California Points & Authorities § 190.253

§ 190.253 Opposing Contention That Plaintiff Is Not Entitled to Recovery Because Plaintiff's Lack of Care Contributed to Injury--Plaintiff's Comparative Negligence or Secondary Assumption of Risk Requires Reduction of Plaintiff's Recovery by Proportion of Fault but Does Not Bar Recovery

[1] FORM

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is not liable for plaintiff's injuries caused by defendant's product (see, e.g., §§ 190.252, 190.256).*]

PLAINTIFF'S COMPARATIVE NEGLIGENCE OR SECONDARY ASSUMPTION OF RISK REDUCES PLAINTIFF'S RECOVERY BY PLAINTIFF'S PROPORTIONAL FAULT BUT DOES NOT BAR RECOVERY.

A. Comparative Fault Applies to Strict Products Liability Cases. The system of comparative fault applies to actions founded on strict products liability (*Daly v. General Motors Corp. (1978) 20 Cal. 3d 725, 742, 144 Cal. Rptr. 380, 575 P.2d 1162*).

B. Plaintiff's Recovery Is Reduced Only to Extent Plaintiff Contributed to Injury. In a strict products liability case, a plaintiff's recovery is reduced only to the extent that his or her own lack of reasonable care contributed to his or her injury (*Daly v. General Motors Corp. (1978) 20 Cal. 3d 725, 737, 144 Cal. Rptr. 380, 575 P.2d 1162*).

[*Optional*] **C. Assumption of Risk Requires Application of Comparative Fault Principles Rather Than Bar of Action if Defendant Owed Duty to Plaintiff.** The manufacturer of a product owes a duty to users of its product, making the primary assumption of risk doctrine inapplicable in strict products liability actions; plaintiff's knowing encounter of a risk of injury caused by the defendant's breach constitutes secondary assumption of risk, which is merged into the comparative fault system (*Milwaukee Elec. Tool Corp. v. Superior Court (1993) 15 Cal. App. 4th 547, 560-565, 19 Cal. Rptr. 2d 24*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that plaintiff is barred from recovery. The ground of opposition set forth is that plaintiff's recovery is reduced only to the extent that plaintiff contributed to plaintiff's injuries.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities opposing a motion for summary judgment or summary adjudication on the issue that defendant is not strictly liable. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should state to what extent plaintiff contributed to his or her injuries, if at all, and that plaintiff is entitled to recover the remaining percentage representing the extent to which defendant caused plaintiff's injuries [*see, e.g., Daly v. General Motors Corp. (1978) 20 Cal. 3d 725, 144 Cal. Rptr. 380, 575 P.2d 1162* (evidence of plaintiff's negligence does not automatically bar recovery but is evidence of comparative negligence)]. If this form is used to oppose a contention that plaintiff's action is barred by the assumption of risk doctrine, counsel should discuss facts and precedent supporting the position that a manufacturer of a defective product does owe a duty to users of that product for purposes of analyzing assumption of the risk. Because of that duty, the manufacturer's defense is limited to secondary assumption of risk, which does not bar plaintiff's action but applies principles of comparative fault [*see Milwaukee Elec. Tool Corp. v. Superior Court (1993) 15 Cal. App. 4th 547, 560-565, 19 Cal. Rptr. 2d 24]* .

[3] Discussion of Authorities

[a] Comparative Fault Applies to Strict Products Liability Cases

In ***Daly v. General Motors Corp.*** *(1978) 20 Cal. 3d 725, 144 Cal. Rptr. 380, 575 P.2d 1162* , plaintiffs' decedent sustained fatal head injuries when the car that he was driving at 50 miles per hour hit a metal freeway divider, his door was thrown open, and he was ejected from the car. Plaintiffs brought an action in strict liability against the car's manufacturer and various companies in its chain of distribution. Plaintiffs claimed at trial that the car was defective because an improperly designed door latch was activated by the impact, causing decedent to be ejected from the car. Defendants, on the other hand, introduced evidence indicating that the decedent had failed to use either the seat belt or the door lock, and that decedent had been intoxicated, which had led to his failure to use the seat belt or door lock. The jury returned a verdict in favor of defendants, and plaintiffs appealed.

The Supreme Court reversed the judgment, holding that the defenses presented by defendants should not automatically act as a total bar to plaintiffs' recovery, but that instead the principles of comparative negligence apply to a strict liability action. The Court explained that the goal of strict products liability is not frustrated by the adoption of comparative principles, because plaintiffs are still relieved of proving that the manufacturer or distributor was negligent in the production, design, or dissemination of the article in question; defendant is still subject to strict liability; and the principle of protecting the defenseless is still preserved, because plaintiff's recovery is reduced only to the extent that his or her own lack of reasonable care contributed to his or her injury (*20 Cal. 3d 725, 731-743)* . In addition, the Court found that reversible error occurred by the admission of evidence of the decedent's intoxication and failure to use safety devices in the car (*20 Cal. 3d 725, 744-746)* .

[b] Plaintiff's Recovery Is Reduced Only to Extent Plaintiff Contributed to Injury

Daly v. General Motors Corp. *(1978) 20 Cal. 3d 725, 144 Cal. Rptr. 380, 575 P.2d 1162* , is discussed in *§ 190.253[3][a]*.

[c] Assumption of Risk Requires Application of Comparative Fault Principles Rather Than Bar of Action if

Defendant Owed Duty to Plaintiff

In ***Milwaukee Elec. Tool Corp. v. Superior Court*** *(1993) 15 Cal. App. 4th 547, 19 Cal. Rptr. 2d 24* , the plaintiff was using a drill manufactured by the Milwaukee Electric Tool Corp. (Milwaukee), to drill through angle iron while on an A-frame ladder. The drill had a side-support handle, which was designed to control the rotational forces generated by the drill; the plaintiff knew that the drill would occasionally "bind up"--that is, the drill bit would stop, causing the body of the drill to rotate in a counterclockwise direction--and that the side-support handle would protect the user from this phenomenon. Plaintiff was injured when the drill bound up while he was using his free hand to hold a post on the building where he was working; the rotation of the drill threw plaintiff off the ladder, causing serious injuries to plaintiff's wrist and arm. Plaintiff sued Milwaukee on theories of strict products liability, breach of express and implied warranty, and negligence. Milwaukee moved for summary adjudication establishing that its affirmative defense of plaintiff's assumption of risk barred the causes of action for strict products liability and breach of warranty. The trial court denied the motion, and Milwaukee sought a writ of mandate from the court of appeal. The court of appeal denied the writ, but the Supreme Court granted review, and remanded the petition to the court of appeal for reconsideration in light of the intervening decision in *Knight v. Jewett (1992) 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2, 834 P.2d 696* .

The court of appeal again denied the petition, holding that assumption of the risk did not bar the plaintiff's action, but merely required apportionment of fault under comparative fault principles (*15 Cal. App. 4th 547, 551)* . The court examined the development of the strict products liability theory, and noted the retention of some concepts from the law of negligence, which was the context in which the Supreme Court applied the assumption of risk principles in *Knight* (*15 Cal. App. 4th 547, 555-559)* . The court relied on authorities including *Daly v. General Motors Corp. (1978) 20 Cal. 3d 725, 734-737, 144 Cal. Rptr. 380, 575 P.2d 1162* [*see § 190.253[3][a]*], which held that comparative fault principles applied to strict products liability actions as well as those based on negligence, to conclude that negligence theory and strict products liability theory were functionally similar insofar as duty and breach are concerned (*15 Cal. App. 4th 547, 559)* . Therefore, the assumption of risk analysis used in *Knight,* focusing on whether an action is barred because the doctrine requires a finding that defendant owed no duty to prevent plaintiff's injury, or whether the action is instead subject to comparative fault principles on the ground that defendant did owe a duty to plaintiff but plaintiff knowingly encountered a risk of injury caused by the defendant's breach of that duty, is properly applied to strict products liability actions (*15 Cal. App. 4th 547, 559-561)* .

In determining whether Milwaukee had established the bar of primary assumption of risk, the court stated that a manufacturer has a duty to users of its products, to produce defect-free products (*15 Cal. App. 4th 547, 562)* . The court also rejected Milwaukee's contention that plaintiff's allegedly dangerous misuse of the drill reduced or removed that duty of care. Although assumption of risk principles have been used to find that no duty exists in cases involving the firefighter's rule, or in cases in which a veterinarian is injured by an animal that he or she is treating, those cases involve professional persons employed to confront the very dangers posed by the injury-causing agent (*15 Cal. App. 4th 547, 562-563)* . In contrast, the user of a power tool is not employed for the purpose of testing the manufacturer's products for defects (*15 Cal. App. 4th 547, 563)* . Once the manufacturer's duty to users of its products is established, the assumption of risk defense asserted by the manufacturer is necessarily limited to secondary assumption of risk, under which liability is apportioned according to fault (*15 Cal. App. 4th 547, 565-566)* .

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19-190 California Points & Authorities § 190.254

§ 190.254 Opposing Contention That Plaintiff Is Not Entitled to Recovery Because of Primary Assumption of Risk--Defendant Owes Duty to Participants Not to Increase Risk of Harm Over and Above That Inherent in Sport

[1] FORM

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of pints and authorities opposing the contention that defendant is not liable for injuries caused by defendant's product.*]

PRIMARY ASSUMPTION OF RISK DID NOT BAR RECOVERY BECAUSE DEFENDANT OWES A DUTY TO PARTICIPANTS NOT TO INCREASE THE RISK OF HARM OVER AND ABOVE THAT INHERENT IN THE SPORT.

A. Defendant Owes Duty to Participants Not to Increase Risk of Harm Over and Above That Inherent in Sport. Although a defendant owes no duty of care to protect a plaintiff against risks inherent in a particular sport voluntarily played by the plaintiff, the defendant owes a duty to participants not to increase the risk of harm over and above that inherent in the sport (*Ford v. Polaris Indus., Inc. (2006) 139 Cal. App. 4th 755, 767, 43 Cal. Rptr. 3d 215* ; *Knight v. Jewett (1992) 3 Cal. 4th 296, 316* ; *American Golf Corp. v. Superior Court (2000) 79 Cal. App. 4th 30, 35, 93 Cal. Rptr. 2d 683*).

B. Risk Is Inherent in Sport if Its Elimination Would Chill Vigorous Participation and Alter Fundamental Nature of Activity. A risk is inherent in a sport if its elimination would (1) chill vigorous participation in the sport, and (2) alter the fundamental nature of the activity (*Ford v. Polaris Indus., Inc. (2006) 139 Cal. App. 4th 755, 772, 43 Cal. Rptr. 3d 215* ; *Ferrari v. Grand Canyon Dories (1995) 32 Cal. App. 4th 248, 253, 38 Cal. Rptr. 2d 65*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that plaintiff is barred from recovery under the doctrine of primary assumption of risk.

[3] Discussion of Authorities

[a] Defendant Owes Duty to Participants Not to Increase Risk of Harm Over and Above That Inherent in Sport

In ***Ford v. Polaris Indus., Inc.*** *(2006) 139 Cal. App. 4th 755, 43 Cal. Rptr. 3d 215* , the plaintiff sustained severe orifice injuries after falling off the rear of a personal watercraft. The jet-powered nozzle propelled a high-pressure stream of water that ripped her internal organs apart. She alleged that the watercraft was defectively designed because there was no means for a passenger to hold on other than to the operator. The trial court ruled that primary assumption of risk did not bar her suit. The jury returned a verdict in favor of the plaintiff.

The appellate court affirmed. Finding the reasoning of ***Milwaukee Electric Tool Corp. v. Superior Court*** *(1993) 15 Cal. App. 4th 547, 19 Cal. Rptr. 2d 24* "instructive," the court found that primary assumption of risk did not foreclose plaintiff's strict products liability claim. The court acknowledged that the general risk of falling and coming into contact with water is inherent in jet skiing. However, it declined to find that the specific risks of sustaining orifice injuries are inherent in the sport. Orifice injuries and the conduct that causes them do not belong to the "fundamental nature or habit" of the sport. These injuries occur because of rearward ejection into an extremely dangerous, defined space. Providing an alternative to hanging on to the operator would not change the fundamental nature of the sport or deter vigorous participation. The court was unconvinced by defendant's argument that the nature of the sport and its inherent risks is defined by the industry standard. Cases cited by defendant did not support its proposition that primary assumption of risk will preclude a strict products liability design defect claim against a recreational equipment manufacturer simply because its equipment is "essentially the same" in design as that of other manufacturers. The defendant neglected to take into consideration a key principle of ***Knight v. Jewett*** *(1992) 3 Cal. 4th 296, 834 P.2d 696* : that the examination of duty under a primary assumption of risk inquiry takes into account a defendant's role in, or relationship to, the sport in question. Analogizing the duty of sports venue proprietors and operators, where the asserted design defect is the failure to incorporate protection against a serious injury into recreational equipment, the court rephrased the manufacturer's duty to design nondefective products as a duty to take reasonable steps to minimize without altering the nature of the sport, at least under circumstances where the risk poses the gravest danger.

The court next rejected the manufacturer's contention that the jury should have been instructed that in addition to proving a harmful, defective design, the plaintiff also had to prove that the defect increased the risk of harm beyond those risks that are a normal part of the sport of jet skiing. A finding of a design defect would itself establish that the manufacturer increased the risk of harm inherent in jet skiing, and the requested instructions would have been redundant and confusing. The given standard risk/utility/design defect instructions were adequate (*139 Cal. App. 4th 755, 767-775)* .

In ***Knight v. Jewett*** *(1992) 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2, 834 P.2d 696* , defendant broke plaintiff's finger in a game of touch football. The Supreme Court of California affirmed the dismissal of plaintiff's negligence claim, holding that it was barred by the primary assumption of risk doctrine.

The court addressed the distinction between the principles of assumption of risk and comparative fault and adopted the phrases "primary assumption of risk" for the former and "secondary assumption of risk" for the latter. In primary assumption of risk cases, there is no duty on the part of the defendant to protect the plaintiff. In secondary assumption of risk cases, defendant does owe a duty of care to the plaintiff but the plaintiff knowingly encounters a risk of injury caused by the defendant's breach of that duty.

A plaintiff who has suffered harm in primary assumption of risk situations is not entitled to recover from the defendant,

regardless of whether plaintiff's conduct in undertaking the activity was reasonable or unreasonable. Whether the defendant owed a legal duty to protect a plaintiff from a particular risk of harm does not turn on the reasonableness or unreasonableness of the plaintiff's conduct, but rather on the nature of the activity or sport in which the defendant is engaged and the relationship of the defendant and the plaintiff to that activity or sport.

In this case, defendant's conduct in the course of the touch football game did not breach any legal duty owed to plaintiff, and the case accordingly fell within the primary assumption of risk doctrine (*3 Cal. 4th 296, 308-309)* .

In ***American Golf Corp. v. Superior Court*** *(2000) 79 Cal. App. 4th 30, 93 Cal. Rptr. 2d 683* , a golfer's shot ricocheted off a wooden yardage marker, injuring a companion golfer. The injured golfer brought a personal injury action against the golf course for negligent design and placement of the marker. The court of appeal held that the action was barred by the doctrine of primary assumption of risk. The court held that golf is an active sport, errant shots are an inherent risk of golf, markers are an integral part of the sport, and the golf course did not increase the risk of injury by its design and placement of the marker (*79 Cal. App. 4th 30, 35)* .

[b] Risk Is Inherent in Sport if Its Elimination Would Chill Vigorous Participation and Alter Fundamental Nature of Activity.

Ford v. Polaris Indus., Inc. *(2006) 139 Cal. App. 4th 755, 43 Cal. Rptr. 3d 215* , is discussed in *§ 190.254[3][a]*.

In ***Ferrari v. Grand Canyon Dories*** *(1995) 32 Cal. App. 4th 248, 38 Cal. Rptr. 2d 65* , the plaintiff's head struck the metal frame of a raft during a commercial rafting trip sponsored by the defendants. The trial court held that her negligence claim was barred by the doctrine of primary assumption of risk. The court of appeal affirmed (*32 Cal. App. 4th 248, 253)* .

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19-190 California Points & Authorities § 190.255

§ 190.255 Opposing Contention That Plaintiff Is Not Entitled to Recovery Because of Primary Assumption of Risk--Manufacturer Owes Duty to User of Its Product

[1] FORM

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is not liable for injuries caused by defendant's product.*]

PRIMARY ASSUMPTION OF RISK DID NOT BAR RECOVERY, BECAUSE PURSUANT TO STRICT PRODUCTS LIABILITY, A MANUFACTURER OWES A DUTY TO A USER OF ITS PRODUCT, THUS MAKING THE PRIMARY ASSUMPTION OF THE RISK DOCTRINE INAPPLICABLE.

Manufacturer's Duty to Users of Product Under Strict Liability Makes Primary Assumption of Risk Inapplicable as Defense. A defendant cannot establish that it is entitled to the defense of primary assumption of risk, unless the defendant owes no legal duty to the plaintiff. Because the manufacturer of a product owes a duty to the users of its products to make defect-free products, the doctrine of primary assumption of risk is inapplicable in a products liability action (*Ford v. Polaris Indus., Inc. (2006) 139 Cal. App. 4th 755, 768-769, 43 Cal. Rptr. 3d 215* ; *Milwaukee Elec. Tool Corp. v. Superior Court (1993) 15 Cal. App. 4th 547, 565, 19 Cal. Rptr. 2d 24*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff is barred from recovery under the doctrine of primary assumption of risk.

[3] Discussion of Authorities

[a] Manufacturer's Duty to Users of Product Under Strict Liability Makes Primary Assumption of Risk

Inapplicable as Defense

Ford v. Polaris Indus., Inc. *(2006) 139 Cal. App. 4th 755, 43 Cal. Rptr. 3d 215* , is discussed in *§ 190.254[3][a]*.

In ***Milwaukee Elec. Tool Corp. v. Superior Court*** *(1993) 15 Cal. App. 4th 547, 19 Cal. Rptr. 2d 24* , a drill manufacturer contended that the plaintiff's claim against it was barred by primary assumption of risk. The court of appeal disagreed. It pointed out that pursuant to *Knight v. Jewett*, primary assumption of risk embodies a legal conclusion that there is no duty on the part of a defendant to protect the plaintiff from a particular risk. Under products liability, in contrast, a manufacturer does owe a duty to produce detect-free products (*15 Cal. App. 4th 547, 557)* . Moreover, in using a defective product, the user does not intend to confront a risk that is inherent in its use. To the extent that the user does elect to use the product with knowledge of the danger posed by the defect, the user's actions are subsumed by comparative negligence. The manufacturer is not relieved of its duty to make a defect-free product. This makes the primary assumption of risk doctrine inapplicable (*15 Cal. App. 4th 547, 565)* .

[4] Additional Authorities

[a] Manufacturer's Duty to Users of Product Under Strict Liability Makes Primary Assumption of Risk Inapplicable as Defense

The facts and procedural background of *Bunch v. Hoffinger Indus., Inc. (2004) 123 Cal. App. 4th 1278, 20 Cal. Rptr. 3d 780* , are discussed in *§ 190.160[4][b]*. The court held that assumption of risk does not insulate equipment suppliers from liability for providing defective equipment and specifically that primary assumption of risk did not bar the plaintiff's products liability claim (*123 Cal. App. 4th 1278, 1300-1301)* .

The facts and procedural background of *Wright v. Stang Mfg. Co. (1997) 54 Cal. App. 4th 1218, 63 Cal. Rptr. 2d 422* , are discussed in *§ 190.160[4][b]*. The court noted that defendants in primary assumption of the risk cases that owed no duty to an injured plaintiff are in a different position than is a manufacturer of a tool that ultimately injures its user, because the user was not necessarily a professional employed to confront the very danger posed by the injury-causing agent. The court concluded that because primary assumption of the risk was not applicable in the strict products liability context, the plaintiff's cause of action was not barred (*54 Cal. App. 4th 1218, 1233)* .

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19-190 California Points & Authorities § 190.256

§ 190.256 Opposing Contention That Plaintiff Is Not Entitled to Recovery Because Plaintiff's Lack of Care Contributed to Injury--Plaintiff's Conduct Compared to Defendant's Product and Not to Defendant's Conduct

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is not liable for plaintiff's injuries caused by defendant's product (see, e.g., §§ 190.117, 190.252, 190.253).*]

IN APPORTIONING FAULT, PLAINTIFF'S CONDUCT IS COMPARED TO DEFENDANT'S PRODUCT AND NOT TO DEFENDANT'S CONDUCT.

Plaintiff's Conduct Compared to Defendant's Product and Not to Defendant's Conduct. For the purpose of apportionment of comparative fault in a strict products liability action, a plaintiff's conduct is compared to the defendant's product, and not to the defendant's conduct (*Fluor Corp. v. Jeppesen & Co. (1985) 170 Cal. App. 3d 468, 480, 216 Cal. Rptr. 68*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that defendant's conduct is relevant to the apportionment of comparative fault. The ground of opposition set forth is that in apportioning fault, plaintiff's conduct is compared to defendant's product, and not to defendant's conduct.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability; typically, these may include the points and authorities contained in § 190.117. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of

law stated. For example, counsel should differentiate between defendant's product and defendant's conduct, and explain that the former rather than the latter is to be compared to plaintiff's conduct in apportioning fault [*see, e.g., Fluor Corp. v. Jeppesen & Co. (1985) 170 Cal. App. 3d 468, 216 Cal. Rptr. 68* (jury must compare jet crew's conduct to defendant's airport approach chart, not to defendant's conduct in manufacturing chart)].

[3] Discussion of Authorities

[a] Plaintiff's Conduct Compared to Defendant's Product and Not to Defendant's Conduct

The facts and procedural background of ***Fluor Corp. v. Jeppesen & Co.*** *(1985) 170 Cal. App. 3d 468, 216 Cal. Rptr. 68* , are discussed in *§§ 190.20[3][a]* and *190.70[3][a]*. In reversing the judgment for defendant, on the grounds that the trial court erred in failing to instruct the jury on a strict products liability theory, the court of appeals pointed out that the crew's alleged negligence may still be a significant factor in determining comparative negligence. However, the court expressly stated that for purpose of apportionment under comparative negligence, plaintiff's conduct was to be compared not to defendant's conduct, but to its product (*170 Cal. App. 3d 468, 480)* .

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19-190 California Points & Authorities § 190.257

§ 190.257 Opposing Contention That Government Contractor Immunity Is Applicable--No Government Specification

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is not liable for plaintiff's injuries caused by defendant's product (see, e.g., §§ 190.250 -190.256).*]

GOVERNMENT CONTRACTOR IMMUNITY DOES NOT APPLY TO IMMUNIZE DEFENDANT _____ [*name*] FROM LIABILITY FOR DAMAGES CAUSED BY THE DESIGN OF _____ [*specify equipment or product*] BUILT BY DEFENDANT UNDER DEFENDANT'S CONTRACT WITH THE GOVERNMENT BECAUSE THE GOVERNMENT DID NOT SPECIFY THE DESIGN TO BE USED.

Government Contractor Immunity Requires Specification by Government. A contractor may not successfully assert the government contractor immunity unless the government contract contains reasonably precise building specifications; when the contract is silent concerning the details, and does not specifically require or direct anything of the contractor, the government is not compelling any particular design of the contractor, and the contractor is responsible for his or her own design (*see Merritt, Chapman & Scott Corp. v. Guy F. Atkinson Co. (9th Cir. 1961) 295 F.2d 14, 15-16)* .

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the defendant is not liable for any injuries to the plaintiff because as a government contractor the defendant was protected by the government contractor immunity. The ground of opposition is that the immunity is inapplicable because the defendant rather than the government specified the product's design.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities opposing a motion for summary judgment or summary adjudication on the issue that the defendant is not liable. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel might attach a copy of the contract between the defendant and the government, illustrating the lack of government design specification.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 190.243*.

[3] Discussion of Authorities

[a] Government Contractor Immunity Requires Specification by Government

In ***Merritt, Chapman & Scott Corp. v. Guy F. Atkinson Co.*** *(9th Cir. 1961) 295 F.2d 14* , plaintiff brought an action for damages against defendants, contractors on a government dam, when a temporary upper cofferdam collapsed on two different occasions. The district court judgment was for plaintiff. Defendants appealed.

The court of appeals affirmed. The court responded to defendants' contention that they were protected by the government contract defense by explaining that in order to rely on that defense, defendants' obligation must have been contained within their contract with the government. The court looked at the contract and found that the plans and specifications were silent concerning the details, except for some references concerning the crest elevation. The government did not require or direct anything of defendants regarding the materials to be used, the construction methods to be used, the sequence of construction, or any other detail (*295 F.2d 14, 15)* . Plaintiff alleged defendants were negligent in five different respects. The court found that of these five, three were not subject to any direct government control and were entirely within the discretion of defendants, and the remaining two were not required of defendants by any government directive or authority. It found no evidence of government compulsion. The court said that compulsion must exist before the government contract defense is available. It explained that in cases in which the government contract defense was upheld, the plans and specifications were drawn and adopted prior to the contract. In such cases the contractor was entitled to follow those plans and specifications, exercising due and proper care and skill, and to require parties damaged to look to the government, which required such a contract, for relief. The government contractor immunity defense will provide the contractor with relief provided such plans and specifications are inadequate, there has been no departure from the plans, and the work has not been done in an improper, careless, or negligent manner by the contractor (*295 F.2d 14, 15-16)* . The court also noted that although the Corps of Engineers had indicated its preference to hold the upper cofferdam as long as they could, this did not prevent defendants from disregarding those wishes, and making their own decision (*295 F.2d 14, 17)* .

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19-190 California Points & Authorities § 190.258

§ 190.258 Opposing Contention That Government Contractor Immunity Is Applicable--No Significant Conflict Between Government Contractual Requirements and State Law

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is not liable for injuries caused by defendant's product.*]

THE GOVERNMENT CONTRACTOR IMMUNITY DOES NOT APPLY TO IMMUNIZE DEFENDANT _____ [*name*] FROM LIABILITY FOR DAMAGES CAUSED BY THE DESIGN OF _____ [*specify equipment or product*] PRODUCED BY DEFENDANT UNDER CONTRACT WITH THE GOVERNMENT, BECAUSE DEFENDANT HAS FAILED TO SHOW THE NECESSARY SIGNIFICANT CONFLICT BETWEEN THE GOVERNMENT CONTRACTUAL REQUIREMENTS AND STATE LAW.

No Government Contractor Immunity When Significant Conflict Between Contractual Requirement and Law Has Not Been Established. The government contractor defense does not apply when the necessary significant conflict between federal contracting requirements and state law has not been established (*Jackson v. Deft (1990) 223 Cal. App. 3d 1305, 1317, 273 Cal. Rptr. 214*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a defendant is not liable for any injuries to the plaintiff on the ground of government contractor immunity. The ground of opposition is that defendant has failed to show the necessary significant conflict between the government contractual requirements and state law [*see Jackson v. Deft (1990) 223 Cal. App. 3d 1305, 1317, 273 Cal. Rptr. 214]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities in opposition to defendant's motion for summary judgment.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should show that defendant was not precluded by virtue of the government contract from rendering the product safe. For example, if the government contract included relevant specifications, counsel should show that the specifications did not limit further refinement of the design feature in question, which was capable of being made safe without violating the contract.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 190.243*.

[3] Discussion of Authorities

[a] No Government Contractor Immunity When Significant Conflict Between Contractual Requirement and Law Has Not Been Established

In ***Jackson v. Deft*** *(1990) 223 Cal. App. 3d 1305, 273 Cal. Rptr. 214* , a civilian painter employed for several years by the United States Navy brought an action against the suppliers of a certain paint product, seeking damages arising from respiratory injuries he incurred because of exposure to a chemical in the paint (toluene diisocyanate), on the basis that the paint can labels contained inadequate warnings of the dangers of the product (among other theories of liability). Plaintiff alleged that during his employment by the Navy, at two locations, he was exposed to the paint supplied by defendants, which caused him to develop asthma and other disabilities. Defendants moved for summary judgment on the ground that the military contractor defense as defined in *Boyle v. United Techs. Corp. (1988) 487 U.S. 500, 108 S. Ct. 2510, 101 L. Ed. 2d 442* [*see § 190.243[3][a]*], shielded them from any liability under state tort law, and that alternatively, the warnings on their paint products were adequate as a matter of law. One defendant asserted the following: (1) it produced the paint product, a weather-resistant coating, according to military specifications from the Navy; (2) it provided the military with any information it had regarding hazards associated with the use of its product; (3) Navy specifications included specific provisions for marking and labeling, including caution labeling; (4) defendant complied with all Navy specifications, including cautionary language; and (5) regarding the adequacy of its warnings under principles of state tort law, the warnings on its paint can labels were "clear, understandable, and completely unambiguous." Defendant's supporting evidence included the military specifications under which it produced the paint product, copies of certain of its labels, and a declaration its sales vice-president. The declaration stated that defendant complied with all labeling requirements of military specifications, including cautions on product use. The specifications varied for successive periods of time. The first specification required a label on every component container in every kit and on each exterior shipping container, cautioning in capital letters that the coating material is toxic and should be used with adequate ventilation, and that the user should avoid breathing vapors or getting the product in the eyes, on skin, or on clothing. The specification also required a label on each component unit with usage instructions and specific precautions; it was later superseded by an Air Force specification, which required less information on each label on each individual can and container. That specification required only a brief statement regarding the danger of flammability and the need for protective clothing and adequate ventilation, and directed the user to contact the departmental medical service for safe handling instructions. From that point on, defendant used that language on its labels. The other defendant asserted that: (1) the Navy approved reasonably precise specifications for the labeling of the paint coating; (2) it labeled the coating pursuant to the specifications; (3) the Navy was aware of the hazards of the chemical in question; (4) the Navy made no complaints concerning its compliance with the labeling requirements of the specifications; and (5) the labels it used provided adequate warning and explanation of proper procedures for use. That defendant's motion was supported by the pertinent military specifications, copies of its labels, and declarations of its vice-president. One of those labels warned in capital letters that the product was flammable and contained harmful, potentially irritating vapor; it also included a caution regarding adequate ventilation, protective clothing, and fire prevention, and an admonition to

follow OSHA regulations regarding ventilation and respiratory equipment. Plaintiff asserted that defendants failed to establish all the elements of the military contractor's defense, and that the product manufactured by defendants was defective and did not contain an adequate warning. Plaintiff submitted evidence that one of the defendants sold 20 percent of its business in that product to industrial accounts. The sales vice-president for that defendant did not know if anyone at the corporation investigated whether the labels sold to the Navy provided adequate warning of the hazards of the chemical in question, but speculated that some of its technical directors might have investigated the subject. He also testified that the staff determined what language to use on the labels, on the basis of what the Navy requested, other unspecified information it normally receives from its association, and any information from its supplier. The vice-president who testified on behalf of the other defendant stated that it also sold that paint to commercial accounts, that he considered the military labeling specifications to be minimum standards, and that, in his view, the company was not limited by those specifications, and could add additional information that it considered appropriate. Plaintiff submitted a declaration by a psychologist specializing in "the area of human factors," who analyzed and criticized the labels of both defendants, but the trial court sustained one defendant's objection to consideration of that declaration, in part for lack of qualification of the witness as an expert. The trial court granted summary judgment on the alternative grounds of military contractor immunity, and the adequacy as a matter of law of the warnings. Plaintiff appealed.

The court of appeal reversed, holding that triable issues of fact remained regarding both grounds (*223 Cal. App. 3d 1305, 1313-1321)* . The court first considered whether defendants established all the elements of the military contractor's defense, noting that that issue is generally a question of fact for the jury. The court noted that in *Boyle,* the United States Supreme Court clarified at least to some extent the circumstances under which a contractor providing military equipment to the federal government can be held liable under state tort law for injury caused by a design defect (*223 Cal. App. 3d 1305, 1314)* . *Boyle* held that liability for design defects in military equipment cannot be imposed under state law when: (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States. The first two conditions assure that the design feature was considered by a government officer and not merely by the contractor itself; the third condition avoids creating an incentive for the manufacturer to withhold knowledge of risks. The court of appeal noted that although *Boyle* did not address the applicability of the defense in a failure-to-warn case, federal appellate cases (in jurisdictions other than the Ninth Circuit) have considered the issue since *Boyle.* In one of those cases, the court noted, "Stripped to its essentials, the military contractor's defense under *Boyle* is to claim 'The Government made me do it.' " *Boyle* displaces state law only when the Government, making a discretionary, safety-related military-procurement decision contrary to the requirements of state law, incorporates this decision into a military contractor's contractual obligations, thereby limiting the contractor's ability to accommodate safety in a different fashion. That court concluded that if there was an issue of material act regarding the government's control over the warnings accompanying a product, the matter could not be resolved on summary judgment. In another case, the courts found that although the government contractor defense could apply to failure-to-warn cases, it was inapplicable to the facts before it, because there was no conflict between the state duty to warn and the federal contractual duty (*223 Cal. App. 3d 1305, 1316)* .

On the basis of those cases and others, the court of appeal stated that the defendants' evidence did not establish as a matter of law the necessary significant conflict between federal contracting requirements and state law. The court noted that although defendants' evidence did show that certain warnings were required by the military specifications, the evidence did not establish that the specifications placed any limitation on additional information from the manufacturers to users of their products. Rather, the evidence suggested that no such limitation existed. The court concluded that there is at least a triable issue of fact concerning the existence of a substantial conflict between a federal interest and state law, and the trial court erred in granting summary judgment for defendants (*223 Cal. App. 3d 1305, 1317)* . Although determination of that issue was not necessary to its holding, the court noted that the paint in question could be considered "military equipment" for the purposes of applying the military contractor defense. It stated that, in its view, if a product is produced according to military specifications and used by the military because of particular qualities that serve a military purpose, and is incidentally sold commercially as well, that product may nonetheless still qualify as military equipment. Therefore, the evidence that the paint produced by defendants was also sold commercially does not

absolutely foreclose application of the military contractor defense. Conversely, it stated, the scant evidence in the record concerning the qualities of the paints that made them suitable for military aircraft is insufficient to establish as a matter of law that they are military equipment (*223 Cal. App. 3d 1305, 1318-1319)* .

The court also discussed the adequacy of the warnings under state law. The court found that the trial court did not abuse its discretion in refusing to consider the declaration of the psychologist who testified on behalf of plaintiff (*223 Cal. App. 3d 1305, 1319-1320)* . It nevertheless concluded that the trial court erred in holding that the warnings were adequate as a matter of law. The court stated that under California law, a product may be defective because of the absence of an adequate warning of the dangers inherent in its use. Whether the absence of a warning makes a product defective depends on several factors, among them the normal expectations of the consumer regarding how a product will perform, degrees of simplicity or complication in its operation or use, the nature and magnitude of the danger to which the user is exposed, the likelihood of injury, and the feasibility and beneficial effect of including a warning. The court noted that the labels of the two defendants were not identical (and that one defendant ultimately shortened its cautionary instructions), and that reasonable people might disagree about whether any or all of the warnings were unambiguous and conspicuous, and whether they provided sufficient information on the extent of risks and symptoms of overexposure to defendants' products. It concluded that defendants were not entitled to summary judgment on the ground that their labels were adequate as a matter of law (*223 Cal. App. 3d 1305, 1320)* .

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19-190 California Points & Authorities § 190.258A

§ 190.258A Opposing Contention That Government Contractor Immunity Is Applicable--Finding That Defense Applies to Design Defect Claim Does Not Necessarily Immunize Defendant on Failure-to-Warn Claim

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is not liable for injuries caused by defendant's product.*]

GOVERNMENT CONTRACTOR IMMUNITY DOES NOT APPLY TO IMMUNIZE DEFENDANT _____[*name*] FROM LIABILITY FOR DAMAGES CAUSED BY THE FAILURE TO WARN OF THE DANGERS OF _____ [*specify equipment or product*], BECAUSE DEFENDANT DID NOT ESTABLISH AN IDENTIFIABLE INTEREST IN THE EXISTENCE OR METHOD OF A WARNING AND A SIGNIFICANT CONFLICT BETWEEN THAT FEDERAL INTEREST AND THE OPERATION OF STATE LAW.

A. No Government Contractor Immunity for Failure-to-Warn Claims Unless Federal Contract Includes Warning Requirements That Significantly Conflict With State Law. The government contractor defense applies in failure-to-warn cases only if the applicable federal contract includes warning requirements that significantly conflict with those that would be imposed under state law (*Oxford v. Foster Wheeler LLC (1990) 177 Cal. App. 4th 700, 711, 99 Cal. Rptr. 3d 418* ; *Jackson v. Deft, Inc. (1990) 223 Cal. App. 3d 1305, 1317, 273 Cal. Rptr. 214*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a defendant is not liable for any injuries to the plaintiff on the ground of government contractor immunity. The ground of opposition is that the defendant failed to show that the applicable federal contract included warning requirements that significantly conflicted with those that would be imposed under state law (*Oxford v. Foster Wheeler LLC (1990) 177 Cal. App. 4th 700, 711, 99 Cal. Rptr. 3d 418* ; *Jackson v. Deft, Inc. (1990) 223 Cal. App. 3d 1305, 1317, 273 Cal. Rptr. 214*).

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities in opposition to defendant's motion for summary judgment.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. For example, counsel should point to the absence of any specific warning requirements in the federal contract at issue that would significantly conflict with those that would be imposed under state law.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 190.243*.

[3] Discussion of Authorities

[a] No Government Contractor Immunity for Failure-to-Warn Claims Unless Federal Contract Includes Warning Requirements That Significantly Conflict With State Law

In ***Oxford v. Foster Wheeler LLC*** *(1990) 177 Cal. App. 4th 700, 99 Cal. Rptr. 3d 418* , the decedent was exposed to asbestos while working in the boiler repair shop on a navy vessel at various shipyards. Defendant had manufactured the boilers pursuant to detailed military specifications. He developed mesothelioma many years later. His widow brought a wrongful death action alleging products liability and negligence. In a special verdict, the jury found against the plaintiff on her products liability claims for design defect and failure to warn, but in favor of plaintiffs on their negligence claim. The jury also found that the defendant had proven the three elements of the government contractor defense. The trial court found that the defense did not foreclose judgment against the defendant, reasoning that the defense verdict on the products liability claim did not subsume the jury's finding on negligent failure to warn, and that the government contractor defense does not apply to failure to warn claims.

The court of appeal reversed and remanded the action for a new trial, holding that the special verdict form was irreconcilably inconsistent. It did, however, agree with the trial court that the jury's verdict on the government contractor defense did *not* entitle the defendant to judgment in its favor.

The court first agreed with *Jackson v. Deft, Inc., (1990) 223 Cal. App. 3d 1305, 273 Cal. Rptr. 214* , that commercial availability of a product is not the dispositive issue regarding the defense. Confining the defense to products made exclusively for the military would be "unduly confining." Rather, the focus is on whether the area involves "uniquely federal interests," and if so, whether application of state law conflicts with federal policy. The court determined that substantial evidence supported each of the jury's findings regarding the three elements of the defense.

However, the government contractor defense does not immunize a defendant from all liability. The defense has limited application in failure-to-warn cases, coming into play only if the applicable federal contract includes warning requirements that significantly conflict with those that would be imposed under state law. The jury here had not been given a government contractor defense tailored to the failure-to-warn context. Although the jury's findings appeared to preclude liability for claims relating to the design of the boilers, the defense did not necessarily immunize defendant from liability on the failure-to-warn claims (*177 Cal. App. 4th 700, 709-711)* .

Jackson v. Deft, Inc. *(1990) 223 Cal. App. 3d 1305, 273 Cal. Rptr. 214* , is discussed in *190.258[3][a]*.

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19-190 California Points & Authorities § 190.259

§ 190.259 Opposing Contention That Federal Preemption is Applicable

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is not liable for plaintiff's injuries caused by defendant's product.*]

PLAINTIFF'S PRODUCTS LIABILITY ACTION FOR DAMAGES CAUSED BY A DEFECT IN _____ [*specify product, e.g.* A SEAT BELT] IS NOT PREEMPTED BY FEDERAL LAW, BECAUSE _____ [*specify applicable federal statute or regulation, e.g.,* TITLE *15 OF THE UNITED STATES CODE, SECTIONS 1381*-1431] DOES NOT EVINCE A CLEAR AND MANIFEST INTENT TO SUPERSEDE STATE LAW.

[*or*]

PLAINTIFF'S PRODUCTS LIABILITY ACTION FOR DAMAGES CAUSED BY A DEFECT IN _____ [*specify product*] IS NOT PREEMPTED BY FEDERAL LAW, BECAUSE IT IS NOT IMPOSSIBLE FOR THE DEFENDANT TO COMPLY WITH BOTH ITS STATE AND FEDERAL OBLIGATIONS.

A. Federal Preemption Inapplicable Absent Congressional Intent to Supersede State Law. Federal preemption does not apply when Congress did not intend for federal requirements to supersede state law (*Wyeth v. Levine (March 4, 2009) 2009 U.S. LEXIS 1774, at *16* ; *Altria Group, Inc. v. Good (2008) --U.S.--, 129 S. Ct. 538, 543, 172 L. Ed. 2d 398, 406* ; *Medtronic v. Lohr (1996) 518 U.S. 470, 485-486, 116 S. Ct. 2240, 135 L. Ed. 2d 700* ; *McKenney v. Purepac Pharm. Co. (2008) 167 Cal. App. 4th 72, 80, 83 Cal. Rptr. 3d 810* ; *Ketchum v. Hyundai Motor Co. (1996) 49 Cal. App. 4th 1672, 1679, 57 Cal. Rptr. 2d 595*).

B. No Federal Preemption When Defendant Has Failed to Show Conflicting Statutory Specifications. Federal

preemption does not apply when defendant fails to prove that its product was designed, manufactured, and labeled according to federal specifications, or that state specifications conflict with federal standards (*Wyeth v. Levine (March 4, 2009) 2009 U.S. LEXIS 1774, at *30* ; *LaPlante v. Wellcraft Marine Corp. (2001) 94 Cal. App. 4th 282, 114 Cal. Rptr. 2d 196* ; *Steele v. Collagen Corp. (1997) 54 Cal. App. 4th 1474, 1490* ; *Armstrong v. Optical Radiation Corp. (1996) 50 Cal. App. 4th 580, 592-595, 57 Cal. Rptr. 2d 763*).

C. FDA Regulation Does Not Preempt Strict Liability for Failure to Warn. Federal Food and Drug Administration (FDA) regulations do not preempt common law tort remedies for failure to warn (*Wyeth v. Levine (March 4, 2009) 2009 U.S. LEXIS 1774, at *45* ; *McKenney v. Purepac Pharm. Co. (2008) 167 Cal. App. 4th 72, 83-84, 83 Cal. Rptr. 3d 810* ; *Carlin v. Superior Court (1996) 13 Cal. 4th 1104, 1113*).

D. No Federal Preemption of Design Claims Involving "Substantially Equivalent" Medical Device. The MDA does not preempt design claims involving "substantially equivalent" medical devices because the § 510(k) process does not require a device to take a particular form, and because the claims do not impose a legal standard "different from or in addition to" federal requirements (*Medtronic, Inc. v. Lohr (1996) 518 U.S. 470, 494-495, 116 S. Ct. 2240, 135 L. Ed. 2d 700*).

E. No Federal Preemption of Express Warranty Claims Regarding Cigarettes. The federal Public Health Cigarette Smoking Act of 1969 (*15 U.S.C.S. § 1331 et seq.*) does not preempt causes of action for breach of express warranty because those causes of action are derived from and measured by the terms of the warranty, and because the requirements imposed by an express warranty are not imposed "under state law," but rather by the warrantor (*Cipollone v. Liggett Group (1992) 505 U.S. 504, 525, 112 S. Ct. 2608, 120 L. Ed. 2d 407*).

F. No Federal Preemption of Certain Fraud Claims Regarding Cigarettes. The federal Public Health Cigarette Smoking Act of 1969 (*15 U.S.C.S. § 1331 et seq.*) does not preempt causes of action for fraud based on concealment of material facts insofar as they rely on a state law duty to disclose those facts through channels of communication other than advertising or promotion. The federal Act does not preempt fraudulent misrepresentation claims with respect to advertising and promotion because those claims are predicated not on a duty "based on smoking and health," but on the more general duty not to deceive (*Altria Group, Inc. v. Good (2008)-- U.S. --, 129 S. Ct. 538, 545-546, 172 L. Ed. 2d 398* ; *Cipollone v. Liggett Group (1992) 505 U.S. 504, 528-529, 112 S. Ct. 2608, 120 L. Ed. 2d 407* ; *Whiteley v. Philip Morris, Inc. (2004) 117 Cal. App. 4th 635, 666-677*).

G. FIFRA Does Not Preempt State Rule Unless It Satisfies Two Conditions. A particular state rule is not preempted by § 136v(b) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) unless it satisfies two conditions: (1) it is a requirement "for labeling or packaging," and (2) it imposes a labeling or packaging requirement that is "in addition to or different from" those required under FIFRA (*Bates v. Dow Agrosciences L.L.C. (2005) 544 U.S. 431, 125 S. Ct. 1788, 161 L. Ed. 2d 687, 702-703)* .

H. State Law Labeling Requirement That Is Equivalent to and Consistent With FIFRA's Misbranding Provisions Is Not Preempted. A state law labeling requirement is not preempted by § 136v(b) if it is equivalent to and fully consistent with FIFRA's misbranding provisions (*Bates v. Dow Agrosciences LLC (2005) 544 U.S. 431, 125 S. Ct. 1788, 161 L. Ed. 2d 687, 705)* .

I. State Law Requirement Need Not Be Phrased in Identical Language to Corresponding FIFRA Requirement. A state law requirement need not be phrased in the identical language as its corresponding FIFRA requirement to survive preemption (*Bates v. Dow Agrosciences LLC (2005) 544 U.S. 431, 125 S. Ct. 1788, 161 L. Ed. 2d 687, 709)* .

J. Claims Based on Oral Representations Are Outside Scope of FIFRA Preemption. Because FIFRA defines labeling as written, printed, or graphic matter accompanying a pesticide, state law claims based on an agent's oral representations do not constitute requirements "for labeling or packaging" and are not preempted (*Bates v. Dow*

Agrosciences LLC (2005) 544 U.S. 431, 125 S. Ct. 1788, 161 L. Ed. 2d 687, 704 n.17).

K. Express Warranty Claims Not Preempted if Defendant Voluntarily Warranted Product's Fitness for Particular Purpose. State law claims for breach of warranty are not preempted where the manufacturer or retailer voluntarily warranted the pesticide product's fitness for a particular purpose (*Sun Valley Packing v. Consep, Inc. (2001) 94 Cal. App. 4th 315, 322, 114 Cal. Rptr. 2d 237*).

L. Savings Clause of Federal Railroad Safety Act Permits State Regulation of Matter Not Covered by Federal Regulations or Orders. The savings clause of the Federal Railroad Safety Act's express preemption provision permits a state to adopt or continue to enforce a law that covers subject matter not already covered by federal regulations or orders (*49 U.S.C. § 20106*; *Haynes v. AMTRAK (C.D. Cal. 2006) 423 F. Supp. 2d 1073, 1081)* .

M. Savings Clause of Federal Railroad Safety Act Permits State Regulation of Matters Covered by Federal Regulations if Law Meets Three Criteria. The savings clause of the Federal Railroad Safety Act's express preemption provision permits a State to enact or enforce laws on matters covered by federal regulation if the law (1) is necessary to address local safety concerns, (2) is compatible with federal law, and 3) does not necessarily burden state commerce (*49 U.S.C. § 20106*; *Haynes v. AMTRAK (C.D. Cal. 2006) 423 F. Supp. 2d 1073, 1081)* .

N. FDA Labeling Regulation Does Not Preempt Warning Claim Against Generic Drug Manufacturer. The FDA regulation requiring generic manufacturers to use the same labeling used on the original listed drug does not preempt a failure-to-warn claim against a generic drug manufacturer (*McKenney v. Purepac Pharm. Co. (2008) 167 Cal. App. 4th 72, 77, 83 Cal. Rptr. 3d 810*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to the contention that defendant has no liability because plaintiff's state common law claims are preempted by federal statutory requirements. The ground of opposition set forth is that defendant has failed to show that Congress intended the federal requirement to preempt state common law or that defendant has not established that its product was designed, manufactured, or labeled according to federal statutory specifications.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities opposing a motion for summary judgment or summary adjudication on the issue that defendant is not subject to strict liability. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should set forth facts showing that the plaintiffs state claims are not preempted by federal statutory requirements.

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 190.249* may be used to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Federal Preemption Inapplicable Absent Congressional Intent to Supersede State Law

Wyeth v. Levine *(March 4, 2009) 2009 U.S. LEXIS 1774* , is discussed in *§ 190.259[3][c]*.

Altria Group, Inc. v. Good *(2008) -- U.S. --, 129 S. Ct. 538, 172 L. Ed. 2d 398* , is discussed in *§ 190.259[3]*[f].

In ***Medtronic v. Lohr*** *(1996) 518 U.S. 470, 116 S. Ct. 2240, 135 L. Ed. 2d 700* , plaintiff filed a common law negligence claim in Florida state court against the manufacturer of plaintiff's pacemaker when his pacemaker failed, requiring emergency surgery. According to the plaintiff's treating physician, the pacemaker failed because of a defect in the lead. The manufacturer removed the case to the United States District Court on the basis of diversity. Thereafter, the manufacturer moved for summary judgment, alleging that the plaintiff's claims were preempted by *21 U.S.C.S. § 360k(a)*, which provides that no state may establish or continue in effect with respect to a device intended for human use any requirement that is different from, or in addition to, any requirement applicable to the decide under the Federal Drug and Cosmetic Act [*21 U.S.C.S. § 301 et seq.*].

The district court granted the defendant's motion and dismissed the complaint. On appeal, the Eleventh Circuit reversed in part and affirmed in part, holding that: (1) common-law actions were state requirements within the meaning of § 360k(a); (2) the claims based on negligent design were not preempted by § 360k(a); and (3) the claims based on negligent manufacture and failure to warn were preempted by § 360k(a). The United States Supreme Court reversed the Eleventh Circuit's decision insofar as it held that any of the claims were preempted by federal law.

The Court first provided a framework for determining whether a federal statute preempts state law. Preemption analysis must begin with the text of the preemption statute, but that there is a presumption against preemption that supports a narrow interpretation of the statute. There is a presumption that federal statutes do not supersede the historic police powers of the states unless it is the clear and manifest purpose of Congress to do so. In addition, because preemption analysis is guided by the idea that "the purpose of Congress is the ultimate touchstone" in every preemption case, any understanding of the scope of a preemption statute rests primarily on a "fair understanding of congressional purpose. The Court determined that although Congress' intent primarily is discerned from the language of the preemption statute and the statutory framework surrounding it, the structure and purpose of the statute as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law, is also considered relevant (*518 U.S. 470, 485-486)* .

McKenney v. Purepac Pharm. Co. *(2008) 167 Cal. App. 4th 72, 83 Cal. Rptr. 3d 810* , is discussed in *§ 190.259[3][n]*.

Ketchum v. Hyundai Motor Co. *(1996) 49 Cal. App. 4th 1672, 57 Cal. Rptr. 2d 595* , was an appeal from a trial court's $14 million judgment against defendant for injuries sustained by plaintiff while a passenger in an automobile manufactured by the defendant. The court of appeal affirmed in part and reversed in part. In the published portion of the opinion, the court concluded that the design defect claim based on a seat belt design that complied with federal standards was not preempted by the National Traffic and Safety Act. The federal statute provided that "compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." The court determined that Congress intended these federal provisions to specify only the minimum standards for motor vehicle safety. There was no intent to supersede higher safety performance standards (*49 Cal. App. 4th 1672, 1679)* .

NOTE:

In ***Geier v. American Honda Motor Co.*** *(2000) 529 U.S. 861, 866-874, 120 S. Ct. 1913, 146 L. Ed. 2d 814* , discussed in *§ 190.249[3][c]*, the U.S. Supreme Court held that the FMVSA's saving clause does not bar conflict preemption, and that a common law "no airbag" case conflicted with FMVSS 208 and was thus preempted. *Geier* effectively abrogated *Ketchum's* approach to determining the preemptive effect of FMVSS 208 (*Williamson v. Mazda Motor of Am., Inc. (2008) 167 Cal. App. 4th 905, 914, 84*

Cal. Rptr. 3d 545 , modified and reh'g denied, 2008 Cal. App. LEXIS 2269). *Ketchum* should thus not be cited in support of any proposition broader than then general preemption principle stated in this point.

[b] No Federal Preemption When Defendant Has Failed to Show Conflicting Statutory Specifications

Wyeth v. Levine *(March 4, 2009) 2009 U.S. LEXIS 1774* , is discussed in *§ 190.259[3][c]*.

In ***LaPlante v. Wellcraft Marine Corp.*** *(2001) 94 Cal. App. 4th 282, 114 Cal. Rptr. 2d 196* , the plaintiff had been thrown from a boat and then struck by it. The court of appeal held that the Federal Boat Safety Act (FBSA) neither expressly nor impliedly preempted claims alleging inadequate handhold areas in a boat's tow area. In finding no express preemption, the court stated that the FBSA's preemption provision, *46 U.S.C.S. § 4306*, only expressly precludes a state from enforcing a law or regulation that is not identical to a regulation prescribed by the Coast Guard. It does not prohibit the establishment or enforcement by state laws or regulations for which no Coast Guard regulations have been promulgated. Moreover, the preemption provision must be read in conjunction with the savings clause.

The court also found that *United States v. Locke (2000) 529 U.S. 89, 120 S. Ct. 1135, 146 L. Ed. 2d 69* , did not establish field preemption through the FBSA, as that case involved commercial oil tankers, not recreational vessels. Several factors weighed against a finding of field preemption. First, boat safety has traditionally been within the purview of state regulation. Second, the language of the FBSA preemption clause only precludes a state from acting when the Coast Guard has promulgated a regulation. Third, the savings clause makes it clear that Congress did not intend to preclude all state regulation. Fourth, the FBSA does not mandate the promulgation of regulations but merely permits it [*46 U.S.C.S. § 4302(a)*]. Finally, the Coast Guard has not promulgated a comprehensive scheme of federal regulation.

The court also found that plaintiff's common law claims were not subject to conflict preemption. Because the Coast Guard has not adopted any regulations dealing with handrails or handgrips, there is no federal regulations which would conflict with a state common law claim of negligent failure to install such handhold devices. The absence of Coast Guard regulation of handhold devices did not reflect an intention that handhold devices remain unregulated. Unlike the "no propeller guard" cases, in which courts have uniformly concluded that the failure of the Coast Guard to adopt a regulation reflected an intention that the area not be regulated, the Coast Guard did not undertake a comparable decision making process involving handhold devices (*94 Cal. App. 4th 282, 291-295)* .

In ***Steele v. Collagen Corp.*** *(1997) 54 Cal. App. 4th 1474, 63 Cal. Rptr. 2d 879* , plaintiff brought a personal injury action against a collagen manufacturer, alleging that she developed an autoimmune disorder after receiving a test injection of the defendant's product. The trial court granted defendant summary judgment, holding that plaintiff's causes of action were preempted by the Medical Device Amendments to the Federal Food, Drug, and Cosmetic Act [*21 U.S.C.S. §§ 360c, 360k*] because the product had been approved by the Food and Drug Administration (FDA). The court of appeal reversed, holding that the defendant has the burden of proving preemption by establishing that its product was designed, manufactured, and labeled according to the specifications approved by the FDA. Defendant only established that its product had been through the premarket approval (PMA) process, and preemption did not follow from that fact alone. The court remanded the case for further proceedings because it could not determine whether the defendant met the applicable federal standard of care (*54 Cal. App. 4th 1474, 1490)* .

NOTE:

In **Riegel v. Medtronic, Inc. (**2008) *552 U.S. 312, 128 S. Ct. 999, 169 L. Ed. 2d 892* , the U.S. Supreme Court held that the preemption clause of the Medical Device Amendments of 1976 (MDA) bars common law claims challenging the safety or effectiveness of a medical device with premarket approval. **Armstrong v. Optical Radiation Corp.,** below, although not yet overruled, should not be cited to support the contention that state law claims are not "different from, or in addition to" duties imposed by federal law. The facts and procedural background of ***Riegel v. Medtronic, Inc.*** *(2008) 552 U.S. 312,*

128 S. Ct. 999, 169 L. Ed. 2d 892 , are discussed in *§ 190.249[3][k]*.

In ***Armstrong v. Optical Radiation Corp.*** *(1996) 50 Cal. App. 4th 580, 57 Cal. Rptr. 2d 763* , plaintiff brought an action in negligence, strict liability, and breach of warranty against the manufacturer of a surgical aid for injuries she allegedly sustained as a result of the use of the product during surgery. The trial court granted the defendant's motion for summary judgment on the ground that plaintiff's claims were preempted by the Medical Device Amendments of 1976 [*21 U.S.C.S. § 360c et seq.*] to the Food, Drug, and Cosmetic Act [*21 U.S.C.S. § 301 et seq.*] The court of appeal reversed, holding that plaintiff's negligence cause of action was not preempted by federal regulation. To preempt a state common law claim, the defendant must establish the existence of a state law requirement specifically developed with respect to medical devices which differ from or are in addition to federal requirements specific to a particular device. The court determined that although the FDA imposed federal law requirements specifically developed with respect to the defendant's product, but there was no conflicting state law requirement specifically developed with respect to the device. To the extent the negligence claim paralleled federal requirements or was based on a violation of FDA regulations, it was not "different from, or in addition to" the duties mandated by federal law. Moreover, the state law requirements "were not specifically developed 'with respect to' medical devices" (*50 Cal. App. 4th 580, 592-595)* .

[c] FDA Regulation Does Not Preempt Strict Liability for Failure to Warn

In ***Wyeth v. Levine*** *(March 4, 2009) 2009 U.S. LEXIS 1774* , the U.S. Supreme held in a 6-3 opinion that FDA approval of a drug's label does not provide a complete defense to failure-to-warn claims. The three key elements to the ruling are:

- It was not impossible for the drug manufacturer to comply with both its state and federal law obligations regarding drug labeling.

- Plaintiff's state-law failure-to warn claims did not stand as an obstacle to the accomplishment of Congress' purpose in the FDCA.

- The FDA's Preemption Preamble to its 2006 Final Rule was not entitled to deference.

Levine began when the plaintiff received an injection of the anti-nausea drug Phenergan as part of her migraine treatment. The drug was injected directly into her vein through the "IV-push" method. It entered her artery, causing gangrene and resulting in the amputation her entire forearm. She brought a claim against the manufacturer, alleging that the label was defective because it did not instruct practitioners to use the IV-drip method of intravenous administration rather than the higher risk IV-push method. The Phenergan label did warn of the danger of gangrene and amputation following inadvertent intra-arterial injection.

The jury found in favor of the plaintiff. The trial court denied Wyeth's motion for judgment n.o.v., rejecting the manufacturer's preemption arguments. The Vermont Supreme affirmed. The state court ruled that federal labeling requirements created a floor, not a ceiling, for state regulation, and that conflict preemption did not bar the plaintiff's claims. The U.S. Supreme Court granted Wyeth's petition for certiorari.

Justice Stevens delivered the opinion of the Court, which Justices Kennedy, Souter, Ginsburg, and Breyer joined. Before beginning its analysis, The Court identified two legal principles that guided its analysis: the "purpose of Congress" as the ultimate touchstone in every preemption case, and its recognition of the presumption against preemption.

The Court then turned to Wyeth's first argument: that it would have been impossible to comply with the state-law duty to modify labeling without violating federal law. This argument failed, because FDA's "change being effected" (CBE) regulation *does* permit a manufacturer to make certain changes to its label before receiving FDA approval of its supplemental application, *21 C.F.R. § 314.70*(c)(6)(iii)(A), (C). The manufacturer's contention that the CBE regulation

was not implicated because a 2008 amendment allows the manufacturer only to change its label "to reflect newly acquired information"-- *73 Fed. Reg. 49603, 49609*-- was also unsuccessful. Wyeth could have revised the Phenergan label even under the amended regulation, because "newly acquired information" includes "new analyses of previously submitted data." *73 Fed. Reg. 49604* . Wyeth could have analyzed the accumulating data from the 20+ incidents of amputation resulting from Phenergan over the years, and added a stronger warning about IV-push administration of the drug.

The Court rejected the manufacturer's argument that unilaterally adding a stronger warning about IV-push administration would have subjected it to liability for unauthorized distribution. The Court identified a fundamental misunderstanding at the core of Wyeth's argument: that the FDA bears the primary responsibility for the content of a drug's label at all times. To the contrary, numerous amendments to the FDCA and FDA regulations make it clear that ultimate responsibility for a drug's labeling rests with the manufacturer. When the risk of gangrene from IV-push injection became apparent, Wyeth had a duty to adequately warn of that risk, and the CBE regulation permitted it to provide that warning before receiving FDA's approval. In short, absent clear evidence that FDA would not have approved such a change--and Wyeth did not offer any--it was not impossible for the drug manufacturer to comply with both federal and state requirements.

The Court next rejected Wyeth's "purposes and objectives" preemption argument: that requiring it to comply with a state-law duty to provide a stronger warning would interfere with Congress' purpose to entrust FDA to make drug labeling decision. The Court construed the evidence of "Congress' purposes" as actually supporting the opposite point of view: that FDCA establishes only a floor for drug regulation. Had Congress believed that state-law suits posed an obstacle to its objectives, it would have enacted an express preemption provision at some point in the statute's 70-year history. The majority viewed Congress' "silence on the issue, coupled with its certain awareness of the prevalence of state tort litigation," as strong evidence that the legislature did *not* intend FDA oversight to be the exclusive means of ensuring drug safety.

The Court put to rest the contention that the Preemption Preamble to a 2006 FDA regulation-- *71 Fed. Reg. 3922*-- in which the agency declared that its approval of labeling preempts conflicting state law, is entitled to deference. The majority clarified that agencies have no inherent authority to pronounce on preemption. The weight accorded to an agency's view on the issue depends on "its thoroughness, consistency, and persuasiveness." Under this standard, the 2006 Preemption Preamble did not merit deference. The Court criticized the agency's failure to comply with notice-and-comment requirements when it finalized its rule in 2006. Moreover, the FDA's position in 2006 contradicted evidence of Congress' purpose, and reversed the agency's own longstanding position regarding state tort law as a complementary form of drug regulation.

Finally, the Court distinguished the regulatory scheme regarding passive restraint devices in its "no-airbag" case, *Geier v. American Honda Motor Co. (2000) 529 U.S. 861, 120 S. Ct. 1913, 146 L. Ed. 2d 914* . While acknowledging that some state-law claims might frustrate the achievement of Congress's purposes in the FDCA, the one at issue in this case was not one of them. In the end, the Court concluded that the plaintiff's state law failure-to-warn claim was not preempted.

Justice Breyer wrote a one-paragraph concurring opinion. Justice Thomas penned a lengthy, separate opinion, concurring only in the majority's judgment. Justice Alito wrote the dissenting opinion, joined by Chief Justice Roberts and Justice Scalia (*2009 U.S. LEXIS 1774, at *45)* .

The facts and procedural background of ***Carlin v. Superior Court*** *(1996) 13 Cal. 4th 1104, 56 Cal. Rptr. 2d 162, 920 P.2d 134* are discussed in *§ 190.163[3][a]*. In reaffirming that prescription drug manufacturers are strictly liable for failure to warn, the Court rejected the defendant's argument that federal Food and Drug Administration (FDA) drug labeling requirements are determinative of a manufacturer's liability under state law. While not irrelevant (*see § 190.283*), FDA regulations do not preempt common law tort remedies for failure to warn (*13 Cal. 4th 1104, 1113)* .

Thus, the FDA's approval of a particular warning is not determinative of strict liability under state law. However, a manufacturer may not be held liable for failing to give a warning expressly precluded by FDA regulation [*see § 190.174*] (*13 Cal. 4th 1104, 1115 n.4*).

McKenney v. Purepac Pharm. Co. (2008) 167 Cal. App. 4th 72, 83 Cal. Rptr. 3d 810 , is discussed in *§ 190.259[3][n]*.

[d] No Federal Preemption of Design Claims Involving "Substantially Equivalent" Medical Device

Medtronic, Inc. v. Lohr *(1996) 518 U.S. 470, 116 S. Ct. 2240, 135 L. Ed. 2d 700* , is discussed in *§ 190.259[3][a]*.

[e] No Federal Preemption of Express Warranty Claims Regarding Cigarettes

In ***Cipollone v. Liggett Group., Inc.*** *(1992) 505 U.S. 504, 112 S. Ct. 2608, 120 L. Ed. 2d 407* , the plaintiff's decedent began smoking in 1942 and died of lung cancer in 1984. The plaintiff claimed that the defendants were responsible for the decedent's death because they breached express warranties contained in their advertising, because they failed to warn consumers about the hazards of smoking, because they fraudulently misrepresented those hazards to consumers, and because they conspired to deprive the public of medical and scientific information about smoking. The Third Circuit held that federal law preempted the plaintiff's state-law claims, but the United States Supreme Court granted certiorari and reversed in part. The Court determined that federal law preempted state-law claims that relied on a state law requirement or prohibition with respect to promotion or advertising. However, the plaintiff's claim that the defendants breached an express warranty was not preempted because that cause of action is derived from and measured by the terms of the warranty, and because the requirements imposed by an express warranty are not imposed "under state law," but rather by the warrantor (*505 U.S. 504, 525)* .

[f] No Federal Preemption of Certain Fraud Claims Regarding Cigarettes

In ***Altria Group, Inc. v. Good*** *(2008)--U.S.--, 129 S. Ct. 538, 172 L. Ed. 2d 398* , U.S. Supreme Court was presented with the issue of whether the Federal Cigarette Labeling & Advertising Act (Labeling Act) preempted claims alleging that tobacco manufacturers violated state unfair trade practices acts or consumer protection acts by advertising that "light" cigarettes delivered less tar and nicotine than regular brands. The controversy stemmed from statements issued by the FTC in 1966 that it would not challenge factual statements about cigarettes' tar and nicotine content based on the "Cambridge Filter Method" test. The Cambridge test was supposed to produce uniform data regarding tar and nicotine content. The industry then began promoting cigarettes with lower tar and nicotine as "light" cigarettes. The Court ended the controversy by holding in a 5-4 ruling that neither the Labeling Act's preemption provision nor the FTC's actions in the field preempted state-law claims predicated on the duty not to deceive.

The case was brought by a group of Maine smokers of "light" cigarettes. They alleged that the manufacturers deliberately deceived them about the true nature of those cigarettes in violation of the Maine Unfair Trade Practices Act (MUTPA) [Me. Rev. Stat. Ann. Tit. 5, § 207]. They claimed that the manufacturers knew that smokers of "light" cigarettes actually inhale as much tar and nicotine as do smokers of regular cigarettes because of their tendency to engage in "compensatory" smoking. The district court ruled that the MUTPA claim was preempted. The First Circuit Court of Appeals reversed, holding that the smokers' claim was not a warning neutralization claim, but rather, a fraud claim. The U.S. Supreme Court granted the manufacturers' petition for certiorari.

At issue in the case was one of the Labeling Act's two express preemption provisions, § 5(b). That section provides that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter" [*15 U.S.C. § 1334(b)*].

Justice Stevens delivered the opinion of the Court, in which Justices Kennedy, Souter, Ginsburg, and Breyer joined.

The Court began its express preemption analysis by announcing its adherence to the presumption against preemption. Next, it briefly reviewed the plurality's opinion in *Cipollone v. Liggett Group, Inc. (1992) 505 U.S. 504, 528-529, 112 S. Ct. 2608, 120 L. Ed. 2d 407* . To determine whether a particular common law claim was preempted, the *Cipollone* plurality had inquired "whether the legal duty that is the predicate of the common-law damages action constitutes a 'requirement or prohibition based on smoking and health...with respect to...advertising or promotion.' giving that clause a fair but narrow reading." Applying that standard, the *Cipollone* plurality had concluded that fraudulent misrepresentation and concealment claims were not preempted. The *Good* Court stated that the duty not to deceive, as codified in the MUTPA, is likewise unrelated to smoking and health.

The Court then rejected the tobacco companies' argument that the smokers' claim was analogous to the "warning neutralization" claim found to be preempted in *Cipollone* because it was based on statements that "might create a false impression" rather than statements that are "inherently false." After eliminating that argument, it was clear to the majority that *Cipollone's* holding that the common-law fraud claim survived preemption directly applied to the *Good* smokers' MUTPA claim. The Court declined to reject the express preemption framework established by the *Cipollone* plurality, despite its possible lack of "theoretical elegance." The Court also distinguished *Riegel v. Medtronic, Inc. (2008) 552 U.S.312128 S. Ct. 999, 169 L. Ed. 2d 892* , in which it had found that the Medical Device Amendments of 1976 expressly preempted state law claims. In sum, the Court concluded that the phrase "based on smoking and health," narrowly construed, does not encompass the general duty not to make fraudulent statements.

Next, the Court rejected the petitioners' alternative argument that the smokers' claim was impliedly preempted because it presented an obstacle to longstanding FTC policy. A review of FTC regulatory actions revealed that there never was in fact any government policy authorizing the use of the "light" and "low tar" descriptors based on Cambridge Filter Method test results. Significantly, the Agency rescinded its 1966 guidance concerning the Cambridge Filter Method in 2008, referring to it as "sufficiently flawed" [*73 Fed. Reg. 74500]* . Justice Thomas wrote a dissenting opinion, joined by Chief Justice Roberts and Justices Scalia and Alito (*129 S. Ct. 538, 545-546)* .

The facts and procedural background of ***Cipollone v. Liggett Group., Inc.*** *(1992) 505 U.S. 504, 112 S. Ct. 2608, 120 L. Ed. 2d 407* are discussed in *§ 190.259[3][e]*. The United States Supreme Court held that federal law did not preempt the plaintiff's claim of failure to warn insofar as it relied solely on the defendant's testing or research practices or other actions unrelated to advertising. The claim alleging intentional fraud in misrepresenting and concealing a material fact, to the extent that it related to the duty to disclose material facts, was also not preempted. The claim alleging a conspiracy to misrepresent or conceal material facts concerning the hazards of smoking was similarly not preempted (*505 U.S. 504, 528-529)* .

In ***Whiteley v. Philip Morris, Inc.*** *(2004) 117 Cal. App. 4th 635* , the plaintiff and her husband brought fraudulent misrepresentation claims against the defendants. The court of appeal found that federal law did not preempt these claims because the defendants' false assurances that they would keep the public informed of their findings regarding smoking and health, and the manufacturing of a false controversy regarding the health effects of smoking, were affirmative misrepresentations outside the preemptive reach of the federal statute. The court also found that misrepresentation by "half-truths" is a species of affirmative misrepresentation and fraud that is not preempted (*117 Cal. App. 4th 635, 666-677)* .

[g] FIFRA Does Not Preempt State Rule Unless It Satisfies Two Conditions

Bates v. Dow Agrosciences, LLC. *(2005) 544 U.S. 431, 125 S. Ct. 1788, 161 L. Ed. 2d 687* , is discussed in *§ 190.249[3][d]*.

[h] State Law Labeling Requirement That Is Equivalent to and Consistent With FIFRA's Misbranding

Provisions Is Not Preempted

Bates v. Dow Agrosciences, LLC. *(2005) 544 U.S. 431, 125 S. Ct. 1788, 161 L. Ed. 2d 687* , is discussed in *§ 190.249[3][d].*

[i] State Law Requirement Need Not Be Phrased in Identical Language to Corresponding FIFRA Requirement

Bates v. Dow Agrosciences, LLC. *(2005) 544 U.S. 431, 125 S. Ct. 1788, 161 L. Ed. 2d 687* , is discussed in *§ 190.249[3][d].*

[j] Claims Based on Oral Representations Are Outside Scope of FIFRA Preemption

Bates v. Dow Agrosciences, LLC. *(2005) 544 U.S. 431, 125 S. Ct. 1788, 161 L. Ed. 2d 687* , is discussed in *§ 190.249[3][d].*

[k] Express Warranty Claims Not Preempted if Defendant Voluntarily Warranted Product's Fitness for Particular Purpose

In ***Sun Valley Packing v. Consep, Inc.*** *(2001) 94 Cal. App. 4th 315, 114 Cal. Rptr. 2d 237* , a manufacturer's representative recommended to fruit growers a use of the manufacturer's pest mating disruption product that was contrary to the label's directions. The representative also guaranteed that the procedure would control pests. The fruit growers applied the product, but it did not work, and they suffered substantial loss to their orchards. In the growers' action against the manufacturer, the trial court concluded that the representative's statements constituted an off-label guarantee and that FIFRA preemption did not apply to the plaintiffs' statelaw claims. The court of appeal affirmed.

The court of appeal held that in addition to preempting warning claims, FIFRA preempts claims based on breach of an express warranty required and approved by the EPA. Such claims challenge the product label itself, either directly or indirectly. FIFRA also preempts claims based on off-label statements that merely repeat information in the label itself. However, if a manufacturer or retailer voluntarily warrants a pesticide's fitness for a particular purpose, FIFRA does not preempt this voluntary contractual commitment. If the warranty actually addresses matters outside the scope of the required label, a plaintiff is not barred from bringing a common law action. FIFRA thus did not preempt the plaintiffs' claims based on the defendant's express oral guarantee. Nor did FIFRA preemption rules require the court to enforce a damages limitation provision clause in the label that it found invalid under California law (*94 Cal. App. 4th 315, 322)* .

[l] Savings Clause of Federal Railroad Safety Act Permits State Regulation of Matter Not Covered by Federal Regulations or Orders

In ***Haynes v. AMTRAK*** *(C.D. Cal. 2006) 423 F. Supp. 2d 1073* , the decedent died from deep vein thrombosis (DVT) after riding on an Amtrak train from Chicago to Los Angeles. The plaintiff brought an action alleging that the carrier violated common law and statutory duties.

The court first held that the federal Amtrak Act did not preempt California common law claims alleging dangerous seating configurations in trains and failure to warn passengers about DVT. The Amtrak Act's express preemption clause, *49 U.S.C.S. § 24301(g)*, relates to state laws "related to rates, routes, or services." Federal case law has made it clear that a state law does not relate to prices unless it "acts immediately and exclusively upon price," or unless the existence of a price is essential to the law's operation. Although plaintiffs' claims, if successful, could result in higher costs leading to higher rates, they did not work to regulate Amtrak's rates directly. A provision of the Act requiring Amtrak to maintain a minimum amount of liability insurance to handle passengers' claims, *49 U.S.C. § 28103(c)*, was further evidence that Congress did not intend to preempt all state tort law claims against Amtrak

The court next found that the Federal Railroad Safety Act (FRSA) did not preempt plaintiff's common law claims. Pointing out that FRSA preemption is even more disfavored than preemption generally, the court found that the claims were covered by the first part of the savings clause of the FRSA's express preemption provision, *49 U.S.C. § 20106*. There are no federal safety regulations subsuming California tort actions regarding the potential of DVT from poorly designed seats or seating configurations. Nor are there any regulations regarding the duty to warn passengers about DVT.

Despite the absence of preemption under the FRSA, the court nevertheless found that state laws regarding seats and seating configurations were unduly burdensome on interstate commerce and the passenger train industry and were preempted by the *Commerce Clause*. The duty to warn passengers of the dangers of DVT, in contrast, was not unduly burdensome on commerce and not preempted (*423 F. Supp. 2d 1073, 1083-1084)* .

[m] Savings Clause of Federal Railroad Safety Act Permits State Regulation of Matters Covered by Federal Regulations if Law Meets Three Criteria

Haynes v. AMTRAK *(C.D. Cal. 2006) 423 F. Supp. 2d 1073* , is discussed in *§ 190.259[3][l]*.

[n] FDA Labeling Regulation Does Not Preempt Warning Claim Against Generic Drug Manufacturer

In ***McKenney v. Purepac Pharm. Co.*** *(2008) 167 Cal. App. 4th 72, 83 Cal. Rptr. 3d 810* , the plaintiff developed the skin condition tardive dyskinesia following her ingestion of metoclopramide, the generic form of the prescription drug Reglan. She filed a failure-to-warn suit against the generic manufacturer. The superior court sustained the manufacturer's demurrer, holding that all of plaintiff's claims were preempted by federal law. The court of appeal reversed, rejecting the defendant's argument that the failure-to-warn claim was barred by conflict preemption. The court concluded that the federal requirement that a generic drug have the same labeling as a listed drug *[57 Fed. Reg. 17950, 17961 (Apr. 28, 1992)]* does not necessarily result in federal preemption of state failure-to-warn claims against generic manufacturers. The court pointed out that the FDA mechanism for compelling labeling revisions applies to both new and generic drugs, and saw no reason to distinguish between the two types of drugs for preemption purposes. The court found that nothing had changed since *Carlin v. Superior Court (1996) 13 Cal. 4th 1104, 56 Cal. Rptr. 2d 162, 920 P.2d 1347* [discussed in *§ 190.259[3][c]*) mandating the conclusion that generic drug manufacturers are exempt from strict products liability because they must obtain FDA approval before making label changes (*167 Cal. App. 4th 72, 82-84)* .

[4] Additional Authorities

[a] No Federal Preemption When Defendant Has Failed to Show Conflicting Statutory Specifications

In *Notmeyer v. Stryker Corp. (N.D. Cal. 2007) 502 F. Supp. 2d 1051* , part of the plaintiff's prosthetic hip replacement system shattered, requiring revision surgery. The plaintiff brought various state law claims against the manufacturer. The particular device utilized had been given FDA approval under the MDA's special 30-day premarket approval (PMA) supplemental review process. Going against the overwhelming weight of authority, the court determined that the PMA process does not constitute or create "specific FDA requirements applicable to a particular device" and thus cannot be used to preempt related state law causes of action [*502 F. Supp. 2d 1051, 1058]* .

NOTE:

The following year, the U.S. Supreme Court held that *21 U.S.C.S. § 360k(a)*, the MDA's express preemption clause, bars common law claims challenging the safety or effectiveness of a medical device given FDA premarket approval. The facts and procedural background of ***Riegel v. Medtronic, Inc.*** *(2008) 552 U.S. 312, 128 S. Ct. 999, 169 L. Ed. 2d 892* , are discussed in *§ 190.249[3][k]*. Perhaps anticipating the *Riegel* decision, the court added that the fact that the device received the special 30-day PMA supplemental process "cast further doubt on whether plaintiff's state law claims" were preempted [

502 F. Supp. 2d 1051, 1058, n.3].

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Volume 19 Chapters 190-195 PRODUCTS LIABILITY---to---PUBLIC ADMINISTRATIVE LAW
CHAPTER 190 PRODUCTS LIABILITY
PART II. FORMS
D. Defenses

19-190 California Points & Authorities § 190.260

§ 190.260 Opposing Contention That Action for Personal Injuries Under Products Liability Theory Is Barred by Statute of Limitations

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum opposing the contention that the action is time-barred.*]

PLAINTIFF'S PRODUCTS LIABILITY ACTION IS NOT BARRED BECAUSE IT WAS NOT FILED WITHIN TWO YEARS OF THE ACCRUAL OF THE CAUSE OF ACTION, IN THAT PLAINTIFF HAD NO SUSPICION OF WRONGDOING, AND HAD NOT DISCOVERED THE RELEVANT FACTS UNDERLYING HIS/HER CAUSE OF ACTION, MORE THAN TWO YEARS PRIOR TO FILING THE COMPLAINT.

A. Statute Does Not Begin to Run if Plaintiff Has Insufficient Information to Be Put on Inquiry of Wrongdoing. The statute of limitations begins once the plaintiff has a suspicion of wrongdoing, or has notice or information of circumstances to put a reasonable person on inquiry. If the evidence supports a reasonable inference that the plaintiff was not put on notice of wrongdoing, or if further factual development is required, then it cannot yet be determined when the limitations begins to run (*Clark v. Baxter Healthcare Corp. (2000) 83 Cal. App. 4th 1048, 1059-1060, 100 Cal. Rptr. 2d 223*).

B. Discovery Rule Delays Accrual if Diligent Investigation Discloses Only One Kind of Wrongdoing and Injury Was Caused by Wholly Different Kind of Wrongdoing. If a plaintiff's reasonable and diligent investigation discloses only one kind of wrongdoing and the injury in question was actually caused by tortious conduct of a wholly different sort, the discovery rule postpones accrual of the statute of limitations on the newly discovered claim (*Grisham v. Philip Morris U.S.A., Inc. (2007) 40 Cal. 4th 623, 646, 54 Cal. Rptr. 3d 735, 151 P.3d 1151* ; *Fox v. Ethicon Endo-Surgery, Inc. (2005) 35 Cal. 4th 797, 813, 27 Cal. Rptr. 3d 661, 110 P.3d 914*).

C. Statute of Limitations Begins to Run Under Discovery Rule When Plaintiff Has Reason to Suspect Injury and Some Wrongful Cause, Unless Reasonable Investigation Would Not Have Revealed Cause of Action's Factual

Basis. Under the delayed discovery rule, a cause of action accrues and the statute of limitations begins to run when the plaintiff has reason to suspect an injury and some wrongful cause, unless the plaintiff pleads and proves that a reasonable investigation at that time would not have revealed a factual basis for that particular cause of action. In that case, the statute of limitations for that cause of action is tolled until such time as a reasonable investigation would have revealed its factual basis (*Fox v. Ethicon Endo-Surgery Inc. (2005) 35 Cal. 4th 797, 803, 27 Cal. Rptr. 3d 661, 110 P.3d 914*).

D. Suspicion Required to Trigger Statute of Limitations May Not Be Imputed to Plaintiff. The suspicion necessary to trigger the statute of limitations may not be imputed to a plaintiff (*Nelson v. Indevus Pharms., Inc. (2006) 142 Cal. App. 4th 1202, 1206, 48 Cal. Rptr. 3d 668*).

E. Plaintiff Has No Obligation to Seek Out News of Drug's Dangerous Side Effects Through Media. A plaintiff has no obligation to seek out news of a prescription drug's dangerous side effects by reading newspapers or watching television news (*Nelson v. Indevus Pharms., Inc. (2006) 142 Cal. App. 4th 1202, 1208, 48 Cal. Rptr. 3d 668*).

F. Media Reports of Hazardous or Toxic Substances Do Not, by Themselves, Put Reasonable Person on Inquiry Notice. Media reports regarding hazardous material or toxic substances do not, by themselves, constitute sufficient facts to put a reasonable person on inquiry notice that the injury or death was caused or contributed to by the wrongful acts of another (*Code Civ. Proc. § 340.8(c)(2)*; *Nelson v. Indevus Pharms., Inc. (2006) 142 Cal. App. 4th 1202, 1208-1209, 48 Cal. Rptr. 3d 668*).

G. No Special Presumption Based on Common Knowledge That Smoking Is Addictive or Harmful. There is no special presumption that smokers are aware of the addictiveness or health hazards of smoking (*Grisham v. Philip Morris U.S.A., Inc. (2007) 40 Cal. 4th 623, 638, 54 Cal. Rptr. 3d 735, 151 P.3d 1151*).

H. Appreciable Harm Rule Does Not Apply When There Is Earlier Economic Injury and Later Physical Injury. The appreciable harm rule does not apply to cases where there is an earlier manifesting economic injury and a later manifesting physical injury (*Grisham v. Philip Morris U.S.A., Inc. (2007) 40 Cal. 4th 623, 644, 54 Cal. Rptr. 3d 735, 151 P.3d 1151* .

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to the contention that a plaintiff's medical products liability action for personal injuries is barred by the one-year statute of limitations under former Code Civ. Proc. § 340(3) [*see* *Clark v. Baxter Healthcare Corp. (2000) 83 Cal. App. 4th 1048, 1059-1060, 100 Cal. Rptr. 2d 223]* . The statute of limitations for personal injuries and deaths under the current statute, *Code Civ. Proc. § 335.1*, is two years.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to oppose the defense of the statute of limitations. For example, they may be combined with points and authorities opposing a motion for summary judgment or summary adjudication on the issue that plaintiff's action is time-barred. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should set forth facts showing that the cause of action did not accrue one year before the filing of the action. Counsel should argue facts showing that plaintiff had insufficient notice of information to put a reasonable person on inquiry of a wrongdoing prior to that period, and that plaintiff had not discovered the necessary facts prior to that period, whether or not plaintiff was aware of their legal significance at the time.

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 190.247* may be used to oppose the points and authorities in this form.

[c] Related Pleading and Practice Forms

For discussion and forms relating to products liability generally, see California Forms of Pleading and Practice, Ch. 460, *Products Liability* (Matthew Bender).

[3] Discussion of Authorities

[a] Statute Does Not Begin to Run if Plaintiff Has Insufficient Information to Be Put on Inquiry of Wrongdoing

In ***Clark v. Baxter Healthcare Corp.*** *(2000) 83 Cal. App. 4th 1048, 1059-1060, 100 Cal. Rptr. 2d 223* , a products liability action, plaintiff Kirsten Clark sued four manufacturer/distributor defendants who produced and supplied latex gloves that she used in the course of her employment as a nurse, and that caused her to experience allergic reactions. The defendants moved for summary judgment, asserting that the action was barred by the one-year statute of limitations under former Code Civ. Proc., § 340(3). The trial court handling this coordinated litigation heard this motion dealing with the facts relating to Clark, individually, and determined her complaint was not timely filed and granted the defendants motions for summary judgment.

On appeal, the court determine that triable material issues of fact existed as to whether the plaintiff's complaint was timely filed, based on the nature of the allergic reactions she suffered from exposure to the substance of latex in the form of gloves, and whether this constituted the required facts and circumstances to put her on inquiry notice of a potential manufacturing or design defect (or an actionable failure to warn or negligence), that existed in gloves manufactured from that substance. The record could support an inference that she did not become aware of a potential wrongfulness component of her cause of action until more information than the existence of her allergies placed her on inquiry notice and then was actually gained. The court concluded that triable material issues of fact remain as to the limitations issue. Accordingly, the court of appeal reversed the summary judgment entered in favor of the defendants and remanded for further proceedings (*83 Cal. App. 4th 1048, 1059-1060)* .

[b] Discovery Rule Delays Accrual if Diligent Investigation Discloses Only One Kind of Wrongdoing and Injury Was Caused by Wholly Different Kind of Wrongdoing

Grisham v. Philip Morris U.S.A., Inc. *(2007) 40 Cal. 4th 623, 54 Cal. Rptr. 3d 735, 151 P.3d 1151* , is discussed in *§ 190.260[3][g]*.

Fox v. Ethicon Endo-Surgery, Inc*. (2005) 35 Cal. 4th 797, 27 Cal. Rptr. 3d 661, 110 P.3d 914* , is discussed in *§ 190.247[3][f]*.

[c] Statute of Limitations Begins to Run Under Discovery Rule When Plaintiff Has Reason to Suspect Injury and Some Wrongful Cause, Unless Reasonable Investigation Would Not Have Revealed Cause of Action's Factual Basis

Fox v. Ethicon Endo-Surgery, Inc*. (2005) 35 Cal. 4th 797, 27 Cal. Rptr. 3d 661, 110 P.3d 914* , is discussed in *§ 190.247[3][f]*.

[d] Suspicion Required to Trigger Statute of Limitations May Not Be Imputed to Plaintiff

In ***Nelson v. Indevus Pharmaceuticals, Inc.*** *(2006) 142 Cal. App. 4th 1202, 48 Cal. Rptr. 3d 668* , the plaintiff took the diet drug Redux in 1997. She stopped taking the drug after about a month because she was not losing weight. She did not contact an attorney until 2002, when she saw the attorney's television advertisement. She filed her products liability lawsuit in 2003 after receiving the results of an echocardiogram. The trial court granted the drug manufacturer's motion for summary judgment on statute of limitations grounds.

The court of appeal reversed, explaining that the suspicion necessary to trigger the statute of limitations may not be imputed to a plaintiff. A plaintiff's duty to investigate does not begin until the plaintiff actually has a reason to investigate. The court specifically rejected the contention that information given to the general public through media coverage about the dangers of the drug Redux triggered the statute of limitations. The plaintiff had no duty to read newspapers and watch television news and otherwise seek out news of the drug's dangerous side effects.

The court also held that *Code Civ. Proc. § 340.8*, which provides that media reports do not, in and of themselves, constitute sufficient facts to put a reasonable person on inquiry notice, is not limited to environmental hazards but also applies to cases alleging personal injury caused by harmful chemicals. The Legislature's intent that the statute apply to actions involving prescription drugs is found in the chaptered bill.

In addition to rejecting defendant's "construction suspicion" argument, the court declined to find that common and nonspecific such as intermittent heart palpitations, fatigue, and dizziness should, as a matter of law, have caused plaintiff to investigate the possibility that she had been harmed by the diet drugs [*Nelson v. Indevus Pharms., Inc. (2006) 142 Cal. App. 4th 1202, 1206-1211]* .

[e] Plaintiff Has No Obligation to Seek Out News of Drug's Dangerous Side Effects Through Media

Nelson v. Indevus Pharmaceuticals, Inc. *(2006) 142 Cal. App. 4th 1202, 48 Cal. Rptr. 3d 668* , is discussed in *§ 190.260[3][e]*.

[f] Media Reports of Hazardous or Toxic Substances Do Not, by Themselves, Put Reasonable Person on Inquiry Notice

Nelson v. Indevus Pharmaceuticals, Inc. *(2006) 142 Cal. App. 4th 1202, 48 Cal. Rptr. 3d 668* , is discussed in *§ 190.260[3][e]*. See also *Code Civ. Proc. § 340.8*.

[g] No Special Presumption Based on Common Knowledge That Smoking Is Addictive or Harmful

In ***Grisham v. Philip Morris U.S.A., Inc.*** *(2007) 40 Cal. 4th 623, 54 Cal. Rptr. 3d 735, 151 P.3d 1151* , the U.S. Ninth Circuit Court of Appeals certified questions asking (1) whether persons are presumed to have been aware by 1988 that smoking causes addiction and other health problems, and if California does recognize such a presumption, under what circumstances can it be rebutted; and (2) if plaintiff seeks damages resulting from an addiction to tobacco, does a personal injury action accrue when the plaintiff recognizes that he is addicted to tobacco?

The court first concluded that the repealed tobacco immunity statute did not serve as a basis of a conclusive presumption that a particular plaintiff who was a smoker was or should have been aware in 1988 that cigarettes were addictive or dangerous. The court next held that there is no special presumption that smokers are aware of the addictiveness or health hazards of smoking. Rather, the law recognizes a general, rebuttable presumption that plaintiffs have knowledge of the wrongful cause of an injury. If a plaintiff's cause of action depends on delayed discovery of his or her addiction to be timely, he or she must plead facts showing an inability to have discovered that addiction, e.g., reasonable reliance on tobacco company misrepresentations. The first plaintiff in this consolidated action failed to do so with respect to her unfair competition and related causes of action relating to *economic* injury.

However, the plaintiff alleged two different injuries--one physical and the other economic--giving rise to two different types of action. Her claims that involved primarily *physical* injury were filed within one year of the diagnosis of her ailments. The court declined to extend the appreciable harm rule to the circumstances of this case, where there was an early manifesting *economic* injury and a later manifesting *physical* injury. Such an extension would be inconsistent with the discovery rule. The basic rationale of ***Fox v. Ethicon Endo-Surgery Inc.*** *(2005) 35 Cal. 4th 797* --that the discovery of one cause of action does not necessarily mean that plaintiff should have discovered the factual basis for a qualitatively different type of action--was fully applicable here. Thus, plaintiff's discovery of her alleged unfair competition cause of action and related causes of action for economic injury based on smoking addiction did not start the statute of limitations running on her tort cause of action based on later-discovered appreciable harm (*40 Cal. 4th 623, 646)* .

[h] Appreciable Harm Rule Does Not Apply When There Is Earlier Economic Injury and Later Physical Injury

Grisham v. Philip Morris U.S.A., Inc. *(2007) 40 Cal. 4th 623, 54 Cal. Rptr. 3d 735* , is discussed in *§ 190.260[3][g]*.

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19-190 California Points & Authorities § 190.261

§ 190.261 Opposing Contention That Action in Strict Liability or Negligence for Injury to Real or Personal Property Is Barred by Statute of Limitations

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that the action is time-barred.*]

PLAINTIFF'S ACTION IN STRICT LIABILITY OR NEGLIGENCE FOR INJURY TO _____ [REAL *or* PERSONAL] PROPERTY WAS NOT BARRED UNDER CODE OF CIVIL PROCEDURE SECTION _____ [338(b) *or* 338(c)] BECAUSE IT WAS BROUGHT WITHIN THREE YEARS AFTER PLAINTIFF DISCOVERED OR SHOULD HAVE DISCOVERED THE INJURY AND ITS CAUSE.

A. Discovery Rule Applies to Negligence and Strict Liability Claims for Damage Caused by Product Defect to Real or Personal Property. A negligence or strict products liability claim to recover for damages that a product defect causes to real or personal property is governed by the statute of limitations contained in either *Code Civ. Proc. § 338(b)* or *Code Civ. Proc. § 338(c)*, which commences to run when the plaintiff knows, or should have known, of the defect (*Fireman's Fund Ins. Co. v. Sparks Constr., Inc. (2004) 114 Cal. App. 4th 1135, 1150-1151, 8 Cal. Rptr. 3d 446*).

B. Economic Loss Alone Does Not Amount to Type of "Damage" That Causes Products Liability Cause of Action to Accrue. Economic loss alone, without physical injury, does not constitute the type of "damage" that will cause a negligence or strict liability cause of action to accrue (*County of Santa Clara v. Atlantic Richfield Co. (2006) 137 Cal. App. 4th 292, 318, 40 Cal. Rptr. 3d 313 , review granted, depublished, 80 Cal. Rptr. 3d 629, 188 P.3d 579, 2008 Cal. LEXIS 9073*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to the contention that the plaintiff's negligence or strict liability action, which seeks to recover for damage that a defect caused to real or personal property, is time-barred pursuant to *Code Civ. Proc. § 338(b)* (real property) or *Code Civ. Proc. § 338(c)* (personal property).

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel is opposing the defense of the statute of limitations. For example, they may be combined with points and authorities opposing a motion for summary judgment or summary adjudication on the issue that the plaintiff's action is time-barred. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should set forth facts showing that the plaintiff did not discover, or could not have discovered in the exercise of reasonable diligence, the injury and its cause until a specified time.

[3] Discussion of Authorities

[a] Discovery Rule Applies to Negligence and Strict Liability Claims for Damage Caused by Product Defect to Real or Personal Property

In ***Fireman's Fund Ins. Co. v. Sparks Constr., Inc.*** *(2004) 114 Cal. App. 4th 1135, 8 Cal. Rptr. 3d 446* , a defective ballcock in a residence caused a toilet to leak, which in turn caused severe damage to real and personal property. The owners of the residence filed a claim with their insurer, the plaintiff. The plaintiff filed a second amended complaint as the homeowners' subrogee, which contained causes of action for negligence and strict products liability causes and sought to recover for damage that the defect in the ballcock caused to the home and its contents. These claims were governed by the three-year limitations period, applicable to actions for injury to real and personal property, of *Code Civ. Proc. § 338(b), (c)*. Accrual of these causes of action was subject to the discovery rule--that is, they did not accrue until discovery of the defect. The plaintiff's original complaint alleged that the leak was discovered in June 1999, but the second amended complaint alleged that it was not discovered until September 1999. Assuming that the original allegation was binding, the limitations period ran in June 2002. Assuming that the action was not commenced against these defendants until they actually filed their answers in January and March 2002, the action was commenced before the statute had run. Therefore, the trial court erred in ruling that statute of limitations barred the second amended complaint (*114 Cal. App. 4th 1135, 1150-1151)* .

[b] Economic Loss Alone Does Not Amount to Type of "Damage" That Causes Products Liability Cause of Action to Accrue

In ***County of Santa Clara v. Atlantic Richfield Co.*** *(2006) 137 Cal. App. 4th 292, 40 Cal. Rptr. 3d 313 , review granted, depublished, 80 Cal. Rptr. 3d 629, 188 P.3d 579, 2008 Cal. LEXIS 9073* , governmental entities filed a class action against a group of lead manufacturers under, *inter alia*, strict products liability and negligence. The trial court granted summary judgment in favor of the manufacturers on these causes of action on statute of limitations grounds. The Court of Appeal reversed. It explained that a tort cause of action accrues only when "appreciable and actual harm" is caused by the wrongful conduct. Because a cause of action accrues only when the *elements* of the cause of action--including damage--occur, the "appreciable and actual harm" that results in accrual must be harm of the specific type that is recoverable as damages on that type of cause of action. The damages alleged in plaintiffs' strict liability and negligence causes of action were costs for "inspecting, testing, and removing the hazards" of lead paint and other unspecified damages. However, economic loss alone, without physical injury, does not constitute the type of damage that causes strict liability or negligence to accrue. Rather, the compensable injury must be *physical harm to persons or property*. Because plaintiffs were public entities, not human beings, and were not authorized to sue on behalf of any human beings, accrual of their causes of action depended on the occurrence of physical injury to their *property*. However, plaintiffs' allegations of damage did not include the requisite allegations of physical injury to their buildings. They alleged only that lead paint is harmful to *human beings*. Their damages allegations amounted to mere assertions

that the presence of lead paint required them to incur expenses to find and remove it. These expenses were purely economic damages. Thus, their causes of action for strict products liability and negligence never accrued.

Defendants' motion for summary judgment was based solely on the statute of limitations, and they did not assert that plaintiffs failed to state a cause of action due to the absence of allegations of physical injury to the buildings. Because the plaintiffs were not given an opportunity to respond to the motion on that unstated ground, it would have been inappropriate to uphold the lower court's ruling on that ground. The court thus ordered superior court to vacate its order (*137 Cal. App. 4th 292, 316-325)* .

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19-190 California Points & Authorities § 190.262

§ 190.262 Opposing Contention That Sophisticated User Defense Applies--Sophisticated User Defense Is Inapplicable to Strict Liability Design Defect Claim Under Risk-Benefit Analysis

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that the sophisticated user defense applies.*]

THE SOPHISTICATED USER DEFENSE DOES NOT APPLY TO RELIEVE THE DEFENDANT, _____ [*specify name*] OF STRICT LIABILITY FOR THE DEFECTIVE DESIGN OF _____ [*specify product*] BECAUSE THE SOPHISTICATED USER DEFENSE DOES NOT APPLY TO A DESIGN DEFECT CAUSE OF ACTION.

A. Sophisticated User Defense Is Inapplicable to Design Defect Cause of Action. The sophisticated user defense concerns warnings and does not apply to a strict liability design defect cause of action under the risk-benefit analysis (*Johnson v. Honeywell Int'l Inc. (2009) 179 Cal. App. 4th 549, 559, 101 Cal. Rptr. 3d 726*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the sophisticated user doctrine bars plaintiff's strict liability design defect cause of action under the risk-benefit analysis.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary judgment or summary adjudication. The points and authorities may also be adopted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 190.245A* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Sophisticated User Defense Is Inapplicable to Design Defect Cause of Action

The facts and procedural history of ***Johnson v. Honeywell Int'l Inc.*** *(2009) 179 Cal. App. 4th 549, 101 Cal. Rptr. 3d 726* , are discussed in *§ 190.245A[3][a]*. On remand, the case proceeded against the manufacturers of the R-22 refrigerant. The plaintiff filed an amended complaint, bringing causes of action for negligence on a negligence per se theory, and for strict liability on a design defect risk-benefit theory. The trial court determined that the sophisticated user defense barred both causes of action and entered judgment for the defendants.

The Court of Appeal held that the sophisticated user defense applied to plaintiff's negligence cause of action, but not to his strict liability cause of action. The sophisticated user defense concerns warnings. Plaintiff's design defect claim, in contrast, was not concerned with warnings. The court saw "no logical reason" why a defense based on the need for a warning should apply. In a footnote, the court pointed out that the plaintiff acknowledged that the defense would apply to a strict liability design defect cause of action on the consumer expectations theory, because he could not make a claim to be an "ordinary consumer." The court reversed the judgment and remanded the case for further proceedings (*179 Cal. App. 4th 549, 559)* .

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[Reserved]

§§ 190.263[Reserved]

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E. Evidence and Proof

19-190 California Points & Authorities § 190.280

§ 190.280 Supporting Contention That Evidence Is Admissible in Strict Liability Action--Proof of Defect--Evidence of Remedial or Precautionary Measures Taken After Accident

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product (see, e.g., §§ 190.281, 190.282).*]

EVIDENCE THAT DEFENDANT _____ [*name*] TOOK _____ [REMEDIAL *and/or* PRECAUTIONARY] MEASURES WITH REGARD TO THE _____ [*specify product*] AFTER PLAINTIFF'S ACCIDENT HAD OCCURRED IS ADMISSIBLE TO PROVE THAT THE _____ [*specify product*] WAS DEFECTIVE.

Evidence of Remedial or Precautionary Measures Is Admissible to Prove Defect. Evidence of subsequent remedial or precautionary measures taken by a defendant with regard to its product is admissible to prove that the product is defective. *Section 1151 of the Evidence Code* does not prohibit the admission of such evidence, because that section by its own terms excludes evidence of subsequent remedial or precautionary measures only when such evidence is offered to prove negligence or culpable conduct, neither of which is in issue in a strict liability action for placing a defective product on the market (*Ault v. International Harvester Co. (1974) 13 Cal. 3d 113, 117-118, 117 Cal. Rptr. 812, 528 P.2d 1148*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that plaintiff may introduce evidence that defendant took remedial or precautionary measures with regard to its product after plaintiff's accident occurred, to prove that the product is defective.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary judgment or summary adjudication on the issue that defendant is strictly liable for plaintiff's injuries. The points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form and with any other relevant points and authorities combined with this form, to show the relationship between the facts of the case and the points of law stated. For example, counsel should show facts indicating the remedial or precautionary measures that were taken by defendant with regard to the product, and explain how the undertaking of those measures tends to prove that the product is defective [*see, e.g.,* *Ault v. International Harvester Co. (1974) 13 Cal. 3d 113, 117 Cal. Rptr. 812, 528 P.2d 1148* (evidence that defendant had substituted iron for aluminum in producing gear box after plaintiff's accident as admissible to show that gear box was defective)].

[b] Evidence Inadmissible When Remedial Measures Taken by Entity Not Strictly Liable

One court of appeal has held that in a strict liability action against an elevator manufacturer, *Evid. Code § 1151* precludes the use of evidence of remedial measures taken by the nonparty employer of the plaintiff, when the employer's liability, if any, arose from its negligence rather than from a strict liability theory [*Santilli v. Otis Elevator Co., 215 Cal. App. 3d 210, 213, 263 Cal. Rptr. 496]* . The court found that the inclusion of a strict liability theory in the complaint against the defendant manufacturer was not controlling, nor was the nonparty status of the entity that undertook the remedial measures [*Santilli v. Otis Elevator Co., 215 Cal. App. 3d 210, 212-214, 263 Cal. Rptr. 496]* .

[3] Discussion of Authorities

[a] Evidence of Remedial or Precautionary Measures Is Admissible to Prove Defect

In ***Ault v. International Harvester Co.*** *(1974) 13 Cal. 3d 113, 117 Cal. Rptr. 812, 528 P.2d 1148* , plaintiff sustained personal injuries when the motor vehicle in which he was riding plunged to the bottom of a canyon. Plaintiff brought an action in strict liability, warranty, and negligence against the manufacturer of the vehicle, alleging that the accident was caused by a defect in the design of the vehicle's gear box. At trial, plaintiff established evidence that after the accident, defendant changed the production of the gear box by substituting iron for aluminum, a material which plaintiff asserted was defective for the purpose of producing the box. The jury awarded plaintiff $700,000, and defendant appealed.

The Supreme Court affirmed the judgment, holding that the evidence that defendant had substituted iron for aluminum was admissible to show that the gear box was defective. The Court explained that the evidence was not excludable under the terms of *Evid. Code § 1151*, as that section by its own terms excludes evidence of subsequent remedial or precautionary measures only when such evidence is offered to prove negligence or culpable conduct. The case at bar was a strict liability action against a manufacturer, for which neither negligence nor culpability is a necessary ingredient. Because plaintiff would recover if he established that the product was defective, without showing that defendant breached a duty of due care or that defendant was guilty of culpable conduct, the evidence was admissible (*13 Cal. 3d 113, 117-121)* .

[4] Additional Authorities

[a] Evidence of Remedial or Precautionary Measures Is Admissible to Prove Defect

In *Magnante v. Pettibone-Wood Mfg. Co. (1986) 183 Cal. App. 3d 764, 228 Cal. Rptr. 420* , the court of appeal followed *Ault* in holding that a plaintiff suing under a theory of strict products liability was not prohibited by *Evid. Code § 1151* from introducing evidence of subsequent repairs made to the defective product in an attempt to cure the defect (*183 Cal. App. 3d 764, 766-767)* .

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19-190 California Points & Authorities § 190.281

§ 190.281 Supporting Contention That Evidence Is Admissible in Strict Liability or Negligence Action--Proof of Defect, Knowledge, or Cause of Accident--Evidence of Other Accidents, Occurrences, or Failures

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is liable for plaintiff's injuries caused by defendant's product (see, e.g., §§ 190.280, 190.282).*]

EVIDENCE OF THE OTHER SIMILAR _____ [ACCIDENTS *or* OCCURRENCES *or* FAILURES] IS ADMISSIBLE.

[*EITHER*]

A. Evidence Is Admissible to Prove Defective Condition, Knowledge, or Cause of Accident. Evidence of other accidents or occurrences is admissible to prove a defective condition, knowledge, or the cause of an accident, provided that the circumstances underlying them are similar and not too remote (*Elsworth v. Beech Aircraft Corp. (1984) 37 Cal. 3d 540, 555, 208 Cal. Rptr. 874, 691 P.2d 630* ; *Ault v. International Harvester Co. (1974) 13 Cal. 3d 113, 121-122, 117 Cal. Rptr. 812, 528 P.2d 1148* .

[*OR*]

A. Evidence Is Admissible to Prove Defect. Evidence of _____ [accidents *or* occurrences *or* failures] occurring in models that are nearly identical or substantially similar to the model of the product that injured the plaintiff is admissible to prove that the product that injured the plaintiff was defective (*Hasson v. Ford Motor Co. (1982) 32 Cal. 3d 388, 403-404, 185 Cal. Rptr. 654, 650 P.2d 1171* .

[*Optional*] **B. Evidence Is Admissible to Show Defendant Had Notice of Dangerous Condition.** Evidence of previous _____ [accidents *or* occurrences *or* failures] is admissible to show that the defendant had notice of a dangerous condition, so long as the previous _____ [accidents *or* occurrences *or* failures] occurred under similar circumstances. All that is required to show similar circumstances is that the previous _____ [accidents *or* occurrences *or* failures] were such as to attract the defendant's attention to the dangerous situation (*Elsworth v. Beech Aircraft Corp. (1984) 37 Cal. 3d 540, 555, 208 Cal. Rptr. 874, 691 P.2d 630* ; *Hasson v. Ford Motor Co. (1982) 32 Cal. 3d 388, 403-404, 185 Cal. Rptr. 654, 650 P.2d 1171* .

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that plaintiff may introduce evidence of other accidents, occurrences, or failures in either a negligence or a strict products liability action.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary judgment or summary adjudication on the issue that defendant is liable for plaintiff's injuries. The points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form and with any other relevant points and authorities combined with the form, to show the relationship between the facts of the case and the points of law stated. For example, counsel should state facts describing the other accidents, occurrences, or failures, and explain their similarities to the defective condition of the product that injured plaintiff [*see, e.g.* *Elsworth v. Beech Aircraft Corp. (1984) 37 Cal. 3d 540, 555, 208 Cal. Rptr. 874, 691 P.2d 630* (in negligence action, evidence of other accidents involving similar or same model of plane as admissible to show plane was in defective condition); *Hasson v. Ford Motor Co. (1982) 32 Cal. 3d 388, 403-404, 185 Cal. Rptr. 654, 650 P.2d 1171* (in strict liability action, evidence of similar failures in other models nearly identical to car as admissible to show that car was defective); *Ault v. International Harvester Co. (1974) 121-122, 117 Cal. Rptr. 812, 528 P.2d 1148* (in strict liability action, evidence of other similar accidents as admissible to show causation and defect, provided that circumstances are similar and not remote)].

[3] Discussion of Authorities

[a] Evidence Is Admissible to Prove Defective Condition, Knowledge, or Cause of Accident

In ***Elsworth v. Beech Aircraft Corp.*** *(1984) 37 Cal. 3d 540, 208 Cal. Rptr. 874, 691 P.2d 630* , plaintiffs' decedents were killed when the twin engine airplane in which they were flying stalled, spun, and crashed shortly after its takeoff. Plaintiffs brought an action in negligence against the plane's manufacturer. Plaintiffs argued that defendant was negligent per se, because the plane did not comply with various safety regulations adopted by the Federal Aeronautics Administration (FAA), even though the FAA had certified the design as complying with all applicable safety regulations. Plaintiffs also introduced evidence of other accidents involving aircraft built by defendant. The jury returned a verdict for plaintiffs, and defendant appealed.

The Supreme Court affirmed, holding that the cause of action was viable because, even though the federal government had occupied the field of regulating aircraft activity, the state of California may simultaneously grant damages for violation of those regulations (*37 Cal. 3d 540, 547-552)* . In addition, the Court held that the evidence of prior accidents of other aircraft built by defendant had been properly admitted. Specifically, plaintiffs had introduced evidence of 20 similar stall/spin accidents of aircraft built by defendant. Fifteen of these involved another model built by defendant, and five involved the same model as in plaintiffs' accident. The Court, relying on prior appellate case law, held that evidence of prior accidents is admissible to prove a defective condition, knowledge, or the cause of an accident, provided that the circumstances of the other accidents are similar and not too remote. In this case, plaintiffs

had introduced expert testimony that the defect in the design of the model of the plane in which plaintiffs had flown was in its wings, which caused the aircraft to spin unduly in a single engine stall; that the other model had the same design defect; and that this common characteristic produces identical single engine stall/spin characteristics. This evidence of the similarity in the design of both models was sufficient to justify the trial court's conclusion that evidence regarding the other accidents was admissible (*37 Cal. 3d 540, 554-555)* .

The facts and procedural background of ***Ault v. International Harvester Co.*** *(1974) 13 Cal. 3d 113, 117 Cal. Rptr. 812, 528 P.2d 1148* , are discussed in *§ 190.280[3][a]*. In affirming the judgment for plaintiff, the Supreme Court held that the trial court did not err in admitting evidence of an accident occurring before plaintiff's accident and of an accident occurring after plaintiff's accident. In these two other accidents, gear boxes made of aluminum in the same type of motor vehicle had allegedly failed. The Court ruled that the evidence was admissible because evidence of other accidents is admissible to prove a defective condition, knowledge, or the cause of an accident, provided that the circumstances of the other accidents are similar and not too remote. In this case, all three gear boxes had inherent similarities in their physical and mechanical properties, and contained similar defects. Thus, the evidence was properly admitted (*13 Cal. 3d 113, 121-122)* .

[b] Evidence Is Admissible to Prove Defect

The facts and procedural background of ***Hasson v. Ford Motor Co.*** *(1982) 32 Cal. 3d 388, 185 Cal. Rptr. 654, 650 P.2d 1171* , are discussed in *§§ 190.50[3][a]* and *190.223[3][b]*. In affirming the judgment for plaintiff, the Supreme Court held that evidence of pre-recall brake failures in 1965 Continental models had been properly admitted to prove defect in the 1966 Continental model in which plaintiff was riding. The Court explained that plaintiff was not required to prove that the two models were exactly the same, but needed only to show substantial similarity between the two (*32 Cal. 3d 388, 403-404)* .

[c] Evidence Is Admissible to Show Defendant Had Notice of Dangerous Condition

The facts and procedural background of ***Elsworth v. Beech Aircraft Corp.*** *(1984) 37 Cal. 3d 540, 208 Cal. Rptr. 874, 691 P.2d 630* , are discussed in *§ 190.281[3][b]*. In affirming the judgment for plaintiffs, the Supreme Court held that the evidence of the other stall/spin accidents was admissible to show that defendant had notice of a dangerous condition. The Court, relying on prior appellate case law, explained that admissibility for this purpose required only that the previous injury be such as to attract the defendant's attention to the dangerous situation. Because the prior accidents should have alerted defendant to the faulty spinning characteristics of the plane, and because it was contrary to FAA regulations to spin either of the two plane models, defendant should have been alerted to the fact that the spinning of the airplanes in the prior accidents was unintentional and may have been due to a defect in their design (*37 Cal. 3d 540, 555)* .

The facts and procedural background of ***Hasson v. Ford Motor Co.*** *(1982) 32 Cal. 3d 388, 185 Cal. Rptr. 654, 650 P.2d 1171* , are discussed in *§§ 190.50[3][a], 190.223[3][b],* and *190.281[3][b]*. In affirming the judgment for plaintiff, the Supreme Court also held that evidence of letters and testimony concerning the brake failure in the 1965 and 1966 Continental models had been properly admitted at trial. The Court explained that the requirement of showing similarity of circumstances between the 1965 and 1966 models was relaxed. Relying on previous appellate case law, the Court reiterated that all that is required to show similarity is that the previous injury be such as to attract the defendant's attention to the dangerous situation. Because the letters complained of brake failure in the 1965 model due to fluid boil, defendant had been alerted to a dangerous situation, and had notice that the problem persisted even after the brake system was modified (*32 Cal. 3d 388, 404)* .

[4] Additional Authorities

[a] Evidence is Admissible to Prove Defect

In *Aetna Casualty & Surety Co. v. Farmers Brothers Co., 65 Cal. App. 4th 574* , the plaintiffs commenced a products liability action against a manufacturer of a coffee maker to recover damages resulting from a fire allegedly caused by a defective heating unit in the coffee maker. The jury returned a verdict for the plaintiffs. The court of appeal affirmed the judgment, finding that uncontroverted evidence established that the origin and heat source of the fire was the coffee maker. Evidence of the functioning of substantially similar related products was sufficient to prove that the product in question was defective. Wattage tests introduced into evidence by the plaintiff constituted adequate proof that the heating unit could have ignited the coffee urn handle, thereby starting the fire (*65 Cal. App. 4th 574, 579)* .

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19-190 California Points & Authorities § 190.282

§ 190.282 Supporting Contention That Evidence Is Admissible in Strict Liability Action--Proof of Duty to Warn--Evidence of Post-Accident Warning

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product (see, e.g., §§ 190.280, 190.281).*]

EVIDENCE THAT DEFENDANT _____ [*name*] ADDED A WARNING TO THE _____ [*specify product*] AFTER PLAINTIFF'S ACCIDENT HAD OCCURRED IS ADMISSIBLE TO PROVE THAT DEFENDANT HAD A DUTY TO WARN OF ITS DANGERS.

Evidence of Post-Accident Warning Is Admissible in Strict Products Liability Action to Prove Duty to Warn. Evidence that a manufacturer added a warning to its product after the plaintiff's accident had occurred is admissible in a strict products liability action to prove that the manufacturer had a duty to warn of the product's dangers. The exclusionary rule of *Section 1151 of the Evidence Code* does not preclude admission of such post-accident warning evidence in a strict products liability action (*Schelbauer v. Butler Mfg. Co. (1984) 35 Cal. 3d 442, 450, 452, 198 Cal. Rptr. 155, 673 P.2d 743* ; *Burke v. Almaden Vineyards, Inc. (1978) 86 Cal. App. 3d 768, 771, 771-772 n.2, 150 Cal. Rptr. 419*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that plaintiff, to prove that defendant had a duty to warn of the product's dangers, may introduce evidence in a strict products liability action that defendant added a warning to the product after plaintiff's accident had occurred.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context

in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary judgment or summary adjudication on the issue that defendant is strictly liable for plaintiff's injuries. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, and with any other relevant points and authorities combined with this form, to show the relationship between the facts of the case and the points of law stated. For example, counsel should describe the warning that was added to the product by defendant, and explain that the warning warned of the same or similar dangers that caused plaintiff's injuries [*see, e.g., Schelbauer v. Butler Mfg. Co. (1984) 35 Cal. 3d 442, 198 Cal. Rptr. 155, 673 P.2d 743* (post-accident warning of dangers of excessive oil coating as admissible to prove duty to warn); *Burke v. Almaden Vineyards, Inc. (1978) 86 Cal. App. 3d 768, 150 Cal. Rptr. 419* (post-accident warning of dangers of corks of wine bottles as admissible to prove that defendant should have warned of dangers)].

[3] Discussion of Authorities

[a] Evidence of Post-Accident Warning Is Admissible in Strict Products Liability Action to Prove Duty to Warn

In ***Schelbauer v. Butler Mfg. Co.*** *(1984) 35 Cal. 3d 442, 198 Cal. Rptr. 155, 673 P.2d 743* , plaintiff sustained personal injuries when he slipped on a roofing panel that was excessively oiled. Plaintiff brought an action in strict liability and negligence against the manufacturer of the roofing panels. At trial, plaintiff introduced into evidence a copy of defendant's dealer information literature in which a warning had been added after plaintiff's accident. The jury returned a verdict for plaintiff, and defendant moved for a new trial. The trial court issued an order conditionally granting the new trial, unless plaintiff consented to a 15 percent reduction of his award. Plaintiff filed a written consent to the remittitur, and the trial court denied defendant's motion for a new trial. Defendant appealed from both the judgment and the denial of the motion for a new trial.

The Supreme Court modified the trial court's order to provide for a new trial limited to the issue of the proper apportionment of liability, holding that the trial court erred in using a remittitur to condition a new trial order to reduce an excessive damage award only because it reflected an improper apportionment of liability (*35 Cal. 3d 442, 452-458)* . However, the Court also ruled that at the new trial, evidence of defendant's post-accident warning would be admissible to prove that defendant had a duty to warn of the product's dangers. The Court explained that its reasoning in *Ault v. International Harvester Co. (1974) 13 Cal. 3d 113, 117 Cal. Rptr. 812, 528 P.2d 1148* [*see § 190.280[3][a]*], was as applicable to a post-accident warning in the context of a strict liability action as it was to a post-accident change in the manufacture or design of a product. Thus, the Court held that *Evid. Code § 1151* did not preclude the admission of post-accident warning evidence in a strict products liability action (*35 Cal. 3d 442, 449-452)* .

The facts and procedural background of ***Burke v. Almaden Vineyards, Inc.*** *(1978) 86 Cal. App. 3d 768, 150 Cal. Rptr. 419* , are discussed in *§ 190.162[3][a]*. In reversing the judgment for defendant, the court of appeal held that the trial court abused its discretion in excluding the evidence of the subsequent warning. The court noted that the evidence was not excludable under *Evid. Code § 1151* (*86 Cal. App. 3d 768, 771, 771-772 n.2*). The main issue, however, was whether the probative force of the evidence was outweighed by prejudice under *Evid. Code § 352*. The court ruled that the trial court had erred in ruling affirmatively, and held that the jury, not the trial court, should have determined the probative force of the evidence. The court explained that the proffered evidence of the subsequent warning afforded reasonable, logical, and natural inferences that a hazard existed that was not obvious and that created an unreasonable risk of harm in the absence of warning, and that a manufacturer does not ordinarily red-flag a product unless there is a potential danger that requires a warning. The court further explained that the only prejudice of the proffered evidence lay in these inferences. Thus, the evidence should have been admitted at trial (*86 Cal. App. 3d 768, 772-775)* .

[4] Additional Authorities

[a] Evidence of Post-Accident Warning Is Admissible in Strict Products Liability Action to Prove Duty to Warn

In *West v. Johnson & Johnson Prods., Inc. (1985) 174 Cal. App. 3d 831, 220 Cal. Rptr. 437* , plaintiff suffered from toxic shock syndrome after using defendant manufacturer's tampon. Plaintiff brought an action in strict liability against defendant on the theories of design defect and defect from failure to warn. The jury awarded plaintiff damages, and defendant appealed. The court of appeal affirmed the judgment. In so doing, the court held that the trial court did not err in admitting evidence of warnings that were placed on the tampon boxes after plaintiff's illness, as evidence that the product was defective. The court reiterated the rule that in a strict products liability action, post-accident warnings are admissible to show that the product was defective at the time of injury (*174 Cal. App. 3d 831, 855)* .

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19-190 California Points & Authorities § 190.283

§ 190.283 Supporting Contention That Evidence Is Admissible in Strict Liability Action--Proof of Duty to Warn--Evidence of FDA Action or Inaction

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

EVIDENCE OF FDA _____ [ACTION *or* INACTION], SPECIFICALLY _____ [*specify FDA action or inaction, such as a citation to a specific FDA regulation, or the absence of an FDA regulation*] IS ADMISSIBLE TO PROVE THAT DRUG MANUFACTURER _____ [HAD *or* DID NOT HAVE] A DUTY TO WARN OF THE DANGERS OF _____ [*specify drug*] BECAUSE THE EVIDENCE SHOWS WHETHER THE DRUG'S DANGERS [ARE *or* ARE NOT] KNOWN OR REASONABLY SCIENTIFICALLY KNOWABLE.

A. Evidence of FDA Action or Inaction is Admissible in Failure-to-Warn Action to Show Risk. In a strict liability failure-to-warn action, evidence of FDA action or inaction, though not dispositive, may be admissible to show whether a risk was known or reasonably scientifically knowable (*Carlin v. Superior Court (1996) 13 Cal. 4th 1104, 1114*).

B. Evidence of FDA Action or Inaction May Be Considered in Design Defect Claim. In a design defect claim, evidence of FDA action or inaction, through not dispositive, may be considered to show whether a product is safe or not safe (*O'Neill v. Novartis Consumer Health, Inc. (2007) 147 Cal. App. 4th 1388, 1395, 55 Cal. Rptr. 3d 551*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in a strict liability failure-to-warn action in support of the contention that evidence of FDA action or inaction is admissible to prove whether the dangers of a prescription drug are known or reasonably scientifically knowable [*Carlin v. Superior Court (1996) 13 Cal. 4th 1104, 1114]* . The form may be used by either a plaintiff or a defendant depending on which party the FDA action or inaction favors.

The form should be combined with other forms in this publication as necessary to complete argument as to all issues and to place the argument within its proper procedural context. One appropriate procedural context for this contention, for example, would be a motion for summary judgment when FDA action or inaction clearly support the contention and disclose no triable issue as to any material fact [*see Code Civ. Proc. § 437c*]. In this context counsel would need to submit a statement of undisputed facts supported by cognizable evidence in the form of a request for judicial notice or one or more affidavits or declarations. The latter supply facts that are within the personal knowledge of the affiant or declarant [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*], and may also provide the necessary foundation for any accompanying discovery documents or other documentary evidence attached in the form of an exhibit. References to exhibits and declarations must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*see Cal. Rules of Ct., Rule 3.1113(g)*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, in a particular case, a defendant may wish to introduce evidence of a FDA regulation that expressly precludes manufacturers from warning about theoretical hazards [*see 21 C.F.R. § 201.57(d), (e)*] because a prescription drug manufacturer is not strictly liable for failing to give warnings expressly precluded by the FDA [*see § 190.174*]. Under other circumstances, a plaintiff may wish to introduce evidence of FDA approval of a particular warning to show that a danger was known or reasonably scientifically knowable.

[b] Related Points and Authorities

In an appropriate case, the points and *authorities in §§ 190.90, 190.163, 190.166, 190.173*, and *190.174* may be combined with the points and authorities in this form.

[3] Discussion of Authorities

[a] Evidence of FDA Action or Inaction is Admissible in Failure-to-Warn Action to Show Risk.

The facts and procedural background of ***Carlin v. Superior Court*** *(1996) 13 Cal. 4th 1104* are discussed in *§ 190.163[3][a]*. In reaffirming that prescription drug manufacturers are strictly liable for failure to warn, the Court, rejected the plaintiffs argument that FDA regulations are essentially irrelevant in a common law action for failure to warn. Although FDA regulations do not expressly preempt common law tort remedies for failure to warn, in appropriate cases, FDA action or inaction, though not dispositive, may be admissible to show whether a risk was known or reasonably scientifically knowable. For example, in a particular case, it may be significant that the FDA precludes manufacturers from warning about theoretical hazards [*see 21 C.F.R. § 201.57(d), (e)*]. Under other circumstances, it may be significant that the FDA precludes warnings of adverse reactions that are subject to dispute in the medical community [*see 21 C.F.R. § 1.21(c)(1)*]. On the other hand, the FDA's approval of a particular warning, while not determinative of liability, may be relevant to what risks have been indicated by state-of-the-art scientific data (*13 Cal. 4th 1104, 1113-1114)* .

[b] Evidence of FDA Action or Inaction May Be Considered in Design Defect Claim

In ***O'Neill v. Novartis Consumer Health, Inc.*** *(2007) 147 Cal. App. 4th 1388, 55 Cal. Rptr. 3d 551* , plaintiffs claimed that they suffered strokes after using PPA-containing cough and cold products. The trial court refused their proffered instructions and instead instructed the jury that "FDA action or inaction, through not dispositive, may be considered to show whether a product is safe or not safe." The jury returned defense verdicts on their products liability claims. On appeal, plaintiffs contended that the court erred in refusing to instruct the jury that compliance with FDA standards cannot be considered as a basis for assessing the safety of the product in a design defect claim. The Court of Appeal affirmed. It held that the trial court properly incorporated the essence of the holding of ***Ramirez v. Plough, Inc.*** *(1993) 6 Cal. 4th 539, 25 Cal. Rptr. 2d 97, 863 P.2d 167* , in its given instruction (*147 Cal. App. 4th 1388, 1395)* .

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19-190 California Points & Authorities § 190.284

§ 190.284 Supporting Contention That Evidence Is Admissible in Strict Liability or Negligence Action--Proof of Malice and Punitive Damages [Civ. Code § 3294]--Evidence of Failure to Change Known Defective Product or to Remove Product From Market

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is liable for plaintiff's injuries caused by defendant's product (see, e.g., § 190.223).*]

EVIDENCE THAT DEFENDANT _____ [*name*] FAILED TO CHANGE THE _____ [*specify product*] OR REMOVE IT FROM THE MARKET AFTER LEARNING OF ITS DANGERS IS ADMISSIBLE TO PROVE THAT DEFENDANT ACTED DESPICABLY AND WITH WILLFUL AND CONSCIOUS DISREGARD OF THE SAFETY OF OTHERS AND IS THEREFORE SUBJECT TO THE IMPOSITION OF PUNITIVE DAMAGES.

Evidence of Failure to Change or Remove Product From Market Is Admissible on Issue of Malice and Punitive Damages. On the issue of malice and punitive damages, a plaintiff may present any evidence that would tend to prove the essential factors of the conscious disregard concept of malice. Such evidence includes the defendant's failure to make changes in a known defective product or to withdraw a known dangerous product from the market. The evidence is not excludable under *Section 1151 of the Evidence Code*, which only excludes evidence of affirmative remedial or precautionary conduct (*Hilliard v. A.H. Robins Co. (1983) 148 Cal. App. 3d 374, 400-401, 196 Cal. Rptr. 117* ; *see Civ. Code § 3294(a), (b)(1)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that plaintiff, for the purpose of proving malice and punitive damages, may introduce evidence in a strict products liability or negligence action that defendant

failed to change or remove the product from the market after learning of its dangers.

These points and authorities may be combined with other points and authorities pertaining to punitive damages as *set forth in § 190.223*. These points and authorities may also be combined with other points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary judgment or summary adjudication on the issue that defendant is liable for plaintiff's injuries. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, and with any other relevant points and authorities combined with this form, to show the relationship between the facts of the case and the points of law stated. For example, counsel should set forth facts stating the circumstances under which defendant learned of the product's defect and dangers, and that defendant nevertheless continued to market the product unaltered [*see, e.g., Hilliard v. A.H. Robins Co. (1983) 148 Cal. App. 3d 374, 196 Cal. Rptr. 117* (evidence that defendant continued to market IUD unaltered even after learning of large number of cases of pelvic inflammatory disease from its use as admissible to prove malice and punitive damages)].

The 1987 amended version of *Civ. Code § 3294(c)(1)* has changed the definition of malice that is applicable when a defendant's conduct was not intended to cause injury to the plaintiff. Prior to the amendment, such malice was defined as conduct that is carried on by the defendant with conscious disregard of the safety or rights of others. The 1987 amendment added the requirements that the defendant's conduct be "despicable" and that the conduct be carried out with a "willful" as well as a conscious disregard of the safety or rights of others. The cases discussed in this form are based on prior law under which the requirements for entitlement to punitive damages were less rigorous than under current law. The earlier definition of malice is still applicable in any action in which the trial commenced prior to January 1, 1988 [*see Civ. Code § 3294(e)*].

[3] Discussion of Authorities

[a] Evidence of Failure to Change or Remove Product From Market Is Admissible on Issue of Malice and Punitive Damages

The facts and procedural background of ***Hilliard v. A.H. Robins Co.*** *(1983) 148 Cal. App. 3d 374, 196 Cal. Rptr. 117* , are discussed in *§ 190.223[3][b]*. In reversing the directed verdict for defendant on the punitive damages issue, the court of appeal held that evidence of defendant's failure to either change its IUD or to remove it from the market, even after learning of a large number of cases of pelvic inflammatory disease and other complications from its use, was admissible to prove malice and punitive damages. The court explained that although proffered evidence is generally inadmissible if it deals with events occurring after a plaintiff had last used the product, such evidence is admissible on the issue of malice and punitive damages if it tends to prove the essential factors of the conscious disregard concept of malice. The court further held that the evidence was not excludable under *Evid. Code § 1151*, which makes evidence of subsequent repairs inadmissible to establish prior negligence or other culpable conduct. The court explained that the policy purpose of *Evid. Code § 1151* is to exclude evidence of affirmative remedial or precautionary conduct, not to exclude evidence of the failure to make changes in a defective product or the failure to withdraw a dangerous product from the market. In fact, because the failure to make changes in a known defective product or to remove such a product from the market does not promote public safety, the admission of such evidence is consistent with the policy consideration of *Evid. Code § 1151* (*148 Cal. App. 3d 374, 400-401)* .

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19-190 California Points & Authorities § 190.285

§ 190.285 Supporting Contention That Defect and Proximate Cause Resulting in Plaintiff's Injury May Be Proved by Circumstantial Evidence in Strict Liability or Negligence Action

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is liable for plaintiff's injuries caused by defendant's product (see, e.g., §§ 190.286, 190.287).*]

PLAINTIFF HAS PRESENTED SUFFICIENT CIRCUMSTANTIAL EVIDENCE THAT PROVES THAT THE _____ [*specify product*] WAS DEFECTIVE [IN DESIGN] AND THAT THE DEFECT PROXIMATELY CAUSED PLAINTIFF'S INJURIES.

A. Plaintiff May Establish Defect by Circumstantial Evidence. A plaintiff may establish that a product is defective [in design] by circumstantial evidence, particularly when the product has been destroyed or damaged to the extent that a physical determination of defect is precluded (*Notmeyer v. Stryker Corp. (N.D. Cal. 2007) 502 F. Supp. 2d 1051, 1059-1060* ; *Vandermark v. Ford Motor Co. (1964) 61 Cal. 2d 256, 260, 37 Cal. Rptr. 896, 391 P.2d 168* ; *Hughes Tool Co. v. Max Hinrichs Seed Co. (1980) 112 Cal. App. 3d 194, 201, 169 Cal. Rptr. 160*).

B. Plaintiff May Establish Proximate Cause by Circumstantial Evidence. A plaintiff may establish that a defect in a product proximately caused his or her injuries by circumstantial evidence (*Elmore v. American Motors Corp. (1969) 70 Cal. 2d 578, 583-584, 75 Cal. Rptr. 652, 451 P.2d 84* ; *Southern Cal. Edison Co. v. Harnischfeger Corp. (1981) 120 Cal. App. 3d 842, 852, 175 Cal. Rptr. 67*).

C. Plaintiff May Establish Proximate Cause by Showing Defect Was Substantial Factor for Injury. A plaintiff may establish proximate cause by showing that a defect in a product, in reasonable medical probability, was a substantial factor in contributing plaintiff's injuries by circumstantial evidence (*Rutherford v. Owens-Ill., Inc. (1997) 16 Cal. 4th 953, 982-983, 67 Cal. Rptr. 2d 16, 941 P.2d 1203*).

D. Reasonable Inferences Are Available to Show Causation in Food Poisoning Cases. Reasonable inferences drawn from substantial evidence are available to establish causation in food poisoning cases (*Sarti v. Salt Creek Ltd. (2008) 167 Cal. App. 4th 1187, 1191, 85 Cal. Rptr. 3d 506*).

E. Plaintiff Is Not Required to Exclude All Possibilities of Illness Other Than Defendant's Food. A plaintiff in a food poisoning case is not required to exclude all possibilities of his or her illness other than the defendant's food (*Sarti v. Salt Creek Ltd. (2008) 167 Cal. App. 4th 1187, 1210, 85 Cal. Rptr. 3d 506*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that plaintiff may prove defect and causation by circumstantial evidence in a strict liability or negligence action, particularly when the product has been destroyed or damaged to the extent that a physical determination of defect is precluded.

These points and authorities may be combined with other points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary judgment or summary adjudication on the issue that defendant is liable for plaintiff's injuries. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, and with any other relevant points and authorities combined with this form, to show the relationship between the facts of the case and the points of law stated. For example, counsel should state the circumstantial evidence that tends to prove defect and causation, explain how the evidence tends to prove defect and causation, and if applicable, state that the product was destroyed or severely damaged in plaintiff's accident so that a physical determination of defect cannot be made [*see, e.g.,* *Elmore v. American Motors Corp. (1969) 70 Cal. 2d 578, 75 Cal. Rptr. 652, 451 P.2d 84* (inference from circumstantial evidence that plaintiffs' injuries proximately caused by defect in car that existed at time of sale as proper); *Vandermark v. Ford Motor Co. (1964) 61 Cal. 2d 256, 37 Cal. Rptr. 896, 391 P.2d 168* (failure of brakes as properly established by circumstantial evidence); *Southern Cal. Edison Co. v. Harnischfeger Corp. (1981) 120 Cal. App. 3d 842, 175 Cal. Rptr. 67* (defect in crane and proximate cause of damage as properly shown by circumstantial evidence); *Hughes Tool Co. v. Max Hinrichs Seed Co. (1980) 112 Cal. App. 3d 194, 169 Cal. Rptr. 160* (design defect of helicopter and spray equipment as properly shown by circumstantial evidence when product itself is destroyed)].

[3] Discussion of Authorities

[a] Plaintiff May Establish Defect by Circumstantial Evidence

The facts and procedural background of ***Notmeyer v. Stryker Corp.*** *(N.D. Cal. 2007) 502 F. Supp. 2d 1051* are discussed in *§ 190.90A[3][a]*. The court held the plaintiff presented sufficient circumstantial evidence to raise a triable issue of fact as to whether the femoral head to his hip replacement system contained a manufacturing defect (*502 F. Supp. 2d 1051, 1059-1060)* .

The facts and procedural background of ***Vandermark v. Ford Motor Co.*** *(1964) 61 Cal. 2d 256, 37 Cal. Rptr. 896, 391 P.2d 168* , are discussed in *§§ 190.71[3][a], 190.72[3][a], 190.75[3][a]*, and *190.76[3][a]*. In reversing the judgment for defendants, the Supreme Court held that the trial court had erred in striking testimony on the possible causes of the failure of the piston in the master cylinder of the brakes of the car, and in rejecting plaintiffs offer to prove that all the possible causes were attributable to defendants. The Supreme Court explained that plaintiffs were entitled to establish the existence of a defect and defendants' responsibility for that defect by circumstantial evidence, particularly when, as in this case, the damage to the car in the collision precluded a determination of whether the master cylinder

assembly of the brakes had been properly installed and adjusted before the accident (*61 Cal. 2d 256, 260)* .

In ***Hughes Tool Co. v. Max Hinrichs Seed Co.*** *(1980) 112 Cal. App. 3d 194, 169 Cal. Rptr. 160* , the seller of a helicopter and agricultural spray equipment brought an action against a partnership and an individual partner for failure to make payments on the promissory note for the helicopter and equipment. The partnership had stopped payment after the helicopter caught fire in midair during spraying operations, completely destroying the helicopter and equipment. The partnership then cross complained for damages based on strict products liability, breach of warranty, and negligence. The trial court awarded damages on both the complaint and cross complaint, offsetting the judgment against the partnership with the judgment against the plaintiff cross defendant, leaving a net judgment of $5,000 for plaintiff cross defendant. The trial court failed, however, to offset the judgment against the individual partner. The partnership and individual defendant appealed, claiming error as to the latter. The cross defendant appealed on the judgment against it on the cross complaint.

The court of appeal affirmed the judgment on the cross complaint for defective product and breach of implied warranty of fitness (*112 Cal. App. 3d 194, 200-202*). The court also vacated the judgment against the individual defendant, and modified the judgment against the cross defendant to provide for a net recovery of $27,000 for the cross complainant (*112 Cal. App. 3d 194, 205*). In affirming the judgment on the cross complaint, the court held that substantial evidence supported the trial court's findings on the proximate cause of the fire, and the trial court's conclusion that the helicopter and spray equipment were defective products. The court explained that design defect may be shown by circumstantial evidence in the event the product itself is destroyed. Thus, the court rejected cross defendant's contention that expert testimony on the cause of the fire was not sufficient evidence to support the judgment (*112 Cal. App. 3d 194, 200-201*).

[b] Plaintiff May Establish Proximate Cause by Circumstantial Evidence

The facts and procedural background of ***Elmore v. American Motors Corp.*** *(1969) 70 Cal. 2d 578, 75 Cal. Rptr. 652, 451 P.2d 84* , are discussed in *§ 190.50[3][b]*. In reversing the judgment for defendants, the Supreme Court held that the rule that a plaintiff is entitled to establish the existence of a defect and defendants' responsibility for it by circumstantial evidence is equally applicable to a plaintiff seeking to prove that the defect caused his or her injuries. Thus, the Court viewed the evidence in this case that the drive shaft of the car had been disconnected prior to the accident as properly furnishing an inference that plaintiffs' injuries were proximately caused by a defect in the car that existed at the time of sale (*70 Cal. 2d 578, 583-584)* .

The facts and procedural background of ***Southern Cal. Edison Co. v. Harnischfeger Corp.*** *(1981) 120 Cal. App. 3d 842, 175 Cal. Rptr. 67* , are discussed in *§ 190.53[4][a]*. In reversing the summary judgment for defendant on the causes of action for strict liability and negligence, the court of appeal held that plaintiff had presented sufficient evidence of causation to be presented to the jury. The court explained that plaintiff had met the threshold requirement of establishing the elements of defect and proximate cause through circumstantial evidence. Thus, summary judgment had been improper (*120 Cal. App. 3d 842, 852-854)* .

[c] Plaintiff May Establish Proximate Cause by Showing Defect Was Substantial Factor for Injury

In ***Rutherford v. Owens-Ill., Inc.*** *(1997) 16 Cal. 4th 953* ; *67 Cal. Rptr. 2d 16, 941 P.2d 1203* , an individual filed an asbestos-related cause of action in products liability against an asbestos manufacturer and others. The complaint alleged that plaintiff had contracted lung cancer as a result of his exposure to defendant's asbestos products while on the job, and alleged causes of action for products liability, negligent and intentional infliction of emotional distress, and loss of consortium against. After the individual died of lung cancer, the complaint was amended to allege a wrongful death action brought by the wife and daughter. The trial court bifurcated the trial into damages and liability phases. During the liability phase of the trial, the trial court instructed the jury pursuant to local county general order that permitted the plaintiff to elect to shift the burden to the defendant manufacturer to prove its products were not a legal cause of

plaintiff's injuries. The court of appeal reversed the trial court's decision on the grounds that the trial court erred in allowing the burden-shifting instruction.

The California Supreme Court affirmed the court of appeal's decision that the trial court erred by shifting the burden to the defendant to prove it products were not a legal cause of plaintiff's injuries and death. Although plaintiffs in complex asbestos litigation cannot be expected to prove the scientifically unknown details of carcinogenesis, or trace the unknowable path of a given asbestos fiber, the impossibility of proof does not justify use of a burden-shifting instruction. The Court found that asbestos plaintiffs can meet their burden of proving legal causation by demonstrating that exposure to defendant's defective asbestos-containing product, in reasonable medical probability, was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff inhaled or ingested. The substantial factor test is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical. A standard instruction tells juries that each of several actors or forces acting concurrently to cause an injury is a legal cause of the injury "regardless of the extent to which each contributes to the injury" (*16 Cal. 4th 953, 976-978)* .

[d] Reasonable Inferences Are Available to Show Causation in Food Poisoning Cases

In ***Sarti v. Salt Creek Ltd.*** *(2008) 167 Cal. App. 4th 1187, 85 Cal. Rptr. 3d 506* , the plaintiff became ill after splitting a raw tuna-and-vegetable appetizer with her friend at the defendant's restaurant. Almost two weeks later testing revealed the presence of campylobacter bacteria in her sample. Campybacter is not found in raw tuna unless the tuna has been cross-contaminated by raw chicken. The Health Department issued a food-borne illness report identifying four practices at the defendant's restaurant that could lead to cross-contamination: failure to sanitize wipe-down rags, an insufficient amount of sanitizer in the dishwasher, the use of chicken tongs for other food; and the storage of raw vegetables under raw meat. The plaintiff filed a breach of warranty suit against the restaurant. At trial the defendant presented evidence that the plaintiff's friend had not become ill and that its staff followed strict procedures to prevent cross-contamination. The jury found the restaurant liable and awarded substantial damages. The trial judge granted the defendant's motion for judgment n.o.v. on the ground that inferences are unavailable in food poisoning cases.

The court of appeals reversed and ordered reinstatement of the jury's verdict. It held that food poisoning cases are governed by the same rules of causation that govern other tort cases, and that reasonable inferences drawn from substantial evidence are available to show causation. It declined to follow *Minder v. Cielito Lindo Rest. (1977) 67 Cal. App. 3d 1003, 136 Cal. Rptr. 915* , to extent that that case imposed a "heightened" standard of causation in food poisoning cases.

The court next applied its holding to the facts of the case. It concluded that the jury could have reasonably inferred either that a rag used to wipe down a raw chicken board was used to wipe down a vegetable or tuna board, or that raw chicken juice leaked into the vegetables stored beneath the chicken. In contrast to *Minder*, discussed above, the plaintiff's expert expressly linked campylobacter and the cross-contamination found at the restaurant and explained why the plaintiff's friend might not have become ill after eating the same contaminated food (*167 Cal. App. 4th 1187, 1191)* .

[e] Plaintiff Is Not Required to Exclude All Possibilities of Illness Other Than Defendant's Food

The facts and procedural background of ***Sarti v. Salt Creek Ltd.*** *(2008) 167 Cal. App. 4th 1187, 85 Cal. Rptr. 3d 506* , are discussed in *§ 190.258[3][d]*. The court rejected the defendant's contention that the plaintiff was required, as a matter of law, to exclude all "possibilities" for her food poisoning other than the meal she consumed at its restaurant. The standard for causation is "substantial factor." The defendant did not present substantial evidence requiring a finding that the plaintiff picked the campylobacter from a source unrelated to the restaurant (*167 Cal. App. 4th 1187, 1210)* .

[4] Additional Authorities

[a] Plaintiff May Establish Defect by Circumstantial Evidence

The facts and procedural background of *Barker v. Lull Eng'g Co. (1978) 20 Cal. 3d 413, 143 Cal. Rptr. 225, 573 P.2d 443* , are discussed in *§§ 190.110[3][a], 190.110[3][b], 190.111, 190.112, 190.117*, and *190.140*. In devising a comprehensive definition of design defect, the Supreme Court discussed the failure to satisfy ordinary consumer expectations as to safety, the resulting injuries for which a manufacturer is strictly liable. In its discussion, the Court relied on *Vandermark* [*see § 190.285[3][a]*] and on *Elmore* [*see § 190.285[3][b]*] to hold that an injured plaintiff will frequently be able to demonstrate the defectiveness of a product by resort to circumstantial evidence, even when the accident itself precludes identification of the specific defect at fault (*20 Cal. 3d 413, 430)* .

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19-190 California Points & Authorities § 190.286

§ 190.286 Supporting Contention That Evidence Is Sufficient to Be Submitted to Jury on Strict Liability Theory--Proof of Defect by Fact of Accident When Accident Shortly After Sale, Plaintiff Did Not Bring About Accident, and Expert Testimony Suggests Defect

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product (see, e.g., §§ 190.285, 190.287).*]

PLAINTIFF HAS PRESENTED SUFFICIENT EVIDENCE OF A DEFECT IN THE _____ [*specify product*] TO BE SUBMITTED TO THE JURY BECAUSE PLAINTIFF HAS SHOWN THAT THE ACCIDENT OCCURRED SHORTLY AFTER THE PRODUCT'S SALE, PLAINTIFF DID NOTHING TO BRING ABOUT THE ACCIDENT, AND EXPERT TESTIMONY HAS INDICATED THAT A DEFECT IN FACT WAS RESPONSIBLE FOR THE ACCIDENT.

Evidence Sufficient to Show That Accident Occurred Shortly After Sale, Plaintiff Did Nothing to Bring About Accident, and Expert Testimony Indicates Defect Was Responsible for Accident. When a product fails to such an extent that its examination can furnish no clue as to the specific part that failed, the issue of whether a defendant is strictly liable for a plaintiff's injuries may still be submitted to the jury based on the facts that (1) the accident occurred shortly after sale, (2) plaintiffs did nothing to bring about the accident, and (3) expert testimony suggests a defect in fact was responsible for the accident (*Hinckley v. La Mesa R.V. Ctr., Inc. (1984) 158 Cal. App. 3d 630, 643, 205 Cal. Rptr. 22*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the product is defective when plaintiff shows that the accident occurred shortly after sale, plaintiff did nothing to bring about the accident, and expert

testimony suggests a defect was responsible for the accident.

These points and authorities may be combined with other points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities opposing a motion for nonsuit, or supporting a motion for summary judgment or summary adjudication on the issue that defendant is strictly liable for plaintiff's injuries. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, and with any other relevant points and authorities combined with this form, to show the relationship between the facts of the case and the points of law stated. For example, counsel should state facts showing that the accident occurred shortly after the sale of the product, that plaintiff did nothing to bring about the accident, and that the product was destroyed to such an extent that it is impossible to determine the specific part that failed. In addition, counsel should outline the expert testimony, and explain how it suggests that a defect in fact was responsible for the accident [*see, e.g.,* *Hinckley v. La Mesa R.V. Ctr., Inc. (1984) 158 Cal. App. 3d 630, 205 Cal. Rptr. 22* (inference of defect from fact that motor home was destroyed in fire, fire occurred shortly after motor home's purchase, plaintiffs did nothing to bring about fire, and expert testimony that suggested defect caused fire)].

[3] Discussion of Authorities

[a] Evidence Sufficient to Show That Accident Occurred Shortly After Sale, Plaintiff Did Nothing to Bring About Accident, and Expert Testimony Indicates Defect Was Responsible for Accident

In ***Hinckley v. La Mesa R.V. Ctr., Inc.*** *(1984) 158 Cal. App. 3d 630, 205 Cal. Rptr. 22* , plaintiff's motor home was destroyed in a fire. A separate fire had earlier occurred in the motor home's engine compartment, which had been repaired before the second fire occurred. Plaintiff brought an action in strict liability, negligence, and warranty against the seller and manufacturer of the motor home. The trial court granted a nonsuit for the defendants, and plaintiff appealed.

The court of appeal reversed, holding that sufficient circumstantial evidence had been presented to allow the jury to consider a strict liability theory. The court also held that sufficient evidence had been presented on the negligence and warranty theories, and that the doctrine of res ipsa loquitur was applicable (*158 Cal. App. 3d 630, 637-645)* . With regard to the strict liability theory, defendants argued that plaintiff failed to affirmatively establish a defect in manufacture or design defect, and that plaintiffs improperly inferred a defect solely from the fact of the accident. The court rejected this contention, holding that when a product fails to such an extent that its examination can furnish no clue as to the specific part that failed, the facts that (1) the accident occurred shortly after sale, (2) plaintiffs did nothing to bring about the accident, and (3) expert testimony suggests a defect in fact was responsible for the accident, allow the issue of whether defendants are strictly liable for plaintiff's injuries to be submitted to the jury (*158 Cal. App. 3d 630, 642-643)* .

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19-190 California Points & Authorities § 190.287

§ 190.287 Supporting Contention That Plaintiff Is Entitled to Res Ipsa Loquitur Instruction--Both Negligence and Strict Liability Alleged

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that defendant is liable for plaintiff's injuries caused by defendant's product (see, e.g., §§ 190.285, 190.286).*]

PLAINTIFF IS ENTITLED TO A RES IPSA LOQUITUR INSTRUCTION ON THESE FACTS ON PLAINTIFF'S NEGLIGENCE CAUSE OF ACTION, EVEN THOUGH PLAINTIFF HAS ALSO ALLEGED A STRICT LIABILITY CAUSE OF ACTION.

Plaintiff Entitled to Res Ipsa Loquitur Instruction When Warranted, Even if Plaintiff Has Also Alleged Strict Liability. A plaintiff is not required to elect whether to proceed on a negligence theory or a strict liability theory. Thus, the plaintiff is entitled to a res ipsa loquitur instruction on the plaintiff's negligence cause of action if warranted under the facts of the case, even if the plaintiff has additionally alleged a separate cause of action based on a strict liability theory (*Jiminez v. Sears, Roebuck & Co. (1971) 4 Cal. 3d 379, 386-387, 93 Cal. Rptr. 769, 482 P.2d 681*).

[2] Comments

CAUTION:

One court of appeal has held that a trial court erred in instructing the jury on res ipsa loquitur in a case in which both negligence and strict liability were alleged [*Moreno v. Sayre (1984) 162 Cal. App. 3d 116, 208 Cal. Rptr. 444* ; *see § 190.287[3][a]*].

[a] Use of Form

These points and authorities may be submitted in support of the contention that plaintiff is entitled to a res ipsa loquitur instruction on plaintiff's negligence cause of action, even though plaintiff has additionally alleged a strict liability cause

of action.

These points and authorities may be combined with other points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for new trial on the ground that the jury should have been given a res ipsa loquitur instruction for the negligence cause of action. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, and with any other relevant points and authorities combined with this form, to show the relationship between the facts of the case and the points of law stated. For example, counsel should state facts showing that the criteria for a res ipsa loquitur instruction have been met [*see, e.g.,* *Jiminez v. Sears, Roebuck & Co. (1971) 4 Cal. 3d 379, 93 Cal. Rptr. 769, 482 P.2d 681* (res ipsa loquitur instruction should be given under facts of case in which plaintiff sustained injuries from fall from ladder)].

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 190.288* may be used to oppose the contention supported by these points and authorities.

[c] Related Pleading and Practice Forms

For discussion and forms relating to res ipsa loquitur, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[d] Related Points and Authorities

For forms of memoranda of points and authorities related to res ipsa loquitur, see Ch. 165, *Negligence* .

[3] Discussion of Authorities

[a] Plaintiff Entitled to Res Ipsa Loquitur Instruction When Warranted, Even if Plaintiff Has Also Alleged Strict Liability

In ***Jiminez v. Sears, Roebuck & Co.*** *(1971) 4 Cal. 3d 379, 93 Cal. Rptr. 769, 482 P.2d 681* , plaintiff sustained injuries when the ladder he was using broke and he fell. Plaintiff brought an action in strict liability and negligence against the retailer of ladder. The trial judge instructed the jury as to strict liability, but refused to instruct the jury as to res ipsa loquitur; the negligence instructions had been withdrawn. The jury returned a verdict for defendant, and plaintiff moved for a new trial. The trial court granted the motion, stating that under the pleadings and evidence plaintiff was entitled to have the issues of negligence and res ipsa loquitur go to the jury. Defendant appealed the grant of a new trial.

The Supreme Court affirmed the order, holding that a res ipsa loquitur instruction to presume negligence may be proper in a case in which strict liability is also instructed to the jury. The Court explained that instructions on the doctrine of res ipsa loquitur may have been helpful to plaintiff. In a products liability case based on negligence, as in other negligence cases, the conditions of application of the doctrine do not require proof of any particular defect, but only a showing that the occurrence of the injury is of such a nature that it can be said in the light of past experience that it was probably the result of negligence of someone and that defendant is probably the one responsible. Plaintiff proves the conditions of the doctrine, which do not involve proof of the defect, and the jury is told to draw an inference of negligent causation on the part of defendant. Although that inference may necessarily mean that the product had a defect, plaintiff can prevail under the doctrine without identifying the particular defect. Nor does the fact that plaintiff introduced some evidence as to particular defects preclude resort to the res ipsa doctrine. The Court further noted that its

prior cases have assumed without discussing the point that a plaintiff in a products liability case could seek recovery at the same time on theories of strict liability in tort and in negligence. The Court saw no valid reason to require plaintiff to elect whether to proceed on the theory of strict liability in tort or on the theory of negligence. Rather, plaintiff was entitled to have instructions on negligence in addition to those on strict liability, which would not have been confusing to the jury (*4 Cal. 3d 379, 383-387)* .

NOTE:

At least one court of appeal case has held that a trial court erred in instructing the jury on res ipsa loquitur in a case in which both negligence and strict liability were alleged. In that case, plaintiff sustained personal injuries when he attempted to remove scrap metal from the chamber of a punch press during its operation. Plaintiff brought an action in strict liability, negligence, and warranty against the manufacturer and the distributors of the press. The trial court instructed the jury on res ipsa loquitur, and the jury returned a verdict against all defendants but in favor of the manufacturer on the cross complaints for indemnification. Defendant manufacturer appealed.

The court of appeal reversed the judgment, holding that the trial court erred in instructing the jury on res ipsa loquitur. The court noted that the doctrine was not applicable under the facts of the case, because plaintiff could not show that the instrumentality that caused the injury was under the exclusive control of defendant [*Moreno v. Sayre (1984) 162 Cal. App. 3d 116, 124, 208 Cal. Rptr. 444]* . Furthermore, the court observed that the instruction was erroneously given because it was tantamount to telling the jury that the product was the instrumentality that caused the injury and that the product was defective [*Moreno v. Sayre (1984) 162 Cal. App. 3d 116, 123-126, 208 Cal. Rptr. 444]* . The court explained that, whether plaintiff's case was cast in the principles of negligence or in strict liability, plaintiff had the burden of proving that the product had a defect, and that the defect caused the malfunction that led to his injury. Such proof was not only the essence of the products liability theory, it was also required before plaintiff could pursue his res ipsa loquitur theory. Once plaintiff proved those facts, however, the question of negligence would be unnecessary because liability would attach under strict liability. Thus, the court viewed the key issue in the lawsuit as whether defendant's product was related to plaintiff's injury. Under these circumstances, the court stated that a jury instruction that negligence is assumed from the fact of the accident was tantamount to telling the jury that defendant's product was the instrumentality that caused the injury and that the product was defective. The court noted that the doctrine of res ipsa loquitur is designed to assist a plaintiff in establishing the element of negligence when it is shown that a defendant was in control of the thing that produced the injury. However, the court would not allow the doctrine to be invoked to establish the conditions precedent to its invocation, those conditions being the identity of the instrumentality and the defendant's control of that instrumentality [*Moreno v. Sayre (1984) 162 Cal. App. 3d 116, 124-125, 208 Cal. Rptr. 444]* .

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19-190 California Points & Authorities § 190.288

§ 190.288 Opposing Contention That Evidence Is Sufficient to Be Submitted to Jury on Strict Liability Theory--Inference of Defect by Fact of Accident May Not Be Drawn--Res Ipsa Loquitur Not Applicable

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product (see, e.g., § 190.120).*]

DEFENDANT _____ [*name*] IS NOT STRICTLY LIABLE FOR PLAINTIFF'S INJURIES BECAUSE PLAINTIFF HAS NOT AFFIRMATIVELY ESTABLISHED A DEFECT AND THE JURY MAY NOT INFER A DEFECT FROM THE MERE FACT THAT THE ACCIDENT OCCURRED NOR OTHERWISE APPLY THE DOCTRINE OF RES IPSA LOQUITUR.

A. Plaintiff Must Affirmatively Establish Defect. In a strict products liability action, a plaintiff must affirmatively establish and prove by competent evidence that the product was either defective in design or manufacture or both, thus causing the injury, or that inadequate warning relative to use of the product was given (*Barrett v. Atlas Powder Co. (1978) 86 Cal. App. 3d 560, 564, 150 Cal. Rptr. 339*).

B. Jury May Not Infer Defect From Fact of Accident. The jury may not draw an inference of defect from the mere fact of the accident (*Barrett v. Atlas Powder Co. (1978) 86 Cal. App. 3d 560, 564, 150 Cal. Rptr. 339*).

C. Res Ipsa Loquitur Is Not Applicable to Strict Liability Action. The doctrine of res ipsa loquitur is not applicable to a cause of action that is based on the theory of strict liability (*Barrett v. Atlas Powder Co. (1978) 86 Cal. App. 3d 560, 565, 150 Cal. Rptr. 339* ; *Tresham v. Ford Motor Co. (1969) 275 Cal. App. 2d 403, 407, 79 Cal. Rptr. 883*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a defendant is strictly liable for plaintiff's injuries from defendant's product. The ground of opposition set forth is that plaintiff has not affirmatively established that the product is defective, and the jury may not infer defect from the mere fact of the accident nor otherwise apply the doctrine of res ipsa loquitur.

These points and authorities may be combined with the points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for nonsuit, or a motion for summary judgment or summary adjudication on the issue that the product is not defective. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should show that plaintiff has failed to set forth any evidence to prove that the product is defective, and is attempting to rely solely on the fact that the accident happened in order to prove a defect existed [*see, e.g., Barrett v. Atlas Powder Co. (1978) 86 Cal. App. 3d 560, 150 Cal. Rptr. 339* (no competent evidence that blasting cap was defective in design or manufacture or needed warning; res ipsa loquitur inapplicable); *Tresham v. Ford Motor Co. (1969) 275 Cal. App. 2d 403, 79 Cal. Rptr. 883* (res ipsa loquitur not available to prove defect in brakes caused injuries)].

In an appropriate case, these points and authorities may be used to oppose the contention supported by the points and *authorities in § 190.287*.

[b] Related Pleading and Practice Forms

For discussion and forms relating to res ipsa loquitur, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda of points and authorities related to res ipsa loquitur, see Ch. 165, *Negligence* .

[3] Discussion of Authorities

[a] Plaintiff Must Affirmatively Establish Defect

In ***Barrett v. Atlas Powder Co.*** *(1978) 86 Cal. App. 3d 560, 150 Cal. Rptr. 339* , plaintiff suffered personal injuries from a blasting cap that detonated in his hand while he was examining it. Plaintiff brought an action in strict liability against the manufacturer and retailer of the blasting cap. The trial court granted defendants' motion for summary judgment, and plaintiff appealed.

The court of appeal affirmed, holding that the record did not reveal triable issues of fact concerning defendants' liability. Specifically, plaintiff did not establish by competent evidence that the product was defective in design or manufacture, or any basis for assuming that the cap was subject to spontaneous explosion for which warning must be given. Because plaintiff must affirmatively establish and prove by competent evidence that the product was defective or needed a warning, and plaintiff failed to do so, summary judgment was proper (*86 Cal. App. 3d 560, 564-565)* .

[b] Jury May Not Infer Defect From Fact of Accident

The facts and procedural background of ***Barrett v. Atlas Powder Co.*** *(1978) 86 Cal. App. 3d 560, 150 Cal. Rptr. 339* , are discussed in *§ 190.288[3][a]*. The court of appeal held that plaintiff must affirmatively establish a defect and that an inference of defect as a result of the accident may not be drawn (*86 Cal. App. 3d 560, 565)* .

[c] Res Ipsa Loquitur Is Not Applicable to Strict Liability Action

The facts and procedural background of ***Barrett v. Atlas Powder Co.*** *(1978) 86 Cal. App. 3d 560, 150 Cal. Rptr. 339* , are discussed in *§ 190.288[3][a]*. The court of appeal explained that in essence, plaintiff was asking that the doctrine of res ipsa loquitur be applied. The court rejected this notion, holding that the doctrine of res ipsa loquitur is inapplicable to any action predicated on the theory of strict liability (*86 Cal. App. 3d 560, 565)* .

In ***Tresham v. Ford Motor Co.*** *(1969) 275 Cal. App. 2d 403, 79 Cal. Rptr. 883* , plaintiff sustained personal injuries when the brakes of the car in which plaintiff was riding failed. Plaintiff brought an action in strict liability against the automobile manufacturer. The judgment had previously been reversed in *Vandermark v. Ford Motor Co. (1964) 61 Cal. 2d 256, 37 Cal. Rptr. 896, 391 P.2d 168* [*see § 190.71[3][a]*]. On retrial, plaintiffs dismissed all causes of action except those based on strict liability. The trial court refused to instruct the jury as to res ipsa loquitur. The jury returned a verdict for defendant, and plaintiffs appealed.

The court of appeal affirmed the judgment. The court held that the doctrine of res ipsa loquitur is not available in a cause of action based solely on strict liability. The court reasoned that plaintiff was erroneously attempting to shift the burden of proof to defendants to show the existence of a defect that proximately caused injury to plaintiffs. The court explained that such a shift of the burden would have the inappropriate effect of making defendants insurers unless they could produce satisfactory evidence that the automobile was not defective or, even if defective, that the defect did not cause the injury or damage (*275 Cal. App. 2d 403, 406-410)* . the burden of proof to defendants to show the existence of a defect that proximately caused injury to plaintiffs. The court explained that such a shift of the burden would have the inappropriate effect of making defendants insurers unless they could produce satisfactory evidence that the automobile was not defective or, even if defective, that the defect did not cause the injury or damage (*275 Cal. App. 2d 403, 406-410)* .

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Volume 19 Chapters 190-195 PRODUCTS LIABILITY---to---PUBLIC ADMINISTRATIVE LAW
CHAPTER 190 PRODUCTS LIABILITY
PART II. FORMS
E. Evidence and Proof

19-190 California Points & Authorities § 190.289

§ 190.289 Opposing Contention that Expert Opinion Is Admissible in Strict Liability or Negligence Action--Expert Opinion Must Be Based on Matter That Provides Reasonable Basis for Opinion [Evid. Code § 801]

[1] FORM

[*The following may be included in a memoradum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memoradum of points and authorities opposing the contention that defendant is strictly liable for plaintiff's injuries caused by defendant's product (see, e.g., § 190.120).*]

THE OPINION OF PLAINTIFF'S EXPERT THAT _____ [*name defendant's product*] CAUSES _____ [*name plaintiff's illness or injury*] IS INADMISSIBLE BECAUSE IT IS BASED ON A MATTER THAT DOES NOT PROVIDE A REASONABLE BASIS FOR THE OPINION OFFERED.

Matter on Which Expert Relies Must Provide Reasonable Basis for Particular Opinion Offered. Under *Evidence Code Section 801*, the matter on which an expert relies in forming his or her expert opinion must provide a reasonable basis for the particular opinion offered, and an expert opinion based on speculation or conjecture is inadmissible (*Stephen v. Ford Motor Co. (2005) 134 Cal. App. 4th 1363, 1372-1373, 37 Cal. Rptr. 3d 9* ; *Lockheed Litig. Cases (2004) 115 Cal. App. 4th 558, 564, 10 Cal. Rptr. 3d 34*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition of the contention that the opinion on general causation offered by plaintiff's expert is admissible. The ground of opposition is that the opinion does not comply with *Evidence Code § 801* because it is based on a matter that does not provide a reasonable basis for the opinion offered.

These points and authorities may be combined with the points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined

with points and authorities supporting a motion for nonsuit, or a motion for summary judgment or summary adjudication on the issue that the product is not defective. These points and authorities may also be adopted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should show that the report on which the plaintiff's expert relied--examining painters exposed to hundreds of substances--did not indicate whether persons exposed to only the five chemicals supplied by the defendants contracted cancer at a rate greater than the national average [*see, e.g., Lockheed Litig. Cases (2004) 115 Cal. App. 4th 558, 563-565, 10 Cal. Rptr. 3d 34]* .

[3] Discussion of Authorities

[a] Matter on Which Expert Relies Must Provide Reasonable Basis for Particular Opinion Offered.

In ***Stephen v. Ford Motor Co.*** *(2005) 134 Cal. App. 4th 1363, 37 Cal. Rptr. 3d 9* , the tread separated from the rear tire of the plaintiff's vehicle. The vehicle was towed to a scrap yard, where the insurance adjuster and the plaintiff's boyfriend took a few photographs of the vehicle. After the vehicle was sold for scrap, the plaintiff brought an action against the manufacturers of the tire and the vehicle, alleging that both the vehicle and the tire were defectively designed. The trial court excluded the testimony of the plaintiff's tire expert, substantially limited the testimony of her directional stability expert, and granted the defendants' motions for nonsuit. The court of appeal affirmed, holding that the tire expert's testimony was properly excluded. The "Kepner-Tregoe" analysis that the expert used to form his design defect theory requires empirical testing to confirm the conclusions reached from an examination of the data, but the expert admitted that no tests had been performed on the plaintiff's tire. Moreover, he was not aware of anyone else using the Kepner-Tregoe analysis for forensic tire evaluation. The amateur photographs that he used as a substitute for testing did not show the interior of the tire or the tread belt piece that detached, and the expert conceded that he had never before rendered an expert opinion based on photographs. The plaintiff failed to show that there was any substantial similarity between the tire failures relied on by the expert and her own tire failure. She also failed to establish that the amateur photographs were sufficient to support the expert's conclusions. The expert's opinions and conclusions were thus speculation (*134 Cal. App. 4th 1363, 1372-1373)* .

In ***Lockheed Litig. Cases*** *(2004) 115 Cal. App. 4th 558, 10 Cal. Rptr. 3d 34* , plaintiffs sued the manufacturers and suppliers of chemicals, seeking damages for wrongful death allegedly caused by exposure to five toxic chemicals. Plaintiffs' expert based his general causation opinion on a study which analyzed prior epidemiological studies of painters' exposure to dozens of chemicals. The study concluded that the painters experienced a 40 percent greater incidence of lung cancer and a 20 percent greater incidence of various other types of cancer than did the general population. The trial court excluded the testimony on grounds that the study did not provide a reasonable basis for the expert's opinion. The court of appeal affirmed, concluding that an expert opinion must be based on matter that provides a reasonable basis for the opinion, and the court did not err by excluding an opinion that did not comply with this rule.

The plaintiffs argued that under *Evid. Code § 801(b)*, a court should determine only whether the type of matter that an expert relies on in forming his or her opinion is the type of matter that an expert reasonably can rely on in forming an opinion, without regard to whether the matter relied on reasonably does support the opinion offered. According to the plaintiffs, because an expert reasonably can rely on an epidemiological study in forming an opinion, the trial court must admit any expert opinion testimony based on an epidemiological study. The court of appeal rejected this argument. Matter that provides a reasonable basis for one opinion does not necessarily provide a reasonable basis for another opinion. The court construed the language of *Evid. Code § 801(b)* to mean that the matter relied on must provide a reasonable basis for the particular opinion offered, and that an expert opinion based on speculation or conjecture is inadmissible.

The study on which the expert relied showed that painters who were exposed to more than 130 substances and

thousands of chemical compounds contracted cancer at a greater rate than the national average. The study did not indicate, however, whether persons exposed to only the five chemicals supplied by the defendants contracted cancer at a rate greater than the national average. The trial court thus did not abuse its discretion in excluding the expert's testimony (*115 Cal. App. 4th 558, 563-565)* .

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CHAPTER 190 PRODUCTS LIABILITY
PART II. FORMS
E. Evidence and Proof

19-190 California Points & Authorities § 190.290

§ 190.290 Opposing Contention That Defect and Proximate Cause May Be Proved Without Expert Testimony in Products Liability Action

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities opposing the contention that defendant is liable for plaintiff's injuries caused by defendant's product*].

PLAINTIFF MUST INTRODUCE EXPERT TESTIMONY TO ESTABLISH THAT _____ [*specify product*] WAS DEFECTIVE IN DESIGN AND THAT THE DEFECT CAUSED PLAINTIFF'S INJURIES.

A. Expert Testimony Is Required to Establish Causation if Issue Is Complex. Expert testimony is required to establish causation if the complexity of the causation issue is beyond common experience (*Stephen v. Ford Motor Co. (2005) 134 Cal. App. 4th 1363, 1373-1374, 37 Cal. Rptr. 3d 9*).

B. Causation In Personal Injury Action Must Be Based on Expert Testimony Causation in a personal injury action must be proven within a reasonable medical probability, based on competent expert testimony (*Jones v. Ortho Pharm. Corp. 163 Cal. App. 3d 396, 402-403, 209 Cal. Rptr. 456*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the plaintiff does not need to introduce expert testimony to prove that a product is defective and was the proximate cause of the plaintiff's injury.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting summary judgment or summary adjudication on the grounds that the defendant is not

subject to strict liability. These points and authorities may also be adopted for use in an appellate brief.

Counsel should insert argument in this form to show the relationship between the facts of the case and the points of law stated. For example, counsel should show facts indicating that the comprehension of the product design and the causation issue are beyond the common experience of both judges and jurors [*see, e.g., Stephen v. Ford Motor Co. (2005) 134 Cal. App. 4th 1363, 1373-1374, 37 Cal. Rptr. 3d 9]* .

[b] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 190.115* may be used to oppose the contentions supported by these points and authorities.

[3] Discussion of Authorities

[a] Expert Testimony Is Required to Establish Causation if Issue Is Complex

The facts and procedural background of ***Stephen v. Ford Motor Co.*** *(2005) 134 Cal. App. 4th 1363, 37 Cal. Rptr. 3d 9* , are discussed in *§ 190.289[3][a]*. The plaintiff's theory about tire failure was based on the tire's chemical characteristics and the supposedly defective "recipe" used in the manufacturing process--a theory plainly beyond the common experience of both judges and jurors. The plaintiff's failure to present expert testimony was thus fatal to her products liability and negligence claims (*134 Cal. App. 4th 1363)* .

[b] Causation in Personal Injury Action Must Be Based on Expert Testimony

In ***Jones v. Ortho Pharm. Corp.*** *163 Cal. App. 3d 396, 402-403, 209 Cal. Rptr. 456*), the plaintiff brought an action to recover for a cancerous condition she allegedly suffered as a result of the contraceptive pill manufactured by the defendant. The trial court granted the defendant's motion for nonsuit on the ground that the evidence was insufficient to establish a reasonable causal connection between the development or aggravation of the disease and the use of the pill. The court of appeal affirmed. The only evidence relating to the causal connection between the pill and the plaintiff's precancerous condition was the highly conjectural and ambiguous testimony of her experts that the ingestion of the drug may have had some effect on the development or progression of the disease. This evidence was insufficient to establish proximate cause (*163 Cal. App. 3d 396, 402-403)* .

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CHAPTER 190 PRODUCTS LIABILITY
PART II. FORMS
E. Evidence and Proof

19-190 California Points & Authorities § 190.291

§ 190.291 Opposing Contention That Evidence Is Admissible in Strict Liability Action--Proof of Defect--Compliance With Industry Customs or Standards

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief, and may be combined with other appropriate form of memorandum supporting the contention that defendant is liable for plaintiff's injuries caused by defendant's product*].

EVIDENCE OF DEFENDANT'S COMPLIANCE WITH ITS INDUSTRY'S CUSTOM OR SAFETY STANDARDS IS INADMISSIBLE IN A STRICT PRODUCTS LIABILITY ACTION.

A. Evidence of Defendant's Compliance With Industry Custom or Standard Is Not Relevant to Issue of Defect. A manufacturer may not defend a strict products liability action with evidence that it complied with its industry's customs or standards on safety (*Buell-Wilson v. Ford Motor Co. (2006) 141 Cal. App. 4th 525, 545, 46 Cal. Rptr. 3d 147 , dismissed and remanded, 93 Cal. Rptr. 3d 536, 207 P.3d 1, 2009 Cal. LEXIS 4439* ; *Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 803, 174 Cal. Rptr. 348*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition of the contention that evidence of defendant's compliance with industry custom or standard on safety is admissible in a strict products liability action.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of products liability. For example, they may be combined with points and authorities supporting a motion for summary judgment or summary adjudication of the issue that defendant is liable for plaintiff's injuries. The points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, and in any other relevant points and authorities combined with this form, to show the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Evidence of Defendant's Compliance With Industry Custom or Standard Is Not Relevant to Issue of Defect

In ***Buell-Wilson v. Ford Motor Co.*** *(2006) 141 Cal. App. 4th 525, 46 Cal. Rptr. 3d 147 , dismissed and remanded, 93 Cal. Rptr. 3d 536, 207 P.3d 1, 2009 Cal. LEXIS 4439* , the plaintiff was rendered a paraplegic when her Ford Explorer rolled over and its roof crushed. The jury found that the vehicle was defectively unstable and not crashworthy due to a roof defect. The appellate court held that the trial court properly excluded expert testimony that the Explorer's rollover rate was comparative to other vehicles on the road (*141 Cal. App. 4th 525, 545-546)* .

Grimshaw v. Ford Motor Co. *(1981) 119 Cal. App. 3d 757, 174 Cal. Rptr. 348* , is discussed in *§ 190.114[3][a]*.

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[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

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[b] Decisions Reviewable

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[d] Abuse of Discretion as Grounds for Writ

[e] Failure to Conduct Fair Trial as Grounds for Writ

[4] Additional Authorities

[a] Decisions Reviewable

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Reviewing Weight of Evidence

[b] Authority to Exercise Independent Judgment

[4] Additional Authorities

[a] Reviewing Weight of Evidence

[b] Authority to Exercise Independent Judgment

§ 195.12 Writ of Mandate--Decision Substantially Affects Vested Fundamental Right

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Effect of Decision on Petitioner's Rights

[b] "Vested" Denotes Possessed or Acquired

[c] "Fundamental" Denotes Important Right Not Necessarily of Constitutional Dimension

[d] "Fundamental" and "Vested" Not Absolutes but Are Weighed Together

[4] Additional Authorities

[a] Effect of Decision on Petitioner's Rights

[b] "Vested" Denotes Possessed or Acquired

[c] "Fundamental" Denotes Important Right Not Necessarily of Constitutional Dimension

§ 195.13 Writ of Mandate--Agency Is Not Directly Authorized to Exercise Judicial Functions

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Constitutional Authority to Exercise Judicial Functions

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Memoranda

[3] Discussion of Authorities

[a] Determining Support of Substantial Evidence

[b] Findings Based on Hearsay

[4] Additional Authorities

[a] Determining Support of Substantial Evidence

§ 195.15 Writ of Mandate--Invasion of Constitutional Right

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Scope of Review When Constitutional Right Invaded

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[3] Discussion of Authorities

[a] Nongovernmental Agency Decision Reviewable by Writ

[b] Association's Membership Decision Reviewable by Writ

[4] Additional Authorities

[a] Association's Membership Decision Reviewable by Writ

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

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[b] Events Transpiring After Agency's Decision

[c] Evidence on Issue First Raised in Mandate Petition

[4] Additional Authorities

[a] Receipt of Additional Evidence

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Exercise of Judicial Power

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[c] Treble Damages

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

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[b] Fees May Be Recovered Without Formal Hearing

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

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[a] Inquiry on Review Extends to Whether There Was a Fair Trial

[b] Minimum Standards Stated in Adjudication "Bill of Rights"

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

§ 195.32 Violation of Administrative Adjudication "Bill of Rights"--Petitioner denied Copy of Governing Procedure

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

§ 195.33 Violation of Administrative Adjudication "Bill of Rights"--Petitioner Denied Open Hearing

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Agency Must Separate Adjudicative and Prosecutorial Functions

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Presiding Officer Subject to Disqualification

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Agency Must Provide Proper Written Decision

§ 195.37 Violation of Administrative Adjudication "Bill of Rights"--Agency Relied on Decision Not Designated and Indexed as Precedent

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Agency Relied on Nondesignated Decision

[b] Additional Authorities

§ 195.38 Violation of Administrative Adjudication "Bill of Rights"--Agency Conducted Improper Ex Parte Communications

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Agency Conducted Improper Ex Parte Communications

§ 195.39 Violation of Administrative Adjudication "Bill of Rights"--Petitioner Denied Language Assistance

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Agency Followed Rules That Were Not Required to Be Promulgated in Accordance With APA

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Memoranda

§ 195.51 Demurrer Should Be Sustained--Failure to Allege Discretion Vested in Agency

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Failure to Allege Discretion Vested in Agency

§ 195.52 Demurrer Should Be Sustained--Failure to Allege Hearing Requirement

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Failure to Allege Hearing Requirement

[4] Additional Authorities

[a] Failure to Allege Hearing Requirement

§ 195.53 Demurrer Should Be Sustained--Failure to Allege That Evidence Must Be Taken

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Failure to Allege That Evidence Must Be Taken

§ 195.54 Demurrer Should Be Sustained--Failure to Allege That Decision Resulted From Hearing

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Failure to Allege That Decision Resulted From Hearing

§ 195.55 Demurrer Should Be Sustained--Failure to Allege That Decision Is Invalid

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Failure to Allege That Decision Is Invalid

§ 195.56 Demurrer Should Be Sustained--Failure to Allege That Petitioner Is Beneficially Interested in Writ

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Failure to Allege That Petitioner Is Beneficially Interested in Writ

§ 195.57 Demurrer Should Be Sustained--Failure to Allege No Plain, Speedy, Adequate Remedy

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Failure to Allege No Plain, Speedy, Adequate Remedy

§ 195.58 Demurrer Should Be Sustained--Substantial Evidence Rather Than Independent Judgment Applies, General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Application of Proper Standard of Review

[d] Administrative Decisions Held to Merit Substantial Evidence Review

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Independent Judgment Test Applies Only in Limited Circumstances

[b] Substantial Evidence Rule Applies When Decision Does Not Affect Fundamental Vested Right

[4] Additional Authorities

[a] Substantial Evidence Rule Applies When Decision Does Not Affect Fundamental Vested Right

§ 195.59 Demurrer Should Be Sustained--Statute Provides for Review Under Substantial Evidence Test

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Statute Provides for Review Under Substantial Evidence Test

§ 195.60 Substantial Evidence Test Applies When Decision Impacts on Economic Interests Not Fundamental Vested Rights

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Decision Impacts on Economic Interests Not Fundamental Vested Rights

§ 195.61 Demurrer Should Be Sustained--Substantial Evidence Test Applies to Employer's Right to Establish Procedures

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Substantial Evidence Test Applies to Employer's Right to Establish Procedures

[4] Additional Authorities

[a] Substantial Evidence Test Applies to Employer's Right to Establish Procedures

§ 195.62 Demurrer Should Be Sustained--Substantial Evidence Test Applies to License Proceedings

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Substantial Evidence Test Applies to Right to License

§ 195.63 Demurrer Should Be Sustained--Substantial Evidence Test Applies to Decision by Hospital Board

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Decision by Private Hospital Board

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Determining Appropriate Statute of Limitation

[d] Opposing Authorities

[e] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Statute of Limitation as Bar

§ 195.65 Demurrer Should Be Sustained--Four-Year Statute of Limitation Applies

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Authorities

[3] Discussion of Authorities

[a] Four-Year Limitation Period Applies If No Other Period Specifically Applies

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Thirty-Day Limitation Period for Review of Decision by Specified Agency

[b] Thirty-Day Limitation Period for Review of Decision by Delegate of Specified Agency

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Authorities

[3] Discussion of Authorities

[a] Ninety-Day Limitation Period for Review of Local Agency Decision

[b] Service by Mail Does Not Extend Ninety-Day Period

§ 195.68 Demurrer Should Be Sustained--Petitioner Failed to Exhaust Administrative Remedies, General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Authorities

[3] Discussion of Authorities

[a] Court Lacks Jurisdiction When Petitioner Fails to Exhaust Administrative Remedies

[b] Affected Public Exception Does Not Apply When Petitioner Participated

[c] Affected Public Exception Does Not Apply Without Factual Support

[d] Later Claim Barred by Exhaustion of Remedies Doctrine

[e] Failure to Request Reconsideration Regarding Matters Not Previously Considered by Agency

[f] Exhaustion Required Even If Constitutional Rights Are at Issue

[g] Exhaustion Required Even If Questions Concerning Agency's Jurisdiction Arise

[4] Additional Authorities

[a] Court Without Jurisdiction When Petitioner Fails to Exhaust Administrative Remedies

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Agency Has Not Declared What Its Ruling Will Be

[b] Mere Fact That Similar Claims Were Denied Is Not Determinative

[c] Mere Potential for Unfairness Not Sufficient

§ 195.70 Demurrer Should Be Sustained--Petitioner Failed to Exhaust Judicial Remedies

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Petitioner Did Not Appeal Prior Administrative Ruling

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Court Will Transfer to Proper Court

[3] Discussion of Authorities

[a] Review of Appeals Board Decision

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Review of Workers' Compensation Appeals Board Decision

[d] Court Will Transfer to Proper Court

[3] Discussion of Authorities

[a] Review of Appeals Board Decision

[4] Additional Authorities

[a] Review of Appeals Board Decision

§ 195.73 Demurrer Should Be Sustained--No Violation of Due Process When Prosecuting Agency Attorney Simultaneously Served As Adviser to Agency on Unrelated Matter

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] No Violation of Due Process Occurs When Prosecuting Agency Attorney Simultaneously Served as Adviser to Agency on Unrelated Matter

§§ 195.74-195.79 [Reserved]

§ 195.80 Demurrer Should Be Overruled--Invalidity Allegation Is Sufficient

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Decision is Invalid

[4] Additional Authorities

[a] Decision is Invalid

§ 195.81 Demurrer Should Be Overruled--Beneficial Interest Allegation Is Sufficient

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Interest of Participant in Administrative Proceeding

[b] Beneficial Interest of License Applicant

[4] Additional Authorities

[a] Interest of Participant in Administrative Proceeding

[b] Beneficial Interest of License Applicant

§ 195.82 Demurrer Should Be Overruled--Failure to Support Decision With Findings Is Abuse of Discretion

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Decision Not Supported by Findings

[b] Presumption of Sufficient Findings Inapplicable

[c] Findings Must Be Legally Relevant

[4] Additional Authorities

[a] Decision Not Supported by Findings

[b] Presumption of Sufficient Findings Inapplicable

[c] Findings Must Be Legally Relevant

§ 195.83 Demurrer Should Be Overruled--Failure to Support Findings With Evidence Is Abuse of Discretion

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Findings Not Supported By Evidence

[4] Additional Authorities

[a] Findings Not Supported by Evidence

§ 195.84 Demurrer Should Be Overruled--Failure to Proceed in Manner Required by Law Is Abuse of Discretion

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Failure to Proceed as Required by Law

[b] Failure to Follow Spirit of Law

[c] Failure to Recognize Implications of Following Explicit Requirements

[d] Harmonizing Conflicting Laws

[4] Additional Authorities

[a] Failure to Proceed as Required by Law

§ 195.85 Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable to Petition, General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Exceptions to Exhaustion Requirement

§ 195.86 Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable to Constitutional Challenge to Statute

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Exceptions for Constitutional Challenge to Statute on Its Face

[4] Additional Authorities

[a] Exception for Constitutional Challenge to Statute on Its Face

§ 195.87 Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable to State and Local Law Conflict

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Exceptions for Conflicting Local and State Laws

§ 195.88 Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable When Alternative Remedies Are Available

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Exception for Alternative Remedies

[4] Additional Authorities

[a] Exception for Alternative Remedies

§ 195.89 Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable to Predetermined Cases

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Exception for Predetermined Cases

§ 195.90 Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable to Assertion of Wholly Illegal Act

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Exception for Assertion of Wholly Illegal Action

§ 195.91 Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable to Threatened Irreparable Injury

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Exception for Threatened Irreparable Injury

§ 195.92 Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable to Unidentifiable Administrative Remedy

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Exception for Unidentifiable Administrative Remedy

§ 195.93 Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable to Protection of Public Interest

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Exception for Protecting Public Interest

§ 195.94 Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable Because Pursuit of Remedies Is Futile

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Exception When Pursuit of Administrative Remedies Is Futile

[4] Additional Authorities

[a] Exception When Pursuit of Administrative Remedies Is Futile

§ 195.95 Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable to Constitutionality Inadequate Procedures

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Exception for Constitutionally Inadequate Procedures

§ 195.96 Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable Because of Newer Statutory Remedy for Common Law Right

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Exception When Newer Statutory Remedy Provides for Enforcement of Preexisting Common Law Right

§ 195.97 Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable Because Dispute Requires Statutory Construction

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Exception for Dispute Requiring Statutory Construction

§ 195.98 Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable Because Party Could Predict Decision

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Exception When Aggrieved Party Can Positively Predict Administrative Agency's Decision

§ 195.99 Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable Because Subject Beyond Agency's

Jurisdiction

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Exception When Subject Matter Beyond Agency's Jurisdiction

§ 195.100 Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable Because Agency Waived Requirement

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Exception When Agency Has Waived Exhaustion Requirement

§ 195.101 Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable Because Copetitioner Satisfied Requirement

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Exception When Coplaintiff Has Exhausted Administrative Remedies

§ 195.102 Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable Because Agency Has Inadequate Procedure for Redress

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Exhaustion of Remedies Inapplicable Because Agency Has Inadequate Procedure for Redress

[4] Additional Authorities

[a] Exhaustion of Remedies Inapplicable Because Agency Has Inadequate Procedure for Redress

§ 195.103 Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable Because Agency is Estopped from Asserting It

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Exhaustion of Remedies Inapplicable Because Agency Is Estopped from Asserting It

§ 195.104 Demurrer Should Be Overruled--Statute of Limitations Does Not Bar Petition, General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Limitation Under Administrative Procedure Act

[d] Last Day for Reconsideration Order

[e] Extension of Time

[3] Discussion of Authorities

[a] Limitation of Mandate Proceeding

[4] Additional Authorities

[a] Limitation of Mandate Proceeding

§ 195.105 Demurrer Should Be Overruled--Ninety-Day Period for Review of Local Agency Decision Begins on Notice of Time to Seek Judicial Review

[1] FORM

[2] Comments

[a] Use of Form

[b] Split of Authority Regarding Finality

[c] Argument

[3] Discussion of Authorities

[a] Notice Triggers Finality and Commencement of 90-Day Period

[b] Although Decision Final, 90-Day Period Is Tolled Until Notice Given

§ 195.106 Demurrer Should Be Overruled--Service on Party's Attorney Does Not Trigger Ninety-Day Period for Review of Local Agency Decision

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Service of Notice on Party's Lawyer Cannot Substitute for Service on Party

§§ 195.107-195.119 [Reserved]

§ 195.120 Return by Answer--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

§ 195.121 Return by Answer--Petition is Barred by Laches

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Laches as Bar to Administrative Mandamus

[b] Entire Time Involved in Pursuing Remedy as Considered

[4] Additional Authorities

[a] Laches as Bar to Administrative Mandamus

§§ 195.122-195.129 [Reserved]

§ 195.130 Motion for Summary Judgment Should Be Denied--Questions Not Moot From Compliance With Penalty Provisions of Decision

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Compliance With Penalty

§§ 195.131-195.139 [Reserved]

§ 195.140 Order Directing Filing of Record Is Proper--All or Part of Record May Be Filed

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Judicial Order to File Record

[4] Additional Authorities

[a] Judicial Order to File Record

§ 195.141 Motion for Discovery and Augmentation of Record

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Discovery Must Lead to Admissible Evidence

[b] Requirements of Code Civ. Proc. § 1094.5(e)

§§ 195.142-195.149 [Reserved]

§ 195.150 Change of Venue Is Justified--Designated Court Is Not Proper

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Venue in Mandate Proceeding

[b] Venue of Action Against Public Officer

[c] County in Which Cause Arose

[4] Additional Authorities

[a] County in Which Cause Arose

§§ 195.151-195.159 [Reserved]

§ 195.160 Stay of Operation of Administrative Decision Is Proper--Stay Is Not Against Public Interest

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Stay of Operation of Administrative Decision

California Points & Authorities

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Volume 19 Chapters 190-195 PRODUCTS LIABILITY---to---PUBLIC ADMINISTRATIVE LAW
CHAPTER 195 PUBLIC ADMINISTRATIVE LAW
PART I. INTRODUCTION

19-195 California Points & Authorities § 195.01

§ 195.01 Scope of Chapter

This chapter contains memoranda relating to review of a final administrative adjudicative order or decision pursuant to *Code Civ. Proc. § 1094.5*.

Part II, Subpart A, relating to a petition for writ of administrative mandate, includes forms of memoranda generally supporting issuance of the writ of mandate [§ 195.10 et seq.], and supporting issuance of the writ based on violation of the administrative adjudication "*Bill of Rights*" [§ 195.30 et seq.].

Part II, Subpart B, relating to opposition to petition, includes the following forms:

- Supporting [§ 195.50 et seq.] and opposing demurrer [§ 195.80 et seq.] to petition for writ of administrative mandate.
- Supporting return by answer [§ 195.120 et seq.].
- Opposing motion for summary judgment on ground that questions are not moot from compliance with penalty provisions of an administrative decision [§ 195.130].

Part II, Subpart C, relating to miscellaneous procedures, includes the following forms:

- Supporting application for order directing filing of record [§§ 195.140, 195.141].
- Supporting motion for change of venue [§ 195.150].
- Supporting motion for stay of operation of administrative decision [§ 195.160].

Legal Topics:

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

Administrative LawAgency AdjudicationDecisionsGeneral OverviewAdministrative LawAgency AdjudicationReview of Initial DecisionsAdministrative LawJudicial ReviewRemediesMandamusAdministrative LawJudicial ReviewRemediesStays of Proceedings & Supersedeas

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Volume 19 Chapters 190-195 PRODUCTS LIABILITY---to---PUBLIC ADMINISTRATIVE LAW
CHAPTER 195 PUBLIC ADMINISTRATIVE LAW
PART I. INTRODUCTION

19-195 California Points & Authorities § 195.02

§ 195.02 Governing Law

A mandate proceeding for review of a final administrative adjudicatory order or decision is governed by two sets of statutes and one special statute. The special statute, *Code Civ. Proc. § 1094.5*, provides certain procedural variations that became necessary when the so-called "traditional" mandate proceeding was adapted for review of administrative decisions. It is the principal governing statute.

Next in importance are *Code Civ. Proc. §§ 1084-1097, 1107,* and *1108,* which govern mandate proceedings in general.

Finally, mandate proceedings, like all civil proceedings, are governed by *Code Civ. Proc. § 307 et seq.*, which contain general civil procedure provisions. In the event of a conflict between the latter group of statutes and the former group, however, the former statutes prevail [*see Code Civ. Proc. § 1109*]. See also *Cal. Rules of Ct., Rule 8.490 et seq.* for procedural and format requirements for writ petitions filed in an appellate court.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesMandamusCivil ProcedureRemediesWritsCommon Law WritsMandamus

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CHAPTER 195 PUBLIC ADMINISTRATIVE LAW
PART I. INTRODUCTION

19-195 California Points & Authorities § 195.03

§ 195.03 How to Use the Forms in This Chapter

[1] Page Limits on Memoranda

One of the more significant drafting requirements to keep in mind are page limits: supporting memoranda must not exceed 15 pages in (or 20 pages in a summary adjudication proceeding). Exhibits, declarations, attachments, table of contents, a table of authorities, or the proof of service are not included in the page limitation. A reply or closing memorandum may not exceed 10 pages [*Cal. Rules of Ct., Rule 3.1113(d)*]. Any party desiring to file a longer memorandum must obtain leave of court [*see Cal. Rules of Ct., Rule 3.1113(e)*]. These and other drafting requirements are discussed in *further detail in Ch. 1, Writing Legal Memoranda and Briefs, § 1.05*.

[2] Using the Forms to Build a Draft Memorandum

The forms included in this chapter are designed to be combined with other points and authorities to form a complete memorandum. For a detailed discussion on how to select and use the forms in the publication to build a draft memorandum and complete the draft, with detailed discussion of all drafting requirements and strategic or stylistic considerations, see *Ch. 1, Writing Legal Memoranda and Briefs, §§ 1.03 -1.06*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureSummary JudgmentOppositionMemoranda in OppositionCivil ProcedureSummary JudgmentSupporting MaterialsMemoranda of LawCivil ProcedureAppealsBriefs

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CHAPTER 195 PUBLIC ADMINISTRATIVE LAW
PART I. INTRODUCTION

19-195 California Points & Authorities § 195.04

§ 195.04 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

For detailed discussion and forms relating generally to review by California courts of agency adjudications, see the following chapters in California Forms of Pleading and Practice (Matthew Bender):

- Ch. 474, *Availability of Judicial Review of Agency Decisions*.
- Ch. 474A, *Timing of Judicial Review of Agency Decisions*.
- Ch. 474B, *Standards in Reviewing Agency Decisions*.
- Ch. 474C, *Procedures in Reviewing Agency Decisions*.

For other related discussion and forms relating to judicial review generally, see:

- Ch. 40, *Appeal* (discussion and forms relating to civil appeals).
- Ch. 358, *Mandate and Prohibition* (discussion and forms relating to immediate judicial review of orders by extraordinary writ of mandate or prohibition).
- Ch. 492, *Review (Certiorari), Writ of* (discussion and forms relating to immediate judicial review of civil proceedings by extraordinary writ of review).

For detailed discussion and forms relating generally to California public administrative law generally, and public agency adjudications specifically, see respectively the following chapters in California Forms of Pleading and Practice (Matthew Bender):

- Ch. 470, *Overview of Public Administrative Law* et seq.

- Ch. 473, *Public Agency Adjudication* et seq.

[2] Related Points and Authorities Chapters

Memoranda that may be combined with the forms in this chapter, relating to mandate proceedings generally, may be found in Ch. 358, *Mandate and Prohibition* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationGeneral OverviewAdministrative LawJudicial ReviewRemediesMandamusAdministrative LawJudicial ReviewRemediesProhibitionAdministrative LawJudicial ReviewReviewabilityGeneral OverviewAdministrative LawJudicial ReviewStandards of ReviewGeneral Overview

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Volume 19 Chapters 190-195 PRODUCTS LIABILITY---to---PUBLIC ADMINISTRATIVE LAW
CHAPTER 195 PUBLIC ADMINISTRATIVE LAW
PART I. INTRODUCTION

19-195 California Points & Authorities §§ 195.05-195.09

[Reserved]

§§ 195.05[Reserved]

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Volume 19 Chapters 190-195 PRODUCTS LIABILITY---to---PUBLIC ADMINISTRATIVE LAW
CHAPTER 195 PUBLIC ADMINISTRATIVE LAW
PART II. FORMS
A. Petition for Writ of Mandate
1. Grounds Supporting Petition Generally

19-195 California Points & Authorities § 195.10

§ 195.10 Writ of Mandate--General Form

[1] FORM Writ of Mandate--General Form
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF PETITION
Petitioner,	)	FOR WRIT OF MANDATE
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Respondent.	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THE COURT SHOULD GRANT THE PETITION FOR A WRIT OF MANDATE BECAUSE THE RESPONDENT [EXCEEDED ITS JURISDICTION *and/or* ABUSED ITS DISCRETION *and/or* DID NOT AFFORD THE PETITIONER A FAIR TRIAL] IN REACHING ITS FINAL ADJUDICATORY [ORDER *or* DECISION].

A. Propriety of Mandate for Review. A final administrative adjudicatory decision is reviewable in a judicial proceeding for, and is correctable by, a writ of mandate (*Drummey v. State Bd. of Funeral Directors (1939) 13 Cal. 2d 75, 82-85, 87 P.2d 848*).

B. Decisions Reviewable. A final administrative order or decision is reviewable in a mandate proceeding if it was the

result of an administrative proceeding in which by law a hearing was required for the purpose of taking evidence on the basis of which the agency had discretion to determine relevant facts (*Code Civ. Proc. § 1094.5(a)*).

[*EITHER*]

C. Writ of Mandate Is Remedy for Administrative Action in Excess of Entity's Jurisdiction. Adjudicatory activity by an administrative entity which exceeds its jurisdiction is grounds for issuance of a writ of mandate (*Code Civ. Proc. § 1094.5(b)*; *Hardin Oldsmobile v. New Motor Vehicle Board (1997) 52 Cal. App. 4th 585, 598, 60 Cal. Rptr. 2d 583* .

[*AND/OR*]

D. Writ of Mandate Is Remedy for Abuse of Discretion. Abuse of discretion by an administrative adjudicatory entity is grounds for issuance of a writ of mandate (*Code Civ. Proc. § 1094.5(b)*). Abuse of discretion is established if the entity did not proceed in the manner provided by law (*Code Civ. Proc. § 1094.5(b)*; *Environmental Protection and Information Center v. California Department of Forestry and Fire Protection (2008) 44 Cal. 4th 459, 478-479, 80 Cal. Rptr. 3d 28, 187 P.3d 888* ; *Kolender v. San Diego County Civil Service Commission (2007) 149 Cal. App. 4th 464, 470-471, 57 Cal. Rptr. 3d 84*); or if the entity's order or decision is not supported by the findings, or if the findings are not supported by the evidence (*Code Civ. Proc. § 1094.5(b)*).

[*AND/OR*]

E. Writ of Mandate Is Remedy for Failure to Conduct Fair Trial. Failure of an administrative adjudicatory entity to conduct a fair trial is grounds for issuance of a writ of mandate (*Code Civ. Proc. § 1094.5(b)*). An administrative determination is not the product of a fair trial if, for example, an adjudicator is biased or has a pecuniary interest in the outcome of the proceedings (*Nasha L.L.C. v. City of Los Angeles (2004) 125 Cal. App. 4th 470, 482-485, 22 Cal. Rptr. 3d 772* ; *Clark v. City of Hermosa Beach (1996) 48 Cal. App. 4th 1152, 1170, 56 Cal. Rptr. 2d 223*).

[*As appropriate, add specific points and authorities supporting petition for administrative mandate. See § 195.11 et seq.*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for writ of mandate for review of a final administrative adjudicatory order or decision.

With appropriate modifications this memorandum may be used to oppose a demurrer to the petition or a motion for judgment on the pleadings in favor of the respondent.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Any statement of fact should be supported by adequate reference to evidence admitted or otherwise cognizable by the court.

For example, if it is contended that the administrative agency abused its discretion because its findings are not supported by the evidence, the petition must allege the substance of the evidence, including facts subject to judicial notice. If a record of the evidence is available, the petition must be accompanied by a transcript of the evidence attached as an exhibit and incorporated by reference. Thus, in his or her argument, counsel should refer either to the particular allegation of the petition that sets forth the evidence at issue, or to the specific page and line number of the verbatim record of the hearing attached as an exhibit to the petition.

[c] Related Pleading and Practice Forms

For further discussion concerning pleading requirements of a petition for writ of mandate to review an administrative decision, see California Forms of Pleading and Practice, Ch. 474C, *Procedures in Reviewing Agency Decisions* (Matthew Bender); see also the following related chapters:

- Ch. 474, *Availability of Judicial Review of Agency Decisions*.
- Ch. 474A, *Timing of Judicial Review of Agency Decisions*.
- Ch. 474B, *Standards in Reviewing Agency Decisions*.

For additional references to related pleading and practice chapters, see § 195.04[1].

[d] Opposing Memoranda

For memoranda that may be used to oppose the contentions set forth in this form, see *§ 195.50* et seq., generally supporting demurrer to petition, including:

- §§ 195.50-195.57, based on failure to state facts sufficient to constitute a cause of action;
- §§ 195.64-195.67, based on untimeliness under applicable statutes of limitation; and
- §§ 195.68, based on failure to exhaust administrative remedies.

[3] Discussion of Authorities

[a] Propriety of Mandate for Review

Drummey v. State Bd. of Funeral Directors *(1939) 13 Cal. 2d 75, 87 P.2d 848* , was an appeal from the judgment of the superior court in a proceeding for review of an administrative decision. The petitioner sought review alternatively by means of writs of review (certiorari), prohibition, and mandate. A demurrer to the petition was sustained as to the alleged cause of action for writs of review and prohibition (on the basis of then recent Supreme Court decisions holding such writs to be unavailable for review of an administrative decision) but was overruled as to the alleged cause of action for writ of mandate. The eventual judgment was in favor of the petitioner and ordered issuance of a peremptory writ of mandate. The Supreme Court, hearing the appeal, affirmed the superior court judgment and established the rule stated in

Paragraph A. After pointing out that it had recently (in 1936 and 1937) held the writs of review (*i.e.*, certiorari) and prohibition unavailable in such circumstances, and thatthere was no statutory procedure for review, the Supreme Court stated that mandate was the only possible remedy available to those aggrieved by administrative adjudicatory decisions. Historically, the writ of mandate was invented to provide a remedy when no other remedy existed. From an early date it has been held that, when no other remedy is available, mandamus is the proper remedy for one improperly deprived of a professional license by an administrative board to secure the restoration of such license. Statement of the rule in regard to deprivation of a license merely describes the case that was before the Court and does not limit the application of the general rule. After stating the rule the Court set out principles for guiding the superior court's inquiry on review, which principles were later (in 1945) incorporated in *Section 1094.5 of the Code of Civil Procedure* (*13 Cal. 2d 75, 82-85)* .

[b] Decisions Reviewable

Code Civ. Proc. § 1094.5(a) provides that when the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer, the case shall be heard by the court sitting without a jury.

[c] Entity Exceeded Jurisdiction as Grounds for Writ

Code Civ. Proc. § 1094.5(b) provides that a writ of mandate is an appropriate remedy when an administrative entity exceeds its jurisdiction in an adjudicatory matter.

In ***Hardin Oldsmobile v. New Motor Vehicle Board*** *(1997) 52 Cal. App. 4th 585, 60 Cal. Rptr. 2d 583* , a car dealership brought an action against a manufacturer, alleging that defendant accepted bribes in exchange for favors concerning vehicle allocations and new dealership awards. Plaintiff alleged both federal and state causes of action and filed the case in federal district court. The court stayed the proceedings to allow plaintiff to obtain action by the New Motor Vehicle Board. To comply with the district court's order, plaintiff filed a petition for redress with the Board, but also requested the Board to determine it did not have jurisdiction over the claims so that the plaintiff could resume prosecution of the matter as a civil lawsuit. However, the Board accepted jurisdiction over the state law claims. Plaintiff petitioned for a writ of mandate or prohibition, which was denied by the superior court.

The Court of Appeal reversed, finding that the Board should have been prohibited from exercising jurisdiction over the dispute (*52 Cal. App. 4th 585, 589*). The Board's jurisdiction is specific and limited, not general. It is authorized to mediate "honest" disputes between any manufacturer and any member of the public, but that does not extend to serious accusations of misconduct as were raised by the plaintiff in this case (*52 Cal. App. 4th 585, 591*). Nor did the board have the authority to award monetary damages, as were being claimed by the plaintiff (*52 Cal. App. 4th 585, 596-597*). Under these circumstances, the Board's assertion of jurisdiction violated the judicial powers clause of the State Constitution (*52 Cal. App. 4th 585, 598*).

[d] Abuse of Discretion as Grounds for Writ

Under ***Code Civ. Proc. § 1094.5(b)*** an administrative adjudicatory entity abuses its discretion when it fails to proceed in accordance with the applicable law, or when its order or decision is not supported by the findings, or when the findings are not supported by the evidence.

In ***Environmental Protection and Information Center v. California Department of Forestry and Fire Protection*** *(2008) 44 Cal. 4th 459, 478-479, 80 Cal. Rptr. 3d 28, 187 P.3d 888* , the Pacific Lumber Company entered into an agreement with state and federal governments regarding litigation arising from logging on Pacific Lumber's property in Humboldt County. The agreement provided that the state and federal governments would purchase a portion of Pacific Lumber's property for conservation purposes, and that Pacific Lumber could log the rest of its property, provided that it

obtained certain regulatory approvals from state and federal agencies. Pacific Lumber obtained the approvals. Various environmental and labor groups challenged the validity of the regulatory approvals through administrative mandate petitions.

The California Supreme Court held that the standard for review of agency decisions in connection with regulatory approvals is generally abuse of discretion. It held that abuse of discretion is established if the respondent agency has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence (*44 Cal. 4th 459, 478)* . The Court specifically held that it was reviewing for errors of law, and not whether substantial evidence supported the administrative agency's findings. It held that, for purposes of its review, it would accept that the administrative findings were supported by the evidence and would confine its review to determining whether the state agencies failed to proceed in a manner required by law (*44 Cal. 4th 459, 479)* .

In ***Kolender v. San Diego County Civil Service Commission*** *(2007) 149 Cal. App. 4th 464, 470-471, 57 Cal. Rptr. 3d 84* , the plaintiff, San Diego County Sheriff Kolender, demoted his employee, defendant Margaret Gant, from a supervisor position in the detention processing unit to detention processing technician. Gant appealed to the San Diego County Civil Service Commission, which reduced the penalty to a temporary demotion and reinstated her as a supervisor. The Sheriff filed a petition for writ of administrative mandate, requesting the trial court to vacate the Commission's order, asserting the charges of incompetence were supported by substantial evidence and the Sheriff was required to take this action to protect the public service. The trial court granted the petition because it found the Commission had abused its discretion in reducing Gant's penalty in light of the sentencing errors she had made and the prior discipline she had received for ignoring Sheriff's department directives regarding staffing.

The court of appeal upheld the trial court's ruling. It looked at whether the Commission abused its discretion when it reduced the discipline imposed upon Gant, to reinstate her as a supervisor after a temporary suspension (*149 Cal. App. 4th 464, 470-471)* . The court held that some deference should be accorded to the Commission with respect to the degree of punishment imposed (*149 Cal. App. 4th 464, 470-471)* . In reviewing the record to evaluate this exercise of discretion, the court's focus should be on whether the Commission appropriately performed its job in reviewing the manner of discipline imposed on the employee in light of the employer's administration of its own standards and rules. The court held that the Commission should independently review the facts and law, and the Sheriff's findings and final disciplinary order are not due substantial deference (*149 Cal. App. 4th 464, 470-471)* . The court held that the agency's discretion is not unfettered, and reversal is warranted when the agency abuses its discretion, or exceeds the bounds of reason. The specific criteria to be considered in evaluating a public employee discipline dispute include whether the administrative decision manifests an indifference to public safety and welfare. In considering whether such abuse occurred in the context of public employee discipline, the court held that the overriding consideration is the extent to which the employee's conduct resulted in, or if repeated is likely to result in, harm to the public service. Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence (*149 Cal. App. 4th 464, 470-471)* .

[e] Failure to Conduct Fair Trial as Grounds for Writ

Code Civ. Proc. § 1094.5(b) provides that a writ of mandate is an appropriate remedy when an administrative entity fails to conduct a fair trial in an adjudicatory matter.

In ***Nasha L.L.C. v. City of Los Angeles*** *(2004) 125 Cal. App. 4th 470, 482-485, 22 Cal. Rptr. 3d 772* , Nasha owned five lots within an area subject to the Mulholland Scenic Parkway Specific Plan (Mulholland Plan). The Mulholland Plan was designed to preserve the area's scenic and biological features. Nasha sought to develop the property with five new three-story single-family homes. Because the site was located within the boundaries of the Mulholland Plan, Nasha was required to file an application to determine the proposed development's compliance with the Mulholland Plan.

The City Planning Department issued a proposed mitigated negative declaration (MND) for the project. The Santa

Monica Mountains Conservancy (Conservancy) submitted written comments arguing that the proposed MND was deficient for inadequately addressing potential impacts to the nearby wildlife movement corridor. Various neighbors, including Mark Hennessy (Hennessy), also submitted comments claiming the MND was deficient and complained the project would substantially interfere with deer and wildlife habitat, and would degrade wildlife migration.

In response, the Planning Department amended the proposed MND. The Mulholland Design Review Board (DRB) then recommended disapproval of the project on various grounds. Nonetheless, the City Planning Director conditionally approved Nasha's application and certified the MND.

The Conservancy and Hennessy then appealed the Director's decision to the Planning Commission. Shortly before the Planning Commission hearing on the appeal, Commissioner Lucente authored an unsigned article hostile to the project in a local residents association newsletter. In addition to serving on the Planning Commission, Lucente also was president of the local residents association. During the pendency of the appeal to the Planning Commission, Lucente introduced Hennessy at the association's monthly meeting. At that meeting, Hennessy proceeded to speak against the project and in support of his appeal.

At the hearing before the Planning Commission, Lucente did not disclose his authorship of the article or his contact with Hennessy.

When the matter came on for hearing before the Planning Commission, Lucente made some opening remarks. He did not disclose that he authored the newsletter article. Nor did he state that the article advocated a position against the project and sought to rally residents to support the appeal to the Planning Commission.

At the hearing, the Planning Commission heard from various speakers, including representatives of Nasha, the Conservancy, and various area residents, including Hennessy. At the conclusion of the hearing, Lucente made a motion to grant the appeal. The motion was granted

A week after the hearing, Nasha filed a request for reconsideration based on Lucente's bias. The Planning Commission did not reconsider its decision.

Nasha then filed a petition for writ of mandate to overturn the Planning Commission's decision. Nasha named as defendants the City, the Planning Commission, and Lucente in his capacity as a planning commissioner. Nasha pled that the Planning Commission's reversal of the Director's approval of the project was arbitrary, capricious, an abuse of discretion, a denial of Nasha's fundamental right to a fair and impartial decision, and unsupported by substantial evidence. The trial court rejected Nasha's claim of bias arising out of Lucente's prehearing involvement attacking the project and denied Nasha's petition for writ of mandate. Nasha appealed.

The court of appeal held that the proceeding before the Planning Commission was quasi-judicial in nature, rather than quasi-legislative, because the matter involved the determination and application of facts of an individual case, rather than the adoption of general public policy rules. Accordingly, the court held, procedural due process principles applied (*125 Cal. App. 4th 470, 482*). Procedural due process requires that the hearing be conducted before a reasonably impartial, noninvolved reviewer (*125 Cal. App. 4th 470, 482*). While the standard of impartiality required at an administrative hearing is less exacting than that required in judicial proceedings, the court held that Nasha must establish an unacceptable probability of actual bias on the part of those who have actual decision-making power over their claims (*125 Cal. App. 4th 470, 483*). The court held that Lucente's newsletter article gave rise to an unacceptable probability of actual bias and was sufficient to preclude Lucente from serving as a reasonably impartial, noninvolved reviewer (*125 Cal. App. 4th 470, 483)* .

In ***Clark v. City of Hermosa Beach*** *(1996) 48 Cal. App. 4th 1152, 56 Cal. Rptr. 2d 223* the Court of Appeal reversed the defendant City's decision denying a building permit on grounds that the plaintiff had not received a fair trial (*48*

Cal. App. 4th 1152, 1177). The City Council as a whole had an active interest in the subject matter of the plaintiff's application and one of the voting members of the Council was clearly biased against the plaintiff's application (*48 Cal. App. 4th 1152, 1172-1173)* . The plaintiff's application for a building permit had been approved by the City's planning commission but was denied by the City Council on an appeal from the commission's determination. One member of the Council was clearly biased against the plaintiff because he leased an apartment one block away from the plaintiff's proposed construction and would lose an ocean view if the proposed building were completed. Before being elected to the Council, this Councilmember had opposed an earlier building permit application by the plaintiff.

In addition, the Council had repeatedly considered adoption of a proposed ordinance which would have restricted the height of new construction to 30 feet. Plaintiff's building was planned under the existing 35-foot limit. The proponents of the proposed zoning law change had been unable to obtain the necessary super-majority to pass such an ordinance. However, as a simple majority of the Council, they had blocked all new construction in excess of 30 feet. Under these circumstances, the Court of Appeal found that the Council had an interest in the outcome of the proceedings and had not conducted a fair trial of the plaintiff's building permit application, and reversed for a rehearing.

[4] Additional Authorities

[a] Decisions Reviewable

In *Jabola v. Pasadena Redevelopment Agency (1981) 125 Cal. App. 3d 931, 178 Cal. Rptr. 452* , petitioner appealed from the trial court's denial of a petition for administrative mandate under *Code Civ. Proc. § 1094.5* to review her discharge by an administrative agency. On appeal, the administrative agency contended that an employee's discharge was at the will of the agency, and that the decision was therefore not subject to review pursuant to *Code Civ. Proc. § 1094.5*. The court of appeal disagreed, stating that administrative mandamus is applicable whenever an agency exercises an adjudicatory function in considering facts presented in an administrative hearing and that discharge of an employee was such a situation (*125 Cal. App. 3d 931, 934)* . Counsel should note that *Jabola v. Pasadena Redevelopment Agency (1981) 125 Cal. App. 3d 931, 178 Cal. Rptr. 452* , was disapproved on another ground in *Cranston v. City of Richmond (1985) 40 Cal. 3d 755, 768 n.10, 221 Cal. Rptr. 779, 710 P.2d 845* .

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1. Grounds Supporting Petition Generally

19-195 California Points & Authorities § 195.11

§ 195.11 Writ of Mandate--Independent Judgment Test Applies

[1] FORM Writ of Mandate--Independent Judgment Test Applies

[*This form should be combined with a memorandum generally supporting a petition for administrative mandate. See § 195.10.*]

THE COURT SHOULD EXERCISE ITS INDEPENDENT JUDGMENT ON THE EVIDENCE AND DETERMINE WHETHER THE FINDINGS OF THE FINAL ADMINISTRATIVE ADJUDICATORY _____ [ORDER *or* DECISION] ARE SUPPORTED BY THE WEIGHT OF THE EVIDENCE, BECAUSE IT IS ALLEGED THAT THE EVIDENCE DOES NOT SUPPORT THE FINDINGS, AND BOTH (A) THE _____ [ORDER *or* DECISION] SUBSTANTIALLY AFFECTS A VESTED FUNDAMENTAL RIGHT OF PETITIONER, AND (B) RESPONDENT IS NOT DIRECTLY AUTHORIZED BY THE CONSTITUTION TO EXERCISE JUDICIAL FUNCTIONS.

A. Reviewing Weight of Evidence. When it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence (*Code Civ. Proc. § 1094.5(c)*).

B. Authority to Exercise Independent Judgment. A court is authorized to exercise its independent judgment on the evidence when the administrative order or decision attacked substantially affects a vested fundamental right of the petitioner and the respondent agency is not directly authorized by the Constitution to exercise judicial functions (*Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 32, 35, 112 Cal. Rptr. 805, 520 P.2d 29* ; *Rojo v. Kliger (1990) 52 Cal. 3d 65, 90-91, 276 Cal. Rptr. 130, 801 P.2d 373* ; *Griffiths v. Superior Court (2002) 96 Cal. App. 4th 757, 767-768, 117 Cal. Rptr. 2d 445*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for writ of mandate for review of a final administrative adjudicatory order or decision, when the petition alleges an abuse of discretion consisting of a failure of the evidence to support the findings on which the administrative order or decision is based. For related points and authorities for use in contending that (a) the order or decision substantially affects a vested fundamental right of the petitioner, and (b) the respondent is not directly authorized by the Constitution to exercise, see *§§ 195.12* and *195.13*, respectively.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See *§ 195.10[2][b]* for further discussion.

[c] Related Pleading and Practice Forms

For discussion and forms relating to judicial review of administrative decisions generally, see California Forms of Pleading and Practice, Ch. 474, *Availability of Judicial Review* ; Ch. 474A, *Timing of Judicial Review of Agency Decisions* ; Ch. 474B, *Standards in Reviewing Agency Decisions* ; Ch. 474C, *Procedures in Reviewing Agency Decisions* (Matthew Bender). For discussion and forms of petitions for writ of mandate to review administrative decisions affecting physicians, see California Forms of Pleading and Practice, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender).

[d] Opposing Memoranda

For memoranda that may used to oppose the contentions set forth in this form, see *§§ 195.58 -195.63*, supporting demurrer to petition, asserting that substantial evidence test is the appropriate standard to apply.

[3] Discussion of Authorities

[a] Reviewing Weight of Evidence

Code Civ. Proc. § 1094.5(c) provides that, when it is claimed that the findings are not supported by the weight of the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence.

[b] Authority to Exercise Independent Judgment

Strumsky v. San Diego County Employees Retirement Ass'n *(1974) 11 Cal. 3d 28, 112 Cal. Rptr. 805, 520 P.2d 29* , involved an appeal from a judgment denying the petitioner a writ of mandate sought to set aside the decision of the respondent board which denied her certain death benefits. The Supreme Court reversed and remanded to the trial court on the basis that the trial court had erroneously applied the substantial judgment test in reviewing the decision of the board, instead of the independent judgment test. The Court noted that formerly the independent judgment test had been held inapplicable in the case of agencies of constitutional origin which were granted judicial power by the Constitution and local agencies. While this rule is still valid as to the constitutional agencies, there is no longer any valid reason to apply the substantial evidence rule to decisions of local agencies, and the independent judgment test applies. The Court confirmed the holding in *Bixby v. Pierno (1971) 4 Cal. 3d 130, 144-145, 93 Cal. Rptr. 234, 481 P.2d 242* , that when an administrative decision affects a right which has been legitimately acquired or is otherwise vested, and when that right is of a fundamental nature from the standpoint of its economic aspect or its effect in human terms and the importance to the individual, then a full and independent judicial review of the decision is indicated, with the sole exception of agencies of constitutional origin with limited judicial power (*11 Cal. 3d 28, 32, 35)* .

In ***The Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga*** *(2009) 175 Cal. App. 4th 1306, 1321-1322, 96 Cal. Rptr. 3d 813* , a developer sought to develop property into a residential subdivision. The environmental impact report (EIR) required the developer to transfer a certain number of acres for habitat conservation to the County of San Bernardino or other qualified conservation entity approved by the City. The City agreed that it would not unreasonably withhold any necessary consent or approvals. The plaintiff opposed the EIR and challenged the development project. The developer and the plaintiff entered into an agreement under which the developer agreed to convey real property to the plaintiff for conservation purposes and the plaintiff agreed to withdraw its objections to the development project. However, the City refused to approve the plaintiff as a qualified conservation entity. The plaintiff filed a petition for writ of mandate under *Code Civ. Proc. § 1094.5*, challenging the City's determination that it was not qualified to receive and manage land to mitigate the environmental impacts of projects within the City. The plaintiff argued that the City's decision prevented the plaintiff from conducting and growing its business and damaged its reputation, thereby depriving it of a fundamental, vested right. The plaintiff argued that the City unreasonably withheld its consent to approval of the plaintiff, that the City exceeded its authority in denying qualified conservation entity status to the plaintiff, and that the City's hearing was arbitrary, unfair and capricious because its criteria were vague and because the plaintiff was not a part of the proceedings. The trial court denied the plaintiff's petition.

On appeal, the plaintiff argued that because the City agreed that any necessary consent or approvals would not be unreasonably withheld, the standard of review applicable to its writ petition should be a reasonableness standard. It also argued that because the City denied the plaintiff's qualified conservation entity status for the project knowing that a contract between the developer and the plaintiff existed, the denial created a stigma against the plaintiff and implicated a fundamental right, requiring an independent review standard. The court held that in the context of judicial review of administrative decisions, a fundamental right is one that is of such importance to the individual in the life situation that its vital nature demands a full and independent judicial review when abridged (*175 Cal. App. 4th 1306, 1321)* . The court held that the City considered whether the plaintiff had sufficiently demonstrated that it met its criteria to be a qualified conservation entity for the developer's project. The plaintiff's contract with the developer did not create a fundamental, vested right to be found a qualified conservation entity by the City. The plaintiff also argued that it had a fundamental vested right to be a qualified conservation entity for this project because the City had already deemed it a qualified conservation entity for prior projects. The court rejected this argument, holding that the City's decision did not affect the plaintiff's rights to own or manage property that it already had or for any future projects if it demonstrated compliance with the City's criteria (*175 Cal. App. 4th 1306, 1321-1322)* . The court also rejected the plaintiff's argument that the City's denial of qualified conservation entity status stigmatized it and therefore entitled it to independent review. The court held the City's decision affected only the plaintiff's status for this development project; the City did not suggest that the plaintiff had engaged in any wrongdoing or that it could not qualify for future projects (*175 Cal. App. 4th 1306, 1322)* .

In ***State Water Resources Control Bd. Cases*** *(2006) 136 Cal. App. 4th 674, 39 Cal. Rptr. 3d 189* , various water districts challenged State Water Resources Control Board decisions regarding coordinated water rights. The trial court upheld some of the challenges. The Board argued that its interpretations of various Water Code provisions were entitled to deference and should not be overturned, unless clearly erroneous.

The court of appeal disagreed. It first held that *Code Civ. Proc. § 1094.5* applies to a writ proceeding seeking to challenge the Board's water rights decision. The inquiry in such a case extends to whether the Board has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. The court held that the trial court is authorized to exercise its independent judgment on the evidence when the right or interest affected by the administrative decision is a vested one (*136 Cal. App. 4th 674, 721)* . If the right affected is vested, the decision is reviewed by means of a limited trial de novo in which the trial court not only examines the record for errors of law but also exercises its independent judgment upon the weight of the evidence produced before the administrative agency together with any further evidence properly admitted by the court (*136 Cal. App. 4th 674, 721)* . If, on the other hand, the right is not vested the trial court's scope of review extends only to matters of law appearing on the record of the administrative proceeding; accordingly its review of the evidence produced below

is limited to a determination of whether it is legally sufficient to sustain the decision (*136 Cal. App. 4th 674, 721)* . The court held that courts must independently judge the text of a statute, taking into account and respecting an agency's interpretation of its meaning, whether embodied in a formal rule or less formal representation. If a statute's meaning and legal effect is at issue, an agency's interpretation is one among several tools available to the court. Depending on the context, it may be helpful, enlightening, even convincing. It may sometimes be of little worth. Considered alone and apart from the context and circumstances that produce them, agency interpretations are not binding or necessarily even authoritative (*136 Cal. App. 4th 674, 722)* . Thus, the court held that it would exercise its independent judgment, giving deference to the Board's interpretation only if the Board shows that such deference is warranted by the circumstances (*136 Cal. App. 4th 674, 722)* .

Griffiths v. Superior Court *(2002) 96 Cal. App. 4th 757, 767-768, 117 Cal. Rptr. 2d 445* involved a physician whose license was revoked by the Medical Board of California because he was convicted of several misdemeanors for drunk driving. The physician filed a petition for writ of administrative mandamus, arguing that the Medical Board violated due process of law by failing to find a substantial relationship between his convictions and his duties, functions, and qualifications as a physician. The trial court upheld the Medical Board's decision. The court of appeal relied on *Bixby v. Pierno (1971) 4 Cal. 3d 130, 143-146, 93 Cal. Rptr. 234, 481 P.2d 242* and held that, after an administrative agency imposes discipline on a professional licensee, the trial court to which application for mandate is made exercises its independent judgment on the facts (*96 Cal. App. 4th 757, 767-768)* .

[4] Additional Authorities

[a] Reviewing Weight of Evidence

In *Maples v. Kern County Assessment Appeals Board (2002) 96 Cal. App. 4th 1007, 1013-1014, 117 Cal. Rptr. 2d 663* , a property company that operated federally subsidized low-income housing challenged the assessment made of the property by the county assessor. The property company and the assessor agreed that the income approach was the proper valuation for appraising the property. However, they disagreed on whether the subsidized interest rate or a general market rate should be applied to calculate the capitalization rate. The Kern County Assessment Appeals Board adopted the property company's calculation. The trial court issued a writ of mandate directing the board to vacate its determination. The company appealed.

The parties disagreed on whether the court of appeal should defer to the Board's findings or review the case de novo. The company argued that the Board's decision should be upheld if supported by substantial evidence. The assessor contended that the absence of a factual dispute required that the case be resolved as a matter of law.

The court of appeal held that the Board, as a board of equalization, was a constitutional agency exercising quasi-judicial powers delegated to it by the California Constitution (*96 Cal. App. 4th 1007, 1014)* . Therefore, the Board's factual determinations were entitled to the same deference as a judicial decision, i.e., review under the substantial evidence standard. However, the court held that when a board of equalization purports to decide a question of law, the decision is reviewed de novo. The court held that where a taxpayer claims a valid valuation method was improperly applied, the trial court is limited to reviewing the administrative record. The court may overturn the Board's decision only if no substantial evidence in the administrative record supports it. However, where the taxpayer challenges the validity of the valuation method itself, the court is faced with a question of law. In such a case, the court must inquire into whether the challenged valuation method is arbitrary, in excess of discretion, or in violation of the standards prescribed by law. The court noted that whether a taxpayer is challenging "method" or "application" is not always easy to ascertain (*96 Cal. App. 4th 1007, 1014)* .

Byrnes v. Riles (1984) 157 Cal. App. 3d 1170, 204 Cal. Rptr. 100 , involved an appeal from the granting of a writ of an administrative mandate ordering a school district to pay the private-school tuition of a severely language-handicapped student. The trial court had ruled that the administrative record did not support the hearing

officer's determinations. On appeal, the district argued that the decision should be reversed as the trial court did not specify the standard it applied in reviewing the hearing officer's decision. In upholding the decision, the court concluded that the trial court had used the independent judgment standard, which *Code Civ. Proc. § 1094.5* requires when it is claimed that an administrative determination is not supported by the evidence and when the court is statutorily authorized to receive additional evidence (*157 Cal. App. 3d 1170, 1170-1171)* . Although abuse of discretion is established if the court finds that the determinations are not supported by the weight of the evidence, such a finding is not, by itself, evidence of arbitrary and capricious conduct by the hearing officer that would entitle the complainant to an award of attorney's fees under *Gov. Code § 800*.

[b] Authority to Exercise Independent Judgment

In *County of Alameda v. Board of Retirement (1988) 46 Cal. 3d 902, 251 Cal. Rptr. 267, 760 P.2d 464* , a county petitioned for a writ of mandate to review the county board of retirement's decision to award a public employee service-connected disability benefits. The trial court reviewed the board's decision by applying the independent judgment test, and the court of appeal affirmed. The Supreme Court also affirmed, holding that the independent judgment test applies because of the county's direct pecuniary interest in challenging administrative benefits awards. Citing *Interstate Brands v. Unemployment Ins. Appeals Bd. (1980) 26 Cal. 3d 770, 780-781, 163 Cal. Rptr. 619, 608 P.2d 707* , the Court in *County of Alameda* reasoned that the county's interest under the retirement system is analogous to the interest of a private employer in an unemployment insurance reserve account, with the only discernible difference being the identity of one employer as public and the other as private (*46 Cal. 3d 902, 907-910)* .

In *Webster v. Trustees of Cal. State University (1993) 19 Cal. App. 4th 1456, 24 Cal. Rptr. 2d 150* , plaintiff, a tenured state university professor over 70 years of age, petitioned for a writ of mandate after being terminated from his employment for substandard performance. The trial court applied the substantial evidence test in holding that postretirement-age employment is not a vested right and that substantial evidence supported the termination. The court of appeal reversed, holding that the trial court should have applied the independent judgment test because plaintiff made a timely application for the continuation of tenure under *Gov. Code § 43662*. The court also held that, under the administrative scheme adopted by the university, plaintiff had a vested right to continued employment and was entitled to an independent review of the administrative record by a superior court judge under *Code Civ. Proc. § 1094.5* (*19 Cal. App. 4th 1456, 1462)* .

In *Dominey v. Department of Personnel Administration (1988) 205 Cal. App. 3d 729, 252 Cal. Rptr. 620* , respondent Department of Personnel Administration (DPA) denied petitioners' claim, which sought reclassification of their jobs in the Justice Department and awards of back pay for work done "out of class." The trial court denied their petition for writ of mandate after concluding that the DPA decision was quasi-legislative and subject to the standard of review applicable in ordinary mandate proceedings. The court of appeal affirmed on the reclassification issue, but reversed and remanded on the back-pay issue, holding that the DPA decision on the latter was quasi-adjudicative and subject to review under the independent judgment standard applicable in administrative mandate proceedings (*205 Cal. App. 3d 729, 738-740, 743)* . The court held that the independent judgment standard applied, rather than the substantial evidence standard, because the DPA was a legislative, not a constitutional, agency, and an award of back pay involved a fundamental vested right (*205 Cal. App. 3d 729, 740-743)* . The court declined to follow *Allen v. Department of Personnel Adminstration (1987) 193 Cal. App. 3d 355, 361-362, 238 Cal. Rptr. 317* , to the extent that it held that DPA decisions were subject to the substantial evidence standard (*205 Cal. App. 3d 729, 741-742)* .

In *Golde v. Fox (1979) 98 Cal. App. 3d 167, 159 Cal. Rptr. 864* , the court of appeal upheld the trial court's refusal to follow the recommendations of an administrative law judge. Instead, the trial court affirmed the revocation of petitioner's real estate license by the Real Estate Commissioner on the ground of moral turpitude arising out of petitioner's guilty plea to a charge of possession for sale of 800 pounds of marijuana. In this regard, the court of appeal held that, because a fundamental vested right was involved, the trial court had correctly followed its own independent judgment in reweighing the evidence which had been presented to an administrative law judge (*98 Cal. App. 3d 167,*

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§ 195.12 Writ of Mandate--Decision Substantially Affects Vested Fundamental Right

[1] FORM Writ of Mandate--Decision Substantially Affects Vested Fundamental Right

[*This form should be combined with a memorandum supporting exercise by reviewing court of its independent judgment on evidence. See § 195.11.*]

THE COURT SHOULD EXERCISE ITS INDEPENDENT JUDGMENT ON THE EVIDENCE BECAUSE THE _____ [ORDER *or* DECISION] SUBSTANTIALLY AFFECTS A VESTED FUNDAMENTAL RIGHT OF PETITIONER.

A. Effect of Decision on Petitioner's Rights. The courts must decide, on a case-by-case basis, whether some fundamental and basic right of the petitioner will suffer substantial interference because of the administrative order or decision attacked and, if so, whether that right is possessed by and vested in the petitioner rather than merely sought by him (*Bixby v. Pierno (1971) 4 Cal. 3d 130, 144, 93 Cal. Rptr. 234, 481 P.2d 242* ; *Prentice v. Board of Administration, California Public Employees' Retirement System (2007) 157 Cal. App. 4th 983, 988, 69 Cal. Rptr. 3d 167*).

B. "Vested" Denotes Possessed or Acquired. For purposes of determining the applicability of independent judgment review, the term "vested" denotes a right that is either already possessed or legitimately acquired (*Berlinghieri v. Department of Motor Vehicles (1983) 33 Cal. 3d 392, 396, 188 Cal. Rptr. 891, 657 P.2d 383* ; *The Termo Company v. Luther (2008) 169 Cal. App. 4th 394, 406-408, 86 Cal. Rptr. 3d 687*).

C. "Fundamental" Denotes Important Right Not Necessarily of Constitutional Dimension. For purposes of determining the applicability of independent judgment review, the term "fundamental" denotes a right or interest that is important to individuals in their life situations. The right or interest need not be "fundamental" in a constitutional sense that gives rise to due process or equal protection, but need only be of such substantial importance as to warrant independent judgment review (*Berlinghieri v. Department of Motor Vehicles (1983) 33 Cal. 3d 392, 397-398, 188 Cal. Rptr. 891, 657 P.2d 383*). Thus, the mere preservation of purely economic privileges will not likely be deemed

"fundamental," while a basic human right such as the right to pursue a lawful business or occupation will be "fundamental" (*Bixby v. Pierno (1971) 4 Cal. 3d 130, 145-146, 93 Cal. Rptr. 234, 481 P.2d 242* ; *Wences v. City of Los Angeles (2009) 177 Cal. App. 4th 305, 313-318, 99 Cal. Rptr. 3d 199* ; *San Benito Foods v. Veneman (1996) 50 Cal. App. 4th 1889, 1897; 58 Cal. Rptr. 2d 571*).

D. "Fundamental" and "Vested" Not Absolutes but Are Weighed Together. For purposes of determining the applicability of independent judgment review, the terms "fundamental" and "vested" are not used to establish absolutes but are used in a relative sense. It is the weighing of both the fundamental and vested nature of the right that determines whether independent judgment review is required. In other words, the importance and effect of the right is weighed together with the degree to which that right is possessed, to determine whether independent judgment review is required (*Frink v. Prod (1982) 31 Cal. 3d 166, 177-178, 181 Cal. Rptr. 893, 643 P.2d 476*). Thus, for example, when the degree to which a right is vested is not overwhelming but the degree of fundamentalness is, independent judgment review may nevertheless be required (*Frink v. Prod (1982) 31 Cal. 3d 166, 180, 181 Cal. Rptr. 893, 643 P.2d 476*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for writ of mandate for review of a final administrative adjudicatory order or decision, when the petition alleges an abuse of discretion consisting of a failure of the evidence to support the findings on which the administrative order or decision is based, and the order or decision substantially affects a vested fundamental right of the petitioner.

This form should be combined with a memorandum supporting exercise by reviewing court of its independent judgment on evidence [*see § 195.11*]. For points that may be used to contend that the respondent is not directly authorized by the Constitution to exercise judicial functions, see *§ 195.13*.

For references to related Pleading and Practice chapters, see *§ 195.11*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See *§ 195.10[2][b]* for further discussion.

[3] Discussion of Authorities

[a] Effect of Decision on Petitioner's Rights

In ***Bixby v. Pierno*** *(1971) 4 Cal. 3d 130, 93 Cal. Rptr. 234, 481 P.2d 242* , the Supreme Court stated that the courts must decide on a case-by-case basis whether an administrative decision or class of decisions substantially affects a fundamental vested right and thus requires independent judgment review (*4 Cal. 3d 130, 144*).

In ***Prentice v. Board of Administration, California Public Employees' Retirement System*** *(2007) 157 Cal. App. 4th 983, 988, 69 Cal. Rptr. 3d 167* , a public employee challenged his retirement allowance. He applied to the California Public Employees' Retirement System's (PERS) determination of his retirement allowance. Unhappy with PERS's ruling, he filed an administrative appeal, which was denied. He then sought review of the PERS decision by a writ of mandate filed in the trial court, which the trial court denied. The court of appeal held that when an administrative decision substantially affects a fundamental vested right, the trial court, in determining under *Code Civ. Proc. § 1094.5* whether there has been an abuse of discretion because the findings are not supported by the evidence, must exercise its independent judgment on the evidence and find an abuse of discretion if the findings are not supported by the weight of the evidence (*157 Cal. App. 4th 983, 988)* .

[b] "Vested" Denotes Possessed or Acquired

In ***Berlinghieri v. Department of Motor Vehicles*** *(1983) 33 Cal. 3d 392, 188 Cal. Rptr. 891, 657 P.2d 383* , plaintiff's driver's license was suspended by the Department of Motor Vehicles for six months for failure to submit to a blood alcohol test. In upholding the administrative decision on appeal, the superior court rejected the independent judgment test, and found that the administrative decision was supported by substantial evidence. Plaintiff appealed.

The Supreme Court reversed, holding that the independent judgment test applied because the suspension of a driver's license is a fundamental vested right. The Court cited the language in *Bixby v. Pierno (1971) 4 Cal. 3d 130, 143-144, 93 Cal. Rptr. 234, 481 P.2d 242* , that if the decision of an administrative agency will substantially affect a fundamental vested right, then the trial court must not only examine the administrative record for errors of law, but also must exercise its independent judgment on the evidence (*33 Cal. 3d 392, 395*). The Court explained that the term "vested" denotes a right that is either already possessed or legitimately acquired. Thus, retention of driver's license once issued is a "vested" right (*33 Cal. 3d 392, 396)* . The Court further explained that, in the independent judgment review context, the term "fundamental" referred to a right or interest that is important enough to individuals in their life situations to require an independent judicial review of the evidence. Thus, the right may be "fundamental" even though it does not rise to the level of a fundamental right for purposes of due process or equal protection (*33 Cal. 3d 392, 397)* . The Court then concluded that the right to retain a driver's license is "fundamental" as well as "vested," and that the independent judgment test applied to the initial judicial review of an administrative decision to suspend a license (*33 Cal. 3d 392, 396-398)* . The case was then remanded to the trial court for further proceedings consistent with the Court's opinion.

In The ***Termo Company v. Luther*** *(2008) 169 Cal. App. 4th 394, 406-408, 86 Cal. Rptr. 3d 687* , the State Oil and Gas Supervisor ordered the plugging and abandonment of 28 oil wells. The order was based on the finding that the wells had no potential for future commercial production and as idle wells posed a threat to public health and safety and natural resources. The Department of Conservation affirmed the order on the ground that the wells were deserted within the meaning of *Public Resources Code § 3237* because there had been no production for seven years and no attempt at production, and the owners were at a stalemate concerning future operations. The owners of the wells filed petitions for administrative mandamus seeking to overturn the decision and the underlying administrative order. The trial court denied the petitions. The owners appealed on the ground that the trial court erred in applying the substantial evidence standard of review because a fundamental vested right was at stake.

The court of appeal held that the right to continue to operate existing oil wells and to extract oil was a fundamental right. The court further held that the fundamental right was also a vested right, given the number of years the wells have been either in operation or in idle status. The court held that the administrative order would shut down a business that had existed for more than 20 years and would terminate the right to produce oil, a valuable resource. Therefore, the court held that the right to extract oil was vested. Moreover, the court held, the right was fundamental "considering its potentially massive economic aspect and its considerable effect in human terms" (*169 Cal. App. 4th 394, 407-408)* .

[c] "Fundamental" Denotes Important Right Not Necessarily of Constitutional Dimension

Berlinghieri v. Department of Motor Vehicles *(1983) 33 Cal. 3d 392, 188 Cal. Rptr. 891, 657 P.2d 383* , is discussed in *§ 195.12[3][b]*.

In ***Bixby v. Pierno*** *(1971) 4 Cal. 3d 130, 93 Cal. Rptr. 234, 481 P.2d 242* , the Court stated that, in determining whether the right is fundamental, the courts do not alone weigh the economic aspect of it, but the effect of it in human terms and the importance of it to the individual in the life situation. This approach applies in such an instance as the opportunity to continue the practice of one's trade or profession (*4 Cal. 3d 130, 144-145*).

Wences v. City of Los Angeles *(2009) 177 Cal. App. 4th 305, 313-318, 99 Cal. Rptr. 3d 199* , involved an off-duty

police officer's reprimand for improper use of force. As a result of the reprimand, the plaintiff filed an administrative appeal, after which the hearing officer upheld the reprimand. The plaintiff filed a petition for writ of administrative mandate. At trial, the parties agreed that the independent judgment standard of review applied to the trial court's review of the administrative decision. However, the trial court applied the substantial evidence test in ruling on the petition because the only discipline imposed on the plaintiff was a reprimand, and, therefore, a fundamental right was not at stake. The trial court held that the administrative decision did not deprive the plaintiff of any property or employment right, did not affect him financially, and therefore did not authorize the court to exercise its independent judgment on the evidence pursuant *Code Civ. Proc. § 1094.5(c)*.

The court of appeal reversed. It held that if an administrative decision substantially affects a fundamental vested right, the trial court must exercise its independent judgment on the evidence (*177 Cal. App. 4th 305, 313)* . The court held that a right may be deemed fundamental based on the character and quality of either the right's economic or human. Courts should not weigh only the economic aspect of the right, but its effect in human terms and the importance of it to the individual in the individual's life (*177 Cal. App. 4th 305, 313-314)* . The court noted that courts have repeatedly held that discipline imposed on public employees affects their fundamental vested right in employment, and therefore, when a public employee challenges an employer's disciplinary action, the trial court is required to exercise its independent judgment on the evidence (*177 Cal. App. 4th 305, 313-314)* . The court of appeal held that the trial court erred by focusing only on the impact of the reprimand on the plaintiff, rather than on the nature of the right the reprimand affected (*177 Cal. App. 4th 305, 314)* . The court held that the nature of the right affected here was the plaintiff's right to nonprobationary employment. It held further that the reprimand may affect the plaintiff's future opportunities for career advancement (*177 Cal. App. 4th 305, 316)* .

Suspension of a license to operate a commercial food processing plant was held to be a fundamental, vested right in ***San Benito Foods v. Veneman*** *(1996) 50 Cal. App. 4th 1889, 1897, 58 Cal. Rptr. 2d 571* . The nature of the petitioner's right to process food was "crucial to plaintiff's economic viability as a food processor." Review of a decision to suspend that license required application of the independent judgment standard, even though the decision would have resulted in negligible economic harm to the petitioner. Accordingly, the Court of Appeal reversed the Superior Court's ruling which had upheld the suspension under the substantial evidence standard (*50 Cal. App. 4th 1889, 1897*).

[d] "Fundamental" and "Vested" Not Absolutes but Are Weighed Together

In ***Frink v. Prod*** *(1982) 31 Cal. 3d 166, 181 Cal. Rptr. 893, 643 P.2d 476* , petitioner applied for welfare benefits, which were denied. Petitioner appealed the administrative decision to the superior court, which applied the substantial evidence test and upheld the denial of benefits. The superior court, however, noted that had the independent judgment test been applied, the court would have reversed the decision because the weight of evidence was in petitioner's favor. Petitioner appealed.

The Supreme Court reversed the judgment, holding that the independent judgment test applied to an applicant who is denied welfare benefits. The Court explained that under existing case law the trial court properly applied the substantial evidence standard but that the case law was wrong and the independent judgment standard applied. The Court pointed out that *Welf. & Inst. Code § 10962* provides for judicial review of such decisions by mandate pursuant to *Code Civ. Proc. § 1094.5* and that *Code Civ. Proc. § 1094.5* was designed to leave to the courts the establishment of standards for deciding which cases require independent judgment review and which require substantial evidence review (*31 Cal. 3d 166, 172-174)* . In reaching its decision, the Court restated the following applicable rules: (1) In determining whether the right is fundamental, the courts do not only weigh the economic aspect of it, but the effect of it in human terms and the importance of it to the individual in the life situation (*31 Cal. 3d 166, 174, 176)* ; (2) for purposes of determining the applicability of independent judgment review, the terms "fundamental" and "vested" are not used to establish absolutes but are used in a relative sense, that it is the weighing of both the fundamental nature and the vested nature of the right which determines whether independent judgment review is required (*31 Cal. 3d 166, 177)* ; and (3) the ultimate question in determining whether the right is sufficiently basic and fundamental to justify independent judgment

review in each case is whether the affected right is deemed to be of sufficient significance to preclude its extinction or abridgement by a body (administrative agency) lacking judicial power (*31 Cal. 3d 166, 176)* . The Court held that the right of the needy disabled to public assistance is of such significance as to require independent judgment review (*31 Cal. 3d 166, 178)* , that while the degree to which the applicant's right is vested may not be overwhelming, the degree of fundamentalness is, and that, weighing them together, the independent judgment standard should be applied to decisions denying applications for welfare benefits (*31 Cal. 3d 166, 180)* .

The Court, to the extent they were inconsistent, overruled *Tripp v. Swoap (1976) 17 Cal. 3d 671, 131 Cal. Rptr. 789, 552 P.2d 749* , and *Bertch v. Social Welfare Dep't (1955) 45 Cal. 2d 524, 289 P.2d 485* , and disapproved *Ferreira v. Swoap (1976) 62 Cal. App. 3d 875, 133 Cal. Rptr. 449* ; *Millen v. Swoap (1976) 58 Cal. App. 3d 943, 130 Cal. Rptr. 387* ; *Repko v. Carleson (1975) 48 Cal. App. 3d 249, 122 Cal. Rptr. 29* ; *Henderling v. Carleson (1974) 36 Cal. App. 3d 561, 111 Cal. Rptr. 612* ; *County of Madera v. Carleson (1973) 32 Cal. App. 3d 764, 108 Cal. Rptr. 515* ; *Taylor v. Martin (1972) 28 Cal. App. 3d 1057, 105 Cal. Rptr. 211* ; *Stratton-King v. Martin (1972) 28 Cal. App. 3d 686, 104 Cal. Rptr. 916* ; and *County of Contra Costa v. Social Welfare Board (1962) 199 Cal. App. 2d 468, 18 Cal. Rptr. 573* .

[4] Additional Authorities

[a] Effect of Decision on Petitioner's Rights

The right to continued welfare benefits is both fundamental and vested so that the independent judgment standard is invoked in reviewing a welfare decision [*Harlow v. Carleson (1976) 16 Cal. 3d 731, 737, 129 Cal. Rptr. 298, 548 P.2d 698]* . An administrative decision denying an application for welfare benefits also affects a fundamental right and is subject to judicial review by the independent judgment standard [*Frink v. Prod (1982) 31 Cal. 3d 166, 171-180, 181 Cal. Rptr. 893, 643 P.2d 476* (overruling or disapproving numerous cases to the contrary)]. Similarly, a policeman's right to disability benefits for injuries incurred in performance of duties is fundamental and vested, and a trial court is required to exercise independent judgment in reviewing an administrative board's decision [*Dickey v. Retirement Bd. (1976) 16 Cal. 3d 745, 748-751, 129 Cal. Rptr. 289, 548 P.2d 689]* . Furthermore, since Unemployment Insurance Act benefits constitute property rights for purposes of judicial review, the parties are entitled to independent evaluation of the evidence by the superior court, including findings on all essential fact questions [*Bilyeu v. Unemployment Ins. Appeals Bd. (1982) 130 Cal. App. 3d 657, 661, 181 Cal. Rptr. 837]* .

In *Sandarg v. Dental Board of California (2010) 184 Cal. App. 4th 1434, 1440, 109 Cal. Rptr. 3d 826*, the Dental Board of California revoked the petitioner's dental license after adopting a decision by an administrative law judge. The superior court denied the petitioner's petition for writ of mandate seeking reinstatement of his license. The court of appeal held that the right to practice one's profession is a fundamental vested right. If an administrative agency revokes a person's license to practice that profession, when the petitioner brings a petition for a writ of mandate to restore the license, the trial court must apply its independent judgment to its review of the facts underlying the administrative decision [184 Cal. App. 4th 1434, 1440].

In *Seering v. Dept. of Social Services (1987) 194 Cal. App. 3d 298, 239 Cal. Rptr. 422* , which arose out of a mandate proceeding to require the Department of Social Services to set aside its decision revoking a license to operate a family day care home for children based on allegations that one of the operators of the home had sexually abused one of the children attending the home, the court of appeal, in affirming the judgment denying the writ, held that the trial court had properly applied the "independent judgment" test in reviewing the administrative record because the trial court must exercise its independent judgment on the evidence if the decision of the administrative agency substantially affects a fundamental vested right and that the right to engage in such occupation is such a right (*194 Cal. App. 3d 298, 302 n.1*).

[b] "Vested" Denotes Possessed or Acquired

In *Dominey v. Department of Personnel Administration (1988) 205 Cal. App. 3d 729, 252 Cal. Rptr. 620* , discussed in *§ 195.11[4][b]*, this supplement, the court of appeal held that a claim of back pay by public employees was vested in the sense of "already possessed" or "legitimately acquired," because if petitioners prevailed on the claim they would be entitled to compensation for work already performed (*205 Cal. App. 3d 729, 742-743)* .

[c] "Fundamental" Denotes Important Right Not Necessarily of Constitutional Dimension

In *Dominey v. Department of Personnel Administration (1988) 205 Cal. App. 3d 729, 252 Cal. Rptr. 620* , discussed in *§ 195.11[4][b]*, the court of appeal held that a claim of back pay by public employees involved a fundamental right because this compensation directly affected a public employee's ability to support his or her family (*205 Cal. App. 3d 729, 742)* .

Schmitt v. City of Rialto (1985) 164 Cal. App. 3d 494, 210 Cal. Rptr. 788 , involved termination of a police officer's employment with a city, which was held to be a vested fundamental right. Thus, the superior court was required to exercise its independent judgment in reviewing the city council's findings regarding plaintiff's misconduct and its relation to his fitness for the position, but the determination of discharge, being in the nature of discipline or a penalty, was subject to review by the superior court only for abuse of discretion (*164 Cal. App. 3d 494, 500-504)* .

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Volume 19 Chapters 190-195 PRODUCTS LIABILITY---to---PUBLIC ADMINISTRATIVE LAW
CHAPTER 195 PUBLIC ADMINISTRATIVE LAW
PART II. FORMS
A. Petition for Writ of Mandate
1. Grounds Supporting Petition Generally

19-195 California Points & Authorities § 195.13

§ 195.13 Writ of Mandate--Agency Is Not Directly Authorized to Exercise Judicial Functions

[1] FORM Writ of Mandate--Agency Is Not Directly Authorized to Exercise Judicial Functions

[*This form should be combined with a memorandum supporting exercise by reviewing court of its independent judgment on evidence. See § 195.11.*]

THE COURT SHOULD EXERCISE ITS INDEPENDENT JUDGMENT ON THE EVIDENCE BECAUSE THE PETITION ALLEGES AN ABUSE OF DISCRETION CONSISTING OF A FAILURE OF THE EVIDENCE TO SUPPORT THE FINDINGS ON WHICH THE ADMINISTRATIVE _____ [ORDER *or* DECISION] IS BASED, AND THE RESPONDENT IS NOT DIRECTLY AUTHORIZED BY THE CONSTITUTION TO EXERCISE JUDICIAL FUNCTIONS.

Constitutional Authority to Exercise Judicial Functions. Certain state agencies, being directly authorized by the Constitution to exercise judicial functions, may do so to the limited extent of the constitutional grant of power without offending the separation-of-powers doctrine; and, because their factual determinations are due all of the deference and respect usually accorded a judicial decision, a court reviewing such an agency's decision may not exercise its independent judgment on the evidence. All other state agencies and all local agencies, however, have no authority to exercise judicial functions; their factual determinations are not due the deference and respect usually accorded judicial decisions; therefore, a court reviewing such an agency's decision may exercise its independent judgment on the evidence (*Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 32, 35-37, 42-44, 112 Cal. Rptr. 805, 520 P.2d 29*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for writ of mandate for review of a final administrative adjudicatory order or decision, when the petition alleges an abuse of discretion consisting of a failure of the evidence to

support the findings on which the administrative order or decision is based, and the respondent is not directly authorized by the Constitution to exercise judicial functions.

This form should be combined with a memorandum supporting exercise by reviewing court of its independent judgment on evidence [*see § 195.11*]. For points and authorities that may be used to contend that the agency order or decision substantially affects a vested fundamental right of the petitioner respondent, see *§ 195.12*.

For references to related Pleading and Practice chapters, see *§ 195.11*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See *§ 195.10[2][b]* for further discussion.

[3] Discussion of Authorities

[a] Constitutional Authority to Exercise Judicial Functions

In ***Strumsky v. San Diego County Employees' Retirement Ass'n*** *(1974) 11 Cal. 3d 28, 112 Cal. Rptr. 805, 520 P.2d 29* (discussed in *§ 195.10[3][b]*), the Court held that the entire judicial power of the state government is concentrated in the state court system and some "constitutional agencies" (*11 Cal. 3d 28, 43*). The Court also observed that, though the status of certain agencies as constitutional agencies has been clearly established, the status of certain others remains unclear pending judicial determination of that question. With respect to local agencies, however, there is no longer any doubt--because judicial powers may no longer be exercised by "local agencies," the factual findings of those agencies are entitled to no greater deference than those of other agencies lacking judicial powers under the Constitution (*11 Cal. 3d 28, 44*). The Court, therefore, held that in all cases of review of an adjudicatory decision of a local agency, if the order or decision of the agency substantially affects a fundamental vested right, the court must exercise its independent judgment on the evidence and find an abuse of discretion if the findings are not supported by the weight of the evidence (*11 Cal. 3d 28, 32)* .

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Volume 19 Chapters 190-195 PRODUCTS LIABILITY---to---PUBLIC ADMINISTRATIVE LAW
CHAPTER 195 PUBLIC ADMINISTRATIVE LAW
PART II. FORMS
A. Petition for Writ of Mandate
1. Grounds Supporting Petition Generally

19-195 California Points & Authorities § 195.14

§ 195.14 Writ of Mandate--Substantial Evidence Test Applies

[1] FORM Writ of Mandate--Substantial Evidence Text Applies

[*This form should be combined with a memorandum generally supporting a petition for administrative mandate. See § 195.10.*]

IN A CASE IN WHICH THE COURT IS REQUIRED TO APPLY THE SUBSTANTIAL EVIDENCE TEST, THE COURT MUST EXAMINE THE ENTIRE ADMINISTRATIVE RECORD TO DETERMINE WHETHER THE FINDINGS ON WHICH THE ADMINISTRATIVE ORDER OR DECISION IS BASED ARE SUPPORTED BY EVIDENCE OF PONDERABLE LEGAL SIGNIFICANCE, REASONABLE IN NATURE, CREDIBLE, AND OF SOLID VALUE.

A. Determining Support of Substantial Evidence. In a case in which the court may not exercise its independent judgment to determine the weight of the evidence, the court must determine whether the findings on which the administrative order or decision is based are supported by substantial evidence in the light of the whole record (*Code Civ. Proc. § 1094.5(c)*). Substantial evidence is evidence of ponderable legal significance, reasonable in nature, credible, and of solid value [*Plastic Pipe and Fittings Association v. California Building Standards Commission (2004) 124 Cal. App. 4th 1390, 1406-1407, 22 Cal. Rptr. 3d 393]* . The phrase "substantial evidence in the light of the whole record" signifies that the court is to apply the "substantial evidence" rule as generally applied in judicial proceedings in California and not the "scintilla" rule applied in other jurisdictions (*Martin v. Alcoholic Beverage Control Appeals Bd. (1959) 52 Cal. 2d 238, 246, 340 P.2d 1*). The court must examine not just the evidence in support of the administrative decision being reviewed but, rather, all of the evidence in the record (*Le Vesque v. Workmen's Compensation Appeals Bd. (1970) 1 Cal. 3d 627, 638 n.22, 83 Cal. Rptr. 208, 463 P.2d 432* ; *La Costa Beach Homeowners' Association v. California Coastal Commission (2002) 101 Cal. App. 4th 804, 814, 124 Cal. Rptr. 2d 618*). Factual matters are viewed most favorably to the prevailing party, and conflicts are decided in favor of the respondent (*12319 Corporation v. Business License Com. (1982) 137 Cal. App. 3d 54, 64, 186 Cal. Rptr. 726*).

[*Optional*] **B. Findings Based on Hearsay.** Administrative findings are not based on substantial evidence when they

are based solely on hearsay, and there has been a timely objection (*see Gov. Code § 11513(d)*; *Ashford v. Culver City Unified School Dist. (2005) 130 Cal. App. 4th 344, 29 Cal. Rptr. 3d 728* ; *Dibble v. Gourley (2002) 103 Cal. App. 4th 496, 502-503, 126 Cal. Rptr. 2d 709*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for writ of mandate for review of a final administrative adjudicatory order or decision, when the petition alleges an abuse of discretion consisting of a failure of the evidence to support the findings on which the administrative order or decision is based, and the court is precluded from exercising its independent judgment on the evidence either because (a) the order or decision does not substantially affect a vested fundamental right of the petitioner, or because (b) the respondent is directly authorized by the Constitution to exercise judicial functions. In such a case, the court is limited to determining whether the findings are supported by substantial evidence in the light of the whole record [*Code Civ. Proc. § 1094.5(c)*].

For references to related Pleading and Practice chapters, see *§ 195.11*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See *§ 195.10[2][b]* for further discussion.

[c] Related Memoranda

For points and authorities pertaining to mandate proceedings generally, see Ch. 150, *Mandate and Prohibition* . For points and authorities relating to use of the substantial evidence test in reviewing public school teacher dismissal proceedings, see Ch. 211, *Schools: Certification, Dismissal, and Related Employment Issues* .

[3] Discussion of Authorities

[a] Determining Support of Substantial Evidence

Code Civ. Proc. § 1094.5(c) provides that, when it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence; in all other cases abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

La Costa Beach Homeowners' Association v. California Coastal Commission *(2002) 101 Cal. App. 4th 804, 124 Cal. Rptr. 2d 618* , was an appeal of a decision by the California Coastal Commission granting a conditional permit to develop coastal property. The court of appeal reversed the trial court and held that substantial evidence supported the Coastal Commission's decision (*101 Cal. App. 4th 804, 814)* .

Plastic Pipe and Fittings Association v. California Building Standards Commission *(2004) 124 Cal. App. 4th 1390, 22 Cal. Rptr. 3d 393* was an appeal from the judgment of the superior court in a mandate proceeding for review of an administrative adjudicatory decision. The court of appeal held that there was substantial evidence in the record to support the trial court's findings. The court held that evidence is substantial if a reasonable trier of fact could conclude that the evidence is reasonable, credible, and of solid value (*124 Cal. App. 4th 1390, 1406-1407)* .

Martin v. Alcoholic Beverage Control Appeals Bd. *(1959) 52 Cal. 2d 238, 340 P.2d 1* , was an appeal from the

judgment of the superior court in a mandate proceeding for review of an administrative adjudicatory decision. On appeal, the Supreme Court considered the meaning of the phrase in *Code Civ. Proc. § 1094.5(c)*, "substantial evidence in the light of the whole record." Citing earlier cases in which similar language was construed, the Court stated that such phrases have been consistently construed as signifying no more than the adoption by the Legislature, for particular purposes, of the "substantial evidence" rule as generally applied in judicial proceedings in this state rather than the "scintilla" rule, which has been applied in judicial proceedings in some other jurisdictions (*52 Cal. 2d 238, 246)* .

Le Vesque v. Workers' Compensation Appeals Bd. *(1970) 1 Cal. 3d 627, 83 Cal. Rptr. 208, 463 P.2d 432* , was a hearing in the Supreme Court following the court of appeal's denial of a petition for writ of review (certiorari) to review an adjudicatory decision of the Workmen's Compensation Appeals Board. In discussing the proper method of applying the "substantial evidence" test, the Court stated that the reviewing court must consider the entire record and may not isolate only the evidence which supports the board's findings and thus disregard relevant evidence in the record (*1 Cal. 3d 627, 638 n.22*).

12319 Corporation v. Business License Com. *(1982) 137 Cal. App. 3d 54, 186 Cal. Rptr. 726* , was an appeal from a denial by the trial court of a request for a writ of mandamus and/or prohibition and/or administrative mandamus and the dissolving of its order staying the revocation of petitioner's licenses to operate a nightclub. On the issue of sufficiency of the evidence, the court of appeal stated that its power to review the sufficiency of evidence begins and ends with the determination as to whether or not there is any substantial evidence, contradicted or uncontradicted, which would support the finding. Factual matters, the court added, are viewed most favorably to the prevailing party and conflicts are decided in favor of the respondent (*137 Cal. App. 3d 54, 64)* .

[b] Findings Based on Hearsay

Gov. Code § 11513(d) , formerly Gov. Code. Code § 11513(c), provides that hearsay evidence "may be used for the purpose of supplementing or explaining other evidence but *over timely objection* shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions" [emphasis added]. The words, "over timely objection," were added in 1995 (operative July 1, 1997).

Prior to the 1995 amendment of *Gov. Code § 11513(d)*, there was a split in the courts of appeal regarding whether former Gov. Code § 11513(c) permitted hearsay evidence standing alone to be substantial evidence for an administrative finding if it is admitted without objection [*see, e.g.,* *Carl S. v. Commission for Teacher Preparation and Licensing (1981) 126 Cal. App. 3d 365, 370-371, 178 Cal. Rptr. 753* (concluding that hearsay standing alone cannot be substantial evidence for finding, even if it is admitted without objection)].

It appears that *Gov. Code § 11513(d)*, as amended, excludes hearsay evidence, standing alone, from supporting a finding, when there has been a timely objection as defined in the statute. Conversely, however, it appears that the added phrase, "over timely objection" qualifies the statement regarding lack of sufficiency, and the statute permits a finding that is based solely on hearsay when there has been no timely objection. Therefore, it appears that the position of *Carl S, above*, and others, is no longer valid.

In ***Ashford v. Culver City Unified School Dist.*** *(2005) 130 Cal. App. 4th 344, 29 Cal. Rptr. 3d 728* , a plumber employed by a school district was terminated when he allegedly used sick days to do freelance plumbing work outside of the school district. At the administrative hearing against him, the school district presented videotapes allegedly showing the petitioner engaged in activities inconsistent with his claim of illness. The only witness at the hearing was the district's assistant superintendent of human resources, who had not made the videotapes, was not present when they were made, and did not know the person who made them. In addition, she did not know if the person who made the videotapes was at any particular site on any particular date, or whether the dates on the videos were accurate. Based on this evidence, the board of education found that the petitioner was not sick when he took the sick days and dismissed him. The petitioner appealed. The court of appeal held that while administrative bodies are not required to strictly

follow the rules of evidence, hearsay evidence standing alone has no weight (*130 Cal. App. 4th 344, 349)* . Citing *Government Code § 11513(d)*, the court held that hearsay evidence may be used to supplement or explain other evidence but may not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions (*130 Cal. App. 4th 344, 349)* . The court held that the videotapes were hearsay because they were out-of-court statements by the person making the videotapes about petitioner's activities, and were offered to prove the truth of the district's assertion that petitioner was working on days when he claimed to be ill. Because the board's findings and conclusion were based on the videotapes, their admission into evidence to support the district's case was not harmless error, and thus, the court held, the board's decision against petitioner must be set aside (*130 Cal. App. 4th 344, 350)* .

In ***Dibble v. Gourley*** *(2002) 103 Cal. App. 4th 496, 126 Cal. Rptr. 2d 709* , a motorist was arrested for driving under the influence of alcohol. The officer's sworn statement to the Department of Motor Vehicles stated that the motorist had been involved in an accident. Attached to the officer's statement were reports that detailed the circumstances surrounding the accident and arrest. The DMV suspended the motorist's license. The motorist requested a hearing, but he did not appear. When the DMV suspended the motorist's license, the motorist filed a petition for writ of mandate, arguing that the officer's unsworn reports were inadmissible hearsay. The trial court denied the motorist's petition. The court of appeal affirmed the trial court's decision, holding that the motorist waived his claim of error by not objecting to the admissibility of the unsworn reports at the hearing (*103 Cal. App. 4th 496, 502-503)* .

[4] Additional Authorities

[a] Determining Support of Substantial Evidence

State Water Resources Control Bd. Cases (2006) 136 Cal. App. 4th 674, 763-764, 39 Cal. Rptr. 3d 189 , involved coordinated water rights proceedings in which various State Water Resources Control Board decisions were challenged. The court discussed the substantial evidence standard and held that to be substantial, "evidence must be reasonable in nature, credible, and of solid value; it must actually be 'substantial proof of the essentials which the law requires in a particular case" (*136 Cal. App. 4th 674, 763*). With respect to the burden of proof regarding substantial evidence, the court held that when an appellant challenges an administrative decision as being unsupported by substantial evidence, the appellant, not the board, has the burden to demonstrate that the administrative record does not contain sufficient evidence to support the agency's decision (*136 Cal. App. 4th 674, 763-764*).

In *Graber v. City of Upland (2002) 99 Cal. App. 4th 424, 121 Cal. Rptr. 2d 649* , the plaintiffs challenged two ordinances that were adopted by the defendant city on the ground that the ordinances violated the Community Redevelopment Law (*Health & Saf. Code § 33000 et seq.*) and improperly upset the tax distribution balance between the redevelopment agency and other taxing jurisdictions. The trial court applied the substantial evidence standard and ruled in favor of the plaintiffs, holding that the city ordinances were invalid because there was insufficient evidence that the area at issue was predominantly urbanized and blighted. The court of appeal upheld the application of the substantial evidence standard, but held that courts should not be a "rubber stamp" for local governments (*99 Cal. App. 4th 424, 430*). It held that the Community Redevelopment Law requires substantial evidence in the administrative record demonstrating the existence of specific characteristics of urbanization and blight. If the specific finding required by the Community Redevelopment Law cannot be made from the evidence in the administrative record, the evidence is not "substantial" proof of the essentials which the law requires and the finding is not supported by substantial evidence (*99 Cal. App. 4th 424, 430-431*).

In *Desmond v. County of Contra Costa (1993) 21 Cal. App. 4th 330, 25 Cal. Rptr. 2d 842* , the board of supervisors denied a homeowner's application for a land use permit finding that the homeowner's proposal was unsuitable to the character of the neighborhood. The homeowner petitioned the trial court for a writ of mandate. The trial court applied the substantial evidence test and denied the petition on the ground that the homeowner failed to establish either that the board of supervisors' finding was not supported by substantial evidence in the record or that the finding was legally irrelevant to the denial of the request for a land use permit. Affirming the trial court's decision, the court of appeal held

that when the standard of review is the substantial evidence test, it is presumed that the findings and actions of the administrative agency were supported by substantial evidence and, therefore, the burden was on the homeowner to show that there was no substantial evidence whatsoever to support the findings of the board (*21 Cal. App. 4th 330, 335-336)* .

Apte v. Regents of University of California (1988) 198 Cal. App. 3d 1084, 244 Cal. Rptr. 312 , was an appeal from the trial court's grant of a peremptory writ of mandate ordering the University of California to pay salary and benefits for one academic year to a former associate professor, as well as attorney fees, and to conduct an evidentiary hearing on compensation for lost salary in subsequent academic years. In modifying the judgment to delete the requirement of a further hearing, and affirming the judgment as modified, the court of appeal said that, when a statewide agency is delegated quasi-judicial power by the Constitution, the reviewing court is limited to determining whether there was substantial evidence supporting the agency's decision, substantial evidence being relevant evidence that a reasonable mind might accept as adequate to support a conclusion (*198 Cal. App. 3d 1084, 1091)* . The court added that in reviewing the evidentiary basis of an agency's decision, the court (trial and appellate) must consider not just the evidence supporting the agency's decision, but all relevant evidence in the administrative record, including evidence that fairly detracts from the evidence supporting the agency's decision, and that this consideration involves some weighing of the evidence to fairly estimate its worth (*198 Cal. App. 3d 1084, 1091)* .

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19-195 California Points & Authorities § 195.15

§ 195.15 Writ of Mandate--Invasion of Constitutional Right

[1] FORM Writ of Mandate--Invasion of Constitutional Right

[*This form should be combined with a memorandum generally supporting a petition for administrative mandate. See § 195.10.*]

THE COURT SET ASIDE THE ADMINISTRATIVE ADJUDICATORY _____ [ORDER *or* DECISION], DESPITE THE REASONS GIVEN FOR THE _____ [ORDER *or* DECISION], BECAUSE THE REAL REASON FOR THE _____ [ORDER *or* DECISION] WAS OFFICIAL DISSATISFACTION WITH PETITIONER'S EXERCISE OF A CONSTITUTIONAL RIGHT OF _____ [*identify, e.g.,* FREE SPEECH], AND THE ACTION OF _____ [*identify agency*] WAS NOT JUSTIFIED BY A COMPELLING PUBLIC INTEREST.

Scope of Review When Constitutional Right Invaded. When it is claimed that the real reason for an administrative order or decision adversely affecting a person's interests is official dissatisfaction with his exercise of a constitutional right, the court must make an independent assessment of established factual elements and determine whether this was the true reason for dismissal so that, absent the exercise of such right, the adverse action would not have been taken; if this is determined to be true, the court should proceed to consider whether the consequent limitation on constitutional rights was justified by a compelling public interest (*Bekiaris v. Board of Educ. (1972) 6 Cal. 3d 575, 593, 100 Cal. Rptr. 16, 493 P.2d 480*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for writ of mandate for review of a final administrative adjudicatory order or decision, when the petition alleges that the real reason for the order or decision was not stated in the accusation but was, instead, official dissatisfaction with the petitioner's exercise of a constitutional right (such as

freedom of speech).

This form should be combined with a memorandum generally supporting a petition for administrative mandate [*see § 195.10*].

For forms of memoranda supporting a petition for writ of administrative mandate, based on an agency's violation of a petitioner's administrative adjudication "*Bill of Rights*" under *Gov. Code § 11425.10*, see *§ 195.30* et seq..

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See *§ 195.10[2][b]* for further discussion.

[3] Discussion of Authorities

[a] Scope of Review When Constitutional Right Invaded

Bekiaris v. Board of Educ. *(1972) 6 Cal. 3d 575, 100 Cal. Rptr. 16, 493 P.2d 480* , was an appeal from the judgment of the superior court denying a writ of mandate to compel a school board to set aside the allegedly wrongful dismissal of petitioner from employment and to reimburse him for damages suffered by reason of lost employment. The Supreme Court reversed the judgment because the trial court and the board failed to resolve the petitioner's contention that the true reason for his dismissal was the board's disapproval of his exercise of *First Amendment* rights through out-of-school political activities. The Court held that in such a case the reviewing court is required to make an independent assessment of established factual elements and determine whether the true reason for the administrative action was official dissatisfaction with the person's exercise of constitutional rights, so that, absent the exercise of these rights, the agency would not have taken the action in question. If it determines that question in the negative and also finds no legal error in the record, it should deny the writ. If it determines that question in the affirmative, it should proceed to determine whether or not the consequent limitation on constitutional rights was justified by a compelling public interest. If it concludes that it was not justified by a compelling public interest, it should issue a writ of mandate requiring the agency to set aside its decision. If it concludes that it was so justified, it should deny the petition for the writ (*6 Cal. 3d 575, 593)* .

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19-195 California Points & Authorities § 195.16

§ 195.16 Writ of Mandate--Review of Action by Nongovernmental Agency Is Proper

[1] FORM Writ of Mandate--Review of Action by Nongovernmental Agency Is Proper

[*This form should be combined with a memorandum generally supporting a petition for administrative mandate. See § 195.10.*]

THE COURT SHOULD GRANT THE PETITION FOR WRIT OF MANDATE, BECAUSE THE COURT MAY REVIEW A DECISION OF A NONGOVERNMENTAL AGENCY BY WRIT OF MANDATE.

A. Nongovernmental Agency Decision Reviewable by Writ. A writ of mandate under *Section 1094.5 of the Code of Civil Procedure* is available to review not only administrative decisions by governmental agencies, but also administrative decisions by nongovernmental agencies in all cases in which the subject decision is the product of a proceeding in which a hearing and related protections are required by law (*Anton v. San Antonio Community Hosp. (1977) 19 Cal. 3d 802, 815-817, 140 Cal. Rptr. 442, 567 P.2d 1162*).

[*Optional*] **B. Association's Membership Decision Reviewable by Writ.** Administrative mandate pursuant to *Section 1094.5 of the Code of Civil Procedure* is proper to review membership decisions of associations in all cases in which the subject decision is the product of a proceeding in which a hearing and related procedural protections are required by law (see *Anton v. San Antonio Community Hosp. (1977) 19 Cal. 3d 802, 813-817, 140 Cal. Rptr. 442, 567 P.2d 1162*).

[2] Comments

[a] Use of Form

This memorandum may be used in support of a petition for a writ of mandate to review an administrative decision of a nongovernmental agency.

Optional Paragraph B should be used when a person is seeking judicial review of an administrative decision of an association, for example, when seeking review of a hospital's decision to expel a member of its hospital staff. Counsel should include points and authorities supporting the substantive grounds on which petitioner is claiming that the association's decision was improper [*see* Ch. 22, *Associations and Clubs*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See Comments under § 195.10[2][b] for further discussion.

[c] Related Pleading and Practice Forms

For pleading and practice forms relating to administrative mandate generally, see California Forms of Pleading and Practice, Ch. 474, *Availability of Judicial Review of Agency Decisions* et seq. (Matthew Bender). For discussion and forms relating to exclusion or expulsion from membership in an association, see Ch. 61, *Associations and Clubs* , in that publication.

[d] Related Memoranda

For memoranda relating to exclusion or expulsion from membership in an association, see Ch. 22, *Associations and Clubs* .

[3] Discussion of Authorities

[a] Nongovernmental Agency Decision Reviewable by Writ

In ***Anton v. San Antonio Community Hosp.*** *(1977) 19 Cal. 3d 802, 140 Cal. Rptr. 442, 567 P.2d 1162* , a physician petitioned the superior court for a writ of mandate under *Code Civ. Proc. § 1085* to compel defendant hospital to reappoint him to its medical staff. The trial court treated the proceeding as though it had been brought pursuant to the provisions of *Code Civ. Proc. § 1094.5* (administrative mandate) and denied plaintiff relief. Although reversing the judgment on other grounds, the Supreme Court concluded that the trial court had properly treated the proceeding as one for administrative mandate under *Code Civ. Proc. § 1094.5*. The Court held that a petition for a writ of mandate to review an administrative decision under *Code Civ. Proc. § 1094.5* was proper to review decisions of nongovernmental agencies (*19 Cal. 3d 802, 817, 820)* . The Court noted that the language of the statute did not limit mandate review under *Code Civ. Proc. § 1094.5* to administrative decisions by governmental agencies (*19 Cal. 3d 802, 816)* . The Court said that since *Code Civ. Proc. § 1085* mandate is available to compel acts on the part of governmental and nongovernmental agencies, and since the language of *Code Civ. Proc. § 1094.5* describing the kind of administrative body whose decisions are subject to review is substantially identical to that in *Code Civ. Proc. § 1085*, it follows that mandate review under *Code Civ. Proc. § 1094.5* is available for administrative decisions by nongovernmental agencies (*19 Cal. 3d 802, 816-817)* .

[b] Association's Membership Decision Reviewable by Writ

The factual and procedural background of ***Anton v. San Antonio Community Hosp.*** *(1977) 19 Cal. 3d 802, 140 Cal. Rptr. 442, 567 P.2d 1162* , is discussed in [a], *above*. In *Anton*, the Supreme Court reversed a judgment denying a physician's petition for writ of mandate to compel a private, nonprofit hospital to reinstate him to membership on the hospital staff. Addressing itself to the proper procedure for review of the hospital's decision, the Court held that this case fulfilled all of the statutory requirements for review under the procedure established by *Code Civ. Proc. § 1094.5* (*19 Cal. 3d 802, 815)* . The Court, noting that *Code Civ. Proc. § 1094.5* used substantially identical language to *Code Civ. Proc. § 1085* in describing the kind of administrative body whose decisions are subject to mandate review under its provisions, held that *Code Civ. Proc. § 1094.5* was to be applied to the same spectrum of agencies to which *Code Civ.*

Proc. § 1085 has been held applicable (*19 Cal. 3d 802, 817)* .

[4] Additional Authorities

[a] Association's Membership Decision Reviewable by Writ

In *Tiholiz v. Northridge Hospital Foundation (1984) 151 Cal. App. 3d 1197, 199 Cal. Rptr. 338* , the court of appeal affirmed the trial court's denial of a writ of administrative mandate. The court made note of the procedures followed, without finding them improper (*151 Cal. App. 3d 1197, 1201)* . The court said that the function of the trial court was to determine whether the tribunal's administrative record contained substantial evidence in support of the administrative disposition. The appellate court's role is limited to determining whether there was substantial evidence supporting the trial court's ruling (*151 Cal. App. 3d 1197, 1203-1204*).

In *Applebaum v. Board of Directors (1980) 104 Cal. App. 3d 648, 163 Cal. Rptr. 831* , the court of appeal affirmed the trial court's granting of plaintiff's petition for a writ of administrative mandate compelling a private hospital to reinstate the plaintiff physician as a member of its staff (*104 Cal. App. 3d 648, 650)* .

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§ 195.17 Writ of Mandate--Court May Receive Additional Evidence

[1] FORM Writ of Mandate--Court May Receive Additional Evidence

[*This form should be combined with a memorandum generally supporting a petition for administrative mandate. See § 195.10.*]

AT THE HEARING ON THE PETITION THE COURT MAY RECEIVE, IN ADDITION TO THE EVIDENCE THAT WAS PRODUCED IN THE ADMINISTRATIVE PROCEEDING, (A) ANY EVIDENCE THAT COULD NOT, IN THE EXERCISE OF REASONABLE DILIGENCE, HAVE BEEN PRODUCED IN THAT PROCEEDING, AND (B) ANY EVIDENCE THAT WAS IMPROPERLY EXCLUDED IN THAT PROCEEDING.

A. Receipt of Additional Evidence. Although the petitioner is not entitled to a complete new trial of the issues litigated in the administrative proceeding, the court may receive, in the judicial proceeding for review of an administrative adjudicatory order or decision, not only the evidence that was presented in the administrative proceeding, but also (a) any evidence which could not, in the exercise of reasonable diligence, have been produced in that proceeding, and (b) any evidence that was improperly excluded in that proceeding (*Code Civ. Proc. § 1094.5(e)*; *Sierra Club v. California Coastal Commission (2005) 35 Cal. 4th 839, 863, 28 Cal. Rptr. 3d 316, 111 P.3d 294* ; *Bixby v. Pierno (1971) 4 Cal. 3d 130, 143 n.10, 93 Cal. Rptr. 234, 481 P.2d 242* ; *Town of Tiburon v. Bonander (2009) 180 Cal. App. 4th 1057, 1075-1076, 103 Cal. Rptr. 3d 485*).

[*Optional*] **B. Events Transpiring After Agency's Decision.** A superior court is authorized under *Section 1094.5(e) of the Code of Civil Procedure* to receive relevant evidence of events which transpired after the date of the administrative agency's decision (*Windigo Mills v. Unemployment Ins. Appeals Bd. (1979) 92 Cal. App. 3d 586, 597, 155 Cal. Rptr. 63*).

[*Optional*] **C. Evidence on Issue First Raised in Mandate Petition.** A court does not abuse its discretion under *Section 1094.5(e) of the Code of Civil Procedure* by denying a motion to strike evidence that was not part of the administrative record when that evidence is on an issue that is first raised in a petition for writ of administrative

mandamus (*Cranston v. City of Richmond (1985) 40 Cal. 3d 755, 773, 221 Cal. Rptr. 779, 710 P.2d 845*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for writ of mandate for review of a final administrative adjudicatory order or decision, when the petition alleges that the petitioner has certain evidence that he or she could not, in the exercise of reasonable diligence, have presented at the administrative proceeding or that certain evidence was improperly excluded in that proceeding [*see Code Civ. Proc. § 1094.5(e)*].

This form should be combined with a memorandum generally supporting a petition for administrative mandate [*see § 195.10*]. With appropriate modifications, this memorandum may be used to oppose a motion for summary judgment in favor of the respondent.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See Comments under § 195.10[2][b] for further discussion.

[3] Discussion of Authorities

[a] Receipt of Additional Evidence

Code Civ. Proc. § 1094.5(e) provides that, when the court finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before respondent, the court may enter judgment remanding the case to be reconsidered in the light of that evidence; or, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, the court may admit that evidence at the hearing on the writ without remanding the case.

In ***Sierra Club v. California Coastal Commission*** *(2005) 35 Cal. 4th 839, 28 Cal. Rptr. 3d 316, 111 P.3d 294* , the Sierra Club filed a petition for writ of mandate challenging the Coastal Commission's approval of a housing development project that straddled the coastal zone boundary. The Commission issued a permit, finding that the part of the proposed project within the coastal zone conformed with the Coastal Act's policies and requirements. The Sierra Club filed a writ of mandate, arguing that the Commission erred in issuing the permit without considering the adverse impacts in the coastal zone of activities originating in the portion of the project site located outside of the coastal zone. The superior court denied the writ of mandate. The Court of Appeal affirmed. The Sierra Club appealed to the California Supreme Court.

The Sierra Club challenged the permit approval based on its counsel's declaration that the coastal program analyst told him that Commission staff reviewed the final Environmental Impact Report (EIR) in connection with its consideration of the proposed project, but the Commissioners did not. The Sierra Club argued that by failing to review the City's EIR, the Commission members violated the CEQA Guidelines, which provide that "[t]he decisionmaking body of a public agency shall not delegate the following functions: (1) Reviewing and considering a final EIR ... prior to approving a project." Sierra Club also asserted that because the Commissioners did not themselves review the City's EIR, the Court of Appeal erred in partially relying on that EIR to find that substantial evidence supported the Commission's decision.

The California Supreme Court upheld the Court of Appeal's holding. It held that the legislative history of the applicable statute showed that with respect to proposed developments straddling the coastal zone, the legislature intended to divide permit authority between the Commission and other local public entities having jurisdiction over portions of a development outside the coastal zone. In addition, the Court held that the Sierra Club's argument depended on evidence

that was not part of the administrative record. The Court held that judicial review may be conducted solely on the record of the proceeding before the administrative agency (*35 Cal. 4th 839, 863-864)* . Under *Code Civ. Proc. § 1094.5(e)*, a reviewing court may receive additional evidence only if that evidence "in the exercise of reasonable diligence, could not have been produced or that was improperly excluded at the hearing before" the administrative agency (*35 Cal. 4th 839, 863*). Thus, in reviewing the Commission's decision, courts must review only the record before the Commission unless the petitioner shows it could not have produced the new evidence in the exercise of reasonable diligence or unless relevant evidence was improperly excluded at the administrative hearing (*35 Cal. 4th 839, 863*). Because Sierra Club made no attempt to establish either of these prerequisites, the Court refused to consider the statement in counsel's declaration (*35 Cal. 4th 839, 863-864*).

Bixby v. Pierno *(1971) 4 Cal. 3d 130, 93 Cal. Rptr. 234, 481 P.2d 242* was an appeal from the judgment of the superior court in a mandate proceeding for review of an administrative adjudicatory decision. In holding that a trial court must give a limited trial de novo when called on to exercise its independent judgment on the evidence, the court stated that the trial court must exercise its independent judgment on the weight of the evidence produced or which could not, in the exercise of reasonable diligence, have been produced before the administrative agency and any evidence which might have been improperly excluded by the administrative agency (*4 Cal. 3d 130, 143 n.10*).

Town of Tiburon v. Bonander *(2009) 180 Cal. App. 4th 1057, 1075-1076, 103 Cal. Rptr. 3d 485* , involved a special assessment district formed by the plaintiff town to place overhead utility lines underground within the district. Each homeowner in the district agreed to pay between $16,000 to $20,000 per parcel to cover the cost of installing the utility lines underground from the street to each residence. The plaintiff's original estimate of the cost was too low, so the plaintiff imposed a supplemental assessment to cover the increased costs. When the plaintiff filed an action to validate the supplemental assessment pursuant to *Code Civ. Proc. § 860*, the defendants, a group of affected property owners, filed a cross-complaint challenging the supplemental assessment. The trial court limited its review to the administrative record associated with the supplemental district. The trial court granted the plaintiff's motion for summary judgment on most of the defendants' claims. The defendants dismissed one of their claims in order for the trial court to enter a final judgment.

On appeal, the defendants argued that the supplemental assessment failed to satisfy the proportionality requirement imposed by *Cal. Const. Art. XIII D § 4*, which mandates that assessments may not exceed the reasonable cost of the proportional special benefit conferred on a parcel. The court of appeal first held that it would exercise its independent judgment in reviewing whether the assessment violated *Cal. Const. Art. XIII D § 4* because the validity of the assessment was a constitutional question. The defendants argued that the court should review the validity of both the original and supplemental assessments, even though the trial court reviewed only the supplemental assessment. The court of appeal agreed, holding that under *Code Civ. Proc. § 1094.5(e)*, a court authorized to exercise independent judgment may admit and consider extra-record evidence in administrative mandate proceedings if the evidence was improperly excluded by the public agency or could not have been produced through the exercise of reasonable diligence at the time of the hearing [*180 Cal. App. 4th 1057, 1075-1076]* . The court held that the supplemental district concerned the same project as the original district and employed the same special benefit formulas, boundaries, zones, and methodology, and was evidence that the plaintiff considered in forming the supplemental district [*180 Cal. App. 4th 1057, 1076]* .

[b] Events Transpiring After Agency's Decision

Windigo Mills v. Unemployment Ins. Appeals Bd. *(1979) 92 Cal. App. 3d 586, 155 Cal. Rptr. 63* , was an appeal from the judgment in the superior court in a mandate proceeding for review of a decision by the Unemployment Insurance Board. In reviewing the admissibility of new evidence at the administrative mandate hearing, the court found that when the Legislature granted the superior court the discretion to receive relevant evidence which, in the exercise of reasonable diligence, could not have been produced at the administrative hearing [*see Code Civ. Proc. § 1094.5(e)*], it reasonably may be inferred that the Legislature meant to authorize the receipt of evidence of events which took place

after the administrative hearing (*92 Cal. App. 3d 586, 596-597*). The court of appeal held that a superior court is authorized under *Code Civ. Proc. § 1094.5(e)* to receive relevant evidence of events which transpired after the date of the agency's decision (*92 Cal. App. 3d 586, 597*).

[c] Evidence on Issue First Raised in Mandate Petition

Cranston v. City of Richmond *(1985) 40 Cal. 3d 755, 221 Cal. Rptr. 779, 710 P.2d 845* , was an appeal from the judgment in the superior court in a mandate proceeding for review of a city personnel board decision discharging petitioner police officer from his job pursuant to a city personnel rule proscribing conduct unbecoming an employee of the city service. In the superior court, petitioner contended, among other things, that his discharge denied him due process of law because the rule was unconstitutionally vague in that it provided no standard on which his conduct could be judged. In its memorandum in opposition to the petition, respondents included an exhibit consisting of excerpts from the city Police Department Manual. Petitioner moved to strike the exhibit on the ground that it was not part of the administrative record. The trial court denied the motion and denied the petition. Petitioner then sought review of the denial in the Supreme Court.

The Supreme Court affirmed the trial court's judgment denying the petition (*40 Cal. 3d 755, 759*). The Court held that the rule, viewed in the context of other rules and practices pertaining to police service, was not so vague as to preclude discipline for conduct that was so obviously improper for a police officer and so clearly outside the scope of any substantive legal protection as the reckless and unlawful conduct in which petitioner engaged (*40 Cal. 3d 755, 759*). The rule was, therefore, not unconstitutionally vague as applied to a police officer who had engaged in the sort of patently unlawful and reckless conduct engaged in by petitioner (*40 Cal. 3d 755, 772*). The Court then addressed petitioner's argument in support of his contention that the trial court erred in denying his motion to strike respondents' additional evidence. Petitioner argued that because the police department manual was available to respondents at the time of the administrative hearing, that evidence could, with reasonable diligence, have been produced at the hearing, and that therefore the requirements of *Code Civ. Proc. § 1094.5(e)* were not met. The Court held this argument to be without merit. The Court noted that respondents sought to introduce portions of the manual pertaining to the conduct expected of police officers because these provisions were relevant to the issue of whether the rule under which petitioner was discharged was unconstitutionally vague. Petitioner did not challenge the constitutionality of the rule in the hearing before the city personnel board; the issue was first raised in the petition for writ of mandate. Until petitioner raised the issue in his petition, respondents had no reason to anticipate that the challenge would be made and, consequently, had no reason to offer into evidence those portions of the manual that were relevant to petitioner's constitutional challenge. The Court held, under these circumstances, that the trial court did not abuse its discretion under *Code Civ. Proc. § 1094.5(e)* by denying petitioners motion to strike respondents' exhibit (*40 Cal. 3d 755, 773*).

[4] Additional Authorities

[a] Receipt of Additional Evidence

Garamendi v. Golden Eagle Insurance Company (2005) 128 Cal. App. 4th 452, 27 Cal. Rptr. 3d 239 was an appeal of the California Insurance Commissioner's rejection of tort claims against an insurance company. Two former employees of Golden Eagle filed claims against Golden Eagle in liquidation proceedings to recover for alleged fraudulent inducement of their employment contracts, wrongful discharge, defamation, and intentional infliction of emotional distress. The Commissioner rejected the claims. In a proceeding in the trial court to review the Commissioner's rejections, appellants submitted evidence that the Commissioner had not considered during the claims investigation. The trial court refused to consider this new evidence in reviewing the Commissioner's decisions, but the court offered to send the matter back to the Commissioner for further consideration in light of the additional evidence. The court of appeal held that it was appropriate to apply a rule analogous to that applied by trial courts in reviewing adjudicatory administrative decisions under *Code Civ. Proc. § 1094.5* (*128 Cal. App. 4th 452, 468*). The court of appeal held that while the trial court may accept and consider evidence that was not before the Commissioner in reviewing the rejection

of a claim, the court may consider that evidence only to rule on issues other than the merits of the claim, such as the thoroughness of the Commissioner's investigation, the fairness of the Commissioner's procedures, or the Commissioner's unjustified failure to consider relevant evidence (*128 Cal. App. 4th 452, 468*). On the other hand, the court must evaluate the Commissioner's exercise of discretion in ruling on the merits of the claims based only on the evidence the Commissioner actually considered (*128 Cal. App. 4th 452, 468*).

Tiholiz v. Northridge Hospital Foundation (1984) 151 Cal. App. 3d 1197, 199 Cal. Rptr. 338 , involved an appeal from a denial of a writ of administrative mandate. In its decision to deny the writ, the trial court admitted portions of two declarations from persons present at the administrative hearing. Appellant had claimed that the administrative procedure was not fair and that the admissions by the trial court were erroneous. The appellate court upheld the trial court's action. The declarations admitted by the trial court related to the hearing itself and whether the petitioner had raised his objections at that time. In supporting the trial court's actions, the appellate court cited *Code Civ. Proc. § 1094.5*, which allows the admission of evidence by the trial court. It noted that the trial court was exercising its independent judgment on the evidence regarding the issue of fairness that petitioner had raised (*151 Cal. App. 3d 1197, 1204-1205*).

Curtin v. Department of Motor Vehicles (1981) 123 Cal. App. 3d 481, 176 Cal. Rptr. 690 , was an appeal by the Department of Motor Vehicles in which the department claimed that the trial court, in its review of the department's decision suspending Curtin's license, had erroneously considered evidence outside the record of the administrative proceeding. The contested evidence was a letter from the department to Curtin concerning an unrelated previous suspension which resulted from a departmental error and which had been terminated. The letter arrived after the administrative hearing on the present suspension and was not a part of the administrative record, but the trial court considered it in reviewing the propriety of the department's decision.

Although it reversed and remanded on other grounds, the court of appeal held that the admission of the letter was proper under *Code Civ. Proc. § 1094.5(e)*, which allows the admission of relevant evidence during a mandate proceeding which could not have been produced by reasonable diligence or which was wrongfully excluded at the administrative hearing. Although it failed to specify the standard of review which had governed the trial court, the court of appeal held that the rule of *Code Civ. Proc. § 1094.5(e)* applied whether the independent judgment or substantial evidence test is employed by the trial court. The letter concerning Curtin's erroneous license suspension, held the court, was both relevant and impossible to produce at the administrative hearing, and thus came within the purview of *Code Civ. Proc. § 1094.5(e)* (*123 Cal. App. 3d 481, 484-485*).

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§ 195.18 Writ of Mandate--Agency Usurped Judicial Power

[1] FORM Writ of Mandate--Agency Usurped Judicial Power

[*This form should be combined with a memorandum generally supporting a petition for administrative mandate. See § 195.10.*]

THE PETITION FOR A WRIT OF MANDATE SUFFICIENTLY ALLEGES THE INVALIDITY OF THE ADMINISTRATIVE _____ [ORDER *or* ACTION] OF THE _____ [*identify agency*], BECAUSE IT ALLEGES FACTS SHOWING THAT THE _____ [ORDER *or* ACTION] IS AN UNCONSTITUTIONAL USURPATION OF JUDICIAL POWER.

A. Judicial Power Is Vested in Courts. The judicial power of California is vested in the Supreme Court, superior courts, and municipal courts (*Cal. Const., art. VI, § 1*).

B. Exercise of Judicial Power. Agencies not vested by the California Constitution with judicial powers may not exercise judicial powers (*see Strumsky v. San Diego County Employees Retirement Assn. (1974) 11 Cal. 3d 28, 42, 112 Cal. Rptr. 805, 520 P.2d 29*).

C. Test for Constitutionality. The exercise of an act of a judicial nature by an administrative agency is constitutional only when the act is authorized by statute or legislation, is reasonably necessary to effectuate the agency's primary, legitimate regulatory purposes, and when the act does not usurp the power of courts to make enforceable, binding judgments (*Walnut Creek Manor v. Fair Employment & Housing Com. (1991) 54 Cal. 3d 245, 256, 284 Cal. Rptr. 718, 814 P.2d 704* ; *McHugh v. Santa Monica Rent Control Bd. (1989) 49 Cal. 3d 348, 359, 372, 374, 261 Cal. Rptr. 318, 777 P.2d 91*).

[*Optional*] **D. Treble Damages.** An award of treble damages by an administrative agency violates the judicial powers clause of the California Constitution (*Cal. Const., art. VI, § 1*) and is invalid (*McHugh v. Santa Monica Rent Control Bd. (1989) 49 Cal. 3d 348, 378, 386, 261 Cal. Rptr. 318, 777 P.2d 91*).

[*Optional*] **E. Immediately Effective Restitution Orders.** An administrative order requiring immediate payment of money or authorizing immediate withholding of money that would otherwise be owed violates the judicial powers clause of the California Constitution (*Cal. Const., art. VI, § 1*) if the order takes effect before the court has an opportunity to decide whether to stay the order pending review by writ of mandate (*McHugh v. Santa Monica Rent Control Bd. (1989) 49 Cal. 3d 348, 376-377, 386, 261 Cal. Rptr. 318, 777 P.2d 91*).

[*Optional*] **F. Compensatory Damages for Emotional Distress.** An award by an administrative agency of unlimited general compensatory damages for emotional distress violates the judicial powers clause of the California Constitution (*Cal. Const., art. VI, § 1*), and is invalid (*Walnut Creek Manor v. Fair Employment & Housing Com. (1991) 54 Cal. 3d 245, 251, 265, 267, 284 Cal. Rptr. 718, 814 P.2d 704*).

[2] Comments

[a] Use of Form

This memorandum may be used in support of a petition for a writ of mandate to review an administrative decision, when the petition alleges that the challenged act or decision by the agency is a usurpation of the judicial power vested in the courts by *Cal. Const, art. VI, § 1*.

This form should be combined with a memorandum generally supporting a petition for administrative mandate [*see § 195.10*].

This form should not be used if the agency has acted pursuant to a grant of judicial power through the California Constitution. Some statewide agencies, such as the Department of Alcoholic Beverage Control and the Public Utilities Commission, are created by the Constitution, and are thereby vested with certain judicial powers [*see* Cal. Const., arts. XII, XX, *§ 22*]. Others, such as the Workers' Compensation Appeals Board, have been legislatively endowed with judicial powers pursuant to a specific constitutional authorization [*see Cal. Const., art. XIV, §§ 1, 4*].

For references to related Pleading and Practice chapters, see *§ 195.10*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should show that the action taken by the agency is not reasonably necessary to effectuate the agency's primary, legitimate regulatory purposes. See Comments under § 195.10[2][b] for further discussion.

[3] Discussion of Authorities

[a] Exercise of Judicial Power

The facts and procedural background of ***Strumsky v. San Diego County Employees Retirement Assn.*** *(1974) 11 Cal. 3d 28, 112 Cal. Rptr. 805, 520 P.2d 29* are *set forth in § 195.11[3]*. In *Strumsky*, the Supreme Court noted that Cal. Const., art. VI disposes of all judicial power not expressly disposed of elsewhere in the California Constitution (*11 Cal. 3d 28, 42*).

[b] Test for Constitutionality

In ***Walnut Creek Manor v. Fair Employment & Housing Com.*** *(1991) 54 Cal. 3d 245, 284 Cal. Rptr. 718, 814 P.2d 704* , a African-American male filed a complaint of housing discrimination with the Fair Employment and Housing Commission. An administrative law judge awarded the complainant, among other damages, $1,500 in unspecified

compensatory damages. On consideration of additional argument, the Commission found that complainant had been discriminated against on the basis of marital status as well as race, and awarded him, among other damages and fees, $50,000 in compensatory damages for emotional distress. On petition for writ of administrative mandate on issues unrelated to the judicial powers doctrine, the trial court remanded the case to the Commission, and all parties appealed. The court of appeal held, on the issue of agency usurpation of judicial power, that *Gov. Code § 12987* of the Fair Employment and Housing Act (*Gov. Code § 12900 et seq.*) authorizes the Commission to award unlimited compensatory damages for housing discrimination. However, the court held the award of general compensatory damages for emotional distress to be an unconstitutional exercise of judicial power by a nonjudicial body in violation of the judicial powers clause of *Cal. Const., art. VI, § 1*.

The California Supreme Court affirmed the appellate court's ruling on this issue, modifying the judgment with directions to order the superior court to modify its writ to strike the award of compensatory damages for emotional distress (*54 Cal. 3d 245, 273*). In affirming as modified, the Court applied the test, first articulated in *McHugh v. Santa Monica Rent Control Bd. (1989) 49 Cal. 3d 348, 261 Cal. Rptr. 318, 777 P.2d 91* , and set forth in the discussion of *McHugh, below*, for determining whether an administrative agency's award of general compensatory damages violates the judicial powers clause (*54 Cal. 3d 245, 255-256*). Under the first, or substantive, prong of the test, the Court initially inquires as to whether the award is authorized by legislation and is reasonably necessary to accomplish the administrative agency's regulatory purposes. Next, the Court closely scrutinizes the agency's asserted regulatory purposes to ascertain whether the award is merely incidental to a proper, primary regulatory purpose, or whether it is in reality an attempt to transfer determination of a traditional common-law claim from the courts to the agency whose primary purpose is the processing of that type of claim (*54 Cal. 3d 245, 256*). Under the second, or procedural, prong of the test, the Court ascertains whether judicial power remains ultimately with the courts through the power of judicial review (*54 Cal. 3d 245, 265*). Noting *McHugh's* express rejection of the proposition that an agency may exercise all manner of judicial-like power on the simple condition that judicial review of the administrative decision remains available, the Court found the Commission's award of compensatory damages for emotional distress in violation of the judicial powers clause. Even though the award satisfied the second prong of the *McHugh* test, it failed the first prong of the test (*54 Cal. 3d 245, 264-267*).

In ***McHugh v. Santa Monica Rent Control Bd.*** *(1989) 49 Cal. 3d 348, 261 Cal. Rptr. 318, 777 P.2d 91* , two tenants filed an administrative complaint, pursuant to a city charter amendment, alleging that a landlord had overcharged them on rent. After a hearing officer made initial determinations and orders, the parties appealed to the city's rent control board. The board held that the tenants had been overcharged, and awarded restitution of excess rent as well as treble damages. The board expressly authorized one of the tenants to withhold excess rent from future rent payments, and the board's order further stated that the withheld amounts would not form the basis for an unlawful detainer proceeding based on non-payment of rent. The landlord filed a petition for writ of mandate under *Code Civ. Proc. § 1094.5*, seeking to compel the rent control board to set aside its decision on the ground that administrative adjudication of "excess rents" violated the judicial powers clause of the California Constitution (*Cal. Const., art. VI, § 1*). After a hearing, the trial court granted the landlord's motion for summary judgment and entered judgment granting the petition for writ of mandate. It issued a peremptory writ ordering the rent control board to vacate its decisions regarding the two tenants. The trial court declared invalid a provision in the charter amendment that permitted administrative adjudication of excess rents, noting that the provision required the board to exercise judicial powers that fell within the ambit of *Cal. Const., art. VI, § 1*. The rent control board appealed.

The California Supreme Court reversed the judgment, but ordered the trial court to issue a new writ directing the board to reduce its awards to eliminate the treble damages (*49 Cal. 3d 348, 379, 386)* . The Court also directed that enforcement of future restitution orders of the rent control board be stayed so that parties contesting such orders are afforded an opportunity to seek judicial relief before the orders actually take effect (*49 Cal. 3d 348, 377 n.44, 386*). The Court concluded that the contested charter amendment provision was constitutionally infirm in that it (1) authorized the rent control board to award treble damages and (2) permitted orders awarding restitution to become effective before there was an opportunity for the court to decide whether to stay the challenged order pending review of the

administrative decision by writ of mandate (*49 Cal. 3d 348, 386)* . The Court adopted a two-part test for determining whether an agency's acts of judicial nature constitute an unconstitutional exercise of judicial powers: an administrative agency may constitutionally hold hearings, determine facts, apply the law to those facts, and order relief, including certain types of monetary relief, so long as (1) the activities are authorized by statute or legislation and are reasonably necessary to effectuate the administrative agency's primary, legitimate regulatory purposes, and (2) the essential judicial power (that is, the power to make enforceable binding judgments) remains ultimately in the courts, through review of agency determinations (*49 Cal. 3d 348, 359, 372, 374*). The Court found that an administrative order directing restitution of excess rent would be permissible under the test, but that the board's actual order, assessing treble damages and directing the immediate withholding of money that would otherwise be owed, did not meet the test (*49 Cal. 3d 348, 375-379*).

[c] Treble Damages

The facts and procedural background of ***McHugh v. Santa Monica Rent Control Bd.*** *(1989) 49 Cal. 3d 348, 261 Cal. Rptr. 318, 777 P.2d 91* are discussed in [b], *above*. In *McHugh*, the Supreme Court concluded that the rent control board's imposition of treble damages pursuant to the city charter amendment violated the judicial powers clause (*Cal. Const., art. VI, § 1*) (*49 Cal. 3d 348, 386*). The Court found that the agency's assessment of treble damages violated the first prong of the Court's test for constitutionality, which requires that the activity in question be reasonably necessary to effectuate the administrative agency's primary, legitimate regulatory purpose (*49 Cal. 3d 348, 372, 378-379*). The Court noted that administrative agencies regularly exercise a range of powers designed to induce compliance with their regulatory authority (such as the imposition of fines or penalties) and there is no reason to believe that such options would be insufficient under the circumstances of the case (*49 Cal. 3d 348, 378-379*). More significant to the Court, however, was its belief that the power to award damages would pose a risk of producing arbitrary, disproportionate results that would magnify, beyond acceptable risks, the possibility of arbitrariness inherent in any scheme of administrative adjudication (*49 Cal. 3d 348, 379*).

[d] Immediately Effective Restitution Orders

The facts and procedural background of ***McHugh v. Santa Monica Rent Control Bd.*** *(1989) 49 Cal. 3d 348, 261 Cal. Rptr. 318, 777 P.2d 91* are discussed in [3][b], *above*. In *McHugh*, the Supreme Court concluded that the rent control board's authorization to one tenant to withhold overpaid rent immediately, pursuant to a city charter amendment, violated the judicial powers clause (*Cal. Const., art. VI, § 1*) (*49 Cal. 3d 348, 377*). The Court found that the agency's authorization to the tenant violated the second prong of the Court's test for constitutionality, which requires that the activity in question not usurp the power of the courts to make enforceable binding judgments through the review of agency determinations (*49 Cal. 3d 348, 372, 376-377)* . The Court noted that under the charter amendment, the board could direct a tenant to withhold rent money otherwise due before the landlord had even the opportunity to obtain judicial review by petition for writ of mandate and a stay of the board's order (*49 Cal. 3d 348, 376*).

[e] Compensatory Damages for Emotional Distress

The facts and procedural background of ***Walnut Creek Manor v. Fair Employment & Housing Com.*** *(1991) 54 Cal. 3d 245, 284 Cal. Rptr. 718, 814 P.2d 704* , are discussed in Test for Constitutionality, *above*. In that case, the Supreme Court held that a $50,000 award by the Fair Employment and Housing Commission of compensatory damages for emotional distress to an individual found to have been the victim of housing discrimination based on race and marital status violated the judicial powers clause of the California Constitution (*Cal. Const., art. VI, § 1*) (*54 Cal. 3d 245, 257, 265*). The Court found that the Commission's award violated the first prong of the Court's test for constitutionality, in that the award was neither reasonably necessary to accomplish nor merely incidental to the Commission's primary regulatory purposes (*54 Cal. 3d 245, 264*). In so ruling, the Court invalidated *Gov. Code § 12987* of the Fair Employment and Housing Act (*Gov. Code § 12900 et seq.*) under the judicial powers clause insofar as that statute authorizes the award of nonquantifiable general compensatory damages for emotional distress and other intangible

injury (*54 Cal. 3d 245, 267*).

[4] Additional Authorities

[a] Exercise of Judicial Power

In *Lance Camper Mfg. Corp. v. Republic Indem. Co. (1996) 44 Cal. App. 4th 194, 51 Cal. Rptr. 2d 622* , an employer brought an action against its workers' compensation insurer for breach of contract and bad faith. The trial court granted the insurer's motion for judgment on the pleadings, concluding that an employer must pursue administrative review before suing its insurer for breach of contract. The court of appeal disagreed, ruling that the Insurance Commissioner's supervisory and regulatory power over the insurance industry does not give him power to adjudicate all insurance disputes unless persuasive legislative intent to grant this authority can be identified (*44 Cal. App. 4th 194, 199*). The court noted that the California Supreme Court has acknowledged in *Moradi-Shalal v. Fireman's Fund Ins. Companies (1988) 46 Cal. 3d 287, 250 Cal. Rptr. 116, 758 P.2d 58* that private civil actions against insurers are not foreclosed by the powers of the Insurance Commissioner. Since the insured is not challenging rates as being unfair and contrary to administrative regulations, but rather is challenging the insurer's claims handling practices, the insured's claim is not one that is subject to administrative review (*44 Cal. App. 4th 194, 203*). The court thus reversed the trial court order of dismissal of the action.

California Points & Authorities

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Volume 19 Chapters 190-195 PRODUCTS LIABILITY---to---PUBLIC ADMINISTRATIVE LAW
CHAPTER 195 PUBLIC ADMINISTRATIVE LAW
PART II. FORMS
A. Petition for Writ of Mandate
1. Grounds Supporting Petition Generally

19-195 California Points & Authorities § 195.19

§ 195.19 Writ of Mandate--Petitioner May Recover Attorney's Fees

[1] FORM Writ of Mandate--Petitioner May Recover Attorney's Fees

[*This form should be combined with a memorandum generally supporting a petition for administrative mandate. See § 195.10.*]

THE COURT SHOULD AWARD PETITIONER HIS/HER ATTORNEY'S FEES IF THE PETITIONER PREVAILS, BECAUSE THE _____ [ORDER *or* DECISION] WAS THE RESULT OF ARBITRARY OR CAPRICIOUS ACTION OR CONDUCT BY _____ [*identify public agency or official*], A _____ [PUBLIC AGENCY *or* PUBLIC OFFICIAL IN HIS/HER OFFICIAL CAPACITY], AND THE PETITIONER IS PERSONALLY OBLIGATED TO PAY THOSE FEES.

A. Recovery of Attorney's Fees. In any civil proceeding for review of a final administrative adjudicatory order or decision (except one made by the State Board of Control), when it is shown that the order or decision was the result of arbitrary or capricious action or conduct by a public agency or a public official in his or her official capacity, the complainant, if he or she prevails, may collect reasonable attorney's fees, computed at $100 per hour, but not to exceed $7,500, when he or she is personally obligated to pay those fees (*Gov. Code § 800*; *Zuehlsdorf v. Simi Valley Unified School District (2007) 148 Cal. App. 4th 249, 255-256, 55 Cal. Rptr. 3d 467* ; *Abshear v. Teachers' Retirement Board (1991) 231 Cal. App. 3d 1629, 1638, 282 Cal. Rptr. 833*).

[*Optional*] **B. Fees May Be Recovered Without Formal Hearing.** A denial of rights resulting from an administrative proceeding is no less because the denial did not follow a formal administrative hearing, nor would the attorney's fees and costs for seeking review be any less, and thus attorney's fees may be allowed for review of administrative proceedings when there was no formal administrative hearing (*Forrest v. Trustees of Cal. State University & Colleges (1984) 160 Cal. App. 3d 357, 366-368, 206 Cal. Rptr. 595* ; *A.B.C. Federation of Teachers v. A.B.C. Unified Sch. Dist. (1977) 75 Cal. App. 3d 332, 342, 344-345, 142 Cal. Rptr. 111*).

[*Optional*] **C. Arbitrary or Capricious Action or Conduct.** Arbitrary or capricious action or conduct encompasses action or conduct that is not supported by a fair or substantial reason, shows a stubborn insistence on following unauthorized conduct, or amounts to a bad-faith legal dispute (*Abshear v. Teachers' Retirement Board (1991) 231 Cal. App. 3d 1629, 1638, 282 Cal. Rptr. 833* ; *Cerini v. City of Cloverdale (1987) 191 Cal. App. 3d 1471, 1481, 237 Cal. Rptr. 116*).

[*Optional*] **D. Fees to Association Complaining on Behalf of Members.** An award of attorney's fees to an association complaining on behalf of its members is authorized if the association is obligated to pay the fees (*Redondo Beach Police Officers Assn. v. City of Redondo Beach (1977) 68 Cal. App. 3d 595, 596, 597, 137 Cal. Rptr. 384*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for writ of mandate, or an appellate brief, for review of a final administrative adjudicatory order or decision, when the petition or brief contends that the order or decision was the result of arbitrary or capricious action or conduct by the respondent and that the petitioner is personally obligated to pay attorney's fees in some amount up to $7,500 [*Gov. Code § 800*].

The request for attorney's fees should be raised in the trial court, because the issue of arbitrary or capricious conduct is one of fact and, as such, inextricably related to the merits of the case [*Plumbing etc. Employers Council v. Quillin (1976) 64 Cal. App. 3d 215, 222-223, 134 Cal. Rptr. 332]* . Given the factual nature of the issue, *Gov. Code § 800* does not permit a determination of the issue by the appellate court when the issue was not raised below. Moreover, the statute certainly does not permit a determination of the issue by the trial court after an appeal has become final [*Plumbing etc. Employers Council v. Quillin (1976) 64 Cal. App. 3d 215, 225, 134 Cal. Rptr. 332]* .

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See Comments under § 195.10[2][b] for further discussion.

[3] Discussion of Authorities

[a] Recovery of Attorney's Fees

Gov. Code § 800 provides that in any civil action to appeal or review the award, finding, or other determination of any administrative proceeding under the Government Code or under any other provision of state law, except actions resulting from actions of the State Board of Control, when it is shown that the award, finding, or other determination of the proceeding was the result of arbitrary or capricious action or conduct by a public entity or an officer thereof in his or her official capacity, the complainant, if he or she prevails in the civil action, may collect reasonable attorney's fees, computed at $100 per hour, but not to exceed $7,500, when he or she is personally obligated to pay the fees, from the public entity, in addition to any other relief granted or other costs awarded.

In ***Zuehlsdorf v. Simi Valley Unified School District*** *(2007) 148 Cal. App. 4th 249, 255-256, 55 Cal. Rptr. 3d 467* , plaintiff Jessica Zuehlsdorf was a high school sophomore who transferred to the defendant school district from a private school. Zuehlsdorf had played varsity basketball at the private school and wished to play varsity soccer in the defendant school district. Under the California Interscholastic Federation requirements, Zuehlsdorf could not play varsity basketball at the public school because she had participated in that sport at the private school. She was, however, permitted to play any other varsity level sport at the public school, including varsity soccer. Zuehlsdorf tried out for varsity soccer and made the team. Before her first game, Zuehlsdorf's coach told her she could not participate. Zuehlsdorf filed a petition for writ of mandate seeking a restraining order enjoining defendants from preventing her

from playing varsity soccer. The school district acknowledged that Zuehlsdorf was eligible to play varsity soccer under CIF rules, but claimed that the CIF permitted them to enact more stringent regulations concerning eligibility. Thus, the school district decided that Zuehlsdorf was ineligible to play varsity soccer for one calendar year upon her enrollment within that league. The school district held a special meeting to consider Zuehlsdorf's appeal and reaffirmed its decision as to Zuehlsdorf's ineligibility.

The trial court granted a writ of mandate and temporary restraining order to reinstate Zuehlsdorf in the athletic program. The trial court awarded Zuehlsdorf $6,344 in attorney's fees pursuant to *Gov. Code § 800*. The school district appealed the attorney's fees award, arguing that the court erred because there was no factual finding that it acted arbitrarily and capriciously.

The court of appeal disagreed. It noted that the trial court issued a detailed written decision concluding that the school district's exclusion of Zuehlsdorf, based on their own rule whose terms they could not define, was "illogical and capricious." The trial court had observed that, if the rule was interpreted as the defendants suggested, a student would never know if he or she was qualified to participate. Contrary to the school district's argument, the court of appeal held that the trial court made a clear factual finding that the district's conduct was capricious (*148 Cal. App. 4th 249, 256)* .

In ***Abshear v. Teachers' Retirement Board*** *(1991) 231 Cal. App. 3d 1629, 282 Cal. Rptr. 833* , plaintiff sought a disability allowance from defendant board after a knee injury permanently prevented her from working as a physical education teacher. The board denied her application, concluding that she had sufficient college education units to obtain a teaching credential in subjects other than physical education. After a hearing, an administrative law judge reached the same decision, and the board adopted that decision. Plaintiff then filed a petition for a writ of mandate in superior court. The superior court issued the writ, commanding the board to either grant disability benefits to plaintiff or require her to participate in a rehabilitation program to enable her to perform classroom teaching duties within a reasonable time. In so doing, the superior court also awarded plaintiff her attorney's fees in the amount of $1,500. The board appealed from the judgment.

The court of appeal affirmed the superior court's judgment and award of attorney's fees. Furthermore, the appellate court ordered that plaintiff was entitled to recover her attorney's fees on appeal (*231 Cal. App. 3d 1629, 1639*). In so ruling, the court held that the board's decision not to grant plaintiff a disability allowance and not to rehabilitate her for classroom teaching was arbitrary and capricious in that it was not supported by a fair and substantial reason (*231 Cal. App. 3d 1629, 1639*). The court based its ruling on the facts that even though plaintiff had completed college-level course work in various subjects for which a teaching credential could be issued, her course work was done nearly 30 years earlier and, not surprisingly, she could remember nothing of the course contents. The court noted that, given these facts, even though plaintiff might be eligible to obtain a credential in one of those subjects, she would still not be qualified to teach them because there was no evidence that she possessed any classroom teaching skills or any transmittable knowledge of those subjects (*231 Cal. App. 3d 1629, 1635, 1637*). In light of these facts, the board's decision directly contradicted the legislative mandate that teacher credentialing be based not on the completion of course work alone but on specified additional criteria which the board knew plaintiff could not meet (*231 Cal. App. 3d 1629, 1636-1637*).

[b] Fees May Be Recovered Without Formal Hearing

In ***Forrest v. Trustees of Cal. State University & Colleges*** *(1984) 160 Cal. App. 3d 357, 206 Cal. Rptr. 595* , plaintiff was a probationary employee within defendant's system. After he received notice of his termination for failure to pass his probationary period as a custodian, he filed a request for a grievance hearing. Plaintiff's grievance was summarily denied in a letter without any formal administrative hearing on the ground that it was untimely filed. Plaintiff then filed a petition for a writ of mandate to compel defendants to process his grievance and pay him back salary from the date of his dismissal. The trial court granted the petition and judgment was entered directing defendants to process the grievance, pay plaintiff back salary, and allow him reasonable attorney's fees and costs. Defendants appealed.

The court of appeal affirmed the issuance of the writ of mandate and the award of attorney's fees and costs. Defendants claimed that *Gov. Code § 800*, the basis for the award of attorney's fees, did not apply, as the writ was not an action to review an administrative proceeding. The court disagreed and distinguished the cases cited by defendants. *Gov. Code § 800* was not meant to be interpreted narrowly. The language clearly indicated a legislative intent to allow a prevailing petitioner attorney's fees for reviewing arbitrary or capricious action or conduct by a public entity or officer thereof for any award, finding, or other determination of any administrative proceeding. Denial of plaintiff's grievance resulted from an administrative decision of some public officer which occurred necessarily at an administrative proceeding. His alleged denial of rights was no less because the denial did not follow a full-blown administrative hearing, nor were the attorney's fees and costs for seeking a review any less. *Gov. Code § 800* provides fees and costs for review by a civil action of an administrative determination by a public entity, and there is no rationale for limiting it to appeal or review from a formal administrative hearing. It is a remedial statute designed to enable employees to seek relief in the courts against arbitrary or capricious action by public entities or officers, and as such, should be liberally construed (*160 Cal. App. 3d 357, 366-368*).

In ***A.B.C. Federation of Teachers v. A.B.C. Unified Sch. Dist.*** *(1977) 75 Cal. App. 3d 332, 142 Cal. Rptr. 111* , six teachers were hired by defendant district to teach during the 1975-76 school year at an annual salary plus a stipend for extra service assignments. During the school year, the district notified the teachers by letter that, pursuant to a newly-amended school board policy deleting the stipend, they would not receive stipends. The teachers then filed a grievance in accordance with district procedure demanding payment of the stipends. The district sent them a letter denying their grievance. The teachers then filed a petition for a writ of mandate, demanding payment of the stipends and characterizing the district's action as arbitrary and capricious and an abuse of discretion. The trial court found mandate to be an appropriate remedy for the teachers and granted their petition. It found the district's action to be arbitrary and capricious and awarded them attorney's fees. The district appealed.

The court of appeal affirmed the judgment of the trial court. In so doing, it held that mandate was an appropriate remedy for the teachers. While not discussing the relationship among issues of the propriety of the remedy, the absence of a formal administrative hearing, and the award of attorney's fees, the court found the district had an official duty to pay the stipends. This duty arose out of the district's legal duty not to reduce teachers' salaries after the beginning of the school year, and constituted an obligation imposed by provisions of the Education Code and district salary schedules and policies (*75 Cal. App. 3d 332, 342*). The court also held the award of attorney's fees to be justified, in that the law was well settled that teachers' salaries could not be reduced retroactively after the beginning of the school year. Therefore, the district's conduct was arbitrary and capricious in that it manifested a stubborn insistence on following an unauthorized course of action (*75 Cal. App. 3d 332, 343-344*). In upholding the award of attorney's fees to the teachers, the appellate court further found that the trial court made a specific finding of fact, supported by testimony at trial on the mandate petition, that the teachers were personally obligated to pay their attorney's fees (*75 Cal. App. 3d 332, 344*).

[c] Arbitrary or Capricious Action or Conduct

The facts and procedural background of ***Abshear v. Teachers' Retirement Board*** *(1991) 231 Cal. App. 3d 1629, 282 Cal. Rptr. 833* are discussed in Recovery of Attorney's Fees, *above*. In that case, the court of appeal found the Teachers' Retirement Board decision arbitrary and capricious because it directly contradicted the legislative mandate that teacher credentialing be based not on the completion of course work alone but on specified additional criteria that it knew plaintiff could not meet (*231 Cal. App. 3d 1629, 1636-1637*). As such, the court held the decision unsupported by a fair and substantial reason. The court also held plaintiff justified to an award of attorney's fees in the superior court and on appeal (*231 Cal. App. 3d 1629, 1639*). In support of its ruling, the court held an administrative agency's or public official's action to be arbitrary and capricious if it encompasses conduct that is not supported by a fair or substantial reason, shows a stubborn insistence on following unauthorized conduct, or amounts to a bad-faith legal dispute (*231 Cal. App. 3d 1629, 1638*).

In *Cerini v. City of Cloverdale (1987) 191 Cal. App. 3d 1471, 237 Cal. Rptr. 116* , the city council of defendant city terminated plaintiff city police officer. Plaintiff then exercised his right to have a city appeals board review the city council's decision. After plaintiff exercised the right, but before the hearing, the city council reduced the board's power to make binding decisions to the power to find facts only. The city council then rejected the board's finding that the officer's actions did not impugn his job capabilities, and voted to uphold his termination despite the board's recommendation that he be reinstated with back pay. Plaintiff sought review by way of administrative mandate, seeking a writ to command the city to comply with the board's decision to reinstate him. The trial court entered judgment denying the petition and plaintiff appealed from that judgment.

The court of appeal reversed the judgment and remanded the case to the trial court with directions to issue the writ and award plaintiff his attorney's fees under *Gov. Code § 800*. In so ruling, the court held defendant's conduct leading up to and including its decision to uphold plaintiff's discharge constituted an unjustifiable reaction, unsupported by substantial reason or fact, to plaintiff's attempt to pursue his right of appeal. The court found the city council's eleventh-hour resolution to reduce the appeals board's authority, in violation of the meet-and-confer requirements of the Meyers-Milias-Brown Act (*Gov. Code § 3500 et seq.*), and its decision to uphold plaintiff's termination despite the board's ruling that the sustained charges did not impugn his professional ability and that he be reinstated to be arbitrary and capricious conduct within the meaning of *Gov. Code § 800* (*191 Cal. App. 3d 1471, 1481-1482*). In support of its decision, the court held recovery of attorney's fees to be proper when an administrative agency or public official makes an unsubstantiated determination or engages in conduct not supported by substantial reason, engages in a bad-faith legal dispute, or follows a course of action contrary to law (*191 Cal. App. 3d 1471, 1481*).

[d] Fees to Association Complaining on Behalf of Members

In ***Redondo Beach Police Officers Assn. v. City of Redondo Beach*** *(1977) 68 Cal. App. 3d 595, 137 Cal. Rptr. 384* , defendant city, to carry out the provisions of the Meyers-Milias-Brown Act (*Gov. Code § 3500*), included three city police captains in an employee representation unit comprised of city employees who were not peace officers. The captains subsequently requested recognition as a separate bargaining unit within plaintiff association, which was comprised of all peace officers from the rank of lieutenant and below. The city refused the request, and the association sought a writ of mandate compelling the city to place them in plaintiff association. The trial court issued a peremptory writ in plaintiff's favor and awarded attorney's fees to the association. The city appealed from the judgment issuing the writ.

The court of appeal affirmed the judgment of the trial court and the award of attorney's fees to plaintiff association. Although the court stated that the award of fees was amply justified (*68 Cal. App. 3d 595, 597*), it did not articulate a rationale for the award. In support of its ruling, the court found that Gov. Code. § 3508, a provision of the Meyers-Milias-Brown Act, clearly entitled all peace officers to representation by an employee representational group from which other types of employees are excluded. Additionally, the court cited case law holding unequivocally the same (*68 Cal. App. 3d 595, 597*). Finally, the court described case law cited by defendant in support of its decision as "quite unhelpful" (*68 Cal. App. 3d 595, 598*). The court further noted that there was no merit to defendant's contention that plaintiff association had no standing to sue and was not a real party in interest (*68 Cal. App. 3d 595, 599*). In light of these points raised by the court, counsel could argue that defendant's conduct was arbitrary and capricious in that it constituted a course of conduct contrary to law [*see, e.g.,* *Cerini v. City of Cloverdale (1987) 191 Cal. App. 3d 1471, 1481, 237 Cal. Rptr. 116* , discussed in [c], *above*].

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CHAPTER 195 PUBLIC ADMINISTRATIVE LAW
PART II. FORMS
A. Petition for Writ of Mandate
1. Grounds Supporting Petition Generally

19-195 California Points & Authorities §§ 195.20-195.29

[Reserved]

§§ 195.20[Reserved]

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A. Petition for Writ of Mandate
2. APA Adjudication "Bill of Rights"

19-195 California Points & Authorities § 195.30

§ 195.30 Violation of Administrative Adjudication "Bill of Rights"--General Form

[1] FORM Violation of Administrative Adjudication "Bill of Rights"--General Form

[*This form should be combined with a memorandum generally supporting a petition for administrative mandate. See § 195.10.*]

THE COURT SHOULD SET ASIDE THE _____ [DECISION *or* ORDER] OF _____ [*identify agency*] ON THE GROUND THAT PETITIONER WAS DENIED A FAIR TRIAL, BECAUSE THE ADJUDICATIVE PROCEEDINGS FAILED TO MEET MINIMUM DUE PROCESS AND PUBLIC INTEREST REQUIREMENTS.

A. Inquiry on Review Extends to Whether There Was a Fair Trial. The inquiry in a case in which a writ is issued for the purpose of inquiring into the validity of any final administrative order or decision under *Code of Civil Procedure Section 1094.5(a)* extends to questions whether there was a fair trial (*Code Civ. Proc. § 1094.5(b)*).

B. Minimum Standards Stated in Adjudication "*Bill of Rights*." *Government Code Section 11425.10* specifies the minimum due process and public interest requirements that must be satisfied in a public agency hearing that is subject to *Government Code Section 11400 et seq.*, [including a formal hearing under *Government Code Section 11500 et seq.*] (25 Cal. L. Revision Comm'n Reports 711, Comment to 1995 enactment of *Gov. Code § 11425.10*).

[*As appropriate, add specific points and authorities supporting petition for administrative mandate based on violation of Gov. Code § 11425.10. See § 195.31 et seq.*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for writ of mandate for review of a final administrative

adjudicatory order or decision on the ground that the petitioner was deprived of a fair hearing because the respondent failed to comply with the requirements stated in the Administrative Adjudication "*Bill of Rights*" set out in the Administrative Procedure Act (APA; *Gov. Code § 11340 et seq.*), which became operative July 1, 1997 [*see Code Civ. Proc. § 1094.5(b)*; 25 Cal. L. Revision Comm'n Reports 711, Comment to 1995 enactment of *Gov. Code § 11425.10*].

This form should be combined with a memorandum generally supporting a petition for administrative mandate [*see § 195.10* et seq.]. As appropriate, this form should be combined with specific points and authorities supporting petition for administrative mandate based on violation of *Gov. Code § 11425.10* [*see § 195.31* et seq.].

With appropriate modifications this memorandum may be used to oppose a demurrer to the petition or a motion for judgment on the pleadings in favor of the respondent.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Any statement of fact should be supported by adequate reference to evidence admitted or otherwise cognizable by the court. See also *Comments in § 195.11[2][b]*.

[c] Related Pleading and Practice Forms

For further discussion related to pleading requirements of a petition for writ of mandate to review an administrative decision, see California Forms of Pleading and Practice, Ch. 474C, *Procedures in Reviewing Agency Decisions* (Matthew Bender). For further discussion relating to the APA's administrative adjudication "*Bill of Rights*," see California Forms of Pleading and Practice, Ch. 473, *Public Agency Adjudication* (Matthew Bender).

[3] Discussion of Authorities

[a] Inquiry on Review Extends to Whether There Was a Fair Trial

The inquiry in a case in which a writ is issued for the purpose of inquiring into the validity of any final administrative order or decision under ***Code of Civil Procedure Section 1094.5(a)*** extends to questions whether the respondent has proceeded without or in excess jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion [*Code Civ. Proc. § 1094.5(b)*].

Chapter 4.5 (*Gov. Code § 11400 et seq.*), that portion of the Administrative Procedure Act which includes the administrative adjudication *bill of rights* provisions, applies generally to agency proceedings to the same extent as *Code Civ. Proc. § 1094.5(a)*, which states that *Code Civ. Proc. § 1094.5* applies only when an agency has issued a final decision "as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the [state agency]" [*see* 25 Cal. L. Rev. Comm. Reports 55 (1995)].

[b] Minimum Standards Stated in Adjudication "Bill of Rights"

Gov. Code § 11425.10 specifies the minimum due process and public interest requirements that must be satisfied in an agency hearing that is subject to *Gov. Code § 11400 et seq.*, including one conducted under the formal hearing provisions of the Administrative Procedure Act (*Gov. Code § 11500 et seq.*) [25 Cal. L. Revision Comm'n Reports 711, Comment to 1995 enactment of *Gov. Code § 11425.10* (operative July, 1, 1997)].

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19-195 California Points & Authorities § 195.31

§ 195.31 Violation of Administrative Adjudication "Bill of Rights"--Petitioner Denied of Notice or Opportunity to Be Heard

[1] FORM Violation of Administrative Adjudication "Bill of Rights"--Petitioner Denied of Notice or Opportunity to Be Heard

[*This form should be combined with a memorandum generally supporting a petition for writ of administrative mandamus to set aside judgment or order on ground violation of Gov. Code § 11425.10. See § 195.30.*]

RESPONDENT DENIED PETITIONER A FAIR HEARING BY FAILING TO PROVIDE HIM/HER WITH _____ [NOTICE *and/or* OPPORTUNITY TO BE HEARD].

Petitioner Is Entitled to Notice and Opportunity to Be Heard. The agency must give the person to which the agency action is directed notice and an opportunity to be heard, including the opportunity to present and rebut evidence (*Gov. Code § 11425.10(a)(1)*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for writ of mandate for review of a final administrative adjudicatory order or decision, when the petition alleges denial of a fair trial based on violation of a person's rights under *Gov. Code § 11425.10(a)*, the APA's administrative adjudication "*Bill of Rights*" (operative July, 1, 1997). The basis of this form is that the petitioner was denied notice or opportunity to be heard [*Gov. Code § 11425.10(a)(1)*].

This form should be combined with a memorandum generally supporting a petition for writ of administrative mandamus to set aside judgment or order on ground violation of *Gov. Code § 11425.10* [*see § 195.30*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel would cite facts set forth in the petition relating to the agency's failure to give notice, or failure to give the petitioner a notice to be heard. See also Comments under § 195.30[2][b].

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19-195 California Points & Authorities § 195.32

§ 195.32 Violation of Administrative Adjudication "Bill of Rights"--Petitioner denied Copy of Governing Procedure

[1] FORM Violation of Administrative Adjudication "Bill of Rights"--Petitioner denied Copy of Governing Procedure

[*This form should be combined with a memorandum generally supporting a petition for writ of administrative mandamus to set aside judgment or order on ground violation of Gov. Code § 11425.10. See § 195.30.*]

RESPONDENT DENIED PETITIONER A FAIR HEARING BY FAILING TO MAKE AVAILABLE TO HIM/HER A COPY OF THE GOVERNING PROCEDURE.

Petitioner Is Required to Receive Copy of Governing Procedure. The agency must make available to the person to the person to which the agency action is directed a copy of the governing procedure, including a statement whether *Gov. Code § 11500 et seq.* applies to the proceeding (*Gov. Code § 11425.10(a)(2)*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for writ of mandate for review of a final administrative adjudicatory order or decision, when the petition alleges denial of a fair trial based on violation of a persons rights under *Gov. Code § 11425.10(a)*, the APA's administrative adjudication "*Bill of Rights*" (operative July 1, 1997). The basis of this form is that the petitioner was denied a copy of the governing procedure [*Gov. Code § 11425.10(a)(2)*].

This form should be combined with a memorandum generally supporting a petition for writ of administrative mandamus to set aside judgment or order on ground violation of *Gov. Code § 11425.10* [*see § 195.30*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel would refer to facts set forth in the petition in his or her argument relating to the failure to make the governing procedure available to the petitioner. See also Comments under § 195.30[2][b].

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19-195 California Points & Authorities § 195.33

§ 195.33 Violation of Administrative Adjudication "Bill of Rights"--Petitioner Denied Open Hearing

[1] FORM Violation of Administrative Adjudication "Bill of Rights"--Petitioner denied Copy of Governing Procedure

[*This form should be combined with a memorandum generally supporting a petition for writ of administrative mandamus to set aside judgment or order on ground violation of Gov. Code § 11425.10. See § 195.30.*]

RESPONDENT DENIED PETITIONER A FAIR HEARING BY FAILING TO CONDUCT A HEARING THAT IS OPEN TO PUBLIC OBSERVATION.

Petitioner Is Entitled to Open Hearing. The hearing must be open to public observation as provided in *Gov. Code § 11425.20* (*Gov. Code § 11425.10(a)(3)*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for writ of mandate for review of a final administrative adjudicatory order or decision, when the petition alleges denial of a fair trial based on violation of a persons rights under *Gov. Code § 11425.10(a)*, the APA's administrative adjudication "*Bill of Rights*" (operative July 1, 1997). The basis of this form is that the petitioner was denied an open hearing [*Gov. Code § 11425.10(a)(3)*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should refer to facts set forth in the petition showing that the hearing was not open to public observation as required by *Gov. Code §§ 11425.10(a)(3), 11425.10*. See also Comments under § 195.30[2][b].

[3] Discussion of Authorities

[a] Petitioner Is Entitled to Open Hearing

Gov. Code § 11425.20 requires a hearing open to public observation. The presiding officer may order closure or make other protective orders for specified purposes [*see Gov. Code § 11425.20(a)*]. The section also provides for hearings conducted by telephone, television, or other electronic means [*see Gov. Code § 11425.20(b)*].

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19-195 California Points & Authorities § 195.34

§ 195.34 Violation of Administrative Adjudication "Bill of Rights"--Agency Failed to Separate Between Adjudicative and Prosecutorial Functions

[1] FORM Violation of Administrative Adjudication "Bill of Rights"--Agency Failed to Separate Between Adjudicative and Prosecutorial Functions

[*This form should be combined with a memorandum generally supporting a petition for writ of administrative mandamus to set aside judgment or order on ground violation of Gov. Code § 11425.10. See § 195.30*].

RESPONDENT DENIED PETITIONER A FAIR HEARING BY FAILING TO SEPARATE THE ADJUDICATIVE FUNCTION FROM THE INVESTIGATIVE, PROSECUTORIAL, AND ADVOCACY FUNCTIONS WITHIN THE AGENCY.

Agency Must Separate Adjudicative and Prosecutorial Functions. The adjudicative function must be separated from the investigative, prosecutorial, and advocacy functions within the agency as provided in *Government Code Section 11425.30* (*Gov. Code § 11425.10(a)(4)*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for writ of mandate for review of a final administrative adjudicatory order or decision, when the petition alleges denial of a fair trial based on violation of a persons rights under *Gov. Code § 11425.10(a)*, the APA's administrative adjudication "*Bill of Rights*" (operative July 1, 1997). The basis of this form is that the agency failed to separate the adjudicative function from the investigative, prosecutorial, and advocacy functions within the agency as provided in *Gov. Code § 11425.30*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Therefore, counsel should refer to facts set forth in the petition showing that the presiding officer served, or was subject to a person who served, in an investigative, prosecutorial, or advocate capacity in the proceeding. See also Comments under § 195.30[2][b].

[3] Discussion of Authorities

[a] Agency Must Separate Adjudicative and Prosecutorial Functions

Gov. Code § 11425.30 forbids a person from serving as a presiding officer in an adjudicative proceeding if the person has served as an investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage, or if the person is subject to the authority, direction, or discretion, of a person who has served in any of those capacities [*see Gov. Code § 11425.30(a)*].

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19-195 California Points & Authorities § 195.35

§ 195.35 Violation of Administrative Adjudication "Bill of Rights"--Petitioner Denied Opportunity to Disqualify Presiding Officer

[1] FORM Violation of Administrative Adjudication "Bill of Rights"--Petitioner Denied Opportunity to disqualify Presiding Officer

[*This form should be combined with a memorandum generally supporting a petition for writ of administrative mandamus to set aside judgment or order on ground violation of Gov. Code § 11425.10. See § 195.30.*]

RESPONDENT DENIED PETITIONER A FAIR HEARING BY DENYING HIM/HER OF THE OPPORTUNITY TO DISQUALIFY THE PRESIDING OFFICER ON THE GROUND OF _____ [BIAS *and/or* PREJUDICE *and/or* INTEREST].

Presiding Officer Subject to Disqualification. The presiding officer is subject to disqualification for bias, prejudice, or interest as provided in *Government Code Section 11425.40* (*Gov. Code § 11425.10(a)(5)*; *Haas v. County of San Bernardino (2002) 27 Cal. 4th 1017, 1034, 119 Cal. Rptr. 2d 341, 45 P.3d 280* (possibility, even implicit, of future employment in exchange for favorable decisions creates an objective, constitutionally impermissible appearance and risk of bias)).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for writ of mandate for review of a final administrative adjudicatory order or decision, when the petition alleges denial of a fair trial based on violation of a persons rights under *Gov. Code § 11425.10(a)*, the APA's administrative adjudication "*Bill of Rights*" (operative July, 1, 1997). The basis of this form is that the agency denied the petitioner the opportunity to disqualify the presiding officer on the ground of bias, prejudice, and interest as provided in *Gov. Code § 11425.40* [*Gov. Code § 11425.10(a)(5)*; *but see Morongo Band of Mission Indians v. State Water Resources Control Board (2009) 45 Cal. 4th 731, 736-742, 88 Cal. Rptr. 3d*

610, 199 P.3d 1142 (no violation of due process when prosecuting agency attorney simultaneously served as adviser to agency on unrelated matter); *see also § 195.73*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also Comments under § 195.30[2][b].

[3] Discussion of Authorities

[a] Presiding Officer Subject to Disqualification

Under ***Gov. Code § 11425.40*** , the presiding officer is subject to disqualification for bias, prejudice, or interest in the proceeding [*Gov. Code § 11425.40(a)*]. Certain grounds are excluded under the statute [*see Gov. Code § 11425.40(b)*].

In ***Haas v. County of San Bernardino*** *(2002) 27 Cal. 4th 1017, 1034, 119 Cal. Rptr. 2d 341, 45 P.3d 280* , the California Supreme Court held that a temporary administrative hearing officer has a pecuniary interest requiring disqualification when the government unilaterally selects and pays the officer on an ad hoc basis and the officer's income from future adjudicative work depends entirely on the government's good will. The Court granted a petitioner's motion to disqualify the hearing officer when the officer was selected and paid for by the government, and when it appeared possible that she would be hired by the government in future cases only if she ruled in the government's favor. The Court held that the problem arises from the lack of specific statutory standards governing temporary hearing officers appointed by counties under *Gov. Code § 27724*, and that procedures like those set forth in the Administrative Procedure Act (*Gov. Code § 11340 et seq.*) are an adequate remedy.

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19-195 California Points & Authorities § 195.36

§ 195.36 Violation of Administrative Adjudication "Bill of Rights"--Petitioner Denied Proper Written Decision

[1] FORM Violation of Administrative Adjudication "Bill of Rights"--Petitioner Denied Proper Written Decision

[*This form should be combined with a memorandum generally supporting a petition for writ of administrative mandamus to set aside judgment or order on ground violation of Gov. Code § 11425.10. See § 195.30*].

RESPONDENT DENIED PETITIONER A FAIR HEARING BY DENYING HIM/HER OF A WRITTEN DECISION, BASED ON THE RECORD, WITH A STATEMENT OF THE FACTUAL AND LEGAL BASIS OF THE DECISION.

Agency Must Provide Proper Written Decision. The decision must be in writing, be based on the record, and include a statement of the factual and legal basis of the decision as provided in *Government Code Section 11425.50* (*Gov. Code § 11425.10(a)(6)*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for writ of mandate for review of a final administrative adjudicatory order or decision, when the petition alleges denial of a fair trial based on violation of a persons rights under *Gov. Code § 11425.10(a)*, the APA's administrative adjudication "*Bill of Rights*" (operative July, 1, 1997). The basis of this form is that the agency denied petitioner a fair hearing by denying him or her of a written decision, based on the record, with a statement of the factual and legal basis of the decision, as provided in *Gov. Code § 11425.50* [*Gov. Code § 11425.10(a)(6)*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, for example, counsel

would refer to defects in the written decision, pointing out how those defects fail to satisfy the statutory requirements for a written decision. See also Comments under § 195.30[2][b].

[3] Discussion of Authorities

[a] Agency Must Provide Proper Written Decision

Under ***Gov. Code § 11425.50*** , the decision must be in writing and include a statement of the factual and legal basis for the decision [*Gov. Code § 11425.50(b)*]. The statement of the factual basis for the decision must be based exclusively on the evidence of record in the proceeding and on matters officially noticed in the proceeding [*Gov. Code § 11425.50(c)*]. The statement may be in the language of, or by reference to the pleadings, but a mere repetition or paraphrase of the relevant statute or regulation is not sufficient unless it is accompanied by a concise and explicit statement of the underlying facts of record that support the decision [*Gov. Code § 11425.50(b)* (also providing requirements when decision based on credibility of witness)].

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19-195 California Points & Authorities § 195.37

§ 195.37 Violation of Administrative Adjudication "Bill of Rights"--Agency Relied on Decision Not Designated and Indexed as Precedent

[1] FORM Violation of Administrative Adjudication "Bill of Rights"--Agency Relied on Decision Not Designated and Indexed as Precedent

[*This form should be combined with a memorandum generally supporting a petition for writ of administrative mandamus to set aside judgment or order on ground violation of Gov. Code § 11425.10. See § 195.30.*]

RESPONDENT DENIED PETITIONER A FAIR HEARING BY RELYING ON A DECISION AS PRECEDENT THAT THE AGENCY HAS NOT DESIGNATED AND INDEXED AS PRECEDENT.

Agency Relied on Nondesignated Precedent Decision. A decision may not be relied on a precedent unless the agency designates and indexes the decision as precedent as provided in *Government Code Section 11425.60* (*Gov. Code § 11425.10(a)(7)*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for writ of mandate for review of a final administrative adjudicatory order or decision, when the petition alleges denial of a fair trial based on violation of a persons rights under *Gov. Code § 11425.10(a)*, the APA's administrative adjudication "*Bill of Rights*" (operative July 1, 1997). The basis of this form is that the agency relied on a decision that it has not designated and indexed as precedent, as provided in *Gov. Code § 11425.60* [*Gov. Code § 11425.10(a)(7)*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, for example, counsel

would refer to the specific portion of the decision that cites as legal basis a decision that has not been designated as precedent, and point out how the agency relied on that decision as precedent. See also Comments under § 195.30[2][b].

[3] Discussion of Authorities

[a] Agency Relied on Nondesignated Decision

Under ***Gov. Code § 11425.60*** , a decision may not be relied on a precedent unless the agency designates the decision as a precedent decision [*Gov. Code § 11425.60(a)*]. The section states the criteria for designating a decision as precedent, but provides that the agency's designation or failure to designate, is not subject to judicial review [*see Gov. Code § 11425.60(b)*].

[b] Additional Authorities

In *Corrales v. Bradstreet (2007) 153 Cal. App. 4th 33, 62 Cal. Rptr. 3d 440* , employees who sought payment for missed meal and rest periods under *Labor Code § 226.7* petitioned for a writ of mandate against the Labor Commissioner. The Commissioner sought to apply to all such claims, as a binding precedent decision, an administrative decision which held that *Labor Code § 226.7* payments constitute penalties rather than wages, thereby resulting in a shorter limitations period and smaller recoveries. The employees complained that the Commissioner violated statutory duties relating to timely processing of employee claims under *Labor Code § 98*, and improperly issued the precedent decision purporting to be binding in all *Labor Code § 98* hearings, in circumvention of rulemaking requirements of the Administrative Procedure Act (APA). The trial court denied the petition.

The court of appeal reversed. It held that *Labor Code § 98* hearings are not subject to the APA's administrative adjudication provisions, and therefore *Government Code § 11425.60* does not apply. Consequently, the designation of the administrative decision as a binding precedent was invalid, requiring reversal of the judgment (*153 Cal. App. 4th 33, 51)* .

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19-195 California Points & Authorities § 195.38

§ 195.38 Violation of Administrative Adjudication "Bill of Rights"--Agency Conducted Improper Ex Parte Communications

[1] FORM Violation of Administrative Adjudication "Bill of Rights"--Agency Conducted Improper Ex Parte Communications

[*This form should be combined with a memorandum generally supporting a petition for writ of administrative mandamus to set aside judgment or order on ground violation of Gov. Code § 11425.10. See § 195.30.*]

RESPONDENT DENIED PETITIONER A FAIR HEARING BY ENGAGING IN UNAUTHORIZED EX PARTE COMMUNICATIONS.

Agency Conducted Improper Ex Parte Communications. Ex parte communications are restricted pursuant to Government Code Section § 11430.10 et seq. (*Gov. Code § 11425.10(a)(8)*; *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (2006) 40 Cal. 4th 1, 10, 50 Cal. Rptr. 3d 585, 145 P.3d 462*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for writ of mandate for review of a final administrative adjudicatory order or decision, when the petition alleges denial of a fair trial based on violation of a person's rights under *Gov. Code § 11425.10(a)*, the APA's administrative adjudication "*Bill of Rights*" (operative July 1, 1997). The basis of this form is that the agency conducted improper ex parte communications [*Gov. Code § 11425.10(a)(8)*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel would refer to facts cited in the petition relating to communications with the presiding officer, arguing that those communications

constitute ex parte communications that are unauthorized under *Gov. Code § 11430.10 et seq.* See also Comments under § 195.30[2][b].

[3] Discussion of Authorities

[a] Agency Conducted Improper Ex Parte Communications

In ***Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board*** *(2006) 40 Cal. 4th 1, 50 Cal. Rptr. 3d 585, 145 P.3d 462* , the Department filed accusations against three licensees for various alleged violations of their liquor licenses. In each case, the Administrative Law Judge considered the parties' evidence and issued a proposed decision to the Department dismissing the accusation. After each administrative hearing but before the Department rendered its decision, the Department prosecutor prepared a report of hearing and apparently sent it to the Department's chief counsel, but not to any of the licensees. These reports were not part of the records, but the generic form provided space for the prosecutor to summarize the issues and the evidence presented at the hearing and to recommend a particular disposition of the case. In each case, the Department rejected the ALJ's proposed decision to dismiss the accusation and suspended the licensee's licenses.

The licensees appealed the Department's decisions to the Alcoholic Beverage Control Appeals Board (Board), arguing that the Department violated their due process rights because the decision maker, the Department's chief counsel, was the prosecutor's supervisor and a biased advocate rather than a neutral decision maker. The Board held that the reports were ex parte communications between the agency's decision maker or decision maker's advisor (the Department's chief counsel) and a party (the Department's prosecutor) prohibited under the APA, and the Department had violated the APA by failing to make the report part of the administrative record, notify the parties of its inclusion, and allow the licensees an opportunity to respond. The court of appeal affirmed.

The California Supreme Court looked at the case to determine how the APA and due process clause apply to a unitary administrative agency like the Department that combines prosecutorial and adjudicative functions in resolving administrative matters. It examined *Gov. Code § 11425.10* prohibition against ex parte communications and held that none of the exceptions to the rule permit prosecutors and other adversarial agency employees to have off-the-record contact about substantive issues with the agency head, or anyone to whom the agency head delegates decision-making authority, during the pendency of an adjudicative proceeding (*40 Cal. 4th 1, 10)* .

The Department argued that the APA limits ex parte communications only during the trial stage, not during the decision stage. After the close of the evidentiary hearing, according to the Department, the agency's prosecutor may secretly advise the agency head without violating the APA. The Court disagreed, based on the APA's legislative history (*40 Cal. 4th 1, 11-15)* . The Department expressed concern that a rule precluding contact between an agency prosecutor and a decision-maker would have dramatic consequences for agencies, requiring them to split and depriving agency heads of their subordinates' advice. The Court held that nothing about their interpretation of the APA required splitting agencies. It held that the Department could still function as a unitary agency, but that it must afford licensees fundamentally fair hearings by observing a limited internal separation of functions. It held that agency heads are free to speak with anyone in the agency and to solicit and receive advice from whomever they please, except the personnel who served as adversaries in a specific case (*40 Cal. 4th 1, 16)* .

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19-195 California Points & Authorities § 195.39

§ 195.39 Violation of Administrative Adjudication "Bill of Rights"--Petitioner Denied Language Assistance

[1] FORM Violation of Administrative Adjudication "Bill of Rights"--Petitioner Denied Language Assistance

[*This form should be combined with a memorandum generally supporting a petition for writ of administrative mandamus to set aside judgment or order on ground violation of Gov. Code § 11425.10. See § 195.30.*]

RESPONDENT DENIED PETITIONER A FAIR HEARING BY DEPRIVING HIM/HER OF LANGUAGE ASSISTANCE.

Petitioner Denied Language Assistance. Language assistance must be made available as provided in *Government Code Section 11435.05 et seq.* (*Gov. Code § 11425.10(a)(9)*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for writ of mandate for review of a final administrative adjudicatory order or decision, when the petition alleges denial of a fair trial based on violation of a person's rights under *Gov. Code § 11425.10(a)*, the APA's administrative adjudication "*Bill of Rights*" (operative July 1, 1997). The basis of this form is that the petitioner was denied language assistance as provided in *Gov. Code § 11435.05 et seq.* [*Gov. Code § 11425.10(a)(9)*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also Comments under § 195.30[2][b].

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2. APA Adjudication "Bill of Rights"

19-195 California Points & Authorities § 195.40

§ 195.40 Violation of Administrative Adjudication "Bill of Rights"--Petitioner Bore Burden of Proof

[1] FORM Violation of Administrative Adjudication "Bill of Rights"--Petitioner Bore Burden of Proof

[*This form should be combined with a memorandum generally supporting a petition for writ of administrative mandamus to set aside judgment or order on ground of violation of Gov. Code § 11425.10. See § 195.30.*]

IN A PUNITIVE ACTION, RESPONDENT DENIED PETITIONER A FAIR HEARING BY REQUIRING HIM OR HER TO BEAR BURDEN OF PROVING RESPONDENT'S CASE HAD NO MERIT.

Petitioner Required to Meet Burden of Proof. In a punitive action, Respondent may not be relieved of its burden of proving its case against *Petitioner (Brown v. City of Los Angeles (2002) 102 Cal. App. 4th 155, 175-176, 125 Cal. Rptr. 2d 474* ; *Los Angeles Police Protective League v. City of Los Angeles (2002) 102 Cal. App. 4th 85, 92-94, 124 Cal. Rptr. 2d 911*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for writ of mandate for review of a final administrative adjudicatory order or decision, when the petition alleges denial of a fair trial based on violation of a person's rights under *Gov. Code § 11425.10(a)*, the APA's administrative adjudication "*Bill of Rights*." The basis of this form is that the petitioner was required to bear the burden of proof.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel would refer to the facts cited in the petition showing that the petitioner was required to bear the burden of proof in the case.

[3] Discussion of Authorities

In ***Los Angeles Police Protective League v. City of Los Angeles*** *(2002) 102 Cal. App. 4th 85, 124 Cal. Rptr. 2d 911* , the Los Angeles Police Protective League, on behalf of officers of the Los Angeles Police Department, challenged the Department's disciplinary procedure. The League argued that the appeal process for an officer's challenge to a punitive reduction in pay grade or involuntary reassignment did not satisfy due process because it relieved the Department of any burden of proof as to the good cause for the Department's action, and relieved the Department of the obligation to present evidence in support of its action.

The court of appeal agreed, holding that the police officers held a property interest in their advanced pay grades and bonus positions and could not be deprived of that property interest without due process of law, including the right to have the Department bear the burden of proving its case against them (*102 Cal. App. 4th 85, 92-94*).

In ***Brown v. City of Los Angeles*** *(2002) 102 Cal. App. 4th 155, 175-176, 125 Cal. Rptr. 2d 474* , the Los Angeles Police Department downgraded Petitioner police officer's paygrade. Petitioner challenged the Department's administrative appeal process on the ground that it did not satisfy due process because it relieved the Department of the burden of proving its case against Petitioner. The court of appeal agreed, holding that relieving the Department of the burden of proving its case against Petitioner violated Petitioner's due process rights (*102 Cal. App. 4th 155, 175-176*).

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19-195 California Points & Authorities § 195.41

§ 195.41 Violation of Administrative Adjudication "Bill of Rights"--Agency Followed Rules That Were Not Promulgated in Accordance With APA

[1] FORM Violation of Administrative Adjudication "Bill of Rights"--Agency Followed Rules That Were Not Promulgated in Accordance With APA

[*This form should be combined with a memorandum generally supporting a petition for writ of administrative mandamus to set aside judgment or order on ground of violation of Gov. Code § 11425.10. See § 195.30.*]

RESPONDENT DENIED PETITIONER A FAIR HEARING BY APPLYING RULES AND REGULATIONS THAT WERE NOT PROMULGATED IN ACCORDANCE WITH THE APA.

No state agency may issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in *Government Code Section 11342.600*, unless it has been adopted as a regulation and filed with the Secretary of State (*Gov. Code § 11340.5(a)*). The APA defines a "regulation" as "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure" (*Gov. Code § 11342.600*).

If a rule constitutes a regulation under the APA, it may not be adopted, amended, or repealed except in conformity with "basic minimum procedural requirements" (*Gov. Code § 11346(a)*). The agency must give the public notice of its proposed regulatory action (*Gov. Code §§ 11346.4, 11346.5*), issue a complete text of the proposed regulation with a statement of the reasons for it (*Gov. Code § 11346.2(a), (b)*), give interested parties an opportunity to comment on the proposed regulation (*Gov. Code § 11346.8*), respond in writing to public comments (*Gov. Code §§ 11346.8(a), 11346.9*), and forward a file of all materials on which the agency relied in the regulatory process to the Office of Administrative Law (*Gov. Code § 11347.3(b)*), which reviews the regulation for consistency, clarity, and necessity (

Gov. Code §§ 11349.1, 11349.3). Any regulation or order of repeal that substantially fails to comply with these requirements may be judicially declared invalid (*Gov. Code § 11350*; *Morning Star Co. v. State Bd. of Equalization (2006) 38 Cal. 4th 324, 332-342, 42 Cal. Rptr. 3d 47, 132 P.3d 249* ; *Naturist Action Committee v. Department of Parks and Recreation (2009) 175 Cal. App. 4th 1244, 1249-1250, 96 Cal. Rptr. 3d 620* ; *County of San Diego v. Bowen (2008) 166 Cal. App. 4th 501, 516-520, 82 Cal. Rptr. 3d 818* ; *Capen v. Shewry (2007) 155 Cal. App. 4th 378, 386-389, 65 Cal. Rptr. 3d 890* ; *Syngenta Crop Prot., Inc. v. Helliker (2006) 138 Cal. App. 4th 1135, 42 Cal. Rptr. 3d 191*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for writ of mandate for review of a final administrative adjudicatory order or decision, when the petition alleges denial of a fair trial based on violation of a person's rights under *Gov. Code § 11425.10(a)*, the APA's administrative adjudication "Bill of Rights." The basis of this form is that the agency applied regulations that were not promulgated pursuant to the APA and are therefore invalid.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case [*see § 195.30[2][b]*].

[3] Discussion of Authorities

In ***Morning Star Co. v. State Bd. of Equalization*** *(2006) 38 Cal. 4th 324, 332-342, 42 Cal. Rptr. 3d 47, 132 P.3d 249* , a taxpayer challenged a hazardous materials assessment imposed by the California Department of Toxic Substance Control pursuant to *Health & Safety Code § 25205.6* on all corporations with 50 or more employees within California, based on the use of common office supplies such as fluorescent light bulbs and batteries. The taxpayer claimed the assessment was overbroad and did not comply with the APA. The superior court granted summary judgment in the agencies' favor, holding that the statute being applied specifies a procedure for the Department to follow on an annual basis; it does not contemplate the propriety or necessity of agency rule-making. The court of appeal affirmed, holding that the APA does not apply to the enforcement of an existing statute or regulation, even if it involves an interpretation of the statute, unless the means of enforcement are set out by an agency in a new rule of general application.

The California Supreme Court reversed. It held that the Department's interpretation of *Health & Safety Code § 25205.6* was a regulation as defined in *Gov. Code § 11342.600*, because it was a rule of general application that interpreted the law (*38 Cal. 4th 324, 334-335)* . As such, it was invalid under *Gov. Code § 11340.5(a)*, because it did not comply with the Administrative Procedure Act. The Court held that the exception set forth in *Gov. Code § 11340.9(f)* for an agency interpretation representing the only legally tenable interpretation of a law did not apply because the complexity of the statutory scheme indicated that the Legislature did not intend a rote or ministerial application by the agency (*38 Cal. 4th 324, 337-338)* . The Court directed the Board to conduct further administrative proceedings on the taxpayer's refund request, without relying on the invalid regulation (*38 Cal. 4th 324, 341)* .

Naturist Action Committee v. Department of Parks and Recreation *(2009) 175 Cal. App. 4th 1244, 1249-1250, 96 Cal. Rptr. 3d 620* , involved a California regulation prohibiting nudity at state parks. In 1979, the director of the defendant department issued an internal memorandum stating that enforcement of nude sunbathing regulations within the State Park System would be made only upon the complaint of a private citizen. This memorandum came to be known as the Cahill Policy. In 2008, the new director of the defendant department issued an internal memorandum rescinding the Cahill Policy as it applied to San Onofre State Beach. The plaintiffs filed a petition for writ of mandate arguing that the defendant's new policy was a regulation that was unenforceable because it did not comply with the APA's rule-making procedures. The plaintiffs sought to reinstate the Cahill Policy pending the defendant's compliance with the APA by giving public notice of the terms of the new policy and offering a public discussion. The trial court

granted the writ, holding that the rescission of the Cahill Policy was a regulation that did not comply with the APA.

On appeal, the court looked at the validity of the Cahill Policy. The court held that the APA defined "regulation" very broadly. The court cited *Tidewater Marine Western, Inc. v. Bradshaw (1996) 14 Cal. 4th 557, 571, 59 Cal. Rptr. 2d 186, 927 P.2d 296* , for the California Supreme Court's definition of a regulation. First, a regulation must be intended to apply generally, rather than in only a specific case. Second, a regulation must implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedure (*175 Cal. App. 4th 1244, 1249)* . The court held that the Cahill Policy satisfied both of these elements. The language of the memorandum stated that the defendant would enforce the prohibition against nude sunbathing within the State Park System only when specific complaints were made. Thus, it applied generally to all state parks. Second, the court held that the Cahill Policy implemented the California regulation prohibiting nudity by explaining that the department would not strictly enforce it (*175 Cal. App. 4th 1244, 1249)* .

The court of appeal further held that the Cahill Policy was invalid because it was not adopted in compliance with the APA. The court held that there was no evidence the defendant sent notice of the regulation to the public, provided an opportunity for public comment, or filed all underlying materials with the Office of Administrative Law, as required by the APA (*175 Cal. App. 4th 1244, 1250)* . The court held that the Cahill Policy was an "underground" regulation that was unenforceable. Therefore, the court held that the defendant's rescission of the Cahill Policy did not have to go through the APA rule-making process because its effect was merely to discontinue an invalid policy (*175 Cal. App. 4th 1244, 1250)* .

In ***County of San Diego v. Bowen*** *(2008) 166 Cal. App. 4th 501, 516-520, 82 Cal. Rptr. 3d 818* , the defendant California Secretary of State decertified and then recertified many voting systems in the state. She imposed numerous preconditions for recertification, including manual ballot tallying. Several counties filed a writ of mandate, challenging these preconditions on the ground that the defendant enacted them without following the APA. The trial court denied the plaintiff's petition, holding that because the manual tallying requirements did not constitute a "regulation," the defendant was not required to comply with the APA.

The court of appeal disagreed. It held that the APA defines "regulation" very broadly. The court cited *Tidewater Marine Western, Inc. v. Bradshaw (1996) 14 Cal. 4th 557, 571, 59 Cal. Rptr. 2d 186, 927 P.2d 296* , for the California Supreme Court's definition of a regulation. First, a regulation must be intended to apply generally, rather than in only a specific case. Second, a regulation must implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedure (*166 Cal. App. 4th 501, 517)* . The defendant argued that the manual tallying requirement did not satisfy the first prong of *Tidewater* because it did not apply to every voting system in California. The court rejected this argument, holding that a rule need not apply universally to satisfy the first *Tidewater* prong; a rule applies generally if it declares how a certain class of cases will be decided (*166 Cal. App. 4th 501, 517)* . With respect to the second prong, the court held that the manual tallying requirement made concrete various provisions of the Elections Code that authorized the defendant to ensure the reliability of electronic voting systems. Consequently, the court held, the manual tallying requirement made specific the law enforced by the agency (*166 Cal. App. 4th 501, 519)* . Because the defendant did not contend that she was otherwise exempted from the APA, or that she satisfied those requirements, the court held that the manual tallying requirements were void (*166 Cal. App. 4th 501, 520)* .

In ***Capen v. Shewry*** *(2007) 155 Cal. App. 4th 378, 386-389, 65 Cal. Rptr. 3d 890* , the plaintiff, a licensed physician, sought to build a surgical clinic that he would wholly own and operate, in which nonowner, nonlessee physicians would practice. He was informed by the State Department of Health Services (Department) that a license for the clinic was required because it would be used by physicians who do not share in its ownership and operation in violation of *Health and Safety Code § 1204(b)(1)*. The plaintiff sued the defendant Department for declaratory relief, claiming that the statute was ambiguous and that the Department's interpretation was a regulation requiring compliance with the APA. The trial court ruled in the plaintiff's favor.

The court of appeal upheld the judgment. It held that the Department's interpretation of the statute was a regulation subject to the APA. The court held that the exception set forth in *Gov. Code § 11340.9(f)* for an agency interpretation representing the only legally tenable interpretation of a law did not apply because the law could be read in more than one way of consequence to a claimed application (*155 Cal. App. 4th 378, 387-388)* . Because the Department's unwritten interpretation was a generally applicable policy, the court held that it constituted a regulation subject to the rulemaking procedures of the APA. Since the Department did not comply with those procedures its interpretive regulation was void (*155 Cal. App. 4th 378, 389)* .

In ***Syngenta Crop Prot., Inc. v. Helliker*** *(2006) 138 Cal. App. 4th 1135, 42 Cal. Rptr. 3d 191* , Dow, a pesticide manufacturer, submitted data to the state Department of Pesticide Regulation (the "Department") concerning the health effects and environmental impacts of the active ingredients in its pesticides in connection with its applications for pesticide registration. The Department had issued California notice 2002-3 (the Notice) describing the general data requirements for registration of a new pesticide containing a currently registered active ingredient. The Notice stated "Some have incorrectly assumed that DPR has the same data requirements for registration actions, such as amendments to currently registered pesticides and new products containing currently registered active ingredients, as it does for new pesticide products containing new active ingredients. This notice is intended to correct any misconceptions and to restate DPR's existing general data requirements for pesticide products." The Department provided no prior notice of the proposed Notice or opportunity to comment on the proposal. The Department also proposed amendments to the California Code of Regulations and characterized the amendments as changes without regulatory effect. The Office of Administrative Law approved the amendments.

Dow filed a combined complaint and petition for writ of mandate for, among other things, violation of the APA by adopting amendments to the California Code of Regulations and issuing the Notice without providing public notice and an opportunity to comment. All the parties filed summary judgment motions. The trial court did not address Dow's challenges to the validity of the regulatory amendments and the Notice.

The court of appeal held that the notice and regulatory amendments were adopted in violation of the APA and were therefore invalid (*138 Cal. App. 4th 1135, 1179)* . The court noted that the Notice purported to restate the Department's existing data requirements for pesticide products. However, the court concluded that the Notice was a regulation for purposes of the rulemaking provisions of the APA because it provided a standard of general application that interpreted the regulations concerning data requirements (*138 Cal. App. 4th 1135, 1178*). The court held that the amendments to the California Code of Regulations were also regulations for purposes of the rulemaking provisions because Govt. Code § 11342.600 defines "regulation" to include amendments to a regulation to implement, interpret, or make specific the law enforced or administered by the agency. The court held that the issue was not whether the Department's construction of the California Code of Regulations was reasonable or consistent with its prior practice, but whether the Department's construction was the only legally tenable construction and did not materially alter any regulatory requirement (*138 Cal. App. 4th 1135, 1179)* . The court held that the amendments did not reflect the only legally tenable construction of the former regulations and were not the sort of clearly nonsubstantive changes or changes compelled by law contemplated by the California Code of Regulations (*138 Cal. App. 4th 1135, 1179*). Even if the amendments were consistent with the Department's practice under the former regulations, the Department was required to inform the public of the proposed formalization of that practice in amended, enforceable regulations (*138 Cal. App. 4th 1135, 1179)* . The court concluded that the Department's complete failure to comply with the rulemaking procedural requirements of the APA was a "substantial failure" and rendered invalid the Notice and regulatory amendments (*138 Cal. App. 4th 1135, 1179)* .

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19-195 California Points & Authorities § 195.42

§ 195.42 Demurrer Should Be Sustained--No Violation of Administrative Adjudication "Bill of Rights"--Agency Followed Rules That Were Not Required to Be Promulgated in Accordance With APA

[1] FORM

[*This form should be combined with a memorandum generally opposing a petition for writ of administrative mandamus on the ground of violation of Gov. Code § 11425.10.*]

THE COURT SHOULD SUSTAIN THE DEMURRER TO THE PETITION FOR WRIT OF MANDATE BECAUSE RESPONDENT DID NOT DENY PETITIONER A FAIR HEARING IN THAT THE RULES AND REGULATIONS RESPONDENT APPLIED WERE NOT REQUIRED TO BE PROMULGATED IN ACCORDANCE WITH THE APA.

A regulation that is intended only for the internal management of an agency need not be promulgated in accordance with the APA (*Californians for Pesticide Reform v. Department of Pesticide Regulation (2010) 184 Cal. App. 4th 887, 905-909, 109 Cal. Rptr. 3d 428*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a demurrer to a petition for writ of mandate for review of a final administrative adjudicatory order or decision when the petition argues that the agency followed rules that were not promulgated in accordance with the APA.

As appropriate, this form should be combined with specific points and authorities supporting a demurrer to a petition for administrative mandate on the ground that the petition fails to allege facts sufficient to constitute a cause of action [*see §§ 195.51 -195.57*].

With appropriate modifications this memorandum may be used to support a respondent's motion for judgment on the pleadings in favor of the respondent.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. In a demurrer, counsel may also request judicial notice, if appropriate, to show the insufficient specificity of the alleged facts [*see Evid. Code § 450 et seq.*]. For further discussion, see *§ 195.10[2][b]*.

[c] Related Pleading and Practice Forms

For discussion and forms relating to judicial review of administrative decisions generally, see California Forms of Pleading and Practice, Ch. 474, *Public Administrative Law: Availability of Judicial Review* (Matthew Bender). For further discussion relating to judicial notice, see California Forms of Pleading and Practice, Ch. 321, *Judicial Notice* (Matthew Bender).

[3] Discussion of Authorities

[a] Agency Followed Rules That Were Not Required to Be Promulgated in Accordance With APA

Californians for Pesticide Reform v. Department of Pesticide Regulation *(2010) 184 Cal. App. 4th 887, 905-909, 109 Cal. Rptr. 3d 428* , involved the Toxic Air Contaminants Act (Act), which imposes responsibilities for the identification and control of toxic air contaminants (TAC). Under the Act, the defendant is responsible for assessing the risks of pesticides and determining whether a pesticide should be listed as a toxic air contaminant. The defendant developed a prioritization procedure by which certain active ingredients were assessed for risk. After the risk assessment, the defendant prepares a report for review by the public and a scientific review panel. The panel's findings then serve as the basis for a rulemaking that can lead to a regulation determining the pesticide to be a TAC. The plaintiff filed a petition for writ of mandate against the defendant, arguing that the prioritization process constituted an underground regulation that was not passed in accordance with the Administrative Procedure Act. The trial court held that the procedure was a matter of internal management and not subject to the rulemaking provisions of the APA.

On appeal, the defendant argued the prioritization process was not a regulation within the meaning of the APA because the defendant did not use the process as a general standard to administer, implement, enforce, or make specific the law. Instead, the defendant argued, the procedure reflected the defendant's efforts to comply with the Act. The court disagreed, holding that because the enforcement of a pesticide prioritization process would have a broad and long-term application, the policy was intended as a rule of general application [*184 Cal. App. 4th 887, 906-907]* . The court held further that the defendant adopted the prioritization policy to implement the Act.

However, the court held that the APA's internal management exception applied to the prioritization procedure. The court held that under *Gov. Code § 11340.9(d)*, the APA's definition of "regulation" specifically excepts a rule, regulation, order, or standard of general application that relates only to the internal management of an agency [*184 Cal. App. 4th 887, 907]* . The court held that the defendant was authorized to evaluate all pesticides in California and was given the discretion to determine the order in which the pesticides would be evaluated. The court held that the prioritization policy did not determine whether the pesticides would undergo review, but merely prioritized when they would undergo review [*184 Cal. App. 4th 887, 909]* .

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19-195 California Points & Authorities §§ 195.43-195.49

[Reserved]

§§ 195.43[Reserved]

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PART II. FORMS
B. Opposition to Petition
1. Demurrer

19-195 California Points & Authorities § 195.50

§ 195.50 Demurrer Should Be Sustained--Petition Fails to State Cause of Action, General Form

[1] FORM Demurrer Should Be Sustained--Petition Fails to State Cause of Action, General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM SUPPORTING DEMURRER TO
Petitioner,	)	PETITION FOR WRIT OF MANDATE
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Respondent.	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THE COURT SHOULD SUSTAIN THE DEMURRER TO THE PETITION FOR WRIT OF MANDATE BECAUSE THE ADJUDICATORY _____ [ORDER *or* DECISION] FAILS TO STATE A CAUSE OF ACTION.

A. Demurrer in Mandate Proceeding. A party on whom a peremptory writ or notice has been served may make a return by demurrer in a mandate proceeding (*Code Civ. Proc. § 1089*).

B. Objection by Demurrer. The party against whom a petition for a writ of mandate has been filed may object, by demurrer as provided in *Code of Civil Procedure Section 430.30*, to the petition on the ground that it does not state facts

sufficient to constitute a cause of action (*Code Civ. Proc. § 430.10(e)*). When any ground for objection to a petition appears on the face thereof (*or* from any matter of which the court is required to or may take judicial notice), the objection on that ground may be taken by a demurrer to the petition (*Code Civ. Proc. § 430.30(a)*).

[*As appropriate, add specific points and authorities supporting demurrer to petition for administrative mandate on the ground that the petition fails to allege facts sufficient to constitute a cause of action. See §§ 195.51 -195.57.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Respondent _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a demurrer to petition for writ of mandate for review of a final administrative adjudicatory order or decision when the petition fails to state a cause of action.

As appropriate, this form should be combined with specific points and authorities supporting demurrer to petition for administrative mandate on the ground that the petition fails to allege facts sufficient to constitute a cause of action [*see* §§ 195.51-195.57].

The party intending to use a part of the administrative record in a case brought under *Code Civ. Proc. § 1094.5* must lodge that part of the record at least five days before the hearing [*Cal. Rules of Ct., Rule 3.1140*]. For a form of memorandum supporting an application for an order directing the filing of a record, see *§ 195.140*].

With appropriate modifications this memorandum may be used to support a respondent's motion for judgment on the pleadings in favor of the respondent.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. In this instance, involving a pleading requirement, counsel should argue that the facts alleged by the opposing party are not sufficient to constitute a cause of action. In his or her argument, counsel would refer to the specific number of the relevant allegation. In a demurrer, counsel may also request judicial notice, if appropriate, to show the insufficient specificity of the alleged facts [*see Evid. Code § 450 et seq.*]. For further discussion, see *§ 195.10[2][b]*.

[c] Related Pleading and Practice Forms

For discussion and forms relating to judicial review of administrative decisions generally, see California Forms of Pleading and Practice, Ch. 474, *Public Administrative Law: Availability of Judicial Review* (Matthew Bender). For discussion and forms relating to petitions for writ of mandate to review administrative decisions affecting physicians, see California Forms of Pleading and Practice, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender). For further discussion relating to judicial notice, see California Forms of Pleading and Practice, Ch. 321, *Judicial*

Notice (Matthew Bender).

[d] Opposing Memoranda

When appropriate, the memorandum *set forth in § 195.80* et seq. may be used to oppose the contentions set forth in this form.

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B. Opposition to Petition
1. Demurrer

19-195 California Points & Authorities § 195.51

§ 195.51 Demurrer Should Be Sustained--Failure to Allege Discretion Vested in Agency

[1] FORM Demurrer Should Be Sustained--Failure to Allege Discretion Vested in Agency

[*This form should be combined with points and authorities generally supporting a demurrer to a petition for administrative mandate based on failure to allege facts sufficient to constitute a cause of action. See § 195.50.*]

THE PETITION FOR WRIT OF MANDATE FAILS TO STATE A CAUSE OF ACTION BECAUSE IT DOES NOT ALLEGE FACTS TENDING TO SHOW THAT DISCRETION TO DETERMINE CERTAIN RELEVANT FACTS IS VESTED IN THE _____ [*identify agency whose order or decision is the subject of proceeding*].

Failure to Allege Discretion Vested in Agency. To allege a cause of action for review of a final administrative adjudicatory order or decision in a mandate proceeding, the petitioner must state facts showing that discretion to determine certain relevant facts is vested in the agency whose order or decision is the subject of the proceeding (*Code Civ. Proc. § 1094.5(a)*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a demurrer to petition for writ of mandate for review of a final administrative adjudicatory order or decision when the petition fails to state a cause of action. The basis of this form is that the petition fails to allege facts showing that discretion to determine certain relevant facts is vested in the agency whose order or decision is the subject of the proceeding.

This form should be combined with points and authorities generally supporting a demurrer to a petition for administrative mandate based on failure to allege facts sufficient to constitute a cause of action [*see § 195.50*].

With appropriate modifications this memorandum may be used to support a respondent's motion for judgment on the

pleadings in favor of the respondent.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See Comments under § 195.50[2][b] for further discussion.

[c] Opposing Memoranda

When appropriate, the memorandum *set forth in § 195.80* et seq. generally, may be used to oppose the contentions set forth in this form.

[3] Discussion of Authorities

[a] Failure to Allege Discretion Vested in Agency

Code Civ. Proc. § 1094.5(a) provides that, when a writ of mandate is issued for the purposes of inquiring into the validity of a final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal, corporation, board or officer (*i.e.*, agency), the case is heard by the court sitting without a jury.

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1. Demurrer

19-195 California Points & Authorities § 195.52

§ 195.52 Demurrer Should Be Sustained--Failure to Allege Hearing Requirement

[1] FORM Demurrer Should Be Sustained--Failure to Allege Hearing Requirement

[*This form should be combined with points and authorities generally supporting a demurrer to a petition for administrative mandate based on failure to allege facts sufficient to constitute a cause of action. See § 195.50.*]

THE PETITION FOR WRIT OF MANDATE FAILS TO STATE A CAUSE OF ACTION BECAUSE IT DOES NOT ALLEGE FACTS TENDING TO SHOW THAT BY LAW A HEARING IS REQUIRED TO BE HELD FOR THE PURPOSE OF DETERMINING THOSE FACTS.

Failure to Allege Hearing Requirement. To allege a cause of action for review of a final administrative adjudicatory order or decision in a mandate proceeding, the petitioner must state facts showing that, by law, a hearing is required to be held for the purpose of determining certain relevant facts (*Code Civ. Proc. § 1094.5(a)*; *300 Deharo Street Investors v. Department of Housing and Community Development (2008) 161 Cal. App. 4th 1240, 1249-1250, 75 Cal. Rptr. 3d 98* ; *Excelsior College v. California Bd. of Registered Nursing (2006) 136 Cal. App. 4th 1218, 1237-1238, 39 Cal. Rptr. 3d 618* ; *Duarte & Witting, Inc. v. New Motor Vehicle Board (2002) 104 Cal. App. 4th 626, 634-641, 128 Cal. Rptr. 2d 501* ; *Weary v. Civil Service Com. (1983) 140 Cal. App. 3d 189, 194-195, 189 Cal. Rptr. 442*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a demurrer to petition for writ of mandate for review of a final administrative adjudicatory order or decision when the petition fails to state a cause of action. The basis of this form is that the petition fails to state facts showing that, by law, a hearing is required to be held for the purpose of determining certain relevant facts.

This form should be combined with a memorandum generally supporting a demurrer to a petition for administrative

mandate based on failure to allege facts sufficient to constitute a cause of action [*see § 195.50*].

With appropriate modifications this memorandum may be used to support a respondent's motion for judgment on the pleadings in favor of the respondent.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See *§ 195.50[2][b]* for further discussion.

[c] Opposing Memoranda

When appropriate, the memoranda *set forth in § 195.80* et seq. generally, may be used to oppose the contentions set forth in this form.

[3] Discussion of Authorities

[a] Failure to Allege Hearing Requirement

In ***300 Deharo Street Investors v. Department of Housing and Community Development*** *(2008) 161 Cal. App. 4th 1240, 1249-1250, 75 Cal. Rptr. 3d 98* , the plaintiff landlord submitted a written request for a rent increase to the Department of Housing and Community Development pursuant to *Health & Saf. Code § 50670(e)*, and Cal. Code Regs., tit. 25, § 7683(c). The Department denied the request based upon its review of the paperwork. The trial court concluded plaintiff's sole remedy was a petition for administrative mandamus pursuant to *Code Civ. Proc. § 1094.5*. The plaintiff appealed, arguing that no administrative hearing occurred and that a writ of administrative mandamus applies only to claims challenging administrative orders or decisions made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the administrative tribunal. The Department argued that the plaintiff's written request for a rent increase, and the Department's denial of the request based upon its review of his paperwork, constituted a "paper hearing."

The court of appeal held that for *Code Civ. Proc. § 1094.5* to apply, a hearing must be required by law. Here, the court held, no statute or regulation required the Department to hold a hearing on the plaintiff's request for a rent increase. The court held that when an agency makes a decision based upon one party's unilateral submissions of information and documents, without taking and considering evidence from opposing parties, no hearing occurs within the meaning of *Code Civ. Proc. § 1094.5* (*161 Cal. App. 4th 1240, 1250)* .

The court held that, even assuming the Department's review of the plaintiff's request could be considered a hearing, it did not trigger administrative mandamus review because it was not required by law (*161 Cal. App. 4th 1240, 1251)* . Moreover, the court held, even if a "purely documentary" hearing satisfied *Code Civ. Proc. § 1094.5*, there must be something in the nature of a hearing, i.e., an adversarial process in which the agency resolves disputed facts after affording interested parties an opportunity to present evidence (*161 Cal. App. 4th 1240, 1251)* .

In ***Excelsior College v. California Bd. of Registered Nursing*** *(2006) 136 Cal. App. 4th 1218, 39 Cal. Rptr. 3d 618* , the California Board of Registered Nursing (Board) had previously recognized Plaintiff Excelsior College, a New York-based distance learning nursing program's program as equivalent to the minimum requirements of accredited programs in California, thus enabling Excelsior graduates to apply for licensure in California. However, the Board subsequently concluded that it had no authority to evaluate out-of-state programs before a nursing program graduate applies for licensure. Excelsior sought an administrative writ of mandate to invalidate the Board's interpretation of the applicable law and to compel the Board to continue accepting the Excelsior program as equivalent to California's minimum requirements. The Board demurred to the petition, arguing that the petition did not state facts sufficient to constitute a cause of action in that Excelsior had no legal right to an adjudicatory hearing by law. The trial court granted

the demurrer.

The court of appealed agreed. It noted that administrative mandate pursuant to *Code Civ. Proc. § 1094.5* is available only if the decision resulted from a "proceeding in which by law: 1) a hearing is required to be given, 2) evidence is required to be taken, and 3) discretion in the determination of facts is vested in the agency" (*136 Cal. App. 4th 1218, 1237-1238)* . The court held that the legal right to an evidentiary hearing may be granted by statute, regulation or rule, or by due process if a liberty or property interest is implicated (*136 Cal. App. 4th 1218, 1238*). Excelsior claimed it was entitled to an evidentiary hearing under due process because it had a property interest in the Board's continued recognition of equivalency. The court rejected this argument, stating that the fact that Excelsior graduates were exempt from certain requirements for 20 years did not confer a property interest upon Excelsior. Thus, Excelsior had no due process right to an evidentiary hearing regarding the Board's decision that Excelsior graduates will be treated the same as graduates from all other out-of-state schools (*136 Cal. App. 4th 1218, 1238*).

In ***Duarte & Witting, Inc. v. New Motor Vehicle Board*** *(2002) 104 Cal. App. 4th 626, 128 Cal. Rptr. 2d 501* , an automobile corporation terminated a dealer's franchise because the corporation discontinued the line of automobiles the dealer sold. The dealer filed a protest of the termination with the New Motor Vehicle Board. Without a hearing, the Board granted the corporation's motion to dismiss the protest on the ground that the Board could not require the corporation to continue producing the line of automobiles.

The dealer filed a petition for a writ of administrative mandate with the superior court, arguing that the Board did not have the power to dismiss the protest and was required to conduct an evidentiary hearing on statutory "good cause" factors for termination. The superior court denied the petition.

The court of appeal affirmed. It held that the Board had implicit power to dismiss the protest and that a hearing was not necessary when the undisputed facts showed good cause for terminating the franchise (*104 Cal. App. 4th 626, 637-641)* .

Weary v. Civil Service Com. *(1983) 140 Cal. App. 3d 189, 189 Cal. Rptr. 442* , arose when plaintiff, a civil service employee, received an "improvement needed" rating for the work she performed, and she instituted an administrative appeal to defendant Civil Service Commission. While the appeal was pending, plaintiff was laid off, and was not placed on the reemployment list because of her rating. Thereafter, a hearing on the appeal was ordered pursuant to a rule of the commission allowing it to grant a hearing at its own discretion. At the hearing of the appeal the hearing officer ordered that plaintiff be placed on the reemployment list because the rating was unjustified, but the commission reviewed the evidence presented at the hearing and the hearing transcript and rejected the officer's proposed findings of fact and conclusions of law, finding instead that the rating was proper. Plaintiff then petitioned the superior court for a writ of administrative mandamus under *Code Civ. Proc. § 1094.5*. The court conducted an independent review of the evidence and, exercising its independent judgment, granted the writ on the ground that the rating was unreasonable under the circumstances. The commission appealed.

The court of appeal reversed, holding that administrative mandamus under *Code Civ. Proc. § 1094.5* was not available to review the decision of the commission (*140 Cal. App. 3d 189, 194)* . The court held that judicial review under *Code Civ. Proc. § 1094.5* is available only from a decision resulting from a proceeding in which by law (1) a hearing is required to be given, (2) evidence is required to be taken, and (3) discretion in the determination of facts is vested in the agency [citing *Taylor v. State Personnel Bd. (1980) 101 Cal. App. 3d 498, 502, 161 Cal. Rptr. 677]* (*140 Cal. App. 3d 189, 194-195*). The rule under which plaintiff obtained a hearing before the commission made the grant of a hearing discretionary, and therefore not required by law, leaving plaintiff's only avenue of review a petition under *Code Civ. Proc. § 1085* to determine whether the action of the commission was an abuse of discretion (*140 Cal. App. 3d 189, 195)* .

[4] Additional Authorities

[a] Failure to Allege Hearing Requirement

In *Heist v. County of Colusa (1984) 163 Cal. App. 3d 841, 213 Cal. Rptr. 278* , a county board of supervisors had passed a resolution, following a public hearing, ordering a portion of a certain road abandoned. Plaintiff, a taxpayer, filed a petition for an extraordinary writ in superior court alleging that the board's action constituted gross abuse of discretion and a gift of public property. The trial court denied the petition, and plaintiff appealed. Plaintiff contended that the abandonment of a county road by the board is a judicial act, governed by *Code Civ. Proc. § 1094.5*, which requires the findings of the board to be supported by substantial evidence. The court of appeal, however, held that abandonment of a county road is a legislative act, governed by *Code Civ. Proc. § 1085*, and that review thereof is limited to an examination of the proceeding to determine whether the action of the administrative body has been arbitrary, capricious, or entirely lacking in evidentiary support, or whether it has failed to give the notices and follow the procedures required by law (*163 Cal. App. 3d 841, 845-846)* . Reviewing the evidence as a whole, the appellate court held that the board's act was not arbitrary or capricious (*163 Cal. App. 3d 841, 848)* .

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Volume 19 Chapters 190-195 PRODUCTS LIABILITY---to---PUBLIC ADMINISTRATIVE LAW
CHAPTER 195 PUBLIC ADMINISTRATIVE LAW
PART II. FORMS
B. Opposition to Petition
1. Demurrer

19-195 California Points & Authorities § 195.53

§ 195.53 Demurrer Should Be Sustained--Failure to Allege That Evidence Must Be Taken

[1] FORM Demurrer Should Be Sustained--Failure to Allege That Evidence Must Be Taken

[*This form should be combined with a memorandum generally supporting a demurrer to a petition for administrative mandate based on failure to allege facts sufficient to constitute a cause of action. See § 195.50.*]

THE PETITION FOR WRIT OF MANDATE FAILS TO STATE A CAUSE OF ACTION BECAUSE IT DOES NOT ALLEGE FACTS TENDING TO SHOW THAT EVIDENCE IS REQUIRED TO BE TAKEN AT A HEARING.

Failure to Allege That Evidence Must Be Taken. To allege a cause of action for review of a final administrative adjudicatory order or decision in a mandate proceeding, the petitioner must state facts showing that evidence is required to be taken at the hearing required by law to determine certain relevant facts (*Code Civ. Proc. § 1094.5(a)*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a demurrer to petition for writ of mandate for review of a final administrative adjudicatory order or decision when the petition fails to state a cause of action. The basis of this form is that the petition fails to show that evidence is required to be taken at the hearing required by law to determine certain relevant facts.

This form should be combined with a memorandum generally supporting a demurrer to a petition for administrative mandate based on failure to allege facts sufficient to constitute a cause of action [*see § 195.50*].

With appropriate modifications this memorandum may be used to support a respondent's motion for judgment on the pleadings in favor of the respondent.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See *§ 195.50[2][b]* for further discussion.

[c] Opposing Memoranda

When appropriate, the memoranda *set forth in § 195.40* generally, may be used to oppose the contentions set forth in this form.

[3] Discussion of Authorities

[a] Failure to Allege That Evidence Must Be Taken

For discussion of ***Code Civ. Proc. § 1094.5(a)*** , see *§ 195.51[3][a]*.

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PART II. FORMS
B. Opposition to Petition
1. Demurrer

19-195 California Points & Authorities § 195.54

§ 195.54 Demurrer Should Be Sustained--Failure to Allege That Decision Resulted From Hearing

[1] FORM Demurrer Should Be Sustained--Failure to Allege That Decision Resulted From Hearing

[*This form should be combined with a memorandum generally supporting a demurrer to a petition for administrative mandate based on failure to allege facts sufficient to constitute a cause of action. See § 195.50.*]

THE PETITION FOR WRIT OF MANDATE FAILS TO STATE A CAUSE OF ACTION BECAUSE IT DOES NOT ALLEGE FACTS TENDING TO SHOW THAT A FINAL ADMINISTRATIVE ORDER OR DECISION WAS MADE AS A RESULT OF HEARING AND A DETERMINATION OF CERTAIN RELEVANT FACTS.

Failure to Allege That Decision Resulted From Hearing. To allege a cause of action for review of a final administrative adjudicatory order or decision in a mandate proceeding, the petitioner must state facts showing that a final administrative order or decision was made as the result of a hearing required by law at which evidence was taken to determine certain relevant facts, and the determination of those facts (*Code Civ. Proc. § 1094.5(a)*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a demurrer to petition for writ of mandate for review of a final administrative adjudicatory order or decision when the petition fails to state a cause of action. The basis of this form is that the petition fails to show that a final administrative order or decision was made as the result of a hearing required by law at which evidence was taken to determine certain relevant facts, and the determination of those facts.

This form should be combined with a memorandum generally supporting a demurrer to a petition for administrative mandate based on failure to allege facts sufficient to constitute a cause of action [*see § 195.50*].

With appropriate modifications this memorandum may be used to support a respondent's motion for judgment on the

pleadings in favor of the respondent.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See *§ 195.50[2][b]* for further discussion.

[c] Opposing Memoranda

When appropriate, the memoranda *set forth in § 195.80* et seq. generally, may be used to oppose the contentions set forth in this form.

[3] Discussion of Authorities

[a] Failure to Allege That Decision Resulted From Hearing

For discussion of ***Code Civ. Proc. § 1094.5(a),*** see *§ 195.51[3][a]*.

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CHAPTER 195 PUBLIC ADMINISTRATIVE LAW
PART II. FORMS
B. Opposition to Petition
1. Demurrer

19-195 California Points & Authorities § 195.55

§ 195.55 Demurrer Should Be Sustained--Failure to Allege That Decision Is Invalid

[1] FORM Demurrer Should Be Sustained--Failure to Allege That Decision Is Invalid

[*This form should be combined with a memorandum generally supporting a demurrer to a petition for administrative mandate based on failure to allege facts sufficient to constitute a cause of action. See § 195.50.*]

THE PETITION FOR WRIT OF MANDATE FAILS TO STATE A CAUSE OF ACTION BECAUSE IT DOES NOT ALLEGE FACTS TENDING TO SHOW THAT THE ORDER OR DECISION IS INVALID.

Failure to Allege That Decision Is Invalid. To allege a cause of action for review of a final administrative adjudicatory order or decision in a mandate proceeding, the petitioner must state facts showing that the order or decision is invalid (*Code Civ. Proc. § 1094.5(a)*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a demurrer to petition for writ of mandate for review of a final administrative adjudicatory order or decision when the petition fails to state a cause of action. The basis of this form is that the petition fails to show that the order or decision is invalid.

This form should be combined with a memorandum generally supporting a demurrer to a petition for administrative mandate based on failure to allege facts sufficient to constitute a cause of action [*see § 195.50*].

With appropriate modifications this memorandum may be used to support a respondent's motion for judgment on the pleadings in favor of the respondent.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See *§ 195.50[2][b]* for further discussion.

[c] Opposing Memoranda

When appropriate, the memoranda *set forth in § 195.80* may be used to oppose the contentions set forth in this form.

[3] Discussion of Authorities

[a] Failure to Allege That Decision Is Invalid

For discussion of ***Code Civ. Proc. § 1094.5(a)*** , see *§ 195.51[3][a]*.

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CHAPTER 195 PUBLIC ADMINISTRATIVE LAW
PART II. FORMS
B. Opposition to Petition
1. Demurrer

19-195 California Points & Authorities § 195.56

§ 195.56 Demurrer Should Be Sustained--Failure to Allege That Petitioner Is Beneficially Interested in Writ

[1] FORM Demurrer Should Be Sustained--Failure to Allege That Petitioner Is Beneficially Interested in Writ

[*This form should be combined with a memorandum generally supporting a demurrer to a petition for administrative mandate based on failure to allege facts sufficient to constitute a cause of action. See § 195.50.*]

THE PETITION FOR WRIT OF MANDATE FAILS TO STATE A CAUSE OF ACTION BECAUSE IT DOES NOT ALLEGE FACTS TENDING TO SHOW THAT THE PETITIONER IS BENEFICIALLY INTERESTED IN ISSUANCE OF THE WRIT.

Failure to Allege That Petitioner Is Beneficially Interested in Writ. To allege a cause of action for review of a final administrative adjudicatory order or decision in a mandate proceeding, the petitioner must state facts showing that the petitioner is beneficially interested in the issuance of the writ (*Code Civ. Proc. § 1086*; *Personnel Comm'n v. Barstow Unified Sch. Dist. (1996) 43 Cal. App. 4th 871, 50 Cal. Rptr. 2d 797*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a demurrer to petition for writ of mandate for review of a final administrative adjudicatory order or decision when the petition fails to state a cause of action. The basis of this form is that the petition fails to show that the petitioner is beneficially interested in the issuance of the writ.

This form should be combined with a memorandum generally supporting a demurrer to a petition for administrative mandate based on failure to allege facts sufficient to constitute a cause of action [*see § 195.50*].

With appropriate modifications this memorandum may be used to support a respondent's motion for judgment on the pleadings in favor of the respondent.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See *§ 195.50[2][b]* for further discussion.

[c] Opposing Memoranda

When appropriate, the memoranda *set forth in § 195.81* may be used to oppose the contentions set forth in this form.

[3] Discussion of Authorities

[a] Failure to Allege That Petitioner Is Beneficially Interested in Writ

For discussion of ***Code Civ. Proc. § 1094.5(a)*** , see *§ 195.51[3][a]*.

In ***Personnel Comm'n v. Barstow Unified Sch. Dist.*** *(1996) 43 Cal. App. 4th 871, 50 Cal. Rptr. 2d 797* , a personnel commission of a school district sought a writ of mandate compelling the district to vacate a decision to lay off the district's transportation workers and contract with a private company. The superior court granted a writ, but the court of appeal reversed on procedural grounds, concluding that the commission lacked standing to sue. *Code Civ. Proc. § 1086* provides that a writ of mandate must be issued upon the verified petition of the party beneficially interested. The requirement that a petitioner be beneficially interested generally means the person must have some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large (*43 Cal. App. 4th 871, 877)* . The function of the personnel commission is to classify employees and positions, and to review certain decisions at the instance of an affected employee. However, it has no authority to take legal action to challenge decisions of the district concerning the employment of classified employees or the contracting out of work (*43 Cal. App. 4th 871, 879)* . Finding that the commission had no beneficial interest in the proceeding, the court reversed the judgment of the superior court, and remanded with directions to dismiss the proceeding with respect to the claims of the commission.

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CHAPTER 195 PUBLIC ADMINISTRATIVE LAW
PART II. FORMS
B. Opposition to Petition
1. Demurrer

19-195 California Points & Authorities § 195.57

§ 195.57 Demurrer Should Be Sustained--Failure to Allege No Plain, Speedy, Adequate Remedy

[1] FORM Demurrer Should Be Sustained--Failure to Allege No Plain, Speedy, Adequate Remedy

[*This form should be combined with a memorandum generally supporting a demurrer to a petition for administrative mandate based on failure to allege facts sufficient to constitute a cause of action. See § 195.50.*]

THE PETITION FOR WRIT OF MANDATE FAILS TO STATE A CAUSE OF ACTION BECAUSE IT DOES NOT ALLEGE FACTS TENDING TO SHOW THAT THE PETITIONER HAS NO PLAIN AND SPEEDY REMEDY IN THE ORDINARY COURSE OF LAW.

Failure to Allege No Plain, Speedy, Adequate Remedy. To allege a cause of action for review of a final administrative adjudicatory order or decision in a mandate proceeding, the petitioner must state facts showing that the petitioner has no plain, speedy, and adequate remedy in the ordinary course of law (*Code Civ. Proc. § 1086*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a demurrer to petition for writ of mandate for review of a final administrative adjudicatory order or decision when the petition fails to state a cause of action. The basis of this form is that the petition fails to show that the petitioner has no plain, speedy, and adequate remedy in the ordinary course of law.

This form should be combined with a memorandum generally supporting a demurrer to a petition for administrative mandate based on failure to allege facts sufficient to constitute a cause of action [*see § 195.50*].

With appropriate modifications this memorandum may be used to support a respondent's motion for judgment on the pleadings in favor of the respondent.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See *§ 195.50[2][b]* for further discussion.

[c] Opposing Memoranda

When appropriate, the memoranda *set forth in § 195.80* et seq. generally, may be used to oppose the contentions set forth in this form.

[3] Discussion of Authorities

[a] Failure to Allege No Plain, Speedy, Adequate Remedy

For discussion of ***Code Civ. Proc. § 1094.5(a),*** see *§ 195.51[3][a]*.

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PART II. FORMS
B. Opposition to Petition
1. Demurrer

19-195 California Points & Authorities § 195.58

§ 195.58 Demurrer Should Be Sustained--Substantial Evidence Rather Than Independent Judgment Applies, General Form

[1] FORM Demurrer Should Be Sustained--Substantial Evidence Rather Than Independent Judgment Applies, General Form

[*Caption. see § 195.50.*]

THE COURT SHOULD SUSTAIN THE DEMURRER TO THE PETITION FOR WRIT OF MANDATE BECAUSE IN THIS CASE THE SUBSTANTIAL EVIDENCE TEST, RATHER THAN THE INDEPENDENT JUDGMENT TEST, DEFINES THE PROPER SCOPE OF REVIEW OF THE FINAL ADMINISTRATIVE ADJUDICATORY _____ [ORDER *or* DECISION] OF THE _____ [*identify agency*].

A. Demurrer in Mandate Proceedings. [*See § 195.50[1]*, Paragraph A].

B. General Rule. When it is claimed that an administrative agency's findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence; and in all other cases abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record (*Code Civ. Proc. § 1094.5(c)*).

C. Independent Judgment Test Applies Only in Limited Circumstances. On reviewing an administrative decision when it is claimed the evidence does not support the findings, the court is authorized to exercise its independent judgment on the evidence, and to determine whether the findings are supported by the weight of the evidence, when both (1) the administrative decision in question substantially affects a vested fundamental right of the person seeking judicial review and (2) the agency in question is not directly authorized by the California Constitution to exercise judicial functions (*Bixby v. Pierno (1971) 4 Cal. 3d 130, 143, 93 Cal. Rptr. 234, 481 P.2d 242* ; *see Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 32, 35, 112 Cal. Rptr. 805, 520 P.2d 29*).

D. Substantial Evidence Test Applies When Decision Does Not Affect Fundamental Vested Right. When an administrative decision does not involve, or substantially affect, any fundamental vested right, the trial court must review the entire administrative record to determine whether the findings are supported by substantial evidence (*Bixby v. Pierno (1971) 4 Cal. 3d 130, 144 , 93 Cal. Rptr. 234 , 481 P.2d 242* ; *SP Star Enterprises, Inc. v. City of Los Angeles (2009) 173 Cal. App. 4th 459, 468-471, 93 Cal. Rptr. 3d 152* ; *Jaramillo v. State Bd. for Geologists and Geophysicists (2006) 136 Cal. App. 4th 880, 888-889, 39 Cal. Rptr. 3d 170*).

[*As appropriate, this form should be combined with a memorandum asserting that the substantial evidence test applies in a particular instance. See §§ 195.58 -195.63.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Respondent _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a demurrer to a petition for a writ of mandate for review of a final administrative adjudicatory order or decision of a local agency when the order or decision does not substantially affect a vested fundamental right of the petitioner, or when the respondent is directly authorized by the Constitution to exercise judicial functions. In such cases, the court is limited to determining whether the findings are supported by substantial evidence in the light of the whole record [*Code Civ. Proc. § 1094.5*].

This form should be combined with a caption [*see § 195.50*]. It should also be combined with a memorandum asserting that the substantial evidence test applies in a particular instance [*see §§ 195.58 -195.63*].

With appropriate modifications, this memorandum may be submitted in opposition to a petition for a writ of administrative mandate [*see, e.g., § 195.10[3]*], or in support of an answer to such a petition. Furthermore, this memorandum may be incorporated into an appellate brief when a trial court has misapplied the independent judgment test.

For detailed coverage of the standards of judicial review applicable to administrative decisions, see California Forms of Pleading and Practice, Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq. (Matthew Bender).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See *§ 195.50[2][b]* for further discussion.

[c] Application of Proper Standard of Review

The issue of whether the independent judgment test applies to a particular administrative decision is not always easily resolved. The courts are required to decide on a *case-by-case* basis whether an administrative decision or class of

decisions substantially affects fundamental rights and thus requires independent judgment review [*Bixby v. Pierno (1971) 4 Cal. 3d 130, 144, 93 Cal. Rptr. 234, 481 P.2d 242]* . Therefore, situations may arise in which there are no reported cases on point concerning a particular type of administrative decision.

[d] Administrative Decisions Held to Merit Substantial Evidence Review

The memoranda *set forth in §§ 195.58 -195.63* illustrate three general types of administrative decisions that have been held to merit substantial evidence review, rather than independent judgment review. Counsel should note that there are numerous other cases determining the appropriate standard of judicial review [*see, e.g.,* *Berlinghieri v. Department of Motor Vehicles (1983) 33 Cal. 3d 392, 398, 188 Cal. Rptr. 891, 657 P.2d 383* (suspension of driver's license by Department of Motor Vehicles as subject to independent judgment review); *Mileikowsky v. Tenet Healthsystem (2005) 128 Cal. App. 4th 531, 554-555, 27 Cal. Rptr. 3d 171* (hearing officer's imposition of terminating sanction reviewed under abuse of discretion standard); *MHC Operating Limited Partnership v. City of San Jose (2003) 106 Cal. App. 4th 204, 220, 130 Cal. Rptr. 2d 564* (in challenge to rent control board ruling, court reviewed factual determinations for substantial evidence and independently reviewed interpretation of ordinance, according it due deference)].

In certain instances, the standard of review is governed by statute [*see, e.g., Bus. & Prof. Code § 2087* (substantial evidence rule applies when Medical Board of California denies accreditation to medical school); *see also* *Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd. (1979) 24 Cal. 3d 335, 342-346, 156 Cal. Rptr. 1, 595 P.2d 579* (California Legislature may provide for review under substantial evidence standard of decisions of statewide agencies on which California Constitution does not confer judicial power)]. The memorandum *set forth in § 195.66* is an example of such a statute.

[e] Opposing Memoranda

When appropriate, the memoranda *set forth in § 195.80* et seq. generally, may be used to oppose the contentions set forth in this form.

[3] Discussion of Authorities

[a] Independent Judgment Test Applies Only in Limited Circumstances

In ***Bixby v. Pierno*** *(1971) 4 Cal. 3d 130, 93 Cal. Rptr. 234, 481 P.2d 242* , petitioner sought a writ of mandamus to compel defendant Commissioner of Corporations to set aside his decision approving a recapitalization plan submitted for approval by real party in interest. The trial court found that the commissioner's ruling was supported by substantial evidence and did not constitute an abuse of discretion. Petitioner appealed.

The Supreme Court affirmed the judgment. Reciting the text of *Code Civ. Proc. § 1094.5(c)*, the court noted that the provision does not establish a single standard for judicial review of the evidentiary basis for agency determinations (*4 Cal. 3d 130, 137*). If a decision of an administrative agency will substantially affect a vested, fundamental right, the trial court not only examines the administrative record for errors of law but also exercises its independent judgment on the evidence disclosed in a limited trial de novo (*4 Cal. 3d 130, 143*). If an administrative decision does not involve, or substantially affect, any fundamental vested right, the trial court must still review the entire administrative record to determine whether the findings are supported by substantial evidence and whether the agency committed any errors of law, but the trial court need not look beyond that whole record of the administrative proceedings (*4 Cal. 3d 130, 144*). The Court found that the administrative decision in the instant case did not tangentially involve any important or fundamental right and therefore did not call for an independent judgment review. It noted that petitioners did not allege any deprivation of their right to a livelihood or a deprivation of their property (*4 Cal. 3d 130, 147)* . The court concluded that the trial court properly applied the substantial evidence standard, and that the commissioner's findings were indeed supported by substantial evidence (*4 Cal. 3d 130, 148-151)* .

Strumsky v. San Diego County Employees Retirement Ass'n *(1974) 11 Cal. 3d 28, 112 Cal. Rptr. 805, 520 P.2d 29* , is discussed in *§ 195.11[3][b]*.

[b] Substantial Evidence Rule Applies When Decision Does Not Affect Fundamental Vested Right

Bixby v. Pierno *(1971) 4 Cal. 3d 130, 93 Cal. Rptr. 234, 481 P.2d 242* , is discussed in *§ 195.58[3][a]*.

SP Star Enterprises, Inc. v. City of Los Angeles *(2009) 173 Cal. App. 4th 459, 468-471, 93 Cal. Rptr. 3d 152* , involved an owner of an adult entertainment club seeking a license to sell alcoholic beverages. The city's zoning commissioner granted the application for one year. After several parties appealed to the city central area planning commission, the application was denied. The plaintiff sought review of the commission's ruling in the trial court through administrative mandamus pursuant to *Code Civ. Proc. § 1094.5*. The trial court denied the mandamus petition, holding that substantial evidence supported the commission's ruling.

On appeal, the plaintiff argued that topless dancing is a recognized form of protected activity and that because the commission's decision affected the plaintiff's ability to engage in protected activity, the trial court was required to conduct an independent review of the record. The court of appeal disagreed. It held that generally when a case involves purely economic interests, courts are less likely to find a right to be fundamental and vested. The court held further that an application for a conditional use permit to sell alcohol for onsite consumption did not involve a fundamental vested right or the right of free speech (*173 Cal. App. 4th 459, 468-471)* .

In ***Jaramillo v. State Bd. for Geologists and Geophysicists*** *(2006) 136 Cal. App. 4th 880, 39 Cal. Rptr. 3d 170* , the Board for Geologists and Geophysicists of the State of California Department of Consumer Affairs (the Board) cited Jaramillo for practicing or offering to practice geophysics without a license. After an evidentiary hearing, the administrative law judge found that Jaramillo was practicing geophysics without a license and issued a proposed decision that sustained the citation and ordered him to pay the fine and cease and desist from violating the law. The Board adopted the ALJ's proposed decision as its own.

Jaramillo filed a petition for writ of mandate under *Code Civ. Proc. § 1094.5* in which he contended that the administrative decision affected his fundamental right to operate his business, and thus the court committed reversible error when it failed to apply the independent judgment standard of review, finding that no fundamental right was implicated in this case. The Board opposed the petition on the ground that the substantial evidence test applied because Jaramillo was not licensed, he was not a member of the geophysical profession, and thus no fundamental vested right was involved.

The court of appeal agreed with the Board. It held that if an underlying administrative decision substantially affects a fundamental vested right, the trial court, in determining whether the agency abused its discretion because the findings are not supported by the evidence, must exercise its independent judgment on the evidence and find an abuse of discretion if the findings are not supported by the weight of the evidence (*136 Cal. App. 4th 880, 888*). If an administrative decision does not substantially affect a fundamental vested right, the trial court considers only whether the findings are supported by substantial evidence in the light of the whole record (*136 Cal. App. 4th 880, 888-889*). Whether an administrative decision substantially affects a fundamental vested right must be decided on a case-by-case basis. Although no exact formula exists by which to make this determination, the issue is whether the affected right is deemed to be of sufficient significance to preclude its extinction or abridgment by a body lacking judicial power (*136 Cal. App. 4th 880, 888-889*). The court concluded that Jaramillo did not have a vested right to operate his business because he was not operating it legally *136 Cal. App. 4th 880, 891)* .

[4] Additional Authorities

[a] Substantial Evidence Rule Applies When Decision Does Not Affect Fundamental Vested Right

In *Automotive Management Group, Inc. v. New Motor Vehicle Bd. (1993) 20 Cal. App. 4th 1002, 24 Cal. Rptr. 2d 904* , an automobile dealer submitted to the New Motor Vehicle Board a protest of its termination as a franchised dealer. An administrative law judge rejected the dealer's protest because it was untimely and the dealer petitioned the court for a writ of mandate. The trial court applied the substantial evidence test and denied the dealer's petition. The court of appeal held that the trial court properly applied the substantial evidence test rather than the independent judgment test. The court noted that the independent judgment test is applied only when the administrative decision substantially affects a fundamental, vested right, and no case has held that an automobile franchise is a fundamental vested right (*20 Cal. App. 4th 1002, 1009-1010)* .

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PART II. FORMS
B. Opposition to Petition
1. Demurrer

19-195 California Points & Authorities § 195.59

§ 195.59 Demurrer Should Be Sustained--Statute Provides for Review Under Substantial Evidence Test

[1] FORM Demurrer Should Be Sustained--Statute Provides for Review Under Substantial Evidence Test

[*This form should be combined with a memorandum generally supporting a demurrer to a petition for administrative mandate based on application of substantial evidence rule. See § 195.58.*]

THE SUBSTANTIAL EVIDENCE TEST DEFINES THE PROPER SCOPE OF REVIEW OF THE FINAL ADMINISTRATIVE ADJUDICATORY _____ [ORDER *or* DECISION] OF THE _____ [*identify agency*] BECAUSE THE LEGISLATURE HAS EXPRESSLY PROVIDED THAT THE TRIAL COURT WILL REVIEW DECISIONS OF THE AGENCY UNDER THE SUBSTANTIAL EVIDENCE TEST.

Statute Provides for Review Under Substantial Evidence Test. The trial court may not exercise its independent judgment, but must review the entire record for substantial evidence, if the agency is of constitutional origin and has been granted limited judicial power by the constitution or if the Legislature accords finality to the findings of a statewide agency, that is, if the Legislature expressly provides that the trial court will review decisions of the agency under the substantial evidence test (*Kensington University v. Council for Private Postsecondary etc. Education (1997) 54 Cal. App. 4th 27, 40, 62 Cal. Rptr. 2d 582*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a demurrer to a petition for a writ of mandate for review of a final administrative adjudicatory order or decision of a local agency when the order or decision is made when the agency is of constitutional origin and has been granted limited judicial power by the constitution, or the Legislature accords finality to the findings of a statewide agency.

This form should be combined with a memorandum generally supporting a demurrer to a petition for administrative mandate on the ground that the substantial evidence test, rather than the independent judgment test applies [*see § 195.58*].

With appropriate modifications, this memorandum may be submitted in opposition to a petition for a writ of administrative mandate or in support of an answer to such a petition. Furthermore, this memorandum may be incorporated into an appellate brief when a trial court has misapplied the independent judgment test.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. That is, counsel should state facts showing that either of the circumstances stated in § 195.59[2][a] apply. See also *§ 195.50[2][b]* for further discussion.

[3] Discussion of Authorities

[a] Statute Provides for Review Under Substantial Evidence Test

In ***Kensington University v. Council for Private Postsecondary etc. Education*** *(1997) 54 Cal. App. 4th 27, 62 Cal. Rptr. 2d 582* , a university submitted a supplemental petition for writ of mandate seeking to vacate the decision of the Council for Private Postsecondary and Vocational Education denying the university's application to operate as a degree-granting institution under the Education Code. The trial court entered judgment denying the petition and the university appealed. On appeal, the university contend, among other things, that the trial court failed to apply the proper standard of review to the record of the administrative hearing.

The court of appeal affirmed the judgment of the trial court. Citing *Dominey v. Department of Personnel Administration (1988) 205 Cal. App. 3d 729, 741, 252 Cal. Rptr. 620* , the court stated that trial court is authorized to exercise its independent judgment on the evidence when the administrative agency is of legislative origin and its decision affects a fundamental vested right. On the other hand, the trial court may not exercise its independent judgment, but must instead review the entire record for substantial evidence, if the agency is of constitutional origin and has been granted limited judicial power by the constitution or if the Legislature accords finality to the findings of a statewide agency, that is, if the Legislature expressly provides that the trial court will review decisions of the agency under the substantial evidence test. With regard to the agency in present case, the Legislature has provided by statute that a party aggrieved by Council's final decision and order may seek judicial review by filing a petition for writ of mandate and that "[t]he factual bases supporting the final decision set forth in the council's statement of decision shall be conclusive if supported by substantial evidence on the record considered as a whole" (*54 Cal. App. 4th 27, 41)* . The court concluded that the university failed to establish that the trial court erred in applying the substantial evidence standard of review (*54 Cal. App. 4th 27, 42)* .

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19-195 California Points & Authorities § 195.60

§ 195.60 Substantial Evidence Test Applies When Decision Impacts on Economic Interests Not Fundamental Vested Rights

[1] FORM Substantial Evidence Test Applies When Decision Impacts on Economic Interests Not Fundamental Vested Rights

[*This form should be combined with a memorandum generally supporting a demurrer to a petition for administrative mandate based on application of substantial evidence rule. See § 195.58.*]

THE SUBSTANTIAL EVIDENCE TEST DEFINES THE PROPER SCOPE OF REVIEW OF THE FINAL ADMINISTRATIVE ADJUDICATORY _____ [ORDER *or* DECISION] OF THE _____ [*identify agency*] BECAUSE THE AGENCY'S DECISION DOES NOT IMPACT ON ANY VESTED FUNDAMENTAL RIGHT, ONLY ON ECONOMIC INTERESTS.

Decision Impacts on Economic Interests Not Fundamental Vested Rights. When the impact of an agency's decision is purely economic, a trial court properly applies the substantial evidence test (*Antelope Valley Press v. Poizner (2008) 162 Cal. App. 4th 839, 849-852, 75 Cal. Rptr. 3d 887* ; *Tennison v. California Victim Compensation and Government Claims Board (2007) 152 Cal. App. 4th 1164, 1181-1182, 62 Cal. Rptr. 3d 88* ; *JKH Enterprises, Inc. v. Department of Industrial Relations (2006) 142 Cal. App. 4th 1046, 1059-1061, 48 Cal. Rptr. 3d 563; E.W.A.P., Inc. v. City of Los Angeles (1997) 56 Cal. App. 4th 310, 327, 65 Cal. Rptr. 2d 325*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a demurrer to a petition for a writ of mandate for review of a final administrative adjudicatory order or decision of a local agency when the order or decision would impact mere economic interests, rather than fundamental vested rights.

This form should be combined with a memorandum generally supporting a demurrer to a petition for administrative mandate on the ground that the substantial evidence test, rather than the independent judgment test applies [*see § 195.58*].

With appropriate modifications, this memorandum may be submitted in opposition to a petition for a writ of administrative mandate or in support of an answer to such a petition. Furthermore, this memorandum may be incorporated into an appellate brief when a trial court has misapplied the independent judgment test.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. That is, counsel should state facts showing that the interests to be impacted by the decision or order are purely economic, such as a restriction of a property owner's return on his or her property, an increase in the cost of doing business, or a reduction of profits [*see E.W.A.P., Inc. v. City of Los Angeles (1997) 56 Cal. App. 4th 310, 327, 65 Cal. Rptr. 2d 325* , discussed in *§ 195.60[3][a]*].

[3] Discussion of Authorities

[a] Decision Impacts on Economic Interests Not Fundamental Vested Rights

In ***Antelope Valley Press v. Poizner*** *(2008) 162 Cal. App. 4th 839, 849-852, 75 Cal. Rptr. 3d 887* , the California's State Compensation Insurance Fund (State Fund) classified newspaper deliverers as employees, rather than independent contractors, for purposes of the publisher's workers' compensation policy. The publisher appealed the classification to the Department of Insurance's administrative hearing bureau. The administrative law judge (ALJ) who heard the case concluded that the carriers were employees for purposes of workers' compensation insurance. The publisher filed a petition for writ of administrative mandamus under *Code Civ. Proc. § 1094.5*. Applying the substantial evidence test, the trial court determined that the ALJ's findings were supported by substantial evidence and should be affirmed. The publisher appealed the trial court's judgment denying its petition for writ of administrative mandamus.

The court of appeal held that when an administrative decision does not substantially affect a fundamental vested right of the person challenging that decision, the trial court must apply the substantial evidence test. The court held that a vested right can be found to be fundamental, and thus require a trial court's independent judgment review, on the basis of one or both of the following factors: (1) the character and quality of its economic aspect; (2) the character and quality of its human aspect. The court held that the ultimate question is whether the affected right is deemed to be of sufficient significance to preclude its extinction or abridgement by a body lacking judicial power. As a general rule, the court held, when a case involves purely economic interests, courts are far less likely to find a right to be fundamental and vested (*162 Cal. App. 4th 839, 850)* . The court concluded that no fundamental vested right was involved or substantially affected in this case. A dispute over the employee status of a newspaper publisher's carriers and whether the publisher should be liable for workers' compensation insurance premiums is clearly an economic issue stemming from social policies regarding labor relations. Therefore, the court held, it would apply the substantial evidence test to the administrative findings (*162 Cal. App. 4th 839, 851-852)* .

In ***Tennison v. California Victim Compensation and Government Claims Board*** *(2007) 152 Cal. App. 4th 1164, 1181-1182, 62 Cal. Rptr. 3d 88* , the plaintiff was convicted of murder in 1990, with his conviction overturned about 12 years later and the court ultimately holding that he was factually innocent of the crime. He filed a claim with the California Victim Compensation Board and Government Claims Board for compensation for the time he was wrongly incarcerated, relying on the finding of factual innocence. The Board rejected his claim based on its holding that the finding of factual innocence did not have collateral estoppel effect before the Board. It held that the plaintiff had the burden of establishing by a preponderance of the evidence that he did not commit the crime for which he was convicted, and did nothing to contribute to his arrest and convictions. The Board held the plaintiff did not meet this burden. The

plaintiff filed a petition for writ of mandate in the trial court. The trial court denied the petition, holding that the Board did not abuse its discretion in holding that the plaintiff did not carry his burden.

On appeal, the plaintiff argued that the Board's decision affected his fundamental rights because he sought the restoration of the living he lost as a result of his wrongful imprisonment and that, accordingly, the trial court should have applied the independent judgment standard of review. The court of appeal held that the plaintiff's application for monetary compensation was neither fundamental nor vested (*152 Cal. App. 4th 1164, 1182)* . The court held that although it could be said the right to claim compensation was vested, the right to obtain compensation did not vest until a claimant persuades the Board on the merits of the application. Accordingly, the court concluded that the trial court properly applied the substantial evidence standard of review to the Board's decision (*152 Cal. App. 4th 1164, 1182)* .

In ***JKH Enterprises, Inc. v. Department of Industrial Relations*** *(2006) 142 Cal. App. 4th 1046, 1059-1061, 48 Cal. Rptr. 3d 563* , the Department of Industrial Relations investigated the plaintiff courier service to determine whether the courier service's drivers were employees or independent contractors for purposes of maintaining workers' compensation insurance. After an administrative hearing, the Department determined that the drivers were employees and upheld a stop labor order. The courier company filed a petition in the trial court for a writ of administrative mandate under *Code Civ. Proc. § 1094.5*. At the hearing, the courier argued that it was entitled to the independent judgment standard of review because, it argued, the Department's decision upholding the stop work order impaired its fundamental vested right to continue doing business in the manner in which it had. Nonetheless, the trial court reviewed the Department's decision under the substantial evidence standard, denying the courier's petition and granting the Department's request for an injunction upholding the stop work order. The courier appealed.

The court of appeal first held that whether a right is fundamental and vested for purposes of ascertaining the appropriate standard of judicial review in an adjudicative administrative mandamus action is to be determined on a case-by-case basis (*142 Cal. App. 4th 1046, 1059)* . The court held that a right is deemed fundamental on either or both of two bases: (1) the character and quality of its economic aspect, or (2) the character and quality of its human aspect (*142 Cal. App. 4th 1046, 1059)* . In other words, a court looks at the nature of the right involved rather than the amount of harm or economic injury sustained (*142 Cal. App. 4th 1046, 1059)* . In addition, the court held that the concepts of "fundamental" and "vestedness" are interrelated such that courts will examine the extent to which a right is vested, i.e., legitimately acquired or already possessed by the individual, in determining whether it is fundamental (*142 Cal. App. 4th 1046, 1060)* .

As a general rule, the court held, courts are less likely to find a right to be fundamental when a case affects purely economic interests (*142 Cal. App. 4th 1046, 1060)* . The court held that administrative decisions which result in restricting a property owner's return on property, increasing the cost of doing business, or reducing profits are considered impacts on economic interests, rather than on fundamental vested rights (*142 Cal. App. 4th 1046, 1060)* .

The court held that the present case regulated labor relations and the enforcement of legislated social policies (*142 Cal. App. 4th 1046, 1061)* . The purpose of the decision was to require the courier to comply with the law as a condition of doing business, not to put it out of business (*142 Cal. App. 4th 1046, 1061)* . The court noted that requiring compliance with the Labor Code by providing workers' compensation insurance for the drivers would not shut down the courier's business. Even if it would, the court held, the continued operation of a business in violation of the applicable law is not a fundamental vested right or one that was legitimately acquired (*142 Cal. App. 4th 1046, 1061)* . Requiring the courier to purchase workers' compensation insurance would require it to incur an expense, and this expense would increase the courier's cost of doing business and potentially decrease profits. But, the court held, this result would affect a purely economic interest and would not involve or affect a right that is fundamental and vested (*142 Cal. App. 4th 1046, 1062)* .

In ***E.W.A.P., Inc. v. City of Los Angeles*** *(1997) 56 Cal. App. 4th 310, 65 Cal. Rptr. 2d 325* , an adult bookstore petitioned for writ of mandate regarding a city's application of a municipal ordinance designed to abate nuisances

contending that the trial court erred in not applying the independent judgment test to judicial review of the administrative decision.

The court of appeal affirmed the judgment. The courts stated that whether an administrative decision substantially affects a fundamental vested right must be decided on a case-by-case basis. Although no exact formula exists by which to make this determination, courts are less sensitive to the preservation of purely economic interests. Administrative decisions which result in restricting a property owner's return on his or her property, increasing the cost of doing business, or reducing profits are considered impacts on economic interests, rather than on fundamental vested rights. In the present case, the bookstore claimed that the time restriction will result in a 46-percent reduction in its hours of operation from its original 24-hour time period of operation. Accordingly, the court found that the impact of the hours restrictions, if any, on bookstore's business was purely economic, and concluded that the trial court properly applied the substantial evidence test (*56 Cal. App. 4th 310, 327)* .

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19-195 California Points & Authorities § 195.61

§ 195.61 Demurrer Should Be Sustained--Substantial Evidence Test Applies to Employer's Right to Establish Procedures

[1] FORM Demurrer Should Be Sustained--Substantial Evidence Test Applies to Employer's Right to Establish Procedures

[*This form should be combined with a memorandum generally supporting a demurrer to a petition for administrative mandate based on application of substantial evidence rule. See § 195.58.*]

THE SUBSTANTIAL EVIDENCE TEST DEFINES THE PROPER SCOPE OF REVIEW OF THE FINAL ADMINISTRATIVE ADJUDICATORY _____ [ORDER *or* DECISION] OF THE _____ [*identify agency*] BECAUSE AN EMPLOYER'S RIGHT TO ESTABLISH EMPLOYMENT PRACTICES AND PROCEDURES AND TO IMPOSE CONDITIONS OF EMPLOYMENT IS NOT A FUNDAMENTAL VESTED RIGHT.

Substantial Evidence Test Applies to Employer's Right to Establish Procedures. The right of an employer to establish employment practices and procedures and to impose conditions of employment is not a fundamental vested right; an administrative decision affecting an employer's right to establish employment practices and procedures and to impose conditions of employment is subject to review under the substantial evidence test (*Northern Inyo Hosp. v. Fair Emp. Practice Com. (1974) 38 Cal. App. 3d 14, 23, 112 Cal. Rptr. 872*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a demurrer to a petition for a writ of mandate for review of a final administrative adjudicatory order or decision of a local agency when the order or decision does not substantially affect a vested fundamental right of the petitioner. The basis of this form is that an employer's right to establish employment practices and procedures and to impose conditions of employment is not a fundamental vested right.

This form should be combined with a memorandum generally supporting a demurrer to a petition for administrative mandate on the ground that the substantial evidence test, rather than the independent judgment test applies [*see § 195.58*].

With appropriate modifications, this memorandum may be submitted in opposition to a petition for a writ of administrative mandate or in support of an answer to such a petition. Furthermore, this memorandum may be incorporated into an appellate brief when a trial court has misapplied the independent judgment test.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See *§ 195.50[2][b]* for further discussion.

[3] Discussion of Authorities

[a] Substantial Evidence Test Applies to Employer's Right to Establish Procedures

In ***Northern Inyo Hosp. v. Fair Emp. Practice Com.*** *(1974) 38 Cal. App. 3d 14, 112 Cal. Rptr. 872* , petitioner hospital district sought a writ of mandate to review and vacate a decision by the Fair Employment Practice Commission (FEPC). The FEPC had issued a decision finding that the hospital district had unlawfully discriminated against one of its former employees. The hospital district's petition alleged that the FEPC abused its discretion in that its findings "were not supported by the weight of the evidence or substantial evidence in the light of the whole record." At the commencement of the hearing on the petition, the hospital district was granted leave to amend by adding an allegation that the FEPC decision "affected fundamental vested rights of Petitioner, to establish employment practices and procedures and to impose conditions to employment at Petitioner's hospital facility." The trial court ordered the FEPC to vacate its decision, finding that petitioner hospital district did not engage in unlawful discrimination. In so doing, the court determined that the FEPC decision affected fundamental vested rights of the petitioner to establish practices and procedures and to impose conditions of employment at its hospital facility and that the court was therefore authorized to exercise its independent judgment on the weight of the evidence. The FEPC appealed, contending that the substantial evidence rather than the independent judgment rule should have been applied in reviewing its decision.

The court of appeal reversed with directions to enter judgment denying the petition for writ of mandate (*38 Cal. App. 3d 14, 26*). It rejected the FEPC's argument that the substantial evidence test applied due to FEPC's status as an agency deriving its adjudicatory powers from the California Constitution; the court found that the FEPC was an agency of legislative origin and that its adjudicatory power was not traceable to a specific provision of the Constitution (*38 Cal. App. 3d 14, 21-22)* . However, the court agreed with the FEPC that fundamental vested rights of the hospital were not affected by the FEPC's decision, and that the substantial evidence test should have been applied by the trial court. The appellate court noted that while the right to pursue a lawful business or occupation is a fundamental right, there is no vested right to conduct a business free of reasonable governmental rules and regulations. The court noted that the hospital's claim that it had a vested right to establish its employment practices and procedures is based on the discredited concept of freedom of contract. The hospital district's vested right argument is rendered even more tenuous by the fact that it is a public agency. As such, it is subject to state laws in promulgating regulations governing the employment and removal of personnel (*38 Cal. App. 3d 14, 22-23*). Reviewing the evidence under the substantial evidence test, the court concluded that there was substantial evidence in light of the whole record to support the FEPC's finding. It noted that its reversal with directions to deny the petition would not involve a usurpation of the fact-finding power of the trial court (*38 Cal. App. 3d 14, 26)* .

[4] Additional Authorities

[a] Substantial Evidence Test Applies to Employer's Right to Establish Procedures

In *Los Angeles County Dept. of Parks & Recreation v. Civil Service Com. (1992) 8 Cal. App. 4th 273, 10 Cal. Rptr. 2d 150* , the real party in interest unsuccessfully applied for a program within the Department of Parks and Recreation, and challenged the decision as unlawfully discriminatory. The Civil Service Commission found in his favor, but the plaintiff Department successfully obtained a writ of mandate from the superior court setting aside the decision, finding that there was no substantial evidence to support the commission's finding of discrimination. The court of appeal affirmed, agreeing that there was no substantial evidence of discrimination. In so holding, the court found that the substantial evidence test, and not the independent judgment test, applies on superior court mandamus review, because the decision by the commission was in favor of the employee, and the employer was the party that sought to have the trial court exercise its independent judgment. An employer's right to discipline or manage its employees is subject to civil service and antidiscrimination regulation, and is not a fundamental vested right entitling the employer to have a trial court exercise its independent judgment on the evidence (*8 Cal. App. 4th 273, 279*).

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19-195 California Points & Authorities § 195.62

§ 195.62 Demurrer Should Be Sustained--Substantial Evidence Test Applies to License Proceedings

[1] FORM Demurrer Should Be Sustained--Substantial Evidence Test Applies to License Proceedings

[*This form should be combined with a memorandum generally supporting a demurrer to a petition for administrative mandate based on application of substantial evidence rule. See § 195.58.*]

THE SUBSTANTIAL EVIDENCE TEST DEFINES THE PROPER SCOPE OF REVIEW OF THE FINAL ADMINISTRATIVE ADJUDICATORY _____ [ORDER *or* DECISION] OF THE _____ [*identify agency*] BECAUSE IT INVOLVES AN AGENCY'S INITIAL DETERMINATION OF WHETHER AN INDIVIDUAL QUALIFIES TO ENTER A PROFESSION OR TRADE.

Substantial Evidence Test Applies to Right to License. In a case involving an agency's initial determination whether an individual qualifies to enter a profession or trade, the substantial evidence test is applicable. A denied license applicant is not entitled to a trial de novo in the reviewing court (*Crandell v. Fox (1978) 86 Cal. App. 3d 760, 763-764, 150 Cal. Rptr. 426*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a demurrer to a petition for a writ of mandate for review of a final administrative adjudicatory order or decision of a local agency when the order or decision does not substantially affect a vested fundamental right of the petitioner. The basis of this form is that the substantial evidence test defines the proper scope of review of an agency's initial determination of whether an individual qualifies to enter a profession or trade.

This form should be combined with a memorandum generally supporting a demurrer to a petition for administrative mandate on the ground that the substantial evidence test, rather than the independent judgment test applies [*see § 195.58*].

With appropriate modifications, this memorandum may be submitted in opposition to a petition for a writ of administrative mandate or in support of an answer to such a petition. Furthermore, this memorandum may be incorporated into an appellate brief when a trial court has misapplied the independent judgment test.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See Comments under § 195.50[2][b] for further discussion.

[3] Discussion of Authorities

[a] Substantial Evidence Test Applies to Right to License

In ***Crandell v. Fox*** *(1978) 86 Cal. App. 3d 760, 150 Cal. Rptr. 426* , petitioner sought a writ of mandate to compel the Real Estate Commissioner to reinstate his real estate salesman's license, which had been revoked two years earlier. The trial court found that the substantial evidence rule of review was applicable, and denied the petition. Petitioner appealed.

The court of appeal reversed. On appeal, petitioner contended that he was entitled to a trial de novo in his petition for a writ of mandate. The court rejected this contention. It stated that an applicant for reinstatement of a license has no greater rights than a person seeking an original license (*86 Cal. App. 3d 760, 763*). The court further noted that in a case involving the agency's initial determination whether an individual qualifies to enter a profession or trade, a court will uphold the decision unless it lacks substantial evidentiary support (*86 Cal. App. 3d 760, 763-764)* . The court concluded that the trial court applied the appropriate standard of review, the substantial evidence test (*86 Cal. App. 3d 760, 764*). The court, however, found that the order denying reinstatement was defective and reversed the judgment on that ground (*86 Cal. App. 3d 760, 764-765, 767)* .

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19-195 California Points & Authorities § 195.63

§ 195.63 Demurrer Should Be Sustained--Substantial Evidence Test Applies to Decision by Hospital Board

[1] FORM Demurrer Should Be Sustained--Substantial Evidence Test Applies to Decision by Hospital Board

[*This form should be combined with a memorandum generally supporting a demurrer to a petition for administrative mandate based on application of substantial evidence rule. See § 195.58.*]

THE SUBSTANTIAL EVIDENCE TEST DEFINES THE PROPER SCOPE OF REVIEW OF THE FINAL ADMINISTRATIVE ADJUDICATORY _____ [ORDER *or* DECISION] OF THE _____ [*identify agency*] BECAUSE IT INVOLVES A DECISION BY _____ [A PRIVATE HOSPITAL BOARD *or* THE BOARD OF DIRECTORS OF A HOSPITAL DISTRICT *or* THE GOVERNING BODY OF MUNICIPAL HOSPITAL].

[*EITHER*]

Decision by Private Hospital Board. The substantial evidence standard applies to review of decisions by private hospital boards, except when discriminatory practices are alleged (*Code Civ. Proc. 1094.5(d)*; *Smith v. Vallejo General Hospital (1985) 170 Cal. App. 3d 450, 455, 216 Cal. Rptr. 189*).

[*OR*]

Decision by Board of Directors of Hospital District. The substantial evidence standard applies to review of decisions by boards of directors of districts organized pursuant to The Local Health Care District Law (*Health and Safety Code § 32000*), except when discriminatory practices are alleged (*Code Civ. Proc § 1094.5(d)*).

[*OR*]

Decision by Governing Body of Municipal Hospital. The substantial evidence standard applies to review of decisions by governing bodies of municipal hospitals, except when discriminatory practices are alleged (*Code Civ. Proc § 1094.5(d)*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a demurrer to a petition for a writ of mandate for review of a final administrative adjudicatory order or decision of a local agency when the order or decision does not substantially affect a vested fundamental right of the petitioner. The basis of this form is that the substantial evidence test applies to decision by hospital board.

This form should be combined with a memorandum generally supporting a demurrer to a petition for administrative mandate on the ground that the substantial evidence test, rather than the independent judgment test applies [*see § 195.58*].

With appropriate modifications, this memorandum may be submitted in opposition to a petition for a writ of administrative mandate or in support of an answer to such a petition. Furthermore, this memorandum may be incorporated into an appellate brief when a trial court has misapplied the independent judgment test.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See Comments under § 195.58[2][b] for further discussion.

[3] Discussion of Authorities

[a] Decision by Private Hospital Board

Code Civ. Proc. § 1094.5(d) provides that in cases arising from private hospital boards, boards of directors of districts organized pursuant to the Local Health Care District Law (*Health & Safety Code § 32000 et seq.*), or governing bodies of municipal hospitals formed pursuant to *Gov. Code § 37600 et seq.* or § 37650 et seq., abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record. The subsection also provides that in all cases in which a petition alleges discriminatory actions prohibited by *Health & Safety Code § 1316* and the plaintiff makes a preliminary showing of substantial evidence in support of the allegation, the court must exercise its independent judgment on the evidence, and abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence.

In ***Smith v. Vallejo General Hospital*** *(1985) 170 Cal. App. 3d 450, 216 Cal. Rptr. 189* , petitioner sought a writ of mandate to set aside a decision by defendant hospital denying him a certain clinical privilege. The trial court reviewed the hospital's decision under the substantial evidence test and denied mandamus relief. Petitioner appealed.

The court of appeal affirmed. On appeal, petitioner argued that the independent judgment standard must apply because (1) the substantial evidence test under *Code Civ. Proc. § 1094.5(d)* could not be constitutionally applied to his fundamental vested right to practice medicine, and (2) defendant hospital did not fall with the definition of "private hospital" under the statute. The court rejected petitioner's arguments. It noted that the substantial evidence test is the appropriate standard of review under *Code Civ. Proc. § 1094.5(d)*, governing petitioner's application for medical privileges. The court also found that defendant hospital, a nonprofit organization, was a "private hospital board" for purposes of the statute. Addressing petitioner's argument that *Code Civ. Proc. § 1094.5(d)* is unconstitutional because

"it treats physicians asserting a fundamental right differently than it does anyone else asserting a fundamental vested right," the court noted that (1) petitioner's license to practice medicine was unaffected by the decision; (2) any right to practice at defendant hospital could not have been considered vested because petitioner was not then exercising that right at the time of his application; and (3) the legislature has authority to provide for substantial evidence review of administrative decisions (*170 Cal. App. 3d 450, 455-456*).

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Volume 19 Chapters 190-195 PRODUCTS LIABILITY---to---PUBLIC ADMINISTRATIVE LAW
CHAPTER 195 PUBLIC ADMINISTRATIVE LAW
PART II. FORMS
B. Opposition to Petition
1. Demurrer

19-195 California Points & Authorities § 195.64

§ 195.64 Demurrer Should Be Sustained--Petition Barred by Statute of Limitations, General Form

[1] FORM Demurrer Should Be Sustained--Petition Barred by Statute of Limitations, General Form

[*Caption. see § 195.50.*]

THE COURT SHOULD SUSTAIN THE DEMURRER TO PETITION FOR A WRIT OF MANDATE BECAUSE THE PETITION SHOWS ON ITS FACE THAT IT IS BARRED BY THE RELEVANT STATUTE OF LIMITATIONS.

A. Demurrer in Mandate Proceedings. [*See § 195.50[1]*, Paragraph A].

B. Statute of Limitations as Bar. A proceeding for a writ of mandate to review a decision or order by an administrative agency is barred if it is not commenced within the applicable limitation period (*Sinetos v. Department of Motor Vehicles (1984) 160 Cal. App. 3d 1172, 1175, 207 Cal. Rptr. 207)* .

[*As appropriate, this form should be combined with a memorandum asserting that the petition is barred by a specific statute of limitation. See §§ 195.65 -195.67.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Respondent _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a demurrer to a petition for a writ of mandate for review of a final administrative adjudicatory order or decision when the petition shows on its face that it is barred by the relevant statute of limitation.

This form should be combined with a caption [*see § 195.50*]. As appropriate, this form should be combined with a memorandum asserting that the action is barred by a specific statute of limitation [*see §§ 195.65 -195.67*].

With appropriate modifications, this memorandum may be used in opposition to the petition or in support of a motion for summary judgment or judgment on the pleadings in favor of respondent.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, he or she should add argument indicating what the relevant statute of limitation is for his or her case and when it began to run. See Comments under § 195.50[2][b] for further discussion.

[c] Determining Appropriate Statute of Limitation

The statutes of limitation in the memoranda *set forth in § 195.65* et seq. do not present an exhaustive list of possible limitation periods for review of administrative actions and orders. Numerous other statutes establish limitation periods for proceedings to review specific types of administrative actions [*see, e.g., Pub. Res. Code §§ 21167(d)* (determination that preparation of environmental impact report not required), 30801 (decision of California Coastal Commission); *Unemp. Ins. Code § 410* (decision of Unemployment Insurance Appeals Board); *Veh. Code § 14401(a)* (order refusing, canceling, suspending, or revoking driver's license); *Welf. & Inst. Code § 10962* (decision affecting application for or receipt of public social services)].

Furthermore, the provisions governing the time for commencing civil actions (*Code Civ. Proc. § 312 et seq.*) are generally applicable in administrative mandate proceedings [*see Code Civ. Proc. § 1109*]. Thus, when none of the statutes of limitation specifically governing review of administrative decisions applies, counsel should review *Code Civ. Proc. § 312 et seq.* to determine whether one of the general civil limitations periods would apply to the facts of the case. For example, when an administrative action or decision is on a claim of entitlement to compensation under a statute imposing monetary liability on an administrative entity, the proceeding may be governed by *Code Civ. Proc. 338(a)*, which provides a three-year limitation period for actions on a liability created by statute [*see Raymond v. Christian (1937) 24 Cal. App. 2d 92, 113-116, 74 P.2d 536]* .

If no statute provides an appropriate period of limitation, the action to review is governed by the four-year period set forth in *Code Civ. Proc. § 343* (*see § 195.65*).

[d] Opposing Authorities

In an appropriate case, the points and authorities *set out in §§ 195.104 -195.106* may be submitted in opposition to this memorandum.

[e] Related Pleading and Practice Forms

For discussion, procedural guide, and forms related to demurrers, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For discussion and forms related to

statutes of limitation, see Ch. 345, *Limitation of Actions* , in that publication.

[3] Discussion of Authorities

[a] Statute of Limitation as Bar

In ***Sinetos v. Department of Motor Vehicles*** *(1984) 160 Cal. App. 3d 1172, 207 Cal. Rptr. 207* , plaintiff filed a petition for writ of mandamus in superior court seeking judicial review, pursuant to *Veh. Code § 14401*, of defendant agency's decision to restrict his driver's license. The trial court issued a peremptory writ ordering plaintiff's license to be reinstated, and denied defendant's motion to dismiss the proceeding on the ground that it was barred by the statute of limitation stated in *Veh. Code § 14401*. Defendant appealed.

The court of appeal reversed, holding that judicial review of the agency's decision was foreclosed by plaintiff's failure to file his petition for administrative mandamus within the period provided by *Veh. Code § 14401* (*160 Cal. App. 3d 1172, 1174*). The court noted that the period within which a mandamus petition must be filed is a period of limitation and the rules of law regarding limitation of actions are therefore applicable to mandamus proceedings. The Legislature's failure to enact a specific provision for extension of the 90-day period within which to file a mandamus petition under *Veh. Code § 14401* manifests a legislative intent not to permit relief from its provisions (*160 Cal. App. 3d 1172, 1176*). Thus, absent such a provision in *Veh. Code § 14401*, and absent any showing by plaintiff that the agency either acted unconscionably toward plaintiff or set out to take unfair advantage of him in advising him of his rights to judicial review, the agency was not estopped from raising the defense of the statute of limitation, and plaintiff was barred from seeking review of the agency's decision (*160 Cal. App. 3d 1172, 1176-1177*).

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CHAPTER 195 PUBLIC ADMINISTRATIVE LAW
PART II. FORMS
B. Opposition to Petition
1. Demurrer

19-195 California Points & Authorities § 195.65

§ 195.65 Demurrer Should Be Sustained--Four-Year Statute of Limitation Applies

[1] FORM Demurrer Should Be Sustained--Four-Year Statute of Limitation Applies

[*This form should be combined with a memorandum generally supporting a demurrer to a petition for administrative mandate based on statute of limitation. See § 196.64.*]

THE ACTION IS BARRED BY THE FOUR YEAR STATUTE OF LIMITATION BECAUSE NO OTHER STATUTE SETS FORTH THE PERIOD OF LIMITATION FOR THE ADMINISTRATIVE PROCEEDING.

Four-Year Limitation Period Applies If No Other Period Specifically Applies. If no statute sets forth the period of limitation for a particular administrative proceeding, the period of limitation for judicial review of an administrative decision is four years from the date the decision became final (*Code Civ. Proc. § 343*; *Allen v. Humboldt County Board of Supervisors (1963) 220 Cal. App. 2d 877, 884-885, 34 Cal. Rptr. 232*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a demurrer to a petition for a writ of mandate for review of a final administrative adjudicatory order or decision when the petition shows on its face that it is barred by the four-year statute of limitation.

This form should be combined with a memorandum generally supporting a demurrer to a petition for administrative mandate on the ground that the petition is barred by a relevant statute of limitation [*see* § 196.64].

With appropriate modifications, this memorandum may be used in opposition to the petition or in support of a motion for summary judgment or judgment on the pleadings in favor of respondent.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, he or she should add argument indicating that the four-year statute of limitation applies to his or her case, and when it began to run. See Comments under § 195.50[2][b] for further discussion.

[c] Opposing Authorities

In an appropriate case, the points and authorities *set out in § 195.104* may be submitted in opposition to this memorandum.

[3] Discussion of Authorities

[a] Four-Year Limitation Period Applies If No Other Period Specifically Applies

In ***Allen v. Humboldt County Board of Supervisors*** *(1963) 220 Cal. App. 2d 877, 34 Cal. Rptr. 232* , petitioner filed a petition for a writ of mandate to set aside a zoning variance granted by defendant agency. This petition was filed more than four months after the agency denied petitioner's administrative appeal. The trial court found that, under *Code Civ. Proc. § 1094.5* and *Gov. Code § 11523*, the petition had to be filed within 30 days after the last day on which reconsideration by the agency could be ordered and that the action was therefore barred. Petitioner appealed.

The court of appeal reversed. It stated that the 30-day period of limitation in *Gov. Code § 11523* was not applicable because it applied only to designated state agencies (*220 Cal. App. 2d 877, 883*). The court noted that the applicable statute of limitation is determined by the nature of the right asserted (*220 Cal. App. 2d 877, 884*). It concluded that, since the right involved in the instant case did not bring any specific statute of limitation into operation, the "catch-all" four-year statute of limitation of *Code Civ. Proc. § 343* applied (*220 Cal. App. 2d 877, 885*).

Note that after *Gov. Code § 11501* was amended in 1995, operative July 1, 1995. This statute determines the applicability of *Gov. Code § 11523* and other provisions of *Gov. Code § 11500 et seq.*, the formal hearing provisions of the Administrative Procedure Act [*see Patterson Flying Service v. Department of Pesticide Regulation (2008) 161 Cal. App. 4th 411, 418-421, 74 Cal. Rptr. 3d 290*]. For discussion of the agencies to which *Gov. Code § 11500 et seq.* now applies, including *Gov. Code § 11523*, see *§ 195.66[3][a]* and California Forms of Pleading and Practice, Ch. 473, *Public Agency Adjudication* (Matthew Bender).

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PART II. FORMS
B. Opposition to Petition
1. Demurrer

19-195 California Points & Authorities § 195.66

§ 195.66 Demurrer Should Be Sustained--Thirty-Day Statute of Limitation Applies to Review of Specified Agency's Decision

[1] FORM Demurrer Should Be Sustained--Thirty-Day Statute of Limitation Applies to Review of Specified Agency's Decision

[*This form should be combined with a memorandum generally supporting a demurrer to a petition for administrative mandate based on statute of limitation. See § 195.64.*]

THE ACTION IS BARRED BY THE THIRTY-DAY LIMITATION PERIOD BECAUSE THE AGENCY IS _____ [ONE SPECIFIED IN THE ADMINISTRATIVE PROCEDURE ACT *or* A DELEGATE OF AN AGENCY SPECIFIED IN THE ADMINISTRATIVE PROCEDURE ACT], AND THE PETITION WAS NOT FILED _____ [ON OR BEFORE _____ (*date*), WHICH IS 30 DAYS AFTER THE LAST DAY ON WHICH RECONSIDERATION COULD BE ORDERED *or* NOT LATER THAN _____ (*date*), WHICH IS THE 30TH DAY FOLLOWING THE DATE ON WHICH THE RECORD WAS DELIVERED TO THE PETITIONER OR HIS OR HER ATTORNEY OF RECORD].

[*EITHER*]

Thirty-Day Limitation Period for Review of Decision by Specified Agency. A petition for a writ of mandate to review a decision by an agency as defined in *Government Code Sections 11500* and *11501* must ordinarily be filed within 30 days after the last day on which reconsideration can be ordered. [If the petitioner has filed a request for the record of the administrative proceedings within 10 days after the last day on which reconsideration can be ordered, the time is extended to not later than the 30th day following the date on which the record is delivered to the petitioner or his or her attorney of record] (*Gov. Code § 11523*; *see Gov. Code §§ 11500(a), 11501*).

[*OR*]

Thirty-Day Limitation Period for Review of Decision by Delegate of Specified Agency. A petition for a writ of mandate to review a decision by an agency that acts as a delegate of an agency as defined in *Government Code Sections 11500* and *11501* must ordinarily be filed within 30 days after the last day on which reconsideration can be ordered (*see Garner v. City of Riverside (1985) 170 Cal. App. 3d 510, 516, 216 Cal. Rptr. 486*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a demurrer to a petition for a writ of mandate for review of a final administrative adjudicatory order or decision when the petition shows on its face that it is barred by the 30-day limitation period governing review of an agency that is specified in the Administrative Procedures Act, or a delegate of the specified agency.

This form should be combined with a memorandum generally supporting a demurrer to a petition for administrative mandate on the ground that the petition is barred by a relevant statute of limitation [*see § 195.64*].

With appropriate modifications, this memorandum may be used in opposition to the petition or in support of a motion for summary judgment or judgment on the pleadings in favor of respondent.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, he or she should add argument indicating that the 30-day statute of limitation applies to his or her case. See Comments under § 195.50[2][b] for further discussion.

[c] Opposing Memoranda

When appropriate, the memoranda *set forth in § 195.104* may be used to oppose the contentions set forth in this form.

[3] Discussion of Authorities

[a] Thirty-Day Limitation Period for Review of Decision by Specified Agency

Gov. Code § 11523 establishes the procedure for judicial review of decisions subject to the formal hearing provisions (*Gov. Code § 11500 et seq.*) of the Administrative Procedure Act (*Gov. Code § 11340 et seq.*). It provides that a petition for a writ of mandamus to review the decision of an administrative agency must be filed within either (1) 30 days after the last day on which the agency can order reconsideration or (2) 30 days after the delivery of the record to petitioner if, within 10 days after the last day on which reconsideration can be ordered, the petitioner requests the agency to prepare all or any part of the administrative record.

Gov. Code §§ 11500* and *11501 define the term "agency" for purposes of *Gov. Code § 11500 et seq.* (including *Gov. Code § 11523*, discussed *above*). "Agency" includes the state boards, commissions, and officer to which *Gov. Code § 11500 et seq.* are made applicable by law [*see Patterson Flying Service v. Department of Pesticide Regulation (2008) 161 Cal. App. 4th 411, 418-421, 74 Cal. Rptr. 3d 290*].

When a statute uses the word "agency" alone, the power to act may be delegated by the agency. In addition, when a statute uses the words "agency itself," the power to act must not be delegated unless the statutes relating to the particular agency authorize the delegation of the agency's power to hear and decide.

Gov. Code § 11501(a), operative July 1, 1997, provides that the APA's formal hearing provisions (*Gov. Code § 11500 et seq.*) apply to any agency as determined by the statutes relating to that agency, and to any agency newly formed after July 1, 1997, unless such agency is expressly excluded.

Former Gov. Code. Code § 11501 previously designated over 60 specific agencies that were subject to the APA formal hearing provisions.

For further discussion regarding agencies subject to the APA's formal hearing provisions, including an extensive (but not exhaustive) list of particular agencies, see California Forms of Pleading and Practice, Ch. 473, *Public Agency Adjudication* (Matthew Bender).

[b] Thirty-Day Limitation Period for Review of Decision by Delegate of Specified Agency

Garner v. City of Riverside *(1985) 170 Cal. App. 3d 510, 216 Cal. Rptr. 486* , involved judicial review of a denial of petitioner's application for disability benefits. Defendant city had elected to have certain of its employees, including petitioner, become members of the Public Employee's Retirement System (PERS). After the city terminated petitioner's employment, petitioner applied to PERS for disability retirement. PERS corresponded with the city manager concerning petitioner's application. It did so pursuant to *Gov. Code § 21024*, which allows PERS to order a "governing body" of a contracting agency to determine whether a member in its employ is incapacitated. The city manager informed PERS by mail that plaintiff suffered no mental or physical difficulties at the time he was terminated. PERS later denied the requested benefits. Petitioner petitioned for a writ of administrative mandate approximately 10 months after the denial. The trial court, pursuant to the city's motion, dismissed the petition on the ground that it was not timely filed. Petitioner appealed.

The court of appeal affirmed. It found that the 30-day period of limitation in *Gov. Code § 11523* applied, and that the petition was therefore barred. Plaintiff contended on appeal that *Gov. Code § 11523* did not apply because the city, which had made the initial determination that petitioner was not disabled, was not subject to the provisions of the Administrative Procedure Act (*Gov. Code § 11340 et seq.*). The court disagreed. Reviewing the statutes governing PERS determinations, former Gov. Code. Code §§ 21024 and 21025, the court found that the *only* determination to be made by the governing body of the contracting agency is whether the PERS member is incapacitated for performance of his or her duties. The formal decision to grant or deny the application for disability retirement is made by PERS, an agency subject to APA provisions. The court stated that even if the city were deemed to have rendered the decision, the result would be the same. In making its determination, the city acted as a delegate of the PERS board; therefore, its determination was subject to the APA provisions that were applicable to PERS (*170 Cal. App. 3d 510, 515-516*).

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B. Opposition to Petition
1. Demurrer

19-195 California Points & Authorities § 195.67

§ 195.67 Demurrer Should Be Sustained--Ninety-Day Statute of Limitation Applies to Review of Local Agency's Decision

[1] FORM Demurrer Should Be Sustained--Ninety-Day Statute of Limitation Applies to Review of Local Agency's Decision

[*This form should be combined with a memorandum generally supporting a demurrer to a petition for administrative mandate based on statute of limitation. See § 195.64.*]

THE ACTION IS BARRED BY THE 90-DAY LIMITATION PERIOD BECAUSE THE AGENCY IS A LOCAL AGENCY AND THE PETITION WAS NOT FILED _____ [NO LATER THAN THE 90TH DAY AFTER _____ (*date*), THE DATE ON WHICH THE DECISION BECAME FINAL *or* NOT LATER THAN _____ (*date*), THE 30TH DAY FOLLOWING THE DATE ON WHICH THE RECORD WAS _____ (PERSONALLY DELIVERED *or* MAILED) TO THE PETITIONER OR HIS/HER ATTORNEY OF RECORD].

A. Ninety-Day Limitation Period for Review of Local Agency Decision. A petition for a writ of mandate to review a local agency's decision must ordinarily be filed no later than the 90th day after the date on which the decision becomes final (*Holden v. Los Angeles City Ethics Comm'n (2006) 137 Cal. App. 4th 1274, 40 Cal. Rptr. 3d 858*). If the petitioner has filed a request for the record of the administrative proceedings within 10 days after the decision has become final, the time is extended to not later than the 30th day following the date on which the record is personally delivered or mailed to the petitioner or his or her attorney of record (*Code Civ. Proc. § 1094.6(b), (d), (g)*).

[*Optional*] **B. Service by Mail Does Not Extend Ninety-Day Period.** *Code of Civil Procedure Section 1013(a)* does not apply to extend the 90-day time period, following deposit in the mail of the written decision or the written findings supporting the decision of the local agency, within which a petition for a writ of mandate to review the decision may be filed (*Code Civ. Proc. § 1094.6(b)*; *Tielsch v. City of Anaheim (1984) 160 Cal. App. 3d 576, 578-580, 206 Cal. Rptr. 740*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a demurrer to a petition for a writ of mandate for review of a final administrative adjudicatory order or decision when the petition shows on its face that it is barred by the 90-day limitation period governing review of a local agency.

This form should be combined with a memorandum generally supporting a demurrer to a petition for administrative mandate on the ground that the petition is barred by a relevant statute of limitation [*see § 195.64*].

With appropriate modifications, this memorandum may be used in opposition to the petition or in support of a motion for summary judgment or judgment on the pleadings in favor of respondent.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, he or she should add argument indicating that the 90-day statute of limitation applies to his or her case. See Comments under § 195.50[2][b] for further discussion.

[c] Opposing Authorities

In an appropriate case, the points and authorities *set out in § 195.105* may be use to oppose the contention set forth in this memorandum.

[3] Discussion of Authorities

[a] Ninety-Day Limitation Period for Review of Local Agency Decision

Code Civ. Proc. § 1094.6(b) provides that an administrative mandate petition to review a local agency decision must be filed no later than the 90th day after the date on which the decision becomes final. If there is no provision for reconsideration of the decision, or for a written decision or written findings supporting the decision, in any applicable provision of any statute, charter, or rule, then the decision is final for the purposes of *Code Civ. Proc. § 1094.6* on the date it is announced. If the decision is not announced at the close of the hearing, then the date, time, and place of the announcement of the decision is required to be announced at the hearing. If there is a provision for reconsideration, the decision is final for the purposes of *Code Civ. Proc. § 1094.6* on expiration of the period during which the reconsideration can be sought. However, if reconsideration is sought, the decision is final on the date that reconsideration is rejected. If there is a provision for a written decision or written findings, then the decision is final for the purposes of *Code Civ. Proc. § 1094.6* on the date it is mailed by first-class mail, postage prepaid, including a copy of the affidavit or certificate of mailing, to the party seeking the writ. *Code Civ. Proc. § 1013(a)* does not apply to extend the time, following deposit in the mail of the decision or findings, within which a petition can be filed.

Code Civ. Proc. § 1094.6(d) provides that if a petitioner files a request for a complete record of the proceedings within 10 days after the date the decision becomes final, the time within which a petition for a writ of administrative mandate may be filed under *Code Civ. Proc. § 1094.5* is extended to not later than the 30th day following the date on which the record is either personally delivered or mailed to the petitioner or his or her attorney of record.

Code Civ. Proc. § 1094.6(g) provides that the provisions of *Code Civ. Proc. § 1094.6* prevail over any conflicting provision in any otherwise applicable law relating to the subject matter, unless the conflicting provisions are a state or federal law that provides a shorter period of limitation, in which case the shorter period of limitations applies.

In ***Holden v. Los Angeles City Ethics Comm'n*** *(2006) 137 Cal. App. 4th 1274, 40 Cal. Rptr. 3d 858* , the ethics commission conducted an audit of Holden's successful campaign for city council. An administrative hearing before the commission took place over three days, ending on April 30, 2002. The president of the commission directed counsel for the executive director to draft findings and submit them to the city attorney for review, and then submit them to Holden for comment. She stated that the findings would be presented to the commission for adoption at its next meeting, on May 21, 2002. Holden attended the May 21, 2002 commission meeting and asked that the matter be continued because he wanted to get an opinion from the city attorney regarding a possible charging deficiency in the accusation. Although the president of the commission told Holden that the commission would not reconsider its determination that violations occurred, the commission continued the matter until its next meeting, on June 18, 2002, because it determined that the proposed findings and order needed to be revised to more accurately reflect their decision. An attorney attended the June 18, 2002 Commission meeting on behalf of Holden and argued that the commission's decision was improper because there was a charging deficiency in the accusation. The president of the commission told him that the commission's decision as to the violations was final and that the commission would not reconsider it. The commission then voted to adopt the findings and order, after amending it to provide, among other things, a deadline for payment of the penalty. The final findings and order were served on Holden June 28, 2002. Holden filed a petition for writ of mandate on September 27, 2002, exactly 90 days after the findings and order were served. The trial court denied the petition. It found that the administrative decision became final under *Code of Civil Procedure § 1094.6* when it was announced on April 30, 2002, the last day of the administrative hearing. Therefore, the court found that the petition was time-barred.

On appeal, the court of appeal held that the decision was final on the date it was announced. *Code of Civil Procedure § 1094.6* does not define "announced" or explain how a decision is "announced." The court applied a "plain and common sense meaning" to that term and held that a decision is announced when it is made known to the public (*137 Cal. App. 4th 1274, 1280)* . The court held that the commission's decision was not announced on April 30 because it was not complete on that date (*137 Cal. App. 4th 1274, 1280)* . Rather, the court held, the commission voted to order Holden to pay a penalty and finalized its order at the June 18 public meeting. Thus, the commission made its completed decision known to the public, i.e., "announced" its decision, at the June 18 meeting. Accordingly, Holden's petition was time-barred (*137 Cal. App. 4th 1274, 1281)* .

[b] Service by Mail Does Not Extend Ninety-Day Period

Code Civ. Proc. § 1094.6(b) provides that *Code Civ. Proc. § 1013(a)* (extending time for performance of right or duty within prescribed period after service of document by mail) does not apply to extend the time, following deposit in the mail of the written decision or written findings supporting the decision of the local agency, within which a petition for judicial review of the decision must be filed. This provision of *Code Civ. Proc. § 1094.6(b)* thus codifies the holding of *Tielsch v. City of Anaheim (1984) 160 Cal. App. 3d 576, 578-580, 206 Cal. Rptr. 740* , discussed, *below*.

Before the 1991 amendment of *Code Civ. Proc. § 1094.6(b)*, expressly precluding the applicability of *Code Civ. Proc. § 1013(a)* to extend the time within which a petition for review of a local agency decision must be filed, petitioner in ***Tielsch v. City of Anaheim*** *(1984) 160 Cal. App. 3d 576, 206 Cal. Rptr. 740* , filed a petition for a writ of administrative mandate 93 days after the date of defendant agency's decision denying him eligibility for retirement. Petitioner claimed that because he was notified of the agency's decision by mail, *Code Civ. Proc. § 1013(a)* gave him 95 days within which to file the petition. The trial court denied the petition, and petitioner appealed.

Holding *Code Civ. Proc. § 1013(a)* to be inapplicable, the court of appeal first explained that it was not bound by dicta in *California Accounts, Inc. v. Superior Court (1975) 50 Cal. App. 3d 483, 123 Cal. Rptr. 304* , and that this was a case of first impression (*160 Cal. App. 3d 576, 578 n.4*). Reviewing other situations in which *Code Civ. Proc. § 1013(a)* does not extend time, such as the time within which to seek trial de novo after arbitration, the time within which to file suit against a public entity after denial of a claim, and the time within which a court may grant a motion for a new trial, the court distinguished the period referred to in *Code Civ. Proc. § 1013(a)* from statutes of limitations (*160 Cal. App.*

3d 576, 578-579). As an additional argument, the court distinguished statutes providing that acts must be done within a certain number of days after "issuance" of a decision as opposed to those that require the action to be taken within a certain period after "service" of a decision. *Code Civ. Proc. § 1094.6* requires the petition to be filed not later than the 90th day following the date on which the decision becomes final and is not tied to service (*160 Cal. App. 3d 576, 579-580*). Lastly, the court distinguished petitions for mandate filed under *Code Civ. Proc. § 418.10(c)* (to quash service of summons), which key the time to service of notice of entry of the order denying the motion to quash (*160 Cal. App. 3d 576, 580*).

California Points & Authorities

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Volume 19 Chapters 190-195 PRODUCTS LIABILITY---to---PUBLIC ADMINISTRATIVE LAW
CHAPTER 195 PUBLIC ADMINISTRATIVE LAW
PART II. FORMS
B. Opposition to Petition
1. Demurrer

19-195 California Points & Authorities § 195.68

§ 195.68 Demurrer Should Be Sustained--Petitioner Failed to Exhaust Administrative Remedies, General Form

[1] FORM Demurrer Should Be Sustained--Petitioner Failed to Exhaust Administrative Remedies, General Form

[*Caption. see § 195.50.*]

THE COURT SHOULD SUSTAIN THE DEMURRER TO THE PETITION FOR WRIT OF MANDATE BECAUSE THE COURT LACKS JURISDICTION TO ISSUE A PEREMPTORY WRIT OF MANDATE IN THAT PETITIONER FAILED TO EXHAUST HIS/HER ADMINISTRATIVE REMEDIES.

A. Demurrer in Mandate Proceeding. [*See § 195.50[1],* Paragraph A].

B. Court Lacks Jurisdiction When Petitioner Fails to Exhaust Administrative Remedies. The exhaustion of administrative remedies is a condition precedent to obtaining judicial relief, and when a plaintiff or petitioner has failed to exhaust his or her administrative remedies, the court is without jurisdiction to adjudicate the action or proceeding (*Campbell v. Regents of the University of California (2005) 35 Cal. 4th 311, 322, 25 Cal. Rptr. 3d 320* ; *Merchandising Concept Group, Inc. v. California Unemployment Insurance Appeals Board (2010) 181 Cal. App. 4th 1274, 1280-1281, 104 Cal. Rptr. 3d 892* ; *In re Conservatorship of Whitley (2007) 155 Cal. App. 4th 1447, 1462-1464, 66 Cal. Rptr. 3d 808* ; *Eight Unnamed Physicians v. Medical Executive Committee of the Medical Staff of Washington Township Hospital (2007) 150 Cal. App. 4th 503, 510-515, 59 Cal. Rptr. 3d 100* ; *Kaiser Foundation Hospitals v. Superior Court (2005) 128 Cal. App. 4th 85, 105, 26 Cal. Rptr. 3d 744* ; *Kane v. Redevelopment Agency (1986) 179 Cal. App. 3d 899, 908, 224 Cal. Rptr. 922* ; *Morton v. Superior Court (1970) 9 Cal. App. 3d 977, 981, 88 Cal. Rptr. 533*).

[*Optional*] **C. Affected Public Exception Does Not Apply When Petitioner Participated.** When a plaintiff or petitioner had notice of administrative proceedings and actively participated at every stage of the hearing process, but failed to exhaust his or her administrative remedies, that failure cannot be excused under the "member of the affected public" exception to the exhaustion of remedies doctrine (*Sea & Sage Audubon Society, Inc. v. Planning Com. (1983) 34 Cal. 3d 412, 418, 194 Cal. Rptr. 357, 668 P.2d 664*).

[*Optional*] **D. Affected Public Exception Does Not Apply Without Factual Support.** A factually unsupported allegation that a person who is challenging the administrative [environmental] review process of a public agency, [and who has never been a party to that challenged process], is acting merely as a concerned member of the public, without more, does not qualify that person as a "member of the affected public" under that exception to the exhaustion of remedies doctrine (*Kane v. Redevelopment Agency (1986) 179 Cal. App. 3d 899, 908, 224 Cal. Rptr. 922*).

[*Optional*] **E. Later Claim Barred by Exhaustion of Remedies Doctrine.** When a petitioner for judicial administrative review adds a later claim that is neither like, nor reasonably related, to his or her original claim considered in the original administrative proceeding, and is not a claim that is likely to be have become apparent during the administrative investigation of the original claim, that later claim is barred by the exhaustion of remedies doctrine (*Okoli v. Lockheed Technical Operations Co. (1995) 36 Cal. App. 4th 1607, 1617, 43 Cal. Rptr. 2d 57*).

[*Optional*] **F. Failure to Request Reconsideration Regarding Matters Not Previously Considered by Agency.** When the Legislature has provided that a petitioner before an administrative tribunal "may" seek reconsideration or rehearing of an adverse decision of that tribunal, a petitioner must seek reconsideration in order to exhaust his or her administrative remedies prior to seeking recourse in the courts, when appropriate to raise matters not previously brought to the agency's attention. Such a petition remains necessary, for example, to introduce evidence or legal arguments before the administrative body that were not brought to its attention as part of the original decision making process (*Sierra Club. v. San Joaquin Local Agency Formation Com. (1999) 21 Cal. 4th 489, 493-494, 510, 87 Cal. Rptr. 702, 981 P.2d 543*).

G. Exhaustion Required Even If Constitutional Rights Are at Issue. Even if the statute sought to be applied and enforced by the administrative agency is challenged upon constitutional grounds, completion of the administrative remedy is a prerequisite to equitable relief (*Service Employees International Union, Local 1000 v. Department of Personnel Administration (2006) 142 Cal. App. 4th 866, 871, 48 Cal. Rptr. 3d 457*).

[*Optional*] **H. Exhaustion Required Even If Questions Concerning Agency's Jurisdiction Arise.** Even if questions concerning the agency's jurisdiction are presented, the doctrine of exhaustion of administrative remedies requires judicial abstention until there has been a final decision in the administrative forum (*McAllister v. County of Monterey (2007) 147 Cal. App. 4th 253, 284-288, 54 Cal. Rptr. 3d 116*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a demurrer to a petition for a writ of mandate for review of a final administrative adjudicatory order or decision of a local agency, when the petitioner has failed to exhaust his or her administrative remedies. This form should be combined with a caption [*see § 195.50*].

With appropriate modifications, this memorandum may be used in opposition to the petition or in support of a motion for summary judgment or judgment on the pleadings in favor of respondent.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should specify all allegations in the petition seeking relief which an administrative remedy is provided by statute, for which there are no corresponding allegations showing that the petitioner sought and exhausted his or her administrative remedy. See also Comments under § 195.50[2][b] for further discussion.

[c] Opposing Authorities

When appropriate, the memorandum and in §§ 195.85-195.103 may be used to oppose the contention set forth in this form.

[3] Discussion of Authorities

[a] Court Lacks Jurisdiction When Petitioner Fails to Exhaust Administrative Remedies

In ***Campbell v. Regents of the University of California*** *(2005) 35 Cal. 4th 311, 25 Cal. Rptr. 3d 320, 106 P.3d 976* , appellant Janet Campbell worked for the Regents as a senior architect. Her job duties included reviewing architectural plans and specifications for campus construction projects costing less than $250,000, to ensure that the projects complied with competitive bidding laws. Campbell claimed that her supervisor directed her to help prepare bid documents that limited competition by using restrictive specifications. Campbell protested to the Regents on several occasions that using these documents to limit the bidding violated state competitive bidding laws. She later reported the violations to the Federal Bureau of Investigation (FBI).

After the FBI questioned UC officials about the alleged violations, the Regents changed Campbell's job duties, assigning her to what she perceived to be menial projects. Campbell went on disability leave. Soon after she returned to work, she was discharged. The Regents blamed her discharge on downsizing. However, Campbell claimed that less senior and less qualified coworkers were retained.

Campbell filed an internal complaint against UCSF and her supervisors under the grievance procedures set forth in UCSF's Personnel Policies for Staff Members (PPSM). She alleged that she was discharged in retaliation for being a whistle-blower. In response, the Regents informed Campbell that the PPSM's complaint resolution process excluded allegations of retaliation for whistleblowing. The letter stated that such complaints should be filed under UCSF's Policy and Procedures for Reporting Improper Governmental Activities and Protection Against Retaliation for Reporting Improper Activities (Policy and Procedures). The letter also stated, "Alleged violations of state and federal laws will be excluded from the [PPSM's] complaint resolution process."

Campbell did not refile her complaint under the Policy and Procedures. Instead, she filed a complaint against the Regents in superior court, seeking damages for retaliatory termination. She alleged that she had either exhausted all administrative remedies or was not required to exhaust them. The Regents demurred to the complaint on the ground that Campbell's refusal to file a grievance under the Policy and Procedures was a failure to exhaust administrative remedies. The trial court sustained the demurrer, granting Campbell leave to amend her complaint to allege either that she had fulfilled the exhaustion requirement, or that an exception to the requirement excused her from its application.

Campbell's first amended complaint alleged that she had filed an internal grievance complaint under the PPSM; that *Government Code § 12653* and *Labor Code § 1102.5* did not require her to exhaust UCSF's administrative remedies; and that the letter informed her that the PPSM excluded her whistleblowing allegations. The Regents again demurred to the amended complaint on the ground that Campbell failed to exhaust her administrative remedies.

The trial court sustained the Regents' demurrer to the first amended complaint. It gave Campbell leave to amend in order to plead that the futility doctrine excused her failure to exhaust, and that the Regents did not notify her of the relevant grievance procedures.

Campbell filed a second amended complaint, alleging that estoppel excused her from complying with exhaustion requirements because the Regents had failed to inform her of "the necessity to file a grievance under the whistle-blowing policy." The Regents demurred to that complaint on the grounds that Campbell failed to allege that exhaustion would have been futile, and that she was properly advised of the applicable grievance procedures. The trial court sustained the Regents' demurrer to the second amended complaint without leave to amend and entered judgment in the Regents' favor.

Campbell appealed. The Court of Appeal affirmed the trial court's dismissal for failure to exhaust administrative remedies. The California Supreme Court granted Campbell's petition for review.

The Court held that the Regents did have jurisdiction against Campbell. It held that the action involved a policy the Regents established to handle complaints of retaliatory dismissal for whistleblowing in an orderly manner. Such a policy is equivalent to a statute and required Campbell to resort initially to internal grievance practices and procedures, Campbell had an administrative remedy that she failed to exhaust (*35 Cal. 4th 311, 322*).

The Court further held that *Government Code § 12653* and *Labor Code § 1102.5* did not create an exception from the requirement that she exhaust UCSF's administrative remedies (*35 Cal. 4th 311, 325-331*).

Campbell also argued that requiring public employees who disclose false claims against a public entity to exhaust their administrative remedies when seeking redress for retaliation places a content-based restriction on their freedom of speech. Campbell contended that by treating public employee whistleblowing differently from private employee whistleblowing, the lower court made an impermissible content-based discrimination against a type of speech. However, the Court held that requiring public employees to exhaust their administrative remedies as a prerequisite to pursuing their claims of retaliatory discharge in superior court does not restrict their freedom to disclose false claims (*35 Cal. 4th 311, 332*).

Campbell also argued that the exhaustion requirement discriminates on the basis of viewpoint because it precludes lawsuits against public entities. The Court held that this claim misstated the effect of the exhaustion requirement, because judicial review of the administrative determination is available via administrative mandamus (*35 Cal. 4th 311, 332*).

In ***Merchandising Concept Group, Inc. v. California Unemployment Insurance Appeals Board*** *(2010) 181 Cal. App. 4th 1274, 1280-1281, 104 Cal. Rptr. 3d 892* , the plaintiff employed what it considered independent contractors. The defendant determined that the hires were not independent contractors, but were employees for whom the plaintiff must pay employment taxes. The defendant issued an assessment and a penalty against the plaintiff. The plaintiff filed a petition for reassessment with an administrative law judge. The administrative law judge affirmed the assessment but reversed the penalty, based on the plaintiff's reliance on advice of counsel. The Appeals Board affirmed the administrative judge's opinion and stated that this was a "final decision." The plaintiff paid the tax and filed a petition for writ of mandate in the superior court. The defendant demurred on various grounds, including the plaintiff's failure to exhaust its administrative remedies. The trial court granted the demurrer without leave to amend.

On appeal, the court held that the California Constitution granted to the Legislature the power to prescribe the manner of proceeding in an action to recover taxes paid. The applicable Unemployment Insurance Code sections set forth a series of administrative steps a taxpayer must take in order to recover taxes. The plaintiff took only the first step and argued that the others were unnecessary. The court disagreed and affirmed the demurrer (*181 Cal. App. 4th 1274, 1280-1281)* .

In ***In re Conservatorship of Whitley*** *(2007) 155 Cal. App. 4th 1447, 1462-1464, 66 Cal. Rptr. 3d 808* , the plaintiff was a conservator for her developmentally disabled adult brother. She appealed from a superior court order granting the North Bay Regional Center's (NBRC) request to move her brother to a different facility. The plaintiff appealed on the ground that the Lanterman Developmental Disabilities Services Act (*Welf. & Inst. Code § 4500 et seq.*) required a legal representative's objection to a proposed community placement to be resolved by an administrative fair hearing procedure followed by superior court review if the conservator, or another party, remains dissatisfied with the result. The plaintiff argued that her attempt to invoke the hearing was improperly thwarted by NBRC's insistence on a judicial hearing in superior court as contemplated in the settlement of an unrelated federal case.

The court of appeal examined the statute and held that the statute's comprehensive approach to resolving disagreements concerning placements, including a voluntary informal meeting, voluntary mediation, and an administrative fair hearing with judicial review, clearly manifested the legislature's intent that the Lanterman Act's fair hearing procedures be the exclusive remedy for actions by legal representatives objecting to a community placement decision (*155 Cal. App. 4th 1447, 1462-1463)* . The court concluded that if a statute provides an administrative remedy, relief must be sought from the administrative body and such remedy must be exhausted before judicial review is available (*155 Cal. App. 4th 1447, 1463)* . Until the administrative remedy is exhausted, the trial court has no jurisdiction (*155 Cal. App. 4th 1447, 1463)* .

In ***Eight Unnamed Physicians v. Medical Executive Committee of the Medical Staff of Washington Township Hospital*** *(2007) 150 Cal. App. 4th 503, 510-515, 59 Cal. Rptr. 3d 100* , the physicians were members of a medical group that had provided all necessary anesthesia services at the defendant hospital for many years. The physicians gave the hospital two days' notice that they would be moving their practices to another hospital. The hospital sought to discipline the physicians for withdrawing services in a way that could have jeopardized patient safety and undermined public confidence in the hospital. The hospital's medical executive committee recommended that the hospital board of directors terminate the physicians' clinical privileges and medical staff membership. The physicians each requested a judicial review committee hearing to dispute the recommendation. The hospital had detailed bylaws setting forth the procedure for challenging discipline recommendations. The physicians sought to consolidate their hearings, but, although one hearing officer granted the request, the hospital did not consolidate the hearings.

The physicians filed a petition for writ of mandate seeking consolidation of the hearings and a stay of the hearings until the petition was decided. The hospital demurred to the petition on the ground that the physicians had failed to exhaust their administrative remedies. The court overruled the demurrer and stayed the proceedings pending determination of the petition. The trial court held that it was illogical to make the physicians wait until the hearing process is complete to seek review of the various consolidation determinations. The hospital appealed.

The court of appeal held that it is the general and well established jurisdictional rule that a plaintiff who seeks judicial relief against an organization of which the plaintiff is a member must first invoke and exhaust the applicable remedies provided by that organization (*150 Cal. App. 4th 503, 510-511)* . The court held that under this doctrine, a party must go through the entire proceeding to a final decision on the merits of the entire controversy before resorting to the courts for relief (*150 Cal. App. 4th 503, 511)* . The court held that the exhaustion requirement did not apply if an administrative remedy was not available (*150 Cal. App. 4th 503, 511)* . However, it held that an administrative remedy was available insofar as the physicians were not contesting the validity of the bylaws, but rather the hospital's alleged failure to follow them by not acceding to one hearing officer's consolidation ruling (*150 Cal. App. 4th 503, 512-513)* . The court held that its review of a hospital's disciplinary procedures was confined to safeguarding basic due process rights, which do not include consolidation of hearings, or procedures employed in deciding a consolidation issue (*150 Cal. App. 4th 503, 513)* .

The court further held that no exception to the exhaustion requirement applied. The court dismissed the physicians' argument that they would suffer irreparable harm if their claims were not consolidated. The court also dismissed their argument that the cost of pursuing individual claims would be prohibitive (*150 Cal. App. 4th 503, 514-515)* .

In ***Kaiser Foundation Hospitals v. Superior Court*** *(2005) 128 Cal. App. 4th 85, 26 Cal. Rptr. 3d 744* , a doctor sued a hospital where she had privileges after her employment was terminated and her privileges revoked. Under *Bus. & Prof. Code § 809.2*, the doctor was required to submit her complaint to a peer review board before filing suit. Under the hospital's bylaws and procedures, the peer review hearing was supposed to begin within 60 days after the doctor requested the hearing. Due to disputes between the parties' lawyers about the composition of the review panel, the hearing did not begin within the 60-day period. The doctor then filed a complaint against the hospital in superior court, seeking, among other things, a declaration that she was not required to exhaust administrative remedies because the hearing would deny her a fair hearing before a neutral and unbiased decision-maker and a hearing was not made

available to her within the time required by statute and due process. The doctor filed a motion for summary adjudication on the declaratory relief cause of action, arguing that she was not required to exhaust her administrative remedies because she did not get a hearing within 60 days, the hospital's hearing process violated due process requirements of impartiality, and she would be irreparably harmed if she were required to pursue the hearing process. The hospital filed a cross-motion for summary adjudication on the declaratory relief cause of action, seeking a declaration that the doctor was required to exhaust the peer review hearing process before resorting to the courts.

The superior court denied the hospital's motion and granted the doctor's motion. The court held that because a hearing was not timely held, and the doctor did not consent to the delay, the doctor was not required to exhaust her administrative remedy before pursuing her superior court actions. According to the trial court, because "no viable administrative remedy contemplated by *Business and Professions Code section 809, et seq.*, was ever made available to [the doctor] on a timely basis," "there was no administrative remedy that she could be required to exhaust before resorting to the court." The hospital filed a petition for a writ of mandate or prohibition or other appropriate relief in appellate court, seeking to restrain the trial court from exercising jurisdiction vested in the peer review panel.

The court of appeal granted the hospital's petition for writ of mandate and reversed the trial court. The court held that the hospital's failure to begin the hearing on time, without more, did not render the administrative remedy of the peer review process inadequate or unavailable and did not constitute a deprivation of fair procedure that the doctor was entitled to escape peer review altogether (*128 Cal. App. 4th 85, 104*). In addition, the court of appeal held that the doctor failed to explain how requiring her to proceed with a peer review hearing that was not commenced within the 60-day period, instead of allowing her to proceed with an immediate action in superior court, would cause her irreparable harm. The court held that the harm to which the doctor referred, the alleged devastation of her career caused by the summary suspension of her surgical privileges and the termination of her employment, had already occurred, if it had occurred at all. The court held that the doctor failed to explain how this harm was irreparable if the administrative process were allowed to go forward, but would not be if she were allowed to go forward with her actions in superior court (*128 Cal. App. 4th 85, 105*).

In ***Kane v. Redevelopment Agency*** *(1986) 179 Cal. App. 3d 899, 224 Cal. Rptr. 922* , a suburban community in Los Angeles County was designated by the city council as a redevelopment project area. The city council adopted a plan that necessitated the preparation of an environmental impact report by the redevelopment agency. Plaintiff, who was not a resident or owner of property in the redevelopment area, did not participate in the administrative process but instead filed a petition for writ of mandate and for an injunction challenging the city's environmental review pursuant to the California Environmental Quality Act (CEQA) (*Pub. Res. Code § 21000 et seq.*). The trial court ordered the issuance of a peremptory writ of mandate, but denied plaintiff's request for attorney's fees. The redevelopment agency appealed.

The court of appeal reversed the judgment, and remanded the cause to the trial court with directions to recall the peremptory writ of mandate, vacate its judgment on the writ, and dismiss the proceeding for lack of jurisdiction on the grounds that plaintiff had failed to exhaust his administrative remedies. The court rejected plaintiff's argument that he was excepted from the exhaustion requirement under the "member of the affected public" exception (discussed in [b], *below*), and held that since the exhaustion requirement applied and plaintiff had failed to exhaust his remedies, the trial court had been without jurisdiction to adjudicate the merits of the mandate petition (*179 Cal. App. 3d 899, 908*).

In ***Morton v. Superior Court*** *(1970) 9 Cal. App. 3d 977, 88 Cal. Rptr. 533* , real parties in interest were city employees with a labor grievance who applied for a writ of mandate and declaratory relief. Petitioners then sought a writ of prohibition in the court of appeal to prevent further proceedings in the lawsuit, on the grounds that real parties in interest did not exhaust their administrative remedies before filing their suit and therefore the court was without jurisdiction to grant the requested relief.

The court of appeal granted the writ of prohibition, holding that the rule is settled that the exhaustion of an administrative remedy, when one is available, is a condition precedent to obtaining judicial relief, and that a court

violating the rule acts in excess of its jurisdiction (*9 Cal. App. 3d 977, 981*). The court found that real parties in interest had a grievance procedure available, and because they had not pursued this remedy, the trial court was without jurisdiction to adjudicate the matter (*9 Cal. App. 3d 977, 981-984*).

[b] Affected Public Exception Does Not Apply When Petitioner Participated

In ***Sea & Sage Audubon Society, Inc. v. Planning Com.*** *(1983) 34 Cal. 3d 412, 194 Cal. Rptr. 357, 668 P.2d 664* , defendant planning commission held a public hearing on a planned community development project. Plaintiffs appeared at the hearing and opposed the project. The commission proceeded to approve tentative maps of the project, and voted to certify the environmental impact report as complete. At the conclusion of the hearing, the chairman advised those present that they had 15 days to appeal the commission's decision to the city council. Plaintiffs mailed a brief letter to the city council, stating that they were thereby appealing the commission's decision. The letter was received by the city clerk's office one day after the filing deadline. No filing fee accompanied the letter. The city rejected the appeal. Plaintiffs then filed an administrative mandamus action. Defendants moved for summary judgment on the ground that plaintiffs had failed to exhaust their administrative remedies. The motion was granted, and plaintiffs appealed.

The Supreme Court affirmed the judgment, holding that plaintiffs had not been excused from the exhaustion of remedies requirement. The Court recognized that an exception to the exhaustion doctrine had been carved out in *Environmental Law Fund, Inc. v. Town of Corte Madera (1975) 49 Cal. App. 3d 105, 114, 122 Cal. Rptr. 282* (discussed in *§ 195.85[3]*), that a public interest litigant should not be barred from judicial relief under the doctrine when it had not participated in, or received any notice of, the relevant administrative proceedings. The Court declined, however, to pass on the validity of the *Corte Madera* holding, because that holding did not sustain plaintiffs' claim in the instant case. In contrast, plaintiffs did have notice of the administrative proceedings and actively participated at every stage of the hearing process. Indeed, plaintiffs had been explicitly reminded of the available administrative appeal. Under these circumstances, plaintiffs' failure to exhaust their remedies was not excusable under the "member of the affected public" exception of *Corte Madera* (*34 Cal. 3d 412, 417-418*).

[c] Affected Public Exception Does Not Apply Without Factual Support

The facts and procedural background of ***Kane v. Redevelopment Agency*** *(1986) 179 Cal. App. 3d 899, 224 Cal. Rptr. 922* , are discussed in [a], *above*. In reversing the judgment granting the peremptory writ of mandate, the court of appeal held that the trial court had been without jurisdiction to adjudicate the merits of the mandate petition because plaintiff had failed to exhaust his administrative remedies. The court of appeal recognized the "member of the affected public" exception to the exhaustion of remedies doctrine that had been carved out in *Environmental Law Fund, Inc. v. Town of Corte Madera (1975) 49 Cal. App. 3d 105, 114, 122 Cal. Rptr. 282* (discussed in *§ 195.85[3]*) (*179 Cal. App. 3d 899, 905*). However, the court held that exception did not apply to plaintiff, because he had failed to allege facts showing how he was affected and that he could not reasonably have been a party to the administrative review process (*179 Cal. App. 3d 899, 902*). The court concluded that a factually unsupported allegation that a person who is challenging the environmental review process is acting merely as a concerned member of the public, without more, does not qualify that person as a "member of the affected public" under that exception to the exhaustion of remedies doctrine. Because the exception did not apply, the trial court had been without jurisdiction to grant a peremptory writ of mandate (*179 Cal. App. 3d 899, 908*).

[d] Later Claim Barred by Exhaustion of Remedies Doctrine

In ***Okoli v. Lockheed Technical Operations Co.*** *(1995) 36 Cal. App. 4th 1607, 43 Cal. Rptr. 2d 57* , the plaintiff brought an action against his employer alleging harassment and discrimination. He first filed the charge with the California Department of Fair Employment and Housing ("DFEH"). In his lawsuit, however, the plaintiff raised additional allegations of retaliation. After trial, the jury rendered a defense verdict on the discrimination and harassment causes of action, but found in the plaintiff's favor on the retaliation claim. The employer appealed, arguing that the

retaliation claim was barred by the exhaustion of remedies doctrine.

The court of appeal reversed the judgment. The court cited the fact that the unlawful retaliation claim occurred after the filing of the DFEH charge and would not reasonably have been uncovered in an investigation of the charges that were made. The record indicated that the agency never had any opportunity, with respect to the additional theory, to pursue the vital policy interest embodied in the legislative act. Since the added claims were neither like nor reasonably related to the DFEH claim, and were not likely to have been uncovered by the agency's investigation of the DFEH claim, the court concluded that the retaliation claim was barred by the exhaustion of remedies doctrine (*36 Cal. App. 4th 1607, 1617*).

[e] Failure to Request Reconsideration Regarding Matters Not Previously Considered by Agency

In ***Sierra Club v. San Joaquin Local Agency Formation Com.*** *(1999) 21 Cal. 4th 489, 87 Cal. Rptr. 702, 981 P.2d 543* , various developers commenced proceedings before a local agency formation commission to obtain approval of a city's annexation of farm land for use in a development project. Petitioners objected in that proceeding, and the agency overruled their objections and approved the proposed annexation. One of the petitioners sent a letter to the agency requesting reconsideration of the approval, but withdrew his request the next day. The petitioners filed a mandamus petition in the superior court, naming the agency as the respondent, and various developers and others as real parties in interest. The agency moved to dismiss the petition, arguing that under statute an aggrieved person may request reconsideration of an adverse local agency formation commission and that such a request is a mandatory prerequisite to filing in the courts. The trial court granted the motion to dismiss. The Court of Appeal affirmed the trial court's order, and the Supreme Court granted review.

The Supreme Court reversed the judgment of the court of appeal, and remanded the cause for further proceedings in accordance with the Court's decision. The Court revisited its decision in *Alexander v. State Personnel Bd. (1943) 22 Cal. 2d 198, 199, 137 P.2d 433* , in which the Court held that when the Legislature has provided that a petitioner before an administrative tribunal "may" seek reconsideration or rehearing of an adverse decision of that tribunal, the petitioner always must seek reconsideration in order to exhaust his or her administrative remedies prior to seeking recourse in the courts. The Court concluded that the *Alexander* rule should be abandoned because it might easily be overlooked by a reasonably alert litigant and it was unlikely that the rule has had any substantial effect in reducing the burden on the courts (*21 Cal. 4th 489, 499, 501*). In addition, the Court found no sufficient basis to extrapolate legislative approval of the *Alexander* rule (*21 Cal. 4th 489, 499, 508*). Therefore, the Court overruled *Alexander*, and held that subject to limitations imposed by statute, the right to petition for judicial review of a final decision of an administrative agency is not necessarily affected by the party's failure to file a request for reconsideration or rehearing before that agency (*21 Cal. 4th 489, 499, 508*).

The Court emphasized that its conclusion did not mean the failure to request reconsideration or rehearing may never serve as a bar to judicial review. A petition for reconsideration remains necessary, for example, to introduce evidence or legal arguments before the administrative body that were not brought to its attention as part of the original decision making process. Moreover, the Court's reasoning was not addressed to new evidence, changed circumstances, fresh legal arguments, filings by newcomers to the proceedings and the like. Likewise, a rehearing petition is necessary to call to the agency's attention errors or omissions of fact or law in the administrative decision itself that were not previously addressed in the briefing, in order to give the agency the opportunity to correct its own mistakes before those errors or omissions are presented to a court. According to the Court, the general exhaustion rule remains valid: administrative agencies must be given the opportunity to reach a reasoned and final conclusion on each and every issue upon which they have jurisdiction to act before those issues are raised in a judicial forum. The Court stated that its decision is limited to the narrow situation in which one would be required, after a final decision by an agency, to raise for a second time the same evidence and legal arguments one has previously raised solely to exhaust administrative remedies under *Alexander* (*21 Cal. 4th 489, 511*).

Although the agency determination in *Sierra Club, above*, was reviewed under *Code Civ. Proc. § 1085* (ordinary mandamus), rather than *Code Civ. Proc. § 1094.5* (administrative mandamus), it appears that the holding in *Sierra Club* is not limited in application to decisions reviewed by ordinary mandamus, and would apply to decisions reviewed by administrative mandamus [*see, e.g.*, *Alexander v. State Personnel Bd. (1943) 22 Cal. 2d 198, 199, 137 P.2d 433* (overruled in *Sierra Club, above*, decided prior to enactment of *Code Civ. Proc. § 1094.5*, concerned quasi-judicial proceeding)]. For further discussion comparing ordinary mandamus and administrative mandamus, see California Forms of Pleading and Practice, Ch. 470, *Overview of Administrative Procedure Law* (Matthew Bender).

[f] Exhaustion Required Even If Constitutional Rights Are at Issue

In ***Service Employees International Union, Local 1000 v. Department of Personnel Administration*** *(2006) 142 Cal. App. 4th 866, 48 Cal. Rptr. 3d 457* , a labor union filed a complaint challenging the state's refusal to permit work site distribution of material supporting a ballot proposition. The state argued the materials were of a partisan political nature within the meaning of prohibitory language in a collective bargaining agreement. The state demurred to the union's complaint on the ground that the union had not attempted to arbitrate the dispute as required by the collective bargaining agreement. The trial court granted the demurrer, and the union appealed.

On appeal, the union argued the state's interpretation of the disputed contract language deprived it of its federal and state constitutional right to communicate freely with its members and such a general policy operated as a prior restraint on free speech, thereby inflicting irreparable harm. The court of appeal first held that the failure to arbitrate before filing a civil action is analogous to the failure to exhaust administrative remedies (*142 Cal. App. 4th 866, 870)* . The union argued that arbitration is too slow and cumbersome when constitutional rights are at issue; therefore, the union argued, the exhaustion requirement must be excused to avoid the irreparable injury involved in suspending its right to free speech (*142 Cal. App. 4th 866, 871)* .

The court of appeal held that even when the statute sought to be applied and enforced by the administrative agency is challenged on constitutional grounds, completion of the administrative remedy is required (*142 Cal. App. 4th 866, 871)* . Among other reasons, the court based this holding on the jurisprudential principle of avoiding constitutional questions when other grounds are available (*142 Cal. App. 4th 866, 872)* . The court rejected the union's argument that merely pleading the *First Amendment* excuses its obligation to exhaust the remedy set forth in its agreement. The court held that more than the mere mention of the *First Amendment* is necessary to demonstrate the irreparable harm that justifies skipping arbitration and rushing to the courts (*142 Cal. App. 4th 866, 873)* .

[g] Exhaustion Required Even If Questions Concerning Agency's Jurisdiction Arise

In ***McAllister v. County of Monterey*** *(2007) 147 Cal. App. 4th 253, 284-288, 54 Cal. Rptr. 3d 116* , the defendant county approved a coastal development permit for construction of a single family dwelling. The plaintiff owned nearby land. The plaintiff filed an administrative appeal of the planning commission's decision, seeking review from the County's board of supervisors. In his appeal, the plaintiff asserted that the proposed project violated a coastal development permit, that it conflicted with numerous policies in the local coastal program, that the planning commission's approval was based on misleading information, and that the project violated CEQA. The board of supervisors unanimously denied the plaintiff's appeal. In the mandamus action, the county and developer filed a demurrer, and the trial court stayed the proceedings. After the Coastal Commission granted the permit, the county and developer filed a second demurrer, which the trial court sustained. The plaintiff then brought an administrative mandamus action before the California Coastal Commission challenging the County's approval. At the same time, he petitioned for writ of mandate in the trial court.

The defendants filed a demurrer to the petition on, among other grounds, the ground that the plaintiff failed to exhaust his administrative remedies before filing suit. The trial court granted the demurrer without leave to amend and ordered the case dismissed in its entirety. The plaintiff appealed, arguing that he was not required to exhaust administrative

remedies because the agency had no jurisdiction and its orders were null and void.

The court of appeal upheld the trial court's ruling, holding that even where an ordinance is challenged on the ground that it is void as applied to a particular property, the challenger must first exhaust all available administrative remedies before asserting a claim in court (*147 Cal. App. 4th 253, 285)* .

[4] Additional Authorities

[a] Court Without Jurisdiction When Petitioner Fails to Exhaust Administrative Remedies

In *Personnel Comm'n v. Barstow Unified Sch. Dist. (1996) 43 Cal. App. 4th 871, 50 Cal. Rptr. 2d 797* , an employees association intervened in a proceeding in which a personnel commission of a school district sought a writ of mandate compelling the district to vacate a decision to lay off the district's transportation workers and contract with a private company. The superior court granted the writ, but the court of appeal reversed on procedural grounds, including a determination that the employees association failed to exhaust administrative remedies available to it. The court noted that prior to the filing of the matter at issue, the association had filed an unfair practice charge against the district with the Public Employment Relations Board (PERB). The PERB subsequently issued a complaint alleging that the district's decision to contract for transportation was made in violation of the district's statutory duty to bargain. The PERB charge had a different statutory basis that the petition for mandate, but both proceedings were based on the same underlying conduct. The court held that although the petition included a request for declaratory relief which could not be granted by the PERB, that additional claim could not be used to avoid the inconvenience of deferred judicial review by bypassing an administrative remedy (*43 Cal. App. 4th 871, 890*). The court reversed the judgment of the superior court, and remanded with directions to stay the proceeding with respect to the claims of the association until administrative remedies were exhausted.

In *Patrick Media Group, Inc. v. California Coastal Com. (1992) 9 Cal. App. 4th 592, 11 Cal. Rptr. 2d 824* , the court of appeal reversed an inverse condemnation judgment entered against the Coastal Commission, ruling that the action was barred by the application of res judicata in that administrative remedies regarding the issuance, denial, or conditions of a permit. Claims that have already been litigated, as well as though in which a judicial remedy is being sought, are barred when they involve issues for which an administrative remedy was available but was not exhausted (*9 Cal. App. 4th 592, 612-618)* .

In *City of Fresno v. Superior Court (1987) 188 Cal. App. 3d 1484, 234 Cal. Rptr. 136* , the court of appeal reversed a trial court decision denying summary judgment to defendant city in an action for wrongful discharge filed by a city employee. The employee had appealed his order of removal to the civil service board, which upheld the order. Thereafter, the employee filed a mandate proceeding attacking the board's decision, but dismissed the proceeding prior to its final disposition. The court of appeal ruled that plaintiff was required to exhaust all his administrative remedies before filing a tort action against the city, and his voluntary dismissal of the petition for writ of mandate amounted to a failure to do so (*188 Cal. App. 3d 1484, 1489)* .

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CHAPTER 195 PUBLIC ADMINISTRATIVE LAW
PART II. FORMS
B. Opposition to Petition
1. Demurrer

19-195 California Points & Authorities § 195.69

§ 195.69 Demurrer Should Be Sustained--Futility Exception to the Exhaustion of Remedies Requirement Does Not Apply

[1] FORM Demurrer Should Be Sustained--Futility Exception to the Exhaustion of Remedies Requirement Does Not Apply

[*Caption. See § 195.50.*]

THE FUTILITY EXCEPTION DOES NOT EXCUSE PETITIONER'S FAILURE TO EXHAUST HIS/HER ADMINISTRATIVE REMEDIES BECAUSE THE AGENCY HAS NEVER DECLARED WHAT ITS RULING WOULD BE.

A. Agency Has Not Declared What Its Ruling Will Be. The futility exception does not apply unless the petitioner can positively state that the administrative body has declared what its ruling will be in a particular case (*Steinhart v. County of Los Angeles (2010) 47 Cal. 4th 1298, 1313-1314, 104 Cal. Rptr. 3d 195, 223 P.3d 57* ; *Coachella Valley Mosquito and Vector Control Dist. v. California Public Employment Relations Board (2005) 35 Cal. 4th 1072, 1081, 112 P.3d 623, 29 Cal. Rptr. 3d 234* ; *In re Darlene T. (2008) 163 Cal. App. 4th 929, 940-941, 78 Cal. Rptr. 3d 119* ; *City and County of San Francisco v. International Union of Operating Engineers, Local 39 (2007) 151 Cal. App. 4th 938, 947-948* ; *Economic Empowerment Foundation v. Quackenbush (1997) 57 Cal. App. 4th 677, 690, 67 Cal. Rptr. 2d 323*).

[*Optional*] **B. Mere Fact That Similar Claims Were Denied Is Not Determinative.** The possibility that an administrative body will honor a claim precludes application of the futility exception even though most other like claims have been dishonored in the past (*Economic Empowerment Foundation v. Quackenbush (1997) 57 Cal. App. 4th 677, 690, 67 Cal. Rptr. 2d 323*).

[*Optional*] **C. Mere Potential for Unfairness Not Sufficient.** Potential for unfairness did not establish futility (*Economic Empowerment Foundation v. Quackenbush (1997) 57 Cal. App. 4th 677, 690, 67 Cal. Rptr. 2d 323*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a demurrer to a petition for a writ of mandate for review of a final administrative adjudicatory order or decision of a local agency, when the petitioner has failed to exhaust his or her administrative remedies. The basis of this form is that the petitioner is not excused from exhausting his or her administrative remedies under the futility doctrine, because it cannot be positively stated that the administrative body has declared what its ruling will be in the particular case.

This form may be submitted in a reply brief to oppose the contentions *set forth in § 195.94*, that the exhaustion of administrative remedies rule does not apply because pursuit of administrative remedies is futile. With appropriate modifications, this memorandum may be used in opposition to the petition or in support of a motion for summary judgment or judgment on the pleadings in favor of respondent.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should refer to the absence of any declaration by the administrative body of what its ruling will be in the particular case.

[3] Discussion of Authorities

[a] Agency Has Not Declared What Its Ruling Will Be

In ***Steinhart v. County of Los Angeles*** *(2010) 47 Cal. 4th 1298, 1313-1314, 104 Cal. Rptr. 3d 195, 223 P.3d 57* , a trustor established a revocable trust, made herself trustee and sole present beneficiary of the trust, and transferred to herself as trustee her residence. The trust became irrevocable upon her death. Under the terms of the trust, the plaintiff (the trustor's sister) received a life estate in the residence so long as she pay taxes and make any necessary repairs. When the trustor died, the defendant county reassessed the residence and substantially increased its valuation for tax purposes. The plaintiff paid the increased tax bills and filed a claim with the defendant seeking a tax refund. She argued that when she received a life estate in the residence, no "change in ownership" occurred within the meaning of *Cal. Const. Art. XIII A, § 2(a)*, to trigger a reassessment. The defendant sent the plaintiff a letter denying her request for a refund. The plaintiff filed a suit against the defendant contesting the reassessment. The defendant filed a demurrer, arguing that the plaintiff failed exhaust her administrative remedies before filing suit and that under *Rev. & Tax Code § 60*, a change in ownership occurs when there is the transfer of a life estate to a nonspouse third party. The trial court granted the demurrer without leave to amend. The Court of Appeal reversed, holding that the futility exception to the exhaustion requirement applied given the defendant's "unyielding position" a change in ownership occurred.

The California Supreme Court held that, ordinarily, a taxpayer seeking judicial relief from an erroneous assessment must exhaust remedies before the administrative body empowered initially to correct the error. The Court further held that the futility exception to the exhaustion requirement must be narrowly applied, and did not apply here. While the defendant clearly stuck to its position in the prior hearings that a change in ownership had occurred, the Court held that nothing in the record indicated that, at the time an application for assessment reduction would have been timely, the defendant had predetermined its position as to whether a change in ownership had occurred. The Court held that the position the defendant took in the subsequent court action the plaintiff filed was insufficient to invoke the futility exception (*47 Cal. 4th 1298, 1313-1314)* .

In ***Coachella Valley Mosquito and Vector Control Dist. v. California Public Employment Relations Board*** *(2005) 35 Cal. 4th 1072, 29 Cal. Rptr. 3d 234, 112 P.3d 623* , the California School Employees Association (CSEA) filed a Myers-Milias-Brown Act (*Gov. C. §§ 3500-3511* (governs collective bargaining and employer-employee relations for local public entities)) unfair practice charge with the Public Employment Relations Board (PERB) against the Coachella

Valley Mosquito and Vector Control District (District). The district filed an answer to the complaint and a motion to dismiss. In the motion, the district argued that the PERB lacked jurisdiction over alleged MMBA violations occurring before a certain date because six months was the limitations period for an MMBA unfair practice charge. The PERB's agent denied the motion to dismiss. The district petitioned for a writ of mandate in the trial court. The CSEA and the PERB opposed the writ petition arguing that the district's action was barred because the district had not exhausted its administrative remedies. The court denied the petition, concluding that the district was not required to exhaust its administrative remedies before challenging the PERB's jurisdiction, that the limitations period for alleging these violations was three years, and that the PERB had jurisdiction over each unfair practice alleged in the complaint.

The district appealed The Court of Appeal affirmed, holding that the district was not required to exhaust its administrative remedies because to do so would have been futile insofar as in other cases the PERB had previously held that the statute of limitations for MMBA violations was three years.

The Supreme Court granted review. It held that, in general, a party must exhaust administrative remedies before resorting to the courts (*35 Cal. 4th 1072, 1080, 29 Cal. Rptr. 3d 234, 112 P.3d 623*). It held further that the doctrine requiring exhaustion of administrative remedies is subject to exceptions, including that the failure to exhaust administrative remedies is excused if it is clear that exhaustion would be futile. However, the Court held that the Court of Appeal had misapplied this rule. The Court held that for the futility exception to apply, it is not sufficient that a party can show what the agency's ruling would be on a particular issue or defense. Rather, the party must show what the agency's ruling would be on a particular case (*35 Cal. 4th 1072, 1081, 29 Cal. Rptr. 3d 234, 112 P.3d 623*). The Court held that it was not sufficient that we know what the PERB's final ruling would have been on the district's limitations defense. Rather, the district had to show how the PERB would have ruled on the CSEA's unfair practices charge. For example, the district might have prevailed on some procedural ground other than expiration of the limitations period, or it might have prevailed on the merits. Thus, the district did not show that further administrative proceedings would have been futile because the outcome of those proceedings was known in advance (*35 Cal. 4th 1072, 1081, 29 Cal. Rptr. 3d 234, 112 P.3d 623*). Rather, the Court held, the district was excused from exhausting administrative remedies because the district was claiming that the PERB lacked authority to resolve the underlying dispute between the parties (*35 Cal. 4th 1072, 1081-1082, 29 Cal. Rptr. 3d 234, 112 P.3d 623*).

In ***In re Darlene T.*** *(2008) 163 Cal. App. 4th 929, 78 Cal. Rptr. 3d 119* , three children were detained with their grandmother for temporary custody. Due to various procedural delays, the detention was not formally approved for over six months. The grandmother sought retroactive Adoption and Safe Families Act of 1997 (ASFA) payments from the Department of Children and Family Services (DCFS) for those six months. The juvenile court ordered retroactive payments from the date of detention. The DCFS filed a notice of appeal arguing that the juvenile court acted in excess of its powers when it ordered DCFS to make retroactive ASFA payments to the grandmother. DCFS argued, among other things, that the court violated law which dictated that an applicant must exhaust administrative remedies before a court may consider the issue of ASFA funding.

The court of appeal agreed. It set forth the administrative steps required to be followed by an individual whose claim for benefits is denied or is not acted upon with reasonable promptness (*see Welf. & Inst. Code § 10950 et seq.*).

The grandmother argued that the requirement of exhaustion of administrative remedies should not be applied because the requirement would result in more delays in the approval of any relative home for AFDC-FC funding purposes and create an impossible logjam on the road to permanence.

The court disagreed, holding that there had been no prior administrative review rendering an administrative hearing to be needless (*163 Cal. App. 4th 929, 940-941)* . The court held that there was no indication that the grandmother ever made an effort to challenge the earlier denial of ASFA approval directly with the Department of Social Services (DSS). Nor was there any indication that such a determination would be outside the scope of DSS's authority or would necessarily render a denial. On the contrary, the court held, such a proceeding would provide a comprehensive record,

as well as a final administrative determination, for the superior court to review (*163 Cal. App. 4th 929, 940-941)* .

In ***City and County of San Francisco v. International Union of Operating Engineers, Local 39*** *(2007) 151 Cal. App. 4th 938, 60 Cal. Rptr. 3d 516* , the City of San Francisco filed a writ petition alleging that a local union violated the city charter by refusing to submit outstanding labor disputes to binding arbitration. The trial court concluded that it did not have jurisdiction to compel the union to arbitrate.

The court of appeal affirmed the denial of the City's petition for writ of mandate and petition to compel arbitration. The court held that the California Public Employment Relations Board (PERB) had exclusive jurisdiction. The City then argued that if the PERB had exclusive jurisdiction, the City should be excused from pursuing its administrative remedy prior to filing suit. The City argued that it should be excused from pursuing its remedies with the PERB because such an action would be futile insofar as the PERB denied its request for an injunction in the lower court proceedings and thus failed to issue the relief the City requested. The court held that failure to exhaust an administrative remedy is excused if it is clear that exhaustion would be futile (*151 Cal. App. 4th 938, 947)* . However, the court held that for the futility exception to apply, it is not sufficient that a party can show what the agency's ruling would be on a particular issue or defense. Rather, the party must show what the agency's ruling would be in the particular case before the court (*151 Cal. App. 4th 938, 947-948)* . The court held that the City could not invoke the futility exception simply by arguing that the PERB denied its request for an injunction. Rather, the City must show how the PERB inevitably would rule on its claim that the union was required to submit to binding arbitration under the charter's mandatory impasse provisions (*151 Cal. App. 4th 938, 947-948)* .

In ***Economic Empowerment Foundation v. Quackenbush*** *(1997) 57 Cal. App. 4th 677, 690, 67 Cal. Rptr. 2d 323* , a foundation intervened in proceedings before the Department of Insurance (Department) on an insurer's applications for rate increases in personal and commercial lines of earthquake insurance. The Commissioner issued an order in the proceedings granting specified rate increases to the insurer. The foundation filed a complaint for declaratory relief and a petition for writ of mandate. The complaint sought a declaration that the foundation was entitled to fees for its work in the insurer's rate proceedings. In the alternative to the relief sought in the complaint, the petition requested an order finding that the Commissioner was disqualified to rule on the foundation's request for fees, and directing that the Commissioner award fees to the foundation. The petition alleged that the Commissioner had engaged in a public campaign of hostility against consumer intervention in Department proceedings generally, and against the foundation specifically. It quoted a press release from the Commissioner stating that the foundation had been getting "fat off the public trough" and certain individuals were "lining their pockets with taxpayer dollars." The petition averred that the Commissioner was biased against the foundation and other interveners, and described other rate proceedings in which the Commissioner had allegedly refused without justification to award compensation to the foundation. The trial court sustained demurrers without leave to amend by the Commissioner and the real party in interest insurer.

The court of appeal affirmed. The foundation argued on appeal that the court should resolve the fee claim, even if the claim is within the Commissioner's exclusive jurisdiction, because the Commissioner's bias made it futile for the foundation to pursue the administrative remedy. The court stated that if a claim is cognizable in the first instance by an agency alone, the doctrine of exhaustion of administrative remedies applies rather than the primary jurisdiction doctrine. The exhaustion doctrine is not a matter of judicial discretion, but is a fundamental rule of procedure under which relief must be sought from the administrative body and this remedy exhausted before the courts will act (*57 Cal. App. 4th 677, 683)* . The court stated that the futility exception is a very narrow one. It does not apply "unless the petitioner can positively state that [the administrative body] has declared what its ruling will be in a particular case" [quoting from *Sea & Sage Audubon Society, Inc. v. Planning Com. (1983) 34 Cal. 3d 412, 418, 194 Cal. Rptr. 357, 668 P.2d 664*]. The Commissioner established procedures for allowance of fees. The foundation did not request an award from the Commissioner in the proceeding, however, and the Commissioner did not take a position on the merits of such a request (*57 Cal. App. 4th 677, 690)* .

[b] Mere Fact That Similar Claims Were Denied Is Not Determinative

The facts and procedural background of ***Economic Empowerment Foundation v. Quackenbush*** *(1997) 57 Cal. App. 4th 677, 690, 67 Cal. Rptr. 2d 323* , are discussed in [a], *above*. The court of appeal stated that the fact that the Commissioner of the Department of Insurance may have treated the foundation and other interveners unfairly in other proceedings did not establish that the Commissioner was bound to do so in the proceedings on which the appeal was before the court. The court cited *County of San Diego v. State of California (1997) 15 Cal. 4th 68, 77-78, 61 Cal. Rptr. 2d 134, 931 P.2d 312* , in which the possibility that a claim would be honored precluded application of the futility exception even though most other like claims had been dishonored in the past (*57 Cal. App. 4th 677, 690*).

[c] Mere Potential for Unfairness Not Sufficient

The facts and procedural background of ***Economic Empowerment Foundation v. Quackenbush*** *(1997) 57 Cal. App. 4th 677, 690, 67 Cal. Rptr. 2d 323* , are discussed in [a], *above*. In concluding that the futility exception did not apply to a foundation's claim for fees for intervening in proceedings to determine an insurer's application for rate increases before the Department of Insurance, the court cited *Edgren v. Regents of University of California (1984) 158 Cal. App. 3d 515, 522, 205 Cal. Rptr. 6* in which a potential for unfairness did not establish futility (*57 Cal. App. 4th 677, 690*).

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19-195 California Points & Authorities § 195.70

§ 195.70 Demurrer Should Be Sustained--Petitioner Failed to Exhaust Judicial Remedies

[1] FORM Demurrer Should Be Sustained--Petitioner Failed to Exhaust Judicial Remedies

[*Caption. See § 195.50.*]

THE COURT SHOULD SUSTAIN THE DEMURRER TO THE PETITION FOR WRIT OF MANDATE BECAUSE PETITIONER FAILED TO EXHAUST HIS/HER ADMINISTRATIVE REMEDIES.

A. Petitioner Did Not Appeal Prior Administrative Ruling in Mandate Action. Unless a party to a quasi-judicial proceeding challenges the agency's adverse findings made in that proceeding, by means of a mandate action in superior court, those findings are binding in later civil actions (*Risam v. County of Los Angeles (2002) 99 Cal. App. 4th 412, 419, 121 Cal. Rptr. 2d 267*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a demurrer to a petition for a writ of mandate for review of a final administrative adjudicatory order or decision of a local agency, when the petitioner has failed to exhaust his or her judicial remedies. The basis of this form is that the petitioner failed to pursue a mandate action in superior court, and therefore the findings of the administrative agency are binding in a later civil action.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should refer to the petitioner's failure to pursue a mandate action in superior court to appeal an administrative ruling, and therefore the findings of the administrative agency are binding in a later civil action.

[3] Discussion of Authorities

[a] Petitioner Did Not Appeal Prior Administrative Ruling

In ***Risam v. County of Los Angeles*** *(2002) 99 Cal. App. 4th 412, 420, 121 Cal. Rptr. 2d 267* , a county employee sued the County of Los Angeles after she was demoted. She alleged that the county demoted her in retaliation for opposing discriminatory practices in violation of the California Fair Employment and Housing Act [*Gov. Code § 12900 et seq.*] (FEHA). The employee filed a grievance with the Civil Service Commission. The Commission held that, while the county did not have sufficient evidence to warrant the employee's demotion, the employee failed to present sufficient evidence that the county violated either the FEHA or the Americans with Disabilities Act (ADA). The employee did not file timely objections to the Commission's findings or file a petition for writ of administrative mandamus. The employee then filed a civil action against the county for demotion in retaliation for opposing discriminatory practices in violation of FEHA. The county filed a motion for summary judgment, contending that the employee's failure to challenge judicially the Commission's finding that the county did not violate FEHA is fatal to the sole FEHA cause of action in her complaint. The employee responded that the administrative hearing officer did not decide whether her demotion was in retaliation for complaining of discriminatory practices. The trial court granted the motion for summary judgment and entered judgment in favor of the county.

The court of appeal affirmed. It concluded that the employee's action was barred by the doctrine of collateral estoppel, as she did not seek judicial review of the adverse administrative finding that she failed to present evidence sufficient to prove any violation of the ADA or FEHA by the county (*99 Cal. App. 4th 412, 419*). The court held that unless a party to a quasi-judicial proceeding challenges the agency's adverse findings made in that proceeding by means of a mandate action in superior court those findings are binding in later civil actions. This requirement of exhaustion of judicial remedies is to be distinguished from the requirement of exhaustion of administrative remedies. Exhaustion of administrative remedies is a jurisdictional prerequisite to resort to the courts. Exhaustion of judicial remedies, on the other hand, is necessary to avoid giving binding effect to the administrative agency's decision, because that decision has achieved finality due to the aggrieved party's failure to pursue the exclusive judicial remedy for reviewing administrative action (*99 Cal. App. 4th 412, 419*).

The court explained that the rule of exhaustion of judicial remedies is based on the doctrine of res judicata and issue preclusion (*99 Cal. App. 4th 412, 419-420* , quoting from *Knickerbocker v. City of Stockton (1988) 199 Cal. App. 3d 235, 241, 244 Cal. Rptr. 764*). Unless the losing party challenges an administrative decision, the decision binds the parties on the issues litigated and if those issues are fatal to a civil suit, the plaintiff cannot state a viable cause of action (*99 Cal. App. 4th 412, 420*).

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19-195 California Points & Authorities § 195.71

§ 195.71 Demurrer Should Be Sustained--No Mandate Review of Alcoholic Beverage Control Appeals Board Decision, General Form

[1] FORM Demurrer Should Be Sustained--No Mandate Review of Alcoholic Beverage Control Appeals Board Decision, General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	
Alcoholic Beverage Control Appeals Board,	)	NO. _____
Respondent,	)	MEMORANDUM IN SUPPORT OF DEMURRER
_____ [*name*],	)	TO PETITION FOR WRIT OF MANDATE
Real Party in Interest.	)	
	)	
	)	

_____

THE COURT SHOULD SUSTAIN THE DEMURRER TO THE PETITION FOR WRIT OF MANDATE BECAUSE THIS COURT LACKS JURISDICTION OF A PROCEEDING TO REVIEW A DECISION OF THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD.

A. Demurrer in Mandate Proceedings. [*See § 195.50[1]*, Paragraph A].

B. Objection by Demurrer. [*See § 195.50[1]*, Paragraph B].

C. Review of Appeals Board Decision. A decision of the Alcoholic Beverage Control Appeals Board may not be reviewed in a judicial proceeding for writ of mandate (*Bus. & Prof. Code §§ 23089, 23090*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

[_____ (Respondent *or* Real Party in Interest)]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a demurrer to a petition for a writ filed in superior court to review a decision by the Alcoholic Beverage Control Appeals Board.

With appropriate modifications this memorandum may be used to support a motion for an order that the proceeding be transferred to the court having subject matter jurisdiction [*see Code Civ. Proc. §§ 396, 1109*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also Comments under § 195.50[2][b] for further discussion.

[c] Court Will Transfer to Proper Court

Rather than dismiss the proceeding, the court will order it transferred to the proper reviewing court [*Code Civ. Proc. §§ 396, 1109*].

[3] Discussion of Authorities

[a] Review of Appeals Board Decision

Bus. & Prof. Code § 23090 provides that any person affected by a final order of the Alcoholic Beverage Control Appeals Board, including the Department of Alcoholic Beverage Control, may apply to the Supreme Court or to the court of appeal for a writ of review (*i.e.*, certiorari) of such final order. *Business and Professions Code Section 23089* provides that final orders of the Alcoholic Beverage Control Appeals Board may be reviewed by the courts specified in Article 5 (commencing with Section 23090) in the manner therein specified and not otherwise. The only manner of review specified in Article 5 is review on a writ of review (*i.e.*, certiorari) [*see Code Civ. Proc. § 1067*].

Because the Department of Alcoholic Beverage Control may seek judicial review of a decision of the Alcoholic Beverage Control Appeals Board [*see Bus. & Prof. Code § 23090*], it will sometimes happen that the person against whom the department has acted will not be the petitioner for review but will be, instead, the real party in interest. (The appeals board will be the respondent.) In such a case, by well established practice, the real party in interest will have the burden of opposing the petition for review [*see, e.g., Tieberg v. Unemployment Ins. Appeals Bd. (1970) 2 Cal. 3d 943, 88 Cal. Rptr. 175, 471 P.2d 975]* .

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19-195 California Points & Authorities § 195.72

§ 195.72 Demurrer Should Be Sustained--No Mandate Review of Worker's Compensation Appeals Board Decision

[1] FORM Demurrer Should Be Sustained--No Mandate Review of Worker's Compensation Appeals Board Decision

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	
Workers' Compensation Appeals Board,	)	NO. _____
Respondent,	)	MEMORANDUM IN SUPPORT OF DEMURRER
_____ [*name*],	)	TO PETITION FOR WRIT OF MANDATE
Real Party in Interest.	)	
	)	
	)	

_____

THE COURT SHOULD SUSTAIN THE DEMURRER TO THE PETITION FOR WRIT OF MANDATE BECAUSE THE COURT LACKS JURISDICTION OF A PROCEEDING TO REVIEW A DECISION OF THE WORKERS' COMPENSATION APPEALS BOARD.

A. Demurrer in Mandate Proceedings. [*See § 195.50[1]*, Paragraph A].

B. Objection by Demurrer. [*See § 195.50[1]*, Paragraph B].

C. Review of Appeals Board Decision. A decision of the Workers' Compensation Appeals Board may not be reviewed in a judicial proceeding for writ of mandate (*Lab. Code §§ 5950, 5955*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

_____ [Respondent *or* Real Party in Interest]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a demurrer to a petition for a writ filed in a superior court to review a decision by the Workers' Compensation Appeals Board.

With appropriate modifications this memorandum may be used to support a motion for an order that the proceeding be transferred to a court having subject matter jurisdiction [*see Code Civ. Proc. §§ 396, 1109*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See also Comments under § 195.50[2][b] for further discussion.

[c] Review of Workers' Compensation Appeals Board Decision

Because either party in a proceeding before the Workers' Compensation Appeals Board may seek judicial review of a decision of the appeals board [*see Lab. Code § 5950*], it will sometimes happen that a person, in whose favor the appeals board has decided, will not be the petitioner for review but will be, instead, the real party in interest. (The appeals board will be the respondent.) In such a case, by well-established, practice, the real party in interest will have the burden of opposing the petition for review [*see, e.g., Tieberg v. Unemployment Ins. Appeals Bd. (1970) 2 Cal. 3d 943, 88 Cal. Rptr. 175, 471 P.2d 975]* .

[d] Court Will Transfer to Proper Court

Rather than dismiss the proceeding, the court will order it transferred to the proper reviewing court [*Code Civ. Proc. §§ 396, 1109*].

[3] Discussion of Authorities

[a] Review of Appeals Board Decision

Labor Code Section 5950 provides that any person affected by an order, decision, or award of the Workers' Compensation Appeals Board may apply to the Supreme Court or to the court of appeal for a writ of review (*i.e.*, certiorari) for the purpose of inquiring into and determining the lawfulness of the order, decision, or award. *Labor Code Section 5955* provides that no court of this state, except the Supreme Court and the courts of appeal to the extent herein specified (*i.e.*, in *Labor Code Sections 5950* through 5956), has jurisdiction to review any order, rule, decision, or award

of the Workers' Compensation Appeals Board.

[4] Additional Authorities

[a] Review of Appeals Board Decision

In *Greitz v. Sivachenko (1957) 152 Cal. App. 2d 849, 313 P.2d 922* , which was an appeal from the judgment of the superior court for enforcement of an award of the Industrial Accident Commission (predecessor agency to the Workers' Compensation Appeals Board [*see* Stats. 1965, ch. 1513, § 214]), the appellant tried to have the award reviewed. The court noted that the award was final [*see Lab. Code § 5950*] and, in any event, could be attacked only by writ of review filed in the Supreme Court or court of appeal [*see Lab. Code §§ 5950, 5955*].

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1. Demurrer

19-195 California Points & Authorities § 195.73

§ 195.73 Demurrer Should Be Sustained--No Violation of Due Process When Prosecuting Agency Attorney Simultaneously Served As Adviser to Agency on Unrelated Matter

[1] FORM Demurrer Should Be Sustained--No Violation of Due Process When Prosecuting Agency Attorney Simultaneously Served As Adviser to Agency on Unrelated Matter

[*Caption. See § 195.50.*]

THE COURT SHOULD SUSTAIN THE DEMURRER TO THE PETITION FOR WRIT OF MANDATE BECAUSE THERE IS NO VIOLATION OF DUE PROCESS WHEN THE PROSECUTING AGENCY ATTORNEY SIMULTANEOUSLY SERVED AS AN ADVISER TO THE AGENCY ON AN UNRELATED MATTER.

No Violation of Due Process Occurs When Prosecuting Agency Attorney Simultaneously Served As Adviser to Agency on Unrelated Matter. There is no violation of due process when the prosecuting agency attorney simultaneously served as an adviser to the agency on an unrelated matter [*Morongo Band of Mission Indians v. State Water Resources Control Board (2009) 45 Cal. 4th 731, 736-742, 88 Cal. Rptr. 3d 610, 199 P.3d 1142]* .

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a demurrer to a petition for a writ of mandate for review of a final administrative adjudicatory order or decision of a local agency, when the petitioner has argues that his or her due process rights were violated when the prosecuting agency attorney simultaneously served as an adviser to the agency on an unrelated matter.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, counsel should refer

to the due process protections provided despite the fact that the prosecuting agency attorney simultaneously served as an adviser to the agency on an unrelated matter.

[3] Discussion of Authorities

[a] No Violation of Due Process Occurs When Prosecuting Agency Attorney Simultaneously Served as Adviser to Agency on Unrelated Matter

In ***Morongo Band of Mission Indians v. State Water Resources Control Board*** *(2009) 45 Cal. 4th 731, 736-742, 88 Cal. Rptr. 3d 610, 199 P.3d 1142* , the plaintiff held a license to divert water from springs for irrigation. The defendant water board issued a notice of proposed revocation of that license on the grounds that the plaintiff failed to beneficially use the water for an extended period and had used the water for unauthorized purposes. The plaintiff requested a hearing to contest the revocation. The defendant issued a notice of public hearing, identifying Staff Counsel Samantha Olson as a prosecutor. The plaintiff filed a petition to disqualify the attorneys prosecuting its license revocation because Olson had concurrently advised the defendant in other matters. The defendant presented evidence that in water rights adjudicative proceedings, a Board member serves as the hearing officer, and the agency staff is separated into prosecutorial and advisory functions. Different staff attorneys are assigned to enforcement and hearing teams. Although agency staff employees did not combine adjudicative and prosecutorial functions in the same proceeding, a staff attorney assigned to an enforcement team may also be assigned to advise the Board members, in an unrelated proceeding, as a hearing team member. Agency employees assigned to the enforcement team are screened from inappropriate contact with Board members and other agency staff through strict application of the state Administrative Procedure Act's rules governing ex parte communications. The trial court granted the petition for writ of mandate compelling Olson's disqualification, and the court of appeal affirmed.

On appeal to the California Supreme Court, the defendant board argued that when the agency attorney who prosecuted an administrative license revocation proceeding had concurrently advised the adjudicator in a separate unrelated matter, the risk that the agency adjudicator will be biased in favor of the prosecuting agency attorney is of a magnitude sufficient to overcome the presumption of impartiality. The California Supreme Court disagreed. It held that any tendency for the agency adjudicator to favor an agency attorney acting as prosecutor because of that attorney's concurrent advisory role in an unrelated matter was too slight and speculative to violate due process (*45 Cal. 4th 731, 737)* . It held further that by itself, the combination of investigative, prosecutorial, and adjudicatory functions within a single agency did not create an unacceptable risk of bias and thus did not violate due process (*45 Cal. 4th 731, 737)* . Rather, the Administrative Procedure Act prohibits ex parte communications [*see Gov. Code § 11430.10*] and requires internal separation of functions (*45 Cal. 4th 731, 738)* . The Administrative Procedure Act requires the separation of prosecutorial and advisory functions on a case-by-case basis only. It does not prohibit an agency employee who acts in a prosecutorial capacity in one case from concurrently acting in an advisory role in an unrelated case (*45 Cal. 4th 731, 738)* .

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19-195 California Points & Authorities §§ 195.74-195.79

[Reserved]

§§ 195.74[Reserved]

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19-195 California Points & Authorities § 195.80

§ 195.80 Demurrer Should Be Overruled--Invalidity Allegation Is Sufficient

[1] FORM Demurrer Should Be Overruled--Invalidity Allegation Is Sufficient

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	MEMORANDUM OPPOSING DEMURRER TO
Respondent.	)	PETITION FOR WRIT OF MANDATE
	)	
	)	

_____

THE COURT SHOULD OVERRULE THE DEMURRER TO THE PETITION FOR WRIT OF MANDATE BECAUSE THE PETITION SUFFICIENTLY ALLEGES THE INVALIDITY OF AN ADMINISTRATIVE ORDER OR DECISION IN THAT IT ALLEGES FACTS SHOWING THAT _____ [THE AGENCY PROCEEDED WITHOUT OR IN EXCESS OF AUTHORITY *or* THE PETITIONER WAS DENIED A FAIR TRIAL AT THE ADMINISTRATIVE HEARING *or* THE AGENCY ABUSED ITS DISCRETION].

Decision is Invalid. The invalidity of the administrative order or decision may be alleged by stating facts tending to show either (1) the agency proceeded without or in excess of authority, (2) the petitioner was denied a fair trial at the administrative hearing, or (3) the agency abused its discretion (*Code Civ. Proc. § 1094.5(b)*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a demurrer to a petition for writ of mandate to review a final administrative adjudicatory order or decision when the demurrer is based on a failure to allege the invalidity of the order or decision.

This form may be used to oppose the form *set forth in § 195.55*.

The party intending to use a part of the administrative record in a case brought under *Code Civ. Proc. § 1094.5* must lodge that part of the record at least five days before the hearing [*Cal. Rules of Ct., Rule 3.1140*].

With appropriate modifications, this memorandum may be used to oppose a motion for judgment on the pleadings in favor of the respondent.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. In this instance, involving a pleading requirement, counsel should argue that the facts alleged in the petition are sufficient to constitute a cause of action. In his or her argument, counsel would refer to the specific number of the relevant allegation. In a demurrer, counsel may also request judicial notice, if appropriate, to show the sufficiency of the cause of action [*see Evid. Code § 450 et seq.*]. For further discussion, see *§ 195.10[2][b]*.

For further legal background, research guides, and forms relating to judicial notice, see California Forms of Pleading and Practice, Ch. 321, *Judicial Notice* (Matthew Bender).

[3] Discussion of Authorities

[a] Decision is Invalid

Code Civ. Proc. § 1094.5(b) provides that the inquiry in an administrative mandate case extends to the questions of whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion.

[4] Additional Authorities

[a] Decision is Invalid

In *Woods v. Superior Court (1981) 28 Cal. 3d 668, 170 Cal. Rptr. 484, 620 P.2d 1032* , an application to the Department of Social Welfare for relocation funds was denied. The applicants then sought and received a "fair hearing" pursuant to *Welf. & Inst. Code § 10950* in which their claim was again denied. The applicants then petitioned the superior court for a writ of mandamus, pursuant to *Code Civ. Proc. § 1094.5*, claiming that the departmental regulations violated federal and state law. The director demurred to the petition contending that the appropriate method of

challenging the validity of a departmental regulation was either by petition for "ordinary" mandamus under *Code Civ. Proc. § 1085* or by an action for declaratory relief. Following the overruling of the demurrer, the director petitioned the Supreme Court for an extraordinary writ to annul the ruling.

In denying the peremptory writ, the Supreme Court held that the scope of a court's inquiry in a mandamus proceeding under either *Code Civ. Proc. § 1085* or *1094.5* extends to a determination of whether the administrative agency proceeded without or in excess of its jurisdiction, whether thee was a fair trial, and whether there was a prejudicial abuse of discretion (*28 Cal. 3d 668, 675*). Furthermore, an abuse of discretion is established when the agency has not proceeded in the manner required by law or has proceeded pursuant to an invalid regulation (*28 Cal. 3d 668, 675, 678*).

Regulations adopted by an administrative agency are required to be consistent with, not in conflict with, and reasonably necessary to effectuate the purpose of the statute authorizing the regulation. The validity of the agency's regulation can be contested through the mandamus procedure and, when it is so contested, the task of the court reviewing the administrative agency's regulation is to decide whether the agency reasonably interpreted the legislative mandate (*28 Cal. 3d 668, 679*).

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19-195 California Points & Authorities § 195.81

§ 195.81 Demurrer Should Be Overruled--Beneficial Interest Allegation Is Sufficient

[1] FORM Demurrer Should Be Overruled--Beneficial Interest Allegation Is Sufficient

[*Caption. See § 195.80.*]

THE COURT SHOULD OVERRULE THE DEMURRER TO THE PETITION FOR WRIT OF MANDATE BECAUSE THE PETITION SUFFICIENTLY ALLEGES THAT THE PETITIONER IS BENEFICIALLY INTERESTED IN THAT IT ALLEGES FACTS SHOWING THAT PETITIONER PARTICIPATED IN THE ADMINISTRATIVE PROCEEDING THAT RESULTED IN THE _____ [ORDER *or* DECISION].

A. Interest of Participant in Administrative Proceeding. A person who participated in the administrative proceeding that resulted in the order or decision is beneficially interested in issuance of a writ of mandate for correction of legal errors that occurred in the proceeding (*Bodinson Mfg. Co. v. California Employment Com. (1941) 17 Cal. 2d 321, 330, 109 P.2d 935*).

[*Optional*] **B. Beneficial Interest of License Applicant.** When the challenged administrative order or decision involves the denial of an application for a license or a permit, the petitioner can allege a beneficial interest in issuance of the writ by stating that he or she qualified and duly applied for the license or permit (*Selby Realty Co. v. City of San Buenaventura (1973) 10 Cal. 3d 110, 123, 109 Cal. Rptr. 799, 514 P.2d 111*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a demurrer to a petition for writ of mandate to review a final administrative adjudicatory order or decision when the demurrer is based on a failure to allege the petitioner's beneficial interest.

This form may be used to oppose the points and authorities *set forth in § 195.56*.

The party intending to use a part of the administrative record in a case brought under *Code Civ. Proc. § 1094.5* must lodge that part of the record at least five days before the hearing [*Cal. Rules of Ct., Rule 3.1140*].

With appropriate modifications this memorandum may be used to oppose a motion for judgment on the pleadings in favor of the respondent.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See Comments under § 195.80[2][b] for further discussion.

[3] Discussion of Authorities

[a] Interest of Participant in Administrative Proceeding

Bodinson Mfg. Co. v. California E. Com. *(1941) 17 Cal. 2d 321, 109 P.2d 935* , was a mandate proceeding, begun in the court of appeal but heard in the Supreme Court on that Court's granting a petition for hearing by the respondent, for review of an administrative adjudicatory decision. One of the issues was whether the petitioner had such a beneficial interest in issuance of the writ as would give standing to sue under *Code Civ. Proc. § 1086*. The Court established the rule that when the challenged administrative decision involves the denial of a license or permit, the petitioner can allege a beneficial interest in issuance of the writ by stating that he or she qualified and duly applied for the license or permit. In stating the rule, the Court noted the absence of any authority which holds that a person permitted by statute to participate as an interested party in the administrative hearings and to take appeals at the administrative level is, nevertheless, without a sufficient interest in the result to test the legality of the final decision before a court of law. Elemental principles of justice require that parties to the administrative proceeding be permitted to retain their status as such throughout the final judicial review by a court of law, for the fundamental issues in litigation remain essentially the same (*17 Cal. 2d 321, 330, 109 P.2d 935*).

[b] Beneficial Interest of License Applicant

Selby Realty Co. v. City of San Buenaventura *(1973) 10 Cal. 3d 110, 109 Cal. Rptr. 799, 514 P.2d 111* , was an appeal from the judgment of the superior court dismissing a proceeding for writ of mandate to review an administrative decision denying the petitioner's application for a building permit. The judgment of dismissal followed an order sustaining a general demurrer to the petition. The petition alleged that on a certain date the petitioner applied for the building permit and submitted plans pursuant to a governing ordinance; that the application was subsequently denied; that the petitioner then appealed pursuant to an established administrative remedial procedure; and that after an adverse decision on that appeal, the petitioner attempted informally to ascertain how the defects in his application might be cured but was not successful. The Supreme Court found the petition sufficient. Although the facts might be unartfully stated, or intermingled with a statement of other facts irrelevant to the cause of action, the petitioner stated a cause of

action for a writ of mandate to compel the issuance of a building permit and that, therefore, the superior court erred in sustaining the general demurrer (*10 Cal. 3d 110, 123, 109 Cal. Rptr. 799, 514 P.2d 111*).

[4] Additional Authorities

[a] Interest of Participant in Administrative Proceeding

Temescal Water Co. v. Dept. Public Works (1955) 44 Cal. 2d 90, 280 P.2d 1 , was an appeal from the judgment of the superior court in favor of the respondent following an order sustaining, without leave to amend, a demurrer to a petition for writ of mandate to review an administrative decision to issue a permit. The Supreme Court reversed with directions to allow an amendment of the petition, stating that statutory authority allows the petitioners to participate in the administrative proceeding; and, if on amendment to their petition they showed their participation as interested parties in the proceeding, they could establish, as well, their interest in a judicial proceeding to review the department's determination. Generally, it is held to be an abuse of discretion by a court to sustain without leave to amend a demurrer to an original complaint, unless the complaint shows on its face that it is incapable of amendment. It did not appear that the petition at hand could not be amended to state a cause of action (*44 Cal. 2d 90, 107, 280 P.2d 1*).

In *Department of Health Services v. Kennedy (1984) 163 Cal. App. 3d 799, 209 Cal. Rptr. 595* , a county civil service commission imposed penalties against employees of the county department of health, and the department subsequently obtained a writ of administrative mandate to order the commission to reconsider the penalties. The employees sought to nullify the effect of the reexamination by contending that the department lacked standing to bring a petition for administrative mandate directed at the commission. The court of appeal affirmed, observing that the department not only had a right to appear at the hearing, but was required to appear, and was a beneficially interested party entitled to standing. The court rejected the employees' contention that the department's status as an arm of county government precludes it from bringing a writ of mandate against the commission, holding rather that the courts recognize the distinction between a county's corporate identity and the various autonomous elements of a county's governmental structure (*163 Cal. App. 3d 799, 802, 209 Cal. Rptr. 595*).

[b] Beneficial Interest of License Applicant

Hippen v. Ford (1900) 129 Cal. 315, 61 P. 929 , was an appeal from the judgment of the superior court that a writ of mandate be issued directing an administrative agency to grant an application for a retail liquor license. The Supreme Court reversed for lack of sufficient supporting evidence; but on the question of pleading, the Court stated that it must appear that the petitioner complied with the law, and took all the necessary steps required in order to show that it was the duty of the defendants to issue the license (*129 Cal. 315, 316, 61 P. 929*).

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19-195 California Points & Authorities § 195.82

§ 195.82 Demurrer Should Be Overruled--Failure to Support Decision With Findings Is Abuse of Discretion

[1] FORM Demurrer Should Be Overruled--Failure to Support Decision With Findings Is Abuse of Discretion

[*Caption. see § 195.80.*]

THE COURT SHOULD OVERRULE THE DEMURRER TO THE PETITION FOR WRIT OF MANDATE BECAUSE THE PETITION STATES A CAUSE OF ACTION BASED ON ABUSE OF DISCRETION IN THAT IT ALLEGES FACTS SHOWING THAT THE ADMINISTRATIVE ADJUDICATORY _____ [ORDER *or* DECISION] IS NOT SUPPORTED BY PROPER FINDINGS.

A. Decision Not Supported by Findings. An agency has abused its discretion if it has failed to support its order or decision with findings that bridge the analytic gap between the order or decision and the evidence (*Code Civ. Proc. § 1094.5(b)*; *Topanga Assn. for a Scenic Community v. Los Angeles County (1974) 11 Cal. 3d 506, 515, 113 Cal. Rptr. 836, 522 P.2d 12* ; *Respers v. University of Cal. Retirement System (1985) 171 Cal. App. 3d 864, 870-873, 217 Cal. Rptr. 594*).

[*Optional*] **B. Presumption of Sufficient Findings Inapplicable.** The presumption that an agency's rulings rest on the necessary findings and that those findings are supported by substantial evidence does not apply to agencies that are required to expressly state their findings and set forth the relevant supportive facts (*Broadway, Laguna etc. Assn. v. Board of Permit Appeals (1967) 66 Cal. 2d 767, 773, 59 Cal. Rptr. 146, 427 P.2d 810* ; *J.L. Thomas, Inc. v. County of Los Angeles (1991) 232 Cal. App. 3d 916, 926, 283 Cal. Rptr. 815*).

[*Optional*] **C. Findings Must Be Legally Relevant.** Findings must be legally relevant in order to support agency action (*Broadway, Laguna etc. Assn. v. Board of Permit Appeals (1967) 66 Cal. 2d 767, 773-774, 59 Cal. Rptr. 146, 427 P.2d 810* ; *City and County of San Francisco v. Board of Permit Appeals (1989) 207 Cal. App. 3d 1099, 1109, 255 Cal. Rptr. 307*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*typed name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a demurrer to a petition for writ of mandate for review of a final adjudicatory order or decision on the basis of failure to state a cause of action based on abuse of discretion, when the petition alleges that the agency failed to support its order or decision with proper findings.

The party intending to use a part of the administrative record in a case brought under *Code Civ. Proc. § 1094.5* must lodge that part of the record at least five days before the hearing [*Cal. Rules of Ct., Rule 3.1140*].

With appropriate modifications this memorandum may be used to oppose a motion for summary judgment in favor of the respondent or a motion for judgment on the pleadings in favor of the respondent.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See Comments under § 195.80[2][b] for further discussion.

[3] Discussion of Authorities

[a] Decision Not Supported by Findings

Code Civ. Proc. § 1094.5(b) provides that the inquiry by the court in an administrative mandate proceeding extends to whether there was any prejudicial abuse of discretion, and that abuse of discretion is established if the order or decision is not supported by the findings.

In ***Topanga Asso. for Scenic Community v. County of Los Angeles*** *(1974) 11 Cal. 3d 506, 113 Cal. Rptr. 836, 522 P.2d 12* , the Los Angeles County Regional Planning Commission granted to original real party in interest a variance to a county ordinance. The variance allowed original real party (who was replaced, at an undisclosed point in the proceedings, by a group of successor real parties in interest) to establish a 93-space mobile home park on 28 acres of land zoned for one-acre minimum lot sizes for light agricultural use and single-family residences. Petitioner nonprofit association appealed the grant to the Los Angeles County Board of Supervisors, which denied the appeal. Petitioner then sought relief by way of administrative mandate in superior court. The superior court denied the mandate petition, and the court of appeal upheld the denial. Petitioner then appealed to the California Supreme Court.

The Court reversed the judgment and remanded the case to the superior court with directions to issue a writ of mandate requiring the board of supervisors to vacate its order awarding the variance. In doing so, the Court determined that the findings did not support the evidence (*11 Cal. 3d 506, 510*). To support its holding, the Court noted that *Code Civ. Proc. § 1094.5* clearly requires that, at a minimum, a court reviewing the decision of an administrative agency must determine both whether substantial evidence supports the agency's findings and whether the findings support the agency's decision (*11 Cal. 3d 506, 514-515*). Furthermore, the Court concluded that *Code Civ. Proc. § 1094.5*

implicitly requires the agency rendering the challenged decision to set forth findings to bridge the analytic gap between the raw evidence and the ultimate decision or order. If the Legislature had desired otherwise, it could have declared as a possible basis for issuing mandate the absence of substantial evidence to support the agency's action. By focusing, instead, on the relationships between evidence and findings and between findings and ultimate action, the Legislature sought to direct the reviewing court's attention to the analytic route the agency traveled from evidence to action. In so ruling, the Court stated its belief that the Legislature must have contemplated the agency would reveal this route, and that *Code Civ. Proc. § 1094.5* leaves no room for the conclusion that the Legislature would have been content to have a reviewing court speculate as to the agency's basis for decision (*11 Cal. 3d 506, 515*).

In the instant case, the Court found the findings insufficient to support the decision because the planning commission's findings did not include facts sufficient to satisfy the legislative criteria applicable to the variance awarded. These criteria emphasized disparities between properties, rather than treatment of the subject property's characteristics in the abstract. Because the commission's findings focused almost exclusively on the qualities of the subject property, the Court held them insufficient to support the decision to award the variance (*11 Cal. 3d 506, 520-522*).

In ***Respers v. University of Cal. Retirement System*** *(1985) 171 Cal. App. 3d 864, 217 Cal. Rptr. 594* , plaintiff was a nurse employed by the University of California Davis Medical Center who, after medical termination, applied for disability income from defendant. After plaintiff's application was denied, an administrative hearing was held. The administrative law judge's proposed decision in favor of plaintiff was rejected by defendant, which made no findings in support of its rejection. Plaintiff filed for a writ of mandate directing defendant to set aside its denial of benefits. The trial court denied the writ. Plaintiff appealed.

The court of appeal reversed and remanded with directions that a peremptory writ of mandate be issued commanding defendant to vacate its decision and make findings sufficient to support its decision and facilitate judicial review. The court stated that as an administrative agency, defendant is required to make findings sufficient both to enable the parties to determine whether and on what basis they should seek review and, in the event of review, to apprise a reviewing court of the basis of the decision (*171 Cal. App. 3d 864, 870*). The need for findings is not based on rule or regulation but is implicit in the *Code Civ. Proc. § 1094.5(b)* definition of "abuse of discretion," which includes instances when an administrative decision is not supported by the findings. In its administrative decision defendant must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order. Absent some indication that defendant adopted the findings of another, no assumption will be made that defendant's findings satisfy the requirements that the grounds on which the agency acted be clearly disclosed and adequately sustained (*171 Cal. App. 3d 864, 871-872*). Defendant's failure to adopt findings is prejudicial and precludes meaningful review (*171 Cal. App. 3d 864, 873*).

[b] Presumption of Sufficient Findings Inapplicable

In ***Broadway, Laguna etc. Assn. v. Board of Permit Appeals*** *(1967) 66 Cal. 2d 767, 59 Cal. Rptr. 146, 427 P.2d 810* , real party in interest property developer applied for a variance from certain provisions of the San Francisco city planning code. The city zoning administrator denied the application, and real party appealed the denial to respondent city Board of Permit Appeals. The board reversed the zoning administrator and granted the application. Plaintiff, an association of interested property owners, petitioned the superior court for a writ of mandate to compel the board to set aside its order. The superior court entered judgment denying the petition, and plaintiff appealed from the judgment.

The Supreme Court reversed the judgment and remanded the case to the superior court with directions to issue a writ of mandate requiring the board to vacate its order granting the variance application and to affirm the zoning administrator's original decision denying the application. The Court based its reversal on the board's failure to make findings in support of its decision that met the requirements of the city planning code (*66 Cal. 2d 767, 773-774*). In so ruling, the Court distinguished the instant case from that of *Siller v. Board of Supervisors (1962) 58 Cal. 2d 479, 25 Cal. Rptr. 73, 375 P.2d 41* . *Siller* holds that the action of a municipal body in granting a variance must be sustained absent a clear and

convincing showing of abuse of discretion because it is presumed, when a variance is granted, that official duty was performed in investigating the matter and that the existence of necessary facts supporting the variance was found [*Siller v. Board of Supervisors (1962) 58 Cal. 2d 479, 484, 25 Cal. Rptr. 73, 375 P.2d 41]* . In the instant case, the Court held that *Siller's* presumption, which the Court interpreted as a presumption that an agency's rulings rest on the necessary findings and that those findings are supported by substantial evidence, does not apply to agencies that are required expressly to state their findings and to set forth the relevant facts supporting those findings (*66 Cal. 2d 767, 773*). The Court found the presumption inapplicable to respondent board because the city planning code requires the board to make findings in variance cases (*66 Cal. 2d 767, 772*).

In ***J.L. Thomas, Inc. v. County of Los Angeles*** *(1991) 232 Cal. App. 3d 916, 283 Cal. Rptr. 815* , plaintiff applied to the Los Angeles County Regional Planning Commission for a conditional use permit to operate a cabaret featuring live adult entertainment. The commission denied the application, and plaintiff appealed the denial to the Los Angeles County Board of Supervisors, which denied his appeal. Plaintiff then filed a petition for a writ of mandate in the superior court, challenging the commission's findings as unsupported by the evidence and challenging the relevancy of the findings to the decision. The superior court entered judgment denying the petition, and plaintiff appealed from the judgment.

The court of appeal reversed the superior court's judgment and directed the court to grant the petition for the writ. The court based its reversal, in part, on the grounds that the findings of defendant commission did not support its decision to deny the application and the evidence was insufficient to support the irrelevant findings that were made. In so holding, the court reaffirmed the rule that the presumption that an agency's rulings rest on the necessary findings and that those findings are supported by substantial evidence does not apply to agencies that are required to expressly state their findings and to set forth the relevant facts supporting those findings (*232 Cal. App. 3d 916, 926*). Because defendant commission was required by the county code to make specified findings relative to the issuance of the conditional use permit applied for by plaintiff, it could not avail itself of the presumption (*232 Cal. App. 3d 916, 922*).

[c] Findings Must Be Legally Relevant

The facts and procedural background of ***Broadway, Laguna etc. Assn. v. Board of Permit Appeals*** *(1967) 66 Cal. 2d 767, 59 Cal. Rptr. 146, 427 P.2d 810* , are discussed in Presumption of Sufficient Findings Inapplicable, *above*. In that case, the Supreme Court reversed the superior court's judgment and directed the court to issue a writ of mandate affirming the San Francisco zoning administrator's decision to deny the application of real party in interest for a zoning variance. In doing so, the Supreme Court held that the findings of the San Francisco Board of Permit Appeals, purporting to support its decision to overrule the zoning administrator, lacked legal relevance (*66 Cal. 2d 767, 773*). The Court based its finding of legal irrelevance on the fact that, even if the board's findings were assumed to be correct, they were insufficient to establish compliance with the five criteria for issuance of variances as set forth in the city planning code (*66 Cal. 2d 767, 771 n.3, 773-774*).

In ***City and County of San Francisco v. Board of Permit Appeals*** *(1989) 207 Cal. App. 3d 1099, 255 Cal. Rptr. 307* , real party in interest owned a multi-unit building that did not conform to zoning regulations. After the city zoning administrator ruled that a nonconforming unit in the building would have to be removed, the owner appealed to the city board of permit appeals. The board overruled the zoning administrator but failed to make any findings that would, under applicable law, allow the nonconforming unit to remain. Instead, the board adopted numerous policy-related findings, stating, for example, that legalization of the nonconforming unit would preserve existing housing stock, maintain affordable housing, and discourage demolition of sound structures. Plaintiff City and County of San Francisco, which sought to have the unit removed, applied for a writ of administrative mandate. The superior court denied the writ, and the plaintiff appealed.

The court of appeal reversed. It held that the board's action allowed the nonconforming dwelling unit contrary to the local planning code. The court noted that the board adopted numerous policy-related findings. However, regardless of

the merit in these considerations, they could not, in the court's opinion, overcome the problem that approval of the unit would violate the city's zoning requirements. The court stated that findings must be legally relevant as well as supported by the evidence in order to support agency action (*207 Cal. App. 3d 1099, 1109*).

[4] Additional Authorities

[a] Decision Not Supported by Findings

William Dal Porto & Sons, Inc. v. Agricultural Labor Relations Bd. (1987) 191 Cal. App. 3d 1195, 237 Cal. Rptr. 206 , involved an appeal by a farm employer of a decision of the Agricultural Labor Relations Board ordering the employer to make restitution to its employees for all economic losses caused by the employer's refusal to bargain in good faith with the employees' union. The court of appeal found that the board erred in making its order without first making findings that the parties would have consummated an agreement but for the bad faith of the employer. It set aside the board's order and remanded the case for further findings (*191 Cal. App. 3d 1195, 1213*).

American Funeral Concepts v. Board of Funeral Directors & Embalmers (1982) 136 Cal. App. 3d 303, 186 Cal. Rptr. 196 , was an appeal from a denial of a funeral director's petition for relief from defendant agency's revocation of his business license for violation of *Bus. & Prof. Code § 7735* (requiring certain money received to be held in trust). The court of appeal found that the agency's findings set forth solely in the language of the applicable legislation were insufficient. The court stated that findings must reveal the lines of factual and legal conclusions on which the agency relied (*136 Cal. App. 3d 303, 309*). Accordingly, the court directed that the case be returned to the agency for proper consideration (*136 Cal. App. 3d 303, 311*).

Los Alamitos Gen. Hosp., Inc. v. Lackner (1978) 86 Cal. App. 3d 417, 149 Cal. Rptr. 98 , was an appeal from a judgment in a proceeding in administrative mandate commenced by a hospital seeking review of a decision of the state Department of Health [now Health Services (*Health & Safety Code § 20*)] denying its application for a permit exemption for acquisition of a new piece of equipment under former Health & Safety Code § 437.10 (*now see Health & Safety Code § 127170*, expansion permit for projects commenced after statute's effective date). The Department had severed the piece of equipment from the remainder of the application for exemptions which involved a project that had been commenced prior to the effective date of the statute. The trial court directed the agency to grant the application for exemption for the piece of equipment.

The court of appeal reversed the judgment with direction to return the case to the administrative agency for appropriate findings of fact. The court quoted *Topanga Assn. for a Scenic Community v. Los Angeles County (1974) 11 Cal. 3d 506, 515, 113 Cal. Rptr. 836, 522 P.2d 12* , and noted that implicit in *Code Civ. Proc. § 1094.5* is a requirement that the agency that renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order. In the instant case the administrative findings made at the conclusion of the hearing stated that the project was for the acquisition of "an EMI Full Body Scanner" (the piece of equipment), rather than the entire expansion project, and then found that the project as so defined was not commenced within the period required for the "grandfather" exemption.

The findings are susceptible of two equally possible meanings. The hearing officer and agency may have determined that the agency had the unqualified power to split an exemption application into component parts constituting separate projects to that the hearing was limited to consideration of the split "separate" project as determined by the Department of Health. Equally, the hearing officer and agency may have determined as a matter of fact that the EMI scanner was not part of the project contemplated by the hospital in its original design but was an afterthought.

If the agency adopted the first approach, its determination rejecting the certificate of need was erroneous. "Project" as used in the statutory scheme is defined in former Health & Safety Code § 437.10 (*now see Health & Safety Code § 127170*). Nothing in the statutory scheme empowers the Department of Health to treat separately the component parts of

that which is a single project in fact. If the agency adopted the second approach, its determination must be accepted by reason of the substantial evidence test because then the issue will have been determined as one of fact. The agency's failure to specifically find on the issue of the factual inclusion of the full-body scanner in the "project" for which exemption was sought thus fails to bridge the analytical gap between the raw evidence and ultimate administrative decision and thus precludes intelligent judicial review (*86 Cal. App. 3d 417, 425-426*).

[b] Presumption of Sufficient Findings Inapplicable

The facts and procedural background of *City and County of San Francisco v. Board of Permit Appeals (1989) 207 Cal. App. 3d 1099, 255 Cal. Rptr. 307* , are discussed in *§ 195.82[3][c]*. In that case, real party in interest asked the court to imply a finding in a decision of the San Francisco Board of Permit Appeals that would allow real party to retain an existing third dwelling unit on property zoned for single-dwelling use, despite the existence of express, contradictory board findings. The court refused to do so, invoking the rule that the presumption that an agency's rulings rest on the necessary findings and that those finding are supported by substantial evidence does not apply to agencies that are required to expressly state their findings and set forth the relevant supportive facts. The court noted that the San Francisco city planning code required the board to make written findings in support of its decision in the instant case (*207 Cal. App. 3d 1099, 1106-1107*).

[c] Findings Must Be Legally Relevant

The facts and procedural background of *J.L. Thomas, Inc. v. County of Los Angeles (1991) 232 Cal. App. 3d 916, 283 Cal. Rptr. 815* , are discussed in *§ 195.82[3][a]*. In that case, the court examined the legal relevance of findings made by the Los Angeles County Regional Planning Commission in support of its decision to deny plaintiff's application for a conditional use permit to operate a cabaret featuring live adult entertainment. The court held the commission's findings failed to support its decision because none of the findings specifically addressed the criteria, as set forth in the county code, governing issuance of the permit. The court noted, furthermore, that the findings even failed to address whether plaintiff had provided the commission with sufficient information to establish those criteria (*232 Cal. App. 3d 916, 927-928*).

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CHAPTER 195 PUBLIC ADMINISTRATIVE LAW
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B. Opposition to Petition
1. Demurrer

19-195 California Points & Authorities § 195.83

§ 195.83 Demurrer Should Be Overruled--Failure to Support Findings With Evidence Is Abuse of Discretion

[1] FORM Demurrer Should Be Overruled--Failure to Support Findings With Evidence Is Abuse of Discretion

[*Caption. See § 195.80.*]

THE COURT SHOULD OVERRULE THE DEMURRER TO THE PETITION FOR WRIT OF MANDATE BECAUSE THE PETITION STATES A CAUSE OF ACTION BASED ON ABUSE OF DISCRETION IN THAT IT ALLEGES FACTS SHOWING THAT THE FINDINGS, ON WHICH THE ADMINISTRATIVE ADJUDICATORY _____ [ORDER *or* DECISION] IS BASED, ARE NOT SUPPORTED BY THE EVIDENCE.

Findings Not Supported by Evidence. An agency has abused its discretion if it has failed to make findings that are supported by the evidence (*Code Civ. Proc. § 1094.5(b)*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a demurrer to a petition for writ of mandate for review of a final

administrative adjudicatory order or decision on the basis of failure to state a cause of action based on abuse of discretion, when the petition alleges that the findings on which the agency based its order or decision are not supported by the evidence received in the administrative proceeding.

The party intending to use a part of the administrative record in a case brought under *Code Civ. Proc. § 1094.5* must lodge that part of the record at least five days before the hearing [*Cal. Rules of Ct., Rule 3.1140*].

With appropriate modifications this memorandum may be used to oppose a motion for summary judgment in favor of the respondent or a motion for judgment on the pleadings in favor of the respondent.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See Comments under § 195.80[2][b]] for further discussion.

[3] Discussion of Authorities

[a] Findings Not Supported By Evidence

Code Civ. Proc. § 1094.5 provides that the inquiry by the court in a mandate proceeding extends to whether there was any prejudicial abuse of discretion and that abuse of discretion is established if the findings are not supported by the evidence.

[4] Additional Authorities

[a] Findings Not Supported by Evidence

Wingfield v. Fielder (1972) 29 Cal. App. 3d 209, 105 Cal. Rptr. 619 , was an appeal from the judgment of the superior court in a mandate proceeding for review of an administrative adjudicatory decision. The court of appeal reversed the judgment of the trial court denying a writ of mandate and remanded to that court with direction to remand the case to the Director of Agriculture for reconsideration of a penalty. In considering the propriety of the administratively imposed penalty, the court noted the general rule that the propriety of a penalty imposed by an administrative agency is a matter of discretion for the agency and its decision will not be disturbed unless there has been a clear abuse of discretion. But in addition, it is well established that in determining whether a given penalty is arbitrary, the standard is set by reason and reasonable people. Such a standard allows for differences of opinion, and a reviewing court may not substitute a decision contrary to that made by the agency, even if the court's decision is equally or more reasonable, if the determination by the agency is one that could have been made by a reasonable person (*29 Cal. App. 3d 209, 221, 105 Cal. Rptr. 619*). But, although the determination of penalty lies with the administrative agency and not the court, there is an exception when the court finds some of the charges unsupported by the evidence and cannot ascertain whether the same penalty would have been imposed had the agency recognized that fact (*29 Cal. App. 3d 209, 223, 105 Cal. Rptr. 619*).

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19-195 California Points & Authorities § 195.84

§ 195.84 Demurrer Should Be Overruled--Failure to Proceed in Manner Required by Law Is Abuse of Discretion

[1] FORM Demurrer Should Be Overruled--Failure to Proceed in Manner Required by Law Is Abuse of Discretion

[*Caption. See § 195.80.*]

THE COURT SHOULD OVERRULE THE DEMURRER TO THE PETITION FOR WRIT OF MANDATE BECAUSE THE PETITION STATES A CAUSE OF ACTION BASED ON ABUSE OF DISCRETION BY ALLEGING FACTS SHOWING A FAILURE TO PROCEED IN THE MANNER REQUIRED BY LAW IN THAT THE AGENCY _____ [FAILED TO FOLLOW THE SPIRIT OF THE LAW EVEN THOUGH THE LAW HAS BEEN LITERALLY OBEYED *or* FAILED TO RECOGNIZE AND ACT ON THE IMPLICATIONS OF THE LAW'S EXPLICIT REQUIREMENTS *or* BASED ITS DECISION ON ITS OWN INTERPRETATION OF THE MEANINGS AND RELATIONS OF CONFLICTING LAWS].

A. Failure to Proceed as Required by Law. Abuse of discretion is established if the agency has not proceeded in the manner required by law (*Code Civ. Proc. § 1094.5(b)*).

[*EITHER*]

B. Failure to Follow Spirit of Law. An agency has clearly abused its discretion if it has proceeded against a person in literal compliance with the requirements of the law but in a way which fosters continued violations of regulatory laws instead of inducing compliance with them (*Walsh v. Kirby (1974) 13 Cal. 3d 95, 104, 118 Cal. Rptr. 1, 529 P.2d 33*).

[*OR*]

B. Failure to Recognize Implications of Following Explicit Requirements. An agency clearly abuses its discretion if

it disregards the practical implications of following the law's explicit requirements and causes a result inconsistent with the intention behind the regulatory scheme of the law (*Walsh v. Kirby (1974) 13 Cal. 3d 95, 104, 118 Cal. Rptr. 1, 529 P.2d 33*).

[*OR*]

B. Harmonizing Conflicting Laws. An agency abuses its discretion if, as a means of reaching its decision, it undertakes the judicial function of construing and harmonizing conflicting laws (*People ex rel. Fund American Companies v. California Ins. Co. (1974) 43 Cal. App. 3d 423, 432-433, 117 Cal. Rptr. 623*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a demurrer to a petition for writ of mandate for review of a final administrative adjudicatory order or decision on the basis of failure to state a cause of action based on abuse of discretion, when the petition alleges that the agency failed to proceed in the manner required by law in that it (a) acted contrary to the spirit of the law even though the literal requirements of the law were obeyed, (b) failed to recognize and act on the practical implications of following the explicit requirements of the law, so that the result intended by the Legislature in enacting regulatory laws has not been achieved, or (c) usurped the judicial function of construing and harmonizing conflicting laws, as a means of reaching its decision.

The party intending to use a part of the administrative record in a case brought under *Code Civ. Proc. § 1094.5* must lodge that part of the record at least five days before the hearing [*Cal. Rules of Ct., Rule 3.1140*].

With appropriate modifications theses points and authorities may be used to oppose a motion for summary judgment in favor of the respondent or a motion for judgment on the pleadings in favor of the respondent.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See Comments under § 195.80[2][b] for further discussion.

[3] Discussion of Authorities

[a] Failure to Proceed as Required by Law

Code Civ. Proc. § 1094.5(b) provides that the inquiry by the court in a mandate proceeding extends to whether there was any prejudicial abuse of discretion and that abuse of discretion is established if the respondent has not proceeded in the manner required by law.

[b] Failure to Follow Spirit of Law

Walsh v. Kirby *(1974) 13 Cal. 3d 95, 118 Cal. Rptr. 1, 529 P.2d 33* , was an original proceeding in the Supreme Court for review, on a writ of certiorari, of an adjudicatory decision of the Alcoholic Beverage Control Appeals Board affirming a decision of the Department of Alcoholic Beverage Control imposing a penalty on the holder of an off-sale general liquor license. The court held the department in the instant case had clearly acted in an excessive manner: first, by proceeding against the licensee in a way designed not to induce conformance with fair trade practices and, second, by imposing cumulative penalties which resulted in de facto revocation of the license and were excessive when measured against the licensee's conduct and the purposes sought to be achieved by the penalty provisions (*13 Cal. 3d 95, 103-104*). As to the first of these abuses, the department's practice under which a licensee's misconduct is knowingly allowed to continue while the department elects to accumulate evidence of multiple violations before filing an accusation naturally tends to foster continuing violations and disruptions in the orderly sale and distribution of alcoholic beverages. A departmental practice, under which notice of a violation given in a timely manner is withheld while the licensee is afforded an opportunity to engage in a series of violations, defeats the very purpose of the fair trade law. This arbitrariness of the department's conduct is even greater, when it can elect, for purely subjective reasons, whether (1) it will file an accusation after the first violation and, thus, provide the warning intended by the Legislature that future violations will result in more severe sanctions, or (2) as in the instant case, deprive the licensee of that warning by not filing the accusation until the licensee is already exposed to such severe sanctions. As to the second departmental abuse, the purposes of the statute were further frustrated by the imposition of heavy cumulative penalties on a retailer when used as weapons to effect a de facto revocation of a license without prior adequate notice of wrongdoing to a licensee. A primary purpose of the legislation is to effect compliance by licensees rather than revocations or suspensions of their licenses, and pertinent legislation (former Bus. & Prof. Code § 24755.1) expressly prohibits a direct revocation or suspension for a violation. The power vested by the statute is perverted when the department utilizes its tools to do indirectly that which is directly and expressly prohibited (*13 Cal. 3d 95, 104*). The Supreme Court labeled the action as arbitrary and capricious. Since the board failed to proceed in the manner required by law, the decision was annulled and the manner remanded for reconsideration (*13 Cal. 3d 95, 106*).

[c] Failure to Recognize Implications of Following Explicit Requirements

Walsh v. Kirby *(1974) 13 Cal. 3d 95, 118 Cal. Rptr. 1, 529 P.2d 33* , is discussed in *§ 195.84[3][b]*.

[d] Harmonizing Conflicting Laws

People ex rel. Fund American Companies v. California Ins. Co. *(1974) 43 Cal. App. 3d 423, 117 Cal. Rptr. 623* , was an appeal in a quo warranto action testing whether one of the parties had a legal right to the use of a corporate name. The Secretary of State had refused to file articles of incorporation, on the basis of his administrative construction of an applicable statute. The court of appeal stated that the Secretary of State was exercising his "discretion" as to the legal meaning of two conflicting statutes. The Secretary was exercising judicial power in harmonizing the statutes--powers clearly beyond the area of his ministerial functions (*43 Cal. App. 3d 423, 432-433*). The Secretary of State is required to reserve names of corporations meeting the requirement of the Corporations Code and has no discretion not to do so. The administrative practice here was a violation of the mandatory provisions of the Code and could not be sustained (*43 Cal. App. 3d 423, 432)* . The court affirmed the judgment of the lower court upholding the defendant's right to use the corporate name (*43 Cal. App. 3d 423, 434*).

[4] Additional Authorities

[a] Failure to Proceed as Required by Law

In *American Insurance Association v. Garamendi (2005) 127 Cal. App. 4th 228, 24 Cal. Rptr. 3d 905* , Insurance Commissioner John Garamendi adopted an emergency regulation regarding the availability of homeowners insurance due to the adoption of underwriting guidelines known as "use it and lose it," under which insurance coverage was lost

due to filing a claim or even inquiring about coverage. Three insurance industry trade groups sought a peremptory writ of mandate to set aside and stop enforcement of the emergency regulation which sought to regulate the use of losses and loss exposure in residential property insurance rating and underwriting. The trial court granted the petition based on the fact that the regulation conflicted with the Insurance Code. The Commissioner appealed.

On appeal, the court of appeal noted that the Commissioner has broad discretion to adopt regulations as necessary to promote the public welfare (*127 Cal. App. 4th 228, 236*). However, the court held that Administrative agencies have only the powers conferred on them, either expressly or impliedly, by the Constitution or by statute. Administrative actions exceeding those powers are void. To be valid, administrative action must be within the scope of authority conferred by the enabling statutes (*127 Cal. App. 4th 228, 236*). After reviewing the emergency regulation and the Insurance Code, the court of appeal found the Insurance Code does not give the Commissioner authority to regulate underwriting for homeowners insurance and invalidated the regulation (*127 Cal. App. 4th 228, 246*).

In *Ontario Community Foundation, Inc. v. State Bd. of Equalization (1984) 35 Cal. 3d 811, 201 Cal. Rptr. 165, 678 P.2d 378* , a hospital obtained a judgment against the State Board of Equalization awarding it a refund of sales tax assessed on the transfer of hospital furnishings and equipment made as part of the sale of the hospital's total assets. The basis for the judgment had been that the transfer was an "occasional sale," and as such was exempt from sales tax. The board had relied on an administrative regulation stating that certain sellers who engaged in other sales that were not tax exempt could not claim an exemption for an occasional sale. The Supreme Court affirmed the judgment, holding that the regulatory restriction imposed conditions on the availability of the tax exemption that were omitted from the statute and at variance with it (*35 Cal. 3d 811, 817*). The Court stated that an abuse of discretion is shown when an agency promulgates a regulation that is inconsistent with the governing statute. The Court stated that administrative regulations that violate statutes by altering, enlarging, or amending them, or impairing their scope are void and must be struck down (*35 Cal. 3d 811, 816-817)* .

Woods v. Superior Court (1981) 28 Cal. 3d 668, 170 Cal. Rptr. 484, 620 P.2d 1032 , is discussed in *§ 195.80[4]*. In that case, the Supreme Court held that an abuse of discretion is established when an agency has not proceeded in the manner required by law, which necessarily implies proceeding under an invalid regulation (*28 Cal. 3d 668, 675, 678*).

Yamada Bros. v. Agricultural Labor Relations Bd. (1979) 99 Cal. App. 3d 112, 159 Cal. Rptr. 905 , was an appeal by an agricultural employer from the trial court's order sustaining a demurrer to a writ of mandate that had been sought to review an order of the Agricultural Labor Relations Board. The court of appeal reversed the trial court's order holding that courts may exercise equitable powers to review administrative decisions in extraordinary circumstances (*99 Cal. App. 3d 112, 121*). The court went on to hold that extraordinary circumstances were shown when the board violated a specific and mandatory provision of the act by failing to make a finding that the employer had refused to bargain in good faith (*99 Cal. App. 3d 112, 123*).

People ex rel. Fund American Companies v. California Ins. Co. (1974) 43 Cal. App. 3d 423, 117 Cal. Rptr. 623 , was an appeal in a quo warranto action testing whether one of the parties had a legal right to the use of a corporate name. The Secretary of State had refused to file articles of incorporation, on the basis of his administrative construction of an applicable statute, and that construction was found by the trial court to be incorrect. The court of appeal affirmed, stating that an administrative determination will be interfered with by the courts when the determination is based upon an error in law. It is for the courts, not for administrative agencies, to lay down the governing principles of law. Accordingly, questions of law are reviewable. Whether an administrative agency applies the legislative standards validly set up, and whether it acts within the authority conferred or goes beyond it, are proper questions for judicial decision. The matter of statutory construction is not finally entrusted to administrative agencies; it is determined ultimately by the courts (*43 Cal. App. 3d 423, 431*).

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19-195 California Points & Authorities § 195.85

§ 195.85 Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable to Petition, General Form

[1] FORM Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable to Petition, General Form

[*Caption. see § 195.80.*]

THE COURT SHOULD OVERRULE THE DEMURRER TO THE PETITION FOR WRIT OF MANDATE BECAUSE THE PETITION DOES NOT FAIL TO STATE A CAUSE OF ACTION BY NOT ALLEGING THE EXHAUSTION OF ADMINISTRATIVE REMEDIES FOR THE REASON THAT THIS IS AN EXCEPTIONAL CASE IN WHICH EXHAUSTION IS NOT REQUIRED.

Exceptions to Exhaustion Requirement. There are exceptional cases in which the doctrine of exhaustion of administrative remedies will not be applied (*Los Angeles County v. Department of Social Welfare (1953) 41 Cal. 2d 455, 457, 260 P.2d 41*).

[As appropriate, this form should be combined with a memorandum asserting that the exhaustion of administrative remedies doctrine is inapplicable in the particular instance. See *§§ 195.86 -195.103*].

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a demurrer to a petition for writ of mandate for review of a final administrative adjudicatory order or decision based on failure to allege exhaustion of administrative remedies, when the petition alleges facts showing that such exhaustion is not required under the exceptional circumstances of the case.

When appropriate, this form may be used to oppose the form *set forth in § 195.68*.

As appropriate, this form should be combined with a memorandum asserting that the exhaustion of administrative remedies doctrine is inapplicable in the particular instance [*see* §§ 195.86-195.103].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See Comments under § 195.80[2][b] for further discussion.

[3] Discussion of Authorities

[a] Exceptions to Exhaustion Requirement

Los Angeles County v. Department of Social Welfare *(1953) 41 Cal. 2d 455, 260 P.2d 41* , was an appeal from the judgment of the superior court that a writ of mandate be issued directing an administrative agency to set side certain adjudicatory orders. On appeal it was argued that the petitioner (county) had failed to exhaust administrative remedies by not seeking a rehearing before the respondent agency (then called the State Social Welfare Board). The court affirmed the rule stated in this memorandum, observing, that there are exceptions to the general rule requiring the exhaustion of administrative remedies. If, as contended by the county, the state board lacked jurisdiction over the subject matter of the proceedings, it was not necessary for the county to seek a rehearing before the board (*41 Cal. 2d 455, 457*).

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19-195 California Points & Authorities § 195.86

§ 195.86 Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable to Constitutional Challenge to Statute

[1] FORM Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable to Constitutional Challenge to Statute

[*This form should be combined with a memorandum generally opposing a demurrer to a petition for administrative mandate based on the inapplicability of the exhaustion of remedies doctrine. See § 195.85.*]

THE COURT SHOULD OVERRULE THE DEMURRER TO THE PETITION FOR WRIT OF MANDATE BECAUSE IT IS IMPROPER TO REQUIRE ALLEGATION OF EXHAUSTION IN A CASE IN WHICH THE PETITION CHALLENGES THE CONSTITUTIONALITY OF A CODE SECTION ON ITS FACE.

Exception for Constitutional Challenge to Statute on Its Face. It would be improper to require a petitioner for writ of mandate for review of a final administrative adjudicatory order or decision to exhaust his or her administrative remedies when (1) he or she challenges the constitutionality of a code section on its face and does not dispute any facts, thus presenting only an issue of law, (2) the issue presented has statewide significance, and (3) unless the issue is promptly resolved by the court, the petitioner will face possible criminal sanctions in choosing which of two conflicting laws to obey (*Sail'er Inn, Inc. v. Kirby (1971) 5 Cal. 3d 1, 6-7, 95 Cal. Rptr. 329, 485 P.2d 529*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a demurrer to a petition for writ of mandate for review of a final administrative adjudicatory order or decision based on failure to allege exhaustion of administrative remedies, when [*Sail'er Inn, Inc. v. Kirby (1971) 5 Cal. 3d 1, 6-7, 95 Cal. Rptr. 329, 485 P.2d 529]* :

- The petitioner challenges the constitutionality of a code section on its face and does not dispute any

facts, thus presenting only an issue of law,

- The issue presented has statewide significance, and

- Unless the issue is promptly resolved by the court, the petitioner will face possible criminal sanctions in choosing which of two conflicting laws to obey.

As appropriate, this memorandum may be used to oppose the points and authorities *set forth in § 195.68*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See Comments under § 195.80[2][b] for further discussion.

[3] Discussion of Authorities

[a] Exceptions for Constitutional Challenge to Statute on Its Face

Sail'er Inn, Inc. v. Kirby *(1971) 5 Cal. 3d 1, 95 Cal. Rptr. 329, 485 P.2d 529* , was an original proceeding in the Supreme Court for a writ of mandate directing an administrative agency not to revoke certain licenses, the agency having begun but not having concluded proceedings for revocation. The Court noted that the petitioners challenged the constitutionality of the statute governing the administrative action in question on its face; no material facts were disputed. They raised important legal issues of statewide significance. Two of them were placed in the untenable situation of having to choose whether to obey possibly conflicting federal and state laws and face a penalty under the one they chose to disobey. In light of these extraordinary circumstances, the Court held that it would be improper to require them to exhaust their administrative remedies (*5 Cal. 3d 1, 6-7*).

[4] Additional Authorities

[a] Exception for Constitutional Challenge to Statute on Its Face

In *In re Mabie (1984) 159 Cal. App. 3d 301, 205 Cal. Rptr. 528* , petitioner sought habeas corpus, contending that he was improperly denied *Penal Code § 2933* worktime credits because he was committed to the California Rehabilitation Center (CRC), rather than being sent to a state prison, and that therefore he was deprived of equal protection of the laws under the *equal protection clause* of *U.S. Const., amend. XIV*, and *Cal. Const., art. I, § 7*. Holding that petitioner had not been deprived of equal protection of the laws under either the U.S. or the California Constitution, the court of appeal initially noted that the doctrine of exhaustion of administrative remedies has not hardened into inflexible dogma, and contains its own exceptions, such as, in the case at bar, when petitioner seeks relief on a constitutional theory (*159 Cal. App. 3d 301, 305*). The court found a compelling justification for limiting *Penal Code § 2933* worktime credits to state prison inmates in that worktime credit would not foster effective treatment for narcotics addiction, which is the purpose of the CRC program (*159 Cal. App. 3d 301, 308*).

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Volume 19 Chapters 190-195 PRODUCTS LIABILITY---to---PUBLIC ADMINISTRATIVE LAW
CHAPTER 195 PUBLIC ADMINISTRATIVE LAW
PART II. FORMS
B. Opposition to Petition
1. Demurrer

19-195 California Points & Authorities § 195.87

§ 195.87 Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable to State and Local Law Conflict

[1] FORM Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable to State and Local Law Conflict

[*This form should be combined with a memorandum generally opposing a demurrer to a petition for administrative mandate based on the inapplicability of the exhaustion of remedies doctrine. See § 195.85.*]

THE COURT SHOULD OVERRULE THE DEMURRER TO THE PETITION FOR WRIT OF MANDATE BECAUSE AVAILABLE ADMINISTRATIVE REMEDIES ARE PROVIDED BY _____ [A LOCAL ORDINANCE *or* A CHARTER PROVISION] WHICH CONFLICTS WITH STATE LAW.

Exception for Conflicting Local and State Laws. When available administrative remedies are provided not by a statute but by a local ordinance or a charter provision which conflicts with state law, a petitioner for writ of mandate for review of a final administrative adjudicatory order or decision is not required to pursue the locally provided administrative remedy before seeking judicial relief (*Professional Fire Fighters, Inc. v. City of Los Angeles (1963) 60 Cal. 2d 276, 287, 32 Cal. Rptr. 830, 384 P.2d 158*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a demurrer to a petition for writ of mandate for review of a final administrative adjudicatory order or decision based on failure to allege exhaustion of administrative remedies, when available administrative remedies are provided not by a statute but by a local ordinance or a charter provision which conflicts with state law.

This form should be combined with a memorandum generally opposing a demurrer to a petition for administrative mandate based on the inapplicability of the exhaustion of remedies doctrine [*see § 195.85*].

As appropriate, this memorandum may be used to oppose the points and authorities *set forth in § 195.68*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See Comments under § 195.80[2][b] for further discussion.

[3] Discussion of Authorities

[a] Exceptions for Conflicting Local and State Laws

Professional Fire Fighters, Inc. v. City of Los Angeles *(1963) 60 Cal. 2d 276, 32 Cal. Rptr. 830, 384 P.2d 158* , was an appeal from the summary judgment of the superior court in favor of the defendant as to a cause of action, among others alleged, for injunctive relief to prevent a city from discriminating against certain public employees because of their membership in a union. The Supreme Court stated that the principal conclusion of law on which the trial court based its summary judgment in favor of defendant on the cause of action for injunction was that plaintiffs failed to exhaust their legal remedies. The administrative remedies referred to by the trial court were not remedies provided by the state Legislature, but were remedies provided in the charter, ordinances, and regulations of defendant city. Thus, the legal remedies which the trial court would have required the plaintiffs to exhaust before granting relief herein were the creatures of local enactment which were valid and binding on plaintiffs only if certain statutes were inapplicable to defendant. In this case, those code sections were applicable to defendant. Thus, the plaintiffs were not required to comply with the local requirements that were in conflict with the state law (*60 Cal. 2d 276, 287*).

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1. Demurrer

19-195 California Points & Authorities § 195.88

§ 195.88 Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable When Alternative Remedies Are Available

[1] FORM Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable to State and Local Law Conflict

[*This form should be combined with a memorandum generally opposing a demurrer to a petition for administrative mandate based on the inapplicability of the exhaustion of remedies doctrine. See § 195.85.*]

THE COURT SHOULD OVERRULE THE DEMURRER TO THE PETITION FOR WRIT OF MANDATE BECAUSE IT INVOLVES A STATUTE THAT CREATES BOTH AN ADMINISTRATIVE REMEDY AND AN ALTERNATIVE JUDICIAL REMEDY, AND THE LEGISLATIVE INTENTION OF MAKING THE TWO REMEDIES ALTERNATIVE IS DISCERNIBLE.

Exception for Alternative Remedies. When a statute creates both an administrative remedy and an alternative judicial remedy, and the legislative intention of making the two remedies alternative is discernible, pursuit of the one is not prerequisite to pursuit of the other (*Runyon v. Board of Trustees of the California State Univ. (2010) 48 Cal. 4th 760, 773-775, 108 Cal. Rptr. 3d 557, 229 P.3d 985* ; *State Board of Chiropractic Examiners v. Superior Court (2009) 45 Cal. 4th 963, 971-974, 89 Cal. Rptr. 3d 576, 201 P.3d 457* ; *Scripps Memorial Hosp., Inc. v. California Employment Comm'n (1944) 24 Cal. 2d 669, 673-674, 151 P.2d 109* ; *Kennedy v. Beaumont Investment, Ltd. (2003) 111 Cal. App. 4th 102, 124-125, 3 Cal. Rptr. 3d 429*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a demurrer to a petition for writ of mandate for review of a final administrative adjudicatory order or decision based on failure to allege exhaustion of administrative remedies, when a statute creates both an administrative remedy and an alternative judicial remedy, and the legislative intention of making the two remedies alternative is discernible. In such a case, pursuit of the one is not prerequisite to pursuit of the other [

Scripps Memorial Hosp., Inc. v. California Employment Comm'n (1944) 24 Cal. 2d 669, 673-674, 151 P.2d 109] .

This form should be combined with a memorandum generally opposing a demurrer to a petition for administrative mandate based on the inapplicability of the exhaustion of remedies doctrine [*see § 195.85*].

As appropriate, this memorandum may be used to oppose the points and authorities *set forth in § 195.68*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See Comments under § 195.80[2][b] for further discussion.

[3] Discussion of Authorities

[a] Exception for Alternative Remedies

In ***Runyon v. Board of Trustees of the California State Univ.*** *(2010) 48 Cal. 4th 760, 773-775, 108 Cal. Rptr. 3d 557, 229 P.3d 985* , the plaintiff was a professor who filed a claim with the defendant alleging he was removed as head of his department in retaliation for reporting improper conduct by the dean. The defendant's human resource department investigated the matter and concluded that the plaintiff's reports did not qualify as protected under the applicable whistleblower act and that he was removed due to his failure to review his department's curriculum. The plaintiff responded in writing to this report, but the human resources department concluded that he was properly demoted. The plaintiff filed an action for damages against the defendant under Govt. Code § 8547.12. Section 8547(c) allows the injured party to seek a civil action if the university has not satisfactorily addressed the complaint within 18 months. The trial court granted the defendant's summary judgment motion on the ground that the plaintiff was required to successfully challenge the defendant's decision by writ of mandate before bringing an action for damages. The court of appeal affirmed.

The California Supreme Court reversed. It looked at the language of the statute and held that Govt. Code § 8547.12 authorizes a damages action by a whistleblower whenever the employee has exhausted his or her internal remedies by filing an internal complaint with the defendant and the defendant has reached an adverse decision. The Court held that the Legislature acknowledged the existence of the parallel administrative remedy but did not require that the administrative findings be set aside by way of a mandate action. To hold otherwise, held the Court, would be contrary to the legislative intent [*48 Cal. 4th 760, 774]* . The Court held that even if it does not produce a judicially binding determination, the Legislature's requirement that the employee submit his or her complaint to a nonbinding administrative investigative procedure is not irrational nor unusual and could lead to early and less costly resolution of disputes [*48 Cal. 4th 760, 774-775]* .

In ***State Board of Chiropractic Examiners v. Superior Court*** *(2009) 45 Cal. 4th 963, 971-974, 89 Cal. Rptr. 3d 576, 201 P.3d 457* , the plaintiff, an employee of the defendant State Board of Chiropractic Examiners (SBCE), noted in the board's computer that the SBCE chairperson's license was expired for several months, and inquired about issuing a citation to the chairperson. Her manager repeatedly told her not to issue the citation. As a result, SBCE managers changed the plaintiff's duties, denied her requests for a modified work schedule, cancelled her alternative work schedule, and transferred her to a different unit. The plaintiff filed a complaint with the State Personnel Board pursuant to the California Whistleblower Protection Act [*Gov. Code § 8547 et seq.*]. The Act imposes liability "in an action for damages"' on "any person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a state employee" for disclosing improper governmental activities or unsafe conditions. However, the Act provides that an action for damages is not available unless the injured party first files a complaint with the State Personnel Board and the board has issued, or failed to issue, findings. After an investigation, the State Personnel Board issued findings that the plaintiff's complaint should be dismissed on the ground that some of the alleged whistleblower

activity did not constitute protected disclosures of improper governmental activities under the Act. Under the State Personnel Board's regulation, the plaintiff could file a petition for a hearing before the Board. The plaintiff thereafter filed an action against the defendant in superior court. The defendant moved for summary judgment, arguing that the plaintiff had failed to exhaust her administrative and judicial remedies. The trial court denied the motion, but the court of appeal issued an alternative writ and stayed the proceedings in the trial court. The court of appeal held that the plaintiff was required to complete the administrative process by petitioning the State Personnel Board for a hearing, and if this hearing request was denied, she was required to seek a writ of mandate from the court to have the Board's findings set aside.

The California Supreme Court disagreed. It looked at the plain language of *Gov. Code § 8547(c)* which requires only that a plaintiff file a complaint with the State Personnel Board and that the Board issue, or fail to issue, findings. The Court held that the statute did not require the plaintiff to petition the State Personnel Board for a hearing or to seek writ review of the Board's findings (*45 Cal. 4th 963, 971)* . The Court further noted that the State Personnel Board's regulations permitted the complaining party to seek a hearing before the Board to challenge adverse findings, but that the Board's regulations cannot amend the statutory scheme (*45 Cal. 4th 963, 972-974)* .

Scripps Memorial Hosp., Inc. v. California Employment Comm'n *(1944) 24 Cal. 2d 669, 151 P.2d 109* , was an appeal from the judgment of the superior court in favor of the plaintiff in an action to recover taxes paid under protest. The appellant contended that the trial court erred in denying a motion to dismiss based on the argument that the plaintiff failed to exhaust administrative remedies before filing suit. The Supreme Court affirmed the judgment. If it could be said that there was an administrative remedy provided by the statute [i.e., the California Unemployment Insurance Act (Stats. 1935, ch. 352) as amended (Stats. 1939, chs. 628, 630)] and by the rules of the California Employment Commission which was available to the plaintiff, it could not be said that the remedy was exclusive or that its exercise was a necessary precedent to the use of the other remedy expressly given by the statute [i.e., the remedy of paying a tax under protest and then suing to recover the amount paid]. None of the cases cited in support of the usual rule requiring exhausting of administrative remedies go to the extent of holding that the rule applies as against another remedy expressly provided in the same statute, which creates the administrative remedy. Assuming that an administrative remedy existed, the most that could be said is that alternative remedies were available to the plaintiff, and the court correctly refused to grant the motions to dismiss (*24 Cal. 2d 669, 673-674*).

In ***Kennedy v. Beaumont Investment, Ltd.*** *(2003) 111 Cal. App. 4th 102, 3 Cal. Rptr. 3d 429* , the state filed a complaint for unfair business practices against mobilehome park landlords, alleging that the landlords violated a municipal ordinance by unlawfully forcing mobilehome park tenants to accept long-term leases in order to avoid rent control. The trial court found for the state.

On appeal, the landlords challenged the trial court's authority to adjudicate violations of the Unfair Business Practices Act, based on *Civil Code § 1947.7*, the Petris Act. The Petris Act provides that a residential landlord who is in substantial compliance with a local rent control ordinance may not be assessed a penalty or any other sanction for noncompliance [*see Civ. Code § 1947.7(b)*]. According to the defendant landlords, the trial court lacked authority to award civil penalties for rent control violations until the administrative procedure set forth by the Petris Act took place. That procedure required notice of deficiency by the designated local agency, determination of compliance by that agency, and an opportunity to cure [*see Civ. Code § 1947.7(b)*].

The court of appeal first questioned whether the Petris Act applied to mobilehome park landowners. The court held that, even assuming the Petris Act applied, nothing in the Act either created an administrative procedure or mandated its exhaustion as a precondition to judicial intervention. The court discussed the difference between exhaustion of remedies and primary jurisdiction. The court held that "exhaustion" applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. "Primary jurisdiction," on the other hand, applies where a claim is originally cognizable in the courts, and comes into play when enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been

placed within the special competence of an administrative body. In such a case the judicial process is suspended pending referral of such issues to the administrative body for its views (*111 Cal. App. 4th 102, 124-125*). Exhaustion applies where an agency alone has exclusive jurisdiction over a case; primary jurisdiction applies where both a court and an agency have the legal capacity to deal with the matter. In this case, the court held that the governing principle was primary jurisdiction, not exhaustion. In the absence of an available administrative remedy, the exhaustion doctrine does not apply (*111 Cal. App. 4th 102, 125*).

[4] Additional Authorities

[a] Exception for Alternative Remedies

In *McKee v. Bell-Carter Olive Co. (1986) 186 Cal. App. 3d 1230, 231 Cal. Rptr. 304* , an agriculture grower brought suit against a food processing company to seek damages for breach of contract. The trial court granted defendant's motion for summary judgment and dismissed the complaint, on the ground that plaintiff failed to exhaust his administrative remedies under relevant statutes governing the regulation of agriculture processors. The court of appeal reversed, holding that plaintiff is not required to exhaust administrative remedies, because *Food & Agric. Code § 55437* states that the remedy therein is in addition to other procedures or remedies, even though it does not expressly state that the remedy is not exclusive (*186 Cal. App. 3d 1230, 1240-1246*).

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1. Demurrer

19-195 California Points & Authorities § 195.89

§ 195.89 Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable to Predetermined Cases

[1] FORM Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable to Predetermined Cases

[*This form should be combined with a memorandum generally opposing a demurrer to a petition for administrative mandate based on the inapplicability of the exhaustion of remedies doctrine. See § 195.85.*]

THE COURT SHOULD OVERRULE THE DEMURRER TO THE PETITION FOR WRIT OF MANDATE BECAUSE THE EXHAUSTION OF REMEDIES REQUIREMENT DOES NOT APPLY WHEN THE AGENCY HAS DECLARED WHAT ITS RULING WOULD BE IN A PARTICULAR CASE.

Exception for Predetermined Cases. Available administrative remedies need not be exhausted when the petitioner for writ of mandate for review of a final administrative adjudicatory order or decision can show positively that the agency has declared what its ruling would be in a particular case (*Gantner & Mattern Co. v. California Employment Comm'n (1941) 17 Cal. 2d 314, 318, 109 P.2d 932 (dictum)* ; *Farahani v. San Diego Community College District (2009) 175 Cal. App. 4th 1486, 1496-1497, 96 Cal. Rptr. 3d 900* ; *Doster v. County of San Diego (1988) 203 Cal. App. 3d 257, 260-262, 251 Cal. Rptr. 507*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a demurrer to a petition for writ of mandate for review of a final administrative adjudicatory order or decision based on failure to allege exhaustion of administrative remedies, when the agency has declared what its ruling would be in a particular case.

This form should be combined with a memorandum generally opposing a demurrer to a petition for administrative mandate based on the inapplicability of the exhaustion of remedies doctrine [*see § 195.85*].

As appropriate, this memorandum may be used to oppose the points and authorities *set forth in § 195.68*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See *§ 195.80[2][b]* for further discussion.

[3] Discussion of Authorities

[a] Exception for Predetermined Cases

Gantner & Mattern Co. v. California Employment Comm'n *(1941) 17 Cal. 2d 314, 109 P.2d 932* , was a mandate proceeding, begun in the court of appeal but heard in the Supreme Court on that Court's order for transfer, for review of an administrative adjudicatory decision and to prevent the agency from giving effect to that decision. It was argued in the Supreme Court that the petitioner was precluded from maintaining the proceeding because of failure to exhaust administrative remedies. The petitioner replied that by a long line of decisions the agency in question had made plain its views as to the law applicable to the situation in the case at bar and that to apply to the agency for relief would have been an idle act. The Court conceded that the petitioner's argument might be accurate, but held that the exhaustion of administrative remedial procedure as laid down by the statute is required unless the petitioner can positively state that the agency has declared what its ruling will be in the particular case (*17 Cal. 2d 314, 318)* .

Farahani v. San Diego Community College District *(2009) 175 Cal. App. 4th 1486, 1496-1497, 96 Cal. Rptr. 3d 900* , involved a plaintiff college professor who was reprimanded by the defendant college district for alleged sexual harassment. Rather than suspending the plaintiff, the defendant required the plaintiff to sign an agreement whereby the plaintiff agreed to a reduction in pay and promised to refrain from conduct that constituted sexual harassment. While the agreement was in effect, the defendant received additional complaints against the plaintiff. The defendant terminated the plaintiff pursuant to the agreement. The termination letter stated, "Since you are being terminated from employment because of a violation of the [agreement], you do not have a right of appeal." The plaintiff requested reinstatement and opportunity to meet. However, the defendant reiterated that, pursuant to the agreement, the plaintiff had no right to appeal the termination. The plaintiff filed a petition for writ of mandate. The defendant argued that the plaintiff failed to exhaust administrative remedies. The trial court granted the petition and ordered the defendant to provide the plaintiff with notice and an opportunity to be heard regarding his termination. The trial court held that the defendant was precluded from arguing that the plaintiff had failed to exhaust his administrative remedies when by its own conduct it advised the plaintiff that he had no rights of appeal.

The court of appeal agreed. The defendant argued that the trial court's ruling stemmed from confusion regarding the word "appeal" in the defendant's termination letter. The defendant argued that it referred only to the plaintiff's statutory hearing and appeal rights which were separate and distinct from the grievance procedures set out in the plaintiff's collective bargaining agreement. The court of appeal rejected this distinction (*175 Cal. App. 4th 1486, 1496-1497)* . It held that a plaintiff need not exhaust administrative remedies provided by statute if the agency has already rejected the claim, announced its position on the claim or made clear it would not consider the plaintiff's evidence (*175 Cal. App. 4th 1486, 1497)* . The court held that the defendant's termination letter unequivocally encompassed all avenues of appeal (*175 Cal. App. 4th 1486, 1497)* .

In ***Doster v. County of San Diego*** *(1988) 203 Cal. App. 3d 257, 251 Cal. Rptr. 507* , plaintiff deputy sheriff was served with an order of termination for incompetence. The county civil service commission found him guilty of several of the charges, but ordered him reinstated to his position with full pay and benefits. After he returned to duty, he received a letter from the undersheriff notifying him that numerous restrictions were being placed on him. Plaintiff's counsel requested clarification and a due process hearing. The sheriff responded that the action was taken because the civil service commission had found plaintiff incompetent, which the sheriff interpreted to mean that plaintiff was

incapable of performing his duties and required strict supervision. The sheriff rejected plaintiff's request for an administrative hearing because plaintiff had failed to so request within five working days of receipt of the order. Plaintiff unsuccessfully sought mandate in superior court, which was denied because plaintiff had failed to exhaust his administrative remedies. Plaintiff sought review from the judgment denying the petition.

The court of appeal reversed the judgment denying the petition, holding that plaintiff's failure to pursue his administrative remedy was not a jurisdictional bar to seeking judicial relief. The court explained that although the exhaustion rule is a procedural one, exceptions to the rule include cases in which resorting to the administrative process would be futile because it is clear what the administrative decision would be. In this case, because the letter was based on the incompetency finding by the civil service commission, it was questionable whether or not an administrative hearing would be adequate, or any purpose served by it. Because the law does not require a party to participate in futile acts, plaintiff's failure to exhaust his administrative remedy did not bar the judicial suit. Administrative review to challenge a decision made earlier by the final decision maker when the decision maker will not be called on to consider different evidence on the ultimate issue would truly be a waste of time. It would be more efficient for the court to review the narrow question of whether the sheriff properly imposed restrictions on plaintiff based on the administrative record made before the civil service commission, rather than to require needless administrative review to determine whether or not there was a legal basis for the sheriff's action (*203 Cal. App. 3d 257, 260-262)* .

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19-195 California Points & Authorities § 195.90

§ 195.90 Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable to Assertion of Wholly Illegal Act

[1] FORM Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable to Assertion of Wholly Illegal Act

[*This form should be combined with a memorandum generally opposing a demurrer to a petition for administrative mandate based on the inapplicability of the exhaustion of remedies doctrine. See § 195.85.*]

THE COURT SHOULD OVERRULE THE DEMURRER TO THE PETITION FOR WRIT OF MANDATE BECAUSE THE EXHAUSTION OF REMEDIES REQUIREMENT DOES NOT APPLY WHEN A PETITIONER TAKES THE POSITION THAT MAKING OF THE _____ [ORDER *or* DECISION] WAS WHOLLY WITHOUT AUTHORITY[, AS WHEN IT IS CLAIMED TO HAVE BEEN UNCONSTITUTIONAL].

Exception for Assertion of Wholly Illegal Action. When a petitioner for writ of mandate for review of an administrative adjudicatory order or decision takes the position that making of the order or decision was wholly without authority, as when it is claimed to have been unconstitutional, he or she may apply to the courts for relief without pursuing administrative remedies (*West Publishing Co. v. McColgan (1946) 27 Cal. 2d 705, 711-712, 166 P.2d 861* ; *California-Nevada Annual Conf. of the United Methodist Church v. San Francisco (2009) 173 Cal. App. 4th 1559, 1569-1571, 94 Cal. Rptr. 3d 64*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a demurrer to a petition for writ of mandate for review of a final administrative adjudicatory order or decision based on failure to allege exhaustion of administrative remedies, when the petitioner takes the position that making of the order or decision was wholly without authority.

This form should be combined with a memorandum generally opposing a demurrer to a petition for administrative mandate based on the inapplicability of the exhaustion of remedies doctrine [*see § 195.85*].

As appropriate, this memorandum may be used to oppose the points and authorities *set forth in § 195.68*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See *§ 195.80[2][b]* for further discussion.

[3] Discussion of Authorities

[a] Exception for Assertion of Wholly Illegal Action

West Pub. Co. v. McColgan *(1946) 27 Cal. 2d 705, 166 P.2d 861* , was an appeal from the judgment of the superior court against the plaintiff in an action to recover taxes forcibly collected by withholding from the plaintiff's funds in the state. The plaintiff sued to recover the amounts collected and asserted that collection was illegal because imposition of the tax on the plaintiff was unconstitutional. On the issue of exhaustion of administrative remedies the court stated that no question was raised either in the claim for refund filed with the Franchise Tax Commissioner or in the pleadings filed in this action concerning the amounts of the assessments; plaintiff merely contended that no tax could be validly imposed. It chose this way of challenging the state's authority to impose the tax, taking the risk that, if such authority existed, its position in court would be that of a delinquent taxpayer that has failed to exhaust its administrative remedies (*27 Cal. 2d 705, 711-712)* .

In ***California-Nevada Annual Conf. of the United Methodist Church v. San Francisco*** *(2009) 173 Cal. App. 4th 1559, 1569-1571, 94 Cal. Rptr. 3d 64* , the plaintiff owner of a church sought to demolish a dilapidated church building and sell the property to raise revenue. *Gov. Code § 25373(b)* provides that the board of supervisors "may, by ordinance, provide special conditions or regulations for the protection, enhancement, perpetuation, or use of places, sites, buildings, structures, works of art and other objects having a special character or special historical or aesthetic interest or value." The defendant city and county passed a resolution seeking to designate the building a historical landmark and halt the demolition. The plaintiff filed a writ of mandate seeking to halt the designation process. The plaintiff argued that, pursuant to *Gov. Code § 25373(d)*, noncommercial buildings owned by religious organizations were exempt from *Gov. Code § 25373(b)*. The court granted the writ, and the defendant appealed, arguing that a church building that is no longer in use is commercial, rather than noncommercial, and therefore is not exempt from *Gov. Code § 25373(b)*. The defendant further argued that because its designation was not final, the plaintiff had not yet exhausted its administrative remedies.

The court of appeal discussed the state of the law regarding *Gov. Code § 25373(d)* and held that is was clear that the defendant's argument was wrong. Accordingly, the court held that the defendant was acting outside its jurisdiction in attempting to designate the church a historical landmark. The court thus held that if an agency is acting beyond its jurisdiction, judicial intervention may be obtained even if the agency has not yet reached a final decision and the affected party has not yet exhausted its administrative remedies (*173 Cal. App. 4th 1559, 1569)* . The court held that to decide whether to hold that the defendant lacked jurisdiction before the landmark designation proceedings had run their course, it would consider three factors: the injury or burden that exhaustion would impose, the strength of the legal argument that the defendant lacked jurisdiction, and the extent to which administrative expertise may aid in resolving the jurisdictional issue (*173 Cal. App. 4th 1559, 1569)* . With respect to the first issue, the court held that since continuing with the landmarking process would not possibly lead to valid restrictions on the plaintiff's ability to demolish the building, the absence of demonstrable hardship to the plaintiff was offset by the absence of any potential disadvantage to the defendant from an immediate resolution of the controversy (*173 Cal. App. 4th 1559, 1570)* . With respect to the second factor, the court held that the law was clear that the defendant had no jurisdiction to designate the

church a landmark (*173 Cal. App. 4th 1559, 1569)* .

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19-195 California Points & Authorities § 195.91

§ 195.91 Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable to Threatened Irreparable Injury

[1] FORM Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable to Threatened Irreparable Injury

[*This form should be combined with a memorandum generally opposing a demurrer to a petition for administrative mandate based on the inapplicability of the exhaustion of remedies doctrine. See § 195.85.*]

THE COURT SHOULD OVERRULE THE DEMURRER TO THE PETITION FOR WRIT OF MANDATE BECAUSE THE EXHAUSTION OF REMEDIES REQUIREMENT DOES NOT APPLY WHEN THE PETITIONER ALLEGES THAT HE SHE WILL SUFFER IRREPARABLE INJURY IF REQUIRED TO PURSUE ADMINISTRATIVE REMEDIES BEFORE SEEKING RELIEF IN THE COURTS.

Exception for Threatened Irreparable Injury. When a petitioner for writ of mandate for review of a final administrative adjudicatory order or decision alleges that he or she will suffer irreparable injury if required to pursue administrative remedies before seeking relief in the courts, he will not be required to pursue administrative remedies first (*United States v. Superior Court (1941) 19 Cal. 2d 189, 196, 120 P.2d 26 (dictum)*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a demurrer to a petition for writ of mandate for review of a final administrative adjudicatory order or decision based on failure to allege exhaustion of administrative remedies, when the petitioner alleges that he or she will suffer irreparable injury if required to pursue administrative remedies before seeking relief in the courts.

This form should be combined with a memorandum generally opposing a demurrer to a petition for administrative mandate based on the inapplicability of the exhaustion of remedies doctrine [*see § 195.85*].

As appropriate, this memorandum may be used to oppose the points and authorities *set forth in § 195.68*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See *§ 195.80[2][b]* for further discussion.

[3] Discussion of Authorities

[a] Exception for Threatened Irreparable Injury

United States v. Superior Court *(1941) 19 Cal. 2d 189, 120 P.2d 26* , was an original proceeding in the Supreme Court to restrain the superior court from continuing an action for injunctive relief against enforcement of a marketing order issued by the United States Secretary of Agriculture. The Supreme Court ordered that a writ of prohibition issue but, on the issue of exhaustion of administrative remedies (such remedies having been available to the plaintiff but unused), the Court recognized that the inadequacy of the administrative remedy, arising from threatened irreparable injury, is a recognized ground for immediate injunctive relief, and, on proof of that fact, the exhaustion requirement has frequently been held inapplicable. However, in the instant case, there was no showing of irreparable injury to warrant interference with an uncompleted administrative proceeding (*19 Cal. 2d 189, 196)* .

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19-195 California Points & Authorities § 195.92

§ 195.92 Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable to Unidentifiable Administrative Remedy

[1] FORM Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable to Unidentifiable Administrative Remedy

[*This form should be combined with a memorandum generally opposing a demurrer to a petition for administrative mandate based on the inapplicability of the exhaustion of remedies doctrine. See § 195.85.*]

THE COURT SHOULD OVERRULE THE DEMURRER TO THE PETITION FOR WRIT OF MANDATE BECAUSE THE EXHAUSTION OF REMEDIES REQUIREMENT DOES NOT APPLY WHEN IT IS EVIDENT THAT SOME ADMINISTRATIVE REMEDY IS AVAILABLE, BUT IT CANNOT REASONABLY BE ASCERTAINED WHAT THAT REMEDY IS OR HOW IT IS TO BE PURSUED.

Exception for Unidentifiable Administrative Remedy. If it is evident that some administrative remedy is available, but it cannot reasonably be ascertained what that remedy is or how it is to be pursued, a petitioner for writ of mandate for review of a final administrative adjudicatory order or decision will not be required to pursue that administrative remedy before seeking relief in the courts (*Unfair Fire Tax Committee v. City of Oakland (2006) 136 Cal. App. 4th 1424, 1428-1431, 39 Cal. Rptr. 3d 701* ; *Pasadena City Fire Fighters Ass'n v. Board of Directors (1974) 36 Cal. App. 3d 901, 907-908, 112 Cal. Rptr. 56*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a demurrer to a petition for writ of mandate for review of a final administrative adjudicatory order or decision based on failure to allege exhaustion of administrative remedies, when it is evident that some administrative remedy is available, but it cannot reasonably be ascertained what that remedy is or how it is to be pursued.

This form should be combined with a memorandum generally opposing a demurrer to a petition for administrative mandate based on the inapplicability of the exhaustion of remedies doctrine [*see § 195.85*].

As appropriate, this memorandum may be used to oppose the points and authorities *set forth in § 195.68*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See *§ 195.80[2][b]* for further discussion.

[3] Discussion of Authorities

[a] Exception for Unidentifiable Administrative Remedy

In ***Unfair Fire Tax Committee v. City of Oakland*** *(2006) 136 Cal. App. 4th 1424, 39 Cal. Rptr. 3d 701* , a property owners association sued a city to determine the validity of a fire suppression assessment district created by a resolution adopted by the city council. The city demurred to the complaint on the ground that the association failed to exhaust the administrative remedies provided by a city ordinance. The association argued that the ordinance allowed a person aggrieved by a resolution creating a fire suppression district to request reconsideration of the resolution by the same decisionmaking body that adopted the resolution. The trial court sustained the city's demurrer and dismissed the complaint.

On appeal the association argued that the ordinance did not specify a procedure to be followed in the appeal to the city council; therefore, it was an ineffective administrative remedy that did not need to be pursued. The association argued that the ordinance allowed a person aggrieved by a resolution creating a fire suppression district to request reconsideration of the resolution by the same decisionmaking body that adopted the resolution, i.e., by the city council. The court held that despite some vague language, the ordinance failed to provide any procedure for submission, evaluation and resolution of the request for reconsideration; it did not state how the appeal may be taken, whether the appellant would be entitled to a hearing, when the matter would be heard, what evidence may be submitted, or the standard for reconsidering the city council's earlier decision (*136 Cal. App. 4th 1424, 1429-1430)* . The court held that a long line of authority holds that the exhaustion of remedies requirement is not applicable if an effective administrative remedy is wholly lacking (*136 Cal. App. 4th 1424, 1429*). The court concluded that the ordinance allowing an aggrieved person to "appeal" to the city council a resolution to establish a fire suppression district did not provide an adequate administrative remedy because it lacked any procedural mechanism for submission, evaluation and resolution of the appeal. The doctrine of exhaustion of administrative remedies therefore did not require the association to pursue such an appeal or request for reconsideration (*136 Cal. App. 4th 1424, 1430*).

Pasadena City Fire Fighters Ass'n v. Board of Directors *(1974) 36 Cal. App. 3d 901, 112 Cal. Rptr. 56* , was an appeal from the summary judgment of the superior court denying relief in a proceeding for writ of mandate to compel city officials to establish a merit employment system and for injunctive relief restraining city officials from conducting a particular examination to fill the position of fire chief. On appeal, it was argued that the summary judgment was proper because, among other reasons, the petitioner did not exhaust available administrative remedies before filing suit. However, the Court observed that in the instant case, it was not clear what administrative remedy was available to the petitioner. Nothing in the affidavits of the moving parties pointed to the existence of such remedies. Denial of a mandate is predicated on that existence. Therefore, the Court reversed the summary judgment and remanded the case for trial (*36 Cal. App. 3d 901, 907-908)* .

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Volume 19 Chapters 190-195 PRODUCTS LIABILITY---to---PUBLIC ADMINISTRATIVE LAW
CHAPTER 195 PUBLIC ADMINISTRATIVE LAW
PART II. FORMS
B. Opposition to Petition
1. Demurrer

19-195 California Points & Authorities § 195.93

§ 195.93 Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable to Protection of Public Interest

[1] FORM Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable to Protection of Public Interest

[*This form should be combined with a memorandum generally opposing a demurrer to a petition for administrative mandate based on the inapplicability of the exhaustion of remedies doctrine. See § 195.85.*]

THE COURT SHOULD OVERRULE THE DEMURRER TO THE PETITION FOR WRIT OF MANDATE BECAUSE THE EXHAUSTION OF REMEDIES REQUIREMENT DOES NOT APPLY, EVEN THOUGH THE PETITIONER IS A PRIVATE PERSON WHO HAS FAILED TO EXHAUST AN ADMINISTRATIVE REMEDY AGAINST GOVERNMENTAL ACTION TAKEN IN AN ADMINISTRATIVE PROCEEDING TO WHICH HE OR SHE WAS NOT A PARTY, ON THE GROUND THAT HE OR SHE IS SEEKING RELIEF FROM THE ACTION BY ENFORCEMENT OF RIGHTS THAT HE OR SHE HOLDS AS A MEMBER OF THE PUBLIC.

Exception for Protecting Public Interest. The failure of a private person to exhaust an administrative remedy against governmental action taken in an administrative proceeding to which he or she was not a party does not bar him or her from seeking relief from the action by enforcement of rights that he or she holds as a member of the public (*Environmental Law Fund, Inc. v. Town of Corte Madera (1975) 49 Cal. App. 3d 105, 114, 122 Cal. Rptr. 282*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a demurrer to a petition for writ of mandate for review of a final administrative adjudicatory order or decision based on failure to allege exhaustion of administrative remedies, even though the petitioner is a private person who has failed to exhaust an administrative remedy against governmental action taken in an administrative proceeding to which he or she was not a party, when he or she is seeking relief from the action by enforcement of rights that he or she holds as a member of the public.

This form should be combined with a memorandum generally opposing a demurrer to a petition for administrative mandate based on the inapplicability of the exhaustion of remedies doctrine [*see § 195.85*].

As appropriate, this memorandum may be used to oppose the points and authorities *set forth in § 195.68*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See *§ 195.80[2][b]* for further discussion.

[3] Discussion of Authorities

[a] Exception for Protecting Public Interest

Environmental Law Fund, Inc. v. Town of Corte Madera *(1975) 49 Cal. App. 3d 105, 122 Cal. Rptr. 282* , was an appeal from the judgment of the superior court in favor of the petitioners in a proceeding for writ of mandate for review of an administrative adjudicatory decision. On appeal, it was contended that the petitioners were barred from seeking judicial relief because of failure to exhaust administrative remedies. The petitioners were not parties to the administrative proceeding (a hearing by a town planning commission on an application for a conditional use permit), and neither the petitioners nor any other person, including the parties in the administrative proceeding, pursued an available administrative remedy. The petitioners sued as members of the public because the administrative action in question affected the entire town where they resided. The court stated that the petitioners were pursuing more than privately held rights, and asserting more than privately held grievances. They were acting as members of the public and in the public interest. Application of the exhaustion doctrine against them, by reason of their default in the administrative proceeding to which they were not parties, would mean in effect the imputation of their default to the public in the absence of any factual basis for such imputation. In general, the doctrine would thus operate to bar the public from redressing a public wrong. This result would not be consistent with principles of waiver or res judicata, and it would totally deserve the public interest. For these reasons, the court held that the failure of a private person to exhaust an administrative remedy, against governmental action taken in an administrative proceeding to which he was not a party, does not bar him from seeking judicial relief from such action by way of enforcing rights that he holds as a member of the affected public (*49 Cal. App. 3d 105, 114)* .

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PART II. FORMS
B. Opposition to Petition
1. Demurrer

19-195 California Points & Authorities § 195.94

§ 195.94 Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable Because Pursuit of Remedies Is Futile

[1] FORM Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable Because Pursuit of Remedies Is Futile

[*This form should be combined with a memorandum generally opposing a demurrer to a petition for administrative mandate based on the inapplicability of the exhaustion of remedies doctrine. See § 195.85.*]

THE COURT SHOULD OVERRULE THE DEMURRER TO THE PETITION FOR WRIT OF MANDATE BECAUSE THE EXHAUSTION OF REMEDIES REQUIREMENT DOES NOT APPLY WHEN THE PURSUIT OF ADMINISTRATIVE REDRESS WOULD BE FUTILE BECAUSE ADMINISTRATIVE REMEDIES ARE UNAVAILABLE OR INADEQUATE.

Exception When Pursuit of Administrative Remedies Is Futile. Failure to exhaust administrative remedies will not preclude resort to the courts when the pursuit of administrative redress would be futile because administrative remedies are unavailable or inadequate (*In re Electric Refund Cases (2010) 184 Cal. App. 4th 1490, 1503-1504, 110 Cal. Rptr. 3d 117* ; *Ahmadi-Kashani v. Regents of the University of California (2008) 159 Cal. App. 4th 449, 456-461, 71 Cal. Rptr. 3d 556* ; *Farmer v. City of Inglewood (1982) 134 Cal. App. 3d 130, 137, 185 Cal. Rptr. 9*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a demurrer to a petition for writ of mandate for review of a final administrative adjudicatory order or decision based on failure to allege exhaustion of administrative remedies, when the pursuit of administrative redress would be futile because administrative remedies are unavailable or inadequate.

This form should be combined with a memorandum generally opposing a demurrer to a petition for administrative

mandate based on the inapplicability of the exhaustion of remedies doctrine [*see § 195.85*].

As appropriate, this memorandum may be used to oppose the points and authorities *set forth in § 195.68*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See *§ 195.80[2][b]* for further discussion.

[c] Opposing Memoranda

When appropriate, the memoranda *set forth in § 195.69* may be used to oppose the contentions set forth in this form.

[3] Discussion of Authorities

[a] Exception When Pursuit of Administrative Remedies Is Futile

In re Electric Refund Cases *(2010) 184 Cal. App. 4th 1490, 1503-1504, 110 Cal. Rptr. 3d 117* , involved buyers of electricity that brought a proceeding before the Federal Energy Regulatory Commission (FERC) against an electricity seller for allegedly charging unjust and unreasonable rates. FERC found in the plaintiffs' favor and ordered the defendant to refund overpayments. The defendant filed an action in the Ninth Circuit Court of Appeals, claiming that FERC did not have jurisdiction over it because it was a nonpublic agency. The court agreed. The plaintiffs then filed a breach of contract action against the defendant in state court. The defendant filed a demur on the ground that by failing to argue in the FERC proceedings that the defendant's "nonpublic" status should be changed, the plaintiffs failed to exhaust their administrative remedies. The trial court sustained the demurrer without leave to amend.

On appeal, the court first held that the plaintiffs did exhaust their administrative remedies by initiating a successful proceeding before FERC, which was later reversed by the Ninth Circuit [*184 Cal. App. 4th 1490, 1501-1503]* . FERC's jurisdiction was always at issue. The court then held that any attempt to change FERC's jurisdiction would have been futile [*184 Cal. App. 4th 1490, 1504]* . At the time the plaintiffs initiated the FERC proceeding, an entity like the defendant had never been treated as an entity subject to FERC's jurisdiction [*184 Cal. App. 4th 1490, 1504]* . In addition, just two months previously in an unrelated matter, FERC had affirmed that an entity like the defendant was not subject to its jurisdiction [*184 Cal. App. 4th 1490, 1504]* . Thus, the court held, the purposes meant to be served by the exhaustion requirement were met and any attempt by the plaintiffs to expand FERC's jurisdiction would have been futile [*184 Cal. App. 4th 1490, 1504]* .

In ***Ahmadi-Kashani v. Regents of the University of California*** *(2008) 159 Cal. App. 4th 449, 456-461, 71 Cal. Rptr. 3d 556* , the plaintiff sued her university employer for sexual harassment. Her union's collective bargaining agreement provided for four steps for pursuing an employment claim. Step 1 was delivering a formal written grievance to the labor relations office at the campus where the employee works. The university then had 15 calendar days to respond. If the university did not timely respond, or the employee was dissatisfied with the response, the employee may proceed to step 2, filing a written appeal within 15 calendar days of when the response was issued or was due. Step 2 was a meeting convened by the "designated University local official"with the employee and her representative, no later than 15 calendar days following receipt of the appeal to Step 2. The purpose of that meeting was to "discuss information and contentions relative to the grievance" and "attempt to resolve" it. Within 15 calendar days after the step 2 meeting, the university was required to issue a written decision regarding the grievance. Step 3 was an appeal filed with the Director of Labor Relations in the Office of the President. The university had 30 days from the receipt of the step 3 appeal to issue its written answer. Step 4 was a binding arbitration, which only the union, not the employee, had the right to initiate.

After the defendant rejected the plaintiff's step 1 grievance, the plaintiff filed a timely step 2 appeal. After eight months

passed and the defendant university did not convene a meeting, the plaintiff filed a claim with the Department of Fair Employment and Housing. Days later, the university scheduled a step 2 meeting with the plaintiff. At the meeting, the witnesses were not placed under oath, no documents were exchanged, and the plaintiff was not permitted to question the defendant. The university subsequently issued a decision, signed by an officer other than the one present at the meeting, denying the plaintiff's claim based on the fact that the claim consisted of only the plaintiff's version of the events and no actual investigation of her claim.

The plaintiff did not appeal to step 3 of the grievance process. Instead, she filed a complaint in superior court alleging causes of action for sexual harassment and wrongful termination. The defendant filed a motion for summary judgment, arguing the complaint was barred because of the plaintiff's failure to exhaust her administrative remedy. The defendant argued that once the plaintiff initiated the internal grievance process, she was required either to participate in that process until its conclusion or be bound by any adverse result. The trial court agreed and granted the motion.

On appeal, the court reversed the trial court's ruling. It distinguished cases the defendant relied on requiring a claimant to follow through on administrative procedures before filing suit. The court of appeal held that, here, the plaintiff was afforded no hearing at all before she abandoned the grievance process. The court held that nothing in the step 2 meeting convened by the defendant suggested that it was intended to afford the plaintiff an opportunity to prove her case. To the contrary, the meeting was merely an opportunity for the parties to discuss information and contentions relative to the grievance (*159 Cal. App. 4th 449, 458)* . The court further held that the defendant's step 2 decision did nothing but demonstrate how wholly inadequate the proceeding was for resolving the plaintiff's claims (*159 Cal. App. 4th 449, 458-459)* . The court held that because the plaintiff never participated in a quasi-judicial hearing as part of her aborted grievance process, there was no decision rendered that would be entitled to preclusive effect in a subsequent court proceeding. The court held that it could perceive of no reason why the plaintiff should be obligated to continue with a grievance process which was wholly unsatisfactory and in which she was not required to participate in the first place (*159 Cal. App. 4th 449, 459)* .

Farmer v. City of Inglewood *(1982) 134 Cal. App. 3d 130, 185 Cal. Rptr. 9* , was an appeal from the judgment of the trial court granting a discharged city employee's petition for writ of mandate to compel a civil service hearing. The court of appeal agreed with the trial court's finding that the administrative remedies provided for in the civil service rule, stating that a terminated employee had 10 days to file a written appeal of termination together with a written answer to the grounds designated as reason for termination, were either unavailable or so nebulous as to be wholly inadequate because no reasons for discharge were ever stated in the notice of final disciplinary action. Therefore, the 10-day period within which to request a hearing never commenced to run (*134 Cal. App. 3d 130, 137)* . The notice of final action only made reference to the charges against the employee that were incorporated in the preliminary notice, and the court of appeal held that this was insufficient because the civil service rule requires findings by the employer (*134 Cal. App. 3d 130, 138*). The employee did retain an attorney and request a hearing, although not within the time limits specified in the civil service rule, and the court of appeal found substantial evidence to support the trial court's conclusion that the employee had exhausted all available administrative remedies except those excused by the action or omissions of appellant city (*134 Cal. App. 3d 130, 139-140*). The court of appeal therefore affirmed the judgment.

[4] Additional Authorities

[a] Exception When Pursuit of Administrative Remedies Is Futile

Tiernan v. Trustees of Cal. State University & Colleges (1982) 33 Cal. 3d 211, 188 Cal. Rptr. 115, 655 P.2d 317 , was an appeal from the judgment of the trial court refusing to grant a petition for writ of administrative mandate sought by a temporary university employee who contested her nonreappointment. Plaintiff had filed a written notice of grievance with the university after receiving formal notice of her nonreappointment and then filed a petition for writ of mandate prior to the grievance hearing. Plaintiff argued that defendants had failed to adopt and follow regulations in *Educ. Code § 89534* prescribing the form, time, and method for giving temporary academic employees notice of their

nonreappointment, and that defendants infringed on her *First Amendment* rights by conditioning their offer of a good recommendation on her agreement to resign rather than contest her nonreappointment. The trial court rejected plaintiff's claims and also declared that plaintiff's failure to exhaust her administrative remedies would bar granting her relief in any event. The Supreme Court reversed, with directions to the trial court to issue a writ of mandate commanding the trustees to issue the regulations required under *Educ. Code § 89534*. The Court reiterated the rule that exhaustion of administrative remedies is not required when an administrative remedy is unavailable or inadequate (*33 Cal. 3d 211, 217*). The Court found that the university grievance procedure provided no avenue for plaintiff to advance her claim that the trustees had a duty to enact regulations governing notice of nonreappointment of temporary employees, and thus plaintiff's action could not be barred by the exhaustion of remedies doctrine (*33 Cal. 3d 211, 217-218*). However, plaintiff's *First Amendment* claim was barred from present consideration because plaintiff had not demonstrated that the grievance procedure available to her was inadequate to resolve the claim, and therefore it fell within the rule requiring exhaustion of administrative remedies (*33 Cal. 3d 211, 217*).

In *Automotive Management Group, Inc. v. New Motor Vehicle Bd. (1993) 20 Cal. App. 4th 1002, 24 Cal. Rptr. 2d 904* , an automobile dealer submitted to the New Motor Vehicle Board a protest of its termination as a franchised dealer. An administrative law judge rejected the dealer's protest because it was untimely and the dealer petitioned the court for a writ of mandate. The trial court applied the substantial evidence test and denied the dealer's petition. The court of appeal reversed, holding that the administrative law judge's decision regarding the timeliness of the dealer's protest should have been submitted to the New Motor Vehicle Board for review. Although the dealer did not request that the Board hear the matter, the court held that this case fell within the futility exception to the exhaustion of administrative remedies doctrine because the administrative law judge expressly stated that the Board should not consider the protest. The court also held that the Board's failure to review the decision was not harmless error (*20 Cal. App. 4th 1002*).

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19-195 California Points & Authorities § 195.95

§ 195.95 Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable to Constitutionality Inadequate Procedures

[1] FORM Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable to Constitutionality Inadequate Procedures

[*This form should be combined with a memorandum generally opposing a demurrer to a petition for administrative mandate based on the inapplicability of the exhaustion of remedies doctrine. See § 195.85.*]

THE COURT SHOULD OVERRULE THE DEMURRER TO THE PETITION FOR WRIT OF MANDATE BECAUSE THE EXHAUSTION OF REMEDIES REQUIREMENT DOES NOT APPLY WHEN THE AVAILABLE PROCEDURES UNDER THE REMEDIES ARE CONSTITUTIONALLY INADEQUATE IN THAT THEY FAIL TO SATISFY DUE PROCESS REQUIREMENTS.

Exception for Constitutionally Inadequate Procedures. Available administrative remedies need not be exhausted when the available procedures under the remedies are constitutionally inadequate in that they fail to satisfy due process requirements (*Bush v. California Conservation Corps (1982) 136 Cal. App. 3d 194, 203-204, 185 Cal. Rptr. 892*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a demurrer to a petition for writ of mandate for review of a final administrative adjudicatory order or decision based on failure to allege exhaustion of administrative remedies, when the available procedures under the remedies are constitutionally inadequate in that they fail to satisfy due process requirements.

This form should be combined with a memorandum generally opposing a demurrer to a petition for administrative mandate based on the inapplicability of the exhaustion of remedies doctrine [*see § 195.85*].

As appropriate, this memorandum may be used to oppose the points and authorities *set forth in § 195.68*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See Comments under § 195.80[2][b] for further discussion.

[3] Discussion of Authorities

[a] Exception for Constitutionally Inadequate Procedures

Bush v. California Conservation Corps *(1982) 136 Cal. App. 3d 194, 185 Cal. Rptr. 892* , was an appeal from a dismissal entered after defendant's demurrer was sustained with leave to amend and plaintiffs thereafter failed to amend. Plaintiffs pleaded several causes of action based on their termination from employment with defendant. On appeal, defendant contended that adequate administrative remedies existed at the time of plaintiffs' terminations and, thus, the dismissal was proper. The court held that plaintiffs were not required to exhaust the administrative remedies before filing suit because the available procedures under the administrative remedies were constitutionally inadequate in that they failed to satisfy due process requirements (*136 Cal. App. 3d 194, 203-204*). The procedures did not provide plaintiffs an opportunity to challenge the charges against them, and the reinstatement procedure required plaintiffs to admit guilt as a prerequisite to reinstatement. In addition, the notice of termination of employment was deficient in satisfying minimal due process notice requirements in that it gave plaintiffs only three hours to vacate the employment premises. The court concluded that plaintiffs had stated a cause of action for denial of their constitutional rights under *42 U.S.C. § 1983*, and reversed the dismissal order (*136 Cal. App. 3d 194, 204*).

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B. Opposition to Petition
1. Demurrer

19-195 California Points & Authorities § 195.96

§ 195.96 Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable Because of Newer Statutory Remedy for Common Law Right

[1] FORM Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable Because of Newer Statutory Remedy for Common Law Right

[*This form should be combined with a memorandum generally opposing a demurrer to a petition for administrative mandate based on the inapplicability of the exhaustion of remedies doctrine. See § 195.85.*]

THE COURT SHOULD OVERRULE THE DEMURRER TO THE PETITION FOR WRIT OF MANDATE BECAUSE THE EXHAUSTION OF REMEDIES REQUIREMENT DOES NOT APPLY WHEN A STATUTORY REMEDY IS PROVIDED FOR THE ENFORCEMENT OF A PREEXISTING COMMON-LAW RIGHT. IN SUCH A CASE, THE NEWER STATUTORY REMEDY WILL BE CONSIDERED ONLY CUMULATIVE AND NEED NOT BE EXHAUSTED BEFORE SEEKING JUDICIAL RELIEF.

Exception When Newer Statutory Remedy Provides for Enforcement of Preexisting Common-Law Right. When a statute creates a right that did not exist at common law and provides a comprehensive system of administrative enforcement, a requirement that administrative remedies be exhausted may be implied; however, when a statutory remedy is provided for the enforcement of a preexisting common-law right, the newer statutory remedy will be considered only cumulative and need not be exhausted before seeking judicial relief (*Boston v. Penny Lane Centers, Inc. (2009) 170 Cal. App. 4th 936, 947, 88 Cal. Rptr. 3d 707* ; *Hentzel v. Singer Co. (1982) 138 Cal. App. 3d 290, 303, 188 Cal. Rptr. 159*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a demurrer to a petition for writ of mandate for review of a final administrative adjudicatory order or decision based on failure to allege exhaustion of administrative remedies, when a

statutory remedy is provided for the enforcement of a preexisting common-law right. In such a case, the newer statutory remedy will be considered only cumulative and need not be exhausted before seeking judicial relief.

This form should be combined with a memorandum generally opposing a demurrer to a petition for administrative mandate based on the inapplicability of the exhaustion of remedies doctrine [*see § 195.85*].

As appropriate, this memorandum may be used to oppose the points and authorities *set forth in § 195.68*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See Comments under § 195.80[2][b] for further discussion.

[3] Discussion of Authorities

[a] Exception When Newer Statutory Remedy Provides for Enforcement of Preexisting Common Law Right

In ***Boston v. Penny Lane Centers, Inc.*** *(2009) 170 Cal. App. 4th 936, 947, 88 Cal. Rptr. 3d 707* , the plaintiff sued the defendant social services agency for wrongful termination. The plaintiff worked as a therapist for children and families. She was terminated after complaining to her supervisor that her workload had increased substantially and that her workplace had become unsafe. The defendant argued that the plaintiff failed to exhaust her administrative remedies set forth under *Health & Safety Code §§ 1596.881* and *1596.882*. *Health & Safety Code § 1596.881* provides that an employer may not discriminate against an employee who makes a good faith complaint to a regulatory agency or the employer regarding violations of the law by the employer, including violation of laws relating to staff-child ratios. *Health & Safety Code § 1596.882* provides that an employee who is discriminated against must pursue a grievance through the Division of Labor Standards Enforcement. The trial court found for the plaintiff.

The court of appeal held that the basis of the plaintiff's claim was not whether she was retaliated against for objecting to the defendant's failure to comply with staffing ratios; it was whether the defendant retaliated against her for objecting to an unsafe working environment, a claim that was more aligned with Cal-OSHA (*170 Cal. App. 4th 936, 947)* . The court further held that if a statute creates a right that did not exist at common law, and provides a comprehensive system of administrative enforcement, an exhaustion of administrative remedies requirement may be implied. However, if a statutory remedy is provided for enforcing a preexisting common-law right, the statutory remedy is considered cumulative. The court held that though Cal-OSHA created a statutory right of action for workplace safety claims, it did not extinguish the common law tort of wrongful termination in violation of the public policy in favor of workplace safety (*170 Cal. App. 4th 936, 947)* . Consequently, the court held, the plaintiff could enforce her right to a safe workplace using the common law tort of wrongful discharge, which preexisted and was separate from the cause of action created by *Health & Safety Code §§ 1596.881* and *1596.882*.

In ***Griffin Dewatering Corp. v. Northern Ins. Co. of N.Y.*** *(2009) 176 Cal. App. 4th 172, 97 Cal. Rptr. 3d 568* , a discharged employee attempted to bring a lawsuit against his former employer based on a common law cause of action for tortious wrongful discharge. The trial court sustained the employer's demurrers to plaintiff's causes of action without leave to amend and dismissed the complaint.

The court of appeal reversed, holding that plaintiff's complaint was sufficient to state a cause of action for tortious wrongful discharge. Defendant argued that the action was properly dismissed because plaintiff failed to exhaust his administrative remedies in that *Lab. Code § 6312* provided for the maintenance by the Labor Commissioner of a lawsuit on behalf of employees who alleged wrongful discharge for the reasons claimed by plaintiff. The court stated that when a statute creates a right that did not exist at common law and provides a comprehensive system of administrative enforcement, a requirement that administrative remedies be exhausted may be implied. Generally, however, when a

statutory remedy is provided for the enforcement of a preexisting common law right, the newer statutory remedy will be considered only cumulative (*138 Cal. App. 3d 290, 303*). The court found that *Lab. Code § 6312* did not constitute a comprehensive system of administrative enforcement, provided for no administrative remedy other than maintenance of a lawsuit by an administrative agency, and showed no legislative intent to preclude an employee from suing on his or her own behalf (*Total Call Int'l, Inc. v. Peerless Ins. Co. (2010) 181 Cal. App. 4th 161, 104 Cal. Rptr. 3d 319*). Therefore, the statutory remedy provided in *Lab. Code § 6312* was not exclusive and did not destroy plaintiff's common law cause of action for wrongful discharge (*138 Cal. App. 3d 290, 304*).

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1. Demurrer

19-195 California Points & Authorities § 195.97

§ 195.97 Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable Because Dispute Requires Statutory Construction

[1] FORM Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable Because Dispute Requires Statutory Construction

[*This form should be combined with a memorandum generally opposing a demurrer to a petition for administrative mandate based on the inapplicability of the exhaustion of remedies doctrine. See § 195.85.*]

THE COURT SHOULD OVERRULE THE DEMURRER TO THE PETITION FOR WRIT OF MANDATE BECAUSE THE EXHAUSTION OF REMEDIES REQUIREMENT DOES NOT APPLY WHEN RESOLUTION OF THE UNDERLYING ISSUE IS SUBJECT TO JUDICIAL CONSTRUCTION OF A STATUTE.

Exception for Dispute Requiring Statutory Construction. A writ of mandate is a proper remedy and may be pursued without first exhausting any administrative remedy when resolution of the underlying issue is subject to judicial construction of a statute (*California Teachers' Assn. v. Governing Board (1983) 145 Cal. App. 3d 735, 749, 193 Cal. Rptr. 650* ; *see Richman v. Santa Monica Rent Control Bd. (1992) 7 Cal. App. 4th 1457, 1463-1464, 9 Cal. Rptr. 2d 690*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a demurrer to a petition for writ of mandate for review of a final administrative adjudicatory order or decision based on failure to allege exhaustion of administrative remedies, when resolution of the underlying issue is subject to judicial construction of a statute.

This form should be combined with a memorandum generally opposing a demurrer to a petition for administrative mandate based on the inapplicability of the exhaustion of remedies doctrine [*see § 195.85*].

As appropriate, this memorandum may be used to oppose the points and authorities *set forth in § 195.68*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See Comments under § 195.80[2][b] for further discussion.

[3] Discussion of Authorities

[a] Exception for Dispute Requiring Statutory Construction

In ***Richman v. Santa Monica Rent Control Bd.*** *(1992) 7 Cal. App. 4th 1457, 9 Cal. Rptr. 2d 690* , the Santa Monica Rent Control Board upheld a hearing examiner's decision that base rent on two rental units owned by plaintiff included parking and that, therefore, plaintiff's purported increase of the parking fees on these units was invalid. Plaintiff sought review of the Board's decision by a petition for a writ of administrative mandate and a complaint for declaratory relief and attorney's fees. Relying on the Petris Act (*Civ. Code § 1947.7 et seq.*), the trial court rendered judgment granting the petition and issuing the writ. The Board appealed from the judgment.

The court of appeal reversed the trial court's judgment, vacated plaintiff's peremptory writ, and remanded the case for further proceedings consistent with its opinion. In doing so, the court ruled on the exhaustion of administrative remedies issue raised by the Board. The Board contended that the Petris Act was not raised at any time during the administrative proceedings as a limitation on the Board's authority to determine base amenities (such as parking) and that, therefore, it should not have been raised for the first time in the writ proceedings. The court held, however, that even though there was arguably conflicting testimony about whether parking was included in the rent, there were no disputed facts relating to the applicability of the Petris Act. Therefore, it was proper for the trial court to consider the Act's applicability, even though it was not raised in the administrative proceedings (*7 Cal. App. 4th 1457, 1464-1465)* . The court couched its exhaustion analysis in terms of the exception applicable when the subject matter of the controversy is outside the agency's jurisdiction, reasoning that the construction and applicability of the Petris Act was outside the Board's jurisdiction (*7 Cal. App. 4th 1457, 1463-1464*). Even though the court ultimately found the Act inapplicable, there was no doubt that the dispute between the landlord, his tenants, and ultimately the Board, required statutory construction of the Act.

In ***California Teachers' Assn. v. Governing Board*** *(1983) 145 Cal. App. 3d 735, 193 Cal. Rptr. 650* , a disabled school teacher who had not appeared for work during the school year was notified by the school district that his teaching contract for the year was invalid due to his absence, and that his extended sick leave and entitlement to health benefits and differential sick-leave pay had been terminated. He was a member of the teacher's union which had a collective bargaining agreement containing a grievance procedure and a provision covering fringe benefits. Rather than pursuing the grievance procedure, however, plaintiff teacher moved for a writ of mandate and declaratory relief requiring payment of the benefits and salary, and the trial court entered judgment accordingly. On appeal, the court of appeal affirmed. The court held that although normally a party to a collective bargaining agreement containing grievance and arbitration procedures must exhaust administrative remedies before resorting to the courts, an exception exists when the underlying issue, in this case the plaintiff's employment status, is undetermined and subject to judicial construction of a statute (*145 Cal. App. 3d 735, 749*).

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PART II. FORMS
B. Opposition to Petition
1. Demurrer

19-195 California Points & Authorities § 195.98

§ 195.98 Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable Because Party Could Predict Decision

[1] FORM Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable Because Party Could Predict Decision

[*This form should be combined with a memorandum generally opposing a demurrer to a petition for administrative mandate based on the inapplicability of the exhaustion of remedies doctrine. See § 195.85.*]

THE COURT SHOULD OVERRULE THE DEMURRER TO THE PETITION FOR WRIT OF MANDATE BECAUSE THE EXHAUSTION OF REMEDIES REQUIREMENT DOES NOT APPLY WHEN AN AGGRIEVED PARTY CAN POSITIVELY STATE WHAT THE ADMINISTRATIVE AGENCY'S DECISION IN HIS OR HER PARTICULAR CASE WOULD BE.

Exception When Aggrieved Party Can Positively Predict Administrative Agency's Decision. Available administrative remedies need not be exhausted when an aggrieved party can positively state what the administrative agency's decision in his or her particular case would be (*Ogo Associates v. City of Torrance (1974) 37 Cal. App. 3d 830, 834, 112 Cal. Rptr. 761*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a demurrer to a petition for writ of mandate for review of a final administrative adjudicatory order or decision based on failure to allege exhaustion of administrative remedies, when an aggrieved party can positively state what the administrative agency's decision in his or her particular case would be.

This form should be combined with a memorandum generally opposing a demurrer to a petition for administrative mandate based on the inapplicability of the exhaustion of remedies doctrine [*see § 195.85*].

As appropriate, this memorandum may be used to oppose the points and authorities *set forth in § 195.68*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See Comments under § 195.80[2][b] for further discussion.

[3] Discussion of Authorities

[a] Exception When Aggrieved Party Can Positively Predict Administrative Agency's Decision

In ***Ogo Associates v. City of Torrance*** *(1974) 37 Cal. App. 3d 830, 112 Cal. Rptr. 761* plaintiffs sought a permit from defendant city to build an apartment project for persons with low incomes. For the previous eight years, the property on which the project was to be built had been zoned for residential uses. Before the permit could be issued, however, the city council enacted an emergency ordinance imposing a moratorium on building permits and dwelling-unit construction in an area of the city that included the proposed construction site. Eventually, the city council adopted a permanent ordinance rezoning the area so that it could only be used for light manufacturing purposes. In the trial court, plaintiffs contended that but for the moratorium and rezoning ordinances, the city would have issued them a building permit, that unconstitutional racial and economic discrimination motivated enactment of the ordinances, that because of the taint the ordinances were invalid, and that the city should be ordered to issue the requested building permit. The trial court denied relief, finding inter alia that plaintiffs had failed to exhaust their administrative remedies in that they did not apply to the city council for a variance from the rezoning ordinance. Plaintiffs appealed the denial of the writ.

The court of appeal reversed (*37 Cal. App. 3d 830, 835*). It noted that the doctrine of exhaustion of administrative remedies contains an exception when the aggrieved party can positively state what the administrative agency's decision in his or her particular case would be. The court found that the instant case fell within this exception. The evidence was overwhelming that the city council's rezoning scheme was due to plaintiffs' plans to build their low income housing project. The court noted that it would be inconceivable for the city council to grant a variance for the very project whose prospective existence brought about the enactment of rezoning. The court stated that the case did not involve a situation in which the possibility of relief from a general policy existed because of the unusual circumstances of a particular case; to the contrary, the circumstances of the instant case gave birth to the ordinance's general policy. Concluding that plaintiffs were not required to pursue futile administrative remedies in order to invoke the jurisdiction of the courts, the court directed the superior court to review plaintiffs' claims of racial discrimination (*37 Cal. App. 3d 830, 834-835*).

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1. Demurrer

19-195 California Points & Authorities § 195.99

§ 195.99 Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable Because Subject Beyond Agency's Jurisdiction

[1] FORM Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable Because Subject Beyond Agency's Jurisdiction

[*This form should be combined with a memorandum generally opposing a demurrer to a petition for administrative mandate based on the inapplicability of the exhaustion of remedies doctrine. See § 195.85.*]

THE COURT SHOULD OVERRULE THE DEMURRER TO THE PETITION FOR WRIT OF MANDATE BECAUSE THE EXHAUSTION OF REMEDIES REQUIREMENT DOES NOT APPLY WHEN THE SUBJECT MATTER OF A CASE LIES OUTSIDE THE ADMINISTRATIVE AGENCY'S JURISDICTION.

Exception When Subject Matter Beyond Agency's Jurisdiction. When the subject matter of a case lies outside the administrative agency's jurisdiction, the aggrieved party is not required to exhaust available administrative remedies (*County of L.A. v. Dept. of Social Welfare (1953) 41 Cal. 2d 455, 457, 260 P.2d 41* ; *Security National Guaranty, Inc. v. California Coastal Commission (2008) 159 Cal. App. 4th 402, 415-418, 71 Cal. Rptr. 3d 522* ; *City of Lodi v. Randtron (2004) 118 Cal. App. 4th 337, 360, 13 Cal. Rptr. 3d 107* ; *Richman v. Santa Monica Rent Control Bd. (1992) 7 Cal. App. 4th 1457, 1463-1464, 9 Cal. Rptr. 2d 690*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a demurrer to a petition for writ of mandate for review of a final administrative adjudicatory order or decision based on failure to allege exhaustion of administrative remedies, when the subject matter of a case lies outside the administrative agency's jurisdiction.

This form should be combined with a memorandum generally opposing a demurrer to a petition for administrative

mandate based on the inapplicability of the exhaustion of remedies doctrine [*see § 195.85*].

As appropriate, this memorandum may be used to oppose the points and authorities *set forth in § 195.68*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See Comments under § 195.80[2][b] for further discussion.

[3] Discussion of Authorities

[a] Exception When Subject Matter Beyond Agency's Jurisdiction

The facts and procedural background of ***County of L.A. v. Dept. of Social Welfare*** *(1953) 41 Cal. 2d 455, 260 P.2d 41* are discussed in *§ 195.85[3]*. In this case, the court of appeal held that when a party is aggrieved by an administrative agency decision or order that was made in excess of the agency's subject matter jurisdiction, exhaustion of administrative remedies is not a mandatory prerequisite to judicial review (*41 Cal. 2d 455, 457*).

Security National Guaranty, Inc. v. California Coastal Commission *(2008) 159 Cal. App. 4th 402, 415-418, 71 Cal. Rptr. 3d 522* , involved a city's grant of a coastal development permit (CDP) to an oceanfront landowner. The Sierra Club and two members of the California Coastal Commission appealed the issuance of the CDP to the Commission. The Commission determined that the appeal raised a "substantial issue" as to whether the project conformed to a local coastal program (LCP). After the administrative appeal process, the Commission voted to deny the CDP for the project on the grounds that the proposed development was inconsistent with the LCP. The Commission declared the property an environmentally sensitive habitat area (ESHA). The plaintiff owner sought a writ of administrative mandamus to remand the matter to the Commission. The trial court denied the petition.

On appeal, the plaintiff argued that the trial court erred in denying its petition for writ of administrative mandamus in that the Commission had no statutory authority to declare the site an ESHA during the administrative appeal from the grant of a CDP. The Commission relied on the doctrine of exhaustion of administrative remedies in claiming that the matter was not ripe for review because there had been no final decision on the kind of development that might be permitted on the site. The court of appeal held that the Commission's argument overlooked the fact that the appeal involves two separate administrative decisions--the Commission's purported ESHA designation and the permitting decision. The court held that the two decisions are of an entirely different character. The court held that amending an LCP, by declaring certain property an ESHA, is a legislative act. After examining the California Coastal Act of 1976 (*Pub. Resources Code § 30000 et seq.*), the court held that nothing in the statutory scheme granted the Commission the authority to make changes to the content of the LCP during an appeal from the grant of a CDP (*159 Cal. App. 4th 402, 422)* . The Commission's role was limited to determining whether a LCP complied with the provisions of the Act.

In ***City of Lodi v. Randtron (2004)*** *118 Cal. App. 4th 337, 13 Cal. Rptr. 3d 107* , the trial court issued an injunction requiring Randtron to comply with an administrative order directing it to abate an environmental nuisance on property it formerly owned and operated and to reimburse the City for all abatement and adjudication costs the City incurred to clean up hazardous substances on the property. The order was issued pursuant to a city ordinance, the Comprehensive Municipal Environmental Response and Liability Ordinance (MERLO) (Lodi Mun. Code, ch. 8.24), which authorized the City to investigate and remediate soil and groundwater contamination.

On appeal, Randtron argued that the administrative abatement order was void and unenforceable because MERLO was preempted by the state Carpenter-Presley-Tanner Hazardous Substance Account Act (HSAA) (*Health & Saf. Code §§ 25300-25395.40*). In response, the City argued that Randtron could not challenge the administrative order because Randtron failed to exhaust its administrative remedies. The court of appeal first held that an administrative abatement

action order issued pursuant to MERLO is preempted by HSAA because the City of Lodi is a site listed by the Department of Toxic Substances Control under *Health & Saf. Code § 25356(d)* for which the state has exclusive jurisdiction over all remedial response actions. The court then held that the exhaustion of administrative remedies doctrine requires that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act (*118 Cal. App. 4th 337, 360*). However, the court held that the rule does not apply where the administrative agency lacked subject matter jurisdiction to issue the challenged order (*118 Cal. App. 4th 337, 360*). Thus, because the City did not have subject matter jurisdiction to issue the order against Randtron, Randtron was not required to exhaust administrative remedies.

The facts and procedural background of ***Richman v. Santa Monica Rent Control Bd.*** *(1992) 7 Cal. App. 4th 1457, 9 Cal. Rptr. 2d 690* are discussed in *§ 195.97*. In this case, the court of appeal held that plaintiff landlord was not precluded from raising the applicability of the Petris Act (*Civ. Code § 1947.7 et seq.*) for the first time in writ proceedings in the trial court, because the construction and applicability of the statute was outside the jurisdiction of defendant rent board. Thus, plaintiff was excepted from the requirement that he exhaust his administrative remedies in this respect, because the Act could not have been judicially construed or applied during the administrative proceedings (*7 Cal. App. 4th 1457, 1463-1465)* .

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1. Demurrer

19-195 California Points & Authorities § 195.100

§ 195.100 Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable Because Agency Waived Requirement

[1] FORM Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable Because Agency Waived Requirement

[*This form should be combined with a memorandum generally opposing a demurrer to a petition for administrative mandate based on the inapplicability of the exhaustion of remedies doctrine. See § 195.85.*]

THE COURT SHOULD OVERRULE THE DEMURRER TO THE PETITION FOR WRIT OF MANDATE BECAUSE THE EXHAUSTION OF REMEDIES REQUIREMENT DOES NOT APPLY WHEN THE RESPONDENT HAS WAIVED THE OBJECTION BY FAILING TO PRESENT IT TO THE TRIAL COURT.

Exception When Agency Has Waived Exhaustion Requirement. The argument that the exhaustion of remedies doctrine applies in a particular case is waived on appeal if it is not presented in the trial court (*Cummings v. Stanley (2009) 177 Cal. App. 4th 493, 505-506, 99 Cal. Rptr. 3d 284* ; *Mokler v. County of Orange (2007) 157 Cal. App. 4th 121, 133-138, 68 Cal. Rptr. 3d 568* ; *Green v. City of Oceanside (1987) 194 Cal. App. 3d 212, 222, 239 Cal. Rptr. 470*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a demurrer to a petition for writ of mandate for review of a final administrative adjudicatory order or decision based on failure to allege exhaustion of administrative remedies, when the respondent has waived the objection by failing to present it to the trial court.

This form should be combined with a memorandum generally opposing a demurrer to a petition for administrative mandate based on the inapplicability of the exhaustion of remedies doctrine [*see § 195.85*].

As appropriate, this memorandum may be used to oppose the points and authorities *set forth in § 195.68*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See Comments under § 195.80[2][b] for further discussion.

[3] Discussion of Authorities

[a] Exception When Agency Has Waived Exhaustion Requirement

Cummings v. Stanley *(2009) 177 Cal. App. 4th 493, 505-506, 99 Cal. Rptr. 3d 284* , involved a challenge to the election of the defendants to the Alameda County Republican Central Committee. The defendants argued that the plaintiff was barred from bringing his claim based on his failure to seek a pre-election remedy to challenge the defendants' eligibility pursuant to the applicable statute. The court of appeal rejected this argument, holding that the defendants waived this defense by failing to raise it in the trial court (*177 Cal. App. 4th 493, 505)* . The court recognized the split of authority on the issue of whether an exhaustion of remedies defense is waived by failure to assert it at trial, and chose to follow the line of cases holding that it does (*177 Cal. App. 4th 493, 505-506)* .

In ***Mokler v. County of Orange*** *(2007) 157 Cal. App. 4th 121, 68 Cal. Rptr. 3d 568* , the plaintiff city employee was terminated from her employment. She sued the defendant city for harassment and retaliatory termination. The jury found in the plaintiff's favor. On appeal, the defendant argued that the court did not have jurisdiction over the case because the plaintiff failed to exhaust her administrative remedies. Conceding that it failed to raise the issue in the trial court, the defendant argued that exhaustion was a jurisdictional issue that could be raised at any time. The court of appeal disagreed. Reviewing prior cases, the court held that exhaustion of administrative remedies is a fundamental rule of procedure followed under the doctrine of stare decisis and binding upon all courts (*157 Cal. App. 4th 121, 134)* . It further held that the exhaustion requirement was not jurisdictional because it was not an "inflexible dogma," but was subject to numerous exceptions (*157 Cal. App. 4th 121, 134)* . The defendant argued that its failure to raise exhaustion of administrative remedies on the plaintiff's retaliation claim did not waive the issue because the defendant had successfully asserted exhaustion on plaintiff's breach of contract and wrongful termination claims in pretrial motions, and that the plaintiff opposed the pretrial motions in part by arguing that exhaustion would have been futile. The court of appeal noted, however, that the trial court never provided the plaintiff with the opportunity to present evidence on the futility exception in response to the defendant's pretrial motions. The court treated the pretrial motions as motions for judgment on the pleadings and granted them (*157 Cal. App. 4th 121, 136-137)* .

In ***Green v. City of Oceanside*** *(1987) 194 Cal. App. 3d 212, 239 Cal. Rptr. 470* , plaintiff brought an action seeking damages against defendant city for wrongful termination and for violating the covenant of good faith and fair dealing. Defendant's amended complaint stated as an affirmative defense that plaintiff's action was barred for failure to exhaust administrative remedies. However, defendant did not urge this affirmative defense at trial, preferring to address the merits of the case in its motions for nonsuit, judgment notwithstanding the verdict, and new trial. During argument of defendant's motion for nonsuit made after plaintiff's opening statement, the trial court asked certain questions concerning administrative remedies. Defendant said it would brief the issue, but failed to do so. On the record, there was no indication that defendant addressed the exhaustion issue further during trial even though it was mentioned again in connection with an evidentiary ruling leading to a stipulation that plaintiff filed a written claim with defendant that was rejected. The trial court entered judgment in favor of plaintiff. Defendant appealed, claiming inter alia that the trial court lacked jurisdiction because plaintiff failed to exhaust his administrative remedies.

The court of appeal affirmed the judgment (*194 Cal. App. 3d 212, 230*). It rejected defendant's contention that the exhaustion doctrine implicates subject matter jurisdiction. Reviewing prior cases, the court concluded that exhaustion is

jurisdictional only in the sense that a court's failure to apply the rule in a situation in which the issue has been properly raised can be corrected by the issuance of a writ of prohibition. The court then addressed the defendant's failure to raise the exhaustion issue at trial. The court stated that the exhaustion issue should not fall outside the general rule of civil litigation that arguments and objections not raised and preserved in the trial court are waived on appeal. In the instant case, the court thought that it was unclear whether plaintiff failed to pursue his administrative remedies because he believed it would be futile to do so. Perhaps, opined the court, defendant initially agreed with plaintiff that exhaustion would have been futile, but having lost its case before a jury, reconsidered that judgment call. The court said that it would be grossly unfair to allow a defendant to ignore the potential procedural defense at a time when facts and memories were fresh and put a plaintiff to the time and expense of a full trial, knowing it could assert the failure to exhaust administrative remedies if it received an adverse jury verdict. The court concluded that the exhaustion doctrine is simply a procedural prerequisite the defendant decided to forego. Having elected to put plaintiff to his proof before a jury, the defendant's dissatisfaction with that result is an insufficient reason for reversal (*194 Cal. App. 3d 212, 222-223*).

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1. Demurrer

19-195 California Points & Authorities § 195.101

§ 195.101 Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable Because Copetitioner Satisfied Requirement

[1] FORM Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable Because Copetitioner Satisfied Requirement

[*This form should be combined with a memorandum generally opposing a demurrer to a petition for administrative mandate based on the inapplicability of the exhaustion of remedies doctrine. See § 195.85.*]

THE COURT SHOULD OVERRULE THE DEMURRER TO THE PETITION FOR WRIT OF MANDATE BECAUSE THE EXHAUSTION OF REMEDIES REQUIREMENT DOES NOT APPLY WHEN COPLAINTIFFS HAVE REPEATEDLY APPEARED BEFORE ADMINISTRATIVE BODIES AND ASSERTED THE OBJECTIONS THAT FORM THE BASIS OF THE PLAINTIFF'S ACTION.

Exception When Coplaintiff Has Exhausted Administrative Remedies. An individual plaintiff challenging administrative acts is not required personally to exhaust remedies before responsible administrative bodies when coplaintiffs have repeatedly appeared before administrative bodies and asserted the objections that form the basis of the plaintiff's action (*Leff v. City of Monterey Park (1990) 218 Cal. App. 3d 674, 681, 267 Cal. Rptr. 343*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a demurrer to a petition for writ of mandate for review of a final administrative adjudicatory order or decision based on failure to allege exhaustion of administrative remedies, when coplaintiffs have repeatedly appeared before administrative bodies and asserted the objections that form the basis of the plaintiff's action.

This form should be combined with a memorandum generally opposing a demurrer to a petition for administrative

mandate based on the inapplicability of the exhaustion of remedies doctrine [*see § 195.85*].

As appropriate, this memorandum may be used to oppose the points and authorities *set forth in § 195.68*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See Comments under § 195.80[2][b] for further discussion.

[3] Discussion of Authorities

[a] Exception When Coplaintiff Has Exhausted Administrative Remedies

In ***Leff v. City of Monterey Park*** *(1990) 218 Cal. App. 3d 674, 267 Cal. Rptr. 343* , petitioner, along with others, filed a petition seeking ordinary mandamus, administrative mandamus, and declaratory relief against respondents, including the city of Monterey Park. The petition sought to prevent respondents from granting real parties in interest permission to develop a home for the aged in a neighborhood zoned R-2. The real parties in interest filed a demurrer directed solely at petitioner, challenging his standing to sue on the ground that he had failed to exhaust his administrative remedies before commencing the action. The trial court sustained the demurrer against petitioner without leave to amend, and petitioner appealed.

The court of appeal reversed. It determined that petitioner alleged facts bringing him within an exception to the exhaustion doctrine: petitioner alleged that his copetitioners had repeatedly appeared before the administrative bodies below and had asserted the objections that were the basis of his zoning challenge. The court concluded that these allegations satisfied the intent of the exhaustion of remedies doctrine (*218 Cal. App. 3d 674, 681*).

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1. Demurrer

19-195 California Points & Authorities § 195.102

§ 195.102 Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable Because Agency Has Inadequate Procedure for Redress

[1] FORM Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable Because Agency Has Inadequate Procedure for Redress

[*This form should be combined with a memorandum generally opposing a demurrer to a petition for administrative mandate based on the inapplicability of the exhaustion of remedies doctrine. See § 195.85*].

THE COURT SHOULD OVERRULE THE DEMURRER TO THE PETITION FOR WRIT OF MANDATE BECAUSE THE EXHAUSTION OF REMEDIES REQUIREMENT DOES NOT APPLY WHEN THE AGENCY DOES NOT HAVE A PERVASIVE AND SELF-CONTAINED SYSTEM OF ADMINISTRATIVE PROCEDURE FOR REGULATION OR MONITORING TO ASSESS OR PREVENT THE HARM THAT THE PETITIONER IS SEEKING TO REDRESS AND WHEN THE FACTUAL ISSUES IN THE CASE DO NOT EXHIBIT A PARAMOUNT NEED FOR SPECIALIZED AGENCY FACT-FINDING EXPERTISE THAT WOULD REQUIRE EXHAUSTION BEFORE PERMITTING THE PETITIONER TO PURSUE THE CLAIMS AND REMEDIES IN COURT.

Exhaustion of Remedies Inapplicable Because Agency Has Inadequate Procedure for Redress. A plaintiff is not required to exhaust administrative remedies when the agency does not have a pervasive and self-contained system of administrative procedure for regulation or monitoring to assess or prevent the harm that plaintiff is seeking to redress and when the factual issues in the case do not exhibit a paramount need for specialized agency fact-finding expertise that would require exhaustion before permitting the plaintiff to pursue the claims and remedies in court (*590 F. Supp. 2d 1244, 1251-1254)*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a demurrer to a petition for writ of mandate for review of a final administrative adjudicatory order or decision based on failure to allege exhaustion of administrative remedies, when the agency does not have a pervasive and self-contained system of administrative procedure for regulation or monitoring to assess or prevent the harm that the petitioner is seeking to redress and when the factual issues in the case do not exhibit a paramount need for specialized agency fact-finding expertise that would require exhaustion before permitting the petitioner to pursue the claims and remedies in court.

This form should be combined with a memorandum generally opposing a demurrer to a petition for administrative mandate based on the inapplicability of the exhaustion of remedies doctrine [*see § 195.85*].

As appropriate, this memorandum may be used to oppose the points and authorities *set forth in § 195.68*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See Comments under § 195.80[2][b] for further discussion.

[3] Discussion of Authorities

[a] Exhaustion of Remedies Inapplicable Because Agency Has Inadequate Procedure for Redress

In ***Rojo v. Kliger*** *(1990) 52 Cal. 3d 65, 276 Cal. Rptr. 130, 801 P.2d 373* , plaintiffs filed suit against their former employer for violations of the Fair Employment and Housing Act (FEHA) (*Gov. Code § 12900 et seq.*) and intentional infliction of emotional distress. Plaintiffs alleged that defendant subjected them to sex discrimination and sexual harassment during their terms of employment. Defendant answered, denied the allegations, and asserted various affirmative defenses. Defendant then moved for summary judgment on the grounds that the FEHA constituted plaintiffs' exclusive remedy and that plaintiffs had failed to exhaust their administrative remedies thereunder. The trial court granted defendant's motion and entered summary judgment in his favor.

On plaintiffs' appeal, the court of appeal reversed the trial court's judgment, holding, among other things, that the FEHA does not preempt or preclude other state law claims relating to employment discrimination. It further held that a victim of sex discrimination is not required to pursue the FEHA administrative remedy except with respect to claims thereunder. Accordingly, the court concluded plaintiffs could proceed with their suit and seek recovery under any applicable theory independent of the FEHA. However, the court held they could not state a cause of action under *Gov. Code § 12940* (sex discrimination as unlawful employment practice) because they did not exhaust their administrative remedies under the FEHA.

Defendant then appealed to the Supreme Court, which affirmed the judgment of the court of appeal. The Court held that, while an employee must exhaust the FEHA administrative remedy before bringing suit on a cause of action thereunder or seeking the relief provided therein, exhaustion is not required before filing a civil action for damages alleging nonstatutory causes of action (*52 Cal. 3d 65, 88*). The Court reasoned that the FEHA does not have a pervasive and self-contained system of administrative procedure for general regulation or monitoring of employment relations so as to assess or prevent discrimination or related wrongs in the employment context (*52 Cal. 3d 65, 87-88*). Furthermore, an employment discrimination case is not one with a paramount need for specialized agency fact-finding expertise such that it would require exhaustion before permitting an aggrieved person to pursue a related nonstatutory claim and remedy in court. Requiring exhaustion with regard to nonstatutory claims under the FEHA would lead to one of two undesirable outcomes. First, an exhaustion requirement would lead to routine issuance of right-to-sue letters, thus nullifying the requirement. Alternatively, an exhaustion requirement would burden the Department of Fair Employment and Housing and the Fair Employment and Housing Commission with the investigation and determination of issues beyond their jurisdiction and special expertise, thereby limiting the resources available for the resolution of

cases within the scope of the FEHA, raising complex issues of collateral estoppel or res judicata, and ultimately bearing no beneficial impact on the judicial system. Second, regardless of the burden imposed on the Department and the Commission, the case in any event would still enter the judicial pipeline, thus producing precisely the result that the exhaustion doctrine was, in part, intended to avert (*52 Cal. 3d 65, 88*).

[4] Additional Authorities

[a] Exhaustion of Remedies Inapplicable Because Agency Has Inadequate Procedure for Redress

In *Department of Fish & Game v. Anderson-Cottonwood Irrigation Dist. (1992) 8 Cal. App. 4th 1554, 11 Cal. Rptr. 2d 222* , the court of appeal reversed a judgment denying a preliminary injunction, finding among other issues that relief for the Department of Fish and Game was not barred by its failure to exhaust administrative remedies against the irrigation district. *Fish & Game Code § 6024* provides for mandatory submission of only certain disputes to the Department of Water Resources; those disputes are expressly limited to technical matters presumably within the particular expertise of the Department of Water Resources. In this case, the dispute related to legal but not technical questions, and the irrigation district did not request a decision from the Department of Water Resources. Since there was no factual dispute, the Department of Fish and Game was not required to first seek a decision from the Department of Water Resources (*8 Cal. App. 4th 1554, 1567*).

In *Automotive Management Group, Inc. v. New Motor Vehicle Bd. (1993) 20 Cal. App. 4th 1002, 24 Cal. Rptr. 2d 904* , an automobile dealer submitted to the New Motor Vehicle Board a protest of its termination as a franchised dealer. An administrative law judge rejected the dealer's protest because it was untimely and the dealer petitioned the court for a writ of mandate. The trial court applied the substantial evidence test and denied the dealer's petition. The court of appeal reversed, holding that the administrative law judge's decision regarding the timeliness of the dealer's protest should have been submitted to the New Motor Vehicle Board for review. Although the dealer did not request that the Board hear the matter, the court held that this case fell within the futility exception to the exhaustion of administrative remedies doctrine because the administrative law judge expressly stated that the Board should not consider the protest. The court also held that the Board's failure to review the decision was not harmless error (*20 Cal. App. 4th 1002, 1015-1016)* .

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Volume 19 Chapters 190-195 PRODUCTS LIABILITY---to---PUBLIC ADMINISTRATIVE LAW
CHAPTER 195 PUBLIC ADMINISTRATIVE LAW
PART II. FORMS
B. Opposition to Petition
1. Demurrer

19-195 California Points & Authorities § 195.103

§ 195.103 Demurrer Should Be Overruled--Exhaustion of Remedies Inapplicable Because Agency is Estopped from Asserting It

[1] FORM Exhaustion of Remedies Inapplicable Because Agency is Estopped From Arguing It

[*This form should be combined with a memorandum generally opposing a demurrer to a petition for administrative mandate based on the inapplicability of the exhaustion of remedies doctrine. See § 195.85.*]

THE COURT SHOULD OVERRULE THE DEMURRER TO THE PETITION FOR WRIT OF MANDATE BECAUSE THE EXHAUSTION OF REMEDIES REQUIREMENT DOES NOT APPLY WHEN THE AGENCY HAS NEGLIGENTLY OR INTENTIONALLY CAUSED A PARTY TO FAIL TO COMPLY WITH A PROCEDURAL PRECONDITION TO RECOVERY. EQUITABLE ESTOPPEL MAY BE ASSERTED WHEN (1) THE PARTY TO BE ESTOPPED WAS APPRISED OF THE FACTS, (2) THE PARTY TO BE ESTOPPED INTENDED THAT ITS CONDUCT BE ACTED UPON OR ACTED IN SUCH A MANNER THAT THE PARTY ASSERTING THE ESTOPPEL HAD A RIGHT TO BELIEVE IT WAS SO INTENDED, (3) THE PARTY ASSERTING ESTOPPEL WAS IGNORANT OF THE TRUE STATE OF FACTS AND (4) THE PARTY MUST HAVE RELIED ON THE CONDUCT TO ITS INJURY.

Exhaustion of Remedies Inapplicable Because Agency Is Estopped from Asserting It. A plaintiff is not required to exhaust administrative remedies when the agency negligently or intentionally caused the plaintiff to fail to comply with administrative remedies (*Shuer v. County of San Diego (2004) 117 Cal. App. 4th 476, 486, 11 Cal. Rptr. 3d 776*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a demurrer to a petition for writ of mandate for review of a final administrative adjudicatory order or decision based on failure to allege exhaustion of administrative remedies, when the agency failed, either negligently or intentionally, to inform the plaintiff about any available administrative procedures

for redressing the relevant harm.

This form should be combined with a memorandum generally opposing a demurrer to a petition for administrative mandate based on the inapplicability of the exhaustion of remedies doctrine [*see § 195.85*].

As appropriate, this memorandum may be used to oppose the points and authorities *set forth in § 195.68*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See Comments under § 195.80[2][b] for further discussion.

[3] Discussion of Authorities

[a] Exhaustion of Remedies Inapplicable Because Agency Is Estopped from Asserting It

In ***Shuer v. County of San Diego*** *(2004) 117 Cal. App. 4th 476, 11 Cal. Rptr. 3d 776* , plaintiff Shuer sued defendant County of San Diego for wrongful termination. In November 2000, Shuer, a licensed psychiatrist, began working on a probationary basis for the County Health and Human Services Agency as a supervising psychiatrist in the Juvenile Forensic Services Facility (JFSF). Her duties included supervising psychiatrists and other medical staff and clinically assessing and treating minors in juvenile hall. During her employment, Shuer concluded that JFSF employees were not meeting the community standard of care. Shuer believed JFSF employees engaged in unethical, negligent, and unlawful practices. When the psychiatrists she supervised failed to take any corrective action, Shuer alerted county counsel.

The county terminated Shuer's employment on July 24, 2001. The county cited as the basis for termination Shuer's failure to complete the duties of her position satisfactorily. Shuer alleged the actual reason for her termination was retaliation for her refusal to participate in, and her efforts to correct, unethical, inappropriate, and illegal practices. With her termination letter, Shuer received a copy of the County of San Diego Civil Service Rules, Rule 4.2.5 dealing with probationary employees. Subdivision (c) stated that the county shall dismiss a probationary employee who is found unsatisfactory for, or incompetent to perform, the duties of the position. The subdivision then states: "A probationer dismissed at any time within the probationary period shall have no right to appeal to the Commission [County of San Diego Civil Service Commission (Civil Service Commission)] in regard to his/her separation or performance appraisal. A probationer who alleges facts showing a violation of his/her liberty interest shall be entitled to a hearing in accordance with the rules ... implemented by the Commission and/or Director."

Shuer alleged that after receiving the termination letter, she discussed a civil service hearing with the Executive Officer of the Civil Service Commission, Larry Cook. Cook explained to Shuer that to have a hearing, she would have to prove that the county violated her "liberty interests." Cook explained that Shuer would have to show that she was dismissed because of her misconduct and that the misconduct was criminal. Shuer concluded that since she was not dismissed for criminal misconduct, she was not entitled to a hearing. Shuer alleged that Cook mentioned that a charge of discrimination was a possibility, but since Shuer was not alleging discrimination, it did not appear appropriate to lodge a complaint with the Civil Service Commission. Shuer alleged Cook did not encourage her to file a complaint with the commission nor did he mention that it might be mandatory to do so if she were to file a claim. As a result of her discussion with Cook, appellant did not seek an administrative remedy.

Shuer alleged that she filed a timely claim with the county. In denying her claim, the county noted Shuer had six months in which to commence a court action but did not mention that she was required to exhaust administrative remedies before filing suit.

When Shuer sued for wrongful termination, the county demurred, arguing Shuer had failed to exhaust administrative

remedies. Shuer argued that the county's misleading statements concerning, and failure to advise her of, any administrative remedies estopped the county from asserting her failure to exhaust such remedies. The trial court granted the demurrer and dismissed Shuer's case. Shuer appealed.

The court of appeal held that a government entity is estopped from asserting as a defense a failure to exhaust administrative remedies when a government agent negligently or intentionally caused a party to fail to comply with a procedural precondition to recovery (*117 Cal. App. 4th 476, 486*). Equitable estoppel may be asserted when (1) the party to be estopped was aware of the facts, (2) the party to be estopped intended that its conduct be acted upon or acted in such a manner that the party asserting the estoppel had a right to believe it was so intended, (3) the party asserting estoppel was ignorant of the true state of facts, and (4) the party relied on the conduct to its injury (*117 Cal. App. 4th 476, 486*). The court held that the county's actions negligently led Shuer to conclude that she had no administrative recourse. That being the case, the court held that the county was estopped from asserting that Shuer failed to exhaust her administrative remedies (*117 Cal. App. 4th 476, 487*).

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19-195 California Points & Authorities § 195.104

§ 195.104 Demurrer Should Be Overruled--Statute of Limitations Does Not Bar Petition, General Form

[1] FORM Demurrer Should Be Overruled--Statute of Limitations Does Not Bar Petition, General Form

[*Caption. see § 195.80.*]

THE COURT SHOULD OVERRULE THE DEMURRER TO THE PETITION FOR WRIT OF MANDATE BECAUSE THE PERIOD PROVIDED BY STATUTE FOR THE FILING OF A PETITION FOR WRIT OF MANDATE IS NOT JURISDICTIONAL IN NATURE BUT IS MERELY A PERIOD OF LIMITATION, AND THE RULES OF LAW RELATING TO THE LIMITATION OF ACTIONS APPLY.

Limitation of Mandate Proceeding. The statutory periods within which petitions for writs of mandate may be filed are not jurisdictional in nature, as are the periods within which appeals may be taken, but are merely periods of limitation; and rules of law relating to the limitation of actions apply to mandate proceedings (*Ginns v. Savage (1964) 61 Cal. 2d 520, 524, 39 Cal. Rptr. 377, 393 P.2d 689*).

[*As appropriate, this form may be combined with a memorandum asserting that the petition is not barred by a particular statute of limitations. See § 195.105*].

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a demurrer to the petition for a writ of mandate for review of a final administrative adjudicatory order or decision. The form may be used when respondent asserts that the proceeding is barred by expiration of a period of limitation that has been tolled, suspended, or extended. Counsel should include points and authorities relating to such defenses. For memoranda dealing with the limitation of actions, see Ch. 143, *Limitation of Actions* .

As appropriate, this form may be used to oppose the points and authorities *set forth in § 195.64 -195.67*.

As appropriate, this form may be combined with a memorandum asserting that the petition is not barred by a particular statute of limitations [*see § 195.105*].

With appropriate modifications, this memorandum may be used to oppose a motion for summary judgment or a motion for judgment on the pleadings in favor of the respondent.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See Comments under § 195.80[2][b] for further discussion.

[c] Limitation Under Administrative Procedure Act

Gov. Code § 11523 provides that administrative decisions may be judicially reviewed by filing a petition for a writ of mandate in accordance with the provisions of the Code of Civil Procedure, subject, however, to the statutes relating to the particular agency. Except as otherwise provided in this section [*see* [e], *below*] any such petition shall be filed within 30 days after the last day on which reconsideration can be ordered [*Gov. Code § 11523*; *but see Ragan v. City of Hawthorne (1989) 212 Cal. App. 3d 1361, 1365-1366, 261 Cal. Rptr. 219* (limitation period in *Gov. Code § 11523* as only applicable to petitions seeking judicial review after agency has held formal hearing in compliance with Administrative Procedure Act)]. The filing period is a statute of limitation and is upheld regardless of personal hardship. The absence of specific extension provisions in *Gov. Code § 11523* precludes relief for delay on grounds of good cause, mistake, inadvertence, surprise, or excusable neglect [*Kupka v. Board of Administration (1981) 122 Cal. App. 3d 791, 795-797, 176 Cal. Rptr. 214]* .

[d] Last Day for Reconsideration Order

Government Code § 11521(a) provides that the power to order a reconsideration shall expire 30 days after the delivery or mailing of a decision to respondent; or on the date set by the agency itself as the effective date of the decision, if such date occurs prior to the expiration of the 30-day period; or at the termination of a stay of not more than 30 days that the agency may grant for the purpose of filing an application for reconsideration; or, if an application was filed before any of the applicable time periods expired, at the termination of a stay not to exceed 10 days that the agency may grant for the purpose of evaluating the application [*see Bonnell v. Medical Board of California (2003) 31 Cal. 4th 1255, 1262-1263, 8 Cal. Rptr. 3d 532, 82 P.3d 740* (interpreting statute)].

[e] Extension of Time

Government Code § 11523 provides that, when petitioner, within 10 days after the last day on which reconsideration can be ordered, requests the agency to prepare all or any part of the record, the time within which a petition may be filed shall be extended until 30 days after its delivery to him.

[3] Discussion of Authorities

[a] Limitation of Mandate Proceeding

Ginns v. Savage *(1964) 61 Cal. 2d 520, 39 Cal. Rptr. 377, 393 P.2d 689* , was an appeal from the judgment of the superior court in a mandate proceeding for review of an administrative adjudicatory decision. The court stated, "The law is settled, and clear, that the statutory periods within which mandamus petitions may be filed are *not* jurisdictional in nature, as are the periods within which appeals may be taken from lower courts, but are mere statutes of limitation. Rules of law relating to limitations of actions are applicable to mandamus proceedings" [*Ginns v. Savage (1964) 61 Cal. 2d 520, 524, 39 Cal. Rptr. 377, 393 P.2d 689* (footnote and citations omitted; italics in original)].

[4] Additional Authorities

[a] Limitation of Mandate Proceeding

Jahangiri v. Medical Bd. of California (1995) 40 Cal. App. 4th 1657, 48 Cal. Rptr. 2d 187 , was an appeal of a denial of a petition for a writ of administrative mandamus. The petitioner requested preparation of the transcript, but did not pay for the transcript until approximately a month after the deadline under *Gov. Code § 11523* to order the transcript. The transcript was not ready at the date of the hearing, and after his application for continuance was denied, petitioner dismissed the action without prejudice, and then refiled. The trial court then denied the petition as untimely filed. The question on appeal was whether payment for transcript preparation must occur at the same time the request is submitted in order for the *Gov. Code § 11523* extension period to apply. Noting that the statute does not require payment at the time of request, the court concluded that payment for the record is not required at the time the request is submitted in order to extend the statute of limitations (*40 Cal. App. 4th 1657, 1663*).

Sinetos v. Department of Motor Vehicles (1984) 160 Cal. App. 3d 1172, 207 Cal. Rptr. 207 , was an appeal from the judgment of the superior court in a mandate proceeding for review of a decision of the Department of Motor Vehicles. Reversing the trial court, the court of appeal held that plaintiff was barred from seeking such review when plaintiff instituted his mandate proceedings more than 90 days after the agency's order became effective (*160 Cal. App. 3d 1172, 1174*). The court held that *Veh. Code § 14401* contained no provision extending the 90-day time period in which to file a mandate petition for review of the agency's decision and that the absence of such a provision manifested a legislative intent that relief from the time limitation therein was therefore unavailable (*160 Cal. App. 3d 1172, 1176*).

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19-195 California Points & Authorities § 195.105

§ 195.105 Demurrer Should Be Overruled--Ninety-Day Period for Review of Local Agency Decision Begins on Notice of Time to Seek Judicial Review

[1] FORM Demurrer Should Be Overruled--Ninety-Day Period for Review of Local Agency Decision Begins on Notice of Time to Seek Judicial Review

[*This form should be combined with a memorandum generally opposing a demurrer to a petition for administrative mandate on the ground that the action is not barred by any statute of limitations. See § 195.104.*]

THE COURT SHOULD OVERRULE THE DEMURRER TO THE PETITION FOR WRIT OF MANDATE BECAUSE THE 90-DAY PERIOD FOR THE FILING OF A PETITION FOR WRIT OF MANDATE TO REVIEW A LOCAL AGENCY DECISION DOES NOT BEGIN TO RUN UNTIL THE LOCAL AGENCY PROVIDES NOTICE THAT CODE OF CIVIL PROCEDURE SECTION 1094.6 GOVERNS THE TIME WITHIN WHICH JUDICIAL REVIEW MUST BE SOUGHT.

A. Notice Requirement. A local agency making a final decision must provide notice to the affected party that the time within which judicial review must be sought is governed by *Code Civ. Proc. § 1094.6* (*Code Civ. Proc. § 1094.6(f)*).

[*EITHER*]

B. Notice Triggers Finality and Commencement of 90-Day Period. The decision of the local agency does not become final for the purpose of the availability of judicial review within the 90-day period set forth in *Code Civ. Proc. § 1094.6(b)*, and the 90-day period does not commence to run, until the agency, as required by *Code Civ. Proc. § 1094.6(f)*, provides the affected party with notice that *Code Civ. Proc. § 1094.6* governs the limitation period for judicial review (*Cummings v. City of Vernon (1989) 214 Cal. App. 3d 919, 920, 922, 263 Cal. Rptr. 97*).

[*OR*]

B. Although Decision Final, 90-Day Period Is Tolled Until Notice Given. The decision of the local agency becomes final for the purpose of the availability of judicial review within the 90-day period set forth in *Code Civ. Proc. § 1094.6(b)*, but the 90-day period is tolled until the agency, as required by *Code Civ. Proc. § 1094.6(f)*, provides the affected party with notice that *Code Civ. Proc. § 1094.6* governs the limitation period for judicial review (*Ciraulo v. City of Newport Beach (2007) 147 Cal. App. 4th 838, 847, 54 Cal. Rptr. 3d 515* ; *El Dorado Palm Springs, Ltd. v. Rent Review Com. (1991) 230 Cal. App. 3d 335, 345-346, 281 Cal. Rptr. 327*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a demurrer to the petition for a writ of mandate for review of a final administrative adjudicatory order or decision of a local agency. The form may be used when the respondent asserts that the proceeding is barred by the 90-day period set forth in *Code Civ. Proc. § 1094.6*, and the party seeking review has timely filed the petition for a writ of mandate within 90 days of notice given pursuant to *Code Civ. Proc. § 1094.6(f)*.

This form should be combined with points and authorities generally opposing a demurrer to a petition for administrative mandate on the ground that the action is not barred by any statute of limitations [*see § 195.104*].

As appropriate, this memorandum may be used to oppose the points and authorities *set forth in § 195.67*.

[b] Split of Authority Regarding Finality

There is a split of authority about when the decision of the local agency becomes final. Two appellate districts, the second and the fourth, have each issued an opinion on the question, and in each case the Supreme Court has declined to review the appellate opinion. On the issue of the running of the 90-day limitation period, the opinions are not at loggerheads, because regardless of when a local agency's decision is held to be final, each opinion holds that for all intents and purposes the limitation period for judicial review of the decision does not begin to run until the agency has given the notice required by *Code Civ. Proc. § 1094.6(f)* [*El Dorado Palm Springs, Ltd. v. Rent Review Com. (1991) 230 Cal. App. 3d 335, 345-346, 281 Cal. Rptr. 327* ; *Cummings v. City of Vernon (1989) 214 Cal. App. 3d 919, 920, 922, 263 Cal. Rptr. 97]* .

On the other hand, on the issue of finality of the decision, the opinions have the potential for conflict. Under the rationale of *Cummings*, which is the Second Appellate District opinion, there is no provision for judicial review of a decision either before notice is given or in the event that it is not given. This is because the issue of an agency's failure to give notice did not arise in that case [*see Cummings v. City of Vernon (1989) 214 Cal. App. 3d 919, 921, 263 Cal. Rptr. 97]* . On the other hand, under the rationale of *El Dorado*, which is the Fourth Appellate District opinion, provision is made for judicial review in both instances, in large part because the agency failed to give the notice in that case [*see El Dorado Palm Springs, Ltd. v. Rent Review Com. (1991) 230 Cal. App. 3d 335, 340-341, 281 Cal. Rptr. 327]* .

Therefore, first Alternative Paragraph B is to be used when counsel is litigating the case in the Second Appellate District. It is the law in that appellate district that the local agency's decision becomes final on the date that notice pursuant to *Code Civ. Proc. § 1094.6(f)* is given to the affected party that the time within which judicial review can be sought is governed by *Code Civ. Proc. § 1094.6* [*Cummings v. City of Vernon (1989) 214 Cal. App. 3d 919, 920, 922, 263 Cal. Rptr. 97]* .

Second Alternative Paragraph B is to be used when counsel is litigating the case in the Fourth Appellate District. It is the law in that appellate district that the local agency's decision becomes final on the date that the decision is issued in its final form [*see Code Civ. Proc. § 1094.6(b)*], but that the limitation period of *Code Civ. Proc. § 1094.6(b)* is tolled until the date the agency gives notice pursuant to *Code Civ. Proc. § 1094.6(f)* to the affected party that the time within which judicial review can be sought is governed by *Code Civ. Proc. § 1094.6* [*El Dorado Palm Springs, Ltd. v. Rent Review Com. (1991) 230 Cal. App. 3d 335, 345-346, 281 Cal. Rptr. 327]* . *Finally, in Ciraulo v. City of Newport Beach (2007) 147 Cal. App. 4th 838, 847, 54 Cal. Rptr. 3d 515* , the issue of finality did not arise, just when the 90-day period for filing and serving a petition for writ of mandate begins to run (*Ciraulo v. City of Newport Beach (2007) 147 Cal. App. 4th 838, 847, 54 Cal. Rptr. 3d 515*).

Counsel litigating in appellate districts other than the second and the fourth may argue for adoption of the interpretation of finality that best suits their cases.

[c] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See Comments under § 195.80[2][b] for further discussion.

[3] Discussion of Authorities

[a] Notice Triggers Finality and Commencement of 90-Day Period

In ***Cummings v. City of Vernon*** *(1989) 214 Cal. App. 3d 919, 263 Cal. Rptr. 97* , plaintiff, who had formerly been employed as a firefighter by defendant city, sought disability benefits from the city. The city denied the disability benefits in a decision dated December 9, 1986. On December 19, the city attorney provided notice to plaintiff that the time for seeking judicial review would be governed by *Code Civ. Proc. § 1094.6*. Plaintiff filed a petition for judicial review on March 13, 1987, a date more than 90 days after the city council's December 9 decision but less than 90 days after the city attorney's December 19 notice. The trial court denied the petition on the ground that it was barred by the statute of limitation, *Code Civ. Proc. § 1094.6(b)*, because the petition was filed more than 90 days after the date of the city council's decision. The plaintiff appealed.

The court of appeal for the Second Appellate District reversed. The court examined the legislative background and purpose of *Code Civ. Proc. § 1094.6* and concluded that the decision of the local agency does not become final for the purpose of the availability of judicial review until the notice required by *Code Civ. Proc. § 1094.6(f)* is given. Therefore, the 90-day limitation period in *Code Civ. Proc. § 1094.6(b)* does not commence until the required notice is given. The court found that the plaintiff's petition was timely filed, since it was filed within 90 days after the notice pursuant to *Code Civ. Proc. § 1094.6(f)* (*214 Cal. App. 3d 919, 922-924*).

The court did not address, nor was it presented with, the issue of whether and when judicial review can be had of a decision that does not become final because the agency fails to give the *Code Civ. Proc. § 1094.6(f)* notice. The Supreme Court denied respondent city's petition for review.

[b] Although Decision Final, 90-Day Period Is Tolled Until Notice Given

In ***Ciraulo v. City of Newport Beach*** *(2007) 147 Cal. App. 4th 838, 847, 54 Cal. Rptr. 3d 515* , the plaintiffs sought an order requiring the City of Newport Beach to grant them a variance from its building code, and thereby allow them to retain the portion of their newly built home which had been constructed in violation of that code. The trial court denied the plaintiffs' petition on various grounds. The City argued that the mandate petition was not timely filed and served, and should have been denied on that basis alone. The court of appeals agreed with the City. The court of appeals held that the City did not give the plaintiffs written notice under *Code Civ. Proc. § 1094.6* until six days after it rendered its decision denying their variance application. The plaintiffs filed and served their writ petition within 90 days of that date.

Consequently, the court held that the mandate petition was timely, as the applicable statute of limitations was tolled until the City gave the plaintiffs written notice under *Code Civ. Proc. § 1094.6* (*147 Cal. App. 4th 838, 847)* .

El Dorado Palm Springs, Ltd. v. Rent Review Com. *(1991) 230 Cal. App. 3d 335, 281 Cal. Rptr. 327* , plaintiff applied to the Palm Springs Rent Review Commission for approval of a hardship rent increase. The commission denied the application for the full amount sought but granted him a partial increase. However, the commission did not notify plaintiff, pursuant to *Code Civ. Proc. § 1094.6(f)*, that *Code Civ. Proc. § 1094.6* governed the time within which he could seek judicial review of the decision. Some seven months after issuance of the decision, plaintiff filed a petition for a writ of mandate in the superior court to compel the commission to grant that portion of his application for a rent increase that had previously been denied. The commission demurred to the petition, contending that the 90-day limitation period in *Code Civ. Proc. § 1094.6(b)* had expired long before plaintiff sought review of the decision. The trial court overruled the demurrer, concluding that the commission had failed to comply with the notice requirement of *Code Civ. Proc. § 1094.6(f)* and that the 90-day limitation period had consequently been tolled before the filing of plaintiff's petition. The trial court subsequently granted the petition, and the commission appealed.

The court of appeal affirmed the judgment. The court agreed with the decision in *Cummings v. City of Vernon (1989) 214 Cal. App. 3d 919, 920, 922, 263 Cal. Rptr. 97* (discussed in Local Agency Decision Becomes Final and 90-Day Period for Review Begins on Agency's Provision of Notice, *above*), that the limitation period in *Code Civ. Proc. § 1094.6* does not begin until the *Code Civ. Proc. § 1094.6(f)* notice is given. However, the court did not agree that the notice must be given in order that the local agency's decision be deemed final for the purpose of *Code Civ. Proc. § 1094.6(b)* (*230 Cal. App. 3d 335, 345*). Instead, the court construed *Code Civ. Proc. § 1094.6* to impose a 90-day period of limitation that is tolled until the *Code Civ. Proc. § 1094.6(f)* notice is given. Under this construction, a decision is final under *Code Civ. Proc. § 1094.6(b)* as soon as the local agency has issued it in final form, and a party is free to seek judicial review before the *Code Civ. Proc. § 1094.6(f)* notice is given (*230 Cal. App. 3d 335, 346*). In so ruling, the court noted that taken to its logical conclusion, the *Cummings* position on finality would permit a local agency to prevent a decision from ever becoming final by simply never issuing a *Code Civ. Proc. § 1094.6(f)* notice. The court also noted that under its own ruling, a local agency's failure to give the notice would not give an aggrieved party an open-ended period within which to seek judicial review, because regardless of the tolling of the 90-day limitation period, the doctrine of laches would still apply to the timeliness of a party's effort to secure review (*230 Cal. App. 3d 335, 345-346*).

The Supreme Court denied appellant real parties' petition for review.

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19-195 California Points & Authorities § 195.106

§ 195.106 Demurrer Should Be Overruled--Service on Party's Attorney Does Not Trigger Ninety-Day Period for Review of Local Agency Decision

[1] FORM Demurrer Should Be Overruled--Service on Party's Attorney Does Not Trigger Ninety-Day Period for Review of Local Agency Decision

[*This form should be combined with a memorandum generally opposing a demurrer to a petition for administrative mandate on the ground that the action is not barred by any statute of limitations. See § 195.104.*]

THE COURT SHOULD OVERRULE THE DEMURRER TO THE PETITION FOR WRIT OF MANDATE BECAUSE SERVICE ON A PARTY'S ATTORNEY DOES NOT TRIGGER THE 90-DAY PERIOD FOR THE FILING OF A PETITION FOR WRIT OF MANDATE TO REVIEW A LOCAL AGENCY DECISION.

Service of Notice on Party's Lawyer Cannot Substitute for Service on Party. The 90-day period for review of a local agency decision under *Code Civil Proc. § 1094.6* applies only if the required notice is served on the party. Service on the party's lawyer does not trigger the 90-day period (*Herman v. Los Angeles County Metropolitan Transportation Authority (1999) 71 Cal. App. 4th 819, 823, 84 Cal. Rptr. 2d 144*).

[2] Comments

[a] Use of Form

This form of memorandum may be submitted in opposition to a demurrer to the petition for a writ of mandate for review of a final administrative adjudicatory order or decision of a local agency. The form may be used when the respondent asserts that the proceeding is barred by the 90-day period set forth in *Code Civ. Proc. § 1094.6*, and the required notice was served on attorney for the party seeking review, but not on the party himself or herself.

This form should be combined with a memorandum generally opposing a demurrer to a petition for administrative mandate on the ground that the action is not barred by any statute of limitations [*see § 195.104*]. This form may be

combined with a memorandum contending that the 90-day period does not begin to run until the local agency provides the *Code Civ. Proc. § 1094.6* notice [*see § 195.105*].

As appropriate, this memorandum may be used to oppose the points and authorities *set forth in § 195.67*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. In this case, counsel would refer to the proof of service of the notice of agency decision and point out that notice of the local agency decision was not served on the party himself or herself, but only on the party's attorney. Therefore, proper service was not made and the 90-day limitation period under *Code Civ. Proc. § 1094.6* never began to run. See also Comments under § 195.80[2][b].

[3] Discussion of Authorities

[a] Service of Notice on Party's Lawyer Cannot Substitute for Service on Party

In ***Herman v. Los Angeles County Metropolitan Transportation Authority*** *(1999) 71 Cal. App. 4th 819, 84 Cal. Rptr. 2d 144* , a transportation authority sent an employee a notice of termination letter. The employee was a lieutenant with the county transportation authority police force. After a lengthy hearing, the arbitrator recommended that the employee be reinstated without back pay. The transportation authority rejected the recommendation and fired the employee. The transportation authority mailed a termination letter, with proof of service, to the employee's attorney. The letter contained a required warning that the employee had to file any petition seeking judicial review of his firing within 90 days of the date of mailing of the termination letter. The transportation authority did not send the letter directly to the employee. The employee filed his administrative mandamus petition a few days beyond the 90-day limitations period. The transportation authority demurred to the petition arguing it was barred by the limitation period of *Code Civil Proc. § 1094.6* because service on the employee's lawyer satisfied the statute's service requirement. The trial court sustained the demurrer with leave to amend. When the employee could not amend his petition to demonstrate compliance with the statute, the trial court granted the transportation authority's dismissal motion on the same ground and denied the petition. The employee appealed.

The court of appeal reversed and remanded the case for the trial court to reinstate the petition. The transportation authority agreed that *Code Civil Proc. § 1094.6* on its face requires service on the party. However, the transportation authority contended that the statute should not be read literally. The transportation authority cited general provisions that in litigation, service on a party's attorney constitutes service on the party and that as agents of their clients, the attorney's knowledge is imputed to the client. The court rejected the argument, stating that if the Legislature intended that notice could be made on a party or his attorney, it could have said so. The court cited *Code Civ. Proc. § 1010* (notice in civil actions) as an example in which such an exception was made (*71 Cal. App. 4th 819, 823*).

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CHAPTER 195 PUBLIC ADMINISTRATIVE LAW
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B. Opposition to Petition
1. Demurrer

19-195 California Points & Authorities §§ 195.107-195.119

[Reserved]

§§ 195.107[Reserved]

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2. Return by Answer

19-195 California Points & Authorities § 195.120

§ 195.120 Return by Answer--General Form

[1] FORM Return by Answer--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	MEMORANDUM SUPPORTING ANSWER TO
Respondent.	)	PETITION FOR WRIT OF MANDATE
	)	
	)	

THE PETITION FOR WRIT OF ADMINISTRATIVE MANDATE SHOULD BE DENIED BECAUSE _____ [*set forth grounds*].

A. Answer in Mandate Proceeding. A party on whom a writ or notice has been served may make a return by verified answer in a mandate proceeding (*Code Civ. Proc. § 1089*).

B. Objection by Answer. The party against whom a petition for a writ of mandate has been filed may raise any ground for objection that does not appear on the face of the petition by objection in an answer (*Code Civ. Proc. § 430.30(b)*).

[*As appropriate, add specific points and authorities supporting answer to petition for administrative mandate. See § 195.121.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Respondent _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of an answer to a petition for writ of mandate for review of a final administrative adjudicatory order or decision.

As appropriate, add specific points and authorities supporting answer to petition for administrative mandate [*see, e.g.,§ 195.121*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Any statement of fact should be supported by adequate reference to evidence admitted or otherwise cognizable by the court. For further discussion, see *§ 195.10[2][b]*.

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19-195 California Points & Authorities § 195.121

§ 195.121 Return by Answer--Petition is Barred by Laches

[1] FORM Return by Answer--Petition is Barred by Laches

[*This form should be combined with a memorandum generally supporting an answer to a petition for administrative mandate. See § 195.120.*]

THE PETITION FOR WRIT OF ADMINISTRATIVE MANDATE IS BARRED BY LACHES BECAUSE PETITIONER UNREASONABLY DELAYED IN SEEKING JUDICIAL RELIEF AND _____ [HAS ACQUIESCED IN THE ACT COMPLAINED OF *or* RESPONDENT HAS SUFFERED SOME PREJUDICE CAUSED BY THE DELAY].

A. Laches as Bar to Administrative Mandamus. A petition for administrative mandate is barred by laches if the petitioner has delayed in prosecuting the mandamus action, and either the petitioner has acquiesced in the act complained of or the respondent has suffered some prejudice caused by the delay (*Vernon Fire Fighters Assn. v. City of Vernon (1986) 178 Cal. App. 3d 710, 719, 223 Cal. Rptr. 871*).

B. Entire Time Involved in Pursuing Remedy as Considered. A petitioner who seeks review of an administrative decision must pursue his or her remedy speedily, and the entire time involved in that pursuit is considered in determining whether or not laches bars recovery. [Thus, the period of time to be considered as constituting possible laches includes the period of time the action is pending, and is not tolled by the filing of the action] (*Vernon Fire Fighters Assn. v. City of Vernon (1986) 178 Cal. App. 3d 710, 720, 223 Cal. Rptr. 871*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of an answer to a petition for writ of mandate for review of a final administrative adjudicatory order or decision when the petitioner has been guilty of laches in prosecuting the action.

This form should be combined with a memorandum generally supporting an answer to a petition for administrative mandate [*see § 195.120*].

With appropriate modifications, this memorandum may be used to support a motion for judgment on the pleadings in favor of the respondent.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. See Comments under § 195.120[2][b] for further discussion.

[3] Discussion of Authorities

[a] Laches as Bar to Administrative Mandamus

In ***Vernon Fire Fighters Assn. v. City of Vernon*** *(1986) 178 Cal. App. 3d 710, 223 Cal. Rptr. 871* , petitioners were fire fighters, and were officers and members of a fire fighters' union. For about two years, the union and respondent city had been engaged in a labor dispute. In 1978, the union held an illegal strike, and union fire fighters were locked out. Respondent hired temporary replacements, and all union fire fighters were terminated by vote of the city council. The union filed a petition for writ of mandate, and the city responded by filing a separate action against the union. Both actions were consolidated for hearing and came on for trial on October 23, 1978, at which time the judge gave a verbal statement of decision in favor of the city. However, although counsel for the city was directed to prepare findings of fact and conclusions of law, the document was never prepared and the cases were dismissed without any judgment having been entered in 1984. Immediately after the judge's verbal statement of decision, the union and the city resumed negotiations. The parties appeared to reach a temporary agreement, and petitioners returned to work; however, further negotiations became fruitless. In the meantime, certain petitioners testified before the grand jury during December 1978 against some of the respondents, who were then indicted. On March 23, 1979, one respondent recommended to the city council that the union's recognition be revoked because of the illegal strike. On April 24, 1979, the city council voted to dismiss petitioners. Their request for reinstatement was denied on July 3, 1979. On August 28, 1979, petitioners filed and served the instant petition for writ of mandate. A first amended petition was filed on April 25, 1980, and a second amended petition was filed on May 11, 1981. Discovery was commenced, but no further discovery was taken after the deposition of a respondent on June 11, 1981. Settlement was reached with one respondent only on April 21, 1982. No further action was taken until July 5, 1984, when petitioners served notice of a hearing of the petition. Respondents filed their answer to the second amended petition on August 10, 1984, and raised the defense of laches. The parties stipulated to a waiver of the five-year statute of limitations of former Code Civ. Proc. § 583(b) (*now see Code Civ. Proc. §§ 583.310, 583.360*) until the time of the hearing, without prejudice to respondents' claim of laches. When the matter came on for hearing, the judge ruled that the petition was barred by laches, because more than five years had elapsed since petitioners' discharge, and respondents had shown overwhelming and uncontradicted evidence that they had been prejudiced by the unreasonable delay. Respondents appealed.

The court of appeal affirmed the judgment, holding that the trial court's decision was supported by substantial evidence. The court explained that an administrative mandate action is barred by laches if a petitioner has delayed in prosecuting the mandamus action, and either petitioner has acquiesced in the act complained of or respondent has suffered some prejudice caused by the delay (*178 Cal. App. 3d 710, 719*). The court noted that the Supreme Court had held in *Conti v. Board of Civil Service Commissioners (1969) 1 Cal. 3d 351, 359-362, 82 Cal. Rptr. 337, 461 P.2d 617* , that prejudice is not presumed but must be proved by competent evidence to the trial court. However, in the instant case, the court held that the trial court's finding of prejudice was supported by substantial evidence presented to the trial court that the city had hired permanent employees to replace petitioners and had no job openings to accommodate them, that petitioners had not waived their claims for back salary and benefits and there would be substantial financial loss to the

city if petitioners were reinstated, and that witnesses and evidence were no longer available because of death, retirement, or resignation (*178 Cal. App. 3d 710, 719, 723)* . The court rejected petitioners' excuse for delay in setting the matter for hearing, which was based on a claim that counsel had been awaiting the outcome of certain irrelevant pending cases, and rejected petitioners' claim of unclean hands (*178 Cal. App. 3d 710, 720-723*). The court also rejected petitioners' argument that the pendency of the action tolled laches, and instead concluded that the period of time to be considered as constituting possible laches includes the period of time the action is pending, as well as the entire time involved in pursuing a speedy remedy (*178 Cal. App. 3d 710, 720*). Because respondents had established the defense of laches, the trial court was justified in finding that laches barred the action (*178 Cal. App. 3d 710, 727*).

[b] Entire Time Involved in Pursuing Remedy as Considered

Vernon Fire Fighters Assn. v. City of Vernon *(1986) 178 Cal. App. 3d 710, 223 Cal. Rptr. 871* , is discussed in [a], *above*.

[4] Additional Authorities

[a] Laches as Bar to Administrative Mandamus

In *San Bernardino Valley Audubon Society v. City of Moreno Valley (1996) 44 Cal. App. 4th 593, 51 Cal. Rptr. 2d 897* the Audubon Society sought a writ of mandate to set aside various approvals by a city for a proposed development project. The Society claimed that the project threatened an endangered species, and thus violated the California Endangered Species Act. The petition originally named the city and the Department of Fish and Game as defendants, and later the society moved to join a local conservation agency and other indispensable parties. The trial court denied the petition on the ground that the issuance of the permit was a legislative act which the trial court would not disturb. The court of appeal affirmed, but on the issue of laches rather than the basis of the trial court's ruling. Citing *Vernon Fire Fighters Ass'n v. City of Vernon (1986) 178 Cal. App. 3d 710, 223 Cal. Rptr. 871* , the court stated that laches bars a mandamus action if the petitioner delays in initiating or prosecuting an action, and prejudice to the respondent results (*44 Cal. App. 4th 593, 605)* . The court noted that there was a delay of well over a year from the execution of the key agency agreement until the Society filed its action, and it was over another year until the conservation agency was joined as a party. The conservation agency presented undisputed evidence of extraordinary prejudice stemming from the delay in initiating a challenge to the agency agreement. Based on this evidence, the court held that anything other than a decision in favor of the conservation agency on the issue of laches would constitute manifest injustice (*44 Cal. App. 4th 593, 607*). Concluding that the Society's petition was barred by laches, the court affirmed the judgment denying the petition.

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19-195 California Points & Authorities §§ 195.122-195.129

[Reserved]

§§ 195.122[Reserved]

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19-195 California Points & Authorities § 195.130

§ 195.130 Motion for Summary Judgment Should Be Denied--Questions Not Moot From Compliance With Penalty Provisions of Decision

[1] FORM Motion for Summary Judgment Should Be Denied--Questions Not Moot From Compliance With Penalty Provisions of Decision

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Petitioner,	)	MEMORANDUM IN OPPOSITION TO MOTION
vs.	)	FOR SUMMARY JUDGMENT
_____ [*name*],	)	Date: _____
Respondent.	)	Time: _____
	)	Location: _____
	)	[Trial Date: _____]
	)	[Attached Documents: _____]

_____

WHEN A FINAL ADMINISTRATIVE ADJUDICATORY _____ [ORDER *or* DECISION] IS THE SUBJECT OF JUDICIAL REVIEW AND THE PETITION WAS FILED WHILE A PENALTY IMPOSED BY THE AGENCY WAS IN EFFECT, THE QUESTIONS PRESENTED FOR JUDICIAL DETERMINATION DO NOT BECOME MOOT MERELY BECAUSE THE PENALTY HAS BEEN COMPLIED WITH DURING THE PENDENCY OF THE PROCEEDING.

Compliance With Penalty. When an Administrative decision is under judicial review, the questions presented for the court's determination are not rendered moot merely because the petitioner has meantime complied with a penalty

imposed by the agency as part of the decision (*Code Civ. Proc. § 1094.5(g)*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion for summary judgment in a mandate proceeding for review of a final administrative adjudicatory order or decision, when the respondent alleges that all questions presented for judicial determination have been rendered moot because of the petitioner's compliance with penalty provisions of the order or decision.

With appropriate modifications, this memorandum may be used to oppose a demurrer to the petition or a motion for judgment on the pleadings in favor of the respondent.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Any statement of fact should be supported by adequate reference to evidence admitted or otherwise cognizable by the court. For further discussion, see *§ 195.10[2][b]*.

[3] Discussion of Authorities

[a] Compliance With Penalty

Code of Civil Procedure Section 1094.5(g) provides that, when any final administrative order or decision is the subject of proceedings under this section, if the petition has been filed while the penalty imposed is in full force and effect, the determination will not be considered to have become moot in cases when the penalty imposed by the administrative agency has been completed or complied with during the pendency of such proceedings.

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19-195 California Points & Authorities §§ 195.131-195.139

[Reserved]

§§ 195.131[Reserved]

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19-195 California Points & Authorities § 195.140

§ 195.140 Order Directing Filing of Record Is Proper--All or Part of Record May Be Filed

[1] FORM Order Directing Filing of Record Is Proper--All or Part of Record May Be Filed

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____ _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF APPLICA-
Respondent.	)	TION FOR ORDER DIRECTING FILING OF AD-
	)	MINISTRATIVE RECORD
	)	

_____

THE COURT MAY ORDER ALL OR PART OF THE RECORD OF THE PROCEEDINGS BEFORE THE _____ [*identify agency*] TO BE FILED.

Judicial Order to File Record. The record of administrative proceedings resulting in an order or a decision subject to review in a mandate proceeding may be ordered to be filed by the court (*Code Civ. Proc. § 1094.5(a)*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [Petitioner *or* Respondent]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of an application for a judicial order directing the filing of all or part of the administrative record in a mandate proceeding for review of a final administrative order or decision.

The party intending to use a part of the administrative record in a case brought under *Code Civ. Proc. § 1094.5* must lodge that part of the record at least five days before the hearing [*Cal. Rules of Ct., Rule 3.1140*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. Thus, for example, counsel would refer to facts subject to judicial notice, in his or argument that all or part of the administrative record should be filed in the proceeding.

For further legal background, research guides, and forms relating to judicial notice, see California Forms of Pleading and Practice, Ch. 321, *Judicial Notice* (Matthew Bender).

[3] Discussion of Authorities

[a] Judicial Order to File Record

Subdivision (a) of ***Code of Civil Procedure Section 1094.5*** provides that all or part of the record of the proceeding before the inferior tribunal, corporation, board, or officer may be filed with the petition, may be filed with respondents' points and authorities, or may be ordered to be filed by the court. Subdivision (a) further provides that when the party seeking the writ has proceeded pursuant to *Section 1088.5 of the Code of Civil Procedure* (no alternative writ sought and petition not accompanied by proof of service), the administrative record must be filed as expeditiously as possible, and may be filed with the petition, or by the respondent after payment of the costs by the petitioner, when required, or as otherwise directed by the court.

[4] Additional Authorities

[a] Judicial Order to File Record

Moran v. Board of Medical Examiners (1948) 32 Cal. 2d 301, 196 P.2d 20 , was an appeal from the judgment of the superior court in a mandate proceeding for review of an administrative adjudicatory decision. The petitioner had requested the official reporter to prepare the administrative record, and on appeal the agency argued that this was not compliance with the statutory requirement of requesting "the agency" to prepare the record. However, the court held that the holding of the trial court, to the effect that petitioner's request to the reporter constituted substantial compliance with the statutory provisions, and amounted to a request to the agency, and that the act of the duly appointed reporter in furnishing the transcript was the act of the agency, must be sustained.

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19-195 California Points & Authorities § 195.141

§ 195.141 Motion for Discovery and Augmentation of Record

[1] FORM Motion for Discovery and Augmentation of Record

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN OPPOSITION TO MOTION
Respondent.	)	FOR DISCOVERY AND AUGMENTATION OF
	)	RECORD
	)	

_____

THE COURT SHOULD DENY THE MOTION FOR DISCOVERY AND AUGMENTATION OF THE RECORD BECAUSE THE EVIDENCE SOUGHT IS NOT ADMISSIBLE [*and/or*]_____ [*designate moving party, e.g., RESPONDENT*] HAS NOT MET THE REQUIREMENTS OF CODE CIV. PROC. § 1094.5(e)

A. Discovery in Mandate Proceedings Must Lead to Admissible Evidence. Although there is no express statutory provision allowing discovery in administrative mandate proceedings, the courts have interpreted *Code Civ. Proc. § 1094.5(e)* as permitting limited posthearing discovery when the moving party shows that the discovery sought is reasonably calculated to lead to admissible evidence (*Pomona Valley Hospital Medical Center v. Superior Court (1997) 55 Cal. App. 4th 93, 102, 63 Cal. Rptr. 2d 743*).

B. Discovery Permitted in Mandate Proceedings Only When Strict Requirements of *Code Civ. Proc. § 1094.5(e)* Are Satisfied. Pursuant to *Code Civ. Proc. § 1094.5(e)* the administrative record may not be augmented except by relevant evidence that could not be produced or was improperly excluded at the hearing before the respondent entity. A

party moving for discovery and augmentation of the record must establish that one of these exceptions applies (*Pomona Valley Hospital Medical Center v. Superior Court (1997) 55 Cal. App. 4th 93, 101, 63 Cal. Rptr. 2d 743*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion for discovery and augmentation of the record in a mandate proceeding for review of a final adjudicatory order or decision, when the moving party has failed to demonstrate that the proposed discovery will lead to evidence that can be considered by the reviewing court.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case and explaining why the moving party's proposed evidence should have been discovered and admitted during the administrative proceedings or why the evidence was not improperly excluded below. Factual assertions should be supported by the administrative record or set forth in a declaration supporting the opposition. For information and forms relating to declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , (Matthew Bender).

[c] Related Pleading and Practice Forms

For further discussion of procedural issued in administrative mandate proceedings see California Forms of Pleading and Practice, Ch. 474C, *Procedures in Reviewing Agency Decisions* (Matthew Bender).

[d] Opposing Memoranda

For memoranda that may be used to oppose the contentions in this form, see *§ 195.17*, Court May Receive Additional Evidence, above.

[3] Discussion of Authorities

[a] Discovery Must Lead to Admissible Evidence

In ***Pomona Valley Hospital Medical Center v. Superior Court*** *(1997) 55 Cal. App. 4th 93, 102, 63 Cal. Rptr. 2d 743* a surgeon, Dr. Bressman, filed a petition for administrative mandate to challenge the decision of a hospital's judicial review committee which suspended him from the hospital's staff. Bressman moved for leave to depose Dr. Knudsen, the former president of the hospital staff, who had initiated the process leading to Bressman's suspension. Bressman sought to depose Knudsen because Knudsen was a competing surgeon practicing the same specialty as Bressman, and had assumed responsibility for those surgeries that would have been Bressman's prior to the suspension.

The trial court granted Bressman's discovery motion, but the Court of Appeal reversed (*55 Cal. App. 4th 93, 109*). The

Court held that the trial court had abused its discretion in granting the motion. *Code Civ. Proc. § 1094.5* gives great deference and respect to administrative orders and finding and sets narrow limits on a party's ability to obtain a new hearing, or to augment the administrative record in a later hearing (*55 Cal. App. 4th 93, 101-102*). To effectuate those policies and limitations, discovery is permissible in administrative mandate proceedings only when it is reasonably calculated to lead to evidence *admissible* under *Code Civ. Proc. § 1094.5(e)* (*55 Cal. App. 4th 93, 102* ; emphasis in original).

While a deposition of Knudsen could have led to discovery of evidence supporting Bressman's theory that Knudsen initiated the suspension for an improper motive, there was no evidence to show that members of the hospital's judicial review committee were biased against Bressman. Knudsen was not a member of the review committee. The Court held that any evidence of Knudsen's motive was therefore irrelevant and inadmissible on the issue of whether Bressman had received a fair administrative hearing (*55 Cal. App. 4th 93, 108-109*).

[b] Requirements of Code Civ. Proc. § 1094.5(e)

Code Civ. Proc. § 1094.5(e) provides "Where the court finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before respondent, it may" remand the case for reconsideration in light of the evidence, or if the independent judgment standard applies, the court may admit and consider the evidence in the administrative mandate proceedings.

Pomona Valley Hospital Medical Center v. Superior Court *(1997) 55 Cal. App. 4th 93, 102, 63 Cal. Rptr. 2d 743* is discussed in *§ 195.141[3][a]*.

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19-195 California Points & Authorities §§ 195.142-195.149

[Reserved]

§§ 195.142[Reserved]

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19-195 California Points & Authorities § 195.150

§ 195.150 Change of Venue Is Justified--Designated Court Is Not Proper

[1] FORM Change of Venue Is Justified--Designated Court Is Not Proper

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF MOTION FOR
Respondent.	)	CHANGE OF VENUE
	)	
	)	

_____

THE COURT SHOULD GRANT RESPONDENT'S MOTION FOR CHANGE OF VENUE BECAUSE THE PETITION HAS NOT BEEN FILED IN THE COUNTY IN WHICH THE CAUSE, OR SOME PART THEREOF, AROSE.

A. Motion for Change of Venue in Mandate Proceeding. A motion for a change of venue is proper in a proceeding to obtain a writ of mandate (*Code Civ. Proc. § 1109*).

B. Motion for Change of Venue. A court may, on motion, change the place of trial when the court designated in the petition is not the proper court (*Code Civ. Proc. § 397(a)*).

C. Venue in Mandate Proceeding. Venue in a mandate proceeding for review of a final administrative adjudicatory order or decision is governed by *Code of Civil Procedure Section 393(1)(b)* (*Lynch v. Superior Court (1970) 7 Cal. App. 3d 929, 930-931, 86 Cal. Rptr. 925*).

D. Venue of Action Against Public Officer. The county in which the cause of some part thereof arose is the proper county for trial of a proceeding against a public officer or a person appointed to perform his or her duties, for an act done by him or her in virtue of his or her office, or against a person who, by his command or in his or her aid, does anything touching the duties of such an officer (*Code Civ. Proc. § 393(1)(b)*).

E. County in Which Cause Arose. The county in which the cause or some part thereof arose, with respect to a mandate proceeding for review of a final administrative adjudicatory order or decision, is the county in which the aggrieved person is directly or most seriously affected by it, such as the county where a licensee has his or her business or where a dismissed public employee was employed (*Lynch v. Superior Court (1970) 7 Cal. App. 3d 929, 931-933, 86 Cal. Rptr. 925* ; *Duval v. Contractors State License Board (1954) 125 Cal. App. 2d 532, 533-536*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Respondent _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for a change of venue in a mandate proceeding for review of a final administrative adjudicatory order or decision, when the petition has not been filed in the county in which the petitioner is directly or most seriously affected by the order or decision, such as the county where he or she has his or her business (if regulated by the respondent) or the county where he or she was employed (if he was dismissed from public employment).

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. If counsel is seeking a change of venue on the ground that the petition has not been filed in the county in which the petitioner is directly or most seriously affected by the order or decision, counsel would refer to matters set forth in a declaration supporting the motion. In referring to the declaration, counsel should refer to the specific page and line number in which the relevant facts are stated. Counsel may also refer to facts of which the court must or may take judicial notice to support his or her argument.

For further legal background, research guides, and forms relating to judicial notice, see California Forms of Pleading and Practice, Ch. 321, *Judicial Notice* (Matthew Bender).

[3] Discussion of Authorities

[a] Venue in Mandate Proceeding

Lynch v. Superior Court *(1970) 7 Cal. App. 3d 929, 86 Cal. Rptr. 925* , was an original proceeding in the court of appeal to compel a change of venue in a superior court mandate proceeding for review of a final administrative adjudicatory decision resulting in the petitioner's dismissal from public employment. The court began its opinion with a

statement of the rule set out in Paragraph B.

[b] Venue of Action Against Public Officer

Code of Civil Procedure Section 393(1)(b) provides that, subject to the power of the court to transfer actions and proceedings, the county in which the cause, or some part thereof, arose, is the proper county for the trial of actions against a public officer or person especially appointed to execute his duties, for an act done by him in virtue of his office; or against a person who, by his command or in his aid, does anything touching the duties of such officer.

[c] County in Which Cause Arose

In ***Lynch v. Superior Court*** *(1970) 7 Cal. App. 3d 929, 86 Cal. Rptr. 925* , the superior court proceeding had been begun in Santa Cruz County, and the respondent sought a change of venue to San Francisco where the dismissed employee had been employed. The court of appeal ordered a transfer to San Francisco and stated that, while certain acts which constituted the charges against the petitioner resulting in his dismissal allegedly occurred in counties other than San Francisco, the basis of his cause of action was the dismissal from his job. This took effect at the agency's headquarters in San Francisco, out of which he was employed. Thus, venue was determined by the petitioner's place of employment or center of operation at the time of his dismissal since that is where the state's action interfered with his activities (*7 Cal. App. 3d 929, 931-933*).

Duval v. Contractors State License Bd. (§ 195 4) *125 Cal. App. 2d 532, 271 P.2d 194* , was an appeal from an order of the superior court for a change of venue in a mandate proceeding for review of a final administrative adjudicatory order revoking a contractor's license. The proceeding had been begun in San Bernardino County, where the contractor had his principal place of business, and it was ordered transferred to Los Angeles County, with which neither the contractor nor the Contractors' State License Board had any relevant connection. The administrative hearing had been held in Riverside County, and the order of revocation had been issued in Sacramento County, where the office of the Registrar of Contractors is located. The court of appeal reversed the order changing venue. In a mandate proceeding to review an administrative order, the effect of which is to deprive a citizen of the right to do business, the proper county for trial is the county in which he carries on the business and in which he will be hurt by enforcement of the order. The court added that such a rule is sound, is in accord with common experience and practice, is of great benefit to the persons most vitally affected, and works no great hardship on the departments and officers of the state (*125 Cal. App. 2d 532, 533-536*).

[4] Additional Authorities

[a] County in Which Cause Arose

In *Sutter Union High School Dist. v. Superior Court (1983) 140 Cal. App. 3d 795, 190 Cal. Rptr. 182* , a petition for a writ of administrative mandamus was filed by a teacher in Sacramento County, which plaintiff characterized as a nonpartisan county under *Code Civ. Proc. § 394(1)*. The trial court agreed with this assessment in denying the district's motion for change of venue, and the district sought a writ of mandate. The court of appeal granted the writ, holding on page 797 that the proper venue for such an action is the county in which the cause arose [*Code Civ. Proc. § 393(1)(b)*]. The provision of *Code Civ. Proc. § 394(1)* regarding venue in a nonpartisan county was held to apply only when the action against a local public entity was filed in a proper county in the first instance (*140 Cal. App. 3d 795, 797*).

Cecil v. Superior Court (1943) 59 Cal. App. 2d 793, 140 P.2d 125 , was an original proceeding in the court of appeal to restrain a superior court from continuing a mandate proceeding for review of a final administrative adjudicatory order revoking a business license. The superior court proceeding had been begun in Los Angeles County, where the licensee's business was operated, and the respondent had unsuccessfully sought a change of venue to Sacramento County, where the respondent was located. The respondent asserted that denial of the motion for change of venue was improper. The court of appeal did not agree and denied relief, holding that, where a citizen is singled out by a state agency and

proceedings are instituted against him or her and result in an order, the effect of which is to deprive him or her absolutely or conditionally of the right to do business, the proper county for redress under *Code of Civil Procedure Section 393* is the county in which he or she carries on the business and in which he or she will be hurt by enforcement of the order. A cause of action does not arise in the county in which a state officer happens to affix his or her name to an order which is to become operative in another county.

California Points & Authorities

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Volume 19 Chapters 190-195 PRODUCTS LIABILITY---to---PUBLIC ADMINISTRATIVE LAW
CHAPTER 195 PUBLIC ADMINISTRATIVE LAW
PART II. FORMS
C. Miscellaneous Procedures

19-195 California Points & Authorities §§ 195.151-195.159

[Reserved]

§§ 195.151[Reserved]

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Volume 19 Chapters 190-195 PRODUCTS LIABILITY---to---PUBLIC ADMINISTRATIVE LAW
CHAPTER 195 PUBLIC ADMINISTRATIVE LAW
PART II. FORMS
C. Miscellaneous Procedures

19-195 California Points & Authorities § 195.160

§ 195.160 Stay of Operation of Administrative Decision Is Proper--Stay Is Not Against Public Interest

[1] FORM Stay of Operation of Administrative Decision Is Proper--Stay Is Not Against Public Interest

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF APPLICA-
Respondent.	)	TION FOR STAY OF ADMINISTRATIVE DE-
	)	CISION
	)	

_____

THE COURT SHOULD STAY OPERATION OF THE ADMINISTRATIVE ADJUDICATORY _____ [ORDER *or* DECISION] OF THE _____ [*identify agency*] PENDING JUDGMENT, BECAUSE THE COURT IN WHICH A PETITION IS FILED MAY DO SO IF THE COURT IS SATISFIED THAT A STAY IS NOT AGAINST THE PUBLIC INTEREST.

Stay of Operation of Administrative Decision. The court in which the petition is filed may stay operation of the administrative order or decision if the court is satisfied that a stay is not against the public interest (*Code Civ. Proc. § 1094.5(g)*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of an application for stay of the operation of an administrative decision while that decision is under review in a mandate proceeding.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. If counsel is referring to matters set forth in a declaration supporting the application, he or she should refer to the specific page and line number in which the relevant facts are stated. Counsel may also refer to facts of which the court must or may take judicial notice to support his or her argument.

For further legal background, research guides, and forms relating to judicial notice, see California Forms of Pleading and Practice, Ch. 321, *Judicial Notice* (Matthew Bender).

[3] Discussion of Authorities

[a] Stay of Operation of Administrative Decision

Code Civ. Proc. § 1094.5(g) provides that the court in which proceedings under that section are instituted may stay the operation of the administrative order or decision pending the judgment of the court, or until the filing of a notice of appeal from the judgment or until the expiration of the time for filing such notice whichever occurs first; provided that no such stay will be imposed or continued if the court is satisfied that it is against the public interest.

California Points & Authorities

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Volume 19A Chapters 196-199 PUBLIC ENTITIES---to---QUO WARRANTO
CHAPTER 196 PUBLIC ENTITIES

19A-196 California Points & Authorities 196.syn

§ 196.syn Synopsis to Chapter 196: PUBLIC ENTITIES

§ 196.01 Scope of Chapter

§ 196.02 Governing Statutes

§ 196.03 Summary of Procedures in Claims and Actions Against Public Employees and Public Entities

[1] Presentation of Claim

[2] Insufficient Claim

[3] Late Claim

[4] When Cause of Action Accrues

[5] Relief From Failure to Present Claim

[6] Action on Claim

[7] Pleading Presentation and Rejection of Claim; Variance

§ 196.04 General Rule of Nonliability of Public Entities for Torts

§ 196.05 Basis of Liability of Public Employees and Public Entities

[1] Act or Omission

[2] Dangerous Condition of Public Property

[3] Special Relationship

[4] Maintenance of Public Nuisance

§ 196.06 Defense and Indemnification of Public Employees

§ 196.07 Availability of Statutory Immunities and Defenses

§ 196.08 Immunity of Public Entity

[1] When Employee Is Immune

[2] Act or Omission of Independent Contractor for Which Public Entity Is Immune

[3] Injuries by Members of National Guard

[4] Punitive Damages

[5] Adoption or Failure to Adopt or Enforce Law

[6] Acts Relating to Permits, Licenses, Certificates, Approvals, Orders, and Similar Authorizations by Public Entities

[7] Acts Relating to Inspection of Property

[8] Misrepresentations of Employees

[9] Injuries by and to Prisoners

[10] Fire Protection or Firefighting Service Received From Another Public Entity

[11] Injury to Mental Patient

[12] Act Constituting Nuisance

[13] Training Programs for Emergency Medical Services

[14] Peace Officers Conducting Vehicular Pursuit

[15] Peace Officer Employed as Private Security Guard or Patrolman

§ 196.09 Immunity of Public Entity and Employee

[1] Publication of Records Relating to Controlled Substances Violators

[2] Advice to Small Claims Court Litigants

[3] Failure to Restrict or Prohibit Tunnel Traffic of Vehicles Carrying Flammable Liquids

[4] Failure to Provide Police Protection

[5] Failure to Provide Prison, Jail, or Correctional Facilities

[6] Interference With Prisoner's Right to Judicial Determination or Review of Legality of Confinement

[7] Failure to Provide Prisoner With Medical Care

[8] Determinations Relating to Parole or Release of Prisoner and Injuries by Escaping or Escaped Prisoner, Escaping or Escaped Arrestee, or Person Resisting Arrest

[9] Failure to Arrest or Retain Arrested Person in Custody

[10] Failure to Provide Fire Protection Service

[11] Failure to Provide or Maintain Sufficient Personnel, Equipment, or Other Fire Protection Facilities

[12] Condition of Firefighting Equipment or Facilities or Injuries Caused in Fighting Fires

[13] Transportation of Person Injured by Fire

[14] Interference With Right of Medical Facility Inmate to Judicial Determination or Review of Legality of Confinement

[15] Decision Relating to Prevention or Control of Communication of Disease

[16] Failure to Make Adequate Physical or Mental Examination

[17] Diagnosing or Failing to Diagnose Mental Illness or Addiction and Treatment

[18] Determinations With Respect to Confinement of Person for Mental Illness or Addiction

[19] Injury Caused by or to Escaping or Escaped Person Confined for Mental Illness or Addiction

[20] Failure to Admit Person to Public Medical Facility

[21] National Influenza Program of 1976

[22] Acts Relating to Taxes

[23] Activities to Abate Impending Peril

[24] Emergency Medical Instructions

[25] Emergency Medical Services

[26] Emergency Rescue Operations

[27] Abatement of Hazardous Substances

[28] Immunities Under Lanterman-Petris-Short Act

§ 196.10 Immunity of Public Employee

[1] Discretionary Acts

[2] Decisions of Peace Officers or Law Enforcement Officials Not to Render Assistance or Respond to Emergency

[3] Execution or Enforcement of Laws

[4] Acts Under Invalid or Inapplicable Enactment

[5] Acts or Omissions of Others

[6] Local Officials

[7] Adoption or Failure to Adopt or Enforce Enactment

[8] Acts Relating to Permits, Licenses, Certificates, Approvals, Orders, and Similar Authorizations by Public Employees

[9] Failure to Inspect or Negligent Inspection of Property

[10] Institution or Prosecution of Judicial or Administrative Proceeding

[11] Prosecutor Immunity

[12] Entry on Property

[13] Theft of Money From Employee's Custody

[14] Misrepresentations

[15] Emergency Care and Emergency Field Care Treatment at Scene

[16] Operation of Emergency Vehicle

[17] Public Employee Engaged in Rescue of Vessel

[18] Peace Officer for Service of Arrest Warrant

[19] Detention of Patients by Acute Care Hospital

§ 196.11 Dangerous Condition on Property

[1] Availability of Statutory Immunities and Defenses

[a] To Public Entity

[i] Generally

[ii] Dangerous Condition Created by Reasonable Act or Omission of Public Entity

[iii] Public Land Trust

[b] To Public Employee

[i] Generally

[ii] Dangerous Condition Created by Reasonable Act or Omission of Public Employee

[2] Determination That Condition Is Not Dangerous

[3] Potential Damages Limitations in Automobile Accident Cases

§ 196.12 Immunities

[1] Plan or Design

[2] Failure to Provide Traffic or Warning Signals, Signs, Markings, or Devices

[3] Traffic Signals Under Control of Emergency Vehicle

[4] Weather Conditions

[5] Natural Condition of Unimproved Property

[a] Generally

[b] Public Beaches

[c] Land Failure Caused by Natural Condition

[6] Nondedicated Roads

[7] Unpaved Access Roads to and Trails in Recreational and Scenic Areas

[8] Specific Unimproved Lands

[9] Hazardous Recreational Activities

[10] Reservoirs, Canals, Conduits, or Drains

[11] General Recreational Users Immunity

§ 196.13 Terminology Used in This Chapter

[1] "Tort Claims Act"

[2] "Board," "Local Public Entity," and "State"

[3] "Employee"

§ 196.14 Judgment Against Public Entity

[1] Effect of Collateral Source Payments

[2] Satisfaction of Judgment

[a] Award in Excess of $100,000

[b] Periodic Payment of Judgment

§ 196.15 How to Use Forms in This Chapter

[1] Page Limits on Points and Authorities

[2] Using Forms to Build Draft Memorandum

§ 196.16 Related Pleadings and Practice Forms

§ 196.17 Related Points and Authorities

§§ 196.18-196.29 [Reserved]

§ 196.30 Supporting Contention That Plaintiff's Claim Against Public Entity Is Excepted or Exempt From Claim Filing Provisions [Gov. Code §§ 905, 905.2] of California Tort Claims Act [Gov. Code §§ 810-996.6]--Statutory Exceptions [Gov. Code §§ 905, 905.1, 905.6]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Opposing Authorities

[a] Claim Against Local Public Entity by State of California or Other Local Public Entity

§ 196.31 Supporting Contention That Plaintiff's Claim Against Public Entity Is Excepted or Exempt from Claim Filing Provisions [Gov. Code §§ 905, 905.2] of California Tort Claims Act [Gov. Code §§ 810-996.6]--Money Recovery Is Incidental to Other Judicial Relief Sought

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Monetary Claim Incidental to Other Judicial Relief Sought

[b] Action for Return of Property Wrongfully Withheld

[c] Mandate Proceeding for Reinstatement to Job and Back Pay

[d] Action for Injunctive Relief and Damages for Violation of Fair Employment and Housing Act

[e] Proceeding to Compel State Officer to Perform Express Statutory Duty to Pay Money

[4] Additional Authorities

[a] Action for Return of Property Wrongfully Withheld

[5] Opposing Authorities

[a] Monetary Relief Incidental to Other Judicial Relief Sought

[b] Action for Return of Property Wrongfully Withheld

§ 196.32 Supporting Contention That Plaintiff's Claim Against Public Entity Is Excepted or Exempt From Claim Filing Provisions [Gov. Code §§ 905, 905.2] of California Tort Claims Act [Gov. Code § 810 et seq.]--Cross Complaint Is Defensive Response to Case Initiated by Public Entity

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Defensive Cross Complaint in Response to Case Initiated by Public Entity

§ 196.33 Supporting Contention That Failure to Present Timely Claim to Public Entity Is Excused--Person Who Sustained Injury, Damage, or Loss Was a Minor [Gov. Code § 946.6(c)(2)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Computing One-Year Period

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Relief Is Mandatory

[b] Denial of Relief Is Abuse of Discretion

[c] Effect of Parent's or Attorney's Lack of Diligence

[4] Additional Authorities

[a] Effect of Parent's or Attorney's Lack of Diligence

[5] Opposing Authorities

[a] Minor's Right to Relief

§ 196.34 Supporting Contention That Failure to Present Timely Claim to Public Entity Is Excused--Person Who Sustained Injury, Damage, or Loss Was Physically or Mentally Incapacitated [Gov. Code § 946.6(c)(3)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Physical or Mental Incapacity

[b] Denial of Relief Is Abuse of Discretion

§ 196.35 Supporting Contention That Failure to Present Timely Claim to Public Entity Is Excused--Person Who Sustained Injury, Damage, or Loss Has Died [Gov. Code § 946.6(c)(4)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

§ 196.36 Supporting Contention That Failure to Present Timely Claim to Public Entity Is Excused--Failure Was Through Mistake, Inadvertence, Surprise, or Excusable Neglect [Gov. Code § 946.6(c)(1)]--General Grounds

[1] FORM

[2] Comments

[a] Use of Form

[b] Requirement That Mistake, Inadvertence, Surprise, or Neglect Be Excusable

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Grounds for Relief

[b] Resolution of Doubts in Favor of Relief

[c] Reasonable Time

[d] Applicability of Case Authority Construing Code Civ. Proc. § 473

[e] Public Entity Has Burden of Showing Prejudice if Relief Is Granted

[4] Additional Authorities

[a] Grounds for Relief

[b] Applicability of Case Authority Construing Code Civ. Proc. § 473

[5] Opposing Authorities

[a] Grounds for Relief

[i] Diligence

[ii] Reasoned Decision Not to Present Claim

[b] Reasonable Time

§ 196.37 Supporting Contention That Failure to Present Timely Claim to Public Entity Is Excused--Failure Was Through Mistake, Inadvertence, Surprise, or Excusable Neglect [Gov. Code § 946.6(c)(1)]--Mistake of Law by Layperson

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Mistake of Law Defined

[b] Mistake of Law Made by Lay Person

[c] Honest Mistake

[4] Additional Authorities

[a] Honest Mistake

[5] Opposing Authorities

[a] Mistake of Law

[b] Deliberate Failure to Comply with Claims Statutes

§ 196.38 Supporting Contention That Failure to Present Timely Claim to Public Entity Is Excused--Failure Was Through Mistake, Inadvertence, Surprise, or Excusable Neglect [Gov. Code § 946.6(c)(1)]--Excusable Neglect Caused by Reliance on Investigative Report

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Excusable Neglect Defined

[b] Excusable Neglect of Claimant in Relying on Public Entity's Request to Forgo Action Pending Investigative Report

[c] Excusable Neglect of Attorney's Investigator

[4] Opposing Authorities

[a] Investigative Mistakes Generally

§ 196.39 Supporting Contention that Failure to Present Timely Claim to Public Entity Is Excused--Failure Was Through Mistake, Inadvertence, Surprise, or Excusable Neglect [Gov. Code § 946.6(c)(1)]--Attorney's Excusable Neglect in Calendaring

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Calendaring Mistake by Attorney as Sufficient

[4] Additional Authorities

[a] Calendaring Mistake by Attorney as Sufficient

§ 196.40 Supporting Contention that Failure to Present Timely Claim to Public Entity Is Excused--Failure Was Through Mistake, Inadvertence, Surprise, or Excusable Neglect [Gov. Code § 946.6(c)(1)]--Excusable Neglect Caused by Emotional Trauma or by Inability to Think Clearly Induced by Medication

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Neglect Based on Emotional Trauma

[b] Neglect Based on Inability to Think Clearly Induced by Medication Prescribed for Injury

[4] Opposing Authorities

[a] Neglect Based on Emotional Trauma

§ 196.41 Supporting Contention that Failure to Present Timely Claim to Public Entity Is Excused--Failure Was Through Mistake, Inadvertence, Surprise, or Excusable Neglect [Gov. Code § 946.6(c)(1)]--Excusable Neglect Caused by Claimant's Fruitless Efforts to Secure Counsel

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Failure to Present Timely Claim Resulted From Claimant's Inability to Obtain Legal Counsel Notwithstanding Diligent Efforts to Do So

§§ 196.42-196.59 [Reserved]

§ 196.60 Supporting Contention That Period for Presenting Claim [Gov. Code § 911.2] Was Tolled--Belated Discovery

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Belated Discovery Rule

[b] Showing Required for Rule to Apply

[c] Test for Determining Applicability of Belated Discovery Rule

[d] Test for Determining Reasonable Diligence

[e] When Cause of Action is Preserved by Belated Discovery Rule

[4] Additional Authorities

[a] Test for Determining Applicability of Belated Discovery Rule

§ 196.61 Supporting Contention That Requirement for Presenting Claim [Gov. Code §§ 905, 905.2] Was Substantially Met

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Substantial Compliance

[b] Substantial Compliance Requires Disclosure of Sufficient Information to Enable Public Entity to Make Adequate Investigation

[c] Filing With Proper Officials

[d] Filing With State Agency Other Than Board of Control

[4] Additional Authorities

[a] Substantial Compliance

[b] Substantial Compliance Requires Disclosure of Sufficient Information to Enable Public Entity to Make Adequate Investigation

[5] Opposing Authorities

[a] Substantial Compliance

[b] Filing With State Agency Other Than Board of Control

§§ 196.62-196.79 [Reserved]

§ 196.80 Supporting Contention That Claim for Equitable or Partial Equitable Indemnity Was Timely Presented [Gov. Code §§ 901, 911.2]

[1] FORM

[2] Comments

[a] Use of Form

[b] Indemnity Action by Subrogee

[c] Indemnity Claim Timely Filed

[3] Discussion of Authorities

[a] Equitable Indemnity Action Authorized

[4] Additional Authorities

[a] Accrual of Indemnity Cause of Action

§§ 196.81-196.99 [Reserved]

§ 196.100 Supporting Contention That Public Entity Waived Defense--Failure to Give Notice of Insufficiency of Claim [Gov. Code § 910.8] Constitutes Waiver of Defense That Claim Is Insufficient [Gov. Code § 911]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] When Document Constitutes a Claim for Purpose of Invoking Waiver

[b] Waiver by Failure to Give Notice of Insufficiency

[4] Additional Authorities

[a] Waiver by Failure to Give Notice of Insufficiency

[5] Opposing Authorities

[a] When Document Constitutes Claim for Purpose of Invoking Waiver

§ 196.101 Supporting Contention That Public Entity Waived Defense--Failure to Give Timely Notice That Claim Was Late [Gov. Code § 911.3(a)] Constitutes Waiver of Defense That Claim Is Not Timely [Gov. Code § 911.3(b)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Definition of Claim

[b] When Failure to Give Notice Waives Defense That Claim Was Not Timely

§ 196.102 Supporting Contention That Failure to Present Claim Is No Defense When Public Agency Failed to Have Required Statement on File in Roster of Public Agencies [Gov. Code § 946.4]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Effect on Claims Requirement of Public Agency's Failure to File Statement

[b] Effect on Claims Requirement of Public Agency's Filing Substantially Noncomplete Statement

[c] Plaintiff Not Misled by Erroneous Statement

[d] Effect on Late or Inadequate Claim

[e] Effect on Statute of Limitations

[4] Opposing Authorities

[a] Public Agency Defined

[b] Effect on Statute of Limitations

§ 196.103 Supporting Contention That Public Entity Is Estopped From Relying on Claimant's Failure to File Claim as Defense to Claimant's Action

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Estoppel as Applicable to Public Entities

[b] Elements of Estoppel

[c] Factors to Be Considered

[d] Misrepresentation of Need to File Claim

[e] Misleading Advice

[f] Failure to Speak When Under Duty to Speak

[g] Estoppel Appropriate if Employee of Public Entity Threatens Plaintiff to Gain Silence

[4] Additional Authorities

[a] Estoppel as Applicable to Public Entities

[b] Misleading Advice

§§ 196.104-196.119 [Reserved]

§ 196.120 Supporting Contention That Prematurely Filed Action Is Timely

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Action Filed Before Claim Denied Is Timely

[b] Action Filed Before Relief From Claim Filing Requirement Is Granted Is Timely

[4] Opposing Authorities

[a] Action Filed Before Claim Denied Is Timely

§§ 196.121-196.139 [Reserved]

§ 196.140 Supporting Contention That Action Was Timely Filed--Following Rejection of Claim [Gov. Code § 945.6]

[1] FORM

[2] Comments

[a] Use of Form

[b] Accrual of Cause of Action

[c] Notice

[d] Plaintiff Imprisoned in State Prison

[e] Intervention

[f] Amended Claim

[g] Related Points and Authorities

[3] Discussion of Authorities

[a] Action Filed Within Six Months After Notice of Rejection of Claim Is Timely

[b] Action Filed Within Two Years of Accrual of Cause of Action Is Timely When Proper Written Notice of Rejection of Claim Is Not Given

[c] "Six Months" Is Six Calendar Months or 182 Days, Whichever Is Longer

[d] Action Filed Within Ninety Days After Notice of Intent to Sue Is Timely

[4] Additional Authorities

[a] Action Filed Within Six Months After Notice of Rejection of Claim Is Timely

[b] Action Filed Within Two Years of Accrual of Cause of Action Is Timely When Proper Written Notice of Rejection of Claim Is Not Given

[5] Opposing Authorities

[a] Action Filed Within Six Months After Notice of Rejection of Claim Is Timely

[b] Action Filed Within Two Years of Accrual of Cause of Action Is Timely When Proper Written Notice of Rejection of Claim Is Not Given

§ 196.141 Supporting Contention That Action Was Timely Filed--No Presentation of Claim Required [Gov. Code § 945.8]

[1] FORM

[2] Comments

[a] Use of Form

[b] Applicable Statute of Limitations

[c] Actions Not Requiring Claim

[d] Related Pleading and Practice Forms

[e] Related Points and Authorities

[3] Discussion of Authorities

[a] When No Claim Required, Action Filed Within Statute of Limitations Applicable to Nonpublic Entity Defendant Is Timely

[4] Opposing Authorities

[a] When No Claim Required, Action Filed Within Statute of Limitations Applicable to Nonpublic Entity Defendant Is Timely

§ 196.142 Supporting Contention That Action Was Timely Filed--Following Order Granting Relief From Claim Presentation Requirement [Gov. Code § 946.6(f)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Commencement of Thirty-Day Period

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Action Filed Within 30 Days After Court-Ordered Relief From Claim Requirement Is Timely

[4] Additional Authorities

[a] Action Filed Within 30 Days After Court-Ordered Relief From Claim Requirement Is Timely

[5] Opposing Authorities

[a] Action Filed Within 30 Days After Court-Ordered Relief From Claim Requirement Is Timely

§ 196.143 Supporting Contention That Action Against Public Employee Was Timely Filed [Gov. Code § 950.6]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Opposing Authorities

[a] Action Against Public Employee Is Timely When Commenced Within Time Applicable to Public Entity

§§ 196.144-196.159 [Reserved]

§ 196.160 Supporting Contention That Action Is Not Barred by Statute of Limitations--Statute Tolled Pending Resolution of Related Administrative Hearing

[1] FORM

[2] Comments

[a] Use of Form

[b] Additional Tolling Provisions

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Tolling of Statute of Limitations

[b] Tolled Pending Review of Dismissal

[4] Additional Authorities

[a] Tolling of Statute of Limitations

§ 196.161 Supporting Contention That Action Is Not Barred By Statute of Limitations--Statute Tolled While Related Federal Action Pending

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Tolling Statute of Limitations

[4] Additional Authorities

[a] Tolling Statute of Limitations

[5] Opposing Authorities

[a] Tolling Statute of Limitations

§ 196.162 Supporting Contention That Action Is Not Barred by Statute of Limitations--Public Entity Estopped From Relying on Statute by Engaging in Settlement Negotiations Throughout Limitations Period

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Public Agency Is Estopped From Asserting Statute of Limitations When It Continued to Engage in Settlement Negotiations

[b] Estoppel Based on Request to Delay Filing Action

[4] Additional Authorities

[a] Public Agency Is Estopped From Asserting Statute of Limitations When It Continued to Engage in Settlement Negotiations

§ 196.163 Supporting Contention That Action Is Not Barred by Statute of Limitations--Amended Complaint Relates Back to Timely Filed Original Complaint

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Amendment to Substitute Public Employees for Doe Defendants Relates Back

[b] Amendment to Substitute Public Entity for Doe Defendant When Plaintiff Was Ignorant of True Name

[4] Additional Authorities

[a] Amendment to Substitute Public Employees for Doe Defendants Relates Back

[5] Opposing Authorities

[a] Amendment to Substitute Public Employees for Doe Defendants Relates Back

§§ 196.164-196.179 [Reserved]

§ 196.180 Supporting Contention That Public Entity or Employee Is Liable for Act or Omission [Gov. Code §§ 815.2(a), 820(a)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] When Elected Official Must Be Named as Codefendant to Hold Public Entity Liable

[c] Statutory Immunity From Liability

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Liability of Public Entity

[4] Opposing Authorities

[a] Liability of Public Entity

[b] Liability for Tortious Act of Independent Contractor

§ 196.181 Supporting Contention That Public Entity or Employee Is Liable for Act or Omission [Gov. Code §§ 815.2(a), 820(a)]--Department of Motor Vehicles Is Liable for Damages Resulting From Department's Negligent Omission of Lienholder's Name From Ownership Certificate [Gov. Code § 818.5]

[1] FORM

[2] Comments

[a] Use of Form

§ 196.182 Supporting Contention That Public Entity or Employee Is Liable for Act or Omission [Gov. Code §§ 815.2(a), 820(a)]--Public Entity Is Liable for Injury Caused by Public Entity's Failure to Discharge Mandatory Duty That Was Designed to Protect Against Risk of That Kind of Injury [Gov. Code § 815.6]

[1] FORM

[2] Comments

[a] Use of Form

[b] Pleading the Enactment

[c] Test for Determining Whether Liability May Be Imposed

[3] Discussion of Authorities

[a] Liability for Breach of Mandatory Duty

[b] Underlying Enactment Need Not Create Private Right of Action

[c] Coroner's Duty to Attempt to Identify Body and Locate Family Member

[d] Liability Based on Police Officer's Failure to Investigate Child Abuse Allegations

[e] Public Entity's Liability for Failure to Require Posting of Payment Bond

[f] Public Entity's Liability for Failure to Ensure Sufficiency of Contractor's Surety

[4] Opposing Authorities

[a] Liability for Breach of Mandatory Duty

[b] "Enactment" Defined

[c] "Regulation" Defined

§ 196.183 Supporting Contention That Public Entity or Employee Is Liable for Act or Omission [Gov. Code §§ 815.2(a), 820(a)]--Public Entity and Public Employee Are Liable for Injury Caused by Public Employee's Failure to Summon Medical Care for Prisoner in Custody and in Need of Immediate Medical Care [Gov. Code § 845.6]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Liability for Failure to Summon Medical Care

[4] Additional Authorities

[a] Liability for Failure to Summon Medical Care

[5] Opposing Authorities

[a] Liability for Failure to Summon Medical Care

§ 196.184 Supporting Contention That Public Entity or Employee Is Liable for Act or Omission [Gov. Code §§ 815.2(a), 820(a)]--Public Employee Is Liable for Injury to Victim of Fire or Fire Operation Caused by Employee's

Willful Misconduct in Transporting or Arranging for Transportation of Victim to Physician or Hospital [Gov. Code § 850.8]

[1] FORM

[2] Comments

[a] Use of Form

§ 196.185 Supporting Contention That Public Entity or Employee Is Liable for Act or Omission [Gov. Code §§ 815.2(a), 820(a)]--Public Entity That Operates Medical Facility [Gov. Code § 854] Is Liable for Injury Caused by Entity's Failure to Provide Equipment, Personnel, or Facilities Required by Statute or Regulation [Gov. Code § 855]

[1] FORM

[2] Comments

[a] Use of Form

§ 196.186 Supporting Contention That Public Entity or Employee Is Liable for Act or Omission [Gov. Code §§ 815.2(a), 820(a)]--Public Entity Is Liable for Injury Caused by Entity's Use of Pesticide [Gov. Code § 862(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Construction of Gov. Code § 862

[3] Discussion of Authorities

[a] State Must Adhere to Statutory Notification Requirements

§ 196.187 Supporting Contention That Public Entity or Employee Is Liable for Act or Omission [Gov. Code §§ 815.2(a), 820(a)]--Public Entity Is Liable for Death or Injury to Person or Property Proximately Caused by Public Employee's Negligent Operation of Motor Vehicle, Including Emergency Vehicle [Veh. Code § 17001]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Immunities Not Applicable to Liability Under Vehicle Code

[b] Liability When Motor Vehicle Involved Was Emergency Vehicle

[c] Failure of Emergency Vehicle to Sound Siren

[d] Liability When Prisoner Is Negligently Allowed to Steal Emergency Vehicle in Operation

[4] Additional Authorities

[a] Liability When Motor Vehicle Involved Was Emergency Vehicle

[5] Opposing Authorities

[a] Immunities Not Applicable to Liability Under Vehicle Code

§ 196.188 Supporting Contention That Public Entity or Employee Is Liable for Act or Omission [Gov. Code §§ 815.2(a), 820(a)]--Public Entity Is Liable for Injury Caused by Public Employee's Failure to Act as Reasonably Prudent Person While Engaged in Rescue Following Collision, Accident, or Other Casualty Involving Vessel [Harb. & Nav. Code § 656(a), (c)(2)]

[1] FORM

[2] Comments

[a] Use of Form

§ 196.189 Supporting Contention That Public Entity or Employee Is Liable for Act or Omission [Gov. Code §§ 815.2(a), 820(a)]--Public Entity That Warned of Danger Causing Need for Rescue Involving Vessel Is Liable for Injury Caused by Public Employee's Gross Negligence During Rescue [Harb. & Nav. Code § 656(a), (c)(3)]

[1] FORM

[2] Comments

[a] Use of Form

§ 196.190 Supporting Contention That Public Entity is Liable for Act or Omission [Gov. Code § 815.2(a)]--Public Entity is Liable for Discrimination Prohibited by Fair Employment and Housing Act [Gov. Code § 12926(d)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Immunities

[a] Public Entity Employer May be Directly Liable for Discrimination Prohibited by Fair Employment and Housing Act

§§ 196.191-196.209 [Reserved]

§ 196.210 Supporting Contention That Public Entity Is Liable for Dangerous Condition of Public Property [Gov. Code § 835]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Statutory Immunities

[c] Exclusions From "Property"

[d] Dangerousness of Condition

[i] Generally

[ii] Condition Creating Minor, Trivial, or Insignificant Risk

[iii] Failure to Provide Traffic Control Signals or Signs

[iv] Evidence of Happening of Accident

[v] Evidence of Postaccident Protective Corrective Action by Public Entity

[e] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Liability of Public Entity for Dangerous Condition of Its Property

[b] "Dangerous Condition" Defined

[c] Kind of "Due Care" Required

[d] "Constructive Notice" of Public Entity Defined

[e] "Protect Against" Defined

[4] Additional Authorities

[a] Liability of Public Entity for Dangerous Condition of Its Property

[b] "Dangerous Condition" Defined

[5] Opposing Authorities

[a] Liability of Public Entity for Dangerous Condition of Its Property

[b] "Property" Defined

[c] "Dangerous Condition" Defined

[d] Kind of "Due Care" Required

§ 196.211 Supporting Contention That Public Entity Is Liable for Dangerous Condition of Public Property [Gov. Code § 835]--Public Entity Is Liable Even Though Negligent Act or Omission of Third Party Combined With Dangerous Condition to Cause Plaintiff's Injury

[1] FORM

[2] Comments

[a] Use of Form

[b] Limits on Liability When Concurrent Negligence of Two or More Tortfeasors Caused Plaintiff's Injuries

[3] Discussion of Authorities

[a] Third Party's Negligence Does Not Preclude Public Entity's Liability for Injury Caused by Dangerous Condition

[4] Additional Authorities

[a] Third Party's Negligence Does Not Preclude Public Entity's Liability for Injury Caused by Dangerous Condition

[5] Opposing Authorities

[a] Third Party's Negligence Does Not Preclude Public Entity's Liability for Injury Caused by Dangerous Condition

§ 196.212 Supporting Contention That Public Entity Is Liable for Dangerous Condition of Public Property [Gov. Code § 835]--Public Entity Is Liable Even Though Dangerous Condition Was Negligent Use of Property by Third Party With Knowledge of Public Entity

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Dangerous Condition Caused by Use of Property

[b] Foreseeable Use of Property by Third Person

§ 196.213 Supporting Contention That Public Entity Is Liable for Dangerous Condition of Public Property [Gov. Code § 835]--Public Entity Is Liable Even Though Dangerous Condition Was Caused by Condition on Adjacent Property

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Public Entity Liable for Dangerous Condition of Its Property Caused by Condition on Adjacent Property

[4] Additional Authorities

[a] Public Entity Liable for Dangerous Condition of Its Property Caused by Condition on Adjacent Property

§ 196.214 Supporting Contention That Public Entity Is Liable for Dangerous Condition of Public Property [Gov. Code § 835]--Public Entity Is Liable for Natural Condition of Its Unimproved Property That Injures Adjacent Property or Persons on Adjacent Property

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Liability for Injury to Adjacent Property or Person on Adjacent Property Caused by Natural Condition of Public Entity's Unimproved Property

§§ 196.215-196.229 [Reserved]

§ 196.230 Supporting Contention That Public Entity or Employee Is Liable for Injury Caused by Violation of Duty Arising From Special Relationship or Circumstance--Duty of Public Entity to Warn of Known Criminal Activity on Public Property

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Factors to Consider in Determining Duty

[b] Duty to Protect Person From Misconduct of Third Person

[c] Special Relationship Between Possessor of Land and Invitee

[d] Applicability of General Tort Law to Government Tort Liability

[e] Liability of Public Entity for Criminal Act of Third Party

[f] Determination of Whether Condition Is Dangerous

§ 196.231 Supporting Contention That Public Entity or Employee Is Liable for Injury Caused by Violation of Duty Arising From Special Relationship or Circumstance--Duty of Public Entity or Employee to Warn of Peril Created by Entity and Not Readily Discoverable by Others

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Duty of Public Entity to Warn of Foreseeable Peril Created by It

[b] Duty of State When Placing Juvenile Parolee in Foster Home

[c] Special Relationship Not Required

§ 196.232 Supporting Contention That Public Entity or Employee Is Liable for Injury Caused by Violation of Duty Arising From Special Relationship or Circumstance--Duty of Public Entity or Employee to Private Citizen Asked to Perform Public Function Involving Foreseeable Risk of Injury

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] When Special Relationship Exists

[b] Creation of Special Relationship by Asking Private Citizen to Perform Public Function

[4] Opposing Authorities

[a] Creation of Special Relationship by Asking Private Citizen to Perform Public Function

§ 196.233 Supporting Contention That Public Entity or Employee Is Liable for Injury Caused by Violation of Duty Arising From Special Relationship or Circumstance--Duty of California Highway Patrol Officer Investigating Plight of Specific Persons on Roadway to Prevent Foreseeable Injury to Persons and Onlookers

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Special Relationship Requirement

[b] Creation of Special Relationship by Investigation and Ascertainment of Foreseeable Danger

§ 196.234 Supporting Contention That Public Entity or Employee Is Liable for Injury Caused by Violation of Duty Arising From Special Relationship or Circumstance--Duty of Law Enforcement Officer to Exercise Reasonable Care for Safety of Persons Whom Officer Stops on Highway

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Duty Owed to Motorists Stopped by Law Enforcement Officer

§ 196.235 Supporting Contention That Public Entity or Employee Is Liable for Injury Caused by Violation of Duty Arising From Special Relationship or Circumstance--Duty of Public Common Carrier to Exercise Utmost Diligence in Providing Safe Carriage of Passengers [Civ. Code § 2100]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Applicability of Statutory Duty to Public Carriers

[b] Duty to Protect Passengers From Assaults by Fellow Passengers

[c] Liability of Public Carrier for Breach of Duty

§§ 196.236-196.249 [Reserved]

§ 196.250 Supporting Contention That Public Entity Is Liable for Damages Resulting From Entity's Maintenance of Nuisance [Civ. Code § 3479]

[1] FORM

[2] Comments

[a] Use of Form

[b] Exceptions to Liability for Nuisance

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] California Tort Claims Act Does Not Bar Actions for Nuisance

[b] Pleading Nuisance and Dangerous Condition Alternatively

[c] When Statutory Sanction Will Justify Nuisance

[4] Additional Authorities

[a] California Tort Claims Act Does Not Bar Actions for Nuisance

[5] Opposing Authorities

[a] When Statutory Sanction Will Justify Nuisance

§§ 196.251-196.269 [Reserved]

§ 196.270 Supporting Contention That Immunity From Liability for Act or Omission Does Not Apply--Licensing Immunity [Gov. Code § 818.4] Does Not Apply to Issuance of License That Creates Dangerous Condition of Public Property

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Licensing Immunity Not Applicable if Dangerous Condition Created

§ 196.271 Supporting Contention That Immunity From Liability for Act or Omission Does Not Apply--Licensing [Gov. Code § 818.4] and Enforcement [Gov. Code § 818.2] Immunities Do Not Apply When Public Entity or Employee Has Breached Mandatory Duty [Gov. Code § 815.6]

[1] FORM

[2] Comments

[a] Use of Form

[b] Federal Civil Rights Actions

[3] Discussion of Authorities

[a] Licensing Immunity Is Not Applicable With Breach of Mandatory Duty

[b] Enforcement Immunity Is Not Applicable With Breach of Mandatory Duty

[4] Additional Authorities

[a] Licensing Immunity Is Not Applicable With Breach of Mandatory Duty

[b] Enforcement Immunity Is Not Applicable With Breach of Mandatory Duty

[5] Opposing Authorities

[a] Licensing Immunity Is Not Applicable With Breach of Mandatory Duty

§ 196.272 Supporting Contention That Immunity From Liability for Act or Omission Does Not Apply--Inspection Immunity [Gov. Code § 818.6] Applies Only to Inspections of Physical Property

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Inspection Immunity Only Applicable to Inspections of Physical Property

[b] Inspection Immunity Not Applicable to Inspections of Foster Parents

[4] Additional Authorities

[a] Inspection Immunity Only Applicable to Inspections of Physical Property

§ 196.273 Supporting Contention That Immunity From Liability for Act or Omission Does Not Apply--Misrepresentation Immunity [Gov. Code § 818.8] Does Not Apply--No Interference With Plaintiff's Financial or Commercial Interests

[1] FORM

[2] Comments

[a] Use of Form

[b] Public Employee Immunity

[3] Discussion of Authorities

[a] Misrepresentation Immunity Is Not Applicable Unless Interference Is With Financial or Commercial Interests

[b] No Immunity for Intentional Concealment of Health and Safety Information

[4] Additional Authorities

[a] Misrepresentation Immunity Is Not Applicable Unless Interference Is With Financial or Commercial Interests

[5] Opposing Authorities

[a] Misrepresentation Immunity Is Not Applicable Unless Interference Is With Financial or Commercial Interests

§ 196.274 Supporting Contention That Immunity From Liability for Act or Omission Does Not Apply--Misrepresentation Immunity [Gov. Code § 818.8] Does Not Apply--Claim Based on Contract

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] California Tort Claims Act Is Not Applicable in Contract Actions

[b] Misrepresentation Immunity Is Not Applicable in Contract Actions

[4] Additional Authorities

[a] Misrepresentation Immunity Is Not Applicable in Contract Actions

[5] Opposing Authorities

[a] Misrepresentation Immunity Is Not Applicable in Contract Actions

§ 196.275 Supporting Contention That Immunity From Liability for Act or Omission Does Not Apply--Prisoner Immunity [Gov. Code § 844.6] Does Not Apply When Neither Plaintiff Nor Person Causing Injury Was Prisoner

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Immunity Is Only Applicable When Either Injured or One Causing Injury Is Prisoner

[b] Detained Person Is Not Prisoner

[c] Minor Committed to Care of Parent Is Not Prisoner

[d] Person Falsely Imprisoned Is Not Prisoner

[e] Parolee Is Not Prisoner

[f] Child Residing With Incarcerated Mother Under Pregnant and Parenting Women's Alternative Sentencing Program Act is Not Prisoner

[4] Additional Authorities

[a] Detained Person Is Not Prisoner

[5] Opposing Authorities

[a] Immunity Is Only Applicable When Either Injured or One Causing Injury Is Prisoner

§ 196.275A Supporting Contention That Immunity From Liability for Act or Omission Does Not Apply--Parole Decision Immunity [Gov. Code § 845.8(a)] Does Not Apply When Based on Ministerial Act

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Parole Decision Immunity Inapplicable to Ministerial Acts

§ 196.276 Supporting Contention That Immunity From Liability for Act or Omission Does Not Apply--Fire Fighter's Immunity [Gov. Code § 850.4] Does Not Apply--Negligent Actor Omission Unrelated to Fire Fighting

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Immunity for Firefighters Is Not Applicable in Emergency Rescue Unrelated to Fire

[b] Immunity for Firefighters Is Not Applicable Before Fire Starts

[4] Opposing Authorities

[a] Immunity for Firefighters Is Not Applicable Before Fire Starts

§ 196.277 Supporting Contention That Immunity From Liability for Act or Omission Does Not Apply--Fire Fighter's Immunity [Gov. Code § 850.4] Does Not Apply--Waiver of Immunity by Public Entity or Employee

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Firefighters' Immunity Is Not Applicable After Waiver by Defendant

§ 196.278 Supporting Contention That Immunity From Liability for Act or Omission Does Not Apply--Discretionary Immunity [Gov. Code § 820.2] Does Not Apply--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Discretionary Act Immunity

[c] Procedural Considerations

[d] Federal Civil Rights Actions

[3] Discussion of Authorities

[a] Discretionary Immunity Only Applies to Basic Policy Decisions

[b] Negligent Implementation of Discretionary Decision Is Not Immune

[c] Contents of Discussion With Press Is Not Discretionary

[d] Decision Not to Warn of Latent Danger From Patient Is Not Discretionary

[e] Effectuation of Legislative Policy Is Not Discretionary

[f] Manner of Conducting Police Investigation Is Not Discretionary

[g] Public Official's Duties in Determining Whether Document Recordable Is Not Discretionary

[h] Determination of Fulfillment of Residency Requirements Is Not Discretionary

[i] Notice of Proposed Disposition of Exhibits Used in Criminal Case Is Not Discretionary

[j] Deputy Public Defender Not Immune When Representing Criminal Defendant

[4] Additional Authorities

[a] Discretionary Immunity Only Applies to Basic Policy Decisions

[b] Negligent Implementation of Discretionary Decision Is Not Immune

[c] Contents of Discussion With Press Is Not Discretionary

[d] Manner of Conducting Police Investigation Is Not Discretionary

[5] Opposing Authorities

[a] Discretionary Immunity Only Applies to Basic Policy Decisions

[b] Negligent Implementation of Discretionary Decision Is Not Immune

[c] Manner of Conducting Police Investigation Is Not Discretionary

§ 196.279 Supporting Contention That Immunity From Liability for Act or Omission Does Not Apply--Law Enforcement Immunity [Gov. Code §§ 818.2, 820.4] Does Not Apply in Federal Civil Rights Action

[1] FORM

[2] Comments

[a] Use of Form

[b] Other Immunities

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] No Enforcement Immunity in Federal Civil Rights Action

§ 196.280 Supporting Contention That Immunity From Liability for Act or Omission Does Not Apply--Law Enforcement Immunity [Gov. Code § 820.4] and Immunity for Instituting or Prosecuting Judicial Proceeding [Gov. Code § 821.6] Do Not Apply in Action for False Arrest or Imprisonment

[1] FORM

[2] Comments

[a] Use of Form

[b] Conditional Immunity for False Arrest

[3] Discussion of Authorities

[a] No Enforcement Immunity for Public Employee for False Arrest or Imprisonment

[b] No Prosecution Immunity for Public Employee for False Arrest or Imprisonment

[c] Employing Public Entity Is Derivatively Liable

[4] Additional Authorities

[a] No Enforcement Immunity for Public Employee for False Arrest or Imprisonment

[b] No Prosecution Immunity for Public Employee for False Arrest or Imprisonment

§ 196.281 Supporting Contention That Immunity From Liability for Act or Omission Does Not Apply--Immunity for Instituting or Prosecuting Judicial Proceeding [Gov. Code § 821.6] Does Not Apply--General Form

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Prosecution Immunity Only Applicable to Malicious Prosecution Action

[b] No Prosecution Immunity When Public Employee Acts Outside Scope of Employment

[c] Scope of Employment

[d] No Prosecution Immunity in Whistle-Blower Actions

[4] Opposing Authorities

[a] Prosecution Immunity Only Applicable to Malicious Prosecution Action

§ 196.282 Supporting Contention That Immunity From Liability for Act or Omission Does Not Apply--Immunity for Failure to Make to Physical or Mental Examination or for Inadequate Examination [Gov. Code § 855.6] Does Not Apply--Examination Made for Purpose of Treatment

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Governmental Immunity for Failure to Conduct Physical or Mental Examination Does Not Apply to Examination for Treatment

§ 196.283 Supporting Contention that Immunity From Liability for Act or Omission Does Not Apply--Immunity Under Emergency Services Act [Gov. Code § 8655] Does Not Apply to Intentional Misrepresentations Related to Physical Safety

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] No Emergency Services Act Immunity for Intentional Concealment of Known Dangers Which Cause Personal Injuries

§§ 196.284-196.299 [Reserved]

§ 196.300 Supporting Contention That Immunity From Liability for Dangerous Condition of Public Property Does Not Apply--Design Immunity [Gov. Code § 830.6] Does Not Apply--General Form

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Required Elements of Design Immunity

[b] Feature That Caused Accident Is Not Part of Approved Design

[c] Adoption of Unreasonable Design

[d] Injury Is Not Caused by Design

[e] Immunity Is Not Applicable When Changed Circumstances Create Dangerous Condition

[f] "Trap" Exception to Design Immunity Is Applicable

[4] Additional Authorities

[a] Required Elements of Design Immunity

[b] Feature That Caused Accident Is Not Part of Approved Design

[c] Adoption of Unreasonable Design

[d] "Trap" Exception to Design Immunity Is Applicable

[5] Opposing Authorities

[a] Required Elements of Design Immunity

[b] Adoption of Unreasonable Design

[c] Injury Is Not Caused by Design

[d] Immunity Is Not Applicable When Changed Circumstances Create Dangerous Condition

[e] "Trap" Exception to Design Immunity Is Applicable

§ 196.301 Supporting Contention That Immunity From Liability for Dangerous Condition of Public Property Does Not Apply--Immunity for Weather Conditions [Gov. Code § 831] Does Not Apply--General Form

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Immunity Is Not Applicable When Effect Not Apparent and Could Not Be Anticipated in Exercise of Due Care

[b] Immunity Is Not Applicable When Dangerous Condition Due to Combination of Weather and Condition of Highway

[c] Immunity Is Not Applicable When Condition Fixed and Predictable

§ 196.302 Supporting Contention That Immunity From Liability for Dangerous Condition of Public Property Does Not Apply--Immunity for Natural Conditions [Gov. Code § 831.2] Does Not Apply--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Injury to Nonuser Caused by Land Failure

[c] Natural Condition of Public Beaches

[d] Hybrid Natural and Artificial Conditions

[3] Discussion of Authorities

[a] Natural Condition Immunity Not Applicable to Improvements

[b] Natural Condition Immunity Not Applicable to Injuries to Nonusers of Adjacent Land

[4] Opposing Authorities

[a] Natural Condition Immunity Not Applicable to Improvements

§ 196.303 Supporting Contention That Immunity From Liability for Dangerous Condition of Public Property Does Not Apply--General Recreational Users Immunity [Civ. Code § 846] Does Not Apply--General Form

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] General Recreation User Immunity Not Applicable to Public Entities

§ 196.304 Supporting Contention That Immunity From Liability for Dangerous Condition of Public Property Does Not Apply--Traffic Control Sign Immunity [Gov. Code § 830.4] Does Not Apply--General Form

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Traffic Control Sign Immunity Limited to Danger Resulting From Failure to Provide Sign

§ 196.305 Supporting Contention That Immunity From Liability for Dangerous Condition of Public Property Does Not Apply--Maintenance of Nondedicated Roads Immunity [Gov. Code § 831.3] Does Not Apply--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Road Maintenance Immunity

[3] Discussion of Authorities

[a] Immunity for Maintenance of Nondedicated Road Limited to Work Performed With Reasonable Care

§ 196.306 Supporting Contention That Immunity From Liability for Dangerous Condition of Public Property Does Not Apply--Immunity for Participation in a Hazardous Recreational Activity [Gov. Code § 831.7] Does Not Apply--Students Engaged in School-Sponsored or Required Activities

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] "Hazardous Recreational Activities" Immunity Is Inapplicable to Athletic Activities Under Supervision of School Personnel

[4] Opposing Authorities

[a] "Hazardous Recreational Activities" Immunity Is Inapplicable to Athletic Activities Under Supervision of School Personnel

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Volume 19A Chapters 196-199 PUBLIC ENTITIES---to---QUO WARRANTO
CHAPTER 196 PUBLIC ENTITIES
PART I. INTRODUCTION

19A-196 California Points & Authorities § 196.01

§ 196.01 Scope of Chapter

This chapter discusses the procedure for submitting a claim against a public entity as a prerequisite for filing an action against that entity. It includes forms of points and authorities supporting the contentions that (1) the action sued on is exempt from the claim-filing requirement [*see §§ 196.30, 196.32*]; (2) the failure to have presented a timely claim is excused because the person who sustained the injury or loss was a minor [*see § 196.33*], was mentally or physically incapacitated [*see § 196.34*], or has died [*see § 196.35*]; and (3) the failure to have presented a timely claim was excused because of mistake, inadvertence, surprise, or excusable neglect [*see §§ 196.36 -196.41*]. It also includes forms of points and authorities supporting the following contentions: (1) that the claims period was tolled because of the plaintiff's belated discovery of the existence of the cause of action [*see § 196.60*]; (2) that there has been substantial compliance with the claims presentation requirement [*see § 196.61*]; (3) that a claim for equitable or partial equitable indemnity was timely presented [*see § 196.80*]; (4) that the failure to give notice of the insufficiency of the claim constitutes a waiver of the defense that the claim was insufficient [*see § 196.100*]; (5) that the public entity's failure to give timely notice that the claim was late constitutes a waiver of the defense that the claim was not timely [*see § 196.101*]; (6) that the failure to present a timely claim is no defense when the public agency failed to have the required statement on file in the roster of public agencies [*see § 196.102*]; and (7) that the public entity is estopped by its conduct from relying on the claimant's failure to have filed a timely claim as a defense to the claimant's action [*see § 196.103*].

Because authorities opposing the contentions set out in this chapter would not generally be used by private practitioners, they are not set out in opposing forms. Instead, authorities opposing contentions set out in a particular form, if any, are discussed in that form under a heading entitled Opposing Authorities. Authorities included under this heading are provided for informational purposes, to indicate qualifications of or limitations to the authority set out in the form.

This chapter contains forms of points and authorities relating to the timeliness of an action against a public entity under the California Tort Claims Act.

The forms in Part II, B.1. contain points and authorities relating to a complaint filed prior to the time complaints are ordinarily filed and includes a form of contention supporting the timeliness of a complaint that was prematurely filed [*see § 196.120*].

The forms in Part II, B.2. contain points and authorities relating to compliance with the appropriate statute of limitations. It includes forms of supporting contentions that the complaint was timely filed after rejection of the claim [*see § 196.140*], when no claim against the public entity was required [*see § 196.141*], after the court ordered relief from the claim filing requirement [*see § 196.142*], and in an action against a public employee or former public employee [*see § 196.143*].

The forms in Part II, B.3. contain points and authorities relating to the timeliness of complaints filed after the statute of limitations has run. It includes forms of contentions supporting the tolling of the statute of limitations pending resolution of a related administrative hearing [*see § 196.160*] and while a related federal action is pending [*see § 196.161*]. It also includes forms of contentions that the public entity is estopped from relying on the statute of limitations by engaging in settlement negotiations throughout the limitations period [*see § 196.162*], and that an amended complaint is timely because it relates back to the original complaint that was timely filed [*see § 196.163*].

This chapter also discusses the tort liability of public entities and their employees.

The forms in Part II, C.1. contain forms of points and authorities supporting various contentions that a public entity or employee is liable for injury resulting from an act or omission [*see §§ 196.180 -196.189*].

The forms in Part II, C.2. contain forms of points and authorities supporting various contentions that a public entity or employee is liable for injury resulting from a dangerous condition of the public entity's property [*see §§ 196.210 -196.214*].

The forms in Part II, C.3. contain forms of points and authorities supporting various contentions that a public entity or employee is liable for injury resulting from the breach of a duty imposed as the result of a special relationship between the injured party and the public entity or the public entity's employee, or a duty imposed as the result of some other special circumstance [*see §§ 196.230 -196.235*].

Part II, C.4. contains a form of points and authorities supporting the contentions that a public entity is liable for injury resulting from the maintenance of a nuisance on its property [*see § 196.250*].

The statutory exceptions and immunities to the general liability of public entities and employees are discussed [*see §§ 196.07 -196.10*; *196.270 -196.306*]. It discusses the statutory immunities that operate to insulate a public entity or employee from tort liability for acts or omissions. It includes forms of points and authorities supporting the contention that the following immunities are unavailable: the licensing immunity [*see §§ 196.270, 196.271*], the inspection immunity [*see § 196.272*], the misrepresentation immunity [*see §§ 196.273, 196.274*], the prisonerimmunity [*see § 196.275*], the firefighter's immunity [*see §§ 196.276, 196.277*], the immunity for discretionary acts [*see § 196.278*], the law enforcement and prosecution immunities [*see §§ 196.279 -196.281*], and the immunity for failure to conduct a physical or mental examination or to conduct an adequate examination [*see § 196.282*].

For discussion of the general statutory bases for liability of public entities and employees for acts or omissions, see *§§ 196.11 -196.12*. It includes a discussion of the statutory immunities that operate to insulate a public entity or employee from tort liability for a dangerous condition of public property. It includes forms of points and authorities supporting the contention that the design immunity is not applicable [*see § 196.300*], that the immunity for weather conditions is not applicable [*see § 196.301*], that the immunity for natural conditions is not applicable [*see § 196.302*], that the general recreational users immunity is not applicable [*see § 196.303*], that the traffic control sign immunity is not applicable [*see § 196.304*], and that the immunity for maintenance of nondedicated roads does not apply [*see § 196.305*].

Legal Topics:

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

TortsProcedureCommencement & ProsecutionSurvivalDeath of PlaintiffsTortsProcedureStatutes of LimitationsTollingGeneral OverviewTortsPublic Entity LiabilityImmunityGeneral OverviewTortsPublic Entity LiabilityLiabilityClaim PresentationGeneral OverviewTortsPublic Entity LiabilityLiabilityClaim PresentationTime LimitationsTortsPublic Entity LiabilityLiabilityState Tort Claims ActsProcedural Requirements

California Points & Authorities

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CHAPTER 196 PUBLIC ENTITIES
PART I. INTRODUCTION

19A-196 California Points & Authorities § 196.02

§ 196.02 Governing Statutes

The statutes of limitations in actions against public entities are set forth in *Gov. Code §§ 945.6, 945.8*, and *946.6(f)*. The statute of limitations for bringing an action against a public employee or former public employee is set forth in *Gov. Code § 950.6*.

The liability of public entities and their employees for injuries caused by an act or omission or a dangerous condition of public property is governed by *Gov. Code §§ 814-895.8*. However, nothing in these provisions affects liability based on contract or the right to obtain relief other than money or damages against a public entity or public employee [*Gov. Code § 814*]. Liability for nuisances are governed by *Civ. Code §§ 3479-3508.2*. The right of an erroneously convicted felon to recover from the state indemnification not exceeding $10,000 for pecuniary injury suffered as a result of the conviction, and the procedure for making the claim are governed by *Penal Code §§ 4900-4906*.

The general public entity immunities are set forth in *Gov. Code §§ 816-818.4*, and *818.6-818.9*. The general public employee immunities are set forth in *Gov. Code §§ 818.7, 818.9* and *820.2-822.2*.

Immunities to liability of public entities and employees for injuries resulting from a dangerous condition of property are set forth generally in *Gov. Code §§ 830-831.8, 835.4, 840*, and *840.6*.

The liabilities of public entities and public employees and the immunities protecting them are governed generally by Gov. Code §§ 814-895.8, Health & Safety Code § 25400, and *Veh. Code §§ 17000-17004.7*. Additional statutory exceptions and immunities are discussed in *§§ 196.180[4]* and *196.210[5]*. Claims and actions against public entities and public employees are governed by *Gov. Code §§ 900-996.6*. Tort liability under agreements between public entities is covered in *Gov. Code §§ 895-895.8* [*see First Interstate Bank v. State of California (1987) 197 Cal. App. 3d 627, 634, 243 Cal. Rptr. 8]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawTortsNuisanceElementsTortsPremises Liability & PropertyGeneral Premises LiabilityDangerous

ConditionsGeneral OverviewTortsPublic Entity LiabilityImmunityGeneral OverviewTortsPublic Entity LiabilityLiabilityClaim PresentationTime LimitationsTortsPublic Entity LiabilityLiabilityState Tort Claims ActsGeneral Overview

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19A-196 California Points & Authorities § 196.03

§ 196.03 Summary of Procedures in Claims and Actions Against Public Employees and Public Entities

[1] Presentation of Claim

Except as otherwise expressly provided, a person having a claim against a public entity or public employee for money or damages must present the claim to the public entity as a prerequisite to filing an action on it [*Gov. Code §§ 905* (claim against a local public entity), 905.2 (claim against the state of California)]. A claim relating to a cause of action for death or for injury to a person or to personal property or growing crops must be presented within six months after the date the cause of action accrued. A claim relating to any other cause of action must be presented within one year after the date the cause of action accrued [*Gov. Code § 911.2(a)*].

For purposes of determining whether a claim was presented within the required period, the presentation date is: (1) the date that the claim is submitted with the filing fee; (2) if a fee waiver is granted, the date that the claim was submitted with an affidavit requesting the fee waiver; or (3) if a fee waiver is denied, the date that the claim was submitted with an affidavit requesting the fee waiver, so long as the filing fee is paid within ten calendar days after the mailing of the notice of denial of the fee waiver [*Gov. Code § 911.2(b)*].

If a claim is filed, it must be acted on within 45 days after its presentation or it is deemed rejected [*Gov. Code § 912.4*]. If the claim is rejected by action or inaction, written notice must be given warning the claimant of the six-month period for filing a court action [*Gov. Code § 913*].

A claim must be presented not only for a cause of action sounding in tort, but for a cause of action for breach of contract as well [*City of Stockton v. Superior Court (2007) 42 Cal. 4th 730, 738, 68 Cal. Rptr. 3d 295, 171 P.3d 20]* . However, a local public entity, or a state agency, may include in any written agreement to which the public entity is a party provisions governing the presentation, by or on behalf of any party, of any or all claims arising out of or related to the agreement and the consideration and payment of such claims [*Gov. Code §§ 930, 930.2*]. Such claims procedures established in the agreement govern the claims to which the agreement relates, although statutory procedures for relief from late claims apply if the agreement requires a claim to be presented less than one year from accrual [*Gov. Code § 930.4*; *see* [5], *below*], and the limitations of *Gov. Code §§ 945.6* and *946* apply if the contractual provisions require presentation of a claim prior to suit [*Gov. Code § 930.6*; *see* [6], *below*]. However, other than the required application of

those statutory procedures, a claim subject to contractual claims procedures written into a public contract is not subject to the statutory claims presentation requirements of *Gov. Code §§ 905* and *910 et seq.*, unless such a requirement is written into the agreement [*Arntz Builders v. City of Berkeley (2008) 166 Cal. App. 4th 276, 288-291, 82 Cal. Rptr. 3d 605*].

[2] Insufficient Claim

Gov. Code §§ 910 and *910.2* prescribe content requirements applicable to claims against public entities. *Gov. Code § 910* requires a claim to contain several listed items, including the name and post office address of the claimant and the circumstances of the occurrence or transaction that gave rise to the claim [*Gov. Code § 910(a), (c)*]. *Gov. Code § 910.2* generally requires the claim to be signed, by either the claimant or by another person on the claimant's behalf [*Gov. Code § 910.2*]. If a public entity receives a claim that fails to comply substantially with the requirements of *Gov. Code § 910* or *910.2*, the entity may, within 20 days after the claim is presented, give written notice of the insufficiency to the claimant [*see Gov. Code § 910.8*; *see also Gov. Code § 915.4* (manner of giving notice)]. Failure by a public entity to give timely notice of insufficiency may result in waiver of any defense concerning the sufficiency of the claim based on a defect or omission in the claim [*see Gov. Code §§ 910.8, 911*].

A document presented to a public entity triggers the notice and defense-waiver provisions of *Gov. Code §§ 910.8* and *911* if it discloses the existence of a claim that, if not satisfactorily resolved, would result in a lawsuit against the entity [*Phillips v. Desert Hosp. Dist. (1989) 49 Cal. 3d 699, 709, 263 Cal. Rptr. 119, 780 P.2d 349* (*Code Civ. Proc. §§ 364* notice as defective claim triggering notice and defense-waiver provisions of *Gov. Code §§ 910.8* and *911*)].

Not every document is sufficient to trigger the notice and waiver provisions, however. One court held, for example, that a "Patient Problem/Complaint Form," submitted to a hospital quality assurance department, together with a "Supplemental Note" dated a few days later, both of which complained about the quality of medical care, did not constitute substantial compliance with the claims statute, and was insufficient to trigger the notice and defense-waiver provisions of *Gov. Code §§ 910.8* and *911*. In this case there was a total failure to comply with at least two of the statutory requirements: (1) failure to transmit the document to the statutorily designated agent under *Gov. Code § 915*, and *(2)* failure to indicate that a monetary claim was being asserted, as required by *Gov. Code § 910(f)* [*Wood v. Riverside Gen. Hosp. (1994) 25 Cal. App. 4th 1113, 1116-1119, 31 Cal. Rptr. 2d 8* (*Phillips* distinguished)].

[3] Late Claim

Application for leave to present a late claim is provided for in *Gov. Code § 911.4*. If a claim required by *Gov. Code § 911.2* to be presented not later than six months after accrual of the cause of action is presented without the application provided in *Gov. Code § 911.4*, the public entity may, at any time within 45 days after the claim is presented, give written notice to the person presenting it that the claim was not timely filed and is being returned without further action [*Gov. Code § 911.3(a)*]. The form of the notice must be substantially in the form set forth in *Gov. Code § 911.3(a)*. Failure to give the notice within 45 days after the claim is presented constitutes a waiver of any defense as to the time limit for presenting the claim, except that no notice need be given and no waiver results when the claim fails to state either an address to which the person presenting it desires notices to be sent or an address of the claimant [*Gov. Code § 911.3(b)*]. While the failure to give notice constitutes a waiver of any defense that the claim was untimely, it does not constitute a waiver of the defense that the action is barred by the statute of limitations set forth in *Gov. Code § 945.6*, discussed in *§ 196.03[6]* [*County of Alameda v. Superior Court (1987) 195 Cal. App. 3d 1283, 1287, 241 Cal. Rptr. 312]* .

A document presented to a public entity triggers the notice and defense-waiver provisions of *Gov. Code § 911.3* if it discloses the existence of a claim that, if not satisfactorily resolved, would result in a lawsuit against the entity [*Phillips v. Desert Hosp. Dist. (1989) 49 Cal. 3d 699, 709, 263 Cal. Rptr. 119, 780 P.2d 349* (*Code Civ. Proc. § 364* notice as defective claim triggering notice and defense-waiver provisions of *Gov. Code § 911.3*)].

[4] When Cause of Action Accrues

A cause of action accrues on the date it would be deemed to have accrued within the meaning of the statute of limitations that would apply had there been no requirement that a claim be presented to and acted on by the public entity before an action on the cause of action can be commenced. However, the date on which a cause of action for equitable indemnity or partial equitable indemnity accrues against a public entity is the date a defendant is served with the complaint giving rise to the defendant's indemnity claim against the public entity [*Gov. Code § 901*; *see § 196.80*].

For purposes of the claim-filing requirements of the Tort Claims Act, a minor's medical malpractice cause of action against a government defendant accrues when the minor's parent or guardian knew or should have known through the exercise of reasonable diligence that a negligent wrongful act of medical care caused the child's injuries [*Torres v. County of Los Angeles (1989) 209 Cal. App. 3d 325, 334-335, 257 Cal. Rptr. 211* (holding that *Code Civ. Proc. § 340.5* is unconstitutional to the extent that it provides different accrual rules for adults and minors); for further discussion of this holding, *see* Ch. 175, *Physicians and Surgeons: Medical Malpractice*].

Courts may also equitably grant additional time for the accrual of molestation claims by minors who, because of their young age, inexperience, ignorance, or other vulnerabilities, were unable at the time of the assault to comprehend the wrongfulness of the conduct [*Curtis T. v. County of Los Angeles (2004) 123 Cal. App. 4th 1405, 1421, 21 Cal. Rptr. 3d 208]* . However, an admission by the abused minor that he or she understood at the time of the abuse the wrongfulness of the conduct can defeat an attempt to delay the accrual of the cause of action [*S.M. v. Los Angeles Unified School Dist. (2010) 184 Cal. App. 4th 712, 720-721, 109 Cal. Rptr. 3d 270]* .

[5] Relief From Failure to Present Claim

If no claim is timely filed and the application for leave to present a late claim [*Gov. Code § 911.4*] is denied or deemed denied [*see Gov. Code § 911.6*], the injured person may, if grounds exist, petition the superior court for relief from the claim-presentation requirement [*see Gov. Code § 946.6*]. The petition must be filed within six months after the application for leave to present a late claim is denied or deemed denied by the publicentity [*Gov. Code § 946.6(b)*]. The petition for relief necessarily places in issue the date the cause of action accrued, which question is resolved in a nonjury proceeding [*Reyes v. County of Los Angeles (1988) 197 Cal. App. 3d 584, 595, 243 Cal. Rptr. 35]* . §§ 196.33-196.41 set out points and authorities that may be used to support this type of petition.

An order denying a petition for leave to file a late claim against a public entity under *Gov. Code 946.6* is appealable. An order granting relief is not appealable but may be reviewed on appeal by the public entity from an adverse judgment on the merits [*County of Alameda v. Superior Court (1987) 196 Cal. App. 3d 619, 622, 242 Cal. Rptr. 215]* . Moreover, an order granting relief may be reviewed by a petition for writ of mandate when that extraordinary relief may prevent a needless and expensive trial [*County of Alameda v. Superior Court (1987) 196 Cal. App. 3d 619, 623, 242 Cal. Rptr. 215]* .

[6] Action on Claim

Except as provided in *Gov. Code § 946.4* (failure to have a proper statement on file in the Roster of Public Agencies) [*see § 196.102*] and in *Gov. Code § 946.6* [*see § 196.03[5]*], no suit for money or damages can be brought against a public entity or employee unless a claim is presented to, and is acted on or deemed rejected by, the public entity [*Gov. Code §§ 945.4, 950.2*]. Thus, the failure to file a claim when one is required is normally fatal to the cause of action [*City of San Jose v. Superior Court (1974) 12 Cal. 3d 447, 454, 115 Cal. Rptr. 797, 525 P.2d 701]* . However, a workers' compensation carrier, which has paid compensation benefits to an injured worker and seeks to intervene in the injured worker's action against a public entity that is alleged to be a third-party tortfeasor, is entitled to use the tort claim filed by the injured worker to satisfy its own claim filing requirement under the California Tort Claims Act [*San Diego Unified Port Dist. v. Superior Court (1988) 197 Cal. App. 3d 843, 845, 847-852, 243 Cal. Rptr. 163]* .

Except as provided in *Gov. Code §§ 946.4* and *946.6*, and subject to *Gov. Code § 945.6(b)* (relating to persons sentenced to prison), an action against a public entity or employee must be commenced within six months after the written notice of denial of the claim given in accordance with *Gov. Code § 913* or, if written notice is not given, within two years from the date the cause of action accrued [*Gov. Code § 945.6(a)*; *see Reyes v. County of Los Angeles (1988) 197 Cal. App. 3d 584, 595, 243 Cal. Rptr. 35]* . When, however, an action against a public entity as a third-party tortfeasor is timely filed by either the injured worker for damages or by the worker's employer or its compensation carrier to recover compensation benefits paid or to be paid to the injured worker, a complaint in intervention by the employer/carrier in the worker's action or by the worker in the employer/carrier's action [*see Lab. Code § 3853*], as the case may be, is timely even though not filed within the time specified in *Gov. Code § 945.6(a)* [*Home Ins. Co. v. Southern Cal. Rapid Transit Dist. (1987) 196 Cal. App. 3d 522, 523-526, 241 Cal. Rptr. 858]* .

If the court grants a petition under *Gov. Code § 946.6*, discussed in *§ 196.03[5]*, suit on the cause of action to which the claim relates must be filed in the court within 30 days [*Gov. Code § 946.6(f)*; *see Bell v. Tri-City Hosp. Dist. (1987) 196 Cal. App. 3d 438, 441, 444, 241 Cal. Rptr. 796* (prematurely filed complaint complies with 30-day requirement)].

A plaintiff suing a public entity or employee for medical malpractice must meet the three-year limitations period of *Code Civ. Proc. § 340.5*, and failure to do so will provide a limitations defense for the defendant even if the plaintiff's action is otherwise timely under the Government Claims Act [*Roberts v. County of Los Angeles (2009) 175 Cal. App. 4th 474, 481, 96 Cal. Rptr. 3d 60]* . For further discussion, *see* Ch. 175, *Physicians and Surgeons: Medical Malpractice* .

[7] Pleading Presentation and Rejection of Claim; Variance

Because submission of a claim to a public entity is a condition precedent to filing suit against that entity [*see Gov. Code § 945.4*], the California Supreme Court has held that a plaintiff must allege in the complaint either facts demonstrating that the plaintiff has complied with the claim presentation requirement or facts excusing such compliance [*State of California v. Superior Court (2004) 32 Cal. 4th 1234, 1239-1243, 13 Cal. Rptr. 3d 534, 90 P.3d 116]* . The plaintiff's failure to do so subjects the complaint to a general demurrer for failure to state facts sufficient to constitute a cause of action [*State of California v. Superior Court (2004) 32 Cal. 4th 1234, 1243, 13 Cal. Rptr. 3d 534, 90 P.3d 116]* .

For the effect of a variance between the claim presented and rejected and the complaint filed, see *Stevenson v. San Francisco Hous. Auth. (1994) 24 Cal. App. 4th 269, 275-278, 29 Cal. Rptr. 2d 398* ; *Watson v. State of California (1993) 21 Cal. App. 4th 836, 844-845, 26 Cal. Rptr. 2d 262* ; *Donohue v. State of California (1986) 178 Cal. App. 3d 795, 799, 801, 802-805, 224 Cal. Rptr. 57* ; and *Moore v. State of California (1984) 157 Cal. App. 3d 715, 719-720, 722-725, 203 Cal. Rptr. 847* .

For discussion of when a complaint that includes elaboration or addition of detail to a claim will not be construed as a variance of the claim, see *White v. Superior Court (1990) 225 Cal. App. 3d 1505, 1511, 275 Cal. Rptr. 706* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsProcedureStatutes of LimitationsAccrual of ActionsGeneral OverviewTortsPublic Entity LiabilityLiabilityClaim PresentationGeneral OverviewTortsPublic Entity LiabilityLiabilityClaim PresentationContent & FormTortsPublic Entity LiabilityLiabilityClaim PresentationTime LimitationsTortsPublic Entity LiabilityLiabilityState Tort Claims ActsProcedural Requirements

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19A-196 California Points & Authorities § 196.04

§ 196.04 General Rule of Nonliability of Public Entities for Torts

All common-law or judicially declared forms of liability for public entities other than liability imposed by the California or United States Constitution (for example, liability for inverse condemnation) are abolished by *Gov. Code § 815*. *Gov. Code § 815* provides that except as otherwise provided by statute, (1) a public entity is not liable for an injury, whether the injury arises out of an act or omission of the public entity or a public employee or any other person [*Gov. Code § 815(a)*; *see Fredette v. City of Long Beach (1986) 187 Cal. App. 3d 122, 129, 231 Cal. Rptr. 598]* ; and (2) the liabilityof a public entity established by *Gov. Code §§ 814-895.8* is subject to any immunity of the public entity provided by statute and is subject to any defenses that would be available to the public entity if it were a private person [*Gov. Code § 815(b)*; *see Harshbarger v. City of Colton (1988) 197 Cal. App. 3d 1335, 1339, 243 Cal. Rptr. 463]* . Thus, *Gov. Code § 815* restores sovereign immunity in California except as provided in the California Tort Claims Act or in other statutes [*Tolan v. State of California ex rel. Dep't of Transp. (1979) 100 Cal. App. 3d 980, 983, 986, 161 Cal. Rptr. 307]* . That is, in California, all government tort liability must be based on statute, although the statute providing for liability need not be part of the California Tort Claims Act [*see, e.g., DeJung v. Superior Court (2008) 169 Cal. App. 4th 533, 545-547, 87 Cal. Rptr. 3d 99* (Fair Employment and Housing Act applies to public entity employers, making such employers susceptible to direct liability for prohibited discrimination); *see Gov. Code § 12926(d)*]. Nor must the statute provide on its face that it is applicable to public entities. Rather, a liability is deemed provided by statute if a statute defines the tort in general terms [*Lopez v. Southern Cal. Rapid Transit Dist. (1985) 40 Cal. 3d 780, 785 n.2, 221 Cal. Rptr. 840, 710 P.2d 907]* .

However, a public entity may not be directly liable under general tort principles in the absence of a specific statute that provides that the entity may be liable [*Munoz v. City of Union City (2004) 120 Cal. App. 4th 1077, 1111-1113, 16 Cal. Rptr. 3d 521]* . Thus, for example, a public entity cannot be held liable under general tort principles for alleged negligence in hiring and supervising its employees, as there is no statutory basis for imposing such liability [de *Villers v. County of San Diego (2007) 156 Cal. App. 4th 238, 252-253, 67 Cal. Rptr. 3d 253]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsClaims By & AgainstTortsPublic Entity LiabilityImmunitySovereign

ImmunityTortsPublic Entity LiabilityLiabilityState Tort Claims ActsExclusions From Liability

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19A-196 California Points & Authorities § 196.05

§ 196.05 Basis of Liability of Public Employees and Public Entities

[1] Act or Omission

Basically, a public entity is liable for an injury proximately caused by an act or omission of an employee of the public entity within the scope of his or her employment if the act or omission would have given rise to a cause of action against that employee or his or her personal representative [*Gov. Code § 815.2(a)*]. A public employee is liable for an injury caused by his or her act or omission to the same extent as a private person and has the same defenses [*Gov. Code § 820*]. However, special pleading requirements may apply in actions against certain public employees or officers [*see Gov. Code § 951*]. Points and authorities relating to the general liability of public entities and employees for an act or omission are *set forth in § 196.180*, with additional points and authorities relating to liability for an act or omission *set out in §§ 196.181 -196.189*.

Both public employees and public entities are protected from liability by a variety of statutory immunities. The general public entity immunities are set forth in *Gov. Code §§ 816-818.4*, and *818.6-818.9*, and the general public employee immunities are set forth in *Gov. Code §§ 818.7, 818.9* and *820.2-822.2*. The public employee immunities are important in actions against public entities because the public entity is normally immune from liability if the public employee is immune [*Gov. Code § 815.2(b)*]. The statutory immunities to general liability of public entities and employees for an act or omission are discussed fully in §§ 196.07-196.10. §§ 196.180-196.189 include forms of points and authorities supporting contentions that a particular immunity does not apply in a given fact situation.

[2] Dangerous Condition of Public Property

A public entity is also liable for injuries resulting from a dangerous condition of its property [*Gov. Code § 835*]. The liability of public employees for a dangerous condition is set forth in *Gov. Code § 840.2*. Points and authorities relating to the general liability of public entities and employees for injuries resulting from a dangerous condition of property are *set forth in § 196.210*, with additional points and authorities relating to liability for a dangerous condition of public property *set out in §§ 196.211 -196.214*.

The res ipsa loquitur presumption does not satisfy the requirements for holding a public entity liable under *Gov. Code § 835(a)*. Res ipsa loquitur requires the plaintiff to show only that (1) the accident was of a kind ordinarily not occurring

in the absence of negligence, (2) the instrumentality of harm was within the defendant's exclusive control, and (3) the plaintiff did not voluntarily contribute to the injuries. By contrast, *Gov. Code § 835(a)* requires the plaintiff to show that an employee of the public entity created the dangerous condition [*Brown v. Poway Unified Sch. Dist. (1993) 4 Cal. 4th 820, 836, 15 Cal. Rptr. 2d 679, 843 P.2d 624]* . The term "created" means the sort of involvement by an employee that would justify a presumption of notice on the entity's part; because res ipsa loquitur alone does not establish that level of involvement, it cannot be the basis for dangerous-condition liability [*Brown v. Poway Unified Sch. Dist. (1993) 4 Cal. 4th 820, 836-838, 15 Cal. Rptr. 2d 679, 843 P.2d 624]* .

Immunities to the liability of public entities and employees for injuries resulting from a dangerous condition of property are set forth generally in *Gov. Code §§ 830-831.8, 835.4, 840*, and *840.6*. These statutory immunities are discussed fully in § 196.12. §§ 196.300-196.306 includes forms of points and authorities supporting contentions that a particular immunity does not apply in a given fact situation.

[3] Special Relationship

An essential element of a cause of action for tort damages is that there be a duty, or obligation, owed by the defendant to the plaintiff [*see Civ. Code § 3333*]. The duty may arise out of a special relationship between the parties [*see Davidson v. City of Westminster (1982) 32 Cal. 3d 197, 203, 185 Cal. Rptr. 252, 649 P.2d 894]* . Points and authorities supporting the existence of a special relationship in specific fact situations between a public entity or a public employee and a person injured are *set forth in §§ 196.230 -196.235*.

[4] Maintenance of Public Nuisance

Apart from liability under the California Tort Claims Act, a public entity may be liable for the maintenance of a nuisance on its property. Points and authorities supporting liability for the maintenance of a nuisance is *set forth in § 196.250*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawTortsNuisanceTypesPublic NuisanceTortsNegligenceDutyAffirmative Duty to ActSpecial RelationshipsGovernment OfficialsTortsPremises Liability & PropertyGeneral Premises LiabilityDangerous ConditionsGeneral OverviewTortsPublic Entity LiabilityImmunityGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsProcedural RequirementsTortsPublic Entity LiabilityLiabilityState Tort Claims ActsScope of EmploymentTortsPublic Entity LiabilityLiabilityVicarious Liability

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19A-196 California Points & Authorities § 196.06

§ 196.06 Defense and Indemnification of Public Employees

Defense and indemnification of public employees is covered in *Gov. Code §§ 825-825.6. Gov. Code § 995.2(c)* allows a public entity to withdraw from the defense of an employee in conflict of interest situations [*see Stewart v. City of Pismo Beach (1995) 35 Cal. App. 4th 1600, 1606, 42 Cal. Rptr. 2d 382]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsProcedureMultiple DefendantsIndemnityGeneral OverviewTortsPublic Entity LiabilityLiabilityVicarious Liability

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19A-196 California Points & Authorities § 196.07

§ 196.07 Availability of Statutory Immunities and Defenses

Gov. Code § 815 provides, except as otherwise provided by statute, that (a) a public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person, and (b) the liability of a public entity established by *Gov. Code §§ 814-895.8* is subject to any immunity of the public entity provided by statute and is subject to any defenses that would be available to the public entity if it were a private person.

Gov. Code § 820(b) provides that the liability of a public employee under *Gov. Code §§ 814-895.8* is subject to any defenses that would be available to the public employee if he or she were a private person.

For forms of points and authorities supporting contentions that a particular statute applies to impose liability on a public entity or employee for its act or omission, see *§§ 196.180 -196.189*.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPublic Entity LiabilityImmunityGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsExclusions From LiabilityTortsPublic Entity LiabilityLiabilityState Tort Claims ActsScope of Employment

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19A-196 California Points & Authorities § 196.08

§ 196.08 Immunity of Public Entity

[1] When Employee Is Immune

Gov. Code § 815.2(b) provides, except as otherwise provided by statute, that a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability.

[2] Act or Omission of Independent Contractor for Which Public Entity Is Immune

Gov. Code § 815.4, providing that a public entity is liable for injury proximately caused by a tortious act or omission of an independent contractor of the entity to the same extent that the entity would be subject to such liability were it a private person, does not subject the public entity to liability for the act or omission of an independent contractor if the public entity would not have been liable had the act or omission been that of an employee of the public entity.

[3] Injuries by Members of National Guard

Gov. Code § 816 provides that a public entity is not liable for injury arising out of any activity conducted by a member of the California National Guard pursuant to *32 U.S.C.S. §§ 316, 502, 503, 504,* or *505* and compensated pursuant to the Federal Tort Claims Act. Moreover, under *Mil. & Vet. Code § 392*, members of the militia are not liable for any act or acts done by them in active service of the state in performance of their duty. Thus, for example, one court held that the state was immune from liability under *Gov. Code § 815.2* and *Mil. & Vet. Code § 392* in a wrongful death action brought by the family of a county deputy sheriff who was killed during a drug interdiction operation in the crash of a helicopter that was being flown by an officer of the California National Guard, which provided air support to state and federal law enforcement officials engaged in the operation [*see Chester v. State of California (1994) 21 Cal. App. 4th 1002, 1004-1008, 26 Cal. Rptr. 2d 575]* .

[4] Punitive Damages

Gov. Code § 818 provides that, notwithstanding any other provision of law, a public entity is not liable for damages awarded under *Civ. Code § 3294* (exemplary or punitive damages) or other damages imposed primarily for the sake of example and by way of punishing the defendant. *Gov. Code § 818* applies only to punitive damages; it does not prohibit

the assessment of civil penalties against a public entity [*see* *Kizer v. County of San Mateo (1991) 53 Cal. 3d 139, 145-150, 279 Cal. Rptr. 318, 806 P.2d 1353* (penalties for noncompliance with Long-Term Care, Health, Safety, and Security Act of 1973 (*Health & Safety Code § 1417 et seq.*) governing long-term health care facilities); *Los Angeles County Metro. Transp. Auth. v. Superior Court (2004) 123 Cal. App. 4th 261, 270-271, 20 Cal. Rptr. 3d 92* (civil penalty provided by *Civ. Code § 52(b)(2)* for victims of hate crimes may be imposed against public entity)].

[5] Adoption or Failure to Adopt or Enforce Law

Gov. Code § 818.2 provides that a public entity is not liable for injury caused by adopting or failing to adopt an enactment or by failing to enforce any law [*see* *Nunn v. State of California (1984) 35 Cal. 3d 616, 621, 200 Cal. Rptr. 440, 677 P.2d 846]* .

For forms of points and authorities supporting the contention that the immunity under *Gov. Code § 818.2* does not apply, see *§§ 196.271* and *196.279*.

[6] Acts Relating to Permits, Licenses, Certificates, Approvals, Orders, and Similar Authorizations by Public Entities

Gov. Code § 818.4 provides that a public entity is not liable for an injury caused by the issuance, denial, suspension, or revocation of, or by the failure or refusal to issue, deny, suspend, or revoke, any permit, license, certificate, approval, order, or similar authorization where the public entity or its employee is authorized by enactment to determine whether such authorization should be issued, denied, suspended, or revoked.

For forms of points and authorities supporting the contention that the immunity under *Gov. Code § 818.4* does not apply, see *§§ 196.270* and *196.271*.

[7] Acts Relating to Inspection of Property

Gov. Code § 818.6 provides that a public entity is not liable for injury caused by its failure to make an inspection, or by reason of making an inadequate or negligent inspection, of any property, other than its property (as defined in *Gov. Code § 830(c)*, relating to dangerous condition of public property) for the purpose of determining whether the property complies with or violates any enactment or contains or constitutes a hazard to health or safety [*see* *Harshbarger v. City of Colton (1988) 197 Cal. App. 3d 1335, 1344-1345, 243 Cal. Rptr. 463* ; *Cochran v. Herzog Engraving Co. (1984) 155 Cal. App. 3d 405, 411-413, 205 Cal. Rptr. 1]* .

For a form of points and authorities supporting the contention that the immunity under *Gov. Code § 818.6* does not apply, see *§ 196.272*.

[8] Misrepresentations of Employees

Gov. Code § 818.8 provides that a public entity is not liable for an injury caused by misrepresentations by its employee, whether or not the misrepresentation is negligent or intentional [*see* *Jopson v. Feather River Air Quality Mgmt. Dist. (2003) 108 Cal. App. 4th 492, 495-499, 133 Cal. Rptr. 2d 506* ; *Bastian v. County of San Luis Obispo (1988) 199 Cal. App. 3d 520, 532-533, 245 Cal. Rptr. 78* ; *Harshbarger v. City of Colton (1988) 197 Cal. App. 3d 1335, 1339-1343, 243 Cal. Rptr. 463]* .

For forms of points and authorities supporting the contention that the immunity under *Gov. Code § 818.8* does not apply, see *§§ 196.273* and *196.274*.

[9] Injuries by and to Prisoners

Gov. Code § 844.6(a) provides that, notwithstanding any other provision in *Gov. Code §§ 814-895.8* (relating to tort liability of public entities and employees), and except as provided in *Gov. Code §§ 814* (liability based on contract or right to relief other than money or damages), 814.2 (relating to workers' compensation), 845.4 [*see § 196.09[6]*], and 845.6 [*see § 196.09[7]*], or in *Penal Code §§ 3500-3524* (relating to biomedical and behavioral research), a public entity is not liable for (1) an injury proximately caused by any prisoner (defined in *Gov. Code § 844*) or (2) an injury to any prisoner.

Gov. Code § 844.6(b) provides that nothing in *Gov. Code § 844.6* affects the liability of a public entity under *Veh. Code §§ 17000-17004.7*, relating to motor vehicles. *Gov. Code § 844.6(c)* provides that, except for an injury to a prisoner, nothing in *Gov. Code § 844.6* prevents recovery from the public entity for an injury resulting from the dangerous condition of public property under *Gov. Code §§ 830-840.6* [*see §§ 196.11 -196.12*]. *Gov. Code § 844.6(d)* provides that (1) nothing in *Gov. Code § 844.6* exonerates a public employee from liability for injury proximately caused by his or her negligent or wrongful act or omission; and (2) the public entity may but is not required to pay any judgment, compromise, or settlement, or may but is not required to indemnify any public employee, in any case where the public entity is immune from liability under *Gov. Code § 844.6*; except that the public entity shall pay, as provided in *Gov. Code §§ 825-825.6*, any judgment based on a claim against a public employee who is lawfully engaged in the practice of one of the healing arts under any law of California for malpractice arising from an act or omission in the scope of his or her employment, and shall pay any compromise or settlement of a claim or action, based on the malpractice, to which the public entity has agreed.

For a form of points and authorities supporting the contention that the immunity under *Gov. Code § 844.6* does not apply, see *§ 196.275*.

[10] Fire Protection or Firefighting Service Received From Another Public Entity

Although *Gov. Code § 850.6* imposes liability on the public entity providing fire protection or firefighting service outside its regular area for injuries for which liability is imposed by statute caused by its act or omission or the act or omission of its employee [*see § 196.180*], it also provides that, notwithstanding any other law, the public entity receiving such fire protection or firefighting service is not liable for any act or omission of the public entity providing the service or for any act or omission of an employee of the public entity providing the service.

Gov. Code § 850.6 further provides that (1) the two public entities may by agreement determine the extent, if any, to which the public entityreceiving the service will be required to indemnify the public entity providing the service; and (2) any claims against the state shall be presented to the California Victim Compensation and Government Claims Board in accordance with *Gov. Code §§ 900-935.7* (relating to claims against public entities) and *Gov. Code §§ 940-962* (relating to actions against public entities and public employees).

[11] Injury to Mental Patient

Gov. Code § 854.8(a) provides that, notwithstanding any other provision of *Gov. Code §§ 814-895.8* (relating to tort liability of public entities and employees), and except as provided in *Gov. Code §§ 814* (liability based on contract or right to relief other than money or damages), 814.2 (relating to workers' compensation), 855 [*see § 196.185*], and 855.2 [*see § 196.09[14]*], a public entity is not liable for (1) an injury proximately caused by a patient of a mental institution; or (2) an injury to an inpatient of a mental institution.

Gov. Code § 854.8(b) provides that nothing in *Gov. Code § 854.8* affects the liability of a public entity under *Veh. Code §§ 17000-17004.7*, relating to motor vehicles. *Gov. Code § 854.8(c)* provides that, except for an injury to an inpatient of a mental institution (defined in *Gov. Code § 854.2*), nothing in *Gov. Code § 854.8* prevents recovery from the public entity for an injury resulting from the dangerous condition of public property under *Gov. Code §§ 830-840.6* [*see §§ 196.11 -196.12*]. *Gov. Code § 854.8(d)* provides that (1) nothing in *Gov. Code § 854.8* exonerates a public

employee from liability for injury proximately caused by his or her negligent or wrongful act or omission; and (2) the public entity may but is not required to pay any judgment, compromise, or settlement, or may but is not required to indemnify any public employee, in any case where the public entity is immune from liability under *Gov. Code § 854.8*; except that the public entity shall pay, as provided in *Gov. Code §§ 825-825.6*, any judgment based on a claim against a public employee who is lawfully engaged in the practice of one of the healing arts under any law of California for malpractice arising from an act or omission in the scope of his or her employment, and shall pay any compromise or settlement of a claim or action, based on the malpractice, to which the public entity has agreed.

The immunity provided by *Gov. Code § 854.8* is jurisdictional and may be raised at any time [*see Hata v. Los Angeles County Harbor/UCLA Med. Ctr. (1995) 31 Cal. App. 4th 1791, 1804, 37 Cal. Rptr. 2d 630]* .

[12] Act Constituting Nuisance

Civ. Code § 3482 provides that nothing that is done or maintained under the express authority of a statute can be deemed a nuisance. This provision applies to public entities as well as to others [*see Farmers Ins. Exch. v. State of California (1985) 175 Cal. App. 3d 494, 503, 221 Cal. Rptr. 225* ; *see also § 196.250*].

[13] Training Programs for Emergency Medical Services

Health & Safety Code § 1799.100 provides in relevant part that in order to encourage local agencies and other organizations to train people in emergency medical services, no local agency, entity of state or local government, or other public organization that sponsors, authorizes, supports, finances, or supervises the training of people, or certifies those people, excluding physicians and surgeons, registered nurses, and licensed vocational nurses, in emergency medical services shall be liable for any civil damages alleged to result from those training programs. Effective January 1, 2009, *Health & Safety Code § 1799.100* also provides similar civil immunity from liability for improper training for local agencies, state or local government entities, and private businesses or nonprofit organizations included on the statewide emergency services registry established under *Gov. Code § 8588.2* that voluntarily and without expectation and receipt of compensation donate services, goods, labor, equipment, resources, or dispensaries or other facilities in compliance with *Gov. Code § 8588.2* [*Health & Safety Code § 1799.100*].

[14] Peace Officers Conducting Vehicular Pursuit

Effective July 1, 2007, a public agency that adopts and promulgates a written policy on vehicular pursuits that meets specified criteria, and provides regular and periodic training on vehicular pursuits on an annual basis, is immune from liability for civil damages for personal injury, death, or property damage resulting from the collision of a vehicle being operated by an actual or suspected violator of the law who is being, has been, or believes he or she is being or has been, pursued in a motor vehicle by a peace officer employed by the public agency [*Veh. Code § 17004.7(b)(1), (g)*]. Similar statutory immunity was provided prior to July 1, 2007, although the earlier version of the statute did not impose either a promulgation or training requirement on the public agency, and it imposed less detailed substantive criteria on the adopted policy [*see* former Veh. Code § 17004.7(b), (c)].

Veh. Code § 17004.7(c) sets forth the minimum standards that must be met by any written policy on vehicular pursuits adopted by the public entity, and *Veh. Code § 17004.7(f)* provides that a determination of whether the policy adopted, or training implemented, complies with *Veh. Code § 17004.7(c)* is a question of law for the court [*see Brumer v. City of Los Angeles (1994) 24 Cal. App. 4th 983, 987-988, 29 Cal. Rptr. 2d 515* (although decided under former version of statute, immunity applies when pursuit policy complies with statute, extent to which pursuit policy followed in particular pursuit irrelevant if policy meets statutory criteria)].

The policy must do more than advise officers to exercise their discretion and use their best judgment. Instead, the policy must control and channel the officer's discretion by providing objective standards by which to evaluate whether the

pursuit should be initiated or terminated [*Ketchum v. State of California (1998) 62 Cal. App. 4th 957, 966-970, 73 Cal. Rptr. 2d 152* (policy adopted by CHP held to provide adequate guidelines for justification, initiation, and termination of pursuit under former version of Veh. Code § 17004.7)].

Veh. Code § 17004.7(a) provides that the adoption of a policy by a public agency is discretionary and that the immunity provided by *Veh. Code§ 17004.7(b)* is in addition to any other immunity provided by law.

The statute uses the terms "public entity" and "public agency" interchangeably and both terms include a city [*Alcala v. City of Corcoran (2007) 147 Cal. App. 4th 666, 671, 53 Cal. Rptr. 3d 908]* .

[15] Peace Officer Employed as Private Security Guard or Patrolman

Pen. Code § 70(d) provides that a public entity may be liable for the actions of off-duty peace officers who are engaged in casual or part-time employment as security guards or patrolmen for private employers, but only under limited circumstances. For a public entity to be liable for an off-duty officer's tortious conduct while engaged in secondary employment, (1) the peace officer must have been in his or her uniform, (2) the secondary employment must have been approved by the county board of supervisors or city council of the principal employer, or their designees, (3) the wearing of uniforms and equipment must have been approved by the principal employer, and (4) the peace officer must be subject to reasonable rules and regulations of the principal employer [*Pen. Code § 70(d)(1)*; *Melendez v. City of Los Angeles (1998) 63 Cal. App. 4th 1, 6-7, 12, 73 Cal. Rptr. 2d 469* (trial court judgment holding city liable reversed when all conditions of statute were not met)]. However, it should be noted that as of 1997, the principal public employer is required to get an indemnity agreement from the secondary private employer as a condition of approving the casual or part-time employment [*Pen. Code § 70(d)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesPunitive DamagesAvailabilityGovernmental EntitiesTortsPremises Liability & PropertyGeneral Premises LiabilityDefensesFirefighter's RuleTortsPublic Entity LiabilityImmunityGeneral OverviewTortsPublic Entity LiabilityLiabilityGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsEmployeesTortsPublic Entity LiabilityLiabilityState Tort Claims ActsExclusions From LiabilityTortsPublic Entity LiabilityLiabilityVicarious Liability

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19A-196 California Points & Authorities § 196.09

§ 196.09 Immunity of Public Entity and Employee

[1] Publication of Records Relating to Controlled Substances Violators

Gov. Code § 818.7 provides that no board, commission, or any public officer or employee of the state of California or of any district, county, city and county, or city is liable for any damage or injury to any person resulting from the publication of any reports, records, prints, or photographs of or concerning any person convicted of violation of any law relating to the use, sale, or possession of controlled substances, when such publication is to school authorities for use in instruction on the subject of controlled substances or to any person when used for the purpose of general education. However, the name of any person concerning whom any such reports, records, prints, or photographs are used shall be kept confidential and every reasonable effort shall be made to maintain as confidential any information which may tend to identify the person.

[2] Advice to Small Claims Court Litigants

Gov. Code § 818.9 provides that a public entity, its employees, and volunteers shall not be liable because of any advice provided to small claims court litigants pursuant to *Code Civ. Proc. §§ 116.260, 116.940*.

[3] Failure to Restrict or Prohibit Tunnel Traffic of Vehicles Carrying Flammable Liquids

Gov. Code § 821.5 provides that neither a public entity nor an employee acting within the scope of his or her employment is liable for failing to prohibit or restrict the time that cargo tank vehicles required to display flammable liquid placards may travel through a tunnel.

[4] Failure to Provide Police Protection

Gov. Code § 845 provides that neither a public entity nor a public employee is liable for failure to establish a police department or otherwise provide police protection service or, if police protection service is provided, for failure to provide sufficient police protection service [*see Zelig v. County of Los Angeles (2002) 27 Cal. 4th 1112, 1144-1147, 119 Cal. Rptr. 2d 709, 43 P.3d 1171* (county not liable for failing to prevent shooting in public courthouse); *Peterson v. San Francisco Cmty. Coll. Dist. (1984) 36 Cal. 3d 799, 815, 205 Cal. Rptr. 842, 685 P.2d 1193* (college district not

liable for failure to provide police protection to female student for injuries sustained when assaulted while ascending staircase of campus parking lot); *Gates v. Superior Court (1995) 32 Cal. App. 4th 481, 494, 38 Cal. Rptr. 2d 489* (while *Gov. Code § 845* applied to complaint for money damages for failure to provide sufficient police protection during riot, immunity is inapplicable to suit for equitable relief); *see also Davidson v. City of Westminster (1982) 32 Cal. 3d 197, 203-205, 185 Cal. Rptr. 252, 649 P.2d 894* (discussing "trilogy of cases" in which court considered duty of care owed by police or correctional officials)].

[5] Failure to Provide Prison, Jail, or Correctional Facilities

Gov. Code § 845.2 provides that except as provided in *Gov. Code §§ 830-840.6*, relating to dangerous conditions of public property, neither a public entity nor a public employee is liable for failure to provide a prison, jail, or penal or correctional facility or, if such facility is provided, for failure to provide sufficient equipment, personnel, or facilities therein.

[6] Interference With Prisoner's Right to Judicial Determination or Review of Legality of Confinement

Gov. Code § 845.4 provides that neither a public entity nor a public employee acting within the scope of his or her employment is liable forinterfering with the right of a prisoner to obtain a judicial determination or review of the legality of his or her confinement. *Gov. Code § 845.4* further provides, however, that a public employee, and the public entity when the employee is acting within the scope of his or her employment, is liable for injury proximately caused by the employee's intentional and unjustifiable interference with such right, but no cause of action for the injury shall be deemed to accrue until it has first been determined that the confinement was illegal.

[7] Failure to Provide Prisoner With Medical Care

Gov. Code § 845.6 provides that neither a public entity nor a public employee is liable for injury proximately caused by the failure of the employee to furnish or obtain medical care for a prisoner in his or her custody. *Gov. Code § 845.6* further provides, however, that (1) except as otherwise provided in *Gov. Code §§ 855.8* and *856* [*see § 196.09[17]* and *[18]*], a public employee, and the public entity when the employee is acting within the scope of his or her employment, is liable if the employee knows or has reason to know that the prisoner is in need of immediate medical care and he or she fails to take reasonable action to summon such medical care (*see § 196.183*); and (2) nothing in *Gov. Code § 845.6* exonerates a public employee who is lawfully engaged in the practice of one of the healing arts under any law of California from liability for injury proximately caused by malpractice, or exonerates the public entity from its obligation to pay any judgment, compromise, or settlement that it is required to pay under *Gov. Code § 844.6(d)* [*see § 196.08[9]*].

[8] Determinations Relating to Parole or Release of Prisoner and Injuries by Escaping or Escaped Prisoner, Escaping or Escaped Arrestee, or Person Resisting Arrest

Gov. Code § 845.8(a) provides that neither a public entity nor a public employee is liable for any injury resulting from determining whether to parole or release a prisoner or from determining the terms and conditions of his or her parole or release or from determining whether to revoke the parole or release. Ministerial acts undertaken in the performance of correctional policy decisions are not covered by this immunity, however [*Perez-Torres v. State of California (2007) 42 Cal. 4th 136, 144-145, 64 Cal. Rptr. 3d 155, 164 P.3d 583* (overruling *Swift v. Department of Corrections (2004) 116 Cal. App. 4th 1365, 11 Cal. Rptr. 3d 406* , failure to release prisoner after learning wrong man was imprisoned was ministerial act not protected by immunity)].

Gov. Code § 845.8(b) provides immunity for any injury caused by (a) an escaping or escaped prisoner, (b) an escaping or escaped arrested person, or (c) a person resisting arrest. This immunity is absolute in that it encompasses both discretionary and ministerial acts or omissions of public entities and public employees [*Ladd v. County of San Mateo (1996) 12 Cal. 4th 913, 50 Cal. Rptr. 2d. 309, 911 P.2d 496* ; *Duarte v. City of San Jose (1980) 100 Cal. App. 3d 648, 654, 161 Cal. Rptr. 140* ; *see Whitcombe v. County of Yolo (1977) 73 Cal. App. 3d 698, 712-713, 141 Cal. Rptr. 189]* .

[9] Failure to Arrest or Retain Arrested Person in Custody

Gov. Code § 846 provides that neither a public entity nor a public employee is liable for injury caused by the failure to make an arrest or by the failure to retain an arrested person in custody [*see Davidson v. City of Westminster (1982) 32 Cal. 3d 197, 205-206 n.4, 185 Cal. Rptr. 252, 649 P.2d 894]* .

[10] Failure to Provide Fire Protection Service

Gov. Code § 850 provides that neither a public entity nor a public employee is liable for failure to establish a fire department or otherwise to provide fire protection service.

[11] Failure to Provide or Maintain Sufficient Personnel, Equipment, or Other Fire Protection Facilities

Gov. Code § 850.2 provides that neither a public entity that has undertaken to provide fire protection service, nor an employee of the public entity, is liable for any injury resulting from the failure to provide or maintain sufficient personnel, equipment, or other fire protection facilities.

[12] Condition of Firefighting Equipment or Facilities or Injuries Caused in Fighting Fires

Gov. Code § 850.4 provides that neither a public entity nor a public employee acting in the scope of his or her employment is liable for any injury resulting from the condition of fire protection or firefighting equipment or facilities or, except as provided in *Veh. Code §§ 17000-17004.7*, relating to motor vehicles, for any injury caused in fighting fires.

For forms of points and authorities supporting the contention that the immunity under *Gov. Code § 850.4* does not apply, see *§§ 196.276* and *196.277*.

[13] Transportation of Person Injured by Fire

Gov. Code § 850.8 provides that (1) any member of an organized fire department, fire protection district, or other firefighting unit of either the state of California or any political subdivision, any employee of the Department of Forestry, or any other public employee when acting in the scope of his or her employment, may transport or arrange for the transportation of any person injured by a fire, or by a fire protection operation, to a physician and surgeon or hospital if the injured person does not object to the transportation; and (2) neither a public entity nor a public employee is liable for any injury sustained by the injured person as a result of or in connection with that transportation or for any medical, ambulance, or hospital bills incurred by or in behalf of the injured person or for any otherdamages. *Gov. Code § 850.8* further provides, however, that a public employee is liable for injury proximately caused by his or her willful misconduct in transporting the injured person or arranging for the transportation [*see § 196.184*].

[14] Interference With Right of Medical Facility Inmate to Judicial Determination or Review of Legality of Confinement

Gov. Code § 855.2 provides that neither a public entity nor a public employee acting within the scope of his or her employment is liable for interfering with the right of an inmate of a medical facility (defined in *Gov. Code § 854*) operated or maintained by a public entity to obtain a judicial determination or review of the legality of the inmate's confinement. *Gov. Code § 855.2* further provides, however, that a public employee, and the public entity when the employee is acting within the scope of his or her employment, is liable for injury proximately caused by the employee's intentional and unjustifiable interference with such right, but no cause of action for the injury shall be deemed to accrue until it has first been determined that the confinement was illegal.

[15] Decision Relating to Prevention or Control of Communication of Disease

Gov. Code § 855.4(a) provides that neither a public entity nor a public employee is liable for an injury resulting from the decision to perform or not to perform any act to promote the public health of the community by preventing disease or controlling the communication of disease within the community if the decision whether the act was or was not to be performed was the result of the exercise of discretion vested in the public entity or the public employee, whether or not such discretion is abused. *Gov. Code § 855.4(b)* adds that neither a public entity nor a public employee is liable for an injury caused by an act or omission in carrying out with due care a decision described in *Gov. Code § 855.4(a)*.

[16] Failure to Make Adequate Physical or Mental Examination

Gov. Code § 855.6 provides that, except for an examination or diagnosis for the purpose of treatment, neither a public entity nor a public employee acting within the scope of his or her employment is liable for injury caused by the failure to make a physical or mental examination, or to make an adequate physical or mental examination, of any person for the purpose of determining whether the person has a disease or physical or mental condition that would constitute a hazard to the health or safety of him or herself or others [*see Smith v. County of Kern (1993) 20 Cal. App. 4th 1826, 1830-1835, 25 Cal. Rptr. 2d 716* (immunity under *Gov. Code § 855.6* did not apply to county hospital's negligent failure to perform test for AIDS virus on blood sample taken from patient for purpose of determining whether plaintiff police officer had been exposed to the virus, because the test was for the purpose of treating plaintiff); *see also § 196.282*].

[17] Diagnosing or Failing to Diagnose Mental Illness or Addiction and Treatment

Gov. Code § 855.8(a) provides that neither a public entity nor a public employee acting within the scope of his or her employment is liable for injury resulting from diagnosing or failing to diagnose that a person is afflicted with mental illness or addiction (defined in *Gov. Code § 854.4*) or from failing to prescribe treatment for mental illness or addiction. *Gov. Code § 855.8(b)* provides that a public employee acting within the scope of his or her employment is not liable for administering with due care the treatment prescribed for mental illness or addiction.

Gov. Code § 855.8(c) provides that nothing in *Gov. Code § 855.8* exonerates a public employee who has undertaken to prescribe for mental illness or addiction from liability for injury proximately caused by his or her negligence or wrongful act in so prescribing. *Gov. Code § 855.8(d)* provides that nothing in *Gov. Code § 855.8* exonerates a public employee from liability for injury proximately caused by his or her negligent or wrongful act or omission in administering any treatment prescribed for mental illness or addiction.

[18] Determinations With Respect to Confinement of Person for Mental Illness or Addiction

Gov. Code § 856(a) provides that neither a public entity nor a public employee acting within the scope of his or her employment is liable for any injury resulting from determining in accordance with any applicable enactment: (1) whether to confine a person for mental illness or addiction (defined in *Gov. Code § 854.4*) [*see also Tarasoff v. Regents of Univ. of Cal. (1976) 17 Cal. 3d 425, 447-448, 131 Cal. Rptr. 14, 551 P.2d 334* (therapists held immune under this provision from liability for wrongful death of woman killed by man undergoing therapy for failure to confine man after he had confided to therapist his intention to kill the woman)]; (2) the terms and conditions of confinement for mental illness or addiction; and (3) whether to parole, grant a leave of absence to, or release a person confined for mental illness or addiction. *Gov. Code § 856(b)* further provides that a public employee is not liable for carrying out with due care a determination described in *Gov. Code § 856(a)*.

Gov. Code § 856(c) provides that nothing in *Gov. Code §§ 856* exonerates a public employee from liability for injury proximately caused by his or hernegligent or wrongful act or omission in carrying out or failing to carry out any of the determinations made under *Gov. Code § 856(a)*.

[19] Injury Caused by or to Escaping or Escaped Person Confined for Mental Illness or Addiction

Gov. Code § 856.2(a) provides that neither a public entity nor a public employee is liable for (1) an injury caused by an escaping or escaped person who has been confined for mental illness or addiction, or (2) an injury to, or the wrongful death of, an escaping or escaped person who has been confined for mental illness or addiction.

Gov. Code § 856.2(b) provides that nothing in *Gov. Code § 856.2* exonerates a public employee from liability (1) if he or she acted or failed to act because of actual fraud, corruption, or actual malice, or (2) for injuries inflicted as a result of his or her own negligent or wrongful act or omission on an escaping or escaped mental patient in recapturing the patient.

[20] Failure to Admit Person to Public Medical Facility

Gov. Code § 856.4 provides that, except as provided in *Gov. Code § 815.6* (relating to mandatory duty of public entity to protect against particular kinds of injuries [*see § 196.182*]), neither a public entity nor a public employee acting in the scope of his or her employment is liable for an injury resulting from the failure to admit a person to a public medical facility.

[21] National Influenza Program of 1976

Gov. Code § 856.6(a) provides that a public entity, public employee, or volunteer (defined in *Gov. Code § 856.6(c)(2)*), participating in the National Influenza Program of 1976, shall not be liable for an injury caused by an act or omission in the promotion of a community program (defined in *Gov. Code § 856.6(c)(1)*) or the administration of vaccine in a community program, including the residual effects of the vaccine, unless the act or omission constitutes willful misconduct.

[22] Acts Relating to Taxes

Gov. Code § 860.2 provides that neither a public entity nor a public employee is liable for an injury caused by (1) instituting any judicial or administrative proceeding or action for or incidental to the assessment or collection of a tax (defined in *Gov. Code § 860*), or (2) an act or omission in the interpretation or application of any law relating to a tax.

[23] Activities to Abate Impending Peril

Gov. Code § 866(a) provides that, subject to the provisions of *Gov. Code § 866(b)* and *(c)*, in the event of public necessity and to avoid impending peril to persons or property as a result of gradual earth movement, a local public entity (as defined in *Gov. Code § 900.4*) is not liable for damages or injury to persons or property resulting from the impending peril or from any action taken to abate the peril, provided the local public entity has, on the basis of expert opinion or other reasonable basis, done all of the following: (1) found, on the basis of adequate evidence such as expert opinion or otherwise, the existence of the impending peril; (2) determined appropriate remedial action to halt, stabilize, or abate the impending peril; and (3) undertaken to implement the remedial action. "Gradual earth movement" is defined as including, without limitation, perceptible changes in the earth either in a subterranean area or at the surface, or both, which if not arrested or contained will, over a gradual period of time, result in damage to or destruction of underground or aboveground property or harm to persons, but does not include movement which is caused by activity undertaken by a local public entity for purposes other than the abatement of peril caused by gradual earth movement [*Gov. Code § 866(a)*].

Gov. Code § 866(b) provides that if the local public entity is unable to complete any of the above described three steps because (1) of the cessation of the hazard, (2) the actions cannot be completed before the occurrence of the hazard, or (3) the entity's legislative body reasonably determines that the remedial action will not abate the danger, the immunity nevertheless applies.

Gov. Code § 866(c) provides that the immunity provided in *Gov. Code § 866* is in addition to any other immunity

provided by law or statute and that any claim of liability based on the impending peril or any action of the local public entity is subject to the immunities and any defenses that would be available to the local public entity if it were a private person.

Gov. Code § 867 provides that an employee of a local public entity is not liable for damages for injury to persons or property resulting from an impending peril or from any action taken to abate the peril pursuant to *Gov. Code § 866*.

[24] Emergency Medical Instructions

Health & Safety Code § 1799.104 provides that (a) no physician or nurse, who in good faith gives emergency instructions to an individual certified as an emergency medical technician-II or a mobile intensive care paramedic at the scene of an emergency, shall be liable for any civil damages as a result of issuing the instructions, and (b) no emergency medical technician-II or mobile intensive care paramedic rendering care within the scope of his or her duties who, in good faith and in a nonnegligent manner, follows the instructions of a physician or nurse shall be liable for any civil damages as a result of following such instructions.

[25] Emergency Medical Services

Health & Safety Code § 1799.106 provides that, in addition to the provisions of *Health & Safety Code § 1799.104* [*see § 196.09[24]*], and *Civ. Code § 1714.2* (immunity to civil liability for cardiopulmonary resuscitation at scene of emergency), and in order to encourage the provision of emergency medical services by firefighters, police officers, or other law enforcement officers, emergency medical technicians I and II, or emergency medical technicians-paramedics, any such person who renders emergency medical services at the scene of an emergency shall only be liable in civil damages for acts or omissions performed in a grossly negligent manner or acts or omissions not performed in good faith, and that a public agency employing such a person shall not be liable for civil damages if the firefighter, police officer, or other such person is not liable [*see City of Santa Cruz v. Superior Court (1988) 198 Cal. App. 3d 999, 1007, 244 Cal. Rptr. 105* (city lifeguard who was certified emergency medical technician as immune under this section and city as immune)].

[26] Emergency Rescue Operations

Health & Safety Code § 1799.107(a) states that the legislature has found and declared that a threat to the public health and safety exists whenever there is a need for emergency services and that public entities and emergency rescue personnel should be encouraged to provide emergency services, and that, to this end, a qualified immunity from liability shall be provided for public entities and "emergency rescue personnel" (defined in *Health & Safety Code § 1799.107(d)*) providing "emergency services" (defined in *Health & Safety Code § 1799.107(e)*).

Health & Safety Code § 1799.107(b) provides that, except as provided in *Veh. Code §§ 17000-17004.7* (liability of public entities and employees arising out of operation of motor vehicles), neither a public entity nor emergency rescue personnel shall be liable for any injury caused by an action taken by the emergency rescue personnel acting within the scope of their employment to provide emergency services, unless the action taken was performed in bad faith or in a grossly negligent manner.

Health & Safety Code § 1799.107(c) provides that for the purposes of *Health & Safety Code § 1799.107*, it shall be presumed that the action taken when providing emergency services was performed in good faith and without gross negligence, and that this presumption shall be one affecting the burden of proof.

The qualified immunity of *Health & Safety Code § 1799.107* extends to protect public entities for the allegedly negligent conduct of 911 emergency dispatchers [*Eastburn v. Regional Fire Prot. Auth. (2003) 31 Cal. 4th 1175, 1184-1185, 7 Cal. Rptr. 3d 552, 80 P.3d 656]* .

[27] Abatement of Hazardous Substances

Health & Safety Code § 25400 provides a qualified immunity from liability to public entities and specified public employees for injuries caused by their efforts to abate the hazards caused by the discharge, spill, or presence of hazardous substances on public or private property. The immunity is not available when the act or omission taken to abate or attempt to abate a hazard reasonably believed to be an imminent peril to public health and safety was performed in bad faith or in a grossly negligent manner, but there is a presumption that the act or omission was performed in good faith and without gross negligence.

[28] Immunities Under Lanterman-Petris-Short Act

The Lanterman-Petris-Short Act (*Welf. & Inst. Code § 5000 et seq.*), relating to the detention and treatment of mentally disordered and gravely disabled persons, contains a number of statutory immunities.

Welf. & Inst. Code § 5113 provides that, except as otherwise provided in specified code sections, the facility providing treatment pursuant to *Welf. & Inst. Code §§ 5150-5157* (detention of mentally disordered persons for evaluation and treatment), *Welf. & Inst. Code §§ 5170-5176* (detention of inebriates for evaluation and treatment), *Welf. & Inst. Code §§ 5250-5259.3* (certification for intensive treatment), *Welf. & Inst. Code §§ 5260-5268* (additional intensive treatment of suicidal persons), or *Welf. & Inst. Code §§ 5300-5309* (postcertification procedures for imminently dangerous persons), the superintendent of the facility and his or her designee, or the peace officer responsible for the detainment of the person shall not be civilly or criminally liable for any action by a person released at or before the end of the period for which he or she was admitted pursuant to the provisions of the appropriate statutes.

Welf. & Inst. Code § 5154, relating to mentally disordered persons, provides as follows:

- Notwithstanding *Welf. & Inst. Code § 5113* [*see § 196.09[28]*], if the provisions of *Welf. & Inst. Code § 5152* (relating to evaluation, treatment and care, release, and information on medication side effects) have been met, the professional person in charge of the facility providing 72-hour treatment and evaluation, his or her designee, the medical director of the facility or his or her designee described in *Welf. & Inst. Code § 5152*, the psychiatrist directly responsible for the person's treatment, or the psychologist, cannot be held civilly or criminally liable for any action by a person released before the end of the 72 hours pursuant to *Welf. & Inst. Code §§ 5150-5157*.

- The professional person in charge of the facility providing 72-hour treatment and evaluation, his or her designee, the medical director of the facility or his or her designee described in *Welf. & Inst. Code§ 5152*, the psychiatrist directly responsible for the person's treatment, or the psychologist, cannot be held civilly or criminally liable for any action by a person released at the end of the 72 hours pursuant to *Welf. & Inst. Code §§ 5150-5157*.

- The peace officer responsible for the detainment of the person cannot be civilly or criminally liable for any action by a person released at or before the end of the 72 hours pursuant to *Welf. & Inst. Code §§ 5150-5157* [*see Tarasoff v. Regents of Univ. of Cal. (1976) 17 Cal. 3d 425, 449-450, 131 Cal. Rptr. 14, 551 P.2d 334* (campus police officers were immune under this provision from liability for wrongful death of woman killed by man they'd been asked to detain at request of therapist and whom they released after brief confinement because he appeared rational); *see also Davidson v. City of Westminster (1982) 32 Cal. 3d 197, 204, 185 Cal. Rptr. 252, 649 P.2d 894* (discussing *Tarasoff*)].

Immunities substantially similar to those set forth in *Welf. & Inst. Code § 5154(a)-(c)* are provided in *Welf. & Inst. Code §§ 5173* and *5259.3*, and immunities substantially similar to *Welf. & Inst. Code § 5154(a)* and *(b)*, are set out in *Welf. & Inst. Code §§ 5267* and *5306*.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsCourtsSmall Claims CourtsGovernmentsState & Territorial GovernmentsClaims By & AgainstTortsPublic Entity LiabilityImmunityGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsExclusions From Liability

California Points & Authorities

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Volume 19A Chapters 196-199 PUBLIC ENTITIES---to---QUO WARRANTO
CHAPTER 196 PUBLIC ENTITIES
PART I. INTRODUCTION

19A-196 California Points & Authorities § 196.10

§ 196.10 Immunity of Public Employee

[1] Discretionary Acts

Gov. Code § 820.2 provides that, except as otherwise provided by statute, a public employee is not liable for an injury resulting from his or her act or omission where the act or omission was the result of the exercise of the discretion vested in him or her, whether or not such discretion is abused [*see Johnson v. State of California (1968) 69 Cal. 2d 782, 793, 73 Cal. Rptr. 240, 447 P.2d 352* ; *Whitcombe v. County of Yolo (1977) 73 Cal. App. 3d 698, 710-713, 141 Cal. Rptr. 189]* .

For a form of points and authorities supporting the contention that the immunity under *Gov. Code § 820.2* does not apply, see *§ 196.278*.

[2] Decisions of Peace Officers or Law Enforcement Officials Not to Render Assistance or Respond to Emergency

Gov. Code § 820.25(a) provides that, for the purposes of *Gov. Code § 820.2* [*see § 196.10[1]*], the decision of a peace officer, as defined in *Penal Code §§ 830.1* and *830.2*, or a state or local law enforcement official, to render assistance to a motorist who has not been involved in an accident or to leave the scene after rendering assistance, on learning of a reasonably apparent emergency requiring his or her immediate attention elsewhere or on instructions from a superior to assume duties elsewhere, shall be deemed an exercise of discretion [*see Williams v. State of California (1983) 34 Cal. 3d 18, 25* & n.5, *192 Cal. Rptr. 233, 664 P.2d 137* ; *see also § 196.233[3][b]*].

Gov. Code § 820.25(b) provides that *Gov. Code § 820.25(a)* shall not apply if the act or omission occurred pursuant to the performance of a ministerial duty and that, for the purposes of the section, "ministerial duty" is defined as a plain and mandatory duty involving the execution of a set task and to be performed without the exercise of discretion.

[3] Execution or Enforcement of Laws

Gov. Code § 820.4 provides that a public employee is not liable for his or her act or omission, exercising due care, in the execution or enforcement of any law. *Gov. Code § 820.4* also provides, however, that nothing in *Gov. Code § 820.4*

exonerates a public employee from liability for false arrest or false imprisonment.

For forms of points and authorities supporting the contention that the immunity under *Gov. Code § 820.4* does not apply, see *§§ 196.279* and *196.280*.

[4] Acts Under Invalid or Inapplicable Enactment

Gov. Code § 820.6 provides that if a public employee acts in good faith, without malice, and under the apparent authority of an enactment that is unconstitutional, invalid, or inapplicable, he or she is not liable for an injury caused thereby except to the extent that he or she would have been liable had the enactment been constitutional, valid, and applicable [*see, e.g., O'Toole v. Superior Court (2006) 140 Cal. App. 4th 488, 504-509, 44 Cal. Rptr. 3d 531* (police officers immune from liability for enforcing college's requirement that nonstudents get permit before distributing anti-abortion information on campus)].

[5] Acts or Omissions of Others

Gov. Code § 820.8 provides that except as otherwise provided by statute, a public employee is not liable for an injury caused by the act or omission of another person. *Gov. Code § 820.8* further provides, however, that this immunity does not exonerate a public employee from liability for injury proximately caused by his or her own negligent or wrongful act or omission.

[6] Local Officials

Gov. Code § 820.9 provides that members of city councils, mayors, members of boards of supervisors, members of school boards, members of governing boards of other local public entities, and members of locally appointed or elected boards and commissions are not vicariously liable for injuries caused by the act or omission of the public entity. *Gov. Code § 820.9* further provides, however, that nothing in *Gov. Code § 820.9 (1)* exonerates an official from liability forinjury caused by that individual's own wrongful conduct or (2) affects the immunity of any other public official.

[7] Adoption or Failure to Adopt or Enforce Enactment

Gov. Code § 821 provides that a public employee is not liable for injury caused by his or her adoption of or failure to adopt an enactment or by his or her failure to enforce an enactment [*see Nunn v. State of California (1984) 35 Cal. 3d 616, 621-622, 200 Cal. Rptr. 440, 677 P.2d 846]* .

[8] Acts Relating to Permits, Licenses, Certificates, Approvals, Orders, and Similar Authorizations by Public Employees

Gov. Code § 821.2 provides that a public employee is not liable for an injury caused by his or her issuance, denial, suspension, or revocation of, or by his or her failure or refusal to issue, deny, suspend, or revoke, any permit, license, certificate, approval, order, or similar authorization where he or she is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended, or revoked [*see Colome v. State Athletic Comm'n (1996) 47 Cal. App. 4th 1444, 1457, 55 Cal. Rptr. 2d 300]* .

[9] Failure to Inspect or Negligent Inspection of Property

Gov. Code § 821.4 provides that a public employee is not liable for injury caused by his or her failure to make an inspection, or by reason of making an inadequate or negligent inspection, of any property, other than the property (as defined in *Gov. Code § 830(c)*, relating to dangerous condition of public property) of the public entity employing the public employee, for the purpose of determining whether the property complies with or violates any enactment or contains or constitutes a hazard to health or safety.

[10] Institution or Prosecution of Judicial or Administrative Proceeding

Gov. Code § 821.6 provides that a public employee is not liable for injury caused by his or her instituting or prosecuting any judicial or administrative proceeding within the scope of his or her employment, even if he or she acts maliciously and without probable cause.

For forms of points and authorities supporting the contention that the immunity under *Gov. Code § 821.6* does not apply, see *§§ 196.280* and *196.281*.

The test of the application of the immunity is causal connection, not time of occurrence, and the immunity applies even to conduct occurring after termination of the prosecution [*Cappuccio, Inc. v. Harmon (1989) 208 Cal. App. 3d 1496, 1498, 257 Cal. Rptr. 4* (inaccurate statements about prosecution made after prosecution were still protected by immunity)].

Persons appointed as deputy district attorneys are protected by prosecutorial immunity under *Gov. Code § 821.6*, even if there is a ministerial defect in the appointment process, so long as the deputy district attorney acts under color of authority and is performing the proper function of a deputy district attorney at the time [*Miller v. Filter (2007) 150 Cal. App. 4th 652, 666-669, 58 Cal. Rptr. 3d 671* (deputy district attorneys protected by *Gov. Code § 821.6* despite district attorney's failure to file written appointments for deputies with county clerk)]. Prosecutorial immunity protects an appointed deputy district attorney even though the deputy receives no salary from the public entity [*Miller v. Filter (2007) 150 Cal. App. 4th 652, 669-670, 58 Cal. Rptr. 3d 671]* .

[11] Prosecutor Immunity

As a quasi-judicial officer, a prosecutor enjoys absolute immunity while acting within his or her official capacity [*Falls v. Superior Court (1996) 42 Cal. App. 4th 1031, 1043, 49 Cal. Rptr. 2d 908]* . A prosecutor is acting within his or her official capacity when subpoenaing a witness or preparing for a post-charging hearing by interviewing a witness and encouraging the witness to testify [*Falls v. Superior Court (1996) 42 Cal. App. 4th 1031, 1045, 49 Cal. Rptr. 2d 908]* .

[12] Entry on Property

Gov. Code § 821.8 provides that a public employee is not liable for injury arising out of his or her entry on any property where the entry is expressly or impliedly authorized by law. *Gov. Code § 821.8* further provides, however, that this immunity does not exonerate a public employee from liability for an injury proximately caused by his or her own negligent or wrongful act or omission.

[13] Theft of Money From Employee's Custody

Gov. Code § 822 provides that a public employee is not liable for money stolen from his or her official custody. *Gov. Code § 822* further provides, however, that this immunity does not exonerate a public employee from liability if the loss was sustained as a result of his or her own negligent or wrongful act or omission.

[14] Misrepresentations

Gov. Code § 822.2 provides that a public employee acting in the scope of his or her employment is not liable for an injury caused by his or her misrepresentation, whether or not the misrepresentation is negligent or intentional, unless the employee is guilty of actual fraud, corruption, or malice [*see* *Bastian v. County of San Luis Obispo (1988) 199 Cal. App. 3d 520, 533, 245 Cal. Rptr. 78* ; *Harshbarger v. City of Colton (1988) 197 Cal. App. 3d 1335, 1340, 243 Cal. Rptr. 463]* .

[15] Emergency Care and Emergency Field Care Treatment at Scene

Health & Safety Code § 1799.102, as amended effective for actions filed on or after August 6, 2009, provides that medical, law enforcement, and emergency personnel providing emergency medical or nonmedical care in good faith and not for compensation at the scene of an emergency are not liable for any civil damages resulting from any act or omission. The scene of an emergency for these purposes does not include emergency departments and other places where medical care is usually offered [*Health & Safety Code § 1799.102(a)*]. Under that statute, persons other than medical, law enforcement, and emergency personnel who render emergency medical or nonmedical care or assistance at the scene of an emergency are not to be held liable for civil damages for any act or omission other than an act or omission that constitutes gross negligence or willful or wanton misconduct [*Health & Safety Code § 1799.102(b)(2)*]. Prior to the 2009 amendment, this statute provided a single, more general immunity for all persons volunteering aid at the scene of an emergency [*see* former *Health & Safety Code § 1799.102*], although the California Supreme Court in 2008 had interpreted the protection to apply only to persons rendering *medical* aid at the scene of a medical emergency [*Van Horn v. Watson (2008) 45 Cal. 4th 322, 329-331, 86 Cal. Rptr. 3d 350, 197 P.3d 164* (pulling injured friend from car involved in accident out of fear that car might explode was not emergency medical care)].

Health & Safety Code § 1799.108 provides that any person who has a certificate issued pursuant to *Health & Safety Code §§ 1797-1799.110* from a certifying agency to provide prehospital emergency field care treatment at the scene of emergency, as defined in *Health & Safety Code § 1799.102*, shall be liable for civil damages only for acts or omissions performed in a grossly negligent manner or acts or omissions not performed in good faith.

[16] Operation of Emergency Vehicle

Veh. Code § 17004 provides that a public employee is not liable for civil damages on account of personal injury to or death of any person or damage to property resulting from the operation, in the line of duty, of an authorized emergency vehicle while responding to an emergency call or when in the immediate pursuit of an actual or suspected violator of the law, or when responding to, but not on returning from, a fire alarm or other emergency call.

[17] Public Employee Engaged in Rescue of Vessel

Harb. & Nav. Code § 656(c)(1) provides that an individual employee of a public entity engaged in a rescue pursuant to the Harbors and Navigation Code shall not be a proper party defendant and shall be dismissed on motion, unless the employee has violated a statute other than a statute creating a general obligation to rescue or is guilty of oppression, fraud, malice, or the conscious disregard of the safety of others.

[18] Peace Officer for Service of Arrest Warrant

Civ. Code § 43.55(a) provides that there is no liability on the part of, and no cause of action arises against, a peace officer who makes an arrest pursuant to a warrant of arrest regular on its face if the peace officer in making the arrest acts without malice and in the reasonable belief that the person arrested is the one referred to in the warrant.

[19] Detention of Patients by Acute Care Hospital

Under *Health & Safety Code § 1799.111*, a licensed acute care hospital as defined by *Health & Safety Code § 1250(a)*, and a licensed acute psychiatric hospital as defined in *Health & Safety Code § 1250(b)*, that are not county-designated facilities pursuant to *Welf. & Inst. Code § 5150*, licensed professional staff of those hospitals, or any physician and surgeon providing emergency medical services in any department of those hospitals to a person at the hospital, is not civilly or criminally liable for detaining a person who is subject to detention pursuant to *Welf. & Inst. Code § 5150*, if all of the following conditions exist during the detention:

- In the opinion of the treating physician and surgeon, or a clinical psychologist with the medical staff privileges, clinical privileges, or professional responsibilities provided in *Health & Safety Code § 1316.5*

, the person cannot be safely released from the hospital because the person, as a result of a mental disorder, presents a danger to himself or herself, or others, or is gravely disabled. *Gravely disabled* means an inability to provide for his or her basic personal needs for food, clothing, or shelter;

- The hospital staff, treating physician and surgeon, or appropriate licensed mental health professional, have made, and documented, repeated unsuccessful efforts to find appropriate mental health treatment for the person;

- The person is not detained beyond 24 hours; and

- There is probable cause for the detention.

Pursuant to *Health & Safety Code § 1799.111(b)*, if the person is detained more than eight hours, but less than 24 hours, the following additional conditions must also be met:

- A discharge or transfer for appropriate mental health treatment for the person has been delayed because of the need for continuous and ongoing care, observation, or treatment provided by the hospital; and

- In the opinion of the treating physician and surgeon, or a clinical psychologist with the medical staff privileges or professional responsibilities provided for in *Health & Safety Code § 1316.5*, the person, as a result of a mental disorder, is still a danger to himself or herself, or others, or is gravely disabled.

Pursuant to *Health & Safety Code § 1799.111(c)*, this protection from liability extends to protection from liability for conduct committed by the detained person after that person's release, if the following conditions exist during the detention:

- The person has not been admitted to a licensed general acute care hospital or a licensed acute psychiatric hospital for evaluation and treatment pursuant to *Welf. & Inst. Code § 5150*; and

- The release from the licensed general acute care hospital or the licensed acute psychiatric hospital is authorized by a physician and surgeon or a clinical psychologist with the medical staff privileges or professional responsibilities provided for in *Health & Safety Code § 1316.5*, who determines, based on a face-to-face examination of the person detained, that the person does not present a danger to himself or herself or others and is not gravely disabled. In order for this protection to extend to a clinical psychologist, the psychologist must have a collaborative treatment relationship with the physician and surgeon. The clinical psychologist may authorize the release of the person from the detention, but only after he or she has consulted with the physician and surgeon. In the event of a clinical or professional disagreement regarding the release of a person subject to the detention, the detention must be maintained unless the hospital's medical director overrules the decision of the physician and surgeon opposing the release. Both the physician and surgeon and the clinical psychologist must enter their findings, concerns, or objections in the person's medical record.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPublic Entity LiabilityImmunityQualified ImmunityTortsPublic Entity LiabilityImmunitySovereign ImmunityTortsPublic Entity LiabilityLiabilityState Tort Claims ActsExclusions From Liability

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CHAPTER 196 PUBLIC ENTITIES
PART I. INTRODUCTION

19A-196 California Points & Authorities § 196.11

§ 196.11 Dangerous Condition on Property

[1] Availability of Statutory Immunities and Defenses

[a] To Public Entity

[i] Generally

Gov. Code § 815 provides that, except as otherwise provided by statute, (1) a public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person, and (2) the liability of a public entity established by *Gov. Code §§ 814-895.8* is subject to any immunity of the public entity provided by statute and is subject to any defenses that would be available to the public entity if it were a private person [*see Peterson v. San Francisco Cmty. Coll. Dist. (1984) 36 Cal. 3d 799, 813 n.12, 205 Cal. Rptr. 842, 685 P.2d 1193]* .

For forms of points and authorities supporting contentions that *Gov. Code § 835* applies to impose liability on a public entity for injury caused by a dangerous condition of public property, see *§§ 196.180 -196.189*.

Because *Gov. Code § 835* qualifies liability for a dangerous condition of public property by stating that the liability applies "except as provided by statute," some immunity statutes, in addition to those statutes that specifically provide defenses to dangerous-condition liability, may be applicable. For example, immunity under *Gov. Code § 855.4* for the failure to prevent the communication of a disease applies to a claim of dangerous condition of public property [*Wright v. City of Los Angeles (2001) 93 Cal. App. 4th 683, 688-689, 113 Cal. Rptr. 2d 352]* .

[ii] Dangerous Condition Created by Reasonable Act or Omission of Public Entity

Gov. Code § 835.4(a) provides that a public entity is not liable under *Gov. Code § 835(a)* (dangerous condition created by negligent or wrongful act or omission of public employee within scope of employment) for injury caused by a condition of its property if the public entity establishes that the act or omission that created the condition was reasonable. The reasonableness of the act or omission that created the condition shall be determined by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the

practicability and cost of taking alternative action that would not create the risk of injury or of protecting against the risk of injury.

Gov. Code § 835.4(b) provides that a public entity is not liable under *Gov. Code § 835(b)* (public entity had actual or constructive notice of condition in time to protect against it) for injury caused by a dangerous condition of its property if the public entity establishes that the action it took toprotect against the risk of injury created by the condition or its failure to take such action was reasonable. The reasonableness of the action or inaction of the public entity shall be determined by taking into consideration the time and opportunity it had to take action and by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of protecting against the risk of such injury [*see Peterson v. San Francisco Cmty. Coll. Dist. (1984) 36 Cal. 3d 799, 813 n.12, 205 Cal. Rptr. 842, 685 P.2d 1193* (discussed in *§ 196.230*); *Ducey v. Argo Sales Co. (1979) 25 Cal. 3d 707, 720, 159 Cal. Rptr. 835, 602 P.2d 755* (discussed in *§ 196.211*)].

[iii] Public Land Trust

For the purposes of the immunities available under *Gov. Code §§ 831.2, 831.4*, and *831.7*, discussed in *§ 196.12[7]*, "public entity" includes a public land trust [*see Gov. Code § 831.5(b)* (also enumerating conditions for qualification as public land trust)]. "Public entity" also includes a public land trust for purposes of the land failure immunity provided by *Gov. Code § 831.25* [*see Gov. Code § 831.5(b)*; *see also § 196.12[5][c]*].

[b] To Public Employee

[i] Generally

Gov. Code § 840 provides that, except as provided in *Gov. Code §§ 840-840.6*, a public employee is not liable for injury caused by a condition of public property when the condition exists because of any act or omission of the employee within the scope of his or her employment and that the liability established by *Gov. Code §§ 840-840.6* is subject to any immunity of the public employee provided by statute and is subject to any defenses that would be available to the public employee if he or she were a private person.

For forms of points and authorities supporting contentions that *Gov. Code § 840.2* applies to impose liability on a public employee for injury caused by a dangerous condition of public property, see *§ 196.210* et seq.

[ii] Dangerous Condition Created by Reasonable Act or Omission of Public Employee

Gov. Code § 840.6(a) provides that a public employee is not liable under *Gov. Code § 840.2(a)* (dangerous condition attributable in whole or in substantial part to employee) for injury caused by a dangerous condition of public property if he or she establishes that the act or omission that created the condition was reasonable. The reasonableness of the act or omission that created the condition shall be determined by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of taking alternative action that would not create the risk of injury or of protecting against the risk of injury.

Gov. Code § 840.6(b) provides that a public employee is not liable under *Gov. Code § 840.2(b)* (public employee had authority, responsibility, and funds to protect against dangerous condition and had actual or constructive notice of condition in time to protect against it) for injury caused by a dangerous condition of public property if he or she establishes that the action taken to protect against the risk of injury created by the condition or the failure to take such action was reasonable. The reasonableness of the inaction or action shall be determined by taking into consideration the time and opportunity the public employee had to take action and by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of protecting against the risk of such injury.

[2] Determination That Condition Is Not Dangerous

In addition to the statutory immunities to liability for injuries caused by a dangerous condition, there are several statutory provisions affecting the determination that a condition is "dangerous" so as to give rise to liability for resulting injuries. These include: *Gov. Code § 830.2* (court may examine evidence in first instance and determine as matter of law that condition is too minor, trivial, or insignificant to be dangerous); *Gov. Code § 830.4* (condition is not dangerous merely because of failure to provide certain traffic control signals or signs); and *Gov. Code § 830.5* (use of evidence of occurrence of accident or postaccident corrective measures to show dangerousness of condition). For further discussion of these provisions, see *§ 196.210[2][d]*.

[3] Potential Damages Limitations in Automobile Accident Cases

Civ. Code § 3333.4 may limit the damages that may be recovered from a public entity for an injury sustained in the course of an automobile accident. That statute, adopted as Proposition 213 in the general election of 1996, provides generally that in any action to recover damages arising out of the operation or use of a motor vehicle, a person may not recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, and other nonpecuniary damages if any of the following applies [*Civ. Code § 3333.4(a)*]:

- At the time of the accident, the injured person was operating the vehicle while under the influence of alcohol or drugs, and was convicted of that offense [*see Veh. Code §§ 23152, 23153*].

- The injured person was the owner of a vehicle involved in the accident, and the vehicle was not insured as required by the financial responsibility laws [*see Veh. Code § 16000 et seq.*].

- The injured person was the operator of a vehicle involved in the accident and cannot establish his or her financial responsibility as required by the financial responsibility laws [*see Veh. Code § 16000 et seq.*].

However, the owner of an uninsured automobile, within the meaning of the financial responsibility laws, may nevertheless recover the noneconomic losses listed above if injured by a motorist who was driving under the influence of alcohol or drugs and who was convicted of that offense [*Civ. Code § 3333.4(c)*; *see Veh. Code §§ 23152, 23153*].

The California Supreme Court has held that *Civ. Code § 3333.4* prevents an uninsured motorist from recovering noneconomic damages from a public entity based on a claim alleging a dangerous condition of public property, or a claim of nuisance, if the claim involves the operation or use of a motor vehicle [*Day v. City of Fontana (2001) 25 Cal. 4th 268, 276-277, 105 Cal. Rptr. 2d 457, 19 P.3d 1196]* . The Court concluded that those actions fall within the clear, unambiguous language of the statute and that construing the statute to cover those actions against a public entity comports with the initiative's declared intent to prevent people who fail to take personal financial responsibility from seeking unreasonable damages [*Day v. City of Fontana (2001) 25 Cal. 4th 268, 277, 105 Cal. Rptr. 2d 457, 19 P.3d 1196]* . The Court also noted that public entities are among those directly affected by uninsured motorists, because they are often left to bear the cost of repairs to public property necessitated by an uninsured tortfeasor's acts and financial irresponsibility [*Day v. City of Fontana (2001) 25 Cal. 4th 268, 276-277, 105 Cal. Rptr. 2d 457, 19 P.3d 1196]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawTortsNuisanceTypesPublic NuisanceTortsPremises Liability & PropertyGeneral Premises LiabilityDangerous ConditionsGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityDefensesGeneral OverviewTortsPublic Entity LiabilityImmunityGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsExclusions From Liability

California Points & Authorities

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Volume 19A Chapters 196-199 PUBLIC ENTITIES---to---QUO WARRANTO
CHAPTER 196 PUBLIC ENTITIES
PART I. INTRODUCTION

19A-196 California Points & Authorities § 196.12

§ 196.12 Immunities

[1] Plan or Design

Gov. Code § 830.6 provides that neither a public entity nor a public employee is liable for an injury caused by the plan or design of a construction of, or an improvement to, public property when the plan or design has been approved in advance of the construction or improvement by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval, or when the plan or design is prepared in conformity with standards previously so approved, if the trial or appellate court determines that there is any substantial evidence on the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor [*see Hefner v. County of Sacramento (1988) 197 Cal. App. 3d 1007, 1010, 1013-1018, 243 Cal. Rptr. 291]* .

Gov. Code § 830.6 also provides that, notwithstanding notice that constructed or improved public property may no longer be in conformity with a plan or design or a standard that reasonably could be approved by the legislative body or other body or employee, this immunity will continue for a reasonable period of time sufficient to permit the public entity to obtain funds for and carry out remedial work necessary to allow the public property to be in conformity with a plan or design approved by the legislative body of the public entity or other body or employee, or with a plan or design in conformity with a standard previously approved by the legislative body or other body or employee. In the event that the public entity is unable to remedy the public property because of practical impossibility or lack of sufficient funds, this immunity shall remain so long as the public entity shall reasonably attempt to provide adequate warnings of the existence of the condition not conforming to the approved plan or design or to the approved standard. Unlike the determination of whether substantial evidence supports the reasonableness of the adoption of the original plan or design, which as noted above is reserved by statute for determination by the court, a plaintiff has a right to have a jury decide whether design immunity has been lost if triable issues of material fact are presented [*Cornette v. Department of Transp. (2001) 26 Cal. 4th 63, 67, 109 Cal. Rptr. 2d 1, 26 P.3d 332]* .

Gov. Code § 830.6 further provides, however, that when a person fails to heed the warning or occupies public property despite the warning, the failure or occupation shall not in itself constitute an assumption of the risk of the danger indicated by the warning.

For a form of points and authorities supporting the contention that the immunity under *Gov. Code § 830.6* does not apply, see *§ 196.300*.

[2] Failure to Provide Traffic or Warning Signals, Signs, Markings, or Devices

Gov. Code § 830.8 provides that neither a public entity nor a public employee is liable under *Gov. Code §§ 830-840.6* for an injury caused by the failure to provide traffic or warning signals, signs, markings, or devices described in the Vehicle Code.

Gov. Code § 830.8 further provides, however, that nothing in this section exonerates a public entity or public employee from liability for injury proximately caused by such failure if a signal, sign, marking, or device (other than one described in *Gov. Code § 830.4*, discussed in *§ 196.11[2]*) was necessary to warn of a dangerous condition that endangered the safe movement of traffic and that would not be reasonably apparent to, and would not have been anticipated by, a person exercising due care [*see 172 L. Ed. 2d 650, 657-659)* ; *Kessler v. State of California (1988) 206 Cal. App. 3d 317, 321-322, 253 Cal. Rptr. 537* ; *Hefner v. County of Sacramento (1988) 197 Cal. App. 3d 1007, 1017-1018, 243 Cal. Rptr. 291* ; *see also Gov. Code §§ 830(b), 835*, and *840.2* (discussed in *§ 196.210*); *Bunker v. City of Glendale (1980) 111 Cal. App. 3d 325, 328, 168 Cal. Rptr. 565* (discussed in *§§ 196.210[3*][a], 196.300[4][d])].

However, *Gov. Code § 830.8* provides immunity to a public entity for failing to repaint a marked crosswalk after preexisting markings are removed for construction, at least in the absence of any hazardous condition that would not be apparent to pedestrians or motorists using the intersection with due care [*Sun v. City of Oakland (2008) 166 Cal. App. 4th 1177, 1193, 83 Cal. Rptr. 3d 372* (installation of "bulb out" sidewalk extensions did not make intersection dangerous condition, even when crosswalk markings were removed in process)]. Moreover, a city's failure to comply with the public notice requirements of *Veh. Code § 21950.5* prior to removing crosswalk markings does not render the city liable for injury to a pedestrian caused by a motorist who fails to yield the right of way [*Sun v. City of Oakland (2008) 166 Cal. App. 4th 1177, 1191-1192, 83 Cal. Rptr. 3d 372*].

[3] Traffic Signals Under Control of Emergency Vehicle

Gov. Code § 830.9 provides that neither a public entity nor a public employee is liable for injury caused by the operation or nonoperation of official traffic control signals when controlled by an emergency vehicle in accordance with the provisions of *Veh. Code § 25258(a)*.

[4] Weather Conditions

Gov. Code § 831 provides that neither a public entity nor a public employee is liable for an injury caused by the effect on the use of streets and highways of weather conditions as such, and that, for the purpose of this provision, the effect on the use of streets and highways of weather conditions includes the effect of fog, wind, rain, flood, ice, or snow, but does not include physical damage to or deterioration of streets and highways resulting from weather conditions.

Gov. Code § 831 further provides, however, that nothing in the section exonerates a public entity or public employee from liability for injury proximately caused by such effect if it would not be reasonably apparent to, and would not be anticipated by, a person exercising due care.

For a form of points and authorities supporting the contention that the immunity under *Gov. Code § 831* does not apply, see *§ 196.301*.

[5] Natural Condition of Unimproved Property

[a] Generally

Gov. Code § 831.2 provides that neither a public entity nor a public employee is liable for an injury caused by a natural condition of any unimproved public property, including but not limited to any natural condition of any lake, stream, bay, river, or beach [*see Mercer v. State of California (1987) 197 Cal. App. 3d 158, 164-165, 242 Cal. Rptr. 701* (to qualify public property as improved so as to take it outside natural condition immunity, improvements must change the physical nature or characteristics of the property at the location of the injury to the extent that it can no longer be considered in a natural condition); *see also Tessier v. City of Newport Beach (1990) 219 Cal. App. 3d 310, 313-315, 268 Cal. Rptr. 233* (human-altered conditions that have existed for some years, that merely duplicate models common to nature are still natural conditions); *Bartlett v. State of California (1988) 199 Cal. App. 3d 392, 395, 397-400, 245 Cal. Rptr. 32* ; *Geffen v. County of Los Angeles (1987) 197 Cal. App. 3d 188, 192, 242 Cal. Rptr. 492* ; *Osgood v. County of Shasta (1975) 50 Cal. App. 3d 586, 589, 123 Cal. Rptr. 442]* .

In *Milligan v. City of Laguna Beach (1983) 34 Cal. 3d 829, 831, 196 Cal. Rptr. 38, 670 P.2d 1121* , this immunity was held to apply only to users of the public property and not to nonusers on adjacent property who are injured [*see § 196.213*].

For a form of points and authorities supporting the contention that the immunity under *Gov. Code § 831.2* does not apply, see *§ 196.301*.

[b] Public Beaches

Gov. Code § 831.21(a) provides that public beaches shall be deemed to be in a natural condition and unimproved notwithstanding the provision or absence of public safety services such as lifeguards, police or sheriff patrols, medical services, fire protection services, beach cleanup services, or signs [*see City of Santa Cruz v. Superior Court (1988) 198 Cal. App. 3d 999, 1007, 244 Cal. Rptr. 105]* .

Gov. Code § 831.21(a) further provides, however, that these provisions apply only to natural conditions of public property and shall not limit any liability or immunity that may otherwise exist pursuant to the California Tort Claims Act (*Gov. Code §§ 810-996.6*). In addition, *Gov. Code § 831.21* applies only to causes of action based on acts or omissions occurring on or after January 1, 1988 [*Gov. Code § 831.21(b)*].

[c] Land Failure Caused by Natural Condition

Gov. Code § 831.25(a) provides that neither a public entity nor a public employee is liable for any damage or injury to property, or for emotional distressunless the plaintiff has suffered substantial physical injury, off the public entity's property caused by land failure (defined in *Gov. Code § 831.25(c)*) of any unimproved public property if the land failure was caused by a natural condition of the unimproved public property. *Gov. Code § 831.25(b)* provides that, for the purposes of *Gov. Code § 831.25*, a natural condition exists and property shall be deemed unimproved notwithstanding the intervention of minor improvements made for the preservation or prudent management of the property in its unimproved state that did not contribute to the land failure. *Gov. Code § 831.25(e)* provides that nothing in *Gov. Code § 831.25* shall limit the immunity provided by *Gov. Code § 831.2* [*see § 196.12[5]*], and *Gov. Code § 831.25(f)* provides that nothing in *Gov. Code § 831.25* creates a duty of care or basis of liability for damage or injury to property or of liability for emotional distress.

Conditions that occur in nature, but are produced by a combination of human and natural forces, are natural conditions as a matter of law [*Schooler v. State of California (2000) 85 Cal. App. 4th 1004, 1009, 102 Cal. Rptr. 2d 343]* . In one case, for example, the fact that pedestrian traffic may have added to the corrosive effect of wind, water, and wave action along a bluff adjacent to a state-owned beach did not alter the fact that bluff erosion was a natural condition, precluding the adjacent landowner from successfully prosecuting a tort suit against the state for damage to the lateral support of his own property caused by the erosion [*Schooler v. State of California (2000) 85 Cal. App. 4th 1004, 1010, 102 Cal.*

Rptr. 2d 343] .

Gov. Code § 831.25(d) provides further, however, that *Gov. Code § 831.25* shall not benefit any public entity or public employee who had actual notice of probable damage that is likely to occur outside the public property because of land failure and who fails to give a reasonable warning of the danger to the affected property owners. *Gov. Code § 831.25(d)* also provides that neither a public entity nor a public employee is liable for any damage or injury arising from the giving of a warning under *Gov. Code § 831.25*.

[6] Nondedicated Roads

Gov. Code § 831.3 provides that neither a public entity nor a public employee is liable for any injury occurring on account of the grading or the performance of other maintenance or repair on or reconstruction or replacement of any road which has not been officially accepted as a part of the road system under the jurisdiction of the public entity if the grading, maintenance, repair, or reconstruction or replacement is performed with reasonable care and leaves the road in no more dangerous or unsafe condition than it was before the work commenced. No act of grading, maintenance, repair, or reconstruction or replacement within the meaning of *Gov. Code § 831.3* shall be deemed to give rise to any duty of the public entity to continue any grading, maintenance, repair, or reconstruction or replacement on any road not a part of the road system under the public entity's jurisdiction. As used in these provisions, "reconstruction or replacement" means reconstruction or replacement performed pursuant to *Sts. & Hy. Code §§ 1160-1197* (relating to methods of performing highway work by permanent road divisions).

[7] Unpaved Access Roads to and Trails in Recreational and Scenic Areas

Gov. Code § 831.4 provides that a public entity, public employee, or a grantor of a public easement to a public entity for any of the following purposes is not liable for an injury caused by a condition of:

- Any unpaved road that provides access to fishing, hunting, camping, hiking, riding (including animal and all types of vehicular riding), water sports, or recreational or scenic areas, and that is not a: (1) city street or highway; (2) county, state, or federal highway; or (3) public street or highway of a joint highway district, boulevard district, bridge and highway district, or similar district formed for the improvement or building of public streets or highways;

- Any trail used for the above purposes; and

- Any paved trail, walkway, path, or sidewalk on an easement of way which has been granted to a public entity, which easement provides access to any unimproved property, so long as such public entity shall reasonably attempt to provide adequate warnings of the existence of any condition of the paved trail, walkway, path, or sidewalk that constitutes a hazard to health or safety. Warnings required by this subdivision shall only be required where pathways are paved, and such requirement shall not be construed to be a standard of care for any unpaved pathways or roads [*see* *Astenius v. State of California (2005) 126 Cal. App. 4th 472, 476, 23 Cal. Rptr. 3d 877* (state immune from liability for death sustained on unpaved trail despite failure to post warnings and regardless of whether state made other improvements to area)].

Gov. Code § 831.4 has been read as embracing three related immunities. Subdivisions (a) and (c) provide immunity for the condition of certain roads and trails that provide "access" to recreational areas. By contrast, the "above purposes" language contained in *Gov. Code § 831.4(b)* has been construed to provide immunity for injuries caused by a condition of any trail that is used for any of the recreational activities described in *Gov. Code § 831.4(a)* [*Carroll v. County of Los Angeles (1997) 60 Cal. App. 4th 606, 610, 70 Cal. Rptr. 2d 504* (immunity of *Gov. Code § 831.4(b)* barred liability for injuries suffered by plaintiff while rollerblading on a paved bicycle path in state park); *Giannuzzi v. State of*

California (1993) 17 Cal. App. 4th 462, 466-467, 21 Cal. Rptr. 2d 335 (immunity of *Gov. Code § 831.4(b)* barred liability for injuries suffered by plaintiff while riding motorcycle on a dirt trail in state park); *but see Treweek v. City of Napa (2000) 85 Cal. App. 4th 221, 232, 101 Cal. Rptr. 2d 883* (boat ramp, standing alone and not as integral part of trail, was not itself "trail")]. Under this construction, a trail that is intended for one of these recreational purposes need not provide access to anything for the immunity of *Gov. Code § 831.4(b)* to attach [*see Giannuzzi v. State of California (1993) 17 Cal. App. 4th 462, 465, 21 Cal. Rptr. 2d 335]* . Immunity may also extend under *Gov. Code § 831.4(b)* if the trail is used only for access to a listed recreation and is not used for the actual recreation itself [*see Treweek v. City of Napa (2000) 85 Cal. App. 4th 221, 229, 101 Cal. Rptr. 2d 883]* .

Trail immunity is available under these provisions even when the trail is paved and even when the claim alleges defects in the design or maintenance of the trail [*Amberger-Warren v. City of Piedmont (2006) 143 Cal. App. 4th 1074, 1084-1085, 49 Cal. Rptr. 3d 631* (immunity applied when injury was sustained onpaved pathway through public dog park, despite allegations that handrails should have been installed); *see also Prokop v. City of Los Angeles (2007) 150 Cal. App. 4th 1332, 1341-1342, 59 Cal. Rptr. 3d 355* (injury allegedly caused by design of access gate to bikeway was covered by trail immunity)].

[8] Specific Unimproved Lands

Gov. Code § 831.6 provides that neither the state of California nor an employee of the state is liable for any injury caused by a condition of the unimproved and unoccupied portions of:

- The ungranted tidelands and submerged lands, and the beds of navigable rivers, streams, lakes, bays, estuaries, inlets, and straits, owned by the state; and

- The unsold portions of the 16th and 36th sections of school lands, the unsold portions of the 500,000 acres granted to the state for school purposes, and the unsold portions of the listed lands selected of the United States in lieu of the 16th and 36th sections and losses to the school grant.

[9] Hazardous Recreational Activities

Gov. Code § 831.7(a) provides that neither a public entity nor a public employee is liable to any person who participates in a hazardous recreational activity (defined in *Gov. Code § 831.7(b)*), including any person who assists the participant, or to any spectator who knew or reasonably should have known that the hazardous recreational activity created a substantial risk of injury to himself or herself and was voluntarily in the place of risk, or having the ability to do so failed to leave, for any damage or injury to property or persons arising out of that hazardous recreational activity.

Gov. Code § 831.7(c) provides further that, notwithstanding the provisions of Gov. Code *§ 831.7(a), Gov. Code* § 831.7 does not limit liability that would otherwise exist for any of the following:

- Failure of the public entity or employee to guard or warn of a known dangerous condition or of another hazardous recreational activity known to the public entity or employee that is not reasonably assumed by the participant as inherently a part of the hazardous recreational activity out of which the damage or injury arose;

- Damage or injury suffered in any case where permission to participate in the hazardous recreational activity was granted for a specific fee; for the purpose of this paragraph, a "specific fee" does not include a fee or consideration charged for a general purpose such as a general park admission charge, a vehicle entry or parking fee, or an administrative or group use application or permit fee, as distinguished from a specific fee charged for participation in the specific hazardous recreational activity out of which the damage or injury arose [*see also Perry v. East Bay Regional Park Dist. (2006) 141 Cal. App. 4th 1, 13,*

45 Cal. Rptr. 3d 477 (when park charged fee specifically for swimming when lifeguards are on duty, specific fee exception to immunity did not apply when swimmer drowned after lifeguards had gone off duty)];

- Injury suffered to the extent proximately caused by the negligent failure of the public entity or public employee to properly construct or maintain in good repair any structure, recreational equipment or machinery, or substantial work improvement used in the hazardous recreational activity out of which the damage or injury arose;

- Damage or injury suffered in any case in which the public entity or employee recklessly or with gross negligence promoted the participation in or observance of a hazardous recreational activity; for the purposes of this paragraph, promotional literature or a public announcement or advertisement that merely describes the available facilities and services on the property does not in itself constitute a reckless or grossly negligent promotion; and

- An act of gross negligence by a public entity or a public employee which is the proximate cause of the injury.

Gov. Code § 831.7(c) further provides that nothing in *Gov. Code § 831.7(c)* creates a duty of care or basis of liability for personal injury or for damage to personal property.

Gov. Code § 831.7(d) provides that nothing in *Gov. Code § 831.7* shall limit the liability of an independent concessionaire, or any person or organization other than the public entity, whether or not the person or organization has a contractual relationship with the public entity to use the public property, for injuries or damages suffered in any case as a result of the operation of a hazardous recreational activity on public property by the concessionaire, person, or organization.

[10] Reservoirs, Canals, Conduits, or Drains

Gov. Code § 831.8(a) provides that, subject to *Gov. Code § 831.8(d)* and *(e)*, neither a public entity nor a public employee is liable for an injury caused by the condition of a reservoir if at the time of the injury the person was using the property for any purpose other than that for which the public entity intended or permitted the property to be used.

Gov. Code § 831.8(b) provides that, subject to *Gov. Code § 831.8(d)* and *(e)*, neither an irrigation district nor an employee thereof nor the state of California nor a state employee is liable for an injury caused by the condition of canals, conduits, or drains used for the distribution of water if at the time of the injury the personinjured was using the property for any purpose other than that for which the district or state intended it to be used.

Gov. Code § 831.8(d) provides that neither a public entity nor a public employee is exonerated under *Gov. Code § 831.8* from liability for injury proximately caused by a dangerous condition of property if:

- The injured person was not guilty of a criminal offense under *Penal Code §§ 552-555.5* (relating to trespassing or loitering near posted industrial property) in entering on or using the property;

- The condition created a substantial and unreasonable risk of death or serious bodily harm when the property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used;

- The dangerous character of the condition was not reasonably apparent to, and would not have been anticipated by, a mature reasonable person using the property with due care; and

- The public entity or the public employee had actual knowledge of the condition and knew or should have known of its dangerous character a sufficient time prior to the injury to have taken measures to protect against the condition.

Gov. Code § 831.8(e) further provides that neither a public entity nor a public employee is exonerated under *Gov. Code § 831.8* from liability for injury proximately caused by a dangerous condition of property if:

- The person injured was less than 12 years of age;

- The dangerous condition created a substantial and unreasonable risk of death or serious bodily harm to children under 12 years of age using the property or adjacent property with due care in a manner in which it was reasonably foreseeable that it would be used;

- The person injured, because of immaturity, did not discover the condition or did not appreciate its dangerous character; and

- The public entity or the public employee had actual knowledge of the condition and knew or should have known of its dangerous character a sufficient time prior to the injury to have taken measures to protect against the condition.

An analogous exception to immunity applies to Los Angeles County flood control agencies and water conservation facilities and their employees, although that exception extends to children 16 years old or younger [*Gov. Code § 831.8(f)*]. The qualified immunity for those agencies, facilities, and employees generally extends to injuries caused by the condition or use of unlined flood control channels or adjacent groundwater recharge spreading grounds if, at the time of injury, the person injured was using the property for any purpose other than that for which the public entity intended it to be used [*Gov. Code § 831.8(c)*].

[11] General Recreational Users Immunity

Civ. Code § 846, which relieves private property owners from liability for injuries to recreational users in specified instances, does not apply to public entities [*see Delta Farms Reclamation Dist. v. Superior Court (1983) 33 Cal. 3d 699, 707, 190 Cal. Rptr. 494, 660 P.2d 1168]* . For a form of points and authorities supporting this contention, see *§ 196.303*. For additional discussion and forms of points and authorities relating to *Civ. Code § 846*, see Ch. 178, *Premises Liability* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsPublic ImprovementsGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityDangerous ConditionsNatural ConditionsTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesRecreational FacilitiesGeneral OverviewTortsPublic Entity LiabilityImmunityGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsExclusions From Liability

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19A-196 California Points & Authorities § 196.13

§ 196.13 Terminology Used in This Chapter

[1] "Tort Claims Act"

The tort liability of government entities and the requirement for presenting claims prior to suing a public entity for money or damages are covered in *Gov. Code §§ 810-996.6*, which comprise Division 3.6 of the Government Code. Division 3.6 is entitled "Claims and Actions Against Public Entities and Public Employees." Enacted in 1963 in response to *Muskopf v. Corning Hosp. Dist. (1961) 55 Cal. 2d 211, 11 Cal. Rptr. 89, 359 P.2d 457* , which struck down governmental immunity to tort liability, this division does not have a short title, and the actual title is cumbersome to use. The result has been for the courts and others to refer to the entire division by the short title, "Tort Claims Act" [*see, e.g., Milligan v. City of Laguna Beach (1983) 34 Cal. 3d 829, 831, 196 Cal. Rptr. 38, 670 P.2d 1121]* , or, to distinguish the California act from the Federal Tort Claims Act, the "California Tort Claims Act" [*see, e.g., Elston v. City of Turlock (1985) 38 Cal. 3d 227, 233 n.5, 211 Cal. Rptr. 416, 695 P.2d 713]* , or, occasionally, "California's Tort Claims Act" [*see, e.g., Peterson v. San Francisco Cmty. Coll. Dist. (1984) 36 Cal. 3d 799, 804, 205 Cal. Rptr. 842, 685 P.2d 1193]* .

The short title can, however, be misleading. Division 3.6 is divided into seven parts. Tort liability of public entities and employees is covered in Part 2 (*Gov. Code §§ 814-895.8*). Part 3 (*Gov. Code §§ 900-935.7*) deals with claims against public entities and Part 4 (*Gov. Code §§ 940-960.8*) deals with actions against public entities and employees. Part 3 applies to claims against public entities for "money or damages" (*see Gov. Code §§ 905, 905.2*) and its provisions apply to both tort and contract claims. Thus, *Gov. Code § 905*, relating to claims against "local" public entities (defined in *Gov. Code § 900.4*), requires the presentation to the public entity of "all claims for money or damages" except as set forth in the section. Although some of the exceptions relate to specific kinds of contract liability (*see Gov. Code § 905(b), (c), (g)* and § 196.30), contract liability as a class is not excluded. The specific contract exceptions would not have been necessary if the statute did not otherwise apply to contract claims [*see Dilts v. Cantua Elementary Sch. Dist. (1987) 189 Cal. App. 3d 27, 31-32, 234 Cal. Rptr. 612* (judgment of dismissal of complaint for damages for breach of written employment contract affirmed for failure to comply with claim-presentation requirements)]. *Gov. Code § 905.2*, relating to claims against the "state" (defined in *Gov. Code § 900.6*) is more precise. It requires the presentation of all claims for money or damages "(1) on express contract, or (2) for an injury for which the state is liable" [*Gov. Code § 905.2(b)(3)*; *see, e.g., White v. State of California (1987) 195 Cal. App. 3d 452, 477, 240 Cal. Rptr. 732]* . That is, it

expressly covers both contracts and torts. Thus, the title "Tort Claims Act," which suggests that the claims must arise from tort, is misleading. In deference to the court cases using the term, however, this chapter refers to the act as the "Tort Claims Act" or the "California Tort Claims Act," although a more accurate title might be the "California Public Liability Act."

[2] "Board," "Local Public Entity," and "State"

As used in the California Tort Claims Act, the word "board" means, in the case of a local public entity, the entity's governing body or, in the case of the state, the Victim Compensation and Government Claims Board [*Gov. Code § 900.2*]. The term "local public entity" includes a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the state of California but does not include the state [*Gov. Code § 900.4*]. The term "State" means the state of California and any office, officer, department, division, bureau, board, commission, or agency of the state claims against which are paid by warrants drawn by the State Controller [*Gov. Code § 900.6*].

[3] "Employee"

The word "employee," as used in the California Tort Claims Act, includes an officer, judicial officer as defined in *Elec. Code § 327*, employee, or servant, whether or not compensated, but does not include an independent contractor [*Gov. Code § 810.2*; *see Briggs v. Lawrence (1991) 230 Cal. App. 3d 605, 618, 281 Cal. Rptr. 578* (salaried full-time public defender engaged in representing assigned clients is public employee, not independent contractor)].

Although the definition of employee may include an employee or servant who is not receiving compensation, unpaid volunteers of public agencies are excluded from the definition of "employee" for workers' compensation purposes. Due to this exclusion, a city was not liable under the doctrine of respondeat superior for the alleged tort of an unpaid volunteer [*Munoz v. City of Palmdale (1999) 75 Cal. App. 4th 367, 368-369, 89 Cal. Rptr. 2d 229* (alleged tortfeasor was volunteer at city's senior center); *see Lab. Code § 3352(i)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPublic Entity LiabilityLiabilityState Tort Claims ActsEmployeesTortsPublic Entity LiabilityLiabilityState Tort Claims ActsEntities CoveredTortsPublic Entity LiabilityLiabilityState Tort Claims ActsProcedural Requirements

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19A-196 California Points & Authorities § 196.14

§ 196.14 Judgment Against Public Entity

[1] Effect of Collateral Source Payments

The effect of collateral source payments, as defined in *Gov. Code § 985(a)*, on a judgment against a public entity for personal injury or wrongful death and their pretrial discovery are governed by *Gov. Code § 985*. For further discussion, see California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Tort Claims Act* (Matthew Bender).

[2] Satisfaction of Judgment

[a] Award in Excess of $100,000

On the entry of a verdict in excess of $100,000 against a public entity in an action for personal injury or wrongful death, the public entity may, within the time set in *Code Civ. Proc. § 659* (relating to motion for new trial), make a written request for a mandatory settlement conference for the purpose of discussing available methods by which the judgment will be satisfied. The court shall then set a date for the conference [*Gov. Code § 962*]. For further discussion, see California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Tort Claims Act* (Matthew Bender).

[b] Periodic Payment of Judgment

A judgment against a public entity may be ordered to be paid by periodic payments only as follows: pursuant to *Code Civ. Proc. § 667.7* (action against health care provider), or *Gov. Code § 970.6* (installment payment of judgments against local public entities), or *Gov. Code § 984(d)* (installment payments when public entity is not insured and judgment exceeds $500,000), or by agreement of the parties [*Gov. Code § 984(c)*]. For discussion of *Code Civ. Proc. § 667.7*, see California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice* (Matthew Bender). For discussion of *Gov. Code §§ 970.6* and *984*, see California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Tort Claims Act* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesCollateral Source RuleGeneral OverviewTortsProcedureSettlementsEnforcementTortsPublic Entity LiabilityLiabilityState Tort Claims ActsGeneral Overview

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19A-196 California Points & Authorities § 196.15

§ 196.15 How to Use Forms in This Chapter

[1] Page Limits on Points and Authorities

One of the more significant drafting requirements to keep in mind are pagelimits: supporting and opposing memoranda filed in discovery motion proceedings may not exceed 15 pages. A reply or closing memorandum may not exceed 10 pages. Exhibits, declarations, attachments, the table of contents, the table of authorities, and the proof of service are excluded from these page limits. Any party must obtain leave of court to file a longer memorandum [*see Cal. Rules of Ct., Rule 3.1113(d), (e)*]. These and other drafting requirements are discussed in further detail in Ch. 1, *Writing Legal Memoranda and Briefs* .

[2] Using Forms to Build Draft Memorandum

Forms in this chapter are in the form of contentions based on particular procedural and substantive points of law, and may be combined with each other depending on the facts and issues involved. They may also be combined with any appropriate procedural forms, depending on the context in which they are raised. For example, the forms supporting a contention that a public entity or employee is liable under the circumstances, or that a statutory immunity from liability does not apply, may be raised in the context of opposing or supporting a motion for summary judgment and, in that context, might be combined with appropriate procedural forms in Ch. 221, *Summary Judgments* . The contentions may also be adapted for use in a trial or appellate brief or be used to research office memoranda and jury instructions. Whatever procedural context or paper is involved, counsel should add argument to the points and authorities being used showing the relationship between the facts of the case and the points of law stated.

For a discussion of how to use the forms in this chapter to draft a memorandum of points and authorities or a trial or appellate brief, discussion of drafting requirements and considerations applicable to memoranda generally, and a skeletal form of a complete memoranda, see Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPleading & PracticeMotion

PracticeSupporting MemorandaTortsPublic Entity LiabilityLiabilityClaim PresentationContent & Form

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19A-196 California Points & Authorities § 196.16

§ 196.16 Related Pleadings and Practice Forms

For discussion, procedural guides, and forms for use in claims and actions against public entities and public employees under the California Tort Claims Act and otherwise, see the following chapters in California Forms of Pleading and Practice (Matthew Bender):

- Ch. 102, *Bridges*
- Ch. 246, *Emergency Vehicles*
- Ch. 257, *False Imprisonment*
- Ch. 304, *Insane and Other Incompetent Persons*
- Ch. 340, *Libel and Slander*
- Ch. 357, *Malicious Prosecution and Abuse of Process*
- Ch. 391, *Nuisance*
- Ch. 464, *Public Entities and Officers: California Tort Claims Act*
- Ch. 512, *Schools*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsPublic ImprovementsBridges & RoadsGovernmentsState & Territorial GovernmentsClaims By & AgainstTortsPublic Entity LiabilityLiabilityState Tort Claims ActsGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsEntities Covered

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19A-196 California Points & Authorities § 196.17

§ 196.17 Related Points and Authorities

For memoranda of points and authorities opposing a general demurrer to a complaint based on the ground that the action is barred by a statute of limitations, see Ch. 143, *Limitation of Actions* .

For forms of points and authorities relating to tort liability in general for negligent conduct or for maintaining a nuisance, see respectively Ch. 165, *Negligence* and Ch. 167, *Nuisance* . Related forms of points and authorities, that may be useful in particular actions against public entities or employees, may also be found in Ch. 103, *False Imprisonment* , Ch. 117, *Insane and Incompetent Persons: Actions Involving Mental Patients* , and Ch. 210, *Schools: Actions by Students* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersEducation LawCivil LiabilityGeneral OverviewReal Property LawTortsNuisanceElementsTortsIntentional TortsFalse ImprisonmentGeneral OverviewTortsNegligenceActionsGeneral Overview

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19A-196 California Points & Authorities §§ 196.18-196.29

[Reserved]

§§ 196.18[Reserved]

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A. Claims Against Public Entities
1. Failure To File Timely Claim

19A-196 California Points & Authorities § 196.30

§ 196.30 Supporting Contention That Plaintiff's Claim Against Public Entity Is Excepted or Exempt From Claim Filing Provisions [Gov. Code §§ 905, 905.2] of California Tort Claims Act [Gov. Code §§ 810-996.6]--Statutory Exceptions [Gov. Code §§ 905, 905.1, 905.6]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S CLAIM AGAINST _____ [*name of public entity*] IS FOR _____ [*specify*], WHICH IS EXPRESSLY EXCEPTED FROM THE CLAIMS PROVISIONS OF THE CALIFORNIA TORT CLAIMS ACT.

[*EITHER*]

Claim Against Local Public Entity Relating to Taxes and Assessments. Claims against local public entities under the Revenue and Taxation Code or other statute prescribing procedures for the refund, rebate, exemption, cancellation, amendment, modification, or adjustment of any tax, assessment, fee, or charge, or any portion thereof, or of any penalties, costs, or charges related thereto, are excepted from the claim presentation requirements set forth in *Sections 900-915.4 of the Government Code* (*Gov. Code § 905(a)*).

[*OR*]

Claim Against Local Public Entity Relating to Mechanics' Liens. Claims against local public entities in connection with which the filing of a notice of lien, statement of claim, or stop notice is required under any provision of law relating to mechanics', laborers', or materialpersons' liens, are excepted from the claim presentation requirements set forth in *Sections 900-915.4 of the Government Code* (*Gov. Code § 905(b)*).

[*OR*]

Claim Against Local Public Entity by Public Employee for Fees, Salary, or Expenses. Claims against local public entities by public employees for fees, salaries, wages, mileage, or other expenses and allowances are excepted from the claim presentation requirements set forth in *Sections 900-915.4 of the Government Code* (*Gov. Code § 905(c)*).

[*OR*]

Workers' Compensation Claim Against Local Public Entity. Claims against local public entities for which the workers' compensation authorized by *Lab. Code § 3200 et seq.* is the exclusive remedy are excepted from the claim presentation requirements set forth in *Sections 900-915.4 of the Government Code* (*Gov. Code § 905(d)*).

[*OR*]

Claim Against Local Public Entity for Public Assistance. Applications or claims against local public entities for any form of public assistance under the Welfare and Institutions Code or other provisions of law relating to public assistance programs and claims for goods, services, provisions, or other assistance rendered for or on behalf of any recipient of any form of public assistance, are excepted from the claim presentation requirements set forth in *Sections 900-915.4 of the Government Code* (*Gov. Code § 905(e)*).

[*OR*]

Retirement or Pension Claim Against Local Public Entity. Applications or claims against local public entities for money or benefits under any public retirement or pension system are excepted from the claim presentation requirements set forth in *Sections 900-915.4 of the Government Code* (*Gov. Code § 905(f)*).

[*OR*]

Claim Against Local Public Entity on Bonds or Other Evidences of Indebtedness. Claims against local public entities for principal or interest on any bonds, notes, warrants, or other evidences of indebtedness are excepted from the claim presentation requirements set forth in *Sections 900-915.4 of the Government Code* (*Gov. Code § 905(g)*).

[*OR*]

Claim Against Local Public Entity Relating to Special Assessment Constituting Lien. Claims against local public entities that relate to a special assessment constituting a specific lien against the property assessed and that are payable from the proceeds of the assessment, by offset of a claim for damages against it or by delivery of any warrant or bonds representing it, are excepted from the claim presentation requirements set forth in *Sections 900-915.4 of the Government Code* (*Gov. Code § 905(h)*).

[*OR*]

Claim Against Local Public Entity by State of California, or Other Local Public Entity. Claims against local public entities by the state of California, by a state department or agency, by another local public entity, or by a judicial branch entity are excepted from the claim presentation requirements set forth in *Sections 900-915.4 of the Government Code* (*Gov. Code § 905(i)*).

[*OR*]

Claim Against Local Public Entity Under Unemployment Insurance Code. Claims against local public entities arising under any provision of the Unemployment Insurance Code, including but not limited to claims for money or benefits, or for refunds or credits of employer or worker contributions, penalties, or interest, or for refunds to workers of deductions from wages in excess of the amount prescribed, are excepted from the claim presentation requirements set forth in *Sections 900-915.4 of the Government Code* (*Gov. Code § 905(j)*).

[*OR*]

Claim Against Local Public Entity Under Labor Code for Penalty or Forfeiture. Claims against local public entities for the recovery of penalties or forfeitures made pursuant to *Sections 1720-1740 of the Labor Code*, relating to public works contracts, are excepted from the claim presentation requirements set forth in *Sections 900-915.4 of the Government Code* (*Gov. Code § 905(k)*).

[*OR*]

Claim Against Local Public Entity Governed by Pedestrian Mall Law of 1960. Claims against local public entities governed by the Pedestrian Mall Law of 1960, set forth as *Sections 11000-11806 of the Streets and Highways Code*, are excepted from the claim presentation requirements set forth in *Sections 900-915.4 of the Government Code* (*Gov. Code § 905(l)*).

[*OR*]

Claim Against Local Public Entity for Childhood Sexual Abuse. Claims to recover damages for childhood sexual abuse brought pursuant to *Code of Civil Procedure Section 340.1* are excepted from the claim presentation requirement set forth in *Sections 900-915.4 of the Government Code*, if arising from conduct occurring on or after January 1, 2009 (*Gov. Code § 905(m)*).

[*OR*]

Claim Against Sheriff for Failure to Pay Over Money Due to Another. Claims to recover from a sheriff money that has come into the sheriff's possession by virtue of his or her office, that the sheriff neglects or refuses to pay over to the entitled person upon demand under *Government Code Section 26680*, are excepted from the claims filing requirements set forth in *Sections 900-915.4 of the Government Code* (*Gov. Code § 905(n)*).

[*OR*]

Claim for Inverse Condemnation. No claim is required to be filed to maintain an action against a public entity for the

taking of, or damage to, private property pursuant to *Section 19 of Article I of the California Constitution* (*Gov. Code § 905.1*).

[*OR*]

Claim Against Regents of University of California. The provisions of *Sections 900-935.7 of the Government Code*, relating to claims against California state or local public entities, do not apply to claims against the Regents of the University of California (*Gov. Code § 905.6*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the claim sued on is expressly excepted from the claim presentation provisions of the Government Code (*Gov. Code §§ 900-915.4*).

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be used in a memorandum of points and authorities in opposition to a demurrer to a complaint, a motion for judgment on the pleadings, or a motion for summary judgment when the ground of the demurrer or motion for judgment on the pleadings is that the complaint fails to allege the presentation and rejection of the claim or when the ground of the motion for summary judgment is that no claim was presented. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms of claims and related forms, see California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Tort Claims Act* (Matthew Bender).

[3] Opposing Authorities

[a] Claim Against Local Public Entity by State of California or Other Local Public Entity

In *City of Ontario v. Superior Court (1993) 12 Cal. App. 4th 894, 16 Cal. Rptr. 2d 32* , the state filed a complaint for equitable indemnity against a city, alleging that third-party plaintiffs had recovered a judgment against the state based on flood damage for which the city was liable, and that the state had paid the judgment. The city demurred, arguing that the state'sdemand was barred because it had not filed a claim with the city pursuant to the city's ordinance requiring all claimants not otherwise governed by state or local laws to present claims pursuant to the requirements of *Gov. Code §§ 910 through 915.2*. The claims requirements were further subject to the provisions of *Gov. Code § 945.4*, i.e., they were a condition precedent to filing suit. The trial court overruled the demurrer, and the court of appeal let a peremptory writ of mandate issue, directing the vacation of that order. The appellate court held that the state is not exempted from the provisions of *Gov. Code § 935*, which allows a local public entity to establish its own policies and procedures for the presentation of claims that are exempted by *Gov. Code § 905*, inasmuch as the state is specified in § 905, and not otherwise excluded from § 935. Therefore, the city's claims requirements apply to state claims (*12 Cal. App. 4th 894, 898-903)* .

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19A-196 California Points & Authorities § 196.31

§ 196.31 Supporting Contention That Plaintiff's Claim Against Public Entity Is Excepted or Exempt from Claim Filing Provisions [Gov. Code §§ 905, 905.2] of California Tort Claims Act [Gov. Code §§ 810-996.6]--Money Recovery Is Incidental to Other Judicial Relief Sought

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S ACTION IS NOT SUBJECT TO THE CLAIMS PRESENTATION PROVISIONS OF THE CALIFORNIA TORT CLAIMS ACT BECAUSE THE PRIMARY PURPOSE OF THE ACTION IS TO SECURE _____ [*specify relief sought, other than money or damages, e.g.,* REINSTATEMENT TO EMPLOYMENT] AND THE CLAIM FOR _____ [*specify money or damages claimed, e.g.,* BACK PAY] IS MERELY INCIDENTAL TO THAT RELIEF.

A. Monetary Claim Incidental to Other Judicial Relief Sought. A claim for money which is merely incidental to some other form of judicial relief sought in an action or proceeding against a public entity is not subject to the claim provisions of *Sections 905, 905.2,* and *945.4 of the Government Code* (*see Minsky v. City of Los Angeles (1974) 11 Cal. 3d 113, 121, 113 Cal. Rptr. 102, 520 P.2d 726* ; *Harris v. State Personnel Bd. (1985) 170 Cal. App. 3d 639, 643, 216 Cal. Rptr. 274* ; *Snipes v. City of Bakersfield (1983) 145 Cal. App. 3d 861, 869, 193 Cal. Rptr. 760*).

[*Optional*] **B. Action for Return of Property Wrongfully Withheld.** A claim against a public entity for the specific recovery of property, including money, is not a claim for "money or damages" within the meaning of *Section 905 of the Government Code,* requiring the presentation of claims against local public entities as a prerequisite to a judicial action on the claim (*Minsky v. City of Los Angeles (1974) 11 Cal. 3d 113, 116-117, 121-124, 113 Cal. Rptr. 102, 520 P.2d 726* ; *Hibbard v. City of Anaheim (1984) 162 Cal. App. 3d 270, 275-276, 208 Cal. Rptr. 733*).

[*Optional*] **C. Mandate Proceeding for Reinstatement to Job and Back Pay.** A proceeding in mandate by a former state employee seeking reinstatement to employment and back pay is exempt from the claim presentation requirements

of *Gov. Code § 905.2(b)(4)* (formerly Gov. Code § 905.2(d)) because the principal relief sought is reinstatement and the claim for back pay is merely incidental to that relief (*Harris v. State Personnel Bd. (1985) 170 Cal. App. 3d 639, 643, 216 Cal. Rptr. 274*).

[*Optional*] **D. Action for Injunctive Relief and Damages for Violation of Fair Employment and Housing Act.** An action against a public entity for injunctive relief and damages under the Fair Employment and Housing Act (*Gov. Code §§ 12900-12996*) is not subject to the claims provisions of *Gov. Code §§ 905* and *945.4* because the action basically is an action for injunctive relief with the claim for damages being merely incidental to that relief (*Snipes v. City of Bakersfield (1983) 145 Cal. App. 3d 861, 869-870, 193 Cal. Rptr. 760*).

[*Optional*] **E. Proceeding to Compel State Officer to Perform Express Statutory Duty to Pay Money.** A proceeding in mandate which seeks to compel a state officer to perform an express statutory duty to pay money is not an action against the state and is outside the purview of the claims statute (*Gov. Code § 905.2*) (*Forde v. Cory (1977) 66 Cal. App. 3d 434, 437-438, 135 Cal. Rptr. 903*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the claim sued on is not subject to the claim presentation provisions of the Government Code (*Gov. Code §§ 900-915.4*). The point of the contention is that a claim for money that is incidental and secondary to some other judicial relief sought against a public entity is exempt from the claims presentation statutes.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be used in a memorandum of points and authorities in opposition to a demurrer to a complaint, a motion for judgment on the pleadings, or a motion for summary judgment when the ground of the demurrer or motion for judgment on the pleadings is that the complaint fails to allege the presentation and rejection of the claim or when the ground of the motion for summary judgment is that no claim was presented. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms of claims and related forms, see California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Tort Claims Act* (Matthew Bender).

[3] Discussion of Authorities

[a] Monetary Claim Incidental to Other Judicial Relief Sought

Minsky v. City of Los Angeles *(1974) 11 Cal. 3d 113, 113 Cal. Rptr. 102, 520 P.2d 726* , was an action by the assignee of the claim of an arrestee for the return of property, specifically a sum of money, that was taken by local police officers at the time of the arrest and wrongfully withheld following the disposition of criminal charges. In reversing the judgment of dismissal following the sustaining of a demurrer without leave to amend on the ground the complaint failed to allege compliance with the claims presentation requirement (*Gov. Code § 905*), the Supreme Court said a claim for the specific recovery of property has never been considered a claim for "money or damages" as used in *Gov. Code § 905* and its predecessors and that only claimants seeking money or damages, as distinguished from other types of judicial relief, are required to conform to the claims procedure (*11 Cal. 3d 113, 121)* . The Court added that

the claims statutes do not impose any requirements for nonpecuniary actions, such as those seeking injunctive, specific, or declaratory relief (*11 Cal. 3d 113, 121)* .

NOTE:

Although *Minsky v. City of Los Angeles* arose under *Gov. Code § 905* relating to claims against local public entities, the Court's holding would appear to apply as well to an action under *Gov. Code § 905.2* relating to claims against the state, because that statute is also limited by its terms to claims for "money or damages."

Harris v. State Personnel Bd. *(1985) 170 Cal. App. 3d 639, 216 Cal. Rptr. 274* , was a supplemental proceeding in mandate by which a discharged employee sought back pay after he had been ordered reinstated without back pay. The board's demurrer to the supplemental petition for writ of mandate was sustained on the ground the employee had not complied with *Gov. Code § 905.2(d)* [*now see Gov. Code § 905.2(b)(4)*], which requires as a condition precedent to suit (*see Gov. Code § 945.4*) the presentation of a claim against the state for money or damages for which settlement is not otherwise provided by statute or constitutional provision. The petition was dismissed with prejudice and the employee appealed.

The court of appeal reversed the judgment of dismissal and remanded the case to the trial court with instructions to issue a writ of mandate directing the State Personnel Board to reconsider the employee's request for back pay. In holding that the claim was not subject to the claim presentation provision of *Gov. Code § 905.2* and that the demurrer to the supplemental petition for writ of mandate should have been overruled, the court said that those actions which seek injunctive or declaratory relief and certain actions in mandamus, such as the employee's action where money is an incident thereto, are exempted from the claim presentation requirements of *Gov. Code §§ 905* and *905.2* (*170 Cal. Ap. 3d 639, 643)* .

Snipes v. City of Bakersfield *(1983) 145 Cal. App. 3d 861, 193 Cal. Rptr. 760* , was an action for injunctive relief and damages by a job applicant against a city police department for alleged racial discrimination in refusing to employ him as a police officer solely because he was black, in violation of (now) *Gov. Code § 12940*. The action was filed after the applicant had exhausted his administrative remedies. The city's demurrer to the complaint on the ground the plaintiff had failed to allege compliance with the Tort Claims Act, specifically with *Gov. Code § 945.4* (providing in part that no action for damages for which a claim must first be presented may be brought until that claim has been presented to, and acted on or deemed rejected by, the public entity), was sustained without leave to amend and the action was dismissed.

The court of appeal reversed; it held that no portion of the applicant's complaint was subject to the claims presentation requirements of *Gov. Code §§ 905* and *945.4* and that the demurrer had therefore been improperly sustained (*145 Cal. App. 3d 861, 870-871)* . The court said that the general scope of the Tort Claims Act's notice-of-claim provisions is limited to "claims for money or damages" (*Gov. Code §§ 905, 905.2*) and that the quoted language exempts actions seeking specific relief other than money or damages, such as injunctive or declaratory relief and certain actions in mandate. An action for specific relief, the court said, does not lose its exempt status solely because incidental money damages are sought (*145 Cal. App. 3d 861, 869-870)* .

[b] Action for Return of Property Wrongfully Withheld

The facts and procedural background of ***Minsky v. City of Los Angeles*** *(1974) 11 Cal. 3d 113, 113 Cal. Rptr. 102, 520 P.2d 726* , are discussed in *§ 196.31[3][a]*. In holding that the claims statutes (*Gov. Code §§ 900-905.8*) did not apply and reversing the judgment of dismissal, the Supreme Court said that *Gov. Code § 905* (relating to claims against local public entities) makes clear that the requirements for presentation of claims apply only to "claims for money or damages" and not to claims for other forms of relief, such as specific recovery of property taken by the city as bailee (*11 Cal. 3d 113, 117)* . The Court added that a claim for the specific recovery of property has never been considered a claim for "money or damages" as used in *Gov. Code § 905* and its predecessors. Only claimants seeking money or

damages, as distinguished from other types of judicial relief, are required to conform to the claims procedures (*11 Cal. 3d 113, 121)* . The Court discussed with approval a similar holding [*Bertone v. City & County of San Francisco (1952) 111 Cal. App. 2d 579, 588, 245 P.2d 29]* , and disapproved any contrary indications in *Union Bank & Trust Co. v. County of Los Angeles* [*Union Bank & Trust Co. v. County of Los Angeles (1934) 2 Cal. App. 2d 600, 605-607, 38 P.2d 442]* (*11 Cal. 3d 113, 122, 123 n.15*).

The Court noted that even if the money taken from an arrestee was no longer traceable to any property presently in the defendant's possession and thus was not strictly available for specific recovery, the cause of action would not be foreclosed by the claims statutes. The Court explained that after a local governmental entity wrongfully withholds an arrestee's property, the arrestee clearly can seek specific recovery of the property while it is still in the possession of the local entity without being limited to the relatively short period for filing claims set forth in the claims statutes. This initial exemption of the action from the claims statute is not lost simply because the city takes the further wrongful step of disposing of the bailed property. The city cannot be permitted to invoke the claims statute, originally not available to it, by virtue of a later wrongful dissipation of the property. To so hold, would be in effect to allow the local entity to profit by its own wrong penalizing a plaintiff who, in the light of the specific recovery remedy available, justifiably did not file a claim (*11 Cal. 3d 113, 121-122 n.14*).

Hibbard v. City of Anaheim *(1984) 162 Cal. App. 3d 270, 275-276, 208 Cal. Rptr. 733* , was an action by a husband and wife against the city to recover property seized in connection with the execution of a search warrant, which was later suppressed, or damages in lieu of the property. The trial court sustained the city's demurrer to the complaint without leave to amend on the ground plaintiffs had failed to comply with the claim-filing requirements of the Government Code. The court of appeal reversed. The court held that the action was not subject to the claim filing requirements of the Tort Claims Act (*162 Cal. App. 3d 270, 275)* . The court said that even if it assumed that the city breached its duty to return the property by auctioning it without a court order, the plaintiffs' claim was still not subject to the act (*162 Cal. App. 3d 270, 276)* . The court said that the initial exemption of the action from the claims statute is not lost simply because the city takes the further wrongful step of disposing of the bailed property. The city cannot be permitted to invoke the claims statute, originally not available to it, by virtue of a later wrongful dissipation of the property. To so hold would be in effect to allow the local entity to profit by its own wrong, penalizing a plaintiff who, in light of the specific recovery remedy apparently available, justifiably did not file a claim (*162 Cal. App. 3d 270, 277)* .

[c] Mandate Proceeding for Reinstatement to Job and Back Pay

The procedural background of ***Harris v. State Personnel Bd.*** *(1985) 170 Cal. App. 3d 639, 216 Cal. Rptr. 274* , is discussed in *§ 196.31[3][a]*. Petitioner, a California State University employee, had sustained a work-related injury and was found by his physician to be temporarily disabled until May 14, 1979. On March 22, 1979, he was referred to the State Compensation Employment Fund for examination by the fund's physician who advised him to return to work May 7th. On May 7th the employee considered himself still disabled but did not advise his employer he would not be returning to work on that date. On the same day, the fund's adjuster advised the employee to file for adjudication of his claim with the Workers' Compensation Appeals Board and told him that he could not be terminated from his employment for filing the claim, which the employee misinterpreted to mean that, if he filed, the employer would have no right to fire him. The employer considered the employee to be absent without leave from May 8, 1979, to May 14, 1979, and, pursuant to *Educ. Code § 89541*, providing that absence without leave of an employee, whether voluntary or involuntary, for five consecutive working days is an automatic resignation from state service as of the last date on which the employee worked, considered the employee to have automatically resigned on May 8th and so notified him. After a subsequent hearing on appellant's application for reinstatement, the State Personnel Board found that the employee's mistaken belief regarding the filing of a workers' compensation claim was a satisfactory reason for his absence from work without first obtaining consent but denied reinstatement on the ground there was no showing that the employee was ready, willing, and able to return to work. After a successful mandate proceeding against the board by the employee, the board ordered the employee reinstated without back salary. The board's demurrer to the employee's subsequent supplemental petition for writ of mandate to the superior court seeking an order for back salary was

sustained on the ground the employee had not complied with Gov. Code§ 905.2(d) [*now see Gov. Code § 905.2(b)(4)*], which, as a condition precedent to suit, requires the presentation of a claim against the state for money or damages for which settlement is not otherwise provided by statute or constitutional provision. The petition was dismissed with prejudice and the employee appealed.

In reversing the judgment of dismissal and remanding the case to the trial court with directions to issue a writ of mandate, the court of appeal held that the claim for back salary was not subject to the claim presentation provision of *Gov. Code § 905.2*, that it was clearly incidental to the employee's request for an order of reinstatement, and that it was therefore exempt from the claim presentation requirements of *Gov. Code § 905.2* (*170 Cal. App. 3d 639, 643)* .

[d] Action for Injunctive Relief and Damages for Violation of Fair Employment and Housing Act

The facts and procedural background of ***Snipes v. City of Bakersfield*** *(1983) 145 Cal. App. 3d 861, 193 Cal. Rptr. 760* , are discussed in *§ 196.31[3][a]*. In reversing the judgment of dismissal, the court of appeal held that *Gov. Code §§ 905* and *945.4* do not apply to an action that seeks principally injunctive relief for employment discrimination, and that an action under the Fair Employment and Housing Act (*Gov. Code § 12900 et seq.*) is basically nonpecuniary, the claims for damages and back pay being incidental to the claim for injunctive relief (*145 Cal. App. 3d 861, 869-870)* .

[e] Proceeding to Compel State Officer to Perform Express Statutory Duty to Pay Money

Forde v. Cory *(1977) 66 Cal. App. 3d 434, 135 Cal. Rptr. 903* , was a mandate proceeding by the executor of the will of a judge who died before retirement to compel the State Controller to pay the judge's children a lump-sum benefit pursuant to *Gov. Code §§ 75104* and *75104.5* in addition to a surviving children's monthly allowance pursuant to *Gov. Code §§ 75091* and *75096*. The trial court ruled that the children were entitled to the monthly allowance but not the lump-sum benefit and the court of appeal affirmed. Answering the Attorney General's argument that the lawsuit could not be maintained because plaintiff had failed to precede it by a State Board of Control claim, the court acknowledged that *Gov. Code § 905.2* requires a claim prior to a money action against the state on an express contract but said that the suit before it was to compel a state officer to perform an express statutory duty, that it was not a money action against the state, and that it was outside the purview of the claims statutes (*66 Cal. App. 3d 434, 437-438)* .

[4] Additional Authorities

[a] Action for Return of Property Wrongfully Withheld

In *Long v. City of Los Angeles (1998) 68 Cal. App. 4th 782, 80 Cal. Rptr. 2d 583* , plaintiff's 525 birds were seized by defendant city following a complaint of neglect. After the city notified plaintiff that he could recover the birds after reimbursing the city for the amounts expended for their care and feeding while in the city's possession, plaintiff sued the city to recover possession of the birds, alleging wrongful seizure, as well as for injunctive relief and money damages to compensate for birds that had allegedly been injured or died as a result of the wrongful detention. The trial court granted the city's motion for summary judgment, agreeing with the city that plaintiff's failure to comply with claims filing requirements of the Tort Claims Act precluding the plaintiff's action. The court of appeal reversed, holding that, under the rule of *Minsky v. City of Los Angeles* [*Minsky v. City of Los Angeles (1974) 11 Cal. 3d 113, 113 Cal. Rptr. 102, 520 P.2d 726* ; *see § 196.31[3][b]*] and *Holt v. Kelly* [*Holt v. Kelly (1978) 20 Cal. 3d 560, 143 Cal. Rptr. 625, 574 P.2d 441]* , the Tort Claims Act did not apply to the plaintiff's action for recovery of his property (*68 Cal. App. 4th 782, 786-787)* . The court of appeal additionally held that the exception for the recovery of specific property applies even when loss of some of the property while in government custody due to the government's own negligence necessitates that plaintiff also seek monetary damages in lieu of return of the lost property (*68 Cal. App. 4th 782, 787)* .

[5] Opposing Authorities

[a] Monetary Relief Incidental to Other Judicial Relief Sought

In *Lozada v. City and County of San Francisco (2006) 145 Cal. App. 4th 1139, 52 Cal. Rptr. 3d 209* , plaintiff was a police officer who filed a claim for relief for alleged violations of the Public Safety Officers Procedural *Bill of Rights* Act, *Gov. Code § 3300 et seq.* (POBRA). The police officer sought declaratory and injunctive relief for the violations, as well as actual damages and civil penalties of $25,000 for each of 13 violations. The trial court barred the POBRA action on the grounds that the officer failed to file a claim with the entity pursuant to the Government Claims Act, and the court of appeal affirmed. The court of appeal concluded that the claims for money and damages were not merely incidental to the declaratory and injunctive relief sought by the officer, but rather were the primary focus of the officer's action. Instead of seeking immediate judicial relief from the alleged POBRA violations, the officer had waited until numerous violations allegedly taking place over a period of six months had occurred and then sought significant monetary damages and penalties for those violations. Under the circumstances, the court concluded that the officer was required to comply with the claims presentation requirements (*145 Cal. App. 4th 1139, 1160-1168)* .

[b] Action for Return of Property Wrongfully Withheld

In *City of Los Angeles v. Superior Court (2008) 168 Cal. App. 4th 422, 85 Cal. Rptr. 3d 560* , plaintiffs filed a class action lawsuit seeking to recover money paid to a city as compensation for emergency response costs associated with incidents caused when plaintiffs were driving under the influence of alcohol or drugs. Plaintiffs alleged that some of the money paid was for fixed costs that did not arise directly from plaintiffs' conduct and should not have been paid. The lead plaintiff had filed a claim with the city in December 2004, which was rejected, and the class action complaint was filed in March 2005. The trial court granted class certification and, after concluding that the claim was not governed by the claims presentation requirements of the Government Claims Act because the claim was one for the specific recovery of property, included in the class all persons who were arrested and billed for emergency response costs after March 23, 2002. The city sought a writ of mandate overturning the trial court's determination that the Government Claims Act did not apply, arguing that it did apply and the class of plaintiffs should thus be limited to those who were arrested and billed within one year of the date the complaint was filed. The court of appeals agreed with the city. The court distinguished the rationale and result of *Minsky v. CIty of Los Angeles (1974) 11 Cal. 3d 113, 113 Cal. Rptr. 102, 520 P.2d 726* , discussed in [3][b], *above.* The court noted that unlike in *Minsky*, the city did not seize money from plaintiffs and hold it for them as a bailee, and the city was under no obligation to return the specific property. Thus, plaintiffs claim for monetary relief was a claim for "money or damages" with the meaning of *Gov. Code § 905* and was subject to the requirements of the *168 Cal. App. 4th 422, 430)* .

California Points & Authorities

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CHAPTER 196 PUBLIC ENTITIES
PART II. FORMS
A. Claims Against Public Entities
1. Failure To File Timely Claim

19A-196 California Points & Authorities § 196.32

§ 196.32 Supporting Contention That Plaintiff's Claim Against Public Entity Is Excepted or Exempt From Claim Filing Provisions [Gov. Code §§ 905, 905.2] of California Tort Claims Act [Gov. Code § 810 et seq.]--Cross Complaint Is Defensive Response to Case Initiated by Public Entity

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

CROSS COMPLAINANT'S CROSS COMPLAINT IS NOT SUBJECT TO THE CLAIMS PRESENTATION REQUIREMENT PROVISIONS OF THE CALIFORNIA TORT CLAIMS ACT BECAUSE IT ASSERTS ONLY DEFENSIVE MATTERS IN RESPONSE TO A CASE INITIATED BY THE PUBLIC ENTITY AND ARISES OUT OF THE SAME EVENT FORMING THE BASIS OF THE PLAINTIFF'S CLAIM.

Defensive Cross Complaint in Response to Case Initiated by Public Entity. A defensive cross complaint is exempt from the claim filing requirement of the California Tort Claims Act when (1) it is in response to a case initiated by the co-defendant public entity, (2) it arises out of the same transaction or event that forms the basis of the plaintiff's claim and does not introduce an unrelated claim, and (3) it asserts only defensive matters, making no claim for affirmative relief (*Krainock v. Superior Court (1990) 216 Cal. App. 3d 1473, 1478, 265 Cal. Rptr. 715*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the claim made the subject of a cross-complaint is not subject to the claim presentation provisions of the Government Code [*see Gov. Code §§ 900-915.4*]. The point of the contention is that the cross complainant's cross complaint against codefendant public entity is in response to a case initiated by that public entity, it arises out of the same transaction or event that forms the basis of the plaintiff's claim, and it asserts only defensive matters.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are used. For example, they may be used in a memorandum of points and authorities in opposition to a demurrer to the cross complaint, a motion for judgment on the pleadings, or a motion for summary judgment when the ground of the demurrer or motion for judgment on the pleadings is that the cross complaint fails to allege the presentation and rejection of the claim or when the ground of the motion for summary judgment is that no claim was presented. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms of claims and related forms, see California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Tort Claims Act* (Matthew Bender).

[3] Discussion of Authorities

[a] Defensive Cross Complaint in Response to Case Initiated by Public Entity

In ***Krainock v. Superior Court*** *(1990) 216 Cal. App. 3d 1473, 265 Cal. Rptr. 715* , a personal injury action was filed against two defendants: an individual and a public school district. The school district defendant filed a cross complaint for indemnity, apportionment, and declaratory relief, naming the individual defendant as the sole cross defendant. In response, the individual defendant filed his own cross complaint for the same relief against the school district. The trial court granted defendant school district's motion for judgment on the pleadings, based on the individual defendant's failure to comply with the claim filing requirement. The individual defendant filed a petition for writ of mandate challenging the trial court's ruling.

The court of appeal issued a peremptory writ of mandate, directing the trial court to vacate its previous order and to enter a new and different order denying the motion for judgment on the pleadings. The court of appeal said that when a cross complaint is defensive and is filed in response to an initiation of action by a public entity, it is unjust to impose a claim filing requirement because the issue of the cross complainant's liability relative to that of the public entity was first raised by the public entity itself in its own cross complaint, and because the public entity had the opportunity to investigate the relevant facts of the incident giving rise to all the claims before the individual defendant ever filed his or her cross complaint, thereby protecting one of the purposes underlying the claim requirement. The court further observed that a contrary rule could lead to unnecessary claims and litigation against public entities, filed purely as precautions against anticipated future actions by those entities (*216 Cal. App. 3d 1473, 1478)* .

The court adopted three rules for determining whether or not the claim filing requirement is not applicable to defensive cross complaints. First, the inapplicability of the claim requirement is limited to cases initiated by the public entity, as opposed to those initiated by a third party in which a defendant seeks to cross complain against a public entity not previously a party to the action. Second, to be exempt from the claim requirement the defensive pleading must arise out of the same transaction or event forming the basis of the plaintiff's claim and may not introduce an unrelated claim. Third, the cross complaint may assert only defensive matter. That is, a cross complaint may be filed without a governmental claim as a prerequisite if it is limited to claims that, if successful, would destroy or diminish the plaintiff's recovery, but not to claims for affirmative relief (*216 Cal. App. 3d 1473, 1478)* .

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CHAPTER 196 PUBLIC ENTITIES
PART II. FORMS
A. Claims Against Public Entities
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19A-196 California Points & Authorities § 196.33

§ 196.33 Supporting Contention That Failure to Present Timely Claim to Public Entity Is Excused--Person Who Sustained Injury, Damage, or Loss Was a Minor [Gov. Code § 946.6(c)(2)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE CLAIMANT _____ [MUST BE *or* SHOULD HAVE BEEN *or* WAS PROPERLY] RELIEVED FROM HIS/HER FAILURE TO PRESENT A CLAIM BECAUSE THE CLAIMANT WAS A MINOR DURING THE ENTIRE PERIOD IN WHICH THE CLAIM COULD HAVE BEEN TIMELY PRESENTED, AND THE APPLICATION FOR LEAVE TO PRESENT A LATE CLAIM, WHICH WAS _____ [DENIED *or* DEEMED DENIED BY LAPSE OF TIME], WAS PRESENTED TO THE PUBLIC ENTITY WITHIN A REASONABLE TIME NOT EXCEEDING ONE YEAR FROM THE DATE THE CAUSE OF ACTION ACCRUED.

A. Right to Petition for Relief From Claim Requirement. When an application for leave to present a late claim is denied or deemed to have been denied by a public entity, a petition may be made to the court in which the cause of action will be filed for an order relieving the petitioner from the provisions of *Section 945.4 of the Government Code*, providing that no action for money or damages may be brought against a public entity on a cause of action for which a claim is required until a claim has been presented to and acted on by the public entity or until it has been deemed to have been rejected by it (*Gov. Code § 946.6(a)*).

B. Minor's Right to Relief. The petitioner is entitled to relief if the application to a public entity to present a late claim was made within a reasonable time, not exceeding one year after the date the cause of action accrued, and the person who sustained the alleged injury, damage, or loss was a minor during the entire period in which the claim could have been timely presented (*Gov. Code § 946.6(c)(2)*).

C. Relief Is Mandatory. The petitioner's right to relief is mandatory (*see Gov. Code §§ 14, 946.6(c)*).

D. Denial of Relief Is Abuse of Discretion. If the application to the public entity to present a late claim was made within a reasonable time, and the petition for relief from the claim requirement was timely filed, it is an abuse of discretion for the court not to grant the petition when the person who sustained the alleged injury, damage, or loss was a minor during the entire time in which the claim could have been timely presented (*Williams v. Mariposa County Unified Sch. Dist. (1978) 82 Cal. App. 3d 843, 851, 147 Cal. Rptr. 452* ; *see Whitfield v. Roth (1974) 10 Cal. 3d 874, 884, 112 Cal. Rptr. 540, 519 P.2d 588*).

[*Optional*] **E. Effect of Parent's or Attorney's Lack of Diligence.** In determining whether an application to a public entity to present a late claim was made within a reasonable time, the neglect or ignorance of the minor's parents or attorney is not attributed to the minor (*Hernandez v. County of Los Angeles (1986) 42 Cal. 3d 1020, 1029-1031, 232 Cal. Rptr. 519, 728 P.2d 1154*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the claimant is entitled to be, should have been, or was properly relieved from his or her failure to have presented a timely claim to the public entity as a condition precedent to his or her filing of a lawsuit, when the application to the public entity for leave to file a late claim was presented within a reasonable time not exceeding one year after the date the cause of action accrued [*see Gov. Code § 911.4(b)*] and was denied or deemed denied pursuant to *Gov. Code § 911.6* (failure or refusal to act on application within 45 days or any extended period agreed to in writing by the parties). The ground for relief is that the person who sustained the alleged injury, damage, or loss was a minor during all of the time specified in *Gov. Code § 911.2* for the presentation of a claim (six months after date cause of action for death or injury to person or to personal property or growing crops accrued, or one year after date of accrual of any other cause of action) and is, therefore, entitled to be relieved from the claim presentation requirement [*Gov. Code § 946.6(c)(2)*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be used in a memorandum of points and authorities in support of a petition for relief under *Gov. Code § 946.6(c)(1)* or in opposition to points and authorities filed by the defendant. They may also be adapted for use in a trial or appellate brief.

For a discussion of when the complaint on the claim must be filed if the points and authorities are submitted in support of a petition for relief under *Gov. Code § 946.6* and the court grants the relief, see *§ 196.143[2]*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Computing One-Year Period

In computing the one-year period in which the application for leave to present a late claim must be presented to the public entity, time during which the person who sustained the alleged injury, damage, or loss is a minor shall be counted, but the time during which he or she is mentally incapacitated and does not have a guardian or conservator of his or her person shall not be counted [*Gov. Code § 911.4(c)*]. This tolling provision applies only to mentally incapacitated adults who lack a guardian or conservator [*Hernandez v. County of Los Angeles (1986) 42 Cal. 3d 1020, 1025, 232 Cal. Rptr. 519, 728 P.2d 1154* ; *Reyes v. County of Los Angeles (1988) 197 Cal. App. 3d 584, 593, 243 Cal. Rptr. 35* ; *see also County of Los Angeles v. Superior Court (2001) 91 Cal. App. 4th 1303, 1310-1313, 111 Cal. Rptr. 2d 471* (appointment of independent counsel empowered to prosecute legal claims on person's behalf does not preclude reliance on tolling provision of *Gov. Code § 911.4(c)*)].

[c] Related Pleading and Practice Forms

For a form of notice of hearing and a form of petition for relief from the claim requirement, see California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Tort Claims Act* (Matthew Bender).

[3] Discussion of Authorities

[a] Relief Is Mandatory

Gov. Code § 946.6(c) provides that the court "shall" relieve the petitioner from the provisions of *Gov. Code § 945.4* if the conditions in *Gov. Code § 946.6(c)* are met. *Gov. Code § 14* defines the word "shall," as used in the Government Code, as mandatory.

[b] Denial of Relief Is Abuse of Discretion

In ***Williams v. Mariposa County Unified Sch. Dist.*** *(1978) 82 Cal. App. 3d 843, 147 Cal. Rptr. 452* , a minor's claim was not timely filed and his timely application to file a late claim was denied. He then filed a petition for relief from the claim requirements, which was also denied. The court of appeal reversed, holding that a minor's petition for relief from the claim requirements must be granted under the statute on a showing that the minor was under the age of 18 years during the entire 100-day (now six-month) claim period prescribed by *Gov. Code § 911.2*, and that the minor's application to the public entity for leave to present a late claim was made within a reasonable time, not exceeding one year after the date the cause of action accrued (*82 Cal. App. 3d 843, 849)* .

In ***Whitfield v. Roth*** *(1974) 10 Cal. 3d 874, 112 Cal. Rptr. 540, 519 P.2d 588* , the Supreme Court upheld a medical malpractice verdict against a public entity and held that a cause of action for malpractice did not accrue until the plaintiff's mother discovered, or through the exercise of reasonable diligence should have discovered, the injury and its cause. In the course of the discussion, the Court stated in dicta that an application for leave to present a late claim by a person who was a minor during the entire claim period must be allowed (*10 Cal. 3d 874, 884)* .

[c] Effect of Parent's or Attorney's Lack of Diligence

In ***Hernandez v. County of Los Angeles*** *(1986) 42 Cal. 3d 1020, 232 Cal. Rptr. 519, 728 P.2d 1154* , plaintiff suffered severe mental retardation and physical handicaps at birth, allegedly from negligent medical care provided by defendant's physicians. Plaintiff failed to file a claim within 100 days (now six months) after the cause of action accrued as prescribed by *Gov. Code § 911.2* but filed an application for leave to present a late claim approximately four and one-half months after discovering the cause of action, a period well within the one-year outer limit prescribed by *Gov. Code § 911.4(b)*. The county denied the application. Plaintiff then petitioned the court pursuant to *Gov. Code § 946.6(b)* for relief from the claims filing requirements. The trial court denied the petition on the ground that plaintiff's application to the public entity was not made within a reasonable time, since plaintiff's attorney was aware of the cause of action from the time that it accrued and there was no explanation for the four and one-half month delay. The court of appeal affirmed.

The Supreme Court reversed. The Court stated the general rule that a public entity is required to accept the late claim of a minor presented within one year after the date the cause of action accrued if the claimant was a minor for the entire 100-day (now six-month) claim period, and that any delay in the late filing was not clearly attributable to a lack of diligence on the part of the minor (*42 Cal. 3d 1020, 1029-1031)* . The Court emphasized that the neglect or ignorance of the minor's parents or attorney was not attributed to the minor in determining lack of diligence on the part of the minor (*42 Cal. 3d 1020, 1030)* . The Court held that because (1) plaintiff's late-claim application was presented within one year of the accrual of his cause of action, (2) plaintiff was a minor for the entire 100-day (now six-month) claim period, and (3) any delay was not clearly attributable to the minor himself, the county was under an obligation to accept the minor's late claim application and the trial court erred in refusing to grant plaintiff relief from the county's denial of his application (*42 Cal. 3d 1020, 1031)* .

[4] Additional Authorities

[a] Effect of Parent's or Attorney's Lack of Diligence

In *Rousseau v. City of San Carlos (1987) 192 Cal. App. 3d 498, 236 Cal. Rptr. 373* , plaintiff, a minor, had been seriously injured in an automobile accident, suffering a skull fracture and brain damage. She filed applications to file late tort claims against various governmental entities 11 months after the accident. Taking into account the dilatory actions of the minor's guardian and attorney, the trial court denied the minor's petition for late claim relief. The court of appeal reversed, finding that the trial court abused its discretion. The court held that the dilatory actions of the guardian and attorney should not have been considered by the trial court; the proper focus should have been on the minor's behavior alone. In light of the minor's seriously debilitated condition, the court found that the time she took to file the petition for judicial relief was not unreasonable (*192 Cal. App. 3d 498, 501-502)* .

[5] Opposing Authorities

[a] Minor's Right to Relief

Reyes v. County of Los Angeles (1988) 197 Cal. App. 3d 584, 243 Cal. Rptr. 35 , was a petition for relief from the claim filing requirement by a 20-year-old mother whose child had been injured at birth by the alleged medical malpractice of the defendant county's medical center. The child was born June 10, 1980. The physician's response to the mother's inquiry a few days later as to what was wrong with the child, after she'd noticed the child had problems including welts on his head and a broken collar bone, was that the child was born that way and it was the mother's fault because she'd squeezed him. In April 1983, the mother discussed the child's problem with her sister, who advised her to consult an attorney. She did so on April 12, 1983, and, according to her, was told she didn't have much of a case and would have to pay all expenses for the attorney to investigate (the attorney's deposition testimony was different). Consequently, she did not pursue the matter. In August 1983, the mother discussed the matter with an acquaintance, who suggested she again consult an attorney. She consulted a law firm on September 15, 1983, and retained it to represent her. On November 18, 1983, the firm filed a claim with the county board of supervisors that was denied on January 5, 1984, and her subsequent application to file a late claim filed on May 23, 1984, was denied on July 9, 1984. The trial court found the cause of action accrued on April 12, 1983, when the mother consulted the first attorney, and denied the petition on the ground that more than a year had elapsed between the date the cause of action accrued and the date the petition for leave to present a late claim was filed.

The court of appeal affirmed. The court said that when the plaintiff is a minor it is not the minor's knowledge or lack of it which determines when the cause of action accrued, but the parents' knowledge or lack of it, and that the mental incapacity of a minor does not excuse the requirement that application for leave to file a late claim be made within one year after the date of accrual (*197 Cal. App. 3d 584, 592)* .

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19A-196 California Points & Authorities § 196.34

§ 196.34 Supporting Contention That Failure to Present Timely Claim to Public Entity Is Excused--Person Who Sustained Injury, Damage, or Loss Was Physically or Mentally Incapacitated [Gov. Code § 946.6(c)(3)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE CLAIMANT _____ [MUST BE *or* SHOULD HAVE BEEN *or* WAS PROPERLY] RELIEVED FROM HIS/HER FAILURE TO PRESENT A TIMELY CLAIM BECAUSE THE CLAIMANT WAS _____ [PHYSICALLY *and/or* MENTALLY] INCAPACITATED DURING THE ENTIRE PERIOD IN WHICH A CLAIM COULD HAVE BEEN TIMELY PRESENTED, AND THE APPLICATION FOR LEAVE TO PRESENT A LATE CLAIM, WHICH WAS _____ [DENIED *or* DEEMED DENIED BY LAPSE OF TIME], WAS PRESENTED TO THE PUBLIC ENTITY WITHIN A REASONABLE TIME NOT EXCEEDING ONE YEAR FROM THE DATE THE CAUSE OF ACTION ACCRUED.

A. Right to Petition for Relief From Claim Requirement. [*See § 196.33, Paragraph A.*]

B. Physical or Mental Incapacity. The petitioner is entitled to relief if the application to a public entity to present a late claim was made within a reasonable time, not exceeding one year after the date the cause of action accrued, and the person who sustained the alleged injury, damage, or loss was physically or mentally incapacitated during the entire period in which the claim could have been timely presented and, by reason of the disability, failed to present a claim during that time (*Gov. Code § 946.6(c)(3)*; *Draper v. City of Los Angeles (1990) 52 Cal. 3d 502, 507-509, 276 Cal. Rptr. 864, 802 P.2d 367*).

C. Relief Is Mandatory. [*See § 196.33, Paragraph C.*]

D. Denial of Relief Is Abuse of Discretion. If the application to the public entity to present a late claim was made within a reasonable time, and the petition for relief from the claim requirement was timely filed, it is an abuse of

discretion for the court not to grant the petition when the person who sustained the alleged injury, damage, or loss was mentally or physically incapacitated during the entire time in which the claim could have been timely presented and, by reason of the disability, failed to present a claim during that time (*Baber v. Napa State Hosp. (1984) 154 Cal. App. 3d 514, 517-519, 201 Cal. Rptr. 432*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the claimant is entitled to be, should have been, or was properly relieved from his or her failure to have presented a timely claim to the public entity as a condition precedent to his or her filing of a lawsuit when the application to the public entity for leave to file a late claim was presented within a reasonable time not exceeding one year after the date the cause of action accrued and was denied or deemed denied pursuant to *Gov. Code § 911.6* (failure or refusal to act on application within 45 days or any extended period agreed to in writing by the parties) [*see Gov. Code §§ 911.4(b), 946.6(c)*]. The ground for relief is that the person who sustained the alleged injury, damage, or loss was physically or mentally incapacitated during all of the time specified in *Gov. Code § 911.2* for the presentation of a claim (six months after date cause of action for death or injury to person or to personal property or growing crops accrued, or one year after date of accrual of any other cause of action) and, by reason of such disability, failed to present a claim during such time [*Gov. Code § 946.6(c)(3)*].

A plaintiff who establishes that he or she was physically or mentally incapacitated during the entire period in which the claim could have been timely filed is entitled to relief even though the public entity was prejudiced by the delay [*see County of Alameda v. Superior Court (1987) 196 Cal. App. 3d 619, 625 n.3* , Cal. Rptr. 215]. This distinguishes this type of relief from relief granted pursuant to *Gov. Code § 911.6(b)(1)* or *946.6(c)(1)*, both of which authorize the public entity to grant leave to file a late claim and the court to grant relief from the claim presentation requirement, respectively, on the grounds of mistake, inadvertence, surprise, or excusable neglect, and which can be granted only if the public entity fails to establish that it would be prejudiced in its defense of the claim if leave or relief is granted [*see §§ 196.36 -196.41*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be used in a memorandum of points and authorities in support of a petition for relief under *Gov. Code § 946.6(c)(1)* or in opposition to points and authorities filed by the defendant. They may also be adapted for use in a trial or appellate brief.

For a discussion of when the complaint on the claim must be filed if the points and authorities are submitted in support of a petition for relief under *Gov. Code § 946.6* and the court grants the relief, see *§ 196.143[2]*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For a form of notice of hearing and a form of petition for relief from the claim requirement, see California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Tort Claims Act* (Matthew Bender).

[3] Discussion of Authorities

[a] Physical or Mental Incapacity

In ***Draper v. City of Los Angeles*** *(1990) 52 Cal. 3d 502, 276 Cal. Rptr. 864, 802 P.2d 367* , plaintiff was seriously injured while in a crosswalk when she was struck by a car driven by a high school student. (Although *Gov. Code §*

911.2 now provides that a claim must be filed within six months after the accrual of a cause of action, at the time of plaintiff's accident the limitation period was 100 days.) Within two months after the expiration of the claim filing period, plaintiff applied for leave to present a late claim with several governmental entities, including the Los Angeles School District. Plaintiff alleged that the accident was caused by defects in the condition of the intersection, and that she had not filed a timely claim because she was severely injured in the accident, suffered permanent brain damage, was unconscious and hospitalized for a long time, and did not have the assistance of counsel. After the applications were denied, plaintiff filed a petition for relief from the claim filing requirement in court. In its opposition to plaintiff's petition, the school district stated that a claim had been timely filed by a different attorney on plaintiff's behalf against it and had been rejected. The trial court denied the petition, ruling that plaintiff failed to establish that her injuries were the cause of her failure to file a timely claim. The trial court also denied plaintiff's subsequent motion for reconsideration, ruling that the claim timely filed by the first attorney on her behalf demonstrated that any failure to file a claim against the other defendants within the claim filing period was not caused by disability. Onappeal by plaintiff, the court of appeal affirmed both orders made by the trial court.

The Supreme Court reversed the judgment of the court of appeal and directed it to reverse the orders appealed from with instructions to grant plaintiff the relief requested; five justices joined in the judgment. In the lead opinion joined by three justices, the Court explained that the grounds for relief provided by *Gov. Code § 946.6(c)(3)* require a showing of both incapacity and that the incapacity was the cause of the failure to file a timely claim (*52 Cal. 3d 502, 506-507)* . The Court concluded that the evidence, viewed in the light of the whole record, established that plaintiff was incapacitated during the claim filing period. Based on the rule of liberal construction of remedial statutes, the Court concluded that plaintiff should be granted relief from the claim filing requirement in light of her serious and prolonged incapacity, but cautioned that the supporting evidence was the minimum acceptable, and in less peculiar and compelling circumstances might well not suffice (*52 Cal. 3d 502, 507-508)* .

Defendants contended that even if plaintiff was incapacitated, she failed to show that her disability caused her failure to timely file her claim. They argued that the timely filing of a claim on her behalf against the school district provided countervailing evidence that her incapacity did not cause her omission. The Court observed that the record of the trial court's reasoning on this point was unclear, and said it was reluctant to bar plaintiff's claim on that basis. It observed that on the date the first claim was filed against the school district, plaintiff was just emerging from a long coma and her ability to reason was severely impaired. In such circumstances the Court found it was inconceivable that she could have authorized the filing of the claim. The Court also said that it could not uphold the ruling on the basis of an assumption that some unnamed person retained that attorney to file a claim for plaintiff, since it is the incapacity of the person who failed to file a claim that is in issue (*52 Cal. 3d 502, 508)* .

[b] Denial of Relief Is Abuse of Discretion

In ***Baber v. Napa State Hosp.*** *(1984) 154 Cal. App. 3d 514, 201 Cal. Rptr. 432* , plaintiff had lost the use of his eye on July 9, 1977, while he was involuntarily hospitalized in a mental hospital as a gravely disabled conservatee. He was released in November 1977 to a halfway house and remained a conservatee pursuant to a treatment plan. Plaintiff continued to suffer severe mental problems, which were exacerbated when he failed to take his antipsychotic medication. Even when he took his medication, it was difficult to converse with and understand him. He also failed to maintain regular contact with his conservator and periodically disappeared from his halfway house. Plaintiff met with an attorney in December 1977. The attorney had difficulty understanding plaintiff and requested hospital records and other information from defendant. The records were not sent to the attorney for over two months, and the hospital staff refused to discuss the case with the attorney. Plaintiff also disappeared and could not be located for some time. A claim, which was denied, was presented on behalf of plaintiff in May 1978. Thereafter, plaintiff filed a complaint against the state and petitioned for relief from the claim-presentation requirement of *Gov. Code § 945.4*. The trial court denied relief.

The court of appeal reversed, holding that the uncontradicted evidence of plaintiff's mental illness established his

incapacity to comply with the claim requirements, which rendered his delay reasonable and the trial court's denial an abuse of discretion (*154 Cal. App. 3d 514, 516-517)* . The court stated that under *Gov. Code § 945.6*, a petitioner may be relieved from the claim-filing requirement of *Gov. Code § 945.4* if the court finds that the application was made within a reasonable time not exceeding one year, and if the failure to file a timely claim was due to the plaintiff's incapacity, as defined in *Gov. Code § 911.6*. The court stated that the determination of what constitutes a reasonable time depends on the particular facts of the case and the policies of the law regarding personal injury claims against the state, and that it also depends on the court's discretion. In finding that the claim was made within a reasonable time, the court pointed out that claim statutes are to be liberally construed to permit the action to be tried on the merits whenever possible. Because the evidence all pointed to the fact that plaintiff was mentally incapacitated, it was arbitrary to disregard that factor as a substantial reason for the delay in presenting the claim (*154 Cal. App. 3d 514, 518-519)* .

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19A-196 California Points & Authorities § 196.35

§ 196.35 Supporting Contention That Failure to Present Timely Claim to Public Entity Is Excused--Person Who Sustained Injury, Damage, or Loss Has Died [Gov. Code § 946.6(c)(4)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

THE CLAIMANT _____ [MUST BE *or* SHOULD HAVE BEEN *or* WAS PROPERLY] RELIEVED FROM HIS/HER FAILURE TO PRESENT A TIMELY CLAIM BECAUSE THE PERSON WHO SUSTAINED THE _____ [INJURY *or* DAMAGE *or* LOSS] DIED DURING THE PERIOD IN WHICH A CLAIM COULD HAVE BEEN TIMELY PRESENTED, AND THE APPLICATION FOR LEAVE TO PRESENT A LATE CLAIM, WHICH WAS _____ [DENIED *or* DEEMED DENIED BY LAPSE OF TIME], WAS PRESENTED TOTHE PUBLIC ENTITY WITHIN A REASONABLE TIME NOT EXCEEDING ONE YEAR FROM THE DATE THE CAUSE OF ACTION ACCRUED.

A. Right to Petition for Relief From Claim Requirement. [*See § 196.33, Paragraph A.*]

B. Relief From Claim Requirement Is Required When Injured Person Dies During Claim Period. If an application to present a late claim was made within a reasonable time not exceeding one year after the date the cause of action accrued and was denied or deemed denied, the court shall relieve the petitioner from the claim requirement if the person who sustained the alleged injury, damage, or loss died during the period in which a claim could have been timely presented (*Gov. Code § 946.6(c)(4)*).

C. Relief Is Mandatory. [*See § 196.33, Paragraph C.*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the claimant is entitled to be, should have been, or was properly relieved from his or her failure to have timely presented a claim to the public entity as a condition precedent to the filing of a lawsuit when the application to the public entity for leave to file a late claim was presented within a reasonable time not exceeding one year after the date the cause of action accrued and was denied or deemed denied pursuant to *Gov. Code § 911.6* (failure or refusal to act on application within 45 days or any extended period agreed to in writing by the parties) [*see Gov. Code §§ 911.4(b), 946.6(c)*]. The ground for relief is that the person who sustained the alleged injury, damage, or loss died before expiration of the time specified in *Gov. Code § 911.2* for the presentation of the claim (six months after date cause of action for death or injury to person or to personal property or growing crops accrued, or one year after date of accrual of any other cause of action) [*Gov. Code § 946.6(c)(4)*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which these points are raised. For example, they may be used in a memorandum of points and authorities in support of a petition for relief under *Gov. Code § 946.6(c)(1)* or in opposition to points and authorities filed by the defendant. They may also be adapted for use in a trial or appellate brief.

For a discussion of when the complaint on the claim must be filed if the points and authorities are submitted in support of a petition for relief under *Gov. Code § 946.6* and the court grants the relief, see *§ 196.143[2]*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For a form of notice of hearing and a form of petition for relief from the claim requirement, see California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers; California Tort Claims Act* .

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19A-196 California Points & Authorities § 196.36

§ 196.36 Supporting Contention That Failure to Present Timely Claim to Public Entity Is Excused--Failure Was Through Mistake, Inadvertence, Surprise, or Excusable Neglect [Gov. Code § 946.6(c)(1)]--General Grounds

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE CLAIMANT _____ [MUST BE *or* SHOULD HAVE BEEN *or* WAS PROPERLY] RELIEVED FROM HIS/HER FAILURE TO PRESENT A TIMELY CLAIM BECAUSE THE FAILURE TO PRESENT A TIMELY CLAIM WAS THROUGH _____ [MISTAKE *and/or* INADVERTENCE *and/or* SURPRISE *and/or* EXCUSABLE NEGLECT], AND THE APPLICATION FOR LEAVE TO PRESENT A LATE CLAIM, WHICH WAS _____ [DENIED *or* DEEMED DENIED BY LAPSE OF TIME], WAS PRESENTED TO THE PUBLIC ENTITY WITHIN A REASONABLE TIME NOT EXCEEDING ONE YEAR FROM THE DATE THE CAUSE OF ACTION ACCRUED.

A. Right to Petition for Relief From Claim Requirement. [*See § 196.33, Paragraph A.*]

B. Grounds for Relief. The claimant is entitled to relief from the claim requirement when the application to the public entity for leave to present a late claim was made within a reasonable time not exceeding one year after the date the cause of action accrued and the failure to present a timely claim was through mistake, inadvertence, surprise, or excusable neglect, unless the public entity establishes that it would be prejudiced in the defense of the claim if the court grants the relief (*Gov. Code § 946.6(c)(1)*; *Ebersol v. Cowan (1983) 35 Cal. 3d 427, 431, 197 Cal. Rptr. 601, 673 P.2d 271*).

C. Relief Is Mandatory. [*See § 196.33, Paragraph C.*]

D. Resolution of Doubts in Favor of Relief. Because the primary policy underlying *Government Code Section 946.6* is that of trial on the merits, any doubts should be resolved in favor of granting relief (*Bettencourt v. Los Rios Cmty.*

Coll. Dist. (1986) 42 Cal. 3d 270, 275-276, 228 Cal. Rptr. 190, 721 P.2d 71).

[*Optional*] **E. Reasonable Time.** Because a person who failed to present a timely claim to the public entity due to mistake or inadvertence cannot apply for leave to present a late claim until the mistake is discovered, an application for leave to present a late claim presented shortly after the mistake is discovered, and within one year after the cause of action accrued, is within a reasonable time (*Gov. Code § 946.6*; *Viles v. State of California (1967) 66 Cal. 2d 24, 32-33, 56 Cal. Rptr. 666, 423 P.2d 818*).

[*Optional*] **F. Applicability of Case Authority Construing *Code Civ. Proc. § 473.*** The showing required for relief because of mistake, inadvertence, surprise, or excusable neglect under *Government Code Section 946.6* is generally same as that for relieving a party from a dismissal under *Code of Civil Procedure Section 473*. Therefore, cases construing *Code of Civil Procedure Section 473* may be cited for the meaning of mistake, inadvertence, surprise, or excusable neglect under *Government Code Section 946.6* (*Ebersol v. Cowan (1983) 35 Cal. 3d 427, 435, 197 Cal. Rptr. 601, 673 P.2d 271* ; *Viles v. State of California (1967) 66 Cal. 2d 24, 29, 56 Cal. Rptr. 666, 423 P.2d 818*).

[*Optional*] **G. Public Entity Has Burden of Showing Prejudice if Relief Is Granted.** Once it is shown that an application for leave to file a late claim was made within a reasonable time and that the failure to present a timely claim was through mistake, inadvertence, surprise, or excusable neglect, the burden shifts to the public entity to establish by a preponderance of the evidence that it would be prejudiced in the defense of the claim if the court relieves the petitioner from the provisions of *Government Code Section 945.4*, which provide that, with specified exceptions, no suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented until a written claim therefor has been presented to the public entity and has been acted on by the board, or has been deemed to have been rejected by the board (*Ramariz v. County of Merced (1987) 194 Cal. App. 3d 684, 688-689, 239 Cal. Rptr. 774*).

[*Add points and authorities supporting the specific ground justifying relief from the claim presentation requirement (see, e.g., §§ 196.37 -196.41).*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the claimant is entitled to be, should have been, or was properly relieved from his or her failure to have presented a timely claim to the public entity as a condition precedent to his or her filing of a lawsuit when the application to the public entity for leave to file a late claim was presented within a reasonable time not exceeding one year after the date the cause of action accrued and was denied or deemed denied pursuant to *Gov. Code § 911.6* (failure or refusal to act on application within 45 days or any extended period agreed to in writing by the parties) [*see Gov. Code §§ 911.4(b), 946.6(c)*]. The ground for relief is that the failure to present a claim within the time specified in *Gov. Code § 911.2* (six months after date cause of action for death or injury to person or to personal property or growing crops accrued, or one year after date of accrual of any other cause of action) was through mistake, inadvertence, surprise, or excusable neglect [*Gov. Code § 946.6(c)(1)*]. Relief is authorized unless the public entity establishes that it would be prejudiced in the defense of the claim if the relief is granted [*Gov. Code § 946.6(c)(1)*; *see County of Alameda v. Superior Court (1987) 196 Cal. App. 3d 619, 625 n.3, 242 Cal. Rptr. 215]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which these points are raised. For example, they may be used in a memorandum of points and authorities in support of a petition for relief under *Gov. Code § 946.6(c)(1)* or in opposition to points and authorities filed by the defendant. They may also be adapted for use in a trial or appellate brief.

For a discussion of when the complaint on the claim must be filed if the points and authorities are submitted in support of a petition for relief under *Gov. Code § 946.6* and the court grants the relief, see *§ 196.143[2]*.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, if relief is sought on the ground of excusable neglect when the claimant made diligent but futile attempts to retain legal counsel, counsel should state the facts showing that the claimant, by attempting to retain legal counsel, made a reasonable effort to ascertain whether or not he or she had a claim but was rebuffed by the attorneys contacted and thus did not identify the claim until the period for presenting a claim had passed [*see Ebersol v. Cowan (1983) 35 Cal. 3d 427, 439, 197 Cal. Rptr. 601, 673 P.2d 271* ; *see also § 196.36[3][a]*].

[b] Requirement That Mistake, Inadvertence, Surprise, or Neglect Be Excusable

Of the four stated grounds (mistake, inadvertence, surprise, or excusable neglect), only neglect is qualified by the adjective "excusable." Nevertheless, it is "uniformly held" that for relief on any or all of the stated grounds it must be shown that one's misconception was reasonable or might have been the conduct of a reasonably prudent person under similar circumstances [*Kaslavage v. West Kern County Water Dist. (1978) 84 Cal. App. 3d 529, 534 n.1, 148 Cal. Rptr. 729* (citing *Shaddox v. Melcher (1969) 270 Cal. App. 2d 598, 601, 76 Cal. Rptr. 80*)]. Apparently, because the inquiry in all cases under *Gov. Code § 946.6(c)(1)* is whether the person's actions were reasonable under the circumstances, the cases interpreting *Gov. Code § 946.6* have not always differentiated the four grounds. Decisions favoring the public entity are noted in § 196.36[5].

In relying on relief from default cases under *Code Civ. Proc. § 473(b)* (*see* Optional Paragraph F of the form), only cases involving *excusable* mistake, inadvertence, surprise, or neglect may be used. The provision of *Code Civ. Proc. § 473(b)*, providing for relief from dismissal or default based on an attorney's affidavit of fault, regardless of excusability, does not apply to relief under *Gov. Code § 946.6* [*Tackett v. City of Huntington Beach (1994) 22 Cal. App. 4th 60, 64-67, 27 Cal. Rptr. 2d 133]* .

[c] Related Pleading and Practice Forms

For a form of notice of hearing and a form of petition for relief from the claim requirement, see California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Tort Claims Act* (Matthew Bender). For discussion relating to relief under Code Civ. Proc. § 473 based on mistake, inadvertence, surprise, or excusable neglect, see California Forms of Pleading and Practice, Ch. 489, *Relief From Judgments and Orders* (Matthew Bender).

[d] Related Points and Authorities

For forms relating to relief under *Code Civ. Proc. § 473* based on mistake, inadvertence, surprise, or excusable neglect, see Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders* .

[3] Discussion of Authorities

[a] Grounds for Relief

In ***Ebersol v. Cowan*** *(1983) 35 Cal. 3d 427, 197 Cal. Rptr. 601, 673 P.2d 271* , claimant was a privately employed bus driver transporting mentally retarded teenagers to a work training program run by a county school district. She was bitten and seriously injured by one of the teenagers and immediately began seeking legal advice on the matter. The first two attorneys contacted informed her that she had no claim and they were not retained. The claimant continued her efforts to retain counsel for approximately four months, but not one of the attorneys contacted expressed an interest in the case and none of them advised her regarding the nature of her claim. Unknown to claimant, the former 100-day (now six-month) limitation for presenting a claim against the county expired before she was finally able to obtain counsel. Twenty-seven days after the period expired, claimant presented to the county a written application for leave to

present a late claim pursuant to *Gov. Code § 911.4*. The application was summarily rejected, and claimant petitioned the superior court for relief from the claim requirement pursuant to *Gov. Code § 946.6*. The superior court denied the petition on the ground claimant had failed to make a sufficient showing of mistake, inadvertence, surprise, or excusable neglect. Claimant appealed the denial.

The Supreme Court reversed the order denying relief and remanded the cause to the trial court. The substantive portion of its opinion is discussed further in § 196.41[3][a]. Before beginning its analysis of the facts, however, the Court cited *Gov. Code § 946.6(c)(1)* for the rule that the court must grant a petition for relief under that statute if the claimant demonstrates by a preponderance of the evidence that the application to the public entity was made within a reasonable time not exceeding one year after the accrual of the cause of action, and if the court concludes that the failure to timely present the claim was through mistake, inadvertence, surprise, or excusable neglect. The Court further said that under *Gov. Code § 946.6(e)*, the trial court must make an independent determination on the petition, relying on any affidavits in support of or in opposition to the petition and any additional evidence received at the hearing on the petition. The Court also stated that the court must then determine whether the public entity would be prejudiced by the granting of the petition (*35 Cal. 3d 427, 431)* .

[b] Resolution of Doubts in Favor of Relief

In ***Bettencourt v. Los Rios Cmty. Coll. Dist.*** *(1986) 42 Cal. 3d 270, 228 Cal. Rptr. 190, 721 P.2d 71* , plaintiffs consulted an attorney concerning a possible cause of action against a community college and its employees. The attorney, under the mistaken belief that the community college employees were employees of the state of California, filed a claim with the state. By the time the attorney realized that he should have filed the claim with the local community college district, the former 100-day (now six-month) claims period had lapsed. Plaintiffs' application for leave to present a late claim was denied by the college district, and plaintiff's petition for relief under *Gov. Code § 946.6* was denied by the superior court.

The Supreme Court reversed, holding that the trial court had abused its discretion in denying relief. The Court reasoned that, because the primary policy underlying *Gov. Code § 946.6* is that of trial on the merits, and because it is a remedial statute intended to provide relief from technical rules, it should be construed in favor of relief whenever possible (*42 Cal. 3d 270, 275-276)* .

[c] Reasonable Time

In ***Viles v. State of California*** *(1967) 66 Cal. 2d 24, 56 Cal. Rptr. 666, 423 P.2d 818* , plaintiff's wife was killed in an automobile accident, which plaintiff claimed was caused by a dangerous and defective condition in the highway. Plaintiff failed to present a timely claim against the state based on information received from insurance adjusters experienced in claims work that he had a year in which to bring an action. When plaintiff consulted an attorney almost nine months after the accident, he learned of the 100-day (now six-month) claim requirement and within two weeks presented an application to the State Board of Control for leave to present a late claim, which application was denied. Plaintiff and his minor son then petitioned the trial court for relief from the claim requirement based on mistake. The court granted the son's petition but denied that of the plaintiff who then appealed.

The Supreme Court reversed the order denying relief. The Court said that before one is entitled to relief, in addition to showing that the failure to file a timely claim was due to mistake or excusable neglect, a petitioner for relief must also show that application to the board for leave to present a late claim was made within a reasonable time not to exceed one year after the date on which the cause of action was deemed to have accrued and must also act with reasonable diligence after discovering the default (*66 Cal. 2d 24, 31)* . The Court held that both of these requirements were met, that plaintiff did not discover the mistake until he had consulted with an attorney and then acted with reasonable diligence to apply to the state for leave to present a late claim (*66 Cal. 2d 24, 31-32)* . The Court further explained that when plaintiff's mistake was the actual cause of his failure to comply with the claim presentation requirement, his application

to the board could obviously not have been made until he discovered his mistake, and the delay was, therefore, reasonable under the circumstances (*66 Cal. 2d 24, 32)* .

[d] Applicability of Case Authority Construing Code Civ. Proc. § 473

The facts and procedural background of ***Ebersol v. Cowan*** *(1983) 35 Cal. 3d 427, 197 Cal. Rptr. 601, 673 P.2d 271* , are discussed in *§ 196.36[3][a]*. In reversing the order denying relief from the claims requirement and remanding the cause to the trial court, the Supreme Court said that the showing required for relief under *Gov. Code § 946.6* because of mistake, inadvertence, surprise, or excusable neglect is the same as required under *Code Civ. Proc. § 473(b)*, for relieving a party from a default judgment (*35 Cal. 3d 427, 435)* .

The facts and procedural background of ***Viles v. State of California*** *(1967) 66 Cal. 2d 24, 56 Cal. Rptr. 666, 423 P.2d 818* , are discussed in *§ 196.36[3][c]*. In reversing the order denying the father's petition for relief, the Supreme Court said that the showing required of a petitioner seeking relief because of mistake, inadvertence, surprise, or excusable neglect under former Gov. Code § 912(b)(1) [*now see Gov. Code § 946.6*] is the same as required under *Code Civ. Proc. § 473(b)*, for relieving a party from a default judgment (*66 Cal. 2d 24, 29)* . The Court then examined the cases under *Code Civ. Proc. § 473* to determine what constitutes a reasonable mistake (*66 Cal. 2d 24, 29)* .

NOTE:

Only cases involving excusable mistake, inadvertence, surprise, or neglect under *Code Civ. Proc. § 473(b)*, may be used to support relief under *Gov. Code § 946.6*. The provision of *Code Civ. Proc. § 473(b)*, providing for relief from a dismissal or default based on an attorney's affidavit of fault, regardless of excusability, does not apply to relief under *Gov. Code § 946.6* [*Tackett v. City of Huntington Beach (1994) 22 Cal. App. 4th 60, 64-65, 27 Cal. Rptr. 2d 133]* .

[e] Public Entity Has Burden of Showing Prejudice if Relief Is Granted

In ***Ramariz v. County of Merced*** *(1987) 194 Cal. App. 3d 684, 239 Cal. Rptr. 774* , plaintiff injured himself, suffering quadriplegia, when he allegedly struck his head on an object while swimming in a lake owned by an irrigation district and operated by a county's Parks and Recreation Division. His devastating injuries, inability to speak English, lack of family in the area, and ignorance of the Government Code resulted in his not filing a claim within the required period. Two hundred fifty five days after the alleged accident he filed an application for leave to present a late claim and a proposed claim for damages, which was denied. Plaintiff then sued the irrigation district and county for damages. Defendants demurred to the complaint on the ground plaintiff had failed to comply with the claim filing requirements, in response to which plaintiff filed a motion for relief from the claims filing requirement. After a hearing, the trial court denied the petition for relief and sustained the demurrers. The court of appeal reversed, holding that plaintiff's failure timely to file his claim was the result of excusable neglect under *Gov. Code § 946.6(c)(1)* and that his applicationfor leave to file a late claim was made within a reasonable time. The court of appeal remanded the case to the trial court for a determination as to whether defendants were prejudiced by plaintiff's delay in filing. On remand, the county's motion, in which the irrigation district joined, for denial of relief from the claims requirement and dismissal of the complaint, was supported by several declarations that sought to establish prejudice. The motion was granted on the ground that defendants suffered prejudice because plaintiff's lateness in seeking relief prevented defendants from locating any persons, whether employees, bystanders, or emergency personnel, who had any knowledge of the incident, or from developing any information as to the location or causation of the incident. Plaintiff again appealed.

In reversing the judgment with directions to vacate the order denying plaintiff's petition for relief from the claim filing requirements and to grant the petition, the court of appeal stated that, once it is shown that an application for leave to file a late claim was made within a reasonable time and that the failure to present a timely claim was through mistake, inadvertence, surprise, or excusable neglect, the burden shifts to the public entity to establish by a preponderance of the evidence that it would be prejudiced in the defense of the claim if the court relieves the petitioner from the provisions of

Gov. Code § 945.4 (*194 Cal. App. 3d 684, 688-689)* . The court acknowledged that it found no reported case defining what constitutes prejudice in this context but agreed with Van Alstyne (Val Alstyne, California Government Tort Liability (Cal. C.E.B. 1980, p. 517)) that the showing of prejudice, when asserted, appears to require a factual basis for concluding that the delay has substantially impaired the entity's ability to present a full and fair defense on the merits (*194 Cal. App. 3d 684, 689)* . The court found the declarations in support of the motion deficient in that they showed only that defendants had been unable to find any witnesses having knowledge of plaintiff's alleged injury or any physical evidence that may have contributed to the injury and had been unable to determine where the alleged injury is supposed to have occurred (*194 Cal. App. 3d 684, 691)* . The court said that completely absent from the declarations was any change of circumstances that could have affected the location of the incident causing plaintiff's injury, such as a change in the water level of the lake, or any showing that any such witness or physical evidence would have been discoverable had plaintiff filed a timely claim. The court said that on the basis of the evidence before the trial court, whether there ever were any such witnesses, physical evidence, or change of circumstances are matters of pure speculation, and that there was no substantial evidence to support the trial court's finding that defendants suffered prejudice. The court said that it necessarily follows that the trial court abused its discretion in denying plaintiff's petition for relief from the claim filing requirements (*194 Cal. App. 3d 684, 691)* .

[4] Additional Authorities

[a] Grounds for Relief

In *Bertorelli v. City of Tulare (1986) 180 Cal. App. 3d 432, 225 Cal. Rptr. 582* , petitioner, having been injured in a traffic accident involving a municipal vehicle, engaged in continual settlement discussions with an insurance adjuster for the municipality during the 100-day (now six-month) claim period following the accident. The petitioner was not aware of the limitation period until he contacted an attorney after the period had passed. The trial court denied the petition for relief under *Gov. Code § 946.6*. The court of appeal reversed, holding that if there is undisputed evidence of ongoing settlement discussions within the former 100-day (now six-month) period between the injured party and an adjuster or other agent for a public entity, the injured party's failure to present a timely formal claim may, under some circumstances, be excused even though the injured party made no attempt to employ counsel (*180 Cal. App. 3d 432, 436)* .

[b] Applicability of Case Authority Construing Code Civ. Proc. § 473

Additional cases stating that the showing required of a petitioner seeking relief under *Gov. Code § 946.6* on the grounds of mistake, inadvertence, surprise, or excusable neglect is the same as that required under *Code Civ. Proc. § 473* for relieving a party from a default judgment include *Elston v. City of Turlock (1985) 38 Cal. 3d 227, 233 n.5, 211 Cal. Rptr. 416, 695 P.2d 713* ; *County of Santa Clara v. Superior Court (1971) 4 Cal. 3d 545, 550 n.1, 94 Cal. Rptr. 158, 483 P.2d 774* ; *County of Alameda v. Superior Court (1987) 196 Cal. App. 3d 619, 625, 242 Cal. Rptr. 215* ; *Kaslavage v. West Kern County Water Dist. (1978) 84 Cal. App. 3d 529, 535, 148 Cal. Rptr. 729* ; *Flores v. Board of Supervisors (1970) 13 Cal. App. 3d 480, 483, 91 Cal. Rptr. 717* ; and *Nilsson v. City of Los Angeles (1967) 249 Cal. App. 2d 976, 979, 58 Cal. Rptr. 20* (predecessor statute).

NOTE:

Only cases involving excusable mistake, inadvertence, surprise, or neglect under *Code Civ. Proc. § 473(b)*, may be relied on to support relief under *Gov. Code § 946.6*. The provision of *Code Civ. Proc. § 473(b)*, providing for relief from default based on an attorney's affidavit of fault regardless of excusability does not apply to relief under *Gov. Code § 946.6* [*Tackett v. City of Huntington Beach (1994) 22 Cal. App. 4th 60, 64-65, 27 Cal. Rptr. 2d 133]* .

[5] Opposing Authorities

[a] Grounds for Relief

[i] Diligence

In *Tammen v. County of San Diego (1967) 66 Cal. 2d 468, 58 Cal. Rptr. 249, 426 P.2d 753* , further discussed in *§ 196.38[4][a]*, the Supreme Court, in affirming the denial of the widow's petition for relief from failure to present to the county a timely claim for wrongful death and reversing the denial as to the minor child, said that a person seeking relief must show both (1) that the application to the public entity for leave to present a late claim was made within a reasonable time not to exceed one year after the accrual of the cause of action and (2) that he or she falls within one of the four alternative situations set forth in former Gov. Code § 912 [now *Gov. Code § 946.6*], that is, mistake, inadvertence, surprise, or excusable neglect (*66 Cal. 2d 468, 474)* .

In *People ex rel. Dep't of Transp. v. Superior Court (2003) 105 Cal. App. 4th 39, 129 Cal. Rptr. 2d 60* , an apparent arson along a highway caused a car fire that killed a woman. Her husband and children filed a late claim against the state that alleged failure to properly maintain the roadside. They waited almost eight months after the death before first consulting an attorney, which they finally did only on the suggestion of the husband's barber. Two weeks later, their attorney filed an application to present a late claim, which was denied by operation of law when the state failed to respond within 45 days. The claimants successfully petitioned the superior court for relief from failing to file a timely claim based on *Gov. Code § 946.6(c)(1)*, but the court of appeal granted a writ of mandate compelling the superior court to vacate its order. The court of appeal held that the claimants could not demonstrate reasonable diligence because they claimant did nothing within the six-month period for filing claims (*105 Cal. App. 4th 39, 44-45)* . The court also rejected the argument that the late claim should be excused because the claimants believed that the fire was caused by an arsonist, because their proposed theory of recovery was that the state was negligent in failing to maintain the weeds and shrubbery along the highway, which represented a dangerous condition no matter how the fire was started (*105 Cal. App. 4th 39, 45)* .

In *Department of Water & Power v. Superior Court (2000) 82 Cal. App. 4th 1288, 99 Cal. Rptr. 2d 173* , the Department of Water & Power of the City of Los Angeles sought a writ of mandate from the court of appeal directing the trial court to vacate its order granting a petition for relief for filing a late claim against the City. The petition had been granted in favor of an automobile accident victim who was seeking to file a claim against the City based on the Department's role in causing the roadway at the site of the automobile accident to be flooded. In granting the writ of mandate, the court of appeal held that the accident victim's total failure to investigate the Department's potential liability and take action within the requisite time period was not reasonable under the circumstances. The accident victim, who was represented by counsel, at all relevant times had or had ready access to the police report of the accident, which indicated that a crew was working on a water line near the accident, gave the crew supervisor's name, and indicated that the roadway was flooded. The police had also taken photographs of the scene, available to the victim, which showed the crew working in the area (*82 Cal. App. 4th 1288, 1292, 1295-1296)* .

In *Spencer v. Merced County Office of Educ. (1997) 59 Cal. App. 4th 1429, 69 Cal. Rptr. 2d 750* , plaintiff was crossing the street when she was hit by a car driven by defendant, who was acting in the course and scope of his employment with the County Office of Education at the time of the accident. Plaintiff retained two lawyers. The first, sent a letter claiming damages on behalf of plaintiff, and received a letter back indicating that the County Office of Education, rather than the County, was defendant's employer and the proper public entity to serve. However, this lawyer erroneously completed but did not file a claim form against the County. The second lawyer received plaintiff's case file which included the above letter, the claim form against the County, and a police accident report listing the County Department of Education as defendant's employer. Because of the completed claim form in the file, the second lawyer assumed the prior attorney had determined that the County was the correct public entity to be served, and filed a government tort claim for plaintiff against the County. The claim was rejected. Plaintiff petitioned for relief from the claim presentation requirements of the Tort Claims Act on the ground of excusable neglect. The trial court denied her petition and plaintiff appealed. The court of appeal affirmed, holding that the mistake was not reasonable under the circumstances and that plaintiff's counsel was not otherwise diligent. The court found that counsel, who failed to consult a roster of public agencies, investigate the case, hire an investigator, request information about the accident involving

plaintiff, or read the police report and letter in plaintiff's file which indicated defendant's employer, was not reasonably diligent in determining the proper public entity to serve (*59 Cal. App. 4th 1429, 1440)* .

In *Munoz v. State of California (1995) 33 Cal. App. 4th 1767, 39 Cal. Rptr. 2d 860* , plaintiff appealed an order denying permission to file a late tort claim for wrongful death against a governmental entity. The claim was based on defendant's failure to treat plaintiff's father for cancer. Plaintiff argued that any neglect in filing the late claim was excusable because it was caused by defendant's failure to honor plaintiff's attorney's repeated requests for medical records. Plaintiff contended that the medical records were needed before counsel could file a claim in good faith. In affirming the denial of permission to file the late claim, the court of appeal notedthat the specificity required for service of a notice in a medical malpractice case, required by *Code Civ. Proc. § 364*, does not apply to the filing of a claim under *Gov. Code § 911.2*. Instead, the contents of a claim are governed by *Gov. Code § 910*, which requires only a general description of the injury. The court thus concluded that the lower court was correct that plaintiff's counsel's goal of perfect precision was no excuse for failure to file the claim within the statutory six-month period (*33 Cal. App. 4th 1767, 1785)* .

In *Greene v. State of California (1990) 222 Cal. App. 3d 117, 272 Cal. Rptr. 52* , the court of appeal affirmed the trial court's order denying the petition for relief from the claim-filing requirement. The court cited the general rule that a petitioner must show more than the failure to discover a fact until too late; he or she must establish that in the use of reasonable diligence, he or she failed to discover it. Petitioner had been injured in a traffic accident, and the purported reason for the failure to timely file a claim was his ignorance about which public entity owned the road where the accident occurred. The court was not convinced that this was the result of excusable neglect, observing that his counsel had received a copy of the CHP report covering the investigation of the accident, which showed that the accident occurred on a state road, clearly part of the state highway system, and that should have placed counsel on notice of the state's potential liability. It rejected the argument that counsel erroneously believed the county owned the road, saying that counsel should have immediately filed a claim with the state to protect her client's interests (*222 Cal. App. 3d 117, 121-122*).

In *Rojes v. Riverside Gen. Hosp. (1988) 203 Cal. App. 3d 1151, 250 Cal. Rptr. 435* , the court of appeal affirmed an order denying relief to a petitioner who had argued that he had not timely filed his claim because he had not been timely informed that defendant hospital was a public entity. The court held that petitioner did not meet his burden of showing that he or his attorney had used reasonable diligence in failing to discover that fact. Indeed, to the contrary, petitioner admitted signing admission forms and receiving billing envelopes that did identify the hospital's connection with the county; petitioner had not noticed the designation on either of these. Petitioner unsuccessfully argued that the hospital had an affirmative duty to inform him that it was a public entity, and to identify itself as such on his medical records, which were examined by his attorney. The court of appeal disagreed, holding that the burden was on petitioner to use reasonable diligence to ascertain the public status of the hospital and the consequent necessity of filing a claim; the hospital had no affirmative duty to identify itself as a public entity to petitioner or to tell him to file a claim (*203 Cal. App. 3d 1151, 1163-1164*). The court noted that a public entity cannot misrepresent itself to be a nonpublic entity, and under *Gov. Code § 7530* is required to identify itself as a public entity when it is identifying itself for any purpose. However, the hospital met this requirement in its identification on the admission papers and on the billing envelopes, and was not required to include this identification on petitioner's medical records as well (*203 Cal. App. 3d 1151, 1165-1166)* .

In *Clark v. City of Compton (1971) 22 Cal. App. 3d 522, 99 Cal. Rptr. 613* , the court of appeal, in affirming an order denying relief, after quoting the rule from *Tammen*, held that the same showing is required under *Gov. Code § 946.6* as that required on a motion under *Code Civ. Proc. § 473*, including the requirement of reasonable diligence in applying for relief and that no such showing had been made (*22 Cal. App. 3d 522, 527-528)* .

[ii] Reasoned Decision Not to Present Claim

In *Hernandez v. Garcetti (1998) 68 Cal. App. 4th 675, 683-684, 80 Cal. Rptr. 2d 443* , the court of appeal affirmed that plaintiff's claim for spoliation of evidence was not timely presented to a county district attorney's office. The spoliation claim arose when an automobile that was to be used as evidence in a product liability action was sold to satisfy a storage lien after having been impounded by the county in conjunction with a DUI charge pending against plaintiff's husband. The impounded automobile was sold in October 1996, and while plaintiff's attorney learned of the sale in mid-December 1996, plaintiff did not present the spoliation claim until July 1997, more than six months after plaintiff's attorney learned the vehicle had been sold and three to four months after the attorney abandoned his attempts to locate the vehicle. Although plaintiff's counsel knew of the spoliation claim and the claim filing time requirements, he argued that he believed the spoliation claim accrued only when he abandoned his attempts to locate the evidence, and thus the claim presented was timely. The court of appeal disagreed, holding that the claim accrued at the latest when it was learned that the automobile had been sold and the decision not to file the claim within six months after learning that the automobile had been sold was an unreasonable mistake of law that was not excusable under *Gov. Code § 946.6(c)(1)* (*68 Cal. App. 4th 675, 683-684)* .

In *Mitchell v. Department of Transp. (1985) 163 Cal. App. 3d 1016, 210 Cal. Rptr. 266* , the court of appeal, in upholding the trial court's denial of plaintiff's petition for relief from the claim presentation requirement, held that an attorney's failure to present a claim based on a reasoned decision that no cause of action lay against a public entity did not constitute excusable neglect or positive misconduct. A party who relies on the attorney's decision by not presenting a timely claim cannot later obtain relief from claim presentation requirements on those grounds (*163 Cal. App. 3d 1016, 1019-1023)* .

[b] Reasonable Time

In *Hasty v. County of Los Angeles (1976) 61 Cal. App. 3d 623, 131 Cal. Rptr. 347* , the court of appeal held that a 60-day delay, from the time thepetitioner's attorney received a complete investigator's report on the accident at issue until the filing of an application to file a late claim, was an unreasonable delay. Therefore, it held that the trial court's denial of the application for relief from claim requirements was proper (*61 Cal. App. 3d 623, 626-627)* .

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Volume 19A Chapters 196-199 PUBLIC ENTITIES---to---QUO WARRANTO
CHAPTER 196 PUBLIC ENTITIES
PART II. FORMS
A. Claims Against Public Entities
1. Failure To File Timely Claim

19A-196 California Points & Authorities § 196.37

§ 196.37 Supporting Contention That Failure to Present Timely Claim to Public Entity Is Excused--Failure Was Through Mistake, Inadvertence, Surprise, or Excusable Neglect [Gov. Code § 946.6(c)(1)]--Mistake of Law by Layperson

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with general points and authorities supporting the contention that the claimant should be relieved from his or her failure to have timely presented a claim to the public entity (see, e.g., § 196.36).*]

THE CLAIMANT _____ [SHOULD BE *or* SHOULD HAVE BEEN *or* WAS PROPERLY] RELIEVED FROM HIS/HER FAILURE TO PRESENT A TIMELY CLAIM BECAUSE THE FAILURE TO PRESENT A TIMELY CLAIM WAS THROUGH A MISTAKE OF LAW BY A LAYPERSON AND THE APPLICATION FOR LEAVE TO PRESENT A LATE CLAIM, WHICH WAS _____ [DENIED *or* DEEMED DENIED BY LAPSE OF TIME], WAS PRESENTED TO THE PUBLIC ENTITY WITHIN A REASONABLE TIME NOT EXCEEDING ONE YEAR FROM THE DATE THE CAUSE OF ACTION ACCRUED.

A. Mistake of Law Defined. A mistake of law is a mistake occurring when a person knows the facts as they really are but has a mistaken belief as to the legal consequence of those facts (*Powell v. City of Long Beach (1985) 172 Cal. App. 3d 105, 109, 218 Cal. Rptr. 97*).

B. Mistake of Law by Layperson. A mistake of law, although not excusable when made by an attorney, may be excusable when made by a layperson (*Powell v. City of Long Beach (1985) 172 Cal. App. 3d 105, 109, 218 Cal. Rptr. 97*).

C. Honest Mistake. Relief should be allowed when the failure to present a timely claim was the result of an honest mistake of law by a claimant (*Viles v. State of California (1967) 66 Cal. 2d 24, 27-31, 56 Cal. Rptr. 666, 423 P.2d 818* ; *Powell v. City of Long Beach (1985) 172 Cal. App. 3d 105, 109-111, 218 Cal. Rptr. 97*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the claimant is entitled to be, should have been, or was properly relieved from his or her failure to have presented a timely claim to a public entity. The ground for relief is that the failure to present a claim within the time specified in *Gov. Code § 911.2* (six months after date of cause of action for death or injury to person or to personal property or growing crops accrued, or one year after date of accrual of any other cause of action) was the result of the claimant's mistake of law [*see Gov. Code § 946.6(c)(1)*]. Relief is authorized unless the public entity establishes that it would be prejudiced in the defense of the claim if the relief is granted [*Gov. Code § 946.6(c)(1)*]. Decisions favoring the public entity are noted in § 196.37[5].

These points and authorities may be used alone or in conjunction with the additional points and authorities *set out in §§ 196.36* and *196.38 -196.41*. They should be combined with other points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be used in a memorandum of points and authorities in support of a petition for relief under *Gov. Code § 946.6(c)(1)* or in opposition to points and authorities filed by the defendant. They may also be adapted for use in a trial or appellate brief.

For a discussion of when the complaint on the claim must be filed if the points and authorities are submitted in support of a petition for relief under *Gov. Code § 946.6* and the court grants the relief, see *§ 196.143[2]*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Mistake of Law Defined

In ***Powell v. City of Long Beach*** *(1985) 172 Cal. App. 3d 105, 218 Cal. Rptr. 97* , petitioner sought relief from denial of permission to present a late claim to a public entity. Petitioner was injured in a work-related accident on a public wharf, although there were no signs posted indicating that the property was in fact owned by a municipal entity. Petitioner, believing that the wharf was owned by his employer, obtained workers' compensation benefits, believing them to be his exclusive remedy. After disagreeing with his employer concerning consultation with a company physician, and approximately five months after the accident, petitioner consulted anattorney. Shortly thereafter, he presented to the public entity a claim along with an application for leave to present a late claim, both of which were denied. The superior court denied the petition for relief, and petitioner appealed.

In reversing the order with directions to grant the petition, the court of appeal said that a mistake of law is a mistake occurring when a person knows the facts as they really are but has a mistaken belief as to the legal consequence of those facts (*172 Cal. App. 3d 105, 109)* .

[b] Mistake of Law Made by Lay Person

The facts and background of ***Powell v. City of Long Beach*** *(1985) 172 Cal. App. 3d 105, 218 Cal. Rptr. 97* , are discussed in *§ 196.37[3][a]*. In reversing the order with directions to grant the petition for relief from the claim presentation requirement, the court of appeal, quoting *Tammen v. County of San Diego* [*Tammen v. County of San Diego (1967) 66 Cal. 2d 468, 479, 58 Cal. Rptr. 249, 426 P.2d 753* ; *see § 196.38[4][a]*], said that a mistake of law may be excusable when made by a layperson, but not when made by an attorney (*172 Cal. App. 3d 105, 109)* .

[c] Honest Mistake

The facts and background of ***Viles v. State of California*** *(1967) 66 Cal. 2d 24, 56 Cal. Rptr. 666, 423 P.2d 818* , are discussed in *§ 196.36[3][c]*. Plaintiff failed to present a timely claim to the State Board of Control based on information received from insurance adjusters experienced in claims work that he had a year in which to bring an action, from which he erroneously concluded that an action against the state could be brought in the same manner and within the same time limits as one against a private person. When plaintiff consulted an attorney almost nine months after the accident, he learned of the 100-day (now six-month) claim requirement and within two weeks presented an application to the State Board of Control for leave to present a late claim, which application was denied. In reversing the order denying relief, the Supreme Court stated that the showing required of a claimant seeking relief from the claim requirement based on mistake, inadvertence, surprise, or excusable neglect is the same as required under *Code Civ. Proc. § 473* for relieving a party from a default judgment and that an examination of the cases applying *Code Civ. Proc. § 473* disclosed that not every mistake of law is excusable but that an honest mistake is excusable, the determining factor being the reasonableness of the misconception (*66 Cal. 2d 24, 29)* . The Court said that plaintiff's erroneous conclusion was not an unreasonable misconception or one that the average prudent person in the conduct of important business affairs would not have formed (*66 Cal. 2d 24, 29-30)* . The Court concluded that plaintiff's honest mistake of law in reliance on an insurance investigator's statements that plaintiff had one year to act was the type of mistake contemplated by the statute; thus the petition should have been granted (*66 Cal. 2d 24, 31-33)* .

The facts and background of ***Powell v. City of Long Beach*** *(1985) 172 Cal. App. 3d 105, 218 Cal. Rptr. 97* , are discussed in *§ 196.37[3][a]*. In reversing the order with directions to grant the petition for relief from the claim presentation requirement, the court of appeal said that not every mistake is excusable, but an honest mistake is excusable if the misconception is reasonable (*172 Cal. App. 3d 105, 109)* . Petitioner's failure to seek advice of counsel was excusable because he believed that workers' compensation was his sole remedy. Under the circumstances, petitioner's actions were reasonable (*172 Cal. App. 3d 105, 110)* . Petitioner presented a claim well within the one-year limitation imposed by *Gov. Code § 946.6* and, hence, did not prejudice the city in its efforts to obtain fresh evidence and resolve the matter in a speedy manner. Judicial policy favors trial on the merits, especially when doubts exist as to the excusability of a petitioner's conduct (*172 Cal. App. 3d 105, 111)* .

[4] Additional Authorities

[a] Honest Mistake

In *Syzemore v. County of Sacramento (1976) 55 Cal. App. 3d 517, 127 Cal. Rptr. 741* , petitioner for relief from the claim requirement was a young, inexperienced serviceman who was injured allegedly as a result of a dangerous condition maintained by the county. He did not learn of the claim requirement until 19 days after the former 100-day (now six-month) period for presenting the claim had expired. He promptly consulted an attorney and applied for leave to present a late claim, which was denied; he then petitioned the court for relief from the claim requirement, which was also denied. The court of appeal reversed holding that his mistake and neglect were clearly excusable (*55 Cal. App. 3d 517, 524)* .

NOTE:

The court of appeal in *Harrison v. County of Del Norte* [*Harrison v. County of Del Norte (1985) 168 Cal. App. 3d 1, 213 Cal. Rptr. 658]* expressly declined to follow *Syzemore*. The *Harrison* court said that the appellant in the case before it sought solace in *Syzemore*, which concluded that it was an abuse of discretion for the trial court to deny relief to a layperson unlearned in the law, ignorant of the four claim requirement, and unaware of the existence of the tenable cause of action, and the appellant cited four cases that seemingly follow *Syzmore*. The court said that in each of the four cases, *Syzmore* is cited only as dicta. The court then respectfully declined to follow *Syzmore*, "because it is inconsistent with governing authority" [Harrison v. *County of Del Norte (1985) 168 Cal. App. 3d 1, 7 n.5, 213 Cal. Rptr. 658]* .

[5] Opposing Authorities

[a] Mistake of Law

The following court of appeal decisions uphold trial courts' denials of petitions and hold that mere ignorance of the existence of the claim requirement and failure to consult an attorney does not constitute a showing of mistake sufficient to entitle petitioners to relief: *Drummond v. County of Fresno (1987) 193 Cal. App. 3d 1406, 1412, 238 Cal. Rptr. 613* ; *Garcia v. Los Angeles Unified Sch. Dist. (1985) 173 Cal. App. 3d 701, 708-709, 219 Cal. Rptr. 544* ; *Harrison v. County of Del Norte (1985) 168 Cal. App. 3d 1, 7, 213 Cal. Rptr. 658* ; *El Dorado Irrigation Dist. v. Superior Court (1979) 98 Cal. App. 3d 57, 62, 159 Cal. Rptr. 267* ; *Tsingaris v. State of California (1979) 91 Cal. App. 3d 312, 314, 154 Cal. Rptr. 135* ; *Roberts v. State of California (1974) 39 Cal. App. 3d 844, 847, 114 Cal. Rptr. 518* ; *Bennett v. Los Angeles (1970) 12 Cal. App. 3d 116, 119-121, 90 Cal. Rptr. 479* ; *Martin v. City of Madera (1968) 265 Cal. App. 2d 76, 80-82, 70 Cal. Rptr. 908* .

[b] Deliberate Failure to Comply with Claims Statutes

NOTE:

Mistakes concerning the existence of the claims requirement, for which relief has sometimes been granted, should be distinguished from deliberate failure to comply with the claims requirement as the result of a mistake concerning the effect of filing a claim, for which relief cannot be granted.

Mitchell v. Department of Transp. (1985) 163 Cal. App. 3d 1016, 210 Cal. Rptr. 266 , is discussed in *§ 196.36[3][a][ii]*.

In *Rivera v. City of Carson (1981) 117 Cal. App. 3d 718, 173 Cal. Rptr. 4* , a petition was filed for relief from the provisions of *Gov. Code § 945.4* that require the presentation of a written claim to the city before bringing an action against it. The petition alleged that the delay in presenting the claim was the result of mistake, inadvertence, surprise, and excusable neglect on the part of petitioners in that they feared that criminal proceedings would be filed against them as a result of the accident that was the basis of the claim. Petitioners' counsel apparently feared that presenting a claim would jeopardize petitioners' position in the criminal proceedings. The petition was denied as to one of the petitioners, who asserted only mistake, inadvertence, surprise, and excusable neglect as the grounds for delay.

The court of appeal affirmed. The court stated that under certain circumstances, claimant's mistaken belief as to the existence, or applicability of the claims statutes, or even mere forgetfulness on the part of claimant's attorney, may be considered adequate mistakes to justify relief under *Gov. Code § 946.6(c)(1)*. The court said, however, that in those instances the failure timely to file was not deliberate and that a deliberate decision not to comply with the claims statutes cannot be considered mistake, inadvertence, surprise, or excusable neglect. Referring to this case, the court said the record indicated that petitioner intentionally chose not to file a claim pending the outcome of the criminal proceedings, but there was no discernible basis for his counsel's apparent belief that the filing of a claim would have jeopardized his position in such proceedings. The court, therefore, held that those circumstances did not constitute cognizable mistake, inadvertence, surprise, or excusable neglect in connection with the failure to present a timely claim (*117 Cal. App. 3d 718, 724-725)* .

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Volume 19A Chapters 196-199 PUBLIC ENTITIES---to---QUO WARRANTO
CHAPTER 196 PUBLIC ENTITIES
PART II. FORMS
A. Claims Against Public Entities
1. Failure To File Timely Claim

19A-196 California Points & Authorities § 196.38

§ 196.38 Supporting Contention That Failure to Present Timely Claim to Public Entity Is Excused--Failure Was Through Mistake, Inadvertence, Surprise, or Excusable Neglect [Gov. Code § 946.6(c)(1)]--Excusable Neglect Caused by Reliance on Investigative Report

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with general points and authorities supporting the contention that the claimant should be relieved from his or her failure to have timely presented a claim to the public entity (see, e.g., § 196.36).*]

THE CLAIMANT _____ [SHOULD BE *or* SHOULD HAVE BEEN *or* WAS PROPERLY] RELIEVED FROM HIS/HER FAILURE TO PRESENT A TIMELY CLAIM BECAUSE THE FAILURE TO PRESENT A TIMELY CLAIM WAS THROUGH THE _____ [CLAIMANT'S EXCUSABLE NEGLECT *or* EXCUSABLE NEGLECT OF THE INVESTIGATOR EMPLOYED BY THE CLAIMANT'S ATTORNEY], AND THE APPLICATION FOR LEAVE TO PRESENT A LATE CLAIM, WHICH WAS _____ [DENIED *or* DEEMED DENIED BY LAPSE OF TIME], WAS PRESENTED TO THE PUBLICENTITY WITHIN A REASONABLE TIME NOT EXCEEDING ONE YEAR FROM THE DATE THE CAUSE OF ACTION ACCRUED.

A. Excusable Neglect Defined. Excusable neglect is that neglect which might have been the act of a reasonably prudent person under the same circumstances (*Boas v. County of San Diego (1980) 113 Cal. App. 3d 355, 358, 169 Cal. Rptr. 828*).

[*EITHER*]

B. Excusable Neglect of Claimant in Relying on Public Entity's Request to Forgo Action Pending Investigative Report. Relief should be granted when the failure to present a timely claim resulted from the claimant's compliance

with the public entity's request to forgo any action pending its investigative report (*Boas v. County of San Diego (1980) 113 Cal. App. 3d 355, 358, 169 Cal. Rptr. 828*).

[*OR*]

B. Excusable Neglect of Attorney's Investigator. Relief should be granted when the failure to present a timely claim resulted from the investigation of an accident by an investigator, employed by claimant's attorney, which was reasonably diligent but mistakenly failed to disclose the potential liability of the public entity (*Kaslavage v. West Kern County Water Dist. (1978) 84 Cal. App. 3d 529, 536-538, 148 Cal. Rptr. 729*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the claimant is entitled to be, should have been, or was properly relieved from his or her failure to have timely presented a claim to a public entity. The ground for relief is that the failure to present a claim within the time specified in *Gov. Code § 911.2* (six months after date of accrual of cause of action for death or injury to person or to personal property or growing crops, or one year after date of accrual of any other cause of action) was the result of excusable neglect [*see Gov. Code § 946.6(c)(1)*], specifically, that the claimant complied with the public entity's request to forgo action pending an investigative report or relied on the report of an investigator, employed by the claimant's attorney, which failed to identify the potential liability of the public entity, although the investigator otherwise acted diligently in investigating the accident. Relief is authorized unless the public entity establishes that it would be prejudiced in the defense of the claim if the relief is granted [*Gov. Code § 946.6(c)(1)*]. Decisions favoring the public entity are noted in § 196.38[4].

These points and authorities may be used alone or in conjunction with the additional points and authorities *set out in §§ 196.36, 196.37,* and *196.39 -196.41*. These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be used in a memorandum of points and authorities in support of a petition for relief under *Gov. Code § 946.6(c)(1)* or in opposition to points and authorities filed by the defendant. They may also be adapted for use in a trial or appellate brief.

For a discussion of when the complaint on the claim must be filed if the points and authorities are submitted in support of a petition for relief under *Gov. Code § 946.6* and the court grants the relief, see *§ 196.143[2]*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Excusable Neglect Defined

In ***Boas v. County of San Diego*** *(1980) 113 Cal. App. 3d 355, 169 Cal. Rptr. 828* , petitioners' daughter was suffocated on April 10, 1979, after sinking in an area along the San Diego River. Despite suffering emotional trauma resulting from their daughter's death, petitioner father contacted several government agencies during early May in an attempt to discover the property owner responsible for the dangerous condition at the accident site and to ascertain the available remedies. On June 12th, the father contacted the office of a San Diego County supervisor and suggested protective measures to prevent future accidents at the site. The supervisor's office promised an investigation and told the father to forgo any other action pending the county's investigative report. On August 27th, after the 100-day (now six-month) period in which to present a claim had expired, the office sent the father a letter implying that the county did not own the accident site. In September the father contacted an attorney who determined that the county owned the

property and on September 18th the father filed an application to present a late claim. On November 6th, the father filed a petition for relief from the claim presentation requirement. The trial court denied the petition, and petitioners appealed.

The court of appeal reversed. The court said that excusable neglect is that neglect which might have been the act of a reasonably prudent person under the same circumstances (*113 Cal. App. 3d 355, 358)* .

[b] Excusable Neglect of Claimant in Relying on Public Entity's Request to Forgo Action Pending Investigative Report

The facts and procedural background of ***Boas v. County of San Diego*** *(1980) 113 Cal. App. 3d 355, 169 Cal. Rptr. 828* , are discussed in *§ 196.38[3][a]*. In reversing the judgment denying the petition for relief, the court of appeal said that *Gov. Code § 946.6* is liberally interpreted and that the policy of deciding cases on their merits supports resolving doubts in favor of the application for relief (*113 Cal. App. 3d 355, 358)* . The court held that petitioner's neglect was excusable because he believed he had done everything necessary to notify the county of the claim and reasonably relied on the assurances of an investigation in waiting until the report was received before consulting an attorney (*113 Cal. App. 3d 355, 358)* . The court said that in light of the county's request that petitioner forgo other action pending the county's investigation and the county's supplying inaccurate information regarding ownership of the property, petitioner's neglect to file a timely claim was excusable (*113 Cal. App. 3d 355, 358)* .

[c] Excusable Neglect of Attorney's Investigator

In ***Kaslavage v. West Kern County Water Dist.*** *(1978) 84 Cal. App. 3d 529, 148 Cal. Rptr. 729* , plaintiff was seriously injured while swimming when he dove from a pipe into an irrigation canal and struck his head. Plaintiff consulted an attorney who sent an investigator to the scene. The investigator spent parts of two days in the investigation but mistakenly failed to ascertain the identity of the public entity that owned the pipe. As a result, a timely claim was not presented to that public entity and plaintiff's application to present a late claim, made eight days after discovery of the fact, was denied. The plaintiff's petition for relief to the trial court was denied. The court of appeal reversed, holding that the failure to discover the existence of, and present a claim to, the public entity, though neglectful, was not inexcusable and that the trial court had abused its discretion in denying the petition as there was no allegation or proof that the public entity would be prejudiced by granting relief (*84 Cal. App. 3d 529, 536-537)* .

[4] Opposing Authorities

[a] Investigative Mistakes Generally

In *Tammen v. San Diego County (1967) 66 Cal. 2d 468, 58 Cal. Rptr. 249, 426 P.2d 753* , plaintiff's husband was killed when his automobile struck two horses which had strayed onto the highway. She immediately consulted an attorney but several months passed before it was suggested that there might be a claim against the county for failure to maintain the highway so that it would not be in a dangerous and defective condition by being exposed to roaming livestock. Six months after that suggestion, the application to present a late claim was presented. The Supreme Court upheld the denial of the widow's petition for relief, holding that the attorney's failure to investigate for that period of time was unreasonable (*66 Cal. 2d 468, 478-480)* .

In *Black v. Los Angeles County (1970) 12 Cal. App. 3d 670, 91 Cal. Rptr. 104* , petitioner's attorney investigated the accident but went to the wrong location, which prevented him from ascertaining the possibility of a claim against the county. The proper location was available in the police report. The court of appeal upheld the denial of the petition and held that the attorney's failure to use reasonable diligence made his neglect inexcusable (*12 Cal. App. 3d 670, 674-678*).

In *Shaddox v. Melcher (1969) 270 Cal. App. 2d 598, 76 Cal. Rptr. 80* , plaintiff and her attorney failed to make a

timely claim against the state even though the state car involved in the accident had a state emblem on it and the driver's employment by the state was revealed in statements to the police. The court of appeal upheld the denial of the petition for relief on the basis that the failure to investigate was inexcusable neglect (*270 Cal. App. 2d 598, 602)* .

In *Fresno v. Superior Court (1980) 104 Cal. App. 3d 25, 163 Cal. Rptr. 807* , the court of appeal, in issuing a writ of mandate directing the trial court to set aside its order granting relief, held that the total failure of plaintiff's attorney to investigate the ownership of a garage in the basement of a Hilton Hotel to determine that it was maintained by the city, a fact the attorney discovered only after defendant filed a cross-complaint against the city, was not excusable neglect (*104 Cal. App. 3d 25, 33-34*).

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19A-196 California Points & Authorities § 196.39

§ 196.39 Supporting Contention that Failure to Present Timely Claim to Public Entity Is Excused--Failure Was Through Mistake, Inadvertence, Surprise, or Excusable Neglect [Gov. Code § 946.6(c)(1)]--Attorney's Excusable Neglect in Calendaring

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with general points and authorities supporting the contention that the claimant should be relieved from his or her failure to have timely presented a claim to the public entity (see, e.g., § 196.36).*]

THE CLAIMANT _____ [SHOULD BE *or* SHOULD HAVE BEEN *or* WAS PROPERLY] RELIEVED FROM HIS/HER FAILURE TO PRESENT A TIMELY CLAIM BECAUSE THE FAILURE TO PRESENT A TIMELY CLAIM WAS THROUGH A CALENDARING MISTAKE OF THE CLAIMANT'S ATTORNEY, AND THE APPLICATION FOR LEAVE TO PRESENT A LATE CLAIM, WHICH WAS _____ [DENIED *or* DEEMED DENIED BY LAPSE OF TIME], WAS PRESENTED TO THE PUBLIC ENTITY WITHIN A REASONABLE TIMENOT EXCEEDING ONE YEAR FROM THE DATE THE CAUSE OF ACTION ACCRUED.

A. Excusable Neglect Defined. [*See § 196.38, Paragraph A.*]

B. Calendaring Mistake by Attorney. Calendar errors by an attorney or a member of the attorney's staff are excusable when the claimant has done everything necessary to enable a claim to be timely presented, the application to the public entity for relief from the timely filing requirement is made within a reasonable time not to exceed one year after the accrual of the cause of action, and there is no showing by the public entity that it would be prejudiced if relief were granted (*Nilsson v. City of Los Angeles (1967) 249 Cal. App. 2d 976, 979-983, 58 Cal. Rptr. 20* ; see *Flores v. Board of Supervisors (1970) 13 Cal. App. 3d 480, 483-485, 91 Cal. Rptr. 717* ; *Segal v. Southern Cal. Rapid Transit Dist. (1970) 12 Cal. App. 3d 509, 511-512, 90 Cal. Rptr. 720*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the claimant is entitled to be, should have been, or was properly relieved from his or her failure to have timely presented a claim to a public entity. The ground for relief is that the failure to present a claim within the time specified in *Gov. Code § 911.2* (six months after date of accrual of cause of action for death or injury to person or to personal property or growing crops, or one year after date of accrual of any other cause of action) was the result of the excusable neglect [*see Gov. Code § 946.6(c)(1)*] of the attorney, consisting of an error in calendaring. Relief is authorized unless the public entity establishes that it would be prejudiced in the defense of the claim if the relief is granted [*Gov. Code § 946.6(c)(1)*].

These points and authorities may be used alone or in conjunction with the additional points and authorities *set out in §§ 196.36 -196.38, 196.40*, and *196.41*. These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be used in a memorandum of points and authorities in support of a petition for relief under *Gov. Code § 946.6(c)(1)* or in opposition to points and authorities filed by the defendant. They may also be adapted for use in a trial or appellate brief.

For a discussion of when the complaint on the claim must be filed if the points and authorities are submitted in support of a petition for relief under *Gov. Code § 946.6* and the court grants the relief, see *§ 196.143[2]*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Calendaring Mistake by Attorney as Sufficient

In ***Nilsson v. City of Los Angeles*** *(1967) 249 Cal. App. 2d 976, 58 Cal. Rptr. 20* , the court of appeal reversed an order denying claimant's petition for leave to file a late claim under *Gov. Code § 912(b)(1)* (repealed, now see *Gov. Code § 946.6*, providing for relief from having to present any claim at all when an application to present a late claim has been rejected or deemed denied). Claimant had been arrested by city police, held in custody, and later released after charges against her had been dropped. While in custody, she consulted an attorney who sent the police department a letter suggesting that his client might have a cause of action for false imprisonment and requesting the names of the complainants, the arresting officers, and the deputy district attorney contacted after the arrest. The late filing of the claim was due to an office error in calendaring a date and was not done to prejudice the defendant or to hide the fact that a claim was to be made. The time for filing the claim expired on April 7th; the claim was filed on May 19th; the application to file a late claim was presented on September 19th. The appellate court noted that the application for leave to present a late claim was filed within one year after the accrual of the cause of action and that no showing was made that the city would be prejudiced if leave were granted. The appellate court concluded that the trial court's order of denial could have been made only on a finding that the claimant did not apply for leave to present a late claim within a reasonable time or that the failure to present the claim was not through mistake, inadvertence, surprise, or excusable neglect (*249 Cal. App. 2d 976, 979)* . The court said that while not every mistake of an attorney constitutes excusable neglect, calendar errors by an attorney or a member of his or her staff are, under appropriate circumstances, excusable (citing cases in which relief had been granted) (*249 Cal. App. 2d 976, 980-981)* . The court noted that at least one other case had granted relief when the claimant's own neglect caused the delay [*see Viles v. State of California (1967) 66 Cal. 2d 24, 56 Cal. Rptr. 666, 423 P.2d 818]* , and observed that the remedial purpose of the statute authorizing relief would not be served if relief were available when the claimant caused the delay but not, as in the present case, when the claimant's attorney caused the delay. Courts are somewhat loath to penalize a litigant on account of some omission on the part of the attorney, particularly where the litigant has acted promptly and has relied on the attorney to protect his or her rights (*249 Cal. App. 2d 976, 982)* . The court recognized that a claimant must act with reasonable diligence after discovering the default but held that the attorney's delay in applying for relief to file a late claim was immaterial in the

absence of any showing of prejudice to the city (*249 Cal. App. 2d 976, 982)* .

In ***Flores v. Board of Supervisors*** *(1970) 13 Cal. App. 3d 480, 91 Cal. Rptr. 717* , plaintiffs, the parents of a child who died on the day of birthbecause of allegedly medically inappropriate procedures in a county hospital, consulted counsel, retained them, and remitted to them the cost of copying the hospital records, all within the statutory period allowed for the filing of the claim, but the claim was filed 23 days late because the attorneys failed to open a file on the case and thus were not reminded of the 100-day (now six-month) limitation period. The trial court denied the petition for relief. The court of appeal reversed, holding that under the facts of the case the attorney's error was excusable neglect. The court stated that, while not every mistake of an attorney constitutes excusable neglect, calendar errors by an attorney or a member of his or her staff are excusable under appropriate circumstances (*13 Cal. App. 3d 480, 483-484)* .

In ***Segal v. Southern Cal. Rapid Transit Dist.*** *(1970) 12 Cal. App. 3d 509, 90 Cal. Rptr. 720* , the claim was filed one day late due to the attorney's mistaken calculation of the applicable time period. The trial court denied the petition for relief. The court of appeal reversed, holding that allowing relief from the claim requirements in such circumstances was consistent with the intent of the statute (*12 Cal. App. 3d 509, 512)* .

[4] Additional Authorities

[a] Calendaring Mistake by Attorney as Sufficient

In Renteria v. Juvenile Justice, Dep't of Corr. & Rehab. (2006) 135 Cal. App. 4th 903 , the plaintiff was bitten by a correctional officer's dog while incarcerated in a juvenile correctional facility. Prior to expiration of the six-month period for filing a claim, the plaintiff's attorney filed a court petition to perpetuate testimony and preserve evidence relating to the event. A deputy attorney general sent a letter to the plaintiff's attorney informing the attorney that a court order would not be necessary and that they would take steps to preserve the evidence. A member of the attorney's staff erroneously assumed after reviewing this letter that a claim had been filed and removed the six-month deadline from their calendar. Nine days after expiration of the six-month deadline, the plaintiff filed a petition to file a late claim with the state. When no response was received, the petition was deemed rejected. The plaintiff sought relief from the court, but the trial court denied the plaintiff's petition to file a late claim. The court of appeal reversed, concluding that the calendaring error constituted excusable neglect. The court concluded that the attorney's reliance on his staff to calendar the deadline was reasonable, and that the error by the attorney's staff was a reasonable mistake under the circumstances. In addition, the plaintiff had exercised appropriate diligence in hiring an attorney and pursuing his claim, and the petition to file a late claim was made only nine days after expiration of the six-month deadline. Finally, the Division of Juvenile Justice had not demonstrated that they would be prejudiced by allowing the late claim (135 Cal. App. 4th 903, 911-912).

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1. Failure To File Timely Claim

19A-196 California Points & Authorities § 196.40

§ 196.40 Supporting Contention that Failure to Present Timely Claim to Public Entity Is Excused--Failure Was Through Mistake, Inadvertence, Surprise, or Excusable Neglect [Gov. Code § 946.6(c)(1)]--Excusable Neglect Caused by Emotional Trauma or by Inability to Think Clearly Induced by Medication

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with general points and authorities supporting the contention that the claimant should be relieved from his or her failure to have timely presented a claim to the public entity (see, e.g., § 196.36).*]

THE CLAIMANT _____ [SHOULD BE *or* SHOULD HAVE BEEN *or* WAS PROPERLY] RELIEVED FROM HIS/HER FAILURE TO PRESENT A TIMELY CLAIM BECAUSE THE FAILURE TO PRESENT A TIMELY CLAIM WAS THROUGH EXCUSABLE NEGLECT CAUSED BY _____ [EMOTIONAL TRAUMA *or* INABILITY TO THINK CLEARLY INDUCED BY MEDICATION TAKEN PURSUANT TO PRESCRIPTION FOR THE INJURY SUSTAINED], AND THE APPLICATION FOR LEAVE TO PRESENT A LATE CLAIM, WHICH WAS _____ [DENIED *or* DEEMED DENIED BY LAPSE OF TIME], WAS PRESENTED TO THE PUBLIC ENTITY WITHIN A REASONABLE TIME NOT EXCEEDING ONE YEAR FROM THE DATE THE CAUSE OF ACTION ACCRUED.

A. Excusable Neglect Defined. [*See § 196.38, Paragraph A.*]

[*EITHER*]

B. Neglect Based on Emotional Trauma. Neglect is excusable and relief should be granted when the claimant's failure to present a timely claim was caused by emotional trauma suffered by the claimant (*County of Santa Clara v. Superior Court (1971) 4 Cal. 3d 545, 552-554, 94 Cal. Rptr. 158, 483 P.2d 774*).

[*OR*]

B. Neglect Based on Inability to Think Clearly Induced by Medication Prescribed for Injury. Neglect is excusable and relief should be granted when the claimant's failure to present a timely claim was caused by the claimant's inability to think clearly which was induced by the medication prescribed and taken as a result of the claimant's injury (*County of Alameda v. Superior Court (1987) 196 Cal. App. 3d 619, 625, 242 Cal. Rptr. 215*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention thatthe claimant is entitled to be, should have been, or was properly relieved from his or her failure to have presented a timely claim to a public entity. The ground for relief is that the failure to present a claim within the time specified in *Gov. Code § 911.2* (six months after the date a cause of action for death or injury to person or to personal property or growing crops accrued, or one year after the date of accrual of any other cause of action) was the result of the claimant's excusable neglect [*see Gov. Code § 946.6(c)(1)*] caused by emotional trauma or by inability to think clearly because of the medication taken pursuant to prescription as a result of the claimant's injury. Relief is authorized unless the public entity establishes that it would be prejudiced in the defense of the claim if the relief is granted [*Gov. Code § 946.6(c)(1)*].

These points and authorities may be used alone or in conjunction with the additional points and authorities set out in *§§ 196.36 -196.39, 196.41*. These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be used in a memorandum of points and authorities in support of a petition for relief under *Gov. Code § 946.6(c)(1)* or in opposition to points and authorities filed by the defendant. They may also be adapted for use in a trial or appellate brief.

For a discussion of when the complaint on the claim must be filed if the points and authorities are submitted in support of a petition for relief under *Gov. Code § 946.6* and the court grants the relief, see *§ 196.143[2]*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Neglect Based on Emotional Trauma

In ***County of Santa Clara v. Superior Court*** *(1971) 4 Cal. 3d 545, 94 Cal. Rptr. 158, 483 P.2d 774* , the respondent trial court had granted plaintiffs' petition for relief from the claim requirement based in part on the testimony of plaintiffs' attorney that the claim for wrongful death was not timely filed because of the emotional trauma resulting from the death of plaintiffs' son, on which the claim was based, during the trial of the son's action against the county in which a timely claim by the son had been presented and denied. In upholding the decision of the trial court, the Supreme Court held that the emotional trauma was sufficient to make the neglect or inadvertence excusable (*4 Cal. 3d 545, 554)* .

[b] Neglect Based on Inability to Think Clearly Induced by Medication Prescribed for Injury

County of Alameda v. Superior Court *(1987) 196 Cal. App. 3d 619, 242 Cal. Rptr. 215* , was a mandate proceeding which arose out an action against a county by a worker who had been injured on August 22, 1985, when his leg was crushed while he was repairing slide damage on a public road. The worker was hospitalized for several weeks after the accident and underwent surgery on his leg. He later returned to the hospital for further surgery consisting of a bone graft. During this period, he was taking prescribed pain medication. The worker did not learn about the claim-filing

requirements until May 4, 1986, when he consulted an attorney, and consequently failed to present a timely claim to the county. His application for leave to present a late claim was presented on May 29, 1986, and denied by operation of law. He then petitioned for an order relieving him of the claim presentation requirement of *Gov. Code § 945.4* (requirement that claim be presented before suit may be brought against a public entity) on the ground of excusable neglect, grounded primarily on his physical and mental condition following the accident. He testified that while he was on the medication prescribed he could not think clearly or tend to important business. A physician familiar with the effects of the medication (Percodan) testified by affidavit that opioids, of which Percodan is one, generally induce in patients a state of apathy toward their painful stimuli and many times toward their surroundings. The trial court granted plaintiff's petition for relief, and the county petitioned the court of appeal for a writ of mandate, challenging the trial court's order. The court of appeal denied the petition for the writ. The Supreme Court granted review and transferred the petition to the court of appeal with directions to issue the alternative writ.

In denying the peremptory writ and discharging the alternative writ after hearing, the court of appeal said it had "no difficulty in concluding that the trial court did not abuse its discretion" in finding that the worker was excused for his neglect in failing to file a timely claim (*196 Cal. App. 3d 619, 624-625)* . The court further concluded that on considering the evidence of real party (plaintiff) that the medication prevented him from thinking clearly, and the expert evidence supporting the possibility of such an effect, the finding of excusable neglect was not unsupported by the evidence (*196 Cal. App. 3d 619, 625)* .

The court distinguished *Harrison v. County of Del Norte* [*Harrison v. County of Del Norte (1985) 168 Cal. App. 3d 1, 213 Cal. Rptr. 658]* , a case the court had previously decided on generally similar facts, on the ground that in *Harrison* the trial court denied relief, and the court of appeal upheld its discretion (in the case before it, the trial court had granted relief and again the court of appeal was upholding the trial court's discretion) (*196 Cal. App. 3d 619, 624)* . The court also distinguished *Lutz v. Tri-City Hospital* [*Lutz v. Tri-City Hosp. (1986) 179 Cal. App. 3d 807, 224 Cal. Rptr. 787]* , in which plaintiff contended his physical incapacity during the period in which a claim could have been timely filed excused his failure to present a claim to a public hospital, on the ground that plaintiff did not suggest how his claimed paraplegia prevented him from presenting his claim within the specified period (*196 Cal. App. 3d 619, 625)* .

[4] Opposing Authorities

[a] Neglect Based on Emotional Trauma

In *People ex rel. Dep't of Transp. v. Superior Court (2003) 105 Cal. App. 4th 39, 129 Cal. Rptr. 2d 60* , an apparent arson along a highway caused a car fire that killed a woman. Her husband and children filed a late claim against the state that alleged failure to properly maintain the roadside. They waited almost eight months after the death before first consulting an attorney, which they finally did only on the suggestion of the husband's barber. Two weeks later, their attorney filed an application to present a late claim, which was denied by operation of law when the state failed to respond within 45 days. The claimants successfully petitioned the superior court for relief from failing to file a timely claim based on *Gov. Code § 946.6(c)(1)*, but the court of appeal granted a writ of mandate compelling the superior court to vacate its order. The court of appeal held that the claimants could not demonstrate reasonable diligence because they claimant did nothing within the six-month period for filing claims (*105 Cal. App.4th 39, 44-45)* . The court also rejected the argument that excusable neglect could be found, based on the emotional effect that the accident had on the husband, because the evidence only indicated a 17-day stay in the hospital by the husband and a bare allegation of postaccident depression, with no evidence showing how these conditions substantially interfered with the husband's ability to function or seek out legal counsel. In addition, no evidence was offered excusing the total lack of diligence by the children (*105 Cal. App. 4th 39, 46)* .

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19A-196 California Points & Authorities § 196.41

§ 196.41 Supporting Contention that Failure to Present Timely Claim to Public Entity Is Excused--Failure Was Through Mistake, Inadvertence, Surprise, or Excusable Neglect [Gov. Code § 946.6(c)(1)]--Excusable Neglect Caused by Claimant's Fruitless Efforts to Secure Counsel

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with general points and authorities supporting the contention that the claimant should be relieved from his or her failure to have timely presented a claim to the public entity (see, e.g., § 196.36).*]

THE CLAIMANT _____ [SHOULD BE *or* SHOULD HAVE BEEN *or* WAS PROPERLY] RELIEVED FROM HIS/HER FAILURE TO PRESENT A TIMELY CLAIM BECAUSE THE FAILURE TO PRESENT A TIMELY CLAIM WAS THROUGH EXCUSABLE NEGLECT CAUSED BY PLAINTIFF'S FRUITLESS EFFORTS TO OBTAIN AN ATTORNEY TO TAKE THE CASE, AND THE APPLICATION FOR LEAVE TO PRESENT A LATE CLAIM, WHICH WAS _____ [DENIED *or* DEEMED DENIED BY LAPSE OF TIME], WAS PRESENTED TO THE PUBLIC ENTITY WITHIN A REASONABLE TIME NOT EXCEEDING ONE YEAR FROM THE DATE THE CAUSE OF ACTION ACCRUED.

A. Excusable Neglect Defined. [*See § 196.38, Paragraph A.*]

B. Failure to Present Timely Claim Resulted From Claimant's Inability to Obtain Legal Counsel Notwithstanding Diligent Efforts to Do So. Neglect in failing to present a timely claim is excusable and relief from the failure should be granted when the failure was caused by the claimant's inability, as a result of the repeated refusals by numerous attorneys to take the claimant's case, to secure the services of legal counsel until after the period for presenting a claim had expired, and the claimant did not learn of the possible cause of action against the public entity until legal counsel was obtained and then promptly applied for leave to present a late claim (*Ebersol v. Cowan (1983) 35 Cal. 3d 427, 434, 197 Cal. Rptr. 601, 673 P.2d 271*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the claimant is entitled to be, should have been, or was properly relieved from his or her failure to have timely presented a claim to a public entity. The ground for relief is that the failure to present a claim within the time specified in *Gov. Code § 911.2* (six months after date of accrual of cause of action for death or injury to person or to personal property or growing crops, or one year after date of accrual of any other cause of action) was the result of the excusable neglect [*see Gov. Code § 946.6(c)(1)*] of the claimant caused by the claimant's inability to obtain legal counsel despite diligent efforts to do so. Relief is authorized unless the public entity establishes that it would be prejudiced in the defense of the claim if the relief is granted [*Gov. Code § 946.6(c)(1)*].

These points and authorities may be used alone or in conjunction with the additional points and authorities *set out in §§ 196.36 -196.40*. These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be used in a memorandum of points and authorities in support of a petition for relief under *Gov. Code § 946.6(c)(1)* or in opposition to points and authorities filed by the defendant. They may also be adapted for use in a trial or appellate brief.

For a discussion of when the complaint on the claim must be filed if the points and authorities are submitted in support of a petition for relief under *Gov. Code § 946.6* and the court grants the relief, see *§ 196.143[2]*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Failure to Present Timely Claim Resulted From Claimant's Inability to Obtain Legal Counsel Notwithstanding Diligent Efforts to Do So

The factual background of ***Ebersol v. Cowan*** *(1983) 35 Cal. 3d 427, 197 Cal. Rptr. 601, 673 P.2d 271* , is discussed in *§ 196.36[3][a]*. In holding that claimant's failure to present a timely claim against the county wasdue to excusable neglect, the Court said that excusable neglect is neglect that might have been the act or omission of a reasonably prudent person under the same or similar circumstances (*35 Cal. 3d 427, 435)* . The county argued on appeal that claimant should be denied relief since she had made no effort to identify her claim against the public entity within the 100-day (now six-month) period. Examining earlier appellate cases dealing with the issue, the Court found that those cases did not require claimants seeking relief under *Gov. Code § 946.6* to undertake their own factual investigations. The cases indicated instead that the claimant must at a minimum make a diligent effort to obtain legal counsel within 100 days (now six months) after the accrual of the cause of action. The court noted that the claimant in the case before it had diligently attempted to obtain legal advice and retain counsel on the matter but was discouraged from pursuing the claim by the attorneys she contacted. Given that nine attorneys told her she had no claim, it could not be reasonably expected that claimant would undertake, or should have undertaken, her own legal or factual investigation (*35 Cal. 3d 427, 439)* .

NOTE:

Although incorrect legal advice may provide a sufficient basis on which to grant relief from the claims-filing requirement, it does not toll the running of the statute of limitations. In a medical malpractice action against a private hospital and private doctors rather than an action against a public entity or public employees, as in *Ebersol*, the Court distinguished *Ebersol* on the ground that the claim-statute relief provisions addressed in that case were fundamentally distinct from the statute of limitations issue involved in case at bench [*Gutierrez v. Mofid (1985) 39 Cal. 3d 892, 901, 218 Cal. Rptr. 313, 705 P.2d 886]* . The Court said that (1) the 100-day (now six-month) government claim

requirement is an obstacle in addition to the normal limitations period applicable to the tort alleged; (2) because the claim period is so short, and because lay persons may have no idea of its existence, it looms as a trap for the unwary; (3) realizing this, the legislature has devised a remedial scheme for relief from this harsh and technical deadline when justice so requires; (4) by the terms of *Gov. Code § 946.6(c)(1)*, relief is justified in this special case for any "neglect" of plaintiff (or his or her counsel) which is excusable; and (5) with traditional exceptions, the language of *Gov. Code § 946.6(c)(1)* invites inquiry into all aspects of plaintiff's diligence in presenting his or her claim, and the courts have so concluded [*Gutierrez v. Mofid (1985) 39 Cal. 3d 892, 901, 218 Cal. Rptr. 313, 705 P.2d 886]* . The Court said that, by contrast, the one-year limitations period for medical malpractice [*Code Civ. Proc. § 340.5*] begins to run on discovery, actual or constructive, of an injury and expires inexorably one year later, that the legislature has made no provision in medical malpractice actions for relief on general grounds of excusable neglect to file in time, and that the discovery limitations period for medical malpractice is not delayed, suspended, or tolled when a plaintiff with actual or constructive knowledge of the facts underlying the malpractice claim is told by an attorney that he or she has no remedy [*Gutierrez v. Mofid (1985) 39 Cal. 3d 892, 902, 218 Cal. Rptr. 313, 705 P.2d 886]* .

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[Reserved]

§§ 196.42[Reserved]

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19A-196 California Points & Authorities § 196.60

§ 196.60 Supporting Contention That Period for Presenting Claim [Gov. Code § 911.2] Was Tolled--Belated Discovery

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE OBJECTION THAT PLAINTIFF'S CLAIM WAS UNTIMELY _____ [SHOULD BE *or* SHOULD HAVE BEEN *or* WAS PROPERLY] OVERRULED BECAUSE PLAINTIFF HAS _____ [PLEADED *or* SHOWN] THAT BECAUSE OF HIS/HER BELATED DISCOVERY OF THE FACTS, PLAINTIFF'S CAUSE OF ACTION DID NOT ACCRUE UNTIL _____ [*date*].

A. Belated Discovery Rule. Under the belated discovery rule, a cause of action does not accrue from the occurrence of the last essential fact or from discovery of the damage to property, but, rather, from the point in time when plaintiff becomes aware, or could have become aware through the exercise of reasonable diligence, of defendant's negligence as a cause (*Bastian v. County of San Luis Obispo (1988) 199 Cal. App. 3d 520, 527, 245 Cal. Rptr. 78*).

B. Showing Required for Belated Discovery Rule to Apply. To raise the issue of belated discovery, the plaintiff must state when the discovery was made, the circumstances behind the discovery, and plead facts showing that the failure to discover was reasonable, justifiable, and not the result of a failure to investigate or act. Once belated discovery is pleaded, the issue of whether plaintiff exercised reasonable diligence in discovering the negligent cause of the injury is a question of fact (*Bastian v. County of San Luis Obispo (1988) 199 Cal. App. 3d 520, 527, 245 Cal. Rptr. 78*).

C. Test for Determining Applicability of Belated Discovery Rule. The test for determining whether the belated discovery doctrine applies to toll the California Tort Claims Act limitations period for filing a claim (*Gov. Code §§ 911.2, 911.4*) is whether the plaintiff has information of circumstances to put a reasonable person on inquiry, or has the opportunity to obtain knowledge from sources open to his or her investigation. If the plaintiff believes that, because of the injury suffered, someone has done something wrong, such a fact is sufficient to alert the plaintiff to the necessity for

investigation and the pursuit of his or her remedies (*Bastian v. County of San Luis Obispo (1988) 199 Cal. App. 3d 520, 527, 245 Cal. Rptr. 78*).

D. Test for Determining Reasonable Diligence. The test for determining whether the plaintiff exercised reasonable diligence in discovering the negligent cause of the injury is not whether the plaintiff was successful in his or her timely investigation, but whether the plaintiff's efforts were reasonable (*Bastian v. County of San Luis Obispo (1988) 199 Cal. App. 3d 520, 528, 245 Cal. Rptr. 78*).

E. When Cause of Action Is Preserved by Belated Discovery Rule. For purposes of the California Tort Claims Act limitation provisions (*Gov. Code §§ 911.2, 911.4*), the belated discovery doctrine preserves a plaintiff's cause of action when, despite diligent investigation, he or she is blamelessly ignorant of the cause of his or her injuries. The rule also protects the defendant, who is spared precipitous litigation (*Bastian v. County of San Luis Obispo (1988) 199 Cal. App. 3d 520, 529, 245 Cal. Rptr. 78*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the claimant's cause of action did not arise until discovery of the defendant's negligence as a cause of plaintiff's injury, and that plaintiff's claim was therefore timely presented to the public entity.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be used in a memorandum of points and authorities in opposition to the public entity's demurrer to the complaint, or motion for judgment on the pleadings, on the asserted ground that the claim against the public entity was untimely and the action is barred for that reason, or in opposition to the public entity's motion for summary judgment on the ground that the action is so barred. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Belated Discovery Rule

Bastian v. County of San Luis Obispo *(1988) 199 Cal. App. 3d 520, 245 Cal. Rptr. 78* , was an action against a deputy sheriff and his employing county for damages. A driver had been killed in a one-car accident on February 19, 1982. A deputy sheriff arrived on the scene and placed alongside the victim's body an empty vodka bottle that he had found some distance away. Plaintiff, a newspaper photographer, arrived a short time later and, in the presence of the deputy sheriff, photographed the scene without knowing that it had been contrived by the placement of the bottle. The photograph was published in the newspaper for which plaintiff worked, which caused a local storm of protest. Because of the publication of the misleading photograph, plaintiff was fired and his reputation as a newspaper photographer suffered. The survivors of the accident victim sued the photographer and the newspaper, among others, but not the deputy sheriff, for damages for intentional infliction of emotional distress, claiming the plaintiff and the newspaper had staged the photograph. On being sued, plaintiff undertook to investigate whether someone had tampered with the accident scene. Plaintiff spoke to the California Highway Patrol officers who attended the scene and they claimed to have no knowledge that the bottle had been moved. Plaintiff tried unsuccessfully to speak to the deputy sheriff, who was uncooperative. The sheriff's department issued a statement asserting that there were no grounds for suspecting that the deputy sheriff was a party to any wrongdoing. During the course of the survivors' lawsuit, the deputy sheriff, on November 11, 1984, testified that he had found the vodka bottle some distance from the accident victim's body and

placed it next to the body. Plaintiff did not learn of this testimony until January 7, 1985. Four days later, he filed a claim with the county for damages for loss of job, for loss of reputation, and for emotional distress and suffering. The county rejected the claim and plaintiff sued. Plaintiff alleged that the deputy sheriff knew plaintiff was a newspaper photographer and that the deputy sheriff had either negligently or intentionally injured plaintiff by not warning plaintiff that the accident scene had been altered. The trial court sustained a demurrer to the negligence action without leave to amend and to the intentional conduct action with leave to amend on the ground, among others, that plaintiff had failed to file a timely claim with the county. Plaintiff declined to amend, and the action was dismissed. Plaintiff appealed, claiming that his complaint sufficiently alleged the tolling of the California Tort Claims Act limitation statutes (*Gov. Code § 911.2, 911.4*) under the doctrine of belated discovery because the cause of his injury, the deputy sheriff's negligence, was unknown until January 7, 1985.

The court of appeal reversed as to the negligence cause of action and affirmed as to the intentional conduct cause of action. The court pointed out that a cause of action normally accrues at the time of injury, but added that, in some situations, the cause of action does not accrue from the occurrence of the last essential fact, or from discovery of the damage to property, but rather from the point in time when plaintiff becomes aware of the defendant's negligence as a cause, or could have become so aware through the exercise of reasonable diligence (*199 Cal. App. 3d 520, 527)* .

[b] Showing Required for Rule to Apply

The facts and procedural background of ***Bastian v. County of San Luis Obispo*** *(1988) 199 Cal. App. 3d 520, 245 Cal. Rptr. 78* , are discussed in *§ 196.60[3][a]*. In reversing the judgment, the court said that to raise the issue of belated discovery, the plaintiff must state when the discovery was made, the circumstances behind the discovery, and plead facts showing that the failure to discover was reasonable, justifiable, and not the result of a failure to investigate or act, and that once belated discovery is pleaded the issue of whether plaintiff exercised reasonable diligence in discovering the negligent cause of the injury is a question of fact. The court concluded that the complaint alleged facts sufficient to establish these pleading requirements and so raised the issue of belated discovery (*199 Cal. App. 3d 520, 527)* .

[c] Test for Determining Applicability of Belated Discovery Rule

The facts and procedural background of ***Bastian v. County of San Luis Obispo*** *(1988) 199 Cal. App. 3d 520, 245 Cal. Rptr. 78* , are discussed in *§ 196.60[3][a]*. In reversing the judgment, the court said that the test for belated discovery is whether the plaintiff has information of circumstances that is sufficient to put a reasonable person on inquiry, or has the opportunity to obtain knowledge from sources open to his or her investigation, and that if plaintiff believes that he or she sustained injuries because someone had done something wrong, such a fact is sufficient to alert the plaintiff to the necessity for investigation and the pursuit of his or her remedies (*199 Cal. App. 3d 520, 527)* .

[d] Test for Determining Reasonable Diligence

The facts and procedural background of ***Bastian v. County of San Luis Obispo*** *(1988) 199 Cal. App. 3d 520, 245 Cal. Rptr. 78* , are discussed in *§ 196.60[3][a]*. In reversing the judgment, the court discussed the investigation undertaken by plaintiff and said that it was true that the survivors' lawsuit put plaintiff on notice of the possibility that someone had moved the vodka bottle and that plaintiff had reason to believe that the deputy sheriff might know something about it, but that the test for diligence is not whether plaintiff was successful in his timely investigation of the causeof his injury, but whether his efforts were reasonable (*199 Cal. App. 3d 520, 528)* . The court concluded that it could not find, as a matter of law, that the plaintiff was not diligent because he had been unsuccessful in his efforts to discover the truth (*199 Cal. App. 3d 520, 527-528)* .

[e] When Cause of Action is Preserved by Belated Discovery Rule

The facts and procedural background of ***Bastian v. County of San Luis Obispo*** *(1988) 199 Cal. App. 3d 520, 245 Cal. Rptr. 78* , are discussed in *§ 196.60[3][a]*. In reversing the judgment, the court explained that to find as a matter of law

that plaintiff was not diligent because he was unsuccessful in his efforts to discover the truth, would encourage other plaintiffs to file suits against government entities even though a diligent investigation fails to uncover facts that give rise to a cause of action (*199 Cal. App. 3d 520, 528-529)* . For the purposes of the California Tort Claims Act limitation provisions (*Gov. Code § 911.2, 911.4*), the court said that the belated discovery rule protects the plaintiff, whose cause of action is preserved when, despite diligent investigation, he or she is blamelessly ignorant of the cause of his or her injuries, and that the rule also protects the defendant, who is spared precipitous litigation (*199 Cal. App. 3d 520, 529)* .

[4] Additional Authorities

[a] Test for Determining Applicability of Belated Discovery Rule

The facts and procedural background of *Reyes v. County of Los Angeles (1988) 197 Cal. App. 3d 584, 243 Cal. Rptr. 35* , are discussed in *§ 196.33[5][a]*. In affirming the order denying the petition for relief from the claim presentation requirement on the ground that the application for leave to present a late claim was not presented within one year after the cause of action accrued (which the trial court determined to be a date almost three years after the alleged medical malpractice occurred), the court of appeal, quoting *Gutierrez v. Mofid (1985) 39 Cal. 3d 892, 897-898, 218 Cal. Rptr. 313, 705 P.2d 886* , an action for medical malpractice not involving a public entity, said that the uniform California rule is that a limitations period dependent on discovery of the cause of action begins to run no later than the time the plaintiff learns, or should have learned, the facts essential to his or her claim. It is irrelevant that plaintiff is ignorant of his or her legal remedy or the legal theories underlying his or her cause of action. If one has suffered appreciable harm and knows or suspects that professional blundering is the cause, that is sufficient to commence the running of the limitations period (*197 Cal. App. 3d 584, 591)* . The court further pointed out that any concealment by the entity's employees of a claimant's injuries does not toll the accrual of the cause of action once discovery has occurred (*197 Cal. App. 3d 584, 595)* .

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19A-196 California Points & Authorities § 196.61

§ 196.61 Supporting Contention That Requirement for Presenting Claim [Gov. Code §§ 905, 905.2] Was Substantially Met

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE OBJECTION THAT PLAINTIFF FAILED TO COMPLY WITH THE CLAIM PRESENTATION REQUIREMENT _____ [SHOULD BE *or* SHOULD HAVE BEEN *or* WAS PROPERLY] OVERRULED BECAUSE PLAINTIFF SUBSTANTIALLY COMPLIED WITH THAT REQUIREMENT.

A. Substantial Compliance. The purpose of the claims statutes is to apprise the public entity of the claim to promote settlement of meritorious claims. Therefore, the claims statutes should not be a trap for the unwary, and substantial rather than strict compliance with the statutes is all that is required (*Elias v. San Bernardino County Flood Control Dist. (1977) 68 Cal. App. 3d 70, 74, 135 Cal. Rptr. 621*).

[*Optional*] **B. Substantial Compliance Requires Disclosure of Sufficient Information to Enable Public Entity to Make Adequate Investigation.** The test of substantial compliance is whether sufficient information is disclosed on the face of the claim to reasonably enable the public entity to make an adequate investigation of the merits of the claim and to settle it without the expense of a lawsuit. A claim need not conform to pleading standards, so long as the facts constituting the cause of action pleaded in any subsequent complaint substantially correspond with the circumstances described in the claim as the basis of the plaintiff's injury (*Smith v. County of Los Angeles (1989) 214 Cal. App. 3d 266, 277, 262 Cal. Rptr. 754*).

[*Optional*] **C. Filing With Proper Officials.** A claim directed to the wrong entity that is filed with the officials who must evaluate the claim and who are the officials of both the entity to whom the claim was directed and the entity to whom the claim should have been directed constitutes substantial compliance with the claimpresentation requirement (*Elias v. San Bernardino County Flood Control Dist. (1977) 68 Cal. App. 3d 70, 75-76, 135 Cal. Rptr. 621*).

[*Optional*] **D. Filing With State Agency Other Than Board of Control.** A claim filed with the state agency responsible for the condition at issue rather than with the state Board of Control, which is the proper agency, constitutes substantial compliance with the claim presentation requirement because the state agency is duty-bound to forward the claim to the *Board of Control (Jamison v. State of California (1973) 31 Cal. App. 3d 513, 516-518, 107 Cal. Rptr. 496*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the claimant substantially complied with the claims presentation requirement of *Gov. Code § 905* or *905.2* and that substantial compliance is all that is required. Paragraph C is for use when the claim was presented to the wrong public entity but the officials of that entity and the responsible public entity are the same and thus the proper entity received actual notice of the claim. Paragraph D is for use when the claim was filed with the state agency responsible for the injury rather than with the State Board of Control.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be used in a memorandum of points and authorities in opposition to the public entity's demurrer to the complaint, or motion for judgment on the pleadings, on the asserted ground that the complaint shows noncompliance with the claims presentation statute, or in opposition to the public entity's motion for summary judgment on the ground that no timely claim was presented. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Substantial Compliance

Elias v. San Bernardino County Flood Control Dist. *(1977) 68 Cal. App. 3d 70, 135 Cal. Rptr. 621* , involved a claim for damages from a defective condition in a road. Plaintiff filed a timely claim against the county and filed suit. A year later, the county moved for a summary judgment based on the fact that the road was owned by the Flood Control District. It obtained the summary judgment and plaintiff served the district as a Doe defendant. The district then obtained a judgment on the pleadings against plaintiff on the theory of noncompliance with the claims statute. The court of appeal reversed and held that plaintiff had substantially complied with the claims statute by filing with the county. The district's officers and directors were also the officers and directors of the county, and the filing of the claim with the county apprised the officers and directors of the claim (*68 Cal. App. 3d 70, 75)* .

[b] Substantial Compliance Requires Disclosure of Sufficient Information to Enable Public Entity to Make Adequate Investigation

In ***Smith v. County of Los Angeles*** *(1989) 214 Cal. App. 3d 266, 262 Cal. Rptr. 754* , plaintiffs, owners of homes destroyed by a landslide, filed a tort claim against defendant county claiming property damage and emotional distress, alleging that in creating a roadway, defendant had cut into a hill, thereby removing support for plaintiffs' homes and creating a landslide danger, resulting in the demolition of plaintiffs' homes. They subsequently brought suit on causes of action for inverse condemnation, dangerous condition of public property, and nuisance. Defendant argued that plaintiffs' claims for dangerous condition of public property and nuisance were not timely filed pursuant to the California Tort Claims Act. The trial court disagreed, and entered judgment for plaintiffs on all three causes of action. Defendant appealed.

The court of appeal affirmed. Defendant argued that plaintiffs' tort claim did not sufficiently allege nuisance and dangerous condition of public property in that the claim alleged only that the construction of the road caused the landslide, and that plaintiffs were barred from later contending that clearance of slide debris from the roadway and water runoff over the roadway contributed to the landslide. In responding to defendant, the court explained that in order to be sufficient, a tort claim against a public entity must describe the circumstances of the occurrence or transaction that gave rise to the claim asserted. Although a claim need not conform to pleading standards, the facts constituting the cause of action pleaded in the complaint must substantially correspond with the circumstances described in the claim as the basis of the plaintiff's injury. The test of substantial compliance is whether sufficient information is disclosed on the face of the filed claim to enable the public entity to make an adequate investigation of the merits of the claim and to settle it without the expense of a lawsuit (*214 Cal. App. 3d 266, 277)* . The court said that although the claim did not expressly encompass the additional facts asserted by plaintiffs at trial regarding removal of debris from the roadway and water runoff, those are not allegations based on a set of facts entirely different from those firstnoticed. The court said the issue was whether the factual basis for plaintiffs' cause of action was fairly reflected in the claim. It concluded that plaintiffs' assertions at trial are matters closely connected with construction of the road, and that the claims were sufficient to put defendant on fair notice that the nature of the road, its maintenance, and its construction were all covered by the claim (*214 Cal. App. 3d 266, 279-280)* .

[c] Filing With Proper Officials

Elias v. San Bernardino County Flood Control Dist. *(1977) 68 Cal. App. 3d 70, 135 Cal. Rptr. 621* , is discussed in *§ 196.61[3][a]*.

[d] Filing With State Agency Other Than Board of Control

In ***Jamison v. State of California*** *(1973) 31 Cal. App. 3d 513, 107 Cal. Rptr. 496* , the plaintiff was injured in an accident with an employee of the state Department of Water Resources. A timely claim was filed with the Department of Water Resources but no claim was filed with the state Board of Control, where all claims against the state must be filed [*see Gov. Code § 915(b)*]. The trial court dismissed the action after a motion for judgment on the pleadings. The dismissal was reversed by the court of appeal, which held that the plaintiff had substantially complied with the claims statute. The claim had been filed in good faith with the state agency responsible for the action. That agency had the duty to forward the claim to the Board of Control. Therefore, the purpose of the claims statutes of notification to the state was fulfilled (*31 Cal. App. 3d 513, 518)* .

NOTE:

One court of appeal has criticized the reasoning of *Jamison*, especially to the extent that it would permit a finding of substantial compliance in the absence of any evidence that the claim was actually received by the appropriate agency [*see Life v. County of Los Angeles (1991) 227 Cal. App. 3d 894, 900-901, 278 Cal. Rptr. 196* ; *see also § 196.61* [5][b].

[4] Additional Authorities

[a] Substantial Compliance

White v. Moreno Valley Unified Sch. Dist. (1986) 181 Cal. App. 3d 1024, 226 Cal. Rptr. 742 , involved a claim against a school district for damages for personal injuries incurred by plaintiff, a minor. Plaintiff's mother had filed the claim with defendant, claiming medical expenses suffered by plaintiff; however, when plaintiff turned 18, her mother dismissed her separate claim. The trial court granted defendant's motion in limine to exclude evidence of plaintiff's medical expenses. Plaintiff appealed from the trial court's denial of her motion for a new trial, or in the alternative for an additur to the damages awarded against the school district. The court of appeal reversed the trial court's judgment and ordered a new trial on the issue of damages. The court held that the claim presented to the school district by plaintiff's

mother was sufficient under the doctrine of substantial compliance to put the school district on notice that plaintiff was claiming medical expenses, even though the claim contained medical expenses incurred by plaintiff's mother only, because plaintiff was also responsible for the reasonable value of the medical services rendered to her (*181 Cal. App. 3d 1024, 1030)* .

Dhuyvetter v. City of Fresno (1980) 110 Cal. App. 3d 659, 168 Cal. Rptr. 61 , involved a claim against a city for damages arising from the operation of its airport that was filed on behalf of named property owners adjacent to the airport and those residing with them and on behalf of all persons similarly adversely affected. Plaintiffs were granted leave to amend the complaint to add as plaintiffs the children residing with them. The city demurred to the amended complaint, urging that the amended complaint failed to comply with the notice requirements of the claim statutes (*Gov. Code §§ 900-996.6*). The demurrer was sustained without leave to amend, but the court of appeal reversed, holding that there was substantial compliance with the claim statutes because the city could determine from the original complaint, if not the names of the children, their existence at a particular address, the nature of the damages suffered, a specific sum claimed as damages, to wit, $5,000 per claimant, the alleged cause of the injury and damage, and the allegation that the city was the responsible party for the injury and damages (*110 Cal. App. 3d 659, 663-664)* .

In *Wheeler v. County of San Bernardino (1978) 76 Cal. App. 3d 841, 143 Cal. Rptr. 295* , plaintiff filed an application to file a late claim relating to recording of an improper survey of plaintiff's property. Plaintiff attached a notice of claim to the application. The application was filed after the 100-day (now six-month) period for personal injury and personal property claims, but within the one-year period for real property damage claims. Plaintiff's complaint was dismissed pursuant to a demurrer for failure to comply with the claims requirement. The court of appeal reversed, holding that the applicable period was one year and that the application to file a late claim, with the attached copy of a proposed claim, constituted substantial compliance with the claims statute (*76 Cal. App. 3d 841, 847-848)* .

[b] Substantial Compliance Requires Disclosure of Sufficient Information to Enable Public Entity to Make Adequate Investigation

In *Connelly v. County of Fresno (2006) 146 Cal. App. 4th 29, 52 Cal. Rptr. 3d 720* , plaintiff was injured in an automobile accident allegedly caused when a county employee ran a stop sign. Less than two months later, plaintiff filed a claim with the county describing the nature of the accident and claiming damage to her truck and car rental costs, as well as "unspecified medical, lost income, future medical." However, she did not otherwise state in the claim that she sufferedpersonal injury. Five months later, plaintiff learned the nature of her physical injuries and that surgery would be required. The county subsequently rejected her claim for personal injuries and plaintiff filed suit. The county argued that plaintiff's claim did not state a claim for personal injuries. The court of appeal held that plaintiff had substantially complied with the claim filing requirement for a personal injury claim. The court concluded that the language in the claim seeking "unspecified medical, lost income, future medical" put the county on notice of personal injuries suffered by the claimant in the accident and that the claimant did not at that time know the extent of the injuries or the associated costs. More detailed information could have been obtained by the county had they investigated, rather than merely rejecting the claim (*146 Cal. App. 4th 29, 39-42)* .

[5] Opposing Authorities

[a] Substantial Compliance

In *Schaefer Dixon Assocs. v. Santa Ana Watershed Project Auth. (1996) 48 Cal. App. 4th 524, 55 Cal. Rptr. 2d 698* , plaintiff, a construction contractor, alleged that a letter sent to the general manager of a government agency constituted a claim for purposes of the Government Tort Claims Act. The letter outlined the history of plaintiff's work and a dispute over fees, and demanded full payment of invoiced fees. The trial court granted a motion by the defendant agency for summary judgment, basing its ruling on the failure of the letter to threaten litigation. The court of appeal affirmed, holding that the letter was never intended and never treated as the functional equivalent of a formal claim. The court

stated that although only substantial compliance rather than strict compliance with statutory claim requirements is required, a claim must be readily identifiable as such (*48 Cal. App. 4th 524, 533)* . The court held that the plain import of plaintiff's letter was merely to provide information and not to advise of imminent litigation over a claim. Furthermore, the letter was not presented as required to the proper person, but was directed to the personal attention of the general manager (*48 Cal. App. 4th 524, 534)* .

In *Johnson v. San Diego Unified Sch. Dist. (1990) 217 Cal. App. 3d 692, 266 Cal. Rptr. 187* , after plaintiff was struck and injured by a speeding motorcycle as she left the grounds of a high school, she filed claims for personal injuries with the city of San Diego and the State Board of Control, naming defendant school district as the responsible entity. The trial court granted summary judgment for defendant in plaintiff's subsequent personal injury action on the grounds of her failure to comply with the claim-filing requirement. The court of appeal affirmed, explaining that the doctrine of substantial compliance is not applicable to a claim that is addressed to the wrong entity (*217 Cal. App. 3d 692, 697)* . It said that although a school district is a state agency, it is a local public entity under the claim-filing requirement of the Tort Claims Act because it is not a state agency; claims against state agencies are paid by warrants issued by the controller (*217 Cal. App. 3d 692, 699)* . The court distinguished plaintiff's situation from the situations in *Elias* and *Jamison* because service on the State Board of Control did not constitute receipt by the proper board ultimately responsible or a subordinate of the governmental entity ultimately liable (*217 Cal. App. 3d 692, 700)* .

Dilts v. Cantua Elementary Sch. Dist. (1987) 189 Cal. App. 3d 27, 234 Cal. Rptr. 612 , was an action for damages for breach of a written employment contract brought by a district elementary school superintendent whose services had been terminated. The trial court dismissed the action after sustaining the district's demurrer to the complaint without leave to amend. It found that a series of letters from the superintendent's attorney to the district, written on the superintendent's behalf, did not constitute sufficient compliance with the claim-filing requirement of the California Tort Claims Act.

The court of appeal affirmed. It held that actions for breach of contract fall within the scope of claims for money or damages and, hence, compliance with the Tort Claims Act filing requirements is compelled (*189 Cal. App. 3d 27, 31)* . The court said that the primary function of the Tort Claims Act is to apprise the governmental body of imminent legal action so that it may investigate and evaluate the claim and, when appropriate, avoid litigation by settling meritorious claims. The court added that compliance with the statute is mandatory, and that failure to file a claim is fatal to a cause of action (*189 Cal. App. 3d 27, 32)* . The court then explained that the issue before it was whether plaintiff filed a defective claim, in which case the doctrine of substantial compliance can be applied, or whether he filed no claim, in which case the doctrine of substantial compliance cannot be invoked (*189 Cal. App. 3d 27, 33)* . The court held that the series of letters did not constitute a claim within the meaning of the act (*189 Cal. App. 3d 27, 36)* . The court added that, assuming arguendo that they did constitute such a claim, they did not contain the information required by *Gov. Code 910*, and, therefore, did not constitute substantial compliance with the act in that they (1) did not contain the name and post office address of the claimant, (2) did not contain the name or names of the public employee or employees causing plaintiff's alleged injury, and (3) did not provide a sufficient description of the circumstances which gave rise to the claim (*189 Cal. App. 3d 27, 37)* . The court concluded that since the letters did not contain the required information, the defendant district was never given an opportunity to grant or deny a claim against it, and, hence, the letters did not fulfill the purposes of the act (*189 Cal. App. 3d 27, 38)* .

NOTE:

There is authority that the doctrine of substantial compliance does not apply if the claim fails to set forth the factual basis for recovery [*see, e.g., Watson v. State of California (1993) 21 Cal. App. 4th 836, 844-845, 26 Cal. Rptr. 2d 262]* . In addition, some cases have indicated that for the doctrine of substantialcompliance to apply, their must be at least some compliance with all of the statutory requirements [*see, e.g., Wood v. Riverside Gen. Hosp. (1994) 25 Cal. App. 4th 1113, 1116-1119, 31 Cal. Rptr. 2d 8* (Patient Problem/Complaint Form submitted to hospital quality assurance department, together with Supplemental Note dated a few days later, both complaining about quality of medical care

held not to constitute substantial compliance with claims statute when there was total failure to comply with at least two of statutory requirements: (1) failure to transmit document to statutorily designated agent under *Gov. Code § 915*, and *(2)* failure to indicate that monetary claim being asserted as required by *Gov. Code § 910(f)*); *see also Del Real v. City of Riverside (2002) 95 Cal. App. 4th 761, 769-771, 115 Cal. Rptr. 2d 705* (letter sent to individual city employee involved in auto accident with plaintiff was insufficient to constitute claim against city, because letter failed to provide sufficient information about identity of claimant or nature of accident, failed to indicate what injury was suffered or what damages were sought, and merely requested information rather than threatened formal proceedings)].

[b] Filing With State Agency Other Than Board of Control

In *Life v. County of Los Angeles (1991) 227 Cal. App. 3d 894, 278 Cal. Rptr. 196* , plaintiff's attorney filed a personal-injury claim alleging medical negligence some time after plaintiff was treated at a medical center owned and operated by defendant county. The claim was sent to the medical center, to the attention of "legal department," because plaintiff's attorney claimed she had been instructed to do so by an unnamed medical center employee. Five months later plaintiff retained new counsel, who filed a claim with the county board of supervisors, which rejected the claim as untimely. The court of appeal affirmed the trial court's grant of summary judgment in plaintiff's subsequent medical malpractice action against defendant county on the ground that plaintiff failed to comply with the claim-filing requirement. Plaintiff contended he had substantially complied with that requirement. The court of appeal said that plaintiff's claim to the medical center's legal department would have constituted substantial compliance only if the misdirected claim were actually received by the appropriate public entity within the time prescribed for presentation. Because there was no evidence to show that the claim actually reached defendant, as a matter of law, there was no substantial compliance with the claims statute (*227 Cal. App. 3d 894, 900*). The court declined to follow *Jamison* and criticized its reasoning. It said that *Jamison* deems the presentation of a claim to a public employee to amount to substantial compliance, irrespective of whether the claim actually reaches the body responsible for evaluating it. The court opined that *Jamison*'s reasoning that regardless of whether the claim was received by the board, it should have been, is at odds with the substantial-compliance doctrine as codified in *Gov. Code § 915(c)*, which demands that the misdirected claim be "actually received" by the appropriate person or board. If a public employee fails to forward a misdirected claim, that claim cannot be in substantial compliance, because it was not "actually received" by the appropriate party. Further, the court criticized *Jamison*'s reliance on a public entity's internal transmittal of a claim, saying it conflicts with *Gov. Code § 915*, which requires the claimant to file with the appropriate official or board. The court said that by focusing on the duty of a public employee in receipt of a claim to forward it to the proper agency, *Jamison* shifts responsibility for appropriately filing a claim from the claimant to the public entity (*227 Cal. App. 3d 894, 901)* .

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19A-196 California Points & Authorities §§ 196.62-196.79

[Reserved]

§§ 196.62[Reserved]

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19A-196 California Points & Authorities § 196.80

§ 196.80 Supporting Contention That Claim for Equitable or Partial Equitable Indemnity Was Timely Presented [Gov. Code §§ 901, 911.2]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE OBJECTION THAT PLAINTIFF FAILED TO PRESENT A TIMELY CLAIM _____ [SHOULD BE *or* SHOULD HAVE BEEN *or* WAS PROPERLY] OVERRULED BECAUSE THE CLAIM WAS PRESENTED WITHIN SIX MONTHS AFTER DEFENDANT/CROSS COMPLAINANT WAS SERVED WITH THE COMPLAINT GIVING RISE TO THE DEFENDANT/CROSS COMPLAINANT'S CLAIM FOR [PARTIAL] EQUITABLE INDEMNITY.

A. Equitable Indemnity Action Authorized. When a plaintiff's injury is proximately caused by the negligent acts of more than one tortfeasor and plaintiff elects to sue fewer than all of the tortfeasors, any of the named defendants can file a cross complaint for equitable indemnity or partial equitable indemnity against unnamed tortfeasors (*People ex rel. Dep't of Transp. v. Superior Court (1980) 26 Cal. 3d 744, 747, 163 Cal. Rptr. 585, 608 P.2d 673*).

B. When Claim Must Be Presented. A claim relating to a cause of action for death or injury to person or to personal property or growing crops shall be presented not later than six months after the accrual of the cause of action. A claim relating to any other cause of action shall be presented not later than one year after the accrual of the cause of action (*Gov. Code § 911.2*).

C. When Cause of Action Accrues. A cause of action for equitable indemnity or partial equitable indemnity accrues on the date on which a defendant is served with the complaint giving rise to the defendant's claim for equitable indemnity or partial equitable indemnity against the public entity (*Gov. Code § 901*).

D. Indemnity Claim Timely Filed. A claim against a public entity for equitable indemnity or partial equitable

indemnity is timely when it is presented within six months after the date on which defendant/cross complainant was served with the complaint giving rise to the indemnity claim (*see Gov. Code §§ 901, 911.2*).

[2] Comments

[a] Use of Form

These points and authorities may be used in support of the contention that a claim for equitable or partial equitable indemnity is timely when presented within six months after the party claiming indemnity was served with the complaint giving rise to the claim. Counsel should note that it is uncertain whether an indemnity claim against a public entity must be presented within the six-month period or the one-year period specified in *Gov. Code § 911.2* for the presenting of a claim after the cause of action has accrued [*see § 196.80[3][b]*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be used in a memorandum of points and authorities in opposition to the public entity's demurrer to the complaint, or motion for judgment on the pleadings, on the asserted ground that the complaint shows noncompliance with the claims presentation statute, or in opposition to the public entity's motion for summary judgment on the ground that no timely claim was presented. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Indemnity Action by Subrogee

If a subrogee (for example, an insurance carrier) pays an injured party on behalf of a subrogor (or insured), and the subrogor had already satisfied the claim-filing requirements under *Gov. Code § 911.2*, the subrogee has the same right of action against the public entity as the subrogor had. Consequently, a subrogee may then proceed with an action against the public entity, and a demurrer brought on the ground that the subrogee failed to comply with claim-filing requirements independently should properly be overruled [*Smith v. Parks Manor (1987) 197 Cal. App. 3d 872, 880-881, 243 Cal. Rptr. 256* (in which the subrogee filed a complaint in intervention, and the public entity's demurrer was ultimately overruled); *see* Ch. 220, *Subrogation*].

[c] Indemnity Claim Timely Filed

Claims against public entities under the California Tort Claims Act fall into two categories for purposes of determining whether they are timely filed. A claim relating to a cause of action for death, personal injury, or personal property damage must be presented not later than six months (formerly, 100 days) after the cause of action accrued. A claim relating to any other cause of action must be presented within one year after theaccrual date [*Gov. Code § 911.2*]. A cause of action for equitable indemnity or partial equitable indemnity accrues on the date when defendant is served with the complaint giving rise to defendant's indemnity claim against the public entity [*Gov. Code § 901*].

When read together, *Gov. Code §§ 901* and *911.2* provide that the time for filing an equitable indemnity claim does not expire until at least six months after the date of accrual of the claimant's cause of action, regardless of the category in which it is classified [*see People ex rel. Dep't of Transp. v. Superior Court (1980) 26 Cal. 3d 744, 750, 163 Cal. Rptr. 585, 608 P.2d 673* (decided under former version of Gov. Code § 911.2, when claim presentation period was 100 days)]. The statutes do not state, however, whether a claim against a public entity for equitable indemnity falls within the six-month or the one-year filing requirement. The Supreme Court has noted, without deciding the issue, that there may be some question concerning the category of *Gov. Code § 911.2* into which a claim for equitable indemnity arising out of a governmental entity's tortious activity falls [*People ex rel. Dep't of Transp. v. Superior Court (1980) 26 Cal. 3d 744, 750, 163 Cal. Rptr. 585, 608 P.2d 673]* . Thus, it is uncertain whether an indemnity claim is timely when

presented between six months and one year after accrual of the cause of action.

[3] Discussion of Authorities

[a] Equitable Indemnity Action Authorized

In ***People ex rel. Dep't of Transp. v. Superior Court*** *(1980) 26 Cal. 3d 744, 163 Cal. Rptr. 585, 608 P.2d 673* , plaintiff sued private persons for injuries resulting from an automobile accident on a state highway, but failed to include the state in the action. Approximately six years after the complaint was filed, defendants filed a cross complaint for equitable indemnity against the state, alleging that the accident was caused by a dangerous condition of public property. The state demurred to the cross complaint on the ground that the action was barred by the California Tort Claims Act because defendants had not filed a claim within 100 days (now six months) of the accident. The trial court overruled the demurrer, and the state then filed a petition for writ of prohibition and/or mandate challenging the trial court's order as arbitrary and in excess of its jurisdiction.

The Supreme Court denied the writ and affirmed the trial court's order overruling the demurrer (*26 Cal. 3d 744, 764)* . Relying on *American Motorcycle Ass'n v. Superior Court (1978) 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899* , the Court noted that when plaintiff's injury is proximately caused by the negligent acts of a number of joint tortfeasors, although each tortfeasor is jointly and severally liable for the injury, plaintiff may not single out only one or a few of the tortfeasors to bear all of the loss. The Court stated that a named defendant who has been so selected for suit may pursue his or her own equitable indemnity action against an additional unnamed tortfeasor to obtain indemnity for any liability that should properly be borne by the additional tortfeasor (*26 Cal. 3d 744, 747)* . The Court also noted that a tort defendant does not lose the right to seek equitable indemnity from another tortfeasor simply because the original plaintiff's action against the nonnamed party may be barred by the statute of limitations. Defendant's equitable indemnity action, the Court stated, is independent of the plaintiff's action, and a defendant may pursue his or her own indemnity action against the nonnamed tortfeasor as long as the statute of limitations on that action has not expired (*26 Cal. 3d 744, 748)* .

The Court devoted most of its discussion to the issue of when a cause of action for equitable indemnity accrues and concluded that the action accrues when the tort defendant pays a judgment or settlement for which he or she is entitled to indemnity (*26 Cal. 3d 744, 748, 750-762)* . This holding was in effect overturned by the legislature's 1981 amendment of *Gov. Code § 901*, which is set out in Paragraph C of this form.

Finally, the Court concluded that when an equitable indemnity action is pursued through a third-party cross complaint prior to accrual of the cause of action, a prior claim need not be filed with the public entity (*26 Cal. 3d 744, 763)* . This ruling also was overturned by the 1981 amendment of *Gov. Code § 901*, because under the statute as amended a private defendant's cause of action for equitable or partial equitable indemnity accrues on the date he or she is served with the complaint giving rise to an indemnity claim, instead of on the date when payment is made. Thus, it would not be possible for an indemnity claim to be pursued by cross complaint prior to the accrual of the indemnity cause of action under *Gov. Code § 901*.

[4] Additional Authorities

[a] Accrual of Indemnity Cause of Action

In *Greyhound Lines, Inc. v. County of Santa Clara (1986) 187 Cal. App. 3d 480, 231 Cal. Rptr. 702* , the court of appeal affirmed the trial court's denial of a petition by defendant in a personal injury action to file a late claim against the county for equitable indemnity. The court held that *Gov. Code § 901* created a special accrual date for pursuing equitable claims against the government, which is the date on which a defendant is served with the complaint giving rise to defendant's claim for equitable indemnity against the government. Enactment of *Gov. Code § 901* changed the rule established by case law [*People ex rel. Dep't of Transp. v. Superior Court (1980) 26 Cal. 3d 744, 163 Cal. Rptr. 585,*

608 P.2d 673 ; *see § 196.80[3][a]*] that an indemnity claim does not accrue until the party seeking indemnity pays the underlying liability (*187 Cal. App. 3d 480, 484)* . Following anearlier decision [*State of California v. Superior Court (1983) 143 Cal. App. 3d 754, 758, 192 Cal. Rptr. 198]* , the court declined to declare a late-discovery rule for the accrual of an indemnity action under *Gov. Code § 901* (*187 Cal. App. 3d 480, 485-488)* .

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[Reserved]

§§ 196.81[Reserved]

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4. Waiver And Estoppel of Claim Presentation Defenses

19A-196 California Points & Authorities § 196.100

§ 196.100 Supporting Contention That Public Entity Waived Defense--Failure to Give Notice of Insufficiency of Claim [Gov. Code § 910.8] Constitutes Waiver of Defense That Claim Is Insufficient [Gov. Code § 911]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE OBJECTION THAT THE CLAIM PRESENTED BY PLAINTIFF WAS INSUFFICIENT _____ [SHOULD BE *or* SHOULD HAVE BEEN *or* WAS PROPERLY] OVERRULED BECAUSE DEFENDANT WAIVED THAT OBJECTION BY FAILING TO NOTIFY PLAINTIFF OF THE INSUFFICIENCY.

A. Notice of Insufficiency Is Required. If in the opinion of the _____ [*either, if action is against state or state agency,* State Board of Control *or, if action is against local public entity, name of defendant's governing body*], or the person designated by it, a claim as presented fails to comply substantially with the requirements of *Sections 910* and *910.2 of the Government Code*, or with the requirements of a form provided under *Section 910.4 of the Government Code* if a claim is presented pursuant thereto, the _____ [board *or name of governing body*] or the person may, at any time within 20 days after the claim is presented, give written notice of the insufficiency, stating with particularity the defects or omissions in it. The notice shall be given in the manner prescribed by *Section 915.4 of the Government Code*, and the _____ [board *or name of governing body*] may not take action on the claim for a period of 15 days after the notice is given (*Gov. Code § 910.8*).

B. When Document Constitutes a Claim for Purpose of Invoking Waiver. A document presented to a public entity constitutes a "claim as presented," triggering the notice and waiver provisions of *Sections 910.8* and *911 of the Government Code*, if it discloses the existence of a claim that, if not satisfactorily resolved, will result in a lawsuit against the entity (*Phillips v. Desert Hosp. Dist. (1989) 49 Cal. 3d 699, 709, 263 Cal. Rptr. 119, 780 P.2d 349* ; *see Alliance Fin. v. City & County of San Francisco (1998) 64 Cal. App. 4th 635, 647, 75 Cal. Rptr. 2d 341* ; *Foster v. McFadden (1973) 30 Cal. App. 3d 943, 949, 106 Cal. Rptr. 685*).

C. Waiver by Failure to Give Notice of Insufficiency. Any defense as to the sufficiency of the claim based on a defect or omission in the claim as presented is waived by failure to give notice of the insufficiency with respect to the defect or omission as provided in *Section 910.8 of the Government Code* although no notice is necessary and no waiver results if the claim fails to state either the claimant's address or the address of a person to whom the claimant wishes notice to be sent (*Gov. Code § 911*; *see Phillips v. Desert Hosp. Dist. (1989) 49 Cal. 3d 699, 711, 263 Cal. Rptr. 119, 780 P.2d 349* ; *Foster v. McFadden (1973) 30 Cal. App. 3d 943, 946-949, 106 Cal. Rptr. 685*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to defendant's objection that the claim presented was insufficient and that, therefore, no proper claim was timely presented when the public entity failed to give notice of the insufficiency of the claim as required by *Gov. Code § 910.8*. *Gov. Code § 910.8* uses the term "board," which is defined in *Gov. Code § 900.2* as meaning, in the case of a local public entity, the entity's governing body and, in the case of the state, the Victim Compensation and Government Claims Board [*see also § 196.13[2]*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be used in a memorandum of points and authorities in opposition to the public entity's demurrer to the complaint, or motion for judgment on the pleadings, if the complaint on its face, or from judicially noticed matter, shows that the claim presented was insufficient, or in opposition to the public entity's motion for summary judgment on the ground that the claim presented was legally insufficient. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] When Document Constitutes a Claim for Purpose of Invoking Waiver

In ***Phillips v. Desert Hosp. Dist.*** *(1989) 49 Cal. 3d 699, 263 Cal. Rptr. 119, 780 P.2d 349* , plaintiffs, a patient and her husband, asserted multiple tort causes of action against defendant hospital and several treating physicians. Before filing the complaint, plaintiffs' counsel mailed to the hospital a notice pursuant to *Code Civ. Proc. § 364(a)* (requiring potential medical malpractice plaintiffs to notify health care providers 90 days before filing a complaint of the intent to sue). This notice advised the defendants, inter alia, that plaintiffs intended to commence a medical malpractice action against them arising out of services provided at the hospital. The hospital demurred to plaintiffs' complaint on the ground that plaintiffs had failed to state a cause of action because plaintiffs did not allege compliance with claim-presentation requirements. Before the demurrer was scheduled to be heard, plaintiffs filed a first amended complaint stating that they had complied with the Tort Claims Act. Plaintiffs also attached and incorporated by reference applications they had recently sent to the state and county for leave to present a late claim. According to the amended complaint, the hospital's demurrer was the first indication to plaintiffs that the hospital was a public entity. The hospital demurred to the first amended complaint, again on the ground that plaintiffs did not comply with the claim-presentation requirements of the Tort Claims Act. The trial court sustained the demurrer without leave to amend and subsequently dismissed the amended complaint. Plaintiffs appealed from the order of dismissal, and the court of appeal affirmed the judgment. The Supreme Court granted review and transferred the case to the court of appeal for reconsideration in light of *Foster v. McFadden* [*Foster v. McFadden (1973) 30 Cal. App. 3d 943, 106 Cal. Rptr. 685]* and *Gov. Code §§ 910.8*, *911*, and *911.3*. The court of appeal rendered a second opinion in which it reaffirmed its initial judgment and distinguished this case from *Foster v. McFadden.* The Supreme Court again granted review.

The Supreme Court unanimously reversed the judgment of the court of appeal, with directions to remand to the trial

court with directions to vacate its order dismissing the action and to enter an order overruling the demurrer (*49 Cal. 3d 699, 712)* . The Court noted that *Gov. Code §§ 910.8* and *911* use the phrase "claim as presented" to identify a claim that is defective because of its failure to comply substantially with *Gov. Code §§ 910* and *910.2*. The Court stated that only a "claim as presented that fails to comply substantially" with the claim-presentation requirements triggers the notice and defense-waiver provisions. Defendants attempted to distinguish between defective "claims" that properly trigger the act's notice and defense-waiver provisions and other notices of possible claims, such as plaintiffs' notice under *Code Civ. Proc. § 364*, which, according to the hospital, it was at liberty simply to ignore without consequence. The Court could perceive no principled basis for the purported distinction, and it concluded that a notice, such as plaintiffs' notice under *Code Civ. Proc. § 364*, must be treated as a defective claim activating the notice and defense-waiver provisions (*49 Cal. 3d 699, 707-708)* . The Court concluded that a document constitutes a "claim as presented," triggering Gov. Code§§ 910.8 and 911, if it discloses the existence of a "claim" that, if not satisfactorily resolved, will result in a lawsuit against the entity. A public entity's receipt of written notice that a claim for monetary damages exists and that litigation may ensue places on the public entity the responsibility, and gives it the opportunity, to notify the potential plaintiff pursuant to *Gov. Code §§ 910.8* and *911* of the defects that render the document insufficient under *Gov. Code §§ 910* and *910.2* and thus might hamper investigation and possible settlement of the claim. Such a written notice claiming monetary damages thereby satisfies the purposes of the Tort Claims Act: to facilitate investigation of disputes and their settlement without trial if appropriate (*49 Cal. 3d 699, 709)* .

NOTE:

Phillips has been held to apply retroactively [*Watts v. Valley Med. Ctr. (1992) 8 Cal. App. 4th 1050, 1057, 10 Cal. Rptr. 2d 794* ; *Wilson v. Tri-City Hosp. Dist. (1990) 221 Cal. App. 3d 441, 450, 270 Cal. Rptr. 436]* .

In ***Alliance Fin. v. City & County of San Francisco*** *(1998) 64 Cal. App. 4th 635, 75 Cal. Rptr. 2d 341* , plaintiff financing agency purchased a series of invoices from a maintenance company, with the right to payment on those invoices assigned to plaintiff. A number of the invoices were for janitorial services performed at Candlestick Park. Plaintiff forwarded copies of the invoices, with notice that it had been assigned the right to payment, to the department of recreation and parks. No payment was made on the invoices and a series of telephone calls and letters were exchanged. Eventually the matter was brought to the attention of the city attorney, who questioned the validity of the invoices and the plaintiff's right to payment. Over an eight month period, plaintiff's attorney sent a pair of letters to the city attorney seeking payment on the invoices. In the first letter, plaintiff's attorney explained the right to payment and requested that the city attorney provide further information "as promptly as possible so we can avoid the necessity of litigation in this matter." In the second letter, plaintiff's attorney again explained the right to payment and closed by volunteering to "meet with the City's representatives prior to filing an action for recovery of those sums." Several months later, plaintiff filed an action against the City and County of San Francisco seeking payment of the money allegedly owed. Defendant moved for summary judgment on the grounds that plaintiff had not filed a claim as required by the Tort Claims Act. The trial court agreed and granted defendant's motion. Plaintiff appealed.

The court of appeal reversed the grant of summary judgment. The court first held that, despite some case authority to the contrary, they agreed with existing court opinions that the claims requirements of the Tort Claims Act applied to actions seeking money owed on a contract (*64 Cal. App. 4th 635, 641)* . The court next reviewed the statutory claims presentation requirements, noting that a "claim as presented" is a claim that fails to comply substantially with the requirements of *Gov. Code §§ 910* and *910.2*, but nonetheless puts the public entity on notice that the claimant is attempting to file a valid claim and that litigation will result if it is not paid or the matter otherwise resolved. A "claim as presented" triggers a duty on the part of the public entity to notify the claimant of the defects or omissions in the claim, and a failure to so notify the claimant waives any defense as to the sufficiency of the claim notice (*64 Cal. App. 4th 635, 643)* . Turning to the communications sent by plaintiff to defendant, the court concluded that the invoices and notices sent to the department of recreation and parks could not be considered a claim or a "claim as presented," in part for failing to communicate that a cause of action for failure to pay the bills had accrued and that litigation might result if the bills were not paid (*64 Cal. App. 4th 635, 646)* . However, the court considered the two letters sent by plaintiff's

attorney to the city attorney and concluded that the requirements for a "claim as presented" had been met. The court noted that the first letter stated the existence of a debt, asserted the right to payment, spoke of avoiding litigation, pointed out that the failure to pay would result in interest and possible future court costs, and asked for more information in order to avoid litigation. Additionally, the second letter confirmed to the city that the claim was ripe and that litigation could be expected if the matter was not resolved. These were held to be sufficient notice of the claim, even though the intent to sue could have been communicated in stronger language and may have been somewhat equivocal (*64 Cal. App. 4th 635, 646-647)* .

In ***Foster v. McFadden*** *(1973), 30 Cal. App. 3d 943, 106 Cal. Rptr. 685* , plaintiff was injured in an accident with a public employee. Plaintiff's attorney sent the employee a letter that was not in substantial compliance with the claims statutes (*Gov. Code §§ 910, 910.2*). The attorney's letter to the employee, with a copy to the employer, gave the client's name and the date and place of the accident, and requested that the employee forward the letter to his insurance carrier and have it contact the attorney immediately, or that the employee contact the attorney if he carried no insurance. The employer, rather than the employee, responded to the letter and informed the attorney of the name, address, and phone number of the employer's insurance carrier and suggested that any further correspondence in connection with the matter be directed to the carrier.

The court of appeal held that the attorney's letter, although not addressed to the employee's employer and not labeled a claim, or even using the word "claim," nevertheless performed the function of a claim (*30 Cal. App. 3d 943, 947)* . It told the employer of a recent accident at a specifiedtime and place involving a specified employee of the employer and requested that the employer forward the letter to its insurance carrier. By its reply, the employer identified the letter for what it was, an unlabeled and deficient claim by plaintiff against the employer for unstated damages for undescribed injuries he allegedly suffered in an identified but undescribed recent accident involving a specified employee of the employer (*30 Cal. App. 3d 943, 947)* . The court said, however, that the letter accomplished the two principal purposes of a sufficient claim: (1) it afforded the district the opportunity to make a prompt investigation of the accident and (2) it gave the employer the opportunity to settle without suit if it so desired (*30 Cal. App. 3d 943, 949)* .

[b] Waiver by Failure to Give Notice of Insufficiency

The facts and procedural background of ***Phillips v. Desert Hosp. Dist.*** *(1989) 49 Cal. 3d 699, 263 Cal. Rptr. 119, 780 P.2d 349* , are discussed in *§ 196.100[3][a]*. The court found that inasmuch as the hospital failed to notify plaintiffs of the insufficiencies in their *Code Civ. Proc. § 364* notice that rendered it defective to comply substantially with *Gov. Code §§ 910, 910.2*, the hospital waived any defenses it may have otherwise asserted on the basis of such insufficiencies (*49 Cal. 3d 699, 711)* .

The facts and procedural background of ***Foster v. McFadden*** *(1973) 30 Cal. App. 3d 943, 106 Cal. Rptr. 685* , are discussed in *§ 196.100[3][a]*. The court of appeal treated the letter to the employee as an insufficient claim and held that under *Gov. Code §§ 910.8* and *911*, the public entity waived a defense based on the defects in the claim by not giving the statutorily required notice of insufficiency (*30 Cal. App. 3d 943, 949)* .

[4] Additional Authorities

[a] Waiver by Failure to Give Notice of Insufficiency

The facts and procedural background of *Wilson v. Tri-City Hosp. Dist. (1990) 221 Cal. App. 3d 441, 270 Cal. Rptr. 436* , is discussed in *§ 196.101[3][a]*. The court of appeal concluded that plaintiff's correspondence met the requirement of *Phillips v. Desert Hospital District* and *Foster v. McFadden* [*Phillips v. Desert Hosp. Dist. (1989) 49 Cal. 3d 699, 263 Cal. Rptr. 119, 780 P.2d 349* ; *Foster v. McFadden (1973) 30 Cal. App. 3d. 943, 106 Cal. Rptr. 685* ; *see § 196.100[3][a]*] and thus triggered the notice and defense-waiver provisions of *Gov. Code §§ 910.8, 911*, and *911.3* (*221 Cal. App. 3d 441, 449)* . The court explained that under *Gov. Code § 910.8* defendant had only 20 days from the

date plaintiff's claim was presented in which to give him notice of defects in the form or substance of his claim. The court said that because that deadline had begun running with the date of the last letter from plaintiff's counsel, the affirmative defense raised in the answer was already waived by the defendant's inaction. Thus, by the time the answer was served, actual notice of any defects was irrelevant: defendant no longer had any right to assert the defects as a defense (*221 Cal. App. 3d 441, 449-450)* .

[5] Opposing Authorities

[a] When Document Constitutes Claim for Purpose of Invoking Waiver

In *Green v. State Ctr. Cmty. Coll. Dist. (1995) 34 Cal. App. 4th 1348, 41 Cal. Rptr. 2d 140* , the trial court sustained a demurrer to plaintiff's complaint for personal injuries on the basis that the complaint showed on its face noncompliance with the California Tort Claims Act. Plaintiff contended that a letter by plaintiff's attorney to the governmental entity constituted notice of the claim, and even though the letter did not meet the requirements of the Act it triggered the waiver provisions because the governmental entity did not notify plaintiff of the deficiencies of the claim. The court of appeal disagreed, stating that other than the ambiguous fact that the letter was from an attorney, it found nothing in the letter from which it could infer that a claim was being made or that litigation would follow if the matter was not resolved. According to the court, the letter warned the defendant to contact its insurance carrier and "advise what disposition you wish to make of this matter." The court held that to be sufficient to constitute a trigger claim, the content of the correspondence to the recipient entity must at least be of such nature as to make it readily discernible by the entity that the purpose is to convey the assertion of a compensable claim, which if not otherwise satisfied, will result in litigation. The court then concluded that the letter from plaintiff's attorney did not satisfy this test (*34 Cal. App. 4th 1348, 1358)* .

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Volume 19A Chapters 196-199 PUBLIC ENTITIES---to---QUO WARRANTO
CHAPTER 196 PUBLIC ENTITIES
PART II. FORMS
A. Claims Against Public Entities
4. Waiver And Estoppel of Claim Presentation Defenses

19A-196 California Points & Authorities § 196.101

§ 196.101 Supporting Contention That Public Entity Waived Defense--Failure to Give Timely Notice That Claim Was Late [Gov. Code § 911.3(a)] Constitutes Waiver of Defense That Claim Is Not Timely [Gov. Code § 911.3(b)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE OBJECTION THAT THE CLAIM PRESENTED BY THE PLAINTIFF WAS NOT TIMELY PRESENTED _____ [SHOULD BE *or* SHOULD HAVE BEEN *or* WAS PROPERLY] OVERRULED BECAUSE THE DEFENDANT WAIVED THAT OBJECTION BYFAILING TO NOTIFY THE PLAINTIFF THAT THE CLAIM WAS LATE.

A. Notice That Claim Was Late. When a claim is required by *Section 911.2 of the Government Code* to be presented not later than six months after accrual of the cause of action, but is presented after that time without the application provided in *Section 911.4 of the Government Code*, the _____ [*either, if action is against state or state agency,* Victim Compensation and Government Claims Board *or, if action is against local public entity, name of defendant's governing body*] or other person designated by it may, at any time within 45 days after the claim is presented, give written notice, substantially in the form prescribed by *Section 911.3(a) of the Government Code*, to the person presenting the claim that the claim was not timely filed and that it is being returned without further action (*Gov. Code § 911.3(a)*).

B. Definition of Claim. A document presented to a public entity constitutes a "claim as presented," triggering the notice and waiver provisions of *Section 911.3 of the Government Code*, if it discloses the existence of a claim that, if not satisfactorily resolved, will result in a lawsuit against the entity (*Phillips v. Desert Hosp. Dist. (1989) 49 Cal. 3d 699, 709, 263 Cal. Rptr. 119, 780 P.2d 349* ; *Wilson v. Tri-City Hosp. Dist. (1990) 221 Cal. App. 3d 441, 449, 270 Cal. Rptr. 436*).

C. When Failure to Give Notice Waives Defense That Claim Was Not Timely. Provided the claim as presented

states either an address to which the person presenting it desires notices to be sent or an address of the claimant, any defense as to the time limit for presenting a claim described in *Section 911.3(a) of the Government Code* is waived by failure to give the notice set forth in that statute within 45 days after the claim is presented (*Gov. Code § 911.3(b)*; *Phillips v. Desert Hosp. Dist. (1989) 49 Cal. 3d 699, 711, 263 Cal. Rptr. 119, 780 P.2d 349* ; *Wilson v. Tri-City Hosp. Dist. (1990) 221 Cal. App. 3d 441, 449-450, 270 Cal. Rptr. 436*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the public entity waived any defense based on the claimant's failure to present a timely claim subject to the six-month period under *Gov. Code § 911.2* by failing to give the claimant timely notice of the late filing [*Gov. Code § 911.3*]. *Gov. Code § 911.3(a)* uses the term "board," which is defined in *Gov. Code § 900.2* as meaning, in the case of a local public entity, the entity's governing body and, in the case of the state, the Victim Compensation and Government Claims Board [*see also § 196.13[2]*].

However, although the failure to give notice constitutes a waiver of any defense that the claim was untimely, it does not constitute a waiver of the defense that the action is barred by the statute of limitations set forth in *Gov. Code § 945.6* [*County of Alameda v. Superior Court (1987) 195 Cal. App. 3d 1283, 1287, 241 Cal. Rptr. 312]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be used in a memorandum of points and authorities in opposition to the public entity's demurrer to the complaint, or motion for judgment on the pleadings, if the complaint on its face, or from judicially noticed matter, shows that the claim presented was late, or in opposition to the public entity's motion for summary judgment on the ground that the claim presented was not timely presented. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Definition of Claim

The facts and procedural background of ***Phillips v. Desert Hosp. Dist.*** *(1988) 49 Cal. 3d 699, 263 Cal. Rptr. 119, 780 P.2d 349* , are *set forth in § 196.100[3][a]*. The Supreme Court held that a document constitutes a "claim as presented" triggering the notice and waiver provisions of *Gov. Code § 911.3* if it discloses the existence of a claim that, if not satisfactorily resolved, will result in a lawsuit against the public entity (*49 Cal. 3d 699, 709)* .

In ***Wilson v. Tri-City Hosp. Dist.*** *(1990) 221 Cal. App. 3d 441, 270 Cal. Rptr. 436* , after plaintiff had been terminated from his employment with defendant hospital district, his attorney wrote to the hospital board of directors claiming the termination was wrongful and a breach of contract. In response, defendant retained counsel who wrote back that defendant had not violated any contract provisions and that plaintiff had received all he was entitled to. Plaintiff's counsel engaged in series of letters with defendant's attorney, culminating in a letter dated August 7 explaining that plaintiff would be asking for substantial money as a reasonable settlement, asking if defendant would waive any further discussions and administrative actions so that he could file a lawsuit and if counsel would accept service on behalf of his client. Plaintiff then filed a wrongful-terminationand breach-of-covenant complaint. Defendant's answer to the complaint raised *Gov. Code §§ 900.4, 905,* and *911.2* as an affirmative defense. In response, plaintiff filed an amended complaint alleging that counsel's correspondence with the hospital board and counsel constituted substantial compliance with the provisions of the claims statute or in the alternative that defendant waived or was estopped to assert the statute. Defendant's demurrer was sustained without leave to amend and the trial court entered a dismissal. Plaintiff appealed.

The court of appeal reversed. In response to defendant's contention that the first letter on behalf of plaintiff was not an unequivocal demand for payment of money damages that gave defendant notice that a suit would result if the matter was not resolved, the court expressed its doubt about defendant's reaction to the letter, observing that in response to that letter, defendant felt obliged to retain outside counsel. Aside from that letter, the court was persuaded by the language of the August 7 letter in which plaintiff's counsel informed defendant that plaintiff would indeed be asking for "substantial money" and inquired whether or not opposing counsel would accept service on behalf of his client. The court said that plainly the letter met the requirement of *Phillips* and *McFadden* [*Phillips v. Desert Hosp. Dist. (1989) 49 Cal. 3d 699, 263 Cal. Rptr. 119, 780 P.2d 349* ; *Foster v. McFadden (1973) 30 Cal. App. 3d 943, 106 Cal. Rptr. 685* ; *see § 196.100[3][a]*]: in the most unequivocal terms it had advised defendant both that plaintiff had a claim for money damages and that a lawsuit would result if he was not paid. The court concluded that under *Phillips* and *McFadden* that letter triggered the notice and defense-waiver provisions of *Gov. Code §§ 910.8, 911,* and *911.3* (*221 Cal. App. 3d 441, 449)* .

[b] When Failure to Give Notice Waives Defense That Claim Was Not Timely

The facts and procedural background of ***Phillips v. Desert Hosp. Dist.*** *(1988) 49 Cal. 3d 699, 263 Cal. Rptr. 119, 780 P.2d 349* , are *set forth in § 196.100[3][a]*. The Supreme Court held that inasmuch as the defendant hospital failed to notify plaintiff of any timeliness defects pursuant to *Gov. Code § 911.3,* the hospital waived any defenses it might have raised on the ground of plaintiffs' asserted failure to present a timely claim (*49 Cal. 3d 699, 711)* .

The facts and procedural background of ***Wilson v. Tri-City Hosp. Dist.*** *(1990) 221 Cal. App. 3d 441, 270 Cal. Rptr. 436* , are discussed in *§ 196.101[3][a]*. The court of appeal held that since plaintiff's August 7 letter was sufficient to present a claim and thereby prompt notice, defendant's failure to provide that notice waived its right to any defense based on any defect or tardiness in the claim as presented (*221 Cal. App. 3d 441, 450)* . Although the fact that defendant wrote back to plaintiff indicated it was aware of a proper address, the court observed that the stationery of both of plaintiff's counsel included an address (*221 Cal. App. 3d 441, 444* , nn.2, 3). It rejected defendant's contention that its answer to the complaint, raising the claims statute as an affirmative defense, provided plaintiff with "actual notice" that his claim was defective. The court explained that consistent with the goal of encouraging prompt attention to claims, governmental agencies do not have an unlimited period of time in which to give claimants notice of defects. Under *Gov. Code § 911.3* defendant had only 45 days in which to give plaintiff notice his claim was not timely filed. The court said that because the August 7 letter was the last and most unequivocal correspondence from plaintiff, the affirmative defense raised in the answer was already waived by the defendant's inaction. Thus, by the time the answer had been served, actual notice of any defects was irrelevant: defendant no longer had any right to assert the defects as a defense (*221 Cal. App. 3d 441, 449-450)* .

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CHAPTER 196 PUBLIC ENTITIES
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19A-196 California Points & Authorities § 196.102

§ 196.102 Supporting Contention That Failure to Present Claim Is No Defense When Public Agency Failed to Have Required Statement on File in Roster of Public Agencies [Gov. Code § 946.4]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE OBJECTION THAT _____ [NO *or* A LATE *or* AN INADEQUATE] CLAIM WAS PRESENTED BY PLAINTIFF TO _____ [*name of public agency*] _____ [SHOULD BE *or* SHOULD HAVE BEEN *or* WAS PROPERLY] OVERRULED BECAUSE DEFENDANT IS A PUBLIC AGENCY AS DEFINED IN SECTION 53050 OF THE GOVERNMENT CODE AND IT FAILED DURING THE REQUIRED PERIOD TO HAVE A [SUBSTANTIALLY _____ (CORRECT *and/or* COMPLETE)] STATEMENT ON FILE IN THE ROSTER OF PUBLIC AGENCIES.

A. Roster of Public Agencies. The California Secretary of State and each county clerk have the duty to establish and maintain an indexed "Roster of Public Agencies," to be so designated, which shall contain the information set forth in Section 53051(a), (b) of the Government Code, and is a public record (*Gov. Code § 53051(c)*).

B. Statements to Be Filed in Roster. Within 70 days after the date it commences its legal existence, the governing body of each public agency, as hereinafter defined, must file with the Secretary of State on a form prescribed by the Secretary of State and also withthe county clerk of each county in which it maintains an office, a statement setting forth (1) the full, legal name of the public agency; (2) the official mailing address of the public agency's governing body; (3) the name and residence or business address of each member of the public agency's governing body; and (4) the name, title, and residence or business address of the chairman, president, or other presiding officer, and the clerk or secretary of the public agency's governing body (*Gov. Code § 53051(a)*).

[*Optional*] **C. Change of Facts.** Within 10 days after any change in the facts required to be stated pursuant to *Section 53051(a) of the Government Code*, an amended statement containing the information required by that section must be

filed on a form prescribed by the Secretary of State (*Gov. Code § 53051(b)*).

D. Public Agency Defined. As used in *Section 53051 of the Government Code*, "public agency" means a district, public authority, public agency, and any other political subdivision or public corporation in California, but does not include the state of California or a county, city and county, or city (*Gov. Code § 53050*).

[*EITHER, if no statement was on file*]

E. Effect on Claims Requirement of Public Agency's Failure to File Statement. When presentation of a claim is a condition precedent to filing suit against a public agency as defined in *Section 53050 of the Government Code*, the failure to present a claim does not constitute a bar or defense to the maintenance of the suit against the agency if, during the 70 days immediately following the accrual of the cause of action, no statement pertaining to the public agency is on file, or is placed on file, in the Roster of Public Agencies in the office of the California Secretary of State and of the county clerk of each county in which the public agency then maintains an office, as required by *Section 53051 of the Government Code* (*Gov. Code § 946.4(a)(1)*; *see Wilson v. San Francisco Redevelopment Agency (1977) 19 Cal. 3d 555, 560, 138 Cal. Rptr. 720, 564 P.2d 872*).

[*OR, if statement on file was substantially incorrect or incomplete*]

E. Effect on Claims Requirement of Public Agency's Filing Substantially Noncomplete Statement. When presentation of a claim is a condition precedent to filing suit against a public agency as defined in *Section 53050 of the Government Code*, the failure to present a claim does not constitute a bar or defense to the maintenance of the suit against the agency if, during the 70 days immediately following the accrual of the cause of action, the information contained in the public agency's statement in the Roster of Public Agencies in the office of the Secretary of State and of the county clerk of each county in which the public agency then maintains an office, is so inaccurate or incomplete that it does not substantially conform to the requirements of *Section 53051 of the Government Code* (*Gov. Code § 946.4(a)(2)*; *see Wilson v. San Francisco Redevelopment Agency (1977) 19 Cal. 3d 555, 560, 138 Cal. Rptr. 720, 564 P.2d 872*).

[*Optional*] **F. Plaintiff Not Misled by Erroneous Statement.** *Section 946.4 of the Government Code*, contains no requirement of a showing of actual deception or confusion on the part of the plaintiff and no such requirement exists. These rules apply whether or not the plaintiff was misled by the erroneous statement (*Wilson v. San Francisco Redevelopment Agency (1977) 19 Cal. 3d 555, 562, 138 Cal. Rptr. 720, 564 P.2d 872*).

[*Optional*] **G. Effect on Late or Inadequate Claim.** These rules apply both to persons who filed no claim at all and to those who filed a late or inadequate claim (*see Wilson v. San Francisco Redevelopment Agency (1977) 19 Cal. 3d 555, 561, 138 Cal. Rptr. 720, 564 P.2d 872* ; *Cavalier Acres, Inc. v. San Simeon Acres Cmty. Servs. Dist. (1984) 151 Cal. App. 3d 798, 800-801, 199 Cal. Rptr. 4*).

[*Optional*] **H. Effect on Statute of Limitations.** The public agency's failure to comply with the provisions of *Section 53051 of the Government Code* not only entitles the claimant to ignore the claim filing requirement entirely but relieves the claimant from compliance with the period specified in *Section 945.6 of the Government Code* for commencement of the action after notice of rejection of a claim that was nevertheless timely filed (*Helzer v. North San Diego County Transit Dev. Bd. (1980) 112 Cal. App. 3d 708, 710-711, 169 Cal. Rptr. 416*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the plaintiff's failure to have presented a claim, or the presentation of an inadequate or late claim, to a public agency is no bar or defense to the plaintiff's action against the public agency because the public agency failed to have any statement, or a sufficient statement, on file in the Roster of Public Agencies at any time during the 70-day period immediately following the accrual of plaintiff's cause of action [*see Gov. Code § 946.4*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be used in a memorandum of points and authorities in opposition to the public entity's demurrer to the complaint, or motion for judgment on the pleadings, if the complaint on its face, or from judicially noticed matter, shows that no claim was presented or that the claim presented was inadequate or late, or in opposition to the public entity's motion for summary judgment on the ground that no claim or an inadequate or late claim was presented. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Effect on Claims Requirement of Public Agency's Failure to File Statement

In ***Wilson v. San Francisco Redevelopment Agency*** *(1977) 19 Cal. 3d 555, 138 Cal. Rptr. 720, 564 P.2d 872* , plaintiff was injured as a result of the condition of a city street. He presented a timely claim to the city but was later informed that a public agency was responsible. Plaintiff then filed a claim with the agency after the then applicable 100-day (now six-month) period had expired. However, the agency's statement on file in the Roster of Public Agencies contained the wrong address and misstated the names of some of its directors and was, therefore, incorrect. The trial court sustained defendant's demurrer to the complaint without leave to amend for failure to present a timely claim and dismissed the action.

The Supreme Court reversed. The Court said the agency's failure to comply with *Gov. Code § 53051* entitles the claimant to ignore the claim-filing requirement entirely (*19 Cal. 3d 555, 560)* .

NOTE:

The court of appeal has held that the plaintiff's being excused from failure to timely file a claim due to the hospital's own failure to file an informational statement deprived plaintiff of an extension of the applicable statute of limitations period [*Code Civ. Proc. § 340.5*], which would otherwise have been tolled during the period in which plaintiff was seeking relief from the claim-filing requirement [*Banfield v. Sierra View Local Dist. Hosp. (1981) 124 Cal. App. 3d 444, 456-457, 177 Cal. Rptr. 290* , *disapproved on other grounds,* *Woods v. Young (1991) 53 Cal. 3d 315, 328 n.4, 279 Cal. Rptr. 613, 807 P.2d 455]* .

[b] Effect on Claims Requirement of Public Agency's Filing Substantially Noncomplete Statement

The facts and procedural background of ***Wilson v. San Francisco Redevelopment Agency*** *(1977) 19 Cal. 3d 555, 138 Cal. Rptr. 720, 564 P.2d 872* , are discussed in *§ 196.102[3][a]*. In reversing the judgment of dismissal, the Court said that under *Gov. Code § 946.4* substantial noncompliance with the requirements of *Gov. Code § 53051* unconditionally excuses the claimant from filing a claim and that a fair reading of the applicable statutes suggests that the agency's failure to comply with *Gov. Code § 53051* entitles the claimant to ignore the claim-filing requirement entirely (*19 Cal. 3d 555, 560)* .

[c] Plaintiff Not Misled by Erroneous Statement

The facts and procedural background of ***Wilson v. San Francisco Redevelopment Agency*** *(1977) 19 Cal. 3d 555, 138 Cal. Rptr. 720, 564 P.2d 872* , are discussed in *§ 196.102[3][a]*. In reversing the judgment of dismissal, the Supreme Court pointed out that *Gov. Code § 946.4* contains no requirement of a showing of actual deception or confusion and the Court would not read such requirement into the section (*19 Cal. 3d 555, 562)* .

[d] Effect on Late or Inadequate Claim

The facts and procedural background of ***Wilson v. San Francisco Redevelopment Agency*** *(1977) 19 Cal. 3d 555, 138 Cal. Rptr. 720, 564 P.2d 872* , are discussed in *§ 196.102[3][a]*. In reversing the judgment of dismissal, the Supreme Court held that *Gov. Code § 946.4* applies to persons who file a late claim as well as to those who file no claim at all. Otherwise, a belated attempt by a person to comply with the claim-filing requirement would place that person in a worse position than one who filed no claim at all (*19 Cal. 3d 555, 561)* .

Cavalier Acres, Inc. v. San Simeon Acres Cmty. Servs. Dist. *(1984) 151 Cal. App. 3d 798, 199 Cal. Rptr. 4* , was an action by a developer against a community services district to recover the amount of a sewer and water connection fee paid under protest. The developer filed a timely claim but it was inadequate to support some of the pertinent allegations in the complaint. The developer was granted a summary judgment and the district appealed, contending, among other things, that its affirmative defense of the failure of the developer to comply with the appropriate claims statute respecting the bringing of the lawsuit against a public entity was valid. The developer contended that the district's contention that its claim was inadequate was immaterial as it was exempt from filing a claim because the district admittedly had failed to comply with *Gov. Code § 53051* (*151 Cal. App. 3d 798, 800)* . The court of appeal rejected the district's contention and accepted that of the developer, and affirmed thejudgment. The court said that, under *Wilson* [*Wilson v. San Francisco Redevelopment Agency (1977) 19 Cal. 3d 555, 138 Cal. Rptr. 720, 564 P.2d 872]* , a public agency's failure to comply with *Gov. Code § 53051* entitles claimants to ignore the claim filing requirement altogether (*151 Cal. App. 3d 798, 800-801)* . The court also noted that an earlier court of appeal decision held that even if a timely "but inadequate" claim is filed, the public agency's failure to comply with the requirements of *Gov. Code § 53051* made the claim presentation procedures inapplicable and superfluous [*Helzer v. North San Diego County Transit Dev. Bd. (1980) 112 Cal. App. 3d 708, 711, 169 Cal. Rptr. 416* ; *see § 196.102[3][e]*] (*151 Cal. App. 3d 798, 801)* .

[e] Effect on Statute of Limitations

In ***Helzer v. North San Diego County Transit Dev. Bd.*** *(1980) 112 Cal. App. 3d 708, 169 Cal. Rptr. 416* , plaintiffs presented a timely claim against the public agency for wrongful death, but filed the complaint more than six months after the claim was denied. The agency demurred based on the six-month period of limitations for filing an action after denial of a claim set forth in *Gov. Code § 945.6(a)(1)*. The trial court dismissed the action after sustaining demurrers to the complaint. The court of appeal reversed, based on the fact that the agency concededly did not have a proper statement on file with the Register of Public Agencies as required by *Gov. Code § 53051*. The court pointed out that *Gov. Code § 945.6* is limited by its own terms by *Gov. Code § 946.4* and held that *Gov. Code § 946.4*, which excuses a plaintiff from the claim requirement if a proper statement is not on file, also applies to excuse the plaintiff from compliance with the six-month statute of limitation after denial even if the claim requirement was met. Since compliance with the claim requirement was excused, the six-month limit of *Gov. Code § 945.6(a)(1)* does not apply. The court pointed out that to apply the six-month limit to plaintiffs would place them in a worse position than if they had not filed a claim at all and that they should not be penalized for filing the unnecessary claim that was at most superfluous (*112 Cal. App. 3d 708, 710-711)* .

[4] Opposing Authorities

[a] Public Agency Defined

In *Lundeen Coatings Corp. v. Department of Water & Power (1991) 232 Cal. App. 3d 816, 283 Cal. Rptr. 551* ,

plaintiff subcontractor brought an action against several parties involved in the contract, including defendant city department, alleging a variety of causes of action, and claiming it was owed more money for services it had rendered. The court of appeal affirmed the trial court's dismissal of defendant city department. After losing its argument that its action was not timely filed in accordance with *Gov. Code § 945.6*, plaintiff argued that it did not need to comply with the provisions of the Tort Claims Act because defendant city department failed to file the statement required by *Gov. Code § 53051 et seq.* However, the court cited *Gov. Code § 53050*, which exempts cities, and held that defendant, as a department of the city, is exempt (*232 Cal. App. 3d 816, 830 n.8*).

[b] Effect on Statute of Limitations

In *Tubbs v. Southern Cal. Rapid Transit Dist. (1967) 67 Cal. 2d 671, 63 Cal. Rptr. 377, 433 P.2d 169* , the plaintiff filed a timely claim with the proper public agency but failed to commence her suit to enforce her claim within six months after the claim was deemed rejected, as required by *Gov. Code § 945.6*. She argued that since defendant agency had not complied with *Gov. Code § 53051*, she was excused from filing a claim and, a fortiori, from observing the six-month statute of limitations. The Supreme Court rejected the argument, noting that a claimant who has actually presented a timely claim with the proper public entity may not invoke former Gov. Code § 945.5 (now *Gov. Code § 946.4*) and *Gov. Code § 53051* to excuse noncompliance with the claims statutes and circumvent the special six-month statute of limitations (*67 Cal. 2d 671, 676)* . In that case, plaintiff's claim arose on May 27, 1963, and a claim was timely presented to the public entity. Thereafter, on September 20, 1963, the California Tort Claims Act became effective and by its own terms was made retroactive; hence it applied to plaintiff's claim. Under that act, plaintiff should have filed her complaint by May 4, 1964; it was filed May 25, 1964. The Court explained that *Gov. Code § 53051* was enacted to provide a means for identifying public agencies and the names and addresses of designated officers needed to enable or assist a person to comply with the applicable claims procedure and that that statute and former Gov. Code § 945.5 (now *Gov. Code § 946.4*) were manifestly designed to assist persons who had not filed claims (*67 Cal. 2d 671, 676-677)* . Notwithstanding this statement, it should be noted that the Court rested its decision in part at least (1) on the fact that *Gov. Code § 945.5* (now *Gov. Code § 946.4*) and *Gov. Code § 53051* were enacted together in 1963 in a chapter different from the California Tort Claims Act and that, unlike the latter act, the former two statutes were not made retroactive; and (2) on the fact that plaintiff had presented a timely claim before they were enacted (*67 Cal. 2d 671, 675-676)* .

NOTE:

The court of appeal followed *Tubbs* in a case in which it held that when a claim has in fact been timely presented to the public entity, the claimant is not in a position to question whether the public entity complied with *Gov. Code § 946.4* and thus circumvent the special six-month statute of limitations. No question of retroactivitywas involved in that case [*Rogers v. Board of Educ. (1968) 261 Cal. App. 2d 355, 359, 67 Cal. Rptr. 905]* . The California Supreme Court cited both *Tubbs* and *Rogers* in a decision in which the Court pointed out that *Tubbs* had been criticized by a commentator, but instead of ruling on the continued viability of *Tubbs*, the Court found *Tubbs* distinguishable from the case before it [*Wilson v. San Francisco Redevelopment Agency (1977) 19 Cal. 3d 555, 561-562, 138 Cal. Rptr. 720, 564 P.2d 872* ; *see § 196.102* [3][a]]. Although the court of appeal relied exclusively on the statutes and on statements made in *Wilson* in reaching its decision in *Helzer v. North San Diego County Transit Development Board*, it did not mention *Tubbs* or *Rogers* [*Helzer v. North San Diego County Transit Dev. Bd. (1980) 112 Cal. App. 3d 708, 169 Cal. Rptr. 416* ; *see § 196.102* [3][e]].

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Volume 19A Chapters 196-199 PUBLIC ENTITIES---to---QUO WARRANTO
CHAPTER 196 PUBLIC ENTITIES
PART II. FORMS
A. Claims Against Public Entities
4. Waiver And Estoppel of Claim Presentation Defenses

19A-196 California Points & Authorities § 196.103

§ 196.103 Supporting Contention That Public Entity Is Estopped From Relying on Claimant's Failure to File Claim as Defense to Claimant's Action

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE OBJECTION THAT PLAINTIFF FAILED TO PRESENT A TIMELY CLAIM TO _____ [*name of public agency*] _____ [SHOULD BE *or* SHOULD HAVE BEEN *or* WAS PROPERLY] OVERRULED BECAUSE DEFENDANT IS ESTOPPED FROM RELYING ON THAT DEFENSE.

A. Estoppel as Applicable to Public Entities. In an appropriate case, the claimant's failure to file a timely claim may be excused and the public entity estopped from urging the failure as a defense (*Fredrichsen v. Lakewood (1971) 6 Cal. 3d 353, 357, 99 Cal. Rptr. 13, 491 P.2d 805* ; *Farrell v. County of Placer (1944) 23 Cal. 2d 624, 630-631, 145 P.2d 570*).

B. Elements of Estoppel. The essential elements of estoppel are false statements or concealments, or conduct amounting thereto, with reference to the transaction made by one who has actual or virtual knowledge of the facts to another who is ignorant of the truth, with the intention, resulting in consummation, that the other should act on such false statements or concealments, or equivalent conduct (*Bruce v. Jefferson Union High Sch. Dist. (1962) 210 Cal. App. 2d 632, 634, 26 Cal. Rptr. 762*).

C. Factors to Be Considered. Among the factors to be considered in determining whether the government's action was sufficiently culpable to warrant estoppel are whether the inaccurate advice or information is negligently ascertained, whether or to what extent the agency is certain of the information it dispenses, whether the agency purports to advise and direct or merely to inform and respond to inquiries, whether the agency acts in bad faith, whether the claimant is one who purports to have no knowledge or training that would aid him or her in determining his or her rights and the public agency purports to be informed and knowledgeable, whether the right of which claimant is being deprived is

significant, and whether a confidential relationship exists between the claimant and the public entity (*Fredrichsen v. Lakewood (1971) 6 Cal. 3d 353, 358, 99 Cal. Rptr. 13, 491 P.2d 805*).

[*EITHER*]

D. Misrepresentation of Need to File Claim. A public entity is estopped from relying on plaintiff's failure to file a timely claim when the failure was caused by the misrepresentations of the public entity's employee as to the necessity of filing a claim (*Fredrichsen v. Lakewood (1971) 6 Cal. 3d 353, 357-360, 99 Cal. Rptr. 13, 491 P.2d 805*).

[*OR*]

D. Misleading Advice. A public entity is estopped from relying on plaintiff's failure to file a timely claim when the public entity's agent advised plaintiff not to employ counsel, and to wait until he or she ascertained all of his or her damages and failed to advise plaintiff of the claim requirement (*Farrell v. Placer County (1944) 23 Cal. 2d 624, 628-631, 145 P.2d 570*).

[*OR*]

D. Failure to Speak When Under Duty to Speak. A public entity is estopped from relying on plaintiff's failure to file a timely claim when employees of the entity informed plaintiff that they would tell plaintiff what he or she should do after an accident and thereafter failed to inform plaintiff of the need to file a timely claim (*Bruce v. Jefferson Union High Sch. Dist. (1962) 210 Cal. App. 2d 632, 633-635, 26 Cal. Rptr. 762*).

[*OR*]

D. Misleading Name. A defendant public entity is estopped from complaining that plaintiff failed to file a timely claim, when

defendant does business under a name different from that filed with the Secretary of State under *Section 53051 of the Government Code*, and plaintiff, relying on information from the Secretary of State that defendant is not listed on the roster of public agencies, fails to present a timely claim (*Elmore v. Oak Valley Hosp. Dist. (1988) 204 Cal. App. 3d 716, 723-724, 251 Cal. Rptr. 405*).

[*Optional*] **E. Estoppel Appropriate if Employee of Public Entity Threatens Plaintiff to Gain Silence.** A public entity may be estopped from asserting the limitations of the claims presentation statute if the entity's agent or employee has prevented or deterred the filing of a timely claim by some affirmative act or threat designed to gain the plaintiff's silence (*Doe v. Bakersfield City Sch. Dist. (2006) 136 Cal. App. 4th 556, 568-573, 39 Cal. Rptr. 3d 79*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a public entity is estopped from relying on the defense that plaintiff failed to file a timely claim when the failure was the result of misrepresentations made by its employees.

These points and authorities may be combined, in an appropriate case, with the points and authorities *set out in § 196.162*, which support the contention that a public entity is estopped from relying on the statute of limitations. They may also be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be used in a memorandum of points and authorities in opposition to the public entity's demurrer to the complaint, or motion for judgment on the pleadings, if the complaint on its face, or from judicially noticed matter, shows that no timely claim was presented, or in opposition to the public entity's motion for summary judgment on the ground that no timely claim was presented. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Estoppel as Applicable to Public Entities

In ***Fredrichsen v. Lakewood*** *(1971) 6 Cal. 3d 353, 99 Cal. Rptr. 13, 491 P.2d 805* , the plaintiff was injured by a fall on a public sidewalk in defendant city. When the plaintiff requested a claim form from the city, the city replied with a letter erroneously stating that the responsibility for sidewalk maintenance rested with a private corporation. Relying on this representation, plaintiff did not pursue her claim against the city but commenced negotiations with the private corporation, which she later sued. Subsequently, plaintiff's attorney discovered that the sidewalk was maintained by the city and immediately thereafter amended the complaint to include the city as a defendant. The trial court sustained the city's demurrer to the complaint without leave to amend because of plaintiff's failure to have presented a claim.

The Supreme Court reversed. The Court said that it is settled that the failure to file the required claim, in the proper circumstances, may be excused and the governmental agency estopped from urging strict compliance with the statutory provisions and that the rule has been applied to allow estoppel in factual situations where claimants have been misled by governmental agents with respect to the procedural and time requirements of the claim statute (*6 Cal. 3d 353, 357)* .

In ***Farrell v. Placer County*** *(1944) 23 Cal. 2d 624, 145 P.2d 570* , plaintiff was injured in an accident allegedly caused by the defective condition of a bridge maintained by Placer and Sutter Counties. Thirteen days after the accident, an agent of the counties visited plaintiff in the hospital, took a complete statement from her, advised her not to hire an attorney and to personally negotiate a settlement, and told her that she could wait until she knew all her damages before making any claim. Based on this advice, she failed to file a timely claim. The trial court sustained the defendants' demurrer to the complaint and dismissed the action.

The Supreme Court reversed. The Court pointed out that although it has been said generally that a governmental agency may not be estopped by the conduct of its officers and employees, there are many instances in which an equitable estoppel in fact will run against the government when justice and right so require (*23 Cal. 2d 624, 627-628)* . The Court said that the filing of a timely claim, while mandatory on the claimant and a condition precedent to his or her cause of action, is nothing more than a procedural requirement as to the public agency, which, as to the claimant, may be excused by estoppel (*23 Cal. 2d 624, 630-631)* .

[b] Elements of Estoppel

In ***Bruce v. Jefferson Union High Sch. Dist.*** *(1962) 210 Cal. App. 2d 632, 26 Cal. Rptr. 762* , plaintiff was a student. Prior to being injured, he had been told that if an injury occurred, a student should report to the school nurse, who would tell him what to do, and that failure to report would preclude compensation. On being injured, plaintiff reported to the nurse, who treated him. After his return to school, he asked the nurse and his teacher what to do about the accident but they refused to talk about it. He failed to file a timely claim. The trial court sustained a general demurrer to the minor's complaint and dismissed the action. Plaintiff appealed. In reversing the judgment, the court of appeal stated

that the essential elements of estoppel are false statements or concealments, or conduct amounting thereto, with reference to the transaction made by one who has actual or virtual knowledge ofthe facts, to another who is ignorant of the truth, with the intention, resulting in consummation, that the other should act on such false statements or concealments, or equivalent conduct (*210 Cal. App. 2d 632, 634)* .

[c] Factors to Be Considered

The facts and procedural background of ***Fredrichsen v. Lakewood*** *(1971) 6 Cal. 3d 353, 99 Cal. Rptr. 13, 491 P.2d 805* , are discussed in *§ 196.103[3][a]*. In reversing the judgment, the Supreme Court stated that among the factors to be considered in determining whether the government's action was sufficiently culpable to warrant estoppel are whether the inaccurate advice or information is negligently ascertained, whether or to what extent the agency is certain of the information it dispenses, whether the agency purports to advise and direct or merely to inform and respond to inquiries, whether the agency acts in bad faith, whether the claimant is one who purports to have no knowledge or training which would aid him or her in determining his or her rights and the public agency purports to be informed and knowledgeable, whether the right of which claimant is being deprived is significant, and whether a confidential relationship exists between the claimant and the public entity (*6 Cal. 3d 353, 358)* . The Court added that the applicability of the estoppel doctrine is not limited to situations where all the enumerated factors are present. Rather, estoppel is available in all circumstances where the complaint alleges facts which, if true, would establish that the government had acted in an unconscionable manner (*6 Cal. 3d 353, 359)* .

[d] Misrepresentation of Need to File Claim

The facts and procedural background of ***Fredrichsen v. Lakewood*** *(1971) 6 Cal. 3d 353, 99 Cal. Rptr. 13, 491 P.2d 805* , are discussed in *§ 196.103[3][a]*. In reversing the judgment, the Supreme Court held that a public entity could be estopped from relying on the claim statute when a claimant has been misled about filing requirements and that this rule applied because the city misrepresented its responsibility for the sidewalk and effectively precluded plaintiff from filing a timely claim (*6 Cal. 3d 353, 359)* . The Court pointed out that the plaintiff had made prompt inquiry of the city and was precluded from filing a timely claim by the city's misrepresentation. It held that the city could not frustrate the plaintiff's attempt to comply with the claims statute, which was enacted for its benefit, and then assert noncompliance as a defense (*6 Cal. 3d 353, 360)* .

[e] Misleading Advice

The facts and procedural background of ***Farrell v. Placer County*** *(1944) 23 Cal. 2d 624, 145 P.2d 570* , are discussed in *§ 196.103[3][a]*. In reversing the judgment of dismissal, the Supreme Court held that a public entity could be estopped by the actions of its agent from relying on plaintiff's failure to file a timely claim and that the agent's actions were sufficient for estoppel since they had lulled plaintiff into not actively pursuing her rights or consulting an attorney (*23 Cal. 2d 624, 628)* .

[f] Failure to Speak When Under Duty to Speak

The facts and procedural background of ***Bruce v. Jefferson Union High Sch. Dist.*** *(1962) 210 Cal. App. 2d 632, 26 Cal. Rptr. 762* , are discussed in *§ 196.103[3][b]*. In reversing the judgment of dismissal, the court of appeal held that the school had put itself in the position of having a duty to advise plaintiff as to how to be compensated for the accident, and, because of its silence in the face of that duty, it was estopped from relying on the claims statute (*210 Cal. App. 2d 632, 634)* .

In ***Elmore v. Oak Valley Hosp. Dist.*** *(1988) 204 Cal. App. 3d 716, 251 Cal. Rptr. 405* , plaintiffs filed a malpractice action, naming defendant as "Oak Valley Hospital" in the complaint. Defendant did business either under the name "Oak Valley Hospital" or "Oak Valley District Hospital." When plaintiffs' attorney attempted to ascertain whether "District Hospital" was listed in the roster of public agencies, he was advised by the Secretary of State there was no

such listing. Defendant demurred on the grounds that it was a public agency and that plaintiffs had failed to plead compliance with the government claims statute. Defendant had filed its statement with the Secretary of State pursuant to *Gov. Code § 53051* under the name "Oak Valley Hospital District." The trial court sustained the demurrer with leave to amend and plaintiffs amended the complaint to allege that noncompliance with the claims statute was excused because (1) defendant failed to comply substantially with *Gov. Code § 53051*, or *(2)* defendant was estopped to assert plaintiffs' noncompliance because of the misleading information it provided in the statement filed with the Secretary of State. Defendant demurred again, contending that it had substantially complied with *Gov. Code § 53051*, and the trial court sustained the demurrer.

The court of appeals reversed. The court held that defendant substantially complied with *Gov. Code § 53051* by setting out its full legal name and the other required information in its statement filed with the Secretary of State (*204 Cal. App. 3d 716, 722)* . However, the court also held that the question of whether defendant was estopped to assert plaintiffs' noncompliance with the government claims statute was an issue of fact not properly decided on demurrer (*204 Cal. App. 3d 716, 724)* . In their amended complaint, plaintiffs had alleged that (1) defendant did business under name "Oak Valley District Hospital" but filed a certificate with the Secretary of State under the name "Oak Valley Hospital District"; (2) plaintiffs were informed by Secretary of State that "Oak Valley District Hospital" was not listed on roster of public agencies; (3) in reliance on that information, plaintiffs' attorney did not present a claim; and (4) defendant misled plaintiffs by filing the certificate as it did. The court held that these allegations were sufficient to constitute an estoppel. Whether plaintiffs couldprove the elements of estoppel required a determination of factual issues, such as whether the hospital was apprised of the potential for confusion caused by the discrepancy in names, whether the hospital intended possible claimants to act on the assumption that its name was as represented in its records, and whether plaintiffs reasonably relied on the manner in which the hospital identified itself in its records (*204 Cal. App. 3d 716, 723-724)* . The court also stated the elements that must be present in order to apply the doctrine of estoppel to a public entity: (1) the public entity was apprised of the facts; (2) the public entity intended that its conduct be acted on, or acted so that plaintiff had a right to believe it was so intended; (3) plaintiff was ignorant of the true state of facts; and (4) plaintiff relied on the public entity's conduct to his or her injury (*204 Cal. App. 3d 716, 724)* .

[g] Estoppel Appropriate if Employee of Public Entity Threatens Plaintiff to Gain Silence

In ***Doe v. Bakersfield City Sch. Dist.*** *(2006) 136 Cal. App. 4th 556, 39 Cal. Rptr. 3d 79* , a school counselor had sexually molested the plaintiff from the time the plaintiff was in junior high school until the plaintiff was 19 or 20 years old. The plaintiff never reported the molestation during the time that it was taking place because the counselor repeatedly threatened the plaintiff that if he did so, the counselor would publicly humiliate the plaintiff. The plaintiff did eventually reveal the molestation to his girlfriend when he was 21 years old. About six months later, after the abuse was revealed publicly, the plaintiff was enrolled in a witness protection program, and the plaintiff began to receive counseling from a psychotherapist, the plaintiff finally felt safe enough to file a claim against the school district that employed the counselor. However, the claim was denied, as was the plaintiff's application to file a late claim. The plaintiff then filed a petition seeking relief from the denial of his application to file a late claim. The trial court denied the petition after refusing to apply the doctrine of equitable estoppel based on the counselor's threats designed to ensure the plaintiff's silence. The plaintiff appealed.

The court of appeal held that the trial court abused its discretion when it refused to apply the doctrine of equitable estoppel under the circumstances of the case. Under existing case law, application of estoppel in these types of cases required that (1) the public entity or one of its agents engaged in some calculated conduct or made some representation that induced the plaintiff not to file a claim within the statutory time for doing so, and (2) the plaintiff then acted promptly, within a year or so, after cessation of the public entity's conduct that caused the estoppel. The court noted that the plaintiff had presented uncontradicted evidence that after he departed junior high and started high school in a different district, the counselor continued to molest him and threatened him to gain his silence. The counselor engaged in similar conduct after the plaintiff graduated from high school. Even after the plaintiff became a legal adult, there was no evidence that the counselor's threats lost any of their effectiveness in dissuading the plaintiff from revealing the

ongoing molestations. Because the threats actually deterred the plaintiff from reporting the abuse even after he graduated from school, application of the estoppel doctrine provided the plaintiff a reasonable time to file a claim after the deterrent effect of the counselor's threats wore off (*136 Cal. App. 4th 556, 571-573)* .

[4] Additional Authorities

[a] Estoppel as Applicable to Public Entities

The facts and procedural background of *Bruce v. Jefferson Union High Sch. Dist. (1962) 210 Cal. App. 2d 632, 26 Cal. Rptr. 762* , are discussed in *§ 196.103[3][b]*. In reversing the judgment of dismissal, the court of appeal said that while it is the general rule that a government agency may not be estopped by the conduct of its officers and employees, there are instances in which an equitable estoppel will run, as, for example, where justice and right require it (*210 Cal. App. 2d 632, 635)* .

[b] Misleading Advice

In *Rand v. Andreatta (1964) 60 Cal. 2d 846, 36 Cal. Rptr. 846, 389 P.2d 382* , plaintiff alleged that, after plaintiff was injured in an accident with a county employee, an agent of the county visited her. He told her (an uneducated woman) not to employ counsel and that her rights would be protected. Relying on these representations, plaintiff did not employ counsel until after the time for filing a claim. Failure to timely file a claim was raised as a special defense and judgment was entered for the public entity. The Supreme Court held that plaintiff's allegations of estoppel were sufficient (*60 Cal. 2d 846, 850)* and reversed the judgment for defendant.

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4. Waiver And Estoppel of Claim Presentation Defenses

19A-196 California Points & Authorities §§ 196.104-196.119

[Reserved]

§§ 196.104[Reserved]

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CHAPTER 196 PUBLIC ENTITIES
PART II. FORMS
B. Filing of Action
1. Premature Filing of Action

19A-196 California Points & Authorities § 196.120

§ 196.120 Supporting Contention That Prematurely Filed Action Is Timely

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

AN ACTION FILED PRIOR TO _____ [THE REJECTION OF THECLAIM BY THE APPROPRIATE PUBLIC ENTITY *or* THE GRANTING OF RELIEF FROM CLAIM FILING REQUIREMENT WHEN A TIMELY CLAIM WAS NOT FILED] IS TIMELY, NOT FATALLY PREMATURE.

[*EITHER*]

Action Filed Before Claim Denied Is Timely. When an action is filed before the claim against the public entity is denied or deemed denied, that prematurely filed complaint states a cause of action and meets the requirement in *Section 945.4 of the Government Code* that the action be filed within six months after the denial of the claim (*Cory v. City of Huntington Beach (1974) 43 Cal. App. 3d 131, 135-136, 117 Cal. Rptr. 475*).

[*OR*]

Action Filed Before Relief From Claim Filing Is Granted Is Timely. When no claim was timely filed, and an action is filed before an order relieving the plaintiff from the claim filing requirement has been granted by the court, that prematurely filed complaint satisfies the provisions of *Section 946.6(f) of the Government Code*, and the filing of a new pleading is unnecessary (*Bell v. Tri-City Hosp. Dist. (1987) 196 Cal. App. 3d 438, 445, 241 Cal. Rptr. 796* ; *Bahten v. County of Merced (1976) 59 Cal. App. 3d 101, 106-107, 130 Cal. Rptr. 539*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of the contention that the complaint was timely filed, even though itwas filed prematurely in the typical progression of a proceeding under the California Tort Claims Act. The alternate paragraphs may be used depending on whether the complaint was filed before the claim was denied by the public entity, or if no timely claim was filed, before relief from the claim filing requirement was granted.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be combined with general points and authorities opposing a demurrer or motion for summary judgment [*see, e.g., Bell v. Tri-City Hosp. Dist. (1987) 196 Cal. App. 3d 438, 440, 241 Cal. Rptr. 796* (demurrer); *Cory v. City of Huntington Beach (1974) 43 Cal. App. 3d 131, 133, 117 Cal. Rptr. 475* (summary judgment)]. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Points and Authorities

For memoranda of points and authorities relating to demurrers on the ground of prematurity of an action, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Action Filed Before Claim Denied Is Timely

In ***Cory v. City of Huntington Beach*** *(1974) 43 Cal. App. 3d 131, 117 Cal. Rptr. 475* , plaintiff was injured in an automobile accident and filed a timely claim against defendant city. Two days after filing the claim, before the claim was denied or deemed denied, plaintiff filed a personal injury action in superior court. Defendant moved for summary judgment, claiming that the action was prematurely filed. The trial court granted the motion. Plaintiff appealed.

The court of appeal reversed (*43 Cal. App. 3d 131, 136)* . It said that when a proper claim has been filed against a local governmental entity, the waiting period is not part of the cause of action, but is a procedural condition precedent to suit. The California Tort Claims Act does not create a cause of action against a public entity, but merely prescribes the manner in which it may be asserted. The prerequisite of rejection may be considered more of a procedural than a substantive requirement. Moreover, the court recognized that since *Gov. Code § 911.2* requires that a cause of action accrue before a claim is filed, rejection of that claim cannot be a part of that cause of action (*43 Cal. App. 3d 131, 135)* . The court went on to conclude that the defense of prematurity, based on plaintiff's failure to comply with the waiting period, merely would have been a ground for abatement, which is waived if not timely made. Moreover, the court observed that even if defendant gave serious consideration to plaintiff's claim rather than merely turning it over to its insurer, defendant could not have been prejudiced by the premature filing of the action since the complaint was not served until the time period had run (*43 Cal. App. 3d 131, 136)* .

[b] Action Filed Before Relief From Claim Filing Requirement Is Granted Is Timely

Bell v. Tri-City Hosp. Dist. *(1987) 196 Cal. App. 3d 438, 241 Cal. Rptr. 796* , was an action in which plaintiffs alleged medical negligence and use of a defectively designed and manufactured product after a series of unsuccessful surgeries was performed on plaintiff husband. Plaintiffs served defendant hospital district with a notice of intention to commence action against a health care provider, and two days later filed their complaint against only fictitiously named defendants. About a month later, plaintiffs served defendant with a written claim and later applied for leave to file a late claim. After defendant denied the late claim application, plaintiffs filed their first amended complaint, naming several defendants and 600 fictitiously named defendants. Defendant was not named in the caption or preliminary allegations,

but was named as a defendant in the eighth cause of action. Thereafter plaintiffs petitioned the court for relief from the written claim requirement. The order granting relief was signed and filed on June 3, 1985. On August 8, 1985, plaintiffs filed an amendment to their first amended complaint substituting defendant for Doe 402, and served defendant on August 12, 1985. The trial court sustained defendant's demurrer without leave to amend based on plaintiffs' failure to file an action against defendant within the 30-day period provided by *Gov. Code § 946.6(f)*, and dismissed the action. Plaintiffs appealed.

The court of appeal reversed, concluding that the first amended complaint, which was on file at the time the court granted relief from the claim requirement, adequately stated a cause of action against defendant despite the fact that defendant was not named in the caption of the complaint (*196 Cal. App. 3d 438, 440-441)* . The court said it did not believe that compliance with the tort claims procedure is an element of a cause of action against a public entity and, therefore, that a complaint naming a public entity cannot be filed before compliance is either achieved or excused (*196 Cal. App. 3d 438, 444)* . The court found that plaintiffs' first amended complaint, which named defendant as a defendant, was a premature complaint under *Bahten v. County of Merced (1976) 59 Cal. App. 3d 101, 130 Cal. Rptr. 539* , and might obviate the need for plaintiffs to take any action within the 30-day period. The court reasoned that the only question was whether that complaint's failure to identify defendant in the caption rendered it insufficient to constitute the "suit on the cause of action to which the claim relates" within the meaning of *Gov. Code § 946.6(f)*, andultimately concluded that the incomplete caption was not a fatal defect. The court observed that reliance on the Doe defendant procedures of *Code Civ. Proc. § 474* would be unavailable to plaintiffs because they were not ignorant of a potential cause of action against defendant and because nothing precluded them from naming defendant as a defendant before relief from the claim presentation requirement had been obtained (*196 Cal. App. 3d 438, 445)* .

In ***Bahten v. County of Merced*** *(1976) 59 Cal. App. 3d 101, 130 Cal. Rptr. 539* , plaintiff was permanently disabled due to injuries sustained in a high school football game. In September 1973, his parents petitioned defendant county for leave to file a late claim, and one week later, before the petition was acted on or deemed denied, filed in superior court a complaint against defendant alleging negligence. Later, plaintiff petitioned the court for an order for relief from compliance with the claims presentation requirement. The motion was granted on April 5, 1974. On June 25, 1974, plaintiff filed an amended complaint. Later the trial court dismissed the action, based on defendant's demurrer. Plaintiff appealed.

The court of appeal reversed. It characterized the dispositive issue as whether plaintiff's amended complaint was barred because it was filed more than 30 days after the court made its order relieving plaintiff from compliance with the claim presentation requirement. The court said that *Gov. Code § 946.6(f)* requires only that suit be brought on the cause of action to which the claim relates within 30 days after the order is made relieving the plaintiff from compliance with *Gov. Code § 945.4*. In cases when the complaint was actually on file when the order granting that relief was made, that prematurely filed complaint satisfies the provisions of *Gov. Code § 946.6(f)*, and the filing of a new pleading is unnecessary (*59 Cal. App. 3d 101, 106-107)* . The court found that defendant was put on notice in September 1973 that plaintiff was charging it with negligence. There was no showing that any of the county's rights were prejudiced or impaired by the premature filing of the original complaint (*59 Cal. App. 3d 101, 112)* .

[4] Opposing Authorities

[a] Action Filed Before Claim Denied Is Timely

In *Chas. L. Harney, Inc. v. State of California (1963) 217 Cal. App. 2d 77, 31 Cal. Rptr. 524* , plaintiff contractor and the state were in dispute concerning the amount of money owed plaintiff after its work on a state highway. After plaintiff's claim on the contract was rejected by the state, plaintiff filed a second claim. The board declined to take any action on that claim, alleging that it was identical with the already rejected claim. Plaintiff then filed suit against the state. The trial court sustained defendant's demurrer and dismissed the case. The court of appeal affirmed the judgment. The court discussed the claim requirements of the predecessor to *Gov. Code § 945.4*, observing that a claim must be

presented, and if the claim is rejected or disallowed, the claimant may bring an action against the state on that claim (*217 Cal. App. 2d 77, 101*). It said that rejection or disallowance of a claim has been made a condition precedent to the commencement of an action against the state. It also said that when the rejection of a claim is a prerequisite to suit, the claim does not ripen into a cause of action until that rejection, the statute of limitations does not begin to run until that event, and the commencement of any action prior to rejection is premature. Failure or refusal to act on the claim is not the equivalent of its rejection or disallowance (*217 Cal. App. 2d 77, 102*).

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California Points & Authorities

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CHAPTER 196 PUBLIC ENTITIES
PART II. FORMS
B. Filing of Action
1. Premature Filing of Action

19A-196 California Points & Authorities §§ 196.121-196.139

[Reserved]

§§ 196.121[Reserved]

California Points & Authorities

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Volume 19A Chapters 196-199 PUBLIC ENTITIES---to---QUO WARRANTO
CHAPTER 196 PUBLIC ENTITIES
PART II. FORMS
B. Filing of Action
2. Timely Filing of Action

19A-196 California Points & Authorities § 196.140

§ 196.140 Supporting Contention That Action Was Timely Filed--Following Rejection of Claim [Gov. Code § 945.6]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S ACTION WAS TIMELY FILED BECAUSE IT WAS FILED WITHIN _____ [*specify the applicable statute of limitations, e.g.,* SIX MONTHS AFTER THE NOTICE OF REJECTION OF HIS/HER CLAIM], THE PERIOD APPLICABLE TO HIS/HER ACTION IN ACCORDANCE WITH THE CLAIMS PROCEDURES.

[*EITHER*]

A. Action Filed Within Six Months After Notice of Rejection of Claim Is Timely. The plaintiff's action was timely filed because it was filed within six months after the date the written notice of the rejection of claim was personally delivered or deposited in the mail (*Gov. Code § 945.6(a)(1)*; *see DeLeon v. Bay Area Rapid Transit (1983) 33 Cal. 3d 456, 457, 189 Cal. Rptr. 181, 658 P.2d 108* ; *Rincon v. Burbank Unified Sch. Dist. (1986) 178 Cal. App. 3d 949, 952, 224 Cal. Rptr. 88*).

[*OR*]

A. Action Filed Within Two Years After Accrual of Cause of Action Is Timely When Proper Written Notice of Rejection of Claim Is Not Given. The plaintiff's action was timely filed because written notice of the rejection of claim was not given, and the action was filed within two years of the accrual of the cause of action. [The plaintiff and the board agreed to extend the period within which the board was required to act on the claim. Because that period of

extension is not part of the time limited for the commencement of the action, the plaintiff's action was timely filed even though filed more than two years after the accrual of the cause of action] (*Gov. Code § 945.6(a)(2)*; *see Jenkins v. County of Contra Costa (1985) 167 Cal. App. 3d 152, 156, 213 Cal. Rptr. 126* ; *Scott v. County of Los Angeles (1977) 73 Cal. App. 3d 476, 482-484, 140 Cal. Rptr. 785*).

[*CONTINUE*]

[*Optional*] **B. "Six Months" Is Six Calendar Months or 182 Days, Whichever Is Longer.** "Six months," as used in the *Gov. Code § 945.6* period of limitation, means six calendar months or 182 days, whichever period is longer (*Gonzales v. County of Los Angeles (1988) 199 Cal. App. 3d 601, 604, 245 Cal. Rptr. 112*).

[*Optional*] **C. Action Filed Within Ninety Days After Notice of Intent to Sue Is Timely.** An action is timely filed when it is filed within ninety days after providing a notice of intent to sue, even if the action is filed more than six months after notice of rejection of claim, because the notice of intent to sue tolls the limitation period for ninety days (*Wurts v. County of Fresno (1996) 44 Cal. App. 4th 380, 382, 51 Cal. Rptr. 2d 689*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the complaint was timely filed because it was filed within the time requirements set forth in *Gov. Code § 945.6*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which these points are raised. For example, they may be combined with general points and authorities opposing a demurrer or motion for summary judgment [*see, e.g., DeLeon v. Bay Area Rapid Transit (1983) 33 Cal. 3d 456, 458, 189 Cal. Rptr. 181, 658 P.2d 108* (demurrer); *Rincon v. Burbank Unified Sch. Dist. (1986) 178 Cal. App. 3d 949, 956, 224 Cal. Rptr. 88* (summary judgment)]. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Accrual of Cause of Action

For the purpose of computing the time limits prescribed by *Gov. Code § 945.6*, the date of the accrual of a cause of action to which a claim relates is the date on which the cause of action would be deemed to have accrued within the meaning of the statute of limitations, which would be applicable thereto if there were no requirement that a claim be presented to and be acted on by the public entity before an action could be commenced thereon [*Gov. Code § 901*].

[c] Notice

Written notice of the action taken or the inaction that signifies rejection must be given in the manner prescribed in *Gov. Code § 915.4* (personaldelivery or mail). The notice must be in substantially the form set forth in *Gov. Code § 913* [*Gov. Code § 913(a)*]. A warning specifying the six-month statute of limitations for filing an action on the rejected claim must be included in the notice [*Gov. Code § 913(b)*]. If the notice sent to the plaintiff does not include the required warning, the plaintiff will have two years, rather than six months, in which to file an action [*see Scott v. County of Los Angeles (1977) 73 Cal. App. 3d 476, 484, 140 Cal. Rptr. 785]* .

[d] Plaintiff Imprisoned in State Prison

Gov. Code § 945.6(b) provides that when a person is unable to commence a suit on a cause of action within the time prescribed in *Gov. Code § 945.6(a)* because he or she was sentenced to imprisonment in a state prison, the time limit for the commencement of such suit is extended to six months after the date that the civil right to commence such a suit is restored to such person, except that the time limit cannot be extended if the public entity establishes that the plaintiff failed to make a reasonable effort to commence the suit, or to obtain a restoration of his or her civil right to do so, before the time prescribed in *Gov. Code § 945.6(a)* expired. Since 1976, however, state prisoners have had the civil right to initiate civil actions [*Penal Code § 2601(e)*]. Since state prisoners are not legally precluded from bringing civil actions, the six-month "extension" period specified in *Gov. Code § 945.6(b)* for commencing a civil action against a public entity appears to be, practically speaking, inoperative. However, see *Gov. Code § 945.3* for statute of limitation tolling provisions concerning a civil action for money damages by a person accused of a crime against a peace officer, or the public entity employing a police officer, based on conduct of the peace officer relating to the offense for which the accused is charged.

If a prisoner files a civil action pro se against a government entity while the prisoner is still incarcerated, the complaint is deemed filed when the complaint is delivered to prison authorities for forwarding to the superior court [*Moore v. Twomey (2004) 120 Cal. App. 4th 910, 918, 16 Cal. Rptr. 3d 163]* .

[e] Intervention

The limitations period of *Gov. Code § 945.6(a)(1)* may be tolled with regard to a party who intervenes in an action that was timely filed when that party had timely filed a claim. Thus, when an injured employee intervened, pursuant to *Lab. Code § 3853*, in an action for damages against a transit district brought by his employer's insurer, although he did not file his complaint until more than six months after rejection of his timely filed tort claim, the court held that the limitations period of *Gov. Code § 945.6(a)(1)* was tolled by the timely filing of the insurer's action [*Home Ins. Co. v. Southern Cal. Rapid Transit Dist. (1987) 196 Cal. App. 3d 522, 525-526, 241 Cal. Rptr. 858* ; for forms of points and authorities relating to intervention generally, *see* Ch. 124, *Intervention*].

[f] Amended Claim

If an amended claim is timely filed that relates to the same transaction or occurrence that gave rise to the original claim, the six-month period for filing suit generally runs from the time that the first claim is rejected [*Sofranek v. County of Merced (2007) 146 Cal. App. 4th 1238, 1248, 53 Cal. Rptr. 3d 426]* . However, a narrow exception to this rule has been recognized when a wrongful death claim is originally submitted without including all the necessary heirs [*Norwood v. Southern Cal. Rapid Transit Dist. (1985) 164 Cal. App. 3d 741, 743-744, 211 Cal. Rptr. 6]* . In addition, if a government entity sends notice upon rejection of an amended claim that the claimant has six-months from rejection of the claim to file suit, the entity may be estopped from relying on rejection of the original claim for purposes of calculating the six-month period for filing suit [*Sofranek v. County of Merced (2007) 146 Cal. App. 4th 1238, 1251-1252, 53 Cal. Rptr. 3d 426]* . The rules governing the amendment of claims are set forth in *Gov. Code § 910.6*. For a form of amendment of claim, see California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Tort Claims Act* (Matthew Bender).

[g] Related Points and Authorities

For memoranda of points and authorities opposing a general demurrer to a complaint based on the ground that the action is barred by a statute of limitations, see Ch. 143, *Limitation of Actions* .

For a memorandum of points and authorities supporting a demurrer to a medical malpractice complaint brought against a public entity on the ground that the action is time-barred under *Gov. Code § 945.6*, even though timely under *Code Civ. Proc. § 340.5*, see Ch. 175, *Physicians and Surgeons: Medical Malpractice* .

[3] Discussion of Authorities

[a] Action Filed Within Six Months After Notice of Rejection of Claim Is Timely

In ***DeLeon v. Bay Area Rapid Transit*** *(1983) 33 Cal. 3d 456, 189 Cal. Rptr. 181, 658 P.2d 108* , plaintiff filed a personal injury claim with defendant transit district. Although plaintiff's complaint alleged that defendant denied her claim, it did not state the date of the denial. Plaintiff proposed to amend her complaint to state that the claim had been denied in writing on June 25, 1979, making the complaint, which was filed December 26, one day beyond the six-month time limit. She argued that *Code Civ. Proc. § 12a* extended the time period by one day since the last day fell on a holiday. The trial court rejected plaintiff's argument, sustained defendant's demurrer without leave to amend, and dismissed the action. Plaintiff appealed.

The California Supreme Court reversed. The Court found that *Code Civ. Proc. § 12a*, which extends the period when the last day for performing an act falls on a holiday, is applicable to the time limit of *Gov. Code § 945.6* for bringing an action against a public entity (*33 Cal. 3d 456, 457)* . The Court acknowledged case law holding that statutory provisions requiringthat an act "shall" be performed "not later than" a certain date are mandatory and are not subject to exception, and that the time limits of *Gov. Code § 945.6* are strictly construed (*33 Cal. 3d 456, 458)* . However, it concluded that *Code Civ. Proc. § 12a* applies to statutes of limitation in general, and no cogent reason for departing from that general rule in this case is apparent. Its applicability would be consistent with the broad language of *Code Civ. Proc. § 12a* and with the purpose of the time limit in *Gov. Code § 945.6* (*33 Cal. 3d 456, 461)* .

In ***Rincon v. Burbank Unified Sch. Dist.*** *(1986) 178 Cal. App. 3d 949, 224 Cal. Rptr. 88* , plaintiff filed a claim against defendant school district, alleging that injuries sustained by her resulted from defendant's failure to properly maintain its school premises. Defendant rejected the claim on February 2, 1984, and alleged that it sent notice of that rejection to plaintiff on February 3, 1984. Plaintiff filed her complaint on September 24, 1984. Defendant moved for summary judgment on the ground that plaintiff had failed to file her complaint within the six-month statutory period. The motion was supported by three declarations. The trial court granted the motion. Plaintiff appealed.

The court of appeal reversed. Citing *Gov. Code § 945.6(a)(1)*, the court said that if notice was given by defendant of action or inaction on her claim, as required by *Gov. Code § 913*, plaintiff claimant must have commenced her action within six months after that notice was personally delivered or deposited in the mail. The six-month period begins to run when notice, sent by certified mail with return receipt requested, was deposited in the mail, rather than when the postal employee delivered the notice and secured signature on receipt (*178 Cal. App. 3d 949, 952)* . The court said the real issue on appeal was whether defendant complied with *Gov. Code §§ 913* and *915.2* (*178 Cal. App. 3d 949, 953)* . The court reviewed the strict requirements of *Code Civ. Proc. § 437c* regarding the moving party's presentation of all the material facts necessary to support a judgment, and noted that the supporting affidavits and declarations are strictly construed (*178 Cal. App. 3d 949, 954-955)* . The court found that none of defendant's supporting declarations satisfied the minimum requirements for granting the summary judgment motion. One was conclusory only on the subject of the mailing, and did not set forth that the declarant observed the notice of rejection mailed, by whom or where it was mailed, or that it was deposited in a properly addressed and stamped envelope in the United States mail. Another declaration also failed to meet the requirements of personal knowledge. The court also found the final declaration, prepared by the secretary who prepared and mailed the rejection, to be inadequate. The court said that the strictures of *Gov. Code § 915.2* require the establishment by declaration or other competent evidence that the notice of rejection was deposited in the United States mail in a sealed envelope, properly addressed with postage paid, and where it was deposited, as well as by whom (*178 Cal. App. 3d 949, 955-956)* .

[b] Action Filed Within Two Years of Accrual of Cause of Action Is Timely When Proper Written Notice of Rejection of Claim Is Not Given

In ***Jenkins v. County of Contra Costa*** *(1985) 167 Cal. App. 3d 152, 213 Cal. Rptr. 126* , plaintiff filed a complaint against defendants on March 25, 1983, for medical malpractice that occurred on June 22, 1981. Plaintiff had presented a claim and an application for leave to present a late claim with defendant public entity on June 22, 1982. Defendant

denied the application for leave to present a late claim, but did not specifically reject the claim. The trial court sustained defendants' demurrer without leave to amend on the basis of failure to comply with applicable claim statutes, and dismissed the action. Plaintiff appealed.

The court of appeal reversed. Plaintiff contended that the filing of her complaint within nine months after the accrual of her cause of action was within the two-year limitation set forth in *Gov. Code § 945.6(a)(2)*, and therefore was timely, since her claim was never rejected in writing. Defendants contended that the six-month period applied, since the written rejection of the application for leave to present a late claim also constituted written rejection of the claim. They argued that when a claim is presented and at the same time an application for leave to file a late claim is presented, the public entity is entitled to believe it is only being requested to act on the application for leave to file a late claim. The court disagreed, and said that a public entity cannot assume that a claim is not timely presented just by the fact that a claim and an application for leave to file a late claim are presented at the same time. To assure itself that the six-month period will apply, it is necessary to give specific written notice of the rejection of the claim. The court said that plaintiff's claim was never rejected in writing as required by the Government Code. Noncompliance with the claim provisions allowed plaintiff two years from the time her cause of action accrued to file her complaint (*167 Cal. App. 3d 152, 156)* .

In ***Scott v. County of Los Angeles*** *(1977) 73 Cal. App. 3d 476, 140 Cal. Rptr. 785* , plaintiff filed a claim against defendant county on July 14, 1975, alleging that the negligence of medical personnel at defendant's hospital at the time of her son's birth in 1960 caused him to be severely retarded. Notice of the denial of the claim, which was sent to plaintiff on September 2, 1975, did not contain the warning required by *Gov. Code § 913(b)*. Instead of filing a complaint, plaintiff filed a new claim, which defendant treated as an application to file a late claim, and rejected; that rejection contained the required warning. Plaintiff then petitioned the court for relief from the claim filing requirement. That petition was denied on July 20, 1976. Plaintiff filed a complaint for damages against defendant on October 27, 1976. Plaintiff appealed the denial of her petition for relief from the claim filing requirement.

The court of appeal concluded that the procedure under consideration was a redundancy, discussed the pertinent issues as guidance for the trial court in future proceedings, and ultimately reversed the trial court order (*73 Cal. App. 3d 476, 480, 485)* . The court explained that under the provisions of *Gov. Code § 911.2*, the time for filing a claim is tied into the accrual of the cause of action. It then discussed the statute of limitations applicable to medical malpractice cases, *Code Civ. Proc. § 340.5*, explaining that under the unique circumstances of the case the issue of when the cause of action accrued and whether the statute of limitations was tolled is critical to both compliance with the California Tort Claims Act and plaintiff's ultimate success on her complaint for malpractice (*73 Cal. App. 3d 476, 480-481)* . In its discussion of the claims procedure, the court concluded that the filing of the claim was in substantial compliance with the claims statutes (*73 Cal. App. 3d 476, 482)* . The court noted that the claim did not on its face show that it was untimely; rather, it contained allegations, which, if true, would have tolled the running of the statute of limitations, and postponed the date of accrual of the cause of action. It said that defendant's rejection of that claim must be treated as an outright rejection and not simply a denial of permission to file a late claim. The failure to include the required warning extended the period for filing the action two years from the accrual of the cause of action. Thus, the court concluded that if plaintiff could succeed at trial in proving that her cause of action did not accrue until a date less than two years prior to October 1976, and that because of a tolling of the statute of limitations, her action was not previously barred, then her complaint was timely filed. The court further explained that if, on the other hand, the cause of action was already barred a the time the claim was filed, then the extension provided by the claims statute would not serve to revive the cause of action (*73 Cal. App. 3d 476, 484)* .

[c] "Six Months" Is Six Calendar Months or 182 Days, Whichever Is Longer

In ***Gonzales v. County of Los Angeles*** *(1988) 199 Cal. App. 3d 601, 245 Cal. Rptr. 112* , after plaintiffs were arrested by sheriffs employed by defendant county they alleged they were falsely arrested, assaulted and battered, and that they suffered emotional distress. Their timely claims were rejected by defendant on January 20, 1983. On July 21, 1983, plaintiffs filed suit against defendant. Defendant moved for summary judgment on the ground that plaintiffs failed to

file within the six-month time limitation of *Gov. Code § 945.6*. The trial court granted defendant's motion and entered summary judgment. Plaintiffs appealed.

The court of appeal reversed and remanded. The court explained that the issue was the interpretation of the term "six months." A problem in the computation of the limitation period arises from the irregularity in the number of days in a month in the calendar. Although six calendar months always equals one half year, the number of days contained in six calendar months varies, ranging from 181 to 184 days. The court reasoned that to harmonize *Gov. Code § 6803*, which provides that "year" means 365 days, and *Gov. Code § 6804*, which provides that "month" means a calendar month, unless otherwise expressed, as well as to eliminate any ambiguity, the six-month bar in *Gov. Code § 945.6* should be construed to mean an action must be filed within six calendar months or 182 days, whichever is longer (*199 Cal. App. 3d 601, 604)* . The court buttressed its position by referring to the strong public policy that seeks to dispose of litigation on the merits, rather than on procedural grounds, whenever possible. Because of this strong public policy, the statute of limitations is a disfavored defense, and such a technical defense should be strictly construed to avoid the forfeiture of a plaintiff's rights (*199 Cal. App. 3d 601, 605)* .

[d] Action Filed Within Ninety Days After Notice of Intent to Sue Is Timely

In ***Wurts v. County of Fresno*** *(1996) 44 Cal. App. 4th 380, 51 Cal. Rptr. 2d 689* , plaintiff filed a medical malpractice action against a doctor and a County hospital after the six-month deadline for filing tort claims against public entities specified in *Gov. Code § 945.6* had passed, but within the ninety-day period of *Code of Civ. Proc. § 364*. The lawsuit was preceded by a timely claim under the Tort Claims Act, after which the County had notified plaintiff that her claim was rejected. Plaintiff then filed a notice of intent to sue pursuant to *Code of Civ. Proc. § 364*. Defendant moved for summary judgment on the ground that plaintiff failed to commence her action within six months after receiving notice of the rejection of her claim. Plaintiff contended that her notice of intent to sue, sent within ninety days after the limitations period, operated to toll the period for ninety days. The trial court granted the motion, and entered judgment in favor of defendant.

The court of appeal reversed. Defendants argued that plaintiff's tort claim was in effect a notice of intent to sue, and consequently, plaintiff's subsequent separate notice was a nullity which did not toll the six-month limitations period. However, a tort claim does not also constitute a notice of intent to sue in the absence of evidence the claimant intended otherwise (*44 Cal. App. 4th 380, 386)* . The court reasoned that the similarity of purpose behind *Code of Civ. Proc. § 364* and *Gov. Code § 910* does not justify a holding that a tort claim constituted a notice simply because the tort claim happened to include specific information about the nature of the injuries suffered by the claimant. Moreover, the filing of a tort claim does not necessarily evidence an intent to sue on the part of the plaintiff. In addition, the court stated that the two statutes addressed different social ills (*44 Cal. App. 4th 380, 386)* . The court acknowledged the Supreme Court's holding in *Phillips v. Desert Hosp. (1989) 49 Cal. 3d 699, 263 Cal. Rptr. 119, 780 P.2d 349* , that a notice of intent to sue may activate the notice and defense waiver provisions of the Tort Claims Act. However, it concluded that while a notice of intent to sue may ultimately function as a tort claim for purposes of the Tort Claims Act under certain circumstances this does not mandate the reverse conclusion that a tort claim must be deemed notice under other circumstances (*44 Cal. App. 4th 380, 387)* . According to the court, a claimant who has complied with the letter and spirit of both code sections is entitled to the full benefit of both statutes, including tolling for ninety days the six-month limitations period of *Gov. Code § 945.6* (*44 Cal. App. 4th 380, 387)* .

[4] Additional Authorities

[a] Action Filed Within Six Months After Notice of Rejection of Claim Is Timely

In *Massa v. Southern Cal. Rapid Transit Dist. (1996) 43 Cal. App. 4th 1217, 51 Cal. Rptr. 2d 164* , plaintiff filed an action against a police officer for the use of excessive force. The complaint was filed outside of the one-year statute of limitations, but within six months after plaintiff's claim was denied by the governmental entity. The trial court granted

defendant's summary judgment motion, and dismissed the case on the grounds of the statute of limitations. The court of appeal disagreed, noting initially that *Gov. Code § 945.6* provides that any suit against a public entity must be commenced not later than six months after the date of delivery of notice of the claim. In *Schmidt v. Southern Cal. Rapid Transit Dist. (1993) 14 Cal. App. 4th 23, 17 Cal. Rptr. 2d 340* , another division of the same district of the court of appeal held that the one-year statute of limitations is satisfied if a lawsuit against a governmental entity is filed within six months after the time the claim is denies, even though it is filed more than one year after the date the cause of action arose. The court found that the facts in *Schmidt* were almost identical to the current case, with the exception that in *Schmidt* the lawsuit was against the governmental entity rather than an employee (*43 Cal. App. 4th 1217, 1220-1221)* . Also noting that *Gov. Code § 950.6* requires that any suit against a public employee be commenced within the time prescribed by *Gov. Code § 945.6* for bringing an action against the public entity, the court reversed the trial court judgment for the defendant.

In *Schmidt v. Southern Cal. Rapid Transit Dist. (1993) 14 Cal. App. 4th 23, 17 Cal. Rptr. 2d 340* , the claimant, who was injured in a bus accident, filed a claim with the appropriate government agency one day short of the six-month filing requirement of *Gov. Code § 911.2*. The agency denied the claim, and notified the claimant that she had only six months in which to file a court action on the claim. She filed the action within that six-month period, but after the one-year statute of limitations for personal injury actions under former Code Civ. Proc. § 340(3) [*now see Code Civ. Proc. § 335.1* (two-year statute of limitations, beginning in 2003)]. The trial court granted a defense motion for judgment on the pleadings, on the ground that the claim was time-barred under former Code Civ. Proc. § 340(3). The court of appeal reversed, holding that in a personal injury action not involving negligence of a health-care provider, compliance with the provisions of the Tort Claims Act exempts a claimant from the provisions of former Code Civ. Proc. § 340(3) (*14 Cal. App. 4th 23, 30)* .

[b] Action Filed Within Two Years of Accrual of Cause of Action Is Timely When Proper Written Notice of Rejection of Claim Is Not Given

In *Mandjik v. Eden Twp. Hosp. Dist. (1992) 4 Cal. App. 4th 1488, 6 Cal. Rptr. 2d 582* , when plaintiffs, a married couple, planned to sue defendant hospital district for medical malpractice, they sent defendant a *Code Civ. Proc. § 364* notice (notice of intent to sue). Defendant treated the notice as a claim for damages under the Tort Claims Act, returned it as untimely, and by letter advised plaintiffs to apply for leave to present a late claim. After plaintiffs did so, attaching a claim for damages to their application, defendant denied the application. Plaintiffs filed an application for relief from the claims presentation requirement in superior court. Although the trial court granted the requested relief in a minute order, plaintiffs' attorney waited four months after receiving it to draft and submit a formal order, and filed a complaint one month after receiving the signed order back from the court. The trial court granted defendant's demurrer without leave to amend and dismissed the action. The court of appeal reversed, and directed the trial court to vacate its order and to issue an order overruling the demurrer. The court explained that neither rejection letter sent by defendant to plaintiffs contained any of the warnings set forth in *Gov. Code § 913* (*4 Cal. App. 4th 1488, 1499)* . Defendant contended that § 913 and its requirement that certain specific language be included in an outright rejection of a timely claim never came into play. It argued that the claim for damages accompanying plaintiffs' application for leave to present a late claim was a required attachment, and not a separate claim. The court disagreed, observing that plaintiffs' application expressly stated it was an alternative application to the claim (*4 Cal. App. 4th 1488, 1500)* . It went on to say that a public entity cannot assume that a claim is not timely presented merely because a claim and an application for leave to file a late claim are presented at the same time. Nor is a public entity permitted to make factual determinations relating to the timeliness of a claim. Rather, when a claim submitted along with an application for leave to present a late claim alleges facts, which, if true, would make the claim timely, the public entity must give specific written notice of rejection under *Gov. Code § 913*. If the public entity fails to do so, the claimant has two years fromthe accrual of his or her cause of action to file the complaint. Thus, the court framed the issue as whether plaintiffs' claim for damages attached to the application for leave to present a late claim was timely on its face. If so, defendant's failure to give a specific written notice of rejection in § 913 entitled plaintiffs to a two-year statute of limitations in § 945.6(a)(2). Although in its letter rejecting plaintiffs' claim, defendants did give a warning, the court found that the version given was incorrect. It used

the amended version that reflected the change in the claim presentation requirement from 100 days to six months. However, the incident on which plaintiffs based their claim was governed by the earlier deadline, and the prior version of the warning should have been used. The court explained that the main purpose for requiring a public entity to notify a claimant about the nature of the timeliness defects in a claim is to enable the claimant to perfect the claim. In this case, defendant, albeit unintentionally, frustrated plaintiffs' efforts to perfect their claim by giving them inaccurate notice. This defective notice caused plaintiffs to focus on the wrong presentation period in drafting their subsequent claim. Under these circumstances, defendant, by virtue of its defective notice, waived its right to assert anything other than a six-month presentation period (*4 Cal. App. 4th 1488, 1503-1504)* . Since plaintiffs' claim was timely on its face under a six-month presentation period and since defendant failed to give specific written notice of rejection in § 913, under *Gov. Code § 945.6(a)(2)* plaintiffs had two years from the accrual of their cause of action to file their complaint (*4 Cal. App. 4th 1488, 1504)* .

In *Wheeler v. County of San Bernardino (1978) 76 Cal. App. 3d 841, 143 Cal. Rptr. 295* , plaintiff's neighbors contracted with a surveyor to survey and stake out the boundaries of their property, and then recorded that survey in the county records on November 19, 1975. Plaintiff, alleging that the survey was inaccurate and that the county surveyor knew, or should have known of the inaccuracy, on March 12, 1976, petitioned defendant county for leave to file a late claim. Defendant sent plaintiff notice of its denial of that application on April 5, 1976. On September 14, 1976, plaintiff filed a petition for relief from the claim filing requirement, which was denied. On November 12, 1976, plaintiff brought suit against defendant for damages to real property. The trial court sustained defendant's demurrer to the complaint without leave to amend and dismissed the action. The court of appeal reversed (*76 Cal. App. 3d 841, 849)* . The court observed that in actions for injury to real property, a claimant has one year in which to present a claim, and that plaintiff had attached a copy of a claim to his petition for leave to file a late claim, and thus had complied with the claim presentation requirement. The court, citing *Gov. Code § 945.6*, said that suit against a governmental entity must be commenced within six months after the governmental entity gives notice of rejection of claim, or within two years after the cause of action accrues if no notice of rejection of claim is given. Defendant contended that its notice of April 14, 1976, was a notice of rejection of claim and consequently plaintiff's action, filed on November 12, 1976, was untimely. The court said that the April 14 notice was on a form designed for use in denying claims. However, it was filled out in a manner that clearly indicated that defendant was not ruling on the claim, but was denying leave to present a late claim (*76 Cal. App. 3d 841, 847)* . The court noted that throughout the case defendant had taken the position that no claim was ever presented, and had fostered and encouraged plaintiff's mistaken belief that he should obtain relief from the claim presentation requirement. The court concluded that if defendant had acknowledged the claim as having been timely presented, and sent a notice expressly rejecting the claim, plaintiff would have filed suit within six months (*76 Cal. App. 3d 841, 848)* .

[5] Opposing Authorities

[a] Action Filed Within Six Months After Notice of Rejection of Claim Is Timely

In *Orr v. City of Stockton (2007) 150 Cal. App. 4th 622, 58 Cal. Rptr. 3d 662* , plaintiff was injured in an automobile collision with a city police officer. The day before plaintiff filed a claim with the city, he filed a petition to perpetuate testimony or preserve evidence under *Code Civ. Proc. § 2035.010 et seq.* The city rejected the claim six weeks later, and complied with the discovery request approximately six weeks after that. Plaintiff filed suit approximately eight months after the claim was rejected by the city. The trial court overruled the city's demurrer on statute of limitations grounds and allowed the action to go to trial. Judgment was entered for plaintiff. The court of appeal reversed. The court rejected plaintiff's argument that the petition to perpetuate testimony or preserve evidence under *Code Civ. Proc. § 2035.010 et seq.* constituted the filing of a "suit" for purposes of the six-month limitations period. The court held that a "suit" for these purposes is an adversarial proceeding in which one party initiates a proceeding against a public entity to enforce a right or redress an injury. Plaintiff's discovery petition did not meet these requirements and thus his suit was not timely filed and should have been dismissed (*150 Cal. App. 4th 622, 629-630)* .

In *Jordan v. City of Sacramento (2007) 148 Cal. App. 4th 1487, 56 Cal. Rptr. 3d 641* , plaintiff sustained injuries when she tripped and fell on a public sidewalk. She filed a timely claim against the city, which was rejected. A representative of the city told plaintiff's attorney that, pursuant to a specified city ordinance, the city was not responsible for maintenance of the sidewalk. The claim was then forwarded to the abutting property owner. The property owner rejected the claim, and plaintiff filed suit against the property owner. Approximately seven months later, after discovering that the city could be partially liable, plaintiff amended the complaint to add the city as a defendant. The city successfully moved for summary judgment on the grounds that the six-month period for filing suit against the city had expired. The court of appeal affirmed. The court rejected plaintiff'sargument that the city should be estopped from relying on the statute of limitations. According to the court, while the city had purported to advise and direct plaintiff to sue only the property owner, this erroneous legal advice did not warrant disregard of the applicable limitations period. The court noted the lack of evidence that the city acted in bad faith or that the plaintiff had a confidential relationship with the city that would warrant holding the city to a higher standard of care when advising plaintiff. The court also noted that plaintiff was represented by an attorney at the time that the erroneous advice was given, and thus plaintiff was not a person lacking knowledge or training that would aid in determining her rights compared with the city. Because the court concluded that the city's conduct was not unconscionable, nor did the city take unfair advantage of plaintiff, estoppel was inappropriate and the trial court properly granted summary judgment (*148 Cal. App. 4th 1487, 1499)* .

In *Han v. City of Pomona (1995) 37 Cal. App. 4th 552, 43 Cal. Rptr. 2d 616* , plaintiff appealed from an order denying a petition for relief from his failure to file a timely tort claim. The trial court concluded that plaintiff showed a lack of diligence from the time when the cause of action arose to the day the petition for relief was heard. The court of appeal affirmed the order denying the petition, finding that although there was excusable neglect for the failure to timely file a tort claim, no excuse existed for the failure to timely serve defendant with the petition for relief. Plaintiff filed the petition for relief in April 1991, but did not serve the defendant with the petition until October 12, 1993. The explanation given by plaintiff's attorney for this lapse of two and one-half years between the time the petition was filed and the time it was served on defendant, was that the attorney "lost contact" with plaintiff. The court reasoned that although *Gov. Code § 946.6* states that the petition should be "filed within six months," and thus does not say "filed and served and a hearing set within six months," setting the hearing and serving the petition on defendant some two and one-half years after it is filed does not comply with the spirit of the statute (*37 Cal. App. 4th 552, 559-560)* .

In *City of Los Angeles v. Superior Court (1993) 14 Cal. App. 4th 621, 17 Cal. Rptr. 2d 703* , property owners who suffered damages from a sewer backup submitted a claim to the city with respect to both personal and real property. Initially, the city denied the claim as untimely because it was not filed within six months after the date on which the damage occurred; it advised claimants that they could seek relief to present a late claim (*Gov. Code § 911.4*). Ultimately, the city allowed a portion of the real property claim, but denied a portion on the ground that it had no prior notice of the condition that caused the damage. The city also denied claimants' request for leave to file a late claim with respect to the personal propertydamage. Claimants simultaneously filed an action seeking damages against the city, and submitted an application under *Gov. Code § 945.6* relieving them from the claims requirement of *Gov. Code § 945.4*. The trial court denied a defense motion for summary judgment. The court of appeal reversed, holding that the personal property cause of action was barred because the petition for relief from the claims requirement was filed more than six months after the city's denial of the claim; and the action based on real property loss was untimely filed because the written rejection contained an explicit warning (*Gov. Code § 913(b)*) with regard to the six-month limitation period under *Gov. Code § 945.6(a)(1)*, and the action was filed more than six months after date of written denial of claim was deposited in the mail (*14 Cal. App. 4th 621, 627-629)* .

In *Cole v. Los Angeles Unified Sch. Dist. (1986) 177 Cal. App. 3d 1, 222 Cal. Rptr. 426* , plaintiff high school football player filed a claim against defendant school district for injuries sustained during a football game. Defendant rejected plaintiff's claim. After plaintiff brought an action, the trial court granted defendant's motion for judgment on the pleadings based on the fact that plaintiff had failed to file a complaint within six months as required by *Gov. Code § 945.6*. The court of appeal affirmed, saying that *Code Civ. Proc. § 1013* is not applicable to *Gov. Code § 945.6*, and

does not extend the time for filing a complaint by five days past the six-month limit after the deposit in the mail of the notice of rejection. The triggering date under *Gov. Code § 945.6* generally will be the date the notice is deposited in the mail or personally delivered to the claimant, at which time the claimant will receive a warning that he or she has a limited time within which to sue and a suggestion that an attorney be consulted (*177 Cal. App. 3d 1, 3)* . The court said it was undisputed that the rejection was mailed on January 4, 1984, and that plaintiff did not file his complaint until July 9, 1984, more than six months after the notice was mailed. A failure to start the action within the statutory time period is a valid ground for dismissal of the action (*177 Cal. App. 3d 1, 5)* .

In *Chalmers v. County of Los Angeles (1985) 175 Cal. App. 3d 461, 221 Cal. Rptr. 19* , after plaintiffs filed personal injury and wrongful death suits against defendant county, the trial court granted defendant's demurrer without leave to amend on the ground plaintiffs' suit was barred by application of the six-month statute of limitations of *Gov. Code § 945.6(a)(1)* and dismissed the action. The court of appeal affirmed. The court observed that plaintiffs received notice of rejection on September 7, 1983, and filed their lawsuit on March 19, 1984, after the six-month limit had passed. Plaintiffs contended that they were entitled to the two-year statute of limitations. They claimed that the letter of rejection did not comply with the notice requirements of *Gov. Code § 913*. They argued that, among other things, *Gov. Code § 913(a)* requires the written notice to contain the date on which the claim was presented and the date of action taken by the public entity or rejection by operation of law (*175 Cal. App. 3d 461, 464)* . Since the letter sent by defendant did not include either date, plaintiffs contended the notice was defective. The court disagreed, saying that *Gov. Code § 913(a)* describes the manner of notice and provides a suggested format. It said that *Gov. Code § 913(a)* does not require everything suggested by plaintiffs. The public entity has the option to follow the format and include the dates. Although not applicable to the notice sent to plaintiffs, the court went on to say that *Gov. Code § 913(b)* requires the notice to include a warning of the six-month time limitation. Because that is mandatory, a failure to include the warning would extend the time for filing the suit to two years from the time of accrual (*175 Cal. App. 3d 461, 465)* .

[b] Action Filed Within Two Years of Accrual of Cause of Action Is Timely When Proper Written Notice of Rejection of Claim Is Not Given

In *Him v. City & County of San Francisco (2005) 133 Cal. App. 4th 437, 34 Cal. Rptr. 3d 838* , the plaintiffs were the parents of an individual who committed suicide while an inpatient at a city-owned hospital. The plaintiffs filed claims against the city on August 30, 2001. Although the city allegedly mailed formal notices rejecting the claims to the plaintiffs' attorney on November 19, 2001, the attorney's office claimed it never received the mailed notices. The plaintiffs subsequently filed a negligence action against the city on March 3, 2003. The city moved for summary judgment on the grounds that the action was untimely, and supported this motion with the claim rejection notices, accompanied by proofs of service by mail signed by a city claims adjuster and a declaration of the adjuster stating that she had mailed the notices in the city on November 19, 2001. The plaintiffs opposed the motion with a declaration from the secretary responsible for mail in the law office of the plaintiffs' attorney stating that no notices were received, along with a letter from the plaintiffs' attorney to potential referral counsel, dated May 2002, informing the referral counsel that no notices had been received as of that date. The trial court granted the motion for summary judgment, and the court of appeal affirmed. The court held that the proofs of service were not deficient merely because they did not indicate the precise mailbox at which the notices had been mailed. It was sufficient that they provided the city and state of mailing (*133 Cal. App. 4th 437, 443-444)* . The court concluded that in determining the timeliness of the lawsuit, the plaintiffs' contention that their attorney never received the notice of rejected claims was legally insufficient to create a triable issue on nonreceipt because the city had provided proofs of service by mail. Recognizing that evidence of nonreceipt is logically probative of nonmailing, the court nonetheless concluded that the Tort Claims Act places on the claimant the risk that a properly mailed notice of claimrejection will not be received due to an error by postal authorities. The Act provides a specific time frame for a public entity to reject a claim, and following a reasonable time after expiration of this period, a claimant should be aware that the claim has been denied and should inquire about notice of denial. A claimant should not be permitted to forgo this opportunity and rely on the fact that no notice was provided in order to extend the limitations period (*133 Cal. App. 4th 437, 445-446)* .

In *Dowell v. County of Contra Costa (1985) 173 Cal. App. 3d 896, 219 Cal. Rptr. 341* , plaintiff filed a timely claim for the wrongful death of her husband with defendant county and the state. Defendant county rejected her claim and mailed plaintiff notice of the rejection on March 24, 1982, without stating how or when it was served. The state rejected plaintiff's claim on June 1, 1982, but did not serve her with its notice of rejection until September 20, 1982. Plaintiff filed suit against defendant on November 12, 1982. Defendant filed a motion for summary judgment on the ground of failure to timely file a court action pursuant to *Gov. Code § 945.6*. The trial court granted the motion and rendered judgment for defendant. The court of appeal affirmed, concluding that the mailing of a notice of rejection starts the running of the six months within which the claimant must file suit on the claim, even though the notice neither states the date on which it was mailed nor is accompanied by a proof of service of mail (*173 Cal. App. 3d 896, 898)* .

Plaintiff had argued that the applicable statute of limitations was two years, since the notice of rejection of her claim did not specify the date on which it was mailed. She contended that defendant's notice did not comply with the requirements of *Gov. Code § 913*. The court disagreed and said that the language of *Gov. Code § 913* does not require that the notice of rejection indicate the date notice was personally delivered or deposited in the mail. The court said when the notice of rejection complies with *Gov. Code § 913*, the six-month statute of limitations cannot be extended by provisions outside the California Tort Claims Act, and plaintiff must be charged with knowledge of the six-month statute of limitations because she filed a timely government tort claim. The court suggested that a claimant who fails to receive a written notice of the public entity's action on the claim within a reasonable time after the end of the 45-day period or its consideration should make inquiry to determine whether, and if so, when, the notice was in fact served. The two-year period of limitations obtains only when the notice was not served; the six-month rule applies if notice was served, even though not actually received by the claimant (*173 Cal. App. 3d 896, 901)* . The court concluded that the notice sent to plaintiff contained a warning of the six-month statute of limitations and clearly informed her of the rejection of her claim. Since she filed a timely claim and received a notice of rejection, plaintiff must be charged with the knowledge of the six-month statute of limitations (*173 Cal. App. 3d 896, 901)* . It was her duty to investigate the exact date on which the rejection was mailed. Her cause of action against defendant was barred (*173 Cal. App. 3d 896, 902)* .

In *Glorietta Foods, Inc. v. City of San Jose (1983) 147 Cal. App. 3d 835, 195 Cal. Rptr. 355* , plaintiff, alleging that it suffered damages as result of action by the fire department of defendant city, filed a claim for damages. Fifty days after the claim was filed, defendant mailed a notice of rejection of the claim to plaintiff. Over one year later plaintiff filed suit. The trial court granted defendant's motion for summary judgment on the ground the action was barred by *Gov. Code § 945.6(a)(1)*. The court of appeal affirmed. Plaintiff contended that it had two years within which it could file the action pursuant to *Gov. Code § 945.6(a)(2)*, because defendant failed to accept or reject its claim within the 45 days prescribed by *Gov. Code §§ 911.6(a)* and *912.4(a)*. The court agreed that both code sections provided that the board "shall" act within 45 days, but said they were restricted in their scope to applications for late claims, and authorized extensions to the deadline for acting before a claim is deemed rejected by operation of law, respectively. The court said that *Gov. Code § 945.6(a)(1)* makes it clear that a public entity may give notice of rejection of a claim and commence the running of the six-month statute of limitations (*147 Cal. App. 3d 835, 838)* .

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CHAPTER 196 PUBLIC ENTITIES
PART II. FORMS
B. Filing of Action
2. Timely Filing of Action

19A-196 California Points & Authorities § 196.141

§ 196.141 Supporting Contention That Action Was Timely Filed--No Presentation of Claim Required [Gov. Code § 945.8]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S ACTION WAS TIMELY FILED BECAUSE THE CLAIM FILING REQUIREMENT DID NOT APPLY TO THE ACTION AND IT WAS FILED WITHIN _____ [*specify the applicable statute of limitations, e.g.*, ONE YEAR OF THE DATE OF PERSONAL INJURY], THE PERIOD APPLICABLE TO A DEFENDANT OTHER THAN A PUBLIC ENTITY.

When No Claim Required, Action Filed Within Statute of Limitations Applicable to Nonpublic Entity Defendant Is Timely. The plaintiff's action was timely filed because a claim was not required to be presented, and the action was commenced within the time prescribed by the statute of limitations that would be applicable if the action was brought against a defendant other than a public entity (*see Gov. Code § 945.8*; *Leaf v. City of San Mateo (1980) 104 Cal. App. 3d 398, 405-408, 163 Cal. Rptr. 711*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the complaint was timely filed against a public entity because (1) the action was not one that required presentation of a claim, (2) the action was commenced within the statutory period that would otherwise apply if the action were brought against a defendant other than a public entity, and (3) no different statute of limitations is specifically applicable to the public entity [*Gov. Code § 945.8*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be combined with general points and authorities opposing a motion for

summary judgment [*see, e.g., Leaf v. City of San Mateo (1980) 104 Cal. App. 3d 398, 402, 163 Cal. Rptr. 711]* . They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Applicable Statute of Limitations

An action against a public entity on a cause of action for which a claim is required to be presented in accordance with *Gov. Code §§ 900-915.4* must be commenced within the time provided by *Gov. Code § 945.6* [*Code Civ. Proc. § 342*; *see § 196.140*]. When presentation of a claim is not required, the action must be commenced within the time pre scribed by the statute of limitations that would be applicable if the action was brought against a defendant other than a public entity, unless a different statute of limitations is specifically applicable to the public entity [*see Gov. Code § 945.8*].

[c] Actions Not Requiring Claim

Gov. Code § 905 specifically exempts a variety of actions from the claim presentation requirement, among them claims under the Revenue and Taxation Code, claims for public assistance under the Welfare and Institutions Code, and claims for money under any public retirement or pension system [*see Gov. Code § 905(a), (e), (f)*; *see also Gov. Code §§ 905.1, 905.6*]. Exceptions to the claim presentation requirement are set out fully in § 196.30.

[d] Related Pleading and Practice Forms

For a general discussion of the limitation of actions, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* (Matthew Bender). For discussion of the limitation of actions in particular areas, see the chapters pertaining to those topics in that publication.

[e] Related Points and Authorities

For memoranda of points and authorities opposing a general demurrer to a complaint based on the ground that the action is barred by a statute of limitations, see Ch. 143, *Limitation of Actions* .

[3] Discussion of Authorities

[a] When No Claim Required, Action Filed Within Statute of Limitations Applicable to Nonpublic Entity Defendant Is Timely

In ***Leaf v. City of San Mateo*** *(1980) 104 Cal. App. 3d 398, 163 Cal. Rptr. 711* , plaintiffs brought an action in inverse condemnation, continuing nuisance, and dangerous condition of public property, arising from subsidence-related damage to real property alleged to be the result of defective sewage and drainage systems of defendant city. The trial court granted defendant's motion for summary judgment on the ground that the action was barred by the statute of limitations. Plaintiffs appealed.

The court of appeal reversed. Although never mentioned by the court, the action was not one in which a claim was required to be presented prior to bringing suit against a public entity. Thus, in deciding whether the action was barred by the statute of limitations, the court considered *Code Civ. Proc. § 337.15* and former Code Civ. Proc. § 338(2) [*now see Code Civ. Proc. § 338(b)*], rather then any of those within the provisions of the California Tort Claims Act. The court said that defendant was not a developer, which was the class that *Code Civ. Proc. § 337.15* was designed to protect, and concluded that *Code Civ. Proc. § 337.15* did not govern the action (*104 Cal. App. 3d 398, 405)* . Thus, whether or not plaintiffs' claim was barred by some other applicable statute of limitations was dependent on a determination of when the cause of action accrued. The court said that the cause of action accrued from the time when plaintiffs became aware

of defendant's negligence as a cause, or could have become so aware through the exercise of reasonable diligence (*104 Cal. App. 3d 398, 408)* .

[4] Opposing Authorities

[a] When No Claim Required, Action Filed Within Statute of Limitations Applicable to Nonpublic Entity Defendant Is Timely

In *Tharp v. Superior Court (1982) 32 Cal. 3d 496, 186 Cal. Rptr. 335, 651 P.2d 1141* , petitioners filed a petition for writs of prohibition andmandate seeking to compel the New Motor Vehicles Board to dismiss a proceeding against them. The Board successfully moved for a change of venue on the basis of *Gov. Code § 955*. The California Supreme Court issued a peremptory writ of mandate directing the superior court to vacate its order for change of venue. The Court discussed the scope of the California Tort Claims Act, and said that *Gov. Code §§ 940-960.8* cover actions against public entities, including the state. It said there is no doubt that the actions against public entities to which those statutes relate are only those to which the claims procedures of *Gov. Code §§ 900-935.7* apply--claims for money or damages--or claims which, though for money or damages, are specifically exempted from the requirement of a claim. Citing *Gov. Code §§ 945.4* and *945.8* as authority, the Court listed as an example the matters listed in *Gov. Code §§ 905* and *905.2*. The Court concluded that *Gov. Code § 955* is part of the special provisions relating to actions against the state and there was absolutely no reason to suppose that it related to any type of action other than actions on claims for money or damages for which the filing of a claim is a statutory prerequisite or actions on claims for money or damages which are specifically exempted from the filing requirement (*32 Cal. 3d 496, 500-501)* .

In *Tubbs v. Southern Cal. Rapid Transit Dist. (1967) 67 Cal. 2d 671, 63 Cal. Rptr. 377, 433 P.2d 169* , plaintiff was injured while a passenger on defendant's bus. She presented a timely claim to the public entity, and later filed a complaint for personal injuries. The trial court sustained defendant's demurrer and dismissed the action. Plaintiff appealed. The California Supreme Court affirmed. The Court said that because plaintiff's cause of action accrued before the effective date of the general claims procedure and she presented a timely claim to the public entity, her claim was deemed to have been presented on September 20, 1963. The Court found that under the applicable provisions, her complaint was not timely filed, and was barred by the statute of limitations (*67 Cal. 2d 671, 675)* . In order to obviate the bar of the statute of limitations, plaintiff filed a second amended complaint in which she argued that no claim was required, and that her filing of a claim had been a superfluous act and should be disregarded. The Court considered the applicable Government Code provisions and rejected plaintiff's argument (*67 Cal. 2d 671, 676)* . Finally, plaintiff argued that the usual one-year statute of limitations, and not the six-month statute, applied to her cause of action by virtue of *Gov. Code § 945.8*. The Court disagreed, noting that *Gov. Code § 945.8* applies to certain claims exempt from the general claims procedure, for example, the exceptions listed in *Gov. Code § 905*, but it did not apply to plaintiff's action (*67 Cal. 2d 671, 677)* .

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CHAPTER 196 PUBLIC ENTITIES
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19A-196 California Points & Authorities § 196.142

§ 196.142 Supporting Contention That Action Was Timely Filed--Following Order Granting Relief From Claim Presentation Requirement [Gov. Code § 946.6(f)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S ACTION WAS TIMELY FILED BECAUSE IT WAS FILED WITHIN 30 DAYS AFTER THE COURT ORDER RELIEVING HIM/HER FROM THE CLAIM FILING REQUIREMENT.

Action Filed Within 30 Days After Court-Ordered Relief From Claim Requirement Is Timely. The plaintiff's action was timely filed because the court issued an order relieving the plaintiff from the claim filing requirement of *Government Code section 945.4*, and the suit was filed within 30 days after that order (*Gov. Code § 946.6(f)*; *County of Nevada v. Superior Court (1986) 183 Cal. App. 3d 806, 809, 228 Cal. Rptr. 447* *Brown v. Huntington Beach Union High Sch. Dist. (1971) 15 Cal. App. 3d 640, 646, 93 Cal. Rptr. 417*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the complaint was timely filed because it was filed within 30 days after the court order relieving the plaintiff from the claim filing requirement [*see Gov. Code § 946.6(f)*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be combined with general points and authorities opposing a demurrer [*see, e.g.,* *Brown v. Huntington Beach Union High Sch. Dist. (1971) 15 Cal. App. 3d 640, 642, 93 Cal. Rptr. 417]* . They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Commencement of Thirty-Day Period

When the court order granting relief from compliance with the claims requirement is contained in a minute order that does not call for the preparation and filing of a formal order, the 30-day statute of limitations commences on the date the minute order is made and filed [*McHale v. State of California (1981) 125 Cal. App. 3d 396, 399, 178 Cal. Rptr. 83]* . However, the 30-day period commences on the date of the minute order only if the minute order does not call for the preparation and filing of a formal order. If the court elects to make a formal order, or direct that such an order be prepared and entered, then the 30-day period commences with the entry of that formal order [*County of Nevada v. Superior Court (1986) 183 Cal. App. 3d 806, 808-809, 228 Cal. Rptr. 447* ; *Todd v. County of Los Angeles (1977) 74 Cal. App. 3d 661, 663, 663 n.1, 141 Cal. Rptr. 622]* . The period commences with the date of the order, and is not extended until actual notice [*Fritts v. County of Kern (1982) 135 Cal. App. 3d 303, 307-308, 185 Cal. Rptr. 212]* .

[c] Related Points and Authorities

For memoranda of points and authorities opposing a general demurrer to a complaint based on the ground that the action is barred by a statute of limitations, see Ch. 143, *Limitation of Actions* .

[3] Discussion of Authorities

[a] Action Filed Within 30 Days After Court-Ordered Relief From Claim Requirement Is Timely

In ***County of Nevada v. Superior Court*** *(1986) 183 Cal. App. 3d 806, 228 Cal. Rptr. 447* , plaintiff petitioned the court for relief from the claim filing requirement. Defendant did not oppose that request, and on August 26, 1985, the trial court announced from the bench that the motion was granted. A minute order reflecting that ruling was entered by the clerk that same day. Plaintiff's counsel prepared a formal order which was signed by the judge and filed on September 4. On October 3, plaintiff filed a complaint against defendant for personal injuries. Defendant demurred, claiming the complaint was barred by the 30-day limitation of *Gov. Code § 946.6(f)*. The trial court overruled the demurrer and defendant sought a writ of mandate directing the trial court to sustain the demurrer.

The court of appeal denied the petition for writ of mandate. Defendant contended that the 30-day period commenced running with the minute order, and cited *McHale v. State of California (1981) 125 Cal. App. 3d 396, 178 Cal. Rptr. 83* , as authority. The court distinguished *McHale*, and said that the entry of the minute order constitutes the operative date for commencement of the 30-day period only if the minute order does not call for the preparation and filing of a formal order. The court observed that a trial court may elect to make a formal order, or direct that such an order be prepared and entry then consists of filing the signed order with the clerk (*183 Cal. App. 3d 806, 808-809)* . Although the minute order entered in this case did not include an express instruction that a formal order be prepared, the court of appeal noted that by operation of local court rule, the trial court was deemed to have directed preparation by plaintiff of a formal order for its signature when, on August 26, it granted the application for relief. Accordingly, the court found the 30 days within which plaintiff could file her action did not commence until September 4, and the complaint was timely (*183 Cal. App. 3d 806, 809)* .

In ***Brown v. Huntington Beach Union High Sch. Dist.*** *(1971) 15 Cal. App. 3d 640, 93 Cal. Rptr. 417* , plaintiff sustained personal injuries in an accident, which she alleged was caused by the negligence of defendant public entities. On April 16, 1969, the trial court granted plaintiff relief from the claim filing requirement. Plaintiff filed a complaint on May 7, 1969, 21 days after that court order. Defendants demurred to the complaint, claiming it was barred by the statute of limitations. The trial court sustained the demurrer without leave to amend, and dismissed the action. Plaintiff appealed.

The court of appeal reversed. The court said that *Gov. Code § 946.6(f)* provides a special period of limitations on actions that can be commenced only after relief from the claims presentation requirement is granted. It establishes a maximum period of 30 days after the granting of judicial relief within which the claimant may commence his or her action. The court said that period may be longer or shorter than the normal period of limitations for actions on claims. The court observed that plaintiff was granted the right to commence suit and did so within the period enunciated. The court further observed that defendant was not injured by the commencement of the action, but had been informed of the accident since the day it occurred (*15 Cal. App. 3d 640, 646)* .

[4] Additional Authorities

[a] Action Filed Within 30 Days After Court-Ordered Relief From Claim Requirement Is Timely

In *Black v. County of Los Angeles (1976) 55 Cal. App. 3d 920, 127 Cal. Rptr. 916* , plaintiffs filed an original and an amended complaint against defendant county in which they sought damages resulting from an automobile accident. After a trial, the trial court entered judgment in favor of plaintiffs. Plaintiffs moved for new trial on the grounds that damages were inadequate. That motion was granted as to only two of the minor plaintiffs and only on the issue of damages. Defendants appealed the judgment and the order granting a new trial. The court of appeal affirmed in part and reversed in part. In addressing the issue of the timeliness of minor plaintiffs' actions, the court reviewed the timelines of the case. The trial court had granted plaintiff minors' petition relieving them of the provisions of *Gov. Code § 945.4*. That order was dated September 10, 1969. The amended complaint was not filed until December 2, 1969. Defendant county contended that the cause of action was barred because minorplaintiffs failed to file the amended complaint within 30 days after the court order (*55 Cal. App. 3d 920, 930)* . However, the court disagreed, and said that the original complaint alleged that plaintiffs did not know and did not have reason to know within the claim-filing period that any public entity defendants might be responsible for the accident. The court found that plaintiffs sufficiently stated a cause of action to permit the amended complaint to relate back to the original complaint. Thus, the court concluded that the causes of action for personal injuries and wrongful death asserted by minors were not barred by *Gov. Code § 946.6(f)* (*55 Cal. App. 3d 920, 931)* .

[5] Opposing Authorities

[a] Action Filed Within 30 Days After Court-Ordered Relief From Claim Requirement Is Timely

The facts and procedural background of *Mandjik v. Eden Township Hosp. Dist. (1992) 4 Cal. App. 4th 1488, 6 Cal. Rptr. 2d 582* , are discussed in *§ 196.140[4][b]*. Although the court of appeal reversed the trial court dismissal, that holding was based on the defective warning language. The court of appeal agreed with the trial court determination that the complaint was not filed within the statutory 30-day period following late claim relief. It said that the 30-day period commences when the court makes an order granting relief. Absent a court directive or a local rule requiring that a formal order be prepared, the date the court "makes an order" is the date it enters its minute order granting relief (*4 Cal. App. 4th 1488, 1496-1497)* . The court rejected plaintiffs' attempts to distinguish their case from the *McHale* line of cases (*4 Cal. App. 4th 1488, 1497-1498)* .

In *Fritts v. County of Kern (1982) 135 Cal. App. 3d 303, 185 Cal. Rptr. 212* , after failing to file a timely claim against defendant county, plaintiff petitioned the court to be relieved of the claim filing requirement. A minute order granting the petition was prepared and mailed to the parties. Thirty one days later plaintiff filed a complaint. Defendant demurred to the complaint, claiming it was barred by the 30-day statute of limitations of *Gov. Code § 946.6(f)*. The trial court sustained the demurrer without leave to amend, and the court of appeal affirmed. The court said the procedure for granting relief from the claim statutes is remedial in nature and must be liberally construed in favor of the claimant, but that liberality does not extend to the 30-day statute of limitations. The California Tort Claims Act indulges late claimants, not late suitors. A late claim suggests late discovery of the proper means of redress. Once a claimant has filed a claim, he or she demonstrates familiarity with the statutory procedures governing that grievance, and can reasonably be charged with knowledge of the time limitations that are part of that procedure (*135 Cal. App. 3d 303, 305-306)* .

The court concluded that the commencement of the 30-day limitation period in *Gov. Code § 946.6(f)* is not extended until actual notice (*135 Cal. App. 3d 303, 307)* . Nor is it extended for an additional five days due to *Code Civ. Proc. § 1013(a)* (service of notice by mail) (*135 Cal. App. 3d 303, 308)* .

In *Rivera v. City of Carson (1981) 117 Cal. App. 3d 718, 173 Cal. Rptr. 4* , plaintiffs petitioned for relief from the claim filing requirement so that they could file a negligence action against defendant city. On August 29, 1979, the trial court granted the petition on the ground that plaintiffs were minors during the period for presentation of claims. On October 1, 1979, plaintiffs filed a complaint against defendant, who demurred to the complaint, claiming it was barred by the 30-day statute of limitations of *Gov. Code § 946.6(f)*. The trial court sustained the demurrer without leave to amend, and dismissed the action, and the court of appeal affirmed (*117 Cal. App. 3d 718, 728)* . The court said that the statute of limitations of *Gov. Code § 946.6(f)* is not tolled by the minority of a petitioner who has been relieved of the requirement of filing a claim before bringing suit against a public entity. The prescribed statutes of limitation for commencement of actions against the state are mandatory and must be strictly complied with. The complaint showed on its face that plaintiffs' action was barred by the *Gov. Code § 946.6(f)* statute of limitations (*117 Cal. App. 3d 718, 726)* .

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19A-196 California Points & Authorities § 196.143

§ 196.143 Supporting Contention That Action Against Public Employee Was Timely Filed [Gov. Code § 950.6]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S ACTION AGAINST _____ [*name*], A[N] [FORMER] EMPLOYEE OF _____ [*specify public entity*] WAS TIMELY FILED BECAUSE IT WAS FILED WITHIN _____ [*specify the applicable statute of limitations, e.g.,* SIX MONTHS AFTER THE NOTICE OF REJECTION OF HIS/HER CLAIM], THE PERIOD APPLICABLE TO AN ACTION BY HIM/HER AGAINST THE PUBLIC ENTITY.

A. Action Against Public Employee Is Timely When Commenced Within Time Applicable to Public Entity. The plaintiff's action against the public employee or former public employee whose act or omission caused the plaintiff injury was timely filed because a written claim for money or damages for injury was presented to the employing public entity, and that claim was rejected, or wasdeemed to have been rejected, and the action was commenced within the time by *Section 945.6 of the Government Code* for bringing an action against a public entity (*Gov. Code § 950.6(a), (b)*).

[*Optional*] **B. Action Filed Within Six Months After Restoration of Civil Right to Commence Action Is Timely.** The plaintiff's action was timely filed because he or she was sentenced to imprisonment in a state prison, and was thereby deprived of his or her civil right to commence actions, and the plaintiff filed the action within six months after the date that his or her civil right to commence actions was restored (*Gov. Code § 950.6(c)*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of the contention that the complaint against a public employee or former public employee was timely filed because it was filed within the time requirements set forth

in *Gov. Code § 945.6* [*see Gov. Code § 950.6*].

When appropriate, these points and authorities may be combined with the points and authorities *set out in § 196.140*, which support the general contention that an action has been filed within the time requirements of *Gov. Code § 945.6*. They may also be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be combined with general points and authorities opposing a demurrer or a motion for summary judgment. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Points and Authorities

For memoranda of points and authorities opposing a general demurrer to a complaint based on the ground that the action is barred by a statute of limitations, see Ch. 143, *Limitation of Actions* .

[3] Opposing Authorities

[a] Action Against Public Employee Is Timely When Commenced Within Time Applicable to Public Entity

In *Julian v. City of San Diego (1986) 183 Cal. App. 3d 169, 229 Cal. Rptr. 664* , on June 20, 1984, plaintiff filed a claim with defendant city for damages for personal injuries. On August 3, that claim was rejected. Additionally, plaintiff's claim for consequential damages arising from the accident, filed on July 31, was rejected on September 14, 1984. On March 5, 1985, plaintiff filed an application to present a late claim for damages, and attached a proposed claim naming the city and specific city employees as defendants. After defendant city refused to consider the proposed claim, plaintiff petitioned the court for an order for relief from the claim filing requirement. The court of appeal affirmed the trial court's denial of that petition (*183 Cal. App. 3d 169, 177*). It said that the six-month period within which to commence an action for damages for personal injuries against public employees begins to run once the six-month period for instituting an action against the employing public entity is triggered by rejection of a claim for damages against the public entity and unnamed public employees (*183 Cal. App. 3d 169, 171)* . The court said only one claim was required and plaintiff's attempt to file a late claim with defendant city by naming city employees allegedly responsible for creating the dangerous condition was ineffective to avoid the bar of the six-month statute of limitations governing his claim (*183 Cal. App. 3d 169, 173)* . The court found that the allegations in plaintiff's claim and proposed late claim show he did not seek to impose liability against individuals who just happened to be public employees. Rather, the claims reflected liability, if any, for plaintiff's injuries arising from the acts of omissions of the employees in the course and scope of their employment resulting in the creation and maintenance of a dangerous condition. No independent or separate basis for imposing liability against the employees outside their employment was alleged in the proposed late claim such that the city would not be subject to potential liability (*183 Cal. App. 3d 169, 174)* . The court said that presentation of a claim against a public employee or former public employee for injury resulting from an act or omission in the scope of his or her public employment is not a prerequisite to the maintenance of an action against the employee, but presentation of a claim against the employing public entity is a prerequisite. *Gov. Code § 950.6* requires an action against the employee to be commenced within the time prescribed for bringing an action against the public entity. A claim for damages for injuries caused by a public employee while acting within the course and scope of his or her employment need not be presented before instituting a court action for those damages against the public employee. However, presentation of a claim to the employing public entity is a condition precedent to maintenance of a court action and the six-month limitations period applies to those actions. The court said plaintiff's assertion that a separate claim for damages against the city employees for his personal injuries was required to be presented was without merit. Scrutiny of the claim and the proposed late claim shows that the basis of potential liability is the same in each (*183 Cal. App. 3d 169, 175)* . Since the only difference between the proposed late claim and the first claim was the substitution of names of the public employees in the later claim, the later claim amounted to no more

than an attempt to amend the original claim. Thus,the amendment relates back to the date the original claim was filed. As a consequence, the court said the six-month statute of limitations began to run from the date the claim was rejected. Since a separate claim was not required, the application for relief from the claim filing requirement was properly denied because the six-months statute of limitation barred any action against the city employees (*183 Cal. App. 3d 169, 176)* .

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[Reserved]

§§ 196.144[Reserved]

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19A-196 California Points & Authorities § 196.160

§ 196.160 Supporting Contention That Action Is Not Barred by Statute of Limitations--Statute Tolled Pending Resolution of Related Administrative Hearing

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S ACTION IS NOT BARRED BECAUSE THE STATUTE OF LIMITATIONS WAS TOLLED WHILE PLAINTIFF WAS PURSUING HIS/HER ADMINISTRATIVE REMEDIES.

A. Tolling of Statute of Limitations. The statute of limitations for actions against public entities is tolled while the plaintiff is pursuing related administrative remedies that may be dispositive of an essential element of the cause of action (*Olson v. County of Sacramento (1974) 38 Cal. App. 3d 958, 960-965, 113 Cal. Rptr. 664*).

[*Optional*] **B. Tolled Pending Review of Dismissal.** The statute of limitations for an action against a public entity for wrongful dismissal is tolled while the former employee plaintiff is pursuing administrative remedies for his or her dismissal and then seeking judicial review of the denial of administrative relief (*Olson v. County of Sacramento (1974) 38 Cal. App. 3d 958, 960-965, 113 Cal. Rptr. 664*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to the argument that the action is barred by the statute of limitations. It is based on the contention that the plaintiff's pursuit of related administrative remedies tolled the statute of limitations.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be combined with general points and authorities opposing a demurrer [

see, e.g., Olson v. County of Sacramento (1974) 38 Cal. App. 3d 958, 959, 113 Cal. Rptr. 664] . They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Additional Tolling Provisions

No person charged with a criminal offense may bring a civil action for money or damages against a police officer or the employing public entity based on that peace officer's conduct relating to the charged offense while those charges are pending before a municipal or superior court. However, this restriction does not prohibit the filing of a claim with the board of a public entity, and does not extend the time within which a claim is required [*see Gov. Code § 945.3*; *see also Schmidlin v. City of Palo Alto (2007) 157 Cal. App. 4th 728, 756-760, 69 Cal. Rptr. 3d 365* ("charges pending before a court" includes charges embodied in notice to appear served on plaintiff)].

Any person, including any insurer, who makes an advance or partial payment, as an accommodation to an injured person or on that person's behalf to his or her heirs or dependents, must at the time of beginning payment notify the recipient in writing of the statute of limitations applicable to the cause of action which that recipient may bring against that person as a result of that injury or death, including any time limitations within which claims are required to be made against the state or any local public entity when those payments are made on behalf of those public entities. Failure to provide that written notice will operate to toll any applicable statute of limitations or time limitations from the time of that advance or partial payment until that written notice is actually given [*Ins. Code § 11583*].

Code Civ. Proc. § 352 sets forth generally tolling provisions applicable to persons who are minors, insane, or imprisoned. It is not applicable to actions against a public entity or public employee within the parameters of the California Tort Claims Act [*Code Civ. Proc. § 352(b)*; *Moyer v. Hook (1970) 10 Cal. App. 3d 491, 494, 89 Cal. Rptr. 234]* .

[c] Related Pleading and Practice Forms

For a general discussion of the limitation of actions, see Ch. 345, *Limitation of Actions* , California Forms of Pleading and Practice (Matthew Bender). For discussion of review of administrative hearings, see California Forms of Pleading and Practice, Ch. 474. *Availability of Judicial Review of Agency Decision* , through Ch. 474C, *Procedures in Reviewing Agency Decisions* (Matthew Bender).

[d] Related Points and Authorities

For memoranda of points and authorities relating to the tolling of the statute of limitations, see Ch. 143, *Limitation of Actions* . For memoranda of points and authorities relating to public administrative decisions, see Ch. 195, *Public Administrative Law* .

[3] Discussion of Authorities

[a] Tolling of Statute of Limitations

Olson v. County of Sacramento *(1974) 38 Cal. App. 3d 958, 113 Cal. Rptr. 664* , was an action for damages for wrongful dismissal from employment with defendant county. Prior to bringing the action, plaintiff had appealed his dismissal to the Civil Service Commission, sought a writ of administrative mandamus to review denial of reinstatement by the commission, and appealed the denial of the writ. The appeal resulted in plaintiff's reinstatement. He then filed a claim and action against defendant. Defendant demurred, contending that the statute of limitations had run because the action was not timely filed in relationship to plaintiff's dismissal from employment. The trial court sustained the

demurrer and dismissed the action. Plaintiff appealed.

The court of appeal reversed. It said that the basis of plaintiff's claim was the wrongfulness of his discharge. If the discharge was lawful, so long as the order of discharge and the findings, decision, and rulings of the civil service commission and the court remained undisturbed, any emotional, mental, or physical pain consequential thereto were not compensable. They would constitute an insuperable barrier to the successful prosecution of plaintiff's claim for damages (*38 Cal. App. 3d 958, 963)* . The court observed that if plaintiff had not exhausted his administrative remedies and the writ of mandate proceedings, his dismissal would have become final and a permanent bar to his assertion of any rights flowing from his wrongful discharge (*38 Cal. App. 3d 958, 964)* . The court emphasized that the judicial policy underlying the tolling of statutes of limitations during the pendency of interrelated administrative proceedings in cases when the latter may be dispositive of an essential element of a legal cause of action is founded on the need for harmony and the avoidance of chaos in the administration of justice. Tolling avoids a multiplicity of actions in cases having common elements of law or fact, or both and relieves litigants of the pressure to outrace each other in seeking an adjudication of one or the other of the legal proceedings in a forum where he or she may believe there is a greater chance of prevailing. The court concluded that the orderly administration of justice is best served by tolling the statute of limitations on independent causes of actions at law until the final determination of the interrelated administrative proceeding (*38 Cal. App. 3d 958, 965)* .

[b] Tolled Pending Review of Dismissal

Olson v. County of Sacramento *(1974) 38 Cal. App. 3d 958, 113 Cal. Rptr. 664* , is discussed in *§ 196.160[3][a]*.

[4] Additional Authorities

[a] Tolling of Statute of Limitations

In *A. Teichert & Son, Inc. v. State of California (1965) 238 Cal. App. 2d 736, 48 Cal. Rptr. 225* (qualified on another point in *E.H. Morrill Co. v. State of California (1967) 65 Cal. 2d 787, 792, 56 Cal. Rptr. 479, 423 P.2d 551*), plaintiff was a contractor on a state highway construction project. There was a dispute about payment for extra work and plaintiff followed settlement remedies prescribed by the contract. When an adequate settlement was not reached, plaintiff filed a claim and then filed suit. In the trial court the state prevailed on the theory that the claim and action were not timely filed because plaintiff's cause of action arose when the contract was completed. The court of appeal reversed, stating that the statute of limitations is suspended during the pendency of administrative proceedings, which form a necessary prelude to a lawsuit (*238 Cal. App. 2d 736, 746)* , or during pursuit of extrajudicial settlement of disputes as required by contract (*238 Cal. App. 2d 736, 746, 747)* . The court found that under one doctrine or the other, the claims under the contract with the state did not accrue, and the two-year period for filing such claims did not start until completion of the settlement procedure established by the contract specifications (*238 Cal. App. 2d 736, 747)* .

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19A-196 California Points & Authorities § 196.161

§ 196.161 Supporting Contention That Action Is Not Barred By Statute of Limitations--Statute Tolled While Related Federal Action Pending

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE PLAINTIFF'S ACTION IS NOT BARRED BECAUSE THE STATUTE OF LIMITATIONS WAS TOLLED PENDING THE RESOLUTION OF A RELATED FEDERAL ACTION.

Tolling Statute of Limitations. The statute of limitations in *Section 945.6 of the Government Code* providing that an action against a public entity must be filed within six months after the denial of the claim is tolled when, after timely filing a claim with the public entity, the plaintiff files the action in federal court. The statute of limitations is tolled during the period the federal action is pending, and the state court action is timely if it is filed within six months after the denial of the claim, not including the time the federal action was pending (*Addison v. State of California (1978) 21 Cal. 3d 313, 316-321, 146 Cal. Rptr. 224, 578 P.2d 941*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to the argument that the action is barred by the statute of limitations. It is based on the contention that the statute of limitations is tolled pending the resolution of a related federal action between the parties.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be combined with general points and authorities opposing a demurrer [*see, e.g., Addison v. State of California (1978) 21 Cal. 3d 313, 316, 146 Cal. Rptr. 224, 578 P.2d 941]* . They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Points and Authorities

For memoranda of points and authorities relating to the tolling of the statute of limitations, see Ch. 143, *Limitation of Actions* .

[3] Discussion of Authorities

[a] Tolling Statute of Limitations

In ***Addison v. State of California*** *(1978) 21 Cal. 3d 313, 146 Cal. Rptr. 224, 578 P.2d 941* , plaintiffs, sellers of automobiles at auctions, were investigated for fraudulent sales practices in a widely publicized investigation during which records were seized. No criminal proceedings resulted. Plaintiffs then filed timely damage claims with the state and defendant investigating county for defamation, abuse of process, and conversion. After the claims were denied, plaintiffs filed an action in federal court, based on the same claims for civil rights violations, and relying on pendent jurisdiction for the torts. More than six months after the denial of the claim, plaintiffs also filed a state court action. The federal action was then dismissed without prejudice to the state action. The state trial court sustained defendants' demurrer on the basis of the statute of limitations, and dismissed the action. Plaintiffs appealed.

The Supreme Court reversed, after applying the doctrine of equitable tolling and finding that the six-month limitation period was suspended during the period when plaintiffs' claims were pending in federal court (*21Cal. 3d 313, 316)* . The Court acknowledged the primary purpose of statutes of limitations, which is to prevent the assertion of stale claims by plaintiffs who have failed to file while the evidence is fresh and witnesses are available. However, it also recognized the general policy that favors relieving a plaintiff from the bar of a limitations statute when, possessing several legal remedies, that plaintiff, reasonably and in good faith, pursues one designed to lessen the extent of his or her injuries or damage (*21 Cal. 3d 313, 317)* . It said that equitable tolling requires timely notice, and lack of prejudice, to the defendant, and reasonable and good-faith conduct on the part of the plaintiff. The Court found that all those elements were present. The federal action involved the same set of facts, and its filing notified defendants of the action and gave them the opportunity to gather evidence and prepare a defense. The Court concluded that applying equitable tolling in plaintiffs' case satisfied the policy underlying the statute of limitations without ignoring the competing policy of avoiding technical and unjust forfeitures (*21 Cal. 3d 313, 319)* . The Court disagreed with defendants' contention that the equitable tolling doctrine should not apply to public entities because it would conflict with the California Tort Claim Act (*21 Cal. 3d 313, 319-320)* .

NOTE:

In *Addison,* the Court found it significant that the warning contained in the notice of rejection of the plaintiffs' claim, although in compliance with the notice set forth in *Gov. Code § 913(b),* did not specify that the action was required to be filed in state court, and gave no indication that filing in federal court would not comply equally with the statutory mandate [*Addison v. State of California (1978) 21 Cal. 3d 313, 320, 146 Cal. Rptr. 224, 578 P.2d 941]* . For additional discussion of notice of rejection of claim, see *§ 196.140*.

[4] Additional Authorities

[a] Tolling Statute of Limitations

In *McAlpine v. Superior Court (1989) 209 Cal. App. 3d 1, 257 Cal. Rptr. 32* , a police officer stopped two men who matched a description of recent robbery suspects, but when they drove away before he could question them, he fired

shots, killing the driver and injuring plaintiff. Plaintiff's timely filed tort claim against defendants, the city and the police officer, was denied. Plaintiff was charged with armed robbery, attempted robbery, and auto theft, to which he pleaded nolo contendere. He was found guilty, and was sentenced three months later. Four months after sentencing, plaintiff filed a tort action in federal court, which he dismissed seven months later when he filed his tort action in state court. Defendants demurred, contending the action was barred by *Gov. Code § 945.6*. The trial court overruled the demurrer, and the court of appeal denied defendants' petition for a writ of mandate. *Gov. Code § 945.3* prevented plaintiff from filing a tort action against defendants while the criminal charges against him were pending. The court concluded that for purposes of *Gov. Code § 945.3*, criminal charges are pending until the date of judgment and sentence. Thus, the complaint in federal court was timely filed (*209 Cal. App. 3d 1, 6-8)* . The court also held that under the doctrine of equitable tolling, the federal filing tolled the statute of limitations on the state complaint, explaining that under the equitable tolling doctrine an alternative remedy pursued during the limitations period, such as a timely filed federal action, will toll the statute of limitations (*209 Cal. App. 3d 1, 5)* .

[5] Opposing Authorities

[a] Tolling Statute of Limitations

In *Dowell v. County of Contra Costa (1985) 173 Cal. App. 3d 896, 219 Cal. Rptr. 341* , discussed in *§ 196.140[5][b]*, plaintiff's action against defendant county was subject to a summary motion by defendant for failure to comply with the statute of limitations of *Gov. Code § 945.6*. On appeal, plaintiff contended that the statute of limitations on her cause of action against defendant county was tolled during the pendency of her claim against the state, and therefore her action against defendant was timely filed following the state's notice of rejection of her claim on September 20, 1982. The court of appeal observed that this argument invoked the doctrine of equitable tolling, and that plaintiff had not raised that doctrine in the trial court. Since she may not raise a new theory for the first time on appeal, the court did not need to address the issue, but went on to address it anyway (*173 Cal. App. 3d 896, 902)* . The court said the doctrine was not applicable. The doctrine of equitable tolling applies only when the plaintiff commences a second action that is in reality a continuation of an earlier action involving the same parties, facts, and cause of action. Due to the lack of identity of the parties, the existence of continuing administrative proceedings by plaintiff against the state would not toll the statute of limitations for plaintiff's cause of action against defendant. The court explained there are three basic requirements for application of the doctrine of equitable tolling: timely notice, lack of prejudice to the defendants, and reasonable and good-faith conduct on the part of the plaintiff. The court said that plaintiff's failure to file suit against defendant until her action on her claim against the state did not provide defendant with notice of her intention to bring suit or prevent prejudice to it. Since the claims proceedings were entirely separate and defendant was not put on notice of plaintiff's intention to sue, the doctrine of equitable tolling was inapplicable (*173 Cal. App. 3d 896, 903)* .

In *Loehr v. Ventura County Community College Dist. (1983) 147 Cal. App. 3d 1071, 195 Cal. Rptr. 576* , plaintiff was dismissed as school superintendent and brought an action under the federal Civil Rights Act in federal court. While that action was pending, plaintiff attempted to comply with the filing requirements under the California Tort Claims Act by filing a claim with defendant college district. After his claim was rejected, plaintiff attempted to amend his federal pleading to add pendent state claims and filed an action in state court for wrongful termination seeking damages and reinstatement. The trial court sustained defendants' demurrers to the complaint and dismissed the action. The court of appeal affirmed (*147 Cal. App. 3d 1071, 1087*). After the court concluded that plaintiff had not complied with the claim filing requirement because his alleged claim did not satisfy the requirements of a claim, it examined the doctrine of equitable tolling of the statute of limitations (*147 Cal. App. 3d 1071, 1084)* . It said that the doctrine of equitable tolling generally applies when an injured person has several legal remedies and, reasonably and in good faith, pursues one designed to lessen the extent of the injury or damages (*147 Cal. App. 3d 1071, 1084)* . The court explained that equitable tolling involves a three-part test. First, the filing of the first claim must provide the defendant in the second claim with timely notice of the need to begin investigating the facts that form the basis of that claim. Generally this means that the defendant in the first claim is the same one being sued in the second. Second, the facts of the two claims must be identical or at least so similar that the defendant's investigation of the first claim will place him or her in a

position to fairly defend the second. Third, the plaintiff must have acted reasonably and in good faith in filing the second claim (*147 Cal. App. 3d 1071, 1085)* . The court observed that each of the causes of action asserted in plaintiff's complaint was predated on a different wrong, and based on a set of facts independent of those set forth in his suit under the federal Civil Rights Act (*147 Cal. App. 3d 1071, 1085)* . The court characterized plaintiff's reliance on *Addison v. State of California (1978) 21 Cal. 3d 313, 146 Cal. Rptr. 224, 578 P.2d 941* , as misplaced. It said that *Addison* applied the doctrine of equitable tolling to situations involving litigants who, possessing several legal remedies for the same harm, reasonably and in good faith pursued one. *Addison* does not say that the statute of limitations should be tolled while a plaintiff who allegedly suffered different wrongs pursues only one remedy for one of those wrongs. The court said that plaintiff failed timely to file any claim that would have alerted defendants to the nature of the various causes of action eventually asserted in the state court suit. Because the federal and state court actions were substantially dissimilar in both the remedies sought and the wrongs alleged, the filing of the federal suit could not have provided timely notice to defendants of the causes of action subsequently alleged in the state court complaint (*147 Cal. App. 3d 1071, 1086)* .

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19A-196 California Points & Authorities § 196.162

§ 196.162 Supporting Contention That Action Is Not Barred by Statute of Limitations--Public Entity Estopped From Relying on Statute by Engaging in Settlement Negotiations Throughout Limitations Period

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S ACTION IS NOT BARRED BECAUSE DEFENDANT PUBLIC ENTITY IS ESTOPPED FROM RELYING ON THE STATUTE OF LIMITATIONS IN THAT IT CONTINUED TO NEGOTIATE WITH PLAINTIFF IN AN ATTEMPT TO COMPROMISE THE CLAIM DURING THE LIMITATION PERIOD.

A. Public Agency Is Estopped From Asserting Statute of Limitations When It Continued to Engage in Settlement Negotiations. When a public entity engages in settlement negotiations with the plaintiff through the period of limitations for filing an action, the plaintiff is justified in relying on the public entity to reject the claim if a compromise is not reached and thus the public entity is estopped from relying on the statute of limitations (*Potstada v. City of Oakland (1973) 30 Cal. App. 3d 1022, 1027-1029, 106 Cal. Rptr. 705*).

[*Optional*] **B. Estoppel Based on Request to Delay Filing Action.** A public entity is estopped from relying on the statute of limitations when it has engaged in settlement negotiations with the plaintiff and has requested that suit not be filed until after a specified document is received, when the public entity knew that receipt would not occur until after the expiration of the limitations period (*Sumrall v. City of Cypress (1968) 258 Cal. App. 2d 565, 569-571, 65 Cal. Rptr. 755* (medical report)).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to the argument that the action is barred by the statute of limitations. It is based on the contention that the public entity is estopped from relying on the statute of

limitations because it engaged in settlement negotiations with the plaintiff through the end of the period.

These points and authorities may be combined, in an appropriate case, with the points and authorities *set out in § 196.103*, which support thecontention that a public entity is estopped from relying on the claims presentation requirements. They may also be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be combined with general points and authorities opposing a demurrer or a motion for summary judgment. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Points and Authorities

For a memorandum of points and authorities relating to estoppel acting to prevent the defendant from asserting the statute of limitations, see Ch. 143, *Limitation of Actions* .

[3] Discussion of Authorities

[a] Public Agency Is Estopped From Asserting Statute of Limitations When It Continued to Engage in Settlement Negotiations

In ***Potstada v. City of Oakland*** *(1973) 30 Cal. App. 3d 1022, 106 Cal. Rptr. 705* , plaintiff was injured in an automobile action with a vehicle owned by defendant city. Plaintiff entered into settlement negotiations with an agent of the city, who was authorized to settle the claim, and later filed a timely claim that was rejected by nonaction. Offers and counteroffers were made until two months before the limitation period expired. At trial, the sole issue was whether defendant could rely on the fact the action was filed after the limitations period. The trial court found for plaintiff. Defendant appealed.

The court of appeal affirmed the judgment. The court reviewed the four elements of estoppel: the party to be estopped must be apprised of the facts; that party must intend that his or her conduct be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; the other party must be ignorant of the true state of facts; and the other party must rely on the conduct to his or her injury (*30 Cal. App. 3d 1022, 1028)* . It held that defendant's actions in attempting to negotiate a settlement with plaintiff justified his assuming that, if a settlement was not reached, the claim would be denied and he would then have time to file the action. Thus, defendant was estopped from relying on the statute of limitations (*30 Cal. App. 3d 1022, 1029)* .

NOTE:

However, if a plaintiff or his or her attorney did not rely on the conduct of the public entity in failing to file the complaint on time, the public entity is not estopped because reliance is an essential element of estoppel [*Isaacson v. City of Oakland (1968) 263 Cal. App. 2d 414, 419, 69 Cal. Rptr. 379]* .

[b] Estoppel Based on Request to Delay Filing Action

Sumrall v. City of Cypress *(1968) 258 Cal. App. 2d 565, 65 Cal. Rptr. 755* , involved an injury to plaintiff caused by an employee of defendant city. A timely claim was filed and plaintiff's attorney was contacted by defendant's insurance company. Settlement negotiations commenced, and during the negotiations a medical report was given to the insurance agent indicating that a final medical report would take three to six months. The agent indicated a desire to settle and requested that plaintiff's attorney not file an action until the final medical report was received. Pending the receipt of the medical report, the period of limitations ran. Suit was filed against defendant and the trial was bifurcated to try the issue of the applicability of the statute of limitations first. The trial court held that defendant was estopped from relying on the statute of limitations.

The court of appeal affirmed. It held that defendant was estopped from relying on the statute of limitations because plaintiff's attorney would have filed the action on time if defendant's agent had not requested that he not file until the final medical report was received, with full knowledge that the report would not be available until after the statute of limitations had run, at which point a settlement might be reached (*258 Cal. App. 2d 565, 571)* .

NOTE:

A public entity's mere request for further information on a claim, especially when the plaintiff is represented by an attorney, does not estop the entity from relying on the statute of limitations [*Tubbs v. Southern Cal. Rapid Transit Dist. (1967) 67 Cal. 2d 671, 678-679, 63 Cal. Rptr. 377, 433 P.2d 169* ; *Rogers v. Board of Educ. (1968) 261 Cal. App. 2d 355, 360-361, 67 Cal. Rptr. 905]* .

[4] Additional Authorities

[a] Public Agency Is Estopped From Asserting Statute of Limitations When It Continued to Engage in Settlement Negotiations

Nicholson-Brown, Inc. v. City of San Jose (1976) 62 Cal. App. 3d 526, 133 Cal. Rptr. 159 , overruled on other grounds, Bullis v. Security Pac. Nat'l Bank (1978) 21 Cal. 3d 801, 815 n.18, 148 Cal. Rptr. 22, 582 P.2d 109 , involved a dispute over a construction contract, concerning which plaintiff contractor filed a timely claim against defendant city. The parties commenced negotiations and settled some of the issues by an agreement. After the agreement was signed, plaintiff brought suit against defendant city as well as the architect. Defendant city claimed that the statute of limitations had expired, but the trial court found that it was estopped from relying on the statute of limitations. The court of appeal affirmed. After reviewing the elements of estoppel, the court held that by its conduct in participating in the negotiations and eventual partial settlement, defendant city was estopped from relying on the bar of the statute of limitations (*62 Cal. App. 3d 526, 531-533)* .

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CHAPTER 196 PUBLIC ENTITIES
PART II. FORMS
B. Filing of Action
3. Late Filing of Action

19A-196 California Points & Authorities § 196.163

§ 196.163 Supporting Contention That Action Is Not Barred by Statute of Limitations--Amended Complaint Relates Back to Timely Filed Original Complaint

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S ACTION WAS TIMELY FILED WITH RESPECT TO _____ [*name*] BECAUSE THE _____ [*specify, e.g.,* THIRD] AMENDED COMPLAINT SUBSTITUTING _____ [*name*] FOR A FICTITIOUSLY NAMED DEFENDANT RELATES BACK TO THE ORIGINAL COMPLAINT, WHICH WAS TIMELY FILED.

A. Amendment to Substitute Public Employees for Doe Defendants Relates Back. An amendment to a complaint meeting the requirements of *Code of Civil Procedure Section 474* relates back to the date of filing of the original complaint in an action against a public employee or former public employee under the California Tort Claims Act. Thus, when a plaintiff sues a public entity and various fictitiously named defendants, that plaintiff may amend his or her complaint to substitute the names of employees or former employees of that public entity for the fictitiously named defendants after the statute of limitations applicable under the California Tort Claims Act has run (*Olden v. Hatchell (1984) 154 Cal. App. 3d 1032, 1037, 201 Cal. Rptr. 715*).

[*Optional*] **B. Amendment to Substitute Public Entity for Doe Defendant When Plaintiff Was Ignorant of True Name.** A plaintiff who, in good faith, is ignorant of the true identity of the defendant, but has substantially complied with the claims presentation requirements by filing a claim with one public entity, may amend a complaint against that public entity and fictitious defendants, to substitute for a fictitiously named defendant the name of a different public entity whose jurisdiction the plaintiff subsequently discovers (*Carlino v. Los Angeles County Flood Control Dist. (1992) 10 Cal. App. 4th 1526, 1535-1536, 13 Cal. Rptr. 2d 437*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of the contention that the action is not time-barred against a particular defendant who was not substituted for a fictitiously named defendant until after the applicable limitations period had expired, on the ground that the amendment related back to the original complaint, which was timely filed [*see, e.g., Carlino v. Los Angeles County Flood Control Dist. (1992) 10 Cal. App. 4th 1526, 1535-1536, 13 Cal. Rptr. 2d 437]* . Optional Paragraph B may be used in the situation in which plaintiff was, in good faith, ignorant of defendant's true identity, but substantially complied with the claims presentation requirement by filing a timely claim with the entity that would respond to a similar claim against the Doe defendant [*Carlino v. Los Angeles County Flood Control Dist. (1992) 10 Cal. App. 4th 1526, 1536, 13 Cal. Rptr. 2d 437]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be combined with general points and authorities opposing a motion to strike the amendment [*see, e.g., Olden v. Hatchell (1984) 154 Cal. App. 3d 1032, 1034, 201 Cal. Rptr. 715* ; *see also Gov. Code § 910.6* (rules governing amendment of claims)]. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For a form of amendment of claim, see California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Tort Claims Act* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities relating to amended pleadings, see Ch. 16, *Amended and Supplemental Pleadings* .

[3] Discussion of Authorities

[a] Amendment to Substitute Public Employees for Doe Defendants Relates Back

In ***Olden v. Hatchell*** *(1984) 154 Cal. App. 3d 1032, 201 Cal. Rptr. 715* , plaintiff sued defendant county and 20 fictitiously named defendants in tort, alleging injuries caused by failure to provide him with necessary medical treatment while he was in custody at the county jail. After the statute of limitations applicable under the California Tort Claims Act had run, plaintiff amended his complaint substituting the names of five employees or former employees of defendant for five of the fictitiously named defendants. The substituted employee defendants moved to strike the amendment on the ground that the claims were barred by the statute of limitations. The trial court granted the motion. Plaintiff appealed.

The court of appeal reversed. Plaintiff contended that pursuant to *Code Civ. Proc. § 474*, the amendment related back to the filing of the original complaint, which was within the six-month statute of limitations. Defendants argued that *Code Civ. Proc. § 474* does not apply to actions against public employees under the California Tort Claims Act. The court disagreed, and said that when a complaint sets forth a cause of action against a defendant designated by a fictitious name and his or her true name is thereafter discovered and substituted by amendment, he or she is considered a party to the action from its commencement so that the statute of limitations stops running as of the date the original complaint was filed (*154 Cal. App. 3d 1032, 1035)* . The court distinguished *Chase v. State of California (1977) 67 Cal. App. 3d 808, 136 Cal. Rptr. 833* , as inapposite to the case. The court said the plaintiff in *Chase* knew the identity of the public entity, and could not possibly have met the requirement of good-faith ignorance of the name of a defendant under *Code*

Civ. Proc. § 474. Indeed, the court observed that because presentation of a claim to a public entity is a prerequisite to bringing suit against it, it appears that a plaintiff could never effectively use a fictitiously named defendant to bring in a public entity defendant [*but see Carlino v. Los Angeles County Flood Control Dist. (1992) 10 Cal. App. 4th 1526, 1536, 13 Cal. Rptr. 2d 437* (dicta unpersuasive); *see generally § 196.163[3][b]*]. Either the action would be barred for failure to present a claim, or the plaintiff would know the identity of the entity to whom the claim had been presented and thus not be ignorant of the name. Considering *Gov. Code §§ 950* and *950.2*, the court opined that the statutory scheme does not similarly preclude the use of a fictitiously named defendant to sue a public employee because only a claim against the public entity, and not against the individual employee, is a prerequisite to bringing a suit (*154 Cal. App. 3d 1032, 1036-1037)* . The court found that the circumstances of the case aptly demonstrated the propriety of the use of *Code Civ. Proc. § 474*. The employee defendants whose names were added by amendment were persons on duty in the sheriff's department when plaintiff was transported to and confined in, the county jail. Thus, it was not surprising that he did not know their individual names at the time suit was filed, and that he did not, or was not able to, discover their names during the brief period of limitations. To require a plaintiff in this type of situation to identify and to name specifically public employee defendants within six months after rejection of a claim by the public entity would have the objectionable result of creating unnecessary litigation through the naming of a greater number of employees than were actually involved in the occurrences relating to the lawsuit (*154 Cal. App. 3d 1032, 1038)* .

[b] Amendment to Substitute Public Entity for Doe Defendant When Plaintiff Was Ignorant of True Name

In ***Carlino v. Los Angeles County Flood Control Dist.*** *(1992) 10 Cal. App. 4th 1526, 13 Cal. Rptr. 2d 437* , plaintiff filed a claim under the Tort Claims Act with the county board of supervisors, based on personal injuries incurred when he fell from a county pier. The board of supervisors failed to respond to the claim. Less than two years after the cause of action accrued, plaintiff filed a complaint against the county, the city, the state of California, and certain Does. Two years later, plaintiff amended the complaint by substituting the county flood control district as a fictitious defendant. The flood control district demurred to the second amended complaint on the ground that no government claim was filed against it, and that the Doe statutes could not be used to avoid a statute of limitations against a governmental entity. The trial court sustained the demurrer with leave to amend. That defendant filed a demurrer to the third amended complaint on the ground that plaintiff failed to file a government claim, and the complaint was time-barred by the two-year mandatory filing requirement of *Gov. Code § 945.6(a)(2)*. The trial court sustained the demurrer without leave to amend, and entered a judgment of dismissal.

The court of appeal reversed, holding that the complaint was not barred by the statute of limitations, because when the complaint was filed plaintiff was ignorant of the true name of the public entity having jurisdiction over the matter (*10 Cal. App. 4th 1526, 1536)* . The court stated that even if plaintiff should have filed his claim directly with the flood control district, he substantially complied with the claims procedures by filing with the county board of supervisors, which ultimately controlled the flood control district (*10 Cal. App. 4th 1526, 1533)* . The court rejected defendant's claim that the suit was untimely. It noted that plaintiff's cause of action was subject to the two-year limitations period under *Gov. Code § 945.6(a)(2)*, and that the flood control district was not named until that period had expired. Therefore, the sole issue is whether the substitution of the flood control district for a Doe defendant relates back to the filing of the originalcomplaint. Defendant cited *Chase v. State of California (1977) 67 Cal. App. 3d 808, 813-814, 136 Cal. Rptr. 833* [*see § 196.163[5][a]*], for the rule that Doe defendant statutes do not apply to suits filed under the Tort Claims Act (*10 Cal. App. 4th 1526, 1535)* . The court distinguished this case because in *Chase*, the plaintiff intentionally failed to name as a defendant a known public entity, against which he had earlier presented his claim for personal injuries. By contrast, the plaintiff before the court was, in good faith, ignorant of the true identity of the defendant, but substantially complied with the claims presentation requirements by fortuitously filing a claim with the public entity that would respond to a similar claim against the Doe defendant. Therefore, plaintiff's complaint is not barred by the applicable statutes of limitations (*10 Cal. App. 4th 1526, 1536)* .

[4] Additional Authorities

[a] Amendment to Substitute Public Employees for Doe Defendants Relates Back

In *Dhuyvetter v. City of Fresno (1980) 110 Cal. App. 3d 659, 168 Cal. Rptr. 61* , plaintiffs, property owners residing in the flight pattern of the airport owned by defendant city, filed claims against defendant. Each claim was filed on behalf of the claimants named therein, those residing with them, and a class comprised of all those similarly situated. After denial of the claims, plaintiffs timely filed a class action seeking to recover their damages. About 16 months after the class action was decertified, the named plaintiffs amended the complaint to add the children residing with them as plaintiffs. Defendant demurred, arguing in part that the suit was not brought within six months after its rejection as required by *Gov. Code § 945.6*. The trial court sustained defendant's demurrer. The court of appeal reversed. The court concluded that there was substantial compliance with the governmental claims statutes (*110 Cal. App. 3d 659, 664-665)* . It then characterized the remaining issue as whether or not the amended complaint related back in time to the filing of the original complaint. The court saw no prejudice to defendant in the filing of the amended complaint. Defendant was apprised from the initiation of the lawsuit that persons residing with the named claimants were seeking damages. But for the fortuitous circumstance to defendant of the decertification of the class, no issue would have arisen concerning the children's right to seek damages (*110 Cal. App. 3d 659, 665)* . The court set forth the modern rule with respect to actions involving parties designated by their true names in the original complaint which is that, when an amendment is sought after the statute of limitations has run, the amended complaint will be deemed filed as of the date of the original complaint provided recovery is sought in both pleadings on the same general set of facts. The court felt that the facts of this case were strongly supportive of permitting an amendment back. It observed that not only was the statute of limitations not a factor, but the parties-plaintiffs to be added by the amendment were alleged in the original complaint, albeit not by name. Nor could it be contended that their injuries and damages, if any, were not of like character and incurred in like manner of their parents who were specifically named. The court saw no possible prejudice in holding that the amended complaint related back to the original date of filing (*110 Cal. App. 3d 659, 665-666)* .

[5] Opposing Authorities

[a] Amendment to Substitute Public Employees for Doe Defendants Relates Back

In *Chase v. State of California (1977) 67 Cal. App. 3d 808, 136 Cal. Rptr. 833* , plaintiff's initial complaint, timely filed after his claim for damages had been rejected, included eight named defendants and 50 Doe defendants, but not the state. Almost two years later plaintiff filed an amended complaint in which the state was added as a named defendant. The state's demurrer on the ground that plaintiff's action was barred by the statute of limitations of *Gov. Code § 945.6* was sustained, and the case dismissed by the trial court. The court of appeal affirmed. The court noted that the state claims procedures requirements were enacted in implementation of the provisions of *Cal. Const. art. III, § 5*, which provides that suits may be brought against the state in that manner and in those courts as is directed by law. Under those procedures the legislature has prescribed the time and manner of filing claims against the state, and the conditions under which the state may be sued. A valid condition is that recovery will be denied when legal action is not brought against the state within the period prescribed by statute (*67 Cal. App. 3d 808, 811)* . The court observed that in plaintiff's original complaint he abandoned any reliance on his previously filed claim. Its presentation was not mentioned, and by that omission no cause of action was alleged against the state, even had it been joined as a named defendant (*67 Cal. App. 3d 808, 812)* . The court said that plaintiff's failure to name the state as a defendant or to allege a cause of action against it appeared purposeful and intentional. At the time of the commencement of plaintiff's action the state was but one of an infinite number of public entities who were subject to the possibility of later joinder as defendants in the action. The court found it would do violence to reason, and to language, to conclude that the filing of the original complaint constituted commencement of an action against any and every public entity who might later be chosen to replace a Doe. The court distinguished cases involving *Code Civ. Proc. § 474* and the liberality of amendment of pleadings permitted by modern rule under which a subsequently named Doe defendant is considered a party to the action from its commencement for purposes of the statute of limitations. It said that the state claims procedure permits no similar liberality in derogation of its mandate that anaction must be commenced within six months after the rejection of the claim (*67 Cal. App. 3d 808, 813)* .

In *Dominguez v. City of Alhambra (1981) 118 Cal. App. 3d 237, 173 Cal. Rptr. 345* , decedent was severely injured in a motor vehicle accident and died 11 days later. Plaintiff, his widow, filed a complaint for wrongful death, and 11 months later attempted to amend the complaint to assert an additional cause of action under former Prob. Code § 573 [*now see Code Civ. Proc. §§ 377.30-377.35*] (survival of cause of action). Defendants included public entities and private parties. The trial court denied her motion to amend. The court of appeal affirmed, stating that a prerequisite to a tort action for damages against a public entity is the prior filing of a claim. Plaintiff timely filed the requisite claim with defendant city. Defendant contended that the claim was only for wrongful death and did not constitute a valid claim for the personal injury cause of action under former Prob. Code § 573 [*now see Code Civ. Proc. §§ 377.30-377.35*] (*118 Cal. App. 3d 237, 243-244)* . The court observed that the proposed amended complaint was barred unless it could be deemed to relate back to the filing of the original complaint for wrongful death. The court noted an action under former Prob. Code § 573 [*now see Code Civ. Proc. §§ 377.30-377.35*] is wholly distinct from an action under former Code Civ. Proc. § 377 [*now see Code Civ. Proc. §§ 377.60-377.61*]. The first is by the estate for injuries suffered by decedent prior to his death, while the latter is by the heirs for loss of support. Additionally, former Code Civ. Proc. § 377 [*now see Code Civ. Proc. §§ 377.60-377.61*] expressly excludes damages recoverable under former Prob. Code § 573 [*now see Code Civ. Proc. §§ 377.30-377.35*]. Thus, the proposed amendment sought to enforce an independent right for an independent entity and it could not relate back, for purposes of satisfying the underlying statute of limitations, to the action for wrongful death (*118 Cal. App. 3d 237, 243, 245)* .

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19A-196 California Points & Authorities §§ 196.164-196.179

[Reserved]

§§ 196.164[Reserved]

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CHAPTER 196 PUBLIC ENTITIES
PART II. FORMS
C. Liability of Public Entities And Employees
1. Liability For Acts or Omissions

19A-196 California Points & Authorities § 196.180

§ 196.180 Supporting Contention That Public Entity or Employee Is Liable for Act or Omission [Gov. Code §§ 815.2(a), 820(a)]--General Form

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE OBJECTION THAT DEFENDANT(S) _____ [IS *or* ARE] NOT LIABLE FOR PLAINTIFF'S INJURIES _____ [SHOULD BE *or* SHOULD HAVE BEEN *or* WAS PROPERLY] OVERRULED BECAUSE THE PLAINTIFF HAS _____ [ALLEGED FACTS SHOWING *or* SHOWN] THAT HIS/HER INJURIES WERE PROXIMATELY CAUSED BY THE _____ [ACT *or* OMISSION] OF [DEFENDANT _____ (*name*)], AN EMPLOYEE OF DEFENDANT _____ [*name of public entity*], IN THE SCOPE OF THE EMPLOYEE'S EMPLOYMENT, AND THAT THE _____ [ACT *or* OMISSION] WOULD, APART FROM GOVERNMENT CODE SECTION 815.2, HAVE GIVEN RISE TO A CAUSE OF ACTION AGAINST THE EMPLOYEE OR HIS/HER PERSONAL REPRESENTATIVE.

A. Liability of Public Entity. A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his or her employment if the act or omission, would, apart from *Government Code Section 815.2*, have given rise to a cause of action against that employee or his or her personal representative (*Gov. Code § 815.2(a)*; *see Walker v. County of Los Angeles (1987) 192 Cal. App. 3d 1393, 1395, 238 Cal. Rptr. 146* ; *Mann v. State of California (1977) 70 Cal. App. 3d 773, 779, 139 Cal. Rptr. 82*).

B. Liability of Public Employee. Except as otherwise provided by statute, a public employee is liable for injury caused by his or her act or omission to the same extent as a private person (*Gov. Code § 820(a)*).

[*Optional*] **C. Liability for Tortious Act of Independent Contractor.** A public entity is liable for injury proximately caused by a tortious act or omission of an independent contractor of the publicentity to the same extent that the public entity would be subject to such liability were it a private person (*Gov. Code § 815.4*).

[*Optional*] **D. Fire Protection or Firefighting Service Outside Regular Area.** Whenever a public entity provides fire protection or firefighting service outside of the area regularly served and protected by the public entity providing the service, the public entity providing the service is liable for any injury for which liability is imposed by statute caused by its act or omission or the act or omission of its employee occurring in the performance of the fire protection or firefighting service (*Gov. Code § 850.6*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the public entity is liable for the plaintiff's injuries because the injuries were proximately caused by the act or omission of an employee of the public entity within the scope of the employment and would have given rise to a cause of action against the employee or the employee's personal representative apart from *Gov. Code § 815.2* [*see Gov. Code §§ 815.2(a), 820(a)*; *see also § 196.180[2][c]*].

Optional Paragraph C should be included if the tortious act or omission was that of an independent contractor [*see Gov. Code § 815.4*; for discussion of statutory immunity from liability under *Gov. Code § 815.4, see § 196.08[2]*].

Optional Paragraph D should be included if the injury was caused by the act or omission of an employee of a public entity providing fire protection or firefighting service outside the area regularly protected and served by it [*see Gov. Code § 850.6*; for discussion of statutory immunity from liability under *Gov. Code § 850.6, see § 196.08[10]*]. In such case, an additional point and authority would be required to show that liability for the particular act or omission is imposed by statute. An example of such a statute would be *Veh. Code § 17001*, imposing liability on public entities for injuries caused by the negligent or wrongful act of an employee in the operation of a motor vehicle [*see § 196.187*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which the substantive points are raised. For example, they may be used in a memorandum of points and authorities in opposition to the public entity's demurrer to the complaint, or motion for judgment on the pleadings, on the asserted ground that the complaint fails to state facts sufficient to constitute a cause of action, or in opposition to the public entity's motion for summary judgment on the ground that the action has no merit, or in support of plaintiff's motion or in opposition to defendant's motion for a new trial. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] When Elected Official Must Be Named as Codefendant to Hold Public Entity Liable

Notwithstanding any other provision in *Gov. Code § 814 et seq.*, if a plaintiff seeks to hold a public entity liable for an act or omission constituting an intentional tort committed by an elected official employed by or otherwise representing the public entity, the plaintiff must name the elected official and the public entity as codefendants in the same action. If plaintiff fails to do so, the public entity is not liable to the plaintiff under *Gov. Code § 814 et seq.* for the elected official's act or omission [*Gov. Code § 815.3(a)*]. Similarly, in a complaint for damages against an elected or appointed state or local officer in his or her individual capacity alleging injuries proximately caused by the officer acting under color of law, the plaintiff must allege with particularity sufficient facts to establish the officer's individual liability and the plaintiff's right to recover from the officer [*Gov. Code § 951*].

Acts or omissions that constitute intentional torts within the meaning of *Gov. Code § 815.3* include, but are not limited to, harassment, sexual battery, and intentional infliction of emotional distress. For purposes of *Gov. Code § 815.3*,

harassment in violation of state or federal law constitutes an intentional tort to the extent permitted by federal law. *Gov. Code § 815.3* does not, however, apply to actions for defamation [*Gov. Code § 815.3(a)*].

For further discussion of *Gov. Code § 815.3*, see Levy, Golden & Sacks, California Torts, Ch. 60 (Matthew Bender).

[c] Statutory Immunity From Liability

There are several statutes immunizing a public entity, a public employee, or both, from liability in given situations. Any one or more of these statutes may, in a proper case, be cited in opposition to these points and authorities. These statutes are discussed fully in §§ 196.07-196.10.

Strictly, the question of the applicability of a statutory immunity does not arise until it is determined that a defendant otherwise owes a duty of care to the plaintiff and thus would be liable in the absence of such immunity [*Williams v. State of California (1983) 34 Cal. 3d 18, 22, 192 Cal. Rptr. 233, 664 P.2d 137* ; *Davidson v. City of Westminster (1982) 32 Cal. 3d 197, 201-202, 185 Cal. Rptr. 252, 649 P.2d 894* ; *Stark v. City of Los Angeles (1985) 168 Cal. App. 3d 276, 282, 214 Cal. Rptr. 216]* . An immunity avoids liability in tort under all circumstances within the limits of theimmunity itself; it is conferred, not because of the particular facts, but because of the status or position of the favored defendant; and it does not deny the tort, but, rather, the resulting liability [*Whitcombe v. County of Yolo (1977) 73 Cal. App. 3d 698, 704-705, 141 Cal. Rptr. 189]* . This is true even if the duty is created by a special relationship between the public entity and the injured person. The existence of a special relationship does not operate to bypass a statutory immunity that expressly applies [*Whitcombe v. County of Yolo (1977) 73 Cal. App. 3d 698, 705, 141 Cal. Rptr. 189* ; *see Davidson v. City of Westminster (1982) 32 Cal. 3d 197, 202, 185 Cal. Rptr. 252, 649 P.2d 894* ; for points and authorities relating to liability arising from a special relationship, *see §§ 196.230 -196.235*].

For forms of points and authorities establishing exceptions to the immunity statutes, see *§§ 196.270* et seq.

[d] Related Pleading and Practice Forms

For forms of complaints against public entities and public employees based on general liability, see California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Tort Claims Act* (Matthew Bender).

[3] Discussion of Authorities

[a] Liability of Public Entity

Walker v. County of Los Angeles *(1987) 192 Cal. App. 3d 1393, 238 Cal. Rptr. 146* , which is discussed in *§ 196.232[3][a]*, was an action against the county by plaintiff, whose thumb was bitten off by a dog he'd captured, pursuant to the request of a county animal control officer. The trial court granted the county's motion for summary judgment, and the plaintiff appealed. The court of appeal reversed. The court said that when a public employee breaches a duty of due care, the public entity is liable for injuries caused by the employee's negligence (*192 Cal. App. 3d 1393, 1395)* .

Mann v. State of California *(1977) 70 Cal. App. 3d 773, 139 Cal. Rptr. 82* , which is discussed in *§ 196.233[3][a]*, was an action against the state for personal injuries sustained in a freeway accident. The state's liability was predicated on the alleged breach of duty of a California Highway Patrol officer in investigating motorists stranded on a freeway because of stalled vehicles. The trial court granted the state's motion for a directed verdict, and plaintiff appealed. In reversing the judgment, the court of appeal quoted the provisions of *Gov. Code § 815.2(a)* (*70 Cal. App. 3d 773, 779)* and held that it was a jury question in regard to whether the officer's conduct constituted actionable negligence towards the plaintiff (*70 Cal. App. 3d 773, 780-781)* .

[4] Opposing Authorities

[a] Liability of Public Entity

In *Van Ort v. Estate of Stanewich (9th Cir. 1996) 92 F.3d 831* , plaintiffs, who were the victims of an assault and attempted robbery by an undercover narcotics officer, sued the County and the Sheriff's Department that employed the officer, for negligence. The district court ruled against them as a matter of law and plaintiffs appealed. The Ninth Circuit Court of Appeal ruled that the County was not vicariously liable under *Gov. Code § 815.2(a)* because the officer was not acting within his scope of employment. In its ruling, the court relied on the holding of *Farmers Ins. Group v. County of Santa Clara (1995) 11 Cal. 4th 992, 47 Cal. Rptr. 2d 478* , which provided that an employer will not be held vicariously liable for an employee's malicious or tortious conduct if the employee substantially deviates from the employment duties for personal purposes. The court found that the free-lance criminal exploits of a law enforcement officer fell within the California Supreme Court's language in *Farmers*. The court dismissed plaintiff's argument that *Gov. Code §§ 815.2(a), 820(a)* left open the possibility that there was statutory authority for a negligent supervision lawsuit (*92 F.3d 831, 840)* .

[b] Liability for Tortious Act of Independent Contractor

In *Bostrom v. County of San Bernardino (1995) 35 Cal. App. 4th 1654, 42 Cal. Rptr. 2d 669* , plaintiff sought to hold the County liable for injuries resulting from the crash of a small airplane. The airplane crashed after takeoff from an airport owned by the County, and leased by the County to a third party for the purpose of providing jet fueling and other services. The crash occurred because an employee of the third party fueled the plane with jet fuel instead of ordinary aviation gas. Plaintiff contended that the third party was the County's independent contractor, and therefore the County could be held vicariously liable under the "independent contractor" exception to sovereign immunity. The trial court held that the independent contractor exception did not apply, and entered an order for summary judgment in favor of the County. The court of appeal noted that the agreement between the County and the third party was entitled "Airport Lease Agreement," and contained conventional lease terms concerning the property and the rent. Furthermore, the third party made its money from its customers, not from the County. The court concluded that there was insufficient evidence to raise a triable issue of fact as to whether the County was liable under the independent contractor exception, and affirmed the trial court judgment (*35 Cal. App. 4th 1654, 1671)* .

California Points & Authorities

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Volume 19A Chapters 196-199 PUBLIC ENTITIES---to---QUO WARRANTO
CHAPTER 196 PUBLIC ENTITIES
PART II. FORMS
C. Liability of Public Entities And Employees
1. Liability For Acts or Omissions

19A-196 California Points & Authorities § 196.181

§ 196.181 Supporting Contention That Public Entity or Employee Is Liable for Act or Omission [Gov. Code §§ 815.2(a), 820(a)]--Department of Motor Vehicles Is Liable for Damages Resulting From Department's Negligent Omission of Lienholder's Name From Ownership Certificate [Gov. Code § 818.5]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE OBJECTION THAT DEFENDANT IS NOT LIABLE TO PLAINTIFF _____ [SHOULD BE *or* SHOULD HAVE BEEN *or* WAS PROPERLY] OVERRULED BECAUSE PLAINTIFF HAS _____ [ALLEGED FACTS SHOWING *or* SHOWN] THAT PLAINTIFF WAS A _____ [GOOD-FAITH PURCHASER *or* LIENHOLDER] OF THE VEHICLE IN QUESTION, THAT DEFENDANT NEGLIGENTLY OMITTED THE LIENHOLDER'S NAME FROM THE OWNERSHIP CERTIFICATE IT ISSUED, AND THAT, AS A PROXIMATE RESULT OF THAT OMISSION, PLAINTIFF WAS DAMAGED.

Liability of DMV for Omission of Lienholder's Name. The Department of Motor Vehicles is liable for any injury to a lienholder or good-faith purchaser of a vehicle caused by the department's negligent omission of the lienholder's name from an ownership certificate issued by the department (*Gov. Code § 818.5*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the Department of Motor Vehicles is liable for the loss sustained by plaintiff that was proximately caused by the department's negligent omission of the lienholder's name from the ownership certificate it issued for the vehicle and the fact that plaintiff is the lienholder or a good-faith purchaser of the vehicle [*Gov. Code § 818.5*]. Note that *Gov. Code § 818.5* provides further that this liability shall not exceed the actual cash value of the vehicle.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be used in a memorandum of points and authorities in opposition to the public entity's demurrer to the complaint, or motion for judgment on the pleadings, on the asserted ground that the complaint fails to state facts sufficient to constitute a cause of action, or in opposition to the public entity's motion for summary judgment on the ground that the action has no merit. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

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CHAPTER 196 PUBLIC ENTITIES
PART II. FORMS
C. Liability of Public Entities And Employees
1. Liability For Acts or Omissions

19A-196 California Points & Authorities § 196.182

§ 196.182 Supporting Contention That Public Entity or Employee Is Liable for Act or Omission [Gov. Code §§ 815.2(a), 820(a)]--Public Entity Is Liable for Injury Caused by Public Entity's Failure to Discharge Mandatory Duty That Was Designed to Protect Against Risk of That Kind of Injury [Gov. Code § 815.6]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE OBJECTION THAT DEFENDANT _____ [*name of public entity*] IS NOT LIABLE TO PLAINTIFF _____ [SHOULD BE *or* SHOULD HAVE BEEN *or* WAS PROPERLY] OVERRULED BECAUSE PLAINTIFF HAS _____ [ALLEGED FACTS SHOWING *or* SHOWN] THAT DEFENDANT WAS UNDER A MANDATORY DUTY IMPOSED BY _____ [*specify constitutional provision, statute, charter provision, or regulation*] TO _____ [*specify duty imposed*], THAT THIS DUTY WAS DESIGNED TO PROTECT AGAINST THE RISK OF _____ [*specify particular kind of injury*], THAT DEFENDANT FAILED TO DISCHARGE THAT DUTY, AND THAT, AS A PROXIMATE RESULT OF THAT FAILURE, PLAINTIFF _____ [*specify injury sustained by plaintiff of kind enactment was designed to prevent*].

A. Liability for Breach of Mandatory Duty. When a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty (*Gov. Code § 815.6*; *see Allison v. Ventura County (1977) 68 Cal. App. 3d 689, 698, 137 Cal. Rptr. 542*).

[*Optional*] **B. "Enactment" Defined.** "Enactment," as used in the California Tort Claims Act, means constitutional provision, statute, charter provision, ordinance, or regulation (*Gov. Code § 810.6*).

[*Optional*] **C. "Regulation" Defined.** "Regulation," as used in the California Tort Claims Act, means a rule, regulation,

order, or standard, having the force of law, adopted by an employee or agency of the United States pursuant to the federal Administrative Procedure Act (*5 U.S.C.S. § 500 et seq.*) or as a regulation by an agency of the state of California pursuant to the Administrative Procedure Act (*Gov. Code § 11340 et seq.*) (*Gov. Code § 811.6*).

[*Optional*] **D. Underlying Enactment Need Not Create Private Right of Action.** If an enactment creates a mandatory governmental duty that is violated, and the requirements of *Gov. Code § 815.6* are otherwise satisfied, *Gov. Code § 815.6*, rather than the underlying enactment, creates the private right of action, and the enactment itself need not manifest an intent to create a private right of action (*Haggis v. City of Los Angeles (2000) 22 Cal. 4th 490, 499-500, 93 Cal. Rptr. 2d 327, 993 P.2d 983*).

[*Optional*] **E. Coroner's Duty to Attempt to Identify Body and Locate Family Member.** A Coroner has a mandatory duty under *Government Code Section 27471(a)*, and *Health & Safety Code Sections 7104* and *7104.1*, to act with reasonable diligence in attempting to identify a body placed in his or her custody and then to attempt with reasonable diligence to locate the decedent's family (*Davila v. County of Los Angeles (1996) 50 Cal. App. 4th 137, 143, 57 Cal. Rptr. 2d 651*).

[*Optional*] **F. Liability Based on Police Officer's Failure to Investigate Child Abuse Allegations.** *Penal Code Section 11166(a)* imposes a mandatory duty on a police officer to investigate child abuse allegations that the officer receives and, if a reasonable person would have suspected child abuse, to report to the appropriate child protective agency, and the failure to perform these mandatory statutory duties may support a tort action for negligence per se against the officer and employing entity, if the child is subsequently injured (*Alejo v. City of Alhambra (1999) 75 Cal. App. 4th 1180, 1184-1190, 89 Cal. Rptr. 2d 768*).

[*Optional*] **G. Public Entity's Liability for Failure to Require Posting of Payment Bond.** A public entity has a mandatory duty under *Civil Code Sections 3247* and *3251* to require the posting of a payment bond as a condition to awarding a public construction contract (*N.V. Heathorn, Inc. v. County of San Mateo (2005) 126 Cal. App. 4th 1526, 1532, 25 Cal. Rptr. 3d 400*).

[*Optional*] **H. Public Entity's Liability for Failure to Ensure Sufficiency of Contractor's Surety.** A public entity awarding a public contract has a mandatory duty under the Bond and Undertaking Law to take reasonable steps to ensure the financial solvency of the sureties provided by its contractors by ensuring that a proposed surety is an admitted surety insurer, or by requiring two or more sufficient personal sureties or a combination of sufficient personal sureties or admitted surety insurers, and by requiring an alleged admitted surety to submit a county clerk's certificate showing that fact (*Walt Rankin & Assocs., Inc. v. City of Murrieta (2000) 84 Cal. App. 4th 605, 622, 624, 101 Cal. Rptr. 2d 48*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a public entity is liable for the plaintiff's injury, which was proximately caused by the entity's failure to discharge a mandatory duty imposed by an "enactment" (defined in *Gov. Code § 810.6*) designed to protect against the kind of injury sustained by plaintiff. Liability results unless the public entity establishes that it exercised reasonable diligence to discharge the duty [*Gov. Code § 815.6*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be used in a memorandum of points and authorities in opposition to the public entity's demurrer to the complaint, or motion for judgment on the pleadings, on the asserted ground that the complaint fails to state facts sufficient to constitute a cause of action, or in opposition to the public entity's motion for summary judgment on the ground that the action has no merit. They may also be adapted for use in a trial or appellate

brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Pleading the Enactment

The specific enactment relied on as imposing the mandatory duty must be pleaded in the complaint [*Lehto v. City of Oxnard (1985) 171 Cal. App. 3d 285, 293, 217 Cal. Rptr. 450* (expressly repudiating contrary holding in *Green v. City of Livermore (1981) 117 Cal. App. 3d 82, 90, 172 Cal. Rptr. 461*)].

[c] Test for Determining Whether Liability May Be Imposed

Gov. Code § 815.6 contains a three-pronged test for determining whether liability may be imposed: (1) the enactment must impose a mandatory, not discretionary, duty; (2) the enactment must be intended to protect against the kind of risk or injury the plaintiff suffered; and (3) the breach of the duty must be a proximate cause of the injury suffered [*Gray v. State of California (1989) 207 Cal. App. 3d 151, 154-155, 254 Cal. Rptr. 581* (test not met); *Posey v. State of California (1986) 180 Cal. App. 3d 836, 848, 225 Cal. Rptr. 830* (test not met); *State of California v. Superior Court (1984) 150 Cal. App. 3d 848, 854, 197 Cal. Rptr. 914* (same); *see also First Interstate Bank v. State of California (1987) 197 Cal. App. 3d 627, 636, 243 Cal. Rptr. 8* (same test, but stating that it must be *the*, rather than *a*, proximate cause of injury suffered, and holding test not met)]. The term "mandatory duty," as used in *Gov. Code § 815.6*, means an obligatory duty that a governmental entity is required to perform, in contrast with a permissive power that a governmental body may choose or not choose to exercise [*Morris v. County of Marin (1977) 18 Cal. 3d 901, 908, 136 Cal. Rptr. 251, 559 P.2d 606* ; *Posey v. State of California (1986) 180 Cal. App. 3d 836, 848, 225 Cal. Rptr. 830]* .

Whether a particular statute is intended to impose a mandatory duty is a question of interpretation for the courts. The legislative intent can usually be determined from the statutory language. However, when the specific language does not shed light about the intent of the legislature, it can be determined from other factors that indicate the intent of the legislature [*Nunn v. State of California (1984) 35 Cal. 3d 616, 624, 200 Cal. Rptr. 440, 677 P.2d 846]* . Not all statutes using direct obligatory language create a mandatory duty within the meaning of *Gov. Code § 815.6* [*Shelton v. City of Westminster (1982) 138 Cal. App. 3d 610, 615, 188 Cal. Rptr. 205* (discussing methods for determining legislative intent, but holding that although it assumed statute in question was mandatory, its purpose was not to protect against kind of injury sustained by plaintiff)]. For points and authorities supporting and opposing various contentions relating to the interpretation of statutes, see Ch. 217, *Statutory Interpretation* .

[3] Discussion of Authorities

[a] Liability for Breach of Mandatory Duty

Allison v. Ventura County *(1977) 68 Cal. App. 3d 689, 137 Cal. Rptr. 542* , was an action for damages for false imprisonment against a county resulting from plaintiff's arrest and incarceration for "many" hours pursuant to a bench warrant issued some three years before in a family law proceeding. The trial court dismissed the complaint after sustaining a demurrer to it without leave to amend. Plaintiff appealed. In reversing the judgment of dismissal, the court of appeal said that both case and statutory law seem to indicate that prompt service of process by a peace officer is in the nature of a mandatory duty, that is, a duty of the type envisioned in *Gov. Code § 815.6*, which provides that an injury resulting from a failure of a public entity to perform a mandatory duty imposed by a statute that is designed to protect against the risk of such an injury is actionable. The court further held that because the bench warrant failed to comply with a number of statutory requirements, it was not regular on its face and the defendant was, therefore, not protected by the immunity provided in former Civ. Code § 43.5(a) [*now Civ. Code § 43.55*; *see also § 196.10[18]*] (*68 Cal. App. 3d 689, 698)* .

[b] Underlying Enactment Need Not Create Private Right of Action

In ***Haggis v. City of Los Angeles*** *(2000) 22 Cal. 4th 490, 93 Cal. Rptr. 2d 327, 993 P.2d 983* , the plaintiff had purchased a home on property located on a coastal bluff, and the home was extensively damaged by landslides following the Northridge Earthquake in 1994 and subsequently had to be demolished. The defendant had known since 1959 that the coastal bluff was vulnerable to landslides, and in 1966 a large slide had in fact destabilized the property that plaintiff eventually purchased. After the slide in 1966, the defendant had issued a notice to the owner of the property to vacate the property and perform stabilization work. However, the defendant failed to record a certificate of substandard condition with the county recorder as required by the municipal code. In 1970, the defendant determined that a hazardous slide condition still existed on the property and issued another notice to abate, but again failed to record a certificate with the county recorder, even though the defendant knew that the owner had not yet complied with the 1966 notice. From 1970 through 1977, the defendant approved various building permits for additions to the residence and surrounding property without requiring any evidence that the unstable conditions had been abated. When plaintiff purchased the property in 1991, the property's geologic instability was not visually apparent nor was it contained in the title report. The plaintiff brought action against the defendant of Los Angeles under *Gov. Code § 815.6* for breach of mandatory duties contained in the municipal code, arguing that because the defendant had failed to record a certificate of substandard conditions or require the previous owners to record affidavits of awareness of slide conditions before issuing building permits, the plaintiff did not know the property was in an active landslide area or that the instability caused by the earlier landslides had never been corrected. The defendant successfully demurred on several grounds. The court of appeal affirmed, holding that the claims were time barred under the applicable statute oflimitations and that the defendant was immune under *Gov. Code § 818.6*, which generally provides immunity for injuries caused by a public entity's failure to conduct a proper safety inspection. The plaintiff appealed, and the Supreme Court subsequently requested briefing on the additional question of whether the municipal code provisions at issue imposed mandatory duties that could form the basis for liability under *Gov. Code § 815.6*.

The Supreme Court affirmed judgment for the defendant. As a preliminary matter, in its analysis of whether the relevant city ordinances imposed mandatory duties that could support a claim of liability under *Gov. Code § 815.6*, the Court rejected the defendant's argument that the action was barred because the ordinances were not intended to create a private right of action. Instead, the Court ruled that if an enactment creates a mandatory governmental duty that is violated, and the requirements of *Gov. Code § 815.6* are otherwise satisfied, *Gov. Code § 815.6*, rather than the underlying enactment, creates the private right of action, and the enactment itself need not manifest an intent to create a private right of action (*22 Cal. 4th 490, 499-500)* .

NOTE:

Despite the general rule described in *Haggis, above*, that the underlying statute need not provide for a private right of action, if the underlying statute that allegedly creates the mandatory duty explicitly immunizes a public entity from damages liability for the failure to act, then the more general provisions of Section 815.6 cannot be used to overcome that immunity [*Arterberry v. County of San Diego (2010) 182 Cal. App. 4th 1528, 1536, 106 Cal. Rptr. 3d 743* (county liability for failure to approve solar energy system could not be predicated on *Gov. Code § 815.6* when *Civ. Code § 714* explicitly shielded public entity from liability)].

[c] Coroner's Duty to Attempt to Identify Body and Locate Family Member

In ***Davila v. County of Los Angeles*** *(1996) 50 Cal. App. 4th 137, 57 Cal. Rptr. 2d 651* , a decedent's children sued the Coroner for failing to make a reasonable attempt to locate them before cremating their father's body. The Coroner moved for summary judgment on the ground that he owed no duty to plaintiffs. The trial court granted defendant's motion and plaintiffs appealed.

The court of appeal reversed. It began its analysis by stating the rule enunciated in *Posey v. State of California (1986)*

180 Cal. App. 3d 836, 225 Cal. Rptr. 830 , that in order for liability to attach under *Gov. Code § 815.6* there must be (1) an enactment imposing a mandatory duty, (2) the enactment must be intended to protect against the risk of the kind of injury suffered by the individual asserting liability, and (3) the breach of the duty must be the cause of the injury suffered. The court first found that the existence of a mandatory duty to make a reasonable attempt to locate decedent's family was established by three California statutes, *Gov. Code § 27471(a)*, and *Health & Safety Code §§ 7104, 7104.1*. The court then found that the purpose of the statutory scheme was not limited to the recovery of costs, as defendant argued, but extended to the right of surviving families to control the disposition of their loved one's remains. Accordingly, the court concluded that the rights granted by all three statutes would have no meaning unless they were read to impose upon the Coroner a duty to act with reasonable diligence in attempting to identify a body placed in his or her custody and then to attempt with reasonable diligence to locate some family member. Finally, the court noted that it was undisputed that, assuming a duty existed in this case, that the duty was breached and the breach was the cause of the injury suffered by plaintiffs. Having found that a duty existed and that it was owed to plaintiffs, the court reversed the summary judgment and remanded the matter for trial on the issues of whether the Coroner acted with reasonable diligence in attempting to identify the decedent's body and in attempting to locate a family member (*50 Cal. App. 4th 137, 143)* .

[d] Liability Based on Police Officer's Failure to Investigate Child Abuse Allegations

In ***Alejo v. City of Alhambra*** *(1999) 75 Cal. App. 4th 1180, 89 Cal. Rptr. 2d 768* , the plaintiff, was a three-year-old child who was living with his mother and her live-in boyfriend. The plaintiff's father became concerned when he noticed that the plaintiff had a black eye, and, when questioned, neither the plaintiff nor his mother gave an explanation sufficient to dispel his concerns. Three days later, the plaintiff's father received a phone call from a neighbor of the plaintiff's mother, who advised the father that the plaintiff's mother and her boyfriend were using drugs and that the boyfriend was physically abusing the plaintiff. Concerned for his son's safety, the plaintiff's father immediately went to the police department, related the story to an officer, and, after giving the officer the address where his son was living, requested immediate help and investigation and even offered to take the police there. However, the police neither investigated nor reported to another agency the allegations of abuse, and six weeks later the plaintiff was severely injured when he was further beaten by his mother's boyfriend. The plaintiff brought an action against the police officer, the city that employed the officer, and the boyfriend. The basis for the action against the officer and the city was negligence in failing to investigate or report a reasonable suspicion of child abuse as mandated by *Pen. Code § 11166(a)*. The city successfully demurred to the complaint, arguing that its officers had no special duty to protect the plaintiff from abuse, that the investigation and reporting of child abuse are discretionary functions, that its officers are immune from liability for the failure to act, and that, in any event, their failure to act was not the cause of the plaintiff's injuries. The plaintiff appealed.

The court of appeal reversed, holding that the complaint stated a cause of action for negligence per se based on a violation of *Pen. Code § 11166(a)*. The court held that *Pen. Code § 11166(a)* imposes a mandatory, rather than discretionary, duty on a police officer to investigate child abuse allegations that the officer receives and, if a reasonable person would have suspected child abuse, to report to the appropriate child protective agency (*75 Cal. App. 4th 1180, 1186)* . The court, pointing to the statutory language limiting the duty to investigate and report to those claims that are objectively reasonable, rejected the city's argument that the burden on policedepartments would be intolerable if they were required to investigate every report of child abuse, no matter how frivolous (*75 Cal. App. 4th 1180, 1188-1189)* . The court also held that the question of whether the officer's negligence was the proximate cause of the plaintiff's subsequent injury was a question of fact that could not be resolved at the pleading stage. However, the court specifically rejected the city's claim that the boyfriend's abuse of the plaintiff was an intervening or superseding cause that broke the chain of causation, because the boyfriend's future criminal conduct may have been a foreseeable result of the plaintiff's remaining in his custody. The court also rejected the city's argument that causation could not be established because it was pure speculation as to whether an investigation or report would have prevented the plaintiff's injuries, holding that the plaintiff should have the opportunity to prove by expert testimony how a reasonably prudent social worker would have responded to the allegations of abuse and how the abuse would have then been prevented (*75 Cal. App. 4th 1180,*

1190-1192) . Finally, the court rejected the city's and the officer's claims that, as a matter of public policy, the investigation of child abuse should be treated as a discretionary act and that they should be immune from liability for that reason (*75 Cal. App. 4th 1180, 1192-1194)* .

[e] Public Entity's Liability for Failure to Require Posting of Payment Bond

In ***N.V. Heathorn, Inc. v. County of San Mateo*** *(2005) 126 Cal. App. 4th 1526, 25 Cal. Rptr. 3d 400* , the plaintiff was a subcontractor on a public construction contract awarded by a county. The plaintiff filed sued against the general contractor, contending that the general contractor owed the plaintiff over $400,000 for work performed on the project. The general contractor then filed for Chapter 11 bankruptcy protection, terminating its obligation to pay the plaintiff the unpaid amounts. During discovery, the plaintiff learned that the general contractor had not posted a payment bond before being awarded the contract, as required by *Civ. Code §§ 3247* and *3251*. The plaintiff then added the county to the suit as a defendant, alleging that the county was liable for breach of the mandatory duty to require posting of a payment bond. The trial court sustained a general demurrer filed by the county on the grounds that the plaintiff's inability to collect money owed to it by the general contractor on a public works project from a statutory payment bond was not an "injury" protected under the Tort Claims Act. The plaintiff appealed.

The court of appeals reversed. The court held first that the county had a mandatory duty under the Civil Code to require posting of a payment bond before awarding the contract to the general contractor, and that the plaintiff sufficiently alleged a breach of that duty (*126 Cal. App. 4th 1526, 1532)* . The court went on to note that under the Tort Claims Act, a public entity is liable only for injuries to the kind of interests that have been protected by the courts in actions between private parties. Because private parties have an analogous protection afforded by the mechanic's lien, the court held that the subcontractor's injury sustained after the county failed to require the posting of a payment bond was an "injury" actionable under Tort Claims Act (*126 Cal. App. 4th 1526, 1535-1537)* . The court also pointed to the holding in *Walt Rankin & Assocs., Inc. v. City of Murrieta (2000) 84 Cal. App. 4th 605, 101 Cal. Rptr. 2d 48* , discussed in *§ 196.182[3][f]*, noting that it would be anomalous to hold a public entity liable for failing to ensure the sufficiency of a contractor's surety, while allowing a public entity to escape liability for failing to require a surety at all (*126 Cal. App. 4th 1526, 1536-1537)* .

[f] Public Entity's Liability for Failure to Ensure Sufficiency of Contractor's Surety

In ***Walt Rankin & Assocs., Inc. v. City of Murrieta*** *(2000) 84 Cal. App. 4th 605, 101 Cal. Rptr. 2d 48* , the plaintiff was a subcontractor on a city's public works project for the construction of a playground park. After being awarded the construction contract, the general contractor provided the city with a payment surety bond as required by *Civ. Code §§ 3247* and *3248*, executed by an Arizona attorney acting for the surety. After the city inquired of the Arizona attorney about the surety, the attorney provided the city with a copy of his special power of attorney to act for the surety, as well as with a letter from the California Secretary of State acknowledging the surety's filing of a statement by a foreign lending institution. However, the city made no further investigation into the financial solvency of the surety. When the general contractor failed to make payment to the plaintiff, the plaintiff initiated statutory stop notice procedures. The city responded by withholding payment of the remaining sum due the general contractor and disbursing that amount to the plaintiff. The parties then discovered that the surety was a foreign corporation that was not licensed as a surety in any state and that the president of the surety had pled guilty to fraudulent misrepresentation in a prosecution brought in federal court. Eventually, the principals for the surety vacated their Arizona offices, leaving no assets or any information on their current location. The plaintiff brought suit to recover the amount still owed. As part of the suit, the plaintiff sued the city for failing to require that the surety was an admitted surety insurer or to confirm the solvency of the surety, which the plaintiff alleged were mandatory duties under the relevant statutes. The trial court ruled on stipulated facts that the city did not have such a duty, and the plaintiff appealed.

The court of appeal reversed, finding that the city had failed to fulfill mandatory statutory duties that could be the basis for tort liability under *Gov. Code § 815.6*. Initially, the court ruled that *Civ. Code §§ 3247* and *3248* did not impose a

mandatory duty on a public entity to investigatethe solvency of a surety on a public contract. Instead, those sections required only that a payment bond meeting certain requirements be provided, and the city had met those requirements in this case (*84 Cal. App. 4th 605, 615-616)* . However, the court also ruled that those provisions had to be read in conjunction with the statutory provisions of the Bond and Undertaking Law, *Code Civ. Proc. § 995.010 et seq.* The court agreed with the plaintiff that the Bond and Undertaking Law imposed mandatory duties. The court first concluded that *Code Civ. Proc. § 995.310* imposed a mandatory duty on a public entity to require that the bond be executed by an admitted surety insurer, or to require two or more sufficient personal sureties or a combination of sufficient personal sureties or admitted surety insurers, and that the city did not do so in this case (*84 Cal. App. 4th 605, 621-622)* . The court also concluded that *Code Civ. Proc. § 995.660* imposed a mandatory duty on a public entity to require an alleged admitted surety to submit a county clerk's certificate showing that it was in fact an admitted surety, a duty that the city had also violated in this case (*84 Cal. App. 4th 605, 624)* .

[4] Opposing Authorities

[a] Liability for Breach of Mandatory Duty

In *172 L. Ed. 2d 650, 659)* , residents of a mobile home park sued the county for failing to direct the park owner to notify the residents when tests showed that the park drinking water contained levels of naturally occurring fluoride that substantially exceeded the maximum contaminant level specified by the Safe Drinking Water Act. The court of appeal held that the county had an implied mandatory duty to direct the park owner to give such notification to residents, but the California Supreme Court disagreed. The Supreme Court noted that in order to impose liability on a government entity for failing to discharge a mandatory duty, the relevant statute or regulation must explicitly mandate that the government entity take the particular action the plaintiff alleges was not taken (*46 Cal. 4th 887, 898)* . The Court then concluded that none of the provisions of the Safe Drinking Water Act or its implementing regulations cited by plaintiffs explicitly mandated that a county, as the local primacy agency overseeing the quality of water within its jurisdiction, direct an operator of a water system to notify the public that their drinking water had impermissibly high levels of any contaminant. The Court noted that the county was generally responsible for oversight of its public water systems under *Health & Safety Code § 116325*, but that statute did not require the county to take any particular act. Moreover, *Health & Safety Code § 116450(a)* required the water system operator, not the county, to notify residents of contamination, and made clear that any specific direction from the county to the water system operator to notify the public was a recommendation and not based on a compulsory duty. The Court also concluded that other implementing regulations in effect during the relevant period permitted, but did not require, a county to intervene in the notification process (*46 Cal. 4th 887, 902-911)* .

NOTE:

On remand from the California Supreme Court after the decision described *above*, the court of appeal noted that the Supreme Court had held only that no mandatory duty to ensure that the water system operator provided notice to his residents could be implied. The court of appeal concluded, however, that plaintiffs had properly alleged that the county had a mandatory duty under *22 C.C.R. § 64256(e)* to read the water quality reports submitted by the operator and failed to do so. The appellate court concluded that these allegations were sufficient to withstand the county's demurrer and any factual disputes as to whether the county even received the reports would have to be resolved by the trial court in future proceedings [*Guzman v. County of Monterey (2009) 178 Cal. App. 4th 983, 992-994, 100 Cal. Rptr. 3d 793]* .

The facts and procedural background of *Haggis v. City of Los Angeles (2000) 22 Cal. 4th 490, 93 Cal. Rptr. 2d 327, 993 P.2d 983* , are discussed in *§ 196.182[3][b]*. In addressing the issue of whether the defendant had failed to comply with a mandatory duty under its own municipal code when it failed to record a notice of substandard property conditions with the county recorder in 1966 and 1970, the Court first concluded that under the relevant municipal code language, the defendant's duty was mandatory. However, the Court then held that the injury to the plaintiff was not the

kind of injury that the municipal code recording requirement was meant to prevent. The Court concluded that the mandatory requirement that the city record a notice of substandard conditions of property with the county recorder, although having the incidental effect of notifying potential purchasers of the property of substandard conditions, was intended as leverage to induce the correction of the substandard condition and was not intended to protect future purchasers or lenders from economic damage subsequently resulting because the substandard conditions were not corrected (*22 Cal. 4th 490, 503)* . As to the plaintiff's claims that the defendant had violated other municipal code provisions that imposed mandatory duties, the Court concluded that the duties imposed by those particular provisions were discretionary and not mandatory, and thus could not be the basis for imposing liability under *Gov. Code § 815.6* (*22 Cal. 4th 490, 506-508)* .

In *Creason v. Department of Health Servs. (1998) 18 Cal. 4th 623, 76 Cal. Rptr. 2d 489, 957 P.2d 1323* , plaintiffs, a minor and her parents, sued the state of California seeking damages allegedly arising from the state's failure to diagnose and report timely and accurately that the minor was suffering from congenital hypothyroidism in breach of an alleged mandatory duty to do so under the Hereditary Disorders Act, *Health & Safety Code § 124975 et seq.* Shortly after the minor's birth and pursuant to the Act, a blood specimen was sent to a state-contracted laboratory for analysis to determine the existence of certain genetic disorders, including congenital hypothyroidism. Although the plaintiffs and their physicians were informed that the test was negative, in accordance with standards contained in regulations adopted to govern the testing and reporting of results, plaintiffs later discovered the infant lacked a thyroid gland and suffered from congenital hypothyroidism. Plaintiffs then brought suit, alleging that defendant breached its duty by failing to exercise reasonable care in formulating the testing and reporting procedures, since the standards adopted failed to report all possible cases of hypothyroidism. The trial court sustained defendant's demurrer without leave to amend, the court of appeal reversed, and the Supreme Court reversed the court of appeal. The Supreme Court concluded that the legislature, in enacting the Hereditary Disorders Act, intended that the Department of Health Services would exercise discretion in selecting the necessary and appropriate testing and reporting standards, after considering the ever-increasing and changing information concerning heritable and congenital defects, as well as expert and public views on testing. In reaching this conclusion, the Court noted statutory language suggesting that the Director of Health Services was vested with the discretion to adopt the testing standards he or she deemed necessary, subject to certain guiding principles. Thus, the Court held that, despite some mandatory language in the Hereditary Disorders Act, including language requiring that the testing procedures "be accurate [and] provide maximum information," the allegedly negligent exercise of discretion in selecting the appropriate testing and reporting standards did not constitute breach of a mandatory duty under *Gov. Code § 815.6* (*18 Cal. 4th 623, 633)* . The Court also held that, even had the plaintiffs stated a cause of action for breach of a mandatory duty, *Gov. Code § 855.6*, which immunizes a government entity from liability for injuries caused by the failure to make a physical or mental examination, or make an adequate physical or mental examination, would have immunized the state from liability (*18 Cal. 4th 623, 635-638)* .

In de Villers v. County of San Diego (2007) 156 Cal. App. 4th 238, 67 Cal. Rptr. 3d 253 , plaintiffs filed a wrongful death action against a county after their decedent was murdered by his wife with toxic drugs that she stole from the medical examiner's office at which she worked. Plaintiffs alleged both that the county was liable for negligently supervising its employees and for violating a mandatory duty imposed by *21 C.F.R. § 1301.71*, which imposes federal regulatory requirements on licensees who hold controlled substances to "provide effective controls and procedures to guard against theft." The court of appeal held that *21 C.F.R. § 1301.71* did not impose a mandatory duty on the county the violation of which could support liability under *Gov. Code § 815.6*, as the regulation established only general goals, but granted wide discretion to licensees to decide how to achieve those goals and did not describe any discrete acts that must be performed (*156 Cal. App. 4th 238, 258-261)* . In addition, the court concluded that the regulation was not designed to prevent the theft of controlled substances that would then be used to commit murder, the particular injury that occurred here (*156 Cal. App. 4th 238, 261-263)* .

In *Department of Corporations v. Superior Court (2007) 153 Cal. App. 4th 916, 63 Cal. Rptr. 3d 624* , plaintiffs were investors who brought suit against the California Department of Corporations after plaintiffs lost money in a pyramid scheme. Plaintiffsalleged that because the Department initially issued desist and refrain orders against the perpetrators

of the scheme, the Commissioner was under a mandatory duty imposed by *Corp. Code § 25612* to rescind the orders only if finding that the rescission was necessary or appropriate in the public interest or for the protection of investors. Plaintiffs alleged that because the Commissioner failed to make explicit findings pursuant to this statute before the orders were rescinded, the Department could be held liable for plaintiffs' losses caused by the fraudulent investment scheme perpetrated after the orders were rescinded. The court of appeal held that *Corp. Code § 25612* did not impose a mandatory duty that could be the basis for a tort suit against the Department. While recognizing that the statute does use mandatory language, the court noted that the overall statutory framework gives the Commissioner significant discretion in the exercise of his or her duties, and *Corp. Code § 25612* fails to provide any guidance with respect to the nature or form of the required findings. As such, the statute does not impose a mandatory duty that could be the basis for a suit brought by investors (*153 Cal. App. 4th 916, 932-933)* . As an independent basis for its decision, the court also held that another provision of the same Act, *Corp. Code § 25510*, expressly stated that apart from four private causes of action authorized by statute, no other provision of the Act could be used to support a private cause of action (*153 Cal. App. 4th 916, 934-935)* .

In *Tilton v. Reclamation Dist. No. 800 (2006) 142 Cal. App. 4th 848, 48 Cal. Rptr. 3d 366* , plaintiffs were the owners of two parcels of property that allegedly had been damaged by failures in the levee underlying the properties. They sued the reclamation district responsible for maintaining the levee. Among their causes of action were claims for inverse condemnation, negligence, failure to provide lateral and subjacent support, nuisance, and trespass. The trial court sustained a demurrer without leave to amend on these causes of action, and the court of appeal affirmed. The court of appeal concluded that the plaintiffs had not pleaded a mandatory duty imposed on defendant to prevent leakage of the levee. The court rejected plaintiffs' argument that regulations and guidelines adopted by the Federal Emergency Management Agency (FEMA), the U.S. Army Corps of Engineers, and the California Reclamation Board, either together or individually, created an applicable mandatory duty. The Army Corps of Engineers' guidelines, which were in the form of a manual and not actually "regulations," were not mandatory and dealt with the construction of a levee, not subsequent maintenance. Thus, even in conjunction with a California regulation requiring that levees be designed and constructed in accordance with those guidelines, they imposed no applicable mandatory duty, given that the plaintiffs' causes of action were predicated on negligent maintenance of the levee, not negligent design or construction (*142 Cal. App. 4th 848, 862-863)* . The court also rejected reliance on FEMA regulations designed to implement a federal flood insurance program, since the regulations did not impose a mandatory duty upon a levee district to maintain its levees in any particular manner (*142 Cal. App. 4th 848, 863)* .

In *Wilson v. County of San Diego (2001) 91 Cal. App. 4th 974, 111 Cal. Rptr. 2d 173* , the plaintiff was a 13-year-old minor who was placed into protective custody at a nonsecure county children's facility, ran away from the facility, and was struck by a car. The plaintiff alleged that the county had a mandatory duty to keep him safe and stop him from running away based on *Welf. & Inst. Code § 300.2*, which provides that the purpose of the juvenile dependency law is "to provide maximum safety and protection for children who are currently being physically, sexually, or emotionallyabused, being neglected, or being exploited, and to ensure the safety, protection, and physical and emotional well-being of children who are at risk of that harm." The court of appeal held that this statute, which does not require a public agency to take any particular action, but merely recites legislative goals and policies that must be implemented through a public agency's exercise of judgment, cannot reasonably be interpreted to impose a mandatory duty on public agencies to guarantee the safety of dependent children in all circumstances (*91 Cal. App. 4th 974, 980)* .

In *Sutherland v. City of Fort Bragg (2000) 86 Cal. App. 4th 13, 102 Cal. Rptr. 2d 736* , property owners brought an action against a city alleging that the city, in approving a building permit on an adjacent lot, had violated a mandatory duty under a city ordinance requiring site and architectural review (SAR) of applications for building permits. As a result of the new building constructed on the adjacent lot, the plaintiffs' existing building lost access to light and air on one side, eventually causing loss of residential rents and eventual foreclosure when they could not make their mortgage payments. These plaintiffs also alleged that the city fire chief had violated a mandatory duty to enforce provisions of the city's fire code by allowing the adjacent building to be built even though its construction obstructed windows in the existing building that were being used as fire exits. In affirming judgment on the pleadings for the city, the court of

appeal held that the city's SAR ordinance did not impose a mandatory duty for purposes of *Gov. Code § 815.6* due to the level of discretion accompanying application of the ordinance (*86 Cal. App. 4th 13, 20-22)* . The court also held that the ordinance was intended primarily to protect scenic and aesthetic interests and was not intended to protect light and air access, or fire escape access, for a neighboring landowner's building (*86 Cal. App. 4th 13, 22-23)* . The court also held that the plaintiffs failed to establish that the lack of SAR review caused their injuries, given evidence that city zoning provisions would have allowed the neighboring landowner to build right up to the edge of his property line (*86 Cal. App. 4th 13, 23-24)* . Finally, the court concluded that the city fire chief exercised considerable discretion in enforcing the fire code and that the fire chief therefore did not violate a mandatory duty in allowing the adjacent building to be built in such a way that it blocked windows in the plaintiffs' building being used as the requisite second fire exit required by code (*86 Cal. App. 4th 13, 24)* .

In *Fleming v. State of California (1995) 34 Cal. App. 4th 1378, 41 Cal. Rptr. 2d 63* , plaintiffs appealed from the dismissal of their action against the state of California and a parole officer for failure to prevent a murder by a parolee who was in violation of his parole. The trial court sustained both defendants' demurrers on grounds of immunity. Plaintiffs argued that their complaint adequately alleged claims against the state for failing to perform the mandatory and statutory duty to arrest the parolee. After he was paroled, the parolee visited the states of Arizona and Oklahoma in violation of his parole. Plaintiffs urged that defendants were then required to arrest the parolee by *Penal Code § 3059,* which states that if any paroled prisoner leaves the state without permission he must be held as an escaped prisoner and arrested as such. However, the court of appeals noted that liability under *Gov. Code § 815.6* arises only where the statute creating the duty is designed to protect against the injury which occurs. The court stated that *Penal Code § 3059* was not intended to protect the public against the risk of criminal attack by a parolee who leaves the state without permission, but rather to keep the parolee available to meet with the parole officer by subjection him or her to arrest as an escapee (*34 Cal. App. 4th 1378, 1384)* . The court also held that the alleged breach was not a legal or proximate cause of plaintiffs' injuries (*34 Cal. App. 4th 1378, 1387)* .

In *State of California v. Superior Court (1992) 8 Cal. App. 4th 954, 10 Cal. Rptr. 2d 527* , the parents of school children molested by a teacher filed a complaint against the state for damages. Plaintiffs alleged that *Educ. Code § 44346(a),* which requires the denial of teaching credentials to any applicant convicted of a sex offense, placed on the state a mandatory duty to deny the teacher's application because he had a prior sex conviction when hired. The state filed a motion for summary judgment, arguing, inter alia, that § 44346(a) did not impose a mandatory duty under *Gov. Code § 815.6,* and was not intended as a vehicle for damages actions against the state. The court of appeal let a peremptory writ issue directing the trial court to vacate its order and to enter an order granting summary judgment (*8 Cal. App. 4th 954, 959)* . It held that, as used in *Gov. Code § 815.6,* the term "mandatory" refers to an obligatory duty that a governmental entity is required to perform, as opposed to a permissive power that a governmental entity may exercise or not as it chooses. The court stated that although § 44346(a) may be a mandatory provision, it neither sets forth a mandatory duty that is privately enforceable, nor renders governmental entities liable to molested students for negligent investigation of a credential applicant. The court noted that there is no indication that the legislature intended to impose a duty that would provide a basis for civil liability (*8 Cal. App. 4th 954, 958)* .

Fredette v. City of Long Beach (1986) 187 Cal. App. 3d 122, 231 Cal. Rptr. 598 , was an action against a city by a 22-year-old man who'd been rendered a quadriplegic when he dove from a city pier into a lagoon and struck his head against the bottom of the lagoon or some unknown solid object. The pier had been undergoing reconstruction that was substantially complete at the time of the accident. Plaintiff requested a jury instruction to the effect that the city was negligent per se in failing to erect barricades in the vicinity of the construction site in violation of regulations contained in the Uniform Building Code. The trial court refused to give the instruction. In affirming the judgment for defendant city on the ground that substantial evidence supported the jury's finding that there was nodangerous condition of public property and that the city's failure to erect barricades or post warning signs was not the proximate cause of plaintiff's injuries, the court of appeal said that the statutes relied on by plaintiff had no application to the case and that the trial court properly refused to instruct on negligence per se (*187 Cal. App. 3d 122, 135)* . The court said that if the injury of the kind sustained by plaintiff was not one of the consequences that the legislature sought to prevent through imposition

of the alleged mandatory duty, liability does not obtain under *Gov. Code § 815.6* (*187 Cal. App. 3d 122, 135-136)* . The court said the provisions of the Uniform Building Code relied on by plaintiff were intended to provide protection to pedestrians using a public way adjacent to building sites from construction related accidents, that the reconstruction of the pier had been substantially completed and any activities that were ongoing simply did not contribute to plaintiff's accident, that the injuries sustained were not of the type that the Uniform Building Code was enacted to prevent, and that plaintiff, in walking onto the pier and intentionally diving from it, was not one of the class of persons for whose protection the regulations were adopted (*187 Cal. App. 3d 122, 136)* .

[b] "Enactment" Defined

The facts of *Wilson v. County of San Diego (2001) 91 Cal. App. 4th 974, 111 Cal. Rptr. 2d 173* , are discussed in *§ 196.182[4][a]*. The court of appeal rejected the plaintiff's argument that a mandatory duty could be found in the county facility's child care worker manual, which provided that facility staff should know where the children are and keep them within view at all times. The court noted that the term "enactment" as used in *Gov. Code § 815.6* means "a constitutional provision, statute, charter provision, ordinance, or regulation," and is intended to refer to all measures of a formal legislative or quasi-legislative nature. The court also noted that the term "regulation" means a rule, regulation, order, or standard adopted pursuant to the Administrative Procedure Act. It does not extend to a regulation that relates only to the internal management of a state agency, and it does not extend to a regulation that is directed to a specific person or group of persons and does not apply generally throughout the state. Therefore, the facility's child care worker manual did not constitute an administrative regulation within the meaning of *Gov. Code § 815.6* and could not impose a mandatory duty for these purposes (*91 Cal. App. 4th 974, 982)* .

In *Posey v. State of California (1986) 180 Cal. App. 3d 836, 225 Cal. Rptr. 830* , the court of appeal stated, with respect to the definition of regulation, that regulations having the "force of law" have been defined as those regulations that are promulgated pursuant to an authorization to implement, interpret, or make specific a law being enforced or administered by the promulgator, and that this excludes informal guides, policy manuals, and recommended procedures helpful in establishing the standards of statutes, but lacking the force of law (*180 Cal. App. 3d 836, 849*). The court held that an internal general order of the California Highway Patrol, which was not adopted pursuant to the authority vested in the California Highway Patrol by statute (*Veh. Code § 2402*), was not a regulation having the force of law and was not, therefore, an enactment within the meaning of *Gov. Code § 815.6* (*180 Cal. App. 3d 836, 849)* .

NOTE:

Additional cases holding that the particular rule or regulation involved imposed no mandatory duty on the public entity or its employees include: *Searcy v. Hemet Unified Sch. Dist. (1986) 177 Cal. App. 3d 792, 799, 223 Cal. Rptr. 206* (guidelines in School Area Pedestrian Safety manual promulgated by State Department of Transportation as not internally binding on defendant unified school district); and *Lehto v. City of Oxnard (1985) 171 Cal. App. 3d 285, 294-295, 217 Cal. Rptr. 450* (internal police department regulations). For provisions concerning when a rule, policy, manual, or guideline of state or local government shall not be considered to be a statute, ordinance, or regulation for the purposes of *Evid. Code § 669(a)*, see *Evid. Code § 669.1*.

[c] "Regulation" Defined

Wilson v. County of San Diego (2001) 91 Cal. App. 4th 974, 111 Cal. Rptr. 2d 173 , is discussed in *§ 196.182[4][b]*.

Posey v. State of California (1986) 180 Cal. App. 3d 836, 225 Cal. Rptr. 830 , is discussed in *§ 196.182[4][b]*.

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Volume 19A Chapters 196-199 PUBLIC ENTITIES---to---QUO WARRANTO
CHAPTER 196 PUBLIC ENTITIES
PART II. FORMS
C. Liability of Public Entities And Employees
1. Liability For Acts or Omissions

19A-196 California Points & Authorities § 196.183

§ 196.183 Supporting Contention That Public Entity or Employee Is Liable for Act or Omission [Gov. Code §§ 815.2(a), 820(a)]--Public Entity and Public Employee Are Liable for Injury Caused by Public Employee's Failure to Summon Medical Care for Prisoner in Custody and in Need of Immediate Medical Care [Gov. Code § 845.6]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE OBJECTION THAT DEFENDANT(S) _____ [IS *or* ARE] NOT LIABLE TO PLAINTIFF _____ [SHOULD BE *or* SHOULD HAVE BEEN *or* WAS PROPERLY] OVERRULED BECAUSE PLAINTIFF HAS _____ [ALLEGED FACTS SHOWING *or* SHOWN] THAT PLAINTIFF SUSTAINED INJURY PROXIMATELY CAUSED BY THE FAILURE OF DEFENDANT _____ [*name of employee*] TO SUMMON MEDICAL CARE FOR PLAINTIFF AND THAT, AT THE TIME OF DEFENDANT'S FAILURE, HE/SHE KNEW, OR HAD REASON TO KNOW, THAT PLAINTIFF WAS IN NEED OF IMMEDIATE MEDICAL CARE AND FAILED TO TAKE ANY REASONABLE ACTION [OR ANY ACTION AT ALL] TO SUMMON SUCH CARE.

Liability for Failure to Summon Medical Care. Except as otherwise provided in *Sections 855.8* and *856 of the Government Code*, a public employee, and the public entity if the employee was acting within the scope of his or her employment, is liable for injury proximately caused by the employee's failure to furnish or obtain medical care for a prisoner in his or her custody if the employee knew or had reason to know that the prisoner was in need of immediate medical care and the employee failed to take reasonable action to summon such medical care (*Gov. Code § 845.6*; *Hart v. County of Orange (1967) 254 Cal. App. 2d 302, 305-308, 62 Cal. Rptr. 73*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a public entity and its employee are

liable for injury sustained as a result of the failure of the employee, acting within the scope of his or her employment, to take reasonable action to summon medical care for a prisoner (defined in *Gov. Code § 844*) when the employee knew or had reason to know that the prisoner was in need of immediate medical care [*see Gov. Code § 845.6*]. For discussion of the immunity otherwise provided by *Gov. Code § 845.6*, see *§ 196.09[7]*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be used in a memorandum of points and authorities in opposition to the public entity's demurrer to the complaint, or motion for judgment on the pleadings, on the asserted ground that the complaint fails to state facts sufficient to constitute a cause of action, or in opposition to the public entity's motion for summary judgment on the ground that the action has no merit. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Liability for Failure to Summon Medical Care

In ***Hart v. County of Orange*** *(1967) 254 Cal. App. 2d 302, 62 Cal. Rptr. 73* , a man was taken ill in his truck. The police were called and found him unconscious. They placed him in the drunk tank, although there was evidence from which the police could have determined that he was sick and not drunk. When he was still unconscious the next morning, he was taken to the hospital where he later died from his illness. His heirs sued the county, which appealed a verdict in favor of the heirs. The court of appeal affirmed. It held that the provisions of *Gov. Code § 845.6* provided for liability of the public entity and public employee to a prisoner for unreasonable failure to summon medical aid despite the general immunity in *Gov. Code § 844.6* for injuries to prisoners. It then held that there was sufficient evidence to support the verdict (*254 Cal. App. 2d 302, 305-308)* .

[4] Additional Authorities

[a] Liability for Failure to Summon Medical Care

Lucas v. County of Los Angeles (1996) 47 Cal. App. 4th 277, 54 Cal. Rptr. 2d 655 , involved an action against a county and individual police officers arising out of the death of a prisoner who swallowed a bag of methamphetamine. Prior to this action plaintiff had filed an action in the federal district court for violation of decedent's civil rights. The federal court granted summary judgment to defendants, with the following conclusions of law: (1) the individual officers were not deliberately indifferent to the serious medical needs of decedent, and (2) the individual officer took reasonable action regarding the obtaining of medical care for decedent. The trial court in the state action then awarded judgment to defendants, ruling without trial that the conclusions of law which came from the federal court were to be given res judicata effect. The court of appeal reversed, holding that the term "reasonable action" in terms of the "deliberate indifference" standard of cruel and unusual punishment under the federal Constitution was not identical to the "reasonable" standard for immunity under *Gov. Code § 845.6*. The court noted that federal law applied a subjective standard of knowledge, so that even if prison officials know of a substantial risk to inmate health or safety, they may be found free from liability if they respond reasonably to the risk. However, under *Gov. Code § 845.6*, in order for a public employee to be liable for failing to provide medical care to prisoners, the employee must know or have reason to know of the need of immediate medical care and fail to summon such care. The court thendetermined that unlike the federal subjective standard of knowledge, the phrase "has reason to know" in *Gov. Code § 845.6* is the equivalent of an objective standard. The court stated that because the standards are different and because it did not know wether the federal court used an objective or subjective test in its factual findings, it must reverse the judgment (*47 Cal. App. 4th 277, 290)* .

Zeilman v. County of Kern (1985) 168 Cal. App. 3d 1174, 214 Cal. Rptr. 746 , was an action by a person who had been arrested and, while on crutches as the result of a ski accident, had fallen in the county jail facility where she was being booked. She sued the county for damages for injuries resulting from the failure of jail personnel to provide her with immediate medical care pursuant to *Gov. Code § 845.6*. Plaintiff's counsel had arrived at the jail after the fall and during the booking procedure and could observe his client being booked in an "agitated, emotional and weakened condition which was easily apparent to him and to any other person in his vicinity." The trial court granted the county's motion for summary judgment on the ground that plaintiff was a prisoner at the time and the county was, therefore, immune from liability under *Gov. Code §§ 844* (defining "prisoner") and 844.6 (granting immunity for an injury to any prisoner). Plaintiff's contentions were that she was not a prisoner at the time of the fall and that therefore the county was not immune under *Gov. Code § 844.6*, or if she was a prisoner, the county was liable under *Gov. Code § 845.6* for failure of the jail officials to have summoned immediate medical care. The court of appeal reversed the summary judgment, holding that there existed triable issue of fact in regard to (1) whether plaintiff was a "prisoner" at the time she fell (the court discussed the conflict among the cases concerning the meaning of *Gov. Code § 844* and concluded that the line of demarcation between status as an arrestee and as a confined person is the completion of the booking process) (*168 Cal. App. 3d 1174, 1181-1183)* ; and (2) whether plaintiff's use of crutches and her agitated condition should have given rise to knowledge of her need for immediate medical care under *Gov. Code § 845.6* (*168 Cal. App. 3d 1174, 1184-1187)* .

[5] Opposing Authorities

[a] Liability for Failure to Summon Medical Care

In *Watson v. State of California (1993) 21 Cal. App. 4th 836, 26 Cal. Rptr. 2d 262* , an inmate in a county jail injured his ankle playing basketball. A nurse examined him the next day, noted that his Achilles tendon was intact, and gave him an ace bandage and pain medication and provided in-cell feeding to minimize leg use. An internist reviewed plaintiff's medical chart, but did not see plaintiff. On and after his transfer to state prison, he complained about his ankle, to three different doctors. The first did not examine the tendon because plaintiff was walking and a torn tendon would cause him to be screaming in pain and in a wheelchair or on crutches. The second provided medication for a sprained ankle after examining an x-ray of the ankle. The third doctor examined the ankle, entered in the medical chart, based on the oral history, that plaintiff had a probable torn Achilles tendon that was mending, furnished medication and tennis shoes, and saw plaintiff five or six more times before plaintiff's release. After being released, plaintiff saw another doctor who determined that he had a ruptured Achilles tendon, which, if not treated could result in permanent injury. The doctor told plaintiff that the doctor believed the tendon should have been treated during his incarceration and that chances for a successful surgical repair were significantly reduced due to the passage of time. Plaintiff then sued the county and state based on a failure to summon and provide reasonable medical care and sued the state employees for medical malpractice. The trial court granted summary judgment in favor of the state, ruling that no triable facts were presented to support a *Gov. Code § 845.6* claim against the state, but denied the county's summary judgment motion (*21 Cal. App. 4th 836, 840)* . The trial court also sustained the state employees' demurrers to the first amended complaint without leave to amend on the grounds that it was barred by the claims presentation statute (*21 Cal. App. 4th 836, 840)* .

The court of appeal affirmed. With regard to *Gov. Code § 845.6*, the court pointed out that the state had provided prompt medical care (*21 Cal. App. 4th 836, 842)* . The court noted that liability under *Gov. Code § 845.6* is limited to serious and obvious medical conditions, if the public entity intentionally or unjustifiably fails to furnish immediate medical care (*21 Cal. App. 4th 836, 841)* . Moreover, the court noted that the state did not have a concomitant duty to assure that its employees (the prison medical staff) properly diagnosed and treated the medical condition (*21 Cal. App. 4th 836, 842)* . To the contrary, under *Gov. Code § 845.6*, a medical malpractice action must be brought against the employees, not the public entity (*21 Cal. App. 4th 836, 842)* . Furthermore, no triable facts were presented that the state knew or had reason to know that the medical care provided at the state prisons was so deficient so as to be tantamount to no medical care (*21 Cal. App. 4th 836, 845*). Notice cannot be imputed to the state based on medical

hindsight by an orthopedic specialist who diagnosed the medical problem almost a year after the injury (*21 Cal. App. 4th 836, 845*).

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CHAPTER 196 PUBLIC ENTITIES
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C. Liability of Public Entities And Employees
1. Liability For Acts or Omissions

19A-196 California Points & Authorities § 196.184

§ 196.184 Supporting Contention That Public Entity or Employee Is Liable for Act or Omission [Gov. Code §§ 815.2(a), 820(a)]--Public Employee Is Liable for Injury to Victim of Fire or Fire Operation Caused by Employee's Willful Misconduct in Transporting or Arranging for Transportation of Victim to Physician or Hospital [Gov. Code § 850.8]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE OBJECTION THAT DEFENDANT _____ [*name of employee*] IS NOT LIABLE TO PLAINTIFF _____ [SHOULD BE *or* SHOULD HAVE BEEN *or* WAS PROPERLY] OVERRULED BECAUSE PLAINTIFF HAS _____ [ALLEGED FACTS SHOWING *or* SHOWN] THAT PLAINTIFF WAS INJURED BY A _____ [FIRE *or* FIRE PROTECTION OPERATION], THAT AT THE TIME DEFENDANT WAS AN EMPLOYEE OF _____ [*name of public entity*], THAT DEFENDANT, ACTING IN THE SCOPE OF HIS/HER EMPLOYMENT, _____ [TRANSPORTED *or* ARRANGED FOR THE TRANSPORTATION OF] PLAINTIFF TO A _____ [PHYSICIAN *or* SURGEON *or* HOSPITAL], AND THAT, AS A PROXIMATE RESULT OF DEFENDANT'S WILLFUL MISCONDUCT IN _____ [TRANSPORTING *or* ARRANGING FOR THE TRANSPORTATION OF] PLAINTIFF, PLAINTIFF SUSTAINED FURTHER INJURY.

Liability of Public Employee for Injury Caused by Willful Misconduct in Transporting or Arranging for Transportation of Fire Victim to Physician and Surgeon or Hospital. Notwithstanding the immunity of a public employee and his or her employing public entity for any injury sustained by a fire victim, or fire protection operation victim, as a result of or in connection with the transportation of the victim to a physician and surgeon or hospital by, or arranged by, the public employee, the employee is liable for injury to the victim proximately caused by his or her willful misconduct in transporting the victim to the physician and surgeon or hospital or arranging for the transportation (*Gov. Code § 850.8*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a public employee acting in the scope of his or her employment is liable for injury sustained by a fire victim or fire protection operation victim who was further injured by the willful misconduct of the employee in transporting, or arranging for the transportation of, the victim to a physician and surgeon or hospital [*Gov. Code § 850.8*]. For discussion of the immunity otherwise provided by *Gov. Code § 850.8*, see *§ 196.09[13]*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be used in a memorandum of points and authorities in opposition to the public entity's demurrer to the complaint, or motion for judgment on the pleadings, on the asserted ground that the complaint fails to state facts sufficient to constitute a cause of action, or in opposition to the public entity's motion for summary judgment on the ground that the action has no merit. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

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Volume 19A Chapters 196-199 PUBLIC ENTITIES---to---QUO WARRANTO
CHAPTER 196 PUBLIC ENTITIES
PART II. FORMS
C. Liability of Public Entities And Employees
1. Liability For Acts or Omissions

19A-196 California Points & Authorities § 196.185

§ 196.185 Supporting Contention That Public Entity or Employee Is Liable for Act or Omission [Gov. Code §§ 815.2(a), 820(a)]--Public Entity That Operates Medical Facility [Gov. Code § 854] Is Liable for Injury Caused by Entity's Failure to Provide Equipment, Personnel, or Facilities Required by Statute or Regulation [Gov. Code § 855]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE OBJECTION THAT DEFENDANT _____ [*name of public entity*] IS NOT LIABLE TO PLAINTIFF _____ [SHOULD BE *or* SHOULD HAVE BEEN *or* WAS PROPERLY] OVERRULED BECAUSE PLAINTIFF HAS _____ [ALLEGED FACTS SHOWING *or* SHOWN] THAT DEFENDANT _____ [OPERATES *or* MAINTAINS] A MEDICAL FACILITY AND THAT PLAINTIFF'S INJURY WAS PROXIMATELY CAUSED BY DEFENDANT'S FAILURE TO PROVIDE ADEQUATE OR SUFFICIENT _____ [EQUIPMENT *and/or* PERSONNEL *and/or* FACILITIES] AS REQUIRED BY _____ [*specify statute or regulation*].

[*EITHER*]

Liability of Public Entity Operating or Maintaining Medical Facility Subject to Regulation by State Department. A publicentity that operates or maintains any medical facility (as defined in *Section 854 of the Government Code*) that is subject to regulation by the California State Department of Health Services, Social Services, Developmental Services, or Mental Health is liable for injury proximately caused by the failure of the public entity to provide adequate or sufficient equipment, personnel, or facilities required by any statute or any regulation of those departments prescribing minimum standards for equipment, personnel, or facilities, unless the public entity establishes that it exercised reasonable diligence to comply with the applicable statute or regulation (*Gov. Code § 855(a)*).

[*OR*]

Liability of Public Entity Operating or Maintaining Medical Facility Not Subject to Regulation by State Department. A public entity that operates or maintains any medical facility that is not subject to regulation by the State Department of Health Services, Social Services, Developmental Services, or Mental Health is liable for injury proximately caused by the failure of the public entity to provide adequate or sufficient equipment, personnel, or facilities substantially equivalent to those required by any statute or any regulation of those departments prescribing minimum standards for equipment, personnel, or facilities applicable to a public medical facility of the same character and class, unless the public entity establishes that it exercised reasonable diligence to conform with those minimum standards (*Gov. Code § 855(b)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a public entity that operates a medical facility, as defined in *Gov. Code § 854*, is liable for the plaintiff's injury, which was proximately caused by the entity's failure to provide adequate or sufficient equipment, personnel, or facilities required by any statute or regulation of the designated department [*Gov. Code § 855*].

If liability is predicated on the failure to comply with a statute, the statute should be cited; the court will take judicial notice of its contents [*see Evid. Code § 451(a)*]. If liability is predicated on the medical facility's failure to comply with a departmental regulation, it would appear that counsel may request the court to take judicial notice of the regulation under *Evid. Code § 452(b)*, which authorizes the taking of judicial notice of regulations of any public entity in the United States. In this latter situation, counsel should furnish the court with sufficient information to enable it to take judicial notice of the matter [*Evid. Code § 453(b)*]. If the regulation is published in the California Code of Regulations, a citation to the appropriate code section would appear to be sufficient. If it is not so published, it would appear that the better practice would be to set forth the regulation verbatim in the points and authorities and secure a certified copy of the regulation to present to the court [*see Evid. Code §§ 1530, 1531*].

Counsel should note that if a plaintiff seeks to impose liability under *Gov. Code § 855* for violation of a regulation, that regulation must have been promulgated by one of the four state departments specified in the statute [*Lockhart v. County of Los Angeles (2007) 155 Cal. App. 4th 289, 305-306, 66 Cal. Rptr. 3d 62]* . In addition, regardless of whether liability is predicated on a statute or regulation, the relevant statute or regulation must prescribe a specific minimum standard that has been violated. Provisions that merely provide general guidelines, such as those requiring "sufficient" personnel or the like, cannot be a basis for imposing liability under the statute [*Lockhart v. County of Los Angeles (2007) 155 Cal. App. 4th 289, 307-309, 66 Cal. Rptr. 3d 62]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be used in a memorandum of points and authorities in opposition to the public entity's demurrer to the complaint, or motion for judgment on the pleadings, on the asserted ground that the complaint fails to state facts sufficient to constitute a cause of action, or in opposition to the public entity's motion for summary judgment on the ground that the action has no merit. They may also be adapted for use in a trial or appellate brief.

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CHAPTER 196 PUBLIC ENTITIES
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19A-196 California Points & Authorities § 196.186

§ 196.186 Supporting Contention That Public Entity or Employee Is Liable for Act or Omission [Gov. Code §§ 815.2(a), 820(a)]--Public Entity Is Liable for Injury Caused by Entity's Use of Pesticide [Gov. Code § 862(b)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE OBJECTION THAT DEFENDANT _____ [*name of public entity*] IS NOT LIABLE TO PLAINTIFF _____ [SHOULD BE *or* SHOULD HAVE BEEN *or* WAS PROPERLY] OVERRULED BECAUSE PLAINTIFF'S INJURIES WERE CAUSED BY DEFENDANT'S USE OF A PESTICIDE.

A. Liability of Public Entity for Use of Pesticide. A public entity is liable for injuries caused by its use of a pesticide to the same extent as a private person except that no presumption of negligence arises from the failure of a public entity or a public employee to comply with a provision of a statute or regulation relating to the use of a pesticide if the statute or regulation by its terms is made inapplicable to the public entity or the public employee (*Gov. Code § 862(b)*).

B. "Pesticide" Defined. As used in *Section 862 of the Government Code*, the word "pesticide" means (1) a "substance" as defined in *Section 12753 of the Food and Agricultural Code*; (2) an "injurious material" the use of which is regulated or prohibited under *Sections 14001-14063 of the Food and Agricultural Code*; and *(3)* any material used for the same purpose as any of the already mentioned materials (*Gov. Code § 862(a)*).

C. State Must Adhere to Statutory Notification Requirements. As part of a Mediterranean fruitfly eradication program, the state is obligated by the *Food and Agricultural Code Sections 5029, 5771 et seq.* to comply with strict notification requirements expressly designed for such programs (*Adkins v. State of California (1996) 50 Cal. App. 4th 1802, 1811, 59 Cal. Rptr. 2d 59*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a public entity is liable for injuries caused by its use of a pesticide as defined in *Gov. Code § 862(a)*. *Gov. Code § 862* is limited to pesticides and has no effect on the rules that determine the liability of public entities for injuries arising from the use of a chemical that is not a pesticide.

Theses points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be used in a memorandum of points and authorities in opposition to the public entity's demurrer to the complaint, or motion for judgment on the pleadings, on the asserted ground that the complaint fails to state facts sufficient to constitute a cause of action, or in opposition to the public entity's motion for summary judgment on the ground that the action has no merit. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Construction of Gov. Code § 862

There appear to be no appellate court cases expressly construing *Gov. Code § 862*. However, in one court of appeal case, the plaintiffs were insurers that sought, on a variety of theories including "strict liability" under *Gov. Code § 862*, to recover from the state of California the amounts they'd paid out on insurance claims for damage done to automobile paint finishes caused by the aerial spraying of Malathion in the 1980-82 Mediterranean fruit fly eradication program in response to the Governor's proclamation of a state of emergency under the Emergency Services Act (*Gov. Code §§ 8550-8668*). The court of appeal said that it is by no means clear that the statute does impose strict liability on the state and quoted the California Law Revision Commission note to *Gov. Code § 862* stating that, although it appears that the effect of the California statutes and regulations relating to the use of pesticides is to impose strict liability for injuries resulting from such use, this conclusion will remain uncertain until there has been a judicial determination of the question in California. The court said that research revealed no case to date interpreting this code section [*Farmers Ins. Exch. v. State of California (1985) 175 Cal. App. 3d 494, 504, 221 Cal. Rptr. 225]* .

However, the court did "tend to agree" with the Attorney General's argument that *Gov. Code § 862(b)* simply did not apply to the facts of the case, reasoning that the statute plainly appears to govern those situations when the state is carrying out proprietary activities on property it either owns or controls as a private person would do and that it does not apply in a situation when the state is acting in its governmental capacity to abate a statewide nuisance [*Farmers Ins. Exch. v. State of California (1985) 175 Cal. App. 3d 494, 504, 221 Cal. Rptr. 225]* . The court nevertheless concluded that whether or not *Gov. Code § 862(b)* imposed strict liability, the state and its agents would be immune from liability under *Gov. Code § 862(b)* by virtue of the immunity provision (*Gov. Code § 8655*) of the Emergency Services Act pursuant to which the Governor acted in proclaiming the state of emergency [*Farmers Ins. Exch. v. State of California (1985) 175 Cal. App. 3d 494, 504, 221 Cal. Rptr. 225]* .

[3] Discussion of Authorities

[a] State Must Adhere to Statutory Notification Requirements

The decision in ***Adkins v. State of California*** *(1996) 50 Cal. App. 4th 1802, 59 Cal. Rptr. 2d 59* , arose out of the Mediterranean fruit fly (Medfly) eradication program of 1989. Plaintiffs, who were hired by the state to hang Medfly traps, became ill after handling the chemical used in the traps. Plaintiffs' supervisors knowingly lied to them about the effect of the chemical, told plaintiffs the chemical was completely safe, and refused to allow them to wear protective clothing. Plaintiffs sued the state for the physical injuries they incurred as a result of exposure to the chemical. The trial court granted a nonsuit, and entered judgment finding the state was immune from liability under the Emergency

Services Act, *Gov. Code §§ 8550 et seq.*

The court of appeal reversed, concluding that the state was not immune under the Emergency Services Act for intentional concealment of known dangers which cause personal injuries. The court stated that in prosecuting the Medfly eradication program the state was acting pursuant to itsauthority under the Emergency Services Act, and that as part of an eradication program, the state was obligated by *Food & Agric. Code §§ 5029, 5771 et seq.* to comply with a number of strict notification requirements expressly designed for such programs. It acknowledged that States were immune from civil actions stemming from the administration of the notice requirements if the director or commissioner used his or her best efforts to comply with the requirements. However, the court found that intentionally misrepresenting the toxic nature of a chemical used in the eradication program could not possibly be considered best efforts to comply with the strict notice requirements, or to comply with the state's obligation to provide complete and accurate information relating to health and safety (*50 Cal. App. 4th 1802, 1816)* .

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19A-196 California Points & Authorities § 196.187

§ 196.187 Supporting Contention That Public Entity or Employee Is Liable for Act or Omission [Gov. Code §§ 815.2(a), 820(a)]--Public Entity Is Liable for Death or Injury to Person or Property Proximately Caused by Public Employee's Negligent Operation of Motor Vehicle, Including Emergency Vehicle [Veh. Code § 17001]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE OBJECTION THAT DEFENDANT _____ [*name of public entity*] IS NOT LIABLE TO PLAINTIFF _____ [SHOULD BE *or* SHOULD HAVE BEEN *or* WAS PROPERLY] OVERRULED BECAUSE PLAINTIFF HAS _____ [ALLEGED FACTS SHOWING *or* SHOWN] THAT _____ [*specify, e.g.,* PLAINTIFF SUSTAINED SERIOUS PERSONAL INJURIES] AS A PROXIMATE RESULT OF THE NEGLIGENT OPERATION OF A MOTOR VEHICLE BY _____ [*name*], WHO, AT THE TIME OF THE ACCIDENT, WAS DEFENDANT'S EMPLOYEE ACTING WITHIN THE SCOPE OF HIS/HER EMPLOYMENT.

A. Liability of Public Entity for Motor Vehicle Accidents. A public entity is liable for death or injury to person or property proximately caused by a negligent or wrongful act or omission in the operation of any motor vehicle by an employee of the public entity acting within the scope of his or her employment (*Veh. Code § 17001*).

[*Optional*] **B. Immunities Not Applicable to Liability Under Vehicle Code.** *Government Code Sections 815.2(b)* and *845.8* do not provide immunity to public entities for liability that is predicated on *Vehicle Code Section 17001* (*Thomas v. City of Richmond (1995) 9 Cal. 4th 1154, 1165, 40 Cal. Rptr. 2d 442, 892 P.2d 1185* (*Gov. Code § 845.8*); *Brummett v. County of Sacramento (1978) 21 Cal. 3d 880, 883-887, 148 Cal. Rptr. 361, 582 P.2d 952* (*Gov. Code § 815.2(b)*).

[*Optional*] **C. Liability When Motor Vehicle Involved Was Emergency Vehicle.** Despite the fact that a public employee operating an authorized emergency vehicle responding to an emergency call, or in the immediate pursuit of an

actual or suspected law violator, or responding to a fire alarm or other emergency call, is immune from liability under *Vehicle Code Section 17004*, the public entity employer is liable under *Vehicle Code Section 17001* for injuries caused by the negligent operation of that vehicle (*Brummett v. County of Sacramento (1978) 21 Cal. 3d 880, 883, 885, 148 Cal. Rptr. 361, 582 P.2d 952* ; *City of Sacramento v. Superior Court (1982) 131 Cal. App. 3d 395, 400, 182 Cal. Rptr. 443*).

[*Optional*] **D. Failure of Emergency Vehicle to Sound Siren.** Police officers are under a duty to exercise due care during a chase for the safety of innocent persons that may be injured, and the duty to use due care may include the duty to sound a siren to warn others of the approaching pursuit. Thus, when police officers engage in a vehicle pursuit and their pursuit causes the suspect to engage in a course of conduct creating a danger to other users of the highway, the trier of fact may conclude that the officers were negligent in failing to flash their red lights or sound their siren in order to alert other innocent parties to the approaching danger created by their pursuit (*Stark v. City of Los Angeles (1985) 168 Cal. App. 3d 276, 283-284, 214 Cal. Rptr. 216*).

[*Optional*] **E. Liability When Prisoner Is Negligently Allowed to Steal Emergency Vehicle in Operation.** When a police officer arrests a person and negligently permits the person to steal the police car in which he was placed and, in a chase in which the stolen police car was pursued by other police cars, injure a third person, the officer's public entity employer is liable to the third person under *Section 17001 of the Vehicle Code* (*Duarte v. San Jose (1980) 100 Cal. App. 3d 648, 654-659, 161 Cal. Rptr. 140*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the defendant public entity is liable for the injury to plaintiff or to plaintiff's property or for the death of plaintiff's decedent proximately caused by the negligent operation of a motor vehicle by an employee of the defendant acting within the scope of his or her employment [*Veh. Code § 17001*].

Optional Paragraph B should be included if the public entity has asserted (or may assert) that it is immune from liability pursuant to the provisions of either *Gov. Code § 815.2(b)* (providing immunity to public entity if employee is immune) or *Gov. Code § 845.8* (providing immunity to public entity based on injury caused by escaping arrested person or person resisting arrest). Optional Paragraph C should be included if the employee is immune from liability under *Veh. Code § 17004*, which provides that a public employee is immune from civil liability for death, personal injury, or property damage resulting from the operation of an emergency vehicle in the line of duty [*see also § 196.10[16]*]. Optional Paragraph D should be included when the injury is caused by the failure of police officers giving chase in an emergency vehicle to sound its siren. Optional Paragraph E should be included when the injury is caused by a person who is negligently permitted to steal an emergency vehicle in operation and injure a third person with it.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be used in a memorandum of points and authorities in opposition to the public entity's demurrer to the complaint, or motion for judgment on the pleadings, on the asserted ground that the complaint fails to state facts sufficient to constitute a cause of action, or in opposition to the public entity's motion for summary judgment on the ground that the action has no merit. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Immunities Not Applicable to Liability Under Vehicle Code

In ***Thomas v. City of Richmond*** *(1995) 9 Cal. 4th 1154, 40 Cal. Rptr. 2d 442, 892 P.2d 1185* , plaintiff fled on foot when a police car approached, and was rendered a quadriplegic when the pursuing police car struck plaintiff in the street. Plaintiff sued the driver of the car and the public entity; the trial court granted summary judgment in favor of both defendants, holding that they were immune under *Gov. Code § 845.8* and *Veh. Code § 17004*. The court of appeal affirmed the grant of summary judgment in favor of the public entity, but reversed as to the driver on the ground that a public entity is not immune if its police officers act negligently or intentionally use excessive force while pursuing a fleeing suspect. Because there were triable issues of fact regarding these issues, the court held that summary judgment should have been denied. The public entity appealed, and the California Supreme Court affirmed.

The Court noted its previous holding in *Brummett v. County of Sacramento (1978) 21 Cal. 3d 880, 883-887, 148 Cal. Rptr. 361, 582 P.2d 952* , discussed that the public entity liability provided by *Veh. Code § 17001* is not subject to the immunity set forth in *Gov. Code § 815.2(b)*, and concluded that the immunity granted by *Gov. Code § 845.8* is similarly subject to the public entity liability imposed by *Veh. Code § 17001* (*9 Cal. 4th 1154, 1165)* . The Court rejected the analysis used in *Hooper v. City of Chula Vista (1989) 212 Cal. App. 3d 442, 454-455, 260 Cal. Rptr. 495* , which had posited that a different rule would apply if the fleeing person, rather than a third person, was injured during the pursuit; the Court held that nothing in the statutory scheme permitted such a distinction (*9 Cal. 4th 1154, 1164-1165)* .

Brummett v. County of Sacramento *(1978) 21 Cal. 3d 880, 148 Cal. Rptr. 361, 582 P.2d 952* , was an action by a motorist, who was injured in an automobile accident with one of two police cars engaged in a high speed pursuit of a suspected felon, against the two police officers and their employer county. The trial court granted defendants' motions for summary judgment on the grounds the officers were immune from liability under *Veh. Code § 17004* and that the county was derivatively immune under *Gov. Code § 815.2(b)*, which provides that except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity when the employee is immune from liability.

The Supreme Court affirmed the judgment in regard to the two officers but reversed it in regard to the county. With respect to the immunity provided by *Gov. Code § 815.2(b)*, the Court said that liability was, in fact, otherwise provided by statute. Specifically, *Veh. Code § 17001* imposed such liability by making a public entity liable for its employee's negligence in the operation of a motor vehicle (*21 Cal. 3d 880, 883)* . After discussing the legislative history of the statutes, the Court said that *Veh. Code § 17004* defined only a limited immunity, that is, an employee immunity, that *Veh. Code § 17001* "otherwise" provides for public entity liability, and that *Veh. Code § 17001*, therefore, is cognizable under the exception of *Gov. Code § 815.2(b)* (*21 Cal. 3d 880, 885)* . The Court concluded thatbased on the evidence in the record, there existed sufficient evidence of the officers' negligence, which would trigger the county's liability, to require that a jury weigh the facts (*21 Cal. 3d 880, 887)* .

[b] Liability When Motor Vehicle Involved Was Emergency Vehicle

Brummett v. County of Sacramento *(1978) 21 Cal. 3d 880, 148 Cal. Rptr. 361, 582 P.2d 952* , is discussed in *§ 196.187[3][a]*.

City of Sacramento v. Superior Court *(1982) 131 Cal. App. 3d 395, 182 Cal. Rptr. 443* , was a mandate proceeding arising out of an action by a highway patrolman against a city and two city policemen for damages for personal injuries resulting from a collision with an automobile that the police officers were pursuing in their patrol vehicle after seeing it go through a red light. The trial court denied the defendants' motions for summary judgment and the defendants petitioned for a writ of mandate. In granting the writ with respect to defendant police officers but denying it with respect to the city, the court of appeal pointed out that the city's argument that it was immune from liability under *Gov. Code § 815.2* because the officers were immune was rejected in *Brummett v. County of Sacramento (1978) 21 Cal. 3d 880, 148 Cal. Rptr. 361, 582 P.2d 952* . The court said that the specific provision for public entity liability in *Veh. Code §*

17001 overrides the general derivative immunity provided by *Gov. Code § 815.2* (*131 Cal. App. 3d 395, 400)* .

NOTE:
For the conditional immunity from liability for death or personal injury or property damage resulting from the collision of the pursued vehicle, see *Veh. Code § 17004.7*. This statute, which was enacted in 1987, is discussed in *§ 196.08*]14].

[c] Failure of Emergency Vehicle to Sound Siren

In ***Stark v. City of Los Angeles*** *(1985) 168 Cal. App. 3d 276, 214 Cal. Rptr. 216* , the court of appeal affirmed a jury finding that police were negligent when a suspect they were pursuing injured plaintiff. The court held that the failure of police to sound their siren during the chase of the suspect provided a sufficient basis for liability under a negligence theory, even though it was the suspect's car rather than the police car that collided with plaintiff (*168 Cal. App. 3d 276, 282-285)* . The court also held that the immunity of *Gov. Code § 845.8* for injuries caused by escaping prisoners or persons resisting arrest did not preclude public entity liability under *Veh. Code § 17001* for torts committed by public employees during the course of employment in situations when the police have not yet detained the suspect (*168 Cal. App. 3d 276, 285-287)* .

NOTE:
A police officer's negligence for failing to sound a vehicle siren or flash emergency lights while pursuing a suspect may only be used to argue for liability against the public entity, because police officers themselves, as public employees, are entitled to immunity under *Veh. Code § 17004*. In applying this immunity to police pursuit cases, the language of *Veh. Code § 17004* is clear and unambiguous and immunizes the public employee even if negligence in the course of the pursuit is alleged [*Cruz v. Briseno (2000) 22 Cal. 4th 568, 572, 93 Cal. Rptr. 2d 715, 994 P.2d 986* (sheriff's deputy was immune despite failing to turn on lights and siren while pursuing speeding vehicle)]. For the conditional immunity from liability for death or personal injury or property damage resulting from the collision of the pursued vehicle, see *Veh. Code § 17004.7*. This statute, which was enacted in 1987, is discussed in *§ 196.08*]14].

[d] Liability When Prisoner Is Negligently Allowed to Steal Emergency Vehicle in Operation

In ***Duarte v. City of San Jose*** *(1980) 100 Cal. App. 3d 648, 161 Cal. Rptr. 140* , a police officer had stopped a car for speeding, arrested the driver for being under the influence of alcohol, placed him in the back of the police car, then left the motor running while he went to help another officer move the arrested driver's car. The arrestee then sped off in the police car and was pursued by other police cars. The chase ended when the stolen vehicle ran off the road and struck and seriously injured the plaintiff, who was mowing his lawn. The injured person sued the officers and their employer city. The trial court granted the defendants' motion for summary judgment on the grounds that (1) both the city and the police officers were immune from liability and (2) neither the city nor the officers owed plaintiff a duty under the circumstances. Plaintiff appealed.

The court of appeal affirmed the judgment for the officers and reversed it in regard to the city. The court held that the officers were immune from liability by *Gov. Code § 845.8*, relating to injuries caused by an escaping prisoner, an escaping or escaped arrested person, or a person resisting arrest, and under *Veh. Code § 17004*, immunizing public employees from liability for civil damages resulting from the operation, in the line of duty, of an authorized emergency vehicle or when in the immediate pursuit of an actual or suspected violator of the law (*100 Cal. App. 3d 648, 654-657)* . The court held, however, that the city was not immune from liability under *Gov. Code § 845.8* because what was alleged was not that the police used insufficient force to restrain the arrestee, but, rather, that they negligently operated police vehicles (*100 Cal. App. 3d 648, 657)* . The court held that the plaintiff could challenge the officers' conduct of the chase pursuant to *Veh. Code § 17001*. The court further held that to be in operation within the meaning of *Veh. Code § 17001*, the vehicle must be in a state of being at work or in the active exercise of some specific function, and that it

need not be moving to be in operation within the meaning of the statute (*100 Cal. App. 3d 648, 657)* . The court concluded that at the time of the theft the stolen police car was in a state of being at work and therefore in operation within the meaning of *Veh. Code § 17001* (*100 Cal. App. 3d 648, 658)* . The court further held that a police officer's duty to operate his police vehicle with due care encompasses a duty to third persons such as plaintiff not to leave that vehicle unattended with its motor still running, under circumstances that invite theft and flight, and that the trial court erred in granting a summary judgment in favor of the city, which may be held liable for the negligence of its employees pursuant to *Veh. Code § 17001* (*100 Cal. App. 3d 648, 659)* .

[4] Additional Authorities

[a] Liability When Motor Vehicle Involved Was Emergency Vehicle

In *City of San Jose v. Superior Court (1985) 166 Cal. App. 3d 695, 212 Cal. Rptr. 661* , the court of appeal held that *Gov. Code § 845.8*, relating to injuries caused by an escaping prisoner, an escaping or escaped arrested person, or a person resisting arrest, does not immunize a public entity from liability under *Veh. Code § 17001* for the negligent acts of its employees in operating emergency vehicles. The court rejected the city's claim that *Gov. Code § 845.8* immunized it from a suit for damages by persons injured when a vehicle being pursued by city police for traffic violations struck a third vehicle. *Under Duarte v. City of San Jose (1980) 100 Cal. App. 3d 648, 161 Cal. Rptr. 140* , discussed in *§ 196.187[3][d]*, and *City of Sacramento v. Superior Court (1982) 131 Cal. App. 3d 395, 182 Cal. Rptr. 443* , discussed in *§ 196.187[3][b]*; a public entity may be liable under *Veh. Code § 17001* even if its employee is immune from liability under *Veh. Code § 17004* (*166 Cal. App. 3d 695, 700-702)* .

In *Gibson v. City of Pasadena (1978) 83 Cal. App. 3d 651, 148 Cal. Rptr. 68* , the complaint alleged that plaintiff was injured when a car that the police were chasing crashed into plaintiff's car. The cause of action against the city was based on the negligence of the police in chasing the vehicle, which had run a red light. The complaint was dismissed after a demurrer was sustained. The court of appeal reversed. It held that the public employee immunity of *Veh. Code § 17004* for injuries caused by emergency vehicles chasing a suspect does not protect the public entity from liability under *Veh. Code § 17001* for injuries caused by the negligence of their employees in operating motor vehicles (*83 Cal. App. 3d 651, 655-656)* .

NOTE:

For the conditional immunity from liability for death or personal injury or property damage resulting from the collision of the pursued vehicle, see *Veh. Code § 17004.7*. This statute, which was enacted in 1987, is discussed in *§ 196.08*]14].

[5] Opposing Authorities

[a] Immunities Not Applicable to Liability Under Vehicle Code

In *Ladd v. County of San Mateo (1996) 12 Cal. 4th 913, 50 Cal. Rptr. 2d. 309, 911 P.2d 496* , the Supreme Court held that the provisions of *Veh. Code § 17001* did not apply. Plaintiff was injured while attempting to escape a vehicle in which she was being transported to a county juvenile hall. Plaintiff had been placed in custody, handcuffed, and was riding in the rear seat of a county vehicle. While the vehicle was stopped at a red traffic signal near some railroad tracks, plaintiff jumped out of the vehicle, ran towards a train, attempted to climb aboard a boxcar, but fell beneath the train and lost both of her legs. Plaintiff relied on *Thomas v. City of Richmond (1995) 9 Cal. 4th 1154, 40 Cal. Rptr. 2d 442, 892 P.2d 1185* , to contend that *Gov. Code § 845.8* did not provide immunity because defendants were liable under *Veh. Code § 17001*. However, the Supreme Court held that the alleged negligence of the county and its employees in failing to provide a secure vehicle, failing to adequately restrain plaintiff, and failing to have a county employee sit in the rear seat with plaintiff to prevent her from escaping, did not constitute negligence in the operation of a motor vehicle within the meaning of *Veh. Code § 17001*. For that statute to apply, it is not sufficient that a motor vehicle somehow be involved in the series of events that results in the injury. The injury must be proximately caused by the negligent

operation of the vehicle (*12 Cal. 4th 913, 923)* .

In *Champion v. County of San Diego (1996) 47 Cal. App. 4th 972, 55 Cal. Rptr. 2d 205* , plaintiffs brought actions for wrongful death and emotional distress based on a murder committed by a prisoner who had escaped from a county van in which he was being transported. The trial court entered judgment in favor of the county after sustaining a demurrer on the basis of *Gov. Code § 845.8*. On appeal, plaintiffs contended that *Veh. Code § 17001* defeats the governmental immunity. The court ofappeal affirmed the judgment, relying on *Ladd v. County of San Mateo (1996) 12 Cal. 4th 913, 50 Cal. Rptr. 2d. 309, 911 P.2d 496* , finding no allegation of negligence relating to the operation of the van. Plaintiffs attempted to allege negligent operation of the van through improper loading of the prisoner, and failure to inform the driver of the danger. However, the court found that the thrust of the negligence allegation was failure to properly train county personnel and failure to secure and supervise the prisoner, rather than anything relating to the driving of the van (*47 Cal. App. 4th 972, 979)* .

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Volume 19A Chapters 196-199 PUBLIC ENTITIES---to---QUO WARRANTO
CHAPTER 196 PUBLIC ENTITIES
PART II. FORMS
C. Liability of Public Entities And Employees
1. Liability For Acts or Omissions

19A-196 California Points & Authorities § 196.188

§ 196.188 Supporting Contention That Public Entity or Employee Is Liable for Act or Omission [Gov. Code §§ 815.2(a), 820(a)]--Public Entity Is Liable for Injury Caused by Public Employee's Failure to Act as Reasonably Prudent Person While Engaged in Rescue Following Collision, Accident, or Other Casualty Involving Vessel [Harb. & Nav. Code § 656(a), (c)(2)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE OBJECTION THAT DEFENDANT _____ [*name of public entity*] IS NOT LIABLE TO PLAINTIFF _____ [SHOULD BE *or* SHOULD HAVE BEEN *or* WAS PROPERLY] OVERRULED BECAUSE PLAINTIFF HAS _____ [ALLEGED FACTS SHOWING *or* SHOWN] THAT PLAINTIFF'S LOSS WAS A PROXIMATE RESULT OF THE FAILURE OF DEFENDANT'S EMPLOYEE TO ACT AS A REASONABLY PRUDENT PERSON WOULD HAVE ACTED UNDER THE SAME OR SIMILAR CIRCUMSTANCES IN THE RESCUE OPERATION.

Liability of Public Entity When Its Employee Fails to Act as Reasonably Prudent Person in Rescue Operation. The public entity employing an individual engaged in a rescue pursuant to the Harbors and Navigation Code following a collision, accident, or other casualty involving a vessel is liable in civil damages when the individual employee failed to act as a reasonably prudent person would have acted under the same or similar circumstances (*Harb. & Nav. Code § 656(a), (c)(2)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the defendant public entity is liable for plaintiff's loss, which was proximately caused by the failure of defendant's employee to act as a reasonably prudent person would have acted under the same or similar circumstances while engaged in a rescue operation following a

collision, accident, or other casualty involving a vessel [*Harb. & Nav. Code § 656(a), (c)(2)*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be used in a memorandum of points and authorities in opposition to the public entity's demurrer to the complaint, or motion for judgment on the pleadings, on the asserted ground that the complaint fails to state facts sufficient to constitute a cause of action, or in opposition to the public entity's motion for summary judgment on the ground that the action has no merit. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

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19A-196 California Points & Authorities § 196.189

§ 196.189 Supporting Contention That Public Entity or Employee Is Liable for Act or Omission [Gov. Code §§ 815.2(a), 820(a)]--Public Entity That Warned of Danger Causing Need for Rescue Involving Vessel Is Liable for Injury Caused by Public Employee's Gross Negligence During Rescue [Harb. & Nav. Code § 656(a), (c)(3)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE OBJECTION THAT DEFENDANT _____ [*name of public entity*] IS NOT LIABLE TO PLAINTIFF, BECAUSE DEFENDANT GAVE A REASONABLE _____ [PRINTED *or* ELECTRONIC *or* VERBAL] WARNING OF THE DANGER CAUSING THE DISTRESS THAT CREATED THE NECESSITY FOR THE RESCUE, AND BECAUSE THERE WAS A REASONABLE OPPORTUNITY FOR THE PARTY IN DISTRESS TO RECEIVE THE WARNING, _____ [SHOULD BE *or* SHOULD HAVE BEEN *or* WAS PROPERLY] OVERRULED BECAUSE PLAINTIFF HAS _____ [ALLEGED FACTS SHOWING *or* SHOWN] THAT PLAINTIFF'S LOSS WAS A PROXIMATE RESULT OF THE GROSS NEGLIGENCE OF DEFENDANT'S EMPLOYEE.

Public Entity Liable for Gross Negligence of Employee. When a public entity has given a reasonable printed, electronic, or verbal warning of the danger causing the distress that created the necessity for the rescue, and there was a reasonable opportunity for the party in distress to have received the warning, the public entity is liable only for the acts or omissions of its employee that were taken in a grossly negligent manner (*Harb. & Nav. Code § 656(c)(3)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the defendant public entity is liable for the grossly negligent acts or omissions of its employee engaged in a rescue following the collision, accident, or other casualty involving a vessel when the entity gave a reasonable printed, electronic, or verbal warning of the danger

causing the distress that created the necessity for the rescue and there was a reasonable opportunity fo the party in distress to have received the warning [*see Harb. & Nav. Code § 656(a), (c)(3)*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be used in a memorandum of points and authorities in opposition to the public entity's demurrer to the complaint, or motion for judgment on the pleadings, on the asserted ground that the complaint fails to state facts sufficient to constitute a cause of action, or in opposition to the public entity's motion for summary judgment on the ground that the action has no merit. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

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19A-196 California Points & Authorities § 196.190

§ 196.190 Supporting Contention That Public Entity is Liable for Act or Omission [Gov. Code § 815.2(a)]--Public Entity is Liable for Discrimination Prohibited by Fair Employment and Housing Act [Gov. Code § 12926(d)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF MAY PURSUE AN ACTION AGAINST A PUBLIC ENTITY EMPLOYER FOR PROHIBITED DISCRIMINATION MADE ACTIONABLE BY THE FAIR EMPLOYMENT AND HOUSING ACT.

Public Entity Employer May be Directly Liable for Discrimination Prohibited by Fair Employment and Housing Act. The Fair Employment and Housing Act applies to public entity employers, making such employers susceptible to direct liability for prohibited discrimination (*DeJung v. Superior Court (2008) 169 Cal. App. 4th 533, 545-547, 87 Cal. Rptr. 3d 99*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that, despite the general immunities of the California Government Claims Act, a plaintiff may state a cause of action for discrimination under the Fair Employment and Housing Act (FEHA), *Gov. Code § 12900 et seq.*, against a public entity who is or was the plaintiff's employer. However, liability under the FEHA must be predicated on the direct liability of the public entity employer. The employer may not be held vicariously liable based on the liability of a public employee.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the contention that the discrimination action is not barred. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law stated. Thus, counsel should include facts supporting the claim of discrimination prohibited by the FEHA and facts under which the public entity employer may be directly, rather than vicariously, liable.

[3] Discussion of Immunities

[a] Public Entity Employer May be Directly Liable for Discrimination Prohibited by Fair Employment and Housing Act

In ***DeJung v. Superior Court*** *(2008) 169 Cal. App. 4th 533, 87 Cal. Rptr. 3d 99* , plaintiff brought an action for age discrimination under the Fair Employment and Housing Act (FEHA), *Gov. Code § 12900 et seq.*, against a county superior court. Plaintiff, who formerly worked as a part-time court commissioner for the defendant, alleged that the defendant discriminated on the basis of age when it hired a new full-time commissioner who was only 43 years old after court members made statements indicating that they wanted to hire someone younger than defendant to fill the full-time position. The trial court granted summary judgment for the defendant on the grounds that the court enjoyed immunity for discretionary hiring acts under provisions of the Government Claims Act, specifically *Gov. Code §§ 815.2(d)* and *820.2*. Alternatively, the trial court ruled that plaintiff had failed to raise a triable issue of fact with regard to the discrimination claim. Plaintiff appealed.

The court of appeal reversed. The court held that discretionary immunity under the Government Claims Act did not provide immunity from suits for illegal discrimination under the FEHA. The court noted that in two earlier California Supreme Court opinions, the Supreme Court had indicated, albeit in dicta, that a public employer might be susceptible to direct liability under the FEHA, even if a public employee could not be personally liable under that statute. The court of appeal then noted that the statutory definition of "employer" under the FEHA, which specifically included "the state or any political or civil subdivision of the state, and cities . . . ," constituted an express declaration of the Legislature's intent to subject public entities to liability for violations of the FEHA, effectively withdrawing in those particular cases any immunity provided under the Government Claims Act. The court also concluded that, as the FEHA was a statute of more specific application than the generalized immunity found in the Government Claims Act, FEHA liability took precedence (*169 Cal. App. 4th 533, 545-547)* . The court then held that triable issues of fact remained on the plaintiff's claim of age discrimination (*169 Cal. App. 4th 533, 549-554)* .

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19A-196 California Points & Authorities §§ 196.191-196.209

[Reserved]

§§ 196.191[Reserved]

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2. Liability For Dangerous Condition of Public Property

19A-196 California Points & Authorities § 196.210

§ 196.210 Supporting Contention That Public Entity Is Liable for Dangerous Condition of Public Property [Gov. Code § 835]--General Form

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE OBJECTION THAT DEFENDANT(S) _____ [IS *or* ARE] NOT LIABLE FOR PLAINTIFF'S INJURIES _____ [SHOULD BE *or* SHOULD HAVE BEEN *or* WAS PROPERLY] OVERRULED BECAUSE PLAINTIFF HAS _____ [ALLEGED FACTS SHOWING *or* SHOWN] THAT (1) PLAINTIFF'S INJURIES WERE PROXIMATELY CAUSED BY A DANGEROUS CONDITION OF PROPERTY _____ [OWNED *or* CONTROLLED] BY DEFENDANT _____ [*name of public entity*]; (2) THE DANGEROUS CONDITION CREATED A REASONABLY FORESEEABLE RISK OF THE KIND OF INJURY THAT WAS INCURRED; AND (3) _____ [THE DANGEROUS CONDITION WAS CREATED BY A _____ (NEGLIGENT *or* WRONGFUL) _____ (ACT *or* OMISSION) OF _____ (DEFENDANT _____ [*name of employee*] *or* AN EMPLOYEE OF THE DEFENDANT) WITHIN THE SCOPE OF HIS/HER EMPLOYMENT *or* DEFENDANT _____ (*name of public entity*) (AND DEFENDANT _____ [*name of employee*]) HAD ACTUAL OR CONSTRUCTIVE NOTICE OF THE DANGEROUS CONDITION A SUFFICIENT TIME PRIOR TO PLAINTIFF'S INJURY TO HAVE TAKEN MEASURES TO PROTECT AGAINST THE DANGEROUS CONDITION].

A. Liability of Public Entity for Dangerous Condition of Its Property. Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury that was incurred and that either (1) a negligent or wrongful act or omission of an employee of the public entity within the scope of his or her employment created the dangerous condition; or (2) the public entity had actual or constructive notice of the dangerous condition

under *Section 835.2 of the Government Code* a sufficient time prior to the injuryto have taken measures to protect against the dangerous condition (*Gov. Code § 835*; *see Ducey v. Argo Sales Co. (1979) 25 Cal. 3d 707, 715-716, 159 Cal. Rptr. 835, 602 P.2d 755* ; *Bunker v. City of Glendale (1980) 111 Cal. App. 3d 325, 328, 168 Cal. Rptr. 565*).

B. Liability of Public Employee for Dangerous Condition of Public Property. An employee of a public entity is liable for injury caused by a dangerous condition of public property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury that was incurred, and that either: (1) the dangerous condition was directly attributable wholly or in substantial part to a negligent or wrongful act of the employee and the employee had the authority and the funds and other means immediately available to take alternative action that would not have created the dangerous condition; or (2) the employee had the authority and it was his or her responsibility to take adequate measures to protect against the dangerous condition at the expense of the public entity and the funds and other means for so doing were immediately available to him or her, and he or she had actual or constructive notice of the dangerous condition under *Section 840.4 of the Government Code* a sufficient time prior to the injury to have taken measures to protect against the dangerous condition (*Gov. Code § 840.2*).

C. "Property" Defined. "Property of a public entity" and "public property" mean real or personal property owned or controlled by the public entity (*Gov. Code § 830(c)*).

D. "Dangerous Condition" Defined. "Dangerous condition" means a condition of property that creates a substantial (as distinguished from a minor, trivial, or insignificant) risk of injury when the property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used (*Gov. Code § 830(a)*; see *Ducey v. Argo Sales Co. (1979) 25 Cal. 3d 707, 718-720, 159 Cal. Rptr. 835, 602 P.2d 755*).

[*Optional*] **E. Kind of "Due Care" Required.** There is no requirement that the plaintiff plead or prove that at the time of the injury he or she was actually using the property with due care. So long as a plaintiff-user can establish that a condition of the property creates a substantial risk to any foreseeable user of the public property who uses it with due care, he or she has successfully alleged or shown the existence of a dangerous condition regardless of his or her personal lack of due care (*Alexander v. State of California ex rel. Dep't of Transp. (1984) 159 Cal. App. 3d 890, 899, 901, 902, 205 Cal. Rptr. 758*).

[*Optional*] **F. "Actual Notice" Defined.** A public entity had actual notice of a dangerous condition if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character (*Gov. Code § 835.2(a)*). A public employee had actual notice of a dangerous condition if he or she had actual personal knowledge of the existence of the condition and knew or should have known of its dangerous character (*Gov. Code § 840.4(a)*).

[*Optional*] **G. "Constructive Notice" of Public Entity Defined.** A public entity had constructive notice of a dangerous condition if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character (*Gov. Code § 835.2(b)*; see *Carson v. Facilities Dev. Co. (1984) 36 Cal. 3d 830, 842-843, 206 Cal. Rptr. 136, 686 P.2d 656*).

[*Optional*] **H. "Constructive Notice" of Public Employee Defined.** A public employee had constructive notice of a dangerous condition if the plaintiff establishes (1) that the public employee had the authority and it was his or her responsibility as a public employee to inspect the property or to see that inspections were made to determine whether dangerous conditions existed in the property, (2) that the funds and other means for making the inspections or for seeing that the inspections were made were immediately available to the employee, and (3) the dangerous condition had existed for such a period of time and was of such an obvious nature that the employee, in the exercise of his or her authority and responsibility with due care, should have discovered the condition and its dangerous character (*Gov. Code § 840.4(b)*).

[*Optional*] **I. "Protect Against" Defined.** "Protect against" includes repairing, remedying, or correcting a dangerous condition, providing safeguards against a dangerous condition, or warning of a dangerous condition (*Gov. Code § 830(b)*; see *Ducey v. Argo Sales Co. (1979) 25 Cal. 3d 707, 716-717, 159 Cal. Rptr. 835, 602 P.2d 755* ; *Ramariz v. County of Merced (1987) 194 Cal. App. 3d 684, 690, 239 Cal. Rptr. 774* ; *Bunker v. City of Glendale (1980) 111 Cal. App. 3d 325, 328, 168 Cal. Rptr. 565*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a public entity is liable for the plaintiff's injuries because the injuries were proximately caused by a dangerous condition of the entity's property [*see Gov. Code § 835*; *see also § 196.210[2][b]*].

Optional Paragraph E is for use when there is some question about whether the plaintiff was exercising due care at the time that he or she was injured. Optional Paragraphs F--I are for use, if appropriate, when the dangerous condition was not created by an employee of the public entity.

These points and authorities may be combined, in an appropriate case, with the additional points and authorities *set out in §§ 196.211 -196.214*. These points and authorities may also be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be used in a memorandum of points and authorities in opposition to the public entity's demurrer to the complaint, or motion for judgment on the pleadings, on the asserted ground that the complaint fails to state facts sufficient to constitute a cause of action, or in opposition to the public entity's motion for summary judgment on the ground that the action has no merit, or in support of plaintiff's motion or in opposition to defendant's motion for a new trial. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Statutory Immunities

Several statutes declare that certain conditions do not constitute a dangerous condition or provide immunity from liability in given situations. Any one or more of these statutes may, in a proper case, be cited in opposition to these points and authorities. These statutes are discussed fully in §§ 196.11-196.12, 196.210-196.214, and 196.300-196.306.

Strictly, the question of the applicability of a statutory immunity does not arise until it is determined that a defendant otherwise owes a duty of care to the plaintiff and thus would be liable in the absence of such immunity [*Williams v. State of California (1983) 34 Cal. 3d 18, 22, 192 Cal. Rptr. 233, 664 P.2d 137* ; *Davidson v. City of Westminster (1982) 32 Cal. 3d 197, 201-202, 185 Cal. Rptr. 252, 649 P.2d 894* ; *Stark v. City of Los Angeles (1985) 168 Cal. App. 3d 276, 282, 214 Cal. Rptr. 216]* . An immunity avoids liability in tort under all circumstances within the limits of the immunity itself; it is conferred, not because of the particular facts, but because of the status or position of the favored defendant; and it does not deny the tort, but, rather, the resulting liability [*Whitcombe v. County of Yolo (1977) 73 Cal. App. 3d 698, 704-705, 141 Cal. Rptr. 189]* . This is true even if the duty is created by a special relationship between the public entity and the injured person. The existence of a special relationship does not operate to bypass a statutory immunity that expressly applies [*Whitcombe v. County of Yolo (1977) 73 Cal. App. 3d 698, 705, 141 Cal. Rptr. 189* ; *see Davidson v. City of Westminster (1982) 32 Cal. 3d 197, 202, 185 Cal. Rptr. 252, 649 P.2d 894* ; for points and authorities relating to liability arising from a special relationship, *see §§ 196.230 -196.235*].

For forms of points and authorities establishing exceptions to the immunity statutes, see *§ 196.270* et seq.

[c] Exclusions From "Property"

For purposes of *Gov. Code §§ 830-840.6*, seismic safety improvements or fire sprinkler improvements that are owned, built, controlled, operated, and maintained by the private owner of the building in which they are installed are not public property or property of a public entity solely because they were financed through formation of a special assessment district [*Gov. Code § 830.1*].

[d] Dangerousness of Condition

[i] Generally

In addition to the statutory immunities to liability for injuries caused by a dangerous condition, there are several statutory provisions [*see § 196.210[2*][d][ii]-[iv]] that affect the determination that a condition is "dangerous" so as to give rise to liability for resulting injuries. Any one or more of these statutes may also be cited, in a proper case, in opposition to these points and authorities.

[ii] Condition Creating Minor, Trivial, or Insignificant Risk

A condition is not a dangerous condition if the trial or appellate court, viewing the evidence most favorably to the plaintiff, determines as a matter of law that the risk created by the condition was of such a minor, trivial, or insignificant nature in view of the surrounding circumstances that no reasonable person would conclude that the condition created a substantial risk of injury when such property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used [*Gov. Code § 830.2*]. For discussion of cases holding that a condition is not dangerous as a matter of law pursuant to *Gov. Code § 830.2*, see *§ 196.210[5][b]*.

[iii] Failure to Provide Traffic Control Signals or Signs

Gov. Code § 830.4 provides that a condition is not dangerous within the meaning of *Gov. Code §§ 830-840.6* merely because of the failure to provide regulatory traffic control signals, stop signs, yield right-of-way signs, or speed restriction signs, as described in the Vehicle Code, or distinctive roadway markings as described in *Veh. Code § 21460*. For example, under *Gov. Code § 830.4*, a city is under no affirmative duty to erect stop signs at a blind intersection [*Mittenhuber v. City of Redondo Beach (1983) 142 Cal. App. 3d 1, 6, 190 Cal. Rptr. 694* ; *see also City of South Lake Tahoe v. Superior Court (1998) 62 Cal. App. 4th 971, 978-980, 73 Cal. Rptr. 2d 146* (city not liable for injuries sustained when two vehicles collided at intersection after earlier accident knocked down stop sign at intersection)].

[iv] Evidence of Happening of Accident

Except where the doctrine of res ipsa loquitur is applicable, the occurrence of the accident that results in the injury is not in and of itself evidence that public property was in a dangerous condition [*Gov. Code § 830.5(a)*].

[v] Evidence of Postaccident Protective Corrective Action by Public Entity

The fact that action was taken after an injury occurred to protect against a condition of public property is not evidence that the public property was in a dangerous condition at the time of the injury [*Gov. Code § 830.5(b)*].

[e] Related Pleading and Practice Forms

For forms of complaints against public entities and public employees based on a dangerous condition of public property, see California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

[3] Discussion of Authorities

[a] Liability of Public Entity for Dangerous Condition of Its Property

The facts and procedural background of ***Ducey v. Argo Sales Co.*** *(1979) 25 Cal. 3d 707, 159 Cal. Rptr. 835, 602 P.2d 755* , are discussed in *§ 196.211[3][a]*. In affirming the judgment for plaintiff, the Court said that, generally speaking, under *Gov. Code § 835* a public entity is liable for an injury if the plaintiff establishes (1) that the property was in a dangerous condition at the time of the injury; (2) that the injury was proximately caused by the dangerous condition; (3) that the dangerous condition created a reasonably foreseeable risk of the kind of injury that was incurred; and (4) either (a) that a public employee negligently or wrongfully created the dangerous condition or (b) that the public entity had actual or constructive notice of the dangerous condition under *Gov. Code § 835.2* a sufficient time prior to the injury to have taken measures to protect against the dangerous condition (*25 Cal. 3d 707, 715-716)* .

Bunker v. City of Glendale *(1980) 111 Cal. App. 3d 325, 168 Cal. Rptr. 565* , was an action by a motorcyclist for personal injuries sustained when, while driving on a city street over the crest of a hill late at night, he collided with a car on the other side that was backing out of a driveway. Before the crest of the hill there was a sign advising motorists to "Slow to 15 Miles an Hour." The jury found plaintiff contributorily negligent and fixed his liability at 44 percent and apportioned the remaining 56 percent to the city. The city appealed.

In affirming the judgment, the court of appeal said that generally, a public entity is liable for injury caused by a dangerous condition of its property if the entity had notice of the danger and failed to take appropriate measures to warn of or remedy the condition, and that the city did not contest the fact that the lack of visibility on the street constituted a dangerous condition (*111 Cal. App. 3d 325, 328)* .

[b] "Dangerous Condition" Defined

The facts and procedural background of ***Ducey v. Argo Sales Co.*** *(1979) 25 Cal. 3d 707, 159 Cal. Rptr. 835, 602 P.2d 755* , are discussed in *§ 196.211[3][a]*. In affirming the judgment for plaintiff, the Court quoted the definition of "dangerous condition" in *Gov. Code § 830(a)* (*25 Cal. 3d 707, 718)* . In reply to the state's argument that cross-median freeway accidents usually result from the negligence of either the victim or a third party, and therefore that the jury could not properly conclude that the absence of a median barrier created a substantial risk of injury when the freeway was used with due care, the Court said that, although it may well be that many, perhaps even most, cross-median accidents result from the negligence of one or more drivers, the evidence was clearly sufficient for the jury to conclude that the lack of a median barrier created a substantial risk of injury even in the absence of negligent conduct. The Court explained that one state highway engineer testified that it is not uncommon to have the violating vehicle be an innocent party and that numerous expert witnesses identified various situations in which cross-median accidents might occur in the absence of negligence, as when the accident results, for example, from mechanical failure, sudden illness, or animals in the road (*25 Cal. 3d 707, 719)* . Citing *Morris v. State of California (1979) 89 Cal. App. 3d 962, 965, 153 Cal. Rptr. 117* , the Court added that the court of appeal, in rejecting an identical argument of the state, said that the median barrier's obvious function was to protect motorists on the freewayfrom the intrusion into their lanes of vehicles crossing the median out of control whether by reason of mechanical or tire failures or other causes unrelated to negligence, or by reason of the negligence of those drivers and owners (*25 Cal. 3d 707, 720)* .

[c] Kind of "Due Care" Required

In ***Alexander v. State of California ex rel. Dep't of Transp.*** *(1984) 159 Cal. App. 3d 890, 205 Cal. Rptr. 758* , an injured car passenger won a verdict against the state of California based on the dangerous condition of the highway intersection at which plaintiff's car collided with another car. The state moved for judgment notwithstanding the verdict and for a new trial. In granting the motions, the trial court opined that "use with due care," as used in *Gov. Code § 830(a)*, includes obeying traffic laws and found, as a matter of law, that no dangerous condition existed at the

intersection. In reversing the orders granting the motions, the court of appeal said that the Tort Claims Act does not require plaintiff to prove that the property was actually being used with due care at the time of the injury, either by the plaintiff or by a third party (*159 Cal. App. 3d 890, 899)* . *Discussing Swaner v. City of Santa Monica (1984) 150 Cal. App. 3d 789, 198 Cal. Rptr. 208* , the court said that so long as a plaintiff-user can establish that a condition of the property creates a substantial risk to any foreseeable user of the public property who uses it with due care, the plaintiff-user has successfully alleged the existence of a dangerous condition regardless of his or her personal lack of due care and that although a public entity may assert the negligence of a plaintiff-user as a defense, it has no bearing on the determination of a dangerous condition in the first instance. They are separate questions of fact, for the trier of fact, and may not be combined or intertwined (*159 Cal. App. 3d 890, 901, 902)* .

[d] "Constructive Notice" of Public Entity Defined

The facts and procedural background of ***Carson v. Facilities Dev. Co.*** *(1984) 36 Cal. 3d 830, 206 Cal. Rptr. 136, 686 P.2d 656* , are discussed in *§ 196.213[3][a]*. The action was for wrongful death and personal injuries arising out of an intersection accident in which the driver of a car (plaintiffs' decedent), entering from a stop sign street, could not see oncoming cross traffic from the stop line because of a sign placed by a private company on adjacent property. To see whether there was any cross traffic, she had to first enter the intersection and was hit broadside by an oncoming car when she did so. One of the grounds asserted by the city in support of its motion for nonsuit was that it could not be liable for any injuries caused by the sign because it had no notice of the sign's presence. In rejecting this ground and reversing the judgment of nonsuit, the Court observed that, unless the dangerous condition is created by a negligent or wrongful act or omission of an employee of the public entity, plaintiff must prove that the public entity had actual or constructive notice of the dangerous condition. There was no evidence that the city had actual notice, but the Court said that constructive notice may be imputed if it can be shown that an obvious danger existed for an adequate period of time before the accident to have permitted the public entity, in the exercise of due care, to discover and remedy the situation (*36 Cal. 3d 830, 842)* . The Court added that questions of whether a dangerous condition could have been discovered by reasonable inspection and whether there was adequate time for preventive measures are properly left to the jury (*36 Cal. 3d 830, 843)* . The court pointed out that the sign had existed next to the intersection for seven months prior to the accident and that a city police officer testified that the traffic at the accident location was on the heavy side of moderate to the low side of heavy, from which a jury could reasonably have inferred that city police officers regularly patrolled the intersection, and that, for the purposes of a motion for nonsuit, the trial court should have accepted as true the evidence that the city had constructive notice (*36 Cal. 3d 830, 844)* .

[e] "Protect Against" Defined

The facts and procedural background of ***Ducey v. Argo Sales Co.*** *(1979) 25 Cal. 3d 707, 159 Cal. Rptr. 835, 602 P.2d 755* , are discussed in *§ 196.211[3][a]*. The state argued, among other things, that it was under no duty to protect the freeway-driving public against dangers not created by physical defects in its property (*25 Cal. 3d 707, 715)* . In affirming the judgment for plaintiff, the Court said that *Gov. Code § 835* specifically provides that, when a public entity has actual or constructive notice of a dangerous condition, the entity's liability may be predicated on its failure to take protective measures to safeguard the public from dangers that may not necessarily be of the entity's own creation. This reading of *Gov. Code § 835* is confirmed by reference to *Gov. Code § 830(b)*, which specifically defines the "protect against" language of *Gov. Code § 835(b)* to include "providing safeguards against a dangerous condition." Thus, the language of the applicable statutes refutes the state's argument that it is under no "duty" to protect the public against dangers that are not created by physical defects in public property (*25 Cal. 3d 707, 716-717)* .

The facts and procedural background of ***Ramariz v. County of Merced*** *(1987) 194 Cal. App. 3d 684, 239 Cal. Rptr. 774* , are discussed in *§ 196.36[3][e]*. In reversing the judgment of dismissal, the court of appeal said that, under the theory of dangerous condition of public property, tort liability can be imposed on a public entity either if it created the dangerous condition or, with actual or constructive notice, did not protect against it (*194 Cal. App. 3d 684, 690)* .

The facts and procedural background of ***Bunker v. City of Glendale*** *(1980) 111 Cal. App. 3d 325, 168 Cal. Rptr. 565* , are discussed in*§§ 196.210[3][a]* and *196.300[4][d]*. On appeal, the city argued that (1) the sign gave sufficient warning of the danger and that plaintiff could have avoided the collision had he conformed his speed to that advised by the sign, and (2), citing *Gov. Code § 830.4* [*see § 196.210[2*][d][iii]], argued that even if the sign did not give sufficient warning of the danger, failure to post an adequate sign could not furnish a basis for imposition of liability on a public entity (*111 Cal. App. 3d 325, 328)* . In affirming the judgment apportioning liability between the plaintiff and the city, the court rejected both arguments. Citing *Gov. Code § 830.8* [*see § 196.12[2]*], the court said that when a dangerous condition exists that would not be reasonably apparent to, or anticipated by, a person exercising due care, and a sign is necessary to warn of the condition, the public entity's failure to provide such a sign may provide a basis for imposition of liability (*111 Cal. App. 3d 325, 328)* . The court pointed out that the sign, having been posted 500 feet below, and three intersections away from, the crest of the hill was confusing in that motorists could not tell whether the warning applied to the intersections or to the grade of the hill, and that the jury's conclusion that the city failed to warn motorists about a dangerous condition was supported by the evidence (*111 Cal. App. 3d 325, 328)* .

[4] Additional Authorities

[a] Liability of Public Entity for Dangerous Condition of Its Property

In *Huffman v. City of Poway (2000) 84 Cal. App. 4th 975, 101 Cal. Rptr. 2d 325* , the plaintiff was rehearsing a play at a performing arts center when he fell through an open trapdoor on the stage. Although the plaintiff knew that the trapdoor was open, he brought suit against the city that owned the center, arguing that the trapdoor constituted a dangerous condition on public property. After the jury found for the plaintiff, the trial court granted judgment notwithstanding the verdict for the city on the grounds that the city did not own or control the property on which the dangerous condition was located, apparently based on the fact that the actual trapdoor mechanism was private property that had been attached to the stage for this production. The court of appeal reversed, finding in part that the city did own the center, the property on which the dangerous condition was located, that further evidence of the city's control over the property was not necessary, and that in any event substantial evidence existed showing that the city retained sufficient control over the center to be liable (*84 Cal. App. 4th 975, 989-990)* . The court also held that there was sufficient evidence that the technical director for the play's production, who had supervised the installation of the trapdoors, was a city employee, even though he was loaned to the organization staging the play at the time of the injury, and that he had the power to prevent, remedy, or guard against the dangerous condition (*84 Cal. App. 4th 975, 990-991)* . The court then concluded that reasonable minds could differ as to whether a dangerous condition actually existed because of the trapdoors, making judgment notwithstanding the verdict inappropriate. The city, through its employee, could have ensured the use of understage lighting, spotters, or glo-tape, as was customary in the theater industry to alert people to the locations of trapdoors, and the absence of these precautions was sufficient to support the jury's finding that a dangerous condition existed (*84 Cal. App. 4th 975, 992-993)* .

[b] "Dangerous Condition" Defined

In *Lane v. City of Sacramento (2010) 183 Cal. App. 4th 1337, 107 Cal. Rptr. 3d 730* , plaintiffs were injured while traveling in an automobile that struck a six-to-seven-inch raised median at a city intersection. Plaintiffs sued the city, arguing that the raised median, coupled with the narrow width of the road lane, constituted a dangerous condition of public property. The trial court granted summary judgment for the city. The court of appeal reversed, holding that the city had failed to demonstrate as a matter of law that the raised center divider did not constitute a dangerous condition of public property. In rejecting the city's proof that the divider was not a dangerous condition as a matter of law, the court concluded that the city failed to prove the absence of prior accidents involving the raised center divider at that particular traffic intersection when the city provided evidence only that the city's claims administrator searched its database and found no claims other than plaintiffs' for the previous five years for that intersection. In rejecting the conclusion that this proved the absence of prior accidents at the intersection for that time period, the court noted that the city had provided no evidence of how the database was created or maintained or how the search was conducted, had

provided no evidentiary basis for concluding that the database constituted an accurate record of claims submitted to the city, and no evidence to support the conclusion that all pertinent records were retrieved. The court also noted that the lack of claims would not prove the lack of accidents at the site that did not result in claims to the city (*183 Cal. App. 4th 1337, 1345-1347)* .

In *Stathoulis v. City of Montebello (2008) 164 Cal. App. 4th 559, 78 Cal. Rptr. 3d 910* , plaintiff was injured when the heel of her shoe caught in a depression in the street as she was crossing toward a friend's residence. As she tried to catch her balance, her other foot became embedded in another adjacent hole in the street and she fell. She sued the city for a dangerous condition of public property, but the trial court granted summary judgment for the defendant after determining that the gouges in the road constituted a trial defect as a matter of law. The court of appeal held that there were triable issues as to whether the defect was trivial and reversed. The court noted that none of the three gouge marks in the road were that large, ranging to no more than about one inch deep at most, there was no debris or other sight obstructions in the road, the weather was clear and dry on the evening of the accident, and the street was lit by streetlamps. However, the court also noted plaintiff's evidence tending to show that the holes were irregularly shaped, with jagged, abrupt vertical edges and containing loose material within, and that the presence of three holes in close proximity may have increased the risk of pedestrian accident and injury. Although there was no evidence that anyone other than plaintiff was ever injured by the potholes, plaintiff had presented evidence that the defects had existed for at least three years. Recognizing that the issue was a close one, the court held that the evidence demonstrated a triable issue regarding the degree of dangerousness of the gouges in the street and whether they presented a substantial risk of injury, and whether the city had notice of the dangerous defect (*164 Cal. App. 4th 559, 568-569)* .

[5] Opposing Authorities

[a] Liability of Public Entity for Dangerous Condition of Its Property

In *Metcalf v. County of San Joaquin (2008) 42 Cal. 4th 1121, 72 Cal. Rptr. 3d 382, 176 P.3d 654* , plaintiff was seriously injured in an automobile accident when, after stopping at a railroad crossing, he proceeded to drive over the elevated tracks and into a "T" intersection where his vehicle collided with a truck. Plaintiff sued the county, who owned and controlled the property, for a dangerous condition of public property based on the fact that although the county placed a stop sign before the railroad tracks, they only painted the word "STOP" and marked a stop line on the pavement in front of the street intersection. At trial, the jury found that a dangerous condition of public property existed, but also found that the dangerous condition was not created through the negligent or wrongful conduct of a public employee, nor did the county have notice of the dangerous condition with sufficient time to take remedial measures. Judgment was entered in favor of defendants. Plaintiff appealed, the court of appeal affirmed, and plaintiff appealed again. The California Supreme Court affirmed. Plaintiff argued that having proven that a dangerous condition of public property existed, he was not required to additionally prove that the dangerous condition was created through the negligence or wrongful conduct of a public employee acting within the scope of employment, or if he was so burdened, that the negligence he must prove was different from common-law negligence. The Supreme Court disagreed. The Court held that, under the plain language of *Gov. Code § 835*, it is not enough that the plaintiff plead and prove that a dangerous condition of public property existed and that it caused injury to plaintiff. He must also plead and prove that the dangerous condition was created through the negligent or wrongful act or omission of an employee of the public entity, or that the public entity had notice of the dangerous condition a sufficient time prior to the injury to take remedial steps (*42 Cal. 4th 1121, 1131)* . The Court noted that while the fact that a dangerous condition was created by a public entity employee, even created deliberately, may be used to support a finding that the dangerous condition was created negligently, such facts do not *necessitate* a factual finding that the dangerous condition was created negligently or wrongfully (*42 Cal. 4th 1121, 1135-1136*). The Court also affirmed that the negligence standard applicable to a finding of liability under this statute is the common-law ordinary negligence standard, which measures the reasonableness of a defendant's conduct in light of the foreseeable risk of harm (*42 Cal. 4th 1121, 1136, 1139)* . By contrast, the Court explained, the "reasonability" relevant to a public entity's affirmative defense under *Gov. Code § 835.4* was a different type of reasonability. Under that defense, a public entity may avoid liability by showing that it did

not act unreasonably, in light of the practicality and cost of pursuing the alternative courses of action available to it, when it created or failed to remedy a dangerous condition, cost/benefit concerns which are irrelevant to establishing negligence liability under *Gov. Code § 835* or under ordinary tort principles (*42 Cal. 4th 1121, 1137-1138)* .

[b] "Property" Defined

In *Public Utilities Com. v. Superior Court (2010) 181 Cal. App. 4th 364, 105 Cal. Rptr. 3d 234* , a wrongful death action was brought against the Public Utilities Commission and others following a death at a railroad crossing caused when a truck pinned a railroad worker to a railcar. Plaintiff alleged the PUC could be held liable for a dangerous condition of public property because many years earlier the PUC had recommended that a gate be placed at the crossing but then failed to ensure that the gate was installed. The Court of Appeal held as a matter of law that the PUC did not control the property and thus could not be held liable for a dangerous condition on public property. The court relied on the following facts: (1) the PUC did not own the property; (2) the railroad was responsible for maintaining the crossing, the signals at the crossing, and an area two feet outside the tracks; (3) the city was responsible for maintaining the approaches and those portions of the crossing not under the railroad's responsibility; and (4) although the PUC could issue orders to others to take preventive measures, and other entities had to seek PUC approval before changing warning devices at the crossing, the PUC had no authority itself to correct any defects associated with the crossing. In addition, the court rejected the claim that the PUC's authority to inspect for safety violations and close the crossing to vehicular and pedestrian traffic established the requisite control, as these were merely aspects of its regulatory powers (*181 Cal. App. 4th 364, 375-376)* . The court noted as well that while the PUC had reached agreement with the other relevant entities that a gate be constructed at the crossing, the PUC had never ordered that the gate be built nor had federal construction funds ever been allocated for the project (*181 Cal. App. 4th 364, 376 n.8*).

Tolan v. State of California ex rel. Dep't of Transp. (1979) 100 Cal. App. 3d 980,161 Cal. Rptr. 307 , was an action against the state and others by a pedestrian who had sustained personal injuries when a motorist jumped an angling curve where a boulevard narrowed from four to two lanes. The parties stipulated that the condition that existed at the time of the accident existed when the state had control and ownership of the street, but that the state had relinquished control to the city three years prior to the accident. Based on this stipulation, the trial court dismissed the action in regard to the state, and plaintiff appealed. The court of appeal affirmed. The court held that to be liable the public entity must be the owner or in control of the property at the time of the injury (*100 Cal. App. 3d 980, 983, 984)* . The court said that the crucial element is control, because, for liability to be imposed, the entity must be in a position to protect against or warn of the hazard (*100 Cal. App. 3d 980, 984)* .

[c] "Dangerous Condition" Defined

In *Sun v. City of Oakland (2008) 166 Cal. App. 4th 1177, 83 Cal. Rptr. 3d 372* , a city altered an intersection to install "bulb outs," sidewalk extensions designed to lessen the distance pedestrians must travel to cross an intersection, and in the construction process removed preexisting crosswalk markings at the intersection. A pedestrian attempting to cross at that intersection was then killed by a motorist who failed to yield the right of way. In an action brought against the city by the decedent's family, the trial court granted summary judgment for the city and the court of appeal affirmed. The court of appeal held that the presence of the bulb outs, which may have invited pedestrians to cross the street, did not create a dangerous condition for purposes of imposing liability on the city. They did not increase or intensify the danger when crossing the street, and a reasonably careful motorist would have had no difficulty seeing and stopping for a pedestrian (*166 Cal. App. 4th 1177, 1190)* . The court also held that the city's failure to comply with the public notice requirements of *Veh. Code § 21950.5* prior to removing the crosswalk markings did not render the city liable for the pedestrian's death, as the city would have been free to remove the markings even after a public hearing (*166 Cal. App. 4th 1177, 1191-1192)* . Finally, the court held that *Gov. Code § 830.8* provided immunity to the city for failing to repaint the marked crosswalk, at least in the absence of any hazardous condition that would not be apparent to pedestrians or motorists using the intersection with due care (*166 Cal. App. 4th 1177, 1193)* .

In *Cerna v. City of Oakland (2008) 161 Cal. App. 4th 1340, 75 Cal. Rptr. 3d 168* , plaintiffs were the survivors and family members of an accident in which an automobile driver struck children who were crossing an intersection while walking to school. The intersection, which had a painted striped crosswalk, was a few blocks from the only entrance to the school. Plaintiffs sued the city and the school district, alleging both that the crosswalk constituted a dangerous condition of public property and that the school district could be held liable under *Ed. Code § 44808*. The trial court granted summary judgment for defendants, and the court of appeal affirmed. The court of appeal first held that the crosswalk did not constitute a dangerous condition of public property for failing to comply with the crosswalk marking requirements of *Veh. Code § 21368*. That statute applied to crosswalks that are "contiguous" to school grounds and the crosswalk at issue was not. Additionally, the court held that liability could not be premised on the failure to provide a traffic light or crossing guards. The court noted that *Gov. Code § 830.4* specifically provided that a condition is not dangerous merely because of the failure to provide traffic signals, and the presence or absence of crossing guards is not a physical condition of the intersection and thus not actionable as a dangerous condition (*161 Cal. App. 4th 1340, 1350-1351)* . The court also held that the school district could not be held liable under *Ed. Code § 44808* because the district had not undertaken to provide for the safety of the students while they were off-campus (*161 Cal. App. 4th 1340, 1357-1360)* .

In *Biscotti v. Yuba City Unified School Dist. (2007) 158 Cal. App. 4th 554, 69 Cal. Rptr. 3d 825* , a nine-year-old boy propped his bicycle handlebar through a chain link fence on the perimeter of a public school, stood on top of the bicycle in order to reach oranges growing on a tree on adjacent property, and injured his arm on the metal tines at the top of the fence when he fell. The boy sued the school district, arguing that the fence was a dangerous condition on public property. The trial court granted summary judgment for the district, and the court of appeal affirmed. The court held that the chain link fence around the perimeter of the school was not a dangerous condition rendering the school district liable for the boy's injury. The court concluded that the danger of using the bicycle as a ladder to reach over a spiked fence had to be reasonably obvious even to a child of plaintiff's age, and plaintiff was not using the fence in a manner in which it was reasonably foreseeable that it would be used (*158 Cal. App. 4th 554, 560-561)* .

In *Brenner v. City of El Cajon (2003) 113 Cal. App. 4th 434, 6 Cal. Rptr. 3d 316* , the plaintiff was struck by a car while crossing a street near a busy intersection that lacked traffic control devices. She sued the city in which the intersection was located, alleging that the street constituted a dangerous condition of public property. She argued that the expansion of the street from two to four lanes resulted in an increase in the volume and speed of traffic on the street, that the proximity of a bus stop, park, convenience store, and school near the intersection resulted in an increase in the number of pedestrians trying to cross the street, and that the defendant failed to install any traffic control devices to help protect pedestrians. The trial court sustained a demurrer for the defendant, and the court of appeal affirmed. As to the first two factors identified by the plaintiff, the court of appeal concluded that neither an increase in volume or speed of traffic after the street was widened, nor the location of facilities such as a bus stop, park, or school near the busy intersection, rendered the street a dangerous condition of public property, at least in the absence of some other allegations concerning the physical condition of the street that made it unsafe to cross when motorists and pedestrians were exercising due care (*113 Cal. App. 4th 434, 440-441)* . As for the failure to install traffic control devices, the court recognized that *Gov. Code § 830.4* specifically provides that the failure to install traffic control devices does not constitute a dangerous condition of public property (*113 Cal. App. 4th 434, 442)* .

In *Sambrano v. City of San Diego (2001) 94 Cal. App. 4th 225, 114 Cal. Rptr. 2d 151* , a two-year-old child being supervised by other family members wandered into a fire ring at the defendant's beach park and suffered third degree burns. The fire rings were approximately five feet square, had six-inch thick concrete walls that extended about 15 inches above the sand, and were painted with red warning signs reading "CAUTION, HOT." The fire ring did not have an active fire at the time of the injury and the family had been in control of the ring for at least four hours. No reports of similar injuries had been reported to the defendant in the five-year period prior to the accident. Suit was brought against the defendant on behalf of the child. The trial court granted summary judgment for the defendant, and the court of appeal affirmed. The court held that the fire rings did not constitute a dangerous condition and that the risk of a small child being burned in a fire ring was a minor, insignificant, or trivial risk if the rings were used with due care in a

foreseeable manner by members of the public. The court rejected the argument that the condition was dangerous merely because it was reasonably foreseeable that small children would not always be closely supervised by parents or other responsible adults, as well as the argument that because the child was seriously injured, there must have been a substantial risk of such injury attributable to the condition of the property (*94 Cal. App. 4th 225, 240-241)* .

In *Schonfeldt v. State of California (1998) 61 Cal. App. 4th 1462, 72 Cal. Rptr. 2d 464* , a teenager climbed a fence, ran across the freeway and was seriously injured when he was struck by a truck. Plaintiffs, as guardian ad litem for their son, contended that four defects combined to constitute a dangerous condition of property funnelingtheir son to run across the freeway: an unlit pedestrian tunnel and muddy narrow pedestrian walkway; a freeway fence four feet, ten inches high instead of recommended height of six feet; a hole in the fence on the other side; and lack of signs warning freeway drivers that pedestrians may illegally attempt to cross the freeway at that location. The trial court granted defendants motion for judgment on the pleadings Plaintiffs appealed. The court of appeal affirmed, holding that none of the alleged facts constituted a dangerous condition, either by themselves or in combination (*61 Cal. App. 4th 1462, 1468)* . According to the court, in climbing the fence and running across the freeway, the teenager chose to use the freeway without due care in a manner which was not reasonably foreseeable. Therefore, the state was not liable for his injury (*61 Cal. App. 4th 1462, 1468)* .

Fredette v. City of Long Beach (1986) 187 Cal. App. 3d 122, 231 Cal. Rptr. 598 , was an action against a city by a 22-year-old man who'd been rendered a quadriplegic when he dove from a city pier into a lagoon and struck his head against the bottom of the lagoon or some unknown solid object. In affirming the judgment for defendant city on the ground that substantial evidence supported the jury's finding that there was no dangerous condition of public property and that the city's failure to erect barricades or post warning signs was not the proximate cause of plaintiff's injuries, the court of appeal, quoting 4 Calif. L. Rev. Comm. Report (1963) p 822, said that the "dangerous condition" of property should be defined in terms of the manner in which it is foreseeable that the property will be used by persons exercising due care in recognition that any property can be dangerous if used in a sufficiently abnormal manner, and added that even though it is foreseeable that persons may use public property without due care, a public entity may not be held liable for failing to take precautions to protect such persons (*187 Cal. App. 3d 122, 132)* . The court said that no reasonable person could conclude that a swimmer, exercising due care and confronted with the notice that the condition itself provided, would have used the pier as a diving platform and that the assertion that the placement of guard rails or the posting of warning signs may have been of some value in no way suggested that the absence of such precautionary measures contributed in any way to the creation of the defective or dangerous condition, and that the danger, if present at all, had to be obvious to anyone using the pier. The court concluded that when all the circumstances were considered, the accident did not result from a momentary miscalculation or lapse on the part of the human agent against which the city was somehow required to prevent. It simply was not foreseeable that any member of the public would use the facilities in such an abnormal or reckless manner (*187 Cal. App. 3d 122, 132)* .

Antenor v. City of Los Angeles (1985) 174 Cal. App. 3d 477, 220 Cal. Rptr. 181 , was an action by pedestrians who were struck by a car while crossing an intersection, Under *Gov. Code § 830.2* [*see § 196.210[2*][d][ii]], a court may determine in the first instance, as a matter of law, that a particular condition is too minor, trivial, or insignificant to be deemed dangerous. The court said that while recognizing that *Gov. Code § 830.2* codified a line of decisions involving breaks, depressions, and irregularities in sidewalk surfaces, the Law Revision Commission comment to the statute is instructive on the scope of the section. The comment states as follows: "This section declares a rule that has been applied by the courts in cases involving dangerous conditions of sidewalks. Technically, it is unnecessary, for it merely declares the rule that would be applied in any event when a court rules on the sufficiency of the evidence. It is included in the chapter to emphasize that the courts are required to determine that there is evidence from which a reasonable person could conclude that a substantial, as opposed to possible, risk is involved before they may permit the jury to find that a condition is dangerous" (*174 Cal. App. 3d 477, 481)* . Quoting *Barone v. City of San Jose (1978) 79 Cal. App. 3d 284, 290-291, 144 Cal. Rptr. 836* , the court said that the correct approach is to determine first if the claimed defect is too trivial, as a matter of law, to be dangerous. An inquiry into this issue is a logical preliminary step before reaching the larger question of whether the nature of the defect, along with other circumstances, is sufficient to raise a jury

question concerning notice. This initial inquiry into the question of "dangerousness" would involve consideration of such matters as the size ad location of the defect with respect to the surrounding area and lighting conditions and whether it has been the cause of other accidents, while the question of notice would necessarily involve not only the factors that are primarily related to "dangerousness," but also such matters as the visibility of the condition, the frequency of travel in the area and the probability, if any, that a reasonable inspection by the appropriate public officials would have discovered its existence and its dangerous character (174 Cal. App. 3d 477, 482).

The court, in affirming the judgment for defendant entered on a directed verdict, held that risks, if any, existing at the intersection where pedestrians were struck by a car as they were crossing a city street in an unmarked crosswalk on a winter's evening were as a matter of law of such minor, trivial, or insignificant nature that no reasonable person would conclude that there existed a substantial risk of injury and hence that no dangerous condition existed. The court said that this was so even though an expert testified that a dangerous condition existed because (1) a traffic engineering study, conducted less than 60 days before the accident, showed no necessity for marked crosswalks, stop signs, or signal lights, despite the fact that the lighting was below national standards, and there had been no prior pedestrian versus car accidents at the intersection; (2) pedestrians were seen at a distance of somewhat over one half of 340 feet by an eyewitness; (3) there was no high traffic volume at the time of the accident; and (4) the curvature of the street where the accident occurred was acceptable for stopping sight distances (*174 Cal. App. 3d 477, 483-484)* .

In *Fielder v. City of Glendale (1977) 71 Cal. App. 3d 719, 139 Cal. Rptr. 876* , an action by a 79-year-old woman who tripped over a raised edge of a segment of a sidewalk and suffered a fractured femur, the court of appeal said that in determining whether a given defect in a city sidewalk is trivial, as a matter of law, the court should not rely merely on the size of the depression; while size may be one of the most relevant factors to the decision, it is not always the sole criterion, and the court should determine whether there existed any circumstances surrounding the accident that might have rendered the defect more dangerous than its mere abstract depth would indicate (*71 Cal. App. 3d 719, 734)* .

In court, in reversing a judgment for plaintiff, held that the fact that the irregularityin the sidewalk constituted a trivial defect as a matter of law, despite expert testimony by one witness that it was a hazard, was indicated by the evidence that it consisted of about a three-fourths inch difference in the level of the two adjoining slabs of the sidewalk, with no evidence of jagged edges, prior falls by others at the same spot, or other factors that would have allowed reasonable minds to conclude that it was dangerous (*71 Cal. App. 3d 719, 732-734)* . The court explained that in the first instance it is for the court to determine whether, as a matter of law, a given defect is not dangerous, to guarantee that cities do not become insurers against injuries arising from trivial defects (*71 Cal. App. 3d 719, 734)* . The court concluded that when a court determines that sufficient evidence has been presented so that reasonable minds may differ about whether the defect is dangerous, the court may not rule that the defect is not dangerous as a matter of law. However, when the only evidence available on the issue of dangerousness does not lead to the conclusion that reasonable minds may differ, then it is proper for the court to find that the defect was trivial as a matter of law (*71 Cal. App. 3d 719, 734)* .

In *Davis v. City of Pasadena (1996) 42 Cal. App. 4th 701, 50 Cal. Rptr. 2d 8* , a woman sued a city after she fell while descending steps at a convention center. Although she was not using a handrail at the time of her fall, she had been walking down the stairs parallel to a handrail which rises diagonally to the stairs. Plaintiff attributed her fall to difficulty in walking down stairs at an oblique angle, and contended that having a handrail which met the steps diagonally invited patrons to descend in that way and thus constituted a dangerous condition. The city moved for summary judgment, and the trial court granted the motion, ruling as a matter of law that steps converging at a right angle with a handrail along the line of convergence did not constitute a dangerous condition. The court of appeal noted that the plaintiff's claim that the handrail invited people to use the stairs at that location illustrated that what was involved was not a defective set of steps, but rather a choice to descend them at an angle. The court noted that the stairs could be descended perpendicularly to the steps along nearby handrails, or could be bypassed completely in favor of other available means of entry. Thus, the dangerous condition, as defined by the plaintiff, was the making available of a choice of descending the stairs in the area of the diagonal handrail as an alternative to other routes of descent. The court concluded that this was at most the type of minor, trivial or insignificant risk contemplated by the statutes as not being a dangerous

condition. The summary judgment was thus affirmed (*42 Cal. App. 4th 701, 705)* .

[d] Kind of "Due Care" Required

In *Milligan v. Golden Gate Bridge Hwy. & Transp. Dist. (2004) 120 Cal. App. 4th 1, 15 Cal. Rptr. 3d 25* , the plaintiff's 14-year-old daughter committed suicide by climbing over a three-and-a-half foot railing andjumping from the Golden Gate Bridge. The plaintiff sued the bridge district for the death, arguing that the railing was inadequate and constituted a dangerous condition of public property. The trial court sustained a demurrer for the district, and the court of appeal affirmed. The court of appeal held that as a matter of law, the bridge district could not be liable for the suicide because, by definition, persons using the bridge to kill themselves were not using the bridge with due care (*120 Cal. App. 4th 1, 7)* . Although the plaintiff pointed out that the three-and-a-half foot railing could be insufficient to prevent persons from accidentally falling from the bridge under the appropriate circumstances, the court noted that even if this were true, the plaintiff's case would still fail due to the lack of a causal connection between those perceived deficiencies in preventing accidental harm and the intentionally self-inflicted death suffered by the decedent (*120 Cal. App. 4th 1, 8-9)* .

The facts and procedural background of *Fredette v. City of Long Beach (1986) 187 Cal. App. 3d 122, 231 Cal. Rptr. 598* , are discussed in *§ 196.210[5][b]*. In affirming the judgment for defendant city, the court of appeal said that so long as a plaintiff-user can establish that a condition of the property creates a substantial risk to any foreseeable user of the public property who uses it with due care, he or she has successfully alleged the existence of a dangerous condition regardless of his or her personal lack of due care, but that, if it can be shown that the property is safe when used with due care and that a risk of harm is created only when foreseeable users fail to exercise due care, then such property is not "dangerous" within the meaning of *Gov. Code § 830(a)* (*187 Cal. App. 3d 122, 131)* . The court further rejected plaintiff's argument that the principles of comparative negligence applied. The court said that this was not a case of negligence on the part of the city, which allowed a dangerous condition of public property to exist, being compared to its negligent use by plaintiff, nor was it a case in which the foreseeably negligent user was led into a trap. Plaintiff knew of the condition and he alone created the sole risk of injury (*187 Cal. App. 3d 122, 133)* .

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Volume 19A Chapters 196-199 PUBLIC ENTITIES---to---QUO WARRANTO
CHAPTER 196 PUBLIC ENTITIES
PART II. FORMS
C. Liability of Public Entities And Employees
2. Liability For Dangerous Condition of Public Property

19A-196 California Points & Authorities § 196.211

§ 196.211 Supporting Contention That Public Entity Is Liable for Dangerous Condition of Public Property [Gov. Code § 835]--Public Entity Is Liable Even Though Negligent Act or Omission of Third Party Combined With Dangerous Condition to Cause Plaintiff's Injury

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE OBJECTION THAT DEFENDANT _____ [*name of public entity*] IS NOT LIABLE FOR PLAINTIFF'S INJURY _____ [SHOULD BE *or* SHOULD HAVE BEEN *or* WAS PROPERLY] OVERRULED BECAUSE THE FACT THAT THE NEGLIGENCE OF A THIRD PARTY COMBINED WITH THE DANGEROUS CONDITION OF THE PUBLIC ENTITY'S PROPERTY TO INFLICT THE INJURY ON PLAINTIFF DOES NOT EXONERATE THE PUBLIC ENTITY FROM LIABILITY WHEN THE INJURY WAS CAUSED IN PART BY A DANGEROUS CONDITION OF THE PUBLIC ENTITY'S PROPERTY.

Third Party's Negligence Does Not Preclude Public Entity's Liability for Injury Caused by Dangerous Condition. If the condition of the public property is dangerous to the public in general, the negligence of a third party that contributes to the plaintiff's injury does not preclude the public entity from liability (*Ducey v. Argo Sales Co. (1979) 25 Cal. 3d 707, 718-719, 159 Cal. Rptr. 835, 602 P.2d 755* ; *Mathews v. State of California ex rel. Dep't of Transp. (1978) 82 Cal. App. 3d 116, 120-121, 145 Cal. Rptr. 443*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that a public entity is liable for the plaintiff's injuries caused by a dangerous condition of the entity's property even though the concurrent negligence of a third party contributed to the injuries. For the law that applies when the dangerous condition is a third party's use of public property that foreseeably creates a danger of injury to others and is made with the consent of the public entity

that knows of the danger, see *§ 196.212*.

These points and authorities may be combined, in an appropriate case, with the general points and authorities *set out in § 196.210* or with the additional points and authorities *set out in §§ 196.212 -196.214*. These points and authorities may also be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be used in a memorandum of points and authorities in opposition to the public entity's demurrer to the complaint, or motion for judgment on the pleadings, on the asserted ground that the complaint fails to state facts sufficient to constitute a cause of action, or in opposition to the public entity's motion for summary judgment on the ground that the action has no merit. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Limits on Liability When Concurrent Negligence of Two or More Tortfeasors Caused Plaintiff's Injuries

On June 3, 1986, after the cases cited and discussed in this form were decided, Proposition 51, the so-called "deep-pockets" initiative, was adopted. It amended *Civ. Code § 1431* (relating to joint and several liability) and *Civ. Code § 1432* (relating to contribution between obligors on joint or joint and several obligations) and added *Civ. Code §§ 1431.1-1431.5*. The purpose of the proposition was to limit the liability of a concurrent tortfeasor for "noneconomic damages" (defined in *Civ. Code § 1431.2(b)(2)*) to his or her percentage of fault. The proposition does this by providing that in any action for personal injury, property damage, or wrongful death, based on principles of comparative fault, the liability of each defendant for noneconomic damages shall be several only and shall not be joint, and that each defendant shall be liable only for the amount of noneconomic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against the defendant for that amount [*Civ. Code § 1431.2(a)*]. Consequently, although the public entity would be jointly and severally liable with its concurrent tortfeasor for plaintiff's "economic damages" (defined in *Civ. Code § 1431.2(b)(1)*), it would be only severally liable for its percentage share of fault for the plaintiff's noneconomic damages.

[3] Discussion of Authorities

[a] Third Party's Negligence Does Not Preclude Public Entity's Liability for Injury Caused by Dangerous Condition

In ***Ducey v. Argo Sales Co.*** *(1979) 25 Cal. 3d 707, 159 Cal. Rptr. 835, 602 P.2d 755* , plaintiffs were seriously injured when the driver of a car coming in the opposite direction, in attempting to stop because of a traffic jam, lost control of the car in a centrifugal skid on the pavement, crossed the freeway median area, and collided head-on with their car. The driver of the out-of-control car was killed in the accident. Plaintiffs sued the state of California, the estate of the deceased driver, and others. The cause of action against the state was based on its failure to have installed a median barrier after notice that its failure to install such a barrier created a dangerous condition. The jury rendered a verdict for plaintiff against the state and the deceased driver's estate. On appeal the Supreme Court affirmed. The Court said that the state recognized that if the condition of its property created a substantial risk of injury even when the property was used with due care, the state gained no immunity from liability simply because, in a particular case, the dangerous condition of its property combined with the negligent conduct of a third person to inflict injury (*25 Cal. 3d 707* , pp. 718-719).

In ***Mathews v. State of California ex rel. Dep't of Transp.*** *(1978) 82 Cal. App. 3d 116, 145 Cal. Rptr. 443* , plaintiff alleged in effect that she was injured when the car she was driving in a westerly direction was struck broadside by a car being negligently driven in a northerly direction in an intersection at which the traffic control lights were malfunctioning. The east-west lights were stuck on green, indicating "go," and the north-south lights were stuck on red, indicating "stop." Plaintiff further alleged that on the morning of the day of the accident the state was informed several

times that the lights were malfunctioning and created a highly dangerous situation at a heavily traveled intersection, but failed to remedy, repair, or correct the malfunction. The court granted the state's motion for judgment on the pleadings on the ground the complaint failed to state a cause of action, and plaintiff appealed. The court of appeal reversed. The Court held that the malfunctioning street lights created a dangerous condition of public property of which the state had notice. It then held that the negligence of the other driver would not preclude the state's liability for the dangerous condition (*82 Cal. App. 3d 116, 121-122)* .

[4] Additional Authorities

[a] Third Party's Negligence Does Not Preclude Public Entity's Liability for Injury Caused by Dangerous Condition

In *Callahan v. City & County of San Francisco (1967) 249 Cal. App. 2d 696, 57 Cal. Rptr. 639* , plaintiff was a passenger in a car that crashed allegedly because of the dangerous condition of a public street. The driver of plaintiff's car was driving recklessly. The trial court dismissed the complaint after sustaining a general demurrer. The court of appeal reversed. It held that the concurrent negligence of the driver did not exonerate the city from liability for the dangerous condition (*249 Cal. App. 2d 696, 701)* .

[5] Opposing Authorities

[a] Third Party's Negligence Does Not Preclude Public Entity's Liability for Injury Caused by Dangerous Condition

In *Zelig v. County of Los Angeles (2002) 27 Cal. 4th 1112, 119 Cal. Rptr. 2d 709, 45 P.3d 1171* , the plaintiffs were the minor children of a woman who was shot and killed by her ex-husband, the children's father, while the woman and her ex-husband were in a courthouse awaiting a hearing regarding spousal and child support. At least three times prior to the date of the shooting, the decedent had told the bailiff in one department of the family court that she feared her ex-husband and believed he might try toharm or kill her. The decedent had in the past obtained restraining orders that limited her ex-husband's right to carry firearms and prevented him from being within 100 yards of a firearm while in the presence of the decedent or their children. However, although the courthouse had posted notices that firearms were not allowed in the courthouse, the county did not actually search patrons to prevent the carrying of concealed firearms into the building. Therefore, the ex-husband was able to carry a concealed revolver into the courthouse, which he used to shoot the decedent in the chest. The plaintiffs, through their guardians, brought suit against the county and the county sheriff's department, asserting various causes of action and alleging primarily that these defendants failed to provide adequate security against third party violence inside the courthouse. The trial court sustained a demurrer for these defendants, but the court of appeal reversed.

The California Supreme Court granted review, reversed the court of appeal, and upheld the trial court's ruling. In addressing the plaintiff's claim that the defendants were liable for allowing a dangerous condition to exist on public property, the Court first held that *Gov. Code § 835* is the sole avenue for imposing liability on a public entity for a dangerous condition on public property and that plaintiffs may not rely on the general negligence principals of *Civ. Code § 1714* to impose liability on a public entity landowner, as they could in an action against a private property owner (*27 Cal. 4th 1112, 1132)* . The Court then reviewed the case law dealing with the liability of a public entity for a dangerous condition of public property in the context of third-party criminal conduct. The Court reaffirmed that liability may only be imposed if there is some physical defect in the property itself and if a causal connection is established between that defect and the injury. In the case of third-party criminal conduct, this requires a causal relationship between the physical defect in the property and the third-party conduct that creates the injury (*27 Cal. 4th 1112, 1135-1136)* . In this particular case, the Court held that the plaintiffs were unable to show that any physical condition of the courthouse increased the risk of the shooting or otherwise had a causal connection to the shooting. In fact, the Court noted that the risk of injury to the decedent was at least as great outside the courthouse as inside (*27 Cal. 4th 1112, 1137)* . The failure to adequately screen for firearms being brought into the building was not a physical defect that could

support liability under *Gov. Code § 835* (*27 Cal. 4th 1112, 1137)* , and in any event, the defendants were immune under *Gov. Code § 845* from liability for failing to provide sufficient security to persons conducting business in a courthouse (*27 Cal. 4th 1112, 1144-1146)* .

In *City of San Diego v. Superior Court (2006) 137 Cal. App. 4th 21, 40 Cal. Rptr. 3d 26* , one car was trying to make a left turn across two lanes of oncoming traffic when it was struck by another vehicle engaged in a race. The city street on which the race was taking place was straight and relatively flat, although there was little street lighting and the accident occurred in the evening. The plaintiffs, who were in the car that was struck, sued the driver of the other car and the city. The plaintiffs argued that the physical condition of the street should have been altered to make it safer, including the addition of more lighting to make it easier for drivers to see approaching traffic and properly gauge its speed. After reviewing the principles set out by the Supreme Court in *Zelig v. County of Los Angeles,* the court of appeal held that the flat, straight city street was not physically defective because of inadequate lighting, but that even if it were, there was no evidence that the lack of adequate lighting influenced the other driver to race (*137 Cal. App. 4th 21, 31)* .

In *Turner v. State of California (1991) 232 Cal. App. 3d 883, 284 Cal. Rptr. 349* , plaintiff, an individual who was shot in the parking lot at Cal Expo, brought a personal injury action against the state and related defendants. The complaint included four causes of action, among them dangerous condition of public property. It alleged that there had been a number of assaults in the parking lot, and that defendants were aware of gang-related violence, but failed to take appropriate steps to protect or warn the public. The court of appeal affirmed the summary judgment granted to defendants by the trial court. The court began by disregarding plaintiff's attempt to claim inadequate lighting as a defective condition of the property because no such allegation had been included in the claim (*232 Cal. App. 3d 883, 888)* . It then said that liability for a dangerous condition of property cannot be premised on third party conduct alone. Such liability may arise only where third party conduct is coupled with a defective condition of the property. The only dangerous condition alleged in plaintiff's complaint was the existence of ongoing criminal activity and/or gang-related violence. This is not a condition of the property itself and cannot alone support a claim under *Gov. Code § 835* (*232 Cal. App. 3d 883, 892)* .

In *Crow v. State of California (1990) 222 Cal. App. 3d 192, 271 Cal. Rptr. 349* , the court of appeal affirmed summary judgment in a student's tort action against the university that owned a dormitory in which he was assaulted by another student, because of plaintiff's failure to identify any defect in the dormitory that contributed to the injuries he sustained. The court explained that third-party conduct by itself, unrelated to the condition of the property, does not constitute a dangerous condition for which a public entity may be liable (222 Cal. App. 3d 192, 204-206).

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19A-196 California Points & Authorities § 196.212

§ 196.212 Supporting Contention That Public Entity Is Liable for Dangerous Condition of Public Property [Gov. Code § 835]--Public Entity Is Liable Even Though Dangerous Condition Was Negligent Use of Property by Third Party With Knowledge of Public Entity

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE OBJECTION THAT DEFENDANT _____ [*name of public entity*] IS NOT LIABLE FOR PLAINTIFF'S INJURY _____ [SHOULD BE *or* SHOULD HAVE BEEN *or* WAS PROPERLY] OVERRULED BECAUSE THE FACT THAT THE DANGEROUS CONDITION RESULTED FROM THE NEGLIGENT USE OF THE PROPERTY BY A THIRD PERSON WITH DEFENDANT'S KNOWLEDGE DOES NOT EXONERATE DEFENDANT FROM LIABILITY FORINJURY SUFFERED AS A RESULT OF SUCH USE WHEN IT WAS FORESEEABLE THAT INJURY WAS LIKELY TO RESULT.

A. Dangerous Condition Caused by Use of Property. It is not only structural defects that can create a dangerous condition of property; the dangerous condition may consist of a use of the property in a reasonably foreseeable manner that creates a danger of injury (*Quelvog v. City of Long Beach (1970) 6 Cal. App. 3d 584, 590, 86 Cal. Rptr. 127*).

B. Foreseeable Use of Property by Third Person. A public entity is liable for injuries sustained as the result of a dangerous condition of its property when that condition results from the negligent use of the property by third persons and it was reasonably foreseeable to the entity that the property would be so used and that such use created a danger of injury to others (*Quelvog v. City of Long Beach (1970) 6 Cal. App. 3d 584, 590-591, 86 Cal. Rptr. 127*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a public entity is liable for the plaintiff's

injuries caused by a dangerous condition of the entity's property that resulted from the use of the property made with the knowledge of the public entity, rather than from a structural defect in the property, and it was foreseeable that the use would result in the kind of injury sustained.

These points and authorities may be combined, in an appropriate case, with the general points and authorities *set out in § 196.210* or with the additional points and authorities *set out in §§ 196.211, 196.213*, and *196.214*. These points and authorities may also be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be used in a memorandum of points and authorities in opposition to the public entity's demurrer to the complaint, or motion for judgment on the pleadings, on the asserted ground that the complaint fails to state facts sufficient to constitute a cause of action, or in opposition to the public entity's motion for summary judgment on the ground that the action has no merit. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Dangerous Condition Caused by Use of Property

Quelvog v. City of Long Beach *(1970) 6 Cal. App. 3d 584, 86 Cal. Rptr. 127* , was an action against the city by the surviving wife and child of a man who had been killed in a fall from a ladder. The man was engaged in the business of repairing neon signs, and, while he was standing on a ladder some 14 feet above a public sidewalk, on which the foot of the ladder rested, and working on a sign, the ladder was struck by an electrically powered wheelchair or "autoette" that knocked the ladder down and caused the man to fall to his death. Although state law (*Veh. Code § 21663*) prohibited the use of motor vehicles on public sidewalks, the city not only permitted autoettes to be driven on the city sidewalks, but encouraged such use, constructed special access areas for the vehicles in the curbs of public sidewalks, and instructed its police department that such use was not to be prevented. Plaintiffs alleged that ever since *Veh. Code § 21663* was enacted, autoettes have been knocking down pedestrians on the city's sidewalks, causing severe injury and much litigation, and that the city had knowledge of the accidents but still encouraged the continued use of autoettes on its sidewalks. The trial court granted the city's motion for judgment on the pleadings, and plaintiff appealed. The city argued that no dangerous condition of its property as defined in *Gov. Code § 830(a)* (*see § 196.210*, Paragraph D) was created or existed, that the sole cause of the accident was the negligence of the driver of the autoette, that the city had done nothing in violation of its duties except to refrain from enforcing *Veh. Code § 21663*, and that under *Gov. Code § 818.2*, providing that a public entity is not liable for an injury caused by failing to enforce any law, it incurred no liability for the accidental death (*6 Cal. App. 3d 584, 589)* .

The court of appeal rejected the city's argument and reversed the judgment on the ground that the complaint sufficiently stated a cause of action against the city for creating and maintaining a dangerous condition (*6 Cal. App. 3d 584, 591-592)* . The court said it is not only structural defects that can create a dangerous condition; a dangerous condition may consist of a use of property in a reasonably foreseeable manner that creates a danger of injury (*6 Cal. App. 3d 584, 590)* . The court explained that the city could not justify its conduct on the ground that it was the duty of the operators to use the vehicles with due care and not create a dangerous condition on the sidewalks, if, as alleged, it had knowledge of accidents they had caused in the past and it was reasonably foreseeable there would be more similar accidents (*6 Cal. App. 3d 584, 591)* . The court said that, on the basis of the allegations of the complaint, it must be presumed that autoettes would not have been operated on the sidewalks if the city had not flouted the state law and encouraged individuals to disobey it. Clearly, it cannot justly claimimmunity from the consequences of its alleged conduct by relying on the fact that it was also failing to enforce state law. *Gov. Code § 818.2* excuses the city for failure to enforce laws that are being violated by others but it does not excuse the city for violating its duty, to avoid the creation of conditions that are dangerous to its citizens or the public generally. The city enjoys no immunity for its alleged affirmative actions and must be held responsible for their consequences (*6 Cal. App. 3d 584, 591)* .

[b] Foreseeable Use of Property by Third Person

Quelvog v. City of Long Beach *(1970) 6 Cal. App. 3d 584, 86 Cal. Rptr. 127* , is discussed in *§ 196.212[3][a]*.

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19A-196 California Points & Authorities § 196.213

§ 196.213 Supporting Contention That Public Entity Is Liable for Dangerous Condition of Public Property [Gov. Code § 835]--Public Entity Is Liable Even Though Dangerous Condition Was Caused by Condition on Adjacent Property

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE OBJECTION THAT DEFENDANT _____ [*name of public entity*] IS NOT LIABLE FOR PLAINTIFF'S INJURY _____ [SHOULD BE *or* SHOULD HAVE BEEN *or* WAS PROPERLY] OVERRULED BECAUSE THE FACT THAT THE DANGEROUS CONDITION OF THE DEFENDANT'S PROPERTY WAS CAUSED BY A CONDITION ON ADJACENT PROPERTY DOES NOT EXONERATE THE PUBLIC ENTITY FROM LIABILITY.

Public Entity Liable for Dangerous Condition of Its Property Caused by Condition on Adjacent Property. A dangerous or defective condition may be found to exist on public property sufficient to impose a duty on the public entity to take corrective or protective measures notwithstanding that the danger exists only by reason of a condition on adjacent property (*Bonanno v. Central Contra Costa Transit Auth. (2003) 30 Cal. 4th 139, 147-151, 132 Cal. Rptr. 2d 341, 65 P.3d 807* ; *Carson v. Facilities Dev. Co. (1984) 36 Cal. 3d 830, 841, 206 Cal. Rptr. 136, 686 P.2d 656*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a public entity is liable for the plaintiff's injuries caused by a dangerous condition of the entity's property even though the dangerous condition was caused by a condition on adjacent property.

These points and authorities may be combined, in an appropriate case, with the general points and authorities *set out in*

§ 196.210 or with the additional points and authorities *set out in §§ 196.211, 196.212*, and *196.214*. They may also be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be used in a memorandum of points and authorities in opposition to the public entity's demurrer to the complaint, or motion for judgment on the pleadings, on the asserted ground that the complaint fails to state facts sufficient to constitute a cause of action, or in opposition to the public entity's motion for summary judgment on the ground that the action has no merit. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

For discussion of the limitations on the joint and several liability doctrine imposed by *Civ. Code § 1431.2* with respect to liability for noneconomic damages, see *§ 196.211[2][b]*.

[3] Discussion of Authorities

[a] Public Entity Liable for Dangerous Condition of Its Property Caused by Condition on Adjacent Property

In ***Bonanno v. Central Contra Costa Transit Auth.*** *(2003) 30 Cal. 4th 139, 132 Cal. Rptr. 2d 341, 65 P.3d 807* , the plaintiff was attempting to reach a bus stop by crossing a busy, uncontrolled intersection on a county road, in order to reach a bus stop. A negligent driver rear-ended another car that had stopped at a painted crosswalk to allow the plaintiff to cross, causing the car that had stopped to strike the plaintiff. Prior to this accident, the county transit authority responsible for locating the bus stop at that site had been put on notice through another accident and other complaints that crossing the busy adjacent street to get to the bus stop was hazardous. The plaintiff brought suit against the county, the county transit agency, the negligent driver, and other parties, but following various settlements eventually went to trial only against the county transit agency. The jury returned a verdict in favor of the plaintiff on her claim based on a dangerous condition of public property and awarded damages. The court of appeal affirmed. The California Supreme Court granted review limitedto the question of whether the location of a bus stop may constitute a dangerous condition of public property because patrons must cross a dangerous crosswalk on adjacent property to reach the stop.

The California Supreme Court answered this question in the affirmative, so long as the other elements for imposing liability under *Gov. Code § 835* have been met. The Court noted that the defendant had no control over the adjacent county street, with its uncontrolled intersection, nor could it control the actions of third-party drivers such as the driver who caused the plaintiff's injuries (*30 Cal. 4th 139, 151-152)* . However, existing law had already established that public property may be considered dangerous if a condition on adjacent property exposes those using the public property to a substantial risk of injury (*30 Cal. 4th 139, 148-151)* . Equally established was the proposition that a dangerous condition exists if some characteristic of the property exposes users to increased risk of harm from third-party negligence or criminal conduct, as discussed in *§ 196.211*, (*30 Cal. 4th 139, 152-153)* . Moreover, the defendant was on notice of the dangers involved in reaching that bus stop, and although installing a new stop at another location would have required the approval of the county, the defendant had sole control over whether to remove that bus stop if its location was unnecessarily dangerous (*30 Cal. 4th 139, 144-147* & n.2). Under those circumstances, the Court found no reason to reverse the jury's determination that the location of the bus stop constituted a dangerous condition of public property (*30 Cal. 4th 139, 156)* .

Carson v. Facilities Dev. Co. *(1984) 36 Cal. 3d 830, 206 Cal. Rptr. 136, 686 P.2d 656* , was a wrongful death and personal injury action by the surviving husband and children of a driver killed in an auto accident, which also injured the children, at an intersection maintained by a city. The defendants were the city, the development company that had built a condominium complex located near the site of the accident, a homeowners' association that had subsequently purchased the condominium complex from the company, and the driver of the other car. Plaintiffs alleged that the decedent's view of the intersection was obscured by an encroaching address sign, which had been placed by the

development company on an adjacent strip of land owned by the city, and some trees located near the sign on the same strip of land. The company had not obtained an encroachment permit to put up the sign on the city's property as was required by city ordinance. The trial court granted defendant city's motion for nonsuit and plaintiffs appealed. In support of its motion for nonsuit, the city asserted that even if the sign created a dangerous condition, the city was not statutorily liable because it did not erect the sign.

The Supreme Court reversed. The Court rejected the city's assertion that it could not be held liable because it did not erect the sign. The Court said that under *Gov. Code § 835* one of the elements necessary to establish liability of a public entity is that the dangerous condition be of its property and that, under the definition of property of a public entity or public property in *Gov. Code § 830(c)*, easements, encroachments, and other property located on the property of the public entity but not owned or controlled by the entity are not included (*36 Cal. 3d 830, 840)* . The Court held, however, that ownership of the sign was irrelevant to the city's liability, since the property at issue was not the sign but the intersection that was rendered dangerous by the erection of the sign, and that the property of a public entity may be considered dangerous if a condition on adjacent property exposes those using the public property to substantial risk of injury (*36 Cal. 3d 830, 840-841)* . The Court distinguished *Mark v. Pacific Gas & Elec. Co. (1972) 7 Cal. 3d 170, 101 Cal. Rptr. 908, 496 P.2d 1276* , in which the Court had held that a public entity was not liable for the electrocution of the decedent by a street lamp that was located on public property but owned and maintained by a utility company. The Court said that in *Mark* the street lamp itself constituted the allegedly dangerous condition, whereas, in the case before it, the sign was not in a dangerous condition, but its location rendered the defendant's intersection dangerous, and that ownership and control of the intersection, not the sign, was the basis of the city's liability (*36 Cal. 3d 830, 841-842)* .

[4] Additional Authorities

[a] Public Entity Liable for Dangerous Condition of Its Property Caused by Condition on Adjacent Property

In *Joyce v. Simi Valley Unified Sch. Dist. (2003) 110 Cal. App. 4th 292, 1 Cal. Rptr. 3d 712* , the plaintiff, a junior high school student, was struck by a car while attempting to cross a busy four-lane street adjacent to her school. The crosswalk she used was marked, but it had no lights or stop signs. The plaintiff sued the school district, arguing that the placement of a school entrance gate adjacent to the dangerous crosswalk constituted a dangerous condition on the school property under *Gov. Code § 830* and *Gov. Code § 835*. The jury returned a verdict for the plaintiff, and the court of appeal affirmed. The court of appeal, citing the California Supreme Court's opinion in *Bonanno v. Central Contra Costa Transit Auth. (2003) 30 Cal. 4th 139, 132 Cal. Rptr. 2d 341, 65 P.3d 807* [*see § 196.213[3][a]*], agreed that the school district could be liable to the plaintiff for the placement of the entrance gate next to a crosswalk at an intersection that the district knew to be dangerous. The placement of that particular gate encouraged students to cross at that crosswalk even though the district was aware both that the crosswalk was at a heavily-traveled intersection that had no lights and that the city had recently raised the speed limit on that street (*110 Cal. App. 4th 292, 298-300)* .

In *Jordan v. City of Long Beach (1971) 17 Cal. App. 3d 878, 95 Cal. Rptr. 246* , plaintiff was injured while walking down a city-maintained sidewalkwhen she fell because of a hole in the pavement and a protruding water pipe that were situated on private property immediately adjacent to the property line between the portion of the pavement on city property and that which extended onto the adjoining private property. The trial court granted the city a summary judgment based on proof that the conditions were on private property. The court of appeal reversed. The court held that a dangerous or defective condition may be found to exist on public property sufficient to impose a duty on the public entity to take corrective or protective measures notwithstanding that the danger exists only by reason of a condition existing on adjacent privately owned property (*17 Cal. App. 3d 878, 883)* . The court concluded that there existed triable issues of fact about whether there was a dangerous condition of public property and this required that the summary judgment be reversed (*17 Cal. App. 3d 878, 881)* .

In *De La Rosa v. City of San Bernardino (1971) 16 Cal. App. 3d 739, 94 Cal. Rptr. 175* , plaintiff was injured when he ran a stop sign and collided with another car. The complaint was based on a dangerous condition of public property in that the stop sign could not be seen at night because of its placement and the fact that it was obscured by foliage growing on adjacent private property. The trial court granted a directed verdict for defendant. The court of appeal reversed. The court held that the condition of public property can be dangerous when the condition of adjacent property exposes persons using public property to a substantial risk of harm (*16 Cal. App. 3d 739, 746)* .

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PART II. FORMS
C. Liability of Public Entities And Employees
2. Liability For Dangerous Condition of Public Property

19A-196 California Points & Authorities § 196.214

§ 196.214 Supporting Contention That Public Entity Is Liable for Dangerous Condition of Public Property [Gov. Code § 835]--Public Entity Is Liable for Natural Condition of Its Unimproved Property That Injures Adjacent Property or Persons on Adjacent Property

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE OBJECTION THAT DEFENDANT _____ [*name of public entity*] IS NOT LIABLE FOR PLAINTIFF'S INJURY _____ [SHOULD BE *or* SHOULD HAVE BEEN *or* WAS PROPERLY] OVERRULED BECAUSE, EXCEPT WHEN THE INJURY RESULTS FROM A LAND FAILURE CAUSED BY A NATURAL CONDITION OF THE PROPERTY, A PUBLIC ENTITY IS NOT IMMUNE FROM LIABILITY FOR AN INJURY CAUSED BY A NATURAL CONDITION OF ITS UNIMPROVED PROPERTY WHEN THE INJURY WAS TO ADJACENT PROPERTY OR TO A PERSON ON ADJACENT PROPERTY.

Liability for Injury to Adjacent Property or Person on Adjacent Property Caused by Natural Condition of Public Entity's Unimproved Property. Although *Section 831.2 of the Government Code* provides that a public entity is not liable for injury caused by a natural condition of unimproved public property, the public entity is liable when the natural condition injures adjacent property or a person on adjacent property (*Milligan v. City of Laguna Beach (1983) 34 Cal. 3d 829, 834-835, 196 Cal. Rptr. 38, 670 P.2d 1121*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of the contention that a public entity's immunity for injuries resulting from a natural condition on unimproved public property under *Gov. Code § 831.2* does not insulate it from liability for injury caused by the dangerous condition of its property to adjacent property or to a person on adjacent property, as opposed to a user of the unimproved public property. For the immunity to liability of a

public entity and its employees for damage or injury to property or for emotional distress off the public entity's unimproved property as the result of land failure caused by a natural condition of the property, see *Gov. Code § 831.25*, discussed in *§ 196.12[5][c]*.

These points and authorities may be combined, in an appropriate case, with the general points and authorities *set out in § 196.210* or with the additional points and authorities *set out in §§ 196.211 -196.213*. These points and authorities may also be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be used in a memorandum of points and authorities in opposition to the public entity's demurrer to the complaint, or motion for judgment on the pleadings, on the asserted ground that the complaint fails to state facts sufficient to constitute a cause of action, or in opposition to the public entity's motion for summary judgment on the ground that the action has no merit. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Liability for Injury to Adjacent Property or Person on Adjacent Property Caused by Natural Condition of Public Entity's Unimproved Property

In ***Milligan v. City of Laguna Beach*** *(1983) 34 Cal. 3d 829, 196 Cal. Rptr. 38, 670 P.2d 1121* , plaintiffs sued to recover damages for injury to property and for emotional distress suffered as a result of the fall of several eucalyptus trees growing on unimproved property owned by defendant city. The complaint alleged that the trees constituted a dangerous condition under *Gov. Code § 835*. Plaintiffs' residence, which was damaged by the fallen trees, was on property adjacent to defendant's property. The trial court entered judgment for defendant on the ground that *Gov. Code § 831.2* immunized defendant from liability under *Gov. Code § 835* caused by a natural condition of unimproved land, and plaintiffs appealed.

The Supreme Court reversed. The Court held that the natural condition immunity of *Gov. Code § 831.2* did not apply when the injury is to adjacent property or to persons on adjacent property (*34 Cal. 3d 829, 834)* . In reaching its conclusion, the Court relied on comments to the California Tort Claims Act adopted by the Senate Committee on the Judiciary and the Assembly Committee on Ways and Means, which stated in regard to *Gov. Code § 831.2* that the intent of the immunity was to encourage public entities to permit public access to unimproved land without the risk of lawsuits based on dangerous condition liability (*34 Cal. 3d 829, 833)* . The Court held that plaintiffs were not within the intended scope of the immunity because they did not use the public property, and the immunity did not apply to nonusers (*34 Cal. 3d 829, 834)* . In view of its holding that *Gov. Code § 831.2* did not apply, the Court did not reach the question of whether the trees constituted a natural condition (*34 Cal. 3d 829, 835)* .

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19A-196 California Points & Authorities §§ 196.215-196.229

[Reserved]

§§ 196.215[Reserved]

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3. Liability Arising From Special Relationship or Circumstance

19A-196 California Points & Authorities § 196.230

§ 196.230 Supporting Contention That Public Entity or Employee Is Liable for Injury Caused by Violation of Duty Arising From Special Relationship or Circumstance--Duty of Public Entity to Warn of Known Criminal Activity on Public Property

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE OBJECTION THAT DEFENDANT _____ [*name of public entity*] IS NOT LIABLE FOR PLAINTIFF'S INJURY BECAUSE IT OWED PLAINTIFF NO DUTY TO PROTECT HIM/HER FROM THE CRIMINAL ACT OF A THIRD PARTY ON ITS PROPERTY _____ [SHOULD BE *or* SHOULD HAVE BEEN *or* WAS PROPERLY] OVERRULED BECAUSE PLAINTIFF HAS _____ [ALLEGED FACTS SHOWING *or* SHOWN] THAT (1) DEFENDANT MAINTAINED ITS PROPERTY IN A DANGEROUS CONDITION IN SUCH A WAY AS TO INCREASE THE RISK OF CRIMINAL ACTIVITY; (2) CRIMINAL CONDUCT OF WHICH DEFENDANT HAD KNOWLEDGE HAD TAKEN PLACE ON ITS PROPERTY; (3) A SPECIAL RELATIONSHIP EXISTED BETWEEN DEFENDANT AS POSSESSOR OF THE PREMISES AND PLAINTIFF AS INVITEE; (4) AS A RESULT OF THAT RELATIONSHIP, DEFENDANT OWED PLAINTIFF THE DUTY TO WARN HIM/HER OF THE KNOWN CRIMINAL CONDUCT ON ITS PROPERTY; (5) DEFENDANT BREACHED THAT DUTY BY FAILING TO WARN PLAINTIFF OF THAT CONDUCT OR TO TAKE ANY OTHER PROTECTIVE MEASURES WITH RESPECT TO ITS PROPERTY; AND (6) AS A PROXIMATE RESULT OF THE DANGEROUS CONDITION OF THE PROPERTY, TOGETHER WITH THE CRIMINAL ACT OF A THIRD PARTY, PLAINTIFF WAS INJURED.

A. Factors to Consider in Determining Duty. In considering whether one owes another a duty of care, factors that must be weighed include the following: (1) the foreseeability of harm to the plaintiff, (2) the degree of certainty that the plaintiff suffered injury, (3) the closeness of the connection between the defendant's conduct and the injury suffered, (4) the moral blame attached to the defendant's conduct, (5) the policy of preventing future harm, (6) the extent of the burden to the defendant and the consequences to thecommunity of imposing a duty to exercise care with resulting

liability for breach, and (7) the availability, cost, and prevalence of insurance for the risk involved. When public agencies are involved, additional elements include the extent of the agency's powers, the role imposed on it by law, and the limitations imposed on it by budget (*Peterson v. San Francisco Cmty. Coll. Dist. (1984) 36 Cal. 3d 799, 806, 205 Cal. Rptr. 842, 685 P.2d 1193* ; *Davidson v. City of Westminster (1982) 32 Cal. 3d 197, 203, 185 Cal. Rptr. 252, 649 P.2d 894*).

B. Duty to Protect Person From Misconduct of Third Person. Although generally, under common law, one has no duty to control the conduct of another and no duty to warn those who may be endangered by such conduct, a duty may nevertheless arise when (1) a special relationship exists between the actor and the third person that imposes a duty on the actor to control the third person's conduct or (2) a special relationship exists between the actor and the other that gives the other a right to protection (*Peterson v. San Francisco Cmty. Coll. Dist. (1984) 36 Cal. 3d 799, 806, 205 Cal. Rptr. 842, 685 P.2d 1193* ; *Davidson v. City of Westminster (1982) 32 Cal. 3d 197, 203, 185 Cal. Rptr. 252, 649 P.2d 894*).

C. Special Relationship Between Possessor of Land and Invitee. Among the commonly recognized special relationships is the one between a possessor of land and members of the public who enter in response to the landowner's invitation. Liability will normally be imposed in circumstances when the possessor had reasonable cause to anticipate the misconduct of third persons (*Peterson v. San Francisco Cmty. Coll. Dist. (1984) 36 Cal. 3d 799, 806, 807, 205 Cal. Rptr. 842, 685 P.2d 1193*).

D. Applicability of General Tort Law to Government Tort Liability. Although the liability of a public entity under the California Tort Claims Act is statutory, the conceptual theory of that liability is keyed to the common law of negligence and damages (*Peterson v. San Francisco Cmty. Coll. Dist. (1984) 36 Cal. 3d 799, 809, 205 Cal. Rptr. 842, 685 P.2d 1193*).

E. Liability of Public Entity for Dangerous Condition of Its Property. Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury that was incurred and that either (a) a negligent or wrongful act or omission of an employee of the public entity within the scope of his or her employment created the dangerous condition; or (b) the public entity had actual or constructive notice of the dangerous condition under *Section 835.2 of the Government Code* a sufficient time prior to the injury to have taken measures to protect against the dangerous condition (*Gov. Code § 835*).

F. "Actual Notice" Defined. [*See § 196.210, Paragraph F.*]

G. "Constructive Notice" Defined. [*See § 196.210, Paragraph G.*]

H. "Protect Against" Defined. [*See § 196.210, Paragraph H.*]

I. Liability of Public Entity for Criminal Act of Third Party. A cause of action for damages sustained as a result of a criminal assault, the risk of which was increased by the dangerous condition of the entity's property, is stated or established under *Gov. Code § 835* by a person to whom the public entity owed a duty of due care by reason of a special relationship between them when the entity, being aware of the condition, failed to take reasonable protective measures, including the providing of safeguards against the dangerous condition or warning plaintiff of the danger, and the plaintiff suffers injury as a result (*Peterson v. San Francisco Cmty. Coll. Dist. (1984) 36 Cal. 3d 799, 812-814, 205 Cal. Rptr. 842, 685 P.2d 1193*).

[*Optional*] **J. Determination of Whether Condition Is Dangerous.** Whether a given set of facts and circumstances creates a dangerous condition is usually a question of fact and may only be resolved as a question of law if reasonable

minds can come to but one conclusion (*Peterson v. San Francisco Cmty. Coll. Dist. (1984) 36 Cal. 3d 799, 810, 205 Cal. Rptr. 842, 685 P.2d 1193*).

[2] Comments

[a] Use of Form

These points and authorities may be used in support of the contention that a public entity is liable for injuries sustained by a plaintiff as the victim of a criminal assault on the entity's property when, by virtue of a special relationship between it and the plaintiff, the entity was under a duty to exercise due care to protect plaintiff from and/or to warn plaintiff of the danger created by the condition of its property, which increased the risk of criminal activity of which the public entity had knowledge, and did neither.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be used in a memorandum of points and authorities in opposition to the public entity's demurrer to the complaint, or motion for judgment on the pleadings, on the asserted ground that the complaint fails to state facts sufficient to constitute a cause of action, or in opposition to the public entity's motion for summary judgment on the ground that the action has no merit. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Points and Authorities

For the liability of a psychotherapist and his or her public entity employer for failure to warn a victim of a patient's threat to kill her, see the discussion of *Tarasoff v. Regents of University of California* [*Tarasoff v. Regents of Univ. of Cal. (1976) 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334]* in Ch. 165, *Negligence*.

[3] Discussion of Authorities

[a] Factors to Consider in Determining Duty

In ***Peterson v. San Francisco Cmty. Coll. Dist.*** *(1984) 36 Cal. 3d 799, 205 Cal. Rptr. 842, 685 P.2d 1193* , plaintiff, a community college student, sued the college district under the California Tort Claims Act for damages for injuries sustained as a result of an attempted daylight rape in the parking lot area of a college campus. The complaint set forth two causes of action. In the first, plaintiff alleged that, by virtue of a special relationship between defendant district and herself, the defendants had a duty to protect her and/or to warn her of danger, and in the second cause of action, which incorporated the provisions of her first cause of action, she alleged liability under *Gov. Code § 835* (*see* Paragraph E of this form) for maintaining a dangerous condition of property that together with the criminal act of a third party caused her injuries. The trial court sustained defendants' demurrer to plaintiff's first amended complaint without leave to amend, and entered a judgment of dismissal. Plaintiff appealed.

The Supreme Court reversed. The Court held that plaintiff's first cause of action alleged facts that were sufficient to establish a common law duty of care, but were inadequate to state a cause of action against a public entity for failure to provide adequate police protection [see *Gov. Code § 845*] (*36 Cal. 3d 799, 804, 815)* , but that plaintiff's second cause of action, by incorporating by reference the allegations in the first cause of action and by pleading the elements of *Gov. Code § 835* (*see* Paragraph E of form), did successfully state a cause of action against the defendant (*36 Cal. 3d 799, 815)* . The Court also rejected defendant's contention that it was immune from liability under *Gov. Code § 820.2* (discretionary decisions) (*36 Cal. 3d 799, 815)* . The Court said the primary question before it was whether under the facts alleged the defendants owed plaintiff a duty of due care (*36 Cal. 3d 799, 805)* . The Court said that in considering

whether one owes another a duty of care, several factors must be weighed including, among others, (1) the foreseeability of harm to the plaintiff, (2) the degree of certainty that the plaintiff suffered injury, (3) the closeness of the connection between the defendant's conduct and the injury suffered, (4) the moral blame attached to the defendant's conduct, (5) the policy of preventing future harm, (6) the extent of the burden to the defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach, and (7) the availability, cost, and prevalence of insurance for the risk involved. Additional factors to be weighed, when public agencies are involved, include the extent of the agency's powers, the role imposed on it by law, and the limitations imposed on it by budget (*36 Cal. 3d 799, 806)* .

In ***Davidson v. City of Westminster*** *(1982) 32 Cal. 3d 197, 185 Cal. Rptr. 252, 649 P.2d 894* , an action for damages against a city by a woman who had been stabbed in a public laundromat that was under police surveillance, the Supreme Court, although it held that no special relationship was created under the facts of the case between the woman and city police officers, so that there was no duty on the part of the police to the plaintiff, said that in determining the existence of a duty of care in a given case, there are a number of pertinent factors to consider. These factors include (1) the foreseeability of harm to the plaintiff, (2) the degree of certainty that the plaintiff suffered injury, (3) the closeness of the connection between the defendant's conduct and the injury suffered, (4) the moral blame attached to the defendant's conduct, (5) the policy of preventing future harm, (6) the extent of the burden to the defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach, and (7) the availability, cost, and prevalence of insurance for the risk involved. When public agencies are involved, additional elements include the extent of the agency's powers, the role imposed on it by law, and the limitations imposed on it by budget (*32 Cal. 3d 197, 203)* .

[b] Duty to Protect Person From Misconduct of Third Person

The facts and procedural background of ***Peterson v. San Francisco Cmty. Coll. Dist.*** *(1984) 36 Cal. 3d 799, 205 Cal. Rptr. 842, 685 P.2d 1193* , are discussed in *§ 196.230[3][a]*. In reversing the judgment of dismissal, the Supreme Court, citing Restatement (Second) of Torts § 315,said that as a general rule one has no duty to control the conduct of another, and no duty to warn those who may be endangered by such conduct, but that a duty may arise when (1) a special relationship exists between the actor and the third person that imposes a duty on the actor to control the third person's conduct, or (2) a special relationship exists between the actor and the other that gives the other a right to protection (*36 Cal. 3d 799, 806)* .

In ***Davidson v. City of Westminster*** *(1982) 32 Cal. 3d 197, 185 Cal. Rptr. 252, 649 P.2d 894* , an action for damages against a city by a woman who had been stabbed in a public laundromat that was under police surveillance, the Supreme Court, although it held that no special relationship was created under the facts of the case between the woman and city police officers, so that there was no duty on the part of the police to the plaintiff, said that, as a general rule, one owes no duty to control the conduct of another, nor to warn those endangered by such conduct, but that such a duty may arise if (1) a special relationship exists between the actor and the third person that imposes a duty on the actor to control the third person's conduct, or (2) a special relationship exists between the actor and the other that gives the other a right to protection (*32 Cal. 3d 197, 203)* .

[c] Special Relationship Between Possessor of Land and Invitee

The facts and procedural background of ***Peterson v. San Francisco Cmty. Coll. Dist.*** *(1984) 36 Cal. 3d 799, 205 Cal. Rptr. 842, 685 P.2d 1193* , are discussed in *§ 196.230[3][a]*. In reversing the judgment of dismissal, the Supreme Court said that among the commonly recognized special relationships is the one between a possessor of land and members of the public who enter in response to the landowner's invitation (*36 Cal. 3d 799, 806)* . Citing *Civ. Code § 1714* and *Gomez v. Ticor (1983) 145 Cal. App. 3d 622, 628, 193 Cal. Rptr. 600* , the Court said that there was no question that if the defendant district were a private landowner operating a parking lot on its premises it would owe plaintiff a duty to exercise due care for her protection (*36 Cal. 3d 799, 807)* ; and that it has long been recognized that a possessor of land

who holds it open to the public for entry for business purposes is subject to liability to members of the public while they are on the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons and by the failure of the possessor to exercise reasonable care (2) to give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it [*see* Restatement (Second) of Torts § 344]. The Court added that liability will normally be imposed in circumstances in which the possessor has reasonable cause to anticipate the misconduct of third persons (*36 Cal. 3d 799, 807)* . Thus, the fact that plaintiff's injuries were caused by a third party would not absolve the defendant of liability. If the realizable likelihood that a third person may act in a particular manner is the hazard or one of the hazards that makes the actor negligent, such an act whether innocent, negligent, or intentionally tortious or criminal does not prevent the actor from being liable for harm caused by it (*36 Cal. 3d 799, 808)* .

[d] Applicability of General Tort Law to Government Tort Liability

The facts and procedural background of ***Peterson v. San Francisco Cmty. Coll. Dist.*** *(1984) 36 Cal. 3d 799, 205 Cal. Rptr. 842, 685 P.2d 1193* , are discussed in *§ 196.230[3][a]*. In reversing the judgment of dismissal, the Supreme Court said that under the circumstances of the case, plaintiff, an enrolled student using the parking lot in exchange for a fee, was an invitee to whom the possessor of the premises would ordinarily owe a duty of due care, but that the question remained whether the provisions of the Tort Claims Act precluded the imposition of such a duty on the defendant under the circumstances of the case (*36 Cal. 3d 799, 808-809)* . The Court, turning to the Tort Claims Act, noted initially that public entity liability is statutory in nature (*see Gov. Code § 815*), but that its provisions are to be read against the background of general tort law, and that the conceptual theory of statutory liability under the act is keyed to the common law of negligence and damages (*36 Cal. 3d 799, 809)* . Quoting *Low v. City of Sacramento (1970) 7 Cal. App. 3d 826, 831, 87 Cal. Rptr. 173* , the Court said that the exclusive sway of statutory rules does not foreclose the aid of common-law tort doctrines and analogies in ascertaining and achieving imperfectly expressed statutory objectives (*36 Cal. 3d 799, 809)* . The Court concluded that an examination of the pertinent doctrines and analogies [*see § 196.230[3][a]*] compelled the conclusion that the defendant did in fact owe the plaintiff a duty of due care (*36 Cal. 3d 799, 814)* .

[e] Liability of Public Entity for Criminal Act of Third Party

The facts and procedural background of ***Peterson v. San Francisco Cmty. Coll. Dist.*** *(1984) 36 Cal. 3d 799, 205 Cal. Rptr. 842, 685 P.2d 1193* , are discussed in *§ 196.230[3][a]*. Plaintiff had alleged that the property was in a dangerous condition because the thick untrimmed foliage and trees around the parking lot and stairway permitted the assailant to perpetrate his crime; she further alleged that defendants were aware of the condition and failed to take reasonable protective measures, including trimming the foliage or warning of the danger, and that defendant created a reasonably foreseeable risk that she and others using the stairway would be injured (*36 Cal. 3d 799, 812)* .

In reversing the judgment of dismissal, the Supreme Court noted that although cases have held that a third party's conduct by itself, unrelated to the conditions of the property, does not constitute a dangerous condition for which a public entity may be held liable, *Gov. Code § 835* does not specifically preclude a finding that a public entity may be under a duty, given special circumstances, to protect against harmful criminal conduct on its property (*36 Cal. 3d 799, 810-811)* . The Court said that intervening criminal conduct cannot absolve the defendant of liability when the plaintiff alleges that defendant maintained its property in such a way so as to increase the risk of criminal activity (*36 Cal. 3d 799, 812)* , and that the risk of assault was reasonably foreseeable, since defendant was aware of the occurrence of other, similar assaults in the parking area but did nothing to either publicize them or warn plaintiff of their occurrence (*36 Cal. 3d 799, 814)* . The Court noted that policy factors militating against imposing a governmental duty to warn in prior cases were inapplicable to the case in question. In the closed environment of a school campus where students pay tuition and fees in exchange for using the facilities, where they spend significant portions of their time and may in fact live, they can reasonably expect the premises to be free from physical defects and that school authorities will exercise reasonable care to keep the campus free from conditions that increase the risk of crime. The warnings sought in this case

would not result in preventing students from using the campus, but only in alerting them to unknown dangers and encouraging them to exercise more caution (*36 Cal. 3d 799, 813-814)* . The Court concluded that the district had a duty to exercise due care to protect students from reasonably foreseeable assaults on the campus (*36 Cal. 3d 799, 814)* ; and that, in light of the relationship between plaintiff and defendants as well as the facts known to the defendants, plaintiff hd stated a cause of action under the Tort Claims At (*36 Cal. 3d 799, 812-813)* .

[f] Determination of Whether Condition Is Dangerous

The facts and procedural background of ***Peterson v. San Francisco Cmty. Coll. Dist.*** *(1984) 36 Cal. 3d 799, 205 Cal. Rptr. 842, 685 P.2d 1193* , are discussed in *§ 196.230[3][a]*. In reversing the judgment of dismissal, the Supreme Court said that, in general, whether a given set of facts and circumstances creates a dangerous condition is usually a question of fact and may only be resolved as a question of law if reasonable minds can come to but one conclusion (*36 Cal. 3d 799, 810)* .

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19A-196 California Points & Authorities § 196.231

§ 196.231 Supporting Contention That Public Entity or Employee Is Liable for Injury Caused by Violation of Duty Arising From Special Relationship or Circumstance--Duty of Public Entity or Employee to Warn of Peril Created by Entity and Not Readily Discoverable by Others

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE OBJECTION THAT DEFENDANT _____ [*name of public entity*] IS NOT LIABLE FOR PLAINTIFF'S INJURY BECAUSE IT OWED PLAINTIFF NO DUTY _____ [SHOULD BE *or* SHOULD HAVE BEEN *or* WAS PROPERLY] OVERRULED BECAUSE PLAINTIFF HAS _____ [ALLEGED FACTS SHOWING *or* SHOWN] THAT DEFENDANT CREATED A FORESEEABLE PERIL TO PLAINTIFF, THAT THE PERIL WAS NOT READILY DISCOVERABLE BY PLAINTIFF, AND THAT, AS A CONSEQUENCE, DEFENDANT OWED PLAINTIFF THE DUTY TO WARN HIM/HER OF THAT PERIL.

A. Duty of Public Entity to Warn of Foreseeable Peril Created by It. A public entity that creates a foreseeable peril, not readily discoverable by endangered persons, has the duty to warn the endangered persons of the potential peril and is liable to an endangered person who is injured as a result of the breach of that duty (*Johnson v. State of California (1968) 69 Cal. 2d 782, 786, 73 Cal. Rptr. 240, 447 P.2d 352*).

[*Optional*] **B. Duty of State When Placing Juvenile Parolee in Foster Home.** In placing a teenage parolee in a foster home, the state owes a duty to warn the foster parents of any latent, dangerous qualities suggested by the parolee's history or character; at a minimum, the duty to warn requires disclosure to the foster parents of any homicidal tendencies the youth may have, any background of violence and cruelty, and the youth's criminal record (*Johnson v. State of California (1968) 69 Cal. 2d 782, 785-786, 73 Cal. Rptr. 240, 447 P.2d 352*).

[*Optional*] **C. Special Relationship Not Required.** The duty to warn of the peril does not require that a special relationship exist between the victim of the peril and the public entity or employee that created the peril (*Bastian v.*

County of San Luis Obispo (1988) 199 Cal. App. 3d 520, 529, 245 Cal. Rptr. 78).

[2] Comments

[a] Use of Form

These points and authorities may be used in support of the contention that, when a public entity creates a foreseeable peril not readily discoverable by the persons endangered by the peril, that entity by reason of this special circumstance has the duty to warn the endangered persons of the peril and is liable for injuries sustained by an endangered person as a result of the breach of that duty.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be used in a memorandum of points and authorities in opposition to the public entity's demurrer to the complaint, or motion for judgment on the pleadings, on the asserted ground that the complaint fails to state facts sufficient to constitute a cause of action, or in opposition to the public entity's motion for summary judgment on the ground that the action has no merit. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Duty of Public Entity to Warn of Foreseeable Peril Created by It

Johnson v. State of California *(1968) 69 Cal. 2d 782, 73 Cal. Rptr. 240, 447 P.2d 352* , was an action by a foster mother against the state of California for damages for injuries suffered when assaulted by a 16-year-old youth with homicidal tendencies and a background of violence and cruelty towards both animals and humans, who had been placed in plaintiff's home by the California Youth Authority without any notice of the boy's dangerous propensities, even though defendant knew of them. The state moved for summary judgment on the ground, among others, that it owed no duty to plaintiff. The motion was granted and plaintiff appealed.

The Supreme Court reversed. The Court, citing several cases, said that these cases impose a duty on those who create a foreseeable peril, not readily discoverable by endangered persons, to warn them of the potential peril (*69 Cal. 2d 782, 786)* . The Court further rejected the contention that the state was immune from liability by reason of specified statutory immunities (*69 Cal. 2d 782, 786-800)* .

NOTE:

The Court pointed out in *Johnson* that the duty to warn may be subject to some qualification, for example, in cases in which sufficiently important policy objectives, achievable only by silence, outweigh the obvious interest in cautioning persons exposed to danger, but that it didn't have to dwell on the question at length because the state offered no such justification for its failure to warn plaintiff [*Johnson v. State of California (1968) 69 Cal. 2d 782, 786 n.2, 73 Cal. Rptr. 240, 447 P.2d 352]* . In a subsequent case, the Supreme Court said that *Johnson,* stripped of its immunity issue, was a straightforward case of liability based on failure to warn of a foreseeable peril created by the defendant and not readily discoverable by the potential victim [*Davidson v. City of Westminster (1982) 32 Cal. 3d 197, 208, 185 Cal. Rptr. 252, 649 P.2d 894]* .

[b] Duty of State When Placing Juvenile Parolee in Foster Home

The facts and procedural background of ***Johnson v. State of California*** *(1968) 69 Cal. 2d 782, 73 Cal. Rptr. 240, 447*

P.2d 352 , are discussed in *§ 196.231[3][a]*. In reversing the summary judgment, the Supreme Court said that as the party placing the youth with the plaintiff, the state had a relationship to the plaintiff that was such that its duty extended to warning of latent, dangerous qualities suggested by the parolee's history or character (*69 Cal. 2d 782, 785)* . Accordingly, the state owed a duty to inform plaintiff of any matter that its agents knew or should have known that might endanger plaintiff's family and that, at a minimum, these facts certainly would have included the youth's homicidal tendencies and background of violence and cruelty, as well as his criminal record (*69 Cal. 2d 782, 786)* . The Court said that this was a classic case for the imposition of tort liability. Defendant failed to warn plaintiff of a foreseeable, latent danger, and this failure led to plaintiff's injury from precisely the expected source. The loss falls peculiarly on plaintiff, who, having no administrative recourse, must achieve vindication in litigation or none at all (*69 Cal. 2d 782, 797)* . The Court explained that since the entire populace of California benefits from the activity of the Youth Authority, it should also share equally the burden of injuries negligently inflicted on individual citizens, and that suits against the state provide a fair and efficient means to distribute these losses (*69 Cal. 2d 782, 797-798)* .

[c] Special Relationship Not Required

The facts and procedural background of ***Bastian v. County of San Luis Obispo*** *(1988) 199 Cal. App. 3d 520, 245 Cal. Rptr. 78* , are discussed in *§ 196.60[3][a]*. In reversing the judgment on the negligence cause of action, the court rejected the county's argument that in order for the deputy sheriffto owe a duty to plaintiff there had to be a special relationship between the two (*199 Cal. App. 3d 520, 529, 531)* . The court said that the deputy sheriff created a peril by placing the vodka bottle alongside the victim's body and that, by this act, he had a duty to warn plaintiff that the accident scene plaintiff was photographing was contrived. The court noted that plaintiff had alleged that it was reasonably foreseeable to the deputy sheriff that publication of a photograph of the victim's body with the vodka bottle deliberately placed next to it would injure plaintiff's reputation and employment status and would subject him to possible civil liability to the victims' survivors and held that this was a question that the jury may decide (*199 Cal. App. 3d 520, 529-530)* . The court said that one who creates a foreseeable danger not readily discoverable by the endangered persons has the duty to warn them of the potential peril. The court added that in this situation, a special relationship is not required to impose the duty (*199 Cal. App. 3d 520, 530)* . The court further held that the trial court erred in finding that the defendants were immunized from liability by *Gov. Code §§ 818.8* and *822.2* (relating to immunity for misrepresentations) (*199 Cal. App. 3d 520, 532-533)* .

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Volume 19A Chapters 196-199 PUBLIC ENTITIES---to---QUO WARRANTO
CHAPTER 196 PUBLIC ENTITIES
PART II. FORMS
C. Liability of Public Entities And Employees
3. Liability Arising From Special Relationship or Circumstance

19A-196 California Points & Authorities § 196.232

§ 196.232 Supporting Contention That Public Entity or Employee Is Liable for Injury Caused by Violation of Duty Arising From Special Relationship or Circumstance--Duty of Public Entity or Employee to Private Citizen Asked to Perform Public Function Involving Foreseeable Risk of Injury

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE OBJECTION THAT DEFENDANT _____ [*name of public entity*] IS NOT LIABLE FOR PLAINTIFF'S INJURY BECAUSE IT OWED NO DUTY TO PLAINTIFF _____ [SHOULD BE *or* SHOULD HAVE BEEN *or* WAS PROPERLY] OVERRULED BECAUSE PLAINTIFF HAS _____ [ALLEGED FACTS SHOWING *or* SHOWN] THAT (1) _____ [*name*], AN EMPLOYEE OF DEFENDANT ACTING IN THE SCOPE OF HIS/HER EMPLOYMENT, REQUESTED PLAINTIFF TO _____ [*specify public function to be performed*]; (2) THIS FUNCTION WAS PART OF THE EMPLOYEE'S OFFICIAL DUTIES AND INVOLVED A FORESEEABLE RISK OF INJURY TO PLAINTIFF; AND (3) PLAINTIFF'S COMPLIANCE WITH THAT REQUEST, AS A RESULT OF WHICH A SPECIAL RELATIONSHIP WAS CREATED IMPOSING ON _____ [*name of employee*], AND THROUGH HIM/HER, ON DEFENDANT _____ [*name of public entity*], THE DUTY TO EXERCISE DUE CARE TO PREVENT INJURY TO PLAINTIFF.

A. When Special Relationship Exists. A special relationship exists when a public officer assumes a duty toward the person injured that is greater than the duty owed to another member of the public (*Walker v. County of Los Angeles (1987) 192 Cal. App. 3d 1393, 1398, 238 Cal. Rptr. 146*).

B. Creation of Special Relationship by Asking Private Citizen to Perform Public Function. By requesting the assistance of a private citizen in the performance of a dangerous task that is a part of the public employee's official duties and that is for the benefit of the general public, a public employee creates a special relationship with the private citizen and owes that citizen the duty to exercise due care to prevent his or her injury (*Carpenter v. City of Los*

Angeles (1991) 230 Cal. App. 3d 923, 931-934, 281 Cal. Rptr. 500 ; *Walker v. County of Los Angeles (1987) 192 Cal. App. 3d 1393, 1401-1404, 238 Cal. Rptr. 146*).

C. Liability of Public Entity. [*See § 196.180, Paragraph A.*]

[2] Comments

[a] Use of Form

These points and authorities may be used in support of the contentions that, by virtue of a special relationship between an employee of the public entity and the plaintiff, created by the employee's requesting the plaintiff to perform a public function involving a foreseeable risk of injury that was a part of the employee's official duties and for the benefit of the general public, the employee was under a duty to exercise due care to prevent injury to the plaintiff, and the public entity is liable for injuries sustained by plaintiff as a result of its employee's breach of that duty.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be used in a memorandum of points and authorities in opposition to the public entity's demurrer to the complaint, or motion for judgment on the pleadings, on the asserted ground that the complaint fails to state facts sufficient to constitute a cause of action, or in opposition to the public entity's motion for summary judgment on the ground that the action has no merit. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] When Special Relationship Exists

Walker v. County of Los Angeles *(1987) 192 Cal. App. 3d 1393, 238 Cal. Rptr. 146* , was an action against the county by plaintiff, whose thumb was bitten off by a dog he'd captured, pursuant to the request of a county animal control officer. Plaintiff alleged that the officer had failed to give him proper equipment and support and otherwise had failed to exercise due care in connection with his attempt to capture the dog. The trial court granted the county's motion for summary judgment on the ground, among others, that there was no special relationship of reliance on the officer that would give rise to a cause of action. Plaintiff appealed.

The court of appeal reversed on the ground that a triable issue existed in regard to whether the officer, and through her the county, owed a duty of due care toward plaintiff (*192 Cal. App. 3d 1393, 1404)* . Citing Restatement (Second) of Torts § 314, the court acknowledged that private citizens ordinarily do not owe an affirmative duty to save their fellow citizens from harm unless they personally created the risk, but that in a very real sense the general public pays public employees specifically for the purpose of having them assume an affirmative duty to aid everyone in that general public and that, if ordinary standards applied, public employees might be held responsible in tort for every injury suffered by every member of society every time a public employee negligently failed to do something that could have prevented harm. The court said that this concept of duty might expose public employees and especially the public treasury to intolerable financial burdens, and that to avoid this possibility, most jurisdictions required something extra before public employees owe a duty in tort to do something to prevent injury to any member of the general public (*192 Cal. App. 3d 1393, 1398)* . The court explained that in California this concern is addressed by requiring a "special relationship" between the public employee and a specific private citizen before a duty is created, and that a special relationship exists if and only if an injured person demonstrates that the public officer assumed a duty toward him or her greater than the duty owned to another member of the public (*192 Cal. App. 3d 1393, 1398)* .

[b] Creation of Special Relationship by Asking Private Citizen to Perform Public Function

In ***Carpenter v. City of Los Angeles*** *(1991) 230 Cal. App. 3d 923, 281 Cal. Rptr. 500* , plaintiff had been shot while making a night deposit of theater receipts. He cooperated with the police investigation and testified at the preliminary hearing. When plaintiff became concerned for his safety, he was assured by the police detective that he had nothing to worry about. Before the trial, the police received from a reliable informant specific information that plaintiff's life was in danger because the robbery defendant had taken out a contract on plaintiff's life. The police never warned plaintiff, who was shot by an unknown assailant two months later, and then placed in a witness protection program. Plaintiff sued defendant city for damages suffered when he was shot by the unknown assailant. The trial court granted defendant's motion for summary judgment. Plaintiff appealed.

The court of appeal reversed. The court concluded that plaintiff, as a witness in a criminal prosecution who had been assured that the robbery defendant posed no real danger to him, enjoyed a special relationship with the city, through its police department, sufficient to impose on the city a duty of care, which required it to warn him about the defendant's subsequent threat to his life (*230 Cal. App. 3d 923, 931)* . The court distinguished the case from previous cases that narrowly circumscribed the liability of a public entity based on police failure to act reasonably in protecting members of the public, characterizing those cases as involving a member of the general public, seeking assistance from an officer within the ambit of the officer's normal course of duty. Plaintiff was a witness who had been asked to assist in a felony prosecution (*230 Cal. App. 3d 923, 931-932)* . The court cited *Walker*, discussed *below*, and its emphasis on the benefit society derived from a citizen who, on request, assisted a public employee in the performance of the employee's public function. It said the societal benefit derived in this case is of even greater importance. Criminal prosecution would utterly cease without the assistance of witnesses (*230 Cal. App. 3d 923, 933)* . The court observed that the police specifically requested and needed plaintiff's assistance in order to prosecute the robbery case. It was of little consequence that plaintiff did not request or seek police protection. The court said the duty arises because the police, after assuring plaintiff that the defendant posed no real danger, received reliable information that plaintiff's life was in danger, but failed to warn him. The court concluded that considerations of policy mandate a finding that the police owed plaintiff a duty of care. Reasonable care required that the police, after lulling plaintiff into a false sense of security, inform him of the threat. As evidenced by the Witness Protection Program, the city already recognized its duty to protect certain witnesses (*230 Cal. App. 3d 923, 933-934)* . The court found that there were no statutory immunities that barred the action (*230 Cal. App. 3d 923, 934-935)* .

The facts and procedural background of ***Walker v. County of Los Angeles*** *(1987) 192 Cal. App. 3d 1393, 238 Cal. Rptr. 146* , are discussed in *§ 196.232[3][a]*. In reversing the summary judgment for the county, the court held that a public employee creates a special relationship with a private citizen by asking that citizen to perform a public function that involves a foreseeable risk of injury, and that by creating the special relationship the public employee owes a duty of due care toward the privatecitizen (*192 Cal. App. 3d 1393, 1395, 1401-1404)* . The court said that it was difficult to imagine a situation in which a public employee has affirmatively created a more direct special relationship or has taken on a more obvious special duty to protect than by expressly requesting a specific private citizen to perform all or part of the employee's public function, especially when this public function involves a foreseeable risk of substantial harm (*192 Cal. App. 3d 1393, 1401)* . The court further pointed out that the control officer had gone to the citizen's home and asked him to help capture the stray animal the trained professional animal control officer had been unable to capture, and that this was enough to create a special relationship from which flowed a duty to minimize any foreseeable risk of harm to the private citizen (*192 Cal. App. 3d 1393, 1402-1403)* . The court added that the case fell within the ambit of Restatement (Second) of Torts § 321, providing that if the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, the actor is under a duty to exercise reasonable care to prevent that risk from taking effect. The court said that the officer's act was asking plaintiff to capture the wild dog, that she knew or should have known this created an unreasonable risk of causing physical harm to plaintiff, and that the officer was thus under a duty to exercise reasonable care to prevent this risk from taking effect (*192 Cal. App. 3d 1393, 1404)* .

The court noted that the criteria for the existence of a duty [*see § 196.230*, Paragraph A] had been met (*192 Cal. App. 3d 1393, 1402 n.6*).

[4] Opposing Authorities

[a] Creation of Special Relationship by Asking Private Citizen to Perform Public Function

In *Hernandez v. City of Pomona (1996) 49 Cal. App. 4th 1492, 57 Cal. Rptr. 2d 406* , plaintiff sued a County, a City and individual police officers for the wrongful death of her son, who was killed by fellow gang members after implicating one of the gang members in a murder. The trial court sustained defendants' demurrers without leave to amend and dismissed plaintiff's complaint. The court of appeal affirmed the trial court's ruling that, under the circumstances alleged by plaintiff, defendants owed no duty to protect plaintiff's deceased son from retaliation by fellow gang members against whom he provided incriminating evidence (*49 Cal. App. 4th 1492, 1495)* . Plaintiff argued that a special relationship existed between the defendants and her son which gave rise to their duty to protect him. She offered two bases for this special relationship: (1) that according to the authority in *Wallace v. City of Los Angeles (1993) 12 Cal. App. 4th 1385, 16 Cal. Rptr. 2d 113* and *Carpenter v. City of Los Angeles (1991) 230 Cal. App. 3d 923, 281 Cal. Rptr. 500* , police officers assurances to her son that no harm would come to him by giving a statement, obligated the officers to protect him; and (2) that pursuant to *Walker v. County of Los Angeles (1987) 192 Cal. App. 3d 1393, 238 Cal. Rptr. 146* , defendants were obligated to protect her son because defendants solicited his assistance in prosecuting the underlying murder case. The court rejected both of these bases. As to the first, the court distinguished both cases as involving a duty to warn as opposed to a duty to protect. To impose this duty, which required the commitment of substantially greater resources than the former, would, according to the court, require both careful consideration and an explicit and well defined commitment to do so. The court ruled that although given ample opportunity to amend her complaint, plaintiff failed to allege that the officer's assurances amounted to such a commitment. As to the duty to assist basis, the court found that there was a great difference between a citizen's role in assisting an animal control officer, as was the case in *Walker*, and a citizen's role in assisting in a criminal prosecution. While the plaintiff in *Walker* was asked to assist the officer and agreed, he had no duty to do so; whereas a citizen has a duty to assist law enforcement in the prosecution of crimes. According to the court, in a world of budgetary constraints and limited resources, the duty on the part of citizens to assist in criminal prosecution did not give rise to a right to protection on demand (*49 Cal. App. 4th 1492, 1504)* .

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19A-196 California Points & Authorities § 196.233

§ 196.233 Supporting Contention That Public Entity or Employee Is Liable for Injury Caused by Violation of Duty Arising From Special Relationship or Circumstance--Duty of California Highway Patrol Officer Investigating Plight of Specific Persons on Roadway to Prevent Foreseeable Injury to Persons and Onlookers

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE OBJECTION THAT DEFENDANT _____ [*name of public entity*] IS NOT LIABLE FOR PLAINTIFF'S INJURY BECAUSE IT OWED NO DUTY TO PLAINTIFF _____ [SHOULD BE *or* SHOULD HAVE BEEN *or* WAS PROPERLY] OVERRULED BECAUSE PLAINTIFF HAS _____ [ALLEGED FACTS SHOWING *or* SHOWN] THAT (1) _____ [*name*], A CALIFORNIA HIGHWAY PATROL OFFICER, UNDERTOOK TO INVESTIGATE THE PLIGHT OF SPECIFIC PERSONS STALLED ON THE ROADWAY, AND KNEW OR SHOULD HAVE KNOWN OF THE FORESEEABLE DANGER TO THOSE PERSONS AND TO ONLOOKERS FROM PASSINGTRAFFIC; AND (2) AS A CONSEQUENCE, A SPECIAL RELATIONSHIP WAS CREATED BETWEEN THOSE PERSONS, INCLUDING PLAINTIFF, AND THE CALIFORNIA HIGHWAY PATROL OFFICER, WHICH IMPOSED ON THE OFFICER, AND THROUGH HIM/HER ON THE STATE, THE DUTY TO THOSE PERSONS TO EXERCISE ORDINARY CARE TO PREVENT FORESEEABLE INJURY TO THEM FROM PASSING TRAFFIC.

A. Special Relationship Requirement. Liability for the negligent omissions of a California Highway Patrol officer can be imposed on the officer, and through him or her, on the state of California, only if a special relationship exists between the officer and the plaintiff at the time the injury was sustained (*Mann v. State of California (1977) 70 Cal. App. 3d 773, 779, 139 Cal. Rptr. 82*).

B. Creation of Special Relationship by Investigation and Ascertainment of Foreseeable Danger. A special relationship is established by a California Highway Patrol officer's investigating the plight of specific persons on a roadway and informing him or her of the foreseeable danger to the persons from passing traffic. Once the special

relationship is established, the officer has the duty to exercise ordinary care to protect the persons from any foreseeable risk of harm (*Mann v. State of California (1977) 70 Cal. App. 3d 773, 780, 139 Cal. Rptr. 82*).

C. Liability of Public Entity. [*See § 196.180, Paragraph A.*]

[2] Comments

[a] Use of Form

These points and authorities may be used in support of two contentions: (1) that the employee was under a duty to exercise due care to prevent injury to the plaintiff, and (2) that the public entity is liable for injuries sustained by plaintiff as a result of its employee's breach of that duty. Those contentions exist by virtue of a special relationship between a California Highway Patrol officer and the plaintiff, created by the officer's investigating the plight of specific persons on a roadway and apprising him or her of the dangerous position of the persons and those about them, such as plaintiff.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be used in a memorandum of points and authorities in opposition to the public entity's demurrer to the complaint, or motion for judgment on the pleadings, on the asserted ground that the complaint fails to state facts sufficient to constitute a cause of action, or in opposition to the public entity's motion for summary judgment on the ground that the action has no merit. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Special Relationship Requirement

Mann v. State of California *(1977) 70 Cal. App. 3d 773, 139 Cal. Rptr. 82* , was an action for personal injuries sustained in a freeway accident on a late winter morning in which some people were killed and others injured, including plaintiff, as the result of a motorist's negligence. On the date of the accident, a California Highway Patrolman, on patrol in his fully equipped and distinctively marked patrol car, saw two cars stranded in the speed-change lane of a freeway. He pulled his vehicle behind them, turned on his rearward flashing amber light, and tried to get the forward car started. In doing so, he stood in the speed-change lane himself and failed to instruct the occupants of the stalled cars and other interested motorists (including plaintiff), some of whom had gotten out of their cars, to get back into them and to avoid standing between the stalled cars. A few minutes after a tow truck operator appeared at the scene, the officer left to resume his normal patrol without advising any of those present that he was leaving. His departure left the stranded cars unprotected by the rearward flashing amber light of his patrol car. He also failed to put out on the freeway any protective flares and did not wait for the tow truck, also equipped with a rearward flashing light, to assume the protective position his patrol car was vacating. A few minutes after the officer left, plaintiff and others, while standing beside the stalled cars, were struck by a partially blind motorist. The trial court granted a motion for directed verdict for the state on the ground that the sole cause of the accident as a matter of law was the negligence of the partially blind driver, and plaintiff appealed.

The court of appeal reversed the judgment on the ground that it was at the very least a jury question in regard to whether the officer's conduct constituted actionable negligence toward plaintiff, proximately causing plaintiff's injuries (*70 Cal. App. 3d 773, 780-781)* . The court said the evidence did not foreclose a finding that if proper protection had been provided the collision would not have occurred. Anyone legally responsible for the victims of the accident being in their exposed position could therefore have been found to have contributed in a substantial way to the causation of the

accident. The jury could also have found that the independent intervening negligent conduct of the partially blind driver was reasonably foreseeable by the officer and would not, in that event, have been a superseding cause, but merely the immediate cause of plaintiff's injuries (*70 Cal. App. 3d 773, 777)* . The court pointed out that the negligence charged against the officer consisted of his failure to do certain things that would have wholly or partially protected the stranded motorists and those about them, including plaintiff, which, as an expert in traffic safety, the officer was enjoined to do, and in leaving them in a dangerous, unprotected position on a freeway after he had investigated and presumably become fully aware of their plight (*70 Cal. App. 3d 773, 779)* . The court said that this misconduct would appear to be a series of negligent omissions, rather than affirmative acts of negligence. That is, the court said the misconduct amounted to nonfeasance rather than misfeasance, and that the officer and, through him, the state of California, could be held liable for those omissions only if a special relationship obtained between him and plaintiff (*70 Cal. App. 3d 773, 779)* .

[b] Creation of Special Relationship by Investigation and Ascertainment of Foreseeable Danger

The facts and procedural background of ***Mann v. State of California*** *(1977) 70 Cal. App. 3d 773, 139 Cal. Rptr. 82* , is discussed in *§ 196.233[3][a]*. In reversing the judgment for the state, the court said that while no special relationship may exist between members of the California Highway Patrol and the motoring public generally, or between the CHP and stranded motorists generally, once a state traffic officer has chosen to investigate the plight of a specific person or persons on a freeway and informed him or her of the foreseeable danger from passing traffic, a special relationship requiring him or her to protect the motorists by readily available means arises and liability may attach if the officer's limited duty to protect these people under these special circumstances is not performed. Stated otherwise, the foreseeable risk of harm to those people may have been unreasonable and, if so, the officer, as a state traffic officer who had acquainted himself with their plight, had a duty to exercise ordinary care to protect them from the risk (*70 Cal. App. 3d 773, 780)* .

NOTE:

The California Supreme Court has discussed *Mann* with approval [*Williams v. State of California (1983) 34 Cal. 3d 18, 192 Cal. Rptr. 233, 664 P.2d 137]* . The Court nevertheless has pointed out that the legislature viewed *Mann* as dangerously extending the liability of peace officers while engaged in activities not involving law enforcement, that is, while rendering assistance to stranded motorists not involved in accidents [*Williams v. State of California (1983) 34 Cal. 3d 18, 25, 192 Cal. Rptr. 233, 664 P.2d 137]* . The Court explained that the legislature purported to overrule *Mann* by enacting *Gov. Code § 820.25* [*see § 196.10*]2]] as an urgency measure in 1979 [*see* Stats. 1979, ch 806, § 2; and Historical Note to *Gov. Code § 820.25*] and said that *Gov. Code § 820.25* has been described by some as conceptually flawed. The Court declined further to discuss the statute on the ground that it dealt with immunities, which were not involved in the case before it [*Williams v. State of California (1983) 34 Cal. 3d 18, 25 n.5, 192 Cal. Rptr. 233, 664 P.2d 137]* . However, the Court said that *Mann* is no more than the application of the duty of care attaching to any volunteered assistance [*Williams v. State of California (1983) 34 Cal. 3d 18, 25-26, 192 Cal. Rptr. 233, 664 P.2d 137]* and pointed out that in *Davidson v. City of Westminster (1982) 32 Cal. 3d 197, 208, 185 Cal. Rptr. 252, 649 P.2d 894* , the Court, citing Restatement (Second) of Torts §§ 323 and 324, characterized *Mann*, properly read, as a simple application of the "good samaritan" doctrine [*Williams v. State of California (1983) 34 Cal. 3d 18, 26, 192 Cal. Rptr. 233, 664 P.2d 137]* . Neither Supreme Court case purported to disapprove *Mann*, and the Court, in *Williams*, confirmed the holding in *Mann* that although no special relationship may exist between members of the California Highway Patrol and the motoring public generally, or between the California Highway Patrol and stranded motorists generally, if the state, through its agents, voluntarily assumes a protective duty toward certain member of the public and undertakes action on behalf of that member, thereby inducing reliance, it is held to the same standard of care as a private person or organization *Williams v. State of California (1983) 34 Cal. 3d 18, 24, 192 Cal. Rptr. 233, 664 P.2d 137]* .

The decision in *Mann* was followed by the court of appeal that rendered the decision in *Clemente v. State of California (1980) 101 Cal. App. 3d 374, 161 Cal. Rptr. 799* , in which the court reversed a judgment of dismissal following the sustaining of a demurrer to the complaint without leave to amend. The court in *Clemente* held that the failure of a police officer investigating a traffic accident at the scene to secure the identity of the alleged tortfeasor who admitted to the officer that his or her vehicle had struck the plaintiff but denied fault, thereby effectively depriving plaintiff, who had been seriously injured and rendered helpless at the accident scene, of the opportunity to sue the tortfeasor for damages, could constitute a breach of the officer's duty of due care and could possibly render him and his employer liable to the plaintiff under *Mann* [*Clemente v. State of California (1980) 101 Cal. App. 3d 374, 379-380, 161 Cal. Rptr. 799]* . In *Williams,* the Supreme Court first criticized *Clemente* as being contrary to the holding in *Winkelman v. City of Sunnyvale (1976) 59 Cal. App. 3d 509, 130 Cal. Rptr. 690* [*Williams v. State of California (1983) 34 Cal. 3d 18, 26-27, 192 Cal. Rptr. 233, 664 P.2d 137]* , and then disapproved *Clemente* to the extent that it was inconsistent with the views stated in *Williams* [*Williams v. State of California (1983) 34 Cal. 3d 18, 28 n.9, 192 Cal. Rptr. 233, 664 P.2d 137]* . *Williams* held that the statehighway patrol has the right, but not the duty, to investigate accidents, or to come to the aid of stranded motorists, and that stopping to aid an injured or stranded motorist does not, in itself, create a special relationship that would give rise to an affirmative duty to secure information or preserve evidence for civil litigation between the motorist and third parties [*Williams v. State of California (1983) 34 Cal. 3d 18, 21, 24, 27-28, 192 Cal. Rptr. 233, 664 P.2d 137]* . The trial court in *Williams* had granted the state's motion for judgment on the pleadings. The Supreme Court concluded that the complaint failed to state facts sufficient to constitute a cause of action in that no duty was alleged, but reversed the judgment with directions t permit plaintiff to file an amended complaint, should she ask leave to do so [*Williams v. State of California (1983) 34 Cal. 3d 18, 28, 192 Cal. Rptr. 233, 664 P.2d 137]* .

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19A-196 California Points & Authorities § 196.234

§ 196.234 Supporting Contention That Public Entity or Employee Is Liable for Injury Caused by Violation of Duty Arising From Special Relationship or Circumstance--Duty of Law Enforcement Officer to Exercise Reasonable Care for Safety of Persons Whom Officer Stops on Highway

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

A LAW ENFORCEMENT OFFICER HAS A DUTY TO EXERCISE REASONABLE CARE FOR THE SAFETY OF THOSE PERSONS WHOM THE OFFICER STOPS ON A ROADWAY, INCLUDING A DUTY NOT TO EXPOSE THOSE PERSONS TO AN UNREASONABLE RISK OF INJURY BY THIRD PARTIES.

Duty Owed to Motorists Stopped by Law Enforcement Officer. A law enforcement officer has a duty to exercise reasonable care for the safety of those persons whom the officer stops on a roadway, which includes a duty not to expose those persons to an unreasonable risk of injury by third parties (*Lugtu v. California Hwy. Patrol (2001) 26 Cal. 4th 703, 718, 110 Cal. Rptr. 2d 528, 28 P.3d 249*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that a law enforcement officer owes a duty to exercise reasonable care for the safety of persons the officer has stopped on a roadway and that this duty owed by the officer includes a duty not to expose persons who have been stopped to an unreasonable risk of injury by third parties driving on the road.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should include facts showing that the officer directed the person being stopped along a roadway where to stop his or her vehicle, and explain how these actions and any subsequent actions by the officer may have

increased the risk of injury to that person.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which these points are raised. For example, they may be used in a memorandum of points and authorities in opposition to the public entity's demurrer to the complaint or motion for judgment on the pleadings, on the asserted ground that the complaint fails to state facts sufficient to constitute a cause of action, or in opposition to the public entity's motion for summary judgment on the ground that the action has no merit. They may also be adapted for use in a trial or appellate brief.

[3] Discussion of Authorities

[a] Duty Owed to Motorists Stopped by Law Enforcement Officer

In ***Lugtu v. California Hwy. Patrol*** *(2001) 26 Cal. 4th 703, 110 Cal. Rptr. 2d 528, 28 P.3d 249* , the vehicle in which the plaintiffs were riding was pulled over for speeding by an officer of the California Highway Patrol (CHP). Because the speeding vehicle was being driven in the far left lane, the officer, who was riding a motorcycle, had approached from the right and signaled the driver of the vehicle to pull onto the center median area that divided the highway, rather than onto the far right shoulder of the highway. After the vehicle had been parked on the center median for about six to eight minutes, a truck being driven in the same direction in the far left lane left the highway and struck the back of the vehicle. The plaintiffs brought suit against the truck driver, the driver of the vehicle in which they had been riding, and the CHP and its officer. Prior to trial, the CHP and the officer moved for summary judgment, arguing among other points that the officer owed no legal duty of care to the plaintiffs. The trial court grantedthe motion for summary judgment, in part on the grounds that, as a matter of law, the officer had no duty to stop the plaintiffs on the right shoulder rather than on the median and that there was no triable issue of fact as to whether the officer acted with due care or whether his conduct caused the injuries. The court of appeal reversed, concluding that the officer owed a duty of reasonable care when he directed the driver to pull over to a particular location and that triable issues of fact existed regarding causation and whether the officer exercised reasonable care.

The California Supreme Court affirmed the court of appeal. The Supreme Court noted that the question of whether the officer owed a duty of care under the circumstances turned on general principles of tort law. The Court then reaffirmed the established principle of law that in carrying out routine traffic enforcement duties or investigations, a law enforcement officer owes a duty of care if the officer engages in an affirmative act that places another person in peril or increases the risk of harm to that person. Accordingly, the Court held that the officer owed a duty to exercise reasonable care for the safety of the persons stopped by the officer, which included a duty not to expose those persons to an unreasonable risk of injury by third parties (*26 Cal. 4th 703, 716-718)* . The Court then rejected the defendants' call for a bright-line rule providing that the duty of a law enforcement officer who has made a traffic enforcement stop entirely off the travel lanes of a freeway does not extend to liability for injuries when a third party's vehicle strikes the vehicle stopped by the officer, adopting instead the application of general negligence principles to the particular facts of the case (*26 Cal. 4th 703, 718-722)* .

In the case before it, the Court concluded that triable issues of fact remained as to whether the officer had breached the applicable duty of reasonable care. The parties had presented conflicting declarations on the issue of whether the officer had acted appropriately in directing the vehicle to park on the median, and the CHP Officer Safety manual indicated that officers were to stop vehicles on the right shoulder. Therefore, summary judgment on this issue was inappropriate (*26 Cal. 4th 703, 722-724)* . Finally, the Court held that the trial court erred in finding that, as a matter of law, the officer's conduct was not the legal cause of the injuries. If a defendant's negligence is based on having exposed the plaintiff to an unreasonable risk of harm from others, the occurrence of the type of conduct against which the defendant had a duty to protect the plaintiff does not constitute a superseding cause that completely relieves the defendant from liability. However, the third party's negligent conduct would properly be considered when allocating fault among the tortfeasors (*26 Cal. 4th 703, 725)* .

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3. Liability Arising From Special Relationship or Circumstance

19A-196 California Points & Authorities § 196.235

§ 196.235 Supporting Contention That Public Entity or Employee Is Liable for Injury Caused by Violation of Duty Arising From Special Relationship or Circumstance--Duty of Public Common Carrier to Exercise Utmost Diligence in Providing Safe Carriage of Passengers [Civ. Code § 2100]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE OBJECTION THAT DEFENDANT _____ [*name of public entity*] IS NOT LIABLE FOR PLAINTIFF'S INJURY BECAUSE IT OWED NO DUTY TO PLAINTIFF _____ [SHOULD BE *or* SHOULD HAVE BEEN *or* WAS PROPERLY] OVERRULED BECAUSE PLAINTIFF HAS _____ [ALLEGED FACTS SHOWING *or* SHOWN] THAT DEFENDANT HAD A DUTY TO PROTECT PASSENGERS ABOARD ITS _____ [*specify, e.g.,* BUSES] FROM _____ [*specify, e.g.,* ASSAULTS BY FELLOW PASSENGERS], AND THAT AS A PROXIMATE RESULT OF THE BREACH OF THAT DUTY, PLAINTIFF WAS INJURED.

A. Duty of Common Carrier to Provide Safe Carriage. A carrier of persons for reward must use the utmost care and diligence for their safe carriage, and provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill (*Civ. Code § 2100*).

B. Applicability of Statutory Duty to Public Carriers. The duty imposed by *Section 2100 of the Civil Code* applies to public carriers as well as private carriers and requires them to do all that human care, vigilance, and foresight reasonably can do under the circumstances (*Lopez v. Southern Cal. Rapid Transit Dist. (1985) 40 Cal. 3d 780, 785, 221 Cal. Rptr. 840, 710 P.2d 907*).

[*Optional*] **C. Duty to Protect Passengers From Assaults by Fellow Passengers.** By virtue of the duty imposed by *Section 2100 of the Civil Code* and the special relationship that exists between a carrier and its passengers, common carriers have a duty to protect passengers from assaults by fellow passengers (*Lopez v. Southern Cal. Rapid Transit*

Dist. (1985) 40 Cal. 3d 780, 785, 789-790, 221 Cal. Rptr. 840, 710 P.2d 907 , disapproving *Hernandez v. Southern Cal. Rapid Transit Dist. (1983) 142 Cal. App. 3d 1063, 191 Cal. Rptr. 436*).

[*Optional*] **D. Liability of Public Carrier for Breach of Duty.** A common carrier, whether public or private, is liable for injuries resulting from an assault by one passenger on another when, in the exercise of the required degree of care, the carrier has or should have knowledge from which it may reasonably be apprehended that an assault on a passenger may occur, and has the ability in the exercise of that degree of care to prevent the injury (*Lopez v. Southern Cal. Rapid Transit Dist. (1985) 40 Cal. 3d 780, 791, 221 Cal. Rptr. 840, 710 P.2d 907*).

[2] Comments

[a] Use of Form

These points and authorities may be used in support of the contentions that a public common carrier has a duty to exercise the utmost care to provide safe carriage of its paying passengers and is liable for injuries suffered as a proximate result of the breach of that duty.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be used in a memorandum of points and authorities in opposition to the public entity's demurrer to the complaint, or motion for judgment on the pleadings, on the asserted ground that the complaint fails to state facts sufficient to constitute a cause of action, or in opposition to the public entity's motion for summary judgment on the ground that the action has no merit. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Applicability of Statutory Duty to Public Carriers

Lopez v. Southern Cal. Rapid Transit Dist. *(1985) 40 Cal. 3d 780, 221 Cal. Rptr. 840, 710 P.2d 907* , was an action for damages against a transit district for injuries received by plaintiffs when a fight broke out among passengers on board one of defendant's buses. The complaint alleged that, while plaintiffs were on board the bus as fare-paying passengers, a group of juveniles began harassing other passengers and a violent argument ensued; that the bus driver was notified of the altercation but failed to take any precautionary measures and continued to operate the bus; that defendant so negligently operated, owned, maintained, supervised, entrusted, inspected, controlled, and drove the bus so as to allow the passengers involved in the violent argument to engage in a violent physical fight; and that plaintiffs were injured as a direct and proximate result of defendant's negligence. They further alleged that there was a history of violent and assaultive conduct by passengers on this particular bus route, that violent incidents occurred daily or weekly, and that defendant was fully aware of this history of violence and the risk posed to passengers riding its buses. The defendant demurred to the complaint on the ground, among others, that it had no duty to protect passengers from assaults by fellow passengers. The trial court sustained the demurrer without leave to amend and dismissed the action.

The Supreme Court reversed. The court held that the duty imposed by *Civ. Code § 2100* applies to public carriers as well as private carriers and requires them to do all that human care, vigilance, and foresight reasonably can do under the circumstances (*40 Cal. 3d 780, 785)* . The Court added that common carriers are not, however, insurers of their passengers' safety, and that the degree of care and diligence that they must exercise is only such as can reasonably be exercised consistent with the character and mode of conveyance adopted and the practical operation of the business of the carrier (*40 Cal. 3d 780, 785)* .

[b] Duty to Protect Passengers From Assaults by Fellow Passengers

The facts and procedural background of ***Lopez v. Southern Cal. Rapid Transit Dist.*** *(1985) 40 Cal. 3d 780, 221 Cal. Rptr. 840, 710 P.2d 907* , are discussed in *§ 196.235[3][a]*. Citing *Terrell v. Key System (1945) 69 Cal. App. 2d 682, 686, 159 P.2d 704* , the Court said that it has been held that the duty imposed on carriers by *Civ. Code § 2100* includes a duty to protect passengers from assaults by fellow passengers (*40 Cal. 3d 780, 785)* . Quoting *Terrell*, the Court said it could see no reason not to apply the rule of *Civ. Code § 2100*, that a "carrier of persons for reward must use utmost care and diligence for their safe carriage," to the recognized duty of a carrier to protect a passenger from assaults by fellow passengers, that this duty can only arise if in the exercise of the required degree of care the carrier has or should have knowledge of conditions from which it may reasonably be apprehended that an assault on a passenger may occur, and has the ability in the exercise of that degree to prevent injury (*40 Cal. 3d 780, 786)* . The Court noted that the holding of *Terrell* is supported by the overwhelming weight of authority, and that virtually all commentators who have considered the issue have concluded that a common carrier's duty to its passengers includes a duty to protect them from assaults by fellow passengers (*40 Cal. 3d 780, 786)* .

Defendant contended that to impose on it the costs of trying to prevent third-party assaults would create a colossal financial burden on the district and that nothing short of an armed security force could be expected to curb effectively criminal violence aboard its buses (*40 Cal. 3d 780, 786-787)* .The Court rejected the argument as not in issue, and that the issue involved was whether defendant, as a public carrier, has a duty to use utmost care and diligence, whatever that may require in a particular case, to protect its passengers from assaults by fellow passengers (*40 Cal. 3d 780, 787)* . The Court said that finding such a duty to exist is not the functional equivalent of finding a duty to provide an armed security guard on every bus, that there are a number of actions a carrier might take short of placing an armed guard on each bus which, in a given case, might be sufficient to meet the duty imposed by *Civ. Code § 2100*, and gave a number of examples (*40 Cal. 3d 780, 787-788)* .

The defendant further argued that under *Williams v. State of California (1983) 34 Cal. 3d 18, 192 Cal. Rptr. 233, 664 P.2d 137* , a public entity is deemed to stand in a special relationship with members of the public only where the entity voluntarily assumes a protective role and induces reliance on its actions, and that since no such detrimental reliance was alleged in the complaint, it had no duty to protect plaintiffs. The Court, after pointing out defendant's argument was a misconstruction of *Williams*, which involved the duty of a police officer and application of the "good samaritan" doctrine, said that implicit in the discussion in *Williams* is the recognition that some relationships by their very nature are "special ones" giving rise to an "initial duty" to come to the aid of others, regardless of whether there has been detrimental reliance in a particular case, and that the relationship between a common carrier and its passengers is just such a special relationship, as is the relationship between an innkeeper and his or her guests, between a possessor of land and those who enter in response to the landowner's invitation, and between a psychiatrist and his or her patients (*40 Cal. 3d 780, 788-789)* .

The Court explained that the special relationship between a carrier and its passengers is even greater than that between other types of businesses and their customers who come on to the "premises" for business purposes. Bus passengers are sealed in a moving steel cocoon. Large numbers of strangers are forced into very close physical contact with one another under conditions that often are crowded, noisy, and overheated. At the same time, the means of entering and exiting the bus are limited and under the exclusive control of the bus driver. Thus, passengers have no control over who is admitted on the bus and, if trouble arises, are wholly dependent on the bus driver to summon help or provide a means of escape. These characteristics of buses are, at the very least, conducive to outbreaks of violence between passengers and at the same time significantly limit the means by which passengers can protect themselves from assaults by fellow passengers. These characteristics of public transportation, along with the duty of utmost care and diligence imposed by *Civ. Code § 2100*, provide a more than ample basis for finding a special relationship between common carriers and their passengers (*40 Cal. 3d 780, 789)* .

[c] Liability of Public Carrier for Breach of Duty

The facts and procedural background of ***Lopez v. Southern Cal. Rapid Transit Dist.*** *(1985) 40 Cal. 3d 780, 221 Cal. Rptr. 840, 710 P.2d 907* , are discussed in *§ 196.235[3][a]*. In reversing the judgment of dismissal, the Court held that *Civ. Code § 2100* imposes on all common carriers, public or private, a duty of utmost care and diligence to protect their passengers from assaults by fellow passengers. The court reiterated, however, that carriers are not insurers of their passengers' safety and will not automatically be liable, regardless of the circumstances, for any injury suffered by a passenger at the hands of a fellow passenger. Rather, a carrier is liable for injuries resulting from an assault by one passenger on another only when, in the exercise of the required degree of care, the carrier has or should have knowledge from which it may reasonably be apprehended that an assault on a passenger may occur, and has the ability in the exercise of that degree of care to prevent the injury (*40 Cal. 3d 780, 791)* .

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[Reserved]

§§ 196.236[Reserved]

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4. Liability For Nuisance

19A-196 California Points & Authorities § 196.250

§ 196.250 Supporting Contention That Public Entity Is Liable for Damages Resulting From Entity's Maintenance of Nuisance [Civ. Code § 3479]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE OBJECTION THAT DEFENDANT _____ [*name of public entity*] IS NOT LIABLE TO PLAINTIFF FOR DAMAGES SUSTAINED AS A PROXIMATE RESULT OF DEFENDANT'S MAINTENANCE OF A NUISANCE BECAUSE THE CALIFORNIA TORT CLAIMS ACT DOES NOT IMPOSE SUCH LIABILITY ON A PUBLIC ENTITY _____ [SHOULD BE *or* SHOULD HAVE BEEN *or* WAS PROPERLY] OVERRULED BECAUSE THAT ACT DOES NOT BAR ACTIONS AGAINST PUBLIC ENTITIES BASED ON NUISANCE, AS DEFINED IN SECTION 3479 OF THE CIVIL CODE, AND SUCH ACTIONS ARE, THEREFORE, AUTHORIZED.

A. "Nuisance" Defined. Anything that is injurious to health, including but not limited to the illegal sale of controlled substances, or that is indecent or offensive to the senses, or that is an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or that unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance (*Civ. Code § 3479*).

B. "Public Nuisance" and "Private Nuisance" Distinguished. A public nuisance is one that affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted on individuals may be unequal (*Civ. Code § 3480*). Every other nuisance is a private nuisance (*Civ. Code § 3481*).

C. California Tort Claims Act Does Not Bar Actions for Nuisance. *Section 815 of the Government Code*, limiting the tort liability of public entities, does not bar nuisance actions against public entities to the extent that such actions are

founded on *Section 3479 of the Civil Code*, and, hence, such actions are authorized (*Nestle v. City of Santa Monica (1972) 6 Cal. 3d 920, 932-936, 101 Cal. Rptr. 568, 496 P.2d 480* ; *Pfleger v. Superior Court (1985) 172 Cal. App. 3d 421, 426, 431-432, 218 Cal. Rptr. 371*).

[*Optional*] **D. Pleading Nuisance and Dangerous Condition Alternatively.** When the facts pleaded in a nuisance action may also support a claim based on the dangerous condition of real property under *Section 835 of the Government Code*, a plaintiff may in the same complaint plead both theories of liability; that is, the plaintiff may state a cause of action (count) for nuisance and a cause of action (count) for dangerous condition of real property, although there can be only one recovery for the same injury (*Pfleger v. Superior Court (1985) 172 Cal. App. 3d 421, 431, 431 n.5, 218 Cal. Rptr. 371*).

[*Optional*] **E. When Statutory Sanction Will Justify Nuisance.** A statutory sanction cannot be pleaded in justification of acts that by the general rules of law constitute a nuisance, unless the acts complained of are authorized by the express terms of the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the legislature contemplated the doing of the very act that brings about the injury (*Greater Westchester Homeowners Ass'n v. City of Los Angeles (1979) 26 Cal. 3d 86, 101, 160 Cal. Rptr. 733, 603 P.2d 1329*).

[2] Comments

[a] Use of Form

These points and authorities may be used in support of the contention that an action against a public entity to recover damages for the maintenance of a nuisance [*see Civ. Code §§ 3491, 3501*], as defined in *Civ. Code § 3479*, is not precluded by the California Tort Claims Act [*see § 196.250[2][b]*].

Paragraph D should be included if the complaint pleads causes of action (counts) based on both nuisance and dangerous condition of public property and defendant claims the joinder is impermissible. Paragraph E should be included if the defendant contends that the complained-of act is done or maintained under statutory authority [*see Civ. Code § 3482*], but the statutory authority relied on does not expressly or by necessary implication authorize the act.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be used in a memorandum of points and authorities in opposition to the public entity's demurrer to the complaint, or motionfor judgment on the pleadings, on the asserted ground that the complaint fails to state facts sufficient to constitute a cause of action, or in opposition to the public entity's motion for summary judgment on the ground that the action has no merit. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Exceptions to Liability for Nuisance

Civ. Code § 3482 provides that nothing that is done or maintained under the authority of a statute can be deemed a nuisance [*see Longfellow v. County of San Luis Obispo (1983) 144 Cal. App. 3d 379, 384, 192 Cal. Rptr. 580* ; *see also § 196.08[12]*]. However, although an activity authorized by statute cannot constitute a nuisance, the manner in which the activity is performed may do so [*see Greater Westchester Homeowners Ass'n v. City of Los Angeles (1979) 26 Cal. 3d 86, 101, 160 Cal. Rptr. 733, 603 P.2d 1329* ; *see also § 196.250[3][c]*].

Additionally, any statutory immunity in the California Tort Claims Act will apply to a nuisance cause of action if the

elements of that immunity are established by sufficient evidence [*Pfleger v. Superior Court (1985) 172 Cal. App. 3d 421, 428, 430, 218 Cal. Rptr. 371* (design immunity under *Gov. Code § 830.6*); *Barnhouse v. City of Pinole (1982) 133 Cal. App. 3d 171, 195-196, 183 Cal. Rptr. 881* (same)]. For discussion of statutory immunities in the California Tort Claims Act, see *§§ 196.07 -196.10*.

[c] Related Pleading and Practice Forms

For forms of complaints based on nuisance generally, see California Forms of Pleading and Practice, Ch. 391, *Nuisance* (Matthew Bender).

[d] Related Points and Authorities

For points and authorities supporting and opposing various contentions relating to nuisance generally, see Ch. 167, *Nuisance* .

[3] Discussion of Authorities

[a] California Tort Claims Act Does Not Bar Actions for Nuisance

Nestle v. City of Santa Monica *(1972) 6 Cal. 3d 920, 101 Cal. Rptr. 568, 496 P.2d 480* , was an action for personal injury and property damages caused by defendant city's operation of a municipal airport. Specifically, plaintiffs claimed that vibration, fumes, and noise emanating from jet aircraft landing and taking off at the airport caused damage to their property, interfered with the free enjoyment of their property, and resulted in physical pain, suffering, and emotional disturbance. They asserted four theories of recovery: (1) inverse condemnation, (2) nuisance, (3) negligence, and (4) zoning violations. The trial court first ruled that the negligence and zoning violations counts failed to state facts sufficient to constitute a cause of action. After trial, the court found for defendant city on the inverse condemnation count on the ground plaintiffs had failed to establish that their property had been damaged. It then ruled that the nuisance count failed to state facts sufficient to constitute a cause of action on the theory that *Gov. Code § 815*, granting general immunity to public entities for an injury except as otherwise provided by statute, precluded liability for nuisance. Judgment for defendant was entered on the inverse condemnation count, and the other three counts were dismissed. Plaintiffs appealed.

The Supreme Court affirmed the judgment for defendant on the inverse condemnation count, but reversed the judgment dismissing the counts for nuisance, negligence, and zoning violations. With respect to the nuisance count, the Court pointed out that in *Gov. Code § 815* (discussed in the § 196.04) the legislature erected as its policy cornerstone a bar against governmental liability except as otherwise provided by statute. The Court said that the Senate committee comments made clear that the California Tort Claims Act itself does not provide for governmental liability for nuisance and that the right to recover damages for nuisance will have to be established under the provisions relating to dangerous conditions of public property or under some other statute that may be applicable to the situation (*6 Cal. 3d 920, 932)* . The Court pointed out that, prior to the enactment of the California Tort Claims Act, public entities had been held liable for nuisances as defined in *Civ. Code § 3479* and that it appeared that with respect to nuisance the rule immediately prior to the enactment of the act was consistent with that subsequently required by the act (*6 Cal. 3d 920, 932-933)* . That is, to avoid the general rule of immunity set forth in *Gov. Code § 815* a suit for nuisance must find statutory support and such support may be furnished by *Civ. Code § 3479* (*6 Cal. 3d 920, 933)* . The Court said that the fact that the nuisance statutes are general in language, and do not specifically refer to public entities, does not preclude their application to such entities, because generally worded code sections are applied to governmental bodies if no impairment of sovereign powers would result (*6 Cal. 3d 920, 933)* . The Court further noted that although the legislature substantially adopted the Law Revision Commission's recommendations for amendment of the California Tort Claims Act in 1970, it deleted from its bill that provision that would have eliminate liability for damages founded on nuisance (*6 Cal. 3d 920, 935)* . The Court, therefore, concluded that the legislature intended to allow such causes of action if they could be tailored to meet the specifications of statutory provisions, such as *Civ. Code § 3479* (*6 Cal. 3d*

920, 936) . The Court added that its conclusion was further supported by the profound interest the 1970Legislature demonstrated in the eradication of evils caused by the various forms of pollution, with particular emphasis on noise pollution (*6 Cal. 3d 920, 936)* . The Court said that because it is well-documented that a nuisance theory provides an effective means for redress in a wide range of actions resulting from pollution, including noise disturbance, it appeared that, in deleting the commission's recommendation to preclude governmental nuisance liability, the legislature intended to preserve this additional weapon in the arsenal available to combat grievous injury to the environment (*6 Cal. 3d 920, 936-937)* . The Court concluded that *Gov. Code § 815* does not bar nuisance actions against public entities to the extent such actions are founded on *Civ. Code § 3479* or other statutory provision that may be applicable, and held that the trial court incorrectly dismissed plaintiffs' cause of action on the ground that it was precluded by *Gov. Code § 815* (*6 Cal. 3d 920, 937)* .

For purposes of retrial, the Court also discussed the statute of limitations that would apply (*6 Cal. 3d 920, 937-938)* .

Pfleger v. Superior Court *(1985) 172 Cal. App. 3d 421, 218 Cal. Rptr. 371* , was a mandate proceeding arising out of consolidated lawsuits by owners and occupants of single-family dwellings located in the City of Pacifica against the city and a county (real parties in interest). The complaints contained, among other causes of action, one based on nuisance in which it was alleged that real parties, who were the owners of real property located uphill from petitioners' homes, had maintained their property in a dangerous condition and had failed and refused to design or construct a drainage system or other slide control facilities for their property adequate to divert and drain hillside surface and subsurface waters and prevent future flooding of and mud slides onto petitioners' properties. Real parties, aware that it was more difficult to defend against a cause of action for nuisance than one for negligence, in that nuisance does not require proof of negligence, demurred to the nuisance causes of action on the ground that a cause of action for nuisance cannot be stated against a public entity when it is predicated on a hazard that could be the basis of a cause of action for dangerous condition of public property for which recovery is permitted under *Gov. Code § 835* [*see § 196.210*, Paragraph A]. The trial court ordered the demurrers sustained without leave to amend, and the plaintiffs petitioned for writs of mandate to compel the trial court to vacate those orders. Real parties contended that to allow a cause of action for nuisance against a public entity, based on a dangerous condition of property, would allow a plaintiff to circumvent the provisions of *Gov. Code § 835*, which they contended required a more stringent showing to impose liability for a dangerous condition on a public entity than does the nuisance statute, *Civ. Code § 3479*.

The court of appeal rejected the real parties' contention, after discussing the holdings in *Nestle v. City of Santa Monica (1972) 6 Cal. 3d 920, 101 Cal. Rptr. 568, 496 P.2d 480* , including the holding that *Gov. Code § 815* does not bar nuisance actions against public entities to the extent such actions are founded on *Civ. Code § 3479* or other statutory provision that may be applicable (*172 Cal. App. 3d 421, 426)* , and other cases involving actions against a public entity involving liability based on nuisance. The court said that boiled down, the contention assumed that because in enacting the Tort Claims Act the legislature explicitly permitted a cause of action for a specific form of negligence against a public entity (*Gov. Code § 835*), which is easier to defend against than a cause of action for nuisance, the legislature must be presumed to have impliedly prohibited a cause of action for nuisance against a public entity (*172 Cal. App. 3d 421, 431-432)* . The court's answer was that if, as the case law establishes, no governmental immunity against a cause of action for nuisance can be found or implied in that provision of the Tort Claims Act where it would most likely be placed (i.e., *Gov. Code § 815*), it would be too great an exercise of judicial imagination to find it by implication in *Gov. Code § 835*, which, without purporting to prescribe an exclusive remedy, defines a form of governmental liability, not immunity (*172 Cal. App. 3d 421, 432)* .

NOTE:

This opinion fails to disclose whether the public property involved was improved or unimproved. *Gov. Code § 831.25* [*see § 196.12* [5][c]], immunizes public entities and employees for damage or injury to property, or for emotional distress, unless plaintiff has suffered substantial physical injury off the public entity's property caused by land failure of any unimproved public property, if the land failure was caused by a natural condition of the property [*Gov. Code § 831.25(a)*]. This immunity would be available in any

case in which the damage or injury was caused by any movement of unimproved land, including a landslide, mudslide, creep, subsidence, and any other gradual or rapid movement of land [*see Gov. Code § 831.25(c)*; *see also § 196.250* [2][b]].

[b] Pleading Nuisance and Dangerous Condition Alternatively

The facts and procedural background of ***Pfleger v. Superior Court*** *(1985) 172 Cal. App. 3d 421, 218 Cal. Rptr. 371* , are discussed in *§ 196.250[3][a]*. In ordering the issuance of peremptory writs of mandate directing the trial court to set aside its orders sustaining without leave to amend the demurrers to the petitioners' nuisance causes of action and to enter orders overruling the demurrers, the court of appeal rejected, as a proposition with which it could not agree, real parties' argument that plaintiff could not assert simultaneously causes of action for nuisance andfor dangerous condition of real property arising from the same condition (*172 Cal. App. 3d 421, 431)* . The court added that although causes of action may be maintained on more than one theory (count), there can, of course, be only one recovery for the same injury, and that the phrase "cause of action" is often used indiscriminately to mean what it says and to mean *counts* that state differently the same cause of action. However, the court also said that even when there are multiple legal theories on which recovery might be predicated, one injury gives rise to only one claim for relief (*172 Cal. App. 3d 421, 431 n.5*).

The court characterized language in *Longfellow v. County of San Luis Obispo (1983) 144 Cal. App. 3d 379, 384, 192 Cal. Rptr. 580* , to the effect that a party could not sue on the basis of nuisance when the action was predicated on a claim of faulty design, as dicta and also as internally inconsistent (*172 Cal. App. 3d 421, 428-430)* . The court further expressly declined to follow language in that case to the extent that it might be construed to say that a party could not simultaneously maintain an action based on nuisance and one based on dangerous condition that arose from the same condition (*172 Cal. App. 3d 421, 430-431)* .

[c] When Statutory Sanction Will Justify Nuisance

In ***Greater Westchester Homeowners Ass'n v. City of Los Angeles*** *(1979) 26 Cal. 3d 86, 160 Cal. Rptr. 733, 603 P.2d 1329* , the Supreme Court affirmed a judgment for plaintiffs in a nuisance action by persons living near a municipal airport for damages for annoyance, inconvenience, discomfort, mental distress, and emotional distress, resulting from noise generated by the arrival and departure of jet planes, although it reversed the postjudgment order relating to prejudgment interest and attorney's fees. After discussing the interrelationship between state and federal law, the Court pointed out that, although the Court had previously held that commercial flights conducted in strict accordance with federal regulations may not be enjoined as nuisances, the prior decision expressly did not determine the rights of landowners who suffer from airplane annoyances to seek damages from the owner or operators of the aircraft or airport, and that preemption did not operate per se to preclude the enforcement of private state remedies for aircraft noise damage, in the absence of a compelling federal interest that would support a finding that Congress intended to nullify state-created rights (*26 Cal. 3d 86, 94)* . The Court then examined relevant law and concluded that claims for personal injuries founded on nuisance have not been federally preempted (*26 Cal. 3d 86, 94-100)* . The city contended that it could not be liable for nuisance because the noise-generating activity complained of was specifically sanctioned by federal and state statutes. The city relied particularly on *Civ. Code § 3482*, providing that nothing that is done or maintained under the express authority of a statute can be deemed a nuisance (*26 Cal. 3d 86, 100)* . The Court, quoting from *Hassell v. San Francisco (1938) 11 Cal. 2d 168, 171, 78 P.2d 1021* , stated that a statutory sanction cannot be pleaded in justification of acts that by the general rules of law constitute a nuisance, unless the acts complained of are authorized by the express terms of the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the legislature contemplated the doing of the very act that occasions the injury. The court explained that a requirement of express authorization embodied in the statute itself insures that an unequivocal legislative intent to sanction a nuisance will be effectuated, while avoiding the uncertainty that would result were every generally worded statute a source of undetermined immunity from nuisance liability (*26 Cal. 3d 86, 101)* . Quoting *Venuto v. Owens-Corning Fiberglas Corp. (1971) 22 Cal. App. 3d 116, 129, 99 Cal. Rptr. 350* , the court said that accordingly, although an activity

authorized by statute cannot be a nuisance, the manner in which the activity is performed may constitute a nuisance (*26 Cal. 3d 86, 101)* .

[4] Additional Authorities

[a] California Tort Claims Act Does Not Bar Actions for Nuisance

Barnhouse v. City of Pinole (1982) 133 Cal. App. 3d 171, 183 Cal. Rptr. 881 , was an action by homeowners for damages to real property and personal injuries resulting from soil subsidence in a housing subdivision. Various of plaintiffs' theories were eliminated through demurrer, dismissal, or nonsuit. One count against the city and the State Department of Transportation, as the owners of public streets, highways, and associated drainage systems that drained storm waters into a ditch onto property owned by defendant Pacific Gas and Electric Company and bordering plaintiffs' lots to the north, was based on a nuisance theory for the design, construction, and maintenance of storm drain systems that allegedly contributed to the slide conditions on the property. This cause of action was eliminated by the court at the close of plaintiffs' case on the theory that the entities were immune from liability for negligence based on the design and construction of public improvements [*see Gov. Code § 830.6*; *see also § 196.12[1]*]. The one theory that went to the jury against the government respondents, inverse condemnation, resulted in a defense verdict. Plaintiffs appealed.

In reversing the elimination of the nuisance count in favor of the city and the state, the court of appeal noted that the *California Supreme Court in Nestle v. City of Santa Monica (1972) 6 Cal. 3d 920, 101 Cal. Rptr. 568, 496 P.2d 480* [*see § 196.250[3][a]*], held that the general rule of governmental immunity provided in *Gov. Code § 815* alone does not preclude anuisance action against a government entity founded on *Civ. Code § 3479* (*133 Cal. App. 3d 171, 195 n.14*). The court held there was sufficient evidence that the inadequately designed, constructed, and maintained storm drain systems contributed to the slide and was sufficient to support a finding of proximate cause, and that because there was insufficient evidence in the record to support the defense of design immunity, the trial court erred in eliminating the nuisance theory (*133 Cal. App. 3d 171, 196)* .

[5] Opposing Authorities

[a] When Statutory Sanction Will Justify Nuisance

In *Jordan v. City of Santa Barbara (1996) 46 Cal. App. 4th 1245, 54 Cal. Rptr. 2d 340* , landowners filed an action against various public agencies alleging that defendants' activities increased the salinity of plaintiffs' groundwater, thereby causing crop losses and reduced land value. The trial court granted judgment to defendants, concluding, among other things, that the operation of a waste treatment facility was authorized by a state permit, thus precluding liability for nuisance pursuant to *Civ. Code § 3482*, which provides that nothing done under the express authority of a statute can be deemed a nuisance. Plaintiffs contended that the permit did not specify that wastewater could be used in the way that it was. The court of appeal recognized that courts have circumscribed the exculpatory effect of to *Civ. Code § 3482* by making the statutory immunity available only where the acts complained of are authorized by the express terms of the statute or permit. However, the permit in question specified that the discharge could not contain specified substances in concentrations which would promote aquatic growths, and plaintiffs did not allege that the facility was operating in violation of this or any other standards imposed in the permit (*46 Cal. App. 4th 1245, 1258-1259)* . The court thus affirmed the judgment for defendants.

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C. Liability of Public Entities And Employees
4. Liability For Nuisance

19A-196 California Points & Authorities §§ 196.251-196.269

[Reserved]

§§ 196.251[Reserved]

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CHAPTER 196 PUBLIC ENTITIES
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1. Immunity From Liability for Acts or Omissions

19A-196 California Points & Authorities § 196.270

§ 196.270 Supporting Contention That Immunity From Liability for Act or Omission Does Not Apply--Licensing Immunity [Gov. Code § 818.4] Does Not Apply to Issuance of License That Creates Dangerous Condition of Public Property

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE LICENSING IMMUNITY UNDER SECTION 818.4 OF THE GOVERNMENT CODE DOES NOT APPLY WHEN THE ISSUANCE OF A LICENSE CREATES A DANGEROUS CONDITION OF PUBLIC PROPERTY.

Licensing Immunity Not Applicable if Dangerous Condition Created. The licensing immunity of *Section 818.4 of the Government Code* is only applicable to discretionary acts, and is not applicable when a public entity issues a license that results in a dangerous condition of public property since the public entity does not have discretion to create a dangerous condition (*Hill v. People ex rel. Dep't of Transp. (1979) 91 Cal. App. 3d 426, 430, 432, 154 Cal. Rptr. 142*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of the contention that the licensing immunity of *Gov. Code § 818.4* is not applicable because the defendant's granting of the license created a dangerous condition of public property. The immunity provided by *Gov. Code § 818.4* is discussed in *§ 196.08[6]*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be combined with general points and authorities opposing a demurrer [*see, e.g., Hill v. People ex rel. Dep't of Transp. (1979) 91 Cal. App. 3d 426, 428, 154 Cal. Rptr. 142]* . They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Licensing Immunity Not Applicable if Dangerous Condition Created

In ***Hill v. People ex rel. Dep't of Transp.*** *(1979) 91 Cal. App. 3d 426, 154 Cal. Rptr. 142* , plaintiff was injured in an accident caused by an oversized truckload hitting the top of an underpass. The truckload was being moved pursuant to a license issued by defendant Department of Transportation that specified the route and mistakenly directed the truck to go through an underpass that was too low. In plaintiff's action for personal injuries against defendant the trial court sustained a demurrer to the complaint based on the licensing immunity, and dismissed the action. Plaintiff appealed.

The court of appeal reversed, holding that the issuance of the license created a dangerous condition of public property for which defendant was liable. In response to defendant's reliance on the licensing immunity, the court held that immunity only applied to discretionary activities and that a public entity has no discretion to create a dangerous condition of public property by issuing a license. Therefore, the licensing immunity was not applicable (*91 Cal. App. 3d 426, 431-432)* .

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1. Immunity From Liability for Acts or Omissions

19A-196 California Points & Authorities § 196.271

§ 196.271 Supporting Contention That Immunity From Liability for Act or Omission Does Not Apply--Licensing [Gov. Code § 818.4] and Enforcement [Gov. Code § 818.2] Immunities Do Not Apply When Public Entity or Employee Has Breached Mandatory Duty [Gov. Code § 815.6]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE _____ [LICENSING IMMUNITY UNDER SECTION 818.4 OF THE GOVERNMENT CODE *and/or* ENFORCEMENT IMMUNITY UNDER SECTION 818.2 OF THE GOVERNMENT CODE] DOES/DO NOT APPLY WHEN THE PUBLIC ENTITY HAS BREACHED ITS MANDATORY DUTY TO _____ [*specify duty*].

[*EITHER*]

Licensing Immunity Is Not Applicable With Breach of Mandatory Duty. The licensing immunity of *Section 818.4 of the Government Code* only protects the public entity against failure to discharge a discretionary duty, and does not apply when the cause of action is based on the failure of a public entity to discharge a mandatory duty under *Section 815.6 of the Government Code* (*Morris v. County of Marin (1977) 18 Cal. 3d 901, 917, 136 Cal. Rptr. 251, 559 P.2d 606* ; *Elson v. Public Utilities Commission (1975) 51 Cal. App. 3d 577, 582-589, 124 Cal. Rptr. 305*).

[*AND/OR*]

Enforcement Immunity Is Not Applicable With Breach of Mandatory Duty. The immunity from liability for failure to enforce a law of *Section 818.2 of the Government Code* only protects the public entity against failure to discharge a discretionary duty, and does not apply when the cause of action is based on the failure of a public entity to

discharge a mandatory duty under *Section 815.6 of the Government Code* (*Morris v. County of Marin (1977) 18 Cal. 3d 901, 917, 136 Cal. Rptr. 251, 559 P.2d 606* ; *Elson v. Public Utilities Commission (1975) 51 Cal. App. 3d 577, 589, 124 Cal. Rptr. 305*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of the contention that neither the licensing immunity of *Gov. Code § 818.4* nor the adoption or law enforcement immunity of *Gov. Code § 818.2* apply, because the complaint alleges the public entity's failure to discharge a mandatory duty. The immunities provided by *Gov. Code § 818.4* and *Gov. Code § 818.2* are discussed in *§ 196.08[6]* and *[5]*, respectively. *Gov. Code § 815.6* provides that generally when a public entity is under a mandatory duty, it is liable for its failure to discharge that duty. For a form of contention supporting public entity liability arising out of *Gov. Code § 815.6*, see *§ 196.182*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be combined with general points and authorities opposing a demurrer or a motion for summary judgment [*see, e.g.,* *Johnson v. Mead (1987) 191 Cal. App. 3d 156, 158, 236 Cal. Rptr. 277* (demurrer); *West v. State of California (1986) 181 Cal. App. 3d 753, 758, 227 Cal. Rptr. 16* (summary judgment)]. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Federal Civil Rights Actions

A licensing immunity identical to that applicable to public entities under *Gov. Code § 818.4* is applicable to public employees under *Gov. Code § 821.2*. The immunity of *Gov. Code § 821.2* is not available to provide immunity to public employees in federal civil rights actions [*Guillory v. County of Orange (9th Cir. 1984) 731 F.2d 1379, 1382]* . Thus, it appears that the public entity licensing immunity of *Gov. Code § 818.4* also does not apply in federal civil rights actions. For a form of contention that the law enforcement immunity of *Gov. Code § 820.4* is not applicable in a federal civil rights action, see *§ 196.279*. For forms of points and authorities relating to civil rights generally, see Ch. 35, *Civil Rights: Unruh Civil Rights Act* and Ch. 35A, *Civil Rights: Equal Protection* .

[3] Discussion of Authorities

[a] Licensing Immunity Is Not Applicable With Breach of Mandatory Duty

In ***Morris v. County of Marin*** *(1977) 18 Cal. 3d 901, 136 Cal. Rptr. 251, 559 P.2d 606* , defendant county issued a building permit to a contractor without requiring that the contractor file the statutorily-required certificate of insurance establishing that he had workers' compensation insurance. When plaintiff, an employee of that contractor, was injured on the job, he was unable to obtain compensation benefits because the contractor was uninsured. Plaintiff sued defendant county, alleging a breach of its statutory duty to require the filing of certificates of insurance before issuing building permits. The trial court sustained a demurrer to the complaint. Plaintiff appealed.

The Supreme Court reversed. It held that there was a mandatory duty imposed by statute on defendant that required the filing of the certificate, and that under *Gov. Code § 815.6* defendant could be held liable for its failure to comply with that duty (*18 Cal. 3d 901, 910-911)* . Before reaching its ultimate conclusion that the licensing and enforcement immunities are only available to immunize a public entity concerning its discretionary acts, and are not available to mandatory duties (*18 Cal. 3d 901, 917)* , the Court thoroughly examined the legislative history and judicial interpretation of the two statutes (*18 Cal. 3d 901, 911-917)* .

In ***Elson v. Public Utilities Commission*** *(1975) 51 Cal. App. 3d 577, 124 Cal. Rptr. 305* , plaintiff was injured in an accident with a bus and recovered an uncollectible judgment against the bus company since the bus company did not carry liability insurance. Defendant Public Utilities Commission had a general order requiring that all carriers maintain liability insurance. Plaintiff sued defendant, alleging that it knew that the bus company did not have the insurance but failed to revoke its operating authority, as it was legally required to do. The trial court sustained a demurrer to the complaint. Plaintiff appealed.

The court of appeal reversed. It held that defendant had a mandatory duty to revoke the bus company's operating authority, and that defendant could be held liable for the breach of that duty (*51 Cal. App. 3d 577, 581-582)* . The court examined the scope of the licensing immunity granted by *Gov. Code § 818.4*, finding that it provides immunity only for discretionary activities of a public entity (*51 Cal. App. 3d 577, 582-589)* . It then applied the same type of analysis to the enforcement immunity by *Gov. Code § 818.2*, once again concluding that it provides immunity only for discretionary activities of a public entity (*51 Cal. App. 3d 577, 589)* .

[b] Enforcement Immunity Is Not Applicable With Breach of Mandatory Duty

Morris v. County of Marin *(1977) 18 Cal. 3d 901, 136 Cal. Rptr. 251, 559 P.2d 606* , is discussed in *§ 196.271[3][a]*.

Elson v. Public Utilities Commission *(1975) 51 Cal. App. 3d 577, 582-589, 124 Cal. Rptr. 305* , is discussed in *§ 196.271[3][a]*.

[4] Additional Authorities

[a] Licensing Immunity Is Not Applicable With Breach of Mandatory Duty

In *Corona v. State of California (2009) 178 Cal. App. 4th 723, 100 Cal. Rptr. 3d 591* , a boxing referee and his wife sued the State of California after discovering that the State Athletic Commission had issued a boxing license to a boxer without first ensuring that the boxer had submitted a negative HIV blood test result as required by *Bus. & Prof. Code § 18712*. The referee worked a fight by the boxer and a week later received a letter from the Commission informing him that the boxer was HIV-positive and that the license had been issued without prior submission of the required test results. The trial court sustained the State's demurrer on the grounds that the State was immune for its licensing activities under *Gov. Code § 818.4*. The Court of Appeal reversed. The court of appeal first held that the State had a mandatory duty under *Bus. & Prof. Code § 18712* to deny a boxing license to a boxer who has not submitted the negative blood test results required by that statute (*178 Cal. App. 4th 723, 729)* . The court also held that the immunity for licensing activities provided under *Gov. Code § 818.4* applies only to discretionary licensing activities and does not apply if a public entity violates a mandatory duty. As such, the State was not immune under that statute for issuing a boxing license without first ensuring that the required blood tests were submitted (*178 Cal. App. 4th 723, 733)* .

In *Thompson v. City of Lake Elsinore (1993) 18 Cal. App. 4th 49, 22 Cal. Rptr. 2d 344* , the plaintiff obtained a building permit from the city and thereafter complied with all the appropriate building codes, regulations, and requirements in completing her renovation. The city by ordinance had adopted Sections 306 and 307 of the Uniform Building Code and a building official approved the owner's building by giving a "Final Inspection Okay." Nevertheless, the city refused to issue a certificate of occupancy and plaintiff instituted suit alleging as one of her causes of action the defendants' failure to perform a mandatory duty. The trial court sustained defendants' demurrers to plaintiff's complaint without leave to amend.

The court of appeal reversed the judgment as to the cause of action for defendants' failure to perform a mandatory duty (as well as to a cause of action for inverse condemnation that was not discussed in the opinion) and affirmed the

judgment as to the other causes of action. With regard to the cause of action for failure to perform a mandatory duty, the court of appeal initially pointed out that the decision whether or not to issue a building permit is the type of discretionary decision covered by the immunity of *Gov. Code §§ 818.4* and *821.4* (*18 Cal. App. 4th 49, 55)* . Referring to Section 307 of the Uniform Building Code, as adopted by the city ordinance, the court noted that under *Gov. Code §§ 818.4* and *821.2*, the public entityand building official would be immune if the building official refused to issue a certificate of occupancy based on determining that the building or structure had not satisfied applicable requirements, even if the determination was erroneous or negligent (*18 Cal. App. 4th 49, 57)* . Under Sections 306(c) and 307(c) of the Uniform Building Code, however, the building official by giving a "Final Inspection Okay" actually approved the building and retained no further discretion to withhold a certificate of occupancy (*18 Cal. App. 4th 49, 58)* . Thus, the immunity of *Gov. Code §§ 818.4* and *821.2* did not act as a bar to liability based on a cause of action for failure to discharge a mandatory ministerial duty (*18 Cal. App. 4th 49, 58)* .

In *Johnson v. Mead (1987) 191 Cal. App. 3d 156, 236 Cal. Rptr. 277* , the court of appeal reversed the trial court's dismissal of the state of California and the Department of Motor Vehicles after sustaining their general demurrer to a complaint for the wrongful death of plaintiffs' nine-year-old daughter. While in a crosswalk, the decedent was hit by the individual defendant who was driving under the influence of alcohol and drugs. The court said that *Veh. Code §§ 12805* (department shall not issue or renew driver's license when person is incapable of safely operating vehicle because of alcoholism or drug addiction) and 12806 (physical or mental defect that in department's opinion does not affect applicant's ability to exercise reasonable control in operating motor vehicle will not prevent issuance of license) indicated the legislature's intent that the department has discretion in the issuance of driver's licenses to persons such as the individual defendant (*191 Cal. App. 3d 156, 159)* . The court nevertheless held that the department had a mandatory duty to refuse to issue or renew a license if it has determined beforehand that the person is unable safely to operate a motor vehicle on a highway. Thus, if the department had already exercised its discretion under *Veh. Code § 12806* and decided that the individual defendant was unable to operate a motor vehicle safely on a highway, it had a mandatory duty not to issue or renew his person's driver's license. The court found that, although the complaint was ambiguous on this issue, it was not subject to a general demurrer (*191 Cal. App. 3d 156, 160)* .

In *Trewin v. State of California (1984) 150 Cal. App. 3d 975, 198 Cal. Rptr. 263* , after plaintiffs were seriously injured when an automobile driven by an 87-year-old man crossed the center divider of a highway and collided with their automobile, they brought a negligence action against the state that had issued the elderly man a driver's license less than two months before, through the Department of Motor Vehicles. The complaint alleged that the department knew the man was elderly and had diminished physical and mental agility to the point of senility and that issuance of driving privileges to him would endanger the lives of others. The trial court entered judgment on the pleadings in favor of the state. The court of appeal reversed. The court found that *Veh. Code § 12805*, which specifies the grounds for refusing to issue a license, was an enactment that imposed a mandatory duty on the department. The result of *Veh. Code § 12805* is that the department must not issue to, or renew a driver's license of, any person when it is determined by examination or other evidence that the person is unable safely to operate a motor vehicle (*150 Cal. App. 3d 975, 979-980)* . Defendant contended the court was required to dismiss the action because the facts are so similar to those in *Papelian v. State of California (1976) 65 Cal. App. 3d 958, 135 Cal. Rptr. 665* , in which the state was immune. The court held that the department had a mandatory duty to refuse to issue or renew a license if it had determined beforehand that the person is unable safely to operate a motor vehicle on a highway, and observed that *Papelian* was not necessarily inapposite. It noted that the *Papelian* complaint did not specifically allege that the department had examined and determined beforehand that it was unsafe to issue the license to the driver causing the accident, as plaintiffs' pleadings did. The *Papelian* complaint had merely alleged that the department was negligent because it failed to ascertain that the driver was too elderly and senile to be capable of safely driving a motor vehicle. The court said the language in *Papelian* indicated the result would have been different had the complaint alleged facts that the license was issued in a manner other than as authorized by the Vehicle Code (*150 Cal. App. 3d 975, 980-981)* .

Young v. City of Inglewood (1979) 92 Cal. App. 3d 437, 154 Cal. Rptr. 724 , involved a complaint by plaintiff homeowner against defendant city that had knowingly issued a building permit to an unlicensed contractor to work on

plaintiff's property in violation of its statutory duty only to issue permits to licensed contractors. The trial court sustained a general demurrer to the complaint and the court of appeal reversed. It held that the licensing immunity was not applicable to complaints based on failure to discharge a mandatory duty relying on *Morris v. Marin County (1977) 18 Cal. 3d 901, 136 Cal. Rptr. 251, 559 P.2d 606* , discussed in *§ 196.271[3][a]* (*92 Cal. App. 3d 437, 440)* .

[b] Enforcement Immunity Is Not Applicable With Breach of Mandatory Duty

Quelvog v. City of Long Beach (1970) 6 Cal. App. 3d 584, 86 Cal. Rptr. 127 , was a wrongful death action brought against defendant city after decedent was killed in a fall caused by a person driving an electric autoette on the sidewalk who knocked over decedent's ladder. The complaint alleged that defendant had encouraged the driving of autoettes on the sidewalk and failed to enforce the state law against driving those vehicles on the sidewalk. The trial court granted the city's demurrer. The court of appeal reversed the judgment for defendant. It held that permitting the autoettes on sidewalks created a dangerous condition of public property and that defendant was not immune based on the failure to enforce state lawsimmunity of *Gov. Code § 818.2* because defendant violated its own duty not to create a dangerous condition (*6 Cal. App. 3d 584, 591)* .

[5] Opposing Authorities

[a] Licensing Immunity Is Not Applicable With Breach of Mandatory Duty

In *Sonoma Ag Art v. Department of Food & Agric. (2004) 125 Cal. App. 4th 122, 22 Cal. Rptr. 3d 468* , the plaintiff was a grower who sued the State of California and the Department of Food and Agriculture for negligence in incorrectly finding under a grapevine certification program that the grower's grapevines had fanleaf virus, which lowered the sale price of the vines. The trial court sustained the defendants' demurrer to the cause of action, finding that the defendants were immune from suit under *Gov. Code §§ 818.4* and *821.2*. The court of appeal affirmed. The court concluded that in grading the plaintiff's grapevine, the state had issued a "certificate" within the meaning of those Government Code provisions (*125 Cal. App. 4th 122, 126-127*). The court further held that the issuing of the certificate was a discretionary act for which immunity was provided. The court noted that although there was mandatory language in the statutes establishing the duty to test grapevines, the state was required under those establishing statutes to exercise significant discretion in performing its testing duty, including significant discretion in adopting specific regulations, in overseeing vineyards, and in issuing and renewing certificates (*125 Cal. App. 4th 122, 128-129*).

In *Inland Empire Health Plan v. Superior Court (2003) 108 Cal. App. 4th 588, 133 Cal. Rptr. 2d 735* , the plaintiff suffered a perforation of the uterus and bowel while undergoing an abortion performed at a clinic to which she was referred by her primary care physician, who was a member of a private independent practice association under contract to provide health coverage for Medi-Cal participants. The plaintiff sued various parties, including the public entity health maintenance organization (HMO) to which she belonged. She alleged that the HMO was liable for negligent credentialing of the physician who owned the clinic at which the abortion was performed. The trial court denied the HMO's motion for summary judgment, but the court of appeal granted a writ of mandate ordering the trial court to grant summary judgment. The court of appeal held that the decision of a public entity HMO to credential a physician to receive Medi-Cal reimbursements was a discretionary decision protected by the immunity of *Gov. Code § 818.4*. The HMO was authorized by statute to determine which physicians are eligible to receive Medi-Cal reimbursements, after setting its own standards and policies, consistent with federal standards, to guide its determinations, and the court concluded that the application of these standards to a particular physician was a discretionary one (*108 Cal. App. 4th 588, 592-594)* .

In *Waschek v. Department of Motor Vehicles (1997) 59 Cal. App. 4th 640, 69 Cal. Rptr. 2d 296* , a pedestrian injured by a 96-year-old licensed driver sued the Department of Motor Vehicles (DMV) which had determined that the driver was able to safely drive a motor vehicle on a highway. The trial court granted summary judgment to the DMV and the court of appeal affirmed. On appeal, plaintiff contended that *Veh. Code § 12805*, which provides that the department

must not issue or renew a driver's license to, any person when it is determined that the person is unable to safely operate a motor vehicle upon a highway, imposed a mandatory duty on the DMV which it failed to discharge. The court rejected this argument, finding that not only was there no determination that the applicant was unable to safely operate a motor vehicle, but a license examiner specifically made the determination that he was able to safely operate a motor vehicle. Because there was no dispute that the DMV had determined that applicant was able to safely drive, and, in its discretion, issued him a license, its decision was cloaked in immunity (*59 Cal. App. 4th 640, 647)* .

In *Burchett v. City of Newport Beach (1995) 33 Cal. App. 4th 1472, 40 Cal. Rptr. 2d 1* , plaintiffs sued a city and various individuals based on a denial of an application to retain a nonconforming driveway, in connection with a proposed redevelopment of their residential property. Defendants demurred on the grounds of the immunity for discretionary determinations. Plaintiffs did not respond to the demurrer, and it was granted by the trial court. Plaintiffs appealed, claiming that the trial court's conclusion that statutory immunity applied was incorrect. Plaintiffs claimed that prior to the denial of their application, they had a written agreement with the city in which the city agreed to allow plaintiffs to improve their property and to retain the existing driveway. This allegation was based on a letter plaintiff had written to the city planning department, on which an assistant planner had penned a note stating that the letter's information was "correct." The court of appeal noted that the City's charter provided that it could not be bound by any contract unless the contract was approved by the City Council and signed by the Mayor and City Clerk (*33 Cal. App. 4th 1472, 1479)* . The court also noted that plaintiffs did not have a building permit or any official agreement to allow their improvements. However, even if the planning department employee's note was considered as some sort of license, the court held that this did not bind the City to issue an encroachment or building permit, since *Gov. Code § 818.4* provides that a public entity is not liable for an injury caused by the refusal to issue a permit when the entity is authorized by law to determine whether or not the permit should be issued (*33 Cal. App. 4th 1472, 1480)* .

In *Cancun Homeowners Ass'n v. City of San Juan Capistrano (1989) 215 Cal. App. 3d 1352, 264 Cal. Rptr. 288* , plaintiff condominium homeowners association filed a complaint for damages suffered as result of the subsidence of the land underlying its condominium complex. Defendant city wasincluded in the suit because its building inspector issued the grading and building permits even though he knew that all the soil was not compacted to the optimum level set forth by the local ordinance. The trial court granted summary judgment in favor of defendant city based on the licensing immunity. The court of appeal affirmed, finding that the issuance of a permit was discretionary in that on its face the local ordinance granted the inspector the discretion to deviate from the recommended compaction standard, and the facts showed he did so only after a thorough investigation (*215 Cal. App. 3d 1352, 1356-1361)* .

In *West v. State of California (1986) 181 Cal. App. 3d 753, 227 Cal. Rptr. 16* , plaintiffs were five couples who contracted for home improvements with defendant contractor. A sales representative for the contractor fraudulently represented that plaintiffs were required first to pay the full contract price, which would be placed in a trust account to be used as needed. In all, plaintiffs paid contractor $276,000. When no or little work was done, and no funds repaid, and they learned that the deposit procedure was a violation of *Bus. & Prof. Code § 7159(d)*, plaintiffs sued, alleging fraud and conversion against defendant contractor and defendant banks. Plaintiffs also sued the state, the Department of Consumer Affairs, and the Contractors' State License Board, alleging that the board had a mandatory duty to investigate the contractor and its sales representatives, that had it performed this duty it would not have licensed them, and that plaintiffs would not have entered into contracts in the absence of these licenses. The trial court issued a summary judgment in favor of defendant. The court of appeal affirmed the judgment. Before beginning its analysis, the court reviewed additional facts. The board had issued a general contractor's license to defendant contractor corporation. It had also registered the sales representative, even though that individual had previously been a contractor and lost his license due to grand theft. The board admitted that if proper procedures had been followed, that individual would not have been registered. In light of these facts, the court looked at *Bus. & Prof. Code § 7153.1*, which provides that the registrar may refuse to register the applicant. The court said that "may" was permissive, and the decision to register a sales representative was discretionary. The court noted the board was careless, and even slovenly in allowing that registration, but because it was under no mandatory duty, it was immune from liability pursuant to *Gov. Code § 818.4* (*181 Cal. App. 3d 753, 760-761)* . The court applied the same type of analysis to the contractor, concluding that the board did not

breach any mandatory duty when it issued the general contractor's license. The sales representative was not designated as an officer, director, or responsible managing employee (*181 Cal. App. 3d 753, 761)* . It also refuted plaintiffs' arguments that the board had other mandatory duties, which, if properly fulfilled, would have prevented the losses suffered by plaintiffs. The court examined each alleged mandatory duty, and found they were not mandatory, and therefore the immunity of *Gov. Code § 818.4* protected defendants from liability (*181 Cal. App. 3d 753, 761-765)* .

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1. Immunity From Liability for Acts or Omissions

19A-196 California Points & Authorities § 196.272

§ 196.272 Supporting Contention That Immunity From Liability for Act or Omission Does Not Apply--Inspection Immunity [Gov. Code § 818.6] Applies Only to Inspections of Physical Property

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE IMMUNITY FOR FAILURE TO MAKE AN ADEQUATE INSPECTION OF PROPERTY UNDER SECTION 818.6 OF THE GOVERNMENT CODE DOES NOT APPLY TO INSPECTIONS OF PERSONS.

A. Inspection Immunity Only Applicable to Inspections of Physical Property. The inspection immunity provided by *Section 818.6 of the Government Code* only applies to inspections of physical property and not to inspections of persons (*Elton v. County of Orange (1970) 3 Cal. App. 3d 1053, 1059-1060, 84 Cal. Rptr. 27*).

[*Optional*] **B. Inspection Immunity Not Applicable to Inspections of Foster Parents.** Because the inspection immunity is only applicable to inspections of physical property, it is not applicable to inspections of foster parents for fitness as foster parents (*Elton v. County of Orange (1970) 3 Cal. App. 3d 1053, 1059-1060, 84 Cal. Rptr. 27*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of the contention that the inspection immunity of *Gov. Code § 818.6* is not applicable because the inspection was not of physical property. The immunity provided by *Gov. Code § 818.6* is discussed in *§ 196.08[7]*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be combined with general points and authorities opposing a demurrer [*see, e.g., Elton v. County of Orange (1970) 3 Cal. App. 3d 1053, 1055, 84 Cal. Rptr. 27]* . They may also be adapted

for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Inspection Immunity Only Applicable to Inspections of Physical Property

In ***Elton v. County of Orange*** *(1970) 3 Cal. App. 3d 1053, 84 Cal. Rptr. 27* , plaintiff minor was the victim of various types of abuse when she was placed in a foster home licensed by the state. She brought an action for mental and physical injuries against defendant county, alleging her injuries were the result of defendant's placing her in the foster home and then failing adequately to supervise and control the foster parents. The trial court granted defendant's demurrers and dismissed the action. Plaintiff appealed.

The court of appeal reversed with directions to the trial court to overrule the demurrers. After it found that two other immunities asserted by defendant were not applicable, the court considered whether the inspection immunity of *Gov. Code § 818.6* applied. The court explained that the immunity applied only to the inspection of physical property for the purpose of determining whether the property violates the law or is hazardous to health or safety. The court said plaintiff was complaining of the permitted deficiencies of her foster parents, and not of the physical inadequacies of the foster home (*3 Cal. App. 3d 1053, 1059)* .

[b] Inspection Immunity Not Applicable to Inspections of Foster Parents

Elton v. County of Orange *(1970) 3 Cal. App. 3d 1053, 84 Cal. Rptr. 27* , is discussed in *§ 196.272[3][a]*.

[4] Additional Authorities

[a] Inspection Immunity Only Applicable to Inspections of Physical Property

In *Sava v. Fuller (1967) 249 Cal. App. 2d 281, 57 Cal. Rptr. 312* , the complaint alleged that a state employee negligently tested a material ingested by a child and found it to be toxic, which it was not. As a result, the child was incorrectly treated and died. The trial court sustained a demurrer on the basis that the acts were discretionary and the inspection immunity was applicable. The court of appeal reversed, holding that the actions were not discretionary. In ruling on a claim that the inspection immunity was applicable, the court cited the Legislative comment to *Gov. Code § 818.6*, which said that inspections such as those made of a building under construction were the type contemplated. The court found that plaintiff claimed no property interest in the plant material, and moreover, that it was not dangerous, before it concluded that the inspection immunity was not applicable (*249 Cal. App. 2d 281, 292-293)* .

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19A-196 California Points & Authorities § 196.273

§ 196.273 Supporting Contention That Immunity From Liability for Act or Omission Does Not Apply--Misrepresentation Immunity [Gov. Code § 818.8] Does Not Apply--No Interference With Plaintiff's Financial or Commercial Interests

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE MISREPRESENTATION IMMUNITY UNDER SECTION 818.8 OF THE GOVERNMENT CODE DOES NOT APPLY TO MISREPRESENTATIONS UNLESS THOSE MISREPRESENTATIONS INTERFERE WITH THE PLAINTIFF'S FINANCIAL OR COMMERCIAL INTERESTS.

A. Misrepresentation Immunity Is Not Applicable Unless Interference Is With Financial or Commercial Interests. The public entity misrepresentation immunity provided by *Section 818.8 of the Government Code* is applicable only when the misrepresentation interferes with the plaintiff's financial or commercial interests. Therefore, it is not applicable when the complaint does not allege that interference (*Johnson v. State of California (1968) 69 Cal. 2d 782, 799-801, 73 Cal. Rptr. 240, 447 P.2d 352*).

[*Optional*] **B. No Immunity for Intentional Concealment of Health and Safety Information.** The public entity misrepresentation immunity provided by *Government Code Section 818.8* does not immunize governmental entities for intentional misrepresentations relating to a risk of physical harm (*Adkins v. State of California (1996) 50 Cal. App. 4th 1802, 1819, 59 Cal. Rptr. 2d 59*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of the contention that the immunity of public entity's from liability for misrepresentation by employees under *Gov. Code § 818.8* is not applicable, because the

alleged misrepresentation did not interfere with theplaintiff's commercial or financial interests. The immunity provided by *Gov. Code § 818.8* is discussed in *§ 196.08[8]*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be combined with general points and authorities opposing a demurrer [*see, e.g., Connelly v. State of California (1970) 3 Cal. App. 3d 744, 747, 84 Cal. Rptr. 257]* . They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Public Employee Immunity

The misrepresentation immunity available to public employees under *Gov. Code § 822.2* should be distinguished from the misrepresentation immunity available to public entities under *Gov. Code § 818.8*. The former immunity does not apply when the employee is guilty of actual fraud, corruption, or actual malice [*see Gov. Code § 822.2*; *see also Universal By-Prods., Inc. v. City of Modesto (1974) 43 Cal. App. 3d 145, 153-154, 117 Cal. Rptr. 525]* . Thus, the public employee is liable if he or she was motivated by a conscious intent to deceive, vex, annoy, or harm the plaintiff in his or her business [*Schonfeld v. City of Vallejo (1975) 50 Cal. App. 3d 401, 410, 123 Cal. Rptr. 669* ; *see Cooper v. Jevne (1976) 56 Cal. App. 3d 860, 874, 128 Cal. Rptr. 724* (nondisclosure of adverse material facts may be sufficient if defendant under duty to disclose)]. For further discussion of the immunity under *Gov. Code § 822.2*, see *§ 196.10[14]*.

[3] Discussion of Authorities

[a] Misrepresentation Immunity Is Not Applicable Unless Interference Is With Financial or Commercial Interests

The facts in ***Johnson v. State of California*** *(1968) 69 Cal. 2d 782, 73 Cal. Rptr. 240, 447 P.2d 352* , are discussed in *§ 196.278[3][a]*. The Supreme Court noted that the term "misrepresentation" potentially lends itself to an extremely expansive and elusive interpretation and could apply in a broad variety of fact situations. The Court then focused on the legislative intention in enacting the immunity and held that the legislature was concerned with providing immunity for the specific tort of misrepresentation, which applies only to interferences with financial or commercial interest. It said that the legislature did not intend to provide immunity for every action that could be deemed a misrepresentation and thus did not provide immunity for a parole officer's failure to give adequate warnings to a foster parent about the dangerous propensity of a minor (*69 Cal. 2d 782, 799-800)* .

[b] No Immunity for Intentional Concealment of Health and Safety Information

The facts and procedural background of ***Adkins v. State of California*** *(1996) 50 Cal. App. 4th 1802, 59 Cal. Rptr. 2d 59* , are discussed in *§ 196.283[3][a]*. Plaintiffs alleged they were injured due to the intentional concealment of health and safety information. The court of appeal held that under the Government Tort Claims Act, *Gov. Code § 818.8*, governmental entities would not be immunized for intentional misrepresentations relating to a risk of physical harm (*50 Cal. App. 4th 1802, 1819)* .

[4] Additional Authorities

[a] Misrepresentation Immunity Is Not Applicable Unless Interference Is With Financial or Commercial Interests

In *Michael J. v. Los Angeles County Dep't of Adoptions (1988) 201 Cal. App. 3d 859, 247 Cal. Rptr. 504* , the court of

appeal held that *Gov. Code §§ 818.8, 822.2* do not preclude an action against a county adoption agency for intentional misrepresentation or fraudulent concealment of an adoptee's medical condition as part of the adoption process. The adoption process is not a commercial transaction, such as leasing and purchasing property or contracting for a pension. The immunity provided governmental entities and public employees by these statutes does not shield a county from liability for misrepresentation and deceit in this social service area, designed to serve the interests of society by acting in the best interests of the child. While the adoptive parents will suffer a financial loss in the sense that they have incurred, and will continue to incur, substantial medical expenses, their loss did not result from a commercial transaction with the county or from the county's interference with a commercial transaction (*201 Cal. App. 3d 859, 872)* .

The facts in *Bastian v. County of San Luis Obispo (1988) 199 Cal. App. 3d 520, 245 Cal. Rptr. 78* , are discussed in *§ 196.60[3][a]*. The court of appeal found that the trial court had erred by finding that the deputy sheriff and county were immunized from liability by *Gov. Code §§ 818.8* and *822.2*. It said that *Gov. Code § 818.8* immunized the county from liability for misrepresentation or deceit, a tort distinct from the general milieu of negligent and intentional wrongs. Thus, the *Gov. Code § 818.8* immunity applied to interferences with financial or commercial interest only. The court further observed that *Gov. Code § 822.2* is a counterpart to *Gov. Code § 818.8*, and the financial or commercial interest restriction applied to it as well (*199 Cal. App. 3d 520, 533)* .

The facts in *Connelly v. State of California (1970) 3 Cal. App. 3d 744, 84 Cal. Rptr. 257* , are discussed in *§ 196.278[4][a]*. In reversing thejudgment based on the sustained demurrer, the court of appeal in *Connelly* held that the misrepresentation immunity did not apply when the loss, although a form of commercial loss, did not result from a commercial transaction between plaintiff and the public entity nor from the public entity's interference with plaintiff's commercial transactions (*3 Cal. App. 3d 744, 752)* .

[5] Opposing Authorities

[a] Misrepresentation Immunity Is Not Applicable Unless Interference Is With Financial or Commercial Interests

In *Burden v. County of Santa Clara (2000) 81 Cal. App. 4th 244, 96 Cal. Rptr. 2d 587* , the plaintiff, who was fired from the office of county counsel only two weeks after he began work, brought an action for common law fraud and for violations of *Lab. Code § 970* against the county. The plaintiff alleged that the conditions of his employment had been misrepresented--specifically, that he was induced to relocate on the promise of a permanent position only to find out after he had been fired that he had been hired into a "provisional" position. The trial court granted summary judgment for the county on the basis of immunity under *Gov. Code § 818.8*, and the court of appeal affirmed. After reviewing case law applying *Gov. Code § 818.8*, the court of appeal rejected the plaintiff's contention that the "routine administrative actions" involved in his hiring did not constitute the kind of commercial or financial transaction that supports application of immunity under that statute. Instead, the court concluded that the alleged misrepresentations regarding his recruitment and hiring clearly arose out of a business transaction between him and the county and that his employment involved a sufficient financial interest to trigger immunity under *Gov. Code § 818.8* (*81 Cal. App. 4th 244, 248-252)* . In addition, citing *Harshbarger v. City of Colton*, the court of appeal held that application of *Gov. Code § 818.8* took precedence over the liability that might otherwise be imposed on the county through application of *Gov. Code §§ 815.2* and *822.2*, which in tandem would seem to impose liability on a public entity for the misrepresentations of employees in cases of actual fraud, corruption, or actual malice (*81 Cal. App. 4th 244, 253*).

In *Harshbarger v. City of Colton (1988) 197 Cal. App. 3d 1335, 243 Cal. Rptr. 463* , plaintiffs contracted with a general contractor for construction of a home on property they owned within the boundaries of defendant city. City building inspectors periodically inspected the residence to ensure that construction was in compliance with applicable codes. The inspectors signed the job card after each inspection, acknowledging compliance, even though their inspections revealed noncompliance. After the contractor stopped work, defendant notified plaintiffs that their residence was not in compliance. Plaintiffs paid a substantial amount of money for reconstruction to bring it into compliance, and

then brought suit against defendant city and the building inspectors on several counts, including misrepresentation. The trial court sustained defendant's demurrer without leave to amend and dismissed the action. The court of appeal affirmed (*197 Cal. App. 3d 1335, 1350)* . Citing *Gov. Code §§ 815.2* and *822.2*, plaintiffs argued that under the doctrine of respondeat superior a public entity is liable for wrongful acts of its employees, whether those acts are negligent or intentional, when the employees are guilty of actual fraud, corruption, or actual malice. In response, the court said *Gov. Code § 822.2* applied only to a public employee, not to a public entity. *Gov. Code § 818.8* provides public entities with absolute immunity from liability for negligent or intentional misrepresentations of its employees. Moreover, the court cited *Gov. Code § 815(b)*, which provides that statutory liabilities are subordinate to statutory immunities, in support of the idea that the immunity provisions of *Gov. Code § 818.8* prevail over the general liability of *Gov. Code § 815.2*. The court concluded that a public employee may be liable for actual fraud, but the public entity is wholly immune (*197 Cal. App. 3d 1335, 1340-1341)* . Plaintiffs alleged that by signing the job card, the inspectors misrepresented that the residence complied with code standards when they knew it was defective. Citing case authority, the court found this alleged interference with plaintiffs' financial interest was analogous to situations in which the government was held to be immune from liability. Thus, the court concluded that defendant was immune from liability under *Gov. Code § 818.8* (*197 Cal. App. 3d 1335, 1341-1342)* . The court also found that the misrepresentation immunity applied to concealment or suppression of fact as well as intentional misrepresentation and negligent misrepresentation. An active concealment has the same force and effect as a misrepresentation that is positive in form (*197 Cal. App. 3d 1335, 1343)* .

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19A-196 California Points & Authorities § 196.274

§ 196.274 Supporting Contention That Immunity From Liability for Act or Omission Does Not Apply--Misrepresentation Immunity [Gov. Code § 818.8] Does Not Apply--Claim Based on Contract

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE MISREPRESENTATION IMMUNITY UNDER SECTION 818.8 OF THE GOVERNMENT CODE DOES NOT APPLY WHEN THE ALLEGED MISREPRESENTATION IS THE BASIS OF A CAUSE OF ACTION FOR BREACH OF CONTRACT.

A. California Tort Claims Act Is Not Applicable in Contract Actions. Nothing in *Government Code Sections 814 through 895.8* (liability of public entities and public employees) affects liability of a public entity for breach of contract (*Gov. Code § 814*; see *E.H. Morrill Co. v. State of California (1967) 65 Cal. 2d 787, 793-794, 56 Cal. Rptr. 479, 423 P.2d 551*).

B. Misrepresentation Immunity Is Not Applicable in Contract Actions. Because the California Tort Claims Act does not affect actions for breach of contract, the misrepresentation immunity provided by *Section 818.8 of the Government Code* is not applicable when the plaintiff alleges a misrepresentation as a breach of contract (*E.H. Morrill Co. v. State of California (1967) 65 Cal. 2d 787, 793-794, 56 Cal. Rptr. 479, 423 P.2d 551* ; *Arthur L. Sachs, Inc. v. City of Oceanside (1984) 151 Cal. App. 3d 315, 323, 198 Cal. Rptr. 483*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of the contention that the misrepresentation immunity of *Gov. Code § 818.8* is not applicable because the plaintiff's action is based on breach of contract. The immunity provided by *Gov. Code § 818.8* is discussed in *§ 196.08[a]*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be combined with general points and authorities opposing a demurrer [*see, e.g., E.H. Morrill Co. v. State of California (1967) 65 Cal. 2d 787, 789, 56 Cal. Rptr. 479, 423 P.2d 551]* . They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] California Tort Claims Act Is Not Applicable in Contract Actions

The facts and holding in ***E.H. Morrill Co. v. State of California*** *(1967) 65 Cal. 2d 787, 56 Cal. Rptr. 479, 423 P.2d 551* are discussed in *§ 196.274[3][b]*.

[b] Misrepresentation Immunity Is Not Applicable in Contract Actions

In ***E.H. Morrill Co. v. State of California*** *(1967) 65 Cal. 2d 787, 56 Cal. Rptr. 479, 423 P.2d 551* , plaintiff contractor brought an action for damages for the costs of performing additional work under a construction contract with the state. Plaintiff alleged that the state misrepresented subsurface conditions, and that those conditions made the cost of performing the contract higher. The trial court sustained the state's demurrer to the complaint based in part on the misrepresentation immunity. Plaintiff appealed.

The Supreme Court reversed. In discussing the applicability of the misrepresentation immunity, the Court cited *Gov. Code § 814*, which provides that the California Tort Claims Act does not apply to causes of action for breach of contract. Thus, when a public entity makes a contract it is liable for a breach of its agreement and the doctrine of governmental immunity does not apply. The Court concluded that the misrepresentation immunity was not applicable because the alleged misrepresentations were the basis of a breach of contract cause of action (*65 Cal. 2d 787, 793-794)* .

In ***Arthur L. Sachs, Inc. v. City of Oceanside*** *(1984) 151 Cal. App. 3d 315, 198 Cal. Rptr. 483* , plaintiff school district's complaint against defendant arose out of the sale and purchase of real property. Defendant cross complained, and the trial court entered judgment against defendant due to his failure to comply with the claims statute. Although it agreed to supply defendant with appraisals of the property while that action was pending, plaintiff failed to do so for several years. When defendant finally received a copy of the appraisals they indicated a value much greater than that asserted by plaintiff, and he sought to amend his cross complaint to rescind the contract on the basis of fraud. The trial court denied his motion. Defendant appealed.

The court of appeal reversed. Plaintiff asserted that as a public entity it was entitled to absolute immunity for the alleged fraudulent representations under *Gov. Code § 818.8*. The court disagreed, stating that when the a public entity makes a contract it is liable for a breach of its agreement and the doctrine of governmental immunity does not apply. The fact that a breach is fraudulent does not make the rule inapplicable (*151 Cal. App. 3d 315, 321)* . The court analyzed whether defendant's cross complaint was a contract or a tort action. Based on its analysis of defendant's pleadings, and the fact that the action was based on a breach of promise, the court concluded that the cross complaint was an action based on contract. It held that because the action was one in contract, the misrepresentation immunity did not apply (*151 Cal. App. 3d 315, 322-323)* .

[4] Additional Authorities

[a] Misrepresentation Immunity Is Not Applicable in Contract Actions

Warner Constr. Corp. v. Los Angeles (1970) 2 Cal. 3d 285, 85 Cal. Rptr. 444, 466 P.2d 996 , was a contract action. In dicta, the Supreme Court stated that although tort causes of action for misrepresentation are precluded by the immunity, the causes of action for breach of contract based on misrepresentations by the public entity were not immune (*2 Cal. 3d 285, 293-294, 294 n.4*).

[5] Opposing Authorities

[a] Misrepresentation Immunity Is Not Applicable in Contract Actions

In *Craland, Inc. v. State of California (1989) 214 Cal. App. 3d 1400, 263 Cal. Rptr. 255* , plaintiff was the successful bidder on tax-defaulted real property. Plaintiff later filed claims against the county and state alleging the land was worthless due to Subdivision Map Act violations, and that the county and state had failed to disclose a landslide defect on the property at the time of sale. Plaintiff filed a lawsuit after his claims were denied. The trial court sustained defendants' demurrer to the complaint and dismissed the action. In affirming the judgment, the court of appeal discussed the immunity enjoyed by the county and state. Public entities are immune from tort liability arising from any misrepresentations made in conjunction with the tax sale of the property. However, the misrepresentation immunity does not affect the contractual liabilities, and plaintiff claimed that the county and state were bound to disclose known, hidden defects just like private sellers of land. The court explained that ordinary contract law does not apply to determine the rights of the purchaser against the seller, and that absent a representation to the contrary, neither the county nor the state warrant the validity or regularity of tax sale proceedings (*214 Cal. App. 3d 1400, 1405)* . The court noted that neither the county nor the state had made any warranty or representation that the property was free of landslides, and in fact, had issued a document cautioning buyers to investigate all parcels prior to purchase (*214 Cal. App. 3d 1400, 1406-1407)* .

In *Page v. City of Montebello (1980) 112 Cal. App. 3d 658, 169 Cal. Rptr. 447* , plaintiffs, widow and minor daughter of decedent, brought suit against defendants on several causes of action. Decedent, who was not a police officer, had been working with defendant police department as an informant and died as result of his undercover activities. Decedent had been promised by one police officer that he or his heirs would receive compensation as though he was a policeman. Plaintiffs claimed that defendants at the time of making the promise had no intent to perform, that decedent performed in reliance on that promise, and that decedent would not have assisted defendants without that promise. The trial court granted summary judgment for defendants. The court of appeal affirmed. The court said that one of plaintiffs' causes of action, although framed in terms of contract, constituted an effort to hold defendant city responsible for the tort of its employee. The court said that *Gov. Code § 818.8* constituted a complete defense. Plaintiffs argued that defendant was not immune, and attempted to distinguish their cause of action as one that sounded in deceitful contract, claiming that it was based on deceit (*112 Cal. App. 3d 658, 670)* . The court observed that plaintiffs never claimed that any promise was made by any one associated with defendant except that one officer. Thus, the only person who could have made a promise without intent to perform was that officer, and only if his promise and intention or lack thereof were imputed to defendant under respondeat superior could defendant be held liable. The court said that defendant enjoyed absolute immunity under *Gov. Code § 818.8*. No contract was ever formed in the absence of knowledge or ratification of the officer's promise by defendant. *Gov. Code § 818.8* establishes its immunity with respect to misrepresentation by an employee (*112 Cal. App. 3d 658, 671)* .

In *Universal By-Prods., Inc. v. City of Modesto (1974) 43 Cal. App. 3d 145, 117 Cal. Rptr. 525* , defendant city issued a notice that it would receive bids for the granting of an exclusive license to provide garbage collection services within the city for eight years. The notice stated that defendant reserved the right to reject any or all bids, and that the award, if made, would be to the lowest responsible bidder. Plaintiff, a bidder, performed a market analysis and other complex studies. After its bid was rejected, it brought suit against defendant, alleging misrepresentation, fraud, and breach of contract. The trial court sustained defendant's general demurrers and dismissed the action. The court of appeal affirmed. Plaintiff attempted to overcome defendant's claim of governmental immunity by characterizing the action as a

misrepresentation in breach of contract. The court did not agree, noting that there were no allegations of an express contract, and the facts did not support the inference of an implied contract. It said the gravamen of the action was an allegation of a lack of good faith in the solicitation of bids preliminary to the awarding of a contract, and thus, the misrepresentation was in tort rather than in contract (*43 Cal. App. 3d 145, 153)* . The court said that even under the limitation of the immunity to interferences with financial or commercial interests, the fraudulent representation alleged by plaintiff clearly was a commercial transaction within the intended scope of *Gov. Code § 818.8* (*43 Cal. App. 3d 145, 154)* .

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19A-196 California Points & Authorities § 196.275

§ 196.275 Supporting Contention That Immunity From Liability for Act or Omission Does Not Apply--Prisoner Immunity [Gov. Code § 844.6] Does Not Apply When Neither Plaintiff Nor Person Causing Injury Was Prisoner

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE PRISONER IMMUNITY UNDER SECTION 844.6 OF THE GOVERNMENT CODE DOES NOT APPLY WHEN _____ [PLAINTIFF *or* THE PERSON CAUSING PLAINTIFF'S INJURY] WAS NOT LAWFULLY INCARCERATED AND THUS NOT A PRISONER.

A. Immunity Is Only Applicable When Either Injured or One Causing Injury Is Prisoner. The prisoner immunity of *Section 844.6 of the Government Code* is only applicable to public entities when either the person injured, or the person causing the injury, is a prisoner, that is, a person confined in a correctional facility or institution under the authority of law enforcement authorities or legal process (*Patricia J. v. Rio Linda Union Sch. Dist. (1976) 61 Cal. App. 3d 278, 287, 132 Cal. Rptr. 211* (person causing injury was not prisoner); *see Gov. Code § 844*).

[*Optional*] **B. Detained Person Is Not Prisoner.** A person who has been detained by the police but who has not been arrested or booked is not a prisoner and the public entity is not immune from liability for injury to that person (*Larson v. City of Oakland (1971) 17 Cal. App. 3d 91, 96-98, 94 Cal. Rptr. 466*).

[*Optional*] **C. Minor Committed to Care of Parent Is Not Prisoner.** A minor who has been placed on probation and committed to the care of his or her parents is not a prisoner and a public entity is not immune from liability for an injury caused by that person (*Thompson v. County of Alameda (1980) 27 Cal. 3d 741, 747, 167 Cal. Rptr. 70, 614 P.2d 728* ; *Patricia J. v. Rio Linda Union Sch. Dist. (1976) 61 Cal. App. 3d 278, 286-288, 132 Cal. Rptr. 211*).

[*Optional*] **D. Person Falsely Imprisoned Is Not Prisoner.** The prisoner immunity of *Section 844.6 of the Government Code* does not apply to a case of false imprisonment because a person who has been illegally confined is not a prisoner.

[Even if a person was originally a prisoner, false confinement beyond the proper term of his or her imprisonment does not extend his or her existence as a prisoner within the immunity] (*Sullivan v. County of Los Angeles (1974) 12 Cal. 3d 710, 716-717, 117 Cal. Rptr. 241, 527 P.2d 865*).

[*Optional*] **E. Parolee Is Not Prisoner.** Neither a person on the way to prison, nor a parolee on the way out of prison are prisoners (*Fearon v. Department of Corr. (1984) 162 Cal. App. 3d 1254, 1256, 209 Cal. Rptr. 309*).

[*Optional*] **F. Child Residing With Incarcerated Mother Under Pregnant and Parenting Women's Alternative Sentencing Program Act is Not Prisoner.** A child residing with his or her incarcerated mother under the Pregnant and Parenting Women's Alternative Sentencing Program Act is not a "prisoner" for purposes of the Government Tort Claims Act, as such a child resides in the facility because the mother is housed there and not because the child is the subject of any legal restraint (*Lawson v. Superior Court (2010) 180 Cal. App. 4th 1372, 1387, 103 Cal. Rptr. 3d 834* ; *see Pen. Code § 1174 et seq.*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the prisoner immunity of *Gov. Code § 844.6* is not applicable because neither the plaintiff nor the person causing the plaintiff's injury was a prisoner. The immunity provided by *Gov. Code § 844.6* is discussed in *§ 196.08[9]*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be combined with general points and authorities opposing a motion for summary judgment [*see, e.g., Zeilman v. County of Kern (1985) 168 Cal. App. 3d 1174, 1176, 214 Cal. Rptr. 746]* . They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Immunity Is Only Applicable When Either Injured or One Causing Injury Is Prisoner

In ***Patricia J. v. Rio Linda Union Sch. Dist.*** *(1976) 61 Cal. App. 3d 278, 132 Cal. Rptr. 211* , plaintiffs' daughter was raped by a minor school employee, who was a ward of the court committed to the custody of his mother. Plaintiffs sued defendant school district for negligently hiring a dangerous person and negligently failing to supervise him or warn of his dangerous propensities. Defendant demurred based on its immunity for injuries caused by prisoners. The trial court sustained the demurrer and dismissed the action. Plaintiffs appealed.

The court of appeal reversed. It analyzed the definition of prisoner set forth in *Gov. Code § 844*, the terms of which include an inmate of a prison, jail, or penal or correctional facility, and the legislative comment. The court concluded that for the immunity provided by *Gov. Code § 844.6* to apply, a prisoner must be a person confined in a correctional facility or institution under the authority of law enforcement authorities or legal process.Because this definition did not include a minor ward committed to the custody of his or her parent, defendant was not immune from liability for the minor's acts that injured plaintiffs' daughter (*61 Cal. App. 3d 278, 283-288)* .

[b] Detained Person Is Not Prisoner

In ***Larson v. City of Oakland*** *(1971) 17 Cal. App. 3d 91, 94 Cal. Rptr. 466* , plaintiff's suit against defendant city for personal injuries alleged that he had been injured when he was beaten by a police officer who suspected plaintiff was

driving a stolen car, and chased him after a minor traffic offense. Although plaintiff was never arrested or booked, the injury occurred after he had been detained and handcuffed. After granting defendant's motion for nonsuit, the trial court granted a motion for new trial on the basis that plaintiff was not a prisoner within the terms of the immunity. Defendant appealed the order granting a new trial.

The court of appeal affirmed. The court reviewed statutory and case definitions of "prisoner," concluding that it does not include a person detained by the police but not arrested, or arrested and not booked, and that it clearly was not intended to embrace persons detained by law officers temporarily for purposes of investigation. It said that in specifying what the term prisoner includes, in context, that which is not included is excluded. The court further substantiated its position by observing that immunities from liability should be narrowly construed because liability is the general rule and immunities are exceptions to the general rule (*17 Cal. App. 3d 91, 96-98)* .

[c] Minor Committed to Care of Parent Is Not Prisoner

The facts and procedural background of ***Thompson v. County of Alameda*** *(1980) 27 Cal. 3d 741, 167 Cal. Rptr. 70, 614 P.2d 728* , are discussed in *§ 196.278[5][a]*. The plaintiff's son was killed by a juvenile who had been given temporary leave from his custody with defendant county to his mother's home. Although the Supreme Court found defendant immune on other grounds, it held that the prisoner immunity did not apply because the juvenile was not a prisoner when he was placed in custody of his parents (*27 Cal. 3d 741, 747)* .

Patricia J. v. Rio Linda Union Sch. Dist. *(1976) 61 Cal. App. 3d 278, 132 Cal. Rptr. 211* , is discussed in *§ 196.275[3][a]*.

NOTE:

A ward of the juvenile court confined in a facility, including a foster home, has been held to be a prisoner for purposes of the immunity [*Jiminez v. County of Santa Cruz (1974) 42 Cal. App. 3d 407, 411, 116 Cal. Rptr. 878]* .

[d] Person Falsely Imprisoned Is Not Prisoner

The facts in ***Sullivan v. County of Los Angeles*** *(1974) 12 Cal. 3d 710, 117 Cal. Rptr. 241, 527 P.2d 865* , are discussed in *§ 196.280[3][b]*. The plaintiff was confined in jail beyond his proper jail term and brought an action for false imprisonment. The Supreme Court disagreed with defendant's contention that the prisoner immunity applied. It said that plaintiff was not a prisoner at the time he was allegedly falsely imprisoned. The Court explained that false imprisonment is not an injury to a prisoner, but instead, is an injury to a nonprisoner which converts him or her to a prisoner. It found that the legislature did not intend to distinguish between an individual who is wrongfully deprived of his or her liberty before the starting of a jail term and one who is wrongfully deprived of his or her liberty after the jail term ends. The Court said that continued confinement cannot legally make someone a prisoner when that person's jail term has expired, and concluded that *Gov. Code § 844.6* did not apply to a case of false imprisonment (*12 Cal. 3d 710, 716-717)* .

[e] Parolee Is Not Prisoner

In ***Fearon v. Department of Corr.*** *(1984) 162 Cal. App. 3d 1254, 209 Cal. Rptr. 309* , when plaintiff was first incarcerated in state prison, his silver belt buckle was taken by prison officials for safekeeping until his release. After he was released on parole, plaintiff demanded his property and was told that it had been lost. Plaintiff filed a complaint alleging negligent loss of the property and conversion. The trial court granted defendant's motion for judgment on the pleadings and dismissed the complaint, relying solely on the immunity set forth in *Gov. Code § 844.6*. Plaintiff appealed.

The court of appeal reversed the judgment on the conversion action and affirmed on the negligence action (*162 Cal.*

App. 3d 1254, 1258) . Plaintiff argued that because he was paroled prior to the time defendant refused to return his property, he was not a prisoner and the statutory immunity provided by *Gov. Code § 844.6* did not apply. The court detailed some of the instances in which a person is not a prisoner, concluding that a person on the way to prison and a parolee on the way out of prison are not prisoners and are not barred from bringing a tort action against a public entity (*162 Cal. App. 3d 1254, 1256)* . Although plaintiff was barred from injury that took place during the time he was a prisoner, he was not barred from action arising during the time his status was that of parolee rather than prisoner. On the date of his parole plaintiff had the right to immediate possession of the belt buckle. A conversion can occur when a willful failure to return property deprives the owner of possession. The court concluded that plaintiff had sufficiently alleged a claim for a conversion that occurred while he was on parole (*162 Cal. App. 3d 1254, 1257)* .

[f] Child Residing With Incarcerated Mother Under Pregnant and Parenting Women's Alternative Sentencing Program Act is Not Prisoner

In ***Lawson v. Superior Court*** *(2010) 180 Cal. App. 4th 1372, 103 Cal. Rptr. 3d 834* , a female inmate was serving a prison sentence with her infant daughter at a community-based facility pursuant to the Pregnant and Parenting Women's Alternative Sentencing Program Act, *Pen. Code § 1174 et seq.*, which provides an alternative to state prison commitment to female prisoners with substance abuse problems who are pregnant or have young children at the time of sentencing. The inmate's daughter developed severe respiratory problems, later diagnosed as double pneumonia, but, according to the complaint, facility staff members repeatedly denied requests for treatment for eight to eleven days. A staff member eventually took the inmate's daughter for treatment, but the delay resulting in permanent injury. The inmate, on behalf of herself and her daughter, sued the State, certain state employees, the facility, and certain facility employees, including causes of action for negligence, infliction of emotional distress, and failure to furnish medical care to a prisoner under *Gov. Code § 845.6*. The trial court sustained defendants' demurrers to most of the causes of action. Plaintiffs sought writ relief.

The court of appeal granted a writ of mandate directing the trial court to vacate portions of its order sustaining the demurrers. With respect to claims brought by the mother against the State and a state employee, the court held that the demurrers were properly sustained. Because she was an inmate in the facility after being sentenced for criminal conduct, she was a prisoner for purposes of the Tort Claims Act and, pursuant to *Gov. Code § 844.6*, the State could not be held liable unless the complaint alleged facts showing that a state employee failed to take action when she was in need of immediate medical care. Because she could not do so, both the State and the state employee were immune from liability to the mother (*180 Cal. App. 4th 1372, 1384-1385)* . The court ruled, however, that the daughter was not a prisoner for purposes of applying the Tort Claims Act. The court noted that under *Gov. Code § 844*, a "prisoner" includes an inmate of a correctional facility, and such status begins upon initial entry into a correctional facility, pursuant to penal process, for the purpose of being booked following a lawful arrest. In addition, the commonly understood meaning of the term generally designates a person in legal custody charged with some crime or public offense. Prior case law had also established that a prisoner must be confined in a correctional facility under the authority of law enforcement authorities or legal process. Under these authorities, the court of appeal concluded that the daughter was not a prisoner under the Tort Claims Act. She resided in the facility because her mother was housed there, not because she was the subject of any legal restraint. Because the daughter was not a prisoner, although neither the State nor the state employee were entitled to claim the special immunities of *Gov. Code §§ 844.6* and *845.6*, the complaint did not state a cause of action for failure to provide medical care to a prisoner in violation of *Gov. Code § 845.6* (*180 Cal. App. 4th 1372, 1385-1388)* .

[4] Additional Authorities

[a] Detained Person Is Not Prisoner

In *Zeilman v. County of Kern (1985) 168 Cal. App. 3d 1174, 214 Cal. Rptr. 746* , plaintiff, who had an injured leg and was using crutches, was arrested. While being booked, she remained standing for an extended period of time and

eventually slipped and fell. Plaintiff brought an action against defendant county for damages resulting from personal injuries suffered in the fall, and the trial court granted defendant's motion for summary judgment based on a claim of governmental immunity pursuant to *Gov. Code § 844*. The court of appeal reversed, holding that plaintiff's status when injured, as either a prisoner or mere detainee awaiting booking, remained a triable issue of fact precluding summary judgment (*168 Cal. App. 3d 1174, 1178-1183)* .

[5] Opposing Authorities

[a] Immunity Is Only Applicable When Either Injured or One Causing Injury Is Prisoner

In *Teter v. City of Newport Beach (2003) 30 Cal. 4th 446, 133 Cal. Rptr. 2d 139, 66 P.3d 1225* , the plaintiff was arrested and booked into the city jail for public intoxication pursuant to *Pen. Code § 647*, which permits a peace officer to place a person under the influence of intoxicating liquor in civil protective custody. While in jail, the plaintiff was assaulted by another prisoner. He then sued the city for negligence, and the city defended on the grounds that it was immune from liability under *Gov. Code § 844.6* because the plaintiff was a prisoner at the time of the assault. The California Supreme Court agreed that the city was immune from liability under *Gov. Code § 844.6*. The Court first held that a person confined in a correctional facility or institution pursuant to *Pen. Code § 647* is a prisoner for purposes of *Gov. Code § 844.6*, because the person is being held pursuant to a penological objective. In reaching this conclusion, the Court rejected a contrary holding of the court of appeal in *Meyer v. City of Oakland (1980) 107 Cal. App. 3d 770, 166 Cal. Rptr. 79 (30 Cal. 4th 446, 451-453)* . The Court additionally held that if a person taken into custody pursuant to a valid arrest under *Pen. Code § 647* is subsequently released without charges being filed, and if a certificate is issued under *Pen. Code § 851.6* that describes the earlier period of custody as a "detention," that person is still considered a prisoner during the time of detention for purposes of applying the immunity of *Gov. Code § 844.6* (*30 Cal. 4th 446, 454)* .

In *Badiggo v. County of Ventura (1989) 207 Cal. App. 3d 357, 254 Cal. Rptr. 771* , plaintiff husband sued defendant county for injuries sustained when he fell descending the stairs at the county work furlough facility, and his wife sued for loss of consortium. Contending that it was immune from liability under *Gov. Code §§ 844* and *844.6*, defendant brought a motion for summary judgment. The summary judgment granted by the trial court was affirmed by the court of appeal. Plaintiff husband claimed that he was not a "prisoner" because the work facility was not a "jail" within the meaning of *Gov. Code §§ 844* and *844.6*. The court acknowledged the many differences between work furlough facilities and jails and prisons, but noted that the decisive element in determining whether or not a person is a prisoner is whether or not that individual was confined due to court commitment or legal process (*207 Cal. App. 3d 357, 359-360)* . It concluded that plaintiff's restraint satisfied the element of confinement (*207 Cal. App. 3d 357, 361)* . The court also rejected plaintiff wife's claim because it was based on injuries to her husband, a prisoner, and thus barred by *Gov. Code § 844.6* (*207 Cal. App. 3d 357, 361-362)* .

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CHAPTER 196 PUBLIC ENTITIES
PART II. FORMS
D. IMMUNITY OF PUBLIC ENTITY OR EMPLOYEE FROM LIABILITY
1. Immunity From Liability for Acts or Omissions

19A-196 California Points & Authorities § 196.275A

§ 196.275A Supporting Contention That Immunity From Liability for Act or Omission Does Not Apply--Parole Decision Immunity [Gov. Code § 845.8(a)] Does Not Apply When Based on Ministerial Act

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE PAROLE DECISION IMMUNITY OF GOVERNMENT CODE SECTION 845.8(a) APPLIES ONLY TO BASIC POLICY DECISIONS, SUCH AS WHETHER TO GRANT PAROLE, AND DOES NOT APPLY WHEN PLAINTIFF'S INJURY IS CAUSED BY A MINISTERIAL ACT.

Parole Decision Immunity Inapplicable to Ministerial Acts. Ministerial acts undertaken in the performance of correctional policy decisions are not covered by the parole decision immunity of *Gov. Code § 845.8(a)* (*Perez-Torres v. State of California (2007) 42 Cal. 4th 136, 144-145, 64 Cal. Rptr. 3d 155, 164 P.3d 583*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the parole decision immunity of *Gov. Code § 845.8(a)* does not apply when plaintiff's injury is caused by a ministerial decision undertaken to implement a basic policy decision for which immunity would be available.

These points and authorities may be combined with points and authorities relating to the specific procedural context in which the issue of defendant's liability arises. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law

stated. Thus, counsel should include facts detailing the ministerial conduct that caused plaintiff's injury and argue that immunity is not available for such conduct.

[3] Discussion of Authorities

[a] Parole Decision Immunity Inapplicable to Ministerial Acts

In *Perez-Torres v. State of California (2007) 42 Cal. 4th 136, 64 Cal. Rptr. 3d 155, 164 P.3d 583* , plaintiff was arrested for driving under the influence of alcohol. When police checked plaintiff's criminal history, they learned that he had an earlier arrest for spousal abuse. Although no charges were filed for the earlier arrest, plaintiff had erroneously been assigned the criminal identification and information (CII) number ofanother arrestee who shared the same name as plaintiff and who had served prison time for an arrest on charges of spousal abuse. Because this other arrestee was on parole when plaintiff was arrested, the decision was made to imprison plaintiff for a parole violation because of the DUI charges, even though plaintiff was not actually on parole. Despite protesting that the police had the wrong man, plaintiff remained in jail for 20 days before it was determined that plaintiff was not the man who was on parole, and plaintiff remained in jail for an additional 5 days because of a federal immigration hold also erroneously caused by the mistaken identity. Plaintiff sued the State and three parole agents for negligence, false imprisonment, and related causes of action. The trial court granted summary judgment for defendants. The court of appeal affirmed on the basis of immunity under *Gov. Code § 845.8(a).*

The California Supreme Court reversed. The Court first held that the error in assigning plaintiff the wrong CII number, and the subsequent decision to revoke plaintiff's (non-existent) parole based on that error, were basic policy decisions covered by the immunity of *Gov. Code § 845.8(a)* (*42 Cal. 4th 136, 141-142)* . Relying in part on its earlier analysis in *Johnson v. State of California (1968) 69 Cal. 2d 782, 73 Cal. Rptr. 240, 447 P.2d 352* , however, the Court then held that ministerial acts undertaken in the performance of correctional policy decisions are not covered by the immunity of *Gov. Code § 845.8(a),* overruling a contrary suggestion made by the court of appeal in *Swift v. Department of Corrections (2004) 116 Cal. App. 4th 1365, 11 Cal. Rptr. 3d 406* . The Supreme Court held that the distinction articulated in *Johnson* between basic policy decisions, for which statutory immunity is available, and ministerial decisions undertaken to implement those policy decisions, for which immunity is not generally available, applies to the immunity provided under *Gov. Code § 845.8(a).* In the case before it, the Court concluded that while the State's decision to revoke plaintiff's parole, even if based on erroneous information about his identity, was a policy decision covered by immunity, the failure of state personnel to release plaintiff after they knew or should have known that they were detaining the wrong person was a ministerial act not protected by immunity under *Gov. Code § 845.8(a)* (*42 Cal. 4th 136, 144-145)* .

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1. Immunity From Liability for Acts or Omissions

19A-196 California Points & Authorities § 196.276

§ 196.276 Supporting Contention That Immunity From Liability for Act or Omission Does Not Apply--Fire Fighter's Immunity [Gov. Code § 850.4] Does Not Apply--Negligent Actor Omission Unrelated to Fire Fighting

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE FIREFIGHTERS' IMMUNITY UNDER SECTION 850.4 OF THE GOVERNMENT CODE DOES NOT APPLY WHEN PLAINTIFF'S INJURIES ARE CAUSED BY A NEGLIGENT ACT THAT OCCURS DURING A RESCUE UNRELATED TO FIGHTING FIRES.

A. Immunity for Firefighters Is Not Applicable in Emergency Rescue Unrelated to Fire. An injury caused by the negligent act of firefighters employed by a public entity that occurs during a rescue incident unrelated to fighting a fire is not an injury caused in "fighting fires" pursuant to *Section 850.4 of the Government Code*, and the public entity and the firefighters are therefore not entitled to immunity from liability for the injury (*Lewis v. Mendocino Fire Prot. Dist. (1983) 142 Cal. App. 3d 345, 346-347, 190 Cal. Rptr. 883*).

[*Optional*] **B. Immunity for Firefighters Is Not Applicable Before Fire Starts.** An injury caused by the negligent act of a firefighter employed by a public entity before a fire is started is not an injury caused in "fighting fires" pursuant to *Section 850.4 of theGovernment Code*, and the public entity and the firefighter are not entitled to immunity from liability for the injury (*Potter v. City of Oceanside (1981) 114 Cal. App. 3d 564, 566, 170 Cal. Rptr. 753*).

[2] Comments

[a] Use of Form

These memorandum of points and authorities may be submitted in support of the contention that the firefighters' immunity of *Gov. Code § 850.4* is not applicable because the negligent act of the firefighter that caused the plaintiff's injury did not occur during the course of fighting a fire. The immunity provided by *Gov. Code § 850.4* is discussed in *§*

196.09[12].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be combined with general points and authorities opposing a demurrer [*see, e.g., Lewis v. Mendocino Fire Prot. Dist. (1983) 142 Cal. App. 3d 345, 346, 190 Cal. Rptr. 883]* . They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Immunity for Firefighters Is Not Applicable in Emergency Rescue Unrelated to Fire

In ***Lewis v. Mendocino Fire Prot. Dist.*** *(1983) 142 Cal. App. 3d 345, 190 Cal. Rptr. 883* , plaintiff was injured when a tree fell on his tent, trapping him underneath. Members of defendant fire department attempted to rescue him, but in the course of the rescue they negligently dropped the tree on plaintiff twice, causing him further injuries. In plaintiff's negligence action against defendant, the trial court sustained defendant's demurrer and entered judgment for defendants on the basis of the firefighters' immunity. Plaintiff appealed.

The court of appeal reversed, holding that *Gov. Code § 850.4* does not grant immunity to a fire district when its personnel negligently injure a person rescued during a nonfirefighting incident (*142 Cal. App. 3d 345, 346)* . The court said that *Gov. Code § 850.4* should be construed to bar governmental liability only when the legislature has clearly intended to provide immunity, and that in governmental tort cases, liability is the rule and immunity is the exception. It quoted the language of *Gov. Code § 850.4*, which specifies injury caused in fighting fires. The court observed that the legislature could have exempted firefighters from tort liability from all emergency rescue operation, not merely those related to combatting fires, but chose not to do so (*142 Cal. App. 3d 345, 347-348)* .

[b] Immunity for Firefighters Is Not Applicable Before Fire Starts

In ***Potter v. City of Oceanside*** *(1981) 114 Cal. App. 3d 564, 170 Cal. Rptr. 753* , plaintiff was operating a trenching machine that broke a natural gas line, causing gas to escape. He summoned help, and employees of defendant city's fire department arrived. The fire captain negligently told plaintiff to start the trenching machine and move it from the area. When plaintiff did so, the escaping gas caused a fire that injured him. The trial court sustained defendant's demurrer to plaintiff's negligence complaint on the ground that defendant was immune from liability under *Gov. Code § 850.4* and dismissed the action. Plaintiff appealed.

The court of appeal reversed, reasoning that pursuant to *Gov. Code § 850.4*, the legislature could have granted immunity to firefighters "acting in the scope of their employment" or "acting to prevent fires," but chose to bar liability only for injuries caused in "fighting fires." The court then held that plaintiff's complaint was not barred by *Gov. Code § 850.4* because the negligent act of the firefighter occurred before any fire started (*114 Cal. App. 3d 564, 566)* .

[4] Opposing Authorities

[a] Immunity for Firefighters Is Not Applicable Before Fire Starts

In *City & County of San Francisco v. Superior Court (1984) 160 Cal. App. 3d 837, 207 Cal. Rptr. 6* , after their property was damaged by fire, plaintiffs filed a complaint for damages against defendant city and individual firefighters of defendant's fire department. Plaintiffs alleged that those firefighters participated in an improper social gathering on the evening of the fire, leaving the fire station nearest plaintiff's property unattended, and intentionally, negligently, wilfully, and wrongfully failed to carry out their duties. The trial court failed to grant defendants' demurrer. The court of

appeal granted a peremptory writ of mandate directing the trial court to set aside its order overruling defendants' demurrer, sustain the demurrer, and enter judgment for defendants. The court said that firefighters are immune from liability for injuries caused in fighting fires. The court disagreed with plaintiffs' contention that the legislature never intended immunity for willful misconduct (160 Cal. App. 3d 837, 841). It said that the absolute immunity of *Gov. Code § 850.4* absolved defendant from liability for acts of itself or its employees while they are fighting fires. Although the immunity does not apply if firefighters are engaged in an activity other than fighting fires, the court said that getting to the firequickly is of the very essence of fighting fires. The court further observed that even if *Gov. Code § 850.4* could be so narrowly construed to apply to actions only after firefighters reached the fire, the immunity of *Gov. Code § 850* (failure to provide fire protection service) would apply (*160 Cal. App. 3d 837, 842)* .

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19A-196 California Points & Authorities § 196.277

§ 196.277 Supporting Contention That Immunity From Liability for Act or Omission Does Not Apply--Fire Fighter's Immunity [Gov. Code § 850.4] Does Not Apply--Waiver of Immunity by Public Entity or Employee

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE FIREFIGHTERS' IMMUNITY UNDER SECTION 850.4 OF THE GOVERNMENT CODE DOES NOT APPLY WHEN THE DEFENDANT WAIVED THE IMMUNITY BY NOT PLEADING AND PROVING IT.

Firefighters' Immunity Is Not Applicable After Waiver by Defendant. The defendant's failure to plead and prove the immunity provided by *Section 850.4 of the Government Code* will be deemed a waiver of that immunity (*McMahan's of Santa Monica v. City of Santa Monica (1983) 146 Cal. App. 3d 683, 689, 194 Cal. Rptr. 582*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of the contention that the firefighters' immunity of *Gov. Code § 850.4* is not applicable because the defendant waived that immunity by failing to plead and prove it. The immunity provided by *Gov. Code § 850.4* is discussed in *§ 196.09[12]*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be combined with general points and authorities opposing a motion for summary judgment. They may also be adapted for use in a trial or appellate brief [*see, e.g., McMahan's of Santa Monica v. City of Santa Monica (1983) 146 Cal. App. 3d 683, 689, 194 Cal. Rptr. 582]* .

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Firefighters' Immunity Is Not Applicable After Waiver by Defendant

In ***McMahan's of Santa Monica v. City of Santa Monica*** *(1983) 146 Cal. App. 3d 683, 194 Cal. Rptr. 582* , plaintiff's furniture store and inventory were damaged when a water main owned and operated by defendant city broke and spewed forth water. Plaintiff brought suit against defendant on several causes of action. Subsequently, due to the liquidation of defendant's insurer, all the causes of action except inverse condemnation were voluntarily dismissed. The trial court entered judgment for plaintiff on the inverse condemnation suit. Defendant appealed the judgment, and plaintiff appealed the damage award as inadequate.

The court of appeal affirmed. The court observed that defendant city had failed to plead and prove the immunity provided by *Gov. Code § 850.4*. The court said that immunity was considered an affirmative defense and must be plead and proven or is deemed waived. Thus, the court concluded it did not need to decide the question of whether the facts presented would have shown an immunity (*146 Cal. App. 3d 683, 689)* .

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19A-196 California Points & Authorities § 196.278

§ 196.278 Supporting Contention That Immunity From Liability for Act or Omission Does Not Apply--Discretionary Immunity [Gov. Code § 820.2] Does Not Apply--General Form

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE DISCRETIONARY IMMUNITY UNDER SECTION 820.2 OF THE GOVERNMENT CODE DOES NOT APPLY BECAUSE THE PUBLIC EMPLOYEE'S ACT WAS NOT DISCRETIONARY, BUT WAS MERELY AN IMPLEMENTATION OF A BASIC POLICY DECISION.

A. Discretionary Immunity Only Applies to Basic Policy Decisions. The discretionary act immunity afforded to public employees by *Section 820.2 of the Government Code* is only applicable when the employee makes a basic policy decision. Subsequent implementation of that basic decision is ministerial, not discretionary, and therefore not immune (*Lopez v. Southern Cal. Rapid Transit Dist. (1985) 40 Cal. 3d 780, 794, 221 Cal. Rptr. 840, 710 P.2d 907* ; *Johnson v. State of California (1968) 69 Cal. 2d 782, 793-798, 73 Cal. Rptr. 240, 447 P.2d 352*).

[*Optional*] **B. Negligent Implementation of Discretionary Decision Is Not Immune.** When an injury results from the negligent implementation of a discretionary decision, there is no immunity (*McCorkle v. City of Los Angeles (1969) 70 Cal. 2d 252, 261-262, 74 Cal. Rptr. 389, 449 P.2d 453*).

[*Optional*] **C. Contents of Discussion With Press Is Not Discretionary.** A public official's decision to discuss a matter of public interest with the press and the decision concerning the contents of that discussion are not basic policy decisions and thus not discretionary acts immune from liability (*Sanborn v. Chronicle Publ'g Co. (1976) 18 Cal. 3d 406, 414-416, 134 Cal. Rptr. 402, 556 P.2d 764*).

[*Optional*] **D. Decision Not to Warn of Latent Danger From Patient Is Not Discretionary.** When a psychiatrist is informed by a patient that the patient is going to harm a specific person physically, the decision not to tell that person of

that threat is not a basic policy decision and thus not a discretionary act immune from liability (*Tarasoff v. Regents of Univ. of Cal. (1976) 17 Cal. 3d 425, 444-447, 131 Cal. Rptr. 14, 551 P.2d 334*).

[*Optional*] **E. Effectuation of Legislative Policy Is Not Discretionary.** A public official's determination of whether or not standards set by statute and state regulation have been met is not a basic policy decision and thus not a discretionary act immune from liability, because the basic policy decision was made in the setting of the standards (*Ramos v. County of Madera (1971) 4 Cal. 3d 685, 692-695, 94 Cal. Rptr. 421, 484 P.2d 93*).

[*Optional*] **F. Manner of Conducting Police Investigation Is Not Discretionary.** While a police officer's decision to investigate an accident may be discretionary, the officer's negligent choice of a method to conduct the investigation is ministerial and thus not immune (*McCorkle v. City of Los Angeles (1969) 70 Cal. 2d 252, 259-261, 74 Cal. Rptr. 389, 449 P.2d 453*).

[*Optional*] **G. Public Official's Duties in Determining Whether Document Recordable Is Not Discretionary.** The factors considered by a county surveyor in determining whether or not surveys can properly be recorded are statutorily prescribed and do not involve discretion, and thus the surveyor's decision is not immune from liability (*Wheeler v. County of San Bernardino (1978) 76 Cal. App. 3d 841, 848-849, 143 Cal. Rptr. 295*).

[*Optional*] **H. Determination of Fulfillment of Residency Requirements Is Not Discretionary.** The determination by the county clerk and an elections board of whether or not residency requirements are met by potential voters is ministerial and thus the decision is not immune from liability (*Fenton v. Groveland Cmty. Servs. Dist. (1982) 135 Cal. App. 3d 797, 806-807, 185 Cal. Rptr. 758*).

[*Optional*] **I. Notice of Proposed Disposition of Exhibits Used in Criminal Case Is Not Discretionary.** The notification of the attorneys of record and parties not represented by attorneys of the proposed disposition of exhibits used in a criminal case is not discretionary, and the destruction of exhibits without that notice renders the governmental entity liable to the owner for conversion of exhibits that should have been returned (*Tallmadge v. County of Los Angeles (1987) 191 Cal. App. 3d 251, 254-255, 236 Cal. Rptr. 338* , construing predecessor statute).

[*Optional*] **J. Deputy Public Defender Not Immune When Representing Criminal Defendant.** A deputy public defender is not immune from liability for acts or omissions made in the course of providing legal representation to a criminal defendant, because these are operational decisions that are incident to the normal functioning of the office of the public defender and are not the type of discretionary policy decisions that are immunized from liability (*Barner v. Leeds (2000) 24 Cal. 4th 676, 688, 102 Cal. Rptr. 2d 97, 13 P.3d 704*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of the contention that the discretionary act immunity of *Gov. Code § 820.2* is not applicable because the act of the public employee was not discretionary, but instead was an implementation of a basic policy decision. The immunity provided by *Gov. Code § 820.2* is discussed in *§ 196.10[1]*.

These points and authorities may, in an appropriate case, be combined with the points and authorities *set out in § 196.279* (relating to application of the law enforcement immunity), when Optional Paragraph G (relating to conduct of investigation) is used. They may also be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be combined with general points and authorities opposing a motion for summary judgment [*see, e.g., Johnson v. California (1968) 69 Cal. 2d 782, 784, 73 Cal. Rptr. 240, 447 P.2d 352]* . They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

[b] Discretionary Act Immunity

The discretionary act immunity of *Gov. Code § 820.2* is one of the most important of the immunities because of its general application. It is also one of the hardest immunities to analyze because of the difficulties of drawing the line between discretionary policy decisions and ministerial implementation of those decisions. The courts have not set out a general rule concerning what is discretionary and what is ministerial. In arguing against the application of the immunity, counsel should emphasize that the action that damaged his or her client was an improper implementation of a basic policy decision, not the policy decision itself. Therefore, it is important to analyze the situation carefully and make the proper distinctions between discretionary policy decisions and ministerial implementation.

[c] Procedural Considerations

Although the issue of whether or not the discretionary immunity applies to immunize the public entity has been decided at the demurrer stage [*see, e.g.,* *Thompson v. County of Alameda (1980) 27 Cal. 3d 741, 746, 167 Cal. Rptr. 70, 614 P.2d 728* ; *Watts v. County of Sacramento (1982) 136 Cal. App. 3d 232, 234, 186 Cal. Rptr. 154]* , there is authority indicating that the requisite showing cannot be made by a defendant at the demurrer stage [*see* *Lopez v. Southern Cal. Rapid Transit Dist. (1985) 40 Cal. 3d 780, 794, 221 Cal. Rptr. 840, 710 P.2d 907]* . To be entitled to the immunity, the public entity must make a showing that a basic policy decision, consciously balancing risks and advantages, took place. The fact that an employee normally engages in discretionary activity is irrelevant if, in a given case, the employee did not render a considered decision. Such a showing cannot be made at the demurrer stage [*Lopez v. Southern Cal. Rapid Transit Dist. (1985) 40 Cal. 3d 780, 794, 221 Cal. Rptr. 840, 710 P.2d 907]* . Indeed, the applicability of any statutory immunity does not even arise until it is determined that a defendant otherwise owes a duty of care to the plaintiff [*Lopez v. Southern Cal. Rapid Transit Dist. (1985) 40 Cal. 3d 780, 785, 221 Cal. Rptr. 840, 710 P.2d 907]* .

[d] Federal Civil Rights Actions

The discretionary act immunity of *Gov. Code § 820.2* does not provide immunity to public employees in federal civil rights actions [*Guillory v. County of Orange (9th Cir. 1984) 731 F.2d 1379, 1382* ; for additional discussion of the relation of immunities provided by the California Tort Claims Act to federal civil rights actions, see *§ 196.279[2]*]. For memoranda of points and authorities relating to civil rights generally, see Ch. 35, *Civil Rights: Unruh Civil Rights Act* and Ch. 35A, *Civil Rights: Equal Protection* .

[3] Discussion of Authorities

[a] Discretionary Immunity Only Applies to Basic Policy Decisions

In ***Lopez v. Southern Cal. Rapid Transit Dist.*** *(1985) 40 Cal. 3d 780, 221 Cal. Rptr. 840, 710 P.2d 907* , while plaintiffs were passengers on board a bus owned and operated by defendant transit district, a group of juveniles began harassing other passengers and a violent argument ensued. The bus driver was notified of the altercation but failed to take any precautionary measures, and continued to operate the bus. The argument escalated into a violent physical fight and plaintiffs were injured. Plaintiffs alleged that there was a history of violent and assaultive conduct by passengers on that bus route, and that defendant was fully aware of that history and the risk posed to passengers. When plaintiffs brought a personal injury action against it, defendant demurred, arguing that it had no duty to protect passengers from assaults by fellow passengers and that it was immune from liability under *Gov. Code §§ 845, 820.2,* and *815.2(b)*. The trial court sustained the demurrer and dismissed the action. Plaintiffs appealed.

The Supreme Court reversed and remanded. The Court concluded that plaintiffs' complaint alleged facts sufficient to

establish the existence of a duty and that the facts alleged did not implicate either *Gov. Code § 845* (immunity for failure to provide police protection) or *Gov. Code § 820.2* to bar plaintiffs from bringing the action. The Court emphasized that its holding was limited, and said it did not hold that defendant breached its duty to plaintiff, or that *Gov. Code §§ 845* and *820.2* would necessarily be inapplicable to the facts of the case as those facts unfold during discovery and at trial (*40 Cal. 3d 780, 796)* . In its discussion of the *Gov. Code § 820.2* immunity, the Court said that any act, no matter how ministerial, involves some degree of discretion and judgment in the literal sense. *Gov. Code § 820.2* confers immunity only for those basic policy decisions which have been committed to coordinate branches of government; it does not immunize government entities from liability for subsequent ministerial actions taken in the implementation of those basic policy decisions. This distinction is often characterized as that between the planning and operation levels of decision making (*40 Cal. 3d 780, 793)* . The Court said that the basic policy decision concerning protection of passengers was a decision made by the legislature in enacting *Civ. Code § 2100* and in authorizing defendant to conduct business as a common carrier. It said that *Civ. Code § 2100* requires bus drivers to act to protect passengers from assaults by fellow passengers, at least to the extent required by the exercise of utmost care and diligence and consistent withtheir personal safety. Furthermore, the Court observed that an individual bus driver's decision concerning what form of protective action to take in a particular case does not rise to the level of governmental decisions calling for judicial restraint. Rather, it is the kind of ministerial, operational action taken to implement the legislature's basic policy decision that is not immunized by *Gov. Code § 820.2*. The fact that in a particular case a bus driver might have alternative courses of action from which to choose and this choice might involve a certain degree of judgment, does not elevate the driver's decision to the level of basic policy. Moreover, the Court said that even if a bus driver's decision concerning what kind of protective action to take could be considered a discretionary one, it would be improper to sustain defendant's demurrer on the basis of *Gov. Code § 820.2*. *Gov. Code § 820.2* provides immunity only for the acts or omissions that are the result of the exercise of the discretion vested in a public employee. Thus, to avail itself of the discretionary immunity a public entity must prove that the employee, in deciding to perform (or not to perform) the act which led to a plaintiff's injury, consciously exercised discretion in the sense of assuming certain risks in order to gain other policy objectives. To be entitled to immunity, the public entity must make a showing that such a policy decision, consciously balancing risks and advantages, took place. The fact that an employee normally engages in discretionary activity is irrelevant if, in a given case, the employee did not render a considered decision. Such a showing was not and could not have been made by a defendant at the demurrer stage (*40 Cal. 3d 780, 794)* .

Johnson v. State of California *(1968) 69 Cal. 2d 782, 73 Cal. Rptr. 240, 447 P.2d 352* , was a personal injury action brought by a foster parent who had been assaulted by a foster child placed in her home. Plaintiff sued the state alleging that the placement officer had negligently failed to warn her of the known dangerous propensities of the child. The trial court entered summary judgment for defendant. Plaintiff appealed.

The Supreme Court reversed. The Court said the determinative issue was whether the placement officer's failure to warn was protected by the discretionary immunity of *Gov. Code § 820.2*. The Court rejected a strictly semantic inquiry into the meaning of "discretionary" because almost any act admits of some element of discretion and it was clear that such a broad definition was not intended by the legislature. The Court concluded that the issue must be judged on the basis of the underlying policy reasons for the immunity (*69 Cal. 2d 782, 787-790)* . The Court found that the danger that public employees would be insufficiently zealous in the performance of their duties was not the reason for the immunity because public employees do not have to defend themselves or pay judgments against themselves in actions arising out of their employment (*69 Cal. 2d 782, 790-793)* . The Court held that the discretionary act immunity was intended to protect officials making basic policy decisions and not to protect the ministerial implementation of such basic policy decisions (*69 Cal. 2d 782, 793-794)* . To be entitled to the immunity, the public entity must be able to show that a policy decision, consciously balancing risks and advantages, took place (*69 Cal. 2d 782, 794-795 n.8*). Based on the distinction between discretionary or planning decisions and ministerial or operational decisions, the Court found that, although the decision to place a foster child might have been discretionary, the decision not to warn the parents of the child's violent propensities was clearly only a ministerial implementation of the placement decision and not entitled to immunity (*69 Cal. 2d 782, 797-798)* .

[b] Negligent Implementation of Discretionary Decision Is Not Immune

In ***McCorkle v. City of Los Angeles*** *(1969) 70 Cal. 2d 252, 74 Cal. Rptr. 389, 449 P.2d 453* , plaintiff was injured following an automobile accident. A police officer employed by defendant city investigated the accident, and during that investigation requested plaintiff to show him the skid marks in the road. In so doing, plaintiff was struck by another car. Plaintiff brought suit against defendant city, alleging his injuries were caused by the officer's negligence. The trial court entered judgment on the verdict for plaintiff. Defendant city appealed.

The Supreme Court affirmed the judgment. The Court said that even if the act of a public employee was discretionary, immunity will not result if the injury to another results, not from the public employee's exercise of the discretion vested in him or her to undertake the act, but from that employee's negligence in performance after having made the discretionary decision to do so. Thus, even if the police officer exercised his discretion in undertaking the accident investigation, *Gov. Code § 820.2* did not clothe him with immunity from the consequences of his negligence in conducting it. There would only have been immunity if plaintiff's injury was the result of the officer's exercise of discretion. The Court concluded that plaintiff's injury was the result of the officer's negligence after any discretion had been exercised (*70 Cal. 2d 252, 261-262)* .

[c] Contents of Discussion With Press Is Not Discretionary

In ***Sanborn v. Chronicle Publ'g Co.*** *(1976) 18 Cal. 3d 406, 134 Cal. Rptr. 402, 556 P.2d 764* , plaintiff brought a defamation action based on statements made by a county clerk to a newspaper reporter in explanation of why the clerk released certain funds to plaintiff. The trial court judgment was for plaintiff. Defendants appealed.

The Supreme Court affirmed the judgment. The Court found that the statements were not privileged (*18 Cal. 3d 406, 412-414)* . It then foundthat the decision to talk to the press was not a discretionary act in the nature of a basic policy decision made at the planning stage of the city's operations. Rather, the decision was a routine, ministerial act, and thus the discretionary act immunity did not apply (*18 Cal. 3d 406, 415)* .

[d] Decision Not to Warn of Latent Danger From Patient Is Not Discretionary

Tarasoff v. Regents of Univ. of Cal. *(1976) 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334* , was a wrongful death action brought by the parents of a murdered young woman. The action was based on the failure of psychotherapists employed by a public university to warn the young woman that a patient had threatened to kill her. The patient later made good on his threat. The trial court sustained demurrers to the complaint. Plaintiff appealed.

The Supreme Court reversed. It held that the psychotherapists owed a duty to the victim. It then held that defendants were not immune from liability for their failure to warn the victim of the latent danger. The Court said the decision of whether or not to warn did not rise to the level of a basic policy decision required for a discretionary act (*17 Cal. 3d 425, 445-446)* .

NOTE:

Civ. Code § 43.92, enacted after *Tarasoff*, establishes limitations on a psychotherapist's duty to predict, warn, and protect a third person from a patient's violent behavior.

[e] Effectuation of Legislative Policy Is Not Discretionary

In ***Ramos v. County of Madera*** *(1971) 4 Cal. 3d 685, 94 Cal. Rptr. 421, 484 P.2d 93* , officials of defendant county terminated plaintiff's welfare payments because her minor children refused to work harvesting grapes. Plaintiff recipient brought a class action for injunctive relief and damages. The trial court sustained a demurrer on the basis of failure to exhaust administrative remedies. Plaintiff appealed.

The Supreme Court reversed, holding that plaintiffs did not have to exhaust administrative remedies. It then discussed defendant's claims of immunity based on the discretionary act immunity. The Court held that the officials were not exercising discretion in cutting off welfare because state law and regulations determined who was eligible and left no room for discretion in local officials. Also, the officials did not have discretion to coerce plaintiffs to violate state law by having minors work without work permits (*4 Cal. 3d 685, 694)* .

[f] Manner of Conducting Police Investigation Is Not Discretionary

McCorkle v. City of Los Angeles *(1969) 70 Cal. 2d 252, 74 Cal. Rptr. 389, 449 P.2d 453* , is discussed in *§ 196.278[3][b]*.

[g] Public Official's Duties in Determining Whether Document Recordable Is Not Discretionary

In ***Wheeler v. County of San Bernardino*** *(1978) 76 Cal. App. 3d 841, 143 Cal. Rptr. 295* , plaintiff brought an action for damages to real property alleging that the county surveyor of defendant county allowed a survey to be recorded when he knew or should have known it was inaccurate. The trial court sustained a general demurrer and dismissed the action. Plaintiff appealed.

The court of appeal reversed. The court found that the function of the county surveyor in connection with the recording of a survey is set forth by state statute. Thus, it held that the surveyor was not engaged in discretionary activity when he was engaged in his statutory duty to examine the survey and determine if it should be filed. Such duties did not amount to basic policy decisions (*76 Cal. App. 3d 841, 849)* .

[h] Determination of Fulfillment of Residency Requirements Is Not Discretionary

Fenton v. Groveland Cmty. Servs. Dist *(1982) 135 Cal. App. 3d 797, 185 Cal. Rptr. 758* , was an action for damages for denial of plaintiffs' right to vote. The trial court dismissed the action for failure to make a timely amendment to the complaint after sustaining defendants' demurrer. Plaintiffs appealed.

The court of appeal reversed and remanded the case. The court found that in determining if potential voters met residency requirements the county clerk and elections board were exercising a ministerial task (*135 Cal. App. 3d 797, 806-807)* . Thus, the court held that the grant of governmental immunity in *Gov. Code § 820.2* did not immunize defendant officials when they denied plaintiffs the right to vote (*135 Cal. App. 3d 797, 807)* .

[i] Notice of Proposed Disposition of Exhibits Used in Criminal Case Is Not Discretionary

In ***Tallmadge v. County of Los Angeles*** *(1987) 191 Cal. App. 3d 251, 236 Cal. Rptr. 338* , when plaintiff was prosecuted for unlawful possession of firearms, machine guns and other firearms were seized and used as evidence in the case. Plaintiff was convicted of unlawful possession of machine guns, but was not convicted of unlawful possession of the otherfirearms. All the firearms were destroyed pursuant to court order without notice to plaintiffs as required by former Penal Code § 1418 [*now see Penal Code § 1417.7*] and contrary to the representation of the deputy district attorney that the guns would be returned without the necessity for plaintiff to initiate legal process for their recovery. Plaintiff and the co-owner of the firearms then sued the county and the deputy district attorney. The trial court granted defendants' motion for summary judgment on the ground of governmental immunity (*191 Cal. App. 3d 251, 253)* .

The court of appeal reversed the judgment with directions. The court held that although plaintiffs were barred by governmental immunity from stating a cause of action for misrepresentation based on the district attorney's statements [*see Gov. Code §§ 818.8, 822.2*], their complaint stated a cause of action against the county for conversion, which is not barred by statutory governmental immunity (*191 Cal. App. 3d 251, 253-254)* . With regard to defendant's contention that it was immune by application of the discretionary act immunity, the court held that the provisions of former Penal Code § 1418 were mandatory and hence immunity for discretionary acts did not bar the suit (*191 Cal. App. 3d 251,*

255) .

NOTE:

Penal Code § 1417.7 provides that no less than 15 days before any proposed disposition of an exhibit, the court must notify the district attorney (or other prosecuting attorney), the attorney of record of each party, and each party who is not represented by counsel of the proposed disposition.

[j] Deputy Public Defender Not Immune When Representing Criminal Defendant

In ***Barner v. Leeds*** *(2000) 24 Cal. 4th 676, 102 Cal. Rptr. 2d 97, 13 P.3d 704* , the plaintiff was represented by a deputy public defender in an underlying criminal action in which the plaintiff was convicted for taking part in a bank robbery. In the course of the underlying representation, the deputy public defender chose not to file a motion for disclosure of confidential informants mentioned in the case file or to conduct an independent investigation regarding the informants or the information they revealed to police authorities, despite the fact that information in the file suggested that there may have been information available that was favorable to the defense. Although the plaintiff was convicted in the criminal action and incarcerated for more than one year, the plaintiff was subsequently found to have been factually innocent of the charges, and his conviction was set aside when the actual bank robber was apprehended. The plaintiff then brought a lawsuit that included a legal malpractice action against the deputy public defender who represented him in the criminal action, alleging negligence in failing to investigate and act on the information regarding the confidential informants. The deputy public defender moved for summary judgment, contending that, as a public employee, she was immune from liability for discretionary acts or omissions under *Gov. Code § 820.2*. The trial court agreed and granted the motion. The court of appeal reversed, however, concluding that deputy public defenders were subject to liability for legal malpractice unless and until the legislature clearly provided for discretionary immunity for those particular public employees.

The California Supreme Court agreed that the trial court erred in granting summary judgment for the deputy public defender, although the Court rejected the analysis of the court of appeal, which centered on whether or not the legislature expressly provided discretionary acts immunity to deputy public defenders. The Supreme Court noted that the legislature has clearly provided discretionary acts immunity for all public employees, so long as the acts or omissions are the type of acts or omissions protected by the statute. However, case law beginning with *Johnson v. State of California (1968) 69 Cal. 2d 782, 73 Cal. Rptr. 240, 447 P.2d 352* [*see § 196.278[3][a]*], had established that immunity under *Gov. Code § 820.2* is limited to basic policy decisions that are expressly committed to coordinate branches of government and as to which judicial interference would be inappropriate, and does not extend to lower-level acts or omissions that are merely operational in nature. Therefore, the issue to be decided was whether or not the actions of the deputy public defender while representing a criminal defendant were policy decisions protected by the statute or operational decisions that were not protected (*24 Cal. 4th 676, 684-685)* .

Relying on the analysis and conclusions of *Johnson* and its progeny, the Court concluded that once a deputy public defender has undertaken to represent a criminal defendant, discretionary acts immunity does not protect the public defender's actions implementing the basic decision to provide representation, to the extent those actions do not implicate policy-level decisions. Therefore, the actions taken by the defendant while representing the plaintiff in the underlying robbery prosecution were not protected by discretionary acts immunity (*24 Cal. 4th 676, 687)* . The Court noted that although legal representation includes difficult choices among often complex alternatives and the exercise of professional skill and judgment, the attorney's actions for purposes of *Gov. Code § 820.2* ordinarily involve operational judgments that implement the initial decision to provide representation to the client. Moreover, holding deputy public defenders liable for malpractice merely subjects these attorneys to the same standards and principles of liability applicable to private attorneys performing identical services in the same type of proceedings, and does not result in unwarranted judicial interference in the affairs of the other branches of government (*24 Cal. 4th 676, 688)* . The Court also rejectedvarious policy arguments advanced by the defendant suggesting reasons that deputy public defenders ought to be provided discretionary acts immunity, ultimately concluding that these policy arguments are properly addressed to

the legislature and not the courts (*24 Cal. 4th 676, 690-691)* .

[4] Additional Authorities

[a] Discretionary Immunity Only Applies to Basic Policy Decisions

In *Ogborn v. City of Lancaster (2002) 101 Cal. App. 4th 448, 124 Cal. Rptr. 2d 238* , the plaintiffs brought an action against a city and individual city officials after the city, as part of a nuisance abatement program and pursuant to a valid warrant, destroyed the rental house in which the plaintiffs were living. The plaintiffs alleged that the city failed to provide due process before destroying their home and belongings, and asserted causes of action for civil rights violations under federal law and the California Constitution, as well as claims for trespass and conversion. The defendants successfully moved for summary judgment on the grounds of qualified immunity. The court of appeal affirmed in part and reversed in part. Although the qualified immunity doctrine protected the individual defendants from the civil rights claims, that doctrine did not protect against the state tort claims. The court then considered whether the individual defendants were protected from tort liability under *Gov. Code § 820.2*. The court briefly reviewed the distinction between basic policy decisions, which are afforded protection under the statute, and ministerial decisions, which implement basic policy decisions and are not afforded protection. The court then concluded that one city official, the director of the department of community development, was immune from tort liability under the statute for his role in administering the nuisance abatement program, because his role was limited to conducting the initial hearing at which the relevant property was declared a public nuisance. However, another city official who actively participated in implementing the nuisance abatement program with respect to the property at issue was not immune under the statute, because he was present at the time the house was bulldozed and in fact gave the order to demolish the house, conduct that was ministerial in nature (*101 Cal. App. 4th 448, 461)* .

In *Wallace v. City of Los Angeles (1993) 12 Cal. App. 4th 1385, 16 Cal. Rptr. 2d 113* , the mother of a witness in a criminal trial who was murdered after anonymous threats against her life, brought a wrongful death action against the police officer in charge of the criminal case and the city having jurisdiction over the police force. The individual defendant, a detective in the police agency in question, persuaded the decedent to testify in a murder trial. After it became apparent that she was an important witness, the decedent's mother received an anonymous telephone call threatening decedent's life if she testified. Evidence at the trial conflicted with regard to the extent to which decedent engaged in conversations with the defendant concerning her safety, and the degree of fear that the decedent expressed to him. Nevertheless, the evidence showed that she was concerned about her safety, and that the defendant assured her that she was in no danger because her testimony was not needed, in that there were cumulative witnesses. Based on that assurance, the decedent, a college student, allegedly did not alter her daily routine, nor did she seek refuge with relatives. Allegedly, the defendant told the decedent and plaintiff, with whom she lived, that if he felt she were in danger, he would tell her and remove her from her home, that none of the people in the house needed to take precautions regarding daily routines, and that there was no need to provide police protection. Based on the immunity afforded by *Gov. Code § 845*, the trial court granted nonsuit in favor of both defendants, and plaintiff appealed.

The court of appeal reversed the judgment, and remanded the case. The court first discussed the individual defendant's duty of care to the decedent, concluding that he had a duty to warn based of the creation of a peril (*12 Cal. App. 4th 1385, 1401-1402)* . With respect to *Gov. Code § 820.2*, the court stated that the defendant did not engage in discretionary acts when he (1) minimized the importance of the threatening phone call that the plaintiff received, (2) determined at various points in his murder investigation that he would not inform the decedent or plaintiff about the criminal defendant's possible involvement in other murders or his threats against other witnesses, (3) determined that he would not inform them that he considered the criminal defendant to be a threat to the community at large and especially to persons who might testify against him, and (4) determined that he would not offer protection to decedent despite what he knew about the phone call and about the criminal defendant. The court stated the established rule that the decision to warn or not warn of foreseeable, latent dangers does not rise to the level of a basic policy decision that constitutes a discretionary act (*12 Cal. App. 4th 1385, 1403)* . The court held that although the defendant's decision to offer the

decedent to the prosecutor as a witness may have been a discretionary one, his subsequent decisions to refrain from warning her about the danger associated with her role of witness and refrain from offering her protection were not (*12 Cal. App. 4th 1385, 1404)* .

Bohrer v. County of San Diego (1980) 104 Cal. App. 3d 155, 163 Cal. Rptr. 419 , was a wrongful death action brought after the deceased died of a drug overdose. Plaintiffs alleged that employees of defendant county had negligently increased decedent's prescription for drugs after notice of her abuse of those drugs, and that such abuse caused her death. The trial court sustained defendant's demurrer and dismissed the action. The court of appeal reversed. It held that the decision to increase the prescriptionafter notice of abuse was not a discretionary act such that defendant was immune from liability, even though the decision to allow decedent to administer her own medication may have been a discretionary act (*104 Cal. App. 3d 155, 162)* .

In *Elton v. County of Orange (1970) 3 Cal. App. 3d 1053, 84 Cal. Rptr. 27* , plaintiff was injured when she was placed in a foster home where she was mistreated. She brought an action against defendant county alleging that its employees failed to properly investigate and supervise her placement. The complaint was dismissed after a general demurrer was sustained. The court of appeal reversed. It held that the acts of defendant in implementing the decision to place a child in a foster home were ministerial and did not amount to basic policy decisions (*3 Cal. App. 3d 1053, 1058)* .

In *Connelly v. State of California (1970) 3 Cal. App. 3d 744, 84 Cal. Rptr. 257* , plaintiff brought a negligence action on various causes against the state when, in reliance on information received from the state regarding how high the river would rise, plaintiff set his marina docks too low and they were damaged when the river rose higher than predicted. Defendant's demurrers were sustained and judgment entered accordingly. The court of appeal affirmed and reversed in part. It found that defendant was not protected from liability by the discretionary act immunity. The court distinguished between the planning and operational levels of decision making, observing that planning and basic policy decisions are discretionary acts within the scope of the immunity, while the administrative duties that carry out policy decisions are not. It found that the determination to issue flood forecasts was a policy making function, a discretionary activity within the scope of governmental immunity, while gathering, evaluating, and disseminating flood forecast information were administrative or ministerial activities outside the scope of governmental immunity. Thus, the question of whether the unprotected acts were performed negligently must be determined from the facts (*3 Cal. App. 3d 744, 750-751)* .

[b] Negligent Implementation of Discretionary Decision Is Not Immune

In *Newton v. County of Napa (1990) 217 Cal. App. 3d 1551, 266 Cal. Rptr. 682* , parents brought suit on various causes of action against various county agencies on behalf of themselves and as guardians ad litem for their children after defendants had subjected each of the children to a body search after receiving a report of child abuse. The trial court granted defendants' demurrer and dismissed the case. The court of appeal reversed dismissal on some of the causes of action. The court explained that *Welf. & Inst. Code § 16504* requires county welfare departments to carry out an immediate in-person response in emergency situations after receiving a report of child abuse, and that *Welf. & Inst. Code § 16513* and *Gov. Code § 820.4* provide immunity for such investigations. The court observed that such a response implies a prior determination that an emergency exists. Thus, defendants are immune from liability for the decision to conduct an in-person response to an emergency situation. However, the immunity does not extend beyond actions implied in the decision to investigate (*217 Cal. App. 3d 1551, 1560)* . Thus, the court concluded that defendants' immunity from liability for the various causes of action depended on whether or not their actions went beyond the actions necessary for an investigation. Accordingly, defendants were granted full immunity in the action for invasion of privacy which alleged no gratuitous actions unnecessary for a proper investigation, partial immunity to the action for negligent infliction of emotional distress, which alleged negligence not only in the decision to investigate but in certain abusive actions by defendants that were unrelated to a proper investigation, and no immunity to the causes of action for battery and false imprisonment (*217 Cal. App. 3d 1551, 1561-1562)* .

[c] Contents of Discussion With Press Is Not Discretionary

In *H & M Assocs. v. City of El Centro (1980) 109 Cal. App. 3d 399, 167 Cal. Rptr. 392* , plaintiff limited partnership owned and operated a large apartment complex. Defendants city and members of the city council knew that plaintiff had made an application for refinancing with the Federal Housing Authority and that plaintiff had contractual relationships with its tenants. Defendant city furnished water to the apartment complex through eight separate water meters, each with its own account number. Through its city manager, defendant city terminated water service to the apartment complex without notifying plaintiff of its intent to do so, without providing plaintiff with either a hearing or an opportunity to pay the delinquent amount due, and after plaintiff had tendered payment on seven of the eight accounts. The city manager, by telephone, then notified the mortgagees, the FHA, the local newspaper, and several other government agencies that the water service had been terminated and would not be reinstated. As a result of defendants' action, plaintiff lost numerous tenants, and became unable to pay the mortgage payments. The mortgages were foreclosed, the premises sold, and plaintiff lost the property. Plaintiff brought an action against defendants for intentional interference with contractual relationships, invasion of privacy, and conspiracy, alleging that defendants acted with the intent to interfere with and disrupt plaintiff's contractual relationships based on their hope to buy the property at a bargain price at the foreclosure sale. The trial court sustained defendant's demurrer and dismissed the action.

The court of appeal reversed. In its decision the court addressed defendants' assertion that the actions of its city manager were discretionary in nature for which immunity is granted to the public employee and vicariously to the public entity. They urged that the city ordinance giving thecity manager wide latitude in functioning as the administrative head of the government of te city under the direction and control of the city council supported the discretionary nature of his actions. The court was not persuaded by defendants' argument, quoting authority that to be entitled to immunity the public entity must make a showing that a policy decision, consciously balancing risks and advantages, took place. The fact that an employee normally engages in "discretionary activity" is irrelevant if, in a given case, the employee did not render a considered decision (*109 Cal. App. 3d 399, 406-407)* . The court observed that the ordinance neither refers to nor describes the alleged conduct as discretionary. Even if it was so labeled, the court doubted that a decision of a city manager to terminate water service to a customer fell within the ambit of planning as contrasted to the operational level of decision making. The court concluded that defendants failed to make the required showing necessary for immunity (*109 Cal. App. 3d 399, 407)* .

Toney v. State of California (1976) 54 Cal. App. 3d 779, 126 Cal. Rptr. 869 , was an action for defamation and intentional infliction of emotional distress based in part on press releases issued discussing plaintiff's actions. The trial court entered judgment for plaintiff, and the court of appeal affirmed. It held that although the decision to issue a press release was discretionary, the timing, content, and manner of release, were ministerial acts and the state was not immune from liability arising from those ministerial acts (*54 Cal. App. 3d 779, 793)* .

[d] Manner of Conducting Police Investigation Is Not Discretionary

In *Green v. City of Livermore (1981) 117 Cal. App. 3d 82, 172 Cal. Rptr. 461* , plaintiffs' car was struck by an intoxicated driver driving the car of a person arrested a short time before for drunk driving. During their investigation of the drunk driving, the police officers of defendant city had failed to impound the car or remove the keys, thereby allowing the intoxicated passenger of the car to drive it from the scene of the arrest and collide with plaintiffs' car. Plaintiffs sued defendant for their injuries. The trial court sustained defendant's demurrer and dismissed the action. The court of appeal reversed, reasoning that the allegations did not involve the discretion of the officers in deciding whether or not to investigate the car, but instead, only their negligence in the conduct of the discretionary investigation. The court then held that neither the discretionary immunity of *Gov. Code § 820.2*, nor the specific discretionary immunity for failure to enforce a statute (*Gov. Code §§ 821, 818.2*), immunized defendant from the legal consequences of the officers' negligence in failing to remove the keys from the vehicle (*117 Cal. App. 3d 82, 87-89)* .

NOTE:

The *Green* case has been criticized for its discussion of the pleading of the special relationship between the investigating officer and the injured plaintiff [*see Lehto v. City of Oxnard (1985) 171 Cal. App. 3d 285, 292-294, 217 Cal. Rptr. 450]* .

Gibson v. City of Pasadena (1978) 83 Cal. App. 3d 651, 148 Cal. Rptr. 68 , was a wrongful death action in which the decedent was killed when a car being chased by the police for running a red light crashed into his car. The action alleged negligence by the police in chasing the vehicle. The trial court's dismissal of the action after sustaining defendant's demurrer was reversed by the court of appeal. It held that the decision to stop the driver was a discretionary act, but that the implementation of that decision by chasing the driver at over 100 miles-per-hour was ministerial and thus the discretionary act immunity did not preclude liability (*83 Cal. App. 3d 651, 659-660)* .

[5] Opposing Authorities

[a] Discretionary Immunity Only Applies to Basic Policy Decisions

In *Caldwell v. Montoya (1995) 10 Cal. 4th 972, 42 Cal. Rptr. 2d 842, 897 P.2d 1320* , plaintiff, who had been a school district superintendent, sought damages from individual members of an elected school board for voting to terminate his employment. Plaintiff alleged that defendants' motivation for their votes was race and age discrimination. The defendants demurred, claiming discretionary immunity under *Gov. Code § 820.2*. The trial court agreed, sustained the demurrer, and entered judgment dismissing the individual defendants. The court of appeal reversed, concluding that the complaint did not establish defendants' claim of personal immunity for discretionary acts because such immunity turns on the factual question of whether defendants' conduct involved conscious consideration of risks and benefits (*10 Cal. 4th 972, 977)* . The California Supreme Court reversed the court of appeal, concluding that the trial court was correct that *Gov. Code § 820.2* provided discretionary act immunity (*10 Cal. 4th 972, 978)* . The Court noted that the test for whether an act is an immune discretionary act distinguishes between "planning" and "operational" functions of government (*10 Cal. 4th 972, 981)* . The Court also stated that the board's decision about who should be superintendent is a peculiarly sensitive and subjective choice, and that it would be unwise to hold individual board members personally accountable at law for things they said in the course of deliberations of such a matter. Plaintiff argued that because his discrimination causes of action were created by the legislature and not by commonlaw, that they were not covered by the immunity of *Gov. Code § 820.2*. However, the Court rejected this, ruling that the statute does not grant or withhold its protection on the basis of whether the legal duty arose by common law or by statute (*10 Cal. 4th 972 986)* .

In *Thompson v. County of Alameda (1980) 27 Cal. 3d 741, 167 Cal. Rptr. 70, 614 P.2d 728* , defendant county had a juvenile offender in its custody and control under court order, and knew that he had latent, extremely dangerous and violent propensities regarding young children, and that he had indicated he would, if released, take the life of a young child residing in his mother's neighborhood. Plaintiffs and their son lived down the street from the mother of that juvenile offender. Defendant released the offender into his mother's custody at her home without warning her, the local police, or any parents in the area. Within 24 hours of his release, the offender murdered plaintiffs' five-year-old son. Plaintiffs sued defendant county for wrongful death, alleging several counts of negligence. The trial court sustained defendant's general demurrer and dismissed the action. The Supreme Court affirmed the judgment. The Court analyzed the discretionary act immunity pertaining to two actions by defendant: the act of releasing the offender, and the selection of his mother as custodian. The Court said the determination of whether or not to release an offender is a discretionary decision clothed with immunity under *Gov. Code § 820.2* when made by the appropriate authorities. The decision to parole comprises the resolution of policy considerations, entrusted by statute to a coordinate branch of government, that compels immunity from judicial examination. Plaintiffs did not allege that the releasing agent was not empowered to make the determination to release the offender. Thus, the release decision was immune (*27 Cal. 3d 741, 747)* . In analyzing whether or not the custodian selection was within the immunity of *Gov. Code § 820.2*, the Court had to decide whether that decision was ministerial, because it amounted only to an obedience to orders or the performance of a duty in which the officer is left no choice of his or her own, or discretionary, because it required personal

deliberation, decision, ad judgment. The Court concluded that the discretionary nature of the selection of custodians for potentially dangerous minors and the determination of the requisite level of government supervision for those custodians became apparent when the underlying policy considerations were analyzed. Choosing a proper custodian to direct the attempted rehabilitation of a minor with a prior history of antisocial behavior is a complex task involving a careful consideration and balancing of such factors as the protection of the public, the physical and psychological needs of the minor, the relative suitability of the home environment, the availability of other resources, and the need to reintegrate the minor into the community. That decision, requiring comparisons, choices, judgments, and evaluations, comprised the very essence of the exercise of discretion and is immunized under *Gov. Code § 820.2* (*27 Cal. 3d 741, 748-749)* .

In *Jacqueline T. v. Alameda County Child Protective Services (2007) 155 Cal. App. 4th 456, 66 Cal. Rptr. 3d 157* , a mother brought suit against a county and county employees for alleged negligence in investigating three separate reports of possible child abuse of her children. Plaintiff's children routinely spent weekends with their father, his girlfriend, and her 11-year-old son, and evidence came to light indicating that the girlfriend's son may have been sexually abusing two of plaintiff's children. Three reports were made to county personnel and investigations were made after all three reports, which included interviews with the parties involved, and reports were filed with the police department. However, county personnel after all three investigations concluded that the allegations were unsubstantiated and took no further action to protect plaintiff's children. The girlfriend's son subsequently admitted to the sexual abuse, prompting plaintiff to sue the county for negligence. The court of appeal held that the county and the county employees who conducted the investigations were immune from liability because the decisions they made during the investigation of the child abuse allegations, including the decision that the charges were unsubstantiated, were discretionary decisions protected under *Gov. Code § 820.2*. The court noted that the conduct of which plaintiff complained was not conduct dealing with the actual delivery of social services to abused, neglected, or exploited children, but rather the preliminary determinations regarding whether such social services were actually necessary. The court also concluded that the county was immune from liability under *Gov. Code § 821.6*, which provides broad immunity for instituting and prosecuting any judicial or administrative proceeding (*155 Cal. App. 4th 456, 464-468)* .

In *Masters v. San Bernardino County Employees Retirement Ass'n (1995) 32 Cal. App. 4th 30, 37 Cal. Rptr. 2d 860* , plaintiff sued a county retirement association and individual members of the association's retirement board for alleged wrongful conduct in initially denying and failing to promptly award her a disability retirement pension. Plaintiff alleged that the association's administrator caused plaintiff's medical reports to be withheld from consideration by the association's medical advisor. Since the medical advisor was without benefit of the reports, he reported to the board that, although plaintiff was disabled, there was insufficient medical evidence to establish the service connection of the injury to plaintiff's employment. Plaintiff alleged a delay of 19 months between the time she applied for and the time she was ultimately awarded a disability pension. The defendants demurred to the complaint, asserting governmental immunity, and the trial court sustained the demurrer. The court of appeal agreed that the individual board members had discretionary immunity for their adjudicatory decisions on plaintiff's application. However, the court held that *Gov. Code § 820.2* did not provide discretionary immunity for the administrator's decisions about how to process the application. (*32 Cal. App. 4th 30, 47-49)* . The court reasoned that no discretion is provided to suppress evidence intentionally. The court concluded that the association was immune for any alleged breach of fiduciary duty as to the individual board members, but not as to the administrator, provided that plaintiff could state a cause of action against the administrator (32 Cal. App. 4th 30, 49). The court thus reversed the judgment in part, sustaining the demurrer, but requiring that plaintiff be granted leave to amend the complaint to state a cause of action against the administrator and the association (32 Cal. App. 4th 30, 49).

[b] Negligent Implementation of Discretionary Decision Is Not Immune

In *Ortega v. Sacramento County Dept. of Health & Human Services (2008) 161 Cal. App. 4th 713, 74 Cal. Rptr. 3d 390* , plaintiff was an 11-year-old minor who wasremoved from her father's custody by the county when her father was arrested for screaming uncontrollably in the street while under the influence of PCP. Three days later, plaintiff was

returned to the custody of her father, and four days after being returned, her father stabbed her in the heart and lungs with a knife. Plaintiff lived and sued the county for returning her to her father's custody, but the court of appeal held that the county was immune from suit under the discretionary functions immunity of *Gov. Code § 820.2*. The undisputed evidence indicated that the investigation conducted by the social worker handling plaintiff's case was woefully inadequate in that the social worker failed to ascertain that plaintiff's father had been under the influence of PCP, rather than alcohol, and that he had a history of violence and drug abuse and 30 prior convictions, even though this information was in the relevant case file available to the worker. The social worker, who was inexperienced and handling only her second case, also failed to discuss the case with a supervisor as required before making the decision to release plaintiff back to her father. Nonetheless, the court of appeal held that the decision to release plaintiff back to her father was a discretionary decision protected by immunity, even if the social worker was negligent in her investigation. According to the court, allowing plaintiff to proceed on a theory that the social worker breached a ministerial duty to gather the pertinent facts before making a decision would effectively eviscerate the discretionary functions immunity, as in every case there would have to be a trial to determine the actions that comprised the investigation forming the basis for any exercise of discretion (*161 Cal. App. 4th 713, 732-733)* .

[c] Manner of Conducting Police Investigation Is Not Discretionary

In *Watts v. County of Sacramento (1982) 136 Cal. App. 3d 232, 186 Cal. Rptr. 154* , plaintiffs contracted with a landowner entitling plaintiffs to grow and harvest crops on the landowner's land. When plaintiffs arrived to harvest their crop, the landowner ordered them off the land and called the sheriff's department of defendant county to remove plaintiffs. Plaintiffs were instructed by the officers, upon threat of arrest, to leave the property. Plaintiffs obeyed and thereafter brought an action against defendant seeking damages for unlawful interference with their economic business opportunity. The trial court sustained defendant's demurrer and dismissed. The court of appeal affirmed the judgment. It said a decision to arrest, or to take some protective action less drastic than arrest, is an exercise of discretion for which a peace officer may not be held liable in tort. The court said that settling a disagreement concerning plaintiffs' right to be on the land by ordering them to leave was clearly action short of arrestfor which the officers are immune from liability (*136 Cal. App. 3d 232, 234)* . The court characterized plaintiffs' action as a claim of negligent investigation. Plaintiffs claimed the officers breached the duty of care owed them by failing to investigate whether they had any legal right to be on the property. The court said there was no legal basis for plaintiffs' assumption that once law enforcement officials have decided to intervene in a dispute, any subsequent action by the officials is ministerial. In order to settle the dispute, the officers were obliged to exercise their discretion after they had observed what was happening and had listened to the explanation of those present. Any direction given by the officers purporting to exercise official authority would have been an invasion of the personal liberty of at least some of those present. Those intrusions are a regular and necessary part of police work conducted for the preservation of public safety ad order and the decision to use this official authority on any particular occasion is peculiarly a matter of judgment and discretion for which neither the officers nor defendant may be held liable in tort (*136 Cal. App. 3d 232, 235)* .

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Volume 19A Chapters 196-199 PUBLIC ENTITIES---to---QUO WARRANTO
CHAPTER 196 PUBLIC ENTITIES
PART II. FORMS
D. IMMUNITY OF PUBLIC ENTITY OR EMPLOYEE FROM LIABILITY
1. Immunity From Liability for Acts or Omissions

19A-196 California Points & Authorities § 196.279

§ 196.279 Supporting Contention That Immunity From Liability for Act or Omission Does Not Apply--Law Enforcement Immunity [Gov. Code §§ 818.2, 820.4] Does Not Apply in Federal Civil Rights Action

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE LAW ENFORCEMENT IMMUNITY UNDER SECTIONS 818.2 AND 820.4 OF THE GOVERNMENT CODE DOES NOT APPLY IN AN ACTION ALLEGING VIOLATION OF FEDERAL CIVIL RIGHTS.

No Enforcement Immunity in Federal Civil Rights Action. Because the state may not impair federally created rights or impose conditions on them, the immunity afforded public entities by *Section 818.2 of the Government Code* and the immunity afforded public employees by *Section 820.4 of the Government Code* for failure to enforce the law do not apply in an action against police officers under the federal Civil Rights Act of 1871 (*42 U.S.C.S. §§ 1981-1983, 1985,* and *1986*) (*Graham v. City of Biggs (1979) 96 Cal. App. 3d 250, 255, 157 Cal. Rptr. 761*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of the contention that the law enforcement immunity of *Gov. Code § 818.2,* available to public entities, and the law enforcement immunity of *Gov. Code § 820.4,* available to public employees, are not available because the action is one alleging a violation of the plaintiff's federal civil rights. The immunities provided by *Gov. Code §§ 818.2* and *820.4* are discussed in *§§ 196.08[5]* and *196.10[3],* respectively.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be combined with general points and authorities opposing a demurrer [*see, e.g., Graham v. City of Biggs (1979) 96 Cal. App. 3d 250, 252, 157 Cal. Rptr. 761]* . They may also be adapted

for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Other Immunities

Although the case on which this form is based considered only the law enforcement immunities, there is authority that none of the governmental immunity statutes may be successfully applied against a claim brought under the federal Civil Rights Act [*Martinez v. California (1980) 444 U.S. 277, 284, 284 n.8, 100 S. Ct. 553, 62 L. Ed. 2d 481* ; *Fenton v. Groveland Cmty. Servs. Dist. (1982) 135 Cal. App. 3d 797, 808, 185 Cal. Rptr. 758]* .

[c] Related Pleading and Practice Forms

For discussion of federal civil rights statutes (*42 U.S.C.S. §§ 1981-1983, 1985*, and *1986*), see California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post -Civil War Civil Rights Statutes* (Matthew Bender).

[d] Related Points and Authorities

For memoranda of points and authorities relating to civil rights generally, see Ch. 35, *Civil Rights: Unruh Civil Rights Act* and Ch. 35A, *Civil Rights: Equal Protection* .

[3] Discussion of Authorities

[a] No Enforcement Immunity in Federal Civil Rights Action

In ***Graham v. City of Biggs*** *(1979) 96 Cal. App. 3d 250, 157 Cal. Rptr. 761* , after she was raped in her car, plaintiff reported the rape and theidentity of the rapist to the police department of defendant city. Although plaintiff was in physical pain and emotional distress, the responding officer refused to drive her to the hospital, required her to wait at the hospital and later to drive herself home while under the influence of valium, and subsequently made her pay for the examination. The police chief and police commissioner, who was also the mayor, refused to order the questioning of three men overheard discussing the rape shortly after it occurred. Plaintiff's car was never examined for evidence; nor was the man she identified ever located or questioned. Plaintiff brought an action for violation of her civil rights against defendant city and individuals, alleging they acted in concert in the performance (or lack thereof) of their official duties to deny plaintiff due process and equal protection. The trial court sustained defendants' demurrers without leave to amend and dismissed the case. Plaintiff appealed.

The court of appeal reversed. The court held the allegations of the complaint were sufficient to state a cause of action under *42 U.S.C.S. §§ 1983, 1985(3)*, and *1986* for violation of plaintiff's civil rights (*96 Cal. App. 3d 250, 253-255)* . The court refuted defendants' contention that plaintiff's action was barred by *Gov. Code §§ 818.2* and *820.4* of the California Tort Claims Act, and flatly stated that was never the law. The court discussed *Williams v. Horvath (1976) 16 Cal. 3d 834, 838-842, 129 Cal. Rptr. 453, 548 P.2d 1125* , which considered the effect of the claim filing requirement in a similar federal civil rights action, and which concluded that the state may not impair federally created rights or impose conditions on them as support for its conclusion that defendants' were not absolved of liability on the basis of the enforcement immunity (*96 Cal. App. 3d 250, 255-256)* .

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Volume 19A Chapters 196-199 PUBLIC ENTITIES---to---QUO WARRANTO
CHAPTER 196 PUBLIC ENTITIES
PART II. FORMS
D. IMMUNITY OF PUBLIC ENTITY OR EMPLOYEE FROM LIABILITY
1. Immunity From Liability for Acts or Omissions

19A-196 California Points & Authorities § 196.280

§ 196.280 Supporting Contention That Immunity From Liability for Act or Omission Does Not Apply--Law Enforcement Immunity [Gov. Code § 820.4] and Immunity for Instituting or Prosecuting Judicial Proceeding [Gov. Code § 821.6] Do Not Apply in Action for False Arrest or Imprisonment

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

NEITHER THE PUBLIC EMPLOYEE LAW ENFORCEMENT IMMUNITY UNDER SECTION 820.4 OF THE GOVERNMENT CODE NOR THE IMMUNITY UNDER SECTION 821.6 OF THE GOVERNMENT CODE FOR INSTITUTING OR PROSECUTING ANY JUDICIAL PROCEEDING APPLY TO AN ACTION FOR FALSE ARREST OR IMPRISONMENT.

A. No Enforcement Immunity for Public Employee for False Arrest or Imprisonment. A public employee is not immune from liability in an action for false arrest or false imprisonment by reason of the immunity of *Section 820.4 of the Government Code* for executing or enforcing the law (*Milliken v. City of South Pasadena (1979) 96 Cal. App. 3d 834, 839-840, 158 Cal. Rptr. 409*).

B. No Prosecution Immunity for Public Employee for False Arrest or Imprisonment. A public employee is not immune from liability in an action for false arrest or false imprisonment by reason of the immunity of *Section 821.6 of the Government Code* for instituting or prosecuting a judicial proceeding. That immunity only protects against actions for malicious prosecution (*Sullivan v. County of Los Angeles (1974) 12 Cal. 3d 710, 719-721, 117 Cal. Rptr. 241, 527 P.2d 865*).

[*Optional*] **C. Employing Public Entity Is Derivatively Liable.** When a public employee is liable as a public employee for false imprisonment, the employing public entity is derivatively liable under the provisions of *Section 815.2 of the Government Code* (*Sullivan v. County of Los Angeles (1974) 12 Cal. 3d 710, 717, 117 Cal. Rptr. 241, 527 P.2d 865*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of the contention that there is no governmental immunity precluding liability for false arrest or false imprisonment. Paragraph A is based on the inapplicability of the law enforcement immunity of *Gov. Code § 820.4* because that immunity specifically excludes those types of actions. The immunity provided by *Gov. Code § 820.4* is discussed in *196.10[3]*; Paragraph B is based on the inapplicability of the prosecution immunity of *Gov. Code § 821.6* because that immunity only protects against actions for malicious prosecution. The immunity provided by *Gov. Code § 821.6* is discussed in *§ 196.10[10]*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be combined with general points and authorities opposing a motion for summary judgment [*see, e.g., Milliken v. City of South Pasadena (1979) 96 Cal. App. 3d 834, 838, 158 Cal. Rptr. 409]* . They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Conditional Immunity for False Arrest

There is no liability on the part of and no cause of action will arise against any peace officer who makes an arrest pursuant to a warrant regular on its face if the peace office in making the arrest acts without malice and in the reasonable belief that the person arrested is the one referred to in the warrant [*Civ. Code § 43.55(a)*]. However, this immunity is a conditional immunity, and is destroyed by evidence of malice in effecting the arrest [*McKay v. County of San Diego (1980) 111 Cal. App. 3d 251, 254, 168 Cal. Rptr. 442]* . For further discussion, see *§ 196.10[18]*.

[3] Discussion of Authorities

[a] No Enforcement Immunity for Public Employee for False Arrest or Imprisonment

In ***Milliken v. City of South Pasadena*** *(1979) 96 Cal. App. 3d 834, 158 Cal. Rptr. 409* , while at a police station complaining of a neighbor's disturbing the peace and furnishing liquor to minors, plaintiff was informed that there was a bench warrant on her. In fact, that warrant had been recalled, and plaintiff so informed the officer. Although there was disagreement on whether or not the recall was verified by the warrant card file and another officer, plaintiff was arrested at that time. After she was booked, plaintiff was arrested without a warrant on an unrelated charge of carrying a concealed weapon, although once again the parties disagreed on the surrounding facts. After her release plaintiff brought a complaint against defendants on three causes of action: false arrest and imprisonment for both arrests, and malicious prosecution for the weapons charge. The trial court granted summary judgment for defendants. Plaintiff appealed.

The court of appeal reversed. Based on the immunity provided by *Gov. Code § 821.6*, the court agreed with defendants' contention that plaintiff had no cause of action against them for malicious prosecution in instituting criminal proceedings, even if the officer acted maliciously and without probable cause. However, the court stated that *Gov. Code § 820.4* provided no comparable immunity for the false arrest and imprisonment charges, and those charges involved triable issues of fact that could not be resolved by way of summary judgment (*96 Cal. App. 3d 834, 839-840)* .

[b] No Prosecution Immunity for Public Employee for False Arrest or Imprisonment

In ***Sullivan v. County of Los Angeles*** *(1974) 12 Cal. 3d 710, 117 Cal. Rptr. 241, 527 P.2d 865* , plaintiff's complaint for false imprisonment alleged that the sheriff of defendant county had kept plaintiff in jail after the sheriff knew or

should have known that plaintiff should have been released. The trial court sustained defendant's demurrer on the basis of governmental immunity and dismissed the action. Plaintiff appealed.

The Supreme Court reversed and remanded, concluding that no governmental immunity protected defendant in a false imprisonment action (*12 Cal. 3d 710, 722)* . It held that the immunity in *Gov. Code § 821.6* for instituting or prosecuting judicial proceedings even maliciously only provides immunity against actions for malicious prosecution, and does not provide immunity against actions for false arrest or false imprisonment, which do not involve initiating or prosecuting a judicial proceeding (*12 Cal. 3d 710, 719-721)* .

[c] Employing Public Entity Is Derivatively Liable

The facts and procedural background of ***Sullivan v. County of Los Angeles*** *(1974) 12 Cal. 3d 710, 117 Cal. Rptr. 241, 527 P.2d 865* , are discussed in *§ 196.280[3][b]*. The Supreme Court said that no immunity provision in the California Tort Claims Act insulates a public entity from liability for false imprisonment (*12 Cal. 3d 710, 715)* . It then set forth the statutory scheme under which a public entity might be derivatively liable when its employee is liable. *Gov. Code § 820* provides that unless immunized by statute, a public employee is liable for injury caused by his or her act or omission to the same extent as a private person. *Gov. Code § 815.2* extends that liability to the public entity. *Gov. Code § 820.4* specifically precludes false arrest and false imprisonment from its immunity provisions. Thus, if the county sheriff was liable as a public employee for his alleged failure to release plaintiff from jail after all charges against him were dismissed, then the county would be derivatively liable for those acts (*12 Cal. 3d 710, 717)* .

[4] Additional Authorities

[a] No Enforcement Immunity for Public Employee for False Arrest or Imprisonment

In *Jackson v. City of San Diego (1981) 121 Cal. App. 3d 579, 175 Cal. Rptr. 395* , plaintiff sued defendant city for damages for false imprisonment after being convicted and imprisoned for crimes he did not commit. Plaintiff was initially arrested without a warrant, but after a grand jury indictment, he was lawfully rearrested on a bench warrant pursuant to the indictment. A jury awarded plaintiff damages. The court of appeal reversed for a limited retrial on the issue of damages. The court balanced the competing policy considerations expressed in *Gov. Code § 820.4*, which permits a public employee to be liable for false arrest or false imprisonment, and *Gov. Code § 821.6*, which provides immunity to public employees for maliciousprosecution. The court ultimately concluded that there was liability for false imprisonment, but the damages were limited by the prosecution immunity, which became relevant after the grand jury indictment. The court reasoned that by enacting both *Gov. Code §§ 820.4* and *821.6*, the legislature intended that a ceiling be placed on damages that may be awarded for false imprisonment, limiting those damages to the period of incarceration beginning with the false arrest, but ending when lawful process begins. The court then held that plaintiff was entitled to all the damages he suffered during the period from his warrantless arrest to the date he was rearrested pursuant to the grand jury indictment (*121 Cal. App. 3d 579, 582)* .

[b] No Prosecution Immunity for Public Employee for False Arrest or Imprisonment

In *Harden v. San Francisco Bay Area Rapid Transit Dist. (1989) 215 Cal. App. 3d 7, 263 Cal. Rptr. 549* , plaintiff was a police officer for defendant public transit district who ran a part-time typewriter repair business. Some time after opening his business plaintiff was charged with possession of stolen typewriters, arrested, and released. After the charges were dismissed for lack of evidence, plaintiff sued defendant and its employee, his superior officer, for false imprisonment and negligent and intentional infliction of emotional harm. Plaintiff alleged that his superior officer, who had previously subjected him to racially motivated harassment, had knowingly given false and materially incomplete information of a character that could be expected to stimulate plaintiff's arrest. The trial court entered judgment against defendants for false arrest and false imprisonment. The court of appeal rejected defendants' contention that the *Gov. Code § 821.6* immunity applied. It cited the language of *Gov. Code § 820.4*, the enforcement immunity, which provides that it does not exonerate a public employee from liability for false arrest or false imprisonment, and concluded that

there is no immunity provision that insulates a public entity from liability for false imprisonment. The court said the legislative intent behind *Gov. Code § 821.6* was to protect public employees from liability only for malicious prosecution and not for false imprisonment, and thus, it cannot be interpreted to defeat the common law liability for false imprisonment preserved in *Gov. Code § 820.4* (*215 Cal. App. 3d 7, 14)* . In analyzing an unrelated immunity, the court did observe that the distinction between malicious prosecution and false arrest is not always easy to discern, and that a cause of action for false arrest or imprisonment may lie where the same facts also support a cause of action for malicious prosecution (*215 Cal. App. 3d 7, 16-17)* .

In *McKay v. County of San Diego (1980) 111 Cal. App. 3d 251, 168 Cal. Rptr. 442* , plaintiff brought a false imprisonment action alleging that an investigative officer in the district attorney's office obtained a warrant to arrest plaintiff based on information the officer knew to be false. The trial court dismissed the action, declaring it was barred because of the blanket immunity given public employees and employers under *Gov. Code § 821.6*. The court of appeal reversed. The court held that *Gov. Code § 821.6* cannot be interpreted to defeat the common-law liability for false imprisonment preserved in *Gov. Code § 820.4*, which excludes public employees from any immunity for false arrest or imprisonment (*111 Cal. App. 3d 251, 254)* .

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CHAPTER 196 PUBLIC ENTITIES
PART II. FORMS
D. IMMUNITY OF PUBLIC ENTITY OR EMPLOYEE FROM LIABILITY
1. Immunity From Liability for Acts or Omissions

19A-196 California Points & Authorities § 196.281

§ 196.281 Supporting Contention That Immunity From Liability for Act or Omission Does Not Apply--Immunity for Instituting or Prosecuting Judicial Proceeding [Gov. Code § 821.6] Does Not Apply--General Form

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE PUBLIC EMPLOYEE IMMUNITY UNDER SECTION 821.6 OF THE GOVERNMENT CODE FOR INSTITUTING OR PROSECUTING ANY JUDICIAL OR ADMINISTRATIVE PROCEEDING DOES NOT APPLY BECAUSE _____ [THE ACTION BROUGHT BY PLAINTIFF IS NOT A MALICIOUS PROSECUTION ACTION *or* _____ (*name of public employee*) WAS ACTING OUTSIDE THE SCOPE OF HIS/HER EMPLOYMENT IN INSTITUTING THE _____ (JUDICIAL *or* ADMINISTRATIVE) PROCEEDING AGAINST THE PLAINTIFF *or* THE ACTION BROUGHT BY PLAINTIFF IS BASED ON VIOLATION OF THE WHISTLE-BLOWER STATUTE, TO WHICH PROSECUTION IMMUNITY DOES NOT APPLY].

[*EITHER*]

A. Prosecution Immunity Only Applicable to Malicious Prosecution Action. The prosecution immunity of *Government Code Section 821.6* is only applicable to actions based on malicious prosecution or similar type of misconduct (*see Tallmadge v. County of Los Angeles (1987) 191 Cal. App. 3d 251, 254-255, 236 Cal. Rptr. 338*).

[*OR*]

A. No Prosecution Immunity When Public Employee Acts Outside Scope of Employment. A public employee is not immune from liability in an action for malicious prosecution by reason of the immunity of *Government Code*

Section 821.6 for instituting orprosecuting a judicial proceeding when that employee has acted outside the scope of his or her employment (*Vivell v. City of Belmont (1969) 274 Cal. App. 2d 38, 40-41, 78 Cal. Rptr. 841*).

[*Optional*] **B. Scope of Employment.** A public employee is only acting in the course and scope of employment when he or she is engaged in work that employee was employed to perform or when the act is an incident to that employee's duty and was performed for the benefit of the employer and not to serve that employee's own purposes or conveniences (*see Sanborn v. Chronicle Publishing Co. (1976) 18 Cal. 3d 406, 411, 134 Cal. Rptr. 402, 556 P.2d 764*).

[*Optional*] **C. No Prosecution Immunity in Whistle-Blower Actions.** The prosecution immunity of *Government Code Section 821.6* does not apply to immunize public employees charged with violation of *Government Code Section 19683*, the whistle-blower statute, which provides redress to state employees for harm suffered by the use of official power to deter reporting of unlawful government activity (*Shoemaker v. Myers (1992) 2 Cal. App. 4th 1407, 1423-1425, 4 Cal. Rptr. 2d 203*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of the contention that the prosecution immunity of *Gov. Code § 821.6* is not applicable because the action brought by the plaintiff is not a malicious prosecution or similar type of action, because the public employee was acting outside the scope of his or her employment, or because the action is based on the whistle-blower statute, and the prosecution immunity does not apply. Optional Paragraph B may be used to delineate the proper scope of the public employee's employment. Optional Paragraph C may be used when the whistle-blower statute is involved. The immunity provided by *Gov. Code § 821.6* is discussed in *§ 196.10[10]*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be combined with general points and authorities opposing a nonsuit [*see, e.g., Vivell v. City of Belmont (1969) 274 Cal. App. 2d 38, 39, 78 Cal. Rptr. 841]* . They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Prosecution Immunity Only Applicable to Malicious Prosecution Action

The facts and procedural background of ***Tallmadge v. County of Los Angeles*** *(1987) 191 Cal. App. 3d 251, 236 Cal. Rptr. 338* , are discussed in *§ 196.278[3][i]*. The court of appeal held that the prosecution immunity did not protect defendant county from liability. It said that the immunity did not apply because plaintiff's action was one to recover damages for firearms destroyed by defendant after plaintiff had been convicted of unlawful possession of firearms; it was not a malicious prosecution action. The court reasoned further that because the prosecution had ended when the act complained of occurred, the injury was not caused by a public employee instituting or prosecuting a judicial proceeding (*191 Cal. App. 3d 251, 254-255)* .

[b] No Prosecution Immunity When Public Employee Acts Outside Scope of Employment

In ***Vivell v. City of Belmont*** *(1969) 274 Cal. App. 2d 38, 78 Cal. Rptr. 841* , plaintiff and individual defendant were adjoining landowners who agreed to share the cost of constructing a sewer line along their common boundary. Plaintiff refused to pay the full amount demanded by individual defendant, but paid a smaller amount, allegedly the agreed upon

amount. When plaintiff did not connect his property to the sewer line, but continued to use a septic tank, the individual defendant, who was a city councilman of defendant city, claimed plaintiff lived on the land and caused defendant city to file a misdemeanor complaint for violation of a city sewer ordinance. A warrant was issued on the complaint, and plaintiff was arrested by the San Francisco police. Plaintiff brought a complaint against defendant individual and defendant city alleging false arrest and imprisonment, malicious prosecution, and abuse of process. The trial court issued a judgment of nonsuit in favor of defendant city. Plaintiff appealed.

The court of appeal affirmed. Initially the court observed that the only cause of action available against defendant city, malicious prosecution, was barred by reason of governmental immunity (*274 Cal. App. 2d 38, 40)* . The court then addressed the potential liability of individual defendant for malicious prosecution. It said the immunity of a public employee from liability for malicious prosecution extends only to proceedings within the scope of his or her employment. The court said defendant was acting wholly outside the scope of his duties as a councilman if he sought private gain from urging prosecution by the city. To be entitled to immunity, he would have to show that he acted within the scope of his employment as a city councilman (*274 Cal. App. 2d 38, 40-41)* .

[c] Scope of Employment

The facts and procedural background of ***Sanborn v. Chronicle Publ'g Co.*** *(1976) 18 Cal. 3d 406, 134 Cal. Rptr. 402, 556 P.2d 764* , are discussed in *§ 196.278[3][c]*. Although the court of appeal concluded that the city clerk was acting within the scope of his employment when he spoke with a reporter, because he had at least implied authority to speak with the press about operations of the clerk's office (*18 Cal. 3d 406, 412)* , its discussion of the term "scope of employment," as it concerns public employees for purposes of the California Tort Claims Act is instructive. The court said that a public employee is acting in the course and scope of employment when he or she is engaged in work that employee was employed to perform or when the act is an incident to that employee's duty and was performed for the benefit of the employer and not to serve that employee's own purposes or conveniences. The court explained further that scope of employment has been equated with the express or implied power of the public employee to act in a particular instance, and in evaluating the employee's conduct to determine whether it is within the ambit of his or her authority, courts look not to the nature of the act itself, but to the purpose or result intended. If the object or end to be accomplished is within the employee's express or implied authority, the act is deemed to be within the scope of his or her employment irrespective of its wrongful nature (*18 Cal. 3d 406, 411)* .

[d] No Prosecution Immunity in Whistle-Blower Actions

In ***Shoemaker v. Myers*** *(1992) 2 Cal. App. 4th 1407, 4 Cal. Rptr. 2d 203* , plaintiff, a former investigator for a state department, sued the department, its director, and assorted management personnel. Plaintiff's complaint set forth a variety of counts based on his allegedly wrongful termination for his investigation and reporting of instances of illegal conduct tolerated by the department. One of plaintiff's counts alleged violation of *Gov. Code § 19683*, the whistle-blower statute. Defendants contended that the prosecution immunity of *Gov. Code § 821.6* applied, and that they were immune from liability. The trial court sustained defendants' demurrers and dismissed the case. Plaintiff appealed.

The court of appeal reversed the judgment insofar as it ordered dismissal of plaintiff's claim for violation of the whistle-blower statute, remanded for further proceedings, and otherwise affirmed. The court accepted the characterization of the whistle-blower claim as within the general rubric of malicious prosecution. Plaintiff argued that the whistle-blower statute must be considered an exception to *Gov. Code § 821.6* immunity. Defendants contended that all tort claims are expressly covered by the immunity statutes and policy considerations permit no exception for § 19683 (*2 Cal. App. 4th 1407, 1423)* . The court contrasted the application of the two statutes. Section 821.6 applies to claims against a public employee arising from the initiation or prosecution of judicial or administrative proceedings. *Gov. Code § 19683* applies when any state employee directly or indirectly uses or threatens to use any official authority or influence in any manner whatsoever which tends to discourage, restrain, interfere with, coerce or discriminate against

any other state employee because the latter has reported information relating to an actual or suspected violation of law. The court said the coverage of §§ 821.6 and 19683 overlaps when public employees are accused of using official authority to discourage, restrain, interfere with, coerce, and discriminate against another public employee by means of a judicial or administrative proceeding (*2 Cal. App. 4th 1407, 1423)* . The policy behind *Gov. Code § 821.6* is to encourage fearless performance of official duties. State employees should investigate and prosecute matters within their purview without fear of reprisal. Protection is provided even when official action is taken maliciously and without probable cause. The purpose underlying § 19683 is to provide redress to state employees for harm suffered by the use of official power to deter reporting of unlawful government activity. It is designed to encourage such reporting and thereby facilitate the detection or prosecution of official wrongdoing (*2 Cal. App. 4th 1407, 1424)* . Because the scope and purposes of § 19683 are narrower than those of § 821.6, the court said the former prevails when the two are in conflict. It continued by saying that to hold otherwise would reduce the protection afforded by § 19683 to situations where a public employee uses official authority to harm another public employee by means other than formal disciplinary proceedings, or where a nonpublic employee uses official authority to harm a public employee in any way. The court found that because it is far more likely the party violating § 19683 will be a public employee, granting § 821.6 immunity would immunize the most egregious conduct undertaken to discourage whistleblowing. The right of the injured party to civil damages for such conduct, as expressly guaranteed by § 19683, would be rendered illusory (*2 Cal. App. 4th 1407, 1424)* . The court concluded that recognition of § 821.6 immunity for cases falling within § 19683 would seriously weaken the whistle-blower statute and thereby frustrate the legislative purpose behind its enactment. Thus, violators of § 19683 are not entitled to § 821.6 immunity (*2 Cal. App. 4th 1407, 1424-1425)* .

Plaintiff also asserted a *Tameny* claim for wrongful termination in violation of public policy for investigating and reporting unlawful conduct and for invoking his right to counsel upon interrogation for misconduct. These claims were based on the public policies implicated by the whistle-blower statute and former Gov. Code § 3303(h) [*now see Gov. Code § 3303(i)*], which permits him, as a public safety officer, the right to counsel during interrogation for misconduct. The court concluded that nothing in those statutes suggests that the legislature intended that a claim for wrongful termination in violation of public policy against otherwise immune public employees could survive simply because, from among all of the sources ofpublic policy that might theoretically be implicated, the particular policies at issue arose from those particular statutes (*2 Cal. App. 4th 1407, 1425)* .

[4] Opposing Authorities

[a] Prosecution Immunity Only Applicable to Malicious Prosecution Action

In *County of Los Angeles v. Superior Court (2009) 181 Cal. App. 4th 218, 104 Cal. Rptr. 3d 230* , investigators in the district attorney's office began a criminal investigation into the real estate dealings of a county employee. In the course of the investigation, the chief investigator obtained a search warrant from a magistrate to search the residence and office of the suspect. The district attorney's office seized documents, computer hard drives and associated computer equipment, and passports. The seized materials were eventually returned, although some of the computers allegedly no longer functioned properly. The district attorney's office decided not to file charges, concluding that there was insufficient admissible evidence to prove criminal charges. The suspect sued the district attorney's office and others for civil rights violations under *Civ. Code § 52.1* and under the federal civil rights statute, *42 U.S.C. § 1983*. All defendants filed a motion for summary adjudication of those causes of action, which the trial court denied. Defendants sought writ relief of this decision, which the Court of Appeal granted. The Court of Appeal held that the district attorney and the county were immune under *Gov. Code § 821.6* from liability for obtaining and executing the search warrant, and searching, seizing, retaining, and even damaging plaintiffs' property. Even if members of the district attorney's office acted with malice or without probable cause, the conduct was causally connected to a criminal investigation and prosecution, and under those circumstances, prosecutorial immunity applied. The fact that the decision was eventually made not to file charges did not change this result (*181 Cal. App. 4th 218, 229-230)* . The court also held that immunity under *Gov. Code § 821.6* applied to a cause of action under *Civ. Code § 52.1* (*52 Cal. 3d 65, 72-73)* . As to the cause of action under the federal civil rights statute, the court held that the district attorney was a state actor and thus

immune to the same extent as the state would be under the *Eleventh Amendment* (*52 Cal. 3d 65, 75)* .

In *Gillan v. City of San Marino (2007) 147 Cal. App. 4th 1033, 55 Cal. Rptr. 3d 158* , plaintiff was a high school girls basketball coach who was accused of sexual touching and harassment by a former player. Police officers who had interviewed the accuser took plaintiff into custody, but released him shortly thereafter after issuing a detention notice and press release. Their stated purpose in detaining plaintiff was to publicize the accusations so that other victims would come forward, but no one did. The district attorney subsequently decided not to prosecute the case due to the lack of corroborating evidence. Plaintiff sued various parties, including the city and police officers, for civil rights violations under *Civ. Code § 52.1*, defamation, and intentional infliction of emotional distress. Plaintiff prevailed at trial on those causes of action and was awarded substantial damages. The court of appeal reversed in part. After reviewing the facts, including the accuser's inconsistent statements, the court held that the police lacked probable cause to arrest plaintiff and on that basis defendants could be held liable under *Civ. Code § 52.1* (*147 Cal. App. 4th 1033, 1044-1050)* . However, the court also held that the defendants could not be liable for defamation or intentional infliction of emotional distress. The press releases and other public statements made by the individual defendants were made in the course of and in furtherance of a criminal investigation. Therefore, regardless of whether those statements were reasonable or appropriate, or made maliciously as part of a groundless threat of criminal prosecution, the defendants were immune from liability pursuant to the prosecutorial immunity provided under *Gov. Code § 821.6*, which applied not just to malicious prosecution actions (*147 Cal. App. 4th 1033, 1048-1050)* .

In *Ross v. San Francisco Bay Area Rapid Transit Dist. (2007) 146 Cal. App. 4th 1507, 53 Cal. Rptr. 3d 715* , plaintiff sued his former employer, the San Francisco Bay Area Rapid Transit District (BART), for discrimination and wrongful termination in violation of public policy. He alleged that BART employees, fueled by discriminatory and retaliatory motives because of plaintiff's alleged participation in a work stoppage, initiated and prosecuted administrative proceedings to discipline or discharge him based on accusations they knew to be false. The court of appeal held that *Gov. Code § 821.6* shielded BART from liability for wrongful termination in violation of public policy. The court noted that, in the case of common law liability for wrongful termination in violation of public policy, a public entity could be liable only vicariously and would be immune if the employee is immune (*146 Cal. App. 4th 1507, 1514)* . The court concluded that plaintiff's claims, although not specifically claims for malicious prosecution, fell under the general rubric of that tort, and as such the immunity of *Gov. Code § 821.6* applied (*146 Cal. App. 4th 1507, 1516)* .

In *Javor v. Taggart (2002) 98 Cal. App. 4th 795, 120 Cal. Rptr. 2d 174* , the plaintiff was a general building contractor who brought suit against personnel of the California Uninsured Employer's Fund stemming from their conduct in placing an erroneous lien against the plaintiff's residence. The lien was placed after the Fund, which provided benefits to an injured worker totaling $37,000, determined that the worker was employed by the plaintiff, who did not provide workers' compensation benefits. After four years of unsuccessfully trying to get the lien removed, the plaintiff hired an attorney and eventually prevailed. The plaintiff then brought suit against personnel of the Fund, alleging a federal civil rights claim and state law causes of action for slander and clouding of title, intentional infliction of emotional distress, and negligence. However, the defendants successfully demurred to the state law claims on the ground that they were immune under *Gov. Code § 821.6*, and the court of appeal affirmed. The court noted that the immunity of *Gov. Code § 821.6* was not limited to only malicious prosecution actions, nor was it limited to conduct occurring during formal proceedings. Instead, the immunity may be extended to the employees of administrative departments, and it may be extended to investigation and other actions taken in preparation for formal proceedings (*98 Cal. App. 4th 795, 808)* . In this particular case, the defendants worked within the administrative system established to implement the Workers' Compensation Act, and they were charged with seeking reimbursement from illegally uninsured employers after the state has paid benefits. Therefore, the defendants, who made their decisions in the course of investigations and through formal administrative proceedings, were entitled to immunity under *Gov. Code § 821.6* so that they could carry out their duties without fear of reprisal (*98 Cal. App. 4th 795, 809)* .

In *Gensburg v. Miller (1994) 31 Cal. App. 4th 512, 37 Cal. Rptr. 2d 97* , plaintiffs, who operated a foster home out of their residence, brought a federal civil rights action against employees of the state Department of Social Services and

the County Department of Social Services based on the suspension of plaintiffs' foster home license. Plaintiffs alleged that defendants had a vendetta to drive plaintiffs out of the foster care business because of the plaintiffs' practice of accepting foster children from divergent racial and ethnic backgrounds. The trial court sustained a demurrer on the ground that the defendants were absolutely immune from civil liability. The court of appeal agreed with the trial court, initially noting that the defendants were protected by the immunity set forth in *Gov. Code § 821.6* against any state or common law causes of action (*31 Cal. App. 4th 512, 518)* . The court then looked to federal law to determine the scope of immunity of governmental officials from an action based on federal law. The court discussed a United States Supreme Court decision which has held thatprosecutors have absolute immunity from civil rights suits, and noted that this type of immunity has been extended by most federal courts to social workers performing their statutorily authorized functions. Reasoning that the defendants had done nothing but perform the very functions granted to them by state law, the court concluded that their actions were shielded by absolute immunity (*31 Cal. App. 4th 512, 525)* .

In *Alicia T. v. County of Los Angeles (1990) 222 Cal. App. 3d 869, 271 Cal. Rptr. 513* , the parents of a four-year-old girl sued the county for various torts after their daughter was removed from their custody and placed in a foster home for several months. A child-abuse investigation had been instigated when the attending medical personnel had discovered a vaginal infection that they believed was the result of molestation. A subsequent examination revealed that there had been no molestation. The court of appeal affirmed the dismissal of the action. The court held that both *Gov. Code § 821.6* and *Gov. Code § 820.2* (discretionary-act immunity) provided complete immunity for the social workers in their investigation of the abuse and the instigation of child dependency proceedings (*222 Cal. App. 3d 869, 882-883)* .

In *Jenkins v. County of Orange (1989) 212 Cal. App. 3d 278, 260 Cal. Rptr. 645* , a mother whose son had been removed from her custody based on reports of child abuse, brought suit against defendant county and its employee social worker after her son was returned to her, alleging negligence in the investigation of the reported child abuse. The trial court sustained defendants' demurrer and dismissed the action. The court of appeal affirmed, finding that the *Gov. Code § 821.6* immunity applied. The court said that *Gov. Code § 821.6* is not limited to suits for damages for malicious prosecution, although that is its principal use. It cited cases in which *Gov. Code § 821.6* has provided immunity to government officials who published charges of improper collection methods, and in which government officials published records of a disciplinary action against plaintiff (*212 Cal. App. 3d 278, 283)* . The court explained that it is for the best interests of the community as a whole that public officials be protected from harassment in the performance of the duty to investigate crime and to institute criminal proceedings. It found that defendant social worker was also immune for failing to consider all of the evidence and thereby misrepresenting information to the juvenile court, because weighing and presenting evidence are prosecutorial functions. As such, these acts are within the ambit of instituting or prosecuting any judicial or administrative proceeding. The court concluded that since the social worker is immune from liability, so was defendant county (*212 Cal. App. 3d 278, 284)* .

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19A-196 California Points & Authorities § 196.282

§ 196.282 Supporting Contention That Immunity From Liability for Act or Omission Does Not Apply--Immunity for Failure to Make to Physical or Mental Examination or for Inadequate Examination [Gov. Code § 855.6] Does Not Apply--Examination Made for Purpose of Treatment

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE IMMUNITY OF A PUBLIC ENTITY OR EMPLOYEE UNDER GOVERNMENT CODE SECTION 855.6 FOR FAILURE TO MAKE A PHYSICAL OR MEDICAL EXAMINATION, OR FOR FAILING TO MAKE AN ADEQUATE EXAMINATION, OF ANY PERSON DOES NOT APPLY TO THIS CASE BECAUSE THE EXAMINATION THAT DEFENDANT DID NOT [ADEQUATELY] CONDUCT WAS IN CONNECTION WITH DEFENDANT'S TREATMENT OF PLAINTIFF'S _____ [PHYSICAL *or* MENTAL] CONDITION.

Governmental Immunity for Failure to Conduct Physical or Mental Examination Does Not Apply to Examination for Treatment. The immunity in *Government Code Section 855.6* for failure to make a physical or mental examination, or for failure to make an adequate examination, does not apply to an examination or diagnosis made for purposes of treatment, regardless of whether the examination is of the person being treated or some other person (*Smith v. County of Kern (1993) 20 Cal. App. 4th 1826, 1833-1835, 25 Cal. Rptr. 2d 716*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that the immunity under *Gov. Code § 855.6* for failure to make a physical or mental examination, or for failure to make an adequate examination, does not apply because the physical or medical examination at issue pertained to the public entity's or employee's treatment of plaintiff's physical or mental condition. The immunity provided by *Gov. Code § 855.6* is discussed in *§ 196.09[16]*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which the substantive points are raised. For example, they may be combined with general points and authorities opposing a demurrer to plaintiff's complaint. They also may be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Governmental Immunity for Failure to Conduct Physical or Mental Examination Does Not Apply to Examination for Treatment

In ***Smith v. County of Kern*** *(1993) 20 Cal. App. 4th 1826, 25 Cal. Rptr. 2d 716* , a police officer, in discharge of his duties, had assisted a man ("Doe") who had attempted suicide and had stated that he had AIDS. In the course of assisting Doe, the officer became covered with Doe's blood. The officer requested that a county employee obtain an AIDS test from Doe. The county agreed to do so and obtained a blood sample from Doe, but the county employee inadvertently conducted the wrong type of test on the blood sample, discarded the rest of the blood sample, and then discharged Doe without determining his identity. Later, Doe was again located and a new blood sample was taken. The correct test showed that Doe was infected with the AIDS virus. The police officer sued the county for negligence based on the emotional distress suffered by him and his family during the period between the administration of the erroneous and the correct blood tests. The trial court sustained with prejudice the county's demurrer to the amended complaint and entered judgment on the demurrer.

The court of appeal reversed, initially noting that in evaluating whether a plaintiff may be able to state a cause of action, all allegations are taken as true even though their proof appears unlikely and accepts facts that may be implied or inferred from those expressly alleged (20 Cal. App. 4th 1826, 1830). The court construed the amended complaint to allege that in order to facilitate diagnosis and treatment of the plaintiff for possible exposure to the AIDS virus, the plaintiff requested that employees of the county's medical center obtain a blood sample from Doe and determine whether Doe suffered from AIDS. The county employees agreed to undertake the necessary testing in order to facilitate plaintiff's diagnosis and treatment and in furtherance of that agreement, obtained a blood sample but negligently tested the blood for hepatitis instead of AIDS and negligently discarded the remaining unused blood sample (20 Cal. App. 4th 1826, 1831-1832).

The county argued that it was immune from liability under *Gov. Code § 855.6*, which provides that, except for an examination or diagnosis for the purpose of treatment, a public entity is immune for injuries caused by the failure to make a physical examination, or to make an adequate physical or mental examination, of any person for the purpose of determining whether such person has a disease or medical condition that would constitute a health or safety hazard (*20 Cal. App. 4th 1826, 1832-1833* & n.6). The crucial question in this case was whether the AIDS test of Doe's blood was "an examination or diagnosis for the purpose of treatment" within the meaning of the statute (*20 Cal. App. 4th 1826, 1833)* . The court noted that this section would clearly not provide immunity if defendant's laboratory had undertaken to test the plaintiff's blood for AIDS in order to assist in the diagnosis of whether he had contracted the disease (*20 Cal. App. 4th 1826, 1834)* . The court then concluded that the source of the material examined was not determinative of the applicability of that section, but rather, the question was whether the public employee's actions were taken to facilitate the delivery of medical diagnosis or care to the individual who was injured by the employee's actions. It found that the facts in the amended complaint permitted a reasonable inference that the county's laboratory undertook to perform a test on the Doe's blood for the purpose of assisting the plaintiff's physician in examining or diagnosing his exposure to AIDS. The court stated that plaintiff was entitled to amend the complaint to expressly allege a negligence cause of action based on those facts (*20 Cal. App. 4th 1826, 1834-1835)* .

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19A-196 California Points & Authorities § 196.283

§ 196.283 Supporting Contention that Immunity From Liability for Act or Omission Does Not Apply--Immunity Under Emergency Services Act [Gov. Code § 8655] Does Not Apply to Intentional Misrepresentations Related to Physical Safety

[1] FORM

[*The following may be included in a memorandum or points and authorities, or in a trial or appellate brief.*]

IMMUNITY UNDER THE EMERGENCY SERVICES ACT, GOVERNMENT CODE SECTION 8655, DOES NOT APPLY IN THIS CASE BECAUSE DEFENDANT INTENTIONALLY CONCEALED A KNOWN DANGER WHICH CAUSED PERSONAL INJURIES TO PLAINTIFFS.

A. Immunity Under Emergency Services Act. The state or its political subdivisions are not liable for any claim based upon the exercise or performance, or the failure to exercise or perform, a discretionary function or duty on the part of a state or local agency or any employee of the state or its political subdivisions in carrying out the emergency services provisions (*Gov. Code § 8655*).

B. No Emergency Services Act Immunity for Intentional Concealment of Known Dangers Which Cause Personal Injuries. The state is not immune from liability under the Emergency Services Act, *Gov. Code § 8655*, for the intentional concealment of known dangers which cause personal injuries (*Adkins v. State of California (1996) 50 Cal. App. 4th 1802, 1806, 59 Cal. Rptr. 2d 59*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of the contention that the immunity of *Gov. Code § 8655* is not applicable because thestate intentionally concealed known dangers which caused personal injuries.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be combined with general points and authorities opposing a nonsuit [*see, e.g., Adkins v. State of California (1996) 50 Cal. App. 4th 1802, 1805, 59 Cal. Rptr. 2d 59]* . These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence of intentional concealment of known dangers on the part of the state which caused personal injuries, and should argue that the grant of immunity under the Emergency Services Act does not cover these actions [*see Adkins v. State of California (1996) 50 Cal. App. 4th 1802, 1806, 59 Cal. Rptr. 2d 59]* .

[c] Related Pleading and Practice Forms

For forms and discussion relating to the immunity of public entities, see California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Tort Claims Act* (Matthew Bender).

[d] Related Points and Authorities

For memoranda of points and authorities relating to the liability of public entities for injury caused by the entities use of pesticide, see *§ 196.186*.

[3] Discussion of Authorities

[a] No Emergency Services Act Immunity for Intentional Concealment of Known Dangers Which Cause Personal Injuries

Adkins v. State of California *(1996) 50 Cal. App. 4th 1802, 59 Cal. Rptr. 2d 59* , arose out of the Mediterranean fruit fly (Medfly) eradication program of 1989. Plaintiffs were hired by the state to hang Medfly traps and became ill after handling the chemical used in the traps. Plaintiffs' supervisors knowingly lied to them about the effect of the chemical, told plaintiffs the chemical was completely safe, and refused to allow them to wear protective clothing. Plaintiffs sued the state for the physical injuries they incurred as a result of exposure to the chemical. The trial court granted a nonsuit in favor of defendant at the conclusion of plaintiff's opening statement and entered judgment finding the state immune from liability under the Emergency Services Act, *Gov. Code §§ 8550 et seq.*

The court of appeal reversed, concluding that the state was not immune from liability under the Emergency Services Act for intentional concealment of known dangers which cause personal injuries. The court acknowledged that in prosecuting the Medfly eradication program the state was acting pursuant to its authority under the Emergency Services Act, and that the Act provided the state and its political subdivisions immunity from liability for any claim based upon the exercise or performance, or the failure to exercise or perform, a discretionary function or duty on the part of the state or local agency in carrying out the provisions of the Act. The court noted that as part of an eradication program, the state was obligated by *Food & Agric. Code §§ 5029, 5771 et seq.* to comply with a number of strict notification requirements, and acknowledged that states were immune from civil actions stemming from the administration of the notice requirements if the director or commissioner used his or her best efforts to comply with the requirements. The court also noted the recent decision of *Macias v. State of California (1995) 10 Cal. 4th 844, 42 Cal. Rptr. 2d 592* , which requires the state to convey the most complete and accurate health information practicable to affected citizens. The court then rejected the state's argument that *Gov. Code §§ 8550 et seq.* immunized it because the acts were discretionary. The court felt that this approach failed to recognize the state's mandatory obligation to provide complete and accurate information, and failed to recognize that the exercise of the state's police powers must be reasonable and proper under the circumstances. Thus, while the state had the discretion to formulate the eradication program and had the discretion to carry out that function, the state had no discretion not to use its best efforts to accurately notify its

citizens of health and safety precautions to be taken. The court concluded that intentionally misrepresenting the toxic nature of a chemical used in the eradication program could not possibly be considered best efforts to comply with the strict notice requirements or to comply with the obligation to provide complete and accurate information relating to health and safety (*50 Cal. App. 4th 1802, 1816)* .

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California Points & Authorities

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Volume 19A Chapters 196-199 PUBLIC ENTITIES---to---QUO WARRANTO
CHAPTER 196 PUBLIC ENTITIES
PART II. FORMS
D. IMMUNITY OF PUBLIC ENTITY OR EMPLOYEE FROM LIABILITY
1. Immunity From Liability for Acts or Omissions

19A-196 California Points & Authorities §§ 196.284-196.299

[Reserved]

§§ 196.284[Reserved]

California Points & Authorities

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Volume 19A Chapters 196-199 PUBLIC ENTITIES---to---QUO WARRANTO
CHAPTER 196 PUBLIC ENTITIES
PART II. FORMS
D. IMMUNITY OF PUBLIC ENTITY OR EMPLOYEE FROM LIABILITY
PART 2. Immunity From Liability For Dangerous Condition of Public Property

19A-196 California Points & Authorities § 196.300

§ 196.300 Supporting Contention That Immunity From Liability for Dangerous Condition of Public Property Does Not Apply--Design Immunity [Gov. Code § 830.6] Does Not Apply--General Form

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE DESIGN IMMUNITY UNDER SECTION 830.6 OF THE GOVERNMENT CODE DOES NOT APPLY BECAUSE ITS REQUIRED ELEMENTS HAVE NOT BEEN SHOWN TO EXIST.

A. Required Elements of Design Immunity. To rely on the design immunity of *Section 830.6 of the Government Code*, the defendant public entity or public employee has the burden of proving: that there was a causal relationship between the plan and the accident, that there was discretionary approval of the plan prior to construction, and that there was substantial evidence supporting the reasonableness of the design (*Anderson v. City of Thousand Oaks (1976) 65 Cal. App. 3d 82, 88-89, 135 Cal. Rptr. 127* ; *De La Rosa v. City of San Bernardino (1971) 16 Cal. App. 3d 739, 748, 94 Cal. Rptr. 175*).

[*Optional*] **B. Feature That Caused Accident Is Not Part of Approved Design.** The design immunity applies only to those features included in the design approved by the public entity, and does not apply to features that, although part of the completed project, were not part of the approved design plan (*Cameron v. State of California (1972) 7 Cal. 3d 318, 324-326, 102 Cal. Rptr. 305, 497 P.2d 777*).

[*Optional*] **C. Adoption of Unreasonable Design.** The design immunity does not apply when the design of the facility is unreasonable because it is hazardous and presents a high risk of injury, and the cost of providing safeguards is relatively small (*Davis v. Cordova Recreation & Park Dist. (1972) 24 Cal. App. 3d 789, 796-800, 101 Cal. Rptr. 358*).

[*Optional*] **D. Injury Is Not Caused by Design.** The design immunity does not apply to negligence independent of

design, even though the independent negligence is only a concurring proximate cause of the injury; thus, it provides no immunity when the injury was not caused by a feature of the design (*Mozzetti v. City of Brisbane (1977) 67 Cal. App. 3d 565, 574-575, 136 Cal. Rptr. 751* ; *Flournoy v. State of California (1969) 275 Cal. App. 2d 806, 812-813, 80 Cal. Rptr. 485*).

[*Optional*] **E. Immunity Is Not Applicable When Changed Circumstances Create Dangerous Condition.** The design immunity does not apply when a plan or design, although originally approved, is operating under changed circumstances and produces a dangerous condition of public property, thereby causing injury (*Baldwin v. State of California (1972) 6 Cal. 3d 424, 438, 99 Cal. Rptr. 145, 491 P.2d 1121*).

[*Optional*] **F. "Trap" Exception to Design Immunity Is Applicable.** The design immunity does not apply if a sign is necessary to warn of a dangerous condition that would not be reasonably apparent to, and would not have been anticipated by, a person using a highway with due care, and the public entity fails to post adequate warning signs, thereby creating a trap to the motorist (*Cameron v. State of California (1972) 7 Cal. 3d 318, 327, 102 Cal. Rptr. 305, 497 P.2d 777* ; *Anderson v. City of Thousand Oaks (1976) 65 Cal. App. 3d 82, 93, 135 Cal. Rptr. 127* ; *see Gov. Code § 830.8*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the design immunity of *Gov. Code § 830.6* is not applicable to immunize the defendant public entity from liability for dangerous conditions of public property [*Gov. Code § 835*] because the defendant did not establish the elements required for application of the design immunity. The immunity provided by *Gov. Code § 830.6* is discussed in *§ 196.12[1]*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be combined with general points and authorities opposing a motion for nonsuit [*see, e.g., Cameron v. State of California (1972) 7 Cal. 3d 318, 321, 102 Cal. Rptr. 305, 497 P.2d 777]* . They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Required Elements of Design Immunity

In ***Anderson v. City of Thousand Oaks*** *(1976) 65 Cal. App. 3d 82, 135 Cal. Rptr. 127* , plaintiffs' son was killed when a car in which he was a passenger failed to negotiate a curve of a road designed, constructed, and maintained by defendant city. Plaintiffs sued defendant for wrongful death alleging it was negligent in the maintenance of the road in a dangerous condition, in the failure to provide speed or warning signs, and defendant had notice of the dangerous condition. Defendant's motion for a summary judgment based on the design immunity was granted by the trial court. Plaintiffs appealed.

The court of appeal reversed with directions to vacate the order granting a summary judgment (*65 Cal. App. 3d 82, 93)* . It held that three basic elements must be established for a public entity successfully to invoke the design immunity: first, a causal relationship between the plan and the accident; second, discretionary approval of the plan prior to construction; and third, substantial evidence supporting the reasonableness of the design (*65 Cal. App. 3d 82, 88-89)* . The court then found that defendant had established all these elements by its affidavits and was thus protected by the design immunity. The court found, however, that there was an independent basis of liability for failure to warn of a

known dangerous condition and that there were factual issues concerning defendant's notice of the condition. Therefore, a summary judgment was inappropriate (*65 Cal. App. 3d 82, 91-93)* .

The facts and procedural background of ***De La Rosa v. City of San Bernardino*** *(1971) 16 Cal. App. 3d 739, 94 Cal. Rptr. 175* , are discussed in *§ 196.213[3][a]*. In reversing the trial court's judgment entered on defendant's motion for directed verdict, the court discussed the elements of design immunity. It said that a successful defense of design immunity depends on the entity's establishing a causal relationship between the design and the accident and establishing the design's approval in advance of construction, and a court must find substantial evidence of the design's reasonableness. The court then held that defendant could not rely on the design immunity because it had not established that the installation or position of the stop sign in question was a part of the approved design (*16 Cal. App. 3d 739, 748)* .

[b] Feature That Caused Accident Is Not Part of Approved Design

In ***Cameron v. State of California*** *(1972) 7 Cal. 3d 318, 102 Cal. Rptr. 305, 497 P.2d 777* , plaintiff was injured when the car in which she was a passenger went out of control rounding a curve. Plaintiff sued defendant state for damages for the personal injuries she sustained, alleging that the improper banking of the curve caused the accident. The trial court entered a judgment of nonsuit based on the design immunity. Plaintiff appealed.

The Supreme Court reversed. The Court said defendant presented facts sufficient to establish the initial applicability of a design immunity under *Gov. Code § 830.6*, but then plaintiff introduced evidence to show that the design plans contained no specification of superelevation, and that it was the superelevation that caused the accident. The Court concluded that defendant's failure to present evidence that the superelevation that was actually constructed on the curve was the result of or conformed to a design approved by the public entity vested with discretionary authority was fatal to its claim of immunity. It thus held that the design immunity was not applicable (*7 Cal. 3d 318, 326)* .

[c] Adoption of Unreasonable Design

In ***Davis v. Cordova Recreation & Park Dist.*** *(1972) 24 Cal. App. 3d 789, 101 Cal. Rptr. 358* , plaintiffs' son drowned in a pond in a public park. Although most of the pond was very shallow, there was a deeper portion with steep sides in the middle of the pond. The child's drowning apparently was the result of his falling into the deeper portion. Plaintiffs sued defendant, the public entity operating the park, for damages for their son's death alleging two negligence causes of action. Although it denied defendant's motions for nonsuit, the trial court ultimately directed judgment for defendant on the basis of design immunity. Plaintiffs appealed.

The court of appeal reversed. It reviewed the facts, noting that the park was located in a neighborhood with many small children who frequented the park and its facilities. The pond was located in the center of sloping lawn area, with an area of flat cement around its perimeter. The pond had several purposes: decoration, drainage during the rainy season, and fishing for young children. The court was unpersuaded by defendant's contention that the design immunity applied because the design was obviously aesthetic rather than for wading or swimming purposes. It said that *Gov. Code § 830.6* required measurement of the facility by the standard of reasonableness. Thus, the court had to look, not only to the plan, but to the practice, and not only to the artistic and architectural conception on the drawing board, but to the facility in being and in reality. The court said that neither it, nor the planners, could ignore the attraction that children feel for water when considering the reasonableness of the design of a pond located in a park heavily used by children. Moreover, the court found the immunity could not be supported by an argument that to erect fences or post signs would do artistic violence to the general scheme (*24 Cal. App. 3d 789, 799)* . Citing *Gov. Code § 835.4*, the court said that the determination of reasonableness also involved a weighing of the probability and gravity of potential injury to persons and property foreseeably exposed tothe risk of injury against the practicability and cost of taking alternative action. It concluded that in this case the risk of injury was relatively great and the cost of protection relatively small (*24 Cal. App. 3d 789, 800)* .

[d] Injury Is Not Caused by Design

In ***Mozzetti v. City of Brisbane*** *(1977) 67 Cal. App. 3d 565, 136 Cal. Rptr. 751* , plaintiffs' property was damaged by flooding allegedly caused by the resurfacing of a street and construction of a new sidewalk. Plaintiffs sued defendants city and city engineer for damages on several negligent causes of action. The trial court entered judgment in favor of plaintiffs after a jury verdict in their favor. Defendants appealed.

The court of appeal affirmed the judgment of liability but reversed for retrial the issue of damages. The court said that the design immunity defense rests on the combination of three statutory elements: the approval of design in advance of construction by a legislative body or officer exercising discretionary authority, a court finding of substantial evidence of the design's reasonableness, and a causal relationship between the plan or design and the accident. The court said that the defendant public entity has the burden of pleading and proving the defense of design immunity and each of its essential elements. Failure to prove any element is fatal to the applicability of that defense (*67 Cal. App. 3d 565, 574)* . The court found that the evidence negating the requisite causal relationship between the design defect and the flooding was overwhelming. The inundation of plaintiffs' premises and damages resulting therefrom were not attributable solely to the design defect of the project, but were caused, at least partially, by the poor maintenance and clogging of the drainage system. The court said that by its very terms the design immunity is limited to a design-caused accident. It does not immunize against liability caused by negligence independent of design, even though independent negligence is only a concurring proximate cause of the accident (*67 Cal. App. 3d 565, 575)* .

Flournoy v. State of California *(1969) 275 Cal. App. 2d 806, 80 Cal. Rptr. 485* , was a wrongful death action in which the decedent was killed when her car skidded on an icy bridge and was struck by a truck and a trailer. There were no warning signs indicating the icy condition or the necessity for a reduction in driving speed. The trial court granted a summary judgment based on the design immunity. Plaintiff appealed.

The court of appeal reversed. Defendant argued that the design immunity prevailed over any liability for a dangerous condition of public property. The court disagreed, saying that the design immunity is limited to a design-caused accident. It does not immunize from liability caused by negligence independent of design, even though the independent negligence is only a concurring, proximate cause of the accident (*275 Cal. App. 2d 806, 811)* . The court said that *Gov. Code § 830.6* protects the public from liability for reasonably conceived design choices made in the exercise of discretionary authority. The ice on the bridge was a consequence of the bridge's physical surroundings, not of a design choice. The court found that defendant failed to establish the bridge's plan or design as a proximate cause of the accident (*275 Cal. App. 2d 806, 812)* , and concluded that the design immunity was not an available defense (*275 Cal. App. 2d 806, 813)* .

[e] Immunity Is Not Applicable When Changed Circumstances Create Dangerous Condition

In ***Baldwin v. State of California*** *(1972) 6 Cal. 3d 424, 99 Cal. Rptr. 145, 491 P.2d 1121* , plaintiff was injured when his vehicle was struck from behind while waiting to make a left turn from a heavily travelled highway at an intersection without a left-turn lane. Plain tiff sued the state, alleging that the intersection had become hazardous as a result of the large increase of traffic. The trial court granted summary judgment in favor of defendant on the basis of the design immunity. Plaintiff appealed.

The Supreme Court reversed. It held that when a plan or design of construction of, or improvement to, public property, although shown to have been reasonably approved in advance or prepared in conformity with standards previously so approved, as being safe, nevertheless in its actual operation under changed physical conditions produces a dangerous condition of public property and causes injury, the public entity does not retain the immunity from liability conferred on it by *Gov. Code § 830.6* (*6 Cal. 3d 424, 438)* . The Court said that design immunity persists only so long as conditions have not changed. After it has approved a plan or design, the public entity may not hide its head in the blueprints, blithely ignoring the actual operation of the plan. Once the public entity has notice that the plan or design, under

changed physical conditions, has produced a dangerous condition of public property, it must act reasonably to correct or alleviate the hazard. That notice may be actual or constructive, and must be a sufficient time prior to the injury to have permitted the public entity to take measures to protect against the danger (*6 Cal. 3d 424, 434)* .

[f] "Trap" Exception to Design Immunity Is Applicable

The facts and procedural background of ***Cameron v. State of California*** *(1972) 7 Cal. 3d 318, 102 Cal. Rptr. 305, 497 P.2d 777* , are discussed in *§ 196.300[3][b]*. The Supreme Court reversed a judgment of nonsuit in favor of plaintiff. The Court said *Gov. Code § 830.8* provides that a public entity may be liable for failure to provide warning signs if a sign was necessary to warn of a dangerous condition which would not be reasonably apparent to, and would not have been anticipated by, a person using the highway with due care. It found that the evidence introduced by plaintiffs showing: that a driver entering the curve at a lawful speed and exercising due care would be unable to perceive the uneven superelevation; that thisuneven superelevation would trap the driver into thinking the curve would continue to the left, while it in fact continued to the right; that the driver, too late to remedy the situation, would discover himself or herself going too fast, the weight of the car shifting and perhaps rolling over; and that warning signs, indicating the proper speed to negotiate the curve, if obeyed by the driver, would eliminate the dangerousness from the condition of uneven superelevation, was sufficient to find the state was negligent in failing to warn of the dangerous condition (*7 Cal. 3d 318, 327)* .

The facts and procedural background of ***Anderson v. City of Thousand Oaks*** *(1976) 65 Cal. App. 3d 82, 135 Cal. Rptr. 127* , are discussed in *§ 196.300[3][a]*. The court of appeal reversed the summary judgment granted by the trial court in favor of defendant. Plaintiffs alleged that defendant was negligent in its failure to warn motorists adequately of the curve, because although the posted speed limit was 65 miles per hour, the design speed of the curve was 45 miles per hour, and defendant posted no warning signs of the curve. In response to that allegation, the court addressed the sign placement immunity granted by *Gov. Code §§ 830.4* and *830.8*. It said that the broad discretion allowed a public entity in the placement of road control signs is limited by the requirement that there be adequate warning of dangerous conditions not reasonably apparent to motorists. Thus, a public entity is not shielded from liability for maintenance of a dangerous condition in its property, if it fails to post signs in circumstances constituting a trap to the motorist. The court found that plaintiffs' averments regarding the speed parameters of the curve in the road illustrated the type of trap contemplated. Without any warnings prior to the curve, even a cautious driver might well commit himself or herself to the curve at a speed 10 miles per hour in excess of the maximum safe speed, but still within the posted speed limit, posing the grave danger of either losing control of the automobile or of leaving the roadway (*65 Cal. App. 3d 82, 93)* .

[4] Additional Authorities

[a] Required Elements of Design Immunity

In *Levin v. State of California (1983) 146 Cal. App. 3d 410, 194 Cal. Rptr. 223* , plaintiffs brought a wrongful death action against the state after decedent was killed when her automobile went over an embankment after a head-on collision with another automobile. Plaintiffs alleged that defendant was liable under *Gov. Code § 835* for a dangerous condition of public property because the road lacked guardrails or a median barrier. The court of appeal reversed the summary judgment issued by the trial court on the basis of the design immunity. The court noted that the elements of the design immunity defense are: (1) a causal relationship between the design and the accident; (2) approval of the design in advance of the construction by an officer exercising discretionary authority; and (3) substantial evidence of the reasonableness of the design. The court found that although a causal relationship had been established, defendant failed to establish the second and third elements of the defense (*146 Cal. App. 3d 410, 415-418)* .

The facts and procedural background of *Mozzetti v. City of Brisbane (1977) 67 Cal. App. 3d 565, 136 Cal. Rptr. 751* , are discussed in *§ 196.300[3][d]*. The court of appeal explained that the defendant public entity has the burden of pleading and proving the defense of design immunity and each of its essential elements, and that failure to prove any

enumerated ingredient is fatal to the applicability of that defense (*67 Cal. App. 3d 565, 574)* . The court then found that the evidence fell short of showing that the plan or design of the project was approved in advance of construction by the city council or an authorized officer. It observed that although there was testimony that the project was approved by the city council, the evidence was uncontradicted that the one-page surface drawing so approved did not show the requisite details of the road design; there were several changes during the construction that materially affected plaintiffs' property; and there was no satisfactory evidence that the changes were approved by either the city council or a public employee possessing that discretionary authority (*67 Cal. App. 3d 565, 574)* .

[b] Feature That Caused Accident Is Not Part of Approved Design

Johnston v. Yolo County (1969) 274 Cal. App. 2d 46, 79 Cal. Rptr. 33 , involved an accident allegedly caused by the design of two sharp curves in a road. Plaintiff brought a personal injury action against defendant county. The trial court entered judgment for plaintiff after a jury verdict in his favor. The court of appeal affirmed (*274 Cal. App. 2d 46, 61)* . It held that the design immunity did not apply to immunize defendant from liability because the evidence showed that the county engineer did not approve the design of the curve. He actually disapproved the design but was required to order the construction because the board of supervisors would not finance a proper design (*274 Cal. App. 2d 46, 52-54)* .

[c] Adoption of Unreasonable Design

In *Morfin v. State of California (1993) 12 Cal. App. 4th 812, 15 Cal. Rptr. 2d 861* , persons who were injured while inside a DMV building, by a vehicle that crashed into the building, brought an action against the state alleging unsafe design of the building. The defendant raised the defense of design immunity under *Gov. Code § 830.6*, and the plaintiffs sought discovery of information regarding prior vehicle collisions with not only that particular building, but also other DMV buildings within the previous ten years, on the ground that the evidence would tend to show that the state was on notice of an unusually high risk of that type of accident at DMV facilities, and therefore was not entitled to immunity. The trial court denied discoverywith respect to accidents at other DMV locations, and judgment was entered for defendant. The court of appeal reversed, holding that evidence relating to other DMV buildings was relevant with respect to whether the state had knowledge of the unusual risk associated with DMV parking lots vis-a-vis danger to adjacent buildings (*12 Cal. App. 4th 812, 816-817)* .

[d] "Trap" Exception to Design Immunity Is Applicable

In *Bunker v. City of Glendale (1980) 111 Cal. App. 3d 325, 168 Cal. Rptr. 565* , while riding his motorcycle up a steep hill, plaintiff collided with a woman backing out of a driveway. Plaintiff brought an action for personal injuries and property damages against defendant city, alleging that he was unable to see the woman in sufficient time to stop and avoid the collision, and that defendant failed to provide adequate warning of the dangerous condition. The trial court denied defendant's motion for summary judgment, and entered judgment in favor of plaintiff on the basis of the jury's special verdict. The court of appeal affirmed. The court explained that although *Gov. Code § 830.4* provides that the absence of traffic control signals or signs does not in itself make a condition a dangerous one, *Gov. Code § 830.8* provides that when a dangerous condition exists which would not be reasonably apparent to, or anticipated by, a person exercising due care, and a sign is necessary to warn of the condition, the public entity's failure to provide such a sign may provide a basis for imposition of liability against the public entity. It said that the sign warning oncoming traffic to slow to 15 miles per hour was sited three intersections away from, and approximately 500 feet below, the crest of the hill. The court said there was evidence that motorists could not tell whether the warning applied to the intersections or to the grade of the hill. It held that the jury's conclusion that defendant failed to warn motorists about a dangerous condition was supported by substantial evidence (*111 Cal. App. 3d 325, 328-329)* .

[5] Opposing Authorities

[a] Required Elements of Design Immunity

In *Laabs v. City of Victorville (2008) 163 Cal. App. 4th 1242, 78 Cal. Rptr. 3d 372* , plaintiff was injured while she was a passenger in a northbound car that collided with another car that was attempting a left turn onto the southbound lane of the same street. Because of the particular history of that street, the northbound lane was the property of the county, while the southbound lane was the property of the city. Plaintiff sued both entities, alleging that the curvature of the road created a dangerous condition of public property in that there was insufficient visibility leading up to the intersection. The trial court granted the city's motion for summary judgment, and the court of appeal affirmed. Because the driver of the other car was trying to reach city property when the accident occurred, the court first concluded that there were triable issues as to whether the city could be liable for a collision that occurred on the county's adjacent property (*163 Cal. App. 4th 1242, 1262)* . However, the court then held that the city was nonetheless immune from liability under the design immunity of *Gov. Code § 830.6*. The court concluded that the evidence on summary judgment was sufficient to show a causal relationship between the curvature of the road and adequacy of stopping sight distance, as well as discretionary approval of the road design plans prior to construction. As to the third element of the defense, substantial evidence to support the reasonableness of the design, the court concluded that while the city's own evidence was insufficient to meet its burden of proof, the evidence submitted by the plaintiff in opposition to the motion for summary judgment provided sufficient evidence. Plaintiff's evidence included a declaration, originally submitted by the county, giving the opinion of a civil traffic engineer that the design of the road was not only reasonable, but excellent, and that there was no defect in the design or operation of the road. The court concluded that this declaration implicitly supported the conclusion that the design was reasonable (*163 Cal. App. 4th 1242, 1263-1267)* .

In *Fuller v. Department of Transp. (2001) 89 Cal. App. 4th 1109, 107 Cal. Rptr. 2d 823* , the plaintiffs brought a wrongful death action against the State Department of Transportation following the death of family members in an automobile accident. The plaintiffs alleged a dangerous condition of public property, arguing that the posted 55-miles-per-hour speed limit was too fast for the curved highway condition at the scene of the accident. The trial court granted nonsuit in favor of the defendant, and the court of appeal affirmed. The court of appeal held that the defendant was entitled to assert design immunity in a suit alleging that injury was caused by setting a roadway speed limit too high, if that speed limit was set in accordance with some plan and discretionarily adopted by an employee with the authority to do so (*89 Cal. App. 4th 1109, 1115)* . The court rejected the plaintiffs' argument that design immunity should not apply because the setting of a speed limit has nothing to do with the construction of, or improvements to, public property. Instead, the court concluded that roadway construction was an improvement to public property, that "design speed," such as the safe speed at which a curve may be negotiated, was an inherent part of roadway design, and that speed regulations are part and parcel of the safety features of a road improvement (*89 Cal. App. 4th 1109, 1114-1115)* . The court also held that in this case the speed plan approved by the defendant's traffic engineer took into account the relevant statutory and engineering considerations and was therefore reasonable (*89 Cal. App. 4th 1109, 1118)* .

In *Uyeno v. State of California (1991) 234 Cal. App. 3d 1371, 286 Cal. Rptr. 328* , plaintiffs, parents of a young boy killed when struck by a car in an intersection, sued the state, alleging the death was the result of an improperly timed traffic signal at the intersection. The court of appeal affirmed the trial court dismissal based on the design immunity. Plaintiffs argued that the design immunity defense was improper because there was no prior approval of the timing sequence and because it was not approved by anyone other than the signal operator. The court explained that the timing sequence of traffic lights requires some observance in operation and does not readily lend itself to a full pre-implementation determination. Although preliminary plans are formulated in accordance with basic guidelines, it is not until the timing sequence has been set and observed that it can be finally approved. Accordingly, the authority for designating and implementing timing systems has been delegated to employees who are experts within the field. The court found this type of approval to constitute the prior discretionary approval as contemplated by § 830.6 (*234 Cal. App. 3d 1371, 1378-1379)* . The court also said that although it may be prudent in many instances to have a third person approve a design for an improvement, such review is not always necessary, or compelled by law. Section 830.6 requires only that the project be approved by an employee exercising discretionary authority to give such approval. There is no requirement that the approving employee be someone other than the person who prepares the plan or design (*234 Cal.*

App. 3d 1371, 1380) .

In *Compton v. City of Santee (1993) 12 Cal. App. 4th 591, 15 Cal. Rptr. 2d 660* , a motorist brought an action against a city seeking damages arising from a traffic accident, and alleging that the placement of a bridge constituted a dangerous condition of public property. The trial court granted summary judgment for defendant based on immunity under *Gov. Code § 830.6*. The court of appeal affirmed, holding, inter alia, that under the facts a substantial basis existed on which a governmental official could have decided that the design was reasonable. The court noted that the design was supervised by the county engineer, and that the design metor exceeded the state and county standards in effect at the time it was approved, and still met or exceeded the present sight line recommendations promulgated by the state Department of Transportation and American Association of State Highway and Transportation Officials (*12 Cal. App. 4th 591, 597)* .

[b] Adoption of Unreasonable Design

In *Hefner v. County of Sacramento (1988) 197 Cal. App. 3d 1007, 243 Cal. Rptr. 291* , after plaintiff was injured in an automobile accident in which she was struck broadside by a car at an intersection, she sued defendant county alleging the defective design of the intersection at which the accident occurred constituted a dangerous condition of property that caused the collision. A stop sign and a limit line were placed 38 feet and 13 feet south of the edge of the pavement of the cross street, respectively. Plaintiff alleged that she had stopped her vehicle at the limit line, but her view of the cross street was obscured, and that as she pulled beyond the limit line she was hit by a driver approaching on the cross street who believed she was pulling out in front of him and therefore swerved his car to avoid what he thought would be a collision. In fact, plaintiff's car was stopped and the intended evasive maneuver actually directed the other car straight into plaintiff's. The trial court granted defendant's motion for summary judgment on the ground it was immune from liability arising out of the defective design of improvements to public property provided by *Gov. Code § 830.6*.

The court of appeal affirmed, concluding that there was substantial evidence on the basis of which a reasonable public employee could have adopted the design (*197 Cal. App. 3d 1007, 1010)* . The court said a public entity is entitled to a defense of design immunity if there is any substantial evidence on which the approval can be reasonably based, and it is error to submit a design defense to a jury. In determining whether evidence before the trial court is substantial, the question is whether the evidence "reasonably inspires confidence" and is of "solid value." The court said that since there was no dispute that the injury was caused by the design and that the design was approved by an employee exercising discretionary authority, he issue was whether there was any substantial evidence on the basis of which a reasonable public employee could have adopted the design. Defendant failed to disprove plaintiff's allegations that the vision and visibility of those stopped at the limit line were totally obscured by a mound of vegetation and dirt. The court thus assumed that a driver stopped at the limit line could neither see nor be seen by drivers approaching on the cross street. County engineers, however, testified that the placement of the limit line met all national and state standards for design and safety, and that it met reasonable and safe engineering practices. Plaintiff's engineer testified that the manual pertaining to traffic control devices required different placement of the limit line (*197 Cal. App. 3d 1007, 1014-1015)* .

The court noted that ordinarily, the opinion of a civil engineer regarding the reasonableness of design constitutes any substantial evidence sufficient to support a design immunity defense, but courts have rejected expert testimony ostensibly supporting design immunity when the testimony has been flawed sufficiently to destroy its substantiality (*197 Cal. App. 3d 1007, 1015)* . The court found that the trial court was entitled to disregard the testimony of plaintiff's expert, since no language in the manual pertaining to traffic control devices supported his testimony (*197 Cal. App. 3d 1007, 1015-1016)* . The court concluded that the placement of the limit line satisfied all established design criteria and safe engineering practices, and that the testimony of the county engineers constituted substantial evidence sufficient to justify placement of the line, and defendant was entitled to design immunity (*197 Cal. App. 3d 1007, 1017)* .

[c] Injury Is Not Caused by Design

In *Bay Area Rapid Transit Dist. v. Superior Court (1996) 46 Cal. App. 4th 476, 53 Cal. Rptr. 2d 906* , plaintiff brought an action against the defendant, a transit district, for negligent maintenance based on injuries she received after a train she was riding jerked back and forth. The defendant moved for summary judgment on the basis of the statutory design immunity of *Gov. Code § 830.6*, introducing evidence of a design which may cause lurching during acceleration. In opposition, plaintiff offered an expert declaration stating that there had been a failure of one of the elements of the system, and that this could be caused by negligent maintenance or supervision. The defendant replied with the undisputed fact that the car in question had received preventive maintenance six days before the accident. The trial court denied the defendant's motion, and the defendant sought a writ of mandate. The court of appeal found that the defendant had demonstrated that the accident was caused by the design of the train, because the acceleration system could cause lurching, and held that the declaration by plaintiff's expert failed to raise a triable issue of fact that something other than the acceleration design produced the lurching that caused the accident (*46 Cal. App. 4th 476, 481-482)* . The court thus directed the trial court to enter a new order granting the defendant's motion for summary judgment.

[d] Immunity Is Not Applicable When Changed Circumstances Create Dangerous Condition

In *Alvis v. County of Ventura (2009) 178 Cal. App. 4th 536, 100 Cal. Rptr. 3d 494* , plaintiffs brought suit against a county after a large landslide killed 10 people and destroyed 16 homes. Plaintiffs argued that the retaining wall built five years earlier after another landslide constituted a dangerous condition of public property in that it redirected the path of the subsequent landslide and may in fact have helped cause the subsequent landslide. The trial court granted summary judgment or summary adjudication in favor of defendant on all causes of action except a cause of action for inverse condemnation, which plaintiffs subsequently dismissed. The court of appeal affirmed. The court first held that plaintiffs' expert's declaration was not substantial evidence to create a triable issue of fact as to the cause of the landslide, because that expert's earlier statements about the cause of the landslide directly contradicted his subsequent statements and no reason for the contradictory positions was provided (*178 Cal. App. 4th 536, 548-549)* . The court then held that the design immunity of *Gov. Code § 830.6* provided a complete defense to the county. The court rejected plaintiffs' claim that the county could be liable for negligence in its maintenance of the wall because it did not drain adequately. The court noted that the "maintenance" proposed by the plaintiff was actually a change in the original design of the project, in that plaintiffs were actually arguing for different drainage measures that had been considered and rejected when the original design was approved (*178 Cal. App. 4th 536, 550-551)* . The court also rejected plaintiffs' claims that the original wall design approval was not made knowingly because the county board was not apprised of all negative concerns expressed by one consultant. The court held that application of design immunity did not require that the decision-maker who approved the design first be informed of every negative comment or concern expressed by every consultant or expert who reviewed the proposed plan, so long as evidence supported the reasonableness of the plan or design (*178 Cal. App. 4th 536, 553)* . Finally, the court held that plaintiffs had not shown a change of physical conditions sufficient to defeat design immunity. The court noted that a claimed change of physical conditions cannot be based on the same technical data or policy decisions that went into the original plan or design. Instead, immunity is preserved if a public entity approves a design that contemplated and made allowances for the possibility of the specific change of condition argued by the plaintiff. Because the county's approval of the retaining wall considered and made allowances for drainage through the wall, the plaintiffs' change of condition argument failed as it was based on alleged inadequate drainage that allegedly allowed for water to build up in the soil behind the wall (*178 Cal. App. 4th 536, 554-555)* .

In *Mirzada v. Department of Transp. (2003) 111 Cal. App. 4th 802, 4 Cal. Rptr. 3d 205* , the plaintiffs were a family involved in an automobile accident in which a drunk driver had crossed a 60-foot median on the highway and hit the plaintiffs' car, killing one family member. The plaintiffssued the California Department of Transportation, arguing that liability could be imposed for failing to install a barrier on the median prior to the accident. The trial court granted summary judgment for the defendant on the grounds of design immunity, and the court of appeal affirmed. Conceding that the defendant was entitled to design immunity for the original design of the highway, the plaintiffs argued that changed conditions had resulted in the loss of that immunity. The court of appeal disagreed. The court disregarded the fact that the defendant subsequently scheduled erection of a barrier for the accident site, because that decision did not

constitute an admission that the lack of a barrier constituted a dangerous condition (*111 Cal. App. 4th 802, 807)* . The court noted that the fact that traffic volume on the highway more than tripled from the construction year of 1972 to the accident year of 1998 did not, by itself, establish a dangerous condition or result in a loss of design immunity (*111 Cal. App. 4th 802, 807-808)* . The court also rejected the relevance of the plaintiffs' general claim that accidents across medians more than 45 feet wide had increased substantially since 1991, because this claim proved nothing about the condition at the accident site, which itself had a 60-foot median (*111 Cal. App. 4th 802, 808)* . Finally, the court rejected the plaintiffs' claim that vague evidence of the number of vehicle accidents in the "vicinity" of the accident site created a triable issue of fact as to a changed condition, because the defendant had countered with evidence showing that no accidents had occurred within 5 years prior to the plaintiffs' accident along a more specific 2.8-mile stretch of highway that included the precise site of the plaintiffs' accident (*111 Cal. App. 4th 802, 808-809)* .

In *Wyckoff v. State of California (2001) 90 Cal. App. 4th 45, 108 Cal. Rptr. 2d 198* , the plaintiff's family was killed when a driver traveling in the opposite direction on a state freeway crossed over the center median and collided head-on with the plaintiff's car. The plaintiff argued in his suit against the state of California that the lack of a center median barrier constituted a dangerous condition of public property. The court of appeal affirmed the trial court's grant of summary judgment for the defendant. The court of appeal first held that the defendant was entitled to assert design immunity. Although the highway median width averaged 45 feet 5 inches at the site of the accident, and the approved plans called for a median of 46 feet, the median as built was in substantial conformity with and did not materially depart from the plans (*90 Cal. App. 4th 45, 52-55)* . Addressing the plaintiff's contention that changed conditions made the location a dangerous condition, the court of appeal first concluded that an increase in traffic volume on the highway did not constitute a changed condition, noting in part that the peak traffic volume was still well below the designed capacity of the road (*90 Cal. App. 4th 45, 60)* . The court then concluded that the change in speed limit from 55 miles per hour to 65 miles per hour did not constitute a changed condition. The defendant's expert had explained that there was no evidence that the higher posted speed limit resulted in higher cross-median accidents, and in fact studies showed that prior to the elimination of the national speed limit of 55 miles per hour, drivers were largely ignoring that restriction and there was very little actual speed increase after the speed limits were raised (*90 Cal. App. 4th 45, 60)* . Finally, the court concluded that the plaintiff's evidence of nine cross-median accidents over a 24-mile stretch of the highway during a 21-month period, none of which were within a half-mile in either direction from the site of the plaintiff's accident, was not statistically aberrant enough to put the defendant on notice of a dangerous condition (*90 Cal. App. 4th 45, 61-62)* .

In *Alvarez v. State of California (1999) 79 Cal. App. 4th 720, 95 Cal. Rptr. 2d 719* , the plaintiff was injured and her son killed when a vehicle traveling on the highway in the opposite direction veered across the median and struck her vehicle. The plaintiff sued the state of California, alleging that the lack of a median barrier constituted a dangerous condition of public property. The state successfully moved for summary judgment based on design immunity. The plaintiff appealed on the grounds that even if the state established design immunity, that immunity was defeated by changed conditions because an increase in traffic flow had triggered a state review as to whether to add a barrier to the highway, engineers had recommended adding the barrier, and State officials had approved the barrier (although this barrier approval occurred after the plaintiff's accident).

The court of appeal affirmed. In reaching its decision, the court reconsidered its earlier decision in *Bane v. State of California (1989) 208 Cal. App. 3d 860, 256 Cal. Rptr. 468* , in which the court had held that the 1979 amendment to *Gov. Code § 830.6* eliminated the requirement of a changed physical condition before an approved design may be deemed unreasonable [*see Baldwin v. State of California (1972) 6 Cal. 3d 424, 99 Cal. Rptr. 145, 491 P.2d 1121* ; *see also § 196.300[3][e]*]. The court agreed with subsequent court of appeal decisions that the *Bane* decision erred in eliminating the changed physical condition requirement (*79 Cal. App. 4th 720, 736-737)* . In addition, although the court agreed that an increase in traffic flow may constitute a changed physical condition under the appropriate circumstances, the plaintiff had failed to demonstrate that the traffic increase caused a dangerous condition of which the state was aware. The court noted that median barriers statistically increased the accident rate and that the accident history at the particular site was unremarkable. Therefore, the state's determination, triggered because of an increase in traffic flow, that the benefit of adding a barrier now outweighed the detriment did not constitute a determination that the

median without a barrier was a dangerous condition or that that conditions had changed so that design immunity had ended (*79 Cal. App. 4th 720, 737-739)* .

In *Dole Citrus v. State of California (1997) 60 Cal. App. 4th 486, 70 Cal. Rptr. 2d 348* , a Dole employee was driving on the freeway towards a freewayovercrossing when a person lit himself on fire, jumped off the overcrossing, and crashed through his windshield, severely injuring him. Plaintiff, the driver's employer, sued the state in an effort to recover the amount of workers' compensation benefits it had paid on behalf of its injured driver. Plaintiff contended that the guardrail along the side of the overpass was inadequate in height to prevent objects from being thrown onto or falling onto the freeway below. The trial court upheld that state's claim of design immunity, and granted the state's motion for summary judgment. On appeal plaintiff argued that the state lost the design immunity protection of *Gov. Code § 830.6* due to changed circumstances.

The court of appeal disagreed, holding that plaintiff failed to present sufficient evidence of changed circumstances; evidence that physical conditions at a specific location had changed in such a manner that the original design had created a dangerous condition of which the entity had notice (*60 Cal. App. 4th 486, 489, 493-494)* . Plaintiff argued that a 1971 statute, *Sts. & Hy. Code § 92.6*, which required the Department of Transportation to install and maintain screening on state freeway overpasses at such locations as it determined to be appropriate, and subsequent Department attempts to comply with it (including changes in its design manual) constituted both a recognition that unscreened overcrossings were a dangerous condition, and a conclusion by the state that circumstances have changed, such that the original design immunity ended. The court first determined that neither the statute nor the changes in the design manual required the installation of protective screening on every freeway overpass in the state. Instead, they required the department to install screening on new construction and at other locations it deemed appropriate. It then disagreed with the concept that changes in the design manual which sought to improve the design standards, supported the conclusion or constituted an admission that the superseded design standards were defective. According to the court, the new standards only provided alternative railing standards for new construction (*60 Cal. App. 4th 486, 494)* .

In *Grenier v. City of Irwindale (1997) 57 Cal. App. 4th 931, 67 Cal. Rptr. 2d 454* , plaintiff sued a City over the dangerous condition of a flooded street. The trial court granted summary judgment for defendant on the theory of design immunity, *Gov. Code § 830.6* and the court of appeal affirmed. On appeal plaintiff argued that even if the City had initially acquired immunity for its design of the street, that immunity was lost when the City became aware that flooding of the street was a dangerous condition. The court of appeal reviewed the pertinent case and statutory authority in order to determine whether a change in physical conditions was necessary to defeat design immunity [*see Baldwin v. State of California (1972) 6 Cal. 3d 424, 434, 99 Cal. Rptr. 145, 491 P.2d 1121* ; *see also § 196.300[3][e]*], or whether immunity terminated if the subsequent history showed the design was unreasonable for any reason once the public entity had notice of the dangerous condition and a sufficient time period to remedy it. After reviewing the history of the immunity statute, the court declined to follow *Bane v. State of California (1989) 208 Cal. App. 3d 860, 256 Cal. Rptr. 468* , and held that the requirement of changed physical conditions was a prerequisite to the loss of design immunity. In this case, plaintiff's evidence, showing that one previous accident occurred on the street in seven years, and that City knew that the street flooded during storms, failed to show a change in conditions sufficient to defeat design immunity (*57 Cal. App. 4th 931, 945)* .

[e] "Trap" Exception to Design Immunity Is Applicable

In *Weinstein v. Department of Transp. (2006) 139 Cal. App. 4th 52, 42 Cal. Rptr. 3d 417* , the plaintiffs were involved in an accident in which one car crossed a median on a state highway and struck another car that was traveling in the other direction. The plaintiffs sued the Department of Transportation, alleging that the accident site was a dangerous condition of public property. The accident site included a "lane drop" in which one of three northbound lanes merged with another, a sign on the right-hand side of the road indicating the lane merger, pavement arrows indicating the merger, a 94-foot-wide median with cyclone fencing to prevent u-turns, and a relatively straight road with no sight restrictions. The trial court granted the defendant's motion for summary judgment based on design immunity, and the

court of appeal affirmed. The plaintiffs argued that although the absence of a sturdy median barrier, the width of the paved median, and the alignment of the road were all aspects of the approved design, it was unreasonable for any public entity to approve such a design because it did not conform to applicable state standards. The court disagreed, concluding that the design conformed to applicable state standards, which entitled the defendants to design immunity (*139 Cal. App. 4th 52, 58-59)* . The plaintiffs also argued that even if design immunity were appropriate, the defendant could be liable for failing to provide a sign warning of the lane drop on the median side of the highway. The court, citing *Gov. Code § 830.8*, noted that the absence of a warning sign cannot be the basis for liability unless there is a hidden dangerous condition. The plaintiffs' claim for the need of a warning sign was based on the absence of a median barrier, the horizontal alignment of the roadway, and the width of the paved median, none of which were hidden dangers. Because the defendant could not be liable for any of these aspects of the highway's approved design as dangerous conditions, it could not be liable for failing to warn of these same aspects of the highway (*139 Cal. App. 4th 52, 61)* .

The facts and procedural background of *Hefner v. County of Sacramento (1988) 197 Cal. App. 3d 1007, 243 Cal. Rptr. 291* , are discussed in *§ 196.300[5][b]*. The court of appeal affirmed the judgment for defendant. It considered plaintiff's contention that the allegedly defective design of the intersection created a "trap" that would override any immunity provided by *Gov. Code § 830.6*. The court explained the "trap" exception to the design immunity.Under *Gov. Code § 830.8*, an entity can be liable for its failure to warn of a dangerous condition that causes harm. By force of its terms the design immunity of *Gov. Code § 830.6* is limited to a design-caused accident. It does not immunize from liability caused by negligence independent of design, even though the independent negligence is only a concurring, proximate cause of the accident. The court said that when a public entity is immune from liability for injuries caused by a dangerous condition of its property because the dangerous condition was created as a result of a plan or design that conferred immunity under *Gov. Code § 830.6*, the public entity may nevertheless be liable for failure to warn of this dangerous condition when the failure to warn is negligent and is an independent, separate, concurring cause of the accident (*197 Cal. App. 3d 1007, 1017-1018)* . It said, however, that the "trap" exception applies only when it is alleged that the entity failed to post adequate signs warning of a dangerous condition. The court observed that plaintiff's case did not present the issue of defective or inadequate warning signs; instead, plaintiff hoped to circumvent immunity based only on the allegation that the intersection design itself presented a trap. Absent a claim that warning signs are inadequate, the "trap" exception to governmental immunity is inapplicable (*197 Cal. App. 3d 1007, 1018)* .

California Points & Authorities

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CHAPTER 196 PUBLIC ENTITIES
PART II. FORMS
D. IMMUNITY OF PUBLIC ENTITY OR EMPLOYEE FROM LIABILITY
PART 2. Immunity From Liability For Dangerous Condition of Public Property

19A-196 California Points & Authorities § 196.301

§ 196.301 Supporting Contention That Immunity From Liability for Dangerous Condition of Public Property Does Not Apply--Immunity for Weather Conditions [Gov. Code § 831] Does Not Apply--General Form

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE IMMUNITY UNDER SECTION 831 OF THE GOVERNMENT CODE, GRANTED TO A PUBLIC ENTITY FOR WEATHER CONDITIONS AFFECTING STREETS AND HIGHWAYS, IS NOT APPLICABLE WHEN _____ [SUCH EFFECT WOULD NOT BE REASONABLY APPARENT TO, AND WOULD NOT BE ANTICIPATED BY, A PERSON EXERCISING DUE CARE *or* THE DANGEROUS CONDITION IS DUE TO A COMBINATION OF THE EFFECT OF THE WEATHER CONDITION AND THE CONDITION OF THE HIGHWAY *or* THE CONDITION IS A FIXED AND PREDICTABLE ASPECT OF NATURE AGAINST WHICH HUMAN CARE AND FORESIGHT COULD PROTECT].

[*EITHER*]

Immunity Is Not Applicable When Effect Not Apparent and Could Not Be Anticipated in Exercise of Due Care. The immunity for the effect of weather conditions on streets and highways of *Section 831 of the Government Code* does not exonerate a public entity or public employee from liability for injury proximately caused by such effect if it would not be reasonably apparent to, and would not be anticipated by, a person exercising due care in using the streets or highways (*Erfurt v. State of California (1983) 141 Cal. App. 3d 837, 845, 190 Cal. Rptr. 569* ; *Callahan v. City & County of San Francisco (1967) 249 Cal. App. 2d 696, 704, 57 Cal. Rptr. 639*).

[*AND/OR*]

Immunity Is Not Applicable When Dangerous Condition Due to Combination of Weather and Condition of Highway. The immunity for weather conditions affecting streets and highways of *Section 831 of the Government Code* does not apply when the dangerous condition is due to a combination of the effect of the weather condition and the condition of the highway (*see Erfurt v. State of California (1983) 141 Cal. App. 3d 837, 845-846, 190 Cal. Rptr. 569*).

[*AND/OR*]

Immunity Is Not Applicable When Condition Fixed and Predictable. The immunity for weather conditions affecting streets and highways of *Section 831 of the Government Code* does not apply when the condition is a fixed and predictable aspect of nature that human care and foresight could protect against (*see Erfurt v. State of California (1983) 141 Cal. App. 3d 837, 846, 190 Cal. Rptr. 569*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of the contention that the immunity for weather conditions affecting public streets and highways of *Gov. Code § 831* is not applicable. The alternative optional paragraphs may be used either separately or in conjunction with one another, depending on the facts. The immunity provided by *Gov. Code § 831* is discussed in *§ 196.12[4]*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be combined with general points and authorities opposing a demurrer [*see, e.g., Callahan v. City & County of San Francisco (1967) 249 Cal. App. 2d 696, 697, 57 Cal. Rptr. 639]* . They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Immunity Is Not Applicable When Effect Not Apparent and Could Not Be Anticipated in Exercise of Due Care

In ***Erfurt v. State of California*** *(1983) 141 Cal. App. 3d 837, 190 Cal. Rptr. 569* , plaintiff brought an action against the state for personal injuries sustained in an automobile accident allegedly due to a dangerous condition on a highway. Plaintiff was driving her automobile up an incline on the highway and was suddenly blinded by the rising sun when she reached the crest. The highway split in a "Y" formation immediately after the crest and went around a pillar to an overpass. Plaintiff could not see in front of her because of the sun and could not find any highway lane markings to guide her and consequently crashed into the pillar. The evidence disclosed that there were no devices, such as "bot dots," on the highway to warn a driver of the pillar or guide traffic away from the abutment. Inaddition, the distance from the guard rail surrounding the pillar to the point where the striping began did not meet the minimum standard for channelization of a highway. The trial court entered judgment on the jury verdict in favor of plaintiff, and the state appealed, contending in part that the weather condition immunity of *Gov. Code § 831* applied.

The court of appeal affirmed the judgment. The court held that the immunity of *Gov. Code § 831* did not apply for three independent reasons. It said that by its own terms, *Gov. Code § 831*, does not apply to the effect of weather conditions on the use of a highway if it would not be reasonably apparent to, and would not be anticipated by, a person exercising due care. The court noted that there was sufficient testimony that, given the nature of the incline on which plaintiff was driving, the blinding sun could not be anticipated, nor was it reasonably apparent (*141 Cal. App. 3d 837, 845)* .

In ***Callahan v. City & County of San Francisco*** *(1967) 249 Cal. App. 2d 696, 57 Cal. Rptr. 639* , plaintiff brought a personal injury action against defendant city for injuries sustained when the car in which she was a passenger drove into a lake. Plaintiff alleged defendant was negligent in that the street where the accident occurred was frequently covered with fog, and it was designed with the appearance of a freeway, but ended abruptly at another street. Ahead there were logs, trees, and a declivity into a lake. She alleged that it was reasonably likely that a careful driver, in foggy conditions, might continue over the end of the road into the logs, trees, or lake. No adequate warning signs or devices were provided. Defendant demurred, and the trial court sustained that demurrer and entered judgment accordingly. Plaintiff appealed.

The court of appeal reversed, with direction to overrule the demurrer. The court said that *Gov. Code § 831* exempts public entities from liability caused by the effect on the use of streets and highways of weather conditions, but does not exonerate a public entity from liability for injury proximately caused by that effect if it would not be reasonably apparent to, and would not be anticipated by, a person exercising due care (*249 Cal. App. 2d 696, 704)* . Plaintiff's allegations related not only to a condition of fog, but also to the layout of the streets and especially to the appearance of a freeway where actually there was none, and to the lack of signs. The reference to persons using due care has to do with the public at large as distinguished from one particular driver (*249 Cal. App. 2d 696, 705)* .

[b] Immunity Is Not Applicable When Dangerous Condition Due to Combination of Weather and Condition of Highway

The facts and procedural background of ***Erfurt v. State of California*** *(1983) 141 Cal. App. 3d 837, 190 Cal. Rptr. 569* , are discussed in *§ 196.301[3][a]*. The court of appeal affirmed the judgment in favor of plaintiff, finding that the immunity of *Gov. Code § 831* did not apply for three independent reasons. The second reason it articulated for the inapplicability of that immunity was that the dangerous condition was not merely the effect of blinding sunlight on a public highway, but was the result of the effect of blinding sunlight combined with improper channelization and lack of devices to properly guide and warn the driver around an object in the middle of the freeway (*141 Cal. App. 3d 837, 845-846)* .

[c] Immunity Is Not Applicable When Condition Fixed and Predictable

The facts and procedural background of ***Erfurt v. State of California*** *(1983) 141 Cal. App. 3d 837, 190 Cal. Rptr. 569* , are discussed in *§ 196.301[3][a]*. The court of appeal affirmed the judgment in favor of plaintiff, finding that the immunity of *Gov. Code § 831* did not apply for three independent reasons. The third reason given by the court was based on the constant and predictable presence of the sun. The legislative purpose of *Gov. Code § 831* was to immunize against the effect of weather conditions, known or unknown, predictable or unpredictable, that no amount of human care or foresight could fully protect against. The court reasoned that considered in this light, the rising of the sun resembles more a fixed aspect of nature than does wind, rain, flood, ice, or snow, all of which are set out in *Gov. Code § 831* and none of which are absolutely certain to be present in a certain time or place. The court noted that from the standpoint of human care and foresight, the rising of the sun is like the contours of the shoreline, the nature of the soil on which the road is built, or even nightfall itself, since every day, at any given time, regardless of the weather, the sun occupies a predictable point in the sky relative to any given location. The sun is always there, unlike the weather conditions set out in the statute (*141 Cal. App. 3d 837, 847)* .

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CHAPTER 196 PUBLIC ENTITIES
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19A-196 California Points & Authorities § 196.302

§ 196.302 Supporting Contention That Immunity From Liability for Dangerous Condition of Public Property Does Not Apply--Immunity for Natural Conditions [Gov. Code § 831.2] Does Not Apply--General Form

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE NATURAL CONDITIONS IMMUNITY UNDER SECTION 831.2 OF THE GOVERNMENT CODE ONLY APPLIES TO NATURAL CONDITIONS ON UNIMPROVED PROPERTY, AND DOES NOTAPPLY _____ [WHEN ANY IMPROVEMENTS HAVE BEEN MADE BY THE PUBLIC ENTITY *or* WHEN THE INJURY IS SUSTAINED BY A NONUSER OF THE PUBLIC PROPERTY].

[*EITHER*]

Natural Condition Immunity Not Is Applicable to Improvements. The natural condition immunity of *Section 831.2 of the Government Code* only applies to natural conditions on unimproved property. It does not apply when the injury is the result of an improvement of property made by a public entity (*Buchanan v. City of Newport Beach (1975) 50 Cal. App. 3d 221, 225-227, 123 Cal. Rptr. 338*).

[*AND/OR*]

Natural Condition Immunity Not Applicable to Injuries to Nonusers of Adjacent Land. The natural condition immunity of *Section 831.2 of the Government Code* is not applicable to injuries caused to persons who are not users of the public land, but are nonusers on adjacent property (*Milligan v. City of Laguna Beach (1983) 34 Cal. 3d 829, 833-835, 196 Cal. Rptr. 38, 670 P.2d 1121*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of the contention that the immunity for injuries resulting from a natural condition on unimproved public property of *Gov. Code § 831.2* is not applicable either because some type of improvement has been made or because the injury is sustained by someone not using the publicly held land. The immunity provided by *Gov. Code § 831.2* and related immunities are discussed in *§ 196.12[5]*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be combined with general points and authorities opposing a motion for summary judgment [*see, e.g., Mercer v. State of California (1987) 197 Cal. App. 3d 158, 161, 242 Cal. Rptr. 701]* . They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Injury to Nonuser Caused by Land Failure

Gov. Code § 831.25(a) [*see § 196.12[5][c]*] provides an immunity to liability for certain injuries caused by land failure of any unimproved public property if the land failure was caused by a natural condition of the unimproved public property. It includes injuries to property, or for emotional distress unless the plaintiff has suffered substantial physical injury, off the public entity's property [*Gov. Code § 831.25(a)*]. It appears that to abrogate the prior decision in *Milligan v. City of Laguna Beach (1983) 34 Cal. 3d 829, 196 Cal. Rptr. 38, 670 P.2d 1121* [*see § 196.302[3][b]*], to the extent that it may be applied to injuries caused by land failure.

[c] Natural Condition of Public Beaches

Gov. Code § 831.21 [*see § 196.12[5][b]*] provides that public beaches are deemed to be in a natural condition and unimproved notwithstanding the provision or absence of public safety services such as lifeguards, police or sheriff patrols, medical services, fire protection services, beach cleanup services, or signs. Thus, it appears that the prior decision in *Buchanan v. City of Newport Beach (1975) 50 Cal. App. 3d 221, 123 Cal. Rptr. 338* [*see § 196.302[3][a]*], no longer controls with respect to improvements that fall within that section's description of public safety services on public beaches.

[d] Hybrid Natural and Artificial Conditions

In one case, decided prior to the enactment of *Gov. Code § 831.21* [*see § 196.12[5][b]*], a court of appeal held that the *Gov. Code § 831.2* immunity did not apply when the dangerous condition was a hybrid of natural and artificial conditions. For example, when the public entity voluntarily, but negligently, provides a protective service, and thereby creates a dangerous condition by combining a known natural defect on the property with public reliance on the entity's protective warnings, a public entity is not protected by the immunity [*Gonzales v. City of San Diego (1982) 130 Cal. App. 3d 882, 885-889, 182 Cal. Rptr. 73]* . Because, however, the facts of the *Gonzales* case involved life guard services at a public beach, the ruling appears to be abrogated by *Gov. Code § 831.21* [*Geffen v. County of Los Angeles (1987) 197 Cal. App. 3d 188, 192-194, 242 Cal. Rptr. 492]* . However, counsel could conceivably argue that the reasoning of *Gonzales* is persuasive in hybrid situations involving public property other than public beaches.

[3] Discussion of Authorities

[a] Natural Condition Immunity Not Applicable to Improvements

In ***Buchanan v. City of Newport Beach*** *(1975) 50 Cal. App. 3d 221, 123 Cal. Rptr. 338* , after plaintiff was injured while body surfing at a beach under the control of defendant city, he brought an action for personalinjury against

defendant. Plaintiff alleged that the wedge of beach where he was injured was created by defendant by constructing a jetty, dredging sand from the channel of the harbor entrance adjacent to the jetty, and depositing the dredged sand on what had been submerged sand spits, raising the beach level by 27 feet and causing a steep slope from the shoreline into the water, and that this condition of the beach, plus the interaction of the ocean swells against the jetty, caused a refraction of the waves, producing a dangerous surfing condition. Plaintiff claimed that defendant had notice of the dangerous condition a sufficient time prior to the injury to have taken measures to protect against the dangerous condition. The trial court concluded that the injury sustained by plaintiff was caused by a natural condition of unimproved public property for which defendant was not liable by virtue of *Gov. Code § 831.2*, and dismissed the action. Plaintiff appealed.

The court of appeal reversed, concluding there was evidence supporting plaintiff's cause of action and that the evidence did not establish that recovery was foreclosed by *Gov. Code § 831.2* (*50 Cal. App. 3d 221, 229)* . The court reviewed the evidence concerning the wave action in the wedge area of beach where plaintiff was injured. The court concluded that the type of wave that plaintiff was riding, which thrust him down and caused him to break his neck, was the product of an improvement of property by governmental agencies, was man-made, and was not a natural condition. It said that the alteration of the flow of the ocean, the wave action, and the slope of the beach caused unnatural conditions, and that defendant had actual notice of the dangerous condition of the beach, but posted no warning signs, even though it had considered closing the beach to swimmers. The court observed that question whether these conditions had become natural by the passage of time and by the action of tides, was a question of fact (*50 Cal. App. 3d 221, 225-227)* .

NOTE:
This decision may be limited by *Gov. Code § 831.21* [*see § 196.302*[2][c]].

[b] Natural Condition Immunity Not Applicable to Injuries to Nonusers of Adjacent Land

In ***Milligan v. City of Laguna Beach*** *(1983) 34 Cal. 3d 829, 196 Cal. Rptr. 38, 670 P.2d 1121* , eucalyptus trees growing on defendant city's property fell during a storm, causing injury to plaintiffs' residence on adjacent property. Plaintiffs sued defendant for damages to their house and for emotional distress, alleging that defendant maintained the trees in a dangerous condition. Among its other defenses, defendant claimed immunity under *Gov. Code § 831.2*. The trial court held that the immunity applied and rendered judgment in favor of defendant. Plaintiffs appealed.

The Supreme Court reversed, holding that the natural condition immunity of *Gov. Code § 831.2* is inapplicable to injuries caused to nonusers on adjacent property (*34 Cal. 3d 829, 835)* . The Court reviewed the Legislative policy underlying the immunity, which is that it is desirable to permit public use of governmental property, and recognizing that governmental agencies might prohibit that use if they were put to the expense of making the property safe, responding to tort actions, and paying damages. That policy reflects the shortage of funds for improving property for recreational use and the fairness of requiring users to assume the risk of injury. The Court said the policy has nothing to do with an injury sustained by an adjacent landowner from a tree on government land. The governmental agency may not preclude landowners from using their land, and immunity is not necessary to assure that landowners are permitted to use their land. Moreover, the Court found that nonusers of government land do not receive the reciprocal benefit of use, and the principle of fairness has no application. Since the policy on which the immunity relied on by defendant is based was not applicable to injuries occurring to nonusers on adjacent land, the Court found that immunity did not apply (*34 Cal. 3d 829, 833)* . The Court concluded that while the natural condition immunity may be applicable when the decayed tree limb falls on a user of the governmental property, it is not applicable when the limb injures adjacent property or persons on adjacent property because there is no danger that the governmental agency will close the property to use (*34 Cal. 3d 829, 834)* .

NOTE:
This decision may be limited by *Gov. Code § 831.25* [*see § 196.302* [2][b]].

[4] Opposing Authorities

[a] Natural Condition Immunity Not Applicable to Improvements

In *Arroyo v. State of California (1995) 34 Cal. App. 4th 755, 40 Cal. Rptr. 2d 627* , plaintiff was injured by a mountain lion while walking on a hiking trail in a state park. He then sued the state, alleging that the state knew of the dangerous condition posed by mountain lions in the area. The state demurred to the complaint based on the immunity established by *Gov. Code § 831.2*. The trial court sustained the demurrer. On appeal, plaintiffquestioned whether a wild animal constitutes a "natural condition" of the park within the meaning of the immunity statute. The court of appeals concluded that it does, stating that the immunity is not restricted to conditions of real property, but applies to property of a public entity including personal property. The court concluded that wild animals fall within this definition because they are owned by the state. Plaintiff also argued that the state negligently assumed voluntary protective service because its signs generally indicated that the park was reasonably safe. However, the court ruled that the immunity of *Gov. Code § 831.2* permits public entities to provide signs without incurring potential liability for failure to notify of every possible danger (*34 Cal. App. 4th 755, 764)* .

In *State of California v. Superior Court (1995) 32 Cal. App. 4th 325, 39 Cal. Rptr. 2d 1* , a plaintiff who fell off a horse on a trail in a state park sued the state for injuries. The complaint stated that plaintiff fell when a mountain bicyclist came towards her at an extremely high rate of speed and spooked her horse, and alleged that a dangerous condition was created by the combination of the speeding mountain cyclist and the narrow, steep and twisting trails. The state demurred, claiming immunity based on *Gov. Code § 831.2* and on *Gov. Code § 831.4*, which provides immunity from injuries caused by a condition of trails which provide access to riding. The trial court ruled that the statute provided only a limited immunity, and reasoned that the combination of the third party conduct and the physical defect removed plaintiff's suit from the limited scope of the immunity statutes. The state then sought a prerogative writ to set aside the trial court's order overruling the demurrer. The court of appeal issued the peremptory writ of mandate, ruling that the state is absolutely immune from liability for injuries caused by a physical defect of a trail. The court concluded that *Gov. Code § 831.4* extended the cloak of immunity to cover roads or trails used for recreational activities (*32 Cal. App. 4th 325, 328)* .

In *Valenzuela v. City of San Diego (1991) 234 Cal. App. 3d 258, 286 Cal. Rptr. 1* , plaintiff brought a personal injury action against defendant city after he dove from a rock on a city beach into shallow water and severely damaged his spinal cord. The trial court granted summary judgment in favor of defendant on the grounds it was immune under *Gov. Code §§ 831.2* and *831.7* (hazardous recreational activity immunity). In affirming that judgment, the court of appeal addressed plaintiff's argument that *Gov. Code § 831.2* was inapplicable because defendant placed appropriate warning signs only a quarter of a mile south of the accident, thereby creating a dangerous condition requiring warning signs directly in the area of the accident. The court reasoned that signs are passive and are designed simply to warn people to take care if they assume the risk in using the unimproved public property in its natural condition. Defendant never assumed an active role in risk management. It simply placed warning signs in an area where injuries had occurred. The mere placement of signs in a dangerous area does not reasonably induce the public to believe all other areas are safe. This is particularly true where the danger is obvious, such as jumping off a rock into shallow water. Moreover, plaintiff did not even allege the warning signs a quarter mile south of his accident induced his decision to dive (*234 Cal. App. 3d 258, 262)* .

In *City of Santa Cruz v. Superior Court (1988) 198 Cal. App. 3d 999, 244 Cal. Rptr. 105* , plaintiff became a quadriplegic as a result of his dive into a river in which he injured his spine. Plaintiff sued defendant city, alleging that its failure to provide warnings caused his accident. A lifeguard assigned to the area had been instructed to prohibit persons from diving into the river. Although there was contradictory evidence concerning their presence, signs prohibiting diving were normally posted in the area. The trial court found that the river was unimproved public property in a natural condition. Defendant moved for summary judgment on the basis of the immunity provided by *Gov. Code § 831.2*. The trial court denied the motion. The court of appeal issued a peremptory writ of mandate, directing the trial court to grant summary judgment in favor of defendant. The court explained that the *Gov. Code § 831.2* immunity is absolute (*198 Cal. App. 3d 999, 1004)* . The court said that there was no evidence that lifeguards were ever placed so

as to induce people to think it was safe to dive wherever there were no lifeguards. Nor was there evidence that anyone induced plaintiff to dive into shallow water in an unimproved area, or that he was misled by any public employee into believing the area was safe for diving (*198 Cal. App. 3d 999, 1005-1006)* . The court observed that the presence or absence of warning signs could not abrogate defendant's statutory immunity for injuries resulting from use of unimproved public property (*198 Cal. App. 3d 999, 1006)* . It explained that the legislative policy underlying the immunity is to permit public use of governmental property without making the cost prohibitive, given the shortage of funds to improve property for recreational use and given the fairness of requiring users to assume the risk of injury. The intent of the Legislature was to preclude liability for unimproved natural conditions unless the public entity engaged in conduct which actively increased the degree of dangerousness of a natural condition (*198 Cal. App. 3d 999, 1006-1007)* .

In *Mercer v. State of California (1987) 197 Cal. App. 3d 158, 242 Cal. Rptr. 701* , plaintiff suffered permanent paralysis after falling down the side of a sand dune while riding an all-terrain vehicle in a park owned and managed by the state. When plaintiff brought a personal injury action against the state, alleging its negligence in failing to warn him of the treacherous conditions of the dunes, the trial court granted defendant's motion for summary judgment on the basis of *Gov. Code § 831.2* and dismissed the case. The court of appeal affirmed (*197 Cal. App. 3d 158, 170)* . The court addressed plaintiff's contention that the immunity did not apply because the state had improved the park by posting signs anderecting fences. It observed that the scope of *Gov. Code § 831.2* is not made clear by its language, but it appears that to qualify public property as improved, and thereby take it outside the natural condition immunity, the improvements must change the physical nature or characteristics of the property at the location of the injury to the extent that it can no longer be considered in a natural condition. The court continued that to avoid the immunity, not only must the improvements change the physical characteristics of property, they must do so at the location of the injury. Thus, improvements of a portion of a public park do not remove the immunity from the unimproved areas. The court concluded there was no evidence of any alteration in the natural condition of the dunes in the vehicular recreation area. None of the improvements plaintiff claimed removed the immunity--signs setting speed limits, warning of surf conditions, marking access roads, and prohibiting entry into environmentally sensitive or nonpublic areas, and fences, were erected in the dunes area. The dunes were not therefore transformed into improved property. Moreover, the court noted that there was no evidence suggesting that any of the alleged improvements had any causal connection with plaintiff's accident (*197 Cal. App. 3d 158, 165)* .

In *McCauley v. City of San Diego (1987) 190 Cal. App. 3d 981, 235 Cal. Rptr. 732* , plaintiff was injured after falling from cliffs overhanging a beach owned and operated by defendant city. In the resultant personal injury action, the trial court entered judgment in favor of the city on the ground that the city was entitled to absolute immunity under *Gov. Code § 831.2*. The court of appeal affirmed. Plaintiff contended that defendant's posting of signs warning of false and slippery trails along the cliffs constituted an ineffective attempt to warn the public, and that it should be held responsible for its negligence in failing to warn properly. The court said the passive nature of defendant's posting of warning signs was designed simply to warn people to take care if they assumed the risk in using the unimproved property in its natural condition, and that defendant had not induced any public reliance on defendant's detecting and warning of latent and hidden dangers (*190 Cal. App. 3d 981, 988-989)* . The court went on to say that the legislative purpose of *Gov. Code § 831.2* is fostered by allowing public entities to post warnings of purely natural dangerous conditions on unimproved public property without jeopardizing their *Gov. Code § 831.2* immunity (*190 Cal. App. 3d 981, 990-991)* .

In *Winterburn v. City of Pomona (1986) 186 Cal. App. 3d 878, 231 Cal. Rptr. 105* , after their 11-year-old son died when rocks and debris fell from the roof of a cave where he was playing, plaintiffs brought a wrongful death action against defendant city as owner of the cave property. The trial court granted defendant's motion for summary judgment on the basis of *Gov. Code § 831.2*. The court of appeal affirmed. After refuting plaintiffs' contention that *Gov. Code § 831.2* was only applicable to rural recreational areas, the court addressed plaintiffs' contention that defendant voluntarily undertook to protect the public from the cave, and then negligently failed to do so. The court found no voluntary assumption of duty by defendant. It said that defendant had done nothing to prevent access to the cave, and had not promised to do anything to prevent such access. Although plaintiffs alleged there had been complaints to defendant

about the cave, the court observed they were irrelevant, as they related to its use by gang members (*186 Cal. App. 3d 878, 882)* .

In *Keyes v. Santa Clara Valley Water Dist. (1982) 128 Cal. App. 3d 882, 180 Cal. Rptr. 586* , plaintiff was injured when he struck a submerged object while swimming and diving in a reservoir owned and operated by defendants. He brought an action claiming negligence against defendants alleging that the reservoir contained numerous submerged logs and objects creating a dangerous and hazardous condition and that defendants had actual knowledge of that condition. Defendants claimed immunity based on *Gov. Code § 831.2*. The trial court sustained defendants' demurrer and dismissed the action. The court of appeal reversed and remitted the case, granting plaintiff 20 days to file an amended complaint. The immunity conferred to public entities by *Gov. Code § 831.2* extends to any natural condition of any lake, whether it is natural or artificial. In this case, the reservoir was an artificial, man-made lake used by the public for recreational activities. The court said *Gov. Code § 831.2* codifies an absolute immunity regarding injuries caused by natural conditions associated with unimproved publicly held real property, including water bodies and courses, and applies to natural conditions on unimproved realty (*128 Cal. App. 3d 882, 887)* . It noted that *Gov. Code § 831.2* fails to define or establish a precise standard for determining when, as the result of developmental activity, public property in its natural state ceases to be unimproved. However, the court concluded that some form of physical change in the condition of the property at the location of the injury, which justifies the conclusion that the public entity is responsible for reasonable risk management in that area is required for the property to be deemed improved. Plaintiff's complaint did not allege the necessary element of causal nexus between the dangerous condition and either human conduct or an artificial improvement (*128 Cal. App. 3d 882, 888)* .

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19A-196 California Points & Authorities § 196.303

§ 196.303 Supporting Contention That Immunity From Liability for Dangerous Condition of Public Property Does Not Apply--General Recreational Users Immunity [Civ. Code § 846] Does Not Apply--General Form

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE GENERAL RECREATIONAL USERS IMMUNITY OF *CIVIL CODE SECTION 846* DOES NOT APPLY TO PUBLIC ENTITIES.

General Recreational User Immunity Not Applicable to Public Entities. The recreational user immunity set forth in *Section 846 of the Civil Code* does not apply to public entities; it is only applicable to private landowners (*Delta Farms Reclamation Dist. v. Superior Court (1983) 33 Cal. 3d 699, 707, 190 Cal. Rptr. 494, 660 P.2d 1168* ; *Nelsen v. City of Gridley (1980) 113 Cal. App. 3d 87, 90-96, 169 Cal. Rptr. 757*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of the contention that the general recreation user immunity of *Civ. Code § 846* is not applicable to immunize the defendant public entity from liability for dangerous conditions of public property [*Gov. Code § 835*] because *Civ. Code § 846* does not apply to public entities. The immunity under *Civ. Code § 846* is discussed in *§ 196.12[11]*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be combined with general points and authorities opposing a motion for summary judgment [*see, e.g., Nelsen v. City of Gridley (1980) 113 Cal. App. 3d 87, 89, 169 Cal. Rptr. 757]* . They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] General Recreation User Immunity Not Applicable to Public Entities

In ***Delta Farms Reclamation Dist. v. Superior Court*** *(1983) 33 Cal. 3d 699, 190 Cal. Rptr. 494, 660 P.2d 1168* , plaintiffs sought damages against defendant water district for wrongful death and emotional distress. While wading in a waterway, two 15-year-old girls stepped off a hidden drop point and drowned. Plaintiffs, mothers and sister of the deceased, alleged that defendant knew of the dangerous condition, knew that visitors were common, and should have provided some warning of the latent danger in the waterway. Defendant demurred on several grounds, among them the limitation of duty set forth in *Civ. Code § 846*. When the trial court failed to sustain its demurrer, defendant petitioned for a writ of mandate directing the trial court to sustain its general demurrer.

The Supreme Court denied the writ of mandate. Defendant claimed the protection of *Civ. Code § 846*, which limits the duty of care owed by an owner of any estate or other interest in real property to persons using the property for designated recreational purposes. The Court said the legislative history of *Civ. Code § 846*, when considered in conjunction with other matters then before the legislature, left no doubt that public entity liability was then very much on the mind of the legislature, and that had it intended to bring those entities under the umbrella of *Civ. Code § 846*, it would have done so. Because *Civ. Code § 846* and the California Tort Claims Act were passed simultaneously and deal with the same problem, the Court said they must be interpreted to avoid any conflict with regard to injuries to recreational users of public property (*33 Cal. 3d 699, 704-705)* . Further analysis by the Court revealed additional reasons for the inapplicability of *Civ. Code § 846* to public entities. *Civ. Code § 846* preserved the distinction between trespassers, licensees, and invitees, concepts that are foreign to the California Tort Claims Act. Application of *Civ. Code § 846* to public entities would eviscerate large portions of the California Tort Claims Act and would lead to some patently absurd results (*33 Cal. 3d 699, 706-707)* .

The *Delta Farms* Court disapproved the holdings in *Moore v. City of Torrance (1979) 101 Cal. App. 3d 66, 166 Cal. Rptr. 192* , *Gerkin v. Santa Clara Valley Water Dist. (1979) 95 Cal. App. 3d 1022, 157 Cal. Rptr. 612* , and *English v. Marin Mun. Water Dist. (1977) 66 Cal. App. 3d 725, 136 Cal. Rptr. 224* , to the extent they hold that *Civ. Code § 846* applies to public entities (*33 Cal. 3d 699, 707)* .

Plaintiff in ***Nelsen v. City of Gridley*** *(1980) 113 Cal. App. 3d 87, 169 Cal. Rptr. 757* , was injured when his motorcycle struck a cable across a city-owned road. He then sued defendant city for personal injuries allegingthat the cable constituted a known dangerous condition on city property. The trial court granted summary judgment for defendant on the basis of *Civ. Code § 846*, which provides that an owner of real property has no duty of care to keep the premises safe for entry or use of others for certain specific recreational uses. Plaintiff appealed.

The court of appeal reversed, holding that *Civ. Code § 846* does not apply to public entities. The court noted that the purpose of *Civ. Code § 846* was to encourage private landowners to allow recreational uses and that this purpose did not apply to public entities (*113 Cal. App. 3d 87, 91)* . The court also noted that *Civ. Code § 846* was incompatible with the provisions of the California Tort Claims Act, which contains specific immunities covering certain recreational uses of public land that are not consistent with *Civ. Code § 846*. Finally, the court examined the history of *Civ. Code § 846* and the California Tort Claims Act, and found that there was no legislative intent that *Civ. Code § 846* apply to public entities (*113 Cal. App. 3d 87, 92-94)* .

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19A-196 California Points & Authorities § 196.304

§ 196.304 Supporting Contention That Immunity From Liability for Dangerous Condition of Public Property Does Not Apply--Traffic Control Sign Immunity [Gov. Code § 830.4] Does Not Apply--General Form

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE IMMUNITY UNDER SECTION 830.4 OF THE GOVERNMENT CODE, GRANTED TO A PUBLIC ENTITY FOR FAILURE TO PROVIDE REGULATORY TRAFFIC CONTROL SIGNALS OR SIGNS, IS NOT APPLICABLE WHEN THE CONDITION IS DANGEROUS FOR REASONS OTHER THAN THE FAILURE TO PROVIDE REGULATORY TRAFFIC SIGNALS OR SIGNS.

Traffic Control Sign Immunity Limited to Danger Resulting From Failure to Provide Sign. *Gov. Code § 830.4* immunizes a public entity from liability only where the dangerous condition exists solely as a result of that entity's failure to provide a regulatory traffic device or street marking. If a traffic intersection is dangerous for reasons other than the failure to provide regulatory signals or street markings, *Gov. Code § 830.4* provides no immunity (*Washington v. City & County of San Francisco (1990) 219 Cal. App. 3d 1531, 1534-1535, 269 Cal. Rptr. 58*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the *Gov. Code § 830.4* immunity for failure to provide traffic control signals or signs is not applicable. The immunity provided by *Gov. Code § 830.4* is discussed in *§ 196.11[2]*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are used. For example, they may be used in a memorandum of points and authorities in opposition to a motion for judgment notwithstanding the verdict [*see, e.g., Washington v. City & County of San Francisco (1990) 219*

Cal. App. 3d 1531, 1534, 269 Cal. Rptr. 58] . They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Traffic Control Sign Immunity Limited to Danger Resulting From Failure to Provide Sign

Washington v. City & County of San Francisco *(1990) 219 Cal. App. 3d 1531, 269 Cal. Rptr. 58* , was a wrongful-death action in which plaintiffs' decedent died in a motor vehicle accident in an intersection adjacent to an elevated freeway. The city and county was included as a defendant based on allegations that the intersection was dangerous public property. Defendant city and county appealed the trial court's judgment based on the jury verdict in favor of plaintiffs.

The court of appeal affirmed. Defendant claimed immunity pursuant to *Gov. Code § 830.4*, which protects a public entity from liability for its failure to provide a regulatory traffic device or street marking. Both the trial court and court of appeal were unpersuaded by that claim. The court of appeal explained that *Gov. Code § 830.4* provides immunity only where the allegedly dangerous condition exists solely as a result of the failure to provide a regulatory traffic device or street marking. It said that if a traffic intersection is dangerous for reasons other than the failure to provide regulatory signals or street markings, *Gov. Code § 830.4* provides no immunity. Although the intersection at which decedent was killed had no traffic device or street marking, the court observed that the danger was not caused solely by the failure to provide those traffic controls. The intersection was additionally dangerous because of the vision limitations caused by the presence of metal pillars in the middle of the street, and the shadow caused by the freeway above (*219 Cal. App. 3d 1531, 1534-1535)* .The court pointed out that cases involving the absence of traffic control signals or signs often confuse the provisions of *Gov. Code § 830.4* with those of § 830.8, and incorrectly frame the issue as whether or not the lack of signs created a "trap" for the unwary. It dismissed the "trap" argument as irrelevant (*219 Cal. App. 3d 1531, 1537-1539)* .

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19A-196 California Points & Authorities § 196.305

§ 196.305 Supporting Contention That Immunity From Liability for Dangerous Condition of Public Property Does Not Apply--Maintenance of Nondedicated Roads Immunity [Gov. Code § 831.3] Does Not Apply--General Form

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE IMMUNITY UNDER GOVERNMENT CODE SECTION 831.3, GRANTED TO A PUBLIC ENTITY FOR INJURY RESULTING FROM ANY ACT OF REPAIR TO OR MAINTENANCE OF A ROAD THAT HAS NOT BEEN OFFICIALLY ACCEPTED INTO THE JURISDICTION OF THAT ENTITY, DOES NOT APPLY IF THE WORK WAS NOT PERFORMED WITH REASONABLE CARE OR IF IT LEFT THE ROAD IN A MORE DANGEROUS OR UNSAFE CONDITION THAN IT WAS BEFORE THE WORK WAS COMMENCED.

Immunity for Maintenance of Nondedicated Road Limited to Work Performed With Reasonable Care. *Government Code Section 831.3* immunizes a public entity for any act of grading, reconstruction, replacement, maintenance, or repair to a road that has not been accepted by that public entity only if the work was done with reasonable care and did not leave the road in a more dangerous or unsafe condition than it was before the work was commenced (*Matthews v. County of San Bernardino (1991) 233 Cal. App. 3d 1623, 1634-1635, 285 Cal. Rptr. 422*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of the contention that the immunity for the repair or maintenance of a nondedicated road provided by *Gov. Code § 831.3* is not applicable because it is limited to work performed with reasonable care and that did not leave the road in a more dangerous or unsafe condition than it was before the work was commenced.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be combined with general points and authorities opposing a motion for summary judgment [*see, e.g., Matthews v. County of San Bernardino (1991) 233 Cal. App. 3d 1623, 1626, 285 Cal. Rptr. 422]* .

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Road Maintenance Immunity

There are two general statutory schemes regarding public entity immunity from liability for road maintenance. The first provides that a public entity is not liable for any injury occurring on account of the grading, maintenance, repair, or reconstruction or replacement of any road that has not officially been accepted as a part of the road system under the jurisdiction of the public entity if that work is performed with reasonable care and leaves the road in no more dangerous or unsafe condition than it was before the work commenced [*see Gov. Code § 831.3*]. The second scheme is specific to counties and cities. No county will be held liable for failure to maintain any road unless and until it has been accepted into the county road system by action of the board of supervisors, or its designee [*see Sts. & Hy. Code § 941(b)*]. No city will be held liable for failure to maintain any road until it has been accepted into the city system by resolution of the governing body [*see Sts. & Hy. Code § 1806*].

Although *Gov. Code § 831.3* and *Sts. & Hy. Code §§ 941* and *1806* address similar topics, they are distinct without being inconsistent. *Gov. Code § 831.3* addresses a public entity's misfeasance in its action of maintaining, grading, or repairing an unaccepted road. *Sts. & Hy. Code §§ 941* and *1806* immunize a county or a city from any claimed nonfeasance regarding its lack of maintaining unaccepted roads. *Gov. Code § 831.3* and *Sts. & Hy. Code §§ 941* and *1806* address different circumstances regarding the liability of a county or a city if it maintains or does not maintain unaccepted roads. Moreover, while *Gov. Code § 831.3* includes all public entities described in Gov. Code § 811.2, Sts. & Hy. Code §§ 941 and 1806 are limited to counties and cities [*see Matthews v. County of San Bernardino (1991) 233 Cal. App. 3d 1623, 1633, 1633 n.6, 285 Cal. Rptr. 422* (no city involved; court discussed *Sts. & Hy. Code § 941* and characterized *Sts. & Hy. Code § 1806* as city equivalent of § 941)].

[3] Discussion of Authorities

[a] Immunity for Maintenance of Nondedicated Road Limited to Work Performed With Reasonable Care

In ***Matthews v. County of San Bernardino*** *(1991) 233 Cal. App. 3d 1623, 285 Cal. Rptr. 422* , after sustaining injuries when the automobile in which she was riding struck a berm and rolled over, plaintiff sued defendant county and road maintenance district alleging negligent road maintenance and dangerous condition of public property. Defendants denied the allegations and raised numerous affirmative defenses, including several public entity immunities. Defendant county moved for summary judgment on the grounds that it did not own, possess, or control the road where the incident occurred, and that even if it did own or control the subject road, it was not liable because the road had never been accepted into its road system. Defendant district moved for summary judgment on the grounds that the road had never been accepted into the system of county roads, and that therefore it was immune, and that as a district, it was part of the county and not a legal entity capable of being sued. The trial court granted both motions and entered judgment for defendants. Plaintiff appealed.

The court of appeal reversed the judgment for defendant county, concluding that the trial court had erred because there were triable issues of material fact. For reasons stated in an unpublished portion of its opinion, the court of appeal affirmed the judgment for defendant district. The court was not persuaded by defendant county's argument based on two affirmative defenses: (1) nonliability for any dangerous condition of public property based on its lack of ownership and control of the subject road portion, pursuant to *Gov. Code §§ 835* and *830(c)*; and *(2)* nonliability for damages and

injuries incurred by users of unaccepted roads, based on *Sts. & Hy. Code § 941* (*233 Cal. App. 3d 1623, 1634)* . Although *Sts. & Hy. Code § 941* has since been amended, the court observed that at the time of plaintiff's accident, a road could only have been accepted into the county road system by resolution by the board of supervisors. Defendant argued that because no such resolution of acceptance was ever passed, the road was never accepted, and it was not liable for injuries occurring on an unaccepted road. The court said that defendant's reliance on § 941, which simply precludes liability for failure to maintain unaccepted roads, did not consider the effect of *Gov. Code § 831.3*, which specifically excludes from immunity any act of grading, reconstruction, replacement, maintenance, or repair to unaccepted if that work was not done with reasonable care and if that work left the road in a more dangerous or unsafe condition than it was in before the work commenced (*233 Cal. App. 3d 1623, 1631)* . The court said that although plaintiff had produced evidence of defendant's control of the road and the fact that defendant had done maintenance work on the road prior to the accident, defendant failed to produce any countervailing evidence sufficient to meet its initial burden of establishing all the undisputed facts necessary for either affirmative defense. Specifically, defendant failed to produce any evidence that, to the extent it did maintain the road, that work was performed with reasonable care and left the road in no more dangerous or unsafe condition than it was before the work commenced (*233 Cal. App. 3d 1623, 1634-1635)* .

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Volume 19A Chapters 196-199 PUBLIC ENTITIES---to---QUO WARRANTO
CHAPTER 196 PUBLIC ENTITIES
PART II. FORMS
D. IMMUNITY OF PUBLIC ENTITY OR EMPLOYEE FROM LIABILITY
PART 2. Immunity From Liability For Dangerous Condition of Public Property

19A-196 California Points & Authorities § 196.306

§ 196.306 Supporting Contention That Immunity From Liability for Dangerous Condition of Public Property Does Not Apply--Immunity for Participation in a Hazardous Recreational Activity [Gov. Code § 831.7] Does Not Apply--Students Engaged in School-Sponsored or Required Activities

[1] FORM

[*The following may be included in a memorandum or points and authorities, or in a trial or appellate brief.*]

GOVERNMENT CODE SECTION 831.7, WHICH GRANTS IMMUNITY TO A PUBLIC ENTITY FOR INJURIES TO A PERSON ENGAGED IN A HAZARDOUS RECREATIONAL ACTIVITY, DOES NOT BAR THIS ACTION BECAUSE THAT IMMUNITY IS NOT APPLICABLE TO STUDENTS ENGAGED IN SCHOOL-SPONSORED OR REQUIRED ACTIVITIES.

"Hazardous Recreational Activities" Immunity Is Inapplicable to Athletic Activities Under Supervision of School Personnel. The hazardous recreational activities immunity of *Government Code Section 831.7* does not apply when the injury occurs during an athletic activity under the supervision of school personnel (*Avila v. Citrus Cmty. Coll. Dist. (2006) 38 Cal. 4th 148, 159-160, 41 Cal. Rptr. 3d 299, 131 P.3d 383* ; *Iverson v. Muroc Unified Sch. Dist. (1995) 32 Cal. App. 4th 218, 227, 38 Cal. Rptr. 2d 35* ; *Acosta v. Los Angeles Unified Sch. Dist. (1995) 31 Cal. App. 4th 471, 476, 37 Cal. Rptr. 2d 171*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted by plaintiff in support of the contention that the *Gov. Code § 831.7* immunity from injuries to people who participate in hazardous recreational activities is not applicable. The immunity provided by *Gov. Code § 831.7* is discussed in *§ 196.12[9]*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context

in which they are used. For example, they may be used in a memorandum of points and authorities in opposition to a motion for judgment notwithstanding the verdict [*Acosta v. Los Angeles Unified Sch. Dist. (1995) 31 Cal. App. 4th 471, 37 Cal. Rptr. 2d 171]* .

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the nature of the activity in which plaintiff was participating when injured, and should discuss facts showing that the activity was supervised by school personnel, either in a required physical education class [*see* *Acosta v. Los Angeles Unified Sch. Dist. (1995) 31 Cal. App. 4th 471, 37 Cal. Rptr. 2d 171]* or in school-sponsored extracurricular activities [*see* *Iverson v. Muroc Unified Sch. Dist. (1995) 32 Cal. App. 4th 218, 227, 38 Cal. Rptr. 2d 35]* .

[3] Discussion of Authorities

[a] "Hazardous Recreational Activities" Immunity Is Inapplicable to Athletic Activities Under Supervision of School Personnel

In ***Avila v. Citrus Cmty. Coll. Dist.*** *(2006) 38 Cal. 4th 148, 41 Cal. Rptr. 3d 299, 131 P.3d 383* , the plaintiff, a baseball player for a community college baseball team, was struck in the head by a pitch thrown during a preseason exhibition game played on the opponent's field. The plaintiff alleged that the pitch was either thrown negligently or intentionally in retaliation because one of the pitcher's teammates was hit by a pitch in the previous inning. The plaintiff staggered, felt dizzy, and was in pain, although his manager made him stay in the game for a few minutes before finally taking him out. No one tended to his injuries, which turned out to be serious. The plaintiff sued both school districts, his manager, and various other entities. As to the opposing school district, the plaintiff alleged that it school was negligent in failing to summon or provide medical care at the time of the injury, failing to supervise and control the opposing pitcher, failing to provide adequate supervisory personnel and officials, and failing to provide adequate equipment. The school district demurred on the grounds that it was immune from liability under *Gov. Code § 831.7(a)*, the public entity immunity statute for injuries occurring during hazardous recreational activities, and the trial court sustained the demurrer and dismissed the action as to the district. The court of appeal reversed, relying on previous court of appeal opinions to rule that *Gov. Code § 831.7* does not extend immunity to claims predicated on the negligent supervision of public school athletes and that the school district owed a duty of supervision to plaintiff. The school district appealed.

The California Supreme Court reversed the court of appeal. Addressing the issue of immunity under *Gov. Code § 831.7*, the Court first concluded that the statute itself was ambiguous as to what constitutes a "recreational" activity, and noted a split in authority at the court of appeal level as to whether it applied to negligence claims against schools and universities for athletic injuries (*38 Cal. 4th 148, 154-155)* . The Court then looked to the legislative history of the statute and concluded that the statute was adopted as a premises liability measure designed to limit liability based on a public entity's failure either to maintain public property or to warn of a dangerous condition on public property when a person suffers an injury while using the public property for unsupervised hazardous recreational activity (*38 Cal. 4th 148, 156-157)* . However, the Court also noted the tension between *Gov. Code § 831.7* and a separate body of law that imposes on public schools and universities the duty to supervise their students, including during athletic practices and games. Without deciding whether *Gov. Code § 831.7* applies outside the premises liability context, the Court, agreeing with two earlier court of appeal opinions, held that school-sponsored and supervised sports activities are not "recreational" in the sense of voluntary unsupervised play as envisioned by the statute. Instead, these sports are a fundamental part of the school's educational mission. Therefore, the statute did not apply to immunize public educational entities from liability for injuries to students sustained during those activities (*38 Cal. 4th 148, 158-160)* . The Court then went on to hold that getting hit by a pitch, even a pitch thrown at a batter intentionally, was an inherent risk of the game of baseball, and under the primary assumption of risk doctrine, the school district owed no duty to the plaintiff to protect him from the injury he suffered (*38 Cal. 4th 148, 163-168)* .

In ***Iverson v. Muroc Unified Sch. Dist.*** *(1995) 32 Cal. App. 4th 218, 38 Cal. Rptr. 2d 35* , plaintiff, a student injured during a soccer match as part of a physical education class conducted during regular school hours, sued the school for negligently instructing and supervising the students engaged in the class. The defendant moved for summary judgment on the basis of *Gov. Code § 831.7*, contending that plaintiff was participating in a hazardous recreational activity in which he voluntarily placed himself at risk. The trial court agreed that immunity attached as a matter of law, and granted the motion.

The court of appeal reversed, holding that *Gov. Code § 831.7* does not apply to injuries sustained on school grounds during a physical education class required by the school and conducted during school hours (*32 Cal. App. 4th 218, 227)* . The court addressed two issues in analyzing the case. First, with regard to whether the immunity would apply to an involuntary participant, the court rejected defendants claim that the words "voluntarily in the place of risk" in the statute applied only to spectators and not to participants, concluding that the reference to voluntariness applies only to spectators (*32 Cal. App. 4th 218, 225)* . Second, the court reviewed the Legislative history and determined that the immunity statute was aimed at "recreational" area users, and that there was no indication that the law was meant to apply to school children, school playgrounds, or physical education classes (*32 Cal. App. 4th 218, 225)* . The court also noted that a recent appellate court decision had concluded that "hazardous recreational activities" do not include school-sponsored extracurricular athletic activities under the supervision of school personnel (*32 Cal. App. 4th 218, 226)* . The court concluded that a body contact sport incorporated into a schooltime physical education class is not a "recreational" activity within the meaning of the immunity statute, and held that the statute was not applicable to the plaintiff's injuries (*32 Cal. App. 4th 218, 227)* .

In ***Acosta v. Los Angeles Unified Sch. Dist.*** *(1995) 31 Cal. App. 4th 471, 37 Cal. Rptr. 2d 171* , a member of a high school gymnastics team sued the school district for injuries received while practicing under the supervision of his coach in the school gymnasium after school. By special verdict, the jury found that at the time of the accident plaintiff was engaged in a "hazardous recreational activity" within the immunity of *Gov. Code § 831.7*. The trial court thus entered judgment in favor of the school district. Plaintiff then moved for a new trial and judgment notwithstanding the verdict. The trial court concluded that it had failed to properly instruct the jury on a distinction between a "recreational" activity and a "school directed" activity, and thus ordered a new trial limited to determining whether plaintiff's injury resulted from a "school-directed" activity.

The court of appeal reversed, holding that the immunity provided by *Gov. Code § 831.7* had no application. The court stated that since the facts were undisputed, the question of whether plaintiff was engaged in a "hazardous recreational activity" was a question of law for the court, and concluded that the issue of immunity should never have gone to the jury because "hazardous recreational activities" do not include school-sponsored extracurricular athletic activities under the supervision of school personnel (*31 Cal. App. 4th 471, 476)* . The court reasoned that if the term "hazardous recreational activity" was interpreted to include school-sponsored and supervised activities, then schools should be immune from liability for the negligent supervision of students engaged in virtually every extracurricular sport, as well as activities that are often part of a school's physical education program. The court concluded that this would constitute a major revision of California law with respect to school district tort liability (*31 Cal. App. 4th 471, 477)* . Since the immunity was not available, the court held that the trial court should have granted plaintiff's motion for judgment notwithstanding the verdict as to liability and ordered a new trial on damages (*31 Cal. App. 4th 471, 479)* .

[4] Opposing Authorities

[a] "Hazardous Recreational Activities" Immunity Is Inapplicable to Athletic Activities Under Supervision of School Personnel

In *Ochoa v. California State Univ. (1999) 72 Cal. App. 4th 1300, 85 Cal. Rptr. 2d 768* , the plaintiff was a university student who was punched by another player while participating in an intramural soccer game. Although the game was

officiated, the referee closest to the plaintiff and his attacker was unable to prevent the punch, although he separated the combatants immediately afterwards. The plaintiff brought suit against the university, alleging that the university negligently failed to supervise the game and instruct the participants. The defendant successfully moved for summary judgment, with the trial court determining that under *Crow v. State of California (1990) 222 Cal. App. 3d 192, 271 Cal. Rptr. 349* , the plaintiff's status as a student did not create a special relationship with the defendant that imposed a duty of due care owed by the defendant to the plaintiff. The defendant had also argued that it was entitled to immunity under *Gov. Code § 831.7*, but the trial court did not rule on that claim.

The court of appeal affirmed, reiterating that colleges and universities may no longer be charged with a general duty of care to supervise student activities. Although the language in the referee handbook supplied by the defendant authorized referees to take steps to control unruly behavior at games, the court rejected the plaintiff's contention that a special relationship was formed, giving rise to a duty to protect students from the criminal acts of third parties, by the defendant's organizing and sponsoring the intramural activity (*72 Cal. App. 4th 1300, 1305)* . The court also agreed with the defendant that no duty should be created under general tort law or public policy (*72 Cal. App. 4th 1300, 1306)* . Moreover, although the trial court had not ruled on the claim of immunity under *Gov. Code § 831.7*, the court of appeal held that the university was immune under that statute. The court distinguished the decisions in *Acosta v. Los Angeles Unified Sch. Dist. (1995) 31 Cal. App. 4th 471, 37 Cal. Rptr. 171* , and *Iverson v. Muroc Unified Sch. Dist. (1995) 32 Cal. App. 4th 218, 38 Cal. Rptr. 2d 35* , described in § 196.306[3][a], on the basis that the plaintiff was an adult taking part in a voluntary activity. Because, as the Supreme Court had noted, colleges and universities had no duty to supervise the activities of their adult students, the duty of supervision required of school districts used by the courts in *Acosta* and *Iverson* could not override *Gov. Code § 831.7*. Moreover, because the defendant did not require or expect the plaintiff to take part in intramural soccer, the plaintiff in this case was not similarly situated to the plaintiffs in *Acosta* and *Iverson* (*72 Cal. App. 4th 1300, 1308)* .

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§§ 198.05-198.09 [Reserved]

§ 198.10 Demurrer to Action For Rescission Based on Lapse of Limitation Period

[1] FORM

[2] Comments

[a] Use of Form

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[c] Related Pleading and Practice Forms

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[3] Discussion of Authorities

[a] Failure to State Cause of Action

[b] Limitation Period for Quiet Title Action Governed by Plaintiff's Basic Cause of Action

[c] Failure to Rescind Promptly Bars Quiet Title Action

§ 198.11 Quiet Title Action Is Barred by Limitation Period Applicable to Fraud or Mistake

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

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[3] Discussion of Authorities

[a] Three-Year Statute of Limitations Applies to Quiet Title Action Based on Fraud or Mistake

§ 198.12 Quiet Title Action Is Barred by Limitation Period Relating to Seisin or Possession

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Memoranda

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[3] Discussion of Authorities

[a] Burden of Proof

§§ 198.13-198.19 [Reserved]

§ 198.20 Quiet Title Action Is Not Barred Because There Is No Limitation Against Plaintiff in Possession

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] No Limitation Period Against Plaintiff in Possession

[4] Additional Authorities

[a] No Limitation Period Against Plaintiff in Possession

§ 198.21 Quiet Title Action Is Not Barred by Limitation Period for Fraud or Mistake When Deed Was Never Delivered

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Statute of Limitations for Fraud or Mistake Does Not Apply if Deed Not Delivered

[4] Additional Authorities

[a] Statute of Limitations for Fraud or Mistake Does Not Apply if Deed Not Delivered

§ 198.22 Quiet Title Action Is Not Barred by Limitation Period for Fraud or Mistake Because Cause of Action Did Not Accrue Until Discovery

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Quiet Title Action Based on Fraud or Mistake Does Not Accrue Until Discovery of Facts Constituting Fraud or Mistake

§ 198.23 Action to Quiet Title to Easement by Necessity Is Not Barred by Limitation Period

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] No Limitation Period in Action to Quiet Title to an Easement by Necessity

§§ 198.24-198.29 [Reserved]

§ 198.30 Equitable Interest Is Insufficient to Maintain Quiet Title Action Against Holder of Legal Title

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Equitable Interest Is Insufficient to Quiet Title Against Holder of Legal Title

[4] Additional Authorities

[a] Equitable Interest Is Insufficient to Quiet Title Against Holder of Legal Title

§§ 198.31-198.34 [Reserved]

§ 198.35 Any Interest in Real Property Is Sufficient to Maintain Quiet Title Action

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[3] Discussion of Authorities

[a] Any Estate or Interest in Land Is Sufficient to Maintain Quiet Title Action

[4] Additional Authorities

[a] Any Estate or Interest in Land Is Sufficient to Maintain Quiet Title Action

§ 198.36 Equitable Interest Is Sufficient to Maintain Quiet Title Action Against Another Holder of Equitable Interest

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Equitable Interest is Sufficient to Maintain Quiet Title Action Against Holder of Equitable Title

§ 198.37 Adverse Claimant Can Obtain Relief in Quiet Title Action Based on Lack of Title in Plaintiff

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[3] Discussion of Authorities

[a] Court May Determine Conflicting Claims of Any Estate or Interest

§§ 198.38-198.39 [Reserved]

§ 198.40 Demurrer to Quiet Title Action Based on Failure to Allege Plaintiff's Title and Basis of Title

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[3] Discussion of Authorities

[a] Failure to Allege Plaintiff's Title and Basis of Title

§ 198.41 Demurrer to Answer in Quiet Title Action Based on Failure to Include Required Allegations

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[3] Discussion of Authorities

[a] Failure to Allege Defendant's Claim and Facts Controverting Material Allegations of Complaint

[4] Additional Authorities

[a] Failure to Allege Defendant's Claim and Facts Controverting Material Allegations of Complaint

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19A-198 California Points & Authorities § 198.01

§ 198.01 Scope of Chapter

This chapter contains memoranda relating to quieting title. Specifically, it includes the following types of memoranda:

- Supporting (*see §§ 198.10 -198.12*) and opposing (*see §§ 198.20 -198.23*) actions based on the statute of limitations.

- Supporting (*see § 198.30*) and opposing (*see §§ 198.35 -198.37*) actions based on the sufficiency of particular interests to maintain a quiet title action.

- Supporting a demurrer to the complaint (*see § 198.40*) and a demurrer to the answer (*see § 198.41*) based on the failure to include required allegations.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersGovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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19A-198 California Points & Authorities § 198.02

§ 198.02 Governing Law

Quiet title actions are governed by *Code Civ. Proc. § 760.010 et seq.* When such an action involves real property, it may also be governed by *Code Civ. Proc. § 318*, a statute of limitation, and by *Code Civ. Proc. §§ 742, 743*, concerning a court-ordered survey of the property.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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19A-198 California Points & Authorities § 198.03

§ 198.03 How to Use the Forms in This Chapter

[1] Page Limits on Memoranda

One of the more significant drafting requirements to keep in mind are page limits: supporting and opposing memoranda must not exceed 15 pages, or 20 pages for a summary judgment motion or summary adjudication motion. A reply or closing memorandum may not exceed 10 pages. Exhibits, declarations, attachments, tables of contents, a table of authorities, or proof of service are not counted [*Cal. Rules of Ct., Rule 3.1113(d)*]. A party must apply to the court for permission to file a longer memorandum [*see Cal. Rules of Ct., Rule 3.1113(e)*]. These and other drafting requirements are discussed in *further detail in Ch. 1, Writing Legal Memoranda and Briefs, § 1.05*.

[2] Using the Forms to Build a Draft Memorandum

The forms in this chapter are designed to be combined with other points to form a complete memorandum. For a detailed discussion on how to select and use the forms in the publication to build a draft memorandum and complete the draft, with detailed discussion of all drafting requirements and strategic or stylistic considerations, see *Ch. 1, Writing Legal Memoranda and Briefs, §§ 1.03 -1.06*. For a skeletal form of memorandum for use in creating a properly formatted outline in which to compile relevant forms from this publication, see *Ch. 1, Writing Legal Memoranda and Briefs, § 1.10*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPleading & PracticeMotion PracticeSupporting MemorandaCivil ProceduresSummary JudgmentOppositionMemoranda in OppositionCivil ProceduresSummary JudgmentSupporting MaterialsMemoranda of LawReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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19A-198 California Points & Authorities § 198.04

§ 198.04 Related Discussion and Forms

[1] Related Pleading and Practice Forms

For detailed legal background discussion, a research guide, a procedural checklist, and practice forms of motions and other papers relating to quiet title actions generally, see California Forms of Pleading and Practice, Ch. 482, *Quieting Title* (Matthew Bender).

Other related chapters in the publication include:

- Ch. 101, *Boundaries.*
- Ch. 107, *Cancellation of Instruments*.
- Ch. 184, *Deeds.*
- Ch. 213, *Documents of Title.*
- Ch. 240, *Easements.*
- Ch. 241, *Ejectment*.
- Ch. 270, *Fraudulent Conveyances*.
- Chs. 330-335, *Landlord and Tenant*.
- Ch. 345, *Limitation of Actions.*
- Ch. 348, *Lis Pendens*.

[2] Related Memoranda

- For coverage of quiet title actions by adverse possessors, see Ch. 13, *Adverse Possession* .

- For memoranda supporting and opposing demurrers based on statutes of limitations, see Ch. 143, *Limitation of Actions* .

[3] Related California Real Estate Law and Practice Chapter

For a comprehensive discussion of the law pertaining to quieting title, see California Real Estate Law & Practice, Ch. 370, *Quieting Title and Determining Adverse Claims* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersBoundariesReal Property LawDeedsGeneral OverviewReal Property LawLimited Use RightsEasementsGeneral OverviewReal Property LawPriorities & RecordingLis PendensReal Property LawTitle QualityAdverse Claim ActionsEjectmentReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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[Reserved]

§§ 198.05[Reserved]

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PART II. FORMS
A. Statute of Limitations

19A-198 California Points & Authorities § 198.10

§ 198.10 Demurrer to Action For Rescission Based on Lapse of Limitation Period

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF DEMURRER
[and DOES I through _____,]	)	TO COMPLAINT
Defendant(s).	)	
	)	
	)	

_____

THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION FOR QUIETING TITLE BECAUSE IT REVEALS ON ITS FACE THAT (1) THE BASIC CAUSE OF ACTION GIVING RISE TO PLAINTIFF'S RIGHT TO RELIEF IS BASED ON RESCISSION, AND (2) THERE WAS INEXCUSABLE DELAY IN SEEKING RESCISSION.

A. Objection by Demurrer. The party against whom a complaint has been filed may object to the complaint by demurrer on the ground that it does not state facts sufficient to constitute a cause of action (*Code Civ. Proc. § 430.10(e)*). When any ground for objection to a complaint appears on the face of the complaint (or from any matter of which the court is required to or may take judicial notice), the objection on that ground may be taken by a demurrer to the complaint (*Code Civ. Proc. § 430.30(a)*).

B. Failure to State Cause of Action. The objection that an action is barred by a statute of limitations may be made by demurrer (*Basin Construction Corp. v. Department of Water & Power (1988) 199 Cal. App. 3d 819, 823, 245 Cal. Rptr. 178*) notwithstanding the fact that *Code Civ. Proc. § 430.10* does not specifically list the statute of limitations as an objection permitted to be raised by demurrer. An objection based on the statute of limitations is deemed to be included in the ground of demurrer that the complaint does not state facts sufficient to constitute a cause of action under *Code Civ. Proc. § 430.10(e)* (*Bank of America Etc. Assn. v. Ames (1936) 18 Cal. App. 2d 311, 313-314)* .

C. Limitation Period for Quiet Title Action Governed by Plaintiff's Basic Cause of Action. The limitation period in a quiet title action for the recovery of real property is based on the limitation period applicable to the basic cause of action giving rise to the plaintiff's right to relief (*Leeper v. Beltrami (1959) 53 Cal. 2d 195, 212 214, 1 Cal. Rptr. 12, 347 P.2d 12*).

D. Failure to Rescind Promptly Bars Quiet Title Action. When the plaintiff's basic right in a quiet title action is to rescind based on defendant's fraud or duress, a complaint that shows on its face that the plaintiff did not rescind promptly after knowledge of the facts entitling the plaintiff to rescission is demurrable regardless of the form in which the prayer for relief is couched (*Leeper v. Beltrami (1959) 53 Cal. 2d 195, 214, 1 Cal. Rptr. 12, 347 P.2d 12*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant

_____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a defendant s general demurrer to a complaint when (1) the complaint reveals that the underlying action supporting the plaintiff's right to quiet title is based on the plaintiff's right to rescission due to fraud or duress, and (2) the complaint shows that plaintiff did not rescind promptly after becoming aware of facts entitling the plaintiff to rescission. Even though the facts in *Leeper v. Beltrami (1959) 53 Cal. 2d 195, 1 Cal. Rptr. 12, 347 P.2d 12* justifying rescission involved duress [*see* [3][b], *below*, for discussion of *Leeper*] presumably this form could also be used in other situations entitling the plaintiff to rescission, such as mutual mistake.

This form may also be adapted for use in a motion for judgment on the pleadings based on the failure to state facts sufficient to constitute a cause of action [*see Code Civ. Proc. § 438(c)(1)(B)(ii)*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should refer to the allegations in the complaint that establish that the plaintiff's underlying cause of action is based on plaintiff's right to rescission, and the allegations that demonstrate that the plaintiff failed to rescind promptly after becoming aware of facts entitling the plaintiff to rescind. Counsel can then argue the complaint is subject to demurrer based on the authorities set forth above.

[c] Related Pleading and Practice Forms

For related coverage in California Forms of Pleading and Practice (Matthew Bender), see the following chapters:

- Ch. 345, *Limitation of Actions* (includes form of demurrer for use in asserting the bar of statute of limitations).
- Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (discussion, procedures, and forms relating to demurrers generally).
- Ch. 537, *Summary Judgment* (form of notice for summary judgment and related discussion).
- Ch. 482, *Quieting Title* (forms and discussion relating to quieting title generally).

[d] Related Memoranda

For memoranda for use in supporting demurrers based on the statute of limitations, see Ch. 143, *Limitation of Actions* . For memoranda supporting demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For memoranda for use in supporting motions for summary judgment, see Ch. 221, *Summary Judgments* .

[e] Opposing Memoranda

In an appropriate case, the points *set out in § 198.20* (when the plaintiff has been in possession of the property) may be used to oppose a demurrer supported by this form.

[3] Discussion of Authorities

[a] Failure to State Cause of Action

In ***Basin Construction Corp. v. Department of Water & Power*** *(1988) 199 Cal. App. 3d 819, 245 Cal. Rptr. 178* , the owners of a property filed a complaint in intervention in another property owner's action against the City of Los Angeles for damages to their property arising out of a fire caused by malfunctioning city electrical equipment. The trial court sustained the defendant's demurrer without leave to amend based on the applicable five-year statute of limitations. The court of appeal affirmed, holding that a complaint is subject to general demurrer when the complaint shows on its face that the cause of action is barred by the statute of limitations (*199 Cal. App. 3d 819, 823)* .

An explanation for the above ruling was set forth in ***Bank of American Etc. Assn. v. Ames*** *(1936) 18 Cal. App. 2d 311* . In this action for money due under a contract, the trial court overruled the defendant's demurrer, which was based on the bar of the statute of limitations. Judgment was entered for the plaintiff and the defendant appealed, in part on the theory that the action was barred by the statute of limitations. The court of appeal affirmed the judgment, holding that the demurrer had been properly overruled because, under any theory, a part of the claim was good (*18 Cal. App. 2d 311, 315)* . The court did acknowledge that Code Civ. Proc. § 430 does not expressly authorize the common practice of raising the statute of limitations bar by way of demurrer. However, citing *California Safe etc. Co. v. Sierra etc. Co. (1910) 158 Cal. 690, 112 P. 274* , the court concluded that the only ground under which the statute of limitations could be brought was the ground of failure to state facts sufficient to constitute a cause of action (*18 Cal. App. 2d 311, 314)* .

[b] Limitation Period for Quiet Title Action Governed by Plaintiff's Basic Cause of Action

Leeper v. Beltrami *(1959) 53 Cal. 2d 195, 1 Cal. Rptr. 12, 347 P.2d 12* , involved in pertinent part an action in which plaintiffs sought to quiet title and to set aside or cancel an executed deed by which certain property was conveyed as a result of duress by two of the defendants. Plaintiffs alleged that the defendant grantee of the deed had knowledge of the duress leading to the conveyance. Following the sustaining of defendants' demurrer to plaintiffs' complaint, the trial

court entered judgment, from which plaintiffs appealed.

The Supreme Court affirmed that portion of the trial court's judgment in favor of defendant grantee. The court noted that the plaintiffs' right to quiet title was based on their right to rescind the conveyance and cancel the deed, which right to rescission was in turn based on the grantee's knowledge of duress perpetrated by other defendants. After discussing the considerable confusion in authorities on the applicable statute of limitations for such a cause of action, the court found that the modern rule places more emphasis on the basic rights involved to determine the applicable statute of limitations. Thus, the court noted that it has been held that, when the complaint is in two counts, one to quiet title and one to cancel a deed, if the count to quiet title depends on the cancellation count, the complaint must stand or fall on that count. Similarly, many cases have held that, when the legal title is in the defendant, and the plaintiff seeks to quiet title on the ground defendant's title was secured from the plaintiff by fraud, the plaintiff must plead and prove facts constituting the fraud. The court concluded that "the modern tendency is to look beyond the relief sought, and to view the matter from the basic cause of action giving rise to the plaintiff's right to relief" (*53 Cal. 2d 195, 213-214)* .

[c] Failure to Rescind Promptly Bars Quiet Title Action

The facts and procedural background of ***Leeper v. Beltrami*** *(1959) 53 Cal. 2d 195, 1 Cal. Rptr. 12, 347 P.2d 12* are discussed under Limitation Period for Quiet Title Action Governed by Plaintiff's Basic Cause of Action, above. The court held in this case that the plaintiff's right at issue was to rescind based on fraud, and that a party must rescind promptly after knowledge of the fraud or duress. The complaint revealed that the plaintiffs waited for two or three years to attempt to rescind. This was inexcusable delay and the complaint was demurrable (*53 Cal. 2d 195, 211-214)* .

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Volume 19A Chapters 196-199 PUBLIC ENTITIES---to---QUO WARRANTO
CHAPTER 198 QUIETING TITLE
PART II. FORMS
A. Statute of Limitations

19A-198 California Points & Authorities § 198.11

§ 198.11 Quiet Title Action Is Barred by Limitation Period Applicable to Fraud or Mistake

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF'S QUIET TITLE ACTION IS BARRED BECAUSE THE BASIC CAUSE OF ACTION GIVING RISE TO PLAINTIFF'S RIGHT TO RELIEF IS BASED ON _____ [FRAUD *or* MISTAKE] AND THE COMPLAINT WAS FILED MORE THAN THREE YEARS AFTER PLAINTIFF'S DISCOVERY OF FACTS CONSTITUTING THE _____ [FRAUD *or* MISTAKE].

A. Limitation Period for Quiet Title Action Governed by Plaintiff's Basic Cause of Action. [*See § 198.10[1], Paragraph C.*]

B. Three-Year Statute of Limitations Applies to Quiet Title Action Based on Fraud or Mistake. When the underlying cause of action for plaintiff's quiet title action is based on fraud or mistake, the action is subject to *Code Civ. Proc. § 338(d)*, which requires the action to be brought within three years of the discovery of facts constituting the fraud or mistake (*Code Civ. Proc. § 338(d)*; *Ankoanda v. Walker-Smith (1996) 44 Cal. App. 4th 610, 615, 52 Cal. Rptr. 39* ; *Turner v. Milstein (1951) 103 Cal. App. 2d 651, 659, 230 P.2d 25*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the defendant s contention that the plaintiff's quiet title action is barred by a three-year statute of limitations when the underlying cause of plaintiff's action is based on fraud or mistake.

This form may be combined with memoranda pertaining to the specific procedural context in which counsel wishes to raise this statute of limitations issue. For example, this form may be combined with § 198.10[1], Paragraphs A and B, to support a general demurrer to a complaint. This form may also be adapted for use in a motion for summary judgment, a

motion for judgment on the pleadings, a trial or appellate brief, or jury instructions.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, in supporting a demurrer to a complaint, counsel should refer to allegations in the complaint that establish that (1) the plaintiff's underlying cause of action is based on fraud or mistake, and (2) plaintiff failed to bring action within three years from discovering the fraud or mistake. Likewise, counsel should set forth these facts, supported by affidavits or declarations when appropriate, in a motion for summary judgment or a brief. Counsel can then argue that the complaint is subject to demurrer, or judgment should be entered for the defendant, as appropriate, based on the authorities set forth above.

[c] Related Pleading and Practice Forms

For a form of demurrer for use in asserting the bar of the statute of limitations, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* (Matthew Bender). For a form of notice for summary judgment and related discussion, see Ch. 537, *Summary Judgment* , in that set. For forms and discussion relating to quieting title generally, see Ch. 482, *Quieting Title* , also in that set.

[d] Related Memoranda

For memoranda for use in supporting demurrers based on the statute of limitations, see Ch. 143, *Limitation of Actions* . For memoranda supporting demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For memoranda and authorities for use in supporting motions for summary judgment, see Ch. 221, *Summary Judgments* .

[e] Opposing Memoranda

In an appropriate case, the memoranda *set out in § 198.20* (when the plaintiff has been in possession of the property), 198.21 (when the deed was never delivered), or 198.22 (when plaintiff's discovery of the fraud or mistake occurred within three years of the filing of the complaint) may be used to oppose a contention supported by this form.

[3] Discussion of Authorities

[a] Three-Year Statute of Limitations Applies to Quiet Title Action Based on Fraud or Mistake

In ***Ankoanda v. Walker-Smith*** *(1996) 44 Cal. App. 4th 610, 52 Cal. Rptr. 39* , the plaintiff executed sequential deeds granting the defendant an interest in plaintiff's property (first as a tenant in common and later as a joint tenant), because of a mistaken belief that the defendant needed to be on title to qualify for a certain grant program. Later, the defendant asserted full ownership rights. The plaintiff brought a quiet title action and the trial court entered judgment for the plaintiff, based on mutual mistake, and also found that a five-year statute of limitations applied, but that the statute was tolled during the period of the tenancy. The defendant appealed.

The court of appeal reversed. First, it held that the three-year statute of limitations based on fraud or mistake [*see Code Civ. Proc. § 338(d)*] applied to this action because the underlying cause of action was based on the mutual mistake of the parties regarding the grant program requirements (*44 Cal. App. 4th 610, 615)* . Furthermore, on a issue unrelated to this point, it held that the statute of limitations was not tolled during the tenancy [*see § 198.20[4*] for discussion of court's ruling on this point].

In ***Turner v. Milstein*** *(1951) 103 Cal. App. 2d 651, 230 P.2d 25* , the plaintiff brought a quiet title action based on the defendant's fraud in causing a sheriff's sale of the plaintiff's property to satisfy a judgment, without notice to plaintiff and with the intent to conceal from plaintiff the time and place of the sale. The property was sold to the defendant for a

small fraction of the fair market value. The trial court sustained the defendant's demurrer based, in part, on the application of the four-year statute of limitations set forth in *Code Civ. Proc. § 343* (for actions not otherwise covered).

The court of appeal reversed and held that when, as in this case, the gist of the action is fraud, and relief is sought on that ground, the action comes directly within the provision of former Code Civ. Proc. § 338(4) (now *Code Civ. Proc. § 338(d)*), irrespective of the form of action. Because this section was not specified as a ground of demurrer, the court would not consider it as a ground for affirming the judgment because the only question before it was whether the cause of action was barred by the particular section mentioned in the demurrer (*103 Cal. App. 2d 651, 659)* .

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Volume 19A Chapters 196-199 PUBLIC ENTITIES---to---QUO WARRANTO
CHAPTER 198 QUIETING TITLE
PART II. FORMS
A. Statute of Limitations

19A-198 California Points & Authorities § 198.12

§ 198.12 Quiet Title Action Is Barred by Limitation Period Relating to Seisin or Possession

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF'S QUIET TITLE ACTION IS BARRED BECAUSE PLAINTIFF WAS NOT SEISED OR POSSESSED OF THE PROPERTY WITHIN FIVE YEARS BEFORE THE COMPLAINT WAS FILED.

A. Limitation Period. No action for the recovery of real property, or for the recovery of possession of real property, can be maintained unless it appears that the plaintiff, or the plaintiff's ancestor, predecessor, or grantor, was seised or possessed of the property in question within five years before the commencement of the action (*Code Civ. Proc. § 318*).

B. Burden of Proof. Plaintiff has the burden of proof to show that plaintiff or his or her predecessors in interest have been seised or possessed of the property in question within five years before commencement of the action (*Safwenberg v. Marquez (1975) 50 Cal. App. 3d 301, 311, 123 Cal. Rptr. 405*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that plaintiff's quiet title action is barred by the limitation period set forth in *Code Civ. Proc. § 318*, which requires plaintiff or plaintiff's predecessors to have been seised or possessed of the property within five years before commencement of the action.

This form may be combined with memoranda pertaining to the specific procedural context in which counsel wishes to raise this statute of limitations issue. For example, this form may be combined with § 198.10[1], Paragraphs A and B, to support a general demurrer to a complaint. This form may also be adapted for use in a motion for summary judgment, a motion for judgment on the pleadings, a trial or appellate brief, or jury instructions.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, in supporting a demurrer to a complaint, counsel should refer to allegations in the complaint that establish that plaintiff's cause of action is primarily for the recovery of real property [*see § 198.12[3*][b] for discussion of related, incidental causes of action], and that plaintiff was not seised or possessed of the property within five years of the filing of the complaint. Likewise, counsel should set forth these facts, supported by affidavits or declarations when appropriate, in a motion for summary judgment or brief. Counsel can then argue that the complaint is subject to demurrer, or judgment should be entered for defendant, as appropriate, based on the authorities set forth above.

[c] Related Pleading and Practice Forms

For a form of demurrer for use in asserting the bar of the statute of limitations, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* (Matthew Bender). For a form of notice for summary judgment and related discussion, see Ch. 537, *Summary Judgment* , in that set. For forms and discussion relating to quieting title generally, see Ch. 482, *Quieting Title* , also in that set.

[d] Related Memoranda

For memoranda for use in supporting demurrers based on the statute of limitations, see Ch. 143, *Limitation of Actions* . For memoranda supporting demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings.* For memoranda for use in supporting motions for summary judgment, see Ch. 221, *Summary Judgments* .

[e] Opposing Memoranda

In an appropriate case, the memorandum *set out in § 198.20* (when the plaintiff has been in possession of the property) or 198.23 (when the plaintiff's title is based on an easement by necessity) may be used to oppose a contention supported by this form.

[3] Discussion of Authorities

[a] Burden of Proof

In ***Safwenberg v. Marquez*** *(1975) 50 Cal. App. 3d 301, 123 Cal. Rptr. 405* , the plaintiff, as executrix of an estate, brought an action to quiet title to an abandoned street, and, incidentally, to reform an ambiguous deed executed by the original grantor approximately 30 years before the action was filed. The two defendants each owned a lot adjacent to the abandoned street and each claimed title to the center of the street. The trial court entered judgment for the plaintiff in pertinent part, and the defendants appealed.

The court of appeal reversed on the issue appealed by the defendants. First, it held that the applicable statute of limitations in this case was governed by *Code Civ. Proc. § 318*, which requires the plaintiff to show that the plaintiff, or the plaintiff's predecessor in interest, was seised or possessed of the property within five years of the commencement of the action. The court explained that Section 318 is more than an ordinary statute of limitations, which constitutes merely a personal defense that is waived if not pleaded. Section 318 is an expression of public policy that bars an action to recover real property after five years, regardless of whether or not it is affirmatively pleaded (*50 Cal. App. 3d 301, 311)* .

The court held further that the plaintiff has the burden of proof to show that it has met the requirements of *Code Civ. Proc. § 318*, and that, in this case, the plaintiff had not carried this burden. Therefore, her quiet title action was barred and the judgment was reversed (*50 Cal. App. 3d 301, 311-312)* .

The court also discussed an important distinction to be made in quiet title actions involving statute of limitations issues. It noted that California authorities distinguish between the following: cases in which a cause of action for reformation on the ground of fraud or mistake is *incidental* to a quiet title action, which are subject to the five-year statute in *Code Civ. Proc. § 318*; and those cases in which there is no attempt to recover property or establish title over and above the action for reformation, which are subject to the three-year statute that was set forth in former Code Civ. Proc. § 338(4) at the time the opinion was filed, and is now found in *Code Civ. Proc. § 338(d)* (*see 50 Cal. App. 3d 301, 310* ; citations omitted, emphasis added).

This holding is somewhat inconsistent with the authorities discussed in *§ 198.11[3]*. Those cases held that the three-year statute in *Code Civ. Proc. § 338(d)* applies to a quiet title action in which the *underlying cause of action is based on fraud or mistake, irrespective of the form of action* [*Ankoanda v. Walker-Smith (1996) 44 Cal. App. 4th 610, 615* ; *Turner v. Milstein (1951) 103 Cal. App. 2d 651, 659, 230 P.2d 25]* . When viewed together, the case authorities appear to turn on the interpretation of whether the cause of action for fraud or mistake is *incidental* to the quiet title action or the reverse. Counsel should review the facts and discussion in these cases carefully to craft a persuasive argument based on the facts of the subject action.

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Volume 19A Chapters 196-199 PUBLIC ENTITIES---to---QUO WARRANTO
CHAPTER 198 QUIETING TITLE
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A. Statute of Limitations

19A-198 California Points & Authorities §§ 198.13-198.19

[Reserved]

§§ 198.13[Reserved]

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Volume 19A Chapters 196-199 PUBLIC ENTITIES---to---QUO WARRANTO
CHAPTER 198 QUIETING TITLE
PART II. FORMS
A. Statute of Limitations

19A-198 California Points & Authorities § 198.20

§ 198.20 Quiet Title Action Is Not Barred Because There Is No Limitation Against Plaintiff in Possession

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF'S QUIET TITLE ACTION IS NOT BARRED BY THE STATUTE OF LIMITATIONS BECAUSE NO LIMITATION PERIOD APPLIES TO A PLAINTIFF IN POSSESSION OF THE PROPERTY.

A. No Limitation Period Against Plaintiff in Possession. No statute of limitations runs against a plaintiff seeking to quiet title while he or she is in possession of the property (*Muktarian v. Barmby (1965) 63 Cal. 2d 558, 560, 47 Cal. Rptr. 483, 407 P.2d 659*).

[2] Comments

[a] Use of Form

This form may be submitted to oppose the contention that a statute of limitations bars the plaintiff's quiet title action.

This form may be combined with memoranda pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the statute of limitations does not apply to a plaintiff while the plaintiff is in possession of the property. For example, this form may be adapted for use to oppose a general demurrer to a complaint, or for inclusion in a motion for summary judgment, a trial or appellate brief, or jury instructions.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, in opposing a demurrer to a complaint, counsel should refer to allegations in the complaint that establish that plaintiff has been in possession of the property. Likewise, counsel should set forth these facts, supported by affidavits or declarations when appropriate, in a motion for summary judgment or brief. Counsel can then argue that the demurrer should be overruled,

or judgment should be entered for the plaintiff, as appropriate, based on the authorities set forth above.

[c] Related Pleading and Practice Forms

For discussion, procedures and forms relating to demurrers generally, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For forms and discussion relating to summary judgment proceedings, see Ch. 537, *Summary Judgment* , in that set. For forms and discussion relating to quieting title generally, see Ch. 482, *Quieting Title* , also in that set.

[d] Related Memoranda

For memoranda for use in opposing demurrers based on the statute of limitations, see Ch. 143, *Limitation of Actions* . For memoranda authorities opposing demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For memoranda for use in opposing motions for summary judgment, see Ch. 221, *Summary Judgments* .

[e] Opposing Memoranda

In an appropriate case, this memorandum may be used in opposition to the points *set forth in §§ 198.10* (action barred for failure to rescind promptly), 198.11 (action barred by statute of limitations for fraud or mistake), or 198.12 (action barred for failure to show seisin or possession within five years of the commencement of the action).

[3] Discussion of Authorities

[a] No Limitation Period Against Plaintiff in Possession

In ***Muktarian v. Barmby*** *(1965) 63 Cal. 2d 558, 47 Cal. Rptr. 483, 407 P.2d 659* , the 75-year-old plaintiff executed a grant deed to his son, subject to a life estate, but without intending to relinquish control over the property prior to his death. The father continued to live on the property, and when the son later refused to cooperate in a sale of a part of the property, the father brought an action to quiet title. The trial court ruled that the three-year statute of limitations for fraud or mistake [*see Code Civ. Proc. § 338(d)*] barred the plaintiff's quiet title action. The plaintiff appealed.

The Supreme Court reversed the judgment for the defendant. It acknowledged the ruling in *Leeper v. Beltrami (1959) 53 Cal. 2d 195, 1 Cal. Rptr. 12, 347 P.2d 12* [*see § 198.10[3*][c] for discussion of *Leeper*] that it is ordinarily necessary to refer to the underlying theory of relief to determine which statute of limitations applies. However, the court held that in this case, it was unnecessary to determine the applicable statute of limitations, for no statute of limitations runs against a plaintiff seeking to quiet title while he or she is in possession of the property (*63 Cal. 2d 558, 560)* .

The Court explained that, in many instances, one in possession would not know of dormant adverse claims of persons not in possession. Moreover, even if, as in plaintiff's case, the party in possession knows of such a potential claimant, there is no reason to put the party to the expense and inconvenience of litigation until such a claim is pressed against him or her (*63 Cal. 2d 558, 560-561)* .

Counsel should be aware of the following limitations of the ruling in *Muktarian*.

The facts of *Ankoanda v. Walker-Smith (1996) 44 Cal. App. 4th 610, 52 Cal. Rptr. 2d 39* are discussed in detail in *§ 198.11[3]*. The trial court in *Ankoanda* held that the plaintiff-landlord had remained seised and possessed of the leased property through her tenant and therefore that the statute of limitations was tolled under *Muktarian v. Barmby* [*see § 198.20[3]* for discussion of *Muktarian*].

In reversing the judgment for the plaintiff, the court of appeal held that (1) the applicable statute of limitations was the three-year period set forth in *Code Civ. Proc. § 338(d)*, based on the mutual mistake of the parties, and (2) the statute

was not tolled during the tenancy of the defendant, contrary to the trial court's ruling. The court of appeal held that the possession required to toll the statute of limitations under *Muktarian* must be "exclusive and undisputed" (*44 Cal. App. 4th 610, 615)* . In *Ankoanda*, both landlord and tenant were record owners of the property, and had an equal right to possession of the entire property as against third parties, but did not have right to the exclusive possession of the property as against each other (*44 Cal. App. 4th 610, 618)* .

The *Muktarian* rule tolling the statute of limitations when the plaintiff is in possession does not apply to set aside a tax collector's deed issued to the State of California for delinquent taxes. In such cases, the one-year statutes of limitations set forth in *Rev. & Tax. Code §§ 175* and *3521* apply [*Sears v. Calaveras (1955) 45 Cal. 2d 518, 520-522, 289 P.2d 425]* .

[4] Additional Authorities

[a] No Limitation Period Against Plaintiff in Possession

In *In re Allustiarte (9th Cir. 1986) 786 F. 2d 910* applied the ruling of *Muktarian v. Barmby (1965) 63 Cal. 2d 558, 47 Cal. Rptr. 483, 407 P.2d 659* [*see § 198.20[3*] for discussion of *Muktarian*] to permit a bankruptcy trustee to quiet title in a parcel that had been transferred by the debtors to certain family trusts, when the debtors had at all times remained in possession of the property. The court of appeals in *Allustiarte* affirmed the trial court judgment in favor of the trustee, holding that a trustee stands in the shoes of the debtors (*786 F.2d 910, 913)* .

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Volume 19A Chapters 196-199 PUBLIC ENTITIES---to---QUO WARRANTO
CHAPTER 198 QUIETING TITLE
PART II. FORMS
A. Statute of Limitations

19A-198 California Points & Authorities § 198.21

§ 198.21 Quiet Title Action Is Not Barred by Limitation Period for Fraud or Mistake When Deed Was Never Delivered

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF'S QUIET TITLE ACTION IS NOT BARRED BY THE STATUTE OF LIMITATIONS FOR FRAUD OR MISTAKE BECAUSE THE DEED WAS NEVER DELIVERED.

A. Statute of Limitations for Fraud or Mistake Does Not Apply if Deed Not Delivered. If a deed is executed as a result of fraud or mistake but there is no delivery of the deed, the three-year statute of limitations for fraud or mistake [*Code Civ. Proc. § 338(d)*] does not apply to the plaintiff's quiet title action (*Kenney v. Parks (1902) 137 Cal. 527, 530, 70 P. 556*).

[2] Comments

[a] Use of Form

This form may be submitted to oppose the contention that the plaintiff's quiet title action is barred by the three-year statute of limitations for fraud or mistake, when the deed was never delivered.

This form may be combined with memoranda pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the three-year statute of limitations for fraud or mistake does not apply because of nondelivery of the deed. For example, this form may be adapted for use to oppose a general demurrer to a complaint, or for use in a motion for summary judgment, a trial or appellate brief, or jury instructions.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, in opposing a

demurrer to a complaint, counsel should refer to allegations in the complaint that establish that there was never any delivery of the deed. Likewise, counsel should set forth these facts, supported by affidavits or declarations when appropriate, in opposition to a motion for summary judgment, or in a brief. Counsel can then argue that the demurrer should be overruled, or judgment should be entered for plaintiff, as appropriate, based on the authorities set forth above.

[c] Related Pleading and Practice Forms

For discussion, procedures and forms relating to demurrers generally, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For forms and discussion relating to summary judgment proceedings, see Ch. 537, *Summary Judgment* , in that set. For forms and discussion relating to quieting title generally, see Ch. 482, *Quieting Title* , also in that set.

[d] Related Memoranda

For memoranda for use in opposing demurrers based on the statute of limitations, see Ch. 143, *Limitation of Actions* . For memoranda opposing demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For memoranda for use in opposing motions for summary judgment, see Ch. 221, *Summary Judgments* .

[e] Opposing Memoranda

In an appropriate case, this form may be used in opposition points set forth *in § 198.11* (action barred by statute of limitations for fraud or mistake).

[3] Discussion of Authorities

[a] Statute of Limitations for Fraud or Mistake Does Not Apply if Deed Not Delivered

In ***Kenney v. Parks*** *(1902) 137 Cal. 527, 70 P. 556* , the plaintiff executed two deeds in favor of her husband based on the mutual understanding that the deeds would have no effect until recorded and that the deeds would not be recorded unless her husband survived her. The deeds were subsequently recorded by her husband. After her husband's death, plaintiff was ousted from the property by the executors of her husband s estate. After an initial action and an appeal, the plaintiff brought a second action, and the trial court found that this action was barred by *Code Civ. Proc. § 338*, based on fraud or mistake. The plaintiff appealed.

The Supreme Court reversed and remanded for further proceedings. It acknowledged that mistake and fraud were indeed alleged and found, but that the plaintiff's cause of action was complete without regard to these facts. The court held that because of the mutual understanding of the plaintiff and her husband regarding the execution of the deed, either there was no delivery, or the deed took effect subject to a trust in favor of the plaintiff. In the former event, the applicable statute of limitations would be governed by *Code Civ. Proc. § 318*; in the latter event, by *Code Civ. Proc. § 343*. Because the only statute pleaded was *Code Civ. Proc. § 338*, the court held that the plaintiff was entitled to relief. Further, on an issue not directly relevant to the point in question, it held that plaintiff should not be barred because she brought the second action within one year of the reversal in the first action, in compliance with *Code Civ. Proc. § 355* (*137 Cal. 527, 528-530)* .

[4] Additional Authorities

[a] Statute of Limitations for Fraud or Mistake Does Not Apply if Deed Not Delivered

In *Estate of Pieper (1964) 224 Cal. App. 2d 670, 37 Cal. Rptr. 46* , the decedent executed a deed in favor of Parkinson, the eventual administrator of the decedent's estate. It was alleged that the decedent was totally incompetent to comprehend the meaning and nature of the deed, and therefore was unable to form the intent to divest herself of title,

resulting in the lack of delivery of the deed to Parkinson. Parkinson raised the defense of the statute of limitations. The trial court made no findings on this issue and declared the deed invalid. Parkinson appealed.

The court of appeal reversed and remanded, with directions to the trial court to make findings on the issue of the statute of limitations. The court held that the gravamen of the petitioner's action was not fraud or mistake and therefore *Code Civ. Proc. § 338* did not apply. The court found no authorities directly holding which statute of limitations applies to an action to set aside a deed or declare it invalid on the basis of nondelivery, and concluded that the four-year statute in *Code Civ. Proc. § 343* was applicable. The delay was over 13 years. However, the petitioner claimed that Parkinson should be estopped from asserting the bar of the statute of limitations (for reasons not relevant to this point), and the court remanded the case to the trial court for a determination on the statute of limitations issue (*224 Cal. App. 2d 670, 688-690)* .

The Supreme Court in Kenney v. Parks (1903) 137 Cal. 527, 70 P. 556 [*see § 198.21[3*] for discussion of *Kenney*] held that the five-year period in *Code Civ. Proc. § 318* applied to an action for nondelivery of a deed. The *Pieper* court did not take notice of this holding, but instead held that the four-year period in *Code Civ. Proc. § 343* applied. Counsel arguing cases involving the nondelivery of a deed should be aware of the inconsistency in these holdings.

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CHAPTER 198 QUIETING TITLE
PART II. FORMS
A. Statute of Limitations

19A-198 California Points & Authorities § 198.22

§ 198.22 Quiet Title Action Is Not Barred by Limitation Period for Fraud or Mistake Because Cause of Action Did Not Accrue Until Discovery

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF'S QUIET TITLE ACTION IS NOT BARRED BY THE STATUTE OF LIMITATIONS FOR FRAUD OR MISTAKE BECAUSE PLAINTIFF'S DISCOVERY OF THE _____ [FRAUD *or* MISTAKE] OCCURRED WITHIN THREE YEARS OF THE COMMENCEMENT OF THE ACTION.

A. Quiet Title Action Based on Fraud or Mistake Does Not Accrue Until Discovery of Facts Constituting Fraud or Mistake. When the underlying right to relief in a quiet title action is fraud or mistake, the applicable statute of limitations is three years, as provided in *Code Civ. Proc. § 338(d)*, but the cause of action does not accrue until discovery of the facts constituting the fraud or mistake (*Code Civ. Proc. § 338(d)*; *Arthur v. Davis (1981) 126 Cal. App. 3d 684, 690, 178 Cal. Rptr. 920*).

[2] Comments

[a] Use of Form

This form may be submitted to oppose the contention that the quiet title action is barred by the three-year statute of limitations for fraud or mistake when the claimant's discovery of the fraud or mistake occurred within three years of the commencement of the action.

This form may be combined with memoranda pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the cause of action did not accrue until discovery of the facts constituting fraud or mistake. For example, this form may be adapted for use to oppose a general demurrer to a complaint, or for inclusion in a motion for summary judgment, a trial or appellate brief, or jury instructions.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, in opposing a demurrer to a complaint, counsel should refer to allegations in the complaint that establish that the plaintiff's discovery of the facts constituting the fraud or mistake occurred within three years of the date the complaint was filed. Likewise, counsel should set forth these facts, supported by affidavits or declarations when appropriate, in opposition to a motion for summary judgment, or in a brief. Counsel can then argue that the demurrer should be overruled, or judgment should be entered for plaintiff, as appropriate, based on the authorities set forth above.

[c] Related Pleading and Practice Forms

For discussion, procedures and forms relating to demurrers generally, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For forms and discussion relating to summary judgment proceedings, see Ch. 537, *Summary Judgment* , in that set. For forms and discussion relating to quieting title generally, see Ch. 482, *Quieting Title* , also in that set.

[d] Related Memoranda

For memoranda for use in opposing demurrers based on the statute of limitations, see Ch. 143, *Limitation of Actions* . For memoranda opposing demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For memoranda and authorities for use in opposing motions for summary judgment, see Ch. 221, *Summary Judgments* .

[e] Opposing Memoranda

In an appropriate case, this form may be used in opposition to the memorandum *set forth in § 198.11* (action barred by statute of limitations for fraud or mistake).

[3] Discussion of Authorities

[a] Quiet Title Action Based on Fraud or Mistake Does Not Accrue Until Discovery of Facts Constituting Fraud or Mistake

Code Civ. Proc. § 338(d) provides that an action for relief on the ground of fraud or mistake is not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.

In ***Arthur v. Davis*** *(1981) 126 Cal. App. 3d 684, 178 Cal. Rptr. 920* , the plaintiff and her husband purchased a home with the help of a loan from their real estate agent. After escrow closed, the real estate agent asked the buyers to sign a paper which turned out to be a grant deed to the property, granting the property to the real estate agent. The buyers thought the blank form they signed was some sort of guarantee of security for the loan. The buyers lived in the property, paying the mortgage and property taxes. Several years later the real estate agent asserted ownership and demanded that the buyers pay rent to the agent. In a second trial, the trial court quieted title in favor of plaintiff and the defendant appealed.

The court of appeal affirmed the judgment. It held that the applicable statute of limitations was the three-year period in *Code Civ. Proc. § 338(4)* [*now see Code Civ. Proc. § 338(d)*] for fraud or mistake, based on the plaintiff's justifiable mistake as to the nature of the document. The court further held that the cause of action did not accrue "until the discovery, by the aggrieved party, of the facts constituting the ... mistake" (citations omitted). The court noted that there was substantial evidence to support the trial court's finding that at no time prior to three years of the filing of the complaint did the plaintiff or her husband discover that they had signed a deed in favor of the real estate agent, nor should they have discovered that fact (*126 Cal. App. 3d 684, 690)* .

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A. Statute of Limitations

19A-198 California Points & Authorities § 198.23

§ 198.23 Action to Quiet Title to Easement by Necessity Is Not Barred by Limitation Period

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF'S ACTION IS NOT BARRED BY A STATUTE OF LIMITATIONS BECAUSE NO LIMITATION PERIOD APPLIES TO AN ACTION TO QUIET TITLE TO AN EASEMENT BY NECESSITY.

A. No Limitation Period in Action to Quiet Title to an Easement by Necessity. It is not appropriate to fix a limitation period on a quiet title action to establish an easement by necessity arising out of a remote grant of contiguous parcels (*Lichty v. Sickels (1983) 149 Cal. App. 3d 696, 703, 197 Cal. Rptr. 137*).

[2] Comments

[a] Use of Form

This form may be submitted to oppose the contention that an action to quiet title to an easement by necessity is barred by a statute of limitations.

This form may be combined with memoranda pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that there is no statute of limitations for an easement by necessity. For example, this form may be adapted for use to oppose a general demurrer to a complaint, or for inclusion in a motion for summary judgment, a trial or appellate brief, or jury instructions.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, in opposing a demurrer to a complaint, counsel should refer to allegations in the complaint that establish the creation and continued existence of an easement by necessity. Likewise, counsel should set forth these facts, supported by affidavits or

declarations when appropriate, in opposition to a motion for summary judgment, or in a brief. Counsel can then argue that the demurrer should be overruled, or judgment should be entered for plaintiff, as appropriate, based on the authorities set forth above.

[c] Related Pleading and Practice Forms

For discussion, procedures and forms relating to demurrers generally, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For forms and discussion relating to summary judgment proceedings, see Ch. 537, *Summary Judgment* , in that set. For forms and discussion relating to quieting title generally, see Ch. 482, *Quieting Title* , also in that set.

[d] Related Memoranda

For memoranda for use in opposing demurrers based on the statute of limitations, see Ch. 143, *Limitation of Actions* . For memoranda opposing demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For memoranda for use in opposing motions for summary judgment, see Ch. 221, *Summary Judgments* .

[e] Opposing Memoranda

In an appropriate case, this form of memorandum may be used in opposition to points *set forth in § 198.12* (action barred by statute of limitations relating to seisin or possession).

[3] Discussion of Authorities

[a] No Limitation Period in Action to Quiet Title to an Easement by Necessity

In ***Lichty v. Sickels*** *(1983) 149 Cal. App. 3d 696, 197 Cal. Rptr. 137* , the plaintiff filed an action to establish an easement by necessity across a contiguous parcel of property owned by the defendant. The trial court granted a motion for summary judgment in favor of the defendant on the basis that the plaintiff's cause of action was barred by the five-year statute of limitations set forth in *Code Civ. Proc. § 318*. The plaintiff appealed.

The court of appeal reversed. The court held that it would not be appropriate to fix a limitation period on actions to establish easements by necessity in the nature of quiet title actions such as this, in light of the public policy considerations for these easements. It noted that there is an inconsistency between on the one hand applying a limitation period and on the other hand giving effect to the rule that the easement terminates only when the necessity ceases. The court likened the situation to that in *Muktarian v. Barmby (1965) 63 Cal. 2d 558, 47 Cal. Rptr. 483, 407 P.2d 659* [*see § 198.20[3*] for discussion of *Muktarian*], where there is no reason to put the party to the expense and inconvenience of litigation until the activity adverse to the easement by necessity (i.e., threatening to cut it off) occurs (*149 Cal. App. 3d 696, 703)* .

The court noted, however, that its holding did not affect any assertions pertaining to issues such as the creation or continued existence of an easement by necessity, or laches (*149 Cal. App. 3d 696, 704)* .

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[Reserved]

§§ 198.24[Reserved]

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PART II. FORMS
B. Sufficient Interests

19A-198 California Points & Authorities § 198.30

§ 198.30 Equitable Interest Is Insufficient to Maintain Quiet Title Action Against Holder of Legal Title

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF'S QUIET TITLE ACTION IS BARRED BECAUSE PLAINTIFF'S INTEREST IN THE PROPERTY IS MERELY EQUITABLE IN NATURE AND DEFENDANT HOLDS LEGAL TITLE TO THE PROPERTY.

A. Equitable Interest Is Insufficient to Quiet Title Against Holder of Legal Title. It has been repeatedly held in this state that an action to quiet title will not lie in favor of the holder of an equitable title as against the holder of a legal title (*G.R. Holcomb Estate Co. v. Burke (1935) 4 Cal. 2d 289, 297, 48 P.2d 669*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the contention that the party seeking to quiet title cannot do so because the claimant's interest is merely equitable in nature and the adverse claimant holds legal title to the property.

This form may be combined with memoranda pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a quiet title action will not lie for the holder of an equitable interest as against the holder of legal title. For example, this form may be combined with § 198.10[1], Paragraphs A and B, to support a general demurrer to a complaint. This form may also be adapted for use in a motion for summary judgment, a motion for judgment on the pleadings, a trial or appellate brief, or jury instructions.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, in supporting a demurrer to a complaint, counsel should refer to allegations in the complaint that establish that the plaintiff's claim is

based on an equitable interest only and not on a right to legal title to the property. Likewise, counsel should set forth these facts, supported by affidavits or declarations when appropriate, in a motion for summary judgment or brief. Counsel can then argue that the complaint is subject to demurrer, or judgment should be entered for defendant or adverse claimant, as appropriate, based on the authorities set forth above.

[c] Related Pleading and Practice Forms

For discussion, procedures and forms relating to demurrers generally, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For a form of notice for summary judgment and related discussion, see Ch. 537, *Summary Judgment* , in that set. For forms and discussion relating to quieting title generally, see Ch. 482, *Quieting Title* , also in that set.

[d] Related Memoranda

For memoranda supporting demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For memoranda for use in supporting motions for summary judgment, see Ch. 221, *Summary Judgments* .

[e] Opposing Memoranda

In an appropriate case, the points *set out in § 198.36* (equitable interest is sufficient as against holder of equitable title) or 198.37 (equitable right to legal title to be distinguished from equitable interest) may be used to oppose a contention supported by this form.

[3] Discussion of Authorities

[a] Equitable Interest Is Insufficient to Quiet Title Against Holder of Legal Title

The factual background of ***G.R. Holcomb Estate Co. v. Burke*** *(1935) 4 Cal. 2d 289, 48 P.2d 669* involved a complex financial plan for a family with significant real property holdings. When G.R. Holcomb died, his wife and children set up a family corporation to which they transferred the property they inherited from Holcomb. The family conducted this corporation as a family affair, paying all their living expenses out of the corporation's accounts. At one point, the corporation issued checks for the purchase of five properties that were held in the names of certain individual heirs.

Subsequently, the family corporation experienced financial difficulty, and 87 percent of the stock was transferred to trustees for a creditor bank of the corporation. These trustees, on behalf of the plaintiff corporation, brought an action to quiet title to the five parcels owned by the heirs on the theory that the heirs held title in trust for the plaintiff corporation. The trial court ruled in favor of the defendant heirs, and the plaintiff appealed.

The Supreme Court affirmed. In reviewing the evidence, it noted that the intention of the plaintiff corporation and the defendant heirs at the time the plaintiff paid for the parcels in question was that the heirs were purchasing these properties with their own money, and for their own use and benefit. The court held that at most the plaintiff would be the equitable owner of the lands, and that quiet title will not lie in favor of the holder of an equitable title as against the holder of a legal title (*4 Cal. 2d 289, 297-298)* .

[4] Additional Authorities

[a] Equitable Interest Is Insufficient to Quiet Title Against Holder of Legal Title

In *Strong v. Strong (1943) 22 Cal. 2d 540, 140 P.2d 386* , the husband of the defendant purchased a property partially with community funds. The husband induced his wife to sign a deed to the property to his mother, on the theory that he was in financial difficulty, that the conveyance would protect their home, and that the mother would shortly reconvey

the property to them. The husband and wife divorced and the wife was awarded the property. The mother brought a quiet title action against the wife. The trial court ruled in favor of the defendant (wife). The plaintiff (mother) appealed.

The court of appeal reversed. The court rejected the defendant's argument that judgment in her favor should be affirmed on the ground that she was induced to sign the deed based on a false representation by her husband. The court held that the defendant failed to plead fraud, a specific requirement. And because the defendant did not hold legal title to the property, any rights she might have to the cancellation of the deed or to the declaration of a construction trust were entirely equitable. These rights cannot be established in a quiet title action when the pleadings contain merely general allegations asserting defendant's ownership and denying that of plaintiff (*22 Cal. 2d 540, 545-546)* .

The *Strong* court, by implication, indicated that had the defendant pleaded and proved fraud, she may have had a cause of action to set aside the deed to the plaintiff.

Counsel should be aware that the quiet title statute [*Code Civ. Proc. § 760.010 et seq.*] includes provisions that might arguably expand the scope of quiet title actions to include an equitable interest in property. For example, *Code Civ. Proc. § 760.010 (a)* defines a "claim" as a legal *or equitable right*, title, estate, lien or interest in property or cloud upon title (emphasis added). Likewise, *Code Civ. Proc. § 760.020 (a)* provides that a quiet title action may be brought to establish title against adverse claims to real or personal property *or any interest therein* (emphasis added). The Law Revision Commission Comment to this latter statute included the following statement: "This chapter does not limit the interests that may be determined ...; it is intended to provide the broadest possible forum for clearing title to the fee or any other interest in property."

To date, however, there have been no cases that deal specifically with the issue of whether the quiet title statute modifies prior case law on this point. In at least one case subsequent to the effective date of the current statute, the court of appeal held that a party who had alleged essentially a cause of action for theft had no standing to bring a quiet title action, "because whatever interest it might have is only equitable, and the holder of equitable title cannot maintain a quiet title action against the legal owner," thereby confirming prior case law [*see Lewis v. Superior Court (1994) 30 Cal. App. 4th 1850, 1866, 37 Cal. Rptr. 2d 63]* . For discussion of the distinction between an equitable right to legal title and an equitable interest in real property, see *§ 198.37[3]*.

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[Reserved]

§§ 198.31[Reserved]

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B. Sufficient Interests

19A-198 California Points & Authorities § 198.35

§ 198.35 Any Interest in Real Property Is Sufficient to Maintain Quiet Title Action

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF'S INTEREST IN THE PROPERTY, CONSISTING OF _____ [*specify*], IS SUFFICIENT TO MAINTAIN A QUIET TITLE ACTION BECAUSE ANY ESTATE OR INTEREST IN LAND MAY BE QUIETED.

A. Any Estate or Interest in Land is Sufficient to Maintain Quiet Title Action. It is well settled that the owner of any estate or interest in land of which the law takes cognizance is entitled to have any claim adverse to the owner's interest, such as it is, determined (*German-American Savings Bank v. Gollmer (1909) 155 Cal. 683, 687, 102 P. 932* (decided under former Code Civ. Proc. § 738; *now see Code Civ. Proc. § 760.010 et seq.*).

[2] Comments

[a] Use of Form

This form may be submitted to oppose the contention that the claimant s interest is not sufficient to maintain a quiet title action when the claimant's interest is in fact an interest in real property, even if less than a fee interest.

This form may be combined with memoranda pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the claimant's interest is sufficient to maintain a quiet title action. For example, this form may be adapted for use to oppose a general demurrer to a complaint, in a motion for summary judgment, in a trial or appellate brief, or in jury instructions.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, in opposing a

demurrer to a complaint, counsel should refer to allegations in the complaint that establish the exact nature of the plaintiff's interest, stating that such an interest is an interest or estate in real property. Likewise, counsel should set forth these facts, supported by affidavits or declarations when appropriate, in opposition to a motion for summary judgment, or in a brief. Counsel can then argue that the demurrer should be overruled, or judgment should be entered for claimant, as appropriate, based on the authorities set forth above.

[c] Related Pleading and Practice Forms

For discussion, procedures and forms relating to demurrers generally, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For forms and discussion relating to summary judgment proceedings, see Ch. 537, *Summary Judgment* , in that set. For forms and discussion relating to quieting title generally, see Ch. 482, *Quieting Title* , also in that set.

[d] Related Memoranda

For memoranda opposing demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For memoranda for use in opposing motions for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Any Estate or Interest in Land Is Sufficient to Maintain Quiet Title Action

In ***German-American Savings Bank v. Gollmer*** *(1909) 155 Cal. 683, 102 P. 932* , plaintiff filed an action to quiet title to its leasehold interest of an estate for years. Judgment was entered for the plaintiff and the defendant appealed.

The Supreme Court stated that while the action was somewhat novel, it saw no reason why it could not be maintained under the quiet title statute. It held that the owner of any estate or interest in land is entitled to have any claim adverse to his or her interest, such as it is, determined. Whatever interest plaintiff has may be quieted. If a title in fee, the interest may be quieted; if a lesser interest, the lesser interest may be likewise quieted (*155 Cal. 683, 686-687)* . The court held that there was no error in overruling the demurrer (*155 Cal. 683, 687)* , but reversed the judgment and remanded the case on other grounds (*155 Cal. 683, 689, 692)* .

[4] Additional Authorities

[a] Any Estate or Interest in Land Is Sufficient to Maintain Quiet Title Action

In *Hendershott v. Shipman (1951) 37 Cal. 2d 190, 231 P.2d 481* , the plaintiffs brought a quiet title action based on a treasurer s deed. The trial court held that the plaintiffs were not owners of the lot, but they did have a valid and subsisting lien on the property by way of a certificate of sale on a bond. The defendants appealed.

The Supreme Court affirmed the judgment, holding that the fact that the plaintiffs did not prevail on their claim of title in fee did not preclude the court from declaring a lesser interest. It is well settled that the court may finally determine as between the parties in a quiet title action all of the conflicting claims regarding *any estate or interest* in the property (*37 Cal. 2d 190, 194)* .

In *Golden West Baseball Company v. City of Anaheim (1994) 25 Cal. App. 4th 11, 31 Cal. Rptr. 2d 378* , the plaintiff sued the City of Anaheim for issuing a conditional use permit to a third party for development of part of the parking lot used by the plaintiff. The trial court determined in part that the plaintiff had a leasehold interest in the parking lot on game days.

The court of appeal held that the plaintiff's interest was not a leasehold, but rather either an easement or an irrevocable

license (*25 Cal. App. 4th 11, 19)* , and, in either event, its interest could be the subject of a quiet title action (*25 Cal. App. 4th 11, 50)* . The judgment was affirmed with certain modifications (*25 Cal. App. 4th 11, 51-52)* .

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B. Sufficient Interests

19A-198 California Points & Authorities § 198.36

§ 198.36 Equitable Interest Is Sufficient to Maintain Quiet Title Action Against Another Holder of Equitable Interest

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF'S EQUITABLE INTEREST IN THE PROPERTY IS SUFFICIENT TO MAINTAIN A QUIET TITLE ACTION AGAINST DEFENDANT BECAUSE DEFENDANT ALSO ASSERTS AN EQUITABLE INTEREST IN THE PROPERTY.

A. Equitable Interest is Sufficient to Maintain Quiet Title Action Against Holder of Equitable Title. Although it is true that one claiming an equitable interest cannot quiet title as against a party with legal title, it is also true that when both parties assert mere equities in real property, a quiet title action may be maintained to ascertain which party has the superior equity (*Horn v. Govan (1959) 172 Cal. App. 2d 77, 82, 341 P.2d 784*).

[2] Comments

[a] Use of Form

This form may be submitted to oppose the contention that the holder of an equitable interest cannot maintain a quiet title action when the adverse claimant has an equitable interest only.

This form may be combined with memoranda pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a holder of an equitable interest cannot maintain a quiet title action. For example, this form may be adapted for use to oppose a general demurrer to a complaint, in a motion for summary judgment, in a trial or appellate brief, or in jury instructions.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, in opposing a demurrer to a complaint, counsel should refer to allegations in the complaint that establish that both the plaintiff and the defendant have equitable interests only in the property. Likewise, counsel should set forth these facts, supported by affidavits or declarations when appropriate, in opposition to a motion for summary judgment, or in a brief. Counsel can then argue that the demurrer should be overruled, or judgment should be entered for plaintiff, as appropriate, based on the authorities set forth above.

[c] Related Pleading and Practice Forms

For discussion, procedures and forms relating to demurrers generally, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For forms and discussion relating to summary judgment proceedings, see Ch. 537, *Summary Judgment* , in that set. For forms and discussion relating to quieting title generally, see Ch. 482, *Quieting Title* , also in that set.

[d] Related Memoranda

For memoranda opposing demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For memoranda for use in opposing motions for summary judgment, see Ch. 221, *Summary Judgments* .

[e] Opposing Memoranda

In an appropriate case, this form may be used in opposition to points *set forth in § 198.30* (equitable interest insufficient to quiet title).

[3] Discussion of Authorities

[a] Equitable Interest is Sufficient to Maintain Quiet Title Action Against Holder of Equitable Title

In ***Horn v. Govan*** *(1959) 172 Cal. App. 2d 77, 341 P.2d 784* , two brothers, Roy and Orville, inherited some property. Orville conveyed his interest to Roy but remained in possession of the property. Roy opened escrow to sell the property to the plaintiffs. Before closing escrow, the plaintiffs brought an action to quiet title as against Orville and his wife (defendants). The plaintiffs then proceeded to close escrow on the property. Judgment was entered for the plaintiffs and the defendants appealed.

The court of appeal affirmed the judgment. The defendants contended on appeal that the plaintiffs could not maintain a quiet title action because their interest in the property at the time they filed the complaint, as buyers under a contract to purchase the property and not as holders of legal title, was merely equitable. The defendants also argued that Roy should have held the property in trust for Orville after Orville conveyed his interest to Roy. The court held that while it was true that the plaintiffs interest was merely equitable at the commencement of the action, so also was the defendants interest. It further held that when both parties assert mere equities in real property, a quiet title action may be maintained to ascertain which party has the superior equity (*172 Cal. App. 2d 77, 82)* .

California Points & Authorities

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Volume 19A Chapters 196-199 PUBLIC ENTITIES---to---QUO WARRANTO
CHAPTER 198 QUIETING TITLE
PART II. FORMS
B. Sufficient Interests

19A-198 California Points & Authorities § 198.37

§ 198.37 Adverse Claimant Can Obtain Relief in Quiet Title Action Based on Lack of Title in Plaintiff

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

DEFENDANT CAN OBTAIN RELIEF IN A QUIET TITLE ACTION BASED ON THE _____ [WEAKNESS OF PLAINTIFF'S TITLE *or* LACK OF TITLE IN PLAINTIFF].

A. Court May Determine Conflicting Claims of Any Estate or Interest. The court may determine as between the parties in a quiet title action all of the conflicting claims regarding any estate or interest in the property (*Baucum v. LeBaron (1955) 136 Cal. App. 2d 593, 595, 289 P.2d 266*).

[2] Comments

[a] Use of Form

This form may be submitted to oppose the contention that an adverse claimant cannot obtain relief in a quiet title action based on the weakness or lack of title in the plaintiff.

This form may be combined with memoranda pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the court has the power to determine all the conflicting claims in a quiet title action. For example, this form may be adapted for use to oppose a general demurrer to a cross-complaint, in a motion for summary judgment, in a trial or appellate brief, or in jury instructions.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, in opposing a demurrer to a cross-complaint, counsel should refer to allegations in the cross-complaint that establish that the adverse claimant has an interest in real property in his or her own right. Likewise, counsel should set forth these facts, supported

by affidavits or declarations when appropriate, in opposition to a motion for summary judgment, or in a brief. Counsel can then argue that the demurrer should be overruled, or judgment should be entered for the adverse claimant, as appropriate, based on the authorities set forth above.

[c] Related Pleading and Practice Forms

For discussion, procedures and forms relating to demurrers generally, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For forms and discussion relating to summary judgment proceedings, see Ch. 537, *Summary Judgment* , in that set. For forms and discussion relating to quieting title generally, see Ch. 482, *Quieting Title* , also in that set.

[d] Related Memoranda

For memoranda opposing demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For memoranda for use in opposing motions for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Court May Determine Conflicting Claims of Any Estate or Interest

In ***Baucum v. LeBaron*** *(1955) 136 Cal. App. 2d 593, 289 P.2d 266*), plaintiffs brought a quiet title action, alleging that defendants claimed certain easements on the real property. Defendants filed a cross-complaint seeking reformation of a deed (which contained an error in the legal description of the easements) and quiet title to their easements. The trial court ruled in pertinent part that the defendants were the owners of the easements in question. Plaintiffs appealed.

The court of appeal affirmed. It rejected the plaintiff's argument on appeal that the defendants could not recover because of the general rule that one can recover only on the strength of one's own title rather than on the weakness or lack of title in one's adversary. It noted that the defendants claim was based on a mutual mistake of the parties in the deeds. The court held that when a party shows an equitable right to have a legal title conveyed to him or her, the court in the exercise of its chancery powers may grant the proper relief under (former) Code Civ. Proc. § 738 [*now see Code Civ. Proc. § 760.010 et seq.*]. The court of appeal also held that the trial court may determine, as between the parties in a quiet title action, all of the conflicting claims regarding any estate or interest in the property (*136 Cal. App. 2d 593, 594-595)* .

This case can be distinguished from the authorities discussed in *§ 198.30[3], [4]*, which held that an equitable interest is insufficient to quiet title as against the holder of a legal title. In the subject case, the defendants had an equitable right (based on mutual mistake) to have the legal title to their easements quieted. Counsel should be mindful of the distinction between an equitable right to a legal title on the one hand, and a mere equitable interest in property on the other hand.

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19A-198 California Points & Authorities §§ 198.38-198.39

[Reserved]

§§ 198.38[Reserved]

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CHAPTER 198 QUIETING TITLE
PART II. FORMS
C. Pleading Requirements

19A-198 California Points & Authorities § 198.40

§ 198.40 Demurrer to Quiet Title Action Based on Failure to Allege Plaintiff's Title and Basis of Title

[1] FORM

[*For caption, see § 198.10[1].*]

THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION BECAUSE IT DOES NOT INCLUDE ALLEGATIONS REGARDING PLAINTIFF'S TITLE AND THE BASIS OF PLAINTIFF'S TITLE, [AND DOES NOT ALLEGE THE SPECIFIC FACTS CONSTITUTING THE ADVERSE POSSESSION].

A. Objection by Demurrer. [*See § 198.10]1], Paragraph A.*]

B. Failure to Allege Plaintiff's Title and Basis of Title. In a quiet title action, the complaint must include the title of the plaintiff as to which a determination is sought and the basis of the title. [Further, when the title is based on adverse possession, the complaint must allege the specific facts constituting the adverse possession] (*Code Civ. Proc. § 761.020(b)*; *see Stafford v. Ballinger (1962) 199 Cal. App. 2d 289, 18 Cal. Rptr. 568*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant

_____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a demurrer to a complaint or cross-complaint seeking to quiet title to property when the complaint fails to include allegations regarding the claimant s title and basis of the title. This form may also be adapted for use in a motion for judgment on the pleadings based on the failure to state facts sufficient to constitute a cause of action [*see Code Civ. Proc. § 438(c)(1)(B)(ii)*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, in supporting a demurrer to a complaint or a cross-complaint, counsel should refer to the lack of allegations in the complaint or cross-complaint establishing the claimant s title and the basis of the title. If the complaint includes specific allegations that affirmatively reveal the absence of title, counsel should refer to these allegations. Counsel can then argue that the complaint or cross-complaint is subject to demurrer based on the authorities set forth above and discussed below.

[c] Related Pleading and Practice Forms

For discussion, procedures and forms relating to demurrers generally, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For forms and discussion relating to quieting title generally, see Ch. 482, *Quieting Title* , also in that set.

[d] Related Memoranda

For memoranda supporting demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Failure to Allege Plaintiff's Title and Basis of Title

In ***Stafford v. Ballinger*** *(1962) 199 Cal. App. 2d 289, 18 Cal. Rptr. 568* , plaintiff alleged in his amended complaint that he had entered into a contract to buy a lot from the predecessor of one of the defendants. The seller reneged and refused to complete the sale. The plaintiff brought an action to quiet title and the trial court sustained defendants' demurrers to plaintiff's third amended complaint without leave to amend. The plaintiff appealed.

The court of appeal affirmed. The court stated that in an action to quiet title, the complaint should allege the interest of the plaintiff in the property at the time the action is commenced. The complaint set forth two causes of action, one to quiet title and the other setting forth the facts and circumstances on which plaintiff's claim of title was based. Although a general allegation of ownership of the property is sufficient if the plaintiff owns the property in fee, such an allegation is treated as a conclusion if the detailed facts on which the claim of ownership is predicated are also alleged. The court stated that in such a case, (1) the specific facts will control rather than the general allegation in determining whether the complaint states sufficient facts to constitute a cause of action, and (2) only one cause of action will have been stated. Accordingly, if the specifically pleaded facts affirmatively reveal the absence of an essential element in a plaintiff's claim of title, no cause of action is stated. In applying these rules, the court found plaintiff's complaint did not state a cause of action because the allegations in the second cause of action disclosed that plaintiff did not have legal title to the property in question. At most, the plaintiff may have acquired some equitable rights by virtue of his contract to purchase (*199 Cal. App. 2d 289, 292-295)* .

The holding in *Stafford* was rendered prior to the effective date of the current quiet title statute [*Code Civ. Proc. § 760.010 et seq.*]. Because *Code Civ. Proc. § 761.020(b)* requires that the complaint include not only the title of plaintiff, but also the basis for the title, it is possible that the general rule referred to in *Stafford* (i.e., that a general allegation of ownership of the property is sufficient if the plaintiff owns the property in fee) may not withstand a challenge based on

the current statute. Because the holding in *Stafford* was not based on this general rule, however, this possibility should not impact the authority of *Stafford* for the point stated.

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19A-198 California Points & Authorities § 198.41

§ 198.41 Demurrer to Answer in Quiet Title Action Based on Failure to Include Required Allegations

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF DEMURRER
[and DOES I through _____,]	)	TO ANSWER
Defendant(s).	)	
	)	
	)	

THE ANSWER TO THE COMPLAINT [OR CROSS-COMPLAINT] IS SUBJECT TO DEMURRER BECAUSE IT FAILS TO INCLUDE THE DEFENDANT'S CLAIM TO TITLE [AND/OR] ANY FACTS CONTROVERTING MATERIAL ALLEGATIONS OF THE COMPLAINT.

A. Objection by Demurrer. The party against whom an answer has been filed may object to the answer by demurrer on the ground that it does not state facts sufficient to constitute a defense (*Code Civ. Proc. § 430.20(a)*). When any ground for objection to an answer appears on the face of the answer (or from any matter of which the court is required to or may take judicial notice), the objection on that ground may be taken by a demurrer to the answer (*Code Civ. Proc. § 430.30(a)*).

B. Failure to Allege Defendant's Claim and Facts Controverting Material Allegations of Complaint. In an answer to a quiet title action, the defendant must allege his or her claims to the property and any facts tending to controvert any

material allegations of the complaint that the defendant does not wish to be taken to be true (*Code Civ. Proc. § 761.030(a)(1), (2)*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant

_____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a demurrer to an answer to a complaint or cross-complaint seeking to quiet title when the answer fails to include allegations regarding the defendant's title and/or any facts tending to controvert material allegations of the complaint. This form may also be adapted for use in a motion for judgment on the pleadings based on the failure to state facts sufficient to constitute a defense [*see Code Civ. Proc. § 438(c)(1)(A)*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, in supporting a demurrer to an answer, counsel should refer to the lack of (1) allegations in the answer establishing the defendant s claim to title, or (2) any facts controverting the material allegations in the complaint. Counsel can then argue that the answer is subject to demurrer, or judgment on the pleadings should be entered for the plaintiff, as appropriate, based on the authorities set forth above.

[c] Related Pleading and Practice Forms

For discussion, procedures and forms relating to demurrers generally, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For forms and discussion relating to quieting title generally, see Ch. 482, *Quieting Title* , also in that set.

[d] Related Memoranda

For memoranda supporting demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Failure to Allege Defendant's Claim and Facts Controverting Material Allegations of Complaint

The answer in a quiet title action must be verified and must set forth the following: (1) any claim the defendant has, (2) any facts tending to controvert any material allegations of the complaint that the defendant does not wish to be taken as true, and (3) a statement of any new matter constituting a defense [*Code Civ. Proc. § 761.030(a)*].

[4] Additional Authorities

[a] Failure to Allege Defendant's Claim and Facts Controverting Material Allegations of Complaint

In *Morel v. Morel (1928) 203 Cal. 417, 264 P. 760* , the plaintiff filed a complaint to quiet title in which she alleged in detail the facts on which her asserted title was based. In the answer, the defendant only denied that plaintiff was the owner or was entitled to the possession of the property. The plaintiff moved for, and the trial court rendered, a judgment on the pleadings in the plaintiff's favor, on the ground that the answer lacked sufficient denials of the allegations of the complaint.

In affirming the judgment, the Supreme Court held that defendant's denial could not be held sufficient to present an issue. The court reasoned that, because the complaint set forth in detail the probative facts on which the plaintiff's title was based and the defendant failed to deny these facts in his answer, his denial of ownership in the plaintiff must be held to be merely the denial of a legal conclusion. Therefore, the trial court was not in error in granting the plaintiff's motion for judgment on the pleadings (*203 Cal. 417, 418-419)* .

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§ 199.01 Scope of Chapter

§ 199.02 Governing Law

§ 199.03 When Points and Authorities Required

[1] Application for Leave to Sue

[2] Appearance by Proposed Defendant to Oppose Application

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§§ 199.07-199.19 [Reserved]

§ 199.20 Supporting Application for Leave to Sue in Quo Warranto [11 Cal. Code Reg. § 2(b)]--Usurpation of Public Office [Code Civ. Proc. § 803]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Public Office Defined

[b] Title to Elective Office

[c] Two Persons Elected to Same Office

[d] Person Holding Two Incompatible Offices

[4] Additional Authorities

[a] Quo Warranto Proper Against Usurper of Public Office

[b] Title to Elective Office

§ 199.21 Supporting Application for Leave to Sue in Quo Warranto [11 Cal. Code Reg. § 2(b)]--Usurpation of Franchise--By Person [Code Civ. Proc. § 803]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Franchise Defined

[b] How Franchise Granted

§ 199.22 Supporting Application for Leave to Sue in Quo Warranto [11 Cal. Code Reg. § 2(b)]--Usurpation of Franchise--By Corporation [Code Civ. Proc. § 803]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Usurpation Defined

[b] Exclusive Remedy to Attack Corporate Validity

[c] Proper to Oust Corporation From Exercise of Unlawful Franchise

§ 199.23 Supporting Application for Leave to Sue in Quo Warranto [11 Cal. Code Reg. § 2(b)]--Invalid Annexation by Municipal Corporation

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Proper to Challenge Invalid Annexation

§§ 199.24-199.29 [Reserved]

§ 199.30 Opposing Application for Leave to Sue in Quo Warranto [11 Cal. Code Reg. § 3]--Public Office Not Involved

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Quo Warranto Not Proper When Public Office Not Involved

§ 199.31 Opposing Application for Leave to Sue in Quo Warranto [11 Cal. Code Reg. § 3]--Complaint on Information and Belief

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Complaint on Information and Belief Insufficient

§ 199.32 Opposing Application for Leave to Sue in Quo Warranto [11 Cal. Code Reg. § 3]--Issues Previously Litigated

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Issues Previously Litigated

§§ 199.33-199.39 [Reserved]

§ 199.40 1/2 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10] in Quo Warranto [Code Civ. Proc. §§ 803, 811]--Bar of Relevant Statute of Limitations [Code Civ. Proc. §§ 349.1, 349.4, 349]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Failure to State Cause of Action

[b] Statute Applicable to Quo Warranto Actions

[4] Additional Authorities

[a] Statute Applicable to Quo Warranto Actions

§ 199.41 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10] in Quo Warranto [Code Civ. Proc. §§ 803, 811]--Failure to Allege Facts Establishing Usurpation

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Failure to Establish Usurpation

§ 199.42 Supporting Demurrer [Code Civ. Proc. § 430.10] to Complaint in Quo Warranto [Code Civ. Proc. §§ 803, 811] to Invalidate Annexation Proceedings--Annexation Proceedings Not Complete

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Remedy in Quo Warranto Not Mature When Annexation Proceedings Incomplete

[4] Additional Authorities

[a] Remedy in Quo Warranto Not Mature When Annexation Proceedings Incomplete

§§ 199.43-199.49 [Reserved]

§ 199.50 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10] in Quo Warranto [Code Civ. Proc. §§ 803, 811]--Statute of Limitations Inapplicable

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Statute of Limitations as Not Invocable to Bar Challenge of Subsequent Void Annexation Proceedings

§§ 199.51-199.59 [Reserved]

§ 199.60 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Compel Attorney General to Grant Leave to Sue in Quo Warranto [Code Civ. Proc. § 803]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Leave to Sue as Compelled When Abuse of Discretion in Refusing Requested Leave to Sue

[4] Additional Authorities

[a] Leave to Sue as Compelled When Abuse of Discretion in Refusing Requested Leave to Sue

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19A-199 California Points & Authorities § 199.01

§ 199.01 Scope of Chapter

This chapter contains memoranda of points and authorities for use in supporting [*see §§ 199.20 -199.23*] and opposing [*see §§ 199.30 -199.32*] applications for leave to sue in quo warranto; supporting [*see §§ 199.40 -199.42*] and opposing § 199.50 demurrers to complaints in quo warranto; and supporting a petition for a writ of mandate to compel the Attorney General to sue in quo warranto § 199.60.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsQuo Warranto

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19A-199 California Points & Authorities § 199.02

§ 199.02 Governing Law

Actions in quo warranto are governed by *Code Civ. Proc. §§ 803-811*. The statutes of limitation applicable to actions in quo warranto are found in *Code Civ. Proc. §§ 349.1, 349.4,* and *349*1/2.

Regulatory requirements applicable to a relator's application for leave to sue in quo warranto and appearances by a proposed defendant to oppose such an application are set out in *11 Cal. Code Reg. §§ 1-11* and 28.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsQuo WarrantoGovernmentsLegislationStatutes of LimitationsTime Limitations

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19A-199 California Points & Authorities § 199.03

§ 199.03 When Points and Authorities Required

[1] Application for Leave to Sue

The application for leave to sue in quo warranto submitted to the Attorney General by a relator [*see 11 Cal. Code Reg. § 1* (relator as private party desiring leave to sue in name of people of California under law requiring prior permission from Attorney General)] must include points and authorities showing why the proposed proceeding should be brought in the name of the people of California [*11 Cal. Code Reg. § 2(b)*]. This requirement is satisfied by an application and a memorandum of points and authorities showing that it would be in the public interest to have the substantial issue of law or fact raised in the proposed complaint determined judicially [*see 35 Ops. Cal. Atty. Gen. 198, 199 (1960)* (application in quo warranto to question right of city councilman to remain on council after moving to new residence outside city as presenting issue of importance to more than 350 California cities)].

The application for leave to sue must also include points and authorities supporting the contentions of the relator that a public office *[8 Ops. Cal. Atty. Gen. 221, 222 (1946)]* or franchise *[9 Ops. Cal. Atty. Gen. 1, 2 (1947)]* is usurped, intruded into, or unlawfully held or exercised by the proposed defendant [*11 Cal. Code Reg. § 2(b)*].

[2] Appearance by Proposed Defendant to Oppose Application

Any appearance by the proposed defendant [*see 11 Cal. Code Reg. § 3* (time in which proposed defendant may appear to oppose application for leave to sue in quo warranto)] may be supported by points and authorities, but points and authorities are not required by any statute or administrative regulation. It is probably better practice for a proposed defendant to support any opposition to an application for leave to sue in quo warranto with points and authorities (1) showing why the proposed proceeding should not be brought in the name of the people of California, and (2) refuting the contentions of the relator that a public office or franchise is usurped, intruded into, or unlawfully held or exercised by the proposed defendant [*see 11 Cal. Code Reg. §§ 2(b), 3*]. Such opposition may be written *[30 Ops. Cal. Atty. Gen. 36, 39 (1957)]* . It may take the form of opposing affidavits (or declarations [*Code Civ. Proc. § 2015.5*]) *[8 Ops. Cal. Atty. Gen. 221, 222 (1946)]* or petitions *[8 Ops. Cal. Atty. Gen. 221, 223 (1946)]* . In addition, the Attorney General may require that opposition be made by means of an informal appearance by the proposed defendant.

[3] Other Proceedings

Once a complaint in quo warranto [*Code Civ. Proc. §§ 803, 811*] is filed, the action proceeds in the same manner as any other civil action [*People v. Richmond (1965) 141 Cal. App. 2d 107, 117, 296 P.2d 351]* . The requirements with respect to when memoranda of points and authorities must be submitted are the same as in any other civil action. For example, a party filing a demurrer or motion, except for a motion listed in *Cal. Rules of Ct., Rule 3.1114* must serve and file with that demurrer or motion a supporting memorandum [*Cal. Rules of Ct., Rule 3.1113(a)*; for detailed discussion regarding when memoranda are required in civil proceedings generally, see Ch. 1, *Writing Legal Memoranda and Briefs*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureRemediesWritsCommon Law WritsQuo Warranto

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19A-199 California Points & Authorities § 199.04

§ 199.04 Page Limits on Points and Authorities

Generally, a supporting or opposing memorandum of points and authorities must not exceed 15 pages, or in the case of a memorandum supporting or opposing motion for summary judgment or summary adjudication, 20 pages. A reply or closing memorandum may not exceed 10 pages [*see Cal. Rules of Ct., Rule 3.1113(d)*]. Any party desiring to file a longer memorandum must obtain leave of court [*see Cal. Rules of Ct., Rule 3.1113(e)*]. For further discussion of the page limitations under *Cal. Rules of Ct., Rule 3.1113*, and of other basic format requirements of memoranda of points and authorities, see *Ch. 1, Writing Legal Memoranda and Briefs, § 1.05*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureSummary JudgmentOppositionMemoranda in OppositionCivil ProcedureSummary JudgmentSupporting MaterialsMemoranda of LawCivil ProcedureRemediesWritsCommon Law WritsQuo Warranto

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19A-199 California Points & Authorities § 199.05

§ 199.05 Related Pleading and Practice Chapters

For discussion, procedures, and forms for use in quo warranto actions, see Ch. 483, *Quo Warranto* in CALIFORNIA FORMS OF PLEADING AND PRACTICE. For discussion, procedures, and forms for use in related proceedings, see the following chapters in CALIFORNIA FORMS OF PLEADING AND PRACTICE:

- Ch. 160, *Corporations*.
- Ch. 182, *Declaratory Relief*.
- Ch. 243, *Elections*.
- Ch. 358, *Mandate and Prohibition*.
- Ch. 492, *Review (Certiorari), Writ of*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDirectors & OfficersTerms in OfficeElectionsCivil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsProhibitionCivil ProcedureRemediesWritsCommon Law WritsQuo WarrantoCivil ProcedureAppealsAppellate JurisdictionState Court Review

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19A-199 California Points & Authorities § 199.06

§ 199.06 Related Points and Authorities

Related memoranda of points and authorities that may be useful in particular quo warranto cases may be found in Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePretrial JudgmentsJudgment on the PleadingsCivil ProcedureRemediesWritsCommon Law WritsQuo Warranto

California Points & Authorities

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Volume 19A Chapters 196-199 PUBLIC ENTITIES---to---QUO WARRANTO
CHAPTER 199 QUO WARRANTO
PART I. INTRODUCTION

19A-199 California Points & Authorities §§ 199.07-199.19

[Reserved]

§§ 199.07[Reserved]

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Volume 19A Chapters 196-199 PUBLIC ENTITIES---to---QUO WARRANTO
CHAPTER 199 QUO WARRANTO
PART II. FORMS

19A-199 California Points & Authorities § 199.20

§ 199.20 Supporting Application for Leave to Sue in Quo Warranto [11 Cal. Code Reg. § 2(b)]--Usurpation of Public Office [Code Civ. Proc. § 803]

[1] FORM

BEFORE THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA

The People of the State of California on the Relation of _____ [*name*],	)	
Plaintiff,	)	POINTS AND AUTHORITIES IN SUPPORT OF APPLICATION FOR LEAVE TO SUE IN QUO WARRANTO
vs.	)	
_____ [*name* (*s*)],	)	
Defendant(s).	)	
	)	

A SUIT IN QUO WARRANTO IS PROPER TO REMEDY THE USURPATION OF A PUBLIC OFFICE.

A. Quo Warranto Proper Against Usurper of Public Office. An action in quo warranto may be brought by the Attorney General, in the name of the people of the State of California, upon his/her own information or upon the complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military (*Code Civ. Proc. § 803*).

B. Public Office Defined. A public office is created by a legislature prescribing the duties of a position or employment and fixing the compensation therefor, where those duties pertain to the public and are continuing and permanent, not occasional or temporary (*People ex rel. Chapman v. Rapsey (1940) 16 Cal. 2d 636, 639, 107 P.2d 388*).

[*Optional*] **C. Title to Elective Office.** Title to an elective office cannot be litigated by any other means than a quo warranto action (*Visnich v. Sacramento County Bd. of Educ. (1974) 37 Cal. App. 3d 684, 690, 112 Cal. Rptr. 469*).

[*Optional*] **D. Two Persons Elected to Same Office.** A cause of action for usurpation of public office is stated where it appears from the complaint that two persons are declared elected to one office, received certificates and qualified, and are performing duties thereof (*People v. Davidson (1905) 2 Cal. App 100, 103, 83 P 161*).

[*Optional*] **E. Person Holding Two Incompatible Offices.** An action in quo warranto is the only proper method of challenging an individual's right to hold two incompatible offices (*People ex rel. Chapman v. Rapsey (1940) 16 Cal. 2d 636, 644, 107 P.2d 388*).

Respectfully submitted,

_____ [*signature*]

Attorney for Relator

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of an application for leave to sue in quo warranto [*11 Cal. Code Reg. § 2(b)*] brought against a person usurping a public office, civil or military [*Code Civ. Proc. § 803*].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms of application for leave to sue in quo warranto and proposed complaints in quo warranto for usurpation of public office, see Ch. 483, *Quo Warranto* in CALIFORNIA FORMS OF PLEADING AND PRACTICE.

[3] Discussion of Authorities

[a] Public Office Defined

In ***People ex rel. Chapman v. Rapsey*** *(1940) 16 Cal. 2d 636, 107 P.2d 388* , the Attorney General instituted a suit in quo warranto against an individual to determine by what right and authority that individual held the offices of city judge and city attorney for the community concurrently. Defendant demurred to the complaint, arguing that a city attorney was not a public officer and, in the alternative, if a city attorney was a public officer, his duties were not in conflict with his duties as a city judge. The trial court sustained the demurrer without leave to amend. On appeal, the Supreme Court reversed with directions to the trial court to overrule the demurrer and proceed with the disposition of the case. The Court found that the position of city attorney was a public office in that the legislature created the position, fixed the compensation therefor, and prescribed the duties, which pertained to the public and were continuing and permanent, not occasional or temporary (*16 Cal. 2d 636, 639)* . Furthermore, the Court found that the Attorney General had stated a cause of action in quo warranto by alleging the holding of two incompatible offices by one individual since the duties of city judge and city attorney are incompatible and, when two offices are incompatible, an individual terminates his or her right to hold the first office upon his or her accepting the second (*16 Cal. 2d 636, 644)* .

[b] Title to Elective Office

In ***Visnich v. Sacramento County Bd. of Educ.*** *(1974) 37 Cal. App. 3d 684, 112 Cal. Rptr. 469* , plaintiff petitioned for a writ of mandate against a school district to require reapportionment of the seven trustee areas within the school

district. The trial court found the school district in need of reapportionment and approved a plan of reapportionment. The plaintiff requested a special election in which all trustees were to stand for election even though their terms were not yet expired. This request was granted in the judgment, and the writ of mandate issued. The school district appealed. On plaintiff's request, the trial court issued an order directing that the school district's appeal not operate as a stay of execution of the judgment, whereupon the school district petitioned for a writ of mandate compelling the superior court to vacate this order. The court of appeal stayed the order directing a special election of trustees and found that an action in quo warranto, not a mandate proceeding, was the proper means to try title to elective office and that the trial court had exceeded its jurisdiction in ordering a special election which would have reduced the term of office of some of the trustees (*37 Cal. App. 3d 684, 690)* .

[c] Two Persons Elected to Same Office

In ***People v. Davidson*** *(1905) 2 Cal. App. 100, 83 P. 161* , a complaint in quo warranto to oust individuals exercising the office of constable was amended at trial following a motion by defendants for nonsuit. The defendants objected to the amending of the complaint. However, amendment was permitted. Subsequently, judgment was entered ousting defendants and defendants' motion for a new trial was denied. The defendants maintained on appeal that the complaint should not have been amended and that the complaint, even as amended to include an allegation that illegal ballots were regularly counted in the election of a constable, failed to state a cause of action. The court of appeals affirmed the trial court's decision in favor of plaintiff and found that plaintiff had stated a cause of action by alleging that two persons had been declared elected to one office, had received certificates and qualified, had performed the duties of the office, and were usurpers and intruders (*2 Cal. App. 100, 103)* .

[d] Person Holding Two Incompatible Offices

People ex rel. Chapman v. Rapsey *(1940) 16 Cal. 2d 636, 107 P.2d 388* is *discussed under § 199.20[3][a]*.

[4] Additional Authorities

[a] Quo Warranto Proper Against Usurper of Public Office

In 27 Ops. Cal. Atty. Gen. 249 (1956) , a relator sought permission to sue in quo warranto from the Attorney General. The relator stated that a special election had been ordered by a county's board of supervisors to determine if the voters would recall a hospital director, and that the relator had been nominated by the board of supervisors as a candidate to succeed the hospital director in the event the director was recalled. The relator challenged the election which had failed to recall the hospital director by a slim margin by alleging the invalidity of some of the absentee ballots cast. The Attorney General, in granting leave to sue in quo warranto to the relator, found that the right of a director to hold office in a hospital district could be tested in an action in quo warranto when the allegation is made that ballots were improperly cast in a recall election of that director, thus making him a usurper of public office *[27 Ops. Cal. Atty. Gen. 249, 252 (1956)]* .

[b] Title to Elective Office

In *People v. Kwolek (1995) 40 Cal. App. 4th 1521, 48 Cal. Rptr. 2d 325* , a criminal defendant claimed that his conviction was void because the judge, a municipal judge sitting by assignment on the superior court, had no authority to sit as a permanent member of the superior court. Defendant raised the issue on appeal. Although it addressed the issue on the merits, and concluded that the judge did have proper authority, the court of appeal also held that the validity of the judge's appointment could not be challenged in the appeal because the proper method of challenge was a quo warranto proceeding (*40 Cal. App. 4th 1521, 1531)* .

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19A-199 California Points & Authorities § 199.21

§ 199.21 Supporting Application for Leave to Sue in Quo Warranto [11 Cal. Code Reg. § 2(b)]--Usurpation of Franchise--By Person [Code Civ. Proc. § 803]

[1] FORM

[*Caption. See § 199.20.*]

A SUIT IN QUO WARRANTO IS PROPER TO REMEDY THE USURPATION OF A FRANCHISE BY AN INDIVIDUAL.

A. Quo Warranto Proper Against Usurper of Franchise. An action in quo warranto may be brought by the Attorney General, in the name of the people of the State of California, upon his/her own information or upon the complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds or exercises any franchise (*Code Civ. Proc. § 803*).

B. Franchise Defined. A franchise is a special privilege to perform certain acts or exercise certain functions which is conferred upon an individual by a government duly empowered to grant the privilege (*Oakland v. Hogan (1940) 41 Cal. App. 2d 333, 346, 106 P.2d 987*).

C. How Franchise Granted. The grant of a franchise may be in the exercise of administrative, legislative, or judicial powers (*Oakland v. Hogan (1940) 41 Cal. App. 2d 333, 342, 106 P.2d 987*).

Respectfully submitted,

_____ [*signature*]

Attorney for Relator

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted in support of an application for leave to sue in quo warranto [*11 Cal. Code Reg. § 2(b)*] brought against a person usurping a franchise [*Code Civ. Proc. § 803*].

Where appropriate, counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms of application for leave to sue in quo warranto and proposed complaints in quo warranto for usurpation of a franchise, see Ch. 483, *Quo Warranto* in CALIFORNIA FORMS OF PLEADING AND PRACTICE.

[3] Discussion of Authorities

[a] Franchise Defined

In ***Oakland v. Hogan*** *(1940) 41 Cal. App. 2d 333, 106 P.2d 987* , the City of Oakland initiated a quo warranto action under *Code Civ. Proc. § 811* to determine the authority of certain persons to maintain and operate a private wharf on public tidelands without having obtained any city or state franchise for that right. Defendants' demurrer to the city's amended complaint was sustained without leave to amend. The city did not amend, judgment was entered for defendants, and the city appealed. Defendants argued that the maintenance of a wharf for the private business of its owner did not constitute the exercise of a franchise. The court of appeal defined a franchise as a special privilege conferred on an individual or a corporation by a government duly empowered legally to grant the privilege and stated that if the privilege is one that any individual may enjoy without a permit from the government or is a right which one individual may grant to another individual without approval of the government, the privilege is not a franchise (*41 Cal. App. 2d 333, 346)* . The court found that the city was vested with jurisdiction to grant or withhold a franchise to operate a private wharf on its public lands and was, under *Code Civ. Proc. § 811*, entitled to maintain an action in quo warranto. Therefore, it reversed and remanded the case to the superior court with instructions to overrule the demurrer and allow defendants a reasonable time in which to answer (*41 Cal. App. 2d 333, 358-359)* .

[b] How Franchise Granted

Oakland v. Hogan *(1940) 41 Cal. App. 2d 333, 106 P.2d 987* is *discussed under § 199.21[3][a]*.

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19A-199 California Points & Authorities § 199.22

§ 199.22 Supporting Application for Leave to Sue in Quo Warranto [11 Cal. Code Reg. § 2(b)]--Usurpation of Franchise--By Corporation [Code Civ. Proc. § 803]

[1] FORM

[*Caption. See § 199.20.*]

A SUIT IN QUO WARRANTO IS PROPER TO REMEDY THE USURPATION OF A FRANCHISE BY A CORPORATION.

A. Quo Warranto Proper Against Corporate Usurper of Franchise. An action in quo warranto may be brought by the Attorney General, in the name of the people of the State of California, upon his/her own information or upon the complaint of a private party, against any corporation, either de jure or de facto, which usurps, intrudes into, or unlawfully holds or exercises any franchise in the State of California (*Code Civ. Proc. § 803*).

B. Franchise Defined. A franchise is a special privilege to perform certain acts or exercise certain functions which is conferred upon a corporation by a government duly empowered to grant the privilege (*Oakland v. Hogan (1940) 41 Cal. App. 2d 333, 346, 106 P.2d 987*).

C. Usurpation Defined. Usurpation occurs where a corporation exercises a power it has no right to exercise (*People v. Rosenstein-Cohn Cigar Co. (1900) 131 Cal. 153, 157, 63 P 163*).

[*Optional*] **D. Exclusive Remedy to Attack Corporate Validity.** An action in quo warranto is the only proper remedy in cases questioning or attacking the existence and organization of a private, municipal, or other public corporation (*San Ysidro Irrigation Dist. v. Superior Court (1961) 56 Cal. 2d 708, 715, 16 Cal. Rptr. 609, 365 P.2d 753*).

[*Optional*] **E. Proper to Oust Corporation From Exercise of Unlawful Franchise.** An action in quo warranto is proper to oust a corporation from the exercise of a franchise which is unlawful for it to exercise (*People v. California Protective Corp. (1926) 76 Cal. App 354, 361, 244 P 1089*).

Respectfully submitted,

_____ [*signature*]

Attorney for Relator

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted in support of an application for leave to sue in quo warranto [*11 Cal. Code Reg. § 2(b)*] brought against a corporation usurping a franchise [*Code Civ. Proc. § 803*].

Where appropriate, counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms of application for leave to sue in quo warranto and proposed complaints in quo warranto for usurpation of a franchise, see Ch. 483, *Quo Warranto* in CALIFORNIA FORMS OF PLEADING AND PRACTICE.

[3] Discussion of Authorities

[a] Usurpation Defined

In ***People v. Rosenstein-Cohn Cigar Co.*** *(1900) 131 Cal. 153, 63 P 163* , an action was brought in quo warranto to revoke a corporation's charter and to dissolve the corporation for its alleged failure to organize and commence the transaction of business within one year of its incorporation as required by statute. The trial court found that the corporation did commence business within one year. Judgment was entered in favor of defendant and plaintiff's motion for a new trial was denied. Plaintiff appealed on the ground that the judgment was not supported by the evidence. The Supreme Court stated that a franchise is in the nature of a trust, the terms of a corporation's charter being the conditions of the trust, and that a corporation's charter is to be forfeited when it violated one or more of the essential conditions of the trust. The Court found that no essential conditions of the corporation's charter had been violated by the corporation and, thus, that there had been no usurpation of its corporate franchise (*131 Cal. 153, 156-157)* . Because the corporation had not usurped its franchise, the Court affirmed the trial court's judgment for defendant and order denying a new trial.

[b] Exclusive Remedy to Attack Corporate Validity

In ***San Ysidro Irrigation Dist. v. Superior Court*** *(1961) 56 Cal. 2d 708, 16 Cal. Rptr. 609, 365 P.2d 753* , the City of San Diego brought an action for declaratory relief and for preliminary and permanent injunctions against an irrigation district to prevent construction of new water lines. The trial court issued a temporary restraining order against the irrigation district. The district moved for dismissal and filed a demurrer alleging that quo warranto was the exclusive means by which the city could test the existence of the district. The demurrer was overruled and a preliminary injunction was issued. The district then petitioned for a writ of prohibition to restrain the superior court from any further proceedings against the district. The Supreme Court denied the writ. The Court pointed out that, in an action by the Attorney General under *Code Civ. Proc. § 803*, quo warranto is the exclusive remedy by which to question or attack the existence and organization of a private, municipal, or other public corporation. Therefore, a declaratory relief action would not be proper (*56 Cal. 2d 708, 715-716)* . However, the court noted that when a quo warranto action is brought by a city under *Code Civ. Proc. § 811*, an action for declaratory relief is equally available since the latter action does not enlarge the jurisdiction of the superior court over the parties or the subject matter [*San Ysidro Irrigation Dist. v. Superior Court (1961) 56 Cal. 2d 708, 717, 16 Cal. Rptr. 609, 365 P.2d 753]* .

[c] Proper to Oust Corporation From Exercise of Unlawful Franchise

In ***People v. California Protective Corp.*** *(1926) 76 Cal. App 354, 244 P 1089* , the Attorney General brought an action in quo warranto against a corporation employing attorneys to render legal services for its clients for a yearly charge. The corporation's first demurrer was overruled and its second demurrer was overruled when it failed to appear. The trial court issued an order restraining the corporation from the practice of law and excluding it from exercising a corporate franchise in California. In addition, the trial court levied a fine and costs on the defendant corporation. The corporation appealed from the judgment and from the order denying its motion to retax costs. The judgment and order were affirmed on appeal. The court of appeal found that a cause of action was stated in that the complaint alleged that defendant was incorporated for and was engaged in the rendering of legal services to its patrons, members, and clients paying a specified yearly charge pursuant to an employment contract (*76 Cal. App 354, 359)* . In addition, because the court of appeal found that the right to practice law was in the nature of a franchise from the State, it held that an action in quo warranto lies to secure a judgment of ouster and seizure of the franchise when a corporation unlawfully assumes to exercise that right (*76 Cal. App 354, 361)* .

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19A-199 California Points & Authorities § 199.23

§ 199.23 Supporting Application for Leave to Sue in Quo Warranto [11 Cal. Code Reg. § 2(b)]--Invalid Annexation by Municipal Corporation

[1] FORM

[*Caption. See § 199.20.*]

A SUIT IN QUO WARRANTO IS PROPER TO CHALLENGE AN INVALID ANNEXATION BY A MUNICIPAL CORPORATION.

A. Quo Warranto Proper Against Corporate Usurper of Franchise. [*See § 199.22, Paragraph A.*]

B. Usurpation Defined. [*See § 199.22, Paragraph C.*]

C. Proper to Challenge Invalid Annexaton. An attempted annexation which goes beyond the applicable annexation statutes in a basic and fundamental respect may be attacked by a suit in quo warranto, whether the annexation was protested effectively or not, and irrespective of any finding with respect to such protect (*People v. Corte Madera (1950) 97 Cal. App. 2d 726, 732, 218 P.2d 810*).

Respectfully submitted,

_____ [*signature*]

Attorney for Relator

[2] Comments

[a] Use of Form

The foregoing memorandum of points and authorities may be submitted in support of an application for leave to sue in quo warranto [*11 Cal. Code Reg. § 2(b)*] brought against a municipal corporation invalidly annexing territory.

Where appropriate, counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms of application for leave to sue in quo warranto and proposed complaints in quo warranto against annexing municipal corporations, see Ch. 483, *Quo Warranto* in CALIFORNIA FORMS OF PLEADING AND PRACTICE.

[3] Discussion of Authorities

[a] Proper to Challenge Invalid Annexation

In ***People v. Corte Madera*** *(1950) 97 Cal. App. 2d 726, 218 P.2d 810* , a complaint in quo warranto was brought on the application of a landowner in purportedly annexed territory. The complaint alleged that the town council had initiated proceedings to annex three separate parcels of uninhabited territory and that each parcel was contiguous to the town but not contiguous to the other parcels as required by the applicable annexation statutes. The town filed a general demurrer which was overruled. The town declined to answer within the time allowed it and stood on its demurrer. After a default judgment was entered for plaintiff nullifying the annexation proceedings, the town appealed. The court of appeal found that separated parcels could not be annexed in a single annexation proceeding under the applicable statutes when the parcels were not contiguous to one another. The court of appeal further found that when an attempted annexation goes beyond the applicable annexation statutes in a basic and fundamental respect, as here, it may be attacked by a suit in quo warranto whether the relator had protested the annexation proceedings effectively, ineffectively, or not at all, and irrespective of the conclusiveness of the town council's finding of an insufficient protest (*97 Cal. App. 2d 726, 732)* .

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[Reserved]

§§ 199.24[Reserved]

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19A-199 California Points & Authorities § 199.30

§ 199.30 Opposing Application for Leave to Sue in Quo Warranto [11 Cal. Code Reg. § 3]--Public Office Not Involved

[1] FORM

BEFORE THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA

The People of the State of California on the Relation of _____ [*name*],	)	
Plaintiff,	)	POINTS AND AUTHORITIES IN OPPOSITION TO APPLICATION FOR LEAVE TO SUE IN QUO WARRANTO [*11 Cal. Code Reg. § 3*]
vs.	)	
_____ [*name*(*s*)],	)	
Defendant(s).	)	
	)	

A SUIT IN QUO WARRANTO AGAINST A USURPING PUBLIC OFFICER IS NOT PROPER WHEN A PUBLIC OFFICE IS NOT INVOLVED.

Quo Warranto Not Proper When Public Office Not Involved. An action in quo warranto is not proper when a public office is not involved, and a public office is not involved when an individual does not exercise powers and perform duties for the government (*Stout v. Democratic County Cent. Comm. (1952) 40 Cal. 2d 91, 94, 251 P.2d 321*).

Respectfully submitted,

_____ [*signature*]

Attorney for Proposed Defendant

[2] Comments

[a] Use of Form

The foregoing form of memorandum points and authorities is for use by a proposed defendant in opposing [*11 Cal. Code Reg. § 3*] an application for leave to sue in quo warranto [*11 Cal. Code Reg. § 2*] when the relator alleges the usurpation of a public office [*Code Civ. Proc. § 803*].

Where appropriate, counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms of application for leave to use in quo warranto and proposed complaints in quo warranto for usurpation of public office, see Ch. 483, *Quo Warranto* in CALIFORNIA FORMS OF PLEADING AND PRACTICE.

[3] Discussion of Authorities

[a] Quo Warranto Not Proper When Public Office Not Involved

In ***Stout v. Democratic County Cent. Comm.*** *(1952) 40 Cal. 2d 91, 251 P.2d 321* , individuals elected as committee persons for a political party petitioned the Supreme Court for a writ of mandate compelling the political party to revoke its appointment of additional committee persons. In opposing the petition, the political party argued that a writ of mandate should not issue because the proper remedy for the wrong alleged was by a suit in quo warranto. The Court issued a peremptory writ of mandate as requested. The Court held that the remedy of quo warranto was not appropriate because it related to public officers in the sense of incumbents exercising sovereign powers of government and that political party committee persons were not public officers because they performed duties for a particular political party rather than the sovereign power of the public (*40 Cal. 2d 91, 94)* .

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19A-199 California Points & Authorities § 199.31

§ 199.31 Opposing Application for Leave to Sue in Quo Warranto [11 Cal. Code Reg. § 3]--Complaint on Information and Belief

[1] FORM

[*Caption. See § 199.30.*]

A SUIT IN QUO WARRANTO IS PROPERLY DENIED WHEN APPLICATION INCLUDES A COMPLAINT BASED SOLELY ON INFORMATION AND BELIEF.

Complaint on Information and Belief Insufficient. A complaint based solely on information and belief is not sufficient to warrant an Attorney General granting leave to sue in quo warranto in the absence of any other showing by the relator in the form of affidavits or oral testimony of any person concerning facts within his/her knowledge touching on the alleged usurpation (*Lamb v. Webb (1907) 151 Cal. 451, 455-456, 91 P. 102, 91 P. 646*).

Respectfully submitted,

_____ [*signature*]

Attorney for Proposed Defendant

[2] Comments

[a] Use of Form

The foregoing points and authorities are for use by a proposed defendant in opposing [*11 Cal. Code Reg. § 3*] an application for leave to sue in quo warranto [*11 Cal. Code Reg. § 2*] when the relator's complaint is based solely on information and belief.

Where appropriate, counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms of application for leave to sue in quo warranto and proposed complaints in quo warranto for usurpation of an office or franchise, see Ch. 483, *Quo Warranto* in CALIFORNIA FORMS OF PLEADING AND PRACTICE.

[3] Discussion of Authorities

[a] Complaint on Information and Belief Insufficient

In ***Lamb v. Webb*** *(1907) 151 Cal. 451, 91 P. 102, 91 P. 646* , the cause of action arose after a relator applied to the Attorney General for leave to sue an alleged usurper of public office in quo warranto. The purpose of the suit was to show that the relator and defendant did not tie in the election for the position of supervisor but, rather that plaintiff had won a majority of the legal votes cast. The Attorney General, after a hearing, refused to grant leave to sue to the relator. The relator applied to the governor for an order directing the Attorney General to grant leave to sue, but the governor refused to issue such an order. Thereafter, the relator petitioned for a writ of mandate to compel the Attorney General to grant leave to sue. The Attorney General, the defendant named in the petition, demurred, and the demurrer was overruled. The trial court ordered the peremptory writ as prayed for and the defendant appealed from that order. The Supreme Court held that that decision by the Attorney General on an application for leave to sue in quo warranto was a matter of discretion and that the Attorney General could be compelled to grant leave to sue by a writ of mandate only where the Attorney General had abused his or her discretion in reviewing the application (*151 Cal. 451, 454)* . In examining the application, the Court found that it included a verified complaint in which the relator, on information and belief, alleged that four illegal votes were cast for the defendant and that election officers had discarded votes marked for the relator plaintiff in tabulating the results of the election. No affidavits or oral testimony was offered by any person as to facts within his or her knowledge touching on the election. The Supreme Court found the complaint in quo warranto insufficient to give the Attorney General reason to believe the defendant's a usurper. Therefore, the Court reversed the judgment of the trial court and directed it to sustain the demurrer to the complaint (*151 Cal. 451, 455-456)* .

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19A-199 California Points & Authorities § 199.32

§ 199.32 Opposing Application for Leave to Sue in Quo Warranto [11 Cal. Code Reg. § 3]--Issues Previously Litigated

[1] FORM

[*Caption. See § 199.30.*]

A SUIT IN QUO WARRANTO IS PROPERLY DENIED WHEN THE APPLICATION RAISES ISSUES PREVIOUSLY LITIGATED.

Issues Previously Litigated. Leave to sue in quo warranto may be denied when the relator's application raises the same issues which have been litigated in a previous action *(36 Ops. Cal. Atty. Gen. 317, 319 (1960))* .

Respectfully submitted,

_____ [*signature*]

Attorney for Proposed Defendant

[2] Comments

[a] Use of Form

The foregoing points and authorities are for use by a proposed defendant in opposing [*11 Cal. Code Reg. § 3*] an application for leave to sue in quo warranto [*11 Cal. Code Reg. § 2*] when the issues raised in the application have been previously litigated.

Where appropriate, counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms of application for leave to sue in quo warranto and proposed complaints in quo warranto for usurpation of a franchise by annexation, see Ch. 483, *Quo Warranto* in CALIFORNIA FORMS OF PLEADING AND PRACTICE.

[3] Discussion of Authorities

[a] Issues Previously Litigated

In 36 Ops. Cal. Atty. Gen. 317 (1960) , two persons petitioned for a writ of mandate, a preliminary injunction, and declaratory relief in the superior court against a city to block the completion of annexation proceedings by the city. The trial court handed down a memorandum adverse to the petitioners and judgment was entered in conformity with the memorandum. The petitioners then applied to the court of appeal for a writ of supersedeas and their request was denied. The petitioners next applied to the superior court for a temporary restraining order preventing the city from passing and filing the annexation ordinance during appeal. The superior court refused to issue such an order. Thereafter, the petitioners, as relators, sought leave from the Attorney General to sue in quo warranto, claiming that their appeal had become moot by virtue of the annexation being completed. The city opposed the application, arguing that the relators had had their day in court and that the Attorney General should deny leave to sue in quo warranto on a doctrine analogous to res judicata. The Attorney General denied leave to sue in quo warranto because, with one exception, the relators' application raised the same issues litigated in the previous superior court action (*36 Ops. Cal. Atty. Gen. 317, 319)* . Only one new matter was raised in the relators' application, and the Attorney General found it to be a minor tecnical defect in procedure not affecting the validity of the annexation (*36 Ops. Cal. Atty. Gen. 317, 321)* .

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19A-199 California Points & Authorities §§ 199.33-199.39

[Reserved]

§§ 199.33[Reserved]

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19A-199 California Points & Authorities § 199.40

§ 199.40 1/2 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10] in Quo Warranto [Code Civ. Proc. §§ 803, 811]--Bar of Relevant Statute of Limitations [Code Civ. Proc. §§ 349.1, 349.4, 349]

[1] FORM

SUPERIOR COURT OF CALIFORNIA, COUNTY OF _____ [The People of the State of California on the Relation of] _____ [*name*], Plaintiff, vs. _____ [*name*(*s*)], Defendant(s).	))))))	NO. _____ POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER TO COMPLAINT IN QUO WARRANTO [*Code Civ. Proc. §§ 430.10,* _____ (803 *or* 811)]

PLAINTIFF'S COMPLAINT IN QUO WARRANTO FAILS TO STATE A CAUSE OF ACTION IN THAT IT APPEARS ON THE FACE THEREOF THAT IT IS BARRED BY THE STATUTE OF LIMITATIONS.

A. Objection by Demurrer. The party against whom a complaint has been filed may object, by demurrer as provided in *Section 430.30 of the Code of Civil Procedure*, to the complaint on the ground that it does not state facts sufficient to constitute a cause of action (*Code Civ. Proc. § 430.10(e)*). When any ground for objection to a complaint appears on the face thereof [or from any matter of which the court is required to or may take judicial notice], the objection on that ground may be taken by a demurrer to the complaint (*Code Civ. Proc. § 430.30(a)*).

B. Failure to State Cause of Action. The objections that an action is barred by a statute of limitations must be deemed to be included in the ground of demurrer that the complaint does not state facts sufficient to constitute a cause of action (*Bell v. Bank of Cal. (1908) 153 Cal. 234, 245, 94 P 889*).

[*OR*]

C. Statute of Limitations. An action to contest the validity of acts or proceedings taken under color of law to form, organize, incorporate, dissolve, consolidate, change organization or reorganize, or to change the territorial boundaries of, a city, county, city and county, special district, public corporation or other public entity, or an improvement district within any of the foregoing, must be brought within six months from the date of completion of the acts or proceedings contested in the absence of any existing statute prescribing a shorter period of limitation (*Code Civ. Proc. § 349.1*).

[*OR*]

C. Statute of Limitations. An action to contest the validity of acts or proceedings taken under color of law either to form, organize, incorporate, or change the territorial boundaries of a city, county, city and county, special district, public corporation or other public entity, or an improvement district, annexed area, or zone within any of the foregoing or to authorize, issue, sell, or exchange bonds of the entity or territory, must be brought within 60 calendar days from the date notices are mailed by the entity or territory informing property owners within the entity or territory of the acts or proceedings (*Code Civ. Proc. § 349.4*).

[*EITHER*]

C. Statute of Limitations. An action to contest the validity of proceedings for the incorporation of a municipal corporation, the annexation of territory to a municipal corporation, or for the consolidation of municipal corporation must be brought within three months after the completion of the proceedings (*Code Civ. Proc. § 349*1/2).

[*Optional*] **D. Statute Applicable to Quo Warranto Actions.** Section 3491/2 of the Code of Civil Procedure is applicable to actions in quo warranto (*People v. Los Angeles (1928) 93 Cal. App 532, 536, 538, 269 P 934*).

Respectfully submitted,

_____ [*signature*]

Attorney for Defendant

[2] Comments

[a] Use of Form

The foregoing form of memorandum of points and authorities may be submitted in support of a demurrer to a complaint in quo warranto which is brought either by a relator with leave from the Attorney General [*Code Civ. Proc. § 803*] or by a board of supervisors or legislative body of a municipal corporation [*Code Civ. Proc. § 811*] where it appears on the face of the complaint, or from any matter of which the court is required to or may take judicial notice, that the action is barred by a statute of limitations.

Where appropriate, counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, the foregoing points and authorities may be used to oppose an application for leave to sue in quo warranto by a relator [*see 11 Cal. Code Reg. §§ 2, 3*].

[c] Related Pleading and Practice Forms

For forms of complaint in quo warranto, see Ch. 483, *Quo Warranto* in CALIFORNIA FORMS OF PLEADING AND PRACTICE.

[3] Discussion of Authorities

[a] Failure to State Cause of Action

Bell v. Bank of Cal. *(1908) 153 Cal. 234, 94 P 889* was an action for the recovery of shares of stock. The defendant asserted in a general demurrer that the action was barred by a statute of limitations, and the trial court sustained the demurrer and dismissed the action. The method of asserting the defense of bar of a statute of limitations was not, apparently, an issue either in the trial court or on appeal; but the Supreme Court said that the bar of the statute of limitations is not specified as a ground of demurrer in the code, and that objection to a complaint, while required to be stated in the demurrer, must be deemed to be included within the ground of want of facts sufficient to constitute a cause of action.

[b] Statute Applicable to Quo Warranto Actions

In ***People v. Los Angeles*** *(1928) 93 Cal. App 532, 269 P 934* , a complaint in quo warranto was brought to challenge the validity of certain proceedings taken by a municipality to annex certain territory. The municipality demurred to the complaint on the ground that the action was barred by *Code Civ. Proc. § 349*1/2. On sustaining the demurrer, the trial court entered judgment dismissing the action, and the plaintiff appealed. The court of appeal affirmed the trial court's dismissal, finding that *Code Civ. Proc. § 349*1/2 applies to all actions within which the validity of proceedings for the annexation of territory to municipal corporations, or the consolidation of municipal corporations, can be challenged (*93 Cal. App 532, 536)* .

[4] Additional Authorities

[a] Statute Applicable to Quo Warranto Actions

In 23 Ops. Cal. Atty. Gen. 300 (1954) , two relators applied to the Attorney General for leave to sue in quo warranto to determine whether a proposed defendant city could validly exercise municipal and corporate jurisdiction over an area of land purportedly annexed by it. The relators claimed there were serious defects in the annexation proceedings by the city. On the other 1hand, the proposed defendant argued that the relators could not contest the validity of the proceedings since the provisions of *Code Civ. Proc. § 349*1/2 limited any attack on the validity of annexation proceedings to a three-month period after the completion of the annexation. The Attorney General denied the relators leave to sue in quo warranto because their objections to the annexation were not raised within three months after the completion of the annexation and affirmed the applicability of *Code Civ. Proc. § 349*1/2 to quo warranto actions (*23 Ops. Cal. Atty. Gen. 300, 300-301, 304)* .

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19A-199 California Points & Authorities § 199.41

§ 199.41 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10] in Quo Warranto [Code Civ. Proc. §§ 803, 811]--Failure to Allege Facts Establishing Usurpation

[1] FORM

[*Caption. See § 199.40.*]

PLAINTIFF'S COMPLAINT IN QUO WARRANTO FAILS TO STATE A CAUSE OF ACTION IN THAT THE SPECIFIC FACTS ALLEGED THEREIN DO NOT CONSTITUTE A USURPATION.

A. Objection By Demurrer. [*See § 199.40, Paragraph A.*]

B. Failure to Establish Usurpation. A complaint in quo warranto is subject to a general demurrer if the specific facts stated and relied on by the pleader to show a usurpation do not state a cause of action (*People v. Palm Springs (1958) 51 Cal. 2d 38, 41, 331 P.2d 4*).

Respectfully submitted,

_____ [*signature*]

Attorney for Defendant

[2] Comments

[a] Use of Form

The foregoing form of memorandum of points and authorities may be submitted in support of a demurrer to a complaint in quo warranto [*Code Civ. Proc. §§ 803, 811*] where the allegations in the complaint do not state a cause of action because they fail to establish a usurpation.

Where appropriate, counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, the foregoing points and authorities may be used to oppose an application for leave to sue in quo warranto by a relator [*see 11 Cal. Code Reg. §§ 2, 3*].

[c] Related Pleading and Practice Forms

For forms of complaint in quo warranto, see Ch. 483, *Quo Warranto* in CALIFORNIA FORMS OF PLEADING AND PRACTICE.

[3] Discussion of Authorities

[a] Failure to Establish Usurpation

In ***People v. Palm Springs*** *(1958) 51 Cal. 2d 38, 331 P.2d 4* , an action in quo warranto was brought to test the validity of an annexation of uninhabited territory by a city. Defendant demurred to plaintiff's complaint, which charged the invalidity of the annexation both generally and specifically. The trial court sustained the demurrer without leave to amend and, thereafter, entered judgment in favor of defendant. Plaintiff appealed and the Supreme Court affirmed. The Court examined plaintiff's allegations as to why the annexation was void to determine if a cause of action for usurpation was stated. The complaint had alleged that the annexation was void because: (1) written notice of the annexation proceedings was not given to one owner of land within the territory; (2) the notice and hearing given the other landowners did not satisfy the statutory requirements; (3) protests submitted to the city council deprived it of jurisdiction to annex the territory; and (4) because the annexation was unreasonable, amounted to a fraudulent abuse of the statute, and operated to take property without due process of law. Finding that each of plaintiff's allegations was unsupported by case law, the Court concluded that the allegations did not establish the invalidity of the annexation.

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19A-199 California Points & Authorities § 199.42

§ 199.42 Supporting Demurrer [Code Civ. Proc. § 430.10] to Complaint in Quo Warranto [Code Civ. Proc. §§ 803, 811] to Invalidate Annexation Proceedings--Annexation Proceedings Not Complete

[1] FORM

[*Caption. See § 199.40.*]

A SUIT IN QUO WARRANTO CONTESTING ANNEXATION PROCEEDINGS IS NOT PROPER WHEN THE PROCEEDINGS ARE NOT COMPLETE.

A. Objection By Demurrer. [*See § 199.40, Paragraph A.*]

B. Remedy in Quo Warranto Not Mature When Annexation Proceedings Incomplete. Quo warranto is not an appropriate remedy unless annexation proceedings are completed and the municipal corporation or district is exercising control over the annexed territory (*American Distilling Co. v. City Council, Sausalito (1950) 34 Cal. 2d 660, 667, 213 P.2d 704*).

Respectfully submitted,

_____ [*signature*]

Attorney for Defendant

[2] Comments

[a] Use of Form

The foregoing form of memorandum of points and authorities may be submitted in support of a demurrer to a complaint in quo warranto brought by the Attorney General [*Code Civ. Proc. § 803*] or by the board of supervisors or legislative body of a municipal corporation [*Code Civ. Proc. § 811*] where the complaint contests certain annexation proceedings, but is brought prior to the completion of such proceedings. It should be noted that the foregoing points and authorities would appear to be inapplicable to an action in quo warranto brought pursuant to *Code Civ. Proc. § 349.4* (60 days to

contest annexation after notice to landowners), *set out in § 199.40*, Paragraph C (second alternative).

Where appropriate, counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Uses

With appropriate modifications, the foregoing points and authorities may be used to oppose an application for leave to sue in quo warranto by a relator [*see 11 Cal. Code Reg. §§ 2, 3*].

[c] Related Pleading and Practice Forms

For forms of complaint in quo warranto to challenge annexation proceedings, see Ch. 483, *Quo Warranto* in CALIFORNIA FORMS OF PLEADING AND PRACTICE.

[3] Discussion of Authorities

[a] Remedy in Quo Warranto Not Mature When Annexation Proceedings Incomplete

In ***American Distilling Co. v. City Council, Sausalito*** *(1950) 34 Cal. 2d 660, 213 P.2d 704* , the petitioner commenced a mandate proceeding to compel the Sausalito City Council to terminate annexation proceedings with respect to certain industrial property contiguous to Sausalito. The trial court issued an alternative writ of mandate directing the city council to terminate its annexation proceedings or to show cause why it had not done so. In addition, the alternative writ directed the city council to make a finding that petitioner's protest as an owner of land within the territory to be annexed was duly made. Subsequently, the city council approved the annexation on the ground that a sufficient protest had not been presented. Counsel for the city council moved at trial for dismissal of the mandate proceedings on the ground that an annexation ordinance had been adopted and that the granting of relief would interfere with the performance of a legislative act. The motion was denied. After a hearing on the merits, the trial court declared the ordinance void and issued a peremptory writ of mandate commanding the city council to adopt a resolution setting aside the ordinance and the annexation proceedings. On appeal, the city council argued that the trial court should have exercised its discretionary power to deny the peremptory writ because the petitioner had a plain, speedy, and adequate remedy at law in quo warranto. In rejecting this argument, the Supreme Court declared that quo warranto is the appropriate remedy to question the legality of annexation proceedings only where the annexation proceedings have been completed and the municipal corporation or district is exercising control over the annexed territory. Because the remedy in quo warranto was not mature at the time relief was sought by the petitioner, a petition in mandate was proper. Therefore, the Court reasoned, the trial court did not abuse its discretion in granting the writ (*34 Cal. 2d 660, 667)* . The judgment appealed from was affirmed with the modification that the provision commanding the city council to set aside the annexation ordinance be struck.

[4] Additional Authorities

[a] Remedy in Quo Warranto Not Mature When Annexation Proceedings Incomplete

In *Colton v. Rialto (1964) 230 Cal. App. 2d 174, 40 Cal. Rptr. 766* , the City of Colton petitioned for a writ of mandate to declare certain annexations by the City of Rialto void. Rialto's motion to quash service was denied. In addition, Rialto demurred on the ground that the petition did not state a cause of action and that there was a nonjoinder of respondents in that the city council and city clerk of Rialto were not named in the petition. Colton thereafter filed a complaint in quo warranto alleging the same facts alleged in its petition and subsequently filed an amended petition for writ of mandate. Rialto filed a motion to dismiss the petition, alleging that mandate was not proper to review completed annexation proceedings, as well as an answer and a demurrer. The trial court found that the Rialto annexations were invalid from their inception and that the enabling ordinances passed after the proceedings in mandate had commenced were likewise

invalid. Rialto appealed from the adverse judgment on the ground that quo warranto was the sole remedy to question completed annexation proceedings, such as the Rialto annexations. The court of appeal affirmed the trial court's judgment, finding that the annexation proceedings were incomplete in that Rialto had not passed its enabling ordinances in good faith and that, therefore, mandate was the proper remedy (*230 Cal. App. 2d 174, 181-183)* .

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19A-199 California Points & Authorities §§ 199.43-199.49

[Reserved]

§§ 199.43[Reserved]

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19A-199 California Points & Authorities § 199.50

§ 199.50 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10] in Quo Warranto [Code Civ. Proc. §§ 803, 811]--Statute of Limitations Inapplicable

[1] FORM

SUPERIOR COURT OF CALIFORNIA, COUNTY OF _____ [The People of the State of California on the Relation of] _____ [*name*], Plaintiff, vs. _____ [*name*(*s*)], Defendant(s).	)))))))	NO. _____ POINTS AND AUTHORITIES IN OPPOSITION TO DEMURRER TO COMPLAINT IN QUO WARRANTO [*Code Civ. Proc. §§ 430.10,* _____ (803 *or* 811)]

COMPLAINT IS NOT BARRED BY STATUTE OF LIMITATIONS WHEN ANNEXATION PROCEEDINGS CONTESTED ARE NULL AND VOID FROM THE BEGINNING.

Statute of Limitations as Not Invocable to Bar Challenge of Subsequent Void Annexation Proceedings. Section 3491/2 of the Code of Civil Procedure may not be invoked as a bar to a quo warranto action brought to contest subsequent annexation proceedings which were initiated after other annexation proceedings were complete and which were, thus, null and void from the beginning (*People v. Corte Madera (1952) 115 Cal. App. 2d 32, 37-38, 251 P.2d 988*).

Respectfully submitted,

_____ [*signature*]

Attorney for _____

[Plaintiff *or* Relator]

[2] Comments

[a] Use of Form

The foregoing form of memorandum of points and authorities may be submitted in opposition to a demurrer to a complaint in quo warranto [*Code Civ. Proc. §§ 803, 811*] where the defendant has demurred on the ground that the complaint to challenge the validity of annexation proceedings is barred by the applicable statute of limitations [*see Code Civ. Proc. §§ 349.1, 349.4, 349*1/2]. The practitioner should note that the authority cited in the foregoing form applies specifically to the statute of limitations set by *Code Civ. Proc. § 349*1/2; the practitioner may wish to include additional authority to support the applicability of the case authority cited in the foregoing to the statute limitations raised by the defendant in the demurrer if that statute differs from *Code Civ. Proc. § 349*1/2.

Where appropriate, counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Statute of Limitations as Not Invocable to Bar Challenge of Subsequent Void Annexation Proceedings

In ***People v. Corte Madera*** *(1952) 115 Cal. App. 2d 32, 251 P.2d 988* , an action in quo warranto was instituted by the Attorney General on the relation of a private party to invalidate certain annexation proceedings by a municipal corporation. Finding that the challenged annexation proceedings had been commenced prior to those of another town and thus prevailed over the subsequent proceedings, the trial court entered judgment for the defendants. Plaintiff appealed on the ground that the quo warranto action constituted an attack on the subsequent annexation proceedings in violation of *Code Civ. Proc. § 349*1/2 and that the subsequent proceedings were valid for failure of any action contesting them within the period set forth in *Code Civ. Proc. § 349*1/2. The defendant agreed that *Code Civ. Proc. § 349*1/2 was applicable to quo warranto actions but contended that the statute could not be used to perfect a subsequent annexation in derogation of a valid prior annexation. The court of appeal affirmed the judgment of the trial court in favor of defendants. It found that, since the subsequent proceedings were null and void from their inception, the failure to contest the subsequent proceedings within the period prescribed by *Code Civ. Proc. § 349*1/2 did not validate them (*115 Cal. App. 2d 32, 37-38)* .

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19A-199 California Points & Authorities §§ 199.51-199.59

[Reserved]

§§ 199.51[Reserved]

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19A-199 California Points & Authorities § 199.60

§ 199.60 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Compel Attorney General to Grant Leave to Sue in Quo Warranto [Code Civ. Proc. § 803]

[1] FORM

SUPERIOR COURT OF CALIFORNIA, COUNTY OF _____ _____ _____ [*name*], Petitioner, vs. _____ [*name*], Attorney General, Respondent.	)))))))	NO. _____ POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDATE [*Code Civ. Proc. §§ 1085, 1086*]

LEAVE TO SUE IN QUO WARRANTO MAY BE COMPELLED BY MANDATE WHERE ATTORNEY GENERAL ABUSES DISCRETION IN REFUSING TO GRANT REQUESTED LEAVE TO SUE.

Leave to Sue as Compelled When Abuse of Discretion in Refusing Requested Leave to Sue. The court may compel by mandate that the Attorney General grant leave to sue in quo warranto when the Attorney General's abuse of discretion in refusing the requested leave to sue is extreme and clearly indefensible (*Campbell v. Mosk (1961) 197 Cal. App. 2d 640, 648, 17 Cal. Rptr. 584*).

Respectfully submitted,

_____ [*signature*]

Attorney for Petitioner

[2] Comments

[a] Use of Form

The foregoing form of memorandum of points and authorities may be used to support a petition for a writ of mandate [*Code Civ. Proc. § 1086*] compelling an Attorney General to grant leave to sue in quo warranto [*Code Civ. Proc. § 803*]. It should be noted, however, that although many cases have affirmed the right of a court to compel the Attorney General to grant leave to sue in quo warranto when he or she has abused his or her discretion in refusing requested leave to sue, there are no cases compelling the Attorney General to exercise his or her discretion by granting the requested leave to sue [*Lamb v. Webb (1907) 151 Cal. 451, 454-455, 91 P 102* ; *Campbell v. Mosk (1961) 197 Cal. App. 2d 640, 648, 17 Cal. Rptr. 584]* .

Where appropriate, counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms of application for leave to sue in quo warranto and proposed complaints in quo warranto, see Ch. 483, *Quo Warranto* in CALIFORNIA FORMS OF PLEADING AND PRACTICE. For forms of petition for a writ of mandate, see Ch. 358, *Mandate and Prohibition* in that set.

[3] Discussion of Authorities

[a] Leave to Sue as Compelled When Abuse of Discretion in Refusing Requested Leave to Sue

In ***Campbell v. Mosk*** *(1961) 197 Cal. App. 2d 640, 17 Cal. Rptr. 584* , a relator applied for leave to sue in quo warranto to challenge the validity of an annexation of territory by the City of San Jose. The Attorney General granted conditional leave to sue and the relator filed its complaint accordingly. Subsequently, the Attorney General denied leave to sue on the ground that a quo warranto action would not serve the public interest and ordered the relator to dismiss the complaint. Thereafter, the relator petitioned for a writ of mandate and/or review (certiorari) to compel the Attorney General to grant the denied leave to sue. The City of San Jose and the Attorney General demurred to the petition on the grounds that it did not state a cause of action and that the petitioner lacked standing to attack the annexation. The trial court sustained the demurrers without leave to amend. The petitioner appealed from the judgment entered against it. On appeal, the Attorney General argued that a court should never compel an Attorney General to grant leave to sue in quo warranto. However, the court of appeal held that court intervention was justified and proper when the Attorney General's abuse of discretion in refusing the requested leave to sue was extreme and clearly indefensible. The court did not find a showing of such abuse in the case at hand. The court reexamined the four factors instrumental in the Attorney General's decision not to institute the quo warranto suit and declared that the Attorney General had some justification in finding that no public interest would be served by the proposed quo warranto action. Therefore, the court affirmed the judgment sustaining the demurrers (*197 Cal. App. 2d 640, 648)* .

[4] Additional Authorities

[a] Leave to Sue as Compelled When Abuse of Discretion in Refusing Requested Leave to Sue

International Assn. of Fire Fighters v. City of Oakland (1985) 174 Cal. App. 3d 687, 220 Cal. Rptr. 256 involved consolidated appeals of the dismissal of two complaints for declaratory relief to invalidate the effectiveness of city charter amendments passed by the electorate in propositions on a city ballot. The court of appeal affirmed the judgments of dismissal, holding that each action was one that may only be brought as a quo warranto action by the Attorney General. In affirming, however, the court recognized the dangers of resting the decision of whether or not to bring such an action in the arbitrary discretion of the Attorney General. The court also recognized that the Attorney General's pivotal role in quo warranto proceedings has its origin deep in the roots of the common law. The court explained that the law on quo warranto remains murky in California, because *Code Civ. Proc. § 803* provides that an action "must" be

brought when the Attorney General "has reason to believe" that conditions exist warranting the bringing of the action, indicating that the decision to bring the action is within the Attorney General's discretion even when cloaked with the appearance of being mandatory. Thus, the court indicated that in a proper case when the proposed relator has an individual right distinct in kind from the right of the general public enforceable by an action in the nature of quo warranto, and when he or she has presented a proper petition with facts necessary to establish that right, the court would not hesitate to hold that mandamus would issue to correct any arbitrary, capricious, or unreasonable action by the Attorney General in his or her control of such action. In affirming the dismissal, the court then made clear that plaintiffs might be able to seek judicial review by way of mandamus, should the Attorney General fail to act on a petition by plaintiffs for leave to file a quo warranto acton (*174 Cal. App. 3d 687, 693-699)* .

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CHAPTER 200 RECEIVERS

20-200 California Points & Authorities 200.syn

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.syn Synopsis to Chapter 200: RECEIVERS

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§ 200.02 Governing Law

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§ 200.04 Related Discussion and Forms

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§§ 200.05-200.09 [Reserved]

§ 200.10 Supporting Motion to Appoint Receiver [see Code Civ. Proc. §§ 86(a)(8), 564]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Discretion of Trial Court to Appoint Receiver

[4] Additional Authorities

[a] Discretion of Trial Court to Appoint Receiver

§§ 200.11-200.19 [Reserved]

§ 200.20 Opposing Motion to Appoint Receiver--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Refusal to Appoint Receiver Is Largely Within Discretion of Trial Court

[b] Power to Appoint Receiver to Be Used With Caution

[4] Additional Authorities

[a] Refusal to Appoint Receiver Is Largely Within Discretion of Trial Court

§ 200.21 Opposing Motion to Appoint Receiver--Complaint Fails to State Cause of Action on Which Relief Can Be Granted

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Receivership Is Provisional Remedy Ancillary to Pending Action

[b] Failure of Complaint to State Cause of Action on Which Relief Can Be Granted

§ 200.22 Opposing Motion to Appoint Receiver--Less Drastic Means of Relief Are Available

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Availability of Less Drastic Relief

[4] Additional Authorities

[a] Availability of Less Drastic Relief

§ 200.23 Opposing Motion to Appoint Receiver--No Reasonably Certain Benefit to Moving Party and Distinct Disadvantage to Opposing Party

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] No Certain Benefit to One Party and Distinct Disadvantage to Other Party

§ 200.24 Opposing Motion to Appoint Receiver--Evidence Used to Support Appointment Is Conclusory or Based on Information and Belief

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Reply Memorandum

[3] Discussion of Authorities

[a] Evidence Based on Conclusory Allegations and on Information and Belief Is Insufficient to Appoint Receiver

[4] Additional Authorities

[a] Evidence Based on General and Conclusory Allegations and on Information and Belief Is Insufficient

§ 200.25 Opposing Motion to Appoint Receiver--Evidence Used to Support Appointment Lacks Factual Allegation of Injury

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Reply Memorandum

[3] Discussion of Authorities

[a] Evidence Lacking Factual Allegations of Any Injury Is Insufficient to Appoint Receiver

§ 200.26 Opposing Motion to Appoint Receiver--Party Seeking Appointment Has Failed to Show by Preponderance of Evidence That Appointment Is Warranted

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Reply Memorandum

[3] Discussion of Authorities

[a] Burden of Proof Is Preponderance of Evidence

§§ 200.27-200.39 [Reserved]

§ 200.40 Reply Memorandum Supporting Motion to Appoint Receiver--Form of Evidence Is Sufficient to Justify Appointment

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Form of Evidence to Justify Appointment of Receiver

§§ 200.41-200.49 [Reserved]

§ 200.50 Supporting Confirmation of Ex Parte Appointment of Receiver [Cal. Rules of Ct., Rule 3.1175, 3.1176]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Confirmation Hearing

[d] Modification for Use in Support of Ex Parte Application for Order to Show Cause Why Receiver Should Not Be Appointed

[e] Related Pleading and Practice Forms

[f] Opposing Memoranda

[3] Discussion of Authorities

[a] Power of Court to Appoint Receiver Ex Parte

[b] Appointment on Showing of Necessity or Emergency

[c] Appointment on Showing of Irreparable Injury

[4] Additional Authorities

[a] Appointment on Showing of Necessity or Emergency

[b] Appointment on Showing of Irreparable Injury

§ 200.51 Supporting Confirmation of Ex Parte Appointment of Receiver [Cal. Rules of Ct., Rule 3.1175(a), 3.1176(a), (b)]--Exercise of Discretion Governed by Circumstances at Time of Making Order

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Exercise of Discretion Governed by Circumstances at Time of Making Order

[4] Additional Authorities

[a] Exercise of Discretion Governed by Circumstances at Time of Making Order

§§ 200.52-200.59 [Reserved]

§ 200.60 Opposing Confirmation of Ex Parte Appointment of Receiver--Receiver Should Not Be Confirmed Because of Inadequate Showing of Imperative Emergency or Necessity [Cal. Rules of Ct., Rule 3.1175(a)(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Confirmation Hearing

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Appointment Void Absent Showing of Emergency or Necessity

[4] Additional Authorities

[a] Appointment Void Absent Showing of Emergency

§ 200.61 Opposing Confirmation of Ex Parte Appointment of Receiver--Inadequate Showing of Irreparable Injury [Cal. Rules of Ct., Rule 3.1175(a)(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Confirmation Hearing

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Appointment Void Absent Showing of Irreparable Injury

§ 200.62 Opposing Confirmation of Ex Parte Appointment of Receiver--Appointment Void for Lack of Undertaking by Party Seeking Appointment [Code Civ. Proc. § 566(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Appointment Void When Applicant Fails to Give Undertaking

[4] Additional Authorities

[a] Appointment Void When Applicant Fails to Give Undertaking

§ 200.63 Opposing Confirmation of Ex Parte Appointment of Receiver--Appointment Void as to Codefendants to Whom Undertaking Does Not Run

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Undertaking Required to Run to All Defendants, and Appointment Void as to Codefendants to Whom Undertaking Does Not Run

§§ 200.64-200.69 [Reserved]

§ 200.70 Supporting Court's Own Motion to Appoint Receiver

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Court May Appoint Receiver on Its Own Motion

§§ 200.71-200.79 [Reserved]

§ 200.80 Supporting Contention That Receiver Should Be Appointed in Action by Vendor to Vacate Fraudulent Purchase of Property [Code Civ. Proc. § 564(b)(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Showing Required

[d] Related Memoranda

§§ 200.81-200.89 [Reserved]

§ 200.90 Supporting Contention That Receiver Should Be Appointed in Action Between Parties Jointly Owning or Interested in Property or Fund [Code Civ. Proc. § 564(b)(1)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Action Between Parties Jointly Owning or Interested in Property, Fund, or Proceeds.

[b] Showing of Probable Interest in Property, Fund, or Proceeds

[c] Showing That Property Is in Danger of Destruction, Removal, or Loss

§ 200.91 Supporting Contention That Receiver Should Be Appointed in Action Between Parties Jointly Owning or Interested in Property or Fund [Code Civ. Proc. § 564(b)(1)]--Determination of Ultimate Issue of Precise Relationship of Parties Is Not Prerequisite to Granting Motion to Appoint Receiver

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Determination of Ultimate Issue of Precise Relationship of Parties Is Not Prerequisite to Granting Motion to Appoint Receiver

§§ 200.92-200.99 [Reserved]

§ 200.100 Supporting Contention That Receiver Should Be Appointed in Action Between Partners [Code Civ. Proc. § 564(b)(1)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[e] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Action Between Partners

[b] Appointment on Showing of Probable Interest in Property, Fund, or Proceeds

[c] Appointment on Showing That Property Is in Danger of Loss, Removal, or Material Injury

[4] Additional Authorities

[a] Action Between Partners

§ 200.101 Supporting Contention That Receiver Should Be Appointed in Action Between Partners [Code Civ. Proc. § 564(b)(1)]--Appointment of Receiver to Wind Up Partnership Business When Surviving Partner Refuses to Do So

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Appointment of Receiver to Wind Up Business of Partnership When Surviving Partner Refuses to Do So

§§ 200.102-200.109 [Reserved]

§ 200.110 Supporting Contention That Receiver Should Be Appointed in Action Between Vendors and Vendees

[Code Civ. Proc. § 564(b)(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Action Between Vendor and Vendee

[b] Showing of Probable Interest in Property, Fund, or Proceeds

[c] Showing That Property Is in Danger of Loss, Removal, or Material Injury

[4] Additional Authorities

[a] Action Between Vendor and Vendee

§§ 200.111-200.119 [Reserved]

§ 200.120 Supporting Contention That Receiver Should Be Appointed in Action Between Joint Venturers [Code Civ. Proc. § 564(b)(1)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Action Between Joint Venturers

[b] Showing of Probable Interest in Property, Fund, or Proceeds

[c] Showing That Property Is in Danger of Loss, Removal, or Material Injury

§ 200.121 Supporting Contention That Receiver Should Be Appointed--Action Between Joint Venturers--Whether

Relationship Between Parties Is Partnership or Joint Venture Is Immaterial

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Whether Relationship Between Parties Is Partnership or Joint Venture Is Immaterial

§§ 200.122-200.129 [Reserved]

§ 200.130 Opposing Contention That Receiver Should Be Appointed in Action Between Parties Jointly Owning or Interested in Property or Fund [Code Civ. Proc. § 564(b)(1)]--Property or Fund Not in Danger of Loss, Removal, or Material Injury

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Receivership Under Code Civ. Proc. § 564(b)(9) Precluded if Another Subdivision Governs

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Party Who Fails to Show That Property, Fund, or Proceeds Is in Danger of Loss, Removal, or Material Injury Is Not Entitled to Appointment of Receiver

§§ 200.131-200.139 [Reserved]

§ 200.140 Opposing Contention That Receiver Should Be Appointed in Action Between Partners [Code Civ. Proc. § 564(b)(1)]--Property or Fund Not in Danger of Loss, Removal, or Material Injury--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Receivership Under Code Civ. Proc. § 564(b)(9) Precluded if Another Subdivision Governs

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Failure to Show Probable Right to or Interest in Partnership Property or Funds

[b] Failure to Show That Partnership Property or Funds Are in Danger of Loss, Removal, or Material Injury

§ 200.141 Opposing Contention That Receiver Should Be Appointed in Action Between Partners [Code Civ. Proc. § 564(b)(1)]--Mere Fact of Partner's Request for Appointment of Receiver in Dissolution Proceeding Is Insufficient to Justify Appointment

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Mere Fact of Partner's Request for Appointment of Receiver in Dissolution Proceeding Is Insufficient to Justify Appointment

§§ 200.142-200.149 [Reserved]

§ 200.150 Opposing Contention That Receiver Should Be Appointed in Action Between Vendors and Vendees [Code Civ. Proc. § 564(b)(1)]--Failure to Show Fraud in Purchase or Interest in Property

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Receivership Under Code Civ. Proc. § 564(b)(9) Precluded if Another Subdivision Governs

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Failure to Show Fraud in Purchase or Interest in Property.

§§ 200.151-200.159 [Reserved]

§ 200.160 Opposing Contention That Receiver Should Be Appointed in Action Between Joint Venturers [Code Civ. Proc. § 564(b)(1)]--Property or Fund Not in Danger of Loss, Removal, or Material Injury

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Receivership Under Code Civ. Proc. § 564(b)(9) Precluded if Another Subdivision Governs

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Failure to Show That Property or Funds of Joint Venture Are in Danger of Loss, Removal, or Material Injury

§§ 200.161-200.169 [Reserved]

§ 200.170 Supporting Contention That Receiver Should Be Appointed in Unlawful Detainer Proceeding [Code Civ. Proc. § 564(b)(7)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Unlawful Detainer Proceeding

[b] Unlawful Detainer Proceeding by Purchaser at Foreclosure Sale Against Party in Possession

§§ 200.171-200.179 [Reserved]

§ 200.180 Supporting Contention That Receiver Should Be Appointed in Action by Secured Lender to Enforce Right to Inspect Real Property to Determine Release of Hazardous Substance [Civ. Code § 2929.5; Code Civ. Proc. § 564(c)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

§§ 200.181-200.189 [Reserved]

§ 200.190 Supporting Contention That Receiver Should Be Appointed in Action for Specified Performance of Assignment of Rents Provision [Code Civ. Proc. § 564(b)(11)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Related Cases

§ 200.191 Supporting Contention That Appointment of Receiver Should Continue After Entry of Judgment for Specific Performance of Assignment of Rents Provision [Code Civ. Proc. § 564(b)(11)]--Appointment May Be Continued Pending Nonjudicial Foreclosure

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

§ 200.192 Supporting Contention That Receiver Should Be Appointed in Case by Assignee Under Assignment of Leases, Rents, Issues, or Profits [Code Civ. Proc. § 564(b)(12); Civ. Code § 2938(g)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Related Cases

§§ 200.193-200.199 [Reserved]

§ 200.200 Supporting Contention That Receiver Should Be Appointed in Foreclosure Action by Secured Lender [Code Civ. Proc. § 564(b)(2)]--Condition of Mortgage Not Performed or Property in Danger, and Property Is Insufficient to Discharge Secured Debt

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Appointment of Receiver in Foreclosure Action

§§ 200.201-200.209 [Reserved]

§ 200.210 Opposing Contention That Receiver Should Be Appointed in Foreclosure Action by Secured Lender [Code Civ. Proc. § 564(b)(2)]--Property Is Sufficient to Discharge Secured Debt

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Sufficiency of Property to Discharge Debt.

[b] Material Injury to Property

§§ 200.211-200.219 [Reserved]

§ 200.220 Supporting Contention That Receiver Should Be Appointed in Action by Creditor to Subject Property or Fund to Creditor's Claim [Civ. Code § 3439.07(a)(3)(B); Code Civ. Proc. § 564(b)(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Appointment of Receiver Available When Property Is Fraudulently Transferred or Obligation Is Fraudulently Incurred

[b] Action by Creditor to Subject Property or Fund to Creditor's Claim

§§ 200.221-200.229 [Reserved]

§ 200.230 Opposing Contention That Receiver Should Be Appointed in Action by Creditor to Subject Property or Fund to Creditor's Claim [Civ. Code § 3439.07(a)(3)(B); Code Civ. Proc. § 564(b)(1)]--Property or Fund Not in Danger of Loss, Removal, or Material Injury

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Receivership Under Code Civ. Proc. § 564(b)(9) Precluded if Another Subdivision Governs

[3] Discussion of Authorities

[a] Creditor Is Not Entitled to Appointment of Receiver When Property or Fund Is Not in Danger of Loss, Removal, or Material Injury

§ 200.231 Opposing Contention That Receiver Should Be Appointed in Action by Creditor to Subject Property or Fund to Creditor's Claim [Civ. Code § 3439.07(a)(3)(B); Code Civ. Proc. § 564(b)(1)]--Party in Position of General Creditor Not Entitled to Appointment

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Party in Position of General Creditor Is Not Entitled to Appointment of Receiver

§§ 200.232-200.239 [Reserved]

§ 200.240 Supporting Contention That Receiver Should Be Appointed in Case Involving Corporation That Is Insolvent or Has Forfeited Corporate Rights [Code Civ. Proc. § 564(b)(6)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Modern Preference for Relief Under Corporations Code

[d] Related Pleading and Practice Forms

§ 200.241 Supporting Contention That Receiver Should Be Appointed on Dissolution of Corporation on Application of Creditor or Shareholder [Code Civ. Proc. §§ 564(b)(5), 565]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Modern Preference for Relief Under Corporations Code

[d] Related Pleading and Practice Forms

§§ 200.242-200.249 [Reserved]

§ 200.250 Supporting Contention That Receiver Should Be Appointed in Case to Preserve Property or Rights of Party [Code Civ. Proc. § 564(b)(9)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Appointment to Preserve Property or Rights of Party

[b] Broad Discretion to Appoint Receiver Under Predecessor Subdivision

§ 200.251 Supporting Contention That Receiver Should Be Appointed in Case to Preserve Property or Rights of Party [Code Civ. Proc. § 564(b)(9)]--Appointment of Receiver in Actions for Partition

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Appointment of Receiver in Actions for Partition

§§ 200.252-200.259 [Reserved]

§ 200.260 Opposing Contention That Receiver Should Be Appointed in Case to Preserve Property or Rights of Party [Code Civ. Proc. § 564(b)(9)]--Action Is Clearly Governed by Another Subdivision of Code Civ. Proc. § 564

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Party Is Not Entitled to Appointment of Receiver Under Code Civ. Proc. § 564(b)(8) When Case Is Clearly Governed by Another Subdivision of Code Civ. Proc. § 564

§§ 200.261-200.269 [Reserved]

§ 200.270 Supporting Contention That Receiver Should Be Appointed in Attachment Proceeding [Code Civ. Proc. § 488.700]--Appointment Necessary to Preserve Value of Property

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Parties Authorized to Seek Appointment of Receiver

[d] Method of Application for Receiver

[e] Related Memoranda

§§ 200.271-200.279 [Reserved]

§ 200.280 Supporting Contention That Receiver Should Be Appointed to Carry Judgment Into Effect [Code Civ. Proc. § 564(b)(3)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Appointment of Receiver to Carry Judgment Into Effect

§ 200.281 Supporting Contention That Receiver Should Be Appointed to Carry Judgment into Effect [Code Civ. Proc. § 564(b)(3)]--Appointment of Receiver to Abate Public Nuisance

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Appointment of Receiver to Abate Public Nuisance

§§ 200.282-200.289 [Reserved]

§ 200.290 Supporting Contention That Receiver Should Be Appointed to Dispose of Property According to Judgment [Code Civ. Proc. § 564(b)(4)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Appointment of Receiver to Dispose of Property According to Judgment

§§ 200.291-200.299 [Reserved]

§ 200.300 Supporting Contention That Receiver Should Be Appointed to Preserve Property During Pendency of Appeal [Code Civ. Proc. § 564(b)(4)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Appointment of Receiver to Preserve Property During Pendency of Appeal

§ 200.301 Supporting Contention That Receiver Should Be Appointed to Preserve Property During Enforcement Proceedings [Code Civ. Proc. §§ 564(b)(4), 699.070]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Parties Authorized to Seek Appointment of Receiver

[d] Method of Application for Receiver

§§ 200.302-200.309 [Reserved]

§ 200.310 Supporting Contention That Receiver Should Be Appointed to Enforce Judgment [Code Civ. Proc. §§ 564(b)(4), 699.010 et seq.]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] 1982 Amendments to Laws Governing Enforcement of Judgments

[3] Discussion of Authorities

[a] Appointment of Receiver to Enforce Judgment Under Enforcement of Judgments Law

§ 200.311 Supporting Contention That Receiver Should Be Appointed to Enforce Judgment [Code Civ. Proc. §§ 564(b)(4), 699.010 et seq.]--Appointment Is Necessary to Ensure Fair and Orderly Satisfaction of Judgment

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

§ 200.312 Supporting Contention That Receiver Should Be Appointed to Enforce Judgment [Code Civ. Proc. §§ 564(b)(4), 699.010 et seq.]--General Form--Appointment Is Proper to Enforce Simple Money Judgment

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Appointment of Receiver as Proper to Enforce Simple Money Judgment

§ 200.313 Supporting Contention That Receiver Should Be Appointed to Enforce Judgment [Code Civ. Proc. §§ 564(b)(4), 699.010 et seq.]--Court Is Not Required to Order Examination Proceedings Prior to Appointing Receiver

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Court Is Not Required to Order Examination Proceedings Prior to Appointing Receiver to Enforce Judgment

§§ 200.314-200.319 [Reserved]

§ 200.320 Supporting Contention That Receiver Should Be Appointed to Enforce Judgment [Code Civ. Proc. §§ 564(b)(4), 699.010 et seq.]--Appointment to Take Possession of Judgment Debtor's Interest in Alcoholic Beverage License [Code Civ. Proc. § 708.630]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Appointment to Take Possession of Judgment Debtor's Interest in Alcoholic Beverage License

§ 200.321 [Reserved]

§ 200.322 Supporting Contention That Receiver Should Be Appointed--To Enforce Judgment--Judgment Debtor's Transferable Interest in General Partnership Charged With Unsatisfied Amount of Judgment Debt [Corp. Code § 16504]--Partnership Governed by Uniform Partnership Act of 1994 [Corp. Code §§ 16100-16962]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

§ 200.323 Supporting Contention That Receiver Should Be Appointed to Enforce Judgment [Code Civ. Proc. §§ 564(b)(4), 699.010 et seq.]--Appointment to Apply Franchise Granted by Public Entity to Satisfy Money Judgment [Code Civ. Proc. § 708.920]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Appointment of Receiver

§§ 200.324-200.329 [Reserved]

§ 200.330 Supporting Contention That Receiver Should Be Appointed to Enforce Judgment For Possession or Sale of Property [Code Civ. Proc. §§ 564(b)(4), 708.610-708.630, 712.060]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

§§ 200.331-200.339 [Reserved]

§ 200.340 Supporting Contention That Receiver Should Be Appointed After Sale of Real Property Pursuant to Decree of Foreclosure [Code Civ. Proc. §§ 564(b)(4), 699.070]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

§ 200.341 Supporting Contention That Receiver Should Be Appointed in Arbitrable Controversy [Code Civ. Proc. § 1281.8(b)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Appointment of Receiver in Connection With Arbitrable Controversy

§§ 200.342-200.349 [Reserved]

§ 200.350 Supporting Contention That Party, Party's Attorney, Person Interested in Action, or Relative of Judge Receiver Should Be Appointed Receiver [Code Civ. Proc. § 566(a)]--Written Consent to Appointment

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Nomination of Receivers

[d] Opposing Memoranda

§ 200.351 Supporting Contention That Party, Party's Attorney, Person Interested in Action, or Relative of Judge Receiver Should Be Appointed Receiver [Code Civ. Proc. § 566(a)]--Waiver of Objection

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Failure to Timely Object to Appointment Constitutes Waiver of Objection

§§ 200.352-200.359 [Reserved]

§ 200.360 Opposing That Party, Party's Attorney, Person Interested in Action, or Relative of Judge Receiver Should Be Appointed Receiver [Code Civ. Proc. § 566(a)]--Consent Is Required

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Requirement That All Parties Consent in Writing to Appointment of Receiver

[b] Court Is Without Jurisdiction to Appoint Receiver Absent Written Consent of Parties Filed With Clerk

§§ 200.361-200.369 [Reserved]

§ 200.370 Supporting Contention That Receiver Is Properly Exercising His or Her Powers in General [Code Civ. Proc. § 568]--Functions and Powers Controlled by Statute and Court Order

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Functions and Powers of Receiver Controlled by Statute and Court Order

§ 200.371 Supporting Contention That Receiver Is Properly Exercising His or Her Powers in General [Code Civ. Proc. § 568]--Enumeration of Receiver's Powers

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Functions and Powers of Receiver Under Code Civ. Proc. § 568

§ 200.372 Supporting Contention That Receiver Is Properly Exercising His or Her Powers in General [Code Civ. Proc. § 568]--Court's Main Function Is to Act in Best Interest of Parties Concerned

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Functions of Court Toward Receivership Property

§ 200.373 Supporting Contention That Receiver Is Properly Exercising His or Her Powers in General [Code Civ. Proc. § 568]--Enumeration of Receiver's Powers--Receiver's Management Is Under Court's Supervision and Control

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Receivership Property Under Control of Court

§ 200.374 Supporting Contention That Receiver Is Properly Exercising His or Her Powers in General [Code Civ. Proc. § 568]--Receiver May Petition Court for Additional Authority or Instructions As Needed

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Receiver May Petition Court for Additional Authority or Instructions As Needed

§ 200.375 Supporting Contention That Receiver Is Properly Exercising His or Her Powers in General [Code Civ. Proc. § 568]--Receiver's Acts Done Without Prior Court Authorization May Be Ratified by Subsequent Approval

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Receiver's Acts Done Without Prior Court Authorization May Be Ratified by Subsequent Approval

[b] Ratification Rule Is One of Common Sense

§§ 200.376-200.379 [Reserved]

§ 200.380 Opposing Contention That Receiver Is Properly Exercising His or Her Powers in General [Code Civ. Proc. § 568]--Receiver Lacks Power Beyond That Conferred by Statute or Court Order [Code Civ. Proc. § 568]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Receiver Lacks Power Beyond That Conferred by Statute and Court Order

§ 200.381 Opposing Contention That Receiver Is Properly Exercising His or Her Powers in General [Code Civ. Proc. § 568]--Powers Limited to Those Enumerated by Statute

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Enumerated Functions and Powers of Receiver Under Code Civ. Proc. § 568

§ 200.382 Opposing Contention That Receiver Is Properly Exercising His or Her Powers in General [Code Civ. Proc. § 568]--Powers and Duties Depend on Order of Appointment

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Powers and Duties Depend on Order of Appointment

§ 200.383 Opposing Contention That Receiver Is Properly Exercising His or Her Powers in General [Code Civ. Proc. § 568]--No Express Authority to Contractually Bind Property or Fund of Receivership Estate

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Contract of Receiver Binding Property or Fund Is Improper Without Court Approval

[b] Unauthorized Contract of Receiver Is Not Binding on Court

§§ 200.384-200.409 [Reserved]

§ 200.410 Supporting Contention That Receiver Is Properly Exercising His or Her Powers in Deposit of Securities [Code Civ. Proc. § 568.1; Fin. Code §§ 1592, 30004-30006, 30200]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

§§ 200.411-200.419 [Reserved]

§ 200.420 Supporting Contention That Receiver Is Properly Exercising His or Her Powers in Employment of Attorney [Cal. Rules of Ct., Rule 3.1180]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

§§ 200.421-200.429 [Reserved]

§ 200.430 Supporting Contention That Receiver Is Properly Exercising His or Her Powers in Commencement and Defense of Actions [Code Civ. Proc. § 568]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Power of Receiver to Bring and Defend Actions in Own Name as Receiver.

§§ 200.431-200.439 [Reserved]

§ 200.440 Opposing Contention That Receiver Is Properly Exercising His or Her Powers in Commencement and Defense of Actions [Code Civ. Proc. § 568]--Receiver Must Have Special or Express Authority

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Requirement That Receiver Have Statutory or Express Court Authority to Bring or Defend Actions

§ 200.441 Opposing Contention That Receiver Is Properly Exercising His or Her Powers in Commencement and Defense of Actions [Code Civ. Proc. § 568]--Authority to Employ Counsel Is Insufficient

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Authority of Receiver to Employ Counsel as Insufficient Authority to Bring or Defend Action

§§ 200.442-200.449 [Reserved]

§ 200.450 Supporting Contention That Receiver Is Properly Exercising His or Her Powers in Sale of Property [Code Civ. Proc. §§ 568.5, 701.510-701.680]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Power of Receiver to Sell Property

[4] Additional Authorities

[a] Power of Receiver to Sell Property

§ 200.451 Supporting Contention That Receiver Is Properly Exercising His or Her Powers in Sale of Property [Code Civ. Proc. §§ 568.5, 701.510-701.680]--Receiver's Duty to Realize Largest Possible Amount From Sale

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Duty of Receiver to Realize Largest Possible Amount From Sale of Property

§ 200.452 Supporting Contention That Receiver Is Properly Exercising His or Her Powers in Sale of Property [Code Civ. Proc. §§ 568.5, 701.510-701.680]--Court Has Power to Change Manner of Sale in Court's Custody

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Court as Empowered to Change Manner of Sale of Property in Its Custody

§§ 200.453-200.459 [Reserved]

§ 200.460 Supporting Contention That Sale of Property Should Be Confirmed [Code Civ. Proc. § 568.5]--Court Has Power to Confirm Sale

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Power of Court to Confirm Receiver's Sale of Property

§ 200.461 Supporting Contention That Sale of Property Should Be Confirmed [Code Civ. Proc. § 568.5]--Court Has Wide Discretion in Confirming Sale

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Wide Discretion of Court in Confirming Receiver's Sale of Property

§ 200.462 Supporting Contention That Sale of Property Should Be Confirmed [Code Civ. Proc. § 568.5]--Court May Confirm Sale Conducted in Mode Other Than That Provided for by Statute or Court Order

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Power of Court to Confirm Receiver's Sale of Property Conducted in Mode Other Than That Provided for by Statute or Court Order

§§ 200.463-200.469 [Reserved]

§ 200.470 Opposing Contention That Court Should Confirm Sale of Property [Code Civ. Proc. § 568.5]--Confirmation of Fraudulent, Unfair, or Oppressive Sale Is Improper

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Confirmation of Fraudulent, Unfair, or Oppressive Sale as Improper

§ 200.471 Opposing Contention That Court Should Confirm Sale of Property [Code Civ. Proc. § 568.5]--Receiver Has Failed to Establish Necessity for Sale

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Receiver Required to Establish Necessity for Sale

§ 200.472 Opposing Contention That Court Should Confirm Sale of Property [Code Civ. Proc. § 568.5]--Receiver Has Breached His or Her Duty to Obtain Best Possible Bargain on Sale

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Duty of Court to Obtain Best Bargain Possible on Sale of Property

§§ 200.473-200.479 [Reserved]

§ 200.480 Supporting Contention That Receiver Is Properly Exercising His or Her Powers in Payment of Unclaimed Funds Into State Treasury by Receiver [Code Civ. Proc. § 570]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Payment of Unclaimed Funds Into State Treasury by Receiver

[b] Payment of Notice Publication Costs

§ 200.481 Supporting Contention That Receiver Has the Authority to Borrow Money to Fund the Receivership Estate and to Issue Receivership Certificates

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Power of Receiver to Borrow Money and Issue Receivership Certificates

Robert Kaplan
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FOOTNOTES:
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California Points & Authorities

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Volume 20 Chapters 200-209 RECEIVERS---to---SANCTIONS
CHAPTER 200 RECEIVERS
PART I. INTRODUCTION

20-200 California Points & Authorities § 200.01

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.01 Scope of Chapter

This chapter contains memoranda of points and authorities relating to the appointment of a receiver and administration of receivership.

Part II, Subpart A, relating to proceedings to appoint a receiver generally includes the following types of forms:

- Supporting and opposing motions to appoint receivers (*see § 200.10* et seq.).
- Supporting and opposing confirmation of ex parte appointments of receivers (*see § 200.50* et seq.).
- Supporting court's own motion to appoint receiver (*see § 200.70* et seq.).

Part II, Subpart B, relating to appointment of receiver in specified actions, includes the following types of forms:

- Supporting the contention that a receiver should be appointed in a vendor's action to vacate a fraudulent purchase (*see § 200.80*).
- Supporting and opposing the contention that a receiver should be appointed in an action between joint owners of property or fund (*see § 200.90* et seq.).
- Supporting the contention that a receiver should be appointed in an unlawful detainer action (*see § 200.170*).
- Supporting the contention that a receiver should be appointed in a secured lender's action to enter and inspect property for the release of a hazardous substance (*see § 200.180* et seq.).
- Supporting the contention that a receiver should be appointed in a case involving assignment of

leases, rents, issues, or profits (*see § 200.190* et seq.).

- Supporting and opposing the contention that a receiver should be appointed in a foreclosure action by a secured lender (*see § 200.200* et seq.).

- Supporting and opposing the contention that a receiver should be appointed in a creditor's action to subject the property or fund to a creditor's claim (*see § 200.220* et seq.).

- Supporting the contention that a receiver should be appointed in a case involving a corporations that is dissolved, insolvent, or has forfeited corporate rights (*see § 200.240* et seq.).

- Supporting and opposing the contention that a receiver should be appointed in cases under usages of equity (*see § 200.250* et seq.).

Part II, Subpart C, relates to the appointment of a receiver in specified proceedings, and includes the following types of forms:

- Supporting the contention that a receiver should be appointed in attachment proceedings (*see § 200.270*).

- Supporting the contention that a receiver should be appointed in post judgment proceedings (*see § 200.280* et seq.).

Part II, Subpart D, relates to the eligibility of receivers, and includes the following types of forms:

- Supporting and opposing the contention that a party, party's attorney, person interested in the action, or relative of the judgment should be appointed a receiver (*see § 200.350* et seq.).

Part II, Subpart E, relates to administration of receiverships, and includes the following types of forms:

- Supporting and opposing the contention that a receiver is properly exercising his or her powers in general (*see § 200.370* et seq.).

- Supporting the contention that a receiver is properly exercising his or her powers in the deposit of securities (*see § 200.410*).

- Supporting the contention that a receiver is properly exercising his or her powers in the employment of an attorney (*see § 200.420*).

- Supporting and opposing the contention that a receiver is properly exercising his or her powers in the commencement and defense of actions (*see § 200.430* et seq.).

- Supporting and opposing the contention that a receiver is properly exercising his or her powers in the sale of property (*see § 200.450* et seq.).

- Supporting the contention that a receiver is properly exercising his or her powers in the payment of unclaimed funds into the state treasury (*see § 200.480*).

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CHAPTER 200 RECEIVERS
PART I. INTRODUCTION

20-200 California Points & Authorities § 200.02

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.02 Governing Law

[1] Statutes

[a] Appointment of Receiver

Code Civ. Proc. § 564 is the principal statute governing the appointment of receivers both while an action is pending and after judgment. Authority for the appointment of receivers pursuant to *Code Civ. Proc. § 564* in a limited civil case is contained *Code Civ. Proc. § 86(a)(8)*.

Under *Code Civ. Proc. § 564(b)(1)*, a receiver may be appointed in various actions on the application of any party whose right to or interest in the subject property or fund is probable and when it is shown that the property or fund is in danger of loss, removal, or material injury.

Under *Code Civ. Proc. § 564(b)(2)*, a receiver may be appointed in an action by a secured lender for the foreclosure of the deed of trust or mortgage and sale of the property on which there is a lien under a deed of trust or mortgage, when it appears that the property is in danger of loss, removal, or material injury, or that the condition of the deed of trust or mortgage has not been performed and that the property is probably insufficient to discharge the deed of trust or mortgage debt.

Under *Code Civ. Proc. § 564(b)(3)*, a receiver may be appointed after judgment to carry the judgment into effect. Under *Code Civ. Proc. § 564(b)(4)*, a receiver may be appointed after judgment:

- To dispose of property according to the judgment,
- To preserve property during the pendency of an appeal,
- Pursuant to the Enforcement of Judgments Law (*Code Civ. Proc. § 680.010 et seq.*), or

- After the sale of real property pursuant to a decree of foreclosure, during the redemption period, to collect, expend, and disburse rents as directed by the court or otherwise provided by law.

Under *Code Civ. Proc. § 564(b)(5)*, a receiver may be appointed when a corporation has been dissolved, as provided in *Code Civ. Proc. § 565*.

Under *Code Civ. Proc. § 564(b)(6)*, a receiver may be appointed when a corporation is insolvent, is in imminent danger of insolvency, or has forfeited its corporate rights.

Under *Code Civ. Proc. § 564(b)(7)*, a receiver may be appointed in an action of unlawful detainer.

Under *Code Civ. Proc. § 564(b)(8)*, a receiver may be appointed at the request of the Public Utilities Commission, pursuant to *Pub. Util. Code § 855*, which provides for the appointment of a receiver to take possession of the property of, and to operate, a water or sewer system corporation under specified circumstances.

Under *Code Civ. Proc. § 564(b)(8)*, a receiver may also be appointed at the request of the Public Utilities Commission, pursuant to *Pub. Util. Code § 5259.5*, which provides for the appointment of a receiver to identify stored items of property, take possession of property, return property to an owner or owners, and/or manage the business of a household goods carrier or carriers, whenever the commission determines that any household goods carrier or any officer, director, or agent of a household goods carrier has abandoned, or is abandoning stored household goods or property of any shippers under contract with the carrier or carriers.

Under *Code Civ. Proc. § 564(b)(10)*, a receiver may be appointed at the request of the Office of Statewide Health Planning and Development, or the Attorney General, pursuant to *Health & Safety Code § 129173*. Section 129173 provides for the appointment of a receiver for a borrower (or the borrower's assets) when the borrower may be unable to fulfill its obligations under an insured loan transaction that is subject to the California Health Facility Construction Loan Insurance Law [*Health & Safety Code § 129125 et seq.*].

Under *Code Civ. Proc. § 564(b)(11)*, a receiver may be appointed in an action by a secured lender for specified performance of an assignment of rents provision in a deed of trust, mortgage, or separate assignment document, and in addition, the appointment may be continued after entry of judgment for specific performance in that action if appropriate to protect, operate, or maintain real property encumbered by the deed of trust or mortgage, or to collect the rents, while a pending nonjudicial foreclosure under power of sale in the deed of trust or mortgage is being completed.

Under *Code Civ. Proc. § 564(b)(12)*, a receiver may be appointed in a case brought by an assignee under an assignment of leases, rents, issues, or profits pursuant to *Civ. Code § 2938(g)*.

Under *Code Civ. Proc. § 564(b)(9)*, a receiver may be appointed in all other cases when necessary to preserve the property or rights of any party.

Under *Code Civ. Proc. § 564(c)*, a receiver may be appointed in an action brought by a secured lender under *Civ. Code § 2929.5* to obtain entry and an inspection of the real property security when there is reason to believe there has been or will be a release of a hazardous substance to or from the real property.

Code Civ. Proc. § 565 governs the appointment of a receiver on the dissolution of a corporation.

Various other statutes govern the appointment of receivers in specific instances. For example:

Civ. Code § 3439.07(a)(3)(B) governs the appointment of a receiver in an action for relief against a transfer or obligation under the Uniform Fraudulent Transfer Act (*Civ. Code § 3439 et seq.*).

Fam. Code § 290 governs the appointment of a receiver to enforce a judgment, order, or decree of the court under the Family Code.

Code Civ. Proc. § 488.700 provides for the appointment of a receiver in attachment proceedings.

Code Civ. Proc. § 1422 provides for the appointment of a receiver in escheat actions by the attorney general, and *Gov. Code § 12527* provides for the appointment of a receiver to take possession of property unlawfully derived in an action by the attorney general in the name of the people of the State of California.

Corp. Code §§ 6216, 6511, 6513, 8216, 8511, and *8513* govern the appointment of receivers in actions by the attorney general against corporations. *Fin. Code § 8250* governs the appointment of receivers by the Savings and Loan Commissioner for savings associations under specified circumstances.

Health & Safety Code § 1325 governs the appointment of receivers by the State Department of Health Services to manage long-term health care facilities.

Ins. Code §§ 11093, 11095-11096, and *11106* govern the appointment of receivers of domestic fraternal benefit societies in actions by the attorney general against those societies.

Under *Code Civ. Proc. § 904.1(a)(7),* an order of a superior court appointing a receiver, other than in a limited civil case, is appealable to the court of appeal. An order appointing a receiver in a limited civil case is appealable to the appellate division of the superior court under *Code Civ. Proc. § 904.2(h).*

[b] Administration of Receivership

Code Civ. Proc. §§ 566-570 are the principal statutes governing the administration of receivership and the powers and duties of receivers. *Code Civ. Proc. § 566(a)* establishes eligibility requirements for the appointment of receivers. *Code Civ. Proc. § 566(b)* requires the posting of an undertaking by a receiver appointed ex parte. *Code Civ. Proc. § 567(a)* requires a receiver to take an oath to perform his or her duties faithfully. *Code Civ. Proc. § 567(b)* requires the receiver to give an undertaking to the state of California, to the effect that the receiver will faithfully discharge the duties of receiver in the action and obey the orders of the court and allows the receiver the cost of the undertaking. *Code Civ. Proc. § 568* governs the power of the receiver to bring and defend actions in his or her own name, to take and keep possession of the receivership property, to receive rents, to collect debts, to compound for and compromise debts, to make transfers, and generally to do any acts respecting the property that are authorized by the court. *Code Civ. Proc. § 568.1* governs the power of the receiver to deposit securities. *Code Civ. Proc. § 568.5* governs the power of the receiver to sell property, subject to court confirmation. *Code Civ. Proc. § 569* governs the power of the receiver to deposit funds. *Code Civ. Proc. § 570* requires the receiver to pay unclaimed funds into the State Treasury.

Various other statutes govern the powers and duties of receivers. For example:

Code Civ. Proc. § 1204 governs the priority of claims against property turned over to a receiver for the benefit of creditors.

Fin. Code §§ 8251-8254 govern the administration of a receivership when the Savings and Loan Commissioner has appointed a receiver of a savings and loan association.

Gov. Code § 6860 provides that farm loan bonds are acceptable investments of receivership funds.

Health & Safety Code §§ 1326-1335 govern the administration of a receivership when the State Department of Health

Services has appointed a receiver to manage a long-term health care facility.

[2] Rules of Court

Cal. Rules of Ct., Rule 3.1175, governs the application procedure for obtaining an ex parte order appointing a receiver.

Cal. Rules of Ct., Rule 3.1176, governs the confirmation by the court of its ex parte order appointing a receiver. In particular, *Cal. Rules of Ct., Rule 3.1176(b)* requires that the following papers be served on all adverse parties as soon as reasonably practical, but no later than 5 days after the date on which the order to show cause is issued, unless the court orders another time for service:

- A copy of the complaint if not previously served.
- The order to show cause stating the date, time, and place of the hearing.
- Any affidavits supporting the application.
- A memorandum supporting the application.

Cal. Rules of Ct., Rule 3.1177, governs the procedure for nomination of one or more persons for appointment or substitution as receiver.

Cal. Rules of Ct., Rule 3.1180, governs the application procedure for the receiver's employment of counsel.

Cal. Rules of Ct., Rule 3.1179 recites the neutral status of a receiver and prohibits specified contracts and agreements between a receiver or potential receiver and the party seeking appointment of the receiver. *Cal. Rules of Ct., Rule 3.1181*, governs the procedure for the receiver's filing of initial and supplementary inventories with the court of all property of which the receiver has taken possession by virtue of appointment. *Cal. Rules of Ct., Rule 3.1182* governs a receiver's monthly reports to the parties, and *Cal. Rules of Ct., Rule 3.1183* governs interim fees and objections to interim accounts and reports. *Cal. Rules of Ct., Rule 3.1184*, governs the procedure for settling the receiver's account.

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20-200 California Points & Authorities § 200.03

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.03 How to Use the Forms in This Chapter

[1] Page Limits on Points and Authorities

One of the more significant drafting requirements to keep in mind are page limits: supporting memoranda must not exceed 15 pages (20 in a summary adjudication proceeding). Exhibits, declarations, attachments, a table of contents, a table of authorities, and the proof of service are not included in the page limitation. A reply or closing memorandum may not exceed 10 pages [*Cal. Rulesof Ct., Rule 3.1113(d)*]. Any party desiring to file a longer memorandum must obtain leave of court [*see Cal. Rules of Ct., Rule 3.1113(e)*]. These and other drafting requirements are discussed in *further detail in Ch. 1, Writing Legal Memoranda and Briefs, § 1.04*.

[2] Using the Forms to Build a Draft Memorandum

The forms included in this chapter are designed to be combined with other memoranda to form a complete memorandum. For a detailed discussion on how to select and use the forms in the publication to build a draft memorandum and complete the draft, with detailed discussion of all drafting requirements and strategic or stylistic considerations, see *Ch. 1, Writing Legal Memoranda and Briefs, § 1.03* et seq.

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20-200 California Points & Authorities § 200.04

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.04 Related Discussion and Forms

[1] Related Pleading and Practice Forms

For detailed legal background discussion, research guides, procedural checklists, and practice forms of motions and other papers relating to the appointment of receivers and administration of receiverships, see California Forms of Pleading and Practice, Ch. 486, *Receivers* (Matthew Bender). For forms of complaints for use in actions in which a receiver might be appointed under Code Civ. Proc. § 564(b)(1), see the appropriate title in that publication, for example:

- Ch. 7, *Accounting, Action for*.
- Ch. 160, *Corporations*, Pt. X.
- Ch. 258, *Family Law Enforcement: General Enforcement Principles and Remedies*, §§ 258.70 et seq., 258.120 et seq.
- Ch. 270, *Fraudulent Conveyances*.
- Ch. 303, *Injunctions*.
- Ch. 333, *Landlord and Tenant: Eviction Actions*.
- Ch. 482, *Quieting Title*.
- Ch. 555, *Trust Deeds and Real Property Mortgages*.

Other related chapters in that publication include the following:

- Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances* (receivership as basis for quasi-in-rem jurisdiction).

- Ch. 538, *Suretyship, Bonds, and Undertakings* (undertaking on appointment of receiver pendente lite).

[2] Related Points and Authorities

- For memoranda relating to actions involving accountings generally, see Ch. 12, *Accounting* .

- For memoranda relating to actions involving attachment generally, see Ch. 23, *Attachment* .

- For memoranda relating to actions involving corporations generally, see Ch. 52, *Corporations* .

- For memoranda relating to actions involving injunctions generally, see Ch. 116, *Injunctions* .

- For memoranda relating to actions involving joint venturers generally, see Ch. 170, *Partnerships and Joint Ventures* .

- For memoranda relating to actions involving trust deeds and mortgages generally, see Ch. 230, *Trust Deeds and Real Property Mortgages* .

- For memoranda relating to unlawful detainer actions generally, see Ch. 236, *Unlawful Detainer* .

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20-200 California Points & Authorities §§ 200.05-200.09

AUTHOR: Robert Kaplan Editorial Consultant

[Reserved]

§§ 200.05[Reserved]

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Volume 20 Chapters 200-209 RECEIVERS---to---SANCTIONS
CHAPTER 200 RECEIVERS
PART II. FORMS
A. Proceedings to Appoint Receiver
1. Noticed Motion to Appoint Receiver

20-200 California Points & Authorities § 200.10

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.10 Supporting Motion to Appoint Receiver [*see* Code Civ. Proc. §§ 86(a)(8), 564]--General Form

[1] FORM Supporting Motion to Appoint Receiver [see Code Civ. Proc. §§ 86(a)(8), 564]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*]	)	MEMORANDUM OF POINTSAND AUTHORIT-
Plaintiff,	)	IES SUPPORTING MOTION TO APPOINT RE-
vs.	)	CEIVER
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

THE COURT SHOULD APPOINT A RECEIVER IN THIS ACTION BECAUSE THE COURT HAS JURISDICTION TO MAKE THE APPOINTMENT AND SHOULD EXERCISE ITS DISCRETION TO MAKE THE APPOINTMENT AFTER CONSIDERATION OF THE EVIDENCE.

[*EITHER if unlimited civil case*]

A. Jurisdiction of Court. A receiver may be appointed by the court in which an action or proceeding is pending in any case in which the court is empowered by law to appoint a receiver (*Code Civ. Proc. § 564*).

[*OR if limited civil case*]

A. Jurisdiction of Court. A receiver may be appointed by the court in which an action or proceeding, including a limited civil case, is pending in any case in which the court is empowered by law to appoint a receiver (*Code Civ. Proc. §§ 86(a)(8), 564*).

B. Discretion of Trial Court to Appoint Receiver. The appointment of a receiver rests largely in the discretion of the trial court; its action in appointing a receiver will not be disturbed in the absence of a showing of abuse of discretion (*Goes v. Perry (1941) 18 Cal. 2d 373, 381, 115 P.2d 441* ; *City and County of San Francisco v. Daley (1993) 16 Cal. App. 4th 734, 20 Cal. Rptr. 2d 256*).

[*Add points and authorities that set forth appropriate substantive grounds for the appointment of a receiver (see, e.g., §§ 200.80 et seq., 200.270 et seq., and 200.350 et seq.).*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion to appoint a receiver. They set forth the grounds that the court has jurisdiction to make the appointment, and that the court should exercise its discretion to make the appointment [*see Code Civ. Proc. § 564*; Cal. Rules of Ct., Rules 3.1175-3.1177].

This is a general form that should be combined with memoranda that set forth appropriate substantive grounds for the appointment of a receiver [*see, e.g., §§ 200.80 et seq., 200.270 et seq., and 200.350* et seq.].

This memorandum may be combined with memoranda contending that the form of evidence is sufficient to justify appointment [*see § 200.40[1]*].

In addition, this memoranda may be adapted for use:

- In supporting the confirmation of an ex parte order appointing a receiver [*see § 200.50*].

- In a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

- As allegations or as a prayer in a complaint in a pending action seeking the provisional relief of receivership [*see* California Forms of Pleading and Practice, Ch. 486, *Receivers* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should include specific facts showing that theappointment of a receiver is within the trial court's discretion under the particular facts of the case. For memoranda supporting the exercise of the trial court's discretion in appointing a receiver, see *§§ 200.80 et seq., 200.270 et seq., and 200.350* et seq. For example, in an appropriate case, counsel would refer to evidence set forth in:

- Declarations and affidavits submitted in support of, or even in opposition to, the appointment [*see Cal. Rules of Court, Rule 3.1306(a)*].

- Discovery documents, such as deposition transcripts and answers to interrogatories and requests for admission.

- The opposing party's pleadings that constitute admissions.

- Other documentary evidence generally.

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*].

When counsel cites facts in his or her argument, counsel should refer to the particular page and line number of the declaration, deposition transcript, or other document, that contains the cited facts. In addition, the relevant portion of any testimony in a deposition should be marked in a manner that calls attention to the testimony [*see Cal. Rules of Court, Rule 3.1116(c)*].

For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Forms

For related legal background, research and procedural checklists, and forms, including a form of notice of motion for the appointment of a receiver and general form of allegations and prayer in a complaint seeking the appointment of a receiver, see California Forms of Pleading and Practice, Ch. 486, *Receivers* (Matthew Bender).

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Memoranda

In an appropriate case, the memorandum *set out in § 200.20* et seq. may be used to oppose the contention supported by

this memorandum.

[3] Discussion of Authorities

[a] Discretion of Trial Court to Appoint Receiver

Goes v. Perry *(1941) 18 Cal. 2d 373, 115 P.2d 441* , was an action by plaintiff for claim and delivery to recover furniture and fixtures located in a building on property that plaintiff purchased at a trustee's sale. Intervenor subsequently intervened in the action, claiming that the money used to purchase the property was wrongfully appropriated from a trust fund belonging to her and her co-owners of the real property on which the building was located. By her complaint in intervention, intervenor sought to impose a trust on the property, in favor of herself and her co-owners, and to obtain a receiver of the personalty. Based on her complaint and a supporting affidavit, the trial court issued an ex parte order appointing a receiver of the personalty. Defendant appealed the order, contending it could not be sustained, because neither the complaint in intervention nor the supporting affidavit alleged facts entitling intervenor to the appointment.

The Supreme Court initially noted that the trial court had appointed a receiver of the real property and the building prior to intervenor's intervention, and that the order appointing that receiver was affirmed in the related case of *Baumann v. Bedford (1941) 18 Cal. 2d 366, 372, 115 P.2d 437* . The Court then affirmed the trial court's order appointing the receiver in the instant action, holding that the trial court did not abuse its discretion in making the appointment (*18 Cal. 2d 373, 382)* . The Court held that the appointment of a receiver rests largely in the discretion of the trial court and that the trial court's action in appointing a receiver will not be disturbed by an appellate court in the absence of a showing of abuse of discretion (*18 Cal. 2d 373, 381)* . The Court noted the extended period of bitter litigation between parties holding conflicting interests in the property and in security devices financing the property, and the fact that the owners of the security devices had received nothing on the principal of their investments in the property. Additionally, the Court noted that to remove the furniture and fixtures allegedly purchased with funds that respondent claimed were misappropriated from her would impair the value of the building as well as lessen, if not destroy, the income from the real property. The Court found that these facts supported the trial court's decision to place the property under the receiver's management until the conclusion of the litigation (*18 Cal. 2d 373, 382)* .

In ***City and County of San Francisco v. Daley*** *(1993) 16 Cal. App. 4th 734, 20 Cal. Rptr. 2d 256* , the city and county brought suit against defendants to abate a public nuisance based on the hazardous condition of their single-family residence. After extended proceedings, the plaintiff moved for appointment of a receiver to make the repairs. The court granted the motion, citing three years of noncompliance. The receiver's powers were "to make necessary repairs and alterations to bring the property into full compliance with the San Francisco Municipal Code." The court's order granted the receiver the power to "undertake, to employ and to enter, into contracts with persons and services as necessary to repair the Property." The receiver was also ordered to "conduct a study of the estimated cost of repairs and report to the court on the feasibility of rehabilitation prior to beginning such repairs." One of the defendants appealed.

The court of appeal affirmed. The court held that the trial court had the power to appoint a receiver in this situation under *Code Civ. Proc. § 564(b)(3)*, which allows appointment after judgment, in order to carry a judgment into effect, and that this power applied in abatement proceedings (*16 Cal. App. 4th 734, 742-743)* . The court then stated that the rule is established that the appointment of a receiver rests largely in the discretion of the trial court and that its action in appointing a receiver (or in refusing to do so) will not be disturbed in the absence of a showing that the court's discretion has been abused (*16 Cal. App. 4th 734, 744)* . The court then concluded that the trial court had not abused its discretion, rejecting three arguments made by the defendant. First, although appointment of a receiver is a drastic remedy, the procedural history of the case demonstrated clearly that this was an exceptional case warranting appointment of a receiver. Second, the trial court did not abuse its discretion by failing to consider options short of receivership. The court noted that the existence of such options does not in itself preclude appointment of a receiver; their availability and efficacy must be considered, and that the defendant's contention was utterly unsupported by the

record. Finally, the court held that the order was not overbroad in the repairs it authorized the receiver to address (*16 Cal. App. 4th 734, 742-746)* . After further finding that the trial court had accorded defendant a fair hearing on the appointment of a receiver, the court of appeal affirmed the appointment (*16 Cal. App. 4th 734, 746-747)* .

[4] Additional Authorities

[a] Discretion of Trial Court to Appoint Receiver

Breedlove v. Breedlove Excavating Co. (1942) 56 Cal. App. 2d 141, 132 P.2d 239 , was an action for an accounting involving a partnership, in which plaintiff claimed that he was deprived of his right to share in the profits of the business. After noticed motion and hearing, plaintiff obtained the appointment of a receiver to take charge of certain books and funds of both the partnership and the individual defendants, and to conduct certain functions of defendant partnership. The order appointing the receiver was then stayed pending appeal when the action went to trial. However, because the trial judge died before a decision was rendered, the action ended in a mistrial. Defendants then appealed the order appointing the receiver, contending that plaintiff was not a partner in the business and therefore had no right to interfere with its conduct, to seek an accounting, or to have a receiver administer and guard the funds and property.

The court of appeal affirmed the order, finding that the order appointing the receiver to keep the property and funds intact pending the outcome of the trial was within the scope of the trial court's constitutional discretion. The court noted that because the parties' contentions were fortified by persuasive and sufficient affidavits, whatever position the trial court took would be amply supported (*56 Cal. App. 2d 141, 144)* . The court held it both elementary and controlling that the question of the appointment of a receiver is one commonly addressed to the sound discretion of the trial court, to be exercised on the basis of all the facts before it. Thus, when it is found, based on conflicting evidence, that danger is threatened to property or funds, and the appointment of a receiver is made, the reviewing court will seldom hold that the lower tribunal has been guilty of an abuse of discretion. Indeed, the discretion of the trial court is so broad that an appellate tribunal will interfere with its exercise only in those cases when the trial court has arbitrarily exercised its power (*56 Cal. App. 2d 141, 143)* .

In *Venza v. Venza (1949) 94 Cal. App. 2d 878, 211 P.2d 913* (discussed in *§ 200.70[3]*), an action by plaintiff, a divorcee, against defendants, including her former husband, to establish her community interest in a cannery operated by defendants, defendants appealed the trial court's appointment of a receiver of the business pending conclusion of the litigation. Quoting from *Goes v. Perry (1941) 18 Cal. 2d 373, 381, 115 P.2d 441* (discussed in *§ 200.10[3][a]*), the court of appeal affirmed the order appointing the receiver, holding the rule well established that the appointment of a receiver rests largely in the discretion of the trial court, and that its action in appointing a receiver will not be disturbed by an appellate court in the absence of a showing of abuse of discretion (*94 Cal. App. 2d 878, 883)* . The court of appeal upheld the trial court's order even though the trial court issued the order on its own motion and even though the order was broader in scope than that originally suggested by the court to the parties (*94 Cal. App. 2d 878, 882-884)* .

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Volume 20 Chapters 200-209 RECEIVERS---to---SANCTIONS
CHAPTER 200 RECEIVERS
PART II. FORMS
A. Proceedings to Appoint Receiver
1. Noticed Motion to Appoint Receiver

20-200 California Points & Authorities §§ 200.11-200.19

AUTHOR: Robert Kaplan Editorial Consultant

[Reserved]

§§ 200.11[Reserved]

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Volume 20 Chapters 200-209 RECEIVERS---to---SANCTIONS
CHAPTER 200 RECEIVERS
PART II. FORMS
A. Proceedings to Appoint Receiver
1. Noticed Motion to Appoint Receiver

20-200 California Points & Authorities § 200.20

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.20 Opposing Motion to Appoint Receiver--General Form

[1] FORM Opposing Motion to Appoint Receiver--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____ _____

_____ [*name*]	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORIT-
vs.	)	IES OPPOSING MOTION TO APPOINT RECEIV-
_____ [*name*],	)	ER
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
		Trial Date: _____

_____

THE COURT SHOULD NOT APPOINT A RECEIVER IN THIS ACTION BECAUSE AN APPOINTMENT WOULD BE AN ABUSE OF DISCRETION, IN THAT IT WILL RESULT IN AN INJURY GREATER THAN THAT SOUGHT TO BE AVERTED BY THE APPOINTMENT.

A. Refusal to Appoint Receiver Is Largely Within Discretion of Trial Court. The refusal to appoint a receiver rests largely within the discretion of the trial court, and its refusal of an application for the appointment of a receiver will not be disturbed on appeal in the absence of a clear showing that the court has abused its discretion (*Starbird v. Lane (1962) 203 Cal. App. 2d 247, 261, 21 Cal. Rptr. 280* ; *Elson v. Nyhan (1941) 45 Cal. App. 2d 1, 4-5, 113 P.2d 474*).

B. Power to Appoint Receiver to Be Used With Caution. The power to appoint a receiver is a delicate one, to be exercised with caution lest the injury caused by the appointment be greater than the injury sought to be averted (*Cohen v. Herbert (1960) 186 Cal. App. 2d 488, 495, 8 Cal. Rptr. 922* ; *Dabney Oil Co. v. Providence Oil Co. (1913) 22 Cal. App 233, 238, 133 P. 1155*).

[*Add points and authorities, as necessary, setting forth additional procedural grounds §§ 200.21 et seq., as well as substantive grounds (see e.g., §§ 200.130 et seq., 200.210, 200.230 et seq., and 200.260), in opposition to the appointment of a receiver*.]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion to a appoint a receiver and that a court should exercise its discretion to make the appointment. They are general procedural points related to the law of receivership and designed for use in opposition to the appointment of a receiver, regardless of the substantive law of the action in which they are raised.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 200.10[1]*.

This general form of points and authorities may be combined with points and authorities that set forth appropriate substantive grounds for opposing appointment of a receiver [*see, e.g., §§ 200.130 et seq., 200.210, 200.230 et seq., and 200.260*].

These points and authorities may be modified for use in opposing the confirmation of an ex parte order appointing a receiver [*see §§ 200.60* et seq.]. They may also be adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should insert facts showing that the appointment of the receiver would be a clear abuse of the court's discretion. See also the *comments in § 200.10[2][b]* regarding evidentiary support for facts stated.

[c] Related Pleading and Practice Forms

For a form of notice of motion to appoint receiver, legal background, research guide, and an opposing party's procedural

checklist, see California Forms of Pleading and Practice, Ch. 486, *Receivers* (Matthew Bender).

[3] Discussion of Authorities

[a] Refusal to Appoint Receiver Is Largely Within Discretion of Trial Court

In ***Starbird v. Lane*** *(1962) 203 Cal. App. 2d 247, 21 Cal. Rptr. 280* , plaintiffs brought a stockholders' derivative action against defendants, a corporation and its directors. Alleging fraud and abuse of authority and discretion on the part of the board, plaintiffs sought the removal of the board, the installation of a new board, a permanent prohibition against defendant directors from ever holding office in the corporation, and the appointment of a receiver of the assets of the corporation during litigation. The trial court sustained, without leave to amend, general demurrers of 13 defendants to plaintiffs' fifth amended and supplemental complaint, denied plaintiffs' application for the appointment of the receiver, and sustained, with leave to amend, the general demurrer of the three remaining defendants to the fifth amended and supplemental complaint. The court subsequently entered judgment for the 13 defendants and, after plaintiffs failed to amend the complaint within the time allowed, dismissed the action against the remaining three defendants. Plaintiffs appealed from the judgment for the 13 defendants and from the order dismissing the action against the remaining three defendants.

The court of appeal sustained the judgment and order of the trial court, holding that plaintiffs failed to state a cause of action against all defendants. In so ruling, the court expressly affirmed the trial court's refusal to appoint a receiver and held that in the absence of a clear showing of an abuse of discretion, the trial court's order appointing or refusing to appoint a receiver will be upheld. Because the complaint failed to state a cause of action on which the ancillary relief of receivership could be based, and because there exists no separate cause of action for the appointment of a receiver, the trial court did not abuse its discretion in refusing to order appointment of the receiver (*203 Cal. App. 2d 247, 261)* .

In ***Elson v. Nyhan*** *(1941) 45 Cal. App. 2d 1, 113 P.2d 474* , plaintiff recovered a money judgment in a personal injury action against defendants. Plaintiff then assigned her judgment to appellant. When execution on the money judgment was returned unsatisfied, appellant petitioned the trial court for the appointment of a receiver in aid of execution in order to satisfy the judgment by selling five taxicab licenses issued to defendants by the San Francisco Police Commission. After notice and hearing, the trial court denied the petition, and appellant then appealed from the order of denial.

The court of appeal affirmed the trial court's order denying appellant's petition for the appointment of a receiver (*45 Cal. App. 2d 1, 5)* . At the outset, the court noted that although the case involved a number of issues, the appeal could be decided on the sole ground of the trial court's discretionary power to deny the petition for the appointment of a receiver (*45 Cal. App. 2d 1, 2)* . The court held that under the circumstances as they appeared in the record, it was unable to say the trial court abused its discretion in refusing to make the appointment (*45 Cal. App. 2d 1, 5)* . The court based its ruling on the trial court's determination that because sale of the licenses required the police commission's approval, the appointment of the receiver would be an idle act, since the commission would not recognize the transfer of the licenses at a receiver's sale in light of its policy of refusing to recognize involuntary transfers of taxicab licenses (*45 Cal. App. 2d 1, 4)* . The court reiterated the established rule that the appointment of, or the refusal to appoint, a receiver rests largely in the discretion of the trial court and that its action in appointing a receiver or refusing to appoint a receiver will not be disturbed in the absence of a showing that the court's discretion has been abused (*45 Cal. App. 2d 1, 4-5)* .

[b] Power to Appoint Receiver to Be Used With Caution

In ***Cohen v. Herbert*** *(1960) 186 Cal. App. 2d 488, 8 Cal. Rptr. 922* , plaintiffs brought an action against defendants, one of whom was a limited partner of plaintiffs and both of whom were general partners of each other. The complaint alleged that the limited partner defendant had made various improper charges against partnership accounts, and had commingled assets and liabilities of the partnership with other entities under his control and failed to account. It also

alleged that both defendants, as general partners, had charged numerous personal living and traveling expenses to the partnership. Plaintiffs sought an accounting, declaratory relief, damages, and the appointment of a receiver of the partnership. Subsequently, plaintiffs obtained an order against defendants to show cause why a receiver should not be appointed. At the hearing on the order, the trial court denied defendants' request for a continuance of one week and ordered the appointment of the receiver to take possession of all the property and assets of the partnership and to operate the partnership. It also enjoined defendants from interfering with the operation or control of the receiver or his actions. Furthermore, it required defendants to deliver any property or assets of the limited partnership in their possession to the receiver. Defendants appealed from the order appointing the receiver and from the orders denying their motions for a continuance of the hearing on the receiver's appointment.

The court of appeal noted initially that the orders denying the continuance were not appealable and dismissed that appeal, holding them to be reviewable on the appeal from the order appointing the receiver (*186 Cal. App. 2d 488, 490)* . The court then reversed the order appointing the receiver, finding a clear abuse of discretion on the part of the trial court in denying the motions for continuance. The court did not rule on defendants' contention that plaintiffs' showing was insufficient to warrant the appointment, nor did it imply that it deemed the showing to be sufficient (*186 Cal. App. 2d 488, 496)* . However, in reversing the trial court, the court of appeal held the power of a court to appoint a receiver a delicate one, to be exercised with caution lest injury be done to the parties and their properties. The remedy is an extraordinary and harsh one. Thus, courts should grant reasonable time to parties to prepare for a hearing on an application for the appointment of a receiver, since such a serious matter should not be made without a full and complete hearing unless the due administration of justice clearly requires it. The court found defendants' showing most persuasive, finding nothing in the record showing a lack of diligence or good faith on their parts (*186 Cal. App. 2d 488, 495)* .

In ***Dabney Oil Co. v. Providence Oil Co.*** *(1913) 22 Cal. App 233, 133 P. 1155* , plaintiff corporation sought to quiet title to and impose a constructive trust on two parcels of real property, one parcel of which was oil-producing and leased to defendant corporation, and the other parcel of which was undeveloped and unproved oil land owned by defendant corporation. Additionally, plaintiff sought to void the deed transferring one of the parcels to defendant. Plaintiff also sought an accounting from all defendants, individual and corporate. After filing the complaint, plaintiff moved the court for the appointment of a receiver of all of the property and for an injunction enjoining defendants from operating the property. After hearing, the trial court issued an order appointing a receiver to take possession of the net proceeds of the sale of oil produced on the property. The court's order included a provision that defendants, together with any other persons or firms holding any proceeds of the property, surrender to the receiver all proceeds of the property. Defendants appealed from the order of the trial court appointing the receiver.

The court of appeal reversed the trial court's order appointing the receiver. The court held it an abuse of the trial court's discretion to appoint a receiver when the purpose sought by the appointment could be accomplished and the rights of the parties more adequately protected by the granting of an injunction (*22 Cal. App 233, 239)* . The court ruled that the power to appoint a receiver is a delicate one and should be exercised with caution, lest the injury caused by the appointment be greater than the injury sought to be averted (*22 Cal. App 233, 238)* .

[4] Additional Authorities

[a] Refusal to Appoint Receiver Is Largely Within Discretion of Trial Court

In *Stevens v. Torregano (1961) 192 Cal. App. 2d 105, 13 Cal. Rptr. 604* , an action to impose a constructive trust on certain assets of a decedent's estate, plaintiff appealed from the trial court's judgment dismissing her first cause of action and its order, contained therein, refusing to appoint a receiver. The court of appeal affirmed the trial court's judgment and its refusal to appoint the receiver, holding that the appointment of the receiver was within the court's discretion and noting that the trial court, having determined that plaintiff was entitled to no relief on her first cause of action, properly denied the interim relief sought on that cause of action (*192 Cal. App. 2d 105, 111)* .

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A. Proceedings to Appoint Receiver
1. Noticed Motion to Appoint Receiver

20-200 California Points & Authorities § 200.21

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.21 Opposing Motion to Appoint Receiver--Complaint Fails to State Cause of Action on Which Relief Can Be Granted

[1] FORM Opposing Motion to Appoint Receiver--Complaint Fails to State Cause of Action on Which Relief Can Be Granted

[*This form should be combined with a general memorandum of points and authorities opposing a motion to appoint receiver (see § 200.20) or a memorandum opposing an ex parte application to appoint receiver (see § 200.60 et seq.), or included in a trial or appellate brief.*]

THE COURT SHOULD NOT APPOINT A RECEIVER IN THIS ACTION BECAUSE AN APPOINTMENT WOULD BE AN ABUSE OF DISCRETION, IN THAT THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION ON WHICH RELIEF, TO WHICH RECEIVERSHIP IS ANCILLARY, CAN BE GRANTED.

A. Receivership Is Provisional Remedy Ancillary to Pending Action. Statutes authorizing the appointment of receivers do not create substantive rights of action to appoint receivers. There is, therefore, no such thing as an action brought distinctively for the mere appointment of a receiver, and an appointment, when made, is ancillary to the action brought (*Murray v. Superior Court (1900) 129 Cal. 628, 632, 62 P. 191* ; *French Bank Case (1879) 53 Cal. 495, 552, 553)* .

B. Failure of Complaint to State Cause of Action on Which Relief Can Be Granted. When a complaint fails to state a cause of action such that it asks for no affirmative relief to which a receivership is incidental, an order appointing a receiver has no validity (*Frick v. Calmin Mortgage Corp., Ltd. (1934) 220 Cal. 746, 748, 32 P.2d 619* ; *Starbird v. Lane (1962) 203 Cal. App. 2d 247, 261, 21 Cal. Rptr. 280*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the court should appoint a receiver on the ground that the complaint fails to state a cause of action that supports the appointment of a receiver.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities set out in see *§ 200.10[1]*.

These points and authorities should be combined with a general memorandum of points and authorities opposing a motion to appoint receiver [*see § 200.20[1]*]. These points and authorities may be adapted for use in a memorandum opposing the confirmation of an ex parte order appointing a receiver [*see § 200.60* et seq.]. They may also be adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should insert facts showing that the moving party's complaint fails to state a cause of action for relief other than the appointment of a receiver. See also the *comments in § 200.10[2][b]* regarding evidentiary support for facts stated.

[c] Related Pleading and Practice Forms

For a form of notice of motion to appoint receiver, legal background, research guide, and an opposing party's procedural checklist, see California Forms of Pleading and Practice, Ch. 486, *Receivers* (Matthew Bender).

[3] Discussion of Authorities

[a] Receivership Is Provisional Remedy Ancillary to Pending Action

In ***Murray v. Superior Court*** *(1900) 129 Cal. 628, 62 P. 191* , plaintiff, a real party in interest, brought an action against defendant life insurance corporation, also a real party in interest, alleging that the corporation's liabilities exceeded its assets, that the corporation had ceased to issue insurance policies and to carry on the business for which it was organized, and that, unless the court took charge of the corporation's assets, the assets would be consumed in expenses and there would be nothing left with which to pay death claims due to policy holders. Plaintiff prayed that the directors be enjoined from paying out corporate funds and from interfering with or transacting corporate business. Plaintiff also prayed for the appointment of a receiver to take charge of all funds and properties, to collect all dues, and to receive and pay creditors' claims. The trial court granted plaintiff the relief sought and ordered the appointment of a receiver to take charge of all the funds, property, and assets of the corporation. Petitioner subsequently obtained a judgment against real-party-in-interest corporation and attempted to levy on the funds, credits, and personal property under the receiver's control. When these attempts failed, petitioner sought a writ of prohibition from the Supreme Court to prevent the trial court from enforcing its order appointing the receiver.

The Supreme Court issued a peremptory writ of prohibition to the trial court, finding that the trial court did not have jurisdiction to appoint the receiver (*129 Cal. 628, 630-631, 635)* . The Court noted that the purpose of plaintiff's action was to take the assets and business of the corporation out of the hands of the directors and turn them over to a stranger. Quoting from the *French Bank Case (1879) 53 Cal. 495, 552, 553* (discussed *below*), the Court held that there is no such thing as an action brought distinctively for the mere appointment of a receiver. The appointment, when made, is ancillary to or in aid of an action, and the authority conferred on a court to make the appointment necessarily presupposes that an action is pending before it, instituted by someone authorized by law to commence it (*129 Cal. 628, 632)* . The Court noted that the trial court did not possess the power, under the facts stated in the complaint, to take the property from the corporation and turn it over to the hands of a third party when the corporation had not been dissolved

or judged insolvent, when there were no allegations of fraud or mismanagement on the part of the directors, and when plaintiff's complaint did not seek the removal of the directors (*129 Cal. 628, 631)* .

In the ***French Bank Case*** *(1879) 53 Cal. 495* , plaintiff depositor brought an action against defendant corporate thrift institution for payment for legal services rendered. In addition to a money judgment, plaintiff sought orders declaring the corporation insolvent, dissolving the corporation, and appointing a receiver to take charge of and wind up the affairs of the corporation. The trial court granted plaintiff's prayer for appointment of a receiver and appointed a receiver to take charge of the corporation, to take possession of all corporate assets, and to do everything necessary to protect the rights of its creditors and depositors. The corporation appealed from the trial court's order appointing the receiver.

The Supreme Court reversed, holding the trial court exceeded its jurisdiction in issuing the order, because plaintiff's complaint failed to state a cause of action on which relief could be granted *53 Cal. 495, 553-554)* . The Court held that *Code Civ. Proc. § 564*, the statute on which plaintiff based his action and which authorizes the appointment of receivers, does not create substantive rights of action when none existed before. Its aim is simply to provide a more efficacious remedy for causes of action that already exist and are provided for elsewhere. Its purpose is to preserve the property pending litigation so that the relief awarded by the judgment, if any, may be effective. Therefore, there is no such thing as an action brought distinctively for the appointment of a receiver. An appointment, when made, is ancillary to or in aid of the action brought, and the authority conferred on the court to make the appointment necessarily presupposes that an action is pending before it, instituted by someone authorized by law to commence it (*53 Cal. 495, 552-553)* . The Court found that there was no statute that confers on a private person, either as stockholder or creditor, the right to maintain an action to dissolve a corporation on the ground that it is insolvent, or to obtain relief by seizing its property from its constituted management and placing it in the hands of a receiver (*53 Cal. 495, 553)* . Furthermore, the Court found no inherent equitable power by which the trial court could effectively dissolve the corporation by appointing the receiver when the power of the receiver, once put in motion, would necessarily supersede the corporate power (*53 Cal. 495, 550-551)* .

[b] Failure of Complaint to State Cause of Action on Which Relief Can Be Granted

In ***Frick v. Calmin Mortgage Corp., Ltd.*** *(1934) 220 Cal. 746, 32 P.2d 619* , plaintiffs, a judgment creditor and two stockholders of defendant corporation, filed a complaint in the nature of a creditors' bill to collect on the judgment creditor's judgment against the corporation. Plaintiffs sought the sole relief of the appointment of a receiver of the assets and property of the corporation. On the same day that plaintiffs filed their complaint, defendant corporation voluntarily appeared in the cause and filed a written consent to the appointment of a receiver. Subsequently, the trial court ordered the appointment of a receiver. One year later the trial court, on its own motion, vacated its order appointing the receiver and ordered off calendar a pending petition to appoint another receiver. Subsequently, the trial court filed a nunc pro tunc supplemental order, amending its vacation of the order appointing the original receiver to show that the order of vacation was based on the court's finding that its original order of appointment was in excess of its jurisdiction. One of the plaintiffs then appealed from the order removing the appointment of the other receiver from the calendar.

The Supreme Court affirmed the trial court's order removing the appointment of the later receiver from the calendar. In so doing, the Court agreed with the trial court that the initial appointment was in excess of the trial court's jurisdiction. The Court held that the complaint failed to state a cause of action in that it asked for no affirmative relief to which a receivership might be incidental. Hence, the order appointing the receiver had no validity (*220 Cal. 746, 748)* .

The facts and procedural background of ***Starbird v. Lane*** *(1962) 203 Cal. App. 2d 247, 21 Cal. Rptr. 280* , are discussed in *§ 200.20[3][a]*. In affirming the trial court's judgment for defendants and concomitant refusal to order the appointment of a receiver, the court of appeal found that plaintiffs were not entitled to the appointment of a receiver, because the complaint failed to state a cause of action. The court relied on *Frick v. Calmin Mortgage Corp., Ltd. (1934) 220 Cal. 746, 748, 32 P.2d 619* (discussed *above*), for the proposition that because the appointment of a receiver is incidental to the main objects of the complaint, there is no separate cause of action for the appointment of a receiver (

203 Cal. App. 2d 247, 261) .

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20-200 California Points & Authorities § 200.22

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.22 Opposing Motion to Appoint Receiver--Less Drastic Means of Relief Are Available

[1] FORM Opposing Motion to Appoint Receiver--Less Drastic Means of Relief Are Available

[*This form should be combined with a general memorandum of points and authorities opposing a motion to appoint receiver (see § 200.20) or a memorandum opposing an ex parte application to appoint receiver (see § 200.60 et seq.), or included in a trial or appellate brief.*]

THE COURT SHOULD NOT APPOINT A RECEIVER IN THIS ACTION BECAUSE AN APPOINTMENT WOULD BE AN ABUSE OF DISCRETION IN THAT _____ [*specify other available remedy, e.g.,* INJUNCTIVE RELIEF], A REMEDY LESS DRASTIC THAN RECEIVERSHIP, IS AVAILABLE TO _____ [*specify party seeking appointment, e.g.,* PLAINTIFF].

Availability of Less Drastic Relief. Because the appointment of a receiver is a drastic remedy, a court should carefully weigh the propriety of appointment in exercising its discretion to appoint a receiver and should not make the appointment when a remedy less drastic in nature and scope will adequately protect the interests of the litigants (*A.G. Col Co. v. Superior Court (1925) 196 Cal. 604, 613, 238 P. 926* ; *Dabney Oil Co. v. Providence Oil Co. (1913) 22 Cal. App 233, 239, 133 P. 1155*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the court should appoint a receiver on the ground that remedies less drastic than receivership are available to the party seeking the appointment of a receiver.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the

points and authorities set out in see *§ 200.10[1]*.

These points and authorities should be combined with a general memorandum of points and authorities opposing a motion to appoint receiver [*see § 200.20[1]*]. These points and authorities may be adapted for use in a memorandum opposing the confirmation of an ex parte order appointing a receiver [*see § 200.60* et seq.]. They may also be adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should insert facts showing that a less drastic remedy, such as an injunction, is available to the party seeking the receivership in lieu of the appointment of a receiver. See also the *comments in § 200.10[2][b]* regarding evidentiary support for facts stated.

[c] Related Pleading and Practice Forms

For a form of notice of motion to appoint receiver, legal background, research guide, and an opposing party's procedural checklist, see California Forms of Pleading and Practice, Ch. 486, *Receivers* (Matthew Bender).

[3] Discussion of Authorities

[a] Availability of Less Drastic Relief

In ***A.G. Col Co. v. Superior Court*** *(1925) 196 Cal. 604, 238 P. 926* , plaintiff corporation, the real party in interest, brought an action against defendant petitioners. Plaintiff alleged that defendant directors converted stock of one of defendant corporations to their own uses as part of a conspiracy to defraud plaintiff of its property, that another of defendant corporations was brought into existence for the purpose of cheating plaintiff of its property, and that the latter corporation was in imminent danger of insolvency. Plaintiff sought, among other relief, the appointment of a receiver to take charge of and manage the business of both corporations in order to preserve and protect plaintiff's rights and interests. Based on the complaint and a supporting affidavit, the trial court issued an ex parte order appointing a receiver of the corporations. Petitioners then moved the court, ex parte, for an order setting aside the order appointing the receiver. The trial court denied this ex parte motion but after a hearing on petitioners' subsequent noticed motion to set aside, set aside the appointment of the original receiver and appointed another to take his place. Petitioners then sought a writ of prohibition in the Supreme Court to vacate the trial court's orders appointing the receivers, both ex parte and after notice and hearing.

The Supreme Court granted the petition and ordered the trial court to vacate its orders appointing both receivers. The Court found it clear that every presumed right of plaintiff corporation, for which it sought relief in the complaint, could have been fully protected and made available by either injunctive relief or other statutory remedies which the Court did not identify (*196 Cal. 604, 614)* . The Court held it a well-established rule that a receiver should not be appointed when a remedy less drastic in nature and scope is available to insure adequate protection of the rights of the litigants (*196 Cal. 604, 613)* . The Court found that there was no emergency, pending or imminent, that required so harsh a remedy as ousting the regularly qualified, acting, and financially successful officers of defendant corporations and substituting a receiver for the management and control of the business of the corporations (*196 Cal. 604, 614)* . The Court based its finding on petitioners' evidence, in the form of affidavits and testimony, that defendant directors did not convert stock to their own uses, that there was no conspiracy to defraud plaintiff, that plaintiff had no interest in property out of which it could be cheated by one of defendant corporations, and that neither corporation was in any danger of insolvency when the receivers were appointed (*196 Cal. 604, 609-610)* .

The facts and procedural background of ***Dabney Oil Co. v. Providence Oil Co.*** *(1913) 22 Cal. App 233, 133 P. 1155* ,

are discussed in *§ 200.20[3][b]*. In reversing the trial court's order appointing the receiver, the court noted that a receiver should not be appointed when the result desired by the appointment can be obtained by less stringent means calculated to protect the rights of all parties. Additionally, the court noted that when an injunction will protect all the rights to which the applicant for the receivership appears to be entitled, a receiver will not be appointed. It is an abuse of the trial court's discretion to appoint a receiver when the purpose sought by the appointment could be accomplished and the rights of the parties more adequately protected by the granting of an injunction (*22 Cal. App 233, 239)* . The court found that the sole purpose of the trial court's order, besides empowering the receiver to seek recovery of proceeds derived by defendants from operation of the property, was to sequester the net income from the property by requiring defendants to pay it over to the receiver. However, the court found that the purpose of holding net proceeds intact pending the suit could have been accomplished by an order granting an injunction in which, on plaintiff's giving of a sufficient undertaking to protect defendants from damages, defendants would be restrained from paying out any proceeds from the sale of oil, other than for operation of the wells (*22 Cal. App 233, 238)* .

[4] Additional Authorities

[a] Availability of Less Drastic Relief

In *Golden State Glass Corp. v. Superior Ct. (1939) 13 Cal. 2d 384, 90 P.2d 75* , a stockholders' derivative suit, defendants sought a writ of prohibition to prevent the enforcement of respondent court's ex parte order appointing a receiver and its subsequent orders denying their motion to vacate the appointment and confirming the appointment. The Supreme Court issued the writ, finding that no sufficient grounds existed for continuing the receivership during litigation and that the trial court exceeded its jurisdiction in confirming its ex parte order appointing the receiver (*13 Cal. 2d 384, 396)* . The Court noted the drastic character of the remedy of receivership and held that, ordinarily, if there is any other remedy less severe in its results that will adequately protect the rights of the parties, a court should not take property out of the hands of its owners (*13 Cal. 2d 384, 393)* .

In *Rogers v. Smith (1946) 76 Cal. App. 2d 16, 172 P.2d 365* , an action for money had and received, the court of appeal reversed the trial court's order confirming the ex parte appointment of a receiver, finding plaintiff's action to be essentially one at law for the recovery of a debt in which the remedy of attachment was available and would have been adequate. The court held that receivership is not a substitute for attachment and thus could not be resorted to for the reason urged by plaintiff, that an attachment would have been more expensive than receivership. The court noted that the saving of expense was a poor excuse for the appointment of a receiver when plaintiff's sole argument for appointment was that only a nominal bond was required to enable a receiver to take possession of all of defendants' property, while a very large bond was required to attach that property (*76 Cal. App. 2d 16, 21)* . Rogers is discussed in *§ 200.230[3][a]*.

In *Ryan v. Murphy (1919) 39 Cal. App 640, 179 P. 517* , a creditors' action brought to subject certain real property of defendant to plaintiffs' claims, defendant appealed from an order appointing a receiver of the property. The court of appeal reversed, on a number of grounds, the trial court's order appointing the receiver. One of the grounds for reversal was the fact that plaintiffs could have adequately protected their interests in the property against future alienation by filing a lis pendens (*39 Cal. App 640, 642-643)* .

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20-200 California Points & Authorities § 200.23

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.23 Opposing Motion to Appoint Receiver--No Reasonably Certain Benefit to Moving Party and Distinct Disadvantage to Opposing Party

[1] FORM Opposing Motion to Appoint Receiver--No Reasonably Certain Benefit to Moving Party and Distinct Disadvantage to Opposing Party

[*This form should be combined with a general memorandum of points and authorities opposing a motion to appoint receiver (see § 200.20) or a memorandum opposing an ex parte application to appoint receiver (see § 200.60 et seq.), or included in a trial or appellate brief.*]

THE COURT SHOULD NOT APPOINT A RECEIVER IN THIS ACTION BECAUSE AN APPOINTMENT WOULD BE AN ABUSE OF DISCRETION, IN THAT NO REASONABLY CERTAIN BENEFIT WILL RESULT TO _____ [*specify party seeking appointment, e.g.,* PLAINTIFF] FROM THE APPOINTMENT, AND A DISTINCT DISADVANTAGE WILL RESULT TO _____ [*specify opposing party, e.g.,* DEFENDANT].

No Certain Benefit to One Party and Distinct Disadvantage to Other Party. When it appears that no reasonably certain benefit will result to one litigant and a distinct disadvantage will result to another, courts should weigh carefully the propriety of appointing a receiver, and should not make the appointment when there is no benefit or advantage to be gained thereby (*Elson v. Nyhan (1941) 45 Cal. App. 2d 1, 5, 113 P.2d 474* ; *Lowe v. Copeland (1932) 125 Cal. App 315, 324, 13 P.2d 522*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the court should appoint a receiver on

the ground that no reasonably certain benefit will result to the party seeking the appointment, and a distinct disadvantage will result to the party opposing the appointment.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 200.10[1]*.

These points and authorities should be combined with a general memorandum of points and authorities opposing a motion to appoint receiver [*see § 200.20[1]*]. These points and authorities may be adapted for use in a memorandum opposing the confirmation of an ex parte order appointing a receiver [*see § 200.60* et seq.]. They may also be adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should insert facts showing not only that the party seeking the appointment will gain no certain benefit by the receivership, but also, if appropriate, that the opposing party will be placed at a distinct disadvantage by the appointment. See also the *comments in § 200.10[2][b]* regarding evidentiary support for facts stated.

[c] Related Pleading and Practice Forms

For a form of notice of motion to appoint receiver, legal background, research guide, and an opposing party's procedural checklist, see California Forms of Pleading and Practice, Ch. 486, *Receivers* (Matthew Bender).

[3] Discussion of Authorities

[a] No Certain Benefit to One Party and Distinct Disadvantage to Other Party

The facts and procedural background of ***Elson v. Nyhan*** *(1941) 45 Cal. App. 2d 1, 113 P.2d 474* , are discussed in *§ 200.20[3][a]*. In affirming the trial court's refusal to order the appointment of a receiver in aid of execution, as requested by plaintiff's assignee, the court of appeal held that when it appears that no reasonably certain benefit will result to one litigant, and a distinct disadvantage will result to another, courts should weigh carefully the propriety of appointing a receiver. The court noted that receivers are often legal luxuries, frequently representing an extravagant cost to a losing litigant (*45 Cal. App. 2d 1, 5)* .

In ***Lowe v. Copeland*** *(1932) 125 Cal. App 315, 13 P.2d 522* , an action for declaratory relief, plaintiff sought a decree declaring him to be the owner of certain shares of stock in one of defendant corporations and enjoining the individual defendant and the other corporate defendant from transferring certain patent rights. In the alternative, plaintiff sought damages and the appointment of a receiver of the business of one of defendant corporations. The trial court refused to appoint the receiver and, after trial, entered judgment denying plaintiff the relief prayed for in his complaint. Plaintiff appealed from the judgment, contending that portions of the trial court's findings were unsupported and that the findings did not support the judgment.

The court of appeal affirmed the judgment and the trial court's refusal to appoint a receiver. The court held that the trial court did not err, because a receiver should not be appointed when no benefit or advantage is to be gained thereby. The court found that there was no advantage to be gained by any party by placing the business of the corporation in receivership. There was no allegation or claim that, with the exception of the patent rights, defendant corporation had any assets that could be subject to receivership or that, even if the rights were retained, the corporation could or would continue in business. Furthermore, there were no funds in the company's treasury, no means of raising funds from its stockholders, and no business prospect that would bring any funds into the treasury to enable it to carry on the business (*125 Cal. App 315, 324)* .

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20-200 California Points & Authorities § 200.24

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.24 Opposing Motion to Appoint Receiver--Evidence Used to Support Appointment Is Conclusory or Based on Information and Belief

[1] FORM Opposing Motion to Appoint Receiver--Evidence Used to Support Appointment Is Conclusory or Based on Information and Belief

[*This form should be combined with a general memorandum of points and authorities opposing a motion to appoint receiver (see § 200.20) or a memorandum opposing an ex parte application to appoint receiver (see § 200.60 et seq.), or included in a trial or appellate brief.*]

THE COURT SHOULD NOT APPOINT A RECEIVER IN THIS ACTION BECAUSE AN APPOINTMENT WOULD BE AN ABUSE OF DISCRETION, IN THAT THE _____ [*specify evidence used to support appointment, e.g.,* COMPLAINT] CONSISTS OF _____ [ALLEGATIONS BASED LARGELY ON INFORMATION AND BELIEF *and/or* _____ (GENERAL *and/or* CONCLUSORY) ALLEGATIONS)], AND THUS THE SUPPORTING EVIDENCE IS INSUFFICIENT TO JUSTIFY THE APPOINTMENT OF A RECEIVER.

Evidence Based on Conclusory Allegations and on Information and Belief Is Insufficient to Appoint Receiver. A complaint or affidavit based largely on generalities, conclusions, and information and belief is insufficient to support the appointment of a receiver (*Golden State Glass Corp. v. Superior Ct. (1939) 13 Cal. 2d 384, 396, 90 P.2d 75* (complaint); *Mason v. San-Val Oil & Water Co., Ltd. (1934) 1 Cal. 2d 670, 672-673, 36 P.2d 616* (complaint and affidavit)).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the court should appoint a receiver on the ground that the evidence used to support the appointment is conclusory or based on information and belief.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 200.10[1]*.

These points and authorities should be combined with a general form of memorandum of points and authorities opposing a motion to appoint receiver [*see § 200.20[1]*]. These points and authorities may be adapted for use in a memorandum opposing the confirmation of an ex parte order appointing a receiver [*see § 200.60* et seq.]. They may also be adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should insert facts showing that the evidence of the party seeking the appointment consists of generalities, conclusions, and allegations or declarations based largely on information and belief. See also the *comments in § 200.10[2][b]* regarding evidentiary support for facts stated.

[c] Related Pleading and Practice Forms

For a form of notice of motion to appoint receiver, legal background, research guide, and an opposing party's procedural checklist, see California Forms of Pleading and Practice, Ch. 486, *Receivers* (Matthew Bender).

[d] Reply Memorandum

In an appropriate case, the points and authorities *set out in § 200.40[1]* may be used to reply to the contention supported by this form.

[3] Discussion of Authorities

[a] Evidence Based on Conclusory Allegations and on Information and Belief Is Insufficient to Appoint Receiver

In ***Golden State Glass Corp. v. Superior Ct.*** *(1939) 13 Cal. 2d 384, 90 P.2d 75* , plaintiff directors brought a stockholder's derivative action against defendant directors for damages for injury to the corporation, alleging defendants committed acts of fraud and mismanagement, and that the board of directors was deadlocked, thus virtually suspending transaction of corporate business. Based on the allegations in the verified complaint, plaintiffs sought and the trial court granted an ex parte application for the appointment of a receiver to take possession, during litigation, of the corporation's property. Defendants moved to vacate the order and subsequently sought to resist a confirmation of the appointment, but the trial court denied each of these motions. Defendants sought a writ of prohibition to prevent the enforcement of respondent court's orders appointing the receiver.

The Supreme Court issued the writ of prohibition, finding that no sufficient grounds existed for continuing the receivership during litigation and that the trial court exceeded its jurisdiction in confirming its ex parte order appointing the receiver (*13 Cal. 2d 384, 396)* . The court found that, contrary to plaintiffs' allegations, corporate business was being transacted by defendants, the corporation was solvent, and that during the month in which plaintiffs' complaint was filed the corporation had assets in excess of its liabilities (*13 Cal. 2d 384, 395-396)* . The Court noted that while these findings did not address plaintiffs' allegations of defendants' fraud and mismanagement, those allegations were stated as conclusions or on information and belief. The Court found that stronger proof was essential to justify the receivership in the face of specific and detailed evidence that the corporation's business was being successfully

conducted at a profit. Relying on *Mason v. San-Val Oil & Water Co., Ltd. (1934) 1 Cal. 2d 670, 672-673, 36 P.2d 616* (discussed *below*), the Court held that a complaint based largely on generalities, conclusions, and information and belief is insufficient on which to appoint a receiver (*13 Cal. 2d 384, 396)* .

In ***Mason v. San-Val Oil & Water Co., Ltd.*** *(1934) 1 Cal. 2d 670, 36 P.2d 616* , a stockholder's derivative action, plaintiff shareholders sued defendant corporation, its directors, officers, and other shareholders, seeking an accounting of all corporate transactions, cancellation of stock issued to defendant stockholders, and removal of defendant directors, together with a declaration that their offices were vacant. Plaintiffs' complaint alleged the failure of consideration for the issuance of stock to defendant shareholders, and misappropriation of funds, fraud, and conspiracy to defraud on the part of defendant directors. Contending that the corporation was in imminent danger of insolvency, plaintiffs, after notice and hearing, obtained the appointment of a receiver of the corporation pending conclusion of the suit. Defendants appealed from the trial court's order appointing the receiver.

The Supreme Court reversed the trial court's order, agreeing with defendants' contention that the trial court improperly appointed the receiver on the showing made. Looking to the complaint, the Court noted that the allegations of malfeasance on defendants' part were based on information and belief and were replete with generalities and conclusions, without any allegations of fact substantiating or purporting to substantiate the charges. The Court ruled that the allegations, in their current form, without more, could not be considered sufficient allegations of the charges made (*1 Cal. 2d 670, 672)* . Looking to plaintiffs' affidavits supporting the motion for the appointment of the receiver, the Court found that these added nothing to the complaint. The Court ruled that the generalities contained in the affidavits could not be deemed sufficient to supplement the complaint by making up for its deficient factual allegations (*1 Cal. 2d 670, 672-673)* . Finally addressing plaintiffs' contention that the corporation was in imminent danger of insolvency, the Court found it to be uncontroverted at the appointment hearing that the corporation had long since been conducting business at between $2,000 and $6,500 a month and appeared to be a going and prosperous concern. The Court noted that it was difficult to ascertain on what theory the action was brought or the appointment of a receiver authorized (*1 Cal. 2d 670, 673)* .

[4] Additional Authorities

[a] Evidence Based on General and Conclusory Allegations and on Information and Belief Is Insufficient

In *McCaslin v. Kenney (1950) 100 Cal. App. 2d 87, 223 P.2d 94* , an action for dissolution of an oil drilling partnership, the trial court placed the physical property of the partnership in receivership. The court did so on defendant's motion, and in principal reliance on affidavits, filed by defendant, declaring that plaintiff's negligence necessitated the receivership. On plaintiff's appeal from the trial court's order, the court of appeal reversed the order, holding that, in an application for the appointment of a receiver, the facts allegedly supporting the conclusions of an affiant must be based on the affiant's knowledge. The statements in the affidavits filed by defendant were mere conclusions, not based on the affiants' personal knowledge and, as such, not competent evidence of plaintiff's negligence (*100 Cal. App. 2d 87, 94)* . *McCaslin* is discussed in *200.140[3][a]*.

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20-200 California Points & Authorities § 200.25

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.25 Opposing Motion to Appoint Receiver--Evidence Used to Support Appointment Lacks Factual Allegation of Injury

[1] FORM Opposing Motion to Appoint Receiver--Evidence Used to Support Appointment Lacks Factual Allegation of Injury

[*This form should be combined with a general memorandum of points and authorities opposing a motion to appoint receiver (see § 200.20) or a memorandum opposing an ex parte application to appoint receiver (see § 200.60 et seq.), or included in a trial or appellate brief.*]

THE COURT SHOULD NOT APPOINT A RECEIVER IN THIS ACTION BECAUSE AN APPOINTMENT WOULD BE AN ABUSE OF DISCRETION, IN THAT THE _____ [*specify evidence used to support appointment, e.g.,* COMPLAINT] LACKS FACTUAL ALLEGATIONS OF ANY INJURY AND THUS THE SUPPORTING EVIDENCE IS INSUFFICIENT TO JUSTIFY THE APPOINTMENT OF A RECEIVER.

Evidence Lacking Factual Allegations of Any Injury Is Insufficient to Appoint Receiver. A complaint that lacks factual allegations of any injury is an insufficient basis on which to appoint a receiver (*Starbird v. Lane (1962) 203 Cal. App. 2d 247, 261-262, 21 Cal. Rptr. 280*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the court should appoint a receiver on the ground that the evidence used to support the appointment lacks factual allegations of any injury.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the

points and authorities *set out in § 200.10[1]*.

These points and authorities should be combined with a general memorandum of points and authorities opposing a motion to appoint receiver [*see § 200.20[1]*]. These points and authorities may be adapted for use in a memorandum opposing the confirmation of an ex parte order appointing a receiver [*see § 200.60* et seq.]. They may also be adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should insert facts showing that the moving party's evidence lacks factual allegations of any injury. See also the *comments in § 200.10[2][b]* regarding evidentiary support for facts stated.

[c] Related Pleading and Practice Forms

For a form of notice of motion to appoint receiver, legal background, research guide, and an opposing party's procedural checklist, see California Forms of Pleading and Practice, Ch. 486, *Receivers* (Matthew Bender).

[d] Reply Memorandum

In an appropriate case, the points and authorities *set out in § 200.40[1]* may be used to reply to the contention supported by this form.

[3] Discussion of Authorities

[a] Evidence Lacking Factual Allegations of Any Injury Is Insufficient to Appoint Receiver

The facts and procedural background of ***Starbird v. Lane*** *(1962) 203 Cal. App. 2d 247, 21 Cal. Rptr. 280* , a stockholder's derivative action, are discussed in *§ 200.20[3][a]*. In sustaining the judgment and order of the trial court dismissing plaintiffs' complaint for failure to state a cause of action, the court of appeal expressly affirmed the trial court's refusal to appoint a receiver. The court found a fatal deficiency in the complaint in its lack of factual allegation of any injury necessitating the appointment of a receiver (*203 Cal. App. 2d 247, 261)* . While the complaint stated, by way of conclusion, that great and irreparable damage had been and would be done unless a receiver was appointed, it alleged no fact to show how either plaintiffs or the corporation had been, or would be, injured. Additionally, while the complaint alleged that it was defendants' intent to force plaintiffs to sell their shares in the corporation, or be deprived of them, it contained no allegation that any defendant had taken or threatened to take any specific action reasonably calculated to accomplish that purpose. Finally, while the complaint suggested that the assets of the corporation would be dissipated unless a receiver was appointed, it contained no allegation of actual injury and no showing of how or in what manner any injury would result to the corporation because of any alleged threatened act or omission by defendants (*203 Cal. App. 2d 247, 261-262)* .

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20-200 California Points & Authorities § 200.26

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.26 Opposing Motion to Appoint Receiver--Party Seeking Appointment Has Failed to Show by Preponderance of Evidence That Appointment Is Warranted

[1] FORM Opposing Motion to Appoint Receiver--Party Seeking Appointment Has Failed to Show by Preponderance of Evidence That Appointment Is Warranted

[*This form should be combined with a general memorandum of points and authorities opposing a motion to appoint receiver (see § 200.20) or a memorandum opposing an ex parte application to appoint receiver (see § 200.60 et seq.), or included in a trial or appellate brief.*]

THE COURT SHOULD NOT APPOINT A RECEIVER IN THIS ACTION BECAUSE THE APPOINTMENT IS AN ABUSE OF THE COURT'S DISCRETION IN THAT _____ [*specify party seeking appointment, e.g.,* PLAINTIFF] HAS FAILED TO SHOW BY A PREPONDERANCE OF THE EVIDENCE THAT THE APPOINTMENT IS WARRANTED.

Burden of Proof Is Preponderance of Evidence. A party seeking the appointment of a receiver must show by a preponderance of the evidence that the appointment is warranted (*Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp. (1953) 116 Cal. App. 2d 869, 874, 254 P.2d 599*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the court should appoint a receiver on the ground that the party seeking the appointment has failed to show by a preponderance of the evidence that the appointment is warranted.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 200.10[1]*.

These points and authorities should be combined with a general memorandum of points and authorities opposing a motion to appoint receiver [*see § 200.20[1]*]. These points and authorities may be adapted for use in a memorandum opposing the confirmation of an ex parte order appointing a receiver [*see § 200.60* et seq.]. They may also be adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should insert facts showing that the party seeking the appointment has not met its burden of proving, by a preponderance of the evidence, that the appointment of the receiver is warranted.

[c] Related Pleading and Practice Forms

For a form of notice of motion for the appointment of a receiver, research guide, and an opposing party's procedural checklist, California Forms of Pleading and Practice, Ch. 486, *Receivers* (Matthew Bender).

[d] Reply Memorandum

In an appropriate case, the points and authorities *set out in § 200.40[1]* may be used to reply to the contention supported by this form.

[3] Discussion of Authorities

[a] Burden of Proof Is Preponderance of Evidence

In ***Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp.*** *(1953) 116 Cal. App. 2d 869, 254 P.2d 599* , plaintiff corporation brought an action against defendant corporation, who was the assignee of a lease to mining property owned by plaintiff, to rescind the lease and for an accounting. By noticed motion, plaintiff also sought the appointment of a receiver to shut down operation of the mine and mill on the property and to prohibit persons from trespassing on the property, contending that defendant had refused to allow plaintiff's representatives to enter the property, that defendant had used plaintiff's machinery and failed to keep it in good repair, that defendant was insolvent, and that defendant was removing ores and minerals from the mine. The trial court granted the motion and appointed the receiver. Defendant appealed from the order appointing the receiver, contending that the trial court abused its discretion in making the appointment in that plaintiff's showing of the need for a receiver was insufficient to warrant the appointment.

The court of appeal reversed the order of the trial court appointing the receiver. The court held that in order to obtain the appointment of the receiver, plaintiff was required to meet a burden of proving, by a preponderance of the evidence, that the appointment was warranted (*116 Cal. App. 2d 869, 874)* . The court found that plaintiff had failed to meet its burden of proving by a preponderance of the evidence that under *Code Civ. Proc. 564(1)* (*now see Code Civ. Proc. § 564(b)(1)*) (authorizing the appointment of a receiver in an action between parties jointly interested in property), (1) it shared a joint interest in the mine, (2) the mine was in danger of loss, removal, or material injury, and (3) plaintiff's right to possession of the mine was probable (*116 Cal. App. 2d 869, 873)* . The court observed that certain declarations submitted by plaintiff relative to defendant's solvency were unfounded, unsupported, and rebutted by the declaration and testimony of defendant's president and one of its employees (*116 Cal. App. 2d 869, 874)* .

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CHAPTER 200 RECEIVERS
PART II. FORMS
A. Proceedings to Appoint Receiver
1. Noticed Motion to Appoint Receiver

20-200 California Points & Authorities §§ 200.27-200.39

AUTHOR: Robert Kaplan Editorial Consultant

[Reserved]

§§ 200.27[Reserved]

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20-200 California Points & Authorities § 200.40

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.40 Reply Memorandum Supporting Motion to Appoint Receiver--Form of Evidence Is Sufficient to Justify Appointment

[1] FORM Reply Memorandum Supporting Motion to Appoint Receiver--Form of Evidence Is Sufficient to Justify Appointment

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*]	)	REPLY MEMORANDUM OF POINTS AND AU-
Plaintiff,	)	THORITIES SUPPORTING MOTION TO AP-
vs.	)	POINT RECEIVER
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

THE COURT SHOULD APPOINT A RECEIVER IN THIS ACTION BECAUSE THE EVIDENCE IS IN THE PROPER FORM AND SUPPORTS APPOINTMENT.

Form of Evidence to Justify Appointment of Receiver. Evidence to justify the appointment of a receiver may be

presented in the form of allegations in a complaint or other pleading, or on noticed motion by affidavit (or declaration under *Code Civ. Proc. § 2015.5*) or testimony (*Brown v. Memorial Nat. Home Foundation (1958) 158 Cal. App. 2d 448, 456, 322 P.2d 600 , cert. denied, 358 U.S. 943 (1959)* ; *Armbrust v. Armbrust (1946) 75 Cal. App. 2d 272, 274-275, 171 P.2d 75*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form is a reply memorandum of points and authorities that may be submitted in support of a motion to appoint receiver. The basis of the reply is that the evidence is in the proper form to justify appointment. Evidence to justify the appointment of a receiver may be presented in the form of allegations in a complaint or other pleading, or on noticed motion by affidavit (or declaration under *Code Civ. Proc. § 2015.5*) or testimony.

In an appropriate case, these points and authorities may be submitted in reply to the contentions supported by the points and authorities *set out in §§ 200.24 -200.26*.

From a strategic standpoint, counsel who represents a party who is seeking the appointment of a receiver normally would not raise the issue stated in these points and authorities in an initial memorandum. Rather, he or she would include the points and authorities in a reply memorandum or brief served in response to the opposing party's objection to the receivership.

These points and authorities may be adapted for use in memorandum supporting a motion to appoint a receiver [*see § 200.10[1]*], or supporting the confirmation of an ex parte order appointing a receiver [*see § 200.50[1]*]. They may also be adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should include specific facts showing that the appointment of a receiver is within the trial court's discretion under the particular facts of the case. See also the *comments in § 200.10[2][b]* regarding evidentiary support for facts stated.

[c] Related Pleading and Practice Forms

For related legal background, research and procedural checklists, and forms, including a form of notice of motion for the appointment of a receiver and general form of allegations and prayer in a complaint seeking the appointment of a receiver, see California Forms of Pleading and Practice, Ch. 486, *Receivers* (Matthew Bender).

[3] Discussion of Authorities

[a] Form of Evidence to Justify Appointment of Receiver

In ***Brown v. Memorial Nat. Home Foundation*** *(1958) 158 Cal. App. 2d 448, 322 P.2d 600 , cert. denied, 358 U.S. 943 (1959)* , the California Attorney General brought an action to resolve a dispute between two private corporations over the charitable trusts managed and controlled by one of the corporations. At the conclusion of the trial, the court entered a judgment, which it termed an interlocutory judgment. Among the provisions of the judgment was the appointment of receivers to take possession of all of appellant corporation's assets, books, records, and papers. Appellant subsequently appealed from the judgment. Respondents attorney general and corporation, contending that the judgment was interlocutory rather than final, and thus not appealable, moved to dismiss appellant's appeal.

The court of appeal found the judgment to be final rather than interlocutory, despite the trial court's terminology, and dismissed respondents' motion to dismiss appellant's appeal (*158 Cal. App. 2d 448, 453, 457)* . Additionally, because a review of the order appointing the receivers would be essentially coextensive with a review of the merits of the case, the court held the provision of the judgment appointing the receivers to be specifically appealable under former Code Civ. Proc. § 963(2) (*now see Code Civ. Proc. § 904.1(g)*, authorizing an appeal from an order appointing a receiver in a superior court case) (*158 Cal. App. 2d 448, 453, 456)* . Relying on *Armbrust v. Armbrust (1946) 75 Cal. App. 2d 272, 274-275, 171 P.2d 75* (discussed *below*), the court held that evidence to justify the appointment of a receiver may be presented in the form of allegations in a complaint or other pleading, by affidavit, or by testimony (*158 Cal. App. 2d 448, 456)* .

Counsel should note that the trial court's judgment appointing the receivers was subsequently affirmed in *Brown v. Memorial Nat. Home Foundation (1958) 158 Cal. App. 2d 448, 322 P.2d 600* .

In ***Armbrust v. Armbrust*** *(1946) 75 Cal. App. 2d 272, 171 P.2d 75* , plaintiff brought an action against his former spouse to rescind a written agreement establishing a joint tenancy in an apartment building and to establish his interest in certain real and personal property. Defendant answered the complaint and cross complained, seeking appointment of a receiver to preserve the property during litigation. After notice and hearing of defendant's motion for appointment of a receiver, the trial court granted the motion and appointed a receiver. At the hearing on the motion, the court permitted plaintiff to testify, but not defendant, since her notice of motion did not indicate that the motion would be presented on oral testimony. However, the court did consider the matter, as requested in defendant's motion, on the verified cross complaint and on the records and files in the action. Plaintiff appealed the order, contending, among other things, that defendant's failure to produce oral testimony amounted to a failure to produce evidence sufficient to warrant appointment of the receiver.

The court of appeal affirmed the trial court's order. The court held that evidence to justify the appointment of a receiver may be presented in the form of allegations in a complaint or other pleading, by affidavit, or by testimony (*75 Cal. App. 2d 272, 274-275)* . The court held that defendant's failure to testify at the hearing did not constitute a failure to produce evidence in support of her motion, since the trial court considered the matter on the verified cross complaint, the records, and the files in the action. The court of appeal found it readily apparent that the pleadings relied on by the trial court were considered as an affidavit or as evidence in support of the application for appointment. The pleadings were properly before the trial court, since the notice of motion stated defendant's intended reliance on the verified cross complaint and the records and files in the action (*75 Cal. App. 2d 272, 275)* .

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A. Proceedings to Appoint Receiver
1. Noticed Motion to Appoint Receiver

20-200 California Points & Authorities §§ 200.41-200.49

AUTHOR: Robert Kaplan Editorial Consultant

[Reserved]

§§ 200.41[Reserved]

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A. Proceedings to Appoint Receiver
2. Order to Show Cause re Ex Parte Appointment of Receiver

20-200 California Points & Authorities § 200.50

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.50 Supporting Confirmation of Ex Parte Appointment of Receiver [Cal. Rules of Ct., Rule 3.1175, 3.1176]--General Form

[1] FORM Supporting Confirmation of Ex Parte Appointment of Receiver [Cal. Rules of Ct., Rule 3.1175, 3.1176]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*]	)	NO. _____
Plaintiff,	)	MEMORANDUM SUPPORTING CONFIRMA-
vs.	)	TION OF EX PARTE ORDER APPOINTING RE-
_____ [*name*],	)	CEIVER
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

THE COURT'S EX PARTE ORDER APPOINTING A RECEIVER IN THIS ACTION SHOULD BE CONFIRMED BECAUSE THE COURT HAS JURISDICTION, POWER, AND DISCRETION TO MAKE THE APPOINTMENT ON _____ [*specify party seeking appointment, e.g.,* PLAINTIFF'S] SHOWING OF _____ [EMERGENCY *or* NECESSITY] AND IRREPARABLE INJURY UNDER *RULE*

3.1175(a)(1) OF THE CALIFORNIA RULES OF COURT.

[*EITHER if unlimited civil case*]

A. Jurisdiction of Court. A receiver may be appointed by the court in which an action or proceeding is pending in any case in which the court is empowered by law to appoint a receiver (*Code Civ. Proc. § 564*).

[*OR if limited civil case*]

A. Jurisdiction of Court. A receiver may be appointed by the court in which an action or proceeding, including a limited civil case, is pending in any case in which the court is empowered by law to appoint a receiver (*Code Civ. Proc. §§ 86(a)(8), 564*).

B. Power of Court to Appoint Receiver Ex Parte. The court has the power to appoint a receiver ex parte under certain circumstances on a proper showing of need therefor (*Huellmantel v. Huellmantel (1899) 124 Cal. 583, 589, 57 P. 582* ; *see Cal. Rules of Ct., Rule 3.1175*).

C. Appointment on Showing of Necessity or Emergency. The court may appoint a receiver ex parte and without notice if the imperative necessity or emergency is shown in the complaint or supporting affidavits (*Cal. Rules of Ct., Rule 3.1175(a)(1)*; *Misita v. Distillers Corp., Ltd. (1942) 54 Cal. App. 2d 244, 250, 128 P.2d 888*).

D. Appointment on Showing of Irreparable Injury. The appointment of a receiver may be made ex parte if the complaint or supporting affidavits show an immediate danger of irreparable injury to the applicant together with the reasons the applicant would suffer irreparable injury during the time necessary for a hearing on notice (*Cal. Rules of Ct., Rule 3.1175(a)(1)*; *Maggiora v. Palo Alto Inn, Inc. (1967) 249 Cal. App. 2d 706, 712, 57 Cal. Rptr. 787*).

E. Exercise of Discretion Governed by Situation at Time of Making Order. [*see § 200.51[1]*].

[*Add points and authorities that set forth appropriate substantive grounds for the appointment of a receiver (see, e.g., §§ 200.80 et seq., 200.270 et seq., and 200.350 et seq.).*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of the contention that an ex parte order appointing a receiver should be confirmed [*see Cal. Rules of Ct., Rules 3.1175(a), 3.1176(a)*]. For a memorandum providing that the exercise of

discretion by the court is evaluated by the circumstances at the time that the court made its order, see *§ 200.51[1]*.

This form is a general form that should be combined with points and authorities that set forth appropriate substantive grounds for the appointment of a receiver [*see, e.g., §§ 200.80 et seq., 200.270 et seq., and 200.350* et seq.].

These points and authorities may be combined with points and authorities contending that the form of evidence is sufficient to justify appointment [§ 200.40[1]].

In addition, this memoranda may be adapted for use:

- In a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

- As allegations or as a prayer in a complaint in a pending action seeking the provisional relief of receivership [*see* California Forms of Pleading and Practice, Ch. 486, *Receivers* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should insert facts showing the nature of the emergency justifying the ex parte appointment and the reasons the applicant would suffer irreparable injury, especially during the time necessary for a hearing on notice. Counsel should also insert facts showing the nature of the irreparable injury. For example, when appropriate, counsel would refer to evidence set forth in any of the following:

- Declarations and affidavits submitted in support of, or even in opposition to, the appointment [*see Cal. Rules of Ct., Rule 3.1306(a)*].

- Discovery documents, such as deposition transcripts and answers to interrogatories and requests for admission.

- The opposing party's pleadings that constitute admissions.

- Other documentary evidence generally.

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*].

When counsel cites facts in his or her argument, counsel should refer to the particular page and line number of the declaration, deposition transcript, or other document, that contains the cited facts. In addition, the relevant portion of any testimony in a deposition should be marked in a manner that calls attention to the testimony [*see Cal. Rules of Ct., Rule 3.1116(c)*].

For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Confirmation Hearing

Whenever a receiver is appointed without notice, the appointment must be made returnable on an order to show cause why the appointment should not be confirmed [*Cal. Rules of Ct., Rule 3.1176(a)*]. Cal. Rules of Ct., Rule 3.1176 sets forth the procedure to be followed prior to the hearing, including service of papers, and provisions for continuing the hearing. In particular, counsel should note that as soon as is practical, but no later than 5 days after the date on which the order to show cause is issued, unless the court orders another time for service, the applicant must serve the following on each of the adverse parties [*Cal. Rules of Ct., Rule 3.1176(b)*]:

- A copy of the complaint, if not previously served.
- The order to show cause, showing the date, time, and place of the hearing.
- Any affidavits supporting the application.
- A memorandum supporting the application.

[d] Modification for Use in Support of Ex Parte Application for Order to Show Cause Why Receiver Should Not Be Appointed

An ex parte application for an order to show cause why a receiver should not be appointed is a substitute for the noticed motion procedure when the adverse party has not yet appeared in the case and it is subject to the same rules regarding notice and memoranda that apply to a notice of motion for appointment of a receiver [*see*, generally, *Sarracino v. Superior Court (1974) 13 Cal. 3d 1, 8 n.6, 118 Cal. Rptr. 21, 529 P.2d 53* ; *Cohen v. Herbert (1960) 186 Cal. App. 2d 488, 491-492, 8 Cal. Rptr. 922]* . Hence, this memorandum supporting the confirmation of an ex parte order appointing a receiver, under *Cal. Rules of Ct., Rules 3.1175(a), 3.1176(a)*, may be adapted for use in such a case.

[e] Related Pleading and Practice Forms

For a form of declaration in support of the ex parte appointment of a receiver, a form of order to show cause why the ex parte appointment of a receiver should not be confirmed, a form of order confirming the ex parte appointment of a receiver, legal background, and an applicant's procedural checklist, see California Forms of Pleading and Practice, Ch. 486, *Receivers* (Matthew Bender).

[f] Opposing Memoranda

In an appropriate case, the memorandum set out in *§ 200.60* et seq. may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Power of Court to Appoint Receiver Ex Parte

Cal. Rules of Ct., Rule 3.1175(a), authorizes the court to appoint a receiver ex parte. It sets forth, in addition to any other matters supporting an application forthe ex parte appointment of a receiver, elements on which the applicant must make a detailed showing by verified complaint or affidavit in order to obtain the appointment. *Cal. Rules of Ct., Rule 3.1175(b)*, permits the applicant to be excused from setting forth any such elements if they are unknown to the applicant and cannot be ascertained with due diligence.

Huellmantel v. Huellmantel *(1899) 124 Cal. 583, 57 P. 582* , was an action for dissolution of marriage in which the trial court awarded plaintiff wife specific sums in alimony and attorney's fees, together with costs at trial and on appeal. As part of the judgment, the trial court placed a lien on real property owned by both plaintiff and defendant. The court also ordered the property to be sold, and appointed a receiver to take possession of the property, collect its rents and

profits, conduct the sale of the property, receive the proceeds, and pay plaintiff the amount of her judgment from the proceeds. Defendant appealed both the judgment and the trial court's order denying his motion for a new trial.

The Supreme Court, affirming in part and reversing in part the judgment, affirmed the order appointing the receiver for the property. The Court held that a receiver ought to be appointed on only the clearest proof of the propriety of the appointment, on the application of one of the parties, and generally not without notice. While noting that the ex parte appointment of a receiver is exceptional, the Court held that appointment is allowable under certain circumstances on proper showing. In so holding, the Court noted that even though there was nothing in the transcript to show that the trial court had acted on its own motion and without the application of plaintiff or notice to defendant in appointing the receiver, in support of the trial court's judgment it must presume that the trial court acted on due application and after notice to defendant. Furthermore, if its presumption were wrong, the Court noted that it was the defendant's duty to show otherwise (*124 Cal. 583, 589)* .

[b] Appointment on Showing of Necessity or Emergency

Misita v. Distillers Corp., Ltd. *(1942) 54 Cal. App. 2d 244, 128 P.2d 888* , was an action to remove one of defendants as director of defendant corporation. Plaintiff sought the ex parte appointment of a receiver to control the business of the corporation, preserve its assets, and protect the rights of complaining stockholders during litigation. On plaintiff's presentation of a verified complaint and supporting affidavits to the trial court, together with plaintiff's filing of a bond, the court ordered the appointment of the receiver and ordered defendants to appear subsequently to show cause why the receivership should not continue until the termination of the action. After hearing on the order to show cause, in which plaintiffs moved to continue the receivership and defendants moved to vacate the appointment, the trial court ordered the receivership continued until termination of the action and denied defendants' motion to vacate. On the same day the court issued the ruling, the parties stipulated to and obtained orders terminating the receivership, discharging the receiver, and issuing an injunction under the terms of which the respective rights of the parties would be protected. Thereafter, defendants appealed from the ex parte order appointing the receiver, the order continuing the appointment, and the order denying their motion to vacate the appointment.

The court of appeal affirmed the orders of the trial court. The court initially noted that defendants sought reversal of the trial court's orders, to enable themselves to sue on the plaintiff's bond to recover for expenditures made and damage done by reason of the receivership. However, because the receivership was terminated by stipulation on the same day the trial court ordered its continuance, no expenses were incurred or damage done thereafter. Therefore, the appeal narrowed down to the question of the validity of the trial court's ex parte order appointing the receiver (*54 Cal. App. 2d 244, 246-247)* . Citing *Huellmantel v. Huellmantel (1899) 124 Cal. 583, 57 P. 582* (discussed in *§ 200.50[3][a]*), for the proposition that ex parte appointment of a receiver is allowable under certain circumstances on a proper showing, the court ruled that the appointment of a receiver may be made ex parte and without notice if the imperative necessity or emergency is shown in the application or supporting affidavits (*54 Cal. App. 2d 244, 250)* . The court held that the allegations in the complaint demonstrated the requisite necessity and emergency in that the corporation's board of directors was unable to function as such, the stockholders were unable to meet, and the defendant director, in sole control of the corporation's management, was using the employees, the premises, and the equipment for personal purposes and was engaged in the commission of illegal acts that could result in loss of the corporation's license to do business at all. Under these facts and circumstances, and in view of other pending litigation, the trial court was amply justified in appointing the receiver ex parte (*54 Cal. App. 2d 244, 251-252)* .

[c] Appointment on Showing of Irreparable Injury

Maggiora v. Palo Alto Inn, Inc. *(1967) 249 Cal. App. 2d 706, 57 Cal. Rptr. 787* , involved actions for an accounting, monies had and received, account stated, declaratory relief, and specific performance of a lease providing for defendant's construction and subsequent operation of a hotel and convention facility on plaintiffs' real property. On presentation of their complaint to the trial court, together with supporting declarations, plaintiffs obtained an ex parte

order appointing a receiver to protect and maintain the business of the hotel and convention facility. After hearings on plaintiffs' petition for confirmation of the appointment, the trial court affirmed the appointment, finding it justified, reasonable, and necessary to protect and maintain the business. However, the court found that confirmation of the appointment would compel defendant to incur extra expenses duplicating certain existing expenses and might prevent the corporation from continuing to operate. Therefore, on defendant's stipulation to amandatory injunction that it would not voluntarily terminate or close the business, and that it would perform certain terms of the lease, the court denied confirmation of the appointment and terminated the receivership. Defendant appealed from the order affirming the ex parte appointment.

The court of appeal affirmed the order of the trial court affirming its ex parte appointment of the receiver. The court held that plaintiffs established the requisite immanency and irreparable injury to justify the ex parte appointment. The court ruled that the undisputed insolvent financial status of defendant and its hotel operations, together with defendant's threats to close down, indicated an immediate danger of irreparable injury to the going enterprise and to plaintiffs' interest in the total property (*249 Cal. App. 2d 706, 712)* .

[4] Additional Authorities

[a] Appointment on Showing of Necessity or Emergency

In *People v. Christ's Church (1947) 79 Cal. App. 2d 858, 181 P.2d 49* , an action for the removal of the church's trustee and for an accounting, the People obtained an ex parte order appointing a receiver of the church pending the accounting. On defendant's appeal of the order, the court of appeal affirmed the trial court, finding that the trustee's proposed sale of real estate owned by the church, together with his intended conversion of the proceeds to his own use, constituted a showing of emergency sufficient to support the ex parte order (*79 Cal. App. 2d 858, 860-861)* . Quoting from *Misita v. Distillers Corp., Ltd. (1942) 54 Cal. App. 2d 244, 128 P.2d 888* (discussed in *§ 200.50[3][b]*), the court held that a receiver may be appointed ex parte and without notice if the imperative necessity or emergency warranting the appointment is shown in the application or supporting affidavits (*79 Cal. App. 2d 858, 862)* .

[b] Appointment on Showing of Irreparable Injury

People v. Riverside University (1973) 35 Cal. App. 3d 572, 111 Cal. Rptr. 68 , was an action to enjoin a university and certain of its officers from engaging in unlawful and fraudulent business practices and to secure compliance with terms of the charitable trust with which the university's assets were impressed. The People had obtained the ex parte appointment of a receiver to take possession of, preserve, and maintain the property, assets, and records of the university, to continue the university in operation, and to ensure that all currently enrolled students had the opportunity to complete the current academic quarter. The court of appeal affirmed the unconditional release of the receiver. The trial court had found the appointment warranted by virtue of the irreparable injury students would suffer if the university closed before completion of the current academic quarter in that students would have expended hours of study for which they would receive no credit, law students would be ineligible to take the first bar examination for unaccredited law schools, and many students would not receive degrees to which they would be entitled. Additionally, closing classes before the end of the quarter would result in termination of accreditation and approval theretofore issued by the State Superintendent of Public Institutions and other state and federal agencies (*35 Cal. App. 3d 572, 577)* .

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2. Order to Show Cause re Ex Parte Appointment of Receiver

20-200 California Points & Authorities § 200.51

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.51 Supporting Confirmation of Ex Parte Appointment of Receiver [Cal. Rules of Ct., Rule 3.1175(a), 3.1176(a), (b)]--Exercise of Discretion Governed by Circumstances at Time of Making Order

[1] FORM Supporting Confirmation of Ex Parte Appointment of Receiver [Cal. Rules of Ct., Rule 3.1175(a), 3.1176(a), (b)]--Exercise of Discretion Governed by Circumstances at Time of Making Order

[*This form should be combined with a general memorandum supporting confirmation of ex parte appointment of receiver (see § 200.50[1]), or included in a trial or appellate brief.*]

THE COURT'S EX PARTE ORDER APPOINTING A RECEIVER IN THIS ACTION SHOULD BE CONFIRMED BECAUSE THE COURT PROPERLY EXERCISED ITS DISCRETION BASED ON THE CIRCUMSTANCES THAT EXISTED AT THE TIME OF ITS ORDER.

Exercise of Discretion Governed by Circumstances at Time of Making Order. In general, the granting of an ex parte order appointing a receiver rests in the sound discretion of the trial court, in the exercise of which the court must be governed necessarily by the situation as it is presented and appears to the court at the time of making the order (*Moore v. Oberg (1943) 61 Cal. App. 2d 216, 221, 142 P.2d 443* ; *Misita v. Distillers Corp., Ltd. (1942) 54 Cal. App. 2d 244, 247, 128 P.2d 888*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of the contention that an ex parte order appointing a receiver should be confirmed [*see Cal. Rules of Ct., Rules 3.1175(a), 3.1176(a)*].

This memorandum should be combined with a general memorandum supporting confirmation of an ex parte order

appointing a receiver [*see § 200.50[1]*]. This memorandum may be adapted for use in a memorandum supporting a motion to appoint a receiver [*see § 200.10[1]*]. It may also be adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts ofthe case. In particular, counsel should insert facts showing the nature of the emergency justifying the ex parte appointment and the reasons the applicant would suffer irreparable injury, especially during the time necessary for a hearing on notice. Counsel should also insert facts showing the nature of the irreparable injury. See also the *comments in § 200.50[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the memorandum *set out in § 200.60* et seq. may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Exercise of Discretion Governed by Circumstances at Time of Making Order

Moore v. Oberg *(1943) 61 Cal. App. 2d 216, 142 P.2d 443* , involved an action by one joint venturer against his coventurers for recovery of his share of the assets of the business. On plaintiff's application, the trial court issued an ex parte order appointing a receiver to take possession of the money, property, and accounts receivable of the business. At a subsequent noticed hearing during which both plaintiff and defendants submitted conflicting affidavit evidence, the trial court confirmed the appointment of the receiver, finding the appointment necessary to prevent defendants from collecting the accounts receivable and converting these accounts, together with the remaining joint assets of the business, to their own uses, and thereby irreparably injuring plaintiff's interest in the business. Defendants appealed from both the order appointing the receiver and the order confirming the appointment.

The court of appeal dismissed the appeal from the ex parte order of appointment and affirmed the order confirming the receiver's appointment (*61 Cal. App. 2d 216, 223)* . The court found that the trial court had not clearly abused its discretion in appointing the receiver, since the facts found by the trial court established an attempted scheme by defendants to deprive plaintiff of his property and of the advantages gained by the joint venture (*61 Cal. App. 2d 216, 222-223)* . The court held that when the propriety of the appointment of a receiver is doubtful and based on uncontradicted evidence, or when the evidence is conflicting, the question of the appointment of a receiver is addressed to the sound discretion of the trial court, to be exercised on all the facts before it. The trial court's discretion is so broad that an appellate court will not reverse an order of appointment if it is based on facts concerning which reasonable minds might differ relative to the necessity for the receivership,. The court noted that even if it were of the opinion that there was no danger of the loss of, removal of, or other irreparable injury to the assets of the joint venture, it could not substitute its conclusion for that of the trial court when the trial court's conclusion was based on sufficient evidence to support its orders. To justify the interference of an appellate court with an order confirming the ex parte appointment of a receiver, it must be clear that the order was an arbitrary exercise of power on the part of the trial court (*61 Cal. App. 2d 216, 221-222)* .

The facts and procedural background of ***Misita v. Distillers Corp., Ltd.*** *(1942) 54 Cal. App. 2d 244, 128 P.2d 888* , are discussed in *§ 200.50[3][b]*. In upholding the trial court's ex parte appointment of a receiver, the court of appeal noted that since the power to appoint ex parte lies in the superior court, the question on appeal is not one of jurisdiction but of error and, as such, is limited to the inquiry whether the trial court abused its discretion (*54 Cal. App. 2d 244, 250)* . The court held that generally, the granting of an ex parte order appointing a receiver rests in the sound discretion of the

trial court, in the exercise of which the trial court must be governed necessarily by the situation as it is presented and appears to the court at the time of making the order (*54 Cal. App. 2d 244, 247)* . Therefore, the pending emergency and necessity for the appointment of a receiver are matters for the trial court to decide. In the present case, the court of appeal could not find an abuse of discretion in the appointment of the receiver (*54 Cal. App. 2d 244, 252)* .

[4] Additional Authorities

[a] Exercise of Discretion Governed by Circumstances at Time of Making Order

In *McNeil v. Graner (1949) 92 Cal. App. 2d 371, 206 P.2d 1120* , an action for fraud, defendants appealed from the trial court's ex parte order appointing a receiver to prevent the dissipation of defendants' assets, in which plaintiffs claimed an interest. In affirming the trial court's order, the court of appeal found substantial evidence to support the order and held, therefore, that the trial court's action was not an abuse of discretion (*92 Cal. App. 2d 371, 373)* . The court held that the trial court may appoint a receiver in all cases in which receivers have heretofore been appointed by the usages of courts of equity, and that the appointment will not be disturbed on appeal in the absence of a clear showing of abuse of discretion (*92 Cal. App. 2d 371, 374)* .

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2. Order to Show Cause re Ex Parte Appointment of Receiver

20-200 California Points & Authorities §§ 200.52-200.59

AUTHOR: Robert Kaplan Editorial Consultant

[Reserved]

§§ 200.52[Reserved]

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20-200 California Points & Authorities § 200.60

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.60 Opposing Confirmation of Ex Parte Appointment of Receiver--Receiver Should Not Be Confirmed Because of Inadequate Showing of Imperative Emergency or Necessity [Cal. Rules of Ct., Rule 3.1175(a)(1)]

[1] FORM Opposing Confirmation of Ex Parte Appointment of Receiver--Receiver Should Not Be Confirmed Because of Inadequate Showing of Imperative Emergency or Necessity [Cal. Rules of Ct., Rule 3.1175(a)(1)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*]	)	MEMORANDUM OPPOSING CONFIRMATION
Plaintiff,	)	OF EX PARTE ORDER APPOINTING RECEIVER
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

THE COURT'S EX PARTE ORDER APPOINTING A RECEIVER IN THIS ACTION SHOULD NOT BE CONFIRMED, BECAUSE _____ [*specify party seeking appointment, e.g.,* PLAINTIFF] HAS FAILED TO MAKE THE REQUISITE SHOWING OF _____ [EMERGENCY *or* NECESSITY] UNDER *RULE 3.1175(a)(1) OF THE CALIFORNIA RULES OF COURT*.

Appointment Void Absent Showing of Emergency or Necessity. Appointment of a receiver will not be made ex parte and without notice except in cases of emergency that make it imperatively necessary to act at once and without notice (*A.G. Col Co. v. Superior Court (1925) 196 Cal. 604, 613, 238 P. 926* ; *Turner v. Superior Court (1977) 72 Cal. App. 3d 804, 809-810 n.2, 140 Cal. Rptr. 475* ; *see Cal. Rules of Ct., Rule 3.1175(a)(1)*).

[*Add points and authorities, as necessary, setting forth additional procedural grounds §§ 200.20 et seq. and §§ 200.61 et seq., as well as substantive grounds (see, e.g., §§ 200.130 et seq., 200.210, 200.230 et seq., and 200.260), in opposition to the appointment of a receiver.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to the contention that the ex parte order appointing a receiver should be confirmed, on the ground that the party seeking the appointment has failed to make the requisite showing of emergency [*see Cal. Rules of Ct., Rule 3.1175(a)(1)*]. For a memorandum opposing confirmation of ex parte order appointing receiver on the ground that the party seeking receivership has failed to show irreparable harm, see *§ 200.61[1]*.

In an appropriate case, this memorandum may be submitted in opposition to the contention supported by the memorandum *set out in § 200.50* et seq.

This form may be combined with points and authorities that set forth appropriate substantive grounds for opposing appointment of a receiver [*see, e.g., §§ 200.130 et seq., 200.210, 200.230 et seq., and 200.260*].

In addition, this memorandum may be adapted for use:

- In a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

- As allegations or as a prayer in a complaint in a pending action seeking the provisional relief of receivership [*see* California Forms of Pleading and Practice, Ch. 486, *Receivers* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should insert facts showing the absence of necessity or emergency requiring the ex parte appointment. Counsel should also insert facts showing that the applicant would not suffer irreparable injury, particularly during the time necessary for a hearing on notice [*see Cal. Rules of Ct., Rule 3.1175(a)(1)*]. See also the *comments in § 200.50[2][b]* regarding evidentiary support for facts stated.

[c] Confirmation Hearing

For a discussion of the service and filing requirements for the confirmation hearing under Cal. Rules of Ct., Rule 3.1176(a) and (b), see *§ 200.50[2][c]*. For a discussion of instances in which the party seeking to confirm appointment is excused under Cal. Rules of Ct., Rule 3.1175(b), from setting forth all the matters usually required for an ex parte appointment, see *§ 200.50[3][a]*.

[d] Related Pleading and Practice Forms

For a form of declaration in support of the ex parte appointment of a receiver, a form of order to show cause why the ex parte appointment of a receiver should not be confirmed, a form of order confirming the ex parte appointment of a receiver, and an opposing party's procedural checklist, see California Forms of Pleading and Practice, Ch. 486, *Receivers* (Matthew Bender).

[3] Discussion of Authorities

[a] Appointment Void Absent Showing of Emergency or Necessity

The facts and procedural background of ***A.G. Col Co. v. Superior Court*** *(1925) 196 Cal. 604, 238 P. 926* , are discussed in *§ 200.22[3][a]*. The court of appeal ordered the trial court to vacate its orders appointing receivers. Citing *Fischer v. Superior Court (1895) 110 Cal. 129, 138, 42 P. 561* (discussed in *§ 200.61[3][a]*), the Court reiterated the principle that from the standpoint of the business welfare of a defendant corporation, the appointment of a receiver on an ex parte application is so dangerous that it should be done only in cases of the greatest emergency and when irreparable injury will unquestionably result if the appointment is not made (*196 Cal. 604, 613)* . In the instant case, the Court found that there was no such emergency, pending or imminent, that required so harsh a remedy as ousting the regularly qualified, acting, and financially successful officers of defendant corporations and substituting a receiver for the management and control of the business of the corporations (*196 Cal. 604, 614)* . The Court based its finding on petitioners' evidence, in the form of affidavits and testimony, that defendant directors did not convert stock to their own uses, that there was no conspiracy to defraud plaintiff, that plaintiff had no interest in property out of which it could be cheated by one of defendant corporations, and that neither corporation was in any danger of insolvency when the receivers were appointed (*196 Cal. 604, 609-610)* .

In ***Turner v. Superior Court*** *(1977) 72 Cal. App. 3d 804, 140 Cal. Rptr. 475* , a savings and loan association, the real party in interest, sued petitioners, who were the coowners of certain real property and a hotel located on the property, on a promissory note, seeking judicial foreclosure on the property and the hotel. Pursuant to the terms of the deed of trust securing the property, and after notice and hearing, the savings and loan association obtained the appointment of a receiver to take possession of the property, operate the hotel business, and collect rents, issues, and profits. Subsequently, on the ex parte application of one of petitioners, the trial court appointed the same receiver to take possession of the other petitioners' liquor license, even though the license was not part of the security for the debt covered by the trust deed. Thereafter, one of petitioners noticed a motion for confirmation of a proposed sale of the property, including the liquor license, by the receiver. The remaining petitioners, seeking to halt the sale, petitioned the court of appeal for a writ of prohibition to prevent the trial court from confirming the sale. The petitioner who had sought confirmation of the sale then petitioned the court of appeal for a writ of mandate to require the trial court to authorize sale of the liquor license.

Consolidating the two matters for consideration and decision, the court of appeal denied the petition for a writ of mandate to compel inclusion of the liquor license in the order authorizing sale of the property. The appellate court then issued a peremptory writ prohibiting the trial court from confirming the proposed sale of the property and ordering that court to vacate its order authorizing the sale (*72 Cal. App. 3d 804, 819)* . The court held that it was beyond the trial court's jurisdiction to authorize the receiver to take possession of the liquor license, because the license was not part of

the property hypothecated under the trust deed and the owners of the license did not consent to the receiver's possession of it (*72 Cal. App. 3d 804, 816)* . The record did not support the ex parte appointment of the receiver to take possession of the liquor license. An order appointing a receiver on an ex parte application should only be issued in cases of emergency that make it imperatively necessary to act at once and without notice, and no showing of emergency or imperative necessity had been made in the case at hand. The stringent procedural requirements of former Cal. Rules of Ct., Rule 238 (*now see Cal. Rules of Ct., Rule 3.1175*), for the ex parte appointment of a receiver were not satisfied (*72 Cal. App. 3d 804, 809-810 fn. 2*).

[4] Additional Authorities

[a] Appointment Void Absent Showing of Emergency

In *Golden State Glass Corp. v. Superior Ct. (1939) 13 Cal. 2d 384, 90 P.2d 75* , an action between corporate directors for damages for injury to the corporation, plaintiffs obtained the ex parte appointment of a receiver to take possession of the corporation's property, alleging the board of directors was deadlocked and the transaction of corporate business was thereby virtually suspended. On defendants' petition, the Supreme Court issued a writ of prohibition preventing enforcement of respondent court's order of appointment, finding the order to be in excess of that court's jurisdiction. The Court held, from the standpoint of the business welfare of a defendant corporation, the appointment of a receiver on an ex parte application should be done only in cases of the greatest emergency when, without an appointment, irreparable injury will unquestionably result (*13 Cal. 2d 384, 393)* . The Court found the requisite emergency justifying the appointment did not exist, since the corporation was clearly solvent at the time of the receivership and defendants were, in fact, transacting corporate business at a profit (*13 Cal. 2d 384, 395-396)* .

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20-200 California Points & Authorities § 200.61

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.61 Opposing Confirmation of Ex Parte Appointment of Receiver--Inadequate Showing of Irreparable Injury [Cal. Rules of Ct., Rule 3.1175(a)(1)]

[1] FORM Opposing Confirmation of Ex Parte Appointment of Receiver--Inadequate Showing of Irreparable Injury [Cal. Rules of Ct., Rule 3.1175(a)(1)]

[*Caption. See § 200.60[1].*]

THE COURT'S EX PARTE ORDER APPOINTING A RECEIVER IN THIS ACTION SHOULD NOT BE CONFIRMED, BECAUSE _____ [*specify party seeking appointment, e.g.,* PLAINTIFF] HAS FAILED TO MAKE THE REQUISITE SHOWING OF IRREPARABLE INJURY UNDER *RULE 3.1175(a)(1) OF THE CALIFORNIA RULES OF COURT*.

Appointment Void Absent Showing of Irreparable Injury. Appointment of a receiver will not be made ex parte and without notice except in the case of irreparable pending injury (*Fischer v. Superior Court (1895) 110 Cal. 129, 138, 42 P. 561* ; *McCall v. McCall Brothers Co. (1933) 135 Cal. App 558, 559, 27 P.2d 648* ; *see Cal. Rules of Ct., Rule 3.1175(a)(1)*).

[*Add points and authorities, as necessary, setting forth additional procedural grounds §§ 200.20 et seq. and §§ 200.60 and 200.62, as well as substantive grounds (see e.g., §§ 200.130 et seq., 200.210, 200.230 et seq., and 200.260), in opposition to the appointment of a receiver.*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to the contention that the ex parte order appointing a receiver should

be confirmed, on the ground that the party seeking the appointment has failed to make the requisite showing of irreparable injury [*see Cal. Rules of Ct., Rule 3.1175(a)(1)*]. For points and authorities opposing confirmation of ex parte order appointing receiver on the ground that the party seeking receivership has failed to show emergency or necessity, see *§ 200.60[1]*.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 200.50* et seq.

This form may be combined with points and authorities that set forth appropriate substantive grounds for opposing appointment of a receiver [*see, e.g., §§ 200.130 et seq., 200.210, 200.230 et seq., and 200.260*].

In addition, these points and authorities may be adapted for use:

- In a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

- As allegations or as a prayer in a complaint in a pending action seeking the provisional relief of receivership [*see* California Forms of Pleading and Practice, Ch. 486, *Receivers* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should insert facts showing the absence of necessity or emergency requiring the ex parte appointment. Counsel should also insert facts showing that the applicant would not suffer irreparable injury, particularly during the time necessary for a hearing on notice [*see Cal. Rules of Ct., Rule 3.1175(a)(1)*]. See also the *comments in § 200.50[2][b]* regarding evidentiary support for facts stated.

[c] Confirmation Hearing

For a discussion of the service and filing requirements for the confirmation hearing under *Cal. Rules of Ct., Rule 3.1176(a)* and *(b)*, see *§ 200.50[2][c]*. For a discussion of instances in which the party seeking to confirm appointment is excused under *Cal. Rules of Ct., Rule 3.1175(b)*, from setting forth all the matters usually required for an ex parte appointment, see *§ 200.50[3][a]*.

[d] Related Pleading and Practice Forms

For a form of declaration in support of the ex parte appointment of a receiver, a form of order to show cause why the ex parte appointment of a receiver should not be confirmed, a form of order confirming the ex parte appointment of a receiver, and an opposing party's procedural checklist, see California Forms of Pleading and Practice, Ch. 486, *Receivers* (Matthew Bender).

[3] Discussion of Authorities

[a] Appointment Void Absent Showing of Irreparable Injury

In ***Fischer v. Superior Court*** *(1895) 110 Cal. 129, 42 P. 561* , plaintiff, the real party in interest, commenced an action against petitioner and defendant corporation for wrongfully procuring shares belonging to plaintiff, wrongfully inducing plaintiff to sell a number of plaintiff's shares to petitioner, misappropriating dividends, and wrongfully issuing stock certificates. Plaintiff sought, among other relief, the appointment of a receiver to take possession and charge of the corporation's property, to work, operate, and develop the property during the pendency of the action, and to take possession of and hold all net corporate profits. The trial court granted plaintiff's ex parte application for appointment of

the receiver, and petitioner subsequently sought a writ of prohibition from theSupreme Court to prevent the trial court from proceeding further under the order appointing the receiver.

The Supreme Court granted the petition and issued a peremptory writ of prohibition, ordering the trial court to desist from further proceedings under the order appointing the receiver. The Court held the trial court exceeded its jurisdiction in appointing the receiver (*110 Cal. 129, 144)* . The Court noted the general rule that the appointment of a receiver to take property out of a defendant's possession without trial and without notice is unjustifiable except when it clearly appears that irreparable injury would be done during the few days necessary for a hearing on notice (*110 Cal. 129, 138)* . The trial court acted in excess of its jurisdiction in that the corporation was not subject to irreparable injury, because the corporation was already in receivership, as the result of a prior action, when the order appointing the receiver in the instant action was made (*110 Cal. 129, 139)* . The trial court further exceeded its jurisdiction in that it had no statutory authority to appoint a receiver to dissolve, in effect, the corporation by displacing the corporate management and putting the receiver in its place (*110 Cal. 129, 140)* .

McCall v. McCall Brothers Co. *(1933) 135 Cal. App 558, 27 P.2d 648* , was an action for dissolution of partnership in which plaintiff sought, among other relief, the appointment of a receiver. On plaintiff's filing of her verified complaint, the trial court issued an ex parte order appointing a receiver. Defendant appealed from the order of appointment.

The court of appeal reversed the trial court's order appointing the receiver. The court held the trial court erred in making the ex parte order appointing the receiver, because plaintiff made no showing that irreparable injury would result if the receiver was not appointed. Relying on *Fischer v. Superior Court (1895) 110 Cal. 129, 138, 42 P. 561* (discussed *above*), the court reiterated the general rule that so harsh a measure as the appointment of a receiver to take property out of a defendant's possession without trial and without notice would be unjustifiable except when it clearly appears that irreparable injury will be done during the few days necessary for a hearing on notice. The court found the allegations of the complaint in the instant case to be insufficient to show any great emergency or that any irreparable injury would be done during the few days necessary for a hearing on notice of an application for the appointment of a receiver (*135 Cal. App 558, 559)* .

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20-200 California Points & Authorities § 200.62

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.62 Opposing Confirmation of Ex Parte Appointment of Receiver--Appointment Void for Lack of Undertaking by Party Seeking Appointment [Code Civ. Proc. § 566(b)]

[1] FORM Opposing Confirmation of Ex Parte Appointment of Receiver--Appointment Void for Lack of Undertaking by Party Seeking Appointment [Code Civ. Proc. § 566(b)]

[*Caption. See § 200.60[1].*]

THE COURT'S EX PARTE ORDER APPOINTING A RECEIVER IN THIS ACTION SHOULD NOT BE CONFIRMED, BECAUSE _____ [*specify party seeking appointment, e.g.,* PLAINTIFF] HAS FAILED TO FILE THE UNDERTAKING REQUIRED BY SECTION 566(b) OF THE CODE OF CIVIL PROCEDURE.

Appointment Void When Applicant Fails to Give Undertaking. Before ordering the appointment of a receiver on an ex parte application, the court must require an undertaking from the applicant, and the court's failure to do so renders the order of appointment void (*Code Civ. Proc. § 566(b)*; *Stoff v. Erken (1916) 172 Cal. 481, 481-482, 156 P. 1033* ; *Westphal v. Superior Court (1932) 120 Cal. App 263, 264, 7 P.2d 711*).

[*Add points and authorities, as necessary, setting forth additional procedural grounds §§ 200.21 et seq. and §§ 200.60, 200.61, and 200.63, as well as substantive grounds (see, e.g., §§ 200.130 et seq., 200.210, 200.230 et seq., and 200.260), in opposition to the appointment of a receiver.*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the ex parte order appointing a

receiver should be confirmed, on the ground that the party seeking the appointment has failed to file the undertaking required by *Code Civ. Proc. § 566(b)*. The court must require the undertaking from the party seeking the appointment before making the order appointing the receiver ex parte. If the ex parte appointment has been procured wrongfully, maliciously, or without sufficient cause, the party opposing appointment is entitled to any damages sustained as a result of the receiver's appointment and entry on its duties [*Code Civ. Proc. § 566(b)*].

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 200.50* et seq.

This form may be combined with points and authorities that set forth appropriate substantive grounds for opposing appointment of a receiver [*see, e.g., §§ 200.130 et seq., 200.210, 200.230 et seq., and 200.260*].

In addition, these points and authorities may be adapted for use:

- In a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

- As allegations or as a prayer in a complaint in a pending action seeking the provisional relief of receivership [*see* California Forms of Pleading and Practice, Ch. 486, *Receivers* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should insert facts showing the court's failure to exact the undertaking required by *Code Civ. Proc. § 566(b)* before making the ex parte appointment. See also the *comments in § 200.50[2][b]* regarding evidentiary support for facts stated.

[c] Related Pleading and Practice Forms

For a form of declaration in support of the ex parte appointment of a receiver, a form of order to show cause why the ex parte appointment of a receiver should not be confirmed, and a form of order confirming the ex parte appointment of a receiver, California Forms of Pleading and Practice, Ch. 486, *Receivers* (Matthew Bender).

[3] Discussion of Authorities

[a] Appointment Void When Applicant Fails to Give Undertaking

In ***Stoff v. Erken*** *(1916) 172 Cal. 481, 156 P. 1033* , an action for the foreclosure of a mortgage, the trial court issued an ex parte order appointing a receiver. Defendant subsequently appealed from the order of appointment.

Reversing the order of the trial court, the Supreme Court held the order to be erroneous because the record showed that the trial court failed to exact any undertaking from the applicant before making the order (*172 Cal. 481, 481-482)* . The Court based its ruling on former Code Civ. Proc. § 566 (*now see Code Civ. Proc. § 566(b)*), which mandates a court, before making an ex parte order appointing a receiver, to require an undertaking from the applicant in an amount fixed by the court, to the effect that the applicant will pay to the defendant all damages sustained by the defendant if the applicant shall have wrongfully procured the order. The Court held the trial court's order erroneous even though the applicant, after filing the transcript in the Supreme Court, provided the Court with a certified copy of an undertaking purportedly on file in the trial court at the time the receiver was appointed. The Court noted that, even if it could consider the copy of the undertaking as part of the record on appeal, the copy did not cure the defect in the appointment, because it failed to show both that the undertaking was required by the trial court and the amount of the undertaking was fixed by the court as required by former Code Civ. Proc. § 566. Because the bill of exceptions filed on appeal declared that it contained all of the proceedings surrounding the receiver's appointment but did not contain the

undertaking or any order referring to it or fixing its amount, and because there was no proceeding to correct the bill, the copy of the undertaking could not be considered a part of the record on appeal (*172 Cal. 481, 482)* .

In ***Westphal v. Superior Court*** *(1932) 120 Cal. App 263, 7 P.2d 711* , petitioner sought, and the court of appeal issued, a writ of prohibition to prevent a receiver appointed by respondent court from further interfering with petitioner's property. The court based its issuance of the writ on former Code Civ. Proc. § 566 (*now see Code Civ. Proc. § 566(b)*), which mandates a court, before making an order appointing a receiver on an ex parte application, to require an undertaking from the applicant in an amount to be fixed by the court. By the undertaking, the applicant undertakes to pay to the defendant all damages the defendant may sustain by reason of the appointment of the receiver and entry by the receiver on his or her duties, in case the applicant has procured the appointment wrongfully, maliciously, or without sufficient cause. The court ruled that the appointment of the receiver was void because the applicant had not complied with the provisions of former Code Civ. Proc. § 566 (*120 Cal. App 263, 264)* .

[4] Additional Authorities

[a] Appointment Void When Applicant Fails to Give Undertaking

In *Sweins v. Superior Court (1936) 16 Cal. App. 2d 336, 60 P.2d 313* , an action to foreclose a chattel mortgage, respondent court issued an ex parte order appointing a receiver without requiring the applicants for the order to give an undertaking pursuant to former Code Civ. Proc. § 566 (*now see Code Civ. Proc. § 556(b)*). The court of appeal issued a peremptory writ of prohibition to prevent enforcement of the order of appointment. The court held the provisions of former Code Civ. Proc. § 566 to be mandatory such that the order of respondent court appointing the receiver without the required undertaking was void (*16 Cal. App. 2d 336, 336)* .

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20-200 California Points & Authorities § 200.63

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.63 Opposing Confirmation of Ex Parte Appointment of Receiver--Appointment Void as to Codefendants to Whom Undertaking Does Not Run

[1] FORM Opposing Confirmation of Ex Parte Appointment of Receiver--Appointment Void as to Codefendants to Whom Undertaking Does Not Run

[*Caption. See § 200.60[1].*]

THE COURT'S EX PARTE ORDER APPOINTING A RECEIVER IN THIS ACTION SHOULD NOT BE CONFIRMED, BECAUSE THE COURT'S APPROVAL OF THE UNDERTAKING DOES NOT RUN TO ALL THE DEFENDANTS IN THIS ACTION AND IS THEREFORE VOID AS TO THE DEFENDANTS TO WHOM THE UNDERTAKING DOES NOT RUN.

Undertaking Required to Run to All Defendants, and Appointment Void as to Codefendants to Whom Undertaking Does Not Run. The undertaking should be in such form that any defendant would have a right of action thereon if he or she is damaged by the appointment, and the court's approval of an undertaking that does not run to all defendants in an action renders the appointment void as to those defendants to whom the undertaking does not run (*Title Insurance & Trust Co. v. California Dev. Co. (1912) 164 Cal. 58, 65, 127 P. 502* ; *Falloon v. Superior Court (1926) 79 Cal. App 149, 153, 248 P. 1057*).

[*Add points and authorities, as necessary, setting forth additional procedural grounds §§ 200.21 et seq. and §§ 200.60 and 200.61, as well as substantive grounds (see e.g., §§ 200.130 et seq., 200.210, 200.230 et seq., and 200.260), in opposition to the appointment of a receiver.*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the ex parte order appointing a receiver should be confirmed, on the ground that court's approval of the undertaking does not run to all the defendants in this action and is therefore void as to the defendants to whom the undertaking does not run [*see Title Insurance & Trust Co. v. California Dev. Co. (1912) 164 Cal. 58, 65, 127 P. 502* ; *Falloon v. Superior Court (1926) 79 Cal. App 149, 153, 248 P. 1057]* . For points and authorities based on a lack of undertaking generally, see *§ 200.62[1]*.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 200.50* et seq.

This form may be combined with points and authorities that set forth appropriate substantive grounds for opposing appointment of a receiver [*see, e.g., §§ 200.130 et seq., 200.210, 200.230 et seq., and 200.260*].

In addition, these points and authorities may be adapted for use:

- In a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

- As allegations or as a prayer in a complaint in a pending action seeking the provisional relief of receivership [*see* California Forms of Pleading and Practice, Ch. 486, *Receivers* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should insert facts showing the failure of the undertaking to run in favor of all defendants in the action. See also the *comments in § 200.50[2][b]* regarding evidentiary support for facts stated.

[c] Related Pleading and Practice Forms

For a form of declaration in support of the ex parte appointment of a receiver, a form of order to show cause why the ex parte appointment of a receiver should not be confirmed, a form of order confirming the ex parte appointment of a receiver, and an opposing party's procedural checklist, see California Forms of Pleading and Practice, Ch. 486, *Receivers* (Matthew Bender).

[3] Discussion of Authorities

[a] Undertaking Required to Run to All Defendants, and Appointment Void as to Codefendants to Whom Undertaking Does Not Run

In ***Title Insurance & Trust Co. v. California Dev. Co.*** *(1912) 164 Cal. 58, 127 P. 502* , an action to foreclose a mortgage or trust deed made by defendants to secure the payment of certain bonds issued by it, plaintiffs obtained the ex parte appointment of a receiver, pursuant to *Code Civ. Proc. § 564(2)* (*now see Code Civ. Proc. § 564(b)(1)* and *(2)*, providing for the appointment of a receiver when mortgaged property is in danger of being lost, removed, or materially injured, or when the property is probably insufficient to discharge the mortgage debt). Before the court issued its order of appointment, plaintiff filed the undertaking required by former Code Civ. Proc. § 566 (*now see Code Civ. Proc. § 566(b)*). However, the undertaking ran in favor of one defendant only, and not in favor of defendant-appellant. When this defect in the undertaking was subsequently called to the trial court's attention, the court ordered plaintiff to file a new undertaking that would (1) run to all defendants, (2) ratify and confirm the original undertaking, and (3) provide that the liability on the undertaking last filed should relate back to and cover all damages caused by the appointment from the time it was made. On plaintiff's compliance with this order, defendant-appellant appealed from the ex parte order appointing the receiver, contending the order was void as to it.

The Supreme Court, finding that the undertaking in fact did run in favor of one of defendants and did not purport to run to or in favor of any other of defendants, including defendant-appellant, reversed the trial court's order appointing the receiver insofar as the order affected defendant-appellant (*164 Cal. 58, 65, 66)* . The Court held that the purpose of the undertaking requirement of former Code Civ. Proc. § 566 (*now see Code Civ. Proc. § 566(b)*) is to provide security to each defendant for the recovery of any damages he or she might suffer at the hands of a receiver whose appointment was procured wrongfully, maliciously, or without sufficient cause. The undertaking should, therefore, be in such a form that any defendant has a right of action thereon if he or she is damaged by the appointment (*164 Cal. 58, 65)* . While the Court found it unnecessary to say whether the second undertaking operated to make the receiver's appointment valid from the date of the ex parte order of appointment, the Court did find that the second undertaking operated to make the appointment valid from the time of filing the second undertaking, and that it would also cure any defects in the manner of the execution of the original undertaking (*164 Cal. 58, 65-66)* . The Court noted that because defendant-appellant was not a necessary party to the action and did not claim any interest in the property in receivership, the reversal of the order of appointment would not affect the order's validity as to the other parties to the action and would inure only to the benefit of defendant-appellant. The result of excluding defendant-appellant from the order would be that its rights or interests would not be bound for any costs or expenses engendered by the receivership (*164 Cal. 58, 66)* .

In ***Falloon v. Superior Court*** *(1926) 79 Cal. App 149, 248 P. 1057* , a contempt proceeding arose out of two underlying actions, a condemnation action and a quiet title action. In the quiet title action, plaintiff, who was not a party to the condemnation action, sued a number of defendants who each claimed an interest in the property that was the subject matter of both actions. One of these defendants, who was also an intervenor in the condemnation action, answered and cross complained, alleging both an equitable title to the property and the existence of an interlocutory judgment in the condemnation action in favor of the plaintiff city in that action. Her cross complaint also sought the appointment of a receiver to take charge of funds that the city had deposited in court in the condemnation action for ultimate disbursement to the owners of the condemned property. Subsequently, cross complainant noticed a motion to appoint the receiver. Five days later, plaintiff also noticed a motion to appoint a receiver of the funds. The trial court heard both motions on the same day and appointed a receiver.

In the contempt proceeding, cross complainant's attorney obtained a stipulation from all parties to both the condemnation and the quiet title actions, except the plaintiff in the quiet title action, to withdraw the funds, of which the receiver had been appointed, on deposit in court. The attorney then deliberately misrepresented to a presiding judge in a department other than the one in which the receiver had been appointed that the litigation was settled, and obtained an order from that judge permitting the withdrawal of the funds. Subsequently, counsel for plaintiff in the quiet title action instituted contempt proceedings against the attorney. After being found guilty of contempt under former Code Civ. Proc. § 1209(3) (willful neglect or violation of duty by an attorney as contempt) (*now see Code Civ. Proc. § 1209(a)(3)*), the attorney sought to annul the judgment.

The court of appeal affirmed the judgment of the trial court finding the attorney guilty of contempt (*79 Cal. App 149, 159)* . In so ruling, the court specifically addressed the appointment of the receiver. The court held the appointment to be, in effect, ex parte as to two of the defendants in the quiet title action, and as such, void as to them because the trial court failed to require from either of the moving parties the undertaking of an applicant for an ex parte order appointing a receiver, mandated by former Code Civ. Proc. § 566 (*now see Code Civ. Proc. § 566(b)*). In so holding, the court found that neither motion for the appointment was served on these two defendants (*79 Cal. App 149, 153)* . Additionally, the notice of motion filed by the quiet title plaintiff not only was not served on the same two defendants, but also omitted all reference to any property or res to be taken into the possession of the receiver (*79 Cal. App 149, 152-153)* . Finally, even though the quiet title plaintiff amended her complaint to include a prayer for the appointment of a receiver, it was not clear to the court whether she had done so before or after the receiver was actually appointed (*79 Cal. App 149, 153)* .

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PART II. FORMS
A. Proceedings to Appoint Receiver
2. Order to Show Cause re Ex Parte Appointment of Receiver

20-200 California Points & Authorities §§ 200.64-200.69

AUTHOR: Robert Kaplan Editorial Consultant

[Reserved]

§§ 200.64[Reserved]

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3. Appointment of Receiver on Court's Own Motion

20-200 California Points & Authorities § 200.70

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.70 Supporting Court's Own Motion to Appoint Receiver

[1] FORM Supporting Court's Own Motion to Appoint Receiver

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*]	)	MEMORANDUM SUPPORTING COURT'S OWN
Plaintiff,	)	MOTION TO APPOINT RECEIVER
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

THE COURT SHOULD APPOINT A RECEIVER IN THIS ACTION BECAUSE THE COURT HAS THE AUTHORITY TO APPOINT A RECEIVER ON ITS OWN MOTION, AND THE CIRCUMSTANCES OF THIS CASE SUPPORT THE EXERCISE OF THE COURT'S DISCRETION IN FAVOR OF THE APPOINTMENT.

Court May Appoint Receiver on Its Own Motion. In the exercise of its discretion, the court may appoint a receiver on its own motion, when the necessary facts and parties are before it, if it deems the case a proper one for a receiver (*see Whitney v. Buckman (1864) 26 Cal. 447, 453* ; *Venza v. Venza (1949) 94 Cal. App. 2d 878, 883-884, 211 P.2d 913*).

[*Add points and authorities that set forth appropriate substantive grounds for the appointment of a receiver (see, e.g., §§ 200.80 et seq., 200.270 et seq., and 200.350 et seq.).*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of appointment of a receiver on the court's own motion if the court requests briefing on the issue or may be incorporated in an appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

This form is a general form that should be combined with points and authorities that set forth appropriate substantive grounds for the appointment of a receiver [*see, e.g., §§ 200.80 et seq., 200.270 et seq., and 200.350* et seq.].

These points and authorities may be combined with points and authorities contending that the form of evidence is sufficient to justify appointment [*see § 200.40[1]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should include specific facts showing that the appointment of a receiver is within the trial court's discretion under the particular facts of the case. For example, in an appropriate case, counsel would refer to evidence set forth in any of the following:

- Declarations and affidavits submitted in support of, or even in opposition to, the appointment [*see Cal. Rules of Court, Rule 3.1306(a)*].

- Discovery documents, such as deposition transcripts and answers to interrogatories and requests for admission.

- The opposing party's pleadings that constitute admissions.

- Other documentary evidence generally.

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*].

When counsel cites facts in his or her argument, counsel should refer to the particular page and line number of the

declaration, deposition transcript, or other document, that contains the cited facts. In addition, the relevant portion of any testimony in a deposition should be marked in a manner that calls attention to the testimony [*see Cal. Rules of Court, Rule 3.1116(c)*].

For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Forms

For a form of notice of motion for the appointment of a receiver, general form of allegations and prayer in a complaint seeking the appointment of a receiver, and applicant's procedural checklist, see California Forms of Pleading and Practice, Ch. 486, *Receivers* (Matthew Bender).

[d] Opposing Memoranda

In an appropriate case, the points and authorities *set out in § 200.20* et seq. may be used to oppose the contention supported by these points and authorities. In addition, in an appropriate case, the memoranda opposing the appointment of a receiver on substantive grounds set in §§ 200.130 et seq., 200.210, 200.230 et seq., and 200.260 may be used to oppose the contention supported by this memorandum.

[3] Discussion of Authorities

[a] Court May Appoint Receiver on Its Own Motion

In ***Whitney v. Buckman*** *(1864) 26 Cal. 447* , plaintiffs obtained title to certain real property held by defendants. After judgment and pending defendants' motion for a new trial, plaintiffs sought injunctive relief to prevent defendants from diverting the flow of spring water on the property and to prevent defendants from damaging the building and machinery located on the property that plaintiffs used in their business of bottling and selling the spring water. At the hearing on plaintiffs' application for an injunction, the court did not grant injunctive relief but appointed a receiver to take charge of the springs, bottle and sell the waters, and retain the proceeds pending litigation. After entry of final judgment for plaintiffs, and on plaintiffs' motion, the trial court ordered the receiver to pay to plaintiffs the net proceeds of the sale of the water. Defendants appealed from this order.

The Supreme Court affirmed the trial court's order of payment of the proceeds to plaintiffs. The Court found the evidence sufficient to justify the appointment of the receiver (*26 Cal. 447, 453)* . The Court noted that when the trial court made the appointment, the necessary facts and parties were all before the court, and defendant did not object to the appointment. Furthermore, defendant did not seek a continuance to prepare himself further on the issue of the propriety of the appointment. On these facts, the Court found that the trial court, in the exercise of its discretion, deemed the case a proper one for a receiver rather than an injunction and made the appointment. The Court further found the interests of the parties to be served by the appointment. However, despite this language of approval, the Court held the order of appointment not reviewable, because defendant had not appealed from that order. Defendant appealed only from an order issued subsequent to judgment, and on that appeal the interlocutory order appointing the receiver could not be reviewed (*26 Cal. 447, 453-454)* .

In ***Venza v. Venza*** *(1949) 94 Cal. App. 2d 878, 211 P.2d 913* , plaintiff, a divorcee, brought an action against defendants, including her former husband, to establish her community interest in a cannery operated by defendants. Subsequent to filing the action, plaintiff obtained a temporary restraining order, restraining defendants from selling various agricultural products of the cannery during the current packing season. Defendants then moved the court for an order either dissolving the restraining order or requiring plaintiff to furnish an undertaking as a condition of continuing the restraining order. At the hearing on defendants' motion, and with the consent of all parties, the court suggested that a

receiver of the cannery be appointed to take charge of the finances of the business. The next day, again without objection from defendants, the court appointed a receiver to take possession of all of defendants' assets. The court then enjoined defendants from interfering with the possession of the receiver, and subsequently dissolved the temporary restraining order. Defendants appealed from the trial court's order appointing the receiver.

Quoting from *Whitney v. Buckman (1864) 26 Cal. 447, 453* (discussed *above*), the court of appeal affirmed the trial court's order appointing the receiver, holding that an order appointing a receiver may be made without any previous request by either party (*94 Cal. App. 2d 878, 883)* . In so ruling, the court noted that even though the order appointing the receiver was broader than the kind of order suggested in open court, the record contained no showing that counsel for defendants objected to either the appointment of the receiver or the scope of the order of appointment (*94 Cal. App. 2d 878, 882)* . Indeed, the court noted defendants' counsel's statement in the record that he thought, as a practical matter, the receivership would work out all right (*94 Cal. App. 2d 878, 883)* . Additionally, defendants' counsel was present in court when the temporary restraining order was dissolved, and made no objection to the dissolution (*94 Cal. App. 2d 878, 882)* . Finally, the court found no showing in the record that defendants suffered from the action of the trial court, that any miscarriage of justice resulted from the court's order, or that the receiver interfered with the orderly operation of the business or extended his powers further than to maintain the status quo of the business as originally suggested by the trial court (*94 Cal. App. 2d 878, 882-883)* .

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20-200 California Points & Authorities §§ 200.71-200.79

AUTHOR: Robert Kaplan Editorial Consultant

[Reserved]

§§ 200.71[Reserved]

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B. Appointment of Receiver in Specified Actions
1. Vendor's Action to Vacate Fraudulent Purchase

20-200 California Points & Authorities § 200.80

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.80 Supporting Contention That Receiver Should Be Appointed in Action by Vendor to Vacate Fraudulent Purchase of Property [Code Civ. Proc. § 564(b)(1)]

[1] FORM Supporting Contention That Receiver Should Be Appointed in Action by Vendor to Vacate Fraudulent Purchase of Property [Code Civ. Proc. § 564(b)(1)]

[*This form should be combined with a memorandum of points and authorities supporting a motion to appoint receiver (see § 200.10) or an ex parte application to appoint receiver (see § 200.50), or included in a trial or appellate brief.*]

THE COURT SHOULD APPOINT A RECEIVER IN THIS ACTION BECAUSE _____ [*specify party seeking appointment, e.g.,* PLAINTIFF] IS A VENDOR WHO IS SEEKING TO VACATE A FRAUDULENT PURCHASE OF PROPERTY, HE/SHE/IT HAS A PROBABLE _____ [RIGHT TO *or* INTEREST IN] [THE PROCEEDS OF] THE PROPERTY SOUGHT TO BE PLACED IN RECEIVERSHIP, AND THE _____ [PROCEEDS *or* PROPERTY] IS/ARE IN DANGER OF _____ [LOSS *and/or* REMOVAL *and/or* MATERIAL INJURY].

Action by Vendor to Vacate Fraudulent Purchase of Property. The court in which an action or proceeding is pending may appoint a receiver in an action by a vendor to vacate a fraudulent purchase of property on the application of any party whose right to or interest in the property, or its proceeds, is probable, and when the applicant shows that the property is in danger of loss, removal, or material injury (*Code Civ. Proc. § 564(b)(1)*).

[2] Comments

[a] Use of Form

This form of memorandum may be submitted in support of the contention that a receiver should be appointed in an

action by a vendor to vacate a fraudulent purchase of property when [*see Code Civ. Proc. § 564(b)(1)*]:

- The interest of the moving party in the property or its proceeds is probable, and
- It is shown that the property is in danger of being lost, removed, or materially injured.

This memorandum should be combined with a form of memorandum relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of the appointment. For example, this memorandum may be:

- Submitted in support of a motion to appoint a receiver [*see § 200.10*].
- Submitted in support of the confirmation of an ex parte order appointing a receiver [*see § 200.50*].
- Adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].
- Raised as allegations or as a prayer in a complaint in a pending action seeking the provisional relief of receivership [*see* California Forms of Pleading and Practice, Ch. 486, *Receivers* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should include specific facts showing fraud, that the moving party has a right to or interest in the property sought to be placed in receivership, or its proceeds, and that the property is in danger of loss, removal, or material injury. For example, counsel would refer to evidence set forth in:

- Declarations and affidavits submitted in support of or in opposition to the appointment [*see Cal. Rules of Court, Rule 3.1306(a)*].
- Discovery documents, such as deposition transcripts and answers to interrogatories and requests for admission.
- The opposing party's pleadings that constitute admissions.
- Other documentary evidence generally.

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*].

When counsel cites facts in his or her argument, counsel should refer to the particular page and line number of the declaration, deposition transcript, or other document, that contains the cited facts. In addition, the relevant portion of any testimony in a deposition should be marked in a manner that calls attention to the testimony [*see Cal. Rules of Court, Rule 3.1116(c)*].

For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Showing Required

Code Civ. Proc. § 564(b)(1) states that a receiver may be appointed in an action by a vendor to vacate a fraudulent purchase of property on the application of any party whose right to or interest in the property, or its proceeds, is probable, and when it is shown that the property is in danger of loss, removal, or material injury. Nevertheless, counsel should note that in *Cal. Delta Farms v. Chinese Amer. Farms (1928) 204 Cal. 524, 526, 269 P. 443* , the Supreme Court held that in order to justify the appointment of a receiver under *Code Civ. Proc. § 564(b)(1),* either fraud must be shown in the purchase or the party seeking the receiver must be shown to have some right in, lien on, or claim to the property or fund in issue. *Cal. Delta Farms* is discussed in *§ 200.150[3][a]*.

[d] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

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20-200 California Points & Authorities §§ 200.81-200.89

AUTHOR: Robert Kaplan Editorial Consultant

[Reserved]

§§ 200.81[Reserved]

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B. Appointment of Receiver in Specified Actions
2. Action Between Joint Owners of Property or Fund

20-200 California Points & Authorities § 200.90

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.90 Supporting Contention That Receiver Should Be Appointed in Action Between Parties Jointly Owning or Interested in Property or Fund [Code Civ. Proc. § 564(b)(1)]--General Form

[1] FORM Supporting Contention That Receiver Should Be Appointed in Action Between Parties Jointly Owning or Interested in Property or Fund [Code Civ. Proc. § 564(b)(1)]--General Form

[*This form should be combined with a memorandum of points and authorities supporting a motion to appoint receiver (see § 200.10) or an ex parte application to appoint receiver (see § 200.50), or included in a trial or appellate brief.*]

THE COURT SHOULD APPOINT A RECEIVER IN THIS ACTION BECAUSE _____ [*specify party seeking appointment, e.g.,* PLAINTIFF], TOGETHER WITH _____ [*specify opposing party, e.g.,* DEFENDANT], JOINTLY _____ [OWNS *or* IS INTERESTED IN] [THE PROCEEDS OF] _____ [THE PROPERTY *or* A FUND] SOUGHT TO BE PLACED IN RECEIVERSHIP, HE/SHE/IT HAS A PROBABLE _____ [RIGHT TO *or* INTEREST IN] [THE PROCEEDS OF] THE PROPERTY OR FUND, AND THE _____ [PROCEEDS *or* PROPERTY *or* FUND] IS/ARE IN DANGER OF _____ [LOSS *and/or* REMOVAL *and/or* MATERIAL INJURY].

A. Action Between Parties Jointly Owning or Interested in Property, Fund, or Proceeds. In an action between parties jointly owning or interested in property or a fund, or the proceeds of either, a receiver may be appointed by the superior court in which the action or proceeding is pending, or by a judge thereof, on the application of any party whose right to or interest in the property, fund, or proceeds is probable, and when the applicant shows that the property, fund, or proceeds is in danger of loss, removal, or material injury (*Code Civ. Proc. § 564(b)(1)*; *Maggiora v. Palo Alto Inn, Inc. (1967) 249 Cal. App. 2d 706, 710, 57 Cal. Rptr. 787*).

B. Showing of Probable Interest in Property, Fund, or Proceeds. If it appears that the party seeking the appointment of the receiver has at least a probable right to or interest in the property or fund sought to be placed in receivership, the

appointment will not be disturbed on appeal (*Maggiora v. Palo Alto Inn, Inc. (1967) 249 Cal. App. 2d 706, 710, 57 Cal. Rptr. 787* ; *Republic of China v. Chang (1955) 134 Cal. App. 2d 124, 130-131, 285 P.2d 351*).

C. Showing That Property Is in Danger of Loss, Removal, or Material Injury. If it appears that the property or fund sought to be placed in receivership is in danger of destruction, removal, or misappropriation, the appointment will not be disturbed on appeal (*see Goes v. Perry (1941) 18 Cal. 2d 373, 381, 115 P.2d 441* ; *Armbrust v. Armbrust (1946) 75 Cal. App. 2d 272, 275, 171 P.2d 75*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the court should appoint a receiver in an action between parties jointly owning or interested in property or a fund, or the proceeds thereof, on the grounds that the party seeking the appointment must have a probable right to or interest in the property, fund, or proceeds sought to be placed in receivership, and that the property, fund, or proceeds is in danger of being lost, removed, or materially injured [*see Code Civ. Proc. § 564(b)(1)*].

These points and authorities should be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of the appointment. For example, these points and authorities may be:

- Submitted in support of a motion to appoint a receiver [*see § 200.10*].
- Submitted in support of the confirmation of an ex parte order appointing a receiver [*see § 200.50*].
- Adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].
- Raised as allegations or as a prayer in a complaint in a pending action seeking the provisional relief of receivership [*see* California Forms of Pleading and Practice, Ch. 486, *Receivers* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should include specific facts showing a probable joint or common interest between or among the parties in the property or fund sought to be placed in receivership, and showing that the property or fund, or its proceeds, is in danger of loss, removal, or material injury. See also the *comments in § 200.80[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

The points and *authorities in § 200.130* may be used in an appropriate case to oppose the points and authorities set out in this general form (as well as the points and authorities designed to be combined with this form, *set out in § 200.91*).

[3] Discussion of Authorities

[a] Action Between Parties Jointly Owning or Interested in Property, Fund, or Proceeds.

The facts and procedural background of ***Maggiora v. Palo Alto Inn, Inc.*** *(1967) 249 Cal. App. 2d 706, 57 Cal. Rptr. 787* , are discussed in *§ 200.50[3][c]*. The court of appeal affirmed the trial court's affirmance of its ex parte order

appointing a receiver of defendant's hotel and convention center. The court of appeal ruled that the pertinent question on a motion for a receivership is whether the facts alleged in a petitioner's complaint and declarations establish at least a probability of a joint or common interest in an enterprise that is in danger of loss, removal, or material injury, as required by *Code Civ. Proc. § 564(b)(1)*. The court found not only that the allegations of the supporting documents in the instant case sufficiently disclosed the required interest and danger, but also that the trial court was justified in its finding that the ex parte appointment of the receiver was warranted (*249 Cal. App. 2d 706, 712)* .

[b] Showing of Probable Interest in Property, Fund, or Proceeds

The facts and procedural background of ***Maggiora v. Palo Alto Inn, Inc.*** *(1967) 249 Cal. App. 2d 706, 57 Cal. Rptr. 787* , are discussed in *§ 200.50[3][c]*. In affirming the trial court's affirmance of its ex parte order appointing a receiver of defendant's hotel and convention center, the court of appeal held that the appointment of a receiver rests largely in the discretion of the trial court. Therefore, if it appears that the party seeking the appointment has at least a probable right or interest in the property sought to be placed in receivership, the appointment of the receiver will not be disturbed on appeal (*249 Cal. App. 2d 706, 710)* . The court then held that plaintiffs had made a sufficient showing of joint or common interest in the property to warrant the appointment of the receiver (*249 Cal. App. 2d 706, 710)* . In so holding, the court considered the terms of the lease between plaintiffs and defendants, which provided that, in exchange for plaintiffs' lease of the real property to defendants for a period of 99 years, defendants would pay to plaintiffs a minimum monthly rental, together with a percentage rental of certain gross receipts of the hotel and convention business. The court also considered plaintiffs' agreement to allow defendant to subordinate the entire premises, including the land, to construction loans, and plaintiffs' agreement to act as co-trustors with defendant on chattel mortgages and two deeds of trust securing the purchase price of the property. The trust deeds assigned the rents of the property to the holders of the first and second deeds of trust in the event of a default (*249 Cal. App. 2d 706, 708, 711)* . In ruling that the totality of these financial arrangements provided a joint or common interest in the property among the parties, sufficient to justify the appointment of the receiver, the court noted the importance of the financial provisions, inasmuch as they increased the liabilities of plaintiffs far beyond those normally found in the usual lessor-lessee situation (*249 Cal. App. 2d 706, 711)* .

In ***Republic of China v. Chang*** *(1955) 134 Cal. App. 2d 124, 285 P.2d 351* , plaintiff government advanced in the course of business several million dollars to the director of one of its purchasing offices in the United States who, in turn, entered into a conspiracy with defendant to embezzle some of these funds. Pursuant to the conspiracy, defendant and the purchasing office director represented to plaintiff that they had spent several thousand dollars on the purchase of aircraft equipment and in payment of administrative expenses. In reality, the purchasing office director gave the funds to defendant, who used them to purchase assorted real and personal property for his own use, including various objets d'art and an automobile. Plaintiff subsequently closed the purchasing office and filed an action for an accounting in federal court against the director. After the director fled the United States, plaintiff commenced actions against defendant for embezzlement and money had and received, seeking damages and the imposition of a constructive trust on the property acquired by defendant with the embezzled funds. Plaintiff also sought the ex parte appointment of a receiver, claiming that defendant had threatened to leave the United States permanently in the near future and to take the personal property with him, and was in fact engaged in removing all of his assets, including the personal property, from the state. The trial court appointed, ex parte, a receiver of the property and subsequently confirmed the appointment. Defendant then appealed from both the order of appointment and the order of confirmation.

The court of appeal affirmed the trial court's orders. The court noted that the appointment of a receiver is a matter in the discretion of the trial court and that if it appears that the party seeking the appointment has at least a probable right or interest in the property, and that there is danger of the property being lost, destroyed, or misappropriated, then a reviewing court is, as a general rule, in no position to say that a court of first instance has abused its discretion in appointing the receiver. The court then held that the allegations of plaintiff's verified complaint, together with declarations supporting an application for an order for defendant's arrest and supporting plaintiff's application for the appointment of the receiver, were legally sufficient to show that plaintiff had a probable interest in the property and that

there was danger that the property would be removed from the jurisdiction of the superior court (*134 Cal. App. 2d 124, 131-132)* . These documents contained allegations that defendant had in his possession a number of objets d'art that he had purchased with funds received by him from the purchasing office director, that defendant intended to leave the United States permanently, that he intended to ship all of his personal belongings, including the objets d'art, to an unknown destination, and that he had recently applied for a visa for entry into a foreign country (*134 Cal. App. 2d 124, 127-128)* .

[c] Showing That Property Is in Danger of Destruction, Removal, or Loss

The facts and procedural background of ***Goes v. Perry*** *(1941) 18 Cal. 2d 373, 381, 115 P.2d 441* , are discussed § 200.10[3][a]. In Goes, intervenor sought to impose a constructive trust on, and to place in receivership, personal property consisting of the furniture and fixtures of a hotel and club. Intervenor claimed that the money used to purchase the personal property was wrongfully appropriated from a trust fund belonging to her and others. The hotel and club, together with its business and the real property on which the hotel and club was located, were already in receivership at the time intervenor filed her complaint in intervention. In affirming the trial court's order appointing a receiver of the personal property, the Supreme Court held that the appointment of a receiver rests largely in the discretion of the trial court, and that its action in appointing the receiver will not be disturbed by an appellate court in the absence of a showing of abuse of discretion. The Court found that the trial court did not abuse its discretion because the intervenor's allegations in support of the appointment were sufficient to justify the trial court in appointing the receiver for the preservation of the personal property. In so ruling, the Court considered intervenor's allegations that the quiet and peaceful possession, management, and control of all the property, real and personal, in the hands of one receiver was the best and only means of avoiding great confusion and loss of the property. The Court also considered intervenor's allegation that placing the personal property in receivership would not stop or seriously interfere with the hotel and club business but, on the contrary, would be absolutely essential to its continued operation (*18 Cal. 2d 373, 380-381)* .

The facts and procedural background of ***Armbrust v. Armbrust*** *(1946) 75 Cal. App. 2d 272, 171 P.2d 75* , are discussed in *§ 200.40[3][a]*. In affirming the trial court's order appointing the receiver after notice and hearing, the court of appeal held that the appointment of a receiver is a matter in the discretion of the trial court. Therefore, if it appears that the party seeking the appointment has at least a probable right to or interest in the property, and that there is danger of the property being lost, destroyed, or misappropriated, a reviewing court is, as a general rule, in no position to say that a court of first instance has abused its discretion in appointing the receiver (*75 Cal. App. 2d 272, 275)* . The court of appeal found that under *Code Civ. Proc. § 564(b)(1)* the apartment building in dispute was in danger of material injury. In so ruling, the court considered the allegations in defendant's cross complaint that plaintiff had, to the dissatisfaction of the tenants, failed to properly care for and manage the property, and that plaintiff was occupying one of the apartments in the building without paying rent. The court also considered plaintiff's claim that, unless a receiver was appointed, loss of rentals, deterioration and depreciation of the property, and dissipation of other assets was likely to result (*75 Cal. App. 2d 272, 274)* .

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Volume 20 Chapters 200-209 RECEIVERS---to---SANCTIONS
CHAPTER 200 RECEIVERS
PART II. FORMS
B. Appointment of Receiver in Specified Actions
2. Action Between Joint Owners of Property or Fund

20-200 California Points & Authorities § 200.91

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.91 Supporting Contention That Receiver Should Be Appointed in Action Between Parties Jointly Owning or Interested in Property or Fund [Code Civ. Proc. § 564(b)(1)]--Determination of Ultimate Issue of Precise Relationship of Parties Is Not Prerequisite to Granting Motion to Appoint Receiver

[1] FORM Supporting Contention That Receiver Should Be Appointed in Action Between Parties Jointly Owning or Interested in Property or Fund [Code Civ. Proc. § 564(b)(1)]--Determination of Ultimate Issue of Precise Relationship of Parties Is Not Prerequisite to Granting Motion to Appoint Receiver

[*This form should be combined with a memorandum of points and authorities supporting a motion to appoint receiver (see § 200.10) or an ex parte application to appoint receiver (see § 200.50), or included in a trial or appellate brief.*]

THE COURT SHOULD APPOINT A RECEIVER IN THIS ACTION BECAUSE _____ [*specify party seeking appointment, e.g.,* PLAINTIFF] HAS SHOWN A PROBABLE JOINT OR COMMON INTEREST IN THE _____ [PROPERTY *or* FUND] CONCERNED, AND A DETERMINATION OF THE PRECISE RELATIONSHIP OF THE PARTIES IS NOT A PREREQUISITE TO APPOINTMENT OF A RECEIVER.

Determination of Ultimate Issue of Precise Relationship of Parties Is Not Prerequisite to Granting Motion to Appoint Receiver. In deciding whether to appoint a receiver, the trial court is not required to determine the ultimate issues involving the precise relationship of the parties; therefore, the party seeking the appointment of the receiver need show nothing more than a probable joint or common interest in the property or fund concerned (*Maggiora v. Palo Alto Inn, Inc. (1967) 249 Cal. App. 2d 706, 711, 57 Cal. Rptr. 787*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the court should appoint a receiver in an action between parties jointly owning or interested in property or a fund, or the proceeds thereof, on the ground that the party seeking the appointment has established a probable joint or common interest in the property or fund concerned. The trial court is not required to determine the ultimate issues involving the precise relationship of the parties [*Maggiora v. Palo Alto Inn, Inc. (1967) 249 Cal. App. 2d 706, 711, 57 Cal. Rptr. 787* , discussed in *§ 200.91[3][a]*].

From a strategic standpoint, counsel who represents a party who is seeking the appointment of a receiver normally would not raise the issue stated in these points and authorities in an initial memorandum. Rather, he or she would include the points and authorities in a reply memorandum or brief served in response to the opposing party's objection to the receivership.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of the appointment. For further discussion, see *§ 200.90[2][a]*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Therefore, counsel would refer to title, testamentary, or other documents that establish a probable joint or common interest in the property or fund concern. See also the *comments in § 200.80[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

The points and *authorities in § 200.130* may be used in an appropriate case to oppose the points and authorities set out in this form.

[3] Discussion of Authorities

[a] Determination of Ultimate Issue of Precise Relationship of Parties Is Not Prerequisite to Granting Motion to Appoint Receiver

The facts and procedural background of ***Maggiora v. Palo Alto Inn, Inc.*** *(1967) 249 Cal. App. 2d 706, 57 Cal. Rptr. 787* , are discussed in *§ 200.50[3][c]*. In affirming the trial court's affirmance of its ex parte order appointing a receiver of defendant's hotel and convention center, the court of appeal addressed appellants' contention that plaintiffs had established no joint or common interest in the property sought to be placed in receivership. Finding that plaintiffs had established a joint or common interest in the property, as required by *Code Civ. Proc. § 564(b)(1)*, the court held that the trial court, at the hearing on the confirmation of the ex parte appointment of the receiver (which the court of appeal termed "the motion for receivership"), was not required to determine the ultimate issues involving the precise relationship of the parties. At that pretrial stage of the proceedings, the trial court needed to determine nothing more than that the parties seeking the receivership showed a probable joint or common interest in the property concerned (*249 Cal. App. 2d 706, 711)* .

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20-200 California Points & Authorities §§ 200.92-200.99

AUTHOR: Robert Kaplan Editorial Consultant

[Reserved]

§§ 200.92[Reserved]

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20-200 California Points & Authorities § 200.100

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.100 Supporting Contention That Receiver Should Be Appointed in Action Between Partners [Code Civ. Proc. § 564(b)(1)]--General Form

[1] FORM Supporting Contention That Receiver Should Be Appointed in Action Between Partners [Code Civ. Proc. § 564(b)(1)]--General Form

[*This form should be combined with a memorandum of points and authorities supporting a motion to appoint receiver (see § 200.10) or an ex parte application to appoint receiver (see § 200.50), or included in a trial or appellate brief.*]

THE COURT SHOULD APPOINT A RECEIVER IN THIS ACTION BECAUSE _____ [*specify party seeking appointment, e.g.,* PLAINTIFF] and _____ [*specify opposing party, e.g.,* DEFENDANT] ARE PARTNERS, _____ [*specify party seeking appointment, e.g.,* PLAINTIFF] HAS A PROBABLE _____ [RIGHT TO *or* INTEREST IN] THE _____ [PROPERTY *or* FUND *or* PROCEEDS OF THE _____ (PROPERTY *or* FUND)] SOUGHT TO BE PLACED IN RECEIVERSHIP, AND THE _____ [PROCEEDS *or* PROPERTY *or* FUND] IS/ARE IN DANGER OF _____ [LOSS *and/or* REMOVAL *and/or* MATERIAL INJURY].

A. Action Between Partners. A receiver may be appointed in an action between partners when the party seeking the appointment has a probable right to or interest in the property or fund, or the proceeds thereof, sought to be placed in receivership, and there is danger of the property, fund, or proceeds being lost, removed, or materially injured (*Code Civ. Proc. § 564(b)(1)*; *Whitley v. Bradley (1910) 13 Cal. App. 720, 725, 110 P. 596*).

B. Appointment on Showing of Probable Interest in Property, Fund, or Proceeds. When the trial court, albeit on conflicting evidence, is presented with proof of an actual business partnership, the appointment of a receiver of the assets of the partnership is entirely within the trial court's discretion, and an appellate court is not justified in substituting its discretion for that of the trial court unless the trial court has abused its discretion in ordering the

appointment (*Baldwin v. Baldwin (1944) 67 Cal. App. 2d 175, 177, 153 P.2d 567* ; *Whitley v. Bradley (1910) 13 Cal. App. 720, 725, 110 P. 596*).

C. Appointment on Showing That Property Is in Danger of Loss, Removal, or Material Injury. When it appears that there is danger of misappropriation or loss of the property of a partnership, a reviewing court is in no position to say that the trial court has abused its discretion in appointing a receiver of the property (*Sibert v. Shaver (1952) 113 Cal. App. 2d 19, 21-22, 247 P.2d 609* ; *Breedlove v. Breedlove Excavating Co. (1942) 56 Cal. App. 2d 141, 143, 132 P.2d 239*)

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the court should appoint a receiver in an action between partners on the ground that the party seeking the appointment has a probable right to or interest in the property or fund, or the proceeds thereof, sought to be placed in receivership, and that the property or fund, or its proceeds, is in danger of being lost, removed, or materially injured [*see Code Civ. Proc. § 564(b)(1)*].

These points and authorities should be linked with points and authorities related to an action between parties jointly interested in property or fund, or the proceeds thereof, generally [*see § 200.90[1]*].

As required, these points and authorities may also be linked with points and authorities providing that determination of the ultimate issue of the precise relationship of the parties is not prerequisite to granting a motion to appoint a receiver [*see § 200.91[1]*], and with points and authorities providing that a determination of whether the relationship between the parties is a partnership or joint venture is immaterial [*see § 200.121[1]*].

These points and authorities should be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of the appointment. For example, these points and authorities may be:

- Submitted in support of a motion to appoint a receiver [*see § 200.10*].

- Submitted in support of the confirmation of an ex parte order appointing a receiver [*see § 200.50*].

- Adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

- Raised as allegations or as a prayer in a complaint in a pending action seeking the provisional relief of receivership [*see* California Forms of Pleading and Practice, Ch. 486, *Receivers* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should include specific facts showing that a partnership exists and that the partnership property or fund, or its proceeds, is in danger of loss, removal, or material injury. See also the *comments in § 200.80[2][b]* regarding evidentiary support for facts stated.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of

this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* . For memoranda of points and authorities relating to actions involving partnerships generally, see Ch. 170, *Partnerships and Joint Ventures* .

[d] Opposing Points and Authorities

The points and *authorities in § 200.140* may be used in an appropriate case to oppose the points and authorities set out in this form.

[e] Related Pleading and Practice Forms

For discussion and forms of allegations and prayers in complaints seeking the appointment of a receiver in an action between partners, see California Forms of Pleading and Practice, Ch. 406, *Partnerships: Dissolution* . For discussion and forms of a notice of motion for the appointment of a receiver, and a declaration in support of the ex parte appointment of a receiver, see California Forms of Pleading and Practice, Ch. 486, *Receivers* .

[3] Discussion of Authorities

[a] Action Between Partners

In ***Whitley v. Bradley*** *(1910) 13 Cal. App. 720, 110 P. 596* , plaintiffs sought the dissolution of a partnership, an accounting of the partnership's business, and the interim appointment of a receiver to take possession of the assets of and run the business. According to the complaint, plaintiffs and defendant entered into an agreement to form a partnership to conduct the business of manufacturing and selling cement wash-trays and to conduct a general cement construction business. Under the agreement, each of the three parties would furnish a third of the capital necessary to carry on the business, each would receive a third of the profits of the business, and each would be liable for a third of the debts of the business. By conducting the business according to the terms of the partnership agreement, the partnership acquired assorted real and personal property. Some time subsequent to the partnership agreement, defendant denied the existence of the partnership and plaintiffs' interest therein, excluded plaintiffs from any participation in the business, and took sole charge of the business, retaining all the income from the business. After notice and hearing on plaintiffs' motion to appoint a receiver, the trial court ordered a receiver of the business appointed. Defendants appealed from the order.

The court of appeal affirmed the trial court's order appointing the receiver, finding that the trial court did not abuse its discretion in ordering the appointment (*13 Cal. App. 720, 726)* . The court held that before a court is justified in appointing a receiver, it must appear that the person seeking the receivership has at least a probable right to or interest in the property or fund involved in the litigation, and that there is danger of its being lost, destroyed, or misappropriated unless a receiver is appointed (*13 Cal. App. 720, 725)* . The court found that there was a showing, sufficient to warrant affirming the trial court's order, that the parties formed themselves into a partnership for the purpose of conducting the business, preparatory to forming a corporation (*13 Cal. App. 720, 728-729)* . The court also found that plaintiff had made a showing that the business assets were in danger of loss or misappropriation, in light of the allegations in the complaint that defendant, in retaining sole charge of the business, had reduced the quality of goods manufactured by the business, sold the goods at unreasonably low prices, liquidated the business' assets, and applied the proceeds of the liquidated assets to his own use (*13 Cal. App. 720, 723)* .

[b] Appointment on Showing of Probable Interest in Property, Fund, or Proceeds

In ***Baldwin v. Baldwin*** *(1944) 67 Cal. App. 2d 175, 153 P.2d 567* , plaintiff sought a judgment for money had and received and on an account stated. Defendant answered and cross complained, alleging a partnership in a business with plaintiff, and demanding an accounting. Defendant then moved the trial court for the appointment of a receiver. Plaintiff answered defendant's cross complaint, and filed affidavits in opposition to defendant's motion. After considering the

pleadings, affidavits, and testimony of the parties, the trial court entered an order appointing a receiver. Plaintiff appealed from that order.

The court of appeal affirmed the order of the trial court. It found plaintiff's contention that there were no assets to be placed in receivership in which defendant could claim an interest to be without merit. The court held that when it appears, albeit on conflicting evidence, that there is proof of an actual business partnership, that the business is insolvent, and that assets are being wasted or misappropriated, the appointment of a receiver of the assets is within the discretion of the trial court. An appellate court will not interfere with the exercise of that discretion unless it has been so abused as to result in a miscarriage of justice (*67 Cal. App. 2d 175, 177)* . In so ruling, the court, unconvinced that the trial court abused its discretion in appointing the receiver, held defendant's evidence, even though contradicted by plaintiff, to be sufficient to deter it from interfering with the trial court's order (*67 Cal. App. 2d 175, 178)* . The court based its holding on defendant's testimony that she loaned plaintiff the money with which to go into business, that she was his business partner, and that she assisted him in the manual performance of their business undertakings, including paying the bills and doing the banking. The court relied, additionally, on her testimony that the funds of the business were deposited jointly in her name and that of plaintiff, that the assets of the business amounted to approximately $10,000, and that appellant had threatened to ruin the business rather than account to her (*67 Cal. App. 2d 175, 177-178)* .

The facts and procedural background of ***Whitley v. Bradley*** *(1910) 13 Cal. App. 720, 110 P. 596* , are discussed in *§ 200.100[3][a]*. In *Whitley*, defendant contended the trial court abused its discretion in appointing a receiver of the partnership's assets and property in that there was no partnership relation among the parties by which plaintiffs could claim an interest in the assets and property of the business. The court of appeal rejected this contention. In affirming the trial court's order appointing the receiver, the court of appeal initially noted plaintiffs' contention that the original agreement between the parties was to form a partnership to conduct business, to thereafter incorporate the business, and then to transfer the business and the partnership's property to the corporation. Under that agreement, the property was owned and the business was conducted by the parties as partners (*13 Cal. App. 720, 726)* . While there was not an overwhelming amount of evidence showing that the parties first formed themselves into a partnership to conduct the business, there was a sufficient showing that that was the original arrangement and intention of the parties, and that they in fact did form a partnership and conduct business as partners, to warrant the appointment of a receiver on the basis of plaintiffs' probable partnership interest in the assets and property of the business (*13 Cal. App. 720, 728-729)* . The partnership did, in fact, acquire property, including the lease to property on which a building was to be built to house the operations of the business (*13 Cal. App. 720, 727)* . This lease, of itself, was a valuable asset. Additionally, a corporation was, in fact, formed, but the property and business were never transferred to it. Therefore, the property and business in which plaintiffs claimed an interest remained in the partnership (*13 Cal. App. 720, 729)* .

[c] Appointment on Showing That Property Is in Danger of Loss, Removal, or Material Injury

Sibert v. Shaver *(1952) 113 Cal. App. 2d 19, 247 P.2d 609* , arose out of actions to rescind an assignment by plaintiffs to defendant of their interest in the invention of and the patent on a potato slicer, and an accounting to one of plaintiffs as administratrix of the affairs of a partnership between defendant and decedent, his partner. The trial court in that action, affirmed in *Sibert v. Shaver (1952) 111 Cal. App. 2d 833, 245 P.2d 514* , decreed the existence of a partnership, the rescission of the assignment, a settlement of the partnership affairs, and an accounting to decedent's estate under the supervision of the probate court for decedent's interest in the partnership and in all profits collected by defendant from the business he conducted for the partnership. When plaintiffs received no accounting in probate, and when it appeared likely that they never would, they obtained an order, from another trial court, appointing a receiver of the business, books, records, property, and assets of the partnership. Defendant appealed from the order appointing the receiver.

The court of appeal affirmed the order, finding that the trial court did not abuse its discretion in making the order. The court held that when, as in the instant case, it appears there is danger of a misappropriation of the property of a partnership and there is evidence, albeit conflicting, of the likelihood of loss, a reviewing court is in no position to say

that the trial court abused its discretion in appointing a receiver (*113 Cal. App. 2d 19, 21-22)* . In support of its holding, the court relied on the trial court's finding that defendant had in fact stated that he would personally spend the entire proceeds of the partnership business before he would pay the plaintiffs a nickel, that he would go bankrupt before he would account to them for anything, and that he would never turn any of the books of the partnership over to anyone. Relying on *Baldwin v. Baldwin (1944) 67 Cal. App. 2d 175, 177, 153 P.2d 567* (discussed in *§ 200.10[3][a]*), for the proposition that these statements of defendant were sufficient to deter a reviewing court from interfering with the order appointing the receiver, the court found the trial court's belief in the truth of the statements to be sufficient to warrant the order (*113 Cal. App. 2d 19, 21)* . The court noted, however, that the trial court also had before it the findings of the court in the underlying action that defendant had appropriated large amounts of money and property of the partnership to his own use, had sold products of a gross value in excess of one million dollars and pocketed the money without any record or account, and had invested the proceeds of the business for his own use (*113 Cal. App. 2d 19, 22)* .

The facts and procedural background of ***Breedlove v. Breedlove Excavating Co.*** *(1942) 56 Cal. App. 2d 141, 132 P.2d 239* , are discussed in *§ 200.10[3][a]*. In *Breedlove*, the court of appeal affirmed the trial court's order appointing a receiver of the partnership business. The court held it to be an elementary and controlling principle that when it appears, albeit on conflicting evidence, that danger is threatened to property or funds, and a receiver of the threatened property or funds is appointed, a reviewing court seldom will hold a trial court guilty of an abuse of discretion in making the appointment (*56 Cal. App. 2d 141, 143)* . The court affirmed the trial court's exercise of its discretion in finding that plaintiff was a partner of one of the individual defendants and, as such, entitled to an equal interest in the profits of the business. The court also found that plaintiff was deprived, by defendant partner, of his right to share in those profits (*56 Cal. App. 2d 141, 142-143)* . Plaintiff was, therefore, entitled to the assistance of the court in having the funds and earnings of the partnership impounded and conserved, and in having his property protected from threatened loss and injury at the hands of defendants (*56 Cal. App. 2d 141, 144)* .

[4] Additional Authorities

[a] Action Between Partners

In *Spira v. Superior Court (1974) 41 Cal. App. 3d 536, 540, 116 Cal. Rptr. 93* , petitioners sought a writ of mandate to order the trial court to vacate its order overruling their demurrer to the fourth cause of action in real party in interest's cross complaint and to enter an order sustaining the demurrer without leave to amend. Granting the petition, the court of appeal ruled that the allegations in real party in interest's fourth cause of action, to the effect that petitioners abused court process by moving to appoint a receiver in their action against him for a declaration of rights and an accounting under a partnership agreement, failed to state a cause of action. The court noted, in dictum, that *Code Civ. Proc. § 564(b)(1)* provides for the appointment of a receiver in an action between partners when it is shown that the property or fund sought to be placed in receivership is in danger of loss, removal, or material injury (*41 Cal. App. 3d 536, 540)* .

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20-200 California Points & Authorities § 200.101

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.101 Supporting Contention That Receiver Should Be Appointed in Action Between Partners [Code Civ. Proc. § 564(b)(1)]--Appointment of Receiver to Wind Up Partnership Business When Surviving Partner Refuses to Do So

[1] FORM Supporting Contention That Receiver Should Be Appointed in Action Between Partners [Code Civ. Proc. § 564(b)(1)]--Appointment of Receiver to Wind Up Partnership Business When Surviving Partner Refuses to Do So

[*This form should be combined with a general form of memorandum of points and authorities supporting appointment of a receiver in an action between partners (see § 200.100).*]

THE COURT SHOULD APPOINT A RECEIVER IN THIS ACTION BECAUSE _____ [*name*], THE SURVIVING PARTNER OF DECEDENT _____ [*name*] REFUSES TO WIND UP THE PARTNERSHIP'S BUSINESS.

Appointment of Receiver to Wind Up Business of Partnership When Surviving Partner Refuses to Do So. When the surviving partner refuses to wind up the business of the partnership on the death of a copartner, the trial court may appoint a receiver of the assets of a partnership, at the instance of the representative of a deceased partner (*Jay v. Clark (1948) 85 Cal. App. 2d 88, 94, 192 P.2d 462*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the court should appoint a receiver in an action between partners on the ground that a surviving partner refuses to wind up the business of the partnership on the death of a copartner [*see* *Jay v. Clark (1948) 85 Cal. App. 2d 88, 94, 192 P.2d 462* , discussed in *§*

200.101[3][a]].

These points and authorities should be combined with a general form of memorandum of points and authorities supporting appointment of a receiver in an action between partners [*see § 200.100[1]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should include specific facts showing that a partnership has deceased, and the surviving partner has refused to wind up the partnership's business. See also the *comments in § 200.80[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

The points and *authorities in § 200.140* may be used in an appropriate case to oppose the points and authorities set out in this form.

[3] Discussion of Authorities

[a] Appointment of Receiver to Wind Up Business of Partnership When Surviving Partner Refuses to Do So

In ***Jay v. Clark*** *(1948) 85 Cal. App. 2d 88, 192 P.2d 462* , plaintiff administrator of decedent's estate brought an action against defendant to wind up the business of a partnership that had existed between decedent and defendant. The business of the partnership was the printing and publication of a newspaper. According to the complaint, defendant failed to wind up the partnership affairs after decedent's death and continued the business. Defendant refused to render any account of decedent's interest in the business, failed to keep true accounts of the business, and failed to pay funds due to decedent from the partnership. The court tried the matter sitting without a jury. It filed findings that since decedent's death, defendant had carried on the partnership business without the consent of plaintiff, decedent's heirs, or the legatees under decedent's will, that defendant had refused to wind up the partnership affairs or render any accounting of decedent's interest in the business, and that an accounting was necessary. The court entered an interlocutory judgment appointing a receiver to take possession of the property and assets of the partnership, to collect its assets and to sell the business, and to operate it until it could be sold as a going concern. Defendant appealed from the judgment, contending that it unlawfully ousted him from possession of the business and deprived him of his right to wind up.

The court of appeal affirmed the trial court's judgment, finding the trial court did not abuse its discretion in appointing the receiver to wind up the partnership affairs and sell the assets (*85 Cal. App. 2d 88, 94)* . The court cited *Whitley v. Bradley (1910) 13 Cal. App. 720, 110 P. 596* (discussed in *§ 200.100[3][b]*), for the proposition that an order appointing a receiver of a partnership business is one of sound judicial discretion that will not be disturbed in the absence of a showing of clear abuse (*85 Cal. App. 2d 88, 95)* . Regardless of a surviving partner's general right to wind up the business, a court of equity may take the partnership assets from his or her possession and control and appoint a receiver when partnership property is being mismanaged, wasted, or improperly commingled with that of the survivor, or when the survivor is faithless to his or her duty and, for example, continues the business for a purpose other than closing it or delays unreasonably in closing it (*85 Cal. App. 2d 88, 94-95)* . The court noted that the relationship of a surviving partner to the administrator of a deceased partner is fiduciary; therefore, the survivor must exercise his or her talents and industry honestly and in the highest good faith. The court concluded that from defendant's testimony, his attitude toward the administrator of decedent's estate, and his conduct of the partnership's affairs, the trial court was justified in questioning defendant's good faith. The court noted that while defendant claimed the business had only a value of from $7,000 to $11,000 at the time of decedent's death, he admitted that he had had an offer of $20,000 for what would have been the equivalent of a two-thirds interest (*85 Cal. App. 2d 88, 95)* . Additionally, the record showed that three years prior to the commencement of the action, defendant would have been happy to buy an undivided half interest in the business for $22,500, take over the accounts, and assume all the indebtedness. Finally, one

of plaintiff's witnesses testified, in effect, that at the time of decedent's death, the equipment alone was worth more than defendant's estimated value of the business.

In light of these showings, coupled with defendant's contentions that there was nothing due plaintiff, and that not only was defendant entitled to keep all of the partnership property but also that the estate was indebted to him for some $2,100, the court found the trial court justified in finding the appointment of the receiver necessary (*85 Cal. App. 2d 88, 95-96)* .

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CHAPTER 200 RECEIVERS
PART II. FORMS
B. Appointment of Receiver in Specified Actions
2. Action Between Joint Owners of Property or Fund

20-200 California Points & Authorities §§ 200.102-200.109

AUTHOR: Robert Kaplan Editorial Consultant

[Reserved]

§§ 200.102[Reserved]

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20-200 California Points & Authorities § 200.110

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.110 Supporting Contention That Receiver Should Be Appointed in Action Between Vendors and Vendees [Code Civ. Proc. § 564(b)(1)]

[1] FORM Supporting Contention That Receiver Should Be Appointed in Action Between Vendors and Vendees [Code Civ. Proc. § 564(b)(1)]

[*This form should be combined with a memorandum of points and authorities supporting a motion to appoint receiver (see § 200.10) or an ex parte application to appoint receiver (see § 200.50), or included in a trial or appellate brief.*]

THE COURT SHOULD APPOINT A RECEIVER IN THIS ACTION BECAUSE _____ [*specify party seeking appointment, e.g.,* PLAINTIFF] IS _____ [*specify relationship between parties, e.g.,* THE VENDOR OF REAL PROPERTY TO _____ (*specify opposing party, e.g.,* DEFENDANT VENDEE)], HAS A PROBABLE _____ [RIGHT TO *or* INTEREST IN] _____ [THE PROPERTY *or* THE PROCEEDS OF THE PROPERTY] SOUGHT TO BE PLACED IN RECEIVERSHIP, AND THE _____ [PROPERTY or PROCEEDS] IS/ARE IN DANGER OF _____ [LOSS *and/or* REMOVAL *and/or* MATERIAL INJURY].

A. Action Between Vendor and Vendee. In an action between a vendor and a vendee, such as an action by a vendor of real property against a vendee in default under the contract of sale, *Code of Civil Procedure, Section 564(b)(1)* authorizes the appointment of a receiver when the party seeking receivership shows that it has a probable interest in the property and that there is danger of its loss or material injury (*Snidow v. Hill (1948) 84 Cal. App. 2d 702, 706, 191 P.2d 513* ; *Barnes v. Morrison (1929) 102 Cal. App. 152, 159, 282 P. 986*).

B. Showing of Probable Interest in Property, Fund, or Proceeds. If it appears that the party seeking the appointment of the receiver has at least a probable right to or interest in the property sought to be placed in receivership, and the trial court so finds, then a reviewing court is, as a general rule, in no position to say that the trial court has abused its

discretion in appointing the receiver (*Snidow v. Hill (1948) 84 Cal. App. 2d 702, 706, 191 P.2d 513* ; *Barnes v. Morrison (1929) 102 Cal. App. 152, 158-159, 282 P. 986*).

C. Showing That Property Is in Danger of Loss, Removal, or Material Injury. If it appears that the property sought to be placed in receivership is in danger of destruction, removal, or misappropriation, and the trial court so finds, then a reviewing court is, as a general rule, in no position to say that the trial court has abused its discretion in appointing the receiver (*Snidow v. Hill (1948) 84 Cal. App. 2d 702, 706, 191 P.2d 513*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the court should appoint a receiver in an action between a seller of real property and his or her buyer on the grounds that the seller has a probable interest in the property or its proceeds and when it appears that the property is in danger of being lost, removed, or materially injured [*see Code Civ. Proc. § 564(b)(1)*].

These points and authorities should be linked with points and authorities related to an action between parties jointly interested in property or fund, or proceeds thereof, generally [*see § 200.90[1]*]. As required, these points and authorities may also be linked with points and authorities providing that determination of ultimate issue of precise relationship of parties as not prerequisite to granting motion to appoint receiver [*see § 200.91[1]*].

These points and authorities should be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of the appointment. For example, these points and authorities may be:

- Submitted in support of a motion to appoint a receiver [*see § 200.10*].
- Submitted in support of the confirmation of an ex parte order appointing a receiver [*see § 200.50*].
- Adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].
- Raised as allegations or as a prayer in a complaint in a pending action seeking the provisional relief of receivership [*see* California Forms of Pleading and Practice, Ch. 486, *Receivers* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should include specific facts showing that the cause of action is one between parties jointly interested in property or its proceeds, that the party seeking the receivership has a probable right to or interest in the property, or its proceeds, and that the property or the proceeds is in danger of loss, removal, or material injury. See also the *comments in § 200.80[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

The points and *authorities in § 200.150[1]* may be used in an appropriate case to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Action Between Vendor and Vendee

In ***Snidow v. Hill*** *(1948) 84 Cal. App. 2d 702, 191 P.2d 513* , plaintiff vendor and defendant vendee entered into a contract for the sale of real property on which was located a citrus grove and a private residence. The contract provided that title was to remain in the vendor until the purchase price was paid in full, that the vendor had the right to all proceeds received from sale of the fruit produced from the citrus grove, and that if the vendor advanced money in connection with the care, operation, or maintenance of the property, he was to be reimbursed out of the first money received in connection with the transaction. The contract included a provision stating that there existed a trust deed on the property that required the property to be correctly cared for and protected. Defendant defaulted on his payments under the contract, and plaintiff instituted an action to quiet title to the property and sought, ex parte, the appointment of a receiver to culture and care for the citrus grove. The trial court ordered the appointment of a receiver, and defendant appealed from the order of appointment.

The court of appeal affirmed the order of the trial court, finding that the trial court had jurisdiction to appoint a receiver. The court ruled that *Code Civ. Proc. § 564(b)(1)* authorizes the appointment of a receiver on the application of the plaintiff or of any party whose right to or interest in the property or fund is probable, and when it is shown that the property or fund is in danger of being lost, removed, or materially injured (*84 Cal. App. 2d 702, 704)* . In so ruling, the court found that in the instant action between parties jointly interested in property, plaintiff had made a sufficient showing to the trial court that he had a probable interest in the property and that there was danger of its loss or material injury. Additionally, the court particularly noted the fact that plaintiff's right to the proceeds of the citrus crop was an admitted fact (*84 Cal. App. 2d 702, 706)* . The court based its ruling in part on the nature of the order appointing the receiver, which it found to be notable not for the powers it granted to the receiver but for the extreme limitation based on those powers. The order, which simply authorized the receiver to properly culture and care for the citrus grove, left the use and possession of the residence with defendants, and did not grant the receiver either possession or control of the proceeds of the crop (*84 Cal. App. 2d 702, 704)* .

In ***Barnes v. Morrison*** *(1929) 102 Cal. App. 152, 282 P. 986* , plaintiff administrator of decedent's estate entered into a contract for the sale of farmland of the estate. The buyer deposited a percentage of the purchase price with plaintiff, but failed to make further payments. When plaintiff subsequently demanded payment of the balance of the purchase price, the buyer responded that he was financially unable to obtain the money. Plaintiff then elected to rescind the sale, notifying the buyer of his breach of the contract of sale and declaring a forfeiture of the deposit. Subsequently, and without plaintiff's knowledge or authority, the buyer purported to lease the property to a third party, on terms entitling the buyer to share in the crops to be produced on the property. Pursuant to this purported lease, the third party took immediate possession of the property and planted crops. Plaintiff then instituted an action against both the buyer and his lessee, seeking forfeiture of the deposit, termination of defendants' claim to the property and the crops, and the appointment of a receiver to harvest and market the crops and to take charge of the proceeds pending the litigation. The trial court appointed the receiver but subsequently rescinded the order and revoked the appointment. The court then sustained defendants' demurrers to the complaint without leave to amend and entered judgment dismissing the action. Plaintiff appealed from both the judgment of dismissal and the order revoking the appointment of the receiver.

The court of appeal reversed both the judgment of dismissal and the order revoking the appointment of the receiver, holding that, in the instant action between parties jointly interested in the property, *Code Civ. Proc. § 564(b)(1)* authorized the receiver's appointment (*102 Cal. App. 152, 159)* . The court found that plaintiff had an interest in the property and the crops, since defendants, who wrongfully entered on the property and grew the crops without plaintiff's consent or knowledge, had no right or title to either (*102 Cal. App. 152, 158)* . Additionally, the crops were in immediate danger of removal because they were ready for harvest at the time plaintiff filed his complaint and because defendants had threatened to so harvest and market the crops for their own benefit (*102 Cal. App. 152, 155)* .

[b] Showing of Probable Interest in Property, Fund, or Proceeds

The facts and procedural background of ***Snidow v. Hill*** *(1948) 84 Cal. App. 2d 702, 191 P.2d 513* are discussed in *§ 200.110[3][a]*. In *Snidow*, the court held that the trial court had jurisdiction, under *Code Civ. Proc. § 564(b)(1)*, to appoint the receiver. In support of its holding, the court found that plaintiff made a showing of probable interest in the property (*84 Cal. App. 2d 702, 706)* . The court based its finding on the admitted fact of the provision in the contract of sale granting plaintiff the right to all the proceeds received from the sale of fruit from the citrus grove on the property. Additionally, the contract provided that title was to remain in plaintiff until the purchase price was paid in full. Finally, the contract provided that if plaintiff advanced money in connection with the care, operation, or maintenance of the property, he was to be reimbursed out of the first money received in connection with the transaction (*84 Cal. App. 2d 702, 703, 706)* .

The facts and procedural background of ***Barnes v. Morrison*** *(1929) 102 Cal. App. 152, 282 P. 986* , are discussed in *§ 200.110[3][a]*. In reversing the trial court's order revoking the appointment of the receiver, the court of appeal found plaintiff to have a probable right to or interest in the property. The court found defendants to be trespassers and held that when crops are planted by a trespasser who wrongfully assumes to hold possession and threatens to harvest and market the crops for his or her own benefit, the appointment of a receiver is authorized in an appropriate proceeding (*102 Cal. App. 152, 159)* . The court reasoned that when a purchaser under an executory contract takes possession of property with the consent of the vendor, the purchaser has an equitable title. However, when the purchaser wrongfully enters without the knowledge or consent of the vendor, the purchaser acquires no right or title thereby. Similarly, the purchaser under an executory contract is the owner of crops grown on land during the time he or she is rightfully in possession, but the purchaser has no title to crops that are planted after his or her rights have been terminated by virtue of his or her own acts or default. Thus, if the facts alleged in plaintiff's complaint were true, defendant buyer was a mere trespasser who acquired no right, title, or interest in any share of the crops (*102 Cal. App. 152, 158)* . Similarly, if the buyer's codefendant and lessee had previous actual or constructive knowledge of defendant buyer's default and notice of termination of rights under the sale, the lessee could acquire no better title to the crops than his lessor possessed (*102 Cal. App. 152, 159)* .

[c] Showing That Property Is in Danger of Loss, Removal, or Material Injury

The facts and procedural background of ***Snidow v. Hill*** *(1948) 84 Cal. App. 2d 702, 191 P.2d 513* , are discussed in *§ 200.110[3][a]*. In *Snidow*, the court held that the trial court had jurisdiction to appoint the receiver. The court found that plaintiff made a showing that the property was in danger of being lost or materially injured by the statement in his affidavit in support of the ex parte application that the value of the property had so depreciated since the contract was entered into that it was insufficient to discharge the balance due on the contract (*84 Cal. App. 2d 702, 703, 704)* . The court found further evidence of danger of loss or material injury from the fact that defendants failed to irrigate, disc, and fertilize the grove at proper times, even though accepted agricultural practice required such care. Unless the grove was so tended when the trees were blooming and setting fruit, irreparable damage would be caused to the soil, trees, and crop (*84 Cal. App. 2d 702, 703, 706)* . Additionally, testimony indicating a lack of financial ability on defendants' part to properly care for the property supported the showing of loss of or material injury to the property. Although the testimony taken at the hearing was sharply conflicting, plaintiff's testimony was in accordance with the statement in his affidavit, and he was corroborated by another witness as to defendants' lack of care of the property (*84 Cal. App. 2d 702, 703)* . Finally, the contract of sale recognized the existence of a deed of trust on the property, and the trust deed required the property to be correctly cared for and protected (*84 Cal. App. 2d 702, 703, 706)* .

[4] Additional Authorities

[a] Action Between Vendor and Vendee

In *Schreiber v. Ditch Road Investors (1980) 105 Cal. App. 3d 675, 164 Cal. Rptr. 633* , the court of appeal affirmed the trial court's order approving the final account of a receiver and dismissing as moot a complaint in intervention. Plaintiff vendor brought the underlying action against defendant vendee in default under a contract of sale to enforce the

provisions of a trust deed assigning rents, issues, and profits to plaintiffs as additional security. At plaintiff's request, and with the acquiescence of intervenor bank, which held a security interest in the crops growing on the property, the trial court appointed a receiver to take possession of the property, to care for, preserve, and maintain it, and to harvest and market the existing crops on the property and any other crops that might subsequently have matured during the term of the receivership (*105 Cal. App. 3d 675, 678)* .

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20-200 California Points & Authorities §§ 200.111-200.119

AUTHOR: Robert Kaplan Editorial Consultant

[Reserved]

§§ 200.111[Reserved]

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20-200 California Points & Authorities § 200.120

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.120 Supporting Contention That Receiver Should Be Appointed in Action Between Joint Venturers [Code Civ. Proc. § 564(b)(1)]--General Form

[1] FORM Supporting Contention That Receiver Should Be Appointed in Action Between Joint Venturers [Code Civ. Proc. § 564(b)(1)]--General Form

[*This form should be combined with a memorandum of points and authorities supporting a motion to appoint receiver (see § 200.10) or an ex parte application to appoint receiver (see § 200.50), or included in a trial or appellate brief.*]

THE COURT SHOULD APPOINT A RECEIVER IN THIS ACTION BECAUSE _____ [*specify party seeking appointment, e.g.,* PLAINTIFF] AND _____ [*specify opposing party, e.g.,* DEFENDANT] ARE JOINT VENTURERS, _____ [*specify party seeking appointment, e.g.,* PLAINTIFF] HAS A PROBABLE _____ [RIGHT TO *or* INTEREST IN] _____ [THE PROPERTY *or* THE PROCEEDS OF THE PROPERTY] SOUGHT TO BE PLACED IN RECEIVERSHIP, AND THE _____ [PROPERTY *or* PROCEEDS] IS/ARE IN DANGER OF _____ [LOSS *and/or* REMOVAL *and/or* MATERIAL INJURY].

A. Action Between Joint Venturers. *Section 564, subdivision (b)(1), of the Code of Civil Procedure* authorizes the appointment of a receiver in an action between joint venturers when the moving party's right to or interest in the property or fund, or the proceeds thereof, is probable and there is danger of the property or fund, or the proceeds thereof, being lost, removed, or materially injured (*Sachs v. Killeen (1958) 165 Cal. App. 2d 205, 212-213, 331 P.2d 735* ; *Neider v. Dardi (1955) 130 Cal. App. 2d 646, 649, 279 P.2d 598*).

B. Showing of Probable Interest in Property, Fund, or Proceeds. When there is evidence that the moving party has at least a probable right to or interest in the property of a joint venture sought to be placed in receivership, the appointment of the receiver will not be disturbed on appeal (*Sachs v. Killeen (1958) 165 Cal. App. 2d 205, 213, 331*

P.2d 735 ; *Galich v. Brkich (1951) 103 Cal. App. 2d 187, 190, 229 P.2d 89*).

C. Showing That Property Is in Danger of Loss, Removal, or Material Injury. When there is evidence that the property of a joint venture sought to be placed in receivership is in danger of destruction, removal, or misappropriation, the appointment of the receiver will not be disturbed on appeal (*Sachs v. Killeen (1958) 165 Cal. App. 2d 205, 213, 331 P.2d 735* ; *Moore v. Oberg (1943) 61 Cal. App. 2d 216, 223, 142 P.2d 443*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the court should appoint a receiver in an action between joint venturers on the ground that the party seeking appointment has a probable interest in the property or its proceeds and that the property is in danger of being lost, removed, or materially injured [*see Code Civ. Proc. § 564(b)(1)*].

These points and authorities should be linked with points and authorities related to an action between parties jointly interested in property or fund, or proceeds thereof, generally [*see § 200.90[1]*]. As required, these points and authorities may also be linked with points and authorities providing that determination of the ultimate issue of the precise relationship of the parties is not prerequisite to granting a motion to appoint a receiver [*see § 200.91[1]*].

These points and authorities should be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of the appointment. For example, these points and authorities may be:

- Submitted in support of a motion to appoint a receiver [*see § 200.10*].
- Submitted in support of the confirmation of an ex parte order appointing a receiver [*see § 200.50*].
- Adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch 50, *Appeal: Briefs* (Matthew Bender)].
- Raised as allegations or as a prayer in a complaint in a pending action seeking the provisional relief of receivership [*see* California Forms of Pleading and Practice, Ch. 486, *Receivers* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should include specific facts showing a joint venture as evidence of a probable joint or common interest between or among the parties in the property or fund sought to be placed in receivership, and showing that the property or fund, or its proceeds, is in danger of loss, removal, or material injury. See also the *comments in § 200.80[2][b]* regarding evidentiary support for facts stated.

[c] Related Points and Authorities

For memoranda of points and authorities relating to actions involving joint venturers generally, see Ch. 170, *Partnerships and Joint Ventures* .

[d] Opposing Points and Authorities

The points and *authorities in § 200.160[1]* may be used in an appropriate case to oppose the points and authorities set out in this general form (as well as the points and authorities designed to be combined with this form, *set out in § 200.121*).

[3] Discussion of Authorities

[a] Action Between Joint Venturers

In ***Sachs v. Killeen*** *(1958) 165 Cal. App. 2d 205, 331 P.2d 735* , plaintiff brought an action for an accounting and for damages for fraud against his co-venturers. Plaintiff alleged that plaintiff and defendants entered into an agreement under which defendants undertook to manufacture a device for regulating the speed of electric motors which had been invented by plaintiff. Under the agreement, plaintiff was to do all experimental and design work, and to market the device, but was not to contribute any capital or be charged with any losses from the venture. Defendants, on the other hand, agreed to divide the net profits of the enterprise equally with plaintiff, to furnish him with quarterly statements, to remit with the statements any sums due him, and to permit him to inspect the books and records pertaining to the project. On termination of the venture, either party could buy out the interest of the other. Plaintiff then alleged that defendants formed a conspiracy to deprive him of his rightful share of the profits from the enterprise. Plaintiff also sought the appointment of a receiver of the business, and of all real and personal property owned by defendants, contending that defendants had acquired this property with funds wrongfully withheld from plaintiff. In support of the appointment, plaintiff alleged that defendants were insolvent, and that unless a receiver was appointed, they would conceal their property, remove it from the jurisdiction of the court, and alter or destroy their records. The trial court granted plaintiff's application for the ex parte appointment of the receiver and subsequently confirmed the order of appointment. Defendants appealed from both the order appointing the receiver and the order confirming the appointment.

The court of appeal dismissed, as not appealable, the ex parte order appointing the receiver, but affirmed the order confirming the appointment of the receiver (*165 Cal. App. 2d 205, 215)* . The court found that on the showing made by plaintiff, the trial court was warranted in confirming the appointment of the receiver. The appointment was authorized by *Code Civ. Proc. § 564(b)(1)*, which provides for the appointment of a receiver in an action between parties jointly owning or interested in any property or fund, or the proceeds thereof, when the party seeking the appointment has a probable right to or interest in the property, fund, or proceeds and when it is shown that the property, fund, or proceeds are in danger of being lost, removed, or materially injured (*165 Cal. App. 2d 205, 212-213)* .

In ***Neider v. Dardi*** *(1955) 130 Cal. App. 2d 646, 279 P.2d 598* , an action by one of two joint venturers against the other and a corporation for an accounting, the interlocutory decree rendered in the action included an order appointing a receiver of the assets of the venture. The venture consisted in the management and use of a lease of certain real property owned jointly by plaintiff and the individual defendant. The individual defendant unsuccessfully claimed in the trial court that the venture also included the corporate codefendant, a refrigerator sales and repair business, and that therefore he was entitled to substantial offsets owing to losses in that phase of the venture. Defendants appealed from the trial court's order appointing the receiver.

The court of appeal affirmed the trial court's order, finding that a clearer case could hardly be found for not disturbing the trial court's exercise of its sound discretion to order the appointment (*130 Cal. App. 2d 646, 648-649)* . The court ruled that the appointment came well within the purview of *Code Civ. Proc. § 564(b)(1)* (*130 Cal. App. 2d 646, 649)* . In support of its holding, the court found that the individual defendant was in sole control of the venture, executing subleases, collecting rents, and making disbursements through the medium of the refrigerator sales and repair business, the corporate codefendant (*130 Cal. App. 2d 646, 648)* . In this manner, defendant excluded plaintiff from participation in the management of the enterprise, from enjoyment of any share in its profits, and from all knowledge of its transactions. Additionally, the court found evidence that defendant had dissipated a very considerable portion of the receipts of the enterprise and had hazarded the loss of its sole asset (*130 Cal. App. 2d 646, 649)* . For example,

defendant failed to pay ad valorem taxes on the leased premises and allowed the property to remain sold to the state for nonpayment of prior taxes. Defendant also diverted a substantial amount of the venture's funds for the equipment, maintenance, and repair of the premises used for a restaurant business belonging to him personally and not to the joint venture (*130 Cal. App. 2d 646, 648)* . In light of these findings, the need for the appointment of the receiver to protect and conserve both the assets and plaintiff's share of future rentals was compelling (*130 Cal. App. 2d 646, 649)* .

[b] Showing of Probable Interest in Property, Fund, or Proceeds

The facts and procedural background of ***Sachs v. Killeen*** *(1958) 165 Cal. App. 2d 205, 331 P.2d 735* , are discussed in *§ 200.120[3][a]*. The court of appeal found that the trial court was warranted in confirming its ex parte order appointing a receiver of the joint venture and of defendants' real and personal property. In so doing, the court addressed defendants' contention that there was no evidence that plaintiff had an interest in the property placed in receivership. The court ruled that when there is evidence that a plaintiff has at least a probable right to or interest in the property sought to be placed in receivership, and that the property is in danger of destruction, removal, or misappropriation, the appointment of a receiver will not be disturbed on appeal. In applying this rule, the court found that under the agreement, plaintiff was to receive 50 percent of the net profits from the sale of the speed control device. Therefore, it could not be doubted that plaintiff had an interest in the net profits of the enterprise. Furthermore, the court found that the trial court could properly have inferred from the facts alleged in the affidavits supporting plaintiff's application for the appointment of the receiver that defendants were diverting to their own use the net profits which belonged to plaintiff. It was likewise a reasonable inference, if not a necessary one, from the showing made by plaintiff, that the real and personal property of defendants, subsequently placed in receivership, was acquired in large part with the funds withheld from plaintiff (*165 Cal. App. 2d 205, 213)* .

In ***Galich v. Brkich*** *(1951) 103 Cal. App. 2d 187, 229 P.2d 89* , an action for dissolution and termination of an alleged partnership or joint venture, plaintiff moved the trial court for the appointment of a receiver of the business pending dissolution. The joint venture consisted in the operation of a contracting business by plaintiff and the individual defendant. The corporate defendant, which held the contractor's license under which business was conducted, was alleged to be the alter ego of the individual defendant, who was also the president of the corporation. The trial court granted plaintiff's motion and ordered the appointment of the receiver. Defendants appealed from the order.

The court of appeal affirmed the trial court's order appointing the receiver, holding that it could not say that the trial court had manifestly abused its discretion in ordering the appointment. Even though the record disclosed conflict of evidence as to certain phases of the venture's transactions, and even though considerable confusion existed in reference to the accounts of the joint venture, the court found that plaintiff had shown a probable interest in the property and funds of the business. It was conceded that real and personal property was purchased with joint venture funds (*103 Cal. App. 2d 187, 190)* . Some of this property was held in the names of the individual parties, some in the name of the corporate defendant, and some in the name of plaintiff and the corporate defendant. Additionally, the oral agreement between the parties provided that profits and losses of the venture were to be equally shared, and specified an amount that each party was to draw in weekly wages (*103 Cal. App. 2d 187, 188-189)* .

[c] Showing That Property Is in Danger of Loss, Removal, or Material Injury

The facts and procedural background of ***Sachs v. Killeen*** *(1958) 165 Cal. App. 2d 205, 331 P.2d 735* , are discussed in *§ 200.120[3][a]*. In finding that the trial court was warranted in confirming its ex parte order appointing a receiver of the joint venture and of defendants' real and personal property, the court of appeal rejected defendants' contention that plaintiff made no showing that the property in receivership was in danger of loss, removal, or material injury (*165 Cal. App. 2d 205, 214)* . The court initially ruled that when there is evidence that a plaintiff has at least a probable right to or interest in the property sought to be placed in receivership, and that the property is in danger of destruction, removal, or misappropriation, the appointment of a receiver will not be disturbed on appeal (*165 Cal. App. 2d 205, 213)* . The trial court could reasonably have concluded from the evidence of defendants' continuous misappropriation of funds and

diversion of profits into assets held by them in their own names, and from their concealment of the actual profits of the business, that those assets were in danger of being lost to plaintiff and placed beyond his reach. These facts, therefore, presented a showing sufficient to justify the appoint of the receiver (*165 Cal. App. 2d 205, 214)* .

The facts and procedural background of ***Moore v. Oberg*** *(1943) 61 Cal. App. 2d 216, 142 P.2d 443* , are discussed in *§ 200.51[3][a]*. The court of appeal affirmed the trial court's order confirming its ex parte appointment of the receiver to take possession of the money, property, and accounts receivable of the joint construction contracting venture. The court found that the trial court did not clearly abuse its discretion, since the facts found by the trial court established an attempted scheme by defendants to deprive plaintiff of his property and of the advantages gained by the joint venture (*61 Cal. App. 2d 216, 222-223)* . Therefore, the appointment was warranted to the degree that plaintiff showed that the property or fund sought to be placed in receivership was in danger of being lost, removed, or materially injured (*61 Cal. App. 2d 216, 223)* . The court relied on defendants' withdrawal of the bulk of the venture's funds from the venture's bank account, and their redeposit of the funds in personal accounts to which plaintiff had no access. Additionally, defendants' withdrawal of the funds left some obligations of the venture unsatisfied, over and above that portion of the funds due to plaintiff as his share of the profits of the business. The court thus found the appointment necessary to prevent defendants from collecting the accounts receivable and converting these accounts, together with the remaining joint assets of the business, to their own uses, and thereby irreparably injuring plaintiff's interest in the business (*61 Cal. App. 2d 216, 218-219)* .

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20-200 California Points & Authorities § 200.121

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.121 Supporting Contention That Receiver Should Be Appointed--Action Between Joint Venturers--Whether Relationship Between Parties Is Partnership or Joint Venture Is Immaterial

[1] FORM Supporting Contention That Receiver Should Be Appointed--Action Between Joint Venturers--Whether Relationship Between Parties Is Partnership or Joint Venture Is Immaterial

[*This form should be combined with a memorandum of points and authorities supporting a motion to appoint receiver (see § 200.10) or an ex parte application to appoint receiver (see § 200.50), or included in a trial or appellate brief.*]

THE COURT SHOULD APPOINT A RECEIVER IN THIS ACTION BECAUSE _____ [*specify party seeking appointment, e.g.,* PLAINTIFF] HAS SHOWN A PROBABLE JOINT OR COMMON INTEREST IN THE _____ [PROPERTY *or* FUND] CONCERNED BY VIRTUE OF HIS/HER RIGHT UNDER THE AGREEMENT TO RECEIVE A SUBSTANTIAL PERCENTAGE OF THE NET PROFITS OF THE ENTERPRISE.

Whether Relationship Between Parties Is Partnership or Joint Venture Is Immaterial. It is immaterial whether an agreement creates a partnership or a joint venture when, under the agreement, the moving party is to receive a substantial percentage of the net profits of the enterprise (*Sachs v. Killeen (1958) 165 Cal. App. 2d 205, 213, 331 P.2d 735*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the court should appoint a receiver in an action between joint venturers on the ground that the moving party has shown a probable joint or common

interest in the property or fund concerned in that under the agreement, the moving party is to receive a substantial percentage of the net profits of the enterprise.

From a strategic standpoint, counsel who represents a party who is seeking the appointment of a receiver normally would not raise the issue stated in these points and authorities in an initial memorandum. Rather, he or she would include the points and authorities in a reply memorandum or brief served in response to the opposing party's objection to the receivership.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of the appointment. For further discussion, see *§ 200.120[2][a]*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Therefore, counsel should refer to the specific clause of the agreement creating the enterprise that establishes that the moving party is entitled to receive a substantial percentage of the net profits of the enterprise. See also the *comments in § 200.80[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

The points and *authorities in § 200.160[1]* may be used in an appropriate case to oppose the points and authorities set out in this form.

[3] Discussion of Authorities

[a] Whether Relationship Between Parties Is Partnership or Joint Venture Is Immaterial

The facts and procedural background of ***Sachs v. Killeen*** *(1958) 165 Cal. App. 2d 205, 331 P.2d 735* , are discussed in *§ 200.120[3][a]*. The court of appeal found that the trial court was warranted in confirming its ex parte order appointing a receiver of the joint venture and of defendants' real and personal property. In so doing, the court rejected defendants' contention that because the written agreement alleged in plaintiff's complaint created neither a partnership nor a joint venture, plaintiff was in the position of an unsecured creditor suing at law to recover a debt, and as such, not entitled to the appointment of a receiver. Preliminarily, the court noted that the action was not one at law, but essentially one in equity to obtain an accounting and establish a constructive trust. The court then held that it was immaterial whether the agreement created either a partnership or a joint venture, because under the agreement, whatever its denomination, plaintiff was to receive 50 percent of the net profits from the sale of the speed control device (*165 Cal. App. 2d 205, 213)* .

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20-200 California Points & Authorities §§ 200.122-200.129

AUTHOR: Robert Kaplan Editorial Consultant

[Reserved]

§§ 200.122[Reserved]

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20-200 California Points & Authorities § 200.130

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.130 Opposing Contention That Receiver Should Be Appointed in Action Between Parties Jointly Owning or Interested in Property or Fund [Code Civ. Proc. § 564(b)(1)]--Property or Fund Not in Danger of Loss, Removal, or Material Injury

[1] FORM Opposing Contention That Receiver Should Be Appointed in Action Between Parties Jointly Owning or Interested in Property or Fund [Code Civ. Proc. § 564(b)(1)]--Property or Fund Not in Danger of Loss, Removal, or Material Injury

[*This form should be combined with a memorandum of points and authorities opposing a motion to appoint receiver (see § 200.20 et seq.) or an ex parte application to appoint receiver (see § 200.60 et seq.), or included in a trial or appellate brief.*]

THE COURT SHOULD NOT APPOINT A RECEIVER IN THIS ACTION BECAUSE _____ [*specify party seeking appointment, e.g.,* PLAINTIFF], AS JOINTLY _____ [OWNING *or* INTERESTED IN] WITH _____ [*specify opposing party, e.g.,* DEFENDANT] THE _____ [PROPERTY *or* FUND *or* PROCEEDS OF THE _____ (PROPERTY *or* FUND)] SOUGHT TO BE PLACED IN RECEIVERSHIP, HAS NOT SHOWN THAT THE _____ [PROCEEDS *or* PROPERTY *or* FUND] IS/ARE IN DANGER OF _____ [LOSS *and/or* REMOVAL *and/or* MATERIAL INJURY].

Party Who Fails to Show That Property, Fund, or Proceeds Is in Danger of Loss, Removal, or Material Injury Is Not Entitled to Appointment of Receiver. In order for a receiver to be appointed under *Code of Civil Procedure Section 564(b)(1)*, it is necessary that the party show that the property is in danger of loss, removal, or material injury (*Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp. (1953) 116 Cal. App. 2d 869, 873, 254 P.2d 599* ; *Dabney Oil Co. v. Providence Oil Co. (1913) 22 Cal. App. 233, 237, 133 P. 1155*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a receiver should be appointed in an action between parties jointly owning or interested in property or a fund, or the proceeds thereof, on the ground that the property or fund, or its proceeds, is not in danger of loss, removal, or material injury [*see Code Civ. Proc. § 564(b)(1)*].

These points and authorities should be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of the appointment. For example, these points and authorities may be:

- Submitted in combination with memoranda opposing the appointment of receivers on procedural grounds [*see, e.g., §§ 200.20 et seq. and 200.60* et seq.].

- Submitted in opposition to a motion to appoint a receiver [*see § 200.20* et seq.].

- Submitted in opposition to the confirmation of an ex parte order appointing a receiver [*see § 200.60*].

- Adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in §§ 200.90[1]* and *200.91[1]*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should include specific facts showing that the property or fund, or its proceeds, is not in danger of loss, removal, or material injury. See also the *comments in § 200.80[2][b]* regarding evidentiary support for facts stated.

[c] Receivership Under Code Civ. Proc. § 564(b)(9) Precluded if Another Subdivision Governs

Counsel should note that under former Code Civ. Proc. § 564(b)(8), the predecessor to *Code Civ. Proc. § 564(b)(9)*, which now provides for appointment of a receiver "in all other cases where necessary to preserve the property or rights of any party," that ground for appointment of a receiver could not be invoked in a case that alleged facts bringing it within one of the other subdivisions of *Code Civ. Proc. § 564* if the evidence did not support appointment under the other subdivision [*Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp. (1953) 116 Cal. App. 2d 869, 874, 254 P.2d 599]* . Therefore, these points and authorities may be combined, when appropriate, with the points and authorities *set out in § 200.260[1]* when it is contended that a subdivision other than *Code Civ. Proc. § 564(b)(9)* governs the appointment.

[d] Related Pleading and Practice Forms

For discussion and forms, based on Code Civ. Proc. § 564(b)(1), of a notice of motion for the appointment of a receiver, and a declaration in support of the ex parte appointment of a receiver, see California Forms of Pleading and Practice, Ch. 486, *Receivers* (Matthew Bender).

[3] Discussion of Authorities

[a] Party Who Fails to Show That Property, Fund, or Proceeds Is in Danger of Loss, Removal, or Material

Injury Is Not Entitled to Appointment of Receiver

The facts and procedural background of ***Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp.*** *(1953) 116 Cal. App. 2d 869, 254 P.2d 599* , are discussed in *§ 200.26[3][a]*. *Alhambra* involved an attempt by plaintiff corporation to place in receivership certain mining property that it owned but that was under the control of defendant corporation, the assignee of a lease to the property. In reversing the trial court's order appointing the receiver, the court of appeal ruled that in order for plaintiff to invoke the power of the court under *Code Civ. Proc. § 564(b)(1)*, it was necessary for it to show that it shared a joint interest with defendant in the property, that its right to possession was probable, and that the property was in danger of being lost, removed, or materially injured (*116 Cal. App. 2d 869, 873)* . While the court of appeal assumed, for the purposes of the opinion, that plaintiff shared a joint interest with defendant in the property, and conceded, for the purposes of the opinion, that the record justified the trial court's assumption that plaintiff's right to possession of the property was probable, the court found plaintiff unable to show that receivership was necessary to protect the property from loss, removal, or material injury. The court based its finding on defendant's showing that, contrary to plaintiff's allegations, defendant was not delinquent in the payment of wages to its employees, defendant was not in default of payment of certain tax and insurance obligations, and defendant was not in arrears in salary payments to the supervisor of the property because of defendant's inability to pay. Furthermore, the only purpose of the order appointing the receiver was to shut down the operations of the mine and mill on the property and to prohibit trespassing on the property, and this result could have been accomplished by injunctive relief (*116 Cal. App. 2d 869, 874)* .

The facts and procedural background of ***Dabney Oil Co. v. Providence Oil Co.*** *(1913) 22 Cal. App. 233, 133 P. 1155* , are discussed in *§ 200.20[3][b]*. *Dabney* involved an attempt by plaintiff corporation to place in receivership two parcels of real property, one parcel of which was oil-producing and leased to defendant corporation, and the other parcel of which was undeveloped and unproved oil land owned by defendant corporation. In reversing the trial court's order appointing the receiver, the court of appeal found that the case clearly fell within the provisions of *Code Civ. Proc. § 564(b)(1)*, as an action to recover property, together with a fund consisting of the proceeds derived from the operation of the property. As such, the trial court had no power to appoint a receiver unless it was satisfied that plaintiff's right in the property or fund, or its proceeds, was probable and that the property or fund, or its proceeds, was in danger of loss, removal, or material injury (*22 Cal. App. 233, 237)* . Conceding that the record justified the trial court's conclusion that plaintiff had a probable right to the property and the fund, the court of appeal found that the property was not in danger of being lost, removed, or materially injured. The only purpose of the order appointing the receiver was to sequester the property's net income by requiring defendants to pay it to the receiver (*22 Cal. App. 233, 238)* . Because this purpose could have been achieved by injunctive relief, the court found the appointment of the receiver to be an abuse of discretion on the part of the trial court (*22 Cal. App. 233, 239)* .

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20-200 California Points & Authorities §§ 200.131-200.139

AUTHOR: Robert Kaplan Editorial Consultant

[Reserved]

§§ 200.131[Reserved]

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20-200 California Points & Authorities § 200.140

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.140 Opposing Contention That Receiver Should Be Appointed in Action Between Partners [Code Civ. Proc. § 564(b)(1)]--Property or Fund Not in Danger of Loss, Removal, or Material Injury--General Form

[1] FORM Opposing Contention That Receiver Should Be Appointed in Action Between Partners [Code Civ. Proc. § 564(b)(1)]--Property or Fund Not in Danger of Loss, Removal, or Material Injury--General Form

[*This form should be combined with a memorandum of points and authorities opposing a motion to appoint receiver (see § 200.20 et seq.) or an ex parte application to appoint receiver (see § 200.60 et seq.), or included in a trial or appellate brief.*]

THE COURT SHOULD NOT APPOINT A RECEIVER IN THIS ACTION BECAUSE _____ [*specify party seeking appointment, e.g.,* PLAINTIFF], AS A PARTNER OF _____ [*specify opposing party, e.g.,* DEFENDANT], HAS NOT SHOWN _____ [A PROBABLE _____ (RIGHT TO *or* INTEREST IN) THE _____ (PROPERTY *or* FUND *or* PROCEEDS OF THE _____ (PROPERTY *or* FUNDS)) SOUGHT TO BE PLACED IN RECEIVERSHIP *and/or* THAT THE _____ (PROCEEDS *or* PROPERTY or FUND) IS/ARE IN DANGER OF _____ (LOSS *and/or* REMOVAL *and/or* MATERIAL INJURY)].

[*EITHER*]

A. Failure to Show Probable Right to or Interest in Partnership Property or Funds. In an action between partners, a receiver may not be appointed pursuant to *Code of Civil Procedure Section 564(b)(1)* if it is not shown that the party seeking the appointment has a probable right to the property or fund, or the proceeds thereof (*Rondos v. Superior Court (1957) 151 Cal. App. 2d 190, 195, 311 P.2d 113* ; *McCaslin v. Kenney (1950) 100 Cal. App. 2d 87, 95, 223 P.2d 94*).

[*AND/OR*]

B. Failure to Show That Partnership Property or Funds Are in Danger of Loss, Removal, or Material Injury. In an action between partners, a receiver may not be appointed pursuant to *Code of Civil Procedure Section 564(b)(1)* if it is not shown that the property or fund, or the proceeds thereof, is in danger of being lost, removed, or materially injured (*Rondos v. Superior Court (1957) 151 Cal. App. 2d 190, 195, 311 P.2d 113* ; *McCaslin v. Kenney (1950) 100 Cal. App. 2d 87, 95, 223 P.2d 94*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a receiver should be appointed in an action between partners on the ground that the party seeking the appointment cannot show [*see Code Civ. Proc. § 564(b)(1)*]:

- That the property or fund, or the proceeds thereof, sought to be placed in receivership is in danger of loss, removal, or material injury, or

- That he or she has a probable right to or interest in the property, fund, or proceeds.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in §§ 200.100[1]* and *200.101[1]*.

These points and authorities should be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of the appointment. For example, in an appropriate case, these points and authorities may be:

- Submitted in combination with memoranda opposing the appointment of receivers on procedural grounds [*see, e.g., §§ 200.20 et seq. and 200.60* et seq.].

- Submitted in opposition to a motion to appoint a receiver [*see § 200.20* et seq.].

- Submitted in opposition to the confirmation of an ex parte order appointing a receiver [*see § 200.60*].

- Adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should include specific facts showing that the property, fund, or proceeds are not in danger of loss, removal, or material injury, or that the party seeking the appointment has no probable interest in or right to the property, fund, or proceeds sought to be placed in receivership. See also the *comments in § 200.80[2][b]* regarding evidentiary support for facts stated.

[c] Receivership Under Code Civ. Proc. § 564(b)(9) Precluded if Another Subdivision Governs

Counsel should note that under former Code Civ. Proc. § 564(b)(8), the predecessor to *Code Civ. Proc. § 564(b)(9)*,

which now provides for appointment of a receiver "in all other cases where necessary to preserve the property or rights of any party," that ground for appointment of a receiver could not be invoked in a case that alleged facts bringing it within one of the other subdivisions of *Code Civ. Proc. § 564* if the evidence did not support appointment under the other subdivision [*Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp. (1953) 116 Cal. App. 2d 869, 874, 254 P.2d 599]* . Therefore, these points and authorities may be combined, when appropriate, with the points and authorities *set out in § 200.260[1]* when it is contended that a subdivision other than *Code Civ. Proc. § 564(b)(9)* governs the appointment.

[d] Related Pleading and Practice Forms

For discussion and forms of allegations and prayers in complaints seeking the appointment of a receiver in an action between partners, see California Forms of Pleading and Practice, Ch. 406, *Partnerships: Dissolution* . For discussion and forms of a notice of motion for the appointment of a receiver, and a declaration in support of the ex parte appointment of a receiver, see California Forms of Pleading and Practice, Ch. 486, *Receivers* .

[3] Discussion of Authorities

[a] Failure to Show Probable Right to or Interest in Partnership Property or Funds

In ***Rondos v. Superior Court*** *(1957) 151 Cal. App. 2d 190, 311 P.2d 113* , plaintiff and defendants entered into an agreement to form a partnership. Under the agreement, one of two existing partners agreed to sell plaintiff an interest in a nightclub business, so that plaintiff and the remaining partner would then be new partners in the business. Plaintiff's purchase price was placed in an escrow, and the contract between the parties provided that title to the existing partner's interest would pass to plaintiff on closing of the escrow and after issuance of a new liquor license to the new partners. On the failure of the Department of Alcoholic Beverage Control to issue the license, and on the remaining partner's withdrawal of the application for transfer of the liquor license and service of notice of rescission of the agreement on plaintiff, plaintiff brought an action for dissolution of partnership against the two partners. On plaintiff's motion, after notice and hearing, the trial court ordered the appointment of a receiver to take possession of and conduct the partnership's business. One of defendants appealed from the order, and sought a writ of prohibition in the court of appeal to prevent the trial court from enforcing the order.

The court of appeal issued the writ, concluding that the order appointing the receiver exceeded the trial court's jurisdiction in that plaintiff had no interest in the business. When a complaint fails by its allegations to show that the conditions required by law have been complied with, an order for the appointment of a receiver is void for all purposes (*151 Cal. App. 2d 190, 195)* . The court noted that plaintiff sought the appointment of a receiver under *Code Civ. Proc. § 564(b)(1),* providing that a receiver may be appointed in an action between partners on the motion of plaintiff or any party whose interest in the property is probable. The court found that plaintiff had no interest in the business since, by express stipulation of the contract between the parties, title to an interest in the business would not pass until the on-sale liquor license under which the business was operated had been transferred to the new partnership. Additionally, had the contract not so provided, the law would have, because the regulations governing the conduct of an on-sale liquor business prohibit the transfer of title to a licensed business except coincidentally with the transfer of the license (*151 Cal. App. 2d 190, 194)* .

In ***McCaslin v. Kenney*** *(1950) 100 Cal. App. 2d 87, 223 P.2d 94* , plaintiff brought an action for dissolution of an oil drilling partnership. Defendant answered the complaint and, at the same time, filed a notice of motion for the appointment of a receiver for the preservation of the oil wells and pumping equipment constituting the physical property of the partnership. In support of his motion, defendant relied on assertions in his affidavit and in that of an employee that plaintiff was physically and mentally incompetent to manage the physical property of the partnership, and that plaintiff had negligently managed the property on one occasion. The trial court granted defendant's motion, and plaintiff appealed from the order appointing the receiver.

The court of appeal reversed the trial court's order, finding that the requirements of *Code Civ. Proc. § 564(b)(1)* for the appointment of a receiver in an action between partners were not met. The trial court apparently based its order of appointment on the fact that if a partner in an action for dissolution requests the appointment of a receiver, he or she is entitled to one simply by virtue of the request. In finding this an insufficient basis on which to appoint a receiver, the court held that clearly the case at bar fell within the provisions of *Code Civ. Proc. § 564(b)(1)* as an action between partners. As such, the court had no power to appoint the receiver unless it was satisfied that the right of plaintiff in the property was probable and that the property was in danger of being lost, removed, or materially injured (*100 Cal. App. 2d 87, 95)* . Defendant's affidavits in support of the appointment of the receiver were insufficient to prove that plaintiff's negligence posed a danger to the partnership property since the allegation of negligence was merely a conclusion, unsupported by factual allegations. Thus, the court found there was no proof that the partnership property was in danger of loss, removal, or material injury, and ruled that the receiver should not have been appointed (*100 Cal. App. 2d 87, 94-95)* .

[b] Failure to Show That Partnership Property or Funds Are in Danger of Loss, Removal, or Material Injury

The facts and procedural background of ***Rondos v. Superior Court*** *(1957) 151 Cal. App. 2d 190, 311 P.2d 113* , are discussed in *§ 200.140[3][a]*. In granting defendant's writ of prohibition to prevent the trial court from enforcing its order appointing a receiver, the court of appeal held that it was apparent from the record that plaintiff neither alleged nor showed that even if plaintiff had any interest in the partnership business, there was any danger of loss, removal, or material injury to that interest (*151 Cal. App. 2d 190, 194)* . A party seeking appointment must demonstrate both that he or she has a probable right to or interest in the property, fund, or the proceeds sought to be placed in receivership, and that the property is in danger of loss, removal, or material injury (*151 Cal. App. 2d 190, 195)* .

McCaslin v. Kenney *(1950) 100 Cal. App. 2d 87, 223 P.2d 94* , is discussed in *§ 200.140[3][a]*.

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20-200 California Points & Authorities § 200.141

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.141 Opposing Contention That Receiver Should Be Appointed in Action Between Partners [Code Civ. Proc. § 564(b)(1)]--Mere Fact of Partner's Request for Appointment of Receiver in Dissolution Proceeding Is Insufficient to Justify Appointment

[1] FORM Opposing Contention That Receiver Should Be Appointed in Action Between Partners [Code Civ. Proc. § 564(b)(1)]--Mere Fact of Partner's Request for Appointment of Receiver in Dissolution Proceeding Is Insufficient to Justify Appointment

[*This form should be combined with a general form of memorandum of points and authorities opposing appointment of a receiver in an action between partners (see § 200.140).*]

THE COURT SHOULD NOT APPOINT A RECEIVER IN THIS ACTION BECAUSE THE MERE REQUEST FOR APPOINTMENT OF A RECEIVER IN A CASE UNDER CODE OF CIVIL PROCEDURE SECTION 564(b)(1) IS NOT SUFFICIENT TO JUSTIFY THE APPOINTMENT.

Mere Fact of Partner's Request for Appointment of Receiver in Dissolution Proceeding Is Insufficient to Justify Appointment. In an action for dissolution of a partnership, the mere fact that a partner requests the appointment of a receiver in a case falling within the provisions of *Code of Civil Procedure Section 564(b)(1)* is not a sufficient basis to justify the appointment (*McCaslin v. Kenney (1950) 100 Cal. App. 2d 87, 95, 223 P.2d 94*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to the contention that a receiver should be appointed in an action for dissolution of a partnership on the ground that the mere request for appointment of a receiver in such a case is not sufficient to justify the appointment under *Code Civ. Proc. § 564(b)(1)*.

These points and authorities should be combined with a general form of memorandum of points and authorities opposing appointment of a receiver in an action between partners [*see § 200.140*].

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in §§ 200.100[1]* and *200.101[1]*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Therefore, counsel should refer to facts showing that the party seeking appointment has failed to show that the basic requirements for appointment under *Code Civ. Proc. § 564(b)(1)* are present, despite the request for appointment. See also the *comments in § 200.80[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Mere Fact of Partner's Request for Appointment of Receiver in Dissolution Proceeding Is Insufficient to Justify Appointment

The facts and procedural background of ***McCaslin v. Kenney*** *(1950) 100 Cal. App. 2d 87, 223 P.2d 94* , is discussed § 200.24[4][a]. The court of appeal reversed the trial court's order, finding that the requirements of *Code Civ. Proc. § 564(b)(1)* for the appointment of a receiver in an action between partners were not met. The trial court apparently based its order of appointment on the fact that if a partner in an action for dissolution requests the appointment of a receiver, he or she is entitled to one simply by virtue of the request. In finding this an insufficient basis on which to appoint a receiver, the court held that clearly the case at bar fell within the provisions of *Code Civ. Proc. § 564(b)(1)* as an action between partners. As such, the court had no power to appoint the receiver unless it was satisfied that the right of plaintiff in the property was probable and that the property was in danger of being lost, removed, or materially injured (*100 Cal. App. 2d 87, 95)* .

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2. Action Between Joint Owners of Property or Fund

20-200 California Points & Authorities §§ 200.142-200.149

AUTHOR: Robert Kaplan Editorial Consultant

[Reserved]

§§ 200.142[Reserved]

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20-200 California Points & Authorities § 200.150

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.150 Opposing Contention That Receiver Should Be Appointed in Action Between Vendors and Vendees [Code Civ. Proc. § 564(b)(1)]--Failure to Show Fraud in Purchase or Interest in Property

[1] FORM Opposing Contention That Receiver Should Be Appointed in Action Between Vendors and Vendees [Code Civ. Proc. § 564(b)(1)]--Failure to Show Fraud in Purchase or Interest in Property

[*This form should be combined with a memorandum of points and authorities opposing a motion to appoint receiver (see § 200.20 et seq.) or an ex parte application to appoint receiver (see § 200.60 et seq.), or included in a trial or appellate brief.*]

THE COURT SHOULD NOT APPOINT A RECEIVER IN THIS ACTION BECAUSE _____ [*specify moving party, e.g.,* PLAINTIFF] HAS NOT SHOWN A PROBABLE INTEREST IN THE _____ [PROPERTY *or* PROCEEDS OF THE PROPERTY] SOUGHT TO BE PLACED IN RECEIVERSHIP IN THAT _____ [*specify, e.g.,* PLAINTIFF VENDOR HAS SHOWN NEITHER FRAUD IN THE PURCHASE OF THE PROPERTY BY _____ (*specify opposing party, e.g.* DEFENDANT VENDEE) NOR ANY RIGHT IN OR LIEN ON THE PROPERTY].

Failure to Show Fraud in Purchase or Interest in Property. In order to justify the appointment of a receiver under *Code of Civil Procedure Section 564(b)(1)* in an action between a vendor of real property and his or her vendee, the party seeking the appointment must show fraud in the purchase of the property or that he or she has some right in, lien on, or claim to the property (*Cal. Delta Farms v. Chinese Amer. Farms (1928) 204 Cal. 524, 526, 269 P. 443* ; *see Khatchadourian v. Davidian (1947) 79 Cal. App. 2d 539, 541, 179 P.2d 853*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to the contention that a receiver should be appointed in an action between a seller of real property and his or her buyer on the ground that the party seeking the appointment has no probable interest in the property or its proceeds [*see Code Civ. Proc. § 564(b)(1)*], or that there was fraud in the purchase of the property [*see Cal. Delta Farms v. Chinese Amer. Farms (1928) 204 Cal. 524, 526, 269 P. 443]* .

These points and authorities should be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of the appointment. For example, in an appropriate case, these points and authorities may be:

- Submitted in combination with memoranda opposing the appointment of receivers on procedural grounds [*see, e.g., §§ 200.20 et seq. and 200.60* et seq.].

- Submitted in opposition to a motion to appoint a receiver [*see § 200.20* et seq.].

- Submitted in opposition to the confirmation of an ex parte order appointing a receiver [*see § 200.60*].

- Adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 200.110[1]*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should include specific facts showing that the party seeking the appointment has no probable interest in or right to the property, fund, or proceeds sought to be placed in receivership, or that there was fraud in the purchase of the property. See also the *comments in § 200.80[2][b]* regarding evidentiary support for facts stated.

[c] Receivership Under Code Civ. Proc. § 564(b)(9) Precluded if Another Subdivision Governs

Counsel should note that under former Code Civ. Proc. § 564(b)(8), the predecessor to *Code Civ. Proc. § 564(b)(9)*, which now provides for appointment of a receiver "in all other cases where necessary to preserve the property or rights of any party," that ground for appointment of a receiver could not be invoked in a case that alleged facts bringing it within one of the other subdivisions of *Code Civ. Proc. § 564* if the evidence did not support appointment under the other subdivision [*Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp. (1953) 116 Cal. App. 2d 869, 874, 254 P.2d 599]* . Therefore, these points and authorities may be combined, when appropriate, with the points and authorities *set out in § 200.260[1]* when it is contended that a subdivision other than *Code Civ. Proc. § 564(b)(9)* governs the appointment.

[d] Related Pleading and Practice Forms

For discussion and forms, based on Code Civ. Proc. § 564(b)(1), of a notice of motion for the appointment of a receiver, and a declaration in support of the ex parte appointment of a receiver, see California Forms of Pleading and Practice, Ch. 486, *Receivers* (Matthew Bender).

[3] Discussion of Authorities

[a] Failure to Show Fraud in Purchase or Interest in Property.

In ***Cal. Delta Farms v. Chinese Amer. Farms*** *(1928) 204 Cal. 524, 269 P. 443* , plaintiff seller commenced an action against defendant buyer for forfeiture of the defendant's rights under a contract for the sale of agricultural land. Plaintiff alleged that defendant was in arrears in its payments under the contract and apparently insolvent. As the property was being cropped by various tenants of defendant under agreements providing for shares of the yield in lieu of rentals, plaintiff moved the court for an order appointing a receiver to secure and keep all of defendant's share, or its equivalent, of the crops produced on the property during the litigation. The trial court granted plaintiff's motion, and appointed the receiver under a sweeping order that essentially divested defendant of all rights as the owner of the property and invested those rights in the receiver. Defendant appealed from the order appointing the receiver.

The Supreme Court reversed the trial court's order, finding no authority under *Code Civ. Proc. § 564(b)(1)* for the appointment. The Court ruled that under *Code Civ. Proc. § 564(b)(1)*, either fraud must be shown in the purchase of the property or the plaintiff must be shown to have some right in, lien on, or claim to the property sought to be impounded. The Court found that plaintiff made no claim of fraud, and in the Court's view, plaintiff had no right in or to the property, or any part of it (*204 Cal. 524, 526)* . The crops in the hands of defendant, a bona fide adverse claimant, were not the property of plaintiff, but the property of defendant, and remained so whether they were growing or severed (*204 Cal. 524, 528)* . Therefore, plaintiff had no rights in the crops, and even if plaintiff proved successful in his action, his rights were limited to the value of defendant's use and occupation of the property from the time of forfeiture of the contract. In so ruling, the Court distinguished the case at bar from the case of growing crops produced by a trespasser and not severed on the entry of the true owner of the property (*204 Cal. 524, 526)* [*see, e.g.,* *Barnes v. Morrison (1929) 102 Cal. App. 152, 159, 282 P. 986* (discussed in *§ 200.110[3*][a])].

In ***Khatchadourian v. Davidian*** *(1947) 79 Cal. App. 2d 539, 179 P.2d 853* , plaintiff buyer brought an action for the specific performance of a contract for the sale of agricultural property against his seller. Defendant seller answered and asserted, as an affirmative defense, that she had been induced to enter into the contract through misrepresentations made by plaintiff as to the value of the property. After trial, but before judgment, plaintiff sought the appointment of a receiver ex parte to take possession of the property, to harvest and sell all crops growing thereon, and to take possession of previously harvested crops that had been removed from the property. The trial court granted plaintiff's application, and defendant subsequently appealed from the court's ex parte order appointing the receiver.

The court of appeal reversed the trial court's order, holding the allegations in both the complaint and the petition for appointment insufficient to justify the appointment of a receiver. The court noted that defendant, contesting in court plaintiff's right to receive a deed to the land on payment of certain money and giving of certain security, was holding the property under a claim of right until the issue of ownership could be decided. Relying on the reasoning in *Cal. Delta Farms v. Chinese Amer. Farms (1928) 204 Cal. 524, 269 P. 443* (discussed *above*), the court held that the party in possession of the property, holding it under a claim of right and contesting the right of another to title, is entitled to the crops produced on the land until a conveyance is made or a judgment entered (*204 Cal. 524)* . Plaintiff, therefore, had no interest in the property sufficient to justify the appointment of a receiver. While plaintiff might be entitled to the crops growing on the land when he paid and secured the purchase price and received a deed, or possibly when judgment was entered, he was not entitled to possession of crops that had been previously harvested, and he was not entitled to the appointment of a receiver to take possession of the harvested and unharvested crops prior to judgment (*204 Cal. 524)* .

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20-200 California Points & Authorities §§ 200.151-200.159

AUTHOR: Robert Kaplan Editorial Consultant

[Reserved]

§§ 200.151[Reserved]

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20-200 California Points & Authorities § 200.160

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.160 Opposing Contention That Receiver Should Be Appointed in Action Between Joint Venturers [Code Civ. Proc. § 564(b)(1)]--Property or Fund Not in Danger of Loss, Removal, or Material Injury

[1] FORM Opposing Contention That Receiver Should Be Appointed in Action Between Joint Venturers [Code Civ. Proc. § 564(b)(1)]--Property or Fund Not in Danger of Loss, Removal, or Material Injury

[*This form should be combined with a memorandum of points and authorities opposing a motion to appoint receiver (see § 200.20 et seq.) or an ex parte application to appoint receiver (see § 200.60 et seq.), or included in a trial or appellate brief.*]

THE COURT SHOULD NOT APPOINT A RECEIVER IN THIS ACTION BECAUSE _____ [*specify party seeking appointment, e.g.,* PLAINTIFF], AS A CO-VENTURER OF _____ [*specify opposing party, e.g.,* DEFENDANT], HAS NOT SHOWN THAT THE _____ [PROPERTY *or* FUND *or* PROCEEDS OF THE _____ (PROPERTY *or* FUND)] SOUGHT TO BE PLACED IN RECEIVERSHIP IS/ARE IN DANGER OF _____ [LOSS *and/or* REMOVAL *and/or* MATERIAL INJURY].

Failure to Show That Property or Funds of Joint Venture Are in Danger of Loss, Removal, or Material Injury. A showing that joint venture property or funds are in danger of being lost, removed, or materially injured is a prerequisite for an order appointing a receiver under *Code of Civil Procedure Section 564(b)(1)* (*Thornburg v. Rais (1952) 111 Cal. App. 2d 304, 305, 244 P.2d 741*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to the contention that a receiver should be appointed

in an action between joint venturers on the ground that property, funds, or proceeds sought to be put in receivership are not in danger of being lost, removed, or materially injured [*see Code Civ. Proc. § 564(b)(1)*].

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in §§ 200.120[1]* and *200.121[1]*.

These points and authorities should be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of the appointment. For example, these points and authorities may be:

- Submitted in combination with memoranda opposing the appointment of receivers on procedural grounds [*see, e.g., §§ 200.20 et seq. and 200.60* et seq.].

- Submitted in opposition to a motion to appoint a receiver [*see § 200.20* et seq.].

- Submitted in opposition to the confirmation of an ex parte order appointing a receiver [*see § 200.60*].

- Adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should include specific facts showing that the property, funds, or proceeds sought to be put in receivership are not in danger of being lost, removed, or materially injured. See also the *comments in § 200.80[2][b]* regarding evidentiary support for facts stated.

[c] Receivership Under Code Civ. Proc. § 564(b)(9) Precluded if Another Subdivision Governs

Counsel should note that under former Code Civ. Proc. § 564(b)(8), the predecessor to *Code Civ. Proc. § 564(b)(9)*, which now provides for appointment of a receiver "in all other cases where necessary to preserve the property or rights of any party," that ground for appointment of a receiver could not be invoked in a case that alleged facts bringing it within one of the other subdivisions of *Code Civ. Proc. § 564* if the evidence did not support appointment under the other subdivision [*Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp. (1953) 116 Cal. App. 2d 869, 874, 254 P.2d 599]* . Therefore, these points and authorities may be combined, when appropriate, with the points and authorities *set out in § 200.260[1]* when it is contended that a subdivision other than *Code Civ. Proc. § 564(b)(9)* governs the appointment.

[d] Related Pleading and Practice Forms

For discussion and forms, based on Code Civ. Proc. § 564(b)(1), of a notice of motion for the appointment of a receiver, and a declaration in support of the ex parte appointment of a receiver, see California Forms of Pleading and Practice, Ch. 486, *Receivers* (Matthew Bender).

[3] Discussion of Authorities

[a] Failure to Show That Property or Funds of Joint Venture Are in Danger of Loss, Removal, or Material Injury

In ***Thornburg v. Rais*** *(1952) 111 Cal. App. 2d 304, 244 P.2d 741* , two joint venturers sought a declaration as to the rights, duties, and obligations of themselves and their co-venturers, the defendants, relative to the funds and property of the joint venture. The property of the joint venture consisted of 16 lots of residential rental property, together with the rental income generated by the property. Plaintiffs' complaint also sought to dissolve the venture, obtain a partition of the property of the venture, and place the property in receivership. The trial court appointed a receiver of the property, and defendants appealed from the order of appointment.

The court of appeal reversed the trial judge's order appointing the receiver. The court ruled that plaintiffs did not show that the joint venture property or the funds were in danger of being lost, removed, or materially injured. As this showing is a prerequisite under *Code Civ. Proc. § 564(b)(1)* for an order appointing a receiver, the appointment of the receiver was unwarranted. The court based its conclusion on the fact that, at the time the receiver was appointed, 14 multiple dwellings, located throughout the 16 lots, had been completed and were all rented. When the monthly rentals on the dwellings were collected, they were deposited in a bank account to the credit of two members of the joint venture, one of whom was plaintiff and the other of whom was defendant. These funds could only be withdrawn by check bearing the signatures of both venturers. Additionally, the funds in the bank account at all times exceeded any amounts payable on the deeds of trust against the property and on all other fixed charges against the property (*111 Cal. App. 2d 304, 305)* .

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20-200 California Points & Authorities §§ 200.161-200.169

AUTHOR: Robert Kaplan Editorial Consultant

[Reserved]

§§ 200.161[Reserved]

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20-200 California Points & Authorities § 200.170

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.170 Supporting Contention That Receiver Should Be Appointed in Unlawful Detainer Proceeding [Code Civ. Proc. § 564(b)(7)]

[1] FORM Supporting Contention That Receiver Should Be Appointed in Unlawful Detainer Proceeding [Code Civ. Proc. § 564(b)(7)]

[*This form should be combined with a memorandum of points and authorities supporting a motion to appoint receiver (see § 200.10) or an ex parte application to appoint receiver (see § 200.50), or included in a trial or appellate brief.*]

THE COURT SHOULD APPOINT A RECEIVER IN THIS UNLAWFUL DETAINER PROCEEDING BECAUSE THE APPOINTMENT IS NECESSARY FOR _____ [*specify party seeking appointment, e.g.,* PLAINTIFF], AS A _____ [LANDLORD, TO OBTAIN POSSESSION OF THE PROPERTY FROM HIS/HER/ITS TENANT or PURCHASER AT A FORECLOSURE SALE, TO OBTAIN POSSESSION OF THE PROPERTY FROM THE PARTY CURRENTLY IN POSSESSION].

[*EITHER*]

Unlawful Detainer Proceeding. A court has jurisdiction under *Code of Civil Procedure Section 564(b)(7)* to appoint a receiver of rental property in an unlawful detainer proceeding by a landlord against a tenant (*Code Civ. Proc. § 564(b)(7)*; *Telegraph Avenue Corp. v. Raentsch (1928) 205 Cal. 93, 100, 269 P. 1109*).

[*OR*]

Unlawful Detainer Proceeding by Purchaser at Foreclosure Sale Against Party in Possession. *Code of Civil*

Procedure Section 564(b)(7) authorizes a court to appoint a receiver in an unlawful detainer proceeding by the purchaser of real property at a foreclosure sale under a deed of trust against the party in possession of the property (*Code Civ. Proc. § 564(b)(7)*; *Pacific States S. & L. Co. v. Hoffman (1933) 134 Cal. App. 601, 603, 25 P.2d 1006*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that a receiver should be appointed in an unlawful detainer proceeding by either a landlord against a tenant or a purchaser at a foreclosure sale against a party in possession [*see Code Civ. Proc. § 564(b)(6)*].

Counsel should note that the appointment of a receiver who assumes full possession and control of the premises in an unlawful detainer proceeding constitutes an eviction of the tenant and, as such, relieves the tenant from payment of the rent during the period of the receiver's occupancy [*Telegraph Avenue Corp. v. Raentsch (1928) 205 Cal. 93, 100, 269 P. 1109]* .

These points and authorities should be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of the appointment. For example, when appropriate, these points and authorities may be:

- Submitted in support of a motion to appoint a receiver [*see § 200.10*].
- Submitted in support of the confirmation of an ex parte order appointing a receiver [*see § 200.50*].
- Adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch 50, *Appeal: Briefs* (Matthew Bender)].
- Raised as allegations or as a prayer in a complaint in a pending action seeking the provisional relief of receivership [*see* California Forms of Pleading and Practice, Ch. 486, *Receivers* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should include specific facts showing either the landlord-tenant relationship or the purchaser-party in possession relationship between the parties. Counsel should also include specific facts showing that the proceeding is properly one for unlawful detainer. See also the *comments in § 200.80[2][b]* regarding evidentiary support for facts stated.

[c] Related Pleading and Practice Forms

For discussion and forms seeking the appointment of a receiver under Code Civ. Proc. § 564(b)(7), see California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions* .

[3] Discussion of Authorities

[a] Unlawful Detainer Proceeding

In ***Telegraph Avenue Corp. v. Raentsch*** *(1928) 205 Cal. 93, 269 P. 1109* , plaintiff sued in unlawful detainer to recover possession of a block of real property. Plaintiff and defendant lessee executed a lease for a term of 99 years. After lessee took possession under the lease, he executed first and second mortgages, respectively, to his codefendants.

The premises were occupied as a public market and were sublet to a number of subtenants. Subsequently, rent payments under the lease became delinquent. At the end of the first month in which payment was in default, plaintiff served on lessee and mortgagees notices declaring the default and demanding that the parties either pay or quit the premises within three days. The next month, plaintiff served them with similar notices of nonpayment of rent for that month. The month after that, plaintiff served similar notices of nonpayment of rent and demands to either pay or quit the premises on lessee, mortgagees, and some of the subtenants. Plaintiff then commenced the unlawful detainer action against all parties most recently served with payment and quit notices. Subsequent to filing the action, plaintiff obtained the ex parte appointment of a receiver to take possession and control of the premises, to collect all rents from subtenants that were paid to them, and to remain in possession until judgment in the action was entered. After a bench trial, the court rendered judgment canceling the lease under which the property was held, and awarding possession to plaintiff and a money judgment against defendant. Defendant lessee appealed from this judgment on a number of grounds, including that that portion of the money judgment representing rental due under the lease during the receiver's occupancy of the premises was erroneous.

The Supreme Court agreed with defendant lessee that inclusion of the disputed rental payments in the judgment was erroneous. The Court therefore modified the judgment by striking that amount from the money judgment awarded to plaintiff, but otherwise affirmed the trial court's judgment as modified (*205 Cal. 93, 102)* . In ruling on this issue, the Court held that the jurisdiction of the trial court to appoint a receiver in an action of unlawful detainer lay in former Code Civ. Proc. § 564(b)(6) [*see now Code Civ. Proc. § 564(b)(7)*]. Neither defendant nor the Court challenged the propriety of the receiver's appointment. However, the appointment of a receiver who assumes full possession and control of the premises in an unlawful detainer proceeding is an eviction of the tenant and, as such, relieves the tenant from payment of the rent called for by the lease during the period of the receiver's occupancy (*205 Cal. 93, 100)* .

[b] Unlawful Detainer Proceeding by Purchaser at Foreclosure Sale Against Party in Possession

In ***Pacific States S. & L. Co. v. Hoffman*** *(1933) 134 Cal. App. 601, 25 P.2d 1006* , plaintiff, a purchaser of property at a foreclosure sale under a deed of trust, filed an unlawful detainer action against defendants. The complaint alleged, among other things, that the property consisted of an apartment house with a specified monthly income, and that one of defendants was insolvent and would collect and divert the proceeds from that income. By his complaint, plaintiff sought damages, possession of the property, and the appointment of a receiver to take possession of the premises pending determination of the action, with full power and authority to operate, control, and manage the apartment house. The trial court issued an order appointing a receiver. One of defendants, the successor in interest of the obligors, appealed the order.

The court of appeal affirmed the order of the trial court appointing the receiver. The court held that former Code Civ. Proc. § 564(b)(6) [*see now Code Civ. Proc. § 564(b)(7)*] authorizes the appointment of a receiver in an unlawful detainer action by the purchaser of real property at a foreclosure sale under a deed of trust against the party in possession of the property. Prior decisions had upheld suits in unlawful detainer following sales under trust deeds. The court reasoned that, because the remedy of unlawful detainer is purely statutory, and no constitutional inhibition intervenes, the question whether unlawful detainer actions shall be extended to cover cases when the conventional relation of landlord and tenant does not exist is a legislative and not a judicial question. The fact that in their legislative inception unlawful detainer proceedings were limited to cases in which the conventional relation existed does not prevent the Legislature from extending the remedy to other cases if it sees fit to do so. Therefore, since former Code Civ. Proc. § 564(b)(6) [*see now Code Civ. Proc. § 564(b)(7)*, by its terms, authorizes the appointment of a receiver in actions of unlawful detainer, a receiver may be appointed in unlawful detainer actions involving the conventional relation of landlord and tenant, as well as unlawful detainer actions not involving that conventional relation between the parties (*134 Cal. App. 601, 603)* .

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20-200 California Points & Authorities §§ 200.171-200.179

AUTHOR: Robert Kaplan Editorial Consultant

[Reserved]

§§ 200.171[Reserved]

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4. Secured Lender's Action to Enter and Inspect Property for Hazardous Substance Release

20-200 California Points & Authorities § 200.180

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.180 Supporting Contention That Receiver Should Be Appointed in Action by Secured Lender to Enforce Right to Inspect Real Property to Determine Release of Hazardous Substance [Civ. Code § 2929.5; Code Civ. Proc. § 564(c)]

[1] FORM Supporting Contention That Receiver Should Be Appointed in Action by Secured Lender to Enforce Right to Inspect Real Property to Determine Release of Hazardous Substance [Civ. Code § 2929.5; Code Civ. Proc. § 564(c)]

[*This form should be combined with a memorandum of points and authorities supporting a motion to appoint receiver (see § 200.10) or an ex parte application to appoint receiver (see § 200.50), or included in a trial or appellate brief.*]

THE COURT SHOULD APPOINT A RECEIVER IN THIS ACTION BECAUSE THE SUPERIOR COURT MAY DO SO IN AN ACTION BY A SECURED LENDER TO ENTER AND INSPECT PROPERTY FOR RELEASE OF HAZARDOUS SUBSTANCE, AND THE CIRCUMSTANCES OF THIS CASE INDICATE THAT IT IS APPROPRIATE THAT THE COURT EXERCISE ITS DISCRETION IN FAVOR OF THE APPOINTMENT.

Secured Lender's Action to Enforce Rights to Enter and Inspect Property for Release of Hazardous Substance. The superior court may appoint a receiver in an action other than a limited civil case brought by a secured lender to enforce the rights provided in *Section 2929.5 of the Civil Code*, to enable the secured lender to enter and inspect the real property security for the purpose of determining the existence, location, nature, and magnitude of any past or present release or threatened release of any hazardous substance into, onto, beneath, or from the real property security (*Code Civ. Proc. § 564(c)*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that a receiver should be appointed in an action by a secured lender to enforce his or her rights under the law permitting inspection of real property regarding a release, or threatened release, of a hazardous substance [*see Civ. Code § 2929.5*; *Code Civ. Proc. § 564(c)*].

These points and authorities should be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of the appointment. For example, these points and authorities may be:

- Submitted in support of a motion to appoint a receiver [*see § 200.10*].

- Submitted in support of the confirmation of an ex parte order appointing a receiver [*see § 200.50*].

- Adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch 50, *Appeal: Briefs* (Matthew Bender)].

- Raised as allegations or as a prayer in a complaint in a pending action seeking the provisional relief of receivership [*see* California Forms of Pleading and Practice, Ch. 486, *Receivers* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should include specific facts showing that it would be proper for the court to exercise its discretion in favor making the appointment. See also the *comments in § 200.80[2][b]* regarding evidentiary support for facts stated.

[c] Related Pleading and Practice Forms

For discussion relating to an action under Civ. Code § 2929.5, see California Forms of Pleading and Practice, Ch. 555, *Trust Deeds and Real Property Mortgages* (Matthew Bender).

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20-200 California Points & Authorities §§ 200.181-200.189

AUTHOR: Robert Kaplan Editorial Consultant

[Reserved]

§§ 200.181[Reserved]

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Volume 20 Chapters 200-209 RECEIVERS---to---SANCTIONS
CHAPTER 200 RECEIVERS
PART II. FORMS
B. Appointment of Receiver in Specified Actions
5. Cases Involving Assignments of Leases, Rents, Issues, or Profits

20-200 California Points & Authorities § 200.190

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.190 Supporting Contention That Receiver Should Be Appointed in Action for Specified Performance of Assignment of Rents Provision [Code Civ. Proc. § 564(b)(11)]--General Form

[1] FORM Supporting Contention That Receiver Should Be Appointed in Action for Specified Performance of Assignment of Rents Provision [Code Civ. Proc. § 564(b)(11)]--General Form

[*This form should be combined with a memorandum of points and authorities supporting a motion to appoint receiver (see § 200.10) or an ex parte application to appoint receiver (see § 200.50), or included in a trial or appellate brief.*]

THE COURT SHOULD APPOINT A RECEIVER IN THIS ACTION BECAUSE THE SUPERIOR COURT MAY DO SO IN AN ACTION BY A SECURED LENDER FOR SPECIFIED PERFORMANCE OF AN ASSIGNMENT OF RENTS PROVISION IN A _____ [DEED OF TRUST *or* MORTGAGE *or* SEPARATE ASSIGNMENT DOCUMENT], AND THE CIRCUMSTANCES OF THIS CASE SUPPORT THE APPOINTMENT OF A RECEIVER.

Receiver May Be Appointed in Action for Specified Performance of Assignment of Rents Provision. A receiver may be appointed by the court in which an action or proceeding is pending, or by a judge thereof, in an action by a secured lender for specified performance of an assignment of rents provision in a deed of trust, mortgage, or separate assignment document (*Code Civ. Proc. § 564(b)(11)*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that a receiver should be appointed in an action by a secured lender for specified performance of an assignment of rents provision in a deed of trust, mortgage,

or separate assignment document [*see Code Civ. Proc. § 564(b)(11)*].

These points and authorities should be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of the appointment. For example, these points and authorities may be:

- Submitted in support of a motion to appoint a receiver [*see § 200.10*].

- Submitted in support of the confirmation of an ex parte order appointing a receiver [*see § 200.50*].

- Adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

- Raised as allegations or as a prayer in a complaint in a pending action seeking the provisional relief of receivership [*see* California Forms of Pleading and Practice, Ch. 486, *Receivers* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should include specific facts showing that the party seeking receivership is a secured lender, that the action is based on an assignment of rents provisions in a deed of trust, mortgage, or separate assignment document, and that a receivership is appropriate to protect the interests of the secured lender under that document. See also the *comments in § 200.80[2][b]* regarding evidentiary support for facts stated.

[c] Related Pleading and Practice Forms

For discussion and forms seeking the appointment of a receiver under Code Civ. Proc. § 564(b)(11), see California Forms of Pleading and Practice, Ch. 555, *Trust Deeds and Real Property Mortgages* (Matthew Bender).

[3] Related Cases

Counsel should also review the cases dealing with actions based upon assignment of rent provisions in a deed of trust, mortgage or separate assignment document, cited in § 200.252.

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20-200 California Points & Authorities § 200.191

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.191 Supporting Contention That Appointment of Receiver Should Continue After Entry of Judgment for Specific Performance of Assignment of Rents Provision [Code Civ. Proc. § 564(b)(11)]--Appointment May Be Continued Pending Nonjudicial Foreclosure

[1] FORM Supporting Contention That Appointment of Receiver Should Continue After Entry of Judgment for Specific Performance of Assignment of Rents Provision [Code Civ. Proc. § 564(b)(11)]--Appointment May Be Continued Pending Nonjudicial Foreclosure

[*This form should be combined with a memorandum of points and authorities supporting a motion to appoint receiver (see § 200.10) or an ex parte application to appoint receiver (see § 200.50), or included in a trial or appellate brief.*]

THE COURT SHOULD PERMIT THE CONTINUATION OF THE RECEIVER'S APPOINTMENT AFTER ENTRY OF JUDGMENT FOR SPECIFIC PERFORMANCE IN THIS ACTION BECAUSE THE RECEIVERSHIP IS APPROPRIATE _____ [_____ (TO PROTECT, OPERATE, *and/or* MAINTAIN) *and/or* IN ORDER TO COLLECT RENTS FROM] ENCUMBERED REAL PROPERTY, PENDING THE COMPLETION OF A NONJUDICIAL FORECLOSURE UNDER A POWER OF SALE.

Appointment May Be Continued Pending Nonjudicial Foreclosure. An appointment of a receiver in an action by a secured lender for specific performance of an assignment of rents provision in a deed of trust, mortgage, or separate assignment document, may be continued after entry of a judgment for specific performance in that action, if appropriate to protect, operate, or maintain real property encumbered by the deed of trust or mortgage or to collect the rents therefrom while a pending nonjudical foreclosure under power of sale in the deed of trust or mortgage is being completed (*Code Civ. Proc. § 564(b)(11)*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the appointment of receiver should continue after entry of a judgment for specific performance in an action by a secured lender for specific performance of an assignment of rents provision under deed of trust, mortgage, or separate assignment document [*Code Civ. Proc. § 564(b)(11)*; *see § 200.190[1]*].

The basis for continuation of the appointment is that it is appropriate to protect, operate, or maintain real property encumbered by the deed of trust or mortgage or to collect the rents from the encumbered property while there is a pending nonjudical foreclosure under power of sale in the deed of trust or mortgage [*Code Civ. Proc. § 564(b)(11)*].

These points and authorities should be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of the appointment. For discussion of these alternatives, see *§ 200.190[2]*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should include specific facts showing that continuation of the receivership is appropriate to protect the secured lender's interests under assignment of rents clause. See also the *comments in § 200.80[2][b]* regarding evidentiary support for facts stated.

[c] Related Pleading and Practice Forms

For discussion and forms seeking the appointment of a receiver under Code Civ. Proc. § 564(b)(11), see California Forms of Pleading and Practice, Ch. 555, *Trust Deeds and Real Property Mortgages* (Matthew Bender).

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20-200 California Points & Authorities § 200.192

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.192 Supporting Contention That Receiver Should Be Appointed in Case by Assignee Under Assignment of Leases, Rents, Issues, or Profits [Code Civ. Proc. § 564(b)(12); Civ. Code § 2938(g)]

[1] FORM Supporting Contention That Receiver Should Be Appointed in Case by Assignee Under Assignment of Leases, Rents, Issues, or Profits [Code Civ. Proc. § 564(b)(12); Civ. Code § 2938(g)]

[*This form should be combined with a memorandum of points and authorities supporting a motion to appoint receiver (see § 200.10) or an ex parte application to appoint receiver (see § 200.50), or included in a trial or appellate brief.*]

THE COURT SHOULD APPOINT A RECEIVER IN THIS CASE BECAUSE _____ [*identify party seeking appointment, e.g.*, PLAINTIFF] IS AN ASSIGNEE UNDER AN ASSIGNMENT OF _____ [LEASES *or* RENTS *or* ISSUES *or* PROFITS], AND THE CIRCUMSTANCES OF THIS CASE SUPPORT THE APPOINTMENT OF A RECEIVER.

Case by Assignee under Assignment of Leases, Rents, Issues, or Profits. A receiver may be appointed by the court in which an action or proceeding is pending, or by a judge thereof, in a case brought by an assignee under an assignment of leases, rents, issues, or profits pursuant to *Civil Code Section 2938(g)* (*Code Civ. Proc. § 564(b)(12)*).

[2] Comments

[a] Use of Form

This form is a memorandum of points and authorities for use by an assignee under an assignment of leases, rents, issues, or profits pursuant to *Civ. Code § 2938(g)* [*see Code Civ. Proc. § 564(b)(12)*; *Civ. Code § 2938(g)*].

These points and authorities should be combined with a form of memorandum of points and authorities relating to the

specific procedural context in which counsel wishes to raise the issue of the propriety of the appointment. For discussion of these alternatives, see *§ 200.190[2]*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel for the assignee seeking receivership should refer to (1) the assignment provisions, whether the assignment is in a separate document or as a part of a mortgage or deed of trust; and (2) refer to evidence, such as declarations, deposition transcripts, or other documents that tend to establish that a receivership should be appointed to enable the assignee to successfully enforce the assignment. See also the *comments in § 200.80[2][b]* regarding evidentiary support for facts stated.

[c] Related Pleading and Practice Forms

For discussion and forms seeking the appointment of a receiver under Code Civ. Proc. § 564(b)(12), see California Forms of Pleading and Practice, Ch. 555, *Trust Deeds and Real Property Mortgages* (Matthew Bender).

[3] Related Cases

Counsel should also review the cases dealing with actions based upon assignment of rent provisions in a deed of trust, mortgage or separate assignment document, cited in § 200.252.

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20-200 California Points & Authorities §§ 200.193-200.199

AUTHOR: Robert Kaplan Editorial Consultant

[Reserved]

§§ 200.193[Reserved]

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20-200 California Points & Authorities § 200.200

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.200 Supporting Contention That Receiver Should Be Appointed in Foreclosure Action by Secured Lender [Code Civ. Proc. § 564(b)(2)]--Condition of Mortgage Not Performed or Property in Danger, and Property Is Insufficient to Discharge Secured Debt

[1] FORM Supporting Contention That Receiver Should Be Appointed in Foreclosure Action by Secured Lender [Code Civ. Proc. § 564(b)(2)]--Condition of Mortgage Not Performed or Property in Danger, and Property Is Insufficient to Discharge Secured Debt

[*This form should be combined with a memorandum of points and authorities supporting a motion to appoint receiver (see § 200.10) or an ex parte application to appoint receiver (see § 200.50), or included in a trial or appellate brief.*]

THE COURT SHOULD APPOINT A RECEIVER IN THIS ACTION BECAUSE _____ [*specify party seeking appointment, e.g.,* PLAINTIFF] IS A SECURED LENDER SEEKING FORECLOSURE AND SALE OF PROPERTY ON WHICH HE/SHE/IT HOLDS A LIEN UNDER A _____ [DEED OF TRUST *or* MORTGAGE], _____ [THE CONDITION OF THE _____ (DEED OF TRUST *or* MORTGAGE) HAS NOT BEEN PERFORMED or THE PROPERTY IS IN DANGER OF BEING LOST *and/or* REMOVED *and/or* MATERIALLY INJURED], AND THE PROPERTY IS PROBABLY INSUFFICIENT TO DISCHARGE THE SECURED DEBT.

Appointment of Receiver in Foreclosure Action. In an action by a secured lender for the foreclosure of the deed of trust or mortgage and sale of the property on which there is a lien under a deed of trust or mortgage, a receiver may be appointed when it appears that the property is in danger of being lost, removed, or materially injured, or that the condition of the deed of trust or mortgage has not been performed, and that the property is probably insufficient to discharge the deed of trust or mortgage debt (*Code Civ. Proc. § 564(b)(2)*; *Boyd v. Benneyan (1928) 204 Cal. 23, 25, 266 P. 278* ; *Brush v. Apartment & Hotel F. Corp. (1927) 82 Cal. App. 723, 725, 256 P. 285*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that a receiver should be appointed in an action by a secured lender for the foreclosure of a deed of trust or mortgage and the sale of the property subject to the deed of trust or mortgage. The grounds for this contention are that the property is in danger of being lost, removed, or materially injured, or that the condition of the deed of trust or mortgage has not been performed, and that the property is probably insufficient to discharge the deed of trust or mortgage debt [*Code Civ. Proc. § 564(b)(2)*].

These points and authorities should be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of the appointment. For example, these points and authorities may be:

- Submitted in support of a motion to appoint a receiver [*see § 200.10*].

- Submitted in support of the confirmation of an ex parte order appointing a receiver [*see § 200.50*].

- Adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch 50, *Appeal: Briefs* (Matthew Bender)].

- Raised as allegations or as a prayer in a complaint in a pending action seeking the provisional relief of receivership [*see* California Forms of Pleading and Practice, Ch. 486, *Receivers* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should cite specific allegations in the complaint or specific facts stated in supporting affidavits (or declarations under penalty of perjury under *Code Civ. Proc. § 2015.5*) to demonstrate that the value of the property is probably insufficient to discharge the secured debt [*see Brush v. Apartment & Hotel F. Corp. (1927) 82 Cal. App. 723, 726, 256 P. 285* , discussed in *§ 200.200[3][a]*]. See also the *comments in § 200.80[2][b]* regarding evidentiary support for facts stated.

[c] Related Pleading and Practice Forms

For discussion and forms of allegations and prayers in complaints seeking the appointment of a receiver under Code Civ. Proc. § 564(b)(2), see California Forms of Pleading and Practice, Ch. 486, *Receivers* .

For a discussion and form of a complaint under Code Civ. Proc. § 564(8) for specific performance of a provision in a trust deed authorizing the appointment of a receiver when the obligation secured by the trust deed is in default, together with a form of notice of motion, supporting declaration, and order for the appointment of a receiver as provided in a trust deed, see California Forms of Pleading and Practice, Ch. 555, *Trust Deeds and Real Property Mortgages* .

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Appointment of Receiver in Foreclosure Action

In ***Boyd v. Benneyan*** *(1928) 204 Cal. 23, 266 P. 278* , plaintiffs brought an action to foreclose a mortgage on property given to secure a promissory note executed by defendant mortgagor in favor of plaintiffs. By its terms, the mortgage covered the rents, issues, and profits of the mortgaged premises. Subsequent to the execution of the mortgage to plaintiffs, and prior to the commencement of the action, defendant mortgagor also gave to each of her two codefendants a mortgage on one year's crop, grown on her property, to secure payment for two promissory notes. At the commencement of the action, the court appointed a receiver to take possession of the premises; manage, cultivate, and farm it; harvest, sell, and dispose of the crops; and collect and hold the rents, issues, and profits subject to the further order of the court. After trial, the court entered a decree of foreclosure, adjudging plaintiffs entitled to a sale of the property, and adjudging that the receivership be continued to carry out the provisions of the decree. Subsequent to the judgment, defendant mortgagor sought the discharge of the receiver and the payment of the proceeds from the sale of the crops to her codefendants to apply on the notes secured by the mortgages that she had granted them. The trial court granted defendant mortgagor's motion, and plaintiffs appealed from that order.

The Supreme Court affirmed the order of the trial court discharging the receiver and ordering funds received by him to be paid to defendant mortgagor's codefendants (*204 Cal. 23, 28)* . In addressing the validity of the receiver's appointment, the Court held it beyond question that the trial court had the power, under former Code Civ. Proc. § 564 subd. (2) [*now see Code Civ. Proc. § 564(b)(2)*], to appoint the receiver because plaintiffs had made a proper showing for the appointment (*204 Cal. 23, 25-26)* . Specifically, the Court affirmed the trial court's findings that the value of the mortgaged property was less than the mortgage debt, and that the mortgagor was impliedly unable to perform the condition of making payments on the mortgage since she was insolvent (*204 Cal. 23, 24)* .

In ***Brush v. Apartment & Hotel F. Corp.*** *(1927) 82 Cal. App. 723, 256 P. 285* , plaintiff brought an action to foreclose a mortgage on a leasehold on an apartment house, together with the furniture and furnishings contained in the apartment house. On plaintiff's motion, the trial court ordered the appointment of a receiver of the property. Defendant appealed from the order appointing the receiver.

The court of appeal affirmed the trial court's order, finding that the trial court did not abuse its discretion in ordering the appointment of the receiver. The court found that unless the leasehold, which comprised the bulk of the mortgaged property, was placed in receivership, it was in danger of becoming totally extinguished. Plaintiff had alleged facts sufficient to show that the value of the mortgaged property was insufficient to discharge the debt (*82 Cal. App. 723, 727-728)* . In so ruling, the court looked to the allegations in plaintiff's affidavits that the amount of the mortgage debt was $6,044 and the value of the furnishings covered by the mortgage was $3,500. Plaintiff also alleged that even if defendants were to continue in possession of the property for a year, the furnishings would not bring in more than $2,000. Finally, there was a pending condemnation action in which the cancellation of the leasehold was sought. If the condemnation action was successful, the leasehold would be totally extinguished so that by the time the instant action came to trial, the entire mortgaged property would be deteriorated and practically worthless (*82 Cal. App. 723, 725-726)* . As such, the property would, of course, be insufficient to discharge the mortgage debt under former Code Civ. Proc. § 564 subd. (2) (*now see Code Civ. Proc. § 564 (b)(2)*) (*82 Cal. App. 723, 727)* .

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20-200 California Points & Authorities §§ 200.201-200.209

AUTHOR: Robert Kaplan Editorial Consultant

[Reserved]

§§ 200.201[Reserved]

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20-200 California Points & Authorities § 200.210

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.210 Opposing Contention That Receiver Should Be Appointed in Foreclosure Action by Secured Lender [Code Civ. Proc. § 564(b)(2)]--Property Is Sufficient to Discharge Secured Debt

[1] FORM Opposing Contention That Receiver Should Be Appointed in Foreclosure Action by Secured Lender [Code Civ. Proc. § 564(b)(2)]--Property Is Sufficient to Discharge Secured Debt

[*This form should be combined with a memorandum of points and authorities opposing a motion to appoint receiver (see § 200.20 et seq.) or an ex parte application to appoint receiver (see § 200.60 et seq.), or included in a trial or appellate brief.*]

THE COURT SHOULD NOT APPOINT A RECEIVER IN THIS ACTION BECAUSE _____ [*specify party seeking appointment, e.g.,* PLAINTIFF] HAS NOT ALLEGED SPECIFIC FACTS SUPPORTING HIS/HER/ITS ALLEGATION THAT THE VALUE OF THE PROPERTY IS PROBABLY INSUFFICIENT TO DISCHARGE THE DEBT SECURED BY THE _____ [DEED OF TRUST *or* MORTGAGE].

[*EITHER*]

A. Sufficiency of Property to Discharge Debt. A receivership should not be appointed in a foreclosure action under *Code of Civil Procedure Section 564(b)(2)*, except on a statement of facts showing that the actual value of the premises is less than the debt secured, with interest and costs, and that resort to the rents and profits is necessary (*Bank of Woodland v. Stephens (1904) 144 Cal. 659, 660, 79 P. 379*).

[*AND/OR*]

B. Material Injury to Property. A receiver should not be appointed under *Code of Civil Procedure Section 564(b)(2)*

on the ground that the property is in danger of being materially injured, unless the injury would so depreciate the property's value that it would no longer afford adequate security for the payment of the secured debt (*Title etc. Trust Co. v. California Dev. Co. (1912) 164 Cal. 58, 61-62, 127 P. 502*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to the contention a receiver should be appointed under *Code Civ. Proc. § 564(b)(2)* in an action by a secured lender for the foreclosure of a deed of trust or mortgage and the sale of the property subject to the deed of trust or mortgage. The ground for opposition is that the party seeking the appointment has not demonstrated that the property is probably insufficient to discharge the secured debt [*see Code Civ. Proc. § 564(b)(2)*].

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 200.200[1]*.

These points and authorities should be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of the appointment. For example, these points and authorities may be:

- Submitted in combination with memoranda opposing the appointment of receivers on procedural grounds [*see, e.g., §§ 200.20 et seq. and 200.60* et seq.].

- Submitted in opposition to a motion to appoint a receiver [*see § 200.20* et seq.].

- Submitted in opposition to the confirmation of an ex parte order appointing a receiver [*see § 200.60*].

- Adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice Ch. 50, *Appeal: Briefs* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should include specific facts showing that the value of the property is sufficient to discharge the mortgage debt. Counsel may also include specific facts, when appropriate, showing that the property is not in danger of loss, removal, or material injury such as to cause the value of the property to drop below the level of the debt. See also the *comments in § 200.80[2][b]* regarding evidentiary support for facts stated.

[c] Related Pleading and Practice Forms

For a discussion and forms of allegation in a complaint seeking to appoint a receiver of property under Code Civ. Proc. § 564(b)(2) in an action by a mortgagee to foreclose on a mortgage, see California Forms of Pleading and Practice, Ch. 486, *Receivers* .

[3] Discussion of Authorities

[a] Sufficiency of Property to Discharge Debt.

In ***Bank of Woodland v. Stephens*** *(1904) 144 Cal. 659, 79 P. 379* , plaintiff brought an action to foreclose a mortgage, and sought the appointment of a receiver under former Code Civ. Proc. § 564 subd. (2) [*now see Code Civ. Proc. § 564(b)(2)*]. The trial court ordered the appointment of the receiver and, after trial, rendered judgment in plaintiff's favor. The judgment included a provision continuing the receiver in office after issuance of the final decree in the action. Defendant appealed from the judgment, contending that the court did not have jurisdiction under the facts of the complaint to appoint a receiver and, therefore, it had no power to continue him in office after making the final decree.

The Supreme Court modified the judgment by striking out that part concerning the continuance of the receiver in office after the final decree. In so ruling, the Court held that the allegation in the complaint that "the mortgaged premises are insufficient to pay and discharge the mortgage debt" was insufficient to support the appointment of the receiver under former Code Civ. Proc. § 564 subd. (2) [*now see Code Civ. Proc. § 564(b)(2)*]. The Court found the statement to be no more than a conclusion. It was not enough that the complaint stated the conclusion alone; the value of the property was required to be alleged. The Court analogized its reasoning to that underlying the requirement that a plaintiff must plead facts showing irreparable injury when seeking injunctive relief, and may not simply plead the conclusion that he or she will suffer irreparable injury that cannot be compensated in damages. The appointment of a receiver involves the taking of defendant's property from his or her possession, a measure more violent and drastic than an injunction. Therefore, receivership should never be allowed in cases of mortgage foreclosure, except on a statement of facts showing that the actual value of the mortgaged premises is less than the debt secured, with interest and costs, and that resort to the rents and profits is necessary. Former Code Civ. Proc. § 564 subd. (2) [*now see Code Civ. Proc. § 564(b)(2)*] states the various conclusions that must be made by a trial court before it can appoint a receiver in foreclosure suits. The complaint or affidavit on which the application for a receiver is based must state facts that support one or more of those conclusions; it is not enough to state the conclusions alone (*144 Cal. 659, 660-661)* .

[b] Material Injury to Property

The facts and procedural background of ***Title Insurance & Trust Co. v. California Dev. Co.*** *(1912) 164 Cal. 58, 127 P. 502* , are discussed in *§ 200.63[3][a]*. In *Title*, the Supreme Court reversed the trial court's order appointing the receiver, as to defendant-appellant, finding plaintiff's allegation that the property was probably insufficient to discharge the mortgage debt did not support the appointment of a receiver under former Code Civ. Proc. 564 subd. (2) (*now see Code Civ. Proc. § 564(b)(2)*) because neither the value of the property, nor any facts indicating its value, were set forth in the complaint or in the supporting affidavit (*164 Cal. 58, 61)* . The Court held it was necessary for plaintiff to show not only that the mortgaged property was in danger of material injury, but also that the injury would so depreciate the value of the property that the property would no longer afford adequate security for the payment of the debt (*164 Cal. 58, 62)* . If all the mortgaged property was lost or removed from the jurisdiction, then the entire security would be gone, and prejudice to the rights of the mortgagee would necessarily ensue, since he or she is entitled to have the property remain accessible, whatever its value, and even though the value may far exceed the mortgage debt. But if the danger is only that the property may be materially injured, then the relative value of the property after the injury has been inflicted and the amount of the debt must be considered in order to determine if the mortgagee's interests require the court to deprive the mortgagor of lawful possession of his or her own property. If the injury, though considerable, will still leave enough of the property remaining intact to be ample security for the debt, a trial court should not interfere because the mortgagee can suffer no injury to his or her interests (*164 Cal. 58, 61-62)* .

The Court looked to the property itself in finding there was no showing that the injury to plaintiff's property would so depreciate its value that it would no longer afford adequate security for the payment of the debt. The property consisted of an irrigation system, covering 318 acres of land, including a canal, and all buildings, structures, tools, and personal property used in connection with the system. The danger of material injury to the property was alleged to be the deterioration of certain structures on a portion of the land. The structures were alleged to be of importance to the irrigation system because they were the only suitable places for putting the canal water into the irrigation system. However, the Court found that plaintiff had not alleged the extent, the present condition, or the values of the remaining portions of the system. Therefore, it may well have been that, even with the injuries as alleged, the property remaining

would far exceed the amount due on the indebtedness and would still constitute abundant security for its payment. If so, the additional expense incurred in appointing a receiver would not have been necessary to keep the system in operation (*164 Cal. 58, 63)* . While the water users might want the appointment for their protection, the system's bondholders, being otherwise fully secured, would have no interest sufficient to justify the appointment. Thus, the Court ruled that when the showing of apprehended injury fails to make it appear that the mortgagee's interests and security will be jeopardized, it is a clear abuse of the trial court's discretion to order the appointment of a receiver (*164 Cal. 58, 64)* .

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20-200 California Points & Authorities §§ 200.211-200.219

AUTHOR: Robert Kaplan Editorial Consultant

[Reserved]

§§ 200.211[Reserved]

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7. Creditor's Action to Subject Property or Fund to Creditor's Claim

20-200 California Points & Authorities § 200.220

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.220 Supporting Contention That Receiver Should Be Appointed in Action by Creditor to Subject Property or Fund to Creditor's Claim [Civ. Code § 3439.07(a)(3)(B); Code Civ. Proc. § 564(b)(1)]

[1] FORM Supporting Contention That Receiver Should Be Appointed in Action by Creditor to Subject Property or Fund to Creditor's Claim [Civ. Code § 3439.07(a)(3)(B); Code Civ. Proc. § 564(b)(1)]

[*This form should be combined with a memorandum of points and authorities supporting a motion to appoint receiver (see § 200.10) or an ex parte application to appoint receiver (see § 200.50), or included in a trial or appellate brief.*]

[*EITHER*]

THE COURT SHOULD APPOINT A RECEIVER IN THIS ACTION BECAUSE _____ [*specify party seeking appointment, e.g.,* PLAINTIFF] IS A CREDITOR SEEKING TO SUBJECT _____ [PROPERTY *and/or* A FUND] TO HIS/HER/ITS CLAIM, AND _____ [*specify opposing party, e.g.,* DEFENDANT] HAS _____ [TRANSFERRED THE PROPERTY *or* INCURRED AN OBLIGATION] THAT IS FRAUDULENT AS TO _____ [*specify party, e.g.,* PLAINTIFF].

[*AND/OR*]

THE COURT SHOULD APPOINT A RECEIVER IN THIS ACTION BECAUSE _____ [*specify party seeking appointment, e.g.,* PLAINTIFF] IS A CREDITOR SEEKING TO SUBJECT _____ [PROPERTY and/or A FUND] TO HIS/HER/ITS CLAIM, AND _____ [*specify party seeking appointment, e.g.,* PLAINTIFF] HAS A PROBABLE _____ [RIGHT TO *or* INTEREST IN] THE _____ [PROPERTY *or* FUND *or* PROCEEDS OF THE _____ (PROPERTY *or*

FUND)], AND THE _____ [PROCEEDS *or* PROPERTY *or* FUND] IS/ARE IN DANGER OF _____ [LOSS *and/or* REMOVAL *and/or* MATERIAL INJURY].

[*EITHER, if proceeding under Civ. Code § 3439.07(a)(3)(B)*]

A. Appointment of Receiver Available When Property Is Fraudulently Transferred or Obligation Is Fraudulently Incurred. In an action for relief under *Civil Code Sections 3439 through 3439.12*, a creditor, subject to applicable principles of equity and the limitations of *Civil Code Section 3439.08*, and in accordance with the applicable rules of civil procedure, may obtain the appointment of a receiver to take charge of the asset transferred or its proceeds (*Civ. Code § 3439.07(a)(3)(B)*).

[*AND/OR, if proceeding under Code Civ. Proc. § 564(b) (1)*]

B. Action by Creditor to Subject Property or Fund to Creditor's Claim. When property is transferred with the intent to delay, hinder, or defeat creditors, even though there is consideration for the transfer, the appointment of a receiver for the property is proper (*Code Civ. Proc. § 564(b)(1)*; *Burrows v. Jorgensen (1958) 158 Cal. App. 2d 644, 647-648, 323 P.2d 150* ; *Heffernan v. Bennett & Armour (1952) 110 Cal. App. 2d 564, 588, 243 P.2d 846*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that a receiver should be appointed in an action by a creditor under the Uniform Fraudulent Transfer Act (*Civ. Code §§ 3439-3439.12*) whether or not the creditor's claim has matured [*see Civ. Code § 3439.07(a)(3)(B)*; *see also Civ. Code § 3439.01(b)* (defining claim), (c) (defining creditor)].

These points and authorities may also be submitted in support of the contention that the appointment of a receiver is proper in an action by a creditor to subject any property or fund to the creditor's claim when [*Code Civ. Proc. § 564(b)(1)*]:

- The creditor shows that his or her right to or interest in the property or fund, or the proceeds thereof, sought to be placed in receivership is probable, and

- The creditor shows that the property or fund, or its proceeds, is in danger of being lost, removed, or materially injured.

These points and authorities should be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of the appointment. For example, these points and authorities may be:

- Submitted in support of a motion to appoint a receiver [*see § 200.10*].

- Submitted in support of the confirmation of an ex parte order appointing a receiver [*see § 200.50*].

- Adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice Ch. 50, *Appeal: Briefs* (Matthew Bender)].

- Raised as allegations or as a prayer in a complaint in a pending action seeking the provisional relief of receivership [*see* California Forms of Pleading and Practice, Ch. 486, *Receivers* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, if counsel is proceeding under *Civ. Code § 3439.07(a)(3)(B)*, counsel should set forth the facts establishing the criteria of the type of fraudulent transfer claimed, specifying the provision of the Uniform Fraudulent Transfer Act under which the transfer or obligation is claimed as fraudulent, that is,

- *Civ. Code § 3439.04(a)* (intentional),

- *Civ. Code § 3439.04(b)(1)* (made by a debtor engaged or about to engage in a business or transaction for which the debtor's remaining assets are unreasonably small in relation to the business or transaction without receiving reasonably equivalent value in exchange),

- *Civ. Code § 3439.04(b)(2)* (made by a debtor who intended to incur, or believed, or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they came due without receiving reasonably equivalent value in exchange), or

- *Civ. Code § 3439.05* (as to a creditor whose claim arose before the transaction claimed to be fraudulent, a transfer or obligation made by a debtor who was insolvent at the time or became insolvent as a result of the transfer or obligation without receiving reasonably equivalent value in exchange) [*see also Civ. Code § 3439.02* (defining insolvency)].

If counsel is proceeding under *Code Civ. Proc. § 564(b)(1)*, counsel should include specific facts showing that the property or fund sought to be placed in receivership is subject to the creditor's claim and is in danger of loss, removal, or material injury.

See also the *comments in § 200.80[2][b]* regarding evidentiary support for facts stated.

[c] Related Pleading and Practice Forms

For related legal background, research, and forms of complaints and allegations relating to the Uniform Fraudulent Transfer Act (Civ. Code § 3439 et seq.), see California Forms of Pleading and Practice, Ch. 270, *Fraudulent Conveyances* (Matthew Bender). For related legal background, research and procedural checklist, and forms of allegation, notice of motion, and declaration for appointment of receiver under Code Civ. Proc. § 564(b)(1) and (b)(8), see California Forms of Pleading and Practice, Ch. 486, *Receivers* (Matthew Bender).

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and *authorities in §§ 200.230, 200.231* may be used in an appropriate case to oppose the appointment of a receiver to take possession of property allegedly subject to a creditor's claim.

[3] Discussion of Authorities

[a] Appointment of Receiver Available When Property Is Fraudulently Transferred or Obligation Is Fraudulently Incurred

The Uniform Fraudulent Transfer Act, as enacted in California (*Civ. Code §§ 3439-3439.12*), applies to transfers made and obligations incurred or after January 1, 1987 [*Civ. Code § 3439.12*; *see also* Stats. 1986, ch. 383]. Under the Act, no distinction is made between creditors whose claims have matured and those whose have not. "Claim" is defined to include all rights to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured [*Civ. Code § 3439.01(b)*].

Except that creditors with matured claims may now have appointment of a receiver, cases considering appointment of receivers for the protection of creditors harmed by fraudulent transfer or obligations should remain applicable because, insofar as the provisions of *Civ. Code §§ 3439-3439.12* are substantially the same as the provisions of former Civ. Code §§ 3439-3439.13 (repealed by Stats. 1986, ch 383), they shall be construed as restatements and continuations, and not as new enactments [*Civ. Code § 3439.12*].

The limitations of *Civ. Code § 3439.08*, referred to in *Civ. Code § 3439.07(a)* relate to exceptions to voidability and to the rights of the transferee or obligee. A transfer or obligation cannot be voided against a person who took in good faith and for reasonably equivalent value or against any subsequent transferee or obligee [*Civ. Code § 3439.08(a)*]. The creditor's judgment is limited to the value of the asset transferred, as adjusted under *Civ. Code § 3439.08(c)*, or the amount necessary to satisfy the creditor's claim, whichever is less.

Judgment may be entered against [*Civ. Code § 3439.08(b)*]:

- The first transferee of the asset or the person for whose benefit the transfer was made, and
- Any subsequent transferee other than a good-faith transferee who took for value or from any subsequent transferee.

Any judgment based on the value of the asset transferred must be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require [*Civ. Code § 3439.08(c)*].

Notwithstanding the voidability of a transfer or obligation, a good-faith transferee or obligee is entitled, to the extend of the value given the debtor for the transfer or obligation, to [*Civ. Code § 3439.08(d)*]:

- A lien or a right to retain any interest in the asset transferred,
- Enforcement of any obligation incurred, and/or
- A reduction in the amount of the liability on the judgment.

A transfer, other than one that is intentionally fraudulent under *Civ. Code § 3439.04(a)*, is not voidable if it results from either of the following [*Civ. Code § 3439.08(e)(2)*]:

- Termination of a lease on default by the debtor when the termination is pursuant to the lease and applicable law [*Civ. Code § 3439.08(e)(1)*];
- Enforcement of a lien in a noncollusive manner and in compliance with applicable law, including Division 9 of the Commercial Code, other than a retention of collateral under *Com. Code §§ 9620* and

9621 and other than a voluntary transfer by the debtor to the lienor in satisfaction of all or part of the secured obligation.

[b] Action by Creditor to Subject Property or Fund to Creditor's Claim

A receiver may be appointed by the court in which an action or proceeding is pending, or by a judge of that court in an action by a creditor to subject any property or fund to the creditor's claim. The receiver may be appointed on the application of the plaintiff, or of any party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and when it is shown that the property or fund is in danger of being lost, removed, or materially injured [*Code Civ. Proc. § 564(b)(1)*].

In ***Burrows v. Jorgensen*** *(1958) 158 Cal. App. 2d 644, 323 P.2d 150* , plaintiffs filed an action for fraud in the sale of a leasehold. Defendants defaulted and judgment was entered in favor of plaintiffs. Plaintiffs then filed a second action to set aside transfers of three additional leaseholds in fraud of creditors. After filing the second action, plaintiffs moved for the appointment of a receiver to take over the management and control of defendants' property to satisfy the judgment in the first action. Subsequently, the trial court heard both the motion to appoint the receiver in the first action, and an order, issued in the second action, for defendants to show cause why a receiver should not be appointed. The trial court ordered a receiver appointed in both actions, and defendants then appealed the orders in each action.

The court of appeal affirmed each order appointing the receiver. The court initially found that there was consideration for defendants' transfers of the three leaseholds in the second action (*158 Cal. App. 2d 644, 647)* . However, even when a transfer is made with consideration, the transfer may be set aside if it was made with the intent to delay, hinder, or defeat creditors. In the instant action, the court noted that the transfers were made the day after defendants were served with an order of examination of their assets in the first action. Additionally, both defendants' counsel and one of defendants virtually admitted transferring the leaseholds to defeat plaintiffs' judgment. Furthermore, the transfers consisted of almost all of defendants' nonexempt property, which the court found to be an indication of fraud. Finally, the transferees were a daughter and son-in-law of defendants, which the court found to be another indication of fraud. Finding that defendants' transfers of the leaseholds were made with the intent to delay, hinder, or defeat plaintiffs' judgment in the first action, and that this fact was proven by clear and convincing evidence, the court held the appointment of the receiver to be proper. The court found authority for the appointment under *Code Civ. Proc. § 564(b)(1)*, providing for the appointment of a receiver in an action by a creditor to subject property or fund to the creditor's claim. The court found additional authority for the appointment under *Code Civ. Proc. § 564(b)(4)*, providing for the appointment of a receiver after judgment to enforce the judgment, and under former Code Civ. Proc. § 564(b)(7) (*now see Code Civ. Proc. § 564(b)(9)*), providing for the appointment of a receiver in all cases in which receivers have been appointed by the usages of courts of equity (*158 Cal. App. 2d 644, 648)* .

In ***Heffernan v. Bennett & Armour*** *(1952) 110 Cal. App. 2d 564, 243 P.2d 846* , plaintiff, an assignee of one of defendant corporation's creditors, brought a class action against defendant, on behalf of himself and all other creditors of defendant, to set aside as fraudulent the transfer of certain assets and the payment of certain funds. Prior to judgment, plaintiff obtained an order from the trial court appointing a receiver to take possession of the business and assets of defendant and to continue and manage the business as a going concern. The trial court found that defendant entered into the transfer of assets and the payment of funds with an actual intent to defraud existing and future creditors, and rendered judgment for plaintiff. Defendant appealed from the judgment and from the order appointing the receiver, and from the trial court's orders denying defendant's motions to set aside the judgment and the order appointing the receiver.

The court of appeal reversed the judgment, finding erroneous that portion of the judgment relating to the payment of plaintiff's claim out of the property and money fraudulently transferred. However, the court affirmed the order appointing the receiver, ruling that the trial court's findings of fact, conclusions of law, and judgment were correct insofar as they found that defendant's assets and money in issue were transferred in fraud of creditors (*110 Cal. App. 2d 564, 597)* . In affirming the appointment, the court found that the trial court did not abuse its discretion in appointing

the receiver to preserve and conserve the property that was the subject matter of the action. The court cited *Code Civ. Proc. § 564(b)(1)*, which provides for the appointment of a receiver in an action by a creditor to subject property or a fund to the creditor's claim. The court also cited former Code Civ. Proc. § 564(b)(7) (*now see Code Civ. Proc. § 564(b)(9)*, providing for the appointment of a receiver in all cases in which receivers have been appointed by the usages of courts of equity (*110 Cal. App. 2d 564, 588)* .

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CHAPTER 200 RECEIVERS
PART II. FORMS
B. Appointment of Receiver in Specified Actions
7. Creditor's Action to Subject Property or Fund to Creditor's Claim

20-200 California Points & Authorities §§ 200.221-200.229

AUTHOR: Robert Kaplan Editorial Consultant

[Reserved]

§§ 200.221[Reserved]

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20-200 California Points & Authorities § 200.230

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.230 Opposing Contention That Receiver Should Be Appointed in Action by Creditor to Subject Property or Fund to Creditor's Claim [Civ. Code § 3439.07(a)(3)(B); Code Civ. Proc. § 564(b)(1)]--Property or Fund Not in Danger of Loss, Removal, or Material Injury

[1] FORM Opposing Contention That Receiver Should Be Appointed in Action by Creditor to Subject Property or Fund to Creditor's Claim [Civ. Code § 3439.07(a)(3)(B); Code Civ. Proc. § 564(b)(1)]--Property or Fund Not in Danger of Loss, Removal, or Material Injury

[*This form should be combined with a memorandum of points and authorities opposing a motion to appoint receiver (see § 200.20) or an ex parte application to appoint receiver (see § 200.60), or included in a trial or appellate brief.*]

[*EITHER, if subject of receivership is property or a fund*]

THE COURT SHOULD NOT APPOINT A RECEIVER IN THIS ACTION BECAUSE THE _____ [PROPERTY *or* FUND] IS NOT IN DANGER OF BEING LOST, REMOVED, OR MATERIALLY INJURED.

[*OR, if subject of receivership is proceeds of property or a fund*]

THE COURT SHOULD NOT APPOINT A RECEIVER IN THIS ACTION BECAUSE THE PROCEEDS OF _____ [PROPERTY *or* FUND] ARE NOT IN DANGER OF BEING LOST, REMOVED, OR MATERIALLY INJURED.

[*OR, if subject of receivership is both property or a fund and proceeds thereof*]

THE COURT SHOULD NOT APPOINT A RECEIVER IN THIS ACTION BECAUSE THE _____ [PROPERTY *or* FUND], AND THE PROCEEDS THEREOF, ARE NOT IN DANGER OF BEING LOST, REMOVED, OR MATERIALLY INJURED.

[*CONTINUE*]

Creditor Is Not Entitled to Appointment of Receiver When Property or Fund Is Not in Danger of Loss, Removal, or Material Injury. When a complaint fails by its allegations to show that the property or fund sought to be placed in receivership is in danger of loss, removal, or material injury, the appointment of a receiver is void for all purposes (*Rogers v. Smith (1946) 76 Cal. App. 2d 16, 21, 172 P.2d 365* ; *In re Stein (1936) 14 Cal. App. 2d 303, 306, 58 P.2d 175*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to the contention that a receiver should be appointed under *Civ. Code § 3439.07(a)(3)(B)*, or under *Code Civ. Proc. § 564(b)(1)* in an action by a creditor to subject property or a fund to the creditor's claim.

The ground of opposition is that the creditor is unable to show that the property or the fund, or the proceeds thereof, sought to be placed in receivership is in danger of loss, removal, or material injury. For discussion of 1986 and 1987 amendments to *Civ. Code §§ 3439-3439.12*, see *§ 200.220[3][a]*.

These points and authorities should be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of the appointment. For example, these points and authorities may be:

- Submitted in combination with memoranda opposing the appointment of receivers on procedural grounds [*see, e.g., §§ 200.20 et seq. and 200.60* et seq.].

- Submitted in opposition to a motion to appoint a receiver [*see § 200.20* et seq.].

- Submitted in opposition to the confirmation of an ex parte order appointing a receiver [*see § 200.60*].

- Adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

This form may be combined with the *form in § 200.231[1]*, to contend, in addition, that a general creditor is not entitled to receivership.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 200.220[1]*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should include specific facts showing that the property or fund, or its proceeds, is not in danger of loss, removal, or material injury. See also the *comments in § 200.80[2][b]* regarding evidentiary support for facts stated.

[c] Receivership Under Code Civ. Proc. § 564(b)(9) Precluded if Another Subdivision Governs

Counsel should note that under former Code Civ. Proc. § 564(b)(8), the predecessor to *Code Civ. Proc. § 564(b)(9)*, which now provides for appointment of a receiver "in all other cases where necessary to preserve the property or rights of any party," that ground for appointment of a receiver could not be invoked in a case that alleged facts bringing it within one of the other subdivisions of *Code Civ. Proc. § 564* if the evidence did not support appointment under the other subdivision [*Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp. (1953) 116 Cal. App. 2d 869, 874, 254 P.2d 599]* . Therefore, these points and authorities may be combined, when appropriate, with the points and authorities *set out in § 200.260[1]* when it is contended that a subdivision other than *Code Civ. Proc. § 564(b)(9)* governs the appointment.

[3] Discussion of Authorities

[a] Creditor Is Not Entitled to Appointment of Receiver When Property or Fund Is Not in Danger of Loss, Removal, or Material Injury

In ***Rogers v. Smith*** *(1946) 76 Cal. App. 2d 16, 172 P.2d 365* , an action against a partnership and individual defendants for money had and received, plaintiff sought to recover a debt for payment of expenses, for services rendered, and for payments due under a contract for the purchase and sale of electric-machine gun motors. In his complaint, plaintiff prayed for an accounting, the sale of defendant partnership's assets to provide payment to plaintiff from the proceeds of the sale, injunctive relief, and for the appointment of a receiver of defendants' property. The trial court ordered, ex parte, the appointment of a receiver as requested and subsequently confirmed the appointment. Defendants appealed from the order confirming the appointment.

The court of appeal reversed the trial court's order confirming the ex parte appointment of the receiver. The court noted that plaintiff's authority for the appointment of the receiver was former Civ. Code § 3439.10(b) (*now see Civ. Code § 3439.07(a)(3)(B)*), providing for the appointment of a receiver to take charge of property when a conveyance made or obligation incurred is fraudulent as to a creditor whose claim has not matured (*76 Cal. App. 2d 16, 20)* . The court first found plaintiff's action to be essentially one at law for the recovery of a debt in which the remedy of attachment was available and would have been adequate. The court then held that the showing made by plaintiff furnished no ground for the appointment of a receiver. Even though plaintiff alleged in the complaint that defendants were insolvent, allegations in his subsequent affidavits proved the contrary. Additionally, neither plaintiff's complaint nor his affidavit alleged that defendants were indebted to anyone except himself, and defendants, in fact, denied their indebtedness to plaintiff (*76 Cal. App. 2d 16, 21)* . Furthermore, there was no allegation that defendants had placed a single dollar or any item of property beyond their control or beyond the reach of creditors. Finally, the shifting of funds between the individual defendants and the partnership defendant was not such as to place the funds beyond plaintiff's reach and was of no more concern to the partnership's creditors than the transfer by a debtor of a roll of bills from one pocket to another (*76 Cal. App. 2d 16, 22)* .

In ***In re Stein*** *(1936) 14 Cal. App. 2d 303, 58 P.2d 175* , petitioner was convicted of the misdemeanor offense of conducting the business of auctioneer without paying the required license fee. He was sentenced to pay a fine and, in default of payment, to be imprisoned in the county jail until he paid the fine. He did not pay, was committed to jail, and sought release on a writ of habeas corpus. Petitioner contended that he was appointed receiver in a pending superior court action and that the appointment gave him the power to conduct a public sale without having to first obtain an auctioneer's license. The complaint in that action alleged that defendants were indebted to plaintiff and other creditors, that the indebtedness was due and unpaid, and that if a receiver were appointed with authority to carry on defendants'

business and dispose of their stock of merchandise, it would be possible to obtain funds sufficient to pay off the indebtedness.

The court of appeal discharged the writ and remanded petitioner to custody, finding that because the allegations in the complaint in the pending civil action failed to state facts conferring jurisdiction on that court to appoint a receiver, the trial court was without power to order the appointment (*14 Cal. App. 2d 303, 306)* . The court found that the complaint failed by its allegations to show that the conditions required by Code *Civ. Proc. § 564(b)(1)* for the appointment of a receiver were complied with, that is, that plaintiff had a probable right to or interest in the property sought to be placed in receivership and that the property was in danger of loss, removal, or material injury (*14 Cal. App. 2d 303, 305)* .

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20-200 California Points & Authorities § 200.231

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.231 Opposing Contention That Receiver Should Be Appointed in Action by Creditor to Subject Property or Fund to Creditor's Claim [Civ. Code § 3439.07(a)(3)(B); Code Civ. Proc. § 564(b)(1)]--Party in Position of General Creditor Not Entitled to Appointment

[1] FORM Opposing Contention That Receiver Should Be Appointed in Action by Creditor to Subject Property or Fund to Creditor's Claim [Civ. Code § 3439.07(a)(3)(B); Code Civ. Proc. § 564(b)(1)]--Party in Position of General Creditor Not Entitled to Appointment

[*This form should be combined with a memorandum of points and authorities opposing a motion to appoint receiver (see § 200.20) or an ex parte application to appoint receiver (see § 200.60), or included in a trial or appellate brief.*]

THE COURT SHOULD NOT APPOINT A RECEIVE IN THIS ACTION BECAUSE _____ [*specify party seeking appointment, e.g.,* PLAINTIFF] HAS NOT SHOWN A PROBABLE _____ [RIGHT TO *or* INTEREST IN] THE _____ [PROPERTY *or* FUND *or* PROCEEDS OF THE _____ (PROPERTY *or* FUND)] IN THAT _____ [*specify, e.g.,* PLAINTIFF IS A GENERAL CREDITOR OF DEFENDANT].

Party in Position of General Creditor Is Not Entitled to Appointment of Receiver. In an action in which the appointment of a receiver is sought under *Code of Civil Procedure Section 564(b)(1)*, a party who is unable to show a right to the property sought to be placed in receivership is, at most, in no better position than that of a general creditor and, as such, not entitled to the appointment of a receiver (*Cal. Delta Farms v. Chinese Amer. Farms (1928) 204 Cal. 524, 526, 269 P. 443*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to the contention that a receiver should be appointed under *Civ. Code § 3439.07(a)(3)(B)*, or under *Code Civ. Proc. § 564(b)(1)* in an action by a creditor to subject property or a fund to the creditor's claim.

The ground of opposition is that the creditor is only a general creditor who does not have a probable right to or interest in the property, fund, or the proceeds. For discussion of 1986 and 1987 amendments to *Civ. Code §§ 3439-3439.12*, see *§ 200.220[3][a]*.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 200.220[1]*.

These points and authorities should be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of the appointment. The procedural contexts in which this issue may arise are *set forth in § 200.220[2]*.

This form may be combined with the *form in § 200.230[1]*, to contend, in addition, that the property or fund is not in danger of loss, removal, or material injury.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should include specific facts showing that the property or fund, or its proceeds, is not in danger of loss, removal, or material injury, or that the creditor is a general creditor and, as such, has no probable interest in or right to the property, fund, or proceeds sought to be placed in receivership. See also the *comments in § 200.80[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Party in Position of General Creditor Is Not Entitled to Appointment of Receiver

The facts and procedural background of ***Cal. Delta Farms v. Chinese Amer. Farms*** *(1928) 204 Cal. 524, 269 P. 443* , are discussed in *§ 200.150[3][a]*. In reversing the trial court's order appointing the receiver, the Supreme Court found that because plaintiff made no claim of fraud and had no right whatsoever in or to the property or any part of it, plaintiff was at most in no better position than that of a general creditor, and as such not entitled to the appointment of a receiver. The Court noted that a vendee in default under an executory contract of purchase, who continues in possession after notice of cancellation, is an adverse claimant, and all privity between him or her and the vendor, ceases with that notice (*204 Cal. 524, 526)* .

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20-200 California Points & Authorities §§ 200.232-200.239

AUTHOR: Robert Kaplan Editorial Consultant

[Reserved]

§§ 200.232[Reserved]

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8. Cases Involving Dissolved or Insolvent Corporations

20-200 California Points & Authorities § 200.240

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.240 Supporting Contention That Receiver Should Be Appointed in Case Involving Corporation That Is Insolvent or Has Forfeited Corporate Rights [Code Civ. Proc. § 564(b)(6)]

[1] FORM Supporting Contention That Receiver Should Be Appointed in Case Involving Corporation That Is Insolvent or Has Forfeited Corporate Rights [Code Civ. Proc. § 564(b)(6)]

[*This form should be combined with a memorandum of points and authorities supporting a motion to appoint receiver (see § 200.10) or an ex parte application to appoint receiver (see § 200.50), or included in a trial or appellate brief.*]

THE COURT SHOULD APPOINT A RECEIVER IN THIS ACTION BECAUSE THE SUPERIOR COURT MAY DO SO IN A CASE IN WHICH A CORPORATION _____ [IS INSOLVENT *or* IS IN IMMINENT DANGER OF INSOLVENCY *or* HAS FORFEITED ITS CORPORATE RIGHTS], AND THE CIRCUMSTANCES OF THIS CASE INDICATE THAT IT IS APPROPRIATE THAT THE COURT EXERCISE ITS DISCRETION IN FAVOR OF THE APPOINTMENT.

Case Involving Corporation That Is Dissolved, Insolvent, or Has Forfeited Corporate Rights. A receiver may be appointed by the court in which an action or proceeding is pending, or by a judge thereof, in cases when a corporation is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights (*Code Civ. Proc. § 564(b)(6)*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that a receiver should be appointed in a case involving a corporation that is insolvent, in imminent danger of insolvency, or has its forfeited corporate rights [*see Code Civ. Proc. § 564(b)(6)*].

The appointment of a receiver under *Code Civ. Proc. § 564(b)(6)* is ancillary to some other action that the plaintiff may bring against the corporation and does not provide an independent basis for appointment of a receiver [*see Mason v. San-Val Oil & Water Co., Ltd. (1941) 1 Cal. 2d 670, 673, 36 P.2d 615]* . Therefore, this provision does not authorize a private person, such as a shareholder or creditor seize a corporation's property out of the hands of the corporation's management and place it in the hands of a receiver [*see Sunset Farms, Inc. v. Superior Court (1935) 9 Cal. App. 2d 389, 401, 50 P.2d 106]* .

For points and authorities supporting an application by a shareholder or creditor to appoint a receiver on dissolution of a corporation, see *§ 200.241*. For memoranda for use in voluntary or involuntary dissolution proceedings generally, see Ch. 52, *Corporations* .

These points and authorities should be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of the appointment. For example, these points and authorities may be:

- Submitted in support of a motion to appoint a receiver [*see § 200.10*].

- Submitted in support of the confirmation of an ex parte order appointing a receiver [*see § 200.50*].

- Adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

- Raised as allegations or as a prayer in a complaint in a pending action seeking the provisional relief of receivership [*see* California Forms of Pleading and Practice, Ch. 486, *Receivers* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should include specific facts showing that the corporation is either insolvent, in imminent danger of insolvency, or has its forfeited corporate rights [*see Code Civ. Proc. § 564(b)(6)*]. See also the *comments in § 200.80[2][b]* regarding evidentiary support for facts stated.

[c] Modern Preference for Relief Under Corporations Code

Because of the strict construction that courts have applied to *Code Civ. Proc. § 564(b)(6)*, the instances in which a receiver may be appointed on these grounds has been greatly limited. Thus, courts are more likely to use remedies relating to voluntary or involuntary dissolution of the corporation, including the appointment of a receiver, provided in the General Corporation Law [*see Corp. Code § 1800 et seq.*]. For further discussion, see Ballantine & Sterling, California Corporation Laws, § 307.01 (Matthew Bender)].

[d] Related Pleading and Practice Forms

For discussion and forms seeking the appointment of a receiver under Code Civ. Proc. §§ 564(b)(5) and (6), 565, see California Forms of Pleading and Practice, Ch. 486, *Receivers* (Matthew Bender). For discussion and forms relating to voluntary and involuntary dissolution of corporations, see California Forms of Pleading and Practice, Ch. 160, *Corporations* , Pt. X (Matthew Bender).

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20-200 California Points & Authorities § 200.241

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.241 Supporting Contention That Receiver Should Be Appointed on Dissolution of Corporation on Application of Creditor or Shareholder [Code Civ. Proc. §§ 564(b)(5), 565]

[1] FORM Supporting Contention That Receiver Should Be Appointed on Dissolution of Corporation on Application of Creditor or Shareholder [Code Civ. Proc. §§ 564(b)(5), 565]

[*This form should be combined with a memorandum of points and authorities supporting a motion to appoint receiver (see § 200.10) or an ex parte application to appoint receiver (see § 200.50), or included in a trial or appellate brief.*]

THE COURT SHOULD APPOINT A RECEIVER IN THIS ACTION BECAUSE THE SUPERIOR COURT MAY DO SO ON THE DISSOLUTION OF ANY CORPORATION ON THE APPLICATION OF ANY _____ [CREDITOR *or* SHAREHOLDER *or* MEMBER], AND IT IS APPROPRIATE THAT THE COURT EXERCISE ITS DISCRETION IN FAVOR OF APPOINTMENT IN THIS CASE.

Appointment on Dissolution of Corporation on Application of Creditor or Shareholder. On the dissolution of any corporation, the superior court of the county in which the corporation carries on its business or has its principal place of business, on application of any creditor of the corporation, or of any stockholder or member thereof, may appoint one or more persons to be receivers or trustees of the corporation, to take charge of the estate and effects thereof and to collect the debts and property due and belonging to the corporation, and to pay the outstanding debts thereof, and to divide the moneys and other property that shall remain over among the stockholders or members (*Code Civ. Proc. §§ 564(b)(5), 565*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that a receiver should be appointed on dissolution of corporation on application of a creditor or shareholder [*see Code Civ. Proc. § 565*; *see also Code Civ. Proc. § 564(b)(5)* (receiver may be appointed when corporation has been dissolved as provided in *Code Civ. Proc. § 565*)].

These points and authorities should be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of the appointment. For example, these points and authorities may be:

- Submitted in support of a motion to appoint a receiver [*see § 200.10*].

- Submitted in support of the confirmation of an ex parte order appointing a receiver [*see § 200.50*].

- Adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

- Raised as allegations or as a prayer in a complaint in a pending action seeking the provisional relief of receivership [*see* California Forms of Pleading and Practice, Ch. 486, *Receivers* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should include specific facts showing that the corporation has been dissolved [*see Code Civ. Proc. § 564(b)(5)*], and that the circumstances of the case justify the court's exercise of discretion in favor of appointing a receiver [*see Code Civ. Proc. § 565*]. See also the *comments in § 200.80[2][b]* regarding evidentiary support for facts stated.

[c] Modern Preference for Relief Under Corporations Code

Because of the strict construction that courts have applied to *Code Civ. Proc. §§ 564(b)(5), 565*, the instances in which a receiver may be appointed on these grounds has been greatly limited. Thus, courts are more likely to use remedies relating to voluntary or involuntary dissolution of the corporation, including the appointment of a receiver, provided in the General Corporation Law [*see Corp. Code § 1800 et seq.*]. For further discussion, see Ballantine & Sterling, California Corporation Laws, § 307.01 (Matthew Bender).

[d] Related Pleading and Practice Forms

For discussion and forms seeking the appointment of a receiver under Code Civ. Proc. § 565, see California Forms of Pleading and Practice, Ch. 486, *Receivers* . For discussion and forms relating to voluntary and involuntary dissolution of corporations, see California Forms of Pleading and Practice, Ch. 160, *Corporations* , Pt. X (Matthew Bender).

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20-200 California Points & Authorities §§ 200.242-200.249

AUTHOR: Robert Kaplan Editorial Consultant

[Reserved]

§§ 200.242[Reserved]

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20-200 California Points & Authorities § 200.250

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.250 Supporting Contention That Receiver Should Be Appointed in Case to Preserve Property or Rights of Party [Code Civ. Proc. § 564(b)(9)]--General Form

[1] FORM Supporting Contention That Receiver Should Be Appointed in Case to Preserve Property or Rights of Party [Code Civ. Proc. § 564(b)(9)]--General Form

[*This form should be combined with a memorandum of points and authorities supporting a motion to appoint receiver (see § 200.10) or an ex parte application to appoint receiver (see § 200.50), or included in a trial or appellate brief.*]

THE COURT SHOULD APPOINT A RECEIVER IN THIS ACTION BECAUSE THE ACTION IS ONE IN WHICH A RECEIVER IS NECESSARY TO PRESERVE THE _____ [PROPERTY *or* RIGHTS *or* PROPERTY AND RIGHTS] OF _____ [*party status and name, e.g.,* PLAINTIFF ACME CORPORATION].

A. Appointment of Receiver to Preserve Property or Rights of Party. A receiver may be appointed by the court in which an action or proceeding is pending, or by a judge thereof, in all other cases when necessary to preserve the property or rights of any party (*Code Civ. Proc. § 564(b)(9)*; *see Boyle v. Superior Court (1917) 176 Cal. 671, 673, 170 P. 1140* ; *Quaglino v. Quaglino (1979) 88 Cal. App. 3d 542, 546, 152 Cal. Rptr. 47* (decided under prior law)).

[*Optional*] **B. Broad Discretion to Appoint Receiver Under Predecessor Subdivision.** Former Code of Civil Procedure Section 564(b)(8), the predecessor to *Code of Civil Procedure Section 564(b)(9)*, granted the court the power to appoint a receiver in all cases in which receivers had been appointed by usages of courts of equity, and was held to give the court all discretion formerly utilized by a chancellor in equity. Further, exercise of that discretion would not be disturbed on appeal absent a clear showing of abuse of discretion (*McNeil v. Graner (1949) 92 Cal. App. 2d 371, 374, 206 P.2d 1120*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that a receiver should be appointed in all other cases when necessary to preserve the property or rights of any party [*Code Civ. Proc. § 564(b)(9)*]. Presumably "other" is to indicate, as under the predecessor subdivision, former Code Civ. Proc. § 564(b)(8), that the authority of *Code Civ. Proc. § 564(b)(9)* is not to be invoked if the facts of the case bring it within another subdivision of *Code Civ. Proc. § 564(b)* [*see Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp. (1953) 116 Cal. App. 2d 869, 874, 254 P.2d 599* ; *Dabney Oil Co. v. Providence Oil Co. (1913) 22 Cal. App. 233, 237, 133 P. 1155* , discussed at *§ 200.260*]. Optional Paragraph B is to argue that the authority granted by *Code Civ. Proc. § 564(b)(9)* is in fact as broad as that granted by the predecessor subdivision, former Code Civ. Proc. § 564(b)(8).

These points and authorities should be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of the appointment. For example, these points and authorities may be:

- Submitted in support of a motion to appoint a receiver [*see § 200.10*].
- Submitted in support of the confirmation of an ex parte order appointing a receiver [*see § 200.50*].
- Adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch 50, *Appeal: Briefs* (Matthew Bender)].
- Raised as allegations or as a prayer in a complaint in a pending action seeking the provisional relief of receivership [*see* California Forms of Pleading and Practice, Ch. 486, *Receivers* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should include specific facts showing the specific rights or property that are in jeopardy and that nothing other than appointment of a receiver will adequately protect those rights or that property. See also the *comments in § 200.90[2][b]* regarding evidentiary support for facts stated.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Related Pleading and Practice Forms

For discussion and forms of allegations and prayers in complaints seeking the appointment of a receiver under Code Civ. Proc. § 564(b)(8), see California Forms of Pleading and Practice, Ch. 486, *Receivers* .

[3] Discussion of Authorities

[a] Appointment to Preserve Property or Rights of Party

Code Civ. Proc. § 564(b)(9) was amended by Stats 2001, ch. 44, to allow for appointment of a receiver "in all other

cases, when necessary to preserve the property or rights of any party." The predecessor subsection, which had been renumbered several times, provided for appointment of a receiver in all cases in which receivers had been appointed by usages of courts of equity. The cases cited in this form were decided under the statute granting power to appoint in accordance with usages of equity, but have been retained here because their facts show that the receiver in each case was appointed to protect the rights or property of a party when there appeared no other way to protect them.

In ***Boyle v. Superior Court*** *(1917) 176 Cal. 671, 170 P. 1140* , a stockholder's derivative action, plaintiffs sought the removal of two directors of real party in interest defendant corporation. Plaintiffs also sought the appointment of a receiver to take possession and charge of the assets and property of the corporation. In their complaint, plaintiffs alleged the directors were guilty of fraud, dereliction of duty, and violation of their trust as directors. Plaintiffs also alleged that dissension had arisen in the board of directors such that the board had reached a deadlock. No corporate business was being transacted, and the corporation had ceased operations. During trial, but before judgment, the trial court appointed a receiver to take charge of the assets and continue the business of the corporation. Defendants sought a writ of prohibition in the court of appeal seeking to prevent the trial court from enforcing his order appointing the receiver. The court of appeal dismissed the proceeding and quashed the alternative writ. The receiver then sought a writ of mandate in the Supreme Court to order the trial court to approve his bond and undertaking and to allow him to qualify for his appointment as receiver.

The Supreme Court issued the writ of mandate as requested by the receiver. In so doing, the Court ruled that the trial court had jurisdiction to appoint the receiver under former Code Civ. Proc. § 564(b)(6) (*176 Cal. 671, 673)* . The Court held it beyond controversy that courts of equity, both English and American, had appointed receivers under precisely the situation as presented in the case at bar (*176 Cal. 671, 673-674)* . These receivers were not appointed to close up the affairs of a corporation, or to dissolve the corporations, but to preserve their properties and, when possible, continue their corporate functions (*176 Cal. 671, 674)* . The Court ruled that dissensions and honest differences of opinion that result in making it impossible for a corporation to carry on its business to advantage or, as in the instant case, to carry on at all, are sufficient to invoke the action of a court of equity to appoint a receiver (*176 Cal. 671, 674)* . The Court concluded by noting that equity does not possess power to wind up the affairs of corporations, but in the case at bar, equity did not attempt to exercise that power (*176 Cal. 671, 675)* .

In ***Quaglino v. Quaglino*** *(1979) 88 Cal. App. 3d 542, 152 Cal. Rptr. 47* , two minor children, through their guardian ad litem, sued their father for child support and sought the appointment of a receiver. Defendant was convicted of the murder of plaintiffs' mother, and was currently incarcerated on that charge. The trial court ordered the appointment of a receiver of certain property specified in the complaint. Defendant appealed from the trial court's order appointing the receiver.

The court of appeal affirmed the order of the trial court. In so doing, the court addressed defendant's contention that the court lacked jurisdiction to appoint the receiver when there was no concomitant order to defendant to pay child support (*88 Cal. App. 3d 542, 545)* . Relying on former Code Civ. Proc. § 564(b)(7), the court held it clear that the appointment of the receiver, pending the outcome of the suit, was proper as a case in which receivers have heretofore been appointed by the usages of courts of equity. The court found that the complaint made out the case of need by the children and ability of the father to pay support. The trial court did not feel it had enough information on which to made a specific order of child support; it desired more information about the needs of the children and the income available for support before making a support order. In the interim, to prevent dissipation of defendant's assets that could be used for child support, the trial court acted properly in appointing a receiver, even though an order for child support had not been entered. The court cited *Nichols v. Superior Court (1934) 1 Cal. 2d 589, 594, 36 P.2d 380* , and *Guay v. Superior Court (1957) 147 Cal. App. 2d 764, 768-769, 305 P.2d 990* , among other cases, in noting that similar preliminary orders of receivership, even though anticipatory of further spousal and/or child support orders, had theretofore been upheld as proper. The record in the instant case demonstrated the great probability that the court would soon make an order of support and that defendant's property was in fact needed as a source to provide payment (*88 Cal. App. 3d 542, 546)* .

[b] Broad Discretion to Appoint Receiver Under Predecessor Subdivision

In ***McNeil v. Graner*** *(1949) 92 Cal. App. 2d 371, 206 P.2d 1120* , plaintiffs brought an action against defendant owner and operator of oil-bearing properties for fraud based on defendant's commingling oil from different wells, overcharging for operating expenses, and submitting false royalty statements. After the action was commenced, plaintiffs applied, ex parte, for the appointment of a receiver. Finding that defendant's assets were in danger of being lost and dissipated to the irreparable injury of plaintiffs, the court appointed a receiver pending the determination of the action. Defendant then appealed from the trial court's order appointing the receiver.

The court of appeal affirmed the trial court's order. The court ruled that there was substantial evidence to support the order, particularly plaintiffs' prior judgment against defendant in a similar action arising out of similar activities on defendant's part. The court found that, on the evidence before it, the trial court's order appointing the receiver was not an abuse of discretion (*92 Cal. App. 2d 371, 373)* . The instant action fell clearly within the purview of former Code Civ. Proc. § 564(b)(7). This broad provision gives to the trial court all the discretion formerly utilized by the chancellor in equity. The trial court's determination that under detailed circumstances, less drastic relief, such as injunctive relief, would be inadequate, and that resort should be made to receivership, will not be disturbed on appeal absent a clear showing of abuse of discretion. In the instant case, there was no showing how injunctive relief would protect plaintiffs from the continued perpetration of practices that prior litigation had determined to be fraudulent (*92 Cal. App. 2d 371, 374)* .

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20-200 California Points & Authorities § 200.251

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.251 Supporting Contention That Receiver Should Be Appointed in Case to Preserve Property or Rights of Party [Code Civ. Proc. § 564(b)(9)]--Appointment of Receiver in Actions for Partition

[1] FORM Supporting Contention That Receiver Should Be Appointed in Case to Preserve Property or Rights of Party [Code Civ. Proc. § 564(b)(9)]--Appointment of Receiver in Actions for Partition

[*This form should be combined with a general form of memorandum of points and authorities supporting a motion to appoint receiver (see § 200.10) or an ex parte application to appoint receiver (see § 200.50), or included in a trial or appellate brief.*]

THE COURT SHOULD APPOINT A RECEIVER IN THIS ACTION BECAUSE THE COURT HAS JURISDICTION TO APPOINT A RECEIVER AS AN ANCILLARY REMEDY IN AN ACTION FOR PARTITION OF REAL PROPERTY.

Appointment of Receiver in Actions for Partition. The court has jurisdiction to appoint a receiver as an ancillary remedy in an action for partition of real property among tenants in common when circumstances require it (*see Goodale v. Fifteenth Dist. Court (1880) 56 Cal. 26, 29, 33* ; *Blodgett v. Haddock (1949) 95 Cal. App. 2d 17, 18, 212 P.2d 26*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that a receiver should be appointed because the court has jurisdiction to appoint a receiver as an ancillary remedy in an action for partition of real property among tenants in common when circumstances require it. Although decided under the former wording of Code Civ. Proc. § 564, which allowed appointment of a receiver in all cases in which receivers had been appointed by usages of

courts of equity, the cases cited in this form have been retained because their facts show that the receiver in each case was appointed to protect the rights or property of a party when there appeared to be no other way to protect them [*see Code Civ. Proc. § 564(b)(9)* (receiver may be appointed when necessary to preserve property or rights of party)]. Appointment of a receiver in a partition action between tenants in common has been limited to situations in which the tenant in possession is attempting to oust the party seeking the receiver or is in some way interfering with the applicant's common possession and use of the property, or otherwise endangering the rights of the applicant [*see Reas v. Clemence (1916) 173 Cal. 106, 108, 159 P. 432]* .

These points and authorities should be combined with a general form of memorandum of points and authorities supporting appointment of a receiver in an action when necessary to preserve the property or rights of a party [*see Code Civ. Proc. § 564(b)(9)*; *see § 200.250[1]*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should include specific facts showing that the case is one in which the rights or property of the applicant are in jeopardy and that nothing other than appointment of a receiver will adequately protect those rights or that property. See also the *comments in § 200.80[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Appointment of Receiver in Actions for Partition

In ***Goodale v. Fifteenth Dist. Court*** *(1880) 56 Cal. 26* , plaintiffs brought a suit for partition against defendants. An interlocutory decree was subsequently entered, and three referees were appointed to partition the land in controversy. Thereafter, the trial court ordered the appointment of a receiver to take possession of the lands and lease them in parcels, to collect the rents, issues, and profits of the lands pending the action, and therefrom to pay the taxes and such other expenses as the court might direct, as well as to exercise the powers and duties of receivers in all similar cases. After the appointment, petitioner applied to the Supreme Court on a writ of certiorari to review the order of the trial court in appointing the receiver.

The Supreme Court dismissed the writ, finding the trial court's action in appointing the receiver to be correct (*56 Cal. 26, 33)* . The Court initially noted that a suit in partition is an equitable proceeding, and that former Code Civ. Proc. § 564(b)(6) provides that a receiver may be appointed in all cases in which receivers have heretofore been appointed by the usages of courts of equity (*56 Cal. 26, 29)* . The Court then surveyed a number of both English and American cases in which receivers had been appointed in partition suits. The Court concluded that it is competent for a court of equity, in some cases, to grant a receiver in partition suits when, for example, it is necessary to preserve the complainants from serious loss if they are unable to rent portions of the property, or to collect rent of other portions rented, because of defendant's conduct (*56 Cal. 26, 32)* .

In ***Blodgett v. Haddock*** *(1949) 95 Cal. App. 2d 17, 212 P.2d 26* , decedent bequeathed a portion of his estate in trust to his executors as trustees for his daughter for life. At her death, the trust fund was to be equally divided among decedent's remaining children or their issue. Pursuant to the bequest, the trustees acquired a certain lot of real property and made improvements on it, for which they used money constituting that portion of the estate due the daughter. After the daughter's death, her surviving husband, the defendant, occupied one of the dwelling units on the property and collected rentals from the three tenants in possession of the other three units. Plaintiffs commenced a suit against defendant for partition of the property to reach him as the party in possession of the property. Finding that defendant was without means or assets to pay any judgment for rentals and had no income other than from the trust property, the trial court issued an order appointing a receiver. The trial court found that defendant was occupying the property, title to which reverted to plaintiffs on his wife's death, since she had only a life estate in the property and no interest to pass on

to her husband at her death. Defendant appealed from the trial court's order appointing the receiver.

The court of appeal affirmed the order. The court found the question for decision to be whether an order appointing a receiver for the corpus of a testamentary trust estate that has reverted to the testator's heirs on the death of the sole beneficiary is valid. The court found that it was a valid order. The court ruled that the superior court has jurisdiction to appoint a receiver as an ancillary remedy in an action for partition of real property among tenants in common, and should do so when the circumstances require it (*95 Cal. App. 2d 17, 18)* . Defendant lacked assets or income from which a judgment could have been satisfied and had no divine guaranty for avoiding death or protracted illness. How, the court asked, could the heirs and devisees of the testator have been made secure against loss otherwise than by the appointment of a receiver to collect and conserve the revenues earned by the properties pending the outcome of a trial? The remedy of receivership was prescribed by *Code Civ. Proc. § 564* and was long in use in actions for partition. Pending the ultimate disposition, the trust corpus and its income had to be so conserved by the court as to enable the rightful owners to come into their own (*95 Cal. App. 2d 17, 19)* .

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20-200 California Points & Authorities §§ 200.252-200.259

AUTHOR: Robert Kaplan Editorial Consultant

[Reserved]

§§ 200.252[Reserved]

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20-200 California Points & Authorities § 200.260

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.260 Opposing Contention That Receiver Should Be Appointed in Case to Preserve Property or Rights of Party [Code Civ. Proc. § 564(b)(9)]--Action Is Clearly Governed by Another Subdivision of Code Civ. Proc. § 564

[1] FORM Opposing Contention That Receiver Should Be Appointed in Case to Preserve Property or Rights of Party [Code Civ. Proc. § 564(b)(9)]--Action Is Clearly Governed by Another Subdivision of Code Civ. Proc. § 564

[*This form should be combined with a memorandum of points and authorities opposing a motion to appoint receiver (see § 200.20 et seq.) or an ex parte application to appoint receiver (see § 200.60 et seq.), or included in a trial or appellate brief.*]

THE COURT SHOULD NOT APPOINT A RECEIVER IN THIS ACTION BECAUSE THE ACTION IS CLEARLY GOVERNED BY _____ [*specify, e.g.,* CODE OF CIVIL PROCEDURE SECTION 564(b)(1)], THEREBY PRECLUDING APPOINTMENT UNDER CODE OF CIVIL PROCEDURE SECTION 564(b)(9).

Party Is Not Entitled to Appointment of Receiver Under *Code Civ. Proc. § 564(b)(9)* When Case Is Clearly Governed by Another Subdivision of *Code Civ. Proc. § 564*. A party may not invoke the provisions of *Code of Civil Procedure Section 564(b)(9)* to appoint a receiver in a case alleging facts bringing it within one of the other subdivisions of *Code of Civil Procedure Section 564* if the evidence does not support appointment under the other subdivision (*Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp. (1953) 116 Cal. App. 2d 869, 874, 254 P.2d 599* ; *Dabney Oil Co. v. Providence Oil Co. (1913) 22 Cal. App. 233, 237, 133 P. 1155* (decided under prior versions of *Code Civ. Proc. § 564(b)*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to the contention that a receiver should be appointed in an action under Code *Civ. Proc. § 564(b)(9)* (where necessary to preserve property or rights of party) appointment based on usages of equity on the ground that the action is governed by another subdivision of *Code Civ. Proc. § 564*. Although the cases cited in this form were decided when the applicable subdivision of *Code Civ. Proc. § 564* provided for appointment of a receiver "[i]n all other cases where receivers have heretofore been appointed by the usages of courts of equity," while *Code Civ. Proc. § 564(b)(9)* now provides for appointment of a receiver "[i]n all other cases where necessary to preserve the property or rights of any party," the cases are being retained because the language "in all other cases" remains in the current version of the subdivision.

These points and authorities should be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of the appointment. For example, these points and authorities may be:

- Submitted in combination with memoranda opposing the appointment of receivers on procedural grounds [*see, e.g., §§ 200.20 et seq. and 200.60* et seq.].

- Submitted in opposition to a motion to appoint a receiver [*see § 200.20* et seq.].

- Submitted in opposition to the confirmation of an ex parte order appointing a receiver [*see § 200.60*].

- Adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in §§ 200.250[1]* and *200.251[1]*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should include specific facts showing not only that the case is clearly governed by any subdivision of *Code Civ. Proc. § 564* other than subdivision (9), but also that the party seeking receivership has failed to meet the statutory prerequisites for the appointment under the appropriate subdivision. See also the *comments in § 200.80[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Party Is Not Entitled to Appointment of Receiver Under Code Civ. Proc. § 564(b)(8) When Case Is Clearly Governed by Another Subdivision of Code Civ. Proc. § 564

The facts and procedural background of ***Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp.*** *(1953) 116 Cal. App. 2d 869, 254 P.2d 599* , are discussed in *§ 200.26[3][a]*. In *Alhambra*, the court of appeal reversed the trial court's order appointing the receiver, finding that plaintiff had failed to show that the property sought to be placed in receivership was in danger of loss, removal, or material injury, as required under *Code Civ. Proc. § 564(b)(1)*. The court also found that plaintiff could not invoke the provisions of former Code Civ. Proc. § 564(b)(7), providing for the appointment of a receiver in all other cases in which receivers have heretofore been appointed by the usages of courts of equity. In so ruling, the court relied on *Dabney Oil Co. v. Providence Oil Co. (1913) 22 Cal. App. 233, 237, 133 P. 11556* (discussed *below*), for the proposition that the provisions of former Code Civ. Proc. § 564(b)(6) cannot be invoked in a case alleging facts bringing it within one of the other subdivisions of *Code Civ. Proc. § 564* (*116 Cal.*

App. 2d 869, 874) .

The facts and procedural background of ***Dabney Oil Co. v. Providence Oil Co.*** *(1913) 22 Cal. App. 233, 133 P. 1155* , are discussed in *§ 200.20[3][b]*. In *Dabney*, the court of appeal reversed the trial court's order appointing the receiver, finding that plaintiff had failed to show that the property sought to be placed in receivership was in danger of loss, removal, or material injury, as required under former Code Civ. Proc. § 564(1). Finding the case to fall clearly within the provisions of former Code Civ. Proc. § 564(1), the court also ruled that plaintiff could not invoke the provisions of former Code Civ. Proc. § 564(6), providing for the appointment of a receiver in all other cases in which receivers have heretofore been appointed by the usages of courts of equity. The court held that the provisions of *Code Civ. Proc. § 564(6)* cannot be invoked in a case that alleges facts bringing it within one of the other subdivisions of *Code Civ. Proc. § 564* (*22 Cal. App. 233, 237)* .

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B. Appointment of Receiver in Specified Actions
9. Receivership in Cases Under Usages of Equity

20-200 California Points & Authorities §§ 200.261-200.269

AUTHOR: Robert Kaplan Editorial Consultant

[Reserved]

§§ 200.261[Reserved]

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1. Receivership in Attachment Proceedings

20-200 California Points & Authorities § 200.270

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.270 Supporting Contention That Receiver Should Be Appointed in Attachment Proceeding [Code Civ. Proc. § 488.700]--Appointment Necessary to Preserve Value of Property

[1] FORM Supporting Contention That Receiver Should Be Appointed in Attachment Proceeding [Code Civ. Proc. § 488.700]--Appointment Necessary to Preserve Value of Property

[*This form should be combined with a memorandum of points and authorities supporting a motion to appoint receiver (see § 200.10) or an ex parte application to appoint receiver (see § 200.50), or included in a trial or appellate brief.*]

[*EITHER, if property is perishable or subject to depreciation*]

THE COURT SHOULD APPOINT A RECEIVER IN THIS ACTION TO PRESERVE THE VALUE OF PROPERTY THAT _____ [HAS BEEN *or* IS SOUGHT TO BE] ATTACHED, BECAUSE THE PROPERTY IS _____ [PERISHABLE *or* WILL GREATLY DETERIORATE OR GREATLY DEPRECIATE IN VALUE]

[*OR, if receivership is in best interests of parties*]

THE COURT SHOULD APPOINT A RECEIVER IN THIS ACTION TO PRESERVE THE VALUE OF PROPERTY THAT _____ [HAS BEEN *or* IS SOUGHT TO BE] ATTACHED, BECAUSE THE INTERESTS OF THE PARTIES WILL BE BEST SERVED BY AN ORDER APPOINTING A RECEIVER.

[*CONTINUE*]

A. Appointment as Necessary to Preserve Property Value. If the property has been or is sought to be attached, the court may appoint a receiver to take any action the court orders necessary to preserve the value of property if the court determines that the property is perishable, or will greatly deteriorate or depreciate in value, or that, for some other reason, the interests of the parties will be best served by the appointment of a receiver (*Code Civ. Proc. § 488.700(a)*).

B. Law Governing Appointment of Receiver in Attachment Proceedings. The provisions of *Code of Civil Procedure Sections 564-571* govern the appointment, qualifications, powers, rights,

and duties of a receiver appointed under *Code of Civil Procedure Section 488.700* (*Code Civ. Proc. § 488.700(d)*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of the contention that a receiver should be appointed under *Code Civ. Proc. § 488.700*, when property has been or is sought to be attached. The court may appoint a receiver when the appointment is necessary to preserve the value of the property, if the court determines that the property is perishable, or will greatly deteriorate or depreciate in value, or that, for some other reason, the interests of the parties will be best served by the order [*see Code Civ. Proc. §§ 488.700(a), 699.070(a)*].

These points and authorities should be combined with a form of memorandum relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of the appointment. For example, this memorandum may be:

- Submitted in support of a motion to appoint a receiver [*see § 200.10*].
- Submitted in support of the confirmation of an ex parte order appointing a receiver [*see § 200.50*].
- Adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].
- Raised as allegations or as a prayer in a complaint in a pending action seeking the provisional relief of receivership [*see* California Forms of Pleading and Practice, Ch. 486, *Receivers* (Matthew Bender)].

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. In particular, counsel should include specific facts showing that the property to be levied on is perishable, will greatly deteriorate, or will greatly depreciate in value, or any other specific facts showing that the interests of the parties will be best served by the appointment of a receiver. For example, in an appropriate case, counsel would refer to evidence set forth in:

- Declarations and affidavits submitted in support of, or even in opposition to, the appointment [*see Cal. Rules of Court, Rule 3.1306(a)*].
- Discovery documents, such as deposition transcripts and answers to interrogatories and requests for admission.

- The opposing party's pleadings that constitute admissions.
- Other documentary evidence generally.

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. § 2009* (authorizing use of affidavits "upon a motion")]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*].

When counsel cites facts in his or her argument, counsel should refer to the particular page and line number of the declaration, deposition transcript, or other document, that contains the cited facts. In addition, the relevant portion of any testimony in a deposition should be marked in a manner that calls attention to the testimony [*see Cal. Rules of Court, Rule 3.1116(c)*].

For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Parties Authorized to Seek Appointment of Receiver

An order appointing a receiver under *Code Civ. Proc. § 488.700(a)* may be made on application by the plaintiff, the defendant, or a person who has filed a third-party claim pursuant to *Code Civ. Proc. §§ 720.010-720.800*.

[d] Method of Application for Receiver

The application for the appointment of the receiver must be made on noticed motion if the court so directs or if a court rule so requires. Otherwise, the application may be made ex parte [*Code Civ. Proc. § 488.700(a)*].

[e] Related Memoranda

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

For memoranda for use in attachment proceedings generally, see Ch. 23, *Attachment* .

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20-200 California Points & Authorities §§ 200.271-200.279

AUTHOR: Robert Kaplan Editorial Consultant

[Reserved]

§§ 200.271[Reserved]

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20-200 California Points & Authorities § 200.280

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.280 Supporting Contention That Receiver Should Be Appointed to Carry Judgment Into Effect [Code Civ. Proc. § 564(b)(3)]--General Form

[1] FORM Supporting Contention That Receiver Should Be Appointed to Carry Judgment Into Effect [Code Civ. Proc. § 564(b)(3)]--General Form

[*This form should be combined with a memorandum of points and authorities supporting a motion to appoint receiver (see § 200.10) or an ex parte application to appoint receiver (see § 200.50), or included in a trial or appellate brief.*]

THE COURT SHOULD APPOINT A RECEIVER AFTER JUDGMENT IN THIS ACTION BECAUSE THE APPOINTMENT IS NECESSARY TO CARRY THE JUDGMENT INTO EFFECT.

Appointment of Receiver to Carry Judgment Into Effect. A receiver may be appointed by the court in which an action or proceeding is pending, or by a judge thereof, after judgment, to carry the judgment into effect (*Code Civ. Proc. § 564(b)(3)*; *Darter v. Magnussen (1959) 172 Cal. App. 2d 714, 720, 342 P.2d 528* ; *Koshaba v. Koshaba (1942) 56 Cal. App. 2d 302, 314, 132 P.2d 854*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a receiver should be appointed after judgment to carry the judgment into effect [*see Code Civ. Proc. § 564(b)(3)*].

These points and authorities should be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of the appointment. For example,

these points and authorities may be:

- Submitted in support of a motion to appoint a receiver [*see § 200.10*].

- Adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. In particular, counsel should include specific facts showing that the appointment of a receiver is necessary to carry the judgment into effect. See also the *comments in § 200.270[2][b]* regarding evidentiary support for the facts stated.

[3] Discussion of Authorities

[a] Appointment of Receiver to Carry Judgment Into Effect

In ***Darter v. Magnussen*** *(1959) 172 Cal. App. 2d 714, 342 P.2d 528* , plaintiff was granted an interlocutory decree of divorce. The decree contained, among other provisions, a provision for sale of certain community property, a ranch. In that provision, the trial court reserved jurisdiction to make any further order relative to the sale of the ranch. No appeal was taken from that decree by either party. Subsequent to entry of the interlocutory decree, plaintiff died. Defendant thereafter moved to modify the interlocutory decree, principally by redistributing the ranch property. The court denied the motion, and defendant appealed. Plaintiff's executor, substituted for plaintiff in the action, then moved for an order appointing a receiver to sell the ranch in satisfaction of the interlocutory judgment. The trial court ordered a receiver of the ranch appointed. Defendant appealed from both the trial court's order denying defendant's motion to modify the interlocutory decree and the order appointing the receiver.

The court of appeal consolidated both appeals for hearing and decision, and affirmed the trial court's orders. In affirming the trial court's appointment of the receiver, the court ruled that the trial court did not abuse its discretion because the court did not, in appointing the receiver, reserve jurisdiction to change the property award or to determine that the ranch would not be sold. The court ruled that the property rights in the ranch were determined by the decree, which was not under attack. The trial court, in appointing the receiver, had no discretion to do otherwise. Its duty was to enforce the terms of the decree, and its order in appointing the receiver was made pursuant to the authority of former Code Civ. Proc. § 564 subd. (3), (*now see Code Civ. Proc. § 564(b)(3)*) to enforce the decree and carry it into effect (*172 Cal. App. 2d 714, 720)* .

In ***Koshaba v. Koshaba*** *(1942) 56 Cal. App. 2d 302, 132 P.2d 854* , plaintiff brought a stockholder's derivative action to remove one of defendants from his position as director of both of defendant corporations, and to compel him to restore certain moneys allegedly misappropriated from the corporations. Plaintiff also sought the appointment of a receiver to take charge of the business of defendant corporations, and to operate them until new directors could be appointed. After trial, the court found that the directors of one of defendant corporations were under the domination of defendant director, that defendant director was guilty of fraudulent and dishonest acts and gross abuse of authority, and that he had diverted corporate funds to his own use. The judgment ordered, among other things, that defendant director be removed from the boards of both corporations and that he be barred from election for ten years. The judgment also ordered the appointment of a receiver to carry into effect the terms of the judgment by operating the business until a new director could be duly elected to take defendant's place, calling an election for a new director, securing a writ of execution to be levied against defendant's stock to enforce the money judgment against him, to pay the court-appointed accountant, and to report back to the court (*56 Cal. App. 2d 302, 307, 314)* . Defendants appealed from the judgment.

The court of appeal affirmed the trial court's judgment, including the order appointing the receiver. The court found no merit in defendants' contentions that the trial court possessed no power to divorce the duly constituted directors from control of the corporation. The court held that former Code Civ. Proc. § 564 subd. (3) (*now see Code Civ. Proc. § 564(b)(3)*) expressly conferred on the trial court power to appoint a receiver after judgment to carry the judgment into effect. This was exactly what the trial court did. It did not, for example, dissolve the corporation. It merely took reasonable steps to preserve the business in safe hands pending the election of a new director and manager, and to ensure that its judgment would be carried into effect (*56 Cal. App. 2d 302, 314)* .

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20-200 California Points & Authorities § 200.281

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.281 Supporting Contention That Receiver Should Be Appointed to Carry Judgment into Effect [Code Civ. Proc. § 564(b)(3)]--Appointment of Receiver to Abate Public Nuisance

[1] FORM Supporting Contention That Receiver Should Be Appointed to Carry Judgment into Effect [Code Civ. Proc. § 564(b)(3)]--Appointment of Receiver to Abate Public Nuisance

[*This form should be combined with a memorandum of points and authorities supporting a motion to appoint receiver (see § 200.10) or an ex parte application to appoint receiver (see § 200.50), or included in a trial or appellate brief.*]

THE COURT SHOULD APPOINT A RECEIVER AFTER JUDGMENT IN THIS ACTION BECAUSE APPOINTMENT IS APPROPRIATE TO CARRY INTO EFFECT A JUDGMENT TO ABATE A PUBLIC NUISANCE.

Appointment of Receiver to Abate Public Nuisance. The court has the discretion under *Code of Civil Procedure Section 564(b)(3)* to appoint a receiver to carry into effect a judgment to abate a public nuisance (*see City and County of San Francisco v. Daley (1993) 16 Cal. App. 4th 734, 742-744, 20 Cal. Rptr. 2d 256*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a receiver should be appointed after judgment in an action to abate a nuisance to carry the judgment into effect [*see Code Civ. Proc. § 564(b)(3)*]. They may be combined with a general form of points and authorities supporting the contention that a receiver should be appointed to carry the judgment into effect [*see § 200.280[1]*].

These points and authorities should be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of the appointment. For example, these points and authorities may be:

- Submitted in support of a motion to appoint a receiver [*see § 200.10*].

- Adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should include specific facts showing that the appointment of a receiver is necessary to carry the judgment into effect. See also the *comments in § 200.270[2][b]* regarding evidentiary support for the facts stated.

[3] Discussion of Authorities

[a] Appointment of Receiver to Abate Public Nuisance

City and County of San Francisco v. Daley *(1993) 16 Cal. App. 4th 734, 20 Cal. Rptr. 2d 256* , involved an action initiated by a city in August 1988 against a residential property owner and her daughter to abate a public nuisance existing on the property. Only defendant's son answered, after which a default was entered. At a following hearing, the court ordered defendants to remedy the violations and to apply for all appropriate building permits. After repeated continuances of an order to show cause hearing to hold the parties in contempt, the son was jailed for five days for contempt. Throughout this period the three transferred title to the property among themselves. The city finally noticed a hearing for November 1991 for the appointment of a receiver to correct the outstanding violations. The court ordered the appointment. Defendant mother filed an appeal from the order.

The court of appeal affirmed the appointment. The court rejected defendant's argument that *Code Civ. Proc. § 564(b)(3)* was inapplicable in abatement proceedings. The plain language of that section permits the appointment of a receiver after judgment, to carry the judgment into effect. There is nothing in the statute to suggest that the Legislature intended to exclude judgments in abatement proceedings (*16 Cal. App. 4th 734, 742-744)* . Although the appointment of a receiver is sometimes characterized as a drastic remedy, the facts of the case supported the appointment. The court rejected defendant's argument that other remedies should have been considered. It would have been nonsensical to shut off the power and water to the unoccupied property, especially after jailing the son was not effective. The city did not have to attempt to seize the property under eminent domain. Contrary to defendant's argument, demolition had been offered as an option. Finally, the court rejected defendant's argument that the order to correct all outstanding code violations was overbroad. Defendant was protected from excessive repairs because the order required the receiver to first report to the court on the estimated costs of repairs (*16 Cal. App. 4th 734, 745-746)* .

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20-200 California Points & Authorities §§ 200.282-200.289

AUTHOR: Robert Kaplan Editorial Consultant

[Reserved]

§§ 200.282[Reserved]

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20-200 California Points & Authorities § 200.290

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.290 Supporting Contention That Receiver Should Be Appointed to Dispose of Property According to Judgment [Code Civ. Proc. § 564(b)(4)]

[1] FORM Supporting Contention That Receiver Should Be Appointed to Dispose of Property According to Judgment [Code Civ. Proc. § 564(b)(4)]

[*This form should be combined with a memorandum of points and authorities supporting a motion to appoint receiver (see § 200.10) or an ex parte application to appoint receiver (see § 200.50), or included in a trial or appellate brief.*]

THE COURT SHOULD APPOINT A RECEIVER AFTER JUDGMENT IN THIS ACTION BECAUSE THE APPOINTMENT IS NECESSARY TO DISPOSE OF PROPERTY ACCORDING TO THE JUDGMENT.

Appointment of Receiver to Dispose of Property According to Judgment. A receiver may be appointed by the court in which an action or proceeding is pending, or by a judge thereof, after judgment, to dispose of the property according to the judgment (*Code Civ. Proc. § 564(b)(4)*; *see Sheridan v. Sheridan (1972) 33 Cal. App. 3d 917, 922, 109 Cal. Rptr. 466*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a receiver should be appointed after judgment to dispose of property according to the judgment [*see Code Civ. Proc. § 564(b)(4)*].

These points and authorities should be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of the appointment. For example,

these points and authorities may be:

- Submitted in support of a motion to appoint a receiver [*see § 200.10*].

- Adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should include specific facts showing that the appointment of a receiver is necessary to dispose of property according to the judgment. See also the *comments in § 200.270[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Appointment of Receiver to Dispose of Property According to Judgment

In ***Sheridan v. Sheridan*** *(1972) 33 Cal. App. 3d 917, 109 Cal. Rptr. 466* , plaintiff petitioned the trial court for the appointment of a receiver to receive the salary checks of defendant, a federal employee, and to disburse the checks to plaintiff in payment of defendant's obligations of child support, attorney's fees, costs, and indebtedness pursuant to a judgment dissolving the marriage of plaintiff and defendant. The trial court granted plaintiff's petition, and defendant appealed from the order appointing the receiver, contending that the doctrine of sovereign immunity precluded the California court from appointing a receiver when the sole purpose of the appointment was the receipt and disbursement of the salary of defendant, an employee of a federal agency.

The court of appeal affirmed the order of appointment. The court held the doctrine of sovereign immunity inapplicable to prevent the appointment when no relief was sought against the federal government, and when the trial court's order did not attempt to garnish or attach any property in the possession of the federal government, was directed to defendant alone, and was applicable to defendant's salary only after it had come into his possession (*33 Cal. App. 3d 917, 920)* . Even though the salary could not be reached by plaintiff through a receiver while the money remained a mere debt due from the government to defendant, and as such was an intangible credit, the salary checks did become available and amenable to control of the court when defendant received them. Their character and status were changed thereby and became tangible property in the actual possession and control of defendant. If necessary or expedient to secure conversion of the checks into legal tender and apply them toward satisfaction of the judgment, the court was empowered to appoint a receiver for that purpose. Noting that no governmental agency was a party or objected to the action at bar, so long as the sovereign was not directly involved, the court found no cogent reason why federal employees should enjoy complete immunity from state enforcement of their financial obligations (*33 Cal. App. 3d 917, 921-922)* .

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20-200 California Points & Authorities §§ 200.291-200.299

AUTHOR: Robert Kaplan Editorial Consultant

[Reserved]

§§ 200.291[Reserved]

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20-200 California Points & Authorities § 200.300

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.300 Supporting Contention That Receiver Should Be Appointed to Preserve Property During Pendency of Appeal [Code Civ. Proc. § 564(b)(4)]

[1] FORM Supporting Contention That Receiver Should Be Appointed to Preserve Property During Pendency of Appeal [Code Civ. Proc. § 564(b)(4)]

[*This form should be combined with a memorandum of points and authorities supporting a motion to appoint receiver (see § 200.10) or an ex parte application to appoint receiver (see § 200.50), or included in a trial or appellate brief.*]

THE COURT SHOULD APPOINT A RECEIVER AFTER JUDGMENT IN THIS ACTION BECAUSE THE APPOINTMENT IS NECESSARY TO PRESERVE PROPERTY DURING THE PENDENCY OF _____ [*specify party seeking the appointment, e.g.,* PLAINTIFF'S] APPEAL.

Appointment of Receiver to Preserve Property During Pendency of Appeal. A receiver may be appointed by the court in which an action or proceeding is pending, or by a judge thereof, after judgment, to preserve property during the pendency of an appeal (*Code Civ. Proc. § 564(b)(4)*; *Sibert v. Shaver (1952) 113 Cal. App. 2d 19, 22, 247 P.2d 609*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a receiver should be appointed after judgment to preserve property during the pendency of an appeal [*see Code Civ. Proc. § 564(b)(4)*].

These points and authorities should be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of the appointment. For example,

these points and authorities may be:

- Submitted in support of a motion to appoint a receiver [*see § 200.10*].

- Adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should include specific facts showing that the appointment of a receiver is necessary to preserve the property during the pendency of an appeal. See also the *comments in § 200.270[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Appointment of Receiver to Preserve Property During Pendency of Appeal

The facts and procedural background of ***Sibert v. Shaver*** *(1952) 113 Cal. App. 2d 19, 247 P.2d 609* , are discussed in *§ 200.100[3][c]*. In *Sibert*, the court of appeal affirmed the trial court's order appointing a receiver of the partnership property on plaintiffs' motion. The court based its ruling, in part, on *Code Civ. Proc. § 564(b)(4)*, finding the appointment necessary to preserve the partnership's property during the pendency of defendant's appeals from the merits of the action. The court relied on the trial court's finding that defendant had in fact stated that he would personally spend the entire proceeds of the partnership business before he would pay the plaintiffs a nickel, that he would go bankrupt before he would account to them for anything, and that he would never turn any of the books of the partnership over to anyone (*113 Cal. App. 2d 19, 22)* .

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20-200 California Points & Authorities § 200.301

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.301 Supporting Contention That Receiver Should Be Appointed to Preserve Property During Enforcement Proceedings [Code Civ. Proc. §§ 564(b)(4), 699.070]

[1] FORM Supporting Contention That Receiver Should Be Appointed to Preserve Property During Enforcement Proceedings [Code Civ. Proc. §§ 564(b)(4), 699.070]

[*This form should be combined with a memorandum of points and authorities supporting a motion to appoint receiver (see § 200.10) or an ex parte application to appoint receiver (see § 200.50), or included in a trial or appellate brief.*]

[*EITHER, if property is perishable or subject to depreciation*]

THE COURT SHOULD APPOINT A RECEIVER IN THIS ACTION TO PRESERVE THE VALUE OF PROPERTY THAT HAS BEEN LEVIED ON BY WRIT OF EXECUTION, BECAUSE THE PROPERTY IS _____ [PERISHABLE *or* WILL GREATLY DETERIORATE OR GREATLY DEPRECIATE IN VALUE]

[*OR, if receivership is in best interests of parties*]

THE COURT SHOULD APPOINT A RECEIVER IN THIS ACTION TO PRESERVE THE VALUE OF PROPERTY THAT HAS BEEN LEVIED ON BY WRIT OF EXECUTION, BECAUSE THE INTERESTS OF THE PARTIES WILL BE BEST SERVED BY AN ORDER APPOINTING A RECEIVER.

[*CONTINUE*]

A. Appointment Is Necessary to Preserve Property Value. In the enforcement of a money judgment by writ of execution, the court may appoint a receiver to take any action the court orders necessary to preserve the value of property levied on if the court determines that the property is perishable, or will greatly deteriorate or depreciate in value, or that, for some other reason, the interests of the parties will be best served by the appointment of a receiver (*Code Civ. Proc. §§ 699.010, 699.070(a)*).

B. Law Governing Appointment of Receiver to Enforce Judgment. The provisions of *Code of Civil Procedure Sections 564-571* govern the appointment, qualifications, powers, rights, and duties of a receiver appointed under *Code of Civil Procedure Section 699.070* (*Code Civ. Proc. §§ 564(b)(4), 699.070(d)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a receiver should be appointed under *Code Civ. Proc. § 699.070*, to enforce a money judgment by writ of execution. The court may appoint a receiver when the appointment is necessary to preserve the value of the property, if the court determines that the property is perishable, or will greatly deteriorate or depreciate in value, or that, for some other reason, the interests of the parties will be best served by the order [*see Code Civ. Proc. §§ 488.700(a), 699.070(a)*].

These points and authorities should be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of the appointment. For example, these points and authorities may be:

- Submitted in support of a motion to appoint a receiver [*see § 200.10*].
- Submitted in support of the confirmation of an ex parte order appointing a receiver [*see § 200.50*].
- Adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].
- Raised as allegations or as a prayer in a complaint in a pending action seeking the provisional relief of receivership [*see* California Forms of Pleading and Practice, Ch. 486, *Receivers* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should include specific facts showing that the property to be levied on is perishable, will greatly deteriorate, or will greatly depreciate in value, or any other specific facts showing that the interests of the parties will be best served by the appointment of a receiver. See also the *comments in § 200.270[2][b]* regarding evidentiary support for facts stated.

[c] Parties Authorized to Seek Appointment of Receiver

An order appointing a receiver under *Code Civ. Proc. § 699.070(a)* may be made on application of the judgment creditor, the judgment debtor, or a person who has filed a third-party claim pursuant to *Code Civ. Proc. §§ 720.010-720.800*.

[d] Method of Application for Receiver

The application for the appointment of the receiver must be made on noticed motion if the court so directs or if a court rule so requires. Otherwise, the application may be made ex parte [*Code Civ. Proc. § 699.070(a)*].

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2. Receivership in Postjudgment Proceedings

20-200 California Points & Authorities §§ 200.302-200.309

AUTHOR: Robert Kaplan Editorial Consultant

[Reserved]

§§ 200.302[Reserved]

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20-200 California Points & Authorities § 200.310

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.310 Supporting Contention That Receiver Should Be Appointed to Enforce Judgment [Code Civ. Proc. §§ 564(b)(4), 699.010 et seq.]--General Form

[1] FORM Supporting Contention That Receiver Should Be Appointed to Enforce Judgment [Code Civ. Proc. §§ 564(b)(4), 699.010 et seq.]--General Form

[*This form should be combined with a memorandum of points and authorities supporting a motion to appoint receiver (see § 200.10) or an ex parte application to appoint receiver (see § 200.50), or included in a trial or appellate brief.*]

THE COURT SHOULD APPOINT A RECEIVER AFTER JUDGMENT IN THIS ACTION BECAUSE THE APPOINTMENT IS NECESSARY TO ENFORCE THE JUDGMENT.

Appointment of Receiver to Enforce Judgment Under Enforcement of Judgments Law. The appointment of a receiver is proper after judgment to enforce a judgment under the Enforcement of Judgments Law contained in *Code of Civil Procedure Sections 680.010-724.260* (*Code Civ. Proc. § 564(b)(4)*; *Bruton v. Tearle (1936) 7 Cal. 2d 48, 53, 59 P.2d 953* ; *Crocker National Bank v. O'Donnell (1981) 115 Cal. App. 3d 264, 269, 171 Cal. Rptr. 225* (both cases decided prior to 1982 amendments to *Code Civ. Proc. §§ 564(b)(4)* and *680.010-724.260*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contentions that a receiver should be appointed to enforce a judgment under the Enforcement of Judgments Law (*Code Civ. Proc. §§ 680.010-724.260*) [*see Code Civ. Proc. § 564(b)(4)*; *Fam. Code § 290* (Family Code judgment or order may be enforced by appointment of receiver as court in its discretion determines to be necessary)].

These points and authorities should be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of the appointment. For example, these points and authorities may be:

- Submitted in support of a motion to appoint a receiver [*see § 200.10*].

- Adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should include specific facts showing that the appointment of a receiver is necessary to enforce the judgment. See also the *comments in § 200.270[2][b]* regarding evidentiary support for facts stated.

[c] 1982 Amendments to Laws Governing Enforcement of Judgments

In 1982, *Code Civ. Proc. § 564(b)(4)* was amended to delete the requirements that, before obtaining a receiver in aid of the execution of a judgment, the party seeking appointment had to show that execution had been returned unsatisfied or that the judgment debtor refused to apply his or her property in satisfaction of the judgment. Similarly, former Code Civ. Proc. §§ 714 and 715, providing for supplementary proceedings in aid of execution of judgments, were repealed and replaced by *Code Civ. Proc. §§ 708.110-708.205*, providing for the examination of a debtor and discovery of his or her assets. Finally, *Code Civ. Proc. §§ 680.010-724.260* were added, comprising the new Enforcement of Judgments Law.

[3] Discussion of Authorities

[a] Appointment of Receiver to Enforce Judgment Under Enforcement of Judgments Law

A receiver may be appointed by the court in which an action or proceeding is pending, or by a judge thereof, after judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or pursuant to *Code Civ. Proc. §§ 680.010-724.260* (enforcement of judgments), or after sale of real property pursuant to a decree of foreclosure, during the redemption period, to collect, expend, and disburse rents as directed by the court or otherwise provided by law (*Code Civ. Proc. § 564(b)(4)*).

In ***Bruton v. Tearle*** *(1936) 7 Cal. 2d 48, 59 P.2d 953* , the original plaintiff (subsequently deceased) brought an action against defendant to recover a judgment for unpaid alimony. She recovered judgment and defendant appealed the judgment. During the pendency of the appeal, the original plaintiff died, her administrator was substituted, and the judgment was affirmed. Despite various efforts to obtain satisfaction of the judgment, it was only partially satisfied. Defendant subsequently entered into an agreement with plaintiff's administrator by which defendant would, over time, satisfy the remainder of the judgment. After defendant had ceased making payments under the agreement, even though the judgment remained unsatisfied, plaintiff's administrator obtained, on notice and after hearing, the appointment of a receiver in aid of execution. The affidavit supporting the application for the appointment set forth facts showing that execution of the judgment had been returned only partially satisfied, that defendant refused to apply his earnings to the satisfaction of the judgment, and that defendant, his manager, and his film studio employer had conspired to defeat collection of the judgment. Defendant appealed from the order appointing the receiver.

Adopting, in part, the opinion of the court of appeal, the Supreme Court affirmed the trial court's order appointing the receiver. The Court ruled that the trial court had jurisdiction to make the order appointing the receiver under former

Code Civ. Proc. § 564 subd. (4), providing for the appointment of a receiver after judgment in proceedings in aid of execution, when an execution has been returned unsatisfied, or when the judgment debtor refuses to apply property in satisfaction of the judgment (*now see Code Civ. Proc. § 564(b)(4)*, providing for the appointment of a receiver pursuant to the Enforcement of Judgments Law). The trial court also had jurisdiction to make the order because the action was not an attempt to bring an independent action in the nature of a creditor's bill, but was a proceeding strictly in accordance with the statutory provisions for proceedings supplemental to execution (*now see Code Civ. Proc. §§ 708.110-708.205* (examination proceedings). Furthermore, showing was clearly sufficient to justify the appointment of the receiver (*7 Cal. 2d 48, 53)* .

In ***Crocker National Bank v. O'Donnell*** *(1981) 115 Cal. App. 3d 264, 171 Cal. Rptr. 225* , plaintiff obtained a money judgment against defendant, based on a promissory note. Plaintiff unsuccessfully attempted to collect or execute on the judgment. Subsequently, plaintiff moved the trial court for the appointment of a receiver in aid of execution under *Code Civ. Proc. § 564(b)(4)*. The matter came on for hearing, and the trial court granted plaintiff's motion. The order appointing the receiver authorized the receiver to demand, collect, and receive all earnings by defendant, individually, and as a corporation, from any and all sources, including the individual defendant's professional medical corporation, of which the individual defendant was the sole shareholder. The order also authorized the receiver to take possession of all books and records of defendant, individually and as a corporation, to enable the receiver to collect the earnings of defendant individually. Defendants appealed from the order, contending, among other things, that the order was invalid insofar as it applied to the records of the corporation.

The court of appeal affirmed the trial court's order appointing the receiver, finding defendants' contention as to the invalidity of the order relative to the corporation to be wholly without merit (*115 Cal. App. 3d 264, 267, 269)* . The court found that the individual defendant was the sole shareholder of the corporation, that he used corporation funds as his own, and that his use of the corporate checking account for his personal expenses operated to defraud creditors by preventing plaintiff, as a practical matter, from reaching his earnings. The court accepted plaintiff's contention that the order appointing the receiver under *Code Civ. Proc. § 564(b)(4)* was necessary to prevent the individual defendant from taking his earnings out of the corporation for his own benefit without applying the earnings to the judgment (*115 Cal. App. 3d 264, 267)* .

NOTE:

Cases Decided Prior to 1982 Amendment. Counsel should note that these cases were decided prior to the 1982 amendment of *Code Civ. Proc. § 564(b)(4)* [*see* discussion in *§ 200.310[2][c]*]. However, the cases still appear to be valid authority for the proposition that a receiver may be appointed under *Code Civ. Proc. § 564(b)(4)*, after judgment, pursuant to the Enforcement of Judgments Law.

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20-200 California Points & Authorities § 200.311

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.311 Supporting Contention That Receiver Should Be Appointed to Enforce Judgment [Code Civ. Proc. §§ 564(b)(4), 699.010 et seq.]--Appointment Is Necessary to Ensure Fair and Orderly Satisfaction of Judgment

[1] FORM Supporting Contention That Receiver Should Be Appointed to Enforce Judgment [Code Civ. Proc. §§ 564(b)(4), 699.010 et seq.]--Appointment Is Necessary to Ensure Fair and Orderly Satisfaction of Judgment

[*This form should be combined with a memorandum of points and authorities supporting a motion to appoint receiver (see § 200.10) or an ex parte application to appoint receiver (see § 200.50), or included in a trial or appellate brief.*]

THE COURT SHOULD APPOINT A RECEIVER AFTER JUDGMENT IN THIS ACTION BECAUSE THE APPOINTMENT IS A REASON ABLE METHOD TO OBTAIN THE FAIR AND ORDERLY SATISFACTION OF THE JUDGMENT.

A. Appointment to Ensure Fair and Orderly Satisfaction of Judgment. The court may appoint a receiver to enforce the judgment when the judgment creditor shows that, considering the interests of both the judgment creditor and the judgment debtor, the appointment of a receiver is a reasonable method to obtain the fair and orderly satisfaction of the judgment (*Code Civ. Proc. §§ 564(b)(4), 708.620*).

B. Law Governing Appointment of Receiver to Enforce Judgment. The provisions of *Code of Civil Procedure Sections 564-571* govern the appointment, qualifications, powers, right, and duties of a receiver appointed under *Code of Civil Procedure Sections 708.610-708.620* (*Code Civ. Proc. §§ 564(b)(4), 708.610*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a receiver should be appointed to enforce a judgment when the judgment creditor shows that the appointment is a reasonable method to obtain the fair and orderly satisfaction of the judgment [*see Code Civ. Proc. § 708.620*]. For points and authorities that may be submitted in support of the contention that the appointment of a receiver is proper to apply the judgment debtor's interest in an alcoholic beverage license to the satisfaction of a money judgment under *Code Civ. Proc. § 708.630*, see *§ 200.320[1]*.

These points and authorities should be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of the appointment. For example, these points and authorities may be:

- Submitted in support of a motion to appoint a receiver [*see § 200.10*].

- Adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should include specific facts showing that, considering the interests of both the judgment creditor and the judgment debtor, the appointment of a receiver is a reasonable method to obtain the fair and orderly satisfaction of the judgment. See also the *comments in § 200.270[2][b]* regarding evidentiary support for facts stated.

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20-200 California Points & Authorities § 200.312

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.312 Supporting Contention That Receiver Should Be Appointed to Enforce Judgment [Code Civ. Proc. §§ 564(b)(4), 699.010 et seq.]--General Form--Appointment Is Proper to Enforce Simple Money Judgment

[1] FORM Supporting Contention That Receiver Should Be Appointed to Enforce Judgment [Code Civ. Proc. §§ 564(b)(4), 699.010 et seq.]--General Form--Appointment Is Proper to Enforce Simple Money Judgment

[*This form should be combined with a memorandum of points and authorities supporting a motion to appoint receiver (see § 200.10) or an ex parte application to appoint receiver (see § 200.50), or included in a trial or appellate brief.*]

THE COURT SHOULD APPOINT A RECEIVER AFTER JUDGMENT IN THIS ACTION BECAUSE THE APPOINTMENT IS PROPER TO ENFORCE THE SIMPLE MONEY JUDGMENT THAT THIS CASE PRESENTS.

Appointment of Receiver as Proper to Enforce Simple Money Judgment. The provisions of *Code of Civil Procedure Section 564(b)(4)*, authorizing the appointment of a receiver after judgment to enforce a judgment under the Enforcement of Judgments Law, do not exclude appointment of a receiver to collect a simple money judgment (*Code Civ. Proc. § 564(b)(4)*; *Olsan v. Comora (1977) 73 Cal. App. 3d 642, 647, 140 Cal. Rptr. 835* (decided prior to 1982 amendments to *Code Civ. Proc. §§ 564(b)(4)* and *680.010-724.260*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the appointment of a receiver is proper to enforce a simple money judgment [*see Code Civ. Proc. § 564(b)(4)*]. For discussion regarding 1982 amendments to laws governing enforcement of judgments, see *§ 200.310[2][c]*.

These points and authorities should be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of the appointment. For example, these points and authorities may be:

- Submitted in support of a motion to appoint a receiver [*see § 200.10*].

- Adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should include specific facts showing that the appointment of a receiver is necessary to enforce the judgment. See also the *comments in § 200.270[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Appointment of Receiver as Proper to Enforce Simple Money Judgment

The facts and procedural background of ***Olsan v. Comora*** *(1977) 73 Cal. App. 3d 642, 140 Cal. Rptr. 835* , are discussed in *§ 200.312[3][a]*. In *Olsan*, in affirming the trial court's order appointing a receiver, the court of appeal held that the law, both statutory and decisional, did not support defendant's contention that a receiver could not be appointed to enforce a simple money judgment (*73 Cal. App. 3d 642, 646)* . The court looked to former Code Civ. Proc. § 564 subd. (4), providing for the appointment of a receiver in proceedings in aid of execution, when an execution has been returned unsatisfied, or when the judgment debtor refuses to apply his or her property in satisfaction of the judgment. The court found the wording of the former statute to be clear and ambiguous, and found that it did not exclude the appointment of a receiver to collect a simple money judgment. The court ruled that the wording only limited the circumstances under which a court may use the somewhat harsh remedy of receivership. The court ruled that prior case law confirmed that it was proper, under certain circumstances, to appoint a receiver under *Code Civ. Proc. § 564(b)(4)* to enforce a simple money judgment (*73 Cal. App. 3d 642, 647)* .

NOTE:

Case Decided Prior to 1982 Amendment. Counsel should note that this case was decided prior to the 1982 amendment of *Code Civ. Proc. § 564(b)(4)* [*see* discussion in *§ 200.310[2][c]*]. However, the case still appears to be valid authority for the proposition that a receiver may be appointed under *Code Civ. Proc. § 564(b)(4)*, after judgment, pursuant to the Enforcement of Judgments Law.

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20-200 California Points & Authorities § 200.313

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.313 Supporting Contention That Receiver Should Be Appointed to Enforce Judgment [Code Civ. Proc. §§ 564(b)(4), 699.010 et seq.]--Court Is Not Required to Order Examination Proceedings Prior to Appointing Receiver

[1] FORM Supporting Contention That Receiver Should Be Appointed to Enforce Judgment [Code Civ. Proc. §§ 564(b)(4), 699.010 et seq.]--Court Is Not Required to Order Examination Proceedings Prior to Appointing Receiver

[*This form should be combined with a memorandum of points and authorities supporting a motion to appoint receiver (see § 200.10) or an ex parte application to appoint receiver (see § 200.50), or included in a trial or appellate brief.*]

THE COURT SHOULD APPOINT A RECEIVER AFTER JUDGMENT IN THIS ACTION WITHOUT EXAMINATION PROCEEDINGS.

Court Is Not Required to Order Examination Proceedings Prior to Appointing Receiver to Enforce Judgment. There is no provision in *Code of Civil Procedure Section 564(b)(4)* requiring examination proceedings under *Code of Civil Procedure Sections 708.110-708.205* before the remedy of receivership may be invoked, and the court is not required to order an examination proceeding if it is convinced that the appointment of a receiver is necessary to aid in the execution of a judgment (*Code Civ. Proc. § 564(b)(4)*; *Olsan v. Comora (1977) 73 Cal. App. 3d 642, 648, 140 Cal. Rptr. 835* (decided prior to 1982 amendments to *Code Civ. Proc. §§ 564(b)(4)* and *680.010-724.260*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the court is not required to order examination proceedings under *Code Civ. Proc. §§ 708.110-708.205* before appointing a receiver to enforce a

judgment. For discussion regarding 1982 amendments to laws governing enforcement of judgments, see *§ 200.310[2][c]*.

These points and authorities should be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of the appointment. For example, these points and authorities may be:

- Submitted in support of a motion to appoint a receiver [*see § 200.10*].

- Adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should include specific facts showing that the appointment of a receiver is necessary to enforce the judgment. See also the *comments in § 200.270[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Court Is Not Required to Order Examination Proceedings Prior to Appointing Receiver to Enforce Judgment

In ***Olsan v. Comora*** *(1977) 73 Cal. App. 3d 642, 140 Cal. Rptr. 835* , plaintiff obtained a money judgment against defendant. The judgment became final after being affirmed on appeal. By means of an execution and garnishment, plaintiff collected a portion of the judgment from defendant out of a pending escrow. Plaintiff then sought the appointment of a receiver under former Code Civ. Proc. § 564 subd. (4). After notice and hearing, the trial court appointed a receiver to take possession and collect all earnings, cash, bank deposits, and checks representing amounts received by defendant for services performed by him as a dentist. Defendant appealed from the order, contending that the appointment of a receiver to collect a simple money judgment can only be made in connection with supplemental proceedings in aid of execution under former Code Civ. Proc. §§ 714 and 715 (*now see Code Civ. Proc. §§ 708.110-708.205* (examination proceedings)) (*73 Cal. App. 3d 642, 647)* .

The court of appeal affirmed the trial court's order appointing the receiver. The court held that, contrary to defendant's contention, case law and former Code Civ. Proc. § 564(b)(4) did not exclude the direct appointment of a receiver by a court absent supplementary proceedings (now examination proceedings). The court ruled there was no provision in former Code Civ. Proc. § 564 subd.(4) requiring supplemental proceedings before the remedy of receivership could be invoked. Furthermore, there was no similar provisional language in former Code Civ. Proc. §§ 714 and 715. Finally, the court noted that the practice in superior courts in numerous counties was that a petitioning party had procedural alternatives, and could proceed under former Code Civ. Proc. §§ 714 and 715, or could proceed directly by motion to the court under former Code Civ. Proc. § 564 subd. (4) (*73 Cal. App. 3d 642, 648)* . Noting that the latter procedure was used by plaintiff, the court found a logical and expeditious reason for that pragmatic procedure in that the trial court was convinced of the need for the appointment by the evidence in support of plaintiff's motion (*73 Cal. App. 3d 642, 648-649)* . Therefore, the trial court was not required to order a supplementary proceeding that would only establish anew the need for a receiver. The court concluded that it was satisfied the trial court had jurisdiction to appoint the receiver under the facts and procedures used in the case, and that it did not abuse its discretion in doing so (*73 Cal. App. 3d 642, 649)* .

NOTE:

Case Decided Prior to 1982 Amendment. Counsel should note that this case was decided prior to the

1982 amendment of *Code Civ. Proc. § 564(b)(4)* [*see* discussion in *§ 200.310[2][c]*]. However, the case still appears to be valid authority for the proposition that a receiver may be appointed under *Code Civ. Proc. § 564(b)(4)*, after judgment, pursuant to the Enforcement of Judgments Law.

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20-200 California Points & Authorities §§ 200.314-200.319

AUTHOR: Robert Kaplan Editorial Consultant

[Reserved]

§§ 200.314[Reserved]

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20-200 California Points & Authorities § 200.320

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.320 Supporting Contention That Receiver Should Be Appointed to Enforce Judgment [Code Civ. Proc. §§ 564(b)(4), 699.010 et seq.]--Appointment to Take Possession of Judgment Debtor's Interest in Alcoholic Beverage License [Code Civ. Proc. § 708.630]

[1] FORM Supporting Contention That Receiver Should Be Appointed to Enforce Judgment [Code Civ. Proc. §§ 564(b)(4), 699.010 et seq.]--Appointment to Take Possession of Judgment Debtor's Interest in Alcoholic Beverage License [Code Civ. Proc. § 708.630]

[*This form should be combined with a memorandum of points and authorities supporting a motion to appoint receiver (see § 200.10) or an ex parte application to appoint receiver (see § 200.50), or included in a trial or appellate brief.*]

THE COURT SHOULD APPOINT A RECEIVER AFTER JUDGMENT IN THIS ACTION BECAUSE THE APPOINTMENT IS NECESSARY TO APPLY THE JUDGMENT DEBTOR'S INTEREST IN HIS/HER/ITS ALCOHOLIC BEVERAGE LICENSE TO THE SATISFACTION OF THE JUDGMENT.

Appointment to Take Possession of Judgment Debtor's Interest in Alcoholic Beverage License. A court may apply a judgment debtor's interest in an alcoholic beverage license to the satisfaction of a money judgment by appointing a receiver, for the purpose of transferring that portion of the judgment debtor's interest in the license that is transferable to the receiver, unless the judgment debtor shows that the amount of delinquent taxes and claims of creditors with priority over the judgment creditor exceeds the probable sale price of the license (*Code Civ. Proc. §§ 564(b)(4), 708.630*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the appointment of a receiver is proper

to apply the judgment debtor's interest in an alcoholic beverage license to the satisfaction of a money judgment by placing the license in receivership [*see Code Civ. Proc. § 708.630*].

These points and authorities should be combined with a general form of memorandum in support of the contention that a receiver should be appointed to enforce a judgment [*see § 200.310[1*].

These points and authorities should also be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of the appointment. For example, these points and authorities may be:

- Submitted in support of a motion to appoint a receiver [*see § 200.10*].

- Submitted in support of the confirmation of an ex parte order appointing a receiver [*see § 200.50*].

- Adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

- Raised as allegations or as a prayer in a complaint in a pending action seeking the provisional relief of receivership [*see* California Forms of Pleading and Practice, Ch. 486, *Receivers* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In a proceeding under *Code Civ. Proc. § 708.630*, counsel should also include specific facts showing that some or all of debtor's interest in an alcoholic beverage license is transferable under *Bus. & Prof. Code §§ 24070-24082* (transfer of alcoholic beverage licenses). See also the *comments in § 200.270[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Appointment to Take Possession of Judgment Debtor's Interest in Alcoholic Beverage License

The judgment debtor's interest in an alcoholic beverage license may be applied to the satisfaction of a money judgment only as provided in *Code Civ. Proc. § 708.630* [*Code Civ. Proc. § 708.630(a)*]. The court may appoint a receiver for the purpose of transferring the judgment debtor's interest in an alcoholic beverage license that is transferable under *Bus. & Prof. Code §§ 24070-24082*, unless the judgment debtor shows, in the proceeding to appoint a receiver, that the amount of delinquent taxes described in *Bus. & Prof. Code § 24049* and claims of creditors with priority over the judgment creditor pursuant to *Bus. & Prof. Code § 24074* exceed the probable sale price of the license (*Code Civ. Proc. § 708.630(b)*). The exercise of powers by the receiver is governed by *Code Civ. Proc. § 708.630(c)*.

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20-200 California Points & Authorities § 200.321

AUTHOR: Robert Kaplan Editorial Consultant

[Reserved]

§ 200.321[Reserved]

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20-200 California Points & Authorities § 200.322

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.322 Supporting Contention That Receiver Should Be Appointed--To Enforce Judgment--Judgment Debtor's Transferable Interest in General Partnership Charged With Unsatisfied Amount of Judgment Debt [Corp. Code § 16504]--Partnership Governed by Uniform Partnership Act of 1994 [Corp. Code §§ 16100-16962]

[1] FORM Supporting Contention That Receiver Should Be Appointed--To Enforce Judgment--Judgment Debtor's Transferable Interest in General Partnership Charged With Unsatisfied Amount of Judgment Debt [Corp. Code § 16504]--Partnership Governed by Uniform Partnership Act of 1994 [Corp. Code §§ 16100-16962]

[*This form should be combined with a memorandum of points and authorities supporting a motion to appoint a receiver (see § 200.10) or an ex parte application to appoint a receiver (see § 200.50), or included in a trial or appellate brief.*]

A RECEIVER SHOULD BE APPOINTED AFTER JUDGMENT IN THIS ACTION BECAUSE THE APPOINTMENT IS NECESSARY TO ENFORCE A JUDGMENT AGAINST THE JUDGMENT DEBTOR BY MEANS OF A CHARGING ORDER APPLYING THE JUDGMENT DEBTOR'S TRANSFERABLE INTEREST IN _____ [*specify name of partnership*], A PARTNERSHIP, TOWARD SATISFACTION OF THE JUDGMENT.

A. Charging Order as Available to Satisfy Judgment. If a money judgment is rendered against a partner or a partner's transferee, but not against the partnership, and the partnership is governed by the Uniform Partnership Act of 1994 (*Corp. Code §§ 16100-16962*), the judgment debtor's transferable interest may be applied toward the satisfaction of the judgment by an order charging the judgment debtor's transferable interest in the partnership (*Corp. Code §§ 16111(a),(b), 16504(a)*).

B. Appointment of Receiver. For a partnership governed by the Uniform Partnership Act of 1994 (*Corp Code §§ 16100-16962*), the court may appoint a receiver of the share of the distributions due or to become due the judgment debtor in respect of the partnership and make all other orders, directions, accounts, and inquiries the judgment debtor

might have made or the circumstances of the case may require [*Corp. Code §§ 16111(a), (b), 16504(a)*].

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a receiver should be appointed after judgment to charge the judgment debtor's transferable interest in a general partnership to satisfy the unpaid amount of the judgment when a money judgment is rendered against a partner or a partner's transferee, but not against the partnership [*see Corp. Code § 16504(a)*].

For discussion of which Act applies, see [c], *below*.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of the appointment. They may also be adapted generally for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should include specific facts showing the nature and extent of the debtor partner's interest in the partnership. See also the *comments in § 200.270[2][b]* regarding evidentiary support for facts stated.

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2. Receivership in Postjudgment Proceedings

20-200 California Points & Authorities § 200.323

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.323 Supporting Contention That Receiver Should Be Appointed to Enforce Judgment [Code Civ. Proc. §§ 564(b)(4), 699.010 et seq.]--Appointment to Apply Franchise Granted by Public Entity to Satisfy Money Judgment [Code Civ. Proc. § 708.920]

[1] FORM Supporting Contention That Receiver Should Be Appointed to Enforce Judgment [Code Civ. Proc. §§ 564(b)(4), 699.010 et seq.]--Appointment to Apply Franchise Granted by Public Entity to Satisfy Money Judgment [Code Civ. Proc. § 708.920]

[*This form should be combined with a memorandum of points and authorities supporting a motion to appoint receiver (see § 200.10) or an ex parte application to appoint receiver (see § 200.50), or included in a trial or appellate brief.*]

THE COURT SHOULD APPOINT A RECEIVER AFTER JUDGMENT IN THIS ACTION BECAUSE THE APPOINTMENT IS NECESSARY TO ENFORCE THE MONEY JUDGMENT BY APPLYING THE FRANCHISE GRANTED TO THE JUDGMENT DEBTOR BY _____ [*specify public entity*], A PUBLIC ENTITY, TO SATISFACTION OF THE JUDGMENT.

A. Application of Franchise Granted by Public Entity to Satisfaction of Money Judgment. The court may, in its discretion, order a franchise, granted by a public entity, applied to the satisfaction of a money judgment (*Code Civ. Proc. § 708.920(a)*).

B. Factors Considered by Court in Applying Franchise to Satisfaction of Judgment. In exercising its discretion to order a franchise applied to the satisfaction of a money judgment, the court shall determine whether application of the franchise to the satisfaction of the judgment is proper, taking into account all the circumstances of the case, including, but not limited to, the nature of the franchise, whether the franchise is, by its terms, transferable, and the likelihood that application of the franchise to the satisfaction of the judgment will yield a substantial amount (*Code Civ. Proc. § 708.920(a)*).

C. Appointment of Receiver. If the court orders application of the franchise to the satisfaction of the judgment, application shall be by such means as appear proper to the court, including, but not limited to, the appointment of a receiver (*Code Civ. Proc. §§ 564(b)(4), 708.920(b)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a receiver should be appointed after judgment to apply a franchise granted by a public entity to the satisfaction of a money judgment [*see Code Civ. Proc. § 708.920(b)*; *see also Code Civ. Proc. § 708.910* ("franchise" defined)].

These points and authorities should be combined with a general form of memorandum in support of the contention that a receiver should be appointed to enforce a judgment [*see § 200.310[1*].

These points and authorities should be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of the appointment. For example, these points and authorities may be:

- Submitted in support of a motion to appoint a receiver [*see § 200.10*].

- Adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should include specific facts showing that the franchise is amenable to receivership. Additionally, counsel should include facts showing that application of the franchise to satisfaction of the judgment will yield a substantial amount. See also the *comments in § 200.270[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Appointment of Receiver

If the court orders application of the franchise to the satisfaction of the judgment, application shall be by such means as appear proper to the court, including, but not limited to, sale of the franchise, assignment of the franchise or its proceeds, or appointment of a receiver. The court may include in its order, or make additional orders containing, provisions to effectuate the application of the franchise to the satisfaction of the judgment, including, but not limited to, provisions relating to the place of sale of the franchise, possession of the judgment debtor's property necessary for the exercise of the franchise, receipt of proceeds of the franchise, recovery of penalties imposed by law and recoverable for injury to the franchise or for damages or other cause, and the judgment debtor's powers, duties, and liability for penalties and forfeitures [*Code Civ. Proc. § 708.920(b)*].

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20-200 California Points & Authorities §§ 200.324-200.329

AUTHOR: Robert Kaplan Editorial Consultant

[Reserved]

§§ 200.324[Reserved]

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20-200 California Points & Authorities § 200.330

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.330 Supporting Contention That Receiver Should Be Appointed to Enforce Judgment For Possession or Sale of Property [Code Civ. Proc. §§ 564(b)(4), 708.610-708.630, 712.060]

[1] FORM Supporting Contention That Receiver Should Be Appointed to Enforce Judgment For Possession or Sale of Property [Code Civ. Proc. §§ 564(b)(4), 708.610-708.630, 712.060]

[*This form should be combined with a memorandum of points and authorities supporting a motion to appoint receiver (see § 200.10) or an ex parte application to appoint receiver (see § 200.50), or included in a trial or appellate brief.*]

THE COURT SHOULD APPOINT A RECEIVER AFTER JUDGMENT IN THIS ACTION BECAUSE THE APPOINTMENT IS NECESSARY TO ENFORCE THE JUDGMENT FOR THE _____ [POSSESSION *or* SALE] OF PROPERTY.

Appointment to Enforce Judgment for Possession or Sale of Property. The court may appoint a receiver under *Code of Civil Procedure Sections 708.610-708.630* to enforce a judgment for possession or sale of property (*Code Civ. Proc. §§ 564(b)(4), 712.060*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a receiver should be appointed to enforce a judgment for the possession or sale of property [*see Code Civ. Proc. § 712.060*].

These points and authorities should be combined with a general form of memorandum in support of the contention that a receiver should be appointed to enforce a judgment [*see § 200.310[1]*]. It may also be combined with points and

authorities in support of appointment to ensure the fair and orderly satisfaction of the judgment [*see § 200.311[1]*].

These points and authorities should be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of the appointment. For example, these points and authorities may be:

- Submitted in support of a motion to appoint a receiver [*see § 200.10*].

- Submitted in support of the confirmation of an ex parte order appointing a receiver [*see § 200.50*].

- Adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also*, California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

- Raised as allegations or as a prayer in a complaint in a pending action seeking the provisional relief of receivership [*see* California Forms of Pleading and Practice, Ch. 486, *Receivers* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should include specific facts showing the existence of a judgment for the possession or sale of property, and that, under *Code Civ. Proc. § 708.620*, the appointment is a reasonable method to obtain the fair and orderly satisfaction of the judgment. See also the *comments in § 200.270[2][b]* regarding evidentiary support for facts stated.

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20-200 California Points & Authorities §§ 200.331-200.339

AUTHOR: Robert Kaplan Editorial Consultant

[Reserved]

§§ 200.331[Reserved]

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20-200 California Points & Authorities § 200.340

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.340 Supporting Contention That Receiver Should Be Appointed After Sale of Real Property Pursuant to Decree of Foreclosure [Code Civ. Proc. §§ 564(b)(4), 699.070]

[1] FORM Supporting Contention That Receiver Should Be Appointed After Sale of Real Property Pursuant to Decree of Foreclosure [Code Civ. Proc. §§ 564(b)(4), 699.070]

[*This form should be combined with a memorandum of points and authorities supporting a motion to appoint receiver (see § 200.10) or an ex parte application to appoint receiver (see § 200.50), or included in a trial or appellate brief.*]

THE COURT SHOULD APPOINT A RECEIVER AFTER JUDGMENT IN THIS ACTION BECAUSE A RECEIVER IS NECESSARY, AFTER SALE OF REAL PROPERTY PURSUANT TO THE DECREE OF FORECLOSURE, TO COLLECT, EXPEND, AND DISBURSE RENTS DURING THE REDEMPTION PERIOD, AS _____ [DIRECTED BY THE COURT *or* PROVIDED BY LAW].

Appointment After Sale of Real Property Pursuant to Decree of Foreclosure. A receiver may be appointed by the court in which an action or proceeding is pending, or by a judge thereof, after sale of real property pursuant to a decree of foreclosure, during the redemption period, to collect, expend, and disburse rents as directed by the court or otherwise provided by law (*Code Civ. Proc. § 564(b)(4)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a receiver should be appointed after real property has been sold pursuant to a decree of foreclosure, to collect, expend, and disburse rents, during the redemption period, as directed by the court or otherwise provided by law [*see Code Civ. Proc. § 564(b)(4)*].

These points and authorities should be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of the appointment. For example, these points and authorities may be:

- Submitted in support of a motion to appoint a receiver [*see § 200.10*].

- Adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should include specific facts showing that the appointment of a receiver is necessary to collect, expend, and disburse rents during the redemption period. See also the *comments in § 200.270[2][b]* regarding evidentiary support for facts stated.

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3. Receivership in Arbitration Proceedings

20-200 California Points & Authorities § 200.341

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.341 Supporting Contention That Receiver Should Be Appointed in Arbitrable Controversy [Code Civ. Proc. § 1281.8(b)]--General Form

[1] FORM Supporting Contention That Receiver Should Be Appointed in Arbitrable Controversy [Code Civ. Proc. § 1281.8(b)]--General Form

[*This form should be combined with a memorandum of points and authorities supporting a motion to appoint receiver (see § 200.10) or an ex parte application to appoint receiver (see § 200.50), or included in a trial or appellate brief.*]

THE COURT SHOULD APPOINT A RECEIVER IN CONNECTION WITH THIS ARBITRABLE CONTROVERSY BECAUSE THE AWARD TO WHICH THE APPLICANT MAY BE ENTITLED MAY BE RENDERED INEFFECTUAL.

Appointment of Receiver in Connection With Arbitrable Controversy. A receiver may be appointed by the court in connection with an arbitrable controversy only on the ground that the arbitration award to which the applicant may be entitled may be rendered ineffectual without such an appointment (*Code Civ. Proc. § 1281.8(b)*; *see Marsch v. Williams (1994) 23 Cal. App. 4th 238, 248-249, 28 Cal. Rptr. 2d 402* (court, not arbitrators, have authority to appoint receiver under *Code Civ. Proc. § 1281.8(b)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a receiver should be appointed in connection with an arbitrable controversy [*see Code Civ. Proc. § 1281.8(b)*].

Any application to appoint a receiver under *Code Civ. Proc. § 1281.8(b)* is required to be accompanied by a complaint or by copies of a demand for arbitration and any response thereto. If accompanied by a complaint, the application to appoint a receiver shall be accompanied by a statement stating whether the party is or is not reserving the party's right to arbitration [*Code Civ. Proc. § 1281.8(b)*]. In addition, an application for appointment of a receiver under *Code Civ. Proc. § 1281.8(b)* does not operate to waive any right of arbitration which the applicant may have pursuant to written agreement to arbitrate if, at the same time the application is presented, the applicant also presents to the court an application that all the proceedings in the action be stayed pending the arbitration of any issue, question or dispute which is claimed to be arbitrable under the agreement and is relevant to the action in which appointment of receiver is sought. [*Code Civ. Proc. § 1281.8(d)*].

These points and authorities should be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of the appointment. For example, these points and authorities may be:

- Submitted in support of a motion to appoint a receiver [*see § 200.10*].

- Adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. In particular, counsel should include specific facts showing that the appointment of a receiver is necessary because the arbitration award which the applicant might be entitled to may be rendered ineffectual without the appointment of a receiver. See also the *comments in § 200.270[2][b]* regarding evidentiary support for the facts stated.

[c] Related Pleading and Practice Forms

For related legal background, see *California Forms of Pleading and Practice, Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.42* (Matthew Bender).

[d] Related Points and Authorities

For additional points and authorities relating to arbitration of disputes, including points and authorities relating to staying an action pending arbitration, which may be used in conjunction with this form, see Ch. 20, *Arbitration: Compelling* .

[3] Discussion of Authorities

[a] Appointment of Receiver in Connection With Arbitrable Controversy

Marsch v. Williams *(1994) 23 Cal. App. 4th 238, 28 Cal. Rptr. 2d 402* , involved a dispute between partners which resulted in one partner filing a complaint against the other for fraud, breach of fiduciary duty, and other causes of action. The other partner successfully petitioned to compel arbitration and stay the action pending arbitration. After lengthy proceedings, the panel of arbitrators rendered an award that included the appointment of one of the panel members as receiver to supervise the sale of the partnership's property and the dissolution of the partnership. The trial court confirmed award, and one of the partners appealed.

The Court of Appeal, addressing the part of the award appointing a receiver, held that receivers have no power to appoint a receiver (*23 Cal. App. 4th at 245-249*). The court first noted the absence of any statutory authority for

arbitrators to appoint a receiver (*23 Cal. App. 4th at 245-246*), and then held that the parties cannot by their agreement empower an arbitrator to appoint a receiver (*23 Cal. App. 4th at 246-248*). The court, in declining to exercise its whatever liberty it might have to recognize a nonstatutory receiver, reasoned in part that the fact that the legislature has expressly provided in *Code Civ. Proc. § 1281.8* that parties to an arbitration agreement may apply to the superior court for appointment of a receiver, meant that there was very little practical need to find that arbitrators do have the power to appoint a receiver. The court also relied on the fact that a receiver is an agent of the Court and not of the parties, and a receivership estate in the receiver's hands is under the control and continuing supervision of the court (*23 Cal. App. 4th at 248*). Therefore, the court held that the arbitrators had exceeded their powers by appointing a receiver and reversed the judgment confirming the award to that extent. The court went on however, to suggest that on remand the trial court should consider whether it should appoint a receiver under *Code Civ. Proc. § 564(b)(1)* as a correction of the award (*23 Cal. App. 4th at 248-249*).

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20-200 California Points & Authorities §§ 200.342-200.349

AUTHOR: Robert Kaplan Editorial Consultant

[Reserved]

§§ 200.342[Reserved]

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D. Persons Eligible for Appointment as Receivers

20-200 California Points & Authorities § 200.350

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.350 Supporting Contention That Party, Party's Attorney, Person Interested in Action, or Relative of Judge Receiver Should Be Appointed Receiver [Code Civ. Proc. § 566(a)]--Written Consent to Appointment

[1] FORM Supporting Contention That Party, Party's Attorney, Person Interested in Action, or Relative of Judge Receiver Should Be Appointed Receiver [Code Civ. Proc. § 566(a)]--Written Consent to Appointment

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

THE COURT SHOULD APPOINT _____ [*name*] AS RECEIVER IN THIS ACTION BECAUSE A PERSON WHO IS _____ [*specify, e.g.,* INTERESTED IN THE ACTION] MAY BE APPOINTED RECEIVER WHEN THE PARTIES CONSENT IN WRITING TO THE APPOINTMENT.

Appointment of Receiver With Written Consent of Parties Filed With Clerk. A party or attorney of a party, or person interested in an action, or related to any judge of the court by consanguinity or affinity within the third degree, may be appointed receiver therein if written consent of the parties has been obtained and filed with the clerk of the court (*see Code Civ. Proc. § 566(a)*).

[*Add additional points and authorities supporting the appointment of the receiver on substantive or procedural grounds (see, e.g., §§ 200.10 and 200.80 et seq.).*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that a receiver should be appointed who is a party, an attorney of a party, a person interested in an action, or a person related to any judge of the court by consanguinity or affinity within the third degree because written consent of the parties has been obtained and filed with the clerk of the court [*see Code Civ. Proc. § 566(a)*].

These points and authorities should be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of the appointment. For example, these points and authorities may be:

- Submitted in support of a motion to appoint a receiver [*see § 200.10*].

- Submitted in support of the confirmation of an ex parte order appointing a receiver [*see § 200.50*].

- Adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

- Raised as allegations or as a prayer in a complaint in a pending action seeking the provisional relief of receivership [*see* California Forms of Pleading and Practice, Ch. 486, *Receivers* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should include specific facts showing that all parties have consented, in writing, to the appointment of the receiver and that the written consent has been filed with the clerk of the court. Alternatively, counsel should include facts showing that the party seeking to deny the validity of the appointment failed to timely object when the receiver was appointed. For example, in an appropriate case counsel would refer to evidence set forth in:

- Declarations and affidavits submitted in support of, or even in opposition to, the appointment [*see Cal. Rules of Court, Rule 3.1306(a)*].

- Discovery documents, such as deposition transcripts and answers to interrogatories and requests for admission.

- The opposing party's pleadings that constitute admissions.

- Other documentary evidence generally.

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*].

When counsel cites facts in his or her argument, counsel should refer to the particular page and line number of the declaration, deposition transcript, or other document, that contains the cited facts. In addition, the relevant portion of any testimony in a deposition should be marked in a manner that calls attention to the testimony [*see Cal. Rules of Court, Rule 3.1116(c)*].

For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Nomination of Receivers

At the hearing of an application for the appointment of a receiver on notice, or at the hearing for confirmation of an ex parte appointment, each party appearing may suggest in writing one or more persons for appointment or substitution as receiver, stating the reasons. The suggestion shall be without prejudice to objections to the appointment or confirmation [*Cal. Rules of Ct., Rule 3.1177*].

[d] Opposing Memoranda

In an appropriate case, the memorandum *set out in § 200.360[1]* may be used to oppose the contention supported by the points and *authorities in § 200.350[1]*.

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D. Persons Eligible for Appointment as Receivers

20-200 California Points & Authorities § 200.351

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.351 Supporting Contention That Party, Party's Attorney, Person Interested in Action, or Relative of Judge Receiver Should Be Appointed Receiver [Code Civ. Proc. § 566(a)]--Waiver of Objection

[1] FORM Supporting Contention That Party, Party's Attorney, Person Interested in Action, or Relative of Judge Receiver Should Be Appointed Receiver [Code Civ. Proc. § 566(a)]--Waiver of Objection

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE COURT SHOULD APPOINT _____ [*name*] AS RECEIVER IN THIS ACTION BECAUSE A PERSON WHO IS _____ [*specify, e.g.,* INTERESTED IN THE ACTION] MAY BE APPOINTED RECEIVER WHEN THE OTHER PARTIES HAVE WAIVED THEIR OBJECTIONS TO THE APPOINTMENT.

Failure to Timely Object to Appointment Constitutes Waiver of Objection. It is the duty of the party opposed to the appointment of a receiver to make timely objection to the appointment. The failure to make a timely objection constitutes a waiver and estops the party from denying the validity of the appointment (*Hise v. Superior Court (1943) 21 Cal. 2d 614, 623, 134 P.2d 748* ; *Weygandt v. Larson (1933) 130 Cal. App 304, 309-310, 19 P.2d 852*).

[*Add additional points and authorities supporting the appointment of the receiver on substantive or procedural grounds (see, e.g., §§ 200.10 and 200.80 et seq.).*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that a receiver should be appointed who is a party, an attorney of a party, a person interested in an action, or a person related to any judge of the court by consanguinity or affinity within the third degree because a party has failed to timely object to the appointment.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of the appointment.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, when the opposing party has failed to appeal the order appointing the receiver, counsel would request that the court take judicial notice of the fact that no appeal was filed by the opposing party, and point out that the failure to appeal constitutes a waiver of the party's objection to appointment of the receiver [*Hise v. Superior Court (1943) 21 Cal. 2d 614, 623, 134 P.2d 748* , discussed in *§ 200.351[3][a]*]. See also the *comments in § 200.350[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 200.360[1]* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Failure to Timely Object to Appointment Constitutes Waiver of Objection

Hise v. Superior Court *(1943) 21 Cal. 2d 614, 134 P.2d 748* , arose out of a class action to impress a constructive trust on the assets of one savings and loan association, title to which was held by defendant, another savings and loan association. Plaintiffs in that action sought to remove defendant as trustee of the assets and sought an accounting. After trial, the court entered judgment for plaintiffs, impressing a trust on the assets in favor of plaintiff class. The judgment provided for the appointment of a receiver to enforce the money judgment, requiring payment of certain of the assets to approximately 17,000 persons comprising the plaintiff class. Subsequently, the trial court issued an order appointing the then state building and loan commissioner as receiver to carry the judgment into effect. Petitioner in the instant action later succeeded the receiver as building and loan commissioner. Thereafter, the receiver filed with the trial court, respondent in the instant action, a petition for an order directing the building and loan commissioner to show cause why he should not be ordered to render an account of certain amounts held by him and to pay the receiver from that account an amount sufficient to satisfy that portion of the money judgment from which no appeal was taken. Respondent court issued the order, directing petitioner to show cause why the relief should not be granted. Petitioner then sought a writ of prohibition in the court of appeal, directing respondent court to show cause why it should not be prohibited from enforcing its judgment.

The court of appeal issued a peremptory writ of prohibition, restraining respondent court from taking any further steps to enforce the judgment, without, however, restricting the right of the receiver to receive and disburse any amounts paid by petitioner, as building and loan commissioner, in full or partial satisfaction of it (*21 Cal. 2d 614, 630)* . In seeking the writ, petitioner contended, among other things, that the receiver's appointment was a nullity because the receiver was a party to the underlying action, and the written consent to the appointment of all other parties to the action was not filed as required by former Code Civ. Proc. § 566 (*now see Code Civ. Proc. § 566(a)*). Citing *Weygandt v. Larson (1933) 130 Cal. App 304, 309-310, 19 P.2d 852* (discussed *below*), the court found the appointment valid, ruling that, under the circumstances of the case, petitioner was estopped to deny the validity of the appointment for all purposes for which the receiver could lawfully act under the judgment (*21 Cal. 2d 614, 623)* . The court found that, on notice to all interested parties in the action, respondent court appointed the then building and loan commissioner, in his individual capacity, as receiver to carry the judgment into effect (*21 Cal. 2d 614, 622-623)* . At the time of the appointment, no written consent of the parties was filed with the clerk. However, no appeal was taken from the order of appointment. Furthermore, petitioner recognized the receiver by virtue of petitioner's application to a superior court (other than respondent court) for an order permitting him to mail a required notice-to-creditors to the receiver in lieu of individual notices to each plaintiff in the action, and also by virtue of his payment to the receiver to apply on the judgment in favor of certain members of the plaintiff class. The court noted that the superior court, in issuing those orders, implicitly

recognized the advantage of having a receiver represent the judgment creditors in the savings and loan association's liquidation proceedings (*21 Cal. 2d 614, 623)* .

In ***Weygandt v. Larson*** *(1933) 130 Cal. App 304, 19 P.2d 852* , plaintiff, as distributee and representing the heirs of decedent, brought an action for an accounting and to restrain defendants from disposing of certain trust property. After trial, one of defendants was adjudged the record owner of certain real property to which he held title as trustee under a trust established by decedent. However, the interests of the beneficiaries of that trust were held subordinate to a certain indebtedness owing by some of them to the trust estate. The judgment included orders dissolving the trusts and appointing a receiver of the land held by defendant trustee. The judgment empowered the receiver to manage the property and to collect all indebtedness due the trust estate from the beneficiaries and others owing money to the trust estate. Thereafter, the receiver wound up the affairs of the trust estate and moved for a deficiency judgment against those defendants owing money to the trust estate. The trial court granted the receiver's motion, and rendered judgment in favor of the receiver and against defendants for the various amounts of their indebtedness. Those defendants then appealed from the deficiency judgment.

The court of appeal modified, and affirmed as modified, the trial court's deficiency judgment. Among other things, the court found the appointment of the receiver valid under *Code Civ. Proc. § 566* (*now see Code Civ. Proc. § 566(a)*). It was admitted that the receiver was attorney for some of the heirs of decedent's estate prior to his appointment as receiver. However, the court found that the appointment was made in open court in the presence of defendants and their attorneys, all of whom knew of the receiver's prior association in the action. Defendants did not object to the appointment at the time it was made and had taken no steps to vacate the appointment. On the contrary, for two years they stood by, with no objection, and saw him take over the trust estate, administer its affairs, and consummate numerous transactions. For the first time, on the instant appeal, they raised the question of his competency to act as receiver. The court ruled that it was defendants' duty to make timely objection to the appointment if they were not content to have it stand. Citing *Title Insurance & Trust Co. v. California Dev. Co. (1915) 171 Cal. 227, 230, 152 P. 564* , the court ruled that failure to timely object to the appointment was a waiver of the right to object to it (*130 Cal. App 304, 309)* . The court noted that the order appointing the receiver was appealable, but no appeal was taken from it. Therefore, on appeal from a judgment, the appellate court is without authority to review any order from which an appeal might have been taken (*130 Cal. App 304, 310)* .

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CHAPTER 200 RECEIVERS
PART II. FORMS
D. Persons Eligible for Appointment as Receivers

20-200 California Points & Authorities §§ 200.352-200.359

AUTHOR: Robert Kaplan Editorial Consultant

[Reserved]

§§ 200.352[Reserved]

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20-200 California Points & Authorities § 200.360

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.360 Opposing That Party, Party's Attorney, Person Interested in Action, or Relative of Judge Receiver Should Be Appointed Receiver [Code Civ. Proc. § 566(a)]--Consent Is Required

[1] FORM Opposing That Party, Party's Attorney, Person Interested in Action, or Relative of Judge Receiver Should Be Appointed Receiver [Code Civ. Proc. § 566(a)]--Consent Is Required

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE COURT SHOULD NOT APPOINT _____ [*name*] AS RECEIVER IN THIS ACTION BECAUSE HE/SHE IS A PERSON WHO IS _____ [*specify, e.g.*, INTERESTED IN THE ACTION] AND HAS NOT _____ [OBTAINED *and/or* FILED WITH THE CLERK OF THE COURT] THE WRITTEN CONSENT OF THE PARTIES TO HIS/HER APPOINTMENT.

A. Requirement That All Parties Consent in Writing to Appointment of Receiver. No party or attorney of a party, or person interested in an action, or related to any judge of the court by consanguinity or affinity within the third degree can be appointed receiver therein without the written consent of the parties, filed with the clerk of the court (*Code Civ. Proc. § 566(a)*; *A.G. Col Co. v. Superior Court (1925) 196 Cal. 604, 618, 238 P. 926*).

B. Court Is Without Jurisdiction to Appoint Receiver Absent Written Consent of Parties Filed With Clerk. When there is neither the written consent of all parties to the appointment of, for example, a person interested in the action, as receiver, nor any oral consent by the parties in open court, even if oral consent would suffice, the court is without jurisdiction to make the appointment (*see Code Civ. Proc. § 566(a)*; *A.G. Col Co. v. Superior Court (1925) 196 Cal. 604, 621, 238 P. 926*).

[*Add additional points and authorities opposing the appointment of the receiver on substantive grounds (see, e.g., §§ 200.130 et seq., 200.210, 200.230 et seq., and 200.260) or procedural grounds (see, e.g., §§ 200.20 et seq. and 200.60 et seq.).*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to the contention that a receiver should be appointed who is a party, an attorney of a party, a person interested in an action, or a person related to any judge of the court by consanguinity or affinity within the third degree. The grounds for opposition are that written consent of the parties has not been obtained and filed with the clerk of the court [*see Code Civ. Proc. § 566(a)*].

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in §§ 200.350[1]* and *200.351[2]*.

These points and authorities should be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the propriety of the appointment. For example, these points and authorities may be:

- Submitted in combination with memoranda opposing the appointment of receivers on procedural grounds [*see, e.g., §§ 200.20 et seq. and 200.60* et seq.].

- Submitted in opposition to a motion to appoint a receiver [*see § 200.20* et seq.].

- Submitted in opposition to the confirmation of an ex parte order appointing a receiver [*see § 200.60*].

- Adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should include specific facts showing the absence of the written consent of any or all parties to the appointment of the receiver. If appropriate, counsel should also include specific facts showing the absence of the oral consent of the parties to the appointment. See also the *comments in § 200.350[2][b]* regarding evidentiary support for the facts stated.

[3] Discussion of Authorities

[a] Requirement That All Parties Consent in Writing to Appointment of Receiver

The facts and procedural background of ***A.G. Col Co. v. Superior Court*** *(1925) 196 Cal. 604, 238 P. 926* , are discussed in *§ 200.22[3][a]*. In *A.G. Col Co.*, the Supreme Court ordered the trial court to vacate its orders appointing receivers. In so ruling, the Court held that former Code Civ. Proc. § 566 (*now see Code Civ. Proc. § 566(a)*) provides, in part, that no person interested in an action can be appointed receiver therein without the written consent of the parties, filed with the clerk. An examination of the proceedings in the case disclosed that no written consent to the appointment of the second receiver of defendant corporations was ever filed with the clerk of the court (*196 Cal. 604, 618)* . Finding that the conditions of former Code Civ. Proc. § 566, requiring the consent of all parties to the appointment of an interested party to serve as receiver and requiring the consent to be filed with the clerk, were not met, the Court held the trial court was without jurisdiction in making the appointment (*196 Cal. 604, 621)* .

[b] Court Is Without Jurisdiction to Appoint Receiver Absent Written Consent of Parties Filed With Clerk

The facts and procedural background of ***A.G. Col Co. v. Superior Court*** *(1925) 196 Cal. 604, 238 P. 926* , are discussed in *§ 200.22[3][a]*. In ordering the trial court to vacate its orders appointing receivers of defendant corporations, the Supreme Court held the trial court to have been without jurisdiction to appoint a party interested in the action as a second receiver in the action, in view of the fact that there was no compliance with the provisions of former Code Civ. Proc. § 566 (*now see Code Civ. Proc. § 566(a)*) requiring the written consent of all parties to the appointment to be filed with the clerk. Additionally, assuming, without deciding, that some form of oral consent to the appointment would satisfy the requirements of former Code Civ. Proc. § 566, the trial court was without jurisdiction in making the appointment in the absence of any oral consent by all parties in open court (*196 Cal. 604, 621)* . In so holding, the Court found it clear that, if it could be said that defendants' attorney consented at all to the appointment of the receiver, the consent was not free and voluntary. Counsel for defendants was placed in the untenable position of having either to accept the trial court's appointment of an interested party as a second receiver or to accept a continuance in the case to an unspecified date with an apparently equally interested party serving as current receiver during the period of the continuance. As such, counsel's "consent" was a manifestation that, as a matter of preference, if the trial court insisted on continuing the matter in its then status, with the current receiver, it would be more agreeable to defendants to have the interested party appointed receiver. The Court also found that defendants never waived their objections to the appointment, that the record contained frequent statements by defendants' counsel that the court was without jurisdiction to appoint a receiver at all, and that defendants especially objected to the appointment of any person interested in the action (*196 Cal. 604, 620)* .

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20-200 California Points & Authorities §§ 200.361-200.369

AUTHOR: Robert Kaplan Editorial Consultant

[Reserved]

§§ 200.361[Reserved]

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20-200 California Points & Authorities § 200.370

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.370 Supporting Contention That Receiver Is Properly Exercising His or Her Powers in General [Code Civ. Proc. § 568]--Functions and Powers Controlled by Statute and Court Order

[1] FORM Supporting Contention That Receiver Is Properly Exercising His or Her Powers in General [Code Civ. Proc. § 568]--Functions and Powers Controlled by Statute and Court Order

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE RECEIVER IS PROPERLY EXERCISING HIS/HER POWERS BECAUSE THOSE POWERS HAVE BEEN CONFERRED ON HIM/HER BY _____ [STATUTE *and/or* THE ORDER APPOINTING HIM/HER *and/or* COURT ORDERS SUBSEQUENT TO THE ORDER OF APPOINTMENT].

Functions and Powers of Receiver Controlled by Statute and Court Order. The functions and powers of the receiver are controlled by statute, by the order appointing the receiver, and by the court's subsequent orders (*see Code Civ. Proc. § 568*; *Cal-American Income Property Fund VII v. Brown Development Corp. (1982) 138 Cal. App. 3d 268, 273, 187 Cal. Rptr. 703*).

[*Add points and authorities supporting the exercise of the receiver's powers in specific instances (see § 200.410 et seq.).*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the receiver is properly exercising his or her powers, under statute and court order [*see Code Civ. Proc. § 568*].

The form may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the powers of the receiver. For example, these points and authorities may be submitted in support of a receiver's motion for permission to engage in any of the activities authorized by *Code Civ. Proc. § 568*. They may also be adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should include specific facts showing that the acts of the receiver are pursuant to statute and court order. Thus, for each act of the receiver that is an issue in the case, counsel should point how that act complies with the terms of the appointing order and the provisions of the statute. For example, in an appropriate case counsel would refer to evidence set forth in:

- Declarations and affidavits submitted in support of, or even in opposition to, the appointment [*see Cal. Rules of Court, Rule 3.1306(a)*].

- Discovery documents, such as deposition transcripts and answers to interrogatories and requests for admission.

- The opposing party's pleadings that constitute admissions.

- Other documentary evidence generally.

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits "upon a motion"), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*].

When counsel cites facts in his or her argument, counsel should refer to the particular page and line number of the declaration, deposition transcript, or other document, that contains the cited facts. In addition, the relevant portion of any testimony in a deposition should be marked in a manner that calls attention to the testimony [*see Cal. Rules of Court, Rule 3.1116(c)*].

For further legal background, research guides, and forms relating to judicial notice and affidavits and declaration, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Opposing Memoranda

In an appropriate case, the points and authorities *set out in § 200.380* et seq. may be used to oppose the contention supported by these points and authorities.

[d] Related Pleading and Practice Forms

For discussion and forms of petitions by a receiver for orders, forms of orders authorizing the receiver to engage in activities permitted by Code Civ. Proc. § 568, and a form of allegation of a receiver's capacity to sue pursuant to court order, see California Forms of Pleading and Practice, Ch. 486, *Receivers* .

[3] Discussion of Authorities

[a] Functions and Powers of Receiver Controlled by Statute and Court Order

In ***Cal-American Income Property Fund VII v. Brown Development Corp.*** *(1982) 138 Cal. App. 3d 268, 187 Cal. Rptr. 703* , defendants builders and developers sold a shopping center and office complex to plaintiff. Plaintiffs secured payment of the purchase price of the property by a promissory note and a trust deed. In order to give defendants sufficient time to complete construction and lease the premises, plaintiff agreed to a one-year leaseback. Subsequently, plaintiff filed a complaint against defendant for damages for breach of contract and for declaratory and equitable relief, seeking termination of the lease and cancellation of the promissory note and reconveyance of the trust deed. Defendant cross complained for rescission, for damages for breach of contract and fraud, and to foreclose the trust deed. Both pleadings sought the appointment of a receiver to preserve the property pending trial. Pursuant to stipulation, the court appointed a receiver. After his appointment, the receiver obtained an ex parte order from the trial court authorizing him to retain an appraiser to express an opinion on the fair market value of the property. The receiver also noticed a motion for an order of the trial court confirming the proposed sale. The receiver's petition for both orders included a letter to defendants from a law firm retained by a real estate broker representing an unidentified purchaser offering to buy the property. Before hearing on the motion to confirm the sale, the court received the appraiser's written opinion of the property's fair market value. The trial court also received one of defendants' affidavits, urging sale of the property pursuant to the offer, on the grounds that there were insufficient funds to pay various amounts due on the property, including funds needed to complete tenant improvements necessary to lease the premises, to pay money due subcontractors, and to pay real property taxes due and payable in two upcoming installments.

Plaintiff objected to the proposed sale and confirmation on a number of grounds, contending that the receiver lacked authority to sell the property, the alleged financial difficulties were caused by the receiver's ineffective marketing efforts and inept administrative abilities, the offer was too low in light of an earlier appraisal placing the value of the property at about $1 million higher than that of the current appraisal, and the sale was the result of collusion among one of defendants, the buyer, and the receiver. After hearing abbreviated oral argument from counsel, the trial court granted the receiver's motion to confirm the proposed sale. Plaintiff then moved the trial court for reconsideration of its order, to vacate the order appointing the receiver, and to terminate the receivership. The trial court denied each of these motions. Plaintiffs appealed from the trial court's order confirming the sale.

The court of appeal reversed the trial court's order confirming the sale. The court of appeal did find, however, that the receiver had the power to sell the property (*138 Cal. App. 3d 268, 273-274)* . In affirming the receiver's power to sell, the court disagreed with plaintiff's contention that, under the stipulation appointing the receiver, the receivership was the same as a rents and profits receivership, in which the receiver's powers are limited to the express terms of the order of appointment. The court held that the receiver's functions and powers are controlled by statute, by the order appointing him or her, and by the court's subsequent orders (*138 Cal. App. 3d 268, 273)* . The court based its authority on *Code Civ. Proc. §§ 568* (enumerating receiver's various powers) and 568.5 (enumerating receiver's power to sell property subject to court confirmation, and discussed in *§ 200.450* et seq.), which authorized the receiver to perform such acts respecting the property as the court may authorize, including the sale of real and personal property on notice and subject to court confirmation (*138 Cal. App. 3d 268, 273-274)* . The court also found that the order appointing the receiver authorized him to bring and defend actions in his own name, to take and keep possession of the real property, to employ a management company, to receive rents, to collect debts, to pay just claims and debts other than debts claimed to be due the parties, and generally to do such acts respecting the property as the court might authorize or the parties, by stipulation, could agree on without prejudice to any further order (*138 Cal. App. 3d 268, 272 n.1*).

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20-200 California Points & Authorities § 200.371

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.371 Supporting Contention That Receiver Is Properly Exercising His or Her Powers in General [Code Civ. Proc. § 568]--Enumeration of Receiver's Powers

[1] FORM Supporting Contention That Receiver Is Properly Exercising His or Her Powers in General [Code Civ. Proc. § 568]--Enumeration of Receiver's Powers

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE RECEIVER IS PROPERLY EXERCISING HIS/HER POWERS BECAUSE THOSE POWERS HAVE BEEN CONFERRED ON HIM/HER BY STATUTE.

Functions and Powers of Receiver Under *Code Civ. Proc. § 568*. Under *Section 568 of the Code of Civil Procedure*, the court may authorize a receiver to bring and defend actions in his or her own name as receiver, to take and keep possession of the property in receivership, to receive rents and collect debts, to compound for and compromise the same, to make transfers, and generally to perform such acts respecting the property in receivership as the court may authorize (*Code Civ. Proc. § 568*; *Cal-American Income Property Fund VII v. Brown Development Corp. (1982) 138 Cal. App. 3d 268, 274, 187 Cal. Rptr. 703*).

[*Add points and authorities supporting the exercise of the receiver's powers in specific instances (see § 200.410 et seq.).*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the receiver is properly exercising his or her powers as enumerated by statute [*see Code Civ. Proc. § 568*].

The form may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the powers of the receiver. For example, these points and authorities may be submitted in support of a receiver's motion for permission to engage in any of the activities authorized by *Code Civ. Proc. § 568*. They may also be adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should include specific facts showing that the acts of the receiver are among the powers enumerated by statute. Therefore, counsel would refer to the particular acts of the receiver that are an issue in the case, and point out how those acts comply with the provisions of *Code Civ. Proc. § 564 et seq.* See also the *comments in § 200.370[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 200.380* et seq. may be used to oppose the contention supported by these points and authorities.

[d] Related Pleading and Practice Forms

For discussion and forms of petitions by a receiver for orders, forms of orders authorizing the receiver to engage in activities permitted by Code Civ. Proc. § 568, and a form of allegation of a receiver's capacity to sue pursuant to court order, see California Forms of Pleading and Practice, Ch. 486, *Receivers* .

[3] Discussion of Authorities

[a] Functions and Powers of Receiver Under Code Civ. Proc. § 568

The facts and procedural background of ***Cal-American Income Property Fund VII v. Brown Development Corp.*** *(1982) 138 Cal. App. 3d 268, 187 Cal. Rptr. 703* , are discussed in *§ 200.370[3][a]*. In affirming the power of the receiver to sell the property, although reversing the trial court's confirmation of the sale, the court of appeal held that *Code Civ. Proc. § 568* authorized the receiver, in addition to the powers explicitly granted by *Code Civ. Proc. § 568*, to perform such acts respecting the property as the court may authorize. Additionally, the court held *Code Civ. Proc. § 568*, when construed together with *Code Civ. Proc. § 568.5* (authorizing receiver's sale of property), authorized the sale of real and personal property by the receiver on notice and subject to court confirmation (*138 Cal. App. 3d 268, 273-274)* .

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20-200 California Points & Authorities § 200.372

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.372 Supporting Contention That Receiver Is Properly Exercising His or Her Powers in General [Code Civ. Proc. § 568]--Court's Main Function Is to Act in Best Interest of Parties Concerned

[1] FORM Supporting Contention That Receiver Is Properly Exercising His or Her Powers in General [Code Civ. Proc. § 568]--Court's Main Function Is to Act in Best Interest of Parties Concerned

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE RECEIVER IS PROPERLY EXERCISING HIS/HER POWERS BECAUSE HIS/HER ACTS WERE DONE IN THE BEST MANNER POSSIBLE AND FOR THE BEST INTERESTS OF THE PARTIES CONCERNED.

Functions of Court Toward Receivership Property. The main function of the court is to manage or dispose of the receivership estate in the best manner possible and for the best interests of the parties concerned (*Lesser & Son v. Seymour (1950) 35 Cal. 2d 494, 499, 218 P.2d 536* ; *Steinberg v. Goldstein (1954) 129 Cal. App. 2d 682, 685-686, 278 P.2d 22*).

[*Add points and authorities supporting the exercise of the receiver's powers in specific instances (see § 200.410 et seq.).*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the receiver is exercising his or her powers in a way that is consistent with the court's main function to manage or dispose the receivership estate for the best interests of the concerned parties.

The form may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the powers of the receiver. For example, these points and authorities may be submitted in support of a receiver's motion for permission to engage in any of the activities authorized by *Code Civ. Proc. § 568*. They may also be adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should include specific facts showing that the receiver's actions are in harmony with the court's purpose to oversee estate assets for the best interest of the concerned parties. For example, in a case in which the receiver is moving to amend an earlier order in which the court has instructed the receiver regarding his or her receiver's duties, counsel would refer to facts showing that the request is necessary for the best interest of the concerned parties, in order that the receivership estate's debts could be paid, the affairs of the business wound up, and the receivership terminated [*see* *Steinberg v. Goldstein (1954) 129 Cal. App. 2d 682, 685-686, 278 P.2d 22* , discussed in *§ 200.372[3][a]*]. See also the *comments in § 200.370[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 200.380* et seq. may be used to oppose the contention supported by these points and authorities.

[d] Related Pleading and Practice Forms

For discussion and forms of petitions by a receiver for orders, forms of orders authorizing the receiver to engage in activities permitted by Code Civ. Proc. § 568, and a form of allegation of a receiver's capacity to sue pursuant to court order, see California Forms of Pleading and Practice, Ch. 486, *Receivers* .

[3] Discussion of Authorities

[a] Functions of Court Toward Receivership Property

In ***Lesser & Son v. Seymour*** *(1950) 35 Cal. 2d 494, 218 P.2d 536* , an action to dissolve and terminate a partnership, plaintiffs sought an accounting and the appointment of a receiver to preserve the partnership assets. The trial court appointed a receiver with full powers to manage, operate, and control all of the partnership assets and business. The trial court reserved jurisdiction to instruct the receiver and increase his powers. Thereafter, plaintiffs moved the trial court for an order directing the receiver to sell the property. The trial court granted plaintiffs' motion, and provided detailed instructions about how and when the sale should be conducted. Subsequently, on receipt of an offer on the property, the receiver petitioned the trial court for an order confirming the proposed sale. After hearing on the motion for confirmation, the trial court ordered confirmation of sale of the partnership property not to the first offeree, but rather to plaintiffs. Defendants appealed from the trial court's order directing sale of the receivership assets.

The Supreme Court affirmed the trial court's order of sale. In affirming, the Court addressed defendants' contention that because the sale did not occur within the time specified in the trial court's initial order of sale, the trial court had no jurisdiction to confirm it. The Court held the main function of the trial court is to manage or dispose of the receivership estate in the best manner possible and for the best interest of the parties concerned. The Court ruled that the effectual performance of that duty necessarily required some flexibility and continuity of jurisdiction in giving instructions to a receiver about the manner in which property should be sold (*35 Cal. 2d 494, 499)* .

In ***Steinberg v. Goldstein*** *(1954) 129 Cal. App. 2d 682, 278 P.2d 22* , an action to dissolve a partnership, the presiding

judge of the superior court issued and subsequently confirmed an ex parte order appointing a receiver of the partnership business and property. Thereafter, the judge provided the receiver with extensive instructions as to his duties and the conduct of the business and affairs of the partnership. The presiding judge then assigned the case to another judge for trial. After trial, the trial court entered an interlocutory judgment decreeing a dissolution of the partnership. Some time thereafter, the receiver filed his final report and account and petitioned for discharge. The receiver then filed an amendment and supplement to the final report, together with a motion to amend an early order of the presiding judge instructing the receiver in his duties. The receiver made the latter motion on the ground that it was necessary in order that partnership debts could be paid, the partnership wound up, and the receivership terminated. The presiding judge granted the motion and approved the report and account, as amended and supplemented. Pursuant to the order granting the motion, the judge ordered defendant to deliver certain property and pay a specified amount of money to the receiver. Defendant appealed from the order approving the report and account and ordering defendant to deliver the property and pay the money to the receiver.

The court of appeal affirmed the presiding judge's order. On appeal, defendant contended the presiding judge's order amending its earlier instructions to the receiver effectively declared certain of defendant's personal property to be partnership property and fixed values and rentals for its use. Defendant contended that not only did this arbitrarily change the agreement under which defendant had received and used the property, but it also invaded the powers of the trial court in the action. The court of appeal held the trial court's powers were not invaded, since a final judgment was not entered in the action and could not be entered until the partnership's assets were reduced to cash and the debts paid. Citing *Lesser & Son v. Seymour (1950) 35 Cal. 2d 494, 499, 218 P.2d 536* (discussed *above*), the court held the main function of the court to be to manage or dispose of the receivership estate in the best manner possible and for the best interests of the parties concerned. To effectually perform that duty necessarily required some flexibility and continuity of jurisdiction in giving instructions as to the manner of disposition of the property (*129 Cal. App. 2d 682, 685-686)* .

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Volume 20 Chapters 200-209 RECEIVERS---to---SANCTIONS
CHAPTER 200 RECEIVERS
PART II. FORMS
E. Administration of Receivership
1. Exercise of Powers in General

20-200 California Points & Authorities § 200.373

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.373 Supporting Contention That Receiver Is Properly Exercising His or Her Powers in General [Code Civ. Proc. § 568]--Enumeration of Receiver's Powers--Receiver's Management Is Under Court's Supervision and Control

[1] FORM Supporting Contention That Receiver Is Properly Exercising His or Her Powers in General [Code Civ. Proc. § 568]--Enumeration of Receiver's Powers--Receiver's Management Is Under Court's Supervision and Control

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE RECEIVER IS PROPERLY EXERCISING HIS/HER POWERS BECAUSE HIS/HER ACTS WERE DONE UNDER THE COURT'S CONTROL AND CONTINUOUS SUPERVISION.

Receivership Property Under Control of Court. The receiver is an agent and officer of the court, holding custody of the receivership property on behalf of the court for the real owners thereof; the property in the receiver's hands is really under the control and continuous supervision of the court (*Lesser & Son v. Seymour (1950) 35 Cal. 2d 494, 499, 218 P.2d 536* ; *Steinberg v. Goldstein (1954) 129 Cal. App. 2d 682, 685, 686, 278 P.2d 22*).

[*Add points and authorities supporting the exercise of the receiver's powers in specific instances (see § 200.410 et seq.).*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the acts of the receiver comply with the court's supervision and control of the receiver.

The form may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the powers of the receiver. For example, these points and authorities may be submitted in support of a receiver's motion for permission to engage in any of the activities authorized by *Code Civ. Proc. § 568*. They may also be adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Therefore, for example, counsel would refer to specific acts performed by the receiver that complies with the supervisory requirements mandated by the court that issued the order that appointed the receiver. See also the *comments in § 200.370[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 200.380* et seq. may be used to oppose the contention supported by these points and authorities.

[d] Related Pleading and Practice Forms

For discussion and forms of petitions by a receiver for orders, forms of orders authorizing the receiver to engage in activities permitted by Code Civ. Proc. § 568, and a form of allegation of a receiver's capacity to sue pursuant to court order, see California Forms of Pleading and Practice, Ch. 486, *Receivers* .

[3] Discussion of Authorities

[a] Receivership Property Under Control of Court

The facts and procedural background of ***Lesser & Son v. Seymour*** *(1950) 35 Cal. 2d 494, 218 P.2d 536* , are discussed in *§ 200.372[3][a]*. In affirming the trial court's order of the sale of receivership property, the Court found the trial court had the power to change the manner of sale of property in its custody from that previously prescribed by it in the order directing the sale. The Court held a receiver is a mere agent of the court, and the property in the receiver's hands is really under the control and continuous supervision of the court (*35 Cal. 2d 494, 499)* .

The facts and procedural background of ***Steinberg v. Goldstein*** *(1954) 129 Cal. App. 2d 682, 278 P.2d 22* , are discussed, are discussed in *§ 200.372[3][a]*. In *Steinberg*, the court of appeal affirmed the final report and account of the receiver, together with an order of a judge of the superior court amending its instructions to the receiver. The court held that the receiver merely holds the custody of the property involved in the litigation on behalf of the court for the real owners of the property. The court may therefore direct the delivery to the receiver of specific property that is involved in litigation. The court also ruled that the extent of the property embraced by the receivership was a question the court appointing the receiver had the power and jurisdiction to determine. That court could therefore determine whether any particular property was or was not involved in the action and in the receivership proceeding (*129 Cal. App. 2d 682, 686)* .

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20-200 California Points & Authorities § 200.374

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.374 Supporting Contention That Receiver Is Properly Exercising His or Her Powers in General [Code Civ. Proc. § 568]--Receiver May Petition Court for Additional Authority or Instructions As Needed

[1] FORM Supporting Contention That Receiver Is Properly Exercising His or Her Powers in General [Code Civ. Proc. § 568]--Receiver May Petition Court for Additional Authority or Instructions As Needed

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE RECEIVER MAY APPLY TO THE COURT FOR INSTRUCTION AND AUTHORITY FROM TIME TO TIME AS NECESSARY.

Receiver May Petition Court for Additional Authority or Instructions As Needed. It is eminently proper for a receiver to apply to the court by which he or she was appointed for instruction and authority from time to time as he or she may need it (*Free Gold Mining Co. v. Spiers (1901) 135 Cal. 130, 131-132, 67 P. 61* ; *see In re Executive Life Ins. Co. (1995) 32 Cal. App. 4th 433, 399-400, 38 Cal. Rptr. 2d 453*).

[*Add points and authorities supporting the exercise of the receiver's powers in specific instances (see § 200.410 et seq.).*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that a request for additional instruction or authority by the receiver is appropriate.

The form may be combined with a form of memorandum of points and authorities relating to the specific procedural

context in which counsel wishes to raise the issue of the powers of the receiver. For example, these points and authorities may be submitted in support of a receiver's motion for permission to engage in any of the activities authorized by *Code Civ. Proc. § 568*. They may also be adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Therefore, for example, counsel should refer to specific facts in a declaration supporting an application for additional authority, by page and line number, showing that unforeseeable circumstances have arisen that require action by the receiver that was not provided for in the order appointing the receiver. See also the *comments in § 200.370[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Receiver May Petition Court for Additional Authority or Instructions As Needed

In ***Free Gold Mining Co. v. Spiers*** *(1901) 135 Cal. 130, 67 P. 62* , a receiver who was appointed to take charge and control mining property petitioned the trial court for an order authorizing him to purchase and install a cyanide tailings plant for the purpose of working tailings in his possession. After a hearing, the trial court granted the petition and provided specifications relating to the daily capacity of the plant and method of payment. Persons who alleged that they were aggrieved parties appealed the order.

The Supreme Court dismissed the appeal. The Court stated that it is eminently proper for a receiver to apply to the court by which he or she was appointed for instruction and authority from time to time as the receiver may need it. In this case, the Court noted, the appointment order directed the receiver to apply to the court for instructions when necessary. The receiver is but the hand of the court, to aid it in preserving and managing the property involved in the suit for the benefit of those to whom it may ultimately be determined to belong. The Court held that any order the court may make on application of the receiver for such direction, whether for the expenditure of money or for the performance of any duty, may, if erroneous, be reviewed "on proper exceptions thereto after final judgment has been rendered" (*135 Cal. 130, 131-132)* .

In re Executive Life Ins. Co. *(1995) 32 Cal. App. 4th 344, 38 Cal. Rptr. 2d 453* , involved proceedings for settlement of claims against an insolvent insurer whose portfolio contained various high-risk junk bonds. In addition to taking other action, the Insurance Commissioner granted motions for approval of professional fees retained for the rehabilitation of the insurer, and the trial court approved the Commissioner's action. Various entities appealed the trial court's decision, alleging that the trial court erred in the process it employed in discharging its statutory duty to approve those fees. The Commissioner asserted that the court of appeal was without jurisdiction to preview the issue because such orders were separately appealable and no appeal had been taken.

Although the court of appeal reversed the trial court's order relating to certain other aspects, the court affirmed the trial court's order relating to the Commissioner's approval of professional fees. The court cited, by analogy to receivership, *Free Gold Mining Co. v. Spiers*, discussed *above*, in which the Supreme Court stated that it "is eminently proper for a receiver to apply to the court for which he was appointed for instruction and authority from time to time as he may need it" and that the court would be hampered in its efforts to preserve the property and the parties' interests if every that order is subject to direct appeal. Accordingly, the court held that there was no jurisdictional obstacle to reviewing the trial court's order (*32 Cal. App. 4th 344, 400)* .

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20-200 California Points & Authorities § 200.375

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.375 Supporting Contention That Receiver Is Properly Exercising His or Her Powers in General [Code Civ. Proc. § 568]--Receiver's Acts Done Without Prior Court Authorization May Be Ratified by Subsequent Approval

[1] FORM Supporting Contention That Receiver Is Properly Exercising His or Her Powers in General [Code Civ. Proc. § 568]--Receiver's Acts Done Without Prior Court Authorization May Be Ratified by Subsequent Approval

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE COURT SHOULD RATIFY THE RECEIVER'S ACTS BECAUSE _____ [*state reason for receiver's action, e.g.,* THE RECEIVER ACTED IN AN EMERGENCY WHEN NO PRIOR APPROVAL WAS POSSIBLE], AND HE/SHE ACTED IN GOOD FAITH AND IN A MANNER THAT WAS BENEFICIAL TO THE INTERESTED PARTIES.

A. Receiver's Acts Done Without Prior Court Authorization May Be Ratified by Subsequent Approval. In a proper case, the action of a receiver, although taken without prior court authorization, may be ratified by subsequent court approval (*Rochat v. Gee (1902) 137 Cal. 497, 500, 70 P. 478* ; *People v. Riverside University (1973) 35 Cal. App. 3d 572, 582, 585, 111 Cal. Rptr. 68*).

[*Optional*] B. Ratification Rule Is One of Common Sense. The rule allowing ratification by subsequent court approval of a receiver's action in equity, is one of common sense. It is necessitated by the fact that often a receiver is required to act in an emergency when no prior approval is possible. When, therefore, a receiver has acted in good faith, in a manner beneficial to the interested parties, the receiver's acts, though taken without court authorization, should be subsequently approved (*People v. Riverside University (1973) 35 Cal. App. 3d 572, 582, 585, 111 Cal. Rptr. 68*).

[*Add points and authorities supporting the exercise of the receiver's powers in specific instances (see § 200.410 et seq.).*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the receiver properly exercised his or her powers and, therefore, the court should ratify the receiver's actions by subsequent approval.

From a strategic standpoint, counsel who represents a party who is seeking to uphold a receiver's action normally would not raise the issue stated in these points and authorities in an initial memorandum. Rather, he or she would include the points and authorities in a reply memorandum or brief served in response to an opposing party's objection to the receiver's acts.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Therefore, for example, counsel would refer to facts in declarations submitted in the proceedings that disclose that the situation in which the receiver acted was an emergency situation, and that under the circumstances, the action was in the best interest of the concerned parties. See also the *comments in § 200.370[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 200.380* et seq. may be used to oppose the contention supported by these points and authorities.

[d] Related Pleading and Practice Forms

For discussion and forms of petitions by a receiver for orders, forms of orders authorizing the receiver to engage in activities permitted by Code Civ. Proc. § 568, and a form of allegation of a receiver's capacity to sue pursuant to court order, see California Forms of Pleading and Practice, Ch. 486, *Receivers* .

[3] Discussion of Authorities

[a] Receiver's Acts Done Without Prior Court Authorization May Be Ratified by Subsequent Approval

In ***Rochat v. Gee*** *(1902) 137 Cal. 497, 70 P. 478* , an action for dissolution of a partnership, plaintiff obtained the appointment of a receiver. The order appointing the receiver was very broad, authorizing him, among other things, to manage, control, and dispose of all the property of the partnership. When the receiver took possession of the business of the partnership, a number of creditors were pressing the payment of their debts and threatening attachment suits. Plaintiff furnished the receiver with a list of the debts and requested the receiver to pay them. At the time, defendant knew that the receiver was paying these debts, but made no objection. At the conclusion of the litigation, the receiver submitted his final account to the court for approval. The trial court issued an order settling the final account, and defendant appealed from the order.

The Supreme Court affirmed the order of the trial court settling the receiver's final account. In affirming, the Court ruled that the receiver's payment of certain of the partnership's debts without specific authority to do so from the trial court did not warrant a reversal of the trial court's order (*137 Cal. 497, 499)* . Ordinarily a receiver should not pay debts without a previous direction of the court. Assuming, however, that the order appointing the receiver was not broad enough to cover the receiver's action in question, the general rule against payment of debts absent court authority is not inexorable. In a proper case, a receiver's act may be sanctioned by the trial court, either by a previous order or by a subsequent approval (*137 Cal. 497, 500)* .

In ***People v. Riverside University*** *(1973) 35 Cal. App. 3d 572, 111 Cal. Rptr. 68* , the Attorney General brought an action against Riverside University, a nonprofit corporation engaged in the operation of an educational institution, and three of its officers to secure compliance with the terms of the charitable trust with which the university's assets were impressed, and to enjoin the officers from engaging in unlawful and fraudulent business practices. In addition to the injunction, the complaint sought exemplary damages and other equitable relief. After the complaint was filed, the trial court issued an ex parte order appointing a receiver of the university. The trial court instructed the receiver to take possession of and preserve and maintain the property, assets, and records of the university, to continue the university in operation by employing such persons as necessary to conduct regular courses of instruction, to pay for their services at the usual rates, to do all those things and incur the risks and obligations ordinarily incurred by owners, managers, and operators of similar educational institutions, and to exert every means possible to ensure that all students currently enrolled had the opportunity to complete the current academic quarter. Thereafter, on the trial court's decision that the need for the receivership had ceased, the receiver filed his final account and petitioned for fees and discharge. Defendants objected to the request for fees and discharge, alleging that the receiver had sold assets of the university without court authority or confirmation, in violation of *Code Civ. Proc. § 568.5* (authority of receiver to sell property on court order subject to court confirmation of sale). The trial court then ordered the receiver to file, after the fact, the petition for authority to sell property and for confirmation of the sales. After the receiver had so filed, the court denied the petition for permission to sell the property, but nevertheless confirmed the sales. The court conditioned approval of the receiver's account and his discharge on defendants not having commenced proceedings against the receiver and/or his surety for damages resulting from the sale of certain of the property at less than fair market value. The receiver appealed from the order conditioning approval of his final account and his discharge on defendants' failure to commence proceedings against him or his surety.

The court of appeal reversed the trial court's conditional approval of the account and discharge of the receiver, with directions to the trial court to approve the final account and grant the receiver and his surety an unconditional discharge (*35 Cal. App. 3d 572, 588)* . The court first held that when a receiver is appointed to take possession of and operate a quasi-public corporation, such as Riverside University, that is obligated to render continued service to the public, the receiver may, in the first instance, be vested with broad authority to do anything the corporation might have done to make the most out of the assets in his or her hands (*35 Cal. App. 3d 572, 580)* . Citing *Rochat v. Gee (1902) 137 Cal. 497, 500, 70 P. 478* (discussed *above*), the court held that an action of a receiver in equity, though taken without prior court authorization, may be ratified by subsequent court approval (*35 Cal. App. 3d 572, 585)* .

[b] Ratification Rule Is One of Common Sense

The facts and procedural background of ***People v. Riverside University*** *(1973) 35 Cal. App. 3d 572, 111 Cal. Rptr. 68* , are discussed in *§ 200.375[3][a]*. Citing *Maggiora v. Palo Alto Inn, Inc. (1967) 249 Cal. App. 2d 706, 713, 57 Cal. Rptr. 787* (discussed in *§ 200.50[3][c]*), the court of appeal found the rule to be one of common sense, necessitated by the fact that often a receiver is required to act in an emergency when no prior approval is possible. When, therefore, a receiver has acted in good faith, in a manner beneficial to the interested parties, the receiver's acts, though taken without court authorization, should be subsequently approved (*35 Cal. App. 3d 572, 582)* . The court noted that the trial court could have authorized the receiver to sell the unneeded furniture and equipment at a private sale, at the best price attainable under the circumstances, in order to provide funds for the continued operation of the university. Having the power to authorize private sales in the first instance, the trial court possessed the power to approve sales so made without prior authorization (*35 Cal. App. 3d 572, 585)* .

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20-200 California Points & Authorities §§ 200.376-200.379

AUTHOR: Robert Kaplan Editorial Consultant

[Reserved]

§§ 200.376[Reserved]

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20-200 California Points & Authorities § 200.380

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.380 Opposing Contention That Receiver Is Properly Exercising His or Her Powers in General [Code Civ. Proc. § 568]--Receiver Lacks Power Beyond That Conferred by Statute or Court Order [Code Civ. Proc. § 568]

[1] FORM Opposing Contention That Receiver Is Properly Exercising His or Her Powers in General [Code Civ. Proc. § 568]--Receiver Lacks Power Beyond That Conferred by Statute or Court Order [Code Civ. Proc. § 568]

[*The following may be included in an memorandum of points and authorities, or in a trial or appellate brief.*]

THE RECEIVER MAY NOT _____ [*specify receiver's action, e.g.,* CONTRACTUALLY BIND THE RECEIVERSHIP PROPERTY] BECAUSE THE POWER TO DO SO HAS NOT BEEN CONFERRED ON HIM/HER BY _____ [STATUTE *and/or* THE ORDER APPOINTING HIM/HER *and/or* ANY COURT ORDER ISSUED SUBSEQUENT TO THE ORDER OF APPOINTMENT].

Receiver Lacks Power Beyond That Conferred by Statute and Court Order. The functions and powers of a receiver are controlled by statute, by the order appointing the receiver, and by orders subsequently made by the court, and the receiver has no powers beyond those so conferred (*Morand v. Superior Court (1974) 38 Cal. App. 3d 347, 351, 113 Cal. Rptr. 281* ; *Nulaid Farmers Assn. v. LaTorre (1967) 252 Cal. App. 2d 788, 792, 60 Cal. Rptr. 821*).

[*Add points and authorities opposing the receiver's exercise of his or her powers in specific instances (see, e.g., §§ 200.440 et seq., and 200.470 et seq.).*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to the contention that the receiver is properly exercising his or her powers, under statute or court order [*see Code Civ. Proc. § 568*].

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 200.370* et seq.

The form may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the powers of the receiver. For example, these points and authorities may be submitted in opposition to a receiver's motion for permission to engage in any of the activities authorized by *Code Civ. Proc. § 568*. They may also be adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs*; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should include specific facts showing that the receiver is acting or has acted beyond the scope of his or her authority under statute or court order. Therefore, for example, counsel would refer to declarations submitted in the proceedings, by page and line, and point out facts that disclose conduct by the receiver that was not authorized. See also the *comments in § 200.370[2][b]* regarding evidentiary support for facts stated.

[c] Related Pleading and Practice Forms

For discussion and forms of petitions by a receiver for orders, forms of orders authorizing the receiver to engage in activities permitted by Code Civ. Proc. § 568, and a form of allegation of a receiver's capacity to sue pursuant to court order, see California Forms of Pleading and Practice, Ch. 486, *Receivers* .

[3] Discussion of Authorities

[a] Receiver Lacks Power Beyond That Conferred by Statute and Court Order

In ***Morand v. Superior Court*** *(1974) 38 Cal. App. 3d 347, 113 Cal. Rptr. 281* , a money judgment was obtained against one of petitioners, a corporation. When execution on the judgment was returned unsatisfied, the trial court appointed a receiver in aid of execution to take over any and all assets of the judgment debtor, to take all necessary actions to reduce them to possession, and to collect any rents due from tenants or sublessees of the judgment debtor. The receiver subsequently commenced an action for declaratory relief against the judgment debtor and four other parties, including the petitioners in the instant action, who were not mentioned by the receiver in his application to the court for permission to employ counsel. The action sought a judicial declaration that a certain sublease in which defendants allegedly claimed an interest was the sole property of the judgment debtor. The complaint also alleged that certain of the defendants were each the alter ego of the other, and prayed for punitive damages. Petitioners demurred to the complaint on the ground that the trial court had no jurisdiction to entertain the receiver's action against them. After the trial court overruled their demurrers, petitioners sought peremptory writs of mandate from the court of appeal directing that their demurrers be sustained without leave to amend.

The court of appeal issued alternative writs of mandate to the trial court and then issued peremptory writs, finding the trial court to be in error in overruling petitioners' demurrers since it was without jurisdiction to entertain the receiver's action against petitioners. The court held the receiver had no legal authority to commence the action against petitioners because the court appointing the receiver had given him no special or express permission to commence an action against petitioners (*38 Cal. App. 3d 347, 353)* . The functions and powers of a receiver are controlled by statute, by the order appointing the receiver, and by orders subsequently made by the court. The receiver has no powers beyond those so conferred (*38 Cal. App. 3d 347, 351)* .

In ***Nulaid Farmers Assn. v. LaTorre*** *(1967) 252 Cal. App. 2d 788, 60 Cal. Rptr. 821* , an action by plaintiff to foreclose certain chattel mortgages held by it against defendant and others, plaintiff sought the appointment of a

receiver to hold and operate various poultry farms owned by defendants. The trial court issued an ex parte order appointing the receiver as requested, and subsequently confirmed the appointment. The order of appointment empowered the receiver, under the control and subject to the order of the trial court, to take, care for, keep possession of, manage, operate, and conduct the poultry farms, to take charge of and manage the property, to collect rents, issues, and profits, and to do all things necessary for the preservation and repair of and the reduction of indebtedness on the property, with all other usual powers and duties of a receiver. Thereafter, appellant filed a complaint in intervention against the receiver in his official capacity, alleging that appellant and the receiver had entered into a contract providing for the growing of fryer chickens on one of the properties subject to the receivership. In the complaint in intervention, appellant sought specific enforcement of the contract, together with damages for repudiation of the contract. The receiver generally demurred to the complaint in intervention, contending, among other things, that the complaint contained no allegations that the receiver had obtained court approval of the contract with appellant. The trial court sustained the demurrer without leave to amend and entered judgment dismissing the complaint in intervention. Appellant appealed from the judgment of dismissal.

The court of appeal affirmed the judgment of the trial court, holding that because appellant sued the receiver solely in his official capacity, but failed to allege court approval of the contract, a condition precedent to the statement of any cause of action against the receiver, the trial court properly sustained the demurrer. The court held the order appointing the receiver did not authorize him to enter into the contract with appellant. The order merely invested the receiver with the usual powers to manage, preserve, and repair the receivership property, under the control and subject to the order of the trial court. Thus, court approval for the contract was necessary (*252 Cal. App. 2d 788, 793)* .

Furthermore, from examination of the record, the court found that neither the applicable statute (*Code Civ. Proc. § 568*) nor the order appointing the receiver contained language that could reasonably be construed as authorizing the receiver, without the consent of the trial court, to enter into a contract of such magnitude as that with appellant. The powers enumerated in the order appointing the receiver were specifically granted under the control and subject to the order of the court. As such, they did not include the power to enter into contracts with regard to the receivership property beyond those necessary to maintain and preserve it. The contract with appellant, if valid and enforceable, would have significantly interfered with the trial court's control over a portion of the receivership estate. Furthermore, the contract would have prevented plaintiff from foreclosing, during the duration of the contract, the chattel mortgages of personal property located on the property (*252 Cal. App. 2d 788, 792)* .

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20-200 California Points & Authorities § 200.381

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.381 Opposing Contention That Receiver Is Properly Exercising His or Her Powers in General [Code Civ. Proc. § 568]--Powers Limited to Those Enumerated by Statute

[1] FORM Opposing Contention That Receiver Is Properly Exercising His or Her Powers in General [Code Civ. Proc. § 568]--Powers Limited to Those Enumerated by Statute

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE RECEIVER MAY NOT _____ [*specify receiver's action, e.g.,* CONTRACTUALLY BIND THE RECEIVERSHIP PROPERTY] BECAUSE THE RECEIVER'S ACTION IS NOT WITHIN THE POWERS ENUMERATED BY STATUTE.

Enumerated Functions and Powers of Receiver Under *Code Civ. Proc. § 568*. The receiver has, under the control of the court, the power to bring and defend actions in his or her own name, as receiver, to take and keep possession of the property, to receive rents, collect debts, and compound for and compromise the same, to make transfers, and generally to do such acts respecting the property as the court may authorize (*Code Civ. Proc. § 568*; *see Nulaid Farmers Assn. v. LaTorre (1967) 252 Cal. App. 2d 788, 791-792, 60 Cal. Rptr. 821*).

[*Add points and authorities opposing the exercise of the receiver's powers in specific instances (see, e.g., §§ 200.380, 200.440 et seq., and 200.470 et seq.).*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to the contention that the receiver is properly exercising his or her powers as enumerated by statute [*see Code Civ. Proc. § 568*].

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 200.370* et seq.

The form may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the powers of the receiver. For example, these points and authorities may be submitted in opposition to a receiver's motion for permission to engage in any of the activities not specifically authorized by *Code Civ. Proc. § 568*. They may also be adapted generally for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should include specific facts showing that the receiver is acting or has acted beyond the scope of his or her authority enumerated under *Code Civ. Proc. § 568*. Therefore, for example, counsel should refer to page and line number of declarations submitted in the proceedings that disclosed instances of specific conduct that is unauthorized. See also the *comments in § 200.370[2][b]* regarding evidentiary support for facts stated.

[c] Related Pleading and Practice Forms

For discussion and forms of petitions by a receiver for orders, forms of orders authorizing the receiver to engage in activities permitted by Code Civ. Proc. § 568, and a form of allegation of a receiver's capacity to sue pursuant to court order, see California Forms of Pleading and Practice, Ch. 486, *Receivers* .

[3] Discussion of Authorities

[a] Enumerated Functions and Powers of Receiver Under Code Civ. Proc. § 568

The facts and procedural background of ***Nulaid Farmers Assn. v. LaTorre*** *(1967) 252 Cal. App. 2d 788, 60 Cal. Rptr. 821* , are discussed in *§ 200.380[3][a]*. The court of appeal affirmed the trial court's order dismissing appellant's complaint in intervention against the receiver. The court found the receiver acted beyond the scope of his powers in entering into a contract with appellant concerning certain of the property of the receivership estate (*252 Cal. App. 2d 788, 793)* . In ruling that no statute or court order permitted the receiver to enter into the contract, the court found the receiver's actions to be circumscribed by *Code Civ. Proc. § 568*. Subject to court approval, *Code Civ. Proc. § 568* provides for, and the receiver's powers were thereby limited to, the power to bring and defend actions in his own name as receiver, to take and keep possession of the property, to receive rents, collect debts, to compound for and compromise the same, to make transfers, and generally to do such acts respecting the property as the court may have authorized (*252 Cal. App. 2d 788, 791)* .

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CHAPTER 200 RECEIVERS
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E. Administration of Receivership
1. Exercise of Powers in General

20-200 California Points & Authorities § 200.382

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.382 Opposing Contention That Receiver Is Properly Exercising His or Her Powers in General [Code Civ. Proc. § 568]--Powers and Duties Depend on Order of Appointment

[1] FORM Opposing Contention That Receiver Is Properly Exercising His or Her Powers in General [Code Civ. Proc. § 568]--Powers and Duties Depend on Order of Appointment

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

Powers and Duties Depend on Order of Appointment. When a receiver's powers and duties are not directly prescribed by statute, they depend on the court's order of appointment (*Nulaid Farmers Assn. v. LaTorre (1967) 252 Cal. App. 2d 788, 791, 60 Cal. Rptr. 821*).

[*Add points and authorities opposing the receiver's exercise of his or her powers in specific instances (see, e.g., §§ 200.440 et seq., and 200.470 et seq.).*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to the contention that the receiver is properly exercising his or her powers as enumerated in the order of appointment.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 200.370* et seq.

The form may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the powers of the receiver. For example, these points and authorities may be submitted in

opposition to a receiver's motion for permission to engage in any of the activities authorized by *Code Civ. Proc. § 568*. They may also be adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Therefore, counsel would:

- Refer to the powers set forth in the appointing order,
- Identify the objectionable acts of the receiver, and
- Point out how those acts exceed the scope of the receiver's appointment.

See also the *comments in § 200.370[2][b]* regarding evidentiary support for facts stated.

[c] Related Pleading and Practice Forms

For discussion and forms of petitions by a receiver for orders, forms of orders authorizing the receiver to engage in activities permitted by Code Civ. Proc. § 568, and a form of allegation of a receiver's capacity to sue pursuant to court order, see California Forms of Pleading and Practice, Ch. 486, *Receivers* .

[3] Discussion of Authorities

[a] Powers and Duties Depend on Order of Appointment

Nulaid Farmers Assn. v. LaTorre *(1967) 252 Cal. App. 2d 788, 60 Cal. Rptr. 821* , is discussed in *§ 200.380[3][a]*. From examination of the record, the court found that neither the applicable statute, *Code Civ. Proc. § 568*, nor the order appointing the receiver contained language that could reasonably be construed as authorizing the receiver, without the consent of the trial court, to enter into a contract of such magnitude as that with appellant. The powers enumerated in the order appointing the receiver were specifically granted under the control and subject to the order of the court. As such, they did not include the power to enter into contracts with regard to the receivership property beyond those necessary to maintain and preserve it. The contract with appellant, if valid and enforceable, would have significantly interfered with the trial court's control over a portion of the receivership estate. Furthermore, the contract would have prevented plaintiff from foreclosing, during the duration of the contract, the chattel mortgages of personal property located on the property (*252 Cal. App. 2d 788, 792)* .

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20-200 California Points & Authorities § 200.383

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.383 Opposing Contention That Receiver Is Properly Exercising His or Her Powers in General [Code Civ. Proc. § 568]--No Express Authority to Contractually Bind Property or Fund of Receivership Estate

[1] FORM Opposing Contention That Receiver Is Properly Exercising His or Her Powers in General [Code Civ. Proc. § 568]--No Express Authority to Contractually Bind Property or Fund of Receivership Estate

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE RECEIVER MAY NOT ENTER INTO A CONTRACT BINDING THE _____ [PROPERTY *and/or* FUND] IN THE RECEIVERSHIP ESTATE BECAUSE HE/SHE DOES NOT HAVE THE AUTHORITY OR APPROVAL OF THE COURT TO DO SO.

A. Contract of Receiver Binding Property or Fund Is Improper Without Court Approval. It is the general rule that a receiver has no right or power to make a contract binding the property or fund in his or her custody without the authority or approval of the court (*see Code Civ. Proc. § 568*; *Nulaid Farmers Assn. v. LaTorre (1967) 252 Cal. App. 2d 788, 793, 60 Cal. Rptr. 821*).

B. Unauthorized Contract of Receiver Is Not Binding on Court. It is the general rule that an unauthorized agreement of a receiver does not bind the court in charge of the receivership, since it is not recognized as a contract of the receivership, but rather as the receiver's own contract (*Nulaid Farmers Assn. v. LaTorre (1967) 252 Cal. App. 2d 788, 793, 60 Cal. Rptr. 821*).

[*Add points and authorities opposing the receiver's exercise of his or her powers in specific instances (see, e.g., §§ 200.440 et seq., and 200.470 et seq.).*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to the contention that the receiver is properly exercising his or her powers, under statute or court order, by entering into a contract binding the receivership property without court approval [*see Code Civ. Proc. § 568*].

The form may be combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the powers of the receiver. For example, these points and authorities may be submitted in support of a demurrer to a complaint in an action against a receiver for breach of contract, on the ground that the complaint fails to allege the trial court approved the contract [*see, e.g., Nulaid Farmers Assn v. LaTorre (1967) 252 Cal. App. 2d 788, 791, 60 Cal. Rptr. 821]* . They may also be adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Therefore, counsel should include specific facts showing that neither statute nor court order authorizes the receiver to enter into the contract. For example, counsel would refer to specific terms of the contract alleged to be beyond the receiver's powers, and point out how those terms exceed the receiver's authority. See also the *comments in § 200.370[2][b]* regarding evidentiary support for facts stated.

[c] Related Pleading and Practice Forms

For discussion and forms of petitions by a receiver for orders, forms of orders authorizing the receiver to engage in activities permitted by Code Civ. Proc. § 568, and a form of allegation of a receiver's capacity to sue pursuant to court order, see California Forms of Pleading and Practice, Ch. 486, *Receivers* .

[3] Discussion of Authorities

[a] Contract of Receiver Binding Property or Fund Is Improper Without Court Approval

The facts and procedural background of ***Nulaid Farmers Assn. v. LaTorre*** *(1967) 252 Cal. App. 2d 788, 60 Cal. Rptr. 821* , are discussed in *§ 200.380[3][a]*. The court of appeal affirmed the trial court's order dismissing appellant's complaint in intervention against the receiver. The court found the receiver acted beyond the scope of his powers in entering into a contract with appellant concerning certain of the property of the receivership estate. The court ruled that neither *Code Civ. Proc. § 568* nor the trial court order appointing the receiver permitted the receiver to enter into the contract. The court so holding, the court stated the general rule that a receiver has no right or power to make a contract binding the property or fund in his or her custody without the authority or approval of the court (*252 Cal. App. 2d 788, 793)* .

[b] Unauthorized Contract of Receiver Is Not Binding on Court

The facts and procedural background of ***Nulaid Farmers Assn. v. LaTorre*** *(1967) 252 Cal. App. 2d 788, 60 Cal. Rptr. 821* , are discussed in *§ 200.380[3][a]*. In *Nulaid*, the court of appeal affirmed the trial court's order dismissing appellant's complaint in intervention against the receiver. The court held neither *Code Civ. Proc. § 568* nor the order appointing the receiver authorized him to enter into the contract in question. They merely invested him with the usual powers to manage, preserve, and repair the receivership property under the control and subject to the order of the court. Hence, court approval for the contract was necessary. The court held it the general rule that an unauthorized agreement of a receiver does not bind the court in charge of the receivership, is not recognized as a contract of the receivership, and is treated as the receiver's own contract. Therefore, because intervenor saw fit to sue the receiver solely in his

official capacity, and failed to allege court approval of the contract, which was a condition precedent to the statement of any cause of action against the receiver, the demurrer was properly sustained (*252 Cal. App. 2d 788, 793)* .

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20-200 California Points & Authorities §§ 200.384-200.409

AUTHOR: Robert Kaplan Editorial Consultant

[Reserved]

§§ 200.384[Reserved]

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2. Deposit of Securities

20-200 California Points & Authorities § 200.410

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.410 Supporting Contention That Receiver Is Properly Exercising His or Her Powers in Deposit of Securities [Code Civ. Proc. § 568.1; Fin. Code §§ 1592, 30004-30006, 30200]

[1] FORM Supporting Contention That Receiver Is Properly Exercising His or Her Powers in Deposit of Securities [Code Civ. Proc. § 568.1; Fin. Code §§ 775, 30004-30006, 30200]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE COURT SHOULD AUTHORIZE THE DEPOSIT OF THE SECURITIES BY THE RECEIVER BECAUSE THE RECEIVER HAS THE POWER, UNDER SECTION 568.1 OF THE CODE OF CIVIL PROCEDURE, TO DEPOSIT SECURITIES IN A SECURITIES DEPOSITORY THAT IS EITHER LICENSED UNDER SECTION 30200 OF THE FINANCIAL CODE, OR THAT IS EXEMPT FROM LICENSING BY SECTIONS 30005 OR 30006 OF THE FINANCIAL CODE.

Receiver's Power to Deposit Securities. The receiver may, under the control of the court, deposit any securities in a securities depository, as defined in *Section 30004 of the Financial Code*, which is either licensed under *Section 30200 of the Financial Code* or exempted from licensing by *Section 30005* or *30006 of the Financial Code*; the securities may be held by the securities depository in the manner authorized by *Section 1592 of the Financial Code* (*Code Civ. Proc. § 568.1*).

[*Add points and authorities supporting the exercise of the receiver's powers in general (see, e.g., § 200.370 et seq.).*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the receiver may properly deposit

any securities in his or her hands in a securities depository, as defined by *Fin. Code § 30004*, that is either licensed under *Fin. Code § 30200* or is exempt from licensing under *Fin. Code § 30005* or *30006*, and that the securities may be held by the securities depository in the manner authorized by *Fin. Code § 1592* [*see Code Civ. Proc. § 568.1*].

This form of points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the powers of the receiver. For example, these points and authorities may be submitted in support of a receiver's motion for permission to deposit securities [*see Code Civ. Proc. § 568.1*]. They may also be adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should include specific facts showing that the security depositories chosen meet the requirements of *Code Civ. Proc. § 568.1* in that they are either licensed under *Fin. Code § 30200*, or exempted from licensing by *Fin. Code § 30005* or *30006*. See also the *comments in § 200.370[2][b]* regarding evidentiary support for facts stated.

[c] Related Pleading and Practice Forms

For discussion and forms of petitions by a receiver for orders, forms of orders authorizing the receiver to engage in activities permitted by Code Civ. Proc. § 568.1, and a form of allegation of a receiver's capacity to sue pursuant to court order, see California Forms of Pleading and Practice, Ch. 486, *Receivers* .

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20-200 California Points & Authorities §§ 200.411-200.419

AUTHOR: Robert Kaplan Editorial Consultant

[Reserved]

§§ 200.411[Reserved]

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3. Employment of Attorney

20-200 California Points & Authorities § 200.420

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.420 Supporting Contention That Receiver Is Properly Exercising His or Her Powers in Employment of Attorney [Cal. Rules of Ct., Rule 3.1180]

[1] FORM Supporting Contention That Receiver Is Properly Exercising His or Her Powers in Employment of Attorney [Cal. Rules of Ct., Rule 3.1180]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE COURT SHOULD APPROVE THE EMPLOYMENT OF _____ [*name of attorney or law firm*] AS ATTORNEY BY THE RECEIVER BECAUSE THE RECEIVER HAS SHOWN THAT THE EMPLOYMENT IS NECESSARY AND THAT THE ATTORNEY HAS NO PROFESSIONAL RELATIONSHIP WITH ANY PARTY IN THE ACTION, OR WITH ANY PARTY'S ATTORNEY.

Receiver's Employment of Attorney Is Proper With Court Approval After Showing of Necessity for Employment. A receiver may employ an attorney after obtaining court approval. The written application for the receiver's employment of an attorney must state the necessity for the employment, the name of the attorney proposed to be employed, and that the attorney is not attorney for, associated with, or employed by an attorney for any party (Cal. Rules of Ct., Rule 3.1180).

[*Add points and authorities supporting the exercise of the receiver's powers in general (see, e.g., § 200.370 et seq.).*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that a receiver may properly employ an attorney [*see* Cal. Rules of Ct., Rule 3.1180].

This form of points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the powers of the receiver. For example, this form may be submitted in support of an application for the approval of the employment of an attorney by the receiver. They may also be adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should include specific facts showing the necessity for the receiver's employment of an attorney. See also the *comments in § 200.370[2][b]* regarding evidentiary support for facts stated.

[c] Related Pleading and Practice Forms

For discussion and a form of application by a receiver for authority to employ an attorney, see California Forms of Pleading and Practice, Ch. 486, *Receivers* .

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3. Employment of Attorney

20-200 California Points & Authorities §§ 200.421-200.429

AUTHOR: Robert Kaplan Editorial Consultant

[Reserved]

§§ 200.421[Reserved]

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4. Commencement and Defense of Actions

20-200 California Points & Authorities § 200.430

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.430 Supporting Contention That Receiver Is Properly Exercising His or Her Powers in Commencement and Defense of Actions [Code Civ. Proc. § 568]

[1] FORM Supporting Contention That Receiver Is Properly Exercising His or Her Powers in Commencement and Defense of Actions [Code Civ. Proc. § 568]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE COURT SHOULD PERMIT _____ [*specify litigation, e.g.*, COMMENCEMENT OF _____ (*specify action*)] BY THE RECEIVER BECAUSE HE/SHE HAS THE POWER UNDER SECTION 568 OF THE CODE OF CIVIL PROCEDURE, TO BRING AND DEFEND ACTIONS IN HIS OR HER OWN NAME.

Power of Receiver to Bring and Defend Actions in Own Name as Receiver. The receiver has, under the control of the court, power to bring and defend actions in his or her own name, as receiver (*Code Civ. Proc. § 568*; *Holzman v. United California Bank (1967) 248 Cal. App. 2d 833, 838-839, 57 Cal. Rptr. 33* ; *Southern Pacific Co. v. Schwartz (1964) 226 Cal. App. 2d 481, 486, 38 Cal. Rptr. 243*).

[*Add points and authorities, if desired, supporting the contention that the receiver may employ an attorney (see, e.g., § 200.420).*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the receiver, under the control of the court, is able to bring and defend actions in his or her own name [*see Code Civ. Proc. § 568*].

This form of points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the powers of the receiver. For example, these points and authorities may be submitted in support of a receiver's motion for permission to bring or defend an action. They may also be adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Counsel should, therefore, include specific facts showing that the receiver has authority to act, and identify the dispute that causes the need for litigation. See also the *comments in § 200.370[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 200.440* et seq. may be used to oppose the contention supported by these points and authorities.

[d] Related Pleading and Practice Forms

For discussion and a form of petition by a receiver for an order, together with a form of order, authorizing the receiver to sue a third party for the recovery of property, as well as a form of allegation of a receiver's capacity to sue pursuant to court order for use in a complaint in an action by or against a receiver, see California Forms of Pleading and Practice, Ch. 486, *Receivers* .

[3] Discussion of Authorities

[a] Power of Receiver to Bring and Defend Actions in Own Name as Receiver.

In ***Holzman v. United California Bank*** *(1967) 248 Cal. App. 2d 833, 57 Cal. Rptr. 33* , plaintiff receiver commenced an action against defendant bank for breach of trust arising out of the bank's alleged wrongful dishonor of checks drawn on the account of the corporation of which plaintiff was receiver. The action arose out of a prior action by the corporations commissioner against the corporation. In that action, the commissioner had issued the corporation a permit to sell and issue its securities, and had required all subscription money to be paid to defendant bank for deposit in an escrow account. After discovering a diversion of some of these funds from the escrow account to the corporation's checking account in defendant bank, the commissioner suspended the permit and brought an action against the corporation for declaratory relief and an accounting. The commissioner also sought the appointment of a receiver of the corporation. The trial court appointed plaintiff. After his appointment, plaintiff obtained permission from the trial court to sue defendant bank. The bank answered plaintiff's complaint by raising the affirmative defense that plaintiff lacked standing to sue for money allegedly due to subscribers of the corporation, and the parties agreed to a separate trial on this issue. At trial, the court found that neither plaintiff nor the corporation had any right, title, or interest in the money, and that plaintiff was not the real party in interest and could not, therefore, maintain the action. The court dismissed the action, entered judgment, and denied plaintiff's subsequent motion for a new trial. Plaintiff appealed from the judgment of dismissal.

The court of appeal reversed the trial court's judgment of dismissal. The court initially based its ruling on its finding that the trial court's premise, that plaintiff was seeking to recover from the bank money in which the corporation had no interest, was contrary to the evidence and the law (*248 Cal. App. 2d 833, 836)* . The issue before the court was whether plaintiff, as receiver for the corporation, was entitled to maintain an action against the bank asserting the liability of the bank for the funds wrongfully deposited in the corporation's checking account. The court interpreted *Code Civ. Proc. § 568* as authorizing the receiver to bring the action and found that he was clothed with the legal right to maintain the

action seeking resolution of the respective rights and obligations of both the corporation and the subscribers as they resulted from the bank's handling of the accounts (*248 Cal. App. 2d 833, 839)* . Additionally, the order appointing the receiver specifically empowered him to bring and defend actions in his own name as receiver (*248 Cal. App. 2d 833, 834-835)* . The court held that as a contingent or conditional owner of the funds, the corporation, through its receiver, had an assertable interest in their recovery. As one entrusted with actual, even though temporary, possession of subscribers' funds while in transit to the bank as interim custodian, and as an entity charged with responsibility to the subscribers for the safety of their funds while its obligations to them were yet unfulfilled, the corporation had a continuing obligation to the subscribers (*248 Cal. App. 2d 833, 839)* .

In ***Southern Pacific Co. v. Schwartz*** *(1964) 226 Cal. App. 2d 481, 38 Cal. Rptr. 243* , plaintiff commenced an action against defendants for money due for the transportation of certain salvage goods. Two of defendants, doing business as partners, cross complained against plaintiff for conversion of certain of their salvage goods. At trial, the receiver of the partnership in whose name the cross-complaining defendants were doing business moved to dismiss the cross complaint. The trial court granted the motion, and subsequently gave judgment for plaintiff against one of the cross-complaining defendants and judgment for the remaining defendants against plaintiff. Defendant against whom judgment was rendered moved the court for a new trial. When the trial court denied that motion, defendant appealed from the order denying the motion and the order dismissing the cross complaint.

The court of appeal reversed the order denying the new trial motion, dismissed the appeal from that order, and affirmed the order dismissing the cross complaint. In affirming the dismissal of the cross complaint, the court found that the firm composed of the cross complaining defendants was represented by the attorney for the receiver of the firm. Therefore, the receiver, by and through his attorney, had authority, under *Code Civ. Proc. § 568*, to move the court to dismiss the cross complaint (*226 Cal. App. 2d 481, 486)* .

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20-200 California Points & Authorities §§ 200.431-200.439

AUTHOR: Robert Kaplan Editorial Consultant

[Reserved]

§§ 200.431[Reserved]

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20-200 California Points & Authorities § 200.440

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.440 Opposing Contention That Receiver Is Properly Exercising His or Her Powers in Commencement and Defense of Actions [Code Civ. Proc. § 568]--Receiver Must Have Special or Express Authority

[1] FORM Opposing Contention That Receiver Is Properly Exercising His or Her Powers in Commencement and Defense of Actions [Code Civ. Proc. § 568]--Receiver Must Have Special or Express Authority

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE RECEIVER MAY NOT _____ [BRING *or* DEFEND] _____ [*specify legal action*] BECAUSE HE OR SHE HAS NO STATUTORY AUTHORITY AND THE COURT HAS NOT GRANTED HIM/HER EXPRESS PERMISSION UNDER SECTION 568 OF THE CODE OF CIVIL PROCEDURE.

Requirement That Receiver Have Statutory or Express Court Authority to Bring or Defend Actions. A receiver may commence an action only by authority of statute or the special or express permission of the court that appointed him or her (*Code Civ. Proc. § 568*; *Bishop v. McKillican (1899) 124 Cal. 321, 327, 57 P. 76* ; *Morand v. Superior Court (1974) 38 Cal. App. 3d 347, 351, 113 Cal. Rptr. 281*).

[*Add points and authorities opposing the exercise of the receiver's powers in general (see, e.g., § 200.380 et seq.).*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to the contention that a receiver may bring or defend actions in his or her own name, as receiver, absent either statutory authority or the express permission of the appointing court to do so [*see Code Civ. Proc. § 568*].

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 200.430[1]*.

This form of points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the powers of the receiver. For example, these points and authorities may be submitted in support of a demurrer to a complaint in an action commenced by a receiver [*see, e.g., Morand v. Superior Court (1974) 38 Cal. App. 3d 347, 352, 113 Cal. Rptr. 281* , discussed in *§ 200.440[3][a]*]. They may also be adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs*; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should refer to specific facts show that commencement or defense of the litigation in question exceeds the receiver's statutory authority. In addition, counsel may request that the court take judicial notice of the fact that the court has issued no order authorizing the receiver to commence the litigation in question [*see Evid. Code § 452(d)*]. See also the *comments in § 200.370[2][b]* regarding evidentiary support for facts stated.

[c] Related Pleading and Practice Forms

For discussion and a form of petition by a receiver for an order, together with a form of order, authorizing the receiver to sue a third party for the recovery of property, see California Forms of Pleading and Practice, Ch. 486, *Receivers* .

[3] Discussion of Authorities

[a] Requirement That Receiver Have Statutory or Express Court Authority to Bring or Defend Actions

In ***Bishop v. McKillican*** *(1899) 124 Cal. 321, 57 P. 76* , plaintiff receiver sued defendant county sheriff for the recovery of personal property which, according to plaintiff, belonged to the railroad corporation of which plaintiff was receiver. The trial court found the property to be properly in defendant's possession, and entered judgment accordingly. Plaintiff appealed from the judgment and from the trial court's order denying plaintiff's motion for a new trial.

The Supreme Court affirmed the judgment and order of the trial court. The Court first ruled that plaintiff never had possession of the articles sued for as receiver. The Court found that, by virtue of a stipulation between plaintiff and defendant, defendant, who obtained possession of the disputed corporate property by virtue of a writ of attachment issued on the same day that plaintiff was appointed receiver of the corporation, merely left the property with plaintiff for safekeeping. Furthermore, pursuant to the stipulation, plaintiff agreed to restore possession of the property to defendant on defendant's demand (*124 Cal. 321, 324-325)* . Thus, the property never passed into the receiver's possession (*124 Cal. 321, 325)* . Looking to the trial court's orders for plaintiff's authority to bring the action, the Court found that the only authority plaintiff had for bringing the action was the order appointing him. However, that order did not specially authorize plaintiff to sue for the recovery or value of property withheld or converted of which he was never in possession (*124 Cal. 321, 325)* . The Court ruled that plaintiff had no power under the order of appointment to bring suits for the recovery of property when the suits might involve risk or expensive litigation. Additionally, plaintiff had no power to contest the corporation's claimed property right if contesting that right might involve risk or expensive litigation (*124 Cal. 321, 327)* .

The facts and procedural background of ***Morand v. Superior Court*** *(1974) 38 Cal. App. 3d 347, 113 Cal. Rptr. 281* , are discussed in *§ 200.380[3][a]*. In *Morand*, the court of appeal found the trial court to be in error in overruling petitioners' demurrers since it was without jurisdiction to entertain the receiver's action against petitioners. The court held the receiver had no legal authority to commence the action against petitioners, finding the court appointing the

receiver had given him no special or express permission to commence an action against petitioners (*38 Cal. App. 3d 347, 353)* . The court held it to be the rule that the functions and powers of a receiver are controlled by statute, by the order appointing the receiver, and by orders subsequently made by the court. The receiver has no powers beyond those so conferred. This rule is given particular effect with regard to action sought to be commenced by the receiver. Citing *Bishop v. McKillican (1899) 124 Cal. 321, 325-326, 57 P. 76* (discussed *above*), and *Tibbets v. Cohn & Co. (1897) 116 Cal. 365, 367, 48 P. 372* , the court held that the receiver may commence an action only by authority of statute or the special or express permission of the court that appointed him or her (*38 Cal. App. 3d 347, 351)* .

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CHAPTER 200 RECEIVERS
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E. Administration of Receivership
4. Commencement and Defense of Actions

20-200 California Points & Authorities § 200.441

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.441 Opposing Contention That Receiver Is Properly Exercising His or Her Powers in Commencement and Defense of Actions [Code Civ. Proc. § 568]--Authority to Employ Counsel Is Insufficient

[1] FORM Opposing Contention That Receiver Is Properly Exercising His or Her Powers in Commencement and Defense of Actions [Code Civ. Proc. § 568]--Authority to Employ Counsel Is Insufficient

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE RECEIVER MAY NOT _____ [BRING *or* DEFEND] _____ [*specify legal action*] BECAUSE THE MERE FACT THAT HE/SHE MAY EMPLOY LEGAL COUNSEL DOES NOT AUTHORIZE HIM/HER TO COMMENCE OR DEFEND A CIVIL ACTION.

Authority of Receiver to Employ Counsel as Insufficient Authority to Bring or Defend Action. An order of the court, permitting a receiver to employ counsel to take necessary action to obtain possession of property, falls far short of leave to commence an action against parties unnamed in the order (*see Cal. Rules of Ct., Rule 3.1180*; *Morand v. Superior Court (1974) 38 Cal. App. 3d 347, 353, 113 Cal. Rptr. 281*).

[*Add points and authorities opposing the exercise of the receiver's powers in general (see, e.g., § 200.380 et seq.).*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to the contention that the mere authority of a receiver to employ counsel is adequate authority to bring or defend an action.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the

points and authorities *set out in § 200.430[1]*.

This form of points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the powers of the receiver. For example, these points and authorities may be submitted in support of a demurrer to a complaint in an action commenced by a receiver [*see, e.g.,* *Morand v. Superior Court (1974) 38 Cal. App. 3d 347, 352, 113 Cal. Rptr. 281* , discussed in *§ 200.441[3][a]*]. They may also be adapted generally for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should refer to specific facts show that commencement or defense of the litigation in question exceeds the receiver's statutory authority. In addition, counsel may request that the court take judicial notice of the fact that the court has issued no order authorizing the receiver to commence the litigation in question [*see Evid. Code § 452(d)*]. See also the *comments in § 200.370[2][b]* regarding evidentiary support for facts stated.

[c] Related Pleading and Practice Forms

For discussion and a form of petition by a receiver for an order, together with a form of order, authorizing the receiver to sue a third party for the recovery of property, see California Forms of Pleading and Practice, Ch. 486, *Receivers* .

[3] Discussion of Authorities

[a] Authority of Receiver to Employ Counsel as Insufficient Authority to Bring or Defend Action

The facts and procedural background of ***Morand v. Superior Court*** *(1974) 38 Cal. App. 3d 347, 113 Cal. Rptr. 281* , are discussed in *§ 200.380[3][a]*. In holding the receiver had no legal authority to commence his action against petitioners, the court of appeal also held the trial court's order permitting the receiver to employ counsel was insufficient authority for the receiver to commence the action (*38 Cal. App. 3d 347, 353)* . Subsequent to the receiver's appointment, the trial court that appointed him authorized him to employ a designated attorney as his attorney to take whatever action might become necessary to obtain possession of the judgment debtor's property then in the possession of another named corporation, and to do all other things necessary to enable him to effectively carry out the responsibilities of the receivership (*38 Cal. App. 3d 347, 351-352)* . The court of appeal noted that this order was the only conceivable authority of the receiver for bringing the action. However, the court found this questionable authority to sue one defendant fell far short of leave to commence an action against the unnamed parties who were the petitioners in the instant action. The order's language that the receiver should do all things necessary to enable him to effectively carry out the responsibilities of his receivership gave no special or express permission to commence an action against petitioners. Indeed, if it did, then the trial court would have improperly relinquished to the receiver the discretion whether an action might be commenced, and if so, against whom (*38 Cal. App. 3d 347, 353)* .

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20-200 California Points & Authorities §§ 200.442-200.449

AUTHOR: Robert Kaplan Editorial Consultant

[Reserved]

§§ 200.442[Reserved]

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5. Sale of Property

20-200 California Points & Authorities § 200.450

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.450 Supporting Contention That Receiver Is Properly Exercising His or Her Powers in Sale of Property [Code Civ. Proc. §§ 568.5, 701.510-701.680]

[1] FORM Supporting Contention That Receiver Is Properly Exercising His or Her Powers in Sale of Property [Code Civ. Proc. §§ 568.5, 701.510-701.680]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE COURT SHOULD AUTHORIZE THE RECEIVER'S PROPOSED SALE OF PROPERTY BECAUSE THE RECEIVER HAS THE POWER UNDER SECTION 568.5 OF THE CODE OF CIVIL PROCEDURE, SUBJECT TO CONFIRMATION BY THE COURT, TO SELL REAL OR PERSONAL PROPERTY IN THE RECEIVER'S POSSESSION.

Power of Receiver to Sell Property. A receiver may, pursuant to an order of the court and subject to confirmation by the court, sell real or personal property in the receiver's possession on the notice and in the manner prescribed by *Sections 701.510-701.680 of the Code of Civil Procedure* (*Code Civ. Proc. § 568.5*; *Cal-American Income Property Fund VII v. Brown Development Corp. (1982) 138 Cal. App. 3d 268, 273-274, 187 Cal. Rptr. 703*).

[*Add points and authorities supporting the exercise of the receiver's powers in general (see, e.g., § 200.370 et seq.).*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the receiver may properly sell real or personal property in the receivership's possession, on the notice and in the manner prescribed by *Code Civ. Proc. §§ 701.510-701.680* (requirements for notice of sale and sale of property that has been levied on). The sale is not final

until confirmed by the court [*Code Civ. Proc. § 568.5*].

This form of points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the powers of the receiver. For example, these points and authorities may be submitted in support of a receiver's motion for permission to sell real or personal property in the receiver's possession [*see Code Civ. Proc. § 568.5*]. They may also be adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Therefore, counsel should include specific facts showing the actual necessity for the sale [*see, e.g.,* *Cal-American Income Property Fund VII v. Brown Development Corp. (1982) 138 Cal. App. 3d 268, 275, 187 Cal. Rptr. 703* , discussed in *§ 200.450[3][a]*]. See also the *comments in § 200.370[2][b]* regarding evidentiary support for facts stated.

[c] Related Pleading and Practice Forms

For discussion and forms of petitions by a receiver for orders, forms of orders authorizing the receiver to engage in activities permitted by Code Civ. Proc. § 568.5, and a form of allegation of a receiver's capacity to sue pursuant to court order for use in a complaint in an action by or against a receiver, see California Forms of Pleading and Practice, Ch. 486, *Receivers* .

For discussion and forms relating to execution sales pursuant to Code Civ. Proc. §§ 701.510-701.680, see California Forms of Pleading and Practice, Ch. 254, *Executions and Enforcement of Nonmoney Judgments* .

[3] Discussion of Authorities

[a] Power of Receiver to Sell Property

The facts and procedural background of ***Cal-American Income Property Fund VII v. Brown Development Corp.*** *(1982) 138 Cal. App. 3d 268, 187 Cal. Rptr. 703* , are discussed in *§ 200.370[3][a]*. In affirming the receiver's power to sell the property, even though reversing the trial court's confirmation of the sale, the court found authority for the power of sale in both the order appointing the receiver and *Code Civ. Proc. §§ 568* and *568.5* (*138 Cal. App. 3d 268, 273-274 n.1*). The court held it did not need to decide whether an order based on the parties' stipulation appointing a receiver (purporting to limit both the receiver's and the trial court's power to act beyond the scope of the original order) could restrict the trial court's authority because the order in the case did not limit the trial court's power to confirm a sale of the property. Although the stipulation for the receiver's appointment did not expressly refer to a sale of the property by the receiver, it did not preclude that possibility. The order authorized the receiver generally to do such acts respecting the property as the trial court may have authorized. Additionally, as a result of the parties' apparent sensitivity to the need for flexibility to respond to changed circumstances, the order defining the receiver's duties was made without prejudice to any further order. The trial court also retained jurisdiction to enable either party to apply for further orders or for modifications of the existing order. The trial court thus correctly decided the receiver had the power to sell subject to its confirmation (*138 Cal. App. 3d 268, 274)* .

[4] Additional Authorities

[a] Power of Receiver to Sell Property

In *Security National Bank v. Geernaert (1988) 199 Cal. App. 3d 1425, 245 Cal. Rptr. 912* , the court of appeal reversed the trial court's judgment in favor of the lender on grounds set forth in an unpublished part of the opinion. In holding

that a secured party is exempted from the requirement of giving notice of sale when the sale of the collateral is conducted by a court appointed receiver, the court stated the receiver and not the secured party controls the time and place of the sale (*199 Cal. App. 3d 1425, 1431)* . A receiver appointed under *Code Civ. Proc. §§ 564-570* is an officer or representative of the court. He or she is not the agent of either party, but represents all parties interested in the property. The sale is made pursuant to an order of the court, and the receiver must give notice of the sale pursuant to *Code Civ. Proc. 568.5*. The debtor's protection is being able to object to the appointment of the receiver, to object to any defects in the notice of sale or mismanagement of the property, to seek to surcharge the receiver, or to object to the receiver's final accounting and discharge. In addition, the receiver's accounting should constitute a complete accounting of the proceeds of the sale. A debtor who fails to object to the notice of sale by the receiver or the receiver's accounting or discharge cannot thereafter attack the sale (*199 Cal. App. 3d 1425, 1431-1433)* .

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20-200 California Points & Authorities § 200.451

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.451 Supporting Contention That Receiver Is Properly Exercising His or Her Powers in Sale of Property [Code Civ. Proc. §§ 568.5, 701.510-701.680]--Receiver's Duty to Realize Largest Possible Amount From Sale

[1] FORM Supporting Contention That Receiver Is Properly Exercising His or Her Powers in Sale of Property [Code Civ. Proc. §§ 568.5, 701.510-701.680]--Receiver's Duty to Realize Largest Possible Amount From Sale

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE COURT SHOULD AUTHORIZE THE RECEIVER'S PROPOSED SALE OF PROPERTY BECAUSE THE RECEIVER HAS FULFILLED HIS/HER DUTY TO OBTAIN THE LARGEST POSSIBLE AMOUNT IN THE SALE OF THE PROPERTY.

Duty of Receiver to Realize Largest Possible Amount From Sale of Property. The receiver has the affirmative duty to endeavor to realize the largest possible amount from the sale of the receivership property (*Cal-American Income Property Fund VII v. Brown Development Corp. (1982) 138 Cal. App. 3d 268, 276 n.8, 187 Cal. Rptr. 703*).

[*Add points and authorities supporting the exercise of the receiver's powers in general (see, e.g., § 200.370 et seq.).*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the receiver is properly exercising his or her powers by fulfilling his or her duty to realize the largest possible amount from the sale.

This form of points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the powers of the receiver. For example,

these points and authorities may be submitted in support of a receiver's motion for permission to sell real or personal property in the receiver's possession [*see Code Civ. Proc. § 568.5*]. They may also be adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

The form may also be modified for use in a reply brief to respond to an adverse party's contention that the receiver is acting without authority regarding sale of receivership property.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Therefore, counsel should refer to specific facts in, for example, supporting declarations, showing that the receiver's actions were consistent with his or her duty to sell the subject property at the highest possible price [*see, e.g., Cal-American Income Property Fund VII v. Brown Development Corp. (1982) 138 Cal. App. 3d 268, 276 n.8, 187 Cal. Rptr. 703* , discussed in *§ 200.451[3][a]*]. See also the *comments in § 200.370[2][b]* regarding evidentiary support for facts stated.

[c] Related Pleading and Practice Forms

For discussion and forms of petitions by a receiver for orders, forms of orders authorizing the receiver to engage in activities permitted by Code Civ. Proc. § 568.5, and a form of allegation of a receiver's capacity to sue pursuant to court order for use in a complaint in an action by or against a receiver, see California Forms of Pleading and Practice, Ch. 486, *Receivers* .

[3] Discussion of Authorities

[a] Duty of Receiver to Realize Largest Possible Amount From Sale of Property

The facts and procedural background of ***Cal-American Income Property Fund VII v. Brown Development Corp.*** *(1982) 138 Cal. App. 3d 268, 187 Cal. Rptr. 703* , are discussed in *§ 200.370[3][a]*. In affirming the receiver's power to sell the property, even though reversing the trial court's confirmation of the sale, the court of appeal ruled that the trial court cannot be blind to pressure tactics frequently applied by real estate purchasers. In ruling that a buyer's refusal to extend the time of the offer to buy will not, standing alone, always go to the issue of necessity for sale of the receivership property, the court held the receiver has the affirmative duty to endeavor to realize the largest amount from the sale of the receivership property (*138 Cal. App. 3d 268, 276* & fn. 8).

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20-200 California Points & Authorities § 200.452

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.452 Supporting Contention That Receiver Is Properly Exercising His or Her Powers in Sale of Property [Code Civ. Proc. §§ 568.5, 701.510-701.680]--Court Has Power to Change Manner of Sale in Court's Custody

[1] FORM Supporting Contention That Receiver Is Properly Exercising His or Her Powers in Sale of Property [Code Civ. Proc. §§ 568.5, 701.510-701.680]--Court Has Power to Change Manner of Sale in Court's Custody

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE COURT SHOULD AUTHORIZE THE RECEIVER'S PROPOSED SALE OF PROPERTY BECAUSE THE COURT IS EMPOWERED TO CHANGE THE MANNER OF SALE IN THE COURT'S CUSTODY.

Court as Empowered to Change Manner of Sale of Property in Its Custody. If the trial court prescribes a different mode of sale, a receiver, when authorized, need not sell receivership property in the manner provided for in *Section 568.5 of the Code of Civil Procedure* (*see Lesser & Son v. Seymour (1950) 35 Cal. 2d 494, 499, 218 P.2d 536* ; *People v. Riverside University (1973) 35 Cal. App. 3d 572, 583, 585, 111 Cal. Rptr. 68*).

[*Add points and authorities supporting the exercise of the receiver's powers in general (see, e.g., § 200.370 et seq.).*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the receiver is properly exercising his or her powers in proposing a mode of sale that is not in the manner provided for in *Code Civ. Proc. § 568.5*.

This form of points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the powers of the receiver. For example,

these points and authorities may be submitted in support of a receiver's motion for permission to sell real or personal property in the receiver's possession [*see Code Civ. Proc. § 568.5*]. They may also be adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

The form may also be modified for use in a reply brief to respond to an adverse party's contention that the receiver is acting without authority regarding sale of receivership property.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Therefore, counsel should refer to the specific circumstances of the proposed sale that support counsel's argument that the sale is consistent with the court's order. See also the *comments in § 200.370[2][b]* regarding evidentiary support for facts stated.

[c] Related Pleading and Practice Forms

For discussion and forms of petitions by a receiver for orders, forms of orders authorizing the receiver to engage in activities permitted by Code Civ. Proc. § 568.5, see California Forms of Pleading and Practice, Ch. 486, *Receivers* .

[3] Discussion of Authorities

[a] Court as Empowered to Change Manner of Sale of Property in Its Custody

The facts and procedural background of ***Lesser & Son v. Seymour*** *(1950) 35 Cal. 2d 494, 218 P.2d 536* , are discussed in *§ 200.372[3][a]*. In *Lesser*, the trial court, in initially ordering the receiver to sell the partnership property in receivership, specified that the sale was to occur by a certain date and that if it did not occur on that date, then the property was to be sold in the manner prescribed by law for execution sales. Pursuant to that order, and after receiving an offer on the property, the receiver petitioned the trial court for confirmation of a proposed sale to the offeree. However, when the confirmation finally came on for hearing, and since notice had been duly given, the trial court offered all the property for sale in open court. Plaintiffs were the highest bidders, and the trial court accepted their bid.

The Supreme Court affirmed the trial court's order directing sale of the property to plaintiffs. The Court held a court in an equity proceeding has the power to change the manner of sale of property in its custody by a receiver appointed by it from that previously prescribed by it in the order directing the sale. In that connection, the trial court may make the sale itself, even though the prior order called for it to be made by the receiver. The Court found, in effect, that the directions in the order of sale concerning the manner in which the sale should be made were merely instructions to the receiver. As procedural directions to the receiver, they did not go the substantive rights of the parties. Of course, they were binding on the receiver, but while for some purposes they may have been final, the main function of the trial court was to manage or dispose of the receivership estate in the best manner possible and for the best interest of the parties concerned. To effectively perform that duty necessarily required some flexibility and continuity of jurisdiction in giving instructions to the receiver as to the manner in which the property should be sold to meet exigencies as they may have arisen (*35 Cal. 2d 494, 499)* . In support of its holding, the Court found that operation of the property by the receiver had resulted in substantial loss, that plaintiffs had loaned money to the receiver to keep the operations afloat, but defendants had advanced none, that the parties had diligently tried to find a purchaser for the property, that plaintiffs were not only the highest bidders but also the only bidders, and that the bid was fair and reasonable (*35 Cal. 2d 494, 498)* .

The facts and procedural background of ***People v. Riverside University*** *(1973) 35 Cal. App. 3d 572, 111 Cal. Rptr. 68* , are discussed in *§ 200.375[3][a]*. In *Riverside University*, the trial court apparently felt it was powerless to approve the receiver's account and to give him an unqualified discharge, since the receiver's sales of certain of the receivership property were admittedly not made in the manner prescribed by a former version of Code Civ. Proc. § 568.5 (current

version substantially the same in relevant parts) (*35 Cal. App. 3d 572, 582-583)* . Implicit in the trial court's order making the discharge conditional was the assumption that the receiver would be liable for the difference between the price received and the fair market value of the items sold. However, the court of appeal concluded the receiver was entitled to an approval of his account and to final discharge, notwithstanding the fact the sales were not made in the manner provided for sales on execution, as prescribed by former Code Civ. Proc. § 568.5. The court therefore reversed the trial court's conditional approval and discharge, with directions to approve the final account and grant the receiver and his surety an unconditional discharge.

The court first ruled that, in the absence of a statute otherwise providing, the trial court may authorize a receiver to sell receivership property at either private or public sale (*35 Cal. App. 3d 572, 587-588)* . The court then ruled that a trial court may prescribe or ratify unconditionally a different mode of sale than that provided under former Code Civ. Proc. § 568.5 for execution sales. A receiver is an agent of the trial court, and the property in receivership is really under the control and continuous supervision of the trial court. Consequently, unless regulated by statute, the trial court has full power to order the receiver to dispose of property in such a manner as the trial court may deem in the best interest of the parties concerned. Additionally, the receiver's advice and opinion regarding the value of the property, and the time, place, and manner of its disposition, are entitled to great respect and weight (*35 Cal. App. 3d 572, 583)* . In the absence of more explicit language, the court did not read former Code Civ. Proc. § 568.5 as restricting the inherent equitable power of a trial court to prescribe the manner in which a receiver may sell property. This is particularly true of the type of receivership with which was involved in the case at bar, that of a nonprofit corporation organized and operating as an institution of higher education. Therefore, the trial court could have authorized the receiver to sell the property at private sale, at the best price attainable under the circumstances, in order to provide funds for the continued operation of the university (*35 Cal. App. 3d 572, 585)* .

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AUTHOR: Robert Kaplan Editorial Consultant

[Reserved]

§§ 200.453[Reserved]

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20-200 California Points & Authorities § 200.460

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.460 Supporting Contention That Sale of Property Should Be Confirmed [Code Civ. Proc. § 568.5]--Court Has Power to Confirm Sale

[1] FORM Supporting Contention That Sale of Property Should Be Confirmed [Code Civ. Proc. § 568.5]--Court Has Power to Confirm Sale

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE COURT SHOULD CONFIRM THE SALE OF PROPERTY BY THE RECEIVER BECAUSE CONFIRMATION IN THIS CASE IS WITHIN THE COURT'S POWER.

Power of Court to Confirm Receiver's Sale of Property. A receiver's sale of property under *Section 568.5 of the Code of Civil Procedure*, pursuant to an order of court, is final on confirmation by the court (*Code Civ. Proc. § 568.5*; *People v. Riverside University (1973) 35 Cal. App. 3d 572, 579, 111 Cal. Rptr. 68*).

[*Add points and authorities supporting the exercise of the receiver's powers in general (see, e.g., § 200.370 et seq.).*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the court should confirm a sale of real or personal property, pursuant to court order, by a receiver, because the confirmation is within the court's power [*see Code Civ. Proc. § 568.5*].

This form of points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the powers of the receiver. For example,

these points and authorities may be submitted in support of a receiver's motion for confirmation of the sale of property in the receiver's possession [*see Code Civ. Proc. § 568.5*]. They may also be adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Therefore, for example, counsel would refer to documentary evidence, attached as exhibits to declarations in support of motion for confirmation of sale, showing that the sale has occurred. See also the *comments in § 200.370[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 200.470* et seq. may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Power of Court to Confirm Receiver's Sale of Property

The facts and procedural background of ***People v. Riverside University*** *(1973) 35 Cal. App. 3d 572, 111 Cal. Rptr. 68* , are discussed in *§ 200.375[3][a]*. In *Riverside University*, the trial court conditionally approved the receiver's account and gave him a qualified discharge because his sales of certain of the receivership property were admittedly not made in the manner prescribed by former Code Civ. Proc. § 568.5 (*now see Code Civ. Proc. § 568.5*, containing substantially the same provisions). The court of appeal reversed the trial court's orders of conditional approval and discharge, with directions to unconditionally approve the account and discharge the receiver (*35 Cal. App. 3d 572, 587-588)* . The court based its ruling on former Code Civ. Proc. § 568.5, providing that a receiver may, pursuant to an order of court, sell real or personal property in his or her possession as receiver, on the notice and in the manner provided for sale of property under execution (*now see Code Civ. Proc. §§ 701.510-701.680*), and providing that the sale is not final until confirmed by the court (*35 Cal. App. 3d 572, 579)* .

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20-200 California Points & Authorities § 200.461

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.461 Supporting Contention That Sale of Property Should Be Confirmed [Code Civ. Proc. § 568.5]--Court Has Wide Discretion in Confirming Sale

[1] FORM Supporting Contention That Sale of Property Should Be Confirmed [Code Civ. Proc. § 568.5]--Court Has Wide Discretion in Confirming Sale

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE COURT SHOULD CONFIRM THE SALE OF PROPERTY BY THE RECEIVER BECAUSE THERE IS NO EVIDENCE OF FRAUD, UNFAIRNESS, OR OPPRESSION IN THE SALE.

Wide Discretion of Court in Confirming Receiver's Sale of Property. When there is no evidence of fraud, unfairness, or oppression in a receiver's sale of property under *Section 568.5 of the Code of Civil Procedure*, the court has wide discretion in confirming the sale (*Lesser & Son v. Seymour (1950) 35 Cal. 2d 494, 503, 218 P.2d 536* ; *People v. Riverside University (1973) 35 Cal. App. 3d 572, 582, 111 Cal. Rptr. 68*).

[*Add points and authorities supporting the exercise of the receiver's powers in general (see, e.g., § 200.370 et seq.).*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the court should confirm a sale of real or personal property, pursuant to court order, by a receiver, because the confirmation is within the court's power [*see Code Civ. Proc. § 568.5*].

This form of points and authorities may be combined with a form of memorandum of points and authorities relating to

the specific procedural context in which counsel wishes to raise the issue of the powers of the receiver. For example, these points and authorities may be submitted in support of a receiver's motion for confirmation of the sale of property in the receiver's possession [*see Code Civ. Proc. § 568.5*]. They may also be adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should include specific facts showing the absence of fraud, oppression, or unfairness in the sale [*see People v. Riverside University (1973) 35 Cal. App. 3d 572, 582, 111 Cal. Rptr. 68]* . See also the *comments in § 200.370[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 200.470* et seq. may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Wide Discretion of Court in Confirming Receiver's Sale of Property

The facts and procedural background of ***Lesser & Son v. Seymour*** *(1950) 35 Cal. 2d 494, 218 P.2d 536* , are discussed in *§ 200.372[3][a]*. In *Lesser*, the Supreme Court affirmed the receiver's sale of property and the court's confirmation of the sale under former Code Civ. Proc. § 568.5 (*now see Code Civ. Proc. § 568.5*, containing substantially the same provisions). The Court held the trial court has wide discretion in accepting a bid and confirming a judicial sale. The Court found no fraud, unfairness, or oppression in the sale in the case at bar. The Court further found the order confirming the sale was supported by the evidence in that the operation of the property by the receiver was a losing proposition, and plaintiffs were the only ones who advanced funds to keep the operations rolling. Additionally, even though there was evidence placing the fair market value of the sale property at a higher figure than that for which the trial court ultimately confirmed the sale, the Court held the trial court did not have to accept the higher figure. Finally, the Court found that endeavors had been made to sell the property, none of which were successful until plaintiffs offered to buy the property (*35 Cal. 2d 494, 503)* .

The facts and procedural background of ***People v. Riverside University*** *(1973) 35 Cal. App. 3d 572, 111 Cal. Rptr. 68* , are discussed in *§ 200.375[3][a]*. In *Riverside University*, the court of appeal reversed the trial court's conditional discharge of the receiver and its conditional approval of the receiver's account, with directions to the trial court to unconditionally approve the account and discharge the receiver. The court addressed the controlling considerations in a trial court's exercise of its discretion to confirm a receiver's sale. The court found, generally, if no good reason appears for refusing to confirm a receiver's sale, such as chilling of bids or other misconduct, or gross inadequacy of price, the sale should be confirmed. The order of confirmation gives the judicial sanction of the court. When the order is made, it relates back to the time of sale and cures all defects and irregularities, except those founded in want of jurisdiction or in fraud. The matter of confirmation rests on the sound discretion of the appointing court, to be judicially exercised in view of all the surrounding facts and circumstances, and in the interests of fairness, justice, and rights of the respective parties. When there is no evidence of fraud, unfairness, or oppression in the sale, the trial court has wide discretion in confirming a judicial sale (*35 Cal. App. 3d 572, 582)* .

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5. Sale of Property

20-200 California Points & Authorities § 200.462

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.462 Supporting Contention That Sale of Property Should Be Confirmed [Code Civ. Proc. § 568.5]--Court May Confirm Sale Conducted in Mode Other Than That Provided for by Statute or Court Order

[1] FORM Supporting Contention That Sale of Property Should Be Confirmed [Code Civ. Proc. § 568.5]--Court May Confirm Sale Conducted in Mode Other Than That Provided for by Statute or Court Order

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE COURT HAS THE POWER TO CONFIRM THE RECEIVER'S SALE EVEN THOUGH THE SALE WAS CONDUCTED IN A MODE OTHER THAN THAT PROVIDED FOR BY STATUTE OR COURT ORDER.

Power of Court to Confirm Receiver's Sale of Property Conducted in Mode Other Than That Provided for by Statute or Court Order. *Section 568.5 of the Code of Civil Procedure* does not preclude a court from confirming a receiver's sale of property when the manner in which the sale is made is different from that provided for in *Section 568.5 of the Code of Civil Procedure* or by court order (*see Code Civ. Proc. § 568.5*; *Lesser & Son v. Seymour (1950) 35 Cal. 2d 494, 499, 503-504, 218 P.2d 536* ; *People v. Riverside University (1973) 35 Cal. App. 3d 572, 583, 585, 111 Cal. Rptr. 68*).

[*Add points and authorities supporting the exercise of the receiver's powers in general (see, e.g., § 200.370 et seq.).*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the court has the power to confirm a receiver's sale of real or personal property that has been conducted in a mode other than that provided for by statute or court order.

This form of points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the powers of the receiver. For example, these points and authorities may be submitted in support of a receiver's motion for confirmation of the sale of property in the receiver's possession [*see Code Civ. Proc. § 568.5*]. They may also be adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel may refer to the circumstances of the sale that indicate that the change is merely a change in procedural directions to the receiver, and not one that affects the substantive rights of the parties [*see Lesser & Son v. Seymour (1950) 35 Cal. 2d 494, 499, 218 P.2d 536* , discussed in *§ 200.462[3][a]*]. *See also* the *comments in § 200.370[2][b]* regarding evidentiary support for facts stated.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 200.470* et seq. may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Power of Court to Confirm Receiver's Sale of Property Conducted in Mode Other Than That Provided for by Statute or Court Order

The facts and procedural background of ***Lesser & Son v. Seymour*** *(1950) 35 Cal. 2d 494, 218 P.2d 536* , are discussed in *§ 200.372[3][a]*. In *Lesser*, the Supreme Court affirmed the receiver's sale of property and the court's confirmation of the sale under former Code Civ. Proc. § 568.5 (*now see Code Civ. Proc. § 568.5*, containing substantially the same provisions). The Court ruled that a court in an equity proceeding has the power to change the manner of sale of property in its custody by a receiver appointed by it from that previously prescribed by it in the order directing the sale. The Court found the change in the manner of sale to be merely a change in procedural directions to the receiver, and not one to affect the substantive rights of the parties. To effectually manage the receivership estate in the best manner possible and for the best interest of the parties concerned, the trial court necessarily required some flexibility and continuity of jurisdiction in giving instructions to the receiver as to the manner in which the property should be sold to meet exigencies as they might have arisen (*35 Cal. 2d 494, 499)* .

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20-200 California Points & Authorities §§ 200.463-200.469

AUTHOR: Robert Kaplan Editorial Consultant

[Reserved]

§§ 200.463[Reserved]

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20-200 California Points & Authorities § 200.470

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.470 Opposing Contention That Court Should Confirm Sale of Property [Code Civ. Proc. § 568.5]--Confirmation of Fraudulent, Unfair, or Oppressive Sale Is Improper

[1] FORM Opposing Contention That Court Should Confirm Sale of Property [Code Civ. Proc. § 568.5]--Confirmation of Fraudulent, Unfair, or Oppressive Sale Is Improper

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE COURT SHOULD NOT CONFIRM THE SALE OF PROPERTY BY THE RECEIVER BECAUSE THE SALE IS/WAS _____ [FRAUDULENT *and/or* UNFAIR *and/or* OPPRESSIVE].

Confirmation of Fraudulent, Unfair, or Oppressive Sale as Improper. On appeal, reversal of a trial court's order confirming a receiver's sale of property is warranted if the appellate court concludes the trial court abused its discretion by confirming a fraudulent, unfair, or oppressive sale (*see Code Civ. Proc. § 568.5*; *see also Lesser & Son v. Seymour (1950) 35 Cal. 2d 494, 503-504, 218 P.2d 536* ; *Cal-American Income Property Fund VII v. Brown Development Corp. (1982) 138 Cal. App. 3d 268, 274, 187 Cal. Rptr. 703*).

[*Add points and authorities opposing the exercise of the receiver's powers in general (see, e.g., § 200.380 et seq.).*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to the contention that the court should confirm a receiver's sale of property under *Code Civ. Proc. § 568.5*, because the sale was fraudulent, unfair, or oppressive.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the

specific procedural context in which counsel wishes to raise the issue of the powers of the receiver. For example, these points and authorities may be submitted in opposition to a receiver's motion for an order either permitting or confirming the sale of receivership property [*see § 200.460* et seq., *see also, e.g.,* *Cal-American Income Property Fund VII v. Brown Development Corp. (1982) 138 Cal. App. 3d 268, 272-273, 187 Cal. Rptr. 703* , discussed in *§ 200.470[3][a]*]. They may also be adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Therefore, for example, counsel would refer, by page and line numbers, to facts stated in declarations or in deposition transcripts that show that the sale is fraudulent, unfair, or oppressive. See also the *comments in § 200.370[2][b]* regarding evidentiary support for facts stated.

[c] Related Pleading and Practice Forms

For discussion and forms relating to actions for fraud generally, see California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* . For discussion of fraud as defense to action for breach of contract, see California Forms of Pleading and Practice, Ch. 140, *Contracts* .

[3] Discussion of Authorities

[a] Confirmation of Fraudulent, Unfair, or Oppressive Sale as Improper

The facts and procedural background of ***Lesser & Son v. Seymour*** *(1950) 35 Cal. 2d 494, 218 P.2d 536* , are discussed in *§ 200.372[3][a]*. In *Lesser*, the Supreme Court affirmed the trial court's order directing a sale of the receivership assets. The Court affirmed the order of sale even though the sale was conducted at a time and in a manner contrary to that prescribed in the trial court's initial order directing sale of the property. The Court held there is wide discretion in the trial court in accepting a bid and confirming a judicial sale. There was no fraud, unfairness, or oppression in the sale. Therefore, the trial court did not abuse its discretion in confirming the sale (*35 Cal. 2d 494, 503-504)* .

The facts and procedural background of ***Cal-American Income Property Fund VII v. Brown Development Corp.*** *(1982) 138 Cal. App. 3d 268, 187 Cal. Rptr. 703* , are discussed in *§ 200.370[3][a]*. In *Cal-American*, the court of appeal reversed the trial court's order confirming a sale of the receivership property. Citing *People v. Riverside University (1973) 35 Cal. App. 3d 572, 582, 111 Cal. Rptr. 68* , discussed in *§ 200.310*, the court held judicial confirmation of a receiver's sale rests on the appointing court's sound discretion exercised in view of all the surrounding facts and circumstances, and in the interest of fairness, justice, and the rights of the respective parties. The proper exercise of discretion requires the court to consider all material facts and evidence, and to apply legal principles essential to an informed, intelligent, and just decision. Reversal is warranted only after concluding the trial court abused its discretion by confirming a fraudulent, unfair, or oppressive sale (*138 Cal. App. 3d 268, 274)* . The court found the sale to be manifestly unfair to plaintiff because the receiver did not present facts demonstrating the need for a sale (*138 Cal. App. 3d 268, 276)* . Furthermore, the receiver did not describe an imminent fiscal crisis warranting the drastic action of an immediate sale (*138 Cal. App. 3d 268, 275)* . The trial court did not adequately consider the surrounding facts and circumstances in light of fairness, justice, and the rights of the parties, and therefore abused its discretion in confirming the sale (*138 Cal. App. 3d 268, 276)* .

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20-200 California Points & Authorities § 200.471

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.471 Opposing Contention That Court Should Confirm Sale of Property [Code Civ. Proc. § 568.5]--Receiver Has Failed to Establish Necessity for Sale

[1] FORM Opposing Contention That Court Should Confirm Sale of Property [Code Civ. Proc. § 568.5]--Receiver Has Failed to Establish Necessity for Sale

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE COURT SHOULD NOT CONFIRM THE SALE OF PROPERTY BY THE RECEIVER BECAUSE THE RECEIVER FAILED TO ESTABLISH THE NECESSITY FOR THE SALE.

Receiver Required to Establish Necessity for Sale. The receiver must establish actual, not imaginary, necessity for the sale, and must also demonstrate that the sale must be consummated at the time the receiver wishes the sale to occur (*see Code Civ. Proc. § 568.5*; *Cal-American Income Property Fund VII v. Brown Development Corp. (1982) 138 Cal. App. 3d 268, 275, 187 Cal. Rptr. 703*).

[*Add points and authorities opposing the exercise of the receiver's powers in general (see, e.g., § 200.380 et seq.).*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to the contention that the court should confirm a receiver's sale of property under *Code Civ. Proc. § 568.5*, on the ground that the receiver failed to establish the necessity for the sale.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the

specific procedural context in which counsel wishes to raise the issue of the powers of the receiver. For example, these points and authorities may be submitted in opposition to a receiver's motion for an order either permitting or confirming the sale of receivership property [*see § 200.460* et seq., *see also, e.g.,* *Cal-American Income Property Fund VII v. Brown Development Corp. (1982) 138 Cal. App. 3d 268, 272-273, 187 Cal. Rptr. 703* , discussed in *§ 200.471[3][a]*]. They may also be adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Therefore, for example, counsel would refer to the facts in declarations in support of the receiver's motion to confirm, by page and line, and point out how the facts asserted, when viewed most favorably, are insufficient to support an order for an immediate sale [*see Cal-American Income Property Fund VII v. Brown Development Corp. (1982) 138 Cal. App. 3d 268, 187 Cal. Rptr. 703* , discussed in *§ 200.471[3][a]*]. See also the *comments in § 200.370[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Receiver Required to Establish Necessity for Sale

The facts and procedural background of ***Cal-American Income Property Fund VII v. Brown Development Corp.*** *(1982) 138 Cal. App. 3d 268, 187 Cal. Rptr. 703* , are discussed in *§ 200.370[3][a]*. In *Cal-American*, the court of appeal reversed the trial court's order confirming a sale of the receivership property. Citing *Lesser & Son v. Seymour (1950) 35 Cal. 2d 494, 503, 218 P.2d 536* , discussed in *§ 200.472*, the court held the receiver had to establish actual, not imaginary, necessity for the sale in order for the trial court to properly confirm the sale. The receiver also needed to demonstrate the sale had to be consummated at that time. The receiver had to show that the property would be lost to creditors at some future time unless the trial court ordered the sale, and that the sale had to occur within a specified time to avoid loss (*138 Cal. App. 3d 268, 275)* . The court found the distinction between the need for a sale and the timing of the sale critical. The trial court must engage in a two-level analysis, first deciding whether a sale is required, and then determining when the sale should take place. Naturally, a trial court will focus on the same factors at both analytical stages, but it will likely allocate different weights to these factors at each step (*138 Cal. App. 3d 268, 275 n.7*).

The court held that although the receiver presented information reflecting an unpleasant situation, those facts viewed most favorably were insufficient to support an order for an immediate sale. The receiver's moving papers for confirmation never stated why the sale was required. Additionally, even though defendant's papers suggested a sale should be considered at some future time, they did not describe an imminent fiscal crisis warranting the drastic action of an immediate sale (*138 Cal. App. 3d 268, 275)* . The fact that a potential buyer would not extend the time of the offer did not, standing alone, go to the issue of necessity for the sale when the court had no information on what efforts, if any, had been made to market the property, or whether other offers from other purchasers were forthcoming. The status of the litigation and the effect a sale would have on the parties were both facts and circumstances the court must consider before confirming a sale. At the time of the hearing to confirm the sale, the trial court was thus obligated to scrutinize the documents objectively to evaluate whether the circumstances required an immediate sale of the property with the resultant loss to plaintiff of the opportunity to litigate its rights to the property (*138 Cal. App. 3d 268, 276)* .

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20-200 California Points & Authorities § 200.472

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.472 Opposing Contention That Court Should Confirm Sale of Property [Code Civ. Proc. § 568.5]--Receiver Has Breached His or Her Duty to Obtain Best Possible Bargain on Sale

[1] FORM Opposing Contention That Court Should Confirm Sale of Property [Code Civ. Proc. § 568.5]--Receiver Has Breached His or Her Duty to Obtain Best Possible Bargain on Sale

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE COURT SHOULD NOT CONFIRM THE SALE OF PROPERTY BY THE RECEIVER BECAUSE THE RECEIVER HAS BREACHED HIS/HER DUTY TO OBTAIN THE BEST BARGAIN POSSIBLE ON THE SALE OF THE SUBJECT PROPERTY.

Duty of Court to Obtain Best Bargain Possible on Sale of Property. A court confirming the sale of property by a receiver should attempt to obtain the best bargain possible under the circumstances (*see Code Civ. Proc. § 568.5*; *Cal-American Income Property Fund VII v. Brown Development Corp. (1982) 138 Cal. App. 3d 268, 276 fn. 8, 187 Cal. Rptr. 703*).

[*Add points and authorities opposing the exercise of the receiver's powers in general (see, e.g., § 200.380 et seq.).*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to the contention that the court should confirm a receiver's sale of property under *Code Civ. Proc. § 568.5*, has breached his or her duty to obtain the best bargain possible on the sale of the subject property.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the powers of the receiver. For example, these points and authorities may be submitted in opposition to a receiver's motion for an order either permitting or confirming the sale of receivership property [*see § 200.460* et seq., *see also, e.g.,* *Cal-American Income Property Fund VII v. Brown Development Corp. (1982) 138 Cal. App. 3d 268, 272-273, 187 Cal. Rptr. 703* , discussed in *§ 200.472[3][a]*]. They may also be adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Therefore, counsel should refer to specific facts in, for example, supporting declarations, showing that the receiver breached his or her duty to obtain the highest possible price [*see, e.g.,* *Cal-American Income Property Fund VII v. Brown Development Corp. (1982) 138 Cal. App. 3d 268, 276 n.8, 187 Cal. Rptr. 703* , discussed in *§ 200.472[3][a]*]. See also the *comments in § 200.370[2][b]* regarding evidentiary support for facts stated.

[3] Discussion of Authorities

[a] Duty of Court to Obtain Best Bargain Possible on Sale of Property

The facts and procedural background of ***Cal-American Income Property Fund VII v. Brown Development Corp.*** *(1982) 138 Cal. App. 3d 268, 187 Cal. Rptr. 703* , are discussed in *§ 200.370[3][a]*. In *Cal-American*, the court of appeal reversed the trial court's order confirming a sale of the receivership property. The court found the sale was manifestly unfair to plaintiff because the receiver did not present facts demonstrating the need for a sale. Additionally, the trial court did not adequately consider the surrounding facts and circumstances in light of fairness, justice, and the rights of the parties. Under the circumstances, the court found it clearly unreasonable for the trial court to rush to accommodate a mystery buyer whose unknown credit was thought to be sufficient to support a $600,000 unsecured interest-bearing note in derogation of the ownership rights of plaintiffs (*138 Cal. App. 3d 268, 276)* . The court found that the trial court should not, in any case, be blind to tactics frequently applied by real estate purchasers. The receiver had the affirmative duty to endeavor to realize the largest amount from the sale of the receivership property. A trial court confirming the sale of property should also attempt to obtain the best bargain possible under the circumstances (*138 Cal. App. 3d 268, 276 n.8*).

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20-200 California Points & Authorities §§ 200.473-200.479

AUTHOR: Robert Kaplan Editorial Consultant

[Reserved]

§§ 200.473[Reserved]

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6. Payment of Unclaimed Funds Into State Treasury

20-200 California Points & Authorities § 200.480

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.480 Supporting Contention That Receiver Is Properly Exercising His or Her Powers in Payment of Unclaimed Funds Into State Treasury by Receiver [Code Civ. Proc. § 570]

[1] FORM Supporting Contention That Receiver Is Properly Exercising His or Her Powers in Payment of Unclaimed Funds Into State Treasury by Receiver [Code Civ. Proc. § 570]

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE COURT SHOULD AUTHORIZE PAYMENT BY THE RECEIVER OF $_____ FROM THE RECEIVERSHIP ESTATE INTO THE STATE TREASURY BECAUSE THE FUNDS BELONG TO A PERSON WHOSE WHEREABOUTS ARE UNKNOWN TO THE RECEIVER.

A. Payment of Unclaimed Funds Into State Treasury by Receiver. A receiver possessing funds belonging to a person whose whereabouts are unknown to the receiver shall, before receiving his or her discharge as receiver, after publication of required notice, and on order of the court, pay the funds into the State Treasury (*Code Civ. Proc. § 570*).

B. Payment of Notice Publication Costs. All costs and expenses connected with the advertising of notice shall be paid out of the unclaimed funds in the receiver's possession (*Code Civ. Proc. § 570*).

[*Add points and authorities supporting the exercise of the receiver's powers in general (see, e.g., § 200.370 et seq.).*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the receiver possessing funds belonging to a person whose whereabouts are unknown to the receiver must, before his or her discharge as receiver,

after publication of notice, and on order of the court, pay the funds into the State Treasury [*see Code Civ. Proc. § 570*].

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of the powers of the receiver. For example, these points and authorities may be submitted in support of a receiver's motion for an order to pay unclaimed funds in the receiver's possession into the State Treasury [*see Code Civ. Proc. § 570*]. They may also be adapted generally for use in a trial or appellate brief [*see* Ch. 1, *Writing Legal Memoranda and Briefs* ; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs* (Matthew Bender)].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. In particular, counsel should include specific facts showing the receiver has published notice in accordance with the provisions of *Code Civ. Proc. § 570*. See also the *comments in § 200.370[2][b]* regarding evidentiary support for facts stated.

[c] Related Pleading and Practice Forms

For a discussion and form of notice of unclaimed funds in a receiver's possession, together with a form of order for payment of unclaimed funds in a receiver's possession to the State Treasury, see California Forms of Pleading and Practice, Ch. 486, *Receivers* .

[3] Discussion of Authorities

[a] Payment of Unclaimed Funds Into State Treasury by Receiver

A receiver in possession of funds belonging to a person whose whereabouts are unknown to the receiver must, before being discharged as receiver, publish notice of the receiver's possession of the funds. The notice must appear at least once a week for four consecutive weeks in one or more newspapers published in the county. It must set forth the name of the owner of any unclaimed funds, the last known place of residence or the post office address of the owner, and the amount of the unclaimed funds. Any funds remaining in the receiver's hands unclaimed for 30 days after the date of the last publication of notice shall be reported to the court. On order of the court, all such funds must be paid into the State Treasury, accompanied with a copy of the order, which must set forth the facts required in the notice [*Code Civ. Proc. § 570*].

[b] Payment of Notice Publication Costs

All costs and expenses connected with the advertising of notice discussed in *§ 200.480[3][a]* must be paid out of the funds the whereabouts of whose owners are unknown [*Code Civ. Proc. § 570*].

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7. Borrowing of Money

20-200 California Points & Authorities § 200.481

AUTHOR: Robert Kaplan Editorial Consultant

§ 200.481 Supporting Contention That Receiver Has the Authority to Borrow Money to Fund the Receivership Estate and to Issue Receivership Certificates

[1] FORM Supporting Contention That Receiver Has the Authority to Borrow Money to Fund the Receivership Estate and to Issue Receivership Certificates

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE COURT SHOULD AUTHORIZE THE RECEIVER TO BORROW MONEY IN THE FORM OF RECEIVERSHIP CERTIFICATES TO PRESERVE AND PROTECT THE RECEIVERSHIP ESTATE.

Power of Receiver to Borrow Money and Issue Receivership Certificates. A receiver may, pursuant to an order of the court, borrow money and issue first priority receiver certificates as security for the loans made to him or her (*Title Ins. etc. Co. v. California Dev. Co. (1915) 171 Cal. 173, 191, 152 P. 542* ; *Title Ins. etc. Co. v. California Dev. Co. (1915) 171 Cal. 227, 231, 152 P. 564*).

[*Add points and authorities supporting the exercise of the receiver's power in general (see, e.g., § 200.370 et seq.).*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of an application made by a receiver to borrow money and to issue receivership certificates.

This form of points and authorities may also be adapted generally for use in a trial or appellate brief [*see* Ch. 1, Writing Legal Memoranda and Briefs; *see also* California Forms of Pleading and Practice, Ch. 50, *Appeal: Briefs*

(Matthew Bender)].

[b] Argument

Counsel should also add argument linking the points in this form with the facts of the case. Therefore, counsel should include specific facts showing the actual necessity for the receiver's request to borrow money and to issue receivership certificates.

[3] Discussion of Authorities

[a] Power of Receiver to Borrow Money and Issue Receivership Certificates

Title Ins. etc. Co. v. California Dev. Co. *(1915) 171 Cal. 173, 152 P. 542* , involved convoluted litigation following the failure of the canal and irrigation system that caused the catastrophic 1904 flood of the Imperial Valley, which created the Salton Sea. The California Development Company was formed to build this canal and irrigation system. Because the canal went through Mexico, a Mexican corporation was also formed to facilitate the project. The Mexican corporation was owned by the California Development Company and by the principals who had formed that company. The Title Insurance and Trust Company was trustee on a deed of trust securing bonds issued to build the system. After the flood, the New Liverpool Salt Company, in 1908, recovered a judgment against the California Development Company for over $450,000, for the loss of its land and business. Meanwhile, the CDC, without means to control the flow, obtained a series of loans for that purpose from the Southern Pacific Railroad beginning in 1905. In seeking repayment, the SP ultimately formed a second Mexican corporation which bought the properties of the first Mexican corporation at an execution sale.

The case cited in this form commenced in 1909, when the Title Insurance and Trust Co. brought suit to foreclose on its deed of trust securing CDC bonds. Defendants, in addition to CDC, included the SP, the New Liverpool Salt Co., other parties claiming interests in the property subordinate to the plaintiff's lien, both Mexican corporations, and others. A receiver was appointed early in the litigation, and pursuant to court order, over $300,000 in receiver's certificates were issued (*171 Cal. 173, 183)* . (These certificates, issued to obtain funds to construct a restraining levee, were ordered to be repaid from the revenues of the receiver's carrying on of the CDC business, and were declared to be a first lien on the property in his possession [*see* *Title Ins. & Trust Co. v. Calif. etc. Co. (1911) 159 Cal. 484, 486, 114 P. 838* (holding that the order authorizing the issuance of the bonds was not appealable)]).

The trial court found that the irrigation system should be sold in its entirety, by selling the stock of the Mexican corporations and the system in the United States in one sale as one property. The judgment provided that after expenses of sale, the proceeds were to be paid to two of the original principals behind the CDC for amounts they had advanced in connection with creation of the first Mexican corporation, then to the amount due on the receiver's certificates, then to the Title Insurance and Trust Co., next to the New Liverpool Salt Co., then to the SP, and any remainder to CDC (*171 Cal. 173, 191)* . The SP and the new Mexican corporation appealed, raising issues relating to the treatment of the entire system, including Mexico corporations, as one property and the priority of the SP lien versus that of the New Liverpool Salt Co.

The Supreme Court affirmed the judgment, although it did note that the above statement of the priority of the receiver's certificates was not entirely accurate because the New Liverpool Salt Co. had appealed from the order appointing the receiver and the order had been reversed as to the New Liverpool Salt Co. Thus, the final judgment had actually given that company priority to a limited extent over the holders of receiver's certificates. This was not material to the appeal at hand, however, and therefore was not further detailed (*171 Cal. 173, 192)* .

Title Ins. etc. Co. v. California Dev. Co. *(1915) 171 Cal. 227, 152 P. 564* , is the decision in another appeal of the judgment discussed above. This appeal was by an intervenor who was a holder of some of the bonds which were

secured by the deed of trust that was being foreclosed upon in the action. The appeal was from that part of the judgment that gave holders of the receiver's certificates priority over the bonded indebtedness secured by the deed of trust (*171 Cal. 227, 229)* . The appellant argued that the court had no authority to make the receiver's certificates a lien prior to that secured by the bonded indebtedness (*171 Cal. 227, 231)* .

Affirming the judgment, the Supreme Court first noted the general rule that in a case involving a private corporation, the court will not authorize receiver's certificates and make them a prior lien on mortgaged property for the purpose of procuring funds to continue the management and operation of the business, with an exception for railroad receiverships. However, the court held that there can be no question of the right of the court to give priority to certificates issued to enable the receiver to carry out the primary object of his appointment, that is, the care and preservation of the property. The court concluded that in this case there was ample evidence to justify the conclusion that all of the expenditures authorized by the court were required for the actual care and preservation of the property committed to the receiver's custody (*171 Cal. 227, 231)* .

California Points & Authorities

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Volume 20 Chapters 200-209 RECEIVERS---to---SANCTIONS
CHAPTER 201 REFERENCE AND REFEREES

20-201 California Points & Authorities 201.syn

§ 201.syn Synopsis to Chapter 201: REFERENCE AND REFEREES

§ 201.01 Scope of Chapter

§ 201.02 Governing Law

§ 201.03 Papers Filed in Cases Pending Before Referee

§ 201.04 How to Use the Forms in This Chapter

[1] Page Limits on Points and Authorities

[2] Using the Forms to Build a Draft Memorandum

§ 201.05 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

[2] Related Points and Authorities

§§ 201.06-201.09 [Reserved]

§ 201.10 Supporting Contention That Reference May Be or Was Properly Ordered--To Try Any or All Issues in Action or Proceeding, Whether of Fact or of Law, and to Report Statement of Decision [Code Civ. Proc. § 638(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Power of Court to Correct Records to Show Reference Was Properly Made

[b] Failure to Secure Written Consent to General Reference or Enter Consent in Minutes Is Waiver

[c] "Exception" Defined

[4] Additional Authorities

[a] Failure to Secure Written Consent to General Reference or Enter Consent in Minutes Is Waiver

§ 201.11 Supporting Contention That Reference May Be or Was Properly Ordered--With Consent of Parties to Ascertain Fact Necessary to Enable Court to Determine Action or Proceeding [Code Civ. Proc. § 638(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

§ 201.12 Supporting Contention That Reference May Be or Was Properly Ordered--Without Consent of Parties When Trial of Issue of Fact Requires or Required Examination of Long Account [Code Civ. Proc. § 639(a)(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Reference Over Objection of Party

[b] Reference Authorized Whenever Court Has Authority to Take Account Itself

§ 201.13 Supporting Contention That Reference May Be or Was Properly Ordered--Without Consent of Parties When Taking of Account Is or Was Necessary for Information of Court Before Judgment or for Carrying Judgment or Order Into Effect [Code Civ. Proc. § 639(a)(2)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Points and Authorities

§ 201.14 Supporting Contention That Reference May Be or Was Properly Ordered--Without Consent of Parties When Question of Fact, Other Than on Pleadings, Arises or Arose on Motion or Otherwise in any Stage of Action [Code Civ. Proc. § 639(a)(3)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Reference Without Consent of Parties When Fact Question Arises on Motion or Otherwise

§ 201.15 Supporting Contention That Reference May Be or Was Properly Ordered--Without Consent of Parties When Necessary for Information of Court in Special Proceeding [Code Civ. Proc. § 639(a)(4)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Reference Without Consent of Parties When Necessary for Court's Information in Special Proceeding

[b] Original Proceeding in Appellate Court

§ 201.16 Supporting Contention That Reference May Be or Was Properly Ordered--Without Consent of Parties When Appointment of Referee Is Necessary to Hear and Determine Discovery Matters and to Report Findings and Recommendation [Code Civ. Proc. § 639(a)(5)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Reference Without Consent of Parties to Hear and Determine Discovery Motions or Disputes

§ 201.17 Supporting Contention That Preliminary Adjudication of Right to Accounting Is or Was Not Required and That Reference May Be Ordered at any Stage of Action

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Prior Adjudication of Party's Right to Accounting Is Not Required

[b] Stage of Proceeding at Which Reference Might Be Directed

[4] Additional Authorities

[a] Prior Adjudication of Party's Right to Accounting Is Not Required

§ 201.18 Supporting Contention That Parties May Agree on Person to Be Appointed Referee [Code Civ. Proc. § 640]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] No Requirement That Referee Appointed Be Subordinate Judicial Officer

§ 201.19 Supporting Contention That Reference May Be or Was Properly Ordered--Contract Provision Requiring Reference Is Not Unconscionable [Code Civ. Proc. § 638(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Criteria of Unconscionability

[b] Burdens of Proof

[c] Level of Procedural Unconscionability Here Is Low

[d] Unilateral Opt-Out Provision Is Not Likely to Be Misused

[e] Attorney's Fee Provision Is Not Unconscionable

[f] Secrecy Provision May Be Illegal, but May Be Severed

[g] No Showing Has Been Made That Referee's Fees Will Impose Undue Burden

[h] Presumption of Benefit From Waiver of Jury Trial

§§ 201.20-201.39 [Reserved]

§ 201.40 Opposing Contention That Reference May Be or Was Properly Ordered--Court Has No Power to Order General Reference Without Consent of Parties [Code Civ. Proc. § 638(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] General Reference Requires Consent of Parties

[b] Parties Entitled to Trial by Jury in Action at Law

[c] Contractual Provision for Reference Is Not Enforceable Against Subsequent Purchaser

[4] Additional Authorities

[a] General Reference Requires Consent of Parties

§ 201.41 Opposing Contention That Reference May Be or Was Properly Ordered--Court Has No Power to Order Special Reference Not Authorized by Code Civ. Proc. § 639 Without Consent of Parties

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Special Reference Not Authorized by Code Civ. Proc. § 639 Is Improper Without Consent of Parties

[b] Limitation on Scope of Reference Under Code Civ. Proc. § 639(a)(1)

[c] Specificity Required for Reference Under Code Civ. Proc. § 639(a)(3)

§ 201.42 Opposing Contention That Reference May Be or Was Properly Ordered--Reference to Take Account [Code Civ. Proc. § 639(a)(1), (2)] Is Discretionary With Court and Denied When Unnecessary

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Reference Is Discretionary With Court

[b] Trial Court Has Discretion to State Account Itself

[c] Transaction Short and Not Complex

[4] Additional Authorities

[a] Reference Is Discretionary With Court

[b] Trial Court Has Discretion to State Account Itself

§ 201.43 Opposing Contention That Reference May Be or Was Properly Ordered--Dissolution of Marriage Proceeding Is Not Special Proceeding Within Meaning of Code Civ. Proc. § 639(a)(4)

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Classification of Dissolution of Marriage

§ 201.44 Opposing Contention That Reference May Be or Was Properly Ordered--Contract Provision Requiring Reference Is Unconscionable [Code Civ. Proc. § 638(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Elements of Procedural Unconscionability

[b] Elements of Substantive Unconscionability

§ 201.45 Opposing Contention That Reference May Be or Was Properly Ordered--Contract Provision Would Result in Inconsistent Rulings or Parallel Forums

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Discretion of Trial Court

[b] Inconsistent Rulings

§§ 201.46-201.49 [Reserved]

§ 201.50 Supporting Contention That Referee Is Disqualified--Referee Lacks Qualifications to Be Juror [Code Civ. Proc. §§ 641(a), 642]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

§ 201.51 Supporting Contention That Referee Is Disqualified--Referee Is Related to Party to Action, Officer of Corporate Party, or Judge of Court in Which Action Is Pending [Code Civ. Proc. §§ 641(b), 642]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Disqualification Under Code Civ. Proc. § 170.1

[d] Computing Degree of Consanguinity or Affinity

[e] Related Pleading and Practice Forms

[f] Related Points and Authorities

§ 201.52 Supporting Contention That Referee Is Disqualified--Referee Stands in Prohibited Relationship With Party to Action [Code Civ. Proc. §§ 641(c), 642]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

§ 201.53 Supporting Contention That Referee Is Disqualified--Referee Served as Juror or Witness in Trial Between Same Parties [Code Civ. Proc. §§ 641(d), 642]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

§ 201.54 Supporting Contention That Referee Is Disqualified--Referee Is Interested in Action [Code Civ. Proc. §§ 641(e), 642]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

§ 201.55 Supporting Contention That Referee Is Disqualified--Referee Has Unqualified Opinion or Belief as to Merits of Action [Code Civ. Proc. §§ 641(f), 642]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

§ 201.56 Supporting Contention That Referee Is Disqualified--Referee Is Biased Against Party [Code Civ. Proc. §§ 641(g), 642]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

§ 201.57 Supporting Contention That Referee Is Disqualified--Referee Lacks Essential Technical Qualifications [Code Civ. Proc. §§ 641.2, 642]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

§ 201.58 Supporting Contention That Court Commissioner or Referee Is Disqualified--Person Is Prejudiced Against Party or Attorney [Code Civ. Proc. § 170.6]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Disqualification of Discovery Referee

[b] Timeliness of Peremptory Challenge to Discovery Referee

[4] Additional Authorities

[a] Additional Disclosures Required

§§ 201.59-201.69 [Reserved]

§ 201.70 Supporting Contention That Referee's Report Under Special Reference [Code Civ. Proc. §§ 638(b), 639] Should Be or Was Properly Confirmed and Adopted by Trial Court

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Use of Motion Procedure to Confirm Report

[b] Referee's Decision as Special Verdict

[c] Weight of Special Referee's Decision

[4] Additional Authorities

[a] Use of Motion Procedure to Confirm Report

[b] Referee's Decision as Special Verdict

[c] Weight of Special Referee's Decision

§ 201.71 Supporting Contention That Referee's Report Is Presumed to Be Supported by Evidence

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Referee's Report Presumed Supported by Evidence

[b] Effect of Failure to Produce Reporter's Transcript

[4] Additional Authorities

[a] Effect of Failure to Produce Reporter's Transcript

§ 201.72 Supporting Contention That Factual and Legal Basis of Referee's Decision Is Not Required to Be Stated on Special Reference

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] When Statement of Decision by Referee Is Required

[b] When Factual and Legal Basis of Referee's Decision Is Required to Be Stated

§ 201.73 Supporting Contention That Referee's Decision on Whole Issue Must Stand as Decision of Court [Code Civ. Proc. § 644(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Referee's Decision as Basis for Judgment

[b] Distinctions Between Referee and Temporary Judge

[c] Referee Is Not Required to Take Oath

[4] Additional Authorities

[a] Referee's Decision as Basis for Judgment

§ 201.74 Supporting Contention That Referee's Statement of Decision Forms Part of Judgment Roll [Code Civ. Proc. §§ 638(a), 643(a), 644(a), 670(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Judgment Roll

§ 201.75 Supporting Contention That Order Confirming or Modifying Referee's Report on Special Reference Need Not Be Included in Judgment Roll [Code Civ. Proc. § 670(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Court Order Confirming or Modifying Referee's Report Is Not Part of Judgment Roll

§§ 201.76-201.79 [Reserved]

§ 201.80 Opposing Contention That Referee's Report Under Special Reference [Code Civ. Proc. §§ 638(b), 639] Should Be or Was Properly Confirmed--Report Is Not Supported by Evidence or Is Incomplete or Ambiguous

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Report Not Supported by Evidence

[b] Report Incomplete or Ambiguous

§ 201.81 Opposing Contention That Referee's Decision Must Stand as Decision of Court--Reference Presumed Special and Report Advisory Only

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Reference Presumed to Be Special

[b] Referee's Report on Special Reference Is Not Binding on Trial Court

[c] Effect of Referee's Report on Special Reference

[4] Additional Authorities

[a] Referee's Report on Special Reference Is Not Binding on Trial Court

§ 201.82 Opposing Contention That Referee's Decision Must Stand as Decision of Court--Reference Was by Consent of Parties Under Code Civ. Proc. § 638(b) to Ascertain Facts Only

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Reference Under Code Civ. Proc. § 638(b) Is Special

[4] Additional Authorities

[a] Reference Under Code Civ. Proc. § 638(b) Is Special

§ 201.83 Opposing Contention That Referee's Decision Must Stand as Decision of Court--Reference Was Ordered Under Code Civ. Proc. § 639

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Reference Under Code Civ. Proc. § 639 Is Special

§ 201.84 Opposing Contention That Finding of Referee Must Stand as Finding of Court--Reference Under Code Civ. Proc. § 639(a)(1) Was to Hear and Decide Whole Issue Relating Only to the Account

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Meaning of "Whole Issue"

§ 201.85 Opposing Contention That Decision of Referee Must Stand as Decision of Court--Reference Under Code Civ. Proc. § 639(a)(1) Was to Report on Specific Questions of Fact Involved in Accounting

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Referee's Report on Specific Fact Questions Involved in Account Is Not Binding on Trial Court

§ 201.86 Opposing Contention That Discovery Referee's Report [Code Civ. Proc. § 639(a)(5)] Should Be or Was Properly Confirmed--Referee Did Not Examine Each Item as to Which Privilege Was Claimed

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Dominant Purpose Standard

§§ 201.87-201.89 [Reserved]

§ 201.90 Supporting Contention That New Trial Should Be or Was Properly Granted Following Trial of Case by Referee Pursuant to General Reference [Code Civ. Proc. § 638(a)]--Newly Discovered Evidence [Code Civ. Proc. § 657(4)] or Evidence Insufficient to Support Judgment [Code Civ. Proc. § 657(6)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Applicability of New Trial Provisions to Trial by Referee

[b] Newly Discovered Evidence

[c] Insufficiency of Evidence

§ 201.91 Supporting Contention That Order Granting Premature Motion for New Trial After Interlocutory Order Directing an Accounting Is Void

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Invalidity of Order for New Trial after Interlocutory Judgment Directing Reference

[4] Additional Authorities

[a] Invalidity of Order for New Trial After Interlocutory Judgment Directing Reference

§§ 201.92-201.99 [Reserved]

§ 201.100 Opposing Contention That New Trial Should Be or Was Properly Granted--Reference Was Special and Report May Be Set Aside Without Granting New Trial

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] New Trial Is Not Required in Order to Set Aside Referee's Report on Special Reference

[4] Additional Authorities

[a] New Trial Is Not Required in Order to Set Aside Referee's Report on Special Reference

§§ 201.101-201.109 [Reserved]

§ 201.110 Supporting Contention That Order or Judgment Is Interlocutory and Nonappealable--Order or Judgment Directs Reference to Take Account or Directs Parties to Account and Future Judicial Action to Settle Rights of Parties Is Required

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Order or Judgment Directing Reference to Take Accounting Is Interlocutory and Nonappealable

[b] Rule Applies When Accounting Is Ordered but No Reference Is Made

[4] Additional Authorities

[a] Order or Judgment Directing Reference to Take Accounting Is Interlocutory and Nonappealable

[b] Rule Applies When Accounting Is Ordered but No Reference Is Made

§§ 201.111-201.119 [Reserved]

§ 201.120 Opposing Contention That Order or Judgment Is Interlocutory and Nonappealable--Judgment in Action for Accounting Fully Determines Rights of Parties and Is Final Because It Does Not Direct Reference to Take Account and No Further Judicial Action Is Required

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Court's Denomination of Order or Judgment Is Not Determinative

[b] General Test

[c] When Judgment in Action for Accounting Is Final

[4] Additional Authorities

[a] Court's Denomination of Order or Judgment Is Not Determinative

[b] General Test

[c] When Judgment in Action for Accounting Is Final

§ 201.121 Opposing Contention That Order or Judgment Is Interlocutory and Nonappealable--Appeal From Interlocutory Judgment Determining Right to Redeem Property From Mortgage or Lien and Directing Accounting Is Authorized [Code Civ. Proc. § 904.1(a)(8)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points and Authorities

California Points & Authorities

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Volume 20 Chapters 200-209 RECEIVERS---to---SANCTIONS
CHAPTER 201 REFERENCE AND REFEREES
PART I. INTRODUCTION

20-201 California Points & Authorities § 201.01

§ 201.01 Scope of Chapter

This chapter discusses references and contains memoranda of points and authorities supporting and opposing various contentions for use in an action or special proceeding involving a reference of one or more issues in a case to a referee to take evidence and report a statement of decision or facts.

This chapter contained the following forms:

- Memoranda supporting [*see §§ 201.10 -201.16*] and opposing [*see §§ 201.40 -201.43*] various contentions regarding the propriety of ordering a reference. Also included are a form of memorandum supporting the contention that the entry of an interlocutory judgment determining the parties' right to an accounting is not required as a condition precedent to ordering a reference to take an account [*see § 201.17*] and a form of memorandum supporting the contention that the parties may agree on the person or persons to serve as referees [*see § 201.18*].

- Forms supporting the contention that the person appointed or to be appointed as referee is not qualified to serve as a referee in the case [*see § 201.50* et seq.].

- Forms supporting [*see § 201.70* et seq.] and opposing [*see § 201.80* et seq.] various contentions regarding the effect of the referee's report.

- Forms supporting [*see § 201.90* et seq.] and opposing [*see § 201.100*]. contentions regarding the propriety of granting a new trial.

- Forms supporting [*see § 201.110*] and opposing [*see § 201.120* et seq.] the contention that a judgment or order relating to a reference or an accounting is not appealable.

The provisions governing disqualification of a judge for cause (*Code Civ. Proc. § 170 et seq.*) also apply to the disqualification of a referee or court commissioner [*see Code Civ. Proc. § 170.5(a)*]. For discussion and forms relating to disqualification of judges for cause that may be adapted for use in disqualifying a referee, see Ch. 130, *Judges* . For

discussion and forms relating to a peremptory disqualification of a judge under *Code Civ. Proc. § 170.6* that may be adapted for use in disqualifying a referee, see Ch. 130, *Judges* .

This chapter does not include forms for use in hearings before referees who are employed by a court or public entity to take evidence in specific kinds of special proceedings, such as (1) juvenile court proceedings, or (2) administrative hearings, such as those before the state Department of Social Services, the Unemployment Insurance Appeals Board, or the Workers' Compensation Appeals Board. For a discussion and forms for use in such special proceedings, see the appropriate title in California Forms of Pleading and Practice.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersRefereesGeneral OverviewCivil ProcedureJudicial OfficersRefereesAppointmentsCivil ProcedureJudicial OfficersReferencesInsurance LawIndustry RegulationState Insurance Commissioners & DepartmentsHearingsWorkers' Compensation & SSDIAdministrative ProceedingsHearings & Review

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§ 201.02 Governing Law

References and trials by referees are governed generally by *Code Civ. Proc. §§ 638-645.2*. These provisions preserve the traditional distinction between a "general" reference, that is, a trial before a referee on all the issues of fact or of law in a case, and a "special" reference, in which the referee considers only part of the issue or some of the issues in the case [*see Ellsworth v. Ellsworth (1954) 42 Cal. 2d 719, 722, 269 P.2d 3* ; *Estate of Bassi (1965) 234 Cal. App. 2d 529, 536, 44 Cal. Rptr. 541]* .

Code Civ. Proc. §§ 638 and *639* apply only to references in civil actions or proceedings. Thus, while a discovery referee would be authorized pursuant to *Code Civ. Proc. § 639(a)(5)* to determine issues of privilege in a civil action, a reference under *Code Civ. Proc. § 639(a)(4)* is not available in a proceeding to determine whether documents seized from a criminal suspect are privileged because that is a criminal special proceeding and not the type of "special proceeding" to which section 639 applies [*People v. Los Angeles Superior Court (Laff) (2001) 25 Cal. 4th 703, 707, 107 Cal. Rptr. 2d 323, 23 P.3d 563]* . Similarly, *Code Civ. Proc. §§ 638* and *639* do not apply to juvenile court referees [*In re M. (1975) 14 Cal. 3d 727, 734, 122 Cal. Rptr. 574, 537 P.2d 406]* .

References with the consent of the parties are governed generally by *Code Civ. Proc. § 638* [*see §§ 201.10 -201.11, 201.40*] and references without the consent of the parties by *Code Civ. Proc. § 639* [*see §§ 201.12 -201.17, 201.41 -201.43*].

In addition, a number of statutes authorize the appointment of a referee or referees in specified actions or proceedings [*see, e.g., Code Civ. Proc. § 491.130* (examination by referee of third person in attachment proceedings); *Code Civ. Proc. § 585(b)* (reference to take account or proof of fact necessary to enable court to give judgment for plaintiff after defendant's default or to carry judgment into effect); *Code Civ. Proc. § 636* (after judgment for plaintiff or defendant on issue of law, reference to take account or proof of fact necessary to enable court to carry judgment into effect or to complete judgment); *Code Civ. Proc. § 708.110 et seq.* (examination by referee of judgment debtor or third person supplemental to execution); *Code Civ. Proc. § 873.010 et seq., 873.280, 873.290, 873.710, 873.940 et seq.* (appointment of referees in partition actions); *Prob. Code § 8920 et seq.* (appointment of probate referee to appraise estate property)].

The person or persons to whom a reference may be ordered is covered by *Code Civ. Proc. § 640* [*see § 201.18*]. *Code Civ. Proc. § 640* in part provides a procedure for appointing a referee or referees the parties do not agree on the selection of a referee. The grounds for objecting to the appointment of any person as a referee are set forth in *Code Civ. Proc. §§ 641-642* [*see §§ 201.50 -201.57*]. The disqualification of referees and commissioners for cause is governed by *Code Civ. Proc. §§ 170-170.5* [*see Code Civ. Proc. § 170.5(a)*]. *Code Civ. Proc. § 170.6* provides for the peremptory challenge for prejudice of a commissioner or referee to try a case or hear any matter therein which involves a contested issue of law or fact [*see § 201.58*].

The bond required of a referee or commissioner handling property or money is covered by *Code Civ. Proc. § 571*. *Code Civ. Proc. § 1053* provides that when there are three referees all must meet, but that two of them may do any act which might be done by all. The authority of commissioners to take proof and make and report findings, and exceptions to their findings, are covered by *Code Civ. Proc. § 259(b), (e),* and *(g)*. When the referee's report must be filed is covered by *Code Civ. Proc. § 643*, and its effect is governed by *Code Civ. Proc. §§ 644* and *645* [*see §§ 201.70 -201.73, §§ 201.80 -201.85*]. The manner of excepting to the report is also provided for in *Code Civ. Proc. §§ 644* and *645*. A copy of a referee's finding forms a part of the judgment roll in a case [*Code Civ. Proc. § 670(b)*; § 201.74]. The manner of setting the referees' fees is covered by *Code Civ. Proc. § 1023*, and payment of the fees is covered by *Code Civ. Proc. §§ 639(d)(6)* and *645.1*.

References by agreement are also governed by *Cal. Rules of Ct., Rule 3.900 et seq.* References by order are also governed by *Cal. Rules of Ct., Rules 3.920 et seq.*

The procedure for charging a person with contempt committed before a referee is set forth in *Code Civ. Proc. § 1211*. For a discussion and forms for use in a contempt proceeding, see Ch. 135, *Contempt* , in California Forms of Pleading and Practice (Matthew Bender). For memoranda of points and authorities for use in a contempt proceeding, see Ch. 47, *Contempt* , in this publication.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersRefereesGeneral OverviewCivil ProcedureJudicial OfficersRefereesAppointmentsCivil ProcedureJudicial OfficersReferences

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20-201 California Points & Authorities § 201.03

§ 201.03 Papers Filed in Cases Pending Before Referee

In all cases pending before a referee appointed with [*see Code Civ. Proc. § 638*] or without [*see Code Civ. Proc. § 639*] the parties' consent, the word "Referee:" followed by the referee's name must appear below the nature of the paper or the character of the action or proceeding [*Cal Rules of Ct., Rule 2.111(8)*].

Also, in cases pending before referees, a party must tender and the clerk must accept for filing all original documents accompanied by the required fee within the time limits specified by law. The filing party must provide a file-stamped copy to the referee of each documents relevant to the issues before the referee [*Cal. Rules of Ct., Rule 2.400(b)(1)*].

If a document must be filed with the court before it is considered by a judge, the referee must not accept or consider any copy of that document unless the document has the clerk's file stamp or is accompanied by a declaration stating that the original document has been submitted to the court for filing [*Cal. Rules of Ct., Rule 2.400(b)(2)*]. If a document would ordinarily be filed with the court if a party submits an ex parte application, the party that submits the document or application to a referee must file the original with the court no later than the next court day after the document or application was submitted to the referee and must promptly provide a filed-stamped copy of the document or application to the referee [*Cal. Rules of Ct., Rule 2.400(b)(3)*]. A party that has submitted a document to a referee must immediately notify the referee if the document is not accepted for filing by the court or if the filing is subsequently canceled [*Cal. Rules of Ct., Rule 2.400(b)(4)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersRefereesGeneral OverviewCivil ProcedureJudicial OfficersRefereesAppointmentsCivil ProcedureJudicial OfficersReferences

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§ 201.04 How to Use the Forms in This Chapter

[1] Page Limits on Points and Authorities

One of the more significant drafting requirements to keep in mind are page limits: supporting and opposing memoranda of points and authorities must not exceed 15 pages, or 20 pages in a summary judgment proceeding. A reply or closing memorandum may not exceed 10 pages in length [*see Cal. Rules of Ct., Rule 3.1113(d)*]. Exhibits, declarations, attachments, tables of contents and authorities, and proof of service are not counted. Any party must obtain leave of court to file a longer memorandum [*see Cal. Rules of Ct., Rule 3.1113(d), (e)*]. These and other drafting requirements are discussed in *further detail in Ch. 1, Writing Legal Memoranda and Briefs, § 1.05*.

[2] Using the Forms to Build a Draft Memorandum

The forms included in this chapter are designed to be combined with other points and authorities to form a complete memorandum. For detailed discussion on how to select and use the forms in the publication to build a draft memorandum and complete the draft, with detailed discussion of all drafting requirements and strategic or stylistic considerations, see *Ch. 1, Writing Legal Memoranda and Briefs, §§ 1.03 -1.06*. For a skeletal form of memorandum for use in creating a properly formatted outline in which to compile relevant forms from this publication, see *Ch. 1, Writing Legal Memoranda and Briefs, § 1.10*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersReferencesCivil ProcedureSummary JudgmentSupporting MaterialsMemoranda of Law

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§ 201.05 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

For a discussion of references and referees, a procedural guide, and forms for use in securing a reference in an action or special proceeding, see California Forms of Pleading and Practice, Ch. 38, *Reference* (Matthew Bender).

For discussion and forms relating to disqualification of judges for cause that may be adapted for use in disqualifying a referee, see Ch. 130, *Judges* . For discussion and forms relating to a peremptory disqualification of a judge under Code Civ. Proc. § 170.6 that may be adapted for use in disqualifying a referee, see Ch. 130, *Judges* .

The procedure for charging a person with contempt committed before a referee is set forth in Code Civ. Proc. § 1211. For a discussion and forms for use in a contempt proceeding, see Ch. 135, *Contempt* , in California Forms of Pleading and Practice (Matthew Bender).

For a discussion and/or forms for use in particular actions or special proceedings involving references or referees, see the following chapters in that publication:

- Ch. 7, *Accounting, Action for*.
- Ch. 62, *Attachment*.
- Ch. 124, *Intervention*.
- Ch. 174, *Costs and Attorney's Fees*.
- Ch. 220, *Dissolution of Marriage and Related Proceedings*.
- Ch. 254, *Executions and Enforcement of Judgments*.

- Ch. 292, *Habeas Corpus*.
- Ch. 358, *Mandate and Prohibition*.
- Ch. 397, *Partition*.

[2] Related Points and Authorities

For forms of memoranda supporting and opposing the disqualification of judges for cause under *Code Civ. Proc. § 170 et seq.*, which forms can be adapted for use in supporting or opposing the disqualification of a referee or commissioner [*see Code Civ. Proc. § 170.5(a)*], see Ch. 130, *Judges* , in this publication. For memoranda of points and authorities for use in a contempt proceeding, see Ch. 47, *Contempt* , in this publication.

Other related memoranda of points and authorities involving references may be found in the following chapters in this publication:

- Ch. 12, *Accounting*.
- Ch. 60, *Costs*.
- Ch. 169, *Partition*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersRefereesGeneral OverviewCivil ProcedureJudicial OfficersRefereesAppointmentsCivil ProcedureJudicial OfficersReferences

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[Reserved]

§§ 201.06[Reserved]

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PART II. FORMS
A. Grounds for Reference

20-201 California Points & Authorities § 201.10

§ 201.10 Supporting Contention That Reference May Be or Was Properly Ordered--To Try Any or All Issues in Action or Proceeding, Whether of Fact or of Law, and to Report Statement of Decision [Code Civ. Proc. § 638(a)]

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

_____ [AN *or* THE] ORDER OF REFERENCE TO TRY ANY AND ALL ISSUES IN THIS CASE, WHETHER OF FACT OR OF LAW, AND TO REPORT A STATEMENT OF DECISION _____ [MAY BE *or* WAS] PROPERLY GRANTED BECAUSE _____ [_____ (BOTH *or* ALL) PARTIES BY AGREEMENT _____ (FILED WITH THE COURT *or* ENTERED IN THE MINUTES) CONSENTED TO IT *or* THE CONTROVERSY BETWEEN THE PARTIES _____ (ARISES *or* AROSE) OUT OF A _____ (CONTRACT *or* LEASE) THAT PROVIDES THAT ANY CONTROVERSY ARISING THEREFROM SHALL BE HEARD BY A REFERENCE *or* THE MATTER WAS REFERRED TO THE REFEREE WITHOUT ANY OBJECTION BY _____ (*specify party, e.g.,* DEFENDANT) WHO PARTICIPATED FULLY IN THE HEARING BEFORE THE REFEREE].

A. Reference by Consent of Parties. A reference to hear and determine any or all of the issues in an action or proceeding, whether of fact or of law, and to report a statement of decision may be ordered on the agreement of the parties filed with the clerk or judge, or entered in the minutes, or on the motion of a party to a written contract or lease which provides that any controversy arising therefrom shall be heard by a reference if the court finds a reference agreement exists between the parties (*Code Civ. Proc. § 638(a)*).

[*Optional*] **B. Power of Court to Correct Records to Show Reference Was Properly Made.** A court has the inherent power to correct its records to show, when such is the fact, that an order of reference was properly made pursuant to the stipulation of the parties (*Garland v. Smith (1933) 131 Cal. App. 517, 524, 21 P.2d 688*).

[*Optional*] **C. Failure to Secure Written Consent to General Reference or Enter Consent in Minutes Is Waiver.**

The failure of the court to secure the written consent of the parties to a general reference or to enter their consent in the minutes is waived by the parties trying the entire matter before the referee without excepting to the order of reference or otherwise objecting or raising any question as to the sufficiency of the order of reference (*see Shain v. Peterson (1893) 99 Cal. 486, 487, 33 P. 1085* ; *Joshua Hendy Machine Works v. Pacific Cable Constr. Co. (1893) 99 Cal. 421, 423, 33 P. 1084* ; *Garland v. Smith (1933) 131 Cal. App. 517, 525, 21 P.2d 688*).

[*Optional*] **D. "Exception" Defined.** An exception is an objection on a matter of law to a decision made, either before or after judgment, by a court, tribunal, judge, or other judicial officer, in an action or proceeding (*Code Civ. Proc. § 646*).

[2] Comments

[a] Use of Form

The points and authorities at [1], *above*, may be submitted in support of the contention that a reference to hear and determine any or all of the issues in an action or proceeding, whether of fact or of law, and to report a statement of decision, may be or was properly ordered [*see Code Civ. Proc. § 638(a)*]. Optional Paragraph B should be included when a nunc pro tunc entry was made in the court's records showing the agreement of the parties to the reference. Optional Paragraph C should be included when the court's records do not show that the reference was made pursuant to the agreement of the parties, but was in fact so made, or when, although the parties did not consent to the reference, they did not except or object to the order of reference and fully participated in the hearing before the referee. Optional Paragraph D should be included if the issue as to the propriety of the order of reference is raised, for example, on a motion for new trial or in an appellate court, and what constitutes an exception is in issue.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue regarding the propriety of a reference. For example, the points and authorities, excluding Paragraphs B, C, and D, may be combined with points and authorities submitted with a written stipulation for a reference or in support of a motion for a reference should the court decline to order a reference on the stipulation of the parties. The points and authorities, including Paragraph B or C may be combined with points and authorities in opposition to a motion under *Code Civ. Proc. § 473(d)* to vacate and set aside the referee's report and judgment on the ground and the judgment is void. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show that the reference is or was general, that is, to hear and determine any or all issues in the case, whether of fact or of law, and to report a statement of decision, and either (1) all the parties agreed to the reference and the agreement was filed with the clerk or judge or entered in the minutes, or the case arises or arose out of a written contract or lease providing that any controversy arising thereunder shall be heard by a reference, or (2) if not all the parties expressly consented to the reference, the nonconsenting parties did not object and participated fully in the hearing before the referee. It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations.

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California

Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Forms

For forms of stipulation for a general reference, and of a notice of motion, supporting declaration, and order directing a reference, see Ch. 38, *Reference* , in California Forms of Pleading and Practice. For forms of stipulation for a general reference for accounting, and of a notice of motion, supporting declaration, and order directing a reference, see Ch. 7, *Accounting, Action for,* in that publication.

[d] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 201.40* may be used to oppose the contention supported by the points and authorities at [1], *above*.

[3] Discussion of Authorities

[a] Power of Court to Correct Records to Show Reference Was Properly Made

Garland v. Smith *(1933) 131 Cal. App. 517, 21 P.2d 688* , was an action for the balance due for work performed under a contract. Defendant cross complained to recover on a promissory note and for alleged overpayments on the present and another contract. The trial court ordered the matter referred to a referee to try all issues both of law and of fact. The court's minutes failed to indicate that the parties had agreed to the reference but were corrected by a nunc pro tunc order to so state. The order recited that an inspection of the records revealed that the minute order did not correctly set forth the order made and that the records should be corrected to conform to the facts and speak the truth. The nunc pro tunc order then provided that the order should be corrected to read that it being stipulated and agreed by and between the attorneys for the respective parties, in open court, that the cause be referred to a named person as referee as to the law and facts, the court orders the cause referred to the named person, as referee, as to the law and facts. The case was tried before the referee, who reported his findings and conclusions (now statement of decision [*see Code Civ. Proc. §§ 638(a), 644(a)*]) to the court. The court adopted the findings and conclusions and rendered judgment for plaintiff. The judgment recited that at the time the case was set for trial the respective parties to the action, through their counsel, stipulated and agreed in open court to a reference to a named referee and that the court thereupon ordered a reference. Defendant appealed, contending among other things that the trial court erred in ordering the matter referred to a referee because the record failed to show the parties had stipulated to the reference.

The court of appeal rejected the contention and affirmed the judgment. The court held that entry of the nunc pro tunc order was proper. The court said it is fundamental that every court of record has the inherent power to cause its acts and proceedings to be correctly set forth in its records. When it is brought to the court's attention that the clerk's record does not correctly show the order that was made by the court at the time it was given, the authority of the court to cause its records to be corrected in accordance with the facts is undoubted (*131 Cal. App. 517, 524)* .

[b] Failure to Secure Written Consent to General Reference or Enter Consent in Minutes Is Waiver

Shain v. Peterson *(1893) 99 Cal. 486, 33 P. 1085* , was an action by an assignee to recover payment for goods sold to defendant. The court referred the case to a referee to take the proof of all material allegations in the complaint and report the same to the court. The order did not appear to have been made by consent of the parties and the action was not one in which the court was authorized to make the order without the consent of the parties. The parties, however, appeared before the referee without objection and submitted their testimony. No objection to the order was ever made in the trial court. On the day after the referee concluded the taking of testimony, the court, without defendant's consent, made a further order, referring the case to the same referee to try all the issues in the action, both of fact and of law, and report a finding and judgment (now statement of decision [*see Code Civ. Proc. §§ 638(a), 644(a)*]) to the court. No

exception was taken to this order. The referee made his report with his finding of facts and conclusion of law that plaintiff was entitled to judgment for the amount stated in the complaint. Plaintiff moved for judgment. Defendant appeared at the hearing of the motion and made specific exceptions to certain findings on the ground they were contrary to the evidence. The motion was submitted to the court on the exceptions. The court thereafter rendered judgment for plaintiff in accordance with the referee's report. Defendant's motion for new trial was denied and defendant appealed.

The Supreme Court affirmed. The Court held that defendant, by failing to object to the reference and by fully participating in the hearing before the referee, waived all objections to the reference. The Court further held that an appellate court would not undertake to review the trial court's action in making an order of reference without the consent of the parties, in a case when such consent is required, in the absence of an exception to it by the party complaining of the ruling (*99 Cal. 486, 487)* .

Joshua Hendy Machine Works v. Pacific Cable Constr. Co. *(1893) 99 Cal. 421, 33 P. 1084* , was an action to recover the balance due for goods sold and work performed. The court, without the consent of the parties, made an order referring the cause to a referee to state an account between the parties and to report findings and a judgment (now statement of decision [*see Code Civ. Proc. §§ 638(a), 644(a)*]). Judgment was eventually rendered for plaintiff, and defendant appealed, contending, among other things, that the trial court erred in referring the case to the referee without the consent of the parties.

With respect to the argument that the reference was unauthorized, the Supreme Court pointed out that the action was an ordinary action at law and that the trial court in such a case should not make a reference for the trial of all the issues except on the agreement of the parties. However, the Court said that defendant did not reserve any exception to the order of reference and held that, not having done so, defendant could not insist on the error of the court in making the order as a ground for the reversal of the judgment (*99 Cal. 421, 423)* . The Court nevertheless reversed the judgment on the ground the referee's findings did not support it.

The facts and procedural background of ***Garland v. Smith*** *(1933) 131 Cal. App. 517, 21 P.2d 688* , are discussed at [a], *above*. In affirming the judgment, the court of appeal said that defendant's contention that the court's record failed to show the parties had stipulated to the reference could be sufficiently answered by the recitation in the judgment that the parties had agreed to the reference (*131 Cal. App. 517, 524)* . The court added, however, that objection to a reference which has been ordered without consent is waived by a failure to take exception to it, and that since it affirmatively appeared from the record that defendant appeared before the referee without objection and submitted evidence in support of the allegations of his answer and cross complaint he must be held to have waived all objections to the reference (*131 Cal. App. 517, 525)* .

[c] "Exception" Defined

In addition to defining "exception," *Code Civ. Proc. § 646* specifies when an exception must be taken. The orders and rulings reserved without exceptions are listed in *Code Civ. Proc. § 647*, which does not list an order of reference. The section does provide, however, that if the party, at the time when the order, ruling, action, or decision is sought or made, or within a reasonable time thereafter, makes known his or her position thereon, by objection or otherwise, all other orders, rulings, actions, or decisions are deemed to have been excepted to.

[4] Additional Authorities

[a] Failure to Secure Written Consent to General Reference or Enter Consent in Minutes Is Waiver

Estate of Hart (1938) 11 Cal. 2d 89, 77 P.2d 1082 , arose out of a probate proceeding. Exceptions and objections to the executor's first and final account, report, and petition for distribution were filed. The matter was then referred to a court commissioner who conducted a full hearing in which the parties participated and a number of witnesses were

examined. The commissioner adopted the findings proposed by the objectors and rejected those proposed by the executor and thereafter filed his report, findings, and conclusions which were adopted by the court and a judgment adverse to the executor was rendered. The executor appealed, contending that his statutory rights under Code Civ. Proc. § 259a (now *Code Civ. Proc. § 259*) had been violated. Under that statute, any party to a contested proceeding heard before a commission has a right to argue exceptions before the court after notice of motion is given. The Supreme Court rejected the contention and affirmed the judgment. The Court held that the commissioner heard the matter as a referee under *Code Civ. Proc. § 638* and not as a commissioner under former Code Civ. Proc. § 259a (now *Code Civ. Proc. § 259*). The Court said that while the original minute order of reference was so brief as perhaps to be uncertain, the subsequent developments must necessarily have made clear to the executor that the commissioner was acting as a referee, and if in fact there was no agreement of reference, it is most extraordinary that no point was made of this until after adverse findings were clearly indicated (*11 Cal. 2d 89, 91-92)* . The Court concluded that the participation of the executor in the hearing and subsequent consideration of the case, with knowledge of the commissioner's statements (regarding the legal issues involved, his intention to rule on them, and that he was hearing the matter as a referee and had to make a finding to the court) is indicative of a prior consent to the reference or a waiver of objection to it (*11 Cal. 2d 89, 92)* .

In *Estate of Doran (1956) 138 Cal. App. 2d 541, 292 P.2d 655* , a proceeding to determine heirship, there were several groups of heirs represented by different attorneys, one of whom was a claimant himself who also represented two other heirs. However, by an association of attorneys by the attorneys of record, including the attorney-claimant, this group was also represented by one of the other attorneys. At a hearing at which the attorney-claimant did not appear, the court on stipulation of the attorneys present referred the matter to a referee. The referee subsequently filed his report and a judgment adverse to the group of heirs of which the attorney-claimant and heirs represented by him were members was entered. The court of appeal affirmed. The court rejected the attorney-claimant's argument that the probate court did not have jurisdiction to order the reference because he did not consent in writing or in open court to the reference as required by *Code Civ. Proc. § 638* and did not appear at the hearing at which the reference was ordered. The court said that by virtue of the association of attorneys, all parties, including the attorney-claimant, were bound by the stipulation agreeing to the reference (*138 Cal. App. 2d 541, 545-546)* . With respect to the nonappearance at the hearing, the court pointed out that in *Garland v. Smith (1933) 131 Cal. App. 517, 524, 21 P.2d 688* (discussed at [3][b], *above*), it was noted that any objection to a reference ordered without consent is waived by a failure to take exception to it and added that the heirs knew the matter of reference was to come up at the scheduled hearing, but nevertheless did not appear (*138 Cal. App. 2d 541, 546-547)* .

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A. Grounds for Reference

20-201 California Points & Authorities § 201.11

§ 201.11 Supporting Contention That Reference May Be or Was Properly Ordered--With Consent of Parties to Ascertain Fact Necessary to Enable Court to Determine Action or Proceeding [Code Civ. Proc. § 638(b)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [AN *or* THE] ORDER OF REFERENCE TO ASCERTAIN THE FACT(S) _____ [*specify facts to be ascertained*] _____ [MAY BE *or* WAS] PROPERLY GRANTED BECAUSE ASCERTAINMENT OF _____ [THIS FACT *or* THESE FACTS] _____ [IS *or* ARE *or* WAS *or* WERE] NECESSARY TO ENABLE THE COURT TO DETERMINE THIS _____ [ACTION *or* PROCEEDING] AND BECAUSE _____ [BOTH PARTIES BY AGREEMENT _____ (FILED WITH THE COURT *or* ENTERED IN THE MINUTES) CONSENTED TO IT *or* THE CONTROVERSY BETWEEN THE PARTIES _____ (ARISES *or* AROSE) OUT OF A _____ (CONTRACT *or* LEASE) THAT PROVIDES THAT ANY CONTROVERSY ARISING THEREFROM SHALL BE HEARD BY A REFERENCE].

Reference by Consent of Parties. A reference to ascertain a fact necessary to enable the court to determine an action or proceeding may be ordered on the agreement of the parties filed with the clerk or judge, or entered in the minutes, or on the motion of a party to a written contract or lease that provides that any controversy arising therefrom shall be heard by a reference if the court finds a reference agreement exists between the parties (*Code Civ. Proc. § 638(b)*).

[2] Comments

[a] Use of Form

The points and authorities at [1], *above*, may be submitted in support of the contention that a reference to ascertain a fact necessary to enable the court to determine an action or proceeding may be or was properly ordered because the parties consented to it either by written agreement filed with the court or orally in open court and the consent was entered in the minutes [*Code Civ. Proc. § 638(b)*].

The points and authorities at [1], *above*, may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue as to the propriety of a reference. For example, the points and authorities may be combined with points and authorities submitted with a written stipulation for a reference or in support of a motion for a reference should the court decline to order a reference on the stipulation of the parties. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should show that the reference is or was to ascertain a specified fact or facts necessary to enable the court to determine the action or proceeding and either that the reference was consented to in writing or in open court by the parties or that the action or proceeding arose out of a contract or lease providing that any controversy arising therefrom shall be heard by a reference. It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations.

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Forms

For forms of stipulation for a special reference, and of a notice of motion, supporting declaration, and order directing a reference, see Ch. 38, *Reference* , in California Forms of Pleading and Practice.

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CHAPTER 201 REFERENCE AND REFEREES
PART II. FORMS
A. Grounds for Reference

20-201 California Points & Authorities § 201.12

§ 201.12 Supporting Contention That Reference May Be or Was Properly Ordered--Without Consent of Parties When Trial of Issue of Fact Requires or Required Examination of Long Account [Code Civ. Proc. § 639(a)(1)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [AN *or* THE] ORDER OF REFERENCE ON THE _____ [COURT'S OWN MOTION *or* APPLICATION OF _____ (*specify party, e.g.,* PLAINTIFF)] TO TAKE AND STATE AN ACCOUNT [AND DIRECTING THE REFEREE TO HEAR AND DECIDE THE WHOLE ISSUE] _____ [MAY BE *or* WAS] PROPERLY GRANTED BECAUSE THIS IS AN ACTION IN EQUITY AND THE EXAMINATION OF A LONG ACCOUNT _____ [IS *or* WAS] REQUIRED FOR TRIAL OF THE ISSUE _____ [*specify issue of fact*].

A. Reference to Examine Long Account. When the parties do not consent, the court may, on the written motion of any party, or on its own motion, appoint a referee pursuant to the provisions of subdivision (b) of *Code of Civil Procedure Section 640* when the trial of an issue of fact requires the examination of a long account on either side; [in which case the referee(s) may be directed to hear and decide the whole issue, or report on any specific question of fact involved therein] (*Code Civ. Proc. § 639(a)(1)*).

[*Optional*] **B. Reference Over Objection of Party.** The reference may be made over the objection of a party if the action is in equity and the examination of a long account is required (*Putman v. Superior Court (1930) 209 Cal. 223, 228-229, 286 P. 425* ; *Jones v. Gardner (1881) 57 Cal. 641, 643)* .

[*Optional*] **C. Reference Authorized Whenever Court Has Authority to Take Account Itself.** Whenever a court has power to take an account itself, it may order a reference to take it under the general implied powers of the court (*Trumpler v. Cotton (1895) 109 Cal. 250, 255, 41 P. 1033* ; *see Code Civ. Proc. § 187*).

[2] Comments

[a] Use of Form

The points and authorities at [1], *above*, may be submitted in support of the contention that a court may order or properly ordered a reference without the consent of the parties because the examination of a long account is or was required by the trial of an issue of fact in the case [*Code Civ. Proc. § 639(a)(1)*]. *Code Civ. Proc. § 640(b)*, referred to in Paragraph A, governs the manner of choosing the person(s) to serve as referee when the parties cannot agree and is *set forth in § 201.18[1]*. Optional Paragraph B should be included if the reference is or was expressly objected to by the adverse party. Optional Paragraph C should be included if the action involves an account and there is a statute authorizing the court to take the account.

The points and authorities at [1], *above*, may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue as to the propriety of a reference to take an account. For example, the points and authorities may be combined with points and authorities supporting a motion for a reference. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

In addition, the points and authorities at [1], *above*, may be combined with points and authorities in opposition to a petition for a writ of mandate seeking to compel the trial court to vacate its order of reference or in opposition to a petition for a writ of prohibition seeking to restrain the trial court from enforcing its order.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show that the action is in equity and the examination of a long account is or was required for the trial of an issue of fact in the case.

[b] Related Pleading and Practice Forms

For forms of a notice of motion, supporting declaration, and order directing a special reference for an accounting under Code Civ. Proc. § 639, see Ch. 7, *Accounting, Action for*, in California Forms of Pleading and Practice. For forms for use in mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* , in that publication.

[c] Related Points and Authorities

For memoranda of points and authorities generally supporting and opposing petitions for writs of mandate and prohibition, see Ch. 150, *Mandate and Prohibition* , in this publication.

[d] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 201.41* and *201.42* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Reference Over Objection of Party

Putman v. Superior Court *(1930) 209 Cal. 223, 286 P. 425* , was a proceeding in prohibition, arising out of an action for dissolution of a partnership and an accounting in which defendant denied that any partnership existed. The trial judge, after he had announced his conclusion at trial that a partnership existed and over defendant's objection, directed a reference on the ground that trial of one of the issues of fact involved required the examination of a long account. Defendant petitioned for a writ of prohibition to prohibit the trial judge from proceeding further with the action and to prohibit the other parties from proceeding with the reference.

Although critical of the trial judge's premature, unwise, and unjudicial attitude, action, and conclusion, the Supreme Court denied the petition. The Court, quoting from *Jones v. Gardner (1881) 57 Cal. 641* (discussed *below*), said that the language of former Code Civ. Proc. § 639(1) (now *Code Civ. Proc. § 639(a)(1)*), authorizing a reference when the parties do not consent, indicates that the power of the court to refer depends on the pleadings on the one side or the other, that a reference is made when the trial of an issue of fact requires the examination of a long account, and that a reference for such purpose may, under the state Constitution, be made in any equity suit when either party alleges facts showing an accounting to be necessary (*209 Cal. 223, 229)* .

Jones v. Gardner *(1881) 57 Cal. 641* , was an action to declare a deed a mortgage and to foreclose it. From a judgment for plaintiff, defendant appealed, contending among other things that the trial court had no power to send the case to a referee for trial and that the parties were entitled to a jury trial on the legal issues.

The Supreme Court affirmed. The Court held that the language of former Code Civ. Proc. § 639(1) (now *Code Civ. Proc. § 639(a)(1)*) indicates that the power of the court to refer depends on the pleadings on the one side or the other, that the reference is made when the trial of an issue of fact requires the examination of a long account, that a reference for such purpose may, under the state Constitution, be made in any equity suit when either party alleges facts showing an accounting to be necessary, and that the action to declare the deed a mortgage and foreclose it was in equity (*57 Cal. 641, 643)* .

[b] Reference Authorized Whenever Court Has Authority to Take Account Itself

Trumpler v. Cotton *(1895) 109 Cal. 250, 41 P. 1033* , was an action on an undertaking resulting from defendant guardian's failure to file his final account in a guardianship proceeding. The undertaking was executed by defendant guardian as principal and defendant sureties and conditioned on the guardian's faithful performance of his duties as guardian of plaintiff's person and estate. The guardian failed to appear in response to a citation, and the trial court referred the matter to a referee to prepare the guardian's final account. The account was made and presented by the referee. The sureties objected to the report and to the jurisdiction of the court. The court overruled the objections, settled the account, and rendered judgment for plaintiff. The sureties appealed, contending among other things that the trial court had no jurisdiction to settle and allow a guardian's account except when presented by the guardian and that no one else could swear to an account for him.

The Supreme Court rejected this contention. The Court held that under the applicable statute the trial court had power to compel the guardian to present his account for settlement. Citing *Code Civ. Proc. § 187* relating to the implied powers of a court or judicial officer, the Court said that when jurisdiction is conferred on a court all the means to carry it into effect are also given and that if the course of proceedings is not specifically designated by the code any suitable mode may be adopted that may appear most conformable to the code (*109 Cal. 250, 254-255)* . The Court concluded that the trial court therefore had power to state the account, and since the trial court could take and state the account itself it could refer it to a referee to state it (*109 Cal. 250, 255)* .

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A. Grounds for Reference

20-201 California Points & Authorities § 201.13

§ 201.13 Supporting Contention That Reference May Be or Was Properly Ordered--Without Consent of Parties When Taking of Account Is or Was Necessary for Information of Court Before Judgment or for Carrying Judgment or Order Into Effect [Code Civ. Proc. § 639(a)(2)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [AN *or* THE] ORDER OF REFERENCE TO TAKE AND STATE AN ACCOUNT IN THIS CASE _____ [MAY BE *or* WAS] PROPERLY GRANTED BECAUSE THE TAKING OF AN ACCOUNT _____ [IS *or* WAS] NECESSARY FOR THE INFORMATION OF THE COURT _____ [BEFORE JUDGMENT *or* FOR CARRYING A _____ (JUDGMENT *or* ORDER) INTO EFFECT].

Reference Without Consent of Parties Necessary for Information of Court Before Judgment or to Carry Judgment or Order Into Effect. When the parties do not consent, the court may, on the written motion of any party, or of its own motion, appoint a referee pursuant to the provisions of subdivision (b) of *Code of Civil Procedure Section 640* when the taking of an account is necessary for the information of the court before judgment or for carrying a judgment or order into effect (*Code Civ. Proc. § 639(a)(2)*).

[2] Comments

[a] Use of Form

The points and authorities at [1], *above*, may be submitted in support of the contention that a reference to take and state an account may be or was properly granted because the taking of an account is or was necessary for the information of the court either before judgment or for carrying a judgment or order into effect [*Code Civ. Proc. § 639(a)(2)*]. *Code Civ. Proc. § 640(b)*, referred to in the form, governs the manner of choosing the person(s) to serve as referee when the parties cannot agree and is *set forth in § 201.18[1]*.

The points and authorities at [1], *above*, may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue as to the propriety of a reference. For example, the points and authorities may be combined with points and authorities submitted in support of a motion for a reference. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

In addition, the points and authorities at [1], *above*, may be combined with points and authorities in opposition to a petition for a writ of mandate seeking to compel the trial court to vacate its order of reference or in opposition to a petition for a writ of prohibition seeking to restrain the trial court from enforcing its order.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should show that the taking of an account is or was necessary for the information of the court either before judgment or for carrying a judgment or order into effect.

[b] Related Pleading and Practice Forms

For forms of a notice of motion, supporting declaration, and order directing a special reference under Code Civ. Proc. § 639, see Ch. 7, *Accounting, Action for*, and Ch. 38, *Reference*, in California Forms of Pleading and Practice.

[c] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 201.42* may be used to oppose the contention supported by the points and authorities in [1], *above*.

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20-201 California Points & Authorities § 201.14

§ 201.14 Supporting Contention That Reference May Be or Was Properly Ordered--Without Consent of Parties When Question of Fact, Other Than on Pleadings, Arises or Arose on Motion or Otherwise in any Stage of Action [Code Civ. Proc. § 639(a)(3)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [AN *or* THE] ORDER OF REFERENCE TO _____ [*specify nature of order*] _____ [MAY BE *or* WAS] PROPERLY GRANTED IN THIS CASE BECAUSE A QUESTION OF FACT AS TO _____ [*specify issue about which question of fact exists*] AROSE ON _____ [*specify, e.g.,* THE MOTION OF _____ (*party*) FOR AN ORDER GRANTING SUMMARY JUDGMENT].

Reference Without Consent of Parties When Fact Question Arises on Motion or Otherwise. When the parties do not consent, the court may, on the written motion of any party, or of its own motion, appoint a referee pursuant to the provisions of subdivision (b) of *Code of Civil Procedure Section 640* when a question of fact, other than on the pleadings, arises on motion or otherwise, in any stage of the action (*Code Civ. Proc. § 639(a)(3)*; *Estate of Beard (1999) 71 Cal. App. 4th 753, 777-778, 84 Cal. Rptr. 2d 276*).

[2] Comments

[a] Use of Form

The points and authorities at [1], *above*, may be submitted in support of the contention that a reference may be or was properly granted because a question of fact, other than on the pleadings, arose on a motion or otherwise in any stage of the action [*Code Civ. Proc. § 639(a)(3)*]. *Code Civ. Proc. § 640(b)*, referred to in the form, governs the manner of choosing the person(s) to serve as referee when the parties cannot agree and is *set forth in § 201.18[1]*.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the

specific procedural context in which counsel wishes to raise the issue as to the propriety of a reference. For example, the points and authorities may be combined with points and authorities submitted in support of a motion for a reference. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

In addition, the points and authorities may be combined with points and authorities in opposition to a petition for a writ of mandate seeking to compel the trial court to vacate its order of reference or in opposition to a petition for a writ of prohibition seeking to restrain the trial court from enforcing its order.

Counsel should insert argument in the form showing the relationship between the facts of the case and the point of law stated. Thus, counsel should show what question of fact arose and that it arose on a motion or otherwise, other than on the pleadings.

[b] Related Pleading and Practice Forms

For forms of a notice of motion, supporting declaration, and order directing a special reference under Code Civ. Proc. § 639, see California Forms of Pleading and Practice, Ch. 7, *Accounting, Action for*, and Ch. 38, *Reference*.

[3] Discussion of Authorities

[a] Reference Without Consent of Parties When Fact Question Arises on Motion or Otherwise

Estate of Beard *(1999) 71 Cal. App. 4th 753, 84 Cal. Rptr. 2d 276* , was a bitterly contested estate in part due to fact that decedent had not changed his will to include provision for his wife (appellant) at the time of his death. The will left the bulk of the estate to decedent's two adult children. The widow filed numerous claims and objections, including a petition for family allowance. The parties agreed to a compromise in October, 1988, which was memorialized in Order Approving Compromise and Settlement. That agreement was modified and an Amended Order issued in December, 1988, which provided for the widow and required her, among other things, to dismiss all of her pending appeals in the probate proceedings and to expunge a lis pendens she had filed against the estate. Appellant did not dismiss that appeal, and the court appointed a commissioner to execute the dismissal of that appeal. In 1990, the children filed a motion to set aside the Amended Order and to withdraw from the original Settlement, on the grounds appellant had failed to comply with the terms of the original Settlement, the Amended Order, or a 1989 order. In August, 1990, the court appointed a special referee "to determine (1) whether appellant's failure to dismiss the [then-pending] appeal breached the agreement; or (2) whether the appellant's failure to dismiss the appeal was necessitated by the executor's actions." The referee filed his report in December, 1990, finding that (1) appellant "breached" the express requirements of the original Settlement, the Amended Order, and the court's subsequent March 1989 order to dismiss her then-pending appeal; (2) appellant's failure to comply was not justified or excused by a clerical drafting error in the Order for Preliminary Distribution's (omission of the December 2, 1988, date for turning over apartments to appellant); and (3) appellant's procedural remedy for this drafting error was to file a motion under *Code Civ. Proc. § 473* to correct the error. The children moved for confirmation of the referee's report, and appellant opposed it. The court rejected appellant's objections to the appointment of the referee as untimely and therefore waived, and ordered the referee's report confirmed and adopted as the decision of the court. Thereafter the widow appealed that and four other orders, claiming as to the reference that it was an improper referral of issues of law to a referee.

The court of appeal affirmed, noting that *Code Civ. Proc. § 639(a)(3)*, authorizes a trial court, without the consent of the parties, to make a special reference to a referee to make certain factual determinations. The scope of a nonconsensual special reference is limited to the resolution of particular factual questions on existing controversies; the referee's factual findings are advisory recommendations only, and do not become binding unless adopted by the court. Although it was unfortunate and confusing that the order appointing the referee and the referee's report both spoke in terms of appellant's "breach" of the court's orders, that terminology was not controlling. The questions which the trial court submitted to the referee were clearly ones of fact, i.e., had appellant in fact disobeyed the Amended Order; and if so, was her

disobedience necessitated or justified by the acts or omissions of the executor? In light of the complexity of the factual and procedural record, the trial court's reference of these questions was not error (*71 Cal. App. 4th 753, 777-778)* .

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A. Grounds for Reference

20-201 California Points & Authorities § 201.15

§ 201.15 Supporting Contention That Reference May Be or Was Properly Ordered--Without Consent of Parties When Necessary for Information of Court in Special Proceeding [Code Civ. Proc. § 639(a)(4)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [AN *or* THE] ORDER OF REFERENCE IN THIS CASE _____ [MAY BE *or* WAS] PROPERLY GRANTED BECAUSE THIS IS A SPECIAL PROCEEDING AND A REFERENCE _____ [IS *or* WAS] NECESSARY FOR THE INFORMATION OF THE COURT.

A. Reference Without Consent of Parties When Necessary for Court's Information in Special Proceeding. When the parties do not consent, the court may, on the written motion of any party, or of its own motion, appoint a referee pursuant to the provisions of subdivision (b) of *Code of Civil Procedure Section 640* when it is necessary for the information of the court in a special proceeding (*Code Civ. Proc. § 639(a)(4)*; *see Holt v. Kelly (1978) 20 Cal. 3d 560, 562-563, 143 Cal. Rptr. 625, 574 P.2d 441*).

[*Optional*] **B. Original Proceeding in Appellate Court.** A reference is essential when the determination of controverted issues of fact becomes necessary in an original proceeding in an appellate court (*Holt v. Kelly (1978) 20 Cal. 3d 560, 562, 143 Cal. Rptr. 625, 574 P.2d 441*).

[2] Comments

[a] Use of Form

The points and authorities in [1], *above*, may be submitted in support of the contention that a reference may be or was properly ordered because the proceeding is a special proceeding and the reference is or was necessary for the information of the court [*Code Civ. Proc. § 639(a)(4)*]. *Code Civ. Proc. § 640(b)*, referred to in Paragraph A of the form, governs the manner of choosing the person(s) to serve as referee when the parties cannot agree and is *set forth in § 201.18[1]*. Optional Paragraph B should be included when the special proceeding is or was commenced and pending

in an appellate court (*e.g.*, a proceeding for an extraordinary writ). Common special proceedings of a civil nature are covered by Part Three of the Code of Civil Procedure [*Code Civ. Proc. § 1063 et seq.*] and by *Fam. Code §§ 1800 et seq., 4800 et seq.* As a rule of thumb, special proceedings are normally commenced by petition, whereas civil actions are commenced by complaints. Notable exceptions are proceedings in unlawful or forcible detainer or forcible entry and eminent domain, all of which are special proceedings and all of which are commenced by the filing of a complaint [*see Code Civ. Proc. §§ 1166* (forcible entry or detainer and unlawful detainer), 1250.110 (eminent domain)].

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue as to the propriety of a reference in a special proceeding to ascertain facts for the information of the court [*Code Civ. Proc. § 639(a)(4)*]. For example, the points and authorities may be combined with points and authorities supporting a motion for an order directing such a reference. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

In addition, these points and authorities may be combined with points and authorities in opposition to a petition for a writ of mandate seeking to compel the trial court to vacate its order of reference or in opposition to a petition for a writ of prohibition seeking to restrain the trial court from enforcing its order.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show, if there is any doubt about it, first that the case is a special proceeding, and then the matter to be referred and why the reference is necessary for the information of the court. It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Forms

For forms of a notice of motion, supporting declaration, and order directing a special reference under Code Civ. Proc. § 639, see California Forms of Pleading and Practice, Ch. 7, *Accounting, Action for,* and Ch. 38, *Reference*.

[d] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 201.43* may be used to oppose the contention supported by the points and authorities in [1], *above*.

[3] Discussion of Authorities

[a] Reference Without Consent of Parties When Necessary for Court's Information in Special Proceeding

Holt v. Kelly *(1978) 20 Cal. 3d 560, 143 Cal. Rptr. 625, 574 P.2d 441* , was a mandate proceeding against a sheriff by which petitioner sought recovery of property taken from him at the time of his arrest or its value if it could not be returned. Defendant's demurrer to the petition was sustained. Subsequently, petitioner sought a writ from the Supreme Court. The Supreme Court transferred the proceeding to the court of appeal with directions to issue an alternative writ of mandate. The court of appeal appointed counsel for petitioner and a referee to hear evidence and make findings on certain specified questions. The referee found that (1) the property claimed was taken from petitioner by the sheriff's department, (2) it was petitioner's property, (3) no written inventory of the property was made and the sheriff's office had no means of determining its ownership, (4) the property had a value of $500, and (5) none of the items was returned to petitioner. The court of appeal nevertheless denied relief.

The Supreme Court granted a hearing. In ordering that a writ of mandate issue directing respondent to return the property or, if unable to do so, the sum of $500, the Supreme Court said that the appointment of a special referee without the consent of the parties is authorized under former Code Civ. Proc. § 639(4) (now *Code Civ. Proc. § 639(a)(4)*) when it is necessary for the information of the court in a special proceeding (*20 Cal. 3d 560, 562)* .

[b] Original Proceeding in Appellate Court

The facts and procedural background of ***Holt v. Kelly*** *(1978) 20 Cal. 3d 560, 143 Cal. Rptr. 625, 574 P.2d 441* , are discussed at [a], *above.* In upholding the propriety under former Code Civ. Proc. § 639(4) (now *Code Civ. Proc. § 639(a)(4)*) of the reference ordered by the court of appeal, the Supreme Court said that since appellate courts are not equipped to take evidence, a reference is essential when the determination of controverted issues of fact becomes necessary in an original proceeding (*20 Cal. 3d 560, 562)* .

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A. Grounds for Reference

20-201 California Points & Authorities § 201.16

§ 201.16 Supporting Contention That Reference May Be or Was Properly Ordered--Without Consent of Parties When Appointment of Referee Is Necessary to Hear and Determine Discovery Matters and to Report Findings and Recommendation [Code Civ. Proc. § 639(a)(5)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [AN *or* THE] ORDER OF REFERENCE IN THIS CASE _____ [MAY BE *or* WAS] PROPERLY GRANTED BECAUSE A REFERENCE IS AUTHORIZED WHEN THE COURT DETERMINES IT IS NECESSARY TO APPOINT A REFEREE TO HEAR AND DETERMINE _____ [DISCOVERY MOTIONS *and/or* DISPUTES RELEVANT TO DISCOVERY] IN AN ACTION.

Reference Without Consent of Parties to Hear and Determine Discovery Motions or Disputes. When the parties do not consent, the court may, on the written motion of any party, or of its own motion, appoint a referee pursuant to the provisions of subdivision (b) of *Code of Civil Procedure Section 640* when the court in any pending action determines in its discretion that it is necessary for the court to appoint a referee to hear and determine any and all discovery motions and disputes relevant to discovery in the action and to report findings and make a recommendation thereon (*Code Civ. Proc. § 639(a)(5)*; *see Motown Record Corp. v. Superior Court (1984) 155 Cal. App. 3d 482, 487, 202 Cal. Rptr. 227*).

[2] Comments

[a] Use of Form

The points and authorities at [1], *above*, may be submitted in support of the contention that a reference may be or was properly granted because a reference is or was necessary to hear and determine discovery motions and/or disputes relevant to discovery in the action and to report findings and make a recommendation thereon [*Code Civ. Proc. § 639(a)(5)*]. *Code Civ. Proc. § 640(b)*, referred to in the form, governs the manner of choosing the person(s) to serve as

referee when the parties cannot agree and is *set forth in § 201.18[1]*.

The points and authorities at [1], *above*, may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue as to the propriety of a reference. For example, the points and authorities may be combined with points and authorities submitted in support of a motion for a reference. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

In addition, the points and authorities at [1], *above*, may be combined with points and authorities in opposition to a petition for a writ of mandate seeking to compel the trial court to vacate its order of reference or in opposition to a petition for a writ of prohibition seeking to restrain the trial court from enforcing its order.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should show the facts that necessitate the appointment of a referee to hear and determine the discovery motions or disputes relevant to discovery, or both. Necessity may be occasioned, for example, by the failure of counsel to narrow the issues presented by cross motions to compel production of documents caused by their inability to get along with each other [*see Bird v. Superior Court (1980) 112 Cal. App. 3d 595, 597, 169 Cal. Rptr. 530* (trial court ordered reference, but court of appeal correctly held reference not authorized by *Code Civ. Proc. § 639*; holding repudiated by Legislature in its 1981 amendment of *Code Civ. Proc. § 639* to add subdivision (e) [*now* (a)(5)] to expressly provide for such reference)].

It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations*, and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Forms

For forms of a notice of motion, supporting declaration, and order directing a special reference under Code Civ. Proc. § 639, see Ch. 38, *Reference*, in California Forms of Pleading and Practice. For forms for use in discovery proceedings, see Ch. 190, *Discovery: Scope, Regulation, and Timing*, Ch. 191, *Discovery: Privileges and Other Discovery Limitations*, Ch. 192, *Discovery: Sanctions for Discovery Misuse*, Ch. 193, *Discovery: Depositions*, Ch. 194, *Discovery: Interrogatories*, Ch. 195, *Discovery: Inspection of Tangible Evidence*, Ch. 196, *Discovery: Requests for Admissions*, Ch. 197, *Discovery: Physical and Mental Examinations*, Ch. 198, *Discovery: Exchange of Expert Witness Information*, Ch. 199, *Discovery: Preservation of Evidence*, Ch. 200, *Discovery: Review of Discovery Orders*, in that publication.

[d] Related Points and Authorities

For memoranda of points and authorities generally supporting and opposing discovery motions, see Ch. 80, *Discovery: Scope, Regulation, and Timing*, Ch. 81, *Discovery: Privileges and Other Discovery Limitations*, Ch. 82, *Discovery: Sanctions for Discovery Misuse*, Ch. 83, *Discovery: Depositions*, Ch. 84, *Discovery: Interrogatories*, Ch. 85, *Discovery: Production or Inspection of Tangible Evidence*, Ch. 86, *Discovery: Requests for Admissions*, Ch. 87, *Discovery: Physical and Mental Examinations*, Ch. 88, *Discovery: Exchange of Expert Witness Information*, Ch. 89, *Discovery: Preservation of Evidence*, Ch. 89A, *Discovery: Review of Discovery Orders*, in this publication.

[3] Discussion of Authorities

[a] Reference Without Consent of Parties to Hear and Determine Discovery Motions or Disputes

Motown Record Corp. v. Superior Court *(1984) 155 Cal. App. 3d 482, 202 Cal. Rptr. 227* , was a mandate proceeding that arose out of a discovery dispute between the parties to a civil action in which the reference provisions of former Code Civ. Proc. § 639(e) [*see now Code Civ. Proc. § 639(a)(5)*] were utilized. In that case, the trial judge had referred the dispute to a referee who found that plaintiffs had failed to comply in a timely manner with the trial court's earlier order regarding production of documents and that the failure to comply resulted in a waiver of plaintiffs' claim that some of the documents were protected by the attorney-client and work-product privileges. The referee recommended that plaintiffs be ordered to produce all the documents described in defendant's request within 20 days and pay attorney fees of $1,000. The monetary sanction was based in part on plaintiffs' meritless objections to written interrogatories that the referee recommended be answered. Plaintiffs' motion for modification of the referee's tentative findings and recommendations, asserting that their slight tardiness in compliance (one day as to service of the required papers and 10 days as to service of an attorney declaration that concerned only a portion of the disputed documents) did not justify the severe sanction recommended and that the purported finding of a waiver of privilege was unauthorized by statutory or case law. The trial court adopted the referee's findings and recommendations and ordered plaintiffs to produce within 20 days all the documents to which they had asserted the privilege.

Although the court of appeal pointed out that the reference was ordered pursuant to *Code Civ. Proc. § 639*, it nevertheless held that the sanctions imposed by the trial court were excessive and not reasonably calculated to achieve the purpose of effecting compliance with discovery and that plaintiffs had not waived the attorney-client privilege under *Evid. Code § 912*, which provides the exclusive means by which that privilege may be waived (*155 Cal. App. 3d 482, 488, 490-492)* . The court therefore ordered that a peremptory writ of mandate the trial court to vacate that part of its order finding a blanket waiver of privilege and ordering all disputed documents produced without a prior determination regarding the existence of a valid claim of privilege (*155 Cal. App. 3d 482, 492-493)* .

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20-201 California Points & Authorities § 201.17

§ 201.17 Supporting Contention That Preliminary Adjudication of Right to Accounting Is or Was Not Required and That Reference May Be Ordered at any Stage of Action

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [AN *or* THE] ORDER OF REFERENCE IN THIS CASE _____ [MAY BE *or* WAS] PROPERLY GRANTED BECAUSE THERE IS NO REQUIREMENT THAT THE TRIAL COURT FIRST ADJUDICATE A PARTY'S RIGHT TO AN ACCOUNTING BEFORE IT DIRECTS A REFERENCE TO TAKE AN ACCOUNT, [AND A REFERENCE TO TAKE AN ACCOUNT MAY BE ORDERED AT ANY STAGE OF THE ACTION, THE MATTER BEING ONE AS TO THE ORDER OF PROOF].

A. Prior Adjudication of Party's Right to Accounting Is Not Required. There is no requirement under either Section 638 or *Section 639 of the Code of Civil Procedure*, relating respectively to references on agreement of the parties and references without the consent of the parties, that the trial court before ordering a reference find that a party is entitled to an accounting and enter an interlocutory judgment to that effect (*see Schefski v. Anker (1932) 216 Cal. 624, 627, 15 P.2d 744* ; *Fredendall v. Shrader (1920) 45 Cal. App. 719, 724-726, 188 P. 580*).

[*Optional*] **B. Stage of Proceeding at Which Reference Might Be Directed.** *Section 639 of the Code of Civil Procedure* places no restrictions on the trial court as to the time during the pendency of the action when it first acquires jurisdiction to appoint a referee; hence, the stage in an equity action at which the court may take testimony in the process of an accounting, or order a reference for that purpose, is not a matter of jurisdiction, but rather of the order of proof in the particular case (*Putman v. Superior Court (1930) 209 Cal. 223, 228, 229, 286 P. 425*).

[2] Comments

[a] Use of Form

The points and authorities at [1], *above*, may be submitted in support of the contention that no prior adjudication of a

party's right to an accounting is required as a prerequisite to the trial court's ordering a reference. Optional Paragraph B should be included if there is or is likely to arise any question as to the stage of a proceeding at which an accounting may be taken or a reference ordered.

The points and authorities at [1], *above*, may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue as to the propriety of a reference to take an account. For example, the points and authorities may be combined with points and authorities, such as those publication out in § 201.12, supporting a motion for an order directing a reference [*Code Civ. Proc. § 639(a)(1)*]. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

In addition, the points and authorities at [1], *above*, may be combined with points and authorities in opposition to a petition for a writ of mandate seeking to compel the trial court to vacate its order of reference or to a petition for a writ of prohibition seeking to restrain the trial court from enforcing its order.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms of a notice of motion, supporting declaration, and order directing a special reference under Code Civ. Proc. § 639, see Ch. 7, *Accounting, Action for* in California Forms of Pleading and Practice (Matthew Bender). For forms for use in mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* , in that publication.

[c] Related Points and Authorities

For memoranda of points and authorities supporting and opposing petitions for writs of mandate and prohibition, see Ch. 150, *Mandate and Prohibition* , in this publication.

[3] Discussion of Authorities

[a] Prior Adjudication of Party's Right to Accounting Is Not Required

Schefski v. Anker *(1932) 216 Cal. 624, 15 P.2d 744* , was an action for dissolution of a partnership and an accounting. The trial court, on stipulation of the parties and without first rendering an interlocutory judgment, ordered a reference to take an accounting. Thus, the reference was made under *Code Civ. Proc. § 638(b)* (reference on agreement of parties) rather than under *Code Civ. Proc. § 639(a)(1)* (reference without consent of parties). The referee subsequently filed his report, but, unable to understand many of its entries, the judge refused to accept it and took additional testimony in open court. From the judgment subsequently entered, both parties appealed.

The Supreme Court reversed with directions because of errors in the account and confusion in the trial court's record. With respect to the trial court's failure to enter an interlocutory judgment directing the reference, the Court said the entering of an interlocutory judgment was not necessarily a condition precedent to ordering a reference, it being well settled in this state that the trial court may, whenever necessary, order an accounting with or without entry of an interlocutory judgment (*216 Cal. 624, 627)* .

Fredendall v. Shrader *(1920) 45 Cal. App. 719, 188 P. 580* , was an action by stockholders (1) to cancel certain trust deeds and chattel mortgages given by defendant corporation to defendant partners to secure payment of promissory notes and shares of stock in defendant corporation issued to defendant partners, (2) to declare void a contract for the sale of oil by defendant corporation to defendant partners, and (3) for an accounting. Other stockholders filed complaints in intervention adopting plaintiffs' complaint. The original action was subsequently dismissed by the original plaintiffs and the case proceeded to trial on the complaints in intervention. After trial the case was referred to a referee to take an

account under *Code Civ. Proc. § 639(a)* (reference without consent of parties). The referee subsequently filed his report which was confirmed by the court. The court made findings (now statement of decision [*see Code Civ. Proc. § 632*]), and judgment was entered in favor of interveners and against defendant partners for $105,406.25. Defendant partners appealed, contending, among other things, that the trial court had no jurisdiction to appoint a referee to take an accounting without first making findings showing that the interveners were entitled to an accounting and rendering an interlocutory judgment to that effect.

The court of appeal rejected the contention and affirmed the judgment. The court said that *Code Civ. Proc. § 639* provides for no such preliminary formality and that the procedure adopted by the trial court with respect to the order of reference appeared to be in accord with the customary practice which had prevailed in California for many years and had received the approval of the Supreme Court (*45 Cal. App. 719, 724)* .

[b] Stage of Proceeding at Which Reference Might Be Directed

The facts and background of ***Putman v. Superior Court*** *(1930) 209 Cal. 223, 286 P. 425* , are discussed at *§ 201.12[3][a]*. The Court said that *Code Civ. Proc. § 639* places no restrictions on the trial court regarding the time during the pendency of the action when it first acquires jurisdiction to appoint a referee and that the implication of the section is to the contrary (*209 Cal. 223, 228)* . The Court explained that regarding the stage in an equity action when the court may proceed of itself to take testimony in the process of an accounting or order a reference for that purpose is not a matter of jurisdiction but, rather, a matter of the order of proof in the particular case (*209 Cal. 223, 229)* .

[4] Additional Authorities

[a] Prior Adjudication of Party's Right to Accounting Is Not Required

The factual background of *Putman v. Superior Court (1930) 209 Cal. 223, 286 P. 425* , is discussed § 201.12[3][a]. The Court, quoting *Fredendall v. Shrader (1920) 45 Cal. App. 719, 724, 188 P. 580* (discussed at [3][a], *above*), disagreed with appellant's argument that the court was without jurisdiction to order a reference because it had not previously found that the interveners were entitled to an accounting and entered an interlocutory decree adjudging that fact. *Code Civ. Proc. § 639* provides for no such preliminary formality, and the procedure adopted by the trial court with respect to the order of reference appeared to be in accord with the customary practice that had prevailed in California for many years and received the approval of the Supreme Court (*209 Cal. 223, 228-229)* .

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20-201 California Points & Authorities § 201.18

§ 201.18 Supporting Contention That Parties May Agree on Person to Be Appointed Referee [Code Civ. Proc. § 640]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE PARTIES [HAVE] EXPRESSLY AGREED ON THE APPOINTMENT OF _____ [*name(s*)] TO ACT AS REFEREE(S) HEREIN AND SUCH APPOINTMENT _____ [SHOULD BE *or* WAS PROPERLY] MADE.

A. Who May Be Appointed Referees. A reference may be ordered to the person or persons, not exceeding three, agreed on by the parties (*Code Civ. Proc. § 640(a)*). [If the parties do not agree, on the selection of the referee or referees, each party must submit to the court up to three nominees for appointment as referee and the court must appoint one or more referees, not exceeding three, from among the nominees against whom there is no legal objection. If no nominations are received from any of the parties, the court must appoint one or more referees, not exceeding three, against whom there is no legal objection, or the court may appoint who reside in the county in which the action or proceeding is triable, and against whom there is no legal objection, or the court may appoint a court commissioner of the county where the cause is pending as a referee (*Code Civ. Proc. § 640(b)*)].

[*Optional*] **B. No Requirement That Referee Appointed Be Subordinate Judicial Officer.** A referee to whom a reference is made pursuant to *Sections 638 et seq. of the Code of Civil Procedure* need not be a subordinate judicial officer, but may be any person who is not disqualified to act as such under those provisions (*see Bird v. Superior Court (1980) 112 Cal. App. 3d 595, 597-598, 169 Cal. Rptr. 530*).

[2] Comments

[a] Use of Form

The points and authorities at [1], *above*, may be submitted in support of the contention that the parties may agree on the

person or persons to act as referees in the case [*see Code Civ. Proc. § 640(a)*]. Optional Paragraph B should be included when the person or persons agreed on is or are not subordinate judicial officers. See *§§ 201.50 -201.58* for memoranda supporting objections to the qualifications of persons to act as referees.

The points and authorities at [1], *above*, may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue as to the right of the parties to agree on the person or persons who are or were to act as referees. For example, the points and authorities may be combined with points and authorities submitted to a judge with a stipulation or request for a reference in which the parties further agree on the person or persons to act as referees in the case. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show that the parties have agreed on a person or persons to serve as referees in the case and their identity or identities.

[b] Related Pleading and Practice Forms

For forms relating to the appointment of a referee, see Ch. 38, *Reference* , in California Forms of Pleading and Practice.

[3] Discussion of Authorities

[a] No Requirement That Referee Appointed Be Subordinate Judicial Officer

Bird v. Superior Court *(1980) 112 Cal. App. 3d 595, 169 Cal. Rptr. 530* , was a mandate proceeding that involved an order appointing as referee a retired superior court judge to hear and determine issues presented by a discovery motion and future discovery motions in a case pending in the trial court. The court of appeal issued a writ directing the trial court to vacate the order on the ground the reference was not authorized by either *Code Civ. Proc. § 638* or *639*. In declining to consider the contention that hearing and determination of discovery matters is a subordinate judicial task which may be delegated to a subordinate judicial officer pursuant to *Cal. Const., art. VI, § 22*, the court said that a person to whom a reference is made pursuant to *Code Civ. Proc. § 638 et seq.* is a referee and referees need not be subordinate judicial officers of the court, such as commissioners, or probate or juvenile referees employed the court (*112 Cal. App. 3d 595, 597-598)* . The court concluded that regardless of his qualifications, the retired judge was acting in the capacity of a referee in which, under *Code Civ. Proc. § 641*, any person competent as a juror might serve (*112 Cal. App. 3d 595, 598)* .

It should be noted that the precise holding of the court in *Bird* that the reference was not authorized by *Code Civ. Proc. § 638* or *639* has been changed by the 1981 amendment to *Code Civ. Proc. § 639* to allow references in the situation involved in *Bird* [*see Code Civ. Proc. § 639(a)(5)*; *see also § 201.16*].

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20-201 California Points & Authorities § 201.19

§ 201.19 Supporting Contention That Reference May Be or Was Properly Ordered--Contract Provision Requiring Reference Is Not Unconscionable [Code Civ. Proc. § 638(a)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

_____ [AN *or* THE] ORDER OF REFERENCE TO _____ [A *or* THE] REFEREE TO TRY ANY OR ALL OF THE ISSUES IN THIS CASE, WHETHER OF FACT OR OF LAW, AND TO REPORT A STATEMENT OF DECISION THEREON _____ [MAY BE *or* WAS] PROPERLY ORDERED BECAUSE THE CONTRACT PROVISION REQUIRING A JUDICIAL REFERENCE IS NOT UNCONSCIONABLE AND SHOULD BE ENFORCED.

A. Criteria of Unconscionability. Unconscionability is a question of law for the court to decide. Unconscionability has both a "procedural" and a "substantive" element, the former focusing on "oppression" or "surprise" due to unequal bargaining power, the latter on "overly harsh" or "one-sided" results. The prevailing view is that procedural and substantive unconscionability must *both* be present in order for a court to refuse to enforce a contract or clause under the doctrine of unconscionability. [But they need not be present in the same degree. A sliding scale may be invoked: the more substantively oppressive the contract term(s), the less evidence of procedural unconscionability is required for a court to conclude that the term is unenforceable, and vice versa] (*Greenbriar Homes Communities, Inc. v. Superior Court (2004) 117 Cal. App. 4th 337, 343-344, 11 Cal. Rptr. 3d 371* ; *Woodside Homes of Cal., Inc. v. Superior Court (Folger) (2003) 107 Cal. App. 4th 723, 727, 132 Cal. Rptr. 2d 35* ; *Pardee Construction Co. v. Superior Court (Rodriguez) (2002) 100 Cal. App. 4th 1081, 1088, 123 Cal. Rptr. 2d 288*).

B. Burdens of Proof. The party who prepared and submitted a contract containing unexpected or harsh terms has the burden of showing that the other party had notice of them, and the party asserting unconscionability as a defense has the burden of establishing it (*Woodside Homes of Cal., Inc. v. Superior Court (Folger) (2003) 107 Cal. App. 4th 723, 727-728, 132 Cal. Rptr. 2d 35*).

C. Level of Procedural Unconscionability Here Is Low. Although the contracts are several pages long, and contain a

great deal of small print, the _____ [*specify party or status, e.g.*, buyers] were necessarily made aware of the existence of the judicial reference provision because they had to initial that paragraph separately. Although the print of the judicial reference provision is small and does not stand out, it is immediately prefaced [above the spaces for the buyers' initials] by the large, bolded statement: "By initialing below, the parties acknowledge that they have read and understand the foregoing and accept that they are waiving their right to a jury trial." Further, the caption--"JUDICIAL REFERENCE OF DISPUTES"--is not misleading, The most important aspect of the judicial reference, the fact that it does not involve a jury, is clearly and conspicuously set forth. In addition, the provision itself discloses that a reference will require fees for the referee, and sets out the presumptive method of apportioning those fees. Thus, even if the court were to assume that _____ [*specify party or status, e.g.*, buyers] could not have eliminated the judicial reference provision, they still can show/have shown only a low level of procedural unconscionability because there was no surprise or misrepresentation (*Woodside Homes of Cal., Inc. v. Superior Court (Folger) (2003) 107 Cal. App. 4th 723, 730, 130 Cal. Rptr. 2d 35*).

[*OR*]

C. Level of Procedural Unconscionability Is Low. A contractual provision for judicial reference is not procedurally unconscionable if printed where the purchaser is likely to see it, immediately above the block for his or her signature, and there is no evidence that any purchasers tried to negotiate out of the provision and were rebuffed (*Greenbriar Homes Communities, Inc. v. Superior Court (2004) 117 Cal. App. 4th 337, 344-345, 11 Cal. Rptr. 3d 371*).

[*Optional*] **D. Unilateral Opt-Out Provision Is Not Likely to Be Misused.** A provision, like the one here, that allows _____ [*specify party or status, e.g.*, defendant] to refuse to participate in the judicial reference unless it is satisfied that all necessary and appropriate parties will participate in the proceeding is designed to ensure that the entire dispute be resolved in one setting. There is nothing to indicate how or why _____ [*specify party or status, e.g.*, defendant] might manipulate this provision to its advantage (*Woodside Homes of Cal., Inc. v. Superior Court (Folger) (2003) 107 Cal. App. 4th 723, 731, 130 Cal. Rptr. 2d 35*).

[*Optional*] **E. Attorney's Fee Provision Is Not Unconscionable.** The part of the judicial reference provision that requires each party to bear their own attorneys' fees, takes/took nothing away from _____ [*specify party or status contesting provision, e.g.*, plaintiffs] and is neither harsh nor oppressive (*Woodside Homes of Cal., Inc. v. Superior Court (Folger) (2003) 107 Cal. App. 4th 723, 731, 130 Cal. Rptr. 2d 35*).

[*Optional*] **F. Secrecy Provision May Be Illegal, but May Be Severed.** The part of the judicial reference provision that requires a stenographic record of the trial, but requires that record to be kept confidential except as necessary for posthearing motions and appeals, is troubling, not because it is unfair or undesirable with respect to the parties themselves, but because it might interfere with the public interest in open proceedings. However, if the secrecy provision is/was challenged at some point in the proceedings and found to be unenforceable, it can be severed (*Woodside Homes of Cal., Inc. v. Superior Court (Folger) (2003) 107 Cal. App. 4th 723, 732, 130 Cal. Rptr. 2d 35*).

[*Optional*] **G. No Showing Has Been Made That Referee's Fees Will Impose Undue Burden.** The provision for judicial reference in this case calls for the expenses of the judicial reference to be shared evenly [but provides in addition that the referee may direct payment at his or her discretion. Expenses for the referee could be substantial, especially compared with the "free" access to the court itself]. While a contract which imposes on the weaker party the possibility of substantial expense is unconscionable, to satisfy his or her burden of proof, the party seeking to establish that the expense renders their agreement unconscionable, must establish at the least that the fees they are likely to pay would be greater than those which would accrue in litigation before the court. Here, _____ [*specify party or status, e.g.*, buyers] made no such showing, nor did they establish that the probable additional expenses of a judicial reference, if any, would be impossible or unreasonably difficult for them to pay[, or that judicial reference was not economically sound from their point of view] (*Greenbriar Homes Communities, Inc. v. Superior Court (2004) 117*

Cal. App. 4th 337, 345, 11 Cal. Rptr. 3d 371 ; *Woodside Homes of Cal., Inc. v. Superior Court (Folger) (2003) 107 Cal. App. 4th 723, 733-735, 130 Cal. Rptr. 2d 35*).

[*Optional*] **H. Presumption of Benefit From Waiver of Jury Trial.** A party can waive his or her right to a jury trial. Based on the public policy in favor of alternative dispute resolution, the court may assume, unless proven otherwise, that a party who gives up the right to a jury trial in favor of alternative dispute resolution gains the benefit of economies of time or expense. Each party also gains the other party's waiver of the right to a jury trial (*Woodside Homes of Cal., Inc. v. Superior Court (Folger) (2003) 107 Cal. App. 4th 723, 734-735, 130 Cal. Rptr. 2d 35*).

[2] Comments

[a] Use of Form

The points and authorities at [1], *above*, may be submitted in support of the contention that a general reference under *Code Civ. Proc. § 638(a)* may be, or was, properly ordered to try any or all issues in an action or proceeding, whether of fact or of law, and to report a statement of decision thereon when the contract provision requiring judicial reference is fair enough not to be unconscionable; that is when the weaker party was not surprised by the inclusion of the provision for judicial reference, or any of its terms, and those terms are fair, or at least not so onerous as to "shock the conscience." The general statements of the elements of procedural unconscionability and substantive unconscionability are not included, but may be incorporated from the form at § 201.44[1]. Instead, the form at [1], *above*, focuses on the specific aspects of the judicial reference provisions at issue. Counsel should use only those which address the similar or identical aspects of the judicial reference provision her or she seeks to enforce. In particular, counsel may have to modify Paragraph C if any aspects of the situation differ from those considered by the authority used in the form. The bracketed language in Paragraph G is from *Woodside Homes of Cal., Inc. v. Superior Court (2003) 107 Cal. App. 4th 723, 132 Cal. Rptr. 2d 35* .

Counsel also should keep in mind that the party opposing enforcement of the judicial reference provision has the burden of proving unconscionability [*see* Paragraph B], and may prefer to use some of the optional paragraphs of the form in reply or rebuttal rather than at the outset. Optional Paragraph G especially lends itself to use after the party trying to establish that the judicial reference provision is unconscionable has failed to carry its burden with regard to the claim that the provision is financially burdensome.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue as to the propriety of a general reference under *Code Civ. Proc. § 638(a)*. For example, the points and authorities may be combined with the points and authorities submitted in opposition to a motion for a general reference. They may also be combined with the points and authorities submitted in support of a motion for an order vacating an order of reference. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief. In addition, these points and authorities may be combined with points and authorities in support of a petition for a writ of mandate seeking to compel the trial court to vacate its order of reference or in support of a petition for a writ of prohibition seeking to restrain the trial court from enforcing its order.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, the argument should quote or refer to the provision at issue and the circumstances under which it was negotiated and explain each instance that shows the lack of surprise, oppression, unfairness, or unequal allocation of risk or expense. It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations.

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities supporting and opposing enforcement of arbitration provisions on the ground that they are unconscionable, see Ch. 20, *Arbitration: Compelling* , and Ch. 20A, *Arbitration: Resisting* .

[d] Opposing Points and Authorities

For a memorandum of points and authorities opposing enforcement of a provision for judicial reference on the ground that it is unconscionable, see *§ 201.44*.

[3] Discussion of Authorities

[a] Criteria of Unconscionability

Greenbriar Homes Communities, Inc. v. Superior Court *(2004) 117 Cal. App. 4th 337, 11 Cal. Rptr. 3d 371* , arose out of consolidated construction-defect cases by 69 owners of homes built by petitioner's predecessor. Forty-three of the real parties were original owners, and the remainder were subsequent purchasers. The development contract between the builder and the original purchasers provided that any disputes would be determined by judicial reference pursuant to *Code Civ. Proc. § 638 et seq.*, with the referee to determine all issues of law and fact and to issue a final judgment. Parties were to bear the costs of the reference equally. The trial court refused to order the reference, finding that real parties would be subjected to a multiplicity of suits because subcontractors would not be joined in the reference, but it made no ruling on the issue of the provision's alleged unconscionability. Petitioner moved for reconsideration, supporting its motion with copies of contracts with its subcontractors. In the builder-subcontractor contracts, the subcontractors agreed that in any dispute between petitioner-builder and third parties that resulted in petitioner making a claim against a subcontractor, petitioner could require the subcontractor to join in the reference. The trial court denied the motion for reconsideration without explanation. Petitioner sought relief from that order by writ of mandate.

The court of appeal issued an alternative writ of mandate and stayed all proceedings in the underlying actions. Ultimately, the court of appeal agreed that because subsequent purchasers never consented to judicial reference, they could not be forced to participate in a general reference (*117 Cal. App. 4th 337, 343)* ; the court therefore denied the writ as to them. As to original purchasers, the court granted the writ, directing the trial court to vacate its ruling denying the reference of claims brought by original purchasers (*117 Cal. App. 4th 337, 348)* . The court found no basis to refuse enforcement of the reference provision based on any threat of a multiplicity of suits because that risk was significantly minimized by the contracts binding all the subcontractors to join in the reference (*117 Cal. App. 4th 337, 346-348)* . The court concluded that the provision for judicial reference was not unconscionable (*117 Cal. App. 4th 337, 346)* .

Although unconscionability is a judicially created doctrine, *Civ. Code § 1670.5* provides a statutory basis for a court's refusal to enforce a contract it finds to have been unconscionable at the time it was made (*117 Cal. App. 4th 337, 343-344)* . Unconscionability has procedural and substantive aspects. Procedural unconscionability takes into consideration the parties' relative bargaining strength and the extent to which a provision is hidden or unexpected, while the substantive element requires terms that "shock the conscience," or at least may be described as harsh or oppressive.

Both elements must be present, but the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to conclude that the term is unenforceable, and vice versa. In this case, the reference provision was printed in the same size and font as the rest of the contract and appeared immediately above the signature block for purchasers (*117 Cal. App. 4th 337, 344)* . The court found the provision not to be procedurally unconscionable. No evidence was presented that original purchasers lacked meaningful choice to decline agreeing to the reference or that any attempts to negotiate this provision had been rebuffed. There was no element of surprise. The provision was not buried, but appeared where the purchaser was likely to see it (*117 Cal. App. 4th 337, 345)* .

Woodside Homes of Cal., Inc. v. Superior Court (Folger) *(2003) 107 Cal. App. 4th 723, 130 Cal. Rptr. 2d 35* , like *Pardee Construction Co. v. Superior Court (Rodriguez) (2002) 100 Cal. App. 4th 1081, 123 Cal. Rptr. 2d 288* , discussed in part *below*, and which is the basis of the form at § 201.44, considered unconscionability in the context of a provision for judicial reference in a form contract drafted by a developer/builder of tract homes, but came to a different conclusion (*107 Cal. App. 4th 723, 736)* . Plaintiffs were buyers of homes from defendant under contracts which required any lawsuit relating to the condition, design, or construction of [any portion of] the purchased home to be submitted to judicial reference pursuant to *Code Civ. Proc. § 638(a)* and *Code Civ. Proc. §§ 641* though 645.1. Significant provisions for the conduct of the reference included the following:

- The referee was to be a retired judge or attorney with substantial experience in real estate matters;
- The parties were entitled to discovery, with the referee to supervise and enforce orders;
- There was to be a stenographic record of the trial, which was to be kept confidential except as necessary for posthearing motions and appeals;
- The referee was to render a statement of decision with findings of fact and conclusions of law;
- The decision could be entered as a judgment, but was also appealable;
- Seller was not required to participate in the judicial reference unless it was satisfied that all necessary and appropriate parties would participate in the proceeding;
- The parties were to share costs and referee's fees equally, unless the referee ordered otherwise; and
- Each party was responsible for their own attorneys' fees.

Defendant moved to compel a reference, representing to the court that all subcontractors on the project were bound by agreements to participate in any reference of disputes related to their work. The trial court denied the motion, agreeing with buyers that the provision for judicial reference was unconscionable and unenforceable, in particular with regard to the provisions for confidentiality, compensation of the referee, the possibility that a mere attorney might be selected as referee; Woodside's unilateral power to decline to participate; and the lack of provision for mediation. Defendant sought review by petition for writ of mandate.

The court of appeal issued the writ (*107 Cal. App. 4th 723, 726)* . The court of appeal began its analysis by noting that this was not an arbitration case, and thus *Code Civ. Proc. § 1298.7*, which allows a purchaser to pursue a court action against a developer for construction and design defects despite having signed an arbitration agreement, was not applicable, nor was *Basura v. U.S. Home Corp. (2002) 98 Cal. App. 4th 1205, 1212, 1214, 120 Cal. Rptr. 2d 328* , which held when the transaction involves interstate commerce, *Code Civ. Proc. § 1298.7* is preempted by the Federal Arbitration Act, and the arbitration provision should be enforced (*107 Cal. App. 4th 723, 726)* . Nevertheless, the court noted that binding judicial reference is similar enough to nonjudicial arbitration that a similar approach is justified in evaluating the enforceability of the provision here at issue (*107 Cal. App. 4th 723, 727)* . The court of appeal discussed

the basic concept of unconscionability, saying that the term has both a procedural and a substantive element. The former takes into consideration the parties' relative bargaining strength and the extent to which a provision is "hidden" or unexpected, while the substantive element requires terms that "shock the conscience" or at the least may be described as "harsh or oppressive" (*107 Cal. App. 4th 723, 727)* . It has been held that the party who prepared and submitted a contract containing unexpected or harsh terms has the burden of showing that the other party had notice of them, and that the party asserting unconscionability as a defense has the burden of establishing that condition (*107 Cal. App. 4th 723, 728)* .

Pardee Construction Co. v. Superior Court (Rodriguez) *(2002) 100 Cal. App. 4th 1081, 123 Cal. Rptr. 2d 288* arose from construction defect litigation regarding seven detached single-family "entry-level" residences built by defendant/petitioner Pardee. Each buyer had signed an "Offer to Purchase and Escrow Instructions" drafted by Pardee which required all agreement-related claims, including construction defects, to be determined by a general reference conducted by a single retired superior court judge appointed pursuant *Code Civ. Proc. § 368 et seq.* The provision included a waiver of the right to punitive damages. Defendant appeared specially to seek a stay of the proceedings and appointment of a judicial referee under the terms of the agreement. Plaintiffs claimed the agreements, including the provisions for judicial reference, were contracts of adhesion, unconscionable, and against public policy. The trial court denied Pardee's motion, finding that the provision requiring submission to judicial reference was unconscionable, that the waiver of the right to recover punitive damages was contrary to public policy [*Civ. Code § 1668*], and that the entire agreement was contrary to *Code Civ. Proc. § 1298.7*, which allows homeowners to sue on construction defect claims notwithstanding the fact that they have agreed to arbitrate those claims. Pardee petitioned for a writ of mandate directing the trial court to vacate its order denying the motion for appointment of a judicial referee.

The court of appeal denied the petition, agreeing that the provisions for judicial reference were unconscionable (*100 Cal. App. 4th 1081, 1092-1093)* . The court first determined that the entire contract was a contract of adhesion, but said that even if the agreements were deemed not to be adhesive, they were unconscionable at the time they were made (*100 Cal. App. 4th 1081, 1087)* . The court discussed the elements of unconscionability, noting that unconscionability is a question of law for the court to decide. Unconscionability has both a "procedural" and a "substantive" element, the former focusing on "oppression" or "surprise" due to unequal bargaining power, the later on "overly harsh" or "one-sided" results. The prevailing view is that procedural and substantive unconscionability must *both* be present in order for a court to refuse to enforce a contract or clause under the doctrine of unconscionability. But they need not be present in the same degree. A sliding scale may be invoked: the more substantively oppressive the contract term(s), the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa (*100 Cal. App. 4th 1081, 1088)* .

[b] Burdens of Proof

Woodside Homes of Cal., Inc. v. Superior Court (Folger) *(2003) 107 Cal. App. 4th 723, 130 Cal. Rptr. 2d 35* , is discussed at [a], *above*.

[c] Level of Procedural Unconscionability Here Is Low

The facts and procedural background of ***Woodside Homes of Cal., Inc. v. Superior Court (Folger)*** *(2003) 107 Cal. App. 4th 723, 130 Cal. Rptr. 2d 35* , are discussed at [a], *above*. The court of appeal chose to focus on the differences between the provision for judicial reference in this case and the one in *Pardee* (*107 Cal. App. 4th 723, 728)* . Here, unlike *Pardee*, there was no evidence concerning any buyer's disagreement or attempt to reject the judicial reference provisions. Nor was there any evidence whether the homes here could be characterized as "entry level" or "mid-level" or "upper level," nor any evidence concerning the availability of similarly-priced housing stock in the region (*107 Cal. App. 4th 723, 729)* . Although the contracts in this case were several pages long, and contained a great deal of small print, the buyers were necessarily made aware of the existence of the judicial reference provision because they had to initial that paragraph separately (*107 Cal. App. 4th 723, 729-730)* . While the print of the provisions was small and did

not stand out, immediately above the spaces for the buyers' initials was the large, bolded statement: "By initialing below, the parties acknowledge that they have read and understand the foregoing and accept that they are waiving their right to a jury trial." The caption--"JUDICIAL REFERENCE OF DISPUTES"--did not contain the arguably misleading addition present in *Pardee*: "TRIAL BY JUDGE IN COURT OF COMPETENT JURISDICTION." (*107 Cal. App. 4th 723, 729)* . Here, the most important aspect of the judicial reference, the fact that it does not involve a jury, was clearly and conspicuously set forth. The paragraph also noted that a reference would require fees for the referee, and set out the presumptive method of apportionment. Thus, the contracts here lacked most, if not all, of the procedurally unconscionable factors found to exist in *Pardee*. Nor was there any evidence of either de facto coercion, lack of choice, or ignorance and unsophistication on the part of the buyers. Even if the court were to assume that buyers could not have eliminated judicial reference provisions, the buyers have shown only a low level of procedural unconscionability because, there was no surprise or misrepresentation. Thus, in order to prevail, buyers would have to establish a *high* level of substantive unconscionability (*107 Cal. App. 4th 723, 730)* .

The facts and procedural background of ***Greenbriar Homes Communities, Inc. v. Superior Court*** *(2004) 117 Cal. App. 4th 337, 11 Cal. Rptr. 3d 371* , and the portions of the opinion addressing unconscionability in general and procedural unconscionability are discussed at [a], *above*.

[d] Unilateral Opt-Out Provision Is Not Likely to Be Misused

The facts and procedural background of ***Woodside Homes of Cal., Inc. v. Superior Court (Folger)*** *(2003) 107 Cal. App. 4th 723, 130 Cal. Rptr. 2d 35* , are discussed at [a], *above*. In considering substantive unconscionability, the court of appeal again began by noting the differences between the judicial reference provision in *Pardee* and the one in this case. The provision in this case had no limit on damages and required the parties to share the referee's fees evenly unless the referee determined otherwise. The things that the trial court here was concerned--Woodside's power to "opt out," the lack of any provision for attorneys' fees, the possibility that a non-judge could be selected, the confidentiality of the transcript, and the lack of provisions for mediation, did not trouble the court of appeal (*107 Cal. App. 4th 723, 730)* . The court noted that Woodside had required virtually all of its subcontractors to agree to participate in any judicial reference proceeding and that the provision was designed to ensure that the entire dispute could be resolved in one setting. The court found nothing to indicate how or why Woodside might manipulate this provision to its advantage (*107 Cal. App. 4th 723, 731)* . As for the trial court's concern that a mere attorney could be appointed as referee, the court of appeal pointed out that the law governing references accepts such persons as qualified referees [*see Code Civ. Proc., §§ 638, 640-641*]. Similarly, the court of appeal found speculative, and to a large extent rebutted by Woodside's counsel, the trial court's concern that mediation or settlement conferences would be unavailable (*107 Cal. App. 4th 723, 731)* . As for the provision that both sides would bear their own attorneys' fees, this took nothing away from the buyers and was neither harsh nor oppressive (*107 Cal. App. 4th 723, 731)* . The confidentiality provision did trouble the court of appeal to the extent that it might interfere with the public interest in open proceedings. The court found nothing unfair or undesirable about the secrecy provision with respect to the parties themselves (*107 Cal. App. 4th 723, 732)* . In addition, if the secrecy provision was challenged at some point in the proceedings and found to be unenforceable, it could be severed (*107 Cal. App. 4th 723, 732)* .

[e] Attorney's Fee Provision Is Not Unconscionable

The facts and procedural background of ***Woodside Homes of Cal., Inc. v. Superior Court (Folger)*** *(2003) 107 Cal. App. 4th 723, 130 Cal. Rptr. 2d 35* , are discussed at [a], *above*. The court's consideration of the attorney's fee provision is discussed at [d], *above*.

[f] Secrecy Provision May Be Illegal, but May Be Severed

The facts and procedural background of ***Woodside Homes of Cal., Inc. v. Superior Court (Folger)*** *(2003) 107 Cal. App. 4th 723, 130 Cal. Rptr. 2d 35* , are discussed at [a], *above*. The court's consideration of the secrecy provision is

discussed at [d], *above.*

[g] No Showing Has Been Made That Referee's Fees Will Impose Undue Burden

The facts and procedural background of ***Greenbriar Homes Communities, Inc. v. Superior Court*** *(2004) 117 Cal. App. 4th 337, 11 Cal. Rptr. 3d 371* , and the portions of the opinion addressing unconscionability in general and procedural unconscionability are discussed at [a], *above*.

The *Greenbriar Homes Communities* court also found the provision not to be substantively unconscionable. Its terms were not one-sided and did not limit the amount or type of relief the original purchasers could obtain. The judicial reference provision attempted to ensure that the parties could enforce their rights and avail themselves of an efficient and fair a manner of resolving arguments, consistent with the rules of procedure and evidence that apply to a trial. Real parties challenged the fee-sharing provision as contrary to *Ting v. AT&T (9th Cir. 2003) 319 F.3d 1126, 1151* , which found an arbitration fee-sharing provision categorically unreasonable because it imposed on consumers cost greater than they would have borne had they filed a complaint in court. The court of appeal disagreed, noting that California has applied this rule, announced in *Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 110-111, 99 Cal. Rptr. 2d 745, 6 P.3d 669* , only if an employee relies on unwaivable statutory rights, and that one appellate court has determined that in consumer arbitration cases, any claim that arbitral fees are unreasonable should be handled on a case-by-case basis, with the consumer having the burden of proof (*117 Cal. App. 4th 337, 345)* .

The facts and procedural background of ***Woodside Homes of Cal., Inc. v. Superior Court (Folger)*** *(2003) 107 Cal. App. 4th 723, 130 Cal. Rptr. 2d 35* , are discussed at [a], *above*. Turning to the matter of the expense of a reference, the court of appeal noted that the provision for judicial reference in this case called for the even division of the expenses of the judicial reference, with an additional provision authorizing the referee to direct payment at his or her discretion. Still, the expenses for the referee could be substantial. Arguably, compared with the "free" access to the court itself, a contract which imposes on the weaker party the possibility of substantial expense is unconscionable (*107 Cal. App. 4th 723, 732)* . For buyers to show that their agreement is unconscionable, they had to demonstrate at the least that the fees they were likely to pay would be greater than those which would accrue in litigation before the court. Here, the buyers made no such showing, although Woodside's counsel's uncontradicted representation was that it was routine for courts to appoint a nonconsensual special master or referee to handle at least all pretrial matters such as discovery and settlement negotiations. Thus, in even if they were to pursue a trial, buyers could still be potentially responsible for a share of any fees charged by the referee. No attempt was made to establish the likely length of a jury trial, or the additional attorneys' fees, if any, which litigation before the court would be likely to generate (*107 Cal. App. 4th 723, 733)* . Nor did buyers establish that the probable additional expenses of a judicial reference, if any, would be impossible or unreasonably difficult for them to pay or that judicial reference was not economically sound from their point of view (*107 Cal. App. 4th 723, 733-734)* .

[h] Presumption of Benefit From Waiver of Jury Trial

The facts and procedural background of ***Woodside Homes of Cal., Inc. v. Superior Court (Folger)*** *(2003) 107 Cal. App. 4th 723, 130 Cal. Rptr. 2d 35* , are discussed at [a], *above*. Concerning the buyer's waiver of their rights to jury trial, the court of appeal noted that the waiver here was not obtained by a stealthy device, such as by a provision buried near the end of a long document (*107 Cal. App. 4th 723, 734)* . The court of appeal noted that the *Pardee* court found no evidence in the record that the buyers had gained anything in return for their waiver, because it was not persuaded that there would be any economies of time or expense. This court of appeal however, took the approach that, based on the public policy favoring alternative dispute resolution, it should assume that economies existed unless proven otherwise. Buyers did get something in addition for their jury waiver, Woodside's matching waiver (*107 Cal. App. 4th 723, 734)* . The court of appeal discussed the possible reasons for the popularity of alternative dispute resolution provisions in contracts drawn by the party most likely to be the defendant if disputes arose (*107 Cal. App. 4th 723, 734-736)* , and concluded by noting that while it did not purport to hold all agreements for judicial reference to be valid

and enforceable, the agreements for judicial reference is this case were enforceable (*107 Cal. App. 4th 723, 736)* .

California Points & Authorities

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CHAPTER 201 REFERENCE AND REFEREES
PART II. FORMS
A. Grounds for Reference

20-201 California Points & Authorities §§ 201.20-201.39

[Reserved]

§§ 201.20[Reserved]

California Points & Authorities

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Volume 20 Chapters 200-209 RECEIVERS---to---SANCTIONS
CHAPTER 201 REFERENCE AND REFEREES
PART II. FORMS
A. Grounds for Reference

20-201 California Points & Authorities § 201.40

§ 201.40 Opposing Contention That Reference May Be or Was Properly Ordered--Court Has No Power to Order General Reference Without Consent of Parties [Code Civ. Proc. § 638(a)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

_____ [AN *or* THE] ORDER OF REFERENCE TO _____ [A *or* THE] REFEREE TO TRY ANY OR ALL OF THE ISSUES IN THIS CASE, WHETHER OF FACT OR OF LAW, AND TO REPORT A STATEMENT OF DECISION _____ [MAY NOT BE *or* WAS NOT PROPERLY] ORDERED BECAUSE NOT ALL THE PARTIES TO THIS ACTION [HAVE] CONSENTED TO THE REFERENCE.

A. General Reference Requires Consent of Parties. Except for a controversy arising out of a written contract or lease providing that such controversy shall be heard by a reference, a reference may be ordered to try any or all of the issues in an action or proceeding, whether of fact or of law, and to report a statement of decision only on the agreement of the parties filed with the clerk or judge, or entered in the minutes (*Code Civ. Proc. § 638(a)*; *see Holt v. Kelly (1978) 20 Cal. 3d 560, 562, 143 Cal. Rptr. 625, 574 P.2d 441* ; *Ellsworth v. Ellsworth (1954) 42 Cal. 2d 719, 722, 269 P.2d 3* ; *Settlemire v. Superior Court (Settlemire) (2003) 105 Cal. App. 4th 666, 673, 29 Cal. Rptr. 2d 560*).

[*Optional*] **B. Parties Entitled to Trial by Jury in Action at Law.** In view of a party's constitutional right to trial by jury secured by *Article I, Section 16, of the California Constitution*, the court may not, without the consent of all the parties to the action, order a reference in an action at law (*Grim v. Norris (1861) 19 Cal. 140, 142* ; *Smith v. Pollock (1852) 2 Cal. 92, 94)* .

[*Optional*] **C. Contractual Provision for Reference Is Not Enforceable Against Subsequent Purchaser.** A provision in a development contract for consensual reference of any disputes arising under the agreement cannot be enforced against a subsequent purchaser of the home built for the original contracting party (*Greenbriar Homes Communities, Inc. v. Superior Court (2004) 117 Cal. App. 4th 337, 343, 11 Cal. Rptr. 3d 371*)

[2] Comments

[a] Use of Form

The points and authorities at [1], *above*, may be submitted in opposition to a contention that a general reference under *Code Civ. Proc. § 638(a)* may be or was properly ordered to try any or all issues in an action or proceeding, whether of fact or of law, and to report a statement of decision when not all of the parties to the case consented to the reference. Optional Paragraph B should be included when the effect of the reference is or was to deprive a party of his or her constitutional right to trial by jury.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue as to the propriety of a general reference under *Code Civ. Proc. § 638(a)*. For example, the points and authorities may be combined with the points and authorities submitted in opposition to a motion for a general reference. They may also be combined with the points and authorities submitted in support of a motion for an order vacating an order of reference or, since the referee's finding constitutes a part of the judgment roll [*see Code Civ. Proc. § 670(b)*; § 201.74], a motion to set aside and vacate the judgment entered on the referee's report on the ground entry of the judgment was unauthorized and the judgment is void on its face [*see Code Civ. Proc. § 473(d)*]. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

In addition, these points and authorities may be combined with points and authorities in support of a petition for a writ of mandate seeking to compel the trial court to vacate its order of reference or in support of a petition for a writ of prohibition seeking to restrain the trial court from enforcing its order.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show that not all the parties, including the party he or she represents, consented to the reference. If optional Paragraph B is included, counsel should also show that the action is one in which the parties are entitled to a trial by jury and that a jury trial has been demanded or has not been waived. It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations.

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Forms

For forms that may be adapted for use in moving to set aside or vacate a judgment under Code Civ. Proc. § 473(d) on the ground entry of judgment on the referee's report was unauthorized and the judgment is void, see California Forms of Pleading and Practice, Ch. 489, *Relief From Judgments and Orders* . For forms for use in mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* , in that publication.

[d] Related Points and Authorities

For memoranda of points and authorities generally supporting and opposing a motion to set aside a judgment on the ground it is void or a petition for writ of mandate or prohibition, see Ch. 70, *Defaults, Default Judgments, and Relief*

From Judgments and Orders , and Ch. 150, *Mandate and Prohibition* , in this publication.

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities at [1], *above*, may be submitted in opposition to the contention supported by the points and authorities *set out in § 201.10*.

[3] Discussion of Authorities

[a] General Reference Requires Consent of Parties

The facts and background of ***Holt v. Kelly*** *(1978) 20 Cal. 3d 560, 143 Cal. Rptr. 625, 574 P.2d 441* , are discussed in *§ 201.15[3][a]*. In upholding the propriety of a special reference, the Court, citing *Code Civ. Proc. §§ 638(a)* and *644*, said that a general reference is permitted only by the consent of the parties (*20 Cal. 3d 560, 562)* .

Ellsworth v. Ellsworth *(1954) 42 Cal. 2d 719, 269 P.2d 3* , involved an appeal from a superior court order vacating a prior order that adopted the findings and recommendation of a court commissioner. The case arose out of a proceeding by the mother to modify the provisions of a divorce decree awarding custody of the parties' minor son to the father. The matter had been referred to a court commissioner who, after a hearing, made findings of fact on which he based a recommendation that custody be given to the mother. The trial judge endorsed the report 'So ordered' and by a minute order directed a modification of the decree in accordance with the commissioner's recommendation. The father filed exceptions to the commissioner's findings of fact and the court's subsequent order, together with a motion to set them aside. The court sustained the exceptions and granted the motion, leaving in effect the custody order as set forth in the divorce decree. The mother appealed from the order vacating the first order, contending that the second order was equivalent to an order granting a new trial and was appealable. The father moved to dismiss the appeal on the ground the order was interlocutory and nonappealable.

The Supreme Court pointed out that the statutory provisions governing proceedings before referees and commissioners preserve the traditional distinction between a general reference, that is, a trial before a referee on all the issues of fact or of law, and a special reference, in which the referee considers only a part of the issues. Citing *Code Civ. Proc. § 638(a)*, the Court said that a general reference may be had only with the consent of the parties (*42 Cal. 2d 719, 722)* . The Court, however, dismissed the appeal on the ground the order was interlocutory because the reference to the commissioner was made pursuant to former Code Civ. Proc. § 259a(2) (*now Code Civ. Proc. § 259(b)*). The Court said that this statute does not require the consent of the parties and does not contemplate a hearing on the whole issue within the meaning of the statutory provisions relating to a general reference and concluded that the proceeding was equivalent to a special and not a general reference (*42 Cal. 2d 719, 723)* .

Real party in ***Settlemire v. Superior Court (Settlemire)*** *(2003) 105 Cal. App. 4th 666, 129 Cal. Rptr. 2d 560* , applied for a domestic violence restraining order against her husband. A commissioner issued a temporary restraining order and set the matter for an order to show cause hearing to determine not just the restraining order, but temporary child custody, visitation, disposition of a community asset, the relinquishment of firearms, and the exclusion of husband from the residence. Husband objected to a commissioner deciding the case and moved to vacate the assignment as well as to disqualify the commissioner. The trial court denied the motion to vacate the assignment, referred it to a different commissioner, and modified the order to state that the matter was referred pursuant to *Code Civ. Proc. § 259(b)* for a hearing, and findings on any matter of fact on which information was required by the court. Husband petitioned the court of appeal for writ of mandate, contending that without a stipulation from both parties, the commissioner lacked the authority to preside over the proceeding.

The court of appeal issued the writ, having concluded that the trial court's broad order for reference of a case with multiple factual issues was an improper delegation of judicial duties. The court of appeal directed the trial court to issue

an order that specified the factual issues to be resolved (*105 Cal. App. 4th 666, 673)* . *Code Civ. Proc. § 259(b)* provides in part that subject to the supervision of the court, every court commissioner has the power to take proof and make and report findings thereon as to any matter of fact on which information is required by the court. Any party to any contested proceeding may except to the commissioner's report. The court of appeal listed many duties of commissioners that do not require the consent or stipulation of the parties (*105 Cal. App. 4th 666, 672-673)* . As to references, there are two kinds: general and special. In a general reference hearing, the referee, with the consent of the parties, hears and decides the entire controversy [*see Code Civ. Proc. § 638*]. A trial court's nonconsensual general reference constitutes an unconstitutional abdication of judicial authority (*105 Cal. App. 4th 666, 673)* .

[b] Parties Entitled to Trial by Jury in Action at Law

Cal. Const., art. I, § 16, provides in part that trial by jury is an inviolate right and shall be secured to all and that in a civil cause a jury may be waived by the consent of the parties expressed as prescribed by statute. The applicable statute is *Code Civ. Proc. § 631*.

Grim v. Norris *(1861) 19 Cal. 140* , was an action on common counts for work and labor performed (quantum meruit) and money paid (indebitatus assumpsit). Without the consent of the parties and over the objection of the defendant, the court referred the case to a referee for trial on the ground that trial of the case required examination of a long account (*now Code Civ. Proc. § 639(a)(1)*). On the report of the referee, a judgment was entered for plaintiff and defendant appealed.

The Supreme Court reversed. The Court pointed out that the constitution secures the right of trial by jury to all and provides that the right shall remain inviolate forever (*now Cal. Const., art. I, § 16*). The Court said that, if the statute (*now Code Civ. Proc. § 639(a)(1)*) could be construed to have authorized the reference, the right to trial by jury could be entirely swept away by legislative enactment. The Court explained that the framers of the constitution regarded the right to a jury trial as too sacred and valuable to be intrusted to the guardianship of the Legislature, and that the constitutional provision was intended as a restriction on legislative authority. The Court held that the constitutional provision did not, however, extend to equity causes and was limited in its operation to those cases in which the right of trial by jury previously existed. The Court would not presume an intentional violation of the constitution by the Legislature in enacting the statute and that, by construing the statute as applying solely to proceedings in equity, it would avoid even a seeming conflict between the two instruments (*19 Cal. 140, 142*). The Court had no doubt that this construction was in accordance with the legislative intent, but that, whether it was or wasn't, it was certain that no other effect could be given to the statute (*19 Cal. 140, 142-143*).

Smith v. Pollock *(1852) 2 Cal. 92* , was an action on a common count for services rendered in which the trial court referred the case to a referee for trial on the ground the trial would involve the examination of a long account. Defendant's counsel did not object to the reference and, on his suggestion, a provision was added to the order requiring plaintiffs to serve defendant with a copy of the account sued on. Three days later, defendant moved that the order of reference be set aside and insisted on a jury trial. The motion was denied, and defendant appealed.

The Supreme Court reversed. The Court pointed out that the California Constitution (*now Cal. Const., art. I, § 16*) provides that the right to trial by jury shall be secured to all and remain inviolate forever, but that a jury may be waived in civil causes in the manner provided by law. The Court further pointed out that in the statute relating to references the Legislature had authorized a waiver of the right to jury trial by providing that a reference could be ordered on the agreement of the parties filed with the court or entered in the minutes (*now Code Civ. Proc. § 638*). The Court said: (1) the language of the constitution was explicit; (2) the mere silence of an attorney could not amount to a waiver of a constitutional right; (3) the act concerning references required the consent of the parties to be in writing or entered on the minutes; (4) the waiver must appear affirmatively and not by implication; and (5) defendant was not concluded by the act of his counsel because the statute concerning attorneys (*now Code Civ. Proc. § 283(1)*) gives an attorney power to bind his principal only by an agreement in writing, filed with the clerk or entered on the minutes of the court, and that

no such agreement appeared in the record of the case (*2 Cal. 92, 94)* . The Court concluded that the effect of the order of reference was to deprive defendant of a constitutional right, that any waiver of the right must appear in the manner prescribed by law, that no such waiver appeared directly from the record, and that the Court could not infer it from the silence of defendant's counsel when the order of reference was made (*2 Cal. 92, 94)* .

[c] Contractual Provision for Reference Is Not Enforceable Against Subsequent Purchaser

The facts and procedural background of ***Greenbriar Homes Communities, Inc. v. Superior Court*** *(2004) 117 Cal. App. 4th 337, 11 Cal. Rptr. 3d 371* , and the portion of the opinion dealing with the alleged unconscionability of the provision for judicial reference are discussed at *§ 201.19[3][a]* and *[g]*. The court of appeal agreed with the trial court regarding the claims of subsequent purchasers, holding that, because they had never consented to judicial reference, they could not be forced to participate in a general reference (*117 Cal. App. 4th 337, 343)* .

[4] Additional Authorities

[a] General Reference Requires Consent of Parties

In *In re M. (1975) 14 Cal. 3d 727, 122 Cal. Rptr. 574, 537 P.2d 406* , the Supreme Court, in seeking guidance from the roles of other types of referees in order to determine the constitutional limitations placed on judicial acts by juvenile court referees, pointed out that statutes governing references (*Code Civ. Proc. § 638(a), 644(a)*) permit a general reference of all the factual and legal issues of a civil case for binding determination by a referee only if the reference is consented to by the parties (*14 Cal. 3d 727, 734)* .

Jovine v. FHP, Inc. (1998) 64 Cal. App. 4th 1506, 76 Cal. Rptr. 2d 322 , was a wrongful termination action in which a special discovery referee was appointed pursuant to *Code Civ. Proc. § 639(a)(5)*. However, that referee proceeded to hear and determine three motions for summary judgment, which disposed of plaintiff's case. Despite objections, the trial court adopted the referee's orders on the motions and entered judgment thereon. Plaintiff appealed.

The court of appeal reversed. Plaintiff's participation in the motions was no substitute for consent required by *Code Civ. Proc. § 638*. There was no written consent and no oral consent on the record. Nor did plaintiff's actions amount to waiver or estoppel of the right to have referee's determinations voided. To ratify a general reference on the basis of waiver or estoppel would undermine important public policies: (1) the constitutional prohibition on improper delegation of judicial power and (2) the principle that the courts are open to litigants and the cost of operating them is borne as a public expense because they are an integral and essential part of our democratic form of government (*64 Cal. App. 4th 1506, 1509, 1523, 1526-1531)* .

Additional cases stating or holding that a general reference may be had only on the consent of the parties include: *Barker Bros. Inc. v. Coates (1931) 211 Cal. 756, 758, 297 P. 8* ; *Bird v. Superior Court (1980) 112 Cal. App. 3d 595, 599, 169 Cal. Rptr. 530* ; *Estate of Bassi (1965) 234 Cal. App. 2d 529, 536, 44 Cal. Rptr. 541* ; *Weinfeld v. Weinfeld (1958) 159 Cal. App. 2d 608, 613, 324 P.2d 342* .

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CHAPTER 201 REFERENCE AND REFEREES
PART II. FORMS
A. Grounds for Reference

20-201 California Points & Authorities § 201.41

§ 201.41 Opposing Contention That Reference May Be or Was Properly Ordered--Court Has No Power to Order Special Reference Not Authorized by Code Civ. Proc. § 639 Without Consent of Parties

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [AN *or* THE] ORDER OF REFERENCE IN THIS CASE _____ [MAY NOT BE *or* WAS NOT] PROPERLY GRANTED BECAUSE THE COURT HAS NO POWER TO ORDER A REFERENCE FOR ANY PURPOSE NOT AUTHORIZED BY SECTION 639 OF THE CODE OF CIVIL PROCEDURE WITHOUT THE CONSENT OF THE PARTIES.

A. Special Reference Not Authorized by *Code Civ. Proc. § 639* Is Improper Without Consent of Parties. A special reference without the consent of the parties for a purpose not authorized by *Section 639 of the Code of Civil Procedure* is improper (*In re Marriage of Galis (1983) 149 Cal. App. 3d 147, 150, 196 Cal. Rptr. 659* ; *Bird v. Superior Court (1980) 112 Cal. App. 3d 595, 599, 169 Cal. Rptr. 530*).

[*Optional*] **B. Limitation on Scope of Reference Under *Code Civ. Proc. § 639(a)(1)*.** The court has no power under Section *§ 639(a)(1) of the Code of Civil Procedure*, authorizing a reference when trial of an issue of fact requires the examination of a long account on either side, to order a reference without the consent of the parties for the trial of any issue of fact other than that involved in the examination of a long account (*Williams v. Benton (1864) 24 Cal. 1451, 424, 425)* .

[*Optional*] **C. Specificity Required for Reference Under *Code Civ. Proc. § 639(a)(3)*.** A special reference is limited to specific fact determinations. A court may appoint a referee without the consent of the parties under *Section 639(a)(3) of the Code of Civil Procedure* when a question of fact, other than on the pleadings, arises on motion or otherwise, in any stage of the action. However, unless the trial court's order of reference specifies the factual issues it wishes the referee to resolve, a special reference of all issues [in a contested divorce action] is not permitted by [either] Section 639(a)(3) [or 259] of the Code of Civil Procedure (*Settlemire v. Superior Court (Settlemire) (2003) 105 Cal. App. 4th 666, 673-676,*

29 Cal. Rptr. 2d 560).

[2] Comments

[a] Use of Form

The points and authorities at [1], *above*, may be submitted in opposition to a contention that a special reference may be or was properly ordered without the consent of the parties. Optional Paragraph B should be included if the reference will be or was made under *Code Civ. Proc. § 639(a)(1)* and the referee will be or was directed to find on issues other than those involved in the examination of a long account. Optional Paragraph C is for use if the reference will be or was made under *Code Civ. Proc. § 639(a)(3)* and the order of reference will not or does not specify the factual issues to be resolved. The bracketed language in Optional Paragraph C is for use if the special reference will be or has been made to a commissioner in a dissolution action law matter, purportedly under the authority of *Code Civ. Proc. § 259*.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue as to the propriety of a reference without the consent of the parties. For example, the points and authorities may be combined with the points and authorities submitted in opposition to a motion for a reference for a purpose not authorized by *Code Civ. Proc. § 639*, or in opposition to a motion for a reference under *Code Civ. Proc. § 639(a)(1)* to try a fact issue other than one involved in the examination of a long account. Alternatively, when an objection to the reference was timely made, they might be combined with points and authorities in opposition to a motion for an order confirming and adopting the referee's report [*see § 201.70*] or in support of a motion to set aside and vacate the judgment entered on the referee's report on the ground entry of the judgment was unauthorized and the judgment is void [*see Code Civ. Proc. § 473(d)*]. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

In addition, these points and authorities may be combined with points and authorities in support of a petition for a writ of mandate seeking to compel the trial court to vacate its order of reference or in support of a petition for a writ of prohibition seeking to restrain the trial court from enforcing its order.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show that not all the parties or none of them has consented to the reference and that the reference is not authorized by any provision of *Code Civ. Proc. § 639*.

[c] Related Pleading and Practice Forms

For forms that may be adapted for use in moving to set aside or vacate a judgment under Code Civ. Proc. § 473(d) on the ground entry of judgment on the referee's report was unauthorized and the judgment is void, see California Forms of Pleading and Practice, Ch. 489, *Relief From Judgments and Orders* . For forms for use in mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* , in that publication.

[d] Related Points and Authorities

For memoranda of points and authorities generally supporting and opposing a motion to set aside and vacate a void judgment on various grounds or a petition for writ of mandate or prohibition, see Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders* , and Ch. 150, *Mandate and Prohibition* , in this publication.

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities at [1], *above*, may be submitted in opposition to the contentions

supported by the points and authorities *set out in §§ 201.12 -201.16* or those in § 201.70.

[3] Discussion of Authorities

[a] Special Reference Not Authorized by Code Civ. Proc. § 639 Is Improper Without Consent of Parties

In re Marriage of Galis *(1983) 149 Cal. App. 3d 147, 196 Cal. Rptr. 659* , was a contested dissolution of marriage proceeding set before a commissioner. Prior to commencement of the trial, the parties were requested to stipulate that the matter could be heard and determined by the commissioner sitting as a temporary judge. Counsel for the wife refused to stipulate. The commissioner then transferred the matter to a judge of the court, who, over the wife's objection, assigned the same commissioner to hear evidence and make findings of fact and recommendations as to the disposition of the matter in his capacity as a referee. The commissioner proceeded to hear the evidence of the parties and subsequently issued findings of fact (now decision [*see Code Civ. Proc. § 645*]) and recommendations in the matter. The wife petitioned the judge who had made the reference for a reconsideration of the referee's recommendations and a trial before the judge on the issues of spousal support, child support, and attorney's fees. The petition was denied without a hearing. An interlocutory judgment (now judgment) of dissolution was subsequently granted by the judge that incorporated the findings and recommendations of the referee. The wife appealed.

The court of appeal remanded the case to the trial court with instructions to vacate the interlocutory judgment and the order of reference. The court said that when a party does not consent to a reference the authority of the court to make the reference on its own motion is defined and limited by *Code Civ. Proc. § 639* (*149 Cal. App. 3d 147, 150)* . The court enumerated the matters listed in *Code Civ. Proc. § 639* which may be referred, and, quoting from *Williams v. Benton (1864) 24 Cal. 424, 425-426* (discussed at [b], *below*), said that the character of the issue which may be referred is particularly described in the section, and, by necessary implication, all issues not answering to that description are excluded from the operation of the section (*149 Cal. App. 3d 147, 150-151)* . The court of appeal concluded that the matter referred--a full-fledged contested dissolution proceeding--failed to qualify under any of the categories listed in *Code Civ. Proc. § 639* (*149 Cal. App. 3d 147, 152)* .

The facts and procedural background of ***Bird v. Superior Court*** *(1980) 112 Cal. App. 3d 595, 169 Cal. Rptr. 530* , are discussed at *§ 201.18[3][a]*. As pointed out there, the case involved an order appointing a referee to hear and determine issues presented by a discovery motion and future discovery motions in a case pending in the trial court. The court of appeal issued a writ directing the trial court to vacate the order. The appellate court held: (1) the authority of the trial court to make a reference is defined and limited by *Code Civ. Proc. §§ 638* (reference with consent of parties) and 639 (reference without consent of parties); (2) since the reference was made without the consent of the parties it was a special reference under *Code Civ. Proc. § 639*; and *(3) Code Civ. Proc. § 639* did not authorize a reference for such purpose (*112 Cal. App. 3d 595, 598-599)* . In reaching its conclusion, the court said that in *Williams v. Benton (1864) 24 Cal. 424, 425-426* (discussed at [b], *below*), the Supreme Court construed the corresponding substantially identical provisions of §§ 182 and 183 of the former Practice Act and held that a reference made without the consent of both parties in a suit to dissolve a partnership and settle the partnership account which empowered the referee to "try all the issues and report a finding and judgment thereon" was beyond the power of the court. The appellate court noted that in *Williams* there were issues other than the condition of the partnership accounts (*e.g.*, what the respective partners' shares were). Quoting *Williams*, the court of appeal said that the power of the court to compel a reference is derived from § 183 of the former Practice Act [*now Code Civ. Proc. § 639*], can be exercised only as therein provided, that the character of the issue which may be referred is particularly described, and that by necessary implication all issues not answering to that description are excluded from the operation of the section (*112 Cal. App. 3d 595, 599)* .

Note that *Code Civ. Proc. § 639* was amended in 1981 to allow references in the situation involved in *Bird* [*see Code Civ. Proc. § 639(a)(5)*; *In re Marriage of Galis (1983) 149 Cal. App. 3d 147, 154 n.5, 196 Cal. Rptr. 659* ; *see also § 201.16*].

[b] Limitation on Scope of Reference Under Code Civ. Proc. § 639(a)(1)

Williams v. Benton *(1864) 24 Cal. 424* , was an action to dissolve a partnership and for an accounting. When the case was called for trial, plaintiff moved for the appointment of a referee to try all the issues and report a finding and judgment thereon. The motion was opposed by defendant but granted by the trial court and the matter was referred. The referee reported a judgment in favor of plaintiff and the court ordered a judgment in accordance with the report. Defendant appealed.

The Supreme Court reversed on the ground the trial court had no power without the consent of the parties to refer issues other than those involved in the examination of a long account to the referee or to direct the referee to report a judgment (*24 Cal. 424, 426)* . The Court said that under § 83 of the former Practice Act [*now Code Civ. Proc. § 639(a)(1)*] when the trial of an issue of fact requires the examination of a long account on either side, a reference without the consent of the parties may be ordered, but that if there are other issues in the case not involving the examination of a long account, the court has no compulsory power to send them to a referee for trial (*24 Cal. 424, 425)* . The Court held that it was not the intention of the Legislature to confer compulsory power on the court over the question of reference beyond such issues as involve the examination of a long account. Even in this situation, under the Constitution, the statute could not apply to cases in which the parties have a constitutional right to a trial by jury, although the Court pointed out the right to a jury trial did not apply in the case before it (*24 Cal. 424, 426)* .

[c] Specificity Required for Reference Under Code Civ. Proc. § 639(a)(3)

The facts and procedural background of ***Settlemire v. Superior Court (Settlemire)*** *(2003) 105 Cal. App. 4th 666, 129 Cal. Rptr. 2d 560* , and the portion of the opinion addressing general references, is discussed at *§ 201.40[3][a]*. The court of appeal issued a writ of mandate after concluding that the trial court's broad order for nonconsensual reference of a case with multiple factual issues was an improper delegation of judicial duties. The court of appeal directed the trial court to issue an order that specified the factual issues to be resolved (*105 Cal. App. 4th 666, 673)* . The court noted that a special reference is limited to specific fact determinations. A court may appoint a referee without the consent of the parties when a question of fact, other than on the pleadings, arises on motion or otherwise, in any stage of the action [*see Code Civ. Proc § 639(a)(3)*]. The findings and recommendations made by a commissioner at a special reference hearing are advisory and not binding (*105 Cal. App. 4th 666, 673)* . *Code Civ. Proc. § 259(e)* provides in part that in family law matters, a commissioner is authorized to hear and report findings and conclusions to the court for approval, rejection, or change in all preliminary matters. In a typical order for reference, the trial court informs the hearing officer of the specific facts it wishes to be resolved (*105 Cal. App. 4th 666, 674-675)* . Reference of all issues in a contested divorce action is not permitted by either *Code Civ. Proc. § 639* or *Code Civ. Proc. § 259* (*105 Cal. App. 4th 666, 676)* .

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CHAPTER 201 REFERENCE AND REFEREES
PART II. FORMS
A. Grounds for Reference

20-201 California Points & Authorities § 201.42

§ 201.42 Opposing Contention That Reference May Be or Was Properly Ordered--Reference to Take Account [Code Civ. Proc. § 639(a)(1), (2)] Is Discretionary With Court and Denied When Unnecessary

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [AN *or* THE] MOTION FOR A REFERENCE TO TAKE AN ACCOUNT IS ADDRESSED TO THE DISCRETION OF THE TRIAL COURT AND _____ [SHOULD BE *or* WAS PROPERLY] DENIED BECAUSE A REFERENCE _____ [IS *or* WAS] UNNECESSARY.

A. Reference Is Discretionary With Court. A motion for a reference to take an account is addressed to the sound discretion of the court (*Mashon v. Haddock (1961) 190 Cal. App. 2d 151, 168-169, 11 Cal. Rptr. 865* ; *Walsh v. Jack Rubin & Sons, Inc. (1960) 182 Cal. App. 2d 652, 655, 6 Cal. Rptr. 346* ; *Berkowitz v. Kiener Co. (1940) 37 Cal. App. 2d 419, 426, 99 P.2d 578*).

[*Optional*] **B. Trial Court Has Discretion to State Account Itself.** A reference will not be ordered when the court, for any reason it deems it proper to do so, can, after examination of the testimony, state the account itself (*Walsh v. Jack Rubin & Sons, Inc. (1960) 182 Cal. App. 2d 652, 655, 6 Cal. Rptr. 346* ; *Berkowitz v. Kiener Co. (1940) 37 Cal. App. 2d 419, 426, 99 P.2d 578*).

[*Optional*] **C. Transaction Short and Not Complex.** A reference to take an account will not be ordered when the transaction to be considered is short and not complex (*Walsh v. Jack Rubin & Sons, Inc. (1960) 182 Cal. App. 2d 652, 655, 6 Cal. Rptr. 346* ; *Puim v. Callahan (1955) 135 Cal. App. 2d 70, 77, 286 P.2d 526* ; *Berkowitz v. Kiener Co. (1940) 37 Cal. App. 2d 419, 426, 99 P.2d 578*).

[2] Comments

[a] Use of Form

The points and authorities at [1], *above*, may be submitted in opposition to a contention that a reference to take an account may be or was properly ordered when the reference is or was unnecessary. Optional Paragraph B should be included when the court can or was able to state the account itself on the basis of testimony or evidence already introduced. Optional Paragraph C should be included if the account is or was short and not complex.

The points and authorities at [1], *above*, may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue as to the propriety of a reference to take an account. For example, the points and authorities may be combined with the points and authorities submitted in opposition to a motion for a reference to take an account [*see Code Civ. Proc. § 639(a)(1), (2)*]. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show that a reference to take an account is or was unnecessary.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities at [1], *above*, may be submitted in opposition to the contention supported by the points and authorities *set out in §§ 201.12* and *201.13*.

[3] Discussion of Authorities

[a] Reference Is Discretionary With Court

Mashon v. Haddock *(1961) 190 Cal. App. 2d 151, 11 Cal. Rptr. 865* , involved consolidated actions by the personal representatives of deceased limited partners against the general partners (1) to determine the interests of the limited partners in a dissolved limited partnership and in joint venture corporations, (2) for an accounting, and (3) for other relief. Defendants' motion for a reference under former Code Civ. Proc. § 639(2) (*now Code Civ. Proc. § 639(a)(2)*), authorizing a reference when the taking of an account is necessary for the information of the court, was denied. The trial judge was of the opinion that all the evidence necessary for decision of the case was already in the record (*190 Cal. App. 2d 151, 168)* . Judgment was rendered for plaintiffs. Defendants appealed, contending, inter alia, that the denial of their motion for a reference was an abuse of discretion.

The court of appeal, in modifying the judgment to delete certain interest awarded and affirming it as modified, pointed out that the actions presented a most difficult and complex accounting, that it was and is a veritable accountant's nightmare, and that the trial judge had to make the best accounting he could (*190 Cal. App. 2d 151, 163)* . Despite the complexity involved, the appellate court concurred in the opinion of the trial court that all the evidence necessary for decision of the case was already in the record and held that the trial court did not abuse its discretion in denying the motion for a reference (*190 Cal. App. 2d 151, 168)* . A motion for a reference is addressed to the sound discretion of the trial court, and will not be disturbed on appeal unless there is an abuse of discretion (*190 Cal. App. 2d 151, 169)* .

Walsh v. Jack Rubin & Sons, Inc. *(1960) 182 Cal. App. 2d 652, 6 Cal. Rptr. 346* , was an action by an employee against his former employer for an accounting and other relief. The employment contract provided that plaintiff was to receive commissions of 71/2 percent based on the gross profits of the business as his compensation. The term "gross profits" was defined in the contract. At the trial, the written contract, the purported commission statements, and defendant's ledger containing the record of sales, expenses, and all the accounts pertaining to the venture were introduced in evidence. Defendant then requested the trial court to order an accounting, and the trial court declined to do so. The trial court concluded that ordering an accounting was unnecessary, since it was able to determine from the records and evidence introduced that plaintiff was entitled to a specified sum, and it rendered judgment for plaintiff in that amount. Defendant appealed, contending that the trial court erred in not ordering an accounting and in proceeding to decide the case itself.

The court of appeal affirmed. The court said that it was solely within the discretion of the trial court to determine whether a reference for an accounting was necessary, that there was no error in refusing to grant appellant's request for a reference, and that the trial court may well have concluded from the evidence in the case that a reference to an accountant would not help it in correctly determining the issues involved (*182 Cal. App. 2d 652, 654-655)* . The court then quoted the statements from *Berkowitz v. Kiener Co. (1940) 37 Cal. App. 2d 419, 426, 99 P.2d 578* , discussed *below* (*182 Cal. App. 2d 652, 655)* .

Berkowitz v. Kiener Co. *(1940) 37 Cal. App. 2d 419, 99 P.2d 578* , was an action to recover commissions due under a written contract and for an accounting. Judgment was for plaintiff and defendants appealed, contending, among other things, that the trial court erred in not referring the accounting problem to a qualified accountant.

The court of appeal affirmed. The court said that although *Code Civ. Proc. § 639* authorizes the trial court in certain cases to appoint a referee for the taking of an accounting there is nothing in that section, or in any decision of our appellate courts, which makes it mandatory for the court to do so. The court added that inasmuch as references are ordered merely as an aid and assistance to the court, a reference is not necessary and may be dispensed with in any case when the court can get along well enough without it, and that ordering a reference is therefore a matter of discretion. Concluding that it was entirely within the discretion of the trial court to determine whether it was necessary to refer the accounting to an accountant, the court of appeal held that there was no error in the trial court's refusal to grant defendant's request for a reference (*37 Cal. App. 2d 419, 426)* .

[b] Trial Court Has Discretion to State Account Itself

The facts and procedural background of ***Walsh v. Jack Rubin & Sons, Inc.*** *(1960) 182 Cal. App. 2d 652, 6 Cal. Rptr. 346* , are discussed at [a], *above.* In affirming the judgment for plaintiff, the court of appeal quoted the statements from *Berkowitz v. Kiener Co. (1940) 37 Cal. App. 2d 419, 426, 99 P.2d 578* , discussed *below.*

The facts and background of ***Berkowitz v. Kiener Co.*** *(1940) 37 Cal. App. 2d 419, 99 P.2d 578* , are discussed at [a], *above.* In affirming the judgment for plaintiff, the court of appeal said that it is ordinarily within the discretion of the court to state the account itself after an examination of the testimony, and that questions fit for reference will be determined by the court itself without a reference whenever it can conveniently do so, to the saving of time and expense (*37 Cal. App. 2d 419, 426)* .

[c] Transaction Short and Not Complex

The facts and procedural background of ***Walsh v. Jack Rubin & Sons, Inc.*** *(1960) 182 Cal. App. 2d 652, 6 Cal. Rptr. 346* , are discussed at [a], *above.* In affirming the judgment for plaintiff, the court of appeal quoted the statements from *Berkowitz v. Kiener Co. (1940) 37 Cal. App. 2d 419, 426, 99 P.2d 578* , discussed at [a], *above* (*182 Cal. App. 2d 652, 655)* .

Puim v. Callahan *(1955) 135 Cal. App. 2d 70, 286 P.2d 526* , was an action for an accounting by an inventor against a partnership and its individual partners. The partnership was licensed under an exclusive license agreement with plaintiff to manufacture and sell plaintiff's specified patented devices in consideration of the payments to plaintiff of four percent of the net sales. The trial court found for defendants, expressly finding that defendants had accounted to plaintiff for all moneys due under the licensing agreement, and rendered judgment for defendants. Plaintiff appealed, contending, among other things, that the matter should have been referred to a referee.

The court of appeal affirmed. Citing *Berkowitz v. Kiener Co. (1940) 37 Cal. App. 2d 419, 426, 99 P.2d 578* (discussed at [a], *above*), the court said that references are ordered merely as an aid and assistance to the court, that in a case when the court can get along well enough without it a reference may be dispensed with, and that when the transaction under

consideration is not complex, the court itself may make the accounting after an examination of the testimony (*135 Cal. App. 2d 70, 77)* .

The facts and procedural background of ***Berkowitz v. Kiener Co.*** *(1940) 37 Cal. App. 2d 419, 99 P.2d 578* , are discussed at [a], *above*. In affirming the judgment for plaintiff, the court of appeal said that a reference will not be ordered, even in a matter of account, when the transaction to be considered is short and in no respect complex (*37 Cal. App. 2d 419, 426)* .

[4] Additional Authorities

[a] Reference Is Discretionary With Court

The facts and procedural background of *Puim v. Callahan (1955) 135 Cal. App. 2d 70, 286 P.2d 526* , are discussed at [3][c], *above.* In affirming judgment for defendants, the court of appeal said that the granting or refusal of a motion for a reference is addressed to the sound discretion of the court, and the ruling will not be disturbed on appeal unless there is a showing of abuse of discretion (*135 Cal. App. 2d 70, 76-77)* .

[b] Trial Court Has Discretion to State Account Itself

In *Chazan v. Most (1962) 209 Cal. App. 2d 519, 25 Cal. Rptr. 864* , which arose out of an action by one partner of a dissolved partnership against the other for an accounting and a cross action by defendant partner against plaintiff and an employee of the former partnership for damages for unfair competition in which the former employee filed a counterclaim (now cross complaint [*see Code Civ. Proc. § 428.80*]) against defendant for money due for services rendered the partnership, the court of appeal modified the judgment for plaintiff and the former employee for the net amounts found due them to correct an error in computation and affirmed the judgment as modified. Rejecting defendant's contention that reversal was required because the trial judge determined the profits of the partnership without appointing a referee to take the account, the court of appeal said there was no requirement that the trial court make a reference in an action for an accounting (*209 Cal. App. 2d 519, 521)* .

Stoll v. Selander (1947) 81 Cal. App. 2d 286, 183 P.2d 935 , arose out of a derivative action by a stockholder against the corporation and its president for an accounting and to quiet title to real and personal property. The court of appeal affirmed the judgment ordering defendant president to render an accounting to the corporation and then to deliver to and pay the corporation all assets and money found to belong to it, and declaring the corporation the absolute owner of the real property. The court of appeal stated that the practice in accounting suits is for the court to determine first whether an accounting is due and then either take the account or make a reference for that purpose. If a reference is required, an interlocutory judgment is usually entered, followed by a final judgment determining the amount of the recovery. Although the issues in the case had only been partly tried, the court said it could not reverse the judgment with directions that an accounting be had and judgment be entered in accordance with it, as should have been done instead of merely ordering defendant to account, because plaintiff had not appealed, but cautioned that its affirmance was not to be deemed an approval of the procedure (*81 Cal. App. 2d 286, 294)* . With respect to the court's statement that when a reference is made an interlocutory judgment is entered, it should be noted that *Code Civ. Proc. § 639* imposes no such requirement [*see § 201.17*].

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A. Grounds for Reference

20-201 California Points & Authorities § 201.43

§ 201.43 Opposing Contention That Reference May Be or Was Properly Ordered--Dissolution of Marriage Proceeding Is Not Special Proceeding Within Meaning of Code Civ. Proc. § 639(a)(4)

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [AN *or* THE] ORDER OF REFERENCE IN THIS CASE WITHOUT THE CONSENT OF THE PARTIES _____ [MAY NOT BE *or* WAS NOT PROPERLY] GRANTED UNDER THE PROVISIONS OF SECTION 639(a)(4) OF THE CODE OF CIVIL PROCEDURE BECAUSE A DISSOLUTION OF MARRIAGE PROCEEDING IS NOT A SPECIAL PROCEEDING WITHIN THE MEANING OF THIS STATUTE.

Classification of Dissolution of Marriage. A dissolution of marriage proceeding is a civil action and not a special proceeding within the meaning of *Section 639(a)(4) of the Code of Civil Procedure* (*In re Marriage of Galis (1983) 149 Cal. App. 3d 147, 151-154, 196 Cal. Rptr. 659*).

[2] Comments

[a] Use of Form

The points and authorities at [1], *above*, may be submitted in opposition to a contention that a special reference under *Code Civ. Proc. § 639(a)(4)* (reference when necessary for information of court in special proceeding) may be or was properly ordered without the consent of the parties in a dissolution of marriage proceeding.

The points and authorities at [1], *above*, may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue as to the propriety of a reference without the consent of the parties. For example, the points and authorities may be combined with points and authorities submitted in opposition to a motion for a reference under *Code Civ. Proc. § 639(a)(4)*. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

In addition, the points and authorities at [1], *above*, may be combined with points and authorities in support of a petition for a writ of mandate seeking to compel the trial court to vacate its order of reference or in support of a petition for a writ of prohibition seeking to restrain the trial court from enforcing its order.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should show that the proceeding is in fact a dissolution of marriage proceeding and, hence, the reference is not authorized under *Code Civ. Proc. § 639(a)(4)* or under any other provision of *Code Civ. Proc. § 639*.

[b] Related Pleading and Practice Forms

For forms for use in proceedings in mandate or prohibition, see Ch. 358, *Mandate and Prohibition* , in California Forms of Pleading and Practice (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities generally supporting and opposing a petition for a writ of mandate or prohibition, see Ch. 150, *Mandate and Prohibition* .

[d] Opposing Points and Authorities

In an appropriate case, the points and authorities at [1], *above*, may be submitted in opposition to the contention supported by the points and authorities *set out in § 201.15*.

[3] Discussion of Authorities

[a] Classification of Dissolution of Marriage

The facts and procedural background of ***In re Marriage of Galis*** *(1983) 149 Cal. App. 3d 147, 196 Cal. Rptr. 659* , are discussed at *§ 201.41[3][a]*. Although the court of appeal noted that a divorce action historically was neither an action law nor a suit in equity, and hence, could qualify as a special proceeding, it traced the constitutional and statutory background of divorce and concluded that a dissolution of marriage proceeding was an action and not a special proceeding within the meaning of *Code Civ. Proc. § 639(a)(4)* (*149 Cal. App. 3d 147, 151-154)* .

It should be noted that in reaching its conclusion the court relied heavily on former constitutional provisions and pre-1970 cases decided when it was clear that divorce was treated as a civil action. However, the opinion fails to discuss the power of the Legislature to modify what historically has been treated as a civil action in which there was no right to a jury trial so as to convert it to a special proceeding. The Legislature appears to have done this in 1969 by its repeal of the statutes governing divorce actions and its adoption of "no-fault divorce." This legislative intent seems manifest in the Family Law Act (former Civ. Code §§ 4000-5183; *now see* Family Code) by its classification of the matter as a "proceeding" and not as an "action," and by its providing for a "hearing" and not a "trial" [*see* former Civ. Code §§ 4503, 4508; *now see Fam. Code §§ 200, 2333, 2334*]. Additionally, dissolution of marriage is commenced not by a complaint as was an action for divorce, but by a petition [Civ. Code § 4503], which is the pleading normally used to commence a special proceeding of a civil nature (*e.g.*, petition for change of name [*Code Civ. Proc. § 1276*], petition for adoption [*Fam. Code §§ 8714, 8802*], petition for writ of mandate [*Code Civ. Proc. § 1086*]). Under the holding in *Galis, above*, it appears a family law proceeding is now the only "civil action" commenced by the filing of a petition. Nevertheless, the result in *Galis* may be upheld on the theory that the order of reference was in effect an attempt by the trial judge to make a general reference of the entire case over the objection of a party. The trial court did not purport to act under the authority of *Code Civ. Proc. § 639(a)(4)* by directing the referee to report facts "necessary for the information of the court," but directed the commissioner to hear the evidence and make findings of fact and recommendations as to the disposition of the matter in his capacity as a referee. That is, the court wanted the matter adjudicated by the referee, and such a reference is not authorized by any provision in *Code Civ. Proc. § 639* and,

without the consent of the parties, is not authorized by *Code Civ. Proc. § 638*.

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20-201 California Points & Authorities § 201.44

§ 201.44 Opposing Contention That Reference May Be or Was Properly Ordered--Contract Provision Requiring Reference Is Unconscionable [Code Civ. Proc. § 638(a)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [AN *or* THE] ORDER OF REFERENCE TO _____ [A *or* THE] REFEREE TO TRY ANY OR ALL OF THE ISSUES IN THIS CASE, WHETHER OF FACT OR OF LAW, AND TO REPORT A STATEMENT OF DECISION THEREON _____ [MAY NOT BE *or* WAS NOT] PROPERLY ORDERED BECAUSE THE CONTRACT PROVISION REQUIRING A JUDICIAL REFERENCE IS UNCONSCIONABLE AND SHOULD NOT BE ENFORCED.

A. Criteria of Unconscionability. [*See § 201.19[1], Paragraph A*].

B. Burdens of Proof. [*See § 201.19[1], Paragraph B.*]

C. Elements of Procedural Unconscionability. Procedural unconscionability concerns the manner in which the contract was negotiated and the circumstances of the parties at that time. Procedural unconscionability focuses on factors of oppression and surprise. The oppression component arises from an inequality of bargaining power of the partes to the contract and an absence of real negotiation or real choice on the part of the weaker party. The surprise component relates to the terms to which the party supposedly agreed being hidden in a prolix printed form drafted by the party seeking to enforce those terms (*Pardee Construction Co. v. Superior Court (Rodriguez) (2002) 100 Cal. App. 4th 1081, 1088-1089, 123 Cal. Rptr. 2d 288*).

D. Elements of Substantive Unconscionability. Substantive unconscionability focuses on the actual terms of the agreement and traditionally involves contract terms that are so one-sided as to "shock the conscience" or that impose harsh or oppressive terms. Oppression is present when an agreement includes terms serving to limit the obligations or liability of the stronger party (*Pardee Construction Co. v. Superior Court (Rodriguez) (2002) 100 Cal. App. 4th 1081, 1090-1091, 123 Cal. Rptr. 2d 288*).

[2] Comments

[a] Use of Form

The points and authorities at [1], *above*, may be submitted in opposition to a contention that a general reference under *Code Civ. Proc. § 638(a)* may be or was properly ordered to try any or all issues in an action or proceeding, whether of fact or of law, and to report a statement of decision thereon when the contract provision requiring judicial reference is so unfair as to be unconscionable; that is one when the weaker party had no real opportunity to negotiate and the reference provision allocates the risks, rights, or remedies in a manner so unfair as to "shock the conscience."

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue as to the propriety of a general reference under *Code Civ. Proc. § 638(a)*. For example, the points and authorities may be combined with the points and authorities submitted in opposition to a motion for a general reference. They may also be combined with the points and authorities submitted in support of a motion for an order vacating an order of reference. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief. In addition, these points and authorities may be combined with points and authorities in support of a petition for a writ of mandate seeking to compel the trial court to vacate its order of reference or in support of a petition for a writ of prohibition seeking to restrain the trial court from enforcing its order.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, the argument should quote or refer to the provision at issue and the circumstances under which it was negotiated and explain each instance of unequal or unfair bargaining power and allocation of risk. It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations.

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities supporting and opposing enforcement of arbitration provisions on the ground that they are unconscionable, see Ch. 20, *Arbitration: Compelling* , and Ch. 20A, *Arbitration: Resisting* .

[d] Opposing Points and Authorities

For a memorandum of points and authorities supporting enforcement of a provision for judicial reference on the ground that it is not unconscionable, see *§ 201.19*.

[3] Discussion of Authorities

[a] Elements of Procedural Unconscionability

The facts and procedural background of ***Pardee Construction Co. v. Superior Court (Rodriguez)*** *(2002) 100 Cal. App.*

4th 1081, 123 Cal. Rptr. 2d 288 , and the portion of the opinion addressing the general criteria for unconscionability, are discussed at *§ 201.19[3][a]*. The court of appeal continued, noting that procedural unconscionability concerns the manner in which the contract was negotiated and the circumstances of the parties at that time (*100 Cal. App. 4th 1081, 1088)* . Procedural unconscionability focuses on factors of oppression and surprise. The oppression component arises from an inequality of bargaining power of the partes to the contract and an absence of real negotiation or real choice on the part of the weaker party. The surprise component relates to the terms to which the party supposedly agreed being hidden in a prolix printed form drafted by the party seeking to enforce those terms. With respect to the oppression component of unconscionability, the court noted that the parties had unequal bargaining power. As purchasers of entry-level homes, plaintiffs had far less economic power than Pardee. None of the several hundred buyers in the development struck out the judicial reference provision contained in the purchase agreement; there was no real negotiation about removal of that provision (*100 Cal. App. 4th 1081, 1089)* . With regard to the surprise component of procedural unconscionability, the judicial reference provision, including the waiver of jury trial, was buried in a form contract, and was physically difficult to read as printed in dense single-spaced capital letters (*100 Cal. App. 4th 1081, 1089-1090)* . A significant element of the surprise component was the absence of any mention of referee's fees or responsibility for their payment, which left open the potential that buyers might be liable, in part for those fees, which counsel indicated at oral argument were $200 to $300 per hour. Those three factor (lack of bargaining about the reference provision, the fact that the provision was difficult to read, and the fact there was no mention the economically significant issue of liability for referee's fees) rendered the reference provision procedurally unconscionable (*100 Cal. App. 4th 1081, 1090)* .

[b] Elements of Substantive Unconscionability

The facts and procedural background of ***Pardee Construction Co. v. Superior Court (Rodriguez)*** *(2002) 100 Cal. App. 4th 1081, 123 Cal. Rptr. 2d 288* , and the portion of the opinion addressing the general criteria for unconscionability, are discussed at *§ 201.19[3][a]*. Addressing the issue of substantive unconscionability, the court of appeal noted that substantive unconscionability focuses on the actual terms of the agreement and traditionally involves contract terms that are so one-sided as to "shock the conscience" or that impose harsh or oppressive terms (*100 Cal. App. 4th 1081, 1090)* . Oppression is present when an agreement includes terms serving to limit the obligations or liability of the stronger party. Waiver of the right to recover punitive damages, although potentially severable from the remainder of the reference provision, was substantively unconscionable because in practical reality, it was only for Pardee's benefit. Before upholding a provision waiving the right to a jury trial, the court said it must scrutinize the impact of that waiver. Sometimes waiver of the right to a jury trial can have advantages of speed or economy; however, nothing in this case suggested either. Although there was evidence that significant portions of construction defect cases were commonly sent to judicial reference, there was no evidence that any time-saving would result from referring the entire matter to a judicial referee (*100 Cal. App. 4th 1081, 1091-1092)* . The court concluded that as the reference provision gave buyers nothing in return for waiving their right to a jury trial, it was so one-sided as to be substantively unconscionable (*100 Cal. App. 4th 1081, 1092)* .

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20-201 California Points & Authorities § 201.45

§ 201.45 Opposing Contention That Reference May Be or Was Properly Ordered--Contract Provision Would Result in Inconsistent Rulings or Parallel Forums

[1] FORM Opposing Contention That Reference May Be or Was Properly Ordered--Contract Provision Would Result in Inconsistent Rulings or Parallel Forums

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

_____ [AN or THE] ORDER OF REFERENCE TO _____ [A or THE] REFEREE TO TRY ANY OR ALL OF THE ISSUES IN THIS CASE, WHETHER OF FACT OR OF LAW, AND TO REPORT A STATEMENT OF DECISION THEREON _____ [MAY NOT BE or WAS NOT] PROPERLY ORDERED BECAUSE ORDERING REFERENCE UNDER THE CONTRACT WOULD RESULT IN _____ [INCONSISTENT RULINGS *or* PARALLEL FORUMS].

A. Discretion of Trial Court. By its plain terms, *Code Civ. Proc. § 638* vests the trial court with discretion when the court is asked by a party to appoint a referee pursuant to a predispute reference agreement (*Tarrant Bell Prop., LLC v. Superior Court (2009) 179 Cal. App. 4th 1283, 1293, 102 Cal. Rptr. 3d 235*).

B. Inconsistent Rulings. The court may deny reference where the action involves sending some of the parties to a referee while others remain in the superior court, and using a referee would risk inconsistent rulings on common issues of law or fact and would require the parties to conduct the same discovery, litigate and ultimately try the same issues in separate but parallel forums (*Tarrant Bell Prop., LLC v. Superior Court (2009) 179 Cal. App. 4th 1283, 1294-1295, 102 Cal. Rptr. 3d 235*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a contention that a general reference under *Code Civ. Proc. § 638(a)* may be or was properly ordered to try any or all issues in an action or proceeding, whether of fact or of law, and

to report a statement of decision thereon when the ordering of reference under the contract provision would result in inconsistent rulings or parallel forums.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue as to the propriety of a general reference under *Code Civ. Proc. § 638(a)*. For example, the points and authorities may be combined with the points and authorities submitted in opposition to a motion for a general reference. They may also be combined with the points and authorities submitted in support of a motion for an order vacating an order of reference. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief. In addition, these points and authorities may be combined with points and authorities in support of a petition for a writ of mandate seeking to compel the trial court to vacate its order of reference or in support of a petition for a writ of prohibition seeking to restrain the trial court from enforcing its order.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, the argument should point to the multitudinous litigation occurring simultaneously with no certainty of consistent results or in various parallel judicial, arbitral, and/or quasi-judicial forums. It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, arbitration proceedings, and administrative dockets or by affidavits or declarations.

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[3] Discussion of Authorities

[a] Discretion of Trial Court

Tarrant Bell Property, LLC v. Superior Court *(2009) 179 Cal. App. 4th 1283, 102 Cal. Rptr. 3d 235*, affirmed a trial court's denial of a motion to appoint a referee under a pre-dispute reference agreement between the parties. The court of appeals held that the "may" in the statute authorizing appointment of referees pursuant to a reference agreement make the appointment discretionary, not mandatory (179 Cal. App. 4th 1283, 1290). By its plain terms, *Code Civ. Proc. § 638* vests the trial court with discretion when the court is asked by a party to appoint a referee pursuant to a predispute reference agreement. Amendments to *Code Civ. Proc. § 638* allow enforcement of predispute agreements as a means to ease court congestion, and courts were effectively given discretion to refuse enforcement of such agreements where the case would more efficiently be handled in the superior court (*179 Cal. App. 4th 1283, 1293)* . In doing so, the trial court may consider the risk of inconsistent rulings on a common issue of law or fact, the duplication of efforts, increased costs, potential delays in resolution, and any unmitigated burden on the superior court (*179 Cal. App. 4th 1283, 1293)* . The portion of the opinion concerning risk of inconsistent rulings is discussed in [b], *below*.

[b] Inconsistent Rulings

Tarrant Bell Property, LLC v. Superior Court *(2009) 179 Cal. App. 4th 1283, 102 Cal. Rptr. 3d 235*, affirmed a trial court's denial of a motion to appoint a referee under a pre-dispute reference agreement between the parties. The trial court found that sending some of the plaintiff-residents to a referee while others remained in the superior court risked

inconsistent rulings on common issues of law or fact and would require the parties "to conduct the same discovery, litigate and ultimately try the same issues in separate but parallel forums," resulting in "duplication of effort, increased costs, and potentially, delays in resolution." The court rejected defendants' argument that there was a lack of commonality, and thus no risk of inconsistent rulings, because each resident's damages were unique. The court rightly noted that common issues do exist, including the primary issue of liability for the alleged failure to maintain the premises by, for example, failing to provide adequate sewage, water, and electrical services to all residents. The court also rejected defendants' argument that reference would reduce, not increase costs, by reducing the number of plaintiff witnesses appearing in the superior court. Thus, the trial court's finding of high risk of inconsistent rulings was supported by the evidence (179 Cal. App. 4th 1283, 1294-1295). The portion of the opinion concerning discretion of the trial court to order reference is discussed in [a] above.

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[Reserved]

§§ 201.46[Reserved]

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B. Grounds for Objection to Referee

20-201 California Points & Authorities § 201.50

§ 201.50 Supporting Contention That Referee Is Disqualified--Referee Lacks Qualifications to Be Juror [Code Civ. Proc. §§ 641(a), 642]

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

_____ [*Name*] IS DISQUALIFIED TO ACT AS A REFEREE IN THIS CASE BECAUSE HE/SHE LACKS THE STATUTORY QUALIFICATIONS OF A JUROR IN THAT HE/SHE _____ [*specify, e.g.,* HAS BEEN CONVICTED OF A FELONY].

A. Person Lacks Qualifications of Juror. A party may object to the appointment of any person as a referee on the ground that he or she lacks any of the qualifications prescribed by statute to render a person competent as a juror[, except a requirement of residence within a particular county in the state] (*Code Civ. Proc. § 641(a)*).

B. Persons Unqualified to Act as Jurors. All persons are eligible and qualified to be prospective trial jurors, except the following: (1) persons who are not citizens of the United States; (2) persons who are less than 18 years of age; (3) persons who are not domiciliaries of California as determined pursuant to *Sections 200-217 of the Elections Code*; (4) persons who are not residents of the jurisdiction in which they are summoned to serve; (5) persons who have been convicted of malfeasance in office or a felony, and whose civil rights have not been restored; (6) persons who are not possessed of sufficient knowledge of the English language, provided that no person shall be deemed incompetent solely because of the loss of sight or hearing in any degree or other disability that impedes the person's ability to communicate or that impairs or interferes with the person's mobility; (7) persons who are serving as grand or trial jurors in any California court; (8) persons who are the subject of conservatorship (*Code Civ. Proc. § 203(a)*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of the contention that a person appointed or to be appointed referee in a

case is disqualified to act as such because he or she is unqualified to serve as a juror [*see Code Civ. Proc. § 641(a)*]. For additional grounds of disqualification that may be combined with or used in lieu of the points and authorities at [1], *above*,, see *§§ 201.51 -201.56*. For a memorandum of points and authorities supporting an objection to the appointment of a person as a referee under *Code Civ. Proc. § 641.2*, relating to actions to protect and conserve natural resources, see *§ 201.57*. For a memorandum of points and authorities supporting a peremptory challenge to a court commissioner or referee under *Code Civ. Proc. § 170.6*, see *§ 201.58*.

The points and authorities at [1], *above*, may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue as to the qualifications of a person to act as referee. For example, the points and authorities may be combined with points and authorities submitted in support of objections to the appointment of a person as a referee in the case or in support of a motion to remove the appointed referee and appoint a new referee. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show the facts establishing the ground of disqualification to serve as a juror. For example, if the ground is that the person has been convicted of a felony, counsel should request the court to take judicial notice of the records of the court in which the person was convicted and secure an authenticated copy of the record of conviction for presentation to the court in the pending action or proceeding. Note, however, that felons whose civil rights have been restored are eligible for jury service [*Code Civ. Proc. § 203(a)(5)*; *see Penal Code §§ 1203.4* (expungement of record), 4852.13 (certificate of rehabilitation), 4853 (governor's pardon)]. On judicial notice, see *Evid. Code §§ 452(d)* and *453*. On the admissibility of a final judgment adjudging a person guilty of a crime punishable as a felony as an exception to the hearsay rule in civil trials, see *Evid. Code § 1300*. Counsel can also submit cognizable evidence in support of factual statements by references to the court's file, including verified pleadings, or by affidavits or declarations.

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Forms

For forms of a notice of motion to remove an appointed referee and appoint a new referee, a supporting declaration, and an order granting the motion, see Ch. 38, *Reference* , in California Forms of Pleading and Practice.

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B. Grounds for Objection to Referee

20-201 California Points & Authorities § 201.51

§ 201.51 Supporting Contention That Referee Is Disqualified--Referee Is Related to Party to Action, Officer of Corporate Party, or Judge of Court in Which Action Is Pending [Code Civ. Proc. §§ 641(b), 642]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Name*] IS DISQUALIFIED TO ACT AS A REFEREE IN THIS CASE BECAUSE HE/SHE IS RELATED BY _____ [CONSANGUINITY *or* AFFINITY] WITHIN THE THIRD DEGREE TO _____ [*name*], WHO IS _____ [A PARTY TO THIS CASE *or* THE _____ (*specify officer, e.g.,* PRESIDENT) OF _____ (*name of corporation*) WHICH IS A PARTY TO THIS CASE *or* A JUDGE OF THIS COURT] IN THAT HE/SHE and _____ [*name of party, officer, or judge*] ARE _____ [*specify, e.g.,* BROTHERS].

A. Person Related to Party, Officer of Corporate Party, or Judge of Court. A party may object to the appointment of any person as a referee on the ground that he or she is related by consanguinity or affinity, within the third degree, to either party, or to an officer of a corporation which is a party, or to any judge of the court in which the appointment will be made (*Code Civ. Proc. § 641(b)*).

B. Computation of Relationship. The third degree of relationship is calculated according to the civil law system (see *Code Civ. Proc. § 170.5(a), (d)*).

[2] Comments

[a] Use of Form

The points and authorities at [1], *above*, may be submitted in support of the contention that a person appointed or to be appointed referee in a case is disqualified to act as such on the ground he or she is related within the third degree to either party, the officer of a corporate party, or a judge of the court in which the case is pending [*see Code Civ. Proc. § 641(b)*; for additional grounds, see discussion at [c]. *below*]. See also *§§ 201.50* and *201.52 -201.56* for grounds of

disqualification that may be combined with or used in lieu of the points and authorities at [1], *above*. For a memorandum of points and authorities supporting an objection to the appointment of a person as a referee under *Code Civ. Proc. § 641.2*, relating to actions to protect and conserve natural resources, see *§ 201.57*. For a memorandum of points and authorities supporting a peremptory challenge to a court commissioner or referee under *Code Civ. Proc. § 170.6*, see *§ 201.58*.

The points and authorities at [1], *above*, may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue as to the qualifications of a person to act as referee. For example, the points and authorities may be combined with points and authorities submitted in support of objections to the appointment of a person as a referee in the case or in support of a motion to remove the appointed referee and appoint a new referee. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should present facts showing that the person is related by consanguinity or affinity within the third degree to a party to the case, or to an officer of a corporate party, or to a judge of the court. Such fact may be shown by the admission of the party or person or by the production of authenticated copies of birth or marriage certificates. On the admissibility of prior admissions of a party as an exception to the hearsay rule, see *Evid. Code § 1220*. On the admissibility of birth and marriage certificates as an exception to the hearsay rule and the authentication and proof of writings, see *Evid. Code §§ 1281* and *1400-1454*, respectively. The fact may also be established by an affidavit or declaration under penalty of perjury of a witness who has personal knowledge of the relationship [*see Code Civ. Proc. §§ 2002(1), 2003, 2009, 2015.5*; *Evid. Code §§ 700-702* (competency of witnesses)]. Counsel may also submit cognizable evidence in support of factual statements by request for judicial notice [*see Evid. Code § 450* et seq.] or by references to the court's file, including verified pleadings. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Disqualification Under Code Civ. Proc. § 170.1

Code Civ. Proc. § 170.1 sets forth matters that will disqualify a judge from hearing or trying a matter. The word "judge," as used in this section, is defined as including court commissioners and referees [*Code Civ. Proc. § 170.5(a)*]. *Code Civ. Proc. § 170.1(a)* provides that a judge shall be disqualified if any one or more of the following is true:

> (1) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding [*Code Civ. Proc. § 170.1(a)(1)* (setting forth when judge is deemed to have personal knowledge)].
>
> (2) The judge served as a lawyer in the proceeding or, in any other proceeding involving the same issues, served as a lawyer for or gave advice to any party in the present proceeding on any matter involved in the action or proceeding [*Code Civ. Proc. § 170.1(a)(2)* (setting forth when judge is deemed to have served as a lawyer in the proceeding)].
>
> (3) The judge has a financial interest in the subject matter in the proceeding or in a party to the proceeding [*Code Civ. Proc. § 170.1(a)(3)* (setting forth when judge is deemed to have a financial interest)].
>
> (4) The judge, or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person is a party to the proceeding or an officer, director, or trustee of a party [*Code Civ. Proc. § 170.1(a)(4)*].

(5) A lawyer or a spouse of a lawyer in the proceeding is the spouse, former spouse, child, sibling, or parent of the judge or the judge's spouse or if such a person is associated in the private practice of law with a lawyer in the proceeding [*Code Civ. Proc. § 170.1(a)(5)*].

(6) For any reason (a) the judge believes his or her refusal would further the interests of justice, (b) the judge believes there is a substantial doubt as to his or her capacity to be impartial, or (c) a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial. Bias or prejudice towards a lawyer in the proceeding may be grounds for disqualification [*Code Civ. Proc. § 170.1(a)(6)*].

(7) By reason of permanent or temporary physical impairment, the judge is unable to properly perceive the evidence or is unable to properly conduct the proceeding [*Code Civ. Proc. § 170.1(a)(7)*].

(8) Whether or not the judge has a current arrangement concerning prospective employment or other compensated service as a dispute resolution neutral, or is participating in, or within the last two years has participated in, discussions regarding such prospective employment either (A) with a party to the proceeding or (B) when the matter before the judge includes issues relating to the enforcement of an agreement to submit a dispute to alternative dispute resolution or the appointment or use of a dispute resolution neutral [*Code Civ. Proc. § 170.1(a)(8)*]. For purposes of *Code Civ. Proc. § 170.1(a)(8)*, "party" includes the parent, subsidiary, or other legal affiliate of any entity that is a party and is involved in the transaction, contract, or facts that gave rise to the issues subject to the proceeding and, a "dispute resolution neutral" means an arbitrator, mediator, temporary judge appointed under *Section 21 of Article VI of the California Constitution*, referee appointed under *Code Civ. Proc. § 638* or *639*, special master, neutral evaluator, settlement officer, or settlement facilitator [*Code Civ. Proc. § 170.1(a)(8)*].

As can be seen, the provisions of *Code Civ. Proc. § 170.1(a)* to some extent duplicate the provisions of *Code Civ. Proc. § 641* as set forth at [1], *above*. For memoranda of points and authorities supporting and opposing the disqualification of a judge on the grounds set forth in *Code Civ. Proc. § 170.1(a)* that may be used alone in support of the contention that the referee is disqualified or adapted for use in combination with the points and authorities at [1], *above*, see Ch. 130, *Judges* , in this publication.

[d] Computing Degree of Consanguinity or Affinity

The degree of relationship is computed by the number of generations that must be counted between relatives. Each generation is a degree. There are two rules for counting the generations to compute the degree of consanguinity (blood relationship) or affinity (relationship by marriage) between persons. They are the common law rule and the civil law rule. Under the common law rule, a first cousin, or cousin-german, for example, is related in the third degree [*see* People v. de la *Guerra (1864) 24 Cal. 73, 74, 76-77]* . Under the civil law rule a cousin-german is related in the fourth degree [*see Robinson v. Southern Pacific Co. (1895) 105 Cal. 526, 557-558, 38 P. 94* ; People v. de la *Guerra (1864) 24 Cal. 73, 76]* . That is, degrees in the collateral line under the civil law rule are counted by generations from one of the relatives up to the common ancestor, and from the common ancestor to the other relative; in computing the relationship, the first relative is excluded, the other relative included, and the ancestor counted but once. Thus, brothers are related in the second degree; uncle and nephew are related in the third degree; cousins-german are related in the fourth degree, and so on [former Prob. Code § 253].

The civil law rule was originally adopted in California by the Practice Act of 1850 [Stats. 1850, ch. 96, § 4 (predecessor to former Prob. Code § 253)], but applied only to the computation of relationship for the purpose of descent and distribution of estates. Consequently, the California Supreme Court held that the civil law rule for computing relationship set forth in the former Practice Act did not apply in computing the degree of consanguinity or affinity of a

judge for the purpose of determining his or her disqualification to sit in a case because the statute, by its terms, applied to the descent and distribution of estates. The Court reasoned that the statute was in derogation of the common law and therefore had to be strictly construed [People v. de la *Guerra (1864) 24 Cal. 73, 76-77]* .

In 1872 the statutes were codified and the civil law rule for computing degrees of relationship was set forth in former Civ. Code § 1393, but again, by the placement of this statute, it applied only to descent and distribution of estates. Nevertheless, the Supreme Court held that since there was a statute it applied in computing the degree of consanguinity or affinity of judges for the purpose of determining their disqualification to sit in a case under former Code Civ. Proc. § 170 [*Robinson v. Southern Pacific Co. (1895) 105 Cal. 526, 557-558, 38 P. 94]* . The *Robinson* Court distinguished *de la Guerra* on the ground the latter case was decided before the codes were adopted. The *Robinson* Court reasoned as follows: (1) the civil law rule was codified (former Civ. Code § 1393); (2) this was the only statute on the subject; (3) all the codes were to be construed together as one statute; and (4) section 4 of each of the then existing codes provided (as they do now) that the common-law rule that statutes in derogation of the common law are to be strictly construed has no application to the codes.

Civ. Code § 1393 was repealed in 1931 and reenacted as former Prob. Code § 253 (Stats. 1931, ch 281). This latter code section was repealed in 1983 (Stats. 1983, ch 842), operative January 1, 1985, and not continued in other sections.

In 1984, former Code Civ. Proc. §§ 170-170.1, relating to the disqualification of judges, were repealed and *Code Civ. Proc. §§ 170-170.5*, covering the same matter, were enacted. *Code Civ. Proc. § 170.5(d)* provides that the third degree of relationship shall be calculated according to the civil law system. By its placement in the code, this statute appears to apply only to the grounds for disqualification of judges, court commissioners, and referees set forth in *Code Civ. Proc. § 170.1* and not to the grounds for disqualification of a referee set forth in *Code Civ. Proc. § 641*. Nevertheless, under the reasoning of *Robinson, above*, it can be argued that the statute applies to the disqualification of referees for relationship under Civ. Code § 641.

[e] Related Pleading and Practice Forms

For forms of a notice of motion to remove an appointed referee and appoint a new referee, a supporting declaration, and an order granting the motion, see Ch. 38, *Reference* , in California Forms of Pleading and Practice.

[f] Related Points and Authorities

For memoranda of points and authorities supporting and opposing the disqualification of a judge on the grounds set forth in *Code Civ. Proc. § 170.1(a)* that may be used alone in support of the contention that the referee is disqualified or adapted for use in combination with the points and authorities at [1], *above*, see Ch. 130, *Judges* , in this publication.

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20-201 California Points & Authorities § 201.52

§ 201.52 Supporting Contention That Referee Is Disqualified--Referee Stands in Prohibited Relationship With Party to Action [Code Civ. Proc. §§ 641(c), 642]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Name*] IS DISQUALIFIED TO ACT AS A REFEREE IN THIS CASE BECAUSE HE/SHE _____ [STANDS IN THE RELATION OF _____ (GUARDIAN AND WARD *or* CONSERVATOR AND CONSERVATEE *or* MASTER AND SERVANT *or* EMPLOYER AND CLERK *or* PRINCIPAL AND AGENT) TO *or* IS A MEMBER OF THE FAMILY OF *or* IS A PARTNER IN BUSINESS WITH *or* IS SECURITY ON A _____ (BOND *or* OBLIGATION)] FOR _____ [*name*], WHO IS A PARTY IN THIS CASE.

Person Standing in Prohibited Relationship With Either Party. A party may object to the appointment of any person as a referee on the ground that he or she stands in the relation of guardian and ward, conservator and conservatee, master and servant, employer and clerk, or principal and agent, to either party or is a member of the family of either party, or a partner in business with either party, or security on any bond or obligation for either party (*Code Civ. Proc. § 641(c)*).

[2] Comments

[a] Use of Form

The points and authorities at [1], *above*, may be submitted in support of the contention that a person appointed or to be appointed referee in a case is disqualified to act as such because of a particular prohibited relationship with one of the parties [*see Code Civ. Proc. § 641(c)*]. For a discussion of related grounds for disqualification under *Code Civ. Proc. § 170.1*, see *§ 201.51[2][c]*. For additional grounds of disqualification that may be combined with or used in lieu of the points and authorities at [1], *above*,, see *§§ 201.50*, *201.51*, and *201.53 -201.56*. For a memorandum of points and authorities supporting an objection to the appointment of a person as a referee under *Code Civ. Proc. § 641.2*, relating to

actions to protect and conserve natural resources, see *§ 201.57*. For a memorandum of points and authorities supporting a peremptory challenge to a court commissioner or referee under *Code Civ. Proc. § 170.6*, see *§ 201.58*.

The points and authorities at [1], *above*, may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue regarding the qualifications of a person to act as referee. For example, the points and authorities may be combined with points and authorities submitted in support of objections to the appointment of a person as a referee in the case or in support of a motion to remove the appointed referee and appoint a new referee. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should present facts showing that the person stands in a prohibited relationship to either party. Such fact may be shown by the admission of the party. On the admissibility of prior admissions of a party as an exception to the hearsay rule, see *Evid. Code § 1220*. Alternatively, it may be shown by an affidavit or declaration under penalty of perjury executed by a witness having personal knowledge of the facts [*see Code Civ. Proc. §§ 2002(1), 2003, 2009, 2015.5*; *Evid. Code §§ 700-702* (competency of witnesses)]. Or, if the relationship is that of guardian and ward or conservator and conservatee, such fact may be established by requesting the court to take judicial notice of the records of the court establishing the relationship and producing an authenticated copy of the court's order appointing the guardian or conservator. On judicial notice, see *Evid. Code §§ 452(d), 453*. Or, if the relationship is a family relationship, the fact might be shown by producing authenticated copies of birth or marriage certificates. On the admissibility of birth and marriage certificates as an exception to the hearsay rule and the authentication and proof of writings, see *Evid. Code §§ 1281* and *1400-1454*. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see CALIFORNIA Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations*, and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Forms

For forms of a notice of motion to remove an appointed referee and appoint a new referee, a supporting declaration, and an order granting the motion, see Ch. 38, *Reference*, in California Forms of Pleading and Practice.

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20-201 California Points & Authorities § 201.53

§ 201.53 Supporting Contention That Referee Is Disqualified--Referee Served as Juror or Witness in Trial Between Same Parties [Code Civ. Proc. §§ 641(d), 642]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Name*] IS DISQUALIFIED TO ACT AS A REFEREE IN THIS CASE BECAUSE HE/SHE _____ [SERVED AS A JUROR *or* WAS A WITNESS] ON A PRIOR TRIAL BETWEEN THE SAME PARTIES.

Person Served as Juror or Witness Between Same Parties. A party may object to the appointment of any person as a referee on the ground that he or she served as a juror or was a witness on any trial between the same (*Code Civ. Proc. § 641(d)*).

[2] Comments

[a] Use of Form

The points and authorities at [1], *above*, may be submitted in support of the contention that a person appointed or to be appointed referee in a case is disqualified to act for having served as a juror or been a witness on any trial between the same parties [*see Code Civ. Proc. § 641(d)*]. For a discussion of related grounds for disqualification under *Code Civ. Proc. § 170.1*, see *§ 201.51[2][c]*. For additional grounds of disqualification that may be combined with or used in lieu of the points and authorities at [1], *above*, see *§§ 201.50 -201.52* and *201.54 -201.56*. For a memorandum of points and authorities supporting an objection to the appointment of a person as a referee under *Code Civ. Proc. § 641.2*, relating to actions to protect and conserve natural resources, see *§ 201.57*. For a memorandum of points and authorities supporting a peremptory challenge to a court commissioner or referee under *Code Civ. Proc. § 170.6*, see *§ 201.58*.

The points and authorities at [1], *above*, may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue as to the qualifications of a person

to act as referee. For example, the points and authorities may be combined with points and authorities submitted in support of objections to the appointment of a person as a referee in the case or in support of a motion to remove the appointed referee and appoint a new referee. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should request the court to take judicial notice of the prior action or proceeding and secure authenticated copies of the pleadings in the prior case to establish identity of parties and cause and of the court's record identifying the person as a juror or witness in the prior case for presentation to the court in the pending action or proceeding. On judicial notice, see *Evid. Code §§ 452(d), 453*. On authentication and proof of writings, see *Evid. Code §§ 1400-1454*. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Forms

For forms of a notice of motion to remove an appointed referee and appoint a new referee, a supporting declaration, and an order granting the motion, see Ch. 38, *Reference* , in California Forms of Pleading and Practice.

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20-201 California Points & Authorities § 201.54

§ 201.54 Supporting Contention That Referee Is Disqualified--Referee Is Interested in Action [Code Civ. Proc. §§ 641(e), 642]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Name*] IS DISQUALIFIED TO ACT AS A REFEREE IN THIS CASE BECAUSE HE/SHE HAS AN INTEREST IN THE _____ [EVENT OF *or* THE MAIN QUESTION INVOLVED IN] THE ACTION IN THAT _____ [*specify*].

Person Has Interest in Action. A party may object to the appointment of any person as a referee on the ground that he or she has an interest in the event of the action or in the main question involved in the action (*Code Civ. Proc. § 641(e)*).

[2] Comments

[a] Use of Form

The points and authorities at [1], *above*, may be submitted in support of the contention that a person appointed or to be appointed referee in a case is disqualified to act on the ground of interest in the action [*see Code Civ. Proc. § 641(e)*]. For a discussion of related grounds for disqualification under *Code Civ. Proc. § 170.1*, see *§ 201.51[2][c]*. For additional grounds of disqualification that may be combined with or used in lieu of the points and authorities at [1], *above*, see *§§ 201.50 -201.53*, *201.55*, and *201.56*. For a memorandum of points and authorities supporting an objection to the appointment of a person as a referee under *Code Civ. Proc. § 641.2*, relating to actions to protect and conserve natural resources, see *§ 201.57*. For a memorandum of points and authorities supporting a peremptory challenge to a court commissioner or referee under *Code Civ. Proc. § 170.6*, see *§ 201.58*.

The points and authorities at [1], *above*, may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue as to the qualifications of a person to act as referee. For example, the points and authorities may be combined with points and authorities submitted in

support of objections to the appointment of a person as a referee in the case or in support of a motion to remove the appointed referee and appoint a new referee. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should present facts showing that the person has an interest in the case. Depending on the nature of the case, such interest may be established by the person's admission or by an affidavit or declaration under penalty of perjury executed by a person who has personal knowledge of the fact [*see Code Civ. Proc. §§ 2002(1)* 2003, 2009, 2015.5; *Evid. Code §§ 700-702* (competency of witnesses)]. Or, if the action is one involving real property in which the person has an ownership interest, for example, the interest may be shown by presentation of authenticated copies of the public records showing the interest. On authentication and proof of writings, see *Evid. Code §§ 1400-1454*. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Forms

For forms of a notice of motion to remove an appointed referee and appoint a new referee, a supporting declaration, and an order granting the motion, see Ch. 38, *Reference* , in California Forms of Pleading and Practice.

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20-201 California Points & Authorities § 201.55

§ 201.55 Supporting Contention That Referee Is Disqualified--Referee Has Unqualified Opinion or Belief as to Merits of Action [Code Civ. Proc. §§ 641(f), 642]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Name*] IS DISQUALIFIED TO ACT AS A REFEREE IN THIS CASE BECAUSE HE/SHE HAS _____ [FORMED *or* EXPRESSED] AN UNQUALIFIED _____ [OPINION *or* BELIEF] AS TO THE MERITS OF THE ACTION.

Person Has Prejudged Action. A party may object to the appointment of any person as a referee on the ground that he or she has formed or expressed an unqualified opinion or belief as to the merits of the action (*Code Civ. Proc. § 641(f)*).

[2] Comments

[a] Use of Form

The points and authorities at [1], *above*, may be submitted in support of the contention that a person appointed or to be appointed referee in a case is disqualified to act on the ground that he or she has prejudged the action [*see Code Civ. Proc. § 641(f)*; but see *Code Civ. Proc. § 170.2* (when expression of view on legal or factual issue not ground for disqualification under *Code Civ. Proc. § 170.1*)]. For a discussion of related grounds for disqualification under *Code Civ. Proc. § 170.1*, see *§ 201.51[2][c]*. For additional grounds of disqualification that may be combined with or used in lieu of the points and authorities at [1], *above*, see *§§ 201.50 -201.54* and *201.56*. For a memorandum of points and authorities supporting an objection to the appointment of a person as a referee under *Code Civ. Proc. § 641.2*, relating to actions to protect and conserve natural resources, see *§ 201.57*. For a memorandum of points and authorities supporting a peremptory challenge to a court commissioner or referee under *Code Civ. Proc. § 170.6*, see *§ 201.58*.

The points and authorities at [1], *above*, may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue as to the qualifications of a person

to act as referee. For example, the points and authorities may be combined with points and authorities submitted in support of objections to the appointment of a person as a referee in the case or in support of a motion to remove the appointed referee and appoint a new referee. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should present facts showing that the person has formed or expressed an unqualified opinion or belief as to the merits of the action. The fact may be shown by the person's admission. On the admissibility of prior admissions of a party as an exception to the hearsay rule, see *Evid. Code § 1220*. Or it may be shown by an affidavit or declaration under penalty of perjury executed by a person having personal knowledge of the fact [*see Code Civ. Proc. §§ 2002(1), 2003, 2009, 2015.5*; *Evid. Code §§ 700-702* (competency of witnesses)]. Or, if the opinion or belief was expressed in a writing, the fact may be shown by producing the writing or an authenticated copy of it. On the best evidence rule, see *Evid. Code §§ 1500-1511*. On authentication and proof of writings, see *Evid. Code §§ 1400-1454*. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Forms

For forms of a notice of motion to remove an appointed referee and appoint a new referee, a supporting declaration, and an order granting the motion, see Ch. 38, *Reference* , in California Forms of Pleading and Practice.

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20-201 California Points & Authorities § 201.56

§ 201.56 Supporting Contention That Referee Is Disqualified--Referee Is Biased Against Party [Code Civ. Proc. §§ 641(g), 642]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Name*] IS DISQUALIFIED TO ACT AS A REFEREE IN THIS CASE BECAUSE OF THE EXISTENCE OF A STATE OF MIND IN HIM/HER EVINCING ENMITY AGAINST OR BIAS TO _____ [*specify party, e.g.,* PLAINTIFF].

Person Is Biased Against Party. A party may object to the appointment of any person as a referee on the ground that there exists a state of mind in the potential referee evincing enmity against or bias toward either party (*Code Civ. Proc. § 641(g)*).

[2] Comments

[a] Use of Form

The points and authorities at [1], *above*, may be submitted in support of the contention that a person appointed or to be appointed referee in a case is disqualified to act on the ground of enmity against or bias toward either party to the action [*see Code Civ. Proc. § 641(g)*]. For a discussion of related grounds for disqualification under *Code Civ. Proc. § 170.1*, see *§ 201.51[2][c]*. For additional grounds of disqualification that may be combined with or used in lieu of the points and authorities at [1], *above*, see *§§ 201.50 -201.55*. For a memorandum of points and authorities supporting an objection to the appointment of a person as a referee under *Code Civ. Proc. § 641.2*, relating to actions to protect and conserve natural resources, see *§ 201.57*. For a memorandum of points and authorities supporting a peremptory challenge to a court commissioner or referee under *Code Civ. Proc. § 170.6*, see *§ 201.58*.

The points and authorities at [1], *above*, may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue as to the qualifications of a person

to act as referee. For example, the points and authorities may be combined with points and authorities submitted in support of objections to the appointment of a person as a referee in the case or in support of a motion to remove the appointed referee and appoint a new referee. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should present facts showing that the person has a state of mind evincing enmity against or bias toward either party. The fact may be shown by the person's admission. On the admissibility of prior admissions of a party as an exception to the hearsay rule, see *Evid. Code § 1220*. Or it may be shown by an affidavit or declaration under penalty of perjury executed by a person having personal knowledge of the fact [*see Code Civ. Proc. §§ 2002(1), 2003, 2009, 2015.5*; *Evid. Code §§ 700-702* (competency of witnesses)]. Or, if the enmity or bias was expressed in a writing, the fact may be shown by producing the writing or an authenticated copy of it. On the best evidence rule, see *Evid. Code §§ 1500-1511*. On authentication and proof of writings, see *Evid. Code §§ 1400-1454*. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Forms

For forms of a notice of motion to remove an appointed referee and appoint a new referee, a supporting declaration, and an order granting the motion, see Ch. 38, *Reference* , in California Forms of Pleading and Practice.

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B. Grounds for Objection to Referee

20-201 California Points & Authorities § 201.57

§ 201.57 Supporting Contention That Referee Is Disqualified--Referee Lacks Essential Technical Qualifications [Code Civ. Proc. §§ 641.2, 642]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Name*] IS DISQUALIFIED TO ACT AS A REFEREE IN THIS CASE BECAUSE THE ACTION SEEKS TO _____ [CONSERVE *or* PROTECT *or* ENHANCE *or combination of these*] _____ [*specify particular natural resource of California*] FROM _____ [POLLUTION *or* IMPAIRMENT *or* DESTRUCTION] FROM _____ [*summarize alleged activities threatening environment*], AND _____ [*name*] IS NOT TECHNICALLY QUALIFIED WITH RESPECT TO THE PARTICULAR SUBJECT MATTER OF THIS ACTION IN THAT _____ [*specify lack of technical qualifications*].

Person Is Not Technically Qualified in Environmental Protection Case. In any action under *Sections 12600 et seq. of the Government Code*, relating to environmental protection, a party may object to the appointment of any person as a referee on the ground that he or she is not technically qualified with respect to the particular subject matter of the proceeding (*Code Civ. Proc. § 641.2*).

[2] Comments

[a] Use of Form

The points and authorities at [1], *above*, may be submitted in support of the contention that a person appointed or to be appointed referee in an environmental protection action is disqualified to act as such on the ground that he or she is not technically qualified with respect to the particular subject matter of the action [*see Code Civ. Proc. § 641.2*; *Gov. Code §§ 12600 et seq.*]. For other grounds for disqualifying a person as a referee, see *§§ 201.50 -201.56*. For a memorandum of points and authorities supporting a peremptory challenge to a court commissioner or referee under *Code Civ. Proc. § 170.6*, see *§ 201.58*.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue as to the qualifications of a person to act as referee. For example, the points and authorities may be combined with points and authorities submitted in support of objections to the appointment of a person as a referee in the case or in support of a motion to remove the appointed referee and appoint a new referee. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form showing the relationship between the facts of the case and the point of law stated. Thus, counsel should show what qualifications are required, what the person's qualifications are, and in what respect they are deficient. This may be established by the admissions of the person. On the admissibility of prior admissions of a party as an exception to the hearsay rule, see *Evid. Code § 1220*. Or they may be established by affidavits or declarations under penalty of perjury executed by persons having knowledge of the qualifications required and of the person's qualifications [*see Code Civ. Proc. §§ 2002(1), 2003, 2009, 2015.5*; *Evid. Code §§ 700-702* (competency of witnesses)]. For who is qualified to be an expert witness, see *Evid. Code § 720*. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Forms

For forms of a notice of motion to remove an appointed referee and appoint a new referee, a supporting declaration, and an order granting the motion, see Ch. 38, *Reference* , in California Forms of Pleading and Practice (Matthew Bender).

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PART II. FORMS
B. Grounds for Objection to Referee

20-201 California Points & Authorities § 201.58

§ 201.58 Supporting Contention That Court Commissioner or Referee Is Disqualified--Person Is Prejudiced Against Party or Attorney [Code Civ. Proc. § 170.6]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Name*] IS DISQUALIFIED TO ACT AS A REFEREE IN THIS CASE BECAUSE HE/SHE IS PREJUDICED AGAINST [THE INTEREST OF] _____ [*specify party or party's attorney, e.g.,* PLAINTIFF *or* PLAINTIFF'S ATTORNEY] SO THAT _____ [*specify, e.g.,* PLAINTIFF *or* PLAINTIFF's ATTORNEY] CANNOT OR BELIEVES THAT HE/SHE CANNOT HAVE A FAIR AND IMPARTIAL _____ [TRIAL *or* HEARING] BEFORE SUCH REFEREE.

A. Person Is Prejudiced Against Party. No court commissioner or referee of any California trial court shall try any civil action or special proceeding of any kind or character nor hear any matter therein that involves a contested issue of law or fact when it is established as provided in *Section 170.6 of the Code of Civil Procedure* that the court commissioner or referee is prejudiced against any party or attorney or the interest of any party or attorney appearing in the action or proceeding (*Code Civ. Proc. § 170.6(a)(1)*).

[*Optional*] **B. Disqualification of Discovery Referee.** A litigant may exercise his or her peremptory challenge under *Section 170.6 of the Code of Civil Procedure* to disqualify a court-appointed discovery referee (Autoland, Inc. v. Superior court *(1988) 205 Cal. App. 3d 857, 860, 252 Cal. Rptr. 263*).

[*Optional*] **C. Timeliness of Peremptory Challenge to Discovery Referee.** A peremptory challenge to a discovery referee appointed under *Code of Civil Procedure, Section 639(a)(5)* must be made to the court by a party either within the following time periods (*Code Civ. Proc. § 639(b)*):

If the discovery referee was appointed for all discovery purposes, within 10 days after notice of the appointment, or if the party has not yet appeared in the action, the motion must be made within 10 days after the that party's appearance.

If the discovery referee has been assigned only for limited discovery purposes and the referee assigned is known at least 10 days before the date set for hearing, at least five days before the date set for hearing.

[2] Comments

[a] Use of Form

The points and authorities at [1], *above*, may be submitted in support of the contention that a court commissioner or referee appointed or to be appointed referee in a case is disqualified to act on the ground of prejudice towards a party or the party's attorney so that the party or attorney cannot or believes that he or she cannot have a fair and impartial trial or hearing before the referee [*see Code Civ. Proc. § 170.6*]. Optional paragraph B is for use when a party is seeking to disqualify a court-appointed discovery referee. Optional Paragraph C is to establish the timeliness of a peremptory challenge to a discovery referee [*see Code Civ. Proc. § 639(b)*].

Cal. Rules of Ct., Rules 3.904(b) and *3.924(b)*, set forth at [4][a], *below* may be relevant in terms of describing certain information the referee is required to disclose.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue as to the qualifications of a person to act as referee. For example, the points and authorities may be combined with points and authorities submitted in support of objections to the appointment of a court referee or commissioner as a referee in the case or in support of a peremptory challenge to remove the appointed referee from the case [*see Code Civ. Proc. § 170.6*]. The points and authorities set forth at [1], *above*, may also be adapted for use in a trial or appellate brief.

In addition, these points and authorities may be combined with a memorandum of points and authorities in support of a petition for a writ of mandate to compel the trial court to grant a timely challenge to the referee under *Code Civ. Proc. § 170.6* after it has failed to do so or for a writ of prohibition to restrain the challenged referee from proceeding or continuing to hear the matter after the trial court has failed to remove him or her as referee [*see Code Civ. Proc. §§ 1085, 1086* (writ of mandate), 1102, 1103 (writ of prohibition)].

[b] Argument

Counsel should insert argument linking the points in this form with the facts of the case and the points of law stated. It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations.

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Forms

For forms for use in peremptorily challenging a judge, court commissioner, or referee under Code Civ. Proc. § 170.6, see Ch. 317, *Judges* , in California Forms of Pleading and Practice. For forms of petitions for writ of mandate and writ of prohibition and related papers, see Ch. 358, *Mandate and Prohibition* .

[d] Related Points and Authorities

For memoranda of points and authorities supporting and opposing a petition for writ of prohibition to restrain a judge from trying a case or hearing a matter after having denied a motion to disqualify under *Code Civ. Proc. § 170.6*, which may be adapted for use in challenging a referee, see Ch. 130, *Judges* . That chapter also contains memoranda addressing the timeliness of peremptory challenges.

[3] Discussion of Authorities

[a] Disqualification of Discovery Referee

In **Autoland, Inc. v. Superior court** *(1988) 205 Cal. App. 3d 857, 252 Cal. Rptr. 263* , the court of appeal issued a writ of mandate directing the superior court to vacate its order striking the petitioner's peremptory challenge against a discovery referee. The court held that a court-appointed discovery referee may be disqualified by peremptory challenge under *Code Civ. Proc. § 170.6*. The court noted respondents' argument that the circumstances under which the "referee" was added to *Code Civ. Proc. § 170.6* indicated that the Legislature was thinking only of juvenile court referees. The court concluded, however, that the language of the statute was not so limited and was too plain to be limited by reference to circumstantial evidence of legislative intent. The court concluded that, if a litigant can exercise his or her one peremptory challenge to disqualify a particular judge or court commissioner from hearing the discovery motion, there is no compelling reason why he or she should be unable to disqualify a particular referee from hearing the motion (*205 Cal. App. 3d 857, 860)* .

[b] Timeliness of Peremptory Challenge to Discovery Referee

Code Civ. Proc. § 639(b) was enacted by Stats 2000, ch. 1011, effective January 1, 2001. Before then, case law established a similar timing requirement for peremptory challenges to discovery referees [*see People v. Superior Court (Lavi) (1993) 4 Cal. 4th 1164, 1182-1185, 17 Cal. Rptr. 2d 815, 847 P.2d 1031* ; ***Pedus Services, Inc. v. Superior Court*** *(1999) 72 Cal. App. 4th 140, 84 Cal. Rptr. 2d 771* ; *Stevens v. Superior Court (1997) 52 Cal. App. 4th 55, 59, 60 Cal. Rptr. 2d 397]* .

[4] Additional Authorities

[a] Additional Disclosures Required

Effective July 1, 2001, in addition to any other disclosure required by law, no later than five days prior to the deadline for parties to file a motion for disqualification of the referee under *Code of Civil Procedure § 170.6* or, if the referee is not aware of his or her appointment or of a matter subject to disclosure at that time, as soon as practicable thereafter, a referee must disclose to the parties the following [*Cal. Rules of Ct., Rules 3.904(b)* (reference by agreement, 3.924(b) (reference by order)]:

- Any matter subject to disclosure under subdivisions (D)(2)(f) and (D)(2)(g) of canon 6 of the Code of Judicial Ethics; and

- Any significant personal or professional relationship the arbitrator has or has had with a party, attorney, or law firm in the current case, including the number and nature of any other proceedings in the past 24 months in which the referee has been privately compensated by a party, attorney, law firm, or insurance company in the current case for any services. The disclosure must include privately compensated service as an attorney, expert witness, or consultant or as a judge, referee, arbitrator, mediator, settlement facilitator, or other alternative dispute resolution neutral.

Cal. Rules of Ct., Appendix Code of Judicial Ethics, Canon (D)(2)(f) requires the referee to disclose in writing or on the

record information required by law, or information the referee believes the parties or their lawyers might consider relevant to the question of disqualification, even if he or she believes that there is no actual basis for disqualification.

Cal. Rules of Ct., Appendix Code of Judicial Ethics, Canon (D)(2)(g) requires the referee to disclose in writing or on the record membership in any organization that practices invidious discrimination on the basis of race, sex, religion, national origin, or sexual orientation, except for membership in a religious or an official military organization of the United States and membership in a nonprofit youth organization so long as membership does not violate canon 4A [conduct of extrajudicial activities].

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[Reserved]

§§ 201.59[Reserved]

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CHAPTER 201 REFERENCE AND REFEREES
PART II. FORMS
C. Referee's Report

20-201 California Points & Authorities § 201.70

§ 201.70 Supporting Contention That Referee's Report Under Special Reference [Code Civ. Proc. §§ 638(b), 639] Should Be or Was Properly Confirmed and Adopted by Trial Court

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE REFEREE'S REPORT IN THIS CASE IS SUPPORTED BY COMPETENT AND SUFFICIENT EVIDENCE AND _____ [SHOULD BE *or* WAS PROPERLY] CONFIRMED AND ADOPTED BY THE COURT.

A. Use of Motion Procedure to Confirm Report. Although no statutory authority exists for a motion to confirm the report of a referee appointed under an order of special reference, a motion has been commonly used to bring the referee's report to the attention of the court and has been approved without comment in several appellate opinions (*see, e.g., Code Civ. Proc. § 644(b)*; *Hall v. Bru (1932) 216 Cal. 153, 154, 13 P.2d 716* ; *Fooshe v. Sunshine (1950) 96 Cal. App. 2d 336, 345, 215 P.2d 66*).

B. Referee's Decision as Special Verdict. A referee's decision reported to the court pursuant to an order of reference to report the facts has the effect of a special verdict and should be sustained unless plainly not warranted by any reasonable view of the evidence (*see Code Civ. Proc. § 645*; *Williams v. Flinn & Treacy (1923) 61 Cal. App. 352, 358-359, 214 P. 1024*).

[*Optional*] **C. Weight of Special Referee's Decision.** A special referee's decision, although not binding and advisory only, is entitled to great weight when based in substantial part on the credibility of witnesses because of the referee's unique opportunity to observe the demeanor of the witnesses when they testified (*Holt v. Kelly (1978) 20 Cal. 3d 560, 562-563, 143 Cal. Rptr. 625, 574 P.2d 441* ; *see, e.g., Code Civ. Proc. § 644(b)*).

[2] Comments

[a] Use of Form

The points and authorities at [1], *above*, may be submitted in support of the contention that the referee's report on a special reference should be or was properly confirmed. Optional Paragraph C should be included when witnesses testified at the hearing before the referee and the testimony was conflicting.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue as to the effect of the referee's report on a special reference. For example, the points and authorities may be combined with a memorandum of points and authorities submitted in support of a motion for an order confirming and adopting the referee's report. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Initially, counsel need only show that the report complied with the order of reference, because the report is presumed to be supported by the evidence [*see § 201.71*]. Counsel may submit cognizable evidence by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Forms

For a form of notice of motion for an order adopting the referee's report on a special reference, see Ch. 38, *Reference* , in California Forms of Pleading and Practice.

[d] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 201.80* may be used to oppose the contention supported by the points and authorities at [1], *above*. In the event the referee's report exceeded the scope of the order of reference, the points and *authorities in § 201.41* may also be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Use of Motion Procedure to Confirm Report

As amended effective January 1, 2001, *Code Civ. Proc. § 644(b)* provides that in the case of all references other than consensual general references under *Code Civ. Proc. § 638*, the decision of the referee or commissioner is only advisory. The court may adopt the referee's recommendations in whole or in part after independently considering the referee's findings and any objections and responses thereto filed with the court.

Hall v. Bru *(1932) 216 Cal. 153, 13 P.2d 716* , was an action to partition real property. Pursuant to the stipulation of the parties, the court appointed a referee to ascertain whether the property could or could not be partitioned without great prejudice to the owners. The referee reported that after due notice and in the presence of counsel for all parties he personally inspected the premises and found that partition could not be had without great prejudice to the owners. Plaintiff's counsel served and filed a notice of motion for an order confirming the referee's report. At the hearing of the motion, plaintiff appeared with counsel and introduced evidence in support of the referee's report. The motion was granted and an interlocutory judgment ordering the property sold was filed. Subsequently, defendants moved for an order setting aside the order confirming the referee's report on the ground the order was taken through their inadvertence, surprise, and excusable neglect. The motion was denied, and defendants appealed.

The Supreme Court, after reciting the foregoing facts, said the showing in support of the motion to set aside failed to establish sufficient diligence on the part of the defendants, held the trial court did not abuse its discretion in denying the motion to set aside, and affirmed the judgment (*216 Cal. 153, 154-155)* .

Fooshe v. Sunshine *(1950) 96 Cal. App. 2d 336, 215 P.2d 66* , was an action by purchasers to rescind a sale of farm land or for damages in which one of the defendants filed a cross complaint against plaintiffs for damages, dissolution of a partnership with plaintiffs to farm the land, and an accounting. The trial of the case resulted in a judgment for defendants on the complaint. On the cross complaint, the court denied damages but ordered the partnership dissolved and an accounting. The judgment appointed a referee to take the accounting. All parties appeared at the hearing before the referee, evidence was introduced, and the matter was submitted. The referee thereafter filed his report with the court. The court subsequently approved and adopted the referee's report as its findings and made certain additional findings (now statement of decision [*see Code Civ. Proc. § 632*]). The court rendered judgment for plaintiffs and defendant appealed.

In affirming the judgment, the court of appeal said that when the motion to approve the referee's report was made and argued before the court, appellant tendered no additional evidence; the referee's findings (now decision [*see Code Civ. Proc. § 645*]) became the court's findings and properly support the judgment (*96 Cal. App. 2d 336, 345)* .

[b] Referee's Decision as Special Verdict

Code Civ. Proc. § 645 provides in part that when the reference is to report the facts, the decision reported has the effect of a special verdict.

Williams v. Flinn & Treacy *(1923) 61 Cal. App. 352, 214 P. 1024* , was an action to recover alleged commissions owed plaintiff for street work contracts secured for defendant contractors. Plaintiff attached as an exhibit to his complaint an itemized statement of account, showing a balance due him of over $4,000. Defendants, in their answer, claimed certain credits and denied that the exhibit attached to the complaint was a full or complete statement of any account between the parties. The matter was referred to a referee to take an account. At the hearing before the referee, defendants discovered that they had failed in their answer to set up numerous credits against plaintiff in addition to those alleged in their answer and requested permission to amend their answer to include them. The referee said he would not permit the amendment at that time, but would receive all the evidence and then permit amendments accordingly. After completion of the hearing, it became clear the referee under the order appointing him had no power to permit amendments to the pleadings. The referee nevertheless in his findings (now decision [*see Code Civ. Proc. § 645*]) allowed all the credits to which defendants were entitled. Defendants' subsequent request to amend their answer to conform to the proof submitted by the parties and received by the referee was denied by the trial judge, and plaintiff's exceptions to the referee's report as to all credits allowed not specified in defendants' answer were sustained. Judgment was entered for plaintiff without any offset for the unpleaded credits, and defendants appealed.

The court of appeal reversed with instructions to the trial court to accept and confirm the referee's report and give judgment for plaintiff in accordance with it. The appellate court held that an amendment of the answer was not necessary, since the items of the account were in issue by reason of the exhibit attached to the complaint and defendants' denial of it. The court held that under the denial, defendants were at liberty to contest each and every item of the alleged account and their right was not limited by the individual items of the account specifically denied in their answer (*61 Cal. App. 352, 358)* . The court said: (1) a referee's finding (now decision [*see Code Civ. Proc. § 645*]) on a question of fact is entitled to the same weight as a special verdict of a jury when the evidence was produced before and heard by him; (2) the finding should be sustained unless plainly not warranted by any reasonable view of the evidence; and (3) the trial court should have accepted the referee's findings and given judgment in accordance with them (*61 Cal. App. 352, 358-359)* .

[c] Weight of Special Referee's Decision

Code Civ. Proc. § 644(b) is set forth at [a], *above*.

The facts and procedural background of ***Holt v. Kelly*** *(1978) 20 Cal. 3d 560, 143 Cal. Rptr. 625, 574 P.2d 441* , are discussed at *§ 201.15[3][a]*. In characterizing the weight to be accorded a referee's findings (now decision [*see Code Civ. Proc. § 645*]) on a special reference, the Court said a special referee's findings are not binding and are properly characterized as advisory only; nonetheless, when the findings of a referee are based in substantial part on the credibility of witnesses, such findings, although not binding on the court, are entitled to great weight in view of the referee's unique opportunity to observe the demeanor of the witnesses (*20 Cal. 3d 560, 562-563)* .

[4] Additional Authorities

[a] Use of Motion Procedure to Confirm Report

In *Klein v. Maddox (1943) 59 Cal. App. 2d 141, 138 P.2d 28* , the court of appeal, in an action to partition real property, affirmed an order made on plaintiff's motion confirming the referee's report that physical partition of the real property could not be had without injury to the parties and directing the referee to sell (*59 Cal. App. 2d 141, 146)* .

In *In re Riccardi (1926) 80 Cal. App. 66, 251 P. 650* , the application of a disbarred attorney for reinstatement as an attorney at law was opposed by the local bar association and, on stipulation of the parties, the court of appeal referred the matter to a referee to hear all the testimony, take evidence, make findings of fact (now decision [*see Code Civ. Proc. § 645*]), and report to the court. Subsequently, the referee's report was filed with the court. The attorney's motion to amend the referee's findings and to take such further testimony as may be proper to make such findings in the attorney's favor and against the contentions of the bar association was denied. The bar association's countermotion to accept the referee's findings was granted (*80 Cal. App. 66, 70)* .

[b] Referee's Decision as Special Verdict

In *Bernard v. Sloan (1906) 2 Cal. App. 737, 84 P. 232* , an action to recover commissions for the sale of onion seed, a reference with the consent of the parties was ordered to report findings of fact (now decision [*see Code Civ. Proc. § 645*]) as to the state of account between plaintiff and defendants. Judgment based on the referee's report to which some of defendants' objections had been allowed and others overruled was rendered for plaintiff. The court of appeal affirmed. The court said that the finding of facts reported by the referee was equivalent to a special verdict [*see Code Civ. Proc. § 645*] or to the findings of fact (now statement of decision [*see Code Civ. Proc. § 632*]) made by the court on its trial of a cause, and that a review of the referee's decision on a question of fact is subject to the same rules as is the action of a jury in a special verdict or of a court on its finding of facts (*2 Cal. App. 738, 751)* .

[c] Weight of Special Referee's Decision

In re De La Roi (1945) 27 Cal. 2d 354, 164 P.2d 10 , cert. denied, 329 U.S. 761, 67 S. Ct. 115, 91 L. Ed. 656 (1946) , was an original habeas corpus proceeding in the Supreme Court. Petitioner had been convicted of having murdered a fellow inmate and had been sentenced to death. Some of the fellow inmates who testified against him had since recanted their testimony. Petitioner alleged that he had been convicted on perjured testimony. The Court appointed a referee to take testimony on the issues of fact presented by the petition and the return to the petition. The referee took testimony and subsequently filed his report finding against petitioner's contentions. Counsel for petitioner filed exceptions. In ordering the writ discharged and the prisoner remanded to custody, the Court said that although it was not bound by the findings of fact (now decision [*see Code Civ. Proc. § 645*]) made by a referee, his conclusions are entitled to more consideration than the bare testimony of the witnesses, that he had an opportunity to observe the demeanor of those who appeared before him and to weigh what they said in connection with their manner on the witness stand. The Court added that the evidence not only fully justified the findings adverse to the petitioner but compelled them (*27 Cal. 2d 354, 364)* .

See also *In re Lessard (1965) 62 Cal. 2d 497, 507, 42 Cal. Rptr. 583, 399 P.2d 39* (the findings of the referee are not binding on the court, although they are entitled to great weight); *In re Rose (1965) 62 Cal. 2d 384, 387, 42 Cal. Rptr. 236, 398 P.2d 428* (same).

The facts and procedural background of *Bernard v. Sloan (1906) 2 Cal. App. 737, 84 P. 232* , are discussed at [b], *above.* In affirming the judgment for plaintiff, the court said that the weight of evidence, the resolution of any conflict in the evidence, the credibility of the witnesses, and the character of their testimony are matters on which a referee is required to exercise his or her judgment and in which his or her judgment will be accepted by the court as correct, unless clearly shown to be erroneous. With respect to the oral testimony received by the referee, the court pointed out that the referee had an opportunity to observe the witness's manner of testifying, the clearness or hesitancy with which he was able to exercise his memory, and to determine whether he was entitled to credit or should be disbelieved (*2 Cal. App. 737, 751)* .

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C. Referee's Report

20-201 California Points & Authorities § 201.71

§ 201.71 Supporting Contention That Referee's Report Is Presumed to Be Supported by Evidence

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE REFEREE'S REPORT IS PRESUMED TO BE SUPPORTED BY COMPETENT AND SUFFICIENT EVIDENCE AND THE BURDEN OF PROVING OTHERWISE IS ON THE PARTY CHALLENGING THE REPORT.

A. Referee's Report Presumed Supported by Evidence. The report of a referee comes before the trial court with a presumption that it is based on competent and sufficient evidence and the burden of proving otherwise is on the party challenging the sufficiency of the evidence to support the report (*Brodie v. Barnes (1942) 56 Cal. App. 2d 315, 319, 132 P.2d 595*).

[*Optional*] **B. Effect of Failure to Produce Reporter's Transcript.** The failure of the party excepting to a referee's report on the ground of insufficiency of the evidence to produce a copy of the reporter's transcript of the proceedings before the referee prevents a judicial consideration of the exceptions (*Brodie v. Barnes (1942) 56 Cal. App. 2d 315, 319-320, 132 P.2d 595*).

[2] Comments

[a] Use of Form

The points and authorities in [1], *above*, may be submitted in support of the contention that a referee's report is presumed to be supported by the evidence. Optional Paragraph B should be included when the challenge is based on the asserted insufficiency of the evidence to support the referee's report and the challenging party has failed to procure and produce a copy of the reporter's transcript of the proceedings before the referee.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the

specific procedural context in which counsel wishes to raise the issue as to the sufficiency of evidence to support the referee's report. For example, they may be combined with a memorandum of points and authorities submitted in opposition to exceptions to the referee's report based on insufficiency of the evidence or, if the report has been confirmed and adopted by the trial court and the objection that the report is not supported by the evidence is raised on a motion for new trial [*see Code Civ. Proc. § 657(6)*] or a motion to set aside and vacate the judgment and enter a new and different judgment [*see Code Civ. Proc. § 663*], they may be combined with a memorandum of points and authorities submitted in opposition to the motion. They may also be used in an appellate brief in opposition to the contention that the report should not have been confirmed and adopted by the trial court because it was not supported by the evidence produced at the hearing before the referee. In addition, the points and authorities set forth in this form may also be adapted for use in a trial brief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show how the challenging party has failed to sustain his or her burden of proving that the referee's report is not supported by the evidence. Counsel may submit cognizable evidence by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Forms

For a form of exceptions to the report of a referee on a special reference, see Ch. 38, *Reference* ; in California Forms of Pleading and Practice. For forms for use on a motion for new trial or to set aside and vacate a judgment and enter a new and different judgment, see Ch. 371, *Motions After Trial* , in that publication. For forms for use with respect to the record on appeal from superior and municipal courts, see Ch. 44, *Appeal: Preparing and Filing the Record* , and Ch. 345A, *Limited Civil Cases* , respectively, in that publication.

[d] Related Points and Authorities

For forms of memoranda of points and authorities generally supporting and opposing motions for new trial and motions to set aside and vacate the judgment and enter another and different judgment, see Ch. 155, *Motions After Trial* , in this publication.

[3] Discussion of Authorities

[a] Referee's Report Presumed Supported by Evidence

Brodie v. Barnes *(1942) 56 Cal. App. 2d 315, 132 P.2d 595* , was an action against the widow and son of a deceased employee to impress a constructive trust on certain properties held by them to secure repayment of the amount embezzled by the employee after plaintiff's claim for reimbursement from the deceased's estate had been filed and rejected. Defendants were the executors of the estate. At the request of the parties, the trial court appointed a referee to investigate and report back the extent and disposition of all misappropriated funds. A report and supplemental report were subsequently filed. Defendants filed exceptions contending that certain of the referee's findings (now decision [*see Code Civ. Proc. § 645*]) were not supported by the evidence, but they failed to secure a reporter's transcript of the proceedings before the referee. The trial judge repeatedly called this to their attention and informed them he could not pass on the sufficiency of evidence to support the referee's findings unless the evidence was produced, and that the burden was on defendants to support their exceptions. Defendants refused to have a reporter's transcript prepared. The court eventually adopted the referee's report and rendered judgment for plaintiff for the amount embezzled not barred by the statute of limitations. Defendants appealed.

The court of appeal reversed a portion of the judgment relating to the source from which repayment was to be made and affirmed the balance of the judgment. With respect to the referee's report, the court said that the findings and report of the referee came before the trial court with a presumption that they were based on competent and sufficient evidence and that the burden was on defendants to support their exceptions (*56 Cal. App. 2d 315, 319)* .

[b] Effect of Failure to Produce Reporter's Transcript

The facts and procedural background of ***Brodie v. Barnes*** *(1942) 56 Cal. App. 2d 315, 132 P.2d 595* , are discussed under [a], *above.* A reporter's transcript of the proceedings before the referee was included in the record on appeal. In reversing the judgment in part and affirming it in part, the court of appeal said the only way the defendants could support their exceptions to the referee's report relating to the sufficiency of the evidence was to produce the evidence and that, having failed and refused to produce it before the trial court, although given ample opportunity to do so, they could not properly produce the transcript before the appellate court and secure a ruling on their contentions relating to the sufficiency of the evidence (*56 Cal. App. 2d 315, 319-320)* . The court said it is elementary that an appellate court, in passing on the sufficiency of the evidence, cannot consider evidence not before the trial court and held that, since it could not consider the reporter's transcript of the proceedings before the referee, all findings of the trial court (now statement of decision [*see Code Civ. Proc. § 632*]) and all findings of the referee (now decision [*see Code Civ. Proc. § 645*]) had to be conclusively presumed to be supported (*56 Cal. App. 2d 315, 319-320)* .

[4] Additional Authorities

[a] Effect of Failure to Produce Reporter's Transcript

In *Klein v. Maddox (1943) 59 Cal. App. 2d 141, 138 P.2d 28* , the court of appeal, in an action to partition real property, affirmed an order made on plaintiff's motion confirming the referee's report that physical partition of the real property could not be had without injury to the parties and directing the referee to sell. Defendant had filed no objections to the report and on appeal contended the evidence was insufficient to support the referee's and trial court's conclusions. The court of appeal held that defendants were precluded from urging this ground because no reporter's transcript of the proceedings before the referee or of the proceedings in court on the hearing of the motion to confirm the referee's report had been included in the record on appeal and because no objections to the report had been filed in the trial court (*59 Cal. App. 2d 141, 144)* .

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PART II. FORMS
C. Referee's Report

20-201 California Points & Authorities § 201.72

§ 201.72 Supporting Contention That Factual and Legal Basis of Referee's Decision Is Not Required to Be Stated on Special Reference

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE REFERENCE IN THIS CASE WAS SPECIAL TO _____ [*specify purpose*] AND, HENCE, THERE IS NO REQUIREMENT THAT THE REFEREE SET FORTH IN HIS/HER REPORT THE FACTUAL AND LEGAL BASIS OF HIS/HER DECISION.

A. When Statement of Decision by Referee Is Required. *Section 643(a) of the Code of Civil Procedure*, providing that the referees or commissioners must report their statement of decision in writing to the court, applies only to a general reference under *Section 638(a) of the Code of Civil Procedure* to try any or all of the issues of an action or proceeding, whether of fact or of law, and not to a special reference (see *Code Civ. Proc. §§ 638(a), 643(a), 644*; *Dallman Co. v. Southern Heater Co. (1968) 262 Cal. App. 2d 582, 589-590, 68 Cal. Rptr. 873*).

B. When Factual and Legal Basis of Referee's Decision Is Required to Be Stated. Although the statement of decision of a referee reported by a referee under a general reference pursuant to *Section 638(a) of the Code of Civil Procedure* may be required to explain the factual and legal basis as to each of the principal controverted issues before the referee, no such requirement is imposed on the decision of a referee reported pursuant to a special reference (see *Code Civ. Proc. §§ 632, 643(c)*; *Dallman Co. v. Southern Heater Co. (1968) 262 Cal. App. 2d 582, 589-590, 68 Cal. Rptr. 873*).

[2] Comments

[a] Use of Form

The points and authorities at [1], *above*, may be submitted in support of the contention that on a special reference to report facts, a referee is not, in his or her report to the court, required to report a statement of decision explaining the

factual and legal basis of his or her decision. However, for the purposes of this form, it is assumed that the statement of decision required by *Code Civ. Proc. § 643(a)*, as in the case of a statement of decision issued by a court [*see Code Civ. Proc. § 632*], must explain the factual and legal basis of the decision [*see* discussion at [3][b], *below*]. It is also assumed that the holding in *Dallman Co. v. Southern Heater Co. (1968) 262 Cal. App. 2d 582, 589, 68 Cal. Rptr. 873* , to the effect that *Code Civ. Proc. § 643*, prior to its 1984 amendment, applied only to general references under *Code Civ. Proc. § 638(a)* and not to special references continues to apply to *Code Civ. Proc. § 643* as amended. These assumptions are supported by the fact that as a result of the 1984 amendments an order directing a referee to report a statement of decision is expressly required only by *Code Civ. Proc. § 638(a)*, which authorizes a general reference. Further, the 2000 amendments to *Code Civ. Proc. § 643* only refer to a "statement of decision" in *Code Civ. Proc. § 643(a)* [*see* [3][a], *below*] and set forth other requirements for a special referee's report [*see Code Civ. Proc. § 643(c)*, at [3][b], *below*; *see also Code Civ. Proc. §§ 644, 645*].

The points and authorities at [1], *above*, may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue as to whether a referee in his or her report to the court pursuant to an order of special reference is required to explain the factual and legal basis for his or her decision. For example, they may be combined with a memorandum of points and authorities submitted in opposition to exceptions to the referee's report based on the absence of the explanation. They may also be used in an appellate brief in opposition to the contention that the report should not have been confirmed and adopted by the trial court because the referee had failed to explain the factual and legal basis for his or her decision. In addition, the points and authorities set forth in this form may also be adapted for use in a trial brief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. However, all that counsel need show is that the referee's report complied with the order of reference. This may be done by asking the court to take judicial notice of its own file [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Forms

For a form of exceptions to the report of a referee on a special reference, see Ch. 38, *Reference* , in California Forms of Pleading and Practice. For forms for use with respect to the record on appeal from superior and municipal courts, see Ch. 44, *Appeal: Preparing and Filing the Record* , and Ch. 345A, *Limited Civil Cases* , respectively, in that publication.

[3] Discussion of Authorities

[a] When Statement of Decision by Referee Is Required

Of the two statutes authorizing the court to order a reference (*Code Civ. Proc. §§ 638, 639*), only *Code Civ. Proc. § 638(a)*, relating to a general reference, authorizes the court to order the referee to report a statement of decision, as opposed to a decision or report [*see Code Civ. Proc. §§ 643, 645*]. Similarly, *Code Civ. Proc. § 644* allows for entry of judgment after the filing of a statement of decision only after a general reference. *Code Civ. Proc. § 643(a)* provides that, unless otherwise directed by the court, the referees or commissioner must report their statement of decision in writing to the court within 20 days after the hearing, if any, has been concluded and the matter has been submitted. *Code Civ. Proc. § 643(b)* provides that a referee appointed pursuant to *Code Civ. Proc. § 638* must report as agreed by the parties and approved by the court.

Code Civ. Proc. § 644(a) provides that in the case of a consensual general reference pursuant to *Code Civ. Proc. § 638*,

the decision of the referee or commissioner on the whole issue must stand as the decision of the court, and on filing of the statement of decision with the clerk of the court, judgment may be entered thereon in the same manner as if the action had been tried by the court, while *Code Civ. Proc. § 644(b)* provides that in the case of all other references, the decision of the referee or commissioner is only advisory. The court may adopt the referee's recommendations in whole or in part after independently considering the referee's findings and any objections and responses thereto filed with the court.

Dallman Co. v. Southern Heater Co. *(1968) 262 Cal. App. 2d 582, 68 Cal. Rptr. 873* , was an action for loss of business profits and goodwill resulting from a breach of contract. Pursuant to the stipulation of the parties, the trial court ordered the matter referred to a court commissioner as referee to determine the existence and amount of damages. The referee subsequently filed his report which was adopted by the trial court. Judgment was for plaintiff. Defendant appealed, contending that the referee failed to make findings of fact (now statement of decision) as required by then *Code Civ. Proc. § 643* and that the court's findings of fact (now statement of decision [*see Code Civ. Proc. § 632*]) based on evidence not adduced before it were insufficient to support the judgment.

The court of appeal rejected the contentions and affirmed the judgment on the ground the reference was special under *Code Civ. Proc. § 638(b)*. The court said that then *Code Civ. Proc. § 643* applied to a general reference to try any or all of the issues of an action under *Code Civ. Proc. § 638(a)* and not to a special reference (*262 Cal. App. 2d 582, 590)* .

[b] When Factual and Legal Basis of Referee's Decision Is Required to Be Stated

Code Civ. Proc. § 632, relating to trial by the court, abolishes findings of fact and conclusions of law and substitutes in their stead a statement of decision that must explain the factual and legal basis for the court's decision regarding each of the principal controverted issues at trial. The 1984 amendment to *Code Civ. Proc. § 643*, relating to referees, likewise, did away with findings of fact and conclusions of law and substituted in their stead a statement of decision. That same terminology, "statement of decision" is retained in *Code Civ. Proc. § 643(a)*, as amended effective January 1, 2001. However, *Code Civ. Proc. § 643(c)*, first effective January 1, 2001, provides that the report filed by a referee appointed pursuant to *Code Civ. Proc. § 639*, must include a recommendation on the merits of any disputed issue, a statement of the total hours spent and the total fees charged by the referee, and the referee's recommended allocation of payment. *Code Civ. Proc. § 643(c)* also provides for objections to the report and requires the court to review any objections and responses to them. The sections relating to references (*Code Civ. Proc. § 638 et seq.*) fail to define statement of decision or to specify its contents. Nevertheless, the legislative purpose behind the 1984 amendments to the reference statutes was to make the procedure on references conform to that followed on a trial by the court [*see* Legislative Counsel's Digest to AB 3088, enacted as Stats. 1984, ch. 350]. Consequently, it would appear that the provisions of *Code Civ. Proc. § 632*, relating to the content of the statement of decision issued by a court, would apply to a referee's statement of decision under *Code Civ. Proc. §§ 638(a)* and *643(a)*. Thus, like the court's statement of decision under *Code Civ. Proc. § 632*, it would appear that a referee's statement of decision under *Code Civ. Proc. 643(a)* would have to explain the factual and legal basis for the decision as to each of the principle controverted issues.

The facts and procedural background of ***Dallman Co. v. Southern Heater Co.*** *(1968) 262 Cal. App. 2d 582, 68 Cal. Rptr. 873* , are discussed at [a], *above.* In affirming the judgment, the court of appeal held that the reference ordered by the trial court was a special reference under *Code Civ. Proc. § 638(b)* to ascertain a fact necessary to enable the court to determine the action and that in such a reference findings of fact and conclusions of law by the referee are not required (*262 Cal. App. 2d 582, 589-590)* . Quoting *National Brass Wks. v. Weeks (1928) 92 Cal. App. 318, 321, 268 P. 412* (discussed at *§ 201.75[3][a]*), the court reasoned that in such a case the court ultimately determines the facts and the law by rendering its decision containing the findings of fact and conclusions of law (now statement of decision [*see Code Civ. Proc. § 632*]) which serves as the basis for the judgment entered; the judgment thus entered is in no way dependent on the referee's report for support but is grounded on the court's decision. The court added that such findings and conclusions (now statement of decision) must be made by the trial court (*262 Cal. App. 2d 582, 590)* . In rejecting defendant's contention that the court could not make findings of fact based on evidence not adduced before it, the court

said that *Code Civ. Proc. § 638(b)* expressly authorizes a reference to ascertain and report facts necessary to enable a court to determine an issue when the parties agree to such procedure, and that defendant, having stipulated to just such a procedure, could not complain (*262 Cal. App. 2d 582, 590-591)* .

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20-201 California Points & Authorities § 201.73

§ 201.73 Supporting Contention That Referee's Decision on Whole Issue Must Stand as Decision of Court [Code Civ. Proc. § 644(a)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

JUDGMENT IN THIS CASE _____ [SHOULD BE *or* SHOULD HAVE BEEN *or* WAS PROPERLY] ENTERED IN THE SAME MANNER AS IF THE ACTION HAD BEEN TRIED BY THE COURT BECAUSE THE REFEREE'S DECISION WAS ON THE WHOLE ISSUE AND, THEREFORE, THE REFEREE'S STATEMENT OF DECISION _____ [MUST STAND *or* STANDS] AS THE DECISION OF THE COURT.

A. Scope of Reference. A reference on the agreement of the parties filed with the clerk or judge, or entered in the minutes, or on the motion of a party to a written contract or lease that provides that any controversy arising therefrom shall be heard by a reference if the court finds a reference agreement exists between the parties, may be ordered to hear and determine any or all issues in an action or proceeding, whether of fact or of law, and to report a statement of decision (*Code Civ. Proc. § 638(a)*).

B. Referee's Decision as Basis for Judgment. In the case of a consensual general reference pursuant to *Code of Civil Procedure Section 638*, the decision of the referee or commissioner on the whole issue must stand as the decision of the court, and on the filing of the statement of decision with the clerk of the court, judgment may be entered on it in the same manner as if the action had been tried by the court (*Code Civ. Proc. § 644(a)*; *see Ellsworth v. Ellsworth (1954) 42 Cal. 2d 719, 722, 269 P.2d 3* ; *Lewis v. Grunberg (1928) 205 Cal. 158, 162, 270 P. 181*).

[*Optional*] **C. Distinctions Between Referee and Temporary Judge.** Although a general reference referee's statement of decision must stand as the finding of the court, the actual judgment is entered by the trial judge in the same manner as though the matter had been tried by the court. A general reference preserves the court's power regarding new trial motions and other postjudgment remedies. A temporary judge has broader powers than a referee, including the power to

render a judgment which is appealable in the same manner as one rendered by a constitutional judge. In keeping with this broad authority, a temporary judge must take an oath of office before performing judicial functions (*Kajima Engineering and Construction, Inc. v. Pacific Bell (2002) 103 Cal. App. 4th 1397, 1401, 127 Cal. Rptr. 2d 464* ; *see Cal. Const., art. VI, § 21*; *Cal. Rules of Ct., Rule 2.831*).

[*Optional*] **D. Referee Is Not Required to Take Oath.** The type of dispute resolution employed here was a general reference, not a trial by a temporary judge. Thus, the statement of decision [and judgment entered thereon] is/are not invalid because the referee did not need to take the oath required of a temporary judge by *California Constitution, article IV, section 21* and California Rules of Court, Rule 244 (*Kajima Engineering and Construction, Inc. v. Pacific Bell (2002) 103 Cal. App. 4th 1397, 1400-1401, 127 Cal. Rptr. 2d 464*).

[2] Comments

[a] Use of Form

The points and authorities at [1], *above*, may be submitted in support of a contention that the referee's statement of decision, filed under a consensual general reference made pursuant to *Code Civ. Proc. § 638(a)*, is binding on the court and that judgment on it must be entered in the same manner as if the action had been tried by the court. For a form of memorandum of points and authorities supporting the contention that a new trial should be or was properly granted when the judgment in the case is based on a referee's report, see *§ 201.90*. Optional Paragraphs C and D are to rebut or anticipate any contention that the statement of decision of a referee serving under general reference pursuant to *Code Civ. Proc. § 638(a)*, or the judgment entered thereon, is invalidated because the referee did not take the oath of required of a temporary judge by *Cal. Const., art. VI, § 21*; *Cal. Rules of Ct., Rule 2.831*. Optional Paragraph C sets forth the primary distinction between a general reference and a trial by a temporary judge. Optional Paragraph D addresses the distinction that a temporary judge, but not a referee, need take the oath.

The points and authorities at [1], *above*, may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue regarding the effect of a referee's report. For example, the points and authorities may be combined with points and authorities in opposition to exceptions to the report filed by the other party. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

In addition, the points and authorities at [1], *above*, may also be combined with a memorandum of points and authorities in support of a petition for a writ of mandate seeking to compel the trial court to enter judgment on the referee's report or for a writ of prohibition seeking to restrain the trial court from proceeding to try the action after the referee's report has been submitted to the court, or both [*see Code Civ. Proc. §§ 1085, 1086* (writ of mandate), 1102, 1103 (writ of prohibition)].

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel must show that the reference was general and that the referee's report complies with the order of reference. If counsel is using optional Paragraph C or D, the argument should detail any stipulation of the parties and show how they came to be confused about whether they were agreeing to a reference or trial by a temporary judge. It is advisable for counsel to submit cognizable evidence in support of factual statements, by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations.

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to

establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Forms

For a form of a referee's report on the whole issue and related forms, see Ch. 38, *Reference* , in California Forms of Pleading and Practice (Matthew Bender). For forms for use in mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* , in that publication.

[d] Related Points and Authorities

For memoranda of points and authorities generally supporting and opposing petitions for writs of mandate and prohibition, see Ch. 150, *Mandate and Prohibition* , in this publication.

[3] Discussion of Authorities

[a] Referee's Decision as Basis for Judgment

Lewis v. Grunberg *(1928) 205 Cal. 158, 270 P. 181* , was an action by a seller of a stock of merchandise against the buyers arising out of a dispute as to the construction of the sale contract. The parties stipulated that the cause be ordered to a referee to try all of the issues in the action, whether of fact or of law, and to report a finding and judgment (now statement of decision [*see Code Civ. Proc. § 638(a)*]) thereon, and an order to that effect was signed. The referee recited as a part of his findings that he was appointed to find on both questions of law and fact. The referee found for plaintiff in the sum of $3,439.76 with interest from February 15, 1922. By its judgment, the trial court awarded plaintiff the sum of $4,857.74 with interest from April 21, 1922. Defendants appealed.

The Supreme Court modified the judgment to conform to the referee's finding and affirmed the judgment as modified. The Court held that the reference was general and that under former Code Civ. Proc. § 644 the referee's findings were binding. It said that on the filing of the findings of the referee, judgment should have been entered in accordance with it (*205 Cal. 158, 162)* .

Although the cases discussed above relied on former Code Civ. Proc. § 644, the 1984 amendment to that section only changed the term "finding" to "decision" and "statement of decision," but did not change the section's basic requirement that judgment may be entered based on the referee's decision following a general reference.

[b] Distinctions Between Referee and Temporary Judge

Kajima Engineering and Construction, Inc. v. Pacific Bell *(2002) 103 Cal. App. 4th 1397, 127 Cal. Rptr. 2d 464* , arose out of a work-related injury at a construction site. Kajima sued defendants to recover workers' compensation benefits paid to its injured employee, who joined the litigation as a plaintiff in intervention. After the case was assigned to a judge for all purposes, the parties stipulated on the record to have the action tried by a retired superior court judge. After a four-day bench trial, that judge ruled in favor of Pacific Bell, issued a statement of decision setting forth findings of fact and law, and filed it in the superior court. The judge to whom the case had been assigned entered judgment on the statement of decision and heard and decided the postjudgment motion regarding costs. The injured worker appealed, claiming the retired judge failed to take the oath required of temporary judges by former Cal. Rules of Ct., Rule 244, [*see now Cal. Rules of Ct., Rule 2.831*], and *Cal. Const., art. VI, § 21*.

The court of appeal affirmed (*103 Cal. App. 4th 1397, 1403)* , saying the appellant was mistaken concerning the form of alternative dispute resolution employed here (*103 Cal. App. 4th 1397, 1399)* . The case was not tried by a temporary

judge. Instead, trial was conducted by a referee on a general reference pursuant to *Code Civ. Proc. § 638(a)*. Although a temporary judge is required to take an oath, a referee is not (*103 Cal. App. 4th 1397, 1400)* . A reference by the trial court involves sending an action or proceeding, or some issue raised therein, to a referee for hearing, determination, and report back to the court (*103 Cal. App. 4th 1397, 1400-1401)* . A general reference is authorized by *Code Civ. Proc. § 638(a)* if the parties have agreed thereto in an agreement filed with the clerk or judge or entered in the minutes or docket. Although a general reference referee's statement of decision must stand as the finding of the court, the actual judgment is entered by the trial judge in the same manner as though the matter had been tried by the court. Additionally, a general reference preserves the court's power regarding new trial motions and other postjudgment remedies (*103 Cal. App. 4th 1397, 1401)* . A temporary judge has broader powers than a referee, including the power to render a judgment which is appealable in the same manner as one rendered by a constitutional judge. In keeping with this broad authority, a temporary judge must take an oath of office before performing judicial functions (*103 Cal. App. 4th 1397, 1401)* . Here, the assigned judge entered judgment on the statement of decision filed by the retired judge, whose lack of authority to enter judgment establishes that he served as a referee on a general reference rather than as a temporary judge (*103 Cal. App. 4th 1397, 1401-1402)* . Additional evidence that the retired judge served as a referee is the fact the assigned judge ruled on the postjudgment motions concerning costs (*103 Cal. App. 4th 1397, 1402)* .

[c] Referee Is Not Required to Take Oath

Kajima Engineering and Construction, Inc. v. Pacific Bell *(2002) 103 Cal. App. 4th 1397, 127 Cal. Rptr. 2d 464* , is discussed at [b], *above*.

[4] Additional Authorities

[a] Referee's Decision as Basis for Judgment

Bowie v. Borland (1885) 68 Cal. 233, 9 P. 79 , was an action for an accounting. The parties stipulated to a reference to determine all factual and legal issues in the case and to the entry of judgment on the referee's report when filed, and the court so ordered. Judgment was entered by the court clerk on the subsequently filed report. On motion of the losing party, the trial court vacated the judgment on the ground the clerk was not authorized to enter it. The Supreme Court held the clerk was expressly authorized by the trial court's order of reference to enter judgment in accordance with the referee's report and reversed the order (*68 Cal. 233, 234)* .

Additional supporting cases include: *Dynair Electronics, Inc. v. Video Cable, Inc. (1976) 55 Cal. App. 3d 11, 20, 127 Cal. Rptr. 268* ; *Estate of Johnston (1970) 12 Cal. App. 3d 855, 859, 91 Cal. Rptr. 116* ; *Estate of Bassi (1965) 234 Cal. App. 2d 529, 536, 44 Cal. Rptr. 541* .

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20-201 California Points & Authorities § 201.74

§ 201.74 Supporting Contention That Referee's Statement of Decision Forms Part of Judgment Roll [Code Civ. Proc. §§ 638(a), 643(a), 644(a), 670(b)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE REFEREE'S STATEMENT OF DECISION IN THIS CASE CONSTITUTES A PART OF THE JUDGMENT ROLL.

Judgment Roll. A referee's statement of decision is a part of the judgment roll (*see Code Civ. Proc. §§ 638(a), 643(a), 644(a), 670(b)*; *Brodie v. Barnes (1942) 56 Cal. App. 2d 315, 320, 132 P.2d 595*).

[2] Comments

[a] Use of Form

The points and authorities at [1], *above*, may be submitted in support of the contention that the referee's statement of decision in the case constitutes a part of the judgment roll [*see Code Civ. Proc. §§ 644(a), 670(b)*].

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue as to the contents of the judgment roll. For example, they may be combined with a memorandum of points and authorities submitted in support of a motion to augment the record [*see, e.g., Cal. Rules of Ct., Rule 8.155(a)* (augmentation of record)]. They may also be combined with a memorandum of points and authorities in support of a motion under *Code Civ. Proc. § 473(d)*, to set aside the judgment on the ground the judgment is void when the invalidity appears from an examination of the referee's statement of decision on which judgment was entered. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law

stated.

[b] Related Pleading and Practice Forms

For forms for use with respect to the record on appeal from superior or municipal courts, see Ch. 44, *Appeal: Preparing and Filing the Record* , and Ch. 345A, *Limited Civil Cases* , respectively, in California Forms of Pleading and Practice. For forms of notices of motion to set aside a judgment which may be adapted for use in moving under Code Civ. Proc. § 473(d) for an order setting aside an order or judgment on the ground it is void, see Ch. 489, *Relief From Judgments and Orders* , in that publication.

[c] Related Points and Authorities

For forms of memoranda of points and authorities generally supporting a motion to set aside a judgment on the ground it is void on its face, see Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders* , in this publication.

[3] Discussion of Authorities

[a] Judgment Roll

Code Civ. Proc. § 670(b) provides that the judgment roll in a case other than one in which the complaint is not answered by any defendant consists of, among other papers, the statement of decision of the court, or finding of the referee. Although *Code Civ. Proc. § 670(b)* uses the term "finding of the referee," the reference statutes (*Code Civ. Proc. § 638 et seq.*) were amended in 1984 to substitute the words "decision" or "statement of decision" for the words "finding" or "findings"; and that terminology was carried forward in later amendments [*see Code Civ. Proc. §§ 638(a), 643(a), 644(a), 645*; *see also* discussion at *§ 201.72[3*][a] and [b]]. *Code Civ. Proc. § 670*, however, was not amended. Nevertheless, the term "finding of the referee" in *Code Civ. Proc. § 670(b)* should be read as "statement of decision of the referee" to comport with the amended reference statutes. Under *Code Civ. Proc. §§ 638(a)* and *643(a)*, the referee or commissioner must report his or her "statement of decision" in writing to the court within 20 days after the hearing, if any, is concluded and the matter is submitted; under *Code Civ. Proc. § 644(a)* in a consensual general reference pursuant to *Code Civ. Proc. § 638*, the decision of the referee or commissioner on the whole issue stands as the decision of the court, and on filing of the statement of decision, judgment is entered on it in the same manner as if the action had been tried by the court [*see § 201.73*].

The facts and procedural background of ***Brodie v. Barnes*** *(1942) 56 Cal. App. 2d 315, 132 P.2d 595* , are discussed in *§ 201.71[3][a]*. In affirming the judgment in part and reversing it in part, the court of appeal said that there can be no doubt but that the referee's report and findings and exceptions thereto are properly part of the judgment roll (*56 Cal. App. 2d 315, 320)* .

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20-201 California Points & Authorities § 201.75

§ 201.75 Supporting Contention That Order Confirming or Modifying Referee's Report on Special Reference Need Not Be Included in Judgment Roll [Code Civ. Proc. § 670(b)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE PAPERS CONSTITUTING THE JUDGMENT ROLL ARE LISTED IN SECTION 670 OF THE CODE OF CIVIL PROCEDURE AND THERE IS NO REQUIREMENT UNDER THIS SECTION THAT AN ORDER CONFIRMING OR MODIFYING A REFEREE'S REPORT FILED PURSUANT TO A SPECIAL REFERENCE BE INCLUDED IN THE JUDGMENT ROLL.

Court Order Confirming or Modifying Referee's Report Is Not Part of Judgment Roll. There is no legal requirement that a court order confirming or modifying a referee's findings made pursuant to a special reference be included in the judgment roll (*see Code Civ. Proc. § 670*; *National Brass Wks. v. Weeks (1928) 92 Cal. App. 318, 322, 268 P. 412*).

[2] Comments

[a] Use of Form

The points and authorities at [1], *above*, may be submitted in support of the contention that there is no legal requirement that a court order confirming or modifying a referee's report on a special reference be included in the judgment roll [*see Code Civ. Proc. § 670*].

The points and authorities at [1], *above*, may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue as to whether an order modifying or confirming a referee's report on a special reference constitutes a part of the judgment roll. For example, they may be used in an appellate brief in opposition to the contention that the judgment is defective because the judgment roll does not contain an order confirming or modifying the referee's finding. The points and authorities set forth in this form may

also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms for use with respect to the record on appeal from superior courts and municipal courts, see Ch. 44, *Appeal: Preparing and Filing the Record* , and Ch. 345A, *Limited Civil Cases* , in California Forms of Pleading and Practice.

[3] Discussion of Authorities

[a] Court Order Confirming or Modifying Referee's Report Is Not Part of Judgment Roll

Code Civ. Proc. § 644(b) provides that in the case of all references other than general consensual references pursuant to *Code Civ. Proc. § 638*, the decision of the referee or commissioner is only advisory. The court may adopt the referee's recommendations in whole or in part after independently considering the referee's findings and any objections and responses thereto filed with the court.

National Brass Wks. v. Weeks *(1928) 92 Cal. App. 318, 268 P. 412* , was an action to recover on a bond given by defendant sureties to secure the faithful performance of a building contract between plaintiff owner and defendant contractor. It was alleged the contractor had used materials different from and inferior to those required by the contract and the work was not performed in a workmanlike manner. When the cause came on for trial, the court, on stipulation of the parties, appointed a referee "to try any and all of the issues of fact and to report a finding thereon and to ascertain the facts necessary to enable the court to determine this action" (*92 Cal. App. 318, 320)* . The referee thereafter heard the evidence and filed his report, to which defendants filed written objections. The court subsequently filed its decision containing complete findings of fact and conclusions of law (now, statement of decision [*see Code Civ. Proc. § 632*]), and judgment was entered accordingly for plaintiff. Defendants appealed on the judgment roll, contending among other things that the judgment was fatally defective in that the judgment roll did not contain an order confirming or modifying the referee's findings (now decision [*see Code Civ. Proc. §§ 644, 645*]).

The court of appeal found no merit to this contention and affirmed. The court said that when the order of reference is made and the referee's findings are filed pursuant to a general reference under *Code Civ. Proc. § 638(a)* (reference to try any or all issues in action or proceeding, whether of fact or law), and judgment is entered thereon in accordance with *Code Civ. Proc. § 644(a)*, then, under the express provisions of *Code Civ. Proc. § 670*, the findings of the referee constitute part of the judgment roll because the judgment in the action is based entirely on the referee's findings. But when the order of reference is made and the referee's findings are reported pursuant to *Code Civ. Proc. § 638(b)* (to ascertain fact necessary to enable court to determine action or proceeding), a special reference, there is no legal requirement that the order of the court confirming or modifying the findings be made part of the judgment roll (*92 Cal. App. 318, 322)* .

Although *National Brass Wks.* involved a special reference with the consent of the parties pursuant to *Code Civ. Proc. § 638(b)*, the same reasoning would appear to apply to a referee's report made pursuant to a special reference ordered without the consent of the parties under *Code Civ. Proc. § 639*.

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[Reserved]

§§ 201.76[Reserved]

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20-201 California Points & Authorities § 201.80

§ 201.80 Opposing Contention That Referee's Report Under Special Reference [Code Civ. Proc. §§ 638(b), 639] Should Be or Was Properly Confirmed--Report Is Not Supported by Evidence or Is Incomplete or Ambiguous

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE REFEREE'S REPORT IN THIS CASE _____ [IS *or* WAS] _____ [NOT SUPPORTED BY THE EVIDENCE *and/or* INCOMPLETE *and/or* AMBIGUOUS] AND _____ [SHOULD NOT BE *or* WAS IMPROPERLY] CONFIRMED AND ADOPTED BY THE COURT.

[*EITHER, when report not supported by evidence*]

Report Not Supported by Evidence. A court may refuse to accept the report of a referee under an order of special reference when the referee's decision is not supported by the evidence (see *Clark v. Millsap (1926) 197 Cal. 765, 784-785, 242 P. 918* ; *McHenry v. Moore (1855) 5 Cal. 90, 92)* .

[*OR, when report is incomplete or ambiguous*]

Report Incomplete or Ambiguous. A court may refuse to accept the report of a referee appointed under an order of special reference when the report is incomplete or ambiguous (see *Schefski v. Anker (1932) 216 Cal. 624, 627, 15 P.2d 744* ; *San Diego Fruit & Prod. Co. v. Elster (1954) 127 Cal. App. 2d 80, 86, 273 P.2d 70*).

[2] Comments

[a] Use of Form

The points and authorities at [1], *above*, may be submitted in opposition to the contention that the referee's report should

be or was properly confirmed and adopted by the trial court. Both paragraphs may be included, separately lettered A and B, if the report is not supported by the evidence and is incomplete or ambiguous.

The points and authorities at [1], *above*, may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue as to the effect of the referee's report. For example, the points and authorities may be submitted in support of exceptions to the referee's report. Or they may be combined with points and authorities in opposition to a motion for an order confirming or adopting the referee's report or in support of a motion to set aside the referee's report. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show in what respect the evidence is insufficient to support the referee's decision or the report is incomplete and ambiguous. With respect to the ground of insufficiency of evidence, counsel will need to procure a copy of the reporter's transcript of the proceedings before the referee and submit it to the court [*see § 201.71*].

[c] Related Pleading and Practice Forms

For a form of notice of motion to set aside a referee's report based on exceptions to the report made pursuant to a special reference, see Ch. 38, *Reference* , in California Forms of Pleading and Practice.

[d] Opposing Points and Authorities

In an appropriate case, the points and authorities at [1], *above*, may be submitted in opposition to the contention supported by the points and authorities *set out in § 201.70*.

[3] Discussion of Authorities

[a] Report Not Supported by Evidence

Clark v. Millsap *(1926) 197 Cal. 765, 242 P. 918* , was an action by a client against her former attorney for an accounting and other relief. Plaintiff had employed defendant to act as her attorney and counselor at law and represent her in certain legal matters which were then pending or about to be commenced, both against her and in her behalf. On defendant's advice, plaintiff had transferred substantially all of her estate, consisting of a large number of securities and real property, to a holding corporation, formed for the purpose by defendant. The property was to be held for her benefit pending a threatened contingency, which had long since passed, and then returned to her. Defendant, however, converted much of the property to cash, took possession of it, and refused to account to plaintiff for it. On the consent of the parties, the trial court appointed a referee to take and state an account between the parties, and the parties stipulated that all exceptions or objections to the report or findings (now decision [*see Code Civ. Proc. § 645*]) of the referee might be made by either party at the time of trial. The referee thereafter made his report. The trial court refused to accept the referee's report as a complete accounting between the parties. Instead, the court heard evidence pertaining to the accounting and made its own findings (now statement of decision [*see Code Civ. Proc. § 632*]). Judgment was for plaintiff. Defendant appealed, contending, among other things, that the trial court committed reversible error by refusing to accept as conclusive and binding the findings of the referee.

The Supreme Court rejected the contention and affirmed the judgment, in effect holding that the reference was special under *Code Civ. Proc. § 638(b)* and not general under *Code Civ. Proc. § 638(a)* (*197 Cal. 765, 784-785)* . The Court said that the referee's report was not supported by evidence which was deemed satisfactory by the trial court and that the trial court had the inherent power to set it aside, as if it were a jury verdict (*197 Cal. 765, 785)* .

McHenry v. Moore *(1855) 5 Cal. 90* , was an action for dissolution of a partnership and an accounting. The matter was referred to a referee to report on the condition of the account, take testimony, and report facts to the court. The referee reported a voluminous mass of testimony, somewhat contradictory in its character, and his findings of fact and conclusions of law (now decision [*see Code Civ. Proc. § 645*]). Exceptions to the report were filed. The court set aside the report, made its own findings of fact (now statement of decision [*see Code Civ. Proc. § 632*]) on the testimony reported, and rendered judgment on its own findings.

The Supreme Court affirmed. It said that it is well settled that a court can interfere and set aside the report of a referee on the same ground as it will proceed to set aside the verdict of a jury, and thus it can set aside a report of a master or referee, not only when it is against the weight of evidence, but also when the facts of the case are various and intricate and the matters involved are in doubt and obscurity (*5 Cal. 90, 92)* .

[b] Report Incomplete or Ambiguous

The facts and procedural background of ***Schefski v. Anker*** *(1932) 216 Cal. 624, 15 P.2d 744* , are discussed in *§ 201.17[3][a]*. Although the Supreme Court reversed the judgment with directions because of errors in the account and confusion in the trial court's record, the Court approved the trial court's rejection of the account reported by a referee. The Court pointed out that the report was incomplete in several respects and obviously incorrect as to others and that when it was submitted to the trial court, the judge admitted that he was unable to understand many of the entries. The Supreme Court rejected the contention that the reference was a general reference under *Code Civ. Proc. § 638(a)* and held that the reference was clearly under *Code Civ. Proc. § 638(b)* (a special reference to ascertain fact necessary to enable court to determine action or proceeding) (*216 Cal. 624, 627)* . The trial court was well within its power in refusing to accept the referee's report and in taking additional testimony after the report was submitted (*216 Cal. 624, 628)* .

San Diego Fruit & Prod. Co. v. Elster *(1954) 127 Cal. App. 2d 80, 273 P.2d 70* , was an action on promissory notes in which defendant cross complained for an accounting and other relief. Prior to trial, the court, without the consent of the parties, appointed a referee to determine certain factual matters insofar as possible. The referee subsequently filed a report that was objected to by defendant. The trial court proceeded to hear evidence and make an accounting between the parties. The court subsequently made findings (now statement of decision [*see Code Civ. Proc. § 632*]) and rendered judgment for defendant for the amount found due him. Plaintiff appealed, contending, among other things, that the trial court had erred in disregarding the referee's report.

The court of appeal rejected the contention and affirmed the judgment. The court pointed out that the reference was special under *Code Civ. Proc. § 639* to report on specific fact questions involved (*127 Cal. App. 2d 80, 82, 85)* . The court said the referee's report did not include facts which would have been sufficient for a decision in the case and the trial court was justified in not accepting the referee's report as final and in taking further evidence to bring out and determine the actual facts (*127 Cal. App. 2d 80, 86)* .

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20-201 California Points & Authorities § 201.81

§ 201.81 Opposing Contention That Referee's Decision Must Stand as Decision of Court--Reference Presumed Special and Report Advisory Only

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE REFEREE'S DECISION IN THIS CASE IS NOT BINDING ON THE COURT BECAUSE THE REFERENCE WAS NOT MADE FOR THE PURPOSE OF DETERMINING THE WHOLE ISSUE, AS THAT TERM IS USED IN SECTION 644(a) OF THE CODE OF CIVIL PROCEDURE, BUT RATHER WAS MADE FOR THE LIMITED PURPOSE OF _____ [*specify purpose*] AND WAS, THEREFORE, A SPECIAL REFERENCE ONLY.

A. Reference Presumed to Be Special. Unless it may be properly inferred by the court from the recitals in the decision of the referee and those of the court that the reference was general in its character, it must be presumed that it was a special reference for the benefit of the court (*Estate of Johnston (1970) 12 Cal. App. 3d 855, 860, 91 Cal. Rptr. 116* ; *see Lewis v. Grunberg (1928) 205 Cal. 158, 161, 270 P. 181*).

B. Referee's Report on Special Reference Is Not Binding on Trial Court. A special reference does not determine the whole issue and the referee's report does not become the decision of the court without further action by the trial judge (*Code Civ. Proc. § 644(b)*; *Ellsworth v. Ellsworth (1954) 42 Cal. 2d 719, 723, 269 P.2d 3* ; *Bird v. Superior Court (1980) 112 Cal. App. 3d 595, 599, 169 Cal. Rptr. 530*).

C. Effect of Referee's Report on Special Reference. In a special reference, the referee's decision is binding only if accepted by the trial court and is accurately characterized as advisory; if the decision is accepted, it is, under *Section 645 of the Code of Civil Procedure*, treated as a special verdict; if it is not accepted, the referee's report, if admitted into evidence, is treated as any other evidence (*Code Civ. Proc. § 644(b)*; *Dynair Electronics, Inc. v. Video Cable, Inc. (1976) 55 Cal. App. 3d 11, 20, 127 Cal. Rptr. 268*).

[2] Comments

[a] Use of Form

The points and authorities at [1], *above*, may be submitted in opposition to the contention that the decision of the referee must stand as the decision of the court.

The points and authorities at [1], *above*, may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue as to the effect of the referee's report. For example, the points and authorities may be combined with points and authorities in opposition to a petition for a writ of mandate or a writ of prohibition seeking in the first instance to compel the trial court to enter judgment on the referee's report and in the second instance to restrain it from otherwise continuing with the trial of the case [*see Code Civ. Proc. §§ 1085, 1086* (writ of mandate), 1102, 1103 (writ of prohibition)]. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel must show that the reference was not a general one, that the referee's report did not purport to decide the whole case, and the issues that were or are to be tried by the court.

[c] Related Pleading and Practice Forms

For forms for use in mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* , in California Forms of Pleading and Practice.

[d] Related Points and Authorities

For forms of memoranda of points and authorities generally supporting and opposing petitions for writs of mandate and prohibition, see Ch. 150, *Mandate and Prohibition* , in this publication.

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities at [1], *above*, may be submitted in opposition to the contention supported by the points and authorities *set out in § 201.73*.

[3] Discussion of Authorities

[a] Reference Presumed to Be Special

Estate of Johnston *(1970) 12 Cal. App. 3d 855, 91 Cal. Rptr. 116* , arose out of a probate proceeding fixing an inheritance tax. The executrix filed objections to the report of the inheritance tax appraiser as to the taxability of a gift from the deceased to the executrix. The court ordered the issue submitted to the probate commissioner. After a hearing the commissioner filed his report with a recommendation that the objections be sustained. The court thereafter considered the evidence as reported by the commissioner, found the gift was made in contemplation of the decedent's death, and concluded as a matter of law that it was taxable. The commissioner's recommendation was rejected and the appraiser's report approved. The executrix appealed, contending that the reference was general under *Code Civ. Proc. § 638(a)* and the commissioner's findings of fact (now decision) had to stand as the finding (now decision) of the court under former Code Civ. Proc. § 644 [*see now Code Civ. Proc. § 644(a)*].

The court of appeal rejected the contention and affirmed the order. The court concluded the reference was special and quoted the statement from *Lewis v. Grunberg (1928) 205 Cal. 158, 161, 270 P. 181* , *below* (*12 Cal. App. 3d 855, 860)* .

The facts and procedural background of ***Lewis v. Grunberg*** *(1928) 205 Cal. 158, 270 P. 181* , are discussed in *§ 201.73[3][a]*. In modifying the judgment to conform to the referee's findings and affirming it as modified, the Supreme Court said that unless it may be properly inferred by the court from the recitals in the findings (now decision [*see Code Civ. Proc. §§ 644, 645*]) of the referee and those of the court (now statement of decision [*see Code Civ. Proc. § 632*]) that the reference was general in its character, it must be presumed that it was a special reference for the benefit of the court (*205 Cal. 158, 161)* .

[b] Referee's Report on Special Reference Is Not Binding on Trial Court

As amended effective January 1, 2001, *Code Civ. Proc. § 644(b)* provides that in the case of all references other than consensual general references under *Code Civ. Proc. § 638*, the decision of the referee or commissioner is only advisory. The court may adopt the referee's recommendations in whole or in part after independently considering the referee's findings and any objections and responses thereto filed with the court.

The facts and procedural background of ***Ellsworth v. Ellsworth*** *(1954) 42 Cal. 2d 719, 269 P.2d 3* , are discussed in *§ 201.40[3][a]*. In dismissing the appeal on the ground that the order vacating the order approving the commissioner's report was interlocutory and nonappealable, the Supreme Court held that the reference to the commissioner under former Code Civ. Proc. § 259a(2) (now *Code Civ. Proc. § 259(b)*), empowering court commissioners to take proof and make and report findings thereon as to any matter of fact on which information is required by the court, was equivalent to a special reference in which the referee's report does not become the decision of the court without further action by the trial judge, and that the commissioner's findings were advisory only (*42 Cal. 2d 719, 722-723)* .

The facts and procedural background of ***Bird v. Superior Court*** *(1980) 112 Cal. App. 3d 595, 169 Cal. Rptr. 530* , are discussed in *§ 201.18[3][a]*. Although the court of appeal ordered a writ issued directing the trial court to vacate its order of reference on the ground the reference was not authorized by statute, the court explained that a limitation applicable to special references of special issues under *Code Civ. Proc. § 639* is that the report and findings of the referee are advisory only, comprise recommendations to the court on the specific issues referred, and become effective only when approved by the trial court. Quoting *Holt v. Kelly (1978) 20 Cal. 3d 560, 562-563, 143 Cal. Rptr. 625, 574 P.2d 441* (discussed in *§ 201.15[3][a]*), involving a reference by a court of appeal to hear evidence and make findings on certain specified questions, the court in *Bird* said in contrast to a general reference, which is permitted only by consent of the parties, a special referee's findings are not binding and are properly characterized as advisory only (*112 Cal. App. 3d 595, 599)* .

[c] Effect of Referee's Report on Special Reference

Code Civ. Proc. § 644(b) is set forth at [b], *above*. *Code Civ. Proc. § 645*, as amended effective January 1, 2001, provides that the decision of the referee appointed pursuant to *Code Civ. Proc. § 638* or commissioner may be excepted to and reviewed in like manner as if made by the court. When the reference is to report the facts, the decision reported has the effect of a special verdict.

Dynair Electronics, Inc. v. Video Cable, Inc. *(1976) 55 Cal. App. 3d 11, 127 Cal. Rptr. 268* , arose out of three actions consolidated for trial only. One of these was an action for, among other relief, an accounting. In this action, the court, on stipulation of the parties, appointed a referee to prepare an audit on funds advanced by plaintiffs (a corporation and its successor corporation) to defendant corporation which was involved in the construction of cable television systems. The referee's report was subsequently filed. Plaintiffs moved under former Code Civ. Proc. § 645 for an order accepting the referee's report as a special verdict. The court denied the motion but received the report in evidence as an expert opinion. The report showed that plaintiffs had advanced $124,600 to defendants. However, the referee could trace or allocate only $83,537 to construction of the television systems, and $41,063 remained unaccounted. The trial court reduced the $41,063 figure by $10,847 as representing an advance to the individual involved in constructing the

systems and an allocation of a percentage of his salary directly to the projects, and rendered judgment in favor of plaintiffs for $30,216. Plaintiffs appealed, contending, among other things, that the trial court erred in denying the motion to accept the referee's report as a special verdict, in which event it would have recovered judgment in the amount of $41,063.

The court of appeal rejected the contention. Citing former Code Civ. Proc. §§ 638(1) and 644 [*see now Code Civ. Proc. §§ 638(a)* and *644(a)*], the court said that in a general reference, consented to by all the parties, the factual and legal determinations (now statement of decision) of the referee are binding, but that in a special reference, the referee's findings of fact are binding only if so accepted by the trial court and are accurately characterized as advisory. Citing *Code Civ. Proc. § 645*, the court explained that if a special referee's findings (now decision) are accepted by the trial court they are treated as a special verdict, but added that before a special reference is accorded the status of a special finding of fact, the trial court must have accepted it as such; otherwise, the report, if admitted into evidence, is treated as any other evidence. The court held the trial court's election to treat the referee's report as evidence only, thus providing the latitude to consider other evidence in making its ruling in the action, was proper and no abuse of discretion appeared (*55 Cal. App. 3d 11, 20)* . However, the court modified the judgment to cover the amount of the advance given the individual constructing the cable television systems, noting there was no evidence that the amount had been repaid or forgiven, and affirmed the judgment as modified (*55 Cal. App. 3d 11, 21-22)* .

[4] Additional Authorities

[a] Referee's Report on Special Reference Is Not Binding on Trial Court

Additional cases stating the rule that a special reference does not determine the whole issue and the report of the referee does not become the decision of the court without further action by the trial judge, include: *In re M. (1975) 14 Cal. 3d 727, 734, 122 Cal. Rptr. 574, 537 P.2d 406* (by analogy to references made pursuant to *Code Civ. Proc. §§ 638, 639,* and other statutory provisions, holding juvenile court referee's determinations in compulsory reference are not binding until adopted by court); *Dallman Co. v. Southern Heater Co. (1968) 262 Cal. App. 2d 582, 589, 68 Cal. Rptr. 873* ; *Estate of Bassi (1965) 234 Cal. App. 2d 529, 537, 44 Cal. Rptr. 541* (until adoption of report and filing of findings of fact and conclusions of law [now statement of decision (*Code Civ. Proc. § 632*)], special referee's report may be set aside without necessity of granting new trial).

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20-201 California Points & Authorities § 201.82

§ 201.82 Opposing Contention That Referee's Decision Must Stand as Decision of Court--Reference Was by Consent of Parties Under Code Civ. Proc. § 638(b) to Ascertain Facts Only

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE REFEREE'S DECISION IN THIS CASE IS NOT BINDING ON THE COURT BECAUSE THE REFERENCE WAS MADE PURSUANT TO THE AGREEMENT OF THE PARTIES UNDER THE AUTHORITY OF SECTION 638(b) OF THE CODE OF CIVIL PROCEDURE TO ASCERTAIN _____ [*specify fact or facts*], WHICH _____ [IS *or* ARE *or* WAS *or* WERE] NECESSARY TO ENABLE THE COURT TO DETERMINE THE _____ [ACTION *or* PROCEEDING], AND IT WAS, THEREFORE, A SPECIAL REFERENCE ONLY.

A. Statutory Authority for Reference With Consent of Parties. A referee may be appointed on the agreement of the parties filed with the clerk or judge, or entered in the minutes to ascertain a fact necessary to enable the court to determine an action or proceeding (*Code Civ. Proc. § 638(b)*).

B. Reference Under *Code Civ. Proc. § 638(b)* Is Special. A reference on the agreement of the parties pursuant to *Section 638(b) of the Code of Civil Procedure* to ascertain a fact necessary to enable the court to determine an action or proceeding is a special reference (*Dynair Electronics, Inc. v. Video Cable, Inc. (1976) 55 Cal. App. 3d 11, 20, 127 Cal. Rptr. 268* ; *Estate of Johnston (1970) 12 Cal. App. 3d 855, 859, 91 Cal. Rptr. 116*).

[2] Comments

[a] Use of Form

The points and authorities at [1], *above*, may be submitted in opposition to the contention that the decision of the referee pursuant to a reference ordered with the consent of the parties must stand as the decision of the court when the reference was simply to ascertain facts and not to report a statement of decision [*see Code Civ. Proc. §§ 638(b), 644*].

The points and authorities at [1], *above*, may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue as to the effect of the referee's report. For example, the points and authorities may be combined with points and *authorities in § 201.81* and submitted in opposition to a petition for a writ of mandate to compel the trial court to enter judgment on the referee's report or in opposition to a petition for a writ of prohibition seeking to restrain the trial court from otherwise continuing with the trial of the case. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show that the order of reference, although made with the consent of the parties, was to ascertain a fact or facts only, that the referee's report did not purport to decide the whole case, and what issues remain or remained for trial by the court.

[c] Related Pleading and Practice Forms

For forms for use in mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* , in California Forms of Pleading and Practice.

[d] Related Points and Authorities

For forms of memoranda of points and authorities generally supporting and opposing petitions for writs of mandate and prohibition, see Ch. 150, *Mandate and Prohibition* , in this publication.

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities at [1], *above*, may be submitted in opposition to the contention supported by the points and authorities *set out in § 201.73*.

[3] Discussion of Authorities

[a] Reference Under Code Civ. Proc. § 638(b) Is Special

The facts and procedural background of ***Dynair Electronics, Inc. v. Video Cable, Inc.*** *(1976) 55 Cal. App. 3d 11, 127 Cal. Rptr. 268* , are discussed in *§ 201.81[3][c]*. In modifying the judgment, the court of appeal said that the appointment of a referee pursuant to an agreement of the parties is governed by *Code Civ. Proc. § 638*, and that *Code Civ. Proc. § 638(b)* provides for a special reference in which the referee is appointed to ascertain a fact necessary to aid the court in reaching its decision (*55 Cal. App. 3d 11, 20)* .

The facts and procedural background of ***Estate of Johnston*** *(1970) 12 Cal. App. 3d 855, 91 Cal. Rptr. 116* , are discussed in *§ 201.81[3][a]*. In affirming the order fixing inheritance tax, the court of appeal pointed out that *Code Civ. Proc. § 638* relates only to references ordered on the agreement of the parties. The court explained (1) that a reference under *Code Civ. Proc. § 638(a)* refers to a general reference for trial before a referee, (2) that on such a reference the referee's findings (now statement of decision [*see Code Civ. Proc. §§ 638(a), 644(a)*]) must stand as the findings (now decision [*see Code Civ. Proc. §§ 632, 644(a)*]) of the court, and (3) that judgment will be entered thereon in the same manner as though the matter had been tried by the court. The court added that, on the other hand, *Code Civ. Proc. § 638(b)* provides for a special reference (to ascertain a fact necessary to enable the court to determine an action or proceeding) and that on such a reference the referee's report may be set aside or disregarded by the court, that the findings (now decision [*see Code Civ. Proc. §§ 644(b), 645*]) are advisory only (*12 Cal. App. 3d 855, 859)* . The court held the record on appeal did not indicate anything other than a limited or special reference was ordered by the court

and, since it was a special reference, the court was permitted to make its own findings and decision on the evidence presented by the probate commissioner (*12 Cal. App. 3d 855, 860)* .

[4] Additional Authorities

[a] Reference Under Code Civ. Proc. § 638(b) Is Special

The facts and procedural background of *Schefski v. Anker (1932) 216 Cal. 624, 15 P.2d 744* , are discussed in *§ 201.17[3][a]*. Although the Supreme Court reversed the judgment because of numerous errors in the record, it held that the reference was a special reference made under *Code Civ. Proc. § 638(b)*, and not a general reference under *Code Civ. Proc. § 638(a)*, and that the trial court was well within its power in refusing to accept the report and in taking additional testimony after the report was submitted (*216 Cal. 624, 627-628)* .

The facts and procedural background of *Clark v. Millsap (1926) 197 Cal. 765, 242 P. 918* , are discussed in *§ 201.80[3][a]*. In affirming the judgment, the Supreme Court said that under the reference the referee was authorized only to take and state the account and was not authorized to try all issues of fact and law and report a finding and judgment (now statement of decision) thereon as provided in *Code Civ. Proc. § 638(a)* (*197 Cal. 765, 784)* . The referee was appointed to aid the court in the computation of accounts in the interests of time and the trial court went fully into the whole matter of the accounting. Former Code Civ. Proc. § 644 was not controlling as the reference did not include both questions of fact and law, and was not adopted by the trial court. The report was, therefore, susceptible of vacation without the necessity of granting a new trial (*197 Cal. 765, 784-785)* .

The facts and procedural background of *National Brass Wks. v. Weeks (1928) 92 Cal. App. 318, 268 P. 412* , are discussed in *§ 201.75[3][a]*. In affirming the judgment for plaintiff, the court of appeal said that a referee's report on an order of reference made pursuant to *Code Civ. Proc. § 638(b)* is not binding on the court, since further proceedings by the court are essential to a complete determination of the cause. The order of reference, by including the clause "and to ascertain the facts necessary to enable the court to determine this cause" and by omitting to state that the referee was authorized to try all issues "whether of fact or of law," clearly showed that the cause was not intended to be taken from the trial court and committed to the referee for decision (*92 Cal. App. 318, 321)* .

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20-201 California Points & Authorities § 201.83

§ 201.83 Opposing Contention That Referee's Decision Must Stand as Decision of Court--Reference Was Ordered Under Code Civ. Proc. § 639

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE REFEREE'S DECISION IN THIS CASE IS NOT REQUIRED TO STAND AS THE DECISION OF THE COURT UNDER THE PROVISIONS OF SECTION 644(a) OF THE CODE OF CIVIL PROCEDURE BECAUSE THE REFERENCE WAS ORDERED WITHOUT THE CONSENT OF THE PARTIES PURSUANT TO THE PROVISIONS OF SECTION 639(a) _____ [*cite paragraph*] OF THE CODE OF CIVIL PROCEDURE TO _____ [*specify*].

Reference Under *Code Civ. Proc. § 639* Is Special. A reference under *Section 639 of the Code of Civil Procedure* does not require the consent of the parties and is a special reference (*see Estate of Johnston (1970) 12 Cal. App. 3d 855, 860, 91 Cal. Rptr. 116*).

[2] Comments

[a] Use of Form

The points and authorities at [1], *above*, may be submitted in opposition to the contention that the decision of the referee pursuant to a reference allegedly ordered with the consent of the parties must stand as the decision of the court when the reference was made without the consent of the parties pursuant to one of the paragraphs of *Code Civ. Proc. § 639(a)*.

The points and authorities at [1], *above*, may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue as to the effect of the referee's report. For example, the points and authorities may be combined with points and *authorities in § 201.81* and submitted in opposition to a petition for a writ of mandate to compel the trial court to enter judgment on the referee's report or in opposition to a petition for a writ of prohibition seeking to restrain the trial court from otherwise continuing with the

trial of the case. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show what the order of reference stated, that the order was made without the consent of all the parties, that the referee's report did not purport to decide the whole case, and what issues remain or remained to be tried by the court.

[c] Related Pleading and Practice Forms

For forms for use in mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* , in California Forms of Pleading and Practice.

[d] Related Points and Authorities

For forms of memoranda of points and authorities generally supporting and opposing petitions for writs of mandate and prohibition, see Ch. 150, *Mandate and Prohibition* , in this publication.

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities at [1], *above*, may be submitted in opposition to the contention supported by the points and authorities *set out in § 201.73*.

[3] Discussion of Authorities

[a] Reference Under Code Civ. Proc. § 639 Is Special

The facts and procedural background of ***Estate of Johnston*** *(1970) 12 Cal. App. 3d 855, 91 Cal. Rptr. 116* , are discussed in *§ 201.81[3][a]*. In affirming the order fixing inheritance tax, the court said that in a reference under *Code Civ. Proc. § 639* consent of the parties is not necessary and, except perhaps where "the referees may be directed to hear and decide the whole issue" (now *Code Civ. Proc. § 639(a)(1)*; *see § 201.84*), a reference under *Code Civ. Proc. § 639* is obviously a special reference (*12 Cal. App. 3d 855, 860)* .

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20-201 California Points & Authorities § 201.84

§ 201.84 Opposing Contention That Finding of Referee Must Stand as Finding of Court--Reference Under Code Civ. Proc. § 639(a)(1) Was to Hear and Decide Whole Issue Relating Only to the Account

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE REFEREE'S DECISION IN THIS CASE IS NOT REQUIRED TO STAND AS THE DECISION OF THE COURT UNDER THE PROVISIONS OF SECTION 644(a) OF THE CODE OF CIVIL PROCEDURE BECAUSE (1) THE REFERENCE WAS MADE WITHOUT THE CONSENT OF ALL THE PARTIES PURSUANT TO THE PROVISIONS OF SECTION 639(a)(1) OF THE CODE OF CIVIL PROCEDURE, AND (2) THE TERM "WHOLE ISSUE," AS USED IN THE ORDER REFERRING THE MATTER TO THE REFEREE TO TAKE AND STATE AN ACCOUNT AND DIRECTING THE REFEREE TO HEAR AND DETERMINE THE WHOLE ISSUE, MEANS ONLY THE WHOLE ISSUE INVOLVED IN THE ACCOUNT AND NOT OTHER ISSUES INVOLVED IN THE CASE.

Meaning of "Whole Issue." "Whole issue," as used in *Section 639(a)(1) of the Code of Civil Procedure*, authorizing a reference without the consent of the parties when trial of an issue of fact requires the examination of a long account and providing that the referees may be directed to hear and decide the whole issue, means only the whole issue involved in the accounting and not other issues involved in the case (*Barker Bros. Inc. v. Coates (1931) 211 Cal. 756, 758, 297 P. 8* ; *Williams v. Benton (1864) 24 Cal. 424, 425* ; *Fredendall v. Shrader (1920) 45 Cal. App. 719, 723, 188 P. 580*).

[2] Comments

[a] Use of Form

The points and authorities at [1], *above*, may be submitted in opposition to the contention that the decision of the referee made pursuant to a reference directing the referee to hear and decide the whole issue is binding on the court when the order of reference was made without the consent of the parties pursuant to *Code Civ. Proc. § 639(a)(1)* to take and state an account and the case involves the determination of other issues not related to the account.

The points and authorities at [1], *above*, may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue as to the effect of the referee's report. For example, the points and authorities may be combined with the points and *authorities in § 201.40* or *201.81* and submitted in opposition to a petition for a writ of mandate to compel the trial court to enter judgment on the decision or in opposition to a writ of prohibition to restrain the trial court from otherwise continuing with the trial of the case. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should show what the order of reference stated, that the order was made without the consent of all the parties, that the referee's report did not purport to decide the whole case, and what issues remain or remained to be tried by the court. Counsel may submit cognizable evidence by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Forms

For forms for use in mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* , in California Forms of Pleading and Practice.

[d] Related Points and Authorities

For forms of memoranda of points and authorities generally supporting and opposing petitions for writs of mandate and prohibition, see Ch. 150, *Mandate and Prohibition* , in this publication.

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities at [1], *above*, may be submitted in opposition to the contention supported by the points and authorities *set out in § 201.73*.

[3] Discussion of Authorities

[a] Meaning of "Whole Issue"

Barker Bros. Inc. v. Coates *(1931) 211 Cal. 756, 297 P. 8* , involved consolidated actions to recover on claims for building materials and labor furnished and used in the construction of a bungalow. Plaintiff sought judgment against the contractor and the fixation of a lien on the property of the owners. The contractor defaulted. When the case came up for trial, the court on its own motion and over defendants' objection, referred it to a referee to try any and all issues of fact and law arising under the issues made by the pleadings. The referee heard the evidence and reported it to the court. The court, which had before it all the evidence taken by the referee and may have heard additional evidence, conducted a hearing on the report, approved the referee's findings, and amplified them by findings of fact and conclusions of law (now statement of decision [*see Code Civ. Proc. § 632*]) of its own. Judgment was rendered for plaintiff impressing a lien on the property. The owners appealed.

The Supreme Court affirmed. The Court said the record showed an examination of a "long account" was necessary, the reference was warranted under former Code Civ. Proc. § 639(1) (now *Code Civ. Proc. § 639(a)(1)*), and under this provision the referee could be directed to hear and decide the whole issue or report on any specific question of fact

involved therein. The Court said the decision of the "whole issue" in the foregoing statute meant the whole issue involved in the accounting (*211 Cal. 756, 758)* . Appellants had suffered no injury by the broad terms of the order of reference, since the trial court had done just what appellants intended it should do--it heard and determined the cause. Under this construction, the referee's findings did not determine the whole case and the trial court was able to make its own findings and conclusions (*211 Cal. 756, 758-759)* .

The facts and procedural background of ***Williams v. Benton*** *(1864) 24 Cal. 424* , the leading case on this issue, are discussed at *§ 201.41[3][b]*. In reversing the judgment for plaintiff entered on the referee's report, the Supreme Court said that under § 183 of the former Practice Act (now Code Civ. Proc. § 639(a)(1)) when the trial of an issue of fact requires the examination of a long account on either side, a reference may be ordered, and the referees may in such case be directed to hear and decide the whole issue or report on any specific question of fact involved therein. The Court explained that the word "issue" is used twice in the statute, each time in the singular number, that no other issue is mentioned than such as requires the examination of a long account, and that no power is given the trial court to direct the referee to report a judgment. If there be but one issue in the action, and that issue involves the examination of a long account, the whole case may be sent to a referee, but even in that case the referee cannot be invested with power to report a judgment. If there are other issues in the case not involving the examination of a long account, the court has no compulsory power to send them to a referee for trial (*24 Cal. 424, 425)* .

The facts and procedural background of ***Fredendall v. Shrader*** *(1920) 45 Cal. App. 719, 188 P. 580* , are discussed in *§ 201.17[3][a]*. In affirming the judgment for the interveners, the court of appeal pointed out that the power of a referee under an order of reference made under the first subdivision of *Code Civ. Proc. § 639* (now *Code Civ. Proc. § 639(a)(1)*) is limited to the examination of a "long account," as to which the referee may, as directed by the court, either hear and decide the whole matter or issue, or report on any specific question of fact involved therein. The court held that the whole matter or "issue" refers to or means the account, and does not include other issues in the case or issues having no direct or immediate connection with the account (*45 Cal. App. 719, 723)* .

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20-201 California Points & Authorities § 201.85

§ 201.85 Opposing Contention That Decision of Referee Must Stand as Decision of Court--Reference Under Code Civ. Proc. § 639(a)(1) Was to Report on Specific Questions of Fact Involved in Accounting

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE REFEREE'S REPORT IN THIS CASE IS NOT REQUIRED TO STAND AS THE DECISION OF THE COURT UNDER THE PROVISIONS OF SECTION 644(a) OF THE CODE OF CIVIL PROCEDURE BECAUSE THE REFERENCE WAS MADE WITHOUT THE CONSENT OF THE PARTIES PURSUANT TO THE PROVISIONS OF SECTION 639(a)(1) OF THE CODE OF CIVIL PROCEDURE TO REPORT ON SPECIFIC QUESTIONS OF FACT INVOLVED IN THE ACCOUNTING AND THE REPORT IS NOT BINDING ON THE COURT.

A. Direction to Report on Specific Fact Questions Involved in Accounting. On a reference ordered without the consent of the parties when the trial of an issue of fact requires the examination of a long account on either side, the referee may be directed to hear and decide the whole issue or report on any specific question of fact involved therein (*Code Civ. Proc. § 639(a)(1)*).

B. Referee's Report on Specific Fact Questions Involved in Account Is Not Binding on Trial Court. The report of a referee made pursuant to a reference ordered under *Section 639(a)(1) of the Code of Civil Procedure* directing the referee to report on specific fact questions involved in an accounting is a special, not a general, reference and is not binding on the trial court (*see Code Civ. Proc. § 644(b)*; *San Diego Fruit & Prod. Co. v. Elster (1954) 127 Cal. App. 2d 80, 85, 273 P.2d 70*).

[2] Comments

[a] Use of Form

The points and authorities at [1], *above*, may be submitted in opposition to the contention that the report of the referee on a reference ordered pursuant to *Code Civ. Proc. § 639(a)(1)* directing the referee to report on specific questions of

fact involved in an account is binding on the court.

The points and authorities at [1], *above*, may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue as to the effect of the referee's report. For example, the points and authorities may be combined with the points and *authorities in § 201.40* or 201.871 and submitted in opposition to a petition for a writ of mandate to compel the trial court to enter judgment on the decision or in opposition to a writ of prohibition to restrain the trial court from otherwise continuing with the trial of the case. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show (1) what the order of reference stated, (2) that the order was made without the consent of all the parties, (3) that the referee's report did not purport to decide the whole case, and (4) what issues remain or remained to be tried by the court. Counsel may submit cognizable evidence by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Forms

For forms for use in mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* , in California Forms of Pleading and Practice.

[d] Related Points and Authorities

For forms of memoranda of points and authorities generally supporting and opposing petitions for writs of mandate and prohibition, see Ch. 150, *Mandate and Prohibition* , in this publication.

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities at [1], *above*, may be submitted in opposition to the contention supported by the points and authorities *set out in § 201.73*.

[3] Discussion of Authorities

[a] Referee's Report on Specific Fact Questions Involved in Account Is Not Binding on Trial Court

Code Civ. Proc. § 644(b) is set forth at § 201.70[3][a].

The facts and procedural background of ***San Diego Fruit & Prod. Co. v. Elster*** *(1954) 127 Cal. App. 2d 80, 273 P.2d 70* , are discussed at *§ 201.80[3][b]*. In affirming judgment for defendant, the court of appeal, in response to plaintiff's argument that under *Code Civ. Proc. § 645* the finding of the referee has the effect of a special verdict, said that ordinarily a jury's verdict is only advisory in an equity case and there is a distinction between the effect of the finding of a referee when the reference is general and when it is merely special. The court explained that this distinction is recognized in *Code Civ. Proc. § 639(a)* authorizing references without the consent of the parties, and providing that the court may either direct the referee to hear and decide the whole issue or merely to "report upon any specific question of fact involved." The reference involved was not a general one directing the referee to decide the whole issue, but was one directing the referee to find on certain specific questions involved (*127 Cal. App. 2d 80, 85)* . The court said the referee's report did not include facts which would have been sufficient for a decision of the case and the trial court was

justified in not accepting it as final and in taking further evidence to bring out and determine the actual facts (*127 Cal. App. 2d 80, 86)* .

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20-201 California Points & Authorities § 201.86

§ 201.86 Opposing Contention That Discovery Referee's Report [Code Civ. Proc. § 639(a)(5)] Should Be or Was Properly Confirmed--Referee Did Not Examine Each Item as to Which Privilege Was Claimed

[1] FORM

A DISCOVERY REFEREE APPOINTED TO DETERMINE MATTERS OF ATTORNEY-CLIENT OR WORK PRODUCT PRIVILEGE MUST EXAMINE EACH ITEM TO DETERMINE ITS DOMINANT PURPOSE.

A. Dominant Purpose Standard. When a discovery referee is appointed to determine matters involving assertion of the attorney client privilege and/or work product privilege with regard to documents prepared by, or questions asked of, an attorney who served in a dual capacity, [for example, to do claims review and analysis as well as to render legal advice], the referee must examine each document and question to determine its dominant purpose (*2,022 Ranch v. Superior Court (Chicago Title Ins. Co.) (2003) 113 Cal. App. 4th 1377, 1392, 1397, 1401, 7 Cal. Rptr. 3d 197*).

[2] Comments

[a] Use of Form

The points and authorities in [1], *above*, may be submitted in opposition to the contention that the report of a discovery referee [*see Code Civ. Proc. § 639(a)(5)*] appointed to resolve claims of attorney-client and/or work product privilege should be, or was properly, adopted by the court. The contention is based on the ground that the referee did not conduct the requisite document-by-document or question-by-question review when the attorney served not only as an attorney, but also in some other capacity, such as claims investigator. Admittedly, this may be difficult to prove, because the referee does not have to set forth the reasons for his or her findings in the report [*see Code Civ. Proc. §§ 632, 643(c)*; discussed in *§§ 201.70 -201.72*].

This memorandum is not intended as a complete memorandum and addresses only the procedure that must be adhered to by the discovery referee. It is not intended to address the substantive merits of a privilege claim. For authorities addressing the merits of a particular attorney-client or work product privilege claim, see Ch. 81, *Discovery: Privileges and Other Discovery Limitations* . Counsel may wish to include authorities from that chapter in his or her

memorandum. Counsel should also include other authority from this chapter, specifically § 201.80 et seq. as well as authority related to the procedural context in which the memorandum is submitted. For example, the points and authorities may be submitted in support of exceptions to the referee's report. Or they may be combined with points and authorities in opposition to a motion for an order confirming or adopting the referee's report or in support of a motion to set aside the referee's report. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel must show that the referee did not make a document-by-document or question-by-question analysis of the privilege asserted. Perhaps, as in the authority used in this form, the referee's report itself will give evidence regarding how extensive a review he or she made. Counsel may submit cognizable evidence by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Forms

For forms for use in mandate and prohibition proceedings, see California Forms of Pleading and Practice, Ch. 358, *Mandate and Prohibition* (Matthew Bender).

[d] Related Points and Authorities

For forms of memoranda of points and authorities generally supporting and opposing petitions for writs of mandate and prohibition, see Ch. 150, *Mandate and Prohibition* , in this publication.

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities in [1], *above*, may be submitted in opposition to the contentions supported by the points and authorities *set out in § 201.70* et seq.

[3] Discussion of Authorities

[a] Dominant Purpose Standard

2,022 Ranch v. Superior Court (Chicago Title Ins. Co.) (2003) 113 Cal. App. 4th 1377, 7 Cal. Rptr. 3d 197 was a bad faith action by an insured under a title insurance policy against its insurer to recover damages it claimed were caused by the insurer's failure to disclose exceptions in the title insurance policy. Defendant/real party objected to document production requests and deposition questions on the grounds of attorney-client privilege and work product. Its claims handlers, who made the decision to deny plaintiff/petitioner's title insurance claim, were attorneys. The matter was referred to a retired judge to determine the matter as a referee. The referee reported that two of the 65 documents were not privileged, and upheld the privilege as to all the deposition questions and the remainder of the documents. The trial court adopted the referee's report, which resulted in denial of the motions to produce documents and compel answers to deposition questions. Plaintiff petitioned for writ of mandate, contending that the dominant purpose of the claims handler review was investigation of the claim and therefore, even if the claims handlers were attorneys, that no attorney-client privilege attached. Plaintiff/petitioner further contended that no attorney-client privilege attached to items in a claim file in first party insured bad faith actions.

The court of appeal reversed, finding that the referee erred in failing to review each deposition question and withheld

document to determine which constituted Chicago Title's factual investigation of 2,022 Ranch's claim and which constituted attorney-client communications or work product (*113 Cal. App. 4th 1377, 1382)* . The referee found that the attorneys were not engaged in activity beyond claims review and analysis, and that all the requested information was relevant, despite defendant's admission of liability, because plaintiff alleged defendant's actions were willful, malicious, and oppressive and sought punitive damages. Although the referee noted that assertion of the attorney-client privilege might interfere with a clear understanding of the circumstances of the matter, he nevertheless upheld the privilege claim (*113 Cal. App. 4th 1377, 1386)* . The court discussed cases and situations in which the privilege was asserted by attorneys serving a dual function: as negotiator and attorney, to give business and legal advice, and discussed the "dominant purpose" doctrine. In those situations, the court should base its ruling on the subject matter of each document (*113 Cal. App. 4th 1377, 1390-1392)* . The court noted that the attorney-client and work-product privileges can be waived by placing the contents of privileged communications at issue, and that when privileged information goes to the heart of the claim, fundamental fairness requires that it be disclosed for the litigation to proceed (*113 Cal. App. 4th 1377, 1394-1396)* . However, the court did not agree with plaintiff that all material developed by the in-house counsel claims adjusters was open to discovery (*113 Cal. App. 4th 1377, 1397)* . The court of appeal discussed several cases and treatises that emphasized the importance of the original claim file in bad faith cases: how else is the jury to know if the insured acted fairly and in good faith in denying the claim (*113 Cal. App. 4th 1377, 1396)* ? The court also reiterated the rule that when attorney-client privilege is asserted, the court must generally determine the issue on a document-by-document and issue-by-issue basis. The referee did not examine each deposition question and each document in accordance with that standard to determine the dominant purpose of each. Thus, the court of appeal granted the writ and returned the matter to the trial court with directions for the court to conduct a particularized review of the deposition questions and documents consistent with that standard (*113 Cal. App. 4th 1377, 1397, 1401)* . The court of appeal had reviewed some of the documents and questions in camera and determined that some concerned only factual claims and others could be discoverable after redaction to omit the attorney-adjuster's impressions or conclusions (*113 Cal. App. 4th 1377, 1399-1400)* .

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[Reserved]

§§ 201.87[Reserved]

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D. New Trial After Judgment on Referee's Report

20-201 California Points & Authorities § 201.90

§ 201.90 Supporting Contention That New Trial Should Be or Was Properly Granted Following Trial of Case by Referee Pursuant to General Reference [Code Civ. Proc. § 638(a)]--Newly Discovered Evidence [Code Civ. Proc. § 657(4)] or Evidence Insufficient to Support Judgment [Code Civ. Proc. § 657(6)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

A NEW TRIAL IN THIS CASE _____ [SHOULD BE *or* WAS PROPERLY] GRANTED BECAUSE _____ [OF NEWLY DISCOVERED EVIDENCE, MATERIAL FOR _____ (*specify, party who moved or is moving for new trial, e.g.,* DEFENDANT) WHICH _____ (*specify, e.g.,* DEFENDANT) COULD NOT, WITH REASONABLE DILIGENCE, HAVE DISCOVERED AND PRODUCED AT THE TRIAL BEFORE THE REFEREE *or* THE EVIDENCE PRESENTED BEFORE THE REFEREE _____ (IS *or* WAS) INSUFFICIENT TO JUSTIFY HIS/HER DECISION].

A. New Trial Defined. A new trial is a reexamination of an issue of fact in the same court after a trial and decision by a jury, court, or referee (*Code Civ. Proc. § 656*).

B. Applicability of New Trial Provisions to Trial by Referee. The statutory provisions relating to a new trial (*Code Civ. Proc. § 656 et seq.*) apply when trial was by a referee on whose statement of decision a judgment was entered (*see Cappe v. Brizzolara (1862) 19 Cal. 607, 608* ; *In re Riccardi (1926) 80 Cal. App. 66, 71-72, 251 P. 650*).

[*EITHER, when ground is newly discovered evidence*]

C. Newly Discovered Evidence. A new trial is proper under *Section 657(4) of the Code of Civil Procedure* when evidence, which is material to the party making application, has been newly discovered and could not, with reasonable diligence, have been discovered and produced at the trial (*see Hoyt v. Saunders (1854) 4 Cal. 345, 347-348)* .

[*OR, when ground is insufficiency of the evidence*]

C. Insufficiency of Evidence. A new trial is proper under *Section 657(6) of the Code of Civil Procedure* when the evidence presented before the referee is insufficient to sustain the referee's statement of decision on which judgment was entered (*see Cappe v. Brizzolara (1862) 19 Cal. 607, 608* ; *In re Riccardi (1926) 80 Cal. App. 66, 72-73, 251 P. 650*).

[2] Comments

[a] Use of Form

The points and authorities at [1], *above*, may be submitted in support of the contention that a new trial may be or was properly granted after trial of a case by a referee on a general reference. The first alternative for Paragraph C should be included when the new trial is or was grounded on newly discovered evidence [*see Code Civ. Proc. § 657(4)*]; the second alternative for Paragraph C should be included when the new trial is or was grounded on insufficiency of the evidence to support the referee's statement of decision [*see Code Civ. Proc. §§ 638(a), 644(a), 657(6)*]. For a full discussion of the motion for new trial, including all the grounds on which the motion may be based and the procedure to follow, see Ch. 371, *Motions After Trial* , in California Forms of Pleading and Practice.

The points and authorities at [1], *above*, may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue as to the propriety of granting a new trial after trial by a referee pursuant to an order of general reference under *Code Civ. Proc. § 638(a)*. For example, they may be combined with a memorandum of points and authorities submitted in support of a motion for new trial following the filing of the referee's statement of decision. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, if the new trial is sought or was granted because of newly discovered evidence, counsel should show what the newly discovered evidence is or was, its materiality, and how it would or did affect the referee's report. These matters should be set out in affidavits or declarations under penalty of perjury [*see Code Civ. Proc. §§ 658, 2015.5*]. If the ground is insufficiency of the evidence, counsel should identify each factual basis stated in the referee's statement of decision that is not supported by the evidence and point out all the evidence introduced that bears on that fact. If possible, counsel should produce a copy of the reporter's transcript, if any, of the proceedings before the referee and point out all the evidence in the transcript that bears on the challenged factual determination [*see* Code Civ. Proc. §§ 658, 660]. Counsel may submit cognizable evidence by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations.

Affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) are authorized generally for use in support of or in opposition to a motion [*see Code Civ. Proc. §§ 2009* (authorizing use of affidavits on a motion), 2015.5]. Their purpose is to supply the facts within the personal knowledge of the affiant (or declarant) necessary to establish the ground or grounds of the motion [*see Code Civ. Proc. §§ 2002(1), 2003*; *Evid. Code § 702*]. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Forms

For a form of judgment based on a referee's report made pursuant to a special reference and adopted by the court, a form

of notice of intention to move for a new trial following entry of judgment on a referee's report made pursuant to a general reference, and a form of order setting aside a referee's report or judgment and granting a new trial, see Ch. 38, *Reference* , in California Forms of Pleading and Practice. For forms for general use in moving for a new trial, see Ch. 371, *Motions After Trial* , in that publication.

[d] Related Points and Authorities

For memoranda of points and authorities generally supporting and opposing a motion for new trial, see Ch. 371, *Motions After Trial* , in this publication.

[e] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 201.100* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Applicability of New Trial Provisions to Trial by Referee

Cappe v. Brizzolara *(1862) 19 Cal. 607* , was an action on a promissory note by the assignee against the makers in which defendants (1) asserted as an affirmative defense that plaintiff took the note after maturity and (2) claimed various setoffs. The case was sent to a referee, who reported findings and judgment (now statement of decision [*see* Code Civ. Proc. § 632]) for defendants. Plaintiff's motion for new trial on the ground of insufficiency of the evidence to justify the decision was granted, and one of the defendants appealed.

The Supreme Court affirmed. The Court said that the provisions of the former Practice Act relating to new trials (now *Code Civ. Proc. § 656 et seq.*) are general in their terms and vest in the courts the same power in cases tried by a referee as in cases tried by the court itself or by a jury, that every case is placed on the same footing, and the grounds on which a new trial may be granted are the same in all cases, irrespective of the manner in which the case was originally tried (*19 Cal. 607, 608)* .

The facts and procedural background of ***In re Riccardi*** *(1926) 80 Cal. App. 66, 251 P. 650* , are discussed at *§ 201.70[4][a]*. In denying the motion to amend the referee's findings and granting the counter motion to adopt and confirm the referee's findings, the court of appeal quoted the language from *Cappe v. Brizzolara (1862) 19 Cal. 607, 608* , *above* (*80 Cal. App. 66, 71)* . The court explained that *Cappe* was based on provisions relating to references in the former Practice Act, but that the provisions contained in the former Practice Act had been codified, are now set forth in *Code Civ. Proc. § 638 et seq.*, and that no material change in the wording had been made (*80 Cal. App. 66, 72)* .

[b] Newly Discovered Evidence

Hoyt v. Saunders *(1854) 4 Cal. 345* , was an action on a promissory note. By consent of the parties, the case was referred to a referee to report on all questions of law and fact in the case. After the referee had prepared his report but before it was filed, defendant applied for leave to reopen the case to introduce newly discovered evidence. The referee denied the application because of doubt as to his power to grant it. The referee subsequently filed his report (now statement of decision [*see Code Civ. Proc. §§ 638(a), 644(a)*]), but, in a supplemental report, he intimated to the court that had such newly discovered evidence been adduced at trial, the result would probably have been different. Defendant's motion for a new trial was denied, and judgment was entered on the referee's report. Defendant appealed.

The Supreme Court reversed. The Court said that the trial court should have granted a new trial on the ground of newly discovered evidence (*4 Cal. 345, 347)* . The Court pointed out that the referee's report disclosed some hesitation and doubt on the part of the referee in arriving at his conclusions of fact and that his supplemental report showed that, had

the newly discovered evidence been adduced on the trial, the result in all probability would have been different (*4 Cal. 345, 347-348)* . The Court held that, under the circumstances, the ends of justice would be better preserved by a new trial (*4 Cal. 345, 348)* .

[c] Insufficiency of Evidence

The facts and procedural background of ***Cappe v. Brizzolara*** *(1862) 19 Cal. 607* , are discussed at [a], *above.* In affirming the order granting a new trial, the Supreme Court said that there is no doubt that it was competent for the trial court to grant a new trial on the ground of insufficiency of the evidence and that its legal discretion in that respect was not affected by the fact that the case was tried before a referee (*19 Cal. 607, 608)* .

The facts and procedural background of ***In re Riccardi*** *(1926) 80 Cal. App. 66, 251 P. 650* , are discussed at *§ 201.70[4][a]*. In denying the motion to amend the referee's findings and granting the counter motion to adopt and confirm the referee's findings, the court of appeal pointed out that *Code Civ. Proc. § 645* provides that the findings (now decision) of the referee or commissioner may be excepted to and reviewed in like manner as if made by the court and that when the reference is to report the facts, the finding reported has the effect of a special verdict (*80 Cal. App. 66, 72)* . The court said that on first reading, the first sentence of the section was not altogether clear, but that its history threw full light on its meaning. The court discussed the history of the section and concluded that under *Code Civ. Proc. § 645* a party may object to the want of findings or on the ground that there is no finding regarding a particular fact in issue, but that when a party thinks any finding is contrary to or unsupported by the evidence, the party must make that a ground of a motion for a new trial and cannot avail himself or herself of the alleged error in any other manner (*80 Cal. App. 66, 72-73)* .

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20-201 California Points & Authorities § 201.91

§ 201.91 Supporting Contention That Order Granting Premature Motion for New Trial After Interlocutory Order Directing an Accounting Is Void

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE ORDER IN THIS CASE GRANTING A MOTION FOR NEW TRIAL AFTER ENTRY OF AN INTERLOCUTORY JUDGMENT FIXING THE LIABILITY AND RIGHTS OF THE PARTIES AND DIRECTING A REFERENCE FOR AN ACCOUNTING ON THE BASIS OF WHICH FUTURE JUDICIAL ACTION IS REQUIRED IS PREMATURE AND VOID.

Invalidity of Order for New Trial After Interlocutory Judgment Directing Reference. An order granting a motion for new trial after entry of an interlocutory judgment directing a reference to take and state an account is premature and void (*Middleton v. Finney (1931) 214 Cal. 523, 528, 6 P.2d 938*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that an order granting a motion for new trial after entry of an interlocutory order directing a reference to take and state an account is premature and void. For points and authorities in support of the contention that the order is interlocutory only, which may be combined with the points and authorities at [1], *above, § 201.110*.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue as to the propriety of granting a new trial following entry of an order or judgment directing a reference to take and state an account. For example, the points and authorities may be combined with points and authorities in opposition to a motion for new trial following the entry of such a judgment or in support of a motion to set aside the order granting a new trial. They may also be used in an

appellate brief on appeal from the order granting a motion for new trial [*see Code Civ. Proc. §§ 904.1(a)(4), 904.2(e)*]. The points and authorities set forth in this form may also be adapted for use in a trial brief.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should show that an order of reference was made to take an accounting and that the order is interlocutory only, that is, that a judicial act remains to be done. Counsel may submit cognizable evidence by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Forms

For forms for use on a motion for a new trial, see Ch. 371, *Motions After Trial* , in California Forms of Pleading and Practice. For form and contents of appellate briefs on appeal from superior or municipal court, see Ch. 50, *Appeal: Briefs* , and Ch. 345A, *Limited Civil Cases* , in that publication.

[d] Related Points and Authorities

For forms of memoranda of points and authorities generally supporting and opposing motions for new trial, see Ch. 155, *Motions After Trial* , in this publication.

[3] Discussion of Authorities

[a] Invalidity of Order for New Trial after Interlocutory Judgment Directing Reference

Middleton v. Finney *(1931) 214 Cal. 523, 6 P.2d 938* , was a certiorari proceeding arising out of an action for dissolution of a partnership and an accounting. The trial court rendered judgment dissolving the partnership, determining the respective interests of the parties in specified property, directing an accounting, and providing that on completion of the accounting the court would decree the amount of money due from the parties. Defendants moved for a new trial and the motion was denied. The accountant's report was subsequently filed and adopted by the trial court, which decreed the sums due. Defendants' motion to vacate both the original and subsequent judgments and for a new trial was granted. Plaintiff petitioned for a writ of certiorari, contending that the trial court had exhausted its jurisdiction to grant a new trial with respect to the first judgment by its prior order denying the motion for new trial.

The Supreme Court affirmed on the ground that an erroneous premature order cannot deprive the trial court of the power to make the correct order at the proper time (*214 Cal. 523, 528)* . The Court explained that under *Gunder v. Gunder (1929) 208 Cal. 559, 561-562, 282 P. 794* , discussed at *§ 201.110[3][a]*, the parties correctly conceded that the first judgment was interlocutory and not final. The Court said: (1) though certain issues had been declared to be settled in the first decree and there remained only the necessity of ascertaining the amounts of money to be paid, this had to be done and until done the case before the trial court was not concluded; (2) the computations, though they involved a mere matter of arithmetic, were subject to the approval of the trial court and were to be incorporated, if approved, in a further judgment; and (3) a judicial act therefore remained to be done (*214 Cal. 523, 525)* . The Court held that if a judgment is interlocutory and not made subject to appeal or motion for new trial by express statutory authority, a motion for new trial is premature and void and may be set aside by the trial court (*214 Cal. 523, 528)* .

[4] Additional Authorities

[a] Invalidity of Order for New Trial After Interlocutory Judgment Directing Reference

Other cases not involving an accounting but holding that proceedings for a new trial taken prematurely are a nullity include *Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal. 2d 450, 459, 20 Cal. Rptr. 321, 369 P.2d 937* ; *Tabor v. Superior Court (1946) 28 Cal. 2d 505, 507, 170 P.2d 667* (matter as jurisdictional and not subject to change by consent, waiver, agreement, or acquiescence); and *Ehrler v. Ehrler (1981) 126 Cal. App. 3d 147, 152, 178 Cal. Rptr. 642* .

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20-201 California Points & Authorities §§ 201.92-201.99

[Reserved]

§§ 201.92[Reserved]

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20-201 California Points & Authorities § 201.100

§ 201.100 Opposing Contention That New Trial Should Be or Was Properly Granted--Reference Was Special and Report May Be Set Aside Without Granting New Trial

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE REFERENCE IN THIS CASE WAS SPECIAL FOR THE PURPOSE OF _____ [*specify*]; HENCE, THE REFEREE'S REPORT MAY BE SET ASIDE AT ANY TIME PRIOR TO THE FILING OF THE COURT'S DECISION WITHOUT THE NECESSITY OF GRANTING A NEW TRIAL.

New Trial Is Not Required in Order to Set Aside Referee's Report on Special Reference. Until the adoption of the referee's report on a special reference and the filing of the court's decision, the report may be set aside without the necessity of granting a new trial (*Ellsworth v. Ellsworth (1954) 42 Cal. 2d 719, 723, 269 P.2d 3*).

[2] Comments

[a] Use of Form

The points and authorities at [1], *above*, may be submitted in opposition to a contention that a new trial should be or was properly granted. The ground of opposition is that the reference was special, the referee's report was advisory only, and the report may be set aside by the trial court without the necessity of granting a new trial.

The points and authorities at [1], *above*, may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue as to the effect of a referee's report. For example, the points and authorities may be combined with the points and authorities submitted in opposition to a motion for new trial or in support of a motion to set aside the order granting a motion for new trial. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

In addition, the points and authorities at [1], *above*, may be combined with points and authorities in opposition to a

petition for a writ of mandate seeking to compel the trial court to enter judgment on the referee's report or in opposition to a petition for a writ of prohibition seeking to restrain the trial court from proceeding to try the case.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show that the reference made was, in fact, special. This may be done by showing the reference was made with the consent of the parties under *Code Civ. Proc. § 638(b)*, or that it was made without the consent of the parties under *Code Civ. Proc. § 639*, or by showing the issues in the case that were tried by the court before the reference was ordered or the issues that remained to be tried after the referee's report was filed.

[c] Related Pleading and Practice Forms

For forms for use on a motion for a new trial, see Ch. 371, *Motions After Trial* , in California Forms of Pleading and Practice. For forms for use in mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* , in that publication.

[d] Related Points and Authorities

For memoranda of points and authorities generally supporting and opposing a motion for new trial or a petition for writ of mandate or prohibition, see Ch. 155, *Motions After Trial* , and Ch. 150, *Mandate and Prohibition* , in this publication.

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities at [1], *above*, may be submitted in opposition to the contention supported by the points and authorities *set out in § 201.90*.

[3] Discussion of Authorities

[a] New Trial Is Not Required in Order to Set Aside Referee's Report on Special Reference

The facts and procedural background of ***Ellsworth v. Ellsworth*** *(1954) 42 Cal. 2d 719, 269 P.2d 3* , are discussed in *§ 201.40[3][a]*. In dismissing the appeal from the order vacating the order approving the commissioner's report, the Supreme Court said that until the adoption of the report of the referee on a special reference and the filing of the trial court's findings of fact and conclusions of law (now statement of decision [*see Code Civ. Proc. § 632*]), the referee's report may be set aside without the necessity of granting a new trial (*42 Cal. 2d 719, 723)*

[4] Additional Authorities

[a] New Trial Is Not Required in Order to Set Aside Referee's Report on Special Reference

Additional cases stating the rule that until adoption of the report of the referee on a special reference and the filing of the trial court's findings of fact and conclusions of law (now statement of decision [*see Code Civ. Proc. § 632*]), the referee's report may be set aside without the necessity of granting a new trial, include: *Estate of Bassi (1965) 234 Cal. App. 2d 529, 537, 44 Cal. Rptr. 541* ; and *Weinfeld v. Weinfeld (1958) 159 Cal. App. 2d 608, 613, 324 P.2d 342* .

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[Reserved]

§§ 201.101[Reserved]

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E. Appeal

20-201 California Points & Authorities § 201.110

§ 201.110 Supporting Contention That Order or Judgment Is Interlocutory and Nonappealable--Order or Judgment Directs Reference to Take Account or Directs Parties to Account and Future Judicial Action to Settle Rights of Parties Is Required

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE _____ [ORDER *or* JUDGMENT] IN THIS CASE IS INTERLOCUTORY [AND NONAPPEALABLE] BECAUSE IT DIRECTS [A REFERENCE TO TAKE] AN ACCOUNTING ON THE BASIS OF WHICH FUTURE JUDICIAL ACTION IS REQUIRED TO FINALLY SETTLE THE RIGHTS OF THE PARTIES.

A. Order or Judgment Directing Reference to Take Accounting Is Interlocutory and Nonappealable. An order or judgment that fixes the rights and liabilities of the parties and directs a reference for an accounting on the basis of which future judicial action is required is interlocutory and nonappealable (see *Hollar v. Saline Products, Inc. (1935) 3 Cal. 2d 80, 81-82, 43 P.2d 273* ; *Gunder v. Gunder (1929) 208 Cal. 559, 561-562, 282 P. 794*); *Yeboah v. Progeny Ventures, Inc. (2005) 128 Cal. App. 4th 443, 448, 27 Cal. Rptr. 3d 150*).

[*Optional*] **B. Rule Applies When Accounting Is Ordered but No Reference Is Made.** The foregoing rule applies to an order or judgment in which the court orders an accounting but does not refer the accounting to a referee (*Lacey v. Bertone (1949) 33 Cal. 2d 649, 653, 203 P.2d 755* ; see *Rose v. Boydston (1981) 122 Cal. App. 3d 92, 97, 175 Cal. Rptr. 836*).

[2] Comments

[a] Use of Form

The points and authorities at [1], *above*, may be submitted in support of the contention that an order or judgment directing an accounting on the basis of which future judicial action is required to settle the rights of the parties is

interlocutory only and nonappealable. Optional Paragraph B should be included if the court ordered an accounting but did not order a reference to take the account.

The points and authorities at [1], *above*, may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue as to the finality or appealability of an order or judgment directing either a reference to take and state an account or an accounting by the parties. For example, the points and authorities may be combined with points and authorities in support of a motion for an order dismissing an appeal from such order or judgment. With appropriate modifications, they may also be combined with points and authorities in opposition to a motion for new trial or in support of a motion to vacate an order granting a new trial. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

In addition, the points and authorities at [1], *above*, may be combined with a memorandum of points and authorities in support of a petition for a writ of mandate seeking to compel a lower appellate court that has refused to do so to dismiss the appeal or in support of a petition for a writ of prohibition seeking to restrain the lower appellate court from proceeding to hear the appeal after it has denied a motion to dismiss, or both.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show what future judicial action is required of the court to determine the rights of the parties in the case as opposed to any future orders that may be necessary merely to give effect to the order or judgment already rendered.

[c] Related Pleading and Practice Forms

For forms for use on a motion for a new trial, see Ch. 371, *Motions After Trial* , in California Forms of Pleading and Practice. For forms for use in moving to dismiss an appeal from superior or municipal court, see Ch. 45, *Appeal: Motion Procedure* , and Ch. 345A, *Limited Civil Cases* , in that publication. For forms for use in mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* , in that publication.

[d] Related Points and Authorities

For forms of memoranda of points and authorities generally supporting and opposing motions for a new trial and petitions for writs of mandate and prohibition, see Ch. 155, *Motions After Trial* , and Ch. 150, *Mandate and Prohibition* , in this publication.

[e] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 201.120* and *201.121* may be used to oppose the contention supported by the points and authorities at [1], *above*.

[3] Discussion of Authorities

[a] Order or Judgment Directing Reference to Take Accounting Is Interlocutory and Nonappealable

Hollar v. Saline Products, Inc. *(1935) 3 Cal. 2d 80, 43 P.2d 273* , was an action for cancellation of a lease of real property, immediate possession of the property, and rents and royalties due. The trial court found for plaintiff on all issues and that defendant was indebted to plaintiff for rents and royalties "in excess of $_____," which excess could be determined only by an accounting. The trial court, by its judgment, ordered that plaintiff recover immediate possession of the property, that a writ of possession issue, and that the lease be canceled. It further ordered that a special master make the accounting and report back to the court the amount due plaintiff on account of rents and

royalties, that plaintiff recover judgment against defendants in the amount of the sum of the indebtedness, and that the sum be inserted in the blank space left in the judgment for that purpose. Defendants appealed.

Plaintiff's motion to dismiss the appeal on the ground that no final judgment had been entered in the action was granted. The Supreme Court, citing the leading case of *Gunder v. Gunder (1929) 208 Cal. 559, 282 P. 794* (discussed *below*), held that a decree that settles the basic issues between the parties, adjudges a party's right to an accounting, and refers the items of the account to be found by a master, is not appealable (*3 Cal. 2d 80, 81)* . Prior to *Gunder* there had existed considerable confusion as to the final effect of such a judgment, but *Gunder* squarely held that such a judgment is not final (*3 Cal. 2d 80, 81-82)* . The Court explained that the peculiar form of the trial court's judgment seemed at first to indicate that it was intended to be a final judgment, but that there remained a judicial act to be done (the approval of the account to be stated by the master appointed for that purpose) and that, as entered, the judgment was not complete (*3 Cal. 2d 80, 82)* .

Gunder v. Gunder *(1929) 208 Cal. 559, 282 P. 794* , was an action (1) to rescind a property settlement agreement on the grounds of fraud and undue influence, (2) to declare an involuntary trust, (3) to cancel prior transfers of property, (4) to order reconveyances and retransfers, (5) for injunctive relief, and (6) for an accounting. Judgment was for plaintiff. The judgment required defendant to render an accounting to a referee who was to take the account and render his report and findings (now decision [*see Code Civ. Proc. §§ 644, 645*]) to the court. The judgment provided that on rendition of the referee's account to the court, and the court's approval of it, plaintiff was to be given a final judgment against defendant. Defendant appealed.

Plaintiff's motion to dismiss the appeal was granted on the ground the judgment was not appealable (*208 Cal. 559, 561)* . Quoting from *Pomper v. Superior Court (1923) 191 Cal. 494, 496, 216 P. 577* , the Supreme Court explained that a decree fixing the liability and rights of the parties which refers the case to a master or subordinate tribunal for a judicial purpose, such as the statement of an account, on which a further decree is to be entered is not final (*208 Cal. 559, 561)* . The Court believed it apparent that the trial court did not intend the judgment to be a final determination of the controversy. The Court said that final judgment regarding the issues adjudicated was reserved by the trial court to be entered on submission of the referee's report, which would then be subject to the court's approval, and at which time the court would also render its final judgment in favor of plaintiff and against defendant in the amount to which the court might find plaintiff was entitled (*208 Cal. 559, 562)* .

Yeboah v. Progeny Ventures, Inc. *(2005) 128 Cal. App. 4th 443, 27 Cal. Rptr. 3d 150* involved a contractual dispute regarding commissions due under six agency agreements or service contracts. The interlocutory judgment provided for an accounting of profits owing to the agent and appointed a retired judge to serve as a special master to adjudicate matters relating to the auditing, accounting and payments due. The referee's report was signed and served on April 8, 2003. On May 13, 2003, the trial court signed an order endorsed on approving it and adopting the report, including the findings and recommendations therein, as a decision of the court. Both parties appealed from that decision. On June 16, 2003, the special master held another hearing, pursuant to which he issued another report on July 8, 2003, awarding certain sums to Yeboah's assignee. Progeny filed objections to that report. However, the court approved it on August 13, 2003. Progeny filed a notice of appeal, purporting to appeal from the court's order approving the special master's report.

The court of appeal dismissed both purported appeals from the May 13th order and the purported appeal from the August 13th order (*128 Cal. App. 4th 443, 451)* , finding neither of those orders to be appealable (*128 Cal. App. 4th 443, 450-451)* . The court of appeal began its discussion by noting that the interlocutory judgment resolved some, but not all, of the issues between the parties. Reference to a master or referee was the factor that made that judgment interlocutory. When there is a reference, further judicial action is required in approving or disapproving the report of the referee or master. The rule is that when further judicial action is required after an accounting has been ordered, the initial order directing an accounting is interlocutory (*128 Cal. App. 4th 443, 448)* . First, there is an interlocutory order determining the right to an accounting, then the account is taken, and finally, judgment is entered for the amount found due. Two characteristics of an interlocutory order or judgment are (1) it is not final for purposes of appeal, and (2) it is

also not final in the trial court, but may be modified after further evidence or law has been considered. Both parties claimed that the that the order of May 13, 2003, was an order entered after judgment that affected the substantial rights of the parties, and was therefore appealable. The court of appeal found their arguments to be based on the mistaken belief that the original interlocutory judgment was a final judgment (*128 Cal. App. 4th 443, 449)* . In the case of a special reference, the referee's report is only the first step. The court must determine the facts and the law by rendering its decision containing its findings of fact and conclusions of law, which serves as the basis for the judgment. If the court adopts the referee's report, the court still must enter a judgment to bring the matter to a conclusion. The court's order of May 13, 2003, was not a judgment and was therefore not a final determination (*128 Cal. App. 4th 443, 450)* . For the same reasons, the order of August 13, 2003, was not appealable. There has not been a final judgment in this case. The appropriate procedure is for the trial court to enter a final judgment, which should comprise the results of the accountings rendered up to the time of the entry of that judgment, including the orders of May 13, 2003, and August 13, 2003. An approval of a referee's report is not the same as a judgment entered following the receipt of the referee's report (*128 Cal. App. 4th 443, 451)* .

[b] Rule Applies When Accounting Is Ordered but No Reference Is Made

Lacey v. Bertone *(1949) 33 Cal. 2d 649, 203 P.2d 755* , was an action for specific performance of a contract to sell plaintiff four apartment houses and for declaratory relief. Defendant cross complained for cancellation of the contract together with damages and an accounting of rents collected by plaintiff while he was in possession. The trial court rendered judgment for defendant terminating the contract, awarding damages, ordering an accounting, and providing for further proceedings in case an account was not rendered or was unsatisfactory. Plaintiff appealed from the judgment and certain orders.

The Supreme Court dismissed the appeal from the judgment. The Court pointed out that under former Code Civ. Proc. § 963 (now *Code Civ. Proc. § 904.1*), an appeal lies only from a final judgment except in certain cases specified in that statute. The Court held that the rule that a judgment fixing the rights and liabilities of the parties and directing a reference for an accounting is interlocutory and nonappealable applies when the court orders a party to render an accounting instead of referring the matter to a master for that purpose, since a judicial act (approval of the account to be rendered) remains to be done, and that this is true even though the judgment does not expressly state that a later final judgment is to follow (*33 Cal. 2d 649, 653)* .

In ***Rose v. Boydston*** *(1981) 122 Cal. App. 3d 92, 175 Cal. Rptr. 836* , a cross action for dissolution of an alleged joint venture and an accounting, a judgment in favor of cross complainants on the existence and terms of the joint venture was filed. The judgment (1) ordered an accounting be had and rendered to the court, (2) declared that the judgment was interlocutory, and (3) stated that the court retained jurisdiction for such additional period of time as may be necessary for the purpose of rendering and settling an account. Thereafter, the trial judge was elevated to a higher court. The case was reassigned to another judge of the same trial court who stated that a mistrial must be declared and the case tried anew unless the original judge returned to complete the trial or the parties stipulated to be bound by the prior findings, conclusions, and interlocutory judgment signed and entered by the original judge. The case was thereafter continued either on stipulation of the parties or the court's own motion for more than four years, after which time cross defendants moved to dismiss the case under former Code Civ. Proc. § 583 (failure to bring case to trial within specified periods [*now see Code Civ. Proc. § 583.310*]). The motion was granted.

In reversing the judgment on the ground the case had been partially tried and no order declaring a mistrial had been entered and, therefore, former Code Civ. Proc. § 583 did not apply, the court of appeal pointed out that substantial issues remained undecided after entry of the interlocutory judgment, that the interlocutory judgment was not final in any respect because further judicial decisions were required, and that the judgment was subject to modification at any time prior to the entry of a final judgment (*122 Cal. App. 3d 92, 97)* .

[4] Additional Authorities

[a] Order or Judgment Directing Reference to Take Accounting Is Interlocutory and Nonappealable

In *Wesley N. Taylor Co. v. Russell (1961) 194 Cal. App. 2d 816, 15 Cal. Rptr. 357* , an action for specific performance of a contract for the sale of real property, the trial court entered an "interlocutory judgment" (1) granting specific performance and directing a reference to take and state an account of all rents, issues, and profits received by defendants from the premises and to ascertain defendants' reasonable expenditures with respect to the property, and (2) stating that on the filing of the referee's report, plaintiff was to recover from defendants the net amount found due it as fixed by the court and that this amount was to be credited against the amount plaintiff was ordered to pay into escrow. On appeal by defendants, the court of appeal held that the judgment was interlocutory and nonappealable and dismissed the appeal (*194 Cal. App. 2d 816, 822-824, 825)* .

In *Gollard v. Bayless (1959) 174 Cal. App. 2d 827, 345 P.2d 299* , the court of appeal, on plaintiff's motion, dismissed defendant's appeal from an "Interlocutory Judgment of Accounting" (except that portion of it granting an injunction). The court held that under former Code Civ. Proc. § 963(1) [*now Code Civ. Proc. § 904.*l(a)] an appeal may, except as otherwise provided in the section, be taken only from a final judgment. A judgment is final only when it determines all of the rights of the parties and requires no further judicial action to give effect to its provisions. A judgment that adjudicates the issues framed by the pleadings, orders a reference to a referee for an accounting, and then provides that on receipt of the accounting the court shall make its final distribution of the property and money to the parties legally entitled to it is interlocutory and not final (*174 Cal. App. 2d 827, 828-829)* .

[b] Rule Applies When Accounting Is Ordered but No Reference Is Made

In *Degnan v. Morrow (1969) 2 Cal. App. 3d 358, 82 Cal. Rptr. 557* , an action and cross action for dissolution of a partnership, an accounting, and partition of partnership property, the trial court rendered judgment (1) ordering an accounting, payment of partnership debts, and payment of certain fees to defendant for services and (2) adjudging that certain real property was owned jointly and equally by the parties, partitioning it equally one-half to each, and providing for sale and disposition of the proceeds if the parties could not agree on an equal division. The judgment made no provision for dissolution of the partnership. On appeal by defendant, the court of appeal said that a judgment that orders an accounting is necessarily interlocutory in nature, and that although a judgment is final in form or designation, it is interlocutory and nonappealable if further judicial action is required. Failure to refer the accounting to a referee does not create a final judgment, and a reservation by the court of further jurisdiction over the accounting will be inferred (*2 Cal. App. 3d 358, 363)* . The court held, however, that the judgment was severable and that the portion relating to partition, though interlocutory, was appealable under former Code Civ. Proc. § 904.1(i) [*now see Code Civ. Proc. § 904.1(a)(9)*]. The court affirmed that portion of the judgment and held the remainder of it to be interlocutory and nonappealable (*2 Cal. App. 3d 358, 364, 366)* .

In *David v. Goodman (1948) 89 Cal. App. 2d 162, 200 P.2d 568* , an action to rescind a partnership agreement and for an accounting in which defendant cross complained for dissolution of the partnership and an accounting, the trial court rendered judgment (1) decreeing the agreement void, (2) ordering defendant to render an accounting, (3) enjoining defendant from transferring or hypothecating any of his property pending the accounting, and (4) enjoining defendant from interfering with plaintiff in the conduct of the business. The judgment further decreed that when defendant shall have fully and satisfactorily accounted to plaintiff for monies and property belonging to the business, defendant was to be paid one half the net profits earned by the business in the course of its operations between specified dates, less monies received by him from a drawing account. On appeal by defendant, the court of appeal affirmed the judgment insofar as it granted an injunction but on its own motion dismissed the appeal as to the remainder of the judgment. The court said it was clear the judgment did not fully determine the rights of the parties in controversy. A decree which settles the basic interest between the parties, adjudges the complainant's right to an accounting and refers the finding of the items of the account to the master is not an appealable order (*89 Cal. App. 2d 162, 166)* .

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[Reserved]

§§ 201.111[Reserved]

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20-201 California Points & Authorities § 201.120

§ 201.120 Opposing Contention That Order or Judgment Is Interlocutory and Nonappealable--Judgment in Action for Accounting Fully Determines Rights of Parties and Is Final Because It Does Not Direct Reference to Take Account and No Further Judicial Action Is Required

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE JUDGMENT IN THIS ACTION FOR AN ACCOUNTING IS FINAL [AND APPEALABLE] BECAUSE IT FIXES THE RIGHTS AND LIABILITIES OF THE PARTIES AND NO FURTHER JUDICIAL ACTION IS REQUIRED OTHER THAN THAT NECESSARY TO CARRY THE JUDGMENT INTO EFFECT.

A. Court's Denomination of Order or Judgment Is Not Determinative. It is the substance and effect of a judgment, and not what it is denominated by the court, that determines its finality for the purposes of appeal (*Price v. Slawter (1959) 169 Cal. App. 2d 448, 451, 337 P.2d 914* ; *see* *Lyon v. Goss (1942) 19 Cal. 2d 659, 669-670, 123 P.2d 11*).

B. General Test. When no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the judgment, the judgment is final, but when anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the judgment is interlocutory (*see* *Lyon v. Goss (1942) 19 Cal. 2d 659, 670, 123 P.2d 11*).

C. When Judgment in Action for Accounting Is Final. A judgment in an action involving an accounting is final if nothing further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties (*Zappettini v. Buckles (1914) 167 Cal. 27, 32-33, 138 P. 696*).

[2] Comments

[a] Use of Form

The points and authorities at [1], *above*, may be submitted in opposition to the contention that a judgment in a case

involving an accounting is interlocutory and nonappealable when nothing further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties.

These points and authorities may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue as to the effect of a judgment in an action involving an accounting. For example, the points and authorities may be combined with points and authorities in opposition to a motion to dismiss an appeal from such a judgment. With appropriate modifications, they may also be combined with points and authorities in support of a motion for new trial. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

In addition, these points and authorities may be combined with a memorandum of points and authorities in opposition to a petition for a writ of mandate seeking to compel a lower appellate court that has refused to do so to dismiss the appeal or in opposition to a petition for a writ of prohibition seeking to restrain the lower appellate court from proceeding to hear the appeal after it has denied a motion to dismiss, or both.

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show that all issues in the case have been adjudicated and that no further judicial action is required or was contemplated other than that necessary to carry the judgment into effect. Counsel may submit cognizable evidence by request for judicial notice [*see Evid. Code § 450 et seq.*], by references to the court's file, including verified pleadings, or by affidavits or declarations. For further legal background, research guides, and forms relating to judicial notice, affidavits, and declarations, see California Forms of Pleading and Practice, Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 321, *Judicial Notice* (Matthew Bender).

[c] Related Pleading and Practice Forms

For forms for use in moving for a new trial, see Ch. 371, *Motions After Trial* , in California Forms of Pleading and Practice. For forms for use on a motion to dismiss an appeal from superior or municipal court, see Ch. 45, *Appeal: Motion Procedure* , and Ch. 345A, *Limited Civil Cases* , in that publication. For forms for use in mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* , in that publication.

[d] Related Points and Authorities

For forms of memoranda of points and authorities generally supporting and opposing motions for a new trial and petitions for writs of mandate and prohibition, see Ch. 155, *Motions After Trial* , and Ch. 150, *Mandate and Prohibition* , in this publication.

[e] Opposing Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 201.110*.

[3] Discussion of Authorities

[a] Court's Denomination of Order or Judgment Is Not Determinative

Price v. Slawter *(1959) 169 Cal. App. 2d 448, 337 P.2d 914* , was an action to terminate a joint venture. The trial court entered an "interlocutory" judgment adjudging that the joint venture should be dissolved and its affairs wound up, that its assets be sold by a commissioner appointed for the purpose, that the proceeds be applied to discharge the liabilities of the venture, and that pending further order of the court the management and control of the joint venture

business (the operation of a motel) was left in plaintiffs, subject to the authority of the commissioner to sell it. The court found the total value of the assets and liabilities of the joint venture and the amount owed to plaintiffs for advances, and ordered that the net proceeds from the sale of the assets be applied in a specified order. The court reserved jurisdiction to make such further orders as may reasonably be required in order to consummate the dissolution and winding up of the joint venture and the rendition of a final judgment. Defendant appealed and petitioned for a writ of supersedeas. Plaintiff moved to dismiss the appeal on the ground the judgment was interlocutory and nonappealable.

In holding the judgment final and appealable, the court of appeal said that whether a judgment is a final one does not depend on what it is entitled but what it does (*169 Cal. App. 2d 448, 451-452)* .

Lyon v. Goss *(1942) 19 Cal. 2d 659, 123 P.2d 11* , was an action for declaratory and equitable relief under a contract and lease. An interlocutory decree that the contract was in force and that defendant was entitled to fulfill it was entered. This decree did not complete the declaration of the rights and duties of the parties and reserved for future consideration issues pertaining to performance and prevention of performance of the agreement. Plaintiff appealed. Some five months later, a final decree adjudging that neither party recover relief other than a declaration of rights as set forth in the interlocutory decree was rendered, and defendant appealed.

The Supreme Court concluded that the first decree was in fact interlocutory and the second final. The Court dismissed the appeal from the first decree and reversed the second decree on the merits. The Court explained, however, that a decree in equity which is denominated "interlocutory" and directs a further hearing for certain purposes, may make so complete and final adjudication of all issues of fact and law as to constitute a "final judgment" within the meaning of the term as used in the statutes concerning appeals and held that it is not the form of the decree but the substance and effect of the adjudication which is determinative (*19 Cal. 2d 659, 669-670)* .

[b] General Test

The facts and procedural background of ***Lyon v. Goss*** *(1942) 19 Cal. 2d 659, 123 P.2d 11* , are discussed under [a], *above.* The Supreme Court said that, as a general test, when no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, that decree is final, but when anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is interlocutory (*19 Cal. 2d 659, 670)* .

[c] When Judgment in Action for Accounting Is Final

Zappettini v. Buckles *(1914) 167 Cal. 27, 138 P. 696* , arose on an application for a writ of supersedeas to stay execution of a judgment pending appeal. The action in which the judgment was rendered was for dissolution of a partnership, an accounting, and, after payment of debts, a distribution of the remaining assets between the parties as their respective interests may appear. The judgment dissolved the partnership, itemized the partnership property which consisted of both real and personal property, and ordered that the property be sold together as a whole and in one parcel at public sale for cash by a receiver appointed by the court, and that the receiver, after deducting the costs and expenses of sale, pay the remainder of the proceeds into court to abide the further order of the court. The judgment further provided that the proceeds of the sale be paid and applied as follows: (1) to the payment of the fees and expenses of the receiver, the same "to be fixed and determined by the court"; (2) to the payment of the fees and expenses of a referee appointed by the court, the same "to be fixed and determined by the court"; (3) to the payment of the partnership debts on determination thereof by the court (the court reserved jurisdiction to make this determination); and (4) any balance remaining to be paid to the two partners in specified proportions, such payments to be made as ordered by the court, or on the consent of the parties to the action. The judgment provided that each party to the action was to pay his own costs. Plaintiff appealed. Notwithstanding the appeal, defendant and the receiver proceeded with execution of the judgment insofar as it provided for the sale of the property, and plaintiff applied for a writ of supersedeas to stay the execution.

The Supreme Court held the judgment was final for the purposes of appeal and ordered a writ of supersedeas issued. The Court said that notwithstanding the deferring of the fixing of the compensation of the receiver and of the referee, and the reservation of the determination of the question of the debts of the firm to others, the judgment fully and finally determined all the rights of the parties as between themselves, that the partnership was dissolved, all the property was ordered sold, and the manner in which the proceeds should be divided was finally adjudicated, including the respective proportions of the two partners in any money remaining after the payment of the costs of sale, fees of receiver, fees of referee, and the debts of the firm. The Court said that nothing remained to be done by the trial court except the mere ascertainment of the amounts due to others than the parties on account of fees for services in the action and debts owing by the partnership, and to see that the decree already made was properly executed (*167 Cal. 27, 32)* .

It should be noted that if the Supreme Court had held the judgment nonappealable, the partnership property would have been sold at a forced sale with the expenses of the sale and receiver's fees charged against the proceeds of the sale before the matter could be reviewed by an appellate court. Any reversal by the appellate court of a subsequent "final" judgment in the case could not undo this damage.

However, it should also be noted that subsequent cases have cast some doubt on *Zappettini* as to the appealability of a judgment ordering a partnership accounting [*Degnan v. Morrow (1969) 2 Cal. App. 3d 358, 363, 82 Cal. Rptr. 557* , discussed at *§ 201.110[4][b]*]. The holding in *Zappettini* has been distinguished on the ground that it did not order an accounting or a reference for an accounting, but ordered a sale of property and specified the distribution to be made of the proceeds, and thus there was no further judicial action required on the part of the court to finally adjudicate the rights of the parties [*see* *Gunder v. Gunder (1929) 208 Cal. 559, 561, 282 P. 794* , discussed at *§ 201.110[3][a]*]. But in another case in which the trial court had ordered a reference to take an accounting, the Supreme Court, in holding the order interlocutory and nonappealable, said that *Zappettini* could be distinguished from the case before it but that even if this were not so, *Zappettini* would have to be considered as modified to conform to the holdings of, among other cases, *Gunder* [*Di Blasi v. Di Blasi (1930) 209 Cal. 753, 754, 290 P. 7* ; *see* *Hollar v. Saline Products, Inc. (1935) 3 Cal. 2d 80, 82, 43 P.2d 273* (quoting *Di Blasi*, and discussed at *§ 201.110[3*][a]); *Degnan v. Morrow (1969) 2 Cal. App. 3d 358, 363, 82 Cal. Rptr. 557]* . Thus, the rule of the foregoing cases distinguishing or commenting on *Zappettini* appears to be that an order or judgment directing a reference to take an account is interlocutory and nonappealable, and that an order or judgment that orders an accounting without directing a reference is also interlocutory and nonappealable, since a reservation by the court of further jurisdiction over the accounting will be inferred [*see* *Degnan v. Morrow (1969) 2 Cal. App. 3d 358, 363, 82 Cal. Rptr. 557* ; *but see* *Howard Townsite Owners, Inc. v. Mills (1968) 268 Cal. App. 2d 223, 227-228, 73 Cal. Rptr. 715* (discussed at [4][c], *below*); *Phillips v. Cleaver (1947) 82 Cal. App. 2d 751, 755-756, 187 P.2d 80]* . Finally, one court of appeal has maintained that there is no logical way to distinguish *Zappettini* from contrary authorities, and that *Zappettini* has been not only modified, but impliedly overruled [*see* *Kinoshita v. Horio (1986) 186 Cal. App. 3d 959, 966, 231 Cal. Rptr. 241]* .

[4] Additional Authorities

[a] Court's Denomination of Order or Judgment Is Not Determinative

In *Brown v. Memorial Nat. Home Foundation (1958) 158 Cal. App. 2d 448, 322 P.2d 600* , cert. denied *358 U.S. 943, 79 S. Ct. 353, 3 L. Ed. 2d 352 (1959)* , the court of appeal denied a motion to dismiss appeals from an "interlocutory" judgment and from a minute order approving the first account current of receivers, fixing the receivers' compensation, and authorizing payment out of the receivership estate on the ground the judgment was final. In reaching its decision, the court noted the well-settled rule that denomination of a judgment as "interlocutory" is not determinative of its finality for purposes of appeal, but that the substance of the judgment determines its finality (*158 Cal. App. 2d 448, 453)* .

See also *Eldridge v. Burns (1978) 76 Cal. App. 3d 396, 404, 142 Cal. Rptr. 845* ; *Reynolds v. Special Projects, Inc. (1968) 260 Cal. App. 2d 496, 499, 67 Cal. Rptr. 374* .

[b] General Test

The facts and procedural background of *Zappettini v. Buckles (1914) 167 Cal. 27, 138 P. 696* , are discussed at [3][c], *above.* In holding the judgment appealed from was final, the Court said the general rule in determining whether a judgment is final or merely interlocutory is that if anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the judgment is interlocutory only (*167 Cal. 27, 33)* .

See also *Knodel v. Knodel (1975) 14 Cal. 3d 752, 761 n.11, 122 Cal. Rptr. 521, 537 P.2d 353* ; *Bakewell v. Bakewell (1942) 21 Cal. 2d 224, 227, 130 P.2d 975* ; *Eldridge v. Burns (1978) 76 Cal. App. 3d 396, 404, 142 Cal. Rptr. 845* ; *Palo Alto-Menlo Park Yellow Cab Co. v. Santa Clara County Transit Dist. (1976) 65 Cal. App. 3d 121, 129, 135 Cal. Rptr. 192* .

[c] When Judgment in Action for Accounting Is Final

In *Howard Townsite Owners, Inc. v. Mills (1968) 268 Cal. App. 2d 223, 73 Cal. Rptr. 715* , which arose out of an action to determine the validity of a community oil and gas lease and entitlement to payment of royalties under it, the court of appeal held that the "interlocutory judgment," decreeing the lease valid and that plaintiffs continued to be entitled to royalties under it and ordering the attorneys for the parties to determine and report to the court the amount of past royalties due for the purpose of entry of a final decree, was final and appealable. Quoting *Phillips v. Cleaver (1947) 82 Cal. App. 2d 751, 755-756, 187 P.2d 80* , the court of appeal said that a present judgment was ordered for, defendants were ordered to pay the sum found to be due to plaintiff by reason of the accounting, nothing further remained to be done in the nature of a judicial action, the rights of the parties were fully established, and all that remained were such proceedings as were necessary to carry the judgment into effect (*268 Cal. App. 2d 223, 228)* .

The factual background of *Price v. Slawter (1959) 169 Cal. App. 2d 448, 337 P.2d 914* , is discussed at [3][a], *above.* The court of appeal held that the judgment was practically identical to the one in *Zappettini v. Buckles (1914) 167 Cal. 27, 138 P. 696* (discussed at [3][c], *above*), and held that the judgment was final, since it fully and finally determined all the rights of the parties as between themselves (*169 Cal. App. 2d 448, 451-452)* .

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20-201 California Points & Authorities § 201.121

§ 201.121 Opposing Contention That Order or Judgment Is Interlocutory and Nonappealable--Appeal From Interlocutory Judgment Determining Right to Redeem Property From Mortgage or Lien and Directing Accounting Is Authorized [Code Civ. Proc. § 904.1(a)(8)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

AN APPEAL BY THE AGGRIEVED PARTY FROM AN INTERLOCUTORY JUDGMENT DETERMINING THE RIGHT TO REDEEM _____ [REAL *or* PERSONAL] PROPERTY FROM A _____ [MORTGAGE *or* LIEN] AND DIRECTING AN ACCOUNTING IS EXPRESSLY AUTHORIZED BY THE PROVISIONS OF CODE OF CIVIL PROCEDURE SECTION 904.1(a)(8).

A. Who May Appeal. Any party aggrieved may appeal in the cases prescribed in *Code of Civil Procedure Section 901 et seq.* (*Code Civ. Proc. § 902*).

B. Action to Redeem Property From Mortgage or Lien. An appeal may be taken from an interlocutory judgment, order, or decree made or entered in an action to redeem real or personal property from a mortgage thereof, or a lien thereon, determining the right to redeem and directing an accounting [*Code Civ. Proc. § 904.1(a)(8)*].

[2] Comments

[a] Use of Form

The points and authorities at [1], *above*, may be submitted in opposition to the contention that an interlocutory judgment directing an accounting is nonappealable when the judgment was entered in an action to redeem real or personal property from a mortgage or lien.

The points and authorities at [1], *above*, may be combined with a form of memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue as to the appealability of an

interlocutory judgment determining the right to redeem and directing an accounting in an action to redeem property from a mortgage or lien. For example, the points and authorities may be combined with points and authorities in opposition to a motion to dismiss an appeal from such a judgment. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

In addition, the points and authorities at [1], *above*, may be combined with a memorandum of points and authorities in opposition to a petition for a writ of mandate seeking to compel a lower appellate court that has refused to do so to dismiss the appeal or in opposition to a petition for a writ of prohibition seeking to restrain the lower appellate court from proceeding to hear the appeal after it has denied a motion to dismiss, or both.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show that the case is one coming within the provisions of *Code Civ. Proc. § 904.1(a)(8)*.

[b] Related Pleading and Practice Forms

For forms relating to appeals from superior and municipal courts, see Ch. 40, *Appeal: An Overview* , et seq. and Ch. 345A, *Limited Civil Cases* in California Forms of Pleading and Practice. For forms for use in mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* , in that publication.

[c] Related Points and Authorities

For forms of memoranda of points and authorities generally supporting and opposing petitions for writs of mandate and prohibition, see Ch. 150, *Mandate and Prohibition* , in this publication.

[d] Opposing Points and Authorities

In an appropriate case, the points and authorities at [1], *above*, may be submitted in opposition to the contention supported by the points and authorities *set out in § 201.110*.

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CHAPTER 205 REVIEW (CERTIORARI), WRIT OF

20-205 California Points & Authorities 205.syn

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[1] FORM

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[a] Use of Form

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[b] Petition by Beneficially Interested Party

[c] Action in Excess of Court's Power Exceeds Jurisdiction

[d] Lack of Appellate Remedy

[e] Lack of Other Plain, Speedy, and Adequate Remedy

§ 205.21 Supporting Petition for Writ of Review (Certiorari) [Code Civ. Proc. § 1068; Cal. Rules of Ct., Rule 8.490(b)]--Judgment or Order of Contempt Not Appealable and in Excess of Jurisdiction [Code Civ. Proc. §§ 904.1(a)(1)(B), 1222]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Adjudication of Contempt Not Appealable

[b] Contempt Order May Be Annulled if Court Exceeded Jurisdiction

[4] Additional Authorities

[a] Adjudication of Contempt Not Appealable

[b] Contempt Order May Be Annulled if Court Exceeded Jurisdiction

§ 205.22 Supporting Petition for Writ of Review (Certiorari) [Code Civ. Proc. § 1068; Cal. Rules of Ct., Rule 8.490(b)]--Abuse of Discretion by Local Board or Officer

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Writ of Review Will Test Whether Exercise of Discretion by Local Board or Officer Was Proper

[4] Additional Authorities

[a] Writ of Review Will Test Whether Exercise of Discretion by Local Board or Officer Was Proper

§ 205.23 Opposing Petition for Writ of Review (Certiorari) [Code Civ. Proc. §§ 1068, 1107; Cal. Rules of Ct., Rule 8.487]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

[3] Discussion of Authorities

[a] Requirements for Issuance of Writ of Review

[b] Only Beneficially Interested Party May Petition

[c] Writ Denied if Action Within Jurisdiction

[d] Writ Denied if Seeks to Examine Discretionary Matters Within Jurisdiction

[4] Additional Authorities

[a] Requirements for Issuance of Writ of Review

[b] Writ Denied if Sought to Examine Discretionary Matters Within Jurisdiction

§ 205.24 Opposing Petition for Writ of Review (Certiorari) [Code Civ. Proc. §§ 1068, 1107; Cal. Rules of Ct., Rule 8.487]--Inferior Tribunal, Board, or Officer Was Not Exercising Judicial Functions

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Writ Denied if No Exercise of Judicial Functions

[4] Additional Authorities

[a] Writ Denied if No Exercise of Judicial Functions

§ 205.25 Opposing Petition for Writ of Review (Certiorari) [Code Civ. Proc. §§ 1068, 1107; Cal. Rules of Ct., Rule 8.487]--Right of Appeal or Other Remedy Exists or Existed

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Writ of Review Denied if Appeal or Other Remedy Available

[b] Writ of Review Denied if Right to Appeal Lost by Petitioner's Inaction

[4] Additional Authorities

[a] Writ of Review Denied if Appeal or Other Remedy Available

[b] Writ of Review Denied if Right to Appeal Lost by Petitioner's Inaction

§ 205.26 Opposing Petition for Writ of Review (Certiorari) [Code Civ. Proc. §§ 1068, 1107; Cal. Rules of Ct., Rule 8.487]--Petitioner's Claim Moot or Barred by Laches

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Writ of Review Denied if Matter Moot

[b] Writ of Review Denied for Laches

[4] Additional Authorities

[a] Writ of Review Denied if Matter Moot

[b] Writ of Review Denied for Laches

California Points & Authorities

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CHAPTER 205 REVIEW (CERTIORARI), WRIT OF
PART I. INTRODUCTION

20-205 California Points & Authorities § 205.01

§ 205.01 Scope of Chapter

This chapter contains memoranda that may be submitted as a part of a civil action to support or oppose issuance of a writ of review, also known as a writ of certiorari [*see Code Civ. Proc. § 1067*]. Points and authorities supporting petitions for writs of review are included in §§ 205.20-205.22. Points and authorities opposing issuance of writs of review are included in §§ 205.23-205.26.

The use of the writ of certiorari by the United States Supreme Court to review decisions of California appellate courts is beyond the scope of this chapter. For discussion and forms relating to this writ, see Moore's Federal Practice, Ch. 406, *Certiorari Jurisdiction Over State Courts* (Matthew Bender).

Also beyond the scope of this chapter is the use of the writ of review by the California appellate courts to review adjudicatory decisions of statewide public agencies having constitutionally delegated adjudicatory power, such as the Agricultural Labor Relations Board [*see Lab. Code § 1160.8*; *Cal. Rules of Ct., Rule 8.498*], the Public Employment Relations Board [*see Gov. Code §§ 3520, 3542, 3564*; *Cal. Rules of Ct., Rule 8.498*], the Public Utilities Commission [*Pub. Util. Code §§ 1756-1767*; *Cal. Rules of Ct., Rule 8.496*], and the Workers' Compensation Appeals Board [*Lab. Code §§ 5950-5955*; Cal. Rules of Ct., Rule 8.494].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsAppellate JurisdictionState Court ReviewCivil ProcedureU.S. Supreme Court ReviewGeneral Overview

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PART I. INTRODUCTION

20-205 California Points & Authorities § 205.02

§ 205.02 Governing Law

Original jurisdiction to issue writs of review is granted to the California Supreme Court, courts of appeal, and superior courts by *Cal. Const., art. VI, § 10*. The application for and issuance of a writ of review (certiorari) is generally governed by *Code Civ. Proc. §§ 1067-1077, 1107*, and *1108*. Rules of practice and procedure are contained in *Cal. Rules of Ct., Rules 8.485-8.493*.

Although the term "review" is used in the California Rules of Court governing a petition for review to the Supreme Court of a court of appeal decision [*see, e.g., Cal. Rules of Ct., Rules 8.500-8.552*], this usage should not be confused with the term "writ of review" or "writ of certiorari" as used in *Cal. Rules of Ct., Rule 8.490*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionState Court Review

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20-205 California Points & Authorities § 205.03

§ 205.03 How to Use Forms in This Chapter

[1] Page Limits on Memoranda

One of the more significant drafting requirements to keep in mind are page limits: supporting and opposing memoranda filed in discovery motion proceedings may not exceed 15 pages. A reply or closing memorandum may not exceed 10 pages. Exhibits, declarations, attachments, the table of contents, the table of authorities, and the proof of service are excluded from these page limits. Any party must obtain leave of court to file a longer memorandum [*see Cal. Rules of Ct., Rule 3.1113(d), (e)*]. These and other drafting requirements are discussed in further detail in Ch. 1, *Writing Legal Memoranda and Briefs* .

[2] Using the Forms to Build a Draft Memorandum

This chapter contains general forms supporting [*see § 205.20*] and opposing [*see § 205.23*] a petition for a writ of review. When appropriate according to the facts of the case, any of the partial forms supporting [*see §§ 205.21, 205.22*] or opposing [*see §§ 205.24 -205.26*] the issuance of the writ should be combined with the general supporting or opposing form, respectively.

The forms may also be used when appropriate with points and authorities supporting a response to the petition by answer [*Code Civ. Proc. §§ 1069.1, 1089*; *Cal. Rules of Ct., Rule 8.487(a)*], demurrer [*Code Civ. Proc. §§ 1069.1, 1089*; *Cal. Rules of Ct., Rule 8.487(b)*], or motion to dismiss [*see Pacific Home B.R. v. Daugherty (1925) 75 Cal. App 623, 626, 243 P. 473* (decided before answer was permissible pleading)].

A petition for a writ of review is frequently combined with requests for other writs in the alternative, such as prohibition, habeas corpus, and mandate [*Lankton v. Superior Court (1936) 5 Cal. 2d 694, 697, 55 P.2d 1170* (prohibition); *In re Smith (1976) 65 Cal. App. 3d 291, 296, 135 Cal. Rptr. 5* (habeas corpus); *Oksner v. Superior Court (1964) 229 Cal. App. 2d 672, 691, 40 Cal. Rptr. 621* (mandate)] Therefore, the forms in this chapter should be combined with those appropriate for any alternative relief sought. In addition, it should be noted that while this chapter has been prepared in accordance with statutorily authorized uses for the writ of review, alternative remedies should be investigated to determine whether any other is more appropriate in a given instance [*see Code Civ. Proc. § 1094.5* (administrative mandate)].

The captions on the forms in this chapter have been drafted on the premise that the petition has been or will be filed in a court of appeal. The captions may be appropriately modified when the petition is directed to the Supreme Court or a superior court.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeGeneral OverviewCivil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPleading & PracticeMotion PracticeSupporting MemorandaCivil ProceduresAppealsBriefsCivil ProceduresAppealsMotions on Appeal

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20-205 California Points & Authorities § 205.04

§ 205.04 Related Pleading and Practice Chapters

For a discussion of the substantive law governing issuance of the writ of review, the relationship of this writ to other writs (such as mandate and prohibition), and forms of petition and response, see California Forms of Pleading and Practice, Ch. 492, *Review (Certiorari), Writ of* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureAppealsAppellate JurisdictionState Court Review

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20-205 California Points & Authorities § 205.05

§ 205.05 Related Points and Authorities Chapters

For memoranda supporting and opposing issuance of the writs of mandate, prohibition, and habeas corpus, see Ch. 150, *Mandate and Prohibition* and Ch. 110, *Habeas Corpus* , respectively, in this publication. For memoranda supporting and opposing issuance of a writ of mandate for review of a final administrative adjudicatory order or decision pursuant to *Code Civ. Proc. § 1094.5*, see Ch. 195, *Public Administrative Law* .

For a discussion of how to use the forms in this chapter to draft a memorandum or a trial or appellate brief, and for a sample of a complete memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsProhibition

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20-205 California Points & Authorities §§ 205.06-205.19

[Reserved]

§§ 205.06[Reserved]

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PART II. FORMS

20-205 California Points & Authorities § 205.20

§ 205.20 Supporting Petition for Writ of Review (Certiorari) [Code Civ. Proc. § 1068; Cal. Rules of Ct., Rule 8.490(b)]--General Form

[1] FORM

[IN THE] COURT OF APPEAL OF CALIFORNIA
_____ APPELLATE DISTRICT
[DIVISION _____]
[*or other as appropriate depending on which court petition is filed in*]

_____ [*name*],	)	NO. _____
Petitioner,	)	MEMORANDUM IN SUPPORT OF WRIT OF RE-
vs.	)	VIEW (CERTIORARI)
_____ [*name*],	)	Date: _____
Respondent,	)	Time: _____
_____, [*name*]	)	Location: _____
Real Party in Interest.	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THE WRIT OF REVIEW SHOULD ISSUE BECAUSE THE _____ [INFERIOR TRIBUNAL *or* OFFICER *or* BOARD] EXCEEDED ITS JURISDICTION IN THE EXERCISE OF ITS JUDICIAL FUNCTIONS AND THERE IS NO APPEAL, NOR ANY PLAIN, SPEEDY, AND ADEQUATE REMEDY.

A. Requirements for Issuance of Writ of Review. A writ of review may be granted by court when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of that tribunal, board, or officer, and there is no appeal nor, in the judgment of the court, any plain, speedy, and adequate remedy (*Code Civ. Proc. § 1068*; *People v. Cimarusti (1978) 81 Cal. App. 3d 314, 319, 146 Cal. Rptr. 421* ; *Buchwald v. Superior Court (1967)*

254 Cal. App. 2d 347, 353, 62 Cal. Rptr. 364).

B. Petition by Beneficially Interested Party. The application for the writ must be made on the verified petition of the party beneficially interested (*Code Civ. Proc. § 1069*; *see Taylor v. Superior Court (1942) 20 Cal. 2d 244, 247, 125P.2d 1* ; *see also Fuller v. San Bernardino Valley Mun. Wat. Dist. (1966) 242 Cal. App. 2d 52, 56-57, 51 Cal. Rptr. 120*).

C. Notice to Adverse Party. The court may require a notice of the application for a writ of review to be given to the adverse party, or may grant an order to show cause why it should not be allowed, or may grant the writ without notice (*Code Civ. Proc. § 1069*).

[*Optional*] **D. Action in Excess of Court's Power Exceeds Jurisdiction.** A court exceeds its jurisdiction if it acts in excess of its power, as defined by constitutional provision, statute, or rules developed by the courts and followed under the doctrine of stare decisis (*Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal. 2d 450, 454-455, 20 Cal. Rptr. 321, 369 P.2d 937* ; *see Dvorin v. Appellate Dept. (1975) 15 Cal. 3d 648, 650, 125 Cal. Rptr. 771, 542 P.2d 1363*).

E. Inferior Tribunal, Board, or Officer Was Exercising Judicial Function. The action taken by the tribunal, board or officer must have been in the exercise of judicial functions (*Code Civ. Proc. § 1068*; *Garvin v. Chambers (1924) 195 Cal. 212, 220, 232 P. 696* , *O'Brien v. Olson (1941) 42 Cal. App. 2d 449, 453, 109 P.2d 8*).

F. Lack of Appellate Remedy. A lack of appellate remedy means that there is no right of appeal from the action taken by the inferior tribunal, board, or officer (*see Mitchell v. Superior Court (1972) 28 Cal. App. 3d 759, 764-765, 104 Cal. Rptr. 921* ; *Brady v. Superior Court (1962) 200 Cal. App. 2d 69, 72, 19 Cal. Rptr. 242*).

[*Optional*] **G. Appeal Remedy Lost Because Lack of Required Notice.** If the right of appeal is lost because petitioner, who was without fault, did not receive notice of the proceedings and entry of an adverse judgment, or order, and notice was required to be given, petitioner may have the proceedings reviewed by a writ of review (*Grinbaum v. Superior Court (1923) 192 Cal. 528, 554-556, 221 P. 635*).

H. Lack of Other Plain, Speedy, and Adequate Remedy. For a legal remedy to be adequate it must afford relief on the very matter that is the subject of the petition and must be equally as convenient and effective as the extraordinary remedy demanded (*Estate of Bodger (1954) 128 Cal. App. 2d 710, 715, 276 P.2d 83*).

[*When appropriate, this form should be combined with partial forms governing specific fact situations (see, e.g., §§ 205.21, 205.22)*].

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

[2] Comments

[a] Use of Form

This form may be submitted in support of a petition for issuance of a writ of review (or certiorari) [*Code Civ. Proc. §*

1068; *see Code Civ. Proc. § 1067* (writ of certiorari may be denominated writ of review)].

The sample caption in this form is for use when the petition is directed to a court of appeal. The caption may be modified when the petition is directed to the Supreme Court or a superior court. For forms of alternative captions, see Ch. 108, *Captions and Introductions* in California Forms of Pleading and Practice (Matthew Bender).

Memoranda in support of a petition for issuance of a writ of review are required to be filed if the petition is made to a court of appeal or the Supreme Court [*Cal. Rules of Ct., Rule 8.486(a)*]. While neither the Code of Civil Procedure nor the California Rules of Court expressly requires the filing of points and authorities in support of a petition for the writ in superior court, construction of several rules together dictates that a memorandum should be filed. *Cal. Rules of Ct., Rule 3.1100* provides that the law and motion rules set forth in *Cal. Rules of Ct., Rules 3.1100 et seq.* apply to civil law and motion proceedings in superior court. *Cal. Rules of Ct., Rule 3.1103(a)(2)* defines law and motion as including any proceedings on application for a writ of review. An application for an order is a motion [*Code Civ. Proc. § 1003*]. *Cal. Rules of Ct. Rule 3.1113(a)* provides that a party filing a notice of motion must serve and file with it a memorandum to be relied on [*see Cal. Rules of Ct., Rule 3.1103(b)*]. Moreover, a petition for issuance of a writ of review is not listed in *Cal. Rules of Ct., Rule 3.1114* as a petition that does not require a memorandum [*see Cal. Rules of Ct., Rule 3.1114*]. The required format and contents of the memorandum are set forth in *Cal. Rules of Ct., Rule 3.1113*.

A petition for a writ of review is frequently combined with requests for other writs in the alternative, such as prohibition, habeas corpus, and mandate [*Lankton v. Superior Court (1936) 5 Cal. 2d 694, 697, 55 P.2d 1170* (prohibition); *In re Smith (1976) 65 Cal. App. 3d 291, 296, 135 Cal. Rptr. 5* (habeas corpus); *Oksner v. Superior Court (1964) 229 Cal. App. 2d 672, 691, 40 Cal. Rptr. 621* (mandate)]. Therefore, the points and authorities set forth in this form should be combined with those appropriate for any alternative relief sought.

If an inferior court's action is the subject of the petition, optional paragraph D should be used. If petitioner had a right of appeal but lost that right because of the failure to receive notice of the proceedings and of an adverse judgment or order,and notice was required to be given by the opposing party, optional paragraph G should be used.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Generally, counsel must present facts showing that an inferior tribunal, board, or officer that exercises judicial functions exceeded its jurisdiction, and that no appeal or any plain, speedy, or adequate remedy is available [*see Code Civ. Proc. § 1068*]. A threshold matter is whether the action complained of was judicial in nature; facts showing judicial action should be established. If an inferior board or officer is involved, there may be a dispute over the judicial character of the action taken [*see Garvin v. Chambers (1924) 195 Cal. 212, 216, 232 P. 696*]. If the petition seeks review of judicial action by a local board, this form should be combined with the points and *authorities in § 205.22* [*but see Code Civ. Proc. § 1094.5* (administrative mandate to review certain administrative action)].

Counsel should present authority demonstrating why the action complained of is not appealable. Appeal of civil actions is generally governed by *Code Civ. Proc. §§ 901-914*. While the appealability of judgments and orders has generally expanded since many of the older decisions concerning writs of review were rendered [*see § 205.25[2][a]*], certain adjudications remain nonappealable [*see, e.g., Code Civ. Proc. §§ 116.710, 116.780* (superior court judgments after appeal from small claims court), 904.1(a)(1)(B), 1222 (contempt)]. If a contempt action is involved counsel should combine the allegations *found in § 205.21* with those in the foregoing form.

Counsel must also factually establish the manner in which jurisdiction was exceeded. In addition to addressing subject matter and personal jurisdiction, counsel should determine if the inferior body followed any constitutional provision, statute, or rule of decisional law requiring that it exercise its power over the parties in a particular manner [*see Yoakum v. Small Claims Court (1975) 53 Cal. App. 3d 398, 401-402, 125 Cal. Rptr. 882*].

[c] Related Pleading and Practice Forms

For forms of petition for writ of review, notices of application for the writ, orders to show cause, motions and orders for further return of the writ, forms for the writ itself, and judgment on review, see Ch. 492, *Review (Certiorari), Writ of,* in California Forms of Pleading and Practice (Matthew Bender).

[d] Related Memoranda

For forms in support of petitions for writs of mandate, prohibition and habeas corpus, see Ch. 150, *Mandate and Prohibition* and Ch. 110, *Habeas Corpus* .

[e] Opposing Memoranda

In an appropriate case, the points and authorities *set out in §§ 205.23 -205.26* may be used to oppose the petition for writ of review supported by this points and authorities.

[3] Discussion of Authorities

[a] Requirements for Issuance of Writ of Review

In ***People v. Cimarusti*** *(1978) 81 Cal. App. 3d 314, 146 Cal. Rptr. 421* , defendants were charged with civil violations of several consumer protection statutes. The trial judge ordered a reduction in a stipulated judgment between plaintiff and two defendants and subsequently refused to sign the unaltered judgment in his chambers on the ground that it imposed an excessive monetary penalty against the stipulating defendants. Plaintiff refused to prepare a new judgment and moved to have the matter set for trial as to those defendants. The motion was denied with prejudice, and no judgment was ever signed by the trial court, nor was any other stipulation ever reached. Plaintiff appealed.

The court of appeal treated the appeal as a request for a writ of review and found that neither order was appealable. It further found that the trial judge exceeded his jurisdiction by establishing a penalty without benefit of a trial or a stipulation (*81 Cal. App. 3d 314, 322)* . Therefore, since the trial court had exceeded its jurisdiction and there was no appeal or any plain, speedy and adequate remedy, the court of appeal held that a writ of review was the proper remedy under *Code Civ. Proc. § 1068* (*81 Cal. App. 3d 314, 319)* .

Buchwald v. Superior Court *(1967) 254 Cal. App. 2d 347, 62 Cal. Rptr. 364* , involved a contract dispute between members of the musical group "Jefferson Airplane" and their common business representative. Each member's contract required arbitration of any dispute between the parties. A dispute arose between the members and the representative, and the representative commenced proceedings to compel arbitration. Plaintiff group members filed a petition with the California Labor Commissioner, claiming the representative violated the Artists' Managers Act (*see Lab. Code §§ 1700-1700.46*), the terms of the contract, and other statutory provisions. Plaintiffs also filed a superior court action seeking an injunction against arbitration. Defendant filed an answer objecting to the jurisdiction of the Labor Commissioner, and moved in superior court to compel arbitration. The trial court granted defendant's motion. Plaintiffs petitioned for a writ of review or, alternatively, for writs of mandate, or prohibition.

The court of appeal issued the writ of review, annulling the trial court's orders. It held that the superior court's order exceeded its jurisdiction because the contractual dispute was pending before the Labor Commissioner, which hadoriginal jurisdiction of the dispute by statute. Furthermore, there was no right of appeal or other plain, speedy, or adequate remedy (*254 Cal. App. 2d 347, 353)* .

[b] Petition by Beneficially Interested Party

In ***Taylor v. Superior Court*** *(1942) 20 Cal. 2d 244, 125 P.2d 1* , a superior court had issued a preliminary injunction in

an action to establish a partnership. Plaintiff had posted security for the injunction pursuant to a minute order. Thereafter, orders to show cause against defendant charging contempt for alleged violations of the injunction were issued based on affidavits of an auditor employed by plaintiff. The orders to show cause were dismissed because the trial judge erroneously ruled that plaintiff had failed to post bond for the injunction. Plaintiff then petitioned for a writ of review. In opposition to the petition defendant contended that plaintiff was not a beneficially interested party within the meaning of *Code Civ. Proc. § 1069* because affidavits in support of the orders to show cause were made by plaintiff's auditor.

The Supreme Court annulled the order discharging the persons alleged to be in contempt of court. After determining that the trial court had exceeded its jurisdiction and that plaintiff had no appellate remedy, the Court held that plaintiff was a beneficially interested party for purposes of petitioning for a writ of review, within the meaning of *Code Civ. Proc. § 1069*, because he was the person for whose protection the injunction was obtained, and was not a "stranger to the action" (*20 Cal. 2d 244, 247)* .

In ***Fuller v. San Bernardino Valley Mun. Wat. Dist.*** *(1966) 242 Cal. App. 2d 52, 51 Cal. Rptr. 120* , a peremptory writ of mandate was issued ordering a water district to terminate proceedings for the annexation of certain lands. In its appeal from the issuance of the writ, the water district alleged, among other things, that the parties who obtained the writ were not beneficially interested in the action.

The court of appeal construed the term "beneficially interested" in both *Code Civ. Proc. § 1069* (writ of review) and *Code Civ. Proc. § 1086* (writ of mandate) to mean an interest in which a person has some particular right to be preserved or protected independent of that which he or she holds in common with the public at large. Here, the court found that plaintiffs were beneficially interested because they were property owners in the area to be annexed, and were moving forces in fixing its boundaries, securing boundary commission approval, and circulating and filing a petition for formation of a new district (*242 Cal. App. 2d 52, 58)* .

It should be noted that in ***Green v. Obledo*** *(1981) 29 Cal. 3d 126, 172 Cal. Rptr. 206, 624 P.2d 256* the Supreme Court stated that while ordinarily a writ of mandate will be issued only to persons who are beneficially interested, an exception exists in mandamus cases in which the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty. In those circumstances, the petitioner need not show any legal or special interest in the result. It is sufficient that he or she is interested as a citizen in having the laws executed and the duty in question enforced (.

[c] Action in Excess of Court's Power Exceeds Jurisdiction

Dvorin v. Appellate Dept. *(1975) 15 Cal. 3d 648, 125 Cal. Rptr. 771, 542 P.2d 1363* , involved a complaint to recover unearned interest on a promissory note. Defendant was granted summary judgment by the trial court and plaintiff appealed to the appellate department of the superior court, which reversed and directed the municipal court to enter judgment for plaintiff. Defendant appealed, but the court of appeal denied transfer for further appellate review. Defendant then petitioned for a writ of review.

The Supreme Court granted the writ. It held that the action of the appellate department in entering judgment for plaintiff was in excess of its jurisdiction because plaintiff had never moved for summary judgment. No appellate or other remedy was available, since denial of the transfer by the appellate court was its prerogative and would ordinarily terminate appellate review. Thus, the Court annulled the judgment. In applying the standard set forth in *Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal. 2d 450, 20 Cal. Rptr. 321, 369 P.2d 937* (discussed infra), the Court held that while a writ of review is not available to review the error of a lower court, it is available if the lower court exceeded its jurisdiction (*15 Cal. 3d 648, 650)* .

In ***Auto Equity Sales, Inc. v. Superior Court*** *(1962) 57 Cal. 2d 450, 20 Cal. Rptr. 321, 369 P.2d 937* , the appellate

department of a superior court had vacated a municipal court order granting a new trial to defendants in a civil suit. The superior court did so by overruling the only appellate decision that pertained to the facts and on which the municipal court had relied in granting the new trial. The superior court recognized the appellate decision, but refused to follow it on the ground that it had been incorrectly decided. Defendants then petitioned for a writ of review.

The Supreme Court held that the superior court had exceeded its jurisdiction. The Court explained that the writ of review is a jurisdictional writ, meaning that it cannot be used to attack an error of a lower tribunal committed in the exercise of its jurisdiction, but only against acts committed in excess of its jurisdiction (*57 Cal. 2d 450, 454)* . Here, the lower court refused to apply the one appellate decision that controlled the disposition of the case. Citing *Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 291, 109 P.2d 942* , a writ of prohibition case, the Court held that the failure of the lower court to adhere to the principal of stare decisis amounted to a jurisdictional error. Asthere was no appeal or other remedy available, it was proper to consider the matter by writ of review (*57 Cal. 2d 450, 455)* . However, the Court noted that there was only one controlling case to be applied. If there were conflicting cases from a higher court, it would not necessarily be an excess of jurisdiction for the inferior court to choose between them (*57 Cal. 2d 450, 456)* .

The holding in *Auto Equity Sales* was characterized in ***Yoakum v. Small Claims Court*** *(1975) 53 Cal. App. 3d 398, 125 Cal. Rptr. 882* , as being an attempt to state the concept of excess jurisdiction in broader terms than justified. The *Yoakum* court said that the holding in *Auto Equity Sales* concerning the failure to adhere to stare decisis did not broaden the concept of excess jurisdiction established in earlier cases. Under this concept, a court acts in excess of its jurisdiction if it does not follow the mandate of a constitutional provision, statute, or rule of decisional law of a higher court requiring that it exercise its power over the parties and the cause in a particular manner (*53 Cal. App. 3d 398, 401-402)* . *Yoakum* is discussed further in § 205.20[4][d].

[d] Inferior Tribunal, Board, or Officer Was Exercising Judicial Function

In ***Garvin v. Chambers*** *(1924) 195 Cal. 212, 232 P. 696* , a civil service board had made a finding that a police officer was guilty of insubordination and sustained his dismissal. The officer sought a writ of review. The superior court granted the writ and annulled the board's order. Defendant civil service board appealed.

The Supreme Court affirmed the judgment annulling the order. The Court determined that the actions of the board were clearly quasi-judicial and not ministerial in nature (*195 Cal. 212, 216)* . While the Court focused on whether it could review the evidence considered by the inferior board, it also stated that in the absence of a right to appeal, the writ of review addresses only the jurisdiction of an inferior board or tribunal exercising judicial functions (*195 Cal. 212, 220)* .

In ***O'Brien v. Olson*** *(1941) 42 Cal. App. 2d 449, 109 P.2d 8* , a state governor had dismissed certain prison directors from office. A petition for writ of review was sought to examine the authority for those dismissals.

The court of appeal held that the provision of *Code Civ. Proc. § 1068* that refers to the exercise of judicial functions by an inferior tribunal, board, or officer applied to a state governor. The court determined that the dismissal action was of a judicial character (*42 Cal. App. 2d 449, 453)* . It held that a writ of review properly could be used to determine whether a state governor, sitting in a quasi-judicial capacity, had exceeded his or her jurisdiction in removing the prison directors from office (*42 Cal. App. 2d 449, 455)* . While the court ultimately found that the governor had not exceeded his jurisdiction in removing the prison directors, this did not prevent the writ of review from issuing to permit the court to evaluate his actions (*42 Cal. App. 2d 449, 458)* .

[e] Lack of Appellate Remedy

In ***Mitchell v. Superior Court*** *(1972) 28 Cal. App. 3d 759, 104 Cal. Rptr. 921* , a judgment creditor had successfully

moved to have assets of debtors of the judgment debtor turned over to a court appointed receiver. These debtors claimed an interest adverse to the judgment debtor in the assets, one of which was a car wash. The debtors refused to comply with the receiver's request to allow his agent to participate in the daily operation of the car wash or otherwise turn over its profits to him. All debtors were found in contempt. They sought a writ of review to determine the validity of the trial court's contempt finding.

The court of appeal issued a writ of review, finding that the contempt citation was not appealable. The court annulled the citation, stating that the trial court exceeded its jurisdiction by appointing a receiver as to assets in which the debtors of the judgment debtor claimed an adverse interest. By so doing the trial court had created a void order under applicable statutes, and violation of a void order could not be punished by contempt. The court noted that while an appeal might have been pursued from the original void order, this did not prevent the writ of review from being sought to collaterally attack that order, as there was no appeal from the contempt citation itself (*28 Cal. App. 3d 759, 764-765)* .

In ***Brady v. Superior Court*** *(1962) 200 Cal. App. 2d 69, 19 Cal. Rptr. 242* , another contempt case, a trial court enjoined a real property owner from permitting occupancy of his real property by other than a single family. At the time the order was made some eight different tenants occupied various structures on the land, which was located in a residential area zoned specifically for single family dwellings. The injunction was based on the trial judge's narrow construction of the term "single family" in the local ordinance. The contempt citation was based on a finding that the property owner permitted his son and the son's friend to occupy the premises. The property owner petitioned for a writ of review.

The court of appeal found that a writ of review was the proper means to examine the contempt order, as there was no appellate remedy (*200 Cal. App. 2d 69, 72)* . It appeared that the trial court had exceeded its jurisdiction in authorizing the original injunction and the contempt citation thereafter (*200 Cal. App. 2d 69, 82)* . Citing the concept of jurisdiction as enunciated in *Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 109 P.2d 942* , a writ of prohibition case, the court of appeal reiterated that any acts that exceed the defined power of a court in any instance are in excess of jurisdiction. Here, the court found that the trial judge's construction of the zoning ordinance was clearly removed from the legislative authorization of the ordinance,and exceeded the court's jurisdiction. Therefore, it annulled the contempt citation (*200 Cal. App. 2d 69, 74, 82)* .

[f] Appeal Remedy Lost Because Lack of Required Notice

In ***Grinbaum v. Superior Court*** *(1923) 192 Cal. 528, 221 P. 635* , petitioner, a California resident, had been adjudged insane by a German court and was subsequently institutionalized in Germany, leaving substantial unattended assets in California. A California trust company petitioned for and was granted guardianship of her estate. The order prescribing notice of the proceedings directed that notice be given to certain of her relatives (all in Europe), but neither that order nor the notices themselves were directed to her, and she had no personal knowledge of the proceedings. The trust company managed her estate for several years. She sought annulment of the order appointing the guardian by writ of review on return to California, on the ground that the order was void for lack of notice to her of the proceedings and judgment.

The Supreme Court held that the guardianship proceeding was void because of the lack of personal notice to petitioner. As the lack of notice created a jurisdictional defect, a writ of review was the appropriate remedy to redress petitioner's grievance (*192 Cal. 528, 554-555)* . The respondent trust company argued that she was guilty of laches in waiting to bring the action, that she should have pursued her remedy of appeal, and otherwise had waived her rights to seek a writ of review. The Court held, however, that an insane person could not waive any rights, both by statute (former Civ. Code § 40) and case law (*192 Cal. 528, 551-552)* . Furthermore, while her ability to pursue an appeal had lapsed by the passage of time, she could not be required to pursue an appeal when she had no knowledge of the proceedings or judgment and was institutionalized when they occurred (*192 Cal. 528, 556)* . The Court indicated that the notice required was both statutory (former Code Civ. Proc. § 1793) and based on concepts of due process of law dating from

the Magna Carta (*192 Cal. 528, 541-542)* .

Grinbaum has been cited in several cases, but its application appears restricted to the kind of situation in which notice of a proceeding is entirely inadequate or missing through no fault of the aggrieved party. For example, in *Simmons v. Superior Court (1959) 52 Cal. 2d 373, 377, 341 P.2d 13* (discussed in *§ 205.23[3][a]*), the Supreme Court distinguished *Grinbaum*, finding that extremely unusual circumstances existed in that case to justify issuance of the writ. In *Grinbaum*, the aggrieved party had no notice of the inception of the proceedings and was in no physical or mental condition to receive notice. However, in *Simmons* it was the petitioner's own lack of diligence that caused him to forfeit his appellate remedy (*52 Cal. 2d 373, 377)* . *Grinbaum* was also distinguished in *Bernstein v. Superior Court (1941) 46 Cal. App. 2d 568, 569, 116 P.2d 172* (discussed in *§ 205.26[3][b]*). In contrast to the situation in *Grinbaum*, a husband who was physically disabled but mentally competent was made the ward of his wife. After some six years, he contested the original establishment of the guardianship. However, the court left him to the remedy of challenging the continuation of the guardianship by his daughter (who had filed a separate petition to continue it after her mother's resignation), as he had received the benefit of his estate during the period of the guardianship and received timely notice of the proceedings.

[g] Lack of Other Plain, Speedy, and Adequate Remedy

In ***Estate of Bodger*** *(1954) 128 Cal. App. 2d 710, 276 P.2d 83* , a probate court made an ex parte appointment of an attorney to represent testamentary trust beneficiaries in resisting an appeal by a trustee of a decedent's estate from an order settling the trustee's report and account, and for the trustee's own fees. One of the beneficiaries petitioned the probate court and informed it that she did not wish the services of the appointed attorney, and demanded that the appointment be vacated. While the trustee's appeal was pending, she petitioned for a writ of review, alleging that she had no right of appeal nor other adequate, or speedy remedy at law from the order appointing the attorney.

The court of appeal held that the order appointing the attorney exceeded the jurisdiction of the probate court and was void. There was no law authorizing it to appoint counsel for a competent party to an action if that person had notice of the proceedings and was capable of selecting an attorney. The court also found the order violative of due process of law under *U.S. Const., Amend. XIV*, and *Cal. Const., art. I, § 1*, as well as infringing on petitioner's freedom of contract (*128 Cal. App. 2d 710, 714)* . Turning to the question of petitioner's remedies, the court said that under the provisions of former Prob. Code § 1240 there was no right of appeal available from the order. The suggestion by respondent that she file a repudiation of the appointment in the trustee's appeal was also without merit, because it would not be a part of the appeal and would constitute no part of the issues presented for review. Citing *Dufton v. Daniels (1923) 190 Cal. 577, 582, 213 P. 949* , a mandate proceeding, the court stated that for a legal remedy to be adequate, it must afford relief on the very matter that is the subject of the petition and that is equally as convenient and efficacious as the extraordinary remedy demanded. It was not conceivable that the appointed attorney would withdraw after the appeal without compensation. Petitioner should not have to wait and appeal from the order for his fees. Even if the appointed attorney never sought compensation after pursuing the appeal to a decision, his representation would still remain of record (*128 Cal. App. 2d 710, 715)* .

[4] Additional Authorities

[a] Requirements for Issuance of Writ of Review

In *Thelander v. Superior Court (1962) 58 Cal. 2d 811, 26 Cal. Rptr. 643, 376 P.2d 571* , persons injured in a vehicle collision brought suit against the state for negligence. The state was given additional time to plead over plaintiffs' objection, which plaintiffs claimed violated *Code Civ. Proc. § 1054*. In annulling the order by writ of review the Supreme Court held that the trial court had exceeded its jurisdiction because it extended the time for a responsive pleading by more than 30 days without the adverse party's consent (*58 Cal. 2d 811, 813-814)* . The Court noted that a writ of review was an appropriate remedy to test the power of the issuing court to make the offending order because, if

the order was contrary to statute, the court acted beyond its jurisdiction (*58 Cal. 2d 811, 814)* .

In *Hollaway v. Scripps Memorial Hospital (1980) 111 Cal. App. 3d 719, 168 Cal. Rptr. 782* , after plaintiff appealed from the modification of a personal injury judgment in her favor, the trial court ordered temporary removal of her guardians ad litem and counsel of record and appointed a new attorney and guardian ad litem to advise the court of any conflicts of interest. The court of appeal annulled the order and elected to examine them on writ of review, citing *People v. Cimarusti (1978) 81 Cal. App. 3d 314, 319, 146 Cal. Rptr. 421* (discussed in *§ 205.20[3][a]*). The court of appeal held that the trial court exceeded its jurisdiction by issuing the orders, reasoning that once the appeal notices had been filed the court was divested of jurisdiction, except for collateral or independent matters not involved in the appeal (*111 Cal. App. 3d 719, 721-722)* .

[b] Petition by Beneficially Interested Party

In *Johnson v. City of San Pablo (1955) 132 Cal. App. 2d 447, 283 P.2d 57* , proceedings for annexation of overlapping territories to the cities of San Pablo and Richmond were in progress when petitions for writs of mandamus and review were instituted against each city. A trial court concluded that the San Pablo proceeding was invalid because of jurisdictionally defective steps. The court of appeal, in addition to affirming the trial court's order that the San Pablo proceeding was void because the proceeding exceeded the jurisdiction prescribed by statute (*132 Cal. App. 2d 447, 448-449)* , held that the city of San Pablo was a party beneficially interested to apply for the writs under *Code Civ. Proc. § 1069*. The city had the legal capacity to be a party defendant and a justiciable interests in the controversy (*132 Cal. App. 2d 447, 458)* .

In *Marculescu v. City Planning Com. (1935) 7 Cal. App. 2d 371, 46 P.2d 308* , a superior court issued a writ of prohibition restraining a city planning commission from hearing a petition by property owners to rezone property adjacent to them from commercial to residential use. The property owners appealed. The appellate court found that they were interested persons for purposes of bringing a petition to rezone the property and reversed the action of the superior court. In so doing the court stated that for the purpose of a writ of review, a person is beneficially interested if the judicial action that is sought to be annulled injuriously affects his or her legal right (*7 Cal. App. 2d 371, 374)* .

[c] Action in Excess of Court's Power Exceeds Jurisdiction

In *Andrews v. Superior Court (1960) 183 Cal. App. 2d 756, 7 Cal. Rptr. 194* , a trial court imposed a monetary penalty under former Code Civ. Proc. § 2034 on an attorney it found to be in contempt of court on the ground that the attorney was responsible for the failure of his clients to appear at a court ordered deposition. Because the contempt finding was not appealable, the attorney sought a writ of review. The court of appeal held that the findings set forth in the order did not amount to a showing of contempt and annulled the order. The court stated that when a statute authorizes a prescribed procedure, and the court acts contrary to the authority thus conferred, it has exceeded its jurisdiction and a writ of review will issue to correct that excess (*183 Cal. App. 2d 756, 759)* .

[d] Lack of Appellate Remedy

People v. Gonter (1981) 125 Cal. App. 3d 333, 178 Cal. Rptr. 66 , was a criminal proceeding in which the prosecution appealed an order granting deferred jail commitments under a special program to several defendants. Although defendants had already pleaded guilty, judgment and sentence had not been imposed and there was no right of appeal from the order. The court of appeal treated the request for appeal as a petition for a writ of review and held that the matter was properly reviewable as such under *Code Civ. Proc. § 1068*, because there was a contention of at least arguable merit that the trial court had exceeded its jurisdiction and that there was no right of appeal or other plain, speedy, and adequate remedy (*125 Cal. App. 3d 333, 338)* . In so treating this appeal, however, the court found that the trial court's jurisdiction had not been exceeded and affirmed the order (*125 Cal. App. 3d 333, 340)* .

[e] Lack of Other Plain, Speedy, and Adequate Remedy

In *Yoakum v. Small Claims Court (1975) 53 Cal. App. 3d 398, 125 Cal. Rptr. 882* , plaintiff in three small claims actions had originally petitioned a superior court for writs of review and mandate after denial of a motion pursuant to *Code Civ. Proc. § 473* to be relieved from adverse judgments. The superior court granted the writ of mandate, directing the small claims court to set aside the judgments and reset them for hearing. In affirming and reversing in part, the court of appeal held that either the writ of review or writ of mandate is proper to reviewan action in which a court lacks or exceeds jurisdiction. In this action, the superior court could properly use both writs to determine whether the small claims court exceeded its jurisdiction. However, a writ of mandate was the appropriate remedy to compel the small claims court to hear certain of the matters on which judgment was rendered (*53 Cal. App. 3d 398, 403)* .

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Volume 20 Chapters 200-209 RECEIVERS---to---SANCTIONS
CHAPTER 205 REVIEW (CERTIORARI), WRIT OF
PART II. FORMS

20-205 California Points & Authorities § 205.21

§ 205.21 Supporting Petition for Writ of Review (Certiorari) [Code Civ. Proc. § 1068; Cal. Rules of Ct., Rule 8.490(b)]--Judgment or Order of Contempt Not Appealable and in Excess of Jurisdiction [Code Civ. Proc. §§ 904.1(a)(1)(B), 1222]

[1] FORM

[*The following should be combined, if appropriate, with a general form of memorandum supporting a petition for a writ of review (see, e.g., § 205.20).*]

THE WRIT OF REVIEW SHOULD ISSUE TO EXAMINE THE CONTEMPT _____ [JUDGMENT *or* ORDER] BECAUSE A DETERMINATION OF CONTEMPT IS NOT APPEALABLE AND THE ISSUING COURT EXCEEDED ITS JURISDICTION IN ADJUDICATING THE CONTEMPT.

A. Adjudication of Contempt Not Appealable. An adjudication of contempt of court is not appealable (*Code Civ. Proc. §§ 904.1(a)(1)(B), 1222*; *Mitchell v. Superior Court (1972) 28 Cal. App. 3d 759, 764-765, 104 Cal. Rptr. 921*).

B. Contempt Order May Be Annulled if Court Exceeded Jurisdiction. An adjudication of contempt may be annulled by writ of review if the issuing court exceeded its jurisdiction (*Chapman v. Superior Court (1968) 261 Cal. App. 2d 194, 196, 67 Cal. Rptr. 842* ; *Little v. Superior Court (1968) 260 Cal. App. 2d 311, 318, 67 Cal. Rptr. 77*).

[2] Comments

[a] Use of Form

These points and authorities may be used in support of the issuance of a petition for a writ of review if the inferior court has made an adjudication of contempt of court. Because contempt adjudications are not appealable [*see Code Civ. Proc. §§ 904.1(a)(1)(B), 1222*] they are frequently the subject of petitions for writs of review. § 205.21 should be used in conjunction with § 205.20, a general form supporting a petition for a writ of review.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. In particular, facts indicating how the underlying action, if any (such as an injunction), was in excess of the

court's jurisdiction will help demonstrate why a particular contempt action should be annulled [*see, e.g.,* *Fortenbury v. Superior Court (1940) 16 Cal. 2d 405, 408, 410, 106 P.2d 411* (contempt for violation of temporary restraining order prohibiting picketing)].

[b] Opposing Memoranda

See *§§ 205.23 -205.26*, which are in opposition to a petition for a writ of review, may be used to oppose this form when modified to address the specific facts of a contempt adjudication.

[3] Discussion of Authorities

[a] Adjudication of Contempt Not Appealable

The facts and procedural background of ***Mitchell v. Superior Court*** *(1972) 28 Cal. App. 3d 759, 104 Cal. Rptr. 921*), are discussed in *§ 205.20[3][e]*. In *Mitchell*, the court of appeal issued a writ of review, found a contempt citation not appealable, and annulled the citation. The court stated that the trial court exceeded its jurisdiction by appointing a receiver as to assets in which debtors of a judgment debtor claimed an adverse interest (*28 Cal. App. 3d 759, 764-765)* .

[b] Contempt Order May Be Annulled if Court Exceeded Jurisdiction

In ***Chapman v. Superior Court*** *(1968) 261 Cal. App. 2d 194, 67 Cal. Rptr. 842* , a personal injury action, defendant obtained on the day of trial a subpoena duces tecum for medical records of plaintiff, directing her physician to bring the records to the courthouse on a certain date. Plaintiff was subsequently found in contempt of court for willful failure and refusal to comply with the subpoena and was given a suspended sentence. Plaintiff sought a writ of review, contending that the trial court exceeded its jurisdiction in finding her in contempt and imposing a sentence.

The court of appeal agreed with plaintiff, holding that by writ of review the court could examine the record of and evidence taken by the inferior court to determine whether it exceeded its jurisdiction in adjudicating contempt. Here, the contempt citation and judgment were void as to plaintiff because the subpoena was directed to her physician, not to her (*261 Cal. App. 2d 194, 197)* . While plaintiff happened to be a bookkeeper and receptionist in the office of her physician, she was not the custodian of her own medical records. Evidence must be strictly construed in favor of the accused (*261 Cal. App. 2d 194, 196)* , and the trial court's conclusion that plaintiff had disobeyed the subpoena was contrary to the evidence and to the presumption that she was not guilty of willful disobedience. Therefore, the order finding her in contempt and imposing sentence was annulled (*261 Cal. App. 2d 194, 201)* .

Little v. Superior Court *(1968) 260 Cal. App. 2d 311, 67 Cal. Rptr. 77*), was an action for dissolution of marriage. During the proceedings plaintiff noticeddepositions of a psychoanalyst and psychotherapist whom defendant had consulted. After both deponents refused to answer specific questions on the grounds of the physician-patient privilege, plaintiff moved to compel defendant to execute a written consent authorizing the deponents to answer. This motion was granted, and included an order that in the event of defendant's failure or refusal to execute the written authorization within 10 days the county clerk would be appointed to do so on behalf of defendant. Subsequently, defendant's attorney notified plaintiff by letter that defendant had elected not to execute the authorization. Plaintiff's attorney then obtained an ex parte order directing the chief deputy county clerk to execute the authorization on behalf of defendant. The deposition of one of the consultants was then concluded. The remaining one, however, still refused to answer. Plaintiff moved to have defendant held in contempt of court, and the motion was granted. Defendant petitioned for a writ of review.

The court of appeal annulled the contempt order. It held that the contempt judgment was void because the trial court's order concerning the request for written authorization to have the deponents testify did not order defendant to perform any specific act, but merely approved plaintiff's request for an order. Furthermore, the court held that it could, by writ of

review, examine the whole record of the court and the evidence to determine the trial court's jurisdiction (*260 Cal. App. 2d 311, 316-317)* . Strictly construing the evidence in favor of the accused, the court held that there was a lack of evidence of willful disobedience. In addition, the order was ambiguous because defendant believed he was in compliance with it by allowing the county clerk to execute the consent (*260 Cal. App. 2d 311, 318)* .

[4] Additional Authorities

[a] Adjudication of Contempt Not Appealable

The facts and procedural background of *Andrews v. Superior Court (1960) 183 Cal. App. 2d 756, 7 Cal. Rptr. 194* , are discussed in *§ 205.20[4][c]*. In *Andrews*, the court of appeal held that findings set forth in the minute order of a trial court did not amount to a showing of contempt and annulled the order and its penalty. The court reiterated that when a statute authorizes a prescribed procedure, and a court acts contrary to the authority thus conferred, it has exceeded its jurisdiction and a writ of review will issue to correct that excess (*183 Cal. App. 2d 756, 759)* .

[b] Contempt Order May Be Annulled if Court Exceeded Jurisdiction

In *Cunningham v. Superior Court (1986) 177 Cal. App. 3d 336, 222 Cal. Rptr. 854* , the court of appeal held that a trial court's order requiring an attorney to involuntarily represent an indigent paternity defendant without compensation deprived the attorney of equal protection of the law. The attorney had been held in contempt for refusing to represent the defendant in an action for paternity and reimbursement for public assistance paid on behalf of a child. The court of appeal said that a contempt order cannot stand if the underlying order is invalid. Thus, it issued a writ of review compelling the trial court to vacate its appointment order (*177 Cal. App. 3d 336, 352, 356-357)* .

The facts and procedural background of *Brady v. Superior Court (1962) 200 Cal. App. 2d 69, 19 Cal. Rptr. 242* , are discussed in *§ 205.20[3][e]*. In *Brady*, a trial court enjoined a real property owner from permitting occupancy of his real property by other than a single family. A contempt citation was issued based on a finding that the owner permitted his son and the son's friend to occupy the premises. The court of appeal inferred that the trial court had exceeded its jurisdiction in authorizing the original injunction and the contempt citation, and thus annulled the citation (*200 Cal. App. 2d 69, 77)* .

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Volume 20 Chapters 200-209 RECEIVERS---to---SANCTIONS
CHAPTER 205 REVIEW (CERTIORARI), WRIT OF
PART II. FORMS

20-205 California Points & Authorities § 205.22

§ 205.22 Supporting Petition for Writ of Review (Certiorari) [Code Civ. Proc. § 1068; Cal. Rules of Ct., Rule 8.490(b)]--Abuse of Discretion by Local Board or Officer

[1] FORM

[*The following should be combined, if appropriate, with a general form of memorandum supporting a petition for a writ of review (see, e.g., § 205.20).*]

A WRIT OF REVIEW SHOULD BE ISSUED TO REVIEW _____ [*describe judicial action, e.g.,* THE DENIAL OF PETITIONER'S BUSINESS LICENSE] BY _____ [*specify local board or officer, e.g.,* THE PARADISE CITY COUNCIL] BECAUSE _____ [*specify board or officer, e.g.,* THE COUNCIL] ABUSED ITS DISCRETION AND THUS EXCEEDED ITS JURISDICTION IN THE EXERCISE OF THIS JUDICIAL FUNCTION.

Writ of Review Will Test Whether Exercise of Discretion by Local Board or Officer Was Proper. A writ of review is the appropriate remedy to determine if a local board or officer exceeded his/her/its jurisdiction by abusing the discretion vested in him/her/it in the exercise of a judicial function (*see Code Civ. Proc. § 1068*; *Garvin v. Chambers (1924) 195 Cal. 212, 220-221, 232 P. 696* ; *Ratchford v. County of Sonoma (1972) 22 Cal. App. 3d 1056, 1077, 99 Cal. Rptr. 887*).

[2] Comments

[a] Use of Form

These points and authorities are for use to support a petition for a writ of review when it is alleged that a local board or officer has exceeded its jurisdiction byabusing its discretion in the exercise of a judicial function [*see Code Civ. Proc. § 1068*]. This form should be used in conjunction with § 205.20, a general form supporting a petition for a writ of review. Note that a petition for writ of administrative mandate under *Code Civ. Proc. § 1094.5* is usually a more appropriate remedy and should be considered, in addition to or as an alternative to, a petition for a writ of review.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of

law stated. In particular, the judicial or quasi-judicial nature of the action complained of should be specified, as well as why the action constituted an abuse of discretion [*see, e.g.,* *Garvin v. Chambers (1924) 195 Cal. 212, 216, 232 P. 696* (civil service board action quasi-judicial)].

[b] Opposing Memoranda

With appropriate modifications, §§ 205.23-205.26 may be used to oppose the foregoing form, particularly § 205.24, which specifically opposes the contention that a judicial function was being exercised.

[3] Discussion of Authorities

[a] Writ of Review Will Test Whether Exercise of Discretion by Local Board or Officer Was Proper

The facts and procedural background of ***Garvin v. Chambers*** *(1924) 195 Cal. 212, 232 P. 696* , are discussed in *§ 205.20[3][d]*. In *Garvin*, a civil service board had made a finding that a police officer was guilty of insubordination and sustained his dismissal. The officer sought a writ of review. The writ was granted by the superior court, which annulled the board's order. Defendant civil service board appealed. The Supreme Court affirmed the judgment annulling the order (*195 Cal. 212, 226)* . It held that the board action was quasi-judicial and not ministerial in nature. The Court stated that the city charter provision directing the board to fully hear and determine the matter indicated that the board proceedings was in the nature of an original trial, and its determination was in the nature of an original and final judgment (*195 Cal. 212, 216)* . The Court also stated that in the absence of a right to appeal, the writ of review addresses only the jurisdiction of an inferior board or tribunal exercising judicial functions (*195 Cal. 212, 220)* .

In ***Ratchford v. County of Sonoma*** *(1972) 22 Cal. App. 3d 1056, 99 Cal. Rptr. 887* , an owner of property abutting on a subdivision road discovered that a portion of her property encroached on the road, so she petitioned to have the county board of supervisors declare the road abandoned. The portion of the road in question had never been accepted for public dedication by the board. The board adopted a resolution abandoning the portion of the road containing the encroachment and made a finding that the road was not a county road and at best could be described as a purported county road. Another abutting landowner objected to the abandonment primarily on the ground that the land area was needed for future expansion of the road and underground utilities. She filed a petition for a writ of review contending that the board had no jurisdiction to adopt the abandonment resolution and exceeded its discretion in doing so, with the result being to benefit a private individual. The trial court granted the petition but denied any affirmative relief, and she appealed from the denial.

The court of appeal reversed the denial and remanded the case with instructions to order the resolution void. First, the court determined that the board of supervisors had exercised a judicial function in its action, contrary to older cases holding that matters relating to street improvements were usually legislative in character. The court recognized the test employed in *Quinchard v. Board of Trustees (1896) 113 Cal. 664, 45 P. 856* (discussed in *§ 205.24[4][a]*), namely, that the character of the act or determination sought to be reviewed is the important factor in determining whether a judicial action is present. However, it stated that a better test is whether the act or determination relates to the ascertainment of existing rights, and held that insofar as the abandonment of a street or highway affects the property rights of abutting owners there is something of a judicial function present (*22 Cal. App. 3d 1056, 1067)* . The court also found that the abutting owner had sufficient interest to have standing to seek a writ of review (*22 Cal. App. 3d 1056, 1069)* . The court then turned to the question of the scope of review of the board's action. It stated that either a writ of review or mandate is an appropriate remedy to test the proper exercise of discretion vested in a local board (*22 Cal. App. 3d 1056, 1068)* . A board's decision of what constitutes public interest or convenience is legislative in character, in the absence of fraud or collusion (*22 Cal. App. 3d 1056, 1073-1074)* . After acknowledging that examination of conflicting evidence is not part of the usual scope of review when a writ of review is issued, the court held that the board had exceeded its jurisdiction because there was insufficient evidence and possibly constructive fraud in the board's finding that a portion of the roadway was unnecessary for prospective public use (*22 Cal. App. 3d 1056,*

1075) . Because the record failed to show any public benefit or interest in the abandonment of the portion of the right of way involved and failed to show that it was not necessary for prospective use, the board's resolution should have been declared void (*22 Cal. App. 3d 1056, 1077)* .

[4] Additional Authorities

[a] Writ of Review Will Test Whether Exercise of Discretion by Local Board or Officer Was Proper

DeLucia v. County of Merced (1968) 257 Cal. App. 2d 620, 65 Cal. Rptr. 177 , was an appeal from a superior court order denying writs of mandate or review in order to reverse a holding of a local board of equalization. Although the court ofappeal affirmed this order, it held that a writ of review may be used to examine actions of boards when it is claimed that taxes were illegally collected or that the board's actions were tantamount to fraud. In such a review the chief issues are whether the person affected has been afforded a hearing and, if so, whether there is any evidence to support the board's determination (*257 Cal. App. 2d 620, 623)* .

In *Swars v. Council of the City of Vallejo (1944) 64 Cal. App. 2d 858, 149 P.2d 397* , a superior court denied a petition for writ of review to examine the action of a civil service commission in dismissing a police officer from duty. The petitioner contended that the commission, sitting as an inferior tribunal or board exercising judicial functions, exceeded its jurisdiction in rendering a decision without introduction of evidence, and its purported findings in private were insufficient to support its decision (*64 Cal. App. 2d 858, 863)* . There was no appeal or other remedy available, but the trial court apparently believed that some other remedy existed (*64 Cal. App. 2d 858, 861)* . The court of appeal reversed the denial with directions to issue the writ, holding that the civil service commission lacked jurisdiction to make its decision without taking evidence. Although granting a writ of review is discretionary, it should not be denied if the petition's allegations are sufficient and no grounds for denial appear. Here, the trial judge simply presumed that the actions of the commission were legal, and did not exercise sound discretion (*64 Cal. App. 2d 858, 865)* .

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Volume 20 Chapters 200-209 RECEIVERS---to---SANCTIONS
CHAPTER 205 REVIEW (CERTIORARI), WRIT OF
PART II. FORMS

20-205 California Points & Authorities § 205.23

§ 205.23 Opposing Petition for Writ of Review (Certiorari) [Code Civ. Proc. §§ 1068, 1107; Cal. Rules of Ct., Rule 8.487]--General Form

[1] FORM

[IN THE] COURT OF APPEAL OF CALIFORNIA
_____ APPELLATE DISTRICT
[DIVISION _____]
[*or other as appropriate depending on which court petition is filed in*]

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Respondent,	)	IES IN OPPOSITION TO WRIT OF REVIEW
_____ [*name*],	)	(CERTIORARI)
Real Party in Interest.	)	[*Code Civ. Proc. §§ 1068, 1107*; (*Cal. Rules of Ct., Rule 8.487*)]
	)	
	)	

_____

THE WRIT OF REVIEW SHOULD NOT ISSUE BECAUSE THE _____ [INFERIOR TRIBUNAL *or* BOARD *or* OFFICER] ACTED WITHIN HIS/HER/ITS JURISDICTION WHILE EXERCISING JUDICIAL FUNCTIONS [AND PETITIONER IS NOT BENEFICIALLY INTERESTED IN THE UNDERLYING ACTION].

A. Requirements for Issuance of Writ of Review. A writ of review will only be issued if an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of that tribunal, board, or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy (*Code Civ. Proc. § 1068*; *Simmons v. Superior Court (1959) 52 Cal. 2d 373, 375, 341 P.2d 13* ; *Brown Co. v. Appellate Dept. (1983) 148 Cal. App. 3d 891, 903-905, 196 Cal. Rptr. 258*).

[*Optional*] **B. Only Beneficially Interested Party May Petition.** A writ of review may only be issued if the petitioner is beneficially interested in the underlying action (*Code Civ. Proc. § 1069*; *Marlow v. Superior Court (1941) 17 Cal. 2d 393, 395, 110 P.2d 11* ; *Katenkamp v. Dept. of Finance (1935) 9 Cal. App. 2d 343, 344, 49 P.2d 897*).

C. Writ Denied if Action Within Jurisdiction. A writ of review will not issue to review errors made by the inferior tribunal, board, or officer, but only to determine if the inferior tribunal, board, or officer exceeded his/her/its jurisdiction while exercising judicial functions (*McClearen v. Superior Court (1955) 45 Cal.2d 852, 857-858, 291 P.2d 449* ; *Quezada v. Superior Court (1959) 171 Cal. App. 2d 528, 529, 340 P.2d 1018*).

[*Optional*] **D. Writ Denied if Seeks to Examine Discretionary Matters Within Jurisdiction.** A writ of review will not issue to examine matters of discretion within the jurisdiction of an inferior tribunal, board, or officer (*Estate of Kay (1947) 30 Cal. 2d 215, 218, 225-226, 181 P.2d 1* ; *Turner v. Civil Service Commission (1953) 119 Cal. App. 2d 640, 643-644, 259 P.2d 698*).

[*When appropriate, the foregoing form should be combined with partial forms governing specific fact situations (see, e.g., §§ 205.24 -205.26.*)]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be used to oppose issuance of a writ of review on the ground that the inferior tribunal, board, or officer did not exceed the jurisdiction of that entity [*see Code Civ. Proc. § 1068*]. Optional paragraph B should be used if there is a possibility that petitioner is not a beneficially interested party [*see Code Civ. Proc. § 1069*]. Optional paragraph D should be used if there was an exercise of judicial or quasi-judicial functions, but the action taken was within the discretion of the tribunal, board, or officer.

No statement in opposition to the petition is required unless requested by the court, but within ten days after the petition is filed, the respondent or real party in interest, or both, separately or jointly, may serve and file points and authorities in opposition and a statement of any fact considered material not included in the petition [*Code Civ. Proc. § 1107*; *Cal. Rules of Ct., Rule 8.487(a)*] The court may, in its discretion, allow the filing of the petition without prior service and may deny the petition or issue an alternative writ without first requesting the filing of opposition points and authorities, but the grant of an ex parte application requires a showing of good cause [*Code Civ. Proc. §§ 1069, 1107*; *Cal. Rules of Ct., Rule 8.487(a)(4)*].

The sample caption in this form is for use when the petition is directed to a court of appeal. The caption must be modified when the petition is directed to the Supreme Court or a superior court. For forms of alternative captions, see Ch. 108, *Captions and Introductions* in California Forms of Pleading and Practice (Matthew Bender).

The petition for a writ of review is frequently combined with requests for other writs in the alternative, such as prohibition, habeas corpus, and mandate [*Lankton v. Superior Court (1936) 5 Cal. 2d 694, 697, 55 P.2d 1170* (prohibition); *In re Smith (1976) 65 Cal. App. 3d 291, 296, 135 Cal. Rptr. 5* (habeas corpus); *Oksner v. Superior Court (1964) 229 Cal. App. 2d 672, 691, 40 Cal. Rptr. 621* (mandate)] Therefore, the points and authorities set forth in this form should be combined with those appropriate to oppose any alternative relief sought.

If the action complained of was taken by a board or officer, this form should be combined with § 205.24 to establish the judicial or quasi-judicial nature of the action. If the main issue is not the exercise of jurisdiction but whether a remedy of appeal existed or was exercised by petitioner, this form should be combined with § 205.25. If it appears that the underlying basis for the petition is moot, or that the petition should be barred by the assertion of equitable principles such as laches, § 205.26 should be combined with this form.

This form may also be used when appropriate with points and authorities supporting a response to the petition by answer [*Code Civ. Proc. §§ 1069.1, 1089*; *Cal. Rules of Ct., Rule 8.487*], demurrer [*Code Civ. Proc. §§ 1069.1, 1089*; *Cal. Rules of Ct., Rule 8.487*], or motion to dismiss [*see Pacific Home B.R. v. Daugherty (1925) 75 Cal. App 623, 626, 243 P. 473* (decided before answer was permissible pleading)].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. In particular, facts relating to the legal basis for the judgment or order of the inferior tribunal, board, or officer should be provided to show that jurisdiction was not exceeded by any abuse of discretion.

With appropriate modifications, this form and §§ 205.24-205.26 may be used to oppose the contentions *found in §§ 205.20 -205.22*.

[b] Related Pleading and Practice Forms

For forms of demurrers, motions to dismiss, and orders denying the writ of review see Ch. 492, *Review (Certiorari), Writ of*, in California Forms of Pleading and Practice (Matthew Bender). For a general form of answer or demurrer, see Ch. 26, *Answers* and Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* in that publication.

[c] Related Memoranda

For points and authorities in opposition to requests for writs of mandate,prohibition, and habeas corpus, see Ch. 150, *Mandate and Prohibition* , and Ch. 110, *Habeas Corpus* , respectively.

[3] Discussion of Authorities

[a] Requirements for Issuance of Writ of Review

In ***Simmons v. Superior Court*** *(1959) 52 Cal. 2d 373, 341 P.2d 13* , plaintiff brought a civil action in superior court against a cold storage company and others. After defendant's demurrer to a second amended complaint was sustained with leave to amend, defendant brought a motion to dismiss the complaint on the ground that plaintiff had failed to amend the complaint within the time allowed by the court. The judge granted the motion in chambers by oral direction to his clerk, who then entered the dismissal in the court minutes. No notice of dismissal was given to plaintiff, and he did not learn of it until almost five months after the time for appeal had expired. Plaintiff then petitioned for a writ of review contending that the court exceeded its jurisdiction in the manner of ordering the dismissal and because of a lack of notice to him.

The Supreme Court affirmed the dismissal. Citing *Code Civ. Proc. § 1068*, the Court held that the writ of review is available only if an inferior court has exceeded its jurisdiction and there is no appeal, nor any plain, speedy, and

adequate remedy. Furthermore, the writ will not issue if the petitioner had a right of appeal from the order or judgment and permitted the time for appeal to lapse without perfecting it. If there was an opportunity to appeal and it was lost through the neglect of the aggrieved party, the subsequent absence of a remedy cannot be asserted as the basis for issuing the writ (*52 Cal. 2d 373, 375)* . Plaintiff was not entitled to any notice under prevailing law, and his lack of actual notice was immaterial. It was plaintiff's duty to protect his own record and his failure to do so, absent reasonable justification, did not entitle him to a writ of review (*52 Cal. 2d 373, 376)* . The Court distinguished *Grinbaum v. Superior Court (1923) 192 Cal. 528, 221 P. 635* (discussed in *§ 205.20[3][f]*), finding that extremely unusual circumstances existed there justifying issuance of the writ, which were not present here. While in *Grinbaum* the aggrieved party had no notice of the inception of the proceedings and was in no condition to receive notice, here it was plaintiff's own lack of diligence that caused him to forfeit his appellate remedy (*52 Cal. 2d 373, 377)* . The Court also held that the trial court's jurisdiction was not exceeded by the clerk's entry of the dismissal on instructions from the judge (*52 Cal. 2d 373, 378)* .

Note that *Simmons* was decided prior to the 1965-1993 amendments to *Code Civ. Proc. § 664.5*. The section now provides that a party who submits an order or judgment for entry in most contested actions or special proceedings must send notice of entry of judgment to all parties who have appeared, and that the clerk must mail the notice if a prevailing party is not represented by counsel [*Code Civ. Proc. § 664.5(a), (b)*].

In ***Brown Co. v. Appellate Dept.*** *(1983) 148 Cal. App. 3d 891, 196 Cal. Rptr. 258* , an action to enforce a mechanic's lien, plaintiff obtained judgment in its favor, whereupon the appellate division of the superior court reversed the judgment on the grounds that a preliminary notice concerning the lien required by *Civ. Code § 3097* was prematurely served. The appellate department denied plaintiff's request to certify the case to the court of appeals. Plaintiff then petitioned for a writ of review or, in the alternative, a writ of mandate.

The court of appeal issued a writ of review, but dismissed the proceeding after concluding that the appellate department had not exceeded its jurisdiction, as that term is used in *Code Civ. Proc. § 1068*. While the appellate department had made an erroneous decision as to the merits of the lien notice issue, it did not act without or in excess of its jurisdiction. The trial court had the duty to decide correctly, but its jurisdiction was not in any way defeated or limited by a wrong decision. In writ of review proceedings, the only question is whether the lower court has exceeded its jurisdiction, and if not, no matter how grievously it erred to the prejudice of petitioner, either in matters of fact or law, relief cannot be given (*148 Cal. App. 3d 891, 903-904)* . The court distinguished *Auto Equity Sales Inc. v. Superior Court (1962) 57 Cal. 2d 450, 20 Cal. Rptr. 321, 369 P.2d 937* (discussed in *§ 205.20[3][c]*). In *Auto Equity Sales*, the lower court had deliberately refused to follow a binding decision of a higher court, while here, the appellate department conscientiously attempted to follow the law even though its conclusions were wrong (*148 Cal. App. 3d 891, 904)* .

[b] Only Beneficially Interested Party May Petition

Marlow v. Superior Court *(1941) 17 Cal. 2d 393, 110 P.2d 11* , involved an heirship proceeding. A statement of heirship was filed by children whose grandfather was the uncle of the decedent. Prior to this filing the superior court had made an order of default against all claimants who had not appeared or entered petitions to determine heirship. A motion to strike the statement of heirship was granted, after which the children moved, unsuccessfully, to set aside the default and file their petition. They then petitioned for a writ of review to set aside the default.

The Supreme Court dismissed the proceeding, finding that under the provisions of former Prob. Code § 226 none of the petitioners stood in a relationship to the decedent so as to be beneficially interested in the estate, within the meaning of *Code Civ. Proc. § 1069*, and therefore, a writ of review could not issue (*17 Cal. 2d 393, 395)* .

In ***Katenkamp v. Dept. of Finance*** *(1935) 9 Cal. App. 2d 343, 49 P.2d 897* , a real property owner brought a petition for a writ of review to challenge the granting of a permit by the state to a private corporation. The permit allowed the corporation to maintain two structures on state-owned tidelands, which theproperty owner claimed removed the beach

from his property by creating a breakwater effect, and amounted to a taking of private property for public purposes without due process of law. A demurrer to the petition was sustained by the lower court, and judgment was entered for the respondents. The property owner appealed.

The court of appeal held that the granting of the permit was a ministerial or executive function, not a judicial function, and therefore, it could not be challenged by means of a writ of review (*9 Cal. App. 2d 343, 345)* . While the court declined to rule on the question of whether the property owner was a beneficially interested party within the meaning of *Code Civ. Proc. § 1069*, it recited that this statute has been repeatedly interpreted to mean that a writ of review will not issue in favor of strangers to the record, with exceptions for certain taxpayer actions (*9 Cal. App. 2d 343, 344)* . Therefore the judgment for respondents was affirmed.

[c] Writ Denied if Action Within Jurisdiction

In ***McClearen v. Superior Court*** *(1955) 45 Cal. 2d 852, 291 P.2d 449* , the state had served a notice on an employer to withhold monies owing an employee for delinquent sales taxes. The employee brought a suit for wages in justice court against the employer. The state moved for an order granting a lien on any judgment obtained by the employee pursuant to former Code Civ. Proc. § 688.1, but the motion was denied. The state appealed to the superior court. During the pendency of the appeal the employee obtained judgment against the employer. The superior court remanded the cause for further hearing on the basis that the judge of the justice court had not used discretion in ruling on the motion for a lien. Subsequently the remittitur was recalled, on the ground that the superior court had earlier acted on the mistaken belief that the justice court had not heard any factual issues. A trial de novo was ordered, which resulted in an order granting the state a lien on the employee's judgment. The employee petitioned for a writ of review to annul the action taken by the superior court on the ground that it lacked jurisdiction to entertain any of the proceedings.

The Supreme Court affirmed the orders of the superior court. First, the Court determined that the orders were appealable under former Code Civ. Proc. § 974, which would prevent the employee from obtaining relief through a writ of review (*45 Cal. 2d 852, 855)* . The superior court acted within its jurisdiction in recalling the remittitur, trying the matter de novo, and proceeding without a copy of the pleadings in the main action because each of these actions was sanctioned by statute or case law (*45 Cal. 2d 852, 856-857)* . Finally, the Court stated that it could not make a ruling as to the correctness of the superior court's decision because mere error cannot be examined on a writ of review (*45 Cal. 2d 852, 857-858)* .

In ***Quezada v. Superior Court*** *(1959) 171 Cal. App. 2d 528, 340 P.2d 1018* , a husband was held in contempt of court for failure to make child support payments pursuant to a temporary order for support in a proceeding for dissolution of marriage. At the time of the contempt hearing the parties stipulated that the matter could be heard by a commissioner sitting as a judge pro tempore. The husband was not found in contempt and the wife petitioned for a writ of review, alleging various errors and that the hearing could not take place before a judge pro tempore as it was criminal in nature.

The court of appeal denied the writ of review. Matters of alleged error are not subject to review. Secondly, while the contempt proceeding was criminal in nature it was not, strictly speaking, a criminal action. The court's jurisdiction was not exceeded because the contempt proceeding was ancillary to the dissolution proceeding and was a cause that the court had jurisdiction to decide by appointment of a pro tempore judge by stipulation of the parties, under *Cal. Const., art. VI, § 5* (*171 Cal. App. 2d 528, 529-530)* .

[d] Writ Denied if Seeks to Examine Discretionary Matters Within Jurisdiction

In ***Estate of Kay*** *(1947) 30 Cal. 2d 215, 181 P.2d 1* , a guardian was attempting to confirm the sale of the home of an incompetent person. The guardian was a bank and the incompetent person a physician who remained incompetent less than three months. Prior to being restored to competency, the guardian sold the physician's real property, which he had used as a home and office. The guardian obtained confirmation of the sale by the probate court, on the basis that the sale

was in the best interests of the physician. Because the order confirming the sale was not appealable the physician sought a writ of review to annul the order confirming the sale, on the ground that the probate court had exceeded its jurisdiction in making the finding that the sale was in his best interest and in not granting him a continuance until after his hearing for restoration of competency, which was pending. A writ of review was issued and the matter examined by the Supreme Court.

The Supreme Court affirmed the order confirming the sale. It held that the probate court acted within its discretion as limited by statutory authority. The determination of the sufficiency of evidence as to whether a sale was proper was within the court's discretion, and a writ of review could not be used to annul orders made within the court's jurisdiction that are subject to its discretion (*30 Cal. 2d 215, 218)* . The Court cited the concept of jurisdiction in *Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 109 P.2d 942* (writ of prohibition), and held that even under the broad definition of jurisdiction in that case, the probate court had not exceeded its jurisdiction (*30 Cal. 2d 215, 218-219)* . Furthermore, the granting of a continuance was a matter well within the discretion of the court and it could not be examined on a writ of review (*30 Cal. 2d 215, 225-226)* .

Turner v. Civil Service Commission *(1953) 119 Cal. App. 2d 640, 259 P.2d 698* , involved the dismissal of a deputy coroner from office based on insubordination and other misconduct. The deputy coroner appealed to the civil service commission, and after a hearing the dismissal was sustained. He then petitioned for and obtained a writ of review in the superior court. That court annulled the order of dismissal on the ground that the commission had acted arbitrarily and in excess of its jurisdiction in not admitting evidence of the deputy coroner's efficiency record and good reputation, and that there was insufficient evidence to sustain the dismissal. The civil service commission appealed the annulment, contending that it did not act outside of its jurisdiction or abuse its discretion.

The court of appeal reversed the superior court's annulment. It stated that a writ of review raises jurisdictional questions and cannot be used to review mere error. In reviewing decisions by such commissions the courts are not authorized to exercise their independent judgment on the evidence, and their review is limited to a determination of whether the agency's decision is supported by substantial evidence. Here, there was substantial evidence to sustain the dismissal, and thus there was no apparent abuse of discretion (*119 Cal. App. 2d 640, 643-644)* .

[4] Additional Authorities

[a] Requirements for Issuance of Writ of Review

In *Jillson v. Board of Supervisors (1963) 221 Cal. App. 2d 192, 34 Cal. Rptr. 419* , a taxpayer filed an application with Sacramento County, sitting as a board of equalization, for the reduction of her property tax assessment. The matter was heard and the application denied. She then petitioned for a writ of review or mandate, the respondent demurred to the petition, and the demurrer was sustained. The court of appeals affirmed the judgment of dismissal sustaining the demurrer, holding that the taxpayer had an adequate legal remedy in the form of paying her taxes under protest pursuant to former Rev. & Tax. Code § 5136, by which any deficiency in the hearing could be reviewed. A writ of review will not issue, unless the inferior tribunal has exceeded its jurisdiction and there is no appeal, or other plain, speedy, and adequate remedy (*221 Cal. App. 2d 192, 195)* .

[b] Writ Denied if Sought to Examine Discretionary Matters Within Jurisdiction

In *Nider v. City Commission (1939) 36 Cal. App. 2d 14, 97 P.2d 293* , a city physician was removed from office by a commission for failure to maintain the professional confidence of the city employees and officers through various acts of misconduct. On examination by writ of review, the court of appeal held that in reviewing an order of a city commission it could only review the question of whether the commission had jurisdiction, and not mere errors in the exercise of jurisdiction (*36 Cal. App. 2d 14, 20)* . While the commission permitted evidence that went too far afield to be introduced, there was other sufficient evidence to sustain its findings. The court held that the commission may have

gone to the limit of sound discretion, but did not go beyond it (*36 Cal. App. 2d 14, 23)* . Therefore, as the commission did not exceed its jurisdiction the dismissal of the physician was upheld (*36 Cal. App. 2d 14, 30)* .

In *Nider* one of the bases for finding that a writ of review was a proper remedy to examine the proceedings was the court's conclusion that a writ of mandate was not proper to review judicial action (*36 Cal. App. 2d 14, 28)* . For a discussion of when the remedy of administrative mandamus [*see Code Civ. Proc. § 1094.5*] may now be utilized to secure review of a public agency's actions, [*see Strumsky v. San Diego County Employees Retirement Assn. (1974) 11 Cal. 3d 28, 35, 112 Cal. Rptr. 805, 520 P.2d 29*].

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CHAPTER 205 REVIEW (CERTIORARI), WRIT OF
PART II. FORMS

20-205 California Points & Authorities § 205.24

§ 205.24 Opposing Petition for Writ of Review (Certiorari) [Code Civ. Proc. §§ 1068, 1107; Cal. Rules of Ct., Rule 8.487]--Inferior Tribunal, Board, or Officer Was Not Exercising Judicial Functions

[1] FORM

[*The following should be combined, if appropriate, with a general form of memorandum opposing a petition for a writ of review (see, e.g., § 205.23*)].

THE WRIT OF REVIEW SHOULD NOT ISSUE, BECAUSE THE _____ [INFERIOR TRIBUNAL *or* BOARD *or* OFFICER] WAS NOT EXERCISING JUDICIAL FUNCTIONS.

Writ Denied if No Exercise of Judicial Functions. A writ of review will not issue unless the inferior tribunal, board, or officer exceeded his/her/its jurisdiction while exercising judicial functions (*Monarch Cablevision, Inc. v. City Council (1966) 239 Cal. App. 2d 206, 210, 48 Cal. Rptr. 550* ; *Meyers v. Board of Supervisors (1952) 110 Cal. App. 2d 623, 630-631, 243 P.2d 38* ; *see Code Civ. Proc. § 1068*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be used to oppose a petition for a writ of review on the ground that the inferior tribunal, board, or officer was not exercising judicial functions. The foregoing form should be used in conjunction with the general form opposing a petition for a writ of review [*see § 205.23*].

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. In particular, if the action taken by the tribunal, board, or officer was legislative, rather than judicial,facts showing why the action was legislative should be included [*see, e.g., Quinchard v. Board of Trustees (1896) 113 Cal. 664, 668-669, 45 P. 856* (order for street improvements as legislative function)]. Secondly, if the tribunal, board, or officer acted pursuant to a statute or ordinance, counsel should state how the actions taken comport with the provisions of the statute or ordinance [*see, e.g., Estate of Kay (1947) 30 Cal. 2d 215, 218, 181 P.2d 1* (statute); *Monarch Cablevision, Inc. v. City Council (1966) 239 Cal. App. 2d 206, 211, 48 Cal. Rptr. 550* (ordinance);

see also *Code Civ. Proc. § 1094.5* (review of administrative action by writ of administrative mandamus)].

In an appropriate case, the foregoing points and authorities may be submitted in opposition to a petition for a writ of review supported by the points and authorities *set out in §§ 205.20 -205.22*.

[3] Discussion of Authorities

[a] Writ Denied if No Exercise of Judicial Functions

In ***Monarch Cablevision, Inc. v. City Council*** *(1966) 239 Cal. App. 2d 206, 48 Cal. Rptr. 550* , a city council granted a community antenna television system franchise to a private corporation. A competitor had applied for the franchise as well, and both applications were heard by the council contemporaneously. The competitor claimed that the council exceeded its jurisdiction by erroneously awarding the franchise to the other corporation because the competitor's proposed rates were lower and no required financial statement had been submitted by the other corporation. In addition, it claimed that the award had been based on hearsay evidence about which it had been denied an opportunity to cross-examine. It filed a petition for writs of review and mandate in the superior court to annul the action of the council and to compel the council to grant it the franchise. The corporation awarded the franchise intervened and its motion to dismiss was granted. The competitor then appealed.

The court of appeal affirmed the dismissal. The court found that the actions taken by the city council were legislative in character, based on case decisions concerning the granting of franchises. The character of the act sought to be reviewed is the test for determining whether the writ of review should issue. The writ of review should issue only to determine whether an inferior tribunal, board, or officer exceeded the jurisdiction of that entity in the exercise of judicial functions (*239 Cal. App. 2d 206, 210)* . Furthermore, the council acted pursuant to a city ordinance conferring discretion in awarding franchises and there was no apparent abuse of discretion in making the award (*239 Cal. App. 2d 206, 211)* .

In ***Meyers v. Board of Supervisors*** *(1952) 110 Cal. App. 2d 623, 243 P.2d 38* , a regional planning commission granted an operating permit to a county for a refuse dump near a residential area after notice and a public hearing by the zoning board of the commission. Certain owners of property adjacent to the proposed dumpsite filed protests. The zoning board recommended that the permit be granted, and the commission concurred. Thereafter, the property owners filed a notice of appeal with the board of supervisors, requesting a another hearing and an opportunity to introduce more evidence. The board met, reviewed a transcript of the zoning board proceedings and confirmed the granting of the permit, without notice to the property owners or further public hearing. The property owners petitioned the superior court for a writ of review, contending that the board of supervisors had exceeded its jurisdiction. The petition was denied and they appealed.

The court of appeal affirmed the denial. The court held that the board of supervisors had not exceeded its jurisdiction in affirming the planning commission's decision because it acted within the scope of applicable county ordinances. A writ of review tries only the jurisdiction of an inferior board or tribunal exercising judicial functions (*110 Cal. App. 2d 623, 626)* . Neither the act of reviewing the transcript of the zoning board or the failure to provide the property owners an additional public hearing exceeded the jurisdiction of the board because county ordinances conferred that discretionary authority (*110 Cal. App. 2d 623, 628, 630-631)* .

[4] Additional Authorities

[a] Writ Denied if No Exercise of Judicial Functions

In *Quinchard v. Board of Trustees (1896) 113 Cal. 664, 45 P. 856* , a writ of review was obtained to annul an order of a board of trustees for improvements to a city street. The board of trustees appealed, and the Supreme Court reversed the judgment, thereby dismissing the writ. The Court held that the actions of the board in ordering the street improvements were legislative, not judicial, the character of the act being determinative. A writ of review will only

issue if the action complained of was judicial in nature (*113 Cal. 664, 668-669)* .

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20-205 California Points & Authorities § 205.25

§ 205.25 Opposing Petition for Writ of Review (Certiorari) [Code Civ. Proc. §§ 1068, 1107; Cal. Rules of Ct., Rule 8.487]--Right of Appeal or Other Remedy Exists or Existed

[1] FORM

[*The following should be combined, if appropriate, with a general form of memorandum opposing a petition for a writ of review (see, e.g., § 205.23).*]

A WRIT OF REVIEW SHOULD NOT ISSUE BECAUSE PETITIONER _____ [HAS *or* HAD] AN ADEQUATE REMEDY BY _____ [APPEAL *or state other remedy*].

A. Writ of Review Denied if Appeal or Other Remedy Available. A writ ofreview will not issue if the petitioner has a right of appeal or any other plain, speedy, and adequate remedy (*Code Civ. Proc. § 1068*; *De Lao v. Superior Court (1951) 37 Cal. 2d 711, 712, 234 P.2d 961* ; *Goble v. Municipal Court (1956) 138 Cal. App. 2d 725, 726-727, 292 P.2d 585*).

[*Optional*] **B. Writ of Review Denied if Right to Appeal Lost by Petitioner's Inaction.** A writ of review will not issue if the petitioner had the right to appeal but lost it because of failing to appeal within the time prescribed by law (*Estate of Nersisian (1957) 155 Cal. App. 2d 561, 567, 318 P.2d 168* ; *Faias v. Superior Court (1933) 133 Cal. App 525, 531, 24 P.2d 567*).

[2] Comments

[a] Use of Form

These points and authorities may be used to oppose a petition for a writ of review on the ground that the petitioner has a right of appeal or some other plain, speedy, and adequate remedy, or had that right or remedy and lost it by failing to pursue it within the time period prescribed by law. In the latter case, optional paragraph B should be used. This form should be used in conjunction with the general form opposing a petition for a writ of review [*see § 205.23*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of

law stated. Counsel should indicate what remedies are available to petitioner, and why those remedies are plain, speedy, and adequate. Alternatively, counsel should ascertain whether the action taken by the inferior tribunal, board, or officer is appealable and state any statutory authority for appealability. Note that the availability of appeal has expanded since many of the older cases concerning writs of review were decided. Appeals in civil actions are governed generally by *Code Civ. Proc. §§ 901-914*.

In an appropriate case, these points and authorities may be submitted in opposition to a petition for a writ of review supported by the points and authorities *set out in §§ 205.20 -205.22*.

[b] Related Pleading and Practice Forms

For a general discussion of civil appeals and appealable judgments and orders, see respectively Ch. 40, *Appeal: An Overview* , and Ch. 42, *Appeal: Notice of Appeal* , in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Writ of Review Denied if Appeal or Other Remedy Available

In ***De Lao v. Superior Court*** *(1951) 37 Cal. 2d 711, 234 P.2d 961* , a trial court found for plaintiff in a negligence action. The trial judge signed a judgment reciting that findings of fact and conclusions of law had been waived on the basis of representations of plaintiff's attorney. Defendant moved for a new trial and denied the waiver of findings and conclusions. The court denied his motions, but granted plaintiff's motion to set aside the judgment and for leave to prepare findings and conclusions. Thereafter, a new judgment was signed that contained the findings and conclusions. Defendant then made a second motion for a new trial, which was denied, and proceeded to petition for a writ of review to annul the orders and judgments made by the trial court. He also filed notices of appeal.

The Supreme Court dismissed the proceeding, holding that under *Code Civ. Proc. § 1068*, defendant petitioning for review had to establish not only an excess of jurisdiction by the trial court, but also that there was no appeal or other plain, speedy, and adequate remedy. If the ruling or decision is not appealable, the writ will still not issue if the petitioner has an adequate remedy by appealing from a subsequent order or judgment. Here, the first judgment would have been appealable. While the Court did not determine the merits of the argument against its appealability, it held that because defendant had already commenced an appeal from the second judgment he had an adequate remedy (*37 Cal. 2d 711, 712-713)* .

In ***Goble v. Municipal Court*** *(1956) 138 Cal. App. 2d 725, 292 P.2d 585* , a suit was brought for money due under a contract. The superior court's appellate department reversed the judgment for plaintiff at defendants' instance and ordered the trial court to make and file findings of fact and conclusions of law. The trial court did so and a second judgment for plaintiff was entered, after which defendants moved for a new trial. This motion was denied, and defendants appealed, but the appellate department dismissed the appeal on the ground that it was not timely filed. Defendants then petitioned for a writ of review in the superior court, alleging that the municipal court had failed to properly decide the case in accordance with certain evidence and the trial judge had exceeded his jurisdiction. A writ was initially granted by ex parte order, but plaintiff moved to vacate the writ and dismiss the proceeding on the ground that defendants previously had a right to appeal. The trial court ordered that the writ be vacated and dismissed the proceeding. Defendants appealed the order.

The court of appeal affirmed the order vacating the writ and dismissing the proceeding, holding that a writ of review would not issue if petitioner had a right to appeal, which was lost by petitioner's neglect. The fact that the order had been appealable was determinative. Furthermore, the court held that the trial court had not exceeded its jurisdiction, and to have granted a writ under these circumstances would have had the effect of providing defendants with an alternative or duplicate method of review entirely unauthorized by statute or established law (*138 Cal. App. 2d 725, 726-727)* .

[b] Writ of Review Denied if Right to Appeal Lost by Petitioner's Inaction

Estate of Nersisian *(1957) 155 Cal. App. 2d 561, 318 P.2d 168* , involveddistribution of the estate of a California resident to his nonresident alien relatives. The decedent's will provided that in the event the relatives were not legally entitled to take under it the estate would be distributed to a fraternal organization for charitable purposes. A probate court approved a petition for partial distribution of the bulk of the estate to the fraternal organization because it found that the relatives lived in a country not having a reciprocity agreement for purposes of estate succession. Some of the relatives appealed from that order of distribution, but abandoned the appeals. Thereafter, they moved to vacate the judgment and their motion was denied. They also petitioned for a writ of review, contending that the probate court exceeded its jurisdiction in making the distribution because of a lack of adequate notice of the probate proceedings. The petition was denied and they appealed.

The court of appeal dismissed the appeal. It held that despite the nonappealability of the order denying the motion to vacate the decree of distribution, petitioners had an adequate appellate remedy from the decree of distribution itself, and their abandonment of it could not be grounds for issuance of a writ of review (*155 Cal. App. 2d 561, 567)* . Furthermore, the probate court had not exceeded its jurisdiction because the appearance through counsel cured any defects in the notices (*155 Cal. App. 2d 561, 564-566)* .

Faias v. Superior Court *(1933) 133 Cal. App. 525, 24 P.2d 567* , also involved an estate. The former wife of a decedent filed a claim against his estate for child support due under a divorce decree between the decedent and herself. The estate administrator took no action on the claim and the probate court granted leave to enforce the judgment against the estate, after which the former wife commenced suit on the claim in superior court. Later, the administrator filed a petition to compromise the claim in the probate court. The guardian of an incompetent child of the decedent filed objections to the order requested on the ground that the claim was barred by the statute of limitations. The probate court approved the claim, and the guardian petitioned for a writ of review contending that the court had no jurisdiction to make the orders concerning the claim. A writ of review was granted.

The court of appeal discharged the writ, holding that the guardian should have moved to vacate the original order granting the claimant the right to proceed against the estate. Furthermore, the order would have been appealable as it was one that affected the judgment by way of enforcing it. Neither the administrator nor the heir moved to vacate the order. The fact that the right to appeal may have been lost by lapse of time would not change the general rule that a writ of review will not issue if the remedy of appeal exists, except in unusual cases, such as a want of notice, which was not alleged here (*133 Cal. App. 525, 530-531)* .

[4] Additional Authorities

[a] Writ of Review Denied if Appeal or Other Remedy Available

In *Arens v. Superior Court (1955) 45 Cal. 2d 623, 290 P.2d 257* , a petition for writ of review was brought to review an order of a probate court denying a motion to vacate an order setting apart a probate homestead. The Supreme Court denied the writ on the grounds that the order setting aside the probate homestead was an appealable order and became final when the time for appeal expired. A writ of review will not issue to review an order, unless there is no appeal. While the order denying the motion to vacate was not appealable, and the petitioner had not received notice of the order setting aside the homestead, the fact that the homestead order was appealable was determinative (*45 Cal. 2d 623, 625-626)* .

The facts and procedural background of *Jillson v. Board of Supervisors (1963) 221 Cal. App. 2d 192, 34 Cal. Rptr. 419* , are discussed in *§ 205.23[4][a]*. In *Jillson*, the court of appeal affirmed the sustaining of a demurrer to a taxpayer's petition for a writ of review concerning denial of a reduction of property taxes. The court held that the taxpayer had an adequate legal remedy in the form of paying her taxes under protest, by which any deficiency in the tax

reduction hearing she attended could be reviewed (*221 Cal. App. 2d 192, 195)* .

[b] Writ of Review Denied if Right to Appeal Lost by Petitioner's Inaction

Simmons v. Superior Court (1959) 52 Cal. 2d 373, 341 P.2d 13 , is discussed in *§ 205.23[3][a]*.

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PART II. FORMS

20-205 California Points & Authorities § 205.26

§ 205.26 Opposing Petition for Writ of Review (Certiorari) [Code Civ. Proc. §§ 1068, 1107; Cal. Rules of Ct., Rule 8.487]--Petitioner's Claim Moot or Barred by Laches

[1] FORM

[*The following should be combined, if appropriate, with a general form of memorandum opposing a petition for a writ of review (see, e.g., § 205.23*)].

A WRIT OF REVIEW SHOULD NOT ISSUE BECAUSE THE CLAIM OF PETITIONER IS _____ [MOOT *and/or* BARRED BY LACHES].

[*EITHER*]

A. Writ of Review Denied if Matter Moot. A writ of review will not issue if the claim of petitioner is moot (*Wilson v. L.A. County Civil Service Com. (1952) 112 Cal. App. 2d 450, 454, 246 P.2d 688* ; *James v. Superior Court (1917) 35 Cal. App 148, 149, 169 P. 398*).

[*AND/OR*]

B. Writ of Review Denied for Laches. A writ of review will not issue if thedelay by petitioner in bringing the petition is so long as to constitute laches (*Scott v. Municipal Court (1974) 40 Cal. App. 3d 995, 997, 115 Cal. Rptr. 620* ; *Bernstein v. Superior Court (1941) 46 Cal. App. 2d 568, 569, 116 P.2d 172*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be used to oppose a petition for a writ of review on the grounds that the action complained of has become moot, or that a delay in bringing the petition amounts to laches. The foregoing form should

be used in conjunction with the general form opposing a petition for a writ of review [*see § 205.23*].

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. In particular, counsel should describe any circumstances that undermine the reasons for petitioning for a writ of review [see, *e.g., James v. Superior Court (1917) 35 Cal. App. 148, 149, 169 P. 398* (propriety of injunction moot when purpose already accomplished)]. Facts indicating that the petition is being brought after the period in which an appeal from a final judgment is permitted should also be included, as well as any lack of explanation by petitioner for not bringing the petition sooner [see, *e.g., Scott v. Municipal Court (1974) 40 Cal. App. 3d 995, 997, 115 Cal. Rptr. 620]* .

In an appropriate case, the foregoing points and authorities may be submitted in opposition to a petition for a writ of review supported by the points and authorities *set out in §§ 205.20 -205.22*.

[3] Discussion of Authorities

[a] Writ of Review Denied if Matter Moot

Wilson v. L.A. County Civil Service Com. *(1952) 112 Cal. App. 2d 450, 246 P.2d 688* , involved a dispute over a list of candidates eligible for the position of county clerk. The list originated after a civil service examination. One of the examinees, who placed last on the list, appealed his positioning to the civil service commission and, when that appeal was denied, petitioned for a writ of review in the superior court. The court issued a writ of mandate after finding that the oral portion of the examination was not competitive, and required the civil service commission to cancel the eligible list and hold a new examination. A new examination was held and a new list of candidates was generated. The examinee again petitioned for a writ of review, but it was denied and the denial was affirmed on appeal. In the interim both the examinee and the civil service commission had appealed from the order issuing the writ of mandate; the examinee's appeal was dismissed after being abandoned. However, the appeal by the civil service commission resulted in the reversal of the original order [*see Wilson v. L.A. County Civil Service Com. (1950) 97 Cal. App. 2d 777, 778, 218 P.2d 547*]. Subsequently, the trial court granted the commission's motion to dismiss the proceeding and discharge the writ of review. The motion was made on the ground that the issues in the action were moot and that the eligible list in question was no longer in existence and had expired. The examinee appealed from the order granting the dismissal.

The court of appeal affirmed the dismissal. It held that at the time the motion to dismiss was made, the eligible list in question was no longer in existence under the provisions of the county charter that governed the duration of the list (*112 Cal. App. 2d 450, 452)* . Therefore, the validity of the list had become a moot question. The fact that the court of appeal had made a ruling (reversing the issuance of the writ of mandate) that examined the validity of the examination did not mean that the question of mootness was decided there for purposes of precedent (*112 Cal. App. 2d 450, 453-454)* . Because the only question presented by the original petition for a writ of review was the validity of the original list, any judicial decision would be ineffectual (*112 Cal. App. 2d 450, 454)* .

In ***James v. Superior Court*** *(1917) 35 Cal. App. 148, 169 P. 398* , a preliminary injunction was issued and later dissolved in a civil action in superior court. The purpose of the injunction was to prevent the sale of certain capital stock of a corporation to enforce the payment of an assessment. Plaintiff in the suit paid the assessment and the corporation issued plaintiff a receipt and recorded the payment on its own books of account. However, plaintiff petitioned for a writ of review to annul the order dissolving the injunction, contending that the court was without jurisdiction to dissolve it.

The court of appeals denied the writ of review. The court found that plaintiff was correct in asserting that the superior court exceeded its jurisdiction in dissolving the injunction. However, the purpose of the injunction was already accomplished because plaintiff had prevented sale of the stock by paying the assessment. Therefore, the court held that it was no longer of any legal consequence whether plaintiff was correct in his contention about the injunction. Payment of the assessment had made the injunction issue virtually an abstract proposition of law on which no rights depended

and no relief could be afforded (*35 Cal. App. 148, 149)* .

[b] Writ of Review Denied for Laches

In ***Scott v. Municipal Court*** *(1974) 40 Cal. App. 3d 995, 115 Cal. Rptr. 620* , a municipal court's judgment of contempt was challenged. The contemner was fined and petitioned the superior court for a writ of review. The superior court denied the petition as not being timely filed, based on a delay of approximately six months. The contemner appealed the denial, contending that although he had delayed in petitioning, his petition should not have been denied unless there had been prejudice to the opposing party.

The court of appeal affirmed the denial. It held that under the rule established in *Reynolds v. Superior Court (1883) 64 Cal. 372, 28 P. 121* , a delay in bringing the petition that exceeds the time for the period of appeal from a final judgment bars the petition for review, unless the delay is satisfactorily explained. The court compared this rule to that in habeas corpus proceedings in which petitioners for that writ must explain delay in seeking it. The court distinguished the holding of *Conti v. Board of Civil Service Commissioners (1969) 1 Cal. 3d 351, 82 Cal. Rptr. 337, 461 P.2d 617* , because its holding that prejudice must be shown in order to establish laches applies only to administrative mandamus proceedings. Here, the court continued, the writ of review is more discretionary, although the discretion must be exercised within reason. The petition for the writ occurred well after the 60-day period for appeals from a final judgment (*40 Cal. App. 3d 995, 997)* . The court did not comment, however, on the fact that there is no appeal remedy from a contempt judgment [*see Code Civ. Proc. §§ 904.1(a)(1)(B), 1222*].

Bernstein v. Superior Court *(1941) 46 Cal. App. 2d 568, 116 P.2d 172* , involved a challenge to the appointment of a wife as the guardian of the estate of her husband. After a period of almost six years the husband petitioned for a writ of review, contending that the appointment was invalid, citing *Grinbaum v. Superior Court (1923) 192 Cal. 528, 221 P. 635* (discussed in *§ 205.20[3][f]*). At the time of the petition for the writ, the parties' daughter had also filed a petition to succeed the wife as guardian on the wife's resignation from that position.

The court of appeal denied the writ, holding that the husband's lengthy delay in seeking the writ amounted to laches, and his conduct had amounted to consent to the guardianship. In contrast to the situation in *Grinbaum*, the husband, although physically disabled, was mentally competent, had had the benefit of his estate during the period of the guardianship, and received timely notice of the proceedings. Furthermore, he would have an opportunity to challenge the continuation of the guardianship by his daughter when her petition was heard (*46 Cal. App. 2d 568, 569)* .

[4] Additional Authorities

[a] Writ of Review Denied if Matter Moot

In *Raahauge v. Superior Court (1949) 91 Cal. App. 2d 941, 205 P.2d 1124* , a petition for a writ of review was filed to examine the action of a superior court in refusing to confirm a trustee's purchase of corporate stock. An appeal had also been filed concerning the same matter, and the stated purpose for petition was to prevent loss of the right to a review of the judgment in the event the court decided that it was not appealable. Because the judgment was determined to be appealable, the court of appeal discharged the writ of review, holding that the review proceeding would be meaningless in light of the appeal remedy (*91 Cal. App. 2d 941, 941)* .

[b] Writ of Review Denied for Laches

In *Reid v. Superior Court (1919) 44 Cal. App. 349, 186 P. 634* , a district attorney was removed from office for willful misconduct. Some nine months later, after his term of elective office had expired, he petitioned for a writ of review. The court of appeal held that the matter was moot in that it could not restore the petitioner to elective office after the term had expired, and that his delay in seeking the writ amounted to laches. It cited with approval cases holding that a petitioner must give a sufficient reason for the delay in order for the court to grant the writ and if there is prejudice

resulting from the delay the writ will not be issued (*44 Cal. App. 349, 355)* .

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CHAPTER 205 REVIEW (CERTIORARI), WRIT OF

20-205 California Points & Authorities 205.syn

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§ 205.02 Governing Law

§ 205.03 How to Use Forms in This Chapter

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§ 205.04 Related Pleading and Practice Chapters

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§§ 205.06-205.19 [Reserved]

§ 205.20 Supporting Petition for Writ of Review (Certiorari) [Code Civ. Proc. § 1068; Cal. Rules of Ct., Rule 8.490(b)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Requirements for Issuance of Writ of Review

[b] Petition by Beneficially Interested Party

[c] Action in Excess of Court's Power Exceeds Jurisdiction

[d] Inferior Tribunal, Board, or Officer Was Exercising Judicial Function

[e] Lack of Appellate Remedy

[f] Appeal Remedy Lost Because Lack of Required Notice

[g] Lack of Other Plain, Speedy, and Adequate Remedy

[4] Additional Authorities

[a] Requirements for Issuance of Writ of Review

[b] Petition by Beneficially Interested Party

[c] Action in Excess of Court's Power Exceeds Jurisdiction

[d] Lack of Appellate Remedy

[e] Lack of Other Plain, Speedy, and Adequate Remedy

§ 205.21 Supporting Petition for Writ of Review (Certiorari) [Code Civ. Proc. § 1068; Cal. Rules of Ct., Rule 8.490(b)]--Judgment or Order of Contempt Not Appealable and in Excess of Jurisdiction [Code Civ. Proc. §§ 904.1(a)(1)(B), 1222]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Adjudication of Contempt Not Appealable

[b] Contempt Order May Be Annulled if Court Exceeded Jurisdiction

[4] Additional Authorities

[a] Adjudication of Contempt Not Appealable

[b] Contempt Order May Be Annulled if Court Exceeded Jurisdiction

§ 205.22 Supporting Petition for Writ of Review (Certiorari) [Code Civ. Proc. § 1068; Cal. Rules of Ct., Rule 8.490(b)]--Abuse of Discretion by Local Board or Officer

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Writ of Review Will Test Whether Exercise of Discretion by Local Board or Officer Was Proper

[4] Additional Authorities

[a] Writ of Review Will Test Whether Exercise of Discretion by Local Board or Officer Was Proper

§ 205.23 Opposing Petition for Writ of Review (Certiorari) [Code Civ. Proc. §§ 1068, 1107; Cal. Rules of Ct., Rule 8.487]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

[3] Discussion of Authorities

[a] Requirements for Issuance of Writ of Review

[b] Only Beneficially Interested Party May Petition

[c] Writ Denied if Action Within Jurisdiction

[d] Writ Denied if Seeks to Examine Discretionary Matters Within Jurisdiction

[4] Additional Authorities

[a] Requirements for Issuance of Writ of Review

[b] Writ Denied if Sought to Examine Discretionary Matters Within Jurisdiction

§ 205.24 Opposing Petition for Writ of Review (Certiorari) [Code Civ. Proc. §§ 1068, 1107; Cal. Rules of Ct., Rule 8.487]--Inferior Tribunal, Board, or Officer Was Not Exercising Judicial Functions

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Writ Denied if No Exercise of Judicial Functions

[4] Additional Authorities

[a] Writ Denied if No Exercise of Judicial Functions

§ 205.25 Opposing Petition for Writ of Review (Certiorari) [Code Civ. Proc. §§ 1068, 1107; Cal. Rules of Ct., Rule 8.487]--Right of Appeal or Other Remedy Exists or Existed

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Writ of Review Denied if Appeal or Other Remedy Available

[b] Writ of Review Denied if Right to Appeal Lost by Petitioner's Inaction

[4] Additional Authorities

[a] Writ of Review Denied if Appeal or Other Remedy Available

[b] Writ of Review Denied if Right to Appeal Lost by Petitioner's Inaction

§ 205.26 Opposing Petition for Writ of Review (Certiorari) [Code Civ. Proc. §§ 1068, 1107; Cal. Rules of Ct., Rule 8.487]--Petitioner's Claim Moot or Barred by Laches

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Writ of Review Denied if Matter Moot

[b] Writ of Review Denied for Laches

[4] Additional Authorities

[a] Writ of Review Denied if Matter Moot

[b] Writ of Review Denied for Laches

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20-205 California Points & Authorities § 205.01

§ 205.01 Scope of Chapter

This chapter contains memoranda that may be submitted as a part of a civil action to support or oppose issuance of a writ of review, also known as a writ of certiorari [*see Code Civ. Proc. § 1067*]. Points and authorities supporting petitions for writs of review are included in §§ 205.20-205.22. Points and authorities opposing issuance of writs of review are included in §§ 205.23-205.26.

The use of the writ of certiorari by the United States Supreme Court to review decisions of California appellate courts is beyond the scope of this chapter. For discussion and forms relating to this writ, see Moore's Federal Practice, Ch. 406, *Certiorari Jurisdiction Over State Courts* (Matthew Bender).

Also beyond the scope of this chapter is the use of the writ of review by the California appellate courts to review adjudicatory decisions of statewide public agencies having constitutionally delegated adjudicatory power, such as the Agricultural Labor Relations Board [*see Lab. Code § 1160.8*; *Cal. Rules of Ct., Rule 8.498*], the Public Employment Relations Board [*see Gov. Code §§ 3520, 3542, 3564*; *Cal. Rules of Ct., Rule 8.498*], the Public Utilities Commission [*Pub. Util. Code §§ 1756-1767*; *Cal. Rules of Ct., Rule 8.496*], and the Workers' Compensation Appeals Board [*Lab. Code §§ 5950-5955*; Cal. Rules of Ct., Rule 8.494].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsAppellate JurisdictionState Court ReviewCivil ProcedureU.S. Supreme Court ReviewGeneral Overview

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20-205 California Points & Authorities § 205.02

§ 205.02 Governing Law

Original jurisdiction to issue writs of review is granted to the California Supreme Court, courts of appeal, and superior courts by *Cal. Const., art. VI, § 10*. The application for and issuance of a writ of review (certiorari) is generally governed by *Code Civ. Proc. §§ 1067-1077, 1107*, and *1108*. Rules of practice and procedure are contained in *Cal. Rules of Ct., Rules 8.485-8.493*.

Although the term "review" is used in the California Rules of Court governing a petition for review to the Supreme Court of a court of appeal decision [*see, e.g., Cal. Rules of Ct., Rules 8.500-8.552*], this usage should not be confused with the term "writ of review" or "writ of certiorari" as used in *Cal. Rules of Ct., Rule 8.490*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionState Court Review

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20-205 California Points & Authorities § 205.03

§ 205.03 How to Use Forms in This Chapter

[1] Page Limits on Memoranda

One of the more significant drafting requirements to keep in mind are page limits: supporting and opposing memoranda filed in discovery motion proceedings may not exceed 15 pages. A reply or closing memorandum may not exceed 10 pages. Exhibits, declarations, attachments, the table of contents, the table of authorities, and the proof of service are excluded from these page limits. Any party must obtain leave of court to file a longer memorandum [*see Cal. Rules of Ct., Rule 3.1113(d), (e)*]. These and other drafting requirements are discussed in further detail in Ch. 1, *Writing Legal Memoranda and Briefs* .

[2] Using the Forms to Build a Draft Memorandum

This chapter contains general forms supporting [*see § 205.20*] and opposing [*see § 205.23*] a petition for a writ of review. When appropriate according to the facts of the case, any of the partial forms supporting [*see §§ 205.21, 205.22*] or opposing [*see §§ 205.24 -205.26*] the issuance of the writ should be combined with the general supporting or opposing form, respectively.

The forms may also be used when appropriate with points and authorities supporting a response to the petition by answer [*Code Civ. Proc. §§ 1069.1, 1089*; *Cal. Rules of Ct., Rule 8.487(a)*], demurrer [*Code Civ. Proc. §§ 1069.1, 1089*; *Cal. Rules of Ct., Rule 8.487(b)*], or motion to dismiss [*see Pacific Home B.R. v. Daugherty (1925) 75 Cal. App 623, 626, 243 P. 473* (decided before answer was permissible pleading)].

A petition for a writ of review is frequently combined with requests for other writs in the alternative, such as prohibition, habeas corpus, and mandate [*Lankton v. Superior Court (1936) 5 Cal. 2d 694, 697, 55 P.2d 1170* (prohibition); *In re Smith (1976) 65 Cal. App. 3d 291, 296, 135 Cal. Rptr. 5* (habeas corpus); *Oksner v. Superior Court (1964) 229 Cal. App. 2d 672, 691, 40 Cal. Rptr. 621* (mandate)] Therefore, the forms in this chapter should be combined with those appropriate for any alternative relief sought. In addition, it should be noted that while this chapter has been prepared in accordance with statutorily authorized uses for the writ of review, alternative remedies should be investigated to determine whether any other is more appropriate in a given instance [*see Code Civ. Proc. § 1094.5* (administrative mandate)].

The captions on the forms in this chapter have been drafted on the premise that the petition has been or will be filed in a court of appeal. The captions may be appropriately modified when the petition is directed to the Supreme Court or a superior court.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeGeneral OverviewCivil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPleading & PracticeMotion PracticeSupporting MemorandaCivil ProceduresAppealsBriefsCivil ProceduresAppealsMotions on Appeal

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§ 205.04 Related Pleading and Practice Chapters

For a discussion of the substantive law governing issuance of the writ of review, the relationship of this writ to other writs (such as mandate and prohibition), and forms of petition and response, see California Forms of Pleading and Practice, Ch. 492, *Review (Certiorari), Writ of* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureAppealsAppellate JurisdictionState Court Review

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§ 205.05 Related Points and Authorities Chapters

For memoranda supporting and opposing issuance of the writs of mandate, prohibition, and habeas corpus, see Ch. 150, *Mandate and Prohibition* and Ch. 110, *Habeas Corpus* , respectively, in this publication. For memoranda supporting and opposing issuance of a writ of mandate for review of a final administrative adjudicatory order or decision pursuant to *Code Civ. Proc. § 1094.5*, see Ch. 195, *Public Administrative Law* .

For a discussion of how to use the forms in this chapter to draft a memorandum or a trial or appellate brief, and for a sample of a complete memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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Volume 20 Chapters 200-209 RECEIVERS---to---SANCTIONS
CHAPTER 205 REVIEW (CERTIORARI), WRIT OF
PART I. INTRODUCTION

20-205 California Points & Authorities §§ 205.06-205.19

[Reserved]

§§ 205.06[Reserved]

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Volume 20 Chapters 200-209 RECEIVERS---to---SANCTIONS
CHAPTER 205 REVIEW (CERTIORARI), WRIT OF
PART II. FORMS

20-205 California Points & Authorities § 205.20

§ 205.20 Supporting Petition for Writ of Review (Certiorari) [Code Civ. Proc. § 1068; Cal. Rules of Ct., Rule 8.490(b)]--General Form

[1] FORM

[IN THE] COURT OF APPEAL OF CALIFORNIA
_____ APPELLATE DISTRICT
[DIVISION _____]
[*or other as appropriate depending on which court petition is filed in*]

_____ [*name*],	)	NO. _____
Petitioner,	)	MEMORANDUM IN SUPPORT OF WRIT OF RE-
vs.	)	VIEW (CERTIORARI)
_____ [*name*],	)	Date: _____
Respondent,	)	Time: _____
_____, [*name*]	)	Location: _____
Real Party in Interest.	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THE WRIT OF REVIEW SHOULD ISSUE BECAUSE THE _____ [INFERIOR TRIBUNAL *or* OFFICER *or* BOARD] EXCEEDED ITS JURISDICTION IN THE EXERCISE OF ITS JUDICIAL FUNCTIONS AND THERE IS NO APPEAL, NOR ANY PLAIN, SPEEDY, AND ADEQUATE REMEDY.

A. Requirements for Issuance of Writ of Review. A writ of review may be granted by court when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of that tribunal, board, or officer, and there is no appeal nor, in the judgment of the court, any plain, speedy, and adequate remedy (*Code Civ. Proc. § 1068*; *People v. Cimarusti (1978) 81 Cal. App. 3d 314, 319, 146 Cal. Rptr. 421* ; *Buchwald v. Superior Court (1967)*

254 Cal. App. 2d 347, 353, 62 Cal. Rptr. 364).

B. Petition by Beneficially Interested Party. The application for the writ must be made on the verified petition of the party beneficially interested (*Code Civ. Proc. § 1069*; *see Taylor v. Superior Court (1942) 20 Cal. 2d 244, 247, 125P.2d 1* ; *see also Fuller v. San Bernardino Valley Mun. Wat. Dist. (1966) 242 Cal. App. 2d 52, 56-57, 51 Cal. Rptr. 120*).

C. Notice to Adverse Party. The court may require a notice of the application for a writ of review to be given to the adverse party, or may grant an order to show cause why it should not be allowed, or may grant the writ without notice (*Code Civ. Proc. § 1069*).

[*Optional*] **D. Action in Excess of Court's Power Exceeds Jurisdiction.** A court exceeds its jurisdiction if it acts in excess of its power, as defined by constitutional provision, statute, or rules developed by the courts and followed under the doctrine of stare decisis (*Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal. 2d 450, 454-455, 20 Cal. Rptr. 321, 369 P.2d 937* ; *see Dvorin v. Appellate Dept. (1975) 15 Cal. 3d 648, 650, 125 Cal. Rptr. 771, 542 P.2d 1363*).

E. Inferior Tribunal, Board, or Officer Was Exercising Judicial Function. The action taken by the tribunal, board or officer must have been in the exercise of judicial functions (*Code Civ. Proc. § 1068*; *Garvin v. Chambers (1924) 195 Cal. 212, 220, 232 P. 696* , *O'Brien v. Olson (1941) 42 Cal. App. 2d 449, 453, 109 P.2d 8*).

F. Lack of Appellate Remedy. A lack of appellate remedy means that there is no right of appeal from the action taken by the inferior tribunal, board, or officer (*see Mitchell v. Superior Court (1972) 28 Cal. App. 3d 759, 764-765, 104 Cal. Rptr. 921* ; *Brady v. Superior Court (1962) 200 Cal. App. 2d 69, 72, 19 Cal. Rptr. 242*).

[*Optional*] **G. Appeal Remedy Lost Because Lack of Required Notice.** If the right of appeal is lost because petitioner, who was without fault, did not receive notice of the proceedings and entry of an adverse judgment, or order, and notice was required to be given, petitioner may have the proceedings reviewed by a writ of review (*Grinbaum v. Superior Court (1923) 192 Cal. 528, 554-556, 221 P. 635*).

H. Lack of Other Plain, Speedy, and Adequate Remedy. For a legal remedy to be adequate it must afford relief on the very matter that is the subject of the petition and must be equally as convenient and effective as the extraordinary remedy demanded (*Estate of Bodger (1954) 128 Cal. App. 2d 710, 715, 276 P.2d 83*).

[*When appropriate, this form should be combined with partial forms governing specific fact situations (see, e.g., §§ 205.21, 205.22)*].

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

[2] Comments

[a] Use of Form

This form may be submitted in support of a petition for issuance of a writ of review (or certiorari) [*Code Civ. Proc. §*

1068; *see Code Civ. Proc. § 1067* (writ of certiorari may be denominated writ of review)].

The sample caption in this form is for use when the petition is directed to a court of appeal. The caption may be modified when the petition is directed to the Supreme Court or a superior court. For forms of alternative captions, see Ch. 108, *Captions and Introductions* in California Forms of Pleading and Practice (Matthew Bender).

Memoranda in support of a petition for issuance of a writ of review are required to be filed if the petition is made to a court of appeal or the Supreme Court [*Cal. Rules of Ct., Rule 8.486(a)*]. While neither the Code of Civil Procedure nor the California Rules of Court expressly requires the filing of points and authorities in support of a petition for the writ in superior court, construction of several rules together dictates that a memorandum should be filed. *Cal. Rules of Ct., Rule 3.1100* provides that the law and motion rules set forth in *Cal. Rules of Ct., Rules 3.1100 et seq.* apply to civil law and motion proceedings in superior court. *Cal. Rules of Ct., Rule 3.1103(a)(2)* defines law and motion as including any proceedings on application for a writ of review. An application for an order is a motion [*Code Civ. Proc. § 1003*]. *Cal. Rules of Ct. Rule 3.1113(a)* provides that a party filing a notice of motion must serve and file with it a memorandum to be relied on [*see Cal. Rules of Ct., Rule 3.1103(b)*]. Moreover, a petition for issuance of a writ of review is not listed in *Cal. Rules of Ct., Rule 3.1114* as a petition that does not require a memorandum [*see Cal. Rules of Ct., Rule 3.1114*]. The required format and contents of the memorandum are set forth in *Cal. Rules of Ct., Rule 3.1113*.

A petition for a writ of review is frequently combined with requests for other writs in the alternative, such as prohibition, habeas corpus, and mandate [*Lankton v. Superior Court (1936) 5 Cal. 2d 694, 697, 55 P.2d 1170* (prohibition); *In re Smith (1976) 65 Cal. App. 3d 291, 296, 135 Cal. Rptr. 5* (habeas corpus); *Oksner v. Superior Court (1964) 229 Cal. App. 2d 672, 691, 40 Cal. Rptr. 621* (mandate)]. Therefore, the points and authorities set forth in this form should be combined with those appropriate for any alternative relief sought.

If an inferior court's action is the subject of the petition, optional paragraph D should be used. If petitioner had a right of appeal but lost that right because of the failure to receive notice of the proceedings and of an adverse judgment or order,and notice was required to be given by the opposing party, optional paragraph G should be used.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Generally, counsel must present facts showing that an inferior tribunal, board, or officer that exercises judicial functions exceeded its jurisdiction, and that no appeal or any plain, speedy, or adequate remedy is available [*see Code Civ. Proc. § 1068*]. A threshold matter is whether the action complained of was judicial in nature; facts showing judicial action should be established. If an inferior board or officer is involved, there may be a dispute over the judicial character of the action taken [*see Garvin v. Chambers (1924) 195 Cal. 212, 216, 232 P. 696*]. If the petition seeks review of judicial action by a local board, this form should be combined with the points and *authorities in § 205.22* [*but see Code Civ. Proc. § 1094.5* (administrative mandate to review certain administrative action)].

Counsel should present authority demonstrating why the action complained of is not appealable. Appeal of civil actions is generally governed by *Code Civ. Proc. §§ 901-914*. While the appealability of judgments and orders has generally expanded since many of the older decisions concerning writs of review were rendered [*see § 205.25[2][a]*], certain adjudications remain nonappealable [*see, e.g., Code Civ. Proc. §§ 116.710, 116.780* (superior court judgments after appeal from small claims court), 904.1(a)(1)(B), 1222 (contempt)]. If a contempt action is involved counsel should combine the allegations *found in § 205.21* with those in the foregoing form.

Counsel must also factually establish the manner in which jurisdiction was exceeded. In addition to addressing subject matter and personal jurisdiction, counsel should determine if the inferior body followed any constitutional provision, statute, or rule of decisional law requiring that it exercise its power over the parties in a particular manner [*see Yoakum v. Small Claims Court (1975) 53 Cal. App. 3d 398, 401-402, 125 Cal. Rptr. 882*].

[c] Related Pleading and Practice Forms

For forms of petition for writ of review, notices of application for the writ, orders to show cause, motions and orders for further return of the writ, forms for the writ itself, and judgment on review, see Ch. 492, *Review (Certiorari), Writ of,* in California Forms of Pleading and Practice (Matthew Bender).

[d] Related Memoranda

For forms in support of petitions for writs of mandate, prohibition and habeas corpus, see Ch. 150, *Mandate and Prohibition* and Ch. 110, *Habeas Corpus* .

[e] Opposing Memoranda

In an appropriate case, the points and authorities *set out in §§ 205.23 -205.26* may be used to oppose the petition for writ of review supported by this points and authorities.

[3] Discussion of Authorities

[a] Requirements for Issuance of Writ of Review

In ***People v. Cimarusti*** *(1978) 81 Cal. App. 3d 314, 146 Cal. Rptr. 421* , defendants were charged with civil violations of several consumer protection statutes. The trial judge ordered a reduction in a stipulated judgment between plaintiff and two defendants and subsequently refused to sign the unaltered judgment in his chambers on the ground that it imposed an excessive monetary penalty against the stipulating defendants. Plaintiff refused to prepare a new judgment and moved to have the matter set for trial as to those defendants. The motion was denied with prejudice, and no judgment was ever signed by the trial court, nor was any other stipulation ever reached. Plaintiff appealed.

The court of appeal treated the appeal as a request for a writ of review and found that neither order was appealable. It further found that the trial judge exceeded his jurisdiction by establishing a penalty without benefit of a trial or a stipulation (*81 Cal. App. 3d 314, 322)* . Therefore, since the trial court had exceeded its jurisdiction and there was no appeal or any plain, speedy and adequate remedy, the court of appeal held that a writ of review was the proper remedy under *Code Civ. Proc. § 1068* (*81 Cal. App. 3d 314, 319)* .

Buchwald v. Superior Court *(1967) 254 Cal. App. 2d 347, 62 Cal. Rptr. 364* , involved a contract dispute between members of the musical group "Jefferson Airplane" and their common business representative. Each member's contract required arbitration of any dispute between the parties. A dispute arose between the members and the representative, and the representative commenced proceedings to compel arbitration. Plaintiff group members filed a petition with the California Labor Commissioner, claiming the representative violated the Artists' Managers Act (*see Lab. Code §§ 1700-1700.46*), the terms of the contract, and other statutory provisions. Plaintiffs also filed a superior court action seeking an injunction against arbitration. Defendant filed an answer objecting to the jurisdiction of the Labor Commissioner, and moved in superior court to compel arbitration. The trial court granted defendant's motion. Plaintiffs petitioned for a writ of review or, alternatively, for writs of mandate, or prohibition.

The court of appeal issued the writ of review, annulling the trial court's orders. It held that the superior court's order exceeded its jurisdiction because the contractual dispute was pending before the Labor Commissioner, which hadoriginal jurisdiction of the dispute by statute. Furthermore, there was no right of appeal or other plain, speedy, or adequate remedy (*254 Cal. App. 2d 347, 353)* .

[b] Petition by Beneficially Interested Party

In ***Taylor v. Superior Court*** *(1942) 20 Cal. 2d 244, 125 P.2d 1* , a superior court had issued a preliminary injunction in

an action to establish a partnership. Plaintiff had posted security for the injunction pursuant to a minute order. Thereafter, orders to show cause against defendant charging contempt for alleged violations of the injunction were issued based on affidavits of an auditor employed by plaintiff. The orders to show cause were dismissed because the trial judge erroneously ruled that plaintiff had failed to post bond for the injunction. Plaintiff then petitioned for a writ of review. In opposition to the petition defendant contended that plaintiff was not a beneficially interested party within the meaning of *Code Civ. Proc. § 1069* because affidavits in support of the orders to show cause were made by plaintiff's auditor.

The Supreme Court annulled the order discharging the persons alleged to be in contempt of court. After determining that the trial court had exceeded its jurisdiction and that plaintiff had no appellate remedy, the Court held that plaintiff was a beneficially interested party for purposes of petitioning for a writ of review, within the meaning of *Code Civ. Proc. § 1069*, because he was the person for whose protection the injunction was obtained, and was not a "stranger to the action" (*20 Cal. 2d 244, 247)* .

In ***Fuller v. San Bernardino Valley Mun. Wat. Dist.*** *(1966) 242 Cal. App. 2d 52, 51 Cal. Rptr. 120* , a peremptory writ of mandate was issued ordering a water district to terminate proceedings for the annexation of certain lands. In its appeal from the issuance of the writ, the water district alleged, among other things, that the parties who obtained the writ were not beneficially interested in the action.

The court of appeal construed the term "beneficially interested" in both *Code Civ. Proc. § 1069* (writ of review) and *Code Civ. Proc. § 1086* (writ of mandate) to mean an interest in which a person has some particular right to be preserved or protected independent of that which he or she holds in common with the public at large. Here, the court found that plaintiffs were beneficially interested because they were property owners in the area to be annexed, and were moving forces in fixing its boundaries, securing boundary commission approval, and circulating and filing a petition for formation of a new district (*242 Cal. App. 2d 52, 58)* .

It should be noted that in ***Green v. Obledo*** *(1981) 29 Cal. 3d 126, 172 Cal. Rptr. 206, 624 P.2d 256* the Supreme Court stated that while ordinarily a writ of mandate will be issued only to persons who are beneficially interested, an exception exists in mandamus cases in which the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty. In those circumstances, the petitioner need not show any legal or special interest in the result. It is sufficient that he or she is interested as a citizen in having the laws executed and the duty in question enforced (.

[c] Action in Excess of Court's Power Exceeds Jurisdiction

Dvorin v. Appellate Dept. *(1975) 15 Cal. 3d 648, 125 Cal. Rptr. 771, 542 P.2d 1363* , involved a complaint to recover unearned interest on a promissory note. Defendant was granted summary judgment by the trial court and plaintiff appealed to the appellate department of the superior court, which reversed and directed the municipal court to enter judgment for plaintiff. Defendant appealed, but the court of appeal denied transfer for further appellate review. Defendant then petitioned for a writ of review.

The Supreme Court granted the writ. It held that the action of the appellate department in entering judgment for plaintiff was in excess of its jurisdiction because plaintiff had never moved for summary judgment. No appellate or other remedy was available, since denial of the transfer by the appellate court was its prerogative and would ordinarily terminate appellate review. Thus, the Court annulled the judgment. In applying the standard set forth in *Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal. 2d 450, 20 Cal. Rptr. 321, 369 P.2d 937* (discussed infra), the Court held that while a writ of review is not available to review the error of a lower court, it is available if the lower court exceeded its jurisdiction (*15 Cal. 3d 648, 650)* .

In ***Auto Equity Sales, Inc. v. Superior Court*** *(1962) 57 Cal. 2d 450, 20 Cal. Rptr. 321, 369 P.2d 937* , the appellate

department of a superior court had vacated a municipal court order granting a new trial to defendants in a civil suit. The superior court did so by overruling the only appellate decision that pertained to the facts and on which the municipal court had relied in granting the new trial. The superior court recognized the appellate decision, but refused to follow it on the ground that it had been incorrectly decided. Defendants then petitioned for a writ of review.

The Supreme Court held that the superior court had exceeded its jurisdiction. The Court explained that the writ of review is a jurisdictional writ, meaning that it cannot be used to attack an error of a lower tribunal committed in the exercise of its jurisdiction, but only against acts committed in excess of its jurisdiction (*57 Cal. 2d 450, 454)* . Here, the lower court refused to apply the one appellate decision that controlled the disposition of the case. Citing *Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 291, 109 P.2d 942* , a writ of prohibition case, the Court held that the failure of the lower court to adhere to the principal of stare decisis amounted to a jurisdictional error. Asthere was no appeal or other remedy available, it was proper to consider the matter by writ of review (*57 Cal. 2d 450, 455)* . However, the Court noted that there was only one controlling case to be applied. If there were conflicting cases from a higher court, it would not necessarily be an excess of jurisdiction for the inferior court to choose between them (*57 Cal. 2d 450, 456)* .

The holding in *Auto Equity Sales* was characterized in ***Yoakum v. Small Claims Court*** *(1975) 53 Cal. App. 3d 398, 125 Cal. Rptr. 882* , as being an attempt to state the concept of excess jurisdiction in broader terms than justified. The *Yoakum* court said that the holding in *Auto Equity Sales* concerning the failure to adhere to stare decisis did not broaden the concept of excess jurisdiction established in earlier cases. Under this concept, a court acts in excess of its jurisdiction if it does not follow the mandate of a constitutional provision, statute, or rule of decisional law of a higher court requiring that it exercise its power over the parties and the cause in a particular manner (*53 Cal. App. 3d 398, 401-402)* . *Yoakum* is discussed further in § 205.20[4][d].

[d] Inferior Tribunal, Board, or Officer Was Exercising Judicial Function

In ***Garvin v. Chambers*** *(1924) 195 Cal. 212, 232 P. 696* , a civil service board had made a finding that a police officer was guilty of insubordination and sustained his dismissal. The officer sought a writ of review. The superior court granted the writ and annulled the board's order. Defendant civil service board appealed.

The Supreme Court affirmed the judgment annulling the order. The Court determined that the actions of the board were clearly quasi-judicial and not ministerial in nature (*195 Cal. 212, 216)* . While the Court focused on whether it could review the evidence considered by the inferior board, it also stated that in the absence of a right to appeal, the writ of review addresses only the jurisdiction of an inferior board or tribunal exercising judicial functions (*195 Cal. 212, 220)* .

In ***O'Brien v. Olson*** *(1941) 42 Cal. App. 2d 449, 109 P.2d 8* , a state governor had dismissed certain prison directors from office. A petition for writ of review was sought to examine the authority for those dismissals.

The court of appeal held that the provision of *Code Civ. Proc. § 1068* that refers to the exercise of judicial functions by an inferior tribunal, board, or officer applied to a state governor. The court determined that the dismissal action was of a judicial character (*42 Cal. App. 2d 449, 453)* . It held that a writ of review properly could be used to determine whether a state governor, sitting in a quasi-judicial capacity, had exceeded his or her jurisdiction in removing the prison directors from office (*42 Cal. App. 2d 449, 455)* . While the court ultimately found that the governor had not exceeded his jurisdiction in removing the prison directors, this did not prevent the writ of review from issuing to permit the court to evaluate his actions (*42 Cal. App. 2d 449, 458)* .

[e] Lack of Appellate Remedy

In ***Mitchell v. Superior Court*** *(1972) 28 Cal. App. 3d 759, 104 Cal. Rptr. 921* , a judgment creditor had successfully

moved to have assets of debtors of the judgment debtor turned over to a court appointed receiver. These debtors claimed an interest adverse to the judgment debtor in the assets, one of which was a car wash. The debtors refused to comply with the receiver's request to allow his agent to participate in the daily operation of the car wash or otherwise turn over its profits to him. All debtors were found in contempt. They sought a writ of review to determine the validity of the trial court's contempt finding.

The court of appeal issued a writ of review, finding that the contempt citation was not appealable. The court annulled the citation, stating that the trial court exceeded its jurisdiction by appointing a receiver as to assets in which the debtors of the judgment debtor claimed an adverse interest. By so doing the trial court had created a void order under applicable statutes, and violation of a void order could not be punished by contempt. The court noted that while an appeal might have been pursued from the original void order, this did not prevent the writ of review from being sought to collaterally attack that order, as there was no appeal from the contempt citation itself (*28 Cal. App. 3d 759, 764-765)* .

In ***Brady v. Superior Court*** *(1962) 200 Cal. App. 2d 69, 19 Cal. Rptr. 242* , another contempt case, a trial court enjoined a real property owner from permitting occupancy of his real property by other than a single family. At the time the order was made some eight different tenants occupied various structures on the land, which was located in a residential area zoned specifically for single family dwellings. The injunction was based on the trial judge's narrow construction of the term "single family" in the local ordinance. The contempt citation was based on a finding that the property owner permitted his son and the son's friend to occupy the premises. The property owner petitioned for a writ of review.

The court of appeal found that a writ of review was the proper means to examine the contempt order, as there was no appellate remedy (*200 Cal. App. 2d 69, 72)* . It appeared that the trial court had exceeded its jurisdiction in authorizing the original injunction and the contempt citation thereafter (*200 Cal. App. 2d 69, 82)* . Citing the concept of jurisdiction as enunciated in *Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 109 P.2d 942* , a writ of prohibition case, the court of appeal reiterated that any acts that exceed the defined power of a court in any instance are in excess of jurisdiction. Here, the court found that the trial judge's construction of the zoning ordinance was clearly removed from the legislative authorization of the ordinance,and exceeded the court's jurisdiction. Therefore, it annulled the contempt citation (*200 Cal. App. 2d 69, 74, 82)* .

[f] Appeal Remedy Lost Because Lack of Required Notice

In ***Grinbaum v. Superior Court*** *(1923) 192 Cal. 528, 221 P. 635* , petitioner, a California resident, had been adjudged insane by a German court and was subsequently institutionalized in Germany, leaving substantial unattended assets in California. A California trust company petitioned for and was granted guardianship of her estate. The order prescribing notice of the proceedings directed that notice be given to certain of her relatives (all in Europe), but neither that order nor the notices themselves were directed to her, and she had no personal knowledge of the proceedings. The trust company managed her estate for several years. She sought annulment of the order appointing the guardian by writ of review on return to California, on the ground that the order was void for lack of notice to her of the proceedings and judgment.

The Supreme Court held that the guardianship proceeding was void because of the lack of personal notice to petitioner. As the lack of notice created a jurisdictional defect, a writ of review was the appropriate remedy to redress petitioner's grievance (*192 Cal. 528, 554-555)* . The respondent trust company argued that she was guilty of laches in waiting to bring the action, that she should have pursued her remedy of appeal, and otherwise had waived her rights to seek a writ of review. The Court held, however, that an insane person could not waive any rights, both by statute (former Civ. Code § 40) and case law (*192 Cal. 528, 551-552)* . Furthermore, while her ability to pursue an appeal had lapsed by the passage of time, she could not be required to pursue an appeal when she had no knowledge of the proceedings or judgment and was institutionalized when they occurred (*192 Cal. 528, 556)* . The Court indicated that the notice required was both statutory (former Code Civ. Proc. § 1793) and based on concepts of due process of law dating from

the Magna Carta (*192 Cal. 528, 541-542)* .

Grinbaum has been cited in several cases, but its application appears restricted to the kind of situation in which notice of a proceeding is entirely inadequate or missing through no fault of the aggrieved party. For example, in *Simmons v. Superior Court (1959) 52 Cal. 2d 373, 377, 341 P.2d 13* (discussed in *§ 205.23[3][a]*), the Supreme Court distinguished *Grinbaum*, finding that extremely unusual circumstances existed in that case to justify issuance of the writ. In *Grinbaum*, the aggrieved party had no notice of the inception of the proceedings and was in no physical or mental condition to receive notice. However, in *Simmons* it was the petitioner's own lack of diligence that caused him to forfeit his appellate remedy (*52 Cal. 2d 373, 377)* . *Grinbaum* was also distinguished in *Bernstein v. Superior Court (1941) 46 Cal. App. 2d 568, 569, 116 P.2d 172* (discussed in *§ 205.26[3][b]*). In contrast to the situation in *Grinbaum*, a husband who was physically disabled but mentally competent was made the ward of his wife. After some six years, he contested the original establishment of the guardianship. However, the court left him to the remedy of challenging the continuation of the guardianship by his daughter (who had filed a separate petition to continue it after her mother's resignation), as he had received the benefit of his estate during the period of the guardianship and received timely notice of the proceedings.

[g] Lack of Other Plain, Speedy, and Adequate Remedy

In ***Estate of Bodger*** *(1954) 128 Cal. App. 2d 710, 276 P.2d 83* , a probate court made an ex parte appointment of an attorney to represent testamentary trust beneficiaries in resisting an appeal by a trustee of a decedent's estate from an order settling the trustee's report and account, and for the trustee's own fees. One of the beneficiaries petitioned the probate court and informed it that she did not wish the services of the appointed attorney, and demanded that the appointment be vacated. While the trustee's appeal was pending, she petitioned for a writ of review, alleging that she had no right of appeal nor other adequate, or speedy remedy at law from the order appointing the attorney.

The court of appeal held that the order appointing the attorney exceeded the jurisdiction of the probate court and was void. There was no law authorizing it to appoint counsel for a competent party to an action if that person had notice of the proceedings and was capable of selecting an attorney. The court also found the order violative of due process of law under *U.S. Const., Amend. XIV*, and *Cal. Const., art. I, § 1*, as well as infringing on petitioner's freedom of contract (*128 Cal. App. 2d 710, 714)* . Turning to the question of petitioner's remedies, the court said that under the provisions of former Prob. Code § 1240 there was no right of appeal available from the order. The suggestion by respondent that she file a repudiation of the appointment in the trustee's appeal was also without merit, because it would not be a part of the appeal and would constitute no part of the issues presented for review. Citing *Dufton v. Daniels (1923) 190 Cal. 577, 582, 213 P. 949* , a mandate proceeding, the court stated that for a legal remedy to be adequate, it must afford relief on the very matter that is the subject of the petition and that is equally as convenient and efficacious as the extraordinary remedy demanded. It was not conceivable that the appointed attorney would withdraw after the appeal without compensation. Petitioner should not have to wait and appeal from the order for his fees. Even if the appointed attorney never sought compensation after pursuing the appeal to a decision, his representation would still remain of record (*128 Cal. App. 2d 710, 715)* .

[4] Additional Authorities

[a] Requirements for Issuance of Writ of Review

In *Thelander v. Superior Court (1962) 58 Cal. 2d 811, 26 Cal. Rptr. 643, 376 P.2d 571* , persons injured in a vehicle collision brought suit against the state for negligence. The state was given additional time to plead over plaintiffs' objection, which plaintiffs claimed violated *Code Civ. Proc. § 1054*. In annulling the order by writ of review the Supreme Court held that the trial court had exceeded its jurisdiction because it extended the time for a responsive pleading by more than 30 days without the adverse party's consent (*58 Cal. 2d 811, 813-814)* . The Court noted that a writ of review was an appropriate remedy to test the power of the issuing court to make the offending order because, if

the order was contrary to statute, the court acted beyond its jurisdiction (*58 Cal. 2d 811, 814)* .

In *Hollaway v. Scripps Memorial Hospital (1980) 111 Cal. App. 3d 719, 168 Cal. Rptr. 782* , after plaintiff appealed from the modification of a personal injury judgment in her favor, the trial court ordered temporary removal of her guardians ad litem and counsel of record and appointed a new attorney and guardian ad litem to advise the court of any conflicts of interest. The court of appeal annulled the order and elected to examine them on writ of review, citing *People v. Cimarusti (1978) 81 Cal. App. 3d 314, 319, 146 Cal. Rptr. 421* (discussed in *§ 205.20[3][a]*). The court of appeal held that the trial court exceeded its jurisdiction by issuing the orders, reasoning that once the appeal notices had been filed the court was divested of jurisdiction, except for collateral or independent matters not involved in the appeal (*111 Cal. App. 3d 719, 721-722)* .

[b] Petition by Beneficially Interested Party

In *Johnson v. City of San Pablo (1955) 132 Cal. App. 2d 447, 283 P.2d 57* , proceedings for annexation of overlapping territories to the cities of San Pablo and Richmond were in progress when petitions for writs of mandamus and review were instituted against each city. A trial court concluded that the San Pablo proceeding was invalid because of jurisdictionally defective steps. The court of appeal, in addition to affirming the trial court's order that the San Pablo proceeding was void because the proceeding exceeded the jurisdiction prescribed by statute (*132 Cal. App. 2d 447, 448-449)* , held that the city of San Pablo was a party beneficially interested to apply for the writs under *Code Civ. Proc. § 1069*. The city had the legal capacity to be a party defendant and a justiciable interests in the controversy (*132 Cal. App. 2d 447, 458)* .

In *Marculescu v. City Planning Com. (1935) 7 Cal. App. 2d 371, 46 P.2d 308* , a superior court issued a writ of prohibition restraining a city planning commission from hearing a petition by property owners to rezone property adjacent to them from commercial to residential use. The property owners appealed. The appellate court found that they were interested persons for purposes of bringing a petition to rezone the property and reversed the action of the superior court. In so doing the court stated that for the purpose of a writ of review, a person is beneficially interested if the judicial action that is sought to be annulled injuriously affects his or her legal right (*7 Cal. App. 2d 371, 374)* .

[c] Action in Excess of Court's Power Exceeds Jurisdiction

In *Andrews v. Superior Court (1960) 183 Cal. App. 2d 756, 7 Cal. Rptr. 194* , a trial court imposed a monetary penalty under former Code Civ. Proc. § 2034 on an attorney it found to be in contempt of court on the ground that the attorney was responsible for the failure of his clients to appear at a court ordered deposition. Because the contempt finding was not appealable, the attorney sought a writ of review. The court of appeal held that the findings set forth in the order did not amount to a showing of contempt and annulled the order. The court stated that when a statute authorizes a prescribed procedure, and the court acts contrary to the authority thus conferred, it has exceeded its jurisdiction and a writ of review will issue to correct that excess (*183 Cal. App. 2d 756, 759)* .

[d] Lack of Appellate Remedy

People v. Gonter (1981) 125 Cal. App. 3d 333, 178 Cal. Rptr. 66 , was a criminal proceeding in which the prosecution appealed an order granting deferred jail commitments under a special program to several defendants. Although defendants had already pleaded guilty, judgment and sentence had not been imposed and there was no right of appeal from the order. The court of appeal treated the request for appeal as a petition for a writ of review and held that the matter was properly reviewable as such under *Code Civ. Proc. § 1068*, because there was a contention of at least arguable merit that the trial court had exceeded its jurisdiction and that there was no right of appeal or other plain, speedy, and adequate remedy (*125 Cal. App. 3d 333, 338)* . In so treating this appeal, however, the court found that the trial court's jurisdiction had not been exceeded and affirmed the order (*125 Cal. App. 3d 333, 340)* .

[e] Lack of Other Plain, Speedy, and Adequate Remedy

In *Yoakum v. Small Claims Court (1975) 53 Cal. App. 3d 398, 125 Cal. Rptr. 882* , plaintiff in three small claims actions had originally petitioned a superior court for writs of review and mandate after denial of a motion pursuant to *Code Civ. Proc. § 473* to be relieved from adverse judgments. The superior court granted the writ of mandate, directing the small claims court to set aside the judgments and reset them for hearing. In affirming and reversing in part, the court of appeal held that either the writ of review or writ of mandate is proper to reviewan action in which a court lacks or exceeds jurisdiction. In this action, the superior court could properly use both writs to determine whether the small claims court exceeded its jurisdiction. However, a writ of mandate was the appropriate remedy to compel the small claims court to hear certain of the matters on which judgment was rendered (*53 Cal. App. 3d 398, 403)* .

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CHAPTER 205 REVIEW (CERTIORARI), WRIT OF
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20-205 California Points & Authorities § 205.21

§ 205.21 Supporting Petition for Writ of Review (Certiorari) [Code Civ. Proc. § 1068; Cal. Rules of Ct., Rule 8.490(b)]--Judgment or Order of Contempt Not Appealable and in Excess of Jurisdiction [Code Civ. Proc. §§ 904.1(a)(1)(B), 1222]

[1] FORM

[*The following should be combined, if appropriate, with a general form of memorandum supporting a petition for a writ of review (see, e.g., § 205.20).*]

THE WRIT OF REVIEW SHOULD ISSUE TO EXAMINE THE CONTEMPT _____ [JUDGMENT *or* ORDER] BECAUSE A DETERMINATION OF CONTEMPT IS NOT APPEALABLE AND THE ISSUING COURT EXCEEDED ITS JURISDICTION IN ADJUDICATING THE CONTEMPT.

A. Adjudication of Contempt Not Appealable. An adjudication of contempt of court is not appealable (*Code Civ. Proc. §§ 904.1(a)(1)(B), 1222*; *Mitchell v. Superior Court (1972) 28 Cal. App. 3d 759, 764-765, 104 Cal. Rptr. 921*).

B. Contempt Order May Be Annulled if Court Exceeded Jurisdiction. An adjudication of contempt may be annulled by writ of review if the issuing court exceeded its jurisdiction (*Chapman v. Superior Court (1968) 261 Cal. App. 2d 194, 196, 67 Cal. Rptr. 842* ; *Little v. Superior Court (1968) 260 Cal. App. 2d 311, 318, 67 Cal. Rptr. 77*).

[2] Comments

[a] Use of Form

These points and authorities may be used in support of the issuance of a petition for a writ of review if the inferior court has made an adjudication of contempt of court. Because contempt adjudications are not appealable [*see Code Civ. Proc. §§ 904.1(a)(1)(B), 1222*] they are frequently the subject of petitions for writs of review. § 205.21 should be used in conjunction with § 205.20, a general form supporting a petition for a writ of review.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. In particular, facts indicating how the underlying action, if any (such as an injunction), was in excess of the

court's jurisdiction will help demonstrate why a particular contempt action should be annulled [*see, e.g.,* *Fortenbury v. Superior Court (1940) 16 Cal. 2d 405, 408, 410, 106 P.2d 411* (contempt for violation of temporary restraining order prohibiting picketing)].

[b] Opposing Memoranda

See *§§ 205.23 -205.26*, which are in opposition to a petition for a writ of review, may be used to oppose this form when modified to address the specific facts of a contempt adjudication.

[3] Discussion of Authorities

[a] Adjudication of Contempt Not Appealable

The facts and procedural background of ***Mitchell v. Superior Court*** *(1972) 28 Cal. App. 3d 759, 104 Cal. Rptr. 921*), are discussed in *§ 205.20[3][e]*. In *Mitchell*, the court of appeal issued a writ of review, found a contempt citation not appealable, and annulled the citation. The court stated that the trial court exceeded its jurisdiction by appointing a receiver as to assets in which debtors of a judgment debtor claimed an adverse interest (*28 Cal. App. 3d 759, 764-765)* .

[b] Contempt Order May Be Annulled if Court Exceeded Jurisdiction

In ***Chapman v. Superior Court*** *(1968) 261 Cal. App. 2d 194, 67 Cal. Rptr. 842* , a personal injury action, defendant obtained on the day of trial a subpoena duces tecum for medical records of plaintiff, directing her physician to bring the records to the courthouse on a certain date. Plaintiff was subsequently found in contempt of court for willful failure and refusal to comply with the subpoena and was given a suspended sentence. Plaintiff sought a writ of review, contending that the trial court exceeded its jurisdiction in finding her in contempt and imposing a sentence.

The court of appeal agreed with plaintiff, holding that by writ of review the court could examine the record of and evidence taken by the inferior court to determine whether it exceeded its jurisdiction in adjudicating contempt. Here, the contempt citation and judgment were void as to plaintiff because the subpoena was directed to her physician, not to her (*261 Cal. App. 2d 194, 197)* . While plaintiff happened to be a bookkeeper and receptionist in the office of her physician, she was not the custodian of her own medical records. Evidence must be strictly construed in favor of the accused (*261 Cal. App. 2d 194, 196)* , and the trial court's conclusion that plaintiff had disobeyed the subpoena was contrary to the evidence and to the presumption that she was not guilty of willful disobedience. Therefore, the order finding her in contempt and imposing sentence was annulled (*261 Cal. App. 2d 194, 201)* .

Little v. Superior Court *(1968) 260 Cal. App. 2d 311, 67 Cal. Rptr. 77*), was an action for dissolution of marriage. During the proceedings plaintiff noticeddepositions of a psychoanalyst and psychotherapist whom defendant had consulted. After both deponents refused to answer specific questions on the grounds of the physician-patient privilege, plaintiff moved to compel defendant to execute a written consent authorizing the deponents to answer. This motion was granted, and included an order that in the event of defendant's failure or refusal to execute the written authorization within 10 days the county clerk would be appointed to do so on behalf of defendant. Subsequently, defendant's attorney notified plaintiff by letter that defendant had elected not to execute the authorization. Plaintiff's attorney then obtained an ex parte order directing the chief deputy county clerk to execute the authorization on behalf of defendant. The deposition of one of the consultants was then concluded. The remaining one, however, still refused to answer. Plaintiff moved to have defendant held in contempt of court, and the motion was granted. Defendant petitioned for a writ of review.

The court of appeal annulled the contempt order. It held that the contempt judgment was void because the trial court's order concerning the request for written authorization to have the deponents testify did not order defendant to perform any specific act, but merely approved plaintiff's request for an order. Furthermore, the court held that it could, by writ of

review, examine the whole record of the court and the evidence to determine the trial court's jurisdiction (*260 Cal. App. 2d 311, 316-317)* . Strictly construing the evidence in favor of the accused, the court held that there was a lack of evidence of willful disobedience. In addition, the order was ambiguous because defendant believed he was in compliance with it by allowing the county clerk to execute the consent (*260 Cal. App. 2d 311, 318)* .

[4] Additional Authorities

[a] Adjudication of Contempt Not Appealable

The facts and procedural background of *Andrews v. Superior Court (1960) 183 Cal. App. 2d 756, 7 Cal. Rptr. 194* , are discussed in *§ 205.20[4][c]*. In *Andrews*, the court of appeal held that findings set forth in the minute order of a trial court did not amount to a showing of contempt and annulled the order and its penalty. The court reiterated that when a statute authorizes a prescribed procedure, and a court acts contrary to the authority thus conferred, it has exceeded its jurisdiction and a writ of review will issue to correct that excess (*183 Cal. App. 2d 756, 759)* .

[b] Contempt Order May Be Annulled if Court Exceeded Jurisdiction

In *Cunningham v. Superior Court (1986) 177 Cal. App. 3d 336, 222 Cal. Rptr. 854* , the court of appeal held that a trial court's order requiring an attorney to involuntarily represent an indigent paternity defendant without compensation deprived the attorney of equal protection of the law. The attorney had been held in contempt for refusing to represent the defendant in an action for paternity and reimbursement for public assistance paid on behalf of a child. The court of appeal said that a contempt order cannot stand if the underlying order is invalid. Thus, it issued a writ of review compelling the trial court to vacate its appointment order (*177 Cal. App. 3d 336, 352, 356-357)* .

The facts and procedural background of *Brady v. Superior Court (1962) 200 Cal. App. 2d 69, 19 Cal. Rptr. 242* , are discussed in *§ 205.20[3][e]*. In *Brady*, a trial court enjoined a real property owner from permitting occupancy of his real property by other than a single family. A contempt citation was issued based on a finding that the owner permitted his son and the son's friend to occupy the premises. The court of appeal inferred that the trial court had exceeded its jurisdiction in authorizing the original injunction and the contempt citation, and thus annulled the citation (*200 Cal. App. 2d 69, 77)* .

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20-205 California Points & Authorities § 205.22

§ 205.22 Supporting Petition for Writ of Review (Certiorari) [Code Civ. Proc. § 1068; Cal. Rules of Ct., Rule 8.490(b)]--Abuse of Discretion by Local Board or Officer

[1] FORM

[*The following should be combined, if appropriate, with a general form of memorandum supporting a petition for a writ of review (see, e.g., § 205.20).*]

A WRIT OF REVIEW SHOULD BE ISSUED TO REVIEW _____ [*describe judicial action, e.g.,* THE DENIAL OF PETITIONER'S BUSINESS LICENSE] BY _____ [*specify local board or officer, e.g.,* THE PARADISE CITY COUNCIL] BECAUSE _____ [*specify board or officer, e.g.,* THE COUNCIL] ABUSED ITS DISCRETION AND THUS EXCEEDED ITS JURISDICTION IN THE EXERCISE OF THIS JUDICIAL FUNCTION.

Writ of Review Will Test Whether Exercise of Discretion by Local Board or Officer Was Proper. A writ of review is the appropriate remedy to determine if a local board or officer exceeded his/her/its jurisdiction by abusing the discretion vested in him/her/it in the exercise of a judicial function (*see Code Civ. Proc. § 1068*; *Garvin v. Chambers (1924) 195 Cal. 212, 220-221, 232 P. 696* ; *Ratchford v. County of Sonoma (1972) 22 Cal. App. 3d 1056, 1077, 99 Cal. Rptr. 887*).

[2] Comments

[a] Use of Form

These points and authorities are for use to support a petition for a writ of review when it is alleged that a local board or officer has exceeded its jurisdiction byabusing its discretion in the exercise of a judicial function [*see Code Civ. Proc. § 1068*]. This form should be used in conjunction with § 205.20, a general form supporting a petition for a writ of review. Note that a petition for writ of administrative mandate under *Code Civ. Proc. § 1094.5* is usually a more appropriate remedy and should be considered, in addition to or as an alternative to, a petition for a writ of review.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of

law stated. In particular, the judicial or quasi-judicial nature of the action complained of should be specified, as well as why the action constituted an abuse of discretion [*see, e.g.,* *Garvin v. Chambers (1924) 195 Cal. 212, 216, 232 P. 696* (civil service board action quasi-judicial)].

[b] Opposing Memoranda

With appropriate modifications, §§ 205.23-205.26 may be used to oppose the foregoing form, particularly § 205.24, which specifically opposes the contention that a judicial function was being exercised.

[3] Discussion of Authorities

[a] Writ of Review Will Test Whether Exercise of Discretion by Local Board or Officer Was Proper

The facts and procedural background of ***Garvin v. Chambers*** *(1924) 195 Cal. 212, 232 P. 696* , are discussed in *§ 205.20[3][d]*. In *Garvin*, a civil service board had made a finding that a police officer was guilty of insubordination and sustained his dismissal. The officer sought a writ of review. The writ was granted by the superior court, which annulled the board's order. Defendant civil service board appealed. The Supreme Court affirmed the judgment annulling the order (*195 Cal. 212, 226)* . It held that the board action was quasi-judicial and not ministerial in nature. The Court stated that the city charter provision directing the board to fully hear and determine the matter indicated that the board proceedings was in the nature of an original trial, and its determination was in the nature of an original and final judgment (*195 Cal. 212, 216)* . The Court also stated that in the absence of a right to appeal, the writ of review addresses only the jurisdiction of an inferior board or tribunal exercising judicial functions (*195 Cal. 212, 220)* .

In ***Ratchford v. County of Sonoma*** *(1972) 22 Cal. App. 3d 1056, 99 Cal. Rptr. 887* , an owner of property abutting on a subdivision road discovered that a portion of her property encroached on the road, so she petitioned to have the county board of supervisors declare the road abandoned. The portion of the road in question had never been accepted for public dedication by the board. The board adopted a resolution abandoning the portion of the road containing the encroachment and made a finding that the road was not a county road and at best could be described as a purported county road. Another abutting landowner objected to the abandonment primarily on the ground that the land area was needed for future expansion of the road and underground utilities. She filed a petition for a writ of review contending that the board had no jurisdiction to adopt the abandonment resolution and exceeded its discretion in doing so, with the result being to benefit a private individual. The trial court granted the petition but denied any affirmative relief, and she appealed from the denial.

The court of appeal reversed the denial and remanded the case with instructions to order the resolution void. First, the court determined that the board of supervisors had exercised a judicial function in its action, contrary to older cases holding that matters relating to street improvements were usually legislative in character. The court recognized the test employed in *Quinchard v. Board of Trustees (1896) 113 Cal. 664, 45 P. 856* (discussed in *§ 205.24[4][a]*), namely, that the character of the act or determination sought to be reviewed is the important factor in determining whether a judicial action is present. However, it stated that a better test is whether the act or determination relates to the ascertainment of existing rights, and held that insofar as the abandonment of a street or highway affects the property rights of abutting owners there is something of a judicial function present (*22 Cal. App. 3d 1056, 1067)* . The court also found that the abutting owner had sufficient interest to have standing to seek a writ of review (*22 Cal. App. 3d 1056, 1069)* . The court then turned to the question of the scope of review of the board's action. It stated that either a writ of review or mandate is an appropriate remedy to test the proper exercise of discretion vested in a local board (*22 Cal. App. 3d 1056, 1068)* . A board's decision of what constitutes public interest or convenience is legislative in character, in the absence of fraud or collusion (*22 Cal. App. 3d 1056, 1073-1074)* . After acknowledging that examination of conflicting evidence is not part of the usual scope of review when a writ of review is issued, the court held that the board had exceeded its jurisdiction because there was insufficient evidence and possibly constructive fraud in the board's finding that a portion of the roadway was unnecessary for prospective public use (*22 Cal. App. 3d 1056,*

1075) . Because the record failed to show any public benefit or interest in the abandonment of the portion of the right of way involved and failed to show that it was not necessary for prospective use, the board's resolution should have been declared void (*22 Cal. App. 3d 1056, 1077)* .

[4] Additional Authorities

[a] Writ of Review Will Test Whether Exercise of Discretion by Local Board or Officer Was Proper

DeLucia v. County of Merced (1968) 257 Cal. App. 2d 620, 65 Cal. Rptr. 177 , was an appeal from a superior court order denying writs of mandate or review in order to reverse a holding of a local board of equalization. Although the court ofappeal affirmed this order, it held that a writ of review may be used to examine actions of boards when it is claimed that taxes were illegally collected or that the board's actions were tantamount to fraud. In such a review the chief issues are whether the person affected has been afforded a hearing and, if so, whether there is any evidence to support the board's determination (*257 Cal. App. 2d 620, 623)* .

In *Swars v. Council of the City of Vallejo (1944) 64 Cal. App. 2d 858, 149 P.2d 397* , a superior court denied a petition for writ of review to examine the action of a civil service commission in dismissing a police officer from duty. The petitioner contended that the commission, sitting as an inferior tribunal or board exercising judicial functions, exceeded its jurisdiction in rendering a decision without introduction of evidence, and its purported findings in private were insufficient to support its decision (*64 Cal. App. 2d 858, 863)* . There was no appeal or other remedy available, but the trial court apparently believed that some other remedy existed (*64 Cal. App. 2d 858, 861)* . The court of appeal reversed the denial with directions to issue the writ, holding that the civil service commission lacked jurisdiction to make its decision without taking evidence. Although granting a writ of review is discretionary, it should not be denied if the petition's allegations are sufficient and no grounds for denial appear. Here, the trial judge simply presumed that the actions of the commission were legal, and did not exercise sound discretion (*64 Cal. App. 2d 858, 865)* .

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20-205 California Points & Authorities § 205.23

§ 205.23 Opposing Petition for Writ of Review (Certiorari) [Code Civ. Proc. §§ 1068, 1107; Cal. Rules of Ct., Rule 8.487]--General Form

[1] FORM

[IN THE] COURT OF APPEAL OF CALIFORNIA
_____ APPELLATE DISTRICT
[DIVISION _____]
[*or other as appropriate depending on which court petition is filed in*]

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Respondent,	)	IES IN OPPOSITION TO WRIT OF REVIEW
_____ [*name*],	)	(CERTIORARI)
Real Party in Interest.	)	[*Code Civ. Proc. §§ 1068, 1107*; (*Cal. Rules of Ct., Rule 8.487*)]
	)	
	)	

_____

THE WRIT OF REVIEW SHOULD NOT ISSUE BECAUSE THE _____ [INFERIOR TRIBUNAL *or* BOARD *or* OFFICER] ACTED WITHIN HIS/HER/ITS JURISDICTION WHILE EXERCISING JUDICIAL FUNCTIONS [AND PETITIONER IS NOT BENEFICIALLY INTERESTED IN THE UNDERLYING ACTION].

A. Requirements for Issuance of Writ of Review. A writ of review will only be issued if an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of that tribunal, board, or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy (*Code Civ. Proc. § 1068*; *Simmons v. Superior Court (1959) 52 Cal. 2d 373, 375, 341 P.2d 13* ; *Brown Co. v. Appellate Dept. (1983) 148 Cal. App. 3d 891, 903-905, 196 Cal. Rptr. 258*).

[*Optional*] **B. Only Beneficially Interested Party May Petition.** A writ of review may only be issued if the petitioner is beneficially interested in the underlying action (*Code Civ. Proc. § 1069*; *Marlow v. Superior Court (1941) 17 Cal. 2d 393, 395, 110 P.2d 11* ; *Katenkamp v. Dept. of Finance (1935) 9 Cal. App. 2d 343, 344, 49 P.2d 897*).

C. Writ Denied if Action Within Jurisdiction. A writ of review will not issue to review errors made by the inferior tribunal, board, or officer, but only to determine if the inferior tribunal, board, or officer exceeded his/her/its jurisdiction while exercising judicial functions (*McClearen v. Superior Court (1955) 45 Cal.2d 852, 857-858, 291 P.2d 449* ; *Quezada v. Superior Court (1959) 171 Cal. App. 2d 528, 529, 340 P.2d 1018*).

[*Optional*] **D. Writ Denied if Seeks to Examine Discretionary Matters Within Jurisdiction.** A writ of review will not issue to examine matters of discretion within the jurisdiction of an inferior tribunal, board, or officer (*Estate of Kay (1947) 30 Cal. 2d 215, 218, 225-226, 181 P.2d 1* ; *Turner v. Civil Service Commission (1953) 119 Cal. App. 2d 640, 643-644, 259 P.2d 698*).

[*When appropriate, the foregoing form should be combined with partial forms governing specific fact situations (see, e.g., §§ 205.24 -205.26.*)]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Comments

[a] Use of Form

The foregoing memorandum may be used to oppose issuance of a writ of review on the ground that the inferior tribunal, board, or officer did not exceed the jurisdiction of that entity [*see Code Civ. Proc. § 1068*]. Optional paragraph B should be used if there is a possibility that petitioner is not a beneficially interested party [*see Code Civ. Proc. § 1069*]. Optional paragraph D should be used if there was an exercise of judicial or quasi-judicial functions, but the action taken was within the discretion of the tribunal, board, or officer.

No statement in opposition to the petition is required unless requested by the court, but within ten days after the petition is filed, the respondent or real party in interest, or both, separately or jointly, may serve and file points and authorities in opposition and a statement of any fact considered material not included in the petition [*Code Civ. Proc. § 1107*; *Cal. Rules of Ct., Rule 8.487(a)*] The court may, in its discretion, allow the filing of the petition without prior service and may deny the petition or issue an alternative writ without first requesting the filing of opposition points and authorities, but the grant of an ex parte application requires a showing of good cause [*Code Civ. Proc. §§ 1069, 1107*; *Cal. Rules of Ct., Rule 8.487(a)(4)*].

The sample caption in this form is for use when the petition is directed to a court of appeal. The caption must be modified when the petition is directed to the Supreme Court or a superior court. For forms of alternative captions, see Ch. 108, *Captions and Introductions* in California Forms of Pleading and Practice (Matthew Bender).

The petition for a writ of review is frequently combined with requests for other writs in the alternative, such as prohibition, habeas corpus, and mandate [*Lankton v. Superior Court (1936) 5 Cal. 2d 694, 697, 55 P.2d 1170* (prohibition); *In re Smith (1976) 65 Cal. App. 3d 291, 296, 135 Cal. Rptr. 5* (habeas corpus); *Oksner v. Superior Court (1964) 229 Cal. App. 2d 672, 691, 40 Cal. Rptr. 621* (mandate)] Therefore, the points and authorities set forth in this form should be combined with those appropriate to oppose any alternative relief sought.

If the action complained of was taken by a board or officer, this form should be combined with § 205.24 to establish the judicial or quasi-judicial nature of the action. If the main issue is not the exercise of jurisdiction but whether a remedy of appeal existed or was exercised by petitioner, this form should be combined with § 205.25. If it appears that the underlying basis for the petition is moot, or that the petition should be barred by the assertion of equitable principles such as laches, § 205.26 should be combined with this form.

This form may also be used when appropriate with points and authorities supporting a response to the petition by answer [*Code Civ. Proc. §§ 1069.1, 1089*; *Cal. Rules of Ct., Rule 8.487*], demurrer [*Code Civ. Proc. §§ 1069.1, 1089*; *Cal. Rules of Ct., Rule 8.487*], or motion to dismiss [*see Pacific Home B.R. v. Daugherty (1925) 75 Cal. App 623, 626, 243 P. 473* (decided before answer was permissible pleading)].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. In particular, facts relating to the legal basis for the judgment or order of the inferior tribunal, board, or officer should be provided to show that jurisdiction was not exceeded by any abuse of discretion.

With appropriate modifications, this form and §§ 205.24-205.26 may be used to oppose the contentions *found in §§ 205.20 -205.22*.

[b] Related Pleading and Practice Forms

For forms of demurrers, motions to dismiss, and orders denying the writ of review see Ch. 492, *Review (Certiorari), Writ of*, in California Forms of Pleading and Practice (Matthew Bender). For a general form of answer or demurrer, see Ch. 26, *Answers* and Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* in that publication.

[c] Related Memoranda

For points and authorities in opposition to requests for writs of mandate,prohibition, and habeas corpus, see Ch. 150, *Mandate and Prohibition* , and Ch. 110, *Habeas Corpus* , respectively.

[3] Discussion of Authorities

[a] Requirements for Issuance of Writ of Review

In ***Simmons v. Superior Court*** *(1959) 52 Cal. 2d 373, 341 P.2d 13* , plaintiff brought a civil action in superior court against a cold storage company and others. After defendant's demurrer to a second amended complaint was sustained with leave to amend, defendant brought a motion to dismiss the complaint on the ground that plaintiff had failed to amend the complaint within the time allowed by the court. The judge granted the motion in chambers by oral direction to his clerk, who then entered the dismissal in the court minutes. No notice of dismissal was given to plaintiff, and he did not learn of it until almost five months after the time for appeal had expired. Plaintiff then petitioned for a writ of review contending that the court exceeded its jurisdiction in the manner of ordering the dismissal and because of a lack of notice to him.

The Supreme Court affirmed the dismissal. Citing *Code Civ. Proc. § 1068*, the Court held that the writ of review is available only if an inferior court has exceeded its jurisdiction and there is no appeal, nor any plain, speedy, and

adequate remedy. Furthermore, the writ will not issue if the petitioner had a right of appeal from the order or judgment and permitted the time for appeal to lapse without perfecting it. If there was an opportunity to appeal and it was lost through the neglect of the aggrieved party, the subsequent absence of a remedy cannot be asserted as the basis for issuing the writ (*52 Cal. 2d 373, 375)* . Plaintiff was not entitled to any notice under prevailing law, and his lack of actual notice was immaterial. It was plaintiff's duty to protect his own record and his failure to do so, absent reasonable justification, did not entitle him to a writ of review (*52 Cal. 2d 373, 376)* . The Court distinguished *Grinbaum v. Superior Court (1923) 192 Cal. 528, 221 P. 635* (discussed in *§ 205.20[3][f]*), finding that extremely unusual circumstances existed there justifying issuance of the writ, which were not present here. While in *Grinbaum* the aggrieved party had no notice of the inception of the proceedings and was in no condition to receive notice, here it was plaintiff's own lack of diligence that caused him to forfeit his appellate remedy (*52 Cal. 2d 373, 377)* . The Court also held that the trial court's jurisdiction was not exceeded by the clerk's entry of the dismissal on instructions from the judge (*52 Cal. 2d 373, 378)* .

Note that *Simmons* was decided prior to the 1965-1993 amendments to *Code Civ. Proc. § 664.5*. The section now provides that a party who submits an order or judgment for entry in most contested actions or special proceedings must send notice of entry of judgment to all parties who have appeared, and that the clerk must mail the notice if a prevailing party is not represented by counsel [*Code Civ. Proc. § 664.5(a), (b)*].

In ***Brown Co. v. Appellate Dept.*** *(1983) 148 Cal. App. 3d 891, 196 Cal. Rptr. 258* , an action to enforce a mechanic's lien, plaintiff obtained judgment in its favor, whereupon the appellate division of the superior court reversed the judgment on the grounds that a preliminary notice concerning the lien required by *Civ. Code § 3097* was prematurely served. The appellate department denied plaintiff's request to certify the case to the court of appeals. Plaintiff then petitioned for a writ of review or, in the alternative, a writ of mandate.

The court of appeal issued a writ of review, but dismissed the proceeding after concluding that the appellate department had not exceeded its jurisdiction, as that term is used in *Code Civ. Proc. § 1068*. While the appellate department had made an erroneous decision as to the merits of the lien notice issue, it did not act without or in excess of its jurisdiction. The trial court had the duty to decide correctly, but its jurisdiction was not in any way defeated or limited by a wrong decision. In writ of review proceedings, the only question is whether the lower court has exceeded its jurisdiction, and if not, no matter how grievously it erred to the prejudice of petitioner, either in matters of fact or law, relief cannot be given (*148 Cal. App. 3d 891, 903-904)* . The court distinguished *Auto Equity Sales Inc. v. Superior Court (1962) 57 Cal. 2d 450, 20 Cal. Rptr. 321, 369 P.2d 937* (discussed in *§ 205.20[3][c]*). In *Auto Equity Sales*, the lower court had deliberately refused to follow a binding decision of a higher court, while here, the appellate department conscientiously attempted to follow the law even though its conclusions were wrong (*148 Cal. App. 3d 891, 904)* .

[b] Only Beneficially Interested Party May Petition

Marlow v. Superior Court *(1941) 17 Cal. 2d 393, 110 P.2d 11* , involved an heirship proceeding. A statement of heirship was filed by children whose grandfather was the uncle of the decedent. Prior to this filing the superior court had made an order of default against all claimants who had not appeared or entered petitions to determine heirship. A motion to strike the statement of heirship was granted, after which the children moved, unsuccessfully, to set aside the default and file their petition. They then petitioned for a writ of review to set aside the default.

The Supreme Court dismissed the proceeding, finding that under the provisions of former Prob. Code § 226 none of the petitioners stood in a relationship to the decedent so as to be beneficially interested in the estate, within the meaning of *Code Civ. Proc. § 1069*, and therefore, a writ of review could not issue (*17 Cal. 2d 393, 395)* .

In ***Katenkamp v. Dept. of Finance*** *(1935) 9 Cal. App. 2d 343, 49 P.2d 897* , a real property owner brought a petition for a writ of review to challenge the granting of a permit by the state to a private corporation. The permit allowed the corporation to maintain two structures on state-owned tidelands, which theproperty owner claimed removed the beach

from his property by creating a breakwater effect, and amounted to a taking of private property for public purposes without due process of law. A demurrer to the petition was sustained by the lower court, and judgment was entered for the respondents. The property owner appealed.

The court of appeal held that the granting of the permit was a ministerial or executive function, not a judicial function, and therefore, it could not be challenged by means of a writ of review (*9 Cal. App. 2d 343, 345)* . While the court declined to rule on the question of whether the property owner was a beneficially interested party within the meaning of *Code Civ. Proc. § 1069*, it recited that this statute has been repeatedly interpreted to mean that a writ of review will not issue in favor of strangers to the record, with exceptions for certain taxpayer actions (*9 Cal. App. 2d 343, 344)* . Therefore the judgment for respondents was affirmed.

[c] Writ Denied if Action Within Jurisdiction

In ***McClearen v. Superior Court*** *(1955) 45 Cal. 2d 852, 291 P.2d 449* , the state had served a notice on an employer to withhold monies owing an employee for delinquent sales taxes. The employee brought a suit for wages in justice court against the employer. The state moved for an order granting a lien on any judgment obtained by the employee pursuant to former Code Civ. Proc. § 688.1, but the motion was denied. The state appealed to the superior court. During the pendency of the appeal the employee obtained judgment against the employer. The superior court remanded the cause for further hearing on the basis that the judge of the justice court had not used discretion in ruling on the motion for a lien. Subsequently the remittitur was recalled, on the ground that the superior court had earlier acted on the mistaken belief that the justice court had not heard any factual issues. A trial de novo was ordered, which resulted in an order granting the state a lien on the employee's judgment. The employee petitioned for a writ of review to annul the action taken by the superior court on the ground that it lacked jurisdiction to entertain any of the proceedings.

The Supreme Court affirmed the orders of the superior court. First, the Court determined that the orders were appealable under former Code Civ. Proc. § 974, which would prevent the employee from obtaining relief through a writ of review (*45 Cal. 2d 852, 855)* . The superior court acted within its jurisdiction in recalling the remittitur, trying the matter de novo, and proceeding without a copy of the pleadings in the main action because each of these actions was sanctioned by statute or case law (*45 Cal. 2d 852, 856-857)* . Finally, the Court stated that it could not make a ruling as to the correctness of the superior court's decision because mere error cannot be examined on a writ of review (*45 Cal. 2d 852, 857-858)* .

In ***Quezada v. Superior Court*** *(1959) 171 Cal. App. 2d 528, 340 P.2d 1018* , a husband was held in contempt of court for failure to make child support payments pursuant to a temporary order for support in a proceeding for dissolution of marriage. At the time of the contempt hearing the parties stipulated that the matter could be heard by a commissioner sitting as a judge pro tempore. The husband was not found in contempt and the wife petitioned for a writ of review, alleging various errors and that the hearing could not take place before a judge pro tempore as it was criminal in nature.

The court of appeal denied the writ of review. Matters of alleged error are not subject to review. Secondly, while the contempt proceeding was criminal in nature it was not, strictly speaking, a criminal action. The court's jurisdiction was not exceeded because the contempt proceeding was ancillary to the dissolution proceeding and was a cause that the court had jurisdiction to decide by appointment of a pro tempore judge by stipulation of the parties, under *Cal. Const., art. VI, § 5* (*171 Cal. App. 2d 528, 529-530)* .

[d] Writ Denied if Seeks to Examine Discretionary Matters Within Jurisdiction

In ***Estate of Kay*** *(1947) 30 Cal. 2d 215, 181 P.2d 1* , a guardian was attempting to confirm the sale of the home of an incompetent person. The guardian was a bank and the incompetent person a physician who remained incompetent less than three months. Prior to being restored to competency, the guardian sold the physician's real property, which he had used as a home and office. The guardian obtained confirmation of the sale by the probate court, on the basis that the sale

was in the best interests of the physician. Because the order confirming the sale was not appealable the physician sought a writ of review to annul the order confirming the sale, on the ground that the probate court had exceeded its jurisdiction in making the finding that the sale was in his best interest and in not granting him a continuance until after his hearing for restoration of competency, which was pending. A writ of review was issued and the matter examined by the Supreme Court.

The Supreme Court affirmed the order confirming the sale. It held that the probate court acted within its discretion as limited by statutory authority. The determination of the sufficiency of evidence as to whether a sale was proper was within the court's discretion, and a writ of review could not be used to annul orders made within the court's jurisdiction that are subject to its discretion (*30 Cal. 2d 215, 218)* . The Court cited the concept of jurisdiction in *Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 109 P.2d 942* (writ of prohibition), and held that even under the broad definition of jurisdiction in that case, the probate court had not exceeded its jurisdiction (*30 Cal. 2d 215, 218-219)* . Furthermore, the granting of a continuance was a matter well within the discretion of the court and it could not be examined on a writ of review (*30 Cal. 2d 215, 225-226)* .

Turner v. Civil Service Commission *(1953) 119 Cal. App. 2d 640, 259 P.2d 698* , involved the dismissal of a deputy coroner from office based on insubordination and other misconduct. The deputy coroner appealed to the civil service commission, and after a hearing the dismissal was sustained. He then petitioned for and obtained a writ of review in the superior court. That court annulled the order of dismissal on the ground that the commission had acted arbitrarily and in excess of its jurisdiction in not admitting evidence of the deputy coroner's efficiency record and good reputation, and that there was insufficient evidence to sustain the dismissal. The civil service commission appealed the annulment, contending that it did not act outside of its jurisdiction or abuse its discretion.

The court of appeal reversed the superior court's annulment. It stated that a writ of review raises jurisdictional questions and cannot be used to review mere error. In reviewing decisions by such commissions the courts are not authorized to exercise their independent judgment on the evidence, and their review is limited to a determination of whether the agency's decision is supported by substantial evidence. Here, there was substantial evidence to sustain the dismissal, and thus there was no apparent abuse of discretion (*119 Cal. App. 2d 640, 643-644)* .

[4] Additional Authorities

[a] Requirements for Issuance of Writ of Review

In *Jillson v. Board of Supervisors (1963) 221 Cal. App. 2d 192, 34 Cal. Rptr. 419* , a taxpayer filed an application with Sacramento County, sitting as a board of equalization, for the reduction of her property tax assessment. The matter was heard and the application denied. She then petitioned for a writ of review or mandate, the respondent demurred to the petition, and the demurrer was sustained. The court of appeals affirmed the judgment of dismissal sustaining the demurrer, holding that the taxpayer had an adequate legal remedy in the form of paying her taxes under protest pursuant to former Rev. & Tax. Code § 5136, by which any deficiency in the hearing could be reviewed. A writ of review will not issue, unless the inferior tribunal has exceeded its jurisdiction and there is no appeal, or other plain, speedy, and adequate remedy (*221 Cal. App. 2d 192, 195)* .

[b] Writ Denied if Sought to Examine Discretionary Matters Within Jurisdiction

In *Nider v. City Commission (1939) 36 Cal. App. 2d 14, 97 P.2d 293* , a city physician was removed from office by a commission for failure to maintain the professional confidence of the city employees and officers through various acts of misconduct. On examination by writ of review, the court of appeal held that in reviewing an order of a city commission it could only review the question of whether the commission had jurisdiction, and not mere errors in the exercise of jurisdiction (*36 Cal. App. 2d 14, 20)* . While the commission permitted evidence that went too far afield to be introduced, there was other sufficient evidence to sustain its findings. The court held that the commission may have

gone to the limit of sound discretion, but did not go beyond it (*36 Cal. App. 2d 14, 23)* . Therefore, as the commission did not exceed its jurisdiction the dismissal of the physician was upheld (*36 Cal. App. 2d 14, 30)* .

In *Nider* one of the bases for finding that a writ of review was a proper remedy to examine the proceedings was the court's conclusion that a writ of mandate was not proper to review judicial action (*36 Cal. App. 2d 14, 28)* . For a discussion of when the remedy of administrative mandamus [*see Code Civ. Proc. § 1094.5*] may now be utilized to secure review of a public agency's actions, [*see Strumsky v. San Diego County Employees Retirement Assn. (1974) 11 Cal. 3d 28, 35, 112 Cal. Rptr. 805, 520 P.2d 29*].

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20-205 California Points & Authorities § 205.24

§ 205.24 Opposing Petition for Writ of Review (Certiorari) [Code Civ. Proc. §§ 1068, 1107; Cal. Rules of Ct., Rule 8.487]--Inferior Tribunal, Board, or Officer Was Not Exercising Judicial Functions

[1] FORM

[*The following should be combined, if appropriate, with a general form of memorandum opposing a petition for a writ of review (see, e.g., § 205.23*)].

THE WRIT OF REVIEW SHOULD NOT ISSUE, BECAUSE THE _____ [INFERIOR TRIBUNAL *or* BOARD *or* OFFICER] WAS NOT EXERCISING JUDICIAL FUNCTIONS.

Writ Denied if No Exercise of Judicial Functions. A writ of review will not issue unless the inferior tribunal, board, or officer exceeded his/her/its jurisdiction while exercising judicial functions (*Monarch Cablevision, Inc. v. City Council (1966) 239 Cal. App. 2d 206, 210, 48 Cal. Rptr. 550* ; *Meyers v. Board of Supervisors (1952) 110 Cal. App. 2d 623, 630-631, 243 P.2d 38* ; *see Code Civ. Proc. § 1068*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be used to oppose a petition for a writ of review on the ground that the inferior tribunal, board, or officer was not exercising judicial functions. The foregoing form should be used in conjunction with the general form opposing a petition for a writ of review [*see § 205.23*].

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. In particular, if the action taken by the tribunal, board, or officer was legislative, rather than judicial,facts showing why the action was legislative should be included [*see, e.g., Quinchard v. Board of Trustees (1896) 113 Cal. 664, 668-669, 45 P. 856* (order for street improvements as legislative function)]. Secondly, if the tribunal, board, or officer acted pursuant to a statute or ordinance, counsel should state how the actions taken comport with the provisions of the statute or ordinance [*see, e.g., Estate of Kay (1947) 30 Cal. 2d 215, 218, 181 P.2d 1* (statute); *Monarch Cablevision, Inc. v. City Council (1966) 239 Cal. App. 2d 206, 211, 48 Cal. Rptr. 550* (ordinance);

see also *Code Civ. Proc. § 1094.5* (review of administrative action by writ of administrative mandamus)].

In an appropriate case, the foregoing points and authorities may be submitted in opposition to a petition for a writ of review supported by the points and authorities *set out in §§ 205.20 -205.22*.

[3] Discussion of Authorities

[a] Writ Denied if No Exercise of Judicial Functions

In ***Monarch Cablevision, Inc. v. City Council*** *(1966) 239 Cal. App. 2d 206, 48 Cal. Rptr. 550* , a city council granted a community antenna television system franchise to a private corporation. A competitor had applied for the franchise as well, and both applications were heard by the council contemporaneously. The competitor claimed that the council exceeded its jurisdiction by erroneously awarding the franchise to the other corporation because the competitor's proposed rates were lower and no required financial statement had been submitted by the other corporation. In addition, it claimed that the award had been based on hearsay evidence about which it had been denied an opportunity to cross-examine. It filed a petition for writs of review and mandate in the superior court to annul the action of the council and to compel the council to grant it the franchise. The corporation awarded the franchise intervened and its motion to dismiss was granted. The competitor then appealed.

The court of appeal affirmed the dismissal. The court found that the actions taken by the city council were legislative in character, based on case decisions concerning the granting of franchises. The character of the act sought to be reviewed is the test for determining whether the writ of review should issue. The writ of review should issue only to determine whether an inferior tribunal, board, or officer exceeded the jurisdiction of that entity in the exercise of judicial functions (*239 Cal. App. 2d 206, 210)* . Furthermore, the council acted pursuant to a city ordinance conferring discretion in awarding franchises and there was no apparent abuse of discretion in making the award (*239 Cal. App. 2d 206, 211)* .

In ***Meyers v. Board of Supervisors*** *(1952) 110 Cal. App. 2d 623, 243 P.2d 38* , a regional planning commission granted an operating permit to a county for a refuse dump near a residential area after notice and a public hearing by the zoning board of the commission. Certain owners of property adjacent to the proposed dumpsite filed protests. The zoning board recommended that the permit be granted, and the commission concurred. Thereafter, the property owners filed a notice of appeal with the board of supervisors, requesting a another hearing and an opportunity to introduce more evidence. The board met, reviewed a transcript of the zoning board proceedings and confirmed the granting of the permit, without notice to the property owners or further public hearing. The property owners petitioned the superior court for a writ of review, contending that the board of supervisors had exceeded its jurisdiction. The petition was denied and they appealed.

The court of appeal affirmed the denial. The court held that the board of supervisors had not exceeded its jurisdiction in affirming the planning commission's decision because it acted within the scope of applicable county ordinances. A writ of review tries only the jurisdiction of an inferior board or tribunal exercising judicial functions (*110 Cal. App. 2d 623, 626)* . Neither the act of reviewing the transcript of the zoning board or the failure to provide the property owners an additional public hearing exceeded the jurisdiction of the board because county ordinances conferred that discretionary authority (*110 Cal. App. 2d 623, 628, 630-631)* .

[4] Additional Authorities

[a] Writ Denied if No Exercise of Judicial Functions

In *Quinchard v. Board of Trustees (1896) 113 Cal. 664, 45 P. 856* , a writ of review was obtained to annul an order of a board of trustees for improvements to a city street. The board of trustees appealed, and the Supreme Court reversed the judgment, thereby dismissing the writ. The Court held that the actions of the board in ordering the street improvements were legislative, not judicial, the character of the act being determinative. A writ of review will only

issue if the action complained of was judicial in nature (*113 Cal. 664, 668-669)* .

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20-205 California Points & Authorities § 205.25

§ 205.25 Opposing Petition for Writ of Review (Certiorari) [Code Civ. Proc. §§ 1068, 1107; Cal. Rules of Ct., Rule 8.487]--Right of Appeal or Other Remedy Exists or Existed

[1] FORM

[*The following should be combined, if appropriate, with a general form of memorandum opposing a petition for a writ of review (see, e.g., § 205.23).*]

A WRIT OF REVIEW SHOULD NOT ISSUE BECAUSE PETITIONER _____ [HAS *or* HAD] AN ADEQUATE REMEDY BY _____ [APPEAL *or state other remedy*].

A. Writ of Review Denied if Appeal or Other Remedy Available. A writ ofreview will not issue if the petitioner has a right of appeal or any other plain, speedy, and adequate remedy (*Code Civ. Proc. § 1068*; *De Lao v. Superior Court (1951) 37 Cal. 2d 711, 712, 234 P.2d 961* ; *Goble v. Municipal Court (1956) 138 Cal. App. 2d 725, 726-727, 292 P.2d 585*).

[*Optional*] **B. Writ of Review Denied if Right to Appeal Lost by Petitioner's Inaction.** A writ of review will not issue if the petitioner had the right to appeal but lost it because of failing to appeal within the time prescribed by law (*Estate of Nersisian (1957) 155 Cal. App. 2d 561, 567, 318 P.2d 168* ; *Faias v. Superior Court (1933) 133 Cal. App 525, 531, 24 P.2d 567*).

[2] Comments

[a] Use of Form

These points and authorities may be used to oppose a petition for a writ of review on the ground that the petitioner has a right of appeal or some other plain, speedy, and adequate remedy, or had that right or remedy and lost it by failing to pursue it within the time period prescribed by law. In the latter case, optional paragraph B should be used. This form should be used in conjunction with the general form opposing a petition for a writ of review [*see § 205.23*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of

law stated. Counsel should indicate what remedies are available to petitioner, and why those remedies are plain, speedy, and adequate. Alternatively, counsel should ascertain whether the action taken by the inferior tribunal, board, or officer is appealable and state any statutory authority for appealability. Note that the availability of appeal has expanded since many of the older cases concerning writs of review were decided. Appeals in civil actions are governed generally by *Code Civ. Proc. §§ 901-914*.

In an appropriate case, these points and authorities may be submitted in opposition to a petition for a writ of review supported by the points and authorities *set out in §§ 205.20 -205.22*.

[b] Related Pleading and Practice Forms

For a general discussion of civil appeals and appealable judgments and orders, see respectively Ch. 40, *Appeal: An Overview* , and Ch. 42, *Appeal: Notice of Appeal* , in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Writ of Review Denied if Appeal or Other Remedy Available

In ***De Lao v. Superior Court*** *(1951) 37 Cal. 2d 711, 234 P.2d 961* , a trial court found for plaintiff in a negligence action. The trial judge signed a judgment reciting that findings of fact and conclusions of law had been waived on the basis of representations of plaintiff's attorney. Defendant moved for a new trial and denied the waiver of findings and conclusions. The court denied his motions, but granted plaintiff's motion to set aside the judgment and for leave to prepare findings and conclusions. Thereafter, a new judgment was signed that contained the findings and conclusions. Defendant then made a second motion for a new trial, which was denied, and proceeded to petition for a writ of review to annul the orders and judgments made by the trial court. He also filed notices of appeal.

The Supreme Court dismissed the proceeding, holding that under *Code Civ. Proc. § 1068*, defendant petitioning for review had to establish not only an excess of jurisdiction by the trial court, but also that there was no appeal or other plain, speedy, and adequate remedy. If the ruling or decision is not appealable, the writ will still not issue if the petitioner has an adequate remedy by appealing from a subsequent order or judgment. Here, the first judgment would have been appealable. While the Court did not determine the merits of the argument against its appealability, it held that because defendant had already commenced an appeal from the second judgment he had an adequate remedy (*37 Cal. 2d 711, 712-713)* .

In ***Goble v. Municipal Court*** *(1956) 138 Cal. App. 2d 725, 292 P.2d 585* , a suit was brought for money due under a contract. The superior court's appellate department reversed the judgment for plaintiff at defendants' instance and ordered the trial court to make and file findings of fact and conclusions of law. The trial court did so and a second judgment for plaintiff was entered, after which defendants moved for a new trial. This motion was denied, and defendants appealed, but the appellate department dismissed the appeal on the ground that it was not timely filed. Defendants then petitioned for a writ of review in the superior court, alleging that the municipal court had failed to properly decide the case in accordance with certain evidence and the trial judge had exceeded his jurisdiction. A writ was initially granted by ex parte order, but plaintiff moved to vacate the writ and dismiss the proceeding on the ground that defendants previously had a right to appeal. The trial court ordered that the writ be vacated and dismissed the proceeding. Defendants appealed the order.

The court of appeal affirmed the order vacating the writ and dismissing the proceeding, holding that a writ of review would not issue if petitioner had a right to appeal, which was lost by petitioner's neglect. The fact that the order had been appealable was determinative. Furthermore, the court held that the trial court had not exceeded its jurisdiction, and to have granted a writ under these circumstances would have had the effect of providing defendants with an alternative or duplicate method of review entirely unauthorized by statute or established law (*138 Cal. App. 2d 725, 726-727)* .

[b] Writ of Review Denied if Right to Appeal Lost by Petitioner's Inaction

Estate of Nersisian *(1957) 155 Cal. App. 2d 561, 318 P.2d 168* , involveddistribution of the estate of a California resident to his nonresident alien relatives. The decedent's will provided that in the event the relatives were not legally entitled to take under it the estate would be distributed to a fraternal organization for charitable purposes. A probate court approved a petition for partial distribution of the bulk of the estate to the fraternal organization because it found that the relatives lived in a country not having a reciprocity agreement for purposes of estate succession. Some of the relatives appealed from that order of distribution, but abandoned the appeals. Thereafter, they moved to vacate the judgment and their motion was denied. They also petitioned for a writ of review, contending that the probate court exceeded its jurisdiction in making the distribution because of a lack of adequate notice of the probate proceedings. The petition was denied and they appealed.

The court of appeal dismissed the appeal. It held that despite the nonappealability of the order denying the motion to vacate the decree of distribution, petitioners had an adequate appellate remedy from the decree of distribution itself, and their abandonment of it could not be grounds for issuance of a writ of review (*155 Cal. App. 2d 561, 567)* . Furthermore, the probate court had not exceeded its jurisdiction because the appearance through counsel cured any defects in the notices (*155 Cal. App. 2d 561, 564-566)* .

Faias v. Superior Court *(1933) 133 Cal. App. 525, 24 P.2d 567* , also involved an estate. The former wife of a decedent filed a claim against his estate for child support due under a divorce decree between the decedent and herself. The estate administrator took no action on the claim and the probate court granted leave to enforce the judgment against the estate, after which the former wife commenced suit on the claim in superior court. Later, the administrator filed a petition to compromise the claim in the probate court. The guardian of an incompetent child of the decedent filed objections to the order requested on the ground that the claim was barred by the statute of limitations. The probate court approved the claim, and the guardian petitioned for a writ of review contending that the court had no jurisdiction to make the orders concerning the claim. A writ of review was granted.

The court of appeal discharged the writ, holding that the guardian should have moved to vacate the original order granting the claimant the right to proceed against the estate. Furthermore, the order would have been appealable as it was one that affected the judgment by way of enforcing it. Neither the administrator nor the heir moved to vacate the order. The fact that the right to appeal may have been lost by lapse of time would not change the general rule that a writ of review will not issue if the remedy of appeal exists, except in unusual cases, such as a want of notice, which was not alleged here (*133 Cal. App. 525, 530-531)* .

[4] Additional Authorities

[a] Writ of Review Denied if Appeal or Other Remedy Available

In *Arens v. Superior Court (1955) 45 Cal. 2d 623, 290 P.2d 257* , a petition for writ of review was brought to review an order of a probate court denying a motion to vacate an order setting apart a probate homestead. The Supreme Court denied the writ on the grounds that the order setting aside the probate homestead was an appealable order and became final when the time for appeal expired. A writ of review will not issue to review an order, unless there is no appeal. While the order denying the motion to vacate was not appealable, and the petitioner had not received notice of the order setting aside the homestead, the fact that the homestead order was appealable was determinative (*45 Cal. 2d 623, 625-626)* .

The facts and procedural background of *Jillson v. Board of Supervisors (1963) 221 Cal. App. 2d 192, 34 Cal. Rptr. 419* , are discussed in *§ 205.23[4][a]*. In *Jillson*, the court of appeal affirmed the sustaining of a demurrer to a taxpayer's petition for a writ of review concerning denial of a reduction of property taxes. The court held that the taxpayer had an adequate legal remedy in the form of paying her taxes under protest, by which any deficiency in the tax

reduction hearing she attended could be reviewed (*221 Cal. App. 2d 192, 195)* .

[b] Writ of Review Denied if Right to Appeal Lost by Petitioner's Inaction

Simmons v. Superior Court (1959) 52 Cal. 2d 373, 341 P.2d 13 , is discussed in *§ 205.23[3][a]*.

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20-205 California Points & Authorities § 205.26

§ 205.26 Opposing Petition for Writ of Review (Certiorari) [Code Civ. Proc. §§ 1068, 1107; Cal. Rules of Ct., Rule 8.487]--Petitioner's Claim Moot or Barred by Laches

[1] FORM

[*The following should be combined, if appropriate, with a general form of memorandum opposing a petition for a writ of review (see, e.g., § 205.23*)].

A WRIT OF REVIEW SHOULD NOT ISSUE BECAUSE THE CLAIM OF PETITIONER IS _____ [MOOT *and/or* BARRED BY LACHES].

[*EITHER*]

A. Writ of Review Denied if Matter Moot. A writ of review will not issue if the claim of petitioner is moot (*Wilson v. L.A. County Civil Service Com. (1952) 112 Cal. App. 2d 450, 454, 246 P.2d 688* ; *James v. Superior Court (1917) 35 Cal. App 148, 149, 169 P. 398*).

[*AND/OR*]

B. Writ of Review Denied for Laches. A writ of review will not issue if thedelay by petitioner in bringing the petition is so long as to constitute laches (*Scott v. Municipal Court (1974) 40 Cal. App. 3d 995, 997, 115 Cal. Rptr. 620* ; *Bernstein v. Superior Court (1941) 46 Cal. App. 2d 568, 569, 116 P.2d 172*).

[2] Comments

[a] Use of Form

The foregoing points and authorities may be used to oppose a petition for a writ of review on the grounds that the action complained of has become moot, or that a delay in bringing the petition amounts to laches. The foregoing form should

be used in conjunction with the general form opposing a petition for a writ of review [*see § 205.23*].

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. In particular, counsel should describe any circumstances that undermine the reasons for petitioning for a writ of review [see, *e.g., James v. Superior Court (1917) 35 Cal. App. 148, 149, 169 P. 398* (propriety of injunction moot when purpose already accomplished)]. Facts indicating that the petition is being brought after the period in which an appeal from a final judgment is permitted should also be included, as well as any lack of explanation by petitioner for not bringing the petition sooner [see, *e.g., Scott v. Municipal Court (1974) 40 Cal. App. 3d 995, 997, 115 Cal. Rptr. 620]* .

In an appropriate case, the foregoing points and authorities may be submitted in opposition to a petition for a writ of review supported by the points and authorities *set out in §§ 205.20 -205.22*.

[3] Discussion of Authorities

[a] Writ of Review Denied if Matter Moot

Wilson v. L.A. County Civil Service Com. *(1952) 112 Cal. App. 2d 450, 246 P.2d 688* , involved a dispute over a list of candidates eligible for the position of county clerk. The list originated after a civil service examination. One of the examinees, who placed last on the list, appealed his positioning to the civil service commission and, when that appeal was denied, petitioned for a writ of review in the superior court. The court issued a writ of mandate after finding that the oral portion of the examination was not competitive, and required the civil service commission to cancel the eligible list and hold a new examination. A new examination was held and a new list of candidates was generated. The examinee again petitioned for a writ of review, but it was denied and the denial was affirmed on appeal. In the interim both the examinee and the civil service commission had appealed from the order issuing the writ of mandate; the examinee's appeal was dismissed after being abandoned. However, the appeal by the civil service commission resulted in the reversal of the original order [*see Wilson v. L.A. County Civil Service Com. (1950) 97 Cal. App. 2d 777, 778, 218 P.2d 547*]. Subsequently, the trial court granted the commission's motion to dismiss the proceeding and discharge the writ of review. The motion was made on the ground that the issues in the action were moot and that the eligible list in question was no longer in existence and had expired. The examinee appealed from the order granting the dismissal.

The court of appeal affirmed the dismissal. It held that at the time the motion to dismiss was made, the eligible list in question was no longer in existence under the provisions of the county charter that governed the duration of the list (*112 Cal. App. 2d 450, 452)* . Therefore, the validity of the list had become a moot question. The fact that the court of appeal had made a ruling (reversing the issuance of the writ of mandate) that examined the validity of the examination did not mean that the question of mootness was decided there for purposes of precedent (*112 Cal. App. 2d 450, 453-454)* . Because the only question presented by the original petition for a writ of review was the validity of the original list, any judicial decision would be ineffectual (*112 Cal. App. 2d 450, 454)* .

In ***James v. Superior Court*** *(1917) 35 Cal. App. 148, 169 P. 398* , a preliminary injunction was issued and later dissolved in a civil action in superior court. The purpose of the injunction was to prevent the sale of certain capital stock of a corporation to enforce the payment of an assessment. Plaintiff in the suit paid the assessment and the corporation issued plaintiff a receipt and recorded the payment on its own books of account. However, plaintiff petitioned for a writ of review to annul the order dissolving the injunction, contending that the court was without jurisdiction to dissolve it.

The court of appeals denied the writ of review. The court found that plaintiff was correct in asserting that the superior court exceeded its jurisdiction in dissolving the injunction. However, the purpose of the injunction was already accomplished because plaintiff had prevented sale of the stock by paying the assessment. Therefore, the court held that it was no longer of any legal consequence whether plaintiff was correct in his contention about the injunction. Payment of the assessment had made the injunction issue virtually an abstract proposition of law on which no rights depended

and no relief could be afforded (*35 Cal. App. 148, 149)* .

[b] Writ of Review Denied for Laches

In ***Scott v. Municipal Court*** *(1974) 40 Cal. App. 3d 995, 115 Cal. Rptr. 620* , a municipal court's judgment of contempt was challenged. The contemner was fined and petitioned the superior court for a writ of review. The superior court denied the petition as not being timely filed, based on a delay of approximately six months. The contemner appealed the denial, contending that although he had delayed in petitioning, his petition should not have been denied unless there had been prejudice to the opposing party.

The court of appeal affirmed the denial. It held that under the rule established in *Reynolds v. Superior Court (1883) 64 Cal. 372, 28 P. 121* , a delay in bringing the petition that exceeds the time for the period of appeal from a final judgment bars the petition for review, unless the delay is satisfactorily explained. The court compared this rule to that in habeas corpus proceedings in which petitioners for that writ must explain delay in seeking it. The court distinguished the holding of *Conti v. Board of Civil Service Commissioners (1969) 1 Cal. 3d 351, 82 Cal. Rptr. 337, 461 P.2d 617* , because its holding that prejudice must be shown in order to establish laches applies only to administrative mandamus proceedings. Here, the court continued, the writ of review is more discretionary, although the discretion must be exercised within reason. The petition for the writ occurred well after the 60-day period for appeals from a final judgment (*40 Cal. App. 3d 995, 997)* . The court did not comment, however, on the fact that there is no appeal remedy from a contempt judgment [*see Code Civ. Proc. §§ 904.1(a)(1)(B), 1222*].

Bernstein v. Superior Court *(1941) 46 Cal. App. 2d 568, 116 P.2d 172* , involved a challenge to the appointment of a wife as the guardian of the estate of her husband. After a period of almost six years the husband petitioned for a writ of review, contending that the appointment was invalid, citing *Grinbaum v. Superior Court (1923) 192 Cal. 528, 221 P. 635* (discussed in *§ 205.20[3][f]*). At the time of the petition for the writ, the parties' daughter had also filed a petition to succeed the wife as guardian on the wife's resignation from that position.

The court of appeal denied the writ, holding that the husband's lengthy delay in seeking the writ amounted to laches, and his conduct had amounted to consent to the guardianship. In contrast to the situation in *Grinbaum*, the husband, although physically disabled, was mentally competent, had had the benefit of his estate during the period of the guardianship, and received timely notice of the proceedings. Furthermore, he would have an opportunity to challenge the continuation of the guardianship by his daughter when her petition was heard (*46 Cal. App. 2d 568, 569)* .

[4] Additional Authorities

[a] Writ of Review Denied if Matter Moot

In *Raahauge v. Superior Court (1949) 91 Cal. App. 2d 941, 205 P.2d 1124* , a petition for a writ of review was filed to examine the action of a superior court in refusing to confirm a trustee's purchase of corporate stock. An appeal had also been filed concerning the same matter, and the stated purpose for petition was to prevent loss of the right to a review of the judgment in the event the court decided that it was not appealable. Because the judgment was determined to be appealable, the court of appeal discharged the writ of review, holding that the review proceeding would be meaningless in light of the appeal remedy (*91 Cal. App. 2d 941, 941)* .

[b] Writ of Review Denied for Laches

In *Reid v. Superior Court (1919) 44 Cal. App. 349, 186 P. 634* , a district attorney was removed from office for willful misconduct. Some nine months later, after his term of elective office had expired, he petitioned for a writ of review. The court of appeal held that the matter was moot in that it could not restore the petitioner to elective office after the term had expired, and that his delay in seeking the writ amounted to laches. It cited with approval cases holding that a petitioner must give a sufficient reason for the delay in order for the court to grant the writ and if there is prejudice

resulting from the delay the writ will not be issued (*44 Cal. App. 349, 355)* .

California Points & Authorities

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[1] FORM

[2] Comments

[a] Use of Form

[b] Open Terms

[c] Statute of Frauds

[d] Related Pleading and Practice Forms

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Acceptance Stating Additional Terms

[b] Contract Evidenced by Conduct

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[1] FORM

[2] Comments

[a] Use of Form

[b] Writing Need Not Contain All Material Terms

[c] Definition of Merchant

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Writing Satisfies Statute of Frauds

[b] Requirements Contract Satisfies Quantity Term

[c] Writing Evidencing Contract Between Merchants

[d] Signature Includes Use of Symbol

§ 206.32 Supporting Contention That Enforceable Contract for Sale of Goods Exists--Statute of Frauds Does Not Bar Enforcement--Defendant Admits Existence of Contract [Com. Code § 2201(3)(b)]

[1] FORM

[2] Comments

[a] Use of Form

§ 206.33 Supporting Contention That Enforceable Contract for Sale of Goods Exists--Statute of Frauds Does Not Bar Enforcement--Payment Made or Goods Accepted [Com. Code § 2201(3)(c)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Part Payment Made on Indivisible Unit

[b] Goods Delivered to Third Party at Buyer's Request

[4] Additional Authorities

[a] Payment Made or Goods Accepted

§ 206.34 Supporting Contention That Enforceable Contract for Sale of Goods Exists--Statute of Frauds Does Not Bar Enforcement by Seller Against Buyer--Goods Specially Manufactured for Buyer [Com. Code § 2201(3)(a)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Specially Manufactured Goods

§ 206.35 Opposing Contention That Enforceable Contract for Sale of Goods Exists--Statute of Frauds Bars Enforcement--Writing Insufficient to Show Existence of Contract [Com. Code § 2201(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Effect of Statute of Frauds

[c] Related Pleading and Practice Forms

[3] Additional Authorities

[a] Statute of Frauds

§ 206.36 Opposing Contention That Enforceable Contract for Sale of Goods Exists--Acceptance Made Conditional on Assent to Additional Terms [Com. Code § 2207(1)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Additional or Different Terms

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[1] FORM

[2] Comments

[a] Use of Form

[b] Appropriate Test for Measure of Damages

[c] Notice of Resale

[d] Proof of Market Price

[e] Opposing Points and Authorities

[f] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Intermediate Seller Entitled to Lost Profits

[b] Lost-Volume Seller Entitled to Lost Profits Without Setoff

[4] Additional Authorities

[a] Seller's Right of Resale and Damages Based on Contract Price

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[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Additional Authorities

[a] Limitations Period

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[1] FORM

[2] Comments

[a] Use of Form

[b] Buyer's Conditional Duty

[c] Additional Requirements of Tender

[d] Place for Delivery

[e] Shipping Terms

§ 206.40 Opposing Contention That Seller Entitled to Damages for Buyer's Breach of Contract--Tendered Goods Failed to Conform to Contract [Com. Code § 2601]

[1] FORM

[2] Comments

[a] Use of Form

§ 206.41 Opposing Contention That Seller Entitled to Damages for Buyer's Breach of Contract--Seller Failed to Notify Buyer of Resale of Goods [Com. Code § 2706]

[1] FORM

[2] Comments

[a] Use of Form

[b] Requirements for Notification of Private Sale

[c] Purpose for Notification of Public Sale

§ 206.42 Supporting Contention That Buyer Entitled to Damages for Seller's Breach of Contract--Buyer's Remedies Regarding Accepted Goods [Com. Code § 2714]

[1] FORM

[2] Comments

[a] Use of Form

[b] Deduction of Damages From Price

[c] Opposing Points and Authorities

[d] Related Pleading and Practice Forms

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[1] FORM

[2] Comments

[a] Use of Form

[b] Installment Contracts

[c] Proof of Market Price

[d] Buyer's Security Interest and Right of Resale

[e] Buyer's Right to Goods on Seller's Insolvency

[f] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Buyer's Right to Damages After Cover

[b] Incidental Damages Include Storage and Handling Costs

[c] Consequential Damages Include Lost Profits

[d] Seller That Knows Buyer Will Resell for Profit Is Liable for Lost Profits

[e] Seller Has Burden of Proving Inadequate Mitigation

[4] Additional Authorities

[a] Consequential Damages Include Lost Profits

§ 206.44 Supporting Contention That Buyer Entitled to Consequential Damages [Com. Code § 2715(2)]--Limited or Exclusive Contract Remedy [Com. Code § 2719(1)] Barring Consequential Damages Failed of Its Essential Purpose [Com. Code § 2719(2)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Factual Showing Required

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Failure of Limited Remedy

[b] Consequential Damages Permitted When Limited Remedy Fails of Its Essential Purpose

[4] Additional Authorities

[a] Failure of Limited Remedy of Its Essential Purpose

§ 206.45 Supporting Contention That Buyer Entitled to Damages for Seller's Breach of Contract--Buyer's Right to Specific Performance [Com. Code §§ 2711(2)(b), 2716]

[1] FORM

[2] Comments

[a] Use of Form

[b] Replevin Available

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Inability to Cover Constitutes Special Circumstances

§ 206.46 Opposing Contention That Buyer Entitled to Contract-Market Price Measure of Damages on Nondelivered or Rejected Goods [Com. Code § 2713]--Buyer Limited to Actual Loss When Seller Knew of Resale Contract [Com. Code § 1305(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Buyer Limited to Actual Loss

§ 206.47 Opposing Contention That Buyer Entitled to Consequential Damages [Com. Code § 2715(2)]--Limited or Exclusive Remedy [Com. Code § 2719(1)] Bars Consequential Damages

[1] FORM

[2] Comments

[a] Use of Form

[b] Unconscionability of Limitation on Consequential Damages

[c] Liquidation or Limitation of Damages

[3] Discussion of Authorities

[a] Limited Remedy Does Not Fail of Essential Purpose When Seller's Breach Not Total

§§ 206.48-206.59 [Reserved]

§ 206.60 Supporting Contention That Seller Is Liable for Breach of Express Warranty [Com. Code § 2313]--Establishing Liability Generally

[1] FORM

[2] Comments

[a] Use of Form

[b] Elimination of Reliance Requirement

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Affirmation of Fact or Promise Creates Warranty

[b] Privity Not Required

[c] Express Warranty Applies to Leasing of Chattel

[4] Additional Authorities

[a] Affirmation of Fact or Promise Creates Warranty

[b] Description of Goods Creates Warranty

[c] Privity Not Required

§ 206.61 Supporting Contention That Seller Is Liable for Breach of Express Warranty [Com. Code § 2313]--Cause of Action Not Barred by Expiration of Limitations Period [Com. Code § 2725]--Warranty Explicitly Extends to Future Performance and Cause of Action Accrues on Discovery

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Accrual-on-Discovery Rule

[b] Promise to Repair Defects in Future

§ 206.62 Supporting Contention That Seller Is Liable for Breach of Express Warranty [Com. Code § 2313]--Disclaimer of Warranty [Com. Code § 2316(1)] Ineffective--Disclaimer Inconsistent With Language of Express Warranty

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Disclaimer of Express Warranty Strictly Construed Against Seller

§ 206.63 Supporting Contention That Seller Is Liable for Breach of Implied Warranty of Merchantability [Com. Code § 2314]--Establishing Liability Generally

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Warranty of Merchantability Arises by Operation of Law

[b] Merchantable Goods

[c] Privity Between Supplier and Buyer Who Contracts With Financing Lessor

[4] Additional Authorities

[a] Merchantable Goods

§ 206.64 Supporting Contention That Defendant Is Liable for Breach of Implied Warranty of Merchantability [Com. Code § 2314]--Disclaimer of Warranty [Com. Code § 2316(2)] Ineffective

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Inconspicuous Disclaimer Is Invalid

[b] Disclaimer Inconspicuous When Contrast With Contract Is Slight

§ 206.65 Supporting Contention That Seller Is Liable for Breach of Implied Warranty of Fitness for Particular Purpose [Com. Code § 2315]--Establishing Liability Generally

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Implied Warranty of Fitness for Particular Purpose

§ 206.66 Supporting Contention That Defendant Is Liable for Breach of Implied Warranty of Fitness for Particular Purpose [Com. Code § 2315]--Disclaimer of Warranty [Com. Code § 2316(2)] Ineffective

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

§ 206.67 Supporting Contention That Seller Is Liable for Breach of Express Warranty [Com. Code § 2313], Implied Warranty of Merchantability [Com. Code § 2314] and Implied Warranty of Fitness for Particular Purpose [Com. Code § 2315]--Disclaimer of Warranty [Com. Code § 2316(1)] Ineffective--Seller Did Not Clearly Limit Liability

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] No Disclaimer Unless Seller Clearly Limits Liability

§ 206.68 Supporting Contention That Seller Is Liable for Breach of Warranty of Title or Warranty Against Infringement of Buyer's Interest [Com. Code § 2312]

[1] FORM

[2] Comments

[a] Use of Form

[b] Disclaimer of Warranty of Title

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Rightful Claim of Infringement Is Any Nonfrivolous Claim

§ 206.69 Supporting Contention That Buyer Is Entitled to Damages [Com. Code §§ 2714(2), (3), 2715(2)(b)] for Seller's Breach of Warranty [Com. Code §§ 2312-2315]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Award of Lost Profits Plus Restitution Not Per Se Inconsistent

[b] Attorney's Fees as Damages

[4] Additional Authorities

[a] Buyer's Consequential Damages

§ 206.70 Opposing Contention That Seller Is Liable for Breach of Warranty [Com. Code §§ 2312-2315]--Action

Barred by Expiration of Limitations Period [Com. Code § 2725]

[1] FORM

[2] Comments

[a] Use of Form

[b] Four-Year Limitations Period Inapplicable Absent Sales Contract Between Parties

[c] Four-Year Limitations Period Inapplicable When Dispute Does Not Involve Goods

[d] Two-Year Limitations Period Applicable in Action Based on Personal Injuries

[e] Related Pleading and Practice Forms

[f] Related Points and Authorities

[3] Discussion of Authorities

[a] Four-Year Limitations Period for Action Based on Breach of Warranty

[b] Extension of Warranty to Future Performance

[4] Additional Authorities

[a] Extension of Warranty to Future Performance

§ 206.71 Opposing Contention That Buyer Is Entitled to Damages [Com. Code §§ 2714(2), (3), 2715(2)(b)] for Seller's Breach of Warranty [Com. Code §§ 2312-2315]--Limitation of Remedies [Com. Code § 2316(4)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

§ 206.72 Opposing Contention That Seller Is Liable for Breach of Express Warranty [Com. Code § 2313], Implied Warranty of Merchantability [Com. Code § 2314], and Implied Warranty of Fitness for Particular Purpose [Com. Code § 2315]--Disclaimer of Warranty [Com. Code § 2316]

[1] FORM

[2] Comments

[a] Use of Form

[b] Purpose of Disclaimer Modification Provision

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Contractual Disclaimer of Implied Warranties

[4] Additional Authorities

[a] Words Creating and Negating Warranty Construed as Consistent When Reasonable

[b] Implied Warranties Excluded by "As Is" Language

§ 206.73 Opposing Contention That Seller Is Liable for Breach of Express Warranty [Com. Code § 2313], Implied Warranty of Merchantability [Com. Code § 2314], and Implied Warranty of Fitness for Particular Purpose [Com. Code § 2315]--Transaction Does Not Involve Goods [Com. Code § 2102]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] No Liability for Express Warranty When Dispute Does Not Involve Goods

§ 206.74 Opposing Contention That Seller Is Liable for Breach of Express Warranty [Com. Code § 2313], Implied Warranty of Merchantability [Com. Code § 2314], and Implied Warranty of Fitness for Particular Purpose [Com. Code § 2315]--Transaction Does Not Involve Sale [Com. Code § 2106(1)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] No Breach of Warranty Absent Sale

[b] Blood Transfusion Not Sale

[4] Additional Authorities

[a] No Breach of Warranty Absent Sale

[b] Blood Transfusion Not Sale

§ 206.75 Opposing Contention That Seller Is Liable for Breach of Express Warranty [Com. Code § 2313]--Seller Made No Affirmation of Fact or Promise

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Absence of Affirmation of Fact or Promise

[4] Additional Authorities

[a] Absence of Affirmation of Fact or Promise

§ 206.76 Opposing Contention That Seller Is Liable for Breach of Implied Warranty of Merchantability [Com. Code § 2314] or Implied Warranty of Fitness for Particular Purpose [Com. Code § 2315]--No Privity of Contract Between Plaintiff and Defendant

[1] FORM

[2] Comments

[a] Use of Form

[b] Exceptions to Privity Requirement

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[3] Discussion of Authorities

[a] Privity Required for Action Based on Implied Warranty

[4] Additional Authorities

[a] Privity Required for Action Based on Implied Warranty

§ 206.77 Opposing Contention That Seller Is Liable for Breach of Implied Warranty of Merchantability [Com. Code § 2314] or Implied Warranty of Fitness for Particular Purpose [Com. Code § 2315]--Class Action Cannot Be

Maintained Because of Lack of Common Interests Among Plaintiffs

[1] FORM

[2] Comments

[a] Use of Form

[b] Class Actions

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] No Class Action Based on Implied Warranty of Merchantability When Issues Requiring Separate Litigation Are Too Numerous

[b] No Class Action Based on Implied Warranty of Fitness for Particular Purpose

[4] Additional Authorities

[a] No Class Action Based on Implied Warranty of Fitness for Particular Purpose

§ 206.78 Opposing Contention That Seller Is Liable for Breach of Implied Warranty of Merchantability [Com. Code § 2314]--Seller Not Merchant With Respect to Goods Sold [Com. Code § 2104(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] No Implied Warranty of Merchantability When Defendant Not Merchant

§ 206.79 Opposing Contention That Seller Is Liable for Breach of Implied Warranty of Fitness for Particular Purpose [Com. Code § 2315]--Buyer Did Not Rely on Seller's Skill or Judgment

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] When Implied Warranty of Fitness for Particular Purpose Arises

[b] Buyer's Nonreliance on Seller's Skill or Judgment

§§ 206.80-206.99 [Reserved]

§ 206.100 Supporting Contention That Manufacturer, Distributor, or Seller Made Express Warranty in Consumer Sale [Civ. Code §§ 1790.3, 1791, 1791.2]--General Definitions Included

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Express Warranty Defined

[b] Consumer Warranty Act Supersedes Commercial Code Only in Case of Conflict

[4] Additional Authorities

[a] Express Warranty Defined

§ 206.101 Supporting Contention That Manufacturer of New Motor Vehicle [Civ. Code § 1793.22(e)(2)] Sold in California, or Its Representative, Made Express Warranty

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] New Motor Vehicle Defined

[b] Typical Automobile Repair Warranty

§ 206.102 Supporting Contention That Manufacturer Is Liable for Breach of Express Warranty in Consumer Sale--Failure to Maintain Repair Facility in California [Civ. Code § 1793.2(a)(1)(A)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Additional Authorities

[a] Duty to Maintain Repair Facility in California

§ 206.103 Supporting Contention That Buyer Is Entitled to Replacement or Reimbursement--Failure to Promptly Repair Goods (Other Than New Motor Vehicle) to Conform to Express Warranty [Civ. Code § 1793.2(b)-(d)(1), (e)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Additional Authorities

[a] Repair or Reimbursement

§ 206.104 Supporting Contention Buyer of New Motor Vehicle Is Entitled to Replacement or Restitution--Nonconformity Persists After Reasonable Number of Attempts to Repair [Civ. Code §§ 1793.2(d)(2), 1793.22]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Requirements If Buyer Chooses Restitution

[b] Presumption Regarding Reasonable Number of Attempts to Repair

[c] Manufacturer's and Dealer's Repair Attempts Are Aggregated

[d] No Notification of Third-Party Dispute Resolution Process

[e] Buyer's Right to Rely on Presumption

[f] Buyer's Right to Rely on Presumption Nonconformity Defined

[g] Manufacturer Has Burden of Proving Extension of 30-Day Limit

[h] Buyer's Duty of Notification Never Arose

[i] Buyer Does Not Have to Prove Reliance

[4] Additional Authorities

[a] Requirements If Buyer Chooses Restitution

[b] Nonconformity Defined

§ 206.105 Supporting Contention That Seller Made Warranty in Consumer Sale [Civ. Code §§ 1791.2, 1792-1792.2]--Buyer's Waiver Is Void and Unenforceable [Civ. Code § 1790.1]

[1] FORM

[2] Comments

[a] Use of Form

[b] Commercial Code Counterpart

[c] Related Points and Authorities

§ 206.106 Supporting Contention That Manufacturer or Retailer Impliedly Warranted Merchantability of Consumer Goods [Civ. Code § 1791.1(a), (c)]--Implied Warranty of Merchantability Accompanies Every Sale [Civ. Code § 1792]

[1] FORM

[2] Comments

[a] Use of Form

[b] Commercial Code Counterpart

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Unless Disclaimed, Merchantability Is Warranted

[b] Vertical Privity Not Required if Product Is Purchased New

[4] Additional Authorities

[a] Implied Warranty of Merchantability Defined

§ 206.107 Supporting Contention That Manufacturer or Retailer Has Impliedly Warranted Consumer Goods--Disclaimer Ineffective [Civ. Code §§ 1792.3, 1792.4(a), 1793]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Commercial Code Counterparts

[3] Discussion of Authorities

[a] Express Warranty May Not Limit Implied Warranties

[b] Requirements of Disclaimer of Implied Warranties

§ 206.108 Supporting Contention That Manufacturer, Distributor, or Retailer Impliedly Warranted Fitness of Consumer Goods [Civ. Code §§ 1791.1(b), 1792.1, 1792.2(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Commercial Code Counterpart

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Manufacturer's Implied Warranty of Fitness

[b] Inference of Reliance on Implied Warranty of Consumability

§ 206.109 Supporting Contention That Retailer Impliedly Warranted Fitness of Assistive Devices [Civ. Code §§ 1791(p), 1791.1(b), 1792.2(b)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Retailer's Implied Warranty of Assistive Device

[b] Assistive Device Defined

§ 206.110 Supporting Contention That Buyer Is Entitled to Damages for Seller's Breach of Warranty in Consumer Sale--General Measure of Damages [Civ. Code § 1794(a)-(b)], Attorney's Fees and Costs [Civ. Code § 1794(d)], and Penalty for Willful Violation [Civ. Code § 1794(c)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Right of Action

[b] Attorney's Fees and Costs

[c] Penalty for Willful Violation

[d] Prejudgment Interest

[4] Additional Authorities

[a] Attorney's Fees and Costs

[b] Penalty for Willful Violation

[c] Measure of Damages for Breach of Consumer Warranty

§ 206.111 Supporting Contention That Buyer Is Entitled to Damages for Seller's Breach of Warranty in Consumer Sale--"Lemon Law" Measure of Damages [Civ. Code § 1794(e)(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

§ 206.112 Supporting Contention That Buyer Is Entitled to Damages for Seller's Breach of Warranty in Consumer Sale--Buyer's Reasonable Use of Vehicle Does Not Prevent Rescission

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Reasonable Use Does Not Bar Rescission

§ 206.113 Supporting Contention That Buyer Is Entitled to Damages for Seller's Breach of Warranty in Consumer Sale--Action Not Barred by Expiration of Limitations Period [Civ. Code § 1790.3; Com. Code § 2725]--General Availability

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Song-Beverly Adopts Commercial Code Limitation Period

[b] Song-Beverly Adopts Commercial Code Accrual Rule

§ 206.114 Supporting Contention That Buyer Is Entitled to Damages for Seller's Breach of Warranty in Consumer Sale--Action Not Barred by Expiration of Limitations Period [Civ. Code § 1790.3; Com. Code § 2725]--Warranty Period Extended During Repairs [Civ. Code § 1795.6]

[1] FORM

[2] Comments

[a] Use of Form

[b] Receipts Required to Be Provided by Manufacturer

§ 206.115 Supporting Contention That Buyer Is Entitled to Damages for Seller's Breach of Warranty in Consumer Sale--Action Not Barred by Expiration of Limitations Period [Civ. Code § 1790.3; Com. Code § 2725]--Limitation Period Extended During Third-Party Dispute Resolution Process [Civ. Code § 1793.22(c)]

[1] FORM

[2] Comments

[a] Use of Form

§ 206.116 Supporting Contention That Seller Is Entitled to Costs/Expert Witness Fees [Code Civ. Proc. §§ 998(c), 1032(b)] As Prevailing Party In Action Brought Under Song-Beverly Consumer Warranty Act [Civ. Code § 1790 et seq.]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Seller's Recovery of Costs

[b] Seller's Recovery of Expert Witness Fees

§ 206.117 Supporting Contention That Manufacturer, Distributor, or Retailer Is Liable for Breach of Implied Warranty of Fitness--Personal Injury Tort Claims Distinguished

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Product Liability Claims Unimpaired

§ 206.118 Opposing Contention That Buyer Is Entitled to Damages for Seller's Breach of Warranty in Consumer Sale--Buyer Did Not Purchase "Consumer Goods" [Civ. Code § 1794(a)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Goods Must Be Removable From Their Location Without Causing Further Damage

§ 206.119 Opposing Contention That Seller Made Express Warranty in Consumer Sale--Mere Opinion, Commendation, or Policy Statement [Civ. Code § 1791.2(b), (c)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Points and Authorities

[d] Commercial Code Counterpart

§ 206.120 Opposing Contention That Seller Made Implied Warranty in Consumer Sale--No Implied Warranties Accompany an "As Is" Sale [Civ. Code § 1791.3]

[1] FORM

[2] Comments

[a] Use of Form

[b] Commercial Code Counterpart

§ 206.121 Opposing Contention That Seller Is Liable for Breach of Implied Warranty of Fitness for Particular Purpose [Civ. Code §§ 1791.1(b), 1792.2(a)]--Buyer Did Not Rely on Seller's Skill or Judgment

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Same Analysis Under Song-Beverly and Commercial Code

§ 206.122 Opposing Contention That Seller Is Liable for Breach of Express Warranty in Consumer Sale--No Sale Made in California [Civ. Code § 1793.2(a)(1)(A)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Duty to Maintain Repair Facility in California

[b] Act Does Not Apply to Vehicle Bought Outside California

§ 206.123 Opposing Contention That Seller Is Liable for Breach of Express Warranty in Consumer Sale--Designated Repair Facility in California [Civ. Code § 1793.2(a)(1)(B)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Option to Designate Repair Facility in California

§ 206.124 Opposing Contention That Buyer Is Entitled to Replacement or Reimbursement--Buyer Failed to Deliver Goods for Repair or Notify Manufacturer of Defect [Civ. Code § 1793.2(c)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Buyer's Duty of Return or Notification

§ 206.125 Opposing Contention That Buyer Is Entitled to Replacement or Reimbursement-Claim Based on Defect in New Residential Construction Is Specially Excepted [Civ. Code § 1793.2(e)(2)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

§ 206.126 Opposing Contention That Buyer of New Motor Vehicle Is Entitled to Replacement or Restitution--Buyer Who Did Not Submit to Qualified Third-Party Dispute Resolution Process Cannot Rely on Presumption to Establish Reasonable Number of Attempts to Repair [Civ. Code § 1793.22(c)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Buyer Cannot Rely on Presumption

§ 206.127 Opposing Contention That Buyer of New Motor Vehicle Is Entitled to Replacement or Restitution--Impairment of Vehicle Was Not "Substantial" Within Meaning of Civ. Code § 1793.22(e)(1)

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Impairment Must Be Substantial

[b] Test for Determining Whether Impairment Is Substantial

[4] Additional Authorities

[a] Nonconformity Defined

[b] Test for Determining Whether Impairment Is Substantial

§ 206.128 Opposing Contention That Buyer of New Motor Vehicle Is Entitled to Replacement or Restitution--Manufacturer Was Not Given Opportunity to Repair Vehicle--"Reasonable Number of Attempts" Means at Least Two Attempts to Repair [Civ. Code § 1793.2(d)(2)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] A "Reasonable Number of Attempts" To Repair Requires That the Manufacturer Be Given at Least Two Opportunities to Repair

§ 206.129 Opposing Contention That Buyer Is Entitled to Double Penalty for Breach of Warranty [Civ. Code § 1794(c)]--Recovery of Both Punitive Damages and Civil Penalty Is Prohibited

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Imposition of Both Penalty and Punitive Damages Barred

[b] Plaintiff's Election and Waiver

§ 206.130 Opposing Contention That Buyer of New Motor Vehicle Is Entitled to Double Penalty for Breach of Express Warranty [Civ. Code § 1794(e)]--Manufacturer Maintains Qualified Dispute Resolution Process [Civ. Code § 1794(e)(2)]

[1] FORM

[2] Comments

[a] Use of Form

§ 206.131 Opposing Contention That Buyer of New Motor Vehicle Is Entitled to Double Penalty for Breach of Express Warranty [Civ. Code § 1794(e)]--Buyer Did Not Demand That Manufacturer Replace Vehicle or Make Restitution [Civ. Code § 1794(e)(3)]

[1] FORM

[2] Comments

[a] Use of Form

§ 206.132 Opposing Contention That Buyer of New Motor Vehicle Is Entitled to Double Penalty for Breach of Express Warranty [Civ. Code § 1794(e)]--Manufacturer Complied With Buyer's Demand to Replace Vehicle or Make Restitution [Civ. Code § 1794(e)(4)]

[1] FORM

[2] Comments

[a] Use of Form

§ 206.133 Opposing Contention That Buyer of New Motor Vehicle Is Entitled to Double Penalty for Breach of Express Warranty [Civ. Code § 1794(e)]--Buyer Can Only Have One Penalty [Civ. Code § 1794(e)(5)]

[1] FORM

[2] Comments

[a] Use of Form

§ 206.134 Opposing Contention That Buyer Is Entitled to Damages for Bad-Faith Breach of Covenant of Good Faith and Fair Dealing

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Tort Damages for Breach of Covenant of Good Faith and Fair Dealing Not Available

[4] Additional Authorities

[a] Tort Damages for Breach of Covenant of Good Faith and Fair Dealing Not Available

§§ 206.135-206.149 [Reserved]

§ 206.150 Supporting Contention That Unruh Act Applies to Sales Transaction--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Liberal Construction

§ 206.151 Supporting Contention That Unruh Act Applies to Loan Transaction--Consumer Sale Was Financed by Lender Closely Connected to Seller [Civ. Code § 1801.6]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Substance of Transaction

[b] Lender's Relation to Seller

§ 206.152 Opposing Contention That Unruh Act Applies to Transaction--Contract Was Not Made Within California [Civ. Code § 1802.19]

[1] FORM

[2] Comments

[a] Use of Form

§ 206.153 Opposing Contention That Unruh Act Applies to Transaction--Contract Provided for Residential Construction or Sale of Real Property [Civ. Code § 1801.4(a), (b)]

[1] FORM

[2] Comments

[a] Use of Form

§ 206.154 Opposing Contention That Unruh Act Applies to Transaction--Buyer Terminated Service Contract With No Continuing Obligation

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] No Continuing Obligation

§ 206.155 Opposing Contention That Unruh Act Applies to Transaction--Buyer Did Not Purchase Goods Primarily for Personal Use [Civ. Code § 1802.1]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Personal Use

§ 206.156 Opposing Contention That Unruh Act Applies to Transaction--Transaction Was Insurance Premium Finance Agreement [Civ. Code § 1801.7]

[1] FORM

[2] Comments

[a] Use of Form

[b] Premium Finance Agreements

§ 206.157 Supporting Contention That Buyer May Recover Finance Charges Paid to Seller [Civ. Code § 1812.7]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

§ 206.158 Supporting Contention That Buyer Can Recover Finance Charges Paid to Assignee of Installment Contract or Account [Civ. Code § 1812.7]--Assignee Had Knowledge of Unruh Act Violation

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Constructive Knowledge

§ 206.159 Opposing Contention That Buyer May Recover All Finance and Other Charges Paid to Seller or Assignee--Nonwillful Violation Was Corrected Within 30 Days [Civ. Code § 1812.8]

[1] FORM

[2] Comments

[a] Use of Form

§ 206.160 Supporting Contention That Seller or Assignee Is Due Balance on Retail Installment Contract or Account [Civ. Code § 1812.2]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

§ 206.161 Opposing Contention That Seller or Assignee Is Due Balance on Retail Installment Contract or Account--Seller Repossessed Goods and Deficiency Judgment Is Barred [Civ. Code § 1812.5]

[1] FORM

[2] Comments

[a] Use of Form

§ 206.162 Opposing Contention That Seller or Assignee Is Due Balance on Retail Installment Contract or Account--Buyer Discharged Obligation to Last Known Holder of Contract or Account [Civ. Code § 1806.1]

[1] FORM

[2] Comments

[a] Use of Form

§ 206.163 Opposing Contention That Seller or Assignee Is Due Balance on Retail Installment Contract or Account--Buyer Was Entitled to New Payment Schedule After Defaulting on Balloon Payment [Civ. Code § 1807.3]

[1] FORM

[2] Comments

[a] Use of Form

[b] Balloon Payment Defined

§ 206.164 Opposing Contention That Seller or Assignee Is Due Balance on Retail Installment Contract or Account--Seller Relied on Acceleration Clause Prohibited by Unruh Act [Civ. Code § 1804.1(b)]

[1] FORM

[2] Comments

[a] Use of Form

§§ 206.165-206.179 [Reserved]

§ 206.180 Supporting Contention That Rees-Levering Act Applies to Motor Vehicle Transaction [Civ. Code § 2981]--Sales Contract [Civ. Code § 2981(a)(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

§ 206.181 Supporting Contention That Rees-Levering Act Applies to Motor Vehicle Transaction [Civ. Code § 2981]--Transaction in Form of Lease Is Actually Conditional Sale [Civ. Code § 2981(a)(2)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Court Must Look to Substance Rather Than Form of Agreement

§ 206.182 Supporting Contention That Rees-Levering Act Applies to Motor Vehicle Transaction [Civ. Code § 2981]--Seller-Assisted Financing Not Exempt [Civ. Code § 2982.5(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Purpose of Rees-Levering Act

[b] Rees-Levering Act Applies to Seller-Assisted Loans

[c] Court Looks to Substance of Transaction Rather Than Form

[d] Preparation of Loan Documents by Dealer

[4] Additional Authorities

[a] Court Looks to Substance of Transaction Rather Than Form

§ 206.183 Opposing Contention That Rees-Levering Act Applies to Motor Vehicle Transaction--Cash Sale

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Intent of Rees-Levering Act

[b] Rees-Levering Act Does Not Apply to Cash Sales

§ 206.184 Opposing Contention That Rees-Levering Act Applies to Motor Vehicle Transaction--Seller Is Not "Seller" Under Act [Civ. Code § 2981(b)]

[1] FORM

[2] Comments

[a] Use of Form

§ 206.185 Opposing Contention That Rees-Levering Act Applies to Motor Vehicle Transaction--Vehicle Is Not "Motor Vehicle" Under Act

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Exclusion Is Based on Purpose of Purchase

§ 206.186 Opposing Contention That Rees-Levering Act Applies to Motor Vehicle Transaction--Lease Is Not Conditional Sale Contract [Civ. Code § 2981(a)(2)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Rees-Levering Act Applies Only to Leases That Are "Conditional Sale Contracts"

[b] Lease Agreement Is Not "Conditional Sale Contract"

[c] Maximum Liability Established by Reference to Value at End of Lease

§ 206.187 Opposing Contention That Rees-Levering Act Applies to Motor Vehicle Transaction--Independent Lender Financed Sale Is Exempt From Act [Civ. Code § 2982.5

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Private Financing Excluded From Act

[4] Additional Authorities

[a] Private Financing Excluded From Act

§§ 206.188-206.199 [Reserved]

§ 206.200 Supporting Contention That Buyer May Rescind Contract--Contract Is Unenforceable [Civ. Code § 2983.1]--Seller Violated Formality Provisions [Civ. Code § 2981.9]

[1] FORM

[2] Comments

[a] Use of Form

[b] No "Cooling Off" Period

[c] Attorney's Fees

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Contract Is Unenforceable

§ 206.201 Supporting Contention That Buyer May Rescind Contract--Contract Is Unenforceable [Civ. Code § 2983.1]--Seller Violated Disclosure Provisions [Civ. Code § 2982(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Purpose of Disclosure Requirements

[b] Contract Violates Disclosure Requirements

§ 206.202 Supporting Contention That Buyer May Rescind Contract--Contract Is Unenforceable [Civ. Code § 2983.1]--Seller Violated Finance Charge Provisions [Civ. Code § 2982(j), (k)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

§ 206.203 Supporting Contention That Buyer May Rescind Contract--Contract Is Unenforceable [Civ. Code § 2983.1]--Holder Had Knowledge of Violations [Civ. Code § 2983.1]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Violation Appears on Face of Contract

§ 206.204 Supporting Contention That Buyer May Rescind Contract--Purchaser Was Unable to Obtain Third-Party Financing [Civ. Code § 2982.9]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

§ 206.205 Opposing Contention That Buyer May Rescind Contract [Civ. Code § 2983.1]--Election to Rescind Was Not Made With Reasonable Diligence

[1] FORM

[2] Comments

[a] Use of Form

[b] No "Cooling Off" Period

§ 206.206 Opposing Contention That Buyer May Rescind Contract [Civ. Code § 2983.1]--Seller Is in Substantial Compliance With Statutory Requirements

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Seller Has Substantially Complied With Statute

[b] Rees-Levering Act Is to Be Used as Shield and Not Sword

[4] Additional Authorities

[a] Seller Has Substantially Complied With Statute

§ 206.207 Opposing Contention That Buyer May Rescind Contract [Civ. Code § 2983.1]--Seller Made Accidental or Bona Fide Error in Computation [Civ. Code § 2983]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Seller Made Accidental or Bona Fide Error in Computation

§ 206.208 Opposing Contention That Buyer May Rescind Contract [Civ. Code § 2983.1]--Seller Corrected Violation [Civ. Code § 2984]

[1] FORM

[2] Comments

[a] Use of Form

[b] Contract May Be Enforced Seller or Holder if Defect Is Corrected

[c] When Correction Allowed

[d] Correction Increasing Amount Owed

[e] Time for Correction

[f] Delivery of Corrected Copy

[g] Improper Collections to Be Credited to Buyer

[h] Effect of Correction

§ 206.209 Opposing Contention That Buyer May Rescind Contract [Civ. Code § 2983.1]--Holder Acquired Contract Without Actual Knowledge of Seller's Violation [Civ. Code § 2983.1].

[1] FORM

[2] Comments

[a] Use of Form

§ 206.210 Opposing Contention That Buyer May Rescind Contract [Civ. Code § 2983.1]--Assignee Is Bona Fide Purchaser, Assignee, or Pledgee for Value [Civ. Code § 2983.1].

[1] FORM

[2] Comments

[a] Use of Form

§ 206.211 Supporting Contention That Buyer Is Entitled to Have Lien Canceled and Foreclosure Proceedings Enjoined--Lien Imposed on Impermissible Property [Civ. Code § 2984.2]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Buyer Is Entitled to Cancellation of Encumbrance on Impermissible Property

[4] Additional Authorities

[a] Buyer Is Entitled to Cancellation of Encumbrance on Impermissible Property

§§ 206.212-206.229 [Reserved]

§ 206.230 Supporting Contention That Seller or Holder Is Due Balance on Contract--Buyer Is in Default [Com. Code § 9615(d)(2)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Liability of Buyer for Deficiency Judgment

[c] Buyer's Right to Notice of Intention to Sell

[d] Acceleration of Maturity During Period of Right to Reinstate

[e] Opposing Points and Authorities

[f] Related Forms

[3] Discussion of Authorities

[a] Deficiency Judgment May Lie

§ 206.231 Supporting Contention That Seller or Holder Is Due Balance on Contract--Seller Is Not Required to Allege Compliance With Every Provision of Act

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Seller or Holder Not Required to Allege Specific Compliance With All Sections of Act

§ 206.232 Supporting Contention That Seller or Holder Is Due Balance on Contract--Four-Year Statute of Limitations Applies [Com. Code § 2725]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[c] Four-Year Statute of Limitations in Contracts for Sale

[3] Discussion of Authorities

[a] Four-Year Statute of Limitations Applies

§ 206.233 Opposing Contention That Seller or Holder Is Due Balance on Contract--Seller May Not Accelerate Maturity [Civ. Code § 2983.3(a)].

[1] FORM

[2] Comments

[a] Use of Form

§ 206.234 Opposing Contention That Seller or Holder Is Due Balance on Contract--Seller Has Forfeited Right to Deficiency by Unjustifiable Denial of Reinstatement [Civ. Code § 2983.3(e)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Notices Violated Notice Provisions

§ 206.235 Opposing Contention That Seller or Holder Is Due Balance on Contract--Seller's Assignee Is Subject to Equities and Defenses of Buyer [Civ. Code § 2983.5(a)]

[1] FORM

[2] Comments

[a] Use of Form

§ 206.236 Opposing Contention that Seller or Holder Is Due Balance on Contract--Seller Has Not Complied With Applicable Notice Provisions [Com. Code § 9611(b), (c)(1), (d)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Failure to Comply With Notice Requirements

[4] Additional Authorities

[a] Failure to Comply With Notice Requirements

§ 206.237 Supporting Contention That Seller Is Liable for Conversion--Seller Has Conducted Unauthorized Sale or Has Unjustifiably Refused to Turn Over Vehicle to Buyer

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Forfeiture of Seller's Right to Deficiency Is Not Buyer's Exclusive Remedy

[b] Buyer May Assert Cause of Action for Conversion

[c] Unauthorized Sale and Unjustified Refusal to Turn Over Possession Constitute Conversion

§ 206.238 Supporting Contention That Buyer Is Entitled to Three Times Amount of Finance Charges Paid for Prepayment Penalty Violation [Civ. Code § 2983.1].

[1] FORM

[2] Comments

[a] Use of Form

§ 206.239 Supporting Contention That Party Is Entitled to Attorney's Fees as Prevailing Party [Civ. Code § 2983.4]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Attorney's Fees Available to Prevailing Party in Action Seeking Restitution After Prior Rescission

[b] Buyer Who Prevails on Cross Complaint Against Seller Is Entitled to Attorney's Fees

[c] Defendant in Deficiency Action Can Be Prevailing Party When Plaintiff Has Voluntarily Dismissed Action Without Prejudice

California Points & Authorities

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Volume 20 Chapters 200-209 RECEIVERS---to---SANCTIONS
CHAPTER 206 SALES
PART I. INTRODUCTION

20-206 California Points & Authorities § 206.01

§ 206.01 Scope of Chapter

This chapter contains points and authorities relating to the general subject of commercial and consumer sales. It covers sales governed by Division 2 of the California Code [*Com. Code § 2101 et seq.*], warranties under both Division 2 and California's Song-Beverly Consumer Warranty Act [*Civ. Code § 1790 et seq.*], consumer installment sales, and motor vehicle sales governed by the Rees-Levering Motor Vehicle Sales and Finance Act [*Civ. Code § 2981 et seq.*]. A more detailed description of the points and authorities included in this chapter is set out below.

This chapter contains points and authorities relating to sales governed by Division 2 of the California Commercial Code [*Com. Code § 2101 et seq.*], including points and authorities:

- Supporting [*see §§ 206.30 -206.34*] and opposing [*see §§ 206.35, 206.36*] the contention that an enforceable contract for the sale of goods exists.

- Supporting [*see § 206.37*] and opposing [*see §§ 206.39 -206.41*] the contention that the seller is entitled to damages for the buyer's breach of contract.

- Opposing the contention that either the seller or buyer is entitled to damages, based on the expiration of the limitations period [*see § 206.38*].

- Supporting [*see §§ 206.42 -206.45*] and opposing [*see §§ 206.46, 206.47*] the contention that the buyer is entitled to damages for the seller's breach of contract.

This chapter also contains memoranda of points and authorities relating to warranties under Division 2 of the Commercial Code. It contains points and authorities:

- Supporting the contention that a seller is liable for breach of express warranty [*see §§ 206.60 -206.62*].

- Supporting the contention that a seller is liable for breach of an implied warranty of merchantability [

see §§ 206.63 -206.64].

- Supporting the contention that a seller is liable for breach of an implied warranty of fitness for a particular purpose [*see §§ 206.65 -206.66*].

- Supporting the contention that a seller is liable for breach of those three warranties on the ground that a disclaimer is ineffective [*see § 206.67*].

- Supporting the contention that a seller is liable for breach of warranty of title or warranty against infringement of a buyer's interest [*see § 206.68*].

- Supporting the contention that a buyer is entitled to damages for the seller's breach of warranty [*see § 206.69*].

- Opposing the contention that a seller is liable for breach of warranty, on the ground that the action is time barred [*see § 206.70*].

- Opposing the contention that a buyer is entitled to damages for breach of warranty, on the ground that the agreement contained a limitation on remedies [*see § 206.71*].

- Opposing the contention that a seller is liable for breach of express warranty, or an implied warranty of merchantability or fitness for a particular purpose [*see §§ 206.72 -206.74*].

- Opposing the contention that a seller is liable for breach of express warranty [*see § 206.75*].

- Opposing the contention that a seller is liable for breach of an implied warranty of merchantability or fitness for a particular purpose [*see §§ 206.76, 206.77*].

- Opposing the contention that a seller is liable for breach of an implied warranty of merchantability [*see § 206.78*].

- Opposing the contention that a seller is liable for breach of an implied warranty of fitness for a particular purpose [*see § 206.79*].

In addition, this chapter contains points and authorities relating to California's Song-Beverly Consumer Warranty Act [*Civ. Code § 1790 et seq.*]. In many cases, the Song-Beverly Act provisions duplicate or parallel the Commercial Code (Division 2) warranty provisions, so counsel may wish to refer to discussion of Commercial Code warranties and incorporate authorities from the provisions referred to above, especially when there is no case interpretation available for a Song-Beverly Act provision but there is for the parallel Commercial Code provision. The chapter contains the following points and authorities specifically relating to the Song-Beverly Act:

- Supporting the contention that a manufacturer, distributor, or retail seller made a warranty within the meaning of the Song-Beverly Act [*see §§ 206.100, 206.101* (express warranty), §§ 206.106-206.109 (implied warranty)].

- Supporting the contention that the manufacturer or seller violated the Act and breached its obligation by failing to maintain a repair facility in California [*see § 206.102*] or failing to repair the goods to conform to the warranty [*see §§ 206.103, 206.104*].

- Supporting the contention that a seller is liable for breach of warranty on the ground that a disclaimer

is ineffective [*see § 206.105*].

- Supporting a buyer's entitlement to various elements of damages [*see §§ 206.110 -206.115*].

- Supporting the contention that the Song-Beverly Act was not intended to bar tort remedies for personal injury based on traditional product liability concepts [*see § 206.117*].

- Opposing the manufacturer's, distributor's, or retail seller's liability are based on the grounds that no warranty was made because the statements relied on were mere opinion [*see § 206.119*], no warranty is created in an "as is" sale [*see § 206.120*], and no implied warranty of fitness for a particular purpose is created without the buyer's reliance [*see § 206.121*].

- Opposing the contention that a seller is liable for failure to maintain a repair facility in California on the ground that no sale was made "in this state" [*see § 206.122*].

- Opposing the contention that a seller is liable for failure to maintain a repair facility in California when it has designated a facility [*see § 206.123*].

- Opposing liability on the ground that the buyer failed either to notify the seller or manufacturer of the defect or nonconformity [*see § 206.124*], or, in the case of a new motor vehicle, failed to participate in the manufacturer's qualified third-party dispute resolution process [*see § 206.126*].

- Opposing the buyer's recovery of various specific elements of damages or penalties [*see §§ 206.129 -206.134*].

In addition, this chapter contains points and authorities relating to the requirements for consumer installment sales, including points and authorities:

- Supporting [*see §§ 206.150, 206.151*] and opposing [*see §§ 206.152 -206.156*] contentions that the Unruh Act applies to sales or loan transactions.

- Supporting [*see §§ 206.157, 206.158*] and opposing [*see § 206.159*] contentions that a buyer may recover finance charges.

- Supporting [*see § 206.160*] and opposing [*see §§ 206.161 -206.164*] contentions that a seller is due the balance on a retail installment contract or account.

This chapter concludes with points and authorities relating to actions involving motor vehicle sales finance contracts subject to California's Rees-Levering Motor Vehicle Sales and Finance Act [*Civ. Code § 2981 et seq.*], including points and authorities:

- Supporting [*see §§ 206.180 -206.182*] and opposing [*see §§ 206.183 -206.187*] the contention that the Rees-Levering Act applies to the transaction.

- Supporting [*see §§ 206.200 -206.204*] and opposing [*see §§ 206.205 -206.210*] the contention that a conditional sale contract should be rescinded.

- Supporting the contention that a buyer is entitled to have an encumbrance canceled and foreclosure proceedings enjoined because the encumbrance was imposed on impermissible property [*see § 206.211*].

- Supporting [*see §§ 206.230 -206.232*] and opposing [*see §§ 206.233 -206.236*] the contention that a seller is entitled to recover a deficiency on the total amount due on the contract after repossession and sale.

- Supporting the contention that a seller is liable for conversion for refusing to restore a motor vehicle when a buyer has a right to reinstate the contract [*see § 206.237*].

- Supporting the contention that a buyer is entitled to three times the amount of finance charges paid for a prepayment penalty violation [*see § 206.238*], and supporting the contention that a party is entitled to attorney's fees [*see § 206.239*].

This chapter does not discuss federal credit disclosure requirements prescribed by the Truth in Lending Act [*15 U.S.C. § 1601 et seq.*]. That Act, which includes provisions for civil liability when a seller fails to make required disclosures, is discussed in California Forms of Pleading and Practice, Ch. 501, *Sales: Retail Installment Sales* (Matthew Bender), and California Legal Forms, Ch. 45, *Consumer Installment Loans and Credit Sales* (Matthew Bender).

This chapter contains points and authorities supporting [*see §§ 206.230 -206.232*] and opposing [*see §§ 206.233 -206.236*] the contention that a seller is entitled to recover a deficiency on the total amount due on the contract after repossession and sale. It also includes points and authorities supporting the contention that a seller is liable for conversion for refusing to restore a motor vehicle when a buyer has a right to reinstate the contract [*see § 206.237*], supporting the contention that a buyer is entitled to three times the amount of finance charges paid for a prepayment penalty violation [*see § 206.238*], and supporting the contention that a party is entitled to attorney's fees [*see § 206.239*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesGeneral OverviewCommercial Law (UCC)Sales (Article 2)Subject MatterGeneral OverviewCommercial Law (UCC)Sales (Article 2)WarrantiesGeneral Overview

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§ 206.02 Governing Statutes

Commercial sales are governed generally by Division 2 of the California Commercial Code [*Com. Code § 2102 et seq.*], which is California's version of the Uniform Commercial Code (UCC). Formation of a contract for the sale of goods is governed by *Com. Code § 2201 et seq.* Obligations under a contract for the sale of goods, and construction of the contract are governed by *Com. Code § 2301 et seq.* The passing of title to goods and the rights of creditors and good faith purchasers are governed by *Com. Code § 2401 et seq.* Performance by the parties is governed by *Com. Code § 2501 et seq.* Breach of the contract is governed by *Com. Code § 2601 et seq.* Remedies regarding breach of the contract are governed by *Com. Code § 2701 et seq.*

Warranties under the Commercial Code are governed generally by *Com. Code §§ 2312-2316*. Warranty of title and warranty against infringement of a buyer's interest are governed by *Com. Code § 2312*. Express warranty is governed by *Com. Code § 2313*. The implied warranty of merchantability is governed by *Com. Code § 2314*. The implied warranty of fitness for a particular purpose is governed by *Com. Code § 2315*. Exclusion or modification of warranties is governed by *Com. Code § 2316*. The limitations period for warranty actions is governed by *Com. Code § 2725(1)*. The measure of damages for breach of warranty is governed by *Com. Code § 2714(2)*.

Warranties of consumer goods sold in California are governed by the Song-Beverly Consumer Warranty Act, set forth in *Civ. Code § 1790 et seq.* The parts of the Consumer Warranty Act dealing with express warranties of new motor vehicles is commonly referred to as "the Lemon Law," and that term is used occasionally in this subpart.

The Unruh Act, set forth in *Civ. Code § 1801 et seq.*, governs retail installment sales, or sales made for a deferred payment price payable in installments, entered into by retail sellers and retail buyers for consumer goods in California [*see Civ. Code §§ 1802.1* ("goods" defined), 1802.5-1802.7]. Installment sales covered by the Act include both retail installment contracts and retail installment accounts, which commonly take the form of retailer-issued credit card accounts [*see Civ. Code §§ 1802.6, 1802.7*; *see also §§ 206.07[1], 206.08[1]*]. The Act sets limits on allowable finance charges; requires sellers to disclose certain terms of the contract to the buyer and to any cosignors; and creates a cause of action for damages or an injunction against a seller who violates the finance charge or disclosure provisions, entitling the prevailing party to attorney's fees.

Sales of motor vehicles under conditional sale contracts, defined in *Civ. Code § 2981(a)*, are governed under California law by the Rees-Levering Act (*Civ. Code §§ 2981-2984.4*). Sales of motor vehicles required to be registered under the Vehicle Code are specifically excluded from coverage by the Unruh Retail Installment Sales Act (*Civ. Code § 1801 et seq.*), which governs all retail installment sales generally [*see Civ. Code § 1802.1* (definition of "goods")]. Damages for conversion are governed by *Civ. Code § 3336*.

Sales of motor vehicles under conditional sales contracts may also be governed by the federal Truth in Lending Act (*15 U.S.C. § 1601 et seq.*), and regulations (referred to as Regulation Z) promulgated thereunder (*12 C.F.R. § 226.1 et seq.*). The federal Act governs a conditional sale contract if it imposes a finance charge or provides for payment in more that four installments [*see 15 U.S.C. § 1602(e)-(g)*].

If the buyer entered military service after the obligation was incurred, the Servicemembers Civil Relief Act [*50 U.S.C. App. § 501 et seq.*] will limit the rate of interest and the creditor's rights to enforce the obligation [*see 50 U.S.C. App. §§ 511(8)* (definition of motor vehicle), 522 (stay of proceedings), 526 (tolling of limitations), 527 (maximum rate of interest), 532 (restriction on repossession)].

Parts of the Song-Beverly Consumer Warranty Act (*Civ. Code § 1790 et seq.*) deal with express warranties of new motor vehicles, and are set forth in Subpart II (B).

Open-end leases are governed by the Vehicle Leasing Act (*Civ. Code § 2985.7 et seq.*), but are beyond the scope of this chapter. For discussion and forms relating to the Vehicle Leasing Act, see California Forms of Pleading and Practice, Ch. 90, *Automobiles: Vehicle Leasing Act* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)General OverviewCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesGeneral OverviewCommercial Law (UCC)Sales (Article 2)Subject MatterGeneral Overview

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§ 206.03 Warranties Under Division 10 Governing Personal Property Leases

Warranties between the supplier or lessor and lessee of a personal property lease first made or effective between the parties on or after January 1, 1990, are governed by Division 10 of the Commercial Code [*see Com. Code § 10600*; *see also Com. Code §§ 10103, 10107, 10208-10215, 10516*]. Division 10 is not discussed in this chapter, although a new subpart may be added when Division 10 generates sufficient case law. Although the provisions of Division 10 are fairly similar to those of Division 2, counsel should be aware of the distinction if he or she is working with a situation involving a finance lease or personal property lease. Cases involving personal property lease transactions that occurred before January 1, 1990, are discussed in this part when otherwise applicable [*see, e.g., § 206.63*]. For further discussion and forms relating to warranties under personal property leases and Division 10 of the Commercial Code, see California Forms of Pleading and Practice, Ch. 413, *Personal Property Leases* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)WarrantiesGeneral OverviewCommercial Law (UCC)Leases (Article 2A)Formation & ConstructionWarranties

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§ 206.04 Warranties Under Song-Beverly Consumer Warranty Act

Although not required to be written, an express warranty for purposes of Division 2 of the Commercial Code [*see Com. Code § 2313*] has some of the same elements as an express warranty under the Song-Beverly Consumer Warranty Act (also known as the "Song-Beverly Act"). For instance the exclusion of "puffery" or opinion as a basis for an express warranty is common to both the Commercial Code express warranty and an express warranty under the Song-Beverly Consumer Warranty Act. Many plaintiffs allege causes of action under both provisions arising from the same nucleus of facts. Counsel should consider alleging or arguing that express warranties were created under both provisions. Even cases that only address the creation of an express warranty under *Com. Code § 2313* may be used to argue a particular aspect of the definition in the context of the Song-Beverly Consumer Warranty Act. For points and authorities relating to the Song-Beverly Consumer Warranty Act, see *§ 206.100* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)WarrantiesGeneral OverviewCommercial Law (UCC)Sales (Article 2)WarrantiesExclusion & ModificationCommercial Law (UCC)Sales (Article 2)WarrantiesExpress Warranties

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§ 206.05 Warranties Under Magnuson-Moss Act

The federal Magnuson-Moss Warranty--Federal Trade Commission Improvement Act (*15 U.S.C. § 2301 et seq.*) provides further protection to consumers, primarily through disclosure requirements. This federal Act is beyond the scope of this chapter. For discussion and forms relating to the Magnuson-Moss Act, see California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesGeneral OverviewAntitrust & Trade LawConsumer ProtectionMagnuson-Moss Warranty ActGeneral Overview

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§ 206.06 Goods and Services Defined

"Goods" for purposes of the Unruh Act include tangible chattels bought for use primarily for personal, family, or household purposes. Certificates or coupons exchangeable for these consumer goods are also included. The Act also covers goods that will be affixed to and become part of real property at or after the time of the sale, whether or not the goods are severable from the real property. The Unruh Act does not cover automobiles or any other vehicle required to be registered under the Vehicle Code, or any goods sold or leased with a vehicle under a contract governed by the Rees-Levering Act (*Civ. Code § 2981 et seq.*) [*Civ. Code § 1802.1*; for discussion of the Rees-Levering Act, *see § 206.150* et seq.]. A trailer sold with a vessel is covered by the Unruh Act if it is designed solely to carry the vessel, unless the cash price of the vessel exceeds $25,000 [*see Civ. Code §§ 1802.1, 1801.4(d)* (exemption of vessel); *see also Veh. Code § 9840(a)* ("vessel" defined)].

"Services" covered by the Unruh Act are work, labor, and services that are not for commercial or business use. These include services furnished in connection with the improvement of real property or the providing of insurance. Services furnished in connection with the repair of motor vehicles are also included, although service contracts that are sold in conjunction with the sale or lease of a vehicle required to be registered under the Vehicle Code are not covered by the Act [*Civ. Code § 1802.2*; *see Civ. Code § 2981(o)* ("service contract" defined)]. The Act does not apply to the services of physicians or dentists, nor services for which the tariffs, rates, charges, costs or expenses, including in each instance the deferred payment price, are required by law to be filed with and approved by the federal government or any official, department, division, commission or agency of the United States [*Civ. Code § 1802.2*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)Subject MatterGoodsDefinitionCommercial Law (UCC)Secured Transactions (Article 9)Application & ConstructionDefinitionsCollateralGoodsConsumer Goods

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§ 206.07 Retail Installment Contract

[1] Definition

A "retail installment contract" is a contract for consumer goods or services [*see § 206.06*] which is entered into in California by a retail seller and a retail buyer and which (1) provides for repayment in more than four installments; or (2) provides for repayment in any number of installments and imposes a finance charge on the buyer; or (3) provides for repayment in any number of installments and charges more for the goods or services than they would have cost if the buyer had paid by cash or credit card, or gives the buyer fewer or lower quality goods or services than he or she would have received in a cash sale [*see Civ. Code § 1802.6*]. The contract may or may not contain a title retention provision. Retail installment contracts also include security agreements taken in connection with deferred-payment consumer sales, and leasing contracts giving the lessee the option to purchase the leased goods, for no or nominal consideration, after completing "lease" payments that are substantially equivalent to or in excess of value of the goods [*see Civ. Code § 1802.6*].

Typically a retail installment contract is a "closed-end" contract [*see Fox v. Federated Department Stores, Inc. (1979) 94 Cal. App. 3d 867, 875, 156 Cal. Rptr. 893]* . The contract may provide for add-on sales, however, permitting the buyer to make subsequent purchases under the contract, subject to the same finance charges and other terms as the original purchase [*see Civ. Code § 1808.1*].

[2] Disclosure Requirements

A retail installment contract must be written, dated, and contained in a single document, with printed portions appearing in a specified type size [*Civ. Code §§ 1803.1, 1803.2*]. The buyer must be given a legible copy of the contract at the time he or she signs it [*Civ. Code § 1803.7*]. The contract must contain the entire agreement concerning cost and terms of payment, including any promissory notes and any other evidences of indebtedness between the parties relating to the transaction [*Civ. Code § 1803.2*]. The contract also must contain all of the following:

- A heading in specified type size identifying the nature of the contract and, if the contract is secured by real property, a conspicuous warning concerning the consequences of a default [*Civ. Code § 1803.2(b)*].

- A warning that the buyer should not sign the contract until all blank spaces are filled in [*Civ. Code § 1803.2(c)-(e)*].

- Identification of the buyer and seller, their addresses, and a description of the goods or services sold [*Civ. Code § 1803.3(a)*].

- Disclosures required to be made by Regulation Z of the federal Truth in Lending Act (*15 U.S.C § 1601 et seq.*) [*Civ. Code § 1803.3(b)*; for discussion of Regulation Z, *see* California Forms of Pleading and Practice, Ch. 501, *Sales: Retail Installment Sales* (Matthew Bender)].

- Itemization of the cash price (plus tax and any insurance or official fees) and any down payment, including any trade-in, rebate, or down payment deferred without finance charge; and, when applicable, a description of property traded in and terms of insurance [*Civ. Code § 1803.3(b)-(e), (g)*; *see also Civ. Code § 1803.5* (procuring of insurance)].

- Disclosures concerning the buyer's right to prepay in full and, in case of prepayment, the seller's method of calculating a refund of unearned finance charges [*Civ. Code §§ 1803.2(c)-(e), 1803.3(f)*].

- Notice of the buyer's absolute right to a new payment schedule on default of any balloon payment [*Civ. Code § 1807.3(a)*].

- The buyer's acknowledgment, if any, of receipt of a copy of the contract, appearing in a specified type size directly above the buyer's signature [*Civ. Code § 1803.7*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)Security AgreementsEffectivenessContracts LawSecured TransactionsInstallment ContractsGeneral OverviewContracts LawSecured TransactionsInstallment ContractsLegal TitleContracts LawTypes of ContractsInstallment Contracts

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§ 206.08 Retail Installment Account

[1] Definition

A "retail installment account" is a revolving account established by an agreement, entered into in California by a retail seller and a retail buyer, that requires the buyer to pay in installments the outstanding balance incurred in buying consumer goods or services [*see § 206.06*] from the seller. The account carries a finance charge expressed as a percentage of the periodic balances to accrue in the future, providing the charge is not capitalized or stated as a dollar amount in the agreement. The seller may or may not retain a security interest in the goods sold [*see Civ. Code § 1802.7*]. More commonly known as a "revolving charge account," this type of retail installment account is exemplified by a charge account tied to a credit card issued by a retailer, such as a department store or an oil company [*see Fox v. Federated Department Stores, Inc. (1979) 94 Cal. App. 3d 867, 871, 875, 156 Cal. Rptr. 893]* .

Credit cards that are not issued by a retail seller, but instead are issued by banks or other institutions to finance purchases from many different merchants accepting the card, are not covered by the Unruh Act. For discussion of finance charge limitations applicable to these accounts, see Ch. 568, *Usury* , in California Forms of Pleading and Practice (Matthew Bender).

[2] Acceptance by Buyer

A retail installment account agreement is considered to be accepted by the buyer if (1) the buyer signs the agreement, including signing the application containing the agreement's terms, or (2) the buyer, or a person authorized by the buyer, uses the account, and the buyer has been notified in writing that the use of the credit card will mean that the agreement has been accepted by the buyer [*Civ. Code § 1810*]. The agreement will not become effective, however, unless and until the buyer has been given the disclosures required by *Civ. Code § 1810.1* [*see § 206.08*] and has accepted the agreement as required [*Civ. Code § 1810*].

[3] Required Disclosures

All sellers under retail installment accounts must provide the buyer with the following:

- Full disclosures, in a single written statement given to the buyer before the first transaction the account is made, concerning finance charges, payment requirements, and the conditions under which the seller may retain or acquire a security interest [*Civ. Code § 1810.1*].

- Periodic statements, mailed or delivered at least 14 days before the end of the period within which payment must be made, providing detailed information about account transactions during the period, finance charges, and the amount due [*Civ. Code § 1810.3(a)-(c)*].

- Notice of any change to be made in the terms of the account [*Civ. Code § 1810.3(d)*].

- Notice of the buyer's right to a refund when a credit balance exists in the account [*Civ. Code § 1810.3(e)-(f)*].

- Notice concerning any agreement on the cost of insurance and who is to procure it [*Civ. Code § 1810.5*].

- Any application form or preapproved solicitation for a credit card issued in connection with an account must, with specified exceptions, contain either (1) disclosure of the periodic rate, any annual fee, and any "free-ride" period, or (2) a disclosure that satisfies the initial disclosure statement requirements of Regulation Z [*Civ. Code § 1810.21(a)*]. Similar disclosure requirements for open-end credit cards and charge cards are set forth in *Civ. Code §§ 1748.11(a)* and *1748.22*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSales of GoodsGeneral OverviewContracts LawSales of GoodsPerformanceGeneral OverviewContracts LawTypes of ContractsInstallment Contracts

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§ 206.09 Prohibited Acts and Terms

The Unruh Act restricts the types of provisions that may be included in any retail installment contract. If a prohibited clause appears in a contract covered by the Act, the provision is void but the validity of the contract is not otherwise affected [*Civ. Code § 1804.4*]. The forbidden provisions include any waiver of the Act's provisions [*Civ. Code § 1801.1*]; waiver of claims and defenses that can be asserted against the seller or assignees [*Civ. Code § 1804.1(a), (g)*]; or waiver of protection from certain illegal acts committed in collection or repossession [*see Civ. Code § 1804.1(e)*]. Finance charges are limited [*see Civ. Code § 1805.1 et seq.*], as well as delinquency charges made in either retail installment contracts or retail installment accounts [*see Civ. Code §§ 1803.6, 1810.12*]. The finance and delinquency charge limitations are discussed in detail in California Forms of Pleading and Practice, Ch. 501, *Sales: Retail Installment Sales* (Matthew Bender). Provisions creating a security interest in goods fully paid for or not sold by the seller [*Civ. Code § 1804.3(a)*], in real property unrelated to the goods sold [*Civ. Code § 1804.3(b)*], or in household goods unrelated to the contract [*Civ. Code § 1799.100*] are also prohibited. Other prohibited clauses include a power of attorney appointing the seller or holder of the contract as the buyer's agent for collection or repossession [*Civ. Code § 1804.1(f)*], a provision requiring the buyer to pay any charge by reason of the exercise of his or her right to rescind or void the contract [*Civ. Code § 1804.1(h)*], a provision in a contract for a home improvement [*see Bus. & Prof. Code § 7151.2* (definition)] under which the seller takes a security interest, other than a mechanics' lien, in the buyer's real property which is the buyer's primary residence, if the buyer is a person who is 65 years of age or older [*Civ. Code § 1804.1(j)*], a confession of judgment [*Civ. Code § 1804.1(c)*], or waiver of the venue requirements for actions brought under the Act [*see Civ. Code §§ 1804.1(i), 1812.10*].

In addition to proscribing certain contract provisions, the Act prohibits a seller from doing any of the following:

- Obtaining the buyer's signature to a contract that contains blank spaces to be filled in after it has been signed [*Civ. Code § 1803.4*].

- Failing to deliver a legible copy of the contract and any other required documents to the buyer at the time of execution [*Civ. Code § 1803.7*].

- Inducing an agreement by offering consideration contingent on the happening of a future event [*Civ.*

Code § 1803.10].

- Imposing a delinquency charge for any default of payment on any purchase made before written disclosure concerning the delinquency charge has been given to the buyer [*Civ. Code §§ 1810.3(d), 1810.12*].

- Assessing any finance charge for goods purchased until the goods are in the buyer's possession, except as provided in *Civ. Code §§ 1805.6(b)-(c), 1810.10(b)-(c)* [*Civ. Code §§ 1805.6(a), 1810.10(a)*; for further discussion, *see* California Forms of Pleading and Practice, Ch. 501, *Sales: Retail Installment Sales* (Matthew Bender)].

- Requiring the buyer to obtain financing from a particular source [*Civ. Code § 1812.20*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawSales of GoodsGeneral OverviewContracts LawSales of GoodsPerformanceGeneral OverviewContracts LawTypes of ContractsInstallment Contracts

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§ 206.10 Remedies for Violations

Any person who fails to comply with the provisions of the Unruh Act, or any person who acquires a contract or installment account with knowledge of the noncompliance, is barred from recovery of any finance charge or of any delinquency, collection, extension, deferral or refinance charge imposed in connection with the contract or installment account. The buyer has the right to recover from such a person an amount equal to any charges paid by the buyer [*Civ. Code § 1812.7*]. A buyer who prevails in an action on a contract or account subject to the Act is entitled to attorney's fees and costs, whether the buyer brings the action or defends against an action by the seller or a holder of the contract or account [*see Civ. Code § 1811.1*].

Treble damages can be assessed if the violations are willful. In any case in which a person willfully violates any provision of this chapter in connection with the imposition, computation, or disclosures of or relating to a finance charge on a consolidated total of two or more contracts under the provisions of Article 8 (*Civ. Code § 1808.1 et seq.*) of this chapter, the buyer may recover from that person three times the total of the finance charges and any delinquency, collection, extension, deferral or refinance charges imposed, contracted for, or received on all contracts included in the consolidated total, and the seller shall be barred from the recovery of any such charges against a violator [*Civ. Code § 1812.9*]. Willful violations may also result in the imposition of criminal penalties [*see Civ. Code § 1812.6*].

For forms for use in bringing an action to recover damages and statutory penalties for violations of the Unruh Act, see California Forms of Pleading and Practice, Ch. 501, *Sales: Retail Installment Sales* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)RemediesGeneral OverviewContracts LawSecured TransactionsInstallment ContractsGeneral Overview

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20-206 California Points & Authorities § 206.11

§ 206.11 Nature and Purpose of Rees-Levering Act

The Rees-Levering Act is a comprehensive statute enacted for the protection of motor vehicle purchasers. The Act contains disclosure requirements that are designed to protect the buyer from excessive charges by requiring full disclosure of all items of cost [*Story v. Gateway Chevrolet Co. (1965) 237 Cal. App. 2d 705, 709, 47 Cal. Rptr. 267* ; *see Civ. Code § 2982(a)*].

The Act also contains substantive provisions that are designed to accomplish the following:

- Establish maximum permissible finance and other charges [*see Civ. Code §§ 2982(j), (k), 2982.3, 2982.8*].

- Restrict the types of provisions that may be contained in any security interests that may be created by conditional sale contracts [*see Civ. Code §§ 2982.1, 2983.7, 2984.2*].

- Give the buyer a right to prepay such contracts without penalty [*see Civ. Code § 2982*(*l*)].

- Regulate the repossession and resale of vehicles by the seller or holder [*see Civ. Code §§ 2982.7, 2982.9, 2983, 2983.1*].

The Act also provides the buyer certain remedies [*see Civ. Code §§ 2982.7, 2982.9, 2983, 2983.1*], and establishes criminal penalties for persons who willfully violate the Act [*see Civ. Code § 2983.6*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)RemediesGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesGeneral OverviewCommercial Law (UCC)Sales (Article 2)Subject MatterGoodsGeneral OverviewContracts LawSecured TransactionsInstallment ContractsGeneral Overview

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20-206 California Points & Authorities § 206.12

§ 206.12 How to Use Forms in This Chapter

[1] Page Limits on Points and Authorities

One of the more significant drafting requirements to keep in mind are page limits: supporting and opposing memoranda may not exceed 15 pages. A reply or closing memorandum may not exceed 10 pages. Exhibits, declarations, attachments, the table of contents, the table of authorities, and the proof of service are excluded from these page limits [Cal. Rules of Ct., Rule 3.1113(d)]. Any party must obtain leave of court to file a longer memorandum [*see Cal. Rules of Ct., Rule 3.1113(e)*]. These and other drafting requirements are discussed in further detail in Ch. 1, *Writing Legal Memoranda and Briefs* .

[2] Using the Forms to Build a Draft Memorandum

Counsel should combine the contentions in this chapter with points and authorities supporting or opposing the particular procedure by which the points of law are raised. For a discussion of how to use the forms in this chapter to draft a memorandum of points and authorities or a trial or appellate brief, see Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeContent & FormCivil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPleading & PracticeMotion PracticeSupporting Memoranda

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20-206 California Points & Authorities § 206.13

§ 206.13 Related Pleadings and Practice Forms

For discussion and forms relating to commercial sales, see California Forms of Pleading and Practice, Ch. 500, *Sales: Sales Under the Commercial Code* (Matthew Bender).

For discussion and forms relating to contracts generally, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

For discussion and forms relating to consumer contracts, see California Forms of Pleading and Practice, Ch. 127, *Consumer Contracts and Loans* (Matthew Bender).

For discussion and forms relating to specific performance generally, see California Forms of Pleading and Practice, Ch. 528, *Specific Performance* (Matthew Bender).

For discussion and forms relating to warranties, see California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties* (Matthew Bender).

For discussion and forms relating to the Consumers Legal Remedies Act (*Civ. Code § 1750 et seq.*), see Ch. 504, *Sales: Consumers Legal Remedies Act* , in California Forms of Pleading and Practice.

For discussion and forms relating to warranties between the supplier or lessor and lessee in personal property leases first made or effective between the parties on or after January 1, 1990, see California Forms of Pleading and Practice Ch. 413, *Personal Property Leases* .

For discussion and forms regarding strict products liability, see California Forms of Pleading and Practice, Ch. 460, *Products Liability* .

For discussion and forms relating to retail installment sales, see California Forms of Pleading and Practice, Ch. 501, *Sales: Retail Installment Sales* (Matthew Bender).

For discussion and forms relating to actions under the Rees-Levering Act, see California Forms of Pleading and Practice, Ch. 89, *Automobiles: Sales and Financing Under the Rees-Levering Act* .

For discussion and forms relating to accounting actions, see California Forms of Pleading and Practice, Ch. 7, *Accounting, Action for* (Matthew Bender).

For discussion and forms relating to the basic elements of contract law, see Ch. 140, *Contracts* .

The procedural and general aspects of, and forms relating to, rescission of a contract and restitution, are covered in California Forms of Pleading and Practice, Ch. 490, *Rescission and Restitution* (Matthew Bender).

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20-206 California Points & Authorities § 206.14

§ 206.14 Related Points and Authorities

For points and authorities that may be useful in actions based on a commercial sales contract, see Ch. 50, *Contracts* , and Ch. 214, *Specific Performance* .

For additional related memoranda of points and authorities that may be useful in actions based on warranty, see the following chapters:

Ch. 41, *Class and Representative Actions*.

Ch. 143, *Limitation of Actions*.

Ch. 190, *Products Liability*.

For additional related memoranda of points and authorities that may be useful in actions based on a motor vehicle conditional sale contract, see Ch. 12, *Accounting* , Ch. 50, *Contracts* , and Ch. 116, *Injunctions* .

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[Reserved]

§§ 206.15[Reserved]

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A. Sales Under Commercial Code

20-206 California Points & Authorities § 206.30

§ 206.30 Supporting Contention That Enforceable Contract for Sale of Goods Exists--Contract Made in Manner Sufficient to Show Agreement [Com. Code § 2204]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial appellate brief.*]

AN ENFORCEABLE CONTRACT FOR THE SALE OF GOODS BETWEEN PLAINTIFF AND DEFENDANT HAS BEEN MADE IN A MANNER SUFFICIENT TO SHOW AGREEMENT, BECAUSE _____ [*specify, e.g.,* THE CONDUCT OF BOTH PARTIES SUPPORTS A FINDING THAT THE PARTIES RECOGNIZE THE EXISTENCE OF THE CONTRACT].

A. Contract Made in Manner Sufficient to Show Agreement. A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties that recognizes the existence of the contract (*Com. Code § 2204(1)*).

[*Optional*] **B. Contract Formed Despite Indefinite Terms.** An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined; and even though one or more terms are left open, a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy (*Com. Code § 2204(2), (3)*).

[*Optional*] **C. Acceptance Stating Additional Terms.** A definite and seasonable expression of acceptance or a written confirmation that is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed on, unless acceptance is expressly made conditional on assent to the additional or different terms (*Com. Code § 2207(1)*; *Steiner v. Mobil Oil Corp. (1977) 20 Cal. 3d 90, 93-94, 101, 141 Cal. Rptr. 157, 569 P.2d 751*).

[*Optional*] **D. Contract Evidenced by Conduct.** Conduct by both parties that recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. The

terms of the contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of the Commercial Code (*Com. Code § 2207(3)*; *Steiny and Company, Inc. v. California Electric Supply Co., Inc. (2000) 79 Cal. App. 4th 285, 294-296, 93 Cal. Rptr. 2d 920* ; *Transwestern Pipeline Co. v. Monsanto (1996) 46 Cal. App. 4th 502, 514-515, 53 Cal. Rptr. 2d 887* ; *National Controls, Inc. v. Commodore Bus. Machines, Inc. (1985) 163 Cal. App. 3d 688, 693, 209 Cal. Rptr. 636* ; *Textile Unlimited, Inc. v. A. BMH and Co. Inc. (9th Cir. 2001) 240 F.3d 781, 787-788)* .

[*Optional*] **E. Court Authorized to Determine Effective Terms.** If the parties intend to contract, but the terms of their offer and acceptance differ, the court is authorized to determine which terms are part of the contract, either by reference to the parties' own dealings, or by reference to other provisions of the Commercial Code *(Steiner v. Mobil Oil Corp. (1977) 20 Cal. 3d 90, 99-100*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that an enforceable contract for the sale of goods between plaintiff and defendant was made in a manner sufficient to show agreement [*see Com. Code § 2204(1)*]. Optional Paragraph B is for use if terms of the contract are left open, although the parties intended to contract and there is a reasonably certain basis for a remedy. Optional Paragraph C is for use if the offeree gave a definite expression of acceptance that included additional terms, but did not condition its acceptance on the offeror's agreement to the new terms. Optional Paragraph D is for use if the existence of the contract is evidenced by the parties' conduct. Optional Paragraph E is for use if there is a conflict between the terms of the offer and the acceptance that does not negate the existence of a contract, but requires court determination of the exact terms of the contract.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the existence of a contract for the sale of goods. They may also be adapted for use in a trial or appellate brief.

Counsel should add argument linking the points in this form with the facts of his or her case; for example, argument that a contract was made in a manner sufficient to show agreement between the parties, for example, based on the conduct of the parties.

[b] Open Terms

Under *Com. Code § 2204(3)*, if the parties intend to enter into a binding agreement, the agreement is valid despite missing terms if there is any reasonably certain basis for granting a remedy. The test is not certainty as to what the parties were to do or as to the exact amount of damages due the plaintiff, nor is the fact that one or more terms are left open enough by itself to defeat an otherwise adequate agreement. Rather, commercial standards on "indefiniteness" are intended to be applied [*see, e.g., Com. Code §§ 2305* (open price term), 2311 (parties may supply missing terms in course of performance)]. However, the more terms the parties leave open, the less likely it is that they intend to conclude a binding agreement, although their actions may be conclusive on the matter despite the omissions [*see* U.C.C. Comment to *Com. Code § 2204*].

[c] Statute of Frauds

Com. Code § 2204 embodies the basic policy of recognizing any manner of expression of agreement, whether oral, written, or otherwise. However, the legal effect of such an agreement is, of course, qualified by other provisions of the Commercial Code [*see* U.C.C. Comment to *Com. Code § 2204*]. For example, a contract for the sale of goods for $500 or more is subject to the statute of frauds [*see Com. Code § 2201*; *see also §§ 206.31 -206.35*].

[d] Related Pleading and Practice Forms

For discussion and forms relating to commercial sales, see California Forms of Pleading and Practice, Ch. 500, *Sales: Sales Under the Commercial Code* (Matthew Bender).

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 206.35* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Acceptance Stating Additional Terms

In ***Steiner v. Mobil Oil Corp.*** *(1977) 20 Cal. 3d 90, 141 Cal. Rptr. 157, 569 P.2d 751* , a service station owner brought an action seeking declaratory and monetary relief against an oil company with which it had entered a 10-year written contract, to enforce a subsequent agreement regarding a competitive discount. Under the written contract, defendant provided the down payment for plaintiff's purchase of a service station in exchange for a 10-year contract under which the cash advance was treated as a prepaid competitive allowance, to be amortized over the 10-year period through plaintiff's purchase of 5.8 million gallons of gasoline. Subsequently, plaintiff and defendant's representative negotiated a proposal to allow plaintiff an additional competitive allowance of 1.4 cents per gallon. The additional agreement was contained in a standard form provided by defendant, which stated that defendant could change its terms at any time. Plaintiff sought a promise that defendant would not revoke the 1.4-cent reduction, in response to which the representative with whom plaintiff negotiated sent him a letter declaring that the plaintiff relied on the prepaid competitive allowance plus the 1.4-cent allowance, and that defendant's rejection of those terms would void the contract. The letter remained in the district office through bureaucratic oversight, and consequently was not incorporated into the final agreement package. Approximately one year later, defendant informed plaintiff of a reduction of the discount. The instant action ensued, and the trial court found for plaintiff. Defendant appealed.

The Supreme Court affirmed. The Court initially noted that *Com. Code § 2207* indisputably applies to the instant case (*20 Cal. 3d 90, 98)* . In place of the "mirror image" rule, under which the terms of both offer and acceptance must be identical, *Com. Code § 2207* inquires as to whether the parties intended to complete an agreement. If the parties intend to contract, but the terms of their offer and acceptance differ, *Com. Code § 2207* authorizes a court to determine which terms are part of the contract, either by reference to the parties' own dealings, or by reference to other provisions of the Commercial Code (*20 Cal. 3d 90, 99-100)* . Plaintiff offered to enter into a 10-year contract with defendant only if defendant, among other things, agreed to advance plaintiff $30,000, and to give him a 1.4 cents-per-gallon competitive discount on the price of defendant's gasoline for the duration of the contract. When plaintiff telephoned defendant's employee to inquire about the status of his offer, he was told that defendant had a check for him, that he should open an escrow account, and that he should proceed with the purchase of the service station property. The Court stated that in context, defendant clearly had approved the deal (*20 Cal. 3d 90, 100-101)* . Moreover, the trial court also found that defendant did not in any way make its acceptance expressly conditional on plaintiff's assent to the additional or different terms (*20 Cal. 3d 90, 101)* . The Court held that despite the fact that the terms of defendant's acceptance departed partially from the terms of plaintiff's offer, the parties did form a contract. Under *Com. Code § 2207(2)*, additional terms are to be construed as proposals for additions to the contract. Between merchants, the terms become part of the contract unless: (a) the offer expressly limits acceptance to the terms of the offer; (b) they materially alter it; and (c) notification of objection to them has already been given or is given within a reasonable time after notice is received. Applying *Com. Code § 2207(2)(a)* and *(b)*, the Court concluded that defendant's declaration that the 1.4-cents discount was terminable at defendant's discretion did not become part of the contract. Instead, the parties formed a contract incorporating the terms of plaintiff's offer. Under that contract, plaintiff was guaranteed the discount throughout the 10-year period of the dealer contract (*20 Cal. 3d 90, 100-102)* .

The Court rejected defendant's contention that *Com. Code § 2207* does not apply if the general contract formation rules of *Com. Code § 2204* are not met. The rules of contract formation under the Commercial Code do not include the principle that the parties must agree to all essential terms in order to form a contract (*20 Cal. 3d 90, 103-105)* . Courts have held that, under *Com. Code § 2204(3)*, parties may form a contract even though they do not agree as to the terms of payment, the time or place for performance, the quantity of the goods sold, or the price, which are all terms that might appear to be "essential" to an agreement (*20 Cal. 3d 90, 105)* . The Court also rejected defendant's contention that *Com. Code § 2207(1)* provides that if acceptance is expressly made conditional on assent to additional terms, the acceptance does not operate as an acceptance but as a counteroffer. Although there is some decisional authority for this construction, it conflicts with the language of *Com. Code § 2207(1)* and duplicates the function of the material-variation clause of *Com. Code § 2207(2)(b)* (*20 Cal. 3d 90, 107)* . The Court concluded that the guaranteed discount included in the terms of plaintiff's offer, and not defendant's standard revocable discount provision, became part of the agreement. Defendant cannot assert as a defense the failure of its own bureaucracy to respond to plaintiff's efforts to modify the standard dealer contract furnished by defendant (*20 Cal. 3d 90, 108)* .

[b] Contract Evidenced by Conduct

In ***Steiny and Company, Inc. v. California Electric Supply Co., Inc.*** *(2000) 79 Cal. App. 4th 285, 93 Cal. Rptr. 2d 920* , a general contractor that was sued by an aircraft company after the explosion of an electric switchboard settled the action and sued the subcontractor that installed the switchboard for indemnity. The subcontractor brought an action against the general contractor for work payments withheld, and against the seller of the switchboard for breach of the express warranties of merchantability and fitness for intended use. Trial went forward on the subcontractor's claim against the supplier of the defective equipment. The evidence concerning the contract included the subcontractor's purchase order and the seller's invoice, which contained conflicting provisions concerning warranties. Neither party signed the other party's document and the evidence was in conflict regarding which party's document was first tendered to the other (*79 Cal. App. 4th 285, 290-291)* .

The subcontractor requested the trial court to instruct the jury on the rules in *Com. Code § 2207* and on the implied warranties of merchantability and fitness. The trial court declined these requests. The court instructed that the jury must find "mutual consent in order to conclude that there was a contract"; that "consent is not mutual unless the parties all agreed upon the same thing and the same sense"; and that conduct alone is not effective as an expression of consent. The jury returned a general verdict in favor of the seller (*79 Cal. App. 4th 285, 290-291)* . On appeal, the subcontractor contended the trial court erred in refusing the requested instructions. The court of appeal held that *Com. Code § 2207* squarely applied in this case. The purchase order and invoice contained materially differing terms: the former imposed broad warranty coverage, the latter disclaimed all warranties. The parties, however, manifested an agreement by their conduct: the seller supplied, and the subcontractor accepted, the switchboard gear. Under *Com. Code § 2207(3)* there was a contract, which consisted of the terms on which the two writings agreed, supplemented by the provisions of the code. The code imposes warranties of merchantability by operation of law absent contractual modification or disclaimer. It also imposes a warranty of fitness, absent contractual exclusion or modification, if the seller knows the buyer's purpose for the goods and knows that the buyer is relying on the seller's judgment to furnish suitable goods. The evidence in the case warranted giving the requested instructions under *Com. Code § 2207*, and it was prejudicial error to refuse them (*79 Cal. App. 4th 285, 294-295)* .

In ***Transwestern Pipeline Co. v. Monsanto*** *(1996) 46 Cal. App. 4th 502, 53 Cal. Rptr. 2d 887* , the plaintiff, whose business was the interstate transportation of natural gas, contaminated Southern California Gas Company's pipeline with gas containing PCBs. After settling the gas company's claim, the plaintiff sought equitable indemnity from Monsanto, the PCB manufacturer, on several theories. A jury found Monsanto 37.5 percent responsible for the PCB contamination and awarded the plaintiff damages accordingly. Monsanto filed a timely notice of appeal. In defending against Transwestern's claims, Monsanto relied in part on the limitation-of-liability clauses in its invoices to the plaintiff's parent company, Texas Eastern. These clauses purported to disclaim any liability for consequential damages and limited

the buyer's other damages to the purchase price of the particular order. Monsanto contended that the parent assented to these limitations on liability at the outset of the parties' relationship, and that they had become part of the contract through a course of dealing between the parties over a 12-year period. Therefore, Monsanto concluded, because the parent acted as Transwestern's agent, the limitations on liability were imputed to Transwestern. The trial court directed a verdict against Monsanto on this defense. The court concluded that Monsanto had failed to establish that the limitations on liability contained in its invoices had become part of its sales agreements with Texas Eastern through express agreement or a course of dealing. Thus, even if Texas Eastern acted as Transwestern's agent in transactions with Monsanto, as the jury subsequently found, the limitations on liability could not be imputed to Transwestern because they were not binding on its agent.

The appellate court affirmed. Monsanto's acceptance of Texas Eastern's purchase orders was expressly conditioned, substantially in the language of *Com. Code § 2207(1)*, on Texas Eastern's assent to the additional limitation of liability terms contained in Monsanto's invoices. The court found that Texas Eastern did not expressly or implicitly assent to Monsanto's liability limits (*46 Cal. App. 4th 502, 515)* . No contract, therefore, was formed under *Com. Code § 2207(1)* and *(2)*, and the case was governed by *Com. Code § 2207(3)*, which recognizes a de facto contract between the parties based on the terms on which the parties did agree plus any supplementary terms incorporated under any other provisions of the Commercial Code. Under that section, furthermore, Texas Eastern's assent to the limitation-of-liability clauses could not be inferred from the parties' course of dealing. The court concluded that the conflicting terms and conditions on liability contained in the forms exchanged by the parties failed to establish a course of dealing and Monsanto's liability limits did not become a part of the parties' contracts (*46 Cal. App. 4th 502, 519)* .

In ***National Controls, Inc. v. Commodore Bus. Machines, Inc.*** *(1985) 163 Cal. App. 3d 688, 209 Cal. Rptr. 636* , plaintiff electronics manufacturer brought a breach of contract action against defendant customer, based on defendant's failure to accept the bulk of the merchandise shipped. The parties negotiated several successive orders by telephone. In all cases but one, defendant gave plaintiff a purchase order number by telephone, and plaintiff sent defendant a copy of the sales order. In the last order, for 900 units of merchandise, defendant mailed to plaintiff its own purchase order, which contained a provision on the reverse side disclaiming liability for any incidental or consequential damages. Defendant accepted only 50 of the units, and the remaining 850 units were ultimately sold to another customer of plaintiff. Among other findings, the trial court found that the provision on limitation of damages in defendant's purchase order was a proposal for an additional term that did not become part of the contract because it constituted a material alteration of the agreement. Defendant appealed.

The court of appeal affirmed (*163 Cal. App. 3d 688, 699)* . Although the parties agreed that the sales provisions of the Commercial Code applied, they disagreed about the application of *Com. Code § 2207*. Under *Com. Code § 2207*, parties may conclude a contract even though, after reaching accord, the forms that they exchange to memorialize their agreement differ because each has drafted its form to its own advantage (*163 Cal. App. 3d 688, 693)* . The parties' conduct, including their negotiating procedure, may indicate a consummated process of offer and acceptance, and thus an intent to contract (*163 Cal. App. 3d 688, 693-694)* . In this case, the parties agreed on the terms of a firm order for 900 units over the telephone, prior to defendant's mailing of the purchase order containing the damages provision (*163 Cal. App. 3d 688, 694)* . Therefore, the damages provision did not become part of the agreement, inasmuch as it constituted a material alteration of the agreement within the meaning of *Com. Code § 2207(2)(b)* (*163 Cal. App. 3d 688, 695-696)* . For discussion of the issue of damages in this case, see *§ 206.37[3][b]*.

In ***Textile Unlimited, Inc. v. A. BMH and Co. Inc.*** *(9th Cir. 2001) 240 F.3d 781* , a California corporation which bought goods from a Georgia corporation sued to enjoin arbitration being conducted in Georgia. The arbitration clause was not part of the purchase order, but rather was set forth in the back of the Georgia corporation's invoice. The case arose after plaintiff received a shipment which it claimed was defective and refused to pay. Defendant submitted the matter to arbitration in Georgia. Plaintiff eventually protested on the basis that the arbitration clause was not part of the contract. It moved for a stay of the arbitration pending in Georgia, and the district court preliminarily enjoined the pending arbitration. Defendant appealed the order.

The Ninth Circuit held that the district court did not abuse its discretion in granting the preliminary injunction. Plaintiff had showed that serious questions were raised and that it had a probability of success on the merits. The court first determined that no contract including the arbitration clause was formed pursuant to *Com. Code § 2207(1)*. No specific and unequivocal assent to the supplemental terms was given (*240 F.3d 781, 787-788)* . The court next found that the parties did not dispute that through their actions, they formed a contract under *Com. Code § 2207(3)*. The terms of an agreement pursuant to *Com. Code § 2207(3)* are those terms upon which the parties expressly agreed, coupled with the standard "gap-filler" provisions of Article Two. The UCC does not contain a "gap-filler" provision providing for arbitration. Under *Com. Code § 2207(3)*, the disputed additional items on which the parties do not agree simply drop out and are trimmed from the contract. Thus, the supplemental terms proposed by defendant, including the disputed arbitration clause, did not become part of contract (*240 F.3d 781, 788)* .

[c] Court Authorized to Determine Effective Terms

Steiner v. Mobil Oil Corp. *(1977) 20 Cal. 3d 90, 141 Cal. Rptr. 157, 569 P.2d 751* , is *discussed under § 206.30[3][a]*.

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A. Sales Under Commercial Code

20-206 California Points & Authorities § 206.31

§ 206.31 Supporting Contention That Enforceable Contract for Sale of Goods Exists--Statute of Frauds Does Not Bar Enforcement--Contract Evidenced by Writing [Com. Code § 2201(1)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial appellate brief.*]

AN ENFORCEABLE CONTRACT FOR THE SALE OF GOODS BETWEEN PLAINTIFF AND DEFENDANT EXISTS BECAUSE THE AGREEMENT IS EVIDENCED BY A WRITING SIGNED BY THE DEFENDANT THAT INDICATES THAT A CONTRACT WAS MADE, AND SPECIFIES A QUANTITY TERM.

A. Writing Satisfies Statute of Frauds. A contract for the sale of goods for the price of $500 or more is enforceable by way of action or defense if there is some writing sufficient to indicate that a contract for sale has been made between the parties, and signed by the party against whom enforcement is sought, or by his or her authorized agent or broker, except as otherwise provided in *Commercial Code Section 2201*. A writing is not insufficient because it omits or incorrectly states a term agreed on, although the contract is not enforceable beyond the quantity of goods shown in the writing (*Com. Code § 2201(1)*; *Seaman's Direct Buying Service, Inc. v. Standard Oil Co. (1984) 36 Cal. 3d 752, 764, 206 Cal. Rptr. 354, 686 P.2d 1158*).

[*Optional*] **B. Requirements Contract Satisfies Quantity Term.** A signed writing evidencing a requirements contract specifies a quantity term for purposes of satisfying the statute of frauds under *Commercial Code Section 2201(1)* (*Seaman's Direct Buying Service, Inc. v. Standard Oil Co. (1984) 36 Cal. 3d 752, 764, 206 Cal. Rptr. 354, 686 P.2d 1158*).

[*Optional*] **C. Writing Evidencing Contract Between Merchants.** Between merchants, if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of *Commercial Code Section 2201(1)* against the party, unless written notice of objection to its contents is given within 10 days after it is received (*Com. Code § 2201(2)*; *Procyon Corp. v. Components Direct, Inc. (1988) 203 Cal. App. 3d 409, 412, 249 Cal. Rptr. 813*).

[*Optional*] **D. Signature Includes Use of Symbol.** For purposes of the Commercial Code, "signed" includes any symbol executed or adopted by a party with present intention to authenticate a writing (*Com. Code § 1201(b)(37)*; *Donovan v. RRL Corp. (2001) 26 Cal. 4th 261, 276-278, 109 Cal. Rptr. 2d 807, 27 P.3d 702*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that an enforceable contract for the sale of goods exists between plaintiff and defendant, on the ground that although a formal contract does not exist, an agreement was reached that is evidenced by some writing sufficient to satisfy the statute of frauds [*see Com. Code § 2201(1)*]. Optional Paragraph B is for use if the writing evidences a requirements contract. Optional Paragraph C is for use if the contract is between merchants. Optional Paragraph D is for use to assert that a symbol constitutes a signature under the Commercial Code.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show that the writing evidencing the agreement sufficiently indicates a contract for sale between the parties, and is signed by the defendant.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the contract is outside the statute of frauds. They may also be adapted for use in a trial or appellate brief.

[b] Writing Need Not Contain All Material Terms

The writing required to satisfy the statute of frauds need not contain all the material terms of the contract, and the material terms that are stated need not be precisely stated. All that is required is that the writing afford a basis for believing that the offered oral evidence rests on a real transaction [*see* U.C.C. Comment 1 to *Com. Code § 2201*].

[c] Definition of Merchant

A merchant is a person who deals in goods of the kind involved in the transaction, or is charged with having knowledge or skill associated with dealing with those kinds of goods, by virtue of that person's occupation, or the asserted knowledge or skill of his or her employee, agent, or broker [*see Com. Code § 2104(1)*].

[d] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 206.35* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Writing Satisfies Statute of Frauds

In ***Seaman's Direct Buying Service, Inc. v. Standard Oil Co.*** *(1984) 36 Cal. 3d 752, 206 Cal. Rptr. 354, 686 P.2d 1158* , a ship chandler brought an action against an oil company for breach of an agreement to supply fuel. After plaintiff and defendant reached an agreement regarding defendant's supply of fuel to plaintiff in connection with plaintiff's 40-year marina lease, plaintiff requested an instrument evidencing a binding commitment. Defendant wrote a letter setting forth the terms of the agreement, which included the following language: "we would appreciate your acknowledgement and acceptance of these terms by signing and returning two copies of this letter." The letter was

signed by defendant's agent under the legend, "we accept and agree to the terms and conditions stated herein." Plaintiff signed the letter, and various comments were made by the parties indicating that an agreement had been consummated. Plaintiff obtained a lease for use of a marina based on the letter. Soon afterward, the price of oil rose, and defendant asserted that new federal regulations barred the contract. The federal government issued a supply order on plaintiff's instigation; defendant then denied the existence of a binding agreement, and appealed the government order. Ultimately, the government stated that a supply order would be issued after a court order was obtained establishing that a valid contract existed. Plaintiff's action for breach of contract and related tort claims resulted in a jury verdict in favor of plaintiff, awarding compensatory and punitive damages. Judgment was entered after a reduction of the punitive damages award, and defendant appealed.

The Supreme Court affirmed the judgment with respect to the breach of contract action (*36 Cal. 3d 752, 774)* . The Court initially determined whether the letter signed by the parties satisfied the statute of frauds. The Court noted that the general statute of frauds is embodied in *Civ. Code § 1624*, and concluded that inasmuch as the letter contained all the essential terms of a specific, consummated agreement, it was enforceable under the Civil Code (*36 Cal. 3d 752, 762-763)* . Further, because the contract contemplated a sale of goods, the requirements of the statute of frauds under *Com. Code § 2201* must also be met. Hence, the writing must be signed, it must indicate that a contract has been made, and it must specify a quantity term. Defendant argued that the letter failed to satisfy the Commercial Code's statute of frauds because a quantity term was not specified. But the Court stated that the letter evidenced a "requirements" contract, which was sufficient to satisfy that statute. Inasmuch as a written contract for output and requirements is binding under the Commercial Code, a writing is sufficient that indicates that there has been a real transaction for the sale of output or for the purchase of requirements (*36 Cal. 3d 752, 764)* .

[b] Requirements Contract Satisfies Quantity Term

Seaman's Direct Buying Service, Inc. v. Standard Oil Co. *(1984) 36 Cal. 3d 752, 206 Cal. Rptr. 354, 686 P.2d 1158* , is *discussed under § 206.31[3][a]*.

[c] Writing Evidencing Contract Between Merchants

In ***Procyon Corp. v. Components Direct, Inc.*** *(1988) 203 Cal. App. 3d 409, 249 Cal. Rptr. 813* , plaintiff merchant brought an action against defendant supplier of computer chips for breach of an oral contract. Defendant offered plaintiff a certain quantity of computer chips at a certain price, and guaranteed delivery within six weeks. As a condition of delivery, defendant required plaintiff to obtain an irrevocable letter of credit issued to defendant's bank. The bank issued the irrevocable letter of credit to defendant's bank; it included a description of the chips, sales price, date of delivery, identification of the parties, and the bank's warranty that all requests for payment in accordance with the terms of sale would promptly be filled. Defendant failed to deliver the chips on the agreed date. Plaintiff's action sought the difference between the agreed sales price and the market price on the date of the alleged breach. At trial, defendant argued that the oral contract was unenforceable because it violated the statute of frauds, in that the letter of credit did not meet the writing requirement of *Com. Code § 2201*. The trial court held that the letter of credit sufficed to bring the contract outside the statute of frauds and found for plaintiff, pursuant to *Com. Code § 2201(2)*. Defendant appealed.

The court of appeal affirmed (*203 Cal. App. 3d 409, 414)* . The court noted that the statute of frauds, codified in *Com. Code § 2201*, provides as follows:

> Except as otherwise provided in *Com. Code § 2201*, a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties, and signed by the party against whom enforcement is sought, or by his or her authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed on, but the contract is not enforceable beyond the quantity of goods shown in the writing (*203 Cal. App. 3d 409, 411-412)* .

When the contract is between merchants, *Com. Code § 2201(2)* provides the following exception to the formal writing requirement of *Com. Code § 2201(1)*:

> Between merchants, if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of *Com. Code § 2201(1)* against the party, unless written notice of objection to its contents is given within 10 days after it is received.

The court rejected defendant's contention that the letter of credit could not be a satisfactory writing for purposes of *Com. Code § 2201(2)* because it lacked the signature of plaintiff's authorized agent, and therefore could not constitute confirmation sufficient against the sender. The obvious purpose of the relaxed writing requirement under *Com. Code § 2201(2)* is to expedite confirmation of oral contracts among commercial traders who are presumably knowledgeable in business matters. The statute does not specify that the writing must be signed; additionally, pursuant to *Com. Code § 1201(b)(37)*, "signed" includes any symbol executed or adopted by a party with present intention to authenticate a writing. The requirement of a signature would therefore defeat the goal of quick, informal confirmations of business deals, and lacks support in the Commercial Code. Between merchants, failure to answer a written confirmation of a contract within 10 days of receipt is tantamount to a writing under *Com. Code § 2201(2)* and is sufficient against both parties under *Com. Code § 2201(1)* (*203 Cal. App. 3d 409, 412)* . The court stated that plaintiff did "sign" the irrevocable letter of credit within the meaning of *Com. Code § 1201(b)(37)*, in that it directed the bank to issue the letter, and supplied the relevant contract terms for incorporation in the document. In this limited sense, the bank acted as plaintiff's agent when it sent the letter; and the bank's signature was thus adopted by plaintiff with present intention to authenticate a writing. Moreover, the irrevocable letter of credit fully bound plaintiff to the terms of the contract. In fact, the court noted, the letter not only memorialized the oral contract terms, but also guaranteed payment on delivery of the goods. Consequently, the document more than satisfied the writing requirement of *Com. Code § 2201(2)*. One purpose of the statute is to equalize the position of both sides and avoid giving one party the advantage of monitoring a fluctuating market, knowing that it can bind the other party, but not be bound itself. Defendant demanded the irrevocable letter of credit for precisely that reason, noting that plaintiff had cancelled several previous orders, and defendant wished to ascertain that plaintiff would not renege again. Therefore, the trial court correctly ruled that the irrevocable letter of credit satisfied *Com. Code § 2201(2)* (*203 Cal. App. 3d 409, 413)* .

[d] Signature Includes Use of Symbol

Donovan v. RRL Corp. *(2001) 26 Cal. 4th 261, 109 Cal. Rptr. 2d 807, 27 P.3d 702* , is discussed in *§ 92.98[3][a]*. In that case, the California Supreme Court held that a car dealer's newspaper advertisement reflected an objective manifestation of its intention to make an offer for the sale of a car at a stated price. The dealer's printed name in the ad similarly evidenced an intention to authenticate the advertisement as an offer and therefore constituted a signature satisfying the statute of frauds (*26 Cal. 4th 261, 276-278)* .

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20-206 California Points & Authorities § 206.32

§ 206.32 Supporting Contention That Enforceable Contract for Sale of Goods Exists--Statute of Frauds Does Not Bar Enforcement--Defendant Admits Existence of Contract [Com. Code § 2201(3)(b)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial appellate brief.*]

AN ENFORCEABLE CONTRACT FOR THE SALE OF GOODS BETWEEN PLAINTIFF AND DEFENDANT EXISTS BECAUSE A VALID AGREEMENT EXISTS BETWEEN THE PARTIES, AND DEFENDANT HAS ADMITTED THE EXISTENCE OF THE CONTRACT IN COURT.

Existence of Contract Admitted in Court. A contract that does not satisfy the requirements of *Commercial Code Section 2201(1)* but is valid in other respects, is enforceable if the party against whom enforcement is sought admits in his or her pleading, testimony, or otherwise in court, that a contract for sale was made, in which case the contract is enforceable with respect to the quantity of goods admitted (*Com. Code § 2201(3)(b)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that an enforceable contract for the sale of goods exists between plaintiff and defendant, on the ground that although a formal contract does not exist, the defendant has admitted the existence of the contract in court [*see Com. Code § 2201(3)(b)*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the contract is outside the statute of frauds. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should describe defendant's admission, and show that the contract has been confirmed with

respect to the quantity of goods admitted.

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20-206 California Points & Authorities § 206.33

§ 206.33 Supporting Contention That Enforceable Contract for Sale of Goods Exists--Statute of Frauds Does Not Bar Enforcement--Payment Made or Goods Accepted [Com. Code § 2201(3)(c)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial appellate brief.*]

AN ENFORCEABLE CONTRACT FOR THE SALE OF GOODS BETWEEN PLAINTIFF AND DEFENDANT EXISTS BECAUSE A VALID AGREEMENT EXISTS BETWEEN THE PARTIES, AND _____ [PLAINTIFF *or* DEFENDANT], AS BUYER, HAS _____ [RECEIVED AND ACCEPTED *or* PAID FOR] THE GOODS.

A. Payment Made or Goods Accepted. A contract that does not satisfy the requirements of *Commercial Code Section 2201(1)* but is valid in other respects is enforceable with respect to goods for which payment has been made and accepted, or that have been received and accepted pursuant to *Commercial Code Section 2606* (*Com. Code § 2201(3)(c)*).

[*Optional*] **B. Part Payment Made on Indivisible Unit.** A contract that does not satisfy the requirements of *Commercial Code Section 2201(1)* but is valid in other respects is enforceable if part payment is made on the sale of an indivisible unit (*Lockwood v. Smigel (1971) 18 Cal. App. 3d 800, 803-804, 96 Cal. Rptr. 289*).

[*Optional*] **C. Goods Delivered to Third Party at Buyer's Request.** A contract that does not satisfy the requirements of *Commercial Code Section 2201(1)* but is valid in other respects is enforceable with respect to goods that have been received and accepted when the goods are delivered to a third person, at the direction of the buyer (*Dairyman's Cooperative Creamery Assn. v. Leipold (1973) 34 Cal. App. 3d 184, 188, 109 Cal. Rptr. 753*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that an enforceable contract for the sale of goods exists between plaintiff and defendant, on the ground that the buyer has either paid for the goods or received and accepted them [*see Com. Code § 2201(3)(c)*]. This contention may be used by the seller, for example, to assert the existence of a contract if the buyer has accepted goods under an agreement between the parties, but refuses to pay for them on the ground that no contract exists [*see, e.g., Dairyman's Cooperative Creamery Assn. v. Leipold (1973) 34 Cal. App. 3d 184, 188, 109 Cal. Rptr. 753]* . It may be used by the buyer, for example, to assert an entitlement to goods that were not delivered, for which payment was made [*see, e.g., Lockwood v. Smigel (1971) 18 Cal. App. 3d 800, 802, 96 Cal. Rptr. 289]* . Optional Paragraph B is for use by a buyer when the contract sought to be enforced is based on part payment made on an indivisible unit. Optional Paragraph C is for use by a seller when the contract sought to be enforced is based on goods delivered to a third person at the direction of the buyer.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the contract is outside the statute of frauds. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should show that the buyer under the contract has either paid for the goods or accepted them, and that the contract has been confirmed with respect to those goods. If appropriate, counsel should show that the goods were delivered to a third person at the direction of the buyer, in accordance with the agreement between the seller and buyer.

[3] Discussion of Authorities

[a] Part Payment Made on Indivisible Unit

In ***Lockwood v. Smigel*** *(1971) 18 Cal. App. 3d 800, 96 Cal. Rptr. 289* , the buyer of an automobile brought an action against the seller to enforce an oral contract. Plaintiff and defendant entered into an oral contract for the sale of an automobile for $11,400, $100 of which was to be paid on acceptance of the offer, and the balance on delivery. Plaintiff paid defendant the $100, and defendant failed to deliver the vehicle, having sold it to someone else. The trial court sustained defendant's demurrer without leave to amend, and plaintiff appealed.

The court of appeal reversed (*18 Cal. App. 3d 800, 804)* . The court framed the issue presented as whether under *Com. Code § 2201(3)(c)*, an oral contract for the sale of an automobile (an indivisible unit) is made enforceable by reason of a part payment (*18 Cal. App. 3d 800, 801)* . The oral contract, as pleaded, would have been enforceable under law in effect prior to the enactment of *Com. Code § 2201(3)(c)*, because under former Civ. Code § 1624a, an oral contract for the sale of goods was enforceable if the buyer gave part payment. In place of that rule, *Com. Code § 2201(3)(c)* now states that the contract is enforceable with respect to goods for which payment has been made (*18 Cal. App. 3d 800, 802)* . The official comments to the Uniform Commercial Code note that when the goods are apportionable, the contract is enforceable only with respect to the portion for which payment has been made (*18 Cal. App. 3d 800, 802-803)* . The text of the provision, however, is ambiguous with respect to a part payment on an indivisible unit. The court noted that the purpose of the statute of frauds (*Com. Code § 2201*) is to prevent the enforcement of alleged promises that never were made; it is not to justify contractors in repudiating promises that were in fact made. (*18 Cal. App. 3d 800, 803)* . The new requirement that part payment validates the contract only with respect to goods for which payment has been made is an exception to the policy of liberalization under the Commercial Code, exemplified by its validation of some written memoranda that did not qualify under prior law (*18 Cal. App. 3d 800, 803-804)* . The court stated that the policies of the law were well served by enforcement of the contract alleged in the instant case. When there is part payment instead of a memorandum, this fact evidences the existence of a contract and identifies the party to be charged, that is, the seller who received the money. If the buyer is claiming to have purchased no more than one unit, there can be no dispute over quantity. The possibility that other terms of the bargain may be disputed is not a ground for nonenforcement, because a memorandum that satisfies the statute need not state all of the terms fully or accurately. The

statutory policy that under prior law permitted the enforcement of oral contracts on proof of part payment is equally sound under the Commercial Code, as applied to the sale of an indivisible unit (*18 Cal. App. 3d 800, 804)* .

[b] Goods Delivered to Third Party at Buyer's Request

In ***Dairyman's Cooperative Creamery Assn. v. Leipold*** *(1973) 34 Cal. App. 3d 184, 109 Cal. Rptr. 753* , a seller of dairy products brought an action against a broker, seeking to enforce an oral contract for the purchase of powdered milk. Defendant did not deny that he ordered the goods, but claimed he was not obligated to pay because he acted as a broker rather than a principal, and because the oral agreement was unenforceable under the statute of frauds. The trial court found in favor of plaintiff and awarded damages. Defendant appealed.

The court of appeal affirmed (*34 Cal. App. 3d 184, 189)* . The court set forth the substance of the statute of frauds pursuant to *Com. Code § 2201* (*34 Cal. App. 3d 184, 186)* . The court stated that the oral agreement fell within the exception to the statute of frauds under *Com. Code § 2201(3)(c)* because the milk was delivered to a third party at the direction of defendant. The seller's delivery of goods to a third person at the direction of the buyer was effective to transfer title to the buyer; the receipt and acceptance of the milk by the third party satisfied the statute. The court rejected the defendant's contention that under *Com. Code § 2201(3)(c)*, the receipt and acceptance of the goods must be by the buyer or the buyer's authorized agent, and not some unrelated third party. The adoption of the Commercial Code has not changed the decisional law of California. According to prevailing law, when delivery of goods is made to a third person under the direction of the buyer, it is sufficient to take the case out of the statute. Moreover, defendant's position is inconsistent with the principles of liberal construction of the Commercial Code. The Commercial Code was adopted to simplify, clarify, and modernize the law governing commercial transactions, and to permit the continued expansion of commercial practices to custom, usage, and agreement of the parties (*34 Cal. App. 3d 184, 188)* .

[4] Additional Authorities

[a] Payment Made or Goods Accepted

In *Del E. Webb Corp. v. Structural Materials Co. (1981) 123 Cal. App. 3d 593, 176 Cal. Rptr. 824* , a general contractor brought an action against a building-material supplier for breach of a subcontract agreement. The court of appeal reversed the trial court's dismissal entered on the sustaining of defendant's demurrer without leave to amend. The court held that inasmuch as plaintiff paid in full for all the materials to be furnished under an oral contract, the contract was enforceable as an exception to the statute of frauds, pursuant to *Com. Code § 2201(3)* (*123 Cal. App. 3d 593, 606-607)* .

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20-206 California Points & Authorities § 206.34

§ 206.34 Supporting Contention That Enforceable Contract for Sale of Goods Exists--Statute of Frauds Does Not Bar Enforcement by Seller Against Buyer--Goods Specially Manufactured for Buyer [Com. Code § 2201(3)(a)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial appellate brief.*]

AN ENFORCEABLE CONTRACT FOR THE SALE OF GOODS BETWEEN PLAINTIFF AND DEFENDANT EXISTS BECAUSE A VALID AGREEMENT EXISTS BETWEEN THE PARTIES, UNDER WHICH PLAINTIFF WAS OBLIGATED TO MANUFACTURE GOODS SPECIALLY FOR DEFENDANT; THE GOODS ARE NOT SUITABLE FOR RESALE TO OTHER BUYERS; AND PLAINTIFF MADE FIRM COMMITMENTS FOR THEIR _____ [MANUFACTURE *or* PROCUREMENT] PRIOR TO ANY REPUDIATION OF THE AGREEMENT BY DEFENDANT.

Specially Manufactured Goods. A contract that does not satisfy the requirements of *Commercial Code Section 2201(1)* but is valid in other respects is enforceable if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, and the seller, before notice of repudiation is received and under circumstances that reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement (*Com. Code § 2201(3)(a)*; *Distribu-Dor, Inc. v. Karadanis (1970) 11 Cal. App. 3d 463, 467-469, 90 Cal. Rptr. 231*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that an enforceable contract for the sale of goods exists between plaintiff seller and defendant buyer, on the ground that although a formal contract does not exist, the goods were to be specially manufactured for defendant, plaintiff is unable to resell the goods to other buyers, and prior to any repudiation by defendant, plaintiff began manufacture or made commitments for the procurement of the goods [*see Com. Code § 2201(3)(a)*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the contract is outside the statute of frauds. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should show that the goods were specially manufactured for defendant, that because of their nature, the goods were unsuitable for sale to other buyers, and that prior to any repudiation by defendant, plaintiff either substantially began manufacture, or made a commitment to procure the goods.

[3] Discussion of Authorities

[a] Specially Manufactured Goods

The facts and procedural background of ***Distribu-Dor, Inc. v. Karadanis*** *(1970) 11 Cal. App. 3d 463, 90 Cal. Rptr. 231* , are discussed in *§ 206.37[3][a]*. In *Distribu-Dor*, the court held that an intermediate seller is entitled to damages based on lost profits on the buyer's wrongful rejection or repudiation of acceptance of goods. Preliminarily, the court noted that although the trial court found no express written contract, it made no finding regarding evidence submitted that an express oral contract existed within the estoppel exception to the statute of frauds (*11 Cal. App. 3d 463, 467)* . Plaintiff testified that the mirrors he ordered were of an unusual size, and were not readily resaleable; that many of them had to be recut and edged at great expense and loss; and that defendant's order distorted his company's inventory beyond normal requirements. *Com. Code § 2201(3)(a)* requires a written contract for sale of goods in an amount over $500 unless the goods are to be specially manufactured for the buyer; the goods are not suitable for resale in the ordinary course of the seller's business; and the seller, before receiving notice of repudiation, and under circumstances that reasonably indicate that the goods are for the buyer, has already started the manufacture or has attempted to procure the goods. Under this provision, a bona fide business transaction is evidenced by a seller's conduct that reasonably indicates that the goods are for the buyer. Therefore, the court held there was no justification in holding one portion of the contract enforceable and one not (*11 Cal. App. 3d 463, 468)* . *Com. Code § 2201(3)(a)* clearly codifies one aspect of the general rule that does not permit a party to plead the bar of the statute of frauds if it represents to another the intention to enter an oral contract, and the other pary changes its position in reliance on the representation. Strict adherence to the statute of frauds has been abandoned in favor of certain limited exceptions to promote equity and fair dealing between parties. The court concluded that plaintiff had a valid contract for sale of the mirrors (*11 Cal. App. 3d 463, 469)* .

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20-206 California Points & Authorities § 206.35

§ 206.35 Opposing Contention That Enforceable Contract for Sale of Goods Exists--Statute of Frauds Bars Enforcement--Writing Insufficient to Show Existence of Contract [Com. Code § 2201(1)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial appellate brief.*]

THE PURPORTED AGREEMENT BETWEEN PLAINTIFF AND DEFENDANT IS UNENFORCEABLE BY VIRTUE OF THE STATUTE OF FRAUDS BECAUSE THERE IS NO WRITING SUFFICIENT TO INDICATE THAT A CONTRACT FOR SALE HAS BEEN MADE BETWEEN THE PARTIES AND SIGNED BY THE DEFENDANT OR HIS/HER AUTHORIZED AGENT OR BROKER.

Statute of Frauds. Except as otherwise provided in *Commercial Code Section 2201*, a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties, and signed by the party against whom enforcement is sought, or by his or her authorized agent or broker (*Com. Code § 2201(1)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that an enforceable contract for the sale of goods exists between plaintiff and defendant. The ground for opposition is that there is not writing sufficient to indicate that a contract for sale has been made [*see Com. Code § 2201(1)*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the contract is unenforceable under the statute of frauds. For example, they may be combined with points and authorities in support of a motion for summary judgment on the ground that the alleged agreement is unenforceable pursuant to the statute of frauds. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should show that any writing asserted by plaintiff to evidence an agreement is insufficient for that purpose.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in §§ 206.30* and *206.31*.

[b] Effect of Statute of Frauds

Failure to satisfy the requirements of *Com. Code § 2201* does not render the contract void for all purposes, but merely prevents it from being judicially enforced in favor of a party to the contract [*see* U.C.C. Comment 4 to *Com. Code § 2201*].

[c] Related Pleading and Practice Forms

For discussion and forms relating to commercial sales, see California Forms of Pleading and Practice, Ch. 500, *Sales: Sales Under the Commercial Code* (Matthew Bender).

[3] Additional Authorities

[a] Statute of Frauds

In *C.R. Fedrick, Inc. v. Borg-Warner Corp. (9th Cir. 1977) 552 F.2d 852* , a contractor brought a breach-of-contract action against a pump supplier, seeking to enforce an oral contract. The court of appeals affirmed summary judgment for defendant on the ground that the statute of frauds (*Com. Code § 2201(1), (2)*) barred the action. The court held, inter alia, that plaintiff's letters to defendant, which expressed plaintiff's intention to purchase the pumps from defendant based on defendant's telephonic bid regarding a certain construction contract, were insufficient to constitute confirmation of a contract. The letters were, at most, self-serving statements of actions taken by plaintiff (*552 F.2d 852, 855)* .

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20-206 California Points & Authorities § 206.36

§ 206.36 Opposing Contention That Enforceable Contract for Sale of Goods Exists--Acceptance Made Conditional on Assent to Additional Terms [Com. Code § 2207(1)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

THE PURPORTED AGREEMENT BETWEEN PLAINTIFF AND DEFENDANT IS UNENFORCEABLE BECAUSE ACCEPTANCE OF THE OFFER WAS EXPRESSLY MADE CONDITIONAL ON ASSENT TO ADDITIONAL OR DIFFERENT TERMS.

Additional or Different Terms. No acceptance under *Commercial Code Section 2207(1)* exists when the conditional nature of an acceptance proposing additional or different terms is clearly expressed (*PMC Inc. v. Porthole Yachts Ltd. (1998) 65 Cal. App. 4th 882, 888-889, 76 Cal. Rptr. 2d 832* ; *Textile Unlimited, Inc. v. A. BMH and Co. Inc. (9th Cir. 2001) 240 F.3d 781, 787-788)* .

[2] Comments

[a] Use of Form

These points and authorities are for use in opposing the contention that an enforceable contract for the sale of goods exists between plaintiff and defendant. The ground for opposition is that there the proposal of additional or different terms did not constitute unconditional acceptance [*see Com. Code § 2207(1)*].

Counsel should insert argument in this form showing the relationship between the facts of the case and points of law stated.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the contract is unenforceable due to a conditional acceptance

proposing additional or different.

[3] Discussion of Authorities

[a] Additional or Different Terms

In ***PMC Inc. v. Porthole Yachts Ltd.*** *(1998) 65 Cal. App. 4th 882, 888-889, 76 Cal. Rptr. 2d 832* , the parties entered into an agreement for the purchase and sale of a motorsailer with payment consisting of cash and transfer of title to another boat. The transaction was contingent on completion of a trial run and marine survey on each vessel to the satisfaction of the acquiring party. The agreement required the buyer to accept or reject the trial run and surveys in writing or by telex on or before a certain date. The buyer's president accepted the trial run but proposed a price reduction of $100,000 upon review of the survey. The seller countered with a $50,000 price reduction. The buyer's president then signed a document designated Addendum B, which stated that the buyer and seller agreed to a survey allowance $50,000, and also that the parties agreed to extend the date for the buyer's final acceptance of the vessel to a new and later date. The addendum was sent to the seller's broker with a cover letter requesting extension of the final acceptance date as an alternative to letting the contract expire. The seller did not sign the addendum and the buyer then requested return of its deposit (*65 Cal. App. 4th 882, 885-886)* .

The buyer's broker filed an action by interpleading the deposit with the court. The buyer and seller each asserted a right to the deposit, with the buyer seeking declaratory relief and the seller claiming breach of contract. The superior court entered judgment in favor of the buyer and the seller appealed. The court of appeal found that while Addendum B did not expressly condition acceptance on the seller's agreement to extend the final acceptance date, the cover letter prepared by the buyer's agent clarified the addendum's conditional nature and placed the seller on notice that the buyer would not proceed with the transaction unless the seller agreed to extend the time for final acceptance of the yacht. The court found that the cover letter was a permissible method of expressing the conditional nature of the buyer's acceptance. All that was required under *Com. Code § 2207(1)* was a clear expression in a manner sufficient to notify the offeror that the offeree was unwilling to proceed with the transaction unless the additional or different terms were included in the contract. Given the timing of the addendum (sent on the last day to accept), the contents of the addendum which contained a new term (extended final date), and the cover letter emphasizing the conditional nature of the acceptance, the court held that the parties' original agreement expired by its terms since the buyer had not unconditionally accepted the survey by that expiration date (*65 Cal. App. 4th 882, 888-889)* .

The facts and procedural context of ***Textile Unlimited, Inc. v. A. BMH and Co. Inc.*** *(9th Cir. 2001) 240 F.3d 781* , are *set forth in § 206.30[3][b]*. Plaintiff's purchase order for goods containing the terms of the purchase was sent to defendant, which responded with an invoice containing additional terms (including a provision for binding arbitration in Georgia) followed by shipment of the goods. Defendant argued that a contract including the arbitration clause was formed pursuant to *Com. Code § 2207(1)* because the fine print provided that plaintiff was deemed to have accepted the new terms in full if it did not respond in 24 hours.

The court noted that under *Com. Code § 2207(1),* an acceptance will operate to create a contract even if additional or different terms are stated *unless* the acceptance is expressly conditioned on assent to the new terms. If a contract is created under *Com. Code § 2207(1),* then *Com. Code § 2207(2)* defines the terms of the contract. However, if the acceptance is expressly conditioned on the offeror's assent to the new terms, the acceptance operates as a counteroffer. If the counteroffer is accepted, a contract exists and the additional terms become part of the contract (citing *Diamond Fruit Growers Inc. v. Krack Corp.* (9th Cir. 1986), *794 F.2d, 1440, 1443)* . To qualify as an acceptance under *Com. Code § 2207(1),* an offeror must give specific and unequivocal assent to the supplemental terms. If the new provisions are not accepted, then no contract is formed. However, even when the parties' written expressions do not establish a binding agreement under *Com. Code § 2207(1),* a contract may arise based upon their subsequent conduct pursuant to *Com. Code § 2207(3).* In this case, acceptance was expressly made conditional on plaintiff's assent to additional or different terms, as defendant's documents provided that "Seller's willingness to sell yarn to you is conditioned on your

acceptance of these Terms of sale." Further, plaintiff did not give "specific and unequivocal assent" to the supplemental conditions, including the arbitration clause. Thus, a contract containing the new terms that defendant attempted to pin on plaintiff was not formed under *Com. Code § 2207(1)* (*240 F.2d 781, 787-788)* .

California Points & Authorities

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CHAPTER 206 SALES
PART II. FORMS
A. Sales Under Commercial Code

20-206 California Points & Authorities § 206.37

§ 206.37 Supporting Contention That Seller Entitled to Damages for Buyer's Breach of Contract--Buyer's Nonacceptance of Goods--Resale and Recovery of Damages [Com. Code §§ 2703, 2706, 2708]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial appellate brief.*]

PLAINTIFF SELLER IS ENTITLED TO RECOVER FROM DEFENDANT BUYER THE DIFFERENCE BETWEEN THE RESALE PRICE AND THE CONTRACT PRICE, PLUS INCIDENTAL DAMAGES ALLOWED UNDER THE COMMERCIAL CODE, BECAUSE DEFENDANT WRONGFULLY BREACHED THE CONTRACT FOR THE SALE OF GOODS AND PLAINTIFF CONSEQUENTLY RESOLD THE GOODS AFFECTED BY THE BREACH ACCORDING TO THE REQUIREMENTS UNDER THE COMMERCIAL CODE.

[*EITHER*]

A. Seller's Right of Resale and Damages Based on Contract Price. If the buyer wrongfully rejects or revokes acceptance of goods, fails to make a payment due on or before delivery, or repudiates part or all of the sale, then with respect to any goods directly affected and, if the breach is of the whole contract, then also with respect to the whole undelivered balance, the aggrieved seller may resell and recover damages as provided in *Commercial Code Section 2706* (*Com. Code § 2703(d)*).

B. Difference Between Contract Price and Resale Price Plus Incidental Damages. If the resale is made in good faith and in a commercially reasonable manner, the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under *Commercial Code Section 2710*, less expenses saved in consequence of the buyer's breach (*Com. Code § 2706(1)*).

[*OR*]

A. Seller's Right of Resale and Damages Based on Market Price. If the buyer wrongfully rejects or revokes acceptance of goods, fails to make a payment due on or before delivery, or repudiates part or all of the sale, then with respect to any goods directly affected and, if the breach is of the whole contract, then also with respect to the whole undelivered balance, the aggrieved seller may recover damages for nonacceptance, as provided in *Commercial Code Section 2708* (*Com. Code § 2703(e)*).

B. Difference Between Market Price and Contract Price Plus Incidental Damages. The measure of damages for nonacceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price, together with any incidental damages provided in *Commercial Code Section 2710*, less expenses saved because of the buyer's breach, and subject to *Commercial Code Section 2708(2)* and to the provisions regarding proof of market price under *Commercial Code Section 2723* (*Com. Code § 2708(1)*).

[*Optional*] **C. Lost Profits Plus Incidental Damages.** If the measure of damages provided in *Commercial Code Section 2708(1)* is inadequate to put the seller in as good a position as performance would have done, then the measure of damages is the profit (including reasonable overhead) that the seller would have made from full performance by the buyer, together with any incidental damages provided in *Commercial Code Section 2710*, due allowance for costs reasonably incurred and due credit for payments or proceeds of resale (*Com. Code § 2708(2)*).

[*Optional*] **D. Intermediate Seller Entitled to Lost Profits.** The award of damages based on the difference between the contract price and the market price, pursuant to *Commercial Code Section 2708(1)*, does not adequately compensate an intermediate seller on the buyer's repudiation of an agreement to purchase goods; the proper measure of damages is the dealer's anticipated profit, pursuant to *Commercial Code Section 2708(2)* (*Distribu-Dor, Inc. v. Karadanis (1970) 11 Cal. App. 3d 463, 470, 90 Cal. Rptr. 231*).

[*Optional*] **E. Lost-Volume Seller Entitled to Lost Profits Without Setoff.** When a buyer repudiates a fixed-price contract to purchase goods, *Commercial Code Section 2708(2)* allows courts to award lost profits under the contract to the seller who proves that he or she is a "lost-volume seller." The seller must show that even though he or she resold the contract goods, sale to the third party would have been made regardless of buyer's breach (*National Controls, Inc. v. Commodore Bus. Machines, Inc. (1985) 163 Cal. App. 3d 688, 697, 209 Cal. Rptr. 636*).

[*CONTINUE*]

F. Definition of Incidental Damages. Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses, or commissions incurred in stopping delivery, in the transportation, care, and custody of goods after the buyer's breach, in connection with return or resale of the goods, or otherwise resulting from the breach (*Com. Code § 2710*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the plaintiff seller is entitled to recover damages based on resale of the goods following the defendant buyer's breach of the contract [*see Com. Code §§ 2703(d)* (right of resale), 2706(1) (measure of damages)]. The first alternative Paragraphs A and B are for use to apply the measure of damages based on resale and recovery of the difference between the contract price and the resale price. The second alternative Paragraphs A through E are for use to apply the measure of damages based on recovery of damages for nonacceptance. Optional Paragraph C is for use to apply the measure of damages for lost profits. Optional Paragraph D is for use if Optional Paragraph C is used, and plaintiff is an intermediate seller. Optional Paragraph E is for use if

Optional C is used, and plaintiff is a lost-volume seller. For a discussion of the circumstances under which each measure of damages is appropriate, see *§ 206.37[2][b]*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the seller's measure of damages on the buyer's nonacceptance or repudiation. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should set forth the facts of the breach and the resale, and apply the appropriate measure of damages.

[b] Appropriate Test for Measure of Damages

These points and authorities set forth different standards for the measure of damages to which a seller is entitled after a buyer's breach of a sales contract based on nonacceptance or repudiation. Under most circumstances, the measure of damages set forth in *Com. Code § 2706* is appropriate. For example, if the goods have not been resold in a commercially reasonable manner as specified in that statute, the measure of damages under *Com. Code § 2708* is applicable [*see National Controls, Inc. v. Commodore Bus. Machines, Inc. (1985) 163 Cal. App. 3d 688, 696, 209 Cal. Rptr. 636* (*discussed under § 206.37[3*][b])]. With regard to *Com. Code § 2708*, the measure of damages is the difference between the market price at the time of tender and the unpaid contract price or, in the alternative, the loss of profits to the seller, whichever is greater [*Nixdorf Computer, Inc. v. Jet Forwarding, Inc. (9th Cir. 1978) 579 F.2d 1175, 1177]* . Under this provision, the appropriate measure of damages is the difference between the market price and contract price under *Com. Code § 2708(1)* unless special circumstances exist, in which case the measure of damages based on lost profits under *Com. Code § 2708(2)* is appropriate. Special circumstances for this purpose exist, for example, if plaintiff is an intermediate seller; in that case, the difference between the market price and contract price is not a true representation of the seller's damages, and plaintiff is entitled to lost profits under *Com. Code § 2708(2)* [*Distribu-Dor, Inc. v. Karadanis (1970) 11 Cal. App. 3d 463, 470, 90 Cal. Rptr. 231* (*discussed under § 206.37[3*][a])].

[c] Notice of Resale

If the resale of goods is at a private sale, the seller must give the buyer reasonable notification of the intention to sell [*Com. Code § 2706(3)*]. The seller must also give the buyer reasonable notice of the time and place of a public resale of the goods, unless the goods are perishable or threaten to decline in value rapidly [*Com. Code § 2706(4)(b)*]. For points and authorities in opposition to the seller's entitlement to damages, based on *Com. Code § 2706*, see *§ 206.41*.

[d] Proof of Market Price

If an action based on anticipatory repudiation comes to trial before the time for performance with respect to some or all of the goods, any damages based on market price, pursuant to *Com. Code § 2708* or *2713*, are determined according to the price of the goods prevailing at the time when the aggrieved party learned of the repudiation [*Com. Code § 2723(1)*].

If evidence of a price prevailing at the times or places described in the Commercial Code [*see Com. Code § 2101 et seq.*] is not readily available, the price prevailing within any reasonable time before or after the time described, or at any other place that in commercial judgment or under usage of trade serves as a reasonable substitute for the one described, may be used, making any proper allowance for the cost of transporting the goods to or from the other place [*Com. Code § 2723(2)*].

Evidence of a relevant price prevailing at a time or place other than the one described in the Commercial Code [*see Com. Code § 2101 et seq.*] offered by one party is not admissible unless and until that party has given the other party notice that the court finds sufficient to prevent unfair surprise [*Com. Code § 2723(3)*].

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 206.38 -206.41* may be used to oppose the contention supported by these points and authorities.

[f] Related Pleading and Practice Forms

For discussion and forms relating to commercial sales, see California Forms of Pleading and Practice, Ch. 500, *Sales: Sales Under the Commercial Code* (Matthew Bender).

[3] Discussion of Authorities

[a] Intermediate Seller Entitled to Lost Profits

In ***Distribu-Dor, Inc. v. Karadanis*** *(1970) 11 Cal. App. 3d 463, 90 Cal. Rptr. 231* , plaintiff, an intermediate seller of bathroom fixtures, brought an action against a contractor for breach of contract. Plaintiff, after extensive discussions with defendant regarding supply requirements, asked defendant to sign the written price quotation. Defendant refused, stating that his word was his bond. Plaintiff took measurements for custom mirrors at the construction site, and ordered the mirrors. Subsequently, defendant told plaintiff he had decided to do business with another firm. The trial court specifically found there was no written contract, but made no finding with respect to the existence of an oral express contract. It held that plaintiff was not entitled to recover because he failed to prove damages. Plaintiff appealed.

The court of appeal reversed (*11 Cal. App. 3d 463, 471)* . The court first determined that a valid contract existed for the sale of goods (discussed in *§ 206.34[3][a]*). The court also stated that *Com. Code § 2703(e)* provides that when the buyer wrongfully rejects or revokes acceptance of goods, fails to make a payment due on or before delivery, or repudiates with respect to a part or the whole, then with respect to any goods directly affected and, if the breach is of the whole contract, then also with respect to the whole undelivered balance, the aggrieved seller may recover damages for nonacceptance, or, in a proper case, the price. *Com. Code § 2708(1)* provides that, subject to *Com. Code § 2708(2)*, and to provisions regarding proof of market price, the measure of damages for nonacceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price, together with any recoverable incidental damages, but less expenses saved in consequence of the buyer's breach. *Com. Code § 2708(2)* provides that if the measure of damages under *Com. Code § 2708(1)* is inadequate to put the seller in as good a position as performance would have done, then the measure of damages is the profit that the seller would have made from full performance by the buyer, together with recoverable incidental damages (*11 Cal. App. 3d 463, 469)* . The court noted that the trial court did not indicate which measure of damages it considered. The legislative history of *Com. Code § 2708* indicates that it is similar to former Civ. Code § 1784(3), under which a "middleman," or intermediate seller, is a special circumstance; the measure of damages based on the difference between the market price and contract price is not a true representation of the seller's damages. Plaintiff in the instant case was acting as a "middleman," that is, one who buys at one price from a manufacturer for resale at a higher price. Therefore, the court concluded, the measure of damages under *Com. Code § 2708(2)* must be applied, and plaintiff was entitled to lost profits. The court stated that uncertainty as to the fact of damages, that is, the nature, existence, or cause of the damages, is fatal. However, the same certainty as to the amount of damage is not required (*11 Cal. App. 3d 463, 470)* .

[b] Lost-Volume Seller Entitled to Lost Profits Without Setoff

The facts and procedural background of ***National Controls, Inc. v. Commodore Bus. Machines, Inc.*** *(1985) 163 Cal. App. 3d 688, 209 Cal. Rptr. 636* , are discussed in *§ 206.30[3][b]*. In *National*, the court held that the parties' conduct supported the finding that they entered into a contract for the sale of goods (*163 Cal. App. 3d 688, 693-694)* . The court also discussed the issue of allowable damages. Defendant asserted that plaintiff was not entitled to damages for lost profits under *Com. Code § 2708(2)*; but that if lost profits were properly awarded, defendant was entitled under *Com. Code § 2708* to a credit for the proceeds of plaintiff's resale of the goods. The court stated that damages caused by

a buyer's breach or repudiation of a sales contract are usually measured by the difference between the resale price of the goods and the contract price, pursuant to *Com. Code § 2706*. When it is not appropriate to use this difference to measure the seller's loss (for example, when the goods have not been resold in a commercially reasonable manner), the seller's measure of damages is the difference between the market and the contract prices, pursuant to *Com. Code § 2708(1)*. Ordinarily this measure results in recovery equal to the value of the seller's bargain. However, under certain circumstances, this formula is also not an adequate means to ascertain that value, and the seller may recover the loss of expected profits on the contract under *Com. Code § 2708(2)* (*163 Cal. App. 3d 688, 696)* . When buyers have repudiated a fixed-price contract to purchase goods, other jurisdictions have construed provisions embodying *Com. Code § 2708* to permit the award of lost profits under the contract to the seller who establishes that it is a "lost volume seller," that is, one who proves that even though it resold the contract goods, that sale to a third party would have been made regardless of the buyer's breach, and in addition to the sale to the buyer. The lost-volume seller must establish that had the breaching buyer performed, the seller would have realized profits from two sales (*163 Cal. App. 3d 688, 697)* . Although this rule has been criticized by some commentators, courts have nevertheless implemented it.

The court rejected defendant's contention that if plaintiff is entitled to lost profits under the contract, defendant should receive credit for the proceeds of the resale. The literal language of *Com. Code § 2708(2)* does provide some support for that contention, in that it allows "due credit for payments or proceeds of resale." However, courts in other jurisdictions have uniformly held that this provision does not apply to a lost-volume seller. Logically, lost-volume status, which entitles the seller to the formula under *Com. Code § 2708(2)* rather than that under *Com. Code § 2708(1)*, is inconsistent with a credit for the proceeds of resale (*163 Cal. App. 3d 688, 698)* . The whole concept of lost-volume status is that the sale of goods to the resale purchaser could have been made with other goods, had there been no breach (*163 Cal. App. 3d 688, 698-699)* . In essence, the original sale and the second sale are independent events, becoming related only after breach, as the original sale goods are applied to the second sale. To require a credit for the proceeds of resale is to deny the essential element that entitles the lost-volume seller to *Com. Code § 2708(2)* in the first place, that is, the mutual independence of the contract and the resale. Practically, if the "due credit" clause is applied to the lost-volume seller, the measure of damages is no difference from the recovery under *Com. Code § 2708(1)*, under which the seller recovers the contract-market differential and the profit made on resale. If the "due credit" provision is applied, the seller recovers only the profit made on resale plus the difference between the resale price and the contract price, an almost identical measure to *Com. Code § 2708(1)*. If the "due credit" clause is applied to the lost-volume seller, the damage measure of "lost profits" is rendered nugatory, and the seller is not put in as good a position as if there had been performance. The court observed that at all relevant times, plaintiff's manufacturing plant had the capacity to supply both defendant and the third party to which it resold the goods. Accordingly, the trial court correctly determined that plaintiff was a lost-volume seller, that the usual "contract price minus market price" rule under *Com. Code § 2708(1)* was inadequate to put plaintiff in as good a position as performance would have, and that it was therefore entitled to lost profits on the contract with defendant, without any setoff for profits on the resale (*163 Cal. App. 3d 688, 699)* .

[4] Additional Authorities

[a] Seller's Right of Resale and Damages Based on Contract Price

In *Allied Grape Growers v. Bronco Wine Co. (1988) 203 Cal. App. 3d 432, 249 Cal. Rptr. 872* , a cooperative corporation of grape growers brought an action against a grape-crushing company based on defendant's refusal to accept a portion of the grapes it had ordered. After attempting unsuccessfully to resell the remaining grapes to wineries, plaintiff created a subsidiary corporation that purchased the crop. Although the prevailing price of the grapes was $100 per ton, the value of the grapes to the subsidiary was $70 per ton; to minimize the damage, the subsidiary paid $85 per ton, and split the $30 loss with plaintiff. Plaintiff sought damages in the amount of $15 per ton. The court of appeal upheld the trial court's judgment for plaintiff, holding, inter alia, that under *Com. Code § 2706*, plaintiff's resale was in good faith. The court specifically held that the statute does not prohibit resale to affiliated entities, nor is that type of sale per se commercially unreasonable (*203 Cal. App. 3d 432, 445-447)* .

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20-206 California Points & Authorities § 206.38

§ 206.38 Opposing Contention That Seller or Buyer Entitled to Damages for Breach of Contract--Action Barred by Expiration of Limitations Period [Com. Code § 2725]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial appellate brief.*]

THE CONTRACT THAT IS THE SUBJECT OF THIS ACTION IS NOT ENFORCEABLE BECAUSE THE ACTION ON IT IS BARRED BY THE EXPIRATION OF THE LIMITATIONS PERIOD.

A. Limitations Period. An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it (*Com. Code § 2725(1)*).

B. Accrual of Cause of Action. A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach (*Com. Code § 2725(2)*).

[*Optional*] **C. Limitations Period for Subsequent Action.** If an action commenced within the time limited by *Commercial Code Section 2725(1)* is so terminated as to leave available a remedy by another action for the same breach, the other action may be commenced after the expiration of the time limited and within six months after the termination of the first action, unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute (*Com. Code § 2725(3)*).

[*Optional*] **D. Statute Does Not Affect Tolling.** *Commercial Code Section 2725* does not alter the law on tolling of the statute of limitations (*Com. Code § 2725(4)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the action on a contract for the sale of goods is enforceable and that plaintiff, whether seller or buyer, is entitled to damages. The ground of the contention is that the action on the contract is barred pursuant to the expiration of the limitations period [*see Com. Code § 2725*]. Optional Paragraph C is for use if the action on the contract is one brought subsequent to a previous action terminated prior to the expiration of the limitations period. Optional Paragraph D is for use to assert that the statute does not affect the law on tolling.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue of the expiration of the limitations period. For example, they may be combined with points and authorities in support of a demurrer to the complaint. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should set forth the date of the accrual of the cause of action, and show that the applicable limitations expired before the date the complaint was filed.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in §§ 206.37* and *206.42 -206.45*.

[b] Related Pleading and Practice Forms

For discussion and forms relating to commercial sales, see California Forms of Pleading and Practice, Ch. 500, *Sales: Sales Under the Commercial Code* (Matthew Bender).

[3] Additional Authorities

[a] Limitations Period

In *Jack Heskett Lincoln-Mercury, Inc. v. Metcalf (1984) 158 Cal. App. 3d 38, 204 Cal. Rptr. 355* , an automobile dealer brought an action against a buyer, seeking damages in a deficiency action following repossession of the vehicle. The court of appeal reversed the trial court's dismissal based on application of a one-year period of limitations. The reviewing court held that the applicable limitations period is four years, pursuant to *Com. Code § 2725*, based on an action under the Rees-Levering Motor Vehicle Sales and Finance Act (*Civ. Code § 2981 et seq.*) seeking a deficiency judgment on a conditional sales contract, rather than the recovery of any penalty or forfeiture (*158 Cal. App. 3d 38, 41-43)* . For points and authorities relating to the Rees-Levering Act, see *§ 206.180* et seq.

In *Therma-Coustics Manufacturing, Inc. v. Borden, Inc. (1985) 167 Cal. App. 3d 282, 213 Cal. Rptr. 611* , the court of appeal affirmed the trial court's holding that a one-year limitations provision barred the action, which was brought 21 months after the causes of action arose (*167 Cal. App. 3d 282, 300)* . The court held that the limitations provision, included in defendant's sales documents, became part of the contract as an incorporated additional term, pursuant to *Com. Code § 2207* [*see § 206.30*], and that, in view of *Com. Code § 2725* (stating that the parties may shorten the period to one year), the one-year period was not unreasonable (*167 Cal. App. 3d 282, 295-296)* .

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20-206 California Points & Authorities § 206.39

§ 206.39 Opposing Contention That Seller Entitled to Damages for Buyer's Breach of Contract--Seller Failed Adequately to Tender Goods [Com. Code §§ 2503, 2507(1)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial appellate brief.*]

PLAINTIFF SELLER IS NOT ENTITLED TO RECOVER FROM DEFENDANT BUYER FOR BREACH OF THE CONTRACT FOR THE SALE OF GOODS THAT IS THE SUBJECT OF THIS ACTION BECAUSE PLAINTIFF FAILED ADEQUATELY TO TENDER THE GOODS TO DEFENDANT.

A. Buyer's Duty of Acceptance of Goods Is Conditional. Tender of delivery is a condition to the buyer's duty to accept the goods and, unless otherwise agreed, to the buyer's duty to pay for them. Tender is required before the seller is entitled to acceptance of the goods and to payment according to the contract (*Com. Code § 2507(1)*).

B. Seller's Duty to Deliver Goods. Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition, and give the buyer any notification reasonably necessary to enable the buyer to take delivery. The manner, time, and place for tender are determined by the agreement and the Commercial Code (*Com. Code § 2503(1)*; *see Com. Code § 2101 et seq.*).

C. Tender Requirements. Tender must be at a reasonable hour, and tendered goods must be kept available for the period reasonably necessary to enable the buyer to take possession; but unless otherwise agreed, the buyer must furnish facilities reasonably suited to the receipt of the goods (*Com. Code § 2503(1)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that plaintiff seller is entitled to recover damages arising from the buyer's breach of a contract for the sale of goods. The basis for the contention is that plaintiff

failed adequately to tender delivery of the goods [*see Com. Code § 2507(1)*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the buyer's conditional duty to accept the goods under a contract for the sale of goods. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should describe plaintiff's failure to tender the goods in a manner that satisfies plaintiff's duty to do so under the contract, and consequently, that defendant's duty to accept them did not arise. Counsel should discuss the requirements applicable to specified methods of tender under *Com. Code § 2503(2)-(5)*, set forth under § 206.39[2][c], if applicable.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 206.37*.

[b] Buyer's Conditional Duty

With respect to the buyer's conditional duty of payment, based on the seller's proper tender of goods, the "unless otherwise agreed" language of *Com. Code § 2507(1)* is directed primarily to cases in which payment in advance has been promised, or a letter of credit term has been included. "Payment according to the contract" contemplates immediate payment, payment at the end of an agreed credit term, payment by a time acceptance, and similar terms [*see* U.C.C. Comment 2 to *Com. Code § 2507*].

[c] Additional Requirements of Tender

The seller's duty of tender is specified under *Com. Code § 2503(2)-(5)*, depending on the particular methods of delivery to which the parties have agreed. If the seller is under an obligation to ship the goods, under *Com. Code § 2504*, the seller must comply with the provisions of that statute [*Com. Code § 2503(2)*]. If the seller is required to deliver at a particular destination, the seller must comply with *Com. Code § 2503(1)*, and, when applicable, 2503(4) (goods in possession of a bailee), and 2503(5) (delivery of documents) [*Com. Code § 2503(3)*].

[d] Place for Delivery

If no place or means of delivery is specified in a commercial contract for the sale of goods, the place for delivery is the seller's place of business, or, if none, the seller's residence, unless the contract involves the sale of identified goods that parties know are in some other place, in which case the goods must be delivered to that place [*Com. Code § 2308(a), (b)*; *see* U.C.C. Comment 1 to *Com. Code § 2308*].

[e] Shipping Terms

Unless otherwise agreed, the term F.O.B. (free on board) at a named place, even though used only in connection with the stated price, is a delivery term under which:

- When the term is F.O.B. the place of shipment, the seller must at that place ship the goods in the manner provided in *Com. Code § 2504*, and bear the expense and risk of putting them into the possession of the carrier [*Com. Code § 2319(1)(a)*; *see Com. Code § 2319(3)* (buyer's duty to give needed instructions)];

- When the term is F.O.B. the place of destination, the seller must at the seller's expense and risk transport the goods to that place and there tender delivery of them in the manner provided in *Com. Code § 2503* [*Com. Code § 2319(1)(b)*];

- When under *Com. Code § 2319(1)(a)* or *(b)*, the term is also F.O.B. vessel, car, or other vehicle, the seller must also, at the seller's expense and risk, load the goods on board. If the term is F.O.B. vessel, the buyer must name the vessel, and, in an appropriate case, the seller must comply with the provisions of *Com. Code § 2323* on the form of bill of lading [*Com. Code § 2319(1)(c)*; *see Com. Code § 2319(3)* (buyer's duty to give needed instructions)].

Unless otherwise agreed, the term F.A.S. (free alongside) vessel, at a named port, even though used only in connection with the stated price, is a delivery term under which the seller must [Com. Code: § 2319(2); *see Com. Code § 2319(3)* (buyer's duty to give needed instructions)]:

- At the seller's expense and risk, deliver the goods alongside the vessel in the manner usual in that port or on a dock designated and provided by the buyer; and

- Obtain and tender a receipt for the goods in exchange for which the carrier is under a duty to issue a bill of lading.

Under the terms F.O.B. vessel or F.A.S., the buyer must make payment against tender of the required documents, and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents, unless otherwise agreed [*Com. Code § 2319(4)*].

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20-206 California Points & Authorities § 206.40

§ 206.40 Opposing Contention That Seller Entitled to Damages for Buyer's Breach of Contract--Tendered Goods Failed to Conform to Contract [Com. Code § 2601]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial appellate brief.*]

PLAINTIFF SELLER IS NOT ENTITLED TO RECOVER FROM DEFENDANT BUYER FOR BREACH OF THE CONTRACT FOR THE SALE OF GOODS THAT IS THE SUBJECT OF THIS ACTION BECAUSE PLAINTIFF TENDERED GOODS [IN A MANNER] THAT DID NOT CONFORM TO THE REQUIREMENTS UNDER THE CONTRACT.

Tendered Goods Failed to Conform to Contract. If the goods or the tender of delivery fails in any respect to conform to the contract, the buyer may either reject the whole, accept the whole, or accept any commercial unit or units and reject the rest, unless otherwise agreed pursuant to *Commercial Code Sections 2718* and *2719*, regarding contractual limitations of remedy, and subject to *Commercial Code Section 2612*, regarding breach in installment contracts (*Com. Code § 2601*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that plaintiff seller is entitled to recover damages arising from the buyer's breach of a contract for the sale of goods. The basis for the contention is that plaintiff's tender of goods failed to conform to the requirements under the contract [*see Com. Code § 2601*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the plaintiff's failure to tender goods in conformance with the contract. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should compare plaintiff's tender of the goods with the terms of the contract in that respect, and describe the nonconformity.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 206.37*.

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20-206 California Points & Authorities § 206.41

§ 206.41 Opposing Contention That Seller Entitled to Damages for Buyer's Breach of Contract--Seller Failed to Notify Buyer of Resale of Goods [Com. Code § 2706]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial appellate brief.*]

PLAINTIFF SELLER IS NOT ENTITLED TO RECOVER FROM DEFENDANT BUYER FOR BREACH OF THE CONTRACT FOR THE SALE OF GOODS THAT IS THE SUBJECT OF THIS ACTION BECAUSE PLAINTIFF FAILED TO NOTIFY DEFENDANT OF THE RESALE OF THE GOODS.

[*EITHER*]

Seller Required to Notify Buyer of Private Resale. If the seller, pursuant to the seller's remedy under *Commercial Code Section 2706*, resells goods at a private sale, the seller must give the buyer reasonable notification of the intention to resell (*Com. Code § 2706(3)*).

[*OR*]

Seller Required to Notify Buyer of Public Resale. If the seller, pursuant to the seller's remedy under *Commercial Code Section 2706*, resells goods at a public sale, the sale must be made at a usual place or market for public sale, if one is reasonably available, and the seller must give the buyer reasonable notice of the time and place of the resale, unless the goods are perishable or threaten to decline in value rapidly; and, if the goods are not to be within the view of those attending the sale, the notification of sale must state the place where the goods are located, and provide for their reasonable inspection by prospective bidders (*Com. Code § 2706(4)(b), (c)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that plaintiff seller is entitled to recover damages arising from the buyer's breach of a contract for the sale of goods. The basis for the contention is that plaintiff failed to notify defendant of the resale of goods prior to a private or public sale [*see Com. Code § 2706(3), (4)*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the plaintiff's duty to notify the defendant prior to resale of the goods. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should describe plaintiff's resale of the goods, and show that plaintiff failed to comply with notification requirements with respect to the sale.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 206.37*.

[b] Requirements for Notification of Private Sale

The length of notification of a private sale depends on the urgency of the matter. Notification of the time and place of this type of sale is not required [*see* U.C.C. Comment 8 to *Com. Code § 2706*].

[c] Purpose for Notification of Public Sale

The purpose for the requirement of notification to the buyer of a public sale is to give the buyer an opportunity to bid or to secure the attendance of other bidders [*see* U.C.C. Comment 8 to *Com. Code § 2706*].

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20-206 California Points & Authorities § 206.42

§ 206.42 Supporting Contention That Buyer Entitled to Damages for Seller's Breach of Contract--Buyer's Remedies Regarding Accepted Goods [Com. Code § 2714]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial appellate brief.*]

PLAINTIFF BUYER IS ENTITLED TO RECOVER DAMAGES FROM DEFENDANT SELLER ARISING FROM DEFENDANT'S NONCONFORMITY OF TENDER OF THE GOODS, BASED ON PLAINTIFF'S ACCEPTANCE OF THE GOODS AND RESULTANT LOSS IN THE ORDINARY COURSE OF EVENTS.

A. Damages Recoverable After Acceptance of Nonconforming Goods. If the buyer has accepted goods and given notification pursuant to *Commercial Code Section 2607*, the buyer may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach, determined in any reasonable manner, and, in a proper case, may recover any incidental and consequential damages under *Commercial Code Section 2715* (*Com. Code § 2714(1), (3)*).

B. Buyer's Incidental Damages. [*See § 206.43, Paragraphs I, J.*]

C. Buyer's Consequential Damages. [*See § 206.43, Paragraph K.*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the plaintiff buyer is entitled to recover damages based on defendant seller's breach of the contract arising from defendant's delivery of nonconforming goods or delivery of goods in a manner not in compliance with the contract, when plaintiff has accepted the goods [*see Com. Code § 2714(1), (3)*]. For points and authorities supporting a buyer's right to recover damages for a seller's breach of warranty, see *§ 206.69*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the buyer's entitlement to remedies on acceptance of nonconforming goods. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should set forth damages based on the loss resulting in the ordinary course of events from acceptance of the nonconforming goods, determined in a reasonable manner.

[b] Deduction of Damages From Price

The buyer, on notifying the seller of the intention to do so, may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract [*Com. Code § 2717*; *Hughes Tool Co. v. Max Hinrichs Seed Co. (1980) 112 Cal. App. 3d 194, 202, 169 Cal. Rptr. 160* ; *see AmerisourceBergen Corp. v. Dialysist W., Inc. (9th Cir. 2006) 445 F.3d 1132, 1135-1136* , (construing Arizona statute identical to *Com. Code § 2717*; buyer may not set off contractual claim against debt on separate contract; statute pre-empts common law right of equitable set-off, in situations in which statute applies)].

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 206.47* may be used to oppose the contention supported by these points and authorities.

[d] Related Pleading and Practice Forms

For discussion and forms relating to commercial sales, see California Forms of Pleading and Practice, Ch. 500, *Sales: Sales Under the Commercial Code* (Matthew Bender).

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§ 206.43 Supporting Contention That Buyer Entitled to Damages for Seller's Breach of Contract--Buyer's Remedies Regarding Nondelivered or Rejected Goods [Com. Code §§ 2711, 2712, 2713(1), 2715]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial appellate brief.*]

PLAINTIFF BUYER IS ENTITLED TO RECOVER DAMAGES FROM DEFENDANT SELLER BASED ON _____ [*specify, e.g.,* THE DIFFERENCE BETWEEN THE COST OF COVER AND THE CONTRACT PRICE], ON DEFENDANT'S BREACH OF THE CONTRACT FOR THE SALE OF GOODS, ARISING FROM DEFENDANT'S _____ [NONDELIVERY *or* DELIVERY OF GOODS (IN A MANNER) NOT IN CONFORMANCE WITH THE TERMS OF THE CONTRACT AND PLAINTIFF'S CONSEQUENT REJECTION OF THE GOODS].

A. Buyer's Right to Cancel. If the seller fails to make delivery or repudiates, or the buyer rightfully rejects or justifiably revokes acceptance, then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract, the buyer may cancel (*Com. Code § 2711(1)*).

[*Optional*] **B. Breach Based on Installment Contract.** Whenever nonconformity or default with respect to one or more installments of an installment contract substantially impairs the value of the whole contract, there is a breach of the whole contract (*Com. Code § 2612(3)*).

[*EITHER, if buyer covers*]

C. Buyer's Right to Cover. Whether or not the buyer has canceled a contract for the sale of goods pursuant to *Commercial Code Section 2711(1)*, the buyer may recover so much of the price as has been paid, and, in addition, may cover and have damages under *Commercial Code Section 2712* with respect to all the goods affected, whether or not they have been identified to the contract (*Com. Code § 2711(1)(a)*).

D. Definition of Cover. After a breach within *Commercial Code Section 2711*, the buyer may cover by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller (*Com. Code § 2712(1)*).

E. Buyer's Right to Damages After Cover. The buyer may recover from the seller as damages the difference between the cost of cover and the contract price, together with any incidental or consequential damages defined under *Commercial Code Section 2715*, less expenses saved in consequence of the seller's breach (*Com. Code § 2712(2)*; *see KGM Harvesting Co. v. Fresh Network (1995) 36 Cal. App. 4th 376, 389, 42 Cal. Rptr. 2d 286*).

F. Buyer's Right to Other Remedies After Attempted Cover. Failure of the buyer to effect cover under *Commercial Code Section 2712* does not bar the buyer from any other remedy (*Com. Code § 2712(3)*).

[*OR, if buyer seeks damages under Com. Code § 2713*]

G. Buyer's Right to Recover Damages for Nondelivery. Whether or not the buyer has canceled a contract for the sale of goods under *Commercial Code Section 2711(1)*, the buyer may recover so much of the price as has been paid, and, in addition, may recover damages for nondelivery as provided in *Commercial Code Section 2713* (*Com. Code § 2711(1)(b)*).

[*CONTINUE, relettering as appropriate depending on which alternatives are selected above*]

H. Measure of Damages. The measure of damages for nondelivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach, and the contract price, together with any incidental and consequential damages provided in *Commercial Code Section 2715*, less expenses saved in consequence of the seller's breach, and subject to the provisions regarding proof-of-market price under *Commercial Code Section 2723* (*Com. Code § 2713(1)*).

I. Buyer's Incidental Damages. Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation, care, and custody of goods rightfully rejected, any commercially reasonable charges, expenses, or commissions in connection with effecting cover, and any other reasonable expense incident to the delay or other breach (*Com. Code § 2715(1)*).

[*Optional*] **J. Incidental Damages Include Storage and Handling Costs.** On nonacceptance of goods, a buyer's reasonable costs of storage and handling, and interest on that amount, constitute incidental damages (*S & R Metals, Inc. v. C. Itoh & Co. (America) (9th Cir. 1988) 859 F.2d 814, 818)* .

K. Buyer's Consequential Damages. Consequential damages resulting from the seller's breach include any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know, and that could not reasonably be prevented by cover or otherwise; and injury to person or property proximately resulting from any breach of warranty (*Com. Code § 2715(2)*).

[*Optional*] **L. Consequential Damages Include Lost Profits.** In addition to the difference between the market price and the contract price, the buyer can recover consequential damages, such as lost profits, to the extent they could not have been avoided by cover (*Sun-Maid Raisin Growers v. Victor Packing Co. (1983) 146 Cal. App. 3d 787, 791, 194 Cal. Rptr. 612*).

[*Optional*] **M. Seller That Knows Buyer Will Resell for Profit Is Liable for Lost Profits.** If the seller knows that the

buyer is in the business of reselling the goods, the seller is charged with knowledge that the buyer will be selling the goods in anticipation of a profit; therefore, absent a contractual provision against consequential damages, a seller in breach is liable for the buyer's resulting loss of profit (*Sun-Maid Raisin Growers v. Victor Packing Co. (1983) 146 Cal. App. 3d 787, 791-792, 194 Cal. Rptr. 612*).

[*Optional*] **N. Seller Has Burden of Proving Inadequate Mitigation.** Under *Commercial Code Section 2715*, the breaching party has the burden of proving the inadequacy of efforts to mitigate consequential damages (*Carnation Co. v. Olivet Egg Ranch (1986) 189 Cal. App. 3d 809, 818, 229 Cal. Rptr. 261*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that plaintiff buyer is entitled to recover damages based on defendant seller's breach of the contract arising from either defendant's nondelivery, or defendant's delivery of nonconforming goods or delivery of goods in a manner not in compliance with the contract, when plaintiff has rejected the goods for that reason [*see generally Com. Code §§ 2711* (right to cancel and cover), 2712 (right to damages after cover), 2713 (measure of damages), 2715 (incidental and consequential damages)]. Optional Paragraph B is for use to assert breach of an installment contract. Optional Paragraph J is for use to assert that incidental damages include storage and handling costs. Optional Paragraphs L and M are for use to seek damages based on lost profits. Optional Paragraph N is for use to assert that the breaching seller has the burden to prove that the buyer's attempted mitigation of consequential damages was inadequate.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the buyer's right to remedies based on the seller's breach of contract, after nondelivery or rejection of the goods. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should describe the seller's breach, and apply the appropriate remedy sought.

[b] Installment Contracts

An installment contract is one that requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause stating "each delivery is a separate contract," or equivalent language [*Com. Code § 2612(1)*]. The buyer may reject any installment that is nonconforming if the nonconformity substantially impairs the value of that installment and cannot be cured, or if the nonconformity is a defect in the required documents. However, if the nonconformity does not fall within *Com. Code § 2612(3)* (breach of the whole contract), and the seller gives adequate assurance of its cure, the buyer must accept that installment [*Com. Code § 2612(2)*]. When the seller breaches the whole contract, the aggrieved party nevertheless reinstates the contract by either accepting a nonconforming installment without giving seasonable notice of cancellation, bringing an action with respect only to past installments, or demanding performance of future installments [*Com. Code § 2612(3)*].

[c] Proof of Market Price

Market price is to be determined as of the place of arrival in cases of rejection after arrival or revocation of acceptance [*Com. Code § 2713(2)*].

If an action based on anticipatory repudiation comes to trial before the time for performance with respect to some or all of the goods, any damages based on market price, under *Com. Code § 2708* or *2713*, are determined according to the price of the goods prevailing at the time when the aggrieved party learned of the repudiation [*Com. Code § 2723(1)*].

If evidence of a price prevailing at the times or places described in *Com. Code § 2101 et seq.* is not readily available, the price prevailing within any reasonable time before or after the time described, or at any other place that in commercial judgment or under usage of trade serves as a reasonable substitute for the one described, may be used, making any proper allowance for the cost of transporting the goods to or from the other place [*Com. Code § 2723(2)*].

Evidence of a relevant price prevailing at a time or place other than the one described in *Com. Code § 2101 et seq.* offered by one party is not admissible unless and until that party has given the other party notice that the court finds sufficient to prevent unfair surprise [*Com. Code § 2723(3)*].

[d] Buyer's Security Interest and Right of Resale

On rightful rejection or justifiable revocation of acceptance, a buyer has a security interest in goods in the buyer's possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care, and custody, and may hold the goods and resell them in the same manner as an aggrieved seller, pursuant to *Com. Code § 2706* [*Com. Code § 2711(3)*; *see § 206.41*].

[e] Buyer's Right to Goods on Seller's Insolvency

If the seller fails to deliver or repudiates, and if the goods have been identified, the buyer may, in addition to the remedies provided under Com. Code § 2711(1), recover the goods as provided under *Com. Code § 2502* [*Com. Code § 2711(2)(a)*]. A buyer who has paid a part or all of the price of goods in which the buyer has a special property interest under *Com. Code § 2501* may, on making and keeping good a tender of any unpaid portion of their price, recover them from the seller if the seller becomes insolvent within 10 days after receipt of the first installment on their price, even though the goods have not been shipped, and, if the identification creating the special interest has been made by the buyer, only with respect to goods that conform to the contract for sale [*Com. Code § 2502(1)(b), (3)*].

[f] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 206.46* and *206.47* may be used to oppose the contention supported by the points and authorities in this form.

[3] Discussion of Authorities

[a] Buyer's Right to Damages After Cover

In ***KGM Harvesting Co. v. Fresh Network*** *(1995) 36 Cal. App. 4th 376, 42 Cal. Rptr. 2d 286* , the seller under contract for the sale of lettuce sued the buyer for the balance allegedly due on invoices, and the buyer cross-complained, alleging breach of contract. The trial court determined that the seller breached the contract and that the buyer was entitled to cover damages (and prejudgment interest beginning 30 days before trial). Both buyer and seller appealed.

The court of appeal affirmed in part (on the issue of cover damages) and reversed and remanded in part (on the issue of the date from which buyer was entitled to prejudgment interest) (*36 Cal. App. 4th 376, 389, 392)* . The seller contended that the contract-cover differential is inappropriate when the aggrieved buyer is ultimately able to pass on its additional costs to other parties, and that *Com. Code § 1305* (formerly 110) acts to limit the amount of damages otherwise recoverable under *Com. Code § 2712*, requiring that all subsequent events impacting on the buyer's ultimate profit or loss be taken into consideration. In this case, the buyer had passed on all but $70,000 of its loss to a lettuce broker (*36 Cal. App. 4th 376, 384)* .

The seller relied on *Sun Maid Raisin Growers v. Victor Packing Co. (1983) 146 Cal. App. 3d 787, 194 Cal. Rptr. 612* (*discussed under § 206.43[3][c]*) and *Allied Canners & Packers, Inc. v. Victor Packing Co. (1984) 162 Cal. App. 3d 905, 209 Cal. Rptr. 60* . The court explained that *Sun Maid* did not stand for the proposition that the non-breaching

party is entitled to nothing more than being placed in the position that would have resulted from the breaching party's full performance (*36 Cal. App. 4th 376, 385)* . The court also noted that *Allied Canners*, which holds that *Com. Code § 1305 does* act as a limitation of the amount of damages otherwise recoverable under *Com. Code § 2713*, has been sharply criticized. The court explained that although it had serious reservation about whether the result in *Allied Canners*, with its "inappropriate" emphasis on the good faith of the breaching party in a commercial sales case, would be appropriate in an action seeking damages under *Com. Code § 2713*, it had no reservation about not extending the *Allied Canners* rationale to a *Com. Code § 2712* case such as the one at issue. Quoting what it had earlier referred to as the "unequivocal language of [*Com. Code] section 2712*" (*36 Cal. App. 4th 376, 381)* , the court concluded that when a buyer "cover[s] by making in good faith and without reasonable delay any reasonable purchase ... of goods in substitution for those due from the seller, ... [the buyer] may recover from the seller as damages the difference between the cost of cover and the contract price ... " This, the court reasoned, gives the buyer the benefit of the bargain. What the buyer then chooses to do with that bargain is not relevant to the determination of damages under *Com. Code § 2712* (*36 Cal. App. 4th 376, 389)* .

[b] Incidental Damages Include Storage and Handling Costs

In ***S & R Metals, Inc. v. C. Itoh & Co. (America)*** *(9th Cir. 1988) 859 F.2d 814* , the buyer under contract for the sale of bulk steel brought an action against the seller after revoking acceptance of the goods based on their defective quality. The district court found that plaintiff was entitled to revoke acceptance, and awarded damages, interest, and costs, based on the purchase price of the revoked steel, the reasonable cost of transportation from the delivery place to plaintiff's facility, the reasonable costs of storage and handling, and interest. Defendant appealed.

The court of appeals affirmed. With respect to damages, defendant argued that a contract clause excluding recovery for "special, indirect, or consequential damages" prevents plaintiff from recovering storage, handling, or interest charges. The court held that *Com. Code § 2715(1)* defines incidental damages as including expenses reasonably incurred in the receipt, care, and custody of goods. Because consequential damages are defined in a separate subsection of that statute (*Com. Code § 2515(2)*), these expenses are distinct from consequential damages. The court also held that storage and handling charges are included in expenses for receipt, care, and custody. Because the contract did not exclude incidental damages, it did not exclude storage and handling expenses, which were therefore properly awarded (*859 F.2d 814, 818)* .

[c] Consequential Damages Include Lost Profits

In ***Sun-Maid Raisin Growers v. Victor Packing Co.*** *(1983) 146 Cal. App. 3d 787, 194 Cal. Rptr. 612* , a raisin company brought an action against a packing company, seeking specific performance, injunctive relief, and damages based on breach of an agreement to supply raisins over a period of time. Defendant supplied a portion of the order before August of the relevant year, when it breached the agreement. Plaintiff purchased from other sources some of the raisins it needed, but the crop was damaged by heavy rainfall in September, which increased the market price and prevented plaintiff from purchasing the entire amount needed. The trial court found for plaintiff, and awarded damages based on lost profits. Defendant appealed.

The court of appeal affirmed (*146 Cal. App. 3d 787, 795)* . Defendant contended that the damages award for lost profits was excessive (*146 Cal. App. 3d 787, 789)* . The court stated that the basic measure of damages for a seller's nondelivery or repudiation is the difference between the market price and the contract price, in addition to which the buyer can recover incidental damages such as expenses of cover (*Com. Code § 2715(1)*), and consequential damages such as lost profits (*Com. Code § 2715(2)(a)*), to the extent they could not have been avoided by cover (*146 Cal. App. 3d 787, 790-791)* . Under *Com. Code § 2715(2)(a)*, consequential damages include any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know, and that could not reasonably be prevented by cover or otherwise. The "reason to know" language arises from the foreseeability requirement under Hadley v. Baxendale (1854) 9 Ex. 341, 347, 156 Eng. Rep. 145. The court noted, however, that the

Commercial Code has imposed an objective, rather than a subjective, standard in determining whether the seller should have anticipated the buyer's needs. Thus, actual knowledge by the seller of the buyer's requirements is not required. The only requirement under the statute is that the seller reasonably should have been expected to know of the buyer's exposure to loss. The U.C.C. Comment to *Com. Code § 2715* provides that if the seller knows that the buyer is in the business of reselling the goods, the seller is charged with knowledge that the buyer will be selling the goods in anticipation of a profit (*146 Cal. App. 3d 787, 791)* . Therefore, absent a contractual provision against consequential damages, a seller in breach will always be liable for the buyer's resulting loss of profit (*146 Cal. App. 3d 787, 791-792)* . In the instant case, the evidence supported the finding that plaintiff acted in good faith in a commercially reasonable manner to cover, and that the trial court awarded the lesser of the actual cost of cover and the loss of prospective profits (*146 Cal. App. 3d 787, 792)* . Inasmuch as defendant was charged at the time of contracting with the knowledge that plaintiff would resell the raisins to its customers and attempt to cover in the manner in which it subsequently did, defendant had reason to know that its failure to deliver a portion of the raisins in a timely manner would result in lost profits on resales by plaintiff (*146 Cal. App. 3d 787, 793)* . The court rejected defendant's claim that it was not liable for damages based on the high price of raisins caused by rains that destroyed much of that season's crop, because the possibility of rain damage was clearly foreseeable. The fact that defendant might be surprised by an extraordinary rise in the market price does not mean that the buyer's prospective profits on resale are unforeseeable as a matter of law (*146 Cal. App. 3d 787, 794)* .

[d] Seller That Knows Buyer Will Resell for Profit Is Liable for Lost Profits

Sun-Maid Raisin Growers v. Victor Packing Co. *(1983) 146 Cal. App. 3d 787, 194 Cal. Rptr. 612* , is *discussed under § 206.43[3][c]*.

[e] Seller Has Burden of Proving Inadequate Mitigation

In ***Carnation Co. v. Olivet Egg Ranch*** *(1986) 189 Cal. App. 3d 809, 229 Cal. Rptr. 261* , the buyer under contract to purchase chicken feed brought an action against the seller based on fraud and breach of warranty. (For points and authorities dealing with warranty issues, *see § 206.60* et seq.) With respect to plaintiff's request for consequential damages under *Com. Code § 2715(2)(a)*, based on loss of goodwill, the trial court granted defendant's motion for nonsuit, and plaintiff appealed.

The court of appeal reversed with respect to that issue (*189 Cal. App. 3d 809, 819)* . The court noted that the nonsuit was granted on the theory that *Com. Code § 2715(2)(a)* places on the aggrieved party the burden of showing it took reasonable steps to mitigate its consequential damages, and that the trial court determined, as a matter of law, that plaintiff failed to present evidence to meet that burden (*189 Cal. App. 3d 809, 814)* . The court stated that the burden of proof with regard to mitigation of consequential damages under *Com. Code § 2715(2)(a)* is a case of first impression (*189 Cal. App. 3d 809, 814-815)* . The statute itself is ambiguous in this respect, and the U.C.C. Comments to *Com. Code § 2715* do not address the issue, although the Comments do indicate that the right to consequential damages should be broadly construed (*189 Cal. App. 3d 809, 815)* . The Comment also states that the burden of proving the extent of loss incurred by way of consequential damages is on the buyer, but does not address the allocation of the burden of proof on the mitigation issue (*189 Cal. App. 3d 809, 815-816)* . The statute has been construed to be a codification of prior California law that the buyer must attempt to minimize damages. Thus, the adoption of the U.C.C. did nothing to alter preexisting California law on the right to recover consequential damages and the duty to mitigate losses (*189 Cal. App. 3d 809, 816)* . The court concluded that it should continue to place the burden on this issue on the breaching party (*189 Cal. App. 3d 809, 817)* . Accordingly, the court reversed judgment, because defendant never presented evidence on the issue of plaintiff's mitigation of the consequential damages arising from defendant's breach (*189 Cal. App. 3d 809, 818-819)* . The court also determined issues regarding an offset of a cross claim (*189 Cal. App. 3d 809, 819-821)* .

[4] Additional Authorities

[a] Consequential Damages Include Lost Profits

In *Grupe v. Glick (1945) 26 Cal. 2d 680, 160 P.2d 832* , a breach of warranty action based on a sale of oil-refining equipment, the trial court entered judgment for the plaintiff buyer, and awarded damages, including those based on lost profits. The Supreme Court reversed and remanded, because the trial court failed to make certain findings in support of the award for damages based on lost profits (*26 Cal. 2d 680, 694)* . With respect to the issue of lost profits, the Court stated that the loss of future profits is subject to the general rule that the amount that would have come, but for the defendant's wrongful act, to the plaintiff, must be certain and must have been within the contemplation of the parties when they contracted (*26 Cal. 2d 680, 691)* . When the operation of an established business is prevented or interrupted, as by a tort, or breach of contract or warranty, damages for the loss of prospective profits that otherwise might have been made from its operation are generally recoverable because their occurrence and extent may be ascertained with reasonable certainty from the past volume of business and other provable data relevant to the probable future sales (*26 Cal. 2d 680, 692)* . Damages for the loss of prospective profits are recoverable if the evidence makes reasonably certain their occurrence and extent (*26 Cal. 2d 680, 693)* .

Counsel should note that although *Grupe* involves a breach of warranty (see *§ 206.60* et seq.), it has been cited in an action based on breach of contract for the sale of goods, for its holding regarding a buyer's right to recover lost profits if the evidence shows with reasonable certainty both their occurrence and extent [*see Gerwin v. Southeastern Cal. Assn. of Seventh Day Adventists (1971) 14 Cal. App. 3d 209, 221, 92 Cal. Rptr. 111* (action by buyer for specific performance or damages based on breach of contract)].

In *Green Wood Indus. Co. v. Forceman Int'l Dev. Group, Inc. (2008) 156 Cal. App. 4th 766, 67 Cal. Rptr. 3d 624* , the defendant induced the plaintiff to prepay part of the price for goods that the defendant promised to deliver, although in fact the defendant did not have the goods and had no intention of obtaining the goods for delivery to the plaintiff. The plaintiff had made a resale contract, which could not be performed because of the defendant's fraudulent nondelivery of the goods. The plaintiff, having elected not to cover, sued and obtained a verdict for recovery of the amount paid [*see Com. Code § 2711(1)*] and recovery of the profit lost on the resale contract. The court of appeal affirmed the judgment awarding the amount prepaid and the amount of lost profit. The defendant had contended that the lost profit was not recoverable, that the measure of recovery was the difference between the contract price and the market price of the goods as stated in *Com. Code § 2713*. The court of appeal pointed out that the statute goes on to say "*together with* any incidental and consequential damages" pursuant to *Com. Code § 2715* and cited *Sun-Maid Raisin Growers v. Victor Packing Co. (1983) 146 Cal. App. 3d 787, 194 Cal. Rptr. 612* , discussed in *§ 206.43[3][c]*, for its conclusion that consequential damages can include lost profit on a resale contract (*156 Cal. App. 4th 766, 773-774)* .

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20-206 California Points & Authorities § 206.44

§ 206.44 Supporting Contention That Buyer Entitled to Consequential Damages [Com. Code § 2715(2)]--Limited or Exclusive Contract Remedy [Com. Code § 2719(1)] Barring Consequential Damages Failed of Its Essential Purpose [Com. Code § 2719(2)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF BUYER IS ENTITLED TO RECOVER CONSEQUENTIAL DAMAGES AS PROVIDED IN COMMERCIAL CODE SECTION 2715 BECAUSE THE _____ [EXCLUSIVE *or* LIMITED] CONTRACT REMEDY PURPORTING TO BAR RECOVERY TO CONSEQUENTIAL DAMAGES HAS FAILED OF ITS ESSENTIAL PURPOSE, AND PLAINTIFF IS THEREFORE ENTITLED TO THE REMEDIES UNDER THE COMMERCIAL CODE, WHICH INCLUDE RECOVERY OF CONSEQUENTIAL DAMAGES.

A. Failure of Limited Remedy of Its Essential Purpose. If circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in the Commercial Code (*Com. Code § 2719(2)*; *RRX Industries, Inc. v. Lab-Con, Inc. (9th Cir. 1985) 772 F.2d 543, 547)* .

B. Consequential Damages Permitted When Limited Remedy Fails of Its Essential Purpose. When a limited damages provision excluding recovery of consequential damages fails in its essential purpose, the award of consequential damages is permitted (*RRX Industries, Inc. v. Lab-Con, Inc. (9th Cir. 1985) 772 F.2d 543, 547)* .

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that plaintiff buyer is entitled to recover consequential damages despite a contractual provision either limiting or excluding that right. The ground of the contention is that the limited remedy failed of its essential purpose, and plaintiff is therefore entitled to consequential damages as provided in *Com. Code § 2715* [*see Com. Code § 2719(2), (3)*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which the issue of the buyer's right to consequential damages is raised. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. This issue is particularly fact-oriented, evidenced by decisions stating that "each case must stand on its own facts" [*see RRX Industries, Inc. v. Lab-Con, Inc. (9th Cir. 1985) 772 F.2d 543, 547* (*discussed under § 206.44[3*][a]); *S. M. Wilson & Co. v. Smith Intern., Inc. (9th Cir. 1978) 587 F.2d 1363, 1376* (discussed in *§ 206.47[3][a]*)]. Therefore, counsel should set forth all applicable facts in detail and show that under all circumstances of the case, the seller's breach is total or fundamental, and therefore that any bar or limit to the recovery of consequential damages is unenforceable. Facts supporting this contention include the seller's willful and arbitrary denial of its duty to repair or replace the goods, as well as the seller's untimely and sporadic efforts to comply with the contractual remedy [*see, e.g., Fiorito Bros., Inc. v. Fruehauf Corp. (9th Cir. 1984) 747 F.2d 1309, 1312* (seller's "callous disregard" of limited remedy's purpose; *discussed under § 206.44[4*][a])]. Facts falling short of these circumstances, however, may also support this contention if the seller's efforts, however diligent, to comply with the limited remedy provision fail to rectify the problem substantially.

[b] Factual Showing Required

Counsel should note that one commentator has observed a trend in the Ninth Circuit Court of Appeals toward finding a "total and fundamental" failure of the limited remedy (rendering a contractual limit to recovery of consequential damages ineffective) under facts exhibiting less than willful conduct by the seller, an apparent retreat from that court's previous view that a limited remedy did not fail in that respect absent the seller's willful failure to comply with it (as opposed to the seller's inability to comply). That commentator noted, for example, that although the court in *RRX Industries, Inc. v. Lab-Con, Inc. (9th Cir. 1985) 772 F.2d 543* construed *S. M. Wilson & Co. v. Smith Intern., Inc. (9th Cir. 1978) 587 F.2d 1363* (discussed in *§ 206.47[3][a]*), it ignored the reasoning in *Wilson*, in that the *Wilson* court was heavily influenced by the fact that the seller did not willfully refuse to repair, but rather was unable to do so [*see* Comment, *RRX Industries, Inc. v. Lab-Con, Inc.: Is the Ninth Circuit's Inconsequential Treatment of Consequential Damages Limitations Under U.C.C. § 2-719 Unconscionable? 20 Loy. L.A.L. Rev. 181, 202 (1986)*]. (The court in *Wilson* also reasoned that the buyer's right to Commercial Code remedies in light of the failure of a limited remedy's essential purpose does not necessarily nullify a contractual bar to consequential damages, in which case the buyer ordinarily would be entitled to recover the measure of damages appropriate to that type of contract [*see S. M. Wilson & Co. v. Smith Intern., Inc. (9th Cir. 1978) 587 F.2d 1363, 1375* (parties stipulated that buyer's damages consisted only of consequential damages)].) In light of the apparent trend evidenced by *RRX Industries*, it appears that courts applying California law may decide whether a limited remedy's essential purpose has failed based on the ultimate outcome of the seller's efforts, rather than the extent and sincerity of those efforts.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 206.47* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Failure of Limited Remedy

In ***RRX Industries, Inc. v. Lab-Con, Inc.*** *(9th Cir. 1985) 772 F.2d 543* , the buyer of a computer software system brought a diversity action in federal district court against the seller based on defects in the product. Plaintiff filed suit after repeated unsuccessful efforts by defendant to render the software functional. The district court found that defendant breached the contract, and awarded plaintiff the amount paid under the contract plus consequential damages.

Defendant appealed.

The court of appeals affirmed (*772 F.2d 543, 547)* . With respect to the issue of damages, defendant asserted that the award of consequential damages was improper because the contract limited damages to the amount paid. The court stated that a plaintiff may pursue all the remedies available for breach of contract if its exclusive or limited remedy fails of its essential purpose, pursuant to *Com. Code § 2719(2)*. *Pursuant to S. M. Wilson & Co. v. Smith Intern., Inc. (9th Cir. 1978) 587 F.2d 1363, 1375* (discussed in *§ 206.47[3][a]*), the same court reasoned that when parties agree to a limitation of damages provision, courts should not alter the bargained-for risk allocation unless a breach of contract is so fundamental that it causes a loss that is not part of that allocation. The court in the instant case stated that the district court's award of consequential damages is consistent with the holding of *Wilson*, agreeing with the district court's finding that inasmuch as defendant was either unwilling or unable to provide a system that worked as represented, or to fix the "bugs" in the software, the limited remedies under the contract failed of their essential purpose. It held that the district court properly found the default of the seller so total and fundamental that its consequential damages limitation was expunged from the contract. Consequently, plaintiff was entitled to consequential damages under the Commercial Code. The court stressed that the applicability of *Com. Code § 2719(2)* depends on the facts of each case (*772 F.2d 543, 547)* .

[b] Consequential Damages Permitted When Limited Remedy Fails of Its Essential Purpose

For discussion of ***RRX Industries, Inc. v. Lab-Con, Inc.*** *(9th Cir. 1985) 772 F.2d 543* , see *§ 206.44[3][a]*.

[4] Additional Authorities

[a] Failure of Limited Remedy of Its Essential Purpose

In *Milgard Tempering, Inc. v. Selas Corp. of America (9th Cir. 1990) 902 F.2d 703* , the court of appeals affirmed the district court's holding that a "repair or replacement" remedy in a contract for the sale of a glass-tempering furnace failed of its essential purpose, rendering the contractual "cap" on the recovery of consequential damages unenforceable. The district court's holding was based on the findings that the furnace never lived up to the contract specifications and that the few successful improvements made by the seller were not made within a reasonable period of time (*902 F.2d 703, 706-709)* . Although this case was decided according to Washington law, it construes *S. M. Wilson & Co. v. Smith Intern., Inc. (9th Cir. 1978) 587 F.2d 1363* , decided under California law (discussed in *§ 206.47[3][a]*).

In *Fiorito Bros., Inc. v. Fruehauf Corp. (9th Cir. 1984) 747 F.2d 1309* , the court of appeals affirmed the district court's holding that a "repair or replacement" remedy under a contract to sell trucks intended to haul wet concrete failed of its essential purpose, in an action by the buyer against the seller based on the trucks' inability to hold concrete, and the seller's subsequent denial that the problems were covered under warranty. The district court described defendant's conduct as "callous disregard" for the purposes for which the exclusive repair-or-replacement remedy was designed. The buyer was therefore entitled to consequential damages because the contractual clause barring those damages was unenforceable (*747 F.2d 1309, 1312-1315)* . Although this case was decided according to Washington law, the Ninth Circuit Court of Appeals has noted that it does not differ significantly from California law [*see RRX Industries, Inc. v. Lab-Con, Inc. (9th Cir. 1985) 772 F.2d 543, 547 , discussed under § 206.44[3][a]*].

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20-206 California Points & Authorities § 206.45

§ 206.45 Supporting Contention That Buyer Entitled to Damages for Seller's Breach of Contract--Buyer's Right to Specific Performance [Com. Code §§ 2711(2)(b), 2716]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial appellate brief.*]

PLAINTIFF BUYER IS ENTITLED TO SPECIFIC PERFORMANCE OF THE CONTRACT BREACHED BY DEFENDANT SELLER BECAUSE _____ [THE GOODS ARE UNIQUE *or specify proper circumstances, e.g.,* PLAINTIFF IS UNABLE TO COVER THE GOODS].

A. Buyer's Right to Specific Performance. If the seller fails to deliver or repudiates, the buyer may, in a proper case, obtain specific performance pursuant to *Commercial Code Section 2716* (*Com. Code § 2711(2)(b)*).

B. Remedy of Specific Performance. Specific performance may be decreed if the goods are unique or in other proper circumstances. The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just (*Com. Code § 2716(1), (2)*).

[*Optional*] **C. Inability to Cover Constitutes Special Circumstances.** The relief of specific performance may be granted in proper circumstances, which include the buyer's inability to cover or replace the goods (*Kaiser Trading Co. v. Associated Metals & Minerals Corp. (N.D. Cal. 1970) 321 F. Supp. 923, 932)* .

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that plaintiff buyer is entitled to specific performance of the contract for the sale of goods [*see Com. Code § 2716*]. Optional Paragraph C is for use to assert that plaintiff's inability to cover or replace the goods is a circumstance under which the remedy of specific performance is available.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the buyer's right to specific performance of a contract for the sale of goods. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should set forth plaintiff's ground for entitlement to specific performance, that is, describe the goods as unique, or set forth other proper circumstances.

[b] Replevin Available

If the seller fails to deliver or repudiates, the buyer may, in a proper case, obtain replevin pursuant to *Com. Code § 2716* [*Com. Code § 2711(2)(b)*]. The buyer has a right of replevin for goods identified to the contract if after reasonable effort the buyer is unable to effect cover for the goods, if the circumstances reasonably indicate that the effort will be unavailing, or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered [*Com. Code § 2716(3)*; *see Com. Code § 2505* (shipment under reservation)].

[c] Related Pleading and Practice Forms

For discussion of specific performance generally, see California Forms of Pleading and Practice, Ch. 528, *Specific Performance* (Matthew Bender).

[d] Related Points and Authorities

For memoranda related to specific performance generally, see Ch. 214, *Specific Performance* .

[3] Discussion of Authorities

[a] Inability to Cover Constitutes Special Circumstances

In ***Kaiser Trading Co. v. Associated Metals & Minerals Corp.*** *(N.D. Cal. 1970) 321 F. Supp. 923* , a buyer under contract to purchase a chemical compound brought an action in federal district court against the seller, seeking specific performance, damages, and injunctive relief. Plaintiff required the chemical compound, cryolite, for use in the production of aluminum. With respect to the remedy of specific performance under *Com. Code § 2716(1)*, the court noted that the enactment of that statute broadened the availability of specific performance from those situations involving only ascertained or specified goods, to situations involving "other proper circumstances." The court noted that the U.C.C. Comment [*see* U.C.C. Comment 2 to *Com. Code § 2716*] states that uniqueness is not the sole basis of the remedy under the statute, because relief may also be granted in other proper circumstances, and that inability to cover is strong evidence of other proper circumstances. Although no California case has held explicitly that an inability to cover is sufficient justification for decreeing specific performance, other jurisdictions have done so (*321 F. Supp. 923, 932)* . Based on those decisions, the U.C.C. Comment to *Com. Code § 2716*, and the general trend toward a more liberalized availability of specific performance, the court held that the remedy is available when goods cannot be covered or replaced (*321 F. Supp. 923, 932-933)* .

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20-206 California Points & Authorities § 206.46

§ 206.46 Opposing Contention That Buyer Entitled to Contract-Market Price Measure of Damages on Nondelivered or Rejected Goods [Com. Code § 2713]--Buyer Limited to Actual Loss When Seller Knew of Resale Contract [Com. Code § 1305(a)]

[1] FORM

[*The following may be included in a memorandum, or in a trial appellate brief.*]

PLAINTIFF BUYER IS LIMITED TO ITS ACTUAL LOSS, RATHER THAN THE DIFFERENCE BETWEEN THE MARKET PRICE AND THE CONTRACT PRICE, BECAUSE DEFENDANT SELLER KNEW THAT PLAINTIFF HAD A RESALE CONTRACT, PLAINTIFF HAS NOT SHOWN THAT IT IS LIABLE IN DAMAGES TO THE BUYER UNDER THAT CONTRACT, AND DEFENDANT HAS NOT ACTED IN BAD FAITH IN BREACHING THE CONTRACT WITH PLAINTIFF.

Buyer Limited to Actual Loss. When the seller knew that the buyer had a resale contract, the buyer is not liable in damages to the buyer on its forward contract, and the seller has not acted in bad faith, on the seller's breach of a contract for the sale of goods, the award of damages to the buyer is limited to the buyer's actual loss, or the amount that it expected to make on the transaction (*Allied Canners & Packers, Inc. v. Victor Packing Co. (1984) 162 Cal. App. 3d 905, 915, 209 Cal. Rptr. 60* ; *see Com. Code §§ 1305, 2713*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that plaintiff buyer is entitled to a measure of damages based on the difference between the market price and the contract price, on the seller's breach of a contract for the sale of goods based on nondelivered or rejected goods. The ground of the contention is that the buyer is entitled to only its actual loss, because the seller knew that the buyer had a resale contract, the buyer is not liable in damages to the buyer on its forward contract, and the seller has not acted in bad faith [*see Allied Canners & Packers, Inc. v. Victor Packing Co. (1984) 162 Cal. App. 3d 905, 915, 209 Cal. Rptr. 60* ; *see also Com. Code §§ 1305, 2713*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the scope of the buyer's recoverable damages. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should show that at the time of contracting, defendant seller knew that plaintiff buyer had a resale contract, that plaintiff was not liable in damages to the buyer on its forward contract, and that defendant did not act in bad faith.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 206.43*.

[b] Related Pleading and Practice Forms

For discussion and forms relating to commercial sales, see California Forms of Pleading and Practice, Ch. 500, *Sales: Sales Under the Commercial Code* (Matthew Bender).

[3] Discussion of Authorities

[a] Buyer Limited to Actual Loss

In ***Allied Canners & Packers, Inc. v. Victor Packing Co.*** *(1984) 162 Cal. App. 3d 905, 209 Cal. Rptr. 60* , a raisin exporter brought an action against a fruit processor, seeking damages based on the defendant's failure to deliver a shipment of raisins pursuant to contract. Raisins that are to be sold outside the United States are subject to certain governmental controls administered by the Raisin Administrative Committee (RAC), and are priced substantially below the prevailing market price. Plaintiff, as an exporter, was not eligible to purchase these raisins directly. Defendant, which was eligible to buy the raisins, contracted to sell them to plaintiff, with the knowledge that plaintiff intended in turn to fulfill contracts to supply the raisins to several Japanese firms, pursuant to "forward contracts." Plaintiff was to realize a profit of approximately $4,000. Subsequently, the raisin crop was severely damaged by heavy rainfall. At that point, defendant had not yet applied to purchase the raisins required to fulfill its contract with plaintiff, and the RAC withdrew its offer to release the raisins to any subsequent applicants. Defendant conceded that it breached the contract with plaintiff by notifying plaintiff that it would not deliver the raisins pursuant to the contract. Plaintiff did not cover by purchasing raisins on the open market, which would have cost four times the contract price. The buyers under plaintiff's resale contract either rescinded or did not sue; and plaintiff paid no damages voluntarily. The trial court found that plaintiff was a broker, rather than a buyer, and therefore was not entitled to damages under the Commercial Code. The court found in favor of plaintiff in the amount of the $4,000 it would have profited under its forward contracts, categorizing the damages as lost "commission." Plaintiff appealed.

The court of appeal affirmed, holding that although plaintiff was in fact a buyer, rather than a broker, for purposes of applying Commercial Code remedies it was entitled to damages only in the amount of its actual loss (*162 Cal. App. 3d 905, 910-916)* . The relevant remedies for nondelivery of goods by a seller are provided by *Com. Code §§ 2712* (cover damages), 2713 (damages when buyer has not covered), and 2715 (incidental and consequential damages). Pursuant to *Com. Code § 2712(1)*, after a breach within *Com. Code § 2711*, the buyer may cover, by making in good faith and without unreasonable delay, any reasonable purchase of goods in substitution for those due from the seller. Pursuant to *Com. Code § 2712(2)*, the buyer may recover from the seller as damages, the difference between the cost of cover and the contract price, together with any incidental or consequential damages, less expenses saved in consequence of the seller's breach. *Com. Code § 2713(1)* provides that the measure of damages when the buyer has not covered is the difference between the market price when the buyer learned of the breach and the contract price, together with incidental and consequential damages. The court noted that *Com. Code §§ 2712* and *2713* are sometimes referred to as

"cover" and "hypothetical cover," respectively, because the first involves an actual entry into the market by the buyer, and the second does not (*162 Cal. App. 3d 905, 911)* . The use of the market-contract price formula under *Com. Code § 2713* does not, absent pure accident, result in a damage award reflecting the buyer's actual loss. In the instant case, plaintiff's actual lost profit was $4,000, although application of the market-contract price formula would yield damages of approximately $150,00. Courts interpreting the Uniform Commercial Code are divided on the issue of whether market damages, even though in excess of the plaintiff's loss, are appropriate for a supplier's breach of delivery obligations. One legal commentator has suggested that *Com. Code § 2713* is either an historical anomaly (because cover was not a recognized remedy under pre-Commercial Code law), or, more likely, a statutory liquidated damage clause, that is, a breach inhibitor, the payout of which need bear no close relation to plaintiff's actual loss (*162 Cal. App. 3d 905, 912-913)* . It noted, however, that the explanation conflicts with *Com. Code § 1305(a)* (formerly 1106(1)), which provides that the remedies under the Commercial Code must be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed (*162 Cal. App. 3d 905, 913)* . Viewing *Com. Code § 2713* as, in effect, a statutory provision for liquidated damages, the court framed the issue before it as the determination of whether a damage award to a buyer who has not covered is ever appropriately limited to the buyer's actual economic loss that is below the damages produced by the market-contract formula, and, if so, whether the rule is applicable to the present case (*162 Cal. App. 3d 905, 913-914)* .

Under one view, *Com. Code § 2713* establishes the principle that a buyer's resale contract and damage claims made under it are irrelevant to an award of damages, and that damages therefore cannot be limited to a plaintiff's actual economic loss. It can be argued, however, that *Com. Code § 1305(a)* (formerly 1106(1)) calls for an opposite conclusion. The court found no cases discussing the interaction of *Com. Code §§ 1305* and *2713*, although some pre-Uniform Commercial Code cases held that a limitation to actual losses should be placed on the market-contract price measure of damages under general contract principles (*162 Cal. App. 3d 905, 914)* . In the instant case, the seller knew that the buyer had a resale contract (necessarily so because of RAC requirements), the buyer has not been able to show that it will be liable in damages to the buyer on its forward contracts, and there has been no finding of bad faith on the part of the seller. Under these circumstances, the court concluded that the policy of *Com. Code § 1305(a)* to put the aggrieved party in as good a position as if the other party had performed requires that the award of damages to the buyer be limited to its actual loss, that is, the amount it expected to make on the transaction. The court noted that another appellate case has approved the use of *Com. Code § 1305* to limit damages to the amount that would put the plaintiff in as good a position as if the defendant had performed [*citing Sun-Maid Raisin Growers v. Victor Packing Co. (1983) 146 Cal. App. 3d 787, 792, 194 Cal. Rptr. 612* , discussed in *§ 206.43[3*] [c] (*162 Cal. App. 3d 905, 915)*].

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§ 206.47 Opposing Contention That Buyer Entitled to Consequential Damages [Com. Code § 2715(2)]--Limited or Exclusive Remedy [Com. Code § 2719(1)] Bars Consequential Damages

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial appellate brief.*]

PLAINTIFF BUYER IS NOT ENTITLED TO RECOVER CONSEQUENTIAL DAMAGES FROM DEFENDANT SELLER BECAUSE THE CONTRACT BETWEEN PLAINTIFF AND DEFENDANT PROVIDED _____ [AN EXCLUSIVE *or* A LIMITED] REMEDY THAT _____ [BARS *or* LIMITS] THE AMOUNT OF RECOVERABLE CONSEQUENTIAL DAMAGES[, AND THE CONTRACTUAL REMEDY DID NOT FAIL IN ITS ESSENTIAL PURPOSE, BECAUSE DEFENDANT'S BREACH WAS NOT TOTAL OR FUNDAMENTAL].

A. Contract May Limit Damages. The agreement for the sale of goods may provide for remedies in addition to or in substitution for those provided in the Commercial Code, and may limit or alter the measure of damages recoverable under the Code, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts, subject to Commercial Code provisions regarding failure of the limited remedy, unconscionability, and liquidation and limitation of damages (*Com. Code § 2719(1)(a)*).

B. Expressly Exclusive Remedy Is Sole Remedy. If a remedy provided in the agreement for the sale of goods is expressly agreed to be exclusive, it is the sole remedy, subject to Commercial Code provisions regarding failure of the exclusive remedy, unconscionability, and liquidation and limitation of damages (*Com. Code § 2719(1)(b)*).

[*Optional*] **C. Limited Remedy Does Not Fail of Essential Purpose When Seller's Breach Not Total.** In an action for breach of a contract for the sale of goods brought by a buyer against the seller, when an exclusive or limited remedy is provided to the exclusion of the recovery of consequential damages, the failure of the limited remedy to serve its essential purpose does not require the permitting of consequential damages pursuant to *Commercial Code Section 2719(2)* unless the seller's default is so total and fundamental as to require that the limitation be expunged from the

contract (*S. M. Wilson & Co. v. Smith Intern., Inc. (9th Cir. 1978) 587 F.2d 1363, 1375)* .

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that plaintiff buyer is entitled to recover consequential damages arising from the seller's breach of a contract for the sale of goods. The basis for the contention is that an exclusive or limited remedy under the contract excludes or limits recovery of consequential damages [*see Com. Code § 2719(1)*]. Optional Paragraph C is for use to assert that the contractual remedy did not fail in its essential purpose, and therefore did not effect application of remedies under the Code, because the seller's default was not total or fundamental [*see S. M. Wilson & Co. v. Smith Intern., Inc. (9th Cir. 1978) 587 F.2d 1363, 1375* ; *see also § 206.44*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the scope of the buyer's recoverable damages. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should set forth the applicable limited contractual remedy. The issue regarding whether a limited remedy failed of its essential purpose is particularly fact-oriented, evidenced by decisions stating that "each case must stand on its own facts" [*see RRX Industries, Inc. v. Lab-Con, Inc. (9th Cir. 1985) 772 F.2d 543, 547* (discussed in *§ 206.44[3*][a]; *S. M. Wilson & Co. v. Smith Intern., Inc. (9th Cir. 1978) 587 F.2d 1363, 1376]* . Therefore, counsel should set forth all applicable facts in detail and show that under all circumstances of the case, the seller's breach is not total or fundamental. This contention has been supported by such facts as the equal bargaining power of the parties, and their knowing and voluntary allocation of risks by virtue of the contractual limitation or exclusion, as well as extensive and timely repairs made by the seller. However, whether courts will continue to restrict a plaintiff to a limited remedy under facts such as these is subject to question in light of more recent case holdings. For further discussion, see *§ 206.44[2][b]*.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 206.44*.

[b] Unconscionability of Limitation on Consequential Damages

A contractual limit or bar to the recovery of consequential damages may be held ineffective on the ground of unconscionability. If the loss is commercial, limitation of consequential damages is valid unless it is proved that the limitation is unconscionable. However, with respect to injury to the person in the case of consumer goods, the defendant must prove that the limitation is not unconscionable [*Com. Code § 2719(3)*]. This form may be adapted to include this ground. For points and authorities relating to unconscionability, see Ch. 50, *Contracts* .

[c] Liquidation or Limitation of Damages

The enforceability of a limited or exclusive remedy under *Com. Code § 2719(1)* is subject to *Com. Code § 2718*, which concerns liquidated and limited damages [*see Com. Code § 2719(1)*]. Pursuant to *Com. Code § 2718(1)*, damages for breach by either party may be liquidated in the agreement subject to and in compliance with *Civ. Code § 1671* [for further discussion of liquidated damages, *see* California Forms of Pleading and Practice, Ch. 177, *Damages*]. If the agreement provides for liquidation of damages not in compliance with *Civ. Code § 1671*, remedy may be had pursuant to *Com. Code § 2101 et seq.*

If the seller justifiably withholds delivery of goods because of the buyer's breach, the buyer is entitled to restitution of any amount by which the sum of his or her payment exceeds: (1) the amount to which the seller is entitled by virtue of

terms liquidating the seller's damages in accordance with *Com. Code § 2718(1)*; or *(2)* in the absence of those terms, the lesser amount of either 20 percent of the value of the total performance for which the buyer is obligated under the contract or $500 [*Com. Code § 2718(2)*]. The buyer's right to restitution under *Com. Code § 2718(2)* is subject to offset to the extent that the seller establishes: (1) a right to recover damages under *Com. Code § 2701 et seq.* other than *Com. Code § 2718(1)*; and *(2)* the amount or value of any benefits received by the buyer directly or indirectly by reason of the contract [*Com. Code § 2718(3)*]. If a seller has received payment in goods, their reasonable value or the proceeds of their resale is treated as payments for the purposes of *Com. Code § 2718(2)*, but if the seller has notice of the buyer's breach before reselling goods received in part performance, his or her resale is subject to the *Com. Code § 2706*, regarding resale by an aggrieved seller [*Com. Code § 2718(4)*].

[3] Discussion of Authorities

[a] Limited Remedy Does Not Fail of Essential Purpose When Seller's Breach Not Total

In ***S. M. Wilson & Co. v. Smith Intern., Inc.*** *(9th Cir. 1978) 587 F.2d 1363* , the buyer under a contract for the sale of a tunnel-boring machine brought an action against the seller, stating causes of action that included breach of contract and breach of implied warranty. (For points and authorities dealing with substantive warranty issues, see *§ 206.60*.) The written agreement warranted that the machine would be free from defects in material and workmanship, and that the warranty was established expressly in lieu of all other unwritten warranties, express or implied. The seller limited its liability for any breach of warranty to repair or replacement of defective parts, and generally excluded any liability resulting from the use or loss of use of the machine. The machine did not operate properly, and the problems continued despite defendant's repeated attempts to repair it and provide various replacement parts. The federal district court found for defendant with respect to the breach of contract and breach of implied warranty causes of action, on the ground that plaintiff suffered only consequential damages (pursuant to stipulation by the parties), and that consequential damages were not recoverable. The court dismissed the remaining causes of action as well. Plaintiff appealed.

The court of appeals affirmed, holding, inter alia, that the contractual bar to consequential damages is valid (*587 F.2d 1363, 1374-1375)* . With respect to the damages issue on the breach of contract and breach of implied warranty claims, the court noted that both parties agreed that defendant's attempts to repair the machine were unsuccessful. The court framed the issue before it as the effect, if any, of the defendant's inability to repair on its disclaimers and liability limitations. If defendant's inability to repair demolishes its disclaimer and limited liability, plaintiff can invoke the implied warranty of fitness, and obtain consequential damages permitted under *Com. Code § 2715* (*587 F.2d 1363, 1372)* . Under the Commercial Code, consequential damages are recoverable under *Com. Code § 2714*, regarding breach of warranty. Pursuant to *Com. Code § 2719(1)(a)*, a seller may limit a buyer's remedy to repair and replacement of nonconforming goods or parts, but *Com. Code § 2719(2)* permits the buyer the remedies provided in the Commercial Code when circumstances cause an exclusive or limited remedy to fail of its essential purpose (*587 F.2d 1363, 1373-1374)* .

The court discussed a line of cases in other jurisdictions involving the effect of the failure of a limited remedy's essential purpose on the contractual disclaimer of implied warranties. In the among them, the failure raised an implied warranty of "reasonably prompt and timely repairs," notwithstanding a disclaimer, but the existence of an implied warranty that the product (a tractor) was good and satisfactory, and capable of doing the work for which it was sold, was prevented by the disclaimer. Those cases did not, as defendant asserted, hold that the failure wipes from the contract entirely a disclaimer of express or implied warranties, although they do preclude the existence of an implied warranty of fitness. The court stated that this line of cases supports unanimously the proposition that the failure of a limited remedy's essential purpose removes from the contract the bar to the recovery of consequential damages. Against that authority, plaintiff relied on another line of cases in other jurisdictions, in which the clause barring recovery of consequential damages survived the failure of the repair remedy in its essential purpose. The court then considered, preliminarily, the issue of whether the repair remedy failed its essential purpose (*587 F.2d 1363, 1374)* . The court cited commentary regarding the limited repair warranty, to the effect that it rests on at least three assumptions: that the warrantor will

diligently make repairs, that the repairs will cure the defects, and that consequential loss in the interim will be negligible. As long as these assumptions hold true, the commentator stated, the limited remedy appears to operate fairly, and will usually withstand contentions of unconscionability; but when one of these assumptions proves false, the buyer may find that the substantial benefit of the bargain has been lost. The court stated that two of those assumptions proved false in the instant case: the repairs did not cure the defects, and consequential damages are not negligible. However, defendant attempted to repair the machine, but was unable to do so. As a result, plaintiff lost a substantial benefit of its bargain despite defendant's efforts to provide the limited remedy. Although the failure of the limited repair warranty to achieve its essential purpose made available to the buyer remedies under the Commercial Code, it did not mean that the bar to recovery of consequential damages should be eliminated. Under ordinary circumstances, plaintiff should be entitled to recover the monetary equivalent of the benefit of its bargain pursuant to *Com. Code § 2714(2)*, that is, the difference between the value of what it should have received and what it actually received. However, plaintiff stipulated that it suffered only consequential damages; absent that stipulation, the court stated it would have reversed and remanded to permit plaintiff to recover damages under *Com. Code § 2714(2)*.

The court framed the remaining issue as whether the failure of the limited repair remedy to serve its purpose requires permitting the recovery of consequential damages under *Com. Code §§ 2714(3)* and *2715*, concluding that it does not, based on the characteristics of the contract between plaintiff and defendant. The court stated that parties of relatively equal bargaining power negotiated an allocation of their risks of loss, and consequential damages were assigned to the buyer. While the machine was a complex piece of equipment designed for the buyer's purposes, the seller did not ignore its obligation to repair, but rather was unable to perform it. This fact was not enough to require that the seller absorb losses the buyer plainly agreed to bear. Risk shifting is commercially expensive, and should not be undertaken in the absence of a good reason; an even better reason is required when shifting is contrary to a contract freely negotiated. The default of defendant, as seller, was not so total and fundamental as to require that its consequential damage limitation be expunged from the contract (*587 F.2d 1363, 1375)* . The court emphasized that a bar to consequential damages will not always survive the failure of a limited repair remedy to serve its essential purpose and that each case must stand on its own facts (*587 F.2d 1363, 1375-1376)* .

California Points & Authorities

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Volume 20 Chapters 200-209 RECEIVERS---to---SANCTIONS
CHAPTER 206 SALES
PART II. FORMS
A. Sales Under Commercial Code

20-206 California Points & Authorities §§ 206.48-206.59

[Reserved]

§§ 206.48[Reserved]

California Points & Authorities

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Volume 20 Chapters 200-209 RECEIVERS---to---SANCTIONS
CHAPTER 206 SALES
PART II. FORMS
B. Warranties
1. Commercial Code Warranties

20-206 California Points & Authorities § 206.60

§ 206.60 Supporting Contention That Seller Is Liable for Breach of Express Warranty [Com. Code § 2313]--Establishing Liability Generally

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT _____ [*name of seller*] IS LIABLE TO PLAINTIFF FOR BREACH OF EXPRESS WARRANTY BASED ON _____ [*specify, e.g.,* DEFENDANT'S AFFIRMATION OF FACT THAT _____ (*specify, e.g.,* THE YACHT SOLD TO PLAINTIFF WAS SEAWORTHY FOR OCEAN TRAVEL), WHICH BECAME A PART OF THE BASIS OF THE BARGAIN], AND DEFENDANT'S SALE TO PLAINTIFF OF _____ [*specify, e.g.,* A YACHT] THAT _____ [*specify, e.g.,* FAILED TO BE SEAWORTHY].

A. Affirmation of Fact or Promise Creates Warranty. Any affirmation of fact or promise made by the seller to the buyer that relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods will conform to the affirmation or promise (*Com. Code § 2313(1)(a)*; *Hauter v. Zogarts (1975) 14 Cal. 3d 104, 117, 120 Cal. Rptr. 681, 534 P.2d 377* ; *Keith v. Buchanan (1985) 173 Cal. App. 3d 13, 22, 220 Cal. Rptr. 392*).

B. Description of Goods Creates Warranty. Any description of the goods that is made part of the basis of the bargain creates an express warranty that the goods will conform to the description (*Com. Code § 2313(1)(b)*).

C. Sample or Model Creates Warranty. Any sample or model that is made part of the basis of the bargain creates an express warranty that the whole of the goods will conform to the sample or model (*Com. Code § 2313(1)(c)*).

D. Formal Words Unnecessary. It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee," or that the seller have a specific intention to make a warranty, although an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or

commendation of the goods does not create a warranty (*Com. Code § 2313(2)*).

[*Optional*] **E. Privity Not Required.** Privity is not required for an action based on an express warranty (*Fundin v. Chicago Pneumatic Tool Co. (1984) 152 Cal. App. 3d 951, 957, 199 Cal. Rptr. 789*).

[*Optional*] **F. Express Warranty Applies to Leasing of Chattel.** The concept of express warranty under *Commercial Code Section 2313* extends to the leasing of chattel (*Pau v. Yosemite Park and Curry Co. (9th Cir. 1991) 928 F.2d 880, 886)* .

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a seller is liable for breach of an express warranty regarding the sale of goods [*see Com. Code § 2313*]. Optional Paragraph E is for use to assert that privity is not required in an action based on breach of express warranty. Optional Paragraph F is for use to assert that the express warranty provision of *Com. Code § 2313* applies to the leasing of chattel.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the seller is liable for breach of an express warranty regarding the sale of goods. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Factual discussion is particularly crucial if the express warranty is based on evidence other than a written promise expressly covering the defect that is the basis of the action. For example, if the seller showed plaintiff a brochure describing the vessel as "a picture of sure-footed seaworthiness," and plaintiff explained to defendant the need for a seaworthy ocean-going vessel, counsel should describe the circumstances of negotiations in detail, and argue that the assertion in the brochure became a part of the basis of the bargain, and therefore constituted an express warranty [*see Keith v. Buchanan (1985) 173 Cal. App. 3d 13, 22, 220 Cal. Rptr. 392* (*discussed under § 206.60[3*][a])].

[b] Elimination of Reliance Requirement

The basis-of-the-bargain requirement under *Com. Code § 2313* represents a significant change in the law of warranties. Prior to the adoption of the Uniform Commercial Code, plaintiffs were required to prove their reliance on specific promises made by the seller [*see Hauter v. Zogarts (1975) 14 Cal. 3d 104, 115, 120 Cal. Rptr. 681, 534 P.2d 377]* . For further discussion of the evolution of this area of the law of express warranty, see the discussion of *Hauter* in § 206.80[3][a].

[c] Related Pleading and Practice Forms

For discussion and forms for use in actions involving warranties under the Commercial Code, see California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties* (Matthew Bender). For discussion and forms regarding strict products liability, see California Forms of Pleading and Practice, Ch. 460, *Products Liability* (Matthew Bender).

[d] Related Points and Authorities

For points and authorities relating to products liability generally, see Ch. 190, *Products Liability* .

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 206.70, 206.72* -206.95 may be used to oppose the

contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Affirmation of Fact or Promise Creates Warranty

In ***Hauter v. Zogarts*** *(1975) 14 Cal. 3d 104, 120 Cal. Rptr. 681, 534 P.2d 377* , a boy who was injured by a golfing device, and his mother, who purchased the product, sued the manufacturer and seller. The device was designed to train unskilled golfers, and was advertised as a "completely equipped backyard driving range." It consisted of metal pegs for insertion into the ground, cords, and a golf ball. The label on the shipping carton and the instruction booklet urged players to "drive the ball with full power," and further stated: "COMPLETELY SAFE BALL WILL NOT HIT PLAYER." The boy, a 13-year old with limited golfing experience, read the printed instructions, and also received instructions from his father concerning the use of the device. On his thirteenth try, he took his normal swing with a seven-iron and apparently hit beneath the ball, which looped over the club and knocked him unconscious, causing brain damage. The complaint included causes of action for breach of express and implied warranties and strict products liability. At trial, experts testified that the device was dangerous when the golf club undercuts or hits beneath the ball, and was therefore particularly hazardous to beginners. After a jury verdict for defendants on each cause of action, the trial court granted plaintiffs' motion for judgment notwithstanding the verdict. Defendants appealed.

The Supreme Court affirmed, and remanded the case for determination of damages (*14 Cal. 3d 104, 121)* . With respect to the cause of action based on express warranty, the Court stated that defendants clearly created an express warranty, and that the remaining issue was whether they could escape liability by impliedly limiting the scope of their promise. Breach of express warranty is governed by *Com. Code § 2313*; the key to this provision is that the seller's statements, whether fact or opinion, must become part of the basis of the bargain. The Court noted that the "basis of the bargain" requirement represents a significant change in the law of warranties. Although under former law, plaintiffs had to prove their reliance on specific promises made by the seller, the Commercial Code requires no such proof. According to the U.C.C. Comment to *Com. Code § 2313*, no particular reliance need be shown in order to weave the seller's affirmations of fact into the fabric of the agreement. Rather, any fact that is to take those affirmations out of the agreement requires clear affirmative proof (*14 Cal. 3d 104, 115)* . Commentators have disagreed with regard to the impact of this development, some of whom think the bargain requirement merely shifts the burden of proving nonreliance to the seller, and some of whom find that the Code eliminates the concept of reliance altogether (*14 Cal. 3d 104, 115-116)* . The Court did not resolve the reliance issue, noting that plaintiffs were fully able to meet their burden under either test (*14 Cal. 3d 104, 116-117)* . The boy read and relied on the safety information included with the device. Defendants failed to present any evidence that could remove defendants' assurance of safety from the basis of the bargain. The Court affirmed the trial court's conclusion that defendants expressly warranted the safety of their product and were liable for the injuries that resulted from a breach of that warranty (*14 Cal. 3d 104, 117)* .

In ***Keith v. Buchanan*** *(1985) 173 Cal. App. 3d 13, 220 Cal. Rptr. 392* , a yacht purchaser brought an action against the seller based on alleged unseaworthiness of the vessel. Plaintiff purchased the yacht after obtaining advertising literature, and allegedly telling sales representatives that he wished to purchase an ocean-going boat that would cruise long distances. Plaintiff's own experts inspected the boat prior to purchase and before the boat was put to sea, and they advised plaintiff that it would suit his needs. After delivery of the vessel, a dispute arose with regard to its seaworthiness. Plaintiff's complaint stated causes of action for breach of express warranty and breach of implied warranty. The trial court granted defendants' motion for judgment after the close of plaintiff's case, on the grounds that no express or implied warranties were created. Plaintiff appealed.

The court of appeal reversed with respect to the existence of the express warranty, and remanded for further findings regarding an implied warranty (*173 Cal. App. 3d 13, 26)* . Under *Com. Code § 2313*, express warranties are created by: (1) any affirmation of fact or promise made by the seller to the buyer that relates to the goods and becomes part of the basis of the bargain; and (2) any description of the goods that is made part of the basis of the bargain. Formal words

such as "warranty" or "guarantee" are not required, although the seller's affirmation of the value of the goods or an expression of opinion or commendation of the goods does not create an express warranty (*173 Cal. App. 3d 13, 19)* . To determine whether a seller's statement constitutes an express warranty under *Com. Code § 2313*, the court must consider whether it constitutes an "affirmation of fact or promise" or a "description of the goods," or merely expresses the seller's opinion or commendation of the goods. If the court finds language in support of a warranty, it must then determine whether the statement was "part of the basis of the bargain," and whether the warranty was breached. A warranty relates to the title, character, quality, identity, or condition of the goods. The purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell (*173 Cal. App. 3d 13, 20)* . Whether a particular statement is an expression of opinion or an affirmation of a fact frequently depends on the circumstances at the time the statement is made. The court observed a trend toward narrowing the scope of representations that are considered opinion, or "puffing," resulting in an expansion of the liability for broad statements regarding a product's quality. A seller's statements made during contract negotiations are presumptively affirmations of fact, unless they can reasonably be construed only as opinion. Factors that indicate an opinion include lack of spcificity, equivocality, and an assertion that the goods are experimental (*173 Cal. App. 3d 13, 21)* . Te court concluded that representations in the sales brochure describing the vessel as "a picture of sure-footed seaworthiness" and "a carefully well-equipped and very seaworthy vessel" were affirmations of fact relating to the quality or condition of the boat.

The court noted that under former provisions of the law, a buyer was required to prove reliance on the seller's representations. *Com. Code § 2313* indicates only that the seller's statements must become "part of the basis of the bargain." According to the U.C.C. Comment to that statute, no particular reliance need be shown in order to weave the seller's affirmations of fact into the fabric of the agreement. Rather, once the seller makes the affirmation, a seller can take the affirmation out of the agreement only by providing clear affirmative proof. The court noted that some commentators have criticized the impact of this development, opining that it shifts the burden of proving nonreliance to the seller, or eliminates the concept of reliance altogether (*173 Cal. App. 3d 13, 22)* . The California Supreme Court, although not resolving the issue, has noted that other jurisdictions have retained the reliance requirement despite adoption of the Uniform Commercial Code (*173 Cal. App. 3d 13, 22-23)* . The court stated that the degree to which the seller's representation must be shown to have affected the buyer's decision has clearly changed because of the Code. A buyer need not show that he or she would not have entered into the agreement absent the warranty, or even that it was a dominant factor inducing the agreement. A warranty statement is deemed to be part of the basis of the bargain, and to have been relied on as one of the inducements for the purchase of the product. In other words, the buyer's reliance on an express warranty is not a prerequisite for breach of warranty, as long as the express warranty became part of the bargain. If, however, the resulting bargain does not rest at all on the sellers' representations, they cannot be considered as part of the basis of the bargain. The relevant U.C.C. Comment indicates that in actual practice, affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of the gods; hence, no particular reliance on the statements need be shown in order to incorporate them into the agreement. Therefore, the representations need only be part of the basis of the bargain, or merely a factor or consideration inducing the buyer to enter into the bargain. A warranty statement made by a seller is presumptively part of the basis of the bargain, and the burden is on the seller to prove that the resulting bargain does not rest at all on the representation (*173 Cal. App. 3d 13, 23)* .

The court stated that the buyer's actual knowledge of the true condition of the goods prior to the contract may show that he or she did not rely on the seller's statement as an inducement for the purchase, although the burden is on the seller to demonstrate the buyer's knowledge (*173 Cal. App. 3d 13, 23-24)* . If the buyer inspects the goods before purchase, he or she may be deemed to have waived the seller's express warranties. However, an examination or inspection by the buyer does not necessarily discharge the seller from an express warranty if the defect was not actually discovered and waived. The court held that plaintiff's inspection of the boat by his own experts did not constitute a waiver of the express warranty of seaworthiness, because although they were experienced boat builders, they did not test the boat in the water, and seaworthiness necessarily relates to the vessel at sea. The court concluded that the defendant did not overcome the presumption that the representations regarding seaworthiness were part of the basis of the bargain (*173 Cal. App. 3d 13, 24)* .

[b] Privity Not Required

The facts and procedural background of ***Fundin v. Chicago Pneumatic Tool Co.*** *(1984) 152 Cal. App. 3d 951, 199 Cal. Rptr. 789* , are discussed in *§ 206.62[3][a]*. In *Fundin*, the court of appeal held that a contractual disclaimer was ineffective to negate an express warranty created by the manufacturer's sales brochure for a drilling rig (*152 Cal. App. 3d 951, 957-958)* . The court preliminarily stated that plaintiff's cause of action against the manufacturer did not require privity. When a consumer relies on representations made by a manufacturer in labels or advertising material, recovery is allowable on the theory of express warranty without a showing of privity (*152 Cal. App. 3d 951, 957)* .

[c] Express Warranty Applies to Leasing of Chattel

In ***Pau v. Yosemite Park and Curry Co.*** *(9th Cir. 1991) 928 F.2d 880* , the survivors of a woman killed in a bicycle accident sued the company that had rented the bicycle and recommended to her the bike trail on which the accident occurred. The decedent's family, while visiting Yosemite Park, received defendant's brochure showing numerous bike trails, and advertising defendant's bike-rental service. The brochure encouraged people to "see the sights by bicycle." It illustrated various bike paths, and recommended a certain bike trail, noting that it was closed off to automobile traffic, and describing it as a "safe and enjoyable cycling area." They rented standard (one-speed) bicycles equipped with "coaster-style" brakes, which are engaged when the rider pedals backward, rather than hand brakes, which are located on the handle bars. While riding on the recommended trail, the decedent lost control of the bicycle, and speeded down a hill with her feet off the pedals, eventually striking a pedestrian and suffering fatal injuries herself. Her family brought the action in federal district court, asserting tort and breach-of-warranty causes of action. The court denied plaintiffs' summary judgment motion on the express warranty claim, ruling that that claim could proceed only as negligent or intentional misrepresentation, because the representation in question concerned only the bicycle trail, rather than the rental of the bicycle. The jury found in favor of defendant, and plaintiffs appealed.

The court of appeals reversed (*928 F.2d 880, 891)* . With respect to the express warranty claim, the court noted that the district court's ruling in effect dismissed that claim. Preliminary, it noted that the parties agree that California extends the concept of express warranty to the leasing of chattel. Under *Com. Code § 2313(1)(a)* and *(b)*, express warranties by the seller are created as follows: (a) any affirmation of fact or promise made by the seller to the buyer that relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods will conform to the affirmation or the promise; (b) any description of the goods that is made part of the basis of the bargain creates an express warranty that the goods will conform to the description; and (c) any sample or model that is made part of the basis of the bargain creates an express warranty that the whole of the goods will conform to the sample or model. The court stated that the dismissal appeared to be based on the conclusion that the statements in defendant's brochure did not, as a matter of law, either "relate to the goods" or become "part of the basis of the bargain." The court held this conclusion to be erroneous. Based on trial testimony, a reasonable jury could have concluded that defendant's brochure advertising its rental bikes and stating that the trail was safe constituted a statement of fact that defendant's bikes were safe for that trail, and that this statement became part of the basis of the bargain (*928 F.2d 880, 887)* .

[4] Additional Authorities

[a] Affirmation of Fact or Promise Creates Warranty

In *McDonnell-Douglas Corp. v. Thiokol Corp. (9th Cir. 1997) 124 F.3d 1173* , the manufacturer of a space shuttle's upper stage motors contracted to provide motors to McDonnell-Douglas for inclusion in its upper-stage payload assist module, which was designed to propel satellites from the space shuttle into orbit. In the contract, the motor manufacturer warranted that the motors would be free of defects in material, labor, and manufacture and that the motors would comply with contract drawings and specifications. Following the failure of two satellites to reach their intended orbit, McDonnell-Douglas brought a warranty action against the manufacturer. The district court entered judgment against McDonnell-Douglas. The module manufacturer appealed and the appellate court affirmed (*124 F.3d 1173,*

1174) .

On appeal, McDonnell-Douglas argued that the manufacturer had made two separate promises, both of which constituted express warranties. McDonnell-Douglas first claimed that the manufacturer promised to deliver goods that were free from defects in labor, material, and manufacture. It also claimed that the manufacturer promised to deliver goods that complied with any drawings or specifications incorporated into or referenced by the contract. The Ninth Circuit stated that under *Com. Code § 2313(1)(a)*, any affirmation of fact or promise relating to the subject matter of a contract for the sale of goods, which is made part of the basis of the parties' bargain, creates an express warranty. The court reviewed the criteria enumerated in *Keith v. Buchanan (1985) 173 Cal. App. 3d 13, 220 Cal. Rptr. 392* , *discussed under § 206.60[3][a]*. As set forth in *Keith v. Buchanan*, the court first determines whether the seller's statement amounts to an affirmation of fact or promise relating to the goods sold. Second, the court determines if the affirmation or promise was part of the basis of the bargain. Finally, if the seller made a promise relating to the goods and that promise was part of the basis of the bargain, the court must determine if the seller breached the warranty (*124 F.3d 1173, 1176)* . In applying this three-part test, the appellate court found that the manufacturer's promise to deliver goods free from defects in labor, material, and manufacture related to the goods and was made a part of the basis of the parties' bargain, and therefore constituted an express warranty. It found, however, that the evidence did not show that the motor manufacturer breached its warranty to supply motors that were free from defects in labor, material, or manufacture. To prove a breach of that express warranty, McDonnell-Douglas had to demonstrate that the satellite motors suffered from a flaw in the quality of the material used in their construction, and McDonnell-Douglas failed to do this (*124 F.3d 1173, 1177-1178)* .

As to the second issue, the court stated that the essential inquiry was whether statements in a drawing attached to the contract constituted additional express warranties that were understood and bargained for by the parties. It found that these provisions would constitute performance warranties with serious financial risks involved and it would be very unusual to find the parties intended to bury them in drawings attached to the contract. It held that the facts and circumstances surrounding the making of the contract, the testimony of McDonnell-Douglas agents, understandings prevalent throughout the aerospace industry, and McDonnell-Douglas' own conduct all supported the conclusion that McDonnell Douglas did not bargain for a performance warranty. Accordingly, the court concluded that the statements in the drawings attached to the contract were not intended to be additional warranties forming a part of the bargain of the parties (*124 F.3d 1173, 1178-1179)* .

In *Weinstat v. Dentsply Int'l, Inc. (2010) 180 Cal. App. 4th 1213, 103 Cal. Rptr. 3d 614* , the seller's affirmations of fact became known to the buyer only after the buyer took delivery of the goods, because the statements in question were made in directions on use that were included with the goods in a sealed package. The seller argued that affirmations or descriptions concerning the goods could become express warranties only if they were part of the "dickered" aspects of the individual bargain [*see Com. Code § 2313*, UCC Comment 1], and thus only representations that actually reach the buyer before the purchase is consummated can become "part of the basis of the bargain" [*see Com. Code § 2313(1)(a)*] so as to constitute an express warranty. The court rejected that argument on several grounds, concluding that "the California Uniform Commercial Code contemplates that affirmations, promises and descriptions about the goods contained in product manuals and other materials that are given to the buyer at the time of delivery can become part of the basis of the bargain, ... notwithstanding that delivery occurs after the purchase price has been paid" (*180 Cal. App. 4th 1213, 1230)* . Moreover, "the notion of 'good faith' which infuses the California Uniform Commercial Code affords another rationale for recognizing the validity of express warranties delivered with the purchased product. ... Even before purchasing a product, a buyer would reasonably expect any statement or description of the product appearing in a user manual or similar publication to be true, regardless of when the manual was received or read. A seller's defense based solely on the postsale timing of receipt or awareness of the manual arguably would fall short of good faith" (*180 Cal. App. 4th 1213, 1231)* .

In *Nunes Turfgrass, Inc. v. Vaughan-Jacklin Seed Co. (1988) 200 Cal. App. 3d 1518, 246 Cal. Rptr. 823* , a sod grower brought an action against a seed company, alleging breach of warranty and products liability, based on the sale of

perennial ryegrass seed that was contaminated with annual ryegrass seed. The trial court entered judgment for plaintiff, but limited the recoverable damages, and both parties appealed. The court of appeal affirmed (*200 Cal. App. 3d 1518, 1540)* . It held, inter alia, that defendant breached its express warranty to plaintiff in that defendant expressly warranted that the seed conformed to the label description as required by state and federal law, when in fact defendant failed to list the percentage by weight of annual ryegrass seed in the perennial ryegrass, as required by those laws (*200 Cal. App. 3d 1518, 1532)* . The court also discussed the contractual limitation on plaintiff's entitlement to consequential damages for breach of express warranty and breach of the implied warranty of fitness for a particular purpose (*200 Cal. App. 3d 1518, 1532-1539)* . For discussion of these issues in this case, see Ch. 50, *Contracts* .

In *Putensen v. Clay Adams, Inc. (1970) 12 Cal. App. 3d 1062, 91 Cal. Rptr. 319* , a heart patient brought an action against a surgical-tubing manufacturer and others, based on injuries incurred when the surgical tubing, which was purchased by the hospital and selected by plaintiff's surgeon, kinked during a heart operation, requiring an additional procedure to remove the tubing. The court of appeal reversed the trial court's judgment for defendant manufacturer, following its motion for nonsuit. With regard to the cause of action for express warranty, the court noted that defendant made no oral or written representations that the tubing was fit for that particular procedure, although it stated that the tubing was useful for moving fluids into and from body cavities, and the surgeon inferred that the tubing was suitable for that particular operation. The court held that questions of fact existed regarding whether defendant made an express warranty, and whether defendant breached the warranty, that is, whether the tubing was reasonably fit for the purpose intended (*12 Cal. App. 3d 1062, 1079-1080)* .

The facts and procedural background of *Eichler Homes, Inc. v. Anderson (1970) 9 Cal. App. 3d 224, 87 Cal. Rptr. 893* , are discussed in *§ 206.63[3][b]*. The court in *Eichler* found implied warranties of merchantability and fitness for a particular use in the sale of steel tubing (*9 Cal. App. 3d 224, 231)* . With respect to the express warranty claim against one of the steel manufacturers, the evidence supported the reasonable conclusion that defendant and its representatives stated that their tubing was suitable for the type of radiant heating systems installed by the subcontractors. The court interpreted former Civ. Code § 1732, which preceded *Com. Code § 2313*, and required reliance on the seller's affirmation by the buyer to establish an express warranty (*9 Cal. App. 3d 224, 229 n.3*). The court found an express warranty (under the former code) supported by substantial evidence (*9 Cal. App. 3d 224, 232)* . Counsel should note, however that the former law has been superseded by *Com. Code § 2313*, which does not require reliance, but rather indicates only that the seller's statements must become "part of the basis of the bargain" [*see Keith v. Buchanan (1985) 173 Cal. App. 3d 13, 220 Cal. Rptr. 392* , *discussed under § 206.60[3][a]*].

[b] Description of Goods Creates Warranty

In *Anthony v. General Motors Corp. (1973) 33 Cal. App. 3d 699, 109 Cal. Rptr. 254* , a class action suit brought by truck owners seeking a recall of the wheels installed as optional equipment by the manufacturer, the court of appeal reversed the trial court's dismissal, which was based on the determination that a class action could not be maintained (*33 Cal. App. 3d 699, 709)* . With respect to plaintiffs' assertion of a breach of warranty theory, the court of appeal noted that although an express warranty must ordinarily be created at the time the product is purchased, it can also be created by advertisements. An express warranty could be shown by nationwide advertisements that the wheels in question were free from inherent risk of failure; and by a plate attached to each truck referring to a user's manual, which asserted that the wheels, if loaded within stated limits, were safe and adequate for those loads (*33 Cal. App. 3d 699, 706-707)* .

[c] Privity Not Required

The facts and procedural background of *Hauter v. Zogarts (1975) 14 Cal. 3d 104, 120 Cal. Rptr. 681, 534 P.2d 377* , are *discussed under § 206.60[3][a]*. In *Hauter*, the Supreme Court held that any affirmation of fact or promise made by the seller to the buyer that relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods will conform to the affirmation or promise (*14 Cal. 3d 104, 115, 117)* . The Court noted that although plaintiff was not the purchaser of the product, the fact that he was not in privity with defendants did not bar recovery,

because privity is not required for an action based on express warranty (*14 Cal. 3d 104, 114 n.8*).

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20-206 California Points & Authorities § 206.61

§ 206.61 Supporting Contention That Seller Is Liable for Breach of Express Warranty [Com. Code § 2313]--Cause of Action Not Barred by Expiration of Limitations Period [Com. Code § 2725]--Warranty Explicitly Extends to Future Performance and Cause of Action Accrues on Discovery

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S CAUSE OF ACTION AGAINST DEFENDANT _____ [*name of seller*] FOR BREACH OF EXPRESS WARRANTY IS NOT BARRED BY THE EXPIRATION OF THE FOUR-YEAR LIMITATIONS PERIOD BASED ON ACCRUAL OF THE CAUSE OF ACTION AT THE TIME OF DELIVERY, BECAUSE THE WARRANTY EXPLICITLY EXTENDS TO FUTURE PERFORMANCE OF THE GOODS, AND PLAINTIFF COULD NOT DISCOVER THE BREACH UNTIL THE TIME OF THAT PERFORMANCE. THEREFORE THE CAUSE OF ACTION ACCRUED WHEN PLAINTIFF DISCOVERED, OR SHOULD HAVE DISCOVERED, THE BREACH, WHICH OCCURRED WITHIN THE LIMITATIONS PERIOD PRIOR TO THE FILING OF THE COMPLAINT.

A. Accrual-on-Discovery Rule. When a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of the performance, the cause of action accrues when the breach is or should have been discovered, which is an exception to the general rule that an action for breach of warranty accrues on tender of delivery (*Com. Code § 2725(2)*; *Krieger v. Nick Alexander Imports, Inc. (1991) 234 Cal. App. 3d 205, 215-218, 285 Cal. Rptr. 717*).

[*Optional*] **B. Promise to Repair Defects in Future.** A promise to repair defects that occur during a future period constitutes an express warranty of future performance under the Commercial Code (*Krieger v. Nick Alexander Imports, Inc. (1991) 234 Cal. App. 3d 205, 217*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a seller is liable to the buyer for breach of express warranty under the Commercial Code. The ground for the contention is that the complaint was filed within the limitations period under *Com. Code § 2725* (either the four-year statutory period or a reduced period not less than one year, pursuant to the original agreement), based on the accrual-on-discovery rule applicable to an explicit extension of the warranty to future performance [*see Com. Code § 2725(2)*]. It is for use when the seller asserts that the action is time-barred based on the general accrual rule, which states that a cause of action under the Commercial Code accrues when the breach occurs, and that a breach of warranty occurs on tender of delivery. Optional Paragraph B is for use to assert that a promise to repair future defects constitutes an express warranty of future performance.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which the issue of the limitations period is raised. For example, they may be combined with points and authorities in opposition to a demurrer to the complaint. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel set forth the contract terms explicitly extending the warranty to future performance, and set forth the dates of the breach and the filing of the complaint.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 206.70* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Accrual-on-Discovery Rule

In ***Krieger v. Nick Alexander Imports, Inc.*** *(1991) 234 Cal. App. 3d 205, 285 Cal. Rptr. 717* , an automobile owner brought a complaint for damages against the manufacturer and several dealerships, alleging defendants' inability to rectify the car's defective performance. The buyer of a new BMW automobile purchased it for his son. Within the first 24 hours of use, a portion of the drive train fell out, and performance problems continued to plague the owner. During the first five months, the car was serviced five times by the dealer that sold the car. After determining that that dealer could not repair the car, the owner took it to another dealer, at the suggestion of the distributor. The owner and the estate of the buyer (referred to in this discussion as "plaintiff") filed suit approximately three-and-a-half years after that date. The complaint stated five causes of action, including breach of warranty under the Song-Beverly Consumer Warranty Act (the Consumer Warranty Act, *Civ. Code § 1790 et seq.*) and breach of written warranty under the Commercial Code (*Com. Code § 2313*). The trial court granted defendants' motion for summary judgment on the ground that the action was time-barred. Plaintiff appealed.

The court of appeal reversed, holding, inter alia, that the warranty causes of action were not time-barred (*234 Cal. App. 3d 205, 212-215)* . The court noted that one cause of action alleged breach of the warranty provisions under the Consumer Warranty Act, and another alleged breach of a written warranty to repair the vehicle within 36 months of its purchase or during the first 36,000 miles of its use, whichever first occurred (*234 Cal. App. 3d 205, 210-211)* . Defendant's motion for summary judgment was based on the application of the three-year limitations provision under *Code Civ. Proc. § 338(a)* to the Consumer Warranty Act, and the four-year limitations provision under Com. Code § 2525 to the written warranty governed by the Commercial Code. In granting the motion, the trial court did not specify which limitation period applied to each cause of action. The court noted that *Com. Code § 2725* provides a four-year limitations period for breach of warranty (*234 Cal. App. 3d 205, 213-214)* . With respect to the accrual of the cause of action, under *Com. Code § 2725(2)* an action for breach of warranty accrues on tender of delivery. An exception is

made when a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of that performance (*234 Cal. App. 3d 205, 215)* . The court noted that no California case has interpreted this provision, although other jurisdictions, applying the corresponding Uniform Commercial Code provision, have held that a defendant who moves for summary judgment bears the burden of negating the applicability of the discovery exception for accrual of an action on a future warranty (*234 Cal. App. 3d 205, 215-216)* . Plaintiff alleged in the complaint that he received a written warranty that all defects would be repaired for a period of 36 months or within the first 36,000 miles of use. In opposition to the summary judgment motion, he relied on the discovery rule under *Com. Code § 2725(2)*, submitting a service information bulletin from the manufacturer that discussed problems caused by the fuel quality in the United States and specified that a special service program may reveal additional necessary repairs not covered by the regular BMW limited warranties (*234 Cal. App. 3d 205, 216)* . Plaintiff also submitted repair invoices labeled "warranty," which contained standard clauses informing buyers of their repair rights during the warranty period (*234 Cal. App. 3d 205, 216-217)* . Defendant contended that the case did not involve future performance. It argued that, if in fact BMW represented that it would repair the vehicle for 36 months or 36,000 miles, the representation constituted only an agreement to repair the vehicle free of charge, rather than a warranty of future performance or an extension of the limitations period for an additional four years. The court stated that a promise to repair defects that occur during a future period is the very definition of express warranty of future performance, under both the Consumer Warranty Act and the Commercial Code. Plaintiff's evidence was sufficient to raise a genuine issue with respect to the existence of an express warranty under *Com. Code § 2313* (*234 Cal. App. 3d 205, 217)* . The court concluded that plaintiff raised an issue of material fact with regard to the applicability of the accrual-on-discovery rule codified in *Com. Code § 2725(2)* (*234 Cal. App. 3d 205, 218)* . The court also stated that because both causes of action are governed by the same statute of limitations, the same rule of accrual applies as well. Under the facts, a reasonable trier of fact could conclude that the causes of action accrued when the owner determined that the first dealership could not fix the car. Inasmuch as the complaint was filed less than four years after that date, it is not time-barred (*234 Cal. App. 3d 205, 218-219)* .

[b] Promise to Repair Defects in Future

Krieger v. Nick Alexander Imports, Inc. *(1991) 234 Cal. App. 3d 205, 215-218, 285 Cal. Rptr. 717* , is *discussed under § 206.61[3][a].*

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20-206 California Points & Authorities § 206.62

§ 206.62 Supporting Contention That Seller Is Liable for Breach of Express Warranty [Com. Code § 2313]--Disclaimer of Warranty [Com. Code § 2316(1)] Ineffective--Disclaimer Inconsistent With Language of Express Warranty

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT _____ [*name of seller*] IS LIABLE TO PLAINTIFF FOR BREACH OF EXPRESS WARRANTY DESPITE THE PURPORTED CONTRACTUAL DISCLAIMER, BECAUSE THE DISCLAIMER IS INCONSISTENT WITH THE LANGUAGE DESCRIBING THE EXPRESS WARRANTY.

A. Construction of Words Creating and Negating Warranty. Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty are construed whenever reasonable as consistent with each other; but subject to *Commercial Code Section 2202*, regarding parol or extrinsic evidence, negation or limitation is inoperative to the extent that the construction is unreasonable in that regard (*Com. Code § 2316(1)*).

B. Disclaimer of Express Warranty Strictly Construed Against Seller. A disclaimer of an express warranty is essentially contradictory; courts strictly construe contract language against a party that has both warranted a particular fact to be true and then attempted to disclaim the warranty (*Fundin v. Chicago Pneumatic Tool Co. (1984) 152 Cal. App. 3d 951, 958, 199 Cal. Rptr. 789*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a seller is liable for breach of an express warranty regarding the sale of goods [*see Com. Code § 2313*]. The basis of the contention is that the seller provided an

express warranty, but also attempted to negate or limit it, the effect of which is to create the express warranty according to the appropriate rules of construction [*see Com. Code § 2316(1)*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that an express warranty is effective despite the seller's attempt to disclaim it. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should show that the seller provided an express warranty, but also attempted to negate or limit it, and that the two provisions are inconsistent.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 206.72* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Disclaimer of Express Warranty Strictly Construed Against Seller

In ***Fundin v. Chicago Pneumatic Tool Co.*** *(1984) 152 Cal. App. 3d 951, 199 Cal. Rptr. 789* , the purchaser of a drill rig brought an action against the seller and the manufacturer, alleging causes of action that included breach of express and implied warranties arising from the drill rig's failure to perform as expected. Plaintiff purchased the drill rig from a company that had purchased it for plaintiff from the manufacturer. After obtaining the drill rig, plaintiff discovered, among other problems, that it did not drill as deeply or pump as efficiently as expected. He brought an action against both the seller and the manufacturer. The trial court sustained the manufacturer's demurrer on the grounds that it was not a party to the sales contract, and that the action was time-barred pursuant to *Code Civ. Proc. § 339*. Plaintiff appealed.

The court of appeal affirmed, on the ground that the action was time-barred (*152 Cal. App. 3d 951, 959-960)* . With respect to the substantive warranty issues, however, the court held that privity was not required in an action based on express warranty, and that a purported disclaimer was ineffective to negate the express warranties from the manufacturer (*152 Cal. App. 3d 951, 957-958)* . With respect to the express-warranty disclaimer issue, the court noted that, according to plaintiff, both defendants disseminated a sales brochure, which constituted a warranty. The brochure included detailed specifications of the drilling depth and diameter, and the pumping capacity of the drill rig. The bottom of that page contained the following language: "We reserve the right to amend these specifications at any time without notice. The only warranty applicable is our standard written warranty. We make no other warranty count expressed or implied and particularly make no warranty of suitability for any particular purpose." The court stated that the brochure clearly warrants, under favorable conditions and using a particular drill pipe, that the rig will drill to a certain depth (*152 Cal. App. 3d 951, 957)* . Under *Com. Code § 2316(1)*, words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty are construed whenever reasonable as consistent with each other. But subject to *Com. Code § 2202*, regarding parol or extrinsic evidence, negation or limitation is inoperative to the extent that that construction is unreasonable (*152 Cal. App. 3d 951, 957-958)* . According to the U.C.C. Comment to that provision, it is designed principally to deal with those frequent clauses in sales contracts that seek to exclude "all warranties, express or implied." It seeks to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to that language when inconsistent with language of express warranty, and permitting the exclusion of implied warranties only by conspicuous language or other circumstances that protect the buyer from surprise. The court stated that strict construction against the person who has both warranted a particular fact to be true, and then attempted to disclaim the warranty, is especially appropriate in light of the fact that a disclaimer of an express warranty is essentially contradictory. In the instant case, when a product had been expressly described by its manufacturer as having certain detailed capacities under certain conditions, it would be both unfair and unreasonable to

construe the language "[t]he only warranty applicable is our standard written warranty" as negating the express description, particularly when, for all the consumer knows, the standard warranty is the detailed list of specifications. The court held, therefore, that the warranties contained in the brochure could not be disclaimed or excluded, and hence, they were not (*152 Cal. App. 3d 951, 958)* . However, the court also held that, inasmuch as plaintiff and the manufacturer did not enter into a sales contract, an action by plaintiff against the manufacturer was governed by the two-year limitations provision under *Code Civ. Proc. § 339*, rather than the four-year provision of *Com. Code § 2725*, and, consequently, was time-barred (*152 Cal. App. 3d 951, 958-960)* .

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20-206 California Points & Authorities § 206.63

§ 206.63 Supporting Contention That Seller Is Liable for Breach of Implied Warranty of Merchantability [Com. Code § 2314]--Establishing Liability Generally

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT _____ [*name of seller*] IS LIABLE TO PLAINTIFF FOR BREACH OF THE IMPLIED WARRANTY OF MERCHANTABILITY BECAUSE DEFENDANT IS A MERCHANT WITH REGARD TO THE _____ [*specify, e.g.,* STEEL TUBING] IT SOLD TO PLAINTIFF, AND THOSE GOODS ARE NOT MERCHANTABLE BECAUSE _____ [*specify, e.g.,* THEY ARE NOT FIT FOR THE ORDINARY PURPOSES FOR WHICH THEY ARE USED], AND SPECIFICALLY, _____ [*specify, e.g.,* AFTER INSTALLATION OF THE STEEL TUBING IN RESIDENTIAL STRUCTURES FOR THE PURPOSE OF CONDUCTING RADIANT HEAT, THE TUBING BECAME CORRODED AND DISINTEGRATED].

A. Warranty Implied When Seller Is Merchant. A warranty that the goods will be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind, unless the warranty is excluded or modified pursuant to *Commercial Code Section 2316* (*Com. Code § 2314(1)*).

B. Warranty of Merchantability Arises by Operation of Law. A seller's liability for breach of the implied warranty of merchantability does not arise from any statements or conduct by the seller, but arises by operation of law from the contract of sale (*Hauter v. Zogarts (1975) 14 Cal. 3d 104, 117, 120 Cal. Rptr. 681, 534 P.2d 377*).

[*Optional*] **C. Service of Food or Drink Constitutes Sale.** With respect to the implied warranty of merchantability under *Commercial Code Section 2314*, the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale (*Com. Code § 2314(1)*).

D. Merchantable Goods. Merchantable goods must satisfy at least the following criteria: (1) pass without objection in

the trade under the contract description; (2) in the case of fungible goods, are fair average quality within the description; (3) are fit for the ordinary purposes for which they are used; (4) run, within the variations permitted by the agreement, of even kind, quality, and quantity within each unit and among all units involved; (5) are adequately contained, packaged, and labeled as the agreement may require; and (6) conform to the promises or affirmations of fact made on the container or label (*Com. Code § 2314(2)*; *Hauter v. Zogarts (1975) 14 Cal. 3d 104, 117-118, 120 Cal. Rptr. 681, 534 P.2d 377* ; *Eichler Homes, Inc. v. Anderson (1970) 9 Cal. App. 3d 224, 231, 87 Cal. Rptr. 893*).

[*Optional*] **E. Privity Between Supplier and Buyer Who Contracts With Financing Lessor.** For purposes of establishing liability based on implied warranty, privity may be found between the supplier of a product and a lessee-buyer that entered into a contract with a financing lessor if the supplier and lessee-buyer arranged together to select the product and otherwise had direct dealings with each other in the procurement and maintenance of the product (*U.S. Roofing, Inc. v. Credit Alliance Corp. (1991) 228 Cal. App. 3d 1431, 1442, 279 Cal. Rptr. 533*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a seller is liable for breach of an implied warranty of merchantability [*see Com. Code § 2314*]. Optional Paragraph C is for use to assert that the service of food or drink constitutes a sale. Optional Paragraph E is for use to assert that privity exists between plaintiff, as a lessee-buyer, and defendant, as a supplier of the goods, when plaintiff entered into a contract with a third-party financing lessor, based on the direct dealings between plaintiff and defendant. If the lease was first made or effective between the parties on or after January 1, 1990, it will be governed by *Com. Code §§ 10103, 10107, 10208-10215, 10516* [*see Com. Code § 10600*; *see* discussion in California Forms of Pleading and Practice, Ch. 413, *Personal Property Leases* (Matthew Bender)].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the seller is liable for breach of the implied warranty of merchantability. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should show that defendant is a merchant, and that the goods are not merchantable pursuant to one or more of the criteria set forth in *Com. Code § 2314(2)*, for example, that they are not fit for the ordinary purposes for which those goods are used.

[b] Related Pleading and Practice Forms

For discussion and forms for use in actions involving warranties under the Commercial Code, see California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties* (Matthew Bender). For discussion and forms regarding strict products liability, see California Forms of Pleading and Practice, Ch. 460, *Products Liability* (Matthew Bender).

[c] Related Points and Authorities

For points and authorities relating to products liability generally, see Ch. 190, *Products Liability* .

[d] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 206.72 -206.74, 206.76 -206.78* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Warranty of Merchantability Arises by Operation of Law

The facts and procedural background of ***Hauter v. Zogarts*** *(1975) 14 Cal. 3d 104, 120 Cal. Rptr. 681, 534 P.2d 377* , are discussed in *§ 206.60[3][a]*. In *Hauter*, the Supreme Court held that defendants were liable for breach of the express warranty that their product, a golfing device, was safe to use as instructed (*14 Cal. 3d 104, 117)* . The Court also held that defendants breached the implied warranty of merchantability with respect to the device (*14 Cal. 3d 104,117-118*). The Court stated that, unlike express warranties, which are basically contractual in nature, the implied warranty of merchantability arises by operation of law. Consequently, defendants' liability for an implied warranty does not depend on any specific conduct or promise on their part, but instead turns on whether their product is merchantable under the Commercial Code (*14 Cal. 3d 104, 117)* . The two definitions of merchantability applicable to the instant case are: (1) the product must conform to the promises or affirmations of fact made on the container or label (*Com. Code § 2314(2)(f)*); and (2) the product must be fit for the ordinary purposes for which those goods are used (*Com. Code § 2314(2)(c)*) (*14 Cal. 3d 104, 117-118)* . The Court concluded that the device failed in both respects. As the Court explained in its discussion regarding breach of express warranty, the device did not live up to the statement on the carton that it is completely safe. Further, inasmuch as the product was marketed for use by inexperienced golfers who, by definition, do not hit the ball correctly, the device was not fit for the ordinary purposes for which it is normally used; that is, it was shown at trial to be safe only when the ball was hit correctly (*14 Cal. 3d 104, 118)* .

[b] Merchantable Goods

The facts and procedural background of ***Hauter v. Zogarts*** *(1975) 14 Cal. 3d 104, 120 Cal. Rptr. 681, 534 P.2d 377* , are discussed in *§ 206.60[3][a]*. In *Hauter*, the Supreme Court stated that the seller created an express warranty by virtue of assertions made in the printed instructions for use of the product, a golfing device (*14 Cal. 3d 104, 117)* . According to the evidence, the device was not fit for the ordinary purposes for which it was normally used. The device was designed and marketed for golfers described as "duffers" who desire to improve their technique and who rarely hit a ball solidly. The Court cited expert testimony describing the device as a major safety hazard, and defendants' admission that a person who hits beneath the ball incurs substantial risk of serious injury. The Court rejected, as wholly without merit, defendants' attempt to avoid liability by limiting the scope of their warranties, based on the claim that assertions of complete safety applied only when the ball was hit properly, and supported only by a drawing in the instructions of a golfer "correctly" using the product (*14 Cal. 3d 104, 118)* .

In ***Eichler Homes, Inc. v. Anderson*** *(1970) 9 Cal. App. 3d 224, 87 Cal. Rptr. 893* , a builder, who was sued by homeowners based on defective steel tubing installed in their residences, cross complained against the subcontractors that installed the tubing and the steel manufacturers that supplied it. The subcontractors cross complained against the same steel manufacturers, seeking indemnity. The subcontractors generally installed copper tubing in the homes for heating purposes. When they were unable to import the copper tubing, because of a political crisis, they procured the steel tubing instead. Several years after it was installed, the steel tubing became corroded and leaked. Prior to trial, the builder settled with the homeowners, and the trial proceeded on the cross complaints. The trial court entered judgment in favor of the builder and against the subcontractors on the cross complaint, and in favor of the subcontractors and against the steel manufacturers for indemnification. The steel manufacturers appealed from the judgment, and the other parties appealed from the court's denial of legal fees in the action.

The court of appeal affirmed the judgment in its entirety (*9 Cal. App. 3d 224, 235)* . The court interpreted former Civ. Code § 1735, which applied to the present case, although at the time of appeal it had been superseded by *Com. Code §§ 2314, 2315* (*9 Cal. App. 3d 224, 229 n.3*). The court held that the steel manufacturers impliedly warranted to the subcontractors that the steel tubing was reasonably fit for its intended use and was of merchantable quality (*9 Cal. App. 3d 224, 231)* .

[c] Privity Between Supplier and Buyer Who Contracts With Financing Lessor

In ***U.S. Roofing, Inc. v. Credit Alliance Corp.*** *(1991) 228 Cal. App. 3d 1431, 279 Cal. Rptr. 533* , the lessee-buyer of an allegedly defective crane brought an action against the manufacturer, the supplier, and the financing lessor for breach of warranties. Plaintiff required a particular crane for use in a construction project. It entered into a lease agreement with a leasing company, under which plaintiff selected the equipment and the supplier, and the leasing company purchased the equipment and leased it to plaintiff for a certain period of time. Plaintiff had paid the supplier a deposit prior to arranging the financing. The lease agreement included an option to purchase the crane at the end of the lease term for a certain price; it also contained a disclaimer stating that the lessor makes no express or implied warranties. The leasing company paid the full price of the crane to the supplier, less the amount of plaintiff's deposit. After delivery of the crane, plaintiff immediately experienced problems, which persisted despite repeated repairs. Plaintiff discontinued payments and attempted to revoke the lease. The leasing company treated the nonpayment as a breach of the lease, invoked the acceleration clause, and repossessed and resold the crane. Plaintiff filed suit, and the leasing company cross complained for breach of the lease, seeking a deficiency judgment. The jury found against the supplier and the leasing company on the complaint, awarding damages to plaintiff, and found for plaintiff on the cross complaint. Defendants appealed.

The court of appeal reversed the judgments against the leasing company on both the complaint and the cross complaint, and reversed the judgment against the supplier, remanding the case for a new trial limited to the issue of damages (*228 Cal. App. 3d 1431, 1454-1455)* . The supplier claimed that it was not liable for any breach of warranty as a matter of law because, inter alia, the lack of a written sale agreement between it and plaintiff evidenced the absence of privity of contract between those two parties. The court noted that vertical privity is a prerequisite in California for recovery on a theory of breach of the implied warranties of fitness and merchantability (*228 Cal. App. 3d 1431, 1441)* . In response to the supplier's motion for nonsuit, based in part on lack of privity, plaintiff argued that the sale of the crane was between it and the supplier, with the leasing company providing the financing. The trial court denied the motion and determined that the identity of the parties to the sale was a factual issue for the jury to decide. The jury was instructed that privity of contract between plaintiff and defendant was necessary to support a finding that the defendant is liable for a breach of warranty (*228 Cal. App. 3d 1431, 1441-1442)* . The supplier asserted that since it sold the crane to the leasing company, not to plaintiff, as a matter of law there was no privity between it and plaintiff, and, accordingly, it could not be liable for breach of implied warranty. The court stated that the supplier's argument focused solely on the paper contract, but ignored the considerable testimony regarding the direct dealings between the supplier and plaintiff for the sale and purchase of the crane. These parties had an oral agreement for the sale of the crane, supported by plaintiff's deposit. In addition, the supplier admitted it made at least one express warranty about the crane. When plaintiff experienced problems with the crane, it contacted the supplier, which arranged and paid for the needed repairs. The court concluded that the jury could find the necessary privity to support liability for breach of an implied warranty (*228 Cal. App. 3d 1431, 1442)* .

[4] Additional Authorities

[a] Merchantable Goods

The facts and procedural background of *Pisano v. American Leasing (1983) 146 Cal. App. 3d 194, 194 Cal. Rptr. 77* , are discussed in *§ 206.75[3][a]*. In *Pisano*, the court of appeal held that a buyer cannot recover damages under the theory of breach of express warranty in the absence of any affirmations of fact or promises made by defendants to plaintiff (*146 Cal. App. 3d 194, 197-198)* . With regard to plaintiff's claim based on breach of implied warranty of merchantability and fitness for normal use (*Com. Code § 2314*), the court stated that defendants' liability does not depend on any specific statement or conduct of the seller, but rather arises from the sale contract. The most relevant definition of merchantability in this case is a product's fitness for the ordinary purposes for which it is used. In a breach of warranty action, plaintiff may recover only after demonstrating that a warranty existed, that defendant breached that warranty, and that the breach proximately caused the loss sustained. The court noted that determination of whether the product conformed to the standard performance of like products used in the trade is crucial to that inquiry. Inasmuch as that determination may depend on expert testimony regarding industry standards and local practices, summary judgment

for defendant was improper. The court therefore reversed summary judgment for defendant on that cause of action (*146 Cal. App. 3d 194, 198)* .

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20-206 California Points & Authorities § 206.64

§ 206.64 Supporting Contention That Defendant Is Liable for Breach of Implied Warranty of Merchantability [Com. Code § 2314]--Disclaimer of Warranty [Com. Code § 2316(2)] Ineffective

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

DEFENDANT _____ [*name of seller*] IS LIABLE TO PLAINTIFF FOR BREACH OF THE IMPLIED WARRANTY OF MERCHANTABILITY DESPITE THE PURPORTED CONTRACTUAL DISCLAIMER, BECAUSE THE DISCLAIMER IS INEFFECTIVE IN THAT _____ [*specify, e.g.,* IT DOES NOT MENTION MERCHANTABILITY].

A. Modification of Implied Warranty of Merchantability. Subject to *Commercial Code Section 2316(3)*, which describes enforceable exclusions and modifications of warranty, an exclusion or modification of all or any part of the implied warranty of merchantability must mention merchantability, and, if in writing, must be conspicuous (*Com. Code § 2316(2)*).

[*Optional*] **B. Definition of Conspicuous.** A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. Language in the body of a form is conspicuous if it is in larger or other contrasting type or color. The determination of whether a term or clause is conspicuous is for decision by the court (*Com. Code § 1201(b)(10)*).

[*Optional*] **C. Inconspicuous Disclaimer Is Invalid.** A valid disclaimer provision must be in clear and distinct language and prominently set forth in large, bold print in such a position as to compel notice; a disclaimer provision is invalid if it is inconspicuous (*Dorman v. International Harvester Co. (1975) 46 Cal. App. 3d 11, 17-19, 120 Cal. Rptr. 516*).

[*Optional*] **D. Disclaimer Inconspicuous When Contrast With Contract Is Slight.** A disclaimer provision is not

conspicuous when there is only a slight contrast with the balance of the instrument (*Dorman v. International Harvester Co. (1975) 46 Cal. App. 3d 11, 19, 120 Cal. Rptr. 516*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a seller is liable for breach of an implied warranty of merchantability [*Com. Code § 2314*]. The basis of the contention is that although the written sales contract contains a purported disclaimer of implied warranties, the disclaimer is ineffective [*see Com. Code § 2316(2)*]. Optional Paragraphs B-D are for use if the buyer contends that the disclaimer language was inconspicuous.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that a written disclaimer is ineffective to negate an implied warranty of merchantability. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should show that the purported disclaimer of the implied warranty of merchantability either does not mention the word merchantability, or is inconspicuous, in which case counsel should produce a facsimile of the written agreement and compare the characteristics, such as typeface and location, of the disclaimer, with respect to the rest of the contract. Counsel should argue facts showing that the disclaimer was insufficiently conspicuous to inform a reasonable buyer that he or she was waiving the right to have a quality product.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 206.72* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Inconspicuous Disclaimer Is Invalid

In ***Dorman v. International Harvester Co.*** *(1975) 46 Cal. App. 3d 11, 120 Cal. Rptr. 516* , the purchaser of a tractor and backhoe brought an action against the manufacturer based on breach of express and implied warranties, arising from the equipments' failure to function properly. After a jury verdict in favor of plaintiff, the trial court granted defendant's motion for judgment notwithstanding the verdict and reduced the amount of damages awarded. Plaintiff appealed. (Defendant cross appealed the portion of the judgment on the motion that awarded plaintiff damages, and on other orders not discussed here.)

The court of appeal reversed (*46 Cal. App. 3d 11, 21)* . With respect to the disclaimer issue, the court noted that its terms appeared on the face of the preprinted form sales contract, directly following the terms of the sale, and immediately above the parties' signatures. It stated the following, with original italics and punctuation: "The equipment covered hereby is sold subject only to the applicable manufacturer's standard printed warranty, if any, in effect at the date hereof, receipt of a copy of which is hereby acknowledged, and no other warranties, express or implied, including without limitation, the implied warranties of *merchantability and fitness for a particular purpose shall apply*." The trial court concluded that it was sufficiently conspicuous to constitute a valid disclaimer of the implied warranties of merchantability and fitness for a particular purpose, pursuant to *Com. Code § 2316* (*46 Cal. App. 3d 11, 15-16)* . On appeal, plaintiff contended that the trial court erred in its ruling of the validity of the disclaimer provision because, inter alia, the provision is inconspicuous. The court stated that *Com. Code § 2316(2)* provides that an exclusion of the implied warranty of merchantability in case of a writing must be conspicuous, and that an exclusion of the implied warranty of fitness for a particular purpose must be by a writing and conspicuous (*46 Cal. App. 3d 11, 17)* . Pursuant to

Com. Code § 1201(b)(10), conspicuous is defined as so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capital letters is conspicuous. Language in the body of a form is conspicuous if it is in larger or other contrasting type or color. The determination of whether a term or clause is conspicuous is for decision by the court (*46 Cal. App. 3d 11, 17-18)* . The U.C.C. Comment to *Com. Code § 1201(b)(10)* states that the test of conspicuousness is whether attention can reasonably be expected to be called to the disclaimer provision. The U.C.C. Comment to *Com. Code § 2316* states that it is designed principally to deal with those frequent clauses in sales contracts that seek to exclude "all warranties, express or implied." It seeks to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to that language when inconsistent with language of express warranty, and permitting the exclusion of implied warranties only by conspicuous language or other circumstances that protect the buyer from surprise. In other words, the court observed, *Com. Code § 2316* seeks to protect the buyer from the situation in which the salesman's "pitch," advertising brochures, or large print in the contract, giveth, and the disclaimer clause, in fine print, taketh away. In the instant case, the disclaimer provision appeared close to plaintiff's signature, but emphasized the wording "*merchantability and fitness for particular purpose shall apply*." Although the disclaimer provision was printed in a slightly larger typeface than was the preceding paragraph of the contract, it was not in boldface type. The court concluded that the disclaimer was not sufficiently conspicuous to have negated the implied warranties, particularly because no standard printed warranty was in fact given to plaintiff at that time (*46 Cal. App. 3d 11, 18)* . The court held that a provision is not conspicuous when there is only a slight contrast with the balance of the instrument. The instant disclaimer did not reach that level of conspicuousness so as to exclude the right of the buyer to implied warranties that are an integral part of the transaction. It therefore violated the underlying rationale of *Com. Code § 2316* as set forth in the official comment as protecting the buyer from an unbargained limitation in the purchase of a product The contract also failed to provide an adequate heading for the disclaimer provision. In addition, the punctuation of the italicized portion of the disclaimer was ambiguous and possibly misleading. An implied warranty must be disclaimed by terms so clear, definite, and specific as to leave no doubt as to the intent of the contracting parties. Moreover, the court noted, the manufacturer's standard printed warranty was not included in the contract; it was located on the reverse side of the purchase order, a separate document not shown to be signed by plaintiff or delivered to him at any time (*46 Cal. App. 3d 11, 19)* . A disclaimer of warranties must be specifically bargained for, so that a disclaimer in a warranty given to the buyer after signing the contract is not binding (*46 Cal. App. 3d 11, 19-20)* . The court concluded that the disclaimer was insufficiently conspicuous to inform a reasonable buyer that he or she was waiving the right to have a quality product (*46 Cal. App. 3d 11, 20)* .

[b] Disclaimer Inconspicuous When Contrast With Contract Is Slight

Dorman v. International Harvester Co. *(1975) 46 Cal. App. 3d 11, 120 Cal. Rptr. 516* , is *discussed under § 206.64[3][a].*

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20-206 California Points & Authorities § 206.65

§ 206.65 Supporting Contention That Seller Is Liable for Breach of Implied Warranty of Fitness for Particular Purpose [Com. Code § 2315]--Establishing Liability Generally

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

DEFENDANT _____ [*name of seller*] IS LIABLE TO PLAINTIFF FOR BREACH OF THE IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE BECAUSE AT THE TIME OF CONTRACTING FOR THE SALE OF THE _____ [*specify, e.g.,* STEEL TUBING], DEFENDANT HAD REASON TO KNOW THAT PLAINTIFF'S PARTICULAR PURPOSE WAS TO _____ [*specify, e.g.,* INSTALL THE TUBING IN RESIDENTIAL BUILDINGS FOR THE CONDUCTION OF RADIANT HEATING], PLAINTIFF RELIED ON DEFENDANT'S SKILL AND/OR JUDGMENT TO SELECT THE GOODS FOR THAT PURPOSE, AND THERE WAS NO EXCLUSION OR MODIFICATION OF THAT WARRANTY.

Implied Warranty of Fitness for Particular Purpose. If the seller at the time of contracting has reason to know any particular purpose for which the goods are required, and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under *Commercial Code Section 2316* an implied warranty that the goods are fit for that purpose (*Com. Code § 2315*; *Eichler Homes, Inc. v. Anderson (1970) 9 Cal. App. 3d 224, 231, 87 Cal. Rptr. 893*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a seller is liable for breach of an implied warranty of fitness for a particular purpose [*see Com. Code § 2315*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context

in which counsel wishes to raise the issue that the seller is liable for breach of the implied warranty of fitness for a particular purpose. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel should therefore discuss all facts concerning the communications between plaintiff and defendant prior to the sale, and show that plaintiff clearly explained the intended purpose for the goods, and that he or she relied on plaintiff's skill or judgment in selecting those goods for that purpose. Counsel should also indicate that no exclusion or modification affects that warranty.

[b] Related Pleading and Practice Forms

For discussion and forms for use in actions involving warranties under the Commercial Code, see California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties* (Matthew Bender). For discussion and forms regarding strict products liability, see California Forms of Pleading and Practice, Ch. 460, *Products Liability* (Matthew Bender).

[c] Related Points and Authorities

For points and authorities relating to products liability generally, see Ch. 190, *Products Liability* .

[d] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 206.70, 206.72 -206.74, 206.76, 206.77,* and *206.79* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Implied Warranty of Fitness for Particular Purpose

The facts and procedural background of ***Eichler Homes, Inc. v. Anderson*** *(1970) 9 Cal. App. 3d 224, 87 Cal. Rptr. 893* , are discussed in *§ 206.63[3][b]*. In *Eichler*, the court of appeal held that the steel manufacturers impliedly warranted to the subcontractors that the steel tubing was reasonably fit for its intended use and was of merchantable quality. According to the evidence, the subcontractors had made known to the steel manufacturers the particular purposes for which the steel tubing was required. When a buyer makes known to the seller the particular purpose for which goods are required, the seller offers to sell the goods for those purposes, and the buyer accepts the offer, it is reasonable to assume that the buyer relied on the seller's skill and judgment (*9 Cal. App. 3d 224, 231)* .

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20-206 California Points & Authorities § 206.66

§ 206.66 Supporting Contention That Defendant Is Liable for Breach of Implied Warranty of Fitness for Particular Purpose [Com. Code § 2315]--Disclaimer of Warranty [Com. Code § 2316(2)] Ineffective

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT _____ [*name of seller*] IS LIABLE TO PLAINTIFF FOR BREACH OF THE IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE DESPITE THE PURPORTED CONTRACTUAL DISCLAIMER BECAUSE THE DISCLAIMER _____ [*specify defect in disclaimer, e.g.,* IS NOT CONSPICUOUS] AND THUS IS INEFFECTIVE.

A. Modification of Implied Warranty of Fitness for Particular Purpose. Subject to *Commercial Code Section 2316(3),* which describes enforceable exclusions and modifications of warranty, an exclusion or modification of any implied warranty of fitness must be in writing and conspicuous (*Com. Code § 2316(2)*).

[*Optional*] **B. Definition of Conspicuous.** [*See § 206.64, Paragraph B*].

[*Optional*] **C. Inconspicuous Disclaimer Is Invalid.** [*See § 206.64, Paragraph C*].

[*Optional*] **D. Disclaimer Inconspicuous When Contrast With Contract Is Slight.** [*See § 206.64, Paragraph D*].

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a seller is liable for breach of an implied warranty of fitness for a particular purpose [*see Com. Code § 2315*]. The basis of the contention is that the seller's purported disclaimer of warranty is ineffective [*see Com. Code § 2316(2)*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that a written disclaimer is ineffective to negate an implied warranty of fitness for a particular purpose. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should show that the disclaimer is not in writing or, if in writing, that it is inconspicuous, in which case counsel should produce a facsimile of the written agreement and compare the characteristics, such as typeface and location, of the disclaimer with respect to the rest of the contract. Counsel should argue facts showing that the disclaimer was insufficiently conspicuous to inform a reasonable buyer that he or she was waiving the right to have a quality product.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 206.72* may be used to oppose the contention supported by these points and authorities.

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20-206 California Points & Authorities § 206.67

§ 206.67 Supporting Contention That Seller Is Liable for Breach of Express Warranty [Com. Code § 2313], Implied Warranty of Merchantability [Com. Code § 2314] and Implied Warranty of Fitness for Particular Purpose [Com. Code § 2315]--Disclaimer of Warranty [Com. Code § 2316(1)] Ineffective--Seller Did Not Clearly Limit Liability

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT _____ [*name of seller*] IS LIABLE TO PLAINTIFF FOR BREACH OF _____ [EXPRESS WARRANTY *and/or* IMPLIED WARRANTY OF MERCHANTABILITY *and/or* IMPLIED WARRANTY OF FITNESS FOR PARTICULAR PURPOSE] DESPITE ITS PURPORTED DISCLAIMER OF WARRANTIES BECAUSE DEFENDANT DID NOT CLEARLY LIMIT ITS LIABILITY IN ANY MANNER RELEVANT TO PLAINTIFF'S WARRANTY CLAIMS.

No Disclaimer Unless Seller Clearly Limits Liability. No warranty, express or implied, can be modified or disclaimed unless a seller clearly limits its liability (*Hauter v. Zogarts (1975) 14 Cal. 3d 104, 119, 120 Cal. Rptr. 681, 534 P.2d 377*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a seller is liable for breach of an express warranty, or an implied warranty of merchantability or fitness for a particular purpose, regarding the sale of goods [*see Com. Code § 2313*]. The basis of the contention is that, despite a purported disclaimer of warranty, the seller did not clearly limit its liability with respect to the warranties that are the subject of the action [*see Hauter v. Zogarts (1975) 14 Cal. 3d 104, 119, 120 Cal. Rptr. 681, 534 P.2d 377]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the seller's purported disclaimer of warranty is ineffective because the seller did not clearly limit its liability in that regard. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should argue facts showing that defendant did not use words that clearly communicate that a particular risk falls on the buyer, and that plaintiff therefore was not placed on fair notice of any disclaimer or modification of a warranty.

[b] Related Pleading and Practice Forms

For discussion and forms for use in actions involving warranties under the Commercial Code, see California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties* (Matthew Bender). For a discussion and forms regarding strict products liability, see California Forms of Pleading and Practice, Ch. 460, *Products Liability* (Matthew Bender).

[c] Related Points and Authorities

For points and authorities relating to products liability generally, see Ch. 190, *Products Liability* .

[d] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 206.72* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] No Disclaimer Unless Seller Clearly Limits Liability

The facts and procedural background of ***Hauter v. Zogarts*** *(1975) 14 Cal. 3d 104, 120 Cal. Rptr. 681, 534 P.2d 377* , are discussed in *§ 206.60[3][a]*. In *Hauter*, the Supreme Court held that defendants created an express warranty by virtue of statements that the product was completely safe, and that implied warranties of merchantability and fitness existed as well. The Court rejected defendants' contention that the warranties were limited in scope and only applied when the device was used properly (*14 Cal. 3d 104, 115-118)* . The Court stated that defendants failed to meet the stern requirements of *Com. Code § 2316*, which governs disclaimer and modification of warranties (*14 Cal. 3d 104, 118)* . The Court noted that although *Com. Code § 2316* has drawn criticism for its vagueness, its purpose is clear (*14 Cal. 3d 104, 118-119)* . No warranty, express or implied, can be modified or disclaimed unless a seller clearly limits its liability. According to the relevant U.C.C. Comment, this provision is designed principally to deal with those frequent clauses in sales contracts that seek to exclude all warranties, express or implied. It protects a buyer from unexpected and unbargained language of disclaimer by denying effect to that language when inconsistent with language of express warranty, and permitting the exclusion of implied warranties only by conspicuous language or other circumstances that protect the buyer from surprise. Because a disclaimer or modification is inconsistent with an express warranty, words of disclaimer or modification give way to words of warranty unless some clear agreement between the parties dictates the contrary relationship. At the very least, *Com. Code § 2316* allows limitation of warranties only by means of *words* that clearly communicate that a particular risk falls on the buyer. Moreover, any disclaimer or modification must be strictly construed against the seller (*14 Cal. 3d 104, 119)* . Although parties are free to write their own contract, the consumer must be placed on fair notice of any disclaimer or modification of a warranty and must freely agree to the seller's terms (*14 Cal. 3d 104, 119-120)* . A unilateral nonwarranty cannot be tacked onto a contract containing a warranty (*14 Cal. 3d 104, 120)* . The Court noted that defendants did not point to any language or conduct on their part negating their warranties. They referred only to a drawing on the box and to the notion that golf is a dangerous game, and, based on that meager foundation, attempted to limit their explicit promise of safety. The Court concluded that this showing was insufficient under *Com. Code § 2316*, which requires clear language from anyone seeking to avoid warranty liability (

14 Cal. 3d 104, 120) .

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20-206 California Points & Authorities § 206.68

§ 206.68 Supporting Contention That Seller Is Liable for Breach of Warranty of Title or Warranty Against Infringement of Buyer's Interest [Com. Code § 2312]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT _____ [*name of seller*] IS LIABLE TO PLAINTIFF FOR BREACH OF THE WARRANTY _____ [OF TITLE *or* AGAINST INFRINGEMENT OF PLAINTIFF'S INTEREST] BECAUSE _____ [*specify, e.g.,* WHEN DEFENDANT DELIVERED THE AUTOMOBILE TO PLAINTIFF, THE AUTOMOBILE WAS SUBJECT TO A SECURITY INTEREST OF WHICH PLAINTIFF WAS UNAWARE AT THE TIME OF CONTRACTING].

[*EITHER*]

A. Warranty of Title. Subject to exclusion or modification pursuant to *Commercial Code Section 2312(2)*, there is in a contract for sale of goods a warranty by the seller that the title conveyed shall be good and its transfer rightful (*Com. Code § 2312(1)(a)*).

[*AND/OR*]

B. Warranty Against Infringement of Buyer's Interest. Subject to exclusion or modification pursuant to *Commercial Code Section 2312(2)*, there is in a contract for sale of goods a warranty by the seller that the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge (*Com. Code § 2312(1)(b)*).

[*CONTINUE*]

C. Requirements for Exclusion or Modification. A warranty of title, or warranty that the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge, will be excluded or modified only by specific language or by circumstances that give the buyer reason to know that the seller does not claim title in himself or herself, or that he or she is purporting to sell only the right or title that the seller or a third person may have (*Com. Code § 2312(2)*).

D. Warranty of Merchant Dealing With Particular Type of Goods. Unless otherwise agreed, a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like, except that the seller is held harmless against a buyer's claim that arises out of the seller's compliance with the buyer's specifications (*Com. Code § 2312(3)*).

[*Optional*] **E. "Rightful Claim" of Infringement Means Any Nonfrivolous Claim.** A "rightful claim" under *Commercial Code Section 2312(3)* it is a nonfrivolous claim of infringement that has any significant and adverse effect on the buyer's ability to make use of the goods. "Rightful claim" is not synonymous with a claim that ultimately will prove successful in litigation (*Pacific Sunwear of Cal., Inc. v. Olaes Enters., Inc. (2008) 167 Cal. App. 4th 466, 470, 481, 84 Cal. Rptr. 3d 182*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the seller is liable for breach of a warranty of title, or warranty against infringement of the buyer's interest [*see Com. Code § 2312*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the seller breached the warranty of title, or warranty against infringement of the buyer's interest. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should describe the deficiency in the title, or show that the goods that were delivered were subject to a security interest or other lien or encumbrance, of which the plaintiff was not aware at the time of contracting.

[b] Disclaimer of Warranty of Title

The warranty of title under *Com. Code § 2312(1)* is not designated as an "implied" warranty, and therefore is not subject to *Com. Code § 2316(3), set forth in § 206.72*. Disclaimer of the warranty of title is governed instead by *Com. Code § 2312(2)*, which requires either specific language or the described circumstances [*see* U.C.C. Comment 6 to *Com. Code § 2312*].

[c] Related Pleading and Practice Forms

For discussion and forms relating to commercial sales, see California Forms of Pleading and Practice, Ch. 500, *Sales: Sales Under the Commercial Code* (Matthew Bender). For discussion and forms relating to warranties in the sale of goods, see California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties* (Matthew Bender). For discussion and forms regarding strict products liability, see California Forms of Pleading and Practice, Ch. 460, *Products Liability* (Matthew Bender).

[d] Related Points and Authorities

For points and authorities relating to products liability generally, see Ch. 190, *Products Liability* .

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 206.70* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Rightful Claim of Infringement Is Any Nonfrivolous Claim

In ***Pacific Sunwear of Cal., Inc. v. Olaes Enters., Inc.*** *(2008) 167 Cal. App. 4th 466, 84 Cal. Rptr. 3d 182* , the defendant, a merchant dealing in T shirts imprinted with graphic designs, supplied T shirts for resale in the plaintiff's stores. The plaintiff sued for damages, based on breach of the warranty in *Com. Code § 2312(3)*, to compensate for litigation expenses incurred in defending against a third person's trademark-infringement claim that arose out of the plaintiff's sale of the T shirts. The trial court granted the defendant's motion for summary judgment on the ground that the trademark infringement claim did not constitute a "rightful claim" of infringement and thus did not breach the *Com. Code § 2312(3)* warranty. The trial court reached this conclusion, as a matter of law, after analyzing a federal district court's ruling in the trademark infringement case to the effect that there was not a likelihood of confusion between the allegedly infringing T shirts and the claimant's trademark, and therefore the claimant would not prevail in the infringement lawsuit.

The court of appeal reversed. The issue of what is a "rightful claim" under *Com. Code § 2312(3)* was one of first impression. The court held that a "rightful claim" in this context is not synonymous with a claim that ultimately will prove successful in litigation. Rather, it is a nonfrivolous claim of infringement that has any significant and adverse effect on the buyer's ability to make use of the goods (*167 Cal. App. 4th 466, 470)* . "In sum, it is clear from the official commentary, the statutory scheme and the public policy rationales underlying *California Uniform Commercial Code section 2312*, that the section 2312(3) warranty covers a broad scope of infringement claims and is not limited to claims that ultimately will prove successful in litigation. As we have explained, the warranty against rightful claims applies to all claims of infringement that have any significant and adverse effect on the buyer's ability to make use of the purchased goods, excepting only frivolous claims that are completely devoid of merit. This exception for frivolous claims comports with the Uniform Commercial Code commentary and policy rationales discussed above, while giving necessary effect to the statutory qualifier 'rightful.' The seller's warranty under *California Uniform Commercial Code section 2312* is broad, but neither the statutory text, nor the policy rationales, can support extension of the seller's warranty to even frivolous claims of infringement. As reflected in the statutory text, a seller cannot reasonably be required to seek out and resolve even meritless claims of infringement prior to sale" (*167 Cal. App. 4th 466, 481)* (citation omitted).

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20-206 California Points & Authorities § 206.69

§ 206.69 Supporting Contention That Buyer Is Entitled to Damages [Com. Code §§ 2714(2), (3), 2715(2)(b)] for Seller's Breach of Warranty [Com. Code §§ 2312-2315]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial appellate brief.*]

PLAINTIFF IS ENTITLED TO RECOVER FROM DEFENDANT _____ [*name of seller*] DAMAGES ARISING FROM DEFENDANT'S BREACH OF WARRANTY IN THE SALE OF GOODS TO PLAINTIFF, MEASURED BY THE DIFFERENCE AT THE TIME AND PLACE OF ACCEPTANCE BETWEEN THE VALUE OF THE GOODS ACCEPTED BY PLAINTIFF AND THE VALUE THEY WOULD HAVE HAD IF THEY HAD BEEN AS WARRANTED.

A. Measure of Damages for Breach of Warranty. The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount (*Com. Code § 2714(2)*).

B. Incidental and Consequential Damages Recoverable. In a proper case, any incidental and consequential damages under *Commercial Code Section 2715* may also be recovered in an action for breach of warranty (*Com. Code § 2714(3)*).

C. Buyer's Incidental Damages. Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation, care, and custody of goods rightfully rejected, any commercially reasonable charges, expenses, or commissions in connection with effecting cover, and any other reasonable expense incident to the delay or other breach (*Com. Code § 2715(1)*).

D. Buyer's Consequential Damages. Consequential damages resulting from the seller's breach include any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to

know, and that could not reasonably be prevented by cover or otherwise; and injury to person or property proximately resulting from any breach of warranty (*Com. Code § 2715(2)*).

[*Optional*] **E. Award of Lost Profits Plus Restitution Not Per Se Inconsistent.** In an action for breach of warranty, the award of lost profits plus restitution of the purchase price are not per se inconsistent under proper circumstances (*Berge v. International Harvester Co. (1983) 142 Cal. App. 3d 152, 163, 190 Cal. Rptr. 815*).

[*Optional*] **F. Attorney's Fees as Damages.** When defendant's breach of warranty causes plaintiff to become involved in litigation with a third person, plaintiff may recover, as an item of damages, attorney's fees incurred in prosecuting or defending the third-party action (*De La Hoya v. Slim's Gun Shop (1978) 80 Cal. App. 3d Supp. 6, 9-12 , 146 Cal. Rptr. 68*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a buyer is entitled to recover damages based on a seller's breach of warranty [*see Com. Code § 2714(2), (3)*]. This form is applicable to warranty of title, express warranty, and an implied warranty of merchantability or fitness for a particular purpose. Optional Paragraph E is for use to assert entitlement to lost profits plus restitution for the purchase price. Optional Paragraph F is for use to assert entitlement to attorney's fees as damages.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the buyer's entitlement to remedies for breach of warranty. In the appropriate case, they may also be combined with points and authorities in support of the buyer's entitlement to remedies based on breach of contract for the sale of nonconforming, accepted goods, such as those *set out in § 206.42*. They may also be combined with the appropriate points and authorities *set out in § 206.43*, regarding specific types of incidental and consequential damages available to the buyer. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should set forth damages based on the difference at the time and place of acceptance between the value of the goods accepted and their value if they had been as warranted, or, alternatively, damages based on special circumstances.

[b] Related Pleading and Practice Forms

For discussion and forms relating to commercial sales, see California Forms of Pleading and Practice, Ch. 500, *Sales: Sales Under the Commercial Code* (Matthew Bender). For discussion and forms regarding strict products liability, see California Forms of Pleading and Practice, Ch. 460, *Products Liability* (Matthew Bender).

[c] Related Points and Authorities

For points and authorities relating to products liability generally, see Ch. 190, *Products Liability* .

[d] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 206.71* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Award of Lost Profits Plus Restitution Not Per Se Inconsistent

In ***Berge v. International Harvester Co.*** *(1983) 142 Cal. App. 3d 152, 190 Cal. Rptr. 815* , the purchaser of a new commercial truck brought an action against the manufacturer, stating causes of action for breach of express and implied warranties. Plaintiff purchased the vehicle for use in her trucking business. Her drivers immediately experienced serious problems, including malfunctioning and missing parts, and inadequate engine power; consequently, the truck required frequent repairs, and the drivers became afraid to use it. As a result, plaintiff, who owned one other truck, suffered financial setbacks and ultimately ceased operating her business. Plaintiff sued the manufacturer, which cross complained for damages arising from its repossession of the vehicle. The trial court granted plaintiff's motion for nonsuit on the cross complaint. After a jury trial, the court awarded damages for the sums plaintiff paid toward the purchase price plus lost profits. The trial court granted a new trial on the issue of damages, and plaintiff appealed.

The court of appeal affirmed the trial court's order granting a new trial on the issue of damages (and reversed the trial court's order denying plaintiff attorney's fees) (*142 Cal. App. 3d 152, 165)* . Defendant challenged the award of lost profits on the ground that they were so uncertain and speculative as to be improper as a matter of law. The court stated that lost profits to an established business may be recovered if their extent and occurrence can be ascertained with reasonable certainty (*142 Cal. App. 3d 152, 161)* . The court held that the calculations supporting the amount of lost profits awarded could not be sustained because the evidence on which they were based concerned unrelated businesses (*142 Cal. App. 3d 152, 162-163)* . Consequently, the net profit figure was entirely speculative, and the trial court's order on that issue proper. For the trial court's guidance on remand, the court stated that the award of lost profits and the restitution of sums plaintiff paid toward the purchase price are not per se inconsistent. The Commercial Code does not include a rule of election of remedies (citing U.C.C. Comment 1 to *Com. Code § 2608*), and a similar award has been approved by the Supreme Court (citing *Seely v. White Motor Co. (1965) 63 Cal. 2d 9, 14, 45 Cal. Rptr. 17, 403 P.2d 145*). The court also stated that the truck's reasonable rental value must be offset, that mitigation was not required because plaintiff was financially unable to purchase another truck and resume her business, and that the income plaintiff did procure after ceasing the trucking operation should be offset from any lost profits awarded on retrial only if the trucking business, if operable, would have occupied the time she spent earning those sums (*142 Cal. App. 3d 152, 163)* .

[b] Attorney's Fees as Damages

In ***De La Hoya v. Slim's Gun Shop*** *(1978) 80 Cal. App. 3d Supp. 6* , *146 Cal. Rptr. 68* , a person who bought a used hand gun that had been stolen brought an action against the seller, seeking damages arising from his arrest for possession of the weapon. Neither party knew the gun was stolen at the time of the purchase. The trial court found that plaintiff was entitled to damages under *Com. Code § 2714*, based on breach of warranty of title under *Com. Code § 2312*, and that recoverable damages included the price of the gun and attorney's fees arising from the criminal prosecution of plaintiff. Defendant appealed.

The appellate department of the trial court affirmed (*80 Cal. App. 3d Supp. 6, 12)* . The court stated that a party who becomes embroiled in litigation with third persons as a result of the defendant's tort or breach of contract may recover, as an item of damages, attorney's fees incurred in the third-party action (*80 Cal. App. 3d Supp. 6, 9)* . The court noted that the trial court impliedly found that the parties could reasonably have contemplated at the time defendant sold the gun that if plaintiff's possession of it was questioned, and the gun was discovered to be stolen, plaintiff would be subject to arrest for receiving stolen property. Once the foreseeability of arrest is established, a natural and usual consequence is that plaintiff would incur attorney's fees (*80 Cal. App. 3d Supp. 6, 11)* . The court noted that plaintiff's action was cast in the form of a buyer seeking damages for breach of warranty. Under the Commercial Code, the buyer may in a proper case measure damages by the loss resulting in the ordinary course of events from the seller's breach as determined in any manner that is reasonable. This rule applies to breach of warranty of title, as to any other breach (*80 Cal. App. 3d Supp. 6, 11-12)* .

[4] Additional Authorities

[a] Buyer's Consequential Damages

Bishop v. Hyundai Motor Co. (1996) 44 Cal. App. 4th 750, 52 Cal. Rptr. 2d 134 , is discussed in *§ 206.110[4][c]*. The court of appeal, construing the consequential damages provision of *Com. Code § 2715* as incorporated by *Civ. Code § 1794* (Song-Beverly Consumer Warranty Act), concluded that *Com. Code § 2715*'s reference to losses must be construed and applied in the context of monetary losses actually incurred. Thus, the plaintiff buyer's "loss of use" damages for a period in which she did not have a replacement vehicle after destruction of her vehicle by fire were not recoverable (*44 Cal. App. 4th 750, 755-757)* .

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20-206 California Points & Authorities § 206.70

§ 206.70 Opposing Contention That Seller Is Liable for Breach of Warranty [Com. Code §§ 2312-2315]--Action Barred by Expiration of Limitations Period [Com. Code § 2725]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial appellate brief.*]

DEFENDANT _____ [*name of seller*] IS NOT LIABLE TO PLAINTIFF FOR BREACH OF _____ [EXPRESS AND/OR IMPLIED] WARRANTY BECAUSE THE LIMITATIONS PERIOD EXPIRED PRIOR TO THE FILING OF THE COMPLAINT.

A. Limitations Period. [*See § 206.38, Paragraph A*].

B. Four-Year Limitations Period for Action Based on Breach of Warranty. The limitations period for an action based on breach of warranty under the Commercial Code is four years (*Com. Code § 2725(1)*; *Krieger v. Nick Alexander Imports, Inc. (1991) 234 Cal. App. 3d 205, 213-214, 285 Cal. Rptr. 717*).

C. Accrual of Cause of Action. [*See § 206.38, Paragraph B*].

D. Extension of Warranty to Future Performance. A breach of warranty occurs when tender of delivery is made, except that when a warranty explicitly extends to future performance and discovery of the breach must await the time of that performance, the cause of action accrues when the breach is or should have been discovered (*Com. Code § 2725(2)*; *Carrau v. Marvin Lumber and Cedar Co. (2001) 93 Cal. App. 4th 281, 290-292, 112 Cal. Rptr. 2d 869*). [*Optional:* Generalized assertions in advertisements and literature do not rise to the level of a warranty explicitly extending to future performance (*Carrau v. Marvin Lumber and Cedar Co. (2001) 93 Cal. App. 4th 281, 290-292, 112 Cal. Rptr. 2d 869*)].

[*Optional*] **E. Limitations Period for Subsequent Action.** [*See § 206.38, Paragraph C*].

[*Optional*] **F. Statute Does Not Affect Tolling.** [*See § 206.38, Paragraph D*].

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a seller is liable to the buyer for breach of warranty under the Commercial Code, on the ground that the four-year limitations period expired prior to the filing of the complaint [*see Com. Code § 2725(1)*; *Krieger v. Nick Alexander Imports, Inc. (1991) 234 Cal. App. 3d 205, 213-214, 285 Cal. Rptr. 717]* . This form applies to warranty of title, express warranty, and the implied warranties of merchantability and fitness for a particular purpose [*see Com. Code §§ 2312-2315*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue of the expiration of the limitations period. For example, they may be combined with points and authorities in support of a demurrer to the complaint. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should set forth the date of the accrual of the cause of action, and show that the applicable limitations period expired before the date the complaint was filed.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in §§ 206.60, 206.61*, 206.83, 206.85, and 206.88.

[b] Four-Year Limitations Period Inapplicable Absent Sales Contract Between Parties

The limitations provision under *Com. Code § 2725* does not apply if no contract for sale exists between plaintiff and defendant. For example, if the buyer purchases goods from a company that previously purchased the goods from the manufacturer for resale to the buyer, the buyer's action against the manufacturer is not based on a "sales contract" between those two parties. Therefore, the action is governed by the two-year limitations provision under *Code Civ. Proc. § 339*, rather than the four-year provision under the Commercial Code [*see Fundin v. Chicago Pneumatic Tool Co. (1984) 152 Cal. App. 3d 951, 959-960, 199 Cal. Rptr. 789* , discussed in *§ 206.62[3][a]*].

[c] Four-Year Limitations Period Inapplicable When Dispute Does Not Involve Goods

Inasmuch as *Com. Code § 2201 et seq.* applies only to a contract for the sale of goods, the limitations period under *Com. Code § 2725* does not apply to an action based on a contract for the sale of nongoods, for example, services [*see Filmservice Laboratories, Inc. v. Harvey Bernhard Enterprises, Inc. (1989) 208 Cal. App. 3d 1297, 1304, 256 Cal. Rptr. 735* (oral contract for sale of services governed by two-year limitations period under *Code Civ. Proc. § 339*)].

[d] Two-Year Limitations Period Applicable in Action Based on Personal Injuries

Causes of action for breach of express and implied warranties in suits based on personal injuries are governed by *Code Civ. Proc. § 335.1*, prescribing a two-year limitations period (supplanting former Code Civ. Proc. § 340(3), which allowed one year), rather than the four-year period under *Com. Code § 2725* [*Rose v. Fife (1989) 207 Cal. App. 3d 760, 772, 255 Cal. Rptr. 440* ; *Becker v. Volkswagen of America, Inc. (1975) 52 Cal. App. 3d 794, 802]* . For discussion and forms related to the limitations period under *Code Civ. Proc. § 335.1*, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[e] Related Pleading and Practice Forms

For discussion and forms relating to commercial sales, see California Forms of Pleading and Practice, Ch. 500, *Sales: Sales Under the Commercial Code* (Matthew Bender). For discussion and forms regarding strict products liability, see California Forms of Pleading and Practice, Ch. 460, *Products Liability* (Matthew Bender).

[f] Related Points and Authorities

For points and authorities relating to products liability generally, see Ch. 190, *Products Liability* .

[3] Discussion of Authorities

[a] Four-Year Limitations Period for Action Based on Breach of Warranty

The facts and procedural background of ***Krieger v. Nick Alexander Imports, Inc.*** *(1991) 234 Cal. App. 3d 205, 285 Cal. Rptr. 717* , are discussed in *§ 206.61[3][a]*. In *Krieger*, the court of appeal held that plaintiff's causes of action based on breach of warranty were not time-barred (*234 Cal. App. 3d 205, 218-219)* . In arriving at this holding, the court stated, preliminarily, that *Com. Code § 2725* provides a four-year limitations period for breach of warranty (*234 Cal. App. 3d 205, 213-214)* .

[b] Extension of Warranty to Future Performance

In ***Carrau v. Marvin Lumber and Cedar Co.*** *(2001) 93 Cal. App. 4th 281, 112 Cal. Rptr. 2d 869* , the purchaser of 50 defective windows sued the manufacturer. The trial court granted summary adjudication to the defendant on the implied warranty claim, finding that claim to be time-barred. The remaining claims were tried to a jury, which found for plaintiff on his claims of breach of express warranty and strict products liability, but found for defendant on the claim of breach of the Song-Beverly Act. The defendant appealed from the trial court order denying defendant's motion for new trial or for judgment notwithstanding the verdict, contending that plaintiff's claim of breach of express warranty was time-barred. The appellate court agreed and reversed the judgment. The buyer did not produce any express warranty that accompanied the sale of the windows, but claimed that the manufacturer's advertisements acted as an express warranty that its products were durable and long-lasting. The court cited *Com. Code § 2725(1)* for the requirement that such an action must be brought within four years after the cause of action has accrued. It was undisputed that plaintiff failed to file suit within four years of delivery of the windows; therefore the jury's verdict could be sustained only if, under *Com. Code § 2725(2)*, it could be concluded that defendant's warranty explicitly extended to future performance of the goods (*93 Cal. App. 4th 281, 290)* . The court noted that although no California case has determined the scope of the "future performance" exception to *Com. Code § 2725*, it has been the subject of decisions from other jurisdictions. The vast majority of courts that have considered the point have concluded that the "future performance" exception to the four-year limitations period applies only when the seller explicitly has agreed to warrant its product for a defined period of time. The exception reflects the drafter's intention to establish a reasonable period of time beyond which sellers need not worry about stale warranty claims, but permits a buyer and seller to negotiate to extend liability into the future. Under that reasoning, general assertions as to the performance or durability of a product do not explicitly extend to future performance of the product (*93 Cal. App. 4th 281, 291)* . The court thus held that generalized assertions in advertisements and literature, such as the assertions defendant made about its windows in its advertisements, do not rise to the level of a warranty explicitly extending to future performance. Defendant therefore was entitled to judgment notwithstanding the verdict on plaintiff's claim of breach of express warranty (*93 Cal. App. 4th 281, 292)* .

[4] Additional Authorities

[a] Extension of Warranty to Future Performance

Cardinal Health 301, Inc. v. Tyco Electronics Corp. (2008) 169 Cal. App. 4th 116, 87 Cal. Rptr. 3d 5 , was an action for damages based on breach of express and implied warranties, which was commenced after expiration of the four-year

limitation period in *Com. Code § 2725(2)*. Opposing the defendant's motion for nonsuit, the plaintiff pointed to the defendant's representation, in their agreement, that the product would have a "mechanical life" of 50,000 cycles, and contended that this was an express warranty extending to "future performance," and therefore, under the discovery rule, the plaintiff's suit was timely. The trial court agreed and denied the motion for nonsuit. The court of appeal reversed. Relying on *Carrau v. Marvin Lumber & Cedar Co. (2001) 93 Cal. App. 4th 281, 112 Cal. Rptr. 2d 869* , which in § 206.70[3][b], the court stated, "Although this case presents a more specific warranty involving a promise that the product will work for '50,000 cycles,' the principles expressed in *Carrau* compel a similar conclusion that this warranty does not fall within the 'future performance' exception of section 2725, subdivision (2). The promise about the mechanical life of the spring probe connectors does not specify a date or time in the future, nor did the 50,000 cycle warranty pertain to a time period that could be determined by reference to an external source" (*169 Cal. App. 4th 116, 131)* . In addition, the plaintiff's claims for breach of implied warranties were not subject to the future performance exception. Because an implied warranty is one that arises by operation of law rather than by an express agreement of the parties, courts have consistently held that it is not a warranty that "explicitly extends to future performance of the goods," as required by *Com. Code § 2725(2)* (*169 Cal. App. 4th 116, 134)* .

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20-206 California Points & Authorities § 206.71

§ 206.71 Opposing Contention That Buyer Is Entitled to Damages [Com. Code §§ 2714(2), (3), 2715(2)(b)] for Seller's Breach of Warranty [Com. Code §§ 2312-2315]--Limitation of Remedies [Com. Code § 2316(4)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF IS NOT ENTITLED TO RECOVER FROM DEFENDANT _____ [*name of seller*] THE DAMAGES ASSERTED BECAUSE DEFENDANT EFFECTIVELY LIMITED PLAINTIFF'S REMEDIES TO THE EXCLUSION OF THOSE DAMAGES.

Limitation of Remedies. Remedies for breach of warranty may be limited in accordance with the provisions under Commercial Code Sections 2718 and 2719 on liquidation or limitation of damages, and on contractual modification of remedy (*Com. Code § 2316(4)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a buyer is entitled to certain damages from a seller based on breach of warranty, on the ground that the seller effectively limited remedies to the exclusion of those damages [*see Com. Code § 2316(4)*]. This form applies to warranty of title, express warranty, and the implied warranties of merchantability and fitness for a particular purpose [*see Com. Code §§ 2312-2315*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the seller limited the buyer's remedies to the exclusion of the damages asserted by plaintiff. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of

law stated. Therefore, counsel should set forth the limitation of remedies, for example, the contractual modification of a statutory remedy.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 206.69*.

[b] Related Pleading and Practice Forms

For discussion and forms for use in actions involving warranties under the Commercial Code, see California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties* (Matthew Bender). For discussion and forms regarding strict products liability, see California Forms of Pleading and Practice, Ch. 460, *Products Liability* (Matthew Bender).

[c] Related Points and Authorities

For points and authorities relating to products liability generally, see Ch. 190, *Products Liability* .

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20-206 California Points & Authorities § 206.72

§ 206.72 Opposing Contention That Seller Is Liable for Breach of Express Warranty [Com. Code § 2313], Implied Warranty of Merchantability [Com. Code § 2314], and Implied Warranty of Fitness for Particular Purpose [Com. Code § 2315]--Disclaimer of Warranty [Com. Code § 2316]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT _____ [*name of seller*] IS NOT LIABLE TO PLAINTIFF FOR BREACH OF AN _____ [EXPRESS AND/OR IMPLIED] WARRANTY BECAUSE DEFENDANT EFFECTIVELY DISCLAIMED ALL WARRANTIES ASSERTED BY PLAINTIFF, PURSUANT TO _____ [*specify, e.g.,* A CONTRACTUAL PROVISION WAIVING ALL IMPLIED WARRANTIES EXCEPT FOR THOSE EXPLICITLY STATED, NONE OF WHICH APPLY TO THIS ACTION].

[*EITHER*]

A. Words Creating and Negating Warranty Construed as Consistent When Reasonable. Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty are construed whenever reasonable as consistent with each other; but subject to *Commercial Code Section 2202*, regarding parol or extrinsic evidence, negation or limitation is inoperative to the extent that the construction is unreasonable in that regard (*Com. Code § 2316(1)*)

[*AND/OR*]

B. Contractual Disclaimer of Implied Warranties. A contractual provision waiving all "other" implied warranties except for those explicitly stated effectively disclaims the implied warranties of merchantability and fitness for a

particular purpose under *Commercial Code Section 2316* (*Southern Cal. Edison Co. v. Harnischfeger Corp. (1981) 120 Cal. App. 3d 842, 855-856, 175 Cal. Rptr. 67*).

[*AND/OR*]

C. Implied Warranties Excluded by "As Is" Language. Notwithstanding *Commercial Code Section 2316(2)*, which sets forth requirements for exclusion or modification of warranty, unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults," or other language that is commonly understood to alert the buyer to the exclusion of warranties, and plainly expresses that there is no implied warranty (*Com. Code § 2316(3)(a)*).

[*AND/OR*]

D. No Implied Warranty When Inspection Would Have Revealed Defect. Notwithstanding *Commercial Code Section 2316(2)*, which sets forth requirements for exclusion or modification of warranty, when the buyer before entering into the contract has examined the goods, or a sample or model of the goods, as fully as desired, or has refused to examine the goods, there is no implied warranty with regard to defects that an examination should have revealed under the circumstances (*Com. Code § 2316(3)(b)*).

[*AND/OR*]

E. Modification of Implied Warranty by Trade Usage. Notwithstanding *Commercial Code Section 2316(2)*, which sets forth requirements for exclusion or modification of warranty, an implied warranty can be excluded or modified by course of dealing, course of performance, or usage of trade (*Com. Code § 2316(3)(c)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a seller is liable for breach of an express warranty, or an implied warranty of merchantability or fitness for a particular purpose, on the ground that the seller effectively disclaimed the warranty asserted by the buyer [*see Com. Code § 2316*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that seller is not liable for breach of the warranties mentioned above. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should show that the disclaimer was in writing and conspicuous, and produce a facsimile of the written agreement and compare the characteristics, such as typeface and location, of the disclaimer with respect to the rest of the contract. Counsel should argue facts showing that the disclaimer was sufficiently conspicuous to inform a reasonable buyer that he or she was waiving the warranty rights.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in §§ 206.64, 206.66*, and 206.87.

CAUTION:

A disclaimer of warranty may be denied enforcement despite technical compliance with the requirements of *Com. Code § 2316* if it is unconscionable [*A & M Produce Co. v. FMC Corp. (1982) 135 Cal. App. 3d 473, 484, 186 Cal. Rptr. 114]* . For points and authorities on this and related issues, see Ch. 50, *Contracts* .

[b] Purpose of Disclaimer Modification Provision

Com. Code § 2316(1) is designed principally to deal with clauses in sales contracts that seek to exclude "all warranties, express or implied." It seeks to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to that language when inconsistent with language of express warranty, and permitting the exclusion of implied warranties only by conspicuous language or other circumstances that protect the buyer from surprise [*see* *Appalachian Ins. Co. v. McDonnell Douglas Corp. (1989) 214 Cal. App. 3d 1, 34, 262 Cal. Rptr. 716* ; *see also* U.C.C. Comment 1 to *Com. Code § 2316*].

[c] Related Pleading and Practice Forms

For discussion and forms for use in actions involving warranties under the Commercial Code, see California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties* (Matthew Bender). For discussion and forms regarding strict products liability, see California Forms of Pleading and Practice, Ch. 460, *Products Liability* (Matthew Bender).

[d] Related Points and Authorities

For points and authorities relating to products liability generally, see Ch. 190, *Products Liability* .

[3] Discussion of Authorities

[a] Contractual Disclaimer of Implied Warranties

In ***Southern Cal. Edison Co. v. Harnischfeger Corp.*** *(1981) 120 Cal. App. 3d 842, 175 Cal. Rptr. 67* , plaintiffs filed suit against the manufacturers of a crane, seeking damages resulting from an accident caused by a defect in the crane. The accident occurred nine years after plaintiffs purchased the crane. The complaint stated causes of action for negligence, strict liability in tort, and breach of implied warranties. The trial court granted defendants' motion for summary judgment, and plaintiffs appealed.

The court of appeal affirmed as to the cause of action for breach of warranty but reversed with respect to the other causes of action (*120 Cal. App. 3d 842, 857)* . The court held that a clause in the contract limiting defendants' liability for defects to 18 months from the date of delivery, and a provision waiving all "other" implied warranties (except for title to the crane's parts) barred plaintiffs' action on the implied warranties of merchantability and fitness for a particular purpose under *Com. Code § 2316* (*120 Cal. App. 3d 842, 855-856)* .

[4] Additional Authorities

[a] Words Creating and Negating Warranty Construed as Consistent When Reasonable

In *Appalachian Ins. Co. v. McDonnell Douglas Corp. (1989) 214 Cal. App. 3d 1, 262 Cal. Rptr. 716* , the insurer of a company that purchased a telecommunications satellite brought an action against the manufacturer, stating causes of action in strict products liability, based on the satellite's failure and the insured purchaser's consequent policy claims. The court of appeal affirmed summary judgment for defendants, holding, inter alia, that a disclaimer of express warranties in the contract between buyer and manufacturer effectively negated an express warranty by the rocket subcontractor to the manufacturer. Inasmuch as the buyer failed to show that the warranty by the subcontractor formed a basis of the bargain in its sales contract, the disclaimer was enforceable (*214 Cal. App. 3d 1, 34-35)* .

[b] Implied Warranties Excluded by "As Is" Language

The facts and procedural background of *U.S. Roofing, Inc. v. Credit Alliance Corp. (1991) 228 Cal. App. 3d 1431, 279 Cal. Rptr. 533* , are discussed in *§ 206.63[3][c]*. In *U.S. Roofing*, the court of appeal held that for purposes of establishing liability based on implied warranty, privity may be found between the supplier of a product and a lessee-buyer that entered into a contract with a financing lessor, if the supplier and lessee-buyer arranged together to select the product and otherwise had direct dealings with each other in the procurement and maintenance of the product (*228 Cal. App. 3d 1431, 1442)* . The lease in question contained the following language in capital letters: "The equipment is leased hereunder as-is, and lessor makes no express nor implied nor statutory warranties as to any matter whatsoever, including without limitation the condition of the equipment, its merchantability or its fitness for any purpose" (*228 Cal. App. 3d 1431, 1438)* . With respect to the issue whether the disclaimer is unconscionable, the court held that warranty disclaimers under the Commercial Code are subject to the defense of unconscionability, and concluded that the leasing company's disclaimer, under the circumstances, was not unconscionable (*228 Cal. App. 3d 1431, 1447-1451)* [for discussion of the case for this issue, *see* Ch. 50, *Contracts*]. More particularly, the court also determined that a warranty disclaimer by a financing lessor-vendor that had no active dealing in the manufacture or selection of the product is not per se unconscionable if the lessee otherwise has an adequate remedy for breach of warranty if the product proves defective (*228 Cal. App. 3d 1431, 1450)* .

In *Triple C. Leasing, Inc. v. All-American Mobile Wash (1976) 64 Cal. App. 3d 244, 134 Cal. Rptr. 328* , the lessor of a vehicle brought an action against the lessee, based on defendants' default on payments. The court of appeal affirmed judgment for plaintiff (*64 Cal. App. 3d 244, 251)* . Although not an issue on appeal, the court rejected defendants' assertion of breach of warranty based on defects in the van. The agreement between plaintiffs and defendants expressly provided that there are no express or implied warranties concerning the equipment and that defendants were receiving the equipment "as is." By contract, parties may provide that there are no warranties as to the condition or merchantability of goods (*64 Cal. App. 3d 244, 250)* .

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20-206 California Points & Authorities § 206.73

§ 206.73 Opposing Contention That Seller Is Liable for Breach of Express Warranty [Com. Code § 2313], Implied Warranty of Merchantability [Com. Code § 2314], and Implied Warranty of Fitness for Particular Purpose [Com. Code § 2315]--Transaction Does Not Involve Goods [Com. Code § 2102]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT _____ [*name of seller*] IS NOT LIABLE TO PLAINTIFF FOR BREACH OF AN _____ [EXPRESS AND/OR IMPLIED] WARRANTY BECAUSE THE TRANSACTION THAT IS THE SUBJECT OF THIS ACTION DID NOT INVOLVE GOODS WITHIN THE MEANING OF THE COMMERCIAL CODE.

A. Commercial Code Applies to Sale of Goods. Unless the context otherwise requires, *Commercial Code Section 2101 et seq.* applies to transactions in goods. [It does not apply to any transaction that although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction, nor does it impair or repeal any statute regulating sales to consumers, farmers, or other specified classes of buyers] (*Com. Code § 2102*).

B. Definition of Goods. "Goods" are defined as all things, including specially manufactured goods, that are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities under *Commercial Code Section 8101 et seq.*, and things in action. They also include the unborn young of animals and growing crops, and other identified things attached to realty pursuant to *Commercial Code Section 2107* (*Com. Code § 2105(1)*).

C. Goods Must Be Existing and Identified. Goods must be both existing and identified before any interest in them can pass. Goods that are not both existing and identified are "future" goods, and a purported present sale of future goods, or of any interest in them, operates as a contract to sell (*Com. Code § 2105(2)*).

[*Optional*] **D. No Liability for Express Warranty When Dispute Does Not Involve Goods.** A cause of action for breach of an express warranty, pursuant to *Commercial Code Section 2313*, does not lie when the dispute does not involve goods defined under *Commercial Code Section 2105* (*Kazerouni v. De Satnick (1991) 228 Cal. App. 3d 871, 873, 279 Cal. Rptr. 74*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a seller is liable for breach of an express warranty, or an implied warranty of merchantability or fitness for a particular purpose, on the ground that the transaction that is the subject of the action does not involve goods [*see Com. Code § 2105*]. Optional Paragraph D is for use if the action involves an express warranty.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that seller is not liable for breach of a warranty regarding the sale of goods. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should describe the subject of the dispute, and show that it does not involve goods, as defined under *Com. Code § 2105*.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in §§ 206.60, 206.63,* and 206.85.

[3] Discussion of Authorities

[a] No Liability for Express Warranty When Dispute Does Not Involve Goods

In ***Kazerouni v. De Satnick*** *(1991) 228 Cal. App. 3d 871, 279 Cal. Rptr. 74* , the seller of a business brought an action against the buyers to enforce the promissory note given in payment, on which the buyers had defaulted. The issue at trial was whether defendants' performance was excused, or the plaintiffs entitled to damages, for a misrepresentation in the sale documents as to the approximate monthly receipts and approximate monthly net profits of the business. The trial court found for plaintiffs because, although the listing agreement misstated the monthly receipts and not profits, defendants did not rely on the misstatement. Defendants appealed.

The court of appeal affirmed (*228 Cal. App. 3d 871, 874)* . Defendants asserted that as a matter of law, reliance was not required because the representation in the sale documents was an express warranty, and that, pursuant to *Com. Code § 2313*, reliance by the buyer is not required. The court stated, however, that *Com. Code § 2313* relates to warranties in the sale of goods, and that the dispute between the parties did not involve goods. Under *Com. Code § 2102*, unless the context otherwise requires, *Com. Code § 2101 et seq.* applies to transaction in goods. Under *Com. Code § 2105*, goods are defined as all things, including specially manufactured goods, that are movable at the time of identification to the contract. The court held that the pattern of monthly receipts or profits of plaintiff's business, as to which defendants claims an express warranty, did not involve goods or movables. The instant case was not a dispute over a warranty of the equipment or inventory that were included in the sale of the business; nor was it a case in which it would be impossible or unreasonable to segregate the nongoods aspects of the sale in determining the proper law to be applied (*228 Cal. App. 3d 871, 873)* . Defendants cited no authority applying *Com. Code § 2313* to representations of the monthly receipts or profits of a going business (*228 Cal. App. 3d 871, 873-874)* . Therefore, the court concluded, defendants failed to sustain the contention that the trial court misapplied the law by requiring them to prove reliance (*228 Cal. App. 3d 871, 874)* .

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20-206 California Points & Authorities § 206.74

§ 206.74 Opposing Contention That Seller Is Liable for Breach of Express Warranty [Com. Code § 2313], Implied Warranty of Merchantability [Com. Code § 2314], and Implied Warranty of Fitness for Particular Purpose [Com. Code § 2315]--Transaction Does Not Involve Sale [Com. Code § 2106(1)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT _____ [*name of seller*] IS NOT LIABLE TO PLAINTIFF FOR BREACH OF AN _____ [EXPRESS AND/OR IMPLIED] WARRANTY BECAUSE THE TRANSACTION THAT IS THE SUBJECT OF THIS ACTION DID NOT INVOLVE A SALE WITHIN THE MEANING OF THE COMMERCIAL CODE.

A. Definition of Sale. A sale consists in the passing of title from the seller to the buyer for a price (*Com. Code § 2106(1)*).

B. No Breach of Warranty Absent Sale. An action for breach of warranty does not lie for a transaction that does not involve the sale of goods; a sale is an essential element to impose liability under warranties (*Shepard v. Alexian Brothers Hosp. (1973) 33 Cal. App. 3d 606, 615, 109 Cal. Rptr. 132*).

[*Optional*] **C. Blood Transfusion Not Sale.** A blood transfusion is a service and not a sale; consequently, an entity that furnishes a blood transfusion cannot be held liable for breach of warranty (*Shepard v. Alexian Brothers Hosp. (1973) 33 Cal. App. 3d 606, 615, 109 Cal. Rptr. 132*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a seller is liable for breach of an

express warranty, or an implied warranty of merchantability or fitness for a particular purpose, on the ground that the transaction that is the subject of the action does not involve a sale [*see Com. Code § 2106(1)*]. Optional Paragraph C is for use to assert that a blood transfusion is not a sale.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the seller is not liable for breach of warranty because the transaction did not involve a sale. For example, they may be combined with points and authorities in support of a demurrer to the complaint on the ground that a sale of goods is an element of a cause of action for breach of warranty, and that the face of the complaint shows that the transaction that is the basis of the action is not a sale. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should describe the transaction, and show that it does not involve a sale. For example, if appropriate, counsel should show that the action is based on a service, rather than a sale. For this purpose, counsel should cite any appropriate statutory authority that supports the classification of the particular activity in issue as a service, rather than a sale. It would be especially helpful if the statute states that the activity is construed to be a service for all purposes [*see, e.g., Health & Safety Code § 1606* (blood transfusion or injection is service, not sale, for all purposes); *see also Shepard v. Alexian Brothers Hosp. (1973) 33 Cal. App. 3d 606, 614-615, 109 Cal. Rptr. 132* (noting similarities between strict products liability and concept of implied warranties, and applying *Health & Safety Code § 1606* to bar actions under both theories)].

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in §§ 206.60, 206.63,* and 206.85.

CAUTION:

Note that for purposes of the implied warranty of merchantability, the serving of food or drink is a sale [*see Com. Code § 2314*, discussed in *§ 206.63*].

[3] Discussion of Authorities

[a] No Breach of Warranty Absent Sale

In ***Shepard v. Alexian Brothers Hosp.*** *(1973) 33 Cal. App. 3d 606, 109 Cal. Rptr. 132* , a person who contracted serum hepatitis brought an action against a hospital, asserting causes of action for, inter alia, strict products liability and breach of warranty, based on allegations that the disease was caused by a transfusion of contaminated blood administered to him while he was a patient. The trial court sustained defendant's demurrers to the complaint, without leave to amend, and dismissed the action. Plaintiff appealed.

The court of appeal affirmed (*33 Cal. App. 3d 606, 615)* . With respect to the warranty causes of action, the court stated that a sale is an essential element in the imposition of liability under warranty law, pursuant to *Com. Code §§ 2313-2316*. The court rejected plaintiff's contention that the warranties should be extended to the service of blood transfusion (*33 Cal. App. 3d 606, 614)* . Pursuant to *Health & Safety Code § 1606*, the transfusion of blood and blood product into the human body is construed for all purposes to be the rendition of a service, and not a sale (*33 Cal. App. 3d 606, 609)* . *Health & Safety Code § 1606* states specifically that the procurement, processing, distribution, or use of whole blood, plasma, blood products, and blood derivatives, for the purpose of injecting or transfusing them into the human body, is construed to be, for all purposes whatsoever, the rendition of a service, and is not construed to be a sale for any purposes whatsoever (*33 Cal. App. 3d 606, 609-610)* . According to the rationale of the statute, the supplying of blood by a hospital to a patient is incidental to the services rendered, and therefore cannot be considered a sale. The court held, therefore, that the doctrine of strict products liability was inapplicable to the instant case (*33 Cal. App. 3d 606, 610-614)* . [For discussion of this case with regard to strict products liability issues, *see* Ch. 190, *Products Liability*

] The court observed that the doctrine of strict products liability is essentially the same as that of implied warranty, when stripped of the contract doctrines of privity, disclaimer, requirements of notice of defect, and limitations through inconsistencies with express warranties (*33 Cal. App. 3d 606, 614-615)* . The cause of action based on express warranty asserts the same elements as the implied warranty claims. Consequently, because the furnishing of a blood transfusion is, by law, a service and not a sale, defendant cannot be held liable under a breach of warranty theory (*33 Cal. App. 3d 606, 615)* .

[b] Blood Transfusion Not Sale

Shepard v. Alexian Brothers Hosp. *(1973) 33 Cal. App. 3d 606, 109 Cal. Rptr. 132* , is *discussed under § 206.74[3][a]*.

[4] Additional Authorities

[a] No Breach of Warranty Absent Sale

In *Gautier v. General Telephone Co. (1965) 234 Cal. App. 2d 302, 44 Cal. Rptr. 404* , decided prior to the enactment of the Commercial Code, plaintiffs filed suit against a telephone company for defective telephone service, alleging several theories of liability, including breach of implied warranty of merchantability. The trial court dismissed the action after sustaining defendants' demurrer. The court of appeal affirmed, holding that there is no liability for breach of implied warranty based on a transaction that is construed as the furnishing of services, rather than a sale of chattels (*234 Cal. App. 2d 302, 306)* .

[b] Blood Transfusion Not Sale

In *Fogo v. Cutter Laboratories, Inc. (1977) 68 Cal. App. 3d 744, 137 Cal. Rptr. 417* , the estate of a man who died after contracting viral hepatitis from a blood coagulant administered prior to a tooth extraction brought an action against the manufacturer of the coagulant on theories including strict products liability and breach of express and implied warranties. The trial court refused plaintiffs' instructions on strict liability and on express and implied warranty, and the jury returned a verdict for the manufacturer. Plaintiffs appealed, and the court of appeal affirmed, holding, inter alia, that in transactions involving services, there can be no liability based on either a theory of strict liability or warranty (*68 Cal. App. 3d 744, 759)* [for discussion of this case with respect to the strict products liability issues, *see* Ch. 190, *Products Liability*].

In *McDonald v. Sacramento Medical Foundation Blood Bank (1976) 62 Cal. App. 3d 866, 133 Cal. Rptr. 444* , the estate of a woman who died from serum hepatitis contracted from a blood transfusion administered during a routine surgical operation sued the doctor, the hospital, and the blood bank that supplied the blood, alleging causes of action in strict liability, breach of warranty, and negligence. The trial court sustained defendants' demurrers to the strict liability and breach of warranty actions, and the court of appeal affirmed, holding that *Health & Safety Code § 1606* defines the furnishing of blood and blood products for the purpose of transfusions as the rendition of a service rather than a sale (*62 Cal. App. 3d 866, 870-871)* . [For discussion of this case with respect to the strict products liability issues, *see* Ch. 190, *Products Liability*]

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20-206 California Points & Authorities § 206.75

§ 206.75 Opposing Contention That Seller Is Liable for Breach of Express Warranty [Com. Code § 2313]--Seller Made No Affirmation of Fact or Promise

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT _____ [*name of seller*] IS NOT LIABLE TO PLAINTIFF FOR BREACH OF AN EXPRESS WARRANTY IN THE SALE OF _____ [*specify, e.g.,* THE YACHT] THAT IS THE SUBJECT OF THE ACTION BECAUSE DEFENDANT MADE NO AFFIRMATION OF FACT OR PROMISE OF ANY KIND TO PLAINTIFF REGARDING _____ [*specify, e.g.,* THE SEAWORTHINESS OF THE YACHT FOR OCEAN TRAVEL].

Absence of Affirmation of Fact or Promise. A buyer cannot recover damages under the theory of breach of express warranty in the absence of any affirmations of fact or promises made by defendants to plaintiff (*Pisano v. American Leasing (1983) 146 Cal. App. 3d 194, 197-198, 194 Cal. Rptr. 77* ; *Balido v. Improved Machinery, Inc. (1972) 29 Cal. App. 3d 633, 639, 105 Cal. Rptr. 890*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a seller is liable for breach of an express warranty regarding the sale of goods, on the ground that the seller made no affirmation of fact or promise that could constitute an express warranty [*see Com. Code § 2313*; *see also Pisano v. American Leasing (1983) 146 Cal. App. 3d 194, 197-198, 194 Cal. Rptr. 77]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the seller is not liable for breach of an express warranty. For example,

they may be combined with points and authorities in support of a motion for summary judgment on the ground that there is no material issue of fact regarding the lack of an affirmation or promise by the seller. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should show that the seller made no affirmation of fact or promise to the buyer that relates to the buyer's claim for breach of warranty.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 206.60*.

[b] Related Pleading and Practice Forms

For discussion and forms for use in actions involving warranties under the Commercial Code, see California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties* (Matthew Bender). For discussion and forms regarding strict products liability, see California Forms of Pleading and Practice, Ch. 460, *Products Liability* (Matthew Bender).

[c] Related Points and Authorities

For points and authorities relating to products liability generally, see Ch. 190, *Products Liability* .

[3] Discussion of Authorities

[a] Absence of Affirmation of Fact or Promise

In ***Pisano v. American Leasing*** *(1983) 146 Cal. App. 3d 194, 194 Cal. Rptr. 77* , a cabinetmaker sued the manufacturer, supplier, and lessor of a sanding machine based on alleged defects that caused damage to wooden cabinets he had contracted to construct. The complaint stated causes of action for strict products liability, breach of express warranty, breach of implied warranty, and negligence. The trial court granted defendants' summary judgment motion, and plaintiff appealed.

The court of appeal affirmed with respect to the cause of action for breach of express warranty, which was granted on the ground that plaintiff did not rely on any express warranty in leasing the sander (*146 Cal. App. 3d 194, 198)* . The court stated that in the absence of any affirmations of fact or promises made by defendants to plaintiff, plaintiff cannot recover damages under the theory of breach of express warranty (*Com. Code § 2313*) (*146 Cal. App. 3d 194, 197-198)* . In order to establish an express warranty, plaintiff must demonstrate that defendants' statements of fact or opinion were the basis of the agreement to lease the sander, pursuant to *Com. Code § 2313(1)(a)*. Inasmuch as plaintiff concedes that no such representations were made, summary judgment for defendant was proper (*146 Cal. App. 3d 194, 198)* . For discussion of the products liability issues in this case, see Ch. 190, *Products Liability* .

In ***Balido v. Improved Machinery, Inc.*** *(1972) 29 Cal. App. 3d 633, 105 Cal. Rptr. 890* , plaintiff was injured when a plastic injection molding press she was operating in the course of her employment closed on her hand, crushing it. She filed an action against the manufacturer, the former owner, and her employer, who was the current owner of the press. The action against the former owner stated causes of action for negligence, breach of warranty, and strict liability. The former owner had purchased the press from the manufacturer, and then sold it to the employer five years later. The trial court entered judgment of nonsuit in favor of all defendants after plaintiff had presented her case, and plaintiff appealed the judgment.

The court of appeal affirmed with respect to the judgment in favor of the former owner, and reversed as to other defendants (*29 Cal. App. 3d 633, 649)* . In ruling on the breach of warranty claim against the former owner, the court noted that there was no evidence presented that the former owner had made any express warranties when it sold the

press seven years prior to the accident. Furthermore, because the former owner did not deal in plastic molding presses, its sale of the press did not carry implied warranties of merchantability and fitness for intended use under *Com. Code § 2314* (*29 Cal. App. 3d 633, 639)* .

[4] Additional Authorities

[a] Absence of Affirmation of Fact or Promise

The facts and procedural background of *McDonnell-Douglas Corp. v. Thiokol Corp. (1997) 124 F.3d 1173* , are discussed in *§ 206.60[4][a]*. Plaintiff argued that defendant had made two separate promises, both of which constituted express warranties. The appellate court held that defendant's promise to deliver goods free from defects in labor, material, and manufacture related to the goods and was made a part of the basis of the parties' bargain, and therefore constituted an express warranty. It found, however, that the evidence did not show that defendant breached that warranty (*124 F.3d 1173, 1177-1178)* . As to the second promise, the court held that statements in drawings attached to the contract were not intended to be additional warranties forming a part of the parties' bargain (*124 F.3d 1173, 1178-1179)* .

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20-206 California Points & Authorities § 206.76

§ 206.76 Opposing Contention That Seller Is Liable for Breach of Implied Warranty of Merchantability [Com. Code § 2314] or Implied Warranty of Fitness for Particular Purpose [Com. Code § 2315]--No Privity of Contract Between Plaintiff and Defendant

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT _____ [*name of seller*] IS NOT LIABLE TO PLAINTIFF FOR BREACH OF AN IMPLIED WARRANTY OF _____ [MERCHANTABILITY *or* FITNESS FOR PARTICULAR PURPOSE] BECAUSE THERE WAS NO PRIVITY OF CONTRACT BETWEEN PLAINTIFF AND DEFENDANT.

Privity Required for Action Based on Implied Warranty. Privity between plaintiff and defendant is required in an action based on an implied warranty of merchantability or an implied warranty of fitness for a particular purpose (*Rodrigues v. Campbell Industries (1978) 87 Cal. App. 3d 494, 500, 151 Cal. Rptr. 90*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a seller is liable for breach of an implied warranty of merchantability or fitness for a particular purpose. The ground for opposition is that a cause of action for breach of an implied warranty cannot be maintained because there is no privity of contract between plaintiff and defendant [*see Rodrigues v. Campbell Industries (1978) 87 Cal. App. 3d 494, 500, 151 Cal. Rptr. 90]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue of absence of privity between plaintiff and defendant. For example, if the absence of privity between plaintiff and defendant is apparent on the face of the complaint, these points and authorities may be used in support of a demurrer to the complaint. They may also be adapted for use in a trial or appellate brief.

CAUTION:

An exception to the privity requirement has been created in the case of a family member of the buyer [*see Hauter v. Zogarts (1975) 14 Cal. 3d 104, 114 n.8, 120 Cal. Rptr. 681, 534 P.2d 377]* . In addition, certain other exceptions have been recognized for food and drug products, although these cases were decided prior to the enactment of the Commercial Code. For further discussion, see *§ 206.76[2][b]*.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Counsel should therefore show that the plaintiff did not buy the goods from defendant.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in §§ 206.63* and *206.65*.

[b] Exceptions to Privity Requirement

Although the general rule is that privity between plaintiff and defendant is required in an action based on implied warranty of merchantability or fitness for a particular purpose, courts have recognized an exception with regard to a plaintiff who is a family member of the buyer [*see Hauter v. Zogarts (1975) 14 Cal. 3d 104, 114 n.8, 120 Cal. Rptr. 681, 534 P.2d 377* (discussed in *§ 206.60[3*][a])]. In addition, a line of cases predating the Commercial Code have created exceptions with respect to food products [*see, e.g., Klein v. Duchess Sandwich Co., Ltd. (1939) 14 Cal. 2d 272, 283, 93 P.2d 799* (construing former Civ. Code § 1735, *now see Com. Code § 2315*, governing implied warranty of fitness for particular purpose]. Similarly, pre-code cases have created an exception for drug vaccines [*see, e.g., Gottsdanker v. Cutter Laboratories (1960) 182 Cal. App. 2d 602, 607, 6 Cal. Rptr. 320* (regarding implied warranties of merchantability and fitness for particular purpose)].

If the manufacturer or supplier of goods affirmatively engages in conduct directly with the ultimate buyer, so that functionally the manufacturer or supplier is in the position of the direct seller, then it is fair and appropriate to hold that manufacturer or supplier to an implied warranty that the goods will be fit for the buyer's purposes, if all other elements of the buyer's claim have been established [*Cardinal Health 301, Inc. v. Tyco Electronics Corp. (2008) 169 Cal. App. 4th 116, 144, 87 Cal. Rptr. 3d 5* ; *e.g., U.S. Roofing, Inc. v. Credit Alliance Corp. (1991) 228 Cal. App. 3d 1431, 1441-1442, 1445, 279 Cal. Rptr. 533* (roofing contractor negotiated with equipment supplier for specific item at agreed price; unrelated finance lessor then bought that item from supplier and leased it to contractor, because lease was financially advantageous for contractor; court held that implied warranty of fitness ran from supplier to contractor, in spite of lack of actual privity between them, because of their direct dealings; participation of finance lessor as accommodation party was disregarded)].

Counsel should also note that the privity requirement does not apply to actions for breach of express warranty [*see Rodrigues v. Campbell Industries (1978) 87 Cal. App. 3d 494, 500, 151 Cal. Rptr. 90]* .

[c] Related Pleading and Practice Forms

For discussion and forms for use in actions involving warranties under the Commercial Code, California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties* (Matthew Bender). For discussion and forms regarding strict products liability, see California Forms of Pleading and Practice, Ch. 460, *Products Liability* (Matthew Bender).

[d] Related Memoranda

For points and authorities relating to products liability generally, see Ch. 190, *Products Liability* .

[3] Discussion of Authorities

[a] Privity Required for Action Based on Implied Warranty

In ***Rodrigues v. Campbell Industries*** *(1978) 87 Cal. App. 3d 494, 151 Cal. Rptr. 90* , plaintiffs were crew members of a fishing boat that prematurely returned from the high seas to shore for repairs to the boat's rudder, thus depriving plaintiffs of earnings and a share of the catch. Plaintiffs sued the boat manufacturer for lost wages and a share of the catch, asserting causes of action including breach of implied and express warranties, and strict products liability. The trial court sustained demurrers to the complaint and entered judgment of dismissal against plaintiffs.

The court of appeal reversed, with the exception of the causes of action based on implied warranty (*87 Cal. App. 3d 494, 501)* . The court held that under a breach of implied warranty theory, with certain exceptions inapplicable to the instant case, privity between plaintiffs and defendants is required. This requirement applies to the implied warranty of merchantability, as well as the implied warranty of fitness for a particular purpose. However, the court noted, it is inapplicable to an action based on an express warranty (*87 Cal. App. 3d 494, 500)* . Accordingly, the court concluded that plaintiffs should be permitted to amend the complaint in order to limit the warranty cause of action to express warranty (*87 Cal. App. 3d 494, 501)* .

[4] Additional Authorities

[a] Privity Required for Action Based on Implied Warranty

In re Air Crash Disaster at Sioux City Iowa (N.D. Ill. 1991) 760 F. Supp. 1283 was a federal case transferred to Illinois from the Central District of California, and decided under California law. The estate of a person killed in an airplane crash sued the airplane manufacturer, the manufacturer of the airplane's hydraulic system, and others, alleging that the crash resulted from engine failure and loss of hydraulic power. The federal district court dismissed the cause of action based on breach of implied warranties of fitness for the hydraulic system's intended use and purpose, holding that privity is a requirement for actions based on implied warranty of fitness under California law, and noting that the passenger who was killed was not in privity with the manufacturer of the hydraulic system. The court stated that when there is no contention of privity between the parties on the face of the complaint, the court may properly dismiss a claim based on breach of implied warranty (*760 F. Supp. 1283, 1287)* .

The facts and procedural background of *Osborne v. Subaru of America, Inc. (1988) 198 Cal. App. 3d 646, 243 Cal. Rptr. 815* , are discussed in *§ 206.77[3][a]*. In *Osborne,* the court of appeal upheld the trial court's refusal to certify a nationwide class of plaintiffs for the purpose of seeking relief for defects in a range of automobiles of a certain make, holding, inter alia, that too many issues required separate litigation (*198 Cal. App. 3d 646, 653, 664-665)* . Those issues included the nationwide variations in the law of implied warranty. Although all of the states adopted the cause of action for implied warranty of merchantability under the Uniform Commercial Code, they do not all require vertical privity as a prerequisite. Under *Com. Code § 2314*, vertical privity is required, precluding recovery by used-car buyers in California (*198 Cal. App. 3d 646, 656)* .

In *Anthony v. Kelsey-Hayes Co. (1972) 25 Cal. App. 3d 442, 102 Cal. Rptr. 113* , truck owners brought an action against the truck manufacturer and the manufacturer of certain wheels sold as optional features on the trucks, seeking damages arising from defects in the wheels. Plaintiffs appealed the trial court's dismissal, with respect to the wheel manufacturer, of causes of action based on negligence, strict products liability, and implied warranty of fitness for use. The court of appeal affirmed, holding, inter alia, that privity between the parties is a necessary element to recovery on a breach of an implied warranty of fitness for the buyer's use, with exceptions not applicable to this case. The court stated that a demurrer is properly sustainable in an action based on breach of an implied warranty when lack of privity between plaintiff and defendant is disclosed on the face of the complaint (*25 Cal. App. 3d 442, 448)* .

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B. Warranties
1. Commercial Code Warranties

20-206 California Points & Authorities § 206.77

§ 206.77 Opposing Contention That Seller Is Liable for Breach of Implied Warranty of Merchantability [Com. Code § 2314] or Implied Warranty of Fitness for Particular Purpose [Com. Code § 2315]--Class Action Cannot Be Maintained Because of Lack of Common Interests Among Plaintiffs

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

PLAINTIFFS CANNOT MAINTAIN A CLASS ACTION AGAINST DEFENDANT _____ [*name of seller*] FOR BREACH OF THE IMPLIED WARRANTY OF MERCHANTABILITY AND/OR THE IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE BECAUSE THE ELEMENTS OF THE WARRANTY CANNOT BE SHOWN EXCEPT BY PROOF OF THE INDIVIDUAL CIRCUMSTANCES OF EACH TRANSACTION.

[*EITHER*]

A. No Class Action Based on Implied Warranty of Merchantability When Issues Requiring Separate Litigation Are Too Numerous. No class action based on the implied warranty of merchantability may be maintained when the questions that plaintiffs will be required to litigate separately are too numerous or substantial (*Osborne v. Subaru of America, Inc. (1988) 198 Cal. App. 3d 646, 653, 659, 243 Cal. Rptr. 815*).

[*AND/OR*]

B. No Class Action Based on Implied Warranty of Fitness for Particular Purpose. A class action based on the implied warranty of fitness for a particular purpose cannot be maintained because individual testimony is required to establish the elements of the intended purpose, plaintiff's reliance on defendant's skill or judgment, and defendant's

knowledge of the particular purpose and reliance (*Metowski v. Traid Corp. (1972) 28 Cal. App. 3d 332, 341-342, 104 Cal. Rptr. 599*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a seller is liable for breach of an implied warranty of merchantability or fitness for a particular purpose, brought in a class action suit. The ground for opposition is that determination of the issues supporting each cause of action would require separate litigation for each plaintiff, and therefore, that the action is not one of sufficiently common interest to warrant its certification as a class action.

The points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that a cause of action for breach of the implied warranty of merchantability or the implied warranty of fitness for a particular purpose cannot be maintained in a class action. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the above form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should show that determination of the existence of the warranty and breach varies from plaintiff to plaintiff, giving specific examples if available.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in §§ 206.63* and *206.65*.

[b] Class Actions

Generally, a class action may be maintained when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court [*see Code Civ. Proc. § 382*; *see also Civ. Code § 1781* (class actions under Consumers Legal Remedies Act, *Civ. Code § 1750 et seq.*)].

[c] Related Pleading and Practice Forms

For discussion and forms for use in actions involving warranties under the Commercial Code, see California Forms of Pleading and Practice, California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties* (Matthew Bender). For additional related discussion and forms, see the following chapters in that publication:

- Ch. 120, *Class Actions*
- Ch. 460, *Products Liability*
- Ch. 504, *Sales: Consumers Legal Remedies Act*

[d] Related Points and Authorities

For additional points and authorities that may be used in a class action, see Ch. 41, *Class and Representative Actions* in this set. For points and authorities relating to products liability generally, see Ch. 190, *Products Liability* .

[3] Discussion of Authorities

[a] No Class Action Based on Implied Warranty of Merchantability When Issues Requiring Separate

Litigation Are Too Numerous

In ***Osborne v. Subaru of America, Inc.*** *(1988) 198 Cal. App. 3d 646, 243 Cal. Rptr. 815* , owners of new and used automobiles of a certain make and range of years attempted to bring a class action against the manufacturer and importer-marketer, on theories including breach of express and implied warranty, based on defective engine design. The trial court refused to certify a nationwide class of plaintiffs, holding, inter alia, that too many issues required separate litigation.

The court of appeal affirmed (*198 Cal. App. 3d 646)* . The court stated that pursuant to *Com. Code § 2314(2)(c)*, plaintiffs' claim for breach of implied warranty of merchantability requires a determination regarding whether the vehicles were fit for the ordinary purposes for which they are used (*198 Cal. App. 3d 646, 659)* . The court noted that the party seeking certification of a class must demonstrate that the questions they will be required to litigate separately are not numerous or substantial. Therefore, certification is properly denied when the individual questions to be decided may prove too complex, numerous, and substantial to allow the class action, or when the benefits to be gained may not be significant enough to justify imposition of a judgment binding on absent parties (*198 Cal. App. 3d 646, 653)* . The court stated that that determination in the instant case necessarily varies from vehicle to vehicle, and requires proof of the history of each vehicle and its problems. For example, one plaintiff drove her car approximately 50,000 miles before it required expensive repairs, while other plaintiffs experienced problems much earlier (*198 Cal. App. 3d 646, 659)* .

[b] No Class Action Based on Implied Warranty of Fitness for Particular Purpose

Metowski v. Traid Corp. *(1972) 28 Cal. App. 3d 332, 104 Cal. Rptr. 599* , involved an action by 50 named plaintiffs who filed suit individually and as members of a class of purchasers of an electronic camera against the company that manufactured and sold the camera. The complaint alleged causes of action for breach of express and implied warranties and for fraud and deceit. The trial court sustained demurrers to the complaint and entered judgment of dismissal as to the class suit. Plaintiffs appealed.

The court of appeal affirmed as to the implied warranty of fitness for a particular purpose and reversed as to all other counts (*28 Cal. App. 3d 332, 342)* . The court agreed with defendant's contention that a class action for breach of implied warranty of fitness for a particular purpose could not be maintained because a warranty cannot be shown except by proof of the special circumstances peculiar to each individual transaction. The court stated that the warranty arises only when the purchaser at the time of contracting intends to use the goods for a particular purpose; the seller has reason to know of this particular purpose; the buyer relies on the seller's skill or judgment to select or furnish goods suitable for the particular purpose; and the seller at the time of contracting has reason to know that the buyer is relying on the seller's skill or judgment. Each of these elements could be established only by testimony from each purchaser as to what his or her intended purpose was, whether the purchaser relied on defendant's skill or judgment, and whether defendant had reason to know of the purchaser's purpose and reliance (*28 Cal. App. 3d 332, 341)* . Inasmuch as there is no common method by which these elements could be proved, a class action for implied warranty of fitness for a particular purpose could not be maintained (*28 Cal. App. 3d 332, 341-342)* .

[4] Additional Authorities

[a] No Class Action Based on Implied Warranty of Fitness for Particular Purpose

In *American Suzuki Motor Corp. v. Superior Court (1995) 37 Cal. App. 4th 1291, 44 Cal. Rptr. 2d 526* , the court of appeal issued a writ of mandate directing the trial court to vacate its order denying the plaintiff's motion to decertify the class in a products liability class action alleging that automobiles were defectively designed (*37 Cal. App. 4th 1291, 1301)* . The court of appeal explained that for a class to be certifiable, its members must have a viable cause of action, in this case based on the implied warranty of merchantability or of fitness for a particular purpose (*37 Cal. App. 4th 1291, 1294-1296)* . The court immediately concluded that no implied warranty of fitness claim against the plaintiff had been

stated because the real parties had failed to identify any "particular purpose" for which they supposedly obtained their vehicles (other than the general purpose of providing transportation) (*37 Cal. App. 4th 1291, 1295, n.2*).

The court further explained that in the case of automobiles, the implied warranty of merchantability can be breached only if the vehicle manifests a defect so basic it tenders the vehicle unfit for its ordinary purpose of providing transportation (*37 Cal. App. 4th 1291, 1296-1297)* . The evidence presented in this case demonstrated that only a small percentage of the vehicles sold during the class period were involved in rollover accidents and that nearly all of the vehicles sold to the putative class "did what they were supposed to do for as long as they were supposed to do it"; that is, provide transportation (*37 Cal. App. 4th 1291, 1298-1299* , *quoting Feinstein v. Firestone Tire and Rubber Co. (1982)535 F. Supp. 595, 603)* . Because this evidence indicated that a breach of the implied warranty of merchantability could be maintained by only a few members of the putative class, the court concluded that no ascertainable class existed and the class action for implied warranty of merchantability could not be maintained (*37 Cal. App. 4th 1291, 1301)* . The court noted that the proper remedy for automobile purchasers who alleged they had suffered no personal injury or property damage from the automobiles they claimed were defectively designed was to petition the National Highway Safety Administration for defective investigation, rather than to pursue an implied warranty claim (*37 Cal. App. 4th 1291, 1300-1301)* .

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20-206 California Points & Authorities § 206.78

§ 206.78 Opposing Contention That Seller Is Liable for Breach of Implied Warranty of Merchantability [Com. Code § 2314]--Seller Not Merchant With Respect to Goods Sold [Com. Code § 2104(1)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT _____ [*name of seller*] IS NOT LIABLE TO PLAINTIFF FOR BREACH OF AN IMPLIED WARRANTY OF MERCHANTABILITY BECAUSE DEFENDANT IS NOT A MERCHANT WITH RESPECT TO THE _____ [*specify, e.g.,* MOLDING PRESS] SOLD TO PLAINTIFF.

A. No Implied Warranty of Merchantability When Defendant Not Merchant. A seller of goods is not liable to the buyer for breach of an implied warranty of merchantability if the seller is not a merchant with respect to the goods sold (*Balido v. Improved Machinery, Inc. (1972) 29 Cal. App. 3d 633, 639, 105 Cal. Rptr. 890*).

B. Definition of Merchant. A merchant is a person who deals in goods of the kind involved in the transaction, or otherwise by occupation holds himself or herself out as having knowledge or skill peculiar to the practices or goods involved in the transaction, or to whom that knowledge or skill may be attributed by the employment of an agent, broker, or other intermediary who by occupation holds himself or herself out as having that knowledge or skill (*Com. Code § 2104(1)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a seller is liable for breach of an implied warranty of merchantability, on the ground that the seller is not a merchant with respect to the goods sold [*see Com. Code § 2314*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the seller is not liable for breach of the implied warranty of merchantability. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should show that the seller is not a merchant with respect to the goods that are the subject of the action.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 206.63*.

[b] Related Pleading and Practice Forms

For discussion and forms for use in actions involving warranties under the Commercial Code, see California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties* (Matthew Bender). For discussion and forms regarding strict products liability, see California Forms of Pleading and Practice, Ch. 460, *Products Liability* (Matthew Bender).

[c] Related Points and Authorities

For points and authorities relating to products liability generally, see Ch. 190, *Products Liability* .

[3] Discussion of Authorities

[a] No Implied Warranty of Merchantability When Defendant Not Merchant

The facts and procedural background of ***Balido v. Improved Machinery, Inc.*** *(1972) 29 Cal. App. 3d 633, 105 Cal. Rptr. 890* , are discussed in *§ 206.75[3][a]*. In *Balido*, the court of appeal held that the seller made no express warranties when it sold the press seven years prior to the accident. Furthermore, because the former owner did not deal in plastic molding presses, its sale of the press did not carry implied warranties of merchantability and fitness for intended use under *Com. Code § 2314* (*29 Cal. App. 3d 633, 639)* .

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20-206 California Points & Authorities § 206.79

§ 206.79 Opposing Contention That Seller Is Liable for Breach of Implied Warranty of Fitness for Particular Purpose [Com. Code § 2315]--Buyer Did Not Rely on Seller's Skill or Judgment

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT _____ [*name of seller*] IS NOT LIABLE TO PLAINTIFF FOR BREACH OF AN IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE BECAUSE AT THE TIME OF CONTRACTING FOR THE SALE, PLAINTIFF DID NOT RELY ON DEFENDANT'S SKILL OR JUDGMENT TO SELECT THE GOODS FOR PLAINTIFF'S PARTICULAR PURPOSE.

A. When Implied Warranty of Fitness for Particular Purpose Arises. An implied warranty of fitness for a particular purpose arises only if: (1) the purchaser at the time of contracting intends to use the goods for a particular purpose; (2) the seller at the time of contracting has reason to know of the particular purpose; (3) the buyer relies on the seller's skill or judgment to select or furnish goods suitable for the particular purpose; and (4) the seller at the time of contracting has reason to know that the buyer is relying on that skill and judgment (*Keith v. Buchanan (1985) 173 Cal. App. 3d 13, 25, 220 Cal. Rptr. 392*).

B. Buyer's Nonreliance on Seller's Skill or Judgment. An implied warranty of fitness for a particular purpose does not arise if the seller had no reason to know that it was being relied on, and if the buyer did not in fact rely on the seller's skill or judgment in selecting goods for the buyer's particular purpose (*Keith v. Buchanan (1985) 173 Cal. App. 3d 13, 25, 220 Cal. Rptr. 392*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a seller is liable for breach of an

implied warranty of fitness for a particular purpose, on the ground that the buyer did not rely on the seller's skill or judgment in selecting goods for a particular purpose [*see Com. Code § 2315*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue of the buyer's nonreliance on the seller with regard to an implied warranty of fitness for a particular purpose. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel should therefore describe the circumstances surrounding the sale of the goods, and show that either the seller was unaware that the buyer was relying on its skill or judgment, or that the buyer in fact did not rely on the seller. This point can be shown, for example, by the buyer's use of independent expert advice prior to making a decision to purchase the goods.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 206.65*.

[b] Related Pleading and Practice Forms

For discussion and forms for use in actions involving warranties under the Commercial Code, see California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties* (Matthew Bender). For discussion and forms regarding strict products liability, see California Forms of Pleading and Practice, Ch. 460, *Products Liability* (Matthew Bender).

[c] Related Points and Authorities

For points and authorities relating to products liability generally, see Ch. 190, *Products Liability* .

[3] Discussion of Authorities

[a] When Implied Warranty of Fitness for Particular Purpose Arises

The facts and procedural background of ***Keith v. Buchanan*** *(1985) 173 Cal. App. 3d 13, 220 Cal. Rptr. 392* , are discussed in *§ 206.60[3][a]*. The court's determination that no implied warranty of fitness for a particular purpose arose under the circum stances is *discussed under § 206.79[3][b]*.

[b] Buyer's Nonreliance on Seller's Skill or Judgment

The facts and procedural background of ***Keith v. Buchanan*** *(1985) 173 Cal. App. 3d 13, 220 Cal. Rptr. 392* , are discussed in *§ 206.60[3][a]*. In *Keith*, the court of appeal reversed judgment for defendants with respect to the existence of the express warranty, and remanded for further findings regarding breach of implied warranty (*173 Cal. App. 3d 13, 26)* . With regard to the claim for breach of an implied warranty of fitness for a particular purpose, the court stated that it arises when a seller at the time of contracting has reason to know any particular purpose for which the goods are required, and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods that are fit for the stated purpose (*Com. Code § 2315*) (*173 Cal. App. 3d 13, 24-25)* . The Song-Beverly Consumer Warranty Act (*Civ. Code § 1790 et seq.*) makes an implied warranty applicable to retailers, distributors, and manufacturers [*see Civ. Code §§ 1791.1, 1792.1, 1792.2(a)*, set forth in Subpart B]. An implied warranty of fitness for a particular purpose arises only if: (1) the purchaser at the time of contracting intends to use the goods for a particular purpose; (2) the seller at the time of contracting has reason to know of the particular purpose; (3) the buyer relies on the seller's skill or judgment to select or furnish goods suitable for the particular purpose; and (4) the seller at the time of contracting has reason to know that the buyer is relying on that skill and judgment. The court emphasized that these four elements of reliance are important to the consideration of whether an implied warranty of fitness for a particular purpose exists. If the seller had no reason to know that it was being relied on, its conduct in providing goods cannot fairly be deemed a

tacit representation of their suitability for a particular purpose. If the buyer did not in fact rely, then the principal justification for imposing fitness warranty disappears. In fact, reliance is the primary factor in determining the existence of such a warranty (*173 Cal. App. 3d 13, 25)* . The court agreed with the trial court's finding that plaintiff did not rely on the skill and judgment of defendants to select a suitable vessel, inasmuch as he relied on his own experts (*173 Cal. App. 3d 13, 25-26)* .

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[Reserved]

§§ 206.80[Reserved]

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2. Song-Beverly Consumer Warranty Act

20-206 California Points & Authorities § 206.100

§ 206.100 Supporting Contention That Manufacturer, Distributor, or Seller Made Express Warranty in Consumer Sale [Civ. Code §§ 1790.3, 1791, 1791.2]--General Definitions Included

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE WRITTEN DOCUMENT ENTITLED _____ AND GIVEN TO PLAINTIFF IN CONNECTION WITH THE PURCHASE OF _____ [*specify consumer good, e.g.,* A WORD PROCESSOR AND RELATED PROGRAMS] ON _____ [*date*] CONSTITUTES AN EXPRESS WARRANTY BY DEFENDANT _____ [*name of seller, manufacturer, or distributor*] THAT _____ [*specify, e.g.,* IT WOULD REPAIR ANY DEFECTS CAUSED BY DEFECTIVE MATERIALS THAT BECAME MANIFEST WITHIN ONE YEAR AFTER THE PURCHASE].

A. Express Warranty Defined. "Express warranty" within the meaning of the Consumer Warranty Act is a written statement arising out of a sale to the consumer of a consumer good pursuant to which the manufacturer, distributor, or retailer undertakes to preserve or maintain the utility or performance of the consumer good or provide compensation if there is a failure in utility or performance[, or, if a sample or model is used, that the whole of the goods conforms to that sample or model] (*Civ. Code § 1791.2(a)*; *see Keith v. Buchanan (1985) 173 Cal. App. 3d 13, 19-20, 220 Cal. Rptr. 392*).

[*Optional*] **B. Formal Words Unnecessary.** It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee," but if such words are used, then an express warranty is created (*Civ. Code § 1791.2(b)*).

[*Optional*] **C. Consumer Goods Defined.** "Consumer goods" within the meaning of the Consumer Warranty Act is any new product, or part of a new product, that is used, bought, or leased for use primarily for personal, family, or household purposes, except for clothing and consumables. ["Consumer goods" includes new and used assistive devices

sold at retail] (*Civ. Code § 1791(a)*).

[*Optional*] **D. Sale Defined.** "Sale" within the meaning of the Consumer Warranty Act is (1) the passing of title from the seller to the buyer for a price, or (2) a consignment for sale (*Civ. Code § 1791(n)*).

[*Optional*] **E. Manufacturer Defined.** "Manufacturer" within the meaning of the Consumer Warranty Act is any individual, partnership, corporation, association, or other legal relationship that manufactures, assembles, or produces consumer goods (*Civ. Code § 1791(j)*).

[*Optional*] **F. Consumer Warranty Act Supersedes Commercial Code Only in Case of Conflict.** The provisions of the Consumer Warranty Act do not affect the rights and obligations of parties determined by reference to the Commercial Code except that, when the provisions of the Commercial Code conflict with the rights guaranteed to buyers of consumer goods under the Consumer Warranty Act, the provisions of the Consumer Warranty Act prevail (*Civ. Code § 1790.3*; *Keith v. Buchanan (1985) 173 Cal. App. 3d 13, 19, 220 Cal. Rptr. 392*).

[*Optional*] **G. Home Electronic Product Defined.** "Home electronic product" within the meaning of the Consumer Warranty Act means any television, radio, antenna rotator, audio or video recorder or playback equipment, video camera, video game, video monitor, computer equipment, telephone, telecommunications equipment, electronic alarm system, electronic appliance control system, or other kind of electronic product, if it is normally used or sold for personal, family, or household purposes. The term includes any electronic accessory that is normally used or sold with a home electronic product for one of those purposes, but excludes any single product with a wholesale price to the retail seller of less than $50 (*Civ. Code § 1791(s)*).

[*Optional*] **H. Distributor Defined.** "Distributor" within the meaning of the Consumer Warranty Act is any individual, partnership, corporation, association, or other legal relationship that stands between the manufacturer and the retail seller in purchases, consignments, or contracts for the sale of consumer goods (*Civ. Code § 1791(e)*).

[*Optional*] **I. Retail Seller Defined.** "Retail seller" within the meaning of the Consumer Warranty Act is any individual, partnership, corporation, association, or other legal relationship that engages in the business of selling or leasing consumer goods to retail buyers (*Civ. Code § 1791*(*l*)).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a manufacturer, distributor, or retail seller made an express warranty within the meaning of the Song-Beverly Consumer Warranty Act in connection with the sale of consumer goods [*see Civ. Code § 1791.2(a)*]. The various optional paragraphs are for use if any of the elements of the definition or status of the parties are in dispute.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue establishing the existence of an express warranty. They may also be adapted for use in a trial or appellate brief.

Counsel should add argument linking the points in this form with the facts of his or her case. Generally, counsel should attach the written statement that is claimed to create the express warranty.

[b] Related Pleading and Practice Forms

For discussion and forms for use in actions involving warranties under the Song-Beverly Consumer Warranty Act, see

California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties* (Matthew Bender). That chapter also discusses warranties under the Commercial Code and under the federal Magnuson-Moss Act. For discussion and forms regarding strict products liability, see California Forms of Pleading and Practice, Ch. 460, *Products Liability* (Matthew Bender).

[c] Related Points and Authorities

For points and authorities relating to products liability generally, see Ch. 190, *Products Liability* .

[d] Opposing Points and Authorities

The points and *authorities in § 206.119* may be used to oppose the contention supported by the points and authorities in this form on the ground that the statement was mere policy, commendation, or opinion.

[3] Discussion of Authorities

[a] Express Warranty Defined

Although not required to be written, an express warranty for purposes of the Commercial Code (Division 2) [*see Com. Code § 2313*], has some of the same elements as an express warranty under the Consumer Warranty Act. For instance, the exclusion of "puffery" or opinion as a basis for an express warranty is common to both the Commercial Code express warranty and an express warranty under the Consumer Warranty Act. Many plaintiffs allege causes of action under both Codes arising from the same nucleus of facts. Counsel should consider alleging or arguing that express warranties were created under both Codes. Even cases that only address the creation of an express warranty under *Com. Code § 2313* may be used to argue a particular aspect of the definition in the context of the Consumer Warranty Act. For forms relating to an express warranty under the Commercial Code, see §§ 206.80 -206.82.

The facts and procedural background of ***Keith v. Buchanan*** *(1985) 173 Cal. App. 3d 13, 220 Cal. Rptr. 392* , and the portion of the opinion considering the claim for breach of express warranty under Division 2 of the Commercial Code are *set forth in § 206.60[3][a]*. The only written materials on which plaintiff based his claim of express warranty were advertising brochures. With respect to any express warranty that might have been created under the Song-Beverly Consumer Warranty Act, the court noted that the Consumer Warranty Act establishes broad statutory control over warranties in consumer sales when the consumer goods are bought primarily for personal, family, or household purposes. Provisions of the Consumer Warranty Act do not affect the rights and obligations of parties under the Commercial Code except that if a conflict exists between the code provisions, the rights guaranteed to buyers of consumer goods under the Consumer Warranty Act prevail [*see Civ. Code § 1790.3*] (*173 Cal. App. 3d 13, 19)* . The court set forth *Civ. Code § 1791.2(a)(1)*, but agreed with the trial court that the retail seller did not make any written undertaking (at the time the purchase contract for the sailboat was made) to preserve or maintain the utility or performance of a consumer good or to provide compensation if there was a failure of utility or performance. Thus, in this case, there was no cognizable claim for breach of express warranty under the Consumer Warranty Act (*173 Cal. App. 3d 13, 20)* .

[b] Consumer Warranty Act Supersedes Commercial Code Only in Case of Conflict

Keith v. Buchanan *(1985) 173 Cal. App. 3d 13, 19, 220 Cal. Rptr. 392* , is *discussed under § 206.100[3][a]*.

[4] Additional Authorities

[a] Express Warranty Defined

Civ. Code § 1793.1 requires every manufacturer, distributor, or retailer making express warranties with respect to consumer goods to fully set forth the warranties in simple and readily understood language, which clearly identifies the

party making the express warranties, and which conforms to the federal standards for disclosure of warranty terms and conditions set forth in the Magnuson-Moss Warranty Federal Trade Commission Improvement Act (*15 U.S.C. § 2301 et seq.*), and in the regulations of the Federal Trade Commission adopted pursuant to the provisions of that Act.

In *Reveles v. Toyota By the Bay (1997) 57 Cal. App. 4th 1139, 67 Cal. Rptr. 2d 543* , the buyer of a defective *used* truck sued the dealership for breach of contract, rescission and restitution, negligent and intentional misrepresentation, breach of the Consumers Legal Remedies Act, and breach of the Song-Beverly Act. The buyer accepted a settlement offer on condition that the parties stipulate that the court retain jurisdiction to determine whether plaintiff was the "prevailing party" entitled to attorneys' fees and other costs. The municipal court awarded the buyer attorneys' fees, expert witness fees, and other costs. The buyer and dealership appealed. The superior court reversed and issued an order certifying transfer to the Court of Appeal to determine whether the sale of a used car which includes the additional sale of an extended service contract is a transaction that falls within the provisions of the Song-Beverly Consumer Warranty Act [*Civ. Code § 1795.5*] (*57 Cal. App. 4th 1139, 1148-1149)* . The court of appeal held that a written service contract covering a used vehicle, under which the dealer "undertakes to preserve or maintain the utility or performance" of the vehicle, is an express warranty under *Civ. Code § 1795.5* (applicable to used consumer goods), even though the consumer is required to pay additional consideration for the promised services (*57 Cal. App. 4th 1139, 1155-1158)* .

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20-206 California Points & Authorities § 206.101

§ 206.101 Supporting Contention That Manufacturer of New Motor Vehicle [Civ. Code § 1793.22(e)(2)] Sold in California, or Its Representative, Made Express Warranty

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE WRITTEN DOCUMENT ENTITLED _____ AND GIVEN TO PLAINTIFF IN CONNECTION WITH THE PURCHASE OF _____ [*specify new motor vehicle, e.g.,* A 2003 DODGE VIPER] ON _____ [*date*] CONSTITUTES AN EXPRESS WARRANTY BY DEFENDANT _____ [*name of dealer or manufacturer*] THAT _____ [*specify, e.g.,* IT WOULD REPAIR ANY DEFECTS CAUSED BY DEFECTIVE MATERIALS THAT BECAME MANIFEST WITHIN ONE YEAR AFTER THE PURCHASE].

A. New Motor Vehicle Defined. "New motor vehicle" within the meaning of California's "Lemon Law" is a new motor vehicle that is bought or used primarily for personal, family, or household purposes. "New motor vehicle" also means a new motor vehicle with a gross vehicle weight under 10,000 pounds that is bought or used for business by a person, including a partnership, limited liability company, corporation, association, or any other legal entity, to which not more than five motor vehicles are registered in California, provided that at least one motor vehicle must be registered to that person in California. "New motor vehicle" includes _____ [*use any or all of the following that are applicable:* the chassis, chassis cab, that portion of a motorhome devoted to its propulsion, but excluding any portion designed, used, or maintained primarily for human habitation, and a dealer-owned vehicle and a "demonstrator" (a vehicle assigned by a dealer for the purpose of demonstrating qualities and characteristics common to vehicles of the same or similar model and type) or other motor vehicle sold with a manufacturer's new car warranty] (*Civ. Code § 1793.22(e)(2)*; *see Park City Services, Inc. v. Ford Motor Co. (2006) 144 Cal. App. 4th 295, 306-309, 50 Cal. Rptr. 3d 373* (at least one motor vehicle must be registered to person in California); *Jensen v. BMW of North America, Inc. (1995) 35 Cal. App. 4th 112, 123, 41 Cal. Rptr. 2d 295* (used vehicle sold with balance remaining on manufacturer's warranty is "other motor vehicle sold with a manufacturer's new car warranty").

B. Express Warranty Defined. [*See § 206.100, Paragraph A.*]

C. Typical Automobile Repair Warranty. The typical new motor vehicle repair contract which promises that the vehicle will be free of defects in material and workmanship for a period of months or within the first specified number of miles of its use and that the manufacturer or retail seller will repair any such defects that occur during the applicable period is the very definition of express warranty of future performance, under *Civil Code Section 1791.2* [and under the Commercial Code] (*Krieger v. Nick Alexander Imports, Inc. (1991) 234 Cal. App. 3d 205, 217, 285 Cal. Rptr. 717*).

[*Optional*] **D. Demonstrator Defined.** A "demonstrator" is a vehicle assigned by a dealer for the purpose of demonstrating qualities and characteristics common to vehicles of the same or similar model and type (*Civ. Code § 1793.22(e)(2)*).

[*Optional*] **E. Service Contract Defined.** A "service contract" within the meaning of the Song-Beverly Consumer Warranty Act is a contract in writing to perform, over a fixed period of time or for a specified duration, services relating to the maintenance, replacement, or repair of a consumer product, except that this term does not include a policy of automobile insurance, as defined in *Insurance Code Section 116* (*Civ. Code § 1791(o)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a manufacturer, or its representative in California, made an express warranty regarding a new motor vehicle sold in California and therefore is subject to California's "Lemon Law" [*see Civ. Code §§ 1793.2(d)(2), 1793.22*; *see also Cummins, Inc. v. Superior Court (2005) 36 Cal. 4th 478, 483, 493, 30 Cal. Rptr. 3d 823, 115 P.3d 98* (Song-Beverly Consumer Warranty Act applies only to new vehicles that were bought in California; Act did not apply to new vehicle that California resident had bought in Idaho and that could not be repaired after repeated attempts at manufacturer's authorized repair facility in California)]. A typical express warranty involved in Lemon Law cases is the promise to repair all defects in materials or workmanship discovered in the first "30,000 miles or 3 years" of operation of the vehicle (Paragraph C) [*see Civ. Code § 1791.2*].

If counsel's particular case involves issues regarding the status of the parties [*see, e.g., Civ. Code § 1791(j)* (defining "manufacturer")], or the definition of "sale" [*Civ. Code § 1791(n)*], or "consumer goods" [*Civ. Code § 1791(a)*], optional paragraphs from the *form in § 206.100* should also be incorporated as necessary.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue establishing the existence of an express warranty. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Generally, counsel should attach the written statement that is claimed to create the express warranty.

[b] Opposing Points and Authorities

The points and authorities *set out in § 206.119* may be used to oppose the contention supported by these points and authorities on the ground that the statement was mere policy, recommendation, or opinion.

[3] Discussion of Authorities

[a] New Motor Vehicle Defined

In ***Park City Services, Inc. v. Ford Motor Co.*** *(2006) 144 Cal. App. 4th 295, 50 Cal. Rptr. 3d 373* , a limousine service operating in Texas sued a vehicle manufacturer in California, alleging a claim under the lemon law provisions in the Song-Beverly Consumer Warranty Act. The plaintiff had acquired the vehicle in California; however, the plaintiff took it to Texas, never registered it in California, and never had any other vehicle registered in California. The manufacturer asserted in the trial court that the plaintiff lacked standing because under the statutory definition of "new motor vehicle," the condition of having "not more than five motor vehicles ... registered in" California implicitly required the plaintiff to have at least one vehicle registered in California, yet the plaintiff had no vehicles registered in California. The trial court ruled against the manufacturer on that point. After a trial, judgment was entered in favor of the plaintiff, and the manufacturer appealed.

The court of appeal reversed. After describing the legislative evolution of the lemon law provisions in the Song-Beverly Consumer Warranty Act, the court noted that while the statutory text was unclear on the point, the legislative intent revealed by the history of amendments was to extend the lemon law provisions so as to benefit small businesses in California. It was evident that the legislature had in mind any business with a vehicle registered in California, except a business having more than five registered vehicles (which was presumed not to be a small business in need of statutory warranty protection). The court observed, "We can avoid absurdity only by adding a gloss to the plain language of the statute." In short, there is an implicit requirement that the plaintiff must have at least one vehicle registered in California (*144 Cal. App. 4th 295, 306-308*). A plaintiff with no vehicle registered in California cannot invoke the lemon law provisions of the Act (*144 Cal. App. 4th 295, 309*).

In ***Jensen v. BMW of North America, Inc.*** *(1995) 35 Cal. App. 4th 112* , the court of appeal held that the phrase "other motor vehicle sold with a manufacturer's new car warranty" in *Civ. Code § 1793.22(e)(2)* includes all cars sold with a balance remaining on the new motor vehicle warranty, whether or not they qualify as "demonstrators" under the statute, and that such cars therefore qualify as "new" motor vehicles for purposes of the statute. In *Jensen,* a luxury car lessee sued the vehicle manufacturer for willful violation of the Song-Beverly Consumer Warranty Act [*Civ. Code § 1790 et seq.*]. The dealership that leased the car to plaintiff had represented that the car was a demonstrator car from the dealership, but the dealership had in fact bought the vehicle from an auto leasing affiliate of the manufacturer. The car was leased to plaintiff subject to a manufacturer's new car warranty. Plaintiff alleged that the defendant manufacturer refused to replace the car or provide a refund after six attempts at repairing the brakes were unsuccessful. The trial court entered judgment on jury verdict for plaintiff (but refused to award plaintiff's expert fee). Defendant and plaintiff appealed.

The court of appeal reversed and remanded the judgment denying plaintiff's request for expert witness fees, and affirmed the judgment in all other respects (*35 Cal. App. 4th 112, 138)* . The principal issue on appeal was whether plaintiff's vehicle was a "new motor vehicle" within the meaning of *Civ. Code § 1793.22(e)(2)* (*35 Cal. App. 4th 112, 119)* . Defendant argued that the phrase "or other motor vehicle sold with a manufacturer's new car warranty" clarified the preceding word ("demonstrator") in the statute and was not intended as a separate category of new motor vehicle (plaintiff's car did not meet the definition of "demonstrator" in *Civ. Code § 1793.22(e)(2)*). Plaintiff contended that the Legislature intended the phrase in question to mean a separate category of vehicle, neither a daily rental car nor a demonstrator (*35 Cal. App. 4th 112, 122)* . The court reviewed the amendments to former Civ. Code § 1793.2 (effective January 1, 1993, the definition of "new motor vehicle" was moved without change to *Civ. Code § 1793.22(e)(2)*; *see* Stats. 1992, ch. 1232, § 7), documents related to those legislative proceedings, and the statutory scheme as a whole, as well as the plain meaning of the words themselves, and concluded that "other motor vehicle" was intended as an alternative or separate category of "new motor vehicle," if the vehicle was sold with a manufacturer's new car warranty (*35 Cal. App. 4th 112, 123-125)* . The court held that cars sold with a balance remaining on the manufacturer's new motor vehicle warranty therefore come within the definition of "new motor vehicle" (*35 Cal. App. 4th 112, 123)* .

[b] Typical Automobile Repair Warranty

The facts and procedural background of ***Krieger v. Nick Alexander Imports, Inc.*** *(1991) 234 Cal. App. 3d 205, 285 Cal. Rptr. 717* , are discussed in *§ 206.61[3][a]*. The complaint stated five causes of action, including breach of warranty under the Song-Beverly Consumer Warranty Act and breach of written warranty under the Commercial Code. Concerning the issue of whether an express warranty had been made under either Code, plaintiff argued that the written warranty that all defects would be repaired for a period of 36 months or within the first 36,000 miles of use amounted to a warranty of future performance. Defendant contended it did not promise that the car would be free of defects but only that it would repair them (*234 Cal. App. 3d 205, 216-217)* . The court agreed with plaintiff, stating that a promise to repair defects occurring during a future period is the very definition of express warranty of future performance, under both the Consumer Warranty Act [*see Civ. Code § 1791.2*] and the Commercial Code (*234 Cal. App. 3d 205, 217)* .

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20-206 California Points & Authorities § 206.102

§ 206.102 Supporting Contention That Manufacturer Is Liable for Breach of Express Warranty in Consumer Sale--Failure to Maintain Repair Facility in California [Civ. Code § 1793.2(a)(1)(A)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT HAS BREACHED ITS DUTY IN CONNECTION WITH THE EXPRESS WARRANTY, GIVEN IN CONNECTION WITH THE PURCHASE OF _____ [*describe consumer goods*] ON _____ [*date*], BECAUSE DEFENDANT HAS FAILED TO MAINTAIN A REPAIR FACILITY IN CALIFORNIA.

Duty to Maintain Repair Facility in California. Every manufacturer of consumer goods that sells them in California with its express warranty must maintain in California sufficient service and repair facilities reasonably close to all areas where its consumer goods are sold to carry out the terms of those warranties (*Civ. Code § 1793.2(a)(1)(A)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a manufacturer, or its representative in California, failed to comply with its obligation in regard to express warranties to maintain a repair facility in California [*Civ. Code § 1793.2(a)(1)(A)*].

This form may be combined with points and authorities addressing other aspects of breach and damages [*see, e.g., §§ 206.103, 206.104, 206.130* -206.135]. They may also be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the failure to maintain a repair facility in California. They may also be adapted for use in a trial or appellate brief.

Counsel should add argument linking the points in this form with the facts of his or her case.

[b] Opposing Points and Authorities

The manufacturer may oppose the contention that a seller is liable for failure to maintain a repair facility in California on the ground that no sale was made "in this state." The manufacturer has the option of appointing an independent entity as its authorized repair and service facility [*see § 206.123*].

[3] Additional Authorities

[a] Duty to Maintain Repair Facility in California

Every manufacturer, distributor, or retailer making express warranties and maintaining service and repair facilities in California must, (1) at the time of sale, provide the buyer with the name and address of each such facility or, (2) at the time of the sale, provide the buyer with the name and address and telephone number of a service and repair facility central directory in California, or the toll-free telephone number of a service and repair facility central directory outside California, or (3) maintain at the premises of retail sellers of the warrantor's consumer goods a current listing of the warrantor's authorized service and repair facilities or retail sellers to whom the consumer goods are to be returned for service and repair [*Civ. Code 1793.1(e)*].

A manufacturer that fails to maintain a repair facility in California is liable to any retail seller who incurs obligations in giving effect to the express warranties [*see Civ. Code § 1793.2(a)(2), 1793.5*].

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20-206 California Points & Authorities § 206.103

§ 206.103 Supporting Contention That Buyer Is Entitled to Replacement or Reimbursement--Failure to Promptly Repair Goods (Other Than New Motor Vehicle) to Conform to Express Warranty [Civ. Code § 1793.2(b)-(d)(1), (e)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF IS ENTITLED TO _____ [REPLACEMENT *or* REIMBURSEMENT FOR PAYMENTS MADE FOR THE PURCHASE] OF THE _____ [*specify product, e.g.,* COMPUTER PRINTER] BECAUSE DEFENDANT, AFTER A REASONABLE NUMBER OF ATTEMPTS, FAILED TO REPAIR IT TO CONFORM TO THE EXPRESS WARRANTY.

[*EITHER*]

A. Repair or Reimbursement. For goods other than new motor vehicles, if the manufacturer or its representative in California does not service or repair the goods to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer must either replace the goods or reimburse the buyer in an amount equal to the purchase price paid by the buyer, less that amount directly attributable to use by the buyer prior to the discovery of the nonconformity (*Civ. Code § 1793.2(d)(1)*).

[*OR*]

A. Repair or Reimbursement. If the goods (other than new motor vehicles) cannot practicably be serviced or repaired by the manufacturer or its representative to conform to the applicable express warranties _____ [because of the method of installation *or* because the goods have become so affixed to real property as to become a part

of the real property], then the manufacturer must either replace and install the goods or reimburse the buyer in an amount equal to the purchase price paid by the buyer, including installation costs, less that amount directly attributable to use by the buyer before the discovery of the nonconformity (*Civ. Code § 1793.2(e)(1)*).

[*Optional*] **B. Retail Buyer Defined.** "Buyer" or "retail buyer" within the meaning of the Consumer Warranty Act is an individual who buys consumer goods from a person engaged in the business of manufacturing, distributing, or selling consumer goods at retail. "Person" within the meaning of the Consumer Warranty Act is any individual, partnership, corporation, limited liability company, association, or other legal entity that engages in any such business (*Civ. Code § 1791(b)*).

[*Optional*] **C. Requirement of Promptness.** When service or repair of consumer goods is necessary because they do not conform with the applicable express warranties, service and repair at a facility in California must be commenced within a reasonable time by the manufacturer or its representative in this state. Unless the buyer agrees in writing to the contrary, the goods must be serviced or repaired so as to conform to the applicable warranties within 30 days. [Delay caused by conditions beyond the control of the manufacturer or his representatives extend this 30-day requirement. If delay arises, conforming goods must be tendered as soon as possible following termination of the condition giving rise to the delay] (*Civ. Code § 1793.2(b)*).

[*Optional*] **D. Manufacturer's Obligation to Transport Goods for Repair.** When a buyer has notified the manufacturer or its nearest service and repair facility in California of a defect and that he or she cannot deliver them to the manufacturer for repair because of their size, weight, method of attachment, method of installation, or nature of the nonconformity, the manufacturer, at its option, must service or repair the goods at the buyer's residence, or pick up the goods for service and repair, or arrange for transporting the goods to its service and repair facility. All reasonable costs of transporting the goods when a buyer cannot return them for any of the above reasons are at the manufacturer's expense. The reasonable costs of transporting nonconforming goods after delivery to the service and repair facility until return of the goods to the buyer are at the manufacturer's expense (*Civ. Code § 1793.2(c)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a manufacturer, or its representative in California, failed to promptly repair a consumer product other than a new motor vehicle to conform to express warranties as promptly as required, and that the buyer is therefore entitled to replacement or reimbursement [*Civ. Code § 1793.2(b)-(d)(1), (e)*].

These points and authorities may be combined with points and authorities addressing other aspects of breach and damages [*see, e.g., §§ 206.102, 206.104, 206.130* -206.135]. They may also be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the failure to maintain a repair facility in California. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show when the manufacturer was notified of the defect, when the product was delivered for repair, the period consumed in repair attempts, and the ways in which the product still did not conform to the express warranties.

[b] Opposing Points and Authorities

When the buyer neither delivered the goods for repair or notified the manufacturer of the defect, the points and *authorities in § 206.124* may be used to oppose those in this form.

[3] Additional Authorities

[a] Repair or Reimbursement

Although the coach portion of a motor home is not included in the definition of "new motor vehicle" for purposes of the Song-Beverly Consumer Warranty Act [*Civ. Code § 1790 et seq.*; *see Civ. Code § 1793.22(e)(2), (3)*], and thus is not subject to *Civ. Code § 1793.2(d)(2)*, the replace-or-refund provision applicable to new motor vehicles [*see §§ 206.104, 206.121[3][a]*], motorhome coaches are included in the term "consumer goods," and therefore are covered by *Civ. Code § 1793.2(d)(1)*, the Act's replace-or-refund provision of general application [*National R.V., Inc. v. Foreman (1995) 34 Cal. App. 4th 1072, 1083]* .

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20-206 California Points & Authorities § 206.104

§ 206.104 Supporting Contention Buyer of New Motor Vehicle Is Entitled to Replacement or Restitution--Nonconformity Persists After Reasonable Number of Attempts to Repair [Civ. Code §§ 1793.2(d)(2), 1793.22]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF IS ENTITLED TO _____ [REPLACEMENT *or* RESTITUTION] BECAUSE DEFENDANT, AFTER A REASONABLE NUMBER OF ATTEMPTS, FAILED TO REPAIR THE _____ [*describe new motor vehicle*] TO CONFORM TO THE EXPRESS WARRANTY.

A. Buyer's Options After Failed Repair Attempts. If the manufacturer or its representative in California is unable to service or repair a new motor vehicle to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer must either promptly replace the new motor vehicle or promptly make restitution to the buyer. The buyer may elect restitution in lieu of replacement, and in no event may the manufacturer require the buyer to accept a replacement vehicle (*Civ. Code § 1793.2(d)(2)*).

[*Optional*] **B. Requirements if Buyer Chooses Replacement.** When the buyer of a new motor vehicle that cannot be repaired to conform to express warranties chooses replacement, the manufacturer must replace the buyer's vehicle with a new motor vehicle substantially identical to the vehicle replaced. The replacement vehicle must be accompanied by all express and implied warranties that normally accompany new motor vehicles of that specific kind. The manufacturer also must pay for, or reimburse the buyer the amount of any sales or use tax, license fees, registration fees, and other official fees that the buyer is obligated to pay in connection with the replacement, plus any incidental damages to which the buyer is entitled under *Civil Code Section 1794*, including, but not limited to, reasonable repair, towing, and rental car costs actually incurred by the buyer. The buyer is liable to pay the manufacturer an amount directly attributable to use by the buyer of the replaced vehicle prior to the time the buyer first delivered the vehicle to the manufacturer or distributor, or its authorized service and repair facility, for correction of the problem that gave rise to the nonconformity

(*Civ. Code § 1793.2(d)(2)(A), (C)*).

[*Optional*] **C. Requirements if Buyer Chooses Restitution.** When the buyer of a new motor vehicle that cannot be repaired to conform to express warranties chooses restitution, the manufacturer must make restitution in an amount equal to the actual price paid or payable by the buyer, including any charges for transportation and manufacturer-installed options, but excluding nonmanufacturer items installed by a dealer or the buyer, and including any collateral charges such as sales tax, license fees, registration fees, and other official fees, plus any incidental damages to which the buyer is entitled under *Civil Code Section 1794*, including, but not limited to, reasonable repair, towing, and rental car costs actually incurred by the buyer. "The actual price paid or payable by the buyer" includes paid finance charges. The amount to be paid by the manufacturer to the buyer may be reduced by the manufacturer by that amount directly attributable to use by the buyer prior to the time the buyer first delivered the vehicle to the manufacturer or distributor, or its authorized service and repair facility, for correction of the problem that gave rise to the nonconformity (*Civ. Code § 1793.2(d)(2)(B), (C)*; *Mitchell v. Blue Bird Body Co. (2000) 80 Cal. App. 4th 32, 35-39, 95 Cal. Rptr. 2d 81*).

[*Optional*] **D. Calculating Value of Buyer's Use Before Nonconformity Arose.** The amount directly attributable to use by the buyer is determined by multiplying the actual price of the new motor vehicle paid or payable by the buyer, including any charges for transportation and manufacturer-installed options, by a fraction having as its denominator 120,000 and having as its numerator the number of miles traveled by the new motor vehicle prior to the time the buyer first delivered the vehicle to the manufacturer or distributor, or its authorized service and repair facility, for correction of the problem that gave rise to the nonconformity. Nothing in this paragraph in any way limits the rights or remedies available to the buyer under any other law (*Civ. Code § 1793.2(d)(2)(C)*).

E. Presumption Regarding Reasonable Number of Attempts to Repair. "A reasonable number of attempts" will be presumed to have been made to conform a new motor vehicle to the applicable express warranties if, within one year from delivery to the buyer or 18,000 miles on the odometer of the vehicle, whichever occurs first, either (1) the same nonconformity results in a condition that is likely to cause death or serious bodily injury if the vehicle is driven, and the nonconformity has been subject to repair two or more times by the manufacturer or its agents and the buyer has at least once directly notified the manufacturer of the need for the repair of the nonconformity, or (2) the same nonconformity has been subject to repair four or more times by the manufacturer or its agents, and the buyer has at least once directly notified the manufacturer of the need for the repair of the nonconformity, or (3) the vehicle is out of service by reason of repair of nonconformities by the manufacturer or its agents for a cumulative total of more than 30 calendar days since delivery of the vehicle to the buyer. [The 30-day limit is extended only if repairs cannot be performed due to conditions beyond the control of the manufacturer or its agents.] This is a rebuttable presumption affecting the burden of proof, and it may be asserted by the buyer in any civil action, including an action in small claims court, or other formal or informal proceeding (*Civ. Code § 1793.22(b)*; *see Ibrahim v. Ford Motor Co. (1989) 214 Cal. App. 3d 878, 886, 263 Cal. Rptr. 64*).

[*Optional*] **F. Manufacturer's and Dealer's Repair Attempts Are Aggregated.** *Civil Code Sections 1793.2(d)* and *1793.22(b)* treat the manufacturer and its "representatives in this state," as used in subdivision (d), or "agents," as used in Section 1793.22, as a single entity. The repair efforts of both are aggregated for the purpose of calculating whether the nonconformity has been subject to repair four or more times (*Ibrahim v. Ford Motor Co. (1989) 214 Cal. App. 3d 878, 889, 263 Cal. Rptr. 64*).

[*Optional*] **G. No Notification of Third-Party Dispute Resolution Process.** A buyer can rely on the presumption of *Civil Code Section 1793.22(b)* in an action to enforce the buyer's rights under Section 1793.2(d) if he or she did not receive timely notification that the manufacturer maintained a qualified third-party dispute resolution process. Notification of the availability of the qualified third-party dispute resolution process is not timely if the buyer suffers any prejudice resulting from any delay in giving the notification (*Civ. Code § 1793.22(c)*).

[*Optional*] **H. Buyer's Right to Rely on Presumption.** If a qualified third-party dispute resolution process does not exist, or if the buyer is dissatisfied with that third-party decision, or if the manufacturer or its agent neglects to promptly fulfill the terms of the qualified third-party dispute resolution process decision after the decision is accepted by the buyer, the buyer may assert the presumption provided in *Civil Code Section 1793.22(b)* in an action to enforce the buyer's rights under *Civil Code Section 1793.2(d)* (*Civ. Code § 1793.22(c)*).

I. Nonconformity Defined. "Nonconformity" in the context of express warranties regarding new motor vehicles is one that substantially impairs the use, value, or safety of the new motor vehicle to the buyer or lessee. Whether an impairment is substantial is determined by an objective test, based on what a reasonable person would understand to be a defect (*Civ. Code § 1793.22(e)(1)*; *Lundy v. Ford Motor Company (2001) 87 Cal. App. 4th 472, 478, 104 Cal. Rptr. 2d 545*).

[*Optional*] **J. Manufacturer Has Burden of Proving Extension of 30-Day Limit.** Once a buyer presents sufficient evidence to activate the presumption that a reasonable number of repair attempts have been made, the manufacturer or other party against whom the manufacturer operates has the burden of proving the nonexistence of the presumed fact, including any grounds for extension of the 30-day period (*Ibrahim v. Ford Motor Co. (1989) 214 Cal. App. 3d 878, 890, 263 Cal. Rptr. 64*).

[*Optional*] **K. Buyer's Duty of Notification Never Arose.** The buyer must directly notify the manufacturer of the need for repair of a nonconformity only if the manufacturer has clearly and conspicuously disclosed to the buyer, with the warranty or the owner's manual, the provisions of *Civil Code Sections 1793.2(d)* and *1793.22*, including the requirement of direct notification (*Civ. Code § 1793.22(b)*; *Ibrahim v. Ford Motor Co. (1989) 214 Cal. App. 3d 878, 891, 263 Cal. Rptr. 64*).

[*Optional*] **L. Buyer Does Not Have to Prove Reliance.** The purchaser of a new motor vehicle does not have to prove that he or she relied on an express warranty or service contract given by the manufacturer. [If the buyer did have that burden of proof, reliance would be established by the buyer's continued efforts to have the vehicle repaired to conform to the warrants] (*Ibrahim v. Ford Motor Co. (1989) 214 Cal. App. 3d 878, 890-891, 263 Cal. Rptr. 64*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a manufacturer, or its representative in California, failed to promptly repair a new motor vehicle to conform to express warranties within a reasonable number of attempts, and that the buyer is therefore entitled to replacement or restitution [*Civ. Code § 1793.2(d)(2)*; *see Civ. Code § 1793.22(b), (e)(2)* (presumption of reasonable number of attempts to repair, definition of new motor vehicle, respectively)]. Additional points and authorities from § 206.101 (relating to definitions) should be incorporated as necessary.

Paragraph A describes the buyer's options, the particulars of which are described in Paragraphs B and C. Paragraph D may be used to support calculations under either the replacement or restitution option. Paragraph E sets forth the statutory presumption regarding "reasonable attempts," but except as noted in Optional Paragraph G, it may not be asserted in litigation unless the buyer has first resorted to any third-party dispute resolution process maintained by the manufacturer [*see Civ. Code § 1793.22(c)*]. Thus, Paragraph E should be used with either Optional Paragraph G or H. The remaining optional paragraphs are for use when any of the particular issues they address have been raised.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the manufacturer has not been able to repair the vehicle to conform to the express warranty. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Opposing Points and Authorities

The points and authorities *set out in § 206.126* may be used to oppose the contention supported by these points and authorities on the ground that the buyer cannot rely on the presumption to establish reasonable attempts to repair when he or she did not resort to a third-party dispute resolution process maintained by the manufacturer.

The points and *authorities in § 206.128* may be used to oppose the contention supported by these points and authorities on the ground that the manufacturer was not given at least two opportunities to repair the vehicle, as required by the language in *Civ. Code § 1793.2(d)(2)* which provides for consumer remedies only when the manufacturer is unable to service or repair a new motor vehicle after a "reasonable number of attempts."

[3] Discussion of Authorities

[a] Requirements If Buyer Chooses Restitution

In ***Mitchell v. Blue Bird Body Co.*** *(2000) 80 Cal. App. 4th 32, 95 Cal. Rptr. 2d 81* , plaintiffs purchased a new motor home built by defendant through one of its authorized dealers. The cash price was $364,232. Plaintiffs executed a motor vehicle sale contract in which they agreed to make a $55,000 down payment and finance the balance of the purchase price. The dealer assigned the contract to a lender. Plaintiffs then paid $143,162 under the contract, including $25,291 in principal and $117,871 in interest charges. Plaintiffs sued defendant, the dealer, the lender and others, claiming that the motor home had several nonconformities substantially impairing its value and that after making several unsuccessful attempts to correct the defects, plaintiffs notified defendant of their decision to revoke acceptance of the vehicle. Before trial, plaintiffs and defendant reached a partial settlement whereby plaintiffs returned the vehicle and defendant paid them $60,616, and paid $289,305 to the lender for the balance owed under the contract. The parties agreed to have the court determine the sole remaining issue: whether plaintiffs could recover the $117,871 in finance charges paid by them. The trial court decided this issue against plaintiffs by way of a summary judgment motion (*80 Cal. App. 4th 32, 34)* .

The court of appeal reversed and remanded to the trial court with directions to enter a judgment awarding plaintiffs recovery of their finance charges. It noted that the issue was one of first impression under California's version of the lemon law. Plaintiffs claimed that *Civ. Code § 1793.2(d)(2)(B)* entitled a buyer exercising the refund remedy to recover finance charges paid because those charges constituted part of the "actual price paid or payable" under the statute. The court stated that although that section does not expressly allow recovery of paid finance charges, a reasonable construction of the statute was that the Legislature intended to allow buyers to recover the entire amount actually expended for a new motor vehicle, including paid finance charges, less any of the expenses expressly excluded by the statute (*80 Cal. App. 4th 32, 37)* . That conclusion was supported by the fact that most motor vehicle sales involve financing, and there must be a passage of time before a buyer can seek the refund remedy. In plaintiffs' case, the finance charges constituted the bulk of the money plaintiffs paid to acquire the motor home (*80 Cal. App. 4th 32, 38-39)* .

[b] Presumption Regarding Reasonable Number of Attempts to Repair

Plaintiff in ***Ibrahim v. Ford Motor Co.*** *(1989) 214 Cal. App. 3d 878, 263 Cal. Rptr. 64* , purchased a Cougar in May, 1984. The "Ford Warranty Information" given to plaintiff at the time of purchase provided that the selling dealer would repair, replace, or adjust parts, except tires, found to be defective in factory materials or workmanship made or supplied by Ford. The warranty applied to defects that might develop during the 12 months following the date of purchase or after the first 12,000 miles, whichever occurs earlier. From June 1984 to October 1984, plaintiff had the car in for repairs eight times for approximately 55 days. Repairs ranged from the relatively minor to the replacement of the

A-frame. The one complaint that was not resolved to plaintiff's satisfaction was the car engine's tendency to surge or die unexpectedly. Plaintiff asked the dealer to correct the problem each time the car was at the dealer for repair. When plaintiff brought the car to the dealer on October 17, 1984, it had been driven 11,760 miles, which would seem to coincide with the end of the warranty period. Nevertheless, the dealer attempted two more times, in November and December 1984, to correct the erratic engine performance. After approximately 30 more days in the shop, the problem was still not solved. In early 1985, after a harrowing experience in which the car died while passing over railroad tracks, plaintiff decided she had had enough and asked the Ford Consumer Appeals Board (hereinafter "FCAB") for a full refund of the purchase price. In March 1985, plaintiff made the vehicle available for Ford's inspection by taking it to the dealership, but Ford failed to keep the appointment. After that, plaintiff refused to make the vehicle available to Ford for further repair attempts and Ford apparently never asked again to inspect it. In July 1985, FCAB denied plaintiff's request for a refund. Plaintiff kept the car and kept making payments on it, but bought another vehicle as her primary means of transportation, using the Ford only occasionally. In October 1985, plaintiff commenced an action for rescission, restitution and damages, breach of express and implied warranties, fraud, negligent misrepresentation, and breach of the covenant of good faith and fair dealing against both Ford and the dealer. The dealer settled. The causes of action for breach of express and implied warranties of fitness and merchantability were brought under the Consumer Warranty Act, the Commercial Code, and the Magnuson-Moss Consumer Warranty Act (*15 U.S.C. § 2310 et seq.*). A six-person jury returned a unanimous verdict for Ford. The trial court denied plaintiff's motion for new trial. Plaintiff appealed.

The court of appeal reversed, for cumulative errors in jury instructions (*214 Cal. App. 3d 878, 891-892)* , the most egregious of which instructed that Ford, as well as the dealer, had to be given a reasonable number of attempts to repair the car before plaintiff could bring suit. The court of appeal set forth former Civ. Code § 1793.2(d) and (e) (*now see Civ. Code §§ 1793.2(d), 1793.22(b)*), and commented that neither 30 days in the shop nor four unsuccessful attempts at repair would conclusively prove a buyer's right to replacement or reimbursement (*214 Cal. App. 3d 878, 886)* . These alternative remedies are still dependent on a "reasonable number of attempts" to conform the vehicle to the warranty. The dual criteria of former Civ. Code § 1793.2(e) (*now see Civ. Code § 1793.22(b)*) simply embody the Legislature's decision to declare presumptive standards of what is reasonable for purposes of *Civ. Code § 1793.2(d)*. The court stated that unreasonableness may be found even if a new vehicle has been out of service for less than 30 days, or if there have been fewer than four attempts to repair the same problem. By enacting former Civ. Code § 1793.2(e) (*now see Civ. Code § 1793.22(b)*), the Legislature has not decreed a per se, valid-in-all-circumstances, money-back guarantee for every purchaser whose new automobile has spent 30 days at the dealership for repairs, or who has suffered through four attempts to fix a problem. Those are "only markers on the path of reasonableness that the trier of fact must trod" (*214 Cal. App. 3d 878, 886)* .

[c] Manufacturer's and Dealer's Repair Attempts Are Aggregated

The facts and procedural background of ***Ibrahim v. Ford Motor Co.*** *(1989) 214 Cal. App. 3d 878, 263 Cal. Rptr. 64* , are discussed at *§ 206.124[3][b]*. Ford's primary defense was that the provisions of former Civ. Code § 1793.2(d), (e) (*now see Civ. Code §§ 1793.2(d), 1793.22*) were not triggered until it, not the dealership, had at least one opportunity to repair plaintiff's car. The jury was instructed accordingly, that the repair attempts of the dealership were not to be considered for the purpose of determining plaintiff's entitlement to reimbursement or replacement. The court of appeal held that it was error to instruct that the manufacturer was entitled to a separate attempt to repair. The legislative history of former Civ. Code § 1793.2(d) and (e) (*now see Civ. Code §§ 1793.2(d), 1793.22*) demonstrates beyond any question that any differentiation between the manufacturer and the local representative is unwarranted. The court set forth *Civ. Code § 1793.2(d)* as it existed in 1981 when it referred to "the manufacturer or its representatives in this state." That year, a bill was introduced to add the presumption of reasonableness found in former Civ. Code § 1793.2(e) (*now see Civ. Code § 1793.22(b)*). That bill would have given the buyer the benefit of the presumption "if the same nonconformity has been subject to repair 3 or more times by the dealer and one time by the manufacturer." The bill was subsequently amended and ultimately adopted as what was then *Civ. Code § 1793.2(e)* (*now see Civ. Code § 1793.22(b)*), using the language "the manufacturer or its agents" (*214 Cal. App. 3d 878, 888)* . The court reasoned that

the Legislature's rejection of precise language favorable to Ford's position demonstrates beyond any possible doubt that the instructions were based on a false and legally erroneous construction of former Civ. Code § 1793.2(d) and (e) (*now see Civ. Code §§ 1793.2(d), 1793.22(b)*). Those provisions treat the manufacturer and its "representatives in this state," as used in *Civ. Code § 1793.2(d)*, or "agents," as used in *Civ. Code § 1793.22(b)*, as a single entity. The repair efforts of both are aggregated for the purpose of calculating whether "the nonconformity has been subject to repair four or more times." The instructions had a pronounced potential for misinforming the jury that Ford could not be required to reimburse plaintiff unless and until Ford, notwithstanding the dealership's previous efforts on Ford's behalf, had been given at least one opportunity to fix the problem itself. Former Civ. Code § 1793.2 (*now see Civ. Code § 1793.22(b)*) has no such requirement (*214 Cal. App. 3d 878, 889-890)* .

[d] No Notification of Third-Party Dispute Resolution Process

Other aspects of *Civ. Code § 1793.22(c)* are discussed in *§§ 206.115* and *206.126*.

[e] Buyer's Right to Rely on Presumption

Other aspects of *Civ. Code § 1793.22(c)* are discussed in *§§ 206.115* and *206.126*.

[f] Buyer's Right to Rely on Presumption Nonconformity Defined

The facts and procedural background of ***Lundy v. Ford Motor Company*** *(2001) 87 Cal. App. 4th 472, 104 Cal. Rptr. 2d 545* are *discussed under § 206.127[3][a]*. In Lundy, the count held that whether an impairment is substantial, as contained in *Civ. Code § 1793.22(e)(1)*, is determined by an objective test, based on what a reasonable person would understand to be a defect. The court declined to draft an instruction defining "substantial," but noted that the term injects an element of degree, and not every impairment is sufficient to satisfy the statute (*87 Cal. App. 4th 472, 478)* . The court further found that the erroneous jury instruction required reversal, as it was prejudicial resulting in a miscarriage of justice (*87 Cal. App. 4th 472, 479-480)* .

Note, however, that the procedural context of the case involved reversal of a jury instruction that "substantially" in this context meant that the nonconformity was not imaginary and actually impaired the use, value, or safety of the vehicle. The appellate court concluded that trial court's definition effectively wrote the term "substantially" out of the statue, and held instead that the term injects an element of degree; not every impairment is sufficient to satisfy the statute (*87 Cal. App. 4th 472, 478)* . Thus, although plaintiffs may cite this case for the proposition that whether or not a defect is "substantial" is to be determined by an objective test as discussed above, they should also be aware that it stands for the proposition that, at the least, the requirement is not automatically satisfied by any impairment, however insignificant, that affects use, value, or safety (*87 Cal. App. 4th 472, 478)* . For additional discussion, see *§ 206.127*.

[g] Manufacturer Has Burden of Proving Extension of 30-Day Limit

The facts and procedural background of ***Ibrahim v. Ford Motor Co.*** *(1989) 214 Cal. App. 3d 878, 263 Cal. Rptr. 64* , are discussed at *§ 206.104[3][b]*. Additionally, the court of appeal found error in the jury instructions regarding the issue of an extension of the 30-day repair period. The jury was instructed that plaintiff had the burden of proving that Ford's failure to repair the defect after the statutory number of attempts and days out of service was not caused by conditions beyond the control of defendant. The court held that it was error to assign this burden to plaintiff. Plaintiff's evidence was sufficient to activate the presumption of former Civ. Code § 1793.2(e) (*now see Civ. Code § 1793.22(b)*), which the Legislature specifically declared to be a rebuttable presumption affecting the burden of proof. The effect of such a presumption is to impose on the party against whom it operates the burden of proof regarding the nonexistence of the presumed fact [*Evid. Code § 606*]. Thus, the presumption established by former Civ. Code § 1793.2(e) (*now see Civ. Code § 1793.22(b)*) operated against Ford. By claiming an extension of the 30-day period, Ford was obligated to carry the burden of proving that the delay was caused by conditions beyond its control (*214 Cal. App. 3d 878, 890)* .

[h] Buyer's Duty of Notification Never Arose

The facts and procedural background of ***Ibrahim v. Ford Motor Co.*** *(1989) 214 Cal. App. 3d 878, 263 Cal. Rptr. 64* , are discussed at *§ 206.104[3][b]*. Regarding the notification issue, the trial court instructed the jury in the statutory language that plaintiff was required to notify Ford of the recurring nonconformity. The court of appeal said that the instruction should not have been given, because the consumer's obligation of direct notification [*see Civ. Code § 1793.22*] only arises if the manufacturer made disclosure to the buyer in the manner provided by that section. The written statement, "Ford Warranty Information," was admitted in evidence, but, as a matter of law, that did not satisfy the requirement of conspicuous disclosure. Although Ford claimed the requisite information was in the owner's manual, the manual was not admitted in evidence. The court noted that even instructions that correctly state the law are improper when they lack support in evidence (*214 Cal. App. 3d 878, 891)* .

[i] Buyer Does Not Have to Prove Reliance

The facts and procedural background of ***Ibrahim v. Ford Motor Co.*** *(1989) 214 Cal. App. 3d 878, 263 Cal. Rptr. 64* , are discussed at *§ 206.104[3][b]*. The jury was instructed that plaintiff had the burden of proving she relied on the written statement, "Ford Warranty Information." The court of appeal said that this too was error, because, as held in *Keith v. Buchanan (1985) 173 Cal. App. 3d 13, 22-23, 220 Cal. Rptr. 392* , the manufacturer or seller, not the buyer, has the burden of proving nonreliance (*214 Cal. App. 3d 878, 890)* . Reliance was manifested by plaintiff's continued efforts to have the vehicle repaired and by defendant's acceptance of the responsibility to correct the problem (*214 Cal. App. 3d 878, 891)* .

[4] Additional Authorities

[a] Requirements If Buyer Chooses Restitution

In *Bishop v. Hyundai Motor Co. (1996) 44 Cal. App. 4th 750, 52 Cal. Rptr. 2d 134* , a buyer sought emotional-distress damages and loss-of-use damages for the period when she did not have a replacement vehicle after her vehicle was destroyed by fire. The court of appeal, construing the consequential-damages provision of *Com. Code § 2715* as incorporated by *Civ. Code § 1794*, held that those damages were not recoverable under the Song-Beverly Consumer Warranty Act (*44 Cal. App. 4th 750, 757-758)* .

[b] Nonconformity Defined

In *Oregel v. American Isuzu Motors, Inc. (2001) 90 Cal. App. 4th 1094, 109 Cal. Rptr. 2d 583* , plaintiff leased a new car, which subsequently developed a chronic oil leak that Isuzu was unable to fix. The manufacturer declined to repurchase the car and plaintiff filed suit. The jury found that the car's oil leak was a nonconformity that substantially impaired the use, value, or safety of the car and that the manufacturer was unable to fix the leak after a reasonable number of attempts. The jury also found that the manufacturer willfully violated its obligation to repurchase the car under the Song-Beverly Act, and that it should pay a civil penalty equal to the amount of the damage award. The court of appeal affirmed. It held that the jury's finding that the oil leak was due to a nonconformity, rather than to improper maintenance, was supported by substantial evidence (*90 Cal. App. 4th 1094, 1101-1103)* . The court held further that there was substantial evidence that Isuzu did not repair the car after a reasonable number of attempts, and that there was substantial evidence to support the civil penalty (*90 Cal. App. 4th 1094, 1103-1105)* .

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20-206 California Points & Authorities § 206.105

§ 206.105 Supporting Contention That Seller Made Warranty in Consumer Sale [Civ. Code §§ 1791.2, 1792-1792.2]--Buyer's Waiver Is Void and Unenforceable [Civ. Code § 1790.1]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE WARRANTY MADE BY DEFENDANT TO PLAINTIFF IN CONNECTION WITH THE PURCHASE OF _____ [*specify consumer good, e.g.,* A WORD PROCESSOR AND RELATED PROGRAMS] ON _____ [*date*] IS BINDING ON DEFENDANT BECAUSE THE WAIVER CONTAINED IN _____ [*specify document, e.g.,* PARAGRAPH 12 OF THE PURCHASE AND SALE CONTRACT] IS VOID.

Buyer's Waiver of Warranties Are Void. Any waiver by the buyer of consumer goods of the provisions of the Song-Beverly Consumer Warranty Act[, including what is commonly called "the Lemon Law,"] except as expressly provided in that Act, is deemed contrary to public policy and is unenforceable and void (*Civ. Code § 1790.1*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a buyer is entitled to certain damages from a seller, based on breach of warranty, on the ground that the buyer's waiver or limitation of his or her remedies is void and unenforceable [*see Civ. Code § 1790.1*].

This form applies to an express warranty and the implied warranties of merchantability and fitness for a particular purpose [*see Civ. Code §§ 1791.2, 1792-1792.2*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context

in which counsel wishes to raise the issue that the limitation or attempted waiver is void. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel should set forth the limitation of remedies, for example, a contractual modification of a statutory remedy.

[b] Commercial Code Counterpart

The Commercial Code counterpart to *Civ. Code § 1790.1*, *Com. Code § 2316(4)*, allows a manufacturer or seller to limit the buyer's remedies for breach of warranty in accordance with *Com. Code § 2718* (limitation of damages) and *Com. Code § 2719* (modification of remedy) [*see § 206.71*].

Com. Code § 2316 describes several aspects of their enforcement:

- Rules of construction, parol evidence, and statute of frauds [*see §§ 206.62*, *206.67*].

- Limitations on enforcement of remedies for breach of implied warranties [*see* § 206.84 (merchantability), § 206.86 (fitness)].

- Limitations in standard ways, such as the use of "as is," use of a model or sample, and in accordance with prior dealing of the parties or trade usage [*see § 206.72*].

[c] Related Points and Authorities

§ 206.107 contains points and authorities regarding waiver of the implied warranties.

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20-206 California Points & Authorities § 206.106

§ 206.106 Supporting Contention That Manufacturer or Retailer Impliedly Warranted Merchantability of Consumer Goods [Civ. Code § 1791.1(a), (c)]--Implied Warranty of Merchantability Accompanies Every Sale [Civ. Code § 1792]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT _____ [*name of manufacturer or seller*] IMPLIEDLY WARRANTED THE MERCHANTABILITY OF _____ [*specify item, e.g.,* THE EXERCISE EQUIPMENT] BECAUSE, UNLESS EFFECTIVELY DISCLAIMED, SUCH A WARRANTY ACCOMPANIES ALL RETAIL SALES OF CONSUMER GOODS IN CALIFORNIA.

A. Implied Warranty of Merchantability Defined. "Implied warranty of merchantability" or "implied warranty that goods are merchantable" within the meaning of the Song-Beverly Consumer Warranty Act is a warranty that the consumer goods meet each of the following criteria: (1) pass without objection in the trade under the contract description; (2) are fit for the ordinary purposes for which such goods are used; (3) are adequately contained, packaged, and labeled; and (4) conform to the promises or affirmations of fact made on the container or label (*Civ. Code § 1791.1(a)*).

B. Unless Disclaimed, Merchantability Is Warranted. Unless disclaimed in the manner prescribed by the Song-Beverly Consumer Warranty Act, every sale of consumer goods that are sold at retail in California is accompanied by the manufacturer's and the retail seller's implied warranty that the goods are merchantable (*Civ. Code § 1792*).

[*EITHER*]

[*Optional*] **C. Duration of Implied Warranty That Accompanies Express Warranty.** The duration of the implied

warranty of merchantability, and if present the implied warranty of fitness, are coextensive in duration with an express warranty that accompanies the consumer goods, provided the duration of the express warranty is reasonable; but in no event shall the duration of the implied warranty be less than 60 days nor more than one year following the sale of new consumer goods to a retail buyer (*Civ. Code § 1791.1(c)*).

[*OR*]

[*Optional*] **C. Duration of Implied Warranty With No Express Warranty.** If no duration for an express warranty is stated with respect to consumer goods, or parts of them, the duration of the implied warranty extends for one year following the sale of new consumer goods to a retail buyer (*Civ. Code § 1791.1(c)*).

[*CONTINUE*]

[*Optional*] **D. Consumer Goods Defined.** [*See § 206.100, Paragraph C.*]

[*Optional*] **E. Sale Defined.** [*See § 206.100, Paragraph D.*]

[*Optional*] **F. Manufacturer Defined.** [*See § 206.100, Paragraph E.*]

[*Optional*] **G. Retail Seller Defined.** [*See § 206.100, Paragraph I.*]

[*Optional*] **H. Vertical Privity Not Required if Product Is Purchased New.** California does not require vertical privity in order to state a cause of action for breach of implied warranty if the consumer purchased a new article[, but does require vertical privity for second-hand purchases] (*Walsh v. Ford Motor Co. (D.D.C. 1984) 588 F. Supp. 1513, 1528* ; *see Civ. Code §§ 1791(a), 1791.1(d)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a manufacturer or retail seller impliedly warranted the merchantability of consumer goods within the meaning of the Song-Beverly Consumer Warranty Act. The various optional paragraphs from § 206.100 should be incorporated if any of the elements of definitions or the status of the parties are in dispute.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue establishing the existence of an implied warranty of merchantability. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Generally, counsel should attach relevant advertising and sale documents.

[b] Commercial Code Counterpart

The Commercial Code counterpart regarding implied warranty of merchantability is *Com. Code § 2314*, which is *set forth in § 206.63*.

[c] Related Pleading and Practice Forms

For discussion and forms for use in actions involving warranties under the Song-Beverly Consumer Warranty Act, see California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties* (Matthew Bender). That chapter also discusses warranties under the Commercial Code and under the federal Magnuson-Moss Act. For discussion and forms regarding strict products liability, see California Forms of Pleading and Practice, Ch. 460, *Products Liability* (Matthew Bender).

[d] Related Points and Authorities

For points and authorities relating to products liability generally, see Ch. 190, *Products Liability* .

[3] Discussion of Authorities

[a] Unless Disclaimed, Merchantability Is Warranted

Civ. Code § 1792 also provides that the retail seller has a right of indemnity against the manufacturer in the amount of any liability under *Civ. Code § 1792*.

[b] Vertical Privity Not Required if Product Is Purchased New

Walsh v. Ford Motor Co. *(D.D.C. 1984) 588 F. Supp. 1513* was an action for damages and declaratory and injunctive relief for breach of written and implied warranties, negligence, and strict liability based on allegedly defective transmissions in certain types of automobiles manufactured by defendant between 1976 and 1980. The action was brought under the Magnuson-Moss Warranty Act (*15 U.S.C. § 2301 et seq.*). In order to maintain the action as a class action in federal court, *15 U.S.C. § 2310(d)(3)* required there to be 100 plaintiffs. In determining whether there were 100 plaintiffs who had stated causes of action, the district court examined, among other things, the claims for breach of implied warranty of merchantability. Under Magnuson-Moss [*15 U.S.C. § 2301(7)*], causes of action for breach of implied warranty are based on state law. Thus, plaintiffs from states that do not authorize a cause of action for breach of implied warranty unless there is vertical privity between the manufacturer and the consumer could not be counted towards the 100-plaintiff requirement (*588 F. Supp. 1513, 1524-1526)* .

Three plaintiffs alleged that they bought used Fords in California. The district court cited *Civ. Code § 1791(a)* [*see § 206.100*, Paragraph C (defining "consumer goods" as new)] and *Civ. Code § 1791.1(d)*, and held that California does not require vertical privity for breach of implied warranty if the consumer purchased a new vehicle, but does require vertical privity for second-hand purchases. Thus, the plaintiffs who had purchased used cars could not be counted towards the 100-plaintiff requirement (*588 F. Supp. 1513, 1528)* . Nevertheless, with six plaintiffs to spare, the action was certified (*588 F. Supp. 1513, 1538)* .

[4] Additional Authorities

[a] Implied Warranty of Merchantability Defined

Mocek v. Alfa Leisure, Inc. (2003) 114 Cal. App. 4th 402, 7 Cal. Rptr. 3d 546 , is discussed in *§ 206.130[3][a]*. Before holding that there is no requirement that a seller be given an opportunity to repair when the implied warranty of merchantability is breached, the court provided an overview of the implied warranty of merchantability as set forth in *Civ. Code § 1791.1(a)* (*114 Cal. App. 4th 402, 406)* .

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20-206 California Points & Authorities § 206.107

§ 206.107 Supporting Contention That Manufacturer or Retailer Has Impliedly Warranted Consumer Goods--Disclaimer Ineffective [Civ. Code §§ 1792.3, 1792.4(a), 1793]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT _____ [*name of seller*] IS LIABLE TO PLAINTIFF FOR BREACH OF THE IMPLIED WARRANTY OF _____ [MERCHANTABILITY *and/or* FITNESS FOR PARTICULAR PURPOSE] DESPITE THE PURPORTED CONTRACTUAL DISCLAIMER, BECAUSE THE DISCLAIMER IS INEFFECTIVE IN THAT _____ [THE CONSUMER GOODS WERE NOT SOLD ON AN "AS IS" OR "WITH ALL FAULTS" BASIS *or* A CONSPICUOUS WAIVER WAS NOT PROVIDED][, AND THE PURPORTED DISCLAIMER IS INCLUDED WITHIN AN EXPRESS WARRANTY].

A. Strict Construction of Purported Disclaimer. No implied warranty of merchantability and, if applicable, no implied warranty of fitness may be waived, except in the case of a sale of consumer goods on an "as is" or "with all faults" basis in which the provisions of the Song-Beverly Consumer Warranty Act affecting "as is" or "with all faults" sales are strictly complied with (*Civ. Code § 1792.3*).

B. Buyer's Waivers Void. [*See § 206.105.*]

[*Optional*] **C. Express Warranty May Not Limit Implied Warranties.** A manufacturer, distributor, or retailer, in transacting a sale in which express warranties are given, may not limit, modify, or disclaim the implied warranties guaranteed by the Song-Beverly Consumer Warranty Act to the sale of consumer goods (*Civ. Code § 1793*).

D. Requirements of Disclaimer of Implied Warranties. A sale of goods, governed by the Song-Beverly Consumer Warranty Act, on an "as is" or "with all faults" basis effectively disclaims the implied warranty of merchantability or, if applicable, the implied warranty of fitness, but only if a conspicuous writing is attached to the goods that clearly

informs the buyer, prior to the sale, in simple and concise language of each of the following: (1) the goods are being sold on an "as is" or "with all faults" basis, (2) the entire risk as to the quality and performance of the goods is with the buyer, and (3) should the goods prove defective following their purchase, the buyer and not the manufacturer, distributor, or retailer assumes the entire cost of all necessary servicing or repair (*Civ. Code § 1792.4(a)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a manufacturer or retail seller is liable for breach of an implied warranty of a consumer good. The basis of the contention is that the purported disclaimer was ineffective [*see Civ. Code § 1792.3*]. Optional Paragraph B incorporates the general Song-Beverly rule with respect to voidness of buyer's waivers [*see Civ. Code § 1791.3*]. Optional Paragraph C is for use when there is an express warranty to ensure that it is not interpreted in a way that would negate the implied warranties given by the Consumer Warranty Act. Paragraph D sets forth the particular statements that must be included to effectively disclaim implied warranties.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that a written disclaimer is ineffective to negate an implied warranty. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should show that the purported disclaimer of the implied warranty does not contain the required statements, or is inconspicuous, or both. Counsel should produce a facsimile of the written agreement, and compare the characteristics, such as typeface and location, of the disclaimer, with respect to the rest of the contract. Counsel should argue facts showing that the disclaimer was insufficiently conspicuous to inform a reasonable buyer that he or she was waiving the right to have a quality product.

[b] Related Pleading and Practice Forms

For discussion and forms for use in actions involving warranties under the Commercial Code, see California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties* (Matthew Bender). For a discussion and forms regarding strict products liability, see California Forms of Pleading and Practice, Ch. 460, *Products Liability* (Matthew Bender).

[c] Related Points and Authorities

For points and authorities relating to products liability generally, see Ch. 190, *Products Liability* .

[d] Commercial Code Counterparts

Disclaimer of Commercial Code warranties is governed by *Com. Code § 2316*, which is the basis for §§ 206.64, 206.66, and 206.87. § 206.72 is for use when a disclaimer has complied with all the Commercial Code requirements and therefore is effective.

Civ. Code § 1793 (Paragraph C) has no Commercial Code counterpart. However *Com. Code § 2316(1)* requires specific language to exclude or modify the statutory implied warranties [*see §§ 206.64, 206.66*].

[3] Discussion of Authorities

[a] Express Warranty May Not Limit Implied Warranties

Civ. Code § 1793 also specifies that nothing in the Consumer Warranty Act is intended to prevent a manufacturer,

distributor, or retailer from making express warranties with respect to consumer goods.

[b] Requirements of Disclaimer of Implied Warranties

In the event of a sale of consumer goods by means of a mail order catalog, the catalog offering the goods must contain the required writing as to each item so offered in lieu of the requirement of notification prior to the sale [*Civ. Code § 1792.4(b)*].

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20-206 California Points & Authorities § 206.108

§ 206.108 Supporting Contention That Manufacturer, Distributor, or Retailer Impliedly Warranted Fitness of Consumer Goods [Civ. Code §§ 1791.1(b), 1792.1, 1792.2(a)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT _____ [*name of manufacturer or seller*] KNEW PLAINTIFF WAS RELYING ON IT IN CHOOSING A SUITABLE _____ [*specify item, e.g.,* EXERCISE AND WEIGHT MACHINE], THAT PLAINTIFF'S PARTICULAR PURPOSE WAS TO _____ [*specify, e.g.,* BEGIN REHABILITATION AND EXERCISE AFTER A DISABLING ACCIDENT AND SEVERAL SURGERIES], AND THAT PLAINTIFF WAS RELYING ON DEFENDANT'S SKILL AND/OR JUDGMENT TO SELECT THE GOODS FOR THAT PURPOSE.

A. Implied Warranty of Fitness Defined. "Implied warranty of fitness" within the meaning of the Song-Beverly Consumer Warranty Act means (1) that when the retailer, distributor, or manufacturer has reason to know any particular purpose for which the consumer goods are required, and further, that the buyer is relying on the skill and judgment of the seller to select and furnish suitable goods, then there is an implied warranty that the goods will be fit for that purpose[, and (2) that when an assistive device is sold at retail in California, there is an implied warranty by the retailer that the device is specifically fit for the particular needs of the buyer] (*Civ. Code § 1791.1(b)*).

[*Optional*] **B. Manufacturer's Implied Warranty of Fitness.** Every sale of consumer goods that are sold at retail in California by a manufacturer who has reason to know at the time of the retail sale that the goods are required for a particular purpose and that the buyer is relying on the manufacturer's skill or judgment to select or furnish suitable goods is accompanied by the manufacturer's implied warranty of fitness (*Civ. Code § 1792.1*; *Williams v. Beechnut Nutrition Corp. (1986) 185 Cal. App. 3d 135, 142, 229 Cal. Rptr. 605*).

[*Optional*] **C. Distributor's or Retailer's Implied Warranty of Fitness.** Every sale of consumer goods that are sold at

retail in California by a retailer or distributor who has reason to know at the time of the retail sale that the goods are required for a particular purpose, and that the buyer is relying on the retailer's or distributor's skill or judgment to select or furnish suitable goods, is accompanied by the retailer's or distributor's implied warranty that the goods are fit for that purpose (*Civ. Code § 1792.2(a)*).

[*Optional*] **D. Duration of Implied Warranty.** [*See § 206.106, Alternative Paragraphs C.*]

[*Optional*] **E. Inference of Reliance on Implied Warranty of Consumability.** A plaintiff need not allege reliance when it may be inferred from other allegations that the manufacturer had reason to know that the product was required for a particular purpose and that the buyer was relying on the manufacturer's skill or judgment to select or furnish a suitable product (*Williams v. Beechnut Nutrition Corp. (1986) 185 Cal. App. 3d 135, 142, 229 Cal. Rptr. 605*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a manufacturer, distributor, or retail seller impliedly warranted the fitness of consumer goods within the meaning of the Song-Beverly Consumer Warranty Act [*see Civ. Code §§ 1791.1(b), 1792.1, 1792.2(a)*]. Appropriate points and authorities from § 206.100 should be added if any definitional elements are in dispute, for example, whether the seller is a retailer.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the manufacturer, distributor, or retail seller is liable for breach of the implied warranty of fitness for a particular purpose. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel therefore should discuss all facts concerning the communications between plaintiff and defendant prior to the sale, and show that plaintiff clearly explained the intended purpose for the goods, and that he or she relied on plaintiff's skill or judgment in selecting those goods for that purpose. Counsel should also indicate that no exclusion or modification affects that warranty.

[b] Commercial Code Counterpart

Com. Code § 2315 governs implied warranties under the Commercial Code, and is *set forth in § 206.65*. Lack of the reliance element is demonstrated in the opposing points and *authorities in § 206.79*.

[c] Related Pleading and Practice Forms

For discussion and forms for use in actions involving warranties under the Commercial Code, see California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties* (Matthew Bender). For discussion and forms regarding strict products liability, see California Forms of Pleading and Practice, Ch. 460, *Products Liability* , (Matthew Bender).

[d] Related Points and Authorities

For points and authorities relating to products liability generally, see Ch. 190, *Products Liability* .

[3] Discussion of Authorities

[a] Manufacturer's Implied Warranty of Fitness

Williams v. Beechnut Nutrition Corp. *(1986) 185 Cal. App. 3d 135, 229 Cal. Rptr. 605* , is *discussed under §*

206.108[3][b].

[b] Inference of Reliance on Implied Warranty of Consumability

Williams v. Beechnut Nutrition Corp. *(1986) 185 Cal. App. 3d 135, 229 Cal. Rptr. 605* , was a products liability action brought by a guardian ad litem on behalf of a three-and-one-half-year-old child. The child fell while using a glass apple-juice bottle manufactured by defendant. The bottle broke and cut the child's wrist. The bottle was shaped like a baby bottle and was equipped with a screw top mouth that could accommodate plastic and rubber type screw-on nipples commonly used by infants to drink liquids. The complaint contained four uncaptioned causes of action. The trial court sustained defendant's general demurrer to the fourth amended complaint without leave to amend. Plaintiff appealed.

The court of appeal reversed. Even without labels, the substantive allegations indicated that plaintiff sought recovery under four theories: strict products liability, negligence, breach of express warranty, and implied warranties of merchantability and fitness for intended purpose (*185 Cal. App. 3d 135, 139)* . With respect to the cause of action for breach of implied warranties of merchantability and fitness for intended purpose, the court said that the retail purchase of a consumable product in California carries an implied warranty of fitness for its intended purpose (*185 Cal. App. 3d 135, 142)* . The court cited *Civ. Code § 1792.1* and *Com. Code § 2315* for the proposition that the chief consideration is whether the manufacturer had reason to know the product was required for a particular purpose and that the buyer is relying on the manufacturer's skill or judgment to select or furnish a suitable product. The complaint alleged that defendant produced and sold the juice container knowing or reasonably foreseeing that the product would be given to a child of plaintiff's age; that the child might drop the container; and that it could break and injure the child. Plaintiff failed to allege reliance on defendant's implied warranty. However, the court held that the totality of the allegations reasonably permitted an inference of reliance, and thus met the core prerequisites for pleading breach of implied warranty (*185 Cal. App. 3d 135, 142)* .

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20-206 California Points & Authorities § 206.109

§ 206.109 Supporting Contention That Retailer Impliedly Warranted Fitness of Assistive Devices [Civ. Code §§ 1791(p), 1791.1(b), 1792.2(b)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT _____ [*name of retail seller*] IMPLIEDLY WARRANTED THAT THE _____ [*specify assistive device e.g.,* PROSTHETIC LEG] WAS FIT FOR PLAINTIFF'S PERSONAL NEEDS BECAUSE SUCH A WARRANTY ACCOMPANIES ALL RETAIL SALES OF ASSISTIVE DEVICES IN CALIFORNIA.

A. Retailer's Implied Warranty of Assistive Device. Every sale of an assistive device sold at retail in California is accompanied by the retail seller's implied warranty that the device is specifically fit for the particular needs of the buyer (*Civ. Code § 1792.2(b)*).

B. Assistive Device Defined. "Assistive device" within the meaning of the Song-Beverly Consumer Warranty Act is any instrument, apparatus, or contrivance, including any component or part thereof or accessory thereto, which is used or intended to be used to assist an individual with a disability in the mitigation or treatment of an injury or disease or to assist or affect or replace the structure or any function of the body of an individual with a disability (*Civ. Code § 1791(p)*).

[*Optional*] **C. Duration of Implied Warranty.** [*See § 206.106, Alternative Paragraphs C.*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a retail seller impliedly warranted the

fitness of an assistive device within the meaning of the Song-Beverly Consumer Warranty Act. Appropriate points and authorities from § 206.100 should be added if any definitional elements are in dispute, for example, whether the seller is a retailer.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the retail seller is liable for breach of the implied warranty of fitness for a particular purpose. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Retailer's Implied Warranty of Assistive Device

All new and used assistive devices sold at retail in California must be accompanied by the retail seller's written warranty, which must contain the following language: "This assistive device is warranted to be specifically fit for the particular needs of you, the buyer. If the device is not specifically fit for your particular needs, it may be returned to the seller within 30 days of the date of actual receipt by you or completion of fitting by the seller, whichever occurs later. If you return the device, the seller will either adjust or replace the device or promptly refund the total amount paid. This warranty does not affect the protections and remedies you have under other laws." In lieu of the words "30 days," the retail seller may specify any longer period [*Civ. Code § 1793.02(a)*]. Other aspects of this specific warranty and the rights of buyers with respect to them are governed by *Civ. Code § 1793.02(b)-(h)*.

[b] Assistive Device Defined

The term "assistive device" is defined by *Civ. Code § 1791(p)*, and is set out in Paragraph B of the form. Prescriptive lenses and other ophthalmic goods are excluded from the definition of "assistive device" unless they are sold or dispensed to a blind person, as defined in *Welf. & Inst. Code § 19153*, and unless they are intended to assist the limited vision of the person so disabled [*Civ. Code § 1791(p)*].

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20-206 California Points & Authorities § 206.110

§ 206.110 Supporting Contention That Buyer Is Entitled to Damages for Seller's Breach of Warranty in Consumer Sale--General Measure of Damages [Civ. Code § 1794(a)-(b)], Attorney's Fees and Costs [Civ. Code § 1794(d)], and Penalty for Willful Violation [Civ. Code § 1794(c)]

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

PLAINTIFF IS ENTITLED TO RECOVER _____ [*specify elements of damages, repair, or replacement, e.g.,* THE COSTS OF HAVING A THIRD PARTY REPAIR THE _____ (*specify consumer goods, e.g.,* HIGH-RESOLUTION TELEVISION SYSTEM), COURT COSTS, AND ATTORNEY'S FEES] EXPENDED ON ACCOUNT OF DEFENDANT'S BREACH OF ITS [EXPRESS *or* IMPLIED] WARRANTY, GIVEN IN CONNECTION WITH THE PURCHASE OF _____ [*specify consumer goods*] ON _____ [*date*].

A. Right of Action. Any buyer of consumer goods who is damaged by a failure to comply with any obligation under the Song-Beverly Consumer Warranty Act or under an implied or express warranty or service contract may bring an action for the recovery of damages and other legal and equitable relief (*Civ. Code § 1794(a)*; *see Mocek v. Alfa Leisure, Inc. (2003) 114 Cal. App. 4th 402, 406-408, 7 Cal. Rptr. 3d 546* ; *Gomez v. Volkswagen of America, Inc. (1985) 169 Cal. App. 3d 921, 925, 215 Cal. Rptr. 507*).

B. Measure of Damages for Breach of Consumer Warranty. A buyer damaged by a violation of the Consumer Warranty Act is entitled to replacement or reimbursement as set forth in *Civil Code Section 1793.2(d)*, and

[*ADD, buyer has rightfully rejected or justifiably revoked acceptance goods or has exercised any right to cancel sale*]

to "cover," damages, including incidental and consequential damages, but less expenses saved in consequence of the

breach, or specific recovery of property previously identified in the contract, all in accordance with *Commercial Code Sections 2711*, *2712*, and *2713* (*Civ. Code § 1794(b)(1)*).

[*OR, buyer has accepted goods*]

to damages as measured by *Commercial Code Sections 2714* and *2715*, including the cost of repairs necessary to make the goods conform (*Civ. Code § 1794(b)(2)*).

[*CONTINUE*]

[*Optional*] **C. Commercial Code Remedies for Breach of Implied Warranty.** Any buyer of consumer goods injured by a breach of the implied warranty of merchantability and, if applicable, by a breach of the implied warranty of fitness has the remedies provided in Chapter 6 (commencing with *Commercial Code Section 2601*) and Chapter 7 (commencing with Commercial Code *Section 2701) of Division 2 of the Commercial Code*, and, in any action brought under those provisions, *Civil Code Section 1794* applies (*Civ. Code § 1791.1(d)*).

D. Attorney's Fees and Costs. If the buyer prevails in an action under the Consumer Warranty Act, the court must award the buyer as part of the judgment a sum equal to the aggregate amount of costs and expenses, including attorney's fees based on actual time expended, to the extent that the court determines the fees were reasonably incurred by the buyer in connection with the commencement and prosecution of the action (*Civ. Code § 1794(d)*; *Levy v. Toyota Motor Sales U.S.A., Inc. (1992) 4 Cal. App. 4th 807, 814-817, 5 Cal. Rptr. 2d 770*).

[*Optional*] **E. Consumer Warranty Act Supersedes Commercial Code Only in Case of Conflict.** [*See § 206.100, Paragraph F*.]

[*Optional*] **F. Penalty for Willful Violation.** _____ [Except in any class action under *Code of Civil Procedure Section 382* or under *Civil Code Section 1781*, or with respect to a claim based solely on a breach of an implied warranty, if *or* If] the buyer establishes that the failure to comply was willful, the judgment may include, in addition to the amounts recovered under *Civil Code Section 1794(a)*, a civil penalty that shall not exceed two times the amount of actual damages (*Civ. Code § 1794(c)*; *see Ibrahim v. Ford Motor Co. (1989) 214 Cal. App. 3d 878, 894, 263 Cal. Rptr. 64*).

[*Optional*] **G. Song-Beverly Remedies Are Cumulative.** The remedies provided by the Song-Beverly Consumer Warranty Act are cumulative and do not restrict any remedy that is otherwise available, and, in particular, must not be construed to supplant the provisions of the Unfair Practices Act (*Business and Professions Code Section 16700 et seq.*) (*Civ. Code § 1790.4*).

[*Optional*] **H. Prejudgment Interest.** Prejudgment interest may be recovered in an appropriate case, pursuant to *Civil Code Section 3287* (*Doppes v. Bentley Motors, Inc. (2009) 174 Cal. App. 4th 1004, 1010-011, 94 Cal. Rptr. 3d 797*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of the buyer's entitlement to various elements of damage or other remedies under the Song-Beverly Consumer Warranty Act [*see Civ. Code § 1794(a)-(d)*]. Counsel should incorporate the appropriate paragraphs from §§ 206.103 or 206.124 regarding any replacement, reimbursement, or restitution component of the relief sought [*see Civ. Code § 1793.2(d)*]. The various optional paragraphs are for use if any of the

elements of the remedy are in dispute. *Com. Code §§ 2711-2713*, the general Commercial Code remedies, are discussed in *§§ 206.42 -206.47*. The Commercial Code measure of damages for breach of warranty [*see Com. Code § 2714(2)*] and related definitions of consequential and incidental damages [*see Com. Code §§ 2714(3), 2715*] are *set forth in § 206.69* and should be incorporated whenever they apply.

For memoranda in support of a prevailing *seller's* entitlement to costs and expert witness fees in an action under the Song-Beverly Consumer Warranty Act, see *§ 206.116*.

This form applies to express and implied warranties, except that no penalty for willful breach can be recovered for breach of an implied warranty (Paragraph F). If the product involved is a new motor vehicle, the buyer need not rely on Optional Paragraph F, but may have the double penalty of *Civ. Code § 1794(e)(1)* without having to prove that the manufacturer's violation of the "Lemon Law" was willful [*see § 206.111*]. For additional memoranda supporting a claim for prejudgment interest pursuant to *Civ. Code § 3287* (Paragraph H), see *Ch. 121, Interest, § 121.30* et seq.

This memorandum may be combined with memorandum pertaining to the specific procedural context in which counsel wishes to raise the substantive issue regarding the remedy or recovery. They may also be adapted for use in a trial or appellate brief.

Counsel should add argument linking the points in this form with the facts of his or her case; for example, the calculations of each element of damages being sought.

[3] Discussion of Authorities

[a] Right of Action

In ***Mocek v. Alfa Leisure****, Inc. (2003) 114 Cal. App. 4th 402, 7 Cal. Rptr. 3d 546* , plaintiff purchased a travel trailer, manufactured by defendant, which was delivered at a recreational vehicle park. Plaintiff was required to sign documents and pay for the trailer before being given an opportunity to inspect it. When plaintiff's son connected plaintiff's trailer to the power source, electrical problems resulted with the TV/VCR. Defendant's technician examined the trailer, but was unable to fix its electric system in place and wanted to move the trailer to defendant's plant for repairs. The technician told plaintiff defendant would have to replace all the appliances and test each wire. Plaintiff refused to let defendant take the trailer to be repaired, and advised defendant that he wanted a new trailer or a refund of the purchase price. Plaintiff said he would have no confidence in a repaired trailer because the damage was too extensive. When defendant did not replace the trailer or refund the purchase price, plaintiff brought an action for breach of the implied warranty of merchantability under the Song-Beverly Consumer Warranty Act. The trial court found that the defects constituted a breach of the implied warranty and rendered a judgment in the amount of the purchase price, plus interest, conditioned upon plaintiff returning the trailer to defendant. It concluded that when the implied warranty of merchantability is breached, applicable statutes do not require a buyer to give the seller an opportunity to repair before rescinding the purchase (*114 Cal. App. 4th 402, 404-405)* . Defendant appealed, contending that plaintiff could not rescind the purchase without first giving it an opportunity to repair the defects.

The court of appeal affirmed the judgment, finding that although a different rule may apply when there is a breach of an express warranty, there is no requirement the seller be given an opportunity to repair when the implied warranty of merchantability is breached. The court first gave an overview of the implied warranty and the right of action under *Civ. Code § 1794*. It then concluded that the remedies for breach of express and implied warranties are not identical, and that neither the Song-Beverly Act nor the provisions of the Commercial Code incorporated into the Act supported the defendant's claim. The language of the statutes was unambiguous; there was no reason to believe that the Legislature's failure to set out the same lengthy provisions as those requiring repairs after breach of an express warranty was an oversight (*114 Cal. App. 4th 402, 406-408)* .

Gomez v. Volkswagen of America, Inc. *(1985) 169 Cal. App. 3d 921, 215 Cal. Rptr. 507* , is discussed in *§ 206.134[3][a]*. The court held that the demurrer to the tort cause of action should not have been sustained because, although neither party had mentioned it, the cause of action entitled "bad faith breach of covenant of good faith and fair dealing" stated a cause of action for damages under *Civ. Code § 1794*. A general demurrer should never be sustained if a pleading states a cause of action on any theory (*169 Cal. App. 3d 921, 925)* .

[b] Attorney's Fees and Costs

The court of appeal in ***Levy v. Toyota Motor Sales U.S.A., Inc.*** *(1992) 4 Cal. App. 4th 807, 5 Cal. Rptr. 2d 770* , affirmed the trial court's determination that plaintiff was entitled to $30,000 in attorney's fees and $3,314 in costs. The judgment was for $22,619 ($17,619 plus a $5,000 civil penalty), and was based on breach of express warranty to repair faulty brakes in a 1988 Toyota. Plaintiff could not recover the cost of serving the finance company, which settled with plaintiff before trial (*4 Cal. App. 4th 807, 813)* . Nor was plaintiff allowed to recover costs considered duplicative of law office overhead, such as copying and secretarial services (*4 Cal. App. 4th 807, 816)* . With respect to attorneys' fees, the court of appeal said that although the Song-Beverly Act is obviously designed to protect the public interest, not every action brought under the Act should use the "private attorney general" criteria [*see Code Civ. Proc. § 1021*] to determine the fee award (*4 Cal. App. 4th 807, 814-815)* . This case has no public benefit aspect, so plaintiff had to show that the fees incurred were "allowable," "reasonably necessary to the conduct of the litigation," and "reasonable in amount." Although the trial court found that the items submitted in support of the fee claim were grossly exaggerated and that no more than 10 days of counsel's time should have been required, the record did not indicate how the trial court arrived at its award. The $30,000 award did not reflect an abuse of discretion (*4 Cal. App. 4th 807, 816)* .

Plaintiff also sought an additional $4,200 for attorneys' fees incurred for representation at the motion to tax costs. The court of appeal agreed with the trial court that a separate award for that motion was not appropriate. It was reasonable to conclude that the $30,000 award was adequate to compensate counsel for all services, including those relating to the motion to tax costs (*4 Cal. App. 4th 807, 817)* .

[c] Penalty for Willful Violation

The court of appeal in ***Ibrahim v. Ford Motor Co.*** *(1989) 214 Cal. App. 3d 878, 263 Cal. Rptr. 64* , reversed a judgment for defendant manufacturer because of several errors in jury instructions. One error involved the instruction regarding willfulness. The jury was instructed that "willful" meant something more blameworthy than the sort of misconduct involved in ordinary negligence and something more than the mere intentional doing of an act constituting negligence (*214 Cal. App. 3d 878, 893)* . It connoted an act that is undertaken with either a knowing or reckless disregard of the rights of the consumer in failing to comply with the obligations under the warranty. The court pointed out that it has been more than a decade since the California Supreme Court held that "willful," when used in a penal statute such as *Civ. Code § 1794(c)*, requires only that the illegal act or omission occur intentionally without regard to motive or ignorance of the act's prohibited character. This concept of willfulness does not include a moral component, such as conveyed in the jury instructions by the use of words such as "blameworthy" and "reckless disregard of consumer's rights" associated with oppression, fraud, or malice required by *Civ. Code § 3294* for the recovery of punitive damages. The instructions should have told the jury that it could award a civil penalty if it determined that Ford knew of its obligations but intentionally declined to fulfill them. Instead, the instructions confused the issue with language that virtually compelled a wholly extraneous moral assessment of Ford's conduct (*214 Cal. App. 3d 878, 894)* .

[d] Prejudgment Interest

In ***Doppes v. Bentley Motors, Inc.*** *(2009) 174 Cal. App. 4th 1004, 94 Cal. Rptr. 3d 797* , the buyer of an automobile sued the manufacturer for violations of the Song-Beverly Consumer Warranty Act. The trial court rendered judgment for the buyer, which included an award of prejudgment interest. The manufacturer moved to set aside the judgment

pursuant to *Code Civ. Proc. § 473(d)*, contending that it was void because the Act does not permit recovery of prejudgment interest, and therefore the court had no jurisdiction to award it. The trial court denied the motion.

The court of appeal affirmed, concluding that nothing in the Song Beverly Consumer Warranty Act bars recovery of prejudgment interest under *Civ. Code § 3287* (*174 Cal. App. 4th 1004, 1010-1011)* . The court pointed out that remedies under the Act "are cumulative and shall not be construed as restricting any remedy that is otherwise available" [*Civ. Code § 1790.4*].

[4] Additional Authorities

[a] Attorney's Fees and Costs

In *Nightingale v. Hyundai Motor America (1994) 31 Cal. App. 4th 99* , the buyer was billed and liable only for fees at the hourly rate set at the beginning of the litigation. For purposes of awarding attorney's fees under the Song-Beverly Consumer Warranty Act [*Civ. Code § 1790 et seq.*], the plain language of the statute allows for recovery of attorney's fees that have been "reasonably incurred by the buyer" [*see Civ. Code § 1794(d)*]. Attorney's fees were not "incurred" by Nightengale at rates that increased over the years since the case had begun; therefore, fees could not be awarded at higher rates (*31 Cal. App. 4th 99, 104-105)* .

[b] Penalty for Willful Violation

In *Schreidel v. American Honda Motor Co. (1995) 34 Cal. App. 4th 1242, 40 Cal. Rptr. 2d 576* , the court of appeal affirmed the trial court's holding that the defendant willfully failed to comply with the obligation under *Civ. Code § 1793.2(d)(2)* to replace or make restitution to a buyer for a new automobile with a defective clutch system, thus entitling the buyer to an award of civil penalties in addition to damages [*see Civ. Code § 1794(c)*] (*34 Cal. App. 4th 1242, 1254-1255)* . The buyer had brought the problems to the dealer's attention on six separate occasions, and an independent service station mechanic had reported his observation of pedal-sticking problems to the dealer. Citing *Ibrahim v. Ford Motor Co. (1989) 214 Cal. App. 3d 878, 894, 263 Cal. Rptr. 64* , the court of appeal noted that with regard to the "willful" requirement of *Civ. Code § 1794(c)*, a civil penalty may be awarded if the jury determines that the manufacturer knew its obligations but intentionally declined to fulfill them (*34 Cal. App. 4th 1242, 1250)* . There is no requirement of blame, malice, or moral delinquency (*34 Cal. App. 4th 1242, 1250)* .

However, a manufacturer's failure to refund or replace a defective product is not "willful" under *Civ. Code § 1794(c)* if the manufacturer reasonably and in good faith believes the facts of the case do not call for a refund or replacement [*Kwan v. Mercedes Benz of North America, Inc. (1994) 23 Cal. App. 4th 174, 186, 28 Cal. Rptr. 2d 371]* .

[c] Measure of Damages for Breach of Consumer Warranty

In *Bishop v. Hyundai Motor Co. (1996) 44 Cal. App. 4th 750, 52 Cal. Rptr. 2d 134* , the trial court awarded the buyer "lemon law" penalties under the Song-Beverly Consumer Warranty Act, damages for emotional distress, and damages for loss of use of her vehicle. The manufacturer appealed. The court of appeal, construing the consequential-damages provision of *Com. Code § 2715* as incorporated by *Civ. Code § 1794*, held that emotional-distress damages or damages for loss of use of the vehicle during a period when the buyer incurred no expenses or other monetary loss were not recoverable under the Consumer Warranty Act (*44 Cal. App. 4th 750, 757-758)* . The court also held that evidence of the buyer's emotional distress did not taint the remainder of the jury's verdict, and that the manufacturer's failure to object to an erroneous jury instruction constituted a waiver of the issue on appeal (*44 Cal. App. 4th 750, 758-760)* .

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20-206 California Points & Authorities § 206.111

§ 206.111 Supporting Contention That Buyer Is Entitled to Damages for Seller's Breach of Warranty in Consumer Sale--"Lemon Law" Measure of Damages [Civ. Code § 1794(e)(1)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF IS ENTITLED TO RECOVER _____ [*specify elements of damages, repair, or replacement, e.g.,* DAMAGES, COSTS, AND ATTORNEY'S FEES, AND A CIVIL PENALTY] CAUSED BY DEFENDANT'S FAILURE TO REPAIR THE _____ [*specify, e.g,* 1992 MERCEDES BENZ 300 SL AUTOMOBILE] TO CONFORM TO DEFENDANT'S EXPRESS WARRANTY AFTER A REASONABLE NUMBER OF ATTEMPTS TO DO SO.

Measure of Damages for "Lemon Law" Violation. Except as otherwise provided in *Civil Code Section 1794(e),* if the buyer establishes that the manufacturer or its representative in California (1) did not service or repair the new motor vehicle to conform to the applicable express warranties after a reasonable number of attempts have been made and (2) failed to either replace the vehicle or return any payments and expenses to the buyer, the buyer may recover damages and reasonable attorney's fees and costs, and a civil penalty of up to two times the amount of damages (*Civ. Code § 1794(e)(1)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the proponent's entitlement to damages and the civil penalty imposed for failure to conform a new motor vehicle to express warranties made in connection with its sale [*see Civ. Code § 1794(e)(1)*]. This penalty applies after the manufacturer and its agents have made a reasonable number of attempts to repair the new motor vehicle [*see Civ. Code § 1793.22(c)* (*set forth in § 206.104*)], and, being unsuccessful, have also failed to provide restitution or a replacement vehicle, as required by Civ. Code § 1973.2(d)(2) (also *set forth*

in § 206.104). Counsel should incorporate any needed definitions from §§ 206.100 or 206.101, and the appropriate paragraphs from §§ 206.104 or 206.111 regarding any component elements of damages or their calculations.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue regarding the remedy or recovery. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the above form, showing the relationship between the facts of the case and the points of law stated. Generally, counsel should show the calculations of each element of damages being sought.

Civ. Code § 1794(e) provides for a separate action for damages, civil penalties, and attorney's fees from the action provided by Civ. Code § 1794(a)-(d). While *Civ. Code § 1794(a)-(d)* impose a willfulness requirement for the imposition of a civil penalty, *Civ. Code § 1794(e)* requires no such showing of willfulness. A civil penalty may be imposed based on a manufacturer's failure to comply with a new motor vehicle warranty obligation pursuant to *Civ. Code § 1793.2(d)(2)* [*Suman v. BMW of North America, Inc. (1994) 23 Cal. App. 4th 1, 10-11, 28 Cal. Rptr. 2d 133]* .

[b] Opposing Points and Authorities

§§ 206.130-206.133 set forth exceptions when the civil penalty cannot be awarded for violation of the "Lemon Law."

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20-206 California Points & Authorities § 206.112

§ 206.112 Supporting Contention That Buyer Is Entitled to Damages for Seller's Breach of Warranty in Consumer Sale--Buyer's Reasonable Use of Vehicle Does Not Prevent Rescission

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE FACT THAT PLAINTIFF CONTINUED TO USE THE _____ [*specify item, e.g.,* FORD PINTO AUTOMOBILE] OCCASIONALLY AFTER HE/SHE DISCOVERED THE DEFECT DOES NOT AMOUNT TO WAIVER OF THE RIGHT TO RESCIND AND COLLECT RESTITUTION.

Reasonable Use Does Not Bar Rescission. Reasonable continued use of a motorized vehicle after the buyer learns of the nonconformity does not, as a matter of law, prevent the buyer from asserting rescission, or its Commercial Code equivalent "revocation of acceptance" (*Ibrahim v. Ford Motor Co. (1989) 214 Cal. App. 3d 878, 897, 263 Cal. Rptr. 64*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the proponent's entitlement to damages for a manufacturer's or dealer's failure to conform a new motor vehicle to express warranties made in connection with its sale even though the buyer used the vehicle after learning of the defect.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue regarding the remedy or recovery. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of

law stated. Thus, counsel should show the reasonableness of the continued use.

[3] Discussion of Authorities

[a] Reasonable Use Does Not Bar Rescission

The facts and procedural background of ***Ibrahim v. Ford Motor Co.*** *(1989) 214 Cal. App. 3d 878, 263 Cal. Rptr. 64* , are discussed at *§ 206.104[3][b]*. The last issue addressed by the court was whether plaintiff's continued use of the vehicle for 28,000 miles, until April 1986, and continued payments for the car resulted in a waiver of her right to rescind. The jury instructions on the issue were based mainly on Commercial Code provisions [*see Com. Code §§ 2606-2608*]. The court noted that prior to the enactment of the statutory remedies invoked by plaintiff, California's approach to waiver was clear: waiver will be presumed against a party who, having full knowledge of the circumstances that would warrant rescission, nevertheless accepts and retains benefits accruing under the contract. However, it is clear that reasonable, continued use of a motorized vehicle does not, as a matter of law, prevent the buyer from asserting rescission or its Commercial Code equivalent "revocation of acceptance" (*214 Cal. App. 3d 878, 897)* . This view is based on judicial recognition of the practical realities--purchasers of unsatisfactory vehicles may be compelled to continue using them because of the financial burdens of securing alternative means of transportation for a substantial period of time. The court held that although nothing in the language of the Uniform Commercial Code or the Consumer Warranty Act suggests abrogation of common law principles relating to continued use and waiver of a buyer's right to rescind, the instructions should be reevaluated on retrial (*214 Cal. App. 3d 878, 898)* .

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§ 206.113 Supporting Contention That Buyer Is Entitled to Damages for Seller's Breach of Warranty in Consumer Sale--Action Not Barred by Expiration of Limitations Period [Civ. Code § 1790.3; Com. Code § 2725]--General Availability

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S CAUSE OF ACTION IS GOVERNED BY THE FOUR-YEAR LIMITATIONS PERIOD OF COMMERCIAL CODE SECTION 2725, WHICH HAS NOT EXPIRED.

A. Song-Beverly Adopts Commercial Code Limitation Period. The four-year limitations period under *Commercial Code Section 2725(1)* applies to civil actions brought under the *Song-Beverly Consumer Warranty Act (Krieger v. Nick Alexander Imports, Inc. (1991) 234 Cal. App. 3d 205, 215, 285 Cal. Rptr. 717*).

B. Limitations Period. [*See § 206.38, Paragraph A*].

[*Optional*] **C. Song-Beverly Adopts Commercial Code Accrual Rule.** Because the limitations period under *Commercial Code Section 2725(1)* applies to civil actions brought under the Song-Beverly Consumer Warranty Act, the rule of accrual on discovery, pursuant to *Commercial Code Section 2725(2)*, applies to those actions as well (*Krieger v. Nick Alexander Imports, Inc. (1991) 234 Cal. App. 3d 205, 219, 285 Cal. Rptr. 717*).

[*Optional*] **D. Accrual-on-Discovery Rule.** [*See § 206.61, Paragraph A.*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the limitation period applicable to a

cause of action under the Song-Beverly Consumer Warranty Act has not expired. Optional Paragraphs C and D are for use if there is some issue regarding when the cause of action accrued [*see also Civ. Code §§ 1793.22(c), 1795.6*, regarding tolling, in §§ 206.114, 206.115].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which the issue of the limitations period is raised. For example, they may be combined with points and authorities in opposition to a demurrer to the complaint. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth the applicable contract provision and the relevant dates, such as the date the nonconformity was discovered, the date the warrantor was notified, the date repairs were commenced, the date repairs were completed, and the date it became apparent that the goods could not be made to conform [*see § 206.114[2][b]*].

[3] Discussion of Authorities

[a] Song-Beverly Adopts Commercial Code Limitation Period

The facts and procedural background of ***Krieger v. Nick Alexander Imports, Inc.*** *(1991) 234 Cal. App. 3d 205, 285 Cal. Rptr. 717* , are discussed in *§ 206.61[3][a]*. The complaint stated five causes of action, including breach of warranty under the Consumer Warranty Act and breach of written warranty under the Commercial Code (*Com. Code § 2313*). The trial court granted defendants' motion for summary judgment on the ground that the action was time-barred. Plaintiff appealed.

The court of appeal reversed, holding, inter alia, that the warranty causes of action were not time-barred (*234 Cal. App. 3d 205, 212-215)* . The express warranty involved was a written warranty to repair the vehicle within 36 months of its purchase or during the first 36,000 miles of its use, whichever occurred first (*234 Cal. App. 3d 205, 210-211)* . The relevant dates were: December 31, 1983, date of purchase; May 30, 1984, last of five repair attempts by defendant; October 1984, commencement of alternative dispute resolution process [*see Civ. Code § 1793.22(c)*]; February 5, 1988, filing of complaint. Defendant's motion for summary judgment was based on the application of the three-year limitation provision under *Code Civ. Proc. § 338(a)* (actions based on statutory rights) to the Consumer Warranty Act cause of action, and the four-year limitation provision under Com. Code § 2525 to the cause of action under the Commercial Code.

In granting the motion, the trial court did not specify which limitation period applied to each cause of action. Plaintiff argued that the cause of action under the Consumer Warranty Act did not accrue until one year after the delivery of the car, or until the odometer reached 12,000 miles, or alternatively, that the limitation period was tolled for the dispute resolution process. The court noted that the issue of which limitations period applies to the Consumer Warranty Act is one of first impression. Whichever limitation period applied, the cause of action accrued no later than May 1984, when plaintiff concluded that defendant would be unable to repair the car (*234 Cal. App. 3d 205, 211)* .

Preliminarily, the court stated that sales of consumer goods are governed by two overlapping California statutory schemes: the Commercial Code and the Consumer Warranty Act. Commercial Code remedies include the right to reject nonconforming goods, to revoke acceptance, to cover by purchasing substitute goods, and to recover damages for breach of warranty (*234 Cal. App. 3d 205, 212)* [for discussion of Commercial Code remedies under *Com. Code § 2701 et seq.* generally, *see* pt. I]. The Consumer Warranty Act regulates warranty terms, imposes service and repair obligations on manufacturers, distributors, and retailers who make express warranties, requires disclosure of specified information in express warranties, and broadens a buyer's remedies to include costs, attorney's fees, and civil penalties. The court said, citing *Civ. Code §§ 1790.3* and *1794(b)*, that the Consumer Warranty Act supplements, rather than supersedes, the provisions of the Commercial Code. The "Lemon Law" (*Civ. Code §§ 1793.2(d)(2), 1793.22*) was added to the Consumer Warranty Act in 1982 (and amended in 1992) to give recourse to the buyer of a new automobile

that suffers from the same defect repeatedly, or is out of service for cumulative repairs for an extended period (*234 Cal. App. 3d 205, 213)* . The Consumer Warranty Act itself contains no express limitations period for a civil action (*234 Cal. App. 3d 205, 213)* . *Com. Code § 2725* provides a four-year limitations period for breach of warranty (*234 Cal. App. 3d 205, 213-214)* . The court considered the procedural and substantive statutory scheme of the Consumer Warranty Act in general and *Civ. Code § 1790.3* in particular, as well as the rule that a general provision is controlled by a specific one, the specific one being treated as an exception to the general one (*234 Cal. App. 3d 205, 214-215)* . Thus, a specific statute of limitations, *Com. Code § 2725* in this case, dealing with breaches of warranties, controls over a general limitation such as *Code Civ. Proc. § 338(a)*, especially since the intent of the Consumer Warranty Act was to supplement rather than to supersede the rights and obligations created by the Commercial Code (*234 Cal. App. 3d 205, 215)* .

[b] Song-Beverly Adopts Commercial Code Accrual Rule

The facts and procedural background of ***Krieger v. Nick Alexander Imports, Inc.*** *(1991) 234 Cal. App. 3d 205, 285 Cal. Rptr. 717* , are discussed in *§ 206.61[3][a]*. With respect to the accrual of the cause of action, the court noted that under *Com. Code § 2725(2)*, an action for breach of warranty accrues on tender of delivery. An exception is made when a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of that performance (*234 Cal. App. 3d 205, 215)* . The court noted that no California cases have interpreted this provision, although other jurisdictions, applying the corresponding Uniform Commercial Code provision, have held that a defendant who moves for summary judgment bears the burden of negating the applicability of the discovery exception for accrual of an action on a warranty of future performance (*234 Cal. App. 3d 205, 216)* . Plaintiff urged that the written warranty stating that all defects would be repaired for a period of 36 months or within the first 36,000 miles of use amounted to a warranty of future performance, while defendant contended the warranty did not promise that the car would be free of defects but only that it would repair them (*234 Cal. App. 3d 205, 216-217)* .

The court agreed with plaintiff [*see § 206.101*], and found that plaintiff's evidence was sufficient to raise a genuine issue of material fact with respect to the existence of an express warranty under *Com. Code § 2313* (*234 Cal. App. 3d 205, 217)* , and thus, with regard to the applicability of the accrual-on-discovery rule codified in *Com. Code § 2725(2)* (*234 Cal. App. 3d 205, 218)* . The court also stated that because both causes of action (Commercial Code and Consumer Warranty Act) are governed by the same statute of limitations, the same rule of accrual applies as well (*234 Cal. App. 3d 205, 219)* . Although plaintiff claimed the odometer reading of 11,560 miles on December 20, 1984, should be used to set accrual in December 1984, a reasonable trier of fact could conclude that the cause of action arose on May 30, 1984, the last time the vehicle was repaired by defendant, which coincided with plaintiff's deposition testimony that that was when he decided to take the vehicle to another dealer after defendant failed to repair it. Choosing May 1984 as the date when the cause of action accrued under the discovery rule is consistent with the policy of the "Lemon Law" to give the seller a reasonable opportunity to repair the car [*see Civ. Code §§ 1793.2(d)(2), 1793.22*] (*234 Cal. App. 3d 205, 218)* . Adopting the rule urged by defendant, that the cause of action accrued when the car was first delivered to a buyer, would undermine the legislative purpose that the parties attempt to resolve any deficiencies in performance before resorting to the remedies provided by the Lemon Law (*234 Cal. App. 3d 205, 218-219)* . Since both causes of action are governed by the same statute of limitations, if both causes of action accrued in May 1984, the four-year statute would not have run by February 1988, when the complaint was filed. Thus, summary judgment on those causes of action was improper and had to be reversed (*234 Cal. App. 3d 205, 219)* .

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§ 206.114 Supporting Contention That Buyer Is Entitled to Damages for Seller's Breach of Warranty in Consumer Sale--Action Not Barred by Expiration of Limitations Period [Civ. Code § 1790.3; Com. Code § 2725]--Warranty Period Extended During Repairs [Civ. Code § 1795.6]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S CAUSE OF ACTION IS NOT BARRED BY THE EXPIRATION OF THE FOUR-YEAR LIMITATIONS PERIOD OF COMMERCIAL CODE SECTION 2725 BECAUSE THE WARRANTY PERIOD WAS EXTENDED DURING THE TIME DEFENDANT ATTEMPTED REPAIRS.

A. Warranty Period Extended During Repair. Every warranty period relating to an implied or express warranty accompanying a sale or consignment for sale of consumer goods selling for $50 or more is automatically tolled for the period beginning on the date when the buyer either (1) delivers nonconforming goods to the manufacturer or seller for warranty repairs or service, or (2) pursuant to *Civil Code Section 1793.2(c)* or *1793.22*, notifies the manufacturer or seller of the nonconformity of the goods up to, and including, the date on which (1) the repaired or serviced goods are delivered to the buyer, (2) the buyer is notified the goods are repaired or serviced and are available for the buyer's possession, or (3) the buyer is notified that repairs or service is completed, if repairs or service is made at the buyer's residence (*Civ. Code § 1795.6(a)*).

[*Optional*] **B. When Repairs Have Not Commenced.** Notwithstanding the date or conditions set for the expiration of the warranty period, a warranty period is not deemed expired if, after the buyer has satisfied the requirements of *Civil Code Section 1795.6(a)*, the warranty repairs or service has not been performed due to delays caused by circumstances beyond the control of the buyer. [When the warranty repairs or service has been performed so as to remedy the nonconformity, the warranty period expires in accordance with its terms, including any extension to the warranty period for warranty repairs or service] (*Civ. Code § 1795.6(b)*).

[*Optional*] **C. When Repairs Do Not Correct Nonconformity.** Notwithstanding the date or conditions set for the expiration of the warranty period, a warranty period is not deemed expired if the warranty repairs or service performed on the nonconforming goods did not remedy the nonconformity for which the repairs or service was performed and the buyer notified the manufacturer or seller of this failure within 60 days after the repairs or service was completed (*Civ. Code § 1795.6(b)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the limitation period applicable to a cause of action under the Song-Beverly Consumer Warranty Act has not expired because the warranty period was tolled during repairs or service [*see Civ. Code § 1795.6*]. The optional paragraphs are for use if repairs have not been started or completed to achieve conformity when the warranty period would otherwise have expired. In the situations contemplated by Optional Paragraphs B and C, once the warranty repairs or service has been performed so as to remedy the nonconformity, the warranty period expires in accordance with its terms, including any extension to the warranty period for warranty repairs or service [*Civ. Code § 1795.6(b)*].

For purposes of *Civ. Code § 1795.6* only, "manufacturer" includes the manufacturer's service or repair facility [*Civ. Code § 1795.6(c)*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which the issue of the limitations period is raised. For example, they may be combined with points and authorities in opposition to a demurrer to the complaint. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth the contract provisions governing the expiration of the warranty period and other significant dates, such as the dates the nonconformity was discovered, the date the warrantor was notified, the date repairs were commenced, the date repairs were completed, and the date it became apparent that the goods could not be made to conform [*see § 206.114[2][b]*].

[b] Receipts Required to Be Provided by Manufacturer

Every manufacturer or seller of consumer goods selling for $50 or more must provide a receipt to the buyer showing the date of purchase [*Civ. Code § 1795.6(d)*]. Every manufacturer or seller performing warranty repairs or service on the goods must provide to the buyer a work order or receipt with the date of return and either the date the buyer was notified that the goods were repaired or serviced or, if applicable, the date the goods were shipped or delivered to the buyer [*Civ. Code § 1795.6(d)*].

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20-206 California Points & Authorities § 206.115

§ 206.115 Supporting Contention That Buyer Is Entitled to Damages for Seller's Breach of Warranty in Consumer Sale--Action Not Barred by Expiration of Limitations Period [Civ. Code § 1790.3; Com. Code § 2725]--Limitation Period Extended During Third-Party Dispute Resolution Process [Civ. Code § 1793.22(c)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S CAUSE OF ACTION IS NOT BARRED BY THE EXPIRATION OF THE FOUR-YEAR LIMITATIONS PERIOD OF COMMERCIAL CODE SECTION 2725 BECAUSE IT WAS EXTENDED FOR THE PERIOD CONSUMED BY THE THIRD-PARTY DISPUTE RESOLUTION PROCESS.

Extension for Third-Party Dispute Resolution. Any period of limitation of actions under any federal or California laws with respect to any person is be extended for a period equal to the number of days between the date a complaint is filed with a third-party dispute resolution process and the date of its decision or the date before which the manufacturer or its agent is required by the decision to fulfill its terms if the decision is accepted by the buyer, whichever occurs later (*Civ. Code § 1793.22(c)*).

[2] Comments

[a] Use of Form

The above points and authorities may be submitted in support of the contention that the limitation period applicable to a cause of action under the "Lemon Law" or the Song-Beverly Consumer Warranty Act has not expired because it was tolled during the third-party resolution process. In the case of express warranties of new motor vehicles, use of the third-party resolution process contemplated by this form is required before a buyer may rely on the presumption of *Civ. Code § 1793.22(b)*, regarding reasonable attempts to repair, if the manufacturer maintains one and has notified the buyer of its existence [*see Civ. Code § 1793.22(c)*; *see § 206.101* for applicable definitions].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which the issue of the limitations period is raised. For example, they may be combined with points and authorities in opposition to a demurrer to the complaint. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth the significant dates.

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20-206 California Points & Authorities § 206.116

§ 206.116 Supporting Contention That Seller Is Entitled to Costs/Expert Witness Fees [Code Civ. Proc. §§ 998(c), 1032(b)] As Prevailing Party In Action Brought Under Song-Beverly Consumer Warranty Act [Civ. Code § 1790 et seq.]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS ENTITLED TO RECOVER _____ [*specify, e.g.,* COSTS AND EXPERT WITNESS FEES] AS THE PREVAILING PARTY IN AN ACTION BROUGHT UNDER THE SONG-BEVERLY CONSUMER WARRANTY ACT.

A. Seller's Recovery of Costs. A seller who is the prevailing party in an action brought under the Song-Beverly Consumer Warranty Act may recover costs (*Code Civ. Proc. § 1032(b)*; *Murillo v. Fleetwood Enterprises (1998) 17 Cal. 4th 985, 999, 73 Cal. Rptr. 2d 682, 953 P.2d 858*).

B. Seller's Recovery of Expert Witness Fees. A seller who is the prevailing party in an action brought under the Song-Beverly Consumer Warranty Act may recover expert witness fees actually incurred and reasonably necessary in preparation for either trial or arbitration, or both, or during trial or arbitration, of the case (*Code Civ. Proc. §§ 998(c), 1032(b)*; *Murillo v. Fleetwood Enterprises (1998) 17 Cal. 4th 985, 1001, 73 Cal. Rptr. 2d 682, 953 P.2d 858*).

[2] Comments

[a] Use of Form

This form may be submitted in support of the seller's entitlement to costs and/or expert witness fees as the prevailing party in an action brought under the Song-Beverly Consumer Warranty Act [*Civ. Code § 1790 et seq.*].

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel

wishes to raise the substantive issue regarding the remedy or recovery. The form may also be adapted for use in a trial or appellate brief.

Counsel should add argument linking the points in this form with the facts of his or her case; for example, the calculation of each element of costs or fees being sought.

[3] Discussion of Authorities

[a] Seller's Recovery of Costs

In ***Murillo v. Fleetwood Enterprises*** *(1998) 17 Cal. 4th 985, 73 Cal. Rptr. 2d 682, 953 P.2d 858* , the California Supreme Court held that defendant sellers who are the prevailing parties in an action brought under the Song-Beverly Consumer Warranty Act are entitled to recover their costs and expert witness fees. The plaintiff purchased a motorhome in 1991 from an authorized retail dealer. Later that year, he allegedly perceived various defects in the vehicle. He sought and received repairs to the motorhome but found them unsatisfactory. The purchaser then filed suit, alleging that the sellers breached express and implied warranties as well as other statutory provisions of the Song-Beverly Consumer Warranty Act. The sellers offered to settle the case for $12,000 with the buyer to retain possession of the vehicle, but the buyer refused the offer and the parties proceeded to trial. The sellers prevailed and sought to recover their costs and expert witness fees under *Code Civ. Proc. §§ 1032(b)* and *998(c)*. The buyer moved to strike their memorandum of costs or, in the alternative, to tax costs. The trial court denied the buyer's motions, stating that *Civ. Code § 1794(d)* did not bar defendants' entitlements to costs under *Code Civ. Proc. §§ 998* or *1032*. Plaintiff's alternative motions to tax were also denied. On appeal, the appellate court affirmed (*17 Cal. 4th 985, 988-989)* .

The California Supreme Court affirmed. The court concluded that defendants were entitled to recover both their costs and expert witness fees. Under *Code Civ. Proc. § 1032(b)*, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding except as otherwise expressly provided by statute. The court examined the buyer's argument that *Code Civ. Proc. § 1032(b)* conflicts with the Song-Beverly Consumer Warranty Act. It concluded that, although *Civ. Code § 1794(d)* refers only to "prevailing buyers," it does not expressly disallow recovery of costs for prevailing sellers (*17 Cal. 4th 985, 991)* . Furthermore, the two statutes are not inconsistent because they may be reconciled. A buyer who prevails in an action under the Act is entitled to costs, expenses, and attorney fees pursuant to *Civ. Code § 1794(d)*. A seller who prevails in an action under the Act is entitled to costs under *Code Civ. Proc. § 1032(b)* (*17 Cal. 4th 985, 992)* . Thus, finding the buyer's cited authority distinguishable and finding no express exception in *Civ. Code § 1794(d)* to the general rule set forth in *Code Civ. Proc. § 1032(b)* under which prevailing defendants are entitled to costs, the California Supreme Court concluded that the court of appeal ruled correctly that the sellers were entitled to their costs (*17 Cal. 4th 985, 999)* .

[b] Seller's Recovery of Expert Witness Fees

The facts and procedural background of ***Murillo v. Fleetwood Enterprises*** *(1998) 17 Cal. 4th 985, 73 Cal. Rptr. 2d 682, 953 P.2d 858* , are *discussed under § 206.116[3][a]*. The trial court also had granted the sellers their expert witness fees under *Code Civ. Proc. § 998(c)* because the buyer recovered less than the sellers had offered in a *Code Civ. Proc. § 998* settlement offer. Having concluded that *Civ. Code § 1794(d)* fails to set forth an express exception to the general cost-recovery rule set forth in *Code Civ. Proc. § 1032(b)*, the California Supreme Court concluded that this section of the Song-Beverly Consumer Warranty Act provides no exception to the provisions of *Code Civ. Proc. § 998*. *Code Civ. Proc. § 998(a)* expressly states that the costs allowed under *Code Civ. Proc. § 1032* may be augmented as provided in *Code Civ. Proc. § 998*. Thus, the requirements for recovery of costs and fees under *Code Civ. Proc. § 998* must be read in conjunction with *Code Civ. Proc. § 1032(b)*, including the requirement that *Code Civ. Proc. § 998* costs and fees are available to the prevailing party except as otherwise provided by statute. Because the cost-shifting provisions of the Act do not expressly prevent a prevailing defendant from recovering *Code Civ. Proc. § 998* costs and fees, the court found nothing in the Act prohibiting the trial court's exercise of discretion to award expert witness fees to the sellers (*17 Cal.*

4th 985, 1000) . The court noted that permitting a seller who prevails in a suit brought under the Act to recover expert witness fees under *Code Civ. Proc. § 998* follows from the Legislature's express intent to encourage settlement by forcing the parties to assess their positions realistically before trial. The California Supreme Court concluded that the court of appeal correctly ruled that the sellers were entitled to recover their expert witness fees actually incurred and reasonably necessary in preparation for trial of the case (*17 Cal. 4th 985, 1001)* .

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20-206 California Points & Authorities § 206.117

§ 206.117 Supporting Contention That Manufacturer, Distributor, or Retailer Is Liable for Breach of Implied Warranty of Fitness--Personal Injury Tort Claims Distinguished

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE SONG-BEVERLY CONSUMER WARRANTY ACT DOES NOT IMPAIR PLAINTIFF'S PRODUCT LIABILITY TORT CLAIMS.

Product Liability Claims Unimpaired. An injured party may recover for personal injuries, without the need to rely on either a contract theory of warranty, and thus need not establish privity. The Song-Beverly Consumer Warranty Act does not apply to a personal injury case; the Act is clear on its face that its application is limited to sale contracts in general (*Williams v. Volkswagenwerk Aktiengesellschaft (1986) 180 Cal. App. 3d 1244, 1268-1269, 226 Cal. Rptr. 306*).

[2] Comments

[a] Use of Form

The above points and authorities may be submitted in support of the contention that the Song-Beverly Consumer Warranty Act does not apply to personal injury cases and that its requirements should not be imposed to prevent recovery of personal injury damages based on traditional product liability concepts.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which this substantive issue is raised. For example, they may be combined with points and authorities in opposition to a demurrer to the complaint. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of

law stated.

[3] Discussion of Authorities

[a] Product Liability Claims Unimpaired

Williams v. Volkswagenwerk Aktiengesellschaft *(1986) 180 Cal. App. 3d 1244, 226 Cal. Rptr. 306* , was an action for damages for personal injuries sustained in an automobile accident. Plaintiff, who had purchased a used "demonstrator" model, sued the manufacturer, the importer, and the dealer on theories of strict liability, breach of implied warranty, negligence, and negligent design, inspection, and manufacture. The jury found no design defect, but did find manufacturing defects, and thus found against the manufacturer on the negligence count and against all three defendants on the count for breach of implied warranty. Defendants appealed.

The court of appeal affirmed the judgment. Defendants claimed the award for breach of warranty was erroneous as a matter of law because there was no privity of contract. The court responded that because plaintiff suffered physical injuries from the use of a product marketed by defendant, the rules of product liability pertain, including certain warranties of suitability, not the rules of contract, which apply to nonpersonal injury sales warranties (*180 Cal. App. 3d 1244, 1267)* . A long line of California cases has upheld an injured plaintiff's right to recover for personal injuries, without the need to rely on either a contract theory or privity. A manufacturer is strictly liable in tort when an article it places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. That liability, though historically grounded on express or implied warranty, is not based on an agreement, which would make privity relevant, but is imposed by law. So foreign is the principle of privity of contract to the law of strict liability today that even a bystander may recover for injuries sustained because of a defective product (*180 Cal. App. 3d 1244, 1268)* .

The court held that *Civ. Code § 1795.5* does not impair plaintiff's remedies under strict liability/implied warranty theory. *Civ. Code § 1795.5* provides that notwithstanding the provisions of *Civ. Code § 1791(a)*, defining consumer goods to mean "new" goods, the obligation of a distributor or retail seller of used consumer goods in a sale in which an express warranty is given shall be the same as that imposed on manufacturers. *Civ. Code § 1795.5* simply does not apply to personal injury cases. It is clear on its face that its application is limited to sale contracts in general and those involving express warranties in particular. The court was unaware of any authority that stood for the proposition that the Consumer Warranty Act was intended to impair or restrict personal injury product liability causes of action (*180 Cal. App. 3d 1244, 1269)* .

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20-206 California Points & Authorities § 206.118

§ 206.118 Opposing Contention That Buyer Is Entitled to Damages for Seller's Breach of Warranty in Consumer Sale--Buyer Did Not Purchase "Consumer Goods" [Civ. Code § 1794(a)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT IS NOT LIABLE TO PLAINTIFF FOR BREACH OF THE SONG-BEVERLY CONSUMER WARRANTY ACT BECAUSE PLAINTIFF WAS NOT A BUYER OF "CONSUMER GOODS."

A. Buyer of "Consumer Goods." To prevail in an action under the Song-Beverly Consumer Warranty Act, the purchaser must be a buyer of consumer goods. *Civ. Code § 1794(a)*

B. Definition of "Consumer Goods." "Consumer goods" means any new product or part thereof that is used, bought, or leased for use primarily for personal, family, or household purposes, except for clothing and consumables. "Consumer goods" includes new and used assistive devices sold at retail. *Civ. Code § 1791(a).*

C. Goods Must Be Removable From Their Location Without Causing Further Damage. If the goods cannot be returned to the manufacturer because of the method of attachment, the fact that the manufacturer has a choice of three options under *Civ. Code 1792.3(c)* for arranging service and repair of defective goods implies that the goods must be at least removable from their location without causing further damage. Goods that are not removable, or cannot be serviced or repaired, without causing additional damage therefore are not "consumer goods" within the meaning of the Song-Beverly Act. *Atkinson v. Elk Corporation (2003) 109 Cal. App. 4th 739, 756-757, 135 Cal. Rptr. 2d 433* .

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that a seller is liable for breach of the

Song-Beverly Consumer Warranty Act, such as the contention *set forth in § 206.130*. They are based on the grounds that the purchaser was not a "buyer of consumer goods" under the Act.

These points and authorities may be combined with points and authorities pertaining to the specific factual context in which counsel wishes to raise the issue that the purchaser was not a "buyer of consumer goods" under the Act. For example, Paragraph C may be used if the goods in question are building materials or other similar goods that cannot be removed or serviced without further damage. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the above form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Goods Must Be Removable From Their Location Without Causing Further Damage

In ***Atkinson v. Elk Corporation*** *(2003) 109 Cal. App. 4th 739, 135 Cal. Rptr. 2d 433* , a homeowner brought an action against a roofing company (later dismissed from the action) and a manufacturer of roof shingles which he claimed were defective. The trial court granted a nonsuit on its own motion, on the grounds that the homeowner was not a buyer of consumer goods within the meaning of the Song-Beverly Act. The homeowner appealed. The court of appeal found that although the grant of nonsuit on the court's own motion was irregular, plaintiff was not prejudiced because he would not have withstood a motion for nonsuit after opening statement as to the Song-Beverly causes of action (*109 Cal. App. 4th 739, 757-758)* . To prevail in an action under Song-Beverly, plaintiff must be a "buyer of consumer goods" under *Civ. Code § 1794(a)*. The court first found that plaintiff was a "buyer" under *Civ. Code § 1791(b)*. It examined the statutory language and history to determine that the roofing company was a retail seller within the meaning of Song-Beverly (*109 Cal. App. 4th 739, 749-751)* . It then turned to the issue of whether roof shingles were consumer goods (*109 Cal. App. 4th 739, 751-756)* . That term, as defined in *Civ. Code § 1791(a)*, refers to any new product used primarily for personal, family, or household purposes. The court of appeal noted that the Act must be construed to bring its benefits into action, with reference to the entire scheme of law of which it is a part. *Civ. Code § 1793.2* provides that if goods cannot be returned to a manufacturer because of the method of attachment, the manufacturer has three options. The goods can be serviced at the owner's residence, picked up for service or repair, or transported to the manufacturer's repair facility. This implies that the goods are removable from their location without causing further damage. The court stated that roofing shingles attached to a roof are not removable, nor can they be serviced or repaired without damage. The court therefore held that roof shingles were not consumer goods under the Act. (*109 Cal. App. 4th 739, 757-758)* .

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20-206 California Points & Authorities § 206.119

§ 206.119 Opposing Contention That Seller Made Express Warranty in Consumer Sale--Mere Opinion, Commendation, or Policy Statement [Civ. Code § 1791.2(b), (c)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE WRITTEN DOCUMENT ENTITLED _____ AND GIVEN TO PLAINTIFF IN CONNECTION WITH THE PURCHASE OF _____ [*describe consumer good*] ON _____ [*date*] DOES NOT CONSTITUTE AN EXPRESS WARRANTY BY DEFENDANT _____ [*name of seller*] BUT IS ONLY AN EXPRESSION OF AN OPINION AND/OR COMMENDATION AND/OR POLICY STATEMENT.

A. Express Warranty Defined. [*See § 206.100, Paragraph A.*]

B. Opinion or Commendation Does Not Create Warranty. An affirmation merely of the value of the goods or a statement purporting to be merely an opinion or commendation of the goods does not create a warranty (*Civ. Code § 1791.2(b)*).

C. Policy Statement Does Not Create Warranty. Statements or representations such as expressions of general policy concerning customer satisfaction that are not subject to any limitation do not create an express warranty (*Civ. Code § 1791.2(c)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose the contention that a retail seller made an express warranty within the meaning of the Song-Beverly Consumer Warranty Act when it is claimed that the statement was only

opinion, commendation, or a statement regarding the retailer's general customer satisfaction policy [*see Civ. Code § 1791.2(b), (c)*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that no express warranty was created. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Generally, counsel should attach the written statement that is claimed to have created the express warranty.

[b] Related Pleading and Practice Forms

For discussion and forms for use in actions involving warranties under the Song-Beverly Consumer Warranty Act, see California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties* (Matthew Bender). That chapter also discusses warranties under the Commercial Code and under the federal Magnuson-Moss Act. For discussion and forms regarding strict products liability, see California Forms of Pleading and Practice, Ch. 460, *Products Liability* (Matthew Bender).

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 206.100* may be used to oppose the contention supported by these points and authorities.

[d] Commercial Code Counterpart

The Commercial Code counterpart of the "puffery" exclusion is *Com. Code § 2313(2).*

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20-206 California Points & Authorities § 206.120

§ 206.120 Opposing Contention That Seller Made Implied Warranty in Consumer Sale--No Implied Warranties Accompany an "As Is" Sale [Civ. Code § 1791.3]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF IS NOT ENTITLED TO RECOVER DAMAGES ON ACCOUNT OF THE ALLEGED _____ [LACK OF MERCHANTABILITY *or* UNFITNESS FOR INTENDED PURPOSE] OF THE _____ [*describe product*] BECAUSE THE SALE WAS "AS IS" AND THUS NO IMPLIED WARRANTIES ACCOMPANIED IT.

A. No Implied Warranties for "As Is" Sale. As used in the Song-Beverly Consumer Warranty Act, a sale "as is" or "with all faults" means that the manufacturer, distributor, and retailer disclaim all implied warranties that would otherwise attach to the sale of consumer goods under the provisions of the Act (*Civ. Code § 1791.3*).

[*Optional*] **B. Consumer Goods Defined.** [*See § 206.100, Paragraph C.*]

[*Optional*] **C. Sale Defined.** [*See § 206.100, Paragraph D.*]

[*Optional*] **D. Manufacturer Defined.** [*See § 206.100, Paragraph E.*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a manufacturer, distributor, or retailer is liable for breach of an implied warranty of merchantability or fitness for a particular purpose, on the ground that the sale was "as is" [*see Civ. Code § 1791.3*]. The optional paragraphs are for use if the status of the parties or elements of a

definition are in dispute. Other definitions, such as "distributor" and "retail seller," are *set forth in § 206.100*, and should also be incorporated as necessary.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that seller is not liable for breach of implied warranties. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should attach any document setting forth the "as is" term.

[b] Commercial Code Counterpart

The Commercial Code counterpart to this Song-Beverly "as is" rule is *Com. Code § 2316(3)(a)*, which is *set forth in § 206.72*.

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20-206 California Points & Authorities § 206.121

§ 206.121 Opposing Contention That Seller Is Liable for Breach of Implied Warranty of Fitness for Particular Purpose [Civ. Code §§ 1791.1(b), 1792.2(a)]--Buyer Did Not Rely on Seller's Skill or Judgment

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT _____ [*name of retail seller*] IS NOT LIABLE TO PLAINTIFF FOR BREACH OF AN IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE BECAUSE AT THE TIME OF CONTRACTING FOR THE SALE, PLAINTIFF DID NOT RELY ON DEFENDANT'S SKILL OR JUDGMENT TO SELECT THE GOODS FOR PLAINTIFF'S PARTICULAR PURPOSE.

A. Same Analysis Under Song-Beverly and Commercial Code. The elements and analysis of a buyer's reliance on seller's skill and judgment in determining whether the seller has made an implied warranty of fitness for a particular purpose is the same under the Commercial Code and the Song-Beverly Consumer Warranty Act (*see Keith v. Buchanan (1985) 173 Cal. App. 3d 13, 24-25, 220 Cal. Rptr. 392*).

B. When Implied Warranty of Fitness for Particular Purpose Arises. [*See § 206.79, Paragraph A*].

C. Buyer's Nonreliance on Seller's Skill or Judgment. [*See § 206.79, Paragraph B*].

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a seller is liable for breach of an implied warranty of fitness for a particular purpose on the ground that the buyer did not rely on the seller's skill or judgment in selecting goods for a particular purpose. Because the elements are the same under the Commercial Code and the Song-Beverly Consumer Warranty Act, this form incorporates authorities from § 206.99 in which plaintiff

asserted causes of action under both [*see Civ. Code §§ 1791.1(b), 1792.2(a)*; *Com. Code § 2315*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue of the buyer's nonreliance on the seller with regard to an implied warranty of fitness for a particular purpose. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Counsel should therefore describe the circumstances surrounding the sale of the goods, and show that either the seller was unaware that the buyer was relying on its skill or judgment, or that the buyer in fact did not rely on the seller. This point can be shown, for example, by the buyer's use of independent expert advice prior to making a decision to purchase the goods.

[3] Discussion of Authorities

[a] Same Analysis Under Song-Beverly and Commercial Code

The facts and procedural background of ***Keith v. Buchanan*** *(1985) 173 Cal. App. 3d 13, 220 Cal. Rptr. 392* , are discussed in *§ 206.60[3][a]*. The court's determination that no implied warranty of fitness for a particular purpose arose is discussed in *§ 206.79[3][b]*. Plaintiff had asserted claims for breach of implied warranty of fitness under both the Song-Beverly Consumer Warranty Act and under the Commercial Code. The elements are the same, and the court analyzed them together (*173 Cal. App. 3d 13, 25-26)* .

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20-206 California Points & Authorities § 206.122

§ 206.122 Opposing Contention That Seller Is Liable for Breach of Express Warranty in Consumer Sale--No Sale Made in California [Civ. Code § 1793.2(a)(1)(A)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT HAS NOT BREACHED ITS DUTY IN CONNECTION WITH THE EXPRESS WARRANTY, GIVEN IN CONNECTION WITH THE PURCHASE OF _____ [*describe consumer good*] ON _____ [*date*], BECAUSE DEFENDANT DID NOT MAKE THE SALE IN CALIFORNIA.

A. Duty to Maintain Repair Facility in California. A manufacturer of consumer goods need not comply with the service-and-repair-facility requirement if it does not sell the goods in California (*Civ. Code § 1793.2(a)(1)(A)*; *California State Electronics Assn. v. Zeos Internat. Ltd. (1996) 41 Cal. App. 4th 1270, 1276-1277, 49 Cal. Rptr. 2d 127*).

B. Act Does Not Apply to Vehicle Bought Outside California. Insofar as the Song-Beverly Consumer Warranty Act applies to new motor vehicles, the Act is limited in application to vehicles that were bought in California. The Act does not apply to a vehicle that was bought outside California *Cummins, Inc. v. Superior Court (2005) 36 Cal. 4th 478, 483, 493*).

[2] Comments

[a] Use of Form

This form may be submitted to oppose the contention that a manufacturer failed to maintain a repair facility in California when the manufacturer did not make the sale in California [*see Civ. Code § 1793.2(a)(1)(A)*].

Paragraph B should be included if the vehicle in question was purchased outside California.

Counsel should add argument linking the points in this form with the facts of his or her case.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue regarding where the sale was made. They also may be adapted for use in a trial or appellate brief.

[b] Opposing Points and Authorities

The points and *authorities in § 206.102* oppose those in this form.

[3] Discussion of Authorities

[a] Duty to Maintain Repair Facility in California

In ***California State Electronics Assn. v. Zeos Internat. Ltd.*** *(1996) 41 Cal. App. 4th 1270, 49 Cal. Rptr. 2d 127* , a trade association sought to compel compliance with the Song-Beverly Consumer Warranty Act's repair facilities requirement. Every manufacturer of consumer goods that sells them in California with its express warranty must maintain in California sufficient service and repair facilities reasonably close to all areas where its consumer goods are sold to carry out the terms of those warranties (*Civ. Code § 1793.2(a)(1)(A)*). The defendant was a non-California manufacturer and mail-order distributor of personal computers, which the defendant sold to California consumers directly through telephone orders. The manufacturer moved for summary judgment on the ground that the requirement did not apply to it because its sales were not made in California, or that the statute was invalid because it conflicted with the Commerce Clause of the U.S. Constitution. The trial court bypassed the question of application and granted summary judgment on the ground that the law was unconstitutional, assuming but not deciding that the statute applied to the defendant's sales.

The court of appeal concluded that the manufacturer was entitled to judgment because the Consumer Warranty Act requirement did not apply to the manufacturer's sales, and affirmed the judgment without reaching the constitutional issue. The court stated that whether goods are sold in California depends on where title passes (*41 Cal. App. 4th 1270, 1275)* . It found that the Consumer Warranty Act incorporates the concept of sale by passage of title in the Commercial Code, and the court looked to *Com. Code § 2401*, which provides that title passes to the buyer on shipment when the parties agree to shipment by the seller. The court held that in this case, title passed from the defendant to a California customer on shipment in Minnesota, and thus those sales were not subject to *Civ. Code § 1793.2(a)(1)(A)* (*41 Cal. App. 4th 1270, 1276-1277)* .

[b] Act Does Not Apply to Vehicle Bought Outside California

In ***Cummins, Inc. v. Superior Court*** *(2005) 36 Cal. 4th 478, 30 Cal. Rptr. 3d 823, 115 P.3d 98* , a California resident had bought a new motor vehicle--a motor home containing an engine manufactured by defendant--in Idaho. The engine, which was subject to a manufacturer's warranty, proved to be defective. After the manufacturer's authorized repair facility in California failed to remedy the defects despite numerous attempts, the manufacturer refused to replace the vehicle and refused to provide a refund. The buyer sued for relief under the Song-Beverly Consumer Warranty Act [*see Civ. Code §§ 1793.2(d)(2), 1793.22*]. The manufacturer moved for summary adjudication on the ground that the plaintiff had bought the vehicle in Idaho, arguing that the Act applies only to vehicles bought in California. The trial court denied the motion for summary adjudication. The court of appeal subsequently denied the manufacturer's petition for a writ of mandate, concluding that the Act applies whenever a manufacturer that sells goods in California (or its representative) fails to service or repair the goods to conform to its express warranty, even in cases when the particular goods in question were bought outside California.

The Supreme Court reversed. After analyzing the text of the Act, and considering particularly the language of *Civ. Code*

§ 1793.2(d)(2) in the context of the Act, the court concluded that the Legislature intended the Act to apply only to new vehicles sold in California (*36 Cal. 4th 478, 493)* .

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20-206 California Points & Authorities § 206.123

§ 206.123 Opposing Contention That Seller Is Liable for Breach of Express Warranty in Consumer Sale--Designated Repair Facility in California [Civ. Code § 1793.2(a)(1)(B)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT HAS NOT BREACHED ITS DUTY IN CONNECTION WITH THE EXPRESS WARRANTY, GIVEN IN CONNECTION WITH THE PURCHASE OF _____ [*describe consumer good*] ON _____ [*date*], BECAUSE DEFENDANT HAS DESIGNATED _____ [*name*] AS ITS AUTHORIZED REPAIR FACILITY IN CALIFORNIA.

Option to Designate Repair Facility in California. In lieu of maintaining its own repair facility, a manufacturer of consumer goods that sells them in California with its express warranty may designate and authorize independent repair or service facilities in California as its service and repair facilities to carry out the terms of the warranties as long as they are reasonably close to all areas where its consumer goods are sold (*Civ. Code § 1793.2(a)(1)(B)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose the contention that a manufacturer failed to maintain a repair facility in California when the manufacturer has designated an independent repair facility located in California [*see Civ. Code § 1793.2(a)(1)(B)*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue regarding maintenance of a repair facility in California. They may also be adapted for use in a trial or appellate brief.

Counsel should add argument linking the points in this form with the facts of his or her case.

[b] Opposing Points and Authorities

The points and *authorities in § 206.102* oppose those in this form.

[3] Discussion of Authorities

[a] Option to Designate Repair Facility in California

If a manufacturer chooses to designate independent entities as authorized warranty repair or service facilities, it must comply with *Civ. Code § 1793.2(a)(1)(B)*, regarding rates and terms of the designation and authorization contract.

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20-206 California Points & Authorities § 206.124

§ 206.124 Opposing Contention That Buyer Is Entitled to Replacement or Reimbursement--Buyer Failed to Deliver Goods for Repair or Notify Manufacturer of Defect [Civ. Code § 1793.2(c)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF IS NOT ENTITLED TO REPLACEMENT OR REIMBURSEMENT FOR PAYMENTS MADE FOR THE PURCHASE OF THE _____ [*describe product, e.g.*, WORD PROCESSOR] BECAUSE PLAINTIFF NEVER DELIVERED THE PRODUCT FOR REPAIR OR NOTIFIED THE MANUFACTURER OF THE DEFECT.

Buyer's Duty of Return or Notification. The buyer must deliver nonconforming goods to the manufacturer's service and repair facility in California, unless, due to reasons of size and weight, or method of attachment, or method of installation, or the nature of the nonconformity, delivery cannot reasonably be accomplished. If the buyer cannot return the nonconforming goods for any of these reasons, he or she must notify the manufacturer or its nearest service and repair facility in California. Written notice of nonconformity to the manufacturer or its service and repair facility constitutes return of the goods for purposes of this section (*Civ. Code § 1793.2(c)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose the contention that a manufacturer, or its representative in California, failed to promptly repair a consumer product when the buyer failed to return the item for repair or notify the manufacturer of the defect [*Civ. Code § 1793.2(c)*].

If definitional elements of the transaction are in issue, counsel should incorporate appropriate paragraphs from § 206.100 or § 206.123.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the failure to return the product for repairs or to give notification of the defect. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Opposing Points and Authorities

These points and authorities may be used to appose those in § 206.103.

[3] Discussion of Authorities

[a] Buyer's Duty of Return or Notification

On receipt of notice of nonconformity, the manufacturer, at its option, must service or repair the goods at the buyer's residence, or pick up the goods for service and repair, or arrange for transporting the goods to its service and repair facility. All reasonable costs of transporting the goods when a buyer cannot return them for any of the above reasons are at the manufacturer's expense. The reasonable costs of transporting nonconforming goods after delivery to the service and repair facility, through return of the goods to the buyer, are also at the manufacturer's expense [*Civ. Code § 1793.2(c)*].

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20-206 California Points & Authorities § 206.125

§ 206.125 Opposing Contention That Buyer Is Entitled to Replacement or Reimbursement-Claim Based on Defect in New Residential Construction Is Specially Excepted [Civ. Code § 1793.2(e)(2)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF IS NOT ENTITLED TO REPLACEMENT OR REIMBURSEMENT FOR PAYMENTS MADE FOR THE PURCHASE OF THE _____ [*briefly describe product*] BECAUSE PLAINTIFF'S CLAIM ARISES OUT OF DEFICIENCIES IN THE CONSTRUCTION OF A NEW RESIDENTIAL DWELLING AND _____ [THE PRODUCT IS NOT A "MANUFACTURED PRODUCT" *or* DEFENDANT IS NOT THE MANUFACTURER THAT ORIGINALLY MADE THE EXPRESS WARRANTY FOR THE PRODUCT].

[*EITHER*]

Product Is Not "Manufactured Product." With respect to claims arising out of deficiencies in the construction of a new residential dwelling, the requirement that a manufacturer replace or reimburse when goods cannot practicably be serviced or repaired to conform to the applicable express warranties does not apply to a product that is not a "manufactured product," as defined in *Civil Code Section 896(g)* (*Civ. Code § 1793.2(e)(2)*). *Civil Code Section 896(g)* defines "manufactured product" as a product that is completely manufactured off-site (*Civ. Code § 896(g)(3)(C)*).

[*OR*]

Defendant Did Not Make Original Warranty. With respect to claims arising out of deficiencies in the construction of a new residential dwelling, the requirement that a manufacturer replace or reimburse when goods cannot practicably be serviced or repaired to conform to the applicable express warranties does not apply to a claim against a person or

entity that is not the manufacturer that originally made the express warranty for the product (*Civ. Code § 1793.2(e)(2)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to oppose the contention that a manufacturer, or its representative in California, failed to service or repair a consumer product, when the plaintiff's claim arises out of deficiencies in the construction of a new residential dwelling. The first alternative should be used if the product is not a "manufactured product" as defined in *Civ. Code § 896(g)* (concerning standards for determining when post-2002 construction is defective). The second alternative should be used if the plaintiff's claim is asserted against a person or entity that is not the manufacturer that originally made the express warranty for that manufactured product [*see Civ. Code § 1793.2(e)(2)*].

If definitional elements of the transaction are at issue, counsel should incorporate appropriate paragraphs from § 206.100 or § 206.123.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the failure to return the product for repairs or to give notification of the defect. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Opposing Points and Authorities

These points and authorities may be used to oppose those in § 206.103.

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20-206 California Points & Authorities § 206.126

§ 206.126 Opposing Contention That Buyer of New Motor Vehicle Is Entitled to Replacement or Restitution--Buyer Who Did Not Submit to Qualified Third-Party Dispute Resolution Process Cannot Rely on Presumption to Establish Reasonable Number of Attempts to Repair [Civ. Code § 1793.22(c)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF DID NOT RESORT TO DEFENDANT'S THIRD-PARTY DISPUTE RESOLUTION PROCESS AND THUS MAY NOT RELY ON THE PRESUMPTION THAT A REASONABLE NUMBER OF ATTEMPTS HAVE BEEN MADE TO REPAIR THE VEHICLE.

A. Buyer Cannot Rely on Presumption. If a qualified third-party dispute resolution process exists, and the buyer receives timely notification in writing of the availability of that process with a description of its operation and effect, the buyer cannot assert the presumption in *Civil Code Section 1793.22(b)* to establish that a reasonable number of repair attempts have been made until after the buyer has initially resorted to the qualified third-party dispute resolution process (*Civ. Code § 1793.22(c)*).

B. Notification Is Timely. Notification of the availability of the qualified third-party dispute resolution process is timely if the buyer does not suffer any prejudice resulting from any delay in giving the notification (*Civ. Code § 1793.22(c)*).

[2] Comments

[a] Use of Form

These points and authorities may be used by a manufacturer of new motor vehicles to oppose a new motor vehicle buyer's use of the presumption of Civ. Code § 1793.21(b) [*see § 206.104*] to establish that the manufacturer has expended a "reasonable number of attempts to repair." The ground for opposition is that the manufacturer maintains a

qualified third-party dispute resolution process, and gave notice of that fact to the buyer [*Civ. Code § 1793.22(c)*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue regarding the presumption. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For instance, counsel should incorporate an authenticated copy of the certification from the Department of Consumer Affairs regarding the qualification of the third-party dispute resolution process and its operation and existence at the time of the incidents complained of [*see Civ. Code § 1793.22(d)(9)*].

[3] Discussion of Authorities

[a] Buyer Cannot Rely on Presumption

Civ. Code § 1793.22 also provides that if a qualified third-party dispute resolution process does not exist, or if the buyer is dissatisfied with the third-party decision, or if the manufacturer or its agent neglects to promptly fulfill the terms of the qualified third-party dispute resolution process decision after the decision is accepted by the buyer, the buyer may assert the presumption provided in *Civ. Code § 1793.22(b)* in an action to enforce the buyer's rights under *Civ. Code § 1793.2(d)* to restitution or a replacement vehicle [*see § 206.104*].

The findings and decision of a qualified third-party dispute resolution process are admissible in evidence in the action without further foundation [*Civ. Code § 1793.22(c)*].

The criteria for qualification are set forth in *Civ. Code § 1793.22(d)*.

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20-206 California Points & Authorities § 206.127

§ 206.127 Opposing Contention That Buyer of New Motor Vehicle Is Entitled to Replacement or Restitution--Impairment of Vehicle Was Not "Substantial" Within Meaning of Civ. Code § 1793.22(e)(1)

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF IS NOT ENTITLED TO REPLACEMENT OF OR RESTITUTION FOR THE MOTOR VEHICLE THAT IS THE SUBJECT OF THIS ACTION BECAUSE THE ALLEGED IMPAIRMENT TO THE VEHICLE IN QUESTION WAS NOT "SUBSTANTIAL" AND THEREFORE DOES NOT CONSTITUTE A "NONCONFORMITY" FOR WHICH REPLACEMENT OR RESTITUTION IS AVAILABLE UNDER THE APPLICABLE STATUTES.

A. Nonconformity Defined. "Nonconformity," in the context of express warranties regarding new motor vehicles, is one that substantially impairs the use, value, or safety of the new motor vehicle to the buyer or lessee. (*Civ. Code § 1793.22(e)(1)*)

B. Impairment Must Be Substantial. The term "substantial" in *Civ. Code § 1793.22(e)(1)* injects an element of degree, and not every impairment is sufficient to satisfy the statute. (*Lundy v. Ford Motor Company (2001) 87 Cal. App. 4th 472, 478, 104 Cal. Rptr. 2d 545*)

C. Test for Determining Whether Impairment Is Substantial. Whether an impairment is substantial is determined by an objective test, based on what a reasonable person would understand to be a defect. (*Lundy v. Ford Motor Company (2001) 87 Cal. App. 4th 472, 478, 104 Cal. Rptr. 2d 545*)

[2] Comments

[a] Use of Form

This form may be used by the defendant in an action by the buyer of a new motor vehicle to rebut the contention that the buyer is entitled to replacement or restitution of the Vehicle under the California Lemon Law. The ground asserted in these points and authorities is that the nonconformity forming the basis of the action is not "substantial" within the meaning of the statute. Whether or not a defect is "substantial" ordinarily may be expected to be a question of fact, but these points and authorities may be used to (1) rebut the assertion that any defect, however trivial, automatically rises to the level of a "nonconformity" under the statute; and (2) place in issue whether or not the specific defect in question satisfies the applicable requirement of substantial impairment.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. In this context, defendant should allege facts indicating that the impairment at issue in the case was so significantly trivial or inconsequential that a reasonable person would not regard it as a defect [*see § 206.127[3][b]*].

[3] Discussion of Authorities

[a] Impairment Must Be Substantial

In ***Lundy v. Ford Motor Company*** *(2001) 87 Cal. App. 4th 472, 104 Cal. Rptr. 2d 545* , plaintiff purchased a new vehicle covered by a three-year warranty. He had his vehicle serviced numerous times during the first year of ownership due to an air conditioning system odor and transmission related problems. After the last repair attempt, when his complaints were not corrected to his satisfaction, he requested that Ford replace or repurchase his vehicle. Ford refused the request, and plaintiff brought an action against the manufacturer and dealer for breach of implied and express warranty under the Song-Beverly Consumer Warranty Act. The jury was instructed that plaintiff had to prove, among other things, that plaintiff's vehicle contained a nonconformity covered by the warranty that substantially impaired the use, value, or safety of the vehicle to the buyer. The jury asked for clarification of the term "substantially" as used in that instruction. The court refused defendants' proposed response which was based on a dictionary definition. It then instructed the jury that "substantially" is an adverb modifying the verb impaired, and the use of that term meant that the nonconformity was not imaginary and actually impaired the use, value, or safety of the vehicle. The jury returned a verdict in favor of plaintiff and defendants appealed.

Defendants argued that the definition of "substantially" given the jury did not describe the "degree, quantity or extent of an object or condition" and rendered the defined term meaningless. The court of appeal agreed and reversed. It noted that *Civ. Code § 1793.22(e)(1),* which defines "nonconformity," does not also define "substantially." The trial court's definition effectively wrote the term "substantially" out of the statue. The term injects an element of degree; not every impairment is sufficient to satisfy the statute (*87 Cal. App. 4th 472, 478)* . The court further found that the erroneous jury instruction required reversal, as it was prejudicial resulting in a miscarriage of justice (*87 Cal. App. 4th 472, 479-480)* .

[b] Test for Determining Whether Impairment Is Substantial

The facts and procedural background of ***Lundy v. Ford Motor Company*** *(2001) 87 Cal. App. 4th 472, 104 Cal. Rptr. 2d 545* are *discussed under § 206.127[3][a]*. In reversing an erroneous jury instruction regarding the meaning of "substantially" in this context, the court offered some suggestions about the meaning of the term. The term modifies its object, "impairment." It injects an element of degree; not every impairment is sufficient to satisfy the statute. The court stated that the most analogous definition of "substantially" it found in a context similar to its usage here is in *Com. Code § 2608*. Like *Civ. Code § 1793.22(e)(1), Com. Code § 2608(1)* requires a determination of whether a defect "substantially impairs" the value of goods sold to a buyer. Under *Com. Code § 2608(1),* the trier of fact may consider the nature of the defects; the cost and length of time required for repair; whether past repair attempts have been successful; the degree to which the goods can be used while repairs are attempted; inconvenience to the buyer; and the availability and cost of alternative goods pending repair [*citing* Annot., What Constitutes "Substantial Impairment" Entitling Buyer to Revoke His Acceptance of Goods Under UCC § 2-608(1) (1996) 38 A.L.R. 5th 191 . While

concluding that "substantial," like the term "reasonable," may be incapable of precise definition, the court stated that at the least, the requirement is not satisfied by any impairment, however insignificant, that affects use, value, or safety (*87 Cal. App. 4th 472, 478)* .

[4] Additional Authorities

[a] Nonconformity Defined

The facts and procedural background of *Ibrahim v. Ford Motor Co. (1989) 214 Cal. App. 3d 878, 263 Cal. Rptr. 64* , are *discussed under § 206.104[3][b]*. In *Ibrahim*, plaintiff argued that the use of the term "defect" instead of the statutory term "nonconformity" operated to "mislead the jury into believing that they had to find the vehicle was unsafe in design or manufacture as in a products liability setting rather than simply nonconforming to the warranty after a reasonable number of repair attempts." Although the court stated that it while would have been better practice to instruct the jury with the statutory language, the substitution of "defect" in place of "nonconformity" was not grounds for reversal. The court concluded that the statutory definition of "nonconformity" *is nothing more than a means of describing what the average person would understand to be a defect.* The two words are in effect synonyms (*214 Cal. App. 3d 878, 887)* . Accord, see *Schreidel v. American Honda Motor Co. (1995) 34 Cal. App. 4th 1242, 1249, 40 Cal. Rptr. 2d 576* .

[b] Test for Determining Whether Impairment Is Substantial

The meaning of "substantially impaired" is discussed in *CACI No. 3204* [*Judicial Council of California Civil Jury Instructions, CACI No. 3204* (LexisNexis Matthew Bender, Official Publisher)].

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20-206 California Points & Authorities § 206.128

§ 206.128 Opposing Contention That Buyer of New Motor Vehicle Is Entitled to Replacement or Restitution--Manufacturer Was Not Given Opportunity to Repair Vehicle--"Reasonable Number of Attempts" Means at Least Two Attempts to Repair [Civ. Code § 1793.2(d)(2)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].PLAINTIFF IS NOT ENTITLED TO REPLACEMENT OF OR RESTITUTION FOR THE MOTOR VEHICLE THAT IS THE SUBJECT OF THIS ACTION BECAUSE THE MANUFACTURER WAS NOT GIVEN AT LEAST TWO OPPORTUNITIES TO REPAIR PURSUANT TO *CIVIL CODE SECTION 1793.2(d)(2)* WHICH REQUIRES "A REASONABLE NUMBER OF ATTEMPTS" TO REPAIR THE VEHICLE.

A "Reasonable Number of Attempts" To Repair Requires That the Manufacturer Be Given at Least Two Opportunities to Repair. Because the phrase "reasonable number of attempts" in *Civil Code Section 1793.2(d)(2)* is written in the plural, the statute does not require the manufacturer to make restitution or replacement after only one opportunity to repair. *Silvio v. Ford Motor Company (2003) 109 Cal. App. 4th 1205, 1207-1208, 135 Cal. Rptr. 2d 846*

[2] Comments

[a] Use of Form

This form may be used by the defendant in an action by the buyer of a new motor vehicle to rebut the contention that the buyer is entitled to replacement or restitution of the vehicle under *Civ. Code § 1793.2*. The ground asserted in these points and authorities is that the manufacturer was not given at least two opportunities to repair the vehicle, as required by the language in *Civ. Code § 1793.2(d)(2)*, which provides for consumer remedies only when the manufacturer is unable to service or repair a new motor vehicle after a "reasonable number of attempts."

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of

law stated.

[3] Discussion of Authorities

[a] A "Reasonable Number of Attempts" To Repair Requires That the Manufacturer Be Given at Least Two Opportunities to Repair

In ***Silvio v. Ford Motor Company*** *(2003) 109 Cal. App. 4th 1205, 135 Cal. Rptr. 2d 846* , plaintiffs purchased a new vehicle from defendants. The vehicle developed acceleration problems. The evidence established that defendants were given only one opportunity to repair the vehicle. After that single failed attempt, plaintiffs wanted defendants to buy back the vehicle and did not want it fixed. After defendants refused to buy back the vehicle, plaintiffs brought an action under the Song-Beverly Consumer Warranty Act. Defendants moved for nonsuit on the ground that the express language of *Civ. Code § 1793.2(d)(2)*, which provides for consumer remedies only when the manufacturer is unable to service or repair a new motor vehicle after a "reasonable number of attempts," is written in the plural and requires that the manufacturer be given at least two opportunities to repair. The trial court agreed with defendants' reading of the statute and granted their motion for nonsuit (*109 Cal. App. 4th 1205, 1207)* . The court of appeal affirmed. It phrased the issue on appeal as whether the single failed attempt to repair triggered the manufacturer's obligations set forth in *Civ. Code § 1793.2(d)(2)*. The court saw no ambiguity or uncertainty in the statutory language, which is written in the plural. The statute does not require the manufacturer to make restitution or replacement if it has had only one opportunity to repair the vehicle. The court found that the trial court correctly interpreted and statute, and affirmed (*109 Cal. App. 4th 1205, 1207-1208)* .

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20-206 California Points & Authorities § 206.129

§ 206.129 Opposing Contention That Buyer Is Entitled to Double Penalty for Breach of Warranty [Civ. Code § 1794(c)]--Recovery of Both Punitive Damages and Civil Penalty Is Prohibited

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF IS NOT ENTITLED TO RECOVER BOTH PUNITIVE DAMAGES AND THE CIVIL PENALTY PROVIDED FOR IN *CIVIL CODE SECTION 1794(c).*

A. Imposition of Both Penalty and Punitive Damages Barred. Awarding both punitive damages and the civil penalty under *Civil Code Section 1794(c)* would amount to double punishment in derogation of a defendant's due process rights, and is thus prohibited (*Troensegaard v. Silvercrest Industries, Inc. (1985) 175 Cal. App. 3d 218, 228, 220 Cal. Rptr. 712*).

[*Optional*] **B. Plaintiff's Election and Waiver.** A plaintiff who seeks the civil penalty and also attorney's fees and costs under *Civil Code Section 1794* will be deemed to have elected to waive punitive damages under *Civil Code Section 3294* (*Troensegaard v. Silvercrest Industries, Inc. (1985) 175 Cal. App. 3d 218, 228, 220 Cal. Rptr. 712*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to an award or claim for both punitive damages and the civil penalty of *Civ. Code § 1794(c)*, which is *set forth in § 206.110*, Paragraph F. A plaintiff is likely to seek both only when he or she is advancing some other tort cause of action in addition to his or her claim under the Song-Beverly Consumer Warranty Act. Optional Paragraph B is for use to establish that plaintiff has elected the Song-Beverly penalty rather than punitive damages and is best used when punitive damages are greater than the civil penalty.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that both punitive damages and the penalty cannot be imposed. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Imposition of Both Penalty and Punitive Damages Barred

Troensegaard v. Silvercrest Industries, Inc. *(1985) 175 Cal. App. 3d 218, 220 Cal. Rptr. 712* , was an action for damages for personal injuries based on breach of express warranty, products liability, and fraudulent concealment. Plaintiff had purchased a mobilehome that exuded unacceptable levels of formaldehyde fumes, causing illness and emotional distress. The express warranty was that required by *Civ. Code § 1797.3*. All defendants except the manufacturer settled before trial for $6,000. The trial proceeded against the manufacturer only. The jury awarded plaintiff $90,000 in compensatory damages, $55,000 in punitive damages, and $90,000 as civil penalty. The court thereafter awarded plaintiff $56,555 in attorney's fees and $35,726.71 in costs. Defendant appealed.

The court of appeal modified the judgment by striking the $55,000 in punitive damage award and giving the manufacturer credit for the $6,000 paid by the settling defendants, and as modified, affirmed (*175 Cal. App. 3d 218, 230)* . The court found that there was substantial evidence that defendant's breach of warranty was willful in that after plaintiff notified defendant of the defects, it refused to make her whole and it concealed reports establishing the existence of formaldehyde in excess of recommended limits (*175 Cal. App. 3d 218, 226)* . Defendant contended that awarding both punitive damages and the civil penalty under *Civ. Code § 1794(c)* amounted to double punishment in derogation of its due process rights. The court agreed, maintaining that had the Legislature intended to permit both penal and punitive recovery under *Civ. Code §§ 1794(c)* and *3294* for the same willful, malicious, and oppressive acts, it would in some appropriate manner have said so. The court also held that in seeking the civil penalty and attorney's fees and costs under *Civ. Code § 1794*, plaintiff had elected to waive punitive damages under *Civ. Code § 3294* (*175 Cal. App. 3d 218, 228)* .

[b] Plaintiff's Election and Waiver

Troensegaard v. Silvercrest Industries, Inc. *(1985) 175 Cal. App. 3d 218, 220 Cal. Rptr. 712* , is *discussed under § 206.129[3][a]*.

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20-206 California Points & Authorities § 206.130

§ 206.130 Opposing Contention That Buyer of New Motor Vehicle Is Entitled to Double Penalty for Breach of Express Warranty [Civ. Code § 1794(e)]--Manufacturer Maintains Qualified Dispute Resolution Process [Civ. Code § 1794(e)(2)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF IS NOT ENTITLED TO RECOVER THE DOUBLE PENALTY PROVIDED FOR IN *CIVIL CODE SECTION 1794(e)* BECAUSE DEFENDANT MAINTAINS A QUALIFIED DISPUTE RESOLUTION PROCESS.

No Penalty May Be Imposed on Manufacturer That Maintains Dispute Resolution Process. No civil penalty may be assessed under *Civil Code Section 1794(e)(1)* (the "Lemon Law") against a manufacturer of new motor vehicles if the manufacturer maintains a qualified third-party dispute resolution process that substantially complies with *Civil Code Section 1793.22* (*Civ. Code § 1794(e)(2)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the claim of a purchaser of a new motor vehicle that he or she is entitled to recover the double penalty of *Civ. Code § 1794(e)(1)* [*see § 206.111*] from a manufacturer when the manufacturer maintains a qualified dispute resolution process under *Civ. Code § 1793.22* [*see §§ 206.124*, 206.146].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the penalty cannot be imposed. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of

law stated. In this instance, counsel should incorporate the sale documents that notified the buyer of the existence of the qualified dispute resolution process, and should attach and incorporate the certificate from the Department of Consumer Affairs regarding the qualification of the process and its operation and existence at the time of the incidents complained of [*see Civ. Code § 1793.22(d)(9)*].

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20-206 California Points & Authorities § 206.131

§ 206.131 Opposing Contention That Buyer of New Motor Vehicle Is Entitled to Double Penalty for Breach of Express Warranty [Civ. Code § 1794(e)]--Buyer Did Not Demand That Manufacturer Replace Vehicle or Make Restitution [Civ. Code § 1794(e)(3)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF IS NOT ENTITLED TO RECOVER THE DOUBLE PENALTY PROVIDED FOR IN *CIVIL CODE SECTION 1794(e)* BECAUSE HE/SHE DID NOT DEMAND THAT DEFENDANT REPLACE THE VEHICLE OR MAKE RESTITUTION.

No Penalty May Be Imposed on Manufacturer Unless Buyer Gave Notice. No civil penalty may be assessed under Civil Code Section 1794(e) against a manufacturer of new motor vehicles unless, after the occurrence of the events giving rise to the presumption regarding reasonable number of attempts to repair established in *Civil Code Section 1793.22(b)*, the buyer served written notice on the manufacturer requesting it to comply with its duty under *Civil Code Section 1793.2(d)(2)* to replace the vehicle or to make restitution (*Civ. Code § 1794(e)(3)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the claim of a purchaser of a new motor vehicle that he or she is entitled to recover the double penalty of *Civ. Code § 1794(e)(1)* [*see § 206.111*] from a manufacturer when the buyer failed to demand replacement or restitution before commencing suit [*Civ. Code § 1794(e)(3)*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the penalty cannot be imposed. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

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§ 206.132 Opposing Contention That Buyer of New Motor Vehicle Is Entitled to Double Penalty for Breach of Express Warranty [Civ. Code § 1794(e)]--Manufacturer Complied With Buyer's Demand to Replace Vehicle or Make Restitution [Civ. Code § 1794(e)(4)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF IS NOT ENTITLED TO RECOVER THE DOUBLE PENALTY PROVIDED FOR IN *CIVIL CODE SECTION 1794(e)* BECAUSE DEFENDANT _____ [REPLACED THE VEHICLE *or* MADE RESTITUTION] WITHIN 30 DAYS OF PLAINTIFF'S DEMAND THAT IT DO SO.

No Penalty May Be Imposed if Manufacturer Complies With Buyer's Demand. No civil penalty may be assessed under *Civil Code Section 1794(e)* against a manufacturer of new motor vehicles that complied with a buyer's demand for a replacement vehicle or restitution within 30 days of the service of that demand (*Civ. Code § 1794(e)(4)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the claim of a purchaser of a new motor vehicle that he or she is entitled to recover the double penalty of *Civ. Code § 1794(e)(1)* [*see § 206.111*] from a manufacturer that complied with the buyer's demand for replacement or restitution within 30 days [*Civ. Code § 1794(e)(4)*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the penalty cannot be imposed. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of

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§ 206.133 Opposing Contention That Buyer of New Motor Vehicle Is Entitled to Double Penalty for Breach of Express Warranty [Civ. Code § 1794(e)]--Buyer Can Only Have One Penalty [Civ. Code § 1794(e)(5)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF IS NOT ENTITLED TO RECOVER THE DOUBLE PENALTY UNDER BOTH *CIVIL CODE SECTION 1794(c)* AND *(e)*.

Only One Penalty May Be Imposed. If a buyer recovers a civil penalty under *Civil Code Section 1794(c)*, the buyer may not also recover a civil penalty under *Civil Code Section 1794(e)* for the same violation (*Civ. Code § 1794(e)(5)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the claim of a purchaser of a new motor vehicle that he or she is entitled to recover both the double penalty of *Civ. Code § 1794(e)(1)* [*see § 206.111*] and the double penalty of *Civ. Code § 1794(c)* [*see § 206.110*] for a single violation [*Civ. Code § 1794(e)(5)*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the penalty can only be imposed once. They may also be adapted for use in a trial or appellate brief.

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2. Song-Beverly Consumer Warranty Act

20-206 California Points & Authorities § 206.134

§ 206.134 Opposing Contention That Buyer Is Entitled to Damages for Bad-Faith Breach of Covenant of Good Faith and Fair Dealing

[1] FORM

Tort Damages for Breach of Covenant of Good Faith and Fair Dealing Not Available. No cause of action for bad faith breach of the covenant of good faith and fair dealing arises from breach of an express warranty of consumer goods because the purchaser's remedy is limited to the double damages penalty provided by *Civil Code Section 1794(c)* (*Gomez v. Volkswagen of America, Inc. (1985) 169 Cal. App. 3d 921, 929, 215 Cal. Rptr. 507* ; *see also Krieger v. Nick Alexander Imports, Inc. (1991) 234 Cal. App. 3d 205, 222, 285 Cal. Rptr. 717* (finding no cause of action on other grounds)).

[2] Comments

[a] Use of Form

These points and authorities may be used by a manufacturer, distributor, or retail seller to oppose a buyer's attempt to recover tort damages for breach of express warranty.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue regarding breach of the covenant of good faith and fair dealing. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Tort Damages for Breach of Covenant of Good Faith and Fair Dealing Not Available

Plaintiff in ***Gomez v. Volkswagen of America, Inc.*** *(1985) 169 Cal. App. 3d 921, 215 Cal. Rptr. 507* , bought a 1975 Porsche 914 in January 1975 from a retail dealer defendant that was not a party to the appeal. The car was manufactured by defendant Porsche, A.G. and Volkswagenwerk Aktiengesellschaft (VWAG) in Germany and imported by Volkswagen of America, Inc. (hereinafter "VWoA"). The car came with an express warranty by VWoA to be "free of defects in material and workmanship for 12 months after the date of delivery of the vehicle to the original retail customer or until the vehicle has been driven 20,000 miles, whichever comes first." In May 1975, when the car had about 4,500 miles on it, plaintiff tried to start the car but a fire broke out and severely damaged the car. Plaintiff had the car towed to the dealer and demanded that defendant replace or repair the car, at no cost to plaintiff, pursuant to the warranty. Defendant gave plaintiff a "loaner" car, but refused to repair or replace it, claiming the fire was not a result of a "defect" within the meaning of the warranty. In August 1975, plaintiff purchased a Saab to replace the Porsche. In May 1976, plaintiff sued defendants for strict product liability, negligence, breach of express warranty, breach of implied warranty, and bad faith breach of the covenant of good faith and fair dealing in an express warranty that accompanied the purchase of the Porsche. A demurrer was sustained to the cause of action for "bad faith." After a substantially unchanged first amended complaint, another demurrer was sustained with respect to the bad faith cause of action, this time without leave to amend. Although plaintiff applied for review of that order by writ, the writ was denied. Judgment was entered for plaintiff on the other four causes of action. Plaintiff appealed the order sustaining the demurrer without leave to amend, and defendant appealed the judgment for plaintiff and an order denying a motion for judgment notwithstanding the verdict.

The court of appeal reversed the order sustaining the demurrer on the ground that, although neither party had mentioned it, the cause of action entitled "bad faith breach of covenant of good faith and fair dealing" stated a cause of action for damages under *Civ. Code § 1794*. The court discussed the cause of action for bad faith and the requirement of a special relationship in order for a breach of the covenant to entitle an injured party to tort damages (*169 Cal. App. 3d 921, 926-927)* . The court found the gravamen of plaintiff's cause of action to be based on defendant's attempt to avoid liability by adopting a "stonewall" position without probable cause and with no belief in the existence of a defense.

The court said that if the Legislature had not acted, the argument for extending a tort remedy to plaintiff's cause of action would be most persuasive. However, in enacting the Consumer Warranty Act, the Legislature did act. This appears to indicate that the Legislature felt that the remedy provided by *Civ. Code § 1794* is adequate with regard to the amount of damages a meritorious plaintiff may recover and constitutes a sufficient deterrent to the proscribed conduct (*169 Cal. App. 3d 921, 928)* . Without any apparent inadequacy of the statutory remedy, the court heeded the admonition of the Supreme Court to proceed with caution when addressing undecided areas of law, and concluded that the stated cause of action allowed plaintiff no more than the statutory remedy afforded by *Civ. Code § 1794* (*169 Cal. App. 3d 921, 928-929)* . Because the jury verdict for plaintiff carried no special findings and the facts were so interwoven, the court vacated the entire judgment and remanded for further proceedings (*169 Cal. App. 3d 921, 926, 929)* .

[4] Additional Authorities

[a] Tort Damages for Breach of Covenant of Good Faith and Fair Dealing Not Available

In *Krieger v. Nick Alexander Imports, Inc. (1991) 234 Cal. App. 3d 205, 285 Cal. Rptr. 717* (discussed in *§ 206.113[3][a]*), the court of appeal found no tort cause of action to exist for bad faith on the ground that plaintiff had failed to establish the existence of a special relationship between the parties (*234 Cal. App. 3d 205, 222)* . The cause of action labeled "Tortious Bad Faith Breach of the Covenant of Good Faith" was challenged as barred by the statute of limitations. The court applied the rule set forth in *Frazier v. Metropolitan Life Ins. Co. (1985) 169 Cal. App. 3d 90, 102-103, 214 Cal. Rptr. 883* , that when a cause of action sounds in both tort and contract, the plaintiff is entitled to an election, and is not deemed to have waived the right to apply the four-year limitation period of *Code Civ. Proc. § 337(1)* until he or she obviously makes the election to proceed only in tort (*234 Cal. App. 3d 205, 220-221)* . Defendant in this case failed to establish any such election. Under both the tort theory and the contract theory, the statute of limitations

begins to run on the occurrence of the last element necessary to the cause of action, which in the case of a contract, is usually its breach. An exception is that a cause of action does not accrue until the plaintiff discovers the breach, or should have discovered it. The "discovery rule" is generally applied to contract and tort causes of action in situations involving fiduciary relationships such as professional malpractice (*234 Cal. App. 3d 205, 221)* , and when there is a statutory scheme that imposes a duty to disclose similar to the duty imposed by a fiduciary relationship (*234 Cal. App. 3d 205, 222)* . Although the complaint in this action alleged that a special relationship existed between the parties, no evidence was proffered to establish that the parties were either in a fiduciary relationship or that defendant was governed by a statutory scheme that imposed a duty to disclose. The court caracterized the evidence submitted in opposition to defendant's motion for summary judgment as establishing a traditional seller-buyer relationship governed by the Commercial Code and the Consumer Warranty Act. Thus, there was no basis for application of the discovery rule, and the judgment for defendant on the bad faith cause of action was affirmed (*234 Cal. App. 3d 205, 222)* .

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[Reserved]

§§ 206.135[Reserved]

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20-206 California Points & Authorities § 206.150

§ 206.150 Supporting Contention That Unruh Act Applies to Sales Transaction--General Form

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE TRANSACTION BETWEEN PLAINTIFF AND DEFENDANT IS SUBJECT TO THE UNRUH ACT BECAUSE IT WAS A RETAIL INSTALLMENT SALE BETWEEN A RETAIL BUYER AND A RETAIL SELLER FOR _____ [GOODS FOR USE PRIMARILY FOR PERSONAL, FAMILY, OR HOUSEHOLD PURPOSES *or* SERVICES FOR OTHER THAN A COMMERCIAL OR BUSINESS USE].

A. Liberal Construction. The Unruh Act's provisions should be liberally construed to protect consumers (*Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 823, 94 Cal. Rptr. 796, 484 P.2d 964*).

B. Seller. A "retail seller" for purposes of the Unruh Act is a person engaged in the business of selling goods or furnishing services to retail buyers (*Civ. Code § 1802.3*).

C. Buyer. A "retail buyer" for purposes of the Unruh Act is a person who buys goods or obtains services from a retail seller in a retail installment sale and not principally for the purpose of resale (*Civ. Code § 1802.4*).

[*EITHER*]

D. Goods. "Goods" covered by the Unruh Act are tangible chattels bought for use primarily for personal, family, or household purposes, including certificates or coupons exchangeable for such goods; goods that will be affixed to and become a part of real property at or after the time of the sale, whether or not the goods are severable from the real property; and any trailer sold with and designed solely to carry a vessel having a cash price of $25,000 or less (*Civ. Code § 1802.1*; *see Civ. Code § 1801.4(d)* (exemption of vessel)).

[*AND/OR*]

E. Services. "Services" covered by the Unruh Act are work, labor, and services that are not for a commercial or business use, including services furnished in connection with the improvement of real property, the providing of insurance, or the repair of motor vehicles if the repair is not done under a service contract sold in conjunction with the sale or lease of a vehicle required to be registered under the Vehicle Code (*Civ. Code § 1802.2*; *see Civ. Code § 2981(p)* (service contract defined)).

[*AND EITHER*]

F. Contract. A "retail installment contract" is a contract for consumer goods or services which is entered into in California by a retail seller and a retail buyer and which (1) provides for repayment in more than four installments; or (2) provides for repayment in any number of installments and imposes a finance charge on the buyer; or (3) provides for repayment in any number of installments and charges more for the goods or services than they would have cost if the buyer had paid by cash or credit card, or gives the buyer fewer or lower quality goods or services than he or she would have received in a cash sale (*see Civ. Code § 1802.6*).

[*OR*]

F. Account. A "retail installment account" is a revolving account established by an agreement, entered into in California by a retail seller and a retail buyer, that requires the buyer to pay in installments the outstanding balance incurred in buying consumer goods or services from the seller and carries a finance charge expressed as a percent of the periodic balances to accrue in the future, providing the charge is not capitalized or stated as a dollar amount in the agreement (*see Civ. Code § 1802.7*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a general contention that the Unruh Act applies to a consumer sales transaction.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of whether or not the Unruh Act applies. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 206.152 -206.156* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Liberal Construction

Vasquez v. Superior Court *(1971) 4 Cal. 3d 800, 94 Cal. Rptr. 796, 484 P.2d 964* , was an action brought by a group of consumers who had purchased goods under installment contracts. Plaintiffs sued the seller, as well as the finance company to which the sales contracts were assigned, on the theories of fraud and violation of the Unruh Act. The trial court refused to certify the class action for fraud and the Supreme Court issued a writ of mandate holding, among other things, that the finance company was a proper party to the class action. Although former Civ. Code § 1804.2 limited an assignee's liability to the amount owing "at the time the defense is asserted against the assignee," the Court found the statute did not prevent plaintiffs from bringing an affirmative action against the finance company rather than simply asserting fraud as a defense. The Court reasoned that the purpose of the Unruh Act is to protect consumers, and it should be liberally construed to that end (*4 Cal. 3d 800, 823)* .

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20-206 California Points & Authorities § 206.151

§ 206.151 Supporting Contention That Unruh Act Applies to Loan Transaction--Consumer Sale Was Financed by Lender Closely Connected to Seller [Civ. Code § 1801.6]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE LOAN TRANSACTION BETWEEN PLAINTIFF AND DEFENDANT IS SUBJECT TO THE UNRUH ACT BECAUSE DEFENDANT IS A SUPERVISED FINANCIAL ORGANIZATION _____ [RELATED TO THE SELLER BY COMMON OWNERSHIP AND CONTROL, AND THAT RELATIONSHIP WAS A MATERIAL FACTOR IN THE LOAN TRANSACTION *or* WHO SHARED WITH THE SELLER IN THE PROFITS AND LOSSES OF EITHER OR BOTH THE SALE AND THE LOAN].

A. Substance of Transaction. In applying the Unruh Act, a court must look to the substance rather than the form of the transaction (*Civ. Code § 1801.6(a)*).

B. Lender's Relation to Seller. The Unruh Act applies to a transaction in the form of a loan made by a supervised financial organization to a buyer of goods or services covered by the Unruh Act, when all or a portion of the loan proceeds are used to purchase the goods or services, if either the supervised financial organization and the seller are related by common ownership and control and the relationship was a material factor in the loan transaction, or the supervised financial organization and the seller share in the profits and losses of either or both the sale and the loan (*Civ. Code § 1801.6(b)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the Unruh Act applies to a loan used to finance a consumer installment sale, whether or not the installment contract was not assigned to the lender, when the lender was closely related to the seller. For forms for use when the installment contract or account was assigned to the

lender, see *§ 206.160*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of whether or not the Unruh Act applies. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Substance of Transaction

Civ. Code § 1801.6, which establishes standards for determining whether a loan transaction is subject to the Unruh Act, was enacted in response to *King v. Central Bank (1977) 18 Cal. 3d 840 , 135 Cal. Rptr. 771 , 558 P.2d 857* [*Civ. Code § 1801.6(a)*]. In *King*, a bank regularly furnished its printed contract forms to an insurance broker, who required his clients to finance their purchases through the bank, received a fee for each customer meeting the bank's credit requirements, and shared in the bank's profits. The "loan" contract assigned the insurance policy to the bank as security, together with all rights to cancel the policy in event of nonpayment. The Court in *King* held that the transaction was subject to the Unruh Act because the bank and the broker were jointly engaged in "the providing of insurance" within the meaning of *Civ. Code § 1802.2* (*18 Cal. 3d 840, 845-846)* . The close connection between the bank and the broker, the bank's direct role in arranging and supervising the transaction, and the bank's retention of substantial control over and interest in the insurance policy could all lead a reasonable trier of fact to infer that the bank provided plaintiffs the insurance (*18 Cal. 3d 840, 846-847)* . *Civ. Code § 1801.6* makes clear that a close relationship between the seller and the lender is required before the Unruh Act will apply to a loan transaction.

The statute is not intended to abrogate the judicial principle that the substance of a transaction rather than its form is determinative of its characterization as a loan or credit sale. Furthermore, it is not intended to abrogate what remained of *Morgan v. Reasor Corp. (1968) 69 Cal. 2d 881, 893, 73 Cal. Rptr. 398, 447 P.2d 638* (discussed in *§ 206.158[3][a]*) after Stats. 1969, ch. 554 enacted *Civ. Code § 1801.4* to exempt residential construction contracts from the Unruh Act [*see Civ. Code § 1801.6(a)*].

[b] Lender's Relation to Seller

The term "supervised financial organization" means a person organized, chartered, or holding a license or authorization certificate to make loans pursuant to the laws of California or the United States who is subject to supervision by an official or agency of California or the United States [*Civ. Code § 1801.6(c)(1)*].

For purposes of the Unruh Act, receipt of a loan commission or brokerage or referral fee by a seller from a supervised financial organization does not constitute a sharing of profits of the supervised financial organization, provided that the payment (1) is reasonable under the circumstances existing at the time the loan is consummated, and (2) is not refundable or is wholly or partly refundable only if the loan is voluntarily paid in full prior to its scheduled maturity [*Civ. Code § 1801.6(c)(2)*]. A loan commission, brokerage or referral fee is considered reasonable if it does not exceed the greater of $20 or one percent of the amount financed [*see Civ. Code § 1801.6(c)(2)*].

Payment of money by a seller to a supervised financial organization pursuant to an actual or alleged contractual or statutory obligation to indemnify a supervised financial organization for losses incurred as a result of the assertion by a buyer of claims or defenses with respect to goods or services purchased with loan proceeds does not constitute participation in or sharing of loan losses by the seller [*Civ. Code § 1801.6(c)(3)*].

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20-206 California Points & Authorities § 206.152

§ 206.152 Opposing Contention That Unruh Act Applies to Transaction--Contract Was Not Made Within California [Civ. Code § 1802.19]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE UNRUH ACT DOES NOT APPLY TO THE _____ [CONTRACT *or* ACCOUNT] THAT IS THE SUBJECT OF THIS ACTION BECAUSE THE _____ [CONTRACT *or* ACCOUNT] WAS NOT MADE IN CALIFORNIA.

A. California Contract or Account. A retail installment contract, contract, retail installment account, installment account, or revolving account is not subject to the Unruh Act unless the seller offers or agrees in California to sell to a buyer who is a California resident, or a buyer who is a California resident accepts or offers in California to buy (*see Civ. Code § 1802.19(a)*).

[*Optional*] **B. Solicitation by Out-of-State Seller.** A solicitation or communication to sell, oral or written, originating outside of California, but forwarded to, and received in this state by, a buyer who is a resident of this state is deemed to be an offer or agreement to sell in California (*see Civ. Code § 1802.19(b)*).

[*Optional*] **C. Solicitation by Buyer to Out-of-State Seller.** A solicitation or communication to buy, oral or written, originating within California, from a buyer who is a California resident, but forwarded to, and received by, a retail seller outside of this state, is deemed to be an acceptance or offer to buy in this state (*see Civ. Code § 1802.19(c)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the Unruh Act applies to a consumer sales transaction on the ground that the transaction did not take place in California. Although an out-of-state consumer

sales transaction is not subject to the Unruh Act, it may be governed by the federal credit disclosure requirements prescribed by the Truth in Lending Act (*15 U.S.C. § 1601 et seq.*). For discussion of that Act, see California Forms of Pleading and Practice, Ch. 501, *Sales: Retail Installment Sales* (Matthew Bender).

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of whether or not the Unruh Act applies. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

This form may be used in opposition to the points and authorities *set forth in §§ 206.150* and *206.151*.

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20-206 California Points & Authorities § 206.153

§ 206.153 Opposing Contention That Unruh Act Applies to Transaction--Contract Provided for Residential Construction or Sale of Real Property [Civ. Code § 1801.4(a), (b)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE CONTRACT(S) BETWEEN PLAINTIFF AND DEFENDANT PROVIDE(S) FOR THE _____ [CONSTRUCTION AND/OR SALE OF A STRUCTURE DESIGNED FOR _____ (RESIDENTIAL *or* COMMERCIAL) OCCUPANCY *or* SALE OF REAL PROPERTY], AND THEREFORE IS/ARE NOT SUBJECT TO THE UNRUH ACT.

Construction or Real Estate Contracts. The Unruh Act does not apply to any contract or series of contracts providing for: (1) the construction, sale, or construction and sale of an entire residence, including a mobilehome, or all or part of a structure designed for commercial or industrial occupancy, with or without a parcel of real property or an interest in the parcel; or (2) for the sale of a lot or parcel of real property, including any site preparation incidental to the sale (*Civ. Code § 1801.4(a), (b)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the Unruh Act applies to a consumer sales transaction on the ground that the sales contract provided for construction or sale of an entire residence or for the sale of real property. *Civ. Code § 1801.4* serves as an exception to the rule that a contract for services furnished in connection with the improvement of real property is generally subject to the Act [*see Civ. Code § 1802.2*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of whether or not the Unruh Act applies. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

This form may be used in opposition to the points and authorities *set forth in §§ 206.150* and *206.151*.

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20-206 California Points & Authorities § 206.154

§ 206.154 Opposing Contention That Unruh Act Applies to Transaction--Buyer Terminated Service Contract With No Continuing Obligation

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE UNRUH ACT DOES NOT APPLY TO THE SERVICE CONTRACT BETWEEN PLAINTIFF AND DEFENDANT BECAUSE NONPAYMENT OF AN INSTALLMENT TERMINATED THE CONTRACT WITH NO CONTINUING OBLIGATION TO PAY.

No Continuing Obligation. The Unruh Act does not apply to a service contract that can be terminated without further obligation by nonpayment of the next installment when due because there is no remaining balance or underlying debt to pay (*Crawford v. Farmers Group, Inc. (1984) 160 Cal. App. 3d 1164, 1169 , 207 Cal. Rptr. 155*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the Unruh Act applies to a consumer service contract on the ground that the contract was terminated by nonpayment of the next installment, with no continuing obligation or underlying debt.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of whether or not the Unruh Act applies. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

This form may be used in opposition to the points and authorities *set forth in §§ 206.150* and *206.151*.

[3] Discussion of Authorities

[a] No Continuing Obligation

In ***Crawford v. Farmers Group, Inc.*** *(1984) 160 Cal. App. 3d 1164 , 207 Cal. Rptr. 155* , plaintiff brought a class action for violations of the Unruh Act on behalf of consumers who bought automobile insurance from defendant insurer. Plaintiff's premium was calculated on the basis of a six-month term of insurance and could be paid in monthly installments, with a monthly service fee. The plan provided one month of coverage for each month a premium was paid, without any further obligation to pay or purchase beyond that month. The trial court found for defendant insurance company and plaintiff appealed.

The court of appeal affirmed, holding that the payment plan, although a sale of "services" furnished in connection with the providing of insurance, did not constitute a "retail installment sale" under the Unruh Act because it did not involve an extension of credit. The court reasoned that a buyer could terminate the policy without further obligation by not paying the next month's premium when due, and no creditor-debtor relationship arose because there was no remaining balance or underlying debt to pay (*160 Cal. App. 3d 1164, 1169)* .

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20-206 California Points & Authorities § 206.155

§ 206.155 Opposing Contention That Unruh Act Applies to Transaction--Buyer Did Not Purchase Goods Primarily for Personal Use [Civ. Code § 1802.1]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE TRANSACTION BETWEEN PLAINTIFF AND DEFENDANT WAS NOT SUBJECT TO THE UNRUH ACT BECAUSE PLAINTIFF DID NOT INTEND AT THE TIME THE CONTRACT WAS ENTERED INTO TO USE THE GOODS PRIMARILY FOR PERSONAL USE.

Personal Use. A transaction is not covered by the Unruh Act if, at the time the contract for sale of goods was entered into, the plaintiff did not intend to use the goods primarily for personal, family, or household purposes (*Civ. Code § 1802.1*; *Cessna Finance Corp. v. Pivo (1976) 58 Cal. App. 3d 281, 287-288, 129 Cal. Rptr. 888*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the Unruh Act applies to a consumer sales transaction on the ground that the buyer did not intend to use the purchased goods primarily for personal use.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of whether or not the Unruh Act applies. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

This form may be used in opposition to the points and authorities *set forth in §§ 206.150* and *206.151*.

[3] Discussion of Authorities

[a] Personal Use

In ***Cessna Finance Corp. v. Pivo*** *(1976) 58 Cal. App. 3d 281, 129 Cal. Rptr. 888* , three brothers bought three planes together from a Cessna dealer, who during negotiations suggested that the monthly installment payments could be raised by leasing the planes to a flying club. After the sale, the brothers leased the planes to the club, which made installment payments directly to the dealer's finance company. The brothers themselves each logged under 100 hours of flying time on the planes. When the contract went into default, the finance company repossessed the planes and sought a deficiency judgment against the brothers. The trial court found for defendants, reasoning that the aircraft were "goods" within the meaning of the Unruh Act and that *Civ. Code § 1812.5* prohibits deficiency judgments.

The court of appeal reversed, holding that the aircraft were not bought primarily for personal use under the Unruh Act (*58 Cal. App. 3d 281, 286)* . The question is determined by looking to the intent of the parties at the time the contract was entered into, not the actual use as demonstrated over the life of the contract (*58 Cal. App. 3d 281, 287-288)* . The court found that defendants intended from the beginning that the aircraft would be leased for the purpose of generating revenue to make the monthly payments, necessarily contemplating that the primary use of the aircraft would be by persons other than the buyers. Corroborating that intent, the defendants actually made very little personal use of the aircraft (*58 Cal. App. 3d 281, 288)* . In addition, the court observed that defendants were successful businessmen, not the unsophisticated consumers the Unruh Act was designed to protect (*58 Cal. App. 3d 281, 287)* .

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20-206 California Points & Authorities § 206.156

§ 206.156 Opposing Contention That Unruh Act Applies to Transaction--Transaction Was Insurance Premium Finance Agreement [Civ. Code § 1801.7]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE TRANSACTION BETWEEN PLAINTIFF AND DEFENDANT WAS NOT SUBJECT TO THE UNRUH ACT BECAUSE IT WAS AN INSURANCE PREMIUM FINANCING AGREEMENT ENTERED INTO BY AN INDUSTRIAL LOAN COMPANY.

Insurance Premium Finance Agreement. The Unruh Act does not apply to any premium finance agreement entered into by an industrial loan company pursuant to *Financial Code Section 18560 et seq.* (*Civ. Code § 1801.7*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the Unruh Act applies to a consumer sales transaction on the ground that the transaction was a premium finance agreement entered into by an industrial loan company pursuant to *Fin. Code § 18560 et seq.*

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of whether or not the Unruh Act applies. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

This form may be used in opposition to the points and authorities *set forth in §§ 206.150* and *206.151*.

[b] Premium Finance Agreements

A premium finance agreement is an agreement between an insured and an industrial loan company that is incorporated under *Fin. Code § 18000 et seq.* and is in the business of financing insurance premiums [*see Fin. Code §§ 18560, 18564, 18565*]. The financing agreement takes the form of a loan contract, note, agreement, or obligation by which the insured agrees to pay to the company in installments the principal amount advanced by the company to an insurer or producer in payment of premium on an insurance contract or contracts [*see Fin. Code § 18564*]. The required disclosures and finance charge limitations applicable to premium financing agreements are set out in *Fin. Code §§ 18605 et seq.* and *18625 et seq.*

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20-206 California Points & Authorities § 206.157

§ 206.157 Supporting Contention That Buyer May Recover Finance Charges Paid to Seller [Civ. Code § 1812.7]--General Form

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF IS ENTITLED TO RECOVER ALL _____ [FINANCE and/or DELINQUENCY and/or COLLECTION and/or EXTENSION and/or DEFERRAL and/or REFINANCE] CHARGES IMPOSED IN CONNECTION WITH THE _____ [CONTRACT *or* ACCOUNT] THAT IS THE SUBJECT OF THIS ACTION BECAUSE DEFENDANT FAILED TO COMPLY WITH THE UNRUH ACT.

A. Seller's Forfeiture of Finance Charges. When any person fails to comply with the Unruh Act, that person is barred from recovery of any finance charge or of any delinquency, collection, extension, deferral, or refinance charge imposed in connection with the contract or installment account, and the buyer has the right to recover from that person an amount equal to any of the charges paid by the buyer (*Civ. Code § 1812.7*).

[*Optional*] **B. Treble Damages for Illegal Charges on Add-On Sales.** When a person willfully violates the Unruh Act in connection with the imposition, computation, or disclosures of or relating to a finance charge on a consolidated total of two or more contracts under the Act's provisions governing add-on sales, the buyer may recover from that person an amount equal to three times the total of the finance charges and any delinquency, collection, extension, deferral, or refinance charges imposed, contracted for, or received on all contracts included in the consolidated total, and the seller is barred from the recovery of any such charges (*Civ. Code § 1812.9*; *see Civ. Code § 1808.1 et seq.* (add-on sales)).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a consumer who is a party to a retail installment contract or installment account is entitled to recover all finance and other charges paid to the seller.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the seller's liability for finance and other charges already paid. In addition, if the consumer is a defendant in a collection action, the form may be adapted to support the contention that the seller is barred from recovery of any finance or other charges [*see Civ. Code § 1812.7*]. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 206.159* may be used to oppose the contention supported by these points and authorities.

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20-206 California Points & Authorities § 206.158

§ 206.158 Supporting Contention That Buyer Can Recover Finance Charges Paid to Assignee of Installment Contract or Account [Civ. Code § 1812.7]--Assignee Had Knowledge of Unruh Act Violation

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF IS ENTITLED TO RECOVER ALL _____ [FINANCE and/or DELINQUENCY and/or COLLECTION and/or EXTENSION and/or DEFERRAL and/or REFINANCE] CHARGES IMPOSED IN CONNECTION WITH THE _____ [CONTRACT *or* ACCOUNT] THAT IS THE SUBJECT OF THIS ACTION BECAUSE DEFENDANT HAD CONSTRUCTIVE KNOWLEDGE THAT THE SELLER VIOLATED THE UNRUH ACT.

A. Assignee's Forfeiture of Finance Charges. Any person who acquires a contract or installment account with knowledge of noncompliance with the Unruh Act is barred from recovery of any finance charge or of any delinquency, collection, extension, deferral, or refinance charge imposed in connection with such contract or installment account, and the buyer has the right to recover from that person an amount equal to any of the charges paid by the buyer (*Civ. Code § 1812.7*).

B. Constructive Knowledge. Constructive knowledge, or knowledge of facts sufficient to put a reasonable person on inquiry, are sufficient to constitute "knowledge" under *Civ. Code § 1812.7* (*Morgan v. Reasor Corp. (1968) 69 Cal. 2d 881, 893, 73 Cal. Rptr. 398, 447 P.2d 638*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the Unruh Act applies to an installment contract or account that was assigned to a third party, such as to a lender who financed the sales transaction.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the seller's liability for finance and other charges already paid. In addition, if the consumer is a defendant in a collection action, the form may be adapted to support the contention that the seller is barred from recovery of any finance or other charges [*see Civ. Code § 1812.7*]. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Constructive Knowledge

In ***Morgan v. Reasor Corp.*** *(1968) 69 Cal. 2d 881, 73 Cal. Rptr. 398, 447 P.2d 638* , a builder contracted with plaintiffs to construct a house on their real property. Plaintiffs gave the builder a promissory note for payment in installments, and the builder then assigned the contract and the note to a lender. Plaintiffs later brought an action to recover finance charges paid, claiming the original transaction had not complied with the Unruh Act. The trial court found for plaintiffs, and defendants appealed.

The court of appeal affirmed, holding that the lender had knowledge of noncompliance with the Unruh Act. The court explained that constructive knowledge, or knowledge of facts sufficient to put a reasonable person on inquiry, are sufficient to constitute "knowledge" under *Civ. Code § 1812.7* (*69 Cal. 2d 881, 889)* . Because the lender received the note and the contract as two separate documents, the court reasoned that the lender knew of facts that would have put a reasonable person on inquiry as to whether it had violated the Unruh Act's single-document requirement. The court went on to explain that any prior complaints against the seller or an unusually high discount rate might also constitute suspicious circumstances putting an assignee on inquiry notice (*69 Cal. 2d 881, 893)* .

Morgan was abrogated in part in 1969 when *Civ. Code 1801.4* was enacted to provide that the Unruh Act does not apply to residential construction contracts. For further discussion of this provision, see *§ 206.153*.

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20-206 California Points & Authorities § 206.159

§ 206.159 Opposing Contention That Buyer May Recover All Finance and Other Charges Paid to Seller or Assignee--Nonwillful Violation Was Corrected Within 30 Days [Civ. Code § 1812.8]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IS NOT LIABLE FOR FINANCE AND OTHER CHARGES PAID BY PLAINTIFF BECAUSE THE UNRUH ACT VIOLATIONS WERE NOT WILLFUL AND WERE CORRECTED BY DEFENDANT WITHIN 30 DAYS OF THE EXECUTION OF THE ORIGINAL CONTRACT BY PLAINTIFF.

Correction by Seller or Assignee. A holder of a contract or installment account who corrects a nonwillful violation of the Unruh Act by (1) making delivery to the buyer of a corrected copy of the contract within 30 days of the execution of the original contract by the buyer, and (2) crediting any amount improperly collected from the buyer against the indebtedness evidenced by the contract, is not subject to any penalty under the Act (*Civ. Code § 1812.8*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a consumer who is a party to a retail installment contract or installment account is entitled to recover all finance and other charges paid to the seller or assignee.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the seller's liability for finance and other charges already paid. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

This form may be used in opposition to the points and authorities *set forth in §§ 206.157* and *206.158*.

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20-206 California Points & Authorities § 206.160

§ 206.160 Supporting Contention That Seller or Assignee Is Due Balance on Retail Installment Contract or Account [Civ. Code § 1812.2]--General Form

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT HAS DEFAULTED ON THE _____ [CONTRACT *or* ACCOUNT] THAT IS THE SUBJECT OF THIS ACTION AND PLAINTIFF IS ENTITLED UNDER THE TERMS OF THE _____ [CONTRACT *or* ACCOUNT] TO RECOVERY OF THE BALANCE DUE.

Recovery of Balance Due on Default. In the event of any default by the buyer in the performance of his or her obligations under a contract or installment account, the holder, pursuant to any rights granted therein, may proceed to recover judgment for the balance due (*Civ. Code § 1812.2*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the seller or assignee may recover the balance due on an installment contract or installment account because the buyer has defaulted.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the seller's entitlement to the balance due on the contract or account. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 206.161 -206.163* may be used to oppose the contention supported by these points and authorities.

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20-206 California Points & Authorities § 206.161

§ 206.161 Opposing Contention That Seller or Assignee Is Due Balance on Retail Installment Contract or Account--Seller Repossessed Goods and Deficiency Judgment Is Barred [Civ. Code § 1812.5]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF IS NOT ENTITLED TO RECOVER ANY DEFICIENCY JUDGMENT AFTER REPOSSESSION AND RESALE OF THE GOODS THAT ARE THE SUBJECT OF THE _____ [CONTRACT *or* ACCOUNT] ON WHICH PLAINTIFF HAS SUED.

Deficiency Judgment Prohibited. If the proceeds from the repossession and resale of goods that are the subject of a contract or installment account with a defaulting buyer are not sufficient to cover the expenses of resale, expenses of retaking, and satisfaction of the balance due under the contract or account, the holder may not recover the deficiency from the buyer or from anyone who has succeeded to the obligations of the buyer (*Civ. Code § 1812.5*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the seller or assignee may recover the remaining balance due on an installment contract or installment account on the ground that the seller elected to repossess and resell the goods and therefore is barred from any deficiency judgment.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the seller's entitlement to the balance due on the contract or account. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

This form may be used in opposition to the points and authorities *set forth in § 206.160*.

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20-206 California Points & Authorities § 206.162

§ 206.162 Opposing Contention That Seller or Assignee Is Due Balance on Retail Installment Contract or Account--Buyer Discharged Obligation to Last Known Holder of Contract or Account [Civ. Code § 1806.1]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF IS NOT ENTITLED TO RECOVER THE BALANCE SUED FOR BECAUSE DEFENDANT HAD NO NOTICE OF ACTUAL OR INTENDED ASSIGNMENT OF THE _____ [CONTRACT *or* ACCOUNT] AND PAID THE LAST KNOWN HOLDER OF THE _____ [CONTRACT *or* ACCOUNT].

Payment to Last Known Holder Discharges Obligation. Unless the buyer has notice of actual or intended assignment of a contract or installment account, payment made by the buyer to the last known holder of the contract or installment account discharges the buyer's obligation to the extent of that payment (*Civ. Code § 1806.1*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that an assignee may recover the balance due on an installment contract or installment account on the ground that the buyer paid the last known holder of the contract or account and therefore discharged his or her obligation.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the seller's entitlement to the balance due on the contract or account. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

This form may be used in opposition to the points and authorities *set forth in § 206.160*.

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20-206 California Points & Authorities § 206.163

§ 206.163 Opposing Contention That Seller or Assignee Is Due Balance on Retail Installment Contract or Account--Buyer Was Entitled to New Payment Schedule After Defaulting on Balloon Payment [Civ. Code § 1807.3]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF IS NOT ENTITLED TO RECOVER THE BALANCE SUED FOR BECAUSE THE DEFAULT SUED ON WAS IN THE PAYMENT OF A BALLOON PAYMENT AND DEFENDANT DID NOT OBTAIN A NEW PAYMENT SCHEDULE WITH PAYMENTS NOT SUBSTANTIALLY GREATER THAN THE AVERAGE OF THE PRECEDING INSTALLMENTS.

Buyer Entitled to New Payment Schedule. If a buyer defaults in the payment of any balloon payment, he or she must be given an absolute right to obtain a new payment schedule under which, unless the buyer agrees otherwise, the periodic payments are not substantially greater than the average of the preceding installments (*Civ. Code § 1807.3*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a seller or assignee may recover the balance due on an installment contract or installment account on the ground that the buyer was entitled to a new payment schedule after defaulting on a balloon payment.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the seller's entitlement to the balance due on the contract or account. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of

law stated.

This form may be used in opposition to the points and authorities *set forth in § 206.160*.

[b] Balloon Payment Defined

For purposes of *Civ. Code § 1807.3*, a balloon payment is any payment, other than a deferred down payment, under a contract or refinancing agreement that is more than twice the amount of an otherwise regularly scheduled equal payment. The contract or refinancing agreement providing for a balloon payment must also contain a notice to the buyer of his or her absolute right to obtain a new payment schedule in case of a default in the payment of any balloon payment [*see Civ. Code § 1807.3*].

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20-206 California Points & Authorities § 206.164

§ 206.164 Opposing Contention That Seller or Assignee Is Due Balance on Retail Installment Contract or Account--Seller Relied on Acceleration Clause Prohibited by Unruh Act [Civ. Code § 1804.1(b)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF IS NOT ENTITLED TO RECOVER THE BALANCE SUED FOR BECAUSE IT BECAME DUE PURSUANT TO AN ACCELERATION CLAUSE AND IN THE ABSENCE OF ANY OTHER DEFAULT BY DEFENDANT.

A. Prohibited Clause Is Void. Any provision in a contract that is prohibited by the Unruh Act is void (*Civ. Code § 1804.4*).

B. Acceleration Clause. No contract or obligation may contain a provision by which the holder may accelerate the maturity of any part or all of the amount owing under the contract, in the absence of a buyer's default in the performance of any of his or her obligations (*Civ. Code § 1804.1(b)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that an assignee may recover the balance due on an installment contract or installment account on the ground that the seller accelerated the maturity of the balance due, pursuant to a contractual clause prohibited by the Unruh Act, in the absence of any default by the buyer.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the seller's entitlement to the balance due on the contract or account. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

This form may be used in opposition to the points and authorities *set forth in § 206.160*.

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20-206 California Points & Authorities §§ 206.165-206.179

[Reserved]

§§ 206.165[Reserved]

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20-206 California Points & Authorities § 206.180

§ 206.180 Supporting Contention That Rees-Levering Act Applies to Motor Vehicle Transaction [Civ. Code § 2981]--Sales Contract [Civ. Code § 2981(a)(1)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE TRANSACTION IS SUBJECT TO THE REES-LEVERING MOTOR VEHICLE SALES AND FINANCE ACT BECAUSE IT IS BASED ON A "CONDITIONAL SALE CONTRACT."

A. Transaction Is Subject to Rees-Levering Act. The provisions of the Rees-Levering Motor Vehicle Sales and Finance Act ("Rees-Levering Act") apply to all conditional sale contracts between a buyer and any person engaged in the business of selling or leasing under conditional sale contracts motor vehicles that are required to be registered under the Vehicle Code and are bought primarily for personal or family purposes (*see Civ. Code § 2981(b), (c), (k)*).

B. Contract for Sale Is Conditional Sale Contract. A "conditional sale contract" for purposes of the Rees-Levering Act is any contract for the sale of a motor vehicle between a buyer and a seller, with or without accessories, under which possession is delivered to the buyer and either (A) the title vests in the buyer thereafter only on the payment of all or a part of the price, or the performance of any other condition, or (B) a lien on the property is to vest in the seller as security for the payment of part or all of the price, or for the performance of any other condition (*Civ. Code § 2981(a)(1)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the Rees-Levering Motor Vehicle Sales and Finance Act (*Civ. Code § 2981 et seq.*) applies to an automobile sales transaction.

This form may be used, as appropriate, by either a buyer or a seller. For example, it may be used by a buyer who is seeking to establish his or her right to rescind an unenforceable conditional sale contract [*see § 206.200* et seq.], or by a seller who is seeking to enforce the contract and recover a deficiency after repossession and sale [*see § 206.230*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of whether or not the Rees-Levering Act applies. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, for example, counsel may refer to specific provisions of the sales agreement between the parties to demonstrate that the agreement satisfies the statutory definition of a conditional sale contract under *Civ. Code § 2981(a)(1)* and is therefore subject to the formalities and disclosure requirements under the Rees-Levering Act.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 206.183 -206.187* may be used to oppose the contention supported by these points and authorities.

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20-206 California Points & Authorities § 206.181

§ 206.181 Supporting Contention That Rees-Levering Act Applies to Motor Vehicle Transaction [Civ. Code § 2981]--Transaction in Form of Lease Is Actually Conditional Sale [Civ. Code § 2981(a)(2)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE TRANSACTION IS SUBJECT TO THE REES-LEVERING MOTOR VEHICLE SALES AND FINANCE ACT BECAUSE THE TRANSACTION, ALTHOUGH IN THE FORM OF A LEASE, IS A CONDITIONAL SALE.

A. Transaction Is Subject to Rees-Levering Act. [*See § 206.180, Paragraph A.*]

B. Contract for Bailment Is Conditional Sale Contract. A "conditional sale contract" for purposes of the Rees-Levering Act means any contract for the bailment of a motor vehicle between a buyer and a seller, with or without accessories, by which the bailee or lessee agrees to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the vehicle and its accessories, if any, at the time the contract is executed, and by which it is agreed that the bailee or lessee will become, or for no other or for a nominal consideration has the option of becoming, the owner of the vehicle on full compliance with the terms of the contract (*Civ. Code § 2981(a)(2)*).

C. Court Must Look to Substance Rather Than Form of Agreement. Law and equity require that a court look to substance rather than form in ascertaining the nature and legal effect of an agreement. Therefore, a court must examine the substantive rights and liabilities created by a motor vehicle lease agreement in order to determine whether or not it is a conditional sale contract within the meaning of *Civil Code Section 2981(a)(2)* (*Thomas v. Wright (1971) 21 Cal. App. 3d 921, 924-925, 98 Cal. Rptr. 874*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the Rees-Levering Motor Vehicle Sales and Finance Act (*Civ. Code § 2981 et seq.*) applies to a transaction, even though the transaction is characterized as a lease.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of whether or not the Rees-Levering Act applies. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, for example, counsel would identify the substantive rights and liabilities created by the lease agreement, referring to specific paragraph numbers or clauses in the agreement, pointing out how those provisions satisfy the statutory definition of a conditional sale contract under *Civ. Code § 2981(a)(2)* and is therefore subject to the formalities and disclosure requirements under the Rees-Levering Act.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 206.183 -206.187* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Court Must Look to Substance Rather Than Form of Agreement

In ***Thomas v. Wright*** *(1971) 21 Cal. App. 3d 921, 98 Cal. Rptr. 874* , plaintiff brought an action seeking cancellation and enjoining the foreclosure of a deed of trust on her home executed by her to secure payment of obligations assumed by her under the provisions of an instrument entitled "Automobile Leasing Contract." The trial court rendered judgment in favor of defendants and dissolved a previously granted injunction against the foreclosure. Plaintiff appealed.

The court of appeal reversed the judgment. The court recited the definition of a condition sale contract under *Civ. Code § 2981(a)(2)* and held that the contract fell within that definition. Defendants argued that because the automobile financing contract was entitled "Automobile Leasing Contract" and the parties were therein referred to as "lessor" and "lessee," it was not governed by the Rees-Levering Act (*21 Cal. App. 3d 921, 924)* . The court stated that such nomenclature is not conclusive, however, and that law and equity require that it look to substance rather than form in ascertaining the nature and legal effect of the agreement (*21 Cal. App. 3d 921, 924-925)* . Therefore, the court examined the substantive rights and liabilities created by the so-called "Automobile Leasing Contract" and determined that it was a "Conditional Sale Contract" within the meaning of *Civ. Code § 2981(a)(2)* (*21 Cal. App. 3d 921, 925)* .

NOTE:

After the holding in *Thomas*, *Civ. Code § 2981(a)(2)* was amended, and *Civ. Code § 2981.5* was added to the Rees-Levering Act to exclude certain kinds of "open-ended" automobile leases from the coverage of the Act [*see* Stats. 1973, ch. 696, § 4 (setting forth changes intended to clarify and restate existing law in light of uncertainty in law as evidenced by *Thomas*); *see also Budget Rent-A-Car of Southern Cal. v. Bergman (1981) 121 Cal. App. 3d 256, 264-265 n.2, 175 Cal. Rptr. 286]* . The point set forth in Paragraph C, however, does not appear to have been affected by the changes.

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20-206 California Points & Authorities § 206.182

§ 206.182 Supporting Contention That Rees-Levering Act Applies to Motor Vehicle Transaction [Civ. Code § 2981]--Seller-Assisted Financing Not Exempt [Civ. Code § 2982.5(a)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE TRANSACTION IS SUBJECT TO THE REES-LEVERING MOTOR VEHICLE SALES AND FINANCE ACT BECAUSE THE MOTOR VEHICLE FINANCING IN THIS CASE WAS A SELLER-ASSISTED LOAN.

A. Purpose of Rees-Levering Act. The Rees-Levering Act was not designed to protect the sophisticated buyer, capable of arranging his or her own financing, but to protect the unwary naive purchaser who is the victim of financing arrangements controlled jointly by the seller and lender (*Hernandez v. Atlantic Finance Co. (1980) 105 Cal. App. 3d 65, 75, 164 Cal. Rptr. 279*).

B. Rees-Levering Act Applies to Seller-Assisted Loans. The exemption under *Civil Code Section 2982.5(a)* is designed to exclude from the coverage of the Rees-Levering Act only independent private negotiations between a buyer and his or her lender, without involvement of the seller (*Hernandez v. Atlantic Finance Co. (1980) 105 Cal. App. 3d 65, 77, 164 Cal. Rptr. 279*).

[*Optional*] **C. Court Looks to Substance of Transaction Rather Than Form.** In determining the application of consumer protection laws to particular transactions, the court must look to the substance of the transaction and not allow mere form to dictate the result (*Hernandez v. Atlantic Finance Co. (1980) 105 Cal. App. 3d 65, 77, 164 Cal. Rptr. 279*).

[*Optional*] D. Preparation of Loan Documents by Dealer. When a dealer assists a purchaser of a vehicle by preparing the loan paperwork and taking it to a lending institution, that constitutes a seller-assisted loan and the Rees-Levering Act applies (*Eldorado Bank v. Lytle (1983) 147 Cal. App. 3d Supp. 17, 21 , 195 Cal. Rptr. 499*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the Rees-Levering Motor Vehicle Sales and Finance Act (*Civ. Code § 2981 et seq.*) applies to a transaction because the seller assisted in the financing.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of whether or not the Rees-Levering Act applies. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should refer to facts showing that the seller assisted the buyer in obtaining financing, such as: (1) completion of loan documents for the buyer [*see Eldorado Bank v. Lytle (1983) 147 Cal. App. 3d Supp. 17, 21 , 195 Cal. Rptr. 499* ; *Hernandez v. Atlantic Finance Co. (1980) 105 Cal. App. 3d 65, 73, 164 Cal. Rptr. 279]* ; (2) delivery of loan documents to the seller [*see Eldorado Bank v. Lytle (1983) 147 Cal. App. 3d Supp. 17, 21 , 195 Cal. Rptr. 499* ; *Hernandez v. Atlantic Finance Co. (1980) 105 Cal. App. 3d 65, 73, 164 Cal. Rptr. 279]* ; (3) contact by the seller with the finance company to determine on what terms the finance company will extend credit to the buyer [*Hernandez v. Atlantic Finance Co. (1980) 105 Cal. App. 3d 65, 68, 164 Cal. Rptr. 279]* ; or (4) transportation of buyer to finance company [*Hernandez v. Atlantic Finance Co. (1980) 105 Cal. App. 3d 65, 73, 164 Cal. Rptr. 279]* .

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 206.184* and *206.187* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Purpose of Rees-Levering Act

Hernandez v. Atlantic Finance Co. *(1980) 105 Cal. App. 3d 65, 164 Cal. Rptr. 279* , involved an action brought on behalf of the general public against a finance company and a used motor vehicle dealer for conduct alleged to be in violation of the Rees-Levering Act. Plaintiff alleged that the dealer solicited and obtained prospective purchasers for the sale of its used vehicles by assisting purchasers to obtain loans from defendant finance company. Plaintiff further alleged that the finance company used as security the purchaser's furniture and other personal possessions in addition to the automobile being purchased. Following a court trial, judgment on the merits was granted in favor of defendants and plaintiff appealed.

The court of appeal reversed the judgment. On appeal defendants argued that they were exempt from the Rees-Levering Act under Civ. Code § 2982.5(a), which exempts a loan between the purchaser of a motor vehicle and a supervised financial organization. Plaintiff contended that the exemption was enacted to cover only privately obtained personal loans, and maintained that the Rees-Levering Act was not designed to protect the sophisticated buyer, capable of arranging his or her own financing, but to protect the unwary, naive purchaser who is the victim of financing arrangements controlled jointly by the seller and lender. The court found that the legislative history of the Rees-Levering Act supported plaintiff's position (*105 Cal. App. 3d 65, 75)* . The court held that the conduct of the seller and the finance company was not exempt from the Rees-Levering Act (*105 Cal. App. 3d 65, 78)* , and that the trial court erred in finding that there was no common scheme or design to deprive consumers of the rights secured to them and the general public by the provisions of Rees-Levering (*105 Cal. App. 3d 65, 81)* .

[b] Rees-Levering Act Applies to Seller-Assisted Loans

The facts and procedural background of ***Hernandez v. Atlantic Finance Co.*** *(1980) 105 Cal. App. 3d 65, 164 Cal. Rptr. 279* , are *discussed under § 206.182[3][a]*. In *Hernandez*, the court of appeal addressed the issue of whether a transaction in which an automobile dealer obtained a prospective purchaser and arranged with a finance company for a loan that was to be secured by the purchaser's furniture and other personal possessions is exempt from the requirements of the Rees-Levering Act. The court recited the provisions under *Civ. Code § 2982.5(a)* that provide an exemption for loans between a purchaser of a motor vehicle and a supervised financial organization, as defined, and looked to the plain meaning of the words used by the Legislature. It concluded that the exemption under § 2982.5(a) is designed to exclude from the coverage of the Rees-Levering Act only independent private negotiations between a buyer and his or her lender (*105 Cal. App. 3d 65, 77)* .

[c] Court Looks to Substance of Transaction Rather Than Form

The facts and procedural background of ***Hernandez v. Atlantic Finance Co.*** *(1980) 105 Cal. App. 3d 65, 164 Cal. Rptr. 279* , are *discussed under § 206.182[3][a]*. In *Hernandez*, the court of appeal held that an automobile sales finance transaction was not exempt under *Civ. Code § 2982.5(a)*, which applies to independent private negotiations between a buyer and his or her lender, without the involvement of the seller. In determining the application of consumer protection laws to particular transactions, the court must look to the substance of the transaction and not allow mere form to dictate the result (*105 Cal. App. 3d 65, 77)* .

[d] Preparation of Loan Documents by Dealer

Eldorado Bank v. Lytle *(1983) 147 Cal. App. 3d Supp. 17* , *195 Cal. Rptr. 499* , was an action by a bank against purchasers of a motorhome for the deficiency after the vehicle was repossessed and sold on the default of the purchasers. The vehicle was purchased by defendants with the assistance of a sales employee of the dealer who assisted defendants by filling out a credit application and sending the application to the bank. The lower court held that the loan was seller-assisted and therefore came within the Rees-Levering Act. Since the bank's notice of sale did not comply with the requirements of the Act, the bank was not entitled to a deficiency.

The appellate department of the superior court affirmed the judgment. Citing *Hernandez v. Atlantic Finance Co. (1980) 105 Cal. App. 3d 65, 164 Cal. Rptr. 279* (*discussed under § 206.182[3][a]*), the court stated that when a dealer assists a purchaser of a vehicle by preparing the loan paperwork and taking it to a lending institution, that constitutes a seller-assisted loan and the Rees-Levering Act applies (*147 Cal. App. 3d Supp. 17, 21)* .

[4] Additional Authorities

[a] Court Looks to Substance of Transaction Rather Than Form

The facts and procedural background of *Thomas v. Wright (1971) 21 Cal. App. 3d 921, 98 Cal. Rptr. 874* , are discussed in *§ 206.181[3][a]*. In *Thomas*, the court of appeal held that a lease was a conditional sale contract. Law and equity require that a court look to substance rather than form in ascertaining the nature and legal effect of an agreement. Therefore, a court must examine the substantive rights and liabilities created by a motor vehicle lease agreement in order to determine whether or not it is a conditional sale contract within the meaning of *Civ. Code § 2981(a)(2)* (*21 Cal. App. 3d 921, 924-925)* .

Brewer v. Home Owners Auto Finance Co. (1970) 10 Cal. App. 3d 337, 89 Cal. Rptr. 231 , involved a conditional sale contract for the purchase of a used car, which provided for full payment within seven days. The contract was signed by the buyer and the dealer, and assigned by the dealer to a lender on the same day. Two days later the buyer and the lender entered into an amendment of the agreement that provided for five-year financing. The lender took the purchased automobile as security and, in addition, took a deed of trust on the buyer's home. Following repossession of the car, the buyer brought an action challenging the validity of the trust deed. The court of appeal held that the conditional sale was actually a joint undertaking between the dealer and the finance company and did not avoid the effect of the

Rees-Levering Act. The court cited as factors the concurrent assignment of the security agreement to the lender; the fact that it was couched in terms of a conditional sales contract although full payment was required at the end of seven days; the rapidity with which the new agreement was executed; the modification form of the new agreement; and the failure of the new agreement to refer to the trust deed (*10 Cal. App. 3d 337, 342)* .

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20-206 California Points & Authorities § 206.183

§ 206.183 Opposing Contention That Rees-Levering Act Applies to Motor Vehicle Transaction--Cash Sale

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE TRANSACTION IS NOT SUBJECT TO THE REES-LEVERING MOTOR VEHICLE SALES AND FINANCE ACT BECAUSE IT IS MERELY A CASH SALE, NOT A CREDIT SALE.

A. Intent of Rees-Levering Act. The Rees-Levering Motor Vehicle Sales and Finance Act is intended to protect the inexperienced and unwary retail installment plan purchaser and yet leave the greatest freedom of contract available to the experienced business person (*Shapiro v. Ogle (1972) 28 Cal. App. 3d 261, 266, 104 Cal. Rptr. 553*).

B. Rees-Levering Act Does Not Apply to Cash Sales. The Rees-Levering Act is directed only toward credit sales, and its provisions do not apply to cash sales (*Shapiro v. Ogle (1972) 28 Cal. App. 3d 261, 263, 266, 104 Cal. Rptr. 553*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the Rees-Levering Act applies to a motor vehicle sales transaction. The ground set forth in this form is that the transaction is a cash sale, which is not governed under the Rees-Levering Act.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of whether or not the Rees-Levering Act applies. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of

law stated. For example, if the sales document was a standard form of agreement entitled "Conditional Sale Contract," but its terms provided for a cash deposit and total balance due prior to delivery of the vehicle, counsel should refer to those provisions in arguing that the transaction was not a credit sale, and therefore not governed by the Act [*see Shapiro v. Ogle (1972) 28 Cal. App. 3d 261, 267, 104 Cal. Rptr. 553* (illustrating terms of cash sale agreement)].

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in §§ 206.180 -206.182*.

[3] Discussion of Authorities

[a] Intent of Rees-Levering Act

In ***Shapiro v. Ogle*** *(1972) 28 Cal. App. 3d 261, 104 Cal. Rptr. 553* , plaintiff was a purchaser of a custom mobilehome who sued the seller for return of deposits paid toward the purchase price and attorney's fees under the Rees-Levering Act. In the complaint, plaintiff alleged that the parties entered into a written conditional installment sales contract. The trial court found that the contract was a conditional sales contract under the Rees-Levering Act, and awarded the judgment prayed for with interest and attorney's fees. The seller appealed.

The court of appeal affirmed the judgment for the sum prayed for in the complaint, but reversed the portion allowing attorney's fees. The court stated that the Act is intended to protect the inexperienced and unwary retail installment plan purchaser and yet leave the greatest freedom of contract available to the experienced business person (*28 Cal. App. 3d 261, 266)* . The transaction in question was an intended sale with the full purchase price payable on delivery of the mobilehome, and therefore not governed by the Rees-Levering Act. *Civ. Code § 2983.4* provides for payment of reasonable attorney's fees to the party who prevails in any action on a conditional sale contract; since the action was not on a conditional sale contract, the allowance of an attorney's fee was error (*28 Cal. App. 3d 261, 267)* .

Civ. Code § 2981(k), which defines "motor vehicle" for purposes of the Rees Levering Act, was amended in 1981 to exclude from that definition a mobilehome, as defined in *Health & Safety Code § 18008*, that is sold on or after July 1, 1981 [*see* Stats. 1981, ch. 134 § 1].

[b] Rees-Levering Act Does Not Apply to Cash Sales

The facts and procedural background of ***Shapiro v. Ogle*** *(1972) 28 Cal. App. 3d 261, 104 Cal. Rptr. 553* , are *discussed under § 206.183[3][a]*. In *Shapiro*, the court of appeal held that the provisions of the Rees-Levering Act did not apply to a cash sale when the buyer paid earnest money before receiving delivery of a mobilehome to be custom built, there was a mutual rescission of the contract, and the buyer sued to recover that earnest money. The court referred to the provisions of *Civ. Code § 2981(a)(1)* in concluding that the Act is directed only toward credit sales (*28 Cal. App. 3d 261, 266)* .

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20-206 California Points & Authorities § 206.184

§ 206.184 Opposing Contention That Rees-Levering Act Applies to Motor Vehicle Transaction--Seller Is Not "Seller" Under Act [Civ. Code § 2981(b)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE REES-LEVERING MOTOR VEHICLE SALES AND FINANCE ACT DOES NOT APPLY TO THIS TRANSACTION BECAUSE THE PERSON WHO SOLD THE VEHICLE IS NOT ENGAGED IN THE BUSINESS OF SELLING OR LEASING MOTOR VEHICLES UNDER CONDITIONAL SALE CONTRACTS.

A. Conditional Sale Contract Must Have "Seller." Under the Rees-Levering Act, a "conditional sale contract" is a contract for the sale of a motor vehicle between a buyer and a "seller," as defined (*Civil Code § 2981(a)(1)*).

B. Definition of "Seller." "Seller," for purposes of the Rees-Levering Act, means a person engaged in the business of selling or leasing motor vehicles under conditional sale contracts (*Civ. Code § 2981(b)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the Rees-Levering Act applies to a motor vehicle sales transaction. The ground set forth in this form is that the person who has sold the vehicle is not a "seller" within the meaning of the Rees-Levering Act, and therefore the Act does not apply to the transaction [*see Civ. Code § 2981(b)*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of whether or not the Rees-Levering Act applies. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, if the person who has sold the vehicle is a building contractor, not someone engaged in the business of buying and selling motor vehicles, and the contract in question was for the sale of his or her own vehicle with the buyer allowed to pay in installments, counsel should refer to these facts in arguing that there is no "seller" within the meaning of the Rees-Levering Act.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in §§ 206.180 -206.182*.

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20-206 California Points & Authorities § 206.185

§ 206.185 Opposing Contention That Rees-Levering Act Applies to Motor Vehicle Transaction--Vehicle Is Not "Motor Vehicle" Under Act

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE TRANSACTION IS NOT SUBJECT TO THE REES-LEVERING MOTOR VEHICLE SALES AND FINANCE ACT BECAUSE THE VEHICLE IS NOT A VEHICLE REQUIRED TO BE REGISTERED UNDER THE VEHICLE CODE FOR USE PRIMARILY FOR PERSONAL OR FAMILY PURPOSES.

A. Conditional Sale Contract Must Be for "Motor Vehicle." Under the Rees-Levering Act, a "conditional sale contract" is a contract for the sale of a "motor vehicle" between a buyer and a seller, as defined (*Civil Code § 2981(a)(1)*).

B. Vehicle Is Not "Motor Vehicle." For purposes of the Rees-Levering Act, a "motor vehicle" means any vehicle required to be registered under the Vehicle Code that is bought for use primarily for personal or family purposes, and does not mean any vehicle that is bought for use primarily for business or commercial purposes (*Civ. Code § 2981(k)*).

[*Optional*] **C. Vehicle Is Mobilehome.** A "motor vehicle," for purposes of the Rees-Levering Act, does not mean a mobilehome, as defined in *Health & Safety Code Section 18008*, that is sold on or after July 1, 1981 (*Civ. Code § 2981(k)*).

[*Optional*] **D. Vehicle Is Trailer Sold With Vessel and Within Unruh Act Definition of "Goods."** "Motor vehicle," for purposes of the Rees-Levering Act, does not include any trailer that is sold in conjunction with a vessel and that comes within the definition of "goods" under *Civil Code Section 1802.1* (*Civ. Code § 2981(k)*).

[*Optional*] **E. Exclusion Is Based on Purpose of Purchase.** The exclusionary clause in the statute makes no distinction

based on the magnitude of the "business or commercial purpose." The Legislature obviously has focused on the purpose for which the vehicle is bought, not on the qualifications or business acumen of the buyer (*San Jose Autocar White Co. v. Williamson (1967) 249 Cal. App. 2d 619, 621, 57 Cal. Rptr. 692*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the Rees-Levering Act applies to a motor vehicle sales transaction. The ground set forth in this form is that the vehicle is not a "motor vehicle" within the meaning of the Rees-Levering Act, and therefore the Act does not apply to the transaction [*see Civ. Code § 2981(k)*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of whether or not the Rees-Levering Act applies. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, if the buyer has purchased two truck tractors, and is operating a trucking company that hauls large freight trailers, counsel should argue that the facts demonstrate that the buyer is purchasing the vehicles primarily for business purposes [*see San Jose Autocar White Co. v. Williamson (1967) 249 Cal. App. 2d 619, 621* , 57 Cal. Rtpr. 692].

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in §§ 206.180 -206.182*.

[3] Discussion of Authorities

[a] Exclusion Is Based on Purpose of Purchase

San Jose Autocar White Co. v. Williamson *(1967) 249 Cal. App. 2d 619, 57 Cal. Rptr. 692* , involved an action to recover the amount due on a conditional sale contract after the buyers defaulted and the vehicles, two tractor trucks, were repossessed. Defendants denied liability based on alleged violations of the Rees-Levering Act. The trial court granted judgment for plaintiff and defendant appealed.

The court of appeal affirmed. The court stated that the application of the Act is limited to the sale of a motor vehicle "which is bought for use primarily for personal or family purposes, and does not mean any vehicle that is bought for use primarily for business or commercial purposes." The exclusionary clause in the statute makes no distinction based on the magnitude of the "business or commercial purpose." The Legislature obviously has focused on the purpose for which the vehicle is bought, not on the qualifications or business acumen of the buyer (*249 Cal. App. 2d 619, 621)* .

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20-206 California Points & Authorities § 206.186

§ 206.186 Opposing Contention That Rees-Levering Act Applies to Motor Vehicle Transaction--Lease Is Not Conditional Sale Contract [Civ. Code § 2981(a)(2)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE REES-LEVERING MOTOR VEHICLE SALES AND FINANCE ACT DOES NOT APPLY TO THE TRANSACTION BECAUSE THE LEASE AGREEMENT IS NOT A CONDITIONAL SALE CONTRACT.

A. Rees-Levering Act Applies Only to Leases That Are "Conditional Sale Contracts." The Rees-Levering Motor Vehicle Sales and Finance Act ("Rees-Levering Act") applies when a contract for the bailment of a motor vehicle is a "conditional sale contract," as defined by the Act (*see Civ. Code § 2981(a)(2)*; *Budget Rent-A-Car of Southern Cal. v. Bergman (1981) 121 Cal. App. 3d 256, 265, 175 Cal. Rptr. 286*).

B. Lease Agreement Is Not "Conditional Sale Contract." A "conditional sale contract" for purposes of the Rees-Levering Act means any contract for the bailment of a motor vehicle between a buyer and a seller, with or without accessories, by which the bailee or lessee agrees to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the vehicle and its accessories, if any, at the time the contract is executed, and by which it is agreed that the bailee or lessee will become, or for no other or for a nominal consideration has the option of becoming, the owner of the vehicle on full compliance with the terms of the contract (*Civ. Code § 2981(a)(2)*; *Estate of Gonzalez (1990) 219 Cal. App. 3d 1598, 1603, 269 Cal. Rptr. 68*).

[*Optional*] **C. Maximum Liability Established by Reference to Value at End of Lease.** A contract for the bailment or leasing of a motor vehicle, with or without accessories, that establishes the maximum for which a bailee or lessee may be held liable at the end of the lease or bailment period, or on an earlier termination, by reference to the value of the vehicle at such time, is not a contract by which the bailee or lessee will become or for no other or for a nominal consideration has the option of becoming the owner of the vehicle, for the purposes of *Civil Code Section 2981(a)(2)* or

any other provision of the Rees-Levering Act (*Civ. Code § 2981.5*; *Budget Rent-A-Car of Southern Cal. v. Bergman (1981) 121 Cal. App. 3d 256, 265, 175 Cal. Rptr. 286*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the Rees-Levering Act applies to an agreement for bailment of a motor vehicle. The ground set forth in this form is that the lease agreement does not satisfy the definition of a "conditional sale contract" under *Civ. Code § 2981* and, therefore, the Act is not applicable to the transaction.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of whether or not the Rees-Levering Act applies to a motor vehicle lease agreement. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, if the amount under the lease agreement was not an amount "substantially equivalent to or in excess of the aggregate value of the vehicle," counsel should refer to specific provisions of the motor vehicle lease agreement to: (1) identify the number of payments agreed to under the lease and the total amount to be paid by those payments; (2) argue that such total amount is not an amount substantially equivalent to or in excess of the aggregate value of the vehicle; and (3) conclude that the agreement does not satisfy the definition of a "conditional sale contract" under *Civ. Code § 2981* and, therefore, the Act is not applicable to the transaction [*see Estate of Gonzalez (1990) 219 Cal. App. 3d 1598, 1603, 269 Cal. Rptr. 68]* .

In an appropriate case, the foregoing may be submitted in opposition to the contention supported by the points and authorities *set out in § 206.181*.

[3] Discussion of Authorities

[a] Rees-Levering Act Applies Only to Leases That Are "Conditional Sale Contracts"

In ***Budget Rent-A-Car of Southern Cal. v. Bergman*** *(1981) 121 Cal. App. 3d 256, 175 Cal. Rptr. 286* , an automobile leasing company leased a Rolls Royce automobile to a dealer of old time cars under a 36-month lease. The dealer sold the vehicle to the purchaser. After the certificate of title was not received from the Department of Motor Vehicles, the purchaser learned that the car was under a lease and unsuccessfully attempted to get the dealer to provide the funds to pay the leasing company off and clear the way for the purchaser to get the promised title to the car. The leasing company unsuccessfully attempted to repossess the car and sued the purchaser to recover possession and for damages. In addition to not disturbing the purchaser's possession of the car, the trial court gave a single judgment in favor of the purchaser and against the leasing company. The leasing company appealed.

The court of appeal reversed. One of the issues on the appeal was whether the open-ended lease agreement between the leasing company and the dealer who sold the car to the buyer was actually a sale, thereby permitting the buyer to take title. The buyer contended it was a sale, or like a sale, stating that there was specific authority for the proposition that an "open-ended" automobile lease is actually a conditional sale (*121 Cal. App. 3d 256, 264)* . The court, however, noted that after the cases cited by the buyer were decided, *Civ. Code § 2981.5* was added to the Rees-Levering Motor Vehicle Act to exclude certain kinds of open-ended automobile leases from the Act (*121 Cal. App. 3d 256, 264-265 n.2*). Specifically, the court found that the lessee's maximum liability was to be established by the value of the car as determined by its sales price at the end of the lease. This fact took the agreement out of the application of the Rees-Levering Act under *Civ. Code § 2981.5* (*121 Cal. App. 3d 256, 265)* .

[b] Lease Agreement Is Not "Conditional Sale Contract"

In ***Estate of Gonzalez*** *(1990) 219 Cal. App. 3d 1598, 1603, 269 Cal. Rptr. 68* , the decedent was injured after his vehicle was struck by another vehicle, and then died from a heart attack. The administratrix of the decedent's estate brought an action against the company that leased the vehicle that struck decedent's automobile, seeking damages for decedent's wrongful death, personal injuries, and property damages. The leasing company filed a motion for summary judgment, which was granted. Plaintiff appealed.

The court of appeal reversed. The estate's sole contention on appeal was that the trial court erred in determining as a matter of law that the lease agreement between the lessee (who was the driver of the vehicle that struck decedent's) and the leasing company was a conditional sale agreement. The significance of the distinction is that the liability imposed by *Veh. Code § 17150* on the owner of a motor vehicle does not attach when the owner has sold the car under a conditional sales agreement under *Veh. Code § 17156*. The court agreed with the estate's contention on the ground that the lease agreement did not satisfy either of the requirements under *Civ. Code § 2981(a)(2)* of the Rees-Levering Act, defining a conditional sale agreement. At the time the contract was entered into, the lessee agreed to 29 payments of $215, for a total of $6,235. This amount, in the words of the statute, was not "substantially equivalent to or in excess of the aggregate value of the vehicle," which the parties agreed was $8,295.86. In addition, the anticipated payoff amount was 85 percent of $4,400, almost half of the agreed value of the car. Under no circumstances could that amount be considered, in the words of the statute, "no" consideration or "nominal" consideration. Since the agreement was not a conditional sale agreement, the court concluded that the leasing company was liable for any negligent misuse of its vehicle by the lessee (*219 Cal. App. 3d 1598, 1602-1603)* .

[c] Maximum Liability Established by Reference to Value at End of Lease

The facts and procedural background of ***Budget Rent-A-Car of Southern Cal. v. Bergman*** *(1981) 121 Cal. App. 3d 256, 175 Cal. Rptr. 286* , are *discussed under § 206.186[3][a]*. In *Budget*, the court of appeal found that the lessee's maximum liability under the lease agreement was to be established by the value of the automobile at the end of the lease. By virtue of *Civ. Code § 2981.5*, that fact took the agreement out of the Rees-Levering Act (*121 Cal. App. 3d 256, 265)* .

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20-206 California Points & Authorities § 206.187

§ 206.187 Opposing Contention That Rees-Levering Act Applies to Motor Vehicle Transaction--Independent Lender Financed Sale Is Exempt From Act [Civ. Code § 2982.5

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE TRANSACTION IS EXEMPT FROM THE REES-LEVERING MOTOR VEHICLE SALES AND FINANCE ACT BECAUSE THE LOAN WAS MADE BY A SUPERVISED FINANCIAL ORGANIZATION.

A. "Supervised Financial Organization" Defined. As used in *Civil Code Section 2982.5*, a "supervised financial organization" means a person organized, chartered, or holding a license or authorization certificate under a law of California or the United States to make loans and subject to supervision by an official or agency of this state or the United States (*Civ. Code § 2982.5(a)*).

B. Loan by Supervised Financial Organization Is Exempt From Act. Nothing contained in the Rees-Levering Motor Vehicle Sales and Finance Act ("Rees-Levering Act") affects a loan, or the security therefor, between a purchaser of a motor vehicle and a supervised financial organization, other than the seller of the motor vehicle, all or a portion of which loan is used in connection with the purchase of a motor vehicle (*Civ. Code § 2982.5(a)*).

C. Private Financing Excluded From Act. The exemption in *Civil Code Section 2982.5(a)* is designed to exclude from coverage of the Rees-Levering Act independent private negotiations between a buyer and his or her lender without involvement of the seller, which is consistent with the legislative purpose and policy of the Act (*Hernandez v. Atlantic Finance Co. (1980) 105 Cal. App. 3d 65, 77*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the Rees-Levering Act applies to a motor vehicle sales transaction. The ground set forth in this form is that the loan, or the security therefor, is between a purchaser of a motor vehicle and a "supervised financial organization," as defined by statute, and is therefore exempt from the Act [*Civ. Code § 2982.5(a)*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of whether or not the Rees-Levering Act applies to a motor vehicle lease agreement. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should identify facts establishing that the entity providing the loan for the motor vehicle sales transaction is a supervised financial organization, and that the loan was made without the involvement of the seller of the vehicle.

In an appropriate case, the foregoing may be submitted in opposition to the contention supported by the points and authorities *set out in § 206.182*.

[3] Discussion of Authorities

[a] Private Financing Excluded From Act

The facts and procedural background of ***Hernandez v. Atlantic Finance Co.*** *(1980) 105 Cal. App. 3d 65, 164 Cal. Rptr. 279* , are discussed in *§ 206.182[3][a]*. In *Hernandez*, the court of appeal held that the Rees-Levering Act applied to an automobile sales transaction because of the involvement of the seller in the loan. The court stated, however, that to conclude that the exemption in *Civ. Code § 2982.5(a)* is designed to exclude from the coverage of the Rees-Levering Act only independent private negotiations between a buyer and his or her lender, without involvement of the seller, is consistent with the Legislature's purpose and policy (*105 Cal. App. 3d 65, 77)* .

[4] Additional Authorities

[a] Private Financing Excluded From Act

The facts and procedural background of *Eldorado Bank v. Lytle (1983) 147 Cal. App. 3d Supp. 17 , 195 Cal. Rptr. 499* , are discussed in *§ 206.182[3][d]*. In *Eldorado Bank*, the court held that assistance by the dealer constituted a seller-assisted loan and the Rees-Levering Act applied. The court agreed with the respondents' contention, however, that *Civ. Code § 2982.5* was designed to exempt only private financing obtained independently by a motor vehicle purchaser (*147 Cal. App. 3d Supp. 17, 21)* .

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1. Applicability Of Rees-Levering Act

20-206 California Points & Authorities §§ 206.188-206.199

[Reserved]

§§ 206.188[Reserved]

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2. Rescission Of Contract Or Injunction Against Enforcement

20-206 California Points & Authorities § 206.200

§ 206.200 Supporting Contention That Buyer May Rescind Contract--Contract Is Unenforceable [Civ. Code § 2983.1]--Seller Violated Formality Provisions [Civ. Code § 2981.9]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE BUYER IS ENTITLED TO RESCIND THE CONDITIONAL SALE CONTRACT BECAUSE THE SELLER FAILED TO COMPLY WITH THE FORMALITY REQUIREMENTS OF THE REES-LEVERING ACT.

A. Conditional Sale Contract Must Comply With Formality Requirements. Every conditional sale contract subject to the Rees-Levering Act must comply with the requirements stated in *Civil Code Section 2981.9* (*Civ. Code § 2981.9*).

[*EITHER*]

B. Seller Violated Writing Requirement. Every conditional sale contract subject to the Rees-Levering Act must be in writing (*Civ. Code § 2981.9*).

[*AND/OR*]

C. Seller Violated Print Requirements. Every conditional sale contract subject to the Rees-Levering Act, if printed, must be printed in type no smaller than six points (*Civ. Code § 2981.9*).

[*AND/OR*]

D. Seller Violated Single Document Requirement. Every conditional sale contract subject to the Rees-Levering Act must contain in a single document all of the agreements of the buyer and seller with respect to the total cost and the terms of payment for the motor vehicle, including any promissory notes or any other evidences of indebtedness (*Civ. Code § 2981.9*).

[*AND/OR*]

E. Seller Violated Signature Requirement. The conditional sale contract or a purchase order must be signed by the buyer or his

or her authorized representative and by the seller or its authorized representative (*Civ. Code § 2981.9*; *General Motors Accept. Corp. v. Kyle (1960) 54 Cal. 2d 101, 106, 4 Cal. Rptr. 496, 351 P.2d 768*).

[*AND/OR*]

F. Seller Obtained Buyer's Signature on Contract With Blanks. The seller is not permitted to obtain the signature of the buyer to a contract when it contains blank spaces to be filled in after it has been signed (*Civ. Code § 2981.9*).

[*AND/OR*]

G. Seller Violated Copy Requirement. An exact copy of the contract or purchase order must be furnished to the buyer by the seller at the time the buyer and the seller have signed it. A motor vehicle may not be delivered pursuant to a contract subject to the Rees-Levering Act until the seller delivers to the buyer a fully executed copy of the conditional sale contract or purchase order and any vehicle purchase proposal and any credit statement which the seller has required or requested the buyer to sign and which he or she has signed during the contract negotiations (*Civ. Code § 2981.9*).

[*CONTINUE*]

H. Contract Is Unenforceable. Under *Civil Code Section 2983*, if the seller, except as the result of an accidental or bona fide error in computation, violates any provision of *Civil Code Section 2981.9*, the conditional sale contract is not enforceable, except by a bona fide purchaser, assignee, or pledgee for value, or until after the violation is corrected as provided by statute (*Civ. Code § 2983*; *see Zmak v. Arata Pontiac (1968) 265 Cal. App. 2d 689, 692-693, 71 Cal. Rptr. 506*).

I. Buyer May Rescind Contract. When a conditional sale contract is not enforceable under *Civil Code Section 2983*, the buyer may elect to rescind the contract and return the motor vehicle (*Civ. Code § 2983.1*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the buyer is entitled to a rescission of an unenforceable conditional sale contract under the Rees-Levering Act because the contract does not comply with the formality requirements stated in *Civ. Code § 2981.9* [*see Civ. Code § 2983.1*].

Before a contract may be determined to violate the above provisions, a determination must be made that the

Rees-Levering Act governs the transaction. For points and authorities supporting and opposing the contention that the Act applies to a transaction, see *§ 206.180* et seq.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of whether or not the buyer is entitled to rescind a motor vehicle sales contract. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, for example, if the writing fails to comply with the print requirements under *Civ. Code § 2981.9*, counsel should refer to the specific clauses that fail to comply with the statute.

[b] No "Cooling Off" Period

There is a common misconception that California law provides for a "cooling off" or other cancellation period after the sale or lease of a motor vehicle [Stats 1993, ch. 1092, § 1]. It does not, and the type of rescission for legal cause addressed by this form is to be distinguished. Since July 1, 1994, all sale and lease contract forms have been required to contain a notice with a heading in at least 12-point boldface type, and the text in at least 10-point boldface type, in the prescribed language, stating that no such "cooling off" period exists during which the purchaser may change his or her mind and that after the contract is signed, it can be canceled only for legal cause such as fraud [*Civ. Code § 2982(r)*]. However, on or after July 1, 2006, California law does require a seller to offer a two-day contract cancellation option on used vehicles with a purchase price of less than $40,000, subject to statutory conditions [*see Veh. Code § 11713.21*]. (This contract cancellation option requirement does not apply to the sale of a recreational vehicle, a motorcycle, or an off-highway motor vehicle subject to identification under California law.)

[c] Attorney's Fees

Although a motor vehicle conditional sale contract is extinguished by rescission, the prevailing party is entitled to attorney's fees under *Civ. Code § 2983.4* [*Leaf v. Phil Rauch, Inc. (1975) 47 Cal. App. 3d 371, 378-379, 120 Cal. Rptr. 749]* . For a memorandum of points and authorities supporting the contention that a party is entitled to attorney's fees, see *§ 206.239*.

[d] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 206.205 -206.210* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Contract Is Unenforceable

In ***Zmak v. Arata Pontiac*** *(1968) 265 Cal. App. 2d 689, 71 Cal. Rptr. 506* , the buyer sued for rescission of a conditional sales contract. The trial court held that the dealer, salespersons, and assignee bank violated *Civ. Code § 2982* because the written contract did not state the true trade-in allowance agreed on by the parties; defendants induced plaintiff to sign the contract form in blank; and no completed copy was delivered to plaintiff at the time of the transaction. The trial court further found that plaintiff made a timely election to rescind the contract and ordered its rescission. The trial court granted judgment for the buyer, and the seller appealed.

The court of appeal affirmed. The court, noting that the sole issue on appeal was the sufficiency of the evidence, held that the findings attacked by defendants were supported by substantial evidence and that plaintiffs were therefore entitled to rescission of the contract (*265 Cal. App. 2d 689, 692-693)* .

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20-206 California Points & Authorities § 206.201

§ 206.201 Supporting Contention That Buyer May Rescind Contract--Contract Is Unenforceable [Civ. Code § 2983.1]--Seller Violated Disclosure Provisions [Civ. Code § 2982(a)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE BUYER IS ENTITLED TO RESCIND THE CONDITIONAL SALE CONTRACT BECAUSE THE SELLER FAILED TO COMPLY WITH THE DISCLOSURE REQUIREMENTS OF THE REES-LEVERING ACT.

A. Purpose of Disclosure Requirements. The obvious purpose of *Civil Code Section 2982(a)* is to protect purchasers of motor vehicles against excessive charges by requiring full disclosure of all items of cost (*General Motors Accept. Corp. v. Kyle (1960) 54 Cal. 2d 101, 106, 4 Cal. Rptr. 496, 351 P.2d 768*).

B. Contract Violates Disclosure Requirements. The contract must contain disclosures as required by *Civil Code Section 2982(a),* which must be labeled "itemization of the amount financed" (*Civ. Code § 2982(a)*; *see General Motors Accept. Corp. v. Kyle (1960) 54 Cal. 2d 101, 106, 4 Cal. Rptr. 496, 351 P.2d 768*).

C. Specification of Nondisclosure Violations. _____ [*Here, and in subsequent paragraphs as necessary, specify provisions under Civ. Code § 2982(a) that are alleged to have been violated, e.g.,* The contract must contain the cash price, exclusive of _____ (*specify what was improperly included, e.g.,* document preparation fees and taxes imposed on the sale) (*Civ. Code § 2982(a)(1)(A)*)].

D. Contract Is Unenforceable. Under *Civil Code Section 2983,* if the seller, except as the result of an accidental or bona fide error in computation, violates *Civil Code Section 2982(a),* the conditional sale contract is not enforceable, except by a bona fide purchaser, assignee, or pledgee for value, or until after the violation is corrected as provided by statute (*Civ. Code § 2983*).

E. Buyer May Rescind Contract. [*See § 206.200, Paragraph I.*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the buyer is entitled to a rescission of an unenforceable conditional sale contract under the Rees-Levering Act because the contract does not comply with the disclosure requirements stated in *Civ. Code § 2982(a)* [*see Civ. Code §§ 2983, 2983.1*].

Before a contract may be determined to violate these provisions, a determination must be made that the Rees-Levering Act governs the transaction. For points and authorities supporting and opposing the contention that the Act applies to a transaction, see *§ 206.180* et seq.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of whether or not the buyer is entitled to rescind a motor vehicle sales contract. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, for example, if the writing fails to recite an "itemization of the amount financed," counsel should refer to that omission in support of the argument that the contract fails to comply with the statute, and that the buyer is therefore permitted to elect to rescind the agreement.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 206.205 -206.210* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Purpose of Disclosure Requirements

In ***General Motors Accept. Corp. v. Kyle*** *(1960) 54 Cal. 2d 101, 4 Cal. Rptr. 496, 351 P.2d 768* , a purchaser of a motor vehicle counterclaimed for damages in an action by an assignee of a conditional sale contract against the purchaser for specific recovery of an automobile or its value. The finance company contended that it was a bona fide purchaser for value of the conditional sale contract executed between the purchaser and the seller. The trial court entered judgment against the finance company, and the finance company appealed.

The Supreme Court reversed with directions. The Court quoted its earlier decision in *Carter v. Seaboard Finance Co. (1949) 33 Cal. 2d 564, 573, 203 P.2d 758* , in which the Court stated that the obvious purpose of *Civ. Code § 2982(a)* is to protect purchasers of motor vehicles against excessive charges by requiring full disclosure of all items of cost (*54 Cal. 2d 101, 105-106)* . However, the Court stated that subdivision (a) was not intended to penalize the seller who violates it in the manner concerned in the case before it (that is, to allow the purchaser double recovery by permitting him to have possession of the car, and to recover the purchase price). Thus, the Court reversed the judgment with directions to permit the purchaser to amend his counterclaim and seek recovery on a restitutive rather than a punitive theory (*54 Cal. 2d 101, 106)* .

NOTE:

General Motors was decided prior to 1961 legislation and subsequent amendments that clarified a buyer's right to restitution for violation of disclosure provisions of former Civ. Code § 2981(a) (*now Civ. Code § 2982*) [*see* Stats. 1961, ch. 1626].

[b] Contract Violates Disclosure Requirements

The facts and procedural background of ***General Motors Accept. Corp. v. Kyle*** *(1960) 54 Cal. 2d 101, 4 Cal. Rptr. 496, 351 P.2d 768* , are *discussed under § 206.201[3][a]*. In *General Motors*, the Supreme Court stated that the motor vehicle sales and finance transaction violated *Civ. Code § 2982(a)* in numerous respects, including the fact that the contract failed to recite a "description and itemization of amounts ... which will actually be paid by the seller ... to any public officer as fees in connection with the transaction" (*54 Cal. 2d 101, 106)* .

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20-206 California Points & Authorities § 206.202

§ 206.202 Supporting Contention That Buyer May Rescind Contract--Contract Is Unenforceable [Civ. Code § 2983.1]--Seller Violated Finance Charge Provisions [Civ. Code § 2982(j), (k)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE BUYER IS ENTITLED TO RESCIND THE CONDITIONAL SALE CONTRACT BECAUSE THE SELLER FAILED TO COMPLY WITH THE FINANCE CHARGE LIMITATIONS OF THE REES-LEVERING ACT.

A. Contract Must Comply With Finance Charge Limitations of Act. To the extent applicable, every conditional sale contract subject to the Rees-Levering Act must satisfy the requirements and limitations of *Civil Code Section 2982* (*Civ. Code § 2982*).

[*EITHER*]

B. Dollar Amount of Disclosed Finance Charge Exceeds Amount Allowed. The dollar amount of the disclosed finance charge must not exceed the greater of the amounts stated in *Civil Code Section 2982(j)(1)(A)-(C)* (*Civ. Code § 2982(j)(1)*).

[*AND/OR*]

C. Holder of Contract Has Charged Amount in Excess of Disclosed Finance Charge. The holder of the contract is not permitted to charge, collect, or receive a finance charge that exceeds the disclosed finance charge, except to the extent provided for in *Civil Code Section 2982(j)(2)* (*Civ. Code § 2982(j)(2)*).

[*AND/OR*]

D. Holder of Contract Has Charged Excessive Administrative Finance Charge. If the finance charge or a portion thereof is determined by the simple-interest basis and the amount of the unpaid balance exceeds $5,000, the holder of the contract may, in lieu of its right to a minimum finance charge under *Civil Code Section 2982(j)(1)(C)*), charge, receive, or collect on the date of the contract an administrative charge not to exceed the amount stated in *Civil Code Section 2982(j)(3)* (*Civ. Code § 2982(j)(3)*).

[*AND/OR*]

E. Finance Charge in Contract Providing for Unequal or Irregular Payments Exceeds Amount Allowed. When a contract provides for unequal or irregular payments, or payments on other than a monthly basis, the maximum finance charge must be at the effective rate provided for in *Civil Code Section 2982(j)(1)*, having due regard for the schedule of installments (*Civ. Code § 2982(j)(4)*).

[*AND/OR*]

F. Contract Violates Delinquency Charge Limitations. The contract may provide that for each installment in default for a period of not less than 10 days the buyer is required to pay a delinquency charge in an amount not to exceed in the aggregate 5 percent of the delinquent installment, which amount may be collected only once on any installment regardless of the period during which it remains in default (*Civ. Code § 2982(k)*).

[*AND/OR*]

G. Contract Imposes Delinquency Charge on Payments Under Extension or Deferral Agreement. Payments timely received by the seller under an extension or deferral agreement may not be subject to a delinquency charge unless the charge is permitted by *Civil Code Section 2982.3* (*Civ. Code § 2982(k)*).

[*AND/OR*]

H. Contract Imposes Unreasonable Collection Costs. The contract may only provide for reasonable collection costs and fees in the event of delinquency (*Civ. Code § 2982(k)*).

[*CONTINUE*]

I. Contract Is Unenforceable. Under *Civil Code Section 2983*, if the seller, except as the result of an accidental or bona fide error in computation, violates *Civil Code Section 2982(j)*, the conditional sale contract is not enforceable, except by a bona fide purchaser, assignee, or pledgee for value, or until after the violation is corrected as provided by statute (*Civ. Code § 2983*).

J. Buyer May Rescind Contract. [*See § 206.200, Paragraph I.*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the buyer is entitled to a rescission of an unenforceable conditional sale contract under the Rees-Levering Act because the contract does not comply with the finance charge requirements stated in *Civ. Code § 2982(j), (k)* [*see Civ. Code §§ 2983, 2983.1*].

Before a contract may be determined to violate these provisions, a determination must be made that the Rees-Levering Act governs the transaction. For points and authorities supporting and opposing the contention that the Act applies to a transaction, see *§ 206.180* et seq.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of whether or not the buyer is entitled to rescind a motor vehicle sales contract. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should refer to portions of the contract, with appropriate identification of the clauses in question, that show how the contract violates the finance charge limitations of *Civ. Code § 2982(j), (k)*.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 206.205 -206.210* may be used to oppose the contention supported by these points and authorities.

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20-206 California Points & Authorities § 206.203

§ 206.203 Supporting Contention That Buyer May Rescind Contract--Contract Is Unenforceable [Civ. Code § 2983.1]--Holder Had Knowledge of Violations [Civ. Code § 2983.1]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE BUYER IS ENTITLED TO RESCIND THE CONDITIONAL SALE CONTRACT BECAUSE THE HOLDER OF THE CONDITIONAL SALE CONTRACT KNEW OF THE VIOLATION[S] OF _____ [*identify statute on which rescission is based, e.g., CIVIL CODE SECTION 2982(a)*].

A. Holder of Contract Knew of Violations. If a holder acquires a conditional sale contract with knowledge of a violation of *Civil Code Section 2981.9* or *2982(a), (j),* or *(k),* the conditional sale contract is not enforceable except by a bona fide purchaser, assignee, or pledgee for value, or unless the violation is corrected as provided in *Civil Code Section 2984* (*Civ. Code § 2983.1*).

[*Optional*] **B. Violation Appears on Face of Contract.** A holder of a conditional sale contract may not claim that he or she had no notice of a defect giving rise to a right of rescission if the defect appears on the face of the contract (*see General Motors Accept. Corp. v. Kyle (1960) 54 Cal. 2d 101, 108, 4 Cal. Rptr. 496, 351 P.2d 768*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the buyer is entitled to a rescission of an unenforceable conditional sale contract under the Rees-Levering Act because the holder of a conditional sale contract had acquired the contract with knowledge of a violation of *Civ. Code § 2981.9* or *2982(j), (k)* [*see Civ. Code §§ 2983, 2983.1*].

Before a contract may be determined to violate these provisions, a determination must be made that the Rees-Levering Act governs the transaction. For points and authorities supporting and opposing the contention that the Act applies to a transaction, see *§ 206.180* et seq.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of whether or not the buyer is entitled to rescind a motor vehicle sales contract. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should refer to portions of the contract, or other evidence, that demonstrates that the holder of the conditional sale contract acquired the contract with knowledge of the violation.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 206.205 -206.210* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Violation Appears on Face of Contract

The facts and procedural background of ***General Motors Accept. Corp. v. Kyle*** *(1960) 54 Cal. 2d 101, 4 Cal. Rptr. 496, 351 P.2d 768* , are discussed in *§ 206.201[3][a]*. In *General Motors*, the Supreme Court reversed with direction a trial court's judgment for defendant buyer. The Court examined the issue of whether the holder of the finance company acquired the contract with knowledge of a violation of *Civ. Code § 2982(a)*. The Court stated that the failure of the contract to describe and itemize amounts to be paid as fees appeared on the face of the contract, and therefore the holder of the contract could in no event properly claim that it had no notice of that defect (*54 Cal. 2d 101, 108)* .

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20-206 California Points & Authorities § 206.204

§ 206.204 Supporting Contention That Buyer May Rescind Contract--Purchaser Was Unable to Obtain Third-Party Financing [Civ. Code § 2982.9]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE BUYER IS ENTITLED TO RESCIND THE CONDITIONAL SALE CONTRACT BECAUSE THE BUYER FAILED TO OBTAIN FINANCING FROM A THIRD PARTY.

Buyer Is Unable to Obtain Financing. In the event a buyer obligates himself or herself to purchase, or receive possession of, a motor vehicle under a contract or purchase order, and the seller knows that the buyer intends to obtain financing from a third party without the assistance of the seller, and the buyer is unable to obtain such financing, the contract or purchase order must be deemed rescinded and all consideration thereon must be returned by the respective parties without demand (*Civ. Code § 2982.9*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the buyer is entitled to a rescission of an unenforceable conditional sale contract under the Rees-Levering Act because the buyer was unable to obtain financing from a third party as provided in *Civ. Code § 2982.9*.

Before a contract may be determined to violate these provisions, a determination must be made that the Rees-Levering Act governs the transaction. For points and authorities supporting and opposing the contention that the Act applies to a transaction, see *§ 206.180* et seq.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context

in which counsel wishes to raise the substantive issue of whether or not the buyer is entitled to rescind a motor vehicle sales contract. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should refer to facts, such as the written agreement between the parties, showing that [*Civ Code § 2982.9*]:

- The buyer was obligated to purchase or receive possession of the vehicle under a contract or purchase order.
- The seller had knowledge of the buyer's intent to obtain financing without the seller's assistance.
- The buyer is unable to obtain the financing.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 206.205 -206.210* may be used to oppose the contention supported by these points and authorities.

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20-206 California Points & Authorities § 206.205

§ 206.205 Opposing Contention That Buyer May Rescind Contract [Civ. Code § 2983.1]--Election to Rescind Was Not Made With Reasonable Diligence

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

BUYER SHOULD NOT BE PERMITTED TO RESCIND THE CONTRACT BECAUSE HE/SHE HAS FAILED MAKE THE ELECTION WITH REASONABLE DILIGENCE.

Election to Rescind Not Made With Reasonable Diligence. The election to rescind an unenforceable conditional sale contract and return the motor vehicle must be made with reasonable diligence (*Civ. Code § 2983.1*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the buyer may rescind an unenforceable conditional sale contract. The ground set forth in the form is that the buyer failed to make the election to rescind with "reasonable diligence," as required by *Civ. Code § 2983.1*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of whether or not the buyer is entitled to rescind a motor vehicle sales contract. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should refer to facts that indicate the buyer failed to exercise reasonable diligence in electing to rescind the conditional sale contract [*cf. Gerhard v. Stephens (1968) 68 Cal. 2d 864, 909, 69 Cal. Rptr. 612, 442 P.2d 692* (no substantial evidence that defendants exercised "reasonable diligence" in locating stockholders and heirs under

former statute relating to determination of conflicting claims to realty); *People v. Mendieta (1986) 185 Cal. App. 3d 1032, 1039, 230 Cal. Rptr. 162* (state failed to exercise "reasonable diligence" under *Evid. Code § 240*, defining unavailability of witnesses)].

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in §§ 206.200 -206.204*.

Points and authorities submitted in opposition to the contention that the Rees-Levering Act applies to the transaction may also be used to oppose the contention that the buyer is entitled to rescind a motor vehicle sales contract because of an alleged violation of the Act [*see § 206.180* et seq.].

[b] No "Cooling Off" Period

There is a common misconception that California law provides for a "cooling off" or other cancellation period after the sale or lease of a motor vehicle [Stats 1993, ch. 1092, § 1]. It does not, and the type of rescission for legal cause addressed by this form is to be distinguished. Since July 1, 1994, all sale and lease contract forms have been required to contain a notice with a heading in at least 12-point boldface type and the text in at least 10-point boldface type, in the prescribed language, stating that no such "cooling off" period exists during which the purchaser may change his or her mind and that after the contract is signed, it can be canceled only for legal cause such as fraud [*Civ. Code § 2982(r)*]. However, on or after July 1, 2006, California law does require a seller to offer a two-day contract cancellation option on used vehicles with a purchase price of less than $40,000, subject to statutory conditions [*see Veh. Code § 11713.21*]. (This contract cancellation option requirement does not apply to the sale of a recreational vehicle, a motorcycle, or an off-highway motor vehicle subject to identification under California law.)

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20-206 California Points & Authorities § 206.206

§ 206.206 Opposing Contention That Buyer May Rescind Contract [Civ. Code § 2983.1]--Seller Is in Substantial Compliance With Statutory Requirements

[1] FORM

[*The following may be included in a memorandum or in a trial or appellate brief.*]

BUYER SHOULD NOT BE PERMITTED TO RESCIND THE CONTRACT BECAUSE THE CONTRACT SUBSTANTIALLY CONFORMS TO THE PROVISIONS OF THE REES-LEVERING ACT.

A. Seller Has Substantially Complied With Statute. When there is actual compliance with all matters of substance rather than mere technical imperfections of form or variations in mode of expression, the seller should not be given the stature of noncompliance, thereby transforming the transaction into a windfall for an unscrupulous and designing buyer (*Stasher v. Harger-Haldeman (1962) 58 Cal. 2d 23, 29, 22 Cal. Rptr. 657, 372 P.2d 649*).

B. Rees-Levering Act Is to Be Used as Shield and Not Sword. *Civil Code Section 2982* and its companion provisions constitute a shield, not a sword, for the use of buyers in proper cases. Thus, the statutes must not be applied in a manner that will give a windfall to the conditional purchaser. The purpose of the statute is merely to protect, not to enrich, the buyer in cases of purely formal violations (*Stasher v. Harger-Haldeman (1962) 58 Cal. 2d 23, 29-30, 22 Cal. Rptr. 657, 372 P.2d 649*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the buyer may rescind an unenforceable conditional sale contract. The ground set forth in this form is that the seller has substantially complied with the terms of the Rees-Levering Act.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of whether or not the buyer is entitled to rescind a motor vehicle sales contract. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should refer to facts, such as the written agreement between the parties, to demonstrate that the agreement substantially complies with the requirements of the Act.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in §§ 206.200 -206.204*.

[3] Discussion of Authorities

[a] Seller Has Substantially Complied With Statute

In ***Stasher v. Harger-Haldeman*** *(1962) 58 Cal. 2d 23, 22 Cal. Rptr. 657, 372 P.2d 649* , a buyer brought an action to compel restitution on a claimed rescission of a conditional sale contract to recover payments made under the contract. The trial court found that the contract complied strictly with certain provisions of former Civ. Code § 2982(a), and complied substantially with other provisions under that statute, and granted judgment for defendant automobile dealer. Plaintiff appealed.

The Supreme Court affirmed the judgment. Citing *Carter v. Seaboard Finance Co. (1949) 33 Cal. 2d 564, 573, 203 P.2d 758* , the Court stated that the purpose of former Civ. Code § 2982 [*now see Civ. Code § 2983*] is to protect purchasers of motor vehicles against excessive charges by requiring full disclosure of all items of cost, and that the form and requisites prescribed by the statute are mandatory. However, *Carter* emphasized that a contract that does not substantially conform to the form and requisites is unenforceable. The Court in *Stasher* defined "substantial compliance" to mean actual compliance in respect to the substance essential to every reasonable objective of the statute. But if there is such actual compliance as to all matters of substance, then mere technical imperfections of form or variations in mode of expression by the seller, or such minima as obvious typographical errors, should not be given the stature of noncompliance and thereby transformed into a windfall for an unscrupulous and designing buyer. Further, *Civ. Code § 2982* and its companion provisions constitute a shield not a sword, for the use of buyers in proper cases (*58 Cal. 2d 23, 29)* . Thus, it must not be applied in a manner that will give a windfall to the conditional purchaser, as the purpose of the statute is merely to protect, not to enrich, the buyer in cases of purely formal violations (*58 Cal. 2d 23, 29-30)* .

[b] Rees-Levering Act Is to Be Used as Shield and Not Sword

The facts and procedural background of ***Stasher v. Harger-Haldeman*** *(1962) 58 Cal. 2d 23, 22 Cal. Rptr. 657, 372 P.2d 649* , are *discussed under § 206.206[3][a]*.

[4] Additional Authorities

[a] Seller Has Substantially Complied With Statute

Davis v. Ford Motor Credit Co. (2009) 179 Cal. App. 4th 581, 101 Cal. Rptr. 3d 697 , concerned a creditor's billing practice with respect to a consumer's payments made pursuant to a an automobile installment sale contract. The contract provided, "We may apply each payment to the earned and unpaid part of the Finance Charge, to the unpaid part of the Amount Financed and to other amounts you owe under this contract in any order we choose." The creditor's practice was to apply a consumer's payment to an earlier missed installment (for which a late fee was imposed), rather than to the current month's installment, with the result that the current month's installment became unpaid, triggering a late fee for the current month. The plaintiff's theory was that the successive late fees were prohibited by *Civ. Code § 2982(k)*

and were actionable under the unfair competition law [*Bus. & Prof. Code § 17200 et seq.*] and under the Consumers Legal Remedies Act [*Civ. Code § 1750 et seq.*]. The creditor demurred generally. The trial court sustained the demurrer without leave to amend, and entered a judgment of dismissal. The court of appeal affirmed, concluding that the creditor's practice did not violate the statutory prohibition against charging more than one late fee per delinquent installment [*see Civ. Code § 2982(k)* (late fee "may be collected only once on any installment regardless of the period during which it remains in default")]. The court explained, "For example, if an ontime payment received during the month of April is allocated to March because the March payment was missed, the result of allocating said payment to March is that the April payment was missed, so as to trigger a new late fee for the month of April. Under those circumstances, the consumer has not been charged more than one late fee for the missed March payment. Rather, the first late fee is for the payment missed in March, and the second late fee represents the payment missed in April" (*179 Cal. App. 4th 581, 584*). The plaintiff had argued that when a payment is received on time, it is not delinquent even though a payment was missed in an earlier month, and therefore the creditor should not be able to render the timely payment delinquent by treating it as the earlier missed payment and then treating the current payment as missed. Both the trial court and the appellate court rejected that argument because *Civ. Code § 2982(k)* was not intended to prohibit that practice but instead was intended to prohibit the pyramiding of late fees, that is, imposing a late fee for each month a payment is delinquent (*179 Cal. App. 4th 581, 590-592*).

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20-206 California Points & Authorities § 206.207

§ 206.207 Opposing Contention That Buyer May Rescind Contract [Civ. Code § 2983.1]--Seller Made Accidental or Bona Fide Error in Computation [Civ. Code § 2983]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

BUYER MAY NOT RESCIND THE CONTRACT BECAUSE ANY VIOLATION OF THE REES-LEVERING ACT WAS THE RESULT OF AN ACCIDENTAL OR BONA FIDE ERROR IN COMPUTATION.

Seller Made Accidental or Bona Fide Error in Computation. Although a conditional sale contract is normally unenforceable when there has been a violation under *Civil Code Section 2983,* an exception applies when the violation occurred as the result of an accidental or bona fide error in computation (*Civ. Code § 2983*; *Stasher v. Harger-Haldeman (1962) 58 Cal. 2d 23, 33, 22 Cal. Rptr. 657, 372 P.2d 649*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the buyer may rescind an unenforceable conditional sale contract. The ground set forth in this form is that the violation occurred as the result of an accidental or bona fide error in computation under *Civ. Code § 2983*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of whether or not the buyer is entitled to rescind a motor vehicle sales contract. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in §§ 206.200 -206.204*.

[3] Discussion of Authorities

[a] Seller Made Accidental or Bona Fide Error in Computation

The facts and procedural background of ***Stasher v. Harger-Haldeman*** *(1962) 58 Cal. 2d 23, 22 Cal. Rptr. 657, 372 P.2d 649* , are discussed in *§ 206.206[3][a]*. In *Stasher*, which was decided under a former version of Civ. Code § 2982 [*now see Civ. Code § 2983*], plaintiff buyer contended that the contract failed to recite correctly the number of installments required to pay the contract balance. The Court noted that the trial court found on substantial evidence that the total "39" contained in the "Schedule of Installments" clause was correct, and that the figure "36," referring to the number of installments in the "Statement of Transaction," was a typographical error. The Court held that such an error "of course" did not render the contract voidable at the instance of the buyer (*58 Cal. 2d 23, 33)* .

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20-206 California Points & Authorities § 206.208

§ 206.208 Opposing Contention That Buyer May Rescind Contract [Civ. Code § 2983.1]--Seller Corrected Violation [Civ. Code § 2984]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

BUYER SHOULD NOT BE PERMITTED TO RESCIND THE CONTRACT BECAUSE SELLER HAS CORRECTED THE CONTRACT TO CONFORM TO STATUTORY REQUIREMENTS.

Failure to Comply Has Been Corrected. Any failure to comply with any provision of the Rees-Levering Act may be corrected by the holder as prescribed in *Civil Code Section 2984*, with limitations relating to willful violations. A violation corrected as provided in that section may not be the basis of any recovery by the buyer or affect the enforceability of the contract by the holder, and may not be deemed to be a substantive change in the agreement of the parties (*Civ. Code § 2984*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the buyer may rescind an unenforceable conditional sale contract. The ground set forth in this form is that the seller corrected the violations under *Civ. Code § 2984*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of whether or not the buyer is entitled to rescind a motor vehicle sales contract. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of

law stated. Thus, counsel should refer to facts, such as the corrected copy of the contract delivered to the buyer, showing that the defect has been corrected.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in §§ 206.200 -206.204*.

[b] Contract May Be Enforced Seller or Holder if Defect Is Corrected

If the seller, except as the result of an accidental or bona fide error in computation, violates any provision of *Civ. Code § 2981.9* or *2982(a), (j),* or *(k),* the conditional sale contract is not enforceable. After the violation is corrected, however, as provided in *Civ. Code § 2984*, the contract may be enforced [*see Civ. Code § 2983*].

If a holder acquires a conditional sale contract with knowledge of a violation of *Civ. Code § 2981.9* or *2982(a), (j),* or *(k),* the conditional sale contract may be enforced if the violation is corrected as provided in *Civ. Code § 2984* [*Civ. Code § 2983.1*].

[c] When Correction Allowed

Any failure to comply with any provision of the Rees-Levering Act may be corrected by the holder, provided, however, that a willful violation may not be corrected unless it is a violation appearing on the face of the contract and is corrected within 30 days of the execution of the contract or within 20 days of its sale, assignment, or pledge, whichever is later. The 20-day period must commence with the initial sale, assignment, or pledge of the contract, and provided that any other violation appearing on the face of the contract may be corrected only within such time periods [*Civ. Code § 2984*].

[d] Correction Increasing Amount Owed

A correction that will increase the amount of the contract balance or the amount of any installment as such amounts appear on the conditional sale contract is not effective unless the buyer concurs in writing to the correction [*Civ. Code § 2984*].

[e] Time for Correction

If notified in writing by the buyer of such a failure to comply with any provision of the Rees-Levering Act, the correction must be made within 10 days of notice [*Civ. Code § 2984*].

[f] Delivery of Corrected Copy

When any provision of a conditional sale contract fails to comply with any provision of the Rees-Levering Act, the correction must be made by mailing or delivering a corrected copy of the contract to the buyer [*Civ. Code § 2984*].

[g] Improper Collections to Be Credited to Buyer

Any amount improperly collected by the holder from the buyer must be credited against the indebtedness evidenced by the contract or returned to the buyer [*Civ. Code § 2984*].

[h] Effect of Correction

A violation corrected as provided in *Civ. Code § 2984* must not be the basis of any recovery by the buyer or affect the enforceability of the contract by the holder, and must not be deemed to be a substantive change in the agreement of the parties [*Civ. Code § 2984*].

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20-206 California Points & Authorities § 206.209

§ 206.209 Opposing Contention That Buyer May Rescind Contract [Civ. Code § 2983.1]--Holder Acquired Contract Without Actual Knowledge of Seller's Violation [Civ. Code § 2983.1].

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

BUYER SHOULD NOT BE PERMITTED TO RESCIND THE CONTRACT BECAUSE THE HOLDER OF THE CONDITIONAL SALE CONTRACT ACQUIRED IT WITHOUT ACTUAL KNOWLEDGE OF THE VIOLATION BY THE SELLER.

Contract Is Enforceable by Holder Without Knowledge. If a holder acquires a conditional sale contract without actual knowledge of the violation by the seller of *Civil Code Section 2981.9* or 2982(a), (j), or (k), the contract is valid and enforceable by such holder (*Civ. Code § 2983.1*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the buyer may rescind an unenforceable conditional sale contract. The ground set forth in this form is that the holder acquired the contract without actual knowledge of the violation by the seller of *Civ. Code § 2981.9* or *2982(a), (j),* or *(k)* [*see Civ. Code § 2983.1*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of whether or not the buyer is entitled to rescind a motor vehicle sales contract. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in §§ 206.200 -206.204*.

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20-206 California Points & Authorities § 206.210

§ 206.210 Opposing Contention That Buyer May Rescind Contract [Civ. Code § 2983.1]--Assignee Is Bona Fide Purchaser, Assignee, or Pledgee for Value [Civ. Code § 2983.1].

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

BUYER SHOULD NOT BE PERMITTED TO RESCIND THE CONTRACT BECAUSE THE HOLDER OF THE CONTRACT IS A BONA FIDE _____ [PURCHASER *or* ASSIGNEE *or* PLEDGEE] FOR VALUE.

Contract Is Enforceable by Bona Fide Assignee. Although a conditional sale contract is normally not enforceable if a holder acquires it with knowledge of a violation under *Civil Code Section 2981.9* or *2982(a), (j),* or *(k),* an exception applies when the holder is a bona fide purchaser, assignee, or pledgee for value (*Civ. Code § 2983.1*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the buyer may rescind an unenforceable conditional sale contract. The ground set forth in this form is that the holder is a bona fide purchaser, assignee, or pledgee for value [*see Civ. Code § 2983.1*]. Presumably, *Civ. Code § 2983.1* refers to enforceability by a subsequent taker, since a holder with knowledge cannot be a bona fide purchaser.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of whether or not the buyer is entitled to rescind a motor vehicle sales contract. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in §§ 206.200 -206.204*.

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20-206 California Points & Authorities § 206.211

§ 206.211 Supporting Contention That Buyer Is Entitled to Have Lien Canceled and Foreclosure Proceedings Enjoined--Lien Imposed on Impermissible Property [Civ. Code § 2984.2]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE BUYER IS ENTITLED TO HAVE THE _____ [*identify interest, e.g.,* LIEN] CANCELED[, AND FORECLOSURE PROCEEDINGS AGAINST THE PROPERTY ENJOINED], BECAUSE THE CONDITIONAL SALE CONTRACT PROVIDES FOR THE INCLUSION OF TITLE TO OR A LIEN ON ANY PROPERTY OTHER THAN THAT ALLOWED UNDER *CIVIL CODE SECTION 2984.2(a).*

A. Contract Imposes Lien on Impermissible Property. No conditional sale contract, and no agreement between a seller and a buyer made in connection with a conditional sale contract, may provide for the inclusion of title to or a lien on any property other than those specified in *Civil Code Section 2984.2(a)(1)-(4)* (*Civ. Code § 2984.2(a)*).

[*Optional*] **B. Buyer Is Entitled to Cancellation of Encumbrance on Impermissible Property.** When a conditional sale contract falls within the coverage of the Rees-Levering Act, with the result that the security taken for the obligation created by the contract is invalid and unenforceable under *Civil Code Section 2984.2*, the buyer is entitled to a judgment canceling the security (*see Thomas v. Wright (1971) 21 Cal. App. 3d 921, 922-923, 98 Cal. Rptr. 874*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a buyer is entitled to a cancellation of title to or a lien on property provided for in the conditional sale contract in violation of *Civ. Code § 2984.2(a).*

Civ. Code § 2984.2(a) does not, however, apply to any agreement that meets the requirements of *Civ. Code § 2982.5(b)*

(governing loans by "supervised financial organizations"), and otherwise complies with the Rees-Levering Act. In addition, *Civ. Code § 2984.2(a)* does not apply to any agreement whereby a security interest is taken in real property on which a mobilehome is installed on a foundation system under *Health & Safety Code § 18551* [*Civ. Code § 2984.2(b)*].

Before a contract may be determined to violate these provisions, a determination must be made that the Rees-Levering Act governs the transaction. For points and authorities supporting and opposing the contention that the Act applies to a transaction, see *§ 206.180* et seq.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of whether or not the buyer is entitled to cancellation of title to or a lien on property provided for in the conditional sale contract in violation of *Civ. Code § 2984.2(a)*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should refer to facts showing that the conditional sale contract provides for inclusion of title to or lien on property other than that stated in *Civ. Code § 2984.2(a)*.

[3] Discussion of Authorities

[a] Buyer Is Entitled to Cancellation of Encumbrance on Impermissible Property

The facts and procedural background of ***Thomas v. Wright*** *(1971) 21 Cal. App. 3d 921, 98 Cal. Rptr. 874* , are discussed in *§ 206.181[3][a]*. In *Thomas*, the purchaser brought an action for cancellation and enjoining foreclosure of a deed of trust signed to secure obligations under a document entitled "Automobile Leasing Contract." Judgment for the defendant lessor was reversed on appeal. The court of appeal stated that the Rees-Levering Act prohibits the seller from taking as security for the contract balance the title to or a lien on any property other than the motor vehicle that is the subject matter of the conditional sale (*21 Cal. App. 3d 921, 922)* . The court concluded that the contract fell within the coverage of the Act, and thus the deed of trust that was taken by the finance company as security for the obligations created by the contract was invalid and unenforceable under the provisions of *Civ. Code § 2984.2*. The court concluded that buyer was entitled to a judgment canceling the deed of trust (*21 Cal. App. 3d 921, 922-923)* .

NOTE:

After the holding in *Thomas*, *Civ. Code § 2981(a)(2)* was amended, and *Civ. Code § 2981.5* was added to the Rees-Levering Act, to exclude certain kinds of "open-ended" automobile leases from the coverage of the Act [*see* Stats. 1973, ch. 696, § 4 (changes intended to clarify and restate existing law in light of uncertainty as evidenced by *Thomas*); *see also* *Budget Rent-A-Car of Southern Cal. v. Bergman (1981) 121 Cal. App. 3d 256, 264-265 n.2, 175 Cal. Rptr. 286*)]. The point set forth in Paragraph B, however, does not appear to have been affected by the changes. The legislative intent as expressed above would apparently only affect the holding in the case that an open-end lease is a contract subject to the Rees-Levering Act [*Thomas v. Wright (1971) 21 Cal. App. 3d 921, 924, 98 Cal. Rptr. 874]* . The holding that a collateral deed of trust *is* subject to the ban in the Rees-Levering Act would apparently be unaffected [*see* *Thomas v. Wright (1971) 21 Cal. App. 3d 921, 922-923, 98 Cal. Rptr. 874]* . Open-end leases are now covered by the Vehicle Leasing Act [*see Civ. Code § 2985.7 et seq.*].

[4] Additional Authorities

[a] Buyer Is Entitled to Cancellation of Encumbrance on Impermissible Property

The facts and procedural background of *Hernandez v. Atlantic Finance Co. (1980) 105 Cal. App. 3d 65, 164 Cal. Rptr. 279* , are discussed in *§ 206.182[3][a]*. In *Hernandez*, suit was brought on behalf of the general public to enjoin a finance company and a used automobile dealer from conducting illegal and unfair business practices, and from violating the Rees-Levering Act. The dealer was alleged to have assisted prospective purchasers in obtaining loans from the

finance company. The finance company then wrote personal loans rather than conditional sale contracts, and took as security purchasers' furniture and other personal possessions, in addition to the automobiles being purchased (*105 Cal. App. 3d 65, 68)* . The court held that defendants' conduct constituted unlawful, unfair, and fraudulent business practice, and was enjoinable (*105 Cal. App. 3d 65, 81)* .

In *Brewer v. Home Owners Auto Finance Co. (1970) 10 Cal. App. 3d 337, 89 Cal. Rptr. 231* , the court of appeal affirmed summary judgment for buyers in an action for declaratory judgment and quiet title. The buyers entered into a conditional sale contract for purchase of an automobile with payment due in seven days. The contract was assigned to defendant two days later and amended to provide for five-year financing and an increased balance due. Concurrent with the execution of the amendment, plaintiffs gave a deed of trust to a parcel of improved real property to defendant. The trial court stated that the transaction between the buyer and seller-assignee was one that "philosophically and logically falls directly into the caldron of vicissitudes sought to be remedied by *Civ. Code § 2984.2*, and must fall in a motion for summary judgment" (*10 Cal. App. 3d 337, 340)* . The transaction did not legally avoid the effect of *Civ. Code § 2984.2*, but instead fell within the context of the section and at best was a subterfuge to illegally evade the section (*10 Cal. App. 3d 337, 342)* .

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[Reserved]

§§ 206.212[Reserved]

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20-206 California Points & Authorities § 206.230

§ 206.230 Supporting Contention That Seller or Holder Is Due Balance on Contract--Buyer Is in Default [Com. Code § 9615(d)(2)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Identify party, e.g.,* SELLER] IS ENTITLED TO RECOVER THE BALANCE DUE UNDER THE CONDITIONAL SALE CONTRACT BECAUSE THE BUYER HAS DEFAULTED ON HIS/HER OBLIGATIONS UNDER THE CONTRACT AND A DEFICIENCY REMAINS FOR WHICH THE BUYER IS LIABLE.

A. Deficiency Judgment May Lie. A deficiency judgment may lie after a sale or other disposition of a motor vehicle if the sale or other disposition was in conformity with the provisions of the Rees-Levering Motor Vehicle Sales and Finance Act and the relevant provisions of Division 9 of the Commercial Code, including *Commercial Code Sections 9610-9615* and *9626* (*Civ. Code § 2983.8(b)*; *Bank of America v. Lallana (1998) 19 Cal. 4th 203, 208-210, 77 Cal. Rptr. 2d 910, 960 P.2d 1133*).

B. Debtor Is Liable for Deficiency. If a security interest, under which a disposition of collateral is made, secures payment or performance of an obligation, then after payments are made and proceeds are applied as required by *Commercial Code Section 9615(a)* and permitted by *Commercial Code Section 9615(c)*, the obligor is liable for any deficiency (*Com. Code § 9615(d)(2)*).

[*Optional*] **C. Consumer Debtor Is Liable.** In the case of a consumer transaction, the debtor or any secondary obligor is liable for any deficiency if (1) notice of the disposition of the collateral was duly given to the debtor and any secondary obligor and (2) the collection, enforcement, disposition, and acceptance by the secured party were conducted in good faith and in a commercially reasonable manner (*Com. Code § 9626(b)(2)(B), (C)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the seller is entitled to the balance due after repossession, notice of intention to sell and buyer's right of reinstatement, and sale resulting in a deficiency on the balance due under the contract. Optional Paragraph C may be included in a consumer transaction case.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of whether or not the seller or holder is entitled to recover the contract price after default, repossession, and sale. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should add argument linking the points in this form with the facts of his or her case; for example, facts establishing that:

- The notice required under *Civ. Code § 2983.2(a)* was given.

- The buyer failed to exercise the right to reinstate (or the basis for a reasonable and good faith determination that buyer was not entitled to the right to reinstate, as provided in *Civ. Code § 2983.2(a)*);

- A sale was conducted in a commercially reasonable manner [*see Com. Code § 9607(c)*].

- Appropriate notice of a private or public sale was given [*see Com. Code §§ 9611-9614*; *Bank of America v. Lallana (1998) 19 Cal. 4th 203, 214, 77 Cal. Rptr. 2d 910, 960 P.2d 1133* ; *see also Union Safe Deposit Bank v. Floyd (1999) 76 Cal. App. 4th 25, 32, 90 Cal. Rptr. 2d 36* (bank's notice was defective under former Com. Code § 9504(3) when it failed to state, expressly or impliedly, whether sale would be public or private)].

- A deficiency remained after disposition of the motor vehicle.

[b] Liability of Buyer for Deficiency Judgment

Notwithstanding *Civ. Code § 2983.2* (*see § 206.230[2][c]*) or any other provision of law, no deficiency judgment will lie in any event after any sale or other disposition of a motor vehicle unless the court has determined that the sale or other disposition was in conformity with the provisions of the Rees-Levering Act and the relevant provisions of Division 9 of the Commercial Code, including *Com. Code §§ 9610-9615* and *9626*. The determination may be made on an affidavit unless the court requires a hearing in the particular case [*Civ. Code § 2983.8(b)*].

Under those Commercial Code provisions, in the case of a consumer transaction, the debtor or any secondary obligor is liable for any deficiency only if (1) notice of the disposition of the collateral was duly given to the debtor and any secondary obligor [see *Com. Code §§ 9611-9614* (notice requirements)] and (2) the collection, enforcement, disposition, and acceptance by the secured party were conducted in good faith and in a commercially reasonable manner [*Com. Code § 9626(b)(2)(B), (C)*]. In any other case, if the debtor has placed in issue the secured party's compliance with notice requirements, then unless the secured party proves compliance, the debtor or any secondary obligor has only limited liability for any deficiency [see *Com. Code § 9626(a)*]. For further discussion, see California Forms of Pleading and Practice, Ch. 503, *Sales: Secured Transactions* (Matthew Bender).

[c] Buyer's Right to Notice of Intention to Sell

Except when the motor vehicle has been seized by a public entity as described in *Civ. Code § 2983.3(b)(6)*, the buyer is not liable for the deficiency unless the seller or holder gives the buyer 15 days written notice of his or her intention to sell the repossessed vehicle. This notice must be given within 60 days after repossession of the vehicle and must contain

the information and notices set forth in *Civ. Code § 2983.2(a)(1)-(9)*, including notice to the buyer of his or her right to redeem the automobile and reinstate the contract within 15 days of the giving of notice [*Civ. Code § 2983.2(a)*].

[d] Acceleration of Maturity During Period of Right to Reinstate

If after default by the buyer, the seller or holder repossesses or voluntarily accepts surrender of the motor vehicle, any person liable on the contract has a right to reinstate the contract. The seller or holder may not accelerate the maturity of any part or all of the contract prior to expiration of the right to reinstate, unless the seller or holder reasonably and in good faith determines that any of the circumstances stated in *Civ. Code § 2983.3(b)(1)-(6)* has occurred [*Civ. Code § 2983.3(b)*].

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 206.233 -206.236* may be used to oppose the contention supported by these points and authorities.

[f] Related Forms

For a complaint for a deficiency judgment by the seller of a motor vehicle or a holder against a buyer, see *California Forms of Pleading & Practice, Ch. 89, Automobiles: Sales and Financing Under the Rees-Levering Act, § 89.80* (Matthew Bender). For a complaint for a deficiency judgment, alleging compliance with notice requirements of Division 9 of the Commercial Code [*see Com. Code § 9101 et seq.*], see California Forms of Pleading and Practice, Ch. 503, *Sales: Secured Transactions* (Matthew Bender). For a form for notification that collateral will be sold, see California Legal Forms, Ch. 42, *Secured Transactions*. (Matthew Bender).

[3] Discussion of Authorities

[a] Deficiency Judgment May Lie

In ***Bank of America v. Lallana*** *(1998) 19 Cal. 4th 203, 77 Cal. Rptr. 2d 910, 914-915, 960 P.2d 1133* , the California Supreme Court held that to obtain a deficiency judgment, a secured creditor who sells a defaulting debtor's repossessed car must comply not only with all the provisions of the Rees-Levering Act, but *also* with any relevant provisions in Division 9 of the Commercial Code. In that case, the purchaser bought a car on credit from a dealer, who assigned the contract and the security agreement to Bank of America. When the purchaser failed to make several payments, the bank repossessed the car. The bank notified the purchaser that if she did not redeem the car or reinstate the contract within 15 days, it would sell the car. The bank's vendor advertised that it would conduct an open to the public sealed bid auto auction. It then showed the purchaser's car at several auctions. The car was sold at a sealed bid auction at less than its Blue Book value. The bank sought a deficiency judgment against the purchaser for the difference between what she still owed on the car and the resale price. The purchaser cross-complained for an injunction and restitution. She asserted that bank's practice of giving notice of a private sale but then, without complying with the notice requirements for a public sale, conducting a public sale, was contrary to the Commercial Code and was therefore an unfair business practice under *Bus. & Prof. Code § 17200*, a claim that the trial court rejected but the Court of Appeal accepted. The Court of Appeal remanded the case to the trial court to rule on the purchaser's request for injunctive and restitutionary relief. The California Supreme Court granted the bank's petition for review (*19 Cal. 4th 203, 207-208)* .

The Court held that the secured creditor was required to comply with both the notice provisions of the Rees-Levering Act and former Division 9 of the Commercial Code (*19 Cal. 4th 203, 210)* . It reached its conclusion by interpreting the statutory requirements as follows. *Civ. Code § 2983.2(a)* requires a creditor to give the debtor written notice of its intent to dispose of a repossessed car. It specifies that except as otherwise provided in *Civ. Code § 2983.8*, the debtor will be liable for any deficiency after disposition of the repossessed motor vehicle if the creditor gives the debtor requisite timely notice and provides statutorily specified information. *Civ. Code § 2983.8* provides that no deficiency

judgment will lie after any sale or other disposition of a motor vehicle unless the court has determined that the sale or other disposition was in conformity with the provisions of both the Rees-Levering Act and the relevant provisions of Division 9 of the Commercial Code [*Com. Code § 9101 et seq.*], including provisions governing notice and the manner of disposition [*see* former Com. Code § 9504 (*now see Com. Code §§ 9611-9615* and *9626*)] (*19 Cal. 4th 203, 208-209)* .

In *Lallana*, the debtor's car was sold at a public auction, which the Court concluded was a public sale (*19 Cal. 4th 203, 210-212)* . The court determined that the secured creditor gave proper notice pursuant to the Rees-Levering Act (*19 Cal. 4th 203, 208)* but because it failed to give the debtor proper notice of a public sale pursuant to former Com. Code § 9504(3) (notice of both the time and place of sale), it was precluded from obtaining a deficiency judgment (*19 Cal. 4th 203, 214-215)* .

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20-206 California Points & Authorities § 206.231

§ 206.231 Supporting Contention That Seller or Holder Is Due Balance on Contract--Seller Is Not Required to Allege Compliance With Every Provision of Act

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Identify party, e.g.,* SELLER] IS NOT REQUIRED TO ALLEGE COMPLIANCE SPECIFICALLY UNDER EVERY APPLICABLE SECTION OF THE REES-LEVERING ACT.

Seller or Holder Not Required to Allege Specific Compliance With All Sections of Act. A party bringing an action to recover a deficiency following default and sale under a conditional sale contract is not required to allege compliance specifically with each and every applicable section of the Rees-Levering Act (*Jack Heskett Lincoln-Mercury, Inc. v. Metcalf (1984) 158 Cal. App. 3d 38, 43*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the seller is entitled to the balance due after repossession and sale, when the buyer objects on the ground that the seller has failed to sufficiently allege compliance under the Rees-Levering Act.

From a tactical point of view, these points and authorities would normally be raised after the buyer has raised an objection that the seller has inadequately alleged compliance with the Act.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of whether or not the seller or holder is entitled to recover the contract price after default, repossession, and sale. These points and authorities may also be adapted for use in a trial or

appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should refer to facts establishing that the seller has at least alleged compliance with the statutory scheme [*see Jack Heskett Lincoln-Mercury, Inc. v. Metcalf (1984) 158 Cal. App. 3d 38, 43, 204 Cal. Rptr. 355]* .

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 206.233 -206.235* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Seller or Holder Not Required to Allege Specific Compliance With All Sections of Act

In ***Jack Heskett Lincoln-Mercury, Inc. v. Metcalf*** *(1984) 158 Cal. App. 3d 38, 204 Cal. Rptr. 355* , plaintiff automobile dealer brought an action against defendant buyer alleging causes of action for deficiency and accounting. Defendant had defaulted, and the vehicle was surrendered and then sold, leaving a deficiency on the balance due on the contract. Plaintiff filed an amended complaint to substitute a corporate entity for an individual. Defendant demurred, claiming the statute of limitations had run on the substituted plaintiff and plaintiff failed to plead compliance with *Civ. Code § 2983.2* (governing notice to buyer of intention to sell repossessed vehicle). The trial court sustained defendant's demurrer without leave to amend and entered judgment accordingly. Plaintiff appealed.

The court of appeal reversed. With regard to the issue of whether plaintiff had sufficiently pleaded compliance with *Civ. Code § 2983.2*, the court noted that the amended complaint specifically alleged compliance with "all applicable requirements of *section 2981 et seq. of the Civil Code*." The court stated that it was unaware of any authority that supports the proposition that a complaint must allege compliance specifically with each and every applicable section of a statutory scheme (*158 Cal. App. 3d 38, 43)* .

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20-206 California Points & Authorities § 206.232

§ 206.232 Supporting Contention That Seller or Holder Is Due Balance on Contract--Four-Year Statute of Limitations Applies [Com. Code § 2725]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE FOUR-YEAR STATUTE OF LIMITATIONS UNDER COMMERCIAL CODE SECTION 2725 APPLIES IN AN ACTION FOR A DEFICIENCY JUDGMENT ON A CONDITIONAL SALE CONTRACT.

Four-Year Statute of Limitations Applies. When a plaintiff's action is one seeking a deficiency judgment on a conditional sale contract, the four-year limitations period contained in *Commercial Code Section 2725* is applicable (*Jack Heskett Lincoln-Mercury, Inc. v. Metcalf (1984) 158 Cal. App. 3d 38, 42-43, 204 Cal. Rptr. 355*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the seller is entitled to the balance due after repossession and sale, when the buyer objects on the ground that the statute of limitations has run.

These points and authorities may be submitted in support of the contention that the seller is entitled to the balance due after repossession, notice of intention to sell and buyer's right of reinstatement (or holder's reasonable and good faith determination that buyer lacks that right), and sale, when a deficiency remains.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of whether or not the seller or holder is entitled to recover the contract price after default, repossession, and sale. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel refer to facts establishing the action is one for recovery of a deficiency judgment on a conditional sale contract, and that the four-year limitation period has not elapsed in the action.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 206.233 -206.235* may be used to oppose the contention supported by these points and authorities.

[c] Four-Year Statute of Limitations in Contracts for Sale

An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement, the parties may reduce the period of limitation to not less than one year, but may not extend it [*Com. Code § 2725(1)*].

[3] Discussion of Authorities

[a] Four-Year Statute of Limitations Applies

The facts and procedural background of ***Jack Heskett Lincoln-Mercury, Inc. v. Metcalf*** *(1984) 158 Cal. App. 3d 38, 204 Cal. Rptr. 355* , are discussed in *§ 206.231[3][a]*. In *Metcalf,* defendant buyer relied on *Stone v. James (1956) 142 Cal. App. 2d 738, 740, 299 P.2d 305* , to contend that the applicable period in an action for a deficiency judgment on a conditional sale contract is one year. The court of appeal distinguished *Stone* on the ground that that case involved an action to recover unearned finance charges from the seller for the seller's failure to refund those charges when the buyer paid off the balance due on an automobile sale contract prior to maturity, and therefore sought to enforce a penalty or forfeiture. The instant case, however, had nothing to do with a forfeiture or penalty. Rather, the court concluded, the instant case was consistent with *Massey-Ferguson Credit Corp. v. Casaulong (1976) 62 Cal. App. 3d 1024, 1028, 133 Cal. Rptr. 497* , which held that an action for a deficiency judgment was barred by the four-year limitations period contained in *Com. Code § 2725* (*158 Cal. App. 3d 38, 42)* .

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20-206 California Points & Authorities § 206.233

§ 206.233 Opposing Contention That Seller or Holder Is Due Balance on Contract--Seller May Not Accelerate Maturity [Civ. Code § 2983.3(a)].

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Identify party, e.g.*, SELLER] IS NOT ENTITLED TO THE BALANCE ON THE CONTRACT BECAUSE THE BUYER HAS NOT DEFAULTED AND THE OBLIGATION HAS NOT YET MATURED.

Seller May Not Accelerate Maturity. In the absence of default in the performance of any of the buyer's obligations under the contract, the seller or holder may not accelerate the maturity of any part or all of the amount due thereunder or repossess the motor vehicle (*Civ. Code § 2983.3(a)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the seller may recover the amount due on the contract. The ground set forth in the form is that the buyer has not defaulted and the obligation has not yet matured [*Civ. Code § 2983.3(a)*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of whether or not the seller is entitled to the balance due on the contract. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should refer to facts indicating that the buyer is not in default and that the seller is accelerating the

maturity of the obligation.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in §§ 206.230 -206.232*.

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20-206 California Points & Authorities § 206.234

§ 206.234 Opposing Contention That Seller or Holder Is Due Balance on Contract--Seller Has Forfeited Right to Deficiency by Unjustifiable Denial of Reinstatement [Civ. Code § 2983.3(e)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Identify party, e.g.*, SELLER] MAY NOT RECOVER ANY DEFICIENCY ON THE TOTAL AMOUNT DUE UNDER THE CONDITIONAL SALE CONTRACT BECAUSE HE/SHE HAS FORFEITED ANY SUCH RIGHT BY UNJUSTIFIABLY DENYING THE BUYER OF HIS/HER RIGHT TO REINSTATE THE CONTRACT.

A. Person Liable on Contract Has Right to Reinstate. If after default by the buyer, the seller or holder repossesses or voluntarily accepts surrender of the motor vehicle, any person liable on the contract has a right to reinstate the contract, and the seller or holder is not permitted to accelerate the maturity of any part or all of the contract prior to expiration of the right to reinstate, unless the seller or holder reasonably and in good faith determines that any of circumstances stated in *Civil Code Section 2983.3(b)(1)-(6)* has occurred (*Civ. Code § 2983.3(b)*).

[*Optional*] **B. Notices Violated Notice Provisions.** Except as otherwise provided in *Civil Code Section 2983.8*, prohibiting deficiency judgments in mobilehome sales, persons liable on a conditional sale contract may be liable for any deficiency after disposition of the repossessed or surrendered motor vehicle only if the notice prescribed by *Civil Code Section 2983.2* is given within 60 days of repossession or surrender and does all of those things required under *Civil Code Section 2983.2(a)(1)-(6)* (*Civ. Code § 2983.2(a)*; *Eldorado Bank v. Lytle (1983) 147 Cal. App. 3d Supp. 17, 18-19 n.3 , 195 Cal. Rptr. 499*).

C. Seller Has Burden of Proof That Denial of Reinstatement Was Justified. If the seller or holder denies the right to reinstatement under *Civil Code Section 2983.3(b)* or *(d)(4)*, the seller or holder has the burden of proving that the denial was justified in that it was reasonable and made in good faith (*Civ. Code § 2983.3(e)*).

D. Seller Has Forfeited Right to Deficiency by Failing to Sustain Burden. If the seller or holder fails to sustain the burden of proof, the seller or holder is not entitled to a deficiency[, but it shall not be presumed that the buyer is entitled to damages by reason of the failure of the seller or holder to sustain the burden of proof] (*Civ. Code § 2983.3(e)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the seller may recover the amount due on the contract. The ground set forth in the form is that the seller has forfeited his or her right to deficiency by failing to sustain the burden of proving that the denial was justified in that it was reasonable and made in good faith, as required under *Civ. Code § 2983.3(e)*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of whether or not the seller is entitled to the balance due on the contract. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should refer to facts that demonstrate that the buyer had a right to reinstate, that the seller denied that right, and that the seller has failed to satisfy the burden of proving that the denial was justified under *Civ. Code § 2983.3(e)*.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in §§ 206.230 -206.232*.

[3] Discussion of Authorities

[a] Notices Violated Notice Provisions

The facts and procedural background of ***Eldorado Bank v. Lytle*** *(1983) 147 Cal. App. 3d Supp. 17* , *195 Cal. Rptr. 499* , are discussed in *§ 206.182[3][d]*. In *Eldorado Bank*, the parties stipulated that the notices respecting repossession and sale of a motorhome that were sent to respondents did not comply with *Civ. Code § 2983.2(a)* of the Rees-Levering Act. Since the notices failed to comply with the Act, defendant bank, which held the contract, was not entitled to a deficiency, and the trial court awarded plaintiff buyer's attorney's fees (*147 Cal. App. 3d Supp. 17, 19)* . After determining that the contract was a conditional sale contract and therefore governed by the Rees-Levering Act, because the transaction involved a "seller-assisted loan," the appellate department of the superior court affirmed the judgment (*147 Cal. App. 3d Supp. 17, 21-22)* .

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§ 206.235 Opposing Contention That Seller or Holder Is Due Balance on Contract--Seller's Assignee Is Subject to Equities and Defenses of Buyer [Civ. Code § 2983.5(a)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE HOLDER OF THE CONDITIONAL SALES CONTRACT, AS ASSIGNEE OF THE SELLER, MAY NOT NOT RECOVER ANY DEFICIENCY ON THE TOTAL AMOUNT DUE UNDER THE CONDITIONAL SALE CONTRACT BECAUSE HE/SHE IS SUBJECT TO ALL EQUITIES AND DEFENSES THAT THE BUYER HAS AGAINST THE SELLER.

A. Seller's Assignee Is Subject to Equities and Defenses of Buyer. An assignee of the seller's right is subject to all equities and defenses of the buyer against the seller, notwithstanding an agreement to the contrary, although the assignee's liability may not exceed the amount of the debt owing to the assignee at the time of the assignment (*Civ. Code § 2983.5(a)*).

B. Particular Equities and Defenses Applicable. _____ [*Here, and in subsequent paragraphs as appropriate, set forth the equities and defenses of the buyer against the seller, which apply to the assignee*].

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the holder may recover the amount due on the contract, when the holder is an assignee of the seller. The ground set forth in the form is that the assignee is subject to the equities and defenses of the buyer against the seller under *Civ. Code § 2983.5(a)*. The assignee's liability, however, may not exceed the amount of the debt owing to the assignee at the time of the assignment [*Civ. Code § 2983.5(a)*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of whether or not the seller is entitled to the balance due on the contract. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should refer to particular equities and defenses that the buyer has against the seller, and identify the facts that give rise to those assertions.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in §§ 206.230 -206.232*.

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20-206 California Points & Authorities § 206.236

§ 206.236 Opposing Contention that Seller or Holder Is Due Balance on Contract--Seller Has Not Complied With Applicable Notice Provisions [Com. Code § 9611(b), (c)(1), (d)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or may be adapted for use in a trial or appellate brief or in jury instructions.*]

_____ [*Identify party, e.g.*, SELLER] MAY NOT RECOVER ANY DEFICIENCY ON THE TOTAL AMOUNT DUE UNDER THE CONDITIONAL SALE CONTRACT BECAUSE HE/SHE HAS FORFEITED THAT RIGHT BY FAILING TO PROVIDE THE BUYER WITH APPROPRIATE NOTICE AS REQUIRED BY STATUTE

A. Failure to Comply With Notice Requirements. A secured creditor who sells a defaulting debtor's repossessed car may obtain a deficiency judgment only after compliance with the notice provisions of both the Rees-Levering Act and Division 9 of the Commercial Code (*Bank of America v. Lallana (1998) 19 Cal. 4th 203, 210*).

B. Reasonable Notice Is Required. When collateral is not perishable, does not threaten to decline speedily in value, and is not of a type customarily sold on a recognized market, a secured party that disposes of the collateral is required to send to the debtor a reasonable authenticated notification of disposition (*Com. Code § 9611(b), (c)(1), (d)*).

[*Optional*] **C. Consumer Debtor Is Not Liable.** In the case of a consumer transaction, the debtor is not liable for any deficiency unless notice of the disposition of the collateral was duly given to the debtor pursuant to *Commercial Code Sections 9611-9614* (*Com. Code § 9626(b)(2)(B)*).

[2] Comments

[a] Use of Form

These points and authorities are for use in opposing the contention that the seller may recover the amount due on the

contract. The ground for opposition is that the seller has forfeited his or her right to a deficiency judgment by failing to provide reasonable notice of disposition of the collateral. Optional Paragraph C may be included in a consumer transaction case.

Counsel should insert argument in this form showing the relationship between the facts of the case and points of law stated.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of whether or not the seller is entitled to the balance due on the contract.

[3] Discussion of Authorities

[a] Failure to Comply With Notice Requirements

The facts and procedural background of ***Bank of America v. Lallana*** *(1998) 19 Cal. 4th 203, 77 Cal. Rptr. 2d 910, 960 P.2d 1133* , are discussed in *§ 206.230[3][a]*. In *Lallana*, the debtor's car was sold at a public auction, which the California Supreme Court concluded was a public sale (*19 Cal. 4th 203, 210-212)* . The Court determined that the secured creditor gave proper notice pursuant to the Rees-Levering Act [*see Civ. Code § 2983.2*] (*19 Cal. 4th 203, 208)* . The Court, however, held that to obtain a deficiency judgment, a secured creditor who sells a defaulting debtor's repossessed car must comply not only with all the provisions of the Rees-Levering Act, but *also* with any relevant provisions in Division 9 of the Commercial Code (*19 Cal. 4th 203, 210)* . Because the creditor failed to give the debtor proper notice of a public sale pursuant to former Com. Code § 9504(3) (notice of both the time and place of sale), it was precluded from obtaining a deficiency judgment (*19 Cal. 4th 203, 214-215)* .

[4] Additional Authorities

[a] Failure to Comply With Notice Requirements

Cerritos Valley Bank v. Stirling (2000) 81 Cal. App. 4th 1108, 97 Cal. Rptr. 2d 432 was an action on a guaranty. The guarantor moved for summary judgment on the basis that the secured creditor's failure to give him post-default notice of the sale of the collateral barred its claim for a deficiency judgment. The trial court found that the guarantor's pre-default waiver of the requirement of notice was void as a matter of law, and granted summary judgment to the guarantor. The court of appeal affirmed. The guarantor relied on former Com. Code § 9504(3), which required the secured party to give notice of sale to the debtor (*now see Com. Code § 9611(b)*), and former Com. Code § 9501, which barred pre-default waiver of the right to notice (*now see Com. Code § 9602(7)*). The court of appeal noted that the protections of former Com. Code § 9504 were to be strictly construed and could not be waived by the debtor before the default. Furthermore, it is the prevailing view in California that a guarantor comes within the statutory definition of "debtor"; thus, the guarantor was entitled to notice (*81 Cal. App. 4th 1108, 1113-1114)* . The court therefore held that the guarantor's waiver of notice in the guaranty was void as a matter of law (*81 Cal. App. 4th 1108, 1114-1115)* .

In *Union Safe Deposit Bank v. Floyd (1999) 76 Cal. App. 4th 25, 90 Cal. Rptr. 2d 36* , the court of appeal held that a bank's notice was defective in failing to state, expressly or implicitly, whether the sale would be public or private, and therefore it failed to comply with the specific notice requirements of former Com. Code § 9504(3) (*now see Com. Code §§ 9611-9614*). A general partnership borrowed funds from the bank and issued an installment note signed by the partners. The bank took a security interest in a helicopter owned by the partnership. The loan went into default, and the bank repossessed the helicopter. The bank sent a notice to the partnership and each partner, which stated in part: "Notice Is Hereby Given of the undersigned's intent to sell the repossessed motor vehicle at the expiration of 5 days from the date this notice was mailed ... and 'by private or public sale whichever deems [sic] necessary at redemption address at close of business day.' " The helicopter ultimately was sold for far less than the loan amount, and the bank sued for breach of the installment note. The jury found that the helicopter had been sold in good faith and in a commercially

reasonable manner. The trial court entered a deficiency judgment in favor of the bank (*76 Cal. App. 4th 25, 27-28)* . On appeal, the court examined the purpose of former Com. Code § 9504(3). Citing *Bank of America v. Lallana (1998) 19 Cal. 4th 203, 214, 77 Cal. Rptr. 2d 910, 960 P.2d 1133* (*see § 206.236[3][a]*), the court stated that the purpose of that section was to give the debtor an opportunity to discharge the debt and redeem the collateral, produce another purchaser, or see that the sale is conducted in a commercially reasonable manner (*76 Cal. App. 4th 25, 29)* . The court found that the content of the notice was defective as it did not contain sufficient information to ascertain with specificity the type of sale the bank intended to undertake. The language of the notice arguably suggested either a public or a private sale. It specified the time and place of a possible public sale, but also might have been read to indicate the date after which a private sale would take place. The court noted that California law mandated strict compliance with the notice requirements in former Com. Code § 9504. The law did not permit the creditor to leave the debtor guessing regarding the type of sale contemplated (*76 Cal. App. 4th 25, 29-31)* . The court therefore concluded that the notice was defective, and the bank was precluded from obtaining a deficiency judgment (*76 Cal. App. 4th 25, 32)* .

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20-206 California Points & Authorities § 206.237

§ 206.237 Supporting Contention That Seller Is Liable for Conversion--Seller Has Conducted Unauthorized Sale or Has Unjustifiably Refused to Turn Over Vehicle to Buyer

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

SELLER IS LIABLE FOR CONVERSION BECAUSE BUYER HAS A RIGHT TO REINSTATE THE CONTRACT AND _____ [SELLER HAS CONDUCTED AN UNAUTHORIZED SALE *or* BUYER HAS DEMANDED THAT SELLER TURN OVER POSSESSION OF THE VEHICLE AND SELLER HAS UNJUSTIFIABLY REFUSED TO DO SO].

A. Forfeiture of Seller's Right to Deficiency Is Not Buyer's Exclusive Remedy. When a buyer has a right to the notice set forth in *Civil Code Section 2983.2*, and to reinstate a conditional sale contract in the manner outlined in *Civil Code Section 2983.3*, depriving the noncomplying seller of a deficiency judgment is not the buyer's only remedy (*Cerra v. Blackstone (1985) 172 Cal. App. 3d 604, 609, 218 Cal. Rptr. 15*).

B. Buyer May Assert Cause of Action for Conversion. Once it is determined that a buyer has a right to reinstate the conditional sale contract, the buyer has a right to possession of the vehicle and standing to bring conversion (*Cerra v. Blackstone (1985) 172 Cal. App. 3d 604, 609, 218 Cal. Rptr. 15*).

C. Unauthorized Sale and Unjustified Refusal to Turn Over Possession Constitute Conversion. Both an unauthorized sale and an unjustified refusal to turn over possession on demand, even when possession by the withholder was originally obtained lawfully, constitute conversion (*Cerra v. Blackstone (1985) 172 Cal. App. 3d 604, 609, 218 Cal. Rptr. 15*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the buyer may maintain an action for conversion, after establishing that the buyer has been deprived of his or her right of reinstatement of the conditional sale contract [*see Civ. Code § 3336* (detriment presumed caused by wrongful conversion of personal property)].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of whether or not the buyer is entitled to bring an action for conversion. For example, the form may be used to oppose a general demurrer on the ground that the pleading does not state facts sufficient to constitute a cause of action, or to oppose a defendant's motion for summary judgment or adjudication of the cause of action of conversion. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should refer to facts that demonstrate that the buyer had a right to reinstate, that the seller denied that right, and that the seller either has conducted an unauthorized sale of the motor vehicle or has unjustifiably refused to turn over possession on the buyer's demand.

[b] Related Pleading and Practice Forms

For a form of complaint for damages based on conversion, see California Forms of Pleading and Practice, Ch. 150, *Conversion* (Matthew Bender).

[c] Related Points and Authorities

For a form of memorandum of points and authorities supporting a contention that defendant has converted plaintiff's personal property generally, see Ch. 51, *Conversion* .

[3] Discussion of Authorities

[a] Forfeiture of Seller's Right to Deficiency Is Not Buyer's Exclusive Remedy

Cerra v. Blackstone *(1985) 172 Cal. App. 3d 604, 218 Cal. Rptr. 15* , involved an action for conversion arising out of the repossession and sale of a vehicle in a transaction that was subject to the Rees-Levering Act. Defendant automobile dealer lawfully repossessed a Chevrolet truck sold to plaintiffs after plaintiffs defaulted on one or more installments due under a conditional sale contract. After repossession, the dealer gave a notice of intent to sell the vehicle that, in the court of appeal's words, "did not even come close to complying with *Civ. Code § 2983.2*." Plaintiffs alleged that after they received the notice, they offered to bring the payments current and demanded restoration of the truck, but the dealer rejected the offer and insisted on payoff of the entire loan. Defendant moved for summary judgment, asserting that plaintiffs had no claim for conversion even if the facts asserted were true. The trial court entered summary judgment in favor of defendant and plaintiffs appealed.

The court of appeal reversed the judgment. The court noted that while the motion was one for summary judgment, in essence it had the purpose and effect of a general demurrer. On appeal, the dealer contended that a repossessing conditional seller of a vehicle subject to the Rees-Levering Act suffers one and only one penalty when he or she fails to give the notice required by *Civ. Code § 2983.2*: that the seller may not collect a deficiency (*172 Cal. App. 3d 604, 607)* . After reviewing the Legislature's objective to provide a more comprehensive protection for the unsophisticated motor vehicle consumer under the Rees-Levering Act (*172 Cal. App. 3d 604, 608)* , the court held that a buyer has a right to the notice set forth in *Civ. Code § 2983.2* and, subject to the exceptions in *Civ. Code § 2983.3(b)*, to reinstate the contract in the manner outlined in *Civ. Code § 2983.3*. Depriving the noncomplying seller of a deficiency judgment is not the buyer's only remedy (*172 Cal. App. 3d 604, 609)* .

[b] Buyer May Assert Cause of Action for Conversion

The facts and procedural background of ***Cerra v. Blackstone*** *(1985) 172 Cal. App. 3d 604, 218 Cal. Rptr. 15* , are *discussed under § 206.237[3][a]*. In *Cerra*, the court of appeal stated that once it is determined that the buyer has a right to reinstate the conditional sale contract, the buyer has a right to possession of the vehicle and standing to bring conversion (*172 Cal. App. 3d 604, 609)* .

[c] Unauthorized Sale and Unjustified Refusal to Turn Over Possession Constitute Conversion

The facts and procedural background of ***Cerra v. Blackstone*** *(1985) 172 Cal. App. 3d 604, 218 Cal. Rptr. 15* , are *discussed under § 206.237[3][a]*. In *Cerra*, the court of appeal stated that unjustified refusal to turn over possession on demand constitutes conversion even when possession by the withholder was originally obtained lawfully, and of course so does an unauthorized sale (*172 Cal. App. 3d 604, 609)* .

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3. Enforcement Of Conditional Sale Contract

20-206 California Points & Authorities § 206.238

§ 206.238 Supporting Contention That Buyer Is Entitled to Three Times Amount of Finance Charges Paid for Prepayment Penalty Violation [Civ. Code § 2983.1].

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

BUYER IS ENTITLED TO RECOVER FROM THE _____ [*identify party, e.g.,* SELLER] THREE TIMES THE AMOUNT OF FINANCE CHARGES PAID TO HIM/HER BECAUSE _____ [*identify party, e.g.,* SELLER] HAS VIOLATED THE PROHIBITIONS AGAINST PREPAYMENT PENALTIES UNDER THE REES-LEVERING ACT.

Buyer May Recover Three Times Amount of Finance Charges Paid. If the seller or holder of a conditional sale contract, except as the result of an accidental or bona fide error of computation, violates any provision of *Civil Code Section 2982*(*l*), the buyer may recover from such person three times the amount of any finance charge paid to that person (*Civ. Code § 2983.1*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the buyer may recover from seller three times the amount of finance charges paid to the seller or the holder of the conditional sale contract, under *Civ. Code § 2983.1*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of whether or not the buyer is entitled to triple amount of finance charges paid seller, as provided in *Civ. Code § 2983.1*. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should refer to facts that show how the conditional sale contract violates *Civ. Code § 2982*(*l*).

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20-206 California Points & Authorities § 206.239

§ 206.239 Supporting Contention That Party Is Entitled to Attorney's Fees as Prevailing Party [Civ. Code § 2983.4]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Identify party, e.g,* SELLER] IS ENTITLED TO AN AWARD OF REASONABLE ATTORNEY'S FEES AND COSTS BECAUSE HE/SHE IS THE PREVAILING PARTY IN AN ACTION ON A _____ [CONTRACT *or* PURCHASE ORDER] SUBJECT TO THE PROVISIONS OF THE REES-LEVERING ACT.

A. Party Entitled to Attorney's Fees and Costs. Reasonable attorney's fees and costs shall be awarded to the prevailing party in any action on a contract or purchase order subject to the provisions of the Rees-Levering Act regardless of whether the action is instituted by the seller, holder, or buyer [*Civ. Code § 2983.4*].

[*Optional*] **B. When Defendant Deemed Prevailing Party.** When the defendant alleges in his or her answer that he or she tendered to the plaintiff the full amount to which he or she was entitled, and thereon deposits in court, for the plaintiff, the amount so tendered, and the allegation is found to be true, the defendant is deemed to be a prevailing party within the meaning of *Civil Code Section 2983.4* (*Civ. Code § 2983.4*).

[*Optional*] **C. Attorney's Fees Available to Prevailing Party in Action Seeking Restitution After Prior Rescission.** Although a motor vehicle conditional sale contract is extinguished by rescission, a later action seeking restitution based on the prior rescission nevertheless involves that contract and the prevailing parties are entitled to attorney's fees (*Leaf v. Phil Rauch, Inc. (1975) 47 Cal. App. 3d 371, 378-379, 120 Cal. Rptr. 749*).

[*Optional*] **D. Buyer Who Prevails on Cross Complaint Against Seller Is Entitled to Attorney's Fees.** When a conditional seller's assignee sues the buyer of the vehicle for a deficiency judgment and the buyer prevails on a cross

complaint against the seller, the buyer is entitled to attorney's fees as a prevailing party pursuant to *Civil Code Section 2983.4* (*Golden West Credit Corp. v. Maury (1969) 270 Cal. App. 2d Supp. 913, 916* , *75 Cal. Rptr. 757*).

[*Optional*] **E. Defendant in Deficiency Action Can Be Prevailing Party When Plaintiff Has Voluntarily Dismissed Action Without Prejudice.** The defendant in a deficiency action brought under the Rees-Levering Act can be the prevailing party for purposes of awarding attorney fees pursuant to the Act when the plaintiff has voluntarily dismissed the underlying contract-based action without prejudice prior to trial (*Damian v. Tamondong (1998) 65 Cal. App. 4th 1115, 1129-1130, 77 Cal. Rptr. 2d 262*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the party is entitled to an award of reasonable attorney's fees and costs as the prevailing party under *Civ. Code § 2983.4*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of whether or not the party is entitled to an award of reasonable attorney's fees and costs. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should refer to facts that indicate that there was an action on a contract or purchase order subject to the provisions of the Rees-Levering Act, and that the party was a prevailing party in the action, as provided in *Civ. Code § 2983.4* [*see, e.g.,* *Graciano v. Robinson Ford Sales, Inc. (2006) 144 Cal. App. 4th 140, 149-164, 50 Cal. Rptr. 3d 273* (how to determine which party has prevailed, and how to compute amount of fees to which that party is entitled)].

[b] Related Pleading and Practice Forms

For a discussion and forms relating to recovery of attorney's fees generally, see *California Forms of Pleading and Practice, Ch. 174, Costs and Attorney's Fees, § 174.50 et seq.* (Matthew Bender).

[c] Related Points and Authorities

For a memorandum of points and authorities supporting motions to award or establish entitlement to attorney's fees generally, see Ch. 60, *Costs* .

[3] Discussion of Authorities

[a] Attorney's Fees Available to Prevailing Party in Action Seeking Restitution After Prior Rescission

Leaf v. Phil Rauch, Inc. *(1975) 47 Cal. App. 3d 371, 120 Cal. Rptr. 749* , involved an action by a buyer against an automobile dealer for restitution based on rescission of a motor vehicle conditional sale contract, and attorney's fees. Judgment was entered in favor of plaintiffs and against defendant, but failed to include an award of attorney's fees. Plaintiffs appealed.

The court of appeal reversed the judgment insofar as it failed to include an award of attorney's fees. The court stated that inasmuch as *Civ. Code § 1811.1*, governing attorney's fees and court costs, provides for the recovery of attorney's fees in language identical in all material respects with the language of *Civ. Code § 2983.4*, the phrase "on a contract" should be given the same meaning in both statutes. The legislative history of § 1811.1 provides for liberal interpretation of the phrase, and the assembly subcommittee that recommended the Unruh Act clearly intended no limitation on the type of

action covered by the section (*47 Cal. App. 3d 371, 378)* . A contract is extinguished by its rescission, and the instant action sought restitution based on plaintiff's prior rescission of the motor vehicle conditional sale contract. The action nevertheless involved that contract, which was subject to the provisions of the Rees-Levering Act. Therefore, plaintiffs, as prevailing parties, were entitled to attorney's fees (*47 Cal. App. 3d 371, 378-379)* .

[b] Buyer Who Prevails on Cross Complaint Against Seller Is Entitled to Attorney's Fees

Golden West Credit Corp. v. Maury *(1969) 270 Cal. App. 2d Supp. 913* , *75 Cal. Rptr. 757* , involved an action by an assignee of a conditional sale contract for a motor vehicle against the buyer for a deficiency, and a cross complaint by the buyer against the assignor-seller for attorney's fees under *Civ. Code § 2983.4*. The trial court granted judgment for the cross complainant and the cross defendant appealed.

The appellate department of the superior court affirmed. The court stated that an interpretation that would exempt the original seller from liability to the "prevailing party" would allow a culpable seller to escape responsibility for the cost of litigation by assigning his or her claim at the last minute for purpose of collection to a known insolvent. Thus, the court affirmed the judgment (*270 Cal. App. 2d Supp. 913, 916)* .

[c] Defendant in Deficiency Action Can Be Prevailing Party When Plaintiff Has Voluntarily Dismissed Action Without Prejudice

In ***Damian v. Tamondong*** *(1998) 65 Cal. App. 4th 1115, 77 Cal. Rptr. 2d 262* , the buyer purchased a car pursuant to a contract subject to the Rees-Levering Act. The seller's assignee filed a complaint in municipal court to collect a deficiency judgment after the bank repossessed and sold the vehicle. The buyer's attorney spent approximately 54 hours actively defending the deficiency action. The seller's assignee then voluntarily dismissed the action on the eve of trial. The buyer filed a motion for attorney fees and costs, which the assignee opposed. The trial court denied the motion and the buyer appealed to the appellate department of the superior court. The appellate department vacated the trial court's order and remanded for a determination, using a pragmatic approach based on an analysis of the relevant facts at the trial level, whether the buyer was the "prevailing party" in the action (*65 Cal. App. 4th 1115, 1118-1119)* .

The court of appeal was thus presented with an issue of first impression: whether the defendant in a deficiency action brought under the Rees-Levering Act can be the prevailing party for purposes of awarding attorney fees pursuant to *Civ. Code § 2983.4* when, prior to trial, the plaintiff has voluntarily dismissed the underlying contract-based action without prejudice. Because neither the Rees-Levering Act nor *Civ. Code § 2983.4* defines the term "prevailing party," the respondent urged the court to affirm the municipal court's order denying attorney fees based on *Civ. Code § 1717(b)(2)*, which provides that there is no prevailing party for purposes of that section when an action has been voluntarily dismissed. The court, however, reviewed the legislative history of *Civ. Code §§ 1717* and *2983.4* and held that *Civ. Code § 1717(b)(2)* does not bar a statutory award of attorney fees under *Civ. Code § 2983.4* for a defendant in whose favor a dismissal has been entered in an action on a contract subject to the Rees-Levering Act (*65 Cal. App. 4th 1115, 1120-1128)* . It did not, however, decide whether the buyer was the prevailing party in this case. The court merely stated that the issue of whether a voluntary dismissal was really entered 'in favor" of the defendant can arise in a variety of procedural settings, may involve questions of fact, and is a matter best left to the discretion of the trial court. The court of appeal therefore affirmed the judgment of the appellate department and remanded for a determination on the merits (*65 Cal. App. 4th 1115, 1129-1130)* .

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CHAPTER 207 SANCTIONS

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§ 207.syn Synopsis to Chapter 207: SANCTIONS

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§ 207.04 Page Limits on Points and Authorities

§ 207.05 Related Pleading and Practice Forms

§§ 207.06-207.19 [Reserved]

§ 207.20 Supporting Motion for Sanctions--Complaint Filed or Proceeding Initiated Before 1995--Bad-Faith Actions or Tactics That Are Frivolous or Solely Intended to Cause Unnecessary Delay [Code Civ. Proc. § 128.5]--General Authority for Motion

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Effective Date of Sanctions Statute

[d] Opposing Points and Authorities

[e] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Statutory Authority to Award Monetary Sanctions Consisting of Reasonable Expenses, Including Attorney's Fees

[b] "Actions or Tactics" Defined

[c] "Frivolous" Defined

[d] Sanctions May Be Awarded in Favor of Pro Se Litigant

[4] Additional Authorities

[a] Statutory Authority to Award Monetary Sanctions Consisting of Reasonable Expenses, Including Attorney's Fees

[b] "Actions or Tactics" Defined

§ 207.21 Supporting Motion for Sanctions--Complaint Filed or Proceeding Initiated Before 1995--Bad-Faith Actions or Tactics That Are Frivolous or Solely Intended to Cause Unnecessary Delay [Code Civ. Proc. § 128.5]--Sufficient Nexus Between Offending Action and Expenses Incurred

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Causal Connection

[b] Action's Lack of Merit Is Sufficient Basis for Imposition of Sanctions

§ 207.22 Supporting Motion for Sanctions--Complaint Filed or Proceeding Initiated Before 1995--Bad-Faith Actions or Tactics That Are Frivolous or Solely Intended to Cause Unnecessary Delay [Code Civ. Proc. § 128.5]--Expenses May Be Awarded for Entire Action

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] "Actions or Tactics" Includes Entire Action

§ 207.23 Supporting Motion for Sanctions--Complaint Filed or Proceeding Initiated Before 1995--Bad-Faith Actions or Tactics That Are Frivolous or Solely Intended to Cause Unnecessary Delay [Code Civ. Proc. § 128.5]--Sanctions for Defense of Action Permitted

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] "Actions or Tactics" Includes Defenses

§ 207.24 Supporting Motion for Sanctions--Complaint Filed or Proceeding Initiated Before 1995--Bad-Faith Actions or Tactics That Are Frivolous or Solely Intended to Cause Unnecessary Delay [Code Civ. Proc. § 128.5]--Sanctions Permitted for Some, but Not All, Causes of Action

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Partially Frivolous Complaint

§ 207.25 Supporting Motion for Sanctions--Complaint Filed or Proceeding Initiated Before 1995--Bad-Faith Actions or Tactics That Are Frivolous or Solely Intended to Cause Unnecessary Delay [Code Civ. Proc. § 128.5]--Liability for Sanctions Not Precluded by Existence of Other Remedies for Misconduct

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Liability Not Exclusive

§ 207.26 Supporting Motion for Sanctions--Complaint Filed or Proceeding Initiated Before 1995--Bad-Faith Actions or Tactics That Are Frivolous or Solely Intended to Cause Unnecessary Delay [Code Civ. Proc. §

128.5]--Punitive Damages May Be Awarded in Action by Convicted Felon Against Victim Arising Out of Felony

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

§ 207.27 Supporting Motion for Sanctions--Complaint Filed or Proceeding Initiated Before 1995--Bad-Faith Actions or Tactics That Are Frivolous or Solely Intended to Cause Unnecessary Delay [Code Civ. Proc. § 128.5]--Expenses Other Than Costs and Attorney's Fees Available

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Expenses Are Not Limited to Costs and Attorney's Fees

§ 207.28 Supporting Motion for Sanctions--Pleading, Notice of Motion, or Other Similar Paper Filed in Action or Proceeding Initiated After 1994 [Code Civ. Proc. § 128.7]--General Authority for Motion

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Sanctions Available Under Code Civ. Proc. § 128.7 Are Not Limited to Monetary Sanctions

[d] Notice and Opportunity to Respond

[e] Sanctions for Discovery Violations Are Not Available Under Code Civ. Proc. § 128.7

[f] Effective Date

[g] Relevance of Fed. R. Civ. P., Rule 11

[h] Opposing Points and Authorities

[i] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Certification After Reasonable Inquiry

§ 207.29 Supporting Motion for Sanctions--Pleading, Notice of Motion, or Other Similar Paper Filed in Action or Proceeding Initiated After 1994 [Code Civ. Proc. § 128.7]--Notice of Corrective Action Not Given Within Safe Harbor Period

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Notice of Corrective Action Must Be Given Within "Safe Harbor" Period

§ 207.30 Supporting Motion for Sanctions--Pleading, Notice of Motion, or Other Similar Paper Filed in Action or Proceeding Initiated After 1994 [Code Civ. Proc. § 128.7]--Paper Filed for Improper Purpose [Code Civ. Proc. § 128.7(b)(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Paper Presented for Improper Purpose

§ 207.31 Supporting Motion for Sanctions--Pleading, Notice of Motion, or Other Similar Paper Filed in Action or Proceeding Initiated After 1994 [Code Civ. Proc. § 128.7]--Paper Contains Legal Contentions Not Warranted by Existing Law or Nonfrivolous Argument for Change in Existing Law [Code Civ. Proc. § 128.7(b)(2)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Legal Contentions Are Not Warranted by Existing Law or Nonfrivolous Argument for Change in Existing Law

§ 207.32 Supporting Motion for Sanctions--Pleading, Notice of Motion, or Other Similar Paper Filed in Action or Proceeding Initiated After 1994 [Code Civ. Proc. § 128.7]--Paper Contains Allegations or Factual Contentions Without Evidentiary Support [Code Civ. Proc. § 128.7(b)(3)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Factual Contentions Lacking Sufficient Evidentiary Support

§ 207.33 Supporting Motion for Sanctions--Pleading, Notice of Motion, or Other Similar Paper Filed in Action or Proceeding Initiated After 1994 [Code Civ. Proc. § 128.7]--Paper Contains Denials of Factual Contentions Not Warranted by Evidence or Not Reasonably Based on Lack of Information or Belief [Code Civ. Proc. § 128.7(b)(4)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

§ 207.34 Supporting Motion for Sanctions--Pleading, Notice of Motion, or Other Similar Paper Filed in Action or Proceeding Initiated After 1994 [Code Civ. Proc. § 128.7]--Punitive Damages May Be Awarded in Action by Convicted Felon Against Victim Arising Out of Felony [Code Civ. Proc. § 128.7(f)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

§ 207.34A Supporting Motion for Sanctions--Pleading, Notice of Motion, or Other Similar Paper Filed in Action or Proceeding Initiated After 1994 [Code Civ. Proc. § 128.7]--Juvenile Court Referee May Impose Sanctions in Juvenile Court Dependency Proceedings

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Juvenile Court May Impose Sanctions Under Code Civ. Proc. § 128.7

§ 207.35 Supporting Countermotion for Sanctions--Code Civ. Proc. § 128.7 Sanctions Motion Has an Improper Purpose [Code Civ. Proc. § 128.7(h)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

§ 207.36 Supporting Motion to Impose Monetary Sanction for Violation of Court Order [Code Civ. Proc. § 177.5]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Additional Authorities

§ 207.37 Supporting Motion to Impose Sanctions for Violation of Local Court Rule [Code Civ. Proc. § 575.2; Gov. Code § 68608(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] No Independent Power to Impose Sanction on Innocent Party Under Gov. Code § 68608(b)

[c] Argument

[d] Opposing Points and Authorities

§ 207.38 Supporting Motion to Recover Defense Costs in Action Under Tort Claims Act or for Indemnity or

Contribution [Code Civ. Proc. § 1038]--Defense Costs May be Awarded If Plaintiff Lacked Either Reasonable Cause or Good Faith

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Statutory Authority to Award Defense Costs Under California Tort Claims Act

[b] Defense Costs Available If Either Reasonable Cause or Good Faith Lacking

§ 207.39 Opposing Motion for Sanctions--Complaint Filed or Proceeding Initiated Before 1995--Bad-Faith Actions or Tactics That Are Frivolous or Solely Intended to Cause Unnecessary Delay [Code Civ. Proc. § 128.5]--Action Taken in Good Faith and Not Frivolous

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[d] Effective Dates

[3] Discussion of Authorities

[a] Limit on Power to Award Sanctions Under Code Civ. Proc. § 128.5

[b] Action's Lack of Merit as Insufficient Basis Alone for Imposition of Sanctions

[c] Frivolous Action Is One Prosecuted for Improper Motive or Indisputably Without Merit

[4] Additional Authorities

[a] Action's Lack of Merit as Insufficient Basis Alone for Imposition of Sanctions

§ 207.40 Opposing Motion for Sanctions--Complaint Filed or Proceeding Initiated Before 1995--Bad-Faith Actions or Tactics That Are Frivolous or Solely Intended to Cause Unnecessary Delay [Code Civ. Proc. § 128.5]--Requirements of Notice and Opportunity to Be Heard Not Met

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Notice and Opportunity to Be Heard Required

[b] Written Notice Required

[c] Due Process Requires Adequate Notice

[d] Ex Parte Imposition of Sanctions Offends Due Process

[4] Additional Authorities

[a] Notice and Opportunity to Be Heard Required

[b] Due Process Requires Adequate Notice

§ 207.41 Opposing Motion for Sanctions--Complaint Filed or Proceeding Initiated Before 1995--Bad-Faith Actions or Tactics That Are Frivolous or Solely Intended to Cause Unnecessary Delay [Code Civ. Proc. § 128.5]--Sanctions Authorized Only Against Party or Party's Attorney in Favor of Opposing Party or Opposing Party's Attorney

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Award of Sanctions Against Attorney of Nonparty Improper

[b] Award of Sanctions Against Attorney Associated With Party Through Separate Litigation in Foreign Jurisdiction Improper

§ 207.42 Opposing Motion for Sanctions--Complaint Filed or Proceeding Initiated Before 1995--Bad-Faith Actions or Tactics That Are Frivolous or Solely Intended to Cause Unnecessary Delay [Code Civ. Proc. § 128.5]--Mere Filing of Complaint Without Service on Other Party Is Not Basis for Sanctions

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

§ 207.43 Opposing Motion for Sanctions--Pleading, Notice of Motion, or Other Similar Paper Filed in Action or Proceeding Initiated After 1994 [Code Civ. Proc. § 128.7]--Attorney or Unrepresented Party Conducted Reasonable Inquiry Under Circumstances [Code Civ. Proc. § 128.7(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Inquiry Is Reasonable Under the Circumstances

§ 207.44 Opposing Motion for Sanctions--Pleading, Notice of Motion, or Other Similar Paper Filed in Action or Proceeding Initiated After 1994 [Code Civ. Proc. § 128.7]--Legal Contentions Warranted by Existing Law or Nonfrivolous Argument for Change in Law [Code Civ. Proc. § 128.7(b)(2)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Sanctions Not Justified if Legal Contentions Are Nonfrivolous

§ 207.45 Opposing Motion for Sanctions--Pleading, Notice of Motion, or Other Similar Paper Filed in Action or Proceeding Initiated After 1994 [Code Civ. Proc. § 128.7]--Factual Contentions Had Adequate Evidentiary Support [Code Civ. Proc. § 128.7(b)(3)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Memoranda

[3] Discussion of Authorities

[a] Factual Contentions Have Sufficient Evidentiary Support

§ 207.46 Opposing Motion for Sanctions Pleading, Notice of Motion, or Other Similar Paper Filed in Action or Proceeding Initiated After 1994 [Code Civ. Proc. § 128.7]--Motion Violates Safe Harbor Provision [Code Civ. Proc. § 128.7(c)(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Motion for Sanctions May Not Violate Safe Harbor Provision.

§ 207.47 Opposing Motion to Impose Sanctions for Violation of Local Court Rule [Gov. Code § 66608(b)]--Terminating Sanction Is Inappropriate

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Drastic Measure of Terminating Sanction Not to Be Used in First Instance

[4] Additional Authorities

[a] Drastic Measure of Terminating Sanction Not to Be Used in First Instance

§ 207.48 Opposing Motion to Impose Sanctions for Violation of Local Court Rule [Gov. Code § 66608(b)]--Noncompliance Is Responsibility of Counsel [Code Civ. Proc. § 575.2(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Noncompliance Is Responsibility of Counsel

§ 207.49 Opposing Motion to Impose Sanctions for Violation of Local Court Rule--Local Rule Permitting Sanctions Conflicts With Statute on Same Subject

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Local Rule Allowing For Sanctions May Not Conflict With Statute

§ 207.50 Opposing Motion to Impose Sanctions for Violation of Local Court Rule--Conduct Did Not Violate Local Rule

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Sanctions Improper Under Code Civ. Proc. § 575.2 When Local Rule Not Violated

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20-207 California Points & Authorities § 207.01

§ 207.01 Scope of Chapter

This chapter contains points and authorities for use in supporting and opposing motions for sanctions in trial court actions and proceedings. It contains memoranda of points and authorities supporting [*see §§ 207.20 -207.27*] and opposing [*see §§ 207.39 -207.42*] a motion for sanctions under *Code Civ. Proc. § 128.5* for actions or tactics that are frivolous or have an improper purpose arising from complaints filed or proceedings initiated before 1995. The chapter also contains memoranda of points and authorities supporting [*see §§ 207.28 -207.35*] and opposing [*see §§ 207.43 -207.45*] a motion for sanctions under *Code Civ. Proc. § 128.7*, which replaces *Code Civ. Proc. § 128.5* for complaints filed or other proceedings initiated after 1994. For further discussion of the effective dates for these two sanctions provisions, see *§ 207.02*.

The chapter also contains points and authorities supporting a motion for sanctions for the violation of a court order [*see § 207.36*], points and authorities supporting a motion for sanctions for the violation of local court rules [*see § 207.37*] and points and authorities supporting a motion for defense costs in an action under the California Tort Claims Act or any civil action for indemnity or contribution [*see § 207.38*]. A form of memorandum opposing the imposition of a terminating sanction for violation of local rules [*see § 207.47*] is also included.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesSelf-RepresentationSanctionsCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedurePretrial MattersConferencesSanctionsCivil ProcedureSanctionsGeneral Overview

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§ 207.02 Governing Law

A number of different statutes provide for sanctions for improper litigation tactics. The most generally applicable statutes are *Code Civ. Proc. §§ 128.5* and *128.7*.

Sanctions under *Code Civ. Proc. § 128.5* apply to actions or tactics that "arise from a complaint filed, or a proceeding initiated, on or before December 31, 1994" [*Code Civ. Proc. §§ 128.5(b)(1)*, 128.7(i); *see also Olmstead v. Arthur J. Gallagher & Co. (2004) 32 Cal. 4th 804, 809-819, 11 Cal. Rptr. 3d 298, 86 P.3d 354* (statutory language of *Code Civ. Proc. § 128.5* and related statutes, and other indicia of legislative intent, establish that § 128.5 does not apply to conduct arising from claim initiated after December 31, 1994)]. Sanctions under *Code Civ. Proc. § 128.7* apply to a "complaint or petition filed on or after January 1, 1995, and any other pleading, written notice of motion, or other similar paper filed in such a matter" [*Code Civ. Proc. § 128.7(i)*].

Whether § 128.5 or 128.7 applies is determined by whether the actions or tactics which the court finds to be in bad faith arise from a proceeding initiated on or before December 31, 1994. Where the court maintains continuing jurisdiction over a proceeding initiated by a dissolution of a marriage [*see In re Marriage ofReese & Guy (1999) 73 Cal. App. 4th 1214, 87 Cal. Rptr. 2d 339* ; *In re Marriage of Drake (1997) 53 Cal. App. 4th 1139, 62 Cal. Rptr. 2d 466]* or administration of a trust since its admission to probate [*see Levy v. Blum (2001) 92 Cal. App. 4th 625, 638-643, 112 Cal. Rptr. 2d 144]* , § 128.5 applies if the initial proceeding was filed before December 31, 1994.

Because *Code Civ. Proc. § 128.7* is derived in part from *Fed. R. Civ. P., Rule 11*, some of the discussion in this chapter is based on federal decisions that interpret parts of Rule 11 that are virtually identical to portions of *Code Civ. Proc. § 128.7*. While these federal rulings are not binding on California courts, they should be helpful in interpreting the new California sanctions statute.

Unlike *Code Civ. Proc. § 128.5*, *Code Civ. Proc. § 128.7* does not apply to discovery requests, responses, objections, and motions [*Code Civ. Proc. § 128.7(g)*]. For points and authorities on discovery sanctions, see Ch. 82, *Discovery: Sanctions for Discovery Misuse* .

NOTE:

> The statutory language governing the effective dates of *Code Civ. Proc. §§ 128.5* and *128.7* does not clearly resolve which sanctions to apply with respect to an amended complaint or petition filed in 1995 with respect to an action or proceeding commenced before 1995. On the one hand, the amended complaint or petition "arises from a complaint filed or a proceeding initiated" before 1994, arguably making Section 128.5 sanctions applicable. On the other hand, the amended complaint or petition is a "complaint or petition filed on or after January 1, 1995," arguably making Section 128.7 applicable to any subsequent papers filed in the matter.

Code Civ. Proc. § 177.5 governs sanctions for violation of a court order. *Code Civ. Proc. § 575.2* and *Gov. Code § 68608* govern sanctions for violation of a local court rule.

For points and authorities relating to the recovery of costs and attorney's fees, and to obtain security for costs and attorney's fees, as of right (rather than as a sanction), see Ch. 60, *Costs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedureSanctionsGeneral OverviewLegal EthicsSanctionsGeneral Overview

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20-207 California Points & Authorities § 207.03

§ 207.03 How to Use Forms in This Chapter

[1] Page Limits on Points and Authorities

One of the more significant drafting requirements to keep in mind are page limits: supporting and opposing memoranda filed in discovery motion proceedings may not exceed 15 pages. A reply or closing memorandum may not exceed 10 pages. Exhibits, declarations, attachments, the table of contents, the table of authorities, and the proof of service are excluded from these page limits [*Cal.Rules of Ct., Rule 3.1113(d)*]. Any party must obtain leave of court to file a longer memorandum [*see Cal. Rules of Ct., Rule 3.1113(e)*]. These and other drafting requirements are discussed in further detail in Ch. 1, *Writing Legal Memoranda and Briefs* .

[2] Using the Forms to Build a Draft Memorandum

The points and authorities in this chapter the form of memoranda supporting and opposing motions for orders relating to sanctions. Related supporting or opposing forms may be combined, if appropriate, depending on the facts and issues involved. The forms in this chapter may also be adapted for use in a trial or appellate brief, or be used to research office memoranda. No matter what procedural context is involved, counsel should add argument to the points and authorities being used, showing the relationship between the facts of the case and the points of law stated.

For a discussion of how to use the forms in this chapter to draft a memorandum of points and authorities or a trial or appellate brief, and for a sample of a complete memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeGeneral OverviewCivil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPleading & PracticeMotion PracticeSupporting MemorandaCivil ProceduresSanctionsGeneral Overview

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§ 207.04 Page Limits on Points and Authorities

One of the more significant drafting requirements to keep in mind are page limits: supporting memoranda of points and authorities (other than those in a summary judgment proceeding) must not exceed 15 pages in length. Exhibits, declarations, attachments, and tables of content are not included in the page limitation. A reply or closing memorandum may not exceed 10 pages in length [*Cal. Rules of Ct., Rule 3.1113(d)*]. Any party desiring to file a longer memorandum must obtain leave of court [*see Cal. Rules of Ct., Rule 3.1113(e)*]. These and other drafting requirements are discussed in *further detail in Ch. 1, Writing Legal Memoranda and Briefs § 1.05*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentSupporting MaterialsMemoranda of Law

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20-207 California Points & Authorities § 207.05

§ 207.05 Related Pleading and Practice Forms

For discussion, procedure, and forms pertaining to trial court sanctions, see California Forms of Pleading and Practice, Ch. 510, *Sanctions* (Matthew Bender). For discussion and forms relating to sanctions for frivolous appeals, see California Forms of Pleading and Practice, Ch. 49, *Appeal: Sanctions* (Matthew Bender). For discussion and forms relating to discovery sanctions, see California Forms of Pleading and Practice, Ch. 192, *Discovery: Sanctions for Discovery Misuse* General Introduction (Matthew Bender). For discussion and forms relating to sanctions in family law proceedings, see California Forms of Pleading and Practice, Ch. 224, *Dissolution of Marriage and Related Proceedings: Child Support* (Matthew Bender).

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[Reserved]

§§ 207.06[Reserved]

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20-207 California Points & Authorities § 207.20

§ 207.20 Supporting Motion for Sanctions--Complaint Filed or Proceeding Initiated Before 1995--Bad-Faith Actions or Tactics That Are Frivolous or Solely Intended to Cause Unnecessary Delay [Code Civ. Proc. § 128.5]--General Authority for Motion

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF MOTION FOR
Plaintiff,	)	SANCTIONS
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THIS COURT SHOULD AWARD EXPENSES, INCLUDING ATTORNEY'S FEES, [AND PUNITIVE DAMAGES] TO _____ [*specify moving party, e.g.,* DEFENDANT], _____ [*name*], AGAINST _____ [*specify opposing party, e.g.,* PLAINTIFF], _____ [*name*], UNDER CODE OF CIVIL PROCEDURE SECTION 128.5 AS A SANCTION FOR _____ [*specify opposing party, e.g.,* PLAINTIFF'S] BAD FAITH ACTIONS AND TACTICS THAT WERE _____ [FRIVOLOUS *and/or* SOLELY INTENDED TO CAUSE UNNECESSARY DELAY].

A. Statutory Authority to Award Monetary Sanctions Consisting of Reasonable Expenses, Including Attorney's Fees. Every trial court may order a party, the party's attorney, or both, to pay any reasonable expenses, including

attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay (*Code Civ. Proc. § 128.5*; *580 Folsom Associates v. Prometheus Development Co. (1990) 223 Cal. App. 3d 1, 19-28, 272 Cal. Rptr. 227*).

B. "Actions or Tactics" Defined. Actions or tactics include, but are not limitedto, the making or opposing of motions or the filing and service of a complaint or cross complaint, but only if the actions or tactics arise from a complaint filed, or a proceeding initiated, on or before December 31, 1994 (*Code Civ. Proc. § 128.5(b)(1)*; *see Albion River Watershed Protection Assn. v. Department of Forestry & Fire Protection (1993) 20 Cal. App. 4th 34, 37-38, 24 Cal. Rptr. 2d 341*).

C. "Frivolous" Defined. Frivolous means (1) totally and completely without merit, or (2) for the sole purpose of harassing an opposing party (*Code Civ. Proc. § 128.5(b)(2)*; *Bank of America v. Henkin (1986) 185 Cal. App. 3d 919, 922, 230 Cal. Rptr. 113*).

[*Optional*] **D. Sanctions May Be Awarded in Favor of Pro Se Litigant.** Sanctions may be awarded under *Code of Civil Procedure Section 128.5* in favor of both a self-representing attorney and a non-attorney pro se litigant (*Abandonato v. Coldren (1995) 41 Cal. App. 4th 264, 269, 48 Cal. Rptr. 2d 429*).

[*Add additional points and authorities from §§ 207.21-207.27, as appropriate, to support any specific contentions regarding the motion for sanctions.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a motion for sanctions under *Code Civ. Proc. § 128.5*. *Code Civ. Proc. § 128.5* is a trial court sanction that also applies to judicial arbitration proceedings under *Code Civ. Proc. § 1141.10 et seq.* [*Code Civ. Proc. § 128.5(a)*; *see Lyons v. Wickhorst (1986) 42 Cal. 3d 911, 926, 928, 231 Cal. Rptr. 738, 727 P.2d 1019* (majority of Court suggesting that if litigant fails to participate in judicial arbitration as means of avoiding costs under *Code Civ. Proc. § 1141.21*, court may award such costs as element of monetary sanctions authorized by *Code Civ. Proc. § 128.5*)]. Expenses under this provision may not be imposed except on notice contained in a party's moving or responding papers, or on the court's own motion, after notice and opportunity to be heard [*Code Civ. Proc. § 128.5(c)*]. For forms of notice of motion, see California Forms of Pleading and Practice, Ch. 510, *Sanctions* (Matthew Bender).

In an appropriate case, this form should be combined with the points and authorities *set forth in §§ 207.21 -207.27* pertaining to specific issues that may arise concerning an award of sanctions under *Code Civ. Proc. § 128.5*.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that the petition filed or proceeding initiated before 1995 was totally and completely without merit, or had harassment or unnecessary delay as its sole purpose. In addition, counsel should attach affidavits or declarations that support the memorandum.

[c] Effective Date of Sanctions Statute

Sanctions under *Code Civ. Proc. § 128.5* apply only to actions or proceedings pending as of December 31, 1994 [*see Code Civ. Proc. § 128.5(b)(1)*]. The award of expenses, including attorney's fees, for frivolous actions or delaying tactics in actions and proceedings commenced after December 31, 1994, is governed by *Code Civ. Proc. § 128.7* [*Code Civ. Proc. §§ 128.5(b)(1), 128.7(i)*; *see also § 207.02*]. For points and authorities that may be used in support of a motion for sanctions under *Code Civ. Proc. § 128.7*, see *§§ 207.28 -207.35*.

[d] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 207.39 -207.42* may be used to oppose the motion supported by these points and authorities.

[e] Related Pleading and Practice Forms

For a form of notice of motion and declaration supporting a motion for attorney's fees under Code Civ. Proc. § 128.5, see California Forms of Pleading and Practice, Ch. 510, *Sanctions* (Matthew Bender).

[3] Discussion of Authorities

[a] Statutory Authority to Award Monetary Sanctions Consisting of Reasonable Expenses, Including Attorney's Fees

580 Folsom Associates v. Prometheus Development Co. *(1990) 223 Cal. App. 3d 1, 272 Cal. Rptr. 227* , involved a dispute between parties to a real estate purchase contract. Defendant purchasers had failed to comply with certain contractual obligations during the escrow period concerning indemnification of plaintiff sellers and had declined to carry out the purchase of the property by the end of the escrow period. Plaintiffs demanded that defendants execute a quitclaim deed of their interest in the property, but defendants continued to assert an interest in the property and refused to execute the requested quitclaim deed. Plaintiffs brought a quiet title action against defendants and sought to recover on the indemnity agreement between the parties. Defendants cross complained, assertingthat the plaintiffs breached a joint venture agreement.

The trial court granted plaintiffs' motion for summary adjudication of issues with regard to the defendants' cross complaint, and imposed sanctions on both the defendants and their law firm pursuant to *Code Civ. Proc. § 128.5*. The trial court found that the defendants' actions were not in good faith, and that sanctions were warranted both for the filing of a cross complaint containing allegations that were frivolous and totally and completely without merit, and for submission of pleadings in opposition to plaintiffs' motion for summary adjudication that contained lengthy citations to the record that either did not relate to the factual propositions for which they were cited, or contained no competent evidence and referred to materials that were clearly incompetent. After final judgment, defendants and defendants' law firm brought appeals seeking reconsideration of the sanctions awards under *Code Civ. Proc. § 128.5*.

The court of appeal could find no abuse of discretion by the trial court, and upheld the sanctions imposed under *Code Civ. Proc. § 128.5* (*223 Cal. App. 3d 1, 22, 28)* . With respect to the sanctions against the defendant parties, the court stated that sanctions were justified, because the cross complaint contained numerous material factual allegations concerning the purported formation of a joint venture between the plaintiffs and defendants that were utterly devoid of supporting evidence; in addition, several of the allegations of the cross complaint were completely false. The court

noted that a complete lack of evidence to substantiate key allegations of a cross complaint alleging the terms of a purported joint venture is sufficient ground for imposition of sanctions for the filing of a frivolous pleading (*223 Cal. App. 3d 1, 21-22)* .

Concerning the sanctioning of the law firm, the court of appeal agreed with the law firm that it could not be sanctioned for the filing of the cross complaint, because the firm relied on factual information supplied by one of the defendants to draft the document. However, the court held that the firm could be sanctioned under *Code Civ. Proc. § 128.5* for its separate statement in opposition to the plaintiffs' revised statement of undisputed facts; this document, in the trial court's opinion, included citation to large quantities of material that did not support directly or indirectly the alleged facts for which they were cited (*223 Cal. App. 3d 1, 23)* .

The court of appeal noted that while it was uncontested in the trial court that the law firm initially relied on the factual information it received from defendants to draft the cross complaint, the firm attorneys sat through all of the discovery depositions noticed by plaintiffs and at some point the attorneys had to become aware that their clients had no evidence to support the factual allegations of the cross complaint (*223 Cal. App. 3d 1, 26)* .

The court of appeal also pointed to the attorneys' citations to over 800 pages of evidence, large portions of which did not support the facts for which they were cited, and concluded that the attorneys deliberately misled the trial court, causing the trial court hours of work reviewing irrelevant matter (*223 Cal. App. 3d 1, 24-26)* .

[b] "Actions or Tactics" Defined

In ***Albion River Watershed Protection Assn. v. Department of Forestry & Fire Protection*** *(1993) 20 Cal. App. 4th 34, 24 Cal. Rptr. 2d 341* , an unincorporated association petitioned for a writ of mandate. In doing so, however, it violated local rules and state laws by failing to serve the complaint within 60 days after filing, failing to request a hearing within 90 days, and filing the complaint in pro per instead of through counsel as required by *Bus. & Prof. Code § 6125 et seq.*

The trial court sanctioned the petitioner for failure to serve the complaint within 60 days and failure to request a hearing within 90 days, finding these tactics were in bad faith and for the purpose of delay. The court of appeal reversed. It held the petitioner could not be sanctioned because the requirement of requesting a hearing within 90 days had not yet been applied by the courts to the type of action brought by petitioner However, the court remanded for a determination of whether the failure to serve the complaint within 60 days or the failure to be represented by counsel supported sanctions (*20 Cal. App. 4th 34, 36-37)* .

Note that the the mere filing of a complaint without serving it does not constitute "actions or tactics" for purposes of *Code Civ. Proc. § 128.5* [*Code Civ. Proc. § 128.5(b)(1)*].

[c] "Frivolous" Defined

In ***Bank of America v. Henkin*** *(1986) 185 Cal. App. 3d 919, 230 Cal. Rptr. 113* , the court of appeal upheld a trial court's order granting summary judgment for plaintiff. Plaintiff was granted summary judgment in an action to recover money due on a promissory note, despite defendant's claim that plaintiff had not complied with the 28-day notice requirement for the motion. Defendant's counsel then moved to vacate the summary judgment based on the same claim, and the trial court denied the motion and imposed sanctions against defendant and/or his counsel.

After defendant raised the same claim on appeal, the appellate court affirmed the trial court's ruling and imposed additional sanctions against defendant's counsel. It noted that the repetition on appeal of his error in performing the simplest, most rudimentary function--counting the days on a calendar--was inexcusable in light of the trial court's finding that it formed the basis of a frivolous motion below. The court concluded that any reasonable attorney would find the appeal completely and indisputably devoid of merit (*185 Cal. App. 3d 919, 922)* .

[d] Sanctions May Be Awarded in Favor of Pro Se Litigant

In ***Abandonato v. Coldren*** *(1995) 41 Cal. App. 4th 264, 48 Cal. Rptr. 2d 429* , pro se attorneys demurred to a complaint and moved for an award of attorney fees pursuant to *Code Civ Proc. § 128.5*. The plaintiff dismissed the complaint before the demurrer could be heard. The trial court proceeded with the hearing for sanctions, and made an award on the ground that the complaint was filed in bad faith and plaintiff's tactics were frivolous. Plaintiff contended that defendants could not be awarded attorney fees because they were attorneys representing themselves and thus neither paid, nor incurred any liability to pay, attorney fees.

The court of appeal reasoned that sanctions under *Code Civ Proc. § 128.5* are not limited to court costs and attorney fees, but include those reasonable expenses directly related to and in furtherance of the litigation. Furthermore, a judgment for sanctions could be greater than the amount of attorney time actually billed since it is more like a money judgment compensating a party for harmful conduct than it is like an award of fees as part of the costs of the lawsuit (*41 Cal. App. 4th 264, 268-269)* . The court concluded that sanctions may be awarded under *Code Civ Proc. § 128.5* in favor of both a self-representing attorney and a non-attorney pro se litigant. Accordingly, the order awarding attorney fees was affirmed.

[4] Additional Authorities

[a] Statutory Authority to Award Monetary Sanctions Consisting of Reasonable Expenses, Including Attorney's Fees

In *Rush v. Weinzettl (1993) 14 Cal. App. 4th 66, 17 Cal. Rptr. 2d 354* , a party dismissed the attorney who filed her personal injury action. She retained another attorney, who filed motions on her behalf without first filing a written, formal substitution of attorney. At the hearing on the motions, the trial court declared that the attorney had no standing to appear on his client's behalf, and on request of defendant ordered sanctions under *Code Civ. Proc. § 128.5*. The court of appeal affirmed, holding that the trial court has jurisdiction to sanction an attorney who has no standing to act on behalf of a party in the action, but nevertheless appears after being retained by the client for that purpose (*14 Cal. App. 4th 66, 68-69)* .

In *Wilhelm v. Pray, Price, Williams & Russell (1986) 186 Cal. App. 3d 1324, 231 Cal. Rptr. 355* , plaintiff brought suit against defendant attorney alleging several causes of action in tort. Defendant interposed successful demurrers to plaintiff's original, first amended, and second amended complaints. Plaintiff's third amended complaint revealed only superficial amendments, and the demurrer to that complaint was sustained on precisely the same ground as the previous demurrers. On this record, the court of appeal concluded that the trial court did not err in awarding sanctions under *Code Civ. Proc. § 128.5* (*186 Cal. App. 3d 1324, 1334)* .

In Winick Corp. v. County Sanitation Dist. No. 2 *(1986) 185 Cal. App. 3d 1170, 230 Cal. Rptr. 289* , the court of appeal upheld the trial court's imposition of sanctions under *Code Civ. Proc. § 128.5* against plaintiff. Plaintiff was given notice early in the action that defendant was not a proper party, but plaintiff nevertheless failed to voluntarily dismiss the action and caused defendant to file its answer and move for summary judgment. The court of appeal found that the trial court's findings that plaintiff's tactics and actions were not based on good faith, were frivolous, and caused unnecessary delay were amply supported by the record (*185 Cal. App. 3d 1170, 1181)* .

[b] "Actions or Tactics" Defined

In *Estate of DiGrazia (1993) 13 Cal. App. 4th 681, 16 Cal. Rptr. 2d 621* , a party in a probate action challenged the judge under *Code Civ. Proc. § 170.1*. Following the disqualification hearing, during which the judge was represented by the county counsel, the trial court found the challenge was frivolous and awarded sanctions under *Code Civ. Proc. § 128.5*. The court of appeal affirmed, noting that although the disqualification proceeding is not a part of the main action,

it is ancillary to it. In that proceeding, the judge appears as a party for all practical purposes. The court therefore rejected the assertion that the trial court lacked jurisdiction to award sanctions because the judge was not a party to the action (*13 Cal. App. 4th 681, 683-685)* .

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20-207 California Points & Authorities § 207.21

§ 207.21 Supporting Motion for Sanctions--Complaint Filed or Proceeding Initiated Before 1995--Bad-Faith Actions or Tactics That Are Frivolous or Solely Intended to Cause Unnecessary Delay [Code Civ. Proc. § 128.5]--Sufficient Nexus Between Offending Action and Expenses Incurred

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities supporting the award of sanctions under Code Civ. Proc. § 128.5* (*see § 207.20*), or may be included in a trial or appellate brief.]

IT IS PROPER FOR THIS COURT TO AWARD SPECIFIED EXPENSES, INCLUDING ATTORNEY'S FEES, AS SANCTIONS UNDER CODE OF CIVIL PROCEDURE SECTION 128.5 BECAUSE THERE IS A SUFFICIENT NEXUS BETWEEN THE OFFENDING ACTIONS OR TACTICS AND THE EXPENSES INCURRED, SPECIFICALLY _____ [*specify connection that justifies imposition of sanctions, e.g.,* THERE IS A CAUSAL RELATIONSHIP BETWEEN OPPOSING PARTY'S OFFENDING ACTION AND THE EXPENSES INCURRED BY PARTY *and/or* THE ACTION'S LACK OF MERIT IS SUFFICIENT BASIS BY ITSELF FOR IMPOSING SANCTIONS].

[*EITHER*]

A. Causal Connection. *Code of Civil Procedure Section 128.5* requires nomore than a causal relationship between a party's offending action and the expenses incurred by an opposing party (*On v. Cow Hollow Properties (1990) 222 Cal. App. 3d 1568, 1577, 272 Cal. Rptr. 535*).

[*AND/OR*]

B. Action's Lack of Merit Is Sufficient Basis for Imposition of Sanctions. The fact that an action is objectively without merit is itself sufficient basis for imposing sanctions. There is no requirement of a showing of improper motive or that the party bringing the action knew or should have known that the facts or law or both preclude the action or any

recovery (*Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 12, 244 Cal. Rptr. 581 (First District, Division Four)* ; *Weisman v. Bower (1987) 193 Cal. App. 3d 1231, 1236, 238 Cal. Rptr. 756 (Second District, Division Three)* ; *contra, Atchison, Topeka & Santa Fe Ry. Co. v. Stockton Port Dist. (1983) 140 Cal. App. 3d 111, 116, 189 Cal. Rptr. 208 (Third District))* .

[2] Comments

[a] Use of Form

These points and authorities may be combined with the appropriate points and authorities from § 207.20 and submitted in support of a motion for expenses, including attorney's fees, as sanctions under *Code Civ. Proc. § 128.5* to support the contention that such expenses incurred by a party are recoverable when causally connected to an opposing party's offending action.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that establishes a causal connection between between expenses sought and opposing party's offending actions under *Code Civ. Proc. § 128.5* [*see, e.g., On v. Cow Hollow Properties (1990) 222 Cal. App. 3d 1568, 1577, 272 Cal. Rptr. 535]* .

[3] Discussion of Authorities

[a] Causal Connection

In ***On v. Cow Hollow Properties*** *(1990) 222 Cal. App. 3d 1568, 272 Cal. Rptr. 535* , plaintiff filed a complaint seeking specific performance of a real estate purchase agreement. Defendant responded by answering, as defendant in the specific performance action, and by filing a cross complaint against plaintiff seeking damages for wrongful filing of a lis pendens relating to the action. The trial court found for defendant, both as defendant and as cross complainant. On appeal, however, the court of appeal reversed the judgment on the cross complaint, holding that the plaintiff's filing of the lis pendens was privileged.

On remand, the trial court directed plaintiff to pay defendant/cross complainant a specified amount for attorney's fees, basing the award alternatively on *Civ. Code § 1717* or on *Code Civ. Proc. § 128.5*. Plaintiff challenged the amount of the fee award, which included compensation for two items that related exclusively to the cross complaint, arguing, inter alia, that it was improper to require him to reimburse defendants for their unsuccessful prosecution of the cross complaint against him.

The court of appeal determined that fees related to the cross complaint were properly included in the fee award. The court noted that *Code Civ. Proc. § 128.5(a)* authorizes the award of attorney's fees incurred by another party "as a result of" bad-faith actions. Construing this language broadly in light of the legislative purpose of *Code Civ. Proc. § 128.5*, to control bad-faith and frivolous litigation, the court concluded that *Code Civ. Proc. § 128.5* requires no more than a causal relationship between the offending action and the expense incurred by the opposing party. With regard to the instant case, the requisite relationship was clearly present. The filing of the cross complaint was occasioned solely by the filing of appellant's bad-faith complaint, and if the complaint had not been filed, defendant/cross complainant would have lacked not only the incentive, but the factual basis to pursue its claim on the cross complaint (*222 Cal. App. 3d 1568, 1577-1578)* .

[b] Action's Lack of Merit Is Sufficient Basis for Imposition of Sanctions

The California courts of appeal currently are divided on the question of whether an action's lack of merit is a sufficient

basis, standing alone, for the imposition of sanctions. Several courts have indicated that sanctions under *Code Civ. Proc. § 128.5* may be imposed solely on the basis of objective frivolousness [*see, e.g.,* ***Finnie v. Town of Tiburon*** *(1988) 199 Cal. App. 3d 1, 12, 244 Cal. Rptr. 581 (First District, Division Four)* ; ***Weisman v. Bower*** *(1987) 193 Cal. App. 3d 1231, 1236, 238 Cal. Rptr. 756 (Second District, Division Three)* ; *see also Summers v. City of Cathedral City (1990) 225 Cal. App. 3d 1047, 1070-1072, 275 Cal. Rptr. 594* (discussing split of authority)].

Other courts have followed the position stated in ***Atchison, Topeka & Santa Fe Ry. Co. v. Stockton Port Dist.*** *(1983) 140 Cal. App. 3d 111, 117, 189 Cal. Rptr. 208* (Third District; discussed as an authority under § 207.39[3][a]) and have declined to permit sanctions absent a finding of subjective bad faith [*see, e.g., Llamas v. Diaz (1990) 218 Cal. App. 3d 1043, 1047-1048, 267 Cal. Rptr. 427* (Fourth District, Division Three; discussed as an authority under § 207.39[3][a])]. Those courts would, in all likelihood, reject the point raised by Paragraph B of this form.

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Volume 20 Chapters 200-209 RECEIVERS---to---SANCTIONS
CHAPTER 207 SANCTIONS
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20-207 California Points & Authorities § 207.22

§ 207.22 Supporting Motion for Sanctions--Complaint Filed or Proceeding Initiated Before 1995--Bad-Faith Actions or Tactics That Are Frivolous or Solely Intended to Cause Unnecessary Delay [Code Civ. Proc. § 128.5]--Expenses May Be Awarded for Entire Action

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities supporting the award of sanctions under Code Civ. Proc. § 128.5 (see § 207.20), or may be included in a trial or appellate brief.*]

IT IS PROPER FOR THIS COURT TO AWARD EXPENSES, INCLUDING ATTORNEY'S FEES, FOR THE ENTIRE ACTION AS SANCTIONS UNDER CODE CIV. PROC. § 128.5.

"Actions or Tactics" Includes Entire Action. "Actions or tactics" within the purview of *Code of Civil Procedure Section 128.5* include entire actions (*see Lesser v. Huntington Harbor Corp. (1985) 173 Cal. App. 3d 922, 928-930, 219 Cal. Rptr. 562*).

[2] Comments

[a] Use of Form

These points and authorities may be combined with the appropriate points and authorities from § 207.20 and submitted in support of a motion for expenses, including attorney's fees, as sanctions under *Code Civ. Proc. § 128.5* to support the contention that such sanctions may be sought for an entire action.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that the entire action for which expenses are being sought under *Code Civ. Proc. § 128.5* is not based on good faith, is frivolous, or is causing unnecessary delay in the resolution of a dispute [*see, e.g., Lesser v. Huntington Harbor Corp. (1985) 173 Cal. App. 3d 922, 928-929, 219 Cal. Rptr. 562]* .

[3] Discussion of Authorities

[a] "Actions or Tactics" Includes Entire Action

In ***Lesser v. Huntington Harbor Corp.*** *(1985) 173 Cal. App. 3d 922, 219 Cal. Rptr. 562* , plaintiff brought suit alleging various causes of action. After plaintiff presented his case at trial, the court granted defendant's motion for a nonsuit and imposed sanctions under *Code Civ. Proc. § 128.5*. The court of appeal, in reversing the judgment, held as a preliminary matter that *Code Civ. Proc. § 128.5* applies to entire actions not based on good faith that are frivolous or cause unnecessary delay in the resolution of a dispute (*173 Cal. App. 3d 922, 928-930)* .

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20-207 California Points & Authorities § 207.23

§ 207.23 Supporting Motion for Sanctions--Complaint Filed or Proceeding Initiated Before 1995--Bad-Faith Actions or Tactics That Are Frivolous or Solely Intended to Cause Unnecessary Delay [Code Civ. Proc. § 128.5]--Sanctions for Defense of Action Permitted

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities supporting the award of sanctions under Code Civ. Proc. § 128.5 (see § 207.20), or may be included in a trial or appellate brief.*]

IT IS PROPER FOR THIS COURT TO AWARD EXPENSES, INCLUDING ATTORNEY'S FEES, UNDER CODE OF CIVIL PROCEDURE SECTION 128.5 AGAINST DEFENDANT FOR PURSUING A DEFENSE THAT IS _____ [FRIVOLOUS *and/or* INTENDED TO CAUSE UNNECESSARY DELAY].

"Actions or Tactics" Includes Defenses. "Actions or tactics" within the purview of *Code of Civil Procedure Section 128.5* include defenses (*Southern Christian Leadership Conference v. Al Malaikah Auditorium Co. (1991) 230 Cal. App. 3d 207, 226, 281 Cal. Rptr. 216*).

[2] Comments

[a] Use of Form

These points and authorities may be combined with the appropriate points and authorities from § 207.20 and submitted in support of a motion for expenses, including attorney's fees, as sanctions under *Code Civ. Proc. § 128.5* to support the contention that such sanctions may be sought for a frivolous defense.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of laws stated. Thus, counsel should discuss evidence that the defense pursued by the opposing party was frivolous or was interposed solely for the purpose of causing unnecessary delay and was therefore subject to sanction under *Code Civ. Proc. § 128.5* [*see, e.g.,* *Southern Christian Leadership Conference v. Al Malaikah Auditorium Co. (1991) 230 Cal.*

App. 3d 207, 226-228, 281 Cal. Rptr. 216] .

[3] Discussion of Authorities

[a] "Actions or Tactics" Includes Defenses

In **Southern Christian Leadership Conference v. Al Malaikah Auditorium *Co.*** *(1991) 230 Cal. App. 3d 207, 281 Cal. Rptr. 216* , a breach of contract action, the defendants asserted as an affirmative defense that there was no binding contract. The trial court entered judgment for plaintiffs, and imposed sanctions against the defendants under *Code Civ. Proc. § 128.5* for bringing a frivolous and unmeritorious defense. The defendants appealed.

The court of appeal affirmed the award, holding that *Code Civ. Proc. § 128.5* applies to the opposing of an entire action without proper justification or to the interposing of a frivolous defense to an action (*230 Cal. App. 3d 207, 226-228)* .

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20-207 California Points & Authorities § 207.24

§ 207.24 Supporting Motion for Sanctions--Complaint Filed or Proceeding Initiated Before 1995--Bad-Faith Actions or Tactics That Are Frivolous or Solely Intended to Cause Unnecessary Delay [Code Civ. Proc. § 128.5]--Sanctions Permitted for Some, but Not All, Causes of Action

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities supporting the award of sanctions under Code Civ. Proc. § 128.5 (see § 207.20), or may be included in a trial or appellate brief.*]

IT IS PROPER FOR THIS COURT TO AWARD DEFENDANT EXPENSES, INCLUDING ATTORNEY'S FEES, AS SANCTIONS UNDER CODE OF CIVIL PROCEDURE SECTION 128.5 BASED ON _____ [ONE *or* SOME] OF THE CAUSES OF ACTION IN THE COMPLAINT IN THIS ACTION, SPECIFICALLY THE CAUSE(S) OF ACTION FOR _____ [*specify*], BECAUSE _____ [THAT *or* THOSE] CAUSE(S) OF ACTION IS/ARE FRIVOLOUS, EVEN IF OTHER CAUSES OF ACTION ALLEGED ARE NOT SUBJECT TO SANCTIONS.

Partially Frivolous Complaint. Sanctions may be awarded under *Code of Civil Procedure Section 128.5* when some but not all of the causes of action alleged in the complaint are frivolous (*Bach v. McNelis (1989) 207 Cal. App. 3d 852, 875-876, 255 Cal. Rptr. 232*).

[2] Comments

[a] Use of Form

These points and authorities may be combined with the appropriate points and authorities from § 207.20 and submitted in support of a motion for expenses, including attorney's fees, as sanctions under *Code Civ. Proc. § 128.5* to support the contention that sanctions may be sought for some but not necessarily all of the causes of action alleged in the complaint.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law

stated. Thus, counsel should discuss evidence that some of the causes of action in the complaint, but not necessarily all, are frivolous. Nothing in *Code Civ. Proc. § 128.5* limits the application of sanctions to the entire complaint [*see, e.g., Bach v. McNelis (1989) 207 Cal. App. 3d 852, 875-876, 255 Cal. Rptr. 232]* .

[3] Discussion of Authorities

[a] Partially Frivolous Complaint

In ***Bach v. McNelis*** *(1989) 207 Cal. App. 3d 852, 255 Cal. Rptr. 232* , an attorney brought an action against two judges, challenging the constitutional validity of the assignment of one of the judges, and also alleging that both judges violated the Political Reform Act of 1974. The trial court sustained defendants' demurrers without leave to amend, and awarded defendants attorney's fees as sanctions. Plaintiff appealed from the dismissal of his complaint and from the award of sanctions.

The court reversed the judgment dismissing the Political Reform Act cause of action against one of the judges, but affirmed the judgment in all other respects. The court noted that because of the reversal concerning one of the plaintiff's causes of action, that cause of action would remain presumptively meritorious. Consequently, that portion of plaintiff's complaint could not yet be the subject of sanctions. Only the remaining portions of plaintiff's complaint would be subject to possible sanctions for frivolousness (*207 Cal. App. 3d 852, 881)* .

The court concluded that sanctions may be awarded under *Code Civ. Proc. § 128.5* when some but not all of the causes of action alleged in a complaint are frivolous. The court noted that nothing in *Code Civ. Proc. § 128.5* limits bad-faith "actions or tactics" to the entire complaint. Also, *Code Civ. Proc. § 128.5* permits the imposition of sanctions when motions or other tactics are frivolous or made for the purpose of causing unnecessary delay even though the underlying action may be entirely meritorious. It would be anomalous, noted the court, to permit sanctions in those circumstances and yet deny them when an utterly frivolous and bad-faith cause of action is joined with a meritorious one (*207 Cal. App. 3d 852, 875-876)* . In addition, the court noted, because sanctions have been imposed in analogous circumstances for a partially frivolous appeal, by a parity of reasoning, sanctions should also be available for filing and serving or otherwise prosecuting a partially frivolous complaint (*207 Cal. App. 3d 852, 875-876)* .

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20-207 California Points & Authorities § 207.25

§ 207.25 Supporting Motion for Sanctions--Complaint Filed or Proceeding Initiated Before 1995--Bad-Faith Actions or Tactics That Are Frivolous or Solely Intended to Cause Unnecessary Delay [Code Civ. Proc. § 128.5]--Liability for Sanctions Not Precluded by Existence of Other Remedies for Misconduct

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities supporting the award of sanctions under Code Civ. Proc. § 128.5 (see § 207.20), or may be included in a trial or appellate brief.*]

THIS COURT IS NOT PRECLUDED FROM AWARDING SANCTIONS UNDER CODE OF CIVIL PROCEDURE SECTION 128.5 BY THE EXISTENCE OF OTHER POTENTIAL REMEDIES, [INCLUDING TORT LIABILITY FOR MALICIOUS PROSECUTION], FOR THE SAME MISCONDUCT BECAUSE LIABILITY FOR SANCTIONS UNDER SECTION 128.5 IS IN ADDITION TO ANY OTHER LIABILITY IMPOSED BY LAW FOR ACTS OR OMISSIONS WITHIN THE PURVIEW OF THAT STATUTE.

Liability Not Exclusive. The liability imposed by *Code of Civil Procedure Section 128.5* is in addition to any other liability imposed by law for conduct within the purview of that statute (*Code Civ. Proc. § 128.5(e)*).

[2] Comments

[a] Use of Form

These points and authorities may be combined with the appropriate points and *authorities in § 207.20* and submitted in support of a plaintiff's contention that the liability for sanctions under *Code Civ. Proc. § 128.5* is in addition to other available remedies.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Liability Not Exclusive

The liability imposed by *Code Civ. Proc. § 128.5* is in addition to any other liability imposed by law (for example, tort actions for abuse of judicial process and malicious prosecution, contempt, or sanctions for violation of a court order under *Code Civ. Proc. § 177.5*) for acts or omissions that are within the purview of *Code Civ. Proc. § 128.5* [*Code Civ. Proc. § 128.5(e)*].

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20-207 California Points & Authorities § 207.26

§ 207.26 Supporting Motion for Sanctions--Complaint Filed or Proceeding Initiated Before 1995--Bad-Faith Actions or Tactics That Are Frivolous or Solely Intended to Cause Unnecessary Delay [Code Civ. Proc. § 128.5]--Punitive Damages May Be Awarded in Action by Convicted Felon Against Victim Arising Out of Felony

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities supporting the award of sanctions under Code Civ. Proc. § 128.5 (see § 207.20), or may be included in a trial or appellate brief.*]

IT IS PROPER FOR THIS COURT TO [ALSO] ASSESS PUNITIVE DAMAGES AGAINST PLAINTIFF BECAUSE PLAINTIFF HAS BEEN CONVICTED OF A FELONY AND IS BRINGING THIS ACTION AGAINST _____ [THE VICTIM *or* HEIRS OF THE VICTIM *or* RELATIVES OF THE VICTIM *or* THE VICTIM'S ESTATE *or* THE VICTIM'S PERSONAL REPRESENTATIVE] FOR INJURIES ARISING FROM THE ACTS FOR WHICH PLAINTIFF WAS CONVICTED OF A FELONY, AND THE PLAINTIFF IS GUILTY OF FRAUD, OPPRESSION, OR MALICE IN MAINTAINING THIS ACTION.

Punitive Damages Available in Action by Convicted Felon. The court may assess punitive damages against the plaintiff on a determination by the court that the plaintiff's action was an action maintained by a person convicted of a felony against the person's victim, or the victim's heirs, relatives, estate, or personal representative, for injuries arising from the acts for which the person was convicted of a felony, and that the plaintiff is guilty of fraud, oppression, or malice in maintaining the action (*Code Civ. Proc. § 128.5(d)*).

[2] Comments

[a] Use of Form

These points and authorities may be combined with the appropriate points and *authorities in § 207.20* and submitted in support of a defendant's contention that the court should assess punitive damages against plaintiff, in addition to other sanctions awarded pursuant to *Code Civ. Proc. § 128.5*, because plaintiff has been convicted of a felony, the action is for injuries allegedly suffered by plaintiff arising from the acts on which the plaintiff's felony conviction was based, and the defendant is the victim of the felony or the heir relative, estate or personal representative of the victim.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discussevidence that (1) plaintiff has been convicted of a felony, (2) the defendant is the victim of the felony or the victim's heirs, relatives, estate, or personal representative, (3) the alleged injuries arose from the acts for which the plaintiff was convicted of a felony, and (4) the plaintiff is guilty of fraud, oppression, or malice in maintaining the action [*Code Civ. Proc. § 128.5(d)*].

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20-207 California Points & Authorities § 207.27

§ 207.27 Supporting Motion for Sanctions--Complaint Filed or Proceeding Initiated Before 1995--Bad-Faith Actions or Tactics That Are Frivolous or Solely Intended to Cause Unnecessary Delay [Code Civ. Proc. § 128.5]--Expenses Other Than Costs and Attorney's Fees Available

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities supporting the award of sanctions under Code Civ. Proc. § 128.5 (see § 207.20), or may be included in a trial or appellate brief.*]

IT IS PROPER FOR THIS COURT TO AWARD EXPENSES OTHER THAN COSTS AND ATTORNEY'S FEES AS SANCTIONS UNDER CODE OF CIVIL PROCEDURE SECTION 128.5.

Expenses Are Not Limited to Costs and Attorney's Fees. The expenses to be awarded as sanctions under *Code of Civil Procedure Section 128.5* may include expenses other than costs and attorney's fees (*Abandonato v. Coldren (1995) 41 Cal. App. 4th 264, 268, 48 Cal. Rptr. 2d 429* ; *580 Folsom Associates v. Prometheus Development Co. (1990) 223 Cal. App. 3d 1, 27-28, 272 Cal. Rptr. 227*).

[2] Comments

[a] Use of Form

These points and authorities may be combined with the appropriate points and authorities from § 207.20 and submitted in support of a motion for expenses, in addition to costs and attorney's fees, as sanctions under *Code Civ. Proc. § 128.5*.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and points of law stated. Thus, counsel should discuss evidence of expenses other than attorney's fees and costs that were incurred in the frivolous action brought by opposing party and that should be paid by the opposing party as sanctions under *Code Civ. Proc. § 128.5* [*see, e.g., 580 Folsom Associates v. Prometheus Development Co. (1990) 223 Cal. App. 3d 1, 27-28, 272 Cal. Rptr. 227]* .

[3] Discussion of Authorities

[a] Expenses Are Not Limited to Costs and Attorney's Fees

In ***Abandonato v. Coldren*** *(1995) 41 Cal. App. 4th 264, 48 Cal. Rptr. 2d 429* , the facts and procedural background of which are discussed at *§ 207.20[3][d]*, the court of appeal reasoned that sanctions under *Code Civ Proc. § 128.5* are not limited to court costs and attorney fees, but include those reasonable expenses directly related to and in furtherance of the litigation (*41 Cal. App. 4th 264, 268)* .

The facts and procedural background of ***580 Folsom Associates v. Prometheus Development Co.*** *(1990) 223 Cal. App. 3d 1, 272 Cal. Rptr. 227* , are *set forth in § 207.20[3][a]*. In *580 Folsom*, the sanctioned law firm argued that the trial court improperly awarded as sanctions compensation for time spent by plaintiffs' personnel in defending against the cross complaint. The law firm argued that the "expenses" to be awarded as sanctions under *Code Civ. Proc. § 128.5* cannot include expenses other than costs including attorney's fees. The court of appeal disagreed, noting that the term "expenses" has not been so limited by other courts. The court of appeal remarked that if the law firm's interpretation were followed, it would mean that where a party was (as in the instant case) entitled to attorney's fees under *Civ. Code § 1717* and costs under *Code Civ. Proc. § 1032*, then no sanctions could be awarded against the losing party no matter how frivolous its conduct or how unscrupulous its bad faith (*223 Cal. App. 3d 1, 27-28)* .

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20-207 California Points & Authorities § 207.28

§ 207.28 Supporting Motion for Sanctions--Pleading, Notice of Motion, or Other Similar Paper Filed in Action or Proceeding Initiated After 1994 [Code Civ. Proc. § 128.7]--General Authority for Motion

[1] FORM

[*Caption. See § 207.20[1].*]

IT IS PROPER FOR THIS COURT TO IMPOSE _____ [*specify type of sanction(s), e.g.,* AN ORDER TO PAY A PENALTY INTO COURT], AGAINST _____ [*specify opposing party, e.g.,* PLAINTIFF], _____ [*name*], FOR PRESENTING A PLEADING, PETITION, WRITTEN NOTICE OF MOTION, OR OTHER SIMILAR PAPER THAT VIOLATES CODE OF CIVIL PROCEDURE SECTION 128.7(b).

A. Certification After Reasonable Inquiry. By presenting to the court a pleading, petition, notice of motion, or similar paper, an attorney or unrepresented party is certifying that to the best of that person's knowledge, information, and belief formed after a reasonable inquiry under the circumstances, the paper meets the conditions specified in *Code of Civil Procedure Section 128.7(b)(1)-(4)* (*Code Civ. Proc. § 128.7(b)*; *see McGhee v. Sanilac County (6th Cir. 1991) 934 F.2d 89, 92-93* (decided under similar federal rule)).

[*Add appropriate points and authorities from §§ 207.30-207.33 pertaining to the specific basis or bases under Code Civ. Proc. § 128.7(b) for the motion for sanctions.*]

B. Imposition of Sanctions Under Code Civ. Proc. If, after notice and a reasonable opportunity to respond, the court determines that a paper fails to meet the conditions set forth under *Code of Civil Procedure Section 128.7(b)*, it may impose an appropriate sanction on the attorney, law firm, or party responsible for the violation (*Code Civ. Proc. § 128.7(c)*).

[*EITHER*]

C. Sanctions Under Code Civ. Proc. A trial court may issue a directive of a nonmonetary nature, as warranted for effective deterrence, as a sanction against a party or attorney for the submission of a paper incorrectly certifying that the conditions set forth in *Code of Civil Procedure Section 128.7(b)* are met (*Code Civ. Proc. § 128.7(d)*).

[*AND/OR*]

C. Sanctions Under Code Civ. Proc. A trial court may order an attorney or party to pay a penalty into court, in an amount providing effective deterrence, as a sanction for the submission of a paper incorrectly certifying that the conditions set forth in *Code of Civil Procedure Section 128.7(b)* are met (*Code Civ. Proc. § 128.7(d)*).

[*AND/OR*]

C. Code Civ. Proc. A trial court may order an attorney or party to pay a sanction, as warranted for effective deterrance, equal to some or all of the reasonable expenses, including attorney's fees, incurred by the moving party as a direct result of a pleading, written notice of motion, or other similar paper incorrectly certifying that the conditions set forth in *Code of Civil Procedure Section 128.7(b)* are met (*Code Civ. Proc. § 128.7(d)*).

[*CONTINUE*]

D. Sanctions Apply When Complaint or Petition Filed After 1994. Sanctions under *Code of Civil Procedure Section 128.7* may be awarded with respect to a complaint filed or petition initiated on or after January 1, 1995, or any pleading, written notice of motion, or other similar paper filed in such a matter (*Code Civ. Proc. § 128.7(i)*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be used in support of a motion for sanctions under *Code Civ. Proc. § 128.7*. This form sets forth the general statutory authority for such a motion and contains points and authorities pertaining to the types of sanctions that may be imposed. Counsel should add to this form the appropriate points and authorities *set forth in §§ 207.30 -207.33* pertaining to the specific violation of *Code Civ. Proc. § 128.7(b)* involved in the case.

Code Civ. Proc. § 128.7(a) provides that every pleading, petition, notice of motion, or other similar paper must be signed by at least one attorney of record, or by the party if unrepresented. By presenting the pleading, petition, notice of

motion, or other similar paper to the court, the signing party is certifying that, to the best of his or her knowledge, information, and belief formed after an inquiry reasonable under the circumstances, the paper meets the conditions set forth in *Code Civ. Proc. § 128.7(b)* [*see §§ 207.30 -207.33*]. Presentation of a paper by opposing party or counsel may be by signing, filing, submitting or later advocating the paper [*Code Civ. Proc. § 128.7(b)*].

[b] Argument

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that opposing party or counsel presented a pleading, petition, notice of motion, or similar paper that, after a reasonable inquiry under the circumstances, should have been identified as not meeting the conditions provided by *Code Civ. Proc. § 128.7(b)(1)-(4)* [*Code Civ. Proc. § 128.7(b), (c)*].

Points and authorities covering the specific conditions certified as having been met by the presentation of a pleading, petition, notice of motion, or other similar paper are *set forth in §§ 207.30 -207.33* [*see Code Civ. Proc. § 128.7(b)(1)-(4)*].

[c] Sanctions Available Under Code Civ. Proc. § 128.7 Are Not Limited to Monetary Sanctions

If an attorney or party violates *Code Civ. Proc. § 128.7(b)* by presenting a paper that does not meet the conditions set forth therein, that person may be subject to sanctions that include directives of a nonmonetary nature, an order to pay a penalty to the court, or payment of expenses, including attorney's fees [*see Code Civ. Proc. § 128.7(d)*].

The sanction imposed must be limited to what is sufficient to deter repetition of the conduct or comparable conduct by others similarly situated [*Code Civ. Proc. § 128.7(d)*]. Although this statute has not yet been interpreted by California appellate courts, federal courts interpreting a similar provision in the Federal Rules of Civil Procedure have indicated that directives of a nonmonetary nature may include injunctive relief, disqualification of counsel, or even referral to bar disciplinary authorities [*see Total Television Entertainment Corp. v. Chestnut Hill Village Associates (1992) 145 F.R.D. 375, 385* ; *Merrigan v. Affiliated Bankshares of Colorado, Inc. (D. Colo. 1991) 775 F. Supp. 1408, 1412-1413]* .

Sanctions under *Code Civ. Proc. § 128.7* may not be imposed except by a seperate motion, on notice, after a reasonable opportunity to respond, and consideration of whether the party seeking sanctions has exercised due diligence [*see Code Civ. Proc. § 128.7(c)*].

[d] Notice and Opportunity to Respond

A party must serve the notice of motion for imposition of sanctions under *Code Civ. Proc. § 128.7* at least 21 days before filing the motion with the court. The motion may not be filed with the court unless the challenged paper is not withdrawn or appropriately corrected within the 21-day period [*see Code Civ. Proc. § 128.7(c)(1)*]. Thus, a party or attorney who has the motion for sanctions served on him or her has a 21-day "safe harbor" period within which to withdraw or correct the paper before being subject to sanctions under *Code Civ. Proc. § 128.7*.

[e] Sanctions for Discovery Violations Are Not Available Under Code Civ. Proc. § 128.7

Unlike *Code Civ. Proc. § 128.5*, which applies to complaints filed or proceedings initiated before 1995, *Code Civ. Proc. § 128.7* does not apply to discovery proceedings [*Code Civ. Proc. § 128.7(g)*]. For points and authorities on discovery sanctions, see Ch. 80, *Discovery* .

[f] Effective Date

Sanctions for frivolous actions or delaying tactics are governed by *Code Civ. Proc. § 128.7* for actions and proceedings commenced after 1994 [*see Code Civ. Proc. §§ 128.5(b)(1), 128.7(i)*]. Actions or proceedings pending as of December

31, 1994, are subject to *Code Civ. Proc. § 128.5*, which authorizes an award of expenses, including attorney's fees, for frivolous actions or delaying tactics [*Code Civ. Proc. §§ 128.5(b)(1)*; *see also § 207.02*]. For points and authorities supporting a motion for sanctions under *Code Civ. Proc. § 128.5*, see *§§ 207.20 -207.27*.

[g] Relevance of Fed. R. Civ. P., Rule 11

The certification requirements contained in *Code Civ. Proc. § 128.7(b)* are patterned after those contained in *Fed. R. Civ. P., Rule 11*. A federal court interpretation of Rule 11 is discussed below as a guide in interpreting the new California sanctions statute. While the federal decision is not necessarily binding on California courts, it may provide guidance in interpreting the similar California sanctions statute.

[h] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 207.43 -207.45* may be used to oppose the motion supported by these points and authorities.

[i] Related Pleading and Practice Forms

For forms of notice of motion supporting a motion for sanctions under Code Civ. Proc. § 128.7, see California Forms of Pleading and Practice, Ch. 510, *Sanctions* (Matthew Bender).

[3] Discussion of Authorities

[a] Certification After Reasonable Inquiry

In ***McGhee v. Sanilac County*** *(6th Cir. 1991) 934 F.2d 89* , plaintiff, formerly an employee of Sanilac County, brought a defamation action against a newspaper, his former employer, and various Sanilac County employees for their involvement in the publication of an article in a local newspaper claiming that the plaintiff had resigned his position because of an allegation of sexual assault. After a deposition in which plaintiff admitted that the article in question was true, the district court granted the defendants' motion for summary judgment, but denied defendants' motion for sanctions under *Fed. R. Civ. P., Rule 11*. Defendants appealed the denial of Rule 11 sanctions.

On review, the appellate court found that the district court should have imposed sanctions against the plaintiff's attorney under Rule 11. The appeals court found that the plaintiff's attorney should have known that the pleadings at issue were inadequate after a reasonable inquiry. The standard employed by the court for a reasonable inquiry was what a reasonable attorney would have investigated under the circumstances. According to the court, a reasonable attorney would have investigated the defamation claim to see if the allegedly defamatory statement was true. A reasonable inquiry in this case would have revealed the allegation to be true by a simple questioning of the plaintiff. Furthermore, the court pointed out that a close reading of the article would have alerted a reasonable attorney to the fact that the article, which simply stated that the plaintiff was accused, was not defamatory. The appeals court held that the attorney had not conducted a reasonable inquiry under the circumstances and thus should have been subject toRule 11 sanctions for filing the plaintiff's defamation claim (*934 F.2d 89, 93)* .

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CHAPTER 207 SANCTIONS
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20-207 California Points & Authorities § 207.29

§ 207.29 Supporting Motion for Sanctions--Pleading, Notice of Motion, or Other Similar Paper Filed in Action or Proceeding Initiated After 1994 [Code Civ. Proc. § 128.7]--Notice of Corrective Action Not Given Within Safe Harbor Period

[1] FORM

[*Caption. See § 207.20[1].*]

[*The following should be combined with a general form of memorandum of points and authorities supporting the award of sanctions under Code Civ. Proc. § 128.7 (see § 207.28), or may be included in a trial or appellate brief.*]

IT IS PROPER FOR THIS COURT TO IMPOSE _____ [*specify type of sanction(s), e.g.,* AN ORDER TO PAY A PENALTY INTO COURT], AGAINST _____ [*specify opposing party, e.g.,* PLAINTIFF], _____ [*name*], FOR PRESENTING A PLEADING, PETITION, WRITTEN NOTICE OF MOTION, OR OTHER SIMILAR PAPER THAT VIOLATES CODE OF CIVIL PROCEDURE SECTION 128.7(b) AND FOR FAILING TO GIVE NOTICE OF ANY CORRECTIVE ACTION TAKEN WITHIN 30 DAYS AFTER SERVICE OF THIS MOTION ON _____ [*specify opposing party, e.g.,* PLAINTIFF], _____ [*name*] PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 128.7(c)(1).

No Notice of Corrective Action Given Within Safe Harbor Period. *Code Civ. Proc. § 128.7(c)(1)* provides that a motion for sanctions pursuant to *Code Civ. Proc. § 128.7* may be filed 21 days after service of the motion on the offending party unless within the 21-day period, the offending party withdraws or corrects the improper pleading. The offending party must also give notice of the corrective action within the 21 days to avoid the award of sanctions [*Liberty Mutual Fire Ins. Co. v. McKenzie (2001) 88 Cal. App. 4th 681, 105 Cal. Rptr. 2d 910]* .

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be combined with the memorandum of points and *authorities in §*

207.28 and submitted in support of the contention that an attorney or party is subject to sanctions under *Code Civ. Proc. § 128.7* for presenting a pleading, petition, notice of motion, or other similar paper primarily for an improper purpose, and for failing to give notice of any corrective action taken within the "safe harbor" 21-day period prescribed by *Code Civ. Proc. § 128.7(c)(1)*.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that even though the offending party may have withdrawn or corrected the pleading within the 21-day "safe harbor" period, the offending party failed to give notice of the corrective action within that period.

[3] Discussion of Authorities

[a] Notice of Corrective Action Must Be Given Within "Safe Harbor" Period

In ***Liberty Mutual Fire Ins. Co. v. McKenzie*** *(2001) 88 Cal. App. 4th 681, 105 Cal. Rptr. 2d 910* , an insured cross complained against his insurer for breach of contract and breach of the implied covenant of good faith and named one of the insurer's claims handlers as a cross defendant. However, as a matter of law, an insurance employee cannot be sued for either breach of contract or breach of the implied covenant of good faith [*see Ch. 120, Insurance § 120.170*]. In June, the insurer requested by letter that the insured delete the employee from the cross complaint, and in July, filed an order to show cause to dismiss the employee and for imposition of sanctions. The court issued an order to show cause and set a hearing. On October 21st, the insurer served the insured's attorney with a motion pursuant to *Code Civ. Proc. § 128.7* for sanctions for failing to dismiss the cross complaint against the employee within 30 days of the service of the motion. The insured dismissed the employee on November 17th. However, the insured did not serve the insurer with notice of the dismissal and the insurer did not learn of the dismissal until November 25th. In the meantime, on November 21th, the insurer filed its motion for sanctions. The trial court granted the motion and awarded sanctions against the insured and his attorney (*88 Cal. App. 4th 681, 689-691)* .

The Court of Appeal affirmed the sanctions award. The purpose of the safe harbor provision in § 128.7(c)(1) is to permit an offending party to avoid sanctions by withdrawing the improper pleadings during the statutory 30-day period, saving the court and the parties time and money litigating the pleading as well as the sanctions request. Thus, to avoid an award of sanctions, the offending party must not only take corrective action, but must also give notice to the moving party that it has taken that step. Without that notice, the moving party has no knowledge that the problem has been resolved and consequently it will proceed with filing the motion, thus requiring the expenditure of attorney and court time which could have been avoided had notice been given (*88 Cal. App. 4th 681, 692)* .

NOTE:

The statutory period in *Code Civ. Proc. § 128.7(c)(1)* as discussed in *Liberty Mutual* was 30 days. However, effective January 1, 2003, the statutory safe harbor period is 21 days.

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20-207 California Points & Authorities § 207.30

§ 207.30 Supporting Motion for Sanctions--Pleading, Notice of Motion, or Other Similar Paper Filed in Action or Proceeding Initiated After 1994 [Code Civ. Proc. § 128.7]--Paper Filed for Improper Purpose [Code Civ. Proc. § 128.7(b)(1)]

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities supporting the award of sanctions under Code Civ. Proc. § 128.7 (see § 207.28), or may be included in a trial or appellate brief.*]

SANCTIONS UNDER CODE OF CIVIL PROCEDURE SECTION 128.7 ARE APPROPRIATE BECAUSE THE _____ [PLEADING *or* PETITION *or* NOTICE OF MOTION *or other similar paper*] WAS PRESENTED TO THE COURT BY _____ [*specify opposing party, e.g.,* PLAINTIFF], _____ [*name*] PRIMARILY FOR THE IMPROPER PURPOSE OF _____ [*specify, e.g.,* HARASSING THE DEFENDANT AND CAUSING UNNECESSARY DELAY].

Paper Presented for Improper Purpose. By presenting to the court a pleading, petition, written notice of motion, or other similar paper, counsel or an unrepresented party is certifying that the paper is not being presented primarily for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation (*Code Civ. Proc. § 128.7(b)(1)*). If a paper is presented primarily for an improper purpose in violation of *Code of Civil Procedure Section 128.7(b)(1)*, the attorney or party presenting the paper may be subject to sanctions (*see Code Civ. Proc. § 128.7(c), (d)*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be combined with the memorandum of points and *authorities in § 207.28* and submitted in support of the contention that an attorney or party is subject to sanctions under *Code Civ. Proc. § 128.7* for presenting a pleading, petition, notice of motion, or other similar paper primarily for an improper purpose. The "presentation" of a paper may be by signing, filing, submitting, or later advocating the paper [*Code Civ. Proc. § 128.7(b)*].

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that the pleading or other paper in question was more likely than not presented primarily for an improper purpose such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation [*Code Civ. Proc. § 128.7(b)(1)*].

[3] Discussion of Authorities

[a] Paper Presented for Improper Purpose

Unlike *Code Civ. Proc. § 128.7(b)(2)-(4)*, which are taken verbatim from *Fed. R. Civ. P., Rule 11(b)(2)-(4)*, *Code Civ. Proc. § 128.7(b)(1)* appears to differ significantly from *Fed. R. Civ. P., Rule 11(b)(1)*. Rule 11(b)(1) appears to authorize sanctions if a paper is filed for any improper purpose, while *Code Civ. Proc. § 128.7(b)(1)* appears to require a showing that a paper was filed *primarily* for an improper purpose as a condition for imposing sanctions. The extent to which this difference in language will result in significant differences in interpretation and application of *Code Civ. Proc. § 128.7(b)(1)* and Rule 11(b)(1)has yet to be determined by case law.

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20-207 California Points & Authorities § 207.31

§ 207.31 Supporting Motion for Sanctions--Pleading, Notice of Motion, or Other Similar Paper Filed in Action or Proceeding Initiated After 1994 [Code Civ. Proc. § 128.7]--Paper Contains Legal Contentions Not Warranted by Existing Law or Nonfrivolous Argument for Change in Existing Law [Code Civ. Proc. § 128.7(b)(2)]

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities supporting the award of sanctions under Code Civ. Proc. § 128.7 (see § 207.28), or may be included in a trial or appellate brief.*]

SANCTIONS UNDER CODE OF CIVIL PROCEDURE SECTION 128.7 ARE APPROPRIATE BECAUSE THE LEGAL CONTENTIONS MADE IN THE _____ [PLEADING *or* PETITION *or* NOTICE OF MOTION *or specify some other similar paper*] PRESENTED TO THE COURT BY _____ [*specify opposing party, e.g.*, PLAINTIFF], _____ [*name*], ARE NOT WARRANTED BY EXISTING LAW OR BY ANY NONFRIVOLOUS ARGUMENT FOR THE EXTENSION, MODIFICATION, OR REVERSAL OF EXISTING LAW OR FOR THE ESTABLISHMENT OF NEW LAW.

Legal Contentions Are Not Warranted by Existing Law or Nonfrivolous Argument for Change in Existing Law. By submitting a pleading, petition,written notice of motion, or other similar paper, counsel or an unrepresented party is certifying that the claims, defenses, and other legal contentions in the paper are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law (*Code Civ. Proc. § 128.7(b)(2)*; *see DeSisto College, Inc. v. Line (11th Cir. 1989) 888 F.2d 755, 764-766* (decided under similar federal rule)). If a paper is presented in violation of *Code of Civil Procedure Section 128.7(b)(2)*, the party presenting the paper may be subject to sanctions (*see Code Civ. Proc. § 128.7(c), (d)*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be combined with the memorandum of points and *authorities in § 207.28* and submitted in support of the contention that an attorney or party is subject to sanctions under *Code Civ. Proc. § 128.7* for presenting a pleading, petition, notice of motion, or other similar paper that contains frivolous legal

arguments. The "presentation" of a paper may be by signing, filing, submitting, or later advocating the paper [*Code Civ. Proc. § 128.7(b)*].

Monetary sanctions may not be awarded against a represented party for presenting a pleading, petition, notice of motion, or other similar paper that contains frivolous legal arguments [*Code Civ. Proc. § 128.7(d)(1)*].

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show that the legal contentions within the pleading or paper in question are not warranted by existing law or consist of frivolous arguments for the extension, modification, or reversal of existing law or for the establishment of new law [*Code Civ. Proc. § 128.7(b)(2)*].

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 207.44* may be used to oppose the motion supported by these points and authorities.

[3] Discussion of Authorities

[a] Legal Contentions Are Not Warranted by Existing Law or Nonfrivolous Argument for Change in Existing Law

The certification requirements contained in *Code Civ. Proc. § 128.7(b)* are patterned after *Fed. R. Civ. P., Rule 11*. A federal court interpretation of Rule 11 is discussed below as a guide in interpreting the new California sanctions statute. While the federal decision is not necessarily binding on California courts, it should may guidance in interpreting the new California sanctions statute.

In ***De Sisto College, Inc. v. Line*** *(11th Cir. 1989) 888 F.2d 755* , the attorney for an institution created to serve students with learning disabilities was sanctioned under *Fed. R. Civ. P., Rule 11*, in a suit against individual members of a zoning commission. The college claimed that a zoning commission decision unconstitutionally and illegally misconstrued local zoning ordinances in order to deny the school an opportunity to establish the college. Plaintiff's counsel did not address the issue of legislative immunity in the initial complaint and even after having the issue brought to attention by defendants' motions to dismiss first, second, and third amended complaints, plaintiffs' counsel never addressed the existence of a decision that clearly supported legislative immunity for the individual defendants.

Counsel's failure to acknowledge the clear precedent supporting defendants' assertion of immunity demonstrated an ignorance of the law and thus bad faith, a violation of Rule 11 that requires that a legal contention in a pleading be warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law (*888 F.2d 755, 764-766)* .

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20-207 California Points & Authorities § 207.32

§ 207.32 Supporting Motion for Sanctions--Pleading, Notice of Motion, or Other Similar Paper Filed in Action or Proceeding Initiated After 1994 [Code Civ. Proc. § 128.7]--Paper Contains Allegations or Factual Contentions Without Evidentiary Support [Code Civ. Proc. § 128.7(b)(3)]

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities supporting the award of sanctions under Code Civ. Proc. § 128.7 (see § 207.28), or may be included in a trial or appellate brief.*]

SANCTIONS UNDER CODE OF CIVIL PROCEDURE SECTION 128.7 ARE APPROPRIATE BECAUSE THE ALLEGATIONS AND OTHER FACTUAL CONTENTIONS MADE IN THE _____ [PLEADING *or* PETITION *or* NOTICE OF MOTION *or specify some other similar paper*] PRESENTED TO THE COURT BY _____ [*specify opposing party, e.g.,* PLAINTIFF], _____ [*name*], DO NOT HAVE EVIDENTIARY SUPPORT [AND ARE UNLIKELY TO HAVE EVIDENTIARY SUPPORT AFTER A REASONABLE OPPORTUNITY FOR FURTHER INVESTIGATION OR DISCOVERY].

Factual Contentions Lacking Sufficient Evidentiary Support. By submitting a pleading, petition, written notice of motion, or other similar paper, counsel or an unrepresented party is certifying that the allegations and other factual contentions have sufficient evidentiary support or, if specifically identified, are likely to haveevidentiary support after a reasonable opportunity for further investigation or discovery (*Code Civ. Proc. § 128.7(b)(3)*; *see Aetna Ins. Co. v. Meeker (11th Cir. 1992) 953 F.2d 1328, 1332* (decided under similar federal rule)). If a paper is presented in violation of *Code of Civil Procedure Section 128.7(b)(3)*, the party presenting the paper may be subject to sanctions (*see Code Civ. Proc. § 128.7(c), (d)*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be combined with the memorandum of points and *authorities in § 207.28* and submitted in support of the contention that a party is subject to sanctions under *Code Civ. Proc. § 128.7* for presenting a pleading, petition, notice of motion, or other similar paper containing allegations and other factual

contentions that have no evidentiary support or are unlikely to have evidentiary support after a reasonable opportunity for further investigation or discovery. The "presentation" of a paper may be by signing, filing, submitting, or later advocating the paper [*Code Civ. Proc. § 128.7(b)*].

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should establish that the allegations and other factual contentions within the pleading, petition, notice of motion, or other similar paper in question are not supported by the evidence, or that they would not be supported by any evidence from further investigation or discovery [*Code Civ. Proc. § 128.7(b)(3)*; *see, e.g., Aetna Ins. Co. v. Meeker (11th Cir. 1992) 953 F.2d 1328, 1332]* .

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 207.45* may be used to oppose the motion supported by these points and authorities.

[3] Discussion of Authorities

[a] Factual Contentions Lacking Sufficient Evidentiary Support

The certification requirements contained in *Code Civ. Proc. § 128.7(b)* are patterned after *Fed. R. Civ. P., Rule 11*. A federal court interpretation of Rule 11 is discussed below as a guide in interpreting the new California sanctions statute. While the federal decision is not necessarily binding on California courts, it may provide guidance in interpreting the new California sanctions statute.

In ***Aetna Ins. Co. v. Meeker*** *(11th Cir. 1992) 953 F.2d 1328* , plaintiff insurance company denied the claim of defendant for the purportedly accidental sinking of a sailboat and filed a complaint for declaratory judgment against defendant for a determination of damages. On further investigation, it appeared that the sailboat in question had been stolen and sunk intentionally. Plaintiff insurance company then filed a motion for summary judgment on its complaint for declaratory relief and defendant's claims and counterclaims for insurance company's refusal to pay his claim.

Defendant's attorney filed an opposition to the motion for summary judgment, claiming that there was no evidence that the boat had been sunk intentionally. The district court granted the motion for summary judgment and imposed *Fed. R. Civ. P., Rule 11*, sanctions on the defendant's attorney for making contentions in his opposition to summary judgment that had no basis in fact.

The appeals court upheld the district court's imposition of sanctions. The appeals court pointed out that the at the time of the attorney's opposition to the motion for summary judgment, an investigation had found that the boat had been intentionally sunk. Defendant's attorney did not dispute the standardized methods or means used to ascertain that the boat had been intentionally sunk; thus, his contention that there was no evidence that the boat had been sunk intentionally was not grounded in the evidence and the attorney was subject to sanction for a violation of Rule 11 (*953 F.2d 1328, 1332-1333)* .

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20-207 California Points & Authorities § 207.33

§ 207.33 Supporting Motion for Sanctions--Pleading, Notice of Motion, or Other Similar Paper Filed in Action or Proceeding Initiated After 1994 [Code Civ. Proc. § 128.7]--Paper Contains Denials of Factual Contentions Not Warranted by Evidence or Not Reasonably Based on Lack of Information or Belief [Code Civ. Proc. § 128.7(b)(4)]

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities supporting the award of sanctions under Code Civ. Proc. § 128.7 (see § 207.28), or may be included in a trial or appellate brief.*]

SANCTIONS UNDER CODE OF CIVIL PROCEDURE SECTION 128.7 ARE APPROPRIATE BECAUSE THE DENIALS OF FACTUAL CONTENTIONS IN THE _____ [PLEADING *or* PETITION *or* NOTICE OF MOTION *or specify some other similar paper*] PRESENTED TO THE COURT BY _____ [*specify opposing party, e.g.,* PLAINTIFF], _____ [*name*], ARE NOT WARRANTED BY THE EVIDENCE [AND ARE NOT REASONABLY BASED ON A LACK OF INFORMATION AND BELIEF].

Denials of Factual Contentions Are Unwarranted. By submitting a pleading, petition, written notice of motion, or other similar paper, counsel or an unrepresented party is certifying that the denials of factual contentions arewarranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief (*Code Civ. Proc. § 128.7(b)(4)*). If a paper is presented in violation of *Code of Civil Procedure Section 128.7(b)(4)*, the party presenting the paper may be subject to sanctions (*see Code Civ. Proc. § 128.7(c), (d)*).

[2] Comments

[a] Use of Form

These points and authorities may be combined with the memorandum of points and *authorities in § 207.28* and submitted in support of the contention that a party is subject to sanctions under *Code Civ. Proc. § 128.7* for presenting a pleading, petition, notice of motion, or other similar paper containing denials of factual contentions that are not warranted on the evidence or are not reasonably based on lack of information or belief. The "presentation" of a paper may be by signing, filing, submitting, or later advocating the paper [*Code Civ. Proc. § 128.7(b)*].

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should establish that the denials of factual contentions within the paper in question are not warranted on the evidence, or, if the denials are specifically identified in the pleading as being based on information and belief, that they are not reasonably based on a lack of information or belief [*Code Civ. Proc. § 128.7(b)(4)*].

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20-207 California Points & Authorities § 207.34

§ 207.34 Supporting Motion for Sanctions--Pleading, Notice of Motion, or Other Similar Paper Filed in Action or Proceeding Initiated After 1994 [Code Civ. Proc. § 128.7]--Punitive Damages May Be Awarded in Action by Convicted Felon Against Victim Arising Out of Felony [Code Civ. Proc. § 128.7(f)]

[1] FORM

[*The following should be combined with a general form of memorandum of points and authorities supporting the award of sanctions under Code Civ. Proc. § 128.7 (see § 207.28), or may be included in a trial or appellate brief.*]

[IN ADDITION TO OTHER SANCTIONS THAT MAY BE IMPOSED UNDER CODE OF CIVIL PROCEDURE SECTION 128.7], IT IS [ALSO] PROPER FOR THIS COURT TO ASSESS PUNITIVE DAMAGES AGAINST PLAINTIFF BECAUSE PLAINTIFF HAS BEEN CONVICTED OF A FELONY AND IS BRINGING THIS ACTION AGAINST _____ [THE VICTIM *or* HEIRS OF THE VICTIM *or* RELATIVES OF THE VICTIM *or* THE VICTIM'S ESTATE *or* THE VICTIM'S PERSONAL REPRESENTATIVE] FOR INJURIES ARISING FROM THE ACTS FOR WHICH PLAINTIFF WAS CONVICTED OF THE FELONY, AND THE PLAINTIFF IS GUILTY OF FRAUD, OPPRESSION, OR MALICE IN MAINTAINING THIS ACTION.

Punitive Damages Available in Action by Convicted Felon Against Victim of Felony. In addition to any sanctions available for violation of *Code of Civil Procedure Section 128.7(b)*, the court may assess punitive damages against the plaintiff on a determination by the court that the plaintiff's action was an action maintained by a person convicted of a felony against the person's victim, or the victim's heirs, relatives, estate, or personal representative, for injuries arising from the acts for which the person was convicted of a felony, and that the plaintiff is guilty of fraud, oppression, or malice in maintaining the action (*Code Civ. Proc. § 128.7(f)*).

[2] Comments

[a] Use of Form

These points and authorities may be combined with the appropriate points and *authorities in §§ 207.28 -207.33* and submitted in support of a defendant's contention that the court should assess punitive damages against plaintiff in addition to other sanctions awarded under to *Code Civ. Proc. § 128.7* because plaintiff is a convicted felon bringing an

action against the victim of the felony (or the victim's heirs, relatives, estate, or personal representative) for injuries arising out of the felony for which plaintiff was convicted. The statutory language regarding assessment of punitive damages under *Code Civ. Proc. § 128.7(f)* is identical to that under *Code Civ. Proc. § 128.5(d)* [*see § 207.26*].

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that (1) plaintiff has been convicted of a felony; (2) plaintiff is maintaining an action against the victim of the felony or the victim's heirs, relatives, estate, or personal representative for injuries arising from the acts for which plaintiff was convicted of a felony; and (3) plaintiff is guilty of fraud, oppression, or malice in maintaining the action [*Code Civ. Proc. § 128.7(f)*].

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20-207 California Points & Authorities § 207.34A

§ 207.34A Supporting Motion for Sanctions--Pleading, Notice of Motion, or Other Similar Paper Filed in Action or Proceeding Initiated After 1994 [Code Civ. Proc. § 128.7]--Juvenile Court Referee May Impose Sanctions in Juvenile Court Dependency Proceedings

[1] FORM
[*Caption. See § 207.20[1].*]

[*The following should be combined with a general memorandum supporting the award of sanctions under Code Civ. Proc. § 128.7 (see § 207.28), or may be included in a trial or appellate brief.*]

A JUVENILE COURT REFEREE MAY IMPOSE _____ [*specify type of sanction(s), e.g.,* AN ORDER TO PAY A PENALTY INTO COURT], AGAINST _____ [*specify opposing party, e.g.,* PLAINTIFF], _____ [*name*], FOR PRESENTING A PLEADING, PETITION, WRITTEN NOTICE OF MOTION, OR OTHER SIMILAR PAPER THAT VIOLATES CODE OF CIVIL PROCEDURE SECTION 128.7(b) AND FOR FAILING TO GIVE NOTICE OF ANY CORRECTIVE ACTION TAKEN WITHIN 30 DAYS AFTER SERVICE OF THIS MOTION ON _____ [*specify opposing party, e.g.,* PLAINTIFF], _____ [*name*] PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 128.7(c)(1).

A. Juvenile Court Referee Hearing a Dependency Case May Impose Sanctions Under *Code Civ. Proc. § 128.7*. *Code Civ. Proc. § 128.7*, on its face, applies to all civil courts and civil proceedings, and thus applies to juvenile court proceedings. A juvenile court hearing a dependency case under *Welf. & Inst. Code § 300* may lawfully impose sanctions under *Code Civ. Proc. § 128.7*. A juvenile court referee in dependency proceedings may lawfully impose sanctions under *Code Civ. Proc. § 128.7* because a juvenile court referee in dependency proceedings has essentially the same powers as a judge, and any differences are not material to this issue (*In re Mark B. (2007) 149 Cal. App. 4th 61, 74-81, 56 Cal. Rptr. 3d 697*).

[2] Comments

[a] Use of Form

These points and authorities may be combined with the points and *authorities in § 207.28* and submitted in support of

the contention that an attorney or party in juvenile court proceedings is subject to sanctions under *Code Civ. Proc. § 128.7* for presenting a pleading, petition, notice of motion, or other similar paper primarily for an improper purpose, and for failing to give notice of any corrective action taken within the "safe harbor" 21-day period prescribed by *Code Civ. Proc. § 128.7(c)(1)*, and for the contention that a juvenile court referee may impose sanctions under *Code Civ. Proc. § 128.7*.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Juvenile Court May Impose Sanctions Under Code Civ. Proc. § 128.7

In ***In re Mark B.*** *(2007) 149 Cal. App. 4th 61, 56 Cal. Rptr. 3d 697* , an attorney filed a motion attacking the Sacramento County juvenile court's contract system for appointing conflict counsel in juvenile court dependency proceedings. The attorney who established that system, who was not an attorney of record in the proceedings, obtained leave from the juvenile court to oppose the motion, and then moved for sanctions under *Code Civ. Proc. § 128.7*. The juvenile court referee denied the conflict motion, granted the sanctions motion, and ordered payment of reasonable attorney's fees and expenses to the attorney opposing the conflicts motion (*149 Cal. App. 4th 61, 65-74)* . The court of appeal held that the juvenile court in dependency proceedings could impose sanctions under *Code Civ. Proc. § 128.7,* because that section on its face applies to all civil courts and civil proceedings, and thus applies to juvenile court proceedings (*149 Cal. App. 4th 61, 74-80*). The court then held that a juvenile court referee in dependency proceedings may lawfully impose sanctions under *Code Civ. Proc. § 128.7* because a juvenile court referee in dependency proceedings has essentially the same powers as a judge, and any differences are not material to this issue (*149 Cal. App. 4th 61, 80-81*).

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20-207 California Points & Authorities § 207.35

§ 207.35 Supporting Countermotion for Sanctions--Code Civ. Proc. § 128.7 Sanctions Motion Has an Improper Purpose [Code Civ. Proc. § 128.7(h)]

[1] FORM

[*The following should be combined with a general form of memorandum ofpoints and authorities supporting the award of sanctions under Code Civ. Proc. § 128.7 (see § 207.28), or may be included in a trial or appellate brief.*]

SANCTIONS UNDER CODE OF CIVIL PROCEDURE SECTION 128.7(h) ARE APPROPRIATE BECAUSE THE SANCTION MOTION BY _____ [*specify opposing party, e.g.,* PLAINTIFF], _____ [*name*], WAS BROUGHT FOR THE IMPROPER PURPOSE OF _____ [*specify, e.g.,* HARASSING THE DEFENDANT AND NEEDLESSLY INCREASING THE COST OF THE LITIGATION].

Sanctions for Improper Sanctions Motions. A motion for sanctions brought primarily for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation, is itself subject to a motion for sanctions under *Code of Civil Procedure Section 128.7* (*Code Civ. Proc. § 128.7(h)*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of the contention that a party is subject to sanctions under *Code Civ. Proc. § 128.7(h)* for bringing a motion for sanctions for an improper purpose. It is the intent of the California Legislature that courts must vigorously use their sanctions authority to deter such improper use of a motion for sanctions [*Code Civ. Proc. § 128.7(h)*].

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that the sanctions motion brought by opposing party was brought for an

improper purpose such as to harass, cause unnecessary delay, or needlessly increase the costs of litigation [*Code Civ. Proc. § 128.7(h)*].

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Volume 20 Chapters 200-209 RECEIVERS---to---SANCTIONS
CHAPTER 207 SANCTIONS
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20-207 California Points & Authorities § 207.36

§ 207.36 Supporting Motion to Impose Monetary Sanction for Violation of Court Order [Code Civ. Proc. § 177.5]

[1] FORM

[*Caption. See § 207.20[1].*]

THIS COURT SHOULD IMPOSE SANCTIONS AGAINST _____ [*name of party, attorney, or witness*] FOR VIOLATING THE COURT'S ORDER OF _____ [*date*], _____ [*describe nature of court order violated*], WITHOUT GOOD CAUSE OR SUBSTANTIAL JUSTIFICATION.

Sanction for Violation of Lawful Court Order. A judicial officer has the power to impose reasonable money sanctions, not to exceed $1,500, for any violation of a lawful court order without good cause or substantial justification (*Code Civ. Proc. § 177.5*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion to sanction a party, witness, or attorney for violating the lawful court order without good cause or substantial justification. Sanctions under *Code Civ. Proc. § 177.5* for violating a court order are not to exceed $1,500 and do not apply to advocacy of counsel before the court. Sanctions under *Code Civ. Proc. § 177.5* are payable to the county in which the judicial officer is located, rather than to the moving party.

Sanctions for violating a court order must not be imposed except on notice contained in a party's moving or responding papers or on the court's own motion, after notice and an opportunity to be heard. The order imposing sanctions must be in writing and recite in detail the conduct or circumstances justifying the order [*Code Civ. Proc. § 177.5*].

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that the person against whom sanctions are sought violated a lawful court order without good cause or justification [*Code Civ. Proc. § 177.5*].

[3] Additional Authorities

In *In re Woodham (2002) 95 Cal. App. 4th 438, 115 Cal. Rptr. 2d 431* , after an evidentiary hearing in consolidated proceedings on habeas corpus petitions brought by prison inmates, the superior court entered an order concluding that the Board of Prison Terms violated due process by unacceptable delays in processing life-term inmates' administrative appeals. The court also set a time limit for the Board to answer life-term inmates' appeals, and ordered that if the Board were unable to comply with the time limit, it was required to give the inmate written notice that its response would be delayed. The Board then violated the order by failing to respond to a life-term inmate's administrative appeal involving his asserted legal right to be present at a review hearing on the Board's decision denying him parole or to notify him of the delay. The inmate petitioned thesuperior court for habeas corpus asserting that the Board had denied him due process by not timely responding to the appeal, and the court issued an order to show cause. The court after hearing denied the petition on the ground that the inmate had no right to be present at the review hearing, but found the Board's response to the administrative appeal was untimely, the argument that the failure to make a timely response was attributable to a backlog of appeals and not wilful was unpersuasive, and ordered the Board to show cause why sanctions should not be imposed under *Code Civ. Proc. § 177.5* and former Cal. Rules of Ct., Rule 227. The court then held a hearing and imposed sanctions (*95 Cal. App. 4th 438, 440-442)* . The Court of Appeal affirmed the sanctions order, holding that it was statutorily authorized, since the Board's failure to respond caused unnecessary litigation, and that there was a sufficient factual basis for the award, because the trial court properly concluded that the excuses of administrative error and increase in the number of administrative appeals filed near the same time as this inmate's did not establish that the Board had good cause or substantial justification for violating the underlying order (*95 Cal. App. 4th 438, 443-447)* .

In 20th Century Ins. Co. v. Choong (2000) 79 Cal. App. 4th 1274, 94 Cal. Rptr. 2d 753 , at a mandatory settlement conference, the court imposed a monetary sanction of $200 on counsel for failure to prepare a mandatory settlement conference statement as required by local rule. The order provided that the sanction would be set aside if the statement was submitted by 4:30 the next day. The court also continued the settlement conference to the next week. At the continued conference, counsel conceded that the sanction had not been paid and told the court he did not know the sanction order was directed at him. The trial court rejected the excuse as counsel was present when the order was issued, and imposed an additional sanction of $250 for failing to pay the original sanction. On appeal, the original sanction was not challenged, but counsel argued that the second sanction was an abuse of discretion under *Code Civ. Proc. § 177.5*. The court of appeal held that it was not an abuse of discretion, where the court had every right to impose a monetary sanction to compel obedience to its lawful orders or to punish disobedience and disrespect of the court's processes, and the court could have reasonably believed a swift additional sanction in response to the failure to obey its first order would be more effective than enforcing the first sanction order by a time-consuming action to obtain a writ of execution

and levy on counsel's property (*79 Cal. App. 4th 1274, 1278)* .

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20-207 California Points & Authorities § 207.37

§ 207.37 Supporting Motion to Impose Sanctions for Violation of Local Court Rule [Code Civ. Proc. § 575.2; Gov. Code § 68608(b)]

[1] FORM

[*Caption. See § 207.20[1].*]

THIS COURT SHOULD IMPOSE SANCTIONS AGAINST _____ [*name of party or attorney*] FOR NONCOMPLIANCE WITH _____ [*specify local court rule violated*].

Sanction for Noncompliance With Local Rules. The court may impose sanctions on a party or attorney for failure to comply with local rules. These sanction may include the striking of pleadings, dismissal, entry of a default judgment, or an order to pay expenses including attorney's fees (*see Code Civ. Proc. § 575.2(a)*; *Gov. Code § 68608(b)*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion to sanction a party or attorney for the violation of

local rules. *Code Civ. Proc. § 575.2* provides general authority for the court to enforce local rules with sanctions; *Gov. Code § 68608(b)* specifically authorizes sanctions to enforce local trial court delay reduction (fast-track) rules. *Code Civ. Proc. §§ 177.5, 575.1, 575.2,* together with *Gov. Code § 68608(b)* provide a comprehensive statewide scheme of regulation concerning fast-track matters, and local rules supplement the statewide scheme [*see Moyal v. Lanphear (1989) 208 Cal. App. 3d 491, 500, 256 Cal. Rptr. 296]* .

Local court rules and policies should be checked before moving for sanctions for a violation of local court rules to ascertain if there are any local requirements concerning the motion.

[b] No Independent Power to Impose Sanction on Innocent Party Under Gov. Code § 68608(b)

Code Civ. Proc. § 575.2(b) applies to fast track rules and provides that when a party is in no way personally responsible for counsel's failure to comply with a local fast track rule, sanctions must only be imposed on counsel, not the innocent party. The more general provision contained in *Gov. Code § 68608(b)* does not express a legislative intent to establish an independent sanctioning power. Rather, the two statutes must be read in harmony with each other [*see Garcia v. McCutchen (1997) 16 Cal. 4th 469, 481-482, 16 Cal. Rptr. 2d 319, 940 P.2d 906]* .

For further discussion of the relationship between *Gov. Code § 68608(b)* and*Code Civ. Proc. § 575.2(b),* see California Forms of Pleading and Practice, Ch. 510, *Sanctions* (Matthew Bender).

[c] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that the party or attorney against whom sanctions are sought violated a local court rule and provide argument concerning why the sanction sought is appropriate under the circumstances.

If seeking a sanction of dismissal or other sanction that adversely affects the opposing party's cause of action or defense, counsel should discuss evidence that the party was responsible or partly responsible for the violation of local rule or that the violation was of fast-track rules and thus the sanction is not subject to the prohibition of *Code Civ. Proc. § 575.2(b)* against punishing a party for the failure of counsel to follow local rules [*see § 207.48*; *see also Code Civ. Proc. § 575.2*; *Gov. Code § 68608(b)*].

[d] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 207.47* and *207.48* may be used to oppose the motion supported by the points and authorities in this form.

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20-207 California Points & Authorities § 207.38

§ 207.38 Supporting Motion to Recover Defense Costs in Action Under Tort Claims Act or for Indemnity or Contribution [Code Civ. Proc. § 1038]--Defense Costs May be Awarded If Plaintiff Lacked Either Reasonable Cause or Good Faith

[1] FORM

[*Caption. See § 207.20[1].*]

THE COURT SHOULD ORDER PLAINTIFFS TO PAY DEFENSE COSTS, INCLUDING ATTORNEY'S FEES BECAUSE THE ACTION WAS NOT BROUGHT WITH REASONABLE CAUSE AND IN GOOD FAITH BELIEF THERE WAS A JUSTIFIABLE CONTROVERSY UNDER THE FACTS AND LAW.

A. Statutory Authority to Award Defense Costs Under California Tort Claims Act. If, after the defendant prevails on a dispositive motion, the trial court finds the plaintiff lacked either reasonable cause or good faith in filing or maintaining an action _____ [under the California Tort Claims Act *or* for express or implied indemnity or for contribution], the court shall award to defendant all reasonable and necessary defense costs, in addition to costs normally awarded to the prevailing party. Defense costs include reasonable attorney's fees, expert witness fees, the expense of services of experts, advisers, and consultants in defense of the proceeding, and where reasonably and necessarily incurred in defending the proceeding (*Code Civ. Proc. § 1038(a), (b)*).

B. Defense Costs Available If Either Reasonable Cause or Good Faith Lacking. The defendant need not establish that both reasonable cause and good faith are lacking to recover defense costs under *Code of Civil Procedure Section 1038(a)* (*Kobzoff v. Los Angeles County Harbor/UCLA Medical Center (1998) 19 Cal. 4th 851, 853, 80 Cal. Rptr. 2d 803, 968 P.2d 514*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted by a defendant in an action under the California Tort Claims Act, when the action was brought either without reasonable cause or without a good faith belief in the justifiability of the action.

An award of defense costs under *Code Civ. Proc. § 1038* may be made only on notice and opportunity to be heard [*Code Civ. Proc. § 1038(a)*].

Note that filing a motion to recover defense costs under *Code Civ. Proc. § 1038* waives the defendant's right to malicious prosecution damages, while the failure to make the motion is not deemed a waiver of the right to pursue a malicious prosecution action [*Code Civ. Proc. § 1038(c)*].

Counsel should add argument to this form, linking the points in the form with the facts of his or her case.

[3] Discussion of Authorities

[a] Statutory Authority to Award Defense Costs Under California Tort Claims Act

Under ***Code Civ. Proc. § 1038*** , in any civil proceeding under the California Tort Claims Act, or in any civil action for express or implied indemnity or for contribution, the court, upon motion of the defendant or cross-defendant, shall, at the time of the granting of any summary judgment, motion for directed verdict, motion for judgment under *Code Civ. Proc. § 631.8*, or any nonsuit dismissing the moving party other than the plaintiff, petitioner, cross-complainant, or intervenor (or at such later time set forth by rule), determine whether or not the plaintiff, petitioner, cross-complainant, or intervenor brought the proceeding with reasonable cause and in the good faith belief that there was a justifiable controversy under the facts and law which warranted the filing of the complaint, petition, cross-complaint, or complaint in intervention. If the court should determine that the proceeding was not brought in good faith and with reasonable cause, an additional issue shall be decided as to the defense costs reasonably and necessarily incurred by the party or parties opposing the proceeding, and the court shall render judgment in favor of that party in the amount of all reasonable and necessary defense costs, in addition to those costs normally awarded to the prevailing party [*Code Civ. Proc. § 1038(a)*].

An award of defense costs under this section shall not be made except on notice contained in a party's papers and an opportunity to be heard [*Code Civ. Proc. § 1038(a)*].

"Defense costs" include reasonable attorneys' fees, expert witness fees, the expense of services of experts, advisers, and consultants in defense of the proceeding, and where reasonably and necessarily incurred in defending the proceeding [*Code Civ. Proc. § 1038(b)*].

Code Civ. Proc. § 1038 applies only on motion made prior to the discharge of the jury or entry of judgment, and any party requesting the relief pursuant to this section waives any right to seek damages for malicious prosecution. Failure to make the motion shall not be deemed a waiver of the right to pursue a malicious prosecution action [*Code Civ. Proc. § 1038(c)*].

Code Civ. Proc. § 1038 applies only if the defendant or cross-defendant has made a motion for summary judgment, judgment under *Code Civ. Proc. § 631.8*, directed verdict, or nonsuit, and the court grants that motion [*Code Civ. Proc. § 1038(d)*].

[b] Defense Costs Available If Either Reasonable Cause or Good Faith Lacking

In ***Kobzoff v. Los Angeles County Harbor/UCLA Medical Center*** *(1998) 19 Cal. 4th 851, 853, 80 Cal. Rptr. 2d 803, 968 P.2d 514* , a decedent's family brought an action against a county after the decedent, who was admitted to a county hospital after emergency personnel prevented him from jumping off a cliff, left the hospital and committed suicide. The county answered the complaint and asserted immunity under *Gov. Code § 856.2(a)(2)*. The trial court granted the county's motion for summary judgment because the plaintiffs failed to refute the county's immunity claim. The court also granted the county's motion for defense costs, including attorney's fees, under *Code Civ. Proc. § 1038* because, since the statutory immunity was irrefutable, there was no reasonable cause for filing the action. The court did not make a finding on whether the action was brought in good faith. The court of appeal reversed. It held that, in order to award defense costs under *Code Civ. Proc. § 1038*, the court had to find the defendant lack both reasonable cause *and* good faith in filing the action.

The Supreme Court reversed. It held that the statutory language plainly required only that the plaintiffs lacked reasonable cause *or* bad faith in filing or maintaining the action to support the award of defense costs under *Code Civ. Proc. § 1038*. Since the plaintiffs' action lacked reasonable cause as a matter of law, the award of defense costs was proper (*19 Cal. 4th 851, 856-864)* .

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20-207 California Points & Authorities § 207.39

§ 207.39 Opposing Motion for Sanctions--Complaint Filed or Proceeding Initiated Before 1995--Bad-Faith Actions or Tactics That Are Frivolous or Solely Intended to Cause Unnecessary Delay [Code Civ. Proc. § 128.5]--Action Taken in Good Faith and Not Frivolous

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*]	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORIT-
vs.	)	IES IN OPPOSITION TO MOTION FOR AWARD
_____ [*name*],	)	OF SANCTIONS
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE MOTION BY _____ [*specify party, e.g.,* DEFENDANT] FOR SANCTIONS, UNDER CODE OF CIVIL PROCEDURE SECTION 128.5 SHOULD BE DENIED BECAUSE THE ACTIONS OR TACTICS OF _____ [*specify party, e.g.,* PLAINTIFF] WERE IN GOOD FAITH AND WERE NOT FRIVOLOUS OR SOLELY INTENDED TO CAUSE UNNECESSARY DELAY.

A. Limit on Power to Award Sanctions Under Code Civ. Proc. The court's power to award monetary sanctions under *Code of Civil Procedure Section 128.5* for tactics or actions not based on good faith that are frivolous or solely intended to cause unnecessary delay is not intended to chill the valid assertion of a litigant's rights, and sanctions should not be imposed except in the clearest of cases (*see Atchison, Topeka & Santa Fe Ry. Co. v. Stockton Port Dist. (1983)*

140 Cal. App. 3d 111, 117, 189 Cal. Rptr. 208).

[*Optional*] **B. Action's Lack of Merit as Insufficient Basis Alone for Imposition of Sanctions.** The fact that an action is determined to be without merit does not by itself make the action frivolous when there is no showing of improper motive or that the party bringing the action knew or should have known that the facts or law or both preclude the action or any recovery (*see Atchison, Topeka & Santa Fe Ry. Co. v. Stockton Port Dist. (1983) 140 Cal. App. 3d 111, 116, 189 Cal. Rptr. 208*).

[*Optional*] **C. Frivolous Action Is One Prosecuted for Improper Motive or Indisputably Without Merit.** An action is frivolous only when an issue is prosecuted for an improper motive--to harass the respondent or delay the effect of an adverse judgment--or when it indisputably has no merit. Frivolousness should be narrowly construed to avoid a chilling effect on the assertion of rights, and attorneys should be sanctioned only for the most egregious conduct (*Luke v. Baldwin-United Corp. (1985) 167 Cal. App. 3d 664, 668, 213 Cal. Rptr. 654*).

[*Add appropriate contentions from §§ 207.40-207.42 to support the motion for sanctions.*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion for expenses, including attorney's fees, under *Code Civ. Proc. § 128.5*, when the opposition is based on the fact that no bad faith was shown, and the actions or tactics of the party opposing the motion were not frivolous or solely intended to cause unnecessary delay.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel could insert in Paragraph A the facts supporting the reasonableness of the actions taken under the circumstances. If opposition to the motion is based on more than one ground, these points and authorities may be combined with the memoranda in §§ 207.40-207.42, as appropriate.

[c] Opposing Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposition to the motion supported by the points and authorities *set out in §§ 207.20 -207.27*.

[d] Effective Dates

Sanctions under *Code Civ. Proc. § 128.5* apply only to actions or proceedings pending as of December 31, 1994 [*see*

Code Civ. Proc. § 128.5(b)(1)]. For actions and proceedings commenced after 1994, the award of expenses, including attorney's fees, as a sanction for frivolous actions or delaying tactics is governed by *Code Civ. Proc. § 128.7* [*Code Civ. Proc. §§ 128.5(b)(1), 128.7(i)*; *see also § 207.02*]. For forms that may be used to oppose a motion for sanctions under *Code Civ. Proc. § 128.7*, see *§§ 207.43 -207.45*.

[3] Discussion of Authorities

[a] Limit on Power to Award Sanctions Under Code Civ. Proc. § 128.5

Atchison, Topeka & Santa Fe Ry. Co. v. Stockton Port Dist. *(1983) 140 Cal. App. 3d 111, 189 Cal. Rptr. 208* , involved an action for damages to real and personal property caused by the failure of a levee and the resulting flooding of plaintiff's property. After filing claims against various public entities, including defendant, and the rejection of those claims, plaintiff commenced this action within the six-month statute of limitations of *Gov. Code § 945.6*.

The plaintiff was unsure of the potential liability of defendant port district, so the complaint was not served on the district, and plaintiff informed the district that no action would be taken against it unless discovery instituted against other named and served defendants indicated that the port district was somehow responsible for the levee failure. The port district answered, nevertheless, and sought a summary judgment and discovery.

The court denied the summary judgment motion, but ordered plaintiff to respond to the district's interrogatories. Instead, plaintiff dismissed the action, and the district filed a motion for expenses under *Code Civ. Proc. § 128.5* on the ground that the action against the district was frivolous. The trial court granted the motion on the ground that the failure to respond to the district's interrogatories and the dismissal showed that plaintiff never had a meritorious action against the district. Plaintiff appealed.

The court of appeal reversed, holding that the trial court applied an improper standard (*140 Cal. App. 3d 111, 116)* . The important factor in determining if a party has instituted a frivolous action is not whether a party has a meritorious action, but rather whether the action was initiated with an improper motive, or with knowledge that no action or recovery is possible (*140 Cal. App. 3d 111, 116)* . The court noted that although the Legislature through *Code Civ. Proc. § 128.5* to broaden the trial courts' power to award sanctions for tactics or actions not based on good faith, the Legislature did not intend to chill the valid assertion of a litigant's rights against a public entity or against any other defendant. For this reason, the court observed, sanctions should not be imposed except in the clearest of cases. In this case, the court held, plaintiff filed the action only to avoid the bar of limitations, while at the same time taking no steps that would require the district to incur any expense, and the court therefore concluded that under the circumstances an award of sanctions constituted a manifest abuse of discretion (*140 Cal. App. 3d 111, 117)* .

Note that *Stockton Port Dist.* was decided under *Code Civ. Proc. § 128.5*, prior to its amendment by 1984 and 1985 legislation. Under current *Code Civ. Proc. § 128.5(b)(2)* "frivolous" means totally and completely without merit or for the sole purpose of harassing an opposing party. It is unclear how the case would be decided under the current statute, but given the facts in the case and plaintiff's need to commence its action within the six-month limitation period, it appears that it could be argued that plaintiff's actions were not frivolous even under the new standard. Furthermore, under the current version of the statute, "actions or tactics" do not include the mere filing of a complaint without serving it on the other party [*see Code Civ. Proc. § 128.5(b)(1)*; *see also § 207.42*]. Thus, on that basis alone, the trial court would have had no power to award sanctions to the port district.

[b] Action's Lack of Merit as Insufficient Basis Alone for Imposition of Sanctions

Note that the California courts of appeal currently are divided on the question of whether an action's lack of merit is a sufficient basis, standing alone, for the imposition of sanctions. Several courts have followed the position stated in ***Atchison, Topeka & Santa Fe Ry. Co. v. Stockton Port Dist.*** *(1983) 140 Cal. App. 3d 111, 116, 189 Cal. Rptr. 208*

(discussed in *§ 207.39[3][a]*) and have declined to permit sanctions absent a finding of subjective bad faith [*see, e.g., Llamas v. Diaz (1990) 218 Cal. App. 3d 1043, 1046-1048, 267 Cal. Rptr. 427 (Fourth District, Division Three)* (discussed in *§ 207.39[4][a]*)].

Other courts, however, have indicated that sanctions under *Code Civ. Proc. § 128.5* may be imposed solely on the basis of objective frivolousness [*see, e.g., Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 12, 244 Cal. Rptr. 581 (First District, Division Four)* ; *Weisman v. Bower (1987) 193 Cal. App. 3d 1231, 1236, 238 Cal. Rptr. 756 (Second District, Division Three)* ; *see also Summers v. City of Cathedral City (1990) 225 Cal. App. 3d 1047, 1070-1072, 275 Cal. Rptr. 594* (discussing split of authority)]. Such courts would, in all likelihood, reject the point raised by Paragraph B.

[c] Frivolous Action Is One Prosecuted for Improper Motive or Indisputably Without Merit

In ***Luke v. Baldwin-United Corp.*** *(1985) 167 Cal. App. 3d 664, 213 Cal. Rptr. 654* , plaintiff filed an action against defendant corporation for his wrongful termination. Before answering the complaint, defendant's attorneys questioned adirector in charge of defendant's internal audit about defendant's contacts with California and researched the law on personal jurisdiction over foreign corporations. Defendant's attorneys filed a motion to quash, asserting California did not have personal jurisdiction over defendant, and attached a declaration by the director that contained statements indicating no California contacts.

Defendant's attorneys stipulated to a continuance of the hearing on the motion to allow plaintiff to conduct discovery on the jurisdictional issue. During the deposition of the director, a number of California contacts were disclosed. Defendant's attorneys withdrew the motion to quash. Although no opposition to the motion to quash had been filed, plaintiff filed a request for sanctions, seeking attorney's fees and costs. The trial court ordered sanctions imposed against defendant and defendant's attorneys for filing a frivolous motion to quash. Defendant's attorneys appealed.

The court of appeal reversed. The court focused its inquiry on whether the conduct of defendant's attorneys was so egregious as to justify the imposition of sanctions pursuant to *Code Civ. Proc. § 128.5*. The court cited pertinent language by the *Supreme Court in In re Marriage of Flaherty (1982) 31 Cal. 3d 637, 183 Cal. Rptr. 508, 646 P.2d 179* , on the issue of the attorney's role. Attorneys face the danger of being trapped between their obligation to their clients to diligently pursue any possibly meritorious claims, and their obligation to the judicial system to refrain from prosecuting frivolous claims. The Court in *Flaherty* narrowly confined frivolous to include only issues prosecuted for an improper motive--to harass the respondent or delay the effect of an adverse judgment--or when it indisputably has no merit. Even after defining frivolous, the Court cautioned that any definition must be read so as to avoid a serious chilling effect on the assertion of litigants' rights, and the power to punish attorneys should be used most sparingly to deter only the most egregious conduct (*167 Cal. App. 3d 664, 668)* .

Defendant's attorneys in *Luke* contended that their filing of the motion to quash fell far short of the requisite egregious conduct. The court compared the attorneys' conduct with that of attorneys in three cases in which sanctions were upheld and found that the conduct of defendant's attorneys stood in glaring contrast. The trial court punished the attorneys because it seemed inconceivable that an attorney could not or would not have elicited all the facts prior to the filing of the motion to quash. Yet it had no way to allocate responsiblity between counsel and its client. In all of the cases in which attorneys have been personally sanctioned, their derelictions were blatant; they personally misused the judicial system. The imposition of sanctions against defendant's attorneys was based on impermissible speculation and conjecture as to facts they could have or should have discovered. The Legislature did not intend to chill the valid assertion of a litigant's rights against any defendant. It is clear sanctions should not be imposed except in the clearest of cases (*167 Cal. App. 3d 664, 668-669)* .

The culpability of the attorneys was far from clear. The trial court ignored the unique circumstances and seemed to attribute defendant's conduct to its lawyers, an improper basis for the imposition of sanctions against attorneys. The trial

court had no way to determine whether defendant or its attorneys were to blame for filing the motion without invading the attorney-client privilege. Because there was insufficient evidence that the attorneys initiated the motion for an improper motive, the motion was not utterly without merit when filed. Additionally, the privilege prevented defendant's attorneys from exonerating themselves. Thus, the trial court abused its discretion by ordering the sanctions (*167 Cal. App. 3d 664, 669-670)* .

It should be noted that *Code Civ. Proc. § 128.5* was amended in 1985 to include a definition of frivolous. The statutory definition does not appear to conflict with the language of the case or dictate a different result.

[4] Additional Authorities

[a] Action's Lack of Merit as Insufficient Basis Alone for Imposition of Sanctions

In *Betz v. Pankow (1993) 16 Cal. App. 4th 931, 20 Cal. Rptr. 2d 841* , the plaintiff moved to vacate an arbitration judgment while an appeal was pending. The trial court denied the motion for lack of jurisdiction and imposed sanctions under *Code Civ. Proc. § 128.5* on the plaintiff's counsel for filing a frivolous motion. The appellate court reversed the order imposing sanctions. Pendency of an appeal does not divest a trial court of jurisdiction if a judgment is wholly void and not merely voidable. The plaintiff's motion was not frivolous due to the lack of uniformity in the case law on the issue of whether the arbitration judgment was void or voidable (*16 Cal. App. 4th 931, 940-941)* .

In *Llamas v. Diaz (1990) 218 Cal. App. 3d 1043, 267 Cal. Rptr. 427* , parties who prevailed on the merits as defendants in a fraud action appealed from an order of the trial court denying their motion for sanctions against the plaintiffs' attorney. The court of appeal affirmed the order, noting that although the attorney against whom sanctions were sought brought an action that was "totally and completely without merit," the action was not instituted in bad faith. Citing a specific finding by the trial court that the attorney "sincerely believed there was a basis for recovery," the court of appeal found that any subjective bad faith was negated. The court held that *Code Civ. Proc. § 128.5* requires an assessment of subjective bad faith in addition to finding that a particular action or tactic was frivolous (*218 Cal. App. 3d 1043, 1047-1048)* .

In *Garcia v. Sterling (1985) 176 Cal. App. 3d 17, 221 Cal. Rptr. 349* , the trial court assessed costs to plaintiff for bringing a frivolous motion to strike portions of defendant's answer. Plaintiff contended that these portions constituted false pleadings within the meaning of *Code Civ. Proc. §§ 436* and *437*, because theycontradicted defendant's prior deposition. In reversing, the court of appeal ruled that the motion was clearly without merit since the trial court could not take judicial notice of the truth of the matters contained in the deposition, but held that the trial court nonetheless erred in ordering plaintiffs to pay attorney's fees and costs. The court noted that it could not be said that plaintiff's motion was in bad faith and frivolous simply because plaintiff's counsel relied on decisions that, in the trial court's view, misstated or misapplied the law regarding judicial notice of court records (*176 Cal. App. 3d 17, 22-23)* .

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20-207 California Points & Authorities § 207.40

§ 207.40 Opposing Motion for Sanctions--Complaint Filed or Proceeding Initiated Before 1995--Bad-Faith Actions or Tactics That Are Frivolous or Solely Intended to Cause Unnecessary Delay [Code Civ. Proc. § 128.5]--Requirements of Notice and Opportunity to Be Heard Not Met

[1] FORM

[*The following can be combined with a general form of memorandum of points and authorities opposing the award of sanctions under Code Civ. Proc. § 128.5 (see § 207.39), or may be included in a trial or appellate brief.*]

THE MOTION TO AWARD SANCTIONS TO _____ [*specify party, e.g.,* PLAINTIFF] _____ [*name*] UNDER CODE OF CIVIL PROCEDURE SECTION 128.5 SHOULD BE DENIED BECAUSE ADEQUATE NOTICE AND AN OPPORTUNITY TO BE HEARD HAVE NOT BEEN GIVEN TO _____ [*specify party or other person against whom sanctions have been assessed*].

A. Notice and Opportunity to Be Heard Required. Sanctions may not be imposed under *Code of Civil Procedure Section 128.5,* except on notice contained in a party's moving or responding papers, or the court's own motion, after notice and opportunity to be heard (*see Code Civ. Proc. § 128.5(c)*; *Lesser v. Huntington Harbor Corp. (1985) 173 Cal. App. 3d 922, 930-934, 219 Cal. Rptr. 562*).

B. Written Notice Required. The notice required by *Code of Civil Procedure Section 128.5(c)* must be written, and telephonic notice is not sufficient to meet the statutory requirements (*O'Brien v. Cseh (1983) 148 Cal. App. 3d 957, 961, 196 Cal. Rptr. 409* ; *see Code Civ. Proc. § 1010*).

C. Due Process Requires Adequate Notice. The due process clauses of both the state and federal Constitutions also require that adequate notice be given prior to the imposition of sanctions (*U.S. Const., Amend. XIV*; *Cal. Const., art. I, § 7*; *O'Brien v. Cseh (1983) 148 Cal. App. 3d 957, 961, 196 Cal. Rptr. 409*).

[*Optional*] **D. Ex Parte Imposition of Sanctions Offends Due Process.** The imposition of sanctions ex parte by a superior court is a violation of due process principles (*O'Brien v. Cseh (1983) 148 Cal. App. 3d 957, 962, 196 Cal. Rptr. 409*).

[2] Comments

[a] Use of Form

These points and authorities may be combined with the appropriate points and authorities from § 207.39 and submitted in opposition to a motion for expenses, including attorney's fees, as sanctions under *Code Civ. Proc. § 128.5*. The ground for opposition is that the requirement for notice and opportunity to be heard, as required by *Code Civ. Proc. § 128.5(c)* and due process principles, was not met.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Notice and Opportunity to Be Heard Required

In ***Lesser v. Huntington Harbor Corp.*** *(1985) 173 Cal. App. 3d 922, 219 Cal. Rptr. 562* , plaintiff brought suit against defendant, alleging various causes of action. Defendant's trial brief, served on plaintiff on the day of the trial, contained a demand for expenses that was "buried on page 17 of the trial brief, without any special headings or notice language." After plaintiff presented his case at trial, defendant moved for a nonsuit. The court granted defendant's motion, finding that plaintiff's evidence was unbelievable and did not substantiate plaintiff's claims. The court then concluded that the case was a proper one for sanctions under *Code Civ. Proc. 128.5* and ordered a hearing for the next day to determine the amount of the sanctions. At that hearing, after taking evidence regarding the expenses of the defendant, it imposed costs and attorney's fees of more than $59,000 (*173 Cal. App. 3d 922, 927, 932)* .

The court of appeal reversed on the grounds that plaintiff did not receive adequate notice and was not afforded an adequate opportunity to be heard. It held that notice was required not only by *Code Civ. Proc. 128.5*, but also by the due process clauses of the state and federal constitutions. It also noted that adequate notice should be determined on a case-by-case basis with an additional measure of notice required when the entire lawsuit is questioned as frivolous and the potential amount of sanctions is substantial (*173 Cal. App. 3d 922, 930-932)* . The court held that the notice afforded plaintiff was insufficient since the expenses in defense were substantial and the one or two days' notice afforded plaintiff did not give plaintiff time to prepare declarations in support of his position.

The court additionally held that plaintiff was denied adequate opportunity to be heard. In reviewing case authority, the court suggested that a party subject tosanctions under *Code Civ. Proc. 128.5* is entitled to an evidentiary hearing at which, within the discretion of the trial judge, he or she may produce evidence and witnesses and otherwise defend against the motion (*173 Cal. App. 3d 922, 933-934)* . The court held that the hearing on the motion for sanctions did not adequately allow plaintiff to present evidence in light of the trial court's statement that "the only reason for this hearing, so far as I am concerned, is to determine the amount of the attorney fees" (*173 Cal. App. 3d 922, 934-935)* .

[b] Written Notice Required

In ***O'Brien v. Cseh*** *(1983) 148 Cal. App. 3d 957, 196 Cal. Rptr. 409* , plaintiff in the underlying personal injury action sought sanctions of attorney's fees against defendant. The underlying case had been ordered to arbitration, and the appointed arbitrator sent a letter to both parties notifying them of a scheduled date for the arbitration hearing. Defendant's attorney sent letters back to the arbitrator and to plaintiff's attorney notifying them that that date was not acceptable. One week later, plaintiff's attorney filed an ex parte application for a court order setting an arbitration date, in which he sought sanctions against defendant under *Code Civ. Proc. § 128.5*.

In the application for sanctions, plaintiff's attorney declared that defendant's attorney was trying to "Stonewall" the arbitration date, based on the fact that plaintiff's attorney had placed eight unanswered telephone calls to defendant's attorney, and based on the arbitrator's mentioning having had some difficulty in contacting defendant's attorney. Plaintiff's attorney declared that he had given the necessary four-hour notice under local court rule requirements for ex parte matters by placing telephone calls to two secretaries in defendant's attorney office, informing them of the date, time, and place of the ex parte application, on the day before the hearing on the motion. The trial court set the date for the arbitration hearing and ordered defendant and defendant's attorney to pay $150, stating only as the reason therefor "for good cause appearing." Defendant appealed the part of the order imposing attorney's fees.

The court of appeal reversed because the notice requirements of due process and former Code Civ. Proc. § 128.5(b) [*now see Code Civ. Proc. § 128.5(c)*] were not met and because the order did not detail the justification for the imposition of sanctions with the degree of specificity required by *Code Civ. Proc. § 128.5* (*148 Cal. App. 3d 957, 961-962)* . The court stated that complying with the local requirements for notice in ex parte matters was not sufficient because an application for sanctions under *Code Civ. Proc. § 128.5* is not an ex parte matter. Applications for orders may not be ex parte if a statute or rule requires notice, as does *Code Civ. Proc. § 128.5*. The court stated that *Code Civ. Proc. § 1010* requires notice to be in writing, and that the federal and state due process clauses require that adequate notice be given (*148 Cal. App. 3d 957, 961)* .

The court discussed the purpose for the enactment of *Code Civ. Proc. § 128.5,* which was to ensure that appropriate safeguards would be used when monetary sanctions are awarded. The court stated that another court of appeal decision, *Ellis v. Roshei Corp. (1983) 143 Cal. App. 3d 642, 647* & n.5, *192 Cal. Rptr. 57* , had suggested that the five-day notice requirement for responding papers might not be sufficient to satisfy due process requirements when the responding papers include a request for sanctions under *Code Civ. Proc. § 128.5* (*148 Cal. App. 3d 957, 961-962)* .

The court also stated that summary imposition of sanctions by appellate courts offends due process principles, and that ex parte imposition of sanctions by a superior court is no less offensive (*148 Cal. App. 3d 957, 962)* .

[c] Due Process Requires Adequate Notice

O'Brien v. Cseh *(1983) 148 Cal. App. 3d 957, 196 Cal. Rptr. 409* , is discussed in *§ 207.40[3][b]*.

[d] Ex Parte Imposition of Sanctions Offends Due Process

O'Brien v. Cseh *(1983) 148 Cal. App. 3d 957, 196 Cal. Rptr. 409* , is discussed in *§ 207.40[3][b]*.

[4] Additional Authorities

[a] Notice and Opportunity to Be Heard Required

In *Eby v. Chaskin (1996) 47 Cal. App. 4th 1045, 55 Cal. Rptr. 2d 517* , a court imposed sanctions on a judgment debtor's attorney at a judgment debtor examination when the attorney did not appear. This was the third hearing for the examination. At the first hearing, the debtor failed to appear, but the attorney was there and stated that the debtor was ill. At the second hearing the debtor appeared with an attorney, but failed to produce some documents she had been required to bring. At the third hearing the debtor appeared with the documents, but without her attorney. The attorney appealed the sanctions on the ground that they had been imposed with insufficient notice and opportunity to be heard. The court of appeal noted that the sanctions were imposed in the attorney's absence, and prior to giving the attorney an opportunity to explain her absence (*47 Cal. App. 4th 1045, 1049)* . Since the decision was made without providing the attorney an opportunity to be heard, the court reversed the order of sanctions.

[b] Due Process Requires Adequate Notice

In *Barrientos v. City of Los Angeles (1994) 30 Cal. App. 4th 63, 35 Cal. Rptr. 2d 520* , the trial judge imposed sanctions against the parties' attorneys for alleged conduct of the attorneys in an unreported status conference in chambers. The attorneys objected to the sanctions on the ground that they were not given notice of the court's intent to impose sanctions and an opportunity to be heard. The courtof appeal reversed the trial court's order imposing sanctions. Although the trial judge argued that the attorneys did have notice and an opportunity to be heard, the court of appeal determined that an indirect allusion by the judge of the possibility of a sanctions award made to only one of the two attorneys did not satisfy the notice requirement. In addition, the attorneys should have been provided with an opportunity to explain, on the record, their conduct before the court made its decision (*30 Cal. App. 4th 63, 71)* . Furthermore, the court's offer to strike the sanctions order if the case settled constituted an attempt to coerce a settlement, which is improper (*30 Cal. App. 4th 63, 71-72)* .

In *In re Marriage of Quinlan (1989) 209 Cal. App. 3d 1417, 257 Cal. Rptr. 850* , the court of appeal reversed a trial court's order imposing sanctions under *Code Civ. Proc. § 128.5*, finding that the sanctioned attorney did not have adequate notice of or opportunity to respond to the threat of sanctions. The court noted that opposing party's oral request for sanctions at a post-dissolution hearing based on the attorney's "unorthodox and wholly improper conduct" did not give the attorney any notice of the grounds underlying the sanction order. Furthermore, the grounds recited in the court's formal order imposing sanctions were grounds that were never asserted as a basis for sanctions, either by the opposing party or the judge, at any time before rendition of the sanctions order. In addition, the court never gave the attorney a clue that sanctions might be imposed for conduct not previously specified by the opposing party. The court concluded that the attorney was deprived of due process and that the sanctions order would have to be reversed (*209 Cal. App. 3d 1417, 1421-1422)* .

In *Corralejo v. Quiroga (1984) 152 Cal. App. 3d 871, 199 Cal. Rptr. 733* , plaintiffs filed a complaint against defendants in municipal court. When defendants cross complained, seeking damages in excess of the jurisdictional limits of municipal court, the matter was transferred to superior court on payment of transfer fees by defendants. Plaintiffs filed a motion to dismiss the cross complaint for defendants' failure to pay the requisite transfer fees. Defendants paid the fee one day prior to the hearing on that motion. Plaintiffs received no notice of that payment, and subsequently sought imposition of sanctions under *Code Civ. Proc. § 128.5*, contending that defendants' actions were dilatory and required plaintiffs to suffer expenses of filing and appearing at the hearing to dismiss the cross complaint. The trial court ordered the sanctions imposed as follows: "Motion is granted. Sanctions of $100 from defense counsel to plaintiffs' counsel are ordered." Defendants appealed. The court of appeal reversed (*152 Cal. App. 3d 871, 874)* .

The court observed that the notice given provided that plaintiffs would move for an order for payment of expenses, including attorney's fees, pursuant to *Code Civ. Proc. § 128.5* (*152 Cal. App. 3d 871, 873-874)* . It did not clearly provide that sanctions were being sought against the attorney. The attorney must be put on notice of the need to prove his or her own blamelessness in the complained of action. Moreover, the order failed to cite specific circumstances justifying the imposition of sanctions. That lack of specificity violated not only the statute, but due process principles as well (*152 Cal. App. 3d 871, 874)* .

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CHAPTER 207 SANCTIONS
PART II. FORMS

20-207 California Points & Authorities § 207.41

§ 207.41 Opposing Motion for Sanctions--Complaint Filed or Proceeding Initiated Before 1995--Bad-Faith Actions or Tactics That Are Frivolous or Solely Intended to Cause Unnecessary Delay [Code Civ. Proc. § 128.5]--Sanctions Authorized Only Against Party or Party's Attorney in Favor of Opposing Party or Opposing Party's Attorney

[1] FORM

[*The following can be combined with a general form of memorandum of points and authorities opposing the award of sanctions under Code Civ. Proc. § 128.5 (see § 207.39), or may be included in a trial or appellate brief.*]

IT IS NOT PROPER FOR THE COURT TO AWARD SANCTIONS AGAINST _____ [*name*] AND IN FAVOR OF _____ [*specify, e.g.,* PLAINTIFF _____ (*name*)] UNDER CODE OF CIVIL PROCEDURE SECTION 128.5 BECAUSE A COURT MAY IMPOSE SANCTIONS UNDER THAT SECTION ONLY AGAINST A PARTY OR A PARTY'S ATTORNEY AND IN FAVOR OF AN OPPOSING PARTY OR AN OPPOSING PARTY'S ATTORNEY.

A. Award of Sanctions Against Nonparty or Attorney of Nonparty Improper. Sanctions under *Code of Civil Procedure Section 128.5* may only be imposed against a party or a party's attorney and in favor of an opposing party or an opposing party's attorney. Thus, for example, sanctions against the attorney of a nonparty in favor of that attorney's nonparty client are improper (*see Code Civ. Proc. § 128.5(a)*; *Rabbitt v. Vincente (1987) 195 Cal. App. 3d 170, 174-175, 240 Cal. Rptr. 524*).

[*Optional*] **B. Award of Sanctions Against Attorney Associated With Party Through Separate Litigation in Foreign Jurisdiction Improper.** *Code of Civil Procedure Section 128.5* does not authorize the imposition of sanctions against an attorney who is not of record and is simply associated with a party through separate litigation pursued entirely in a foreign jurisdiction (*County of Imperial v. Farmer (1988) 205 Cal. App. 3d 479, 485, 252 Cal. Rptr. 382*).

[2] Comments

[a] Use of Form

These points and authorities may be combined with the appropriate points andauthorities from § 207.39 and submitted to oppose a motion for expenses, including attorney's fees, as sanctions under *Code Civ. Proc. § 128.5*. The ground for opposition is that an award under *Code Civ. Proc. § 128.5* is improper unless it is made against a party or party's attorney and in favor or an opposing party or opposing party's attorney.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Award of Sanctions Against Attorney of Nonparty Improper

In ***Rabbitt v. Vincente*** *(1987) 195 Cal. App. 3d 170, 240 Cal. Rptr. 524* , two plaintiffs hired the same attorney to sue defendants for personal injuries arising out of an automobile accident. The attorney for plaintiffs settled the cause of action on behalf of one of the plaintiffs, but continued to represent the other in the underlying suit. After the one plaintiff had settled out of the case, defendants served her with a subpoena requiring her appearance at a deposition. Plaintiff failed to appear on the scheduled date, due to a false statement by her attorney's secretary that the deposition had been continued. Defendants initiated a contempt proceeding against the settled plaintiff, and the settled plaintiff hired a new attorney to represent her in this proceeding.

In the contempt proceeding, the presiding referee found that the settled plaintiff was not in contempt. The referee also awarded settled plaintiff sanctions and attorney's fees against her former attorney pursuant to *Code Civ. Proc. § 128.5*, based on a finding that the advice to the plaintiff concerning her attendance at her deposition was unreasonable and in bad faith. The trial court adopted the referee's recommendations and denied the attorney's motion for reconsideration. The attorney appealed, claiming, inter alia, that the trial court exceeded its jurisdiction by awarding the fees under *Code Civ. Proc. § 128.5*.

The court of appeal reversed. It noted that *Code Civ. Proc. § 128.5* enables a trial court to impose sanctions on a party, the party's attorney, or on both, and that cases imposing *Code Civ. Proc. § 128.5* sanctions do so only against a party or a party's attorney, and in favor of an opposing party or an opposing party's attorney. The court said that *Code Civ. Proc. § 128.5* does not give trial courts the power to adjudicate attorney-client disputes of the kind in the instant case. Furthermore, *Code Civ. Proc. § 128.5* does not extend so far as to enable a trial court to impose sanctions against the attorney of a nonparty in favor of that attorney's nonparty client. The court concluded that the sanctions awarded by the trial court exceeded the jurisdictional scope of *Code Civ. Proc. § 128.5* (*195 Cal. App. 3d 170, 174-175)* .

Counsel should note that a case decided subsequent to *Rabbitt* has held that sanctions may be awarded under *Code Civ. Proc. § 128.5* in favor of a *former* party. In *Frank Annino & Sons Construction, Inc. v. McArthur Restaurants, Inc. (1989) 215 Cal. App. 3d 353, 263 Cal. Rptr. 592* , a case in which a dismissed party defendant to a breach of contract action sought sanctions for the bad faith tactics he suffered while he was a party, the court of appeal held that a trial court has jurisdiction to consider a motion under *Code Civ. Proc. § 128.5* for sanctions on behalf of person whom plaintiff had previously dismissed as a party defendant, if the plaintiff's bad faith tactics occurred while the movant was a party (*215 Cal. App. 3d 353, 357-359)* .

The *Frank Annino* court distinguished *Rabbitt*, noting that the sanctions sought in *Rabbitt* were for bad-faith tactics that occurred *after* the settling party withdrew from the underlying lawsuit; furthermore, the bad-faith tactics in *Rabbitt* related to the settling party's role as a witness--not as a party (*215 Cal. App. 3d 353, 358 n.3*). Although the holding in *Frank Annino* could be argued to be inconsistent with the statement in *Rabbitt* that cases imposing *Code Civ. Proc. §*

128.5 sanctions do so only in favor of an opposing party or opposing party's attorney, the general rule that *Code Civ. Proc. § 128.5* sanctions are unavailable to nonparties appears to remain valid, except when, as in *Frank Annino,* the person seeking sanctions is a *former* party who suffered bad-faith tactics while still a party.

[b] Award of Sanctions Against Attorney Associated With Party Through Separate Litigation in Foreign Jurisdiction Improper

In ***County of Imperial v. Farmer*** *(1988) 205 Cal. App. 3d 479, 252 Cal. Rptr. 382* , a California trial court imposed sanctions against an attorney under *Code Civ. Proc. § 128.5*, purportedly based on the attorney's legal services provided to a father in a 1987 custody action filed in the State of Washington under the Uniform Child Custody Jurisdiction Act. The sanctions were imposed during a proceeding brought by the mother to reactivate a 1976 paternity/support action that had been filed in Imperial County, California. The attorney was neither a party nor an attorney of record to this California proceeding. The trial court denied the attorney's motion to vacate the sanction order.

The court of appeal reversed. It held that the reach of *Code Civ. Proc. § 128.5* is confined to actions and conduct within proceedings conducted in California trial courts. Here, the trial court erred by trying to apply the statute to the attorney, who had never been a party to the California paternity/support action, had never been an attorney of record in any California action, and had merely provided legal services to a party to a custody petition in the State of Washington. The attorney filed no action in California, and thus was not subject to sanctions under *Code Civ. Proc. § 128.5* for conduct interfering with the orderly dispatch of litigationproceedings within the supervisory power of the California courts (*205 Cal. App. 3d 479, 485-486)* .

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20-207 California Points & Authorities § 207.42

§ 207.42 Opposing Motion for Sanctions--Complaint Filed or Proceeding Initiated Before 1995--Bad-Faith Actions or Tactics That Are Frivolous or Solely Intended to Cause Unnecessary Delay [Code Civ. Proc. § 128.5]--Mere Filing of Complaint Without Service on Other Party Is Not Basis for Sanctions

[1] FORM

[*The following can be combined with a general form of memorandum of points and authorities opposing the award of sanctions under Code Civ. Proc. § 128.5 (see § 207.39), or may be included in a trial or appellate brief.*]

THE PLAINTIFF'S MERE FILING OF A COMPLAINT WITHOUT SERVING IT ON THE DEFENDANT DOES NOT CONSTITUTE "ACTIONS OR TACTICS" WITHIN THE MEANING OF CODE OF CIVIL PROCEDURE SECTION 128.5 AND THEREFORE CANNOT SERVE AS THE BASIS FOR THE IMPOSITION OF SANCTIONS UNDER THAT STATUTE.

Filing of Complaint Without Service on Opposing Party Is Not Within Purview of *Code Civ. Proc. § 128.5*. The mere filing of a complaint without serving it on an opposing party does not constitute "actions or tactics" for purposes of *Code of Civil Procedure Section 128.5* (*Code Civ. Proc. § 128.5(b)(1)*).

[2] Comments

[a] Use of Form

These points and authorities may be combined with the appropriate points and authorities from § 207.39 and submitted in opposition to a motion for expenses, including attorney's fees, as sanctions under *Code Civ. Proc. § 128.5*. The ground for opposition is that an award under *Code Civ. Proc. § 128.5* may not be based on the mere filing of a complaint without serving it on the opposing party.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

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20-207 California Points & Authorities § 207.43

§ 207.43 Opposing Motion for Sanctions--Pleading, Notice of Motion, or Other Similar Paper Filed in Action or Proceeding Initiated After 1994 [Code Civ. Proc. § 128.7]--Attorney or Unrepresented Party Conducted Reasonable Inquiry Under Circumstances [Code Civ. Proc. § 128.7(b)]

[1] FORM

[*Caption. See § 207.39[1].*]

THE MOTION BY _____ [*specify moving party, e.g.,* DEFENDANT], _____ [*name*], FOR SANCTIONS AGAINST _____ [*specify opposing party or attorney, e.g.,* PLAINTIFF'S ATTORNEY], _____ [*name*], UNDER CODE OF CIVIL PROCEDURE SECTION 128.7 SHOULD BE DENIED BECAUSE _____ [*specify opposing party or attorney, e.g.,* PLAINTIFF'S ATTORNEY] MADE AN INQUIRY THAT WAS REASONABLE UNDER THE CIRCUMSTANCES.

Inquiry Is Reasonable Under the Circumstances. The inquiry required by counsel or an unrepresented party before presenting a pleading, petition, written notice of motion, or other similar paper and certifying that the conditions specified in *Code Civ. Proc. § 128.7(b)(1)-(4)* are met is one that is reasonable under the circumstances (*see Code Civ. Proc. § 128.7(b)*; *CTC Imports and Exports v. Nigerian Petroleum (3d Cir. 1991) 951 F.2d 573, 578-579* (decided under similar federal rule)).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These point and authorities may be submitted in opposition to a motion for sanctions for a violation of *Code Civ. Proc. § 128.7(b)*, which provides that by presenting a pleading, petition, written notice of motion, or other similar paper to the court, counsel or an unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, the conditions specified in *Code Civ. Proc. § 128.7(b)(1)-(4)* are met.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, the memorandum should discuss evidence that counsel or the unrepresented party made an inquiry that was reasonable under the circumstances before presenting the pleading or other paper to the court and that, at the time of presentation, to the best of counsel's or unrepresented party's knowledge, information, and belief, the conditions specified in *Code Civ. Proc. § 128.7(b)(1)-(4)* were met [*see Code Civ. Proc. § 128.5(b)*]. Because the standard is a fact-specific one, the court must consider all the circumstances [*CTC Imports and Exports v. Nigerian Petroleum (3d Cir. 1991) 951 F.2d 573, 578]* .

If the motion is opposed on more than one ground, these memorandum may be combined with the memoranda in § 207.44 or 207.45, as appropriate.

[c] Opposing Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposition to the motion supported by the points and authorities *set out in §§ 207.28 -207.35*.

[3] Discussion of Authorities

[a] Inquiry Is Reasonable Under the Circumstances

The certification requirements contained in *Code Civ. Proc. § 128.7(b)* are patterned after *Fed. R. Civ. P., Rule 11*. A federal court interpretation of Rule 11 is discussed below as a guide in interpreting the new California sanctions statute. While the federal decision is not necessarily binding on California courts, it may provide guidance in interpreting the new California sanctions statute.

In ***CTC Imports and Exports v. Nigerian Petroleum*** *(3d Cir. 1991) 951 F.2d 573* , the attorney representing plaintiff oil importing company obtained an emergency warrant to arrest an oil shipment aboard a tanker. Two days after the execution of the arrest warrant, it was vacated pursuant to the stipulation of both parties. Defendants later moved for summary judgment and *Fed. R. Civ. P., Rule 11* sanctions against the attorney for the plaintiff corporation. The district court granted both the summary judgment and the motion for sanctions, holding that a reasonable inquiry should have put the attorney for plaintiffs on notice that the action he was filing was fraudulent.

The appeals court overruled the district court's order for sanctions against the attorney for pursuing the fraudulent arrest warrant. The appeals court determined the reasonableness of the attorney's inquiry with a standard of objective reasonableness under the circumstances. The court noted that because the standard is a fact-specific one, the court must consider all the circumstances (*951 F.2d 573, 578)* .

The court of appeals found that because the attorney had never worked with the company before, he could not have known of its history of pursuing similar fraudulent actions. The court also noted that because the attorney had only one day in which to file the emergency pleading, he did not have time to fully investigate the situation. The court concluded that the district court had erred in not considering these circumstances and that under the circumstances the attorney had conducted a reasonable inquiry and was not subject to sanction under Rule 11 (*951 F.2d 573, 578, 579)* .

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20-207 California Points & Authorities § 207.44

§ 207.44 Opposing Motion for Sanctions--Pleading, Notice of Motion, or Other Similar Paper Filed in Action or Proceeding Initiated After 1994 [Code Civ. Proc. § 128.7]--Legal Contentions Warranted by Existing Law or Nonfrivolous Argument for Change in Law [Code Civ. Proc. § 128.7(b)(2)]

[1] FORM

[*Caption. See § 207.39[1].*]

THE MOTION BY _____ [*specify moving party, e.g.,* DEFENDANT], _____ [*name*], FOR SANCTIONS AGAINST _____ [*specify opposing party, e.g.,* PLAINTIFF], _____ [*name*], UNDER CODE OF CIVIL PROCEDURE SECTION 128.7 SHOULD BE DENIED BECAUSE THE LEGAL CONTENTIONS CONTAINED IN THE _____ [PLEADING *or* PETITION *or* NOTICE OF MOTION *or other similar paper*] WERE WARRANTED EITHER BY EXISTING LAW OR BY A NONFRIVOLOUS ARGUMENT FOR THE EXTENSION, MODIFICATION, OR REVERSAL OF EXISTING LAW OR FOR THE ESTABLISHMENT OF NEW LAW, [EVEN THOUGH THOSE CONTENTIONS WERE ULTIMATELY REJECTED BY THE COURT].

Sanctions Not Justified if Legal Contentions Are Nonfrivolous. By presenting a pleading, petition, written notice of motion, or other similar paper to the court, an attorney or unrepresented party is certifying that the claims, defenses, and other legal contentions in that paper are warranted either by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law (*Code Civ. Proc. § 128.7(b)(2)*). The law does not require that the legal theory espoused in a filing prevail, but rather that the legal theory be at least plausible (*CJC Holdings, Inc. v. Wright & Lato, Inc. (5th Cir. 1993) 989 F.2d 791, 793-794)* .

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion for expenses, including attorney's fees, as sanctions under *Code Civ. Proc. § 128.7*. The basis for opposition is that, at the time the pleading or other paper was presented, the legal contentions contained in the pleading or other paper were warranted by existing law or by a nonfrivolous legal argument for a change in the existing law [*see Code Civ. Proc. § 128.7(b)(2)*].

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that, at the time of presentation, to the best of counsel's or unrepresented party's knowledge, information, and belief, after a reasonable inquiry, the claim, defense, or other legal contention at issue was warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law [*Code Civ. Proc. § 128.7(b)(2)*].

[c] Opposing Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposition to the motion supported by the points and authorities *set out in § 207.31*.

[3] Discussion of Authorities

[a] Sanctions Not Justified if Legal Contentions Are Nonfrivolous

The certification requirements contained in *Code Civ. Proc. § 128.7(b)* are patterned after *Fed. R. Civ. P., Rule 11*. A federal court interpretation of Rule 11 is discussed below as a guide in interpreting the new California sanctions statute. While the federal decision is not necessarily binding on California courts, it may provide guidance in interpreting the new California sanctions statute.

In ***CJC Holdings Inc. v. Wright & Lato, Inc.*** *(5th Cir. 1993) 989 F.2d 791* , plaintiff corporation obtained a default judgment in a district court in Texas against defendant. Plaintiff then tried to collect the default judgment in district court in New Jersey, which was defendant's principal place of business. Plaintiff then brought a motion for sanctions against defendant in New Jersey. The district court in New Jersey found that it did not have jurisdiction to sanction conduct in another court and in turn sanctioned plaintiff under *Fed. R. Civ. P., Rule 11* for failing to conduct a reasonable legal inquiry into the proper forum for its motion to sanction.

The appeals court overruled the district court's Rule 11 sanctions. The court pointed out that Rule 11 does not require that the legal theory espoused in a filing prevail but only that it be a result of reasonable inquiry into the law. In this case, the court noted, there was authority on either side of the issue of whether the motion for sanctions was appropriate in the New Jersey court and that plaintiff's view that the motion was appropriate was at least plausible (*989 F.2d 791, 793)* .

Finally the court warned that misapplication of Rule 11 sanctions can chill counsel's enthusiasm and creativity in

pursuing novel legal theories and therefore sanctions should not be imposed for the advocacy of a plausible legal theory, especially where the law is unclear (*989 F.2d 791, 794)* .

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20-207 California Points & Authorities § 207.45

§ 207.45 Opposing Motion for Sanctions--Pleading, Notice of Motion, or Other Similar Paper Filed in Action or Proceeding Initiated After 1994 [Code Civ. Proc. § 128.7]--Factual Contentions Had Adequate Evidentiary Support [Code Civ. Proc. § 128.7(b)(3)]

[1] FORM

[*Caption. See § 207.39[1].*]

THE MOTION BY _____ [*specify moving party, e.g.,* DEFENDANT], _____ [*name*], FOR SANCTIONS AGAINST _____ [*specify opposing party, e.g.,* PLAINTIFF], _____ [*name*], UNDER CODE OF CIVIL PROCEDURE SECTION 128.7 SHOULD BE DENIED BECAUSE THE ALLEGATIONS AND OTHER FACTUAL CONTENTIONS CONTAINED IN THE _____ [PLEADING *or* PETITION *or* NOTICE OF MOTION *or other similar paper*] HAVE EVIDENTIARY SUPPORT OR ARE LIKELY TO HAVE SUCH SUPPORT AFTER A REASONABLE OPPORTUNITY FOR FURTHER INVESTIGATION AND DISCOVERY.

Factual Contentions Have Sufficient Evidentiary Support. Sanctions for untrue allegations or other factual contentions are not appopriate if the allegations or other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery (*see Code Civ. Proc. § 128.7(b)(3)*). Contentions based on reasonable inquiry should not be found to be factually frivolous unless some clear authority or a litigant's own clear admission erases the factual underpinning from some essential element of the litigant's pleading (*Greenberg v. Sala (9th Cir. 1987) 822 F.2d 882, 887)* .

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form may submitted in opposition to a motion for expenses, including attorney's fees, as sanctions under *Code Civ. Proc. § 128.7*. The basis for opposition is that the supposedly untrue allegations or factual contentions in a pleading or other paper have evidentiary support or are likely to have such support after a reasonable opportunity for further investigation or discovery [*see Code Civ. Proc. § 128.7(b)(3)*].

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that, to the best of counsel's or unrepresented party's knowledge, information, and belief, after a reasonable inquiry, the allegations and other factual contentions at issue had evidentiary support at the time that the pleading or other paper was presented to the court, or that the contentions were likely to have evidentiary support after a reasonable opportunity for further investigation or discovery [*Code Civ. Proc. § 128.7(b)(3)*].

[c] Opposing Memoranda

In an appropriate case, this form may be submitted in opposition to the motion supported by the form in *§ 207.32*.

[3] Discussion of Authorities

[a] Factual Contentions Have Sufficient Evidentiary Support

The certification requirements contained in *Code Civ. Proc. § 128.7(b)* are patterned after *Fed. R. Civ. P., Rule 11*. A federal court interpretation of Rule 11 is discussed below as a guide in interpreting *Code Civ. Proc. § 128.7(b)*. While the federal decision is not necessarily binding on California courts, it may provide guidance in interpreting the California sanctions statute.

In ***Greenberg v. Sala*** *(9th Cir. 1987) 822 F.2d 882* , a partnership brought an action against its former attorneys for fraud and misrepresentation in the sale of a business enterprise. The attorney for the partnership brought the action quickly after approximately 100 hours of research because of his fear that the suit would soon be time-barred. After serving one of the defendant attorneys, but none of the others, the suit was quickly voluntarily dismissed by plaintiffs. When the other defendant attorneys found out about the suit, they moved for Rule 11 sanctions against plaintiffs.

The district court held that while the complaint did contain some factual errors, such as the amount of time that one of the attorneys was associated with the other defendants, Rule 11 sanctions were not appropriate. The appellate court upheld the ruling of the district court, noting that plaintiffs had made reasonable investigation into the facts of the case. The court held that a complaint based on reasonable inquiry should not be found to be factually frivolous unless some clear authority or a litigant's own clear admission erases the factual underpinnings of the pleading (*822 F.2d 882, 887)* .

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20-207 California Points & Authorities § 207.46

§ 207.46 Opposing Motion for Sanctions Pleading, Notice of Motion, or Other Similar Paper Filed in Action or Proceeding Initiated After 1994 [Code Civ. Proc. § 128.7]--Motion Violates Safe Harbor Provision [Code Civ. Proc. § 128.7(c)(1)]

[1] FORM

[*Caption. See § 207.39[1].*]

THE MOTION BY _____ [*specify moving party, e.g.,* DEFENDANT], _____ [*name*], FOR SANCTIONS AGAINST _____ [*specify opposing party, e.g.,* PLAINTIFF], _____ [*name*], UNDER CODE OF CIVIL PROCEDURE SECTION 128.7 SHOULD BE DENIED BECAUSE THE MOTION WAS SERVED AND FILED AT A TIME WHEN _____ [*specify opposing party, e.g.,* PLAINTIFF] COULD NO LONGER TAKE CORRECTIVE ACTION.

Motion for Sanctions May Not Violate Safe Harbor Provision. *Code of Civil Procedure Section 128.7(c)(1)* provides that a motion for sanctions shall not be filed unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. This is referred to as the "safe harbor provision." If the motion for sanctions is served and filed at a time when the party opposing the motion can no longer take corrective action, the motion violates the safe harbor provision and must be denied (*Galleria Plus, Inc. v. Hanmi Bank (2009) 179 Cal. App. 4th 535, 537-538, 101 Cal. Rptr. 3d 803* ; *Li v. Majestic Industrial Hills LLC (2009) 177 Cal. App. 4th 585, 590-591, 99 Cal. Rptr. 3d 334* ; *Barnes v. Department of Corrections (1999) 74 Cal. App. 4th 126, 136-137, 87 Cal. Rptr. 2d 594*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may submitted in opposition to a motion for expenses, including attorney's fees, as sanctions under *Code Civ. Proc. § 128.7*. The basis for opposition is that the motion violates the so-called "safe harbor provision" of *Code Civ. Proc. § 128.7(c)(1)*, which provides the opposing party 21 days after service to withdraw or correct the offending paper, claim, etc. If corrective action is taken within this time the motion, although served, is not to be filed [*Code Civ. Proc. § 128.7(c)(1)*]. The ground for opposition is that the motion was served and filed at a time, for example, after a trial on the merits, when it was no longer possible for the opposing party to take corrective action.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that, when the motion for sanctions was served, it was no longer possible to withdraw or otherwise appropriately correct the challenged paper, claim, defense, contention, allegation, or denial pursuant to *Code Civ. Proc. § 128.7(c)(1)*.

[3] Discussion of Authorities

[a] Motion for Sanctions May Not Violate Safe Harbor Provision.

Code Civ. Proc. § 128.7(c)(1) provides that a motion for sanctions shall not be filed unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. This is referred to as the "safe harbor provision."

In ***Galleria Plus, Inc. v. Hanmi Bank*** *(2009) 179 Cal. App. 4th 535, 537, 101 Cal. Rptr. 3d 803* , after the plaintiff sued the defendant, the defendant served the plaintiff with a notice of motion for sanctions asserting that the claims underlying the complaint were not warranted by existing law. The notice stated that the motion would come on for hearing "on AAA at BBB." The defendant served the motion on the same day it filed it. *Code Civ. Proc. § 128.7(c)(1)* provides that a notice of motion for sanctions must be served as provided in *Code Civ. Proc. § 1010*, but may not be filed with or presented to the court unless, within 21 days after service of the motion, or any other period as the court may prescribe, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. This 21-day period gives the offending party 21 days to withdraw a questionable pleading without penalty, thus saving the court and the parties time and money litigating the pleading as well as the sanctions request (*179 Cal. App. 4th 535, 538)* . Because the defendant filed the motion on the same day it served it, it did not provide notice of the 21-day period or serve the remedial purpose of *Code Civ. Proc. § 128.7*'s notice provisions (*179 Cal. App. 4th 535, 538)* .

In ***Li v. Majestic Industrial Hills LLC*** *(2009) 177 Cal. App. 4th 585, 590-591, 99 Cal. Rptr. 3d 334* , the plaintiff sued the defendant for wrongful termination. Five years after the parties settled and the plaintiff dismissed the case, the plaintiff filed a motion to vacate the dismissal. The defendant opposed the motion to vacate and served a motion for sanctions under *Code Civ. Proc. § 128.7*, claiming the motion was frivolous. Nineteen days after the defendant served its motion for sanctions, the court denied the plaintiff's motion. Twenty-eight days after it served its motion for sanctions, the defendant filed its motion for sanctions. The court granted the motion and the plaintiff appealed, arguing the motion for sanctions violated the safe harbor provision set forth in *Code Civ. Proc. § 128.7(c)(1)*.

The court of appeal agreed with the plaintiff that the defendant's motion for sanctions violated the safe harbor provision set forth in *Code Civ. Proc. § 128.7(c)(1)*. It held that *Code Civ. Proc. § 128.7(c)(1)* required the party seeking sanctions to serve on the opposing party, without filing or presenting to the court, a notice of motion specifically describing the sanctionable conduct. Service of the motion initiates a 21-day "hold" or "safe harbor" period. During this time, the offending document may be corrected or withdrawn without penalty. If that occurs, the motion for sanctions may not be filed (*177 Cal. App. 4th 585, 590-591)* . Although the defendant waited more than 21 days after serving its motion for sanctions on the plaintiff to file the motion with the court, the trial court heard the plaintiff's motion to vacate on the 19th day following service of the sanctions motion. Therefore, the plaintiff did not have 21 days to correct or withdraw his motion. The court held that because the hearing date selected by the plaintiff for his motion to vacate did not allow the defendant 21 days before its motion for sanctions was heard, the defendant was obligated to move to continue the plaintiff's motion or shorten time to file the motion for sanctions (*177 Cal. App. 4th 585, 592-595)* .

In ***Barnes v. Department of Corrections*** *(1999) 74 Cal. App. 4th 126, 87 Cal. Rptr. 2d 594* , the plaintiff sued defendant Department of Corrections, alleging the department kept documents concerning him in violation of the Public Safety Officers Procedural *Bill of Rights* Act. After trial, judgment was entered in favor of the Department. The Department then filed a motion for sanctions under *Code Civ. Proc. § 128.7*, asserting the complaint was frivolous and totally without foundation. The trial court ordered the plaintiff to pay the department $80,636 as a sanction for filing a frivolous lawsuit.

The court of appeal reversed. It concluded that the Legislature intended that a party could avoid sanctions under *Code Civ. Proc. § 128.7* by withdrawing or appropriately correcting the offending paper, claim, defense, contention, allegation or denial. Allowing a party to wait until corrective action was no longer possible would clearly defeat legislative intent. Therefore, the court held that a motion for sanctions filed after judgment alleging that the complaint was frivolous violates the "safe harbor provision" because it does not allow the offending party the opportunity to take corrective action (*74 Cal. App. 4th 126, 132, 136-137)* .

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20-207 California Points & Authorities § 207.47

§ 207.47 Opposing Motion to Impose Sanctions for Violation of Local Court Rule [Gov. Code § 66608(b)]--Terminating Sanction Is Inappropriate

[1] FORM

[*Caption. See § 207.39[1].*]

THE COURT SHOULD NOT IMPOSE THE DRASTIC MEASURE OF A TERMINATING SANCTION AGAINST _____ [*specify party, e.g.,* PLAINTIFF] BECAUSE _____ [*specify party, e.g.,* PLAINTIFF] HAS NOT PREVIOUSLY FAILED TO COMPLY WITH A RULE OR ORDER IN THIS MATTER.

A. Drastic Measure of Terminating Sanction Not to Be Used in First Instance. The trial court delay reduction rules and the policy of expeditious processing of civil cases do not override, in all situations, the court's obligation to hear cases on the merits (*Wantuch v. Davis (1995) 32 Cal. App. 4th 786, 795, 39 Cal. Rptr. 2d 47*). Preventing parties from presenting their cases on the merits is a drastic measure; under *Government Code Section 68608(b)*, the sanction of dismissing actions or striking pleadings is only authorized if it appears that less severe sanctions would not be effective after taking into account the effect of previous sanctions or previous lack of compliance in the case (*Gov. Code § 68608(b)*; *Wantuch v. Davis (1995) 32 Cal. App. 4th 786, 795, 39 Cal. Rptr. 2d 47* (construing similar language in former Gov. Code § 68609(d)); *Marriage v. Keener (1994) 26 Cal. App. 4th 186, 194, 31 Cal. Rptr. 2d 511* (construing similar language in former Gov. Code § 68609(d)).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion for a sanction based on violation of local rules [*see* Gov. Code § 66608(b); *see also Code Civ. Proc. § 575.2*] when the sanction sought would terminate the lawsuit and deny the sanctioned party the opportunity to a hearing on the merits of the action.

In an appropriate case, these points and authorities may be submitted in opposition to the motion supported by the points and authorities *set out in § 207.37*. For discussion of the relationship between terminating sanctions under *Gov. Code § 68608(b)* and *Code Civ. Proc. § 575.2(b)*, which restricts sanctions that impact parties when the counsel was at fault, see *§ 207.37[2][b]*.

[3] Discussion of Authorities

[a] Drastic Measure of Terminating Sanction Not to Be Used in First Instance

The plaintiff in ***Wantuch v. Davis*** *(1995) 32 Cal. App. 4th 786, 39 Cal. Rptr. 2d 47* , was an indigent prisoner who brought a civil action in propria persona against his former criminal defense attorney and others for legal malpractice and other causes of action. The plaintiff failed to appear at a status conference of which he had notice. The trial court ordered a further status conference and a hearing on an order to show cause for failure to prosecute. The plaintiff informed the court that he was serving a lengthy prison sentence and requested appointment of counsel or transfer to court. He did not appear at the further status conference or hearing on the order to show cause. The trial court struck plaintiff's pleadings and entered judgment against him. Plaintiff appealed.

The court of appeal reversed. The court recognized the trial court's responsibility to expedite the processing of civil cases, and their power under former Gov. Code § 68609(d) (*now see Gov. Code § 68608(b)*); *Code Civ. Proc. § 575.2*; former Cal. Rules of Ct., Rule 227, and local Los Angeles County court rules to impose sanctions for violation of court rules and orders, including terminating sanctions (*32 Cal. App. 4th 786, 794-795)* . Making the statement set out in the form, however, the court, citing former Section 68609(d) and several cases, concluded that terminating sanctions should not be ordered as a first response when noncompliance is through no fault of the party. Because that was the case in the instant matter and the plaintiff had otherwise diligently prosecuted the case, which was little more than a year old, the court held that the trial court abused its discretion (*32 Cal. App. 4th 786, 795)* .

Plaintiff in ***Marriage v. Keener*** *(1994) 26 Cal. App. 4th 186, 31 Cal. Rptr. 2d 511* , filed a quiet title action against several defendants on July 3, 1991. As to one defendant, plaintiff did not serve the complaint until April, 1993. The trial court dismissed the complaint as to that defendant due to the untimeliness of service, which under the local trial court delay rules was required to be served within 60 days of filing. Plaintiff appealed from the dismissal.

The court of appeal reversed. After noting some conflict among the courts of appeal as to whether a case may be dismissed under former Gov. Code § 68609(d) (*now see Gov. Code § 68608(b)*) for failure to serve a summons in the time required by local rule before the expiration of the time allowed for service under *Code Civ. Proc. § 583.420* (discretionary dismissal after two years), the court stated that it did not have to reconcile those authorities because under the facts of the case, Section 68609(d) did not authorize dismissal. The court looked to the statutory language authorizing dismissal or striking pleadings if it appears that less severe sanctions would not be effective after taking into account the effect of previous sanctions or previous lack of compliance in the case. The court pointed out that the record contained no indication of prior sanctions and the trial court did not mention any previous lack of compliance. Thus, the record did not support the severe sanction of dismissal, and the trial court abused its discretion in imposing that sanction (*26 Cal. App. 4th 186, 194)* .

[4] Additional Authorities

[a] Drastic Measure of Terminating Sanction Not to Be Used in First Instance

Sigala v. Anaheim City School Dist. (1993) 15 Cal. App. 4th 661, 19 Cal. Rptr. 2d 38 , was a personal injury action in which the defendant requested trial de novo after the case went through judicial arbitration. The trial court struck the request for trial de novo on a finding that the defendant had made no good faith attempt and had no intention of making any good faith attempt to comply with the court rules requiring parties to participate in good faith at a settlement conference.

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20-207 California Points & Authorities § 207.48

§ 207.48 Opposing Motion to Impose Sanctions for Violation of Local Court Rule [Gov. Code § 66608(b)]--Noncompliance Is Responsibility of Counsel [Code Civ. Proc. § 575.2(b)]

[1] FORM

THE COURT MAY NOT IMPOSE A SANCTION THAT ADVERSELY AFFECTS _____ [*specify party, e.g.,* PLAINTIFF'S] _____ [CAUSE OF ACTION *or* DEFENSE] WHEN THE FAILURE TO COMPLY WITH LOCAL RULES WAS THE RESPONSIBILITY OF COUNSEL.

Noncompliance Is Responsibility of Counsel. If a failure to comply with local rules is the responsibility of counsel and not of the party, sanctions can only be imposed on counsel and the sanction cannot adversely affect the party's cause of action or defense (*Code Civ. Proc. § 575.2(b)*; *Garcia v. McCutchen (1997) 16 Cal. 4th 469, 481-482, 16 Cal. Rptr. 2d 319, 940 P.2d 906*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a motion for the imposition of sanctions on a party based on violation of local rules [*see* Gov. Code § 66608(b); *Code Civ. Proc. § 575.2(b)*] when the failure to comply with

local rules is the responsibility of the party's counsel and not that of the party.

In an appropriate case, these points and authorities may be submitted in opposition to the motion supported by the points and authorities *set out in § 207.37*.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts showing that failure to comply with local rules is the responsibility of counsel and not of the party.

[c] Related Pleading and Practice Forms

For related legal background on Code Civ. Proc. § 575.2(b) generally, and the relationship of Code Civ. Proc. § 575.2 and Gov. Code § 68608 sanctions for violation of local court rules, see California Forms of Pleading and Practice, Ch. 510, *Sanctions* (Matthew Bender).

[3] Discussion of Authorities

[a] Noncompliance Is Responsibility of Counsel

In ***Garcia v. McCutchen*** *(1997) 16 Cal. 4th 469, 16 Cal. Rptr. 2d 319, 940 P.2d 906* , the plaintiff's action for personal injuries was dismissed without prejudice after his attorney failed to comply with local rules pertaining to service of all defendants, and filing of a status memorandum, both within a specified number of days. Although the dismissal was without prejudice, the statute of limitations would have barred claims alleged in a new complaint. The trial court denied the attorney's motion to reconsider. The Court of Appeal reversed the trial court's ruling, concluding that *Code Civ. Proc. § 575.2(b)* prohibits dismissal as a sanction when noncompliance with local court rules is the fault of counsel, not of the litigant. The Supreme Court granted review to resolve an apparent conflict between the Court of Appeal's decision and the decision in *Intel Corp. v. USAIR, Inc. (1991) 228 Cal. App. 3d 1559, 1563-1566, 279 Cal. Rptr. 569* (construing predecessor of *Gov. Code § 68608(b)*, concluding that § 575.2(b) does not limit a court's power to dismiss as sanction for counsel's noncompliance with local rules implementing fast track rules)].

The Supreme Court affirmed the judgment of the Court of Appeal. The defendant contended on appeal that a trial court's power under *Gov. Code § 68608(b)* to dismiss an action for violation of local fast track rules is not subject to the limits of § 575.2(b). The Court disagreed, preferring to construe the two statutes in harmony. The Court stated that under "its plain and common sense meaning, the phrase, 'authorized by law,' incorporates only those sanctioning powers that the law otherwise establishes, including those set forth in section 575.2. It does not express a legislative intent to establish an independent sanctioning power" (*16 Cal. 4th 469, 476)* .

The defendant also cited *Intel Corp. v. USAIR, Inc. (1991) 228 Cal. App. 3d 1559, 1563-1566, 279 Cal. Rptr. 569* , which concluded that *Gov. Code § 68608(b)* is more narrowly circumscribed and specific than § 575.2(b), and is therefore controlling. The Court observed that § 68608(b) relates only generally about a court's power to impose sanctions "authorized by law" in connection with local programs. It does not expressly address the power of a court to impose sanctions for noncompliance with local rules. The Legislature has expressly addressed that subject in § 575.2 and has expressly limited the court's power in subdivision (b) of that section. Thus, it is arguable which statute is the more specific and which the more general (*16 Cal. 4th 469, 477-478)* . Thus, the Court concluded that granting a trial court power to dismiss an action when counselalone is responsible for noncompliance with local rules would be a significant change in the law. Nothing in either the statutory language or the legislative history of the Act reflects a legislative intent to override section 575.2(b)'s limits on a court's sanctioning powers or to give courts expanded dismissal powers with respect to fast track rules (*16 Cal. 4th 469, 481-482)* .

The Court disapproved *Intel Corp. v. USAIR, Inc. (1991) 228 Cal. App. 3d 1559, 1563-1566, 279 Cal. Rptr. 569* and dictum in *Laguna Auto Body v. Farmers Ins. Exchange (1991) 231 Cal. App. 3d 481, 490, 282 Cal. Rptr. 530* , to the extent they are inconsistent with its conclusion.

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20-207 California Points & Authorities § 207.49

§ 207.49 Opposing Motion to Impose Sanctions for Violation of Local Court Rule--Local Rule Permitting Sanctions Conflicts With Statute on Same Subject

[1] FORM

[*Caption. See § 207.39[1].*]

THE COURT SHOULD NOT IMPOSE SANCTIONS FOR VIOLATION OF LOCAL RULE _____ [*specify*], BECAUSE THIS RULE IS INCONSISTENT WITH A STATUTE ON THE SAME SUBJECT.

Local Rule Allowing For Sanctions May Not Conflict With Statute. A local rule allowing sanctions may not permit a lower standard of culpability or less due process protections than a statute on the same subject (*Pacific Trends Lamp & Lighting Products, Inc. v. J. White, Inc. (1998) 65 Cal. App. 4th 1131, 1135, 76 Cal. Rptr. 2d 918*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form points and authorities may be submitted by a party in opposition to a request for the imposition of sanctions

pursuant to a local rule, when the local rule concerns the same subject matter covered by a state statute, and permits the imposition of sanctions under a lower standard of wrongful conduct, and with less due process protection, than that provided by the state statute.

Counsel should add argument to this form, linking the point in the form with the facts of his or her case.

[3] Discussion of Authorities

[a] Local Rule Allowing For Sanctions May Not Conflict With Statute

In ***Pacific Trends Lamp & Lighting Products, Inc. v. J. White, Inc.*** *(1998) 65 Cal. App. 4th 1131, 76 Cal. Rptr. 2d 918* , a party filed a motion for new trial, but thereafter dis not "meet and confer" with the opposing party and file a report on that meeting, pursuant to a local rule requiring that this be done before most motions. In denying the motion, the trial court also imposed sanctions for violating its local rule, which also provided that the court could impose specified sanctions against a party at fault when the court found "no good reason" for the failure to meet and resolve the dispute.

The court of appeal found this rule to be inconsistent with *Code Civ. Proc. § 128.5* (and with *Code Civ. Proc. § 128.7* if it were applicable). The local rule essentially functioned to discourage meritless motions, and to avoid expending judicial resources in hearing such motions. As such, it served the same purpose as the more general sanction statutes, *Code Civ. Proc. § 128.5* and *Code Civ. Proc. § 128.7*, which function more generally to discourage both meritless motions and also meritless actions or other proceedings. The local rule in this instance, however, permitted sanctions to be imposed merely if the court found no good reason for refusing to resolve the dispute informally. The rule thus conflicted with and was preempted by *Code Civ. Proc. § 128.5* or *Code Civ. Proc. § 128.7*, because the latter statutes impose a greater showing of wrongful conduct, and which also provide greater due process protections to the party or attorney subjected to sanctions. The court of appeal held the sanction provision of the local rule could be invoked when there was such conflict with the general sanction statutes (and, alternatively, with the statutes governing new trial motions) (*65 Cal. App. 4th 1131, 1135-1136)* .

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20-207 California Points & Authorities § 207.50

§ 207.50 Opposing Motion to Impose Sanctions for Violation of Local Court Rule--Conduct Did Not Violate Local Rule

[1] FORM

[*Caption. See § 207.39[1].*]

THE COURT SHOULD NOT IMPOSE SANCTIONS FOR VIOLATION OF LOCAL RULE _____ [*specify*], BECAUSE THE CONDUCT DID NOT VIOLATE THE RULE.

Sanctions Improper Under *Code Civ. Proc. § 575.2* When Local Rule NotViolated. Sanctions may not be awarded under *Code Civ. Proc. § 575.2* when the conduct, even though objectionable, does not violate a local rule (*Blum v. Republic Bank (1999) 73 Cal. App. 4th 245, 248-249, 86 Cal. Rptr. 2d 226*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This form points and authorities may be submitted by a party in opposition to a request for the imposition of sanctions

for violation of a local rule, when the conduct complained of is not in violation of the rule.

[b] Argument

Counsel should add argument to this form, linking the point in the form with the facts of his or her case. Thus, counsel should argue facts showing that there was, in fact, no actual violation of the local rule alleged to have been violated.

[3] Discussion of Authorities

[a] Sanctions Improper Under Code Civ. Proc. § 575.2 When Local Rule Not Violated

In *Blum v. Republic Bank (1999) 73 Cal. App. 4th 245, 86 Cal. Rptr. 2d 226* , an attorney called the court clerk and scheduled a status conference without conferring with other counsel. The trial court ordered the attorney to pay $2,500 in sanctions pursuant to *Code Civ. Proc. § 575.2* for violation of a local rule that prohibits ex parte communications with the court on the substance of a pending case.

The court of appeal reversed. Since the local rule prohibited ex parte communications only on the substance of a pending case, scheduling a status conference without conferring with other counsel did not violate the rule. The ex parte prohibitions were not intended to preclude simple communications between attorneys and court clerks on purely administrative matters having nothing to with the substance of the case. The trial court could not expand the local rule to justify the sanctions order (*73 Cal. App. 4th 245, 248-249* .)

California Points & Authorities

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Volume 20 Chapters 200-209 RECEIVERS---to---SANCTIONS
Chapters 208through 209 RESERVED

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Chapters 208RESERVED

California Points & Authorities

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 210 SCHOOLS: ACTIONS BY STUDENTS

21-210 California Points & Authorities 210.syn

§ 210.syn Synopsis to Chapter 210: SCHOOLS: ACTIONS BY STUDENTS

§ 210.01 Scope of Chapter

§ 210.02 Governing Law

§ 210.03 Related Pleading and Practice Chapters

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§§ 210.05-210.19 [Reserved]

§ 210.20 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] by Defendants in Action for Damages [Civ. Code § 3333] for Personal Injuries Against School District and Employees--Negligent Supervision of Students [Civ. Code § 1714(a); Gov. Code §§ 815.2, 820]--No Duty to Supervise or Provide for Safety of Students While off School Property [Educ. Code § 44808]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[e] Opposing Memoranda

[3] Discussion of Authorities

[a] Duty of Care as Essential Element of Negligence

[b] Existence of Duty as Question for Court

[c] School District Not Insurer of Safety of Students

[d] No Liability for Student Safety off School Property

[e] No Duty to Protect Safety of Students on Way to and From School

[f] No Duty to Furnish Transportation or Assign Pupil to Particular School

[g] No Duty to Scout Neighborhood for Gang Members

[h] No Duty to Students Injured Off-Campus While Awaiting Pick-Up by Parents

[4] Additional Authorities

[a] School District as Not Insurer of Safety of Students

[b] No Liability for Student Safety Off School Property

§ 210.21 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] by Defendants in Action for Damages [Civ. Code § 3333] for Personal Injuries Against School District and Employees--Negligent Supervision of Students [Civ. Code § 1714(a); Gov. Code §§ 815.2, 820]--No Duty to Supervise School Grounds Around-the-Clock

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] No Duty to Supervise School Grounds Around-the-Clock

§ 210.22 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] by Defendants in Action for Damages [Civ. Code § 3333] for Personal Injuries Against School District and Employees--Negligent Supervision of Students [Civ. Code § 1714(a); Gov. Code §§ 815.2, 820]--Waiver of Claims by Students Making Nonrequired Field Trip or Excursion [Educ. Code § 35330]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Waiver of Claims by Student Making Field Trip or Excursion

[b] Immunity Extends to School District Employees

[c] Immunity Extends to Any Districts Providing Significant Participation in Conducting Field Trip

[4] Additional Authorities

[a] Waiver of Claims by Student Making Field Trip or Excursion

§ 210.23 Supporting Defendants' Motion to Dismiss [Fed. R. Civ. P., Rule 12(b)(6)] Private Action for Damages and Injunctive Relief for Sexual Harassment in Violation of Title IX of Education Amendments of 1972 [20 U.S.C.S. § 1681 et seq.] Against School District and Employees--Harassment by Another Student

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] No Allegation or Proof That Defendant Is Recipient of Federal Funding as Required by 20 U.S.C.S. § 1681(a)

[b] No Allegation or Showing that Defendants Were Deliberately Indifferent to Known Acts of Sexual Harassment

[c] In Action Based on Sexual Harassment by Fellow Student, No Allegation of Essential Elements Stating Claim for Relief

§ 210.24 Supporting Defendants' Motion to Dismiss [Fed. R. Civ. P., Rule 12(b)(6)] Action for Damages for Violation of 42 U.S.C.S. § 1983 Against School Officials and Employees--Unlawful Search and Seizure in Violation of U.S. Const. amends. IV, XIV

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] No Allegation or Proof That Search of Plaintiff Was Unreasonable

[b] School Officials Need Not Show Individualized Suspicion to Justify Search

[c] Reasonable Suspicion Not Needed to Stop Students to Ask Questions or Conduct Investigation

[d] "Reasonableness" Standard Applies to School Official's Independent Decision to Search Even If Police Provide Information and Are Present

[4] Additional Authorities

§ 210.25 Supporting Defendants' Motion to Dismiss [Fed. R. Civ. P., Rule 12(b)(6)] Action for Declaratory and Injunctive Relief for Violation of Title VI of the Civil Rights Act of 1964 [42 U.S.C.S. § 2000d] Against School District--Hostile Racial Educational Environment

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] No Allegation or Proof That Defendant Is a Recipient of Federal Financial Assistance as Required by 42 U.S.C.S. § 2000d.

[b] In Action Based on Hostile Racial Educational Environment, No Allegation of Essential Elements Stating Claim for Relief

[c] No Allegation or Showing that Defendant Had Notice of or Was Deliberately Indifferent to Hostile Racial Educational Environment

§ 210.26 Supporting Defendants' Motion to Dismiss [Fed. R. Civ. P., Rule 12(b)(6)] Action for Injunctive Relief for Violation of 42 U.S.C.S. § 1983 Against School District--Removal of Racially Discriminatory Literary Works From Mandatory Curriculum

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Memoranda

[3] Discussion of Authorities

[a] Complaint for Violation of Equal Protection Under 42 U.S.C.S. § 1983 Must Plead Intentional Discrimination

[b] Courts May Not Ban Literary Works From School Curricula on Basis of Content

§ 210.27 Opposing Defendants' Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action for Damages for Personal Injuries Against School District and Employees--Negligent Supervision of Students [Civ. Code § 1714(a); Gov. Code §§ 815.2, 820]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Memoranda

[3] Discussion of Authorities

[a] Rules Governing Summary Judgment Procedure

[b] Duty to Supervise Students

[c] Standard of Care

[d] Lack of Ordinary Care

[e] Vicarious Liability of School District

[f] Adequacy of Supervision as Question of Fact

[g] Off-Campus Injury Proximately Caused by Negligent On-Campus Supervision

[h] Failure to Prevent Unauthorized Departure From School

[i] Foreseeability of Injury to Special Needs Student Inflicted in Hidden Area of Campus

[4] Additional Authorities

[a] Duty to Supervise Students

[b] Adequacy of Supervision as Question of Fact

[c] Off-Campus Injury Proximately Caused by Negligent On-Campus Supervision

§ 210.28 Opposing Defendants' Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action for Damages for Personal Injuries Against School District and Employees--Negligent Supervision of Students [Civ. Code § 1714(a); Gov. Code §§ 815.2, 820]--School District as Not Immune From Liability for Injury Sustained on Required Off-Premises School Activity

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Memoranda

[3] Discussion of Authorities

[a] Duty to Supervise Required Off-Campus School Activities

§ 210.29 Opposing Defendants' Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action for Damages for Personal Injuries Against School District and Employees--Negligent Supervision of Students [Civ. Code § 1714(a); Gov. Code §§ 815.2, 820]--Cause of Action Exists for Failure to Warn of Other Student's Violent Tendencies

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[3] Discussion of Authorities

[a] School District May Be Held Liable for Damages Based on Failure to Warn

§ 210.30 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action for Damages for Personal Injuries Against School District and Employees--Negligent Supervision of Students [Civ. Code § 1714(a); Gov. Code §§ 815.2, 820]--School District Not Immune Under "Hazardous Recreational Activity" Immunity [Gov. Code § 831.7] From Liability for Injury Sustained During Physical Education Class Conducted on School Property

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Required Physical Education Class Is Not "Recreational Activity"

§ 210.30A Opposing Defendants' Motion to Dismiss [Fed. R. Civ. P., Rule 12(b)(6)] Action for Damages for Violation of 42 U.S.C.S. § 1983 Against School Officials and Employees--Use of Excessive Force in Violation of U.S. Const. amends. IV, XIV

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Related Memoranda

[3] Discussion of Authorities

[a] Excessive Use of Force Against Student

[b] Law Clearly Established

[c] Supervisory Liability

§ 210.31 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5] of Governing Board of School District and County Board of Education [Educ. Code §§ 48918, 48923]--Expulsion of Public School Student--Denial of Due Process

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Memoranda

[3] Discussion of Authorities

[a] Expulsion Order as Reviewable by Mandate

[b] Authority of School District to Discipline Students

[c] Due Process as Required in Student Disciplinary Proceedings

[d] Notice and Hearing as Required

§ 210.32 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5] of Governing Board of School District and County Board of Education [Educ. Code §§ 48918, 48923]--Expulsion of Public School Student--Improper Grounds for Expulsion

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Memoranda

[3] Discussion of Authorities

[a] Ground for Expulsion Is Required to Be Related to School Activity or Attendance

[b] Possession of Firearm Defined

[c] Vague and Standardless Grounds

[d] Protected Speech

[4] Additional Authorities

[a] Ground for Expulsion as Required to Be Related to School Activity or Attendance

[b] Protected Speech

§ 210.33 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative

Decision [Code Civ. Proc. § 1094.5] of Governing Board of School District and County Board of Education [Educ. Code §§ 48918, 48923]--Expulsion of Public School Student--Decision to Expel Not Supported by Evidence

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Memoranda

[3] Discussion of Authorities

[a] Substantial Evidence Requirement

[b] Reliance on Contradictory Statements and Reports to Support Student Expulsion as Improper

§ 210.34 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086, 1107] to Review Administrative Decision [Code Civ. Proc. § 1094.5] of Governing Board of School District and County Board of Education [Educ. Code §§ 48918, 48923]--Expulsion of Public School Student--Failure to Exhaust Administrative Remedies

[1] FORM

[2] Comments

[a] Use of Form

[b] Procedure for Appealing Decision to Expel

[c] Related Pleading and Practice Chapters

[d] Related Memoranda

[3] Discussion of Authorities

[a] Failure to Exhaust Administrative Remedies

§ 210.35 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086, 1107] to Review Administrative Decision [Code Civ. Proc. § 1094.5] of Governing Board of School District and County Board of Education [Educ. Code §§ 48918, 48923]--Expulsion of Public School Student--School District "Zero Tolerance" Rule Does Not Violate State Law or Federal Due Process Rights

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Memoranda

[3] Discussion of Authorities

[a] In General

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 210 SCHOOLS: ACTIONS BY STUDENTS
PART I. INTRODUCTION

21-210 California Points & Authorities § 210.01

§ 210.01 Scope of Chapter

This chapter contains memoranda for use in certain actions by or on behalf of students against school districts. It contains memoranda supporting [*see §§ 210.20 -210.22*] and opposing [*see §§ 210.27 -210.30*] motions for summary judgment in actions against school districts for damages for personal injuries caused by negligent supervision. This chapter also contains memoranda supporting a motion to dismiss an action for damages and injunctive relief based on sexual harassment by a teacher or fellow student in violation of Title IX of the Education Amendments of 1972 (*20 U.S.C.S. § 1681 et seq.*) [*see § 210.23*], and supporting a motion to dismiss an action for damages for violation of *42 U.S.C.S. § 1983* against school officials and employees based on allegedly unlawful search and seizure in violation of *U.S. Const. amends. IV* and *XIV* [*see § 210.24*]. This chapter also contains memoranda supporting [*see §§ 210.31, 210.32*] and opposing [*see § 210.34*] a petition for writ of mandate to review the decision by the governing board of a school district to expel a student, and opposing a motion to dismiss an action for damages for violation of *42 U.S.C.S. § 1983* against school officials and employees based on alleged use of excessive force in disciplining a student [*see § 210.30A*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureSummary JudgmentSupporting MaterialsMemoranda of LawEducation LawDiscriminationGender & Sex DiscriminationTitle IXGeneral OverviewEducation LawFaculty & StaffMisconduct & PerformanceSexual MisconductSexual HarassmentEducation LawStudentsDiscipline MethodsGeneral OverviewEducation LawStudentsSearch & SeizureRemedies

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CHAPTER 210 SCHOOLS: ACTIONS BY STUDENTS
PART I. INTRODUCTION

21-210 California Points & Authorities § 210.02

§ 210.02 Governing Law

Tort liability of public entities, including school districts, and their employees, is governed by *Gov. Code § 810 et seq.* Actions for personal injury, death, and economic loss arising out of exposure to asbestos within school buildings are governed by *Gov. Code § 905.5*. The liability of school districts for injuries occurring during or because of school-sponsored field trips or excursions is governed by *Educ. Code § 35330*. School district liability for the safety and conduct of pupils when they are off school property generally is governed by *Educ. Code § 44808*. Student disciplinary proceedings are governed by *Educ. Code §§ 48900, 48900.5, 48902, 48903, 48910-48925*. Actions based on sexual harassment of students in public schools and facilities are governed by Title IX of the Education Amendments of 1972 [*20 U.S.C.S. § 1681 et seq.*]. Actions based on school searches of students are governed by *U.S. Const. amends. IV* and *XIV* and *42 U.S.C.S. § 1983*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawCivil LiabilityGeneral OverviewTortsPublic Entity LiabilityLiabilityGeneral Overview

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 210 SCHOOLS: ACTIONS BY STUDENTS
PART I. INTRODUCTION

21-210 California Points & Authorities § 210.03

§ 210.03 Related Pleading and Practice Chapters

For discussion and forms for use in actions against school districts for personal injuries to students, including sexual harassment, and discussion of and forms relating to school searches and student disciplinary proceedings, see California Forms of Pleading and Practice, Ch. 512, *Schools* (Matthew Bender). Fordiscussion and forms relating to actions under *42 U.S.C.S. § 1983* generally, see California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes* (Matthew Bender). For discussion and forms related to actions against public entities generally, see California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Tort Claims Act* (Matthew Bender). For discussion and forms for use in mandate proceedings, see California Forms of Pleading and Practice, Ch. 358, *Mandate and Prohibition* , and Ch. 474, *Availability of Judicial Review of Agency Decisions* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawCivil LiabilityHarassmentEducation LawDiscriminationGender & Sex DiscriminationSexual HarassmentEducation LawStudentsSearch & SeizureGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsExclusions From Liability

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PART I. INTRODUCTION

21-210 California Points & Authorities § 210.04

§ 210.04 Related Points And Authorities Chapters

For memoranda for use in actions against public entities generally, see Ch. 196, *Public Entities* . For memoranda for use in mandate proceedings to review administrative adjudicatory decisions, see Ch. 195, *Public Administrative Law* . For memoranda for use in mandate proceedings generally, see Ch. 150, *Mandate and Prohibition* .

For memoranda for use in actions regarding certification, dismissal, or other employment actions, see Ch. 211, *Schools: Certification, Dismissal and Related Employment Issues* .

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21-210 California Points & Authorities §§ 210.05-210.19

[Reserved]

§§ 210.05[Reserved]

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 210 SCHOOLS: ACTIONS BY STUDENTS
PART II. FORMS

21-210 California Points & Authorities § 210.20

§ 210.20 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] by Defendants in Action for Damages [Civ. Code § 3333] for Personal Injuries Against School District and Employees--Negligent Supervision of Students [Civ. Code § 1714(a); Gov. Code §§ 815.2, 820]--No Duty to Supervise or Provide for Safety of Students While off School Property [Educ. Code § 44808]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
[a minor, by _____ (*name*), his/her Guardian ad Litem,]	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
Plaintiff,	)	[*Code Civ. Proc. § 437c*]
vs.	)	Date: _____
_____ [*names*],	)	Time: _____
Defendants.	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD BE GRANTED BECAUSE A SCHOOL DISTRICT AND ITS EMPLOYEES HAVE NO DUTY TO SUPERVISE OR PROVIDE FOR THE SAFETY OF STUDENTS WHEN THEY ARE OFF SCHOOL PROPERTY UNLESS IT HAS PROVIDED TRANSPORTATION, SPONSORED AN OFF-CAMPUS ACTIVITY, OTHERWISE SPECIFICALLY ASSUMED RESPONSIBILITY FOR

THEIR SAFETY, OR FAILED TO EXERCISE REASONABLE CARE UNDER THE CIRCUMSTANCES.

A. Summary Judgment. Defendant may move for summary judgment in any action or proceeding if it is contended that the action has no merit. Such motionmust be granted if all of the papers submitted show that there is no triable issue as to any material fact and that defendant is entitled to a judgment as a matter of law (*Code Civ. Proc. § 437c*).

B. Duty of Care as Essential Element of Negligence. An indispensable condition of negligence liability is a duty of care owed by the alleged wrongdoer to the injured person or to a class of which he or she is a member (*Richards v. Stanley (1954) 43 Cal. 2d 60, 63, 271 P.2d 23* ; *Wright v. Arcade Sch. Dist. (1964) 230 Cal. App. 2d 272, 276, 40 Cal. Rptr. 812*).

C. Existence of Duty as Question for Court. Existence of a duty of care is initially a question of law for determination by the court (*Wright v. Arcade Sch. Dist. (1964) 230 Cal. App. 2d 272, 276-277, 40 Cal. Rptr. 812* ; *Raymond v. Paradise Unified Sch. Dist. (1963) 218 Cal. App. 2d 1, 7-8, 31 Cal. Rptr. 847*).

D. School District Not Insurer of Safety of Students. School districts and their employees are not insurers of the physical safety of their students, but rather are placed under a duty to exercise reasonable supervision over students while school is in session (*Woodsmall v. Mt. Diablo Unified Sch. Dist. (1961) 188 Cal. App. 2d 262, 267, 10 Cal. Rptr. 447*).

E. No Liability for Student Safety Off School Property. School districts, city or county boards of education, county superintendents of schools, and officers and employees thereof, are not responsible or liable in any way for the conduct or safety of any pupil of the public schools at any time when the pupil is not on school property, unless the district, board, or other person has undertaken to provide transportation to the pupil to and from the school premises, has undertaken a school-sponsored activity off the premises of the school, has otherwise specifically assumed such responsibility or liability, or has failed to exercise reasonable care under the circumstances. In the event of a specific undertaking, the district, board, or person may be liable or responsible for the conduct or safety of a student only if the student is or should be under the immediate and direct supervision of an employee of the school district or board (*Educ. Code § 44808*; *Ramirez v. Long Beach Unified Sch. Dist. (2002) 105 Cal. App. 4th 182, 190, 129 Cal. Rptr. 2d 128*).

[*Optional*] **F. No Duty to Protect Safety of Students on Way to and From School.** A school district is under no duty to supervise or provide for the protection of pupils on their way to and from school, unless it has undertaken to provide transportation for them (*Gilbert v. Sacramento Unified Sch. Dist. (1968) 258 Cal. App. 2d 505, 508, 65 Cal. Rptr. 913* ; *Kerwin v. San Mateo County (1959) 176 Cal. App. 2d 304, 307, 1 Cal. Rptr. 437*).

[*Optional*] **G. No Duty to Furnish Transportation or Assign Pupil to Particular School.** A school district is under no legal duty to furnish transportation to or from school and its failure to do so does not constitute negligence (*Kerwin v. San Mateo County (1959) 176 Cal. App. 2d 304, 308, 1 Cal. Rptr. 437* ; *Girard v. Monrovia City Sch. Dist. (1953) 121 Cal. App. 2d 737, 743, 264 P.2d 115*). Similarly, a school district owes no duty to assign a pupil to a particular school within the district (*Girard v. Monrovia City Sch. Dist. (1953) 121 Cal. App. 2d 737, 743-744, 264 P.2d 115*).

[*Optional*] **H. No Duty to Scout Neighborhood for Gang Members.** A school cannot be an insurer of the safety of students, particularly after school and off school premises, when it has exercised ordinary prudence and due care appropriate to the circumstances. Absent a specific indication of a real and imminent gang-related threat at a particular time and place, or prior incidents reflecting the foreseeable possibility of gang assaults, a school is not required to send observers outside to scout the neighborhood for gang members off the campus and to wait until all is clear before releasing the students (*Brownell v. Los Angeles Unified Sch. Dist. (1992) 4 Cal. App. 4th 787, 795-797, 5 Cal. Rptr. 2d 756*).

[*Optional*] **I. No Duty to Students Injured Off-Campus While Awaiting Pick-Up by Parents.** A school district has

no duty to students, who are waiting after school for their parents to pick them up, to protect them from injuries that occur off-campus on a public street that is not under the control of the school, at least if the injury does not result from the school district's on-campus negligence and the district has not undertaken any specific responsibilities to supervise or protect those students (*Guerrero v. South Bay Union Sch. Dist. (2003) 114 Cal. App. 4th 264, 269-270, 7 Cal. Rptr. 3d 509*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of defendants' motion for summary judgment in an action against a school district and its employees for damages for personal injuries based on allegedly negligent supervision of students. The ground of the motion is that a school district and its employees are under no duty to supervise or provide for the safety of students when they are not on school property except where it has furnished transportation, sponsored an off-campus activity, specifically assumed responsibility for the students' safety or has failed to exercise reasonable care under the circumstances [*Educ. Code § 44808*]. Liability for failure to exercise "reasonable care under the circumstances" applies only when the district has undertaken to care for students as described above and does not otherwise create a basis for liability for general negligence on the part of a school district [*Cerna v. City of Oakland (2008) 161 Cal. App. 4th 1340, 1357, 75 Cal. Rptr. 3d 168*].

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations which support the motion [*see Code Civ. Proc. § 437c*].

[b] Related Uses

With appropriate modifications, these points and authorities may be used to support a demurrer to the complaint if the ground of objection appears on the face of the complaint or from any matter of which the court must or may take judicial notice [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*].

[c] Related Pleading and Practice Chapters

For a form of complaint for damages for personal injuries against a school district and its employees based on negligent supervision of students, see California Forms of Pleading and Practice, Ch. 512, *Schools* (Matthew Bender).

[d] Related Memoranda

For memoranda supporting and opposing motions for summary judgment in actions against public entities generally, see Ch. 196, *Public Entities* . For general memoranda relating to motions for summary judgment, see Ch. 221, *Summary Judgments* .

[e] Opposing Memoranda

The points and *authorities in § 210.27* may be used in an appropriate case to oppose a motion for summary judgment

supported by this memorandum.

[3] Discussion of Authorities

[a] Duty of Care as Essential Element of Negligence

In ***Richards v. Stanley*** *(1954) 43 Cal. 2d 60, 271 P.2d 23* , plaintiff brought an action to recover damages for personal injuries suffered when his motorcycle collided with an automobile owned by defendants, which was being driven at the time by a thief. The complaint alleged that defendants had parked the car on the street and left it unattended and unlocked with the ignition key in the car lock in violation of a city ordinance, and that as a result of defendants' carelessness, the thief was induced to enter the automobile and drive it into a nearby intersection in such a careless and negligent manner as to cause the collision and resulting injuries to plaintiff. Although the defendants' general demurrer to the complaint was overruled, the lower court, at the start of the trial, sustained defendants' objection to the introduction of any evidence against them on the ground that the complaint failed to state a cause of action against them and then granted their motion for a nonsuit.

On appeal, the Supreme Court affirmed. The Court stated that it is an elementary principle that an indispensable factor to liability founded on negligence is the existence of a duty of care owed by the alleged wrongdoer to the person injured, or to a class of which he is a member (*43 Cal. 2d 60, 63)* . The Court then held that under the circumstances of this case, defendants owed no duty to protect plaintiff from injury caused by the negligent driving of their car by a thief (*43 Cal. 2d 60, 63-69)* .

In ***Wright v. Arcade Sch. Dist.*** *(1964) 230 Cal. App. 2d 272, 40 Cal. Rptr. 812* , plaintiff, a child, was struck by an automobile while crossing a public street on his way to school. Through his guardian ad litem, he brought a negligence action against the automobile driver and the school district. At the completion of his trial counsel's opening statement, the trial court granted the school district's motion for nonsuit and plaintiff appealed.

The court of appeal affirmed, noting that an indispensable condition of liability for negligence is a duty of care owed by the alleged wrongdoer to the injured person or to a class of which the injured person is a member and that the existence of a duty of care is initially a question of law for determination by the court, although when reasonable foreseeability of the injury is at issue, the latter element is a jury question (*230 Cal. App. 2d 272, 276-277)* . The court then reviewed other general principles of negligence and concluded that plaintiff's opening statement described a claim of tort liability for negligent failure to take protective action, but did not contain any facts justifying imposition of an affirmative duty to act, and thus lacked a vital element of actionable negligence. Accordingly, the school district's motion for nonsuit was properly granted (*230 Cal. App. 2d 272, 281)* .

[b] Existence of Duty as Question for Court

Wright v. Arcade Sch. Dist. *(1964) 230 Cal. App. 2d 272, 40 Cal. Rptr. 812* , is discussed in *§ 210.20[3][a]*.

Raymond v. Paradise Unified Sch. Dist. *(1963) 218 Cal. App. 2d 1, 31 Cal. Rptr. 847* , was an action by a minor pupil against a school district for personal injuries sustained when he was struck by a school bus. The evidence at the trial indicated that the place where the accident occurred was the driveway of a high school of the district, which was used as a bus stop for elementary school pupils. The district provided no supervision of elementary students during the periods of the day when the driveway was so used. Plaintiff and other pupils often played on the lawn near the bus and would frequently run toward the buses as they approached the stop, although they had been repeatedly warned by the bus drivers not to do this. On the day of the accident, plaintiff ran toward the bus, placed his hand on the moving vehicle, and then fell backwards, injuring himself. The jury found that the school district was negligent in failing to provide supervision for the area. Judgment was entered for plaintiff and the district appealed, contending that it owed no duty to plaintiff.

In affirming the judgment, the court first noted the rule that a duty of care, owed by the alleged wrongdoer to the injured plaintiff or to a class of which he is amember, is indispensable to negligence liability (*218 Cal. App. 2d 1, 6)* . The court then observed that implicit in this appeal was the thesis that the question of duty is one of law for the court, not a question of fact for the jury. The court stated that to the extent that the existence of a duty of care turns on conflicting evidence as to the reasonable foreseeability of injury, the question may be one for the jury. Initially, however, presence of a duty rests on factors other than foreseeability, and its existence is primarily for judicial determination. Thus, in the present case, the court concluded that the trial judge must have made a determination that, granted a foreseeable risk, the school district owed a duty of care, and this determination was one of law, within the scope of appellate review (*218 Cal. App. 2d 1, 7-8)* . The court then held that, under the facts of this case, the school district owed a duty as a matter of law to provide adequate supervisory measures to protect children using the bus loading zone on the grounds of the high school (*218 Cal. App. 2d 1, 10-11)* .

[c] School District Not Insurer of Safety of Students

Woodsmall v. Mt. Diablo Unified Sch. Dist. *(1961) 188 Cal. App. 2d 262, 10 Cal. Rptr. 447* , was an action for personal injuries sustained when plaintiff was pushed by another pupil on student property. The trial court, sitting without a jury, entered judgment for plaintiff. The facts showed that plaintiff was injured when he was pushed from behind by another pupil as his class was lining up for physical education instruction on the school playground. The teacher was not present on the school yard at the time of the injury because he had remained behind the class momentarily to lock the door of the classroom, but he arrived shortly thereafter. No other supervisory personnel were on the playground at the time of the incident.

On appeal, the school district contended that the evidence was insufficient as a matter of law to support the judgment. The court of appeal agreed and reversed the judgment. The court first noted that lack of supervision of pupils or improper supervision may constitute negligence on the part of the school district (*188 Cal. App. 2d 262, 264)* . The court concluded, however, that in this case the uncontroverted evidence demonstrated that supervision would not have prevented the injury and thus lack of supervision was not a proximate cause of the injury (*188 Cal. App. 2d 262, 265)* . The court stated that although the question of whether or not a school district provided adequate supervision is a question of fact, there was in this case no evidence to support a finding that lack of supervision was a proximate cause of plaintiff's injury (*188 Cal. App. 2d 262, 266-267)* . To hold otherwise, said the court, would contradict the rule that school districts are not insurers of the safety of pupils at play or elsewhere (*188 Cal. App. 2d 262, 267)* .

[d] No Liability for Student Safety off School Property

In ***Ramirez v. Long Beach Unified Sch. Dist.*** *(2002) 105 Cal. App. 4th 182, 129 Cal. Rptr. 2d 128* , the plaintiff was the mother of a 15-year-old boy who drowned in a lake while at a camp in the Sequoia National Forest. The camp, designed to provide leadership skills, was run by a nonprofit organization. The boy's school promoted and encouraged attendance at the camp, although the school did not participate in running the camp nor otherwise provide supervision over camp activities. The plaintiff brought suit against the school district, alleging essentially that the school failed to properly supervise at the camp and that the district misrepresented the safety of the camp. The trial court sustained the district's demurrer and the plaintiff appealed.

The court of appeal affirmed. The court noted that *Educ. Code § 44808* provides, with limited exceptions, that school districts are not generally responsible for the safety of students when not on school property. Essentially, a district is immune from liability under the statute for injuries sustained off school property unless a student was or should have been directly supervised by school personnel during a specified undertaking by the school. Under the facts in this case, the court first concluded that the camp was not a school-sponsored activity and that the district did not provide transportation to the camp. The court then concluded that there was no evidence that the school indicated in any way that it would be responsible for the safety of the boy while he was at the camp, no evidence that the boy would have

been under the supervision of any school employees while at the camp, and no evidence that the district employed, trained, or supervised the counselors at the camp. Therefore, the school district was entitled to immunity under *Educ. Code § 44808* (*105 Cal. App. 4th 182, 190-192)* . The court also rejected the plaintiff's contention that the immunity did not extend to causes of action for misrepresentation, as well as her contention that the school was engaged in a joint venture with the camp, because there was no evidence that the school had any right to control the camp, its employees, or its counselors (*105 Cal. App. 4th 182, 193-194)* .

[e] No Duty to Protect Safety of Students on Way to and From School

In ***Gilbert v. Sacramento Unified Sch. Dist.*** *(1968) 258 Cal. App. 2d 505, 65 Cal. Rptr. 913* , the decedent, a six-year-old girl, was struck by a train and killed on her way home from school. The administratrix of her estate brought an action for wrongful death against the school district, among others, alleging that the district was negligent in permitting students to leave school at a time of day when it knew or should have known that a train would be passing by and is not realigning school boundaries so that students would not have to cross the railroad tracks in order to attend school. The trial court sustained demurrers to the complaint and the action was dismissed as against the school district, and plaintiff appealed. The court of appeal affirmed, holding that the school district had no duty to exercise due care to conduct or supervise children in going to or from theirhomes (*258 Cal. App. 2d 505, 508)* . The court noted that although the district must exercise due care when it elects to transport children to or from their homes, the district in this case had not assumed any duty in connection with the transportation of the children (*258 Cal. App. 2d 505, 508)* . The court stated that if any general duty to transport or otherwise provide for the safety of all children who attend school from the school building to home, and vice versa, is to be imposed, then the legislature should do so (*258 Cal. App. 2d 505, 510)* .

In ***Kerwin v. San Mateo County*** *(1959) 176 Cal. App. 2d 304, 1 Cal. Rptr. 437* , plaintiff's brother a six-year-old child, became ill while at school. School authorities called his home and directed plaintiff, who was eleven years old and who was at home alone, to come and take his brother home. Plaintiff proceeded to school on a bicycle designed for one rider. The two boys attempted to ride home on the single bicycle, but the bicycle tipped over, resulting in injuries to plaintiff. Plaintiff brought an action against the school district, alleging that the school district was negligent in failing to investigate, inspect, and ascertain the mode and means of transportation to be used by the children and the safety and adequacy thereof, and in failing to provide a safe an adequate means of transportation for them. The trial court dismissed the action after sustaining a demurrer to the complaint without leave to amend.

On appeal, the court of appeal affirmed. The court noted that a school district is under no duty to supervise or provide for the protection of its pupils on their way home, unless it has undertaken to provide transportation for them (*176 Cal. App. 2d 304, 307)* . The court noted that in this case, defendant had not undertaken to provide transportation for the children, and that plaintiff's complaint appeared to be based on the theory that the district had a duty either to provide transportation for plaintiff and his brother or to determine the manner in which plaintiff was going to transport him (*176 Cal. App. 2d 304, 307-308)* . The court held that no such duty existed (*176 Cal. App. 2d 304, 308)* .

NOTE:

Gilbert and *Kerwin* were decided prior to the enactment of both *Educ. Code § 44808* and its predecessor Educ. Code § 13557.5, providing that no school district, city or county board of education, county superintendent of schools, or any officer or employee of such district or board may be responsible or in any way liable for the conduct or safety of any pupil of the public schools at any time when the pupil is not on school property. However, *Educ. Code § 44808* also provides that this immunity does not apply when the district, board, or person has failed to exercise reasonable care under the circumstances. Thus, the statute may modify the language of *Gilbert* and *Kerwin*, which indicates that a school district has absolutely no duty to supervise students on their way to and from school unless it has undertaken to provide transportation for them. A court could hold that a school district had a duty to supervise students if, under the circumstances, its failure to do so constituted a failure to exercise reasonable care.

Moreover, the Supreme Court has stated, in dictum, that a school district may, in some limited instances, bear a duty to supervise students when they are not on school property [*see Hoyem v. Manhattan Beach City Sch. Dist. (1978) 22 Cal. 3d 508, 515, 150 Cal. Rptr. 1, 585 P.2d 851* ; *see also § 210.27[3][g]*]. In the absence of further decisions interpreting the statute, the effect of *Educ. Code § 44808* on the *Gilbert* and *Kerwin* holdings is unclear.

[f] No Duty to Furnish Transportation or Assign Pupil to Particular School

Kerwin v. San Mateo County *(1959) 176 Cal. App. 2d 304, 1 Cal. Rptr. 437* , is discussed in *§ 210.20[3][e]*.

In ***Girard v. Monrovia City Sch. Dist.*** *(1953) 121 Cal. App. 2d 737, 264 P.2d 115* , decedent, a nine-year-old child, was struck and killed by an automobile while crossing a busy street on his way home from school. Plaintiffs, his parents, brought an action for wrongful death against both the driver of the vehicle and two school districts. The school districts filed a demurrer to the complaint which the trial court sustained without leave to amend. Judgment of dismissal was entered and plaintiffs appealed.

The court of appeal affirmed, holding that no legal breach of duty was committed by the school districts (*121 Cal. App. 2d 737, 743)* . The court rejected plaintiffs' contention that the districts owed a duty to provide decedent with safe transportation home from school, noting that the Education Code provisions which authorize a school district to provide transportation for pupils are clearly permissive in character, and the plaintiffs had cited no authority for the proposition that it was negligence for a school district to fail to provide transportation. The court stated that while a district which undertakes to provide transportation must use due care in doing so, in this case the school district had only undertaken to provide transportation from home to school and was under noduty to provide transportation in both directions (*121 Cal. App. 2d 737, 743)* . The court also rejected plaintiffs' argument that either district owed a duty to the pupil to see that he was enrolled in a particular school within the district (*121 Cal. App. 2d 737, 743-744)* .

[g] No Duty to Scout Neighborhood for Gang Members

In ***Brownell v. Los Angeles Unified Sch. Dist.*** *(1992) 4 Cal. App. 4th 787, 5 Cal. Rptr. 2d 756* , after plaintiff, a high school student, was shot and wounded by gang members immediately after school hours and on a public street adjacent to school property, he sued defendant school district alleging negligent supervision in dismissing students without first ascertaining if the street was free of any gang members. The jury awarded plaintiff damages, and defendant appealed.

The court of appeal reversed with directions to the trial court to dismiss the complaint. The general rule that schools are not legally responsible for accidents that students may suffer once they have been released from school is qualified by *Educ. Code § 44808*, which indicates liability when the school has failed to exercise reasonable care under the circumstances (*4 Cal. App. 4th 787, 794)* . The standard of due care imposed on school authorities in exercising their supervisorial responsibilities is that degree of care that a person of ordinary prudence, charged with comparable duties, would exercise under the same circumstances. The court found that the school exercised due care and, under any view of the evidence, satisfied its supervisorial responsibilities in protecting students from potential gang-related violence. A school cannot and should not be an insurer of the safety of students, particularly after school and off school premises, when it has exercised ordinary prudence and due care appropriate to the circumstances. The school exercised reasonable care and satisfied its duty to supervise adequately students in view of the general precautions it always took to minimize gang-related violence and the absence of any advance indication to school personnel of potential gang violence pertinent to the incident. It was not required to send observers outside to scout the neighborhood for gang members off the campus and to wait until all was clear before releasing the students. The court said that schools should not be required to engage in such visual precaution, absent either (1) any specific indication of a real and imminent gang-related threat at the particular time and place of the shooting, or (2) prior incidents reflecting not necessarily this identical type of assault but that the possibility of this type of harm was foreseeable (4 Cal. App. 24th 787, 795-797).

[h] No Duty to Students Injured Off-Campus While Awaiting Pick-Up by Parents

In ***Guerrero v. South Bay Union Sch. Dist.*** *(2003) 114 Cal. App. 4th 264, 7 Cal. Rptr. 3d 509* , the plaintiff was a six-year-old first grade student who was struck by a car after school in a public street adjacent to the school. First and second grade students had been dismissed from classes at 2:00, older students, including the plaintiff's brother, were dismissed from school at 2:25, and at 2:30, the plaintiff was waiting with her siblings at the school to be picked up by a parent. She crossed the street with her brother to watch another child playing with a toy, and when she decided to cross back to the side of the street where the school was located, she was struck by the car. The plaintiff sued the school district, alleging that the district breached a duty to supervise the students when school ended and failed to provide adequate procedures for the students to be picked up by parents after school. The trial court granted the defendant's motion for summary judgment, concluding that *Educ. Code § 44808* provided an immunity for the district because the injury occurred off-campus and after school hours and because the plaintiff was under the care of an older sibling. The plaintiff appealed.

The court of appeal affirmed. The court noted that pursuant to *Educ. Code § 44808*, the school district would not be liable for the injuries unless they were the result of the district's negligence occurring on school property or were the result of some specific undertaking by the district that the district performed in a negligent manner. Although plaintiff argued that the district's negligence in supervising the dismissed students on-campus while they were waiting to be picked up was sufficient to overcome the limitations on liability imposed by *Educ. Code § 44808*, the court of appeal disagreed. Noting that the plaintiff had failed to articulate exactly what actions the school district should have taken, the court concluded that the plaintiff was essentially arguing that the school district was required to supervise the students after school, even on a public street, until their families have picked them up or they have been safely escorted home. The court declined to impose such a broad duty (*114 Cal. App. 4th 264, 269-270)* . The court also rejected the plaintiff's argument that the school district, in promulgating two written regulations governing student supervision, had undertaken to protect the plaintiff. The court noted that the first regulation, by its own terms, applied only to the supervision of students who are on school grounds. The second regulation provided procedures to deal with students who are left on school grounds and have not been picked up by a certain time. The court again noted that this regulation dealt specifically with on-campus students and suggested no undertaking by the district regarding students who have left campus (*114 Cal. App. 4th 264, 272-273)* .

[4] Additional Authorities

[a] School District as Not Insurer of Safety of Students

In *Thompson v. Sacramento City Unified Sch. Dist. (2003) 107 Cal. App. 4th 1352, 132 Cal. Rptr. 2d 748* , a school district was entitled to summary judgment on a claim of failing to protect the plaintiff, a student, from injuries caused by another student during a fight. Although the plaintiff's assailant had been introuble before, no aspect of his prior conduct bore any relation to the plaintiff. In fact, there was no indication that the assailant even knew the plaintiff before the attack, which was precipitated when the assailant tried to steal marijuana that the plaintiff was allegedly carrying. In addition, the fight between the plaintiff and the assailant arose suddenly during the lunch break, immediately after a school monitor had passed through the area in which the fight occurred. Noting that school districts and their employees are not insurers of the physical safety of students, and that students who deliberately intend to escape supervision will always find a way to do so, the court held that if a fight occurs under these circumstances with such rapidity that supervisory personnel have no opportunity to discover and respond beforehand, claims of abstract negligence based merely on the fact that the fight occurred are insufficient to support actionable negligence (*107 Cal. App. 4th 1352, 1369-1372)* . The court also rejected arguments that the school district could be liable to the plaintiff based on a failure to suspend the assailant, before the fight with the plaintiff, for misconduct unrelated to the plaintiff (*107 Cal. App. 4th 1352, 1361-1369)* .

[b] No Liability for Student Safety Off School Property

In *Cerna v. City of Oakland (2008) 161 Cal. App. 4th 1340, 75 Cal. Rptr. 3d 168* , plaintiffs were the survivors and family members of an accident in which an automobile driver struck children who were crossing an intersection while walking to school. The intersection, which had a painted striped crosswalk, was a few blocks from the only entrance to the school. Plaintiffs sued the city and the school district, alleging both that the crosswalk constituted a dangerous condition of public property and that the school district could be held liable under *Ed. Code § 44808*. The trial court granted summary judgment for defendants, and the court of appeal affirmed. The court of appeal first held that the crosswalk did not constitute a dangerous condition of public property for failing to comply with the crosswalk marking requirements of *Veh. Code § 21368*, as that statute applied to crosswalks that are "contiguous" to school grounds and the crosswalk at issue was not. Additionally, liability could not be premised on the failure to provide a traffic light or crossing guards (*161 Cal. App. 4th 1340, 1350-1351)* . The court then held that the school district could not be held liable under *Ed. Code § 44808* because the district had not undertaken to provide for the safety of the students while they were off-campus. The court held that liability for failure to exercise "reasonable care under the circumstances," as described in the statute, was appropriate only when the district had undertaken to care for the students under the circumstances covered by the statute, that is, only when the district had undertaken to provide transportation to or from the school, undertaken an off-premises activity, or otherwise specifically undertaken responsibility for student safety. The phrase did not otherwise create a basis for liability for general negligence on the part of a school district (*161 Cal. App. 4th 1340, 1357)* . The court went on to hold that the district had not undertaken responsibility for the students under the circumstances. The court rejected plaintiff's claim that an an assumption of responsibility could be premised on an environmental impact report analyzing traffic safety that was prepared in conjunction with opening the school, or on the fact that the school district approved the school site and claimed compliance with safety manuals when doing so. Finally, the court rejected an assumption of responsibility based on allegations that an unidentified school official had induced parents to transfer their children to the school with promises that a crossing guard would be assigned to that particular intersection (*161 Cal. App. 4th 1340, 1358-1360)* .

In *Bassett v. Lakeside Inn, Inc. (2006) 140 Cal. App. 4th 863, 44 Cal. Rptr. 3d 827* , a high school student died after being struck by a drunk driver while she was crossing an intersection on a public street in order to reach a school bus stop. Her parents sued the school district, among others, alleging that the district was liable for creating a dangerous condition of public property through its placement of the school bus stop adjacent to a dangerous intersection. The court of appeal affirmed the trial court's decision to sustain the district's demurrer. The court noted that under *Educ. Code § 44808*, a school district is liable for injuries sustained off of school property only if the injury occurs while the student is under or should have been under the direct supervision of a school employee. While the school district had control over selecting the location for the bus stop and had undertaken to provide transportation for students, the injury did not occur at a time when the district was or should have been providing direct supervision over the student (*140 Cal. App. 4th 863, 872)* .

In *Mosley v. San Bernardino City Unified Sch. Dist. (2005) 134 Cal. App. 4th 1260, 36 Cal. Rptr. 3d 724* , a high school student died after she fell from a school van being driven by the women's basketball coach. The student's parents brought a wrongful death action against the school district, but the trial court sustained the defendant's demurrer, and the court of appeal affirmed. The court held that the district was immune from liability under *Educ. Code § 44808* because the accident did not occur on school property, nor did it occur during a school-sponsored or school-sanctioned activity. The plaintiffs argued that the school district was negligent in hiring and supervising the coach because they should have known that she lacked the experience, training, or psychological stability necessary to drive a van safely. The court disagreed, noting that the school district hired the woman to coach, not to drive, and that the Department of Motor Vehicles was the proper authority to determine whether the woman was competent enough to drive. The court also rejected the implications of the plaintiffs' argument, which could impose broad liability on a school district for any action that could be traced back to allegedly negligent hiring or supervision (*134 Cal. App. 4th 1260, 1264-1265)* .

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 210 SCHOOLS: ACTIONS BY STUDENTS
PART II. FORMS

21-210 California Points & Authorities § 210.21

§ 210.21 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] by Defendants in Action for Damages [Civ. Code § 3333] for Personal Injuries Against School District and Employees--Negligent Supervision of Students [Civ. Code § 1714(a); Gov. Code §§ 815.2, 820]--No Duty to Supervise School Grounds Around-the-Clock

[1] FORM

[*Caption. See § 210.20.*]

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD BE GRANTED BECAUSE A SCHOOL DISTRICT AND ITS EMPLOYEES HAVE NO DUTY TO SUPERVISE PERSONS ON SCHOOL PROPERTY OTHER THAN DURING SCHOOL-RELATED OR ENCOURAGED FUNCTIONS OR ACTIVITIES TAKING PLACE DURING SCHOOL HOURS.

A. Summary Judgment. [*See § 210.20, Paragraph A.*]

B. Duty of Care as Essential Element of Negligence. [*See § 210.20, Paragraph B.*]

C. Existence of Duty as Question for Court. [*See § 210.20, Paragraph C.*]

D. School District Not Insurer of Safety of Students. [*See § 210.20, Paragraph D.*]

E. No Duty to Supervise School Grounds Around-the-Clock. A school district's duty to supervise persons on school property is limited to school-related or encouraged functions and to activities taking place during school hours (*Bartell v. Palos Verdes Peninsula Sch. Dist. (1978) 83 Cal. App. 3d 492, 499, 147 Cal. Rptr. 898*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of defendants' motion for summary judgment in an action against a school district and its employees for damages for personal injuries based on allegedly negligent supervision of students. The ground of the motion is that a school district and its employees have no duty to supervise persons on school property other than during school-related or encouraged functions or activities taking place during school hours.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations which support the motion [*see Code Civ. Proc. § 437c*].

[b] Related Uses

With appropriate modifications, these points and authorities may be used in support of a general demurrer to a complaint if the ground of objection appears on the face of the complaint or from any matter of which the court must or may take judicial notice [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*].

[c] Related Pleading and Practice Chapters

For a form of complaint for damages for personal injuries against a school district and its employees based on negligent supervision of students, see California Forms of Pleading and Practice, Ch. 512, *Schools* (Matthew Bender).

[d] Related Memoranda

For memoranda supporting and opposing motions for summary judgment in actions against public entities generally, see Ch. 196, *Public Entities* . For memoranda relating to summary judgments generally, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] No Duty to Supervise School Grounds Around-the-Clock

In ***Bartell v. Palos Verdes Peninsula Sch. Dist.*** *(1978) 83 Cal. App. 3d 492, 147 Cal. Rptr. 898* , the trial court sustained demurrers to plaintiffs' complaint for wrongful death without leave to amend, and plaintiffs appealed from the judgment of dismissal. According to complaint, the decedent, plaintiffs' son, entered the playground of an elementary school maintained by defendant school district when school was not in session, either through an unlocked gate or a hole in a fence, and suffered fatal injuries when he fell while playing a dangerous game involving the use of a skateboard. The complaint further alleged knowledge by defendant that the game was dangerous and could be played locally only on the unobstructed surface of the school grounds. The complaint predicated recovery against the school district on theories of (1) maintenance of a dangerous condition, and (2) negligent failure to maintain and supervise the grounds or notify parents that the grounds were accessible. In affirming the judgment of dismissal, the court of appeal first noted that school districts and their employees have never been considered insurers of the safety of their students, but rather are placed under a general duty to supervise the conduct of children on school grounds during school sessions, school activities, recesses, and lunch periods (*83 Cal. App. 3d 492, 498)* . The court then held that the school district's duty of supervision is limited to school-related or encouraged functions and to activities taking place during school hours (*83 Cal. App. 3d 492, 499-500)* . The court stated that to require around-the-clock supervision or prison-tight security would impose a financial burden which manifestly would impinge on the very educational purpose for which the school exists (*83 Cal. App. 3d 492, 500)* .

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 210 SCHOOLS: ACTIONS BY STUDENTS
PART II. FORMS

21-210 California Points & Authorities § 210.22

§ 210.22 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c] by Defendants in Action for Damages [Civ. Code § 3333] for Personal Injuries Against School District and Employees--Negligent Supervision of Students [Civ. Code § 1714(a); Gov. Code §§ 815.2, 820]--Waiver of Claims by Students Making Nonrequired Field Trip or Excursion [Educ. Code § 35330]

[1] FORM

[*Caption. See § 210.20.*]

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD BE GRANTED BECAUSE PLAINTIFF WAS MAKING NONREQUIRED FIELD TRIP OR EXCURSION AND THEREFORE IS DEEMED TO HAVE WAIVED ALL CLAIMS AGAINST THE SCHOOL DISTRICT FOR INJURY, ACCIDENT, ILLNESS, OR DEATH OCCURRING DURING OR BECAUSE OF THE FIELD TRIP OR EXCURSION.

A. Summary Judgment. [*See § 210.20, Paragraph A.*]

B. Waiver of Claims by Student Making Field Trip or Excursion. A student participating in a nonrequired field trip or excursion is deemed to have waived all claims against the school district or charter school conducting it and against the State of California for injury, accident, illness, or death occurring during or because of the field trip or excursion (*Educ. Code § 35330*; *Castro v. Los Angeles Bd. of Educ. (1976) 54 Cal. App. 3d 232, 236, 126 Cal. Rptr. 537*).

[*Optional*] **C. Immunity Extends to School District Employees.** The field trip immunity of *Education Code Section 35330* immunizes school district employees acting in the course and scope of employment, even though school district employees are not explicitly included in the language of the statute (*Casterson v. Superior Court (2002) 101 Cal. App. 4th 177, 189, 123 Cal. Rptr. 2d 637*).

[*Optional*] **D. Immunity Extends to Any Districts Providing Significant Participation in Conducting Field Trip.** The immunity of *Educ. Code § 35330* is not limited to the school district in which the injured student is enrolled, but extends to any school district that is a significant participant in conducting the field trip, such as a district that hosts the field trip at its facilities (*Sanchez v. San Diego County Office of Education (2010) 182 Cal. App. 4th 1580, 1584-1586, 106 Cal. Rptr. 3d 750*).

Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of defendants' motion for summary judgment in an action against a school district and its employees for damages for personal injuries based on allegedly negligent supervision of students. The ground of the motion is that plaintiff, by participating in a nonrequired school-sponsored field trip or excursion, is deemed to have waived all claims against the school district, charter school, or state for injury, accident, illness, or death occurring during or because of the field trip or excursion. Optional Paragraph C should be included by a defendant who is a school district employee being sued individually for conduct within the course and scope of employment.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations which support the motion [*see Code Civ. Proc. § 437c*].

[b] Related Uses

With appropriate modifications, these points and authorities may be used to support a general demurrer to a complaint if the ground of objection appears on the face of the complaint or from any matter of which the court must or may take judicial notice [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*].

[c] Related Pleading and Practice Chapters

For a form of complaint for damages for personal injuries against a school district and its employees based on negligent supervision of students, see California Forms of Pleading and Practice, Ch. 512, *Schools* (Matthew Bender).

[d] Related Memoranda

For memoranda supporting and opposing motions for summary judgment in actions against public entities generally, see Ch. 196, *Public Entities* . For memoranda relating to motions for summary judgment, generally, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Waiver of Claims by Student Making Field Trip or Excursion

Educ. Code § 35330 authorizes school districts to conduct field trips or excursions in connection with courses of instruction or school-related social, educational, cultural, athletic, or school band activities to and from places in the state, any other state, the District of Columbia, or a foreign country for pupils enrolled in elementary or secondary schools, and to employ instructors and supervisors and arrange transportation for such field trips and excursions. The section also provides, however, that all persons making the field trip or excursion are deemed to have waived all claims against the district or the State of California for injury, accident, illness, or death occurring during or because of the field tripor excursion. All adults taking out-of-state field trips or excursions and all parents or guardians of pupils taking

such trips are required to sign a statement waiving such claims.

In ***Castro v. Los Angeles Bd. of Educ.*** *(1976) 54 Cal. App. 3d 232, 126 Cal. Rptr. 537* , the court of appeal was called on to interpret the waiver of claims provision of former Educ. Code § 1081.5 [*now see Educ. Code § 35330*]. In that case, plaintiffs brought an action for wrongful death, alleging that decedent, a high school student, was killed while participating in a "summer camp, bivouac, or summer training" with his high school R.O.T.C. unit, which was organized by and under the supervision and control of agents, representatives, and employees of defendant school board, and that his death occurred as a result of their negligence. The school board demurred to the complaint on the ground that former Educ. Code § 1081.5 [*now see Educ. Code § 35330*], which immunizes school districts from liability for injury, accident, illness, or death occurring during or because of a "field trip or excursion," was applicable. The trial court agreed, sustained the demurrer to the complaint without leave to amend, and dismissed the action.

On appeal, the court of appeal reversed. The court noted that former Educ. Code § 13557.5 [*now see Educ. Code § 44808*], which limits liability for injuries occurring off of school property, specifically provides for liability where the district has undertaken a school-sponsored activity off of the school premises (*54 Cal. App. 3d 232, 235)* . The court observed that there would have been no purpose in the legislature's adding this provision to the Education Code if it had intended, by its amendment of former Educ. Code § 1081.5 [*now see Educ. Code § 35330*], to provide absolute immunity from liability for the same away-from-school activity (*54 Cal. App. 3d 232, 236)* . The court then attempted to harmonize the two statutes and concluded that students who are off of the school's property for required school purposes are entitled to the same safeguards as those who are on school property, within supervisorial limits. However, students who participate in nonrequired trips or excursions, although possibly in furtherance of their education are effectively on their own; the voluntary nature of the event absolves the district of liability. The court therefore held that where a school-sponsored activity is involved, that is, one that requires attendance and for which attendance credit may be given, the event is a specific undertaking of the district, and the district is liable and responsible for the safety of any pupil while the pupil is or should be under the immediate and direct supervision of a school district employee (*54 Cal. App. 3d 232, 236)* . The court then examined the allegations of the complaint and concluded that they were sufficient to state a cause of action for school district liability under former Educ. Code § 13557.5 [(*now see Educ. Code § 44808*] and did not place plaintiffs within the immunity provisions of former Educ. Code § 1081.5 [*now see Educ. Code § 35330*] (*54 Cal. App. 3d 232, 237)* .

[b] Immunity Extends to School District Employees

In ***Casterson v. Superior Court*** *(2002) 101 Cal. App. 4th 177, 123 Cal. Rptr. 2d 637* , the plaintiff was participating in an overnight school field trip when he nearly drowned after being pushed into the deep end of a motel swimming pool by other students. The plaintiff filed suit against one of the school district employees who was a chaperone on the trip and should have been at the pool at the time of the incident. The defendant demurred to the complaint on the grounds that she was protected by the field trip immunity of *Educ. Code § 35330*. The trial court overruled the demurrer because the statute only immunized school districts and the state and did not include school district employees. The defendant petitioned for writ of mandate.

The court of appeal issued the writ. After reviewing the legislative history of *Educ. Code § 35330*, the court of appeal concluded that the statute immunizes school district employees acting in the course and scope of employment, even though school district employees are not explicitly included in the language of the statute. According to the court, a contrary conclusion would effectively destroy the immunity of the school district, because the district would be vicariously liable for the employee's conduct under *Gov. Code § 815.2(a)*, which generally requires public entities to pay any judgment against employees for tortious conduct in the course and scope of employment (*101 Cal. App. 4th 177, 180, 189)* .

[c] Immunity Extends to Any Districts Providing Significant Participation in Conducting Field Trip

In ***Sanchez v. San Diego County Office of Education*** *(2010) 182 Cal. App. 4th 1580, 106 Cal. Rptr. 3d 750* , plaintiffs were the parents of a sixth grade student who died while suffering an asthma coronary attack during a field trip. The excursion, a science camp, was held at an outdoor school facility owned and operated by a school district other than the district in which the student was enrolled. Camp counselors gave the decedent her asthma inhaler when her attack occurred and performed CPR until paramedics arrived, but by the time the paramedics were able to airlift her a hospital, she had died from natural causes. Plaintiffs sued the school district that owned and hosted the camp. While defendant argued that it was immune from liability under *Educ. Code § 35330(d)*, plaintiffs argued that this immunity only protected the school district in which the injured student was enrolled. The trial court granted summary judgment in favor of the school district, and plaintiffs appealed.

The court of appeal affirmed. The court noted that it was undisputed that the defendant was a school district within the meaning of *Educ. Code § 35330*. The court then concluded that there was no triable issue of fact as to whether defendant took part in conducting the field trip to their camp, as defendant provided and operated the physical facility for the field trip and all employees at the camp were defendant's employees. Under those facts, the court concluded that defendant played a sufficiently significant role in conducting the field trip to satisfy the requirements for application of the immunity provided by *Educ. Code § 35330* (*182 Cal. App. 4th 1580, 1584-1585)* . The court rejected plaintiffs' argument that because some of the provisions of *Educ. Code § 35330* could only be applied to the school district in which the injured student was enrolled, only that school district was protected by the immunity of *Educ. Code § 35330(d)*. The court also rejected plaintiffs' argument that providing immunity to a school district other than the district in which the injured student was enrolled would frustrate the goals of the statutory immunity. The court noted instead that if a participating school district were denied immunity merely because the injured student was not enrolled in that district, districts such as defendant that provided facilities and personnel for a field trip would require contractual indemnity from other participating school districts as a condition of participation, thereby effectively defeating the immunity provided by the statute to the student's own school district (*182 Cal. App. 4th 1580, 1585-1587)* .

[4] Additional Authorities

[a] Waiver of Claims by Student Making Field Trip or Excursion

In *Wolfe v. Dublin Unified Sch. Dist. (1997) 56 Cal. App. 4th 126, 65 Cal. Rptr. 2d 280* , an action was brought on behalf of an elementary school student who was injured in an automobile accident on the way home from a field trip. The trip was organized by teachers, and took place during normal school hours. Students needed parental consent to participate, and thus was not required for all students. Transportation was provided by volunteers from among the parents. The trial court granted a summary judgment in favor of the school district based on the immunity for nonrequired field trips provided by *Ed. Code § 35330*. The court of appeal affirmed, relying on the reasoning of *Castro v. Los Angeles Board of Education (1976) 54 Cal. App. 3d 232, 126 Cal. Rptr. 537* . As in *Castro*, the court assumed the application of *Ed. Code § 44808* to school-hours travel to and from school. However, the court found the *Ed. Code § 35330* field trip exception applicable, and held that the special provisions of *Ed. Code § 35330* control over any overlapping application of the more general provisions of *Ed. Code § 44808* (*56 Cal. App. 4th 126, 135)* . Plaintiff criticized the emphasis in *Castro* on the voluntary or nonrequired nature of a field trip to distinguish it from a school-sponsored activity, and proposed that the difference should be a matter of degreeof involvement by the school in initiating, arraigning, and supervising the activity. The court rejected this argument as providing too vague of a standard, stating that *Castro* has the advantages of relative certainty and safety.

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 210 SCHOOLS: ACTIONS BY STUDENTS
PART II. FORMS

21-210 California Points & Authorities § 210.23

§ 210.23 Supporting Defendants' Motion to Dismiss [Fed. R. Civ. P., Rule 12(b)(6)] Private Action for Damages and Injunctive Relief for Sexual Harassment in Violation of Title IX of Education Amendments of 1972 [20 U.S.C.S. § 1681 et seq.] Against School District and Employees--Harassment by Another Student

[1] FORM

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF
CALIFORNIA, _____ DIVISION

_____ [*name*],	)	Civil Action, File No. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S ACTION FOR FAILURE TO STATE CLAIM ON WHICH RELIEF CAN BE GRANTED [*Fed. R. Civ. P., Rule 12(b)(6)*]
vs.	)	
_____ [*name(s)*],	)	
Defendant(s).	)	
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

PLAINTIFF'S COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF ALLEGING SEXUAL HARASSMENT BY _____ [TEACHER *or* FELLOW STUDENT] IN VIOLATION OF TITLE IX OF THE EDUCATION AMENDMENTS OF 1972 [*20 U.S.C.S. § 1681 et seq.*] DOES NOT STATE A CLAIM ON WHICH THIS COURT CAN GRANT RELIEF AGAINST DEFENDANTS AND SHOULD BE DISMISSED.

A. Complaint That Fails to State Claim on Which Court Can Grant Relief Should Be Dismissed Under *Fed. R. Civ. P., Rule 12(b)(6)*. Under *Fed. R. Civ. P., Rule 12(b)(6)*, a defendant may move for dismissal of the plaintiff's complaint if the complaint fails to state a claim on which relief can be granted. The defendant has the burden of showing beyond doubt that the plaintiff can prove no set of factsin support of the plaintiff's claim that would entitle the plaintiff to relief [*Hishon v. King & Spalding (1984) 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59* ; *Hughes v. Rowe (1980) 449 U.S. 5, 10, 101 S. Ct. 173, 66 L. Ed. 2d 163* ; *47 Cal. 4th 725, 737)* .

B. No Allegation or Proof That Defendant Is Recipient of Federal Funding as Required by *20 U.S.C.S. § 1681(a)*. To be liable in damages or injunctive relief for sexual harassment of a student by a teacher or fellow student under Title IX of the Education Amendments of 1972, *20 U.S.C.S. § 1681 et seq.*, a school district must be "an education program or activity receiving federal financial assistance" [*20 U.S.C.S. § 1681(a)*; *Davis v. Monroe County Bd. of Educ. (1999) 526 U.S. 629, 639, 119 S. Ct. 1661, 143 L. Ed. 2d 839* (student-on-student sexual harassment); *Gebser v. Lago Vista Indep. Sch. Dist. (1998) 524 U.S. 274, 280-281, 118 S. Ct. 1989, 141 L. Ed. 2d 277* (teacher-on-student sexual harassment); *Franklin v. Gwinnett County Pub. Sch. (1992) 503 U.S. 60, 112 S. Ct. 1028, 117 L. Ed. 2d 208* (teacher-on-student sexual harassment)].

C. No Allegation or Showing that Defendants Were Deliberately Indifferent to Known Acts of Sexual Harassment. A school district, as a recipient of federal education funds, may only be liable in damages under Title IX of the Education Amendments of 1972, *20 U.S.C.S. § 1681 et seq.*, for sexual harassment of a student by a teacher or fellow student when the school district is deliberately indifferent to known acts of sexual harassment by the teacher or fellow student [*Davis v. Monroe County Bd. of Educ. (1999) 526 U.S. 629, 641, 119 S. Ct. 1661, 143 L. Ed. 2d 839* (student-on-student sexual harassment); *Gebser v. Lago Vista Indep. Sch. Dist. (1998) 524 U.S. 274, 277, 118 S. Ct. 1989, 141 L. Ed. 2d 277* (teacher-on-student sexual harassment)].

D. In Action Based on Sexual Harassment by Fellow Student, No Allegation of Essential Elements Stating Claim for Relief. To state a claim for monetary [and injunctive] relief based on sexual harassment of a student by a fellow student under Title IX of the Education Amendments of 1972, *20 U.S.C.S. § 1681 et seq.*, the complaint must allege that the harasser was [and continues to be] under the school's disciplinary authority and that the harassment was [and continues to be] so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit [*Davis v. Monroe County Bd. of Educ. (1999) 526 U.S. 629, 650-651, 119 S. Ct. 1661, 143 L. Ed. 2d 839]* .
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a defendant's motion under *Fed. R. Civ. P., Rule 12(b)(6)* to dismiss a complaint in an action against a school district and its employees for monetary and injunctive relief based on alleged sexual harassment of a student by a teacher or by a fellow student.

Where appropriate, counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations that support the motion.

For discussion of motions to dismiss a federal court action under *Fed. R. Civ. P., Rule 12(b)(6)* for failure to state a claim for relief, see *Moore's Federal Practice--Civil, Ch. 12, § 12.34* (Matthew Bender).

[b] Related Uses

With appropriate modifications, these points and authorities may be used to support a motion for summary judgment brought under *Fed. R. Civ. P., Rule 56*. For discussion of motions for summary judgment in federal court actions generally, see Moore's Federal Practice--Civil, Ch. 56 (Matthew Bender).

[c] Related Pleading and Practice Chapters

For a form of complaint for monetary and injunctive relief for discrimination based on sexual harassment by a teacher or fellow student under Title IX of Education Amendments of 1972, *20 U.S.C.S. § 1681 et seq.*, see California Forms of Pleading and Practice, Ch. 512, *Schools* (Matthew Bender).

[d] Related Memoranda

For memoranda supporting and opposing motions for summary judgment in actions against public entities generally, see Ch. 196, *Public Entities* . For memoranda relating to motions for summary judgment, generally, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] No Allegation or Proof That Defendant Is Recipient of Federal Funding as Required by 20 U.S.C.S. § 1681(a)

Title IX of the Education Amendments of 1972, *20 U.S.C.S. § 1681 et seq.*, and specifically *20 U.S.C.S. § 1681(a)*, prohibits the exclusion of any person from participation in, denial of the benefits of, or subjection to discrimination, onthe basis of sex, under any education program or activity receiving federal financial assistance.

Davis v. Monroe County Bd. of Educ. *(1999) 526 U.S. 629, 119 S. Ct. 1661, 143 L. Ed. 2d 839* , is discussed in *§ 210.23[3][c]*.

In ***Gebser v. Lago Vista Indep. Sch. Dist.*** *(1998) 524 U.S. 274, 118 S. Ct. 1989, 141 L. Ed. 2d 277* , the procedural and factual background of which is discussed in *§ 210.23[3][b]*, the United States Supreme Court held that there is a private right of action under Title IX against recipients of federal education funding, money damages are available, and actionable discrimination includes sexual harassment (*524 U.S. 274, 281)* .

In ***Franklin v. Gwinnett County Pub. Sch.*** *(1992) 503 U.S. 60, 112 S. Ct. 1028, 117 L. Ed. 2d 208* , a student sued a school district, which was a recipient of federal funds, under Title IX of the Education Amendments of 1972, *20 U.S.C.S. § 1681 et seq.*, alleging that she had been subjected to continual sexual harassment and abuse by a teacher, including having sexually oriented conversations with her, forcibly kissing her on the mouth, telephoning her at home, and subjecting her to coercive intercourse. She further alleged that although teachers and administrators took no action to halt the sexual harassment after becoming aware of and investigating it. The teacher resigned on condition that all matters pending against him be dropped, and the school closed its investigation. The District Court dismissed the complaint on the ground that Title IX does not authorize an award of damages. The Eleventh Circuit affirmed.

The United States Supreme Court reversed. The Court held that the general rule is that absent clear direction to the contrary by Congress, the federal courts have the power to award appropriate relief in a cognizable cause of action brought pursuant to a federal statute, and that Congress did not intend to limit application of the general principle in the enforcement of Title IX (*503 U.S. 60, 70-76)* .

[b] No Allegation or Showing that Defendants Were Deliberately Indifferent to Known Acts of Sexual Harassment

Davis v. Monroe County Bd. of Educ. *(1999) 526 U.S. 629, 119 S. Ct. 1661, 143 L. Ed. 2d 839* , is discussed in *§ 210.23[3][c]*.

In ***Gebser v. Lago Vista Indep. Sch. Dist.*** *(1998) 524 U.S. 274, 118 S. Ct. 1989, 141 L. Ed. 2d 277* , a high school student sued a school district that was a recipient of federal funds, raising a claim under Title IX of the Education Amendments of 1972, *20 U.S.C.S. § 1681 et seq.*, based on a sexual relationship with one of her teachers. The student had not reported the relationship to school officials, and after the couple was discovered having sex and the teacher was arrested, the school district terminated his employment. During the time of the relationship, the school district had not distributed an official grievance procedure for lodging sexual harassment complaints or a formal antiharassment policy, as required by federal regulations. The District Court granted the school summary judgment, and the Fifth Circuit affirmed, holding that school districts are not liable under Title IX for teacher-student sexual harassment unless an employee with supervisory power over the offending employee actually knew of the abuse, had the power to end it, and failed to do so.

The United States Supreme Court affirmed. The Court held that under Title IX, a recipient of federal education funds may only be liable in damages under Title IX when it is deliberately indifferent to known acts of sexual harassment by a teacher. Liability arises from an official decision by the recipient not to remedy a violation; agency principles may not be used to impute liability under Title IX to a recipient of federal education funds such as a school district for the misconduct of its teachers, and a school district will not be liable for what amounts to a negligence standard--that is, for a failure to react to harassment of which it knew or should have known (*524 U.S. 274, 279-289)* .

[c] In Action Based on Sexual Harassment by Fellow Student, No Allegation of Essential Elements Stating Claim for Relief

In ***Davis v. Monroe County Bd. of Educ.*** *(1999) 526 U.S. 629, 119 S. Ct. 1661, 143 L. Ed. 2d 839* , a mother sued a county board of education that received federal funds and other defendants, alleging that her daughter was the victim of a prolonged pattern of severe sexual harassment by a fellow fifth-grade student, and claimed monetary and injunctive relief under Title IX of the Education Amendments of 1972, *20 U.S.C.S. § 1681 et seq.* The complaint alleged that plaintiff's daughter was the victim of sexually harassing conduct by a fellow student that continued for many months. Plaintiff alleged that her daughter reported each incident to plaintiff or to school officials; plaintiff, in turn, contacted employees of the defendant school district, but despite the reports, no disciplinary action was taken against the other student. The harassment allegedly continued for several months, until the other student was charged with, and pleaded guilty to, sexual battery. Plaintiff alleged that the school district's and its employees' deliberate indifference to the other student's persistent sexual advances toward her daughter created an intimidating, hostile, offensive, and abuse school environment that violate Title IX. The District Court dismissed the claim under Title IX on the ground that peer sexual harassment provides no ground for a private cause of action under *20 U.S.C.S. § 1681 et seq.*, and the Eleventh Circuit, sitting en banc, affirmed.

The United States Supreme Court reversed and held that under Title IX of the Education Amendments of 1972, *20 U.S.C.S. § 1681 et seq.*, a private right of action may lie against a recipient of Title IX funding, such as a school board, in cases of "student-on-student" harassment. However, liability will lie only under the following circumstances (*526 U.S. 629, 638-648)* :

- The funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities;

- The harasser is under the school's disciplinary authority; and

- The harassment is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit.

The Court held further that liability for damages is limited to circumstances in which the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs, such as when the misconduct occurs during school hours and on school grounds, as in the facts alleged in this case (*526 U.S. 629, 644-646)* . The funding recipient's response to the harassment or the lack of a response must be clearly unreasonable in light of the known circumstances, but need not necessarily be expulsion of every student accused of sexual misconduct in all circumstances (*526 U.S. 629, 647-648)* .

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 210 SCHOOLS: ACTIONS BY STUDENTS
PART II. FORMS

21-210 California Points & Authorities § 210.24

§ 210.24 Supporting Defendants' Motion to Dismiss [Fed. R. Civ. P., Rule 12(b)(6)] Action for Damages for Violation of 42 U.S.C.S. § 1983 Against School Officials and Employees--Unlawful Search and Seizure in Violation of U.S. Const. amends. IV, XIV

[1] FORM

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF
CALIFORNIA, _____ DIVISION

_____ [*name*],	)	Civil Action, File No. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S ACTION FOR FAILURE TO STATE CLAIM ON WHICH RELIEF CAN BE GRANTED [*Fed. R. Civ. P., Rule 12(b)(6)*]
vs.	)	
_____ [*name(s)*],	)	
Defendant(s).	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

PLAINTIFF'S COMPLAINT FOR DAMAGES ALLEGING UNLAWFUL SEARCH AND SEIZURE BY _____ [TEACHER *or specify other school official*] IN VIOLATION OF THE *FOURTH* AND *FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION* DOES NOT STATE A CLAIM ON WHICH THIS COURT CAN GRANT RELIEF AGAINST DEFENDANTS AND SHOULD BE DISMISSED.

A. Complaint That Fails to State Claim on Which Court Can Grant Relief Should Be Dismissed Under *Fed. R. Civ. P., Rule 12(b)(6)*. [*See § 210.23, Paragraph A.*]

B. No Allegation or Proof That Search of Plaintiff Was Unreasonable. Although the federal and state constitutional prohibitions against unreasonable searches and seizures apply to searches conducted by public school officials(*Board of Educ. v. Earls (2002) 536 U.S. 822, 828, 122 S. Ct. 2559, 153 L. Ed. 2d 735* ; *Vernonia Sch. Dist. 47J v. Acton (1995) 515 U.S. 646, 652, 115 S. Ct. 2386, 132 L. Ed. 2d 564* ; *New Jersey v. T.L.O. (1985) 469 U.S. 325, 337-342, 105 S. Ct. 733, 83 L. Ed. 2d 720* ; *In re William G. (1985) 40 Cal. 3d 550, 561, 221 Cal. Rptr. 118, 709 P.2d 1287* ; *People v. Alexander B. (1990) 220 Cal. App. 3d 1572, 1576, 270 Cal. Rptr. 342*), strict adherence to the requirement that a search be based on probable cause is not required in the public school setting (*New Jersey v. T.L.O. (1985) 469 U.S. 325, 341, 105 S. Ct. 733, 83 L. Ed. 2d 720* ; *People v. Alexander B. (1990) 220 Cal. App. 3d 1572, 1576, 270 Cal. Rptr. 342*), and a search in a public school is justified if school officials have reasonable grounds for suspecting that the search will yield evidence that the student has violated or is violating either the law or school rules, and if the measures adopted for the search are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction (*New Jersey v. T.L.O. (1985) 469 U.S. 325, 337-342, 105 S. Ct. 733, 83 L. Ed. 2d 720* ; *People v. Alexander B. (1990) 220 Cal. App. 3d 1572, 1577, 270 Cal. Rptr. 342* ; *see Vernonia Sch. Dist. 47J v. Acton (1995) 515 U.S. 646, 656-657, 115 S. Ct. 2386, 132 L. Ed. 2d 564*).

C. School Officials Need Not Show Individualized Suspicion to Justify Search. In conducting searches of students, school officials need not show individualized suspicion if the search is otherwise reasonable (*Board of Educ. v. Earls (2002) 536 U.S. 822, 828-829, 122 S. Ct. 2559, 153 L. Ed. 2d 735* ; *Smith v. McGlothlin (1997) 119 F.3d 786, 788* ; *see Vernonia Sch. Dist. 47J v. Acton (1995) 515 U.S. 646, 664, 115 S. Ct. 2386, 132 L. Ed. 2d 564* ; *People v. Alexander B. (1990) 220 Cal. App. 3d 1572, 1577-1578, 270 Cal. Rptr. 342*).

[*Optional*] **D. Reasonable Suspicion Not Needed to Stop Students to Ask Questions or Conduct Investigation.** School officials have the power to stop a minor student in order to ask questions or conduct an investigation even in the absence of reasonable suspicion of criminal activity or violation of a school rule, so long as the officials do not exercise that authority in an arbitrary, capricious, or harassing manner (*In re Randy G. (2001) 26 Cal. 4th 556, 561-568, 110 Cal. Rptr. 2d 516, 23 P.3d 239*).

[*Optional*] **E. "Reasonableness" Standard Applies to School Official's Independent Decision to Search Even If Police Provide Information and Are Present.** When a school official independently decides to search a student and conducts the search, the "reasonableness" standard of *New Jersey v. T.L.O.* applies, even if the police provide the information justifying the search and are present when it occurs (*In re K.S. (2010) 183 Cal. App. 4th 72, 77-84, 108 Cal. Rptr. 3d 32*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a defendant's motion under *Fed. R. Civ. P., Rule 12(b)(6)* to dismiss a complaint in an action against a school district and its employees for damages based on a search of a student by school officials.

Where appropriate, counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations that support the motion.

For discussion of motions to dismiss a federal court action under *Fed. R. Civ. P., Rule 12(b)(6)* for failure to state a claim for relief, see *Moore's Federal Practice--Civil, Ch. 12, § 12.34* (Matthew Bender).

[b] Related Uses

With appropriate modifications, these points and authorities may be used to support a motion for summary judgment brought under *Fed. R. Civ. P., Rule 56*. For discussion of motions for summary judgment in federal court actions generally, see Moore's Federal Practice--Civil, Ch. 56 (Matthew Bender).

[c] Related Pleading and Practice Chapters

For a form of complaint for damages based on an allegedly unlawful search of a public school student by school officials, see California Forms of Pleading and Practice, Ch. 512, *Schools* (Matthew Bender).

[d] Related Memoranda

For memoranda supporting and opposing motions for summary judgment in actions against public entities generally, see Ch. 196, *Public Entities* . For memoranda relating to motions for summary judgment, generally, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] No Allegation or Proof That Search of Plaintiff Was Unreasonable

The facts and procedural background of ***Board of Educ. v. Earls*** *(2002) 536 U.S. 822, 122 S. Ct. 2559, 153 L. Ed. 2d 735* , are discussed in *§ 210.24[3][b]*. The United States Supreme Court held that searches by public school officials, such as the collection of urine samples, implicate *Fourth Amendment* interests, and a court is required to review a policy requiring students who participate incompetitive extracurricular activities to submit to drug testing for reasonableness, which is the touchstone of the constitutionality of a governmental search (*536 U.S. 822, 828)* .

In ***Vernonia Sch. Dist. 47J v. Acton*** *(1995) 515 U.S. 646, 115 S. Ct. 2386, 132 L. Ed. 2d 564* , in response to a growing drug problem involving and led by high school athletes, and with input from and approval of parents, an Oregon school district adopted a policy authorizing random urinalysis drug testing of all students participating in interscholastic athletics programs, with the expressed purpose to prevent student athletes from using drugs to protect their health and safety and to provide drug users with assistance programs. A student denied participation in a football program when he and his parents refused to consent to the testing, sued in federal court for declaratory and injunctive relief on the grounds that the policy violated *U.S. Const., amends. IV, XIV*. The district court denied relief, but the Ninth Circuit Court of Appeals reversed, holding that the policy violated both federal and state constitutions (*515 U.S. 646, 648-652)* .

The United States Supreme Court vacated the judgment and remanded to the Court of Appeals on the ground that the policy does not violate the *Fourth* and *Fourteenth Amendments*. The Court found that students in a school environment have a lesser expectation of privacy than members of the population in general, and legitimate privacy expectations are even less with regard to student athletes (*515 U.S. 646, 656-657)* . The court found the invasion of privacy in this case not significant, the nature of the governmental concern was important, if not compelling, and the governmental concern was effectively addressed by the policy (*515 U.S. 646, 658-664)* .

In ***New Jersey v. T.L.O.*** *(1985) 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720* , a teacher discovered two students smoking in a high school lavatory; one of the students denied smoking, whereupon a school official searched her purse and discovered marijuana and paraphernalia implicating the student in marijuana dealing. The official notified the student's mother and the police, and turned the evidence of drug dealing over to the police. The student then confessed that she had been selling marijuana at the high school. The student was suspended from school, which a state court set aside on the ground it was based on evidence seized in violation of the *Fourth Amendment*. The juvenile court, however, denied the student's motion to suppress in the course of her prosecution on delinquency charges. The juvenile court held that although the *Fourth Amendment* applies to searches carried out by school officials, a school official may properly conduct a search of a student if the official has a reasonable suspicion that a crime has been committed or is in the process of being committed, or reasonable cause to believe the search is necessary to maintain school discipline or enforce school policies. The court concluded that the search in this case was reasonable as being based on the official's well-founded suspicion that the student had violated a rule forbidding smoking in the lavatory. Once the student's purse was open, evidence of marijuana violations was in plain view, and the school official was entitled to conduct a thorough search to determine the nature and extent of the student's drug-related activities (*469 U.S. 325, 329-330)* .

The New Jersey appellate and supreme courts agreed that the *Fourth Amendment* applies to searches conducted by school officials. The New Jersey Supreme Court, however, rejected that state's argument that the exclusionary rule should not be employed to prevent the use of evidence unlawfully seized by school officials in juvenile proceedings. The Court agreed with the juvenile court that a warrantless search by a school official does not violate the *Fourth Amendment* so long as the official has reasonable grounds to believe the student possesses evidence of illegal activity or activity that would interfere with school discipline and order, but disagreed with the conclusion that the search in this case was reasonable. The New Jersey Supreme Court found that the contents of the student's purse had no bearing on the accusation against the student for smoking in the lavatory, since possession of cigarettes did not violate school rules and a mere desire for evidence that would impeach the student's claim that she did not smoke cigarettes could not justify the search, and that even if a reasonable suspicion that the student had cigarettes in her purse would justify a search, the school official had no such suspicion, as no one had given him specific information that there were cigarettes in the purse. Finally, whether or not the school official was justified in opening the purse, the evidence of drug use he saw inside did not justify the extensive "rummaging" through the student's papers and effects that followed (*469 U.S. 325, 330-331)* .

The United States Supreme Court agreed that the *Fourth Amendment* prohibition of unreasonable searches and seizures applies to searches conducted by public school officials (*469 U.S. 325, 333)* , but found that the search in this case was not unreasonable (*469 U.S. 325, 344-348)* . The Court found that school authorities are state actors for the purposes of constitutional guarantees related to searches of students, rather than merely surrogates for parents, so they cannot claim parents' immunity from the strictures of the *Fourth Amendment* (*469 U.S. 325, 336-337)* . The U.S. Supreme Court also examined what is reasonable in the context of school searches, and found that the students' legitimate expectations of privacy must be balanced against the schools' equally legitimate need to maintain an environment in which learning can take place; thus, school officials need not obtain a warrant before searching a student under their authority and a search will be justified when school officials have reasonable grounds for suspecting the search will yield evidence that the student has violated or is violating either the law or school rules, and when the measures adopted for the search are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction (*469 U.S. 325, 337-342)* .

In re William G. *(1985) 40 Cal. 3d 550, 221 Cal. Rptr. 118, 709 P.2d 1287* was an appeal from an order declaring a high school student to be a ward of the juvenile court based on unlawful possession of marijuana for purposes of sale in violation of the Health & Safety Code. An assistant principal had seen the student walking on campus during a regular class period, and had searched a calculator carried by the student, which had what the assistant principal thought was an odd bulge. In the search, he found marijuana and other paraphernalia, and called the police, who arrested the student. The assistant principal had no prior information leading him to believe the student possessed marijuana or otherwise violated the law or a school rule, but had a standard procedure of questioning students not in class during regular class

periods. The juvenile court denied the student's motion to suppress, finding that the search was reasonable under the circumstances (*40 Cal. 3d 550, 556)* .

The California Supreme Court reversed. The Court held that California public school officials are subject to the prohibition against unreasonable searches and seizures contained in both *U.S. Const. amends. IV, XIV*, and in *Cal. Const. art. I, § 13* (*40 Cal. 3d 550, 558-561)* . The applicable standard to apply in determining the reasonableness of a search by public school officials is reasonable suspicion, and the governmental interests in providing an environment that protects the health and welfare of all students must be balanced with the privacy interests of individual students, so the standard is less than probable cause (*40 Cal. 3d 550, 562)* . The Court found, however, that the search conducted in this case did not meet the standard of reasonable suspicion, since the assistant principal articulated no facts to support a reasonable suspicion that the student was engaged in a proscribed activity justifying a search (*40 Cal. 3d 550, 566-567)* .

People v. Alexander B. *(1990) 220 Cal. App. 3d 1572, 270 Cal. Rptr. 342* , is discussed in *§ 210.24[3][b]*.

[b] School Officials Need Not Show Individualized Suspicion to Justify Search

In ***Board of Educ. v. Earls*** *(2002) 536 U.S. 822, 122 S. Ct. 2559, 153 L. Ed. 2d 735* , a board of education of an independent school district in Oklahoma adopted a Student Activities Drug Testing Policy, requiring all students who participate in competitive extracurricular activities to submit to drug testing designed to detect only the use of illegal drugs, including amphetamines, marijuana, cocaine, opiates, and barbiturates, not medical conditions or the presence of authorized prescription medications. The policy requires that students take a drug test before participating in an extracurricular activity, submit to random drug testing while participating in that activity, and agree to be tested at any time on reasonable suspicion. Two students sued the school district, alleging that the policy violates the *Fourth Amendment's* protection against unreasonable search and seizure, both on its face and as applied, the school district failed to identify a special need for testing students who participate in extracurricular activities, and the policy neither addresses a proven problem nor promises to bring any benefit to students or the school. The students did not challenge the policy as it applies to athletes or as it provides for drug testing on reasonable, individualized suspicion. The District Court rejected students' claims and granted summary judgment to the school district, noting that special needs exist in the public school context, that, although the district did not show a drug problem of epidemic proportions, there was a history of drug abuse starting in 1970 that presented legitimate cause for concern, and that it could not be disputed that the drug problem among the student body is effectively addressed by making sure that the large number of students participating in competitive, extracurricular activities do not use drugs. The United States Court of Appeals for the Tenth Circuit reversed, holding that the policy violated the *Fourth Amendment*, concluding that before imposing a suspicionless drug testing program, a school must demonstrate some identifiable drug abuse problem among a sufficient number of those subject to the testing and that testing that group of students will actually redress its drug problem. Because the district failed to demonstrate such a problem existed among students participating in competitive extracurricular activities, the Court of Appeals found the policy unconstitutional (*536 U.S. 822, 825-828)* .

The United States Supreme Court reversed. The Court held first that special needs inhere in the public school context, and that although schoolchildren do not shed their constitutional rights when they enter the schoolhouse, *Fourth Amendment* rights are different in public schools than elsewhere, and the inquiry into whether a particular search is reasonable cannot disregard the schools' custodial and tutelary responsibility for children. The Court held that in particular, a finding of individualized suspicion may not be necessary when a school conducts drug testing (*536 U.S. 822, 830*). The Court concluded that the policy is constitutional because students who participate in competitive extracurricular activities have a limited expectation of privacy since they voluntarily subject themselves to many of the same intrusions on their privacy as do athletes, because given the minimally intrusive nature of the sample collection and the limited uses to which the test results are put, the invasion of students' privacy is not significant. In addition, the Court found that given the nationwide epidemic of drug use, and the evidence of increased drug use in Tecumseh schools, it was entirely reasonable for the district to enact this particular drug testing policy. Further, testing students

who participate in extracurricular activities is a reasonably effective means of addressing the district's legitimate concerns in preventing, deterring, and detecting drug use (*536 U.S. 822, 830-837)* .

The factual and procedural background of ***Vernonia Sch. Dist. 47J v. Acton*** *(1995) 515 U.S. 646, 115 S. Ct. 2386, 132 L. Ed. 2d 564* , is discussed in *§ 210.24[3][a]*. The United States Supreme Court suggested that individualized suspicion is not needed to justify a school search in upholding a policy ofrandomly drug testing high school students participating in interscholastic athletic programs. The Court stated that in many respects, the Court thought that drug testing of the students based on suspicion of drug use would be worse than the school district's policy of random testing (*515 U.S. 646, 664)* .

In ***Smith v. McGlothlin*** *(9th Cir. 1997) 119 F.3d 786* , a high school vice principal ordered a search of a group of high school students suspected of smoking near campus after complaints from neighbors. The search led to discovery of one student's possession of knives. A juvenile court judge suppressed evidence of the knives and dismissed charges against the student. The student then sued the vice principal who ordered the search under *42 U.S.C.S. § 1983*. She alleged that the vice principal acted unreasonably in searching her even though school authorities did not have individualized suspicion that she had been smoking, and that the search was conducted in an unreasonable manner. The district court dismissed the action on the grounds that the vice principal was entitled to qualified immunity under Section 1983, since at the time of the search, it was not clearly established that the search was improper.

The Ninth Circuit Court of Appeals affirmed. The court held that there was authority for concluding that the search was lawful, and that as it is fairly clear that the student was not entitled to individualized suspicion before she could be searched, it could not have been clearly established at the time of the search that she had that right. The court held further that the manner of conducting the search was reasonable (*119 F.3d 786, 788)* .

People v. Alexander B. *(1990) 220 Cal. App. 3d 1572, 270 Cal. Rptr. 342* , was an appeal of an order declaring a minor high school student a ward of the juvenile court on a finding that he violated *Penal Code § 12020(a)* by concealing on his person a dirk or dagger. The student was in a group of students about whom the dean of students received information that someone in the group had a weapon. A machete was found on the student by a police officer who was on campus, after the student attempted to move away from a search of the group by the police officer ordered by the dean of students. The information about the weapon was provided by another student, whose name was either not obtained or was forgotten by school authorities. The juvenile court denied the student's motion to suppress evidence of the machete.

The court of appeal affirmed, holding that the dean of students acted reasonably in ordering a search of the student for weapons (*220 Cal. App. 3d 1572, 1577-1578)* . The court held that under the totality of the circumstances, a cursory search of the student and others in his group for dangerous weapons was not only reasonable, it was constitutionally compelled under *Cal. Const., art. I, § 28(c)*, which provides that students and staff of public schools have the inalienable right to attend safe, secure, and peaceful campuses (*220 Cal. App. 3d 1572, 1577)* . The court also held that although there was no individualized suspicion that plaintiff possessed a weapon, suspicion had focused on a group of five or six students, and given the potential danger to students and staff that would have resulted from not searching the entire group, a weapons search of the several accused students was reasonable (*220 Cal. App. 3d 1572, 1577-1578)* .

[c] Reasonable Suspicion Not Needed to Stop Students to Ask Questions or Conduct Investigation

In ***In re Randy G.*** *(2001) 26 Cal. 4th 556, 110 Cal. Rptr. 2d 516, 28 P.3d 239* , a high school security officer, after observing a student, called him out of class, asked for and received his consent to search his bag, and discovered a knife with a locking blade. In a juvenile court proceeding, the minor was declared a ward of the court after a finding that he violated *Pen. Code § 626.10(a)* by possessing a knife with a locking blade on school grounds. The minor's motion to suppress the knife as the result of an illegal detention in violation of the *Fourth Amendment* was denied. The court of appeal agreed with the minor that the standard to be applied was whether the detaining officer had reasonable suspicion

that the person to be detained has been, is, or is about to be engaged in criminal activity or a violation of school rules, but held that the detention was reasonable (*26 Cal. 4th 556, 560-561)* . The Supreme Court affirmed.

Without deciding the issue, the Court held that it would seem that when a school official stops a student to ask a question, the student's liberty has not been restrained over and above the limitations he or she already experiences by attending school, so that the conduct of school officials in moving students about the classroom or from one classroom to another, sending students to the office, or taking them into the hallway to ask a question would not qualify as a detention as defined by the *Fourth Amendment*. In the absence of a *Fourth Amendment* claim, relief, if at all, would come by showing that school officials acted in such an arbitrary manner as to deprive the student of substantive due process in violation of the *Fourteenth Amendment* (*26 Cal. 4th 556, 563-565)* . However, the Court held that detentions of minor students on school grounds do not offend the Constitution, so long as they are not arbitrary, capricious, or for the purposes of harassment, and that reasonable suspicion, whether called "particularized suspicion," "articulable and individualized suspicion," "founded suspicion," or "reasonable cause," need not be shown (*26 Cal. 4th 556, 567)* . The Court disapproved *People v. Alexander B. (1990) 220 Cal. App. 3d 1572, 270 Cal. Rptr. 342* [*see § 210.24[3][b]*] to the extent it is inconsistent with this conclusion (*26 Cal. 4th 556, 567 n.2*). The Court then refused to distinguish the power of school security officers over students from that of other school personnel, whose authority over student conduct may have been delegated to those officers (*26 Cal. 4th 556, 568)* .

[d] "Reasonableness" Standard Applies to School Official's Independent Decision to Search Even If Police Provide Information and Are Present

In ***In re K.S.*** *(2010) 183 Cal. App. 4th 72, 108 Cal. Rptr. 3d 32* , a narcotics detective received a message from a confidential informant the detective had used before and who had proved reliable, that a high school student possessed Ecstasy pills, hidden in a slit in his pants. The detective contacted another police officer, who was the school resource officer at another high school, who contacted the vice-principal of the student's high school, but did not ask her to search or further investigate the student. The resource officer informed the narcotics detective that he had contacted the vice-principal and provided her with the information. Thereafter, the detective went to the school to see if the school was going to follow up on the information given to the vice-principal, but he did not ask the school to do any follow up. Because the information came from the resource officer, the vice-principal believed the tip to be reliable and thereafter confirmed that the student was at school that day. She decided to search the student to ensure the safety of the school's students. She ascertained that the student was scheduled for a physical education (P.E.) class and had a school security officer verify that he was present at that class and dressed for P.E. and not wearing his street clothes, and decided to search his P.E. locker, accompanied by the narcotics detective and a police detective sergeant Conley. The vice-principal had the police officers accompany her because she did not feel comfortable keeping something she found on her person across campus. However, she did not ask either officer to conduct the search. After a campus supervisor opened the locker, she searched the locker and found the jeans with the slit. Inside the slit was a plastic bag containing several pills. The vice-principal took the pants to the school office, and the student was detained. The vice-principal suspected the pills were Ecstasy, and the narcotics detective later confirmed that suspicion. The school resource officer from the other high school arrived at the school after the search was completed and told the vice-principal the amount of Ecstasy found was consistent with possession for sale. A juvenile court petition filed against the student alleged he possessed Ecstasy. After filing an unsuccessful motion to suppress, the student admitted the offense and appealed the dispositional order making him a ward of the juvenile court and placing him on home probation (*183 Cal. App. 4th 72, 76-77)* .

The Court of Appeal affirmed. The court first discussed the reasonableness standard of *New Jersey v. TLO* and *In re William G.* [*see* 3[a], *above*], noting that in both cases the courts declined to address the standard for searches conducted by school officials "in conjunction with or at the behest of law enforcement agencies" (*183 Cal. App. 4th 72, 78* ; *see New Jersey v. T. L. O. (1985) 469 U.S. 325, 341 n.7, 105 S. Ct. 733, 83 L. Ed. 2d 720* ; *In re William G. (1985) 40 Cal. 3d 550, 562 n.12, 221 Cal. Rptr. 118, 709 P.2d 1287*). However, in *K.S.*, a police detective provided the information relied on by school officials to conduct the search and was present when the search occurred. The court

found that a certain level of cooperation between school and police officials is likely when violations of the criminal law, as well as the student code of conduct, are the basis for discipline (*183 Cal. App. 4th 72, 80)* . In *K.S.*, the police role in the search of the student was at all times clearly subordinate to the role of the vice-principal, who made the decision to search and conducted the search, and for that reason, the *T.L.O.* standard applied (*183 Cal. App. 4th 72, 80)* . The narcotics detective's involvement as a mere information conduit did not change the balance of interests. Neither the narcotics detective nor the resource officer advised, instructed, or directed the vice-principal to conduct the search; they merely provided the information that she independently evaluated. Before conducting the search, the vice-principal learned the student was in a P.E. class and his pants could be searched without compelling him to disrobe or be subject to a patdown search. Thus she gathered additional information before acting on the informant's tip. The narcotics detective's presence during the vice-principal's search did not change the result. So long as the school official independently decides to search and invites law enforcement personnel to attend the search to help ensure the safety and security of the school, it would be unwise to discourage the school official from doing so, at least where it is reasonable to suspect that contraband inimical to a secure learning environment is present (*183 Cal. App. 4th 72, 80-81)* . The extent of the police role in a student search at a school governs whether the *T.L.O.* standard applies. In making this determination, the court must examine the totality of the circumstances. The trial court implicitly found that the vice-principal made the decision to search and to have the officers present during the search, and each decision was designed to protect the safety of the school. Further, substantial evidence supported the trial court findings (*183 Cal. App. 4th 72, 83-84)* .

[4] Additional Authorities

In ***Redding v. Safford Unif. School Dist.*** *(9th Cir. 2007) 504 F.3d 828 , aff'd in part, rev'd in part, Safford Unified Sch. Dist. #1 v. Redding, 2009 U.S. LEXIS 4735, 21 Fla. L. Weekly Fed. S 1011* , a middle school student filed an action alleging violation of *42 U.S.C. § 1983* based on a school search. The school had prohibited the nonmedical use, possession, or sale of drugs on school property or at school events. At a school dance, several staff members noticed unusually rowdy behavior from a small group of students, including plaintiff and her friend and detected the smell of alcohol coming from that group. Later, staff members found a bottle of alcohol and a package of cigarettes in the girls' restroom, but no official action was taken against any of the students at that time. Later in the year, the mother of another student told school administrators that her son had become violent with her and was sick to his stomach and the student claimed the incident occurred after he had taken some pills a classmate had given him and that certain students werebringing drugs and weapons to school, giving the administrators detailed accounts regarding the actions of several students, including plaintiff. During a subsequent meeting with the vice principal, the student handed the vice principal a white pill and said that plaintiff's friend had given it to him and a group of students were planning to take pills at lunch. The school nurse identified the pill as a pill available only by prescription. Based on this information, the vice principal went to the friend's classroom and asked the friend to collect her belongings and accompany him to his office. He also noticed a black planner lying on the desk next to hers, which she denied owning. He nevertheless picked up the planner and handed it to a teacher, who promised he would attempt to find the owner; soon thereafter, the teacher discovered the planner contained knives, lighters, a cigarette, and a permanent marker, and he promptly communicated this information to the vice principal. School officials asked the friend to turn out her pockets and open her wallet, which produced one blue pill, several white pills, and a razor blade. The blue pill was later identified as an over-the-counter drug used to treat pain and inflammation. The friend, in response to questioning, identified plaintiff as the person who had given her the pills, and she denied ownership of the planner and claimed no knowledge of its contents. School officials then searched the friend's person and clothing for pills, which did not produce any more pills. While officials searched the friend, the vice principal retrieved plaintiff from her classroom. In his office, she acknowledged the planner belonged to her but claimed that she had lent it to her friend to hide some things from her parents and denied any knowledge of the planner's contents. She also denied knowledge of the pills seized from the friend and denied bringing pills to school and distributing pills to her classmates, and told the vice principal she did not mind being searched. A search her backpack and of her person did not yield anything. She then filed suit. The district court granted defendants' motion for summary judgment, holding that defendants did not violate plaintiff's *Fourth Amendment* rights because their search of her person was both justified at its inception and permissible in its scope (

504 F.3d 828, 829-831) . The Ninth Circuit affirmed. The court held first that because the search was conducted by public school officials and took place during school hours and on school premises, the validity of the search was governed by *New Jersey v. T. L. O. (1985) 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720 (504 F.3d 828, 832* ; for discussion of *New Jersey v. T.L.O., see* [3][a], *above*]. The court then held that the search was justified at its inception, because based on the information available to them, defendants had reasonable grounds for suspecting that the search of plaintiff's person would turn up evidence she had violated or was violating either the law or the rules of the school. At the time defendants searched plaintiff, they had several key pieces of information tying her to the possession and distribution of pills in violation of school policy, including the information that had been provided by the other student and by plaintiff's friend (*504 F.3d 828, 832-834)* . The court also found the search permissible in scope and conducted in a reasonable manner. Barring the unauthorized use of prescription drugs on school premises was an important governmental interest, favoring defendant. The size of the contraband to be found also favored defendants, because they were searching for something small, *i.e.*, pills, and they searched plaintiff's person only after receiving reliable information that she had pills, failing to find them in her backpack, and observing that she was wearing clothes without pockets. The search was conducted by two employees of the same gender as plaintiff, and took place in the privacy of the school nurse's office with the door securely locked. Plaintiff was not physically touched in any way during the search, she was not asked to remove her bra or underwear, and defendants returned her clothing and permitted her to get dressed as soon as the search was over (*504 F.3d 828, 834-836)* .

California Points & Authorities

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 210 SCHOOLS: ACTIONS BY STUDENTS
PART II. FORMS

21-210 California Points & Authorities § 210.25

§ 210.25 Supporting Defendants' Motion to Dismiss [Fed. R. Civ. P., Rule 12(b)(6)] Action for Declaratory and Injunctive Relief for Violation of Title VI of the Civil Rights Act of 1964 [42 U.S.C.S. § 2000d] Against School District--Hostile Racial Educational Environment

[1] FORM

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF
CALIFORNIA, _____ DIVISION

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	Civil Action, File No. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Defendant(s).	)	IES IN SUPPORT OF MOTION TO DISMISS
	)	PLAINTIFF'S ACTION FOR FAILURE TO STATE
	)	CLAIM ON WHICH RELIEF CAN BE GRANTED
		[*Fed. R. Civ. P., Rule 12(b)(6)*]

_____

PLAINTIFF'S COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF ALLEGING HOSTILE RACIAL EDUCATIONAL ENVIRONMENT IN VIOLATION OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 [*42 U.S.C.S. § 2000d*] DOES NOT STATE A CLAIM ON WHICH THIS COURT CAN GRANT RELIEF AGAINST DEFENDANT AND SHOULD BE DISMISSED.

A. Complaint That Fails to State Claim on Which Court Can Grant Relief Should Be Dismissed Under *Fed. R. Civ. P., Rule 12(b)(6)*. [*See § 210.23, Paragraph A.*]

B. No Allegation or Proof That Defendant Is a Recipient of Federal Financial Assistance as Required by *42 U.S.C.S. § 2000d*. To be liable for a hostile racial educational environment under Title VI of the Civil Rights Act of

1964, *42 U.S.C.S. § 2000d*, a defendant school district must be a recipient of federal financial assistance (*42 U.S.C.S. § 2000d*; *Monteiro v. Tempe Union High Sch. Dist. (9th Cir. 1998) 158 F.3d 1022, 1032)* .

C. In Action Based on Hostile Racial Educational Environment, No Allegation of Essential Elements Stating Claim for Relief. For a school district to be liable under Title VI of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000d*, for a hostile racial educational environment, the plaintiff must allege and prove that: there is a racially hostile environment--that is, one in which racial harassment is so severe, pervasive or persistent as to interfere with or limit the ability of an individual to participate in or benefit from services, activities, or privileges provided by the school district; the school district had notice of the problem; and the district failed to respond adequately to redress the racially hostile environment (*Monteiro v. Tempe Union High Sch. Dist. (9th Cir. 1998) 158 F.3d 1022, 1032-1035)* .

D. No Allegation or Showing that Defendant Had Notice of or Was Deliberately Indifferent to Hostile Racial Educational Environment. To be liable under Title VI of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000d*, for a hostile racial educational environment, a school district must have actual or constructive notice of racial harassment and must have been deliberately indifferent to the hostile racial environment [*Monteiro v. Tempe Union High Sch. Dist. (9th Cir. 1998) 158 F.3d 1022, 1034]* .
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a defendant's motion under *Fed. R. Civ. P., Rule 12(b)(6)* to dismiss a complaint in an action against a school district for declaratory and injunctive relief based on a hostile racial educational environment.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations that support the motion.

For discussion of motions to dismiss a federal court action under *Fed. R. Civ. P., Rule 12(b)(6)* for failure to state a claim for relief, see *Moore's Federal Practice--Civil, Ch. 12, § 12.34* (Matthew Bender).

[b] Related Uses

With appropriate modifications, these points and authorities may be used to support a motion for summary judgment brought under *Fed. R. Civ. P., Rule 56*. For discussion of motions for summary judgment in federal court actions generally,see Moore's Federal Practice--Civil, Ch. 56 (Matthew Bender).

[c] Related Pleading and Practice Chapters

For a form of complaint for declaratory and injunctive relief for violation of Title VI of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000d*, for a hostile racial education environment, see California Forms of Pleading and Practice, Ch. 512, *Schools* (Matthew Bender).

[d] Related Memoranda

For memoranda supporting and opposing motions for summary judgment in actions against public entities generally, see Ch. 196, *Public Entities* . For memoranda relating to motions for summary judgment, generally, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] No Allegation or Proof That Defendant Is a Recipient of Federal Financial Assistance as Required by 42 U.S.C.S. § 2000d.

Monteiro v. Tempe Union High Sch. Dist. *(9th Cir. 1998) 158 F.3d 1022* is discussed in *§ 210.25[3][b]*.

[b] In Action Based on Hostile Racial Educational Environment, No Allegation of Essential Elements Stating Claim for Relief

In ***Monteiro v. Tempe Union High Sch. Dist.*** *(9th Cir. 1998) 158 F.3d 1022* , the mother of a high school freshman sued a school district, alleging causes of action under *42 U.S.C.S. § 1983* for violation of the *Equal Protection Clause* of *U.S. Const. amends. V, XIV* seeking to bar assignment in English classes of *The Adventures of Huckleberry Finn* by Mark Twain and *A Rose for Emily* by William Faulkner based on use of word "nigger" as racially discriminatory and encouraging racial discrimination and harassment of African-American students at her daughter's high school. The complaint alleged that African-American students suffered psychological injuries and lost educational opportunities due to the required reading of the literary works, and that the school district had notice that the student suffered these injuries, but refused to offer a remedy other than to allow her to study alone in the library while the works were being discussed in class. It further alleged a violation of Title VI of the Civil Rights Act of 1964 (*42 U.S.C.S. § 2000d*), alleging that the assignment of the literary works "created and contributed to a racially hostile educational environment," including increased racial harassment by other students. The district court dismissed the complaint on the ground that plaintiff failed to state a claim under either the *Equal Protection Clause* or Title VI of the Civil Rights Act of 1964 because the complaint did not contain specific allegations of fact necessary to sustain a claim of discriminatory intent, and dismissed as moot the request for injunctive relief for removal of the literary works from particular English classes because the student was no longer a member of the freshman English class.

The Ninth Circuit affirmed the dismissal of the claim in § 1983 but reversed the dismissal of the claim under Title VI of the Civil Rights Act of 1964 based on a hostile racial educational environment. The court held that a school district's failure to respond to racial harassment of one or more pupils by other students constitutes a violation of Title VI of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000d*, which provides that no person in the United States can be excluded on the ground of race, color, or national origin from participation in, be denied the benefits of, or be subjected to discrimination under and program or activity receiving federal financial assistance (*158 F.3d 1022, 1032-1035)* . Title VI prohibits student-to-student racial harassment (*158 F.3d 1022, 1033)* . A school district violates Title VI when all of the following are true (*158 F.3d 1022, 1033)* :

- There is a racially hostile environment.
- The school district had notice of the problem.
- The district failed to respond adequately to redress the racially hostile environment.

A "racially hostile environment" is one in which racial harassment is so severe, pervasive or persistent as to interfere with or limit the ability of an individual to participate in or benefit from services, activities or privileges provided by the school district. Whether a hostile educational environment exists is a question of fact, determined with reference to the totality of the circumstances, including the victim's race and age. Racial harassment creates a hostile environment if it is

sufficiently severe that it would interfere with the educational program of a reasonable person of the same age and race as the victim. Racist attacks need not be directed at the complainant in order to create a hostile educational environment. A complaint by a parent alleging that her ninth-grade daughter and other similarly situated African-American students attended a school where they were called "niggers" by white children, and that term was written on the walls of the buildings in which they were supposed to learn civics and social studies, sufficiently alleged a hostile racial environment under Title VI (*158 F.3d 1022, 1033)* .

A school district may have either actual or constructive notice of racial harassment. Actual notice may occur when a student or parent makes a complaint about racially demeaning incidents to the appropriate educational authorities. Once on notice of the problem, the district has a legal duty to take reasonable steps to eliminate a racially hostile environment. When a district is "deliberately indifferent" to its students' right to a learning environment free of racial hostility and discrimination, it is liable for damages under Title VI. The district is liable for its failure to act if the need for intervention was so obvious, or if inaction was solikely to result in discrimination, that it can be said to have been deliberately indifferent to the need (*158 F.3d 1022, 1034)* .

[c] No Allegation or Showing that Defendant Had Notice of or Was Deliberately Indifferent to Hostile Racial Educational Environment

Monteiro v. Tempe Union High Sch. Dist. *(9th Cir. 1998) 158 F.3d 1022* is discussed in *§ 210.25[3][b]*.

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California Points & Authorities

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 210 SCHOOLS: ACTIONS BY STUDENTS
PART II. FORMS

21-210 California Points & Authorities § 210.26

§ 210.26 Supporting Defendants' Motion to Dismiss [Fed. R. Civ. P., Rule 12(b)(6)] Action for Injunctive Relief for Violation of 42 U.S.C.S. § 1983 Against School District--Removal of Racially Discriminatory Literary Works From Mandatory Curriculum

[1] FORM

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF
CALIFORNIA, _____ DIVISION

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	Civil Action, File No. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Defendant(s).	)	IES IN SUPPORT OF MOTION TO DISMISS
	)	PLAINTIFF'S ACTION FOR FAILURE TO STATE
	)	CLAIM ON WHICH RELIEF CAN BE GRANTED
		[*Fed. R. Civ. P., Rule 12(b)(6)*]

_____

PLAINTIFF'S COMPLAINT FOR INJUNCTIVE RELIEF FOR REMOVAL OF OFFENSIVE LITERARY WORKS FROM A SCHOOL'S MANDATORY CURRICULUM DOES NOT STATE A CLAIM ON WHICH THIS COURT CAN GRANT RELIEF AGAINST DEFENDANT AND SHOULD BE DISMISSED.

A. Complaint That Fails to State Claim on Which Court Can Grant Relief Should Be Dismissed Under *Fed. R. Civ. P., Rule 12(b)(6)*. [*See § 210.23, Paragraph A.*].

B. Complaint for Violation of Equal Protection Under *42 U.S.C.S. § 1983* Must Plead Intentional Discrimination. A complaint brought under *42 U.S.C.S. § 1983* that alleges a violation of the *equal protection clause* of *U.S. Const. amend. V*, must allege facts showing intentional unlawful discrimination or facts that are at least susceptible of an

inference of discriminatory intent [*Monteiro v. Tempe Union High Sch. Dist. (9th Cir. 1998) 158 F.3d 1022, 1026]* .

C. Courts May Not Ban Literary Works From School Curricula on Basis of Content. Other than educational material subject to prohibitions of religion clauses of *U.S. Const. amend. I*), courts may not ban books or other literary works from school curricula on the basis of their content, even when the works are accused of being racist in whole or in part [*Monteiro v. Tempe Union High Sch. Dist. (9th Cir. 1998) 158 F.3d 1022, 1028-1032]* .
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a defendant's motion under *Fed. R. Civ. P., Rule 12(b)(6)* to dismiss a complaint in an action against a school district for removal of allegedly offensive literary works from a school's mandatory curriculum.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations that support the motion.

For discussion of motions to dismiss a federal court action under *Fed. R. Civ. P., Rule 12(b)(6)* for failure to state a claim for relief, see *Moore's Federal Practice--Civil, Ch. 12, Defenses and Objections--When and How Presented--By Pleading or Motion--Motion for Judgment on Pleadings, § 12.34* (3d ed., Matthew Bender).

[b] Related Uses

With appropriate modifications, these points and authorities may be used to support a motion for summary judgment brought under *Fed. R. Civ. P., Rule 56*. For discussion of motions for summary judgment in federal court actions generally, see Moore's Federal Practice, Ch. 56, *Summary Judgment* (3d ed., Matthew Bender).

[c] Related Memoranda

For memoranda supporting and opposing motions for summary judgment in actions against public entities generally, see Ch. 196, *Public Entities* . For memoranda relating to motions for summary judgment, generally, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Complaint for Violation of Equal Protection Under 42 U.S.C.S. § 1983 Must Plead Intentional Discrimination

Monteiro v. Tempe Union High Sch. Dist. *(9th Cir. 1998) 158 F.3d 1022* is discussed in *§§ 210.25[3][b]* and *210.26[3][b]*.

[b] Courts May Not Ban Literary Works From School Curricula on Basis of Content

The facts and procedural background of ***Monteiro v. Tempe Union High Sch. Dist.*** *(9th Cir. 1998) 158 F.3d 1022* , are discussed in *§ 210.25[3][b]*. The plaintiff's complaint alleged that the mother of a high school freshman sued a school district seeking to bar assignment in English classes of *The Adventures of Huckleberry Finn* by Mark Twain and *A Rose for Emily* by William Faulkner based on use of word "nigger" as racially discriminatory and encouraging racial discrimination and harassment of African-American students at her daughter's high school. The complaint alleged that African-American students suffered psychological injuries and lost educational opportunities due to the required reading of the literary works, and that the school district had notice that the student suffered these injuries but refused to offer a remedy other than to allow her to study alone in the library while the works were being discussed in class. It further alleged that the assignment of the literary works "created and contributed to a racially hostile educational environment," including increased racial harassment by other students. Finally, it alleged that by its conduct the School District intentionally discriminated against Doe. The district court dismissed the complaint on the ground that plaintiff failed to state a claim under the *Equal Protection Clause* because the complaint did not contain specific allegations of fact necessary to sustain a claim of discriminatory intent, and dismissed as moot the request for injunctive relief for removal of the literary works from particular English classes because the student was no longer a member of the freshman English class.

The Ninth Circuit affirmed. The court held that courts may not ban books or other literary works from school curricula on the basis of their content, even when the works are accused of being racist in whole or in part, excluding from its holding and analysis educational material subject to the prohibitions of religion clauses of *U.S. Const. amend. I* (*158 F.3d 1022, 1028-1032)* . Ruling on whether a parent's complaint seeking removal of allegedly racially discriminatory books from a high school's mandatory curriculum stated a cause of action under *42 U.S.C.S. § 1983* based on the *Equal Protection Clause of the United States Constitution*, the court found that attaching civil liability on the basis of the assignment of a book and requiring removal of literary works from the classroom, would severely restrict a student's right to receive material that the school board or other educational authority determines to be of legitimate educational value, and that when a school board identifies information that it believes to be a useful part of a student's education, the student has the right to receive the information (*158 F.3d 1022, 1028-1029)* . Allowing the complaint to go forward would inevitably lead many school districts to "buy their peace" by avoiding the use of books or other materials that express messages or simply use terms that could beargued to cause harm to a group of students (*158 F.3d 1022, 1029)* , and a school board attempting to remove books from its curriculum on the ground that the works might offend would likely be vulnerable to *First Amendment* actions brought by students wishing to study those books, and possibly teachers, as well (*158 F.3d 1022, 1030)* . Important countervailing considerations (that books and words can hurt, particularly racist epithets; that some of the most lauded works of literature convey, explicitly or more subtly, messages of racism and sexism or other ideas that, if accepted blindly, would serve to maintain or promote the invidious inequalities that exist in our world today; that the younger a person is, the more likely it is that those messages will help form that person's thinking; that the feelings of minority students, especially younger ones, are extremely vulnerable when it comes to books that are racist or have racist overtones; and that American society has all too often failed to afford its African-American citizens the equal treatment that the *Fourteenth Amendment* requires, particularly in the area of public education) do not outweigh the *First Amendment* considerations (*158 F.3d 1022, 1031-1032)* .

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§ 210.27 Opposing Defendants' Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action for Damages for Personal Injuries Against School District and Employees--Negligent Supervision of Students [Civ. Code § 1714(a); Gov. Code §§ 815.2, 820]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
[a minor, by _____ (*name*),	)	
his/her Guardian ad Litem]	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORIT-
vs.	)	IES IN OPPOSITION TO MOTION FOR SUM-
_____ [*names*],	)	MARY JUDGMENT
Defendants.	)	[*Code Civ. Proc. § 437c*]
	)	
	)	

_____

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE GROUND THAT A SCHOOL DISTRICT AND ITS EMPLOYEES BREACHED NO DUTY TO SUPERVISE OR PROVIDE FOR THE PROTECTION OF PLAINTIFF SHOULD BE DENIED BECAUSE THERE IS A TRIABLE ISSUE OF FACT AS TO WHETHER OR NOT PLAINTIFF'S INJURY WAS PROXIMATELY CAUSED BY DEFENDANTS' NEGLIGENT SUPERVISION.

A. Rules Governing Summary Judgment Procedure. Granting a motion for summary judgment is proper only if the affidavits or declarations supporting the motion establish every element necessary to sustain a judgment in favor of the moving party and the opposing party has not presented any facts which give rise to a triable issue. In ruling on the

motion, the moving party's affidavits are strictly construed while the opposing party's are liberally construed, and doubts as to the propriety of granting the motion should be resolved in favor of the opposing party (*Corwin v. Los Angeles Newspaper Serv. Bureau, Inc. (1971) 4 Cal. 3d 842, 851, n.6, 852, 94 Cal. Rptr. 785, 484 P.2d 953*). The court may not properly grant summary judgment based on inferences reasonably deducible from the papers submitted, if such inferences are contradicted by other inferences which raise a triable issue of fact (*Hepp v. Lockheed-Cal. Co. (1978) 86 Cal. App. 3d 714, 717-718, 150 Cal. Rptr. 408*).

B. Duty to Supervise Students. School authorities have a duty to supervise at all times the conduct of students on school property and to enforce those rules and regulations necessary to their protection (*Dailey v. Los Angeles Unified Sch. Dist. (1970) 2 Cal. 3d 741, 747, 87 Cal. Rptr. 376, 470 P.2d 360*).

C. Standard of Care. The standard of care imposed on school personnel in carrying out the duty to supervise students is that degree of care which a person of ordinary prudence, charged with comparable duties, would exercise under the same circumstances (*Dailey v. Los Angeles Unified Sch. Dist. (1970) 2 Cal. 3d 741, 747, 87 Cal. Rptr. 376, 470 P.2d 360*).

D. Lack of Ordinary Care. Either a total lack of supervision or ineffective supervision may constitute a lack of ordinary care on the part of those responsible for student supervision (*Dailey v. Los Angeles Unified Sch. Dist. (1970) 2 Cal. 3d 741, 747, 87 Cal. Rptr. 376, 470 P.2d 360*).

E. Vicarious Liability of School District. A school district is vicariously liable for injuries proximately caused by the negligent failure of school officials or employees to properly supervise its students (*Gov. Code § 815.2(a)*; *Dailey v. Los Angeles Unified Sch. Dist. (1970) 2 Cal. 3d 741, 747, 87 Cal. Rptr. 376, 470 P.2d 360*).

F. Adequacy of Supervision as Question of Fact. The questions of whether a school district has provided adequate supervision under the circumstances and whether the supervisor was negligent are for determination by the trier of fact (*J.H. v. Los Angeles Unified School Dist. (2010) 183 Cal. App. 4th 123, 148, 107 Cal. Rptr. 3d 182* ; *Charonnat v. San Francisco Unified Sch. Dist. (1943) 56 Cal. App. 2d 840, 843-844, 133 P.2d 643*).

G. Off-Campus Injury Proximately Caused by Negligent On-Campus Supervision. The fact that an injury occurs off-campus does not in itself insulate school officials from liability if the injury was proximately caused by the school district's negligent failure to properly supervise students on the school premises (*Hoyem v. Manhattan Beach City Sch. Dist. (1978) 22 Cal. 3d 508, 514-518, 150 Cal. Rptr. 1, 585 P.2d 851*).

[*Optional*] **H. Failure to Prevent Unauthorized Departure From School.** School officials have a duty to exercise ordinary care to enforce rules prohibiting students from leaving the school premises before the end of the school day without proper authorization (*Hoyem v. Manhattan Beach City Sch. Dist. (1978) 22 Cal. 3d 508, 514, 150 Cal. Rptr. 1, 585 P.2d 851*).

[*Optional*] **I. Foreseeability of Injury to Special Needs Student Inflicted in Hidden Area of Campus.** If a school district allows a hidden area to be maintained on campus without taking adequate steps to prevent access by students, the foreseeability of that area being used to inflict injury on a special-needs student may be imputed to the district even without proof of prior incidents of victimization taking place in that hidden area (*Jennifer C. v. Los Angeles Unified School Dist. (2008) 168 Cal. App. 4th 1320, 1328-1329, 86 Cal. Rptr. 3d 274*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to defendants' motion for summary judgment in an action for damages for negligent supervision when the motion for summary judgment is based on the ground that defendant breached no duty to provide adequate supervision to plaintiff on school grounds. The ground of opposition set out is that there is a triable issue of fact as to whether or not plaintiff's off-campus injury was proximately caused by defendants' negligent supervision of students in the school premises.

In an appropriate case, this form may be used in opposition to a motion for summary judgment supported by the points and *authorities in § 210.20*.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated, including arguments showing either the insufficiency of the supporting affidavits or declarations or the existence of a triable issue of fact. In addition, counsel should attach affidavits or declarations which oppose the motion [*Code Civ. Proc. § 437c*].

[b] Related Pleading and Practice Chapters

For a form of complaint for damages for personal injuries against a school district and its employees based on negligent supervision of students, see California Forms of Pleading and Practice, Ch. 512, *Schools* (Matthew Bender).

[c] Related Memoranda

For memoranda supporting and opposing motions for summary judgment in actions against public entities generally, see Ch. 196, *Public Entities* . For memoranda relating to motions for summary judgment generally, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Rules Governing Summary Judgment Procedure

Plaintiffs in ***Corwin v. Los Angeles Newspaper Serv. Bureau, Inc.*** *(1971) 4 Cal. 3d 842, 94 Cal. Rptr. 785, 484 P.2d 953* , filed an action against defendants for violations of *Bus. & Prof. Code §§ 16720, 16726* (prohibited restraints of tradeunder Cartwright Act). The trial court granted defendants' motion for summary judgment and plaintiffs appealed from the judgment entered in defendants' favor. The Supreme Court concluded that the trial court had erroneously granted the summary judgment and reversed the judgment. In reviewing the trial court's action, the Court commented that summary judgment is a drastic procedure which should be used with caution so that it does not become a substitute for the open trial method of determining facts (*4 Cal. 3d 842, 851, 852)* .

Hepp v. Lockheed-Cal. Co. *(1978) 86 Cal. App. 3d 714, 150 Cal. Rptr. 408* , was an action for breach of contract and fraud. The trial court granted summary judgment for defendant, and the court of appeal reversed the judgment of dismissal. The court of appeal reviewed the rules for granting summary judgment. It relied on *Code Civ. Proc. § 437c* in stating that summary judgment may not be granted on the basis of inferences that are contradicted by other inferences, which raise a triable issue of fact (86 Cal. 3d 714, 717-718).

[b] Duty to Supervise Students

In ***Dailey v. Los Angeles Unified Sch. Dist.*** *(1970) 2 Cal. 3d 741, 87 Cal. Rptr. 376, 470 P.2d 360* , the decedent, plaintiffs' son, a high school student, was killed in the course of an unsupervised "slap boxing" match with another student which took place on the school grounds during lunch period. Plaintiffs brought a wrongful death action against the school district, alleging that the district's negligence in failing to provide adequate supervision was the proximate cause of their son's death. After both sides had rested, the trial court granted a motion for directed verdict in favor of all defendants. Plaintiffs appealed from the judgment entered on that verdict.

The Supreme Court reversed. The Court first noted that while school districts and their employees have never been considered insurers of the physical safety of students, California law has long imposed on school authorities a duty to supervise at all times the conduct of children on the school grounds and to enforce those rules and regulations necessary to their protection. The Court stated that the standard of care imposed on school personnel in carrying out this duty to supervise is that degree of care which a person of ordinary prudence, charged with comparable duties, would exercise under the same circumstances. Either a total lack of supervision or ineffective supervision may constitute a lack of ordinary care on the part of those responsible for student supervision. The Court observed that under *Gov. Code § 815.2(a)*, a school district is vicariously liable for injuries proximately caused by such negligence (*2 Cal. 3d 741, 747)* . The Court then considered the evidence in the case and concluded that it was sufficient to support a verdict in favor of plaintiffs and that the trial court thus erred in granting the motion for a directed verdict (*2 Cal. 3d 741, 749-751)* .

[c] Standard of Care

Dailey v. Los Angeles Unified Sch. Dist. *(1970) 2 Cal. 3d 741, 87 Cal. Rptr. 376, 470 P.2d 360* , is discussed in *§ 210.27[3][b]*.

[d] Lack of Ordinary Care

Dailey v. Los Angeles Unified Sch. Dist. *(1970) 2 Cal. 3d 741, 87 Cal. Rptr. 376, 470 P.2d 360* , is discussed in *§ 210.27[3][b]*.

[e] Vicarious Liability of School District

Gov. Code § 815.2(a) provides that a public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his or her employment if the act or omission would, apart from *Gov. Code § 815.2*, have given rise to a cause of action against that employee or his or her personal representative.

In ***Dailey v. Los Angeles Unified Sch. Dist.*** *(1970) 2 Cal. 3d 741, 87 Cal. Rptr. 376, 470 P.2d 360* , which is discussed in *§ 210.27[3][b]*, the Supreme Court observed that under *Gov. Code § 815.2(a)*, a school district is vicariously liable for the negligence of school personnel in failing to provide adequate supervision (*2 Cal. 3d 741, 747)* . In a footnote, the Court further explained that *Gov. Code § 815.2* carries over to all public entities the respondeat superior liability previously imposed on school districts by former Educ. Code § 903, which provided that the governing board of a school district is liable in the name of the district for any judgment against the district on account of injury to person or property arising because of the negligence of the district, or its officers or employees (*2 Cal. 3d 741, 747 n.3*).

[f] Adequacy of Supervision as Question of Fact

In ***J.H. v. Los Angeles Unified School Dist.*** *(2010) 183 Cal. App. 4th 123, 107 Cal. Rptr. 3d 182* , plaintiff, while she was a seven-year-old second grade student, was sexually assaulted by other students during a voluntary after-school program intended to provide a playground setting for the students in the mid- to late-afternoon hours. While attending the program, plaintiff alleged that she was a reluctant participant in a "kissing club" that included four other students of her age group. The first incident occurred during the after-school program when three of the students encouraged the fourth to kiss plaintiff against her will. Two days later, also during the after-school program, plaintiff was forced into an

unlocked storage shed by the group and slapped repeatedly by one of the girls until she submitted to forced sexually contact with one of the boys. The incidents were reported four days later. Plaintiff sued the school district and supervisory school personnel, as well as the other students and their parents. The trial court granted summary judgment in favor of the school district defendants, concluding both that a school generally has no duty to children participating in voluntary after-school programs and that the school was not in a special relationship with the students involved because the school had no prior knowledge that the instigating students had sexual proclivities towards plaintiff or other students. Plaintiff appealed.

The court of appeal reversed, holding that the school district did owe a duty of care when supervising students in the after-school program. The court noted that, based on principles established in earlier cases, the fact that participation in the after-school school program was voluntary did not preclude a finding that the school was in a special relationship with the students and owed a duty of care to protect them. The school district had told parents that the after-school program would be supervised, although on the day that plaintiff was sexually assaulted in the shed by the other students, the district had provided only one supervisor for 113 students (*183 Cal. App. 4th 123, 142-143)* . The court also noted that California cases have cited the immaturity of children as a factor to consider when determining a school district's duty of care to students. In the case before it, while there was evidence that the playground supervisor told students to stay within a certain area of the playground, the court noted the tendency of young children to act impulsively and disregard directives regarding their own safety and boundaries, and such immaturity might make a shed obscured from view an enticing location for young children looking to act out (*183 Cal. App. 4th 123, 144-145)* . Under the circumstances present, the court concluded that a duty of care was owed by school personnel and issues remained for the trier of fact as to whether the school district breached this duty and, if so, whether the assault was proximately caused by such breach (*183 Cal. App. 4th 123, 148)* .

In ***Charronat v. San Francisco Unified Sch. Dist.*** *(1943) 56 Cal. App. 2d 840, 133 P.2d 643* , plaintiff, an elementary school student, brought an action against the school district for damages allegedly sustained as a result of having his leg broken by another student during the noon hour at school. The trial court, sitting without a jury, entered a judgment for the plaintiff, finding that his injuries were the result of negligent supervision by the defendant. On appeal, the school district contended that under the facts of the case, to hold the district liable would in effect make the school district an insurer of the safety of its pupils. The district based its contention on the argument that it had, in fact, provided adequate supervision. The court of appeals affirmed the judgment for plaintiff, noting that the questions of whether defendant provided proper supervision under the circumstances, and whether the supervisor was negligent, were questions of fact for the trial court (*56 Cal. App. 2d 840, 843-844)* . The court held that the trial court's findings were sustained by substantial evidence (*56 Cal. App. 2d 840, 844)* .

[g] Off-Campus Injury Proximately Caused by Negligent On-Campus Supervision

In ***Hoyem v. Manhattan Beach City Sch. Dist.*** *(1978) 22 Cal. 3d 508, 150 Cal. Rptr. 1, 585 P.2d 851* , plaintiff, a ten-year-old boy, was attending summer classes at a school operated by defendant school district. On one occasion, plaintiff left the school premises before the end of scheduled classes and was struck by a motorcycle on a public street near the school. Plaintiff and his mother brought an action against the district, alleging that the accident and resulting injuries were proximately caused by the school district's negligent supervision. The trial court sustained demurrers to all causes of action and dismissed the action. In reversing the judgment as to the injuries suffered by the minor plaintiff, the Supreme Court held that the allegations of the complaint were sufficient to state a cause of action against the school district (*22 Cal. 3d 508, 523)* . In so holding, the Court rejected the school district's contention that a school district may not be held liable for an off-campus injury. The Court first observed that several California decisions had held a school district liable for such injuries (*22 Cal. 3d 508, 514-515)* . The Court stated that the district's emphasis on situs of the injury was totally misplaced because, contrary to its assertion, no California decision suggests that when a school district fails to properly supervise a student on school premises, the district can automatically escape liability simply because the student's ultimate injury occurs off school property (*22 Cal. 3d 508, 515)* . The Court also held that *Educ. Code § 44808* (relieving school district and personnel from liability for safety or conduct of pupils at any time when

pupils are not on school property, except when district has undertaken to transport them or otherwise has assumed responsibility for their safety or conduct) did not relieve the school district of liability in this case because the statute is, by its own terms, inapplicable when the school district has failed to exercise reasonable care under the circumstances, as was alleged in plaintiff's complaint in this case (*22 Cal. 3d 508, 516-517)* . Moreover, the Court noted that neither *Educ. Code § 44808* nor any case relied on by the district limits in any way a school district's responsibility to supervise students during school hours on school premises (*22 Cal. 3d 508, 518)* .

[h] Failure to Prevent Unauthorized Departure From School

The factual and procedural background of ***Hoyem v. Manhattan Beach City Sch. Dist.*** *(1978) 22 Cal. 3d 508, 150 Cal. Rptr. 1, 585 P.2d 851* , is discussed in *§ 210.27[3][g]*. In holding that the plaintiff's complaint stated a cause of action for negligent supervision, the Supreme Court rejected the school district's contention that the duty to supervise pupils does not include any responsibility for assuring that pupils remain on the school premises during the school day. The Court noted that, as an earlier case pointed out [*see* *Dailey v. Los Angeles Unified Sch. Dist. (1970) 2 Cal. 3d 741, 747, 87 Cal. Rptr. 376, 470 P.2d 360* ; *see also § 210.27[3][b]*], the duty to supervise includes the duty to enforce those rules and regulations necessary for pupils' protection. The Court then cited a state regulation prohibiting pupils from leaving the school premises at recess, or at any other time before the regular hour for closing school, except in case of emergency, or with the approval of the principal of the school, and observed that this rule is no doubt at least partly for the pupils' protection. The Court then held that school authorities bore the duty of exercising ordinary care to enforce the rule (*22 Cal. 3d 508, 514)* .

[i] Foreseeability of Injury to Special Needs Student Inflicted in Hidden Area of Campus

In *Jennifer C. v. Los Angeles Unified School Dist. (2008) 168 Cal. App. 4th 1320, 86 Cal. Rptr. 3d 274* , a 14-year-old female student with a mental disability was sexually assaulted by another student. The assault took place during and immediately after lunch break in an alcove under a stairway along the school's border, after the assailant had requested that plaintiff follow him to the secluded area. While the space in the alcove was visible through a chain-link fence to people on the street walkingpast, the alcove was not visible to school supervisors unless they made a specific effort to go to and look inside the alcove. The area around the alcove was marked with a bright yellow chain to indicate that the area was off-limits to students. A supervisor had checked the alcove about five times during the 30-minute lunch break, the final time being approximately three minutes before the bell rang to end lunch break. Plaintiff and the assailant were discovered in the alcove about 11 minutes after the bell rang after a parent walking outside of campus reported that two students were having sex in the alcove. Prior to this incident, school officials were unaware of any sexual assaults or other illicit activity occurring during school hours in or around the alcove. When suit was brought against the school district on behalf of the student, the trial court granted summary judgment for the district. Plaintiff appealed.

The court of appeal reversed. Recognizing that the law with respect to "special needs" children was still developing, the court of appeal noted that the court in in *M. W. v. Panama Buena Vista School Dist. (2003) 110 Cal. App. 4th 508, 1 Cal. Rptr. 3d 673* , discussed in [4][a], *below*, had recognized the unique vulnerability of such students and imposed a duty of care on a school to protect a child from an assault that took place in a campus restroom that was not adequately monitored. In accordance with the rationale in *M. W.*, the court of appeal concluded that the school district might have breached a duty owed to the special-needs plaintiff in the instant case. In focusing on the issue of whether the assault was foreseeable, the court held that if a school district allows a hidden area to be maintained on campus without taking adequate steps to prevent access by students, the foreseeability of that area being used to inflict injury on a special-needs student may be imputed to the district even without proof of prior incidents of victimization taking place in that hidden area. Thus, the fact that school officials were aware of no earlier assaults or misconduct in the alcove was not dispositive on the issue of whether the school's duty to provide proper supervision extended to providing better supervision over the hidden alcove (*168 Cal. App. 4th 1320, 1328-1329)* . In light of an expert witness declaration supporting the proposition that the school district failed to provide appropriate supervision, the court held that a triable issue of fact remained such that summary judgment was improper (*168 Cal. App. 4th 1320, 1330-1333)* . The court

also held that a triable issue remained on the issue of whether the hidden alcove constituted a dangerous condition of public property within the meaning of *Gov. Code § 835* (*168 Cal. App. 4th 1320, 1333-1335)* .

[4] Additional Authorities

[a] Duty to Supervise Students

In *M. W. v. Panama Buena Vista Union Sch. Dist. (2003) 110 Cal. App. 4th 508, 1 Cal. Rptr. 3d 673* , the plaintiff, a special education student with learning disabilities, was sexually assaulted by another student in a junior high school restroom at 7:15 in the morning before the start of classes. The plaintiff sued the school district for failure to provide adequate supervision, and the jury awarded the plaintiff over $2,000,000 in damages. The court of appeal upheld the judgment, finding that the school district owed the plaintiff a duty of care under the circumstances. The school gates were opened each morning at 7:00, the restrooms were unlocked between 7:00 and 7:45, administrators and staff typically arrived between 7:00 and 7:30, and classes started at 8:15. However, despite the regular presence of early arriving students and the specific knowledge that the plaintiff regularly arrived at school by 7:15, the school did not assign adult supervisors for specific areas to which students had access until 7:45. In addition, the plaintiff's assailant had a long history of disciplinary problems at the school, including over 30 instances of discipline in the previous two years, and the plaintiff had on several occasions complained to school officials that the assailant was bothering him. Under the circumstances, and in consideration of the special needs presented by special education students, the court of appeal concluded that the assault was foreseeable and that the defendant owed the plaintiff a duty to protect him from the assault. The court also noted that it was not necessary that the school specifically foresee the exact nature of the assault (*110 Cal. App. 4th 508, 520-521)* .

In *Lucas v. Fresno Unified Sch. Dist. (1993) 14 Cal. App. 4th. 866, 18 Cal. Rptr. 2d 79* , the court of appeal reversed the granting of a summary judgment motion by the trial court in favor of the school district based on the doctrine of implied assumption of risk. The court held that the school district owed a duty to a student, which was breached, when the student was struck in the eye and injured by a dirt clod thrown by another student while both students were on the school premisesduring a school day at the morning recess. The school district had a duty to supervise students' conduct on school grounds and owed a duty of care to plaintiff student (*14 Cal. App. 4th. 866, 868-869)* .

In *Constantinescu v. Conejo Valley Unified Sch. Dist. (1993) 16 Cal. App. 4th 1466, 20 Cal. Rptr. 2d 734* the court of appeal held a school district liable under *Gov. Code § 835*, relating to the dangerous condition of public property, for negligently supervising a congested school parking lot. The court found that the school district did not exercise reasonable care by failing to erect a barrier between the lot and a sidewalk where children waited to be picked up by parents (*16 Cal. App. 4th 1466, 1474-1476)* .

[b] Adequacy of Supervision as Question of Fact

In *Farley v. El Tejon Unified Sch. Dist. (1990) 225 Cal. App. 3d 371, 274 Cal. Rptr. 780* , the family of an eight-year-old boy killed when hit by an automobile while crossing the road after being dropped off by a school bus brought a wrongful death action against defendant school district, the owner and operator of the bus. Plaintiffs alleged defendant was negligent in dropping off passengers at that location without signaling the red school bus flashers, and that in doing so, defendant violated *Educ. Code § 44808*, regarding the safety of students off school premises when the school has undertaken to provide transportation for students, and a former version of *Veh. Code § 22112*, which requires the driver of a school bus to operate the flashing red signals whenever the bus is stopped to load children who must cross the road to board the bus.

The court of appeal reversed the summary judgment for defendant granted by the trial court, finding that whether the exercise of reasonable care under the circumstances required defendant to supervise the children's safe crossing of the road is a question to be resolved by the trier of fact. The court explained that once a school district supplies

transportation to its pupils, it has the obligation to provide a reasonably safe system. Although defendant argued that it had no duty of care at the time of the accident because the school bus was no longer in sight, and the victim was no longer under the immediate and direct supervision of defendant, the court framed the issue differently. It said that whether or not the victim should have been under the immediate and direct supervision of an employee of defendant depends on whether the exercise of reasonable care under the circumstances required the school bus driver to supervise students crossing the road after being discharged from the bus (*225 Cal. App. 3d 371, 377-380)* .

[c] Off-Campus Injury Proximately Caused by Negligent On-Campus Supervision

In *Eric M. v. Cajon Valley Union School Dist. (2009) 174 Cal. App. 4th 285, 95 Cal. Rptr. 3d 428* , plaintiff was a six-year-old child who initially boarded a school bus to ride home, but was then allowed to leave the bus unattended when she told the driver that she saw her father's car and would ride home with him. The student, realizing that her father was not there, left the school grounds on foot with other students and was hit by a car when walking toward the bus drop-off spot. The trial court granted summary judgment in favor of the school district, but the court of appeal reversed. The court of appeal held that there were triable issues of fact as to whether the school's duty to exercise immediate and direct supervision over its pupils was breached, and that a reasonable juror could conclude that the school's supervision and precautions at the time the buses were loaded and the child was allowed to leave were deficient and constituted a violation of its duty of care (*174 Cal. App. 4th 285, 299)* .

In *Satariano v. Sleight (1942) 54 Cal. App. 2d 278, 129 P.2d 35* , plaintiff, a high school student, was injured when he was struck by an automobile while crossing a public street which ran between the high school gymnasium and the athletic fields. Plaintiff and his parents brought an action against the driver of the automobile and the school district. The trial court entered a judgment of nonsuit after the close of plaintiff's case. On appeal, the court of appeal reversed.

In discussing the liability of the school district, the court of appeal noted that school authorities are entrusted with the safety of children during school hours and that the school authorities are bound to exercise an amount of care for the children's safety during that period commensurate with the immaturity of their charges and the importance of their trust (*54 Cal. App. 2d 278, 284)* . The court rejected the trial court's view that the school district's duty to supervise students ceased once the child was on a public street, noting that in going from the gymnasium to the playing field, the students were still subject to the school authorities and were merely passing from class to class during the regular hours of school and that the public street under these circumstances became in a sense an extension of the school grounds (*54 Cal. App. 2d 278, 284)* . The court concluded that the evidence presented a question of fact for the jury as to whether with knowledge of the dangerous practice of a large part of the students in crossing the street outside of a crosswalk, ordinary care for their protection required school authorities to do more than merely give sporadic warnings to individuals and groups in those accidental instances when teachers happened to be present (*54 Cal. App. 2d 278, 284-285)* .

California Points & Authorities

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 210 SCHOOLS: ACTIONS BY STUDENTS
PART II. FORMS

21-210 California Points & Authorities § 210.28

§ 210.28 Opposing Defendants' Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action for Damages for Personal Injuries Against School District and Employees--Negligent Supervision of Students [Civ. Code § 1714(a); Gov. Code §§ 815.2, 820]--School District as Not Immune From Liability for Injury Sustained on Required Off-Premises School Activity

[1] FORM

[*Caption. See § 210.27.*]

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE GROUND THAT PLAINTIFF WAS MAKING A FIELD TRIP OR EXCURSION AND THEREBY WAIVED ALL CLAIMS AGAINST THE SCHOOL DISTRICT FOR INJURY, ACCIDENT, ILLNESS, OR DEATH OCCURRING DURING OR BECAUSE OF THE FIELD TRIP OR EXCURSION SHOULD NOT BE GRANTED BECAUSE THERE IS A TRIABLE ISSUE OF FACT AS TO WHETHER OR NOT THE SCHOOL ACTIVITY IN WHICH PLAINTIFF PARTICIPATED WAS ONE WHICH HE/SHE WAS REQUIRED TO ATTEND AND FOR WHICH ATTENDANCE CREDIT WAS GIVEN.

A. Duty to Supervise Students. [*See § 210.27, Paragraph A.*]

B. Standard of Care. [*See § 210.27, Paragraph B.*]

C. Lack of Ordinary Care. [*See § 210.27, Paragraph C.*]

D. Vicarious Liability of School District. [*See § 210.27, Paragraph D.*]

E. Adequacy of Supervision as Question of Fact. [*See § 210.27, Paragraph E.*]

F. Duty to Supervise Required Off-Campus School Activities. Students who are off school property for required school purposes are entitled to same safeguards as those who are on school property, within supervisorial limits; where a school-sponsored activity is involved, that is, one that requires attendance and for which attendance credit may be given, the school district is liable and responsible for the safety of any pupil while that pupil is or should be under the immediate and direct supervision of an employee of the district (*Castro v. Los Angeles Bd. of Educ. (1976) 54 Cal.*

App. 3d 232, 236, 126 Cal. Rptr. 537).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to defendants' motion for summary judgment in an action for damages for negligent supervision when the summary judgment is based on the ground that plaintiff has waived his or her cause of action by participating in a field trip or excursion [*see Educ. Code § 35330*]. The ground of opposition set out is that there is a triable issue of fact as to whether or not the activity in which plaintiff participated was a school-sponsored activity for which attendance was required so that there was no waiver of liability.

In an appropriate case, this form may be used in opposition to a motion for summary judgment supported by the points and *authorities in § 210.22*.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated, including arguments showing either the insufficiency of the supporting affidavits or declarations or the existence of a triable issue of fact. In addition, counsel should attach affidavits or declarations which oppose the motion [*see Code Civ. Proc. § 437c*].

[b] Related Pleading and Practice Chapters

For a form of complaint for damages for personal injuries against a school district and its employees based on negligent supervision of students, see California Forms of Pleading and Practice, Ch. 512, *Schools* (Matthew Bender).

[c] Related Memoranda

For memoranda supporting and opposing motions for summary judgment in actions against public entities generally, see Ch. 196, *Public Entities* . For memoranda relating to motions for summary judgment generally, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Duty to Supervise Required Off-Campus School Activities

The factual and procedural background of ***Castro v. Los Angeles Bd. of Educ.*** *(1976) 54 Cal. App. 3d 232, 126 Cal. Rptr. 537* , is discussed in *§ 210.22[3][a]*. The court of appeal held that although students who participate in nonrequired trips or excursions are effectively on their own because of the deemed waiver provision of former Educ. Code § 1081.5 [*now see Educ. Code § 35330*], students who are off school property for required school purposes are entitled tothe same safeguards as those who are on school property, within supervisorial limits. Thus, the court concluded, when a "school-sponsored activity" is involved (that is, one that requires attendance and for which attendance credit may be given), the district is liable for the safety of any pupil while he or she is under the immediate and direct supervision of a district employee (*54 Cal. App. 3d 232, 236)* .

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21-210 California Points & Authorities § 210.29

§ 210.29 Opposing Defendants' Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action for Damages for Personal Injuries Against School District and Employees--Negligent Supervision of Students [Civ. Code § 1714(a); Gov. Code §§ 815.2, 820]--Cause of Action Exists for Failure to Warn of Other Student's Violent Tendencies

[1] FORM

[*Caption. See § 210.27.*]

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, MADE ON THE GROUND THAT NO BREACH OF DUTY COULD BE ESTABLISHED UNDER THE FACTS ALLEGED IN THE COMPLAINT, SHOULD BE DENIED BECAUSE A SCHOOL DISTRICT MAY BE HELD LIABLE FOR A SCHOOL ADMINISTRATOR'S FAILURE TO WARN A SUPERVISING TEACHER OF A STUDENT'S VIOLENT TENDENCIES.

A. Rules Governing Summary Judgment Procedure. [*See § 210.27, Paragraph A.*]

B. Duty to Supervise Students. [*See § 210.27, Paragraph B.*]

C. Standard of Care. [*See § 210.27, Paragraph C.*]

D. Lack of Ordinary Care. [*See § 210.27, Paragraph D.*]

E. Vicarious Liability of School District. [*See § 210.27, Paragraph E.*]

F. Adequacy of Supervision as Question of Fact. [*See § 210.27, Paragraph F.*]

G. School District May Be Held Liable for Damages Based on Failure to Warn. A school district may be held liable for damages to a student for injuries suffered in an attack by another student, based on a school administrator's failure to warn the supervising teacher of the attacking student's violent tendencies (*Skinner v. Vacaville Unified Sch. Dist. (1995) 37 Cal. App. 4th 31, 42, 43 Cal. Rptr. 2d 384*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a defendant'smotion for summary judgment in an action for damages for negligent supervision when the motion is based on the ground that an administrator's failure to warn the supervising teacher of the attacking student's known violent tendencies cannot give rise to a cause of action. The ground of opposition set out is that a school district may be held liable for a school administrator's failure to warn a supervising teacher of a student's violent tendencies.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence showing a failure to warn, and that the administrator had knowledge of the attacking student's violent tendencies, and should argue that the school district is liable for damages resulting from a breach of the duty to warn [*see Skinner v. Vacaville Unified Sch. Dist. (1995) 37 Cal. App. 4th 31, 42, 43 Cal. Rptr. 2d 384]* .

[c] Related Pleading and Practice Chapters

For discussion and forms relating to negligence, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender).

[3] Discussion of Authorities

[a] School District May Be Held Liable for Damages Based on Failure to Warn

In ***Skinner v. Vacaville Unified Sch. Dist.*** *(1995) 37 Cal. App. 4th 31, 43 Cal. Rptr. 2d 384* , a former student brought a negligence action against a school district for injuries she suffered in an attack by another student. The incident occurred during a volleyball game in a high school physical education class with the physical education teacher standing at a distance of 20 to 30 feet from the volleyball court. Plaintiff sought to prove that the school's principal and vice-principal were negligent in the administration of discipline by failing to warn the physical education teacher of the student's proclivity toward fighting. In a special verdict, the jury found that the District was negligent in failing to protect plaintiff. The District appealed the decision.

Although it reversed the judgment on other grounds, the court of appeal ruled that the evidence would support a finding that the school administrators breached their duty of care toward students under their supervision by failing to notify the physical education teacher of the student's prior record of fighting (*37 Cal. App. 4th 31, 42-43)* . Plaintiff argued that a school district's duty to warn could be based both on statutory grounds and on general principles of negligence. The court of appeal concluded that the verdict could not be upheld on statutory grounds because the trial court had failed to instruct on the requirements of proximate cause incorporated in *Gov. Code § 815.6* (*37 Cal. App. 4th 31, 40)* . As to the negligence theory, the court acknowledged that the duty issue was very close since the student had not inflicted physical injury on other students, but had shown an inordinate tendency to engage in mutual combat that often led to injuries (*37 Cal. App. 4th 31, 42)* . Ultimately, the court determined that the evidence would support a finding that the school administrators breached their duty of care toward plaintiff, a student under their supervision, by failing to notify

the physical education teacher of the aggressor student's record of fighting (*37 Cal. App. 4th 31, 42)* . Despite the court's ruling on the duty issue, the court reversed the judgment on other grounds, ruling that the record could not support for the jury's finding on causation (*37 Cal. App. 4th 31, 43)* .

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21-210 California Points & Authorities § 210.30

§ 210.30 Opposing Defendant's Motion for Summary Judgment [Code Civ. Proc. § 437c] in Action for Damages for Personal Injuries Against School District and Employees--Negligent Supervision of Students [Civ. Code § 1714(a); Gov. Code §§ 815.2, 820]--School District Not Immune Under "Hazardous Recreational Activity" Immunity [Gov. Code § 831.7] From Liability for Injury Sustained During Physical Education Class Conducted on School Property

[1] FORM

[*Caption. See § 210.27.*]

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE THE STATUTORY IMMUNITY FOR A SCHOOL DISTRICT AND ITS EMPLOYEES BASED ON "RECREATIONAL ACTIVITIES" IS INAPPLICABLE TO INJURIES SUSTAINED ON SCHOOL GROUNDS DURING A PHYSICAL EDUCATION CLASS REQUIRED BY THE SCHOOL AND CONDUCTED DURING SCHOOL HOURS.

A. Rules Governing Summary Judgment Procedure. [*See § 210.27, Paragraph A.*]

B. Required Physical Education Class Is Not "Recreational Activity." A body contact sport incorporated into a schooltime physical education class is not a "recreational activity" within the meaning of *Government Code Section 831.7*, which provides qualified immunity to public entities and employees for injuries sustained by a person during "hazardous recreational activity" (*Iverson v. Muroc Unified Sch. Dist. (1995) 32 Cal. App. 4th 218, 227, 38 Cal. Rptr. 2d 35*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to defendants' motion for summary judgment in an action for damages for negligent supervision, when the motion is based on the ground that defendant is immune from liability under *Gov. Code § 831.7*. The ground for opposing defendants' summary judgment motion is that *Gov. Code § 831.7* is inapplicable to injuries sustained on school grounds during a class required by the school and conducted during school hours.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that defendant is liable, or at least is not immune from liability, for damages from personal injury. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence of injuries occurring on school grounds during a class required by the school and conducted during school hours, and argue that, because the injuries were not incurred during activities that are "recreational" within the meaning of *Gov. Code § 831.7*, the immunity statute is inapplicable [*see Iverson v. Muroc Unified Sch. Dist. (1995) 32 Cal. App. 4th 218, 227, 38 Cal. Rptr. 2d 35]* .

[c] Related Pleading and Practice Chapters

For a form of complaint for damages for personal injuries against a school district and its employees based on negligent supervision of students, see California Forms of Pleading and Practice, Ch. 512, *Schools* (Matthew Bender).

[d] Related Memoranda

For memoranda relating to summary judgment generally, see Ch. 221, *Summary Judgments* . For memoranda supporting and opposing motions for summary judgment in actions against public entities generally, see Ch. 196, *Public Entities* .

[3] Discussion of Authorities

[a] Required Physical Education Class Is Not "Recreational Activity"

In ***Iverson v. Muroc Unified Sch. Dist.*** *(1995) 32 Cal. App. 4th 218, 38 Cal. Rptr. 2d 35* , a 14-year-old student brought a negligence action against a school district and a physical education teacher for injuries sustained in a soccer match. The soccer match took place on a school field during an eighth grade physical education class conducted during regular school hours. The student alleged that the district negligently instructed and supervised its students engaged in the class. The district moved for summary judgment on the ground that *Gov. Code § 831.7*, which provides qualified immunity to public entities and employees for injuries sustained by a person during "hazardous recreational activity," immunized them from liability for the student's injuries. The trial court concluded that immunityattached as a matter of law and granted the summary judgment. The student appealed.

The court of appeal reversed, holding that the trial court erred in concluding that *Gov. Code § 831.7* applied. The court first examined the legislative intent behind the statute, which was to protect public entities from lawsuits when recreational users engage in dangerous activities on public property and are injured. It then concluded that a body contact sport incorporated into a school time physical education class is not a "recreational activity" within the meaning of § 831.7, hazardous as that activity may be in the abstract. The court further reasoned that application of § 831.7 to activities that are a part of a school's physical education program would constitute a major revision of California law

with respect to school district tort liability. The court concluded that as a matter of law, § 831.7 was inapplicable to injuries sustained on school grounds during a physical education class required by the school and conducted during school hours (*32 Cal. App. 4th 218, 227)* .

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21-210 California Points & Authorities § 210.30A

§ 210.30A Opposing Defendants' Motion to Dismiss [Fed. R. Civ. P., Rule 12(b)(6)] Action for Damages for Violation of 42 U.S.C.S. § 1983 Against School Officials and Employees--Use of Excessive Force in Violation of U.S. Const. amends. IV, XIV

[1] FORM

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF
CALIFORNIA, _____ DIVISION

_____ [*name*],	)	
Plaintiff,	)	Civil Action, File No._____
Proc.	)	MEMORANDUM OF POINTS AND AUTHORIT-
	)	IES OPPOSING MOTION TO DISMISS
	)	PLAINTIFF'S ACTION FOR FAILURE TO STATE CLAIM ON WHICH RELIEF CAN BE GRANTED [*Fed. R. Civ. P., Rule 12(b)(6)*]

_____

PLAINTIFF'S COMPLAINT FOR DAMAGES ALLEGING USE OF EXCESSIVE FORCE BY _____ [TEACHER *or specify other school official*] IN VIOLATION OF THE *FOURTH* AND *FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION* STATES A CLAIM ON WHICH THIS COURT CAN GRANT RELIEF AGAINST DEFENDANTS AND SHOULD NOT BE DISMISSED.

A. Complaint Does Not Fail to State Claim on Which Court Can Grant Relief and Should Not Be Dismissed Under *Fed. R. Civ. P., Rule 12(b)(6)*. [*See § 210.23, Paragraph A.*]

B. Plaintiff Has Alleged Facts Sufficient to Show That Force Used Against Plaintiff Was Excessive. Excess force by a school official against a student violates the student's constitutional rights (*Preschooler II v. Clark County School Board of Trustees (9th Cir. 2007) 479 F.3d 1175, 1180* ; *P.B. v. Koch (9th Cir. 1996) 96 F.3d 1298, 1302-1303)* . The

consequences of a teacher's use of force against a school student are generally analyzed under the "reasonableness" rubric of the *Fourth Amendment*, and historically courts have applied a substantive due process analysis under the *Fourteenth Amendment's* "shocks the conscience" test (*Preschooler II v. Clark County School Board of Trustees (9th Cir. 2007) 479 F.3d 1175, 1180* ; *see Doe v. Haw. Dep't. of Educ. (9th Cir. 2003) 334 F.3d 906, 908-909* , *quoting New Jersey v. T.L.O. (1985) 469 U.S. 325, 342, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985)* .

C. Student's Right to Be Free From Use of Excessive Force Was Established at Time of Alleged Events, and Reasonable _____ [Teacher *or name other school official*] Would Not Have Believed _____ [His *or* Her] Actions Were Lawful. Since as early as 1977, public school students have had a constitutional due process right to be free from and obtain judicial relief for unjustified intrusions on personal security (*Preschooler II v. Clark County School Board of Trustees (9th Cir. 2007) 479 F.3d 1175, 1181* , *quoting Ingraham v. Wright (1977) 430 U.S. 651, 673, 97 S. Ct. 1401, 51 L. Ed. 2d 711*). Arbitrary corporal punishment represents an invasion of personal security to which their parents do not consent when entrusting the educational mission to the State (*Preschooler II v. Clark County School Board of Trustees (9th Cir. 2007) 479 F.3d 1175, 1181* , *quoting Sandin v. Conner (1995) 515 U.S. 472, 485, 115 S. Ct. 2293, 132 L. Ed. 2d 418*). Excessive and unreasonable corporal punishment of public school students violates the students' constitutional rights (*Preschooler II v. Clark County School Board of Trustees (9th Cir. 2007) 479 F.3d 1175, 1182* ; *P.B. v. Koch (9th Cir. 1996) 96 F.3d 1298, 1304)* .

[*Optional*] **D. School Officials May Be Liable in Supervisory Capacity and For Failure to Remediate.** Under *42 U.S.C.S. § 1983*, a supervisor is liable for the acts of subordinates if the supervisor participated in or directed the violations or knew of the subordinates' violations and failed to act to prevent them (*Preschooler II v. Clark County School Board of Trustees (9th Cir. 2007) 479 F.3d 1175, 1182* ; *Taylor v. List (9th Cir. 1989) 880 F.2d 1040, 1045)* . Supervisory liability is also imposed against a supervisory official in an individual capacity for the supervisor's own culpable action or inaction in the training, supervision, or control of subordinates, for acquiescence in the constitutional deprivations of which the complaint is made, or for conduct that showed a reckless or callous indifference to the rights of others (*Preschooler II v. Clark County School Board of Trustees (9th Cir. 2007) 479 F.3d 1175, 1183* ; *Menotti v. City of Seattle (9th cir. 2005) 409 F.3d 1113, 1149)* . A person subjects another to the deprivation of a constitutional right within the meaning of § 1983, if the person does an affirmative act, participates in another's affirmative act, or omits to perform an act which the person is legally required to do that causes the deprivation of which complaint is made (*Preschooler II v. Clark County School Board of Trustees (9th Cir. 2007) 479 F.3d 1175, 1182* ; *Johnson v. Duffy (9th Cir. 1978) 588 F.2d 740, 743)* . The requisite causal connection may be established when an official sets in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict constitutional harms (*Preschooler II v. Clark County School Board of Trustees (9th Cir. 2007) 479 F.3d 1175, 1183)* . In opposing a motion to dismiss, plaintiff need not show with great specificity how each defendant contributed to the violation of plaintiff's constitutional rights. Rather, plaintiff must state the allegations generally so as to provide notice to the defendants and alert the court as to what conduct violated clearly established law. (*Preschooler II v. Clark County School Board of Trustees (9th Cir. 2007) 479 F.3d 1175, 1182* ; *see Hydrick v. Hunter (9th Cir. 2006) 466 F.3d 676, 689-690)* . Plaintiff's allegations are sufficiently specific to meet this pleading requirement.
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a plaintiff's motion under *Fed. R. Civ. P., Rule 12(b)(6)* to dismiss a complaint in an action against a school district and its employees for damages based on the use of excessive force against a student by school officials.

Where appropriate, counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. In addition, counsel should attach affidavits or declarations that support the motion.

For discussion of motions to dismiss a federal court action under *Fed. R. Civ. P., Rule 12(b)(6)* for failure to state a claim for relief, see *Moore's Federal Practice--Civil, Ch. 12, § 12.34* (Matthew Bender).

[b] Related Uses

With appropriate modifications, these points and authorities may be used to oppose a motion for summary judgment brought under *Fed. R. Civ. P., Rule 12(b)(6)*. For discussion of motions for summary judgment in federal court actions generally, see Moore's Federal Practice--Civil, Ch. 56 (Matthew Bender).

[c] Related Memoranda

For memoranda supporting and opposing motions for summary judgment in actions against public entities generally, see Ch. 196, *Public Entities* . For memoranda relating to motions for summary judgment, generally, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Excessive Use of Force Against Student

In ***Preschooler II v. Clark County School Board of Trustees*** *(9th Cir. 2007) 479 F.3d 1175* , a four-year old preschool student, who had been diagnosed with tuberous sclerosis, a neurological disease that caused tumors to form in variousorgans, primarily in the brain, eyes, heart, kidneys, skin, and lungs, and who suffered from non-verbal autism, alleged that his teacher physically abused him on repeated occasions by assaulting and slapping him repeatedly, hitting his head and face; by body slamming him into a chair; and by forcing him to walk without shoes across the asphalt from the school bus to the classroom. After unsuccessful administrative proceedings, the child's mother filed suit in federal court, alleging causes of action for violation of the Americans with Disabilities Act, the Rehabilitation Act, and *42 U.S.C. § 1983* based on the *Fourth* and *Fourteenth Amendments*; supervisory liability; and various state law claims. The school officials moved to dismiss for failure to state a claim upon which relief can be granted and asserted qualified immunity with respect to the cause of action under § 1983. The district court denied the motion to dismiss as to all claims. The court also denied qualified immunity on the ground that plaintiff had alleged conduct sufficient to support a claim for constitutional deprivation under the *Fourth* and *Fourteenth Amendments* and violations of clearly established law. Officials appealed on the qualified immunity issue (*479 F.3d 1175, 1178-1179)* .

The Ninth Circuit held that the physical abuse allegations rose to the level of constitutional violations. The consequences of a teacher's force against a student at school are generally analyzed under the "reasonableness" rubric of the *Fourth Amendment*. Historically courts applied substantive due process analysis under the *Fourteenth Amendment's* "shocks the conscience" test. The court found that the teacher's seizure of the preschooler and her alleged slapping, forced participation in self-beating and slamming were unreasonable in light of the child's age and disability and the context of the events. He posed no danger to anyone nor was he disruptive in the classroom, and he was more vulnerable than the average pre-school child. The beating, slapping, and slamming by the teacher violated the *Fourth Amendment's* prohibition of the use of excessive force against public schoolchildren (*479 F.3d 1175, 1180)* .

[b] Law Clearly Established

The facts and procedure in ***Preschooler II v. Clark County School Board of Trustees*** *(9th Cir. 2007) 479 F.3d 1175* , are discussed in [a], *above*. The alleged abuse in that case took place between 2002-2003. The Ninth Circuit found that at that time, the right of public school students to be free from excessive force imposed by their teachers was uncontroverted (*479 F.3d 1175, 1181)* . In light of the clear constitutional prohibition of excessive physical abuse of schoolchildren, and the heightened protections for disabled pupils, no reasonable special education teacher would have believed that it was lawful to force a seriously disabled four year old child to beat himself or to violently throw or slam him, so that the teacher was not entitled to qualified immunity for the alleged head beating and slamming assaults on the child (*479 F.3d 1175, 1182)* .

[c] Supervisory Liability

The facts and procedure in ***Preschooler II v. Clark County School Board of Trustees*** *(9th Cir. 2007) 479 F.3d 1175* , are discussed in [a], *above*. The plaintiff alleged that school officials were on notice of the violent and unlawful conduct ongoing in the classroom before and during the time plaintiff was abused, and they failed to act to prevent further harm to him and related several events to support the notice allegation. Further, the school principal and district personnel failed to report the incidents as required by state statute, or to correct the situation. Plaintiff alleged that the superintendent, administrative personnel and the principal were individually liable under § 1983 for their inaction in the training, supervision and control of the teacher. He also alleged that the officials showed a reckless and callous indifference to his rights by permitting the teacher to continue to work with him, knowing she posed a safety risk to the children, and by not reporting or remediating the alleged abuse when they became aware of it. The Ninth Circuit found that although there is no pure *respondeat superior* liability under § 1983, a supervisor is liable for the acts of his subordinates if the supervisor participated in or directed the violations, or knew of the subordinates' violations and failed to act to prevent them (*479 F.3d 1175, 1182)* . The court also found that at this early stage of the proceedings, the plaintiff did not need to show with great specificity how each defendant contributed to the violation of his constitutional rights. Rather, he needed to state the allegations generally so as to provide notice to the defendants and alert the court as to what conduct violated clearly established law, and that the complaint were sufficiently specific to meet the pleading requirement (*479 F.3d 1175, 1182)* . The court also found that it has been clearly established that supervisory liability is imposed against a supervisory official in an individual capacity for the supervisor's own culpable action or inaction in the training, supervision, or control of subordinates, acquiescence in the constitutional deprivations of which the complaint is made, or conduct that showed a reckless or callous indifference to the rights of others. The requisite causal connection may be established when an official sets in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict constitutional harms (*479 F.3d 1175, 1183)* . In this case, the alleged acts and omissions on the part of the officials, if proven true, established that they were liable for the violation of clearly established constitutional rights, because they demonstrated disregard of their responsibilities in hiring, training, supervising, disciplining and reporting abuses committed by the teacher, and that a reasonable special education school official would have known that the teacher's alleged abusive conduct, and the failure of other special education officials to address that conduct, were grounds for liability (*479 F.3d 1175, 1183)* .

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 210 SCHOOLS: ACTIONS BY STUDENTS
PART II. FORMS

21-210 California Points & Authorities § 210.31

§ 210.31 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5] of Governing Board of School District and County Board of Education [Educ. Code §§ 48918, 48923]--Expulsion of Public School Student--Denial of Due Process

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name of pupil*],	)	NO. _____
[a minor, by _____ (*name*), his/her	)	MEMORANDUM OF POINTS AND AUTHORITIES _____ [IN SUPPORT OF *or* IN OPPOSITION TO] PETITION FOR WRIT OF MANDATE
Guardian ad Litem], and _____	)	[*Code Civ. Proc. §§ 1085, 1086, 1094.5*]
[*name of parent*],	)	Date: _____
Petitioners,	)	Time: _____
vs.	)	Location: _____
_____ [*names*],	)	[Judge: _____]
Respondents.	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

MANDATE IS PROPER BECAUSE THE PROCEDURE FOLLOWED BY RESPONDENT GOVERNING BOARD OF RESPONDENT SCHOOL DISTRICT IN EXPELLING PETITIONER FROM SCHOOL DENIED PETITIONER DUE PROCESS.

A. Decisions Reviewable in Mandate Proceeding. A final administrative order or decision is reviewable in a mandate proceeding if it was the result of an administrative proceeding in which a hearing was required by law for the purpose of taking evidence on the basis of which the agency had discretion to determine relevant facts (*Code Civ. Proc. § 1094.5(a)*).

B. Expulsion Order as Reviewable by Mandate. A decision by the governing board of a school district to expel a student is reviewable in a mandate proceeding(*see Code Civ. Proc. § 1094.5(a)*; *Educ. Code § 48918*; *Miller v. Dailey (1902) 136 Cal. 212, 214-220, 68 P. 1029* ; *Fremont Union High Sch. Dist. v. Santa Clara County Bd. of Educ. (1991) 235 Cal. App. 3d 1182, 286 Cal. Rptr. 915* ; *Garcia v. Los Angeles County Bd. of Educ. (1981) 123 Cal. App. 3d 807, 809, 813, 177 Cal. Rptr. 29* ; *Noonan v. Green (1969) 276 Cal. App. 2d 25, 26-31, 80 Cal. Rptr. 513* ; *Myers v. Arcata Union High Sch. Dist. (1969) 269 Cal. App. 2d 549, 552, 563, 75 Cal. Rptr. 68*).

C. Inquiry in Mandate Proceeding. The inquiry in a mandate proceeding to review a final administrative adjudicatory order or decision extends to the questions of whether the agency has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion established by the agency not proceeding in the manner required by law, the order or decision not being supported by the findings, or the findings not being supported by the evidence (*Code Civ. Proc. § 1094.5(b)*).

D. Authority of School District to Discipline Students. Although a school district has the authority to maintain discipline in the schools and to suspend or expel a pupil for misconduct or for refusal or failure to obey school rules, the district must exercise this authority in a manner that satisfies statutory and constitutional standards for disciplinary proceedings (*Abella v. Riverside Unified Sch. Dist. (1976) 65 Cal. App. 3d 153, 167, 135 Cal. Rptr. 177*).

E. Due Process as Required in Student Disciplinary Proceedings. When the state has established a right to a public education, that right is a property interest that may not be taken away for misconduct without adherence to the minimum procedures required by due process (*Goss v. Lopez (1975) 419 U.S. 565, 574, 95 S. Ct. 729, 42 L. Ed. 2d 725*).

[*Optional*] **F. Notice and Hearing as Required.** At the very minimum, due process requires that students who are threatened with removal from school be entitled to notice of the grounds for removal and an opportunity to be heard (*Abella v. Riverside Unified Sch. Dist. (1976) 65 Cal. App. 3d 153, 169, 135 Cal. Rptr. 177* ; *see Educ. Code § 48918* (requiring governing board of each school district to establish rules and regulations governing, and imposing minimum procedures for, expulsion of pupils, including written notice, hearing, service of process, and applicable evidentiary rules); *Educ. Code § 48918.5* (rules and regulations governing expulsion hearings involving sexual assault or battery)).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition to a superior court for a writ of mandate to review the administrative decision by the governing board of a school district to expel a student when the procedure followed by the board denied the student due process.

Optional Paragraph F should be included when the board expelled the student without giving notice of the grounds for

expulsion or affording the student an opportunity to be heard.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Chapters

For a form of petition for writ of mandate to review a decision by the governing board of a school district to expel a student, see California Forms of Pleading and Practice. Ch. 512, *Schools* (Matthew Bender).

[c] Related Memoranda

For memoranda supporting a petition for writ of mandate to review administrative adjudicatory decisions generally, see Ch. 195, *Public Administrative Law* . For memoranda supporting petitions for writs of mandate generally, see Ch. 150, *Mandate and Prohibition* .

[3] Discussion of Authorities

[a] Expulsion Order as Reviewable by Mandate

In ***Noonan v. Green*** *(1969) 276 Cal. App. 2d 25, 80 Cal. Rptr. 513* , the court of appeal reversed a judgment granting issuance of a writ of mandate, but did not discuss the propriety of the mandate proceeding. Instead, the court based its decision on the failure of the student to exhaust her administrative remedies, including appeal to the county board of education (*276 Cal. App. 2d 25, 31)* .

NOTE:

Although *Educ. Code § 48924* states that the decision of the county board of education in an appeal from an expulsion order is "final and binding" on the pupil and the governing board of the school district, it appears that a decision to expel a student may, nevertheless, be reviewed judicially in a mandate proceeding. *Code Civ. Proc. § 1094.5(a)* provides for judicial review by mandate for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in an inferior tribunal, corporation, board, or officer. *Educ. Code § 48918* specifically requires that a hearing be held to determine whether a pupil should be expelled, that evidence be taken at the hearing, and that the governing board or a hearing officer or administrative panel appointed by it determine the facts and render a decision. Although no reported decision has expressly considered the question of the propriety of a mandate proceeding to review the expulsion of a pupil, several appellate decisions have affirmed trial court judgments ordering issuance of a writ of mandate to overturn an expulsion order or reversed judgments denying issuance of such a writ [*see, e.g., Miller v. Dailey (1902) 136 Cal. 212, 214-220, 68 P. 1029* ; *Fremont Union High Sch. Dist. v. Santa Clara County Board of Educ. (1991) 235 Cal. App. 3d 1182, 286 Cal. Rptr. 915* ; *Garcia v. Los Angeles County Bd. of Educ. (1981) 123 Cal. App. 3d 807, 809, 813, 177 Cal. Rptr. 29* ; *Myers v. Arcata Union High Sch. Dist. (1969) 269 Cal. App. 2d 549, 552, 563, 75 Cal. Rptr. 68]* .

[b] Authority of School District to Discipline Students

Abella v. Riverside Unified Sch. Dist. *(1976) 65 Cal. App. 3d 153, 135 Cal. Rptr. 177* , was an appeal from a superior court judgment holding that the school district had legally exempted the plaintiff from school attendance under former Educ. Code § 12152. Plaintiff, who had disciplinary problems, was excluded from school over the objection of her mother, following a conference between her mother and several school officials. The school district based its decision on former Educ. Code § 12152 which exempts from compulsory school attendance any child whose physical or mental

condition is such as to prevent, or render inadvisable, attendance at school or application to study, on presentation to the governing board of satisfactory evidence of the condition.

The court of appeal reversed. It first held that former Educ. Code § 12152 does not establish grounds for involuntary removal of a child from public school attendance (*65 Cal. App. 3d 153, 160)* . The court also held that plaintiff had not been properly excluded under former *Educ. Code § 10553* (authorizing governing board to exclude from attendance at school any child whose physical or mental disability is such as to cause his or her attendance to be inimical to the welfare of other pupils) because the evidence showed that plaintiff was excluded for disciplinary reasons and not because of any mental or physical disability (*65 Cal. App. 3d 153, 165-167)* .

The court then noted that although the school district does have authority to maintain discipline in the schools and to suspend or expel a pupil for refusal or neglect to obey school rules or for other misconduct, that authority must be exercised in a manner that satisfies statutory and constitutional standards for disciplinary proceedings (*65 Cal. App. 3d 153, 167)* . The court concluded that the procedure followed by the school district in excluding plaintiff from school denied her due process of law (*65 Cal. App. 3d 153, 167-170)* .

[c] Due Process as Required in Student Disciplinary Proceedings

Goss v. Lopez *(1975) 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725* , was an appeal from the judgment of a three-judge federal court holding that an Ohio statute that permitted the principal of a public school to suspend a student for up to 10 days without notice or hearing violated the Due Process Clause of *U.S. Const. amend. XIV*. The United States Supreme Court affirmed the judgment. The Court noted that although a state may not be constitutionally obligated to establish and maintain a public school system, Ohio had in this case done so and had required its children to attend. The Court stated that although the authority possessed by the state to prescribe and enforce standards of conduct in its schools is concededly very broad, that authority must be exercised consistently with constitutional safeguards. Thus, the Court held, the state is constrained to recognize a student's legitimate entitlement to a public education as a property interest that is protected by the Due Process Clause and that may not be taken away for misconduct without adherence to the minimum procedures required by that clause (*419 U.S. 565, 574)* . The Court then concluded that the Ohio suspension procedure violated due process (*419 U.S. 565, 577-584)* .

[d] Notice and Hearing as Required

The procedural and factual background of ***Abella v. Riverside Unified Sch. Dist.*** *(1976) 65 Cal. App. 3d 153, 135 Cal. Rptr. 177* , is discussed in *§ 210.31[3][b]*. The plaintiff was involuntarily excluded from school by the school district under former Educ. Code § 12152. In reversing a judgment holding that the exclusion was lawful, the court of appeal noted that the opportunity for instruction at public expense is provided by the laws of this state in response to the mandate of the California Constitution (*65 Cal. App. 3d 153, 167)* , and that this right has been held to be a fundamental interest. The court stated that the legislature has been zealous in establishing precise standards and procedural safeguards to insure that children are not arbitrarily denied their right to a free public education without due cause and an opportunity to be heard. However, noted the court, use of the exemption procedure to exclude a child for a behavior problem denied plaintiff the protection afforded by those statutes (*65Cal. App. 3d 153, 168)* . The court held that due process required, at the very minimum, that students threatened with removal from school, depriving them of the fundamental right to a publicly financed education, be given notice of the grounds for the removal and an opportunity to be heard (*65 Cal. App. 3d 153, 169)* .

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 210 SCHOOLS: ACTIONS BY STUDENTS
PART II. FORMS

21-210 California Points & Authorities § 210.32

§ 210.32 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5] of Governing Board of School District and County Board of Education [Educ. Code §§ 48918, 48923]--Expulsion of Public School Student--Improper Grounds for Expulsion

[1] FORM

[*Caption. See § 210.31.*]

MANDATE IS PROPER BECAUSE RESPONDENT GOVERNING BOARD OF RESPONDENT SCHOOL DISTRICT EXPELLED PETITIONER FOR IMPROPER GROUNDS.

A. Decisions Reviewable in Mandate Proceeding. [*See § 210.31, Paragraph A.*]

B. Expulsion Order as Reviewable by Mandate. [*See § 210.31, Paragraph B.*]

C. Inquiry in Mandate Proceeding. [*See § 210.31, Paragraph C.*]

D. Permissible Grounds for Expulsion. A pupil may not be suspended from school nor recommended for expulsion unless the superintendent or the principal of the school in which the pupil is enrolled determines that the pupil committed one of the acts enumerated in *Education Code Section 48900*. A pupil may be suspended or recommended for expulsion for the following acts (*Educ. Code § 48900*): (1) causing, attempting to cause, or threatening to cause physical injury to another person, or willfully using force or violence on another person, except in self-defense; (2) possessing, selling, or otherwise furnishing any firearm, knife, explosive, or other dangerous object, unless, in the case of possession of such objects, the pupil has obtained written permission to possess the item from a certificated school employee, which is concurred in by the principal or the principal's designee; (3) unlawfully possessing, using, selling, or otherwise furnishing, or being under the influence of any controlled substance listed in *Health and Safety Code Sections 11053 et seq.*, an alcoholic beverage, or an intoxicant of any kind; (4) unlawfully offering, arranging, or negotiating to sell any controlled substance listed in *Health and Safety Code Sections 11053 et seq.*, an alcoholic beverage, or an intoxicant of any kind, and then either selling, delivering, or otherwise furnishing to any person another liquid, substance, or material and representing the liquid, substance, or material as a controlled substance, alcoholic beverage, or intoxicant; (5) committing or attempting to commit robbery or extortion; (6) causing or attempting to cause damage

to school property (as defined in *Education Code Section 48900(t)*) or private property; (7) stealing or attempting to steal school property (as defined in *Education Code Section 48900(t)*) or private property; (8) possessing or using tobacco, or any products containing tobacco or nicotine products, including but not limited to cigarettes, cigars, miniature cigars, clove cigarettes, smokeless tobacco, snuff, chew packets, and betel; however, a pupil is not prohibited from using or possessing his or her own prescription products; (9) committing an obscene act or engaging in habitual profanity or vulgarity; (10) unlawfully possessing, offering, arranging, or negotiating to sell any drug paraphernalia, as defined in *Health and Safety Code Section 11014.5*; (11) disrupting school activities or otherwise willfully defying the valid authority of supervisors, teachers, administrators, school officials, or other school personnel engaged in the performance of their duties; (12) knowingly receiving stolen school property or private property; (13) possessing an imitation firearm as defined in *Education Code Section 48900(m)*; (14) committing or attempting to commit a sexual assault as defined in *Penal Code Section 261*, *266c*, *286*, *288*, *288a*, or *289*, or committing a sexual battery as defined in *Penal Code Section 243.4*; (15) harassing, threatening, or intimidating a pupil who is a witness in a school disciplinary proceeding for the purpose of preventing that pupil from being a witness or of retaliating against that pupil for being a witness, or both; (16) unlawfully offering, arranging to sell, negotiating to sell, or selling the prescription drug Soma; (17) engaging in, or attempting to engage in, hazing; and (18) engaging in the act of bullying, including, but not limited to, bullying committed by means of an electronic act, as defined by *Educ. Code § 32261(f), (g)*, directed specifically toward a pupil or school personnel. A pupil may not be suspended or expelled for any of the acts enumerated unless that act is related to school activity or school attendance occurring within a school under the jurisdiction of the superintendent or principal or occurring within any other school district. A pupil may be suspended or expelled for any of the acts that are related to school activity or attendance that occur at any time, including, but not limited to, any of the following: (1) while on school grounds; (2) while going to or coming from school; (3) during the lunch period, whether on or off the campus; and (4) during, or while going to or coming from, a school sponsored activity [*Educ. Code § 48900(s)*]. A pupil who aids or abets, as defined in *Penal Code Section 31*, the infliction or attempted infliction of physical injury to another may be suspended, but not expelled, except that a pupil adjudged by a juvenile court to have committed, as an aider and abettor, a crime of physical violence in which the victim suffered great bodily injury or serious bodily injury, is subject to recommendation for expulsion (*Educ. Code § 48900(t)*).

[*Optional*] **E. Additional Ground of Sexual Harassment.** In addition to the reasons specified in *Education Code Section 48900*, a pupil enrolled in grade four or higher may be suspended from school or recommended for expulsion if the superintendent or the principal of the school in which the pupil is enrolled determines that the pupil has committed sexual harassment, as defined in *Education Code Section 212.5*. For this purpose, the conduct must be considered by a reasonable person of the same gender as the victim to be sufficiently severe or pervasive to have a negative impact on the victim's academic performance, or to create an intimidating, hostile, or offensive educational environment (*Educ. Code § 48900.2*).

[*Optional*] **F. Additional Ground of Hate Violence.** In addition to the reasons specified in *Education Code Sections 48900*, *48900.2*, a pupil enrolled in grade four or higher may be suspended from school or recommended for expulsion if the superintendent or the principal of the school in which the pupil is enrolled determines that the pupil has caused, attempted to cause, threatened to cause, or participated in anact of, hate violence, as defined in *Education Code Section 223(e)* (*Educ. Code § 48900.3*).

[*Optional*] **G. Additional Ground of Harassment, Threats, or Intimidation.** In addition to the grounds specified in *Education Code Sections 48900* and *48900.2*, a pupil enrolled in grades 4 to 12, inclusive, may be suspended from school or recommended for expulsion if the superintendent or the principal of the school in which the pupil is enrolled determines the pupil has intentionally engaged in harassment, threats, or intimidation directed against school personnel or pupils, that is sufficiently severe or pervasive to have the actual and reasonably expected effect of materially disrupting classwork, of creating substantial disorder, and of invading the rights of either school personnel or pupils by creating an intimidating or hostile educational environment (*Educ. Code § 48900.4*).

[*Optional*] **H. Additional Ground of Terroristic Threats.** In addition to the grounds specified in *Education Code*

Sections 48900-48900.4, a pupil may be suspended from school or recommended for expulsion if the superintendent or the principal of the school in which the pupil is enrolled determines that the pupil has made terroristic threats against school officials or school property, or both, as defined in *Education Code Section 48900.7(b)* (*Educ. Code § 48900.7(a)*).

I. Ground for Expulsion Is Required to Be Related to School Activity or Attendance. A pupil may not be suspended or expelled for any of the acts set forth in *Education Code Section 48900* unless the act is related to school activity or school attendance occurring within a school under the jurisdiction of the superintendent or principal or occurring within any other school district (*Educ. Code § 48900(s)*).

J. Alternatives to Suspensions or Expulsions. A superintendent or principal may use his or her discretion to provide alternatives to suspension or expulsion, including, but not limited to, counseling and an anger management program, for a pupil subject to discipline under *Education Code Section 48900* (*Educ. Code § 48900(v)*). [*Optional*] The legislature intends that alternatives be imposed against a pupil who is truant, tardy, or otherwise absent from school activities (*Educ. Code § 48900(w)*).

[*Optional*] **K. Vague and Standardless Grounds.** The grounds for removal

of a student from public school attendance must not be unconstitutionally vague and standardless (*see Abella v. Riverside Unified Sch. Dist. (1976) 65 Cal. App. 3d 153, 169-170, 135 Cal. Rptr. 177* ; *Myers v. Arcata Union High Sch. Dist. (1969) 269 Cal. App. 2d 549, 559-560, 75 Cal. Rptr. 68*).

[*Optional*] **L. Protected Speech.** Students in public schools cannot be punished merely for expressing their personal views on the school premises, unless school authorities have reason to believe that the expression will substantially interfere with the work of the school, impinge on the rights of other students or promote illegal drug use (*Morse v. Frederick, 127 S. Ct. 2618 (2007)* *Hazelwood Sch. Dist. v. Kuhlmeier (1988) 484 U.S. 260, 266, 108 S. Ct. 562, 98 L. Ed. 2d 592* ; *Tinker v. Des Moines Cmty. Sch. Dist. (1969) 393 U.S. 503, 509, 512-513, 89 S. Ct. 733, 21 L. Ed. 2d 731, 49 Ohio Op. 2d 222 see Educ. Code § 48950*; *see also* Stats. 1992, ch. 1363, § 4).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for a writ of mandate to review the administrative decision by the governing board of a school district to expel a student when the grounds for expulsion were improper.

Optional Paragraph E may be used if a pupil in grade four or higher is accused of sexual harassment.

Optional Paragraph F may be used if a pupil in grade four or higher is accused of participating in an act of hate violence. The language of the controlling statute for this paragraph, *Educ. Code § 48900.3*, refers to former *Educ. Code § 33032.5*, which was renumbered as *Educ. Code § 223* in 1998. Although the legislature did not amend *Educ. Code § 48900.3* to reflect this change, Paragraph F refers to the current, rather than the former, code section.

Optional Paragraph G is for use if the pupil is accused of engaging in intentional harassment, threats, or intimidation directed against a pupil or group of pupils. Optional Paragraph H is for use if the pupil is accused of engaging in terroristic threats. The optional language in Paragraph J is for use in urging an alternative to suspension or expulsion for a student who is truant, tardy, or otherwise absent from school activities. Optional Paragraph K is for use to assert that the ground for expulsion is unconstitutionally vague. Optional Paragraph L is for use to assert that the student cannot be punished for expression that constitutes protected speech.

This form also may be adapted for other uses, including an appellate brief. For example, Paragraph L may be used to support a civil action for injunctive or declaratory relief [*see Educ. Code § 48950* (public high schools and private secondary schools)].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Chapters

For a form of petition for writ of mandate to review a decision by the governing board of a school district to expel a student, see California Forms of Pleading and Practice, Ch. 512, *Schools* (Matthew Bender).

[c] Related Memoranda

For other memoranda supporting a petition for writ of mandate to review administrative adjudicatory decisions generally, see Ch. 195, *Public Administrative Law* . For memoranda supporting petitions for writs of mandate generally, see Ch. 150, *Mandate and Prohibition* .

[3] Discussion of Authorities

[a] Ground for Expulsion Is Required to Be Related to School Activity or Attendance

A pupil may not be suspended or expelled for any of the acts enumerated in *Educ. Code § 48900* unless the act is related to school activity or school attendance occurring within a school under the jurisdiction of the superintendent or principal or occurring within any other school district. However, a pupil may be suspended or expelled for acts enumerated in the statute and related to school activity or attendance that occur at any time, including, but not limited to, any of the following [*Educ. Code § 48900(s)*]:

- While on school grounds.
- While going to or coming from school.
- During the lunch period, whether on or off the campus.
- During, or while going to or coming from, a school sponsored activity.

[b] Possession of Firearm Defined

Under *Educ. Code § 48900* and *Educ. Code § 48915*, "possession" of a firearm for purposes of expulsion means the pupil knowingly and voluntarily hasdirect control over a firearm, unless the pupil has the permission of school officials to possess the firearm or the possession is brief and solely for the purpose of disposing of the firearm, such as handing it to school officials *[80 Ops. Cal. Att'y Gen. 91 (1997)]* .

[c] Vague and Standardless Grounds

The procedural and factual background of ***Abella v. Riverside Unified Sch. Dist.*** *(1976) 65 Cal. App. 3d 153, 135 Cal. Rptr. 177* , is discussed in *§ 210.31[3][b]*. The court of appeal held that the procedure followed by the school district in excluding children from school attendance under former Educ. Code § 12152 denied those children due process of law. In so holding, the court noted that a school board may, under its rule-making power, expand the grounds for removal of a student for the purpose of maintaining discipline in the schools. The exercise of that power must, however, meet constitutional standards of reasonableness. The court noted that by providing for an involuntary exemption from school based on former Educ. Code § 12152, the district had authorized an indefinite exclusion based on a physical, behavioral, or emotional disorder that prevents, or renders inadvisable, attendance at school or application to study. This rule, the court held, was so vague and standardless that the parent would be without any opportunity to refute the charge, thereby making parent participation and right of appeal meaningless (*65 Cal. App. 3d 153, 169)* . The court observed that civil as well as criminal statutes must be sufficiently clear as to give a fair warning of the conduct prohibited, and they must provide a standard or guide against which conduct can be uniformly judged by courts and administrative agencies (*65 Cal. App. 3d 153, 169-170)* . The court noted that this rule has been applied to school regulations, violation of which subject a student to suspension or expulsion. The court further noted that the word "inadvisable" was far less susceptible to precise definition an the word "extreme" which ws condemned in the *Myers* case, and held that the term was unconstitutionally vague when used as the sole standard for involuntary exclusion from school (*65 Cal. App. 3d 153, 170)* .

In ***Myers v. Arcata Union High Sch. Dist.*** *(1969) 269 Cal. App. 2d 549, 75 Cal. Rptr. 68* , petitioner, a high school student, was suspended from school because of the length of his hair. Petitioner brought an action in mandate to compel school authorities to reinstate him. At trial, it was established that petitioner was suspended because the length of his hair violated a portion of the school's dress policy which prohibited "extremes of hair styles." The term was not defined in the school regulations, nor were the actual standards used by school officials in determining what was "extreme" communicated to petitioner or to anyone else. The trial court concluded that the school policy was so vague and indefinite as to render the rule unconstitutional and unenforceable, and entered judgment granting the writ of mandate prayed for.

On appeal, the court of appeal affirmed the order directing issuance of the writ. The court noted that in exercising its rulemaking power, a school district governing board must meet the following constitutional standards of reasonableness (*269 Cal. App. 2d 549, 558-559)* :

- The restraint imposed by the regulations must rationally relate to the enhancement of the educational function.

- The public benefits produced must outweigh the consequent impairment of the student's constitutional rights.

- There can be no alternative less subversive of those rights.

The court observed that when there is empirical evidence that an aspect of a student's dress or appearance (such as hair style) has a disruptive effect within a school, the governing board may exercise its rulemaking power to prohibit it (*269 Cal. App. 2d 549, 558)* . However, the court held, because inhibition of hair styles restrains the freedom of expression guaranteed by the *First* or *Fourteenth Amendments of the U.S. Constitution*, any regulation in this area must be made with narrow specificity (*269 Cal. App. 2d 549, 559)* . The court then held that the dress policy concerning hair styles in this case was vague and standardless, and that it totally lacked the specificity required of governmental regulations which limit the exercise of constitutional rights. The importance of an education to a child is substantial, the court stated, and the state cannot condition its availability on compliance with an unconstitutionally vague standard of conduct (*269 Cal. App. 2d 549, 560)* .

NOTE:

Counsel should exercise some caution in using the *Myers* case. In a more recent case, a court of appeal upheld a school district regulation prohibiting the wearing of long hair by male students. In that case, the court held that hair style, without more, is not per se an expression of speech, symbolic or pure, within the protection of the *First Amendment*, but that hair styles were protected instead as liberty interests under the *Fourteenth Amendment* [*Montalvo v. Madera Unified Sch. Dist. Bd. of Educ. (1971) 21 Cal. App. 3d 323, 334, 98 Cal. Rptr. 593]* . Because hair styles were protected by the Fourteenth rather than *First Amendment*, their regulation is presumed valid, and the burden is on those who assail it to prove its invalidity. The regulation need only be justified by some reasonable relationship between the legitimate concerns of the school administration relating to the educational process and controlling the length and style of male hair [*Montalvo v. Madera Unified Sch. Dist. Bd. of Educ. (1971) 21 Cal. App. 3d 323, 335, 98 Cal. Rptr. 593]* . The court concluded that measured by these standards, the regulations involved were constitutional [*Montalvo v. Madera Unified Sch. Dist. Bd. of Educ. (1971) 21 Cal. App. 3d 323, 335-337, 98 Cal. Rptr. 593]* . This case is, however, distinguishable from *Myers* on its facts in that the hair regulation involved was considerably less vague than the regulation condemned in *Myers*. Thus, *Myers*, insofar as it holds that a student may not be expelled for violation of a vague or standardless school regulation, is arguably still good law.

[d] Protected Speech

In ***Hazelwood Sch. Dist. v. Kuhlmeier*** *(1988) 484 U.S. 260, 108 S. Ct. 562, 98 L. Ed. 2d 592* , high school journalism students brought an action against the school district seeking injunctive relief and monetary damages for violation of their *First Amendment* rights, based on censorship by school officials of articles they had written for the school newspaper. The articles, which concerned the pregnancies of several anonymous students, and the impact of divorce on other students, were deleted from the final version of an issue of the newspaper. The officials in questions made the deletions because the pregnant students might be identifiable, and the families discussed in the divorce article might object. The federal district court held for the defendants, but the court of appeals reversed, holding that the school officials had violated plaintiffs' rights because their censorship actions were not justified. Defendants filed a writ of certiorari.

The Supreme Court reversed, ultimately holding that no violation of *First Amendment* rights occurred (*484 U.S. 260, 276)* . In reaching its conclusion, the Court set forth guidelines regarding limitations on student speech. The Court stated, "Students in the public schools do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate ... . They cannot be punished merely for expressing their personal views on the school premises ... unless school authorities have reason to believe that such expression will substantially interfere with the work of the school or impinge upon the rights of other students" (quotation marks deleted) (*484 U.S. 260, 266)* . The Court proceeded to analyze the facts before it based on the consideration that a student's *First Amendment* rights must be applied in light of the special characteristics of the school environment (*484 U.S. 260, 267-276)* .

In ***Tinker v. Des Moines Cmty. Sch. Dist.*** *(1969) 393 U.S. 503, 512-513, 89 S. Ct. 733, 21 L. Ed. 2d 731, 49 Ohio Op. 2d 222* , high school students brought an action against the school district seeking injunctive relief based on their suspensions for wearing black armbands in protest of the Vietnam War. The federal district court dismissed the complaint, and the federal court of appeals affirmed. Plaintiffs filed a writ of certiorari.

The United States Supreme Court reversed and remanded, holding that a school regulation banning the wearing of armbands, as a form of discussion about the Vietnam War, violates the students' *First Amendment* rights if it is not justified (*393 U.S. 503, 505-514, 49 Ohio Op. 2d 222)* . The Court noted that the district court recognized that the wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the free speech clause of the *First Amendment* (*393 U.S. 503, 505-506, 49 Ohio Op. 2d 222)* . The Court stated that the wearing of armbands in the circumstances of the case was entirely divorced from actually or potentially disruptive

conduct by those participating in it; and that it was closely akin to "pure speech," which is entitled to comprehensive protection under the *First Amendment* (*393 U.S. 503, 505-514, 49 Ohio Op. 2d 222)* . The Court stated that if a regulation were adopted by school officials forbidding discussion of the Vietnam War, or the expression by any student of opposition to it anywhere on school property except as part of a prescribed classroom exercise, it would be obvious that the regulation would violate the constitutional rights of students, at least if it could not be justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school. In the circumstances of the case, the Court concluded, banning the wearing of armbands is no less offensive to the Constitution's guarantees. The Court noted the absence of facts that might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and that no disturbances or disorders on the school premises in fact occurred (*393 U.S. 503, 514, 49 Ohio Op. 2d 222)* .

In ***Frederick v. Morse*** *(9th Cir. 2006) 439 F.3d 1114 , rev'd, Morse v. Frederick, 127 S. Ct. 2618 (2007)* , at an off-site event for which students were released from school to watch the Olympic torch pass by, a high-school senior and friends waited until television cameras would catch it, then unfurled a banner reading "Bong Hits 4 Jesus." The school principal grabbed and crumpled up the banner and suspended the student for 10 days. The student filed a *42 U.S.C.S. § 1983* action against the principal and the school board, seeking declaratory and other relief. The principal and the school board conceded that their objective in crumpling up the banner and disciplining the student was their objection to the display, and that the principal ripped down the banner not over concern that it would cause disruption, but because its message would be understood as advocating or promoting illegal drug use in contradiction to one of the school's educational missions. The district court granted summary judgment for the principal and the school board, on the grounds that no constitutional rights were violated and they had qualified immunity even if *First Amendment* rights were violated.

The Ninth Circuit reversed, finding that the defendants were not entitled to qualified immunity. The banner did not cause disruption, was not sponsored or endorsed by the school, was not part of the curriculum, and did not take place as part of an official school activity, so that discipline based on the banner plainly violated the student's *First Amendment* expression rights. Furthermore, the violated right was clearly established under the case law of the United States Supreme Court and the Ninth Circuit governing the panoply of student speech cases that might face a school principal, so that a reasonable principal would haveunderstood that what this particular principal did violated the student's *First Amendment* rights. Finally, the principal could not have reasonably but mistakenly believed that his conduct did not violate a clearly established constitutional right, given that the law was clear and the principal was aware of it (*439 F.3d 1114, 1117-1125)* . The U.S. Supreme Court granted the principal's and school board's petition for writ of certiorari and reversed the Ninth Circuit's decision (*Morse v. Frederick, 127 S. Ct. 2618 (2007)*). The Court held that school officials can restrict student speech that they reasonably believe promotes illegal drug use without running afoul of the *First Amendment* (*Morse v. Frederick, 127 S. Ct. 2618 (2007)*).

[4] Additional Authorities

[a] Ground for Expulsion as Required to Be Related to School Activity or Attendance

In *Fremont Union High Sch. Dist. v. Santa Clara County Bd. of Educ. (1991) 235 Cal. App. 3d 1182, 286 Cal. Rptr. 915* , a school district expelled a student after he used a stun gun during an altercation with another student. The incident occurred on a campus other than the one that the expelled student regularly attended. The county board of education overturned the expulsion on the ground that the school district lacked jurisdiction to expel the student because the conduct did not take place on his own campus or relate to his own school activity and was therefore not "related to school activity or school attendance" as required by *Educ. Code § 48900*. The trial court granted the district's petition for writ of mandate to overturn the county board's decision, and the court of appeal affirmed. The court of appeal rejected the student's contention that the quoted phrase was limited to conduct that occurs during the student's own school activities or on his own campus, reasoning that such an interpretation of *Educ. Code § 48900* was inconsistent with its statutory language and would not promote a safe and orderly educational environment (*235 Cal. App. 3d 1182,*

1186-1187) .

NOTE:
In 1989, the Legislature amended *Educ. Code § 48900* to clarify that the grounds for expulsion may be based on conduct occurring within a school under the jurisdiction of the superintendent or principal or occurring within any other school district.

[b] Protected Speech

In *Pinard v. Clatskanie Sch. Dist. 6J, 467 F.3d 755 (9th Cir. 2006)* , members of a high school varsity basketball team presented a petition seeking the resignation of their coach, and then refused to board a bus to play in an out-of-town game. They were permanently suspended from the team. In their action under *42 U.S.C. § 1983* alleging that they were punished in violation of their *First Amendment* rights, the trial court denied defendants' motion to dismiss, but granted defendants' motion for summary judgment, concluding that plaintiffs were not engaged in a constitutionally protected activity because their speech was not a matter of public concern nor political in nature, but was akin to speech addressing merely a private grievance against a school employee, with no political dimension. In the alternative, the court concluded that even if the plaintiffs' speech was constitutionally protected, their conduct substantially and materially interfered with a school activity, giving the school district authority to punish them (*467 F.3d 755, 764-769*). The Ninth Circuit held that the petition and their complaints were protected speech because they could not reasonably have led school officials to forecast substantial disruption of or material interference with school activity. However, their refusal to board the bus was not protected by the *First Amendment* because, even if it was expressive conduct, it substantially disrupted and materially interfered with the operation of the varsity boys' basketball program *(467 F.3d 755, 769-770)* . However, the court also found that remand of a claim of retaliation based on their permanent suspension from the team was required for the district court to determine whether they offered evidence from which a reasonable jury could conclude the petition and complaints against the coach were a substantial or motivating factor in the decision to suspend them from the team, not simply the boycott of the out-of-town game (*446 F.3d 964, 977-979*).

In *Harper v. Poway Unif. Schl. Dist. (9th Cir. 2006) 445 F.3d 1166 , vacated, 549 U.S. 1262, 127 S. Ct. 1484, 167 L. Ed. 2d 225, 2007 U.S. LEXIS 2830* , a high school with a history of conflict among its students over issues of sexual orientation, required a student to remove a T-shirt with a message quoting the Bible and condemning and denigrating other students on the basis of their sexual orientation. When he refused, he was kept in the front office for the remainder of the school day because of concerns that his t-shirt was inflammatory, but he was not disciplined. The student sued the school district and individuals in federal district court. He alleged federal causes of action, including violations of his right to free speech, his right to free exercise of religion, the *Establishment Clause*, the *Equal Protection Clause*, and the Due Process Clause, and one state law claim based on *Civ. Code § 52.1*, creating a private cause of action for violation of individual federal and state constitutional rights. The district court granted the district's motion to dismiss as to equal protection, due process, and state law claims, but denied as to his three *First Amendment* claims. The court denied the student's motion for a preliminary injunction seeking to enjoin the school from continuing its violation of his constitutional rights. The court also granted the motion to dismiss damages claims against the district and individual defendants on the ground of qualified immunity (*445 F.3d 1166, 1171-1173) , vacated, 549 U.S. 1262, 127 S. Ct. 1484, 167 L. Ed. 2d 225, 2007 U.S. LEXIS 2830* . On the student's appeal of the denial of the preliminary injunction, the Ninth Circuit held that although the student made the necessary showing of irreparable harm because his *First Amendment* claims survived the motion to dismiss, he failed to demonstrate a likelihood of success on the merits as to any of his three *First Amendment* claims. As to the free speech and viewpoint discrimination claims, the evidence was sufficient to permit school officials to reasonably prohibit speech that intruded on the rights of other students, and the wearing of the t-shirt collided with therights of other students in the most fundamental way (*445 F.3d 1166, 1175-1186)* . As to his free exercise claim, the court found that the school's restriction regarding the t-shirt did not impose a substantial burden on the free exercise of his religious beliefs, because there was no evidence the school compelled affirmation of a repugnant belief, penalized or discriminated against the student because he held religious views abhorrent to the authorities, or conditioned the availability of benefits on his willingness to violate a cardinal

principle of his religious faith, nor did the school lend its power to one or the other side in a controversy over religious authority or dogma, or punish the expression of religious doctrines it believed to be false. The school did not punish the student at all by simply prohibiting him from wearing the offensive and disruptive shirt and requiring him to refrain from attending class for a portion of a day, if he insisted on continuing to wear it. The restriction imposed on wearing the t-shirt also did not constitute a substantial limitation on his right to express his religious views. Further, the school had a compelling interest in providing a proper educational environment for its students and its actions were narrowly tailored to achieve that end (*445 F.3d 1166, 1186-1190) , vacated, 549 U.S. 1262, 127 S. Ct. 1484, 167 L. Ed. 2d 225, 2007 U.S. Dist. LEXIS 2830* . As to the *Establishment Clause* claim, the court found that there was no evidence the school's actions were based on anything other than an entirely secular and legitimate aim of protecting the rights of students and promoting a tolerant and safe learning environment. There was no evidence or allegation that school authorities sought to coerce or encourage the student to participate in some other religion or to adopt some state-supported or other religious faith (*445 F.3d 1166, 1190-1191) , vacated, 549 U.S. 1262, 127 S. Ct. 1484, 167 L. Ed. 2d 225, 2007 U.S. Dist. LEXIS 2830* .

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 210 SCHOOLS: ACTIONS BY STUDENTS
PART II. FORMS

21-210 California Points & Authorities § 210.33

§ 210.33 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5] of Governing Board of School District and County Board of Education [Educ. Code §§ 48918, 48923]--Expulsion of Public School Student--Decision to Expel Not Supported by Evidence

[1] FORM

[*Caption. See § 210.31.*]

MANDATE IS PROPER BECAUSE THE DECISION OF RESPONDENT GOVERNING BOARD OF RESPONDENT SCHOOL DISTRICT TO EXPEL PETITIONER IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. Decisions Reviewable in Mandate Proceeding. [*See § 210.31, Paragraph A.*]

B. Expulsion Order as Reviewable by Mandate. [*See § 210.31, Paragraph B.*]

C. Inquiry in Mandate Proceeding. [*See § 210.31, Paragraph C.*]

D. Decision of Governing Board to Expel Student Must Be Supported by Substantial Evidence. Technical rules of evidence do not apply in student expulsion hearings, but relevant evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. A decision of the governing board to expel shall be supported by substantial evidence showing that the pupil committed any of the acts enumerated in *Education Code Section 48900* (*Educ. Code § 48918(h)*).

[*Optional*] **E. Reliance on Contradictory Statements and Reports to Support Student Expulsion as Improper.** Reliance by the governing board in a school expulsion hearing on statements and reports rather than on testimony by witnesses is improper when the evidence is conflicting and there is no showing that the witnesses were unavailable or that the disclosure of their identity and presence would subject them to a significant and specific risk of harm (*John A. v. San Bernardino City Unified Sch. Dist. (1982) 33 Cal. 3d 301, 308, 187 Cal. Rptr. 472, 654 P.2d 242*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition for a writ of mandate to review the administrative decision by the governing board of a school district to expel a student when there is insufficient evidence to support the expulsion.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should show that reliance by the governing board on written reports and contradictory statements without supporting testimony is not the type of evidence that reasonable persons are accustomed to relying on in the conduct of serious affairs, as required by *Educ. Code § 48918(h)*.

[b] Related Pleading and Practice Chapters

For a form of petition for writ of mandate to review a decision by the governing board of a school district to expel a student, see California Forms of Pleading and Practice, Ch. 512, *Schools* (Matthew Bender). For discussion of and other forms of use in obtaining judicial review of administrative decisions, see California Forms of Pleading and Practice, Ch. 470, *Overview of Public Administrative Law* (Matthew Bender).

[c] Related Memoranda

For other memoranda supporting a petition for writ of mandate to review administrative adjudicatory decisions generally, see Ch. 195, *Public Administrative Law* . For memoranda supporting petitions for writs of mandate generally, see Ch. 150, *Mandate and Prohibition* .

[3] Discussion of Authorities

[a] Substantial Evidence Requirement

A governing board's decision to expel a pupil must be supported by substantial evidence showing that the pupil committed any of the acts enumerated in *Education Code Section 48900* (*Educ. Code § 48918(h)*. Substantial evidence is not synonymous with "any" evidence. It must be reasonable, credible, and of solid value [*see Kuhn v. Department of Gen. Servs. (1994) 22 Cal. App. 4th 1627, 1633, 29 Cal. Rptr. 2d 191* (reviewing decision of State Personnel Board revoking probationary rejection of employee); *see also Code Civ. Proc. § 1094.5(c)* (standard of judicial review of administrative decisions)].

[b] Reliance on Contradictory Statements and Reports to Support Student Expulsion as Improper

In ***John A. v. San Bernardino City Unified Sch. Dist.*** *(1982) 33 Cal. 3d 301, 187 Cal. Rptr. 472, 654 P.2d 242* , a public high school student who was expelled for assaulting two other students petitioned the trial court for a writ of mandate to compel his readmission. A hearing panel appointed by the governing board of the school district recommended expulsion on the basis of a report by the school vice-principal and statements by witnesses. Neither the injured students nor other witnesses to the alleged assault testified. Petitioner was present at the hearing and testified, denying any assault. The school board adopted the hearing panel's recommendation, which was affirmed by the county

board of education. The trial court found that the hearing panel's findings were supported by the weight of the evidence and denied the petition for writ of mandate. Petitioner appealed, contending that the hearing panel denied him due process by denying him the right to confront and cross examine witnesses to the alleged assault.

The Supreme Court held that under the relevant statutory provisions governing student expulsions, the school board acted improperly in expelling petitioner without the testimony of any of the witnesses to the altercation. Accordingly, the Court did not address the issue of petitioner's rights of confrontation and cross examination in violation of the due process clauses of the federal and state Constitutions (*33 Cal. 3d 301, 307)* . The Court stated that under former *Educ. Code § 48914(f)* [*now see Educ. Code § 48918(h)*], the technical rules of evidence are not applicable to a student expulsion hearing. Evidence can be admitted and given probative effect, however, only if it is the kind of evidence on which reasonable persons are accustomed to relying on in the conduct of serious affairs, and any decision of the governing board of a school district to expel a student has to be supported by a preponderance of the evidence. The Court stated that a reasonable person, in the conduct of serious affairs, would not rely solely on written statements but would demand that witnesses be produced so that their credibility may be tested and their testimony weighed against conflicting evidence when their testimony appears readily available and there is no substantial reason why their testimony cannot be produced. The Court added that in some cases revelation of student witnesses' names and the requirement that they testify could subject them to a substantial risk of retaliation. In such cases, the witnesses are not readily available. The Court concluded that under the facts of this case, there was no showing or finding of a significant and specific risk of harm, and therefore the school board could not rely on administrative reports and witnesses' statements when the evidence was conflicting and witnesses were readily available. Consequently, the Court held that the school district failed to establish cause for expulsion by a preponderance of evidence (33 Cal. 3d 301, 308).

NOTE:

Educ. Code § 48914 was repealed, revised, and reenacted as *Educ. Code § 48918* in 1983. The required standard of proof was changed from preponderance of evidence to substantial evidence (*Educ. Code § 48918(h)*). Although the reasoning of *John A.* may not be different under the new statute, it appears the result might change.

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 210 SCHOOLS: ACTIONS BY STUDENTS
PART II. FORMS

21-210 California Points & Authorities § 210.34

§ 210.34 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086, 1107] to Review Administrative Decision [Code Civ. Proc. § 1094.5] of Governing Board of School District and County Board of Education [Educ. Code §§ 48918, 48923]--Expulsion of Public School Student--Failure to Exhaust Administrative Remedies

[1] FORM

[*Caption. See § 210.31.*]

MANDATE IS NOT PROPER BECAUSE PETITIONER FAILED TO EXHAUST HIS/HER ADMINISTRATIVE REMEDIES, INCLUDING APPEAL TO THE COUNTY BOARD OF EDUCATION, PRIOR TO INSTITUTING THE MANDATE PROCEEDING.

Failure to Exhaust Administrative Remedies. A student expelled from public school must exhaust administrative remedies, including appeal of the expulsion order to the county board of education under *Section 48919 of the Education Code*, prior to seeking judicial review of the action in a mandate proceeding (*see Noonan v. Green (1969) 276 Cal. App. 2d 25, 31, 80 Cal. Rptr. 513*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a petition for a writ of mandate to review the administrative decision by the governing board of a school district to expel a student where the student has failed to exhaust his or her administrative remedies, including appeal to the county board of education, prior to instituting the mandate proceeding.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Procedure for Appealing Decision to Expel

County boards of education are required to adopt rules and regulations establishing procedures for expulsion appeals conducted under *Educ. Code § 48919*, which must, at a minimum, include rules and regulations governing (*Educ. Code § 48919*):

- Filing a notice of appeal;
- Setting a hearing date;
- Furnishing notice to the pupil and the governing board regarding the appeal;
- Furnishing a copy of the expulsion hearing record to the county board of education;
- Procedures for the conduct of the hearing; and
- Preserving a record of the appeal.

Within 30 days following a governing board's decision to expel a pupil from school, the pupil or the pupil's parent or guardian may file an appeal to the county board of education. Within 20 school days following the filing of a formal request for an appeal, the board must hold a hearing on the decision to expel. A pupil who fails to appeal the original action of the board within the prescribed time may not subsequently appeal a decision of the board to revoke probation and impose the original order of expulsion (*Educ. Code § 48919*).

In the alternative, a county board of education in Class 1 or Class 2 counties may elect to have appeals under *Education Code Section 48919* heard by a hearing officer or by an impartial administrative panel appointed by the board (*Educ. Code § 48919.5(a)*; *see Educ. Code § 48919.5(e)(1)-(3)* (definition of Class 1 and Class 2 counties)). The hearing officer or impartial administrative panel must prepare a recommended decision, including any findings or conclusions required for that decision, for a final decision by the county board of education (*Educ. Code § 48919.5(b)*).

[c] Related Pleading and Practice Chapters

For a form of petition for writ of mandate to review the decision of the governing board of a school district to expel a student, see California Forms of Pleading and Practice, Ch. 512, *Schools* (Matthew Bender).

[d] Related Memoranda

For memoranda supporting a demurrer to a petition for writ of mandate to review administrative adjudicatory decisions generally, see Ch. 195, *Public Administrative Law* . For memoranda opposing petitions for writs of mandate generally, see Ch. 150, *Mandate and Prohibition* .

[3] Discussion of Authorities

[a] Failure to Exhaust Administrative Remedies

In ***Noonan v. Green*** *(1969) 276 Cal. App. 2d 25, 80 Cal. Rptr. 513* , petitioner, a high school student, was suspended from school for refusal to obey a school rule requiring all female students to wear a uniform to school. A few days later,

her parents were served with a notice of a hearing for the purpose of considering petitioner's expulsion from school and were directed to appear and show cause why petitioner should not be expelled. Without waiting for this hearing, petitioner brought an action for a writ of prohibition (later amended to mandate) to prohibit enforcement of the uniform requirement and to reinstate petitioner as a student. The trial court found that the school rule was unreasonable and unconstitutional and entered judgment granting the writ of mandate.

On appeal, the court reversed. The court noted that the record in this case concerning the regulation and its purpose was indefinite and vague (*276 Cal. App. 2d 25, 28-29)* . The court stated that had petitioner first resorted to the administrative hearing and appeal provided for by the Education Code, much of this vagueness and indefiniteness would have been cleared up (*276 Cal. App. 2d 25, 30)* . The court further stated that the general policy of the law is that where in an administrative proceeding there is an administrative appellate body provided by statute, that body must exercise its jurisdiction before the courts may be called on to act. The parties to such a proceeding may not waive the benefits of a statute established for a public reason, nor may jurisdiction be conferred on the court by consent. The court held that because the parties failed to pursue the administrative remedies provided by the Education Code, the trial court had no jurisdiction to determine the matter (*276 Cal. App. 2d 25, 31)* .

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21-210 California Points & Authorities § 210.35

§ 210.35 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086, 1107] to Review Administrative Decision [Code Civ. Proc. § 1094.5] of Governing Board of School District and County Board of Education [Educ. Code §§ 48918, 48923]--Expulsion of Public School Student--School District "Zero Tolerance" Rule Does Not Violate State Law or Federal Due Process Rights

[1] FORM

[*Caption. See § 210.31.*]

MANDATE IS NOT PROPER BECAUSE SCHOOL DISTRICT'S "ZERO TOLERANCE" RULE DOES NOT VIOLATE STATE LAW OR STUDENT'S DUE PROCESS RIGHTS.

School District's "Zero Tolerance" Rule Does Not Violate State Law or Student's Right to Due Process. A school district's "zero tolerance" policy governing expulsions that requires a principal or the principal's designee to immediately suspend and recommend for expulsion a pupil who committed specified acts at school or at a school activity off school grounds does not violate state law by eliminating the principal's statutory discretion to decide not to recommend the student for an expulsion hearing. The rule also does not violate a student's federal and state due process rights when the rule provides required procedural protections to students (*T.H. v. San Diego Unified Sch. Dist. (2004) 122 Cal. App. 4th 1267, 1281-1287, 19 Cal. Rptr. 3d 532*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a petition for a writ of mandate to review the administrative decision by the governing board of a school district to expel a student under a "zero tolerance" policy, requiring the principal or the principal's designee to recommend to the school board that a student be expelled for committing specified offenses at school or at a school activity off school grounds.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Chapters

For a form of petition for writ of mandate to review the decision of the governing board of a school district to expel a student, see California Forms of Pleading and Practice, Ch. 512, *Schools* (Matthew Bender).

[c] Related Memoranda

For memoranda supporting a demurrer to a petition for writ of mandate to review administrative adjudicatory decisions generally, see Ch. 195, *Public Administrative Law* . For memoranda opposing petitions for writs of mandate generally, see Ch. 150, *Mandate and Prohibition* .

[3] Discussion of Authorities

[a] In General

In ***T.H. v. San Diego Unified Schl Dist.*** *(2004) 122 Cal. App. 4th 1267, 19 Cal. Rptr. 3d 532* , a middle school vice-principal, under the district's "zero tolerance" administrative regulations removing a principal or the principal's designee discretion and making referral for expulsion mandatory for specified acts, recommended that a student be expelled from school because she was involved in repeated acts of fighting. After a series of hearings, the school district agreed with the recommendation and expelled the student from its schools. Under state law, this type of offense could lead to an expulsion, but a school principal has the discretion to decide not to refer the matter to the governing school board for an expulsion hearing. The student brought a civil action against the district, alleging that the district's "zero tolerance" policy of requiring a principal to recommend an expulsion hearing for a student who has committed certain offenses violated state statutes and was unconstitutional. The trial court held that the district's mandatory referral policies violated applicable statutes because they eliminate a school principal's statutory discretion to decide not to recommend a student for an expulsion hearing and violated a student's due process rights, and entered judgment enjoining the district from enforcing or utilizing its zero tolerance policy to the extent the policy required a principal or superintendent to recommend expulsion of pupils in circumstances other than circumstances explicitly identified in the Education Code as requiring a recommendation for expulsion from a principal or superintendent (*122 Cal. App. 4th 1267, 1273-1275)* .

The court of appeal reversed. The court first described the legislature's comprehensive statutory scheme governing the suspension and expulsion of students, including the exclusive grounds for which a student may be suspendedor expelled [*see Educ. Code §§ 48900, 48900.2, 48900.3, 48900.4*], and mandatory procedures a school district must follow before the district may expel a student who has committed one of the identified expulsion offenses [*see Educ. Code § 48918*], which are detailed and extensive. In addition to providing the procedures for conducting the expulsion hearing, the legislature specified the circumstances for triggering an expulsion hearing and the findings that must be made, grouped in three primary categories, depending on the degree of the principal's or superintendent's discretion as to whether to recommend expulsion and the school board's discretion as to whether to order expulsion, depending on the nature of the act [*see Educ. Code § 48915*]. To implement these statutes, the district (1) promulgated a rule governing expulsions that identified causes for expulsion that were essentially identical to the causes identified in the Education Code, (2) set forth procedural requirements for the expulsion hearing process that mirrored the statutory requirements in the Education Code mandating extensive procedural rights, and (3) specified the circumstances under which a principal was required

to refer a student for expulsion under the district's "zero tolerance" policies (*122 Cal. App. 4th 1267, 1276-1278)* . The court then held that although the district's expulsion requirements are different from the statutory requirements in that they eliminate a principal's discretion to decide not to recommend a student for an expulsion hearing, the regulations were not inconsistent with the applicable statutes, since there are no provisions in the Education Code requiring a district to provide a principal with the authority to dismiss an expulsion charge if the principal has found the student has committed the expulsion offense. A different situation would have been presented if the district's stricter recommendation procedures infringed on a student's statutory rights to an objective and fair expulsion procedure, which they did not, and the district's mandatory recommendation requirements did not preclude the principal from expressing his or her own views as to whether expulsion was appropriate in a particular case. Further, a principal retained the discretion to determine a student did not in fact commit the alleged offense and therefore to determine that any referral would be unwarranted (*122 Cal. App. 4th 1267, 1281-1285)* .

The court also found that the expulsion procedures did not violate a student's federal and state constitutional due process rights. The district provided repeated notices to parents and students subject to expulsion, and the regulations provided the required procedural protections. To the extent a student believed he or she did not receive proper notice in a particular case, the student could bring an "as-applied" challenge to the expulsion order. However, in this case it was conceded that the student and her mother had prior written notice that repeated acts of fighting would subject her to expulsion, and that she had been warned on numerous occasions that her continued misconduct would subject her to expulsion (*122 Cal. App. 4th 1267, 1286-1287* & n.8). Further, a student is not constitutionally entitled to have notice of the scope of a principal's authority vis-a-vis the governing school board, and a student's procedural rights were not diminished merely because a principal did not have the discretion to dismiss the matter at the outset of the process. Finally, to the extent the district permitted the principal/superintendent to recommend a student for expulsion for offenses not included in the discipline provisions of the Education Code, those inconsistencies did not create an inevitable due process violation (*122 Cal. App. 4th 1267, 1287)* .

California Points & Authorities

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 211 SCHOOLS: CERTIFICATION, DISMISSAL, AND RELATED EMPLOYMENT ISSUES

21-211 California Points & Authorities 211.syn

§ 211.syn Synopsis to Chapter 211: SCHOOLS: CERTIFICATION, DISMISSAL, AND RELATED EMPLOYMENT ISSUES

§ 211.01 Scope of Chapter

§ 211.02 Governing Law

§ 211.03 Reorganization of Education Code

§ 211.04 Related Pleading and Practice Chapters

§ 211.05 Related Points and Authorities Chapters

§§ 211.06-211.19 [Reserved]

§ 211.20 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Compel Recognition of Permanent Status of School District Employee [Educ. Code § 44929.21]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Memoranda

[d] Opposing Memorandum

[3] Discussion of Authorities

[a] Mandate as Proper to Compel Recognition of Teacher's Permanent Status

[b] Attainment of Permanent Status as Automatic

[c] Probationary Service for 75 Percent of Hours Required of Full-Time Teacher as Constituting One Complete School Year

[d] Leave of Absence Does Not Cause Break in Continuity of Service

[e] Full-Time Permanent Status

[f] Probationary Year Served Under University Internship Credential

§ 211.21 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Compel Reinstatement of Certificated Employee to Administrative or Supervisory Position--Failure to Give Required Advance Notice [Educ. Code § 44951]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Advance Notice Required Before Supervisory or Administrative Employee Released From Position

§ 211.22 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086, 1107] to Compel Recognition of Permanent Status of School District Employee--Non-Reelection of Probationary Teacher (Large District) [Educ. Code § 44929.21]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Probationary Teachers Generally

[b] Non-Reelection of Probationary Teachers

[c] Collective Bargaining and Due Process Rights of Probationary Teachers

[d] More Than One Year of Service in Categorically Funded Position Is Not Included in Computing Service Time for Attainment of Permanent Status

[e] Service as Instructor at Regional Occupational Center Is Not Included in Computing Service Time for Attainment of Permanent Status

[4] Additional Authorities

[a] Non-Reelection of Probationary Teachers

§ 211.23 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086, 1107] to Compel Recognition of Permanent Status of School District Employee--Teacher as Not Attaining Permanent Status in Supervisory or Administrative Position

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Use

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Scope of Tenure Generally

[b] Reassignment of Permanent Employees

[c] Administrative and Supervisory Personnel as Attaining Permanent Status as Classroom Teachers Only

[4] Additional Authorities

[a] Administrative and Supervisory Personnel as Attaining Permanent Status as Classroom Teachers Only

§ 211.24 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086, 1107] to Compel Recognition of Permanent Status of School District Employee--Teacher Holding Multiple Credentials as Attaining Permanent Status as Classroom Teacher Only

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Use

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Teacher Holding Multiple Credentials as Attaining Permanent Status as Classroom Teacher Only

§ 211.25 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086, 1107] to Compel Recognition of Permanent Status of School District Employee--Tenure as Not Bestowing Right to Teach at Particular School or Grade Level

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Use

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Tenure as Not Bestowing Vested Right to Teach at Specific School or Grade Level

[4] Additional Authorities

[a] Tenure as Not Bestowing Vested Right to Teach at Specific School or Grade Level

§ 211.26 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086, 1107] to Compel Reinstatement of Certificated Employee to Administrative or Supervisory Position--Advance Notice Requirement of Educ. Code § 44951 Is Not Applicable

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Advance Notice Requirement Does Not Apply to Reassignment of Administrator or Supervisor for Cause

[b] Advance Notice Requirement Does Not Apply to Transfer of Administrator or Supervisor to Another Position With Same Administrative Classification

§ 211.27 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523] of Commission on Professional Competence [Educ. Code § 44945]--Dismissal of Permanent Employee--Discharge Procedure Not Followed

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Mandate to Review Dismissal of Permanent Employee

[b] Strict Compliance With Dismissal Procedure

[c] Reinstatement of Employee and Payment of Back Salary

[4] Additional Authorities

[a] Independent Judgment on Evidence

[b] Reinstatement of Employee and Payment of Back Salary

§ 211.28 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523] of Commission on Professional Competence [Educ. Code § 44945]--Dismissal of Permanent Employee--Immoral or Unprofessional Conduct [Educ. Code § 44932]--Showing of Unfitness to Teach Required

[1] FORM

[2] Comments

[a] Use of Form

[b] Use of Optional Paragraphs; Contrary Authorities

[c] Suspension Without Pay as Alternative Discipline

[d] Related Pleading and Practice Chapters

[e] Related Points and Authorities

[3] Discussion of Authorities

[a] Dismissal for Cause Only

[b] Unfitness to Teach as Proper Criteria for Discharge on Ground of Immoral or Unprofessional Conduct

[c] Showing of Significant Danger as Required

[d] Commission of Sex Offense as Not Constituting Unfitness to Teach Per Se

[e] Possession of Marijuana as Not Constituting Immoral Conduct Per Se

§ 211.29 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523] of Commission on Professional Competence [Educ. Code § 44945]--Dismissal of Permanent Employee--Violation of School Rules [Educ. Code § 44932]--Grounds for Dismissal Only Where Conduct Is Persistent

[1] FORM

[2] Comments

[a] Use of Form

[b] Use of Optional Paragraph; Contrary Authorities

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Violation of School Rules as Grounds for Dismissal Only Where Conduct Is Persistent

[b] Single Absence Without Leave as Not Constituting Persistent Violation of School Rules

[4] Additional Authorities

[a] Violation of School Rules as Grounds for Dismissal Only Where Conduct Is Persistent

§ 211.30 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523] of Commission on Professional Competence [Educ. Code § 44945]--Dismissal of Permanent Employee--Violation of School Rules [Educ. Code § 44932]--Refusal to Obey Invalid Order as Not Grounds for Dismissal

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Refusal to Obey Invalid Order as Not Grounds for Dismissal

§ 211.31 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523] of Commission on Professional Competence [Educ. Code § 44945]--Dismissal of Permanent Employee--Unprofessional Conduct or Unsatisfactory Performance [Educ. Code § 44932]--School Board as Not Permitted to Dismiss for Unprofessional Conduct or Unsatisfactory Performance Unless Prior Notice and Opportunity to Correct Faults Given [Educ. Code § 44938]

[1] FORM

[2] Comments

[a] Use of Form

[b] Use of Optional Paragraph

[c] Limitations on Use of Form

[d] Related Pleading and Practice Chapters

[e] Related Points and Authorities

[3] Discussion of Authorities

[a] Failure to Give Notice as Fatal to Action by Board to Dismiss Teacher for Unsatisfactory Performance or Unprofessional Conduct

[b] Dismissal as Improper Where Teacher Deprived of Opportunity to Correct Faults by Transfer to Nonteaching Position

[4] Additional Authorities

[a] Failure to Give Notice as Fatal to Action by Board to Dismiss Teacher for Unsatisfactory Performance or Unprofessional Conduct

§ 211.32 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523] of Commission on Professional Competence [Educ. Code § 44945]--Dismissal of Permanent Employee--Conviction of Crime [Educ. Code § 44932]--Conviction of Felony as Not Ground for Dismissal Unless Felony Involves Moral Turpitude

[1] FORM

[2] Comments

[a] Use of Form

[b] Use of Optional Paragraph; Contrary Authorities

[c] Summary Dismissal for Conviction of Certain Crimes

[d] Related Pleading and Practice Chapters

[e] Related Points and Authorities

[3] Discussion of Authorities

[a] Conviction of Felony as Not Grounds for Dismissal Unless Felony Involves Moral Turpitude

[b] Offense of Cultivation of Marijuana as Not Involving Moral Turpitude as a Matter of Law

§ 211.33 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523] of Commission on Professional Competence [Educ. Code § 44945]--Dismissal of Permanent Employee--Conviction of Felony or Crime Involving Moral Turpitude [Educ. Code § 44932]--Pre-1976 Possession of Marijuana Conviction as Not Grounds for Dismissal [Health & Safety Code § 11361.7(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Pre-1976 Possession of Marijuana Conviction as Not Grounds for Dismissal

§ 211.34 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523] of Commission on Professional Competence [Educ. Code § 44945]--Dismissal of Permanent Employee--Limitation on Dismissal for Exercise of Constitutional Rights

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Independent Assessment of True Reason for Dismissal

[b] Dismissal for Exercise of Constitutional Rights

[c] Teacher's Right to Speak

[d] Discipline Improper Where Teacher's Views Expressed in Proper Forum

[e] Failure to Receive Evidence of Dismissal for Exercise of Constitutional Rights

§ 211.35 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] Re Restrictions on Political Speech of School District Employees During Working Hours--[Educ. Code § 7055]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] District's Power to Regulate Employees' Political Activities

[b] District Has Right to Refuse Sponsorship of Political Speech

[c] District's Regulation of Political Speech Does Not Violate Employees' Constitutional Rights

§ 211.36 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5] of Commission on Professional Competence [Educ. Code § 44945; Gov. Code § 11523]--Dismissal of Permanent Employee--Failure to Give Prior Notice and Opportunity to Correct Unsatisfactory Performance or Unprofessional Conduct as Not Precluding Dismissal for Other Causes

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Separate Grounds for Dismissal

[b] Failure to Give Notice of and Opportunity to Correct Unsatisfactory Performance or Unprofessional Conduct as Not Precluding Dismissal on Other Grounds

[4] Additional Authorities

[a] Separate Grounds for Dismissal

[b] Failure to Give Notice of and Opportunity to Correct Unsatisfactory Performance or Unprofessional Conduct as Not Precluding Dismissal on Other Grounds

§ 211.37 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5] of Commission on Professional Competence [Educ. Code § 44945; Gov. Code § 11523]--Dismissal of Permanent Employee--School Board Substantially Complied With Statutory Requirements for Dismissal

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Substantial Compliance Is Sufficient to Satisfy Statutory Requirements

[b] Hypertechnical Procedural Oversights Should Not Thwart Process

211.37A Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5] of Commission on Professional Competence [Educ. Code § 44945; Gov. Code § 11523]--Dismissal of Permanent Employee--School Board Properly Considered Evidence of Matters Occurring More Than Four Years Before Notice of Intent to Dismiss

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memorandum

[3] Discussion of Authorities

[a] Four-Year Limitation is Subject to Equitable Exceptions

§ 211.38 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Compel Reinstatement of Permanent Employee After Economic Layoff [Educ. Code § 44955]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Permanent Employees Dismissed Pursuant to Reduction in Particular Kind of Service

[b] Use of Contract Instead of Full-Time Employees Does Not Violate Educ. Code § 44955 Where Services Provided in Different Manner

§ 211.39 Supporting Petition for Writ of Mandate [Code Civ. Proc. § 1085] to Review Decision of Governing Board to Terminate Probationary Teacher--Teacher Dismissed During School Year Without Following Required Procedures [Educ. Code § 44948.3]

[1] FORM

[2] Comments

[a] Use of Form

[b] Required Procedures

[c] Writ of Mandate

[3] Discussion of Authorities

[a] Dismissal of Probationary Teacher During School Year

§ 211.40 Supporting Petition for Writ of Mandate [Code Civ. Proc. § 1085] to Review Decision of Governing Board to Terminate Probationary Teacher--Teacher Not Reelected for Following School Without Required Advance Notice [Educ. Code § 44929.21(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Required Notice

[3] Discussion of Authorities

[a] Notice of Nonreelection of Probationary Teacher for Succeeding School Year

§ 211.41 Supporting Petition for Writ of Mandate [Code Civ. Proc. § 1085] to Review Decision of Governing Board to Terminate Probationary Teacher--Teacher May Not Be Terminated for Engaging in Protected Activity

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Exercise of Constitutional Rights

[b] Exercise of Protected Labor Rights

§ 211.42 Opposing Petition for Writ of Mandate [Code Civ. Proc. § 1085] to Review Decision of Governing Board to Terminate Probationary Teacher--Decision to Not Reelect Teacher for Following School Year Within Sole Discretion of Board

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Nonrenewal of Probationary Teacher's Contract at Discretion of Governing Board

[b] Effect of Collective Bargaining Agreement

[c] Effect of Statutory Provisions for Preferential Rehiring of Teachers Laid Off for Economic Reasons

§ 211.43 Opposing Petition for Writ of Mandate to Nullify Decision of Governing Board to Terminate Probationary Teacher--Open Session of Board Not Required to Terminate Teacher Based on Performance Evaluation [Gov. Code § 54957]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Governing Board May Meet in Closed Session to Make Personnel Decisions

[b] Scope of Performance Evaluation Under Personnel Exception

§ 211.44 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Prohibit School District's Use of Unclassified Non-Academic Personnel in Nonmerit District [Educ. Code §§ 88003, 88004]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Use of Outside Employees Permitted in Nonmerit School District

§ 211.45 Supporting Employee's Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Compel Payment of Lawful Salary by Governing Board to School District Employee--School District as Without Authority to Lower Salaries After Beginning of School Year

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Mandate as Proper to Compel Payment of Salary by School District

[b] School Board as Without Authority to Reduce Salaries After Beginning of School Year

§ 211.46 Supporting Employee's Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Compel Payment of Lawful Salary by Governing Board to School District Employee--Nonsupervisory Certificated Employee as Required to Be Classified on Basis of Uniform Allowance for Years of Training and Experience [Educ. Code § 45028]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Certificated Employees as Required to Be Classified for Salary Purposes on Basis of Uniform Allowance for Years of Training and Experience

[b] Uniform Allowance for Outside Experience

[4] Additional Authorities

[a] Certificated Employees as Required to Be Classified for Salary Purposes on Basis of Uniform Allowance for Years of Training and Experience

§ 211.47 Opposing Employee's Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Compel Payment of Salary by Governing Board to School District Employee--Governing Board as Permitted to Lower Salaries Prior to Beginning of School Year

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Governing Board as Permitted to Lower Salaries Before Beginning of School Year

§ 211.48 Opposing Employee's Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review School District Decision Reducing Teacher Hours and Wages

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Notice and Hearing Procedures Not Required Unless Permanent Employee Terminated

[b] Termination Not Accomplished by Partial Reduction in Work Hours

§ 211.49 Opposing Employee's Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Compel Payment of Salary by Governing Board to School District Employee--Certain Pay Incentive Programs as Permitted

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] School Board Permitted to Define Experience for Purposes of Salary Classification

[b] Pay Incentive Program as Permitted

§ 211.50 Opposing Employee's Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Compel Payment of Salary by Governing Board to School District Employee--District Permitted to Grant Differential Credit for Purposes of Initial Placement on Salary Schedule [Educ. Code § 45028(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] District Permitted to Grant Differential Credit for Purposes of Initial Placement on Salary Schedule

California Points & Authorities

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 211 SCHOOLS: CERTIFICATION, DISMISSAL, AND RELATED EMPLOYMENT ISSUES
PART I. INTRODUCTION

21-211 California Points & Authorities § 211.01

§ 211.01 Scope of Chapter

This chapter contains forms of memoranda for use in mandate proceedings involving certificated employees, such as teachers, of public school districts. This part includes forms of memoranda for use in supporting [*see §§ 211.27 -211.34*] and opposing [*see §§ 211.36 -211.37A*] a petition for writ of mandate to review the decision of a school district's Commission on Professional Competence dismissing a permanent employee. It also includes forms supporting [*see §§ 211.39 -211.41*] and opposing [*see § 211.42*] a petition for mandate to review the decision of a governing board to terminate the contract of a probationary teacher. Finally, this part contains memoranda supporting and opposing a petition for writ of mandate to compel recognition of an employee's permanent status [*see §§ 211.20, 211.23 -211.25*] and to compel payment of salary to a school district employee [*see §§ 211.45 -211.47, 211.49*].

As noted in the *discussion under § 211.02*, a certificated employee's rights with respect to dismissal or suspension are dependent on whether he or she is classified as a permanent, probationary, substitute, or temporary employee. The question of how a particular teacher should be classified is frequently a cause of litigation [*see, e.g., Balen v. Peralta Junior College Dist. (1974) 11 Cal. 3d 821, 826-830, 114 Cal. Rptr. 589, 523 P.2d 629]* . This part contains forms of memoranda for use in supporting and opposing a petition for writ of mandate to compel recognition of an employee's permanent status [*see §§ 211.20, 211.23 -211.25*]. For a more complete discussion of classification of certificated employees, see Ch. 512, *Schools* , in California Forms of Pleading and Practice (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsMandamusEducation LawFaculty & StaffCompensationPaymentEducation LawFaculty & StaffDiscipline & DismissalAdministrative ProceedingsDecisions

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CHAPTER 211 SCHOOLS: CERTIFICATION, DISMISSAL, AND RELATED EMPLOYMENT ISSUES
PART I. INTRODUCTION

21-211 California Points & Authorities § 211.02

§ 211.02 Governing Law

General definitions and provisions relating to certificated employees of school districts are set forth in *Educ. Code § 44000 et seq.* General rights and duties of all school district employees are set forth in *Educ. Code § 44030 et seq.* The issuance, denial, suspension, and revocation of certification documents is governed by *Educ. Code § 44200 et seq.* General rules governing the employment and classification of certificated employees are set forth in *Educ. Code § 44830 et seq.* Resignations, dismissals, suspensions, and leaves of absence are governed by *Educ. Code § 44930 et seq.* Salaries of certificated employees are governed by *Cal. Const., art. IX, § 6* and *Educ. Code § 45022 et seq.*

The Education Code classifies certificated employees into permanent, probationary, substitute, and temporary employees. A certificated employee who has not been classified as a permanent or substitute employee ordinarily is classified as a probationary employee [*Educ. Code § 44915*]. Generally, a probationary certificated employee automatically will be reclassified as permanent if he or she hasbeen employed by a school district for two complete consecutive school years and is reelected for the next succeeding school year [*Educ. Code § 44929.21(b)*; *but see Educ. Code § 44911* (service under provisional credential not included in computing service required for classification as permanent employee)]. A substitute employee is one who is employed in a position requiring certification to fill in for regularly employed persons who are absent from service [*Educ. Code § 44917*]. Alternatively, a certificated employee may be classified as temporary if employed to teach certain temporary classes of limited duration, to serve in a limited assignment supervising athletic activities, or to serve in an emergency to prevent the stoppage of school district business [*Educ. Code § 44919*]. A nonpermanent certificated employee will be deemed probationary unless, at the time of initial employment, the employee is given a written statement indicating the temporary nature of the employment [*Educ. Code § 44916*; *see Kavanaugh v. West Sonoma County High Sch. Dist. (2003) 29 Cal. 4th 911, 919-926, 129 Cal. Rptr. 2d 811, 62 P.3d 54* (for purposes of *Educ. Code § 44916*, "time of initial employment" is certificated employee's first day of paid service for school district)].

The classification of a certificated employee depends on the position he or she occupies, and a school district may not determine a teacher's classification based on the type of credential or certification he or she has. For example, if a certificated employee occupies a position the Education Code defines as temporary, he or she is a temporary employee; if it is not a position that requires temporary classification (or permanent or substitute), he or she is a probationary employee [*Bakersfield Elementary Teachers Assn. v. Bakersfield City School Dist. (2006) 145 Cal. App. 4th 1260,*

1299, 52 Cal. Rptr. 3d 486 (Educ. Code grants school districts no discretion to deviate from statutory classification scheme)].

An employee's rights with respect to dismissal and suspension are determined by his or her classification. For example, substitute employees may be dismissed at any time at the pleasure of the governing board of the school district [*Educ. Code § 44953*]. Governing boards of school districts may release temporary employees requiring certification qualifications under the following circumstances: (1) at the pleasure of the board, before an employee has served during one school year at least 75 percent of the number of days the regular schools of the district are maintained; or (2) after an employee has served during one school year the number of days described above, if he or she is notified before the end of the school year of the district's decision not to reelect him or her for the next succeeding year [*Educ. Code § 44954*].

On the other hand, permanent teachers cannot be dismissed or suspended except for certain causes [*see Educ. Code §§ 44932, 44933*] and are entitled to certain procedural safeguards [*see Educ. Code §§ 44934-44947*]. During the school year, probationary employees hired in or after the 1983-1984 fiscal year may be dismissed or suspended for unsatisfactory performance determined pursuant to *Educ. Code §§ 44660-44665* or for cause pursuant to *Educ. Code § 44932*. The procedure for their dismissal or suspension is set out in *Educ. Code § 44948.3*. However, probationary employees who are employed in a school district with an average daily attendance of less than 250 pupils (hereinafter referred to as asmall school district) may be dismissed or suspended during the school year only for cause as in the case of permanent employees and have the same procedural rights as those accorded to permanent employees [*see Educ. Code § 44948*; *Pennel v. Pond Union School Dist. (1973) 29 Cal. App. 3d 832, 839, 105 Cal. Rptr. 817]* . Small school districts may also elect to dismiss probationary employees during the school year pursuant to *Educ. Code § 44948.3* [*Educ. Code § 44948.2*]. Probationary employees employed in small school districts may be dismissed at the end of the school year only for cause that relates solely to the welfare of the schools and the pupils thereof [*see Educ. Code § 44948.5(e)*]. The procedure for their dismissal is set out in *Educ. Code § 44948.5*. In addition, both permanent and probationary employees may have their services terminated when the governing board reduces the number of certificated employees for reasons specified in *Educ. Code §§ 44955* or *44955.5*. The procedure regarding notice and hearing for termination of services pursuant to *Educ. Code § 44955* is set out in *Educ. Code § 44949*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawFaculty & StaffDiscipline & DismissalGeneral OverviewEducation LawFaculty & StaffDiscipline & DismissalAdministrative ProceedingsGeneral OverviewEducation LawFaculty & StaffPersonnel ActionsSuspensionsEducation LawFaculty & StaffQualificationsGeneral Overview

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21-211 California Points & Authorities § 211.03

§ 211.03 Reorganization of Education Code

The statutory provisions governing the public school system generally and public school employees in particular have been amended and reorganized numerous times. The original provisions governing the dismissal of teachers were contained in the Political Code. These provisions were transferred to the School Code in 1931. The provisions of the School Code were reorganized and renumbered and the Code was renamed the Education Code in 1943. The Education Code itself was reorganized in 1959 and again in 1976. Many of the cases cited and discussed in this part were decided prior to the latest reorganization of the Education Code under statutory provisions that were either identical or substantially the same as the current provisions. These provisions are cited as "former Educ. Code (or School Code) § _____ (*now* Educ. Code § _____)" when referred to in the Discussion of Authorities.

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawFaculty & StaffDiscipline & DismissalAdministrative ProceedingsStatutory Procedures

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21-211 California Points & Authorities § 211.04

§ 211.04 Related Pleading and Practice Chapters

For a discussion and forms for use in actions involving certificated employees of school districts, see Ch. 512, *Schools* in California Forms of Pleading and Practice (Matthew Bender). For discussion and forms relating to administrative adjudicatory hearings and judicial review thereof, see Ch. 474C, *Procedures in Reviewing Agency Decisions* in California Forms of Pleading and Practice (Matthew Bender). For discussion and forms relating to mandate proceedings generally, see Ch. 358, *Mandate and Prohibition* in California Forms of Pleading and Practice (Matthew Bender). For discussion and forms relating to employees subject to the civil service system, see Ch. 118, *Civil Service* in California Forms of Pleading and Practice (Matthew Bender).

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21-211 California Points & Authorities § 211.05

§ 211.05 Related Points and Authorities Chapters

For memoranda of points and authorities for use in actions involving students, see Ch. 210, *Schools: Actions by Students* .

For forms of memoranda of points and authorities for use in mandate proceedings generally, see Ch. 150, *Mandate and Prohibition* . For forms of memoranda for use in mandate proceedings to review administrative adjudicatory decisions, see Ch. 195, *Public Administrative Law* . For memoranda of points and authorities for use in mandate proceedings involving employees subject to the civil service system, see Ch. 35, *Civil Rights* .

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21-211 California Points & Authorities §§ 211.06-211.19

[Reserved]

§§ 211.06[Reserved]

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21-211 California Points & Authorities § 211.20

§ 211.20 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Compel Recognition of Permanent Status of School District Employee [Educ. Code § 44929.21]

[1] FORM

	)	
	)	NO. _____
SUPERIOR COURT OF CALIFORNIA,	)	MEMORANDUM OF POINTS AND AUTHORIT-
COUNTY OF_____	)	IES IN SUPPORT OF PETITION FOR WRIT OF
_____ [*name*],	)	MANDATE
Petitioner,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Respondent.	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD ISSUE A WRIT OF MANDATE TO COMPEL THE GOVERNING BOARD OF RESPONDENT SCHOOL DISTRICT TO RECOGNIZE PETITIONER'S STATUS AS A PERMANENT EMPLOYEE OF THE SCHOOL DISTRICT.

A. Mandate as Proper to Compel Performance of Duty or Enjoyment of Right. A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act that the law specially enjoins, as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he or she is entitled, and from which he or she is unlawfully precluded by the inferior tribunal, corporation, board, or person (*Code Civ. Proc. § 1085(a)*).

B. Mandate as Proper to Compel Recognition of Teacher's Permanent Status. Mandate directed to the governing board of a school district is the appropriate vehicle to compel the district to recognize a teacher's status as a permanent employee, and may be pursued without first exhausting any administrative remedy (*Middaugh v. Board of Trustees (1975) 45 Cal. App. 3d 776, 781, 119 Cal. Rptr. 826*).

C. Mandatory Classification of Permanent Employee. After having been employed by the district for two complete consecutive school years in a position or positions requiring certification qualifications, every employee of a school district of any type or class having an average daily attendance of 250 or more pupils who is reelected for the next succeeding school year to a position requiring certification qualifications, shall be classified as and become a permanent employee of the district at the commencement of the succeeding school year (*Educ. Code § 44929.21(b)*).

D. Attainment of Permanent Status as Automatic. When a teacher fulfills the statutory requirements, attainment of permanent status is automatic; no application need be made by the teacher, nor is any affirmative action required on the part of the school board (*Vittal v. Long Beach Unified School Dist. (1970) 8 Cal. App. 3d 112, 118, 87 Cal. Rptr. 319*).

[*Optional*] **E. Probationary Service for 75 Percent of School Days as Constituting One Complete School Year.** A probationary employee, who has served in any one school year for at least 75 percent of the number of days the regular schools of the district in which he or she is employed are maintained, must be deemed to have served a complete school year (*Educ. Code § 44908*).

[*Optional*] **F. Probationary Service for 75 Percent of Hours Required of Full-Time Teacher as Constituting One Complete School Year.** A probationary teacher who, during one school year, has taught for 75 percent of the hours required of a full-time teacher, but not 75 percent of the school days, has nonetheless served a complete school year for purposes of attaining permanent status (*Vittal v. Long Beach Unified School Dist. (1970) 8 Cal. App. 3d 112, 119-120, 87 Cal. Rptr. 319*).

[*Optional*] **G. Leave of Absence Does Not Cause Break in Continuity of Service.** When a probationary employee has been granted a leave of absence, that leave of absence does not constitute a break in the continuity of service required for classification of the employee as a permanent employee (*Educ. Code § 44975*; *see Griego v. Los Angeles Unified School Dist. (1994) 28 Cal. App. 4th 515, 519-521, 33 Cal. Rptr. 2d 556*).

[*Optional*] **H. Full-Time Permanent Status.** Where a probationary employee serves in a full-time position in which some or all of the duties require certification qualifications for the entire probationary period, he or she acquires full-time, not part-time, permanent status (*Holbrook v. Board of Educ. (1951) 37 Cal. 2d 316, 329-330, 231 P.2d 853*).

[*Optional*] **I. Probationary Year Served Under University Internship Credential.** If a person has completed a university teaching internship program and obtained a clear credential (*see Educ. Code § 44450 et seq.*), the last year of teaching under the university internship credential counts toward tenure if the person is employed for the next complete school year under the clear credential by the same school district that employed him or her in the last year of internship (*Educ. Code § 44466*). Thus, at the completion of the first year under the clear credential, the person will attain tenure unless the school district gives timely notice of its decision not to reelect him or her (*Peoples v. San Diego Unified Sch. Dist. (2006) 138 Cal. App. 4th 463, 468-472, 41 Cal. Rptr. 3d 383*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a petition to the superior court for a writ of mandate to compel the governing board of a school district to recognize that a teacher has attained tenure, that is, status as a permanent employee of the school district. Such a mandate proceeding may be brought if the school district has attempted to discharge the employee without complying with the procedures applicable to permanent employees, or in any other situation in which the district has failed to accord the employee the rights of a permanent employee.

When optional Paragraph F is included, optional Paragraph E should also be included.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Chapters

For a form of petition for writ of mandate to compel a school district to recognize a teacher's status as a permanent employee, see California Forms of Pleading and Practice, Ch. 512, *Schools* , Pt. II (Matthew Bender).

[c] Related Memoranda

For memoranda of points and authorities supporting petitions for writs of mandate generally, see Ch. 150, *Mandate and Prohibition* .

[d] Opposing Memorandum

In an appropriate case, the memorandum set out in *set out in § 211.22* may be submitted in opposition to the petition supported by this form.

[3] Discussion of Authorities

[a] Mandate as Proper to Compel Recognition of Teacher's Permanent Status

Middaugh v. Board of Trustees *(1975) 45 Cal. App. 3d 776, 119 Cal. Rptr. 826* , was an action for a writ of mandate to compel a school district to recognize appellant's status as a permanent employee and to enjoin the district from proceeding to dismiss her under the procedure applicable to the dismissal of probationary teachers. The trial court granted the district's motion for judgment on the pleadings on the ground that the school board's determination that appellant was a probationary employee in its proceedings to dismiss her was res judicata on that issue. In reversing, the court of appeal noted that mandate directed to the governing board of a school district is an appropriate vehicle to compel the district to recognize a teacher's status as a permanent employee of the district and that it may be pursued without first exhausting any administrative remedy (*45 Cal. App. 3d 776, 781)* . The court held that the allegations of appellant's petition stated a good cause of action for a writ of mandate, and that since a motion for judgment on the pleadings requires the court to accept the allegations as true, the petition established appellant's right to relief unless the school board proceedings of which the trial court took judicial notice conclusively rebutted a necessary allegation of the petition (*45 Cal. App. 3d 776, 781)* . The court then held that the school board's finding that appellant was a probationary employee was not res judicata on that issue and that the trial court had thus erred in granting the motion for judgment on the pleadings (*45 Cal. App. 3d 776, 781-782)* .

[b] Attainment of Permanent Status as Automatic

In ***Vittal v. Long Beach Unified School Dist.*** *(1970) 8 Cal. App. 3d 112, 87 Cal. Rptr. 319* , petitioner sought a writ of mandate from the superior court to compel respondent school district to retroactively classify her as a permanent employee of the district and to pay her alleged salary arrearages. The trial court rendered a judgment requiring the district to classify her as a permanent employee as of a certain date, but denying her any award for the claimed salary deficiencies. The evidence showed, in part, that petitioner had been hired in 1956 to teachEnglish as a second language at an hourly rate, and that she had been employed under similar contracts every year since then, although the number of hours and school days taught per week varied from year to year. The trial court found that for all years except 1967-1968, petitioner had carried a teaching load equivalent to or greater than other permanent teachers instructing the same course. Both parties appealed from the judgment.

In affirming, the court of appeal held, inter alia, that petitioner was entitled to classification as a permanent employee and that the judgment should be modified to require respondent to classify petitioner as a "Full Time Permanent Employee (English as a Second Language)" as the distinction between full and part time is significant (*8 Cal. App. 3d 112, 119, 123-124)* . The court noted that when the provisions for permanent status contained in the Education Code are met, the attainment of permanent status is automatic. No application need be made by the teacher, nor is any affirmative action on the part of the school board necessary (*8 Cal. App. 3d 112, 118)* .

[c] Probationary Service for 75 Percent of Hours Required of Full-Time Teacher as Constituting One Complete School Year

The facts and procedural background of ***Vittal v. Long Beach Unified School Dist.*** *(1970) 8 Cal. App. 3d 112, 87 Cal. Rptr. 319* , are *discussed in § 211.20[3][b]*. In rejecting the school district's contention that petitioner had not fulfilled the statutory requirement of former Educ. Code §§ 11304, 13328 (*now Educ. Code § 44929.21*) that she serve for three complete consecutive school years because petitioner could not point to any three consecutive years in which she had taught at least 75 percent of the school days, the court of appeal held that a teacher who has taught at least 75 percent of the number of hours required of a full-time teacher, but not 75 percent of the days of the school years, has nonetheless taught a complete school year for purposes of attaining permanent status, and is within the class of teachers intended by the Legislature to be benefited by the tenure statute (*8 Cal. App. 3d 112, 119-120)* .

[d] Leave of Absence Does Not Cause Break in Continuity of Service

In ***Griego v. Los Angeles Unified School Dist.*** *(1994) 28 Cal. App. 4th 515, 33 Cal. Rptr. 2d 556* , the plaintiff had taught a complete school year (i.e., more than 75 percent of the number of days that regular school was maintained) as a probationary employee during the 1989-1990 school year. In the 1990-1991 school year, plaintiff was given an approved leave of absence due to a work-related injury and therefore taught slightly less than a complete school year. In the 1991-1992 school year, plaintiff again taught a complete school year as a probationary employee. On June 23, 1992, the school district notified plaintiff that she was not reelected to her position for the 1992-1993 school year. Plaintiff brought a mandate proceeding to compel the district to classify her as a permanent employee of the district, relying on *Educ. Code § 44929.21(b)*, which provides that when an employee in a school district with an average daily attendance of 250 or more pupils has been employed by the district for two complete consecutive school years in a position requiring certification qualifications and is reelected for the next succeeding school year, he or she must be classified as and become a permanent employee of the district. The statute further provides that the governing board of the district must notify the employee on or before March 15 of the employee's second complete consecutive school year of the board's decision to reelect or not reelect the employee for the next succeeding school year, and that the employee is deemed reelected if the board does not give such notice by March 15. The trial court denied the writ, and plaintiff appealed.

On appeal, the district contended that plaintiff had not met the requirements of *Educ. Code § 44929.21(b)* for automatic

classification as a permanent employee because plaintiff had not served a complete school year during 1990-1991; therefore, she had not served two *complete consecutive* school years as required by the statute. The court of appeal rejected this contention, noting that *Educ. Code § 44929.21* must be construed in light of *Educ. Code § 44975*. The first sentence of the latter statute provides that "[n]o leave of absence when granted to a probationary employee shall be construed as a break in the continuity of service required for classification of the employee as permanent." The court held that the "continuity of service" language in *Educ. Code § 44975* relates to the "consecutive" element in *Educ. Code § 44929.21*. Thus, the court concluded, plaintiff properly relied on the first sentence of *Educ. Code § 44975* to argue that between her complete year of service in 1989-1990 and her complete year of service in 1991-1992, there was no break in the continuity of her service--i.e., she had served two consecutive complete school years (*28 Cal. App. 4th 515, 519)* . The court held that the language in the second sentence of *Educ. Code § 44975*, which provides that the time during which the employee is on leave is not to be considered employment for purposes of *Educ. Code § 44929.21*, did not aid the district's case because that language relates to the requirement in § 44929.21 that the consecutive years be "complete." In this case, the court noted, plaintiff was not arguing that the year during which she took her leave (1990-1991) was a complete year; she was only arguing that because of her leave there was no break in continuity between her first and second complete years (1989-1999 and 1991-1992) and that therefore the district was required to notify her by March 15, 1992, of her non-reelection in order to prevent her from achieving permanent status. The court agreed with plaintiff's argument and therefore reversed the judgment (*28 Cal. App. 4th 515, 519-521)* .

[e] Full-Time Permanent Status

Holbrook v. Board of Educ. *(1951) 37 Cal. 2d 316, 231 P.2d 853* , was an appeal from a judgment denying a petition for a writ of mandate to compelrespondent school board to reinstate petitioner to a prior position and classify him as a full-time permanent employee of the district. Petitioner was employed by the board for seven consecutive years in a full-time position in which approximately three-fourths of his time was devoted to duties that did not require certification qualifications and approximately one-fourth of his time was spent performing duties that did require certification qualifications. At the completion of the seven years, the board attempted to discontinue his services as a full-time employee to employ him for only one-fourth time to perform the duties that required certification qualifications. The board contended that petitioner was entitled to only one-fourth time tenure. The trial court agreed and entered judgment denying the writ.

On appeal, the Supreme Court reversed. The Court held that if all or some of the duties assigned to an employee required certification qualifications, then the employee holds a position requiring certification qualifications within the meaning of the tenure statute [*see* former Educ. Code § 13081 (*now Educ. Code § 44929.21*)] (*37 Cal. 2d 316, 329)* . The Court found that nothing in the statutes requires a local school board to assign only certificated duties to any one employee, and observed that no authority referred to the Court necessitated a holding that, on reelection for a fourth consecutive school year, an employee becomes entitled to permanent status only as to the amount of time devoted to certificated duties during the probationary period. The Court stated that to make an employee's tenure rights dependent on the duties assigned to him or her for which a certificate was required, allocated according to time, would mean that an employee would attain permanent status on a part-time basis in every case where, in accordance with the board's authority, the employee was assigned some other, noncertificated duties during his probationary period. To one who must earn his living from his profession, the Court observed, such part-time tenure rights would be valueless and the Court would not assume that the Legislature intended such a result (*37 Cal. 2d 316, 329-330)* .

The Court assumed that part-time employment in a position requiring certification qualifications during the period of employment results in the right to permanent employment on a part-time basis only, and that a school board could contract to employ the same person in two separate part-time positions, only one of which required certification qualifications (*37 Cal. 2d 316, 331)* . The Court concluded, however, that in this case the petitioner was employed in one full-time position, rather than two part-time positions (*37 Cal. 2d 316, 332)* . Thus, on reelection to his fourth consecutive school year in that position, petitioner was entitled to full-time permanent employment in the school district (*37 Cal. 2d 316, 334)* .

[f] Probationary Year Served Under University Internship Credential

In ***Peoples v. San Diego Unified Sch. Dist.*** *(2006) 138 Cal. App. 4th 463, 41 Cal. Rptr. 3d 383* , the plaintiff taught in an elementary school for the defendant school district for two school years with a university intern credential issued under the Teacher Internship Act of 1967 (*see Educ. Code § 44450 et seq.*). At the end of the second year, she obtained a clear (non-internship) credential and taught for the defendant district for another school year. In May of that third year, the defendant notified the plaintiff that she would not be reelected (i.e., rehired) for the next year. The defendant gave this notice under law permitting a school district to terminate a teacher without cause after his or her first year of probationary employment (*Educ. Code § 44929.21(b)*). The plaintiff contended, however, that she could not be terminated without cause because she had attained tenure by the time the defendant gave notice of its intention not to reelect her. Specifically, she contended that (1) the law allowing termination without cause requires the notice to be given by March 15 of the teacher's second qualifying year of employment (*see Educ. Code § 44929.21(b)*), and (2) applying the provisions of the Teacher Internship Act, her year of teaching under the clear credential was her second qualifying year of employment. The court of appeal agreed. Under the Teacher Internship Act, if a person has completed a university teaching internship program and obtained a clear credential, the last year of teaching under the university internship credential counts toward tenure if the person is employed for the next complete school year under the clear credential by the same school district that employed him or her in the last year of internship [*Educ. Code § 44466*]. Thus, at the completion of the first year under the clear credential, the person attains tenure unless the school district gives timely notice of its decision not to reelect him or her. Since the notice in this case was not given by March 15 of the first year under the clear credential, the plaintiff in this case had attained tenure (*138 Cal. App. 4th 463, 468-472)* .

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21-211 California Points & Authorities § 211.21

§ 211.21 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Compel Reinstatement of Certificated Employee to Administrative or Supervisory Position--Failure to Give Required Advance Notice [Educ. Code § 44951]

[1] FORM

[*Caption. See § 211.20.*]

A WRIT OF MANDATE SHOULD BE ISSUED TO COMPEL RESPONDENT TO REINSTATE PETITIONER TO HIS/HER FORMER POSITION OF _____[*specify former administrative or supervisory position*] BECAUSE RESPONDENT FAILED TO NOTIFY PETITIONER IN ADVANCETHAT HE/SHE MAY BE RELEASED FROM HIS/HER POSITION AS REQUIRED BY EDUCATION CODE SECTION 44951 AND NO EXCEPTION TO THE NOTICE REQUIREMENT APPLIES TO THIS CASE.

A. Mandate as Proper to Compel Performance of Duty or Enjoyment of Right. [*See § 211.20, Paragraph A.*]

B. Advance Notice Required Before Supervisory or Administrative Employee Released From Position. Subject to certain statutory exceptions, a certificated employee holding a position requiring an administrative or supervisory credential must be continued in his position for the succeeding school year unless (1) he or she is sent written notice (deposited in the United States registered mail with postage prepaid to his or her last known address) by March 15 stating that he or she may be released from his or her position for the following year, or (2) his or her signature is obtained by March 15 on a written notice stating that he or she may be released from his or her position for the following year (*Educ. Code § 44951*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a petition for writ of mandate to compel the governing board of a school district to reinstate a certificated employee to an administrative or supervisory position, when the district has failed to provide the advance notice required by *Educ. Code § 44951* prior to terminating his or her employment or reassigning him or her to a non-administrative or non-supervisory position.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. If appropriate, counsel should also show that the facts of the case do not support the assertion by the district of any exception to the notice requirement [*see § 211.21[3][a]*].

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 211.26* may be submitted in opposition to petition supported by the points and authorities set out in this form.

[c] Related Points and Authorities

For memoranda of points and authorities supporting petitions for writs of mandate generally, see Ch. 150, *Mandate and Prohibition* .

[3] Discussion of Authorities

[a] Advance Notice Required Before Supervisory or Administrative Employee Released From Position

Under *Educ. Code § 44951*, a certificated employee holding a position requiring an administrative or supervisory credential must be continued in his position for the succeeding school year unless (1) he or she is sent written notice (deposited in the United States registered mail with postage prepaid to his or her last known address) by March 15 stating that he or she may be released from his or her position for the following year, or (2) his or her signature is obtained by March 15 on a written notice stating that he or she may be released from his or her position for the following year. The purpose of this statute is to afford the certificated employee an opportunity to seek other employment as an administrator or supervisor in the event that he or she is reassigned to a teaching or other non-administrative or non-supervisory position [*see Hahn v. Board of Education (1988) 205 Cal. App. 3d 744, 752, 252 Cal. Rptr. 471* ; *Barton v. Governing Board (1976) 60 Cal. App. 3d 476, 479-480, 131 Cal. Rptr. 455]* .

Educ. Code § 44951 further provides, however, that it does not apply to (1) a certificated employee who holds a written contract with an expiration date beyond the current school year; (2) a certificated employee holding a position that is funded for less than a school year; (3) a certificated employee assigned to an acting position whose continuing right to hold this position depends on being selected from an eligible list established for the position; or (4) to the termination of employment under *Educ. Code § 44955* (termination of employment due to decline in average daily attendance, reduction or elimination of services, or modification of curriculum) [*see § 211.26*]. In addition, a court of appeal has held that the notification requirements of *Educ. Code § 44951* do not apply when a school district reassigns a supervisor or administrator for misconduct or other cause [*Jefferson v. Compton Unified School Dist. (1993) 14 Cal. App. 4th 32, 39, 17 Cal. Rptr. 2d 474* ; *see § 211.26*].

California Points & Authorities

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 211 SCHOOLS: CERTIFICATION, DISMISSAL, AND RELATED EMPLOYMENT ISSUES
PART II. FORMS

21-211 California Points & Authorities § 211.22

§ 211.22 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086, 1107] to Compel Recognition of Permanent Status of School District Employee--Non-Reelection of Probationary Teacher (Large District) [Educ. Code § 44929.21]

[1] FORM

[*Caption. See § 211.23.*]

A WRIT OF MANDATE SHOULD NOT ISSUE TO COMPEL THE GOVERNING BOARD TO RECOGNIZE THAT PETITIONER HAS ATTAINED PERMANENT STATUS IN HIS/HER POSITION BECAUSE THE SCHOOL DISTRICT HAS THE ABSOLUTE RIGHT TO DECLINE REELECTION OF PROBATIONARY TEACHERS.

A. Probationary Teachers Generally. A teacher who has not attained permanent status is classified as a probationary employee. A probationary employee may only become a permanent employee if he/she has been employed by the school district for two complete, consecutive school years in a position or positions requiring certification qualifications and is reelected by the district for the succeeding school year to a position requiring certification qualifications (*Educ. Code § 44929.21*; *Culbertson v. San Gabriel Unified Sch. Dist. (2004) 121 Cal. App. 4th 1392, 1397-1399, 18 Cal. Rptr. 3d 234* ; *Smith v. Governing Bd. of Elk Grove Unified Sch. Dist. (2004) 120 Cal. App. 4th 563, 567-569, 16 Cal. Rptr. 3d 1* ; *Fine v. Los Angeles Unified Sch. Dist. (2004) 116 Cal. App. 4th 1070, 1076-1080, 10 Cal. Rptr. 3d 876*).

B. Non-Reelection of Probationary Teachers. School districts with an average daily attendance of 250 students are permitted to decline reelection of probationary teachers for the ensuing school year without any showing of cause, statement of reasons, and without administrative hearings or appeal. The only procedural requirement that the school district must provide is notice to the affected teacher on or before March 15 in his/her second year of employment (*Educ. Code § 44929.21*). Provided this notice requirement is met, the affected teacher has no procedural recourse against the district (*Board of Education v. Round Valley Teachers Assn. (1996) 13 Cal. 4th 269, 279, 52 Cal. Rptr. 2d 115, 914 P.2d 193*).

C. Collective Bargaining and Due Process Rights of Probationary Teachers. *Educ. Code § 44929.21(b)* grants the school district exclusive authority over the decision whether or not to reelect a probationary teacher. Furthermore, *Educ. Code § 44929.21(b)* preempts any collective bargaining agreements seeking to provide greater due process rights to

probationary teachers or impose greater procedural requirements for non-reelection on school districts (*Board of Education v. Round Valley Teachers Assn. (1996) 13 Cal. 4th 269, 284-287, 52 Cal. Rptr. 2d 115, 914 P.2d 193*).

D. More Than One Year of Service in Categorically Funded Position Is Not Included in Computing Service Time for Attainment of Permanent Status. A teacher's service in a position requiring certification in a program or project conducted under contract with a public or private agency, or in a categorically funded project, that is not required by federal or state statutes generally does not count toward the service time required for attainment of permanent status. However, up to one year of such service may be counted if (1) the employee has served in that position pursuant for at least 75 percent of the number of days the regular schools of the district are maintained, and (2) the employee is subsequently employed as a probationary employee in a position requiring certification qualifications (*Educ. Code § 44909*; *Schnee v. Alameda Unified Sch. Dist. (2004) 125 Cal. App. 4th 555, 560-565, 22 Cal. Rptr. 3d 800*).

E. Service as Instructor at Regional Occupational Center Is Not Included in Computing Service Time for Attainment of Permanent Status. An employee's service as an instructor at a regional occupation center is not included in computing the service time required for attainment of permanent status, unless the employee is a regularly credentialed teacher who has been employed to teach in the regular educational programs of the school district and subsequently assigned as an instructor in the regional occupational center or program (*Educ. Code § 44910*). A teacher who retains his or her part-time regular teaching position, and is assigned to an additional part-time regional occupation center teaching position, is not "subsequently assigned" to the regional occupation center for this purpose (*Reis v. Biggs Unified Sch. Dist. (2005) 126 Cal. App. 4th 809, 816-821, 24 Cal. Rptr. 3d 393*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Respondent _____ [*name*]

[2] Comments

[a] Use of Form

This form of memorandum of points and authorities may be submitted in opposition to a petition to the superior court for a writ of mandate to compel the governing board of a school district to recognize an employee's permanent status. The basis of the opposition is that, under *Educ. Code § 44929.21(b)*, a school district has an exclusive right not to reelect a probationary teacher for the ensuing school year without any showing of cause, statement of reasons, and without administrative hearings or appeal as long as the district provides notice of its decision to the teacher on or before March 15 in his or her second year of employment.

[b] Related Points and Authorities

For memoranda of points and authorities opposing petitions for writs of mandate generally, see Ch. 150, *Mandate and Prohibition* . For memoranda of points and authorities supporting petitions for writs of mandate to compel recognition of the permanent status of school district employees or the reinstatement of a supervisory level employee, see *§§ 211.20* and *211.21*, respectively.

[3] Discussion of Authorities

[a] Probationary Teachers Generally

The plaintiff in ***Culbertson v. San Gabriel Unified Sch. Dist.*** *(2004) 121 Cal. App. 4th 1392, 18 Cal. Rptr. 3d 234* , was employed by the defendant school district during the 1999-2000 school year under an "Emergency Long Term Single Subject Teaching Permit." The plaintiff then received a"Professional Clear Single Subject Teaching Credential" and was employed by the defendant district for the 2000-2001 school year as a probationary employee. On May 23, 2001, the defendant sent the plaintiff a written notice of non-reelection of employment for the 2001-2002 school year. The plaintiff sought a writ of mandate to compel the defendant to classify him as a permanent employee, contending that he was entitled to permanent status because he had been employed for two years, and the defendant district had not sent the notice of non-reelection by March 15 of his second year, as required by *Educ. Code § 44929.21(b)*. The trial court denied the writ application, and the court of appeal affirmed.

Educ. Code § 44929.21(b) provides, in relevant part, that if an employee of a large school district (i.e., with an average daily attendance of 250 or more) has been employed by the district for two complete consecutive school years in a position requiring certification qualifications, and the employee is reelected for the next succeeding school year to a position requiring certification qualifications, he or she becomes a permanent employee of the district. *Educ. Code § 44929.21(b)* also provides that if the governing board of the district does not notify the employee, on or before March 15 of the employee's second complete consecutive school year of employment by the district in a position or positions requiring certification qualifications, of a decision not to reelect the employee for the next succeeding school year, the employee will be deemed reelected for the next succeeding school year.

The court of appeal explained that the two-year tenure provision of *Educ. Code § 44929.21(b)* applies only to employees who work two years while eligible to attain permanent status. The plaintiff did not fit within this category because his service in 1999-2000 under the emergency permit constituted service under a provisional credential. Such service may not be included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee of a school district [*Educ. Code § 44911*]. Thus, the defendant district's notice of non-reelection sent in May 2001 was sent during the plaintiff's *first* year of eligible employment and was well before the statutory deadline of March 15 of the second year of eligible employment. The court of appeal rejected an argument that the notice requirement of *Educ. Code § 44929.21(b)* should be applied independently of the statute's tenure provision. That is, an employee must be eligible for permanent employment under the tenure provision before he or she is entitled to the March 15 notice of non-reelection (*121 Cal. App. 4th 1392, 1397-1399)* .

The plaintiff in ***Smith v. Governing Bd. of Elk Grove Unified Sch. Dist.*** *(2004) 120 Cal. App. 4th 563, 16 Cal. Rptr. 3d 1* , held a social science teaching credential. In the 1999-2000 school year she was employed by the defendant school district as a resource specialist in the district's special-education program. Her credential did not qualify her for that job, so she had to obtain an "Emergency Education Specialist Instruction Permit." She obtained a similar permit for the 2000-2001 year. In the 2001-2002 year her teaching duties changed to two-thirds time as a social studies teacher and one-third time in special education. The plaintiff sought a writ of mandate requiring the district to classify her as a permanent tenured teacher as of the beginning of the 2001-2002 school year. She contended that she was entitled to permanent status because she taught for two full years in a position requiring certification classifications, automatically qualifying her for permanent status under *Educ. Code § 44929.21(b)*. The trial court denied the writ, and the court of appeal affirmed.

The court of appeal explained that Section 44929.21(b) would entitle the plaintiff to permanent status, except for the exclusion provided by *Educ. Code § 44911*, which provides that service under a provisional credential may not be included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee of a school district. It is established that an emergency credential such as the one held by the plaintiff is a type of "provisional credential" within the meaning of *Educ. Code § 44911*. Therefore, since the plaintiff's two years of service as a resource specialist were under a provisional credential, at the end of those two years she had not attained permanent status under *Educ. Code § 44929.21(b)* (*120 Cal. App. 4th 563, 567)* .

The court of appeal rejected the plaintiff's contention that she fit within an exception to *Educ. Code § 44911* that allows

certain service under an emergency credential to count toward eligibility for permanent status. Specifically, *Educ. Code § 44911* states that "This section shall not be applicable to teachers granted a one-year emergency credential under the conditions specified in subdivision (b) of Section 44252 and subdivision (h) of Section 44830." (*Educ. Code §§ 44252(b)* and *44830(h)* [repealed eff. Jan. 1, 2009] deal with the credentialing and hiring of certain teachers pending fulfillment of the California basic skills assessment test requirement.) The court of appeal noted that several cases have held that the exception to *Educ. Code § 44911* can be invoked only by holders of sister-state credentials. Therefore, the exception was not applicable to the plaintiff in this case, who did not have a special-education credential from any state (*120 Cal. App. 4th 563, 568-569)* .

Fine v. Los Angeles Unified Sch. Dist. *(2004) 116 Cal. App. 4th 1070, 10 Cal. Rptr. 3d 876* , involved a teacher who was initially employed as a provisional teacher, under an emergency permit, prior to the issuance of her teaching credential. Her credential was valid from August 27, 1999, but she did not receive it until March, 2000, at which time she registered it with the school district that employed her; she and the district then executed a new contract for employment as a probationary teacher. The contract specified that the teacher's first day as a probationary employee was March 8, 2000. The issue in this case was whether the teacher attained permanent status before the district's March 2002, notice of its decisionnot to reelect her. The teacher contended that her probationary status should have related back to the August 27, 1999, effective date of her credential, making the 1999-2000 and 2000-2001 school years her first and second complete school years as a probationary employee. Therefore, the teacher contended, her rehiring for the 2001-2002 school year made her a permanent employee, and the district's March 2002 notice was not timely.

The court of appeal rejected the teacher's contention and held that the district was not required to classify her as probationary retroactive to the validity date of her credential. The court reasoned that a teacher serving under an emergency permit continues to serve under that permit, and under the contract to which he or she agreed, until the teacher is issued a credential and registers it with the school district (*see Educ. Code § 44330*). Thus, in this case the teacher's service as a probationary teacher could not begin until her credential was registered with the school district and a new contract was executed. Therefore, her status as a probationary employee began not on the validity date of her teaching credential, but on the date stated in her contract with the employing school district (*116 Cal. App. 4th 1070, 1076-1080)* . Accordingly, the 2000-2001 and 2001-2002 school years were her first two complete school years as a probationary employee, and the district's March 2002 notice of its decision not to reelect her was timely (*116 Cal. App. 4th 1070, 1072-1073)* .

[b] Non-Reelection of Probationary Teachers

In ***Board of Education v. Round Valley Teachers Assn.*** *(1996) 13 Cal. 4th 269, 52 Cal. Rptr. 2d 115, 914 P.2d 193* , the Round Valley Teacher's union had struck a collective bargaining agreement which set forth procedures for the dismissal or decision not to reelect probationary teachers for the following school year. In particular, the agreement provided that probationary teachers would receive no less than 30 days' notice of non-reelection by the district and would be permitted to appeal the decisions. In addition, the agreement provided that "just cause" was required for non-reelection of probationary teachers (*13 Cal. 4th 269, 272-273)* .

The California Supreme Court distinguished between a "dismissal for cause" pursuant to *Educ. Code §§ 44932 et seq., 44941 et seq.,* and *44948 et seq.,* and a "decision against reelection" pursuant to *Educ. Code § 44929.21(b)* (*13 Cal. 4th 269, 283)* . The court also distinguished between the rights of permanent and probationary teachers (*13 Cal. 4th 269, 284-285)* . Accordingly, *Educ. Code § 44929.21(b)* permits a school district to decline reelection of a probationary teacher at the end of the second year without any showing of cause, statement of reasons, and without administrative hearings or appeal as long as the district provides notice of the decision to the teacher on or before March 15 in his/her second year of employment (*13 Cal. 4th 269, 279)* . Furthermore, *Educ. Code § 44929.21(b)* grants the district exclusive discretion over reelection and preempts any collective bargaining agreements seeking to provide greater due process rights to probationary teachers (*13 Cal. 4th 269, 284-287)* .

[c] Collective Bargaining and Due Process Rights of Probationary Teachers

Board of Education v. Round Valley Teachers Assn. *(1996) 13 Cal. 4th 269, 52 Cal. Rptr. 2d 115, 914 P.2d 193* , is *discussed in § 211.22[3][b].*

[d] More Than One Year of Service in Categorically Funded Position Is Not Included in Computing Service Time for Attainment of Permanent Status

Schnee v. Alameda Unified Sch. Dist. *(2004) 125 Cal. App. 4th 555, 22 Cal. Rptr. 3d 800* , presented the question whether a certificated teacher who has been employed for several years in a categorically funded position under *Educ. Code § 44909* attains permanent status on commencing employment by the school district in a probationary position. The court of appeal held that the teacher does not attain permanent status at the commencement of the probationary position; rather, permanent status is reached only if the teacher is retained for the succeeding school year.

The teacher in this case had been employed for 8 years as a reading specialist, a position that was categorically funded under Section 44909. The next school year, the district hired the teacher as a third-grade teacher, a position supported by general funds, and classified her as a probationary employee. When the district notified the teacher that she would not be reelected for the following school year, the teacher filed a petition for a writ of mandate, claiming that the district did not have the unqualified right to terminate her employment. Specifically, she argued that she had attained permanent status at the commencement of her third-grade position. The trial court dismissed the teacher's petition, holding that she had been properly classified as a probationary employee and the district had properly exercised its unqualified right not to reelect her (*125 Cal. App. 4th 555, 559-560)* .

The court of appeal affirmed. The court acknowledged that *Educ. Code § 44929.21(b)* states that if a teacher is employed by a school district for two complete consecutive school years in a position or positions requiring certification qualifications, and is reelected for the next succeeding school year to a position requiring certification qualifications, the teacher becomes a permanent employee at the commencement of the succeeding school year. The teacher in this case argued that since the reading specialist position and the third-grade position both required certification qualifications, Section 44929.21(b) required that she be classified as a permanent employee at the beginning of her service in the third-grade position.

The court of appeal rejected the teacher's argument, however, because the literal application of Section 44929.21(b) is precluded by the need to reconcile its provisions with other sections of the Education Code. For example, *Educ. Code § 44909* limits the effect of Section 44929.21(b). Section 44909 provides that employment in a categorically funded position not required by federal or state statute does not count toward the service required as a prerequisite to attainment of permanent status unless the employee (1) has served pursuant for at least 75 percent of the number of days the regular schools of the district are maintained, and (2) "is subsequently employed as a probationary employee in a position requiring certification qualifications."

Although Section 44909 is not explicit on the point, the court of appeal interpreted the statute's "is subsequently employed as a probationary employee" language as contemplating one school year of service as a probationary employee before permanent status can be attained. The court found support for this position in the evident intent of the Legislature in the statutory provisions dealing with temporary employees, which clearly require that a teacher who has served at least one year as a temporary employee must serve an additional year as a probationary employee before attaining permanent status (*see Educ. Code §§ 44919, 44920*). Accordingly, reading Sections 44909 and 44929.21(b) together, the court of appeal concluded that the teacher in the present case could not attain permanent status until she completed one year of service as a probationary employee and was reelected for the following school year. In effect, then, only one year of her previous service in the categorically funded position could be counted toward the service required as a prerequisite to attainment of permanent status (*125 Cal. App. 4th 555, 560-565)* .

[e] Service as Instructor at Regional Occupational Center Is Not Included in Computing Service Time for Attainment of Permanent Status

In ***Reis v. Biggs Unified Sch. Dist.*** *(2005) 126 Cal. App. 4th 809, 24 Cal. Rptr. 3d 393* , the plaintiff was a credentialed teacher who for several years was employed by the defendant school district in two concurrent positions: (1) a part-time regular teaching position, and (2) a part-time teaching position in a regional occupational center. When the school district sent the teacher a notice that he was not being reelected to either position, he filed a petition for a writ of mandate. The trial court, finding that the teacher had attained permanent status by virtue of his several years of service, ordered the school district to reinstate the teacher.

The court of appeal affirmed the trial court's judgment as to the regular teaching position, but it reversed as to the position at the regional occupational center. The court of appeal observed that a teacher generally attains permanent status after two years of continuous employment as a probationary teacher in a position requiring certification upon his or her reelection to the district for the third consecutive year (Gov. Code § 44929.21(b)). This general rule is subject to several limitations. For example, *Educ. Code § 44910* provides that service as an instructor in classes conducted at a regional occupational center or program (*see Educ. Code § 52301*) is not to be included in computing the service required as a prerequisite to attainment of permanent status. Section 44910 does not apply, however, to any regularly credentialed teacher who has been employed to teach in the regular educational programs of a school district "and [is] subsequently assigned as an instructor in regional occupational centers or programs" (*Educ. Code § 44910*) (*126 Cal. App. 4th 809, 816-818)* .

The question presented by this case was whether the Legislature intended that a teacher such as the plaintiff, who retains his or her part-time regular teaching position but is assigned an additional part-time teaching position at a regional occupational center, falls within this exception to Section 44910. The court of appeal held that the Legislature did not intend that result. The court found it significant that the plaintiff was a regularly credentialed teacher who was employed to teach in the regular educational programs of the school district, and who continued to teach in that position when he took the additional assignment at the regional occupational center. Thus there was no change to his regular position when he accepted the additional assignment (*126 Cal. App. 4th 809, 818-820)* .

Finding that the pivotal language in the exception to Section 44910, "subsequently assigned," is ambiguous, the court of appeal turned to the legislative history for help in construing that language. The court found that the legislative history of Section 44910 shows that it was designed to allow school districts more flexibility in operating their regional occupational programs (ROPs). The Legislature was concerned that, because ROPs involve education and training in career technical courses (*see Educ. Code § 52301(a)*), an ROP teacher may have only specialized training. The concern was that if a particular program was dropped, but the teacher in that program had acquired permanent status, the teacher could be virtually untransferable to another teaching assignment within the district (*126 Cal. App. 4th 809, 820-821)* .

Therefore, Section 44910 was designed to prevent these specialized, virtually untransferable ROP teachers from becoming permanent employees. At the same time, however, the Legislature sought to shield from the effects of the statute regularly credentialed teachers who had been employed in regular educational programs and then assigned as ROP instructors. Thus, under Section 44910, a probationary teacher in the regular education program of a school district who was accruing credit toward permanent status, but who was then assigned to teach in an ROP, could keep counting his or her service toward the attainment of permanent status even while teaching ROP (*126 Cal. App. 4th 809, 821)* .

In light of the concerns reflected in the legislative history, the court of appeal concluded that Section 44910's "subsequently assigned" language refers to a teacher who is in a regular teaching position and then is reassigned from that position to a ROP position. Accordingly, because the plaintiff's ROP service was a second, concurrent assignment in addition to his regular teaching position, he was not the sort of employee the Legislature was seeking to protect when it enacted the exception to Section 44910 (*126 Cal. App. 4th 809, 821)* .

[4] Additional Authorities

[a] Non-Reelection of Probationary Teachers

In *Grimsley v. Board of Trustees (1987) 189 Cal. App. 3d 1440, 235 Cal. Rptr. 85* , two first-year probationary teachers filed a petition for writ of mandate which alleged that they were unlawfully terminated from their positions. Both teachers were hired by Murdoc Joint Unified School District for the 1983-1984 school year. Although both received satisfactory performance evaluations, the district declined to rehire them for the following school year. Both teachers requested that the district provide them with a statement of reasons for their non-reelection and a hearing to determine if there was cause for the district's decision not to rehire them. The district denied their requests (*189 Cal. App. 3d 1440, 1444-1445)* .

The court ruled that pursuant to *Educ. Code § 44882(b),* the district was permitted to dismiss first year probationary teachers without cause, without notice, or any rights to an administrative hearing or appeal (*189 Cal. App. 3d 1440, 1447-1448)* . Furthermore, the court held that probationary teachers did not have a property interest in their jobs and thus their due process rights were not violated by their non-reelection without procedural redress (*189 Cal. App. 3d 1440, 1449-1451)* .

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 211 SCHOOLS: CERTIFICATION, DISMISSAL, AND RELATED EMPLOYMENT ISSUES
PART II. FORMS

21-211 California Points & Authorities § 211.23

§ 211.23 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086, 1107] to Compel Recognition of Permanent Status of School District Employee--Teacher as Not Attaining Permanent Status in Supervisory or Administrative Position

[1] FORM

	)	
	)	NO. _____
	)	MEMORANDUM OF POINTS
SUPERIOR COURT OF CALIFORNIA,	)	AND AUTHORITIES IN
COUNTY OF _____	)	OPPOSITION
_____ [*name*],	)	TO PETITION FOR WRIT
Petitioner,	)	OF MANDATE
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Respondent.	)	Location: _____
	)	Date Action Filed: _____
	)	[Trial Date: _____]
	)	

_____

A WRIT OF MANDATE SHOULD NOT BE ISSUED TO COMPEL THE GOVERNING BOARD TO RECOGNIZE THAT PETITIONER HAS ATTAINED PERMANENT STATUS IN HIS/HER POSITION BECAUSE ADMINISTRATIVE AND SUPERVISORY PERSONNEL DO NOT ATTAIN PERMANENT STATUS IN THEIR ADMINISTRATIVE OR SUPERVISORY POSITIONS.

A. Scope of Tenure Generally. Tenure (i.e., permanent status) entitles an employee only to permanent employment within the scope of the certificate under which tenure was acquired (*Adelt v. Richmond Sch. Dist. (1967) 250 Cal. App. 2d 149, 152, 58 Cal. Rptr. 151*).

B. Reassignment of Permanent Employees. Subject to a requirement of reasonableness, school districts may reassign permanent employees to any position which is within the scope of the certificate under which permanent status was acquired or in which the work is of a rank and grade equivalent to that by which permanent status was acquired (*Thompson v. Modesto City High School Dist. (1977) 19 Cal. 3d 620, 623, 139 Cal. Rptr. 603, 566 P.2d 237* ; *Adelt v. Richmond Sch. Dist. (1967) 250 Cal. App. 2d 149, 152, 58 Cal. Rptr. 151*).

C. Administrative and Supervisory Personnel as Attaining Permanent Status as Classroom Teachers Only. School district employees holding administrative or supervisory positions requiring certification qualifications do not acquire tenure in their status as supervisors or administrators. On completion of the probationary period, such employees attain permanent status as classroom teachers only (*Educ. Code § 44897(a)*; *Council of Directors & Supervisors v. Los Angeles Unified Sch. Dist. (1973) 35 Cal. App. 3d 147, 152, 110 Cal. Rptr. 624* ; *Hentschke v. Sink (1973) 34 Cal. App. 3d 19, 22, 109 Cal. Rptr. 549*).

[*Optional*] **D. Teacher Promoted to Supervisory or Administrative Position as Retaining Permanent Status as Teacher.** A permanent employee when advanced from a teaching position to an administrative or supervisory position, or assigned any special or other type of work, or given special classification or designation requiring certification qualifications, retains his or her permanent classification as a classroom teacher (*Educ. Code § 44893*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Respondent _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a petition to the superior court for a writ of mandate to compel the governing board of a school district to recognize an employee's permanent status in an administrative or supervisory position. The ground of opposition is that certificated employees may not acquire permanent status as supervisors or administrators.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Use

With appropriate modifications, these points and authorities may also be submitted in opposition to a petition for writ of mandate brought by a permanent employee to challenge his or her assignment from an administrative or supervisory position to a classroom teaching position.

[c] Related Points and Authorities

For memoranda of points and authorities opposing petitions for writs of mandate generally, see Ch. 150, *Mandate and Prohibition* in this set.

[3] Discussion of Authorities

[a] Scope of Tenure Generally

In *Adelt v. Richmond Sch. Dist. (1967) 250 Cal. App. 2d 149, 58 Cal. Rptr. 151* , appellant was employed as a fourth grade teacher at a particular elementary school in respondent school district. After returning from a sabbatical leave of absence, appellant was informed that she had been transferred to a different elementary school to teach fifth and sixth grades. After attempting unsuccessfully to have respondent transfer her back to her old school, appellant resigned under protest. Thereafter, appellant filed a petition for writ of mandate to compel the district to reinstate her as a permanent fourth grade teacher at her old school. After a hearing, the trial court denied her petition.

The court of appeal affirmed the judgment, rejecting appellant's contention that she was entitled to be reinstated in the specific position she held prior to taking her sabbatical leave. The court noted that a tenured teacher has a vested right to permanent employment, subject to those provisions of the Education Code regulating its termination; however, the permanent employment protected is merely employment within the scope of the certificate under which tenure was acquired. Thus, the court held that a school district is entitled to assign teachers anywhere within their certificate, according to the needs of the district. The court observed that tenure does not bestow on the school teacher a vested right to a specific school or to a specific class level of students within any school, and thus, if appellant had not taken a sabbatical leave, she could not have contended that her transfer to a different school was improper (*250 Cal. App. 2d 149, 152)* . The court then held that her right to be reinstated following a leave of absence did not require the school district to assign her to the same specific position she held prior to the leave, as long as the new position was within the scope of the certificate under which she was employed at the time the leave of absence began (*250 Cal. App. 2d 149, 152-153)* . The court also held that the transfer was not unreasonable and that the district was not estopped from transferring appellant (*250 Cal. App. 2d 149, 153-156)* .

[b] Reassignment of Permanent Employees

In *Thompson v. Modesto City High School Dist. (1977) 19 Cal. 3d 620, 139 Cal. Rptr. 603, 566 P.2d 237* , petitioner was a certificated permanentemployee of defendant school district, holding both a teaching credential and a counseling credential. Petitioner commenced employment with the district as a high school teacher but was later assigned to a counseling position which he held at the time he attained permanent status. Thereafter, petitioner was informed that he was being reassigned as a classroom teacher, which involved a reduction in salary. He sought a hearing to contest the reassignment, but was informed that he was not entitled to a hearing because none was required in the case of reassignment as opposed to termination. Petitioner accepted the reassignment under protest and filed a petition for writ of mandate to compel the district to reinstate him as a counselor. The trial court denied the writ and plaintiff appealed.

The Supreme Court affirmed. The Court noted the well-established rule that school districts in the normal course of administration have broad powers to reassign their permanent employees to different positions, including positions involving a reduction in pay and prestige, subject to only two requirements: (1) reasonableness and (2) that the reassigned position be within the scope of the certificate under which tenure was acquired, or the work assigned is of a rank and grade equivalent to that by which the permanent status was acquired (*19 Cal. 3d 620, 623)* . The Court stated that in order to determine the propriety of the reassignment, it is thus necessary to ascertain the certificate under which tenure was acquired or the rank and grade at which permanent status was acquired (*19 Cal. 3d 620, 624)* . The Court then held that petitioner had acquired tenure as a classroom teacher only and that he could therefore be reassigned from a position as a counselor to one as a classroom teacher subject only to the requirement of reasonableness (*19 Cal. 3d 620, 626)* . The Court also held that the hearing procedures applicable to dismissals and termination of services were not applicable to such a reassignment (*19 Cal. 3d 620, 626-628)* .

Adelt v. Richmond Sch. Dist. (1967) 250 Cal. App. 2d 149, 58 Cal. Rptr. 151 , is *discussed in § 211.23[3][a].*

[c] Administrative and Supervisory Personnel as Attaining Permanent Status as Classroom Teachers Only

Educ. Code § 44897(a) provides that a person employed in an administrative or supervisory position requiring certification qualifications, on completing a probationary period, including any time served as a classroom teacher in the same district, must be classified as and become a permanent employee as a classroom teacher, in a district having an average daily attendance of 250 or more pupils. Permanent classification is discretionary in a district having an average daily attendance of less than 250 pupils.

In *Council of Directors & Supervisors v. Los Angeles Unified Sch. Dist. (1973) 35 Cal. App. 3d 147, 110 Cal. Rptr. 624* , defendant school district ordered mass demotions of certain supervisorial and administrative personnel because of budgetary and organizational reasons. Plaintiff, on behalf of these employees, brought an action for declaratory relief, alleging that the mass demotions were illegal. The trial court entered judgment denying declaratory relief. On appeal, plaintiff contended that the mass demotions were illegal because, inter alia, the district had failed to comply with the notice and hearing provisions of former Educ. Code §§ 13447, 13448 (*now Educ. Code §§ 44949, 44955, 44956*) applicable to reduction in number of permanent employees due to decline in pupil attendance or reduction of services. The court of appeal rejected this contention and affirmed the judgment. In holding those provisions inapplicable to the demotion of supervisorial employees, the court noted that supervisors and administrators are not permanent employees as such, but are permanent employees only as classroom teachers (*35 Cal. App. 3d 147, 152)* .

In *Hentschke v. Sink (1973) 34 Cal. App. 3d 19, 109 Cal. Rptr. 549* , petitioner, who held both teaching and administrative credentials, was reassigned from his position as dean of students at a high school to a classroom teaching position. Petitioner requested and was granted a hearing and a statement of reasons for the reassignment, but the governing board of the district confirmed the action. Petitioner then brought an action seeking a writ of mandate to compel his reassignment to his administrative position and declaratory relief as to his rights, duties, and status. The trial court sustained a demurrer to the complaint without leave to amend and dismissed the action. The court of appeal affirmed. It held that, as opposed to a classroom teacher, an administrator attains no tenure in his or her status as such, but serves at the pleasure of the appointing power. Nothing in the Education Code statutes, the court observed, limits the authority of the appointing power to remove an administrator for any reason satisfactory to it, and nothing in the statutes entitles an administrator so removed to any hearing, other than the requirement that, on request, he be furnished with a statement of the reasons for his reassignment to a different status (*34 Cal. App. 3d 19, 22)* .

[4] Additional Authorities

[a] Administrative and Supervisory Personnel as Attaining Permanent Status as Classroom Teachers Only

The facts and procedural background of *Jefferson v. Compton Unified School Dist. (1993) 14 Cal. App. 4th 32, 17 Cal. Rptr. 2d 474* , are discussed in *§ 211.26[3][a]*. In holding that a school district's failure to comply with the advance notice requirement of *Educ. Code § 44951* did not prevent thedistrict from reassigning a school principal to a classroom teaching position for cause, the court of appeal observed that school administrators do not have tenure in their positions and may be reassigned for any reason (*14 Cal. App. 4th 32, 38)* .

In *Neumarkel v. Allard (1985) 163 Cal. App. 3d 457, 209 Cal. Rptr. 616* , a school psychologist and several school nurses terminated by the county superintendent of schools appealed from a judgment denying their petition for a writ of mandate. Petitioners sought to compel the superintendent to reinstate them on the grounds that they had not been accorded the termination procedures set forth in *Educ. Code §§ 44949* and *44955*. On appeal, the court affirmed the denial of the writ. The court held that certificated persons employed by the county superintendent of schools are entitled to the termination rights set forth in *Educ. Code §§ 44949* and *44955* only if they are employed in teaching positions within the meaning of *Educ. Code § 1296*, since only under these circumstances would they be considered probationary or permanent certificated employees (*163 Cal. App. 3d 457, 462-466)* .

In *LaBelle v. San Francisco Unified School Dist. (1983) 140 Cal. App. 3d 292, 189 Cal. Rptr. 530* , plaintiff was reassigned to a classroom teaching position after four years as the principal of an elementary school. She brought an

action challenging the reassignment, arguing that a provision of the San Francisco city charter made her appointment as principal permanent after three years. The trial court entered judgment for the district. The court of appeal affirmed, holding that *Educ. Code §§ 44850.1*, *44895*, and *44894(b)* grant tenure only to a position as a classroom teacher and not to administrative or supervisory positions, and any charter provision that purports to grant a broader tenure is preempted by those statutes (*140 Cal. App. 3d 292, 299-300)* .

California Points & Authorities

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 211 SCHOOLS: CERTIFICATION, DISMISSAL, AND RELATED EMPLOYMENT ISSUES
PART II. FORMS

21-211 California Points & Authorities § 211.24

§ 211.24 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086, 1107] to Compel Recognition of Permanent Status of School District Employee--Teacher Holding Multiple Credentials as Attaining Permanent Status as Classroom Teacher Only

[1] FORM

[*Caption. See § 211.23.*]

A WRIT OF MANDATE SHOULD NOT BE ISSUED TO COMPEL THE GOVERNING BOARD TO RECOGNIZE THAT PETITIONER HAS ATTAINED PERMANENT STATUS IN HIS/HER POSITION AS _____ [*specify, e.g.,* A COUNSELOR] BECAUSE AN EMPLOYEE WHO HOLDS BOTH A TEACHING CREDENTIAL AND A CREDENTIAL AUTHORIZING HIM/HER TO RENDER OTHER SERVICES ATTAINS PERMANENT STATUS AS A CLASSROOM TEACHER ONLY.

A. Scope of Tenure Generally. [*See § 211.23, Paragraph A.*]

B. Reassignment of Permanent Employees. [*See § 211.23, Paragraph B.*]

C. Teacher Holding Multiple Credentials as Attaining Permanent Status as Classroom Teacher Only. An employee who holds both a teaching credential and a credential authorizing him or her to render other services acquires permanent status as a classroom teacher only, regardless of the amount of time served in the nonteaching position and irrespective of which position was held at the completion of the probationary period (*Educ. Code § 44894(b)*; *Thompson v. Modesto City High Sch. Dist. (1977) 19 Cal. 3d 620, 626, 139 Cal. Rptr. 603, 566 P.2d 237* ; *Netwig v. Huntington Beach Union High Sch. Dist. (1975) 52 Cal. App. 3d 529, 532, 125 Cal. Rptr. 170*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Respondent _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a petition to the superior court for a writ of mandate to compel the governing board of a school district to recognize an employee's permanent status, where an employee holding both a teaching credential and a credential authorizing him or her to render other services claims permanent status in a nonteaching position. The ground of opposition is that such an employee attains permanent status as a classroom teacher only [*Educ. Code § 44894(b)*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Use

With appropriate modifications, these points and authorities may also be submitted in opposition to a petition for writ of mandate brought bya permanent employee to challenge his or her reassignment from a nonteaching position (*e.g.*, counselor) to a classroom teaching position.

[c] Related Points and Authorities

For memoranda of points and authorities opposing petitions for writs of mandate generally, see Ch. 150, *Mandate and Prohibition* in this set.

[3] Discussion of Authorities

[a] Teacher Holding Multiple Credentials as Attaining Permanent Status as Classroom Teacher Only

The procedural and factual background of *Thompson v. Modesto City High Sch. Dist. (1977) 19 Cal. 3d 620, 139 Cal. Rptr. 603, 566 P.2d 237* , is discussed in *§ 211.23[3][b]*. In that case, the Supreme Court held that under *Educ. Code § 44894*, employees holding both teaching and counseling certificates acquire permanent status as classroom teachers only and not as counselors, regardless of which position was held by the employee at the completion of the probationary period. Therefore, the court concluded, petitioner acquired tenure as a classroom teacher only and could be reassigned from a counseling position to a teaching position subject only to the requirement of reasonableness (*19 Cal. 3d 620, 626)* .

In *Netwig v. Huntington Beach Union High Sch. Dist. (1975) 52 Cal. App. 3d 529, 125 Cal. Rptr. 170* , petitioner, who held both teaching and counseling credentials, had served as a teacher with the district for three years and having been appointed for a fourth year, became a permanent (i.e., tenured) employee of the district. Petitioner was later reassigned to the position of counselor, in which he served until the district served him with a notice of intention to dismiss him. Petitioner's employment with the district was suspended pending outcome of the dismissal proceedings. The trial court upheld the dismissal but this judgment was reversed on appeal and petitioner was ordered reinstated, whereupon the district notified him that he would be assigned to a teaching position. Petitioner then filed a mandate proceeding to compel the district to reassign him to the position of counselor. The trial court denied the petition, and petitioner appealed.

The court of appeal affirmed. The court noted that although petitioner had tenure, tenure only provides security of employment within the scope of the certificates under which tenure was acquired. The court held that a credentialed teacher who serves his entire probationary period as a teacher and who later is assigned to a counseling position continues to hold tenure only as a teacher regardless of the length of time served as counselor. Thus, the court concluded, petitioner acquired tenure as a teacher and could not challenge his reassignment to that position on the basis

of the tenure laws (*52 Cal. App. 3d 529, 532)* .

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CHAPTER 211 SCHOOLS: CERTIFICATION, DISMISSAL, AND RELATED EMPLOYMENT ISSUES
PART II. FORMS

21-211 California Points & Authorities § 211.25

§ 211.25 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086, 1107] to Compel Recognition of Permanent Status of School District Employee--Tenure as Not Bestowing Right to Teach at Particular School or Grade Level

[1] FORM

[*Caption. See § 211.23.*]

A WRIT OF MANDATE SHOULD NOT BE ISSUED TO COMPEL THE GOVERNING BOARD TO RECOGNIZE THAT PETITIONER HAS ATTAINED PERMANENT STATUS IN HIS/HER POSITION BECAUSE PERMANENT STATUS DOES NOT ENTITLE A TEACHER TO TEACH AT A PARTICULAR SCHOOL OR GRADE LEVEL.

A. Scope of Tenure Generally. [*See § 211.23, Paragraph A.*]

B. Reassignment of Permanent Employees. [*See § 211.23, Paragraph B.*]

C. Tenure as Not Bestowing Vested Right to Teach at Specific School or Grade Level. Tenure does not bestow on the school teacher a vested right to teach at a specific school or to teach a specific grade level of students within any school (*Malynn v. Morgan Hill Unified School Dist. (1982) 137 Cal. App. 3d 785, 788, 187 Cal. Rptr. 303*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Respondent _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a petition to the superior court for a writ of mandate to compel the governing board of a school district to recognize an employee's permanent status, when the employee claims permanent status in a position at a particular school or teaching a particular grade level. The ground of opposition is that permanent status does not bestow on the teacher a vested right to teach at a particular school or grade level.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Use

With appropriate modifications, these points and authorities may also be submitted in opposition to a petition for a writ of mandate by a teacher to contest his or her reassignment to a different school or grade level.

[c] Related Points and Authorities

For memoranda of points and authorities opposing petitions for writs of mandate generally, see Ch. 150, *Mandate and Prohibition* .

[3] Discussion of Authorities

[a] Tenure as Not Bestowing Vested Right to Teach at Specific School or Grade Level

Malynn v. Morgan Hill Unified School Dist. (1982) 137 Cal. App. 3d 785, 187 Cal. Rptr. 303 , involved reassignment of a certificated teacher from a high school to a middle school. A teacher, who was certificated to teach grades nine through 12 and held a special credential for teaching those grades in driver training and driver education, was employed by a high school district, which was later incorporated into the respondent unified school district, to teach exclusively in the district's high school in grades nine through 12. Petitioner received tenure while employed in this position. Following a reorganization of the respondent school district, petitioner was transferred to teach at the district's middle school. This transfer was within the scope of petitioner's teaching certificate. After unsuccessfully contesting the reassignment, petitioner filed a petition for writ of mandate with the superior court to compel the district to reinstate him to the high school. The trial court denied the writ, and petitioner appealed.

The court of appeal affirmed the trial court's determination. The court stated that it has been well settled at least since 1932 that tenure does not infringe on the general power of assignment. The court cited *Adelt v. Richmond Sch. Dist. (1967) 250 Cal. App. 2d 149, 152, 58 Cal. Rptr. 151* (discussed in Additional Authorities, Tenure as Not Bestowing Vested Right to Teach at Specific School or Grade Level, infra), for the rule that tenure does not bestow on the school teacher a vested right to a specific school or to a specific class level within any specific school (*137 Cal. App. 3d 785, 788)* . The court also restated from *Thompson v. Modesto City High Sch. Dist. (1977) 19 Cal. 3d 620, 623-624, 139 Cal. Rptr. 603, 566 P.2d 237* (discussed in *§ 211.23[3][b]*), the rule that the power of a school district to reassign a teacher is subject to only the following two requirements: (1) reasonableness, and (2) that the reassigned position be within the scope of the certificate under which tenure was acquired or the work assigned is of a rank and grade equivalent to that by which permanent status was acquired. The court held that the second requirement set out by *Thompson* is meant to be applied disjunctively. Thus, the court concluded that since the position to which petitioner had been reassigned was within the scope of petitioner's certificate, the reassignment was proper, despite the fact that the new position was of a different rank and grade than that in which petitioner had obtained tenure (*137 Cal. App. 3d 785, 789)* .

[4] Additional Authorities

[a] Tenure as Not Bestowing Vested Right to Teach at Specific School or Grade Level

Adelt v. Richmond Sch. Dist. (1967) 250 Cal. App. 2d 149, 58 Cal. Rptr. 151 , is discussed in *§ 211.23[3][a]*. In rejecting the teacher's contention that she had a right to be reinstated in the same specific position she held prior to taking her sabbatical leave, the court observed that tenure does not bestow on a school teacher a vested right to teach at a specific school or to teach a specific class level of students within a school (*250 Cal. App. 2d 149, 152)* .

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21-211 California Points & Authorities § 211.26

§ 211.26 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086, 1107] to Compel Reinstatement of Certificated Employee to Administrative or Supervisory Position--Advance Notice Requirement of Educ. Code § 44951 Is Not Applicable

[1] FORM

[*Caption. See § 211.23.*]

A WRIT OF MANDATE SHOULD NOT BE ISSUED TO COMPEL RESPONDENT TO REINSTATE PETITIONER TO HIS/HER FORMER POSITION OF _____ [*specify former administrative or supervisory position*] BECAUSE THE ADVANCE NOTICE REQUIREMENT OF EDUCATION CODE SECTION 44951 DOES NOT APPLY TO THIS CASE IN THAT _____ [THE CASE FALLS WITHIN ONE OF THE STATUTORY EXCEPTIONS SET FORTH IN SECTION 44951 *or* PETITIONER WAS TRANSFERRED FROM HIS/HER POSITION FOR CAUSE].

[*EITHER*]

Advance Notice Requirement Does Not Apply to Employee With Written Contract That Expires on Date Beyond Current School Year. The provisions of *Education Code Section 44951* requiring that a certificated administrative or supervisory employee receive notice by March 15 that he or she may be released from his or her position for the following year do not apply to a certificated employee who holds a written contract with an expiration date beyond the current school year (*Educ. Code § 44951*).

[*OR*]

Advance Notice Requirement Does Not Apply to Employee Holding Position That is Funded for Less Than One School Year. The provisions of *Education Code Section 44951* requiring that a certificated administrative or supervisory employee receive notice by March 15 that he or she may be released from his or her position for the following year do not apply to a certificated employee holding a position that is funded for less than a school year (

Educ. Code § 44951).

[*OR*]

Advance Notice Requirement Does Not Apply to Certain Employees in Acting Positions. The provisions of *Education Code Section 44951* requiring that a certificated administrative or supervisory employee receive notice by March 15 that he or she may be released from his or her position for the following year do not apply to a certificated employee assigned to an acting position whose continuing right to hold this position depends on being selected from an eligible list established for the position (*Educ. Code § 44951*).

[*OR*]

Advance Notice Requirement Does Not Apply to Termination of Employment Under *Education Code Section 44955*. The provisions of *Education Code Section 44951* requiring that a certificated administrative or supervisory employee receive notice by March 15 that he or she may be released from his or her position for the following year do not apply to the termination of employment under *Education Code Section 44955* (termination of employment due to decline in average daily attendance, reduction or elimination of services, or modification of curriculum) (*Educ. Code § 44951*).

[*OR*]

Advance Notice Requirement Does Not Apply to Reassignment of Administrator or Supervisor for Cause. The provisions of *Education Code Section 44951* requiring that a certificated administrative or supervisory employee receive notice by March 15 that he or she may be released from his or her position for the following year do not apply when a school district reassigns a supervisor or administrator for misconduct or other cause (*Jefferson v. Compton Unified School Dist. (1993) 14 Cal. App. 4th 32, 39, 17 Cal. Rptr. 2d 474*).

[*OR*]

Advance Notice Requirement Does Not Apply to Transfer of Administrator or Supervisor to Another Position With Same Administrative Classification. The provisions of *Educ. Code Section 44951* requiring that a certificated administrative or supervisory employee receive notice by March 15 that he or she may be released from his or her position for the following year do not apply when a school district transfers or reassigns an administrator with the same administrative classification, as opposed to a demotion or reassignment to another position in a different classification (*Gilliam v. Moreno Valley Unified School District (1996) 48 Cal. App. 4th 518, 520-521, 55 Cal. Rptr. 2d 695*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Respondent _____ [*name*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to a petition for writ of mandate to compel the governing board of a school district to reinstate a certificated employee to an administrative or supervisory position, when the district has allegedly failed to provide the advance notice required by *Educ. Code § 44951* prior to terminating his or her employment or reassigning him or her to a non-administrative or non-supervisory position. The ground of opposition is that the advance notice requirement does not apply to the case because it falls within one of the four statutory exceptions set forth in *Educ. Code § 44951* or because the employee was reassigned for misconduct or other cause.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, these points and authorities may be submitted in opposition to a petition for writ of mandate supported by the points and authorities *set out in § 211.21*.

[b] Related Points and Authorities

For memoranda of points and authorities supporting petitions for writs of mandate generally, see Ch. 150, *Mandate and Prohibition* , in this set.

[3] Discussion of Authorities

[a] Advance Notice Requirement Does Not Apply to Reassignment of Administrator or Supervisor for Cause

In ***Jefferson v. Compton Unified School Dist.*** *(1993) 14 Cal. App. 4th 32, 17 Cal. Rptr. 2d 474* , the petitioner, a school principal, was suspended from his duties on May 26, 1988. On June 16, 1988, the superintendent of the district notified petitioner by letter that he had decided to recommend to the school district's governing board that petitioner be reassigned to a classroom teaching position. The letter was accompanied by a statement charging petitioner with various acts of misconduct and incompetence in his position as principal. On June 28, 1988, the governing board adopted the superintendent's recommendation and demoted petitioner to the position of classroom teacher. Petitioner was informed of the board's decision by letter on June 30, 1988. Petitioner then filed a petition for writ of mandate directing the school board to reinstate him as principal on the ground, among others, that the school district's failure to notify him of the reassignment before March 1, 1988, violated *Educ. Code § 44951*, which at that time required that school districts notify principals by March 1 if they are being released from their position for the following year. The trial court denied the writ, finding that the district had failed to comply with the March 1 notice requirement, but that the failure to comply with the notice requirement did not prevent the district from reassigning the petitioner for cause. Petitioner appealed.

The court of appeal affirmed the denial of the writ. The court noted that the statutory purpose of *Educ. Code § 44951* is to provide the certificated employee a measure of security in terms of year-to-year employment by affording the employee time to seek other employment as an administrator and that the notice requirement has been termed jurisdictional. Reassignment under this section does not require a finding of cause, may be based on no more than a personality conflict, and does not entitle the administrator to a hearing (*14 Cal. App. 4th 32, 38)* . The court observed, however, that notwithstanding this statutory provision, school administrators do not have tenure in their positions and may be reassigned for any reason (*14 Cal. App. 4th 32, 38)* . The court reasoned that although the goal of *Educ. Code § 44951* (providing reassigned administrators time to find other employment for the following school year) is a laudable one, it is less significant that the school district's right to reassign an administrator for misconduct or other cause. The court stated that if *Educ. Code § 44951* were interpreted to apply to reassignment for cause, it would, in effect, preclude a school district from reassigning an administrator after March 1, regardless of the conduct that necessitated the

reassignment. The court concluded that such an interpretation would lead to an absurd result. The court therefore held that because petitioner's reassignment was for cause, compliance with *Educ. Code § 44951* was unnecessary (*14 Cal. App. 4th 32, 39)* .

NOTE:

In 1993, the Legislature amended *Educ. Code § 44951* to eliminate the March 1 notice requirement for principals [*see* Stats. 1993, ch. 261]. However, the statute still contains the general requirement that supervisors and administrators be notified by March 15 that they will be released from their position for the following school year, and the court's reasoning in *Jefferson* appears equally applicable to the March 15 notification requirement.

[b] Advance Notice Requirement Does Not Apply to Transfer of Administrator or Supervisor to Another Position With Same Administrative Classification

In ***Gilliam v. Moreno Valley Unified School District*** *(1996) 48 Cal. App. 4th 518, 55 Cal. Rptr. 2d 695* , the plaintiff was hired as a principal in the Moreno Valley Unified School District. He was a probationary employee and was notified that he would not be reelected by the district on March 11. In a separate letter dated March 16 he was notified that he was being transferred from principal of Canyon Springs High School to a position of "Principal on Assignment." The plaintiff went out on disability and never reported to the new assignment. Plaintiff petitioned for a writ of mandate, claiming that he had not received timely notice of his non-reelection or of his transferred assignment, pursuant to *Educ. Code § 44951*. The trial court found notice of plaintiff's non-reelection was timely and Section 44951 did not apply to his transfer. The appellate court affirmed, holding that plaintiff was not entitled to notice of his transfer, under Section 44951, because he was neither demoted nor reassigned to another administrative position in a different classification. Rather, plaintiff was merely transferred from one position as principal to another, similar position (principal on assignment) within the same administrative classification (*48 Cal. App. 4th 518, 520-521)* .

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21-211 California Points & Authorities § 211.27

§ 211.27 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523] of Commission on Professional Competence [Educ. Code § 44945]--Dismissal of Permanent Employee--Discharge Procedure Not Followed

[1] FORM

	)	
SUPERIOR COURT OF CALIFORNIA,	)	NO._____
COUNTY OF_____	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*],	)	IES IN SUPPORT OF PETITION FOR WRIT OF
Petitioner,	)	MANDATE
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Respondent[,	)	Location: _____
_____ (*name*),	)	Date Action Filed: _____
Real Party in Interest].	)	[Trial Date: _____]
	)	

_____

MANDATE IS PROPER BECAUSE THE SCHOOL DISTRICT'S COMMISSION ON PROFESSIONAL COMPETENCE ORDERED PETITIONER'S DISMISSAL WITHOUT COMPLYING WITH THE REQUIRED PROCEDURES.

A. Decisions Reviewable in Mandate Proceeding. A final administrative order or decision is reviewable in a mandate proceeding if it was the result of an administrative proceeding in which a hearing was required by law for the purpose of taking evidence on the basis of which the agency had discretion to determine relevant facts (*Code Civ. Proc. § 1094.5(a)*).

B. Mandate to Review Dismissal of Permanent Employee. The decision of a Commission on Professional Competence dismissing a permanent employee is reviewable in a mandate proceeding (*Educ. Code § 44945*; *Gov. Code § 11523*; *Pasadena Unified School Dist. v. Commission on Professional Competence (1977) 20 Cal. 3d 309, 313-314, 142 Cal. Rptr. 439, 572 P.2d 53*).

C. Independent Judgment on Evidence. In a mandate proceeding to review the decision of a Commission on Professional Competence to discharge a permanent employee, the reviewing trial court must exercise its independent judgment on the evidence (*Educ. Code § 44945*).

D. Scope of Inquiry in Mandate Proceeding. The inquiry in a mandate proceeding to review a final administrative adjudicatory order or decision extends to the questions of whether the agency has proceeded without or in excess of jurisdiction, whether there was a fair trial, and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the agency did not proceed in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence (*Code Civ. Proc. § 1094.5(b)*).

E. Strict Compliance With Dismissal Procedure. A permanent employee may not be dismissed by the governing board of a school district unless the board strictly complies with the statutory procedures for dismissal (*Mass v. Board of Educ. (1964) 61 Cal. 2d 612, 617-618, 39 Cal. Rptr. 739, 394 P.2d 579* ; *see Shields v. Poway Unified School Dist. (1998) 63 Cal. App. 4th 955, 958-962, 74 Cal. Rptr. 2d 391* ; *Matteson v. State Bd. of Educ. (1943) 57 Cal. App. 2d 991, 997-999, 136 P.2d 120*). If the board fails to follow those procedures, the act of dismissal is a nullity (*Pennel v. Pond Union School Dist. (1973) 29 Cal. App. 3d 832, 838-839, 105 Cal. Rptr. 817*).

F. Reinstatement of Employee and Payment of Back Salary. Reinstatement of a permanent employee in his or her former position, with payment of back salary, is the proper procedure following a finding that the teacher was dismissed illegally (See *Educ. Code § 44946*; *Matteson v. State Bd. of Educ. (1943) 57 Cal. App. 2d 991, 1000, 136 P.2d 120*).

G. [*Add points and authorities relating to specific statutory procedure or school board regulation which respondent board failed to comply with in dismissing petitioner*.]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memoranda of points and authorities may be submitted in support of a petition to the superior court for a writ of mandate for review of a final adjudicatory order or decision of a school district's Commission on Professional Competence discharging a permanent employee where the procedure required by law to be followed was not strictly complied with.

To complete this memorandum, counsel should include additional paragraphs discussing the specific statutory procedure or school board regulation with which the respondent board failed to comply in dismissing the petitioner.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law

stated.

[b] Related Pleading and Practice Chapters

For a form of petition for writ of mandate to review the decision of a school district's Commission on Professional Competence to dismiss a permanent employee, see Ch. 512, *Schools* , Pt. II, in California Forms of Pleading and Practice.

[c] Related Points and Authorities

For other memoranda of points and authorities supporting a petition for writ of mandate to review administrative adjudicatory decisions, see Ch. 195, *Public Administrative Law* . For memoranda of points and authorities supporting petitions for writs of mandate generally, see Ch. 150, *Mandate and Prohibition* .

[3] Discussion of Authorities

[a] Mandate to Review Dismissal of Permanent Employee

Educ. Code § 44945 provides that the decision of a Commission on Professional Competence may, on petition of either the governing board or the employee, be reviewed by a court of competent jurisdiction in the same manner as a decision made by a hearing officer under *Gov. Code §§ 11500-11528*. *Gov. Code § 11523* provides that review of an administrative adjudicatory decision rendered under *Gov. Code §§ 11500-11528* may be had by filing a petition for a writ of mandate in accordance with the provisions of the Code of Civil Procedure, subject to the statutes relating to the particular agency.

Pasadena Unified School Dist. v. Commission on Professional Competence *(1977) 20 Cal. 3d 309, 142 Cal. Rptr. 439, 572 P.2d 53* , was an appeal by the school district from a trial court judgment denying the school district's petition for a writ of mandate to set aside the decision of a Commission on Professional Competence which found that the school district had violated its own procedures and improperly dismissed a teacher. On September 10, the teacher had been notified that she was being involuntarily transferred to another school within the district even though district policy required a teacher to be notified no later than May 15 in the absence of an emergency. The teacher refused to obey the transfer order, and the school board dismissed her. The Commission on Professional Competence found that the district had no grounds to dismiss the teacher, and the trial court agreed.

The Supreme Court noted that the decision of a Commission on Professional Competence may be challenged in superior court by means of a petition for a writ of mandate, and it stated that in reviewing the commission's decision, the superior court should exercise its independent judgment on the evidence. The Court then ruled that in such situations, the scope of review on appeal is limited and an appellate court must sustain the superior court's findings if substantial evidence supports them (*20 Cal. 3d 309, 313-314)* . The Court found substantial support for the finding that no emergency existed and that the district had thus violated its own policy and improperly discharged the teacher (*20 Cal. 3d 309, 314-316)* .

[b] Strict Compliance With Dismissal Procedure

In reversing, the Supreme Court noted that since plaintiff had tenure, the board could dismiss him only if it complied with the statutory procedures (*61 Cal. 2d 612, 617-618)* . At the time, the Education Code required that a governing board obtain a judgment that the board had grounds todismiss a permanent employee; otherwise, the employee could not be dismissed. The board had not obtained such a judgment and could not do so because its original action had been dismissed with prejudice. The Court held, therefore, that the board had failed to follow the strict statutory procedures for dismissal of a school teacher which are set forth in the Education Code and that the plaintiff could not properly be dismissed. Accordingly, plaintiff was entitled to reinstatement, plus full salary for the period of his suspension (*61 Cal.*

2d 612, 618-630) .

In ***Shields v. Poway Unified School Dist.*** *(1998) 63 Cal. App. 4th 955, 74 Cal. Rptr. 2d 391* , a permanent, tenured teacher's credential had been suspended for 10 years due to allegations of sexual misconduct, and the employing school district had notified the teacher of its intention to terminate the teacher's employment. The teacher then made a timely demand for a pretermination hearing under *Educ. Code § 44934 et seq* ., but the school district refused and terminated the teacher without a hearing. The trial court granted the teacher's petition for a writ of mandate requiring the school district to set aside the termination and conduct a pretermination hearing. The court of appeal affirmed. A permanent, tenured teacher has a property interest in continued employment; that property interest is entitled to constitutional protection through procedural due process. The mere fact that the credential had been suspended did not affect the teacher's status as a permanent employee, because the suspension of the credential was only temporary. Thus, if a statute provides for a pretermination hearing if requested by the teacher, the school district may not terminate the teacher without conducting the hearing, even if the termination is based on the long-term suspension of the employee's teaching credential (*63 Cal. App. 4th 955, 958-962)* .

Matteson v. State Bd. of Educ. *(1943) 57 Cal. App. 2d 991, 136 P.2d 120* , is an appeal from a trial court judgment in favor of the board of education in a proceeding in mandate. A permanent teacher employed by the San Francisco School Department applied for a renewal of her state teaching credentials, but her application was denied by the State Commission of Credentials on the basis that she had failed to verify at least five months of successful teaching experience secured in the public schools of California. The commission based its decision on the fact that her principal stated in a letter to the commission that her work had been entirely unsatisfactory without specifying any facts supporting his opinion. At no time during her 11 years of employment as a teacher were charges ever brought against her or was she ever subjected to any disciplinary action. When her credentials were not renewed, the city board of education dismissed her, and the teacher filed a petition for a writ of mandate asking that she be restored to her position with payment of back salary. The court of appeal reversed the trial court's judgment for the board of education. The court held that the action of the state commission in denying the teacher's application for a renewal of her credential, and the subsequent action of the local board of education in summarily dismissing her as a permanent teacher were in violation of her rights as a teacher under state law (*57 Cal. App. 2d 991, 995)* . The court stated that a permanent teacher could not be dismissed and deprived of a teaching credential without charges being filed against him or her and without being afforded the right of trial thereon in accordance with the dismissal procedures established by law. Since the commission thus illegally failed to renew the teacher's credentials and the local board illegally dismissed her, the teacher was held by the court to be entitled to be reinstated in her position with full salary from the date of dismissal (*57 Cal. App. 2d 991, 996-1000)* .

In ***Pennel v. Pond Union School Dist.*** *(1973) 29 Cal. App. 3d 832, 105 Cal. Rptr. 817* , plaintiff was fired by defendant school district from her job as a probationary school teacher on the ground that she had abandoned her position by failing to appear for the first day of school. The school board made its decision at a meeting which plaintiff was not notified of and did not attend. Plaintiff thereafter filed a petition for a writ of mandate to compel her reinstatement and payment of back salary. The trial court denied the writ and plaintiff appealed.

The court of appeal reversed, holding in part that a school board's unilateral termination of a teacher's contract by reason of the teacher's behavior during the school year is governed by the Education Code provisions setting forth the administrative procedures for the dismissal of teachers, rather than by general contract law (*29 Cal. App. 3d 832, 838)* . The court noted that former Educ. Code § 13442 (*now Educ. Code § 44948*; applicable only to probationary employees who are employed in school districts with daily average attendance of less than 250 employees) is intended to give probationary teachers the same procedural rights during the school year as permanent teachers, including the right to written notice of the charges and the board's intention to dismiss at the expiration of 30 days unless the employee demands a hearing, and the right to a hearing in a superior court on timely demand [former Educ. Code §§ 13404, 13412; *now see Educ. Code §§ 44934, 44944, 44948.5*]. Since the school district failed to follow the statutory procedure for terminating plaintiff's employment during the school year, the court held that the board's act in terminating plaintiff's

employment was a nullity (*29 Cal. App. 3d 832* , pp. 838-839).

[c] Reinstatement of Employee and Payment of Back Salary

Educ. Code § 44946 provides that if a teacher has been suspended pending a hearing, he or she must be reinstated within five days after the governing board's decision in his favor, and shall be paid full salary by the governing board for the period of his suspension.

Matteson v. State Bd. of Educ. (1943) 57 Cal. App. 2d 991, 136 P.2d 120 , is *discussed in § 211.27[3][b]*.

[4] Additional Authorities

[a] Independent Judgment on Evidence

In *Governing Board v. Haar (1994) 28 Cal. App. 4th 369, 33 Cal. Rptr. 2d 744* , the school district instituted dismissal proceedings against a teacher for immoral conduct based on his alleged sexual harassment of female students. The Commission on Professional Competence (CPC) found that the teacher had not committed immoral conduct and ordered him reinstated with back pay. The school district sought a writ of mandate from the superior court. The superior court granted the writ and reversed the CPC's decision. On appeal, the teacher contended, among other things, that the trial court improperly substituted its judgment for that of the CPC by independently reviewing the evidence, instead of applying the substantial evidence test. In affirming the judgment, the court of appeal rejected this contention, holding that both *Educ. Code § 44945* and case law require the superior court to exercise its independent judgment on the evidence when reviewing the decision of the CPC (*28 Cal. App. 4th 369, 377)* .

[b] Reinstatement of Employee and Payment of Back Salary

The factual and procedural background of *Mass v. Board of Educ. (1964) 61 Cal. 2d 612, 39 Cal. Rptr. 739, 394 P.2d 579* , is *discussed in § 211.27[3][b]*. After holding that the defendant board had failed to follow the proper statutory procedure in dismissing plaintiff, and that it could not automatically terminate plaintiff's employment rights by reason of the lapse of his credential during a part of the period of his suspension, the Supreme Court held that plaintiff was entitled to reinstatement, to payment of full salary from the date of suspension, including retirement benefits, and to interest thereon (*61 Cal. 2d 612, 630)* .

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 211 SCHOOLS: CERTIFICATION, DISMISSAL, AND RELATED EMPLOYMENT ISSUES
PART II. FORMS

21-211 California Points & Authorities § 211.28

§ 211.28 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523] of Commission on Professional Competence [Educ. Code § 44945]--Dismissal of Permanent Employee--Immoral or Unprofessional Conduct [Educ. Code § 44932]--Showing of Unfitness to Teach Required

[1] FORM

[*Caption. See § 211.27.*]

MANDATE IS PROPER BECAUSE THE SCHOOL DISTRICT'S COMMISSION ON PROFESSIONAL COMPETENCE ORDERED PETITIONER DISMISSED FOR _____ [IMMORAL *or* UNPROFESSIONAL] CONDUCT WITHOUT _____ [ANY *or* A SUFFICIENT] SHOWING THAT PETITIONER IS UNFIT TO TEACH BECAUSE OF SUCH CONDUCT.

A--D. Propriety of Mandate to Review Discharge of Permanent Employee. [*See § 211.27, Paragraphs A--D.*]

E. Dismissal for Cause Only. No permanent employee may be dismissed except for one or more of the following causes: (1) immoral or unprofessional conduct; (2) commission, or aiding or advocating the commission, of acts of criminal syndicalism, as prohibited by Chapter 188 of the Statutes of 1919, or any amendment thereof; (3) dishonesty; (4) unsatisfactory performance; (5) evident unfitness for service; (6) physical or mental condition unfitting him or her to instruct or associate with children; (7) persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the district employing him or her; (8) conviction of a felony or of any crime involving moral turpitude; (9) violation of *Education Code Section 51530*, or conduct specified by *Government Code Section 1028*, as added by Chapter 1418 of the Statutes of 1947; (10) knowing membership by the employee in the Communist Party; or (11) alcoholism or other drug abuse that makes the employee unfit to instruct or associate with children (*Educ. Code § 44932(a)*; *see Educ. Code § 44933*).

F. Unfitness to Teach as Proper Criteria for Discharge on Ground of Immoral or Unprofessional Conduct. A school employee may not be discharged on the ground of immoral or unprofessional conduct unless such conduct indicates his or her unfitnessto teach (*Board of Educ. v. Jack M. (1977) 19 Cal. 3d 691, 696-697, 139 Cal. Rptr. 700,*

566 P.2d 602 ; *see* *Morrison v. State Bd. of Educ. (1969) 1 Cal. 3d 214, 227-230, 82 Cal. Rptr. 175, 461 P.2d 375*).

G. Showing of Significant Danger as Required. An individual can be removed from the teaching profession as unfit to teach only on a showing that his or her retention in the profession poses a significant danger of harm to either students, school employees, or others who might be affected by his or her actions as a teacher (*Board of Educ. v. Jack M. (1977) 19 Cal. 3d 691, 698, 139 Cal. Rptr. 700, 566 P.2d 602* ; *Oakland Unified School Dist. v. Olicker (1972) 25 Cal. App. 3d 1098, 1108, 102 Cal. Rptr. 421* ; *see* *Morrison v. State Bd. of Educ. (1969) 1 Cal. 3d 214, 235, 82 Cal. Rptr. 175, 461 P.2d 375*).

[*Optional*] **H. Commission of Sex Offense as Not Constituting Unfitness to Teach Per Se.** Absent a criminal conviction, a finding in a dismissal proceeding that a teacher committed a sex offense does not demonstrate unfitness to teach per se (*Board of Educ. v. Jack M. (1977) 19 Cal. 3d 691, 700-704, 139 Cal. Rptr. 700, 566 P.2d 602*).

[*Optional*] **I. Possession of Marijuana as Not Constituting Immoral Conduct Per Se.** A finding of possession of marijuana by a teacher, without more, does not constitute immoral conduct as a matter of law (*Von Durjais v. Board of Trustees (1978) 83 Cal. App. 3d 681, 688, 148 Cal. Rptr. 192*).

J. Reinstatement of Employee and Payment of Back Salary. [*See § 211.27, Paragraph F.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a petition to the superior court for a writ of mandate for review of a final adjudicatory order or decision of a school district's Commission on Professional Competence discharging a permanent teacher when the ground for discharge is immoral or unprofessional conduct, but the district failed to show that the alleged conduct demonstrated petitioner's unfitness to teach.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Use of Optional Paragraphs; Contrary Authorities

Optional Paragraph H may be included when petitioner has been discharged solely on the basis of a finding by the commission that he or she committed a sex offense. The Supreme Court has held that commission of a sex offense does not *in itself* render an individual unfit to teach, and a teacher may introduce relevant and admissible evidence to show that, notwithstanding the commission of the act, he or she is presently fit [*Board of Educ. v. Jack M. (1977) 19 Cal. 3d 691, 704, 139 Cal. Rptr. 700, 566 P.2d 602* (*discussed in § 211.28[3*][d])]. Counsel should note, however, that commission of a sex offense may, if accompanied by evidence of its adverse effect on ability to teach, indicate unfitness. A number of reported decisions have upheld the dismissal of a teacher on the grounds of "immoral or unprofessional conduct" or "evident unfitness to teach" based on sexual misconduct [*see, e.g.,* *Governing Board v. Haar (1994) 28 Cal. App. 4th 369, 383-385, 33 Cal. Rptr. 2d 744* (sexual harassment of female students indicated unfitness to teach and justified dismissal); *Gardner v. Commission on Professional Competence (1985) 164 Cal. App. 3d 1035, 1037-1038, 1040, 210 Cal. Rptr. 795* ; *Board of Trustees v. Stubblefield (1971) 16 Cal. App. 3d 820,*

824-827, 94 Cal. Rptr. 318] . It is thus necessary to look at all the facts of a particular case to determine whether commission of a sex offense may constitute grounds for dismissal.

Optional Paragraph I may be inserted when petitioner has been discharged for "immoral or unprofessional conduct" or "evident unfitness to teach" solely on the basis of a finding that he or she was guilty of possession of marijuana. Counsel should exercise caution in using this authority. Whether or not possession of an illegal substance such as marijuana is immoral conduct demonstrating unfitness to teach is a factual issue to be determined in the light of all the surrounding circumstances of a particular case [*Von Durjais v. Board of Trustees (1978) 83 Cal. App. 3d 681, 688, 148 Cal. Rptr. 192* (*discussed in § 211.38[3*][d])]. Thus, although possession of marijuana may not demonstrate unfitness to teach as a matter of law, a number of courts have upheld the dismissal of a teacher for possession of marijuana on the ground that it showed unfitness under the facts of the particular case [*see, e.g.,* *Comings v. State Bd. of Educ. (1972) 23 Cal. App. 3d 94, 105-106, 100 Cal. Rptr. 73* ; *Governing Bd. v. Brennan (1971) 18 Cal. App. 3d 396, 402, 95 Cal. Rptr. 712* ; *see also* *West Valley-Mission Community College Dist. v. Concepcion (1993) 16 Cal. App. 4th 1766, 1775-1778, 21 Cal. Rptr. 2d 5* (interpreting similarly worded provisions of *Educ. Code § 87732*, governing dismissal of community college instructors; under facts of case, substantial evidence supported trial court's finding that teacher's participation in cocaine dealing demonstrated unfitness to teach)].

Counsel should note that *Educ. Code § 44932(a)* has been subsequently amended and now provides that alcoholism or other drug abuse that makes the employee unfit to instruct or associate with children is a separate cause for dismissal of a permanent employee [*see Educ. Code § 44932(a)(11)*].

Counsel should also note that criminal conviction of certain designated sex and controlled substance offenses is grounds for automatic revocation of teaching credentials [*see Educ. Code §§ 44425, 44010, 44011*].

[c] Suspension Without Pay as Alternative Discipline

A permanent certificated employee may also be suspended without pay for a specific period of time on the grounds of unprofessional conduct pursuant to the procedures specified in *Educ. Code §§ 44933-44937, 44943*, and *44944* [*Educ. Code § 44932(b)*].

[d] Related Pleading and Practice Chapters

For a form of petition for writ of mandate to review the decision of a school district's Commission on Professional Competence to dismiss a permanent employee, see California Forms of Pleading and Practice, Ch. 512, *Schools* , Pt. II (Matthew Bender).

[e] Related Points and Authorities

For other memoranda of points and authorities supporting a petition for writ of mandate to review administrative adjudicatory decisions, see Ch. 195, *Public Administrative Law* . For memoranda of points and authorities supporting petitions for writs of mandate generally, see Ch. 150, *Mandate and Prohibition* .

[3] Discussion of Authorities

[a] Dismissal for Cause Only

Educ. Code § 44932(a) provides that no permanent employee may be dismissed except for one or more of the causes specified therein. *Educ. Code § 44933* provides that a permanent employee may be dismissed on grounds of unprofessional conduct consisting of acts or omissions other than those specified in *Educ. Code § 44932*, but any such charge must specify instances of behavior deemed to constitute unprofessional conduct.

[b] Unfitness to Teach as Proper Criteria for Discharge on Ground of Immoral or Unprofessional Conduct

In ***Board of Educ. v. Jack M.*** *(1977) 19 Cal. 3d 691, 139 Cal. Rptr. 700, 566 P.2d 602* , defendant school teacher had been arrested for an alleged homosexual solicitation in a public restroom. Although no criminal charges were ever filed against him, plaintiff school board instituted proceedings in superior court to establish its right to discharge him under former Educ. Code § 13412 (*see now Educ. Code §§ 44943, 44944*) from his tenured teaching position on grounds of immoral or unprofessional conduct. The superior court found that defendant had committed the alleged act, but found, on the basis of conflicting evidence, that his conduct did not demonstrate unfitness to teach. On the basis of these findings, the trial court rendered a judgment in favor of the defendant.

On appeal, the Supreme Court affirmed. The Court first noted that the terms "immoral or unprofessional conduct" are so broad that, standing alone, they could be constitutionally infirm; hence, the proper criteria is fitness to teach (citing *Morrison v. State Bd. of Educ. (1969) 1 Cal. 3d 214, 227-230, 82 Cal. Rptr. 175, 461 P.2d 375* , discussed *below*) (*19 Cal. 3d 691, 696-697)* . The Court then held that the findings of the trial court supported its ultimate finding that defendant's conduct did not demonstrate an unfitness to teach, and that the record revealed substantial evidence to support these findings (*19 Cal. 3d 691, 697-700)* .

For a discussion of possible limitations on the use of this case, see *§ 211.28[2][b]*.

In ***Morrison v. State Bd. of Educ.*** *(1969) 1 Cal. 3d 214, 82 Cal. Rptr. 175, 461 P.2d 375* , petitioner's teaching credential had been revoked by respondent board on grounds of immoral or unprofessional conduct. Petitioner had engaged in a one week homosexual relationship with another teacher. The record indicated that petitioner had never been accused or convicted of any criminal activity, that he had not engaged in any "abnormal activities" since the incident in question, and that no one had ever complained about or criticized his performance as a teacher. Petitioner sought a writ of mandate to compel the board to set aside its decision and restore his credential. After a hearing, the trial court denied the writ, and petitioner appealed.

The Supreme Court reversed and remanded. The court first held that, in the context of the Education Code provisions for revocation of teaching credentials, the terms "immoral or unprofessional conduct" or "conduct involving moral turpitude" must be interpreted to denote conduct that indicates unfitness to teach. In determining whether the teacher's conduct indicates unfitness to teach, the board may consider such matters as: (1) the likelihood that the conduct may have adversely affected students or fellow teachers, (2) the degree of such adversity anticipated, (3) the proximity or remoteness in time of the conduct, (4) the type of teaching certificateheld by the party involved, (5) the extenuating or aggravating circumstances surrounding the conduct, (6) the praiseworthiness or blameworthiness of the motives resulting in the conduct, (7) the likelihood of the recurrence of the conduct, and (8) the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers (*1 Cal. 3d 214, 229)* . The Court held that the statute so interpreted could constitutionally be applied to the petitioner (*1 Cal. 3d 214, 230-235)* . The Court stated, however, that under this statute, an individual can be removed from the teaching profession only upon a showing that his retention in the profession poses a significant danger of harm to either students, school employees, or others who might be affected by his actions as a teacher (*1 Cal. 3d 214, 235)* . The Court then examined the record and found that it contained no evidence whatsoever that petitioner was unfit to teach (*1 Cal. 3d 214, 235-238)* .

[c] Showing of Significant Danger as Required

The procedural and factual background of *Board of Educ. v. Jack M. (1977) 19 Cal. 3d 691, 139 Cal. Rptr. 700, 566 P.2d 602* , is *discussed in § 211.28[3][b]*. In affirming the trial court's decision in favor of defendant teacher, the Supreme Court noted that the trial court's finding that the defendant did not present a threat to students or fellow teachers was supported by substantial evidence in the record and was in accordance with the Supreme Court's holding in the *Morrison* case, that an individual can be removed from the teaching profession only upon a showing that his or her

retention poses a significant danger of harm to his students or fellow teachers (*19 Cal. 3d 691, 698)* .

Oakland Unified School Dist. v. Olicker (1972) 25 Cal. App. 3d 1098, 102 Cal. Rptr. 421 , involved an appeal from a judgment for plaintiff school district justifying defendant's dismissal from her job as a school teacher on grounds of evident unfitness for service. Defendant had reproduced and distributed to her students certain materials prepared by them as lesson assignments and which contained vulgar and obscene language. In reversing the trial court, the court of appeal noted that a permanent or probationary school teacher may not be dismissed on the basis that he or she is unfit to teach unless there is a showing that the teacher's retention in the teaching profession poses a significant danger of harm either to students, school employees, or others who might be affected by his or her actions as a teacher (citing *Morrison v. State Bd. of Educ. (1969) 1 Cal. 3d 214, 235, 82 Cal. Rptr. 175, 461 P.2d 375* , *discussed in § 211.28[3][b]*). The court then examined the undisputed facts of the case and held that, under the principles set forth in *Morrison* there was no support in the record for the trial court's conclusion that defendant's conduct constituted evident unfitness for service (*25 Cal. App. 3d 1098, 1109-1111)* .

Morrison v. State Bd. of Educ. (1969) 1 Cal. 3d 214, 82 Cal. Rptr. 175, 461 P.2d 375 , is *discussed in § 211.28[3][b]*.

[d] Commission of Sex Offense as Not Constituting Unfitness to Teach Per Se

The procedural and factual background of *Board of Educ. v. Jack M. (1977) 19 Cal. 3d 691, 139 Cal. Rptr. 700, 566 P.2d 602* , is *discussed in § 211.28[3][b]*. After determining that the trial court's finding that defendant was not unfit to teach was supported by substantial evidence, the Supreme Court considered and rejected plaintiff school board's contention that proof that defendant committed a public sexual offense demonstrates unfitness to teach per se. The Court noted that the Education Code imposes automatic sanctions only upon teachers who are convicted of certain offenses and ruled that the trial court's finding that defendant committed the alleged acts was not the equivalent of a criminal conviction. The Court also noted that in those cases which have upheld sanctions against teachers who allegedly committed sex offenses (but had not been criminally convicted), the trial court had made findings of fact adverse to the teacher, and the appellate court merely affirmed the findings below as supported by substantial evidence without declaring any rule of per se unfitness (*19 Cal. 3d 691, 700-703)* . Moreover, a rule that commission of such acts renders a person unfit to teach as a matter of law would make meaningless 1976 legislation [*see Educ. Code § 44008(b)*], which grants certain persons convicted of offenses the right to a fitness hearing. The Court therefore concluded that the trial court's finding that defendant committed the alleged homosexual solicitation did not compel a finding that defendant was unfit per se. To the contrary, the trial court could properly consider all evidence on the issue of fitness (*19 Cal. 3d 691, 703-704)* .

For a discussion of possible limitations on the use of this case, see *§ 211.28[2][b]*.

[e] Possession of Marijuana as Not Constituting Immoral Conduct Per Se

In *Von Durjais v. Board of Trustees (1978) 83 Cal. App. 3d 681, 148 Cal. Rptr. 192* , a criminal complaint had been lodged against plaintiff charging her with possession and cultivation of marijuana, and possession of peyote. This complaint was later dismissed. The board, however, filed a formal statement of charges specifying four grounds for dismissal (dishonesty, immoral conduct, evident unfitness for service, and the three alleged narcotics offenses). On plaintiff's demand, a hearing was conducted before a Commission on Professional Competence. The commission found that plaintiff had possessed marijuana, and that the evidence thus established the ground of evident unfitness for service. The commission also determined that the evidence failed to establish any of the other grounds charged. The commission ordered plaintiff's dismissal and denied her claim for back pay during the period of her suspension. Plaintiff then filed adeclaratory relief action in superior court for determination of her right to back pay under the terms of her employment contract. The trial court treated the complaint as a petition for a writ of mandate and exercised its independent judgment on the evidence. In addition to adopting the commission's findings, the trial court also found that plaintiff had possessed peyote as well as marijuana and that this constituted immoral conduct as a matter of law, which justified plaintiff's

suspension without pay as well as her dismissal.

In reversing, the court of appeal held, inter alia, that a finding of possession of marijuana or peyote, without more, does not constitute immoral conduct as a matter of law. The court stated that it is well established that whether the possession of prohibited substances constitutes immoral conduct presents a factual issue to be determined in light of all of the surrounding facts and circumstances. The court then noted that the commission had expressly determined that the evidence failed to establish the charge of immoral conduct and that the trial court's reasoning equating the commission's finding of unlawful possession with immoral conduct per se was unsound (*83 Cal. App. 3d 681, 688)* .

For a discussion of possible limitations on the use of this case, see the Comments to this form under Use of Optional Paragraphs; Contrary Authorities.

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 211 SCHOOLS: CERTIFICATION, DISMISSAL, AND RELATED EMPLOYMENT ISSUES
PART II. FORMS

21-211 California Points & Authorities § 211.29

§ 211.29 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523] of Commission on Professional Competence [Educ. Code § 44945]--Dismissal of Permanent Employee--Violation of School Rules [Educ. Code § 44932]--Grounds for Dismissal Only Where Conduct Is Persistent

[1] FORM

[*Caption. See § 211.27.*]

MANDATE IS PROPER BECAUSE THE SCHOOL DISTRICT'S COMMISSION ON PROFESSIONAL COMPETENCE ORDERED PETITIONER DISMISSED FOR VIOLATION OF AND REFUSAL TO OBEY SCHOOL _____ [LAWS *or* REGULATIONS] WITHOUT ANY SHOWING THAT SUCH CONDUCT WAS PERSISTENT.

A--D. Propriety of Mandate to Review Discharge of Permanent Employee. [*See § 211.27, Paragraphs A--D.*]

E. Dismissal for Cause Only. [*See § 211.28, Paragraph E.*]

F. Violation of School Rules as Grounds for Dismissal Only Where Conduct Is Persistent. A permanent employee may not be dismissed for violation of or refusal to obey state school laws or school board regulations under *Section 44932(a)(7) of the Education Code* unless such conduct is persistent (*Governing Bd. of the Oakdale Union School Dist. v. Seaman (1972) 28 Cal. App. 3d 77, 81, 84, 104 Cal. Rptr. 64, 104 Cal. Rptr. 527* ; *Fresno City High School Dist. v. De Caristo (1939) 33 Cal. App. 2d 666, 675, 92 P.2d 668*).

[*Optional*] **G. Single Absence Without Leave as Not Constituting Persistent Violation of School Rules.** A single violation of school rules forbidding absence without leave does not of itself constitute a persistent violation of school regulations which justifies dismissal of a permanent teacher under *Section 44932 (a)(7) of the Education Code*, even though the violation may result in an absence of several school days (*Governing Bd. of the Oakdale Union School Dist. v. Seaman (1972) 28 Cal. App. 3d 77, 82-84, 104 Cal. Rptr. 64, 104 Cal. Rptr. 527* ; *see Fresno City High School Dist. v. De Caristo (1939) 33 Cal. App. 2d 666, 675, 92 P.2d 668*).

H. Reinstatement of Employee and Payment of Back Salary. [*See § 211.27, Paragraph F*].
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a petition to the superior court for a writ of mandate filed in superior court for review of a final adjudicatory order or decision of a school district's Commission on Professional Competence discharging a permanent employee when the ground for discharge is violation of or refusal to obey state school laws or school board regulations and the alleged violations were not shown to be persistent as required by *Educ. Code § 44932(a)(7)*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Use of Optional Paragraph; Contrary Authorities

Optional Paragraph G may be inserted when the sole violation of school rules alleged is a single unauthorized absence from school. Two court of appeal decisions have indicated that a single violation of school regulations prohibiting absences without leave does not constitute persistent violation of or refusal to obey school rules justifying dismissal even where the violation results in an absence of several school days [*see Governing Bd. of the Oakdale Union School Dist. v. Seaman (1972) 28 Cal. App. 3d 77, 82-84, 104 Cal. Rptr. 64* ; *Fresno City High School Dist. v. De Caristo (1939) 33 Cal. App. 2d 666, 675, 92 P.2d 668* (both *discussed in § 211.29[3*][a])]. Counsel should note that repeated absences, however, may constitute a persistent violation of school regulations in some circumstances, especially when accompanied by an attitude of continuing insubordination [*see Governing Bd. of the Oakdale Union School Dist. v. Seaman (1972) 28 Cal. App. 3d 77, 82-83, 104 Cal. Rptr. 64* (distinguishing *Board of Educ. v. Mathews (1957) 149 Cal. App. 2d 265, 308 P.2d 449*)]. Moreover, a blatant disregard of school authority may in some instances constitute unprofessional conduct, a separate ground for dismissal under *Educ. Code § 44932* [*see Governing Bd. of the Oakdale Union School Dist v. Seaman (1972) 28 Cal. App. 3d 77, 84, 104 Cal. Rptr. 64]* .

[c] Related Pleading and Practice Chapters

For a form of petition for writ of mandate to review the decision of a school district's Commission on Professional Competence to dismiss a permanent employee, see Ch. 512, *Schools* in California Forms of Pleading and Practice.

[d] Related Points and Authorities

For other memoranda of points and authorities supporting a petition for writ of mandate to review administrative adjudicatory decisions generally, see Ch. 195, *Public Administrative Law* . For memoranda of points and authorities supporting petitions for writs of mandate generally, see Ch. 150, *Mandate and Prohibition* .

[3] Discussion of Authorities

[a] Violation of School Rules as Grounds for Dismissal Only Where Conduct Is Persistent

In ***Governing Bd. of the Oakdale Union School Dist. v. Seaman*** *(1972) 28 Cal. App. 3d 77, 104 Cal. Rptr. 64* , appellant, a permanent school teacher who taught mentally retarded children, had been invited to attend an international conference on mental health to be held in Paris during September 1969. In order that she might attend, appellant appeared before the respondent board in June 1969 and applied for a leave of absence until October 1. The school year began in September. The board considered her request, but a motion to grant the leave failed to pass for lack of a second. In July, appellant wrote the superintendent of the school district from Japan and once again requested a leave of absence, reiterating the reasons for her request and suggesting a well-qualified substitute teacher. The superintendent failed to bring this letter to the attention of the board, and appellant received no response to this request. Nevertheless, she did not return to school until October 2. The board then served appellant with notice of its intent to dismiss her. Appellant demanded a hearing in the superior court. The trial court found that appellant had willfully and persistently violated, refused, and failed to obey school board regulations and that there were sufficient grounds for her dismissal.

In reversing, the court of appeal noted that since the trial court's decision that appellant could be dismissed was based on former Educ. Code § 13403(g) (*now see Educ. Code § 44932(a)(7)* (identically worded)), the question was not only whether appellant had violated regulations promulgated by the school district, but also whether the violation was persistent (*28 Cal. App. 3d 77, 81)* . The court rejected the board's argument, based on *Board of Educ. v. Mathews (1957) 149 Cal. App. 2d 265, 308 P.2d 449* , that each day of appellant's absence was a separate violation of the school board's regulations, and that hence, the violation in this case met the statutory requirement of persistence (*28 Cal. App. 3d 77, 81-82)* . The court noted that the evidence did not show that appellant was motivated by an attitude of continuous insubordination. There was no evidence that she had ever violated a school law or regulation before. Moreover, she had requested a leave of absence before leaving and had given sound academic reasons for her request, and she could have reasonably assumed that the request had not been emphatically denied. The court stated that to hold appellant guilty of a persistent violation would be to distort the meaning of the term "persistent," no matter what acceptable definition is used, even though the violation resulted in an absence of several school days (*28 Cal. App. 3d 77, 82)* . The court distinguished the *Mathews* case on the ground that in that case there was conclusive evidence of unethical conduct and continuing insubordination on the part of the teacher (*28 Cal. App. 3d 77, 82-83)* . Finally, the court stated in dictum that it did not mean to suggest that a single willful act of disobedience could never be grounds for dismissal of a permanent teacher. Blatant defiance of school authority might in some instances constitute unprofessional conduct, which is a separate ground for dismissal. The court noted, however, that appellant here was not charged with unprofessional conduct, but only with persistent violation of school regulations (*28 Cal. App. 3d 77, 84-85)* .

Fresno City High School Dist. v. De Caristo *(1939) 33 Cal. App. 2d 666, 92 P.2d 668* , involved a teacher's appeal from a superior court judgment permitting respondent school district to dismiss her. Respondent had served appellant with notice of its intention to dismiss her on a number of grounds, including her violation of school district rules prohibiting absence from school without consent of the district. Appellant had been absent without leave on two school days. In reversing the judgment, the court of appeal noted that three paragraphs of the notice of intention to dismiss were insufficient under former School Code § 5.650 (*now see Educ. Code § 44932(a)(7)*) in that they failed to allege that the violations of school regulations were persistent as required by the statute. The court specifically noted that the third paragraph of the complaint alleged only the two absences without leave and appellant's alleged failure to let a substitute teacher act on one occasion when one had been assigned in appellant's place. As to the latter conduct, the court noted that the rules cited by the school board as allegedly violated by appellant's failure to let the substitute act did not deal with such a situation at all and that therefore the court could disregard this charge. As to the absences without leave, the court held, inter alia, that two absences without leave may not be said to be a persistent course of conduct (*33 Cal. App. 2d 666, 675)* .

[b] Single Absence Without Leave as Not Constituting Persistent Violation of School Rules

Governing Bd. of the Oakdale Union School Dist. v. Seaman (1972) 28 Cal. App. 3d 77, 104 Cal. Rptr. 64 , is *discussed in § 211.29[3][a]*.

Fresno City High School Dist. v. De Caristo (1939) 33 Cal. App. 2d 666, 92 P.2d 668 , is *discussed in § 211.29[3][a]*.

For a discussion of possible limitations on the use of the *Seaman* and *De Caristo* cases for the point set out in optional Paragraph G, see *§ 211.29[2][b]*.

[4] Additional Authorities

[a] Violation of School Rules as Grounds for Dismissal Only Where Conduct Is Persistent

In *Bourland v. Commission on Professional Competence (1985) 174 Cal. App. 3d 317, 219 Cal. Rptr. 906* , the court of appeal affirmed the trial court's granting of a writ of mandate commanding the local school district commission to set aside its dismissal of a teacher, and to reinstate her. The teacher had been dismissed because she had repeatedly refused to include two objectives in a statement of objectives by which her performance for the school year would be evaluated, at the principal's direction. The principal repeated the request on numerous occasions during the next three months, and the teacher repeatedly replied in writing that she refused to supply the two demanded objectives. The board dismissed her pursuant to *Educ. Code § 44932(a)(7)* for persistent violation of or refusal to obey school laws or regulations. In affirming the trial court's granting of a writ of mandate to reverse the board's dismissal, the court of appeal opined that the board had in effect dismissed the teacher for repeatedly refusing to admit agreement with the principal's assertion that she needed improvement in two areas, and not for any actual inadequate performance in those two areas. The court concluded that the continuing debate between the teacher and principal over their difference of opinion could not reasonably be transformed into a "persistent" violation of rules, and thus the trial court had properly concluded that the evidence did not support the dismissal charges.

In *San Dieguito Union High School Dist. v. Commission on Professional Competence (1982) 135 Cal. App. 3d 278, 185 Cal. Rptr. 203* , the court of appeal reversed the trial court's finding that a teacher was guilty of persistent violation of or refusal to obey rules of the school district for failure to prepare adequate and timely lesson plans for substitute teachers. The court noted that evidence at the hearing before the Commission on Professional Competence showed that only two of 16 substitutes complained of lack of lesson plans and that the teacher had offered lengthy explanations about the difficulty of submitting lesson plans when sudden illness prevented notification in advance or preparation of lesson plans. Although the trial court had found this evidence to be a sufficient showing of willfulness constituting a violation or persistent refusal to obey, the court of appeal disagreed, holding that the evidence did not demonstrate willfulness as a matter of law and returned the case to the trial court to make a finding consistent with all the evidence in the case relating to, and warranting the ultimate conclusion of, unfitness to teach (*135 Cal. App. 3d 278, 287-288)* .

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California Points & Authorities

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 211 SCHOOLS: CERTIFICATION, DISMISSAL, AND RELATED EMPLOYMENT ISSUES
PART II. FORMS

21-211 California Points & Authorities § 211.30

§ 211.30 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523] of Commission on Professional Competence [Educ. Code § 44945]--Dismissal of Permanent Employee--Violation of School Rules [Educ. Code § 44932]--Refusal to Obey Invalid Order as Not Grounds for Dismissal

[1] FORM

[*Caption. See § 211.27.*]

MANDATE IS PROPER BECAUSE PETITIONER'S DISMISSAL BY THE SCHOOL DISTRICT'S COMMISSION ON PROFESSIONAL COMPETENCE WAS PREDICATED ON PETITIONER'S REFUSAL TO OBEY AN ORDER WHICH THE SCHOOL AUTHORITIES WERE NOT ENTITLED TO GIVE AND THEREFORE NOT ENTITLED TO HAVE OBEYED.

A--D. Propriety of Mandate to Review Discharge of Permanent Employee. [*See § 211.27, Paragraphs A--D.*]

E. Dismissal for Cause Only. [*See § 211.28, Paragraph E.*]

F. Refusal to Obey Invalid Order as Not Grounds for Dismissal. A teacher's refusal to obey an order which the school authority was not entitled to give and have obeyed is not grounds for dismissal for insubordination (*Pasadena Unified School Dist. v. Commission on Professional Competence (1977) 20 Cal. 3d 309, 314 n. 7, 142 Cal. Rptr. 439, 572 P.2d 53*).

G. Reinstatement of Teacher and Payment of Back Salary. [*See § 211.27, Paragraph F.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a petition to the superior court for a writ of mandate for review of a final adjudicatory order or decision of a school district's Commission on Professional Competence discharging a permanent teacher where the ground for discharge is violation of or refusal to obey state school laws or school board regulations but where such ground is predicated solely on the teacher's refusal to obey an invalid order given by school authorities.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Chapters

For a form of petition for writ of mandate to review the decision of a school district's Commission on Professional Competence to dismiss a permanent employee, see Ch. 512, *Schools* in California Forms of Pleading and Practice.

[c] Related Points and Authorities

For other memoranda of points and authorities supporting a petition for writ of mandate to review administrative adjudicatory decisions generally, see Ch. 195, *Public Administrative Law* . For memoranda of points and authorities supporting petitions for writs of mandate generally, see Ch. 150, *Mandate and Prohibition* .

[3] Discussion of Authorities

[a] Refusal to Obey Invalid Order as Not Grounds for Dismissal

The factual and procedural background of *Pasadena Unified School Dist. v. Commission on Professional Competence (1977) 20 Cal. 3d 309, 142 Cal. Rptr. 439, 572 P.2d 53* , is discussed in *§ 211.27[3][a]*. In that case, a school teacher had been discharged for her refusal to obey an involuntary transfer order which had been given on September 10. The school district's own policy required that notice of such transfers be given no later than May 15, absent an emergency. In affirming the trial court's ruling that the teacher had been improperly dismissed, the Supreme Court noted that under *Educ. Code § 35035(d)*, when a school district adopts a policy concerning transfers of teachers, the superintendent has authority to transfer teachers consistent with that policy. If, however, the superintendent acts contrary to district policy, the transfer order is invalid (*20 Cal. 3d 309, 314)* . The Court then stated that the teacher's refusal to obey an invalid transfer order could not be grounds for her dismissal. In a footnote, the Court supported this statement by citing the rule followed in civil service cases that insubordination can be rightfully predicated only upon a refusal to obey some order which a superior officer is entitled to give and entitled to have obeyed (*20 Cal. 3d 309, 314, fn. 7*). Thus, the teacher'sdismissal could only be justified if the transfer order was valid. The validity of the transfer order depended in turn on whether the evidence established that there was an emergency which excused the school district's failure to give the teacher notice of the transfer before May 15. The Court held that substantial evidence supported the trial court's finding that no such emergency existed (*20 Cal. 3d 309, 314-316)* .

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 211 SCHOOLS: CERTIFICATION, DISMISSAL, AND RELATED EMPLOYMENT ISSUES
PART II. FORMS

21-211 California Points & Authorities § 211.31

§ 211.31 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523] of Commission on Professional Competence [Educ. Code § 44945]--Dismissal of Permanent Employee--Unprofessional Conduct or Unsatisfactory Performance [Educ. Code § 44932]--School Board as Not Permitted to Dismiss for Unprofessional Conduct or Unsatisfactory Performance Unless Prior Notice and Opportunity to Correct Faults Given [Educ. Code § 44938]

[1] FORM

[*Caption. See § 211.27.*]

MANDATE IS PROPER BECAUSE THE SCHOOL DISTRICT'S COMMISSION ON PROFESSIONAL COMPETENCE ORDERED PETITIONER DISMISSED FOR _____ [UNSATISFACTORY PERFORMANCE *or* UNPROFESSIONAL CONDUCT] BUT THE GOVERNING BOARD OF THE SCHOOL DISTRICT FAILED TO GIVE PETITIONER THE PRIOR WRITTEN NOTICE AND OPPORTUNITY TO CORRECT HIS/HER FAULTS REQUIRED BY EDUCATION CODE SECTION 44938.

A--D. Propriety of Mandate to Review Discharge of Permanent Employee. [*See § 211.27, Paragraphs A--D.*]

E. Strict Compliance With Discharge Procedure. [*See § 211.27, Paragraph E.*]

F. Dismissal for Cause Only. [*See § 211.28, Paragraph E.*]

[*EITHER*]

G. Prior Notice of Charges of Unsatisfactory Performance as Required. The governing board of a school district may not act on any charges of unsatisfactory performance unless, at least 90 calendar days prior to the date of the filing, the board or its authorized representative has given the teacher against whom the charge is filed written notice of the unsatisfactory performance, specifying the nature thereof with such specific instances of behavior and with such particularity as to furnish the teacher with an opportunity to correct his or her faults and overcome the grounds for the charge (*Educ. Code § 44938(b)(1)*).

[*OR*]

G. Prior Notice of Charges of Unsatisfactory Performance as Required. The governing board may not act on any charges of unsatisfactory performance during the time period composed of the last one-fourth of the school days it has scheduled for purposes of computing apportionments in any fiscal year, unless the board or its authorized representative has given the teacher against whom the charge is filed written notice of the unsatisfactory performance prior to the beginning of that time period, specifying the nature of the unsatisfactory performance with such specific instances of behavior and with such particularity as to furnish the teacher with an opportunity to correct his or her faults and overcome the grounds for the charge (*Educ. Code § 44938(b)(2)*).

[*OR*]

G. Prior Notice of Charges of Unprofessional Conduct as Required. The governing board may not act on any charges of unprofessional conduct unless at least 45 calendar days prior to the date of the filing, the board or its authorized representative has given to the teacher against whom the charge is filed written notice of the unprofessional conduct, specifying the nature of the unprofessional conduct with such specific instances of behavior and with such particularity as to furnish the teacher with an opportunity to correct his or her faults and overcome the grounds for the charge (*Educ. Code § 44938(a)*).

H. Failure to Give Notice as Fatal to Action by Board to Dismiss Teacher for Unsatisfactory Performance or Unprofessional Conduct. A school board's failure to give a permanent teacher the written notice required by *Education Code Section 44938* is fatal to any action or proceeding by the school board to dismiss a teacher for unsatisfactory performance or unprofessional conduct (*see Tarquin v. Commission on Professional Competence (1978) 84 Cal. App. 3d 251, 257-259, 148 Cal. Rptr. 522* ; *Fresno City High School Dist. v. De Caristo (1939) 33 Cal. App. 2d 666, 676, 92 P.2d 668*).

[*Optional*] **I. Dismissal as Improper Where Teacher Deprived of Opportunity to Correct Faults by Transfer to Nonteaching Position.** A school board is without jurisdiction to dismiss a teacher on grounds of unsatisfactory performance or unprofessional conduct if the teacher is deprived, by reason of his or her transfer to a nonteaching position, of the opportunity of the statutory requisite period of days in which to correct his or her faults following service on him or her of the written notice required by *Education Code Section 44938* (*see Tarquin v. Commission on Professional Competence (1978) 84 Cal. App. 3d 251, 258-259, 148 Cal. Rptr. 522*).

J. Reinstatement of Teacher and Payment of Back Salary. [*See § 211.27, Paragraph F.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a petition to the superior court for a writ of

mandate for review of a final adjudicatory order or decision of a school district's Commission on Professional Competence discharging a permanent teacher when the ground for discharge is unprofessional conduct or unsatisfactory performance, but the school board has failed to give the teacher the prior written notification and opportunity to correct his or her faults required by *Educ. Code § 44938*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Use of Optional Paragraph

Optional Paragraph I may be included when the required notice is served but the teacher is deprived of the opportunity of the number of days prescribed by *Educ. Code § 44938* to correct his or her faults by reason of his or her transfer to a nonteaching position before the statutory period has expired [*see Tarquin v. Commission on Professional Competence (1978) 84 Cal. App. 3d 251, 257-258, 148 Cal. Rptr. 522* (*discussed in § 211.31[3*][a])].

[c] Limitations on Use of Form

Counsel should note that the term "unprofessional conduct" as used in *Educ. Code § 44938* means and refers only to the unprofessional conduct particularly specified as cause for dismissal in *Educ. Code §§ 44932(a)(1)* and *44933*, and does not include any other cause for dismissal specified in *Educ. Code § 44932*. The term "unsatisfactory performance" as used in *Educ. Code § 44938* means and refers only to the unsatisfactory performance particularly specified as cause for dismissal in *Educ. Code § 44932(a)(4)*, and does not include any other cause for dismissal specified in *Educ. Code § 44932* [*Educ. Code § 44938(c)*]. Thus, the failure of a school board to comply with the provisions of *Educ. Code § 44938* does not preclude the board from seeking dismissal of a teacher on grounds other than unsatisfactory performance or unprofessional conduct (*e.g.*, evident unfitness for service) [*see Tarquin v. Commission on Professional Competence (1978) 84 Cal. App. 3d 251, 260, 148 Cal. Rptr. 522]* .

[d] Related Pleading and Practice Chapters

For a form of petition for writ of mandate to review the decision of a school district's Commission on Professional Competence to dismiss a permanent employee, see California Forms of Pleading and Practice, Ch. 512, *Schools* , Pt. II (Matthew Bender).

[e] Related Points and Authorities

For other memoranda of points and authorities supporting a petition for writ of mandate to review administrative adjudicatory decisions generally, see Ch. 195, *Public Administrative Law* . For memoranda of points and authorities supporting petitions for writs of mandate generally, see Ch. 150, *Mandate and Prohibition* .

[3] Discussion of Authorities

[a] Failure to Give Notice as Fatal to Action by Board to Dismiss Teacher for Unsatisfactory Performance or Unprofessional Conduct

In ***Tarquin v. Commission on Professional Competence*** *(1978) 84 Cal. App. 3d 251, 148 Cal. Rptr. 522* , respondent was a permanent teacher employed by appellant school district. The district served on respondent a written notice of unsatisfactory service, charging respondent with, among other things, incompetency, and recommending that he be discontinued from service with the district. Attached to the notice was a specification of charges setting forth the specific instances of behavior alleged to constitute incompetency on respondent's part. During the same month, respondent was transferred to a nonteaching position and was not thereafterassigned to classroom teaching. Subsequently, the governing board of appellant district served on respondent written notice of its intention to dismiss

him on grounds of incompetency, evident unfitness for service, and persistent violation of or refusal to obey school regulations. Respondent demanded and was granted a hearing before a Commission on Professional Competence. The commission held that the district had complied with former Educ. Code § 13407 (*now see Educ. Code § 44938(b)*) and then proceeded to hear the substantive charges against respondent. The commission, in its findings of fact, sustained 34 of 47 charges alleged against respondent and concluded that cause existed for dismissing respondent on all three of the grounds alleged by the district. Accordingly, it ordered respondent's dismissal. Respondent thereafter commenced a mandate proceeding to compel the commission to set aside its decision. The superior court found in respondent's favor and issued the writ of mandate prayed for.

On appeal, appellant district contended, inter alia, that it had complied with former Educ. Code § 13407 (*now see Educ. Code § 44938(b)(1)*). The court of appeal rejected this contention, stating that the purpose of the statute is to give a permanent teacher at least 90 days within which to correct his conduct alleged to constitute incompetency and thus prevent his dismissal on that ground. In the present case, the court noted, appellant district had given respondent notice of his faults within the period prescribed by the statute, but its subsequent removal of respondent from his teaching duties during the same month deprived him of the opportunity to correct his deficiencies alleged to constitute incompetency (*84 Cal. App. 3d 251, 257-258)* . The court therefore concluded that for this and other reasons, the district had failed to comply with the statute and was without jurisdiction to proceed against respondent on charges of incompetency (*84 Cal. App. 3d 251, 259)* . The court held, however, that the district's failure to comply with former Educ. Code § 13407 (*now see Educ. Code § 44938(b)(1)*) did not preclude it from proceeding against respondent on grounds of evident unfitness for service and persistent violation of or refusal to obey school regulations. The court therefore reversed and remanded to the trial court with instructions to review the commission's decision ordering respondent's dismissal on these grounds (*84 Cal. App. 3d 251, 260-262)* .

Counsel should note, however, that in *Blake v. Commission on Professional Competence (1989) 212 Cal. App. 3d 513* , the court of appeal found only the *notice* requirement of *Educ. Code § 44938(a)* to be jurisdictional. The court held that the portion of the statute that pertains to the opportunity to correct behavior is not jurisdictional, but merely an evidentiary consideration. Thus, the teacher's inability to take advantage of the opportunity because of illness or disability did not deprive the Commission on Judicial Competence of jurisdiction to proceed on the charge of unprofessional conduct. However, the failure to provide a teacher with the opportunity to correct his or her deficiencies may constitute a defect in due process (*212 Cal. App. 3d 513, 517-518)* .

The procedural and factual background of ***Fresno City High School Dist. v. De Caristo*** *(1939) 33 Cal. App. 2d 666, 92 P.2d 668* , is discussed in *§ 211.29[3][a]*. In that case, respondent school board had sought to dismiss appellant, a permanent school teacher, on a number of grounds, including incompetency and unprofessional conduct. No notice of the conduct alleged to constitute incompetency and unprofessional conduct had been given to appellant prior to service of the notice of intention to dismiss. The court of appeal noted that the purpose of former School Code § 5.652 (*now see Educ. Code § 44938(a), (b)* (similarly worded)) was to enable a permanent teacher to remedy faults or defects that might be corrected in 90 days and thus prevent discharge. The court then examined the various faults specified in the notice of intention to dismiss and found that they were serious delinquencies which indicated a quick temper and an uncontrolled tongue. The court stated, however, that while such faults were not to be excused, often they can be corrected. The court held, therefore, that appellant should have been given 90 days' notice of the correctable faults before service of the notice of intention to dismiss, that the faults here charged were correctable, and that the failure to give such 90 days' notice was fatal to the action to dismiss appellant (*33 Cal. App. 2d 666, 675-676)* .

Counsel should note that in 1983, *Educ. Code § 44938* was amended and subdivided into subdivisions (a) and (b). In 1995, *Educ. Code §§ 44932* and *44938* were amended to substitute "unsatisfactory performance" for "incompetency" as a ground for dismissal of a permanent certificated employee. As amended, *Educ. Code § 44938(a)* provides for 45 days' written notice to the employee before the employee is dismissed for unprofessional conduct. *Educ. Code § 44938(b)* provides that before an employee may be dismissed for unsatisfactory performance, the governing board must either provide 90 days' written notice or, if the dismissal takes place during period comprising the last 1/4 of the school days

scheduled for the fiscal year, written notice prior to beginning of that period. The requirement that the notice be served "during the preceding term or half school year" was deleted from the statute in 1983.

NOTE:

In *Crowl v. Commission on Professional Competence (1990) 225 Cal. App. 3d 334, 275 Cal. Rptr. 86* , the court held that *Educ. Code § 44938* applies to suspensions as well as to dismissals (*225 Cal. App. 3d 334, 342-347)* . The court further held that if the evidence establishes that the teacher has remediated the conduct during the 45-day period, the teacher may not be suspended based on prior actsof unprofessional conduct (*225 Cal. App. 3d 334, 349-352)* . However, the court did not reach the issue of whether the teacher may demonstrate remediation simply by refraining from unprofessional conduct for 45 days, because the district had stipulated that the teacher had remediated his conduct (*225 Cal. App. 3d 334, 350)* .

[b] Dismissal as Improper Where Teacher Deprived of Opportunity to Correct Faults by Transfer to Nonteaching Position

Tarquin v. Commission on Professional Competence *(1978) 84 Cal. App. 3d 251, 148 Cal. Rptr. 522* , is *discussed in § 211.31[3][a].*

[4] Additional Authorities

[a] Failure to Give Notice as Fatal to Action by Board to Dismiss Teacher for Unsatisfactory Performance or Unprofessional Conduct

In *Forker v. Board of Trustees (1984) 160 Cal. App. 3d 13, 206 Cal. Rptr. 303* , defendant school district notified plaintiff, a librarian with permanent employee status of 19 years, that she would not be reemployed because of a proposed reduction in services. Some months later, defendant reestablished the librarian services it had earlier reduced, but notified plaintiff that she would not be rehired because of her incompetence. After defendant denied plaintiff's request for an evidentiary hearing, she petitioned the superior court for a writ of mandate compelling defendant to reinstate her. The court ordered defendant to reinstate plaintiff and to pay her attorney's fees.

The court of appeal affirmed the judgment. A permanent school employee who continues in service may be dismissed only for a cause specifically allowed by statute. In the case of dismissal for incompetence, one of the allowable causes, the employee is entitled to written notice, and has 90 days to correct the faults and thus prevent discharge for incompetence [*Educ. Code §§ 44932(d), 44938(b)*]. In refusing to rehire her on the ground of incompetence, the board effected plaintiff's dismissal without affording her a hearing, a right possessed by permanent employees who continue in service, and in so doing, the board subjected her to a requirement not imposed on other employees who continued in service (*160 Cal. App. 3d 13, 18)* . The court rejected defendant's attempt to apply its discretion, which it had with respect to competence in layoff cases, to cases involving dismissal for lack of competence, and found that its denial of plaintiff's request for an evidentiary hearing was a violation of her right to due process of law (*160 Cal. App. 3d 13, 20)* .

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 211 SCHOOLS: CERTIFICATION, DISMISSAL, AND RELATED EMPLOYMENT ISSUES
PART II. FORMS

21-211 California Points & Authorities § 211.32

§ 211.32 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523] of Commission on Professional Competence [Educ. Code § 44945]--Dismissal of Permanent Employee--Conviction of Crime [Educ. Code § 44932]--Conviction of Felony as Not Ground for Dismissal Unless Felony Involves Moral Turpitude

[1] FORM

[*Caption. See § 211.27.*]

MANDATE IS PROPER BECAUSE THE SCHOOL DISTRICT'S COMMISSION ON PROFESSIONAL COMPETENCE ORDERED PETITIONER DISMISSED FOR CONVICTION OF A FELONY WITHOUT A SHOWING THAT THE FELONY WAS ONE WHICH INVOLVED MORAL TURPITUDE.

A--D. Propriety of Mandate to Review Discharge of Permanent Employee. [*See § 211.27, Paragraphs A--D.*]

E. Dismissal for Cause Only. [*See § 211.28, Paragraph E.*]

F. Conviction of Felony as Not Grounds for Dismissal Unless Felony Involves Moral Turpitude. A permanent employee may not be dismissed for conviction of a felony under *Section 44932(a)(8) of the Education Code* unless the felony involves moral turpitude (*Board of Trustees v. Judge (1975) 50 Cal. App. 3d 920, 925-928, 123 Cal. Rptr. 830*).

[*Optional*] G. **Offense of Cultivation of Marijuana as Not Involving Moral Turpitude as a Matter of Law.** The offense of cultivation of marijuana is not a crime or felony involving moral turpitude as a matter of law (*Board of Trustees v. Judge (1975) 50 Cal. App. 3d 920, 923-925, 123 Cal. Rptr. 830*).

H. Reinstatement of Employee and Payment of Back Salary. [*See § 211.27, Paragraph F.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]

By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a petition to the superior court for a writ of mandate for review of a final adjudicatory order or decision of a school district's Commission on Professional Competence discharging a permanent employee when the ground for discharge is the employee's conviction of a felony yet there is no showing that the felony involved moral turpitude.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Use of Optional Paragraph; Contrary Authorities

Optional Paragraph G may be inserted if the offense involved is cultivation of marijuana. Counsel should note, however, that although the offense of cultivation of marijuana has been held not to constitute a crime involving moral turpitude as a matter of law, it may constitute an offense involving moral turpitude on the facts of a particular case [*see Board of Trustees v. Judge (1975) 50 Cal. App. 3d 920, 923-924, 123 Cal. Rptr. 830* , and cases cited therein (*discussed in § 211.32[3*])].

Counsel should also note that conviction of a particular felony, while not involving moral turpitude and therefore not in itself grounds for dismissal under *Educ. Code § 44932(a)(8)*, may nevertheless constitute unprofessional conduct or demonstrate evident unfitness for service, which are separate grounds for dismissal under *Educ. Code § 44932* [*see, e.g., Comings v. State Bd. of Educ. (1972) 23 Cal. App. 3d 94, 98-100, 105-106, 100 Cal. Rptr. 73]* . Furthermore, counsel should note that *Educ. Code § 44932* has been subsequently amended and now provides that alcoholism or drug abuse which makes the employee unfit to instruct or associate with children is a separate cause for dismissal of a permanent employee [*see Educ. Code § 44932(a)(11)*].

[c] Summary Dismissal for Conviction of Certain Crimes

As noted in § 211.32[2][a], this form is for use when the school district relies on a criminal conviction to establish a cause for dismissal under *Educ. Code § 44932*. Under some circumstances, however, the district's governing board may dismiss a permanent employee based on a criminal conviction without following the usual hearing procedures or establishing cause under *Educ. Code § 44932*. *Educ. Code § 44425* requires the Commission on Teacher Credentialing to suspend a teaching credential "immediately" if the credential holder is convicted of a sex offense as defined in *Educ. Code § 44010* or a controlled substance offense as defined in *Educ. Code § 44011*. The Commission must revoke the credential if the conviction becomes final, but must terminate the suspension if the conviction is reversed and the holder is acquitted of the offense in a new trial or the charges against the holder are dismissed [*see Educ. Code § 44425*]. Furthermore, *Educ. Code § 44836* prohibits a school district from employing or retaining in employment any person who has been convicted of a sex offense as defined in *Educ. Code § 44010* or a controlled substance offense as defined in *Educ. Code § 44011*, but also provides that if the conviction is reversed and the person is acquitted of the offense in a new trial or the charges against the holder are dismissed "this section does not prohibit his or her employment thereafter."

At least one court of appeal has held that *Educ. Code § 44836* requires the summary dismissal of an employee who has been convicted of one of the specified sex or narcotics offenses, even though an appeal of the conviction may be pending [*see Tuffli v. Governing Board (1994) 30 Cal. App. 4th 1398, 1406-1407, 36 Cal. Rptr. 2d 433]* . Thus, an

employee who has been convicted of one of the specified offenses may be terminated without a hearing or showing of unfitness to teach as ordinarily required for dismissal of a permanent employee [*see Tuffli v. Governing Board (1994) 30 Cal. App. 4th 1398, 1405, 36 Cal. Rptr. 2d 433]* . Generally, if the conviction is subsequently reversed on appeal, the employee must be reinstated to his or her previous position, unless the governing board institutes the hearing procedures under *Educ. Code § 44934 et seq.* and establishes a cause for dismissal under *Educ. Code § 44932* [*see Tuffli v. Governing Board (1994) 30 Cal. App. 4th 1398, 1408-1409, 36 Cal. Rptr. 2d 433]* . However, if the conviction was for one of the specified sex offenses perpetrated against a minor, and the dismissal of the offense was pursuant to *Penal Code § 1203.4* (change of plea after completion of probation), the convicted person may not be employed or reinstated [*Educ. Code § 44836(a)(2)*].

[d] Related Pleading and Practice Chapters

For a form for a petition for writ of mandate to review the decision of a school district's Commission on Professional Competence to dismiss a permanent employee, see California Forms of Pleading and Practice, Ch. 512, *Schools* (Matthew Bender).

[e] Related Points and Authorities

For other memoranda supporting a petition for writ of mandate to review administrative adjudicatory decisions generally, see Ch. 195, *Public Administrative Law* . For memoranda supporting petitions for writs of mandate generally, see Ch. 150, *Mandate and Prohibition* .

[3] Discussion of Authorities

[a] Conviction of Felony as Not Grounds for Dismissal Unless Felony Involves Moral Turpitude

In ***Board of Trustees v. Judge*** *(1975) 50 Cal. App. 3d 920, 123 Cal. Rptr. 830* , appellant board sought to dismiss appellant, a permanent teacher, on grounds of conviction of a felony, conviction of a crime involving moral turpitude, and evident unfitness for service. Respondent had found a single marijuana plant in a pot in an open field while on a walk. Out of curiosity, he took it home and placed it in his backyard, believing that it might be marijuana. About one week later, respondent was arrested and charged with cultivation of marijuana in violation of *Health & Safety Code § 11358*. On respondent's subsequent conviction of this offense, appellant sought his dismissal. After a hearing, the trial court found that the felony conviction and the activity that formed the basis for the conviction did not constitute a crime involving moral turpitude and also that the evidence was insufficient to establish that respondent was unfit to teach by reason of his conduct. On appeal, appellant board contended that respondent's conviction of the crime of cultivation of marijuana involved moral turpitude as a matter of law, and that even if it did not involve moral turpitude, it was a felony, conviction of which was in itself ground for dismissal. In affirming, the court of appeal rejected both of these contentions.

For discussion of certain circumstances under which conviction of a felony may result in summary dismissal without any showing of moral turpitude or unfitness to teach, see *§ 211.32[2][c]*.

[b] Offense of Cultivation of Marijuana as Not Involving Moral Turpitude as a Matter of Law

Board of Trustees v. Judge *(1975) 50 Cal. App. 3d 920, 123 Cal. Rptr. 830* , is *discussed in § 211.32[3][a]*. For a discussion of possible limitations on the use of this case, see *§ 211.32[2][b] -211.32[2][c]*.

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21-211 California Points & Authorities § 211.33

§ 211.33 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523] of Commission on Professional Competence [Educ. Code § 44945]--Dismissal of Permanent Employee--Conviction of Felony or Crime Involving Moral Turpitude [Educ. Code § 44932]--Pre-1976 Possession of Marijuana Conviction as Not Grounds for Dismissal [Health & Safety Code § 11361.7(b)]

[1] FORM

[*Caption. See § 211.27.*]

THE COURT SHOULD ISSUE A WRIT OF MANDATE BECAUSE THE SCHOOL DISTRICT'S COMMISSION ON PROFESSIONAL COMPETENCE ORDERED PETITIONER DISMISSED FOR A CONVICTION FOR POSSESSION OF MARIJUANA THAT OCCURRED PRIOR TO JANUARY 1, 1976.

A--D. Propriety of Mandate to Review Discharge of Permanent Employee. [*See § 211.27, Paragraphs A--D.*]

E. Dismissal for Cause Only. [*See § 211.28, Paragraph E.*]

F. Pre-1976 Possession of Marijuana Conviction as Not Grounds for Dismissal. A public school district has no authority to dismiss a permanent teacher because of an arrest for or conviction of possession of marijuana occurring prior to January 1, 1976 (*Governing Bd. v. Mann (1977) 18 Cal. 3d 819, 826-828, 135 Cal. Rptr. 526, 558 P.2d 1* ; *see Health & Safety Code § 11361.7(b)*).

G. Reinstatement of Employee and Payment of Back Salary. [*See § 211.27, Paragraph F.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a petition to the superior court for a writ of mandate for review of a final adjudicatory order or decision of a school district's Commission on Professional Competence discharging a permanent employee when the ground for discharge is the petitioner's conviction of a felony or crime involving moral turpitude yet such ground is based on a pre-1976 conviction of possession of marijuana.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Chapters

For a form of petition for writ of mandate to review the decision of a school district's Commission on Professional Competence to dismiss a permanent employee, see Ch. 512, *Schools* in California Forms of Pleading and Practice.

[c] Related Points and Authorities

For other memoranda of points and authorities supporting a petition for writ of mandate to review administrative adjudicatory decisions generally, see Ch. 195, *Public Administrative Law* . For memoranda of points and authorities supporting petitions for writs of mandate generally, see Ch. 150, *Mandate and Prohibition* .

[3] Discussion of Authorities

[a] Pre-1976 Possession of Marijuana Conviction as Not Grounds for Dismissal

In ***Governing Bd. v. Mann*** *(1977) 18 Cal. 3d 819, 135 Cal. Rptr. 526, 558 P.2d 1* , defendant, a tenured teacher employed by plaintiff school district, pled guilty to a charge of possession of marijuana arising out of his use and possession of a small quantity of that substance in his private residence. His conviction occurred in 1971. Shortly thereafter, plaintiff school board notified defendant of its intention to dismiss him, asserting that his conviction constituted cause for dismissal under former Educ. Code § 13403(h) (*now see Educ. Code § 44932(a)(8)*). Defendant demanded and was granted a hearing in superior court under the pre-1977 dismissal procedure. The trial court concluded that defendant had been convicted of a felony and that moral turpitude was involved and entered judgment authorizing plaintiff to dismiss defendant.

On appeal, the Supreme Court reversed. The Court noted that the Legislature had recently enacted *Health & Safety Code § 11361.7(b)* which provides, in broad and sweeping language, that no public agency, including a school district, shall impose any sanction on an individual on the basis of a possession of marijuana arrest or conviction, or on the basis of the facts or events leading to such an arrest or conviction, on or after the date the records of such an arrest or conviction are required to be destroyed (by *Health & Safety Code § 11361.5*), or two years from the date of such conviction, or arrest without conviction, with respect to arrests and convictions occurring prior to January 1, 1976. The Court stated that defendant's 1971 conviction fell squarely within this section's reach (*18 Cal. 3d 819, 826-827)* . After examining the statute's purpose, the Court held that the enactment of *Health & Safety Code § 11361.7* has the effect of repealing the statutory authority granted by former Educ. Code § 13403(h) (*now see Educ. Code § 44932(a)(8)*) to dismiss a defendant on the basis of arrests or convictions for possession of marijuana encompassed by *Health & Safety Code § 11361.7(b)*. Accordingly, the plaintiff had no statutory authority to dismiss defendant on the basis of his past possession of marijuana conviction (*18 Cal. 3d 819, 828)* . The Court also held that the statute was intended to be applied retroactively to proceedings pending at the time it was enacted (*18 Cal. 3d 819, 829-831)* .

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21-211 California Points & Authorities § 211.34

§ 211.34 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523] of Commission on Professional Competence [Educ. Code § 44945]--Dismissal of Permanent Employee--Limitation on Dismissal for Exercise of Constitutional Rights

[1] FORM

[*Caption. See § 211.27.*]

MANDATE IS PROPER BECAUSE THE TRUE REASON FOR THE DECISION BY THE GOVERNING BOARD OF THE SCHOOL DISTRICT TO DISMISS PETITIONER AS A PERMANENT EMPLOYEE WAS THE DISSATISFACTION OF SCHOOL OFFICIALS WITH PETITIONER'S EXERCISE OF CONSTITUTIONAL RIGHTS, THE LIMITATION OF WHICH WAS NOT JUSTIFIED BY A COMPELLING PUBLIC INTEREST.

A--D. Propriety of Mandate to Review Discharge of Permanent Employee. [*See § 211.27, Paragraphs A--D.*]

E. Independent Assessment of True Reason for Dismissal. In a mandate proceeding to review an administrative decision dismissing a public school teacher, the trial court must make an independent assessment of the evidence on the question of whether the true reason for the dismissal was official dissatisfaction with the teacher's exercise of constitutional rights (*Adcock v. Board of Education (1973) 10 Cal. 3d 60, 66, 109 Cal. Rptr. 676, 513 P.2d 900*).

F. Dismissal for Exercise of Constitutional Rights. A public school teacher may not be dismissed from employment for the exercise of constitutional rights absent a showing that the restraints imposed on those rights are justified by a compelling public interest (*Bekiaris v. Board of Educ. (1972) 6 Cal. 3d 575, 585-586, 100 Cal. Rptr. 16, 493 P.2d 480*).

[*Optional*] **G. Teacher's Right to Speak.** A public school teacher's right to speak is constitutionally protected as long as it does not result in any disruption, or impairment of discipline, or materially interfere with school activities (*Adcock v. Board of Educ. (1973) 10 Cal. 3d 60, 65, 109 Cal. Rptr. 676, 513 P.2d 900*).

[*Optional*] **H. Discipline Improper if Teacher's Views Expressed in Proper Form.** In the absence of actual disruption, administrative discipline of a public school teacher is improper if the teacher's views, although unpopular,

are expressed in a forum designed for the airing of different views on controversial issues (*Adcock v. Board of Educ. (1973) 10 Cal. 3d 60, 68, 109 Cal. Rptr. 676, 513 P.2d 900*).

[*Optional*] **I. Failure to Receive Evidence of Dismissal for Exercise of Constitutional Rights.** The failure to receive, consider, and make findings regarding evidence offered by the public school teacher that he or she is being dismissed in retaliation for the exercise of constitutional rights whose limitation is not justified by a compelling interest constitutes legal error to be corrected by the issuance of an appropriate writ of mandate (*Bekiaris v. Board of Educ. (1972) 6 Cal. 3d 575, 587-588, 592-593, 100 Cal. Rptr. 16, 493 P.2d 480*).

J. Reinstatement of Employee and Payment of Back Salary. [*See § 211.27, Paragraph F.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a petition to the superior court for a writ of mandate to review an adjudicatory decision by a Commission on Professional Competence to dismiss a permanent certificated employee, if the petitioner alleges that the true reason for his or her dismissal was official dissatisfaction with petitioner's exercise of constitutional rights whose limitation was not justified by a compelling public interest.

Optional Paragraphs G and H may be included if the constitutional right impaired is that of freedom of expression. Optional Paragraph I may be included if petitioner claims that the official conducting the hearing committed legal error by failing to receive, consider, and make findings regarding evidence of the motive for the dismissal.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. It should be established that (1) the teacher was exercising a constitutionally protected right, such as freedom of expression; (2) that the exercise of the right didnot interfere in any way with the educational program of the school district, or that the right was exercised within the context of an educational activity that encouraged the free exchange of ideas; and (3) that soon after the exercise of the right, the district took the adverse personnel action that was the subject of the hearing. If possible, the absence of any ground for the adverse action prior to the exercise of the protected right should be shown.

[b] Related Points and Authorities

For points and authorities in support of a writ of mandate alleging the improper termination of a probationary teacher for the exercise of constitutional rights, see *§ 211.41*. For other memoranda of points and authorities supporting a petition for writ of mandate to review administrative adjudicatory decisions generally, see Ch. 195, *Public Administrative Law* . For memoranda of points and authorities supporting petitions for writs of mandate generally, see Ch. 150, *Mandate and Prohibition* .

[3] Discussion of Authorities

[a] Independent Assessment of True Reason for Dismissal

Adcock v. Board of Educ. (1973) 10 Cal. 3d 60, 109 Cal. Rptr. 676, 513 P.2d 900 , is discussed principally under Teacher's Right to Speak, *infra.* In the case, the California Supreme Court held that in order to retain the ultimate responsibility for insuring that constitutional rights are not abridged in the absence of a sufficient compelling public interest, the trial court must make an independent assessment of the established factual elements to determine whether the true reason for a school board's personnel action was the teacher's exercise of constitutional rights, and, if so, whether the resulting limitation on the exercise of these rights can be justified by any compelling state interest. On appeal from the decision of the trial court, the appellate court must uphold the trial court's determination as to the basis of the administrative action if supported by substantial evidence (*10 Cal. 3d 60, 66)* .

[b] Dismissal for Exercise of Constitutional Rights

Bekiaris v. Board of Educ. (1972) 6 Cal. 3d 575, 100 Cal. Rptr. 16, 493 P.2d 480 , is discussed principally under § 211.34[3][e] and also in § 211.41[3][a]. Although the case involved the dismissal of a probationary teacher, the California Supreme Court set forth the substantive principle applicable to all public employees, i.e., that a public employee may not be dismissed from employment for the exercise of constitutional rights absent a showing that the restraints that the employing body would impose on those rights are justified by a compelling public interest (*6 Cal. 3d 575, 585-586)* .

[c] Teacher's Right to Speak

In *Adcock v. Board of Educ. (1973) 10 Cal. 3d 60, 109 Cal. Rptr. 676, 513 P.2d 900* , plaintiff, a permanent teacher, was transferred to another school because of his open criticism of certain school policies and regulations and the effects of this criticism on school staff and parents. On plaintiff's request, a hearing was held. The evidence at the hearing showed that although plaintiff was openly critical of various school policies and advocated their change, he was not abusive, offensive, or overly loud, and had presented most of his criticism at school-sponsored forums designed for the open discussion of views on these issues. The evidence also showed that plaintiff had never actually violated any school rule or policy, nor had he encouraged or permitted any student to do so. Finally the evidence showed that although many parents and staff members had expressed strong disagreement with plaintiff's views, there was no proof that plaintiff had presented controversial issues in a distorted manner in the classroom or that the dissension engendered by his views had consumed a disproportionate amount of the school staff's time.

At the conclusion of the hearing, the hearing officer issued a proposed decision finding that the transfer was discriminatory and a misuse of authority, and ordered plaintiff reinstated at his old school. The board rejected the proposed decision and, after reviewing the record of the hearing, issued its own decision finding that plaintiff's open and persistent criticism of rules and policies undermined the authority of teachers, parents, and the administration; that his attitudes alienated some of his fellow teachers, administrators, and many parents; and that the divisiveness affected faculty morale and community attitudes towards the school. Accordingly, it approved the transfer.

Plaintiff petitioned the superior court for a writ of mandate. The trial court concluded that the purpose and effect of the transfer was to deny plaintiff his *First Amendment* freedoms, and it therefore issued the writ. The board appealed, and the California Supreme Court affirmed.

The Court first stated the rule that a teacher's right to speak is constitutionally protected as long as it does not result in any disruption, or impairment of discipline, or materially interfere with school activities (*10 Cal. 3d 60, 65)* . The Court noted that while plaintiff's speech may have caused disharmony, mere disharmony or fear of disruption due to the expression of unpopular views will not justify interference with the free expression of opinion (*10 Cal. 3d 60, 68)* . The Court then considered the record and held that in the absence of any actual disruption, any kind of administrative discipline for the content of speech is improper if, as here,the unpopular views were uttered in forums designed for the airing of different views on controversial issues, in a polite but forceful manner (*10 Cal. 3d 60, 68-69)* .

[d] Discipline Improper Where Teacher's Views Expressed in Proper Forum

Adcock v. Board of Educ. (1973) 10 Cal. 3d 60, 109 Cal. Rptr. 676, 513 P.2d 900 , is *discussed in § 211.34[3][c]*.

[e] Failure to Receive Evidence of Dismissal for Exercise of Constitutional Rights

In *Bekiaris v. Board of Educ. (1972) 6 Cal. 3d 575, 100 Cal. Rptr. 16, 493 P.2d 480* , petitioner, a probationary teacher, was notified by respondent board of its intention not to reemploy him for the succeeding school year, stating several reasons therefor. Petitioner demanded and was granted a hearing, which was his right under the then-applicable law [*cf.* Educ. Code § 44949.21(b); § 211.40 (no longer any right to hearing in school district having average daily attendance of 250 or more)]. At the hearing, he attempted to introduce evidence that the true reason for his dismissal was official dissatisfaction with his political activities outside of school. The hearing officer refused to admit this evidence for substantive purposes, stating that the motives of petitioner's superiors were irrelevant if the evidence otherwise justified the dismissal. After the hearing, however, the hearing officer issued a proposed decision in petitioner's favor, without discussing petitioner's claim that he was dismissed for exercise of his constitutional rights. The board rejected the proposed decision and issued its own decision, based on the record before the hearing officer, in which it found that some of the charges against petitioner were supported by the evidence and that these charges constituted sufficient cause not to reemploy petitioner. Although petitioner appeared before the board and submitted arguments that the real reason for his discharge was official dissatisfaction with his political activities and that his dismissal was improper for that reason, the board failed to make a finding on the issue. Thereafter, petitioner filed a petition for writ of mandate in superior court seeking to have the board's decision set aside. The trial court found that the findings and decision of the board were adequately supported by the record, and it entered judgment denying the writ (*6 Cal. 3d 575, 585)* .

On appeal, the California Supreme Court reversed. The Court held that if a teacher, at an administrative hearing to consider the dismissal, seeks to present evidence that he was being dismissed not for the reasons stated in the accusation but for the exercise of constitutional rights, that evidence must be received substantively, and findings must be made concerning it. The failure to do so constitutes legal error, which may be corrected by mandate (*6 Cal. 3d 575, 587-589)* .

The Court then ruled that neither the board nor the trial court had followed these procedures, and accordingly remanded the case to the trial court with instructions to issue a writ of mandate ordering the board to receive all evidence offered to show the real reasons for petitioner's dismissal and to make a finding as to whether the cause of the dismissal was official dissatisfaction with petitioner's exercise of constitutional rights (*6 Cal. 3d 575, 593-594)* .

NOTE:

Counsel should note that not only is it proper for the employee to present evidence related to a constitutional defense at a dismissal hearing, it is essential. A judgment on a writ of mandate to review the administrative determination operates as res judicata to a subsequent civil action arising from the dismissal because all potential defenses, including constitutional and civil rights defenses, may be raised at the administrative hearing [*Takahashi v. Board of Education (1988) 202 Cal. App. 3d 1464, 1484-1485, 249 Cal. Rptr. 578]* .

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21-211 California Points & Authorities § 211.35

§ 211.35 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] Re Restrictions on Political Speech of School District Employees During Working Hours--[Educ. Code § 7055]

[1] FORM

[*Caption. See § 211.23.*]

A WRIT OF MANDATE SHOULD NOT ISSUE TO OVERTURN SCHOOL BOARD POLICY RESTRICTING POLITICAL ADVOCACY BY SCHOOL DISTRICT EMPLOYEES DURING INSTRUCTION.

A. District's Power to Regulate Employees' Political Activities. *Education Code Section 7055* empowers school districts to establish rules and regulations concerning: (a) officers and employees engaging in political activity during working hours, and (b) political activities on school premises (*California Teachers Association v. Governing Board of San Diego (1996) 45 Cal. App. 4th 1383, 1390-1393, 53 Cal. Rptr. 2d 474*).

B. District Has Right to Refuse Sponsorship of Political Speech. A school has the right to refuse to sponsor political speech, even passive speech, in an instructional setting, that might reasonably be perceived to associate the school with any position otherthan neutrality on a political issue in order to disassociate itself from political controversy (*California Teachers Association v. Governing Board of San Diego (1996) 45 Cal. App. 4th 1383, 1390-1393, 53 Cal. Rptr. 2d 474*).

C. District's Regulation of Political Speech Does Not Violate Employees' Constitutional Rights. School employees' free speech rights are not violated by a prohibition on political advocacy during working hours in instructional settings if school employees are permitted to express political views to one another outside the classroom (*California Teachers Association v. Governing Board of San Diego (1996) 45 Cal. App. 4th 1383, 1390-1393, 53 Cal. Rptr. 2d 474*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for Respondent _____ [*name*]

[2] Comments

[a] Use of Form

This form of memorandum of points and authorities may be submitted in opposition to a petition to the superior court for a writ of mandate regarding a school district's policy restricting the political speech of employees in instructional settings. The basis of the opposition is that, under *Educ. Code § 7055*, a school district has authority to refuse to permit any political advocacy, even "passive" speech, that might reasonably be perceived to associate the school with any position other than neutrality on a political issue.

[b] Related Points and Authorities

For memoranda of points and authorities opposing petitions for writs of mandate generally, see Ch. 150, *Mandate and Prohibition* .

[3] Discussion of Authorities

[a] District's Power to Regulate Employees' Political Activities

In ***California Teachers Association v. Governing Board of San Diego*** *(1996) 45 Cal. App. 4th 1383, 53 Cal. Rptr. 2d 474* , the teachers' union sought a writ of mandate to overturn a San Diego school board policy restricting the wearing of political buttons by school district employees. The trial court granted the writ. The court of appeal affirmed, but modified the writ, holding that the district's restriction on political speech by employees in the classroom, pursuant to *Educ. Code § 7055*, fell within the legitimate power of schools to disassociate themselves from political controversy. This is because of the power teachers have over students in their classes and the potentially coercive aspect of any political advocacy by school employees in an instructional setting. However, because there was little risk of similar undue influence when school employees expressed their political views to one another outside the classroom, the district had no power to similarly restrict teachers' political speech in that arena (*45 Cal. App. 4th 1383, 1390-1393)* .

[b] District Has Right to Refuse Sponsorship of Political Speech

California Teachers Association v. Governing Board of San Diego *(1996) 45 Cal. App. 4th 1383, 53 Cal. Rptr. 2d 474* , is *discussed in § 211.35[3][a]*.

[c] District's Regulation of Political Speech Does Not Violate Employees' Constitutional Rights

California Teachers Association v. Governing Board of San Diego *(1996) 45 Cal. App. 4th 1383, 1390-1393, 53 Cal. Rptr. 2d 474* , is *discussed in § 211.35[3][a]*.

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21-211 California Points & Authorities § 211.36

§ 211.36 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5] of Commission on Professional Competence [Educ. Code § 44945; Gov. Code § 11523]--Dismissal of Permanent Employee--Failure to Give Prior Notice and Opportunity to Correct Unsatisfactory Performance or Unprofessional Conduct as Not Precluding Dismissal for Other Causes

[1] FORM

SUPERIOR COURT OF CALIFORNIA, COUNTY OF _____ _____ [*name*] Petitioner, vs. _____ [*name*], Respondent[, _____ (*name*), Real Property in Interest].	)))))))))))	NO._____ MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PETITION FOR WRIT OF MANDATE

MANDATE IS NOT PROPER BECAUSE THE GOVERNING BOARD'S FAILURE TO GIVE PETITIONER NOTICE OF AND OPPORTUNITY TO CORRECT HIS/HER FAULTS AS REQUIRED BY EDUCATION CODE SECTION 44938 DOES NOT PRECLUDE THE SCHOOL DISTRICT'S COMMISSION ON PROFESSIONAL COMPETENCE FROM DISMISSING PETITIONER FOR GROUNDS OTHER THAN UNPROFESSIONAL CONDUCT OR UNSATISFACTORY PERFORMANCE.

A. Separate Grounds for Dismissal. Although a particular act or omission on the part of an employee may constitute

more than one of the causes for removal specified in *Education Code Section 44932(a)*, each of the causes for dismissal specified therein refers to acts or omissions not necessarily included in the other causes (*Tarquin v. Commission on Professional Competence (1978) 84 Cal. App. 3d 251, 260, 148 Cal. Rptr. 522*).

B. Failure to Give Notice of and Opportunity to Correct Unsatisfactory Performance or Unprofessional Conduct as Not Precluding Dismissal on Other Grounds. The failure by the governing board to comply with the provisions of *Education Code Section 44938*, requiring the board to give a permanent employee prior notice of and an opportunity to correct his or her faults before proceeding on any charges of unsatisfactory performance or unprofessional conduct, does not preclude the board from proceeding to dismiss the employee on grounds not involving unsatisfactory performance or unprofessional conduct (*see Tarquin v. Commission on Professional Competence (1978) 84 Cal. App. 3d 251, 260, 148 Cal. Rptr. 522*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Respondent _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a petition to the superior court for writ of mandate to review the decision of a school district's Commission on Professional Competence dismissing a permanent employee. The ground of opposition is that the alleged failure by the governing board to give the employee prior notice of unsatisfactory performance or unprofessional conduct and an opportunity to correct his or her faults, as required by *Educ. Code § 44938*, does not preclude the board from proceeding to dismiss the employee for causes other than unsatisfactory performance or unprofessional conduct.

In an appropriate case, this memorandum may be submitted in opposition to a petition supported by points and authorities *set out in § 211.31*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Counsel should also include argument and points and authorities demonstrating adequate factual and legal support for dismissal of the petitioner on grounds other than unsatisfactory performance or unprofessional conduct.

[b] Related Pleading and Practice Chapters

For a form of petition for writ of mandate to review the decision of a school district's Commission on Professional Competence to dismiss a permanent employee, see California Forms of Pleading and Practice, Ch. 512, *Schools* , Pt. II (Matthew Bender).

[c] Related Points and Authorities

For points and authorities supporting a demurrer to a petition for writ of mandate to review administrative adjudicatory decisons generally, see Ch. 195, *Public Administrative Law* . For memoranda opposing petitions for writs of mandate generally, see Ch. 150, *Mandate and Prohibition* .

[3] Discussion of Authorities

[a] Separate Grounds for Dismissal

The factual and procedural background of ***Tarquin v. Commission on Professional Competence*** *(1978) 84 Cal. App. 3d 251, 148 Cal. Rptr. 522* , is discussed in *§ 211.31[3][a]*. After holding that the school district's governing board had failed to comply with the provisions of former Educ. Code § 13407 (*now see Educ. Code § 44938*), the court of appeal held that this failure by the board precluded them only from proceeding against respondent on the charge of incompetency. Former Educ. Code § 13407 (*now see Educ. Code § 44938*), requiring notice of and opportunity to cure fault, was not applicable to the remaining charges of evident unfitness for service and persistent violation of school laws and regulations, and the board had jurisdiction to proceed on those grounds for removal which did not involve incompetency (*84 Cal. App. 3d 251, 260)* .

The court also rejected the trial court's conclusion that receipt of evidence of incompetency tainted the entire proceeding against respondent, thereby depriving him of a fair hearing. The court observed that although a particular act or omission on the part of a teacher may constitute more than one of the causes for removal specified in former Educ. Code § 13404 (*now see Educ. Code § 44932(a)*), each of the causes for removal specified therein nevertheless refers to acts or omissions not necessarily included in the others (*84 Cal. App. 3d 251, 260)* . The court noted that the Commission on Professional Conduct sustained 14 charges against respondent which were based on grounds other than incompetency, and that none of these acts formed the basis of any charge sustained by the commission which alleged incompetency (*84 Cal. App. 3d 251, 261)* . The court also noted that at the hearing, evidence on each charge was presented separately, so that evidence on the charges of evident unfitness for service and persistent violation of school rules did not include evidence on any charge based on incompetency (*84 Cal. App. 3d 251, 261-262)* . The court concluded that under these circumstances, admission of evidence on the charges of incompetency did not deprive respondent of a fair hearing on the remaining charges (*84 Cal. App. 3d 251, 262)* .

Counsel should note that *Educ. Code §§ 44932* and *44938* were amended in 1995 to substitute "unsatisfactory performance" for "incompetency" as a ground for dismissal of a permanent certificated employee. However, the principles set forth in *Tarquin* would be equally applicable to a dismissal based on unsatisfactory performance.

[b] Failure to Give Notice of and Opportunity to Correct Unsatisfactory Performance or Unprofessional Conduct as Not Precluding Dismissal on Other Grounds

Tarquin v. Commission on Professional Competence *(1978) 84 Cal. App. 3d 251, 148 Cal. Rptr. 522* , is *discussed in § 211.36[3][a]*.

[4] Additional Authorities

[a] Separate Grounds for Dismissal

In *Pittsburg Unified School Dist. v. Commission on Professional Competence (1983) 146 Cal. App. 3d 964, 194 Cal. Rptr. 672* , a permanent certified employee was charged with unprofessional conduct and other separate offenses. At the hearing before the Commission on Professional Competence the unprofessional conduct charge was dropped by the school district. The commission determined that no grounds existed for the teacher's dismissal. The district sought and obtained a writ of mandate commanding the commission to set aside its decision and order the teacher's dismissal. The teacher appealed, contending that all charges should be dismissed for failure of the district to comply with the 90-day notice requirement of former Educ. Code § 44938 (*now see Educ. Code § 44938(a), (b)*). The court of appeal held that the 90-day notice requirement of former Educ. Code § 44938 (*now see Educ. Code § 44938(a), 45*-days' notice required before filing charges of unprofessional conduct, and *Educ. Code § 44938(b), 90*-days' notice required before filing charges of unsatisfactory performance) applied only to the charge of unprofessional conduct and was not applicable here because the charge of unprofessional conduct was dismissed at the hearing (*146 Cal. App. 3d 964, 974)* .

[b] Failure to Give Notice of and Opportunity to Correct Unsatisfactory Performance or Unprofessional

Conduct as Not Precluding Dismissal on Other Grounds

In *Woodland Joint Unified School Dist. v. Commission on Professional Competence (1992) 2 Cal. App. 4th 1429, 4 Cal. Rptr. 2d 227* , the district charged many instances of misconduct as evident unfitness for service [*see Educ. Code § 44932(a)(5)*] rather than as unprofessional conduct. The dismissal was upheld on appeal despite the fact that no notice under *Educ. Code § 44938* was given. The court first defined "evident unfitness for service" as clearly not fit, not adapted to, or unsuitable for teaching, ordinarily because of temperamental defects or inadequacies. It then foundthat, unlike unprofessional conduct, evident unfitness for service connotes a fixed character trait, presumably not remediable merely on receipt of notice that one's conduct fails to meet the expectations of the employing school district [*cf. Bevli v. Brisco (1989) 211 Cal. App. 3d 986, 991, 260 Cal. Rptr. 57* (unprofessional conduct and evident unfitness for service substantially overlap and may have merged into single ground)] (*2 Cal. App. 4th 1429, 1442-1445)* . Therefore, notice was not required to dismiss on the ground of evident unfitness for service, even though the charged conduct was also unprofessional (*2 Cal. App. 4th 1429, 1446-1448)* .

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CHAPTER 211 SCHOOLS: CERTIFICATION, DISMISSAL, AND RELATED EMPLOYMENT ISSUES
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21-211 California Points & Authorities § 211.37

§ 211.37 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5] of Commission on Professional Competence [Educ. Code § 44945; Gov. Code § 11523]--Dismissal of Permanent Employee--School Board Substantially Complied With Statutory Requirements for Dismissal

[1] FORM

[*Caption. See § 211.36.*]

MANDATE IS NOT PROPER BECAUSE THE _____ [SCHOOL DISTRICT *or* GOVERNING BOARD] SUBSTANTIALLY COMPLIED WITH THE REQUIREMENTS OF _____ [EDUCATION CODE SECTION 44938 *and/or* THE STULL ACT (EDUCATION CODE SECTIONS 44660-44665) *and/or other statute*] WHEN IT _____ [*specify actions in substantial compliance*].

A. Substantial Compliance Is Sufficient to Satisfy Statutory Requirements. A school district or governing board of a school district need only substantially comply with the requirements of *Education Code Section 44938* or the Stull Act (*Education Code Sections 44660-44665*), notwithstanding the use of the word "shall," a word generally indicating a mandatory requirement (*Governing Board v. Commission on Professional Competence (1985) 171 Cal. App. 3d 324, 333-334, 217 Cal. Rptr. 457*).

B. Hypertechnical Procedural Oversights Should Not Thwart Process. To allow hypertechnical procedural oversights to thwart the orderly process delineated by the statutory scheme of the dismissal procedure would be to exalt form over substance and would result in an abuse of the judicial process (*Governing Board v. Commission on Professional Competence (1985) 171 Cal. App. 3d 324, 333, 217 Cal. Rptr. 457*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Respondent _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a petition to the superior court for writ of mandate to review the decision of a school district's Commission on Professional Competence dismissing a permanent employee. The ground of opposition is that the school district substantially complied with the requirements of *Educ. Code § 44938* or *Educ. Code §§ 44660-44665*, or some other code section that petitioner claims the district did not strictly follow.

In an appropriate case, this memorandum may be submitted in opposition to a petition supported by points and authorities *set out in §§ 211.27* or *211.31*.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Chapters

For a form of petition for writ of mandate to review the decision of a school district's Commission on Professional Competence to dismiss a permanent employee, see California Forms of Pleading and Practice, Ch. 512, *Schools* , Pt. II (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities supporting a demurrer to a petition for writ of mandate to review administrative adjudicatory decisions generally, see Ch. 195, *Public Administrative Law* . For memoranda of points and authorities opposing petitions for writs of mandate generally, see Ch. 150, *Mandate and Prohibition* .

[3] Discussion of Authorities

[a] Substantial Compliance Is Sufficient to Satisfy Statutory Requirements

In ***Governing Board v. Commission on Professional Competence*** *(1985) 171 Cal. App. 3d 324, 217 Cal. Rptr. 457* , the school districtcompleted a written evaluation of a permanent certificated teacher in February 1980, finding her classroom control and presentation to be unsatisfactory. Follow-up evaluations were completed in May 1980, February 1981, and May 1981, also finding her performance unsatisfactory. On October 14, 1981, the district sent the teacher a 90-day letter pursuant to former Educ. Code § 44938 (*now see Educ. Code § 44938(b)(1)*), informing her of 58 instances of unprofessional conduct and incompetence. A copy of the May 1981 evaluation was attached. On March 3, 1982, the district served the teacher with a notice of intent to dismiss, accompanied by a statement of 57 charges. The teacher filed a written demand for a hearing, at which she moved for dismissal of the charges because the attached evaluation was presented to her later than 60 days before the end of the school year and thus the district had not complied with the requirement of former Educ. Code § 44938 (*now see Educ. Code § 44938(b)(1)*) that a copy of a Stull Act (*Educ. Code §§ 44660-44665*) evaluation be included in the 90-day letter. The administrative law judge agreed with the teacher and dismissed the charges. The district sought a writ of mandate in the superior court, which was denied. The district then appealed the denial of the writ of mandate.

The court of appeal reversed, and ordered the superior court to grant the petition for writ of mandate to compel the administrative law judge to vacate his order dismissing the charges against the teacher. The court held that the district had substantially complied with the requirements of former Educ. Code § 44938 and *Educ. Code §§ 44660-44665*, and that such substantial compliance was all that was required by the statutes despite the use of the word "shall" in the provisions. The court explained that the district had given the teacher unsatisfactory evaluations during the two-year

period preceding the dismissal, and that she had not been prejudiced by receiving the May 1981 evaluation rather than the February 1981 evaluation (which was in compliance with the Stull Act) as an attachment to the notice of intent to dismiss. The court also noted that the Legislature had recently amended *Educ. Code § 44944(c)* to include a provision that the decision that an employee should not be dismissed or suspended shall not be based on nonsubstantive procedural errors committed by the school district or governing board unless the errors are prejudicial errors. The court opined that this provision was added to eliminate the type of situation encountered in the case at bar. The court explained that allowing hypertechnical procedural oversights to thwart the orderly process delineated by the statutory scheme of the dismissal procedure would be to exalt form over substance and would result in an abuse of the judicial process. Thus, the court concluded that only substantial compliance with the dictates of the statutes was required, and because the district had substantially complied with those requirements, the charges against the teacher should not have been dismissed (*171 Cal. App. 3d 324, 332-334)* .

[b] Hypertechnical Procedural Oversights Should Not Thwart Process

Governing Board v. Commission on Professional Competence *(1985) 171 Cal. App. 3d 324, 217 Cal. Rptr. 457* , is discussed in *§ 211.37[3][a]*.

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21-211 California Points & Authorities 211.37A

211.37A Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5] of Commission on Professional Competence [Educ. Code § 44945; Gov. Code § 11523]--Dismissal of Permanent Employee--School Board Properly Considered Evidence of Matters Occurring More Than Four Years Before Notice of Intent to Dismiss

[1] FORM

[*The following may be included in a memorandum opposing mandate, or in a trial or appellate brief.*]

[*Caption. See § 211.36.*]

MANDATE IS NOT PROPER BECAUSE, ALTHOUGH THE _____ [SCHOOL DISTRICT *or* GOVERNING BOARD] CONSIDERED EVIDENCE OF MATTERS THAT OCCURRED MORE THAN FOUR YEARS BEFORE THE FILING OF THE NOTICE OF INTENT TO DISMISS, THE FOUR-YEAR LIMIT OF EDUCATION CODE SECTION 44944(a) IS INAPPLICABLE UNDER THE CIRCUMSTANCES OF THIS CASE.

Four-Year Limitation is Subject to Equitable Exceptions. Generally, a school district's decision to dismiss or suspend a permanent, certificated employee generally may not be based on charges or evidence of any nature relating to matters occurring more than four years prior to the filing of the notice of intent to dismiss or suspend the employee (*Educ. Code § 44944(a)*). However, this four-year limit is subject to equitable exceptions. For example, an employee may be equitably estopped from asserting the four-year limit if the employee's own conduct induced the school district or governing board to delay the filing of the notice of intent to dismiss or suspend the employee (*Atwater Elementary Sch. Dist. v. California Dep't of Gen. Servs. (2007) 41 Cal. 4th 227, 235-238, 59 Cal. Rptr. 3d 233, 158 P.3d 794*).

[2] Comments

[a] Use of Form

This form may be used to oppose a contention that a certificated employee's dismissal or suspension is improperly based on matters occurring more than four years before the filing of the notice of intent to dismiss or suspend the employee [

see Educ. Code § 44944(a)].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. For example, counsel should explain how the conduct of the employee induced the school district or governing board to delay filing the notice of intent to a date more than four years after the events on which the dismissal or suspension is based.

[b] Opposing Memorandum

In an appropriate case, the memorandum *set out in § 211.27* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Four-Year Limitation is Subject to Equitable Exceptions

In ***Atwater Elementary Sch. Dist. v. California Dep't of Gen. Servs.*** *(2007) 41 Cal. 4th 227, 59 Cal. Rptr. 3d 233, 158 P.3d 794* , the California Supreme Court considered the scope of *Education Code Section 44944(a)*, which prohibits the introduction of evidence relating to matters occurring more than four years before a school district files a notice of intention to dismiss a teacher. It also bars the dismissal of a teacher for events occurring more than four years before the notice was filed (*Educ. Code § 44944(a)*). The Supreme Court concluded that the four-year period specified in Section 44944(a) is not absolute, and its application may be limited by equitable principles in an appropriate case (*41 Cal. 4th 227, 234, 237-238)* .

The school district in this case filed and served a notice of intent to dismiss a teacher in 2002, alleging that the teacher had engaged in sexual misconduct with several students between 1992 and 1998 (*see Educ. Code § 44932(a)*). During subsequent administrative proceedings, the teacher moved under Section 44944(a) to dismiss all allegations based on incidents occurring more than four years before the district served its notice of intent to dismiss, and to exclude all evidence of such incidents. The administrative law judge granted the teacher's motions, and the school district sought a writ of mandate to vacate the rulings; after the superior court and court of appeal issued conflicting decisions, the matter came before the Supreme Court. The teacher died after the Supreme Court granted review, rendering the case moot; however, the Court retained the case for decision because it presented an issue of statewide importance (*41 Cal. 4th 227, 235)* .

The precise issue before the Supreme Court was whether Section 44944(a)'s four-year limit is absolute or may be subject to equitable principles. The Court concluded that the limit is not absolute, and that its application is subject to equitable doctrines such as equitable tolling, equitable estoppel, fraudulent concealment, and delayed discovery. For example, equitable estoppel may be applied to prevent a teacher from relying on the four-year limit if the school district's delay in initiating dismissal proceedings was induced by the conduct of the teacher (*41 Cal. 4th 227, 236-238)* .

The Court rejected an argument that the four-year limit of Section 44944(a) is absolute because the statute does not expressly provide an exception for allegations of sexual misconduct. *Education Code Section 44242.7*, which imposes a four-year limit for disciplinary proceedings initiated by the Commission on Teacher Credentialing against credentialed teachers, does contain an explicit exception for allegations of sexual misconduct. However, the Supreme Court reasoned that the Legislature's failure to include a similar express exception in Section 44944(a), which pertains to disciplinary proceedings initiated by school districts, did not foreclose the application of equitable principles to the time limit established by that statute. "It simply reflects a legislative disinclination to write a sweeping exception into the statutory scheme as a matter of law" (*41 Cal. 4th 227, 237-238)* .

The Supreme Court also pointed out that treating Section 44944(a)'s time limit as absolute would create an anomalous situation in which a teacher could be prosecuted criminally, the Commission on Teacher Credentialing could institute credential-revocation proceedings, and a school district could be sued for negligent hiring, retention, and supervision--all on the basis of sexual misconduct occurring more than four years in the past--but the school district would be barred from dismissing the teacher (*41 Cal. 4th 227, 238)* .

Accordingly, the Court concluded that if the school district in this case could have met the requirements of equitable estoppel or another equitable doctrine, it could have introduced evidence of (and based its dismissal proceedings on) incidents falling outside Section 44944(a)'s four-year window (*41 Cal. 4th 227, 238)* .

Associate Justice Kennard filed a dissenting opinion. Justice Kennard would construe the statutory scheme, particularly *Education Code Sections 44242.7* and *44944(a)*, as a clear statement of the Legislature's intent that only the Commission on Teacher Credentialing have the power to discipline a teacher based on allegations of sexual misconduct more than four years old (*41 Cal. 4th 227, 235-238)* .

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21-211 California Points & Authorities § 211.38

§ 211.38 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Compel Reinstatement of Permanent Employee After Economic Layoff [Educ. Code § 44955]

[1] FORM

[*Caption. See § 211.23.*]

A WRIT OF MANDATE SHOULD NOT ISSUE TO COMPEL A SCHOOLDISTRICT TO REINSTATE PERMANENT EMPLOYEE LAID OFF PURSUANT TO EDUC. CODE § 44955(b) BECAUSE OF A REDUCTION IN A PARTICULAR KIND OF SERVICE.

A. Permanent Employees Dismissed Pursuant to Reduction in Particular Kind of Service. *Education Code Section 44955(b)* permits dismissal of permanent and probationary school district employees if there is a sustained decline in average daily pupil attendance or whenever a particular kind of service is reduced or discontinued (*Educ. Code § 44955(b)*; *Gallup v. Alta Loma School District (1996) 41 Cal. App. 4th 1571, 1585-1589, 49 Cal. Rptr. 2d 289*).

B. Use of Contract Instead of Full-Time Employees Does Not Violate *Education Code Section 44955* Where Services Provided in Different Manner. Economic Dismissal of three full-time employees (school psychologists) and replacement by independent contractors, does not violate *Education Code Section 44955(b)* where layoffs constitute a reduction or discontinuance of "a particular kind of service" and where services provided by contract employees are accomplished in different manner than by full-time employees (*Gallup v. Alta Loma School District (1996) 41 Cal. App. 4th 1571, 1585-1589, 49 Cal. Rptr. 2d 289*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Respondent _____ [*name*]

[2] Comments

[a] Use of Form

This form of memorandum of points and authorities may be submitted in opposition to a petition for a writ of mandate to compel a school district to reinstate permanent employees after layoffs due to a reduction or discontinuance "in a particular kind of service," pursuant to *Educ. Code § 44955*.

[b] Related Points and Authorities

For memoranda of points and authorities opposing petitions for writs of mandate generally, see Ch. 150, *Mandate and Prohibition* .

[3] Discussion of Authorities

[a] Permanent Employees Dismissed Pursuant to Reduction in Particular Kind of Service

In ***Gallup v. Alta Loma School District*** *(1996) 41 Cal. App. 4th 1571, 49 Cal. Rptr. 2d 289* , the plaintiff, a school psychologist, was laid off together with two other full-time school psychologists. They were replaced by an administrative psychologist and independent contractor psychologists. The trial court ruled in favor of the plaintiff's reinstatement on the ground that the school board action was not a "reduction or discontinuance of a particular kind of service" under *Educ. Code § 44955(b)*. The trial court reasoned that the services would not be performed in a different manner because they would still be performed by certified school psychologists "in the legally prescribed manner," and thus would continue to be provided in the same way. The court of appeal reversed, holding that use of contract employees instead of full-time psychologists was itself a change in the manner of service and thus the school board's layoffs were in compliance with *Educ. Code § 44955* (*41 Cal. App. 4th 1571, 1585-1589)* .

[b] Use of Contract Instead of Full-Time Employees Does Not Violate Educ. Code § 44955 Where Services Provided in Different Manner

Gallup v. Alta Loma School District *(1996) 41 Cal. App. 4th 1571, 49 Cal. Rptr. 2d 289* , is *discussed in § 211.38[3][a]*.

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21-211 California Points & Authorities § 211.39

§ 211.39 Supporting Petition for Writ of Mandate [Code Civ. Proc. § 1085] to Review Decision of Governing Board to Terminate Probationary Teacher--Teacher Dismissed During School Year Without Following Required Procedures [Educ. Code § 44948.3]

[1] FORM

[*Caption. See § 211.27.*]

THE GOVERNING BOARD IMPROPERLY DISMISSED PETITIONER FROM HIS/HER PROBATIONARY TEACHING POSITION DURING THE SCHOOL YEAR BECAUSE PETITIONER WAS NOT AFFORDED PROPER NOTICE AND A HEARING AS REQUIRED BY EDUCATION CODE SECTION 44948.3.

A. Writ of Mandate. The superior court may issue a writ of mandate to compel the governing board of a school district to admit a party to the use and enjoyment of a right to which he or she is entitled, and from which he or she is unlawfully precluded by the board (*Code Civ. Proc. § 1085(a)*).

B. Dismissal of Probationary Teacher During School Year. First- and second-year probationary teachers may be dismissed during the school year only for unsatisfactory performance determined pursuant to *Education Code Section 44660 et seq.* or for cause determined pursuant to *Education Code Section 44932* (*Educ. Code § 44948.3(a)*; *Grimsley v. Board of Trustees (1987) 189 Cal. App. 3d 1440, 1446, 235 Cal. Rptr. 85*).

C. Notice and Opportunity to Be Heard. A probationary teacher who is dismissed from his or her teaching position during the school year for unsatisfactory performance or for cause must be given 30 days' prior written notice of dismissal and an opportunity to appeal by administrative hearing (*Educ. Code § 44948.3(a)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a probationary teacher's petition to the superior court for writ of mandate to review a final decision of a school district to dismiss the teacher during the school year. The

contention of the form is that the governing board dismissed the teacher without following the procedures required by Educ. Code§ 44948.3. This form is for use with regard to a school district that has an average daily attendance of 250 pupils or more [*see Educ. Code § 44948.3(c)*]. However, a smaller school district may elect to dismiss probationary employees during the school year pursuant to *Educ. Code § 44948.3* [*Educ. Code § 44948.2*].

The form may not be used in the case of nonrenewal of a probationary teacher's contract at the end of the year [*see Grimsley v. Board of Trustees (1987) 189 Cal. App. 3d 1440, 1446, 235 Cal. Rptr. 85]* . For forms of points and authorities for use with regard to nonrenewal, see *§§ 211.40* and *211.41*.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. It should be established that (1) the petitioner was a probationary teacher employed by the respondent school district; (2) petitioner was dismissed from his or her teaching position during the first or second school year of employment; and (3) the petitioner was not afforded the procedures required by *Educ. Code § 44948.3* [*see § 211.39[2][b]*].

[b] Required Procedures

First- and second-year probationary teachers may be dismissed during the school year for unsatisfactory performance determined pursuant to *Educ. Code § 44660 et seq.* or for cause pursuant to *Educ. Code § 44932* [*see §§ 211.28 -211.34*]. Any such dismissal must be in accordance with the procedures of *Educ. Code § 44948.3* [*Educ. Code § 44948.3(a)*].

Under this statute, the superintendent of the district (or his or her designee) must give 30 days prior written notice of dismissal. The notice must be given no later than March 15 in the case of a second-year probationary teacher. The notice must include a statement of the reasons for the dismissal and notice of the opportunity to appeal. If the dismissal is for unsatisfactory performance, a copy of the evaluation conducted pursuant to *Educ. Code § 44664* must accompany the written notice [*Educ. Code § 44948.3(a)(1)*; *see Achene v. Pierce Joint Unified Sch. Dist. (2009) 176 Cal. App. 4th 757, 769-771, 97 Cal. Rptr. 3d 899* (classroom observation report stating that employee needed to "refine" her performance, and lacking any indication that employee's performance was unsatisfactory or that she would be dismissed if she did not make recommended refinements, did not constitute sufficient notice of unsatisfactory performance under *Educ. Code § 44664(b)*)].

If the cause for dismissal is unprofessional conduct or unsatisfactory performance [*see Educ. Code §§ 44932(a)(1), (4), 44938(c)*] the school district must also have sent the employee a previous written notice specifying the nature of the unprofessional conduct or unsatisfactory performance, with such specific instances of behavior and with such particularity as to furnish the employee an opportunity to correct his or her faults and overcome the grounds for the charge. This previous notice must include a copy of the evaluation conducted pursuant to *Educ. Code § 44664* [*Educ. Code § 44938(a), (b)*]. If the cause for dismissal is unprofessional conduct, this previous notice must have been given at least 45 calendar days before the notice of dismissal described in the preceding paragraph [*Educ. Code § 44938(a)*]. If the cause is unsatisfactory performance, this previous notice ordinarily must have been given at least 90 calendar days before the notice of dismissal described in the preceding paragraph [*Educ. Code § 44938(b)*; *see Achene v. Pierce Joint Unified Sch. Dist. (2009) 176 Cal. App. 4th 757, 766-768, 97 Cal. Rptr. 3d 899* (because *Educ. Code § 44938* specifies procedure for dismissal for cause under *Educ. Code § 44932*, it also applies to dismissal for unsatisfactory performance of probationary teacher under *Educ. Code § 44948.3(a),* which incorporates procedures applicable to dismissal for cause under *Educ. Code § 44932*)].

The teacher then has 15 days from receipt of the notice of dismissal to submit to the governing board a written request for a hearing. The governing board may establish procedures for the appointment of an administrative law judge to conduct the hearing and submit a recommended decision to the board. The failure of a teacher to timely request the hearing is a waiver of the right to a hearing [*Educ. Code § 44948.3(a)(2)*].

Educ. Code § 44948.3 does not apply to probationary teachers in a school district having an average daily attendance of less than 250 pupils [*Educ. Code § 44948.3(c)*; *but see Educ. Code § 44948.2* (small school district may elect to dismiss under *Educ. Code § 44948.3*)].

[c] Writ of Mandate

Administrative mandate under *Code Civ. Proc. § 1094.5* may be used to inquire into the validity of any final administrative decision made as the result of a proceeding in which a hearing must be afforded, evidence must be taken, and discretion in determination of facts is vested in the governing board [*Code Civ. Proc. § 1094.5(a)*; *see § 211.27*]. Thus, dismissal of a probationary teacher would be reviewable by administrative mandate, if the procedures required by *Educ. Code § 44948.3* were followed, but the determination after hearing was unfavorable to the probationary teacher on the merits.

The points and authorities set forth in this form, however, attack the dismissal because of the failure to afford the required procedures. Thus, it would seem that the proper remedy is ordinary mandate under *Code Civ. Proc. § 1085* rather than administrative mandate [*see Grimsley v. Board of Trustees (1987) 189 Cal. App. 3d 1440, 1443, 235 Cal. Rptr. 85]* . Under *Code Civ. Proc. § 1085(a)*, a writ of mandate may be issued to a board to compel the admission of a party to the use and enjoyment of a right or office to which he or she is entitled and from which he or she is unlawfully precluded by the board. Alternatively, the writ may be sought under both *Code Civ. Proc. § 1085* and *Code Civ. Proc. § 1094.5*.

A memorandum for use in a case of dismissal of a probationary teacher during the school year that is reviewable by administrative mandate may be assembled using Paragraph B with the procedural points regarding administrative mandate under *Code Civ. Proc. § 1094.5* (see *§ 211.27*, Paragraphs A and D) and the particular substantive points and authorities concerning satisfactory performance or absence of cause for dismissal [*see §§ 211.28 -211.34, 211.41*].

[3] Discussion of Authorities

[a] Dismissal of Probationary Teacher During School Year

Grimsley v. Board of Trustees *(1987) 189 Cal. App. 3d 1440, 235 Cal. Rptr. 85* , is discussed principally in § 211.4[3][a]. In the case, the court rejected the argument advanced by petitioning probationary teachers that *Educ. Code § 44948.3* governs the decision of a school board not to retain a probationary teacher for the next school year. The court held that the statute is limited to dismissals during the school year, defining the school year as only the time prior to the end of classes in June. The court stated that a school board will use *Educ. Code § 44948.3* if it wishes to remove a probationary teacher from the classroom as soon as possible. The import of the statute is that the dismissal becomes effective 30 days after the required notice is given, subject to the hearing and appeals procedures if requested by the teacher (*189 Cal. App. 3d 1440, 1446)* .

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21-211 California Points & Authorities § 211.40

§ 211.40 Supporting Petition for Writ of Mandate [Code Civ. Proc. § 1085] to Review Decision of Governing Board to Terminate Probationary Teacher--Teacher Not Reelected for Following School Without Required Advance Notice [Educ. Code § 44929.21(b)]

[1] FORM

[*Caption. See § 211.27.*]

PETITIONER IS ENTITLED TO CLASSIFICATION AS A PERMANENT EMPLOYEE OF RESPONDENT SCHOOL DISTRICT BECAUSE HE/SHE HAS COMPLETED TWO CONSECUTIVE SCHOOL YEARS AS A PROBATIONARY TEACHER AND WAS NOT NOTIFIED PRIOR TO MARCH 15 OF RESPONDENT'S DECISION NOT TO REELECT HIM/HER FOR THE SUCCEEDING SCHOOL YEAR.

A. Writ of Mandate. [*See § 211.39, Paragraph A.*]

B. Notice of Nonreelection of Probationary Teacher for Succeeding School Year. The governing board of a school district must notify a probationary teacher on or before March 15 of the teacher's second complete consecutive school year of employment of the decision to reelect or not reelect the teacher for the next succeeding school year, and if the notice is not given, the teacher is deemed reelected for the next school year and must be classified as a permanent employee of the district at the commencement of that year (*Educ. Code § 44929.21(b)*). The notice must be given by personal service or some other method that imparts actual notice (*Hoschler v. Sacramento City Unified Sch. Dist. (2007) 149 Cal. App. 4th 258, 263-264, 269, 57 Cal. Rptr. 3d 115*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a probationary teacher's petition to the superior court for writ of mandate to review a final decision of a school district not to reelect the teacher for the succeeding school year. The contention of the form is that the governing board decided not to reelect the teacher without giving the notice required by *Educ. Code § 44929.21(b)*. This form is for use only with regard to a school district that has an average daily attendance of 250 pupils or more [*see Educ. Code § 44929.21(b)*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. It should be established that (1) the petitioner was a probationary teacher employed by the respondent school district; (2) petitioner completed two consecutive school years in a position requiring certification qualifications; (3) petitioner was not reelected (that is, his or her contract was not renewed) for the succeeding (third) school year to a position requiring certification qualifications; and (4) the petitioner was not given notice of the nonreelection on or before March 15, of the second year as required by *Educ. Code § 44929.21(b)* [*see § 211.40[3][b]*].

[b] Required Notice

The governing board of a school district of any type or class having an average daily attendance of 250 or more must notify a probationary teacher, on or before March 15 of the teacher's second complete school year in a position requiring certification qualifications, of the decision to reelect or not reelect the teacher to that position for the next succeeding school year. If the notice is not given, the teacher is deemed reelected for the next succeeding school year [*Educ. Code § 44929.21(b)*]. The notice must be given by personal service or some other method that imparts actual notice [*Hoschler v. Sacramento City Unified Sch. Dist. (2007) 149 Cal. App. 4th 258, 264, 269, 57 Cal. Rptr. 3d 115]* .

The effect of the reelection of a probationary teacher for a third year is to grant the teacher status as a permanent employee (tenure). Every probationary teacher who, after having been employed by the district for two complete consecutive school years in a position requiring certification qualifications, is reelected for the next succeeding school year to a position requiring certification qualifications, must, at the commencement of the succeeding school year, be classified as and become a permanent employee of the district [*Educ. Code § 44929.21(b)*].

[3] Discussion of Authorities

[a] Notice of Nonreelection of Probationary Teacher for Succeeding School Year

In ***Hoschler v. Sacramento City Unified Sch. Dist.*** *(2007) 149 Cal. App. 4th 258, 57 Cal. Rptr. 3d 115* , the central issue was whether a school district had given a teacher timely notice of his nonreelection. *Educ. Code § 44929.21(b)* provides that a teacher on probationary status is deemed to have been reelected for the next school year unless the district notifies the teacher by March 15 of its decision not to reelect him or her. The statute does not prescribe the method of giving notice (*see Educ. Code § 44929.21(b)*).

In this case, the district sent a notice of nonreelection by certified mail on March 12, but the teacher did not receive actual notice until weeks later. (It was undisputed that the teacher had not willfully refused to pick up his mail.) The trial court ruled that sending notice by certified mail complies with *Educ. Code § 44929.21(b)*, but the court of appeal reversed.

The court of appeal noted that under "settled principles of statutory construction," a statute that requires the giving of notice, but is silent as to the manner of giving such notice, contemplates personal service (*149 Cal. App. 4th 258, 264)* . Since Section 44929.21 does not specify the manner of giving notice, the court concluded thatpersonal service, or some other method equivalent to imparting actual notice, is required. Because the district in this case failed to comply with this requirement (and the teacher did not otherwise receive actual notice), the district had not given the teacher

timely notice of his nonreelection, and the teacher was deemed reelected for the next school year (*149 Cal. App. 4th 258, 264, 269)* .

Finally, because the practice of sending notices of nonreelection by certified mail was widespread in many school districts, the court of appeal gave its decision limited retroactive effect, making the personal-notice requirement applicable only to the present case and to teachers who are issued notices of nonreelection after the decision in this case became final (i.e., July 11, 2007, when the California Supreme Court denied review) (*149 Cal. App. 4th 258, 271)* .

California Points & Authorities

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21-211 California Points & Authorities § 211.41

§ 211.41 Supporting Petition for Writ of Mandate [Code Civ. Proc. § 1085] to Review Decision of Governing Board to Terminate Probationary Teacher--Teacher May Not Be Terminated for Engaging in Protected Activity

[1] FORM

[*Caption. See § 211.27.*]

A SCHOOL DISTRICT MAY NOT REFUSE TO REELECT A PROBATIONARY TEACHER FOR THE SUCCEEDING SCHOOL YEARIF THE ACTION IS TAKEN IN RETALIATION FOR THE EXERCISE OF A PROTECTED RIGHT.

A. Writ of Mandate. [*See § 211.39, Paragraph A.*]

[*EITHER*]

B. Exercise of Constitutional Rights. A probationary teacher or one serving at the pleasure of the governing board may not be dismissed from employment for the exercise of constitutional rights absent a showing that the restraints that the employing body would impose on those rights are justified by a compelling public interest (*Bekiaris v. Board of Education (1972) 6 Cal. 3d 575, 585-586, 100 Cal. Rptr. 16, 493 P.2d 480*).

[*OR*]

B. Exercise of Protected Labor Rights. The power to deny a teacher tenure for any lawful reason regardless of the sufficiency of the cause does not permit a school district to refuse to reelect a probationary teacher if the action is taken in retaliation for the exercise of a protected right and constitutes an unfair labor practice under the Educational Employment Relations Act *(McFarland Unified School Dost. v. Public Employment Relations Bd. (1991) 228 Cal. App. 3d 166, 169, 279 Cal. Rptr. 26* ; *see Gov. Code § 3540 et seq.*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a probationary teacher's petition to the superior court for writ of mandate to review a final decision of a school district not to reelect the teacher for the succeeding school year. The contention of the form is that the governing board decided not to reelect the teacher for reasons involving the teacher's exercise of a protected activity. The first alternative Paragraph B alleges that the teacher was dismissed because of the exercise of constitutionally protected rights, such as freedom of speech. The second alternative Paragraph B alleges that the teacher was dismissed because of the exercise of protected labor rights under the Educational Employment Relations Act [*see Gov. Code § 3540 et seq.*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. It should be established that (1) the petitioner was a probationary teacher employed by the respondent school district; (2) while under probationary status, petitioner exercised a protected right, such as freedom of expression; (3) that the exercise of the right did not interfere in any way with the educational program of the school district, or that the right was exercised within the context of an educational activity that encouraged the free exchange of ideas; (4) that soon after the exercise of the right, the district decided not to reelect the petitioner to a teaching position for the succeeding school year; and (5) but for the exercise of the protected right, the teacher would have been reelected for the succeeding year.

[b] Related Points and Authorities

For points and authorities in support of a writ of mandate alleging the improper termination of a permanent teacher for the exercise of constitutional rights, see *§ 211.34*.

[3] Discussion of Authorities

[a] Exercise of Constitutional Rights

The facts and procedural background of *Bekiaris v. Board of Educ. (1972) 6 Cal. 3d 575, 100 Cal. Rptr. 16, 493 P.2d 480* are *set forth in § 211.34[3][b], [e]*. In the case, a probationary teacher was notified by respondent board of its intention not to reemploy him for the succeeding school year, stating several reasons therefor. Petitioner alleged that the true reason for his dismissal was official dissatisfaction with his political activities outside of school.

The California Supreme Court held that if a teacher seeks to present evidence to show that he or she was dismissed for the exercise of constitutional rights whose consequent limitation was not justified by a compelling public interest, that evidence must be received substantively and a determination made (*6 Cal. 3d 575, 587-588)* . In so holding, the court set forth the applicable substantive principle, stating that, "It is now well-settled that even a probationary public employee or one serving at the pleasure of the appointing authority may not be dismissed from his employment for the exercise of constitutional rights absent a showing that the restraints which the employing body would impose on those rights are justified by a compelling public interest" (*6 Cal. 3d 575, 585-586)* .

[b] Exercise of Protected Labor Rights

McFarland Unified School Dist. v. Public Employment Relations Bd. (1991) 228 Cal. App. 3d 166, 279 Cal. Rptr. 26 , involved a petition of a school district to the court of appeal to reverse a ruling of the Public Employment Relations Board (PERB). In the case, a probationary teacher was not reelected to her teaching position at the end of her second year, which had the effect of denying her tenure [*see Educ. Code § 44929.21(b)*; § 211.40]. The teacher filed a complaint with PERB alleging that her nonreelection was because of her exercise of rights as a member of the district's collective bargaining unit. PERB found in favor of the teacher and ordered her reinstated to her position. Because she had completed two years as a probationary teacher, the effect of the reinstatement order was to afford her tenure under *Educ. Code § 44929.21(b)*. The district petitioned the court of appeal for a writ of mandate, alleging that PERB's reinstatement order impermissibly interfered with its authority to decide whether to grant tenure to a probationary teacher.

The court of appeal upheld the PERB order as not in excess of PERB's authority. In an unpublished part of the opinion, the court determined that the evidence supported PERB's conclusion that the district chose not to rehire the teacher for an illegal reason--her participation in protected activity, and that the other lawful reasons advanced by the district were pretextual (*228 Cal. App. 3d 166, 168)* . The court agreed that the final determination about rehiring probationary teachers lies within the discretion of the governing board and that tenure can be denied for any lawful reason regardless of the sufficiency of the cause. However, it disagreed that the power to deny tenure for any lawful reason insulated the district from the scrutiny of PERB if an unfair labor practice complaint alleged that tenure was denied in retaliation for the exercise of protected rights under the Educational Employment Relations Act [*Gov. Code § 3540 et seq.*] (*228 Cal. App. 3d 166, 169)* .

The court then approved reinstatement as a remedy, finding that the determination regarding whether there had been an unfair labor practice and the appropriate remedy for the unfair practice was within the exclusive jurisdiction of PERB. The fact that the teacher would obtain tenure as a result of reinstatement did not mean that PERB was interferring with the district's authority to establish and regulate tenure. It merely gave effect to the determination that the teacher would not have been denied tenure but for her exercise of protected rights (*228 Cal. App. 3d 166, 169)* .

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21-211 California Points & Authorities § 211.42

§ 211.42 Opposing Petition for Writ of Mandate [Code Civ. Proc. § 1085] to Review Decision of Governing Board to Terminate Probationary Teacher--Decision to Not Reelect Teacher for Following School Year Within Sole Discretion of Board

[1] FORM

[*Caption. See § 211.36.*]

THE WRIT OF MANDATE SHOULD BE DENIED BECAUSE THE DECISION AS TO WHETHER TO REELECT A PROBATIONARY TEACHER FOR THE SUCCEEDING SCHOOL YEAR LIES WITHIN THE DISCRETION OF THE GOVERNING BOARD, AND TENURE CAN BE DENIED FOR ANY LAWFUL REASON REGARDLESS OF THE SUFFICIENCY OF THE CAUSE.

A. Nonrenewal of Probationary Teacher's Contract at Discretion of Governing Board. The governing board of a school district has the absolute right under *Education Code Section 44929.21(b)* to dismiss a probationary teacher at the end of a school year without any showing of cause, without any statement of reasons, and without any right of appeal or administrative redress (*Grimsley v. Board of Trustees (1987) 189 Cal. App. 3d 1440, 1444-1448, 235 Cal. Rptr. 85*); *see Bellflower Education Assn. v. Bellflower Unified School Dist. (1991) 228 Cal. App. 3d 805, 808, 279 Cal. Rptr. 179*).

[*Optional*] **B. Effect of Collective Bargaining Agreement.** The discretion of a school district governing board with regard to the nonretention of probationary teachers may not be altered by a collective bargaining agreement (*Fontana Teachers Assn. v. Fontana Unified School Dist. (1988) 201 Cal. App. 3d 1517, 1524-1526, 247 Cal. Rptr. 761* ; *see Bellflower Education Assn. v. Bellflower Unified School Dist. (1991) 228 Cal. App. 3d 805, 809-812, 279 Cal. Rptr. 179*); *see also Gov. Code § 3543.2*).

[*Optional*] **C. Effect of Statutory Provisions for Preferential Rehiring of Teachers Laid Off for Economic Reasons.** Statutory provisions for the preferential rehiring of teachers who have been laid off for economic reasons (*see Educ. Code §§ 44955, 44957*) do not prevent a school district from validly determining not to reelect a probationary teacher under *Education Code Section 44929.21(b)* (*California Teachers Assn. v. Mendocino Unified School Dist. (2001) 92 Cal. App. 4th 522, 526-528*).

Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Respondent _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a probationary teacher's petition to the superior court for writ of mandate to review a final decision of a school district not to reelect the teacher for the succeeding school year. Paragraph A sets forth the basic proposition that the governing board has the sole discretion as to whether to reelect a probationary teacher for the next school year. Optional Paragraph B is for use if the issue arises in the context of a grievance procedure under a collective bargaining agreement. The contention is that non-reelection of a probationary teacher is not a permissible subject for collective bargaining. Optional Paragraph C is for use if the probationary teacher has been laid off for economic reasons and then dismissed pursuant to the governing board's discretion not to reelect probationary teachers. This form is for use by a school district with an average daily attendance of 250 or more [*see Educ. Code § 44929.21(b)*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. It should be established that (1) the petitioner was a probationary teacher employed by the respondent school district; and (2) prior to March 15 of the teacher's second consecutive probationary year, the teacher was given notice of the governing board's decision not to reelect him or her for the succeeding school year [*see Educ. Code § 44929.21(b)*].

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities set forth in this form may be submitted in opposition to a petition for writ of mandate supported by the points and authorities *set out in §§ 211.40* and *211.41*.

[3] Discussion of Authorities

[a] Nonrenewal of Probationary Teacher's Contract at Discretion of Governing Board

In ***Grimsley v. Board of Trustees*** *(1987) 189 Cal. App. 3d 1440, 235 Cal. Rptr. 85* , two first-year probationary teachers were not reelected to their positions for a second school year. They were afforded no statement of reasons or hearing. They then filed a writ of mandate seeking reinstatement to second-year probationary status and back pay, alleging that they could only be terminated for cause or for unsatisfactory performance as teachers, and thus were entitled to a statement of reasons for their dismissal and the opportunity of a hearing and appeal to the governing board.

The superior court denied the writ, and the court of appeal affirmed. The court found that the 1983 amendments to the Education Code changed the procedural rules governing the reemployment of first- and second-year probationary teachers so that they could be terminated without any showing of cause. It held that for probationary teachers hired during or after the 1983-1984 fiscal year, the right to reemployment for the ensuing year is subject to termination without cause at any time before March 15th of the second consecutive year of employment (*189 Cal. App. 3d 1440, 1443-1444)* .

The court first rejected *Educ. Code § 44948.3* as a source of any procedural rights for probationary teachers dismissed at the end of the school year, limiting that section to dismissals during the school year (*189 Cal. App. 3d 1440,*

1445-1446 ; see *§ 211.39[3][a]*). The court found nonrenewal to be governed by former Educ. Code § 44882 [*now see Educ. Code § 44929.21(b)*], which states the tenure requirements for probationary teachers. Under this statute, the only procedural right afforded a probationary teacher is the right to notice of nonrenewal on or before March 15 of the second year of employment [*see § 211.40*]. With regard to first-year probationary teachers, the court posited that the statute might require notice of nonrenewal without specifying any particular time during the first year by which the notice must be given. If not, there would be no statutory notice requirement at all, and the governing board would be free to terminate a probationary teacher's employment after the first year under basic principles of contract law (*189 Cal. App. 3d 1440, 1446-1448)* .

Finally, the court rejected the petitioners' due process arguments. The court found that nothing in the teachers' contracts or in the Education Code provided the teachers with a clearly implied promise of continuing employment, so as to constitute a property interest protected by constitutional due process [*see Board of Regents v. Roth (1972) 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548] (189 Cal. App. 3d 1440, 1449-1452)* .

Bellflower Education Assn. v. Bellflower Unified School Dist. *(1991) 228 Cal. App. 3d 805, 279 Cal. Rptr. 179* , is discussed principally under § 211.40[3][b]. In the case, the court of appeal set forth the basic statutory principle under *Educ. Code § 44929.21(b)*, that probationary teachers may be nonreelected without any showing of cause, without any statement of reasons, and without any right of appeal or administrative redress (*228 Cal. App. 3d 805, 808)* .

[b] Effect of Collective Bargaining Agreement

Fontana Teachers Assn. v. Fontana Unified School Dist. *(1988) 201 Cal. App. 3d 1517, 247 Cal. Rptr. 761* , involved a petition for writ of mandate brought by a collective bargaining unit (FTA) to compel arbitration of a school district's decision under former Educ. Code § 44882(b) [*now see Educ. Code § 44929.21(b)*] not to reelect a probationary teacher for a third year, thereby denying her tenure. FTA alleged that the teacher could not be dismissed unless the district first followed progressive step discipline requirements set forth in the collective bargaining agreement. The trial court's denial of the petition was affirmed on appeal.

The court of appeal first noted that under *Gov. Code § 3543.2(a)*, all matters not specifically enumerated as subject to collective bargaining are reserved to the public school employer and may not be a subject of meeting and negotiating. *Gov. Code § 3543.2(b)* allows parties to a collective bargaining agreement to meet and negotiate regarding causes and procedures for disciplinary action other than dismissal. However, the court rejected FTA's arguments that dismissal of a probationary teacher via nonreelection can be a form of discipline subject to collective bargaining. The court held that the Education and Government Codes have preempted collective bargaining agreements as to dismissal of probationary teachers through nonreelection, and that the dismissal was not a proper subject of arbitration (*201 Cal. App. 3d 1517, 1523-1526)* .

In ***Bellflower Education Assn. v. Bellflower Unified School Dist.*** *(1991) 228 Cal. App. 3d 805, 279 Cal. Rptr. 179* , the collective bargaining agreement provided for specific evaluation procedures that were to be followed with regard to all teachers, including probationary teachers. The school district gave a probationary teacher timely notice of its decision not to reelect her for a third year. The teacher filed a grievance, alleging that the evaluation procedures of the collective bargaining agreement had not been followed. The matter went to arbitration, where the arbitrator first found that the matter was arbitrable and then that the district had violated the evaluation procedures with respect to the grievant. The arbitrator ordered the district to cease and desist from conducting further evaluations in violation of the collective bargaining agreement and ordered that the teacher be reinstated for an additional probationary year, during which time she was to be evaluated for reelection in accordance with required procedures.

The trial court granted the district's petition to vacate the arbitration award. On appeal, the court affirmed denial of that part of the award that ordered the teacher reinstated. Relying on *Gov. Code § 3543.2* and *Fontana Teachers Assn. v. Fontana Unified School Dist. (1988) 201 Cal. App. 3d 1517, 247 Cal. Rptr. 761* , the court held that collective

bargaining agreements are preempted as to causes and procedures relating to nonreelection. The court held that reinstatement together with extension of the probationary period would impinge on the district's right to nonreelect the teacher without cause (*228 Cal. App. 3d 805, 809-812)* .

However, the court reversed as to that part of the trial court's order vacating the cease-and-desist order. The subject of the grievance, violation of bargained-for evaluation procedures, was within the allowable scope of collective bargaining under the Government Code. Further, the finding by the arbitrator that evaluation procedures were violated was not challenged by the district. Thus, the arbitrator's order that the district cease and desist from conducting certificated employee evaluations in violation of the agreement was within the scope of his authority and not in conflict with any applicable statutes (*228 Cal. App. 3d 805, 812-813)* .

[c] Effect of Statutory Provisions for Preferential Rehiring of Teachers Laid Off for Economic Reasons

In ***California Teachers Assn. v. Mendocino Unified School Dist.*** *(2001) 92 Cal. App. 4th 522* , the school district told a probationary teacher she would be laid off for economic reasons, pursuant to *Educ. Code § 44955*. A month later, she was informed that she would not be reelected, pursuant to *Educ. Code § 44929.21*. The teacher then sought a writ of mandate to compel the district to grant her preferential rehiring rights pursuant to *Educ. Code § 44957*, which provides that teachers laid off for economic reasons have preferential rehiring rights for 24 months. The trial court granted the writ, but the court of appeal reversed. Harmonizing the relevant statutory provisions, the court of appeal held that the provisions for the preferential rehiring of teachers who have been laid off for economic reasons (*Educ. Code §§ 44955, 44957*) do not prevent a school district from validly determining not to reelect a probationary teacher under *Educ. Code § 44929.21(b)* (*92 Cal. App. 4th 522, 526-528)* .

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21-211 California Points & Authorities § 211.43

§ 211.43 Opposing Petition for Writ of Mandate to Nullify Decision of Governing Board to Terminate Probationary Teacher--Open Session of Board Not Required to Terminate Teacher Based on Performance Evaluation [Gov. Code § 54957]

[1] FORM

[*Caption. See § 211.36.*]

THE WRIT OF MANDATE SHOULD BE DENIED BECAUSE THE GOVERNING BOARD MAY DECIDE NOT TO REELECT A PROBATIONARY TEACHER IN A CLOSED EXECUTIVE SESSION, ANDTHE TEACHER'S RIGHT TO REQUEST AN OPEN SESSION DOES NOT APPLY UNLESS THE BOARD IS HEARING A SPECIFIC COMPLAINT OR CHARGE AGAINST THE TEACHER.

A. Nonrenewal of Probationary Teacher's Contract at Discretion of Governing Board. [*See § 211.42, Paragraph A.*]

B. Governing Board May Meet in Closed Session to Make Personnel Decisions. Although the California Constitution (*Cal. Const., art. I, § 3(b)(1)*) and the Ralph M. Brown Act (*Gov. Code § 54950 et seq.*) generally requires local legislative bodies (including school district governing boards) to conduct open sessions, that requirement is subject to a "personnel exception," under which a board may hold closed meetings to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee (*Gov. Code § 54957*; *see Cal. Const., art. I, § 3(b)(5)*). Thus, a board may hold a closed session on matters of performance evaluation and to consider or deliberate whether charges justify dismissal or disciplinary action, so long as the board does not conduct an evidentiary hearing. The teacher's right to request an open session applies only if the board is hearing evidence on specific complaints or charges against the teacher (*Kolter v. Commission on Prof'l Competence of L.A. Unified Sch. Dist. (2009) 170 Cal. App. 4th 1346, 1352, 88 Cal. Rptr. 3d 620* ; *Fischer v. Los Angeles Unified Sch. Dist. (1999) 70 Cal. App. 4th 87, 95-98, 82 Cal. Rptr. 2d 452*).

C. Scope of Performance Evaluation Under Personnel Exception. For purposes of the Brown Act's personnel exception, the "evaluation of performance" includes preliminary matters such as the selection of criteria and the establishment of a process for evaluation, as well as post-evaluation action finding the performance satisfactory (*Gov.*

Code § 54957; *Duval v. Board of Trs. (2001) 93 Cal. App. 4th 902, 908-910, 113 Cal. Rptr. 2d 517*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a probationary teacher's petition to the superior court for a writ of mandate to overturn a final decision of the governing board of a school district not to reelect the teacher for the succeeding school year, when the teacher contends that the termination decision is invalid because it was made in a closed session of the board. Paragraph B sets forth the proposition that an open session is not required when the board is making a personnel decision based on a performance evaluation. Paragraph C delineates the scope of matters that are included in "performance evaluation" in this context. This form is for use by a governing board of a school district with an average daily attendance of 250 or more [*see Educ. Code § 44929.21(b)*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. The argument should, therefore, establish that board's decision was based on the overall evaluation of the teacher's performance, and the board did not conduct a hearing on specific complaints or charges brought against the teacher at its closed session [*see Fischer v. Los Angeles Unified Sch. Dist. (1999) 70 Cal. App. 4th 87, 95-98, 82 Cal. Rptr. 2d 452]* .

[b] Opposing Memoranda

In an appropriate case, the points and authorities set forth in this form may be submitted in opposition to a petition for a writ of mandate supported by the points and authorities *set out in §§ 211.40* and *211.41*.

[3] Discussion of Authorities

[a] Governing Board May Meet in Closed Session to Make Personnel Decisions

In ***Kolter v. Commission on Prof'l Competence of L.A. Unified Sch. Dist.*** *(2009) 170 Cal. App. 4th 1346, 88 Cal. Rptr. 3d 620* , the issue was whether the governing board of a school district could convene in a closed session to initiate the process of dismissing a permanent certificated teacher without complying with the Ralph M. Brown Act's requirement that the teacher be given 24-hour written notice of the right to have the matter heard in an open session (*see Gov. Code § 54957*). The court of appeal held that a closed session was permissible and that the teacher's right to an open session did not apply, because the board did not conduct an evidentiary hearing on the charges against the teacher in this case. Rather, the board considered whether those charges justified the initiation of dismissal proceedings under *Educ. Code § 44944*. The court reasoned that under the Brown Act's "personnel exception" to the general open-hearing requirement, the employee's right to notice and to an open hearing applies only when the board "hears" charges, but not when it "considers" discipline or dismissal (*170 Cal. App. 4th 1346, 1352* ; *see Gov. Code § 54957*).

In ***Fischer v. Los Angeles Unified Sch. Dist.*** *(1999) 70 Cal. App. 4th 87, 82 Cal. Rptr. 2d 452* , the school district's governing board decided, in closed session, not to reelect several probationary teachers, after reviewing performance evaluations and staff recommendations concerning each teacher. The teachers petitioned for mandate, contending that the termination decisions were void because the board had not given the teachers notice of the closed session and had

not offered them an opportunity to defend themselves in an open session. The trial court granted the petition for mandate, but the court of appeal reversed, holding that the board's review of the teachers' performance evaluations did not trigger any right of the teachers to request an open session (*Fisher v. Los Angeles Unified School Dist. (1999) 70 Cal. App. 4th 87, 91, 82 Cal. Rptr. 2d 452*).

The court acknowledged that the Ralph M. Brown Act (*Gov. Code § 54950 et seq.*) generally requires local legislative bodies (including school district governing boards) to conduct open sessions (*Fisher v. Los Angeles Unified Sch. Dist. (1999) 70 Cal. App. 4th 87, 95, 82 Cal. Rptr. 2d 452* ; *see Gov. Code §§ 54951, 54952, 54956*). However, that requirement issubject to a "personnel exception," under which a board ordinarily may hold closed sessions to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee (*Gov. Code § 54957*). The personnel exception is itself subject to an exception: if the board is to hear complaints or charges brought against an employee, it must notify the employee of his or her right to have the complaints or charges heard in an open session. If the board fails to give such notice, any action taken by the board against the employee based on the complaints or charges is void (*Gov. Code § 54957*).

The court rejected the teachers' contention that the right to request an open session applies to any personnel matters other than the hearing of specific complaints and charges. This interpretation was based on the court's reading of the statutory language, the policy underlying the personnel exception (to protect employees from public embarrassment and to permit candid discussion of personnel matters by the board), and the policy embodied in *Educ. Code § 44929.21*, which authorizes a school board to decide not to reelect a probationary teacher without a hearing (*Fisher v. Los Angeles Unified Sch. Dist. (1999) 70 Cal. App. 4th 87, 96-98, 82 Cal. Rptr. 2d 452*).

The court also held that as a matter of law, when a board reviews a performance evaluation conducted in the due course of school district business, the board is not "hearing" specific complaints or charges brought against a teacher, even if the evaluation contains specific allegations of misconduct. Both "complaint" and "charge" connote specific accusations brought against an employee by another person; performance evaluations are not normally thought of as being brought against the evaluated employee within the meaning of the Ralph M. Brown Act (*Fisher v. Los Angeles Unified School Dist. (1999) 70 Cal. App. 4th 87, 100-101, 82 Cal. Rptr. 2d 452*).

[b] Scope of Performance Evaluation Under Personnel Exception

In ***Duval v. Board of Trs.*** *(2001) 93 Cal. App. 4th 902, 113 Cal. Rptr. 2d 517* , a school board conducted closed sessions at which it considered general guidelines and standards for evaluating an employee's performance and the form that would be used for such an evaluation; and the board took action to find the employee's evaluation satisfactory. The court of appeal held that such actions did not violate the Brown Act's general prohibition against closed sessions, because they fit within the Act's "personnel exception," under which a board may hold closed meetings to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee (*see Gov. Code § 54957*). In particular, the board's actions in this case constituted "evaluation of performance" under the personnel exception. The court rejected a contention that the statutory term "evaluation of performance" should be construed narrowly to encompass only formal, periodic review of an employee's performance. In keeping with the statutory purpose of permitting the majority of personnel matters to be discussed freely and candidly in closed session, the court held that "evaluation of performance" encompasses a review of an employee's job performance even if that review involves particular instances of job performance rather than a comprehensive review of performance. The court further opined that "evaluation" may include consideration of the criteria for evaluation, consideration of the process for conducting the evaluation, and other preliminary matters, to the extent those matters constitute an exercise of the board's discretion in evaluating a particular employee. These preliminary considerations are an integral part of the actual evaluation. The court also held that taking action to find an evaluation satisfactory is part of the evaluation itself, since "feedback" to the employee is a traditional part of a formal performance evaluation (*Duval v. Board of Trs. (2001) 93 Cal. App. 4th 902, 908-910, 113 Cal. Rptr. 2d 517*).

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21-211 California Points & Authorities § 211.44

§ 211.44 Opposing Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Prohibit School District's Use of Unclassified Non-Academic Personnel in Nonmerit District [Educ. Code §§ 88003, 88004]

[1] FORM

[*Caption. See § 211.23.*]

A WRIT OF MANDATE SHOULD NOT ISSUE TO PREVENT NONMERIT SCHOOL DISTRICT FROM HIRING UNCLASSIFIED NON-ACADEMIC EMPLOYEES.

A. Use of Outside Employees Permitted in Nonmerit School District. *Education Code Sections 88003, 88004,* providing for classification of nonacademic employees, is not violated by the use of outside contractors in a nonmerit community college district; the statutory scheme makes a distinction between merit and nonmerit districts, permitting nonmerit districts to utilize services of individuals who are not classified employees (*California School Employees Assn. v. Kern Community College Dist. (1996) 41 Cal. App. 4th 1003, 1012-1013, 48 Cal. Rptr. 2d 889*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Respondent _____ [*name*]

[2] Comments

[a] Use of Form

This form of memorandum of points and authorities may be submitted in opposition to a petition for a writ of mandate to prevent employment by a nonmerit district of unclassified non-academic workers.

[b] Related Points and Authorities

For memoranda of points and authorities opposing petitions for writs of mandate generally, see Ch. 150, *Mandate and Prohibition* .

[3] Discussion of Authorities

[a] Use of Outside Employees Permitted in Nonmerit School District

In ***California School Employees Assn. v. Kern Community College Dist.*** *(1996) 41 Cal. App. 4th 1003, 48 Cal. Rptr. 2d 889* , the California school employees' union sought a petition for a writ of mandate, claiming that a contract between a nonmerit community college district and an outside groundskeeping service violated *Educ. Code §§ 88003, 88004*, allegedly prohibiting hiring of non-classified employees. The union also argued that use of a private groundskeeping service violated the collective bargaining agreement to which the district and union were parties. The trial court granted injunctive relief to the union. The court of appeal reversed, finding that the statutory scheme made a distinction between merit and nonmerit districts, prohibiting the former, but permitting the latter to employ non-classified personnel. In addition, the court of appeal found that the contract between the district and the private groundskeeping service did not result in the layoff of any classified district employees and thus did not violate the collective bargaining agreement (*California School Employees Assn. v. Kern Community College Dist. (1996) 41 Cal. App. 4th 1003, 1012-1013, 48 Cal. Rptr. 2d 889*).

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21-211 California Points & Authorities § 211.45

§ 211.45 Supporting Employee's Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Compel Payment of Lawful Salary by Governing Board to School District Employee--School District as Without Authority to Lower Salaries After Beginning of School Year

[1] FORM

[*Caption. See § 211.20.*]

A WRIT OF MANDATE TO COMPEL THE GOVERNING BOARD OF A SCHOOL DISTRICT TO PAY PETITIONER HIS/HER LAWFUL SALARY IS PROPER BECAUSE THE GOVERNING BOARD ATTEMPTED, AFTER THE BEGINNING OF THE SCHOOL YEAR, TO REDUCE SALARIES FOR THAT SCHOOL YEAR.

A. Mandate as Proper to Compel Performance of Duty or Enjoyment of Right. [*See § 211.20, Paragraph A.*]

B. Mandate as Proper to Compel Payment of Salary by School District. Mandate is an appropriate remedy for a public school teacher to recover salary due from a school district (*A.B.C. Fed'n of Teachers v. A.B.C. Unified Sch. Dist. (1977) 75 Cal. App. 3d 332, 340-342, 142 Cal. Rptr. 111*).

C. School Board as Without Authority to Reduce Salaries After Beginning of School Year. The governing board of a school district may not take action after the beginning of the school year to reduce salaries of school district employees for that particular year (*A.B.C. Fed'n of Teachers v. A.B.C. Unified Sch. Dist. (1977) 75 Cal. App. 3d 332, 337-340, 142 Cal. Rptr. 111*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a petition to the superior court for a writ of mandate to compel the governing board of a school district to pay a certificated employee his orher lawful salary where the board has attempted, after the beginning of the school year, to reduce salaries for that particular year.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Chapters

For a form of petition for a writ of mandate to compel the governing board of a school district to pay a certificated employee his or her lawful salary, see Ch. 512, *Schools* in California Forms of Pleading and Practice (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities supporting petitions for writs of mandate generally, see Ch. 150, *Mandate and Prohibition* .

[3] Discussion of Authorities

[a] Mandate as Proper to Compel Payment of Salary by School District

In *A.B.C. Fed'n of Teachers v. A.B.C. Unified Sch. Dist. (1977) 75 Cal. App. 3d 332, 142 Cal. Rptr. 111* , the salary schedule of respondent school district had provided for an annual stipend in addition to the basic annual salary rate for teachers at the district's continuation high school. In August 1975, after the commencement of the 1975-1976 school year, and after petitioners had already notified the district of their intent to accept reemployment for that school year, the governing board of the district amended its salary policy to delete the extra pay provision for continuation high school teachers for the 1975-1976 school year. When petitioner's demand for payment of the stipend was refused, they filed a petition for writ of mandate in superior court. The trial court concluded that the district had abused its discretion, that the stipend provision had become part of petitioners' contracts for the 1975-1976 school year, and that each petitioner was therefore entitled to receive the stipend in addition to his or her regular salary for that school year.

On appeal, the district contended, inter alia, that mandate was an inappropriate remedy. In affirming the judgment, the court of appeal rejected this contention. The court noted that although the usual remedy for failure of an employer to pay wages owing to an employee is an action at law for breach of contract, such a remedy is inadequate in the case of a public employee because payment of wages to such an employee usually requires performance of certain ministerial acts by public officials, such as the drawing of a warrant, which cannot be compelled in an ordinary action at law. The court, therefore, held that mandate was the proper remedy to compel the district to pay petitioners the salary lawfully due them (*75 Cal. App. 3d 332, 340-342)* .

[b] School Board as Without Authority to Reduce Salaries After Beginning of School Year

The procedural and factual background of *A.B.C. Fed'n of Teachers v. A.B.C. Unified Sch. Dist. (1977) 75 Cal. App. 3d 332, 142 Cal. Rptr. 111* , is *discussed in § 211.45[3][a]*. In that case, the school district, on appeal, contended, inter alia, that the stipend for continuation high school teachers was extra pay for extra services which the district could terminate at any time. In affirming the judgment for the teachers, the court of appeal rejected this argument. The court first stated the rule that salaries, as fixed by the district's salary schedule and policy, become an integral part of each teacher's employment contract and that school boards may not lower such salaries after the beginning of the school year (*75 Cal. App. 3d 332, 337-338)* . The court then held that since the provision for the stipend was in effect at the time

petitioners notified the district of their intent to accept reemployment, the stipend was an integral part of the employment contract in force as of the beginning of the school year, and the district's unilateral action in amending its policy to eliminate the stipend after the beginning of the school year could have no effect on petitioner's right to receive the stipend during that school year (*75 Cal. App. 3d 332, 339)* .

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21-211 California Points & Authorities § 211.46

§ 211.46 Supporting Employee's Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Compel Payment of Lawful Salary by Governing Board to School District Employee--Nonsupervisory Certificated Employee as Required to Be Classified on Basis of Uniform Allowance for Years of Training and Experience [Educ. Code § 45028]

[1] FORM

[*Caption. See § 211.20.*]

A WRIT OF MANDATE TO COMPEL THE GOVERNING BOARD OF A SCHOOL DISTRICT TO PAY PETITIONER HIS/HER LAWFUL SALARY IS PROPER BECAUSE THE GOVERNING BOARD HAS FAILED TO CLASSIFY HIM/HER FOR SALARY PURPOSES ON THE BASIS OF A UNIFORM ALLOWANCE FOR YEARS OF TRAINING AND YEARS OF EXPERIENCE, AS REQUIRED BY SECTION 45028 OF THE EDUCATION CODE.

A. Mandate as Proper to Compel Performance of Duty or Enjoyment of Right. [*See § 211.20, Paragraph A.*]

B. Mandate as Proper to Compel Payment of Salary by School District. [*See § 211.45, Paragraph B.*]

C. Certificated Employees as Required to Be Classified for Salary Purposes on Basis of Uniform Allowance for Years of Training and Experience. Each person employed by a school district in a position requiring certification qualifications, except a supervisory or administrative position, must be classified on the salary schedule strictly on the basis of a uniform allowance for years of training and years of experience, unless a collective bargaining agreement provides a salary schedule based on other criteria (*Educ. Code § 45028(a)(1)*; *Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified Sch. Dist. (1978) 21 Cal. 3d 650, 660-662, 147 Cal. Rptr. 359, 580 P.2d 1155*).

[*Optional*] **D. Uniform Allowance for Outside Experience.** Under *Section 45028 of the Education Code*, where a school district, for salary classification purposes, grants credit to employee for outside teaching experience, such credit must be made available on a uniform basis to all employees in the district, regardless of when the employee was first employed (*Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified Sch. Dist. (1978) 21 Cal. 3d 650, 660-664, 147 Cal. Rptr. 359, 580 P.2d 1155*).

Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a petition for a writ of mandate to compel the governing board of a school district to pay a certificated employee his or her lawful salary where the school has failed to classify petitioner on the salary schedule on the basis of a uniform allowance for years of training and experience.

Optional Paragraph D may be included where the school district has granted credit for outside teaching experience on less than a uniform basis to all teachers in the district.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Chapters

For a form of petition for a writ of mandate to compel the governing board of a school district to pay a certificated employee his or her lawful salary, see Ch. 512, *Schools* in California Forms of Pleading and Practice (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities supporting petitions for writs of mandate generally, see Ch. 150, *Mandate and Prohibition* .

[3] Discussion of Authorities

[a] Certificated Employees as Required to Be Classified for Salary Purposes on Basis of Uniform Allowance for Years of Training and Experience

Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified Sch. Dist. *(1978) 21 Cal. 3d 650, 147 Cal. Rptr. 359, 580 P.2d 1155* , involved an appeal from a judgment ordering issuance of a writ of mandate directing defendant school district to place plaintiff on a step of its salary schedule commensurate with his years of teaching in both public and private schools and to pay certain elements of back salary. Plaintiff, at the time he was hired by defendant school district, had prior teaching experience consisting of one year in the public schools and five years at an accredited private school. At that time, however, defendant's policy relating to credit for outside teaching experience for purposes of salary classification allowed credit only for service in the public schools. Accordingly, plaintiff was given only one year's outside service credit. The district later amended its policy to allow incoming teachers credit for service in any properly accredited private school. Subsequently, plaintiff requested that he be reclassified on the salary schedule on the basis of the new policy. When this request was rejected, he sought a writ of mandate in superior court. The trial court ordered issuance of the writ, holding that former Educ. Code § 13506 (*now Educ. Code § 45028*), as amended, required that plaintiff be placed on the salary schedule as requested.

On appeal by the district, the Supreme Court affirmed. The Court first noted that prior to its amendment in 1969, former Educ. Code § 13506 had been interpreted as permitting governing boards to make credit for outside teaching experience available on a less than uniform basis to teachers within the system, as long as such classifications were not arbitrary, discriminatory, or unreasonable (*21 Cal. 3d 650, 655-657)* . The Court stated, however, that the intent of the Legislature in amending former Educ. Code § 13506 (*now Educ. Code § 45028*) was to establish a uniform base salary schedule in each school district (*21 Cal. 3d 650* , 660). Thus, the Court held, the new statute had the two-fold purpose of (1) requiring that teachers be classified for salary purposes, and (2) establishing that such classification proceed wholly on a uniform basis of years of training andyears of experience. One effect of this action was to eliminate the possibility of situations in which a district, while granting a given maximum of credit for outside experience, makes such credit available on less than a uniform basis to all teachers (*21 Cal. 3d 650, 661)* . The Court concluded that under the amended version of the statute, certificated employees not occupying supervisory or administrative positions must be classified for salary purposes strictly according to years of training and experience up to the applicable maximum and that the principle of reasonable classification may no longer be employed to justify variations from such uniform treatment on basis of considerations such as stabilizing continuity of service, attracting new teachers, or policy changes necessitated by employment needs (*21 Cal. 3d 650, 662)* . Accordingly, the Court held that plaintiff had to be reclassified for salary purposes in accordance with the district's new rule, allowing credit for prior teaching experience in private as well as public schools (*21 Cal. 3d 650, 665)* .

NOTE:

Counsel should note that the applicability of the above authorities is limited in cases in which a teacher's employment is governed by a collective bargaining agreement. Notwithstanding *Educ. Code § 45028*, a district and the exclusive bargaining representative of its certificated employees must, on the request of either, meet and negotiate regarding the payment of additional compensation based on criteria other than training and years of experience [*Educ. Code § 45028(a)(1)*; *see* Educ. Code § 3540 et seq.; *see also Educ. Code § 45028(e)* (encouraging public-school employers and teachers' exclusive representatives to recognize teacher contributions to improving pupil achievement, provide incentives to teachers to accept teaching assignments in areas of highest need, and recognize relevant professional experience on salary schedule in lieu of units and degrees or in lieu of teaching experience)]. If the parties do not reach mutual agreement, then *Educ. Code § 45028* applies [*Gov. Code § 3543.2(d)*; *see United Teachers of Ukiah v. Board of Education (1988) 201 Cal. App. 3d 632, 636-640, 251 Cal. Rptr. 499* ; *see also Dixon v. Board of Trustees (1989) 216 Cal. App. 3d 1269, 1280, 265 Cal. Rptr. 511]* . However, *Gov. Code § 3543.2(d)* does not provide blanket authority for the parties to a collective bargaining agreement to deviate from *Educ. Code § 45028* in any manner they choose. Years of training and years of experience are the only criteria allowable in setting base salaries. *Gov. Code § 3543.2(d)* then allows for the parties to the CBA to agree on additional compensation. However, there must be some particularized bargained-for criteria, other than years of training and years of experience, to support disparate pay between teachers with like training and experience [*California Teachers' Assn. v. Livingston Union School Dist. (1990) 219 Cal. App. 3d 1503, 1522-1523, 269 Cal. Rptr. 160* ; *San Francisco Classroom Teachers Assn. v. San Francisco Unified School Dist. (1987) 196 Cal. App. 3d 627, 635, 242 Cal. Rptr. 352]* . Thus, if teacher salary schedules are based solely on education and experience, with no other criteria established by the applicable collective bargaining agreement, the salary schedules must be *wholly* uniform, and teachers with the same education and experience must receive the same salary (*Adair v. Stockton Unified Sch. Dist. (2008) 162 Cal. App. 4th 1436, 1444-1447, 77 Cal. Rptr. 3d 62*). For general discussion of the permissible scope of bargaining regarding compensation of public school certificated employees, see Zerger et al., California Public Sector Labor Relations, Chapter 11, Part A.

[b] Uniform Allowance for Outside Experience

Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified Sch. Dist. (1978) 21 Cal. 3d 650, 147 Cal. Rptr. 359,

580 P.2d 1155 , is *discussed in § 211.46[3][a]*.

[4] Additional Authorities

[a] Certificated Employees as Required to Be Classified for Salary Purposes on Basis of Uniform Allowance for Years of Training and Experience

In *California Teachers Assn. v. Governing Board (1991) 229 Cal. App. 3d 695, 280 Cal. Rptr. 286* , the court of appeal found that several salary rules of the Lancaster School District violated the uniformity requirement of *Educ. Code § 45028*. First, the court held that disparate treatment of teachers hired before and after the effective date of *Educ. Code § 45028* is not permitted, and that the district could not "grandfather" in nonuniform treatment on the ground that the policy predated the statute (*229 Cal. App. 3d 695, 701)* .

The court also held that the district could not freeze future salary increases, despite acquisition of additional years of experience, because a teacher failed to complete additional training within a period of time [*see Wygant v. Victor Valley Joint Union High School Dist. (1985) 168 Cal. App. 3d 319, 329, 214 Cal. Rptr. 205]* (*229 Cal. App. 3d 695, 702-703)* .

Finally, the court held that the district could not limit the number of classification advances for training that a teacher may obtain to one per year. Such a limitation creates a lack of uniformity among teachers with the same training and experience based on the amount of time it takes a teacher to achieve the level of training (*229 Cal. App. 3d 695, 703-704)* .

Wygant v. Victor Valley Joint Union High School Dist. (1985) 168 Cal. App. 3d 319, 214 Cal. Rptr. 205 , was a mandate proceeding by a teacher and a teachers' association based on dispute over the school district's professional growth policy. The policy required certificated teachers to earn a certain number of professional growth units within an allotted time period. Failure to earn the units subjected a teacher to denial of credit for years of experience as a teacher, and ultimately to be denied salary increases based on years of experience. The trial court issued a writ of mandate to compel the district to reclassify the teacher and raise her salary and commanded the district to rescind the policy. The court of appeal affirmed, holding that the policy, both on its face and as applied, violated *Educ. Code § 45028* because it did not treat years of training and years of experience uniformly for salary purposes, as required by the statute (*168 Cal. App. 3d 319, 326-331)* .

California Teachers Assn. v. Board of Education (1982) 129 Cal. App. 3d 826, 181 Cal. Rptr. 432 , was a mandate proceeding by state and local teachers' associations to compel a city school district and its superintendent to eliminate its rule governing salary advance of certificated teachers. The rule limited a teacher who advanced on the salary schedule from one column to the next, on attainment of a higher educational level, to a one-step increase for experience even though the teacher had additional years of experience and the new column had steps for those additional years of experience.

The trial court denied the writ and dismissed the petition. The court of appeal reversed, except to the extent that the judgment dismissed that part of the petition relating to claims barred by the statute of limitations (*129 Cal. App. 3d 826, 834)* . The court of appeal held that the district's rule contravened *Educ. Code § 45028* (*129 Cal. App. 3d 826, 828)* .

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21-211 California Points & Authorities § 211.47

§ 211.47 Opposing Employee's Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Compel Payment of Salary by Governing Board to School District Employee--Governing Board as Permitted to Lower Salaries Prior to Beginning of School Year

[1] FORM

[*Caption. See § 211.23.*]

A WRIT OF MANDATE SHOULD NOT BE ISSUED TO COMPEL THE GOVERNING BOARD OF THE SCHOOL DISTRICT TO PAY PETITIONER THE PARTICULAR SALARY REQUESTED BECAUSE THE BOARD MAY REDUCE AN EMPLOYEE'S SALARY IN THE EXERCISE OF A REASONABLE DISCRETION AND BEFORE THE BEGINNING OF THE SCHOOL YEAR.

Governing Board as Permitted to Lower Salaries Before Beginning of School Year. The governing board of a school district may, in the exercise of a reasonable discretion and before the beginning of the school year, reduce the salary of a permanent employee with whom it had contracted in previous year to teach at a higher salary (*Brown v. Hanford Elementary School Bd. (1968) 263 Cal. App. 2d 170, 174, 69 Cal. Rptr. 154*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Respondent _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted to oppose a petition for a writ of mandate to compel payment of a particular salary by the governing board of a school district. The ground of opposition is that the

governing board lowered the employee's salary in the exercise of a reasonable discretion and before the beginning of the school year.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Chapters

For a form of petition for a writ of mandate to compel payment of salary by the governing board of a school district to a certificated employee, see Ch. 512, *Schools* in California Forms of Pleading and Practice (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities opposing petitions for writs of mandate generally, see Ch. 150, *Mandate and Prohibition* in this set.

[3] Discussion of Authorities

[a] Governing Board as Permitted to Lower Salaries Before Beginning of School Year

Brown v. Hanford Elementary School Bd. (1968) 263 Cal. App. 2d 170, 69 Cal. Rptr. 154 , was an appeal from a trial court judgment denying a writ of mandate to compel respondent governing board to restore an additional sum of $200 to the salary of two permanent teachers. The board had, in fixing the salaries of the two teachers for the school year 1956-1957, provided that they should be paid the $200 sum in addition to their regular salary in recognition of their holding valid credentials to teach mentally retarded students. The contracts of each teacher provided for the $200 sum for each succeeding year until 1964-1965, when the board eliminated the extra $200 for these teachers. The court of appeal affirmed, holding that the teachers did not gain tenure as to a particular salary classification which included the $200 bonus (*263 Cal. App. 2d 170, 172)* . The court reviewed previous decisions [*see, e.g., San Diego Fed'n of Teachers v. Board of Educ. (1963) 216 Cal. App. 2d 758, 762, 31 Cal. Rptr. 146* ; *Fidler v. Board of Trustees (1931) 112 Cal. App. 296, 300-302, 304, 296 P. 912]* and noted that they established the principle that a school board can, in the exercise of a reasonable discretion and before the beginning of the school year, reduce the salary of a permanent teacher with whom it had contracted in previous years to teach at a higher salary (*263 Cal. App. 2d 170, 174)* .

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21-211 California Points & Authorities § 211.48

§ 211.48 Opposing Employee's Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review School District Decision Reducing Teacher Hours and Wages

[1] FORM

[*Caption. See § 211.23.*]

A WRIT OF MANDATE SHOULD NOT ISSUE TO COMPEL A SCHOOL DISTRICT TO RESTORE HOURS TO AN EMPLOYEE WORK SCHEDULE OR COMPENSATE AN EMPLOYEE FOR RESULTING LOST WAGES--NOTICE AND HEARING REQUIREMENTS OF EDUCATION CODE SECTIONS 44949, 44955 ARE NOT APPLICABLE.

A. Notice and Hearing Procedures Not Required Unless Permanent Employee Terminated. Notice and hearing procedures set forth in *Education Code Sections 44949* and *44955* are required only when permanent employees are "terminated," and not when teacher hours are reduced in response to legitimate fiscal pressures (*Black v. Compton Unified School Dist. (1996) 46 Cal. App. 4th 493, 500, 54 Cal. Rptr. 2d 140*).

B. Termination Not Accomplished by Partial Reduction in Work Hours. Termination, for purposes of *Education Code Sections 44949* and *44955*, does not occur because of a reduction in the hours of employment, when teachers continue as "full-time" employees, working at least 20 hours per week with no loss in benefits (*Black v. Compton Unified School Dist. (1996) 46 Cal. App. 4th 493, 500, 54 Cal. Rptr. 2d 140*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Respondent _____ [*name*]

[2] Comments

[a] Use of Form

This form of memorandum of points and authorities may be submitted in opposition to a petition for a writ of mandate to compel a school district to restore teacher hours and to provide compensation for lost wages resulting from those reductions, because of an alleged failure to comply with notice and hearing requirements.

[b] Related Points and Authorities

For memoranda of points and authorities opposing petitions for writs of mandate generally, see Ch. 150, *Mandate and Prohibition* .

[3] Discussion of Authorities

[a] Notice and Hearing Procedures Not Required Unless Permanent Employee Terminated

In ***Black v. Compton Unified School Dist.*** *(1996) 46 Cal. App. 4th 493, 54 Cal. Rptr. 2d 140* , teachers filed an action to compel the school district to restore teacher hours and lost wages, which were reduced due to a district fiscal crisis. The teachers complained that they had been "partially" or "constructively" terminated and that the district had failed to comply with the notice and hearing procedures required under *Educ. Code §§ 44949* and *44955*; however, the court held that such procedures were not required when teacher hours were merely reduced in the range of 5.7 to 17.6 percent and teachers remained full time employees with no loss in benefits (*46 Cal. App. 4th 493, 500)* .

[b] Termination Not Accomplished by Partial Reduction in Work Hours

Black v. Compton Unified School Dist. *(1996) 46 Cal. App. 4th 493, 54 Cal. Rptr. 2d 140* , is *discussed in § 211.48[3][a]*.

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California Points & Authorities

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 211 SCHOOLS: CERTIFICATION, DISMISSAL, AND RELATED EMPLOYMENT ISSUES
PART II. FORMS

21-211 California Points & Authorities § 211.49

§ 211.49 Opposing Employee's Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Compel Payment of Salary by Governing Board to School District Employee--Certain Pay Incentive Programs as Permitted

[1] FORM

[*Caption. See § 211.23.*]

MANDATE IS NOT PROPER TO COMPEL THE GOVERNING BOARD OF THE SCHOOL DISTRICT TO PAY PETITIONER THE SALARY DEMANDED BECAUSE THE BOARD IS PERMITTED TO DEFINE EXPERIENCE FOR PURPOSES OF SALARY CLASSIFICATION, PROVIDED THAT THE DEFINITION UNIFORMLY APPLIES TO ALL EMPLOYEES, AND PETITIONER DID NOT POSSESS THE EXPERIENCE REQUIRED TO QUALIFY FOR THE SALARY DEMANDED.

A. School Board Permitted to Define Experience for Purposes of Salary Classification. Under *Section 45028 of the Education Code*, which provides that, unless a collective bargaining agreement provides a salary schedule based on other criteria, all certificated employees must be classified on the salary schedule on the basis of a uniform allowance for years of training and years of experience, the governing board of a school district is free to define "experience" for purposes of its salary schedule, provided that the definition applies uniformly to all teachersemployed by the district (*Mayer v. Board of Trustees (1980) 106 Cal. App. 3d 476, 487, 165 Cal. Rptr. 655*).

[*Optional*] **B. Pay Incentive Program as Permitted.** A pay incentive program which conditions advancement to the next step of the salary schedule on receipt of a satisfactory evaluation of the previous year's service, and which applies to all employees alike, does not violate *Section 45028 of the Education Code* (*Mayer v. Board of Trustees (1980) 106 Cal. App. 3d 476, 487-495, 165 Cal. Rptr. 655*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Respondent _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a petition to the superior court for a writ of mandate to compel payment of salary by the governing board of a school district to a certificated employee. The ground of opposition is that the board is free to define the experience required for a particular salary classification and that petitioner did not have the experience required for the salary demanded. Optional Paragraph B may be included if the board properly declined to advance the employee to the next step on the salary schedule pursuant to a pay incentive program which conditions advancement to the next step on the salary schedule on satisfactory completion of the previous year's service, and which is uniformly applicable to all certificated employees. In an appropriate case, these points and authorities may be submitted in opposition to the points and authorities *set out in § 211.46*.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Chapters

For a form of petition for a writ of mandate to compel payment of salary by the governing board of a school district to a certificated employee, see Ch. 512, *Schools* in California Forms of Pleading and Practice (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities opposing petitions for writs of mandate generally, see Ch. 150, *Mandate and Prohibition* .

[3] Discussion of Authorities

[a] School Board Permitted to Define Experience for Purposes of Salary Classification

In ***Mayer v. Board of Trustees*** *(1980) 106 Cal. App. 3d 476, 165 Cal. Rptr. 655* , the salaries of teachers in a school district were governed by a collective bargaining agreement which provided, in part, that at the end of each year a teacher would be advanced to the next step on the salary schedule, provided that he or she received a satisfactory performance rating for the previous year's service. If the rating were unsatisfactory, the teacher would be denied a salary increase for the ensuing school year. Petitioners received unsatisfactory ratings for a certain school year and were denied salary increases for the subsequent year pursuant to the agreement. They petitioned the superior court for a writ of mandate which, if granted, would have required the governing board of the district to pay them the difference between the salary they would have earned had they received satisfactory performance ratings and the salary they actually earned. Petitioners also prayed that the district be ordered to cease and desist from enforcing any policy whereby salary increases were conditioned on the teachers' receipt of satisfactory performance ratings. The trial court entered judgment for the petitioners, finding that the collective bargaining contract's condition of satisfactory performance to qualify for pay increases violated *Educ. Code § 45028*, which requires that certificated employees be classified on the salary schedule on the basis of a uniform allowance for years of training and years of experience. The board appealed from the judgment.

The court of appeal reversed. It held that under the amended version of *Educ. Code § 45028* (formerly Educ. Code § 13506), a school district is still free to define "experience" for purposes of its salary schedule, provided that the definition applies uniformly to all teachers employed by the district. The court observed that this is precisely what the collective bargaining agreement in this case did. If defined a year of experience within the district's employment as one for which the teacher has received a satisfactory evaluation, and the provision applied to all teachers alike (*106 Cal. App. 3d 476, 487)* . The court noted that cases decided prior to the 1969 amendment of the section had established that

despite the legislative requirement of uniformity of salary treatment of teachers based on their years of experience, a school district could adopt differential salaries based on professional competence or the lack of it (*106 Cal. App. 3d 476, 489-493)* . The court concluded that the subsequent amendment to the section did not affect the validity of those holdings (*106 Cal. App. 3d 476, 493-495)* and that pay incentive program such as the one involved in this case do not contravene *Educ. Code § 45028* (*106 Cal. App. 3d 476, 495)* .

[b] Pay Incentive Program as Permitted

Mayer v. Board of Trustees (1980) 106 Cal. App. 3d 476, 165 Cal. Rptr. 655 , is *discussed in § 211.49[3][a]*.

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21-211 California Points & Authorities § 211.50

§ 211.50 Opposing Employee's Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Compel Payment of Salary by Governing Board to School District Employee--District Permitted to Grant Differential Credit for Purposes of Initial Placement on Salary Schedule [Educ. Code § 45028(b)]

[1] FORM

[*Caption. See § 211.23.*]

MANDATE IS NOT PROPER TO COMPEL THE GOVERNING BOARD OF THE SCHOOL DISTRICT TO PAY PETITIONER THE SALARY DEMANDED BECAUSE THE DISTRICT IS PERMITTED, WITH THE AGREEMENT OF THE EXCLUSIVE REPRESENTATIVE OF CERTIFICATED EMPLOYEES, TO GRANT DIFFERENTIAL CREDIT FOR PRIOR YEARS OF EXPERIENCE OR PRIOR UNITS OF CREDIT FOR PURPOSES OF AN EMPLOYEE'S INITIAL PLACEMENT ON THE DISTRICT'S SALARY SCHEDULE.

District Permitted to Grant Differential Credit for Purposes of Initial Placement on Salary Schedule. It is not a violation of the uniformity requirement of *Education Code section 45028* for a school district, with the agreement of the certificated employees' exclusive representative, if any, to grant any employee, who is hired after a locally specified date, differential credit for prior years of experience or prior units of credit for purposes of initial placement on the district's salary schedule (*Educ. Code § 45028(b)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Respondent _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a petition for a writ of mandate to compel payment of salary by the governing board of a school district to a certificated employee. The ground of opposition is that the board is free, with the agreement of the certificated employees' bargaining representative, to grant an employee hired after a certain date differential credit for prior years of experience or prior units of credit for purposes of initial placement on the district's salary schedule [*see Educ. Code § 45028(b)*]. In an appropriate case these points and authorities may be submitted in opposition to the points and authorities *set out in § 211.46*.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Chapters

For a form of petition for writ of mandate to compel payment of salary by the governing board of a school district to a certificated employee, see Ch. 512, *Schools* in California Forms of Pleading and Practice (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities opposing petitions for writs of mandate generally, see Ch. 150, *Mandate and Prohibition* .

[3] Discussion of Authorities

[a] District Permitted to Grant Differential Credit for Purposes of Initial Placement on Salary Schedule

Educ. Code § 45028(b) provides that it is not a violation of the uniformity requirement of *Educ. Code § 45028* for a district, with the agreement of the exclusive representative of certificated employees, if any, to grant any employee hired after a locally specified date differential credit for prior years of experience or prior units of credit for purposes of initial placement on the district's salary schedule. The subdivision, enacted by the Legislature in 1988, is by its own terms declaratory of existing law [*Educ. Code § 45028(b)*; *see* Stats. 1988, ch. 1461, § 19.7].

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CHAPTER 212 SHORTENING AND EXTENSION OF TIME

21-212 California Points & Authorities 212.syn

§ 212.syn Synopsis to Chapter 212: SHORTENING AND EXTENSION OF TIME

§ 212.01 Scope of Chapter

§ 212.02 Governing Law

§ 212.03 Necessity for Memoranda of Points and Authorities

§ 212.04 Trial Court Delay Reduction Act

§ 212.05 Page Limits on Points and Authorities

§ 212.06 Related Pleading and Practice Chapters

§ 212.07 Related Points and Authorities Chapters

§§ 212.08-212.09 [Reserved]

§ 212.10 Supporting Application or Noticed Motion for Order Extending Time [Code Civ. Proc. § 1054]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Liberal Construction

[b] Showing Good Cause

[c] Timely Application

[d] Before Whom Heard

§ 212.11 Supporting Application or Noticed Motion for Order Extending Time [Code Civ. Proc. § 1054]--For Filing of Cost Bill Cal. Rules of Ct., Rule 3.1700

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Extension of Time to File Cost Bill

§ 212.12 Supporting Application or Noticed Motion for Order Extending Time--To Answer or Otherwise Plead to Complaint [Code Civ. Proc. §§ 473(a), 1054]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Uses

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Liberal Construction

[b] Showing Good Cause

[c] Timely Application

[d] Extensions in Excess of 30 Days as Permissible With Adverse Party's Consent

[e] Before Whom Heard

§ 212.13 Supporting Application or Noticed Motion for Order Vacating Order Extending Time to Answer or Otherwise Plead to the Complaint

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Inherent Equitable Power of Court to Vacate Orders

[b] Order Extending Time Made After Expiration of Time for Answer

[c] Extension for More Than 30 Days

[d] Setting Aside Ex Parte Order Based on Inadvertence, Mistake, or Fraud

[4] Additional Authorities

[a] Order Extending Time Made After Expiration of Time for Answer

§ 212.14 Supporting Application or Noticed Motion for Order Extending Time--Attorney Member of Legislature [Code Civ. Proc. § 1054.1]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] When Extension Not Mandatory

[d] Code of Civil Procedure Sections 595 and 1054.1

[e] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Mandatory Extension for Attorney Member of Legislature

[b] Liberal Construction

[c] Timely Application

[d] Before Whom Heard

§ 212.15 Opposing Application or Noticed Motion for Order Extending Time--Attorney Member of Legislature [Code Civ. Proc. § 1054.1]--Within Court's Discretion

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Objection on Ground of Untimeliness

[d] Motion to Vacate

[3] Discussion of Authorities

[a] Extension for Attorney Legislator as Discretionary

[b] Right to Relief Pendente Lite in a Paternity Action

[c] Right to Invoke a Provisional Remedy

[d] Nature and Urgency of Rights Involved

[e] Availability of Other Counsel

[f] Purposeful Delay

§§ 212.16-212.29 [Reserved]

§ 212.30 Supporting Application for Order Shortening Time for Notice of Motion or for Order to Show Cause [Code Civ. Proc. § 1005(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Order to Show Cause

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21-212 California Points & Authorities § 212.01

§ 212.01 Scope of Chapter

This chapter contains forms of memoranda for use in supporting [*see §§ 212.10 -212.12, 212.14*] and opposing [*see § 212.15*] an application or motion to extend time and for supporting an application for shortening time for notice of motion [*see § 212.30*].

A form of memorandum is also included for supporting an application or motion to vacate an order extending time [*see § 212.13*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensions

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21-212 California Points & Authorities § 212.02

§ 212.02 Governing Law

Code Civ. Proc. § 1054 is the general section governing extensions of time. *Code Civ. Proc. § 473* governs extensions of time relating to answers and demurrers, while *Code Civ. Proc. § 1005(b)* governs extension and shortening of time relating to notices of motion.

Code Civ. Proc. § 1054.1 governs extensions for an attorney attending the Legislature while *Code Civ. Proc. § 595* governs postponements when an attorney, party, or witness is attending the Legislature.

Cal. Rules of Ct., Rule 2.20 governs extension of time before the trial courts, respectively. *Cal. Rules of Ct., Rule 3.1300(b)* governs shortening of time in law and motion proceedings [*see Cal. Rules of Ct., Rule 3.1100*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProceduresPleading & PracticePleadingsTime LimitationsExtensions

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21-212 California Points & Authorities § 212.03

§ 212.03 Necessity for Memoranda of Points and Authorities

An order shortening or extending time may be obtained either through the use of a noticed motion or an application for an ex parte order. Frequently the nature of the order sought dictates the use of an application for an ex parte order since there is not enough time for a noticed motion.

The forms of memoranda in this chapter can be used to support either a noticed motion or an application for an ex parte order. A supporting memorandum must be included with either a motion [*see Cal. Rules of Ct., Rules 3.1113(a)*], or an application for an ex parte order [*Cal. Rules of Ct., Rule 3.1200 et seq.*]; however, a memorandum is not required, but may be filed, if seeking an ex parte application for extension of time to serve pleadings and the application is filed on a Judicial Council form [*Cal. Rules of Ct., Rule 3.1114(a)(2), (b)*]. For a illustration of Judicial Council Form CM-020, Ex Parte Application for Extension of Time to Serve Pleadings and Orders, see *California Forms of Pleading and Practice, Ch. 524, Shortening and Extension of Time, § 524.53A* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensions

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21-212 California Points & Authorities § 212.04

§ 212.04 Trial Court Delay Reduction Act

Superior courts in all California counties are required to implement delay reduction programs [*Gov. Code §§ 68605.5, 68607, 68620(a)*]. Under *Gov. Code § 68607* the trial judge is given the responsibility to maintain control over the pace of litigation. This responsibility includes the duty, consistent with statute, to adopt and use a firm, consistent policy against continuances, to the maximum extent possible and reasonable, in all stages of the litigation [*Gov. Code § 68607(g)*].

Be sure also to review the statute for the procedures involved, because in some cases the court is without authority to shorten some time periods [*see McMahon v. Superior Court (2003) 106 Cal. App. 4th 112, 118, 130 Cal. Rptr. 2d 407* (75-day notice period for summary judgment cannot be shortened by order of court)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeTime LimitationsCivil ProceduresPleading & PracticePleadingsTime LimitationsExtensionsCivil ProceduresPretrial MattersContinuances

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21-212 California Points & Authorities § 212.05

§ 212.05 Page Limits on Points and Authorities

Generally, a supporting or opposing memorandum must not exceed 15 pages in length, or, in the case of a motion for summary judgment or summary adjudication, 20 pages in length. A reply or closing memorandum may not exceed 10 pages in length [*see Cal. Rules of Ct., Rule 3.1113(d)*]. The page limit does not include exhibits, declarations, attachments, the table of contents, the table of authorities, or the proof of service [*Cal. Rules of Ct., Rule 3.1113(d)*]. Any party desiring to file a longer memorandum must obtain leave of court [*see Cal. Rules of Ct., Rule 3.1113(e)*]. For further discussion of the page limitations under *Cal. Rules of Ct., Rule 3.1113*, and of other basic format requirements of memoranda, see *Ch. 1, Writing Legal Memoranda and Briefs, § 1.05*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentSupporting MaterialsMemoranda of Law

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21-212 California Points & Authorities § 212.06

§ 212.06 Related Pleading and Practice Chapters

For a discussion and forms relating to shortening and extension of time, see California Forms of Pleading and Practice, Ch. 524, *Shortening and Extension of Time* (Matthew Bender).

For a discussion of and forms for obtaining continuances, see California Forms of Pleading and Practice, Ch. 136, *Continuances* (Matthew Bender).

For a discussion of and forms relating to extending and/or shortening the time relating to discovery proceedings, see California Forms of Pleading and Practice, Ch. 193, *Discovery: Depositions* , Ch. 194, *Discovery: Interrogatories* , Ch. 195, *Discovery: Inspection of Tangible Evidence* , and Ch. 196, *Discovery: Requests for Admissions* (Matthew Bender).

For a discussion of and forms for noticed and ex parte motions, see California Forms of Pleading and Practice, Ch. 372, *Motions and Orders* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProceduresPleading & PracticePleadingsTime LimitationsExtensionsCivil ProcedureDiscoveryMethodsGeneral Overview

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21-212 California Points & Authorities § 212.07

§ 212.07 Related Points and Authorities Chapters

Memoranda of points and authorities that may be used in supporting or opposing motions for continuance or advancement of proceedings may be found in Ch. 48, *Continuance of Proceedings* .

Memoranda of points and authorities that may be used in supporting or opposing motions for relief from failure to timely file a cost bill may be found in Ch. 60, *Costs* .

Memoranda of points and authorities that may be used in supporting or opposing motions to set aside defaults may be found in Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPleading & PracticeMotion PracticeSupporting MemorandaCivil ProceduresPleading & PracticeMotion PracticeTime LimitationsCivil ProceduresPleading & PracticePleadingsTime LimitationsGeneral Overview

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21-212 California Points & Authorities §§ 212.08-212.09

[Reserved]

§§ 212.08[Reserved]

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21-212 California Points & Authorities § 212.10

§ 212.10 Supporting Application or Noticed Motion for Order Extending Time [Code Civ. Proc. § 1054]--General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF
vs.	)	_____'S [*specify party, e.g.,* DE-
_____ [*name*],	)	FENDANT] _____
Defendant.	)	[APPLICATION *or* MOTION] FOR AN ORDER
	)	EXTENDING TIME TO _____
	)	[*specify act to be done as provided in Code Civ. Proc. § 1054*]
	)	Date: _____
	)	Time: _____
		Location: _____
		[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT MAY EXTEND THE TIME FOR ANY ACT RELATING TO _____ [THE PLEADINGS *or* AMENDMENTS TO THE PLEADING *or* THE PREPARATION OF BILLS OF EXCEPTIONS *or* AMENDMENTS TO BILLS OF EXCEPTIONS OR PLEADINGS *or* THE SERVICE OF NOTICES].

A. Extension for Act Under Code of Civil Procedure. When an act to be done, as provided in the Code of Civil

Procedure, relates to the pleadings in the action, or the preparation of bills of exceptions, or of amendments thereto, or to the service of notices other than of appeal and of intention to move for a new trial, the time allowed for performance may be extended (*Code Civ. Proc. § 1054*).

B. Liberal Construction. *Section 1054 of the Code of Civil Procedure* is to be liberally construed with a view to effect its objects and to promote justice (*see Code Civ. Proc. § 4*).

C. Showing Good Cause. The party seeking the extension must make a showing of good cause for the extension (*Code Civ. Proc. § 1054*). The concept of good cause should not be enshrined in legal formalism; it calls for a factual exposition of a reasonable ground for the order sought. The good cause may be equated to a good reason for a party's failure to perform the specific requirement from which he or she seeks to be excused (*Waters v. Superior Court (1962) 58 Cal. 2d 885, 893, 27 Cal. Rptr. 153, 377 P.2d 265*).

D. Timely Application. An order extending time must be entered during the period within which the act must be performed (*see Coast Elec. Serv., Inc. v. Jensen (1931) 111 Cal. App. 124, 126, 295 P.2d 346*).

[*Optional*] **E. Extension in Excess of 30 Days With Adverse Party's Consent.** The court may grant an extension in excess of 30 days, with the consent of the adverse party (*see Code Civ. Proc. § 1054*).

[*Optional*] **F. Extensions Pursuant to Stipulation Excluded From 30-Day Limit.** Previous extensions pursuant to stipulation are excluded in the computation of the 30-day limitation upon extensions of time allowed by court order (*Code Civ. Proc. § 1054*).

G. Before Whom Heard. _____ [Applications *or* Motions] for extensions of time must be heard and determined by the judge before whom the matter is pending or by the judge who presided at the trial (*Code Civ. Proc. § 1054* [*if form is to be used in support of application add* ; *Cal. Rules of Ct., Rule 2.20(a)*]).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*party's status and name*]

[2] Comments

[a] Use of Form

This form of memorandum may be used in support of either an application for an ex parte order extending time or a notice of motion for an order extending time. It is a general form that sets out the authority of the court to extend time and outlines the general guidelines for the exercise of the court's discretion.

For a discussion of the use of memoranda of points and authorities to support ex parte applications and noticed motions, see the discussion in *§ 212.03*.

[b] Argument

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Counsel should demonstrate why the facts of the current situation constitute good cause for the extension. Counsel should show that the motion is timely by informing the court, in a declaration, of when performance is currently due.

[c] Related Pleading and Practice Forms

For a form of application and declaration for an ex parte order extending time, and a form of order extending time, see Ch. 524, *Shortening and Extension of Time* , in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Liberal Construction

Code Civ. Proc. § 4 is a general statute mandating that all provisions of the Code of Civil Procedure and all proceedings under it are to be liberally construed with a view to effect their objects and to promote justice.

[b] Showing Good Cause

Code Civ. Proc. § 1054 provides for extensions by court order only on a showing of good cause. Although to date, there have been no reported cases specifically interpreting "good cause" under *Code Civ. Proc. § 1054*, in ***Waters v. Superior Court*** *(1962) 58 Cal. 2d 885, 27 Cal. Rptr. 153, 377 P.2d 265* , the Supreme Court found the presence of and defined "good cause" as required under former Code Civ. Proc. § 2019(a)(3) for an order to take a deposition without notice to an unserved defendant. That statement, discussed *below*, has been repeated as a definition of good cause under several other statutes and has been widely accepted as a general definition of good cause [*see Ontario v. Superior Court (1970) 2 Cal. 3d 335, 345-346, 85 Cal. Rptr. 149, 466 P.2d 693* (good cause for failure to comply with requirements of *Code Civ. Proc. § 863* relating to publication of summons in certain actions against public agencies); *United States Postal Serv. v. Unemployment Ins. Appeals Bd. (1976) 63 Cal. App. 3d 506, 514, 134 Cal. Rptr. 19* (good cause under *Unemp. Ins. Code § 1328* for filing late appeal from original determination of *Department of Human Resources Development); Conservatorship of Gray (1970) 12 Cal. App. 3d 513, 521, 90 Cal. Rptr. 776* (good cause under *Prob. Code § 2201* for appointment of a temporary conservator)].

Waters calls for a showing of good cause which consists of a factual exposition of a reasonable ground for the sought order, and which may be equated to a good reason for a party's failure to perform the specific requirement from which the party seeks to be excused (*58 C2d 885, 893)* .

Therefore, under *Code Civ. Proc. § 1054*, the party seeking an extension should make a factual showing of good cause which consists of an exposition of a reasonable ground for the order extending time, that is, which shows a good reason to excuse the party from doing the particular act in question within the required time.

[c] Timely Application

In ***Coast Electric Service, Inc. v. Jensen*** *(1931) 111 Cal. App. 124* , the trial court made an ex parte order, three days after the expiration of the statutory period, extending the time in which the plaintiff could file its memorandum of costs. The memorandum of costs was filed within this extended period. In holding that the defendant's motion to strike the memorandum should have been granted, the court of appeal stated that it is well settled that orders of extension granted pursuant to *Code Civ. Proc. § 1054* must be made during the period of time within which the act may be done, that is, while the right is still alive; if made after the expiration of such period, the orders are void and confer no legal authority for the doing of the act (*111 Cal. App. 124, 126)* .

[d] Before Whom Heard

Code Civ. Proc. *§ 1054* requires that extensions be granted by the judge of the court in which the action is pending, or by the judge who presided at the trial of the action.

Cal. Rules of Ct., Rule 2.20(a) , requires that applications for orders extending time be heard and determined by the judge before whom the matter is pending, provided, however, that in case of the inability, death or absence of this judge, the application may be heard and determined by another judge of the same court.

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CHAPTER 212 SHORTENING AND EXTENSION OF TIME
PART II. FORMS

21-212 California Points & Authorities § 212.11

§ 212.11 Supporting Application or Noticed Motion for Order Extending Time [Code Civ. Proc. § 1054]--For Filing of Cost Bill Cal. Rules of Ct., Rule 3.1700

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF
Plaintiff,	)	_____'S [*specify party, e.g.,*
vs.	)	PLAINTIFF] _____
_____ [*name*],	)	[APPLICATION *or* MOTION] FOR ORDER EX-
Defendant.	)	TENDING TIME FOR FILING COST BILL
	)	Date: _____
	)	Time: _____
	)	Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

THE COURT MAY EXTEND THE TIME FOR FILING A COST BILL.

A. Extension for Act Under Code of Civil Procedure. [*See § 212.10[1], Paragraph A.*]

B. Extension of Time to File Cost Bill. *Code Civ. Proc. § 1054* empowers the court to extend the time for filing a cost-bill (*Beilby v. Superior Court (1902) 138 Cal. 51, 52, 70 P. 1024*).

C. Liberal Construction. [*See § 212.10[1], Paragraph B.*]

D. Showing Good Cause. [*See § 212.10[1], Paragraph C.*]

E. Timely Application. [*See § 212.10[1], Paragraph D.*]

[*Optional*] **F. Extensions in Excess of 30 Days With Adverse Party's Consent.** [*See § 212.10[1], Paragraph E.*]

[*Optional*] **G. Extensions Pursuant to Stipulation Excluded From 30-Day Limit.** [*See § 212.10[1], Paragraph F.*]

H. Before Whom Heard. [*See § 212.10[1], Paragraph G.*]

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*party's status and name*]

[2] Comments

[a] Use of Form

This form of memorandum of points and authorities may be used in support of either an application for an ex parte order or a notice of motion for an order extending time for filing a cost bill. It sets out the general guidelines for the exercise of the court's discretion in granting any extension under *Code Civ. Proc. § 1054* as well as specific case authority recognizing the court's power to extend the time for filing a cost bill.

For a discussion of the use of memoranda of points and authorities to support ex parte applications and noticed motions, see the discussion in *§ 212.03*.

[b] Argument

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Counsel should be certain to demonstrate why the facts of his or her case constitute good cause for an extension of time to file the cost bill.

[c] Related Pleading and Practice Forms

For discussion forms, and a procedural checklist relating to costs, see Ch. 174, *Costs and Attorney's Fees* , in California Forms of Pleading and Practice (Matthew Bender).

For a general form of application and declaration for an ex parte order extending time and for a form of order extending time, see Ch. 524, *Shortening and Extension of Time* , in that publication.

[d] Related Points and Authorities

For additional memoranda of points and authorities relating to cost bills, see Ch. 60, *Costs* .

[3] Discussion of Authorities

[a] Extension of Time to File Cost Bill

In ***Beilby v. Superior Court*** *(1902) 138 Cal. 51, 70 P. 1024* , there was a verdict for defendant. Defendant filed his cost bill within an extension of time granted by the trial judge. The California Supreme Court rejected the argument of the plaintiff that the trial judge lacked the power to extend the time for the filing of the cost bill. It held that the service and filing of a cost bill is within a proper construction of *Code Civ. Proc. § 1054* because it is "substantially a notice other than of appeal" (*138 Cal. 51, 52)* . At the time *Beilby* was decided, *Code Civ. Proc. § 1054* provided for extension of time for acts to be done as provided in the Code of Civil Procedure relating "to the service of notices other than of appeal." It was later amended to provide for extensions relating to "notices other than of appeal and of intention to move for a new trial."

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21-212 California Points & Authorities § 212.12

§ 212.12 Supporting Application or Noticed Motion for Order Extending Time--To Answer or Otherwise Plead to Complaint [Code Civ. Proc. §§ 473(a), 1054]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF DEFEND-
Defendant.	)	ANT'S _____ [APPLICATION *or*
	)	MOTION] TO EXTEND TIME TO ANSWER OR
	)	OTHERWISE PLEAD TO COMPLAINT

_____

THE COURT MAY EXTEND THE TIME WITHIN WHICH A DEFENDANT MAY ANSWER OR OTHERWISE PLEAD TO THE COMPLAINT.

A. Extension for Answer or Demurrer. The court may, in furtherance of justice, and on such terms as may be proper, enlarge the time for answer or demurrer (*Code Civ. Proc. § 473(a)*).

B. Extension for Act Under Code of Civil Procedure. [*See § 212.10[1], Paragraph A.*]

C. Liberal Construction. *Sections 1054* and *473 of the Code of Civil Procedure* are to be liberally construed with a view to effect their objects and to promote justice (*see Code Civ. Proc. § 4*).

D. Showing Good Cause. *Section 1054 of the Code of Civil Procedure* requires the party seeking the extension to make a showing of "good cause" for the extension and *Section 473 of the Code of Civil Procedure* provides for an

extension in furtherance of justice (*see Code Civ. Proc. §§ 473(a), 1054*). The concept of good cause should not be enshrined in legal formalism; it calls for a factual exposition of a reasonable ground for the sought order. The good cause may be equated to a good reason for a party's failure to perform that specific requirement from which he or she seeks to be excused (*Waters v. Superior Court (1962) 58 Cal. 2d 885, 893, 27 Cal. Rptr. 153, 377 P.2d 265*).

E. Timely Application. An order extending time must be entered during the period within which the act must be performed (*see Coast Electric Service, Inc. v. Jensen (1931) 111 Cal. App. 124, 126*).

[*Optional*] **F. Extensions in Excess of 30 Days as Permissible With Adverse Party's Consent.** An extension pursuant to *Section 1054 of the Code of Civil Procedure* for an act relating to the pleadings may be granted for more than 30 days with the consent of the adverse party (*Code Civ. Proc. § 1054*). Although *Section 473 of the Code of Civil Procedure* does not specifically limit the length of the extension the court may grant to answer or demur, generally extensions under the Code of Civil Procedure have been held to be governed by the time requirements set out in *Section 1054 of the Code of Civil Procedure*, even if made pursuant to a statute without an express limit on the length of the permitted extension (*see Lewith v. Rehmke (1933) 217 Cal. 563, 565, 20 P.2d 687*).

[*Optional*] **G. Extensions Pursuant to Stipulation Excluded From 30-Day Limit.** [*See § 212.10[1], Paragraph F.*]

H. Before Whom Heard. _____ [Applications *or* Motions] for extension of time to answer or otherwise plead must be heard and determined by the judge before whom the matter is pending (*Code Civ. Proc. § 1054* [*if form is to be used to support application add; Cal. Rules of Ct., Rule 2.20(a)*]).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*party's status and name*]

[2] Comments

[a] Use of Form

This form of memorandum may be used in support of either an application for an ex parte order or a notice of motion for an order extending time to answer or otherwise plead to the complaint. The form sets out the authority of the court to extend the time to answer or otherwise plead to the complaint and outlines the general guidelines for the exercise of the court's discretion.

For a discussion of the use of memoranda to support ex parte applications, see the discussion in *§ 212.03*.

[b] Argument

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Counsel should be certain to demonstrate why the facts of his or her case constitute good cause for an extension of time to file a responsive pleading to the complaint.

[c] Related Uses

With slight modification this memorandum of points and authorities may be used by a cross defendant seeking an order extending the time within which to file a responsive pleading to the cross complaint.

[d] Related Pleading and Practice Forms

For a form of application and declaration for an ex parte order extending time for answer and for a form of order extending time to answer or otherwise plead, see Ch. 524, *Shortening and Extension of Time* , in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Liberal Construction

Code Civ. Proc. § 4 is a general provision mandating that all provisions of the Code of Civil Procedure and all proceedings under it are to be liberally construed with a view to effect their objects and to promote justice.

[b] Showing Good Cause

Code Civ. Proc. § 1054 requires a showing of good cause for an order extending time. Although ***Code Civ. Proc. § 473*** does not use the term "good cause," it does provide for an order extending time "in furtherance of justice," a term which may logically be equated with "good cause." Counsel may therefore insert argument in this paragraph that these two terms should be equated with the definition of "good cause" from *Waters, below,* applying to both *Code Civ. Proc. §§ 1054* and *473*.

The term "good cause" was defined in ***Waters v. Superior Court*** *(1962) 58 Cal. 2d 885, 27 Cal. Rptr. 153, 377 P.2d 265* , which is discussed in *§ 212.10[3][b]*.

[c] Timely Application

Coast Electric Service, Inc. v. Jensen *(1931) 111 Cal. App. 124* , is discussed in *§ 212.10[3][c]*. Although this case was decided under *Code Civ. Proc. § 1054*, it is most likely that the logic of the case, that an extension must be granted while the right is still alive, would also apply to an extension based on *Code Civ. Proc. § 473(a)*. Furthermore, since *Code Civ. Proc. §§ 1054* and *473(a)* both relate to extensions of time relating to the pleadings, it would be unjust to allow a party to obtain an extension under *Code Civ. Proc. § 473(a)* after the time to perform the act had run, while the same extension is not allowed under *Code Civ. Proc. § 1054*.

[d] Extensions in Excess of 30 Days as Permissible With Adverse Party's Consent

Code Civ. Proc. § 1054 provides that an extension under that section may not exceed 30 days without the consent of the adverse party [*see Code Civ. Proc. § 1054*].

In ***Lewith v. Rehmke*** *(1933) 217 Cal. 563, 20 P.2d 687* , the plaintiff appealed a judgment for defendant. Plaintiff obtained an extension of more than 30 days within which to prepare and serve his bill of exceptions. At that time, former Code Civ. Proc. § 650 required that the draft of a bill of exceptions be prepared and served within 10 days after notice of entry of an order denying a motion for new trial "or such further time as the court in which the action is pending, or a judge thereof, may allow." In holding that the trial court exceeded its jurisdiction in granting an extension of more than 30 days, the Supreme Court held that *Code Civ. Proc. § 650* did not authorize the court to grant an indefinite extension of time for the preparation and service of the draft, but that *Code Civ. Proc. § 650* was to be read in connection with the restriction contained in *Code Civ. Proc. § 1054* on the length of the extension which may be allowed by the court (*217 Cal. 563, 565)* .

Therefore, it appears that *Code Civ. Proc. § 473* should also be read as not authorizing the court to grant an indefinite extension to answer or demur. Rather, it is to be read in connection with the restriction contained in *Code Civ. Proc. § 1054* on the length of the extension which may be allowed for any act relating to the pleadings, as well as with the modification on that restriction, providing for an extension exceeding 30 days on the consent of the adverse party.

[e] Before Whom Heard

Code Civ. Proc. § 1054 requires that extensions be granted by the judge of the court in which the action is pending. *Cal. Rules of Ct., Rule 2.20(a)* requires that applications for orders extending time be heard and determined by the judge before whom the matter is pending; provided, however, that in case of the inability, death, or absence of this judge, the application may be heard and determined by another judge of the same court.

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21-212 California Points & Authorities § 212.13

§ 212.13 Supporting Application or Noticed Motion for Order Vacating Order Extending Time to Answer or Otherwise Plead to the Complaint

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF PLAINTIFF'S
Defendant.	)	_____ [APPLICATION *or* MO-
	)	TION] FOR ORDER VACATING ORDER EX-
	)	TENDING TIME TO ANSWER OR OTHERWISE
		PLEAD

_____

THE COURT MAY VACATE AN ORDER EXTENDING TIME TO ANSWER WHEN THAT ORDER _____ [WAS ENTERED AFTER THE EXPIRATION OF TIME FOR DEFENDANT TO FILE HIS/HER/ITS ANSWER *or* EXTENDED THE TIME TO ANSWER MORE THAN 30 DAYS WITHOUT PLAINTIFF'S CONSENT *or* WAS ENTERED BECAUSE OF INADVERTENCE, MISTAKE, OR FRAUD].

A. Statutory Power of Court to Vacate Orders. Every court has the power to amend and control its process and orders to make them conform to law and justice (*Code Civ. Proc. § 128(a)(8)*).

B. Inherent Equitable Power of Court to Vacate Orders. Independent of statutory provisions, a court has power to correct mistakes in its proceedings, and to annul, within a reasonable time, orders and judgments inadvertently made (*see Wiggin v. Superior Court (1886) 68 Cal. 398, 402, 9 P. 646*).

[*EITHER*]

C. Order Extending Time Made After Expiration of Time for Answer. An order extending the time to answer or otherwise plead to the complaint must be made before expiration of the time to answer or otherwise plead. If made after the expiration of such time, the order is void (*see Lantz v. Vai (1926) 199 Cal. 190, 194, 248 P. 665* ; *Coast Electric Service, Inc. v. Jensen (1931) 111 Cal. App. 124, 126*).

[*OR*]

D. Extension for More Than 30 Days. The court may not, without the consent of the plaintiff, extend for more than 30 days the right of the defendant to answer or otherwise plead to the complaint. An order attempting to do so is void (*Code Civ. Proc. § 1054*; *Thelander v. Superior Court (1962) 58 Cal. 2d 811, 813, 26 Cal. Rptr. 643, 376 P.2d 571* ; *Kennedy v. Mulligan (1902) 136 Cal. 556, 557, 69 P. 291* ; *see also Lewith v. Rehmke (1933) 217 Cal. 563, 565, 20 P.2d 687*).

[*OR*]

E. Setting Aside Ex Parte Order Based on Inadvertence, Mistake, or Fraud. A valid ex parte order may be vacated only after a showing that in the making of the original order there was inadvertence, mistake, or fraud (*Wyoming Pacific Oil Co. v. Preston (1958) 50 Cal. 2d 736, 739, 329 P.2d 489* ; *Sheldon v. Superior Court (1941) 42 Cal. App. 2d 406, 408, 108 P.2d 945*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*party's status and name*]

[2] Comments

[a] Use of Form

This form of memorandum of points and authorities may be used in support of either an application or a noticed motion to vacate an order extending time to answer or otherwise plead to the complaint. Paragraphs A and B set out the statutory and inherent equitable power of the court to vacate its prior order. Paragraphs C, D, and E set out the alternative bases for setting aside an order extending time to answer or otherwise plead. Counsel should select and use whichever paragraph(s) is warranted by the particular facts. Paragraph C would be used when the order extending time is void because it was made after the expiration of time for the defendant to answer or otherwise plead to the complaint. Paragraph D would be used when the total extension(s) ordered by the court exceeds 30 days without plaintiff's consent. Paragraph E would be used whenever plaintiff can prove that the original order extending time was based on inadvertence, mistake, or fraud.

For a discussion of the use of memoranda of points and authorities to support ex parte applications, see the discussion in *§ 212.03*.

[b] Argument

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, if counsel is proceeding under Paragraph E, he or she should indicate what precise facts constitute the inadvertence, mistake, or fraud on which the original order extending time was based.

[3] Discussion of Authorities

[a] Inherent Equitable Power of Court to Vacate Orders

In ***Wiggin v. Superior Court*** *(1886) 68 Cal. 398, 9 P. 646* , the superior court made a decree of final discharge of the administrator of an estate. Afterwards, on application of some of the heirs, the court made an order setting aside and vacating its decree of final discharge on the ground that such discharge was made "inadvertently and *ex parte*." A writ of prohibition was sought on the ground that the court lacked the jurisdiction to set aside its decree of final discharge. The Supreme Court, in denying the application for a writ of prohibition, recognized the inherent power of the trial court, independent of statutory provisions, to correct mistakes in its proceedings and to annul, within a reasonable time, orders and judgments inadvertently made (*68 Cal. 398, 402)* .

[b] Order Extending Time Made After Expiration of Time for Answer

In ***Lantz v. Vai*** *(1926) 199 Cal. 190, 248 P. 665* , after the expiration of the prescribed period, plaintiff sought and obtained an order extending time to serve a proposed bill of exceptions. The Supreme Court held that the judge's order, granting the extension after the expiration of the statutory period within which to prepare the bill, was ineffective and properly ignored by the lower court (*199 Cal. 190, 193-194)* .

For a discussion of ***Coast Electric Service, Inc. v. Jensen*** *(1931) 111 Cal. App. 124* , see *§ 212.10[3][c]*. The court in that case stated that an order extending time pursuant to *Code Civ. Proc. § 1054* must be made during the time within which the act could be done.

Although neither of these cases was decided under *Code Civ. Proc. § 473*, it is most likely that the logic of these cases, that an extension must be granted while the right is still alive, would also apply to an extension based solely on *Code Civ. Proc. § 473* without reference to *Code Civ. Proc. § 1054*.

[c] Extension for More Than 30 Days

Code Civ. Proc. § 1054 provides that an extension of time to plead shall not exceed 30 days, without the consent of the adverse party.

In ***Thelander v. Superior Court*** *(1962) 58 Cal. 2d 811, 26 Cal. Rptr. 643, 376 P.2d 571* , defendant State of California was granted an extension to plead to the complaint until 30 days after the 91st day after the final adjournment of the 1963 Regular Session of the Legislature. In annulling the extension, the Supreme Court held that the order was directly contrary to the language of *Code Civ. Proc. § 1054*, inasmuch as it extended the time for a period of more than 30 days without the consent of the adverse parties (*58 Cal. 2d 811, 813)* .

In ***Kennedy v. Mulligan*** *(1902) 136 Cal. 556, 69 P. 291* , the trial court granted the defendant an order allowing him one day to appear and plead after the trial court ruled on his pending motion to dismiss. In affirming the trial court's subsequent order denying the motion to dismiss and ordering the entry of default against the defendant, the Supreme Court held that the order extending the time to plead was beyond the jurisdiction of the court and void because it was an

attempt to extend the time to plead beyond 30 days without the consent of the plaintiff (*136 Cal. 556, 557)* .

For a discussion of ***Lewith v. Rehmke*** *(1933) 217 Cal. 563, 20 P.2d 687* , and its applicability to *Code Civ. Proc. § 473*, which does not expressly limit extensions of time to answer or demur, see *§ 212.12[3][d]*.

[d] Setting Aside Ex Parte Order Based on Inadvertence, Mistake, or Fraud

In ***Wyoming Pac. Oil Co. v. Preston*** *(1958) 50 Cal. 2d 736* , the plaintiff, almost three years after filing the complaint, obtained an ex parte order allowing service by publication based on affidavits that the defendant was hiding to avoid service. Shortly thereafter, the defendant was personally served. The defendant then made a motion to dismiss under former Code Civ. Proc. § 581a [*now see Code Civ. Proc. § 583.210 et seq.*] for failure to serve and return the summons within the three-year period. The trial court granted the motion. The Supreme Court reversed this order, holding that a dismissal under former Code Civ. Proc. § 581a was improper where there has been a judicial determination that the defendant has been hiding to avoid service. Crucial to this holding was the fact that the ex parte order allowing service by publication was not vacated and could not have been vacated. A valid ex parte order may be vacated only after a showing that there was inadvertence, mistake, or fraud in its making (*50 Cal. App. 2d 736, 739-740)* .

In ***Sheldon v. Superior Court*** *(1941) 42 Cal. App. 2d 406, 108 P.2d 945* , the probate court had appointed the petitioner as special administrator of an estate. Subsequently, the respondent obtained an order removing petitioner and appointing respondent as special administrator solely on the ground that respondent had a "prior right to act as special administratrix." The court of appeal annulled the order of removal because the probate court lacked the power to vacate its original, valid ex parte order of appointment absent a showing of inadvertence, mistake, or fraud in its issuance (*42 Cal. App. 2d 406, 407-408)* .

[4] Additional Authorities

[a] Order Extending Time Made After Expiration of Time for Answer

In *Manning v. Gavin (1939) 14 Cal. 2d 44, 92 P.2d 795* , the plaintiff sought an order extending the time within which to file a bill of exceptions. The order extending time was made after the expiration of the prescribed period for filing the bill. The Supreme Court stated that the trial court acted properly in subsequently granting the defendant's motion to set aside the order extending time. Although the Court did not state its reason, it was presumably because the order was made after expiration of the prescribed period (*14 Cal. 2d 44, 45)* .

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21-212 California Points & Authorities § 212.14

§ 212.14 Supporting Application or Noticed Motion for Order Extending Time--Attorney Member of Legislature [Code Civ. Proc. § 1054.1]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM IN SUPPORT OF DEFEND-
_____ [*name*],	)	ANT'S _____ [APPLICATION *or*
Defendant.	)	MOTION] _____ [*specify, e.g.,*
	)	FOR ORDER EXTENDING TIME TO ANSWER
	)	OR OTHERWISE PLEAD TO COMPLAINT]
		[*Code Civ. Proc. § 1054.1*]

_____

THE COURT MUST EXTEND THE TIME FOR _____ [*specify, e.g.,* A DEFENDANT TO ANSWER OR OTHERWISE PLEAD TO THE COMPLAINT] WHEN HIS/HER/ITS ATTORNEY IS A MEMBER OF THE CALIFORNIA LEGISLATURE AND _____ [THE LEGISLATURE IS IN _____ (SESSION *or* RECESS FOR LESS THAN 41 DAYS) *or* THE ATTORNEY IS A MEMBER OF A LEGISLATIVE COMMITTEE WHICH _____ _____ (IS MEETING *or* IS TO MEET WITHIN A PERIOD NOT EXCEEDING THE TIME REASONABLY NECESSARY TO ENABLE THE ATTORNEY TO REACH THE COMMITTEE MEETING BY THE ORDINARY MODE OF TRAVEL)].

A. Mandatory Extension for Attorney Member of Legislature. An extension to answer or otherwise plead to the complaint must be granted to a defendant whose attorney is a member of the California Legislature if the Legislature is in session or in recess for less than 41 days or when the attorney is a member of a legislative committee which is meeting or is to meet within a period which does not exceed the time reasonably necessary to enable the attorney to

reach the meeting by the ordinary mode of travel (*Code Civ. Proc. § 1054.1*; *Beckley v. Reclamation Bd. (1957) 48 Cal. 2d 710, 716, 312 P.2d 1098* ; *Bottoms v. Superior Court (1927) 82 Cal. App. 764, 768, 256 P. 422*).

B. Liberal Construction. *Section 1054.1 of the Code of Civil Procedure* is to be liberally construed with a view to effect its objects and to promote justice (*see Code Civ. Proc. § 4*).

C. Timely Application. An order extending time must be entered during the period within which the act must be performed (*see Coast Electric Service, Inc. v. Jensen (1931) 111 Cal. App. 124, 126*).

D. Before Whom Heard. _____[Applications *or* Motions] for extensions of time must be heard and determined by the judge before whom the matter is pending (*Code Civ. Proc. § 1054.1* [*if form to be used to support application, add Cal. Rules of Ct., Rule 2.20(a)*].

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*party's status and name*]

[2] Comments

[a] Use of Form

This form of memorandum may be used by an attorney member of the California Legislature in support of either an application for an ex parte order or a notice of motion for an order extending time. With slight modification, it may be used to support an application or motion to extend the time for doing any act relating to the pleadings, or the undertakings to be filed, or the justification of sureties, or the preparation of bills of exceptions, or of amendments to them, or to the service of notices (other than of appeal, intention to move for a new trial, or intention to move to vacate a judgment). It also may not be used to seek an extension to file a motion for a judgment notwithstanding the verdict [*see Code Civ. Proc. § 1054.1*].

For a discussion of the use of memoranda to support ex parte applications, see the discussion in *§ 212.03*.

[b] Argument

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Counsel should show that the motion is timely by informing the court, in a declaration, when the response to the complaint is currently due.

[c] When Extension Not Mandatory

Prior to 1963, *Code Civ. Proc. § 1054.1* provided that an extension under the described circumstances "shall" be granted. In 1963 the statute was amended to provide that the extension is mandatory unless the court determines the extension would defeat or abridge a right to relief pendente lite in a paternity action or a right to invoke a provisional remedy such as pendente lite support in a domestic relations controversy, attachment and sale of perishable goods, receivership of a failing business, and temporary restraining order or preliminary injunction, and that the extension

should not be granted.

The mandatory nature of *Code Civ. Proc. § 1054.1* was further weakened in 1967 by the Supreme Court when it decided that the statute is directory and not mandatory. It is to be applied subject to the discretion of the court as to whether its process and order of business should be delayed. Among the factors to be considered are (1) the nature and urgency of the rights involved, (2) whether the party seeking delay has or can secure other counsel to represent him or her for the particular step in the proceedings then before the court, and (3) whether the attorney who is a member of the Legislature was employed for no other purpose than attempted delay [*Thurmond v. Superior Court (1967) 66 Cal. 2d 836, 839-840, 59 Cal. Rptr. 273, 427 P.2d 985]* .

If counsel for the moving party feels that any of the factors in *Thurmond* might be at least arguably applicable, he or she might wish to add *Thurmond* to the memorandum with argument as to why the factor or factors on which the court might deny the extension are in fact not applicable.

[d] Code of Civil Procedure Sections 595 and 1054.1

Many applications for extensions based on the attorney's membership in the state Legislature, as well as appellate decisions in this area, rely on both *Code Civ. Proc. §§ 595* and *1054.1* without drawing distinctions between the two statutes. Although the two provisions are in fact very similar, it should be noted that *Code Civ. Proc. § 595* deals primarily with continuances of trials and hearings, while *Code Civ. Proc. § 1054.1* deals with extensions of time to do various acts such as filing pleadings. It should also be noted that *Code Civ. Proc. § 595* applies when the legislator is either a party, an attorney of record, or a principal witness, while *Code Civ. Proc. § 1054.1* applies only when the legislator is an attorney of record.

[e] Related Pleading and Practice Forms

For a general form of application and declaration for an ex parte order extending time and an order granting the application, see Ch. 524, *Shortening and Extension of Time* , in California Forms of Pleading and Practice.

[3] Discussion of Authorities

[a] Mandatory Extension for Attorney Member of Legislature

In ***Beckley v. Reclamation Bd.*** *(1957) 48 Cal. 2d 710, 312 P.2d 1098* , a demurrer was sustained without leave to amend. Plaintiff's attorney, a member of the California Legislature which was then in session, sent a telegram to the judge asking him to delay entry of judgment until the Legislature recessed and there was time to study the ruling. The judge never received the telegram and judgment was entered for defendant. When the attorney became aware that the judgment had in fact been entered, he made a motion to vacate the judgment on the grounds that it was entered through mistake, inadvertence, surprise, or excusable neglect and on the grounds that the judgment was contrary to *Code Civ. Proc. §§ 595, 1054*, and *1054.1*. The trial court denied the motion to vacate and the plaintiff appealed.

The Supreme Court, in reversing the trial court, relied on a statement from *Bottoms v. Superior Court (1927) 82 Cal. App. 764, 769-770, 256 P. 422* (discussed below), that the policy behind *Code Civ. Proc. § 1054.1* is that attorney-legislators should be relieved by the law from concerning themselves with extraneous matters or interests not pertaining to their legislative duties while they are in attendance at sessions of the Legislature and actually prosecuting their duties. In view of this clearly expressed legislative policy, the settled policy that where possible there shall be a trial on the merits, the fact that the extension was mandatory had the judge known of the attorney's attendance at a session of the Legislature, and the fact that plaintiff's attorney was in no way to blame for the nondelivery of the telegram advising the court of his legislative duties and his request for a continuance, the Supreme Court concluded that the trial court abused its discretion in refusing to vacate the judgments under *Code Civ. Proc. § 473* (*48 Cal. 2d 710, 718)* .

In ***Bottoms v. Superior Court*** *(1927) 82 Cal. App. 764, 256 P. 422* , the defendant had applied for, and was granted, an extension to answer or otherwise plead to the complaint. The defendant's application for an extension was based on former Code Civ. Proc. § 1054 (*see now Code Civ. Proc. § 1054.1*) in that defendant's attorney was a member of the California Legislature which was then in session. Subsequently the trial court granted the plaintiff's motion to vacate the order extending the defendant's time to plead to the complaint.

The court of appeal noted that the purpose behind the statute is obvious. Since there is no activity connected with and essential to the preservation and maintenance of the social fabric of greater importance than that of the functioning of the legislative department, attorney members of the Legislature should be relieved by the law from concerning themselves with extraneous matters or interests not pertaining to their legislative duties while they are in attendance on sessions of the Legislature and actually prosecuting their duties as such. As a result, the court interpreted the statute as requiring a mandatory postponement where the facts support the application, or where, in a particular case, considerations do not exist or are not satisfactorily shown which would justify a denial of the application. Therefore, the court of appeal annulled the order which vacated the order extending time (*82 Cal. App. 764, 768-769)* .

It should be noted that the provision requiring extensions for attorney legislators was originally enacted in 1895 as an amendment to then *Code Civ. Proc. § 1054*. In 1947 the provision was enacted as *Code Civ. Proc. § 1054.1*. In 1963 the mandatory nature of the statute was somewhat qualified by the addition of its last sentence. For further discussion of both statutory and decisional qualifications of the mandatory aspect of *Code Civ. Proc. § 1054.1*, see [2][c], *above*.

[b] Liberal Construction

Code Civ. Proc. § 4 is a general provision mandating that all provisions of the Code of Civil Procedure and all proceedings under it are to be liberally construed with a view to effect its objects and to promote justice.

[c] Timely Application

Coast Electric Service, Inc. v. Jensen *(1931) 111 Cal. App. 124* , is discussed in *§ 212.10[3][c]*. *Coast Elec.* was decided under *Code Civ. Proc. § 1054* which at that time also governed extensions of time for legislators, now governed by *Code Civ. Proc. § 1054.1*. Although *Coast Elec.* was not decided based on the part of then *Code Civ. Proc. § 1054* dealing with extensions for legislators, it is most likely that its reasoning, that an extension must be granted while the right is still alive, would also apply to an extension based solely on the current *Code Civ. Proc. § 1054.1* providing for extensions for legislators. Therefore, counsel should seek an extension before the time for doing the act has expired, allowing enough time for the order to be granted and entered prior to the expiration of time, as well.

[d] Before Whom Heard

Code Civ. Proc. § 1054.1 requires that extensions be granted by a judge of the court where the action is pending.

Cal. Rules of Ct., Rule 2.20(a) requires that applications for orders extending time be heard and determined by the judge before whom the matter is pending; provided, however, that in case of the inability, death, or absence of this judge, the application may be heard and determined by another judge of the same court.

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 212 SHORTENING AND EXTENSION OF TIME
PART II. FORMS

21-212 California Points & Authorities § 212.15

§ 212.15 Opposing Application or Noticed Motion for Order Extending Time--Attorney Member of Legislature [Code Civ. Proc. § 1054.1]--Within Court's Discretion

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM IN OPPOSITION TO
_____ [*name*],	)	_____'S [*specify party e.g.,* DE-
Defendant.	)	FENDANT] _____
	)	[APPLICATION *or* MOTION] FOR AN ORDER
	)	EXTENDING TIME TO _____
		[*specify, e.g.,* ANSWER OR OTHERWISE PLEAD TO THE COMPLAINT]
		[*Code Civ. Proc. §§ 595, 1054.1*]

_____

AN EXTENSION FOR A PARTY WHOSE ATTORNEY IS A STATE LEGISLATOR IS SUBJECT TO THE COURT'S DISCRETION IN DETERMINING WHETHER ITS PROCESS AND ORDER OF BUSINESS SHOULD BE DELAYED.

A. Extension for Attorney Legislator as Discretionary. An extension for an attorney legislator pursuant to *Section 1054.1 of the Code of Civil Procedure* is subject to the discretion of the court as to whether its process and order of business should be delayed (*Thurmond v. Superior Court (1967) 66 Cal. 2d 836, 839-840, 59 Cal. Rptr. 273, 427 P.2d 985*).

[*Optional*] **B. Right to Relief Pendente Lite in a Paternity Action.** An extension for an attorney legislator should not

be granted when it would defeat or abridge a right to relief pendente lite in a paternity action (*Code Civ. Proc. § 1054.1*).

[*Optional*] **C. Right to Invoke a Provisional Remedy.** An extension for an attorney legislator should not be granted when it would defeat or abridge a right to invoke a provisional remedy (*Code Civ. Proc. § 1054.1*).

[*Optional*] **D. Nature and Urgency of Rights Involved.** In exercising its discretion in deciding whether to grant an extension to an attorney legislator, the court should consider the nature and urgency of the rights involved (*Thurmond v. Superior Court (1967) 66 Cal. 2d 836, 840, 59 Cal. Rptr. 273, 427 P.2d 985*).

[*Optional*] **E. Availability of Other Counsel.** In exercising its discretion in deciding whether to grant an extension to an attorney legislator, the court should consider whether the party seeking delay has or can secure other counsel to represent him or her for the particular step in the proceedings then before the court (*Thurmond v. Superior Court (1967) 66 Cal. 2d 836, 840, 59 Cal. Rptr. 273, 427 P.2d 985*).

[*Optional*] **F. Purposeful Delay.** In exercising its discretion in deciding whether to grant an extension to an attorney legislator, the court should consider whether the attorney legislator was employed for no other purpose than attempted delay (*Thurmond v. Superior Court (1967) 66 Cal. 2d 836, 840, 59 Cal. Rptr. 273, 427 P.2d 985*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to an application or motion seeking an extension on the grounds that a party's attorney is a member of the Legislature (*Code Civ. Proc. § 1054.1*). Counsel should use those optional paragraphs which apply to his or her factual situation.

For further discussion, see also *§ 212.14*.

[b] Argument

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[c] Objection on Ground of Untimeliness

If the extension is sought after the expiration of the time for performance of the act in question, counsel should add to this form a point contending that the court has the power to grant an extension only when the right to perform the act is still alive. See *§ 212.14[1]*, Paragraph C and the discussion of that paragraph in § 212.14[3][c].

[d] Motion to Vacate

If the extension has already been granted ex parte, counsel may wish to make a motion to vacate the order, adapting the *form in § 212.13*, if counsel can assert that the extension order was entered because of inadvertence, mistake, or fraud, or if the order was made after the expiration of time for performance.

[3] Discussion of Authorities

[a] Extension for Attorney Legislator as Discretionary

In ***Thurmond v. Superior Court*** *(1967) 66 Cal. 2d 836, 59 Cal. Rptr. 273, 427 P.2d 985* , the plaintiff had scheduled a hearing on an order to show cause why the defendant, the alleged father of plaintiff's unborn child, should not pay support, and maintenance, and medical expenses necessary for the unborn child during the pendency of a paternity action. The defendant obtained an ex parte continuance of the hearing on the order to show cause. The sole ground for the continuance, which was based on *Code Civ. Proc. §§ 595* and *1054.1*, was that the defendant's attorney was a member of the California Legislature which was then in session. The Supreme Court issued a writ of mandate directing the trial court to vacate its order of continuance. The Court decided that the provisions of *Code Civ. Proc. §§ 595* and 1054.1 are directory, not mandatory. They are to be applied subject to the discretion of the court as to whether its process and order of business should be delayed. Among the factors to be considered are (1) the nature and urgency of the rights involved, (2) whether the party seeking delay has or can secure other counsel to represent him or her for the particular step in the proceedings then before the court, and (3) whether the attorney who is a member of the Legislature was employed for no other purpose than attempted delay (*66 Cal. 2d 836, 839-840)* .

[b] Right to Relief Pendente Lite in a Paternity Action

Code Civ. Proc. § 1054.1 requires an extension for most proceedings in court or before any state administrative agency when an attorney for a party is a member of the Legislature which is in session. It provides that the extension is "mandatory unless the court determines that such extension would defeat or abridge a right to relief pendente lite in a paternity action or a right to invoke a provisional remedy such as pendente lite support in a domestic relations controversy, attachment and sale of perishable goods, receivership of a failing business, and temporary restraining order or preliminary injunction, and that the continuance should not be granted."

[c] Right to Invoke a Provisional Remedy

Code Civ. Proc. § 1054.1 is discussed under Right to Relief Pendente Lite in a Paternity Action, *above.*

[d] Nature and Urgency of Rights Involved

Thurmond v. Superior Court *(1967) 66 Cal. 2d 836, 59 Cal. Rptr. 273, 427 P.2d 985* , is discussed under Extension for Attorney Legislator as Discretionary, *above.*

[e] Availability of Other Counsel

Thurmond v. Superior Court *(1967) 66 Cal. 2d 836, 59 Cal. Rptr. 273, 427 P.2d 985* , is discussed under Extension for Attorney Legislator as Discretionary, *above.*

[f] Purposeful Delay

Thurmond v. Superior Court *(1967) 66 Cal. 2d 836, 59 Cal. Rptr. 273, 427 P.2d 985* , is discussed under Extension for Attorney Legislator as Discretionary, *above*.

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 212 SHORTENING AND EXTENSION OF TIME
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21-212 California Points & Authorities §§ 212.16-212.29

[Reserved]

§§ 212.16[Reserved]

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CHAPTER 212 SHORTENING AND EXTENSION OF TIME
PART II. FORMS

21-212 California Points & Authorities § 212.30

§ 212.30 Supporting Application for Order Shortening Time for Notice of Motion or for Order to Show Cause [Code Civ. Proc. § 1005(b)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF
vs.	)	_____'S [*specify party, e.g.,*
_____ [*name*],	)	PLAINTIFF] APPLICATION FOR AN ORDER
Defendant.	)	SHORTENING TIME FOR NOTICE OF MOTION
	)	_____ [*specify, e.g.,* FOR PRO-
	)	TECTIVE ORDER]
	)	Date: _____
	)	Time: _____
		Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

THE COURT MAY SHORTEN THE TIME FOR GIVING WRITTEN NOTICE OF MOTION.

A. Application for Shortening Time. The court, or a judge of the court, may prescribe a time shorter than that prescribed by *Section 1005(b) of the Code of Civil Procedure* for the giving of written notice of motion (*Code Civ. Proc. § 1005(b)*), either *sua sponte* or on application supported by a declaration showing good cause [*Cal. Rules of Ct., Rule 3.1300(b)*].

[*Optional*] **B. Order to Show Cause.** An order to show cause is, in effect, a notice of motion (*Difani v. Riverside County Oil Co. (1927) 201 Cal. 210, 213-214, 256 P. 210* ; *Donald J. v. Evna M. (1978) 81 Cal. App. 3d 929, 933, 147 Cal. Rptr. 15*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*party's status and name*]

[2] Comments

[a] Use of Form

This form of memorandum may be used in support of an application for an ex parte order shortening time for notice of a motion or for the hearing on an order to show cause. The form sets out the authority of the court to shorten time for notice of motion and, in optional Paragraph B, authority for the proposition that an order to show cause is, in effect, a notice of motion.

For a discussion of the use of memoranda to support ex parte applications, see the discussion in *§ 212.03*.

[b] Argument

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Facts showing good cause for the order shortening time must be set out in a declaration supporting the application [*Cal. Rules of Ct., Rule 3.1700(b)*].

[c] Related Pleading and Practice Forms

For a form of application and declaration for an ex parte order shortening time for notice of motion, and for forms of orders shortening time for notice of motion, see Ch. 524, *Shortening and Extension of Time* , in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Order to Show Cause

In ***Difani v. Riverside County Oil Co.*** *(1927) 201 Cal. 210, 256 P. 210* , plaintiff obtained a default judgment against defendant corporation for unpaid salary and commissions. Thereafter, on application of a creditor and shareholder of the defendant, the court ordered the plaintiff to show cause why the judgment should not be vacated. Subsequently, the trial court ordered the order to show cause stricken as being a collateral attack on the judgment by a stranger. The creditor and shareholder appealed this order. In holding that the trial court acted properly in striking the order to show cause why the judgment should not be vacated, the Supreme Court held that an order to show cause is a notice of motion and a citation to the party to appear at a stated time and place to show cause why a motion should not be granted (*201 Cal. 210, 213-214)* .

In ***Donald J. v. Evna M.*** *(1978) 81 Cal. App. 3d 929, 147 Cal. Rptr. 15* , plaintiff commenced an action for declaratory relief to have himself declared the natural father of the subject child. Visitation rights were ordered. Subsequently, the plaintiff filed an order to show cause seeking clarification of the visitation rights and asking the court to enter judgment (1) declaring him as the natural father, (2) directing the child to use his surname, and (3) ordering correction of the birth certificate. The court resolved the visitation issue, dismissed the causes of action for a determination of paternity and correction of the birth certificate, and denied the request for an order directing the child to use his surname. Plaintiff appealed. In holding that plaintiff's requests for a determination of paternity, a change of the child's surname, and a correction of the child's birth certificate should have been raised in a formal complaint separate and independent of the order to show cause for a clarification of visitation rights, the court stated that an order to show cause is, in effect, a notice of motion. A motion is not an independent right or remedy; it is confined to incidental matters in the progress of a cause. A motion relates to some question that is collateral to the main object of the action (*81 Cal. App. 3d 929, 933-934)* .

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CHAPTER 214 SPECIFIC PERFORMANCE

21-214 California Points & Authorities 214.syn

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§ 214.02 Governing Statutes

§ 214.03 Specific Performance Defined

§ 214.04 Effect of Misrepresentation or Mistake

§ 214.05 Performance of Conditions Precedent

§ 214.06 Elements

[1] Generally

[2] Contract Sufficiently Definite and Certain in Its Terms

[3] Adequate Consideration and Just and Reasonable Contract

[4] Mutuality of Remedy

[5] Inadequacy of Remedy at Law

§ 214.07 Contracts Not Subject to Specific Performance

§ 214.08 Quasi-Specific Performance

§ 214.09 Page Limits on Points and Authorities

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§§ 214.13-214.29 [Reserved]

§ 214.30 Supporting Demurrer to Complaint for Specific Performance [Civ. Code § 3384]--Failure to Allege Valid Agreement

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Existence of Valid and Binding Agreement

[b] Illegal Contract

[4] Additional Authorities

[a] Existence of Valid and Binding Agreement

[b] Illegal Contract

§ 214.31 Supporting Demurrer to Complaint for Specific Performance [Civ. Code § 3384]--Failure to Allege Performance of Conditions Precedent [Civ. Code § 3392]

[1] FORM

[2] Comments

[a] Use of Form

[3] Additional Authorities

[a] Performance of Conditions Precedent

§ 214.32 Supporting Demurrer to Complaint for Specific Performance [Civ. Code § 3384]--Contract Terminated by Failure of Condition Precedent [Civ. Code § 3392]--Disapproval of "Satisfaction" Condition Precedent

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Disapproval of "Satisfaction" Condition

§ 214.33 Supporting Demurrer to Complaint for Specific Performance [Civ. Code § 3384]--Failure to Allege Plaintiff Was Ready, Willing, and Able to Perform in Alleging Excuse

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Ability and Willingness to Perform

[4] Additional Authorities

[a] Ability and Willingness to Perform

§ 214.34 Supporting Demurrer to Complaint for Specific Performance [Civ. Code § 3384]--Failure to Allege Agreement Sufficiently Certain in Its Terms [Civ. Code § 3390(5)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Additional Authorities

[a] Certainty of Terms of Agreement

§ 214.35 Supporting Demurrer to Complaint for Specific Performance [Civ. Code § 3384]--Failure to Allege Adequate Consideration or That Contract Is Just and Reasonable [Civ. Code § 3391(1), (2)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Additional Authorities

[a] Adequate Consideration and Just and Reasonable Contract

§ 214.36 Supporting Demurrer to Complaint for Specific Performance [Civ. Code § 3384]--Contract for Sale or Transfer of Personal Property--Failure to Allege Inadequate Remedy at Law

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Inadequate Remedy at Law

[4] Additional Authorities

[a] Inadequate Remedy at Law

§ 214.37 Supporting Demurrer to Complaint for Quasi-Specific Performance of Agreement to Leave Property by Will--Failure to Allege Inadequate Remedy at Law

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Inadequate Remedy at Law

[b] Contract to Leave Money by Will

[c] Services Compensable in Money

[4] Additional Authorities

[a] Contract to Leave Money by Will

[b] Services Compensable in Money

§ 214.38 Supporting Demurrer to Complaint for Quasi-Specific Performance of Agreement to Leave Property by Will--Alleged Oral Agreement Fails to Satisfy Statutory or Equitable Criteria for Enforcement [Prob. Code § 21700; former Prob. Code § 150 (repealed Jan. 1, 2001); former Civ. Code § 1624(6) (repealed January 1, 1985)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Writing Required

[b] Estoppel to Rely on Requirement That Contract Be Evidenced by Writing

[c] Unconscionable Injury

[d] Unjust Enrichment

[e] Will Insufficient as Memorandum

[4] Additional Authorities

[a] Estoppel to Rely on Requirement That Contract Be Evidenced by Writing

[b] Unconscionable Injury

[c] Unjust Enrichment

[d] Will Insufficient as Memorandum

§ 214.39 Supporting Demurrer to Complaint for Quasi-Specific Performance of Agreement to Leave Property by Will--No Cause of Action Arises During Promisor's Lifetime Unless Agreement Designates Specific Property and Restricts Promisor's Use of That Property

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] No Cause of Action During Promisor's Lifetime

§ 214.40 Opposing Demurrer to Complaint for Specific Performance [Civ. Code § 3384]--General Allegation of Plaintiff's Performance Sufficient [Code Civ. Proc. § 457]

[1] FORM

[2] Comments

[a] Use of Form

[3] Additional Authorities

[a] Allegation of Performance of Conditions Precedent

§ 214.41 Opposing Demurrer to Complaint for Specific Performance [Civ. Code § 3384]--Defendant's Repudiation Excuses Plaintiff's Performance [Civ. Code § 1440]

[1] FORM

[2] Comments

[a] Use of Form

[3] Additional Authorities

[a] Repudiation as Excuses Performance

§ 214.42 Opposing Demurrer to Complaint for Specific Performance [Civ. Code § 3384]--Terms of Contract Are Sufficiently Certain

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Contract containing Material Terms Is Sufficient

[4] Additional Authorities

[a] Contract Containing Material Terms Is Sufficient

§ 214.43 Opposing Demurrer to Complaint for Specific Performance [Civ. Code § 3384]--Sufficient Contract Description of Property

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Sufficiency of Property Description

[4] Additional Authorities

[a] Sufficiency of Property Description

§ 214.44 Opposing Demurrer to Complaint for Specific Performance [Civ. Code § 3384]--Agreed Consideration Is Reasonable Value of Property

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Fair and Reasonable Value of Property

§ 214.45 Opposing Demurrer to Complaint for Specific Performance [Civ. Code § 3384]--Remedy at Law Inadequate

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Inadequate Remedy at Law

[b] Remedy at Law Inadequate for Untraded Stock

[c] Remedy at Law Inadequate for Unavailable Stock

[d] Goods Which Cannot Be Covered or Replaced

[e] Contractual Stipulation for Equitable Relief Should Be Honored

[4] Additional Authorities

[a] Inadequate Remedy at Law

§ 214.46 Opposing Demurrer to Complaint for Quasi-Specific Performance of Agreement to Leave Property by Will--Remedy at Law Inadequate--Consideration for Agreement Was Peculiar Personal Services

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Inadequate Remedy at Law for Peculiar Personal Services

[b] Services Involving Close Relationship

[4] Additional Authorities

[a] Inadequate Remedy at Law for Peculiar Personal Services

[b] Services Involving Close Relationship

§ 214.47 Opposing Demurrer to Complaint for Quasi-Specific Performance of Agreement to Leave Property by Will--Remedy at Law Inadequate--Agreement to Leave Particular Real Property by Will

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Inadequate Remedy at Law

[b] Promise Enforceable During Promisor's Lifetime

[4] Additional Authorities

[a] Promise Enforceable During Promisor's Lifetime

§ 214.48 Opposing Demurrer to Complaint for Quasi-Specific Performance of Agreement to Leave Property by Will--Remedy at Law Inadequate--Consideration for Agreement Was Conveyance of Real Property to Decedent

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Inadequate Remedy at Law

§ 214.49 Opposing Demurrer to Complaint for Quasi-Specific Performance of Agreement to Leave Property by Will--Rendering Peculiar Services Lifts Requirement That Contract Be Evidenced by Writing [Prob. Code § 21700; former Prob. Code § 150 (repealed Jan. 1, 2001); former Civ. Code § 1624(6) (repealed January 1, 1985)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Rendition of Services of Peculiar Character

[4] Additional Authorities

[a] Rendition of Services of Peculiar Character

§ 214.50 Opposing Demurrer to Complaint for Quasi-Specific Performance of Contract to Make Will Complaint Alleges Facts Sufficient to Support Application of Equitable Doctrine of Promissory Estoppel [Prob. Code § 21700;

former Prob. Code § 150 (repealed Jan. 1, 2001); former Civ. Code § 1624(6) (repealed January 1, 1985)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Estoppel to Assert Requirement That Contract Be Evidenced by Writing

[b] Receiving Benefit Under Agreement to Make Irrevocable Joint or Reciprocal Wills

[4] Additional Authorities

[a] Estoppel to Assert Requirement That Contract Be Evidenced by Writing

[b] Estoppel to Assert Statute of Limitations as Defense

[c] Receiving Benefit Under Agreement to Make Irrevocable Joint or Reciprocal Wills

§ 214.51 Supporting Motion to Set Aside and Vacate Judgment and Enter Another and Different Judgment [Code Civ. Proc. §§ 663, 663a]--Incorrect or Erroneous Legal Bases for Court Decision [Code Civ. Proc. § 663(1)]--Defaulting Purchaser Denied Specific Performance as Entitled to Restitution of Only Reasonable Value of Services That Benefited Seller

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Restitution to Defaulting Purchaser Denied Specific Performance Is to Be Only Reasonable Value of Services

§ 214.52 Supporting Motion to Set Aside and Vacate Judgment and Enter Another and Different Judgment [Code Civ. Proc. §§ 663, 663a]--Incorrect or Erroneous Legal Basis for Court Decision [Code Civ. Proc. § 663(1)]--Impossibility Must Be Reconsidered at Time of Entry of Judgment

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Impossibility at Time of Entry of Judgment Controls

§ 214.53 Supporting Motion to Set Aside and Vacate Judgment and Enter Another and Different Judgment [Code Civ. Proc. §§ 663, 663a]--Incorrect or Erroneous Legal Bases for Court Decision [Code Civ. Proc. § 663(1)]--Order to Debtor to Convey Collateral to Secured Party as Reversible Error

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Order to Debtor to Convey Collateral Is Error

§ 214.54 Supporting Motion to Set Aside and Vacate Judgment and Enter Another and Different Judgment [Code Civ. Proc. §§ 663, 663a]--Incorrect or Erroneous Legal Bases for Court Decision [Code Civ. Proc. § 663(1)]--Award of Damages in Lieu of Specific Performance Although Defendant Did Not Rebut Presumption Against Adequacy of Damages as Remedy [Civ. Code § 3387]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Breaching Party Must Prove That Damages Will Be Adequate Remedy

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CHAPTER 214 SPECIFIC PERFORMANCE
PART I. INTRODUCTION

21-214 California Points & Authorities § 214.01

§ 214.01 Scope of Chapter

This chapter contains memoranda of points and authorities for use in supporting [*see §§ 214.30 -214.36*] and opposing [*see §§ 214.40 -214.45*] a general demurrer to a complaint alleging a cause of action for specific performance, and supporting [*see §§ 214.37 -214.39*] and opposing [*see §§ 214.46 -214.50*] a general demurrer to a complaint alleging a cause of action for quasi-specific performance of an agreement to leave property by will. It also contains memoranda of points and authorities supporting a motion to vacate judgment and enter another judgment based on the court's error of law [*see §§ 214.51 -214.54*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewContracts LawRemediesSpecific Performance

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21-214 California Points & Authorities § 214.02

§ 214.02 Governing Statutes

Specific performance is governed by *Civ. Code §§ 3384-3395*.

Legal Topics:

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

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21-214 California Points & Authorities § 214.03

§ 214.03 Specific Performance Defined

Specific performance is the remedy developed by the equity courts for the breach of a contract. A party to a contract who is damaged because of the contract's breach by another party has the option of either going to a law court to recover damages for the breach or going to an equity court to compel specific performance of the contract. Before the equity court will compel specific performance, however, the contract must be one which can be specifically performed. Further, equity courts were designed to supplement the deficiencies of the law courts and will withhold their aid when the law affords full redress [*Glock v. Howard & Wilson Colony Co. (1898) 123 Cal. 1, 6, 55 P. 713]* .

Except as otherwise provided in *Civ. Code § 3384 et seq.*, the specific performance of an obligation may be compelled [*Civ. Code § 3384*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachGeneral OverviewContracts LawRemediesEquitable ReliefGeneral OverviewContracts LawRemediesSpecific Performance

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21-214 California Points & Authorities § 214.04

§ 214.04 Effect of Misrepresentation or Mistake

Specific performance cannot be enforced against a party to a contract if his or her assent was obtained by the misrepresentation, concealment, circumvention, or unfair practices of any party to whom performance would become due under the contract, or by any promise of such a party that has not been substantially fulfilled [*Civ. Code § 3391(3)*]. The same is true if a party's assent was given under the influence of mistake, misapprehension, or surprise, except that when the contract provides for compensation in case of mistake, a mistake within the scope of such a provision may be compensated for and the contract specifically enforced in other respects, if proper [*Civ. Code § 3391(4)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesGeneral OverviewContracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawFormationAmbiguity & MistakeGeneral OverviewContracts LawRemediesSpecific Performance

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21-214 California Points & Authorities § 214.05

§ 214.05 Performance of Conditions Precedent

Specific performance cannot be enforced in favor of a party who has not fully and fairly performed all the conditions precedent on his or her part to the obligation of the other party, except when failure to perform is only partial, and either entirely immaterial or capable of being fully compensated, in which case specific performance may be compelled on full compensation being made for the default [*Civ. Code § 3392*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsConditions PrecedentContracts LawRemediesSpecific Performance

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21-214 California Points & Authorities § 214.06

§ 214.06 Elements

[1] Generally

Six elements are requisite to obtaining the desired relief in a specific performance suit [*Taramind Lithography Workshop, Inc. v. Sanders (1983) 143 Cal. App. 3d 571, 575, 193 Cal. Rptr. 409* ; *Porporato v. Devincenzi (1968) 261 Cal. App. 2d 670, 674, 68 Cal. Rptr. 210]* :

- A contract sufficiently definite and certain in its terms to be enforced.
- A just and reasonable contract.
- Performance of plaintiff's side of the bargain.
- The promisor's failure to perform the contract.
- That the contract was supported by adequate consideration.
- That plaintiff's remedy at law is inadequate.

[2] Contract Sufficiently Definite and Certain in Its Terms

An agreement, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertain able, cannot be specifically enforced [*Civ. Code § 3390(5)*; *see, e.g.,* *Roth v. Malson (1998) 67 Cal. App. 4th 552, 557-559, 79 Cal. Rptr. 2d 226* (in action by prospective buyer for specific performance of alleged contract for sale of real property, buyer's response to seller's counteroffer was held to be counter-counteroffer rather than acceptance, and no contract was formed)].

A greater amount or degree of certainty is required in the terms of a contract which is sought to be specifically enforced than is required in the terms of a contract which is the basis of an action at law for damages. An action at law for damages for breach of a contract is based on a nonperformance of the contract by defendant and this negative

conclusion can often be established without determining all the terms of the agreement with exactness. The suit in equity for specific performance is wholly an affirmative proceeding. The mere fact of nonperformance is not enough; its object is to procure a performance by the defendant, and this demands a clear, definite, and precise understanding of all the terms that must be exactly ascertained before the performance can be enforced [*Patterson v. Reddish (1922) 56 Cal. App 197, 201-202, 204 P. 565]* . Formerly, courts held that a complaint for specific performance could not supply or cure deficiencies in the agreement that would otherwise render the agreement too uncertain for a judgment of specific performance. Rather, the terms to be enforced had to be ascertainable from the terms of the agreement itself [*Durst v. Jolly (1917) 35 Cal. App. 184, 190, 169 P. 449]* . However, the modern trend of the law is to carry out the parties' intent through enforcement of contracts, and to disfavor findings of uncertainty; the defense of uncertainty is valid only when the uncertainty or incompleteness prevents the court from knowing what to enforce [*Blackburn v. Charnley (2004) 117 Cal. App. 4th 758, 766]* . Courts determine the parties' intent, and the terms to be enforced, by examining the contract terms in the context of the agreement and in view of surrounding circumstanced [*De Anza Enterprises v. Johnson (2002) 104 Cal. App. 4th 1307, 1314-1315, 128 Cal. Rptr. 2d 749* (court determined parties' intent with regard to joint venture buyout by looking both to contract document and to circumstances of agreement)]. Extrinsic evidence may supply sufficient certainty to an otherwise uncertain contract so as to support specific enforcement, by explaining or giving meaning or content to the contract terms [*Blackburn v. Charnley (2004) 117 Cal. App. 4th 758, 766* (trial court correctly ordered specific enforcement of real estate purchase agreements based on proper admission of extrinsic evidence to explain general terms of agreements, which evidence rendered agreements sufficiently definite for enforcement)].

[3] Adequate Consideration and Just and Reasonable Contract

Specific performance cannot be enforced against a party to a contract if he or she has not received an adequate consideration for the contract [*Civ. Code § 3391(1)*] or if it is not just and reasonable as to that party [*Civ. Code § 3391(2)*]. Plaintiff must allege and prove facts from which the court may determine that the contract he or she seeks to have specifically enforced was based on an adequate consideration and is just and reasonable as to the defendant [*Foley v. Cowan (1947) 80 Cal. App. 2d 70, 74, 181 P.2d 410]* . This does not mean that it must be alleged in haec verba that the contract was supported by an adequate consideration, and is, as to the defendant, fair and just. These might be held insufficient, but the fact that the contract will satisfy the conscience of the trier of fact must appear from proper statement of facts [*Stiles v. Cain (1901) 134 Cal. 170, 172, 66 P. 231]* .

[4] Mutuality of Remedy

Notwithstanding that the agreed counterperformance is not or would not have been specifically enforceable, specific performance may be compelled if (1) specific performance would otherwise be an appropriate remedy, and (2) the agreed counterperformance has been substantially performed or its concurrent or future performance is assured or, if the court deems necessary, can be secured to the satisfaction of the court [*Civ. Code § 3386*; *see Ellis v. Mihelis (1963) 60 Cal. 2d 206, 215, 32 Cal. Rptr. 415, 384 P.2d 7* ; *Converse v. Fong (1984) 159 Cal. App. 3d 86, 91-92, 205 Cal. Rptr. 242]* .

A person who has signed a written contract may be compelled to specifically perform it, although it is not signed by the other party, if the other party has performed the contract or offers to perform it [*Civ. Code § 3388*].

[5] Inadequacy of Remedy at Law

As in all cases that invoke the equitable powers of a court, a plaintiff seeking performance of a contract must show that the remedy at law is inadequate [*Porporato v. Devincenzi (1968) 261 Cal. App. 2d 670, 674, 68 Cal. Rptr. 210]* .

It is presumed that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation [*Civ. Code § 3387*; *see § 214.54*]. No similar presumption for the agreements for the sale or transfer of

personal property exists. However, the Commercial Code does provide that specific performance may be decreed of a contract for the sale of goods when "the goods are unique or in other proper circumstances" [*Com. Code § 2716(1)*]. Goods are defined in the sales division as all things that are movable other than money, investment securities, and things in action [*Com. Code § 2105(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachNonperformanceContracts LawConsiderationGeneral OverviewContracts LawRemediesGeneral OverviewContracts LawRemediesSpecific Performance

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§ 214.07 Contracts Not Subject to Specific Performance

Civ. Code § 3390 lists five specific types of obligations not specifically enforceable:

- An obligation to render personal services.
- An obligation to employ another in personal services [*see Herman v. County of Los Angeles (2002) 98 Cal. App. 4th 484, 488-489, 119 Cal. Rptr. 2d 691* (finding statute inapplicable to contract providing for transfer of county police officers to sheriff's department)].
- An agreement to perform an act which the party has not power lawfully to perform when required to do so.
- An agreement to procure the act or consent of the spouse of the contracting party, or of any other third person.
- An agreement, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable.

In addition, an agreement for the sale of property cannot be specifically enforced in favor of a seller who cannot give to the buyer a title free from reasonable doubt [*Civ. Code § 3394*].

The fact that a contract provides for liquidated damages or a penalty does not prevent the contract from being specifically enforceable [Civ. Code § 3378]. Whenever an obligation in respect to real property would be specifically enforced against a particular person, it may be enforced against any other person claiming under him or her by a title created subsequently to the obligation except a purchaser or encumbrancer in good faith and for value [*Civ. Code § 3395*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesSpecific PerformanceReal Property LawPurchase & SaleRemediesSpecific Performance

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21-214 California Points & Authorities § 214.08

§ 214.08 Quasi-Specific Performance

The provisions of *Civ. Code § 3384 et seq.* also cover quasi-specific performance. This remedy consists in the imposition by the court of a constructive trust on property that should have gone to the plaintiff pursuant to a contract the court cannot specifically enforce [*Bank of Cal. v. Superior Court (1940) 16 Cal. 2d 516, 524, 106 P.2d 879]* . For example, the making of a will cannot be compelled and therefore cannot be specifically performed. Under some circumstances, however, equity will provide relief equivalent to specific performance by imposing a constructive trust on the property that a decedent had promised to a plaintiff [*see* *Estate of Brenzikofer v. Schwartz (1996) 49 Cal. App. 4th 1461, 1467, 57 Cal. Rptr. 2d 401* ; *Ludwicki v. Guerin (1961) 57 Cal. 2d 127, 130]* . The constructive trust imposed by the court is referred to as an "involuntary trust," and is defined as a trust created by operation of law [*Lauricella v. Lauricella (1911) 161 Cal. 61, 66, 118 P. 430* (interpreting former Civ. Code § 2217, now repealed; *see* *Prob. Code § 15002* (common law regarding trusts controlling); *Prob. Code § 15003* (repeal of former Civ. Code § 2217 not affecting common law regarding fiduciary and confidential relationships)].

Civ. Code § 2224 provides that "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

Additionally, *Civ. Code § 2223* provides that "One who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner."

The quasi-specific performance of a contract will be decreed in equity on the same conditions as specific performance of any other contract will be decreed in equity [*see* *Monsen v. Monsen (1916) 174 Cal. 97, 98, 162 P. 90]* . In other words, the same elements are required for quasi-specific performance and specific performance [*Porporato v. Devincenzi (1968) 261 Cal. App. 2d 670, 674-675, 68 Cal. Rptr. 210]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesGeneral OverviewContracts LawRemediesSpecific PerformanceEstate, Gift & Trust

LawTrustsGeneral Overview

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§ 214.09 Page Limits on Points and Authorities

One of the more significant drafting requirements to keep in mind are page limits. Supporting or opposing memoranda (other than those in a summary judgment proceeding) must not exceed 15 pages in length. Exhibits, declarations, attachments, and tables of contents are not included in the page limitation. A reply or closing memorandum may not exceed 10 pages in length [*Cal. Rules of Ct., Rule 3.1113(d)*]. Any party desiring to file a longer memorandum must obtain leave of court [*see Cal. Rules of Ct., Rule 3.1113(e)*]. These and other drafting requirements are discussed in *further detail in Ch. 1, Writing Legal Memoranda and Briefs, § 1.05*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentSupporting MaterialsMemoranda of Law

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21-214 California Points & Authorities § 214.10

§ 214.10 Using the Forms to Build a Draft Memorandum

The forms included in this chapter are designed to be included with other points and authorities to form a complete memorandum. For detailed discussion on how to select and use the forms in the publication to build a draft memorandum and complete the draft, with detailed discussion of all drafting requirements and strategic or stylistic considerations, see *Ch. 1, Writing Legal Memoranda and Briefs, §§ 1.03 -1.06*. For a skeletal form of memorandum for use in creating a properly formatted outline in which to compile relevant forms from this publication, see *Ch. 1, Writing Legal Memoranda and Briefs, § 1.10*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting Memoranda

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§ 214.11 Related Pleading and Practice Chapters

For a discussion and forms for complaints, allegations, and affirmative defenses involving specific performance, see California Forms of Pleading and Practice, Ch. 528, *Specific Performance* (Matthew Bender). For discussions and forms for use in particular cases involving specific performance, see the following chapters in California Forms of Pleading and Practice:

- Ch. 6, *Accord and Satisfaction*.
- Ch. 160, *Corporations*.
- Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*.
- Ch. 253, *Escrows*.
- Ch. 330, *Landlord and Tenant: General Introduction*.
- Ch. 331, *Landlord and Tenant: Creating the Tenancy*.
- Ch. 332, *Landlord and Tenant: The Tenancy*.
- Ch. 333, *Landlord and Tenant: Eviction Actions*.
- Ch. 334, *Landlord and Tenant: Claims for Damages*.
- Ch. 335, *Landlord and Tenant: Rent Control*.
- Ch. 375, *Motions to Strike*.
- Ch. 400, *Partnerships: Governing Statutes*.

- Ch. 401, *Partnerships: Actions Between General Partners and Partnership*.
- Ch. 402, *Partnerships: Actions Between General Partners or Partnership and Third Parties*.
- Ch. 403, *Partnerships: Actions By and Against Dissociated Partners*.
- Ch. 404, *Partnerships: Actions Between Limited Partners and Partnerships*.
- Ch. 405, *Partnerships: Actions Between Limited Partners or Partnerships and Third Parties*.
- Ch. 406, *Partnerships: Dissolution*.
- Ch. 530, *Statute of Frauds*.
- Ch. 555, *Trust Deeds and Real Property Mortgages*.
- Ch. 569, *Vendor and Purchaser*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersContracts LawRemediesSpecific Performance

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21-214 California Points & Authorities § 214.12

§ 214.12 Related Points and Authorities Chapters

Related memoranda of points and authorities that may be useful in particular cases involving specific performance may be found in the following chapters:

- Ch. 50, *Contracts*.
- Ch. 71, *Demurrers and Motions for Judgment on the Pleadings*.
- Ch. 101, *Escrows*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsGeneral OverviewContracts LawRemediesSpecific Performance

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21-214 California Points & Authorities §§ 214.13-214.29

[Reserved]

§§ 214.13[Reserved]

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21-214 California Points & Authorities § 214.30

§ 214.30 Supporting Demurrer to Complaint for Specific Performance [Civ. Code § 3384]--Failure to Allege Valid Agreement

[1] FORM Supporting Demurrer to Complaint for Specific Performance [Civ. Code § 3384]--Failure to Allege Valid Agreement

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER TO COMPLAINT
vs.	)	
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT FAILS TO ALLEGE FACTS SHOWING THE EXISTENCE OF A VALID AND BINDING AGREEMENT.

A. Objection by Demurrer. The party against whom a complaint has been filed may object, by demurrer as provided in *Code of Civil Procedure Section 430.30*, to the complaint on the ground that it does not state facts sufficient to constitute a cause of action (*Code Civ. Proc. § 430.10(e)*). When any ground for objection to a complaint appears on the face of the complaint (*or* from any matter of which the court is required to or may take judicial notice), the objection on the ground may be taken by a demurrer to the complaint (*Code Civ. Proc. § 430.30(a)*).

B. Existence of Valid and Binding Agreement. The complaint in an action for specific performance must show the existence of a valid and binding agreement which can be specifically enforced (*Spector v. Pete (1958) 157 Cal. App. 2d 432, 437, 321 P.2d 59*).

[*EITHER*]

C. Illegal Contract. When an agreement contravenes the provision of a statute in force at the time it was executed, it is void and cannot be specifically enforced (*Kreamer v. Earl (1891) 91 Cal. 112, 118, 27 P. 735*).

[*OR*]

C. Statute of Frauds. An agreement for the sale of real property or any interest therein is invalid unless it, or a memorandum thereof, is in writing and subscribed by the party to be charged or by the party's agent (*Civ. Code § 1624(a)(3)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a general demurrer to a complaint for specific performance when the demurrer asserts that the complaint fails to state facts sufficient to constitute a cause of action in that there is no allegation of a valid and binding agreement that can be specifically enforced. While only two grounds for invalidity are set forth as Alternative Paragraphs C, counsel may substitute another ground to conform to the facts of the case.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Existence of Valid and Binding Agreement

Spector v. Pete *(1958) 157 Cal. App. 2d 432, 321 P.2d 59* , was an action for specific performance of a contract to convey land. The defendant asserted in a general demurrer that the contract was invalid and not subject to specific performance and the trial court sustained the demurrer without leave to amend and entered judgment for defendant. In affirming the judgment the court of appeal noted that, under the terms of a federal statute by which the defendant had acquired title to the land in question, any conveyance of it made by him within a period of 25 years was null and void. As such, the contract was not specifically enforceable (*157 Cal. App. 2d 432, 440)* .

[b] Illegal Contract

Kreamer v. Earl *(1891) 91 Cal. 112, 27 P. 735* , was an action to specifically enforce a contract for the conveyance of

land. The Supreme Court reversed the judgment for the plaintiff with directions to the trial court to dismiss the action. The contract in question contemplated that defendant administrator's predecessor in title (now deceased) would acquire the land from the state in a manner not authorized by statute and then convey it to the plaintiff in performance of the contract. The Supreme Court held that when the agreement on which the plaintiff relies for specific performance contravenes the provisions of the statutes which were in force at the time it was executed, no recovery can be had upon it (*91 Cal. 112, 118)* .

[4] Additional Authorities

[a] Existence of Valid and Binding Agreement

In *Roth v. Malson (1998) 67 Cal. App. 4th 552, 79 Cal. Rptr. 2d 226* , a prospective buyer brought an action against the seller for specific performance of an alleged contract for the sale of real property. The trial court granted summary judgment in favor of the seller and the prospective purchaser appealed. The court of appeal affirmed, holding that the buyer's response to seller's counteroffer was a counter-counteroffer rather than an acceptance, and no thus contract was formed (*67 Cal. App. 4th 552, 557-559)* .

[b] Illegal Contract

Napa Valley Elec. Co. v. Calistoga Elec. Co (1918) 38 Cal. App. 477, 176 P. 699 , was an action for specific performance of an option to sell a public utility plant to plaintiff. A demurrer to the complaint was sustained for failure to allege that a Railroad Commission order authorizing the sale as required by the Public Utilities Act had been secured. In affirming, the court of appeal held that when the purported contract is illegal and that fact is called to the attention of the court, the court will refuse the plaintiff any relief and will leave the parties where it finds them. In denying a hearing, the Supreme Court found it unnecessary to decide whether the attempted agreement was absolutely void (*38 Cal. App. 477, 480)* .

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21-214 California Points & Authorities § 214.31

§ 214.31 Supporting Demurrer to Complaint for Specific Performance [Civ. Code § 3384]--Failure to Allege Performance of Conditions Precedent [Civ. Code § 3392]

[1] FORM Supporting Demurrer to Complaint for Specific Performance [Civ. Code § 3384]--Failure to Allege Performance of Conditions Precedent [Civ. Code § 3392]

[*Caption. See § 214.30[1].*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT FAILS TO ALLEGE FACTS SHOWING PLAINTIFF'S PERFORMANCE OF CONDITIONS PRECEDENT ON HIS/HER PART TO THE OBLIGATION SOUGHT TO BE SPECIFICALLY ENFORCED.

A. Objection by Demurrer. [*See § 214.30[1], Paragraph A.*]

B. Performance of Conditions Precedent. Specific performance cannot be enforced in favor of a party who has not fully and fairly performed all the conditions precedent on his or her part to the obligation of the other party (*Civ. Code § 3392*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a general demurrer to a complaint for specific performance on the ground that the complaint fails to state facts sufficient to constitute a cause of action because there is no

allegation that plaintiff has performed conditions precedent on his or her part to the obligation sought to be specifically enforced.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Additional Authorities

[a] Performance of Conditions Precedent

Cockrill v. Boas *(1931) 213 Cal. 490, 2 P.2d 774* , was a vendee's action for specific performance of a contract for the sale of real property along with a deduction in the purchase price for alleged defects in the vendors' title. Judgment was rendered for the vendors, quieting their title and forfeiting the vendee's deposit. The Supreme Court held that an essential basis for granting specific performance must be a showing by the plaintiff of performance, tender of performance, or ability and willingness to perform (*213 Cal. 490, 492)* .

In ***Realmuto v. Gagnard*** *(2003) 110 Cal. App. 4th 193, 1 Cal. Rptr. 3d 569* , a seller of real property sued the buyers for specific performance and breach of contract after they failed to complete their purchase of the property. The trial court granted summary judgment for the buyers, finding that providing them with a transfer disclosure statement was a condition precedent to the buyers' duty to perform. Because it was undisputed that the seller never delivered the statement to the buyers, the trial court concluded that there were no triable issues of fact and that the buyers were entitled to judgment as a matter of law. The court of appeal affirmed. It held that delivery of the disclosure statement is a nonwaivable condition precedent to the buyers' duty of performance in every sale of real estate covered by *Civ. Code § 1102 et seq.* The seller's performance of this condition also gives rise to a statutory right of rescission by the buyer. A buyer has no duty to perform the contract unless the seller complies with the statutory disclosure requirements and the buyer chooses not to exercise the right of rescission. In this case, the seller's failure to deliver a transfer disclosure statement precluded this action against the buyers for specific performance and breach of contract (*110 Cal. App. 4th 193, 205)* .

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21-214 California Points & Authorities § 214.32

§ 214.32 Supporting Demurrer to Complaint for Specific Performance [Civ. Code § 3384]--Contract Terminated by Failure of Condition Precedent [Civ. Code § 3392]--Disapproval of "Satisfaction" Condition Precedent

[1] FORM Supporting Demurrer to Complaint for Specific Performance [Civ. Code § 3384]--Contract Terminated by Failure of Condition Precedent [Civ. Code § 3392]--Disapproval of "Satisfaction" Condition Precedent

[*Caption. See § 214.30[1].*]

THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION FOR SPECIFIC PERFORMANCE BECAUSE ITS ALLEGATIONS CLEARLY ESTABLISH THAT THE CONTRACT WAS TERMINATED BY FAILURE OF THE CONDITION PRECEDENT THAT _____ [*specify condition precedent, e.g.,* BUYER APPROVE THE SURVEY AND PRELIMINARY TITLE REPORT].

A. Objections by Demurrer. [*See § 214.30[1], Paragraph A.*]

B. Disapproval of "Satisfaction" Condition. One who expressly and unequivocally disapproves of things, his or her approval of which is a condition precedent to his or her obligations under the contract, has terminated the contract and cannot "waive" the earlier disapproval or enforce the agreement (*Beverly Way Associates v. Barham (1990) 226 Cal. App. 3d 49, 54-56, 276 Cal. Rptr. 240*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a general demurrer to a complaint for specific performance when the demurrer asserts that the plaintiff has terminated the contract by disapproval of a "satisfaction" condition precedent.

Counsel should insert argument in this form, showing the relationship between the allegations of the complaint and the points of law stated.

These points and authorities may be adapted for use in any other procedural context, such as a trial or appellate brief.

[3] Discussion of Authorities

[a] Disapproval of "Satisfaction" Condition

Plaintiff in ***Beverly Way Associates v. Barham*** *(1990) 226 Cal. App. 3d 49, 276 Cal. Rptr. 240* , contracted to buy real property from defendant. The contract specified that plaintiff had 28 days from delivery of certain materials to inspect and approve them. One of the documents subject to this condition was an ALTA survey of the property showing all improvements on the property and the location of all exceptions referred to in the preliminary title. Before the 28-day period expired, plaintiff wrote to defendant rejecting the survey, apparently because an electrical room encroached into areas designated for parking and thus insufficient parking spaces were provided. In the letter, plaintiff expressed the hope that some resolution could be found to the problem and proposed two alternatives. The seller never responded. Plaintiff wrote again, waiving the objections expressed in the first letter. Seller ordered the escrow to prepare cancellation instructions. Plaintiff demanded that the seller complete the transaction. The seller refused; and plaintiff sued for specific performance. Defendant's demurrer was sustained without leave to amend. Plaintiff appealed from the resulting judgment.

The court of appeal affirmed. The condition of buyer's approval is a condition precedent (*226 Cal. App. 3d 49, 54)* . The effect of a buyer's power to approve documentation required is to give the buyer an option not to consummate the purchase but to terminate the contract if it reasonably concludes that the condition precedent has not been fulfilled. The court likened the power of a buyer in that position to the holder of an option and to an offeree (*226 Cal. App. 3d 49, 55)* . The buyer's disapproval was express and unequivocal, and once communicated to the seller terminated the contract. This left the buyer with no power to create obligations against the seller with a late "waiver" of its objections and acceptance of the proferred documentation (*226 Cal. App. 3d 49, 56)* .

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21-214 California Points & Authorities § 214.33

§ 214.33 Supporting Demurrer to Complaint for Specific Performance [Civ. Code § 3384]--Failure to Allege Plaintiff Was Ready, Willing, and Able to Perform in Alleging Excuse

[1] FORM Supporting Demurrer to Complaint for Specific Performance [Civ. Code § 3384]--Failure to Allege Plaintiff Was Ready, Willing, and Able to Perform in Alleging Excuse

[*Caption. See § 214.30[1].*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT FAILS TO ALLEGE PLAINTIFF'S BEING READY, WILLING, AND ABLE TO PERFORM IN PLEADING EXCUSE FOR PERFORMANCE.

A. Objection by Demurrer. [*See § 214.30[1], Paragraph A.*]

B. Ability and Willingness to Perform. One seeking specific performance of a contract has the burden of pleading and proving that he was ready, willing, and able to perform the contract where there is no allegation of performance or tender of performance (*Am-Cal Investment Co. v. Sharlyn Estates, Inc. (1967) 255 Cal. App. 2d 526, 539, 63 Cal. Rptr. 518*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a general demurrer to a complaint for specific performance

when the demurrer asserts that the complaint fails to state facts sufficient to constitute a cause of action in that there is no allegation that the plaintiff was ready, willing, and able to perform in pleading excuse for performance.

When appropriate, counsel should insert argument in this form showing the relationship between the facts of his case and the points of law stated.

[3] Discussion of Authorities

[a] Ability and Willingness to Perform

Am-Cal Investment Co. v. Sharlyn Estates, Inc. *(1967) 255 Cal. App. 2d 526, 63 Cal. Rptr. 518* , involved an agreement for the sale of land which provided for an extension of time to pay the purchase price balance. The vendee treated the vendor's refusal of an extension as an anticipatory breach of the agreement and brought an action for specific performance of the agreement. During the requested extension period, the vendor repudiated the agreement by conveying the land to a third party. In reversing a judgment for the vendee, the court of appeal held that an essential basis for the equitable remedy of specific performance must be a showing by the plaintiff of performance, tender of performance, or ability and willingness to perform. The court further stated that while the positive repudiation of a contract of sale by the vendor excuses the vendee from a formal tender of the price as a condition precedent to an action for specific performance, it does not obviate the necessity of stating in his complaint in such action that he is ready, able, and willing to pay the amount due.

[4] Additional Authorities

[a] Ability and Willingness to Perform

In *Buckmaster v. Bertram (1921) 186 Cal. 673, 200 P. 610* , prior to bringing an action to cancel an agreement to sell and convey land, the vendor had notified the vendee that he was selling part of the land to another and cancelling the agreement. In a cross complaint for specific performance of the vendor's agreement, the vendee alleged that she had been damaged by the vendor's repudiation of the agreement and was ready, able, and willing to perform her part of the agreement after an accounting to determine the amount of damages that should be deducted from the unpaid purchase price. The Supreme Court affirmed the judgment awarding damages to the vendee and quieting the title of the vendor and his grantees on payment of the damages. The Court held that the cross complaint was insufficient because, while the positive repudiation of a contract of sale by the vendor excuses the vendee from a formal tender of the price as a condition precedent to an action for specific performance, it does not obviate the necessity that the vendee state in the complaint that the vendee is ready, able, and willing to pay the amount due. This requisite is not complied with by an offer to pay the amount due after deducting the damages to the vendee.

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21-214 California Points & Authorities § 214.34

§ 214.34 Supporting Demurrer to Complaint for Specific Performance [Civ. Code § 3384]--Failure to Allege Agreement Sufficiently Certain in Its Terms [Civ. Code § 3390(5)]

[1] FORM Supporting Demurrer to Complaint for Specific Performance [Civ. Code § 3384]--Failure to Allege Agreement Sufficiently Certain in Its Terms [Civ. Code § 3390(5)]

[*Caption. See § 214.30[1].*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT FAILS TO ALLEGE AN AGREEMENT SUFFICIENTLY CERTAIN IN ITS TERMS.

A. Objection by Demurrer. [*See § 214.30[1], Paragraph A.*]

B. Certainty of Terms of Agreement. An agreement, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable, cannot be specifically enforced (*Civ. Code § 3390(5)*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a general demurrer to a complaint for specific performance if the demurrer asserts that the complaint fails to state facts sufficient to constitute a cause of action in that it fails to allege an agreement sufficiently certain in its terms.

When appropriate, counsel should insert argument in this form showing the relationship between the facts of his case and the points of law stated.

[3] Additional Authorities

[a] Certainty of Terms of Agreement

Gatley v. Shockley *(1932) 215 Cal. 604* , was an action to quiet title to real property. The defendant contended that she had an equitable interest in the property under her predecessor's exercise of an option to purchase the property and cross complained for specific performance of the option agreement. The agreement was silent as to the respective amounts of two mortgages to be given for the unpaid sale price. In affirming the judgment quieting plaintiff's title and denying specific performance, the Supreme Court held that equity requires as a condition of specific performance a clear, mutual understanding and a positive assent on both sides as to the terms of the contract, and it will withhold the exercise of jurisdiction in that respect unless there is such a degree of certainty as will enable it to do complete equity.

Smith v. Taylor *(1890) 82 Cal. 533, 23 P. 217* , was a vendee's action for the recovery of his down payment on the purchase of an interest in real property. The trial court sustained a general demurrer to the vendor's cross complaint for specific performance. In affirming the judgment for the vendee, the Supreme Court held that the cross complaint was indefinite, ambiguous, and uncertain in that it did not allege how or when conveyance of title was to be made, how the deferred payments were to be secured, or what was agreed as to the assumption of mortgages. If a contract is vague and uncertain, a court will not decree specific performance, but will leave the party to his remedy at law.

Lawrence v. Shutt *(1969) 269 Cal. App. 2d 749, 75 Cal. Rptr. 533* , was an action for specific performance of the release clause in a purchase money deed of trust. The release clause provided for releases of successive portions of the land which were "contiguous to a portion previously released." The court of appeal held that the uncertainty of the release clause prevented specific performance but did not require invalidation of the entire sale agreement. The court concluded that the release clause was uncertain because the contiguous work permitted the selection for release of parcels of any shape which touched a previously released portion. The court explained that the agreement, to be specifically enforceable, must not only contain all the material terms but must also express each term in a reasonably definite manner.

Berven v. Miller *(1948) 86 Cal. App. 2d 39, 194 P.2d 80* , involved a tenant's action for specific performance of a landlord's agreement that, in the event of sale, the tenant would have the "first chance to buy property at the offer made for same." It was alleged that the landlord's heirs sold the property after his death. Judgment for the heirs was entered after sustaining of a general demurrer without leave to amend. In affirming, the court of appeal stated that the terms of payment, the times of payment, and the property to be sold were each so indefinite and uncertain that a court could not decree specific performance of the agreement.

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21-214 California Points & Authorities § 214.35

§ 214.35 Supporting Demurrer to Complaint for Specific Performance [Civ. Code § 3384]--Failure to Allege Adequate Consideration or That Contract Is Just and Reasonable [Civ. Code § 3391(1), (2)]

[1] FORM Supporting Demurrer to Complaint for Specific Performance [Civ. Code § 3384]--Failure to Allege Adequate Consideration or That Contract Is Just and Reasonable [Civ. Code § 3391(1), (2)]

[*Caption. See § 214.30[1].*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT FAILED TO ALLEGE FACTS SHOWING THAT _____ [*either* THE DEFENDANT RECEIVED AN ADEQUATE CONSIDERATION FOR THE CONTRACT SOUGHT TO BE ENFORCED *or* THE CONTRACT IS JUST AND REASONABLE AS TO THE DEFENDANT].

A. Objection by Demurrer. [*See § 214.30[1], Paragraph A.*]

[*EITHER*]

B. Adequate Consideration. Specific performance cannot be enforced against a party to a contract if he has not received an adequate consideration for the contract (*Civ. Code § 3391(1)*).

[*OR*]

B. Just and Reasonable Contract. Specific performance cannot be enforced against a party to a contract if it is not, as to him, just and reasonable (*Civ. Code § 3391(2)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a general demurrer to a complaint for specific performance if the demurrer asserts that the complaint fails to state facts sufficient to constitute a cause of action in that it fails to allege that adequate consideration was received by the defendant or that the contract is just and reasonable as to the defendant.

When appropriate, counsel should insert argument in this form showing the relationship between the facts of his case and the points of law stated.

[3] Additional Authorities

[a] Adequate Consideration and Just and Reasonable Contract

Joyce v. Tomasini *(1914) 168 Cal. 234, 142 P. 67* , was an action for specific performance of a contract to execute a lease of land. The complaint alleged that the contract was "in all respects, just, fair, and reasonable." In reversing the trial court's judgment for plaintiff and holding that defendant's demurrer should have been sustained, the Supreme Court held the plaintiff, in order to allege to good cause of action, must set forth facts which show that the consideration provided for in the contract sought to be specifically enforced is adequate, and that the contract is just and reasonable as to the defendant.

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21-214 California Points & Authorities § 214.36

§ 214.36 Supporting Demurrer to Complaint for Specific Performance [Civ. Code § 3384]--Contract for Sale or Transfer of Personal Property--Failure to Allege Inadequate Remedy at Law

[1] FORM Supporting Demurrer to Complaint for Specific Performance [Civ. Code § 3384]--Contract for Sale or Transfer of Personal Property--Failure to Allege Inadequate Remedy at Law

[*Caption. See § 214.30[1].*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT FAILS TO ALLEGE FACTS SHOWING THAT THE REMEDY AT LAW IS INADEQUATE IN AN ACTION FOR SPECIFIC PERFORMANCE OF A CONTRACT FOR THE SALE OR TRANSFER OF PERSONAL PROPERTY.

A. Objection by Demurrer. [*See § 214.30[1], Paragraph A.*]

B. Inadequate Remedy at Law. Specific performance of a contract for the sale or transfer of personal property will not be decreed where the remedy at law is adequate (*Dunner v. Hoover (1941) 43 Cal. App. 2d 753, 757, 111 P.2d 737*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a general demurrer to a complaint for specific performance of a contract for the sale or transfer of personal property if the demurrer asserts that the complaint fails to state facts

sufficient to constitute a cause of action in that it fails to allege that the remedy at law is inadequate.

When appropriate, counsel should insert argument in this form showing the relationship between the facts of his case and the points of law stated.

[3] Discussion of Authorities

[a] Inadequate Remedy at Law

Dunner v. Hoover *(1941) 43 Cal. App. 2d 753, 111 P.2d 737* , was an action to enforce rescission of the plaintiff's contract to sell a milk route with a customer list enabling defendant to sell 150 quarts per day. A judgment for specific performance was rendered in favor of defendant. In reversing the judgment, the court of appeal held that the action did not come within the exceptions to the rule that equity will not decree specific performance of a contract for the sale of personal property except in rare cases where the remedy at law is not adequate. The breach of the agreement could be relieved by pecuniary compensation on proof of the value of the customer list.

[4] Additional Authorities

[a] Inadequate Remedy at Law

In *Wehen v. Lundgaard (1940) 41 Cal. App. 2d 610, 107 P.2d 491* , a seller's assignee brought an action for specific performance of a conditional sale contract for an ice machine after default in the installments payable by the buyer. A judgment was entered for plaintiff but reversed on appeal. The court of appeal held that it is only where there are present circumstances in view of which a judgment for damages would fall short of the redress which the plaintiff's situation demands that equity will decree specific performance. The court stated that equity will not decree the specific performance of contracts relating to personal property where there is no specific quality in the individual articles which gives them a special value to the contracting party and where the recovery of damages will enable him to purchase others in the market of like kind and quality.

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21-214 California Points & Authorities § 214.37

§ 214.37 Supporting Demurrer to Complaint for Quasi-Specific Performance of Agreement to Leave Property by Will--Failure to Allege Inadequate Remedy at Law

[1] FORM Supporting Demurrer to Complaint for Quasi-Specific Performance of Agreement to Leave Property by Will--Failure to Allege Inadequate Remedy at Law

[*Caption. See § 214.30[1].*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION BECAUSE IT FAILS TO ALLEGE FACTS SHOWING THAT THE REMEDY AT LAW IS INADEQUATE AND THEREFORE QUASI-SPECIFIC PERFORMANCE OF THE CONTRACT TO LEAVE PROPERTY TO THE PLAINTIFF BY WILL CANNOT BE GRANTED.

A. Objection by Demurrer. [*See § 214.30[1], Paragraph A.*]

B. Inadequate Remedy at Law. A cause of action for quasi-specific performance of a contract to leave property in a prescribed manner by will will not lie unless the remedy at law is inadequate (*Flood v. Templeton (1905) 148 Cal. 374, 378, 83 P. 148* ; *Wilkison v. Wiederkehr (2002) 101 Cal. App. 4th 822, 832-833*).

[*Optional*] **C. Contract to Leave Money by Will.** When the contract is one to leave a sum of money by will, the remedy at law for breach of the contract is adequate (*Chahon v. Schneider (1953) 117 Cal. App. 2d 334, 345-346, 256 P.2d 54*).

[*Optional*] **D. Services Compensable in Money.** When services are performed by the plaintiff in consideration of the agreement, quasi-specific performance will not be granted because there is an adequate remedy at law in quantum meruit for the value of the services rendered, unless the services were of such a peculiar nature that their value cannot be estimated by any pecuniary standard (*Shive v. Barrow (1948) 88 Cal. App. 2d 838, 843-844, 199 P.2d 693*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]

By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a general demurrer to a complaint for quasi-specific performance of an agreement to leave property by will when the demurrer asserts that the complaint fails to state facts sufficient to constitute a cause of action in that it fails to allege that the remedy at law is inadequate.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

The points and authorities *set out in §§ 214.46 -214.48* may be used in an appropriate case to oppose a demurrer supported by this form.

[3] Discussion of Authorities

[a] Inadequate Remedy at Law

Flood v. Templeton *(1905) 148 Cal. 374, 83 P. 148* , was an action to enforce a contract to devise real property to plaintiff. The trial court overruled a demurrer to the complaint. Judgment for plaintiff was reversed on appeal. The Supreme Court held that equity does entertain contracts for specific performance to convey the whole or any portion of the promisor's property by will but only when the plaintiff cannot be compensated in money (*148 Cal. 374*).

In ***Wilkison v. Wiederkehr*** *(2002) 101 Cal. App. 4th 822* , plaintiff brought an action for quasi-specific performance, seeking to impose a constructive trust on the proceeds from the sale of the family home. Several of plaintiff's relatives had signed an agreement obligating each of them to make a will leaving that home to plaintiff's father. If all of the signatories had honored the agreement, plaintiff would have received the property by way of his father's will. Instead, however, his grandmother changed her will shortly before her death, which had the effect of leaving the property to plaintiff's aunt. The house was sold and the proceeds were placed in a bank account. Plaintiff sought to impose a constructive trust on those proceeds, and the trial court found in his favor. The court of appeal reversed. It determined that plaintiff could not maintain his action, which sought an equitable remedy, because he had an adequate remedy at law. He could have made a claim based on his grandmother's breach of the written agreement to leave the property to his father. In an action at law for damages, the plaintiff is a creditor and must file a claim against the estate of the deceased promisor. Plaintiff, however, failed to file a creditor's claim in his grandmother's probate proceeding. Because he had and adequate legal remedy, albeit not properly pursued, he could not obtain equitable relief in the form of quasi-specific performance of the family's written agreement (*101 Cal. App. 4th 822, 832-833)* .

[b] Contract to Leave Money by Will

Chahon v. Schneider *(1953) 117 Cal. App. 2d 334, 256 P.2d 54* , involved an action for quasi-specific performance of an oral contract to bequeath a certain bank account to the plaintiff. The trial court sustained a general demurrer to the complaint on the grounds the action was barred by the statute of frauds and entered judgment for defendants. In affirming the judgment, the court of appeal stated that an additional reason why equity would not intervene was that the complaint failed to state facts showing plaintiff's remedy at law was inadequate since damages for the breach of the agreement could be measured and was a definite sum of money recoverable at law (*117 Cal. App. 2d 334*).

[c] Services Compensable in Money

In ***Shive v. Barrow*** *(1948) 88 Cal. App. 2d 838, 199 P.2d 693* , an action for quasi-specific performance of an oral agreement to devise a parcel of real property by will in consideration of, among other things, plaintiff's rendition of labor and services in constructing a building on the property, judgment was entered for defendant after a demurrer was sustained to the third amended complaint. In affirming, the court of appeal noted that no facts were alleged to indicate that the services rendered by plaintiffs were of such a peculiar nature that their value could not be estimated by any pecuniary standard. The court then held that plaintiffs had an adequate remedy at law in quantum meruit for the value of the services performed, and that given the adequate remedy at law, quasi-specific performance could not be granted (*88 Cal. App. 2d 838*).

[4] Additional Authorities

[a] Contract to Leave Money by Will

Morrison v. Land (1915) 169 Cal. 580, 147 P. 259 , was an action for quasi-specific performance of a contract to bequeath $50,000 to plaintiff. A judgment for defendant was entered after a general demurrer to the complaint had been sustained without leave to amend. In affirming the judgment, the Supreme Court held that an ordinary action at law for breach of the contract would afford him full and adequate relief and, therefore, an action to specifically enforce the contract was not proper (*169 Cal. 580*).

[b] Services Compensable in Money

Kobus v. San Diego Trust & Sav. Bank (1959) 172 Cal. App. 2d 574, 342 P.2d 468 , involved an action to impose a constructive trust on all of the decedent's property and to enforce his oral agreement to leave the property to plaintiff, a professional nurse, in consideration of plaintiff's agreement to move into the decedent's residence, to do all the housework, and to care for the decedent for the rest of his life. In affirming a judgment in defendant's favor, the court of appeal found that there was no close family relationship and that the contract did not contemplate the giving of companionship, love, and affection that could not be compensated for in money. The court held that since the services were compensable in damages or in quantum meruit, plaintiff was not entitled to the equitable relief sought (*172 Cal. App. 2d 574*).

Hoyt v. Thomas (1922) 58 Cal. App 14, 207 P. 1038 , involved an action for specific performance of the decedent's agreement to leave plaintiff all of her property if plaintiff would provide the care and personal services, particularly in the management of her business affairs, as she might require for the rest of her life. A general demurrer to the second amended complaint was sustained, and judgment was entered in defendant's favor. Affirming, the court of appeal found that the agreement did not require plaintiff to provide the decedent with filial services or affection and that the services were not of such a peculiar nature that they were not susceptible to pecuniary measurement. Accordingly, the court held that plaintiff could be adequately compensated in money, so that specific performance should not be decreed (*58 Cal. App. 14*).

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21-214 California Points & Authorities § 214.38

§ 214.38 Supporting Demurrer to Complaint for Quasi-Specific Performance of Agreement to Leave Property by Will--Alleged Oral Agreement Fails to Satisfy Statutory or Equitable Criteria for Enforcement [Prob. Code § 21700; former Prob. Code § 150 (repealed Jan. 1, 2001); former Civ. Code § 1624(6) (repealed January 1, 1985)]

[1] FORM Supporting Demurrer to Complaint for Quasi-Specific Performance of Agreement to Leave Property by Will--Alleged Oral Agreement Fails to Satisfy Statutory or Equitable Criteria for Enforcement [Prob. Code § 21700; former Prob. Code § 150 (repealed Jan. 1, 2001); former Civ. Code § 1624(6) (repealed January 1, 1985)]

[*Caption. See § 214.30[1].*]

PLAINTIFF'S COMPLAINT, BASED ON AN ALLEGED ORAL CONTRACT MADE IN _____ [*year*] TO LEAVE PROPERTY TO PLAINTIFF BY WILL, FAILS TO STATE A CAUSE OF ACTION BECAUSE THE ALLEGED CONTRACT DOES NOT MEET THE REQUIREMENTS OF THE APPLICABLE STATUTE, _____ [*for pre-1985 contracts:* FORMER CIVIL CODE SECTION 1624(6) (REPEALED EFFECTIVE JANUARY 1, 1985) *or, for contracts made in the period beginning January 1, 1985 and ending December 31, 2000:* FORMER PROBATE CODE SECTION 150 (REPEALED EFFECTIVE JANUARY 1, 2001) *or, for contracts made on or after January 1, 2001:* PROBATE CODE SECTION 21700] AND IS THEREFORE UNENFORCEABLE [*for contracts made prior to 2001, add:*, AND THE COMPLAINT DOES NOT ALLEGE FACTS SHOWING THAT DEFENDANT IS EQUITABLY ESTOPPED FROM RELYING ON THAT STATUTE].

A. Objection by Demurrer. [*See § 214.30[1], Paragraph A.*]

[*Either, if complaint is based on contract made before 1985:*]

B. Writing Required. The validity of a contract to make a will or devise, when the contract was made before 1985, is governed by the law in effect before 1985 (*see Prob. Code § 21700(c)*; former Prob. Code § 150(c)). Former Civil Code Section 1624(6) (repealed January 1, 1985) provided that an agreement to devise or bequeath any property, or to make any provision for any person by will, was invalid unless it, or some note or memorandum of it, was in writing and subscribed by the party to be charged or by his or her agent.

[*Or, if complaint is based on contract made in 1985-2000:*]

B. Writing Required. The validity of a contract to make a will or devise, when the contract was made in 1985-2000, is governed by the law in effect during that period (*see Prob. Code § 21700(c)*). Former Probate Code § 150(a) (effective January 1, 1985; repealed January 1, 2001) provided that a contract to make a will or devise, or not to revoke a will or devise, or to die intestate, when the contract was made after 1984, could be established only by (1) provisions of a will stating material provisions of the contract, or (2) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract, or (3) a writing signed by the decedent evidencing the contract.

[*Or, if complaint is based on contract made after 2000:*]

B. Writing Required. A contract to make a will or devise or other instrument, or not to revoke a will or devise or other instrument, or to die intestate, when the contract was made after January 1, 2001, can be established only by (1) provisions of a will or other instrument stating the material provisions of the contract, or (2) an expressed reference in a will or other instrument to a contract and extrinsic evidence proving the terms of the contract, or (3) a writing signed by the decedent evidencing the contract, or (4) clear and convincing evidence of an agreement between the decedent and the claimant or a promise by the decedent to the claimant that is enforceable in equity, or (5) clear and convincing evidence of an agreement between the decedent and another person for the benefit of the claimant or a promise by the decedent to another person for the benefit of the claimant that is enforceable in equity (*Prob. Code § 21700(a)*).

[*Continue with the following:*]

[*If complaint is based on an oral agreement that allegedly is enforceable in equity, add Paragraphs C, D, and E, below, as appropriate:*]

C. Estoppel to Rely on Requirement That Contract Be Evidenced by Writing. An oral agreement to make a provision by will is enforceable in equity under the doctrine of estoppel only when the plaintiff alleges that he or she will suffer an unconscionable injury if the agreement is not enforced because of a detrimental change of position in reliance on the oral agreement or that unjust enrichment will result if the party who has received the benefits of the plaintiff's performance were allowed to invoke the statute (*see Kennedy v. Bank of America (1965) 237 Cal. App. 2d 637, 646, 47 Cal. Rptr. 154*).

D. Unconscionable Injury. The plaintiff's rendition of services for the decedent does not constitute unconscionable injury unless the services rendered were of such a peculiar, extraordinary, or unique nature that the law could not compensate for them in money (*Kennedy v. Bank of America (1965) 237 Cal. App. 2d 637, 647-648, 47 Cal. Rptr. 154*).

E. Unjust Enrichment. Unjust enrichment is not established by allegations that services were rendered to the decedent unless it is alleged that those services substantially contributed to the value of the decedent's business or to the assets that comprise the decedent's estate (*Kennedy v. Bank of America (1965) 237 Cal. App. 2d 637, 649, 47 Cal. Rptr. 154*).

[*Optional if alleged agreement was made prior to 1985:*] **F. Will Insufficient as Memorandum.** The execution of a will in accordance with an oral agreement when the will does not expressly refer to the agreement does not constitute a memorandum sufficient to satisfy the requirement that the contract be evidenced by a writing (*see Shive v. Barrow (1948) 88 Cal. App. 2d 838, 848, 199 P.2d 693*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a demurrer to a complaint for quasi-specific performance of an oral agreement to leave property by will. The grounds for the demurrer are that the agreement does not satisfy the applicable statutory criteria [*see § 214.38[3][a]*] for enforcement of a promise to leave property by will and that plaintiff has not alleged facts demonstrating that the alleged oral agreement is enforceable in equity.

Counsel should consider combining these points and authorities with the points and authorities *set forth in § 214.37* because the facts pertaining to whether the plaintiff is unconscionably injured for the purposes of estoppel may also relate to whether the plaintiff has an adequate remedy at law for the purposes of determining the availability of quasi-specific performance [*see Porporato v. Devincenzi (1968) 261 Cal. App. 2d 670, 678, 68 Cal. Rptr. 210]* .

If the complaint alleges that an oral agreement made prior to 1985 is evidenced by a will made pursuant to it, but the will does not expressly refer to the agreement, Paragraph F should be included to show that the will is insufficient as a memorandum for the purposes of validating the contract under the applicable statute of frauds, former Civ. Code § 1624(6). For additional discussion, see *§ 214.38[3][e]*.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should state that plaintiff has failed to allege either that he or she will suffer an unconscionable injury or that the party who received the benefits of the plaintiff's per formance will be unjustly enriched if the contract is not enforced [*see Kennedy v. Bank of America (1965) 237 Cal. App. 2d 637, 646, 47 Cal. Rptr. 154* (*discussed under § 214.38[3]* [b])].

The points and authorities *set out in §§ 214.49* and *214.50* may be used in an appropriate case to oppose a demurrer supported by this memorandum.

Counsel should note that the following cases were decided prior to legislation eliminating the language in former Civ. Code § 1624(6) (statute of frauds) referring to agreements to devise or bequeath property, or to make any provision for any person by will [*see Civ. Code § 1624(a)(5)*]. However, as noted *above*, former Prob. Code § 150 appears to continue the effect of the statute of frauds with respect to contracts to make a will or bequeath property. In fact, former Prob. Code § 150 incorporates the language of a number of the following cases with regard to the requirement that in order to constitute a memorandum of an oral contract to make a will, the will must reflect the essential terms of the contract, or expressly refer to the contract [*see* former Prob. Code § 150(a)(1), (2); *Kennedy v. Bank of America (1965) 237 Cal. App. 2d 637, 649, 47 Cal. Rptr. 154* (*discussed under § 214.38[3]* [b]); *Shive v. Barrow (1948) 88 Cal. App. 2d 838, 848, 199 P.2d 693* (*discussed under § 214.38[3][e]*); *Luders v. Security Trust & Sav. Bank (1932) 121 Cal. App 408, 410, 9 P.2d 271* (*discussed under § 214.38[4][d]*)]. Therefore, it seems that the principles of equity relied on by the following cases remain in effect, and that counsel may still rely on the reasoning of the cases in support of the rule that under circumstances of unjust enrichment or unconscionable injury, a defendant will be estopped from arguing that an oral contract to make a will or devise property in exchange for certain services is invalid because of the absence of written evidence of the contract.

[3] Discussion of Authorities

[a] Writing Required

The validity of a contract to make a will or devise is governed by one of three statutes of frauds, depending on when the contract was made. Before 1985, the applicable statute of frauds was former Civ. Code § 1624(6). That section was superseded on January 1, 1985, by former Prob. Code § 150, which in turn was repealed as of January 1, 2001, and supplanted by the current statute, *Prob. Code § 21700*. The current statute provides that "[a] contract to make a will or devise or other instrument, or not to revoke a will or devise or other instrument, or to die intestate, if made prior to the effective date of this section, shall be construed under the law applicable to the contract prior to the effective date of this section" [*Prob. Code § 21700(c)* (eff. Jan. 1, 2001)]. Former Prob. Code § 150 similarly provided, "A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if made on or before December 31, 1984, can be established only under the law applicable to the contract on December 31, 1984" [former Prob. Code § 150(c) (eff. Jan. 1, 1985)]. (A careful reading of the current statute shows an unintended gap in coverage. Neither the current statute nor the supplanted statute would apply in the case of a contract made on January 1, 2001, since the current statute applies to a contract "made *after* the effective date of this statute" [*Prob. Code § 21700(a)* (emphasis added)], while the supplanted statute would apply to a contract "made *prior to* the effective date of this section" [*Prob. Code § 21700(c)* (emphasis added)]. However, the legislature cannot have intended an absurd result; therefore, such a contract must be held to be governed by one or the other of those statutes.)

For pre-1985 contracts, case law established equitable rules under which an oral contract could be enforced on a theory of estoppel even if it did not satisfy the requirements of former Civ. Code § 1624(6) [*see discussion under § 214.38[3][b]*].

For 1985-2000 contracts, former Prob. Code § 150(a), expressly provided that a contract to make a will or devise could be established "only" by (1) provisions of a will stating material provisions of the contract, or (2) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract, or (3) a writing signed by the decedent evidencing the contract. However, courts have repeatedly held that the language of that section, notwithstanding use of the word "only" as noted above, did not preclude application of equitable estoppel in appropriate cases [*see, e.g., Estate of Housley v. Haywood (1997) 56 Cal. App. 4th 342, 353 354, 65 Cal. Rptr. 2d 628* , discussed in *§ 214.50[3]* [a]; *Estate of Brenzikofer v. Schwartz (1996) 49 Cal. App. 4th 1461, 57 Cal. Rptr. 2d 401* , discussed in *§ 214.50[4][a]*; *Juran v. Epstein (1994) 23 Cal. App. 4th 882, 897, 28 Cal. Rptr. 2d 588* , discussed in *§ 214.50[4][a]*].

For 2001 and later contracts, the current statute, *Prob. Code § 21700*, retains the three methods for establishing a contract or devise that previously appeared in former Prob. Code § 150, noted *above*, but in addition specifies two new statutory grounds under which such a contract may be established: (4) clear and convincing evidence of an agreement between the decedent and the claimant or a promise by the decedent to the claimant that is enforceable in equity, or (5) clear and convincing evidence of an agreement between the decedent and another person for the benefit of the claimant or a promise by the decedent to another person for the benefit of the claimant that is enforceable in equity. Legislative analysis indicates that these additions were intended at least in part to codify the equitable basis for establishing such a contract that previously had been recognized by the case law [*see* Bill Analysis, Senate Judiciary Committee, AB 1491, 1999-2000 Regular Session, pp. 12-13 (March 28, 2000); Bill Analysis, Assembly Committee on Judiciary, AB 1491, 1999-2000 Regular Session, p. 4 (Jan. 11, 2000)].

[b] Estoppel to Rely on Requirement That Contract Be Evidenced by Writing

In ***Kennedy v. Bank of America*** *(1965) 237 Cal. App. 2d 637, 47 Cal. Rptr. 154* , judgment was entered for the defendants after a demurrer to plaintiff's second amended complaint for quasi-specific performance of an oral agreement to leave property by will was sustained without leave to amend. The court of appeal noted that the estoppel to lift an agreement to make a provision by will out of the operation of the statute of frauds is based either on an unconscionable injury that would result from denying enforcement after one party has been induced to make a detrimental change of position in reliance on the oral agreement or on the unjust enrichment that would result if the

party who has received the benefits of the performance of the other were allowed to invoke the statute. The court affirmed because plaintiff had not pleaded facts sufficient to allege either ground of estoppel (*237 Cal. App. 2d 637, 646)* .

As *discussed under § 214.38[3][a]*, case law has validated the continuing application of promissory estoppel principles to oral contracts to make wills when those contracts are made on or after January 1, 1985. Although the leading cases applying equitable estoppel principles to post-1984 contracts held that the facts presented *were* appropriate to invoke application of promissory estoppel, they do note the continuing applicability of the requirements of unconscionable injury or unjust enrichment in the context of post-1984 agreements [*see* *Estate of Housley v. Haywood (1997) 56 Cal. App. 4th 342, 351, 353-354, 65 Cal. Rptr. 2d 628* , discussed in *§ 214.50[3]* [a]; *Juran v. Epstein (1994) 23 Cal. App. 4th 882, 892, 28 Cal. Rptr. 2d 588* , also discussed in *§ 214.50[4][a]*].

[c] Unconscionable Injury

The procedural background of ***Kennedy v. Bank of America*** *(1965) 237 Cal. App. 2d 637, 47 Cal. Rptr. 154* , is *discussed under § 214.38[3][b]*. In affirming, the court of appeal held that plaintiff's allegations that she performed services as a domestic servant and as an assistant in the decedent's retail gasoline station business could be adequately compensated in money and were not peculiar, exceptional, or unique (*237 Cal. App. 2d 637, 647)* . The court noted that plaintiff did not allege that she made her home with the decedent, that any close familiar relationship was involved, that she attended to the decedent's personal needs or nursed him through any illness, or that she did anything destructive to her peace and comfort or injurious to her health for which money could not compensate (*237 Cal. App. 2d 637, 647-648)* . The court additionally noted that plaintiff did not allege that she was uprooted from an established home, moved to a new area, abandoned a going business, sacrificed better opportunities, took the decedent into her owm home, or had any greater relationship than master and servant (*237 Cal. App. 2d 637, 647-648)* .

[d] Unjust Enrichment

The procedural background of ***Kennedy v. Bank of America*** *(1965) 237 Cal. App. 2d 637, 47 Cal. Rptr. 154* , is *discussed under § 214.38[3][b]*. The court held that the complaint did not allege sufficient facts to show that the decedent or the benefeciaries under his will would be unjustly enriched if the oral agreement were not enforced because there was no allegation that the services plaintiff rendered substantially contributed to the value of the decedent's business or to the assets which comprised the decedent's estate. The court held that unjust enrichment does not result and cannot be implied from mere allegations that plaintiff performed services of an impersonal nature for the decedent (*237 Cal. App. 2d 637, 649)* .

[e] Will Insufficient as Memorandum

The facts and procedural background of ***Shive v. Barrow*** *(1948) 88 Cal. App. 2d 838, 199 P.2d 693* , are discussed in *§ 214.37[3][c]*. In affirming, the court of appeal held that the execution of a will in accordance with an oral agreement which does not expressly refer to the agreement does not constitute a note or memorandum sufficient to satisfy the statute of frauds, and that the making of a will by the promisor conforming to an oral agreement is not part performance of the agreement (*88 Cal. App. 2d 838, 848)* [citing *Notten v. Mensing (1935) 3 Cal. 2d 469, 473, 474, 45 P.2d 198* (discussed in *§ 214.50[3][b]*)].

By contrast, in ***Potter v. Bland*** *(1955) 136 Cal. App. 2d 125, 288 P.2d 569* , a will was held to be a sufficient memorandum to remove an oral agreement to leave real property by will when the will stated: "I agree to leave my property upon my death as provided in this will" (*136 Cal. App. 2d 125, 129-132)* .

Note that the above cases involved contracts made prior to 1985; those contracts are governed by former Civ. Code § 1624(6). Contracts to make wills made after January 1, 1985, are governed by former Prob. Code § 150 (1985-2000)

and *Prob. Code § 21700* (post-2000), which contain much more specific statements regarding validation of such contracts by references in wills. Under both of those sections, a contract to make a will can be validated by either (1) provisions of a will stating material provisions of the contract, or (2) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract. The validity of the above cases to a contract made in or after 1985 therefore is questionable in light of the statutory grounds noted in the preceding sentence, and caution should be exercised in using these cases as authority with respect to such a contract in the absence of authority specifically holding these cases applicable to contracts made in or after 1985.

[4] Additional Authorities

[a] Estoppel to Rely on Requirement That Contract Be Evidenced by Writing

Palmer v. Phillips (1954) 123 Cal. App. 2d 291, 266 P.2d 850 , involved an action for quasi-specific performance of the decedent's oral agreement to make a will leaving all her property to plaintiffs in consideration of services rendered by plaintiffs. The services included caring for the decedent's business matters, advising in personal matters, furnishing transportation, assisting in shopping, nursing, and caring for the decedent, doing laundry, running errands, and furnishing companionship and enjoyment. Defendants dafaulted, but the court held that the complaint failed to state a cause of action and entered judgment dismissing the suit. The court of appeal affirmed, holding that the complaint failed to allege facts showing unconscionable injury or unjust enrichment that would establish estoppel and lift the bar of the statute of frauds (*123 Cal. App. 2d 291, 295)* .

In *Chahon v. Schneider (1953) 117 Cal. App. 2d 334, 256 P.2d 54* , the court of appeal affirmed judgment for the defendant entered after a demurrer to the amended complaint for quasi-specific performance of an oral agreement to leave property by will was sustained without leave to amend. The court held that the plaintiff had failed to allege facts showing estoppel to rely on the statute of frauds. Plaintiff had alleged that she agreed to take the decedent into her home and give him room, board, and laundry for $40 per month. Later, plaintiff also provided nursing care, and when she and her husband decided to terminate the relationship, the decedent promised, that, if plaintiff would care for him for the rest of his life, he would leave her a bank account, then containing $46,000. Plaintiff allowed the decedent to stay and provided him with household services and nursing care, did all of his personal errands outside the house, and took him on weekend trips. Plaintiff also alleged that after her husband's death, when she wished to sell her house and engage in a fuller social life than she could while continually at home to care for the decedent, the decedent reiterated his promise to leave her the bank account and she continued to care for him in reliance on his promises. The court held that plaintiff had not so changed her position and that the services rendered were not so peculiar that she could not be compensated in money. The court held that neither unconscionable injury nor unjust enrichment was present since there was an adequate remedy at law for the value of the services (*117 Cal. App. 2d 334, 338-339)* .

[b] Unconscionable Injury

Lombardo v. Santa Monica Young Men's Christian Assn. (1985) 169 Cal. App. 3d 529, 215 Cal. Rptr. 244 , was determined on summary judgment and involved claims for the devise of specific property or plaintiff's right to live there rent-free for as long as she chose. The consideration had been services and affection. There were two writings. One was interpreted as merely expressing appreciation and the intention to devise property to plaintiff, not an actual promise to do so. Insufficient facts existed to estop application of the statute of frauds (*169 Cal. App. 3d 529, 537-540)* . The writing relating to claim for rent-free occupancy was determined to have memorialized an agency, the rent-free occupancy being consideration for the services involved in performance of the agent's duties. Such an agency, not coupled with an interest, did not survive the principal's death (*169 Cal. App. 3d 529, 540-542)* .

Kobus v. San Diego Trust & Sav. Bank (1959) 172 Cal. App. 2d 574, 342 P.2d 468 , is discussed in *§ 214.37[4][b]*.

The procedural background of *Palmer v. Phillips (1954) 123 Cal. App. 2d 291* , *266 P.2d 850* , is *discussed under §*

214.38[4][a]. In affirming, the court of appeal held that the miscellaneous services involved, including some that were purely impersonal and some that were intimate and confidential in nature, were not so peculiar, extraordinary, or exceptional in character that their value could not be estimated by any pecuniary standard and that since their value could be recovered in quantum meruit and no other detrimental change in position was alleged, neither unconscionable injury nor unjust enrichment was sufficiently alleged (*123 Cal. App. 2d 291, 295-296)* .

[c] Unjust Enrichment

In *Smith v. Smith (1954) 126 Cal. App. 2d 194, 272 P.2d 118* , the court of appeal affirmed a judgment for defendant entered after a demurrer to the second amended complaint for quasi-specific performance of an oral agreement to leave property to the plaintiff in consideration of services rendered to his aunt and uncle was sustained without leave to amend. The court of appeal held that there was no allegation of unjust enrichment because plaintiff did not allege that his management of his aunt and uncle's property met with any success that benefited them (*126 Cal. App. 2d 194, 198)* .

Palmer v. Phillips (1954) 123 Cal. App. 2d 291, 266 P.2d 850 , is *discussed under § 214.38[4][b]*.

[d] Will Insufficient as Memorandum

In *Kennedy v. Bank of America (1965) 237 Cal. App. 2d 637, 47 Cal. Rptr. 154* , which is *discussed under § 214.38[3][b]*, the decedent executed both a holographic will and a formal will to carry out his agreement before he executed another will in which plaintiff was not named as a beneficiary. In affirming part of a judgment for defendants, the court of appeal held that the wills that would have carried out the agreement did not constitute sufficient memoranda of the oral agreement to satisfy the statute of frauds because neither will referred to the oral agreement (*237 Cal. App. 2d 637, 649)* .

The factual and procedural background of *Kobus v. San Diego Trust & Sav. Bank (1959) 172 Cal. App. 2d 574, 342 P.2d 468* , is discussed in *§ 214.37[4][b]*. In that case, the decedent executed a will to fulfill his promise to leave his property to plaintiff, but the will could not be probated because it was improperly executed. In affirming judgment for defendants, the court of appeal held that the invalid will, which contained no reference to the alleged oral agreement, did not constitute a sufficient memorandum to satisfy the statute of frauds (*172 Cal. App. 2d 574, 577, 579)* .

Luders v. Security Trust & Sav. Bank (1932) 121 Cal. App 408, 9 P.2d 271 , was an action to enforce a trust on a decedent's property in accordance with the decedent's promise to leave all her property to plaintiff. In affirming judgment for defendants, the court of appeal held that a will executed by the decedent and leaving her property to plaintiff "for her faithful service to me" was not a sufficient memorandum to remove the agreement from the statute of frauds because it did not contain the essential terms of the contract (*121 Cal. App 408, 410-413)* .

NOTE:

The above cases involved contracts made prior to 1985; those contracts are governed by former Civ. Code § 1624(6). Contracts to make wills made after January 1, 1985, are governed by former Prob. Code § 150 (1985-2000) and *Prob. Code § 21700* (post-2000), which contain much more specific statements regarding validation of such contracts by references in wills. For discussion, see *§ 214.38[3][e]*.

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 214 SPECIFIC PERFORMANCE
PART II. FORMS

21-214 California Points & Authorities § 214.39

§ 214.39 Supporting Demurrer to Complaint for Quasi-Specific Performance of Agreement to Leave Property by Will--No Cause of Action Arises During Promisor's Lifetime Unless Agreement Designates Specific Property and Restricts Promisor's Use of That Property

[1] FORM Supporting Demurrer to Complaint for Quasi-Specific Performance of Agreement to Leave Property by Will--No Cause of Action Arises During Promisor's Lifetime Unless Agreement Designates Specific Property and Restricts Promisor's Use of That Property

[*Caption. See § 214.30[1].*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION BECAUSE THE AGREEMENT INVOLVED DOES NOT SPECIFY ANY PARTICULAR PIECE OF PROPERTY [AND DOES NOT RESTRICT DEFENDANT'S RIGHT TO CONSUME OR SELL HIS/HER PROPERTY]. THE PROMISE IS EFFECTIVE ONLY AS TO PROPERTY OWNED BY DEFENDANT AT THE TIME OF HIS/HER DEATH AND NO CAUSE OF ACTION ARISES UNTIL THEN.

A. Objection by Demurrer. [*See § 214.30[1], Paragraph A.*]

B. No Cause of Action During Promisor's Lifetime. When an agreement provides that the promisor will leave to the promisee whatever property the promisor owns at the time of his or her death, the promisor has the right, during his or her lifetime, to consume his or her property for reasonably necessary living expenses and to dispose of his or her property. Since the specific property in which the promisee may claim an interest cannot be identified until the promisor's death, no constructive trust can be imposed on the promisor's property during his or her lifetime (Westbrook v. Superior Court (l986) *176 Cal. App. 3d 703, 712, 222 Cal. Rptr. 317*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a general demurrer to a complaint filed during the promisor's lifetime seeking quasi-specific performance, by imposition of a constructive trust on property of the promisor, of an agreement to leave property by will when the agreement at issue did not reserve particular or identifiable property to the promisee.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the point of law stated. Counsel may wish to contrast the agreement at issue with those cases which described specifics with requisite sufficiency to give rise to a cause of action during the promisor's lifetime. Those cases are discussed in *§ 214.47[3][b]*.

[3] Discussion of Authorities

[a] No Cause of Action During Promisor's Lifetime

The agreement in **Westbrook v. Superior Court** (l986) *176 Cal. App. 3d 703, 222 Cal. Rptr. 317* , provided that defendant, the husband of plaintiff's aunt, would make a will, and not revoke it, providing that on defendant's death, plaintiff would receive all of defendant's property. The agreement obligated plaintiff, if his aunt died before she was old enough to receive a principal distribution from a trust of which both she and plaintiff were beneficiaries, to pay defendant $3000 a month for the rest of defendant's life or to give him property which would generate comparable income. Plaintiff had earlier fulfilled his obligation under the agreement by giving defendant a half interest in an inn then worth approximately $1 million. Later, plaintiff sold his half of the inn to defendant. Still later, defendant sold the inn for $2.2 million and invested the proceeds in the property that was the subject of the action. Defendant had refused to confirm to plaintiff that he had made a will for plaintiff's benefit and told plaintiff that he would leave him nothing. As far as plaintiff knew, the property sought to be subjected to the trust was the only property defendant owned. Plaintiff also filed a lis pendens on the property. The trial court expunged the lis pendens, and plaintiff sought a writ of mandate compelling the trial court to vacate its order expunging the lis pendens.

The court of appeal refused to issue the writ of mandate, saying the expunging of the lis pendens was proper under former Code Civ. Proc. § 409.1 [*now see Code Civ. Proc. §§ 405.30-405.33*]. The court of appeal gave two reasons why imposition of the constructive trust was not proper: first, a promisor has the right, during his or her lifetime, to consume his or her property for reasonably necessary living expenses in good faith, and at least so long as it is not done for the purpose of defeating the agreement, to dispose of his or her property; and, second, the specific property in which the promisee may claim an interest cannot be identified until the promisor's death (*176 Cal. App. 3d 703, 712)* . The court of appeal concluded by distinguishing *Brewer v. Simpson (1960) 53 Cal. 2d 567, 2 Cal. Rptr. 609, 349 P.2d 289* , and *Osborn v. Hoyt (1919) 181 Cal. 336* (discussed in *§ 214.47[3][b]*), on the basis that in those cases specific property had been named in the agreement or, in the case of spouses agreeing to make and not to revoke mutual wills, became identifiable on the first death (*176 Cal. App. 3d 703, 712-713)* .

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 214 SPECIFIC PERFORMANCE
PART II. FORMS

21-214 California Points & Authorities § 214.40

§ 214.40 Opposing Demurrer to Complaint for Specific Performance [Civ. Code § 3384]--General Allegation of Plaintiff's Performance Sufficient [Code Civ. Proc. § 457]

[1] FORM Opposing Demurrer to Complaint for Specific Performance [Civ. Code § 3384]--General Allegation of Plaintiff's Performance Sufficient [Code Civ. Proc. § 457]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN OPPOSITION TO DEMURRER TO COM-
vs.	)	PLAINT
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

PLAINTIFF NEED NOT ALLEGE FACTS SHOWING PERFORMANCE, TENDER OF PERFORMANCE, OR ABILITY AND WILLINGNESS TO PERFORM CONDITIONS PRECEDENT WHERE PLAINTIFF HAS ALLEGED GENERALLY PLAINTIFF'S DUE PERFORMANCE OF ALL CONDITIONS ON PLAINTIFF'S PART.

Allegation of Performance of Conditions Precedent. In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part, and if such allegation be controverted, the party pleading must establish at trial the facts showing such performance (*Code Civ. Proc. § 457*).

Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a general demurrer to a complaint for specific performance when the demurrer asserts that the complaint fails to allege facts showing plaintiff's performance, tender of performance, or ability and willingness to perform conditions precedent, and when the complaint generally alleges the plaintiff's performance of all conditions on plaintiff's part.

When appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Additional Authorities

[a] Allegation of Performance of Conditions Precedent

Gilfallan v. Gilfallan *(1914) 168 Cal. 23, 141 P. 623* , was an action by a vendee for specific performance of a contract to sell 50,000 shares of stock. A judgment for defendant, rendered after the sustaining of a demurrer to the complaint, was reversed on appeal. The Supreme Court held that an allegation that the plaintiff has duly and faithfully complied with and performed each and all of the provisions of the contract on his part to be kept and performed is a sufficient allegation of the performance of all the conditions precedent.

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CHAPTER 214 SPECIFIC PERFORMANCE
PART II. FORMS

21-214 California Points & Authorities § 214.41

§ 214.41 Opposing Demurrer to Complaint for Specific Performance [Civ. Code § 3384]--Defendant's Repudiation Excuses Plaintiff's Performance [Civ. Code § 1440]

[1] FORM Opposing Demurrer to Complaint for Specific Performance [Civ. Code § 3384]--Defendant's Repudiation Excuses Plaintiff's Performance [Civ. Code § 1440]

[*Caption. See § 214.40[1].*]

PLAINTIFF NEED NOT ALLEGE FACTS SHOWING PERFORMANCE, TENDER OF PERFORMANCE, OR ABILITY AND WILLINGNESS TO PERFORM CONDITIONS PRECEDENT WHERE PLAINTIFF HAS ALLEGED DEFENDANT'S REPUDIATION OF THE AGREEMENT.

Repudiation as Excuses Performance. When one party to an obligation gives notice to another party that the first party will not perform the obligation, the other party who is not then in default is entitled to enforce the obligation without performing or offering to perform any conditions on that party's own part in favor of the defaulting party (*Civ. Code § 1440*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a general demurrer to a complaint for specific performance when the demurrer asserts that the complaint fails to allege facts showing plaintiff's performance, tender of performance, or ability and willingness to perform conditions precedent, and when the complaint alleges defendant's

repudiation of the agreement sought to be enforced.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Additional Authorities

[a] Repudiation as Excuses Performance

In ***Beverage v. Canton Placer Mining Co.*** *(1955) 43 Cal. 2d 769, 278 P.2d 694* , an action for specific performance of the defendant's contract to convey a parcel of real property to plaintiffs, the plaintiffs alleged that the defendant refused and failed to perform the contract after repeated demands for performance, and plaintiffs were and continued to be ready, willing, and able to perform the contract. In reversing a judgment on the pleadings for defendant with directions to permit amendment of the complaint to allege repudiation, the Supreme Court held that when a vendor repudiates a contract and indicates that he is not bound thereby, performance of a tender of performance is unnecessary.

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21-214 California Points & Authorities § 214.42

§ 214.42 Opposing Demurrer to Complaint for Specific Performance [Civ. Code § 3384]--Terms of Contract Are Sufficiently Certain

[1] FORM Opposing Demurrer to Complaint for Specific Performance [Civ. Code § 3384]--Terms of Contract Are Sufficiently Certain

[*Caption. See § 214.40[1].*]

A COMPLAINT IS NOT SUBJECT TO DEMURRER ON THE GROUND OF UNCERTAINTY OF THE TERMS OF THE AGREEMENT IF ALL THE MATERIAL TERMS OF THE AGREEMENT ARE ALLEGED AND THE INCIDENTAL TERMS CAN BE INFERRED FROM CUSTOM AND USAGE.

Contract Containing Material Terms Is Sufficient. A complaint for specific performance states a cause of action if the contract as alleged in the complaint contains all the material terms of the agreement and the incidental terms of the agreement can be inferred from custom and usage (*King v. Stanley (1948) 32 Cal. 2d 584, 588-589, 197 P.2d 321 , disapproved on other grounds, Patel v. Liebermensch (2008) 45 Cal. 4th 344, 351, 86 Cal. Rptr. 3d 366, 197 P.3d 177*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a general demurrer to a complaint for specific performance when the demurrer asserts that the complaint fails to allege facts showing an agreement with terms

sufficiently certain as to make clearly ascertainable the precise act to be enforced but when the contract as alleged in the complaint contains all the material terms of the parties' agreement and the incidental terms of the agreement can be inferred from custom and usage.

Counsel should insert argument in the form showing the relationship between the facts of his case and the points of law stated.

[3] Discussion of Authorities

[a] Contract containing Material Terms Is Sufficient

King v. Stanley *(1948) 32 Cal. 2d 584, 197 P.2d 321* , was an action for specific performance of a contract to sell two lots, resulting in judgment for plaintiff. On appeal, it was contended that it could not be ascertained with reasonable certainty from the parties' exchange of writings the duties of each and the conditions of performance. In rejecting this contention, the Supreme Court held that equity does not require that all the terms and conditions of a proposed agreement be set forth in the contract. The usual and reasonable conditions of such a contract are a part of the agreement, and, in the absence of express conditions, custom determines incidental matters relating to the opening of an escrow, furnishing deeds and title insurance policies, prorating of taxes, and the like. The material facts that must be ascertainable from the written contract are the seller, the buyer, the price to be paid, and the property to be transferred (*32 Cal. 2d 584, 588-589)* .

In the list of essential terms, the court in *King v. Stanley* included the time and manner of payment. However, in a subsequent case the court concluded that neither the time of payment nor the manner of payment is an essential term in a contract for sale; therefore, *King v. Stanley* is disapproved to the extent that it states otherwise (*Patel v. Liebermensch (2008) 45 Cal. 4th 344, 351, 86 Cal. Rptr. 3d 366, 197 P.3d 177*).

[4] Additional Authorities

[a] Contract Containing Material Terms Is Sufficient

In *De Anza Enterprises v. Johnson (2002) 104 Cal. App. 4th 1307* , a joint venturer sought specific performance of a term in the joint venture agreement allowing plaintiff to purchase the interest of defendant in the property owned by plaintiff and defendant as part of their joint venture. The agreement did not specify a date by which the valuation was to be measured. The trial court concluded that the agreement was clear on fixing the purchase price by mutual agreement or by appraisal, leaving the date when the fixing would occur to follow as a matter of course after the selection of appraisers. It ordered specific performance, setting the date of valuation to correspond to the time of appraisal, *i.e.*, to follow the buy-out election and appointment of appraisers "as a matter of course." The court did not propose to override the parties' apparent intent to have the property valued by appraisers as part of the appraisal process, which neither party had yet triggered. On appeal, plaintiff disputed the purchase price of defendant's interest, contending that the appraised value of the property should have been determined as of the date defendant defaulted on his contractual obligation, the date plaintiff declared an intention to buy out defendant, or at the latest, the date plaintiff brought the lawsuit. The court of appeal affirmed. Examination of the contract terms, in the context of the document as a whole and the surrounding circumstances, led to the conclusion reached by the trial court that the parties intended to fix the purchase price by mutual agreement or appraisal, leaving the date when the fixing would occur to follow as a matter of course (*104 Cal. App. 4th 1307, 1318)* .

Okun v. Morton (1988) 203 Cal. App. 3d 805, 250 Cal. Rptr. 220 , dealt with the defense of uncertainty in the context of affirming the portions of a judgment awarding plaintiff specific performance and damages for breach of contract. The provision at issue was in an investment contract stating that plaintiff could participate in future ventures "in a manner mutually agreeable in the same ratio which we currently hold stock." It was challenged as a fatally uncertain agreement to agree. The court of appeal said that the defense of uncertainty only has validity when the uncertainty or

incompleteness of the contract prevents the court from knowing what to enforce (*203 Cal. App. 3d 805, 817)* . Even when the uncertainty goes to the precise act which is to be done, extrinsic evidence is admissible to determine what the parties intended. It is only when the extrinsic evidence fails to remove the ambiguity that specific performance must be refused (*203 Cal. App. 3d 805, 819)* . In this case, the extrinsic evidence regarding the conduct of the parties in implementing that provision with respect to their second and third ventures cured any defects or omissions that might render the provision unenforceable (*203 Cal. App. 3d 805, 817-820)* .

In *Burrow v. Timmsen (1963) 223 Cal. App. 2d 283, 35 Cal. Rptr. 668, 100 A.L.R.2d 544* , plaintiff sought specific performance of a land sale or damages. Judgment was entered for defendants after defendants' objections to the introduction of evidence were sustained and their motion for judgment of the pleadings was granted. The contract provided that for the unpaid balance of the purchase price the plaintiff would execute a promissory note for $37,000 with 7 percent interest, payments at $300 per month, and a deed of trust as security for the note. Judgment was reversed on appeal. In concluding that the agreement was not so uncertain as to be incapable of specific enforcement, the court of appeal stated that it was not required that every term and condition of an agreement be set forth in the contract. The usual and reasonable terms found in similar contracts, inferences from the writing, external facts, and custom and usage may be resorted to in an effort to supply a deficiency in an agreement.

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21-214 California Points & Authorities § 214.43

§ 214.43 Opposing Demurrer to Complaint for Specific Performance [Civ. Code § 3384]--Sufficient Contract Description of Property

[1] FORM Opposing Demurrer to Complaint for Specific Performance [Civ. Code § 3384]--Sufficient Contract Description of Property

[*Caption. See § 214.40[1].*]

A COMPLAINT IS NOT SUBJECT TO DEMURRER ON THE GROUND THAT THE DESCRIPTION OF THE PROPERTY SOUGHT TO BE CONVEYED IS INSUFFICIENTLY CERTAIN WHEN IT ALLEGES AN AGREEMENT WITH A DESCRIPTION SUFFICIENT TO ENABLE A COMPETENT SURVEYOR TO LOCATE OR IDENTIFY THE PROPERTY.

Sufficiency of Property Description. A description of property is sufficient if it would enable a competent surveyor to locate or identify the property (*Carlson v. Richardson (1968) 267 Cal. App. 2d 204, 207, 72 Cal. Rptr. 769*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a general demurrer to a complaint for specific performance when the demurrer asserts that the complaint fails to allege that the property sought to be conveyed was sufficiently described in the agreement.

Counsel should insert argument in the form showing the relationship between the facts and the points of law stated.

[3] Discussion of Authorities

[a] Sufficiency of Property Description

Carlson v. Richardson *(1968) 267 Cal. App. 2d 204, 72 Cal. Rptr. 769* , was a vendees' action for specific performance of an agreement to sell one acre of a certain coastal promontory enclosed by drawing a line from northwest to southeast across the neck of the promontory. A judgment of dismissal was entered after sustaining of a general demurrer to the complaint. In reversing the judgment with directions to overrule the demurrer, the court of appeal held that the usual test for sufficiency of a property description is whether a competent surveyor would have any difficulty in locating the land and establishing its boundaries from the description contained in the agreement to convey. The court explained that a description is certain enough if it furnished the means or key by which the location of the property in question may be identified (*267 Cal. App. 2d 204, 207)* .

[4] Additional Authorities

[a] Sufficiency of Property Description

Calvi v. Bittner (1961) 198 Cal. App. 2d 312, 17 Cal. Rptr. 850 , involved an action for specific performance of a deposit receipt agreement for the defendant's sale of land. The complaint alleged that the receipt's notation "AP 73-28-12" referred to a particular parcel shown on a certain assesor's parcel map. A judgment entered after a general demurrer to the complaint has been sustained without leave to amend was reversed on appeal. In holding that the parcel was sufficiently described in the agreement, the court of appeal stated that the description must be such, either in terms or by reference, that the property can be ascertained without resort to parol evidence for the purpose of supplying a description.

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21-214 California Points & Authorities § 214.44

§ 214.44 Opposing Demurrer to Complaint for Specific Performance [Civ. Code § 3384]--Agreed Consideration Is Reasonable Value of Property

[1] FORM Opposing Demurrer to Complaint for Specific Performance [Civ. Code § 3384]--Agreed Consideration Is Reasonable Value of Property

[*Caption. See § 214.40[1].*]

A COMPLAINT IS NOT SUBJECT TO DEMURRER ON THE GROUND THAT IT FAILS TO ALLEGE THAT THE CONSIDERATION FOR THE AGREEMENT IS ADEQUATE, FAIR, AND JUST TO THE DEFENDANT WHERE IT ALLEGES THAT THE AGREED CONSIDERATION IS THE FAIR AND REASONABLE VALUE OF THE PROPERTY.

Fair and Reasonable Value of Property. An allegation that the agreed sale price is a fair and reasonable value of the property is a sufficient allegation that the consideration was fair and adequate (*W.G. Reese Co. v. House (1912) 162 Cal. 740, 745, 124 P. 442*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a general demurrer to a complaint for specific performance where the demurrer asserts that the complaint fails to allege that the agreed consideration for the agreement was fair and reasonable.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Fair and Reasonable Value of Property

W.G. Reese Co. v. House *(1912) 162 Cal. 740, 124 P. 442* , was an action for specific performance of an option to buy certain real property duly exercised by plaintiff and conveyance of the property to plaintiff by the defendant's grantees. A judgment of dismissal was entered on the sustaining of a demurrer to the complaint without leave to amend. In reversing the judgment with directions to overrule the demurrer, the Supreme Court held that to compel the specific performance of a contract, it must be made to appear by affirmative allegation that the consideration was fair and adequate. It is not enough to merely state the legal conclusion of adequacy. Facts supporting the conclusion must be pleaded. Such facts are sufficiently alleged when there is a specific averment to the effect that the agreed sale price is, and at all times since the execution of the agreement has been, a fair and reasonable value of the property (*162 Cal. 740, 745)* .

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21-214 California Points & Authorities § 214.45

§ 214.45 Opposing Demurrer to Complaint for Specific Performance [Civ. Code § 3384]--Remedy at Law Inadequate

[1] FORM Opposing Demurrer to Complaint for Specific Performance [Civ. Code § 3384]--Remedy at Law Inadequate

[*Caption, See § 214.40[1].*]

A COMPLAINT ALLEGES A CAUSE OF ACTION FOR SPECIFIC PERFORMANCE OF AN AGREEMENT WHERE IT STATES FACTS SHOWING THE REMEDY AT LAW TO BE INADEQUATE.

A. Inadequate Remedy at Law. Specific performance is proper when the remedy at law is inadequate because pecuniary compensation will not afford adequate relief (*Gilfallan v. Gilfallan (1914) 168 Cal. 23, 25, 141 P. 623*).

[*Optional*] **B. Remedy at Law Inadequate for Untraded Stock.** The remedy at law is inadequate when the contract is one to sell or convey stock that is not traded in the market and that has no established market value (*Capaldi v. Levy (1969) 1 Cal. App. 3d 274, 281, 81 Cal. Rptr. 629*).

[*Optional*] **C. Remedy at Law Inadequate for Unavailable Stock.** The remedy at law is inadequate when the contract is one for the sale of stock that cannot be purchased on the open market (*Kaneko v. Okuda (1961) 195 Cal. App 2d 217, 233-234, 15 Cal. Rptr. 792*).

[*Optional*] **D. Unique Goods or Other Circumstances Under Commercial Code.** Specific performance of a contract for the sale of goods subject to Division 2 of the Commercial Code may be decreed if the goods are unique or other circumstances make specific performance of the contract proper (*Com. Code § 2716(1)*).

[*Optional*] **E. Goods Defined.** Goods are all things that are movable at the time of indentification to the contract for sale other than the money in which the price is to be paid, investment securities, and things in action (Com. Code § 2015(1)).

[*Optional*] **F. Goods That Cannot Be Covered or Replaced.** The remedy at law is inadequate when the contract is for the sale of goods that cannot be economically obtained elsewhere or replaced (*Kaiser Trading Co. v. Associated*

Metals & Minerals Corp. (N.D. Cal. 1970) 321 F. Supp. 923, 932-933) .

[*Optional*] **G. Contractual Stipulation for Equitable Relief Should Be Honored.** When the parties have stipulated in the contract that the remedy at law would be inadequate and that specific performance is the appropriate relief in the event of a breach of the contract, it is proper for the trial court to honor the parties' agreement unless the court finds that to do so would be contrary to a rule of law or public policy (*DVD Copy Control Assn., Inc. v. Kaleidescape, Inc. (2009) 176 Cal. App. 4th 697, 725726, 97 Cal. Rptr. 3d 856*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a general demurrer to a complaint for specific performance when the demurrer asserts that the complaint fails to allege facts showing that the remedy at law is inadequate. Paragraphs D and E, if appropriate, should be used together. Paragraph F, if appropriate, should accompany Paragraphs D and E.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Inadequate Remedy at Law

Gilfallan v. Gilfallan *(1914) 168 Cal. 23, 141 P. 623* , was an action for specific performance of a contract to sell 50,000 shares of an oil company stock. A judgment was entered for the defendant after the sustaining of a demurrer to the amended complaint and was reversed on appeal. The complaint alleged that at the time of the contract's execution (1) the company's only property was unproven oil land with speculative and uncertain value; (2) defendant owned 100,000 of the company's 300,00 shares of stock; (3) the stock had no actual or market value; and (4) plaintiff could not obtain all or a considerable portion of 500,000 shares from the few persons owning and controlling the company's stock or elsewhere. Holding that the complaint was sufficient to justify specific performance, the Supreme Court stated that when facts are alleged showing that pecuniary compensation will not afford adequate relief, the objection that an adequate remedy at law exists is removed and specific performance will be enforced in proper cases (*168 Cal. 23, 25)* .

[b] Remedy at Law Inadequate for Untraded Stock

Capaldi v. Levy *(1969) 1 Cal. App. 3d 274, 81 Cal. Rptr. 629* , was a seller's action for specific performance in which the buyer failed to complete the escrow for delivery of all the stock of a corporation. The sellers were awarded a judgment for the entire contract price. On appeal, the buyer contended that the selllers' remedy at law for damages was adequate. In affirming the judgment, the court of appeal explained that the propriety of specific enforcement of contracts to sell or convey unique items of personal property, such as shares of stock in closely held corporation that are not traded in the market and that have no established market value, has long been recognized (*1 Cal. App. 3d 274, 281)* .

[c] Remedy at Law Inadequate for Unavailable Stock

Kaneko v. Okuda *(1961) 195 Cal. App. 2d 217, 15 Cal. Rptr. 792* , was an action for the specific performance of a contract for the sale of corporate stock. The shares of stock could not be purchased on the open market and could be acquired only from the individual defendants. They were acquired by the plaintiff as a part of his business program. In affirming a judgment for plaintiff, the court of appeal held that specific performance was proper since the defendant's failure to deliver could not have been compensated by a money judgment (*195 Cal. App. 2d 217, 233-234)* .

[d] Goods Which Cannot Be Covered or Replaced

Kaiser Trading Co. v. Associated Metals & Minerals Corp. *(N.D. Cal. 1970) 321 F. Supp. 923* , was an action for a preliminary injunction, specific performance, and money damages sought by the vendees for breach of a contract to sell cryolite. A preliminary injunction was granted to restrain the defendant from failing to perform under the contract. In applying the provision of *Com. Code § 2716(1)* authorizing specific performance when the goods are unique or in other proper circumstances, the court noted a general trend toward a more liberalized availability of specific performance as well as decisions in other jurisdictions that the remedy should be available when goods cannot be covered or replaced (*321 F. Supp. 923, 932-933)* .

[e] Contractual Stipulation for Equitable Relief Should Be Honored

In ***DVD Copy Control Assn., Inc. v. Kaleidescape, Inc.*** *(2009) 176 Cal. App. 4th 697, 97 Cal. Rptr. 3d 856* , the plaintiff sought equitable relief for the defendant's breach of a contract. The contract included a provision stating that in the event of a breach, "damages alone will not adequately compensate an injured party ... [and,] upon showing to the relevant court's satisfaction that applicable factors other than the fact that harm will be irreparable and that monetary damages are not sufficient to remedy the injury have been fulfilled, [the injured party] will be entitled to specific performance or other temporary, preliminary, or permanent injunctive relief." The trial court concluded that this stipulation was not binding and the court declined, for stated reasons, to give the equitable relief that the plaintiff demanded.

The court of appeal observed that "there is no published California case holding that such stipulations are enforceable" and that "we should treat the stipulation as we would a liquidated damages clause or a consent decree." The court briefly discussed pertinent case law then concluded, "It follows that, as a general matter, where the parties have stipulated to the nature or amount of a remedy, it is proper for the trial court to honor the parties' agreement unless it finds that to do so would be contrary to a rule of law or public policy. The instant stipulation is no exception. In determining the lawfulness of a stipulation that contemplates an equitable remedy, the court should take into account the special nature of equitable remedies. Given their extraordinary nature, equitable remedies are usually unavailable where the remedy at law is adequate, as where damages are quantifiable. That means that a court must reject a stipulation contemplating an equitable remedy that is contrary to law or public policy, such as where the evidence shows that an aggrieved party actually has an adequate remedy at law. Otherwise, the court should honor the parties' agreement and enforce the stipulation" (*176 Cal. App. 4th 697, 725-726)* (citations omitted).

[4] Additional Authorities

[a] Inadequate Remedy at Law

In *Tamarind Lithography Workshop, Inc. v. Sanders (1983) 143 Cal. App. 3d 571, 193 Cal. Rptr. 409* , an action by a film owner against the film producer, the producer cross complained for damages and specific performance of the owner's obligation to feature the producer in the screen credits. The trial court denied the complaint for specific performance, but the court of appeal reversed the decision. The court held that the basic requirements for granting the remedy of specific performance had been met, and most importantly, that it was impossible to accurately ascertain monetary damages for harm resulting from the omission of the producer's name from the credits, thus making the legal remedy of such damages inadequate (*143 Cal. App. 3d 571, 575)* .

Price v. McConnell (1960) 184 Cal. App. 2d 660, 7 Cal. Rptr. 695 , involved a buyer's cross complaint for specific performance in the seller's action for the price of 25 purebred Hereford heifers. The buyer deposited with the court clerk a sum of money for the price and the fee for furnishing registration papers and breeding records. He alleged that the papers and records for the heifers could be obtained only from the seller. There was also evidence that the 25 heifers with their particular background fitted into the buyer's breeding program and could not be bought on the open market. Judgment was entered for specific performance of the agreement to deliver the registration papers and records and for payment of the deposit to the seller on delivery. In affirming the judgment, the court of appeal held that the breach of the contract could not with any degree of certainty be duplicated or adequately compensated in damages, and hence the general rule that equity will not enforce specific performance of a sale of personal property where the breach can be adequately compensated did not apply.

Hercules Glue Co. v. Littooy (1938) 25 Cal. App. 2d 182, 76 P.2d 700 , was an action for specific performance of an investor's agreement to execute any transfer or instrument necessary to perfect the plaintiff's title to all patents, processes, or formulas relating to chemical compounds for insecticide spreaders. A judgment specifically requiring the assignment of the patent for a certain formula was entered and affirmed. The court of appeal held that equity will specifically enforce the performance of a contract to convey patent rights.

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21-214 California Points & Authorities § 214.46

§ 214.46 Opposing Demurrer to Complaint for Quasi-Specific Performance of Agreement to Leave Property by Will--Remedy at Law Inadequate--Consideration for Agreement Was Peculiar Personal Services

[1] FORM Opposing Demurrer to Complaint for Quasi-Specific Performance of Agreement to Leave Property by Will--Remedy at Law Inadequate--Consideration for Agreement Was Peculiar Personal Services

[*Caption. See § 214.40[1].*]

A COMPLAINT ALLEGES A CAUSE OF ACTION FOR QUASI-SPECIFIC PERFORMANCE OF AN AGREEMENT TO LEAVE PROPERTY BY WILL WHERE IT STATES FACTS SHOWING THAT THE CONSIDERATION FOR THE DECEDENTS PROMISE WAS THE RENDITION OF PECULIAR PERSONAL SERVICES.

A. Inadequate Remedy at Law for Peculiar Personal Services. When the consideration for a decedent's promise to leave property by will was the rendition of peculiar personal services, the value of which cannot be estimated by any pecuniary standard, the remedy at law is inadequate (*Fowler v. Hansen (1941) 48 Cal. App. 2d 518, 522-523, 120 P.2d 161*).

B. Services Involving Close Relationship. Personal services rendered as consideration for a promise to leave property by will are peculiar when they involve the assumption or continuation of a family or other close relationship between the contracting parties (*Monarco v. Lo Greco (1950) 35 Cal. 2d 621, 626, 220 P.2d 737*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition of a general demurrer to a complaint for quasi-specific performance of an agreement to leave property by will when the demurrer asserts that the complaint fails to allege facts showing that the remedy at law is inadequate and when the complaint alleges facts showing that plaintiff's services rendered in consideration of the agreement were peculiar.

If appropriate, counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Inadequate Remedy at Law for Peculiar Personal Services

Fowler v. Hansen *(1941) 48 Cal. App. 2d 518, 120 P.2d 161* , was an action for quasi-specific performance of an agreement to leave property to plaintiff by will. In reversing a judgment on the pleadings for defendant, the court of appeal noted that when the consideration for such a contract is that the promisee will assume a peculiar and domestic relation to the promisor and render to him or her services of such a peculiar character that it is practically impossible to estimate their value by any pecuniary standard, specific performance will be decreed.

[b] Services Involving Close Relationship

In ***Monarco v. Lo Greco*** *(1950) 35 Cal. 2d 621, 220 P.2d 737* , the defendant cross complained for quasi-specific performance of a contract to leave property by will. Decedents had agreed to leave property to the defendant, their son and stepson, if he remained at home and worked on the family farm. In affirming the judgment for defendant on the cross complaint, the Supreme Court held that neither the remedy of an action at law for breach of contract nor the quasi-contractual remedy for the value of services rendered is adequate for the breach of a contract to leave property by will in exchange for services of a peculiar nature involving the assumption or continuation of a close family relationship.

[4] Additional Authorities

[a] Inadequate Remedy at Law for Peculiar Personal Services

In *Estate of Brenzikofer v. Schwartz (1996) 49 Cal. App. 4th 1461, 57 Cal. Rptr. 2d 401* , the tenants of a deceased landlord sought quasi-specific performance on a constructive trust theory of the decedent's oral promise to them in 1981 that she would will them the house they were renting if they would agree to take care of her and her cats. The tenants claimed that over the course of their tenancy beginning in 1964, they took care of decedent for more than 26 years. They performed many duties for her, prepared her taxes, made her special meals, gave her daily walks after she entered a board and care facility, and cared for her pets even after her death. They claimed that they approached decedent on many occasions regarding the purchase of the property, and she told them that if they would stick it out, the house would be theirs. The tenants alleged that decedent made her oral promise to will them the house in 1981. The trial court granted the estate administrator's motion for summary judgment and the tenants appealed. The court of appeals reversed, noting that there was sufficient evidence of appellants' contention that they were willed the property to create an issue as to whether the property was impressed with a constructive trust (*49 Cal. App. 4th 1461, 1468)* . The court noted that when a promisee devotes work, energy, and effort on behalf of a promisor and in reliance on the promises made forgoes other opportunities elsewhere, equity will grant relief equivalent to specific performance by imposing a constructive trust on the property that decedent promised to leave to the promisee (*49 Cal. App. 4th 1461, 1467)* .

[b] Services Involving Close Relationship

Porporato v. Devincenzi (1968) 261 Cal. App. 2d 670, 68 Cal. Rptr. 210 , was an action for quasi-specific performance of an agreement to leave property by will. As consideration for the decedent's promise plaintiff had moved to California to raise her son, decedent's grandson, in decedent's home. A judgment of dismissal, entered after a general demurrer to the complaint had been sustained, was reversed on appeal. In holding the plaintiff's remedy at law was inadequate, the court of appeal stated that the services were peculiar because only the promisee could perform them, as is typically the case when a family or other close relationship between the contracting parties plays a part in the agreement.

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21-214 California Points & Authorities § 214.47

§ 214.47 Opposing Demurrer to Complaint for Quasi-Specific Performance of Agreement to Leave Property by Will--Remedy at Law Inadequate--Agreement to Leave Particular Real Property by Will

[1] FORM Opposing Demurrer to Complaint for Quasi-Specific Performance of Agreement to Leave Property by Will--Remedy at Law Inadequate--Agreement to Leave Particular Real Property by Will

[*Caption. See § 214.40[1].*]

THE COMPLAINT ALLEGES A CAUSE OF ACTION FOR QUASI-SPECIFIC PERFORMANCE OF THE AGREEMENT TO LEAVE PROPERTY BY WILL BECAUSE IT STATES FACTS SHOWING THAT THE CONTRACT WAS TO LEAVE A PARTICULAR PIECE OF REAL PROPERTY BY WILL.

A. Pecuniary Compensation Inadequate for Real Property. It is presumed that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation (*Civ. Code § 3387*).

B. Inadequate Remedy at Law. The remedy at law is inadequate when the contract is one to leave a particular piece of real property by will (*Porporato v. Devincenzi (1968) 261 Cal. App. 2d 670, 677, 68 Cal. Rptr. 210*).

[*Optional*] **C. Promise Enforceable During Promisor's Lifetime.** If specific or identifiable property is the subject of the promise to leave property by will, the promisor's right to consume that property for maintenance and support or otherwise dispose of it during his or her lifetime is limited, and the promisor engages in [constructive] fraud so as to frustrate the promise, an action for imposition of a contructive trust on that property, or so much of it as the promisor does not require for reasonable support and maintenance, will lie while the promisor is still alive (*Brewer v. Simpson (1960) 53 Cal. 2d 567, 592, 595-596, 2 Cal. Rptr. 609, 349 P.2d 289* ; *Osborn v. Hoyt (1919) 181 Cal. 336, 340-341*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a general demurrer to a complaint for quasi-specific performance of an agreement to leave property by will when the demurrer asserts that the complaint fails to allege facts showing that the remedy at law is inadequate and when the agreement involved a particular piece of real property. Optional Paragraph C is for use in opposing a demurrer based on the contention that no action will lie during the promisor's lifetime.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Inadequate Remedy at Law

Porporato v. Devincenzi *(1968) 261 Cal. App. 2d 670, 68 Cal. Rptr. 210* , was an action for quasi-specific performance of an alleged oral agreement to devise a parcel of real property. A judgment of dismissal was entered after sustaining a demurrer to the complaint. The court of appeal reversed and held that the complaint sufficiently alleged that the plaintiff was without an adequate remedy at law since the alleged agreement was in effect a contract for the transfer of real property. As such, the party seeking enforcement need not establish inadequacy of the legal remedy, and may rely on the presumption that damages would not adequately compensate for the breach.

[b] Promise Enforceable During Promisor's Lifetime

Brewer v. Simpson *(1960) 53 Cal. 2d 567, 2 Cal. Rptr. 609, 349 P.2d 289* , was an action by third-party beneficiaries for imposition of a constructive trust on property that was the subject of an agreement by husband and wife regarding mutual wills. The agreement provided in part that after the death of the first to die, the other could not change his or her will or in any way deprive the beneficiaries of the benefits of the agreement, subject to the survivor's right, during his or her lifetime, to reasonable use and enjoyment of the combined estates. Husband died first. Wife remarried, lost or hid her will, and in derogation of the agreement with her deceased husband, deeded all her property to herself and her new husband as joint tenants. Judgment was entered for plaintiffs, imposing a constructive trust on the properties, subject to defendants' right to use, sell, and otherwise deal with the property to serve their needs and general well-being in any reasonable manner.

There were cross-appeals. The judgment was affirmed. In affirming, the Supreme Court said it was not necessary that plaintiffs wait until wife's death to bring their action. Her acts amounted to sufficient repudiation of the agreement to give rise to a cause of action (*53 Cal. 2d 567, 593)* . Further, the Court disagreed with defendants' contention that the constructive trust was too restrictive, saying that in view of wife's long-standing attempts to make performance of the agreement with her first husband impossible, the restrictions were as limited as they could be and still insure substantial justice (*53 Cal. 2d 567, 595-596)* .

Osborn v. Hoyt *(1919) 181 Cal. 336* , was an action for imposition of a constructive trust on certain real property that was the subject of a written agreement to leave the property by will. The action was commenced while the promisor was still alive, but he died during trial. Plaintiff/promisees used to hunt in the area of the land in question and discovered the promisor old, infirm, and living in squalid conditions on the 160 acres in question. They fed him, showed him how to homestead the property, piped water to his cabin and garden, installed a 3-mile road from the mouth of the canyon to the property, sent for his daughters in the east, from whom he had been alienated for years, furnished feed and stable to his horses, financed a survey, and built and stocked a clubhouse from which he could take provisions without charge. In derogation of the agreement, the promisor deeded the property to his daughters. The trial court gave judgment imposing

a constructive trust on the property in the hands of the daughters and commanding them to execute a proper deed to plaintiffs. Defendant/daughters appealed.

The Supreme Court affirmed. In affirming, the Court disposed of the contention that the action was premature, saying the situation was to be distinguished from those in which the promisee has no interest during the promisor's lifetime. Since the agreement promised this specific property, and since the daughters knew of their father's promise and gave no consideration for the land, the judgment was proper (*181 Cal. 336, 340-341)* .

[4] Additional Authorities

[a] Promise Enforceable During Promisor's Lifetime

Estate of Brenzikofer v. Schwartz (1996) 49 Cal. App. 4th 1461, 57 Cal. Rptr. 2d 401 , discussed in *§ 214.46[4][a],* also involved a contract to leave a particular piece of real property by will. The court of appeals, in reversing a motion for summary judgement, held that there was sufficient evidence of appellants' contention that they were willed the property to create an issue as to whether the property was impressed with a constructive trust (*49 Cal. App. 4th 1461, 1468)* .

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 214 SPECIFIC PERFORMANCE
PART II. FORMS

21-214 California Points & Authorities § 214.48

§ 214.48 Opposing Demurrer to Complaint for Quasi-Specific Performance of Agreement to Leave Property by Will--Remedy at Law Inadequate--Consideration for Agreement Was Conveyance of Real Property to Decedent

[1] FORM Opposing Demurrer to Complaint for Quasi-Specific Performance of Agreement to Leave Property by Will--Remedy at Law Inadequate--Consideration for Agreement Was Conveyance of Real Property to Decedent

[*Caption. See § 214.40[1].*]

THE COMPLAINT ALLEGES A CAUSE OF ACTION FOR QUASI-SPECIFIC PERFORMANCE OF THE AGREEMENT TO LEAVE PROPERTY BY WILL BECAUSE IT STATES FACTS SHOWING THAT THE CONSIDERATION FOR THE DECEDENT'S PROMISE WAS THE CONVEYANCE OF REAL PROPERTY TO THE DECEDENT.

Inadequate Remedy at Law. When the consideration for a decedent's promise to leave property by will was the conveyance of real property to the decedent, the remedy at law is inadequate (*Trower v. Young (1940) 40 Cal. App. 2d 539, 542-547, 105 P.2d 160*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a general demurrer to a complaint for quasi-specific performance of an agreement to leave property by will when the demurrer asserts that the complaint fails to allege facts showing that the remedy at law is inadequate and when the complaint alleges facts showing that the

consideration for the agreement was the conveyance of real property to the decedent.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Inadequate Remedy at Law

Trower v. Young *(1940) 40 Cal. App. 2d 539, 105 P.2d 160* , involved a decedent's agreement to bequeath and devise half her estate to the plaintiffs where the plaintiffs had relinquished to the decedent their shares of her predeceased husband's estate and had in particular conveyed to the decedent their respective interests in various parcels of real property in the husband's estate. A judgment for defendant, entered after sustaining a demurrer to the complaint, was reversed on appeal. The court of appeal held that the transfer to the decedent of the interest in a number of parcels of real estate made quasi-specific performance a proper remedy.

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CHAPTER 214 SPECIFIC PERFORMANCE
PART II. FORMS

21-214 California Points & Authorities § 214.49

§ 214.49 Opposing Demurrer to Complaint for Quasi-Specific Performance of Agreement to Leave Property by Will--Rendering Peculiar Services Lifts Requirement That Contract Be Evidenced by Writing [Prob. Code § 21700; former Prob. Code § 150 (repealed Jan. 1, 2001); former Civ. Code § 1624(6) (repealed January 1, 1985)]

[1] FORM Opposing Demurrer to Complaint for Quasi-Specific Performance of Agreement to Leave Property by Will--Rendering Peculiar Services Lifts Requirement That Contract Be Evidenced by Writing [Prob. Code § 21700; former Prob. Code § 150 (repealed Jan. 1, 2001); former Civ. Code § 1624(6) (repealed January 1, 1985)]

[*Caption. See § 214.40[1].*]

A CAUSE OF ACTION FOR QUASI-SPECIFIC PERFORMANCE OF AN ORAL AGREEMENT TO LEAVE PROPERTY BY WILL WILL NOT BE BARRED BY THE ABSENCE OF WRITTEN EVIDENCE OF THE CONTRACT WHEN THE COMPLAINT ALLEGES THAT PLAINTIFF RENDERED SERVICES OF SUCH A PECULIAR CHARACTER IN CONSIDERATION OF THE AGREEMENT THAT THEIR VALUE CANNOT BE MEASURED BY ANY PECUNIARY STANDARD, AND PLAINTIFF CANNOT BE RESTORED TO HIS OR HER SITUATION PRIOR TO RENDERING THE SERVICES.

Rendition of Services of Peculiar Character. If the services that are rendered in consideration of an oral agreement to leave property by will are of such a peculiar character that it is impossible to estimate their value by any pecuniary standard, and it is evident that the parties did not intend to measure them by a pecuniary standard, and if the plaintiff cannot be restored to the situation he or she was in prior to rendition of the services, the rendition of the services constitutes such a part performance of the oral agreement as to lift the requirement that the contract be evidenced by a writing. In such a case, equity, when other objections are not present, will decree specific performance (*see Walker v. Calloway (1950) 99 Cal. App. 2d 675, 678, 222 P.2d 455*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a general demurrer to a complaint for quasi-specific performance of an oral agreement to leave property by will when the demurrer asserts that the complaint fails to allege facts sufficient to lift the requirement that the contract be evidenced by a writing.

Counsel should add argument linking the points in this form with the facts of the case; for example, the fact that no recovery may be obtained in quantum meruit because no timely claim for the value of the plaintiff's services was filed with the decedent's estate does not appear to be sufficient to satisfy the requirement that the services not be compensable in money [*see Palmer v. Phillips (1954) 123 Cal. App. 2d 291, 299, 266 P.2d 850]* .

Counsel should consider whether or not to combine this form with the points and authorities *set forth in § 214.46* or *214.47*, or both, so as to argue that, once the requirement of a writing has been avoided, quasi-specific performance is otherwise appropriate.

In an appropriate case, this form may be submitted in opposition to a demurrer supported by the points and authorities *set out in § 214.38*.

The validity of a contract to make a will or devise is governed by one of three statutes of frauds, depending on when the contract was made. Before 1985, the applicable statute of frauds was former Civ. Code § 1624(6). It was superseded January 1, 1985, by former Prob. Code § 150, which in turn was repealed January 1, 2001, and supplanted by *Prob. Code § 21700*. Cases decided under the first statute apparently remain relevant under the current statute and probably could be applied in a case governed by former Prob. Code § 150. For discussion, see *§ 214.38[3][a]*.

[3] Discussion of Authorities

[a] Rendition of Services of Peculiar Character

Plaintiff in ***Walker v. Calloway*** *(1950) 99 Cal. App. 2d 675, 222 P.2d 455* , brought suit for specific performance of the decedent's agreement to leave his entire estate to plaintiff if she would come to California and provide him with companionship, affection, and solace in his remaining days. The trial court sustained a demurrer to the amended complaint, and entered judgment dismissing the action. The court of appeal reversed, applying the rule set out in the foregoing form, relying on earlier California Supreme Court decisions. The court found that the services alleged were of such unusual and exceptional character that they could not and were not intended to be measured by any pecuniary measure. Plaintiff was the decedent's former wife, and the decedent, who had cancer and only a few months to live, desired her companionship and affection. He had a nurse and did not need household services. Plaintiff, on her part, gave up her residence, occupation, home ties, and associations in Michigan to come 2,000 miles to strange surroundings at an advanced age (*99 Cal. App. 2d 675, 677-680)* .

[4] Additional Authorities

[a] Rendition of Services of Peculiar Character

Riganti v. McElhinney (1967) 248 Cal. App. 2d 116, 56 Cal. Rptr. 195 , involved an action for quasi-specific performance of the decedent's agreement to leave plaintiffs part of his real property in consideration of plaintiff's services in looking after his real property, collecting and accounting for the rents, caring for the decedent as long as he lived, and showing him the respect and obedience that children show a father. Judgment was entered in plaintiff's favor, and the court of appeal affirmed, applying the rule set out in the foregoing form. The court held that the services and devotion, consisting of care and attention provided for six years as though plaintiffs were members of the decedent's

family, were of such a peculiar nature that their value could not be estimated by any pecuniary standard, and that there was no intent that they be measured by any pecuniary standard, since a fixed fee could have been established by the parties who had set a fee for plaintiffs' looking after the decedent's real property, in return for which they received free rent. Plaintiff husband had special skills and could have improved his station in life by not fulfilling his obligations under the agreement, but having honored the agreement, could not be restored to the situation prior to rendering the services (*248 Cal. App. 2d 116, 122-123)* .

De Hermosillo v. Morales (1956) 146 Cal. App. 2d 819 , involved an action for quasi-specific performance of the decedent's oral agreement to leave plaintiff a house by will if plaintiff, who lived in Mexico, would stay in California to act as housekeeper and practical nurse, and to look after the decedent's comfort and general welfare. The court of appeal affirmed a judgment in plaintiff's favor, applying the rule set out in the foregoing form and noting that plaintiff and the decedent loved one another as though they were mother and daughter, and that the decedent needed and wanted the services, companionship, love, and affection of plaintiff only (*146 Cal. App. 2d 819, 827-828)* .

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CHAPTER 214 SPECIFIC PERFORMANCE
PART II. FORMS

21-214 California Points & Authorities § 214.50

§ 214.50 Opposing Demurrer to Complaint for Quasi-Specific Performance of Contract to Make Will Complaint Alleges Facts Sufficient to Support Application of Equitable Doctrine of Promissory Estoppel [Prob. Code § 21700; former Prob. Code § 150 (repealed Jan. 1, 2001); former Civ. Code § 1624(6) (repealed January 1, 1985)]

[1] FORM Opposing Demurrer to Complaint for Quasi-Specific Performance of Contract to Make Will Complaint Alleges Facts Sufficient to Support Application of Equitable Doctrine of Promissory Estoppel [Prob. Code § 21700; former Prob. Code § 150 (repealed Jan. 1, 2001); former Civ. Code § 1624(6) (repealed January 1, 1985)]

[*Caption. See § 214.40[1].*]

PLAINTIFF'S COMPLAINT FOR QUASI-SPECIFIC PERFORMANCE OF AN ORAL AGREEMENT TO LEAVE PROPERTY BY WILL STATES AN ENFORCEABLE CLAIM UNDER THE EQUITABLE DOCTRINE OF PROMISSORY ESTOPPEL BECAUSE IT ALLEGES FACTS SHOWING THAT UNCONSCIONABLE INJURY OR UNJUST ENRICHMENT WILL RESULT IF THE AGREEMENT IS NOT ENFORCED.

[*For contracts entered into prior to 2001:*]

A. Estoppel to Assert Requirement that Contract Be Evidenced by Writing. Although the applicable statute of frauds, _____ [*for pre-1985 contracts:* former Civil Code Section 1624(6) (repealed January 1, 1985) *or, for contracts entered into in 1985-2000:* former Probate Code Section 150 (repealed January 1, 2001)], requires that an agreement to make a provision by will be in writing, a party will be estopped from relying on the statute when fraud would result from refusal to enforce an oral contract. The doctrine of estoppel has been applied (1) when an unconscionable injury would result from denying enforcement after one party has been induced to make a serious change of position in reliance on the contract, or (2) when unjust enrichment would result if a party who has received the benefits of the other's performance were allowed to invoke the statute (*Day v. Greene (1963) 59 Cal. 2d 404, 409-410, 29 Cal. Rptr. 785, 380 P.2d 385* ; *Estate of Housley v. Haywood (1997) 56 Cal. App. 4th 342, 351, 353-354, 65 Cal. Rptr. 2d 628* ; *see Monarco v. LoGreco (1950) 35 Cal. 2d 621, 623-624, 220 P.2d 737*).

[*Or, for contracts entered into in or after 2001:*]

A. Estoppel to Assert Requirement that Contract Be Evidenced by Writing. Although the applicable statute of frauds, *Probate Code Section 21700*, generally requires that an agreement to make a provision by will be in writing, it also permits such an agreement to be established by (1) clear and convincing evidence of an agreement between the decedent and the claimant or a promise by the decedent to the claimant that is enforceable in equity, or (2) clear and convincing evidence of an agreement between the decedent and another person for the benefit of the claimant or a promise by the decedent to another person for the benefit of the claimant that is enforceable in equity (*Prob. Code § 21700(a)(4), (5)*). Under settled case law, an oral promise to make a provision by will is enforceable in equity under the doctrine of estoppel to assert the statute of frauds when fraud would result from refusal to enforce an oral contract. The doctrine of estoppel has been applied (1) when an unconscionable injury would result from denying enforcement after one party has been induced to make a serious change of position in reliance on the contract, or (2) when unjust enrichment would result if a party who has received the benefits of the other's performance were allowed to invoke the statute (*Day v. Greene (1963) 59 Cal. 2d 404, 409-410, 29 Cal. Rptr. 785, 380 P.2d 385* ; *Estate of Housley v. Haywood (1997) 56 Cal. App. 4th 342, 351, 353-354, 65 Cal. Rptr. 2d 628* ; *see* *Monarco v. LoGreco (1950) 35 Cal. 2d 621, 623-624, 220 P.2d 737*).

[*CONTINUE*]

[*Optional*] **B. Receiving Benefit Under Agreement to Make Irrevocable Joint or Reciprocal Wills.** When two persons make joint or reciprocal wills under an oral agreement to leave each one's entire property to the survivor and on the death of the survivor to name beneficiaries, and one person performs the agreement by not revoking the will prior to his or her death, equity will grant quasi-specific performance of the oral agreement and impose a constructive trust on the property in favor of the original beneficiaries if the survivor, having received the benefit of the agreement, executes a new will in disregard of the agreed-on disposition. In such a case, the newly designated beneficiaries of the survivor are estopped to rely on the rule that such a contract be evidenced by a writing (*see* *Notten v. Mensing (1935) 3 Cal. 2d 469, 474, 45 P.2d 198* ; *Stahmer v. Schley (1979) 96 Cal. App. 3d 200, 203, 157 Cal. Rptr. 756*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a general demurrer to a complaint for quasi-specific performance of an oral agreement to leave property by will, when the demurrer asserts that the complaint fails to allege facts sufficient to overcome the requirement that the contract be evidenced by a writing [*see Prob. Code § 21700* (applicable to agreements made in or after 2001); former Prob. Code § 150 (repealed January 1, 2001) (applicable to agreements made in 1985-200); former Civ. Code § 1624(6) (repealed January 1, 1985) (applicable to pre-1985 agreements); for discussion, *see § 214.38[3][a]*].

Counsel should add argument linking the points in this form with the facts of the case; for example, allegations sufficient to support a finding of unconscionable injury or unjust enrichment that would support the enforceability in equity of a contract to make a will. If the agreement is adequately alleged, it will have to be proved by full, clear, and convincing evidence in order to prevail at trial [*see* *Crail v. Blakely (1973) 8 Cal. 3d 744, 747, 106 Cal. Rptr. 187,*

505 P.2d 1027] .

In an appropriate case, this form may be submitted in opposition to a demurrer supported by the points and authorities *set out in § 214.38*.

[3] Discussion of Authorities

[a] Estoppel to Assert Requirement That Contract Be Evidenced by Writing

The validity of a contract to make a will or devise is governed by one of three statutes of frauds, depending on when the contract was made. Before 1985, the applicable statute of frauds was former Civ. Code § 1624(6). It was superseded January 1, 1985, by former Prob. Code § 150, which in turn was repealed January 1, 2001, and supplanted by *Prob. Code § 21700*. Cases decided under the first statute apparently remain relevant under the current statute and probably could be applied in a case governed by former Prob. Code § 150. For discussion, see *§ 214.38[3][a]*.

In ***Day v. Greene*** *(1963) 59 Cal. 2d 404, 29 Cal. Rptr. 785, 380 P.2d 385* , the plaintiff brought an action to impress a constructive trust on one-seventh of the residuary estate of her stepmother, claiming that the stepmother had entered into an oral agreement with plaintiff's father (the stepmother's husband) by which the father had agreed to leave all his property to the stepmother in return for which the stepmother, on her death, would leave her estate in equal shares to plaintiff and each of the six children of the father and stepmother. Thereafter, the stepmother did not name plaintiff as one of the residuary beneficiaries of her estate. Judgment was entered in favor of plaintiff, and all but one of the defendants appealed (*59 Cal. 2d 404, 406, 408-409)* .

The California Supreme Court held that the trial court had been correct in ruling that the statute of frauds did not render the agreement unenforceable. The Court held that although the then-applicable statute of frauds (former Civ. Code § 1624(6), repealed Jan. 1, 1985) required that an agreement to make a provision by will be in writing, a party will be estopped from relying on the statute when fraud would result from refusal to enforce an oral contract (citing *Monarco v. Lo Greco, 35 Cal.2d 621, 623, 220 P.2d 737* , discussed *below*). The Court further noted that the doctrine of estoppel has been applied when an unconscionable injury would result from denying enforcement after one party has been induced to make a serious change of position in reliance on the contract, or when unjust enrichment would result if a party who has received the benefits of the other's performance were allowed to invoke the statute (again citing *Monarco v. Lo Greco*, discussed *below*) (*59 Cal. 2d 404, 409-410)* .

The Court found that both of these grounds of estoppel were present in this case. There was ample evidence to demonstrate that plaintiff's father, in reliance on the agreement with the stepmother, had "seriously and unalterably" changed his position by abstaining from making inter vivos gifts or testamentary disposition to plaintiff and leaving his entire estate to the stepmother. The stepmother's children, in turn, would be unjustly enriched if, by invoking the statute of frauds, they would succeed in retaining all the stepmother's residuary estate, part of which would have gone to plaintiff but for the stepmother's breach of the agreement (*59 Cal. 2d 404, 410-411)* .

In ***Estate of Housley v. Haywood*** *(1997) 56 Cal. App. 4th 342, 65 Cal. Rptr. 2d 628* , a son claimed that his deceased father had breached an oral agreement to leave all of the father's property at death to the son if the son cared for the father during the father's lifetime. The trial court found that equitable estoppel did not preclude the defendant, the successor executrix of the father's will and successor trustee of the father's trust, from asserting the applicable statutes of fraud. The date of the alleged agreement was not ascertainable and the trial court did not determine whether former Prob. Code § 150 (repealed January 1, 2001), or its predecessor, former Civ. Code § 1624(6) (repealed January 1, 1985), was the applicable statute. The trial court found, however, that both statutes of fraud would preclude plaintiff from pursuing his action to enforce the alleged oral agreement. Plaintiff appealed summary judgment in favor of defendant.

On appeal, plaintiff contended that his papers opposing the summary judgment motion presented sufficient evidence to create triable issues of material fact on that question and that the court erred by granting the motion. The court of appeal agreed and reversed the judgment. It held that equitable estoppel principles were available under *either* former Prob. Code § 150 or former Civ. Code § 1624(6) to enforce the testator's alleged oral agreement to leave all of his property to his son if the son cared for him during the testator's lifetime (*56 Cal. App. 4th 342, 358)* . The court followed *Juran v. Epstein (1994) 23 Cal. App. 4th 882, 897, 28 Cal. Rptr. 2d 588* , discussed in *§ 214.50[4][a]*, despite the factual distinction that in *Juran* the husband was alive and available to testify regarding the alleged oral agreement. The court of appeal found that nothing in the express language of former Prob. Code § 150 distinguishes between cases in which the promisor is alive and cases in which the promisor is dead, and it declined to create such an intention within the words of former Prob. Code § 150 to abolish the anti-fraud doctrine of equitable estoppel (*56 Cal. App. 4th 342, 354-355)* .

The court cited *Day v. Greene*, discussed *above*, for the proposition that the doctrine of equitable estoppel will be applied to defeat application of the statute in the context of a contract to make a will when fraud would result from refusal to invoke an oral contract. The court noted that the doctrine had been applied (1) when an *unconscionable injury* would result from denying enforcement after one party has been induced to make a serious change of position in reliance on the contract, or (2) when *unjust enrichment* would result if a party who has received the benefits of the other's performance were allowed to invoke the statute. Thus, the court noted, there are two alternative circumstances in which equitable principles may be applied by a court to estop a promisor from relying on the statute of frauds to avoid an oral agreement to make a will or devise. First, equitable estoppel may apply when the promisor had induced the promisee to make a serious change of position in reliance on the oral agreement, commonly known as "detrimental reliance," and a failure to enforce the oral agreement would have caused an unconscionable injury to the promisee. Alternatively, equitable estoppel may apply when the promisor would be unjustly enriched by receiving the benefit of the promisee's performance if the promisor were allowed to invoke the statute of frauds (*56 Cal. App. 4th 342, 351)* .

Monarco v. Lo Greco *(1950) 35 Cal. 2d 621, 220 P.2d 737* , involved a cross complaint in an action to partition agricultural property. The cross complaint sought the imposition of a constructive trust on the property. Cross complainant, the decedent's widow, had agreed with the decedent and one of her sons by a prior marriage that if the son would stay home and work on the property, the decedent and cross complainant would hold the property to the son. The decedent, however, secretly terminated the joint tenancy and executed a will leaving the property to plaintiff, who brought the suit for partition. Judgment was for defendants and cross complainant. The Supreme Court affirmed, holding that the doctrine of estoppel is applied to prevent fraud that would result from refusal to enforce oral contracts in certain circumstances. The Court held that such fraud may inhere in the unconscionable injury that would result from denying enforcement of the contract after one party has been induced by the other seriously to change position in reliance on the contract or in the unjust enrichment that would result if a party who has received the benefits of the other's performance were allowed to rely on the statute of frauds (*35 Cal. 2d 621, 623-624)* . The Court found that both of the grounds for estoppel were presented by the case. Unconscionable injury was present because the son had given up the opportunity to accumulate property of his own and devoted his life to making the family venture a success. Unjust enrichment of the decedent and his devisees was also present because the son's 20 years of labor contributed to the enormous increase in the value of the family venture, the benefits of which the decedent had reaped (*35 Cal. 2d 621, 624)* .

[b] Receiving Benefit Under Agreement to Make Irrevocable Joint or Reciprocal Wills

The leading case of ***Notten v. Mensing*** *(1935) 3 Cal. 2d 469, 45 P.2d 198* , in which plaintiffs sought to impose a constructive trust on certain property, involved an oral agreement between a married couple that they would each leave all their property to the survivor and on the survivor's death all the property would go to specified relatives, including plaintiffs. The complaint alleged that the couple executed such wills, and before they were revoked, the husband died. The wife accepted the benefits of her husband's will, but she then revoked her will and executed a new one leaving all of the property to defendants. The trial court sustained a demurrer to the complaint and entered judgment against

plaintiffs. The Supreme Court reversed, recognizing the availability of the remedy of quasi-specific performance. The Court also noted that the mere execution of the wills did not constitute a sufficient memorandum of the agreement or part performance of it to remove the bar of the statute of frauds (*3 Cal. 2d 469, 473-474)* . The Court held, however, that when two parties execute reciprocal wills pursuant to an oral agreement, and one of the parties dies before either will is revoked, and the other party accepts the benefit of the decedent's will and then revokes his or her own will, a constructive fraud sufficient to raise an estoppel to plead the statute of frauds has been practiced on the first decedent and on the beneficiaries of the oral agreement (*3 Cal. 2d 469, 474)* . The Court noted that these facts show a change of position and reliance on the agreement (*3 Cal. 2d 469, 477)* .

Stahmer v. Schley *(1979) 96 Cal. App. 3d 200, 157 Cal. Rptr. 756* , also involved an action for quasi-specific performance of an oral agreement to leave property by joint will and to impose a constructive trust. A demurrer to the complaint was sustained without leave to amend and judgment was entered dismissing the action. The court of appeal reversed, relying on *Notten v. Mensing (1935) 3 Cal. 2d 469, 473-476, 45 P.2d 198* (discussed, *above*), to hold that when two persons make a joint will pursuant to an oral agreement to leave each one's entire property to the survivor and on the survivor's death to named beneficiaries, and one person performs the agreement by failing to revoke the will prior to his or her death, equity will grant quasi-specific performance of the oral agreement and impose a constructive trust on the property in favor of the original beneficiaries, if the survivor, having received the benefit of the agreement, then executes a new will in disregard of the agreed-on disposition. In that situation, there is a presumption that a constructive fraud has been practiced on the first decedent by the second decedent to the detriment of the original beneficiaries, and that the new beneficiaries will be unjustly enriched if the oral agreement between the decedents is not enforced. Thus, the newly designated beneficiaries are derivatively estopped to plead the statute of frauds (*96 Cal. App. 3d 200, 203)* .

[4] Additional Authorities

[a] Estoppel to Assert Requirement That Contract Be Evidenced by Writing

Crail v. Blakely (1973) 8 Cal. 3d 744, 106 Cal. Rptr. 187, 505 P.2d 1027 , involved an action to enforce an oral agreement between plaintiffs' parents pursuant to which each of the parents agreed to leave his or her estate to the other on the condition that the survivor would leave their combined estate to their children in equal shares. After the mother's death, the husband breached the agreement, leaving only one fourteenth of the estate to plaintiffs. The Supreme Court affirmed judgment for plaintiffs, holding that the defendant estate and legatees were estopped to rely on the statute of frauds because the mother had seriously changed her position in reliance on the agreement by committing suicide so that her husband would be bound by the agreement and so that he could not pressure her into changing her will. The Court also noted that the husband and defendants, who stood in his shoes, would be unjustly enriched if defendants were permitted to invoke the statute of frauds since the husband had received the benefits of his wife's performance of the agreement (*8 Cal. 3d 744, 751-752)* .

In *Redke v. Silvertrust (1971) 6 Cal. 3d 94, 98 Cal. Rptr. 293, 490 P.2d 805* , plaintiff brought suit to enforce an oral agreement pursuant to which her mother had agreed to leave half of her property to her husband, plaintiff's stepfather, provided that he would leave all the property he received from her to plaintiff and her brother. When plaintiff's brother subsequently died suddenly, plaintiff's mother expressed a desire to change her will to leave all her property to plaintiff, but the stepfather convinced her that no change was necessary and that plaintiff would get all the property left to him by her mother. After the mother's death, the stepfather cut plaintiff out of his will. The Supreme Court affirmed the judgment in plaintiff's favor, holding that the mother had so changed her position in reliance on the agreement by not executing a new will to make plaintiff her sole beneficiary, despite her concern over the plaintiff's welfare, that defendants were estopped to rely on the statute of frauds (*6 Cal. 3d 94, 101)* .

Estate of Brenzikofer v. Schwartz (1996) 49 Cal. App. 4th 1461, 57 Cal. Rptr. 2d 401 , discussed in *§ 214.46[4][a],* involved decedent landlord's oral promise to appellant tenants in 1981 that she would will them the house they were renting if they would agree to take care of her and her cats. The appellate court, in reversing a motion for summary

judgment, held that there was sufficient evidence of appellants' contention that they were willed the property to create an issue as to whether the property was impressed with a constructive trust (*49 Cal. App. 4th 1461, 1468)* . The court stated that when quasi-specific performance by declaration of a constructive trust on real property is sought on the basis of an oral agreement to leave the property by will, the two-year period of limitation generally applicable to contracts in writing is not applicable (*49 Cal. App. 4th 1461, 1468)* . The court found that under those circumstances in which the property is impressed with the qualities of a resulting trust, the action may be brought within four years, stating, "The theory is that the statute of frauds does not apply where the plaintiff is entitled to the imposition of a constructive trust, for such a trust arises by operation of law." The court then cited *Juran v. Epstein*, discussed *below*, for the proposition that the statute of frauds will not be made the instrument of shielding, protecting, or aiding the party who relies on it in the perpetration of a fraud (*49 Cal. App. 4th 1461, 1469)* .

In *Juran v. Epstein (1994) 23 Cal. App. 4th 882, 28 Cal. Rptr. 2d 588* , a will beneficiary alleged that her stepfather breached an oral agreement by revoking a 1985 will that he executed while the plaintiff's mother was alive. The couple's wills left everything to each other, with the survivor's estate to be divided between their children. After the plaintiff's mother died, the stepfather revoked his will and executed a new one, which excluded the plaintiff. The plaintiff claimed that the defendant breached his oral contract with the plaintiff's mother to leave their entire estate to the surviving spouse on the condition that the survivor would bequeath the entire estate equally to the plaintiff and another child. The trial court granted the defendant's motion for summary judgment pursuant to former Prob. Code § 150. The appellate court concluded that the plaintiff failed to produce written evidence, under former Prob. Code § 150, of an agreement that the mutual wills would not be revoked (*23 Cal. App. 4th 882, 891)* . However, the court held that because there were triable issues of fact as to whether the parties entered into an oral agreement and whether that agreement was enforceable under the equitable estoppel doctrine, the trial court erred in granting summary judgment (*23 Cal. App. 4th 882, 897)* . The appellate court rejected the defendant's argument that former Prob. Code § 150 abolished the doctrine of equitable estoppel in appropriate cases. It found nothing in the history or language of that section showing that the Legislature intended to abrogate long-standing rules that the courts have the power to apply equitable principles to prevent a party from using the statute of frauds when that use would constitute fraud (*23 Cal. App. 4th 882, 894-895)* .

In *Porporato v. Devincenzi (1968) 261 Cal. App. 2d 670, 68 Cal. Rptr. 210* , an action for quasi-specific performance of an oral agreement to leave property by will, the court of appeal reversed a judgment of dismissal entered after a demurrer to the amended complaint was sustained. The court held that the complaint sufficiently alleged estoppel. The complaint alleged that plaintiff, the widow of the decedent's son, came to San Francisco from Omaha and refrained from resuming her former home in Nebraska so that the decedent could have the companionship of his grandson after the death of his son. Plaintiff alleged that she left family and friends and available employment in Nebraska, where she was staying at the time of her husband's death, in reliance on the decedent's promise to leave her a house. The court held that this was a significant change of position, even though she had formerly lived in San Francisco with her husband. The court also noted that plaintiff would suffer unconscionable injury if the contract were not enforced, since she had given 20 years of her life and her son's childhood years in keeping the bargain (*261 Cal. App. 2d 670, 678-679)* .

The court of appeal in *Horstmann v. Sheldon (1962) 202 Cal. App. 2d 184, 20 Cal. Rptr. 735* , affirmed a judgment imposing a constructive trust on property promised to plaintiff by the decedent, plaintiff's mother, in consideration of plaintiff's residing with and caring for the decedent and refraining from taking regular employment outside the home. The court held that defendants were estopped to rely on the bar of the statute of frauds. The court found both unconscionable injury and unjust enrichment in that plaintiff had devoted many years to performing her part of the bargain and was approaching the later years of life by the time of trial (*202 Cal. App. 2d 184, 188-189)* .

In *Ward v. Wrixon (1959) 168 Cal. App. 2d 642, 336 P.2d 640* , the court of appeal, in affirming a judgment for plaintiff in her action seeking a decree that she was entitled to a life estate in certain real property promised to her by the decedent, held that the defendant was estopped to rely on the statute of frauds. The court held that the services rendered by plaintiff to the decedent in consideration of the promise involved her providing of companionship, entertaining the decedent's friends, and personal services far beyond those normally performed by a servant, including care for the

decedent's person, constant attention to his physical needs, and comfort and solace. Plaintiff also performed heavy construction work while assisting in building a home for the decedent. Plaintiff had received no compensation for her services. The court held that the services were of an extraordinary nature, that they enriched the decedent's estate, and that they were not compensable in money, so that unconscionable injury and unjust enrichment would result from refusal to enforce the agreement (*168 Cal. App. 2d 642)* .

[b] Estoppel to Assert Statute of Limitations as Defense

In *Battuello v. Battuello (1998) 64 Cal. App. 4th 842, 75 Cal. Rptr. 2d 548* , one court followed the reasoning of *Juran v. Epstein (1994) 23 Cal. App. 4th 882, 28 Cal. Rptr. 2d 588 , discussed under § 214.50[4][a]*, in holding that a party may be estopped from asserting the statute of limitations as a defense to an untimely action to enforce an oral promise to make a will. A son brought an action to enforce his father's oral promise to make a will leaving him the family vineyard. His mother demurred on the grounds that the one-year statute of limitations set forth in *Code Civ. Proc. § 366.2* applied because the promisor had made an inter vivos transfer of property covered by the contract. The trial court sustained the demurrer without leave to amend and the son appealed. The court of appeal stated that while *Code Civ. Proc. § 366.2(b)* (then designated as Section 366.2(a)(2)), clearly shows that the Legislature intended that the one-year statute of limitations could not be "tolled" or "extended," the statute says nothing about equitable estoppel. The court concluded that in the absence of any such language or legislative history suggesting that was what the Legislature intended, the doctrine of equitable estoppel still applies. In reaching that conclusion, it held that appellant had alleged sufficient facts to support a claim of equitable estoppel to application of the statute of limitations (*64 Cal. App. 4th 842, 847-848)* .

[c] Receiving Benefit Under Agreement to Make Irrevocable Joint or Reciprocal Wills

Crail v. Blakely (1973) 8 Cal. 3d 744, 106 Cal. Rptr. 187, 505 P.2d 1027 , *Juran v. Epstein (1994) 23 Cal. App. 4th 882, 28 Cal. Rptr. 2d 588* , and *Redke v. Silvertrust (1971) 6 Cal. 3d 94, 98 Cal. Rptr. 293, 490 P.2d 805* , in which the doctrine of estoppel was applied to agreements to make wills, are *discussed under § 214.50[4][a]*.

In *Mintz v. Rowitz (1970) 13 Cal. App. 3d 216, 91 Cal. Rptr. 435* , a husband and wife orally agreed that after the death of one of them the other was to have a life estate in their joint and community property, and that on the survivor's death, the property was to be left in designated proportions to specified children and stepchildren. Although their wills were woefully inadequate to carry out the agreement, when the wife died, her will did leave all her property to the husband. The husband, however, made numerous inter vivos transfers of property, and his will did not completely fulfill the agreement. The court of appeal affirmed the judgment, which set aside the inter vivos transfers and granted quasi-specific performance of the oral agreement, relying on *Notten v. Mensing (1935) 3 Cal. 2d 469, 474, 45 P.2d 198* (*discussed under § 214.50[3][b]*), to hold that there was an estoppel to rely on the statute of frauds (*13 Cal. App. 3d 216, 223-224)* . The court rejected the contention that, since the wife's estate had not been distributed at the time of the husband's death, he had not accepted any benefits under her will. The court noted that full title to the wife's estate vested in the husband at the time of her death, subject only to administration, that much of her estate was not subject to administration, and that the husband had disposed of it rather freely (*13 Cal. App. 3d 216, 224)* .

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 214 SPECIFIC PERFORMANCE
PART II. FORMS

21-214 California Points & Authorities § 214.51

§ 214.51 Supporting Motion to Set Aside and Vacate Judgment and Enter Another and Different Judgment [Code Civ. Proc. §§ 663, 663a]--Incorrect or Erroneous Legal Bases for Court Decision [Code Civ. Proc. § 663(1)]--Defaulting Purchaser Denied Specific Performance as Entitled to Restitution of Only Reasonable Value of Services That Benefited Seller

[1] FORM Supporting Motion to Set Aside and Vacate Judgment and Enter Another and Different Judgment [Code Civ. Proc. §§ 663, 663a]--Incorrect or Erroneous Legal Bases for Court Decision [Code Civ. Proc. § 663(1)]--Defaulting Purchaser Denied Specific Performance as Entitled to Restitution of Only Reasonable Value of Services That Benefited Seller

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____ _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
	)	MEMORANDUM IN SUPPORT OF MOTION TO
vs.	)	SET ASIDE AND VACATE JUDGMENT AND
	)	ENTER ANOTHER AND DIFFERENT JUDG-
_____ [*name*],	)	MENT
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____

_____

THE JUDGMENT SHOULD BE SET ASIDE AND VACATED AND ANOTHER AND DIFFERENT JUDGMENT ENTERED BECAUSE THERE ARE INCORRECT OR ERRONEOUS LEGAL BASES FOR THE DECISION THAT MATERIALLY AFFECT THE SUBSTANTIAL RIGHTS OF DEFENDANT, THUS ENTITLING HIM/HER/IT TO A DIFFERENT JUDGMENT.

A. Motion to Set Aside and Vacate and Enter Another and Different Judgment. On motion of the party aggrieved, a judgment based on a decision by the court may be set aside and vacated by the same court and another and different judgment entered when there is an incorrect or erroneous legal basis for the decision, not consistent with or not supported by the facts, if substantial rights of the party are materially affected thereby, thus entitling the party to a different judgment, and in such a case when the judgment is set aside, the statement of decision must be amended and corrected (*Code Civ. Proc. § 663(1)*).

B. Restitution to Defaulting Purchaser Denied Specific Performance Is to Be Only Reasonable Value of Services. A defaulting purchaser who is denied specific performance of an escrow for the sale of real property is entitled to restitution of the reasonable value of services rendered by it that benefited the seller, but not to the enhancement in value of the property attributable to those services because that would amount to a windfall (*Lesny Development Co. v. Kendall (1985) 164 Cal. App. 3d 1010, 1022-1025, 210 Cal. Rptr. 890*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a motion by a successful seller to set aside and vacate a judgment and enter another and different verdict when a defaulting purchaser has been denied specific performance of a contract for the sale and purchase of real property and the court has applied a legally erroneous measure of damages in awarding the would-be purchaser restitution for services that enhanced the value of the property [*Code Civ. Proc. § 663, 663a*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

The points and authorities in this form may be modified for use in another procedural context, as in a memorandum of points and authorities in support of or in opposition to a motion for summary judgment, or in a trial or appellate brief.

[b] Related Pleading and Practice Forms

For a form of notice of intention to move to set aside and vacate a judgment and to enter another and different judgment, see Ch. 371, *Motions After Trial* in California Forms of Pleading and Practice. For a discussion of the statement of decision generally, see Ch. 529, *Statement of Decision* in that set. For discussion and forms relating to land sale contracts generally, see Ch. 569, *Vendor and Purchaser* in that set.

[c] Related Points and Authorities

For additional authorities and forms supporting a motion to set aside and vacate a judgment and to enter another and different judgment, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] Restitution to Defaulting Purchaser Denied Specific Performance Is to Be Only Reasonable Value of Services

Lesny Development Co. v. Kendall *(1985) 164 Cal. App. 3d 1010, 210 Cal. Rptr. 890* , involved a suit by a purchaser under escrow instructions for the sale and purchase of approximately 19 acres of property for $210,000. Buyer had filed the tentative tract map for the parcel before the instructions were executed. The escrow provided that buyer would continue to seek approval of the map, and the obligation to purchase was conditioned on the county's approval of buyer's tentative tract map. Within five days of approval of the tentative map, buyer was to deposit unconditionally $25,000 which was to be released immediately to seller. Five days after map approval, the buyer delivered a $25,000 check to the escrow holder with instructions that it was not to be released to seller until a grant deed had been placed in escrow. Seller cancelled the escrow instructions unilaterally and buyer sued for specific performance. The original judgment was for buyer for specific performance with respect to 46 of the 69 lots in the tract, the others having been built on by defendant by the time the matter was tried. That judgment was reversed in an unpublished opinion and remanded with instructions to the trial court to determine and award to plaintiff the dollar amount of the enhancement and/or contribution by plaintiff to the subject property (*164 Cal. App. 3d 1010, 1019)* . On remittitur, the trial court awarded the plaintiff $78,750: $18,750 representing 250 hours of effort expended in obtaining the tract map valued at $75 per hour, plus $60,000 representing $7,500 per lot for 8 lots that were not originally anticipated (*164 Cal. App. 3d 1010, 1014)* . Defendant again appealed. Judgment was modified, conditioned on defendant's consent thereto, to reduce plaintiff's recovery to $4690 representing 50 hours of service at $75 per hour, plus $940 paid by plaintiff for the application for approval of the map.

In modifying, the court noted an earlier opinion by it rejecting the contention that a party's voluntary devotion of effort to enhance the value of a contract it later breaches justifies equitable relief from forfeiture (*164 Cal. App. 3d 1010, 1018* , citing Simons v. Young (l979) *93 Cal. App. 3d 170, 155 Cal. Rptr. 460*). It also noted that both its earlier opinion and existing law established that plaintiff was entitled only to such compensation as would make it whole to avoid injustice, not to award it, in whole or in part, the benefit of the bargain with respect to which it was the breaching party (*164 Cal. App. 3d 1010, 1020* , citing Bird v. Kenworthy (1954) *43 Cal. 2d 656, 660 277 P.2d 1*). It reviewed Section 42 of the Restatement of Restitution to the effect that the amount of restitution should be the amount that the land had been increased in value by the improvement or the value of the labor and materials employed in making the improvements, whichever is least, but noted that *Code Civ. Proc. § 871.5* did not adopt the Restatement. The court reasoned that to allow plaintiff recovery based on enhanced value would give it the benefit of the bargain it had breached and leave defendants without compensation for having their property tied up off the market for the nine years of the litigation. It opined that allowing recovery for both the time spent and the value of the additional lots amounted to duplicate damages (*164 Cal. App. 3d 1010, 1022)* . The court deleted from the total of hours expended time spent by plaintiff before the execution of the contract on general meetings with county personnel not related to the map, travel, market research, and feasibility studies (*164 Cal. App. 3d 1010, 1022-1025)* .

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 214 SPECIFIC PERFORMANCE
PART II. FORMS

21-214 California Points & Authorities § 214.52

§ 214.52 Supporting Motion to Set Aside and Vacate Judgment and Enter Another and Different Judgment [Code Civ. Proc. §§ 663, 663a]--Incorrect or Erroneous Legal Basis for Court Decision [Code Civ. Proc. § 663(1)]--Impossibility Must Be Reconsidered at Time of Entry of Judgment

[1] FORM Supporting Motion to Set Aside and Vacate Judgment and Enter Another and Different Judgment [Code Civ. Proc. §§ 663, 663a]--Incorrect or Erroneous Legal Basis for Court Decision [Code Civ. Proc. § 663(1)]--Impossibility Must Be Reconsidered at Time of Entry of Judgment

[*Caption. See § 214.51[1].*]

THE JUDGMENT SHOULD BE SET ASIDE AND VACATED BECAUSE THE TRIAL COURT ERRED IN FAILING TO RECONSIDER THE DEFENSE OF IMPOSSIBILITY AT THE TIME IT ENTERED JUDGMENT.

A. Motion to Set Aside and Vacate and enter Another and Different Judgment. [*See § 214.51[1], Paragraph A.*]

B. Impossibility at Time of Entry of Judgment Controls. If a defendant did not have the power to perform when the contract was breached and the action was commenced, but performance is possible at the time of trial or entry of judgment, the defense of impossibility is not applicable, and the trial court is required to consider the equities of awarding specific performance as of the time of entry of judgment (*Stevens Group Fund IV v. Sobrato Development Co. (1991) 1 Cal. App. 4th 886, 894-897, 2 Cal. Rptr. 2d 460*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the issue of impossibility of defendant's performance and the other equities of awarding specific performance must be evaluated as of the time of trial or entry of judgment. The authorities may be combined with authority pertaining to the specific procedural context in which counsel wished to raise the substantive issue, or they may be used in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the particular case and the points of law stated. Thus, counsel should insert facts, or refer to findings, establishing that the impossibility no longer exists and that the equities still favor awarding specific performance.

[3] Discussion of Authorities

[a] Impossibility at Time of Entry of Judgment Controls

Stevens Group Fund IV v. Sobrato Development Co. *(1991) 1 Cal. App. 4th 886, 2 Cal. Rptr. 2d 460* , arose from an agreement for the sale of a commercial building. When the parties entered into the contract in 1986, the property was subject to a deed of trust that did not require the lender to accept prepayment. Both parties knew that, but the contract still called for defendant to convey title "free and clear." After the contract was formed, defendant asked the lender to accept prepayment, but it refused. Plaintiff relied on the "free and clear" condition and refused to take title subject to the deed of trust, but sued for alternative remedies of damages and specific performance. A jury decided the issue of damages in plaintiff's favor, but the trial court denied plaintiff's request for specific performance even though the loan had matured in 1989, and was payable at that time. The trial court considered itself bound by previous summary judgment orders holding that the lender would have been detrimentally affected by an order for specific performance. Plaintiff appealed, contending that it was entitled to a decree of specific performance because the impediment to defendant's performance had been removed.

The court of appeal reversed and remanded, although it did not go so far as to hold that specific performance was required. The court said that when the impediment to defendant's performance is removed, its performance may be compelled (*1 Cal. App. 4th 886, 894)* . The issue is defendant's ability to perform when plaintiff elects its remedy, not at the time performance is due under the contract (*1 Cal. App. 4th 886, 897)* . All along, plaintiff would have been entitled to specific performance if it was willing to accept the property with the encumbrance. The court of appeal also rejected defendant's contention that *Civ. Code § 3390(4)* (barring specific performance of agreement to procure act or consent of third party) barred specific performance because the lender's consent was not involved at the time a decree for specific performance would have issued (*1 Cal. App. 4th 886, 897)* . The court said that permitting the trial court to consider the seller's ability to perform at the time of the decree provides the court with greater latitude in exercising its equitable power and would also provide greater assurance that a contract would be performed. However, the court made clear that it did not hold that the trial court should order specific performance. That decision was still for the trial court after considering all applicable criteria, so the court remanded for the trial court to consider all relevant factors and determined whether specific performance should be granted (*1 Cal. App. 4th 886, 897)* .

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§ 214.53 Supporting Motion to Set Aside and Vacate Judgment and Enter Another and Different Judgment [Code Civ. Proc. §§ 663, 663a]--Incorrect or Erroneous Legal Bases for Court Decision [Code Civ. Proc. § 663(1)]--Order to Debtor to Convey Collateral to Secured Party as Reversible Error

[1] FORM Supporting Motion to Set Aside and Vacate Judgment and Enter Another and Different Judgment [Code Civ. Proc. §§ 663, 663a]--Incorrect or Erroneous Legal Bases for Court Decision [Code Civ. Proc. § 663(1)]--Order to Debtor to Convey Collateral to Secured Party as Reversible Error

[*Caption. See § 214.51[1].*]

THE JUDGMENT SHOULD BE SET ASIDE AND VACATED BECAUSE THE TRIAL COURT ERRED IN ORDERING THE DEFENDANT TO CONVEY THE COLLATERAL TO THE PLAINTIFF UNDER A SECURITY AGREEMENT NOT CONTAINING ANY PROMISE BY THE DEBTOR TO CONVEY THE COLLATERAL.

A. Motion to Set Aside and Vacate and Enter Another and Different Judgment. [*See § 214.51[1], Paragraph A.*]

B. Order to Debtor to Convey Collateral Is Error. When a debtor is in default under a security agreement that does not contain any promise by the debtor to convey the collateral but contains only an assignment of the collateral for the purpose of creating a security interest, a trial court's order to the debtor to convey the collateral to the secured party is reversible error (*Resolution Trust Corp. v. Winslow (1992) 9 Cal. App. 4th 1799, 1813-1814, 12 Cal. Rptr. 2d 510*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that an order to convey collateral to the secured party is error when the security agreement does not contain any promise by the debtor to convey. The authorities may be used also in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the particular case and the points of law stated.

[3] Discussion of Authorities

[a] Order to Debtor to Convey Collateral Is Error

In ***Resolution Trust Corp. v. Winslow*** *(1992) 9 Cal. App. 4th 1799, 12 Cal. Rptr. 2d 510* , a savings and loan association agreed to furnish start-up capital for a corporation and took, as security for the return of its investment, an assignment of shares of stock in two other corporations controlled by the other party. The agreement did not contain any promise by the other party to convey the stock to the association. Subsequently the association sued for dissolution of the start-up corporation, appointment of a receiver, specific performance of the agreement, damages for breach of contract, and an accounting. The trial court entered judgment for the association and ordered the other party to convey the collateral stock to the association.

The court of appeal reversed the so-called specific performance decree (the order to convey the collateral) on the ground that it was error to order a conveyance when the agreement contained no promise to convey but contained only an assignment for the purpose of creating a security interest (*9 Cal. App. 4th 1799, 1813)* . The court also noted that specific performance is not one of the remedies specified for a secured party under Division 9 of the Commercial Code (*9 Cal. App. 4th 1799, 1814)* .

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21-214 California Points & Authorities § 214.54

§ 214.54 Supporting Motion to Set Aside and Vacate Judgment and Enter Another and Different Judgment [Code Civ. Proc. §§ 663, 663a]--Incorrect or Erroneous Legal Bases for Court Decision [Code Civ. Proc. § 663(1)]--Award of Damages in Lieu of Specific Performance Although Defendant Did Not Rebut Presumption Against Adequacy of Damages as Remedy [Civ. Code § 3387]

[1] FORM Supporting Motion to Set Aside and Vacate Judgment and Enter Another and Different Judgment [Code Civ. Proc. §§ 663, 663a]--Incorrect or Erroneous Legal Bases for Court Decision [Code Civ. Proc. § 663(1)]--Award of Damages in Lieu of Specific Performance Although Defendant Did Not Rebut Presumption Against Adequacy of Damages as Remedy [Civ. Code § 3387]

[*Caption. See § 214.51[1].*]

THE JUDGMENT SHOULD BE SET ASIDE AND VACATED BECAUSE THE TRIAL COURT ERRED IN AWARDING DAMAGES IN LIEU OF SPECIFIC PERFORMANCE, AS THE DEFENDANT DID NOT REBUT THE STATUTORY PRESUMPTION AGAINST THE ADEQUACY OF DAMAGES AS A REMEDY FOR BREACH OF A CONTRACT TO TRANSFER REAL PROPERTY.

A. Motion to Set Aside and Vacate and Enter Another and Different Judgment. [*See § 214.51[1], Paragraph A.*]

B. Pecuniary Compensation Inadequate for Real Property. It is presumed that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation. In the case of a single-family dwelling which the party seeking performance intends to occupy, this presumption is conclusive. In all other cases, this presumption is a presumption affecting the burden of proof (*Civ. Code § 3387*).

C. Breaching Party Must Prove That Damages Will Be Adequate Remedy. A nonbreaching real estate buyer in a commercial or investment context is entitled to specific performance unless the seller rebuts the presumption with evidence showing that damages will be adequate to compensate the buyer (*Real Estate Analytics, LLC v. Vallas (2008) 160 Cal. App. 4th 463, 480, 72 Cal. Rptr. 3d 835*).
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that an award of damages in lieu of specific performance of a contract to transfer real property is error because the defendant did not rebut the statutory presumption against the adequacy of damages as a remedy [*see Civ. Code § 3387*]. The authorities may be used also in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the particular case and the points of law stated.

[3] Discussion of Authorities

[a] Breaching Party Must Prove That Damages Will Be Adequate Remedy

In ***Real Estate Analytics, LLC v. Vallas*** *(2008) 160 Cal. App. 4th 463, 72 Cal. Rptr. 3d 835* , when the owner of a parcel of commercial real property canceled a contract to sell it, the would-be buyer promptly sued for specific performance. The trial court concluded that the plaintiff was entitled to judgment but also found that an award of damages would adequately compensate the plaintiff because the plaintiff's intent in acquiring property was to earn profits from developing or reselling it. The court entered judgment for an amount computed as the difference between the purchase price under the contract and the fair market value of the property on the date the owner breached the contract, plus interest on the deposit that the plaintiff had paid. The plaintiff appealed, seeking a judgment granting specific performance.

The court of appeal reversed and directed entry of a new judgment granting specific performance. By imposing, in *Civ. Code § 3387*, a conclusive presumption for certain residential transactions, the Legislature decided that damages can never be satisfactory compensation for a buyer who intends to live at a single-family home, regardless of the circumstances. But by establishing a rebuttable presumption with respect to other property, the Legislature left open the possibility that damages can be an adequate remedy for breach of real estate contract pertaining to any other kind of property. The rebuttable presumption shifts the burden of proof to the breaching party to prove the adequacy of the damages. Thus, the Legislature intended that a damages remedy for a nonbreaching party to a commercial real estate contract is the exception rather than the rule (*160 Cal. App. 4th 463, 474)* .

The trial court had concluded that the defendant satisfied the burden of proof to overcome the presumption, based on its finding that the plaintiff's sole purpose and entire intent in buying the property was to earn money for the plaintiff's investors and to turn a profit as quickly as possible by reselling the property. The court of appeal described this reasoning as flawed. Standing alone, the fact that the plaintiff was motivated solely to make a profit from the purchase of the property did not overcome the strong statutory presumption that all land is unique and therefore damages were inadequate to make the plaintiff whole for the breach. The property was unique not merely because of its physical attributes and location, but also because of its investment potential and the reasonableness of the agreed-on contract price. These factors fully supported the uniqueness of the property and the inadequacy of a monetary remedy. Thus, although the plaintiff did not necessarily intend to benefit from its personal or commercial use of the land, the land did have a particular unique value because of the manner in which it could be used to earn profits upon a resale. The trial court's reasoning essentially reflected its disagreement with the premise underlying the *Civ. Code § 3387* presumption that all land is unique unless proved otherwise. It was not within the trial court's discretion to do so. Missing from the

trial court's analysis was the recognition that to rebut the presumption that damages are an inadequate remedy, the defendant must come forward with evidence showing that damages will fully compensate the plaintiff for the breach (*160 Cal. App. 4th 463, 476)* . The court of appeal concluded that "a nonbreaching real estate buyer in a commercial or investment context is entitled to specific performance, unless the seller rebuts the presumption with *evidence* showing that monetary damages are adequate to compensate the buyer" (*160 Cal. App. 4th 463, 480* (original emphasis)).

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 215 STATEMENT OF DECISION

21-215 California Points & Authorities 215.syn

§ 215.syn Synopsis to Chapter 215: STATEMENT OF DECISION

§ 215.01 Scope of Chapter

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§ 215.20 Supporting Contention That Statement of Decision Required [Code Civ. Proc. § 632; Cal. Rules of Ct., Rule 3.1590]--In General

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] When Statement of Decision Is Required Explaining Factual and Legal Basis as to Each Principal Controverted Issue

[b] Issuance of Statement of Decision After Timely Request Is Mandatory

[4] Additional Authorities

[a] Announcement of Tentative Decision

[b] Issuance of Statement of Decision After Timely Request Is Mandatory

§ 215.21 Supporting Contention That Statement of Decision Required [Code Civ. Proc. § 632; Cal. Rules of Ct., Rule 3.1590]--Request Not Untimely--Trial on Petition for Writ of Administrative Mandate [Code Civ. Proc. § 1094.5] Lasted More Than One Day

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

[3] Discussion of Authorities

[a] Trial Time Includes Judge's Consideration of Evidence

[b] Statement of Decision Required on Request When Court Excercises Independent Judgment on Evidence

[4] Additional Authorities

[a] Trial Time Includes Judge's Consideration of Evidence

§ 215.22 Supporting Contention That Statement of Decision Required [Code Civ. Proc. § 632; Cal. Rules of Ct., Rule 3.1590]--Determination of Motion Was in Effect Trial of Question of Fact

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Determination of Motion Was in Effect Trial of Question of Fact

§ 215.23 Opposing Contention That Statement of Decision Is Required [Code Civ. Proc. § 632]--Statement of Decision Waived [Cal. Rules of Ct., Rule 3.1590(h)]--Protesting Party Failed to Request Statement of Decision on Controverted Issues

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

[3] Discussion of Authorities

[a] Failure to Request Statement of Decision

[b] Findings Necessary to Support Judgment Will Be Implied

[4] Additional Authorities

[a] Failure to Request Statement of Decision

[b] Findings Necessary to Support Judgment Will Be Implied

§ 215.24 Opposing Contention That Statement of Decision Is Required [Code Civ. Proc. § 632]--Request for Statement of Decision Untimely--Trial Lasted Less Than One Day and Request Not Made Prior to Submission of Matter for Decision

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

[3] Discussion of Authorities

[a] Request Must Be Made Before Submission if Trial Is Concluded Within One Calendar Day or in Less Than Eight Hours Over More Than One Day

§ 215.25 Opposing Contention That Statement of Decision Is Required [Code Civ. Proc. § 632]--Request for Determination of Issue of Law Rather Than Fact

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Determination of Factual Issue

[b] Decision to Defer Determination

[4] Additional Authorities

[a] Determination of Factual Issue

§ 215.26 Opposing Contention That Statement of Decision Is Required [Code Civ. Proc. § 632]--Decision Not a Trial

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Statement of Decision Is Required Only After Trial

[b] Statement of Decision Not Available on Hearing on Preliminary Injunction

[c] Statement of Decision Not Available on Decision of Motion

[4] Additional Authorities

[a] Statement of Decision Not Available on Hearing on Preliminary Injunction

§ 215.27 Opposing Contention That Statement of Decision Is Required [Code Civ. Proc. § 632]--Special Proceedings

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Statement of Decision Not Required in Special Proceedings

§ 215.28 Supporting Contention That Statement of Decision Is Insufficient [Code Civ. Proc. § 632]--Statement of Decision Does Not Explain Factual and Legal Basis Regarding Each Principal Controverted Issue [Code Civ. Proc. § 634]--In General

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] No Inference That Trial Court Decided in Favor of Prevailing Party

[b] Lack of Finding on Material Issues Amounts to Reversible Error

[c] Request for Statement of Decision Must Include Resolution

§ 215.29 Supporting Contention That Statement of Decision Is Insufficient [Code Civ. Proc. § 632]--Statement of Decision Does Not Explain Factual and Legal Basis Regarding Each Principal Controverted Issue [Code Civ. Proc. § 634]--Minute Order Does Not Constitute Statement of Decision [Cal. Rules of Court, Rule 3.1590]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Minute Order Does Not Constitute Statement of Decision

§ 215.30 Opposing Contention That Statement of Decision Is Insufficient [Code Civ. Proc. § 632]--Statement of Decision Sufficiently Explains Factual and Legal Basis as to Each Principal Controverted Issue [Code Civ. Proc. § 634]--Only Ultimate Rather Than Evidentiary Facts Required

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Ultimate Rather Than Evidentiary Facts Required

[4] Additional Authorities

[a] Ultimate Rather Than Evidentiary Facts Required

§ 215.31 Opposing Contention That Statement of Decision Is Insufficient [Code Civ. Proc. § 632]--Statement of Decision Sufficiently Explains Factual and Legal Basis as to Each Principal Controverted Issue [Code Civ. Proc. § 634]--Missing Findings Implied in Other Findings

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Missing Finding Implied in Other Findings

[b] Actual Findings Impliedly Negate Proposed Findings

[c] Missing Finding Adverse to Complaining Party

[4] Additional Authorities

[a] Missing Finding Implied in Other Findings

§ 215.32 Opposing Contention That Statement of Decision Is Insufficient [Code Civ. Proc. § 632]--Statement of Decision Sufficiently Explains Factual and Legal Basis as to Each Principal Controverted Issue [Code Civ. Proc. § 634]--One Clear, Sustained, and Sufficient Finding Supports Judgment

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

[3] Discussion of Authorities

[a] One Clear, Sustained, and Sufficient Finding Supports Judgment

[4] Additional Authorities

[a] One Clear, Sustained, and Sufficient Finding Supports Judgment

§ 215.33 Opposing Contention That Statement of Decision Is Insufficient [Code Civ. Proc. § 632]--Statement of Decision Sufficiently Explains Factual and Legal Basis as to Each Principal Controverted Issue [Code Civ. Proc. § 634]--Requested Finding Concerns Immaterial Issues

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

[3] Discussion of Authorities

[a] Failure to Find on Immaterial Issue

[b] Judgment Otherwise Supported

[4] Additional Authorities

[a] Failure to Find on Immaterial Issue

§ 215.34 Supporting Contention That Presiding Judge May Sign Formal Judgment or Order Conforming to Minutes [Code Civ. Proc. § 635]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

[d] Opposing Memoranda

§ 215.35 Opposing Contention That Presiding Judge May Sign Formal Judgment or Order Conforming to Minutes [Code Civ. Proc. § 635]--Judge Who Heard Evidence Did Not Sign Statement of Decision or Final Judgment [Code Civ. Proc. § 632]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

[3] Discussion of Authorities

[a] No Agreed Findings Filed or Waiver of Findings

[b] Signature of Judge Who Heard Evidence Required

§ 215.36 Opposing Contention That Presiding Judge May Sign Formal Judgment or Order Conforming to Minutes [Code Civ. Proc. § 635]--Tentative Decision Not Binding on Court [Cal Rules of Court, Rule 3.1590(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

[3] Discussion of Authorities

[a] No Legal Judgment Based on Tentative Decision

§ 215.37 Supporting Contention That Reviewing Court May Make Factual Determinations Contrary to or in Addition to Those Made by Trial Court [Code Civ. Proc. § 909; Cal. Rules of Ct., Rules 8.252, 8.54]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[c] Related Pleading and Practice Forms

§ 215.38 Opposing Contention That Reviewing Court May Make Factual Determinations Contrary to or in Addition to Those Made by Trial Court [Code Civ. Proc. § 909; Cal. Rules of Ct., Rules 8.252, 8.54]--Proposed Findings Would Not Constitute Basis for Affirmance or Reversal of Judgment

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Purpose of Findings to Affirm or Reverse Judgment With Directions on Remand

[4] Additional Authorities

[a] Purpose of Findings to Affirm or Reverse Judgment With Directions on Remand

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 215 STATEMENT OF DECISION
PART I. INTRODUCTION

21-215 California Points & Authorities § 215.01

§ 215.01 Scope of Chapter

This chapter contains memoranda relating to the use of statements of decision on the trial of a question of fact by the court. Specifically, the forms relate to requesting and objecting to a statement of decision, and obtaining and objecting to a reviewing court's factual determinations contrary to or in addition to those made by the trial court. The chapter includes memoranda supporting [*see §§ 215.20, 215.21*] and opposing [*see §§ 215.23 -215.27*] contentions that a statement decision is required, supporting [*see §§ 215.28, 215.29*] and opposing [*see §§ 215.30 -215.33*] contentions that a statement of decision is insufficient, supporting [*see § 215.34*] and opposing [*see §§ 215.35, 215.36*] contentions that a presiding judge may sign a statement of decision and judgment, and supporting [*see § 215.37*] and opposing [*see § 215.38*] contentions that a reviewing court may make factual determinations contrary to or in addition to those made by the trial court.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureAppealsGeneral Overview

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CHAPTER 215 STATEMENT OF DECISION
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21-215 California Points & Authorities § 215.02

§ 215.02 Governing Statutes

Requirements for requesting and filing a statement of decision in a trial by the court of a question of fact are generally governed by *Code Civ. Proc. §§ 632-635* and *Cal. Rules of Ct., Rules 3.1590* and *3.1591* (trial court actions). Statements of decision with regard to matters heard by a reference are governed by *Code Civ. Proc. §§ 638* and *643*. Modifications of or additions to a statement of decision in conjunction with rulings on a motion for new trial or a motion to vacate a judgment are governed by *Code Civ. Proc. §§ 662* and *663*. The inclusion of a statement of decision in a judgment roll is governed by *Code Civ. Proc. § 670*. Factual determinations by a reviewing court contrary to or in addition to those made by a trial court are governed by *Code Civ. Proc. § 909* and *Cal. Rules of Ct., Rule 8.252*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewGovernmentsCourtsCourt Records

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CHAPTER 215 STATEMENT OF DECISION
PART I. INTRODUCTION

21-215 California Points & Authorities § 215.03

§ 215.03 Request for and Content of Statement of Decision

Written findings of fact and conclusions of law are not required. However, a statement of decision is required on request of any party appearing at the trial if made within 10 days after announcement of a tentative decision or, when the trial is concluded within one calendar day or in less than eight hours over a period of more than one day, if made prior to submission of the matter for decision. The request must specify those controverted issues on which the party is requesting a statement of decision. After the request, any party may make proposals as to the content of the statement of decision [*see Code Civ. Proc. § 632*]. Any proposal as to the content of the statement of decision must be made within 10 days of the date of the request [*Cal. Rules of Ct., Rule 3.1590(e)*].

The statement of decision must explain the factual and legal basis for the court's decision as to each of the principal controverted issues at trial. It must be in writing, unless the parties appearing at trial agree otherwise, or the trial lasted less than one day, in which case it may be made orally on the record in the presence of the parties [*see Code Civ. Proc. § 632*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedureTrialsBench TrialsCivil ProcedureJudgmentsGeneral Overview

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21-215 California Points & Authorities § 215.04

§ 215.04 Preparation, Filing, and Objections to Statement of Decision

If a party requests a statement of decision, the court must, within 30 days of announcement or service of the tentative decision, prepare and serve a proposed statement of decision and a proposed judgment on all parties that appeared at the trial, unless the court has ordered a party to prepare the statement. A party that has been ordered to prepare the statement must within 30 days after the announcement or service of the tentative decision, serve and submit to the court a proposed statement of decision and a proposed judgment. If the proposed statement of decision and judgment are not served and submitted within that time, any other party that appeared at the trial may within 10 days thereafter (1) prepare, serve, and submit to the court a proposed statement of decision and judgment, or (2) serve on all other parties and file a notice of motion for an order that a statement of decision be deemed waived [*Cal. Rules of Ct., Rule 3.1590(f)*]. Any party may, within 15 days after the proposed statement and judgment have been served, serve and file objections to the proposed statement and judgment [*Cal. Rules of Ct., Rule 3.1590(g)*]. The court may, by written order, extend any of the times prescribed by *Cal. Rules of Ct., Rule 3.1590*. The court may also, at any time prior to the entry of judgment, excuse noncompliance with any of these time limits for good cause shown and on such terms as may be just [*Cal. Rules of Ct., Rule 3.1590(m)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureJudgmentsGeneral Overview

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21-215 California Points & Authorities § 215.05

§ 215.05 How to Use Forms in This Chapter

[1] Page Limits on Memoranda

One of the more significant drafting requirements to keep in mind are page limits: supporting and opposing memoranda filed in discovery motion proceedings may not exceed 15 pages. A reply or closing memorandum may not exceed 10 pages. Exhibits, declarations, attachments, the table of contents, the table of authorities, and the proof of service are excluded from these page limits [*Cal. Rules of Ct., Rule 3.1113(d)*]. Any party must obtain leave of court to file a longer memorandum [*see Cal. Rules of Ct., Rule 3.1113(d)*]. These and other drafting requirements are discussed in further detail in Ch. 1, *Writing Legal Memoranda and Briefs* .

[2] Using the Forms to Build a Draft Memorandum

Depending on the procedural context in which an issue relating to a statement of decision arises, counsel should combine contentions in this chapter with contentions relating to the procedural context in order to create the structure for a memorandum or brief. For example, the contentions regarding whether a statement is required [*see §§ 215.20 -215.29*], or whether a filed statement is sufficient [*see §§ 215.30 -215.36*], may arise in the context of a motion for new trial or a motion to vacate judgment, whereas the contentions regarding whether a reviewing court may make factual determinations contrary to or in addition to those made by the trial court [*see §§ 215.37, 215.38*] may be included in an appellate brief or in a memorandum supporting or opposing a separate appellate motion seeking factual determinations.

One of the more significant drafting requirements to keep in mind are page limits: supporting and opposing memoranda of points and authorities must not exceed 15 pages, or 20 pages in summary judgment or summary adjudication proceeding. A reply or closing memorandum may not exceed 10 pages. Exhibits, declarations, attachments, a table of contents, a table of authorities, and the proof of service are excluded from these page limits [*Cal. Rules of Ct., Rule 3.1113(d)*]. Any party must obtain leave of court to file a longer memorandum [*see Cal. Rules of Ct., Rule 3.1113(e)*]. For discussion of these and other drafting requirements, and discussion of how to prepare a complete memorandum or brief, see Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeGeneral OverviewCivil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPleading & PracticeMotion PracticeSupporting MemorandaCivil ProceduresJudgmentsRelief From JudgmentGeneral Overview

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21-215 California Points & Authorities § 215.06

§ 215.06 Related Pleading and Practice Chapters

For a discussion and forms relating to statements of decision, see California Forms of Pleading and Practice, Ch. 529, *Statement of Decision* (Matthew Bender). For a discussion and forms relating to motions for new trial and motions to vacate judgment, see Ch. 371, *Motions After Trial* in that publication. For a discussion and forms relating to a request to an appellate court to make factual determinations and written opposition to the request, see Ch. 50, *Appeal: Briefs* in that publication.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral Overview

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21-215 California Points & Authorities § 215.07

§ 215.07 Related Memoranda

For memoranda relating to motions for new trial and motions to vacate judgment, see Ch. 155, *Motions After Trial* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

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21-215 California Points & Authorities §§ 215.08-215.19

[Reserved]

§§ 215.08[Reserved]

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CHAPTER 215 STATEMENT OF DECISION
PART II. FORMS

21-215 California Points & Authorities § 215.20

§ 215.20 Supporting Contention That Statement of Decision Required [Code Civ. Proc. § 632; Cal. Rules of Ct., Rule 3.1590]--In General

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

A STATEMENT OF DECISION IS REQUIRED BECAUSE _____ [*name of requesting party*], _____ [*specify party status, e.g.,* PLAINTIFF AND CROSS DEFENDANT] IN THIS ACTION, MADE A TIMELY AND APPROPRIATE REQUEST FOR A STATEMENT OF DECISION.

A. When Statement of Decision Is Required Explaining Factual and Legal Basis as to Each Principal Controverted Issue. On the request of any party appearing at the trial, made within 10 days after the court announces a tentative decision, or, if the trial is concluded within one calendar day or in less than eight hours over more than one day, made prior to submission of the matter for decision, the court must issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial (*Code Civ. Proc. § 632*; *In re Marriage of Hargrave (1985) 163 Cal. App. 3d 346, 353-354, 209 Cal. Rptr. 764*).

B. Announcement of Tentative Decision. On the trial of a question of fact by the court, the court must announce its tentative decision by an oral statement, entered in the minutes, or by a written statement filed with the clerk [*Cal. Rules of Ct., Rule 3.1590(a)*]. The tentative decision does not constitute a judgment and is not binding on the court [*Cal. Rules of Ct., Rule 3.1590(b)*]. The court in its tentative decision may state whether a statement of decision, if requested, will be prepared by the court or by a designated party, and direct that the tentative decision will be the statement of decision unless within 10 days either party specifies controverted issues or makes proposals not covered in the tentative decision [*Cal. Rules of Ct., Rule 3.1590(c)*].

C. Service of Statement of Decision. If a party requests a statement of decision, the court must, within 30 days of announcement or service of the tentative decision, prepare and serve a proposed statement of decision and a proposed judgment on all parties that appeared at the trial, unless the court has ordered a party to prepare the statement [*Cal. Rules of Ct., Rule 3.1590(e)*].

[*Optional*] **D. Issuance of Statement of Decision After Timely Request Is Mandatory.** Issuance of a statement of decision after a timely request for one has been made is mandatory; failure to issue a statement of decision after such a timely request requires reversal (*In re Marriage of S. (1985) 171 Cal. App. 3d 738, 746-750, 217 Cal. Rptr. 561* ; *Miramar Hotel Corp. v. Frank B. Hall & Co. (1985) 163 Cal. App. 3d 1126, 1129, 210 Cal. Rptr. 114*).

[*This form may be combined, when appropriate, with §§ 215.21 and 215.31*.]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a contention that a statement of decision is required in a superior court action if a timely request has been made [*see Code Civ. Proc. § 632*; *Cal. Rules of Ct., Rule 3.1590(a), (e)*]. Optional Paragraph D is for use if counsel wishes to contend that the trial court's failure to issue a statement of decision after a timely request is reversible error [*see In re Marriage of S. (1985) 171 Cal. App. 3d 738, 746-750, 217 Cal. Rptr. 561]* .

The points in this form may be combined with the points in § 215.21 when counsel wishes to contend that a trial on a petition for a writ of administrative mandate was not concluded within one calendar day or in less than eight hours over more than one day, and in § 215.31 when counsel wishes to contend that a minute order does not constitute a statement of decision.

This form should be combined with memoranda pertaining to the specific procedural context in which counsel wishes to raise the issue that a statement of decision is required after a timely request has been made. These points may combined, for example, with those relating to a motion to vacate the judgment and for a new trial [*see Code Civ. Proc. §§ 634, 657* (motion for new trial), 663 (motion for judgment)]. They may also be adapted for use in an appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should discuss facts showing that a timely request for a statement of decision was made within 10 days after the announcement of the tentative decision, or prior to submission of the matter for decision for a trial that was concluded within one calendar day or in less than eight hours over more than one day [*see Code Civ. Proc. § 632*].

[b] Related Pleading and Practice Forms

For forms relating to procedures for obtaining a statement of decision generally, see California Forms of Pleading and Practice, Ch. 529, *Statement of Decision* (Matthew Bender). For forms relating to motions for new trial and motions to vacate judgments generally, see Ch. 371, *Motions After Trial* in that publication.

[c] Related Memoranda

For points and authorities for use in motions for new trial and motions to vacate judgment, see Ch. 155, *Motions After Trial* .

[d] Opposing Memoranda

In an appropriate case, the points and authorities *set out in §§ 215.23 -215.27* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] When Statement of Decision Is Required Explaining Factual and Legal Basis as to Each Principal Controverted Issue

In re Marriage of Hargrave *(1985) 163 Cal. App. 3d 346, 209 Cal. Rptr. 764* , was a proceeding for dissolution of marriage heard by a retired superior court judge sitting as referee. In determining the value of the goodwill of the husband's business, the referee rejected all the testimony on that subject and merely issued a statement of the valuation, with no discernible basis for the calculation. The wife appealed, assigning as error, inter alia, the trial court's failure to explain the basis for the valuation of the husband's goodwill.

The court of appeal reversed, holding that *Code Civ. Proc. § 632* imposes a duty on the trial court to explain the factual and legal basis for its decision as to each of the principal controverted issues at trial (*163 Cal. App. 3d 346, 353-354)* . The goodwill value of the husband's business was undeniably a principal controverted issue in the case. The court noted that despite the wife's objection to the referee's terse statement of value, she was provided no explanation of the factual or legal basis of the referee's determination (*163 Cal. App. 3d 346, 354)* . Although family law courts are generally vested with wide discretion, the discretion intended is not a capricious or arbitrary discretion, but an impartial one, guided and controlled by fixed legal principles (*163 Cal. App. 3d 346, 354-355)* . The referee's rejection of all the testimony on the subject of goodwill valuation left a record with no supporting evidence on that issue. At that point, he should have required the parties to furnish additional evidence or appointed his own expert to testify on that issue (*163 Cal. App. 3d 346, 355)* . (Although the trial commenced after the effective date of the 1981 amendment to *Code Civ. Proc. § 632*, each party submitted proposed findings of fact and conclusions of law. No one objected to the form of the proposals, and the court of appeal treated them as statements of decision (*163 Cal. App. 3d 346, 350-351)* .)

[b] Issuance of Statement of Decision After Timely Request Is Mandatory

In re Marriage of S. *(1985) 171 Cal. App. 3d 738, 217 Cal. Rptr. 561* , was an appeal from an order modifying child custody and visitation provisions of a marital dissolution judgment. In the original judgment, custody of the parties' son was awarded to the wife, and custody of the parties' daughter to the husband. Each parent had visitation rights with the other child. After the husband withheld visitation with the daughter due to alleged abuse by the wife's cohabitant, the wife filed an order to show cause seeking sole custody of the daughter and prevention of any visitation by the husband. The husband responded by seeking sole custody of the son, whom he also claimed had been abused, and safeguards concerning the daughter's visitation. After imposing interim visitation restrictions, the trial court conducted a four-day hearing. After the court made its intended decision changing custody of the son to the husband, the wife timely filed a request for a statement of decision. The trial court subsequently stayed its order and the wife timely filed a request for a statement of decision on the controverted issues. After the trial court vacated the stay order and awarded custody of the son to the husband, the wife again requested a statement of decision. The trial court ordered the husband's counsel to prepare and submit a statement of decision along with a proposed order. The order, but no statement of decision, was filed. The wife appealed.

The court of appeal reversed the custody modification, holding that the trial court's failure to render a statement of decision after the wife's request rendered the modification void. *Code Civ. Proc. § 632* expressly mandates a statement of decision if a request is timely made. Cal. Rules of Ct., Rule 232 [*now see Cal. Rules of Ct., Rules 3.1590*] specifies the preparation procedure and is applied to family law matters by *Cal. Rules of Ct., Rule 5.21*. Citing ***Miramar Hotel Corp. v. Frank B. Hall & Co.*** *(1985) 163 Cal. App. 3d 1126, 1129, 210 Cal. Rptr. 114* (discussed infra), the court held that the trial court's failure to prepare a statement of decision under *Code Civ. Proc. § 632* after a timely request is made by a party constitutes reversible error. The court remanded the matter with directions that the trial court prepare a statement of decision (*171 Cal. App. 3d 738, 746-751)* .

In ***Miramar Hotel Corp. v. Frank B. Hall & Co.*** *(1985) 163 Cal. App. 3d 1126, 210 Cal. Rptr. 114* , after a two-day trial on a cross complaint, the trial court took the matter under submission and subsequently issued a minute order entitled "Memorandum of Decision and Statement of Decision (*Code Civ. Proc. § 632*)." The memorandum listed

findings that cross complainant did not justifiably rely on any representation or misrepresentation by cross defendant or its agents, that no implied or express contract was created, and that the cross complainant was not entitled to recover attorney's fees. Cross complainant filed a request for a formal statement of decision pursuant to *Code Civ. Proc. § 632* as to certain principal controverted issues and various evidentiary factual issues. The trial court entered judgment without issuing any formal statement of decision. Cross complainants appealed.

The court of appeal reversed, noting that the Legislature, by its enactment of former Code Civ. Proc. § 632, and the Judicial Council, by its adoption offormerCal. Rules of Ct., Rule 232 [*now see Cal. Rules of Ct., Rule 3.1590*], created a comprehensive method for informing the parties and ultimately the appellate courts of the factual and legal basis for the trial court's decision (*163 Cal. App. 3d 1126, 1128)* . A properly prepared statement of decision may be vitally important to the litigants in framing the issues, if any, that need to be considered or reviewed on appeal. Although entitled "Statement of Decision," the minute order did not constitute a statement of decision within the meaning of *Code Civ. Proc. § 632* because it failed to explain the factual and legal basis of the court's decision as to the principal controverted issues at trial, an essential element of a statement of decision. By labeling the minute order a statement of decision and ignoring cross complainants' request for the issuance of a statement, the trial court deprived cross complainants of an opportunity to make proposals and objections concerning the court's statement of decision, a vital aspect of the process. The requirements of former Cal. Rules of Ct., Rule 232 [*now see Cal. Rules of Ct., Rule 3.1590*], impose no substantial burden on the courts, because the trial court is specifically authorized to designate a party to prepare the statement of decision. The trial court is therefore required only to review the statement and any objections to it, and to make or order to be made any corrections, additions, or deletions it deems necessary or appropriate. The issuance of a statement of decision after timely request is clearly mandatory pursuant to *Code Civ. Proc. § 632*, and the trial court's failure to do so required reversal (*163 Cal. App. 3d 1126, 1129)* .

[4] Additional Authorities

[a] Announcement of Tentative Decision

The court of appeal in *Neptune Society Corp. v. Longanencker (1987) 194 Cal. App. 3d 1233, 240 Cal. Rptr. 117* , affirmed the trial court's judgment of rescission of a partnership and franchise agreement based on fraud and violations of franchise law. Defendant contended that the fraud ground could not be a basis for the judgment because it was not articulated by the court in its oral announcement of the tentative decision. The court of appeal disagreed, citing former Cal. Rules of Ct., Rule 232(a) [*now see Cal. Rules of Ct., Rule 3.1590(a)*], and said both the judgment and the finding relating to fraud as a ground for rescission were proper (*194 Cal. App. 3d 1233, 1245)* .

[b] Issuance of Statement of Decision After Timely Request Is Mandatory

In *In re Marriage of Reilley (1987) 196 Cal. App. 3d 1119, 242 Cal. Rptr. 302* , the court of appeal held that a trial court improperly failed to render a statement of decision on the issues of child and spousal support after a timely request for the statement was made. *Code Civ. Proc. § 632* requires a trial court to issue the statement on the request of a party when the request is made prior to the submission of a case tried in less than one day. Although neither party was directed by the court to prepare the statement, the court should have prepared one itself. It is reversible error when a statement of decision is not rendered after a timely request therefor has been made (*196 Cal. App. 3d 1119, 1125-1126)* .

In *In re Marriage of McDole (1985) 176 Cal. App. 3d 214, 221 Cal. Rptr. 734* , a dissolution proceeding, the trial court determined the family residence to be community property, and the wife requested a statement of decision, which was successfully opposed by the husband on the ground that it was untimely. The wife appealed from the trial court's entry of judgment. The court of appeal reversed, holding that the request for a statement of decision was timely pursuant to *Code Civ. Proc. §§ 632* (within 10 days after court announces tentative decision) and 1013(a) (additional five days if address is within California); and that it is reversible error for a court to fail to render a statement of decision pursuant to

Code Civ. Proc. § 632 when one is duly and timely requested by a party (*176 Cal. App. 3d 214, 218-219)* .

In *McCurter v. Older (1985) 173 Cal. App. 3d 582, 219 Cal. Rptr. 104* , an action concerning the purchase and sale of real property, the trial court entered judgment against plaintiff, and plaintiff requested a finding on the issue of constructive fraud, which the trial court denied. Plaintiff appealed, and the court of appeal reversed, holding that the trial court committed reversible error by not making a finding of fact on a material issue despite plaintiff's request (*173 Cal. App. 3d 582, 590-591)* .

The facts and procedural background of *Bevli v. Brisco (1985) 165 Cal. App. 3d 812, 212 Cal. Rptr. 36* , are discussed in *§ 215.21[3][a]*. In *Bevli*, the court of appeal held that, in a proceeding for writ of administrative mandate, if time is expended by the trial court in absorbing the evidentiary information for trial, it must be considered as trial time for the purposes of findings under *Code Civ. Proc. § 632*. The court, citing *Miramar Hotel Corp. v. Frank B. Hall & Co. (1985) 163 Cal. App. 3d 1126, 210 Cal. Rptr. 114* (discussed in *§ 146.20[3][b]*), also held that *Code Civ. Proc. § 632* clearly specifies that the issuance of a statement of decision on timely request for one is mandatory. The trial court's failure to issue the statement despite a timely request for it required reversal (*165 Cal. App. 3d 812, 822)* .

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CHAPTER 215 STATEMENT OF DECISION
PART II. FORMS

21-215 California Points & Authorities § 215.21

§ 215.21 Supporting Contention That Statement of Decision Required [Code Civ. Proc. § 632; Cal. Rules of Ct., Rule 3.1590]--Request Not Untimely--Trial on Petition for Writ of Administrative Mandate [Code Civ. Proc. § 1094.5] Lasted More Than One Day

[1] FORM

[*The following may be included in a memorandum or in a trial or appellatebrief, and may be combined with a general contention that a timely request for a statement of decision has been made (see, e.g., § 215.20).*]

THE REQUEST BY _____ [*name*] FOR A STATEMENT OF DECISION WAS TIMELY BECAUSE, INCLUDING THE TIME SPENT BY THE TRIAL JUDGE IN CONSIDERING THE EVIDENCE, THE TRIAL WAS NOT CONCLUDED WITHIN ONE CALENDAR DAY OR IN LESS THAN EIGHT HOURS OVER MORE THAN ONE DAY.

A. Trial Time Includes Judge's Consideration of Evidence. If time is expended by the trial court in absorbing the evidentiary information for trial, it must be considered as trial time for the purposes of findings under *Section 632 of the Code of Civil Procedure* (*Bevli v. Brisco (1985) 165 Cal. App. 3d 812, 822, 212 Cal. Rptr. 36* ; *but see Milligan v. Hearing Aid Dispensers Examining Com. (1983) 142 Cal. App. 3d 1002, 1004 fn. 3, 191 Cal. Rptr. 490*).

[*Optional*] **B. Statement of Decision Required on Request When Court Exercises Independent Judgment on Evidence.** When the applicable scope of review is that of independent judgment, findings must be made if requested (*Bevli v. Brisco (1985) 165 Cal. App. 3d 812, 822, 212 Cal. Rptr. 36* ; *Roccaforte v. City of San Diego (1979) 89 Cal. App. 3d 877, 886-887, 152 Cal. Rptr. 558*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a request for statement of decision was timely, because the trial, including the time spent by the trial court in considering the evidence, was not concluded within one calendar day or in less than eight hours over a period of more than one day. A statement of decision must be

made within 10 days after the court announces its tentative decision, unless the trial is concluded within these periods, in which event the request must be made prior to the submission of the matter for decision [*Code Civ. Proc. § 632*; *see § 215.24*]. Optional Paragraph B is for use when the applicable scope of review is that of independent judgment, and counsel wishes to contend that a statement of decision must be made if requested.

Note that the decision cited for the main point concerns a trial on a petition for administrative mandate, and is distinguished on that ground, because trial court proceedings on petition for writ of administrative mandate uniquely include a reading and consideration of all or portions of the administrative record [*see Bevli v. Brisco (1985) 165 Cal. App. 3d 812, 819-822, 212 Cal. Rptr. 36]* . Whether the rule of law in these points and authorities applies to proceedings other than those for a petition for administrative mandate is unclear. Moreover, the holding in *Bevli* is directly opposed by the court of appeal decision in *Milligan v. Hearing Aid Dispensers Examining Com. (1983) 142 Cal. App. 3d 1002, 1004 fn. 3, 191 Cal. Rptr. 490* [*see § 146.21[3][a]*]. Finally, note that both cases were decided before the 1987 amendments to *Code Civ. Proc. § 632,* which clarified the "one day" limit on trial time and now provide that counsel must request the statement of decision prior to submission of the matter for decision whenever the trial is concluded within one calendar day or in less than eight hours over more than one day [*see § 215.24*].

These points and authorities should be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the trial was not concluded within one calendar day or in less than eight hours over a period of more than one day. For example, they may be combined with those relating to a motion to vacate the judgment and for a new trial. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should discuss facts showing when the judge first began considering the evidence, the time spent in court, and the time spent by the judge after court was adjourned to consider all the evidence presented. Counsel should aggregate the court time and the time spent by the judge outside of court, and show that the total time was neither within one calendar day nor less than eight hours over a period of more than one day [*Code Civ. Proc. § 632*; *see Bevli v. Brisco (1985) 165 Cal. App. 3d 812, 822, 212 Cal. Rptr. 36]* .

In an appropriate case, the points and authorities *set out in § 215.24* may be used to oppose the contention supported by these points and authorities.

[b] Related Pleading and Practice Forms

For forms relating to procedures for obtaining a statement of decision generally, see California Forms of Pleading and Practice, Ch. 529, *Statement of Decision* (Matthew Bender). For forms relating to motions for new trial and motions to vacate judgments generally, see Ch. 371, *Motions After Trial* in that publication.

[c] Related Memoranda

For points and authorities for use in motions for new trial and motions to vacate judgments, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] Trial Time Includes Judge's Consideration of Evidence

Bevli v. Brisco *(1985) 165 Cal. App. 3d 812, 212 Cal. Rptr. 36* , was an action to challenge the discharge of plaintiff and reinstate her with backpay. The college district employing plaintiff as an instructor dismissed her, citing factual allegations to support charges of incompetence, unfitness for service, and refusal to obeyrules and regulations. Plaintiff requested a hearing on the dismissal. The arbitrator determined that the district did not comply with relevant statutory requirements regarding the charges of incompetence, but nevertheless ruled, based on the remaining charges, that the

district did have cause to suspend and dismiss her. Plaintiff brought a petition for administrative mandate. The trial court ordered the issuance of a writ of mandate directing the district and its board of trustees to set aside plaintiff's discharge and reinstate her with backpay. During trial, the court noted that it had read and considered the transcript and exhibits of the administrative hearing from 10:00 a.m. to 11:00 p.m. on the day preceding the trial, and for two hours on the morning of the trial. In its minute order, the trial court stated that counsel for plaintiff shall prepare, serve on opposing counsel, and submit to the court a proposed form of judgment, writ of mandate, and, if requested, a statement of decision. The district filed a request for a statement of decision 10 days later. The court denied the request, stating that although the court had made reference to a possible statement of decision, it omitted to state that the case was tried in less than one day. The court therefore denied the request for a statement of decision on the ground that it was untimely, that is, that it had not been made before the matter was submitted for decision, pursuant to *Code Civ. Proc. § 632*. The district and its board of trustees, as the real parties in interest, appealed.

The court of appeal reversed, ruling against plaintiff on the issue of whether the district is entitled to plead multiple causes for dismissal that are all or in part supported by common factual allegations under the relevant statutes. The court then considered whether the trial lasted more than one day and, consequently, whether the trial court improperly rejected a timely request for a statement of decision (*165 Cal. App. 3d 812, 819)* . The court noted that, in analyzing how long a trial lasts, it must first determine when it commences and when it concludes. Pursuant to *Code Civ. Proc. § 581(a)*, a nonjury trial commences at the beginning of the opening statement of the plaintiff or counsel, and if there is no opening statement, then at the time of the administering of the oath or affirmation to the first witness, or the introduction of any evidence. However, trial court proceedings on petitions for writ of administrative mandate are unique because the trial ordinarily consists of introducing all or portions of the administrative record into evidence, reading and considering the evidence, listening to the arguments of counsel, and then either ruling directly from the bench at the conclusion of argument or submitting the matter for further consideration, and ultimate issuance of a statement of intended decision. The trial did not commence by an opening statement of plaintiff or her counsel or by oath or affirmation to the first witness, because there was none administered. The trial was commenced by the introduction of evidence (*165 Cal. App. 3d 812, 820)* . When the court commenced the process of reading the administrative transcript and exhibits, it was considering the evidence, notwithstanding the fact that the parties did not formally stipulate to the introduction of the exhibits into the proceeding until moments before they began their arguments the following day. The judge's informal process of reading the administrative record ordinarily constitutes the trial of the action from an evidentiary standpoint, with the express or tacit understanding with counsel that when they later begin to argue the case that they will formally introduce into evidence the administrative transcript and exhibits. For the purposes of *Code Civ. Proc. § 632*, the trial was concluded when the court announced its tentative decision (*165 Cal. App. 3d 812, 821)* . To state that the trial was completed in less than one day would be to ignore the fact that the court closely and thoroughly perused the administrative record on the preceding day. The time expended by the trial court in absorbing the evidentiary information for trial must be considered as trial time for the purposes of findings under *Code Civ. Proc. § 632* (*165 Cal. App. 3d 812, 822)* .

It should be noted that a conflict apparently exists between the Court of Appeal, Second Appellate District, Division Five, which decided *Bevli*, and the Court of Appeal, Second Appellate District, Division Two, which decided *Milligan v. Hearing Aid Dispensers Examining Com. (1983) 142 Cal. App. 3d 1002, 191 Cal. Rptr. 490* , also a proceeding for a petition for administrative mandate. In *Milligan*, petitioner contended that he need not make a timely request before the conclusion of the hearing because the trial court's preparation for trial must have taken more than one day. The court rejected petitioner's contention as not supported by the record or by law, and held that the trial court was under no duty to prepare findings in the absence of a timely request before submission of the matter for decision, pursuant to Cal. Rules of Ct., Rule 232 (*142 Cal. App. 3d 1002, 1004 fn. 3*). Counsel might note that in *Bevli*, the court's total time in considering the evidence was documented in the court transcript, whereas in *Milligan*, petitioner appears to have merely speculated that the trial court's preparation for trial must have taken more than one day, and it does not appear that the court's total time in considering the evidence was documented for the record. This distinction was, in fact, the crucial factor in determining the timeliness of a request for statement of decision in *Kearl v. Board of Medical Quality Assurance (1986) 189 Cal. App. 3d 1040, 236 Cal. Rptr. 526* , decided by the Court of Appeal, Second Appellate

District, Division One (discussed in *§ 215.21[4][a]*). The court in *Kearl* noted that in *Bevli*, the record reflected the amount of time expended by the trial court in reviewing the evidence prior to trial, and, distinguishing the instant case on that ground, found that the request was untimely (*189 Cal. App. 3d 1040, 1051)* .

[b] Statement of Decision Required on Request When Court Excercises Independent Judgment on Evidence

The facts and procedural background of ***Bevli v. Brisco*** *(1985) 165 Cal. App. 3d 812, 212 Cal. Rptr. 36* , are discussed in *§ 215.21[3][a]*. In *Bevli*, the court held that, in an action for writ of administrative mandate, time spent by the trial courtin absorbing the evidentiary information for trial must be considered as trial time for the purposes of findings under *Code Civ. Proc. § 632*. The court also noted that proceedings brought on petition for administrative mandate require the trial court to exercise its judgment in an independent review of the record. When the applicable scope of review is that of independent judgment, findings must be made if requested. Further, findings would enable the reviewing party to determine what test the trial court employed in reviewing the administrative decision and the ground on which it found that test to be applicable (*165 Cal. App. 3d 812, 822)* .

Roccaforte v. City of San Diego *(1979) 89 Cal. App. 3d 877, 152 Cal. Rptr. 558* , was an action brought by a police officer challenging several agencies' findings regarding the termination of his injury leave pay, denial of his industrial disability retirement, and his reinstatement to active duty. Petitioner was injured while making an arrest, and the city for which he worked provided medical treatment and paid compensation in the form of injury leave pay until he returned to active duty. Petitioner returned to work, and then took injury leave again due to injury-related medical problems. The city terminated petitioner's injury benefits shortly thereafter on the ground that medical evidence indicated his position was permanent and stationary. A second agency denied him disability retirement benefits on the ground that he was not currently incapacitated, and a third agency refused him reemployment as a police officer on the ground that he failed to meet the necessary physical qualifications. Petitioner filed a petition for writ of administrative mandate, which the trial court denied. The record showed that the trial court applied the substantial evidence test as to the issue regarding termination of petitioner's injury leave pay. However, the record was unclear with respect to the standard of review used as to the issue of retirement. Petitioner appealed.

The court of appeal reversed, holding that the uncertainty as to the standard of review used by the trial court could be resolved by appropriate findings of fact. However, it appears that findings of fact or conclusions of law were neither made nor requested (*89 Cal. App. 3d 877, 886)* . When the applicable scope of review is that of independent judgment, findings must be made if requested. Further, findings would enable the reviewing party to determine what test the trial court employed in reviewing the administrative decision and the ground on which it found that test to be applicable (*89 Cal. App. 3d 877, 886-887)* . The court further held that the city is bound by its contractual agreements with petitioner, and it was the trial court's duty, after examination of the evidence, contract requirements and applicable law, to exercise its independent judgment, and to eliminate conflicting administrative decisions to the end that petitioner be awarded the benefits of his employment contract in accordance with the medical facts (*89 Cal. App. 3d 877, 888)* .

Although *Roccaforte* was decided prior to the 1981 amendments to *Code Civ. Proc. § 632* and former Cal. Rules of Ct., Rule 232(e) [*now see Cal. Rules of Ct., Rule 3.1590(g)*], the case has been cited for the point discussed in a later opinion interpreting the code section and rule as amended [*see Bevli v. Brisco (1985) 165 Cal. App. 3d 812, 822, 212 Cal. Rptr. 36]* .

[4] Additional Authorities

[a] Trial Time Includes Judge's Consideration of Evidence

In *Kearl v. Board of Medical Quality Assurance (1986) 189 Cal. App. 3d 1040, 236 Cal. Rptr. 526* , a proceeding for writ of mandate after administrative hearing, the trial court rejected as untimely petitioner's request for a statement of decision five days after a trial that was begun and completed on the same day (*189 Cal. App. 3d 1040, 1049)* . Some

months later, subsequent to the publication of *Bevli v. Brisco (1986) 165 Cal. App. 3d 812, 212 Cal. Rptr. 36* (discussed in *§ 215.21[3][a]*), petitioner requested that the court document the time spent preliminarily reviewing the evidence, but the court refused on the ground that it could not recall the information. The court of appeal affirmed, holding that if the record does not reflect the amount of time expended by the trial court, the reviewing court cannot speculate on it (*189 Cal. App. 3d 1040, 1051)* .

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21-215 California Points & Authorities § 215.22

§ 215.22 Supporting Contention That Statement of Decision Required [Code Civ. Proc. § 632; Cal. Rules of Ct., Rule 3.1590]--Determination of Motion Was in Effect Trial of Question of Fact

[1] FORM

[*The following may be included in a memorandum or in a trial or appellate brief, and may be combined with a general contention that a timely request for a statement of decision has been made (see, e.g., § 215.20).*]

A STATEMENT OF DECISION IS REQUIRED ON THE COURT'S DETERMINATION OF _____ [*identify motion, e.g.,* PLAINTIFF'S MOTION TO AMEND JUDGMENT], BECAUSE THE COURT IN EFFECT TRIED ISSUES OF FACT IN RENDERING ITS DECISION.

Determination of Motion Was in Effect Trial of Question of Fact. The trial of a question of fact may be involved in decisions based on a motion and justify the conclusion that the trial court should have issued a statement of decision (*see Gruendl v. Oewel Partnership, Inc. (1997) 55 Cal. App. 4th 654, 660-661, 64 Cal. Rptr. 2d. 217*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a statement of decision is required in a superior court action when a trial court's determination of a motion was in effect a trial of questions of fact, and a timely request fora statement of decision has been made [*see Code Civ. Proc. § 632*; *Cal. Rules of Ct., Rule 3.1590(a), (e)*].

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that a statement of decision is required after a timely request has been made.

This form may also be used in support of a motion to vacate the judgment and for a new trial [*see Code Civ. Proc. §§ 634, 657, 663* (motions for judgment and new trial, respectively)]. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should identify the specific facts determined by the trial court's decision of the motion in question. For example, when a trial court granted a judgment creditor's motion to amend the original judgment pursuant to *Code Civ. Proc. § 1871* to add a person as a judgment debtor on an alter-ego theory, the court's determination of whether that person was the alter ego of the corporation, and whether the judgment debtor was estopped from asserting an alter-ego theory of liability, were determinations of questions of fact requiring that a statement of decision be issued [*see Gruendl v. Oewel Partnership, Inc. (1997) 55 Cal. App. 4th 654, 660-661, 64 Cal. Rptr. 2d. 217* , discussed in *§ 146.22[3][a]*].

[3] Discussion of Authorities

[a] Determination of Motion Was in Effect Trial of Question of Fact

In ***Gruendl v. Oewel Partnership, Inc.*** *(1997) 55 Cal. App. 4th 654, 64 Cal. Rptr. 2d. 217* , a judgment creditor moved to amend the original judgment pursuant to *Code Civ. Proc. § 1871* to add an individual as a judgment debtor on an alter-ego theory. The trial court granted the motion. The judgment debtor appealed, contending that the court's determination of the alter ego issue involved determinations of fact and, on the judgment debtor's timely request, the trial court was required to prepare a statement of decision.

The court of appeal reversed the trial court's judgment and remanded with directions to issue a statement of decision regarding the liability of appellant as the alter ego of the limited liability defendants. The court cited the general rule that *Code Civ. Proc. § 632* does not require a statement of decision after a ruling on a motion, even when the motion involves extensive evidentiary hearings and the resulting order is appealable. The court observed, however, that the general rule is not absolute. For example, California courts have created exceptions to the analogous rule that *Code Civ. Proc. § 632* is inapplicable in "special proceedings." In the court's view, the case presented circumstances that justify the conclusion that the trial court should have issued a statement of decision. Both the question of whether the individual judgment debtor is the alter ego of the limited liability defendants, and the question of whether the judgment debtor is estopped from asserting an alter-ego theory of liability against appellant are questions of fact. Thus, in resolving the judgment debtor's motion, the trial court necessarily "tried" those issues of fact and erred by failing to issue a statement of decision (*55 Cal. App. 4th 654, 660)* .

In addition, the court cited other factors to justify its determination that the trial court erred by failing to issue a statement of decision. The court balanced the importance of the issues at stake in the proceeding, including the significance of the rights affected and the magnitude of the potential adverse effect on those rights; and the question of whether appellate review can be effectively accomplished even in the absence of express findings [citing *In re Marriage of Wood (1983) 141 Cal. App. 3d 671, 679-680, 190 Cal. Rptr. 469]* . In so doing, however, the court stated that its conclusion was not intended to have application beyond the facts of the case before it, and cautioned that it may be the better practice for trial courts to issue statements of decision or findings of fact when ruling on motions turn primarily on factual determinations (*55 Cal. App. 4th 654, 661)* .

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21-215 California Points & Authorities § 215.23

§ 215.23 Opposing Contention That Statement of Decision Is Required [Code Civ. Proc. § 632]--Statement of Decision Waived [Cal. Rules of Ct., Rule 3.1590(h)]--Protesting Party Failed to Request Statement of Decision on Controverted Issues

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

_____ [*Name*], THE PROTESTING PARTY, HAS WAIVED ENTITLEMENT TO A STATEMENT OF DECISION ON THE CONTROVERTED ISSUES BY FAILING TO REQUEST A STATEMENT OF DECISION AS TO THOSE ISSUES.

A. Preparation of Judgment When Statement of Decision Not Requested. If a statement of decision is not requested or has been waived and a written judgment is required, the court must prepare and mail a proposed judgment to all parties who appeared at the trial within 10 days after expiration of the time for requesting a statement of decision or time of waiver (*Cal. Rules of Ct., Rule 3.1590(h)*).

B. Failure to Request Statement of Decision. Failure to request findings on specific controverted issues results in a waiver as to those issues (*Agri-Systems, Inc. v. Foster Poultry Farms (2008) 168 Cal. App. 4th 1128, 1134-1135, 85 Cal. Rptr. 3d 917* ; *Atari Inc. v. State Bd. of Equalization (1985) 170 Cal. App. 3d 665, 675, 216 Cal. Rptr. 267* ; *Small v. Smith (1971) 16 Cal. App. 3d 450, 455, 94 Cal. Rptr. 136*).

C. Findings Necessary to Support Judgment Will Be Implied. When findings are not requested of the trial court and therefore waived, findings necessary to support the judgment will be implied, and if there is any substantial evidence to support the judgment, it must be affirmed (*Lee v. Department of Motor Vehicles (1983) 142 Cal. App. 3d 275, 284, 191 Cal. Rptr. 23* ; *Atari Inc. v. State Bd. of Equalization (1985) 170 Cal. App. 3d 665, 675, 216 Cal. Rptr. 267] Small v. Smith (1971) 16 Cal. App. 3d 450, 455, 94 Cal. Rptr. 136*).

[*This form may be combined, when appropriate, with § 215.24.*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a contention that a statement of decision is required. The opposition is based on the ground that the party protesting the trial court's failure to make certain findings waived entitlement to them by failing to request a statement of decision on the controverted issues [*see Code Civ. Proc. § 632*; *Cal. Rules of Ct., Rule 3.1590(h)*; *Atari Inc. v. State Bd. of Equalization (1985) 170 Cal. App. 3d 665, 675, 216 Cal. Rptr. 267]* .

This form may be combined with the points in § 215.24 when counsel wishes to contend that the protesting party's request for a statement of decision was untimely in a trial that lasted less than one day.

This form may be combined with points pertaining to the specific procedural context in which counsel wishes to raise the issue that failure to request a statement of decision as to controverted issues constitutes a waiver on those issues. For example, they may be used to support a noticed motion for an order that the statement of decision has been waived [*see Cal. Rules of Ct., Rule 3.1590(f)*]. These points may also be used in opposition to a motion to vacate the judgment and for a new trial. Finally, they may be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should discuss facts showing that the protesting party failed to request a statement of decision as to the controverted issues. If the protesting party requested a statement of decision, counsel should show that the request failed to include the controverted issues.

In an appropriate case, the points and authorities *set out in § 215.20* may be used to oppose the contention supported by these points and authorities.

[b] Related Pleading and Practice Forms

For forms of motion for an order that a statement of decision be deemed waived, and for forms relating to procedures for obtaining a statement of decision generally, see California Forms of Pleading and Practice, Ch. 529, *Statement of Decision* (Matthew Bender). For forms relating to motions for new trial and motions to vacate judgment generally, see Ch. 371, *Motions After Trial* in that publication.

[c] Related Memoranda

For memoranda for use in motions for new trial and motions to vacate judgments, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] Failure to Request Statement of Decision

In ***Agri-Systems, Inc. v. Foster Poultry Farms*** *(2008) 168 Cal. App. 4th 1128, 1134-1135, 85 Cal. Rptr. 3d 917* , the plaintiff was a contractor licensed in California. The parties entered into a contract to build a grain rolling facility. The contract provided that all disputes arising out of the contract document or work performed would be decided by binding arbitration in accordance with the then current Construction Industry Arbitration Rules of the American Arbitration Association. When the project was finished the plaintiff contractor sued the defendant for full payment. The defendant claimed the project was defective and withheld part of the payment. After an arbitration, the arbitrator found in the defendant's favor. The defendant filed a petition for confirmation of the arbitration award in the superior court. The plaintiff filed an opposition to the petition, asserting that the arbitrator breached his obligation to disclose his law firm's prior representation of an adversary of the plaintiff. The superior court adopted its tentative ruling to grant the petition to confirm the arbitration award (*168 Cal. App. 4th 1128, 1134)* .

The plaintiff appealed, arguing that the superior court's tentative ruling incorrectly stated the status of the case. The

court of appeal held that the plaintiff failed to follow the two-step process set forth in *In re Marriage of Arceneaux (1990) 51 Cal.3d 1130, 275 Cal. Rptr. 797, 800 P.2d 1227* , for asserting that a trial court's tentative decision is deficient. The first step, pursuant to *Code Civ. Proc. § 632*, requires the party to request a statement of decision as to specific issues to obtain an explanation of the trial court's tentative decision. The second step, pursuant to *Code Civ. Proc. § 634*, requires the party to bring the purported deficiencies in the statement of decision to the trial court's attention. As a result of the plaintiff's failure to follow these steps, the court of appeal held that the superior court did not commit reversible error by failing to provide a more detailed statement of decision and the appellate court would imply findings to support the judgment [*168 Cal. App. 4th 1128, 1135]* .

Atari Inc. v. State Bd. of Equalization *(1985) 170 Cal. App. 3d 665, 216 Cal. Rptr. 267* , was an action brought by a manufacturer against a state agency to recover sales and use taxes. Plaintiff designed, manufactured, and sold video computer systems for home use. The system used game cartridges, which the computer owner purchased separately. Plaintiff purchased, under resale certificates, several million catalogs from various printers, and included a catalog in the package with each system and cartridge. The catalog contained a description of a cartridge and the games that can be played with it. The descriptions were written to attract the consumer to a certain activity offered. The catalog did not include prices, serial numbers, or purchasing information. Plaintiff also distributed a large number of catalogs free of charge to distributors and company representatives, and at the company store. Plaintiff claimed entitlement to a refund for taxes paid on the catalogs because the catalogs were marketing aids, exempt pursuant to a certain regulation. The trial court found, under the primary purpose test regarding taxability, that plaintiff was the consumer of the catalogs and therefore subject to the use tax on them. Plaintiff did not request a statement of decision, but filed a document specifying the taxability of the catalogs as a controverted issue, and raised the issue of the primary purpose test but not the exemption test under the relevant regulation. Plaintiff appealed.

The court of appeal affirmed, noting that *Code Civ. Proc. § 632* requires a party requesting a statement of decision to specify those controverted issues on which it is requesting a finding (*170 Cal. App. 3d 665, 674-675)* . Failure to request findings on specific issues results in a waiver as to those issues. In its document filed with the trial court, plaintiff raised only the issue of the primary purpose test. In its appeal, however, plaintiff raised the issue of taxability pursuant to the relevant regulation. Plaintiff's failure to request a finding with respect to the regulation constituted a waiver of its right to raise that issue on appeal (*170 Cal. App. 3d 665, 675)* .

Small v. Smith *(1971) 16 Cal. App. 3d 450, 94 Cal. Rptr. 136* , was an action to reinstate plaintiff's revoked license as an inactive real estate broker. Plaintiff entered into an installment contract to buy certain real property. Plaintiff subsequently entered into an installment contract to resell the property to a third party. Subsequent to the receipt of notice of forfeiture for plaintiff's default in payments, plaintiff collected and retained installment payments from the third party. Plaintiff neither refunded the money nor transferred title to the third party. After an administrative hearing, the commissioner found that plaintiff's receipt and acceptance of payments made by the third party subsequent to the receipt of the notice of forfeiture constituted dishonest acts, and revoked plaintiff's license. Plaintiff was not present at the administrative hearing, and did not offer any evidence at the hearing or subsequently in the trial court. Plaintiff brought a writ of mandamus to seek reinstatement of his license. The trial court approved the administrative findings, and denied plaintiff's writ of mandate. Plaintiff appealed.

The court of appeal affirmed, holding, inter alia, that in reviewing the decision of the commissioner in administrative proceedings, the trial court exercises its independent judgment to determine whether the commissioner's findings are supported by the weight of the evidence (*16 Cal. App. 3d 450, 454)* . The determinations made by the trial court must be accepted by the court of appeal if they are supported by substantial evidence. The court of appeal is obligated to consider the evidence in the light most favorable to the commissioner, giving to the judgment the benefit of every reasonable inference and resolving all conflicts in its favor. In this case, the court held that findings of fact and conclusions of law were not requested of the trial court and were therefore waived (*16 Cal. App. 3d 450, 455)* .

Although *Small* was decided prior to the 1981 amendments to *Code Civ. Proc. § 632* and former Cal. Rules of Ct., Rule

232 [*now see Cal. Rules of Ct., Rule 3.1590*], the case has been cited for the point discussed by later case law interpreting the amended code section and rule [*see Milligan v. Hearing Aid Dispensers Examining Com. (1983) 142 Cal. App. 3d 1002, 1004 n.3, 191 Cal. Rptr. 490]* .

[b] Findings Necessary to Support Judgment Will Be Implied

Lee v. Department of Motor Vehicles *(1983) 142 Cal. App. 3d 275, 191 Cal. Rptr. 23* , was an action to challenge a decision by a state agency to suspend petitioner's driver's license. Petitioner was arrested for driving under the influence of alcohol, and agreed with the arresting officer to take a blood test pursuant to *Veh. Code § 13353*. After a second officer took petitioner to jail, petitioner refused to take a chemical test, even though the officer reminded petitioner that he would lose his license if he refused. After an administrative hearing, the state agency issued a decision suspending petitioner's driver's license for failure to comply with *Veh. Code § 13353*. Petitioner filed a petition for writ of prohibition or mandate in the superior court, seeking to set aside the agency's decision. The trial court denied the petition. Petitioner appealed, contending, inter alia, that the statute requires the arresting officer, rather than a delegate, to administer the chemical test.

The court of appeal affirmed, holding that *Veh. Code § 13353* does not militate against a delegate officer's administration of chemical testing (*142 Cal. App. 3d 275, 282)* . After rejecting other contentions by petitioner, the court noted that findings of fact were not requested from nor expressly issued by the trial court. In such a case, findings necessary to support the judgment will be implied, and if there is any substantial evidence to support the judgment, it must be affirmed (*142 Cal. App. 3d 275, 284)* .

Although *Lee* was decided prior to the 1981 amendments to *Code Civ. Proc. § 632* and former Cal. Rules of Ct., Rule 232 [*now see Cal. Rules of Ct., Rule 3.1590*], the case appears to be in line with case law interpreting the sections as amended.

The facts and procedural background of ***Small v. Smith*** *(1971) 16 Cal. App. 3d 450, 94 Cal. Rptr. 136* , are discussed in *§ 215.23[3][a]*. In *Small*, the court of appeal held that failure to request findings of fact and conclusions of law constitutes a waiver of them. Moreover, findings necessary to support the judgment will be implied, and if there is any substantial evidence to support the judgment, it must be affirmed. The court found that the judgment of the superior court must necessarily have been based on implied findings that included the dishonesty of plaintiff and a lack of a good-faith claim of right (*16 Cal. App. 3d 450, 455)* .

Although *Small* was decided prior to the 1981 amendments to *Code Civ. Proc. § 632* and former Cal. Rules of Ct., Rule 232 [*now see Cal. Rules of Ct., Rule 3.1590*], the case appears to be in line with case law interpreting the sections as amended.

[4] Additional Authorities

[a] Failure to Request Statement of Decision

In *Hall v. Bureau of Employment Agencies (1976) 64 Cal. App. 3d 482, 138Cal. Rptr. 725 , cert. denied, 431 U.S. 920, 97 S. Ct. 2187, 53 L. Ed. 2d 231 (1977)* , reh. denied *433 U.S. 916, 97 S. Ct. 2991, 53 L. Ed. 2d 1102 (1977)* , petitioner brought an unsuccessful petition for writ of mandate challenging a state bureau's suspension of his license on grounds that he had violated specific statutory provisions. Petitioner did not request findings of fact. The court of appeal affirmed, holding that, inter alia, because findings of fact were not requested in the trial court pursuant to former Code Civ. Proc. § 632 and former Cal. Rules of Ct., Rule 232(b) [*now see Cal. Rules of Ct., Rule 3.1590*], the factual findings and legal conclusions were waived. Therefore, findings necessary to support the judgment were implied and if there was any substantial evidence to support the judgment, it had to be affirmed (*64 Cal. App. 3d 482, 496)* .

Although *Hall* was decided prior to the 1981 amendments to *Code Civ. Proc. § 632* and former Cal. Rules of Ct., Rule 232 [*now see Cal. Rules of Ct., Rule 3.1590*], the case cites *Small v. Smith (1971) 16 Cal. App. 3d 450, 455, 94 Cal. Rptr. 136* , for the point discussed. *Small* was cited for that holding by later case law interpreting the amended code section and rule [*see Milligan v. Hearing Aid Dispensers Examining Com. (1983) 142 Cal. App. 3d 1002, 1004 n.3, 191 Cal. Rptr. 490]* .

In *McLaughlin v. Board of Medical Examiners (1973) 35 Cal. App. 3d 1010, 111 Cal. Rptr. 353* , petitioner brought an unsuccessful writ of mandate challenging a state professional board of examiners' revocation of his license (stayed pursuant to probation conditions). Petitioner neither requested nor prepared findings of fact at trial. The court of appeal affirmed, holding, inter alia, that findings of fact and conclusions of law were waived. Therefore, findings necessary to support the judgment were implied, and if there was substantial evidence to support the judgment, it must be affirmed (*35 Cal. App. 3d 1010, 1013)* .

Although *McLaughlin* was decided prior to the 1981 amendments to *Code Civ. Proc. § 632* and former Cal. Rules of Ct., Rule 232 [*now see Cal. Rules of Ct., Rule 3.1590*], the case cites *Small v. Smith (1971) 16 Cal. App. 3d 450, 455, 94 Cal. Rptr. 136* , for the point discussed. *Small* was cited for that holding by later case law interpreting the amended code section and rule [*see Milligan v. Hearing Aid Dispensers Examining Com. (1983) 142 Cal. App. 3d 1002, 1004 n.3, 191 Cal. Rptr. 490]* .

[b] Findings Necessary to Support Judgment Will Be Implied

Hall v. Bureau of Employment Agencies (1976) 64 Cal. App. 3d 482, 138 Cal. Rptr. 725 , cert. denied *431 U.S. 920, 97 S. Ct. 2187, 53 L. Ed. 2d 231 (1977)* , reh. denied *433 U.S. 916, 97 S. Ct. 2991, 53 L. Ed. 2d 1102 (1977)* , and *McLaughlin v. Board of Medical Examiners (1973) 35 Cal. App. 3d 1010, 111 Cal. Rptr. 353* , are discussed in *§ 215.23[4][a]*.

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21-215 California Points & Authorities § 215.24

§ 215.24 Opposing Contention That Statement of Decision Is Required [Code Civ. Proc. § 632]--Request for Statement of Decision Untimely--Trial Lasted Less Than One Day and Request Not Made Prior to Submission of Matter for Decision

[1] FORM

[*The following may be included in a memorandum or in a trial or appellate brief, and may be combined with a contention that the statement of decision was waived (see, e.g., § 215.23).*]

THE REQUEST FOR A STATEMENT OF DECISION BY _____ [*name*] WAS UNTIMELY BECAUSE THE TRIAL WAS CONCLUDED WITHIN ONE CALENDAR DAY OR IN LESS THAN EIGHT HOURS OVER A PERIOD OF MORE THAN ONE DAY, AND THE REQUEST WAS NOT MADE PRIOR TO SUBMISSION OF THE MATTER FOR DECISION.

A. When Statement of Decision Is Required Explaining Factual and Legal Basis as to Each Principal Controverted Issue. [*See § 215.20[1], Paragraph A.*]

B. Request Must Be Made Prior to Submission if Trial Is Concluded Within One Calendar Day or in Less Than Eight Hours Over More Than One Day. In the event that the trial is concluded within one calendar day or in less than eight hours over more than one day, the request for a statement of decision must be made prior to the submission of the matter for decision (*Code Civ. Proc. § 632*; *Gorman v. Tassajara Development Corporation (2009) 178 Cal. App. 4th 44, 61-63, 100 Cal. Rptr. 3d 152*).

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a contention that a statement of decision is required. The ground for opposition is that the protesting party failed to file a timely request for a statement of decision by not making the request before submission of the matter for decision in a trial that was concluded within one calendar day or in less than eight hours over more than one day [*Code Civ. Proc. § 632*].

This form may be combined with the points and *authorities in § 215.23* when counsel wishes to contend that the protesting party's failure to request a statement of decision as to controverted issues constitutes a waiver on those issues.

These points may be combined with points pertaining to the specific procedural context in which counsel wishes to raise the issue that the protesting party failed to request a statement of decision prior tosubmission of the matter for decision in a trial lasting less than the periods specified in *Code Civ. Proc. § 632*. For example, if the opposing party failed to request a statement of decision before submission of the matter in such a trial, but requested a statement after submission of the matter, the points and authorities may be used to oppose a motion to excuse noncompliance with the time limits for preparing a statement of decision [*see Cal. Rules of Ct., Rule 3.1590(m)*; *see, e.g., Architects & Contractors Estimating Service, Inc., v. Smith (1985) 164 Cal. App. 3d 1001, 211 Cal. Rptr. 45* , decided under former Code Civ. Proc. § 632]. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should discuss facts showing that the trial lasted less than the periods specified in *Code Civ. Proc. § 632*, and the protesting party failed to request a statement of decision prior to submission of the matter for decision. Counsel should set forth the dates and times that the trial commenced and ended.

In an appropriate case, the points *set out in §§ 215.20* and *215.21* may be used to oppose the contention supported by these points.

[b] Related Pleading and Practice Forms

For forms of motion for an order excusing noncompliance with the time limit prescribed for preparing a statement of decision, and for forms relating to procedures for obtaining a statement of decision generally, see California Forms of Pleading and Practice, Ch. 529, *Statement of Decision* (Matthew Bender). For forms relating to motions for new trial and motions to vacate judgment generally, see *Ch. 371, Motions After Trial § 371.60* et seq., in that publication.

[c] Related Memoranda

For memoranda for use in motions for new trial and motions to vacate judgments, see *Ch. 155, Motions After Trial, §§ 155.50 et seq. and 155.320* et seq.

[3] Discussion of Authorities

[a] Request Must Be Made Before Submission if Trial Is Concluded Within One Calendar Day or in Less Than Eight Hours Over More Than One Day

In ***Gorman v. Tassajara Development Corporation*** *(2009) 178 Cal. App. 4th 44, 61-63, 100 Cal. Rptr. 3d 152* , plaintiff homeowners sued the defendant contractor for defective construction. Several years after the action was filed, after much discovery and settlement conferences, the parties settled, agreeing that the plaintiffs were the prevailing parties for purposes of recovering attorney's fees. The plaintiffs filed a motion for attorney's fees and costs. The hearing on the motion was continued several times, and eventually lasted less than an hour. The court issued its order the next day. Ten days later, the plaintiffs filed a request for a statement of decision regarding the attorney's fees motion. The trial court denied the request.

On appeal, the court first discussed whether a statement of decision was even required for a motion for attorney's fees. Assuming it was required, the court held that the plaintiffs' request was untimely under *Code Civ. Proc. § 632* because the trial was concluded within one calendar day or in less than eight hours over more than one day, and therefore the request for a statement of decision must be made prior to the submission of the matter for decision (*178 Cal. App. 4th 44, 61)* . The court rejected the plaintiffs' argument that the "trial" lasted three months, including all judicial

consideration of their motion, *i.e.*, 520 pages of briefs and evidence, from the time the motion was filed, through its continuances, to the ruling, whether that consideration took place on or off the bench, or during or after regular working hours (*178 Cal. App. 4th 44, 61-63)* . The court looked at the language of *Code Civ. Proc. § 632*, holding that it does not include the time judges spend reading briefs, researching the law, and preparing for trial. Otherwise, the court held, judges would be required to submit timesheets to the parties, which they clearly are not required to do (*178 Cal. App. 4th 44, 63)* .

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21-215 California Points & Authorities § 215.25

§ 215.25 Opposing Contention That Statement of Decision Is Required [Code Civ. Proc. § 632]--Request for Determination of Issue of Law Rather Than Fact

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

A STATEMENT OF DECISION IS NOT REQUIRED BECAUSE _____ [*name*], THE REQUESTING PARTY, DESIRES A DETERMINATION OF AN ISSUE OF LAW RATHER THAN FACT.

A. When Statement of Decision Is Required Explaining Factual and Legal Basis as to Each Principal Controverted Issue. [*See § 215.20[1], Paragraph A.*]

B. Determination of Factual Issue. The request for a statement of decision is appropriate only after the determination of a factual issue (*In re Marriage of Stich (1985) 169 Cal. App. 3d 64, 76, 214 Cal. Rptr. 919* ; *Northern Cal. Police Practices Project v. Craig (1979) 90 Cal. App. 3d 116, 122, 153 Cal. Rptr. 173*).

[*Optional*] **C. Decision to Defer Determination.** A decision to defer a determination on an issue pending an evidentiary hearing cannot be considered to constitute a trial on the issue so as to justify a request for a statement of decision (*In re Marriage of Stich (1985) 169 Cal. App. 3d 64, 76, 214 Cal. Rptr. 919*).

[*This form may be combined, when appropriate, with §§ 215.26 and 215.27.*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that a statement of decision is required if the requesting party desires a determination of an issue of law rather than fact [*see Code Civ. Proc. § 632*; *In re Marriage of Stich (1985) 169 Cal. App. 3d 64, 76, 214 Cal. Rptr. 919]* .

These points and authorities may be combined with the points and *authorities in § 215.26* when counsel wishes to contend that the requesting party desires a statement of decision on a motion. The points and authorities in this form may be combined with the points and *authorities in § 215.27* when counsel wishes to contend that the requesting party desires a statement of decision in a special proceeding.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that a statement of decision is not required because the requesting party desires a determination of an issue of law rather than fact. For example, they may be used to oppose a motion to vacate the judgment or for a new trial. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should discuss facts showing that the issue that is the subject of the requested statement of decision is one of law rather than fact. For example, if appropriate, counsel should show that a trial court's decision to defer a determination on an issue pending an evidentiary hearing cannot be considered to constitute a trial on the issue so as to justify a request for a statement of decision [*see In re Marriage of Stich (1985) 169 Cal. App. 3d 64, 76, 214 Cal. Rptr. 919]* .

In an appropriate case, the points and authorities *set out in § 215.20* may be used to oppose the contention supported by the points and authorities in the form.

[b] Related Pleading and Practice Forms

For forms relating to procedures for obtaining a statement of decision generally, see California Forms of Pleading and Practice, Ch. 529, *Statement of Decision* (Matthew Bender). For forms relating to motions for new trial and motions to vacate judgments generally, see *California Forms of Pleading and Practice, Ch. 371, Motions After Trial § 371.60 et seq.* (Matthew Bender).

[c] Related Points and Authorities

For points and authorities for use in motions for new trial and motions to vacate judgments, see *Ch. 155, Motions After Trial, §§ 155.50 et seq. and 155.320* et seq.

[3] Discussion of Authorities

[a] Determination of Factual Issue

In re Marriage of Stich *(1985) 169 Cal. App. 3d 64, 214 Cal. Rptr. 919* , was an action for dissolution of marriage filed by the wife, requesting spousal support and a determination of property rights. The couple married in a foreign state, and moved to California, where they acquired a substantial amount of property. The couple separated, and respondent went to Mexico, purporting to establish a permanent residence there, and filed for divorce. He returned to his residence in a foreign state immediately after the Mexican court issued a divorce decree. The divorce judgment stated there was no community property, and made no provision for spousal or child support. Respondent subsequently moved back to California. Respondent sent petitioner a certain sum of money each month from the year of the Mexican decree until 16 years later, when petitioner instituted dissolution proceedings. Respondent threatened to stop the payments unless she cancelled the action. Petitioner set a hearing to obtain temporary spousal support and attorney's fees. A few days prior to the hearing, respondent filed, inter alia, a motion to quash service on the ground that a valid Mexican divorce decree had previously been entered, and therefore no marriage existed. The court heard petitioner's request for temporary support and fees, and took respondent's motion to quash under submission. After argument, the court deferred action on the motion to quash until a trial court determined the validity of the Mexican divorce. The court noted that petitioner's challenge was based on lack of jurisdiction of the Mexican court on the ground of lack of domicile. The court found a reasonable probability of petitioner's success at trial, and therefore granted her motion,

awarding temporary support and fees. Respondent appealed, and filed, inter alia, a motion for new trial and a request for a statement of decision, which the court denied.

The court of appeal affirmed, holding that the trial court was within its jurisdiction to award temporary spousal support and attorney's fees pending determination of the validity of the foreign divorce decree (*169 Cal. App. 3d 64, 71-74)* . The court further held that both requests for a statement of decision and motions for a new trial are appropriate only after the determination of a factual issue. Respondent's attacks were based solely on an issue of law, that is, whether the trial court lacked jurisdiction to make any order in light of the effect, if any, of the foreign divorce order. The trial court's decision to defer a determination on an issue pending an evidentiary hearing cannot be considered to constitute a trial on the issue so as to justify a request for a statement of decision or the filing of a motion for a new trial (*169 Cal. App. 3d 64, 76)* .

Northern Cal. Police Practices Project v. Craig *(1979) 90 Cal. App. 3d 116, 153 Cal. Rptr. 173* , was an action brought by a taxpayer and two associations to compel the disclosure of various documents used by a law enforcement agency to train its officers. Plaintiffs, pursuant to the Public Records Act (Gov. Code§§ 6250-6265), sought to discover the agency's enforcement procedures, including a description of weapons used, arrest techniques, and speed law enforcement guidelines. The agency rejected plaintiffs' request for access to the material on the ground that it concerned officers' safety and internal security, and was therefore exempt from disclosure pursuant to the controlling statutes. Following an in camera hearing, the trial court ordered disclosure of certain materials, and found all remaining materials to be exempt from disclosure. Plaintiffs requested findings of fact listing the court's reasons for refusing to order disclosure of all requested material. The trial court refused the request, and plaintiffs appealed.

The court of appeal affirmed, holding that the fundamental question presented at trial was the propriety of the claim of exemption. Resolution of the question was dependent on the content of the material, viewed in the light of statutory provisions. The question was therefore one of law, not fact, and, as such, findings are not required (*90 Cal. App. 3d 116, 122)* .

Although *Northern Cal.* was decided prior to the 1981 amendment to *Code Civ. Proc. § 632*, the case appears to be in line with case law interpreting the section as amended.

[b] Decision to Defer Determination

In re Marriage of Stich *(1985) 169 Cal. App. 3d 64, 214 Cal. Rptr. 919* , is discussed in *§ 215.25[3][a]*.

[4] Additional Authorities

[a] Determination of Factual Issue

In *Southern Cal. Gas Co. v. City of Vernon (1995) 41 Cal. App. 4th 209, 48 Cal. Rptr. 2d 661* , a gas company petitioned superior court for a writ of mandate to direct a city to issue an encroachment permit to lay a proposed gas line. The trial court granted the petition, and denied a subsequent request by the city for a statement of decision, ruling that its minute order was sufficient. The city appealed, contending, among other things, that the trial court's statement was insufficient. The court of appeal stated that it is axiomatic that a statement of decision is required only as to issues of fact decided by the trial court (*41 Cal. App. 4th 209, 220)* . In ruling on the gas company's petition, the trial court was not adjudicating questions of fact, but was sitting as a reviewing court, scrutinizing the administrative decision of the city. The court held that when the only issue is whether an administrative decision is supported by substantial evidence or whether there has been an abuse of discretion, the issue is essentially one of law and findings are not required (*41 Cal. App. 4th 209, 221)* . The judgment was thus affirmed.

In *Enterprise Insurance Co. v. Mulleague (1987) 196 Cal. App. 3d 528, 241 Cal. Rptr. 846* , a declaratory-relief action

brought by an insurer to determine the extent of uninsured-motorist coverage under *Ins. Code § 11580.2*, the parties submitted the matter on briefs. The court of appeal affirmed judgment as modified in favor of the insurer, holding, inter alia, that inasmuch as the only issue tendered to the trial court was one of law, a statement of decision was not necessary, because if there is no factual issue, there is nothing to inform the appellate court about except the law, which it interprets for itself (*196 Cal. App. 3d 528, 539-540)* .

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21-215 California Points & Authorities § 215.26

§ 215.26 Opposing Contention That Statement of Decision Is Required [Code Civ. Proc. § 632]--Decision Not a Trial

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

A STATEMENT OF DECISION IS NOT REQUIRED BECAUSE THE PROCEEDING WAS NOT A TRIAL WITHIN THE MEANING OF SECTION 632 OF THE CODE OF CIVIL PROCEDURE.

A. When Statement of Decision Is Required Explaining Factual and Legal Basis as to Each Principal Controverted Issue. [*See § 215.20[1], Paragraph A.*]

B. Statement of Decision Is Required Only After Trial. A statement of decision is required only after a trial within the meaning of *Section 632 of the Code of Civil Procedure* (*People v. Landlords Professional Services, Inc. (1986) 178 Cal. App. 3d 68, 72, 223 Cal. Rptr. 483*).

[*Optional*] **C. Statement of Decision Not Available on Hearing on Preliminary Injunction.** A hearing on a preliminary injunction is not a trial within the meaning of *Section 632 of the Code of Civil Procedure* (*People v. Landlords Professional Services, Inc. (1986) 178 Cal. App. 3d 68, 72, 223 Cal. Rptr. 483* ; *see Lavine v. Hospital of the Good Samaritan (1985) 169 Cal. App. 3d 1019, 1026, 215 Cal. Rptr. 708*).

[*Optional*] **D. Statement of Decision Not Available on Decision of Motion.** A statement of decision is neither required nor available on the decision of a motion (*Taliaferro v. Hoogs (1965) 236 Cal. App. 2d 521, 530, 46 Cal. Rptr. 147*).

[*This form may be combined, when appropriate, with §§ 215.25 and 215.27.*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that a statement of decision is required if the requesting party desires a statement ofdecision on a proceeding that is not a trial [*see Code Civ. Proc. § 632*; *see also People v. Landlords Professional Services, Inc. (1986) 178 Cal. App. 3d 68, 72, 223 Cal. Rptr. 483]* .

The points and authorities in this form may be combined with the points and *authorities in § 215.25* when counsel wishes to contend that the requesting party desires a determination of an issue of law rather than fact. These points and authorities may also be combined with the points and *authorities in § 215.27* when counsel wishes to contend that the requesting party desires a statement of decision in a special proceeding.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that a statement of decision is not required on the decision of a motion. These points and authorities may also be used to oppose a motion to vacate the judgment and for a new trial. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. If appropriate, for example, counsel should discuss facts showing that a statement of decision was requested on a motion, or on a hearing on a preliminary injunction.

In an appropriate case, the points and authorities *set out in § 215.20* may be used to oppose the contention supported by these points and authorities.

[b] Related Pleading and Practice Forms

For forms relating to procedures for obtaining a statement of decision generally, see California Forms of Pleading and Practice, Ch. 529, *Statement of Decision* (Matthew Bender). For forms relating to motions for new trial and motions to vacate judgments generally, see Ch. 371, *Motions After Trial* in that publication.

[c] Related Points and Authorities

For points and authorities for use in motions for new trial and motions to vacate judgments, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] Statement of Decision Is Required Only After Trial

In ***People v. Landlords Professional Services, Inc.*** *(1986) 178 Cal. App. 3d 68, 223 Cal. Rptr. 483* , the People sought injunctive relief and civil penalties against several tenant eviction firms on the ground that they were practicing law without a license. The trial court granted preliminary injunctions following several days of testimony on an evidentiary hearing. It refused to issue a statement of decision because the proceeding was not a trial within the meaning of *Code Civ. Proc. § 632*. Defendant appealed.

The court of appeal affirmed, holding that the trial court properly determined that the evidentiary hearing was not a "trial" within the meaning of *Code Civ. Proc. § 632*. The only available authority on the issue is found in dicta in ***People v. Mobile Magic Sales, Inc.*** *(1979) 96 Cal. App. 3d 1, 157 Cal. Rptr. 749* , and ***Lavine v. Hospital of the Good Samaritan*** *(1985) 169 Cal. App. 3d 1019, 215 Cal. Rptr. 708* , stating that findings are not required before entry of a preliminary injunction [for discussion of *Mobile Magic, see § 215.26[4][a], infra*; for discussion of *Lavine, see infra*]. The court noted a preference for requiring a statement of decision, if timely requested, whenever a trial court grants or denies an application for a preliminary injunction, particularly when, as in the instant case, the hearing includes the presentation of oral testimony and is virtually a trial. Nevertheless, *Code Civ. Proc. § 632* only refers to a trial, and no

case defines a hearing on a preliminary injunction, with or without live testimony, as a trial. The court noted that the absence of a statement of decision precludes effective review of the major issue raised in the instant appeal and expressed a desire for legislative remedy of the problem in light of the practical finality that accompanies many preliminary injunctions. However, pursuant to *Code Civ. Proc. § 632*, the court was not required to issue a statement of decision (*178 Cal. App. 3d 68, 70-72)* .

[b] Statement of Decision Not Available on Hearing on Preliminary Injunction

People v. Landlords Professional Services, Inc. ***(1986)*** *178 Cal. App. 3d 68, 223 Cal. Rptr. 483* , is discussed in *§ 215.26[3][a]*.

Lavine v. Hospital of the Good Samaritan *(1985) 169 Cal. App. 3d 1019, 215 Cal. Rptr. 708* , was an action brought by an attorney on behalf of her relative, a hospital patient, for declaratory, injunctive, and statutory relief, to require defendant to provide plaintiff with the patient's hospital records for her inspection and copying. At the hearing on plaintiff's application for temporary restraining order, counsel stipulated that defendant would prepare copies of the records for plaintiff and allow her reasonable access to the originals. The court denied plaintiff's applications for provisional injunctive relief on the ground that an adequate remedy at law was available. Plaintiff subsequently filed a motion for judgment on the pleadings, which incorporated her prior moving papers and sought issuance of preliminary and permanent injunctive relief on grounds that defendant had not yet complied with its stipulation to produce the records. The motion was taken off calendar. Following the patient's death, the court granted plaintiff's motion to substitute herself as plaintiff, and she filed a renewed motion for production of medical records and a motion to disqualify defendant's counsel and certain judges. The court denied all plaintiff's motions, and granted defendant's motion for sanctions, after which time plaintiff filed a motion for reconsideration. The court denied plaintiff's motion for reconsideration, and plaintiff filed a request for a statement of decision. The motion judge referred thematter of his disqualification to the master calendar department for appointment of another judge, who denied the application. Plaintiff filed a renewed request for a statement of decision, which the court denied as untimely. Plaintiff appealed from the order, which, inter alia, denied her request for a statement of decision.

The court of appeal affirmed, noting that plaintiff's request for a statement of decision, if she was entitled to one, should have been made before the matter was submitted for decision, because the trial lasted less than one day, pursuant to *Code Civ. Proc. § 632*. Therefore, if her motions had qualified for a statement of decision, the request would have been untimely. However, a statement of decision, as with findings of fact under former Code Civ. Proc. § 632, is neither required nor available on decision of a motion, including one for a preliminary injunction (*169 Cal. App. 3d 1019, 1026)* .

[c] Statement of Decision Not Available on Decision of Motion

Taliaferro v. Hoogs *(1965) 236 Cal. App. 2d 521, 46 Cal. Rptr. 147* , was an action regarding an attempt to recover money due under the provisions of a property settlement agreement. Cross complainant failed to provide security as required pursuant to the vexatious litigant statute, and the court dismissed the cross complaint accordingly. Cross complainant appealed, contending that the vexatious litigant statute is unconstitutional, and that there was no evidence that he was a vexatious litigant as defined by statute.

The court of appeal affirmed, holding that the vexatious litigant statute (*Code Civ. Proc. §§ 391-391.6*) is constitutional and survives attacks on grounds of denial of equal protection, vagueness, and deprivation of right to jury trial (*236 Cal. App. 2d 521, 525-529)* . As to the contention that the court erred in not making findings, the court of appeal held that findings are not required on order made after granting a motion (*236 Cal. App. 2d 521, 530)* .

Although *Taliaferro* was decided prior to the 1981 amendment to *Code Civ. Proc. § 632*, the case is discussed in ***People v. Mobile Magic Sales, Inc.*** *(1979) 96 Cal. App. 3d 1, 12 fn. 4, 157 Cal. Rptr. 749* , which was cited for the

point discussed in a later opinion interpreting the code section as amended [*see Lavine v. Hospital of the Good Samaritan (1985) 169 Cal. App. 3d 1019, 1026, 215 Cal. Rptr. 708]* . Note, however, that both *Mobile Magic* and *Lavine* concerned a hearing on a preliminary injunction, while *Taliaferro* concerned an order on a motion.

[4] Additional Authorities

[a] Statement of Decision Not Available on Hearing on Preliminary Injunction

In ***People v. Mobile Magic Sales, Inc.*** *(1979) 96 Cal. App. 3d 1, 157 Cal. Rptr. 749* , the People sought civil penalties and injunctive relief against mobile home dealers on grounds of unfair competition and restraint of trade. The trial court granted a preliminary injunction prohibiting certain practices, and defendants appealed. In holding that the evidence, viewed in a light most favorable to the order, warrants an inference that an illegal restraint of commerce was ongoing, the court of appeal noted that although no findings of fact were made by the trial court until after it had lost jurisdiction, findings were not required before entry of the preliminary injunction (*96 Cal. App. 3d 1, 12 fn. 4*).

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CHAPTER 215 STATEMENT OF DECISION
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21-215 California Points & Authorities § 215.27

§ 215.27 Opposing Contention That Statement of Decision Is Required [Code Civ. Proc. § 632]--Special Proceedings

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

A STATEMENT OF DECISION IS NOT REQUIRED BECAUSE _____ [*specify statute governing the special proceeding*], THE CONTROLLING STATUTE FOR THIS PROCEEDING, DOES NOT PROVIDE FOR ONE.

A. When Statement of Decision Is Required Explaining Factual and Legal Basis as to Each Principal Controverted Issue. [*See § 215.20[1], Paragraph A.*]

B. Statement of Decision Not Required in Special Proceedings. Findings are not required in special proceedings unless the particular statute governing the proceeding so provides (*Northern Cal. Police Practices Project v. Craig (1979) 90 Cal. App. 3d 116, 122, 153 Cal. Rptr. 173* ; see *Taliaferro v. Hoogs (1965) 236 Cal. App. 2d 521, 530, 46 Cal. Rptr. 147*).

[*This form may be combined, when appropriate, with §§ 215.25 and 215.26.*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that a statement of decision is required if the requesting party desires a statement of decision in a special proceeding [*see Code Civ. Proc. § 632*; *Northern Cal. Police Practices Project v. Craig (1979) 90 Cal. App. 3d 116, 122, 153 Cal. Rptr. 173]* .

The points and authorities in this form may be combined with the points and *authorities in § 215.25* when counsel wishes to contend that the requesting party desires a determination of an issue of law rather than fact. This points and

authorities may also be combined with the points and *authorities in § 215.26* when counsel wishes to contend that the requesting party desires a statement of decision on a motion.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that a statement of decision is not required in a special proceeding. For example, they may be used to oppose a motion to vacate the judgment and for a new trial. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should discuss facts showing that the action in which the statement of decision was requested is in the nature of a special proceeding, and that the controlling statute does not provide for a statement of decision [*see, e.g., Northern Cal. Police Practices Project v. Craig (1979) 90 Cal. App. 3d 116, 153 Cal. Rptr. 173* (proceeding to disclose public record under *Gov. Code § 6258*)].

In an appropriate case, the points and authorities *set out in § 215.20* may be used to oppose the contention supported by these points and authorities.

[b] Related Pleading and Practice Forms

For forms relating to procedures for obtaining a statement of decision generally, see California Forms of Pleading and Practice, Ch. 529, *Statement of Decision* (Matthew Bender). For forms relating to motions for new trial and motions to vacate judgments generally, see Ch. 371, *Motions After Trial* in that publication.

[c] Related Points and Authorities

For points and authorities for use in motions for new trial and motions to vacate judgments, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] Statement of Decision Not Required in Special Proceedings

The facts and procedural background of ***Northern Cal. Police Practices Project v. Craig*** *(1979) 90 Cal. App. 3d 116, 153 Cal. Rptr. 173* , are discussed in *§ 215.25[3][a]*. The court in *Northern Cal.* held that findings are not required on a question of law, rather than fact. The court also held that findings are not required in a special proceeding authorized by a specific statute, unless the authorizing statute so provides (*90 Cal. App. 3d 116, 122)* .

Although *Northern Cal.* was decided prior to the 1981 amendment to *Code Civ. Proc. § 632*, the case appears to be in line with case law interpreting the section as amended.

The facts and procedural background of ***Taliaferro v. Hoogs*** *(1965) 236 Cal. App. 2d 521, 46 Cal. Rptr. 147* , are discussed in *§ 215.26[3][c]*. In *Taliaferro*, the court held that findings are not required on order made after granting a motion. The court also noted in dictum that findings are not required in special proceedings unless the particular statute so provides (*236 Cal. App. 2d 521, 530)* .

Although *Taliaferro* was decided prior to the 1981 amendment to *Code Civ. Proc. § 632*, the case is discussed in ***People v. Mobile Magic Sales, Inc.*** *(1979) 96 Cal. App. 3d 1, 12 fn. 4, 157 Cal. Rptr. 749* , which was cited for the point discussed in a later opinion interpreting the code section as amended [*see Lavine v. Hospital of the Good Samaritan (1985) 169 Cal. App. 3d 1019, 1026, 215 Cal. Rptr. 708]* . Note, however, that both *Mobile Magic* and *Lavine* concerned a hearing on a preliminary injunction, while *Taliaferro* concerned an order on a motion. For discussion of *Lavine* and *Mobile Magic*, see *§ 215.26[3][b]* and *215.26[4][a]* respectively.

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CHAPTER 215 STATEMENT OF DECISION
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21-215 California Points & Authorities § 215.28

§ 215.28 Supporting Contention That Statement of Decision Is Insufficient [Code Civ. Proc. § 632]--Statement of Decision Does Not Explain Factual and Legal Basis Regarding Each Principal Controverted Issue [Code Civ. Proc. § 634]--In General

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE JUDGMENT CANNOT STAND [AND THE MOTION _____(FOR NEW TRIAL *or* TO SET ASIDE AND VACATE THE JUDGMENT AND ENTER A DIFFERENT JUDGMENT) SHOULD BE GRANTED] BECAUSE THE _____ [TRIAL COURT *or* REFEREE] DID NOT EXPLAIN THE FACTUAL AND LEGAL BASIS FOR HIS/HER/ITS DECISION AS TO EACH OF THE PRINCIPAL CONTROVERTED ISSUES AT TRIAL.

A. When Statement of Decision Is Required Explaining Factual and Legal Basis as to Each Principal Controverted Issue. [*See § 215.20[1], Paragraph A.*]

B. No Inference That Trial Court Decided in Favor of Prevailing Party. When a statement of decision does not resolve a controverted issue, or if the statement is ambiguous and the record shows that the omission of ambiguity was brought to the attention of the trial court either prior to entry of judgment or in conjunction with a motion under Section 657 (new trial) or 663 (vacate judgment and enter different judgment) of the Code of Civil Procedure, it shall not be inferred on appeal or on a motion under *Section 657* or *663 of the Code of Civil Procedure* that the trial court decided in favor of the prevailing party as to those facts or on that issue (*Code Civ. Proc. § 634*; In re Marriage of Weinstein (1991) *4 Cal. App. 4th 555, 571, 5 Cal. Rptr. 2d 558*).

C. Lack of Finding on Material Issues Amounts to Reversible Error. If the trial court fails to make findings on material issues that would fairly disclose a determination of the basis for the trial court's judgment, the failure amounts to reversible error (*Employers Casualty Co. v. Northwestern Nat. Ins. Group (1980) 109 Cal. App. 3d 462, 474, 167 Cal. Rptr. 296* ; *Vale v. Union Bank (1979) 88 Cal. App. 3d 330, 340, 151 Cal. Rptr. 784*).

[*Optional*] **D. Statement of Decision Required on Reference.** A reference may be ordered to try any or all of the issues in an action or proceeding, whether of fact or of law, and to report a statement of decision on the trial of the issues (*see Code Civ. Proc. § 638*).

[*Optional*] **E. Request for Statement of Decision Must Include Resolution.** The submission of a request for a statement of decision without a resolution is improper because it unfairly requires the trial judge not only to speculate which questions embrace ultimate rather than evidentiary facts, but also to recall the record without assistance from counsel (*see People v. Casa Blanca Convalescent Homes, Inc. (1984) 159 Cal. App. 3d 509, 525, 206 Cal. Rptr. 164* ; *McAdams v. McElroy (1976) 62 Cal. App. 3d 985, 996, 133 Cal. Rptr. 637*).

[*This form may be combined, when appropriate, with § 215.29.*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a statement of decision is insufficient because it does not contain the factual and legal basis as to each of the principal controverted issues [*see Code Civ. Proc. §§ 632, 634*]. Optional Paragraph D may be used when the issue or issues was decided by a reference [*see Code Civ. Proc. § 638*]. Optional Paragraph E may be used when a request for a statement of decision was in effect an interrogatory that did not include a proposal for the court to adopt or reject.

The points and authorities in this form may be combined with the points and *authorities in § 215.29* when counsel wishes to contend that a minute order does not constitute a statement of decision.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that the trial court, after receiving an appropriate request for a statement of decision, did not explain the factual and legal basis for its decision as to each of the principal controverted issues. For example, these points and authorities may be used in support of a motion to vacate the judgment and grant a new trial [*see Code Civ. Proc. §§ 634, 657*] or a motion to set aside and vacate a judgment and enter a different judgment [*see Code Civ. Proc. §§ 634, 663*]. In either of these cases, use the optional language in brackets in the main point in capital letters to indicate which motion is being supported by the points and authorities. These points and authorities may also be used in support of objections to a proposed statement of decision or judgment. Finally, they may be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should discuss facts showing that a request for a statement of decision was made, that the disputed matter constituted a principal controverted issue, and that the trial court failed to explain the factual and legal basis for its decision regarding that issue or that the statement as issued was ambiguous [*see Code Civ. Proc. §§ 632, 634*].

[b] Related Pleading and Practice Forms

For forms relating to procedures for obtaining a statement of decision generally, see California Forms of Pleading and Practice, Ch. 529, *Statement of Decision* (Matthew Bender). For forms relating to motions for new trial and motions to vacate judgments generally, see Ch. 371, *Motions After Trial* in that publication.

[c] Related Points and Authorities

For points and authorities for use in motions for new trial and motions to vacate judgments, see Ch. 155, *Motions After Trial* .

[d] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 215.30 -215.33* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] No Inference That Trial Court Decided in Favor of Prevailing Party

In re Marriage of Weinstein *(1991) 4 Cal. App. 4th 555, 571, 5 Cal. Rptr. 2d 558* , involved a proceeding for dissolution of marriage in which the trial court awarded the wife a specified amount of spousal support. The husband appealed.

The court of appeal remanded for further proceedings in accordance with the views expressed in its opinion. After summarizing the trial court's findings, the court concluded that the calculation which the trial court claimed it had specifically considered in setting the amount of support was irreconcilable with the amount actually ordered (*4 Cal. App. 4th 555, 571)* . This may have been due to a computational error, noted the court (*4 Cal. App. 4th 555, 571 n.10*). Under *Code Civ. Proc. § 634*, when an omission from or ambiguity in a statement of decision is brought to the trial court's attention prior to entry of judgment, it shallnot be inferred on appeal that the trial court decided in favor of the prevailing party as to those facts or on that issue. Because the husband brought the discrepancy in numbers to the trial court's attention, the court remanded for the trial court to clarify its statement of decision. The court stated that it had no choice but to take that action, despite its view that the award of spousal support was well within the trial court's discretion (*4 Cal. App. 4th 555, 571)* .

[b] Lack of Finding on Material Issues Amounts to Reversible Error

Employers Casualty Co. v. Northwestern Nat. Ins. Group *(1980) 109 Cal. App. 3d 462, 167 Cal. Rptr. 296* , was an action for declaratory relief regarding the possible defense and indemnification of two insurance carriers under insurance policies in connection with an accident, based on the alleged negligence of defendant insured. Defendant and cross complainant insurance carrier issued a policy to defendant insured that was effective through a certain date. Plaintiff insurance carrier issued a subsequent policy to defendant insured that became effective after the expiration of the former policy, and was in effect during the traffic accident. The facts showed that the alleged negligence of defendant insured may have occurred during the term of plaintiff's policy. The findings of fact of the trial court did not reveal the basis for its conclusion, but rather merely stated that plaintiff's policy provided coverage for the accident. Plaintiff appealed.

The court of appeal affirmed in part and reversed in part. The court affirmed that portion of the judgment that found no liability under defendant and cross complainant insurance carrier's policy, holding that the date of the accident itself and not the causative negligence controlled under the terms of the policy. The court reversed the judgment as to plaintiff. The trial court's findings in terms of the bare ultimate fact made it extremely difficult, if not impossible, for the reviewing court to ascertain the basis for the trial court's conclusion that coverage existed (*109 Cal. App. 3d 462, 473)* . The reviewing court must rely on the findings of fact and conclusions of law from which to glean the basis for the trial court's judgment, pursuant to the former versions of Code Civ. Proc. § 632 and Cal. Rules of Ct., Rule 232(e). If the trial court fails to make findings of fact on material issues that would fairly disclose the determination by the trial court, the failure amounts to reversible error (*109 Cal. App. 3d 462, 473-474)* .

Although *Employers* was decided prior to the 1981 amendments to *Code Civ. Proc. § 632* and former Cal. Rules of Ct., Rule 232(e) [*now see Cal. Rules of Ct., Rule 3.1590(h)*], the case has been cited for the point discussed in a later opinion interpreting the code sections as amended [*see People v. Casa Blanca Convalescent Homes, Inc. (1984) 159 Cal. App. 3d 509, 524, 206 Cal. Rptr. 164]* .

Vale v. Union Bank *(1979) 88 Cal. App. 3d 330, 151 Cal. Rptr. 784* , was an action brought by a law firm against a bank as trustee to recover damages for breach of contract regarding a trust agreement. The trial court entered judgment in favor of plaintiffs but failed to award exemplary damages. The court failed to find on issues regarding whether defendant bank had violated its fiduciary obligations and, in the event of the violation, whether exemplary damages were appropriate. Defendant appealed from the money judgment, and plaintiffs cross appealed from that portion of the judgment that failed to award them exemplary damages.

The court of appeal affirmed as to defendant's appeal, and reversed and remanded as to plaintiff's cross appeal. The court held that the trial court's failure to find on the two protested issues requires reversal because, unless waived, express findings are required on all material issues raised by the pleadings and the evidence, and failure to find on a material issue will ordinarily constitute reversible error (*88 Cal. App. 3d 330, 340)* .

Although *Vale* was decided prior to the 1981 amendments to *Code Civ. Proc. § 632* and former Cal. Rules of Ct., Rule 232(e) [*now see Cal. Rules of Ct., Rule 3.1590(h)*], the case is discussed in *Employers Casualty Co. v. Northwestern Nat. Ins. Group (1980) 109 Cal. App. 3d 462, 167 Cal. Rptr. 296* , which in turn was cited for the point discussed in a later opinion interpreting the code sections as amended [*see People v. Casa Blanca Convalescent Homes, Inc. (1984) 159 Cal. App. 3d 509, 524, 206 Cal. Rptr. 164]* .

[c] Request for Statement of Decision Must Include Resolution

The facts and procedural background of ***People v. Casa Blanca Convalescent Homes, Inc.*** *(1984) 159 Cal. App. 3d 509, 206 Cal. Rptr. 164* , are discussed in *§ 215.30[3][a]*. In *Casa Blanca,* the court of appeal held that only ultimate, rather than evidentiary, facts are required in a statement of decision. The court also held that the submission of a request without resolution is improper because it unfairly requires the trial judge not only to speculate which questions embrace ultimate rather than evidentiary facts, but also to recollect the record without assistance from counsel. The court should have guidance from the requesting party, particularly if there is evidence that would give a multiple choice in answering the interrogatory. Therefore, defendant's request of the trial court to answer interrogatories constituted an inappropriate challenge to the findings or the statement of decision. By describing the violations against defendant and aggregating them into categories, the court performed its statutory duty (*159 Cal. App. 3d 509, 526)* .

The facts and procedural background of ***McAdams v. McElroy*** *(1976) 62 Cal. App. 3d 985, 133 Cal. Rptr. 637* , are discussed in *§ 215.31[3][c]*. In *McAdams,* the court held that the failure to make a finding is harmless if, under the facts of the case, the finding necessarily would have been adverse to the complaining party. The court also held that the practice of requesting the court to make findings on several subjects, without indicating what ultimate facts were established by the evidence, unfairly requires the trial judge to speculate which questions embraceultimate rather than evidentiary facts, and to search the record without counsel's assistance. The court should have guidance from the requesting party (*62 Cal. App. 3d 985, 993)* . The request for further or specific findings under Cal Rules of Court, Rule 232 should be phrased in terms of a finding; a question does not suffice (*62 Cal. App. 3d 985, 994)* .

Although *McAdams* was decided prior to the 1981 amendments to *Code Civ. Proc. § 632* and former Cal. Rules of Ct., Rule 232 [*now see Cal. Rules of Ct., Rule 3.1590*] , the case appears to be in line with case law interpreting the sections as amended.

Counsel should note that the holding in *McAdams,* decided by the First Appellate District of the Court of Appeal, is contrary to that of *Morris v. Thogmartin (1973) 29 Cal. App. 3d 922, 105 Cal. Rptr. 919* , decided by the Fifth Appellate District of the Court of Appeal. The court in *Morris* held that the duty of complying with the requirement for special findings rests on the trial court, not the losing party. The opposing positions of the trial judge who has decided a cause against a party and the losing party is obvious. Interpreting former Code Civ. Proc. § 634, the court held that to require a losing party to guess and speculate as to the factual and legal basis of the court's position by preparing the

form and content of findings is inconsistent with the purpose and history of the statute. Further, it is incongruous to require the losing party to prepare findings that the party may subsequently desire to attack in the trial court or on appeal (*29 Cal. App. 3d 922, 930)* .

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21-215 California Points & Authorities § 215.29

§ 215.29 Supporting Contention That Statement of Decision Is Insufficient [Code Civ. Proc. § 632]--Statement of Decision Does Not Explain Factual and Legal Basis Regarding Each Principal Controverted Issue [Code Civ. Proc. § 634]--Minute Order Does Not Constitute Statement of Decision [Cal. Rules of Court, Rule 3.1590]

[1] FORM

[*The following may be included in a memorandum or in a trial or appellate brief, and may be combined with a general contention that a statement of decision is required (see, e.g., § 215.20), or that an existing statement of decision is insufficient (see, e.g., § 215.28).*]

THE MINUTE ORDER DOES NOT CONSTITUTE A STATEMENT OF DECISION BECAUSE IT FAILS TO EXPLAIN THE FACTUAL AND LEGAL BASIS FOR THE COURT'S DECISION AS TO THE PRINCIPAL CONTROVERTED ISSUES AT TRIAL.

A. When Statement of Decision Is Required Explaining Factual and Legal Basis as to Each Principal Controverted Issue. [*See § 215.20[1], Paragraph A.*]

B. Minute Order Does Not Constitute Statement of Decision. A minute order does not constitute a statement of decision within the meaning of *Section 632 of the Code of Civil Procedure* because it fails to explain the factual and legal basis for the court's decision as to the principal controverted issues at trial (*Miramar Hotel Corp. v. Frank B. Hall & Co. (1985) 163 Cal. App. 3d 1126, 1129, 210 Cal. Rptr. 114*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a minute order does not constitute a statement of decision [*see Code Civ. Proc. § 632*; *Cal. Rules of Ct., Rule 3.1590*; *Miramar Hotel Corp. v. Frank B. Hall & Co. (1985) 163 Cal. App. 3d 1126, 1129, 210 Cal. Rptr. 114]* . Generally, a minute order is an order entered in the permanent daily minutes of the court by the court clerk, as opposed to a formal written order filed with the clerk [*see Gov. Code § 69844*; *see, e.g., Desherow v. Rhodes (1969) 1 Cal. App. 3d 733, 738-739, 82 Cal. Rptr. 138]* .

These points and authorities may be combined with the points and *authorities in § 215.20* when counsel wishes to contend that a statement of decision is required after a request has been made. These points and authorities may also be combined with the points and *authorities in § 215.28* when counsel wishes to contend that a statement of decision is insufficient because it does not contain the factual and legal basis as to each of the principal controverted issues.

These points and authorities may also be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that a minute order does not constitute a statement of decision. For example, these points and authorities may be used to support a motion for new trial [*see Code Civ. Proc. § 657*] or a motion to vacate judgment and enter a different judgment [*see Code Civ. Proc. § 663*]. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should discuss facts showing that a request for a statement of decision was made, the trial court issued a minute order in lieu of a statement of decision, and the minute order fails to explain the factual and legal basis for the court's decision as to the principal controverted issues at trial.

[b] Related Pleading and Practice Forms

For forms relating to procedures for obtaining a statement of decision generally, see California Forms of Pleading and Practice, Ch. 529, *Statement of Decision* (Matthew Bender). For forms relating to motions for new trial and motions tovacate judgments generally, see Ch. 371, *Motions After Trial* in that publication.

[c] Related Points and Authorities

For points and authorities for use in motions for new trial and motions to vacate judgments, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] Minute Order Does Not Constitute Statement of Decision

The facts and procedural background of ***Miramar Hotel Corp. v. Frank B. Hall & Co.*** *(1985) 163 Cal. App. 3d 1126, 210 Cal. Rptr. 114* , are discussed in *§ 215.20[3][b]*. In *Miramar,* the court held that the trial court's failure to issue a statement of decision despite a timely request for one pursuant to *Code Civ. Proc. § 632* required reversal. The court also held that a minute order does not constitute a statement of decision within the meaning of *Code Civ. Proc. § 632* (*163 Cal. App. 3d 1126, 1129)* .

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21-215 California Points & Authorities § 215.30

§ 215.30 Opposing Contention That Statement of Decision Is Insufficient [Code Civ. Proc. § 632]--Statement of Decision Sufficiently Explains Factual and Legal Basis as to Each Principal Controverted Issue [Code Civ. Proc. § 634]--Only Ultimate Rather Than Evidentiary Facts Required

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE STATEMENT OF DECISION SUFFICIENTLY EXPLAINS THE FACTUAL AND LEGAL BASIS AS TO EACH PRINCIPAL CONTROVERTED ISSUE BECAUSE THE TRIAL COURT IS REQUIRED ONLY TO STATE ULTIMATE, RATHER THAN EVIDENTIARY, FACTS.

A. When Statement of Decision Is Required Explaining Factual and Legal Basis as to Each Principal Controverted Issue. [*See § 215.20[1], Paragraph A.*]

B. Ultimate Rather Than Evidentiary Facts Required. A trial court, in rendering a statement of decision under *Section 632 of the Code of Civil Procedure*, is required only to state ultimate rather than evidentiary facts (*Muzquiz v. City of Emeryville (2000) 79 Cal. App. 4th 1106, 94 Cal. Rptr. 2d 579* ; *Wolfe v. Lipsy (1985) 163 Cal. App. 3d 633, 643, 209 Cal. Rptr. 801* ; *People v. Casa Blanca Convalescent Homes, Inc. (1984) 159 Cal. App. 3d 509, 524, 206 Cal. Rptr. 164*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that a statement of decision is insufficient because it did not contain the factual and legal basis as to each of the principal controverted issues. The ground for opposition is that the court is only required to state ultimate, not evidentiary, facts in the statement of decision [*see Code Civ. Proc. § 632*; *Muzquiz v. City of Emeryville (2000) 79 Cal. App. 4th 1106, 94 Cal. Rptr. 2d 579* ; *Wolfe v. Lipsy (1985) 163 Cal. App. 3d 633, 643, 209 Cal. Rptr. 801]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural con text in which counsel wishes to raise the issue that the trial court is required only to state ultimate rather than evidentiary facts. For example, the points and authorities may be used to oppose objections to a proposed statement of decision or judgment. They may also be used to oppose a motion to vacate the judgment and for a new trial. Finally, they may be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should discuss facts showing that the protested findings regarded evidentiary rather than ultimate facts. Ultimate facts are the logical conclusions deduced from certain primary facts evidentiary in character. If from evidentiary facts the allegations can be reached by that process of natural reasoning adopted in the investigation of truth, they are ultimate facts [*see Rhode v. Bartholomew (1949) 94 Cal. App. 2d 272, 279, 210 P.2d 768* ; *see* California Forms of Pleading and Practice, Ch. 123, *Complaints and Cross Complaints* (Matthew Bender)].

In an appropriate case, the points and authorities may be submitted in opposition to the contentions supported by the points and authorities *set out in § 215.28*.

[b] Related Pleading and Practice Forms

For forms relating to procedures for obtaining a statement of decision generally, see California Forms of Pleading and Practice , Ch. 529, *Statement of Decision* (Matthew Bender). For forms relating to motions for new trial and motions to vacate judgments generally, see Ch. 371, *Motions After Trial* in that publication.

[c] Related Points and Authorities

For points and authorities for use in motions for new trial and motions to vacate judgments, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] Ultimate Rather Than Evidentiary Facts Required

In ***Muzquiz v. City of Emeryville*** *(2000) 79 Cal. App. 4th 1106, 94 Cal. Rptr. 2d 579* , an employee sued her former employee for age discrimination based on elimination of her position, resulting in her termination. The trial court entered judgment for defendant following a court trial, and entered a lengthy and detailed statement of decision, finding that the employee failed to establish a prima facie case of age discrimination because she failed to demonstrate either that she was performing her job at a level that met her employer's legitimate expectations or that she was qualified for a newly created position; that assuming she had established a prima facie case, the employer articulated legitimate, nondiscriminatory, budgetary and economic reasons for its decision to terminate her position; and that she failed to carry her burden of establishing that the employer's explanation was a pretext and the real determining influence or motivating factor was age discrimination (*79 Cal. App. 4th 1106, 1115)* .

The court of appeal affirmed, finding that the trial court did not adopt an erroneous burden of proof in its statement of decision or otherwise err by addressing the ample evidence of the employee's poor job performance in the context of its discussion of the central issue of whether the employer had discriminated against the employee because of her age (*79 Cal. App. 4th 1106, 1125)* . The court found further that the statement of decision clearly addressed whether the employee had borne her burden of proving that the employer's stated reasons for eliminating her position were pretextual and actually motivated by age discrimination by setting out its express determination that she failed to prove pretext, the ultimate facts supporting that determination, and the legal basis for its decision (*79 Cal. App. 4th 1106, 1125-1126)* . The court found that the trial court was not required to address how it resolved intermediate evidentiary conflicts, or respond point by point to the various issues posed in the employee's request for a statement of decision (*79 Cal. App. 4th 1106, 1126)* .

Wolfe v. Lipsy *(1985) 163 Cal. App. 3d 633, 209 Cal. Rptr. 801* , was an action to quiet title and for damages brought by purchasers of real property against a purported purchaser at a trustee's sale and other parties. A married couple recorded a declaration of homestead on their residence, the property in issue. The wife encumbered the property in her own name under a third deed of trust. The couple obtained an interlocutory judgment of dissolution of marriage, which awarded the property to the wife. Before the judgment became final, the beneficial ownership of the trust deed was assigned, and the trustee substituted. The new trustee began default proceedings on the property. The wife then conveyed the title by grant deed to plaintiffs. The husband moved to vacate and set aside the interlocutory judgment and final judgment in the dissolution action, which motion was granted. The new trustee conducted a trustee's sale at which he purportedly sold the property to defendant. Plaintiffs initiated the action to quiet title. The trial court issued a memorandum of intended decision that listed, among others, the following findings: that the third trust deed was void, that the foreclosure sale was improperly postponed, that the foreclosure sale was not held at the time noticed, and that the wife could transfer only her interest in the property to plaintiff. The trial court vacated the foreclosure sale and quieted title in plaintiff as to a one-half interest in the property subject to encumbrances. Defendant requested a statement of decision. The trial court adopted its memorandum of intended decision as its statement of decision, and held for plaintiff accordingly. Defendant appealed, contending, inter alia, that the trial court failed to provide a sufficient statement of decision that explained the factual and legal basis of its decision as required by *Code Civ. Proc. § 632*.

The court of appeal affirmed, holding that the trial court's memorandum of intended decision fairly and completely set forth the factual and legal basis for the court's decision as required by *Code Civ. Proc. § 632* (*163 Cal. App. 3d 633, 643)* . The memorandum listed all the ultimate facts necessary to decide the issues placed in controversy by the pleadings and evidence, except for the status of defendant as a bona fide purchaser, which could be inferred from the court's detailed finding that the presumption of validity of the sale was overcome by the facts (*163 Cal. App. 3d 633, 643-644)* . Citing *People v. Casa Blanca Convalescent Homes, Inc. (1984) 159 Cal. App. 3d 509, 524, 206 Cal. Rptr. 164* (discussed infra), the court held that a trial court, in rendering a statement of decision under *Code Civ. Proc. § 632,* is required to state only ultimate rather than evidentiary facts (*163 Cal. App. 3d 633, 643)* .

People v. Casa Blanca Convalescent Homes, Inc. *(1984) 159 Cal. App. 3d 509, 206 Cal. Rptr. 164* , was an action brought by the People to impose penalties and injunctive relief against defendant for various violations of nursing home regulations. The trial court issued a memorandum of intended ruling that found that defendant had repeatedly failed to comply with certain regulations, and enjoined defendants from committing a number of specified acts within its institutions. The memorandum enumerated categories of violations and listed the exact number of acts within each category described. Defendant filed a request for a statement of decision containing demands that the trial court answer over 75 questions and make a list of findings on evidentiary facts on issues not controverted by the pleadings. Instead of addressing defendant's questions, the trial court's statement of decision adopted in exact detail its memorandum of intended ruling. After defendant filed objections to the statement of decision, the court entered judgment for plaintiff. Defendant appealed.

The court of appeal affirmed, holding that a trial court, in rendering a statement of decision under *Code Civ. Proc. § 632*, is required to state ultimate rather than evidentiary facts. The trial court, in listing exactly how many acts it found to haveoccurred within each category described, fairly and completely set forth the factual and legal basis for the court decision as required. It listed all the ultimate facts necessary to decide the issues placed in controversy by the pleadings. Although defendant sought to compel the trial court to make findings with regard to detailed evidentiary facts, and to make minute findings as to individual items of evidence, the court held that this type of detailed evidentiary analysis is not required by law (*159 Cal. App. 3d 509, 524)* .

[4] Additional Authorities

[a] Ultimate Rather Than Evidentiary Facts Required

In *People v. Dollar Rent-a-Car Systems, Inc. (1989) 211 Cal. App. 3d 119, 259 Cal. Rptr. 191* , defendants appealed a judgment and permanent injunction against them for engaging in unfair competition and making false and misleading statements. Defendants contended, among other things, that the statement of decision was deficient because it did not state with particularity the specific facts relied on by the court in making its findings. In its statement of decision, the trial court detailed the misrepresentations made by defendants' employees, expressly disapproved contractual language creating a misperception that a customer was insured, found that several hundred thousand misleading contracts were used during the period being litigated, and expressly determined that the individual defendant controlled the terms and conditions for vehicle rental and sale of the misleading provision. The court of appeal affirmed, holding that the statement of decision fairly discloses the trial court's determination of all material issues of fact. The court stated that the trial court is required only to state ultimate rather than evidentiary facts and that the defendants are not entitled to detailed findings of evidentiary facts as to each individual piece of evidence relied on by the trial court (*211 Cal. App. 3d 119, 128)* .

In *In re Cheryl E. (1984) 161 Cal. App. 3d 587, 207 Cal. Rptr. 728* , the trial court rescinded a minor's relinquishment for adoption on grounds of fraud and undue influence, and a public agency appealed. The court of appeal affirmed, holding that there was sufficient evidence to support the trial court's finding based on its statement of decision because the court is required to state only ultimate rather than evidentiary facts. Findings of ultimate facts necessarily include findings on all intermediate evidentiary facts necessary to sustain them (*161 Cal. App. 3d 587, 599)* .

The facts and procedural background of *Kanner v. Globe Bottling Co. (1969) 273 Cal. App. 2d 559, 78 Cal. Rptr. 25* , are discussed in *§ 215.31[3][b]*. In *Kanner*, the court of appeal held that when proper findings have been made on the various issues of the case, it is not necessary to negate issues contradictory to them. The court also held that findings on merely evidentiary matters are unnecessary (*273 Cal. App. 2d 559, 567-568)* . Although *Kanner* was decided prior to the 1981 amendments to *Code Civ. Proc. §§ 632* and *634*, the case appears to be in line with case law interpreting the sections as amended.

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 215 STATEMENT OF DECISION
PART II. FORMS

21-215 California Points & Authorities § 215.31

§ 215.31 Opposing Contention That Statement of Decision Is Insufficient [Code Civ. Proc. § 632]--Statement of Decision Sufficiently Explains Factual and Legal Basis as to Each Principal Controverted Issue [Code Civ. Proc. § 634]--Missing Findings Implied in Other Findings

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE STATEMENT OF DECISION SUFFICIENTLY EXPLAINS THE FACTUAL AND LEGAL BASIS AS TO EACH PRINCIPAL CONTROVERTED ISSUE BECAUSE THE MISSING FINDING(S) _____ [IS *or* ARE] IMPLICIT IN OTHER FINDINGS [AND _____(NEGATE ISSUES CONTRADICTORY TO THE ACTUAL FINDINGS *and/or* WOULD BE ADVERSE TO _____(*name*), THE COMPLAINING PARTY].

A. When Statement of Decision Is Required Explaining Factual and Legal Basis as to Each Principal Controverted Issue. [*See § 215.20[1], Paragraph A.*]

B. Missing Finding Implied in Other Findings. The failure to make a finding on an issue raised in the pleadings is harmless error when the missing finding reasonably may be found to be implicit in other findings (*Wolfe v. Lipsy (1985) 163 Cal. App. 3d 633, 643-644, 209 Cal. Rptr. 801* ; *People v. Casa Blanca Convalescent Homes, Inc. (1984) 159 Cal. App. 3d 509, 527, 206 Cal. Rptr. 164*).

[*Optional*] **C. Actual Findings Impliedly Negate Proposed Findings.** When proper findings have been made on the various issues of the case, it is not necessary to negate issues contradictory to them (*Beaupre v. Nave (1970) 13 Cal. App. 3d 402, 408, 91 Cal. Rptr. 473* ; *Kanner v. Globe Bottling Co. (1969) 273 Cal. App. 2d 559, 566, 78 Cal. Rptr. 25*).

[*Optional*] **D. Missing Finding Adverse to Complaining Party.** The failure to make a finding on an issue raised in the pleadings and supported by substantial evidence is harmless when the finding necessarily would have been adverse to the party complaining of the missing finding (*Paine v. State Bd. of Equalization (1982) 137 Cal. App. 3d 438, 446,*

187 Cal. Rptr. 47 ; *McAdams v. McElroy (1976) 62 Cal. App. 3d 985, 996, 133 Cal. Rptr. 637*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that a statement of decision is insufficient because the trial court did not make a requested finding. The ground for opposition is that the missing finding may reasonably be inferred from other findings [*see Code Civ. Proc. § 632*; *Wolfe v. Lipsy (1985) 163 Cal. App. 3d 633, 643-644, 209 Cal. Rptr. 801]* . Optional Paragraph C may be used when the missing finding contradicts one or more of the actual findings, and thus has already been negated by implication. Optional Paragraph D may be used when the missing finding necessarily would have been adverse to the protesting party.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that a specific finding is not required if it is reasonably inferred from other findings. For example, these points and authorities may be used to oppose a motion to vacate the judgment and for a new trial. These points and authorities may also be used to oppose objections to a proposed statement of decision or judgment. Finally, they may be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should discuss facts showing that the missing finding is reasonably implied in other findings, is negated by existing findings, or would necessarily be adverse to the complaining party.

In an appropriate case, these points and authorities may be submitted in opposition to the contentions supported by the points and authorities *set out in § 215.28*.

[b] Related Pleading and Practice Forms

For forms relating to procedures for obtaining a statement of decision generally, see California Forms of Pleading and Practice, Ch. 529, *Statement of Decision* (Matthew Bender). For forms relating to motions for new trial and motions to vacate judgments generally, see Ch. 371, *Motions After Trial* in that publication.

[c] Related Points and Authorities

For points and authorities for use in motions for new trial and motions to vacate judgments, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] Missing Finding Implied in Other Findings

The facts and procedural background of ***Wolfe v. Lipsy*** *(1985) 163 Cal. App. 3d 633, 209 Cal. Rptr. 801* , are discussed in *§ 215.30[3][a]*. In *Wolfe*, the court held that the trial court, in rendering a statement of decision under *Code Civ. Proc. § 632*, is required to state only ultimate rather than evidentiary facts. The court also held that a statement of decision need not include findings that may be inferred by the other findings (*163 Cal. App. 3d 633, 643-644)* .

The facts and procedural background of ***People v. Casa Blanca Convalescent Homes, Inc.*** *(1984) 159 Cal. App. 3d 509, 206 Cal. Rptr. 164* , are discussed in *§ 215.30[3][a]*. In *Casa Blanca*, the court held that only ultimate, rather than evidentiary facts are required in a statement of decision. The court also held that the failure to make a finding on an issue raised in the pleadings is harmless error when the missing finding reasonably may be found to be implicit in other findings (*159 Cal. App. 3d 509, 527)* .

[b] Actual Findings Impliedly Negate Proposed Findings

Beaupre v. Nave *(1970) 13 Cal. App. 3d 402, 91 Cal. Rptr. 473* , was an action brought by several unrelated plaintiffs against restaurant proprietors for damages for contraction by plaintiffs of infectious hepatitis. Defendants' son, who worked in the restaurant as a food handler, cleanup man, and dishwasher, contracted infectious hepatitis. Plaintiffs, who were frequent patrons at the restaurant, all contracted the disease within a few days of each other and, with one exception, shortly after defendants' son fell ill. Expert witnesses testified as to the probability that plaintiffs contracted the disease from defendants' son. The trial court found in favor of defendants. Plaintiffs appealed, contending that certain findings were inadequate. One of the protested findings stated that no hepatitis condition to any plaintiff, in any way or in any manner, was proximately caused by or proximately resulted from any action or inaction of defendants or defendants' agents, or any condition for which defendant was liable.

The court of appeal affirmed, holding that the findings adequately stated the ultimate facts, and probative or evidentiary facts supporting them were neither required nor proper (*13 Cal. App. 3d 402, 407)* . Moreover, when proper findings have been made on the various issues of a case, it is not necessary to negate issues contradictory to them. The finding on a particular issue is an implied negation of all contradictory propositions (*13 Cal. App. 3d 402, 408)* .

Although *Beaupre* was decided prior to the 1981 amendments to *Code Civ. Proc. §§ 632* and *634*, the case appears to be in line with case law interpreting the sections as amended.

Kanner v. Globe Bottling Co. *(1969) 273 Cal. App. 2d 559, 78 Cal. Rptr. 25* , was an action brought by a lessor against a lessee for failure to deliver the premises, damages for waste and loss of rental, and for attorney's fees. Plaintiff leased to defendant certain commercial premises. The lease provided that the lessee had inspected the premises and acknowledged that they were in goodcondition at the time the agreement was made. The parties disagreed as to the extent of the damage, whether the damage preexisted the agreement, and whether the condition of the premises was attributable to ordinary use and wear. Evidence at trial showed that vandalism had occurred after the expiration of the lease, that deterioration of the premises was caused by factors not involving defendant, and that many repairs made by plaintiff after the expiration of the lease were unnecessary. The trial court found that defendant, with certain exceptions, maintained the premises in good order and repair, and surrendered them appropriately. Plaintiff appealed, contending, inter alia, that the judgment was not supported by proper findings; and that the trial court erred in failing to hold a hearing on objections to the court's findings and in refusing to make special findings (no findings were made with respect to many particular items of repair).

The court of appeal affirmed, noting that the trial court found that defendant breached the lease in certain enumerated instances only, and in no others. The court also found that plaintiff suffered no other damage to the premises attributable to defendant's occupancy during the term of the lease. The court held that it was obvious that the enumeration of certain particulars to the exclusion of all others obviated the necessity of specifically negating every other item of repair claimed by plaintiff. A specific finding is not required on an issue when it follows by necessary implication from a general finding. Moreover, when proper findings have been made on the various issues of the case, it is not necessary to negate issues contradictory to them. The finding on a particular issue is an implied negation of all contradictory propositions (*273 Cal. App. 2d 559, 566)* .

Although *Kanner* was decided prior to the 1981 amendments to *Code Civ. Proc. §§ 632* and *634*, the case appears to be in line with case law interpreting the sections as amended.

[c] Missing Finding Adverse to Complaining Party

Paine v. State Bd. of Equalization *(1982) 137 Cal. App. 3d 438, 187 Cal. Rptr. 47* , was an action brought by plaintiff-taxpayers against a state board to obtain a refund of sales tax paid under protest. Plaintiffs contended, among other things, that the sales at issue were made pursuant to exemption certificates, which shifted any liability for taxation

to the purchasers. Plaintiffs requested findings on two allegedly material issues regarding the shifting of tax liability to purchasers who had falsely claimed an exemption. The trial court failed to make the requested findings, and held against plaintiffs, concluding that plaintiffs failed to carry the burden of proving their entitlement to the claimed exemption. Plaintiffs appealed.

The court of appeal affirmed, holding that the requested findings were not relevant because the trial court concluded that plaintiffs failed to carry the burden of proving their entitlement to the claimed exemptions, and that the presumption of taxable sales and the responsibility for paying that tax remained on the plaintiffs as taxpayer-sellers. A finding regarding the shifting of liability to purchasers who falsely claim an exemption was therefore unnecessary, and would have been adverse to plaintiffs in any event. The failure to make an express finding is not prejudicial error if the findings actually made are sufficient to support the judgment, and the findings would necessarily have been adverse to the protesting party (*137 Cal. App. 3d 438, 446)* .

Although *Paine* was decided prior to the 1981 amendments to *Code Civ. Proc. §§ 632, 634,* the case appears to be in line with case law interpreting the sections as amended.

McAdams v. McElroy *(1976) 62 Cal. App. 3d 985, 133 Cal. Rptr. 637* , was an action brought by former partners to quiet title to certain timber property that was subject of the partnership dissolution, and for declaratory relief. Two groups of partners dissolved the partnership and distributed its assets between them, taking into account that a third party purportedly owned an interest in some of the property's timber. Subsequently, one group of partners filed the quiet title action and obtained from the third party a relinquishment of all its claims to the property. The remaining group of partners filed an answer and cross complaint in the action, referring to the dissolution agreement and the deeds executed in connection with it. Cross complainants alleged mutual mistake of law and fact with respect to the third party's interest, and asserted that the deeds conveyed to plaintiffs a greater interest in the partnership assets than both groups of partners intended. After trial, the court rendered its memorandum of opinion, finding, among other things, that (1) cross complainants at the time of dissolution did not believe that the third party owned the interest in issue; (2) cross complainants agreed to give plaintiffs the property in dispute in order to effect the division of assets; and (3) there was no mutual mistake of fact or law in the execution of the agreement. Cross complainants filed objections to plaintiffs' proposed findings, and requested numerous specific findings, without suggesting the substance of those findings. The trial court held for plaintiffs. Cross complainants appealed, contending that the findings were inadequate because the court failed to find on specific requested issues, *e.g.*, whether plaintiffs treated the timber on the disputed property as an asset of the partnership subject to distribution.

The court of appeal affirmed, holding that the trial court's findings (*e.g.*, that the timber in issue was not an undivided asset of the partnership) addressed complainants' requests, and were supported by substantial evidence. Moreover, the findings were adverse to cross complainant, and a refusal to make any further finding can in no way be an error (*62 Cal. App. 3d 985, 1000)* . The failure to make a finding is harmless if, under the facts of the case, the finding necessarily would have been adverse to the complaining party (*62 Cal. App. 3d 985, 996)* .

Although *McAdams* was decided prior to the 1981 amendments to *Code Civ. Proc. §§ 632* and *634* and former Cal. Rules of Ct., Rule 232 [*now see Cal. Rulesof Ct., Rule 3.1590*] , the case appears to be in line with case law interpreting the sections as amended.

[4] Additional Authorities

[a] Missing Finding Implied in Other Findings

The facts and procedural background of *McAdams v. McElroy (1976) 62 Cal. App. 3d 985, 133 Cal. Rptr. 637* , are discussed in *§ 215.31[3][c]*. In *McAdams,* the court held that the failure to make a finding is harmless if, under the facts of the case, the finding necessarily would have been adverse to the complaining party. The court also held that the

failure to make a finding on an issue raised in the pleadings and supported by substantial evidence is harmless if the missing finding reasonably may be found to be implicit in other findings (*62 Cal. App. 3d 985, 996)* .

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 215 STATEMENT OF DECISION
PART II. FORMS

21-215 California Points & Authorities § 215.32

§ 215.32 Opposing Contention That Statement of Decision Is Insufficient [Code Civ. Proc. § 632]--Statement of Decision Sufficiently Explains Factual and Legal Basis as to Each Principal Controverted Issue [Code Civ. Proc. § 634]--One Clear, Sustained, and Sufficient Finding Supports Judgment

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE STATEMENT OF DECISION SUFFICIENTLY EXPLAINS THE FACTUAL AND LEGAL BASIS AS TO EACH PRINCIPAL CONTROVERTED ISSUE BECAUSE THERE IS AT LEAST ONE CLEAR, SUSTAINED, AND SUFFICIENT FINDING ON WHICH THE JUDGMENT RESTS.

A. When Statement of Decision Is Required Explaining Factual and Legal Basis as to Each Principal Controverted Issue. [*See § 215.20, Paragraph A.*]

B. One Clear, Sustained, and Sufficient Finding Supports Judgment. However inconclusive any number of the findings may be, if in any case there is at least one clear, sustained, and sufficient finding on which the judgment may rest, every presumption being in favor of the judgment, it will be concluded that the court rested its judgment on that finding or findings, and the others will be disregarded (*Brewer v. Simpson (1960) 53 Cal. 2d 567, 584, 2 Cal. Rptr. 609, 349 P.2d 289* ; *Republic Indemnity Co. v. Empire Builders Corp. (1985) 167 Cal. App. 3d 1163, 1167, 213 Cal. Rptr. 787*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that a statement of decision is insufficient because certain findings are inconclusive. The ground for opposition is that there is at least one clear, sustained, and sufficient finding on which the judgment rests [*see Code Civ. Proc. § 632*; *Brewer v. Simpson (1960) 53 Cal. 2d 567, 584, 2 Cal. Rptr. 609, 349 P.2d 289]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that there is at least one sufficient finding on which the judgment rests. For example, these points and authorities may be used to oppose a motion to vacate the judgment and for a new trial. These points and authorities may also be used to oppose objections to a proposed statement of decision or judgment. Finally, they may be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should discuss one or more findings and show that it is clear, sustained, and sufficient, and supports the judgment.

In an appropriate case, these points and authorities may be submitted in opposition to the contentions supported by the points and authorities *set out in § 215.28*.

[b] Related Pleading and Practice Forms

For forms relating to procedures for obtaining a statement of decision generally, see California Forms of Pleading and Practice, Ch. 529, *Statement of Decision* (Matthew Bender). For forms relating to motions for new trial and motions to vacate judgments generally, see Ch. 371, *Motions After Trial* in that publication.

[c] Related Memoranda

For points and authorities for use in motions for new trial and motions to vacate judgments, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] One Clear, Sustained, and Sufficient Finding Supports Judgment

Brewer v. Simpson *(1960) 53 Cal. 2d 567, 2 Cal. Rptr. 609, 349 P.2d 289* , was an action brought by beneficiaries of mutual wills against the surviving testator for specific performance, to declare a trust, and for an accounting. Testators, husband and wife, executed mutual wills under which all property of the first to die should go to the survivor, and all property of the survivor should go one half to the named relatives of each of them. The husband died, leaving all his property to his wife. She married, and transferred all her property to herself and her husband in joint tenancy. Plaintiffs, named beneficiaries under the mutual wills, brought an action against the surviving testator and her husband. The trial court found, inter alia,that there was an enforceable oral agreement between the wife and decedent to make mutual wills and that neither of them could, after the death of the other, change the named beneficiaries or in any way deprive them of the benefits of the agreement. The trial court entered a judgment impressing a trust for plaintiffs' benefit on all property owned by the wife, and on all property owned by both defendants in joint tenancy. Plaintiffs appealed from certain portions of the judgment that did not afford them all the relief requested. Defendants appealed, protesting findings concerning the relative value of the testators' property when they married, the character of property acquired during the marriage, and, consequently, the fairness of the mutual wills to the wife.

The Supreme Court affirmed, holding that the record as a whole supported a finding that all property acquired by testators during their marriage was community in character. Although the finding that decedent's property was of greater value than the wife's was overturned, that finding was not necessary to support the further finding of fairness of the agreement to the wife (*53 Cal. 2d 567, 584-585)* . The Court held that however lame or inconclusive any number of the findings may be, if in any case there is one clear, sustained, and sufficient finding on which the judgment may rest, every presumption being in favor of the judgment, it will be concluded that the court did rest its judgment on that finding, or those findings, and that the others may and will be disregarded (*53 Cal. 2d 567, 584)* .

Although *Brewer* was decided prior to the 1981 amendment to *Code Civ. Proc. § 632*, the case has been cited for the

point discussed in a later opinion interpreting the code sections as amended [*see Republic Indemnity Co. v. Empire Builders Corp. (1985) 167 Cal. App. 3d 1163, 1167, 213 Cal. Rptr. 787]* .

Republic Indemnity Co. v. Empire Builders Corp. *(1985) 167 Cal. App. 3d 1163, 213 Cal. Rptr. 787* , was an action brought by a worker's compensation insurer against an insured to recover damages for insured's default in premium payments on its policy. Plaintiff issued a worker's compensation insurance policy to defendant, and thereafter issued renewals of the same policy. The policy provided that the insured could participate in the earnings of the insurer represented by surplus accumulated from premiums, subject to certain terms and conditions. Pursuant to one condition, no dividend was payable if any part of the premium for the policy, or immediate renewal of it, remained unpaid. Defendant became in substantial default in premium payments, and plaintiff ultimately cancelled the policy. At trial, defendant asserted in its answer and cross complaint an offset against delinquent premium payments for dividends claimed under the policy provision. The trial court held for plaintiff, finding, among other things, that pertinent policy provisions were reasonable and proper and in accordance with California law, and did not constitute a forfeiture or an unjust enrichment of plaintiff. Further, defendant's breach of the policy provisions abrogated defendant's right to dividends. Defendant appealed, contending that the trial court's statement of decision did not explain the factual and legal basis for its decision as to each of the principal controverted issues at the trial.

The court of appeal affirmed, holding that under *Code Civ. Proc. § 632* the trial court's statement of decision need do no more than give reasons that state the grounds on which the judgment rests. The trial court's finding regarding the reasonableness of the pertinent policy provisions and lack of forfeiture or unjust enrichment sufficiently stated grounds supporting the judgment. A statement of ultimate, not evidentiary, facts is all that has ever been required. Citing *Brewer v. Simpson (1960) 53 Cal. 2d 567, 2 Cal. Rptr. 609, 349 P.2d 289* (discussed *above*), the court held that however lame or inconclusive any findings may be, if there is one clear, sustained, and sufficient finding on which the judgment may rest, it will be concluded that the court did rest its judgment on that finding, and the others may be disregarded (*167 Cal. App. 3d 1163, 1167)* .

[4] Additional Authorities

[a] One Clear, Sustained, and Sufficient Finding Supports Judgment

In *Bauer v. Bauer (1996) 46 Cal. App. 4th 1106, 54 Cal. Rptr. 2d 377* , at the conclusion of a trial for corporate dissolution, the trial court issued a tentative decision concluding that plaintiffs had not proven that they were entitled to dissolution. Plaintiffs then requested a formal statement of decision with specific findings on 21 subjects. The trial court's statement of decision essentially restated the tentative decision. On appeal plaintiffs contended that the trial court erred in not making the requested findings. The court of appeal found no merit in this contention, stating that the statement of decision addressed the substance of all the matters raised by plaintiffs. The trial court is not required to make an express finding of fact on every factual matter controverted at trial, as long as the statement of decision sufficiently disposes of all the basic issues in the case (*46 Cal. App. 4th 1106, 1118)* . The trial court judgment was thus affirmed.

In *Day v. Rosenthal (1985) 170 Cal. App. 3d 1125, 217 Cal. Rptr. 89* , an action for damages for legal malpractice, breach of duty, fraud, and abuse of process, the trial court made findings that set out with precision each material fact in issue. Defendant appealed, contending that the findings did not disclose the basis for the court's determination and that they raised more questions than they answered. The court of appeal affirmed, holding that however unsupported or inconclusive some findings may be, a judgment must be affirmed if there is at least one clear finding sustained by the evidence (*170 Cal. App. 3d 1125, 1161)* . Although *Day* was tried prior to the 1981 amendments to former Cal. Rules of Ct., Rule 232 [*now see Cal. Rules of Ct., Rule 3.1590*] , the case appears to be in line with case law interpreting the sections as amended.

In *Kreisa v. Stoddard (1954) 127 Cal. App. 2d 627, 274 P.2d 164* , an action to recover the balance owing on a

conditional sales contract, the trial court held forplaintiff, and made a finding, over defendant's objection, concerning proof of defendant's oral promise to pay the deficiency. Defendant appealed. The court of appeal affirmed, holding that however unsupported or inconclusive any number of findings may be, if there is at least one clear, sustained, and sufficient finding on which the judgment may rest, every presumption being in favor of the judgment, it will be concluded on appeal that the court rested its judgment on that finding, and the others will be disregarded (*127 Cal. App. 2d 627, 633)* .

California Points & Authorities

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CHAPTER 215 STATEMENT OF DECISION
PART II. FORMS

21-215 California Points & Authorities § 215.33

§ 215.33 Opposing Contention That Statement of Decision Is Insufficient [Code Civ. Proc. § 632]--Statement of Decision Sufficiently Explains Factual and Legal Basis as to Each Principal Controverted Issue [Code Civ. Proc. § 634]--Requested Finding Concerns Immaterial Issues

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE TRIAL COURT NEED NOT MAKE THE REQUESTED FINDING BECAUSE IT REGARDS AN IMMATERIAL ISSUE, AND THE JUDGMENT IS OTHERWISE SUPPORTED WITHOUT THE REQUESTED FINDING.

A. Failure to Find on Immaterial Issue. In rendering a statement of decision, a trial court's failure to find on an immaterial issue is not error (*People v. Casa Blanca Convalescent Homes, Inc. (1984) 159 Cal. App. 3d 509, 524, 206 Cal. Rptr. 164* ; *Lynch v. Cook (1983) 148 Cal. App. 3d 1072, 1080, 196 Cal. Rptr. 544*).

B. Judgment Otherwise Supported. A court's failure to make a particular finding is harmless error if the judgment is otherwise supported and the evidence is not sufficient to sustain a finding in favor of the complaining party that would countervail or destroy other findings (*People v. Casa Blanca Convalescent Homes, Inc. (1984) 159 Cal. App. 3d 509, 524, 206 Cal. Rptr. 164* ; *McAdams v. McElroy (1976) 62 Cal. App. 3d 985, 996, 133 Cal. Rptr. 637*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that a statement of decision is insufficient. The ground for opposition is that the requested finding regards immaterial issues, and that the judgment is otherwise supported [*see Code Civ. Proc. § 632*; *People v. Casa Blanca Convalescent Homes, Inc. (1984) 159 Cal. App. 3d 509, 524, 206 Cal. Rptr. 164]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context

in which counsel wishes to raise the issue that the trial court is not required to make findings regarding immaterial issues, and that a judgment is otherwise supported. For example, these points and authorities may be used to oppose objections to a proposed statement of decision or judgment. They may also be used to oppose a motion to vacate the judgment and for a new trial. Finally, they may be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should discuss facts showing that the requested finding regards an immaterial issue. Counsel should also specify evidence that supports the judgment.

In an appropriate case, these points and authorities may be submitted in opposition to the contentions supported by the points and authorities *set out in § 215.28*.

[b] Related Pleading and Practice Forms

For forms relating to procedures for obtaining a statement of decision generally, see California Forms of Pleading and Practice, Ch. 529, *Statement of Decision* (Matthew Bender). For forms relating to motions for new trial and motions to vacate judgments generally, see Ch. 371, *Motions After Trial* in that publication.

[c] Related Memoranda

For points and authorities for use in motions for new trial and motions to vacate judgments, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] Failure to Find on Immaterial Issue

The facts and procedural background of ***People v. Casa Blanca Convalescent Homes, Inc.*** *(1984) 159 Cal. App. 3d 509, 206 Cal. Rptr. 164* , are discussed in *§ 215.30[3][a]*. In *Casa Blanca*, the court of appeal held that only ultimate, rather than evidentiary, facts are required in a statement of decision. The court also held that failure to find on an immaterial issue is not error (*159 Cal. App. 3d 509, 524)* . Defendant's request constituted an inquisition and a rehearing of the evidence, and the trial court was not required to provide specific answers so long as the findings in the statement of decision fairly disclosed the court's determination of all material issues (*159 Cal. App. 3d 509, 525)* .

Lynch v. Cook *(1983) 148 Cal. App. 3d 1072, 196 Cal. Rptr. 544* , was an action brought by a former minority shareholder and director of a corporation against the majority shareholder, another minority shareholder, and their financial advisor for damages and rescission of a tender offer and stock sale on grounds of fraud,negligent misrepresentation, breach of duty, conspiracy, and violations of other state and federal laws. The minority shareholder defendant made a tender offer to buy all outstanding shares tendered on or before a certain date at a certain price; and eventually purchased all plaintiff's shares at the quoted price. Subsequently, the corporation's board of directors authorized the purchase of all the tender offer shares, and plaintiff was removed from the board. The corporation then deregistered with the Securities and Exchange Commission. The trial court made, among others, the following findings: there was no concealment of a material fact; plaintiff did not enter into any agreement concerning the effect of the stock sale; plaintiff did not rely on the minority shareholder's omission to disclose that he was in effect acting on behalf of the majority shareholder; and no breach of fiduciary duty resulted. The trial court granted defendant's motion for judgment. Plaintiff appealed, contending that the trial court committed reversible error by failing to rule on certain material issues.

The court of appeal affirmed, noting that a material issue is one that is relevant and essential to the judgment, and closely and directly related to the trial court's determination of the ultimate issues in the case (*148 Cal. App. 3d 1072, 1080)* . The court held that the trial court's findings clearly addressed all plaintiff's requested findings except for the issue of the standard of materiality, which was unnecessary to the court's decision (*148 Cal. App. 3d 1072, 1080-1081)*

. A trial court does not commit reversible error for failure to address a requested finding that is surplus to the court's decision and related to mere evidentiary matters (*148 Cal. App. 3d 1072, 1080)* .

Although *Lynch* was tried in 1982, the case cites *Code Civ. Proc. §§ 632* and *634* as they existed prior to the amendments enacted by 1981 legislation. However, *Lynch* appears to be in line with case law interpreting the sections as amended by 1981 legislation.

[b] Judgment Otherwise Supported

The facts and procedural background of ***People v. Casa Blanca Convalescent Homes, Inc.*** *(1984) 159 Cal. App. 3d 509, 206 Cal. Rptr. 164* , are discussed in *§ 215.30[3][a]*. In *Casa Blanca*, the court of appeal held that only ultimate, rather than evidentiary, facts are required in a statement of decision. Moreover, a court's failure to make a finding on a particular matter is harmless error if the judgment is otherwise supported, unless the evidence is sufficient to sustain a finding in favor of the complaining party and would countervail or destroy other findings (*159 Cal. App. 3d 509, 524)* .

The facts and procedural background of ***McAdams v. McElroy*** *(1976) 62 Cal. App. 3d 985, 133 Cal. Rptr. 637* , are discussed in *§ 215.31[3][c]*. In *McAdams*, the court held that the failure to make a finding is harmless if, under the facts of the case, the finding necessarily would have been adverse to the complaining party. The court also held that omission to make a finding, if the judgment is otherwise supported, is harmless error unless the evidence is sufficient to sustain a finding in favor of the complaining party that would have the effect of countervailing or destroying other findings (*62 Cal. App. 3d 985, 996)* .

Although *McAdams* was decided prior to the 1981 amendments to *Code Civ. Proc. §§ 632* and *634* and former Cal. Rules of Ct., Rule 232 [*now see Cal. Rules of Ct., Rule 3.1590*] , the case has been cited for the point discussed in a later opinion interpreting the code sections as amended [*see People v. Casa Blanca Convalescent Homes, Inc. (1984) 159 Cal. App. 3d 509, 524, 206 Cal. Rptr. 164]* .

[4] Additional Authorities

[a] Failure to Find on Immaterial Issue

In *Midwest Television, Inc. v. Scott, Lancaster, Mills & Atha, Inc. (1988) 205 Cal. App. 3d 442, 252 Cal. Rptr. 573* , the issue was whether the defendant advertising agency was liable on a contract for television advertising time that it had entered into on behalf of a client who later went bankrupt. The trial court found the defendant liable, accepting that the industry custom was that an agency was liable on such contracts unless it gave notice of its nonliability. Among the grounds alleged on appeal, the defendant challenged the sufficiency of the statement of decision because it failed to find whether defendant had acted as an agent for a disclosed principal. The appellate court affirmed, holding that the finding was neither relevant nor essential to the judgment. Liability was established by the custom and by the failure of the agency to give notice of its nonliability. That the agency was acting on behalf of a disclosed principal advertiser was obvious, but of no material significance with regard to its own liability (*205 Cal. App. 3d 442, 457-458)* .

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21-215 California Points & Authorities § 215.34

§ 215.34 Supporting Contention That Presiding Judge May Sign Formal Judgment or Order Conforming to Minutes [Code Civ. Proc. § 635]

[1] FORM

[*The following may be included in a memorandum or in a trial or appellate brief.*]

THE JUDGMENT IS VALID BECAUSE THE PRESIDING JUDGE PROPERLY SIGNED THE _____ [FORMAL JUDGMENT *or* ORDER] CONFORMING TO THE DECISION OF THE COURT AS ENTERED IN ITS MINUTES, AND THE JUDGE WHO HEARD OR TRIED THE CASE IS UNAVAILABLE.

Formal Judgment or Order Signed by Presiding Judge. In all cases whenthe decision of the court has been entered in its minutes, and when the judge who heard or tried the case is unavailable, the formal judgment or order conforming to the minutes may be signed by the presiding judge of the court or by a judge designated by the presiding judge (*Code Civ. Proc. § 635*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a final judgment is valid if the presiding judge signed the formal judgment or order conforming to the decision as previously entered in the minutes and the judge who heard or tried the case is unavailable [*see Code Civ. Proc. § 635*]. Counsel should be aware of *Armstrong v. Picquelle (1984) 157 Cal. App. 3d 122, 128, 203 Cal. Rptr. 552* (discussed in *§ 215.35[3][b]*), which states that *Code Civ. Proc. § 635* authorizes the signing of a formal judgment by the presiding judge only if (1) no statement of decision has been requested or (2) the judge who has heard the evidence has already provided the parties with a statement of decision on their request.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that a final judgment conforming to the minutes entered by the trial court and signed by the presiding judge is a valid final judgment. For example, these points and authorities may be used to oppose

a motion to vacate the judgment and for a new trial. They may also be adapted for use in an appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should discuss facts showing that the judge who heard the evidence entered its decision in the minutes, that the judge who heard the evidence is now unavailable, and that the formal judgment or order signed by the presiding judge conformed to the minutes entered by the trial court.

[b] Related Pleading and Practice Forms

For forms relating to motions for new trial and motions to vacate judgments generally, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[c] Related Memoranda

For points and authorities for use in motions for new trial and motions to vacate judgments, see Ch. 155, *Motions After Trial* .

[d] Opposing Memoranda

In an appropriate case, the points and authorities *set out in §§ 215.35* and *215.36* may be used to oppose the contention supported by these points and authorities.

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21-215 California Points & Authorities § 215.35

§ 215.35 Opposing Contention That Presiding Judge May Sign Formal Judgment or Order Conforming to Minutes [Code Civ. Proc. § 635]--Judge Who Heard Evidence Did Not Sign Statement of Decision or Final Judgment [Code Civ. Proc. § 632]

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE JUDGMENT SHOULD BE SET ASIDE BECAUSE THE JUDGE WHO HEARD THE EVIDENCE DID NOT SIGN THE STATEMENT OF DECISION OR FINAL JUDGMENT, AND THE PARTIES DID NOT FILE AN AGREED STATEMENT OF DECISION NOR WAIVE THE FILING OF A STATEMENT OF DECISION.

A. When Statement of Decision Is Required Explaining Factual and Legal Basis as to Each Principal Controverted Issue. [*See § 215.20[1], Paragraph A.*]

B. No Agreed Findings Filed or Waiver of Findings. No proper judgment can be entered when the judge who heard the evidence is unavailable, unless the parties file agreed findings or waive the filing of findings (*Mace v. O'Reilley (1886) 70 Cal. 231, 234, 11 P 721* ; *Swift v. Daniels (1980) 103 Cal. App. 3d 263, 265-266, 162 Cal. Rptr. 863*).

C. Signature of Judge Who Heard Evidence Required. The presiding judge does not have the authority to sign his or her own findings on the basis of a partial transcript of the trial, the minutes, and the parties' respective proposed findings because to do so would deprive the parties of their right to a statement of decision from the judge who heard the evidence (*Armstrong v. Picquelle (1984) 157 Cal. App. 3d 122, 128, 203 Cal. Rptr. 552*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that a final judgment is valid when the presiding judge signed the formal judgment or order conforming to minutes. The ground for opposition is that the parties did not file agreed findings nor waive the filing of findings, and the judge who heard the evidence has not

submitted his or her statement of decision [*see Code Civ. Proc. §§ 632, 635*; *Mace v. O'Reilley (1886) 70 Cal. 231, 234, 11 P 721]* .

These points and authorities may be combined with points and authoritiespertaining to the specific procedural context in which counsel wishes to raise the issue that no valid judgment can be entered when the judge who heard the evidence is unavailable, unless the parties file agreed findings or waive the filing of findings. For example, these points and authorities may be used in support of a motion to vacate the judgment and for a new trial. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should discuss facts showing that the judge who heard the evidence did not sign a statement of decision or the final judgment, the parties neither filed an agreed statement of decision nor waived the filing of a statement of decision, and the presiding judge's signing of the statement of decision was not based on evidence heard by him or her.

In an appropriate case, these points and authorities may be submitted in opposition to the contentions supported by the points and authorities *set out in § 215.34*.

[b] Related Pleading and Practice Forms

For forms relating to procedures for obtaining a statement of decision generally, see California Forms of Pleading and Practice, Ch. 529, *Statement of Decision* (Matthew Bender). For forms relating to motions for new trial and motions to vacate judgments generally, see Ch. 371, *Motions After Trial* in that publication.

[c] Related Memoranda

For points and authorities for use in motions for new trial and motions to vacate judgments, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] No Agreed Findings Filed or Waiver of Findings

Mace v. O'Reilley *(1886) 70 Cal. 231, 11 P 721* , was an action to recover damages for malicious prosecution. After the court trial, the judge entered an order for judgment for damages in a lesser amount than prayed. No findings were filed or waived, and no final judgment entered. The term of the judge who heard the case expired, and a different judge entered the judgment on the former judge's order. Plaintiffs filed a motion to vacate the judgment and for a new trial. The trial court granted the motion on the ground that findings had not been filed nor waived. Defendant appealed.

The Supreme Court affirmed, holding that no valid judgment was entered by the trial judge because an order for judgment is not a final judgment. When the judge who heard the evidence went out of office, the trial was incomplete, and no proper judgment could be entered. A new trial therefore was inevitable, unless agreed findings were filed or waived by both sides to the controversy (*70 Cal. 231, 234)* .

Although *Mace* was decided prior to the 1981 amendments to *Code Civ. Proc. §§ 632-635*, the case has been specifically cited as still controlling law for the point discussed [*see Armstrong v. Picquelle (1984) 157 Cal. App. 3d 122, 128, 203 Cal. Rptr. 552]* .

Swift v. Daniels *(1980) 103 Cal. App. 3d 263, 162 Cal. Rptr. 863* , was an action to quiet title to real property. After trial, the trial court made its intended decision to enter judgment in defendant and cross complainant's favor. The trial judge became incapacitated, and the presiding judge signed formal findings of fact and conclusions of law (purportedly

in conformity with the trial judge's statement of intended decision) under the authority of *Code Civ. Proc. § 635* (signing of judgment or order by presiding judge when trial judge unavailable). Counsel for defendant contended that both parties' counsel agreed on the findings signed by the presiding judge. Counsel for plaintiff contended that he disagreed with some of the findings, and did not agree with any of the conclusions. Plaintiff appealed.

The court of appeal reversed, holding that *Code Civ. Proc. § 635* is inapplicable because findings were not waived, and the court's notice of intended decision was, by definition, not binding on the court, pursuant to former Cal. Rules of Ct., Rule 232(a) [*now see Cal. Rules of Ct., Rule 3.1590(a)-(c)*]. Citing *Mace v. O'Reilley (1886) 70 Cal. 231, 11 P. 721* (discussed *above*), the court held that a new trial is inevitable, unless agreed findings were filed or waived by both sides to the controversy (*103 Cal. App. 3d 263, 265)* .

Although *Swift* was decided prior to the 1981 amendments to *Code Civ. Proc. § 635* and former Cal. Rules of Ct., Rule 232(a) [*now see Cal. Rules of Ct., Rule 3.1590(a)-(c)*] , the case has been specifically cited as still controlling law for the point discussed [*see Armstrong v. Picquelle (1984) 157 Cal. App. 3d 122, 128, 203 Cal. Rptr. 552]* .

[b] Signature of Judge Who Heard Evidence Required

Armstrong v. Picquelle *(1984) 157 Cal. App. 3d 122, 203 Cal. Rptr. 552* , was an action for a partnership accounting. Plaintiff and defendant entered into an oral partnership agreement whereby plaintiff was to provide money to purchase real estate, defendant was to build a house thereon, and both parties were to split the profits on its sale. The parties failed to sell the house after completion, and plaintiff occupied the premises and made improvements to it. Plaintiff filed an action to dissolve the partnership and have an accounting. The trial court dissolved the partnership, provided a formula for an accounting, ordered defendant to pay plaintiff a certain sum of money, and determined the nature of certain expenditures. The court orally announced tentative findings that were entered in the minutes. Defendant requested findings of fact and conclusions of law(although the 1981 amendment to *Code Civ. Proc. § 632* regarding a statement of decision was effective prior to the trial date). The court subsequently directed plaintiff to prepare findings. The trial judge retired, and the parties filed findings and counterfindings with the presiding judge. The presiding judge signed settled findings of fact and conclusions of law (presumably based on the trial judge's tentative findings), signed the judgment in favor of plaintiff, and denied defendant's motion for a new trial. Defendant appealed.

The court of appeal reversed, holding that *Code Civ. Proc. § 635*, as amended, authorizes the signing of a formal judgment by the presiding judge only if (1) no statement of decision has been requested or (2) the judge who has heard the evidence has already provided the parties with a statement of decision on their request. Therefore, *Code Civ. Proc. § 635* does not authorize the presiding judge to sign his or her own findings on the basis of a partial transcript of the trial, the minutes, and the parties' respective proposed findings, because to do so would deprive the parties of their right to a statement of decision from the judge who had heard their evidence (*157 Cal. App. 3d 122, 128)* .

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21-215 California Points & Authorities § 215.36

§ 215.36 Opposing Contention That Presiding Judge May Sign Formal Judgment or Order Conforming to Minutes [Code Civ. Proc. § 635]--Tentative Decision Not Binding on Court [Cal Rules of Court, Rule 3.1590(b)]

[1] FORM

[*The following may be included in a memorandum or in a trial or appellate brief.*]

THE JUDGMENT SHOULD BE SET ASIDE BECAUSE IT WAS ENTERED BY THE PRESIDING JUDGE AND IS BASED SOLELY ON THE TENTATIVE RULING OF THE TRIAL JUDGE, WHO IS NO LONGER AVAILABLE.

A. When Statement of Decision Is Required Explaining Factual and Legal Basis as to Each Principal Controverted Issue. [*See § 215.20[1], Paragraph A.*]

B. Tentative Decision Not Binding. A tentative decision does not constitute a judgment and is not binding on the court (*Cal. Rules of Ct., Rule 3.1590(b)*).

C. No Legal Judgment Based on Tentative Decision. No legal judgment can be entered by a presiding judge who signs findings and a final judgment on the basis of the trial judge's tentative ruling (*Armstrong v. Picquelle (1984) 157 Cal. App. 3d 122, 128, 203 Cal. Rptr. 552*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that the presiding judge entered a valid judgment if the presiding judge signed findings and a final judgment based on the trial judge's tentative ruling [*see Code Civ. Proc. §§ 632, 635*; *Cal. Rules of Ct., Rule 3.1590(b)*; *Armstrong v. Picquelle (1984) 157 Cal. App. 3d 122, 128, 203 Cal. Rptr. 552]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that no legal judgment can be entered by a presiding judge who signs findings

and a final judgment on the basis of the trial court's tentative ruling. For example, these points and authorities may be used in support of a motion to vacate the judgment and for a new trial. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should discuss facts showing that the trial court's decision was tentative, and that the presiding judge who signed the findings and final judgment did not hear the evidence.

In an appropriate case, these points and authorities may be submitted in opposition to the contentions supported by the points and authorities *set out in § 215.34*.

[b] Related Pleading and Practice Forms

For forms relating to procedures for obtaining a statement of decision generally, see California Forms of Pleading and Practice, Ch. 529, *Statement of Decision* (Matthew Bender). For forms relating to motions for new trial and motions to vacate judgments generally, see Ch. 371, *Motions After Trial* in that publication.

[c] Related Memoranda

For points and authorities for use in motions for new trial and motions to vacate judgments, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] No Legal Judgment Based on Tentative Decision

The facts and procedural background of ***Armstrong v. Picquelle*** *(1984) 157 Cal. App. 3d 122, 203 Cal. Rptr. 552* , are discussed in *§ 215.35[3][b]*. In *Armstrong*, the court of appeal held that *Code Civ. Proc. § 635* does not authorize the presiding judge to sign his or her own findings on the basis of a partial transcript of the trial, the minutes, and the parties' respective proposed findings because to do so would deprive the parties of their right to a statement of decision from the judge who had heard their evidence. The statute does not authorize the presiding judge to enter a formal judgment whenever the judge who has heard the evidence has orally entered a tentative decision or tentative findings in theminutes. To interpret *Code Civ. Proc. § 635* to allow a presiding judge to enter judgment on the basis of a tentative decision entered in the minutes would strip the parties of their right, pursuant to *Code Civ. Proc. § 632*, to a statement of decision after the trial judge's tentative ruling (*157 Cal. App. 3d 122, 127)* . Further, to allow entry of judgment by a presiding judge on the basis of a tentative ruling by a nonavailable trial judge would wrest from the parties the right to have the judge who hears the evidence decide the case (*157 Cal. App. 3d 122, 127-128)* . Pursuant to former Cal. Rules of Ct., Rule 232(a) [*now see Cal. Rules of Ct., Rule 3.1590(b)*] , the trial court's tentative decision, made by oral statement entered in the minutes, was not binding on the court. No legal judgment could be entered by the presiding judge on the basis of the trial judge's tentative ruling. The court concluded that the judgment could not stand, and a new trial was required (*157 Cal. App. 3d 122, 128)* .

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§ 215.37 Supporting Contention That Reviewing Court May Make Factual Determinations Contrary to or in Addition to Those Made by Trial Court [Code Civ. Proc. § 909; Cal. Rules of Ct., Rules 8.252, 8.54]

[1] FORM

[*The following may be included in a memorandum or in a trial or appellate brief.*]

THE REVIEWING COURT MAY MAKE FACTUAL DETERMINATIONS CONTRARY TO OR IN ADDITION TO THOSE MADE BY THE TRIAL COURT BECAUSE _____ [THERE WAS NO RIGHT TO JURY TRIAL *OR* TRIAL BY JURY WAS WAIVED].

A. Additional or Contrary Factual Determination by Reviewing Court. In all cases when trial by jury is not a matter of right or when trial by jury has been waived, the reviewing court may make factual determinations contrary to or in addition to those made by the trial court. The factual determinations may be based on the evidence adduced before the trial court either with or without the taking of evidence by the reviewing court. The reviewing court may, for the purpose of making the factual determinations or for any other purpose in the interests of justice, take additional evidence of or concerning facts occurring at any time prior to the decision of the appeal, and may give or direct the entry of any judgment or order and may make any further or other order as the case may require (*Code Civ. Proc. § 909*).

B. Request for Findings by Reviewing Court. A request that the reviewing court make findings of fact must include proposed findings [*Cal. Rules of Ct., Rule 8.252(b)*].

[*Optional*] **C. Application for Production of Additional Evidence on Appeal.** A party may move that the reviewing court take evidence [*Cal. Rules of Ct., Rule 8.252(c)(1)*]. An order granting the motion must state the issues on which evidence will be taken, specify whether the court, a justice, or a special master or referee will take the evidence, and give notice of the time and place for taking the evidence [*Cal. Rules of Ct., Rule 8.252(c)(2)*]. For documentary evidence, a party may offer the original, a certified copy, or a photocopy. The court may admit the document in evidence without a hearing [*Cal. Rules of Ct., Rule 8.252(c)(3)*; *see also Cal. Rules of Ct., Rule 8.54* (procedure for motions in appellate court)].

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a reviewing court may make factual determinations contrary to or in addition to those made by the trial court after a trial in which trial by jury was either precluded or waived [*see Code Civ. Proc. § 909*; *Cal. Rules of Ct., Rule 8.252*]. Optional Paragraph C is for use when counsel wishes to introduce additional evidence on appeal [*see Cal. Rules of Ct., Rule 8.252(c)*]. The application to produce additional evidence must be accompanied by a memorandum , and by a declaration or other supporting evidence if the motion is based on matters not appearing of record [*see Cal. Rules of Ct., Rule 8.54(a)*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that a reviewing court may make factual determinations contrary to or in addition to those made by the trial court after a trial in which trial by jury was either precluded or waived. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should discuss facts showing that the proposed factual determinations are contrary to or in addition to those made by the trial court, and that trial by jury was either precluded or waived.

[b] Opposing Memoranda

In an appropriate case, the points and authorities *set out in § 215.38* may be used to oppose the contention supported by these points and authorities.

[c] Related Pleading and Practice Forms

For forms relating to procedures for obtaining a statement of decision generally, see California Forms of Pleading and Practice, Ch. 529, *Statement of Decision* (Matthew Bender). For forms relating to requests for factual determinations andmotions for the production of evidence in a reviewing court, and written opposition to such requests and motions, see Ch. 51, *Appeal: Hearing and Decision* in that publication.

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PART II. FORMS

21-215 California Points & Authorities § 215.38

§ 215.38 Opposing Contention That Reviewing Court May Make Factual Determinations Contrary to or in Addition to Those Made by Trial Court [Code Civ. Proc. § 909; Cal. Rules of Ct., Rules 8.252, 8.54]--Proposed Findings Would Not Constitute Basis for Affirmance or Reversal of Judgment

[1] FORM

[*The following may be included in a memorandum or in a trial or appellate brief, and may be combined, when appropriate, with the points and authorities in § 215.38.*]

THE REVIEWING COURT SHOULD NOT MAKE FACTUAL DETERMINATIONS CONTRARY TO OR IN ADDITION TO THOSE MADE BY THE TRIAL COURT BECAUSE THE PROPOSED FINDINGS WOULD NOT CONSTITUTE A BASIS FOR AFFIRMANCE OR REVERSAL OF THE JUDGMENT.

Purpose of Findings to Affirm or Reverse Judgment With Directions on Remand. The power granted by *Section 909 of the Code of Civil Procedure* and *Rule 8.252 of the California Rules of Court* to make factual determinations contrary to or in addition to those made by the trial court is to be exercised sparingly. As a general rule, it should be exercised only when the purpose of the new findings would constitute a basis for an affirmance of the judgment or a basis for reversal of the judgment with directions to the trial court to enter judgment for appellants (*Tupman v. Haberkern (1929) 208 Cal. 256, 269, 280 P 970* ; *De Angeles v. Roos Bros., Inc. (1966) 244 Cal. App. 2d 434, 443, 52 Cal. Rptr. 783*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that a reviewing court may make factual determinations contrary to or in addition to those made by the trial court. The ground for opposition is that the proposed findings would not constitute a basis for affirmance of the judgment or reversal of the judgment with directions to the trial court to enter judgment for appellant [*see Code Civ. Proc. §§ 632, 909*; *Cal. Rules of Ct., Rule 8.252*; *Tupman v. Haberkern (1929) 208 Cal. 256, 269, 280 P 970]* .

The points and authorities in this form may be combined with the points and *authorities in § 215.38* when counsel wishes to contend that a reviewing court may not make factual determinations contrary to or in addition to those made by the trial court, on the ground that the trial court did not make findings and the evidence is in conflict.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that a reviewing court may not exercise an independent review of the record and reweigh the evidence absent exceptional circumstances.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Therefore, counsel should discuss facts showing that there are no exceptional circumstances justifying fact finding by the reviewing court. Counsel should show that the purpose of the new findings would not constitute a basis for either an affirmance or reversal of the judgment.

In an appropriate case, these points and authorities may be used to oppose the contention supported by the points and authorities *set out in § 215.37*.

[b] Related Pleading and Practice Forms

For forms relating to procedures for obtaining a statement of decision generally, see California Forms of Pleading and Practice, Ch. 529, *Statement of Decision* (Matthew Bender). For forms relating to requests for factual determinations and motions for the production of evidence in a reviewing court, and written opposition to such requests and motions, see Ch. 51, *Appeal: Hearing and Decision* in that publication.

[3] Discussion of Authorities

[a] Purpose of Findings to Affirm or Reverse Judgment With Directions on Remand

Tupman v. Haberkern *(1929) 208 Cal. 256, 280 P 970* , was an action to compel accounting of profits received by defendants in a transaction involving royalties from the lease of oil lands. Plaintiffs and defendants entered into an agreement to acquire an interest in certain mining claims, and agreed to leave record title to the land in the owner until all patent applications to the federal government were concluded. The record owner executed a grant deed conveying interest in the property to plaintiffs and defendants. Defendants ultimately obtained an abandonment by the owner of record of a pending application for patents, and executed a conveyance of the land to the federal government. The federal government leased a portion of the property to an oil company, in consideration for which the company paid royalties on oil production to the record owner and defendants. Plaintiffs contended that defendants conspired to defraud plaintiffs, and that the lease was obtained pursuant to an initial joint venture between plaintiffs and defendants. Defendants contended, inter alia, that plaintiffshad abandoned their interest in the lands and in the enterprise, and therefore had no interest in the lease proceeds. After trial, the trial judge resigned from office before rendering his decision. On stipulation of the parties, the presiding judge decided the matter and found for defendants. Plaintiffs appealed, contending that the evidence was insufficient to support the findings. Plaintiffs argued that when a record is presented for decision to a trial judge who has not seen the witnesses nor heard their testimony, the reviewing court must also determine whether the trial court was justified in giving weight and credibility to the evidence.

The Supreme Court affirmed. Interpreting former Code Civ. Proc. § 956a (*now see Code Civ. Proc. § 909*), the Court noted that prior to the enactment of the statute, it was firmly established that an appellate tribunal possessed none of the functions of a jury, and that the sole province of the court on appeal was to review the action of the trial court, correct its errors, and therefore pass on questions of law only (*208 Cal. 256, 262)* . It was not the intention of the statute that the reviewing courts should develop generally into trial courts. Rather, it was contemplated that the appellate courts would exercise the new power sparingly and, as a general rule, would exercise it only when the purpose of the new findings was to constitute a basis for an affirmance of the judgment, or a basis for a reversal of the judgment with

directions to the trial court to enter a judgment for the appellant (*208 Cal. 256, 269)* . The primary and principal purpose of the exception is to enable the reviewing courts to make contrary or additional findings on the record presented or on new evidence taken, and thereby affirm or modify the judgment and terminate the litigation. When the judgment appealed from must be reversed and a new trial is ordered (either pursuant to a general order or reversal or a specific remanding of the cause for a new trial), findings of fact by the reviewing court become inappropriate and unauthorized. When the judgment appealed from is reversed and the trial court directed to enter a judgment for the appellant, the reviewing court may make findings in support of the judgment to be entered, but the power should be exercised with caution, and only when it may be declared, as a matter of law, that the respondent could not make a substantial showing in support of his or her cause if a new trial were held, or that the respondent could not, or should not in the interests of justice, make a further showing on retrial (*208 Cal. 256, 269-270)* . The Court found, accordingly, that the judgment was supported by the record, and that whatever joint enterprise existed initially had been abandoned long before the lease was executed. Moreover, the evidence was insufficient to support the finding that the defendants were not guilty of any fraud (*208 Cal. 256, 278)* .

Although *Tupman* was decided prior to the 1981 amendment to *Code Civ. Proc. § 909*, the case is discussed in *De Angeles v. Roos Bros., Inc. (1966) 244 Cal. App. 2d 434, 443, 52 Cal. Rptr. 783* , which was cited for the point discussed in *Tyrone v. Kelley (1973) 9 Cal. 3d 1, 13, 106 Cal. Rptr. 761, 507 P.2d 65* . *Tyrone* is discussed in *People v. Coyer (1983) 142 Cal. App. 3d 839, 845, 191 Cal. Rptr. 376* , which interpreted the code section as amended for the point discussed.

De Angeles v. Roos Bros., Inc. *(1966) 244 Cal. App. 2d 434, 52 Cal. Rptr. 783* , was an action to recover damages for breach of an employment contract. The parties entered into a written agreement to employ plaintiff as executive vice president of defendant clothing corporation for a period of 10 years at a certain salary. Four years later, plaintiff became ill, and was unable to participate in an important buying trip. A couple months thereafter, according to plaintiff, the chairman of the board expressed concern for plaintiff's health, and suggested that plaintiff need not participate in the current buying trip. Plaintiff contended that the chairman of the board did not order him not to go on the trip. Evidence indicated that relations between plaintiff and the chairman of the board were deteriorating. Plaintiff made the trip. Shortly thereafter, the chairman of the board discharged plaintiff for failure to follow his instructions not to make the trip. The trial court found that plaintiff's discharge was wrongful and without just or adequate cause, and that plaintiff had unsuccessfully sought employment comparable to that with defendant. Defendant appealed.

Although *De Angeles* was decided prior to the 1981 amendment to *Code Civ. Proc. § 909*, the case is discussed in *Tyrone v. Kelley (1973) 9 Cal. 3d 1, 13, 106 Cal. Rptr. 761, 507 P.2d 65* , which was cited for the point discussed in *Jacobs v. State Bd. of Optometry (1978) 81 Cal. App. 3d 1022, 1034* , 147 Cal. Rtpr. 225. *Jacobs* is discussed in *People v. Coyer (1983) 142 Cal. App. 3d 839, 845, 191 Cal. Rptr. 376* , which interpreted the code section as amended for the point discussed.

[4] Additional Authorities

[a] Purpose of Findings to Affirm or Reverse Judgment With Directions on Remand

In *Tyrone v. Kelley (1973) 9 Cal. 3d 1, 106 Cal. Rptr. 761, 507 P.2d 65* , an action to recover a finder's fee regarding a lender for defendants' construction project, the trial court found for plaintiff, and defendant appealed. The court of appeal affirmed the judgment and rejected defendant's request for certain findings of fact pursuant to Cal. Rules of Ct., Rule 23. The court held that, although appellate courts are authorized by *Code Civ. Proc. § 909* and former Cal. Rules of Ct., Rule 23 [*now see Cal. Rules of Ct., Rule 8.252*], to make findings of fact on appeal, the authority should be exercised sparingly, and absent exceptional circumstances, no findings should be made (*9 Cal. 3d 1, 13)* . Although *Tyrone* was decided prior to the 1981 amendment to *Code Civ. Proc. § 909*, the case is discussed in *Jacobs v. State Bd. of Optometry (1978) 81 Cal. App. 3d 1022, 1034* , 147 Cal. Rtpr. 225, which was cited for the point discussed in a later opinion interpreting the code section as amended [*see People v. Coyer (1983) 142 Cal. App. 3d 839, 845, 191 Cal.*

Rptr. 376] .

California Points & Authorities

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 216 STATUTE OF FRAUDS

21-216 California Points & Authorities 216.syn

§ 216.syn Synopsis to Chapter 216: STATUTE OF FRAUDS

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§ 216.02 Governing Statutes

§ 216.03 How to Use the Forms in This Chapter

[1] Page Limits on Points and Authorities

[2] Using the Forms to Build a Draft Memorandum

§ 216.04 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

[a] In General

[b] Particular Actions

[2] Related Points and Authorities Chapters

§§ 216.05-216.09 [Reserved]

§ 216.10 Oral Contract That Cannot Be Performed Within One Year From Its Making Is Not Enforceable

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Writing Is Required

[b] Contract Is for Indefinite Period Contemplated by Parties to Be Longer Than One Year

[c] Agreement Is Implied by Law to Last for Over One Year

[d] How One-Year Period Is Computed

[4] Additional Authorities

[a] Writing Is Required

[b] Contract Is for Indefinite Period Contemplated by Parties to Be Longer Than One Year

[c] Agreement Is Implied by Law to Last for Over One Year

§ 216.11 Contract May Be Enforced in Spite of One-Year Performance Rule--Performance Within One Year Is Possible

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Performance Within One Year Is Possible

[b] Performance Within One Year May Be Unlikely

[4] Additional Authorities

[a] Performance Within One Year Is Possible

[b] Performance Within One Year May Be Unlikely

§ 216.12 Contract May Be Enforced in Spite of One-Year Performance Rule--Contract Is for Permanent Employment

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Contract Is for Permanent Employment

[4] Additional Authorities

[a] Contract Is for Permanent Employment

§ 216.13 Contract may Be Enforced in Spite of One-Year Performance Rule--Contract Is to Continue as Long as Performance Is Satisfactory

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Contract Is to Continue as Long as Performance Satisfactory

[4] Additional Authorities

[a] Contract to Continue as Long as Performance Satisfactory

§ 216.14 Contract may Be Enforced in Spite of One-Year Performance Rule--Contingency Extending Performance Beyond One Year Must Be Disregarded

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Contingency Extending Performance Beyond One Year Must Be Disregarded

§ 216.15 Contract may Be Enforced in Spite of One-Year Performance Rule--Contract Is for Qualified Financial Contract

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

§§ 216.16-216.29 [Reserved]

§ 216.30 Oral Contract to Answer for Debt, Default, or Miscarriage of Another Is Not Enforceable

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

§ 216.31 Oral Contract to Answer for Debt, Default, or Miscarriage of Another May Be Enforced--Promisor Has Become Principal Debtor

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Promise to Pay for Consideration Passing to Third Party Is Enforceable

[4] Additional Authorities

[a] Promise to Pay for Consideration Passing to Third Party Is Enforceable

§ 216.32 Oral Contract to Answer for Debt, Default, or Miscarriage of Another May Be Enforced--Consideration Is Beneficial to Promisor

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Leading and Main Object of Promisor Is to Serve Own Interest

[b] Consideration Need Not Be Pecuniary

[4] Additional Authorities

[a] Leading and Main Object of Promisor Is to Serve Own Interest

§§ 216.33-216.39 [Reserved]

§ 216.40 Oral Contract for Conveyance of Real Property to Joint Venture May Be Enforced--Agreement to Share in Net Profits Under Oil and Gas Lease May Be Enforced

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Statute Covers Restrictions on Right to Alienate Real Property

[b] Statute Covers Option to Purchase Real Property

[c] Statute Covers Oil and Gas Rights

[4] Additional Authorities

[a] Statute Covers Option to Purchase Real Property

[b] Statute Covers Oil and Gas Rights

§ 216.41 Oral Contract for Conveyance of Real Property Interest Is Not Enforceable--Transfer of Estate in Real Property Must Be Made in Writing

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Oral Lien Is Invalid

§ 216.42 Oral Contract for Conveyance of Real Property Interest Is Not Enforceable--Agreement to Grant Lien on Real Property Must Be in Writing

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Promise to Grant Lien on Real Property Must Be Written

[b] Promise to Pay Mortgage Must Be Written

§ 216.43 Oral Contract for Conveyance of Real Property Interest Is Not Enforceable--Oral Contract to Lease Real Property for More Than One Year Is Not Enforceable

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Writing Signed by Party to be Charged Is Required

§ 216.44 Oral Contract for Conveyance of Real Property to Joint Venture May Be Enforced--Agreement to Contribute Real Property to Joint Venture May Be Enforced

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Writing Is Not Required to Form Joint Venture Involving Real Property

[4] Additional Authorities

[a] Writing Is Not Required to Form Joint Venture Involving Real Property

§ 216.45 Oral Contract for Conveyance of Real Property to Joint Venture May Be Enforced--Agreement to Engage in Joint Venture to Buy or Sell Real Property May Be Enforced

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Writing Is Not Required to Form Joint Venture to Buy or Sell Real Property

[4] Additional Authorities

[a] Writing Is Not Required to Form Joint Venture to Buy or Sell Real Property

§ 216.46 Oral Contract for Conveyance of Real Property to Joint Venture May Be Enforced--Agreement to Share in Net Profits Under Oil and Gas Lease May Be Enforced

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Writing Is Not Required to Share in Profits

§§ 216.47-216.59 [Reserved]

§ 216.60 Oral Commitment for Loan Exceeding $100,000 Is Not Enforceable--Commercial Loan Commitment Is Not Enforceable

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

§ 216.61 Oral Commitment for Loan Exceeding $100,000 May Be Enforced--Commitment for Loan Secured by Residential Real Property May Be Enforced

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Borrower's Promise to Grant Lien Is Severable

§§ 216.62-216.69 [Reserved]

§ 216.70 Written Contract Made by Agent Without Written Authority Is Not Enforceable

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Authority to Fill in Blanks on Executed Document Must Be Written

[b] Authority to Enter Contract for Spouse Must Be Written

[4] Additional Authorities

[a] Authority to Enter Contract for Spouse Must Be Written

§ 216.71 Written Contract May Be Enforced Even Though Made by Agent Without Written Authority--Executive Officer May Make Contract on Corporation's Behalf

[1] Executive Officer May Make Contract on Corporation's Behalf

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Written Authority Is Not Required

[4] Additional Authorities

[a] Written Authority Is Not Required

§ 216.72 Written Contract May Be Enforced Even Though Made by Agent Without Written Authority--Contract May Be Enforced When Agent Merely Signed Contract at Principal's Direction

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Written Authority Is Not Required to Perform Mechanical Act of Signing Name (Amanuensis Rule)

[b] Agent Is Not Required to Sign Contract in Principal's Immediate Presence

[c] Agent Is Not Required to Be Disinterested Party

[4] Additional Authorities

[a] Written Authority Is Not Required to Perform Mechanical Act of Signing Name (Amanuensis Rule)

§ 216.73 Written Contract May Be Enforced Even Though Made by Agent Without Written Authority--Written Authority Is Not Required When Contract Is Between Principal and Agent

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] No Writing Is Required Between Principal and Agent

§ 216.74 Written Contract May Be Enforced Even Though Made by Agent Without Written Authority--Contract May Be Enforced When Principal Ratified Agent's Unauthorized Act of Signing of Contract for Principal

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Principal Can Implicitly Ratify Agent's Unauthorized Act on Principal's Behalf

[b] Agent's Unauthorized Signing of Contract Can Be Ratified by Principal's Act of Signing Related Documents That Imply Existence of Contract

§§ 216.75-216.89 [Reserved]

§ 216.90 Memorandum of Agreement Does Not Satisfy Statute of Frauds--Memorandum Does Not Contain All Essential Terms of Agreement

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Essential Terms Must Be Stated With Reasonable Certainty

§ 216.91 Memorandum of Agreement Does Not Satisfy Statute of Frauds--Name on Memorandum Was Not Adopted as Signature by Party to be Charged

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Party to Be Charged Must Intend to Adopt Signature

[4] Additional Authorities

[a] Party to Be Charged Must Intend to Adopt Signature

§ 216.92 Memorandum of Agreement is Sufficient to Satisfy Statute of Frauds--Essential Terms of Agreement Are Set Forth With Reasonable Certainty

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Essential Terms Must Be Stated With Reasonable Certainty

[b] Memorandum Must Be Interpreted in Context of Parties' Knowledge at Time of Its Execution

[c] Formal Contract Containing Every Term of Agreement Is Not Required

[d] Extrinsic Evidence Is Admissible to Resolve Uncertainty

[e] Memorandum Evidencing Requirements Contract Is Sufficiently Precise

§ 216.93 Memorandum of Agreement is Sufficient to Satisfy Statute of Frauds--Signature of Party to Be Charged Need Not Be Manually Written

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Typed, Lithographed, Rubber-Stamped, or Printed Signature Is Sufficient

[4] Additional Authorities

[a] Typed, Lithographed, Rubber-Stamped, or Printed Signature Is Sufficient

§ 216.94 Memorandum of Agreement is Sufficient to Satisfy Statute of Frauds--Initials Are Sufficient for Subscription by Party to Be Charged

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Initials May Be Sufficient Subscription

§ 216.95 Memorandum of Agreement is Sufficient to Satisfy Statute of Frauds--Signature on One of Series of Related Papers Is Sufficient for Subscription by Party to Be Charged

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Signature on One of Series of Related Documents Is Sufficient Subscription

[4] Additional Authorities

[a] Signature on One of Series of Related Documents Is Sufficient Subscription

§ 216.96 Memorandum of Agreement is Sufficient to Satisfy Statute of Frauds--Name in Email Is Sufficient for Subscription by Party to Be Charged

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Name in Email Is Sufficient for Subscription by Party to Be Charged

§§ 216.97-216.109 [Reserved]

§ 216.110 Performance Renders Statute of Frauds Inapplicable--Statute of Frauds Is Inapplicable to Fully Executed Contract

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Statute Does Not Cover Fully Executed Contract

[4] Additional Authorities

[a] Statute Does Not Cover Fully Executed Contract

§ 216.111 Performance Renders Statute of Frauds Inapplicable--Statute of Frauds Is Inapplicable When One Party Has Fully Performed

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Statute Does Not Cover Contract Fully Performed by One Party

[b] Payment of Money Is Only Remaining Obligation

[4] Additional Authorities

[a] Statute Does Not Cover Contract Fully Performed by One Party

§ 216.112 Performance Renders Statute of Frauds Inapplicable--Statute of Frauds Is Inapplicable to Past Transactions Performed Under Contract Not to Be Performed Within One Year

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Partial Performance of Contract Not to Be Performed Within One Year Is Binding as to Past Transactions

§ 216.113 Performance Renders Statute of Frauds Inapplicable--Statute of Frauds Is Inapplicable to Real Property Sale Agreement That Is Partially Performed

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Partially Performed Oral Agreement to Sell Real Property May Be Enforced

[4] Additional Authorities

[a] Partially Performed Oral Agreement to Sell Real Property May Be Enforced

§ 216.114 Statute of Frauds Applies in Spite of Partial Performance--Payment of Money Is Insufficient in Itself to Constitute Partial Performance

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Payment of Money Is Insufficient as Partial Performance

[4] Additional Authorities

[a] Payment of Money Is Insufficient as Partial Performance

§§ 216.115-216.129 [Reserved]

§ 216.130 Party Asserting Statute of Frauds Is Estopped to Rely on It--Party Is Guilty of Unconscionable Injury or Would Receive Unjust Enrichment

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Party May Be Estopped to Assert Statute of Frauds

[b] Partial Performance Removes Agreement From Statute of Frauds

[4] Additional Authorities

[a] Party May Be Estopped to Assert Statute of Frauds

[b] Partial Performance Removes Agreement From Statute of Frauds

§ 216.131 Party Asserting Statute of Frauds Is Estopped to Rely on It--Principal Is Estopped to Rely on Requirement That Agent's Authority Must Be in Writing

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Principal Is Estopped by Own Acts to Rely on Requirement That Agent's Authority Be Written

§ 216.132 Party Asserting Statute of Frauds Is Not Estopped to Rely on It--Unconscionable Injury or Unjust Enrichment Is Not Established

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Unconscionable Injury or Unjust Enrichment Is Essential to Estoppel

[b] Rendition of Services Compensable in Quantum Meruit Is Insufficient Basis for Estoppel

[c] Loss of Bargain Is Insufficient Basis for Estoppel

[d] Increase in Value of Property From Market Conditions Is Insufficient as Unjust Enrichment

[e] Fiduciary Asserting Estoppel Is Required to Prove That Agreement Is Fair and Reasonable

[4] Additional Authorities

[a] Unconscionable Injury or Unjust Enrichment Is Essential to Estoppel

[b] Loss of Bargain Insufficient Basis for Estoppel

§ 216.133 Party Asserting Statute of Frauds Is Not Estopped to Rely on It--Principal Is Not Estopped From Relying on Requirement That Agent's Authority Must Be in Writing

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Requirement of Written Authority to Make Contract Within Statute of Frauds Is Not Excused by Estoppel to Rely on Statute in Regard to Contract

§ 216.134 Party Asserting Statute of Frauds Is Not Estopped to Rely on It--Doctrine of Judicial Admissions Does Not Apply to Testimony

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Testimony Does Not Bar Assertion of Statute of Frauds

[4] Additional Authorities

[a] Testimony Does Not Bar Assertion of Statute of Frauds

California Points & Authorities

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 216 STATUTE OF FRAUDS
PART I. INTRODUCTION

21-216 California Points & Authorities § 216.01

§ 216.01 Scope of Chapter

This chapter contains points and authorities for use in supporting contentions in memoranda and briefs that are based on the statute of frauds. The forms in Part II are organized as follows:

- Subpart A, relating to whether a contract is within the statute of frauds, includes contentions regarding the enforceability of an oral contract not performable within one year, an oral contract to answer for the debt, default, or miscarriage of another, an oral contract for conveyance of a real property interest, and an oral commitment to make a loan exceeding $100,000 [§ 216.10 et seq.].

- Subpart B, relating to contracts made by or through agents, includes contentions regarding the enforceability of a written contract made by or through an agent without written authority [§ 216.70 et seq.].

- Subpart C, relating to the sufficiency of a written memorandum, includes contentions regarding whether a particular memorandum does or does not satisfy the statute of frauds [§ 216.90 et seq.].

- Subpart D, relating to the effect of performance or estoppel on a plea of the statute of frauds, includes contentions regarding whether performance or partial performance of a contract renders the statute inapplicable and whether the party asserting the statute is estopped to rely on it [§ 216.110 et seq.].

For points and authorities based on statute of frauds provisions and relating to contracts to pay real estate brokers' commissions, see Ch. 31, *Brokers and Salespersons* , or relating to contracts for the sale of goods, see Ch. 206, *Sales* . Premarital agreements executed on or after January 1, 1986, are governed by *Fam. Code § 1600 et seq.*, discussed in Ch. 114, *Husband and Wife* .

Legal Topics:

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

Contracts LawStatutes of FraudsGeneral OverviewContracts LawStatutes of FraudsExceptionsGeneral OverviewContracts LawStatutes of FraudsRequirementsPerformanceReal Property LawPurchase & SaleContracts of SaleEnforceabilityStatutes of Frauds

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21-216 California Points & Authorities § 216.02

§ 216.02 Governing Statutes

The general statute of frauds, requiring various types of contracts to be in writing, is *Civ. Code § 1624*. Older cases may cite former Code Civ. Proc. § 1973, repealed in 1965, which contained provisions identical to then-existing provisions of *Civ. Code § 1624* (along with an additional sentence in the introductory paragraph, precluding evidence of a covered agreement other than the written memorandum or secondary evidence of its contents).

For a list of additional statutes requiring certain contracts to be in writing, see California Forms of Pleading and Practice, Ch. 530, *Statute of Frauds* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawStatutes of FraudsGeneral OverviewContracts LawTypes of ContractsGeneral Overview

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21-216 California Points & Authorities § 216.03

§ 216.03 How to Use the Forms in This Chapter

[1] Page Limits on Points and Authorities

One of the more significant drafting requirements to keep in mind is page limits: supporting and opposing memoranda must not exceed 15 pages (or 20 pages for a summary judgment motion or summary adjudication motion). Exhibits, declarations, attachments, a table of contents, a table of authorities, and the proof of service are not included in the page limitation. A reply or closing memorandum may not exceed 10 pages [*Cal. Rules of Ct., Rule 3.1113(d)*]. A party desiring to file a longer memorandum must obtain leave of court [*see Cal. Rules of Ct., Rule 3.1113(e)*]. These and other drafting requirements are discussed in detail in Ch. 1, *Writing Legal Memoranda and Briefs* .

[2] Using the Forms to Build a Draft Memorandum

The points and authorities in this chapter are designed to be combined with other points and authorities to form a complete memorandum. For a detailed discussion of how to select and use the forms in this publication to build a draft memorandum and complete the draft, with detailed discussion of all drafting requirements and strategic and stylistic considerations, see Ch. 1, *Writing Legal Memoranda and Briefs* .

The points and authorities in this chapter may also be adapted for use in a trial or appellate brief.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentSupporting MaterialsMemoranda of Law

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21-216 California Points & Authorities § 216.04

§ 216.04 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

[a] In General

For discussion of the statute of frauds generally and avoiding the statute of frauds, as well as discussion and forms related to pleading the statute of frauds, see California Forms of Pleading and Practice, Ch. 530, *Statute of Frauds* (Matthew Bender).

For discussion of the requirement that an agent must have written authority to enter into a contract required to be in writing, see Ch. 427, *Principal and Agent* , in that publication.

[b] Particular Actions

For discussions and forms related to actions in which the issue of the statute of frauds is commonly raised, see the following chapters in California Forms of Pleading and Practice (Matthew Bender):

- Ch. 140, *Contracts*.
- Ch. 182, *Declaratory Relief*.
- Ch. 240, *Easements*.
- Ch. 278, *Gifts*.
- Ch. 300, *Indemnity and Contribution*.
- Ch. 401, *Partnerships: Actions Between General Partners and Partnership*.
- Ch. 528, *Specific Performance*.

- Ch. 538, *Suretyship, Bonds, and Undertakings*.

For discussion and forms related to particular statute of frauds provisions and the effect of the statute of frauds in other areas of law, see the following chapters in that publication:

- Ch. 77, *Auctions and Auctioneers*.
- Ch. 103, *Brokers*.
- Ch. 269, *Fraud and Deceit*.

For forms related to actions for quasi-specific performance, see Ch. 528, *Specific Performance* , in that publication.

[2] Related Points and Authorities Chapters

Typically the substantive points and authorities on the issue of the statute of frauds included in this chapter are submitted is support or in opposition to a demurrer or motion for summary judgment. For procedural points and authorities relating to these proceedings, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* , and Ch. 221, *Summary Judgments* .

For related points and authorities involving contentions based on the statute of frauds, see the following chapters:

- Ch. 31, *Brokers and Salespersons*.
- Ch. 43, *Common Counts and Bills of Particulars*.
- Ch. 50, *Contracts*.
- Ch. 206, *Sales*.

For points and authorities related to quasi-specific performance of an oral agreement to leave property by will, see Ch. 214, *Specific Performance* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActStatutes of FraudsContracts LawStatutes of FraudsGeneral Overview

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21-216 California Points & Authorities §§ 216.05-216.09

[Reserved]

§§ 216.05[Reserved]

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PART II. FORMS
A. Contract Within Scope of Statute of Frauds

21-216 California Points & Authorities § 216.10

§ 216.10 Oral Contract That Cannot Be Performed Within One Year From Its Making Is Not Enforceable

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE CONTRACT ON WHICH THE _____ [*party relying on contract, e.g.,* PLAINTIFF] IS RELYING IS NOT BY ITS TERMS TO BE PERFORMED WITHIN ONE YEAR AND, THEREFORE, IS UNENFORCEABLE BECAUSE IT IS NOT IN WRITING SUBSCRIBED BY THE _____ [*party to be charged, e.g.,* DEFENDANT].

A. Writing Is Required. An agreement that by its terms is not to be performed within one year from being made is unenforceable unless it, or a note or memorandum of it, is in writing and subscribed by the party to be charged or his or her agent (*Civ. Code § 1624(a)(1)*; *Friedman v. Bergin (1943) 22 Cal. 2d 535, 537, 140 P.2d 1*).

[*Optional*] **B. Contract Is for Indefinite Period Contemplated by Parties to Be Longer Than One Year.** When the subject matter of a contract for an indefinite period shows that the parties contemplated a period longer than one year for its performance, the contract is unenforceable under the statute of frauds (*Tostevin v. Douglas (1958) 160 Cal. App. 2d 321, 327-328, 325 P.2d 130*).

[*Optional*] **C. Agreement Is Implied by Law to Last for Over One Year.** If an agreement is implied by law to last for a reasonable period, and the trier of fact finds that the reasonable period is more than one year, the agreement is unenforceable unless it is in writing (*San Francisco Brewing Corp. v. Bowman (1959) 52 Cal. 2d 607, 619, 343 P.2d 1*).

[*Optional*] **D. How One-Year Period Is Computed.** In computing the one-year period, the day the agreement was made is excluded; the year begins the following day and ends at the close of the anniversary of the day the agreement was made (*Columbia Pictures Corp. v. DeToth (1945) 26 Cal. 2d 753, 759, 161 P.2d 217*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that an alleged agreement is unenforceable under the statute of frauds because, by its terms, it cannot be fully performed within one year from its making, and it is not contained or referenced in a writing subscribed by the party to be charged.

These points and authorities may also be used if the agreement in question does not specify a time or duration of performance but the subject matter indicates that the parties contemplated that the performance would last more than one year (Optional Paragraph B) or if the contract is implied by law to last for a reasonable time and that time is found to be more than one year (Optional Paragraph C).

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a party seeks to raise this contention. For example, it may be used to support a defendant's motion for summary judgment.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, in supporting a motion for summary judgment, counsel should include discussion of the moving and opposing affidavits showing, on undisputed facts, the terms of the agreement that extend its performance beyond one year from its making, or, if no duration is stated in the agreement, the subject matter of the contract indicating that a period of more than one year was necessarily contemplated by the parties. Similarly, if the agreement is one implied by law to endure for a reasonable time [*see, e.g., Consol. Theatres, Inc. v. Theatrical Stage Employees Union (1968) 69 Cal. 2d 713, 727-728, 73 Cal. Rptr. 213, 447 P.2d 325]* , counsel should include a discussion of undisputed facts showing that the reasonable time for the agreement to endure is more than one year, based on the parties' course of dealing, their reasonable expectations, and other relevant circumstances. For example, if one party has made a capital contribution to an enterprise, such as a distributorship, pursuant to the contract, counsel should show that a period exceeding one year is necessary in order to recover the capital expenditure and to earn a reasonable profit.

[c] Related Pleading and Practice Chapters

For discussion of the statute of frauds generally and avoiding the statute of frauds, as well as discussion and forms related to pleading the statute of frauds, see California Forms of Pleading and Practice, Ch. 530, *Statute of Frauds* (Matthew Bender).

[d] Related Points and Authorities

These points and authorities should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a motion for summary judgment, they may becombined with appropriate points and authorities set out in Ch. 221, *Summary Judgments* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and authorities *set out in §§ 216.11 et seq., 216.92 et seq., 216.110 et seq., and 216.130* et seq. may be used in an appropriate case to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Writing Is Required

In ***Friedman v. Bergin*** *(1943) 22 Cal. 2d 535, 140 P.2d 1* , the parties executed an instrument setting forth some terms of an agreement under which the plaintiffs received a five-year concession on cigarettes, cigars, candy, and other items at a race track. The instrument stated that a formal contract was to follow, but the formal contract was never executed. For three years the parties performed, and the defendant, who granted the concession, cooperated by selling the plaintiffs items through his stands, accounting to the plaintiffs, and taking care of retail licenses, social security and unemployment insurance payments, industrial accident insurance, and sales tax. After the defendant assigned the contract, the assignees did not cooperate in these matters, and the plaintiffs discontinued operations and sued for breach of contract. The defendants appealed from a judgment for the plaintiffs.

The Supreme Court reversed. The contract was within the statute of frauds because it was to be performed over a five-year period and it was unenforceable unless the executed instrument contained the contract's material terms (*22 Cal. 2d 535, 537)* . The operational matters complained of by the plaintiffs involved the practical construction of material terms not expressed in the instrument. Moreover, if the terms were deemed part of a modification of the contract, the statute of frauds still applied because the modifications were not in writing and were to be performed over a five-year period (*22 Cal. 2d 535, 537-538)* .

[b] Contract Is for Indefinite Period Contemplated by Parties to Be Longer Than One Year

In ***Tostevin v. Douglas*** *(1958) 160 Cal. App. 2d 321, 325 P.2d 130* , the plaintiff alleged, in several inconsistent complaints, that the defendants repudiated an oral agreement under which they had employed the plaintiff to procure personnel and material for a series of television shows. The contract was allegedly for an indefinite period continuing as long as the series was shown on television. The trial court granted a motion to strike the third amended complaint and dismissed the action. The plaintiff appealed.

The court of appeal affirmed. The alleged agreement by its terms was not to be performed within one year from its making, and it was invalid under the statute of frauds. When it is evident from a contract's subject matter that the parties had in contemplation a longer period than one year as the time for its performance, the contract is invalid under the statute of frauds. Under the alleged agreement, payments to the plaintiff were to continue as long as the program was broadcast throughout the world, and the parties must have contemplated that continued performance of the contract was to last more than one year from the date the contract was made. At the time of suit, the show had been on television for more than one year (*160 Cal. App. 2d 321, 327-328)* .

The authority on which this paragraph is based may be compromised, however, in view of the fact that *Newfield v. Insurance Co. of the West (1984) 156 Cal. App. 3d 440, 446-447, 203 Cal. Rptr. 9* , which held that when an employee takes the position that an oral contract expressly or implicitly guaranties employment for longer than one year, the statute of frauds bars action on that contract, was disapproved in *Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 675 n.19, 254 Cal. Rptr. 211, 765 P.2d 373* (discussed in *§ 216.11[3][a]*), to the extent it is inconsistent.

[c] Agreement Is Implied by Law to Last for Over One Year

In ***San Francisco Brewing Corp. v. Bowman*** *(1959) 52 Cal. 2d 607, 343 P.2d 1* , the defendant was the exclusive distributor of the brewing company's products in most of Butte County from 1935 until 1954, when the company terminated the relationship. The company sued on an open account for beer sold and delivered to the defendant, and the defendant cross complained for breach of contract. The company appealed from a judgment on a jury verdict for the defendant.

The Supreme Court reversed. The trial court erred in failing to instruct the jury on the statute of frauds. The jury was properly instructed in regard to determining what a reasonable time would be for the duration of the contract (*52 Cal.*

2d 607, 613-614, 615) . However, the trial court erred in failing to instruct the jury that if they found the reasonable period to be greater than one year, the agreement would not be binding unless it was in writing (*52 Cal. 2d 607, 615, 619)* .

[d] How One-Year Period Is Computed

In ***Columbia Pictures Corp. v. DeToth*** *(1945) 26 Cal. 2d 753, 161 P.2d 217* , the defendant orally agreed to work as a motion picture director for Columbia for a term of one year "immediately next ensuing," with options for Columbia to renew or extend the contract for six additional one-year terms. Each option for a succeeding year was exercisable before the expiration of the current year. On thefollowing day, the defendant sought to defer commencement of the period of employment, representing that he had business commitments and that if Columbia would agree to this modification of the agreement and give him temporary work in the meantime, he would enter into a written contract to evidence the extension of time for commencement of his services under the oral contract. Subsequently, the defendant refused to render services to or enter into any written agreement with Columbia and proceeded to render services to other producers. Columbia sued for a declaration of the parties' rights and duties under the contract, but the trial court sustained a demurrer to the complaint without leave to amend. Columbia appealed from the ensuing judgment of dismissal.

The Supreme Court reversed. An oral contract of employment for a period of one year "immediately next ensuing" with rendition of service to commence the day after the agreement is entered into is not within the statute of frauds. In applying *Civ. Code § 1624(a)(1)*, the words "from the making thereof" are uniformly construed to exclude the day the agreement is made, so that the year is considered to begin the following day and end at the close of the anniversary of the day the agreement was made (*26 Cal. 2d 753, 758-759)* .

[4] Additional Authorities

[a] Writing Is Required

The plaintiff in *Tomlins v. American Ins. Co. (1968) 258 Cal. App. 2d 525, 66 Cal. Rptr. 92* , sued for breach of an oral agreement to employ the plaintiff for three years. The court of appeal held that the agreement obviously could not be performed in one year and that it was within the statute of frauds since no written memorandum was asserted (*258 Cal. App. 2d 525, 527)* . The court also held that the jury had been erroneously instructed on the issue of estoppel to assert the statute of frauds and reversed the judgment for the plaintiff (*258 Cal. App. 2d 525, 528-529)* .

The court of appeal in *Winburn v. All American Sportswear Co. (1963) 215 Cal. App. 2d 380, 30 Cal. Rptr. 321* , held that an oral agreement made in July for the plaintiff to be the defendant's factory representative in the calendar year commencing the following January came within the statute of frauds because it could not be performed within one year (*215 Cal. App. 2d 380, 381-382)* .

Gressley v. Williams (1961) 193 Cal. App. 2d 636, 14 Cal. Rptr. 496 , involved two oral contracts for the employment of the plaintiff by the defendant. The contracts covered different periods. The court of appeal held that the first contract was manifestly invalid and unenforceable as it was made in March 1957 and was to continue until December 1958, a period of more than one year (*193 Cal. App. 2d 636, 640)* . The court held, however, that the second contract, entered into by the parties when they rescinded the first one, was not within the statute of frauds. That contract was for permanent employment and specified the terms of compensation for the one-year period immediately following its making (*193 Cal. App. 2d 636, 641-642)* .

In *Brockman v. Lane (1951) 103 Cal. App. 2d 802, 230 P.2d 369* , the court of appeal rejected the plaintiff's contention that the contract on which the suit was based created a partnership. The court held that the contract was one for the employment of the plaintiff and that since it was for a five-year term, it was invalid under the statute of frauds, whether

it was governed by California or Arizona law (*103 Cal. App. 2d 802, 805)* .

In *Sessions v. Southern Cal. Edison Co. (1941) 47 Cal. App. 2d 611, 616-617, 118 P.2d 935* , the court of appeal held that whether the contract was found to be an agreement to put the plaintiff on inactive employment status until he became 60 or to pay him a certain sum until he reached the age of pension eligibility (in either case, a period of six years) and then to pay him a pension for life, the contract was within the statute of frauds (*47 Cal. App. 2d 611, 616-617)* .

In *Summerhays v. Scheu (1935) 10 Cal. App. 2d 574, 52 P.2d 512* , the court of appeal held that the plaintiff could not rely on the defendant's agreement never again to enter into the orchard-heater business, made in connection with the defendant's sale of patent applications to the plaintiff, because the agreement was obviously not to be performed within one year and was barred by the statute of frauds (*10 Cal. App. 2d 574, 576-577)* .

[b] Contract Is for Indefinite Period Contemplated by Parties to Be Longer Than One Year

Long v. Cramer Meat & Packing Co. (1909) 155 Cal. 402, 101 P. 297 , involved an agreement between tenants in common that their land would always be used for grazing the horses and cattle of the respective parties and their successors and that no sheep would ever be allowed to graze on the land. The Supreme Court held that the agreement, from its nature, was not to be performed within one year and was in violation of the statute of frauds (*155 Cal. 402, 406)* .

[c] Agreement Is Implied by Law to Last for Over One Year

In *Connelly v. Venus Foods, Inc. (1959) 174 Cal. App. 2d 582, 345 P.2d 117* , involving an oral distributorship contract, the court of appeal held that the trial court erred by taking the question of the statute of frauds away from the jury. There was sufficient evidence to support a finding that the contract was of indefinite duration and was thus for a reasonable period terminable on reasonable notice. The evidence could have supported findings that the reasonable period was sufficiently brief to allow termination within one year or that a reasonable period under the circumstances exceeded one year. The evidence would have also been sufficient to support a finding that the parties contracted for performance over a period longer than one year (*174 Cal. App. 2d 582, 586)* .

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PART II. FORMS
A. Contract Within Scope of Statute of Frauds

21-216 California Points & Authorities § 216.11

§ 216.11 Contract May Be Enforced in Spite of One-Year Performance Rule--Performance Within One Year Is Possible

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

EVEN THOUGH PERFORMANCE OF THE AGREEMENT WITHIN ONE YEAR IS UNLIKELY, THE AGREEMENT IS NOT WITHIN THE STATUTE OF FRAUDS BECAUSE IT IS POSSIBLE TO PERFORM THE AGREEMENT WITHIN ONE YEAR.

A. Performance Within One Year Is Possible. *Civil Code Section 1624(a)(1)* applies only to contracts that, by their terms, cannot possibly be performed within one year (*Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 674-675, 254 Cal. Rptr. 211, 765 P.2d 373* ; *White Lighting Co. v. Wolfson (1968) 68 Cal. 2d 336, 343, 66 Cal. Rptr. 697, 438 P.2d 345*).

B. Performance Within One Year May Be Unlikely. A promise unlikely to be performed within one year is not within the statute of frauds if, when the contract was made, full performance was possible in law and in fact before the expiration of a year. This rule applies even if the promise in fact is not performed within one year (*Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 673, 254 Cal. Rptr. 211, 765 P.2d 373* ; *Burgermeister Brewing Corp. v. Bowman (1964) 227 Cal. App. 2d 274, 281, 38 Cal. Rptr. 597*).

[*Optional*] **C. How One-Year Period Is Computed.** [*See § 216.10[1] Paragraph D.*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that the statute of frauds [*Civ. Code § 1624(a)(1)*] does not apply to oral contracts that are possible to perform within one year, even though performance

within one year is not probable. The argument supported by these points and authorities may be raised by a party relying on a contract whenever the adverse party urges that such a contract is invalid under the statute of frauds because it cannot be performed within one year. The argument would most likely be raised against a defense to an action for breach of contract.

These points and authorities may be used when the contract is a lease. Even though paragraph (a)(3) of the statute of frauds relates specifically to leases for a period longer than one year [*see Civ. Code § 1624(a)(3)*], paragraphs (a)(1) and (a)(3) may be applied in appropriate cases to leases as though they were equivalents [*see Fisher v. Parsons (1963) 213 Cal. App. 2d 829, 837, 29 Cal. Rptr. 210]* .

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a party seeks to raise this contention. For example, it may be used to oppose a defendant's motion for summary judgment.

[b] Argument

Counsel should add argument linking these points and authorities with the facts of the case. For example, in opposing a motion for summary judgment, counsel should include discussion of the moving and opposing affidavits showing that there is, at least, a triable issue of fact on whether performance within one year is possible, in that the terms of the agreement create a potential for performance to be completed within one year from the time the contract was made. If the contract requires performance until the occurrence of a particular contingency, counsel would show that the contingency could occur within one year. Similarly, if the contract was for a specific period longer than one year, counsel would show that it was subject to termination by its own terms within one year.

[c] Related Pleading and Practice Chapters

For discussion of the statute of frauds generally and avoiding the statute of frauds, as well as discussion and forms related to pleading the statute of frauds, see California Forms of Pleading and Practice, Ch. 530, *Statute of Frauds* (Matthew Bender).

[d] Related Points and Authorities

These points and authorities may be combined in an appropriate case with those *set out in §§ 216.12 -216.15*.

These points and authorities should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a motion for summary judgment, they may be combined with appropriate points and authorities set out in Ch. 221, *Summary Judgments* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and authorities *set out in § 216.10* may be used in an appropriate case to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Performance Within One Year Is Possible

Foley v. Interactive Data Corp. *(1988) 47 Cal. 3d 654, 254 Cal. Rptr. 211, 765 P.2d 373* , involved three causes of action for wrongful discharge. Demurrers were sustained to all three causes of action, and the judgment entered was affirmed by the court of appeal. The trial court and court of appeal applied *Newfield v. Insurance Co. of the West (1984) 156 Cal. App. 3d 440, 446-447, 203 Cal. Rptr. 9* , to conclude that any action for breach of the implied contract would be barred by the statute of frauds.

The Supreme Court reversed the portion of the judgment relating to the cause of action for breach of an implied agreement that the plaintiff would be discharged only for cause. *White Lighting Co. v. Wolfson (1968) 68 Cal. 2d 336, 343-344, 66 Cal. Rptr. 697, 438 P.2d 345* (discussed *below*) expressed the correct law (*47 Cal. 3d 654, 671-672)* . Even if an oral agreement promised the plaintiff "permanent" employment that would be terminable only on the condition of subsequent poor performance by the plaintiff or for other good cause, that agreement *could* possibly be completed within one year as long as it was for no special term (*47 Cal. 3d 654, 672-673)* . Because the employee can quit or the employer can discharge for cause, even an agreement that strictly defines appropriate grounds for discharge can be completely performed within one year, or within one day for that matter, and not be within the statute of frauds. The weight of authority supports the general rule that if a condition terminating a contract may occur within one year from its making, then the contract is performable within a year and does not fall within the scope of the statute of frauds. This is true even though performance of the contract may extend longer than one year if the condition does not occur (*47 Cal. 3d 654, 673)* . To bring a contract within the statute relating to oral agreements not to be performed within one year, it must appear to be necessarily incapable of performance within that time (*47 Cal. 3d 654, 674-675)* . The contract in this case could have been performed within one year from its making: the plaintiff could have terminated his employment within that period, or the defendant could have discharged the plaintiff for cause. Thus, this contract does not fall within the statute of frauds and the fact that it was an implied or oral agreement is not fatal to its enforcement (*47 Cal. 3d 654, 675)* . The Court concluded by disapproving *Newfield v. Insurance Co. of the West (1984) 156 Cal. App. 3d 440, 203 Cal. Rptr. 9* , to the extent it is inconsistent with the opinion (*47 Cal. 3d 654, 675 n.19*).

In ***White Lighting Co. v. Wolfson*** *(1968) 68 Cal. 2d 336, 66 Cal. Rptr. 697, 438, P.2d 345* , the defendant appealed from a judgment of dismissal entered after a demurrer was sustained to his cross complaint, alleging breach of an oral contract for employment on a permanent basis.

The Supreme Court reversed. Although the employment was to be permanent, it was not to continue for any specified time. The one-year statute of frauds provision [*Civ. Code § 1624(a)(1)*] applies only to contracts that, by their terms, cannot possibly be performed within one year. Since the employment contract was terminable at will, it could be performed within one year under its terms. The inclusion of a provision in the contract that the defendant would receive 1 percent of the employer's gross sales in excess of $1 million a year did not bring the contract within the statute of frauds, even though that amount could not be determined within one year (*68 Cal. 2d 336, 343-344)* .

[b] Performance Within One Year May Be Unlikely

Foley v. Interactive Data Corp. *(1988) 47 Cal. 3d 654, 254 Cal. Rptr. 211, 765 P.2d 373* , is discussed in [a], *above*.

In ***Burgermeister Brewing Corp. v. Bowman*** *(1964) 227 Cal. App. 2d 274, 38 Cal. Rptr. 597* , the defendant, by cross complaint, sued for breach of an oral beer distributorship contract. A verdict for the defendant was returned, and the plaintiff appealed from the ensuing judgment.

The court of appeal affirmed. Substantial evidence supported the jury's finding that there was an oral contract between the parties creating a beer distributorship and expressly providing that the distributorship would continue as long as the defendant used his best efforts to promote and solicit the sale of the plaintiff's products and took care of the territory (*227 Cal. App. 2d 274, 277)* . A promise that is not likely to be performed within one year, and that in fact is not performed within one year, is not within the statute of frauds [*Civ. Code § 1624(a)(1)*] if there is a possibility in law and

in fact that full performance may be completed within one year. Although the defendant had been performing under the contract for 19 years, the contract was not within the statute of frauds because if the defendant had failed to devote his bests efforts or to take care of the territory, the contract would have terminated, and this could have happened within one year (*227 Cal. App. 2d 274, 281)* .

[4] Additional Authorities

[a] Performance Within One Year Is Possible

In *Hollywood M.P. Equip. Co. v. Furer (1940) 16 Cal. 2d 184, 105 P.2d 299* , the Supreme Court recognized as settled that the one-year statute of frauds only invalidates oral contracts that "*cannot* be performed within that period" (*16 Cal. 2d 184, 187)* . The Court held that the statute of frauds did not apply to the oral agreement of the defendant machine shop operator not to make any castings from the plaintiff's patterns other than those ordered by the plaintiff, because the plaintiff might have ordered and received all the castings it desired within one year, thereby terminating the relations between the parties (*16 Cal. 2d 184, 186-187)* .

In *Steward v. Mercy Hospital (1987) 188 Cal. App. 3d 1290, 1296, 233 Cal. Rptr. 881* , the court of appeal reversed the trial court's dismissal of an action for wrongful termination. The trial court based its dismissal on the belief that the action was barred by the statute of frauds. The court of appeal said that the oral employment contract, which allegedly precluded termination without good cause, was capable of being performed within one year because good cause for termination could exist within one year of the formation of the contract. Therefore, the action for wrongful termination was not barred by the statute of frauds (*188 Cal. App. 3d 1290, 1295-1296*).

Fisher v. Parsons (1963) 213 Cal. App. 2d 829, 29 Cal. Rptr. 210 , involved an oral agreement that the plaintiff would provide all office space required by the defendant as long as the defendant was in business and required office space and usable space was available in the plaintiff's building. The court of appeal held that the statute of frauds [*Civ. Code § 1624(a)(1)*] did not bar enforcement of the agreement because the terms of the agreement did not require performance to extend for more than one year (*213 Cal. App. 2d 829, 836-837)* .

In *Lacy v. Bennett (1962) 207 Cal. App. 2d 796, 24 Cal. Rptr. 806* , the court of appeal held that a loan with no definite repayment date was not within the statute of frauds because performance was possible within one year, even though the parties understood it to be a long-term loan (*207 Cal. App. 2d 796, 800-801)* .

In *Mangini v. Wolfschmidt, Ltd. (1961) 192 Cal. App. 2d 64, 13 Cal. Rptr. 503* , the court of appeal, holding that the statute of frauds did not apply to a contract for the exclusive distributorship of the defendant's products, stated that a contract is invalid under the statute of frauds [*Civ. Code § 1624(a)(1)*] only when by its very terms it cannot be performed within one year of its making (*192 Cal. App. 2d 64, 76)* .

See discussion of *Robards v. Gaylord Bros., Inc. (9th Cir. 1988) 854 F.2d 1152* , in § 216.12[4][a].

[b] Performance Within One Year May Be Unlikely

Plumlee v. Poag (1984) 150 Cal. App. 3d 541, 198 Cal. Rptr. 66 , was a wrongful termination action against the employer's estate for breach of an oral contract granting employment for at least 10 years beyond the employer's death. In reversing the dismissal, which was based in part on the defense of the statute of frauds, the court of appeal held that the statute did not apply. The court stated that if by its terms performance of a contract is possible within one year, the contract does not fall within the statute of frauds even though it is probable that it will extend beyond one year (*150 Cal. App. 3d 541, 549)* . Here, the contract contained a clause that the plaintiff's continued employment was conditioned on his reducing "annual shrinkage" of supplies, so it was possible that the contract could be ended by the employer within a one-year period, and therefore it was taken out of the operation of the statute (*150 Cal. App. 3d 541, 549-550)*

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21-216 California Points & Authorities § 216.12

§ 216.12 Contract May Be Enforced in Spite of One-Year Performance Rule--Contract Is for Permanent Employment

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE CONTRACT IS A CONTRACT FOR PERMANENT EMPLOYMENT, AND SUCH A CONTRACT IS NOT WITHIN THE STATUTE OF FRAUDS [EVEN IF COMPENSATION UNDER IT IS MEASURED ON AN ANNUAL BASIS].

Contract Is for Permanent Employment. A contract for employment on a "permanent" basis not stating that the employment would continue for any specified period is not within the statute of frauds [even though part of the compensation is measured on an annual basis, such as a percentage of the employer's annual receipts] (*Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 672-675, 254 Cal. Rptr. 211, 765 P.2d 373* ; *White Lighting Co. v. Wolfson (1968) 68 Cal. 2d 336, 343-344, 66 Cal. Rptr. 697, 438 P.2d 345*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that an oral contract for permanent employment is enforceable notwithstanding the statute of frauds because a contract for permanent employment may be performed within one year. The argument supported by these points and authorities may be raised by a party relying on an oral contract for permanent employment whenever the adverse party argues that the contract is invalid under the statute of frauds because it cannot be performed within one year. The argument would most likely be raised against an employer's defense to an employee's action for breach of contract.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a party seeks to raise this contention. For example, it may be used to oppose a defendant's motion for summary

judgment.

[b] Argument

Counsel should add argument linking these points and authorities with the facts of the case. For example, in opposing a defendant's motion for summary judgment on the ground that the contract is not enforceable, counsel for plaintiff wouldinclude discussion of the moving and opposing affidavits showing that there is at least a triable issue whether the oral contract, for "permanent" employment, does not specify that employment is to continue more than one year.

[c] Related Pleading and Practice Chapters

For discussion of the statute of frauds generally and avoiding the statute of frauds, as well as discussion and forms related to pleading the statute of frauds, see California Forms of Pleading and Practice, Ch. 530, *Statute of Frauds* (Matthew Bender).

[d] Related Points and Authorities

These points and authorities may be combined in an appropriate case with those *set out in §§ 216.11* and *216.13 -216.15*.

These points and authorities should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a motion for summary judgment, they may be combined with appropriate points and authorities set out in Ch. 221, *Summary Judgments* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and authorities *set out in § 216.10* may be used in an appropriate case to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Contract Is for Permanent Employment

Foley v. Interactive Data Corp. *(1988) 47 Cal. 3d 654, 254 Cal. Rptr. 211, 765 P.2d 373* , is discussed in *§ 216.11[3][a]*.

White Lighting Co. v. Wolfson *(1968) 68 Cal. 2d 336, 66 Cal. Rptr. 697, 438 P.2d 345* , is discussed in *§ 216.11[3][a]*. The Supreme Court held that a contract for employment on a permanent basis, not specifying continued employment for any specified period, is one for an indefinite period that could possibly be performed within one year, and the provision in the agreement for a yearly bonus that could not be computed within one year did not bring the agreement within the statute of frauds (*68 Cal. 2d 336, 343-344)* .

[4] Additional Authorities

[a] Contract Is for Permanent Employment

In *Robards v. Gaylord Bros., Inc. (9th Cir. 1988) 854 F.2d 1152* , the court affirmed a judgment for the plaintiff for

breach of an implied contract of employment and negligent infliction of emotional distress. One ground of appeal was that the oral contract of employment was within the statute of frauds. The oral agreement was for an indefinite period and permitted termination only for cause. The plaintiff had in fact worked for the defendant for 35 years. The court agreed that the statute of frauds was no bar to the action [*see Civ. Code § 1624(a)(1)*]. The contract could have been completed in one year because the plaintiff could have been terminated at any time for cause (*854 F.2d 1152, 1155)* .

In *Eisenberg v. Insurance Co. of North America (9th Cir. 1987) 815 F.2d 1285* , the court reversed a grant of summary judgment in favor of an employer in a wrongful termination case. The court applied California law in this diversity case and held that an oral contract for permanent employment was not within *Civ. Code § 1624(a)(1)* if it is possible for the contract to be performed in one year (*815 F.2d 1285, 1291)* . The court relied on *White Lighting Co. v. Wolfson (1968) 68 Cal. 2d 336, 343-344, 66 Cal. Rptr. 697, 438 P.2d 345* , and declined to apply *Newfield v. Insurance Co. of the West (1984) 156 Cal. App. 3d 440, 447, 203 Cal. Rptr. 9* , *disapproved, Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 675 n.19, 254 Cal. Rptr. 211, 765 P.2d 373* (discussed in *§ 216.11[3][a]*) (*815 F.2d 1285, 1290-1291)* .

The court of appeal in *Jenkins v. Family Health Program (1989) 214 Cal. App. 3d 440, 262 Cal. Rptr. 798* , reversed the trial court's judgment, holding it was error to have sustained demurrers to the plaintiff's causes of action for breach of contract and for contract damages for breach of the implied covenant of good faith and fair dealing on the ground that those were actions on an oral contract and thus barred by the statute of frauds [*see Civ. Code § 1624(a)(1)*]. The contract was alleged as an oral contract for employment on a career basis until retirement age that could not be terminated by the defendant except for good, just, and legitimate cause or reason. The court stated that an action on an oral contract is not barred unless the contract cannot possibly be performed within one year (*214 Cal. App. 3d 440, 445-446)* . An oral agreement for permanent employment, not for any specific term, terminable only for poor performance or other good cause, could possibly be performed within one year because the employee can quit or the employer can discharge the employee for cause (*214 Cal. App. 3d 440, 446)* .

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21-216 California Points & Authorities § 216.13

§ 216.13 Contract may Be Enforced in Spite of One-Year Performance Rule--Contract Is to Continue as Long as Performance Is Satisfactory

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE CONTRACT IS NOT WITHIN THE STATUTE OF FRAUDS BECAUSE BY ITS TERMS IT IS TO CONTINUE ONLY AS LONG AS A PARTY'S PERFORMANCE IS SATISFACTORY.

Contract Is to Continue as Long as Performance Satisfactory. A contract that provides that it is to continue as long as a party's performance is satisfactory is a contract of indeterminate duration, which may be completely performed within one year and is not within the statute of frauds (*Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 672-673, 254 Cal. Rptr. 211, 765 P.2d 373* ; *Burgermeister Brewing Corp. v. Bowman (1964) 227 Cal. App. 2d 274, 281-282, 38 Cal. Rptr. 597*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that an oral contract providing for a party's performance to continue as long as it is satisfactory is a contract of indefinite duration, which may be completely performed within one year and is therefore not within the statute of frauds. The argument supported by these points and authorities may be raised by a party relying on such an oral contract whenever the adverse party argues that the contract is invalid under the statute of frauds because it cannot be performed within one year. The argument would most likely be raised against a statute of frauds defense to an action for breach of contract.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a party seeks to raise this contention. For example, it may be used to oppose a defendant's motion for summary judgment.

[b] Argument

Counsel should add argument linking these points and authorities with the facts of the case. For example, in opposing a defendant's motion for summary judgment on the ground that the contract is not enforceable, counsel for plaintiff would include discussion of the moving and opposing affidavits showing that there is at least a triable issue whether the oral employment contract is one of indeterminate duration in that it calls for a party's performance to continue so long as it is satisfactory.

[c] Related Pleading and Practice Chapters

For discussion of the statute of frauds generally and avoiding the statute of frauds, as well as discussion and forms related to pleading the statute of frauds, see California Forms of Pleading and Practice, Ch. 530, *Statute of Frauds* (Matthew Bender).

[d] Related Points and Authorities

These points and authorities may be combined in an appropriate case with those *set out in §§ 216.11*, *216.12*, *216.14*, and *216.15*.

These points and authorities should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a motion for summary judgment, they may be combined with appropriate points and authorities set out in Ch. 221, *Summary Judgments* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and authorities *set out in § 216.10* may be used in an appropriate case to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Contract Is to Continue as Long as Performance Satisfactory

Foley v. Interactive Data Corp. *(1988) 47 Cal. 3d 654, 254 Cal. Rptr. 211, 765 P.2d 373* , is discussed in *§ 216.11[3][a]*.

Burgermeister Brewing Corp. v. Bowman *(1964) 227 Cal. App. 2d 274, 38 Cal. Rptr. 597* , is discussed in *§ 216.11[3][b]*. The court of appeal held that since the contract would have terminated if the defendant had not devoted his best efforts or taken care of the territory, an event that could have occurred within one year, the contract was not one that by its terms could not be performed within one year. The court relied on the reasoning of *Mangini v. Wolfschmidt, Ltd. (1961) 192 Cal. App. 2d 64, 75, 13 Cal. Rptr. 503* , that a contract to perform personal services for an indefinite period, providing for the employment to continue as long as the person performing the services is able to perform or performs satisfactorily, is not within the statute of frauds because it includes a contingency that mayterminate performance within one year (*227 Cal. App. 2d 274, 281-282)* .

[4] Additional Authorities

[a] Contract to Continue as Long as Performance Satisfactory

In *Bondi v. Jewels by Edwar, Ltd. (1968) 267 Cal. App. 2d 672, 73 Cal. Rptr. 494* , the court of appeal held that a contract providing for the plaintiff to close his business and go to work for the defendants for as long as he should satisfactorily perform his duties was not subject to the defense of the statute of frauds (*267 Cal. App. 2d 672, 676)* .

See *Jenkins v. Family Health Program (1989) 214 Cal. App. 3d 440, 445-446, 262 Cal. Rptr. 798* , discussed in *§ 216.12[4][a]*.

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21-216 California Points & Authorities § 216.14

§ 216.14 Contract may Be Enforced in Spite of One-Year Performance Rule--Contingency Extending Performance Beyond One Year Must Be Disregarded

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE CONTRACT IS NOT WITHIN THE STATUTE OF FRAUDS MERELY BECAUSE IT INCLUDES A CONTINGENCY [SUCH AS AN OPTION] THAT MAY EXTEND ITS PERFORMANCE BEYOND ONE YEAR.

Contingency Extending Performance Beyond One Year Must Be Disregarded. A contingency that may extend the performance of a contract for more than one year, such as an option that must be exercised within one year from the date the contract was made, in order to extend the contract, does not bring the contract within the statute of frauds (*Columbia Pictures Corp. v. DeToth (1945) 26 Cal. 2d 753, 757, 759, 161 P.2d 217*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that an oral contract is not unenforceable under the statute of frauds merely because it contains a contingency, such as an option, that may extend its performance beyond one year. The argument supported by these points and authorities may be raised by a party relying on such an oral contract whenever the adverse party argues that the contract is invalid because it cannot be performed within one year. The argument would most likely be raised against a statute of frauds defense to an action for breach of contract.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a party seeks to raise this contention. For example, it may be used to oppose a defendant's motion for summary judgment.

[b] Argument

Counsel should add argument linking these points and authorities with the facts of the case. For example, in opposing a defendant's motion for summary judgment on the ground that the contract is not enforceable, counsel for plaintiff would include discussion of the moving and opposing affidavits showing that there is at least a triable issue whether the oral employment contract is for a definite term ending within one year from the time the contract was made and thus capable of complete performance within one year, even though the occurrence of a contingency might extend the performance of the contract beyond one year. If the contingency is the exercise of an option created by the contract, counsel should show that the option must be exercised within the one-year period.

[c] Related Pleading and Practice Chapters

For discussion of the statute of frauds generally and avoiding the statute of frauds, as well as discussion and forms related to pleading the statute of frauds, see California Forms of Pleading and Practice, Ch. 530, *Statute of Frauds* (Matthew Bender).

[d] Related Points and Authorities

These points and authorities may be combined in an appropriate case with those *set out in §§ 216.11 -216.13* and *216.15*.

These points and authorities should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a motion for summary judgment, they may be combined with appropriate points and authorities set out in Ch. 221, *Summary Judgments* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and authorities *set out in § 216.10* may be used in an appropriate case to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Contingency Extending Performance Beyond One Year Must Be Disregarded

The facts and procedural background of ***Columbia Pictures Corp. v. DeToth*** *(1945) 26 Cal. 2d 753, 161 P.2d 217* , are discussed in *§ 216.10[3][d]*. The Supreme Court held that a contingency that might have extended the period of employment under the contract for more than one year, such as an option to renew or extend the contract exercisable for succeeding years before the expiration of the current year, does not bring the contract within the operation of the statute (*26 Cal. 2d 753, 759)* .

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21-216 California Points & Authorities § 216.15

§ 216.15 Contract may Be Enforced in Spite of One-Year Performance Rule--Contract Is for Qualified Financial Contract

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE CONTRACT IS NOT WITHIN THE STATUTE OF FRAUDS BECAUSE IT IS AN AGREEMENT OR CONTRACT THAT IS VALID IN OTHER RESPECTS AND IS OTHERWISE ENFORCEABLE, IT IS A QUALIFIED FINANCIAL CONTRACT, AND _____ [THERE IS SUFFICIENT EVIDENCE TO INDICATE THAT A CONTRACT HAS BEEN MADE *or* THE PARTIES, BY MEANS OF A PRIOR OR SUBSEQUENT WRITTEN CONTRACT, HAVE AGREED TO BE BOUND BY THE TERMS OF THE QUALIFIED FINANCIAL CONTRACT FROM THE TIME THEY REACHED AGREEMENT ON THOSE TERMS].

Oral Qualified Financial Contract May Be Enforced. Notwithstanding *Civil Code Section 1624(a)(1)*, an agreement or contract that is valid in other respects and is otherwise enforceable is not invalid for lack of a note, memorandum, or other writing and is enforceable by way of an action or defense if the agreement or contract is a qualified financial contract, and either there is sufficient evidence to indicate that a contract has been made or the parties, by means of a prior or subsequent written contract, have agreed to be bound by the terms of the qualified financial contract from the time they reached agreement (by telephone, exchange of electronic messages, or otherwise) on those terms (*Civ. Code § 1624(b)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that the statute of frauds does not apply to an oral qualified financial contract meeting specified criteria [*see Civ. Code § 1624(b)*]. The argument supported by these points and authorities may be raised by a party relying on a contract whenever the adverse party urges that the contract is invalid under the statute of frauds because it cannot be performed within one year. The argument would most

likely be raised against a defense to an action for breach of contract.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a party seeks to raise this contention. For example, it may be used to oppose a defendant's motion for summary judgment.

[b] Argument

Counsel should add argument linking these points and authorities with the facts of the case. For example, in opposing a defendant's motion for summary judgment on the ground that the contract is not enforceable, counsel for plaintiff would include discussion of the moving and opposing affidavits showing that there is at least a triable issue whether the contract is for the purchase and sale of foreign exchange or foreign currency and thus is within the statutory definition of "qualified financial contract" [*see Civ. Code § 1624(b)(2)(A)*].

[c] Related Pleading and Practice Chapters

For discussion of the statute of frauds generally and avoiding the statute of frauds, as well as discussion and forms related to pleading the statute of frauds, see California Forms of Pleading and Practice, Ch. 530, *Statute of Frauds* (Matthew Bender).

[d] Related Points and Authorities

These points and authorities may be combined in an appropriate case with those *set out in §§ 216.11 -216.14*.

These points and authorities should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a motion for summary judgment, they may be combined with appropriate points and authorities set out in Ch. 221, *Summary Judgments* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and authorities *set out in § 216.10* may be used in an appropriate case to oppose the contention supported by these points and authorities.

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[Reserved]

§§ 216.16[Reserved]

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21-216 California Points & Authorities § 216.30

§ 216.30 Oral Contract to Answer for Debt, Default, or Miscarriage of Another Is Not Enforceable

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE CONTRACT ON WHICH THE _____ [*party relying on contract, e.g.,* PLAINTIFF] IS RELYING IS A SPECIAL PROMISE TO ANSWER FOR THE DEBT, DEFAULT, OR MISCARRIAGE OF ANOTHER AND, THEREFORE, IS UNENFORCEABLE BECAUSE IT IS NOT IN WRITING SUBSCRIBED BY THE _____ [*party to be charged, e.g.,* DEFENDANT].

Writing Is Required. A special promise to answer for the debt, default, or miscarriage of another is invalid unless it, or a note or memorandum of it, is in writing and subscribed by the party to be charged or his or her agent (*Civ. Code §§ 1624(a)(2), 2793*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that an alleged agreement is unenforceable under the statute of frauds because it is a special promise to answer for the debt, default, or miscarriage of another, and it is not contained in a writing subscribed by the party to be charged. The argument supported by these points and authorities may be raised whenever the adverse party relies on such a contract. The argument would most likely be raised in defense of an action for breach of such a contract.

Civ. Code § 1624(a)(2) requires a special promise to answer for the debt, default, or miscarriage of another to be in writing, except in the cases provided for in *Civ. Code § 2794*, concerning suretyship. Several types of sureties' promises to answer for the obligation of another are deemed to be original obligations of the surety and need not be in writing [*see Civ. Code § 2794*; *see also § 216.31[3][a]*]. Suretyship obligations generally are required to be in writing by *Civ. Code § 2793*, however. Since the terms "suretyship" and "guaranty" are both defined, in part, as promises to answer for

the debt, promise, or miscarriage of another [*see Civ. Code § 2787*], there would not appear to be any meaningful distinction between the two sections, in the present context.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a party seeks to raise this contention. For example, it may be used to support a defendant's motion for summary judgment.

[b] Argument

Counsel should add argument linking these points and authorities with the facts of the case. For example, in supporting a defendant's motion for summary judgment on the ground that the contract is not enforceable, counsel would include discussion of the moving and opposing affidavits showing that, on undisputed facts, the contract falls within the type covered under *Civ. Code § 1624(a)(2)*.

[c] Related Pleading and Practice Chapters

For discussion of the statute of frauds generally and avoiding the statute of frauds, as well as discussion and forms related to pleading the statute of frauds, see California Forms of Pleading and Practice, Ch. 530, *Statute of Frauds* (Matthew Bender).

[d] Related Points and Authorities

These points and authorities should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum supporting a motion for summary judgment, they may be combined with appropriate points and authorities set out in Ch. 221, *Summary Judgments* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and authorities *set out in §§ 216.31 et seq., 216.92 et seq., 216.110 et seq., and 216.130* et seq. may be used in an appropriate case to oppose the contention supported by these points and authorities.

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21-216 California Points & Authorities § 216.31

§ 216.31 Oral Contract to Answer for Debt, Default, or Miscarriage of Another May Be Enforced--Promisor Has Become Principal Debtor

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE CONTRACT ON WHICH THE _____ [*party relying on contract, e.g.,* PLAINTIFF] IS RELYING IS NOT WITHIN THE STATUTE OF FRAUDS BECAUSE THE _____ [*party relying on contract, e.g.,* PLAINTIFF], AS CREDITOR, _____ [PARTED WITH VALUE *or* ENTERED INTO AN OBLIGATION] IN CONSIDERATION OF THE OBLIGATION IN RESPECT TO WHICH THE _____ [*party relying on statute of frauds, e.g.,* DEFENDANT'S] PROMISE TO ANSWER FOR THE OBLIGATION OF _____ [*name*] WAS MADE, IN TERMS OR UNDER CIRCUMSTANCES THAT RENDER THE _____ [*party relying on statute of frauds, e.g.,* DEFENDANT] THE PRINCIPAL DEBTOR.

A. Original Obligation Is Not Required to Be in Writing. A promise to answer for the obligation of another is deemed an original obligation of the promisor, and need not be in writing, when the creditor parts with value or enters into an obligation in consideration of the obligation in respect to which the promise is made, in terms or under circumstances such as to render the person making the promise the principal debtor, and the person in whose behalf it is made, the surety (*Civ. Code § 2794(2)*).

[*Optional*] **B. Promise to Pay for Consideration Passing to Third Party Is Enforceable.** A person who promises to pay another for goods delivered to a third party is the principal debtor, and not a surety or guarantor, and the promise is not within the statute of frauds, if the seller relies only on the promisor's credit (*Merz v. Poole (1927) 82 Cal. App. 12, 14-15, 254 P. 914* ; *Jan Wai v. Smith-Riddell Co. (1921) 55 Cal. App. 59, 65, 202 P. 952*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that the statute of frauds [*Civ. Code §§ 1624(a)(2), 2793*] does not apply to an oral promise to pay the obligation of another if the creditor parted with value or entered into an obligation in consideration of the obligation in respect to which the promise was made in terms or under circumstances that render the promisor the principal debtor. The issue would most likely be raised in opposing a statute of frauds defense in an action for breach of contract.

This form may be used in a trial or appellate brief, or in a memorandum submitted in any other procedural context in which a party seeks to raise this contention. For example, it may be used to oppose a defendant's motion for summary judgment.

[b] Argument

Counsel should add argument linking these points and authorities with the facts of the case. For example, in opposing a defendant's motion for summary judgment on the ground that the contract is not enforceable, counsel would include discussion of the moving and opposing affidavits showing that there is, at least, a triable issue whether the terms of the agreement or the circumstances under which the agreement was made indicate that the person who promised to pay is the one to whom the creditor would primarily look for payment. This may involve showing that when the promise to pay was made, the promisor directed that the consideration for the promise be directed to a third party (Optional Paragraph B) or other circumstances showing the promisor to be the principal party. A promisor has been deemed the principal debtor when, in connection with the purchase of a hotel, he assumed a chattel mortgage on its furnishings in consideration of the payments on the chattel mortgage being reduced [*Parrish v. Greco (1953) 118 Cal. App. 2d 556, 560-561, 258 P.2d 566]* . A promisor has also been deemed the principal debtor when he agreed to indemnify a sheriff for any liability incurred by the sheriff for damages to property attached by the sheriff in relation to a suit brought by the promisor against a third party, the promisor's promise having been given in consideration of the sheriff's placing the property in the custody of an employee of the promisor [*Burr v. Cross (1906) 3 Cal. App. 414, 415-416, 86 P 824]* .

[c] Related Pleading and Practice Chapters

For discussion of the statute of frauds generally and avoiding the statute of frauds, as well as discussion and forms related to pleading the statute of frauds, see California Forms of Pleading and Practice, Ch. 530, *Statute of Frauds* (Matthew Bender).

[d] Related Points and Authorities

These points and authorities should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a motion for summary judgment, they may be combined with appropriate points and authorities set out in Ch. 221, *Summary Judgments* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and authorities *set out in § 216.30* may be used in an appropriate case to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Promise to Pay for Consideration Passing to Third Party Is Enforceable

Merz v. Poole *(1927) 82 Cal. App. 12, 254 P 914* , involved the sale of trucktires. After the plaintiff refused to sell tires to the truck owner on credit, the truck owner returned to the plaintiff's place of business with the defendant, a jeweler, who apparently owed the truck owner some money. The defendant requested the plaintiff to furnish the truck owner with tires and promised to pay for them. The trial court gave judgment for the plaintiff, and the defendant appealed.

The court of appeal affirmed. The evidence was sufficient to establish that the defendant's promise was an original obligation on his part to pay for the tires, so that he was the principal debtor and not merely a surety or guarantor [*see Civ. Code § 2794(2)*] (*82 Cal. App. 12, 15)* .

In ***Jan Wai v. Smith-Riddell Co.*** *(1921) 55 Cal. App. 59, 202 P 952* , the plaintiff sold meat to a tenant of the defendant. When the plaintiff told the tenant that no more meat would be supplied until the tenant's bill for meat already delivered was paid, the tenant requested the defendant to make the payment. The defendant paid the bill, but the plaintiff refused to give credit to the tenant in regard to future deliveries. The defendant told the plaintiff to send meat to the tenant and that the defendant would pay the bill every three months. The plaintiff proceeded to make deliveries to the tenant, but the defendant never paid for the meat. The plaintiff sued and was given judgment for the price of the meat delivered to the tenant. The defendant appealed.

The court of appeal affirmed. The oral agreement to pay for the meat was not within the statute of frauds, in accordance with the rule that if a seller delivers goods to one person on the promise of another to pay for them and solely on the promisor's credit, the promise is an original one and is not within the statute of frauds (*55 Cal. App. 59, 65)* .

[4] Additional Authorities

[a] Promise to Pay for Consideration Passing to Third Party Is Enforceable

In *Sanders v. Riviera Realty Co. (1951) 104 Cal. App. 2d 70, 230 P.2d 856* , involving a loan by the plaintiff to the defendants, but with the checks representing the loan made payable to a third party at the borrower's request, the court of appeal stated that the mere fact that the consideration passed to a third party did not prevent the defendants from being the principal debtors (*104 Cal. App. 2d 70, 75)* .

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 216 STATUTE OF FRAUDS
PART II. FORMS
A. Contract Within Scope of Statute of Frauds

21-216 California Points & Authorities § 216.32

§ 216.32 Oral Contract to Answer for Debt, Default, or Miscarriage of Another May Be Enforced--Consideration Is Beneficial to Promisor

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE CONTRACT ON WHICH THE _____ [*party relying on contract, e.g.,* PLAINTIFF] IS RELYING IS NOT WITHIN THE STATUTE OF FRAUDS BECAUSE THE _____ [*party relying on statute of frauds, e.g.,* DEFENDANT'S] PROMISE TO ANSWER FOR THE DEBT OF _____ [*name*] WAS GIVEN ON A CONSIDERATION BENEFICIAL TO THE _____ [*party relying on statute of frauds, e.g.,* DEFENDANT].

A. Original Obligation Is Not Required to Be in Writing. A promise to answer for the obligation of another is deemed an original obligation of the promisor, and need not be in writing, when the promise is given on a consideration beneficial to the promisor, whether moving from either of the parties to the antecedent obligation or from another person (*Civ. Code § 2794(4)*).

B. Leading and Main Object of Promisor Is to Serve Own Interest. When the promisor's leading and main object is not to become surety or guarantor of another but to subserve some purpose or interest of his or her own, the promise is not within the statute of frauds even though performance of the promise may pay the debt or discharge the obligation of another (*Schumm v. Berg (1951) 37 Cal. 2d 174, 187, 231 P.2d 39* ; *Farr & Stone Ins. Brokers, Inc. v. Lopez (1976) 61 Cal. App. 3d 618, 622, 132 Cal. Rptr. 641*).

[*Optional*] **C. Consideration Need Not Be Pecuniary.** The consideration required by *Civil Code Section 2794(4)* to remove a promise from the statute of frauds need not be pecuniary (*Farr & Stone Ins. Brokers, Inc. v. Lopez (1976) 61 Cal. App. 3d 618, 622, 132 Cal. Rptr. 641*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that the statute of frauds [*Civ. Code §§ 1624(a)(2), 2793*] does not apply to an oral agreement to pay the obligation of another if the promise was given on a consideration beneficial to the promisor [*Civ. Code § 2794(4)*]. The issue would most likely be raised in opposing a statute of frauds defense in an action for breach of contract.

This form may be used in a trial or appellate brief, or in a memorandumsubmitted in any other procedural context in which a party seeks to raise this contention. For example, it may be used to oppose a defendant's motion for summary judgment.

[b] Argument

Counsel should add argument linking these points and authorities with the facts of the case. For example, in opposing a defendant's motion for summary judgment on the ground that the contract is not enforceable, counsel would include discussion of the moving and opposing affidavits showing that there is, at least, a triable issue concerning the consideration moving to the person whose promise is answer for the debt of another. In this regard, counsel should establish that the promisor's leading and main object is to serve his or her own purpose. An indirect or secondary benefit to the promisor is insufficient [*see Seneca Communications, Inc. v. International Bank of California (1980) 103 Cal. App. 3d 541, 550-551, 163 Cal. Rptr. 176* (applying *Code Civ. Proc. § 1974*, which requires representations as to third party's credit to be in writing; bank's desire to retain patronage of customer regarding whose account representation was made was held to be insufficient benefit)].

[c] Related Pleading and Practice Chapters

For discussion of the statute of frauds generally and avoiding the statute of frauds, as well as discussion and forms related to pleading the statute of frauds, see California Forms of Pleading and Practice, Ch. 530, *Statute of Frauds* (Matthew Bender).

[d] Related Points and Authorities

These points and authorities should be combined with others, as necessary, relating to the procedural context in which they are used. For example, if used in a memorandum opposing a motion for summary judgment, they may be combined with appropriate points and authorities set out in Ch. 221, *Summary Judgments* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and authorities *set out in § 216.30* may be used in an appropriate case to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Leading and Main Object of Promisor Is to Serve Own Interest

In ***Schumm v. Berg*** *(1951) 37 Cal. 2d 174, 231 P.2d 39* , the plaintiff was the child of unmarried parents who entered into an oral contract providing for the father to support the plaintiff in consideration of the mother's refraining from bringing a paternity suit before the plaintiff's birth. The mother also agreed that the plaintiff would have his father's

given name. The plaintiff was to bear the surname of another man, whose marriage to the mother before the plaintiff's birth was contemplated by the contract. The mother fulfilled her obligations under the contract, but the father did not provide the agreed support. After the father's death, the plaintiff, by guardian ad litem, sued his father's estate as the third-party beneficiary of the contract. The trial court entered a judgment of dismissal after sustaining the defendants' demurrer to the complaint. The defendants challenged the contract as invalid under the statute of frauds [*Civ. Code § 1624(a)(2)*], characterizing it as a promise to answer for the obligation of the mother's husband to support the plaintiff. The plaintiff appealed.

The Supreme Court reversed. Assuming that the mother's husband would be liable for support, the promise was not one to the plaintiff to answer for the husband's debt but was an original promise to the mother. Moreover, under *Civ. Code § 2794(4)*, a promise to answer for the debt of another is deemed an original obligation and not within the statute of frauds when it is given on consideration beneficial to the promisor (*37 Cal. 2d 174, 187)* . Whenever the leading and main object of the promisor is not to become surety or guarantor of another but is to subserve some purpose or interest of his or her own, the promise is not within the statute of frauds, even though the effect of the promise may be to pay the debt or discharge the obligation of another [*Greenfield v. Sudden Lumber Co. (1937) 18 Cal. App. 2d 709, 64 P.2d 1007]* . The mother's promise to name the child after the father and to refrain from instituting an action was beneficial to the father (*37 Cal. 2d 174, 187)* . The important question was whether the promises made were in fact assumptions of another's liability or the primary obligation of the promisor, and the precise language used was important in determining whether the promise was conditional and collateral or an independent and original undertaking (*37 Cal. 2d 174, 187-188)* .

In ***Farr & Stone Ins. Brokers, Inc. v. Lopez*** *(1976) 61 Cal. App. 3d 618, 132 Cal. Rptr. 641* , the plaintiff, an insurance agent, advanced premium payments to insurance carriers on behalf of an automobile products company, which was behind in its payments. The defendant was chairman of the board of the automobile products company, and his children assumed its management on a promise that they would share in its ownership. When an agreement regarding payment of the past-due premiums and future premiums was reached between the company and the plaintiff, the defendant promised that if the company did not pay the premiums he would pay them out of his own checkbook. As a result, the plaintiff refrained from canceling the insurance policies on which the plaintiff could have recovered substantial rebates for prepaid premiums it had advanced. The company did not make the payments it had agreed on, and after the defendantsent a letter to the plaintiff disavowing any association of the defendant or his children with the company, the plaintiff sued for the premiums. The defendant appealed from an adverse judgment entered after trial, contending that the statute of frauds barred enforcement of the agreement. The plaintiff argued that the agreement was excepted from the statute of frauds by *Civ. Code § 2794(4)*, which provides that promises to answer for the debt of another made on consideration beneficial to the promisor are deemed original obligations and need not be in writing.

The court of appeal affirmed. Whenever the leading and main object of the promisor is not to become surety or guarantor of another but to subserve some purpose or interest of his or her own, the promise is not within the statute of frauds even though performance of the promise may pay the debt or discharge the obligation of another [*Merritt v. J.A. Stafford Co. (1968) 68 Cal. 2d 619, 628, 68 Cal. Rptr. 447, 440 P.2d 927]* . The plaintiff's forbearance to cancel the insurance policies was a detriment to the plaintiff and a benefit to the defendant's children, who had a promised ownership interest in the company. Reasoning that the defendant had a direct and personal interest in the welfare of his children and their economic venture, and that the defendant's own business reputation was at stake since he had assumed the title of chairman of the board and undertaken to save the failing company, the court held that the statute of frauds did not apply (*61 Cal. App. 3d 618, 621-622)* . The important question is whether the promise is only an assumption of another's liability or a new and primary obligation of the promisor. The evidence supported the trial court's finding that the defendant undertook a new and primary obligation in return for the plaintiff's continued support (*61 Cal. App. 3d 618, 622)* .

[b] Consideration Need Not Be Pecuniary

The facts and procedural background of ***Farr & Stone Ins. Brokers, Inc. v. Lopez*** *(1976) 61 Cal. App. 3d 618, 132 Cal. Rptr. 641* , are discussed in [a], *above*. The court of appeal held that the consideration beneficial to the promisor required for a promise to answer for the debt of another to be deemed an original obligation under *Civ. Code § 2794(4)* need not be pecuniary, although it usually is [*see* *Schumm v. Berg (1951) 37 Cal. 2d 174, 187-188, 231 P.2d 39* (discussed in [a], *above*; part of consideration was agreement to name child after promisor)]. The statute of frauds did not apply when the consideration beneficial to the promisor related to his business reputation and his interest in the welfare of his children and their economic venture (*61 Cal. App. 3d 618, 622)* .

[4] Additional Authorities

[a] Leading and Main Object of Promisor Is to Serve Own Interest

Michael Distributing Co. v. Tobin (1964) 225 Cal. App. 2d 655, 37 Cal. Rptr. 518 , was an action on the defendant's oral promise to supply funds to a corporation that was engaged in construction of a housing project, so that the corporation could pay the plaintiff for lumber supplied to the corporation for the project. Applying the leading-and-main-purpose rule, the court of appeal found that the defendant, as the owner of 51 percent of the stock of the corporation, personally benefitted from the consideration for his promise, which was the continuing delivery of building supplies, and that the evidence supported the conclusion that his prospective pecuniary benefit from the success of the project was the main purpose of his promise. The court held that an inference of suretyship was not required merely because the defendant's promise was to pay the amount through the corporation rather than to the plaintiff directly (*225 Cal. App. 2d 655, 666)* .

Regus v. Schartkoff (1957) 156 Cal. App. 2d 382, 319 P.2d 721 , was an action for personal damages. The plaintiff had been bitten by a dog owned by persons insured by the defendant insurance company. The plaintiff alleged that an agent of the insurance company had orally promised to pay all of the plaintiff's damages if the plaintiff would not retain legal counsel and would refrain from filing suit against the insureds. The trial court sustained a demurrer to the complaint, but the court of appeal reversed, applying the leading-and-main-purpose rule to find that the promise came within the scope of *Civ. Code § 2794(4)* (*156 Cal. App. 2d 382, 390-391)* .

The plaintiff in *Raboff v. Albertson (1954) 122 Cal. App. 2d 555, 265 P.2d 139* , lent money to the defendant's husband for the purchase of a house and a car, but an "IOU" given to the plaintiff, which was intended to create a lien on the house, was insufficient to do so. When the defendant's husband died, the defendant succeeded to his interest in the house as a joint tenant and promised the plaintiff that she would pay the balance due on the loan if the plaintiff would not take action against her personally, would purchase her late husband's stock in a corporation, and would put her on the payroll of the corporation for one year. The court of appeal, in affirming a judgment for the plaintiff, applied the leading-and-main-object rule and found that the promise was the original obligation of the defendant made on consideration beneficial to her within the meaning of *Civ. Code § 2794(4)* (*122 Cal. App. 2d 555, 558-561)* .

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[Reserved]

§§ 216.33[Reserved]

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CHAPTER 216 STATUTE OF FRAUDS
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21-216 California Points & Authorities § 216.40

§ 216.40 Oral Contract for Conveyance of Real Property to Joint Venture May Be Enforced--Agreement to Share in Net Profits Under Oil and Gas Lease May Be Enforced

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE CONTRACT ON WHICH THE _____ [*party relying on contract, e.g.,* PLAINTIFF] IS RELYING IS A CONTRACT FOR THE SALE OF [AN INTEREST IN] REAL PROPERTY AND, THEREFORE, IS UNENFORCEABLE BECAUSE IT IS NOT IN WRITING SUBSCRIBED BY THE _____ [*party to be charged, e.g.,* DEFENDANT].

A. Writing Is Required. An agreement for the sale of real property or of an interest therein is invalid unless it, or a note or memorandum of it, is in writing and subscribed by the party to be charged or his or her agent (*Civ. Code § 1624(a)(3)*).

[*Optional*] **B. Statute Covers Restrictions on Right to Alienate Real Property.** Agreements restricting the right to alienate real property are within the statute of frauds (*Estate of Baglione (1966) 65 Cal. 2d 192, 197, 53 Cal. Rptr. 139, 417 P.2d 683*).

[*Optional*] **C. Statute Covers Option to Purchase Real Property.** An option to purchase real property falls within the statute of frauds (*Woods v. Bradford (1967) 254 Cal. App. 2d 501, 505, 62 Cal. Rptr. 391*).

[*Optional*] **D. Statute Covers Oil and Gas Rights.** An agreement to assign or transfer an interest in oil and gas rights is within the statute of frauds (*Anderson v. Stansbury (1952) 38 Cal. 2d 707, 715, 242 P.2d 305*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that an alleged agreement is unenforceable under the statute of frauds because it is an agreement for the sale of real property or an interest in real property, and it is not contained in a writing subscribed by the party to be charged. The argument supported by these points and authorities may be raised whenever the adverse party relies on such a contract. The argument would most likely be raised in defense of actions for breach of contract or specific performance. The issue might also arise in an action for declaratory relief or to quiet title.

An agreement to share in the net profits realized under an oil and gas lease, as opposed to an agreement to receive an interest in the oil and gas produced under the lease, is not required to be in writing under the statute of frauds [*Dutton v. Interstate Inv. Corp. (1941) 19 Cal. 2d 65, 69-70, 119 P.2d 138]* .

[b] Argument

Counsel should add argument linking these points and authorities with the facts of the case.

[c] Related Pleading and Practice Chapters

For discussion of the statute of frauds generally and avoiding the statute of frauds, as well as discussion and forms related to pleading the statute of frauds, see California Forms of Pleading and Practice, Ch. 530, *Statute of Frauds* (Matthew Bender).

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[e] Opposing Points and Authorities

The points and authorities *set out in §§ 216.44 et seq., 216.92 et seq., 216.110 et seq., and 216.130* et seq. may be used in an appropriate case to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Statute Covers Restrictions on Right to Alienate Real Property

In ***Estate of Baglione*** *(1966) 65 Cal. 2d 192, 53 Cal. Rptr. 139, 417 P.2d 683* , a widow sued her late husband's executor to enforce an alleged contract between her and her husband providing that the survivor would succeed to all property acquired by the parties during the marriage. After a stipulation that the contract was oral, the trial court sustained a demurrer without leave to amend and entered judgment dismissing the action. The plaintiff appealed.

The Supreme Court affirmed. Agreements restricting the right to alienate real property or to make provisions for any person by will are within the statute of frauds [*Civ. Code §§ 1091, 1624(a)(3)*; *Code Civ. Proc. § 1971*] and the plaintiff failed to allege sufficient facts to estop the defendant executor from asserting the statute of frauds (*65 Cal. 2d 192, 197-198)* .

[b] Statute Covers Option to Purchase Real Property

Woods v. Bradford *(1967) 254 Cal. App. 2d 501, 62 Cal. Rptr. 391* , was an action for partition of a ranch owned by the parties as tenants in common. The plaintiff had purchased his interest from the defendant's former husband. The defendant alleged that she and her husband, before trial of their divorce action and in contemplation of equal division of

the ranch, had orally agreed that the husband would convey his interest in the ranch to the defendant so that she could have the ranch as her own. The value of the husband's interest in the ranch was to be credited to him in connection with another ranch owned by the defendant and her husband. The court in the divorce action did order that the ranch be sold and its proceeds be divided equally but did not make provision for the time or manner of carrying out the sale, and the husband subsequently sold his interest to theplaintiff, who started the partition action. When the trial court in the partition action rejected the defendant's attempt to litigate her claim to the property based on the agreement because of her failure to assert the claim in the earlier divorce action, she claimed that the effect of the agreement was to give her a first right to buy her husband's interest from him. The trial court refused to allow proof of the alleged oral agreement. The defendant appealed from an adverse interlocutory judgment of partition.

The court of appeal affirmed. The defendant's claim that the agreement gave her a first right to buy was no improvement to her position because options to purchase real property are within the statute of frauds [*Civ. Code § 1624(a)(3)*] and must be in writing (*254 Cal. App. 2d 501, 505)* .

[c] Statute Covers Oil and Gas Rights

In ***Anderson v. Stansbury*** *(1952) 38 Cal. 2d 707, 242 P.2d 305* , the plaintiffs held a one-fourth interest in an oil and gas prospecting permit on a tract of land from the federal government, and the defendants held the remaining interests in the permit. The defendants and the plaintiffs' predecessors in interest entered into an operating agreement with an oil company for development of the land, and the oil company received a 20-year lease from the government with a preferential right of renewal for successive 10-year periods. Operations proved unprofitable. The oil company offered to reassign the lease to the plaintiffs and the defendants at the end of the 20-year term, if they would pay for the company's pumping equipment on the property. One of the defendants, Stansbury, urged the plaintiffs to contribute to the expenses of buying the pumping equipment and getting a surety bond required for renewal of the lease. The plaintiffs declined to contribute and informed Stansbury that they did not want to continue to hold the interest. Stansbury found another party to take over the plaintiffs' interest, and the plaintiffs executed a written disclaimer of any and all interest and rights, including reserved royalties under the operating agreement, and providing that anyone other than themselves might apply for renewal of the lease. Stansbury proceeded to manage the property and obtained another oil company to take over its operation. The oil company was not satisfied with the sufficiency of the plaintiffs' previous disclaimer, so the plaintiffs, at Stansbury's request, executed another disclaimer and assignment. Operations under the renewal lease were potentially profitable, and the plaintiffs sued the defendants, alleging that the second disclaimer and the assignment were obtained by fraud and seeking a declaration of their rights in the renewal lease, an accounting, and a declaration of a trust. At trial, the court excluded the plaintiffs' offered proof that Stansbury had orally agreed that the plaintiffs should retain their one-fourth interest, even though they signed the disclaimer and assignment to satisfy the oil company. Under this agreement, the plaintiffs were to return an $800 check given to them by Stansbury for the nuisance of executing the disclaimer and assignment. The plaintiffs also offered to prove that Stansbury thereafter sent them a letter stating that it was not "strictly true" that the plaintiffs had "no further interest in the lease, legal or equitable" under "the proposed agreement." The plaintiffs appealed from a judgment for the defendants.

The Supreme Court affirmed. The objections to testimony relating to the agreement between the plaintiffs and Stansbury were properly sustained. The agreement, if it existed, related to incorporeal interests in real property and was thus barred by the statute of frauds because there was no memorandum of it in writing subscribed by the party to be charged, as required by *Civ. Code § 1624(a)(3)*. Stansbury's letter was not a memorandum of the alleged agreement but was merely a proposal that the plaintiffs rejoin the enterprise on terms to be decided in the future (*38 Cal. 2d 707, 715)* . The plaintiffs contended that their partial performance of the agreement avoided the statute of frauds; however, the Court held that neither the payment of money (return of the check) nor the disclaimer of a nonexistent interest was sufficient to constitute partial performance (*38 Cal. 2d 707, 715-716)* .

[4] Additional Authorities

[a] Statute Covers Option to Purchase Real Property

In *Bovo v. Abrahamson (1929) 100 Cal. App. 373, 280 P. 191* , the court of appeal affirmed the trial court's judgment denying the plaintiff the right to redeem certain real property from the defendant and quieting title in the defendant. The defendant was a creditor of the plaintiff and had bought the plaintiff's property when it was sold under another creditor's deed of trust. The defendant's subsequent agreement to reconvey the property to the plaintiff on her payment to the defendant of certain amounts of money within 18 months constituted an option to purchase; since the agreement was neither in writing nor to be performed within one year [*see Civ. Code § 1624(a)(1), (4)*], the action was barred (*100 Cal. App. 373, 383)* .

[b] Statute Covers Oil and Gas Rights

In *Ventura v. Colgrove (1969) 270 Cal. App. 2d 136, 75 Cal. Rptr. 495* , the court of appeal affirmed a judgment for the defendants in an action to impress a trust on part of an oil and gas sublease or to compel assignment of it, or for damages for breach of an oral agreement to assign it. One of the grounds relied on by both the trial and appellate courts was that the action was barred by the statute of frauds [*see Civ. Code § 1624(a)(3)*; *Prob. Code § 15206*] because the alleged agreements were not in writing (*270 Cal. App. 2d 136, 142, 163)* .

In *Denio v. Brennecke (1935) 6 Cal. App. 2d 678, 45 P.2d 229* , the plaintiffs alleged that the defendants had orally agreed to give the plaintiffs 1 percent of all the oil, gas, and other hydrocarbons produced and saved from a particular parcelin return for the plaintiffs' rendition of legal services. The trial court sustained a demurrer to the complaint without leave to amend and entered judgment for the defendants, which was affirmed by the court of appeal on the ground that the agreement was within the statute of frauds as an assignment of an interest in real property (*6 Cal. App. 2d 678, 680)* .

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21-216 California Points & Authorities § 216.41

§ 216.41 Oral Contract for Conveyance of Real Property Interest Is Not Enforceable--Transfer of Estate in Real Property Must Be Made in Writing

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*specify party claiming interest in property*] DOES NOT _____ [OWN THE REAL PROPERTY INVOLVED *or* HAVE _____ (*specify interest claimed in property, e.g.,* A ONE-HALF UNDIVIDED INTEREST IN THE PROPERTY] BECAUSE THERE IS NO WRITING TRANSFERRING THE _____ [PROPERTY *or specify interest involved*] TO HIM/HER.

A. Writing Is Required. No estate or interest in real property, other than for leases for a term not exceeding one year, nor any power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered, or declared, otherwise than by operation of law, or a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by the party's lawful agent authorized by writing (*Code Civ. Proc. § 1971*).

[*Optional*] **B. Oral Lien Is Invalid.** A lien on real property cannot be created by an oral agreement (*Remainders, Inc. v. Bartlett (1963) 215 Cal. App. 2d 295, 298-299, 30 Cal. Rptr. 191*).

[*Optional*] **C. Statute Covers Restrictions on Right to Alienate of Real Property.** [*See § 216.40[1], Paragraph B, above.*]

[*Optional*] **D. Statute Covers Oil and Gas Rights.** [*See § 216.40[1], Paragraph D, above.*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that an alleged transfer of an estate or interest in real property, other than a lease for a term not exceeding one year, is unenforceable because it is not contained in a writing subscribed by the transferor of the estate or interest. The argument supported by these points and authorities may be raised whenever the adverse party relies on such a transfer. The argument would most likely be raised in actions to quiet title, for ejectment, or for foreclosure of an invalid oral lien.

In addition to *Code Civ. Proc. § 1971*, which is stated in Paragraph A in [1], *above*, *Civ. Code § 1091* provides that an estate in real property, other than an estate at will or for a term not exceeding one year, can be transferred only by operation of law or by a written instrument subscribed by the party disposing of the estate, or by his or her agent with written authority. In addition, a trust in relation to real property is not valid unless evidenced by a written instrument signed by the trustee or the trustee's agent if authorized in writing to do so, or by a written instrument conveying the trust property signed by the settlor or the settlor's agent if authorized in writing to do so, or by operation of law [*Prob. Code § 15206*].

[b] Argument

Counsel should add argument linking these points and authorities with the facts of the case.

[c] Related Points and Authorities

For authority that a promise to grant a lien on real property is within the statute of frauds, see *§ 216.42* and *Landes Constr. Co. v. Royal Bank of Canada (9th Cir. 1987) 833 F.2d 1365* (discussed in *§ 216.61[3][a]*).

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Points and Authorities

The points and authorities *set out in § 216.44* et seq. may be used in an appropriate case to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Oral Lien Is Invalid

Remainders, Inc. v. Bartlett *(1963) 215 Cal. App. 2d 295, 30 Cal. Rptr. 191* , was, in part, an action to foreclose a lien on real property allegedly given as security for payment of legal fees. A default judgment was entered granting the plaintiff some of the relief requested but denying foreclosure. On the plaintiff's appeal, the court of appeal affirmed. The court held that a lien on real property cannot be created by an oral agreement [*Code Civ. Proc. § 1971*] (*215 Cal. App. 2d 295, 298-299)* .

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21-216 California Points & Authorities § 216.42

§ 216.42 Oral Contract for Conveyance of Real Property Interest Is Not Enforceable--Agreement to Grant Lien on Real Property Must Be in Writing

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE PROMISE ON WHICH THE _____ [*specify party, e.g.,* PLAINTIFF] RELIES IS ONE _____ [TO GRANT A LIEN ON REAL PROPERTY *and/or* BY A PURCHASER OF REAL PROPERTY TO PAY OR ASSUME AN INDEBTEDNESS SECURED BY THAT PROPERTY] AND, THEREFORE, IS UNENFORCEABLE BECAUSE IT IS NOT IN WRITING SUBSCRIBED BY THE _____ [*party to be charged, e.g.,* DEFENDANT] OR HIS/HER/ITS AGENT [AND WAS NOT SPECIFICALLY PROVIDED FOR IN THE CONVEYANCE OF THE PROPERTY].

A. Promise to Grant Lien on Real Property Must Be Written. A promise to grant a lien on real property as security for a debt is invalid unless it, or some note or memorandum of it, is in writing and subscribed by the party who will be granting the lien or by that party's lawful agent authorized in writing (*Landes Constr. Co. v. Royal Bank of Canada (9th Cir. 1987) 833 F.2d 1365, 1370* ; *see Code Civ. Proc. § 1971*).

B. Promise to Pay Mortgage Must Be Written. An agreement by a purchaser of real property to pay an indebtedness secured by a mortgage or deed of trust on the property purchased is invalid unless it, or some note or memorandum of it, is in writing and subscribed by the party to be charged, or by that party's agent, or unless assumption of the indebtedness by the purchaser is specifically provided for in the conveyance of the property (*Landes Constr. Co. v. Royal Bank of Canada (9th Cir. 1987) 833 F.2d 1365, 1370* ; *see Civ. Code § 1624(a)(6)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that a prospective borrower's alleged

promise to grant a lien on real property or a purchaser's promise to pay or assume an indebtedness secured by the property purchased is unenforceable under the statute of frauds because it is neither contained in a writing subscribed by the purchaser nor specifically provided for in the conveyance [*see Civ. Code § 1624(a)(6)*]. See *§ 216.90* et seq. for points and authorities regarding the sufficiency of the written memorandum.

[b] Argument

Counsel should add argument linking these points and authorities with the facts of the case.

[c] Related Points and Authorities

These points and authorities may be combined with the points and *authorities in §§ 216.40[1], 216.41[1]*, and 216.43[1], which also address real property transactions and the statute of frauds.

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Promise to Grant Lien on Real Property Must Be Written

Landes Constr. Co. v. Royal Bank of Canada *(9th Cir. 1987) 833 F.2d 1365* , is discussed in *§ 216.61[3][a]*.

[b] Promise to Pay Mortgage Must Be Written

Landes Constr. Co. v. Royal Bank of Canada *(9th Cir. 1987) 833 F.2d 1365* , is discussed in *§ 216.61[3][a]*.

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21-216 California Points & Authorities § 216.43

§ 216.43 Oral Contract for Conveyance of Real Property Interest Is Not Enforceable--Oral Contract to Lease Real Property for More Than One Year Is Not Enforceable

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE CONTRACT ON WHICH THE _____ [*party relying on contract, e.g.,* PLAINTIFF] IS RELYING IS A CONTRACT FOR THE LEASE OF [AN INTEREST IN] REAL PROPERTY AND, THEREFORE, IS INVALID AND UNENFORCEABLE BECAUSE IT IS NOT IN WRITING AND SIGNED BY THE _____ [*party to be charged, e.g.,* DEFENDANT].

Writing Signed by Party to be Charged Is Required. When read together, *Civil Code Sections 1091* and *1624* and *Code of Civil Procedure Section 1971* provide that an agreement to lease real property for a term longer then one year cannot be enforced by a lessee unless the agreement is in writing and signed by the lessor (*Bed, Bath & Beyond v. La Jolla Village Square (1997) 52 Cal. App. 4th 867, 875-877, 60 Cal. Rptr. 2d 830*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that an alleged agreement is unenforceable under the statute of frauds because it is an agreement for the lease of real property or of an interest in real property and is not contained in a writing signed by the party to be charged. The argument supported by the above memorandum may be raised whenever the adverse party relies on such a contract. It would most likely be raised in actions for breach of contract or specific performance. The argument might also arise in an action for declaratory relief or to quiet title.

[b] Argument

Counsel should add argument linking these points and authorities with the facts of the case.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Writing Signed by Party to be Charged Is Required

In ***Bed, Bath & Beyond v. La Jolla Village Square*** *(1997) 52 Cal. App. 4th 867, 60 Cal. Rptr. 2d 830* , the plaintiff negotiated for a lease of retail space in a shopping center owned by the defendant. The negotiated terms of the lease were reduced to a written agreement, which the plaintiff, but not the defendant, signed. The defendant then leased the premises for higher rent to a competitor of the plaintiff. The plaintiff sued for specific performance and damages for breach of contract, fraud, and interference with contractual relations and prospective economic advantage. The trial court granted summary adjudication against the plaintiff, concluding that the alleged lease agreement was within the statute of frauds. The plaintiff appealed, contending among other things that the lease agreement was not rendered unenforceable by the statute of frauds. The plaintiff argued that the lease agreement was not subject to the statute of frauds because it possibly could have been performed within one year from the date of its making. One provision of the lease provided that the tenant could terminate the lease before the rental term commenced if the landlord failed to begin preparatory work on the leased premises, or substantially complete it, by a certain date. Another provision gave the landlord the right to terminate the lease before commencement of the rental term if the landlord was unable to obtain the various governmental permits and approvals required for construction of the premises despite exercising diligence and good faith in attempting to do so.

The court of appeals affirmed. The trial court correctly ruled that the statute of frauds rendered the alleged lease agreement unenforceable (*52 Cal. App. 4th 867, 873)* . Three statutes of fraud applied to bar enforcement of the alleged lease in this case: *Civ. Code §§ 1091* and *1624* and *Code Civ. Proc. § 1971* (*52 Cal. App. 4th 867, 874-875)* . When all three sections were read together, it was clear that the Legislature intended that an agreement to lease real property for a term longer than one year cannot be enforced by a lessee unless the agreement is in writing and signed by the lessor. The court distinguished paragraphs (a)(1) and (a)(4) of *Civ. Code § 1624*, finding that paragraph (a)(4) applied as the more specific provision. An agreement to lease real property for a term longer than one year is within *Civ. Code § 1624(a)(4)* regardless of whether the agreement provides that it may be canceled or terminated within one year from the date of its making and before commencement of the lease term. Accordingly, the alleged lease agreement was unenforceable under the statute of frauds, as it was an agreement to lease real property for a term longer than one year and was not signed by the lessor (*52 Cal. App. 4th 867, 877)* .

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21-216 California Points & Authorities § 216.44

§ 216.44 Oral Contract for Conveyance of Real Property to Joint Venture May Be Enforced--Agreement to Contribute Real Property to Joint Venture May Be Enforced

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE AGREEMENT FORMING THE JOINT VENTURE WAS NOT REQUIRED TO BE IN WRITING EVEN THOUGH THE CONTRIBUTION OF ONE OF THE PARTIES TO THE JOINT VENTURE CONSISTS OF REAL PROPERTY.

Writing Is Not Required to Form Joint Venture Involving Real Property. An agreement to form a joint venture concerning real property is not within the statute of frauds, even though the agreement provides for one of the parties to contribute or to sell real property to the venture (*Gross v. Raeburn (1963) 219 Cal. App. 2d 792, 796-799, 33 Cal. Rptr. 432*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that the statute of frauds [*Civ. Code § 1624(a)(3)*] does not apply to anoral agreement to form a joint venture, even though the agreement provides for one of the parties to sell real property to the venture as his or her contribution. The argument supported by these points and authorities may be raised by a party whenever the adverse party urges that such an agreement is invalid under *Civ. Code § 1624(a)(3)*. The argument would most likely be raised in an action for breach of contract or to dissolve the joint venture and request an accounting.

[b] Argument

Counsel should add argument linking these points and authorities with the facts of the case. For example, counsel

should demonstrate that the agreement is in the nature of a joint venture [*see, e.g., James v. Herbert (1957) 149 Cal. App. 2d 741, 748, 309 P.2d 91]* .

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Writing Is Not Required to Form Joint Venture Involving Real Property

Gross v. Raeburn *(1963) 219 Cal. App. 2d 792, 33 Cal. Rptr. 432* , was an action for declaratory relief concerning, in part, a joint venture involving two contiguous parcels of real property, dissolution and winding up of the joint venture, and damages for breach of contract and fraud. The trial court found that the defendants had been the owners of one of the parcels when the parties agreed that they would purchase the adjoining parcel and develop the two parcels together. The agreement provided for the defendants to convey to the plaintiffs an undivided half interest in the that parcel the defendants already owned. The plaintiffs were to compensate the defendants for the interest conveyed. The parties bought the adjacent parcel together, but the defendants refused to convey the agreed interest in their parcel to the plaintiffs, and the plaintiffs sued. The trial court entered judgment for the plaintiffs and denied the defendants' motion for a new trial. On appeal, the defendants contended that an oral agreement of joint venture concerning real property violates the statute of frauds when the real property was owned by one of the joint venturers before formation of the joint venture.

The court of appeal affirmed. An agreement to form a joint venture pursuant to which one of the parties is to sell real property to the venture as part of his or her contribution is not within the statute of frauds [*James v. Herbert (1957) 149 Cal. App. 2d 741, 748-749, 309 P.2d 91* (discussed in [4][a], *below*)] (*219 Cal. App. 2d 792, 796-799)* .

[4] Additional Authorities

[a] Writing Is Not Required to Form Joint Venture Involving Real Property

The plaintiff in *Epstein v. Stahl (1959) 176 Cal. App. 2d 53, 1 Cal. Rptr. 143* , alleged that he and the defendant had entered into an oral joint venture pursuant to which the plaintiff was to provide services, labor, material, and tools to renovate four buildings on property owned by the defendant, and the defendant was to provide money for the renovation and convey to the plaintiff a half interest in the buildings and the real property on which they stood. After the plaintiff performed all of his obligations under the agreement and bought two additional parcels to use for parking in connection with the renovated property, the defendant refused to perform, and the plaintiff sued to dissolve the joint venture and for an accounting. The court of appeal, reversing a judgment of dismissal entered after a demurrer to the complaint was sustained without leave to amend, held that the action was not barred by any statute of frauds [*see Civ. Code §§ 1091, 1624(a)(3)*; *Code Civ. Proc. § 1971*] (*176 Cal. App. 2d 53, 63-64)* .

In *James v. Herbert (1957) 149 Cal. App. 2d 741, 309 P.2d 91* , the plaintiff sued two coventurers for damages, alleging a conspiracy to exclude her from further participation in their oral joint venture and to deprive her of her share in the net profits. The plaintiff alleged that the parties had agreed that one defendant was to contribute three parcels of realty for which he would be compensated by the venture, the other defendant was to arrange financing and supervise construction of improvements on the property, and the plaintiff was to contribute services in managing the venture; and profits were to be divided equally. The court of appeal reversed a judgment dismissing the plaintiff's action after a demurrer to the complaint was sustained. The sale of real property to the venture as one party's contribution to it did not bring the agreement within the statute of frauds (*149 Cal. App. 2d 741, 748-749)* .

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21-216 California Points & Authorities § 216.45

§ 216.45 Oral Contract for Conveyance of Real Property to Joint Venture May Be Enforced--Agreement to Engage in Joint Venture to Buy or Sell Real Property May Be Enforced

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE AGREEMENT IS NOT WITHIN THE STATUTE OF FRAUDS BECAUSE IT IS AN AGREEMENT TO ENGAGE IN A JOINT VENTURE TO _____ [BUY *or* SELL *or* BUY AND SELL] REAL PROPERTY.

Writing Is Not Required to Form Joint Venture to Buy or Sell Real Property. A joint venture agreement to buy or sell real property need not be in writing because it is not within the statute of frauds (*Jaffe v. Heffner (1959) 173 Cal. App. 2d 512, 516, 343 P.2d 374*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that the statute of frauds does not apply to an oral agreement to form a joint venture even though the agreement provides for the parties to buy or sell real property together. The argument supported by these points and authorities may be raised whenever the adverse party urges that such an agreement is invalid under *Civ. Code § 1624(a)(3)*. The argument would most likely be raised in actions for breach of contract, to quiet title, and to declare that one of the coventurers holds the property involved in trust for the other.

[b] Argument

Counsel should add argument linking these points and authorities with the facts of the case. For example, counsel should demonstrate that the agreement is in the nature of a joint venture [*see, e.g.,* *James v. Herbert (1957) 149 Cal.*

App. 2d 741, 748, 309 P.2d 91 (discussed in *§ 216.44[4][a]*); *but see Mazzera v. Wolf (1947) 30 Cal. 2d 531, 535-537, 183 P.2d 649* (mere agreement to join in purchase of land with no evidence of agreement to go into business or joint venture sharing profits and losses was unenforceable under statute of frauds in absence of actual or constructive fraud)].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Writing Is Not Required to Form Joint Venture to Buy or Sell Real Property

The plaintiff in ***Jaffe v. Heffner*** *(1959) 173 Cal. App. 2d 512, 343 P.2d 374* , as administratrix of her late husband's estate, sued the defendants to quiet title to an undivided half interest in a tract of land. The husband and one of the defendants had bought and resold 30 tax-title properties together over a period of about 10 years before the husband's death. Shortly before the husband's death, they had looked at the tract involved and agreed to jointly purchase it at $800, each to put up half of the price if the bid did not exceed that amount, and they paid $15 from a joint partnership account to the county tax collector to have the property advertised for public auction. The sale was advertised, but the husband died before the date set for the auction. The defendant told the plaintiff that he would take care of the purchase as if the husband had not died. However, the defendant subsequently refused the plaintiff's tender of half of the purchase price; and the defendant bid in the property, took title in his own name along with some of his family members, and returned half of the advanced cost of advertising to the plaintiff. The trial court concluded that the plaintiff owned an undivided half interest in the property and that the defendants held that interest in trust for the plaintiff.

The court of appeal affirmed. The court rejected the defendants' contention that the agreement to purchase the property was invalid because it was oral and within the statute of frauds. Such an undertaking by joint venturers is not within the statute of frauds [*Lasry v. Lederman (1957) 147 Cal. App. 2d 480, 305 P.2d 663* (discussed in [4][a], *below*)] (*173 Cal. App. 2d 512, 516)* .

[4] Additional Authorities

[a] Writing Is Not Required to Form Joint Venture to Buy or Sell Real Property

In *Sadugor v. Holstein (1962) 199 Cal. App. 2d 477, 18 Cal. Rptr. 859* , the plaintiff sued to establish a trust in a half interest in real property that the plaintiff and one of the defendants had agreed to purchase together, each putting up half of the price. After their offer had been accepted by the seller, and on the day escrow was to close, the defendant insisted on a change in the terms of the oral joint venture agreement and demanded that the plaintiff put up half of the price in cash and sign a note and deed of trust on the property relating to a loan to the defendant in excess of half of the value of the property. When the plaintiff refused, the defendant purchased the property alone. The court of appeal, in affirming a judgment for the plaintiff, stated that a partnership for the purpose of buying land may be formed by oral agreement (*199 Cal. App. 2d 477, 480)* . In holding that the defendant violated a confidential relationship between the parties, the court distinguished *Mazzera v. Wolf (1947) 30 Cal. 2d 531, 537, 183 P.2d 649* , which held that an oral agreement to join in the purchase of land ordinarily does not give rise to a constructive trust when one of the parties purchases the property for himself or herself, in the absence of fraud in procuring the title or abuse of a confidential relationship. The court of appeal noted that the parties in the case before it had made a joint offer, that they had both advanced funds for a deposit accompanying the offer pursuant to an oral joint venture agreement, that jointventurers are reciprocal fiduciaries (*199 Cal. App. 2d 477, 482-483)* .

In *Lasry v. Lederman (1957) 147 Cal. App. 2d 480, 305 P.2d 663* , the plaintiff and the defendants had orally agreed to

enter into a joint venture to purchase and renovate a vacant building for eventual resale. The defendants had instead bought the building for themselves, and the plaintiff sued for declaratory relief and an accounting. The trial court granted the defendants' motion for nonsuit at the close of the plaintiff's case, holding that no joint venture was proved. The court of appeal reversed, holding that the plaintiff's testimony was sufficient to establish creation of a joint venture agreement. The court stated that such an undertaking by joint venturers is not within the statute of frauds. The court also noted, however, that if there had been no joint venture between the parties, the agreement would have been invalid because it was not in writing [*Mazzera v. Wolf (1947) 30 Cal. 2d 531, 183 P.2d 649]* (*147 Cal. App. 2d 480, 487-488)* .

In *Fitzgerald v. Provines (1951) 102 Cal. App. 2d 529, 227 P.2d 860* , the court of appeal, affirming a judgment declaring the plaintiff and the defendant to each own an undivided half interest in an apartment house, ordering the defendant to make an accounting to the plaintiff, and appointing a receiver to sell the property, held that a joint venture in the purchase and sale of real property may be formed by oral agreement and is not within the statute of frauds (*102 Cal. App. 2d 529, 538*).

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21-216 California Points & Authorities § 216.46

§ 216.46 Oral Contract for Conveyance of Real Property to Joint Venture May Be Enforced--Agreement to Share in Net Profits Under Oil and Gas Lease May Be Enforced

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

AN AGREEMENT TO SHARE IN THE NET PROFITS REALIZED UNDER AN OIL AND GAS LEASE IS NOT REQUIRED TO BE IN WRITING.

Writing Is Not Required to Share in Profits. An agreement that a party will receive a share in the net profits realized by another under an oil and gas lease, as opposed to an agreement that a party receive an interest in the oil and gas produced under the lease, is not required to be in writing (*Dutton v. Interstate Inv. Corp. (1941) 19 Cal. 2d 65, 69-70, 119 P.2d 138*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that the statute of frauds [*Civ. Code § 1624(a)(3)*] does not apply to an oral agreement to share in the profits realized under an oil and gas lease. The argument supported by these points and authorities may be raised by a party whenever the adverse party urges that such an agreement is invalid under *Civ. Code § 1624(a)(3)*. The argument would most likely be raised in an action for breach of contract and for an accounting.

[b] Argument

Counsel should add argument linking these points and authorities with the facts of the case. For example, counsel should demonstrate that the agreement is for the division of the profits realized, rather than for the division of the oil and gas produced.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Writing Is Not Required to Share in Profits

In ***Dutton v. Interstate Inv. Corp.*** *(1941) 19 Cal. 2d 65, 119 P.2d 138* , the plaintiff had ascertained that certain property owned by the City of Los Angeles was probably oil-bearing. He went to an acquaintance who was an oil scout, and they discussed leasing the property, but neither man met the financial requirements of the city for lessees for oil development. The plaintiff and the oil scout then interested the defendant in the transaction, and an agreement was made that the three parties would share the profits from the transaction equally. The defendant applied for the lease, as the defendant was believed to meet the city's financial prerequisites for a lessee. After the defendant obtained a 20-year lease (or permit), the defendant made a settlement with the oil scout but refused to recognize that the plaintiff had any right to compensation or any interest in the profits from the transaction. The plaintiff sued to determine his interest in the profits and for an accounting. The defendant appealed from an interlocutory judgment determining that the plaintiff had a one-third interest in the net profits and ordering an accounting, and from the final judgment entered after the accounting.

The Supreme Court affirmed. An agreement assigning a fractional interest in oil and hydrocarbons produced under an oil and gas lease constitutes a transfer of an interest in real property, which must be in writing under the statute of frauds, *Civ. Code § 1624(a)(3)* (*19 Cal. 2d 65, 69)* . However, the plaintiff's agreement in this case was not to receive one-third of the oil and gas produced under the lease butto receive one-third of the net profits realized by the defendant. An agreement to share the profits from a transaction involving real estate is not required to be in writing (*19 Cal. 2d 65, 69-70)* .

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[Reserved]

§§ 216.47[Reserved]

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21-216 California Points & Authorities § 216.60

§ 216.60 Oral Commitment for Loan Exceeding $100,000 Is Not Enforceable--Commercial Loan Commitment Is Not Enforceable

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE PROMISE ON WHICH THE _____ [*specify party, e.g.,* PLAINTIFF] RELIES IS ONE FOR _____ [A LOAN OF MONEY *and/or* AN EXTENSION OF CREDIT] IN EXCESS OF $100,000 FOR USE IN A COMMERCIAL ENTERPRISE AND, THEREFORE, IS UNENFORCEABLE BECAUSE IT IS NOT IN WRITING SUBSCRIBED BY THE _____ [*party to be charged, e.g.,* DEFENDANT] OR HIS/HER/ITS AGENT.

Oral Commercial Loan Commitment in Excess of $100,000 Is Not Enforceable. A contract, promise, undertaking, or commitment to lend money or to grant or extend credit, in an amount greater than $100,000, not primarily for personal, family, or household purposes, made by a person engaged in the business of lending or arranging for the lending of money or extending of credit, is invalid unless it, or some note or memorandum of it, is in writing and subscribed by the party to be charged, or by that party's agent (*Civ. Code § 1624(a)(7)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that an alleged agreement is unenforceable under the statute of frauds because it is an agreement to make a loan or extend credit of more than $100,000 for other than a personal, family, or household purpose and it is not in a sufficient writing signed by the party to be charged or by its agent [*see Civ. Code § 1624(a)(7)*]. See *§ 216.90* et seq. for points and authorities regarding the sufficiency of the written memorandum. The argument is most likely to be raised by the defendant alleged to have made the oral loan commitment.

[b] Argument

Counsel should add argument linking these points and authorities with the facts of the case. For example, counsel should set forth facts showing that his or her client is in the business of lending money or arranging for the lending of money or extending of credit. Counsel may also wish to include any statutory authority under which his or her client is licensed to lend money or arrange for the extension of credit [*see, e.g., Fin. Code § 18000 et seq.* (industrial loan companies)].

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A. Contract Within Scope of Statute of Frauds

21-216 California Points & Authorities § 216.61

§ 216.61 Oral Commitment for Loan Exceeding $100,000 May Be Enforced--Commitment for Loan Secured by Residential Real Property May Be Enforced

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE AGREEMENT FOR THE _____ [LOAN OF MONEY *and/or* EXTENSION OF CREDIT] IS NOT REQUIRED TO BE IN WRITING BECAUSE IT CONTEMPLATES A LOAN SECURED BY RESIDENTIAL PROPERTY CONSISTING OF ONE TO FOUR DWELLING UNITS.

A. Primary Purpose May Be Presumed. For purposes of the statute of frauds, a contract, promise, undertaking, or commitment to lend money secured solely by residential property consisting of one to four dwelling units must be deemed to be for personal, family, or household use (*Civ. Code § 1624(a)(7)*).

[*Optional*] **B. Borrower's Promise to Grant Lien Is Severable.** A borrower-buyer's oral promise to grant a lien on real property in return for the loan of money with which to purchase that property is severable from promises to repay principal and to pay interest and fees on the loan. [A borrower to whom a loan was made in that situation would still be required to grant the lien on the basis of estoppel and partial performance] (*Landes Constr. Co. v. Royal Bank of Canada (9th Cir. 1987) 833 F.2d 1365, 1370)* .

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that the statute of frauds does not apply to an oral agreement to make a loan or extend credit of more than $100,000 primarily for family, personal, or household purposes. The contention is based on the presumption that a loan secured solely by residential real property must be deemed to be primarily for family, personal, or household purposes [*see Civ. Code § 1624(a)(7)*]. See *§ 216.90* et seq. for points and authorities regarding the sufficiency of the written memorandum.

[b] Argument

Counsel should add argument linking these points and authorities with the factsof the case. For example, counsel should set forth facts describing the property and the terms of the agreement regarding the security.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Borrower's Promise to Grant Lien Is Severable

In ***Landes Constr. Co. v. Royal Bank of Canada*** *(9th Cir. 1987) 833 F.2d 1365* , the plaintiff entered into an agreement to purchase real property on Wilshire Boulevard in Los Angeles for $50 million. The plaintiff was to make a $10 million down payment in three installments of $1 million, $2 million, and $7 million; and the sellers were to take a $40 million note and deed of trust for the remainder of the purchase price. An officer of the defendant orally promised to lend $10 million on the project. The first $3 million was paid from advances under a line of credit that a company controlled by one of the plaintiff's principal shareholders had with the defendant. The defendant and the plaintiff's principals had financed other ventures this way; the advances were made under the other company's line of credit until the paperwork on the project's own loan was completed. The project's own loan in this case was an application for $22.5 million, $7 million of which would be used to pay the last installment of the down payment and the rest of which would be used to finance development of the property. Five days before the $7 million installment was due, the defendant rejected the loan application. The plaintiff forfeited the $3 million already paid. The plaintiff sued for damages for breach of contract and was awarded $18.5 million. The defendant appealed and argued that *Code Civ. Proc. § 1971* brings within the bar of the statute of frauds any oral agreement in which one of the promises is to convey an interest in real estate.

The court of appeals affirmed. An oral agreement to lend money with which to purchase real property clearly falls outside California's statute of frauds [*Civ. Code § 1624(a)(6)*; *Code Civ. Proc. § 1971*]. However, an oral agreement to grant a lien against real property *is* within the California statute of frauds (citing *Remainders, Inc. v. Bartlett (1963) 215 Cal. App. 2d 295, 298-299, 30 Cal. Rptr. 191* , discussed in *§ 216.41[3][b]*). When promises not within the statute of frauds are coupled with a promise that is within the statute, the former are enforceable if they are divisible or separable (citing *White Lighting Co. v. Wolfson (1968) 68 Cal. 2d 336, 345-346, 66 Cal. Rptr. 697, 438 P.2d 345* ; *Pollyanna Homes, Inc. v. Berney (1961) 56 Cal. 2d 676, 678-679, 16 Cal. Rptr. 345, 365 P.2d 401* ; *Magee v. McManus (1886) 70 Cal. 553, 557, 12 P. 451*). This conforms with California's policy to restrict the application of the statute of frauds to those situations precisely covered by its language. The court had to assume that the jury concluded that the plaintiff promised to pay interest and loan fees and to repay principal in addition to its promise to grant the security interest (*833 F.2d 1365, 1370)* . Furthermore, the court said, its holding that the promise to grant the lien was divisible from the other promises would not permit the plaintiff to use the statute of frauds to avoid granting the lien. Under California law, the doctrines of estoppel and partial performance would prevent the plaintiff from asserting the statute of frauds after it had obtained the loan (*833 F.2d 1365, 1370 n.1*).

Landes was decided before the enactment of *Civ. Code § 1624(a)(7)*. However, *Civ. Code § 1624(a)(7)* is expressly intended to be subject to judicially and legislatively recognized defenses and exceptions to *Civ. Code § 1624(a)(1)-(6)* [*see* Stats. 1988, ch. 1096, § 3].

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21-216 California Points & Authorities §§ 216.62-216.69

[Reserved]

§§ 216.62[Reserved]

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B. Agent Making Contract Within Statute of Frauds

21-216 California Points & Authorities § 216.70

§ 216.70 Written Contract Made by Agent Without Written Authority Is Not Enforceable

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE CONTRACT ON WHICH THE _____ [*party relying on contract, e.g.,* PLAINTIFF] IS RELYING IS INVALID AND UNENFORCEABLE BECAUSE IT IS WITHIN THE STATUTE OF FRAUDS AND WAS ENTERED INTO ON THE _____ [*party to be charged, e.g.,* DEFENDANT'S] BEHALF BY AN AGENT WITHOUT WRITTEN AUTHORITY.

A. Contract Is Within Statute of Frauds. [*Insert appropriate authorities to show that contract in question is within statute of frauds; see, e.g., § 216.10[1]* if contract cannot be performed within one year or § 216.30[1] if contract is to answer for debt of another].

B. Written Authority to Contract Is Required. Authority to enter into a contract required by law to be in writing can be given only by an instrument in writing (*Civ. Code § 2309*).

[*Optional*] **C. Authority to Fill in Blanks on Executed Document Must Be Written.** An agent's authority to fill in blanks on a document already executed by his or her principal must be in writing if the document itself is required to be in writing by the statute of frauds (*Monte Carlo Motors, Inc. v. Volkswagenwerk (1960) 177 Cal. App. 2d 107, 111, 1 Cal. Rptr. 920*).

[*Optional]* **D. Authority to Enter Contract for Spouse Must Be Written.** There is no husband-wife exception to the statute of frauds requirement that authority to enter into a contract that is required to be in writing can be given only in writing (*O'Banion v. Paradiso (1964) 61 Cal. 2d 559, 563-564, 39 Cal. Rptr. 370, 393 P.2d 682*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that a contract, although written, is unenforceable under the statute of frauds because the contract is required to be in writing by law (namely, the statute of frauds), and it was entered into by an agent without written authority. The argument supported by these points and authorities may be raised whenever the adverse party relies on such a contract.

These points and authorities are not appropriate for use when an agent who lacks written authority enters into an agreement for his or her principal that is required to be in writing by the agreement of the principal and the other contracting party, because an agent's authority to contract is required to be in writing only when the contract is required to be in writing by law, that is, by statute or judicial decision [*see Ripani v. Liberty Loan Corp. (1979) 95 Cal. App. 3d 603, 610, 157 Cal. Rptr. 272]* .

[b] Argument

Counsel should add argument linking these points and authorities with the facts of the case. For example, counsel should include discussion demonstrating that the contract is within a statute of frauds provision [*see, e.g., Civ. Code § 1624*], that it was entered into by an agent of the person to be charged, and that the agent had no written authority to enter into the contract.

[c] Related Points and Authorities

These points and authorities may be combined with points and authorities supporting the contention that the contract entered into by the agent on behalf of his or her principal was within the statute of frauds [*see, e.g., §§ 216.10[1],* 216.30[1], 216.40[1]].

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Points and Authorities

The points and authorities *set out in § 216.71 et seq. and § 216.131* may be used in an appropriate case to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Authority to Fill in Blanks on Executed Document Must Be Written

In ***Monte Carlo Motors, Inc. v. Volkswagenwerk*** *(1960) 177 Cal. App. 2d 107, 1 Cal. Rptr. 920* , the plaintiff was a retail distributor of the defendant's automobiles. An agent of the defendant approached the plaintiff with a proposal that the plaintiff become a wholesaler for the defendant's automobiles. The agent showed the plaintiff a contract signed by the defendant's general manager in Germany with blank spaces, which included the spaces for the other party's name and signature. The agent told the plaintiff that he would fill in the blanks and deliver the contract to the plaintiff when he returned from a trip. Shortly after hisreturn, however, the agent told the plaintiff that he had decided to retain the current wholesaler. In the meantime, the plaintiff had made expenditures and otherwise acted to its disadvantage in anticipation of the contract. The plaintiff sued for breach of contract, but after trial, the court found that the defendant was not estopped to assert the defenses that the contract violated the statute of frauds because it was not to be performed within one year [*Civ. Code § 1624(a)(1)*] and because the agent had no written authority to enter into it [*Civ. Code § 2309*]. The court entered judgment for the defendant, and the plaintiff appealed.

The court of appeal affirmed. The authority of an agent to fill in blanks on a contract previously executed by the

principal must be in writing if the contract itself is required to be in writing by the statute of frauds. The court distinguished the situation in which the unauthorized agent fills in blanks without the knowledge of a third person who subsequently relies on the contract to his or her detriment, in which case the principal is bound (*177 Cal. App. 2d 107, 111)* . The court then applied a consistent rule to the argument of estoppel, holding that a principal is not estopped to rely on *Civ. Code § 2309* by the agent's mere possession of such an incomplete document but is estopped only when the agent fills in the blanks and delivers the completed instrument to the third person without the third person knowing that the blanks were not filled in when the principal executed the contract (*177 Cal. App. 2d 107, 111-112)* .

[b] Authority to Enter Contract for Spouse Must Be Written

In ***O'Banion v. Paradiso*** *(1964) 61 Cal. 2d 559, 39 Cal. Rptr. 370, 393 P.2d 682* , the plaintiff accepted the written offer of a husband to sell a parcel of real property. The plaintiff deposited the purchase price in escrow at the husband's request. When the plaintiff informed the husband that all he had to do to get the money was go to the title company where the funds were in escrow and sign the deed, the husband informed the plaintiff that he was selling to third parties. The husband and wife proceeded to sell the property to the third parties, and the plaintiff sued the husband and wife and their buyers for specific performance and to quiet title. The trial court found that the husband had intended to include all of his wife's interest in the property in his offer, and that the wife had agreed to the conveyance in accordance with the terms of the written offer. Judgment was entered for the plaintiff, and the buyers appealed.

The Supreme Court reversed. The buyers had standing to raise the issue of the statute of frauds because they were in privity with the husband and wife who were parties to the alleged contract (*61 Cal. 2d 559, 562-563)* . Any contract made by a husband that is within the statute of frauds, such as a contract to sell real property, is unenforceable against the wife in the absence of a written authorization signed by the wife [*Civ. Code § 2309*] because there is no husband-wife exception to the statute of frauds (*61 Cal. 2d 559, 563)* . Thus, the wife could not be forced to perform the agreement because she had not given her husband written authority to execute the agreement on her behalf, even though she knew that her husband was selling the entire property to the plaintiff and intended for him to do so (*61 Cal. 2d 559, 563-564)* .

[4] Additional Authorities

[a] Authority to Enter Contract for Spouse Must Be Written

In *Tamimi v. Bettencourt (1966) 243 Cal. App. 2d 377, 52 Cal. Rptr. 273* , spouses sold a tract of real property after the wife had signed an exclusive listing authorizing the plaintiff, a real estate broker, to make the sale. The plaintiff sued to recover his commission, but the trial court rendered judgment for the defendants. The court of appeal reversed as to the wife but affirmed as to the husband because he had not signed the listing agreement, which was required to be in writing by *Civ. Code § 1624(a)(4)*, and had not given written authorization to his wife to sign the listing agreement on his behalf, as required by *Civ. Code § 2309*. The court refused to recognize any implied authority for the wife to sign on her husband's behalf simply because the listing related to community property (*243 Cal. App. 2d 377, 378)* .

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21-216 California Points & Authorities § 216.71

§ 216.71 Written Contract May Be Enforced Even Though Made by Agent Without Written Authority--Executive Officer May Make Contract on Corporation's Behalf

[1] Executive Officer May Make Contract on Corporation's Behalf

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE WRITTEN CONTRACT ENTERED INTO ON BEHALF OF THE _____ [*party to be charged, e.g.,* DEFENDANT] BY _____ [*name of person signing contract for party to be charged*] IS ENFORCEABLE AGAINST THE _____ [*party to be charged, e.g.,* DEFENDANT] BECAUSE AN EXECUTIVE OFFICER OF A CORPORATION DOES NOT NEED WRITTEN AUTHORITY TO ENTER INTO A CONTRACT ON THE CORPORATION'S BEHALF EVEN THOUGH THE CONTRACT IS REQUIRED TO BE IN WRITING.

Written Authority Is Not Required. An executive officer of a corporation may, on behalf of the corporation, enter into a contract that is required to be in writing even though he or she does not have written authority to enter into the contract for the corporation (*Jeppi v. Brockman Holding Co. (1949) 34 Cal. 2d 11, 17-18, 206 P.2d 847*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that a written contract is not unenforceable even though it was entered into on behalf of the party to be charged by an agent without written authority. The ground for the contention is that the equal-dignity rule of *Civ. Code § 2309*, requiring an agent to have written authority to enter into a contract that is required to be in writing, is not applicable to contracts entered into on a corporation's behalf by one the executive officers. The argument supported by these points and authorities may be raised by a party relying on a contract within the statute of frauds executed by an executive officer of a corporation whenever the adverse party urges that the contract is invalid because the agent executing the contract lacked written authority to enter into it.

[b] Argument

Counsel should add argument linking these points and authorities with the facts of the case. For example, counsel should include discussion of the agent's executive position with the corporation, such as president or general manager.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Written Authority Is Not Required

Jeppi v. Brockman Holding Co. *(1949) 34 Cal. 2d 11, 206 P.2d 847* , was an action for damages for breach of a contract for the sale of real property. The president of the corporation negotiated the contract and signed the escrow instructions. The corporation refused to forward deeds to the escrow holder, however, stating that it had received a better offer. The trial court granted the defendants' motion for nonsuit on the ground that there was no evidence of a contract by any authorized officer of the corporation.

The Supreme Court reversed. The evidence supported an inference that the president of the corporation had actual oral authority to enter into the contract (*34 Cal. 2d 11, 15)* . The authority of an executive officer of a corporation to enter into contracts required to be in writing does not have to be in writing. This is an exception to the equal-dignity rule of the *Civ. Code § 2309*. An executive officer of a corporation should be excepted from the requirement of written authority because he or she is more than an agent; he or she is the representative of the corporation itself [*E.K. Wood Lumber Co. v. Moore Mill & Lumber Co. (9th Cir. 1938) 97 F.2d 402, 408]* . The Court disapproved language to the contrary in *Corporation of America v. Harris (1935) 5 Cal. App. 2d 452, 459, 43 P.2d 307* .

[4] Additional Authorities

[a] Written Authority Is Not Required

Monteleone v. Southern California Vending Corp. (1968) 264 Cal. App. 2d 798, 70 Cal. Rptr. 703 , was an action by a lessor for declaratory relief and damages based on breach of a lease of real property by the lessee, a corporation. The lease had been entered into on behalf of the corporation by a person who was neither an agent nor an employee of the corporation but who subsequently became its general manager and vice-president, and in that capacity, he ratified the lease. The court of appeal held that the ratification made the lease enforceable against the corporation even though the ratification was not in writing, as required by *Civ. Code § 2310* when the original authority is required to be in writing under *Civ. Code § 2309*, because *Civ. Code §§ 2309* and *2310* have no application to the acts of an executive officer of a corporation (*264 Cal. App. 2d 798, 806)* .

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21-216 California Points & Authorities § 216.72

§ 216.72 Written Contract May Be Enforced Even Though Made by Agent Without Written Authority--Contract May Be Enforced When Agent Merely Signed Contract at Principal's Direction

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE WRITTEN CONTRACT ENTERED INTO ON BEHALF OF THE _____ [*party to be charged, e.g.,* DEFENDANT] BY _____ [*name of person signing contract for party to be charged*] IS ENFORCEABLE AGAINST THE _____ [*party to be charged, e.g.,* DEFENDANT] BECAUSE _____ [*name of person signing contract for party to be charged*] MERELY PERFORMED THE MECHANICAL ACT OF SIGNING THE _____ [*party to be charged, e.g.,* DEFENDANT'S] NAME TO THE CONTRACT AT THE _____ [*party to be charged, e.g.,* DEFENDANT'S] DIRECTION.

A. Written Authority Is Not Required to Perform Mechanical Act of Signing Name. (**Amanuensis Rule**) An agent does not need written authority in order to perform the purely mechanical act, not involving any discretion, of signing the principal's name to a contract at the direction of the principal, even though the contract is required to be in writing (*Estate of Stephens v. Williams (2002) 28 Cal. 4th 665, 674-675, 678, 122 Cal. Rptr. 2d 358, 49 P.3d 1093* ; *Murphy v. Munson (1949) 95 Cal. App. 2d 306, 311-313, 212 P.2d 603*).

[*Optional*] **B. Agent Is Not Required to Sign Contract in Principal's Immediate Presence.** The amanuensis rule may apply when an agent, acting with merely mechanical and no discretionary authority, signs the principal's name outside the principal's presence (*Estate of Stephens v. Williams (2002) 28 Cal. 4th 665, 675, 678, 122 Cal. Rptr. 2d 358, 49 P.3d 1093*).

[*Optional*] **C. Agent Is Not Required to Be Disinterested Party.** Although the signing of a grantor's name by an interested amanuensis is presumed to be invalid, the amanuensis may show that his or her signing of the grantor's name was a mechanical act in that the grantor intended to sign the document using the instrumentality of the amanuensis (*Estate of Stephens v. Williams (2002) 28 Cal. 4th 665, 677-678, 678, 122 Cal. Rptr. 2d 358, 49 P.3d 1093*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that a written agreement is not unenforceable even though it was executed on behalf of the party to be charged by an agent without written authority. The ground for the contention is that the equal dignity rule of *Civ. Code § 2309*, requiring an agent to have written authority to enter into a contract that is required to be in writing, does not apply to an agent's purely ministerial act, not involving the exercise of any discretion, of signing the principal's name to a contract at the direction of the principal. A person is acting as an "amanuensis" when he or she performs a mere mechanical function in signing a principal's name to a document. The argument supported by these points and authorities may be raised by a party relying on a contract within the statute of frauds that was signed by an agent at the direction of the principal whenever the adverse party urges that the contract is invalid because the agent lacked written authority to enter into the contract.

[b] Argument

Counsel should add argument linking these points and authorities with the facts of the case. For example, counsel should include discussion of the transaction demonstrating that the agent who signed the contract had no discretion in relation to deciding whether or not to enter into the contract or what its terms would be but merely performed the mechanical act of signing the principal's name to the contract at the principal's direction.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Written Authority Is Not Required to Perform Mechanical Act of Signing Name (Amanuensis Rule)

In ***Estate of Stephens v. Williams*** *(2002) 28 Cal. 4th 665, 678, 122 Cal. Rptr. 2d 358, 49 P.3d 1093* , a widower in declining health decided to make a gift of his home to his daughter. His son had moved to another state, whereas his daughter was involved in the daily activity of caring for her father. The father was losing his eyesight and had executed a durable power of attorney naming the daughter his attorney in fact. The father orally instructed his daughter to sign his name to a grant deed conveying his home to himself and to his daughter as joint tenants. His daughter executed the deed and had it notarized. Her father was not present at the time she signed the deed, but later orally ratified the conveyance. After the father's death, his son filed a petition for probate of the will and a petition to determine title and require transfer of the property to the estate pursuant to *Prob. Code § 9860*. The trial court declared the daughter to be the sole owner under the "amanuensis" rule, which provides that when the signing of a grantor's name is done with the grantor's express authority, the person signing the grantor's name is not deemed an agent but is instead regarded as a mere instrument or amanuensis of the grantor, and that signature is deemed to be that of the grantor. The court found that the daughter's signature of her father's name was a purely ministerial, mechanical act and was not an exercise of any authority under the power of attorney or otherwise as a fiduciary. By virtue of her father's instruction and his subsequent ratification, the signature on the deed was deemed to be the father's as a matter of law, meeting the requirement of *Civ. Code § 1091* that a deed be executed by the grantor. Upon appeal, the court of appeal reversed. It held that under *Civ. Code § 2309*, the daughter's authority to execute the deed as her father's agent had to be in writing. It rejected the amanuensis theory because the deed was not signed in the grantor's presence (*28 Cal. 4th 665, 669-671)* .

The California Supreme Court reversed. It first noted that the daughter was not authorized to sign the deed as her father's agent, pursuant to *Civ. Code §§ 1091, 2309*, or *Prob. Code § 4264*. The respondents argued that the deed

transaction should be valid as a deed signed by the father, because his daughter had acted as his amanuensis in that she performed a mere mechanical function in signing his name to the deed. The court noted that the amanuensis rule has successfully been invoked as an exception to *Civ. Code § 2309*. As discussed in [b] and [c], *below*, despite the fact that the daughter did not sign the deed in her father's presence, and the fact that she was an interested amanuensis, the Court held that the conveyancemust be deemed valid as a deed executed by father under *Civ. Code § 1091* (*28 Cal. 4th 665, 674, 678)* .

Murphy v. Munson *(1949) 95 Cal. App. 2d 306, 212 P.2d 603* , was an action for breach of a sales contract that came within the statute of frauds. In response to an inquiry from the defendant, the plaintiff had sent an offer to sell sawmill machinery to the defendant. The defendant told his clerk that he wanted to order the machinery. In the defendant's presence, the clerk made a written memorandum of the machinery the defendant told him to order. The clerk had no discretion as to what machinery to order or the terms of the contract but merely took the terms by dictation from his principal, transcribed the letter, and signed the defendant's name to it as he had been generally directed to do with such communications. After the defendant refused to accept the machinery, the plaintiff seller sued for breach of contract. The trial court rendered judgment for the defendant, and the plaintiff appealed.

The court of appeal reversed. *Civ. Code § 2309* did not apply because it only requires an agent to have written authority to "enter into a contract" for the principal. The clerk in this case had not entered into the contract in the sense of exercising any discretion in making the agreement to purchase the machinery but had simply acted as a scrivener. An oral request to perform the purely mechanical act of signing the principal's name at the principal's request is valid whether the signing is done in or out of the principal's presence (*95 Cal. App. 2d 306, 311-313)* .

[b] Agent Is Not Required to Sign Contract in Principal's Immediate Presence

The facts and procedural background of ***Estate of Stephens v. Williams*** *(2002) 28 Cal. 4th 665, 678, 122 Cal. Rptr. 2d 358, 49 P.3d 1093* , are discussed in [a], *above*. The California Supreme Court stated that application of the amanuensis rule was not confined to the situation in which an agent signs a contract in the principal's immediate presence. It may also apply when an agent, acting with merely mechanical and no discretionary authority, signs the principal's name outside the principal's presence. The Court rejected the formalistic notion that an amanuensis must sign the document in the presence of the principal. Whether the principal directs the amanuensis by telephone, or as in this case, tells the amanuensis to sign the document and the actual signing is done outside the principal's presence, courts are required to determine whether the signing is a mechanical act (*28 Cal. 4th 665, 675-676*).

[c] Agent Is Not Required to Be Disinterested Party

The facts and procedural background of ***Estate of Stephens v. Williams*** *(2002) 28 Cal. 4th 665, 678, 122 Cal. Rptr. 2d 358, 49 P.3d 1093* , are discussed in [a], *above*. The California Supreme Court noted that the daughter who had signed her father's name to a grant deed conveying his home to himself and to his daughter as joint tenants claimed to be an amanuensis despite the fact that she was also the sole beneficiary of the transfer. No prior California decision addressed the issue of an "interested amanuensis." In such a case, the obvious concern is whether the transfer is a product of fraud, duress, or undue influence. The court stated that the amanuensis rule is an exception to *Civ. Code §§ 2309* and *2310*, and *Prob. Code § 4264(c)*. Because unscrupulous parties could attempt to use the amanuensis rule to sidestep the protections contained in those code sections, the Court held that the signing of a grantor's name by an interested amanuensis must be presumed invalid. In such a case, the interested amanuensis bears the burden to show that his or her signing of the grantor's name was a mechanical act in that the grantor intended to sign the document using the instrumentality of the amanuensis. Here, given that the daughter was an interested party to the deed, it was presumed that her signing of her father's name was invalid. However, this presumption was successfully rebutted. The trial court had found, based on overwhelming evidence, that she signed the deed at her father's direct request. Because her signature was a mere mechanical act, and not an exercise of judgment or discretion, his oral instruction was sufficient. The court stated further that it was perfectly natural for a parent to be more bountiful to the child who has assumed the

greatest burden of care and lavished the highest degree of solicitude on him. The court therefore held that the conveyance must be deemed valid as a deed executed by the grantor pursuant to *Civ. Code § 1091* (*28 Cal. 4th 665, 676-678)* .

[4] Additional Authorities

[a] Written Authority Is Not Required to Perform Mechanical Act of Signing Name (Amanuensis Rule)

Ellis v. Mihelis (1963) 60 Cal. 2d 206, 32 Cal. Rptr. 415, 384 P.2d 7 , involved a contract to sell a ranch. When the plaintiff's agent notified the plaintiff that the seller had signed the contract, the plaintiff told his agent to sign the plaintiff's name to the contract. The plaintiff's agent did so, signing "Herbert E. Ellis, Jr. By Antone L. Ratto Jr." After the seller refused to go through with the deal, the plaintiff sued for specific performance and damages. The defendant appealed from a judgment for the plaintiff. The Supreme Court reversed and rejected, on several grounds, the defendant's contention that the plaintiff could not rely on the contract because the plaintiff's agent did not have written authority to enter into the contract, as required by *Civ. Code §§ 1624(a)(3)* and *2309*. The agent's signing of the plaintiff's name was purely a mechanical act that did not involve the exercise of discretion. Written authorization from the principal is not necessary, and the signature is to be treated as that of the principal whether or not the principal was present at the execution of the contract (*60 Cal. 2d 206, 214)* .

In *Kadota Fig Ass'n v. Case-Swayne Co. (1946) 73 Cal. App. 2d 796, 167 P.2d523* , the court of appeal rejected an argument that a surety stay bond required in relation to an attachment of personal property was void for failure to have been properly executed. The proper agent of the surety company, who did have written authority from the company, personally approved the terms and conditions, including the amount, of the bond, but he was not available to sign it and orally directed a judge of the court in which the underlying action was pending to sign the agent's name to the bond. The judge did so, and the court of appeal held that the signature was proper, as no discretion was involved in signing the agent's name, which was a purely mechanical act. The court held that *Civ. Code § 2309* did not apply because the judge was not given the authority to "enter into a contract" but only to sign the properly authorized agent's name (*73 Cal. App. 2d 796)* .

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CHAPTER 216 STATUTE OF FRAUDS
PART II. FORMS
B. Agent Making Contract Within Statute of Frauds

21-216 California Points & Authorities § 216.73

§ 216.73 Written Contract May Be Enforced Even Though Made by Agent Without Written Authority--Written Authority Is Not Required When Contract Is Between Principal and Agent

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*specify contention, e.g.,* THE PLAINTIFF IS ENTITLED TO INDEMNITY FROM THE DEFENDANT FOR DAMAGES THAT THE PLAINTIFF WAS REQUIRED TO PAY TO _____ (*name*) BECAUSE OF THE DEFENDANT'S BREACH OF THE CONTRACT THAT THE PLAINTIFF MADE WITH _____ (*name*) ON THE DEFENDANT'S BEHALF], EVEN THOUGH THE CONTRACT WAS UNENFORCEABLE BY _____ [*name*] AGAINST THE DEFENDANT UNDER *CIVIL CODE SECTION 2309* BECAUSE THE PLAINTIFF'S AUTHORITY TO CONTRACT FOR THE DEFENDANT WAS NOT IN WRITING, SINCE SECTION 2309 DOES NOT APPLY AS BETWEEN THE PRINCIPAL AND AN AGENT.

No Writing Is Required Between Principal and Agent. *Civil Code Section 2309*, which requires that written authority be given to enter into a contract required by law to be in writing, does not prohibit enforcement of an agreement between the principal and agent (*Sunset-Sternau Food Co. v. Bonzi (1964) 60 Cal. 2d 834, 842, 36 Cal. Rptr. 741, 389 P.2d 133*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that *Civ. Code § 2309*, which requires an agency agreement to be in writing if the agent is authorized to enter contracts required to be in writing, does not prohibit enforcement of an agency agreement between the principal and agent. The argument supported by these points and authorities may be raised by an agent relying on such an agency agreement--for example, to recover his or her commission or to recover indemnification for damages the agent was required to pay to the third party, with whom he or she contracted on the principal's behalf, after the principal breached the contract with the third party.

These points and authorities cannot be used, however, if the agency is for the sale or purchase of real property or an interest in real property or for the lease of real property for a term longer than one year, because an agreement to pay compensation or a commission to an agent, broker, or any other person in relation to such a sale, purchase, or lease is expressly required to be in writing [*Civ. Code § 1624(a)(4)*; *see* Ch. 31, *Brokers and Salespersons*].

[b] Argument

Counsel should add argument linking these points and authorities with the facts of the case.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] No Writing Is Required Between Principal and Agent

In ***Sunset-Sternau Food Co. v. Bonzi*** *(1964) 60 Cal. 2d 834, 36 Cal. Rptr. 741, 389 P.2d 133* , the plaintiff entered into an oral agreement to obtain a buyer for the defendant's apricot kernels. The plaintiff was to deal in its own well-known name, and did so, entering into a contract with a third party for the sale of apricot kernels in its own name. When the price of apricot kernels suddenly soared, the defendant refused to deliver, and the third party successfully sued the plaintiff for damages, which the plaintiff paid. The plaintiff then sued the defendant for indemnity and obtained a judgment. The defendant appealed.

The Supreme Court affirmed. *Civ. Code § 2309*, which provides that authority to enter into a contract required by law to be in writing can only be given in writing, precludes only liability of the principal to the third party on the contract entered into by the agent, and does not affect the agency agreement between the agent and the principal (*60 Cal. 2d 834, 837-843)* . The word "authority" is a technical term used in the law of agency to refer to the power of the agent to obligate the principal to a third party, and not referring to obligations between the principal and agent. Code commissioners' notes to the chapter that includes *Civ.Code § 2309* limit the chapter to dealing with the representation of one person by another and cross-refer to provisions relating to the mutual relation of principal and agent (*60 Cal. 2d 834, 839*). California case law allows agents to recover commissions or damages from principals based on oral agency agreements (*60 Cal. 2d 834, 839-841*). Allowing the agent indemnification by the principal would not abrogate *Civ. Code § 2309*, because that section would still restrict the rights of the third party against the principal, and since the agent's right to indemnification arises only on payment of damages to the third party, the rule would insulate the principal from liability when the agent was insolvent (*60 Cal. 2d 834, 841-842)* .

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B. Agent Making Contract Within Statute of Frauds

21-216 California Points & Authorities § 216.74

§ 216.74 Written Contract May Be Enforced Even Though Made by Agent Without Written Authority--Contract May Be Enforced When Principal Ratified Agent's Unauthorized Act of Signing of Contract for Principal

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE WRITTEN CONTRACT SIGNED ON BEHALF OF THE _____ [*party to be charged, e.g.,* DEFENDANT] BY _____ [*agent signing contract for party to be charged*] IS ENFORCEABLE AGAINST THE _____ [*e.g.,* DEFENDANT] BECAUSE _____ [*agent*]'S ACT OF SIGNING FOR THE _____ [*e.g.,* DEFENDANT] WAS RATIFIED BY THE _____ [*e.g.,* DEFENDANT].

A. Principal Can Implicitly Ratify Agent's Unauthorized Act on Principal's Behalf. An agent's unauthorized act may be adopted by implication based on conduct of the principal from which an intention to consent to or adopt the act may be fairly inferred, including conduct that is inconsistent with any reasonable intention on the principal's part, other than that the principal intended approving and adopting it (*Rakestraw v. Rodrigues (1972) 8 Cal. 3d 67, 73, 104 Cal. Rptr. 57, 500 P.2d 1401*).

B. Agent's Unauthorized Signing of Contract Can Be Ratified by Principal Act of Signing Related Documents That Imply Existence of Contract. When an agent has signed the principal's name on a contract without having authority to execute the contract on the principal's behalf, the principal will be held to have ratified the agent's act if the principal subsequently, and with knowledge that the other party made an offer, signs related documents that imply the existence of the contract in question (*Behniwal v. Mix (2005) 133 Cal. App. 4th 1027, 1039-1042, 35 Cal. Rptr. 3d 320*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that a written agreement is not unenforceable even though it was executed on behalf of the party to be charged by an agent without written authority. The ground for the contention is that the absence of written authority, which normally is required [*see Civ. Code § 2309*], is not relevant when the unauthorized execution was subsequently ratified by the principal. The argument supported by these points and authorities may be raised by a party relying on a contract within the statute of frauds that was signed by an agent, whose act was subsequently ratified by the principal, when the adverse party urges that the contract is invalid because the agent lacked written authority to enter into the contract.

[b] Argument

Counsel should add argument linking these points and authorities with the facts of the case. For example, counsel should include discussion of the facts showing that the principal not only knew that an offer had been made but also, with that knowledge, signed related documents, in which references necessarily implied the existence of the contract in question.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Principal Can Implicitly Ratify Agent's Unauthorized Act on Principal's Behalf

Rakestraw v. Rodrigues *(1972) 8 Cal. 3d 67, 104 Cal. Rptr. 57, 500 P.2d 1401* , was an action to enforce a promissory note on which the agent had forged the principal's signature. After the note was thus executed, the principal discovered the forgery and demanded a role in the business that the faithless agent was financing with the borrowed money. Only when the note became delinquent three years later did the principal complain of the forgery, seeking reimbursement from the agent. The trial court entered judgment for the principal, and the agent appealed.

The California Supreme Court reversed, holding that the principal had ratified the forgery (*8 Cal. 3d 67, 72*). The principal's election not to rescind thetransaction as soon as the principal could have done so, knowing the nature of the forgery, constituted a ratification of the transaction (*8 Cal. 3d 67, 75*). The court noted that ratification may occur expressly or by implication, and ratification by implication is conduct of the principal from which an intention to consent to or adopt the act may be fairly inferred, including conduct that is inconsistent with any reasonable intention on his or her part, other than his or her intention to approve and adopt the act (*8 Cal. 3d 67, 73)* .

[b] Agent's Unauthorized Signing of Contract Can Be Ratified by Principal's Act of Signing Related Documents That Imply Existence of Contract

In ***Behniwal v. Mix*** *(2005) 133 Cal. App. 4th 1027, 35 Cal. Rptr. 3d 320* , the plaintiff sought specific performance of a contract to sell real property. The defendant knew of the plaintiff's offer to buy the property but never signed the contract so as to accept the offer. The defendant's agent signed the defendant's name, without being authorized to execute the contract; and the plaintiff believed that the defendant had signed. Soon thereafter, with knowledge that an escrow was open for concluding the sale, the defendant signed several statutory disclosure forms, in which various references clearly implied the existence of the contract. The trial court concluded, however, that because there was no writing signed by the defendant, in which the essential terms of the contract were shown, the court could not decree specific performance. Judgment was entered for the defendant.

The court of appeal reversed and noted that there is a difference between (1) a writing sufficient to satisfy the statute of

frauds and (2) conduct, including the signing of a document, that is sufficient to ratify an agent's authority to have entered into a written contract which, apart from the question of the agent's authority, would otherwise satisfy the statute of frauds. The question before the court was whether the defendant's signatures on the disclosure forms were sufficient to effect a ratification of what the agent had done on the defendant's behalf. "That is, ratification does *not* entail a requirement that the writing sufficiently set forth the terms of the agreement. The idea is that the terms are *already* identifiable; we only need to ascertain whether the principal accepted them. We must therefore conclude that the answer to our question is yes" (*133 Cal. App. 4th 1027, 1039)* . In this case, without a doubt, the disclosure statements were signed by the seller in contemplation of concluding a sale to the plaintiff, with knowledge that an escrow was open for that purpose.

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[Reserved]

§§ 216.75[Reserved]

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CHAPTER 216 STATUTE OF FRAUDS
PART II. FORMS
C. Sufficiency of Written Memorandum

21-216 California Points & Authorities § 216.90

§ 216.90 Memorandum of Agreement Does Not Satisfy Statute of Frauds--Memorandum Does Not Contain All Essential Terms of Agreement

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE MEMORANDUM OF THE PARTIES' AGREEMENT DOES NOT SATISFY THE STATUTE OF FRAUDS BECAUSE IT DOES NOT CONTAIN ALL OF THE ESSENTIAL TERMS OF THE AGREEMENT WITH REASONABLE CERTAINTY.

Essential Terms Must Be Stated With Reasonable Certainty. A memorandum satisfies the statute of frauds, *Civil Code Section 1624(a)*, if it identifies the subject of the parties' agreement, shows that they made a contract, and states the essential contract terms with reasonable certainty. What is essential depends on the agreement and its context, and also on the subsequent conduct of the parties (*Sterling v. Taylor (2007) 40 Cal. 4th 757, 766, 55 Cal. Rptr. 3d 116, 152 P.3d 420*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that an oral agreement within the statute of frauds is not evidenced by a sufficient memorandum because the memorandum in question does not contain all of the essential terms of the agreement. The argument supported by these points and authorities may be raised by a party relying on the statute of frauds whenever the adverse party relies on a memorandum of an agreement in order to avoid the statute of frauds, but the memorandum fails to contain all the essential terms of the agreement.

[b] Argument

Counsel should add argument linking these points and authorities with the facts of the case. Specifically, counsel should

identify those terms of the agreement that the counsel's client contends are essential, explain why they are essential in the context of the particular agreement, and show that they are absent from the written memorandum of the agreement.

[c] Related Points and Authorities

These points and authorities may be combined with points and authoritiessupporting the contention that the contract at issue is within the statute of frauds [*see, e.g., §§ 216.10[1],* 216.30[1], 216.40[1]].

For points and authorities supporting a demurrer to a complaint to recover a real estate broker's commission on the ground that the memorandum of the agreement to pay a commission was insufficient to satisfy the statute of frauds, see Ch. 31, *Brokers and Salespersons* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Essential Terms Must Be Stated With Reasonable Certainty

Sterling v. Taylor *(2007) 40 Cal. 4th 757, 55 Cal. Rptr. 3d 116, 152 P.3d 420* , is discussed in *§ 216.92[3][d]*. In discussing the use of extrinsic evidence to establish the terms of a contact subject to the statute of frauds, the court began its analysis by noting the statute does not require a written contract; a note or memorandum subscribed by the party to be charged is adequate. A written memorandum is not identical with a written contract; it is merely evidence of the contract and usually does not contain all of the terms (*40 Cal. 4th 757, 765-766)* . In most instances it is not even necessary that the parties intended the memorandum to serve a contractual purpose. Citing the *Restatement 2d of Contracts* and other authorities, the court held that "[a] memorandum satisfies the statute of frauds if it identifies the subject of the parties' agreement, shows that they made a contract, and states the essential contract terms with reasonable certainty." Only the essential terms must be stated. What is essential depends on the agreement and its context and also on the subsequent conduct of the parties. The writing requirement of the statute of frauds serves only to prevent the contract from being unenforceable; it does not necessarily establish the terms of the parties' contract (*40 Cal. 4th 757, 766)* .

The court further held that because the memorandum itself must include the essential contractual terms, extrinsic evidence cannot *supply* those required terms, but can be used to *explain* essential terms that were understood by the parties but would otherwise be unintelligible to others (*40 Cal. 4th 757, 767)* [see discussion in *§ 216.92[3][d]*].

The court explained that it was addressing an issue specifically arising under *Civ. Code § 1624(a)*, and that its discussion "does not apply to any other 'statute of frauds' imposing a stricter writing requirement ...#x2026; [or to] the more liberal statute of frauds provided in the Uniform Commercial Code" (*40 Cal. 4th 757, 765 n.5*).

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21-216 California Points & Authorities § 216.91

§ 216.91 Memorandum of Agreement Does Not Satisfy Statute of Frauds--Name on Memorandum Was Not Adopted as Signature by Party to be Charged

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE MEMORANDUM IS INSUFFICIENT TO SATISFY THE STATUTE OF FRAUDS BECAUSE IT DOES NOT APPEAR ON THE FACE OF THE MEMORANDUM THAT THE NAME RELIED ON AS A SIGNATURE WAS PLACED ON THE DOCUMENT OR ADOPTED BY THE PARTY TO BE CHARGED WITH INTENT TO AUTHENTICATE THE WRITING.

Party to Be Charged Must Intend to Adopt Signature. Even though a signature may be printed, stamped, or typed, and need not be placed at the end of the writing, the statute of frauds is not satisfied unless it is proved that the name relied on as a signature was placed on the document or adopted by the party to be charged with the intention of authenticating the writing. The intent must appear on the face of the document itself and cannot be established by parol evidence (*Marks v. Walter G. McCarty Corp. (1949) 33 Cal. 2d 814, 820-821, 205 P.2d 1025*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that an oral agreement within the statute of frauds is not evidenced by a sufficient memorandum because it does not appear from the memorandum in question that the name relied on as a signature was placed on the memorandum, or was adopted by the party to be charged, with the intent of authenticating the memorandum. The argument supported by these points and authorities may be raised by a party relying on the statute of frauds whenever the adverse party relies on a memorandum of an agreement in order to avoid the statute of frauds, but the memorandum does not contain a name that appears to have been placed on the memorandum or adopted by the party to be charged as his or her signature with intent to authenticate the memorandum.

[b] Argument

Counsel should add argument linking these points and authorities with the facts of the case. For example, counsel might argue that the name of a party included at the beginning of the writing was set forth for identification rather than with intent to authenticate the writing [*see McNear v. Petroleum Export Corp. (1929) 208 Cal. 162, 168, 280 P 684]* .

[c] Related Points and Authorities

These points and authorities may be combined with points and authorities supporting the contention that the contract at issue is within the statute of frauds [*see, e.g., §§ 216.10[1],* 216.30[1], 216.40[1]].

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Party to Be Charged Must Intend to Adopt Signature

In ***Marks v. Walter G. McCarty Corp.*** *(1949) 33 Cal. 2d 814, 205 P.2d 1025* , the plaintiff sued to recover a real estate broker's commission in regard to the sale of a hotel and its furnishings. The defendant had given the broker an unsigned typewritten document setting forth the terms for the sale and stating that a broker's commission in a certain amount would be paid. The broker was given a carbon copy of the document, which was made on a letterhead consisting of a picture of the hotel under which was printed "The Beverly-Wilshire Hotel, Walter G. McCarty Corporation." The broker obtained a buyer, but when the defendant and the buyer concluded the sale, no commission was paid, and the broker sued. The defendant appealed from a judgment for the broker.

The Supreme Court affirmed but modified the judgment so that the amount of the commission recovered related only to the sale of the hotel furnishings, since an agreement to pay a commission on the sale of personal property need not be in writing. The plaintiff could not recover unless there was a sufficient memorandum of the agreement to pay a commission to satisfy the statute of frauds. The signature of the party to be charged need not be placed at the end of the memorandum and need not be manually affixed but may be printed, stamped, or typed. However, the statute of frauds is not satisfied unless it is proved that the name relied on as a signature was placed on the document or adopted by the party to be charged with the intention of authenticating the writing. In other words, the party to be charged must intend to appropriate the name as a signature (*33 Cal. 2d 814, 820)* . There was nothing on the face of the document in this case that would indicate that the defendant intended to adopt the letterhead as the corporation's signature. The intent that a name appearing on a document constitute a signature must appear on the face of the document itself and cannot be proved by parol evidence (*33 Cal. 2d 814, 821)* . The delivery of the document on letterhead stationery indicated, at most, intent to contract rather than intent to adopt the letterhead as a signature, and the testimony of the defendant's president indicated that the letterhead was used to identify the hotel rather than to authenticate the writing (*33 Cal. 2d 814, 821-822)* .

[4] Additional Authorities

[a] Party to Be Charged Must Intend to Adopt Signature

The court of appeal in *Berdan v. Berdan (1940) 39 Cal. App. 2d 478, 103 P.2d 622* , affirmed a judgment for the defendant in an action by his sibling for imposition of a constructive trust on half of their mother's estate. The plaintiff contended that the mother's note on the reverse of a letter from their father to the defendant constituted her promise in consideration of mutual wills to leave her estate to the plaintiff and the defendant in equal shares. The father's letter to the defendant said that he had made a new will leaving everything to their mother on the understanding that if he died

before their mother, she would leave all her estate to the plaintiff and the defendant. Mother wrote on the reverse of that letter, "Dad signed this with his signature and also 'Dad' below. The signature in case you might want to use it. Lawfully, Mother." The judgment was based in part on a finding that the signature "Mother" after a note on the reverse of the letter was not intended by their mother as her signature and therefore did not satisfy the statute of frauds. It was clear from the note that Mother did not believe the word "Dad" was a legal signature. That was sufficient evidence to show that she did not intend "Mother" as her signature (*39 Cal. App. 2d 478, 483*). The sufficiency of a signature as a subscription under the statute of frauds involves both the act of writing the party's name and the intention of finally authenticating the instrument (*39 Cal. App. 2d 478, 484-485*).

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C. Sufficiency of Written Memorandum

21-216 California Points & Authorities § 216.92

§ 216.92 Memorandum of Agreement is Sufficient to Satisfy Statute of Frauds--Essential Terms of Agreement Are Set Forth With Reasonable Certainty

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE MEMORANDUM OF THE PARTIES' AGREEMENT IS SUFFICIENT TO SATISFY THE STATUTE OF FRAUDS BECAUSE IT SETS FORTH ALL OF THE ESSENTIAL TERMS OF THE AGREEMENT WITH REASONABLE CERTAINTY.

A. Essential Terms Must Be Stated With Reasonable Certainty. A memorandum satisfies the statute of frauds, *Civil Code Section 1624(a)*, if it identifies the subject of the parties' agreement, shows that they made a contract, and states the essential contract terms with reasonable certainty. What is essential depends on the agreement and its context and also on the subsequent conduct of the parties (*Sterling v. Taylor (2007) 40 Cal. 4th 757, 766, 55 Cal. Rptr. 3d 116, 152 P.3d 420*).

B. Memorandum Must Be Interpreted in Context of Parties' Knowledge atTime of Its Execution. The court must interpret the memorandum in light of all the circumstances in which it was made, and if the court, after acquiring knowledge of all the facts concerning the transaction that the parties possessed at the time the agreement was made, can plainly determine from the memorandum the identity of the parties to the contract, the nature of its subject matter, and its essential terms, the memorandum will be adequate (*Sterling v. Taylor (2007) 40 Cal. 4th 757, 766-767, 55 Cal. Rptr. 3d 116, 152 P.3d 420* ; *Kaneko v. Okuda (1961) 195 Cal. App. 2d 217, 230, 15 Cal. Rptr. 792* ; *Gibson v. De La Salle Inst. (1944) 66 Cal. App. 2d 609, 620, 152 P.2d 774*).

C. Formal Contract Containing Every Term of Agreement Is Not Required. The writing need not be a formal contract drawn with technical exactness or even one intended to create an obligation (*Kaneko v. Okuda (1961) 195 Cal. App. 2d 217, 230, 15 Cal. Rptr. 792*). The memorandum functions only as evidence of the contract and need not contain every term (*Kerner v. Hughes Tool Co. (1976) 56 Cal. App. 3d 924, 934, 128 Cal. Rptr. 839* ; *Kaneko v.*

Okuda (1961) 195 Cal. App. 2d 217, 230, 15 Cal. Rptr. 792).

[*Optional*] **D. Extrinsic Evidence Is Admissible to Resolve Uncertainty.** If a memorandum includes the essential terms of the parties' agreement, but the meaning of those terms is unclear, the memorandum is sufficient under the statute of frauds, *Civil Code Section 1624(a)*, if extrinsic evidence clarifies the terms with reasonable certainty, and the evidence as a whole demonstrates that the parties intended to be bound (*Sterling v. Taylor (2007) 40 Cal. 4th 757, 771, 55 Cal. Rptr. 3d 116, 152 P.3d 420*).

[*Optional*] **E. Memorandum Evidencing Requirements Contract Is Sufficiently Precise.** An agreement will not be held deficient under the statute of frauds for the failure to express what is clearly implied when the writing is interpreted in accordance with the intentions of the parties. Requirements contracts have been enforced when the surrounding circumstances indicate the approximate scope of the promise. Since a requirements contract is sufficiently precise to be enforceable, a memorandum containing its essential terms is sufficiently precise to satisfy the statute of frauds (*Seaman's Direct Buying Service, Inc. v. Standard Oil Co. (1984) 36 Cal. 3d 752, 762-763, 206 Cal. Rptr. 354, 686 P.2d 1158*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that an alleged contract is referenced by a certain memorandum of agreement that is sufficient to satisfy the statute of frauds. The argument supported by these points and authorities may be raised whenever a party is relying on an agreement within the statute of frauds that is evidenced by a memorandum, and the adverse party contends that the agreement is invalid because the memorandum is deficient.

[b] Argument

Counsel should add argument linking these points and authorities with the facts of the case. For example, counsel should demonstrate that some writing signed by the person to be charged contains the essential elements of a specific agreement. The writing will be insufficient if it discloses no agreement. If the writing imparts the essentials of a contractual obligation but fails to do so in an explicit, definite, or complete manner, it is always permissible to show the circumstances that attended its making. In this regard, extrinsic evidence is admissible to explain trade terms or code words, to resolve ambiguities on the face of the writing, or to ascertain a term of the agreement by resort to another document referred to by the writing. What counsel must show is that the memorandum itself demonstrates the existence of a contractual intent on the part of the party to be charged; in that case, the memorandum will satisfy the statute of frauds, even though extrinsic evidence is necessary to define the limits of the contract [*see Sterling v. Taylor (2007) 40 Cal. 4th 757, 770, 55 Cal. Rptr. 3d 116, 152 P.3d 420* ; *Franklin v. Hansen (1963) 59 Cal. 2d 570, 574, 30 Cal. Rptr. 530, 381 P.2d 386 , disapproved on other grounds, Sterling v. Taylor (2007) 40 Cal. 4th 757, 769, 770, 55 Cal. Rptr. 3d 116, 152 P.3d 420]* .

[c] Related Points and Authorities

For points and authorities opposing a demurrer to a complaint to recover a real estate broker's commission on the ground that there is a sufficient memorandum of the agreement to pay a commission, see Ch. 31, *Brokers and Salespersons* .

For points and authorities opposing a demurrer to a complaint for breach of a contract for the sale of goods on the ground that there is a sufficient memorandum of the sales contract, see Ch. 206, *Sales* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of

this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Points and Authorities

The points and authorities *set out in § 216.90* may be used in an appropriate case to oppose an argument supported by these points and authorities.

[3] Discussion of Authorities

[a] Essential Terms Must Be Stated With Reasonable Certainty

Sterling v. Taylor *(2007) 40 Cal. 4th 757, 55 Cal. Rptr. 3d 116, 152 P.3d 420* ,is discussed in *§ 216.92[3][d]*. In discussing the use of extrinsic evidence to establish the terms of a contract subject to the statute of frauds, the court began its analysis by holding that a memorandum satisfies the statute of frauds if it identifies the subject of the parties' agreement, shows that they made a contract, and states the essential contract terms with reasonable certainty. The court also explained that it was addressing an issue specifically arising under *Civ. Code § 1624(a)* and that its discussion "does not apply to any other 'statute of frauds' imposing a stricter writing requirement ...#x2026; [or to] the more liberal statute of frauds provided in the Uniform Commercial Code" (*40 Cal. 4th 757, 766)* .

[b] Memorandum Must Be Interpreted in Context of Parties' Knowledge at Time of Its Execution

The facts of ***Sterling v. Taylor*** *(2007) 40 Cal. 4th 757, 55 Cal. Rptr. 3d 116, 152 P.3d 420* , are discussed in *§ 216.90[3][a]*. *Sterling* concluded that extrinsic evidence can be used to explain essential terms in a memorandum that were understood by the parties but would otherwise be unintelligible to others (*40 Cal. 4th 757, 767)* . The California Supreme Court held that if a memorandum includes the essential terms of the parties' agreement, but the meaning of those terms is unclear, the memorandum is sufficient under the statute of frauds if (1) extrinsic evidence clarifies the terms with reasonable certainty, and (2) the evidence as a whole demonstrates that the parties intended to be bound (*40 Cal. 4th 757, 771)* . In so holding, the Court disapproved of statements in California cases barring consideration of extrinsic evidence to determine the sufficiency of a memorandum under the statute of frauds, including *Burge v. Krug (1958) 160 Cal. App. 2d 201, 207 325 P.2d 119* , and *Ellis v. Klaff (1950) 96 Cal. App. 2d 471, 216 P.2d 15 (40 Cal. 4th 757, 770)* .

In ***Kaneko v. Okuda*** *(1961) 195 Cal. App. 2d 217, 15 Cal. Rptr. 792* , the four defendants each owned 125 shares of stock in a corporation. All defendants signed an application to the Commissioner of Corporations for the transfer of 100 shares (25 from each of the defendants) to the plaintiff for $100 a share. On the same day, all parties except for one of the defendants signed an agreement for the sale of 300 shares, at $100 a share. The agreement provided for the plaintiff to buy 100 shares on execution of the agreement and to receive an option to purchase 200 more. The plaintiff delivered a check to the defendants for $10,000 to cover the first 100 shares, but they returned it and refused to proceed on the ground that the contract did not express the parties' full agreement. The plaintiff's subsequent checks for $7,500 to each of the defendants, covering the price for all 300 shares, were also returned, and the plaintiff sued for specific performance. The trial court ordered specific performance by the three defendants who signed the agreement, to the extent of 75 shares each, and by the nonsigning defendant, to the extent of 25 shares. The plaintiff and the defendants appealed. On appeal, the defendants argued that the application to the commissioner to transfer the stock was not a sufficient memorandum to take the agreement out of the statute of frauds as to the defendant who had not signed the agreement between the parties.

The court of appeal affirmed. A writing was necessary to remove an agreement for the sale of $500 or more in stock in a corporation from the statute of frauds. If the trial court, after acquiring knowledge of all the facts concerning the transaction that the parties themselves possessed at the time the agreement was made, could plainly determine from the memorandum the identity of the parties to the contract, the nature of its subject matter, and its essential terms, the

memorandum must be held to be adequate [*Brewer v. Horst & Lachmund Co. (1900) 127 Cal. 643, 646, 60 P 418]* (*195 Cal. App. 2d 217, 230)* . The application to the commissioner, signed by the defendant, revealed that the defendant owned 125 shares of stock in a specified corporation and that he wanted to transfer 25 of the shares to the plaintiff for $100 a share; and the application further stated the purpose of the transfer. The application contained all of the essentials of the agreement and was a sufficient memorandum to avoid the statute of frauds (*195 Cal. App. 2d 217, 230-231)* .

Gibson v. De La Salle Inst. *(1944) 66 Cal. App. 2d 609, 152 P.2d 774* , was an action for the specific performance of a sales contract based on two telegrams. The first telegram, from the seller to the buyers, stated, "Find it necessary to ask for following prices 275,000 gallons sherry.85 Stop 80,000 gallons muscatel.90 Stop 45,000 gallons port.85 Stop 50,000 gallons dry red.50 Stop 50,000 gallons dry white.70 Stop or an average price of.80 per gallon on the above 500,000 gallons terms cash but can supply warehouse receipts on 250,000 gallons Stop Please wire today if interested and samples and sales contract will go forward." The second telegram, from the buyers to the seller, read, "Retelegram take all wine at prices specified except dry red and dry white prepare sales contract and ship samples at once wire today confirmation sale sweet wine to us so we may commence accumulating funds for cash payments." On the seller's motion for summary judgment, one of the buyers stated in his affidavit that an agreement for the sale of wine at approximate prices had been made in Chicago but that the seller's representative had declined to fix exact prices for each variety until he had returned to California. The affiant received the seller's telegram shortly thereafter and wired his acceptance within two hours of receiving the telegram. The reference to a sales contract in the buyer's telegram was explained as something the buyer had suggested in the Chicago meeting that he wanted to show to his bankers and was intended only as a substitute for the contract made by the telegrams. The request for a telegram in confirmation was not a condition to the contract but was requested in order to have something to show the bankers until the contract arrived. The samples, which were later waived, were also not a condition of acceptance. The buyers also alleged subsequent telephone conversations with the seller's representative involving the sale of an additional 100,000 gallons of wine, waiver of the request for samples, and the seller's request that oneof the buyers come to California from Ohio to accept delivery of the wine and make payment for it. When the buyer came to California, the seller's representative failed to meet him and refused to sell the wine. The trial court granted summary judgment for the seller, and the buyers appealed. On appeal, the seller's position was that any contract could only be established by writings, and the telegrams were insufficient to establish a contract. The seller contended that its telegram was not an offer, but merely a quotation; that if it were an offer, it was not accepted by the buyers' telegram; and that the seller's telegram was an insufficient memorandum under the statute of frauds for failure to specify the quality of wine to be sold.

The court of appeal reversed. It was well established that when the meaning of language used in a memorandum under the statute of frauds is ambiguous, parol evidence is admissible to show the circumstances surrounding the transaction to determine the meaning intended and understood by the parties (*66 Cal. App. 2d 609, 619)* . If the court were restricted to looking at the telegrams, it might be difficult, if not impossible, to determine the nature of the contract, or that any contract was entered into between the parties; therefore, the court may interpret the memorandum (that is, the telegrams) in the light of all the circumstances under which it was made. Thus, when the court is put into possession of all of the knowledge that the parties to the transaction had at the time, if it can be plainly seen from the memorandum who the parties to the contract were, what the subject matter of the contract was, and what were its terms, then the court should not hesitate to hold the memorandum sufficient [*Brewer v. Horst & Lachmund Co. (1900) 127 Cal. 643, 646-647, 60 P 418]* (*66 Cal. App. 2d 609, 620)* . The meaning of the telegrams, whether the seller's telegram was a mere quotation or an offer and whether the buyers' telegram constituted an acceptance, presented issues of fact for trial in light of the surrounding circumstances (*66 Cal. App. 2d 609, 624-626)* .

[c] Formal Contract Containing Every Term of Agreement Is Not Required

Kerner v. Hughes Tool Co. *(1976) 56 Cal. App. 3d 924, 128 Cal. Rptr. 839* , was an action for breach of a contract pursuant to which the plaintiff was to produce a Broadway show at the defendant's Las Vegas showroom. After oral negotiations, the defendant's agent wrote in a letter to the plaintiff that the agent would "play 'My Fair Lady' around

February or March of 1969 at the Frontier Hotel for a minimum guaranteed run of one year at Seventy-five Thousand ($75,000) Dollars weekly for show and orchestra." The letter also stated that it was "further agreed and understood that if you are unable to bring 'My Fair Lady' in for a price of $75,000 that you will notify me immediately and in no event later than August 27, 1968." The letter concluded that "[t]his agreement will serve as a firm commitment." Before August 27, 1968, the plaintiff wrote to the defendant that "the agreed upon price of $75,000 per week for show and orchestra is okay." The defendant's agent subsequently wrote to the plaintiff that the play would not be available at the time referred to in his previous letter and would not be available until "after September, 1969." The letter also noted that because of the change in availability, the defendant had to reduce the guaranteed run to six months with three-month options, and concluded by requesting to "hear from you in the near future regarding an open date convenient to all parties." Subsequently, after the plaintiff refused to agree to a proposal that the defendant be given the right to cancel the show on two weeks' notice, the defendant backed out of the deal altogether on the ground that there was no commitment. The plaintiff was awarded a judgment for lost profits, and the defendant appealed. The defendant contended that the contract was invalid because the only memoranda of the contract failed to specify the essential elements of the starting date, identity of performers, responsibility for stagehands, and allocation of preproduction costs.

The court of appeal affirmed. A letter may be a sufficient memorandum to take a case out of the statute of frauds. The use of the word "memorandum" in the statute of frauds implies something less than a complete contract, and a memorandum functions only as evidence of the contract and need not contain every term [*Crowley v. Modern Faucet Mfg. Co. (1955) 44 Cal. 2d 321, 323, 282 P.2d 33]* . The statute of frauds does not require more written terms than are required to make the contract itself. The memoranda in this case satisfied the statute of frauds since they contained a statement of the salient terms of the bargain: the plaintiff would supply a show and orchestra, and the defendant would pay $75,000 per week. The modification of the starting date to "after September, 1969" did not make the contract fatally uncertain because time was not of the essence, and a reasonable time within which to perform would be allowed (*56 Cal. App. 3d 924, 934)* .

The facts and procedural background of *Kaneko v. Okuda (1961) 195 Cal. App. 2d 217, 15 Cal. Rptr. 792* , are discussed in [b], *above*. In affirming, the court of appeal, relying on *Guerrieri v. Severini (1955) 132 Cal. App. 2d 269, 274, 281 P.2d 879* , held that the writing relied on to bring a contract out of the statute of frauds need not be a formal contract drawn with technical exactness or even one intended to create an obligation. Moreover, the court, citing *Gibson v. De La Salle Inst. (1944) 66 Cal. App. 2d 609, 627, 152 P.2d 774* , stated that the memorandum need not contain all of the details of an agreement (*195 Cal. App. 2d 217, 230*).

[d] Extrinsic Evidence Is Admissible to Resolve Uncertainty

In ***Sterling v. Taylor*** *(2007) 40 Cal. 4th 757, 55 Cal. Rptr. 3d 116, 152 P.3d 420* , the plaintiff sought enforcement of a contract to sell real property. The evidence and the defendant's admissions established that the parties had made an agreement to sell the property in question, but the defendant (seller) contended that the price was near $17 million, while the plaintiff (buyer) contended that theprice was a little over $14 million. The only evidence of the price was a memorandum handwritten by the plaintiff, which was ambiguous as to the price on which the parties had agreed. This memorandum was referenced by a letter that the defendant had signed, which met the signature requirement in the statute of frauds. The trial court granted the defendant's motion for summary judgment on the ground that the price term was too uncertain to be enforced, and therefore the writings did not comply with the statute of frauds. The court of appeal, reversing, held that the price terms in the memorandum, while ambiguous, could be clarified by examining extrinsic evidence. It concluded that the defendant's evidence raised a triable issue as to whether the parties had agreed on a formula for determining the purchase price.

In the Supreme Court the defendant contended that the court improperly considered extrinsic evidence to resolve the uncertainty about the price. The court stated, "We reverse, but not because the court consulted extrinsic evidence. Extrinsic evidence has long been held admissible to clarify the terms of a memorandum for purposes of the statute of frauds. Statements to the contrary appear in some cases, but we disapprove them. A memorandum serves only an

evidentiary function under the statute. If the writing includes the essential terms of the parties' agreement, there is no bar to the admission of relevant extrinsic evidence to explain or clarify those terms. The memorandum, viewed in light of the evidence, must be sufficient to demonstrate with reasonable certainty the terms to which the parties agreed to be bound. Here, plaintiff[s] attempt[s] to enforce a price term that lacks the certainty required by the statute of frauds" (*40 Cal. 4th 757, 762)* . On the issue of whether extrinsic evidence could be admitted, the court held that if a memorandum includes the essential terms of the parties' agreement, but the meaning of those terms is unclear, the memorandum is sufficient under the statute of frauds if extrinsic evidence clarifies the terms with reasonable certainty and the evidence as a whole demonstrates that the parties intended to be bound. Conflicts in the extrinsic evidence are for the trier of fact to resolve, but whether the evidence meets the standard of reasonable certainty is a question of law for the court (*40 Cal. 4th 757, 771)* .

The court noted that its discussion applied only to *Civ. Code § 1624(a)*, the general statute of frauds, and did not apply to any other statute of frauds imposing a stricter writing requirement [*see, e.g., Civ. Code § 1803.1 et seq.* (retail installment contracts); *Fam. Code §§ 852, 1611* (transmutation agreements; premarital agreements)] or to the more liberal statute of frauds provided in the Uniform Commercial Code [*see Com. Code § 2201*] (*40 Cal. 4th 757, 766 n.5*).

[e] Memorandum Evidencing Requirements Contract Is Sufficiently Precise

In ***Seaman's Direct Buying Service, Inc. v. Standard Oil Co.*** *(1984) 36 Cal. 3d 752, 206 Cal. Rptr. 354, 686 P.2d 1158* , the plaintiff managed a small marine fueling station. The city where the plaintiff operated decided to condemn the waterfront area and develop it into a modern marina. The plaintiff and the city signed an initial lease for a small area of the marina, with the understanding that the lease could be renegotiated to include a larger area for the plaintiff to sublet to others, conditioned on the plaintiff's providing evidence of financial responsibility. The key to approval of the larger lease was the plaintiff's operation of a marine fuel dealership with modernized fueling equipment. To obtain that dealership, the plaintiff opened negotiations with Standard Oil. On reaching an agreement on all major points, the plaintiff repeatedly requested an instrument evidencing a binding commitment, to show to the city. Standard Oil set forth the terms of the agreement in a letter, in which it stated that the offer was subject to mutual agreement on the specific wording of contracts to be drawn, approval by governmental offices involved, and continued approval of the plaintiff's credit status. The letter said that if its terms met with the plaintiff's approval, the plaintiff should sign and return copies of the letter to Standard Oil. The plaintiff did so, presented the letter to the city, and signed a long-term lease for a large area in the marina. Shortly thereafter conditions in the oil industry changed. The agreement contemplated in the letter was never signed. Standard Oil, in response to new federal guidelines, notified the plaintiff that it would not be able to go forth with their agreement, claiming that the regulations were the only reason for its change of position. After the plaintiff obtained a supply order from the controlling federal agency, Standard Oil contended that no binding agreement had ever been reached, and successfully appealed the supply order. The plaintiff appealed and the decision was overturned. The new decision provided that an order directing Standard Oil to fulfill supply obligations to the plaintiff would be issued on the filing of a court decree that a valid contract existed between the parties under state law. The plaintiff asked Standard Oil to stipulate to the existence of a contract. Standard Oil refused, and the plaintiff discontinued operations and sued Standard Oil on several causes of action. The jury verdict was for the plaintiff. The trial court conditionally granted Standard Oil's motion for a new trial unless the plaintiff consented to a reduction of the punitive damages awarded. The plaintiff consented and the judgment was entered. Standard Oil appealed and the plaintiff cross appealed.

The Supreme Court affirmed the breach of contract judgment and reversed and remanded on other causes. The issue in the breach of contract action was whether the letter signed by both parties was sufficient to satisfy the statute of frauds. To meet requirements, the writing must contain the essential elements of a specific, consummated agreement. Only the essential terms must be stated; details or particulars need not be stated. What is essential depends on the agreement and its context and the subsequent conduct of the parties. The letter in this case evidenced an agreement that the plaintiff would become a dealer for Standard Oil, and it set forth the payment price, thereby specifying two essential elements

with sufficientspecificity. No express quantity term was necessary. An agreement will not be held deficient under the statute of frauds for the failure to express what is clearly implied when the writing is interpreted in accordance with the intentions of the parties. The implication of a dealership arrangement is that the wholesaler will supply as much fuel as the dealer requires. The plaintiff and Standard Oil entered into a "requirements contract." Requirements contracts have been enforced when the surrounding circumstances indicate the approximate scope of the promise. Since requirements contracts are sufficiently precise to be enforceable, they are sufficiently precise to satisfy the statute of frauds. The letter contained all of the essential terms of the contract, and was enforceable under *Civ. Code § 1624* (*36 Cal. 3d 752, 762-763)* .

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CHAPTER 216 STATUTE OF FRAUDS
PART II. FORMS
C. Sufficiency of Written Memorandum

21-216 California Points & Authorities § 216.93

§ 216.93 Memorandum of Agreement is Sufficient to Satisfy Statute of Frauds--Signature of Party to Be Charged Need Not Be Manually Written

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE MEMORANDUM IS SUFFICIENT TO SATISFY THE STATUTE OF FRAUDS BECAUSE AN INSTRUMENT IS DEEMED SIGNED EVEN THOUGH THE SIGNATURE IS _____ [TYPED *or* LITHOGRAPHED *or* RUBBER-STAMPED *or* PRINTED].

Typed, Lithographed, Rubber-Stamped, or Printed Signature Is Sufficient. A memorandum is deemed signed even though the signature is typed, lithographed, rubber-stamped, or printed (*Weiner v. Mullaney (1943) 59 Cal. App. 2d 620, 634, 140 P.2d 704*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that an alleged contract is referenced by a certain memorandum of agreement that is sufficient to satisfy the statute of frauds even though it bears an unconventional signature. The argument supported by these points and authorities may be raised whenever a party is relying on an agreement within the statute of frauds that is evidenced by a memorandum containing a typed, lithographed, rubber-stamped, or printed signature, and the adverse party contends that the memorandum is deficient.

[b] Argument

Counsel should add argument linking these points and authorities with the facts of the case.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Points and Authorities

The points and authorities *set out in § 216.91* may be used in an appropriate case to oppose an argument supported by these points and authorities.

[3] Discussion of Authorities

[a] Typed, Lithographed, Rubber-Stamped, or Printed Signature Is Sufficient

Weiner v. Mullaney *(1943) 59 Cal. App. 2d 620, 140 P.2d 704* , was an action for an accounting. The plaintiff's claim was based on a series of letters from the defendant, her brother. The plaintiff claimed that the letters established a trust, of which the plaintiff was beneficiary, in one-third of the property left by the parties' mother. Some of the letters had not been signed at all, but others had the defendant's initials typewritten at the end. The court entered a judgment for the plaintiff, and the defendant appealed.

The court of appeal affirmed. The typewritten initials were a sufficient signature under the statute of frauds. An instrument is deemed signed even though the signature is typed, lithographed, rubber-stamped, or printed (*59 Cal. App. 2d 620, 634-635)* .

[4] Additional Authorities

[a] Typed, Lithographed, Rubber-Stamped, or Printed Signature Is Sufficient

In *Skirball v. RKO Radio Pictures, Inc. (1955) 134 Cal. App. 2d 843, 286 P.2d 954* , an action for breach of contract, the court of appeal held that a memorandum from the defendant's vice-president in charge of commitments and of the legal department to an attorney to prepare a written contract was a sufficient memorandum of the contract. The memorandum contained the vice-president's typewritten name, and the court found that he had initialed the memorandum and adopted his typewritten name on it as his signature (*134 Cal. App. 2d 843, 863)* .

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C. Sufficiency of Written Memorandum

21-216 California Points & Authorities § 216.94

§ 216.94 Memorandum of Agreement is Sufficient to Satisfy Statute of Frauds--Initials Are Sufficient for Subscription by Party to Be Charged

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE MEMORANDUM IS SUFFICIENT TO SATISFY THE STATUTE OF FRAUDS BECAUSE INITIALS ARE SUFFICIENT AS A SUBSCRIPTION WHEN THE PARTY TO BE CHARGED INTENDED THAT THEY CONSTITUTE HIS OR HER SIGNATURE.

Initials May Be Sufficient Subscription. The essential element of a subscription sufficient to satisfy the statute of frauds is an intent, by the party to be charged, to appropriate the name or mark as a signature; it need not be a full handwritten signature to qualify, and even initials may qualify (*Poag v. Winston (1987) 195 Cal. App. 3d 1161, 1179, 241 Cal. Rptr. 330*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of party's contention that initials constitute a sufficient signature on a memorandum of agreement to satisfy the statute of frauds [*see Civ. Code § 1624*] when the party to be charged intended those initials to be his or her signature.

[b] Argument

Counsel should add argument linking these points and authorities with the facts of the case. For example, counsel should show that the party to be charged intended and understood that the initials constituted his or her signature.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Points and Authorities

The points and *authorities in § 216.91* may be used in an appropriate case to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Initials May Be Sufficient Subscription

Poag v. Winston *(1987) 195 Cal. App. 3d 1161, 241 Cal. Rptr. 330* , involved construction of a will, a trust, and related writings, in particular one labeled as the "Fifth Codicil." The primary issue was whether claims by a trust beneficiary under various related documents constituted contests within the meaning of a no-contest clause. The probate court held that claims under a written and signed agreement by the trustor granting benefits to that beneficiary were not contests prohibited by the clause. One such agreement was the "Fifth Codicil," which was typewritten with the words, "These are gifts do not take away BW," in the trustor-testator's handwriting at the end. The probate court concluded that the initials were sufficient as a subscription to satisfy the statute of frauds. The trustees appealed the order determining the rights of the beneficiary.

The court of appeal affirmed. Regarding the sufficiency of initials, the essential element of a subscription sufficient to satisfy the statute of frauds is an intent by the party to be charged to appropriate the name as a signature; it need not be a full handwritten signature to qualify. Hence, even initials qualify (*195 Cal. App. 3d 1161, 1179)* .

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C. Sufficiency of Written Memorandum

21-216 California Points & Authorities § 216.95

§ 216.95 Memorandum of Agreement is Sufficient to Satisfy Statute of Frauds--Signature on One of Series of Related Papers Is Sufficient for Subscription by Party to Be Charged

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE MEMORANDUM IS SUFFICIENT TO SATISFY THE STATUTE OF FRAUDS BECAUSE THE SIGNATURE ON THE _____ [*specify document*], WHICH IS ONE OF A SERIES OF RELATED DOCUMENTS, IS SUFFICIENT AS A SUBSCRIPTION.

Signature on One of Series of Related Documents Is Sufficient Subscription. If one of a series of papers that appear to have some relation to the same matter is signed by the party to be charged, this is enough to satisfy the statute of frauds, because all of the papers are to be considered together as forming one contract or memorandum (*Rader Co. v. Stone (1986) 178 Cal. App. 3d 10, 23, 223 Cal. Rptr. 806*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of party's contentionthat a signature on one of a series of related documents constitutes a sufficient signature to satisfy the statute of frauds [*see Civ. Code § 1624*].

[b] Argument

Counsel should add argument linking these points and authorities with the facts of the case. For example, counsel should present facts to establish that the document setting forth the terms of the obligation and the one on which the signature appears are related [*see Civ. Code § 1642*].

[c] Related Pleading and Practice Forms

For discussion of the principles of contract interpretation under which several documents are construed as one contract, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[d] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Signature on One of Series of Related Documents Is Sufficient Subscription

Rader Co. v. Stone *(1986) 178 Cal. App. 3d 10, 223 Cal. Rptr. 806* , was an action by a real estate broker to recover a commission allegedly due for obtaining a tenant for the defendant's real property. The defendant opened the property for inspection by brokers for the purpose of soliciting brokers to obtain tenants for the property. The plaintiff attended. At the open house, the defendant distributed an offering brochure and a commission schedule. The brochure said that "realtors will be registered with client at first showing and protected." An updated information sheet regarding the property also mentioned the commissions. The plaintiff took a prospective tenant to view the property and filled out the defendant's "client-realtor" registration form, which was signed by an agent of the defendant. The defendant and the plaintiff's client eventually signed a lease. The trial court entered judgment of dismissal after sustaining demurrers without leave to amend. The plaintiff appealed.

The court of appeal reversed. Regarding the sufficiency the defendant's signature on the memoranda authorizing the plaintiff to obtain a tenant for the defendant and entitling the plaintiff to a commission in accordance with the schedule for doing so, if one of a series of papers that appear to have some relation to the same matter is signed by the party to be charged, this is enough to satisfy the statute of frauds because all of the papers are construed together as forming one contract or memorandum. In this case, the brochure, update, and registration form all related to each other, so the signature requirement of the statute of frauds was satisfied (*178 Cal. App. 3d 10, 23)* .

[4] Additional Authorities

[a] Signature on One of Series of Related Documents Is Sufficient Subscription

The court of appeal in *Thompson v. Walsh (1946) 76 Cal. App. 2d 188, 172 P.2d 745* , affirmed a judgment for the plaintiffs for specific performance of an agreement to sell real and personal property. The writings were a listing agreement signed by the defendants employing the broker to sell the house unfurnished, a later listing to sell the property furnished for a higher price (reserving certain furniture for the defendants), an offer signed by the plaintiffs including a receipt signed by the broker, various escrow instructions, and letters signed only by the plaintiffs. The court of appeal said that the writings taken together satisfied the statute of frauds and stated the rule to be that if one of a series of papers that appear to have some relation to the same matter is signed by the party to be charged, this is enough to satisfy the statute of frauds because all of the papers are to be considered together as forming one contract or memorandum (*76 Cal. App. 2d 188, 194*).

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21-216 California Points & Authorities § 216.96

§ 216.96 Memorandum of Agreement is Sufficient to Satisfy Statute of Frauds--Name in Email Is Sufficient for Subscription by Party to Be Charged

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE MEMORANDUM IS SUFFICIENT TO SATISFY THE STATUTE OF FRAUDS BECAUSE A NAME IN AN EMAIL IS SUFFICIENT AS A SUBSCRIPTION.

Name in Email Is Sufficient for Subscription by Party to Be Charged. A name in an email is sufficient to satisfy the signature requirement of the statute of frauds (*Civ. Code § 1633.7*; *Lamle v. Mattel, Inc. (Fed. Cir. 2005) 394 F.3d 1355, 1362-1363)* .

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party'scontention that a name in an email constitutes a sufficient signature to satisfy the statute of frauds [*see Civ. Code § 1624*].

[b] Argument

Counsel should add argument linking these points and authorities with the facts of the case. For example, counsel should demonstrate that the email originated from the other party's email address, that the person whose name appeared on the email was one of the people who negotiated the terms in question, and that this person was authorized to contract on behalf of the party to be charged.

[3] Discussion of Authorities

[a] Name in Email Is Sufficient for Subscription by Party to Be Charged

In ***Lamle v. Mattel, Inc.*** *(Fed. Cir. 2005) 394 F.3d 1355* , a board game inventor brought an action in federal court for breach of contract, patent infringement, and intentional interference with economic relations against a toy manufacturer. The district court granted summary judgment in favor of defendant on all the claims. The Federal Circuit Court of Appeals vacated the grant of summary judgment on the contract claim, finding that there were genuine issues of material fact. With respect to the contract claim, plaintiff argued that an email from defendant's employee repeating the terms of the contract agreed upon at a prior meeting and concluding with "Best Regards" and his name satisfied the statute of frauds requirement that the writing be signed by the party against whom enforcement is sought. The Federal Circuit Court of Appeals stated that had the email been sent after January 1, 2000, there would be no question of its sufficiency under the statute of frauds because the Uniform Electronic Transactions Act [*Civ. Code § 1633.7*] provides that a "record or signature may not be denied legal effect or enforceability solely because it is in electronic form." However, because the email was sent in 1997, the court had to evaluate its validity under California common law. It noted that the Supreme Court of California has never definitively decided whether email and electronic signatures made prior to 2000 satisfy the statue of frauds. The court found, however, that under California law typed names appearing at the end of telegrams are sufficient, as are typewritten names. It found no meaningful difference between a typewritten signature on a telegram and an email. Therefore, it concluded that under California law the email satisfied the statute of frauds, assuming that there was a binding oral agreement and that the email included all the material terms of that agreement *394 F.3d 1355, 1362-1363*).

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CHAPTER 216 STATUTE OF FRAUDS
PART II. FORMS
C. Sufficiency of Written Memorandum

21-216 California Points & Authorities §§ 216.97-216.109

[Reserved]

§§ 216.97[Reserved]

California Points & Authorities

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 216 STATUTE OF FRAUDS
PART II. FORMS
D. Effect of Performance or Estoppel on Plea of Statute of Frauds

21-216 California Points & Authorities § 216.110

§ 216.110 Performance Renders Statute of Frauds Inapplicable--Statute of Frauds Is Inapplicable to Fully Executed Contract

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE STATUTE OF FRAUDS DOES NOT APPLY TO THE CONTRACT BECAUSE IT HAS BEEN FULLY EXECUTED.

Statute Does Not Cover Fully Executed Contract. The statute of frauds does not apply to fully executed contracts (*Bonaccorso v. Kaplan (1963) 218 Cal. App. 2d 63, 69, 32 Cal. Rptr. 69* ; *McComsey v. Leaf (1939) 36 Cal. App. 2d 132, 141-142, 97 P.2d 242*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that even if an oral contract is within the statute of frauds, the statute is not applicable to the contract because it has been fully executed. The argument supported by these points and authorities may be raised whenever a party is relying on a fully executed oral agreement as the basis of some right, and the adverse party contends that the agreement is invalid because it is within the statute of frauds. The argument would most likely be raised in a quiet title action or in defense of an action for rescission of the contract.

[b] Argument

Counsel should add argument linking these points and authorities with the facts of the case. For example, counsel should demonstrate that, under the terms of the oral agreement, nothing remains to be done by either party to the contract.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Statute Does Not Cover Fully Executed Contract

Bonaccorso v. Kaplan *(1963) 218 Cal. App. 2d 63, 32 Cal. Rptr. 69* , was anaction by the purchasers of real property against the sellers and the real estate agent who had negotiated the sale. The plaintiffs sought reformation of a deed of trust they had executed, which covered the entire tract that they had purchased, and an injunction against foreclosure on one parcel of the tract. They also sought damages, a declaration that they owned the parcel in question free of the trust deed, and rescission of the entire deal. The trial court found for the defendants, and the plaintiffs appealed from the judgment. The plaintiffs contended that the transaction was invalid because the documents antecedent to it did not satisfy the requirements of the statute of frauds.

The court of appeal affirmed. The plaintiffs' argument overlooked the purpose of the statute and its application to executory contracts. The contract before the court had been executed by the transfer of title and the documents of security. It has been long established that the statute of frauds has no application to an executed agreement (*218 Cal. App. 2d 63, 69)* .

In ***McComsey v. Leaf*** *(1939) 36 Cal. App. 2d 132, 97 P.2d 242* , the plaintiff sued to recover money allegedly lent to the defendant. In his affidavit opposing a motion for summary judgment, the defendant claimed that the plaintiff promised to give the money to the defendant in consideration of his marrying the plaintiff's daughter. The defendant stated that he did subsequently marry the daughter, that the money was given to him, and that only after the daughter sued for divorce did the plaintiff claim that the money was a loan and demand repayment. The trial court gave summary judgment for the plaintiff, and the defendant appealed. On appeal, the plaintiff urged that the defendant would not be competent to testify to an oral contract in consideration of marriage, in view of the statute of frauds.

The court of appeal reversed. The statute of frauds merely seeks to exclude testimony in an action arising out of an executory contract. In this case, all controversies arising out of the agreement were disposed of by the marriage and payment of the money. Even though the oral contract was undoubtedly invalid under *Civ. Code § 1624*, it could not be objected to after it was mutually executed and consummated [*Freitas v. Freitas (1916) 31 Cal. App. 16, 18-19, 159 P. 611]* (*36 Cal. App. 2d 132, 141-142)* .

[4] Additional Authorities

[a] Statute Does Not Cover Fully Executed Contract

In *Lee v. Lee (2009) 175 Cal. App. 4th 1553, 97 Cal. Rptr. 3d 516* , the defendant was engaged in a dispute over the nature and effect of an undocumented transaction with his mother and brother. The defendant had received $50,000 from his mother and brother, and although the defendant asserted that the money was a loan, the mother and brother asserted that it was payment for the defendant's interest in a parcel of real property. Four years later, the defendant executed and delivered a quitclaim deed transferring that interest to his brother's daughter. Subsequently the defendant persuaded his niece to reconvey the property, but thereafter the niece sued the defendant on alleged causes of action for quiet title, slander of title, fraud, cancellation of instrument, intentional infliction of emotional distress, and constructive trust. At trial the defendant, contending against his niece's position that his quitclaim deed to her had resulted from the supposed contract of sale with his mother and brother, argued that (1) the supposed contract to convey to his mother and brother had been invalid for failure to comply with the statute of frauds and (2) his quitclaim deed to his niece did not

satisfy the statute as a memorandum of the oral agreement because it did not accurately reflect the terms of the supposed sale. Following judgment for the niece, the court of appeal affirmed, saying, "However, the statute of frauds does not apply to an executed contract. A valid deed, i.e., one that is executed by the grantor and delivered to the grantee, is an executed contract. [P] Here, it is undisputed that [the defendant] executed the 2002 quitclaim deed and delivered it to [his niece] with the intent to transfer [his interest to her]. Thus, the 2002 deed was an executed contract. Accordingly, the statute of frauds does not apply to this transfer" (*175 Cal. App. 4th 1553, 1557)* (citations omitted).

The parties in *McGlasson v. Blythe (1956) 143 Cal. App. 2d 152, 299 P.2d 325* , orally agreed to exchange parcels of real property, each to pay the encumbrance on the property received and to obtain a deed. The defendants did all that was required of them under the agreements and received a deed for the property that they received from the plaintiff in the exchange, even though the plaintiff had refused to sign an assignment of the sales contract between herself and the former owner. About four years after the exchange and after the plaintiff's property (received from the defendants in the exchange) was sold in a trustee's sale, the plaintiff sued to quiet title to the property that the defendants had received in the exchange, and the defendants cross complained to quiet title to the property in themselves. In affirming judgment for the defendants, the court of appeal held that the oral exchange agreement was fully executed and that the statute of frauds does not apply to fully executed contracts relating to lands, such as contracts to convey, exchange, or lease land (*143 Cal. App. 2d 152, 156)* .

Freitas v. Freitas (1916) 31 Cal. App. 16, 159 P. 611 , involved a dispute between a widow and her late husband's children by a previous marriage, over the right to the proceeds of an insurance policy. The widow relied on an oral agreement with the husband that he would name her as beneficiary on his insurance policy in consideration of her marrying him. After they were married, the husband did cause the plaintiff to be named as beneficiary on the policy and delivered it to her, but he later obtained the policy without her knowledge and substituted the children as beneficiaries. In affirming a judgment for the widow, the court of appeal found that the agreement had been fully executed and held that it is settled that the statute of frauds does not apply to an executed oral agreement (*31 Cal. App. 16, 19)* .

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D. Effect of Performance or Estoppel on Plea of Statute of Frauds

21-216 California Points & Authorities § 216.111

§ 216.111 Performance Renders Statute of Frauds Inapplicable--Statute of Frauds Is Inapplicable When One Party Has Fully Performed

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE STATUTE OF FRAUDS DOES NOT APPLY TO THE CONTRACT BECAUSE THE _____ [*party relying on contract, e.g.,* PLAINTIFF] HAS FULLY PERFORMED.

A. Statute Does Not Cover Contract Fully Performed by One Party. When one party to an oral contract has fully performed his or her part of the agreement, the statute of frauds has no application to the contract (*Dallman Co. v. Southern Heater Co. (1968) 262 Cal. App. 2d 582, 588, 68 Cal. Rptr. 873*).

[*Optional*] **B. Payment of Money Is Only Remaining Obligation.** The statute of frauds is inapplicable when a contract has been fully performed by one party, and nothing remains to be done except the payment of money by the other party (*Blaustein v. Burton (1970) 9 Cal. App. 3d 161, 185, 88 Cal. Rptr. 319* ; *Dean v. Davis (1946) 73 Cal. App. 2d 166, 169, 166 P.2d 15*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a party'scontention that even if an oral contract is within the statute of frauds, the statute is not applicable because the contract has been fully performed by one party. (This rule is sometimes justified on the ground of estoppel [*Dutton v. Interstate Inv. Corp. (1941) 19 Cal. 2d 65, 70, 119 P.2d 138* ; *Robison v. Hanley (1955) 136 Cal. App. 2d 820, 825, 289 P.2d 560]* . For points and authorities based on estoppel to rely on the statute of frauds, see *§ 216.130* et seq.) The argument supported by these points and authorities may be raised whenever a party is relying on an oral contract that he or she has fully performed, and the adverse party contends that the agreement is invalid or void because it was within the statute of frauds. The argument would most likely be

raised in actions for breach of contract, for specific performance, or to quiet title.

[b] Argument

Counsel should add argument linking these points and authorities with the facts of the case. For example, counsel should show that the party seeking to enforce the contract has performed all of his or her obligations under the agreement.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Points and Authorities

The points and *authorities in § 216.114* may be used in an appropriate case to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Statute Does Not Cover Contract Fully Performed by One Party

In ***Dallman Co. v. Southern Heater Co.*** *(1968) 262 Cal. App. 2d 582, 68 Cal. Rptr. 873* , the defendant, pursuant to an oral agreement with the plaintiff, supplied heaters to the plaintiff under the plaintiff's private label and promised to guarantee and service the heaters for 15 months after their installation in a consumer's home. After the agreement had been performed for about four years, the defendant declared that it would no longer provide service or comply with the provisions of the agreement, and the plaintiff sued for breach of contract. The defendant appealed from a judgment for the plaintiff.

The court of appeal affirmed. The plaintiff had fully performed the agreement, and such a fully executed parol contract is not affected by the statute of frauds. When a party to a contract has fully performed all things to be performed by him or her, that is sufficient to take the contract out of the statute of frauds [*James v. Hall (1928) 88 Cal. App. 528, 534, 264 P 516]* . The statute of frauds has no application to an executed oral agreement (*262 Cal. App. 2d 582, 588)* .

[b] Payment of Money Is Only Remaining Obligation

In ***Blaustein v. Burton*** *(1970) 9 Cal. App. 3d 161, 88 Cal. Rptr. 319* , the plaintiff, a motion picture producer, revealed to the defendants, a prominent acting couple, his idea for a motion picture version of a Shakespearean play. The defendants were to star in the film, which was to be directed by a particular director. The plaintiff had other specific ideas in relation to the project, which he revealed to the defendants. The defendants used the plaintiff's ideas but did not compensate the plaintiff. The plaintiff then sued for breach of contract, among other causes of action. Summary judgment for the defendants was entered, and the plaintiff appealed.

The court of appeal reversed. The plaintiff's declaration in opposition to the motion for summary judgment was sufficient to raise triable issues of fact as to whether the plaintiff's disclosure was made in confidence and was accepted by the defendants on the understanding that they would not use it without the plaintiff's consent. The agreement was not barred by *Civ. Code § 1624(a)(1)*. If the defendants were found to have made an implied promise to pay, conditioned on subsequent use, in return for the plaintiff's act of disclosing the idea, as opposed to his promise to disclose the idea, it would constitute a unilateral contract, which is not within the provision of the statute of frauds pertaining to contracts not to be performed within one year (*9 Cal. App. 3d 161, 184-185)* . On the other hand, it might be found that the

plaintiff disclosed his idea on the condition that the defendants would not use it unless they compensated him, and that the defendants accepted disclosure on that condition, with the plaintiff's compensation to be either his engagement as the producer of the film or payment of the monetary equivalent. In that case, since the film had already been produced without the plaintiff, all that remained to be done was payment by the defendants, and the statute of frauds is inapplicable when a contract has been fully performed by one party, and nothing remains but the payment of money by the other party (*9 Cal. App. 3d 161, 185)* .

Dean v. Davis *(1946) 73 Cal. App. 2d 166, 166 P.2d 15* , involved an oral agreement that the plaintiff would obtain employment for the defendant in consideration of receiving a percentage of the defendant's annual earnings above a threshold amount. The plaintiff obtained employment for the defendant on eight occasions over a two-year period, and the defendant reported the income he received from these jobs and paid the plaintiff his percentage of that amount. The plaintiff sued, alleging that the defendant had under-reported his income and that there was a balance due to the plaintiff. A demurrer to the complaint was sustained without leave to amend, and the plaintiff appealed from the ensuing judgment of dismissal.

The court of appeal reversed. The statute of frauds provision pertaining to contracts not to be performed within one year was not applicable to the case. The plaintiff had performed his agreement to obtain employment for the defendant, and the defendant had rendered the services required by the employment he had accepted. When a contract has been so far performed that nothing remains to be done but the payment of the consideration for the performance, the fact that the contract does not require payment within a year furnishes no defense to an action for the price [*Hellings v. Wright (1916) 29 Cal. App. 649, 656, 156 P 365]* . The statute of frauds does not bar enforcement of a contract by an employee who has fully performed his part of the contract when nothing remains to be done by the other party but to pay the agreed compensation. Additionally, when parties to a contract not to be performed within one year have partly performed it, neither party may avoid its obligations as to past transactions on the ground of the statute of frauds (*73 Cal. App. 2d 166, 168)* . The agreement was performed by the plaintiff, and the defendant had recognized the agreement and the duty to account to the plaintiff by making partial payments under the pretense of making full payment (*73 Cal. App. 2d 166, 168-169)* .

[4] Additional Authorities

[a] Statute Does Not Cover Contract Fully Performed by One Party

The plaintiff in *Nesson v. Moes (1963) 215 Cal. App. 2d 655, 30 Cal. Rptr. 428* , had been employed by the defendant for a four-year period pursuant to an oral contract. The plaintiff sued to recover underpayments in the agreed compensation for the last two years of the term. Affirming a judgment for the plaintiff, the court held that the statute of frauds pertaining to contracts not to be performed within one year does not apply to oral contracts that have been completely performed by one party (*215 Cal. App. 2d 655, 656, 657-659)* . The court distinguished cases holding that the mere rendition of services is usually not such partial performance as to avoid the statute of frauds, on the basis that those cases involved only partial performance of the services required rather than complete performance of those services (*215 Cal. App. 2d 655, 657)* .

In *Prince v. Varona (1956) 144 Cal. App. 2d 673, 301 P.2d 512* , an action to quiet title, the court of appeal held that the statute of frauds did not apply to an oral property settlement agreement entered into by the parties after their divorce, when the plaintiff had fully performed his obligations under the contract and had gone into possession of the real property in question and held it for about nine years. All that remained to be done under the agreement was for the defendant to execute a deed to the plaintiff, and the court held that it would be inequitable to allow the defendant, who had been fully compensated under a fair agreement, to rely on the statute of frauds (*144 Cal. App. 2d 673, 675-676)* .

The court of appeal in *Profit v. Profit (1953) 117 Cal. App. 2d 126, 255 P.2d 25* , an action for annulment of marriage and settlement of property rights, held that an oral agreement between the parties that certain real property would be

shared equally was enforceable against the husband when the wife had conveyed her property to the husband. The court held that when one party to an oral agreement to exchange land has conveyed the property to the other, there is such partial performance as will in equity remove the case from the operation of the statute of frauds (*117 Cal. App. 2d 126, 131)* .

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D. Effect of Performance or Estoppel on Plea of Statute of Frauds

21-216 California Points & Authorities § 216.112

§ 216.112 Performance Renders Statute of Frauds Inapplicable--Statute of Frauds Is Inapplicable to Past Transactions Performed Under Contract Not to Be Performed Within One Year

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

EVEN THOUGH THE CONTRACT CANNOT BE PERFORMED WITHIN ONE YEAR FROM ITS MAKING, THE STATUTE OF FRAUDS DOES NOT APPLY TO RELIEVE THE _____ [*party relying on statute of frauds, e.g.,* DEFENDANT] OF HIS/HER/ITS OBLIGATIONS AS TO PAST TRANSACTIONS UNDER THE CONTRACT.

Partial Performance of Contract Not to Be Performed Within One Year Is Binding as to Past Transactions. When the parties to an oral contract that is not to be performed within one year have partly performed it, neither party can avoid the obligation of the contract as to past transactions on the ground that the contract was within the statute of frauds (*Pio Pico v. Cuyas (1873) 47 Cal. 174, 179* ; *Roberts v. Wachter (1951) 104 Cal. App. 2d 271, 281, 231 P.2d 534*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that even if an oral contract is prospectively unenforceable because it cannot be performed within one year from its making, neither party may avoid obligations under the contract as to past transactions under it. (However, partial performance of a contract not to be performed within one year does not remove the contract from the statute of frauds so as to make the contract prospectively enforceable [*see Kraft v. Rooke (1930) 103 Cal. App. 552, 555-557, 284 P. 935]* .) The argument supported by these points and authorities may be raised whenever a party is relying on such a contract, and the adverse party contends that the agreement is within the statute of frauds. The argument would most likely be raised in an action for breach of the contract.

[b] Argument

Counsel should add argument linking these points and authorities with the facts of the case. For example, counsel should demonstrate that even though the contract was not to be performed within one year from its making, the party relying on the agreement had performed it for some period, so as to become entitled to receive consideration from the other party for that performance.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Partial Performance of Contract Not to Be Performed Within One Year Is Binding as to Past Transactions

Pio Pico v. Cuyas *(1873) 47 Cal. 174* , was an action for rent brought against the lessee of a hotel. The plaintiff also sought to recover money paid for furnishings at the defendant's request. The defendant claimed that after the time of the lease, but before he took possession of the hotel, the parties had orally agreed to enter into a five-year partnership in keeping the hotel, the plaintiff to own the hotel and its furnishings, the defendant to manage the business, and the profits and losses to be divided between the parties. Judgment was rendered for the defendant, and the plaintiff appealed. The plaintiff argued that the oral partnership agreement should not have been allowed in evidence because by its terms it was not to be performed within one year from its making.

The Supreme Court affirmed. The plaintiff's argument was answered by the partial performance of the agreement. The partnership had been entered into and the business had been conducted in the firm name. Under the well-settled construction of the one-year clause of the statute of frauds, neither party could avoid the obligation of the contract as to past transactions under it (*47 Cal. 174, 179)* .

In ***Roberts v. Wachter*** *(1951) 104 Cal. App. 2d 271, 231 P.2d 534* , the plaintiff had rendered legal services in organizing a business and had been involved in its management. Initially, the business was a proprietorship, and the plaintiff was to receive 50 percent of the net profit after the proprietor received a 5-percent return on the invested capital. Later, the business was organized into a partnership. The plaintiff was not a partner but was to receive one sixth of the former proprietor's share of the partnership profits. This agreement was reduced to a written memorandum, authorizing direct payment of that amount to the plaintiff by the partnership. The plaintiff received his share under this agreement from June 1942 through 1944. Early in 1945, the former proprietor agreed to return to the original arrangement, and the plaintiff agreed to perform additional services. For 1945, the plaintiff was paid more than half of the 50-percent share that was owed to him, and the remainder of his share he consented not to withdraw but allowed the partnership the use of the money for a while. The balance due for 1945 was never paid, and the plaintiff sued on an account stated and for money had and received. The defendants appealed from a judgment for the plaintiff. On appeal, the defendants contended, among other things, that the agreement was not to be performed within one year from its making and was therefore required to be in writing.

The court of appeal affirmed. When the parties to a contract that is not to be performed within one year have partly performed it, neither party can avoid the contract's obligations as to past transactions by objecting that the contract was oral and within the statute of frauds (*104 Cal. App. 2d 271, 281)* .

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D. Effect of Performance or Estoppel on Plea of Statute of Frauds

21-216 California Points & Authorities § 216.113

§ 216.113 Performance Renders Statute of Frauds Inapplicable--Statute of Frauds Is Inapplicable to Real Property Sale Agreement That Is Partially Performed

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE CONTRACT IS ENFORCEABLE BECAUSE PARTIAL PERFORMANCE REMOVED THE BAR OF THE STATUTE OF FRAUDS.

Partially Performed Oral Agreement to Sell Real Property May Be Enforced. Partial performance will take an agreement for the sale of real property out of the statute of frauds so that the agreement may be enforced in equity. Mere payment of money is not enough, but taking possession in reliance on the oral agreement, if the possession is actual, visible, notorious, and exclusive so that it furnishes evidence of the agreement between the parties as good as a writing, is sufficient to take the agreement out of the statute of frauds (*Sutton v. Warner (1993) 12 Cal. App. 4th 415, 15 Cal. Rptr. 2d 632* ; *Francis v. Colendich (1961) 193 Cal. App. 2d 128, 131, 14 Cal. Rptr. 56*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that even though an oral contract to sell real property is normally within the statute of frauds, the contract has been removed from the operation of the statute by partial performance. The argument supported by these points andauthorities may be raised whenever a party is relying on a partly performed oral agreement to sell real property as the basis of some right, and the adverse party contends that the agreement is invalid because it was within the statute of frauds. The argument would most likely be raised in an action for breach of the contract, specific performance, or to quiet title.

[b] Argument

Counsel should add argument linking these points and authorities with the facts of the case. For example, counsel should demonstrate that the party relying on partial performance of the contract has, in addition to paying money, taken possession in reliance on the oral agreement, made valuable improvements, or done other acts unequivocally referable to the oral agreement. The possession should be actual, and so visible, notorious, and exclusive that it furnishes evidence of the agreement between the parties that is as good as a writing [*Harrison v. Hanson (1958) 165 Cal. App. 2d 370, 376, 331 P.2d 1084* (partial performance was not established by trivial outlays or employment of real estate consultants to plan development of property, which at most is mere technical possession); *see Davis v. Judson (1910) 159 Cal. 121, 132, 113 P. 147* (partial performance was not established by occasional visits to lots)]. To establish partial performance, the purchaser of real property must show that the taking of possession and making of improvements was done with the vendor's knowledge [*Stark v. Byington (1937) 21 Cal. App. 2d 642, 648, 69 P.2d 995]* . The mere payment of money is not sufficient to establish partial performance [*see § 216.114*].

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Points and Authorities

The points and *authorities in § 216.114* may be used in an appropriate case to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Partially Performed Oral Agreement to Sell Real Property May Be Enforced

In ***Sutton v. Warner*** *(1993) 12 Cal. App. 4th 415, 15 Cal. Rptr. 2d 632* , the plaintiff moved into the defendant's premises as a tenant. Thereafter, the parties made an oral agreement under which the plaintiff made a down payment of $15,000 and had an option to purchase the house from the defendant within five years. In the meantime, the plaintiff made the mortgage payments and made a number of improvements in the house. The plaintiff sued for specific performance of the contract of sale. The trial court granted specific performance. The defendant appealed.

The Court of Appeal affirmed. Under the doctrine of partial performance, an oral agreement to sell real property is enforced when the purchaser has taken possession of the property and either makes a full or partial payment of the purchase price or makes substantial improvements in the property in reliance on the oral agreement. The possession must be actual, visible, notorious, and exclusive so that it manifests clearly that the purchaser is claiming ownership of the property (*12 Cal. App. 4th 415, 422)* . Continuance in possession by a purchaser who is already in possession may, in the proper case, be sufficiently referable to an oral contract of sale to constitute partial performance. Continuing possession by a tenant is sufficient for partial performance when coupled with a down payment, mortgage payments, reimbursement of property taxes, and improvements to the property (*12 Cal. App. 4th 415, 422-424)* .

Francis v. Colendich *(1961) 193 Cal. App. 2d 128, 14 Cal. Rptr. 56* , involved a dispute over a parcel of land originally owned by the Cliftons. The defendant's son had entered into an oral agreement with the Cliftons to purchase the parcel, which adjoined property he already owned. The parcel was paid for, surveyed, and fenced in. Thereafter, it was occupied and used by the defendant and her son until the son's death, after which the defendant, who was his heir, continued to occupy and use the parcel. Nearly eight years after the oral agreement, the plaintiff acquired a deed that included the parcel from successors in interest of the Cliftons. Three years after that, the plaintiff cut the fence and entered the parcel. He left on request but sued to quiet title. The defendant cross complained for specific performance of the oral agreement and for a declaration that the plaintiff held the property in trust for the defendant. The trial court gave judgment for the defendant, and the plaintiff appealed.

The court of appeal affirmed. The trial court had not erred in failing to make specific findings on the issues of the statute of limitations, the statute of frauds, and laches. In regard to the statute of frauds, the evidence would not have sustained a finding that the defendant's claim was barred. Partial performance will take a contract out of the statute of frauds, and the contract then will be enforced by equity. The mere payment of money is insufficient, but taking possession in reliance on the oral agreement, if the possession is actual, visible, notorious, and exclusive so that it furnishes evidence of the agreement between the parties as good as a writing, is sufficient to take the agreement out of the statute of frauds. The possession of the defendant and her son under the oral contract in this case constituted sufficient partial performance to take the contract out of the statute of frauds (*193 Cal. App. 2d 128, 131-132)* .

[4] Additional Authorities

[a] Partially Performed Oral Agreement to Sell Real Property May Be Enforced

In *Baggesi v. Baggesi (1950) 100 Cal. App. 2d 828, 224 P.2d 894* , in which the plaintiff sought a declaration that he owned a half interest in the defendant's farm, the court of appeal stated that the evidence established that the plaintiff had performed his promise to remain on and to care for and develop the land in reliance on the oral agreement that he would receive a half interest in it, and that he irrevocably changed his position as a result of such reliance so as to come within the partial performance exception to the statute of frauds (*100 Cal. App. 2d 828, 835)* .

Engasser v. Jones (1948) 88 Cal. App. 2d 171, 198 P.2d 546 , was an action for specific performance or for damages for breach of contract in relation to an oral agreement for the sale of real estate. The court of appeal held that the evidence sufficiently supported the finding that the plaintiffs were put into possession of the property under the oral agreement of sale, expended money in moving into the property, furnished the house, arranged for water rights, and had exclusive control of the property, all with the knowledge and consent of the defendants, who accepted the down payment and two monthly payments under the oral agreement. Accordingly, the court held that there was sufficient support for the finding that there was partial performance of the agreement and that the agreement was thus taken out of the operation of the statute of frauds (*88 Cal. App. 2d 171, 175-176)* .

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21-216 California Points & Authorities § 216.114

§ 216.114 Statute of Frauds Applies in Spite of Partial Performance--Payment of Money Is Insufficient in Itself to Constitute Partial Performance

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

THE CONTRACT IS NOT ENFORCEABLE BECAUSE THE PAYMENT OF MONEY IS INSUFFICIENT TO CONSTITUTE PARTIAL PERFORMANCE REMOVING THE CONTRACT FROM THE STATUTE OF FRAUDS.

Payment of Money Is Insufficient as Partial Performance. The payment of money is not sufficient partial performance to take an oral agreement out of the statute of frauds because the party paying money under an invalid contract has an adequate remedy at law (*Anderson v. Stansbury (1952) 38 Cal. 2d 707, 716, 242 P.2d 305* ; *Oren Realty & Dev. Co. v. Superior Court (1979) 91 Cal. App. 3d 229, 235, 154 Cal. Rptr. 97*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that an oral agreement has not been removed from the operation of the statute of frauds by partial performance because the mere payment of money does not constitute sufficient partial performance of an oral agreement so as to remove it from the statute of frauds. The argument supported by these points and authorities may be raised by a party relying on the statute of frauds to bar enforcement of an oral agreement whenever the adverse party urges that such an agreement has been removed from the operation of the statute by partial performance that consists solely of the payment of money pursuant to the agreement. The argument would most likely be raised in defending an action for breach of contract, for specific performance, or to quiet title on the ground that the contract on which the adverse party bases his or her claim is barred by the statute of frauds.

[b] Argument

Counsel should add argument linking these points and authorities with the facts of the case. For example, counsel should demonstrate that the only acts in partial performance of the agreement relied on by the adverse party are payments of money.

[c] Related Points and Authorities

These points and authorities may be combined with points and authorities supporting the contention that the contract at issue is within the statute of frauds [*see, e.g., §§ 216.10[1],* 216.30[1], 216.40[1]].

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Payment of Money Is Insufficient as Partial Performance

The facts and procedural background of ***Anderson v. Stansbury*** *(1952) 38 Cal. 2d 707, 242 P.2d 305* , are discussed in *§ 216.40[3][c]*. The Supreme Court, citing *Shive v. Barrow (1948) 88 Cal. App. 2d 838, 848, 199 P.2d 693* , held that the payment of money is not sufficient partial performance to take an oral agreement out of the statute of frauds because the party who pays money under an invalid contract has an adequate remedy at law. The Court also found that the other act relied on to show partial performance did not, as a matter of fact, constitute anychange of position or unconscionable loss (*38 Cal. 2d 707, 716)* .

In ***Oren Realty & Dev. Co. v. Superior Court*** *(1979) 91 Cal. App. 3d 229, 154 Cal. Rptr. 97* , the petitioners, as vendors, and the real parties in interest, as purchasers, had reached an oral agreement for the sale of two homes. The purchasers sent two checks for $5,000 to the escrow agent, but the checks were returned because the purchasers had not signed the escrow instructions. The following day, the purchasers delivered new checks to the escrow agent, who retained the checks on their instructions and their information that they intended to sue for specific performance. In the action for specific performance, the petitioners moved for summary judgment based on the statute of frauds, and the trial court denied the motion, finding a triable issue of fact that might raise an equitable estoppel to rely on the statute of frauds. The petitioners then sought a writ of mandate from the court of appeal to compel the trial court to grant the motion.

The court of appeal ordered the writ to issue. None of the grounds relied on by the purchasers was sufficient to estop the petitioners from asserting the statute of frauds. With respect to transmitting the down payment to the escrow agent: before a party can be estopped to assert the statute of frauds based on the other's partial performance, there must have been a sufficient change of position so that the application of the statutory bar would result in an unjust and unconscionable loss, amounting in effect to a fraud. The payment of money is not sufficient partial performance to take an oral agreement out of the statute of frauds because the party paying money under an invalid contract has an adequate remedy at law (*91 Cal. App. 3d 229, 235)* .

[4] Additional Authorities

[a] Payment of Money Is Insufficient as Partial Performance

In *Davis v. Judson (1910) 159 Cal. 121, 113 P 147* , an action to quiet title, the Supreme Court held that payment of the purchase price did not itself constitute the partial performance necessary to take out of the statute of frauds an oral agreement to convey two lots to the plaintiff in return for the plaintiff's supplying $500 worth of construction material to the defendant (*159 Cal. 121, 131)* .

In *Contreras v. Loya (1961) 192 Cal. App. 2d 176, 13 Cal. Rptr. 233* , an action for specific performance, the court of appeal held that a cash payment made as part of the consideration for an oral agreement to convey an interest in real property was not such a performance as to take the agreement out of the statute of frauds because the injury was compensable in damages (*192 Cal. App. 2d 176, 178)* .

In *Loper v. Flynn (1946) 72 Cal. App. 2d 619, 165 P.2d 256* , the plaintiff sued for specific performance of an agreement with the defendant's testatrix, pursuant to which the testatrix was to devise to him interest in real property that they held as tenants in common, in consideration of his granting to the testatrix all the rents, issues, and profits of the property during the testatrix's life. The plaintiff alleged that he had fully performed his part of the contract, but the court of appeal, in holding that the complaint failed to state a cause of action, stated that the payment of money was insufficient to take the agreement out of the statute of frauds because the money paid could be recovered, with interest, in an action at law (*72 Cal. App. 2d 619, 622)* .

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CHAPTER 216 STATUTE OF FRAUDS
PART II. FORMS
D. Effect of Performance or Estoppel on Plea of Statute of Frauds

21-216 California Points & Authorities §§ 216.115-216.129

[Reserved]

§§ 216.115[Reserved]

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 216 STATUTE OF FRAUDS
PART II. FORMS
D. Effect of Performance or Estoppel on Plea of Statute of Frauds

21-216 California Points & Authorities § 216.130

§ 216.130 Party Asserting Statute of Frauds Is Estopped to Rely on It--Party Is Guilty of Unconscionable Injury or Would Receive Unjust Enrichment

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE _____ [*party relying on statute of frauds, e.g.,* DEFENDANT] IS ESTOPPED TO RELY ON THE STATUTE OF FRAUDS BECAUSE _____ [HE/SHE/IT WILL BE UNJUSTLY ENRICHED IF ALLOWED TO RELY ON THE STATUTE OF FRAUDS *and/or* THE _____ (*party relying on contract, e.g.,* PLAINTIFF) WILL BE UNCONSCIONABLY INJURED IF ENFORCEMENT OF THE CONTRACT IS DENIED BECAUSE HE/SHE/IT HAS SERIOUSLY CHANGED POSITION IN RELIANCE ON THE CONTRACT].

A. Party May Be Estopped to Assert Statute of Frauds. The doctrine of estoppel to assert the statute of frauds has been consistently applied by the California courts to prevent fraud that would result from refusal to enforce oral contracts in certain circumstances. Such fraud may inhere in the unconscionable injury that would result from denying enforcement of the contract after one party has been induced by the other seriously to change his or her position in reliance on the contract, or in the unjust enrichment that would result if a party who has received the benefit of the other's performance were allowed to rely on the statute (*Monarco v. Lo Greco (1950) 35 Cal. 2d 621, 623-624, 220 P.2d 737*).

[*Optional*] **B. Partial Performance Removes Agreement From Statute of Frauds.** A party may be estopped to assert the statute of frauds by the other party's partial performance if such a change of position has occurred that the application of the bar of the statute of frauds would result in an unjust and unconscionable loss, amounting in effect to a fraud (*Anderson v. Stansbury (1952) 38 Cal. 2d 707,715, 242 P.2d 305* ; *Maddox v. Rainoldi (1958) 163 Cal. App. 2d 384, 389-390, 329 P.2d 599*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that the adverse party is estopped from relying on the statute of frauds as a defense to an oral agreement. The argument supported by these points and authorities may be raised whenever the adverse party raises the issue of the statute of frauds, and denial of enforcement would cause irreparable injury or unjust enrichment. However, the general rule pertaining to estoppel to assert the statute of frauds is of limited application respecting oral agreements to pay a real estate broker's commission [*see Owens v. Foundation for Ocean Research (1980) 107 Cal. App. 3d 179, 183, 165 Cal. Rptr. 571* ; *Keely v. Price (1972) 27 Cal. App. 3d 209, 212-214, 103 Cal. Rptr. 531* ; *see also* Ch. 31, *Brokers and Salespersons*].

These points and authorities also may be used in opposing a demurrer to a complaint when facts showing an estoppel have been pleaded. If the party relying on an oral agreement within the statute of frauds pleads the oral contract in the complaint, facts showing estoppel to rely on the statute of frauds as a defense to the agreement must be pleaded [*Palmer v. Phillips (1954) 123 Cal. App. 2d 291, 294-295, 266 P.2d 850]* .

[b] Argument

Counsel should add argument linking these points and authorities with the facts of the case. Thus, counsel should set forth any serious changes in position that his or her client or the party to the contract through whom his or her client is making a claim has made in reliance on the contract, to demonstrate unconscionable injury; alternatively, counsel should set forth the benefits of the contract that have been received by the party relying on the statute of frauds, to demonstrate the unjust enrichment that would result if the contract were not enforced. If the facts show both unconscionable injury and unjust enrichment, both should be demonstrated.

The change in position relied on to show unconscionable injury need not be unequivocally referable to the oral agreement [*Carlson v. Richardson (1968) 267 Cal. App. 2d 204, 208, 72 Cal. Rptr. 769* (purchase of property on which to live while building on nearby property that was subject of oral sales contract)].

In demonstrating unconscionable injury, counsel representing a third-party beneficiary of the oral contract must demonstrate that a party to the contract seriously changed his or her position in reliance on the contract, rather than relying on a change in position by the third-party beneficiary [*see DiSalvo v. Bank of America (1969) 274 Cal. App. 2d 351, 355, 78 Cal. Rptr. 838* (grandmother's giving up of community property interests and testamentary right to leave property to plaintiff in consideration of father's leaving half of his estate to plaintiff was sufficient to estop parties claiming under father's will from denying oral agreement as against plaintiff)].

[c] Related Points and Authorities

For points and authorities opposing a demurrer to a complaint for quasi-specific performance of an oral agreement to leave property by will on the ground that the complaint alleges the rendition of peculiar services or estoppel so as to remove the agreement from the operation of the statute of frauds, see Ch. 214, *Specific Performance* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Points and Authorities

The points and authorities *set out in § 216.132* may be used in an appropriate case to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Party May Be Estopped to Assert Statute of Frauds

In ***Monarco v. Lo Greco*** *(1950) 35 Cal. 2d 621, 220 P.2d 737* , a woman and her husband bought a half interest in agricultural property for $4,000. When the wife's son by a previous marriage decided to leave home and seek an independent living, the wife and her husband made an oral proposal that her son should stay home and work in the family venture. In return, the wife and her husband would keep their property in joint tenancy so that it would pass to the survivor who would leave it to the wife's son except for some small bequests. The wife's son performed his part of the agreement. The value of the half-interest in the property increased to $100,000, and the husband caused the joint tenancy to be terminated and executed a will leaving all of his property to his own grandson without the knowledge of the wife or her son. After the husband's death, the grandson sued to partition the property, and the wife/widow cross complained for a declaration that the grandson held the property in constructive trust. The trial court gave judgment for the wife/widow in both the main action and the cross action, and the grandson appealed.

The Supreme Court affirmed. The controlling question was whether the plaintiff was estopped from asserting the statute of frauds. The doctrine of estoppel to assert the statute of frauds has been consistently applied by California courts to prevent fraud that would result from refusal to enforce oral contracts in certaincircumstances. Such fraud may inhere in the unconscionable injury that would result from denying enforcement of the contract after one party has been induced by the other seriously to change his or her position in reliance on the contract or in the unjust enrichment that would result if a party who has received the benefits of the other's performance were allowed to rely on the statute (*35 Cal. 2d 621, 623-624)* . Often both factors are present, and that was true in the present case. Unconscionable injury was presented because the son, in reliance on repeated assurances that he would receive the property, had given up any opportunity to accumulate his own property and had devoted 20 years of labor to make the family venture successful, without receiving any present interest in the venture. Unjust enrichment was presented because the husband had reaped the benefits of the contract so that he and his devisees would be unjustly enriched if he was relieved of the performance of his own obligations under the agreement by the statute of frauds (*35 Cal. 2d 621, 624-625)* . When a party changes position, he or she is relying on the promise that the contract will be performed, not on the representation that the contract will be put in writing or that the statute of frauds will not be invoked. Also, a party who accepts the benefit of an oral contract will be unjustly enriched if the contract is not enforced, whether the representations related to the statutory requirements or were limited to affirmations that the contract would be performed (*35 Cal. 2d 621, 625-626)* .

[b] Partial Performance Removes Agreement From Statute of Frauds

The facts and procedural background of ***Anderson v. Stansbury*** *(1952) 38 Cal. 2d 707, 242 P.2d 305* , are discussed in *§ 216.40[3][c]*. In affirming, the Supreme Court held that the plaintiffs could not rely on the doctrine of partial performance. Before a party can be estopped to assert the statute of frauds based on the other's partial performance, it must appear that a sufficient change of position has occurred so that the application of the statutory bar would result in an unjust and unconscionable loss, amounting in effect to a fraud [*Mason v. Home Ins. Co. (1935) 10 Cal. App. 2d 696, 698)*]. The Court noted that the plaintiffs' only change in position was the payment of money (by returning the $800 check), which is not sufficient partial performance to remove an agreement from the statute of frauds, and the execution and delivery of the second disclaimer, which did not constitute a change in position or unconscionable injury in light of the previous disclaimer by which the plaintiffs had already completely divested themselves of all interest in the oil and gas permit (*38 Cal. 2d 707, 716)* .

In ***Maddox v. Rainoldi*** *(1958) 163 Cal. App. 2d 384, 329 P.2d 599* , the plaintiffs sought a declaration that the defendant, who was the mother of one of the plaintiffs, held certain real property in trust for the plaintiffs. The plaintiffs alleged that the defendant had orally promised that if the plaintiffs would make necessary improvements and repairs to the property, the defendant would hold legal title to the property in her lifetime, that she would share the use of the property with the plaintiffs, and that she would not sell the property unless she became destitute and the plaintiffs were unable to care for her. The plaintiffs went into possession of the property and made extensive and substantial

improvements to it, making expenditures amounting to several times the original value of the property. The defendant then announced her intention to sell the property unless the plaintiffs purchased it for a specified sum. The trial court granted the defendant's motion for nonsuit on the ground that the action was barred by the statute of frauds because the oral agreement involved an interest in real property and because it was not to be fully performed during the defendant's lifetime. The plaintiffs appealed from the judgment of nonsuit.

The court of appeal reversed. The plaintiffs' making of valuable improvements took the oral declaration of trust out of the statute of frauds (*163 Cal. App. 2d 384, 389)* . It has always been the law that making substantial improvements on real property in reliance on an oral promise such as the promise in this case is sufficient to take the contract out of the statute of frauds. The question is whether there has been such partial performance by the plaintiff as to put the plaintiff in a situation that would be a fraud on the plaintiff unless the oral agreement were enforced and that there is a manifest fraud in permitting a vendor to escape from performance of the contract when the vendee, on an oral agreement for the sale of the land, proceeds to build a house on the land [*Tohler v. Folsom (1850) 1 Cal. 207, 212]* (*163 Cal. App. 2d 384, 389-390)* . In addition, the estoppel, on which is based the rule that partial performance of a contract may take an oral promise out of the statute of frauds, may apply to an oral contract not to be performed within the lifetime of the promisor (*163 Cal. App. 2d 384, 390)* .

[4] Additional Authorities

[a] Party May Be Estopped to Assert Statute of Frauds

Redke v. Silvertrust (1971) 6 Cal. 3d 94, 98 Cal. Rptr. 293, 490 P.2d 805 , involved the defendant's promise to the plaintiff's mother that if she would leave him half of her property, he would leave his share of that property to the plaintiff. The Supreme Court held that the trial court properly concluded that the defendant was estopped to rely on the statute of frauds, since the wife had changed her position to her detriment by not changing her will and trust instrument to make the plaintiff her sole beneficiary; that is, she changed her position by maintaining the status quo despite her concern over the plaintiff's welfare (*6 Cal. 3d 94, 101)* .

In *Byrne v. Laura (1997) 52 Cal. App. 4th 1054, 60 Cal. Rptr. 2d 908* , the plaintiff sued the administrator and heirs of a decedent's estate to enforce a *Marvin* agreement, and the estate cross-complained for unpaid rent. The estate's motion for summary adjudication was granted as to all of the plaintiff's causes of action other than her quantum meruit claim. The trial court found that there was noagreement between her and the decedent to compensate for her services. Even if there had been such an agreement, she would have been adequately compensated for any services she provided. Judgment was entered for the cross complainants for unpaid rent and for the estate on all of the plaintiff's causes of action. On appeal from the judgment, she contended that the trial court erred in granting the summary adjudication motion and that she was entitled to a trial on her causes of action other than the one for quantum meruit. The court of appeal concluded that all of the promises and conduct in evidence could not be characterized solely as an agreement for a joint tenancy. To the extent that the agreements at issue were subject to a statute of frauds, there was a triable issue of fact as to whether the estate was equitably estopped to assert the statute as a defense. Finding the plaintiff's reliance on the decedent's representations to be a classic case for applying the equitable estoppel doctrine [*see* *Monarco v. Lo Greco (1950) 35 Cal. 2d 621, 220 P.2d 737* (discussed in [3][a], *above*)], the court of appeal reversed the judgment on the claims that were summarily adjudicated and on the estate's claim for unpaid rent. Since equitable estoppel was a triable issue of fact, it was error to summarily adjudicate her claim for damages for breach of the property agreement (*52 Cal. App. 4th 1054, 1068-1069)* .

In *Estate of Housley v. Haywood (1997) 56 Cal. App. 4th 342, 65 Cal. Rptr. 2d 628* , a son claimed that his deceased father had breached an oral agreement to leave all of the father's property at death to the son if the son cared for the father during the father's lifetime. The trial court concluded that equitable estoppel did not preclude the defendant, as executrix of the father's will and trustee of the father's trust, from asserting the applicable statutes of fraud. The date of the alleged agreement was not ascertainable, and the trial court did not determine which was the applicable statute:

former Prob. Code § 150 or the predecessor provision removed from former paragraph 6 of *Civ. Code § 1624* in 1983. It concluded, however, that both statutes of fraud would preclude the plaintiff from pursuing his action to enforce the alleged oral agreement. The plaintiff appealed from a summary judgment for the defendant and contended that his papers opposing the summary judgment motion presented sufficient evidence to create triable issues of material fact on that question and that the court erred by granting the motion. The court of appeal agreed and reversed the judgment. It held that equitable estoppel principles were available under former Prob. Code § 150 or former Civ. Code § 1624(b) to enforce the father's alleged oral agreement to leave all of his property to his son if the son cared for him during the testator's lifetime (*56 Cal. App. 4th 342, 358)* .

In *Juran v. Epstein (1996) 23 Cal. App. 4th 882, 28 Cal. Rptr. 2d 588* , an estate beneficiary alleged that her stepfather breached an oral agreement by revoking a 1985 will that he executed while the plaintiff's mother was alive. The couple's wills left everything to each other, with the survivor's estate to be divided between their children. After the plaintiff's mother died, the stepfather revoked his will and executed a new one, which excluded the plaintiff. The plaintiff claimed that the defendant breached his oral contract with the plaintiff's mother to leave their entire estate to the surviving spouse on the condition that the survivor would bequeath the entire estate equally to the plaintiff and another child. The trial court granted the defendant's motion for summary judgment pursuant to former Prob. Code § 150. The appellate court concluded that the plaintiff failed to produce written evidence, under former Prob. Code § 150, of an agreement that the mutual wills would not be revoked (*23 Cal. App. 4th 882, 891)* . However, the court held that because there were triable issues of fact as to whether the parties entered into an oral agreement and whether that agreement was enforceable under the equitable estoppel doctrine, the trial court erred in granting summary judgment (*23 Cal. App. 4th 882, 897)* . The appellate court rejected the defendant's argument that former Prob. Code § 150 abolished the doctrine of equitable estoppel in appropriate cases. It found nothing in the history or language of that section showing that the Legislature intended to abrogate long-standing rules that the courts have the power to apply equitable principles to prevent a party from using the statute of frauds when that use would constitute fraud (*23 Cal. App. 4th 882, 894-895)* .

In *DiSalvo v. Bank of America (1969) 274 Cal. App. 2d 351, 78 Cal. Rptr. 838* , the court of appeal held that a complaint for quasi-specific performance sufficiently alleged estoppel to assert the statute of frauds. The complaint alleged that the plaintiff's father and paternal grandparents had made an agreement regarding disposition of the grandfather's property on his death. Under the agreement, the grandfather was to dispose of all of his community property by will, a substantial part of which was to go to the plaintiff's father, who was to leave half of all his property to the plaintiff. The grandmother performed her part of the agreement and did not protest the grandfather's will, but the plaintiff's father left the plaintiff only a contingent interest in less than one quarter of his estate. The court held that the complaint sufficiently alleged that the grandmother, who had surrendered her community property interests in return for a promise that she would be taken care of for her lifetime and that her son would leave the plaintiff half of his estate, was unconscionably injured and that the beneficiaries under the plaintiff's father's will were unjustly enriched (*274 Cal. App. 2d 351, 355-356)* .

[b] Partial Performance Removes Agreement From Statute of Frauds

In *Estate of Rivolo (1961) 194 Cal. App. 2d 773, 15 Cal. Rptr. 268* , a proceeding to determine heirship, the court of appeal rejected a contention that the respondent's claim to the entire estate was barred by the statute of frauds because it was based on an oral agreement to adopt respondent. The court held that partial performance will take a contract to adopt or a contract of inheritance out of thestatute of frauds (*194 Cal. App. 2d 773, 777)* . The agreement was partly performed by the respondent, who had fully performed the duties of a daughter to the decedent. The fact that the respondent suffered no detriment was deemed irrelevant since such an agreement is primarily for the child's benefit, and partial performance removing the contract from the statute of frauds was found on the basis that the services she performed as a daughter were of such a peculiar nature that their value could not be estimated by any pecuniary measure, and the respondent could not be restored to the situation in which she was before rendition of those services (*194 Cal. App. 2d 773, 777-778)* .

In *Grant v. Long (1939) 33 Cal. App. 2d 725, 92 P.2d 940* , an action for declaratory relief to determine the plaintiff's right to free room and board in a hotel for the rest of her life based on an oral agreement that the parties had been performing for 14 years, the court of appeal held that the defendants were estopped to rely on the statute of frauds and stated that a partially performed contract is usually taken out of the operation of the statute of frauds (*33 Cal. App. 2d 725, 742)* .

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21-216 California Points & Authorities § 216.131

§ 216.131 Party Asserting Statute of Frauds Is Estopped to Rely on It--Principal Is Estopped to Rely on Requirement That Agent's Authority Must Be in Writing

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE _____ [*party relying on statute of frauds, e.g.,* DEFENDANT] IS ESTOPPED FROM RELYING ON *CIVIL CODE SECTION 2309* BECAUSE HE/SHE BY HIS/HER OWN CONDUCT _____ [*specify, e.g.,* LULLED THE _____ (*party relying on contract, e.g.,* PLAINTIFF) INTO BELIEVING THAT HIS/HER AGENT HAD WRITTEN AUTHORITY TO ENTER INTO THE CONTRACT OR HAD NO NEED FOR WRITTEN AUTHORITY *or* ACCEPTED THE BENEFITS OF THE ORAL AUTHORIZATION OF HIS/HER AGENT WITH COMPLETE KNOWLEDGE OF THE CIRCUMSTANCES].

Principal Is Estopped by Own Acts to Rely on Requirement That Agent's Authority Be Written. A principal is estopped to raise the equal-dignities rule of *Civil Code Section 2309*, requiring an agent to have written authority to enter into a contract required by law to be in writing, against a contracting third party if the principal's conduct has the effect of lulling the third party into believing that the agent has written authority to enter into the contract or has no need of written authority (*Kerner v. Hughes Tool Co. (1976) 56 Cal. App. 3d 924, 934, 128 Cal. Rptr. 839*). A principal also may be estopped to rely on *Civil Code Section 2309* if, having complete knowledge of the circumstances, the principal received the benefits resulting from a contract made by the agent without written authority (*Higson v. Montgomery Ward & Co. (1968) 263 Cal. App. 2d 333, 342, 69 Cal. Rptr. 497*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that the adverse party is estopped to rely on an agent's lack of written authority to enter into a contract required by law to be in writing. The argument supported by this memorandum may be raised whenever the adverse party contends that the agreement being relied on

was entered into by an agent who did not have written authority to enter into it, if the adverse party, as principal, is estopped by his or her own actions from relying on the lack of written authority.

[b] Argument

Counsel should add argument linking these points and authorities with the facts of the case. For example, counsel should demonstrate that the acts relied on to create an estoppel based on *Civ. Code § 2309* were acts of the principal rather than of the agent and that the principal had complete knowledge of the circumstances surrounding the transaction and accepted the benefits of the contract.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[d] Opposing Points and Authorities

The points and authorities *set out in § 216.133* may be used in an appropriate case to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Principal Is Estopped by Own Acts to Rely on Requirement That Agent's Authority Be Written

The facts and procedural background of ***Kerner v. Hughes Tool Co.*** *(1976) 56 Cal. App. 3d 924, 128 Cal. Rptr. 839* , are discussed in *§ 216.92[3][c]*. The defendant argued on appeal that it was not bound by the contract, under the equal-dignities rule of *Civ. Code § 2309* requiring written authority for an agent to enter into an agreement required by law to be in writing, because the defendant's agent was employed under an oral agreement and had no writtenauthority to enter into the contract with the plaintiff. The court of appeal agreed with the trial court that the defendant was estopped to rely on the equal-dignities rule. The court held that a principal is estopped to raise the equal-dignities rule against a contracting third party if the principal's conduct has the effect of lulling the third party into believing that the agent has written authority to enter into the contract or has no need of written authority [*McGirr v. Gulf Oil Corp. (1974) 41 Cal. App. 3d 246, 258, 115 Cal. Rptr. 902* (discussed in *§ 216.133* [3][a]); *Higson v. Montgomery Ward & Co. (1968) 263 Cal. App. 2d 333, 341-342, 69 Cal. Rptr. 497* (discussed *below*)] (*56 Cal. App. 3d 924, 934)* . The defendant had given the agent the title of "entertainment director" and placed his name on the hotel's marquee as the presenter of entertainment; the agent had routinely booked the entertainment for the hotel as he had done for Las Vegas hotels for 20 years; the agent had signed the contract on behalf of the defendant for a previous production by the plaintiff at the defendant's hotel; and when the plaintiff had tried to speak to the managing director of the hotel about producing *My Fair Lady*, the managing director had told him to consult the agent. The plaintiff could reasonably believe from the defendant's conduct that either the agent had written authority to enter into all contracts for entertainment, including those required to be in writing, or the defendant would not object to the absence of written authority (*56 Cal. App. 3d 924, 934-935)* . The defendant also argued that in order to establish estoppel, the plaintiff had to show that he had suffered unconscionable injury in reliance on the agent's apparent authority. The court pointed out that the evidence showed such an injury in that the plaintiff had expended time and effort in arranging the production after the agreement had been made with the agent (*56 Cal. App. 3d 924, 935)* .

In ***Higson v. Montgomery Ward & Co.*** *(1968) 263 Cal. App. 2d 333, 69 Cal. Rptr. 497* , the defendant wanted to purchase an entire city block consisting of 17 separately owned parcels. The defendant orally employed a real estate broker, who was given general authority to take care of the details of the various transactions. The defendant knew that the agent was entering into contracts on its behalf for the purchase of real estate and for the payment of real estate

broker's commissions. The plaintiff had been employed by the defendant's agent as a real estate broker in relation to two of the parcels and had been paid commissions for his services. The agent subsequently asked the plaintiff to assist in finding an income property to trade for the last of the 17 parcels, whose owner would not sell but would trade for income property with a suitable lessee. The plaintiff, who was unaware of the lease requirement, found an appropriate property and entered into an agreement with the broker who had an exclusive listing on that property to split the commission. The defendant's agent submitted an offer for the property and gave the plaintiff a written agreement to pay a $15,000 commission. The offer was not accepted, but a second offer, to which the agreement to pay a commission also applied, was accepted. Escrow was opened, but the defendant did not close that deal because a lease of the property had not been concluded. Later, the defendant did purchase the property and paid a commission to the broker who had the exclusive listing on the property. The defendant then traded the property for the last of the 17 parcels of the block. The defendant's agent refused to pay the plaintiff any commission on the purchase of the property, and the plaintiff sued to collect his commission. The judgment was for the plaintiff, but the trial court granted the defendant's motion for a new trial. Both parties appealed.

The court of appeal reversed the order granting a new trial and affirmed the judgment. The evidence was clearly sufficient to support a finding that the defendant had given its agent oral authority to pay real estate commissions (*263 Cal. App. 2d 333, 341)* . Under former Civ. Code § 2309, authority to enter into a contract required by law to be in writing must be written, and under former Civ. Code § 1624 an agreement to pay a real estate broker's commission must be in writing [*see Civ. Code § 1624(a)(4)*] (*263 Cal. App. 2d 333, 341-342)* . However, the plaintiff's commission agreement with the defendant's agent had been fully performed by the plaintiff, and the defendant, with complete knowledge of the circumstances, received the benefits resulting from its oral authorization to its agent to buy the city block in question. The defendant had additionally received the immediate benefit of the commission agreement, which had enabled the defendant to tie up that property in escrow for 90 days while trying to negotiate a lease for the property. Under those circumstances, it would be inequitable to allow the defendant to repudiate its agent's agreement. It is settled law that a principal in such a situation is estopped to deny liability under the agent's agreement (*263 Cal. App. 2d 333, 342)* .

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CHAPTER 216 STATUTE OF FRAUDS
PART II. FORMS
D. Effect of Performance or Estoppel on Plea of Statute of Frauds

21-216 California Points & Authorities § 216.132

§ 216.132 Party Asserting Statute of Frauds Is Not Estopped to Rely on It--Unconscionable Injury or Unjust Enrichment Is Not Established

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE _____ [*specify party relying on statute of frauds, e.g.,* DEFENDANT] IS NOT ESTOPPED FROM RELYING ON THE STATUTE OF FRAUDS BECAUSE THE _____ [*specify party relying on contract, e.g.,* PLAINTIFF] WILL NOT SUFFER UNCONSCIONABLE INJURY AND THE _____ [*specify party relying on statute of frauds, e.g.,* DEFENDANT] WILL NOT BE UNJUSTLY ENRICHED BY NONENFORCEMENT OF THE ALLEGED AGREEMENT.

A. Unconscionable Injury or Unjust Enrichment Is Essential to Estoppel. There can be no estoppel to rely on the statute of frauds unless the application ofthe statute of frauds will cause unconscionable injury to the party relying on the alleged agreement or will unjustly enrich the party relying on the statute of frauds (*Ruinello v. Murray (1951) 36 Cal. 2d 687, 689, 227 P.2d 251* ; *Tomlins v. American Ins. Co. (1968) 258 Cal. App. 2d 525, 528-529, 66 Cal. Rptr. 92*).

[*Optional*] **B. Rendition of Services Compensable in Quantum Meruit Is Insufficient Basis for Estoppel.** Neither unconscionable injury nor unjust enrichment is established by the rendition of services under a contract that is invalid under the statute of frauds if the reasonable value of the services might be recovered in an action in quantum meruit (*Palmer v. Phillips (1954) 123 Cal. App. 2d 291, 299, 266 P.2d 850* .

[*Optional*] **C. Loss of Bargain Is Insufficient Basis for Estoppel.** Loss of the alleged bargain and damages resulting therefrom do not in themselves establish estoppel to rely on the statute of frauds (*Oren Realty & Dev. Co. v. Superior Court (1979) 91 Cal. App. 3d 229, 235, 154 Cal. Rptr. 97*).

[*Optional*] **D. Increase in Value of Property From Market Conditions Is Insufficient as Unjust Enrichment.** An

increase in the value of the property to be sold does not establish that the seller will be unjustly enriched if an alleged sale contract is not enforced, when the increase resulted from market conditions rather than from any act or forbearance to act on the part of the purchaser (*Carlson v. Richardson (1968) 267 Cal. App. 2d 204, 208, 72 Cal. Rptr. 769*).

[*Optional*] **E. Fiduciary Asserting Estoppel Is Required to Prove That Agreement Is Fair and Reasonable.** When estoppel to rely on the statute of frauds is claimed by a person having a fiduciary relationship with the party against whom the claim is asserted, in addition to showing that unconscionable injury would result from failure to enforce the alleged agreement, it must appear that the underlying agreement is fair and reasonable (*Tenzer v. Superscope, Inc. (1985) 39 Cal. 3d 18, 30-33, 216 Cal. Rptr. 130, 702 P.2d 212*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that the party is not estopped to rely on the statute of frauds because there is no estoppel unless the adverse party (relying on the oral agreement) will be unconscionably injured or the party relying on the statute of frauds will be unjustly enriched if the agreement is not enforced. The argument supported by these points and authorities may be raised by a party relying on the statute of frauds whenever the adverse party urges that there is an estoppel to rely on the statute of frauds, if neither unconscionable injury nor unjust enrichment is shown. For example, the argument may be asserted in support of a demurrer to a complaint that alleges an oral agreement but alleges insufficient facts to establish unconscionable injury or unjust enrichment so as to preclude reliance on the statute of frauds [*see Palmer v. Phillips (1954) 123 Cal. App. 2d 291, 294-295, 266 P.2d 850]* .

[b] Argument

Counsel should add argument linking these points and authorities with the facts of the case.

[c] Related Points and Authorities

These points and authorities may be combined with points and authorities supporting the contention that the contract at issue is within the statute of frauds [*see, e.g., §§ 216.10[1],* 216.30[1], 216.40[1]].

For points and authorities supporting a demurrer to a complaint for quasi-specific performance of an oral agreement to leave property by will on the ground that the complaint fails to allege facts showing estoppel to rely on the statute of frauds, see Ch. 214, *Specific Performance* .

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Unconscionable Injury or Unjust Enrichment Is Essential to Estoppel

In ***Ruinello v. Murray*** *(1951) 36 Cal. 2d 687, 227 P.2d 251* , the plaintiff alleged that in consideration of his giving up a "permanent life-time position" with another employer, the defendant agreed to pay the plaintiff a monthly salary plus a yearly bonus for a five-year term. However, after nearly two years and two months, the defendant summarily discharged the plaintiff to avoid payment of a bonus. The plaintiff sought recovery of the salary that he would have received over the remaining term of the agreement, an accounting to determine the amount of the bonus, and a judgment for the bonus amount. The trial court sustained a demurrer to the third amended complaint without leave to amend, and the plaintiff

appealed from the ensuing judgment of dismissal.

The Supreme Court affirmed. There can be no estoppel unless the plaintiff will suffer unconscionable injury or the defendant will be unjustly enriched if the alleged contract is not enforced. The plaintiff failed to allege facts meeting either of those conditions (*36 Cal. 2d 687, 689)* . In order to show unconscionable injury based on giving up existing employment, there must be a showing that the rights given up under the employment contract were so valuable that unconscionableinjury would result from refusing to enforce the alleged employment agreement. The allegation of leaving "permanent life-time" employment was insufficient because such a contract is ordinarily terminable at the will of either party, and leaving such employment for employment with the defendant, which is also terminable at will because of the statute of frauds, does not constitute unconscionable injury (*36 Cal. 2d 687, 689-690)* . In addition, no unjust enrichment was alleged because although the plaintiff had alleged that his efforts substantially increased the gross income of the defendant's property, he did not allege that the reasonable value of his services was greater than the monthly salary he had received. No unjust enrichment results when the promisee has received the reasonable value of his or her services; or if the salary received were not the reasonable value of the services, an action in quantum meruit for that value would prevent unjust enrichment of the defendant (*36 Cal. 2d 687, 690)* .

In ***Tomlins v. American Ins. Co.*** *(1968) 258 Cal. App. 2d 525, 66 Cal. Rptr. 92* , the plaintiff quit his job and went to work for the defendant on an oral agreement that he would be employed for three years. The defendant was informed by the defendant's agent that he could not be given a contract regarding the employment, but that a letter of intent would be obtained. Three weeks after the plaintiff went to work for the defendant, he was discharged. In the plaintiff's suit for breach of contract, the trial court instructed the jury that the statute of frauds does not apply when there have been written representations that a writing will be executed in the future or when an unconscionable injury would result from the refusal to enforce the contract. Judgment was entered on a verdict for the plaintiff, and the defendant appealed.

The court of appeal reversed. The disjunctive "or" in the instruction erroneously allowed the jury to find an estoppel based on a mere promise to reduce the agreement to writing, without any element of unconscionable injury to the plaintiff (*258 Cal. App. 2d 525, 528)* . In *Seymour v. Oelrichs (1909) 156 Cal. 782, 794-795, 106 P. 88* , *disapproved on other grounds, Sterling v. Taylor (2007) 40 Cal. 4th 757, 770* , the Supreme Court had stressed the "unjust and unconscientious injury" to the party against whom the statute of frauds was asserted but also referred to a promise to reduce the oral agreement to writing. In the later case of *Monarco v. Lo Greco (1950) 35 Cal. 2d 621, 625, 220 P.2d 737* , the Supreme Court had noted that even though cases after *Seymour* had listed representation that a writing will be executed as a requirement of estoppel, those cases all involved either unconscionable injury to the party against whom the statute was asserted or unjust enrichment of the party relying on the statute of frauds. The Supreme Court concluded in *Monarco* that estoppel applies in cases of unconscionable injury or unjust enrichment, whether or not the plaintiff relied on representations going to the requirements of the statute itself. Therefore, implicitly, a promise to reduce the agreement to writing, alone and without either unconscionable injury or unjust enrichment, will not suffice to establish an estoppel (*258 Cal. App. 2d 525, 527-528)* .

[b] Rendition of Services Compensable in Quantum Meruit Is Insufficient Basis for Estoppel

Palmer v. Phillips *(1954) 123 Cal. App. 2d 291, 266 P.2d 850* , was an action for quasi-specific performance of an oral agreement that, in consideration of services rendered by the plaintiffs to a woman and her husband for the remainder of their lives, the woman would leave all of her property to the plaintiffs. The complaint alleged that the plaintiffs took care of business matters for the woman and her husband, did yard work, made repairs on their rental property and residence, paid taxes and insurance premiums, advised them on personal matters, gave them transportation, assisted in shopping, nursed and prepared meals for the woman in times of illness and did her laundry, furnished continual companionship, ran errands, and took the woman on automobile trips. The plaintiffs also alleged that they changed their own life-style, forgoing outside pleasures, in order to concern themselves continually with the welfare of the woman and her husband. The woman and her husband both died intestate, so that the plaintiffs were not entitled to any of their property. The plaintiffs sued for quasi-specific performance against the heirs, who defaulted. The

trial court found, however, that the complaint did not state a cause of action and entered a judgment of dismissal. The plaintiffs appealed.

The court of appeal affirmed. The plaintiffs had failed to adequately allege estoppel to remove the bar of the statute of frauds. There can be no estoppel unless the plaintiff will suffer unconscionable injury or the defendant will be unjustly enriched if the oral contract is not enforced [*Ruinello v. Murray (1951) 36 Cal. 2d 687, 689, 227 P.2d 251* (discussed in *§ 216.132[3][a]*)]. The mere rendition of personal services is not sufficient to relieve a contract from the operation of the statute of frauds in an action for quasi-specific performance unless the services are of such peculiar, extraordinary, or exceptional character that it is impossible to estimate their value by any pecuniary standard or to compensate adequately for them in money [*Fowler v. Hansen (1941) 48 Cal. App. 2d 518, 522, 120 P.2d 161]* (*123 Cal. App. 2d 291, 295)* . It did not appear that the plaintiffs had made such a change of position or that the services rendered were so peculiar that they could not be compensated in terms of money, and denial of enforcement of the contract would neither unconscionably injure the plaintiffs nor unjustly enrich the decedent or her heirs if the plaintiff were left to pursue the legal remedy of recovering from the estate the reasonable value of the services rendered [*see* *Chahon v. Schneider (1953) 117 Cal. App. 2d 334, 339, 256 P.2d 54]* . Unfortunately for the plaintiffs, their complaint was also insufficient to state a cause of action for quantum meruit because there was no allegation that they had presented a claim to the estate for the value of the services they had rendered to the woman and her husband (*123 Cal. App. 2d 291, 299)* .

[c] Loss of Bargain Is Insufficient Basis for Estoppel

In ***Oren Realty & Dev. Co. v. Superior Court*** *(1979) 91 Cal. App. 3d 229, 154 Cal. Rptr. 97* , the plaintiffs, who desired to purchase two houses from the defendants, had represented to the defendants that a third person might purchase a house near the two in question, so that the defendant would be able to sell three houses. The defendants offered a reduced price contingent on the third sale, but the plaintiffs declined to enter into the deal on a contingent basis. The defendants agreed that the price would not be contingent on the third sale, repudiated that agreement, and then again agreed that the sale would not be contingent on the third sale. The plaintiffs then signed offers and tendered money to the escrow holder. The defendants never signed anything and reversed their decision as to the contingency basis of the sales. The plaintiffs sued for specific performance, and the trial court denied the defendants' motion for summary judgment. The defendants petitioned for a writ of mandate to compel the trial court to grant their motion for summary judgment.

The court of appeal ordered a writ to issue to direct the trial court to grant the motion for summary judgment. The plaintiffs' allegation that they lost opportunities to purchase other land did not amount to a change of position on their part but only showed the manner in which injury may have flowed from loss of the alleged bargain [*see* *Carlson v. Richardson (1968) 267 Cal. App. 2d 204, 208, 72 Cal. Rptr. 769]* . Loss of bargain, and damages resulting, do not of themselves estop a vendor from relying on the statute of frauds (*91 Cal. App. 3d 229, 235)* .

[d] Increase in Value of Property From Market Conditions Is Insufficient as Unjust Enrichment

Carlson v. Richardson *(1968) 267 Cal. App. 2d 204, 72 Cal. Rptr. 769* , was an action for specific performance of an oral agreement for the sale of real property. The trial court sustained a demurrer to the complaint, and the plaintiffs appealed.

The court of appeal reversed. The description of the property in the complaint was sufficient to specifically enforce the agreement, and the complaint sufficiently alleged facts to estop the defendant from relying on the statute of frauds. However, the allegation that the property had increased in value did not of itself establish that the defendant would be unjustly enriched if the oral contract were not enforced, because the increase apparently resulted from market conditions rather than from any act or forbearance on the plaintiffs' part (*267 Cal. App. 2d 204, 208)* .

[e] Fiduciary Asserting Estoppel Is Required to Prove That Agreement Is Fair and Reasonable

Tenzer v. Superscope, Inc. *(1985) 39 Cal. 3d 18, 216 Cal. Rptr. 130, 702 P.2d 212* , involved a corporate director who had extensive personal and business contacts among investors in the real estate field, but who was not licensed as a broker or salesman. The director sued the corporation for a finder's fee on the sale of the corporate headquarters. The fee had been orally agreed to by the chairman and the plaintiff before the plaintiff introduced the buyer to the corporation. The plaintiff refrained from introducing the buyer to other potential sellers on the basis of the oral agreement with the chairman. At the board meeting at which the sale of the headquarters was approved, the plaintiff disclosed the fee agreement to the rest of the board, but he did not mention the amount of the fee. Discussion was had at that meeting about the payment of the fee, but final decision was deferred until the next meeting. At that meeting the proposal was defeated. The plaintiff's interpretation of the discussion and vote at the second meeting was that it concerned payment of finder's fees to directors in future transactions and that his fee had been approved when the sale was approved. The plaintiff stated causes of action based on breach of contract and unjust enrichment, estoppel, and fraud. The defendant's motion for summary judgment was granted, and the plaintiff appealed.

The Supreme Court reversed. The finder's fee agreement was required to be in writing [*see Civ. Code § 1624(a)(4)*] (*39 Cal. 3d 18, 25-27)* , and a question of fact existed as to whether the plaintiff's activities had gone beyond mere introductions and included matters for which a license would be required (*39 Cal. 3d 18, 31)* . Turning to the implications of the fiduciary relationship, the Court rejected the defendant's contention that any reliance by the plaintiff on the oral agreement was unreasonable as a matter of law. The bargain to be enforced by a director cannot be harsh or unfair. The burden is on the director to prove not only the good faith of the transaction but also its inherent fairness from the point of view of the corporation. The test is whether the transaction carries the earmarks of an arm's length bargain. A transaction unfair to the corporation may be avoided by it, and a director is charged with the knowledge that an unfair agreement may be avoided (*39 Cal. 3d 18, 31-34)* .

[4] Additional Authorities

[a] Unconscionable Injury or Unjust Enrichment Is Essential to Estoppel

In *Estate of Baglione (1966) 65 Cal. 2d 192, 53 Cal. Rptr. 139, 417 P.2d 683* , the Supreme Court affirmed a judgment of dismissal entered after a demurrer to the complaint was sustained without leave to amend. The plaintiff sought to enforce an oral agreement against her late husband's executor pursuant to which the spouses had allegedly promised that on the death of either of them, the other would receive a particular tract of real property. She failed to adequately allege facts constituting estoppel to assert the statute of frauds. She did not allege anyserious change in position or that she made any contributions to the community property different from those she would have made in any event as the decedent's wife. Her only loss was the benefit of a bargain within the statute. There was also no unjust enrichment alleged since the decedent died first and thus received no benefits under the contract (*65 Cal. 2d 192, 198*).

Winburn v. All American Sportswear Co. (1963) 215 Cal. App. 2d 380, 30 Cal. Rptr. 321 , was an action for breach of an oral contract pursuant to which the plaintiff was to be the defendant's factory representative for a calendar year beginning six months from the time the contract was made. The court of appeal held that the plaintiff's claim that he did not seek other product lines to represent, without any claim that other lines were available, failed to establish a serious change of position causing unconscionable injury. Furthermore, unjust enrichment was not established by the plaintiff's claim that he sent a "list of 20 of his biggest customers" to the defendant, since there was no showing that any of them dealt with the defendant (*215 Cal. App. 2d 380, 382)* .

In *Fallon v. American Trust Co. (1959) 176 Cal. App. 2d 381, 1 Cal. Rptr. 386* , an action for quasi-specific performance of an oral agreement to leave property to the plaintiff by will, the court of appeal held that a demurrer to the complaint had been properly sustained and that the plaintiff had failed to allege unconscionable injury or unjust enrichment that would estop the defendant, the executor of the estate of the plaintiff's late husband, from relying on the statute of frauds. The plaintiff alleged that she had performed her part of the agreement by not commencing an action

for divorce, thereby forfeiting a determination of her property and support rights against her husband. The court found these allegations insufficient since there was no allegation that there was any community property to be divided in any divorce proceeding, any separate property of the decedent would not have been subject to division in a divorce proceeding, and forfeiting a determination of support rights was too speculative to be relied on as the basis of estoppel, since the right to support depends on many factors, which were not alleged (*176 Cal. App. 2d 381, 384-385)* .

[b] Loss of Bargain Insufficient Basis for Estoppel

Isaac v. A & B Loan Co. (1988) 201 Cal. App. 3d 307, 247 Cal. Rptr. 104 , discussed in § 216.81[c][i], also considered plaintiffs' contention that their $30,000 downpayment was sufficient basis on which to estop defendant from asserting the defense of the statute of frauds. The court found there was no potential for unconscionable injury or unjust enrichment. Loss of plaintiffs' bargain was not enough to invoke the doctrine of estoppel (*201 Cal. App. 3d 307, 313)* .

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21-216 California Points & Authorities § 216.133

§ 216.133 Party Asserting Statute of Frauds Is Not Estopped to Rely on It--Principal Is Not Estopped From Relying on Requirement That Agent's Authority Must Be in Writing

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

EVEN THOUGH THE FACTS MIGHT SUPPORT AN ESTOPPEL TO RELY ON THE STATUTE OF FRAUDS, THE CONTRACT MAY NOT BE ENFORCED AGAINST THE _____ [*party relying on statute of frauds, e.g.,* DEFENDANT] BECAUSE _____ [*name of agent*] DID NOT HAVE WRITTEN AUTHORITY FROM THE _____ [*party relying on statute of frauds, e.g.,* DEFENDANT] TO ENTER INTO THE CONTRACT ON HIS/HER BEHALF AS REQUIRED BY *CIVIL CODE SECTION 2309*, AND THE _____ [*party relying on statute of frauds, e.g.,* DEFENDANT] IS NOT ESTOPPED BY HIS/HER OWN ACTS FROM RELYING ON SECTION 2309.

Requirement of Written Authority to Make Contract Within Statute of Frauds Is Not Excused by Estoppel to Rely on Statute in Regard to Contract. Even though an agent's acts are such as to render his or her contract enforceable notwithstanding the statute of frauds, the contract is unenforceable against the principal unless the agent had written authority to enter into the contract or the principal is estopped by his or her own acts from relying on the requirement that the agent's authority be in writing (*McGirr v. Gulf Oil Corp. (1974) 41 Cal. App. 3d 246, 254-256, 115 Cal. Rptr. 902*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that the party is not estopped to rely on the statute of frauds, or is not estopped to rely on the requirement that an agent's authority be in writing, or both. The ground for this contention is that the alleged acts giving rise to the estoppel to rely on the statute of frauds were committed by an agent, and the principal is not estopped to rely on the statute of frauds unless the agent had written

authority to enter into the agreement or the principal's own acts or representations estop the principal from denying the agency. The argument supported by these points and authorities may be raised by a party relying on the statute of frauds when the adverse party urges that there is an estoppel to rely on the statute of frauds but the acts relied on to establish estoppel are the acts of an agent of the party sought to be charged, and the agent did not have written authority to enter into the agreement. The argument may also be used when the adverse party contends thatthere is an estoppel to rely on *Civ. Code § 2309* but the facts do not clearly support that contention.

[b] Argument

Counsel should add argument linking these points and authorities with the facts of the case. Thus, counsel should demonstrate that the agent had no written authority to enter into the contract and that the principal did not engage in acts leading the third party to believe that the agent had authority to enter into the contract and did not accept the benefits of the contract with full knowledge of the circumstances [*see Kerner v. Hughes Tool Co. (1976) 56 Cal. App. 3d 924, 934-935, 128 Cal. Rptr. 839* (discussed in *§ 216.131* [3][a])].

[c] Related Points and Authorities

These points and authorities may be combined with the points and authorities *set forth in § 216.70* and may also be combined with points and authorities supporting the contention that the contract at issue is within the statute of frauds [*see, e.g., §§ 216.10[1],* 216.30[1], 216.40[1]].

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Requirement of Written Authority to Make Contract Within Statute of Frauds Is Not Excused by Estoppel to Rely on Statute in Regard to Contract

In ***McGirr v. Gulf Oil Corp.*** *(1974) 41 Cal. App. 3d 246, 115 Cal. Rptr. 902* , the plaintiff was operating a service station for one oil company when he responded to Gulf Oil's advertisement for dealers. An agent of Gulf Oil then contacted the plaintiff. The agent told the plaintiff that he could get a five-year lease on a very profitable service station in about 90 days but declined to put the terms in writing because he did not have to, being the "kingpin in [his] territory." The agent then informed the plaintiff that there was a "dog" station that he had to lease before the profitable station could be leased, and he and the plaintiff agreed that the plaintiff would lease the unprofitable station and would be guarantied a lease on the profitable one. The plaintiff terminated his existing lease, moved some property to the new "dog" station, bought stock and inventory from Gulf Oil for $3,000, and paid a gasoline deposit of $750. The plaintiff signed a standard preprinted one-year lease on the unprofitable station several weeks after taking possession of it. The agent was transferred within a few months, and Gulf Oil took the position that there was no agreement in regard to the profitable station. The plaintiff sued for breach of contract, and the jury returned a verdict awarding damages to the plaintiff. The trial court, however, granted the defendants' motion for judgment notwithstanding the verdict, and the plaintiff appealed.

The court of appeal affirmed. There was no evidence that the agent had actual authority to lease service stations for Gulf Oil. Without taking *Civ. Code § 2309* into account, the agent did have ostensible authority to make binding leases on behalf of the oil company (*41 Cal. App. 3d 246, 252)* . With respect to the contract to lease the profitable station, the plaintiff would suffer the unconscionable injury necessary to estop Gulf Oil from relying on the statute of frauds, which requires leases for a period of more that one year to be in writing [*see Civ. Code § 1624(a)(3)*] (*41 Cal. App. 3d 246, 252-254)* . With respect to the equal-dignities rule embodied in *Civ. Code § 2309*, which requires an agent to have written authority to enter into a contract required by law to be in writing, when the agent has conducted himself or

herself in such a manner that his or her oral contract will be enforced even though it is of a nature that ordinarily it must be in writing, the principal nevertheless cannot be held liable in the absence of written authority or estoppel by the principal's own acts or representations (*41 Cal. App. 3d 246, 254-255)* . California cases have held a principal estopped to rely on the equal-dignities rule when the principal caused the third person to believe that written authority exists or is unnecessary or when the principal accepted the benefits resulting from the oral authorization of the agent with complete knowledge of the circumstances. In either case, the estoppel is based on conduct of the principal in lulling the third person into a belief that the agent had written authority or did not need it or in retaining the benefit of the contract with knowledge of the circumstances (*41 Cal. App. 3d 246, 257-258)* . The most that Gulf Oil had done in this case was to permit its agent to appear to be an agent who could enter into lease agreements with prospective operators, but in no way did Gulf Oil indicate that the agent had authority to enter into leases for more than one year or that his authority was in writing. Moreover, there was no indication that Gulf Oil accepted any benefits resulting from having the plaintiff lease the unprofitable station with knowledge that the plaintiff intended it as part of a contract including a lease of the profitable station. If the plaintiff had dealt with an agent who had written authority, Gulf Oil would be estopped to rely on the statute of frauds because of the plaintiff's unconscionable injury. However, because the plaintiff did not deal with an agent with written authority, and Gulf Oil had neither done anything to mislead the plaintiff into believing that *Civ. Code § 2309* had been satisfied or would not be relied on, nor accepted any benefit of the oral five-year lease relied on by the plaintiff, Gulf Oil was not estopped to rely on *Civ. Code § 2309* (*41 Cal. App. 3d 246, 258)* .

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21-216 California Points & Authorities § 216.134

§ 216.134 Party Asserting Statute of Frauds Is Not Estopped to Rely on It--Doctrine of Judicial Admissions Does Not Apply to Testimony

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE CONTRACT IS NOT ENFORCEABLE BECAUSE, THE CONTRACT BEING ONE OTHER THAN FOR THE SALE OF GOODS, ADMISSION OF THE EXISTENCE OF THE CONTRACT IN TESTIMONY DOES NOT REMOVE THE CONTRACT FROM THE STATUTE OF FRAUDS.

Testimony Does Not Bar Assertion of Statute of Frauds. The doctrine of judicial admissions in California has never been applied to testimony. Testimony that admits the existence of an oral agreement is not sufficient to satisfy the statute of frauds or to prevent reliance on it (*Hasshagen v. Hasshagen (1889) 80 Cal. 514, 517-518, 22 P. 294* ; *Isaac v. A & B Loan Co. (1988) 201 Cal. App. 3d 307, 311-312, 247 Cal. Rptr. 104*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that an oral agreement, other than one for the sale of goods, has not been removed from the statute of frauds by testimony. The doctrine of judicial admissions in California relates only to pleading, not to testimony of the party against whom the oral contract is sought to be enforced.

A contrary rule governs contracts for the sale of goods [*see Com. Code § 2201(3)(b)*].

[b] Argument

Counsel should add argument linking these points and authorities with the facts of the case. For example, counsel

should set forth facts describing the proceeding in which the testimony was given.

[c] Related Points and Authorities

For discussion of requirements and considerations for drafting memoranda, discussion on how to combine the forms of this publication in drafting, and discussion and general forms for completing a draft memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

[3] Discussion of Authorities

[a] Testimony Does Not Bar Assertion of Statute of Frauds

Hasshagen v. Hasshagen *(1889) 80 Cal. 514, 22 P. 294* , was an action to declare an express trust in land. Judgment for the plaintiff was reversed by the Supreme Court on the ground that there was no evidence to sustain the trial court's findings (*80 Cal. 514, 518-519)* . Part of the evidence relied on by the trial court was testimony given by the defendant at proceedings relating to the settlement of a decedent's estate. That testimony denied the establishment of an express trust according to the terms alleged by the plaintiff, but the testimony tended to show an oral agreement that the property should be held in trust pending payment of sums owed by the decedent to the defendant. Even if the defendant's testimony had admitted a trust as alleged by the plaintiff, it did not constitute a written declaration of trust (*80 Cal. 514, 517)* . The testimony was given long after the deed was made and could not take the case out of the statute of frauds (*80 Cal. 514, 518)* .

In ***Isaac v. A & B Loan Co.*** *(1988) 201 Cal. App. 3d 307, 247 Cal. Rptr. 104* , the cross complainants, hereinafter referred to as the plaintiffs, sued for breach of an oral contract for sale of real property and for bad-faith denial of the existence of that contract. The oral agreement was alleged to have been made on July 13, 1985. On July 22, the plaintiffs made a $30,000 down payment on the property. On July 24, a third party commenced an action against all parties to this action seeking to set aside the trustee's sale by which the defendant had acquired title to the property. In that action the defendant's attorney submitted declarations in support of motions to expunge the lis pendens and for an order shortening time for that motion. The declaration supporting the motion to shorten time included the statement that the defendant "currently has a prospective buyer for the property. In the absence of an order shortening time, this motion to expunge lis pendens may not be heard in time for A & B Loan to consummate the sale to the prospective buyer." The declaration supporting the motion to expunge included the statement, "On July 19, 1985, A & B Loan entered into an agreement for the sale of the property, with escrow to close on July 26, 1985. As a result of the filing of the lis pendens by the plaintiff, escrow did not close as scheduled. Although the prospective buyer is still interested in purchasing the property, he has stated that he is unwilling to purchase it unless the title difficulties caused by the lis pendens are cleared." In October, 1985, the defendant sold the property to someone else. The day after that deed was recorded, the defendant returned the plaintiffs' down payment with interest. The plaintiffs argued that the statements in the declarations constituted judicial admissions of the existence of the contract and precluded the defendants from asserting the statute of frauds. After sustaining demurrers without leave to amend, the trial court entered judgment for the cross defendant. The plaintiffs appealed.

The court of appeal affirmed. The plaintiffs' argument was without merit because the doctrine of judicial admissions in California has never been applied to testimony. If the defendant admits the contract in the answer without asserting at the same time the statute as a defense, the defendant will be held to have waived the protection of the statute. On the other hand, testimony that admits the existence of an oral agreement is not sufficient to satisfy the statute of frauds [*Hasshagen v. Hasshagen (1889) 80 Cal. 514, 517, 22 P. 294* (discussed *above*); *Keans, Springmann & Stipek, Inc. v. Alphonzo E. Bell Corp (1954) 126 Cal. App. 2d 311, 326-327, 272 P.2d 35* (discussed in [4][a], *below*); *Ragghianti v. Harris (1954) 124 Cal. App. 2d 17, 18, 268 P.2d 45* (discussed in [4][a], *below*)]. The statements in the declarations were made in an action by a third party, at a time when it was unnecessary for the defendant to consider whether to waive or assert the statute of frauds. Those statements cannot be treated the same as a solemn judicial admission in an

answer to a complaint alleging a contract within the statute of frauds (*201 Cal. App. 3d 307, 311)* .

[4] Additional Authorities

[a] Testimony Does Not Bar Assertion of Statute of Frauds

Keans, Springmann & Stipek, Inc. v. Alphonzo E. Bell Corp. (1954) 126 Cal. App. 2d 311, 272 P.2d 35 , was an action for specific performance of an oral agreement under which the plaintiff was to act as the defendant's broker to negotiate an oil and gas lease in return for an overriding royalty on all oil and gas produced from that lease, to enforce a trust, and for accounting. Judgment for the defendant was affirmed. First, the court of appeal noted that an oil and gas lease for longer than a year, such as this one, was within the statute of frauds, as was the agency agreement alleged by the plaintiff (*126 Cal. App. 2d 311, 326-327)* . The defendant's president admitted the oral agreement in his deposition testimony. The plaintiff contended that the deposition testimony was a sufficient memorandum to satisfy the statute of frauds. The court of appeal disagreed, and distinguished cases in which the defendants had made the admission in an answer without also claiming the protection of the statute of frauds. That, the court agreed, does amount to waiver of the protection of the statute (*126 Cal. App. 2d 311, 327)* . Here, however, the deposition was not sufficient to satisfy the statute of frauds or to estop the defendant from relying on the statute of frauds (*126 Cal. App. 2d 311, 327-328)* .

Ragghianti v. Harris (1954) 124 Cal. App. 2d 17, 268 P.2d 45 , was an action on an oral contract under which the plaintiff was to buy an interest in the defendant's business. The defendant admitted in his testimony in an unrelated action that he had made the contract with the plaintiff. Judgment for the defendant was affirmed. However, testimony of the defendant in a prior proceeding is not sufficient to take the contract out of the statute of frauds [*Hasshagen v. Hasshagen (1889) 80 Cal. 514, 517, 22 P. 294* (discussed in [3][a], *above*)] (*124 Cal. App. 2d 17, 18)* . Such testimony is as ineffective as the defendant's admission to a person on the street. Oral repetition of what is required to be in writing does not take the place of the writing. Neither does it estop the defendant from relying on the statute of frauds (*124 Cal. App. 2d 17, 18)* . The plaintiff argued, as the basis for the application of estoppel, that by admission of the contract in the prior divorce action, the defendant gained an advantage over his former spouse. But that admission did not result in any advantage over or injury to the plaintiff, and the elements of estoppel were not established (*124 Cal. App. 2d 17, 19)* .

California Points & Authorities

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 217 STATUTORY INTERPRETATION

21-217 California Points & Authorities 217.syn

§ 217.syn Synopsis to Chapter 217: STATUTORY INTERPRETATION

§ 217.01 Scope of Chapter

§ 217.02 Governing Law

§ 217.03 Application of Rules of Interpretation to Ordinances, Regulations, and Constitutional and Charter Provisions

§ 217.04 Related Discussion and Forms

[1] Related Pleading and Practice Forms

[2] Related Memoranda

§§ 217.05-217.19 [Reserved]

§ 217.20 Supporting Contention That Statute Be Construed to Ascertain and Effectuate Legislative Intent [Code Civ. Proc. § 1859]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Fundamental Rule of Construction

[b] All Provisions to Be Given Effect

[c] Sensible Construction Consistent With Purpose

[d] Canons of Construction Subordinate to Intent

[e] Court Not to Substitute Its Views for Those of Legislature

[f] Secondary Rules of Construction May Be Applied When Legislative Intent Cannot Be Determined Directly From Statute in Context

[g] Rules of Construction Apply to Statutes Enacted Through Initiative Process

[4] Additional Authorities

[a] Fundamental Rule of Construction

[b] Sensible Construction Consistent With Purpose

[c] Canons of Construction Subordinate to Intent

[d] Secondary Rules of Construction May Be Applied When Legislative Intent Cannot Be Determined Directly From Statute in Context

§ 217.21 Supporting Contention That Statute Should Be Construed to Give Effect to Purpose When Literal Interpretation Would Defeat Apparent Purpose or Lead to Absurdity

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Give Effect to Purpose Rather Than Strict Letter of Statute

[b] Disregard Literal Meaning to Avoid Absurd Results Not Intended by Legislature

[4] Additional Authorities

[a] Give Effect to Purpose Rather Than Strict Letter of Statute

[b] Disregard Literal Meaning to Avoid Absurd Results Not Intended by Legislature

§ 217.22 Supporting Contention That Rules of Statutory Interpretation Apply to Constitutional Provisions, Charter Provisions, Ordinances, and Administrative Regulations

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Constitutional Provisions

[b] Charter Provisions

[c] Ordinances

[d] Administrative Regulations

[4] Additional Authorities

[a] Constitutional Provisions

[b] Ordinances

§ 217.23 Supporting Contention That Constitutional Construction of Statute Preferred

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Constitutional Construction Preferred to Avoid Constitutional Issue in Contrary Construction

[b] Construction to Preserve Statute's Constitutionality

[c] Construe to Give Specificity to Vague Terms

[4] Additional Authorities

[a] Constitutional Construction Preferred to Avoid Constitutional Issue in Contrary Construction

[b] Construction to Preserve Statute's Constitutionality

§ 217.24 Supporting Contention That Court Not to Insert Omitted Terms Into or to Omit Terms From Statutes [Code Civ. Proc. § 1858]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Words Not to Be Altered to Accomplish Purpose Not Apparent on Statute's Face or From Its History

[b] Courts May Not Assert Qualifying Provisions

[4] Additional Authorities

[a] Courts Not to Insert Omitted Terms or to Omit Inserted Terms

[b] Words Not to Be Altered to Accomplish Purpose Not Apparent on Statute's Face or From Its History

§ 217.25 Opposing Contention That Statute Should Be Construed to Ascertain and Effectuate Legislative Intent--Clear Statute Not to Be Construed

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] No Construction of Clear Statute

[b] Give Statute Effect According to Usual Meaning of Its Language

[c] Plain Language of Statute Adhered to When Legislative History Creates Conflicting Inferences

[d] Burden to Show That Statute Should Not Be Applied According to Natural Import of Language

[4] Additional Authorities

[a] No Construction of Clear Statute

[b] Give Statute Effect According to Usual Meaning of Its Language

[c] Plain Language of Statute Adhered to When Legislative History Creates Conflicting Inferences

§ 217.26 Opposing Contention That Court Should Construe Statute To Preserve Its Constitutionality--Avoid Wholesale Rewriting of Statute

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] No Wholesale Rewriting to Preserve Constitutionality

§§ 217.27-217.39 [Reserved]

§ 217.40 Supporting Contention That Words of Statute Be Accorded Usual Meaning

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Turn First to Words to Determine Intent

[b] Words to Be Given Usual Meaning

[c] Word With More Than One Meaning to Be Construed to Attain Purposes of Statute

[4] Additional Authorities

[a] Turn First to Words to Determine Intent

[b] Words to Be Given Usual Meaning

[c] Word With More Than One Meaning to Be Construed to Attain Purposes of Statute

§ 217.41 Supporting Contention That Statutory Definition of Word Binding on Court

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Statutory Definition Binding on Court

§ 217.42 Supporting Contention That Previously Construed Words of Statute on Same or Analogous Subject Presumed to Have Been Used in Same Sense in New Statute

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Previously Construed Words Presumed to Be Used in Same Sense

[b] Adoption of Previous Construction of Federal Legislation on Which State Statute Patterned

[4] Additional Authorities

[a] Previously Construed Words Presumed to Be Used in Same Sense

§ 217.43 Supporting Contention That Words of Statute Be Construed in Context

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Statutory Language to Be Construed in Context

[b] Noscitur a Sociis

[c] Last Antecedent Rule

[d] Words Grouped in List

[e] General Words Used in Conjunction With Specific Words

[f] Adverb Modifying Transitive Verb Usually Also Applies to Verb's Object

[4] Additional Authorities

[a] Statutory Language to Be Construed in Context

[b] Noscitur a Sociis

[c] Last Antecedent Rule

§ 217.44 Supporting Contention That General Words Following Enumeration of Particular Classes of Persons or Things Should Be Construed as Applicable Only to Persons or Things of Same General Nature

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Ejusdem Generis

[4] Additional Authorities

[a] Ejusdem Generis

§ 217.45 Supporting Contention That Legislature's Inclusion of One Thing in Statute Excludes Any Other

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Expressio Unius Est Exclusio Alterius

[4] Additional Authorities

[a] Expressio Unius Est Exclusio Alterius

§ 217.46 Supporting Contention That Statute Be Construed to Produce Internal Harmony and Avoid Surplusage [Code Civ. Proc. § 1858]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] All Provisions to Be Given Effect

[b] Preference for Interpretation Producing Internal Harmony and Avoiding Surplusage

[4] Additional Authorities

[a] Preference for Interpretation Producing Internal Harmony and Avoiding Surplusage

§§ 217.47-217.59 [Reserved]

§ 217.60 Supporting Contention That Statute Be Construed in Harmony With Whole System of Law of Which It Is Part So That All May Have Effect

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Construe Statutes on Same Subject Together

[b] Construe in Harmony With Whole System of Law

[c] Statutes Enacted in Same Legislative Session Especially to Be Construed Together

[d] Repeal by Implication Not Favored

[e] No Implied Repeal of Statutes Enacted by Same Bill

[f] Different Codes and Legislative Acts To Be Construed Together

[4] Additional Authorities

[a] Construe Statutes on Same Subject Together

[b] Construe in Harmony With Whole System of Law

[c] Repeal by Implication Not Favored

§ 217.61 Supporting Contention That Specific Provision Governs General Provision Broad Enough to Cover Same Subject

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Specific Provision Governs General

[b] Specific Provision as Exception to General Provision Regardless of Which Enacted First

[4] Additional Authorities

[a] Specific Provision Governs General

[b] Specific Provision as Exception to General Provision Regardless of Which Enacted First

§ 217.62 Supporting Contention That When Statutes Irreconcilable Later-Enacted One Governs

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Repeal by Implication

[4] Additional Authorities

[a] Repeal by Implication

§ 217.63 Supporting Contention That Inclusion of Provision in One Statute or Part of Statute, but Not in Other Part of Statute or in Other Related Statute, Shows Different Intent

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Omission of Provision Included in Statute on Related Subject or in Other Part of Same Statute

[4] Additional Authorities

[a] Omission of Provision Included in Statute on Related Subject

§ 217.64 Supporting Contentions That Statute Should Be Construed as Cross Referring to Another Statute as It

Existed When Originally Enacted or as It Presently Exists

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Effect of Cross-Reference to Other Statutes

§ 217.65 Opposing Contention That Specific Provision Governs General Provision--Neither Provision Is More Specific

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Principle That Specific Provision Governs General Provision Is Inapplicable if Neither Provision Is More Specific

§§ 217.66-217.79 [Reserved]

§ 217.80 Supporting Contention That Legislative Committee Report May Be Considered in Interpreting Statute

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Consideration of Legislative Committee Report

[4] Additional Authorities

[a] Consideration of Legislative Committee Reports

§ 217.81 Supporting Contention That Report of Commissioners Who Drafted Statute May Be Considered in Interpreting Statute

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Consideration of Reports of Commissions That Propose Statutes

[4] Additional Authorities

[a] Consideration of Reports of Commissions That Propose Statutes

§ 217.82 Supporting Contention That Legislator's Statement of Legislature's Intent Should Be Considered in Interpreting Statute

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Consideration of Legislator's Statement Reflecting Legislature's Intent

[4] Additional Authorities

[a] Consideration of Legislator's Statement Reflecting Legislature's Intent

§ 217.83 Supporting Contention That Legislator's Statement of Intent of Statute Should Not Be Considered in Interpreting Statute

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Legislator's Statement of Intent Not to Be Considered

[4] Additional Authorities

[a] Legislator's Statement of Intent Not to Be Considered

§ 217.84 Supporting Contention That Statute Should Not Be Construed to Include Provision Rejected by

Legislature

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Failure to Enact Specific Provision

[4] Additional Authorities

[a] Failure to Enact Specific Provision

§ 217.85 Supporting Contention That Amendment Substantially Changing Previously Construed Statute Shows Legislative Intent to Change Law

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memorandum

[3] Discussion of Authorities

[a] Intent to Alter Law Inferred From Substantial Changes in Statutory Language

[4] Additional Authorities

[a] Intent to Alter Law Inferred From Substantial Changes in Statutory Language

§ 217.86 Supporting Contention That Legislature Adopted Judicial Interpretation of Statute by Reenacting Previously Construed Portions Without Change

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Adoption of Judicial Interpretation by Reenactment Without Change

[4] Additional Authorities

[a] Adoption of Judicial Interpretation by Reenactment Without Change

§ 217.87 Supporting Contention That Voters' Pamphlet May Be Considered in Interpreting Statute or Constitutional Amendment Enacted by Voters

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Consideration of Arguments Contained in Voters' Pamphlets

§ 217.88 Opposing Contention That Amendment Substantially Changing Previously Construed Statute Shows Legislative Intent to Change Law--Mere Change in Phraseology

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Mere Change in Phraseology

[4] Additional Authorities

[a] Mere Change in Phraseology

§ 217.89 Opposing Contention That Legislature Adopted Judicial Interpretation of Statute by Reenacting Previously Construed Portions Without Change

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Exceptions to Rule That Reenactment of Statute Without Changing Portions Previously Interpreted by Judiciary Adopts Judicial Interpretation

[b] Prior Judicial Construction of Statute Not Mandated When Subsequent Reenactment Not Concerned With Topic of Judicial Construction

§ 217.90 Opposing Contention That Legislative Silence After Court Has Construed Statute Gives Rise to Presumption of Legislative Awareness of and Acquiescence in Construction

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Legislative Silence After Court Has Construed Statute as Not Indicative of Approval

[b] Legislative Silence After Court Has Construed Statute as Giving Rise to Arguable Inference of Approval, at Most

[c] Legislative Silence After Judicial Construction as Not Indicative of Approval Despite Subsequent Legislative Action on Other Parts of Same Act

§ 217.91 Opposing Contention That Report of Commissioners Who Drafted Statute Establishes Legislative Intent

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Commission Report Does Not Necessarily Reflect Legislative Intent

§§ 217.92-217.109 [Reserved]

§ 217.110 Supporting Contention That Administrative Agency's Interpretation of Statute Entitled to Great Weight

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memoranda

[3] Discussion of Authorities

[a] Great Weight of Administrative Interpretation

[b] Reenactment of Statute After Administrative Construction

[4] Additional Authorities

[a] Great Weight of Administrative Interpretation

§ 217.111 Opposing Contention That Administrative Agency's Interpretation of Statute Entitled to Great Weight

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Overthrowing Administrative Interpretation

[b] Internal Agency Memorandum Not Controlling

[c] Agency May Not Enlarge Legislative Enactment

[d] No Deference Owed to Agency Interpretation Embodied in Void Regulations

§§ 217.112-217.129 [Reserved]

§ 217.130 Supporting Contention That Statute Should Be Applied Retroactively--Retroactive Application Necessary to Effectuate Legislative Intent

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Statute Given Retroactive Effect If Necessary to Effectuate Legislative Intent

[b] Constitutional Infirmity of Former Law as Indication of Legislative Intent

[4] Additional Authorities

[a] Statute Given Retroactive Effect If Necessary to Effectuate Legislative Intent

§ 217.131 Supporting Contention That Statute Should Be Applied Retroactively--Retroactive Application of Provision Clarifying Law

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Retroactive Application of Provision Clarifying Law

[b] Clarifying Amendment Applies to Existing Cause of Action

[4] Additional Authorities

[a] Retroactive Application of Provision Clarifying Law

§ 217.132 Supporting Contention That Statute Should Be Applied Retroactively--Amended Statute Consists Only of Procedural Rule

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Change in Procedural Law Applicable Retroactively

[b] Procedural Statute Does Not Create New Action or Destroy Defense

[c] Statute Regulating Costs May Be Applied to Pending Actions

[4] Additional Authorities

[a] Change in Procedural Law Applicable Retroactively

§ 217.133 Opposing Contention That Statute Be Given Retroactive Application

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] No Retroactive Operation Absent Clear Intent

[b] Destruction of Previously Acquired Interest Disfavored

[c] Statute Modifying Civil Liability Not to Be Construed Retroactively

[d] Statute Shortening Period of Limitations Not to Be Construed Retroactively

[e] Erroneous Characterization of Statute as "Declaratory of Existing Law" Not Sufficient Evidence of Retroactive Intent

[4] Additional Authorities

[a] No Retroactive Operation Absent Clear Intent

[b] Statute Modifying Civil Liability Not to Be Construed Retroactively

§ 217.134 Supporting Contention That Application of Statute Does Not Constitute Retroactive Effect

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Memorandum

[3] Discussion of Authorities

[a] Statute Does Not Have Retroactive Effect Unless It Substantially Changes Legal Consequences of Past Events

[b] Application of Statute Is Not Retroactive If It Is Triggered by Event Occurring After Statute's Effective Date

California Points & Authorities

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 217 STATUTORY INTERPRETATION
PART I. INTRODUCTION

21-217 California Points & Authorities § 217.01

§ 217.01 Scope of Chapter

This chapter contains memoranda relating to the interpretation of statutes. It includes memoranda setting out general rules of interpretation [*see §§ 217.20 -217.26*], rules pertaining to the interpretation of the words of a statute [*see §§ 217.40 -217.46*], rules pertaining to the interpretation of statutes in relation to other statutes [*see §§ 217.60 -217.65*], rules pertaining to the consideration of legislative history in interpreting statutes [*see §§ 217.80 -217.91*], and rules pertaining to the weight to be given to administrative interpretation of a statute [*see §§ 217.110, 217.111*]. The chapter also includes memoranda supporting [*see §§ 217.130 -217.132*] and opposing [*see § 217.133*] the retroactive application of a statute, and supporting a contention that application of a statute does not constitute a retroactive application [*see § 217.134*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationGeneral OverviewGovernmentsLegislationEffect & OperationGeneral OverviewGovernmentsLegislationInterpretation

California Points & Authorities

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 217 STATUTORY INTERPRETATION
PART I. INTRODUCTION

21-217 California Points & Authorities § 217.02

§ 217.02 Governing Law

The interpretation of statutes is governed generally by *Code Civ. Proc. §§ 1858, 1859*, and *1866*. In addition, particular codes have provisions governing the interpretation of statutes included within them [*see, e.g., Civ. Code §§ 2-23.6, 3509-3548*; *Code Civ. Proc. §§ 2-32*; *Evid. Code §§ 1-12*]. Some codes also contain provisions defining terms used in the code, which apply unless a specific provision or context requires otherwise [*see, e.g., Evid. Code § 100 et seq.*; *Veh. Code § 100 et seq.*].

Particular acts within a code also may provide definitions of terms used within those acts [*see, e.g., Fam. Code § 4802* (defining terms as used in Uniform Reciprocal Enforcement of Support Act); *Civ. Code § 2981* (defining terms as used in Rees-Levering Motor Vehicle Sales and Finance Act)]. Particular acts may also include provisions setting out their purpose or legislative intent [*see, e.g., Civ. Code § 82* (purposes of California Fair Dealership Law); *Welf. & Inst. Code § 5001* (legislative intent of Lanterman-Petris-Short Act)]. Provisions directing construction of an act may also be included [*see, e.g., Code Civ. Proc. § 1722* (in construing Uniform Foreign-Country Money Judgments Recognition Act, consideration must be given to need to promote uniformity of law with respect to Act's subject matter among states that enact it); *Pub. Res. Code §§ 30007.5, 30009* (conflicts between policies of California Coastal Act of 1976 to be resolved in manner most protective of significant coastal resources, and act to be liberally construed to accomplish purposes of act)].

Legal Topics:

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

California Points & Authorities

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 217 STATUTORY INTERPRETATION
PART I. INTRODUCTION

21-217 California Points & Authorities § 217.03

§ 217.03 Application of Rules of Interpretation to Ordinances, Regulations, and Constitutional and Charter Provisions

The rules of statutory interpretation also apply to ordinances, administrative regulations, and constitutional and charter provisions [*Castaneda v. Holcomb (1981) 114 Cal. App. 3d 939, 942, 170 Cal. Rptr. 875* (city charter); *County of Fresno v. Malmstrom (1979) 94 Cal. App. 3d 974, 979, 156 Cal. Rptr. 777* (constitution); *Andreadis v. Board of Trustees (1976) 59 Cal. App. 3d 344, 351, 130 Cal. Rptr. 652* (administrative regulations); *County of Madera v. Superior Court (1974) 39 Cal. App.3d 665, 668, 114 Cal. Rptr. 283* (ordinance)].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationInterpretationGovernmentsLocal GovernmentsChartersGovernmentsLocal GovernmentsOrdinances & Regulations

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CHAPTER 217 STATUTORY INTERPRETATION
PART I. INTRODUCTION

21-217 California Points & Authorities § 217.04

§ 217.04 Related Discussion and Forms

[1] Related Pleading and Practice Forms

For a discussion of statutes generally, including pleading of statutes, interpretation of statutes, and use of declaratory and injunctive relief to obtain a construction or a determination of the validity of a statute, see Ch. 126A, *Constitutional Law* , and Ch. 531, *Statutes and Ordinances* , in California Forms of Pleading and Practice (Matthew Bender). For forms and additional discussions relating to challenging the validity of statutes, see Ch. 182, *Declaratory Relief* in that set. For forms and discussion relating to challenging the validity of particular types of statutes or ordinances, see, in that set, Ch. 472B, *Review of Agency Rulemaking*, and Ch. 579, *Zoning and Planning*.

[2] Related Memoranda

Related memoranda that may be useful in particular cases in which a temporary restraining order or preliminary injunction against enforcement of a statute or ordinance is sought may be found in Ch. 116, *Injunctions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingGeneral OverviewCivil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsGovernmentsLegislationEffect & OperationGeneral OverviewGovernmentsLegislationInterpretation

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PART I. INTRODUCTION

21-217 California Points & Authorities §§ 217.05-217.19

[Reserved]

§§ 217.05[Reserved]

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 217 STATUTORY INTERPRETATION
PART II. FORMS
A. GENERAL RULES

21-217 California Points & Authorities § 217.20

§ 217.20 Supporting Contention That Statute Be Construed to Ascertain and Effectuate Legislative Intent [Code Civ. Proc. § 1859]

[1] FORM

[*The following may be included in a memorandum supporting or opposing a motion, or in a trial or appellate brief.*]

THE FUNDAMENTAL GOAL OF STATUTORY CONSTRUCTION IS TO ASCERTAIN LEGISLATIVE INTENT SO THAT THE PURPOSE OF THE LAW MAY BE EFFECTUATED.

A. Pursuit of Legislative Intent. In the construction of a statute, the intention of the Legislature is to be pursued, if possible (*Code Civ. Proc. § 1859*).

B. Fundamental Rule of Construction. The fundamental task of statutory construction is to ascertain legislative intent so as to effectuate the purpose of the law (*People v. Cruz (1996) 13 Cal. 4th 764, 774-775, 55 Cal. Rptr. 2d 117, 919 P.2d 731* ; *Walnut Creek Manor v. Fair Employment & Housing Com. (1991) 54 Cal. 3d 245, 268, 284 Cal. Rptr. 718, 814 P.2d 704* ; *Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified Sch. Dist. (1978) 21 Cal. 3d 650, 658, 147 Cal. Rptr. 359, 580 P.2d 1155*).

[*Optional*] **C. All Provisions to Be Given Effect.** Courts must adopt constructions which give effect to all statutory provisions whenever possible (*Parris v. Zolin (1996) 12 Cal. 4th 839, 845, 50 Cal. Rptr. 2d 109, 911 P.2d 9*).

[*Optional*] **D. Sensible Construction Consistent With Purpose.** Courts should act in a reasonable fashion to give statutes a sensible construction in accordance with the purpose of the lawmakers in an attempt to promote rather than defeat the policy underlying the legislation (*Jackson v. City of San Diego (1981) 121 Cal. App. 3d 579, 587, 175 Cal. Rptr. 395* ; *see, e.g., Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson (2005) 545 U.S. 409, 125 S. Ct. 2444, 2450-2452, 162 L. Ed. 2d 390, 400-402)* .

[*Optional*] **E. Canons of Construction Subordinate to Intent.** Canons of construction are not immutable rules, and are

always subordinate to the primary rule that the intent shall prevail over the letter (*Estate of Banerjee (1978) 21 Cal. 3d 527, 539, 147 Cal. Rptr. 157, 580 P.2d 657*).

[*Optional*] **F. Court Not to Substitute Its Views for Those of Legislature.** The court may not substitute its views for those of the Legislature when the legislative decision has been made after weighing policy matters as seen by the legislators (*Jackson v. San Diego (1981) 121 Cal. App. 3d 579, 587, 175 Cal. Rptr. 395* ; *see Drennan v. Security Pac. Nat. Bank (1981) 28 Cal. 3d 764, 779, 170 Cal. Rptr. 904, 621 P.2d 1318 , cert. denied, 454 U.S. 833, 102 S. Ct. 132, 70 L. Ed. 2d 112*).

[*Optional*] **G. Secondary Rules of Construction May Be Applied When Legislative Intent Cannot Be Determined Directly From Statute in Context.** When the intention of the Legislature cannot be determined directly from the words of a statute and from related statutes, a court may apply secondary rules of construction. In so doing, the court must refer to extrinsic sources, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. If the statute is part of a uniform act adopted by the Legislature, the history surrounding the creation and adoption of the uniform act is also relevant (*Hoechst Celanese Corp. v. Franchise Tax Bd. (2001) 25 Cal. 4th 508, 519, 106 Cal. Rptr. 2d 548, 22 P.3d 324* ; *see Mejia v. Reed (2003) 31 Cal. 4th 657, 663, 668-669, 3 Cal. Rptr. 3d 390, 74 P.3d 166*). The court may also consider legal treatises and usages in the affected social or economic group (*Texas Commerce Bank v. Garamendi (1992) 11 Cal. App. 4th 460, 469-481, 14 Cal. Rptr. 2d 854*).

[*Optional*] **H. Rules of Construction Apply to Statutes Enacted Through Initiative Process.** The rules of statutory construction apply equally to construction of statutes enacted through the initiative process and construction of statutes enacted by the Legislature (*Day v. City of Fontana (2001) 25 Cal. 4th 268, 272, 105 Cal. Rptr. 2d 457, 19 P.3d 1196*).

[*Set forth additional points and authorities stating more specific rules of statutory interpretation that aid in ascertaining legislative intent behind statute at issue and support interpretation desired* (*see §§ 217.21 -217.24, 217.40 -217.46, 217.60 -217.63, 217.80 -217.81, 217.88*)].

[2] Comments

[a] Use of Form

This form may be submitted in support of a party's contention that a statute should be interpreted in a particular manner. This form sets forth general rules of statutory interpretation, which relate to the fundamental rule that the court must ascertain and effectuate the Legislature's intent. This form should be combined with other forms setting out more specific rules of statutory construction that may aid in ascertaining the legislative intent behind the statute at issue and that support the interpretation desired by counsel [*see §§ 217.21 -217.24, 217.40 -217.46, 217.60 -217.63, 217.80 -217.86, 217.88*]. Such an argument might be made in any type of action in which a question arises concerning how a statute should be construed.

This form may be combined with a form or memorandum relating to the specific procedural context in which the issue of statutory interpretation arises. This form may also be adapted for use in a trial or appellate brief.

Counsel should also insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion of how evidence of legislative intent supports the interpretation of the statute that he or she is advocating.

[b] Opposing Memoranda

In an appropriate case, the form *set out in § 217.25* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Fundamental Rule of Construction

In ***People v. Cruz*** *(1996) 13 Cal. 4th 764, 55 Cal. Rptr. 2d 117, 919 P.2d 731* , the defendant was convicted of second-degree robbery and possession of a firearm by an ex-felon, in addition to several other lesser charges. Prior to that, defendant had been convicted of first-degree burglary, under *Penal Code § 460*. Defendant's sentence was enhanced by five years under amended *Penal Code § 1192.7* on the basis of the earlier conviction. The statute permitted sentencing enhancement for serious felonies including, "burglary of an inhabited dwelling house." Defendant appealed his sentencing on the grounds that his prior conviction for first degree burglary did not qualify as a "serious felony," within the meaning of amended *Penal Code § 1192.7*, to justify the enhancement. The court of appeal agreed and vacated the five-year enhancement. The court of appeal reasoned that defendant's prior guilty plea to first-degree burglary under *Penal Code § 460* did not fit the definition of burglary under amended *Penal Code § 1192.7*. It held the evidence that the previous burglary was "residential" did not adequately narrow the offense to fit the definition of "burglary of an inhabited dwelling house," as required by *Penal Code § 1192.7* for sentencing enhancement. (A subsequent amendment to the statute now provides that any burglary of the first degree qualifies as a serious felony [*Penal Code § 1192.7(c)(18)*].)

The prosecution appealed and the California Supreme Court reversed, finding that the enhancement provisions were properly pleaded and proved. In seeking to interpret the meaning of the phrase "inhabited dwelling house," the Supreme Court examined the legislative history of the amendment to *Penal Code § 1192.7*. The court reiterated that the fundamental task of statutory construction is to ascertain legislative intent so as to effectuate the purpose of the law. The court added that words of a statute are to be interpreted in the sense in which they would have been understood at the time of the enactment. Although the Legislature declared that the amendment to *Penal Code § 1192.7* was intended to "clarify" the meaning of the earlier version of the statute, the court stated that it is not bound by such pronouncements and must still ascertain the scope and meaning of the earlier version from all the pertinent circumstances and considerations. Nor may courts rely on evidence of the individual views of proponents of the legislation (*People v. Cruz (1996) 13 Cal. 4th 764, 780 n.9, 55 Cal. Rptr. 2d 117, 919 P.2d 731*). Accordingly, the court held that rather than narrow the definition of "burglary of a residence" (appearing in the earlier version of § 1192.7) by substituting the language "burglary of an inhabited dwelling house," the Legislature intended to conform the language of that section to the definition of first-degree burglary provided in *Penal Code § 460*, thus making it a "serious felony," justifying the enhancement (*People v. Cruz (1996) 13 Cal. 4th 764, 783-785, 55 Cal. Rptr. 2d 117, 919 P.2d 731*).

In ***Walnut Creek Manor v. Fair Employment & Housing Com.*** *(1991) 54 Cal. 3d 245, 284 Cal. Rptr. 718, 814 P.2d 704* , the state Fair Employment and HousingCommission awarded plaintiff compensatory and punitive damages against defendant in a case involving a complaint for housing discrimination on the basis of race and marital status. The punitive damage award was in the amount of $40,635 representing the statutory limit ($1,000), plus adjustments and interest, for each of 35 instances when apartment rentals were made to applicants below plaintiff on the waiting list. On a petition for writ of administrative mandate, the trial court remanded the case to the Commission with directions, among other things, to limit punitive damages to $1,000 pursuant to a limitation in *Gov. Code § 12987*. All parties appealed. With respect to the punitive damages award, the court of appeal reversed the trial court's ruling that *Gov. Code § 12987* limited the award to $1,000. All parties then petitioned for review.

The Supreme Court reversed the court of appeal as to the punitive damages award. The Court stated that it was guided by the established principle that its first task in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. The Court noted that to ascertain the Legislature's intent, it must first look to the words of the statute, giving them their usual, ordinary import, that the words must be construed in context, keeping in mind the statutory purpose, and that provisions relating to the same subject matter must be harmonized to the extent possible. If uncertainty exists, the consequences flowing from a particular interpretation should be considered and legislative history and wider historical circumstances of the enactment may also be considered in determining intent (

Walnut Creek Manor v. Fair Employment & Housing Com. (1991) 54 Cal. 3d 245, 268, 284 Cal. Rptr. 718, 814 P.2d 704). Also applying the principle that a statute should be construed whenever possible so as to preserve its constitutionality, the Court concluded that a course of conduct is one "unlawful practice" within the plain meaning of the statute, so that the commission's damage award was improper (*Walnut Creek Manor v. Fair Employment & Housing Com. (1991) 54 Cal. 3d 245, 268-273, 284 Cal. Rptr. 718, 814 P.2d 704*).

Plaintiff teacher in ***Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified Sch. Dist.*** *(1978) 21 Cal. 3d 650, 147 Cal. Rptr. 359, 580 P.2d 1155* , obtained a writ of mandate from superior court directing defendant to place plaintiff on a particular step of defendant's salary schedule and to pay back compensation. When plaintiff was hired by defendant, defendant gave him credit for only one year of experience and gave him no credit for five years of experience in private school. The next year defendant changed its rule so that experience in private schools was credited, and plaintiff brought suit after his request to be classified under the new rule was denied. The Supreme Court affirmed the issuance of the writ, construing former Educ. Code § 13506 (*now see Educ. Code § 45028*) as requiring that plaintiff be placed on the salary schedule as he requested. Quoting *Moyer v. Workmen's Comp. Appeals Bd. (1973) 10 Cal. 3d 222, 230, 110 Cal. Rptr. 144, 514 P.2d 1224* , the Court set forth a number of rules of statutory construction, including the fundamental rule that a court should ascertain the intent of the Legislature so as to effectuate the purpose of the law (*Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified School Dist. (1978) 21 Cal. 3d 650, 658, 147 Cal. Rptr. 359, 580 P.2d 1155*).

[b] All Provisions to Be Given Effect

In ***Parris v. Zolin*** *(1996) 12 Cal. 4th 839, 50 Cal. Rptr. 2d 109, 911 P.2d 9* , the plaintiff was arrested for operating a motor vehicle while under the influence. A blood test was taken and plaintiff's driver's license was suspended. Plaintiff then sought a hearing regarding his license suspension before the Department of Motor Vehicles (DMV) pursuant to Vehicle Code § 13558a and subpoenaed the criminalist who had performed the analysis of his blood. The criminalist did not respond to the subpoena and did not appear at the hearing. The hearing officer upheld the suspension of the plaintiff's license notwithstanding the fact that the criminalist had failed to appear. Plaintiff then sought to have the DMV initiate contempt proceedings against the criminalist under Vehicle Code § 11525, which it declined to do. The plaintiff filed petition for a writ of mandate seeking review of the hearing and enforcement of the subpoena. The superior court ordered the matter remanded to the hearing officer for enforcement of the subpoena and reconsideration. The DMV appealed and the court of appeal reversed the judgment of the superior court. The plaintiff then appealed to the California Supreme Court, which reversed the appellate court decision.

Vehicle Code § 11525 provides that where a witness subpoenaed to attend a hearing before an administrative agency refuses to respond, the agency shall certify the facts to the superior court, which shall issue an order directing the witness to appear and show cause why he or she should not be punished for contempt. The issue before the court was what action the agency was required to take to fulfill its obligation under Vehicle Code § 11525. The plaintiff contended that it was the obligation of the hearing officer to initiate contempt proceedings, whereas the DMV took the position that the party who sought issuance of the subpoena must file an action to enforce the subpoena in superior court. While the hearing officer offered to prepare a transcript and any supporting documentation to assist the plaintiff in enforcing the contempt proceeding, the DMV failed to transmit that documentation to the superior court. The California Supreme Court, citing the rule that in construing a statute courts must give effect to all statutory provisions whenever possible, held that the language of the statute "shall certify" imposed the duty of transmitting the facts on the administrative agency and the DMV's failure to so transmit the certification of facts to the superior court was a breach of that obligation (*Parris v. Zolin (1996) 12 Cal. 4th 839, 844-845, 50 Cal. Rptr. 2d 109, 911 P.2d 9*).

[c] Sensible Construction Consistent With Purpose

Jackson v. City of San Diego *(1981) 121 Cal. App. 3d 579, 175 Cal. Rptr. 395* , involved an action for false imprisonment based on defendant's incarceration of plaintiff for crimes he did not commit. Plaintiff was arrested

without a warrant, and indicted by the grand jury 13 days later. He was convicted of robbery and murder, but released on a writ of habeas corpus after about 10 months of incarceration when the actual perpetrator was convicted. Defendant city appealed from a judgment awarding plaintiff damages.

The court of appeal, in determining that the damages had to be restricted to the period between the unlawful arrest and the indictment, noted that while the California Government Claims Act provides for liability for false imprisonment [*Gov. Code § 820.4*], it also provides for immunity from suit for malicious prosecution [*Gov. Code § 821.6*] (*Jackson v. City of San Diego (1981) 121 Cal. App. 3d 579, 586, 175Cal. Rptr. 395*). Citing prior California case law, the court stated that it had to begin with the fundamental rule that a court should ascertain the intent of the Legislature so as to effectuate the purpose of the law, acting in a reasonable fashion to give statutes a sensible construction in accordance with the purpose of the lawmakers in an attempt to promote rather than defeat the policy underlying the legislation (*121 Cal. App. 3d 579, 587)* . The court held that because the damages involved were apportionable to a period of incarceration constituting false imprisonment and to a separate period constituting malicious prosecution, damages had to be restricted to the former period in accordance with legislative policy (*121 Cal. App. 3d 579, 587-588)* .

Note that the California Supreme Court disapproved *Jackson* to the extent that it held that the recovery of damages for postarraignment confinement is permitted [*Asgari v. City of L.A. (1997) 15 Cal. 4th 744, 758 n.10, 63 Cal. Rptr. 2d 842, 937 P.2d 273]* .

In ***Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*** *(2005) 545 U.S. 409, 125 S. Ct. 2444, 162 L. Ed. 2d 390* , the United States Supreme Court held that the 6-year statute of limitations in the False Claims Act (FCA) does not govern FCA civil actions for retaliation; rather, the most closely analogous state limitations period applies. The False Claims Act (FCA) prohibits any person from making false or fraudulent claims for payment to the United States (*31 U.S.C. § 3729(a)*). Persons who do so are liable for civil penalties and damages (*31 U.S.C. § 3729(a)*). The FCA sets forth two principal enforcement mechanisms: the Attorney General may sue to remedy violations of Section 3729 (*31 U.S.C. § 3730(a)*), and private individuals may bring *qui tam* actions in the government's name for Section 3729 violations (*31 U.S.C. § 3730(b)(1)*).

In 1986 the FCA was amended to create a private cause of action for an individual retaliated against by his or her employer for assisting an FCA investigation or proceeding (*31 U.S.C. § 3730(h)*). The 1986 amendments also revised the language of the 6-year statute of limitations applicable to FCA actions. The 1986 amendments revised *31 U.S.C. § 3731(b)(1)* to read as follows: "A civil action under section 3730 may not be brought ... more than 6 years after the date on which the violation of section 3729 is committed. ... "

The Supreme Court found that Section 3731(b)(1) is ambiguous, rather than clear, about whether a Section 3730(h) retaliation action is "a civil action under section 3730." One reasonable reading is that it applies only to actions arising under Sections 3730(a) and (b), not to Section 3730(h) retaliation actions. That reading is suggested by the language in Section 3731(b)(1) tying the start of the time limit to "the date on which the violation of section 3729 is committed." In other words, the time limit begins to run on the date the defendant submitted a false claim for payment. This language casts doubt on whether Section 3731(b)(1) specifies a limitations period for retaliation actions, because the existence of a Section 3729 violation is not an element of a retaliation claim: a retaliation plaintiff need prove only that the defendant retaliated against him or her for engaging in "lawful acts done ... in furtherance of" an FCA "action filed or to be filed" (*31 U.S.C. § 3730(h)*). In other words, a retaliation action may arise even if the target of an investigation or Section 3729 action turns out to have been innocent. The Supreme Court found that this textual anomaly, at a minimum, shows that Section 3731(b)(1) is ambiguous about whether "action under section 3730" means all actions under Section 3730, or only actions under Section 3730(a) and (b) (*545 U.S. 409, 415-418)* .

Faced with the ambiguity of Section 3731(b)(1)'s literal text, the Supreme Court decided that the most reasonable reading of the provision is to interpret the 6-year period to govern only Section 3730(a) and (b) actions, and not Section 3730(h) retaliation actions. In support of this reading, the Court noted that the very next subsection of the statute,

Section 3731(c), also uses the similarly unqualified phrase "action brought under section 3730" to refer only to Section 3730(a) and (b) actions. Section 3731(c) provides that "[i]n any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence." This provision clearly was not intended to encompass private retaliation actions, because the United States would never be a party to a retaliation claim. This implicit limitation of the phrase "action under section 3730" shows that Congress used the term "action under section 3730" imprecisely in Section 3731 and, in particular, that Congress sometimes used the term to refer only to a subset of Section 3730 actions. Therefore, the Court concluded, it is reasonable to read the same language in Section 3731(b)(1) to be likewise limited (*545 U.S. 409, 417-418)* .

The Supreme Court further explained that reading Section 3731(b)(1) to apply only to Section 3730(a) and (b) actions is in keeping with the default rule that Congress generally drafts statutes of limitations to begin when the cause of action accrues. Therefore, when there are two plausible constructions of a statute of limitations, the Court will adopt the construction that starts the time limit running when the cause of action (in this case, retaliation) accrues. Construing Section 3731(b)(1) to exclude retaliation actions will mean that an analogous state statute of limitations will apply, and the likely analogous state statutes of limitations virtually all start to run when the cause of action accrues (*545 U.S. 409, 417-419)* .

On the other hand, under a reading of Section 3731(b)(1) as encompassing retaliation actions the statute of limitations for an FCA retaliation action would begin to run on the date the actual or suspected FCA violation occurred. Because that date will precede the retaliatory conduct, this reading would start the time limit running before the retaliation action accrues. Moreover, this reading would create the possibility that a retaliation action could be time-barred before it ever accrues (for example, if the employer discovers more than 6 years after a suspected violation of Section 3729 that an employee aided in investigating the suspected violation, and then retaliates against the employee) (*545 U.S. 409, 421-422)* .

Accordingly, the Supreme Court concluded that the FCA's 6-year limitation period does not apply to Section 3730(h) retaliation actions. Instead, the most closely analogous state statute of limitations applies. The Court left it for the court of appeals on remand to decide which state statute of limitations is the appropriate one to borrow in this case (*545 U.S. 409, 422)* .

[d] Canons of Construction Subordinate to Intent

Estate of Banerjee *(1978) 21 Cal. 3d 527, 147 Cal. Rptr. 157, 580 P.2d 657* , involved a dispute over whether or not certain intangible property was subject to California inheritance tax. The State Controller appealed from a superior court order sustaining the estate's objection to the inheritance tax appraiser's report, which had included the intangibles as taxable items. On appeal, the estate relied on the canon of construction, *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of the other), as a basis for arguing that *Rev. & Tax. Code § 13303*, defining "estate" or "property," should not be construed to include the intangible property in question. The Supreme Court rejected this argument, however, holding that the maxim is not a magical incantation, and that it does not refer to any immutable rule. The Court held that like all such guidelines, that canon of construction has many exceptions, and that such rules must always be subordinated to the primary rule that the intent shall prevail over the letter (*21 Cal. 3d 527, 539)* .

[e] Court Not to Substitute Its Views for Those of Legislature

The facts and procedural background of ***Jackson v. City of San Diego*** *(1981) 121 Cal. App. 3d 579, 175 Cal. Rptr. 395* , are *discussed under § 217.20[3][c]*. In *Jackson*, the court of appeal, citing *Drennan v. Security Pac. Nat. Bank (1981) 28 Cal. 3d 764, 779, 170 Cal. Rptr. 904, 621 P.2d 1318 , cert. denied, 454 U.S. 833, 102 S. Ct. 132, 70 L. Ed. 2d 112 , below*, held that it cannot substitute its own views for those of the Legislature when the legislative decision has been made after weighing policy matters as seen by the legislators (*121 Cal. App. 3d 579, 587)* . Accordingly, the

court held that, as tempting as it might be to focus on a legalism to compensate plaintiff for all the damage he suffered by his incarceration for crimes he did not commit by relating all damages to his initial false imprisonment, which was actionable under *Gov. Code § 820.4*, damages could not be allowed for the period that he was incarcerated after the grand jury indicted him, because that period constituted malicious prosecution which is the subject of immunity under *Gov. Code § 821.6* (*121 Cal. App. 3d 579, 587-589)* . Note that the California Supreme Court disapproved *Jackson* to the extent that it held that the recovery of damages for postarraignment confinement is permitted [*Asgari v. City of L.A. (1997) 15 Cal. 4th 744, 758 n.10, 63 Cal. Rptr. 2d 842, 937 P.2d 273]* .

Drennan v. Security Pac. Nat. Bank *(1981) 28 Cal. 3d 764, 170 Cal. Rptr. 904, 621 P.2d 1318 , cert. denied, 454 U.S. 833, 102 S. Ct. 132, 70 L. Ed. 2d 112* , involved a dispute over the proper disclosure statements relating to a loan that used the "Rule of 78's" to compute the refund of the unearned portion of the finance charge. After determining that the federal Truth in Lending Act (*15 U.S.C. § 1601 et seq.*) precluded any explanation of that term beyond the mere reference to it in a credit disclosure statement, the Supreme Court, in dicta, addressed the question of whether or not use of the "Rule of 78's" should be allowed at all. The Court concluded that the rule is a hidden charge that is not understood by borrowers, is burdensome on consumers, and is unjustified by lenders' economic needs. The Court went on, however, to recognize that permitting its use in California was a legislative decision involving the weighing of policy matters as seen by legislators. The Court would not be free to substitute its own views for those of the Legislature regarding the desirability of the rule even if plaintiff had sought a determination that it was invalid (*28 Cal. 3d 764, 779)* . Noting legislative activity that revealed that the Legislature was aware of the issue and had taken the action it deemed appropriate, the Court stated that to embellish the legislative requirements it would be an abuse of judicial authority (*28 Cal. 3d 764, 779-780)* .

[f] Secondary Rules of Construction May Be Applied When Legislative Intent Cannot Be Determined Directly From Statute in Context

Hoechst Celanese Corp. v. Franchise Tax Bd. *(2001) 25 Cal. 4th 508, 106 Cal. Rptr. 2d 548, 22 P.3d 324* , involved the interpretation of the definition of "business income" and "nonbusiness income" under California's version of the Uniform Division of Income for Tax Purposes Act (UDITPA) (*see Rev. & Tax. Code § 25120 et seq.*). The Supreme Court reaffirmed the well-established rules of statutory construction; in seeking to ascertain the legislative intent, the Court begins with the statutory words and gives those words their ordinary meaning. If the statutory language is clear and unambiguous, the Court need go no further. If, however, the language is susceptible to more than one reasonable interpretation, the Court will look to extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. If the statute is part of a uniform act adopted by the Legislature,the history surrounding the creation and adoption of the uniform act is also relevant. In this case, the Court found the statutory language of UDITPA was ambiguous (*see Rev. & Tax. Code § 25120*), based both on the Court's analysis of the words of the statute, and on the conflicting opinions of other states' courts interpreting the UDITPA. The Court noted that the existence of such conflicting opinions demonstrates that reasonable minds may disagree over the meaning of the statutory words. Accordingly, the Court resorted to extrinsic sources--the legislative history, and pre-UDITPA administrative decisions that applied language similar to that adopted in the UDITPA--to guide the Court's interpretation of the statutory language (*25 Cal. 4th 508, 519-526)* .

In ***Mejia v. Reed*** *(2003) 31 Cal. 4th 657, 3 Cal. Rptr. 3d 390, 74 P.3d 166* , the plaintiff was the mother of a child whose father was married to another woman. In a later divorce proceeding, the father and his wife entered into a marital settlement agreement under which the father transferred all his interest in jointly held real property to his wife. The plaintiff brought the present action, claiming that the purpose of this transfer was to prevent her from collecting child support. The plaintiff sought to impose a lien on the transferred real property pursuant to the Uniform Fraudulent Transfer Act (UFTA) (*Civ. Code § 3439.07*; *see Civ. Code § 3439 et seq.*). The trial court assumed that the UFTA applied to the marital settlement agreement, but it granted the father's summary judgment motion on the grounds that no evidence was presented of actual intent to defraud and that constructive fraud under the UFTA was not established

because the transfer had not rendered the father insolvent (*see Civ. Code § 3439.05*). The court of appeal reversed, holding that although the UFTA applies to marital settlement agreements, triable issues of fact precluded summary judgment.

The Supreme Court reversed the judgment of the court of appeal. The Supreme Court held that the UFTA does apply to marital settlement agreements (*31 Cal. 4th 657, 668-669)* . The Court also found that there was no triable issue of constructive fraud under the UFTA, because the transfer had not rendered the father insolvent (*31 Cal. 4th 657, 669-672)* . However, further proceedings were necessary to determine the existence of actual intent to defraud (*31 Cal. 4th 657, 672)* . Accordingly, the Supreme Court remanded the case for further proceedings (*31 Cal. 4th 657, 672)* .

Whether the UFTA applies to transfers made under marital settlement agreements was a question of first impression in this case. The Supreme Court was faced with an apparent conflict between the provisions of the UFTA and the Family Code. The UFTA provides remedies for present and future creditors in the case of a debtor's transfer that is actually or constructively fraudulent (*see Civ. Code §§ 3439.04(a), 3439.05*). On its face, the UFTA applies to all transfers. It defines "transfer" as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset ... ." (*Civ. Code § 3439.01 (i)*). The UFTA excepts only certain transfers resulting from lease terminations or lien enforcement (*Civ. Code § 3439.08(e)*). Thus, the UFTA on its face encompasses transfers made under a marital settlement agreement.

On the other hand, the Family Code provides that property received by a married person in a division of property under a marital settlement agreement "is not liable for a debt incurred by the person's spouse before or during marriage, and the person is not personally liable for the debt, unless the debt was assigned for payment by the person in the division of the property" (*Fam. Code § 916(a)(2)*). The only statutory exception to this grant of immunity from liability is a provision that preserves the liability of property subject to a preexisting lien (*Fam. Code § 916(a)(2)*); the statute does not mention fraudulent transfers. Thus, on its face, the Family Code provision would appear to protect transfers of marital property incident to dissolution from being set aside under the UFTA.

Faced with this apparent conflict, the Supreme Court found that neither the statutory language nor the legislative history was sufficient to resolve the conflict (*31 Cal. 4th 657, 666-668)* . Under the circumstances, the Court turned to a consideration of the relevant policy considerations bearing on the question of legislative intent. The Court found that the Legislature has a general policy of protecting creditors from fraudulent transfers, including transfers between spouses. For example, a transfer before dissolution can be set aside as a fraudulent conveyance (see *Fam. Code § 851*), and a transfer after dissolution can be set aside under the UFTA. Moreover, when the court divides marital property in the absence of an agreement by the parties, it must divide the property equally (see *Fam. Code § 2550*), which provides some protection for a creditor of one spouse only. In view of this overall policy of protecting creditors, the Supreme Court found it unlikely that the Legislature intended to grant married couples a one-time-only opportunity to defraud creditors by including the fraudulent transfer in a marital settlement agreement. Accordingly, based on the policy considerations underlying the UFTA and the Family Code provisions governing dissolution judgments and settlements, the Court concluded that the UFTA applies to transfers made under marital settlement agreements (*31 Cal. 4th 657, 668-669)* .

In ***Texas Commerce Bank v. Garamendi*** *(1992) 11 Cal. App. 4th 460, 14 Cal. Rptr. 2d 854* , the court of appeal undertook to decide what the Legislature intended by the reference to annuities in *Ins. Code § 101*, which provides: "Life insurance includes insurance upon the lives of persons or appertaining thereto, and the granting, purchasing, or disposing of annuities." The appellant contended that the Legislature intended to restrict the word to life annuities (having a term measured by an individual's life), or at least to annuities payable only to individuals. Therespondent contended that the Legislature intended to include annuities-certain (having a fixed term unrelated to any individual's life) and did not intend to restrict the meaning according to the nature of the payee. The court observed that no other provision of the Insurance Code, nor any other statute or controlling decision, provided a definition of the word annuity in this context. Reading the words of the statute and related statutes, the court was able to conclude only that (1)

whatever "annuities" means, annuities in this context are different from policies of life insurance, and (2) the statutory phrase "upon the lives of persons or appertaining thereto" relates back to the word "insurance" and does not relate to the word "annuities" (*11 Cal. App. 4th 460, 469-472)* .

The court turned to secondary rules of construction, in the following order. First, contextual aids urged by the appellant were considered--the rule of *noscitur a sociis* ("it is known by its associates"--in other words, a word's meaning may be broadened or constrained by reference to the rest of the clause in which it appears) and the rule of *ejusdem generis* (general words following a list refer are construed to refer back to the enumerated items only)--but these were held inapplicable because the premises on which they rest did not exist in the present case (*11 Cal. App. 4th 460, 471-474)* . Next, legislative history was reviewed but was found to be unhelpful (*11 Cal. App. 4th 460, 474)* . The contemporaneous meaning of "annuities" showed that annuities-certain were included by commercial and legal usage at the time the statute was enacted; contemporaneous law treatises supported that conclusion (*11 Cal. App. 4th 460, 475-478)* . Current sources supporting the inclusion of annuities-certain also were cited: recent treatises, recent insurance industry texts and communications, and more-specific statutes in other states (*11 Cal. App. 4th 460, 479-481)* . By this same sort of analysis the court concluded that the Legislature did not intend any restriction according to the nature of the payee (*11 Cal. App. 4th 460, 482-483)* .

[g] Rules of Construction Apply to Statutes Enacted Through Initiative Process

In ***Day v. City of Fontana*** *(2001) 25 Cal. 4th 268, 105 Cal. Rptr. 2d 457, 19 P.3d 1196* , the Supreme Court construed *Civil Code Section 3333.4*, which limits the ability of uninsured motorists and convicted drunk drivers to recover noneconomic losses suffered in certain accidents. The statute was enacted through the passage of Proposition 21 in the November 1996 general election. In this case, the Court found that the statute precludes an uninsured motorist from recovering an award of noneconomic damages against a public entity in an action for nuisance and dangerous condition of public property. The Court began its analysis of the statute by stating that the rules of statutory construction apply equally in construing statutes enacted through the initiative process. The Court next examined the language of the statute itself, finding no ambiguity or uncertainty as to the statute's application (*25 Cal. 4th 268, 272-274)* . To reinforce its conclusion, the Court then reviewed the relevant legislative history materials to ensure that the Court's construction of the statute did not undermine the initiative's intent or otherwise lead to absurd results. Because the statute was enacted through the initiative process, those legislative history materials consisted of the Proposition 213 ballot pamphlet materials, including the proposition's "Findings and Declaration of Purpose," the analysis of the initiative by the Legislative Analyst, and arguments printed in the ballot pamphlet (*25 Cal. 4th 268, 274-282)* .

[4] Additional Authorities

[a] Fundamental Rule of Construction

In *Home Depot U.S.A. v. Contractors' State License Board (1996) 41 Cal. App. 4th 1592, 49 Cal. Rptr. 2d 302* , Home Depot, a licensed general contractor sued the Contractor's State Licensing Board to invalidate state regulations, *16 Cal. Code Reg. § 834(b)*, preventing it from accepting certain contracts unless they involved three unrelated building trades or crafts, or the contractor holds the required specialty licenses. The court declared the rule invalid and void, holding that it was promulgated under the authority of *Bus. & Prof. Code § 7057*, but that the rule was inconsistent with and beyond the scope of section 7057. The court also found that the rule was unnecessary to reasonably effectuate the legislative purpose, as applied to the circumstances of the case, and reiterated that the overriding purpose in construing statutes is to ascertain legislative intent and give reasonable construction conforming to that intent. In interpreting legislative intent, court first looks to usual and ordinary meaning of words of statute, with due regard to the language used and the purpose sought to be accomplished (*41 Cal. App. 4th 1592, 1600-1601)* .

People v. Jones (1993) 5 Cal. 4th 1142, 22 Cal. Rptr. 2d 753, 857 P.2d 1163 , was a criminal case concerning the effect of Proposition 8 on sentencing requirements. The issue in the case was whether the electorate intended, when it

enacted Proposition 8, for a prison sentence to be enhanced both for a prior conviction and for a prison term imposed for that conviction. The Supreme Court focused on the means by which the intent of the Legislature is ascertained when it construed the statutory and constitutional scheme enacted by the voters as part of Proposition 8. The Court determined that the first step was to turn to the words themselves for the answer. If the language is clear and unambiguous, then there is no need to resort to construction, or to other indicia in determining the intent of either the Legislature or the voters (*5 Cal. 4th 1142, 1146)* .

Marina Green Homeowners Assn. v. State Farm Fire & Casualty Co. (1994) 25 Cal. App. 4th 200, 30 Cal. Rptr. 2d 364 , was an action by a condominium homeowners association against an insurer. The trial courtgranted summary judgment, and determined that the insurer had no duty under *Ins. Code § 10081* to provide earthquake insurance to cover the common interest in the condominiums project's structure, as distinguished from the units owned by each individual condominium owner. The court of appeal affirmed, finding that the relevant rules of statutory interpretation are well-settled. First, in interpreting statutory meaning, the appellate court makes an independent review. In conducting that review, the court must begin with the cardinal rule applicable to that task: the court must ascertain the legislative intent so as to effectuate the purpose of the law. If the statutory language is unambiguous, legislative intent is determined from the plain meaning of the language itself. Further, in attempting to ascertain legislative intent, effect should be given, whenever possible, to the statute as a whole and to every word and clause thereof, leaving no part of the provision useless or deprived of meaning (*25 Cal. App. 4th 200, 204)* .

City of Sacramento v. Public Employees' Retirement System (1994) 22 Cal. App. 4th 786, 27 Cal. Rptr. 2d 545 , concerned an action by a city against the Public Employees' Retirement System. The trial court determined that an amendment to the relevant statute, former Gov. Code § 20021 (*now see Gov. Code § 20433*), was binding on the city without its election. The court of appeal held that the trial court properly construed the statute. The court stated that the quest for legislative intent in statutory construction is not unbounded. There can be no intent in a statute not expressed in its words, and there could be no intent on the part of the framers of such a statute that does not find expression in their words. The meaning of a statute is to be sought in the language used by the Legislature. Words may not be inserted in a statute in the guise of interpretation (*22 Cal. App. 4th 786, 793)* .

Altaville Drug Store, Inc. v. Employment Development Department (1988) 44 Cal. 3d 231, 242 Cal. Rptr. 732, 746 P.2d 871 , involved the meaning of the word "spouse" as used in *Unemp. Ins. Code § 1032*, which sets forth circumstances in which unemployment insurance benefits awarded to a claimant are not charged to the employer's reserve account. The Supreme Court said that the fundamental rule of statutory construction is to ascertain the intent of the Legislature so as to effectuate the purpose of the law (*44 Cal. 3d 231, 238)* .

In *Landrum v. Superior Court (1981) 30 Cal. 3d 1, 177 Cal. Rptr. 325, 634 P.2d 352* , which is also discussed in *§ 217.60[3][b],* the Supreme Court confronted the question of whether the time in which a criminal defendant's preliminary examination must be held under *Penal Code § 859b* (prior to its 1980 amendment) had to be calculated from the time of defendant's first arraignment or could be measured from the time of his arraignment on a second complaint following dismissal of the first complaint. The Court stated that in construing statutes, the Court is required to interpret them in a manner calculated to give effect to the intent of the Legislature (*30 Cal. 3d 1, 12)* . Noting that *Penal Code § 859b* reflected a clear legislative intent to prevent prolonged incarceration prior to a preliminary hearing, the Court rejected the prosecution's contention that *Penal Code § 859b* should be construed to allow the measurement of time from the second arraignment, although it decided on other grounds that the time could be calculated from the second arraignment (*30 Cal. 3d 1, 12-15)* .

In *Los Angeles County Safety Police Assn. v. County of Los Angeles (1987) 192 Cal. App. 3d 1378, 237 Cal. Rptr. 920* , the court of appeal held that former Penal Code § 830.4, relating to peace officers, was intended by the Legislature to apply to a charter county. In reaching this holding, the court said that a court must ascertain the Legislature's intent to effectuate the purpose of a statute (*192 Cal. App. 3d 1378, 1387)* , that when statutory language can be interpreted as having more than one meaning it is the duty of the courts to accept the meaning intended by the framers of the

legislation, so far as its intention can be ascertained, and that to discern legislative intent the court had to examine the legislative history and statutory context of the act under scrutiny (*192 Cal. App. 3d 1378, 1388)* .

In *Robertson v. Wentz (1986) 187 Cal. App. 3d 1281, 232 Cal. Rptr. 634* , the appellate court was faced with the construction of *Civ. Code § 1714.1(a)*, prior to its 1983 amendment, which imposed liability on the parent or guardian having "custody or control" (now custody and control) of a minor for any act of willful misconduct of the minor that results in injury or death to another person or injury to another's property. In construing the quoted phrase, the court said the following: (1) the paramount goal of statutory interpretation is ascertainment of the legislative intent in order to effectuate the objectives of the law; (2) the provision must be given a reasonable and common sense construction in accordance with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, and which, when applied, will result in wise policy rather than mischief or absurdity; and (3) the court should take into account matters such as context, the object in view, the evils to be remedied, the history of the time and of legislation on the same subject, public policy, and contemporaneous construction (*187 Cal. App. 3d 1281, 1292)* .

In *Flood v. Wyeth Laboratories, Inc. (1986) 183 Cal. App. 3d 1272, 228 Cal. Rptr. 700* , the appellate court was faced with the question of whether *Health & Safety Code § 429.36* (repealed in 1995; *now see Health & Safety Code § 120455*), providing that no person shall be liable for any injury caused by an act or omission in the administration of a vaccine or other immunizing agent to a minor, including the residual effects of the vaccine or immunizing agent, applied to vaccine manufacturers so as to immunize them from products liability, including strict liability in tort. In holding that it did not so apply, the court said that it was bound by the principles oflegislative interpretation, the most fundamental rule of which is that the court should ascertain the intent of the Legislature so as to effectuate the purpose of the law (*183 Cal. App. 3d 1272, 1277)* .

Additional cases holding that the fundamental rule, or well-settled principles, of statutory construction require a court to ascertain the intent of the Legislature in order to effectuate the purpose of the law include *Moore v. Panish (1982) 32 Cal. 3d 535, 548, 186 Cal. Rptr. 475, 652 P.2d 32* ; *Burnsed v. State Bd. of Control (1987) 189 Cal. App. 3d 213, 217, 234 Cal. Rptr. 316* ; *Demirgian v. Superior Court (1986) 187 Cal. App. 3d 372, 374-376, 231 Cal. Rptr. 698* ; *Simpson v. Unemployment Ins. Comp. Appeals Bd. (1986) 187 Cal. App. 3d 342, 350, 231 Cal. Rptr. 690* ; *Referendum Committee v. City of Hermosa Beach (1986) 184 Cal. App. 3d 152, 159, 229 Cal. Rptr. 51* ; *Coastal Care Centers, Inc. v. Meeks (1986) 184 Cal. App. 3d 85, 95, 228 Cal. Rptr. 883* ; and *State of California ex rel. Public Works Bd. v. Bragg (1986) 183 Cal. App. 3d 1018, 1025, 228 Cal. Rptr. 576* .

[b] Sensible Construction Consistent With Purpose

Jutzi v. County of Los Angeles (1987) 196 Cal. App. 3d 637, 242 Cal. Rptr. 74 , was an action against a county hospital for malpractice in rendering emergency medical services, in which the court of appeal, in affirming judgment for defendant, construed *Health & Safety Code § 1799.110(c)*. The court stated that a statute must be given a reasonable and commonsense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, and which, when applied, will result in wise policy rather than mischief or absurdity; any interpretation should also take into account matters such as context, the object in view, the evils to be remedied, the history of the times and of legislation on the same subject, public policy, and contemporaneous construction (*196 Cal. App. 3d 637, 650)* .

See discussion of *Robertson v. Wentz (1986) 187 Cal. App. 3d 1281, 232 Cal. Rptr. 634* , under § 217.20[4][a].

In *Cerra v. Blackstone (1985) 172 Cal. App. 3d 604, 218 Cal. Rptr. 15* , an action for conversion, the language of *Civ. Code § 2983.3* was in issue. The trial court entered summary judgment for defendant, ruling that even if the facts asserted by plaintiff were true, plaintiff had no claim for conversion because the remedy provided by § 2983.3 (depriving a seller who fails to give proper notice of a deficiency judgment) precludes the buyer from exercising any other remedy against the seller. The court of appeal reversed, holding that depriving a seller of a deficiency judgment is

not the buyer's only remedy against the seller for the seller's refusal to reinstate the contract. In construing the statute, the court stated the general rule of statutory construction that the purpose sought to be achieved and the evils to be eliminated by legislation have an important place in ascertaining the legislative intent. Statutes should be interpreted to promote rather than defeat the legislative purpose and policy, and when two constructions appear possible, the court should favor that which leads to the more reasonable result. A construction that affords an opportunity to evade the legislation should be avoided, whereas a construction that would prevent the mischief sought to be remedied by the statute, or the avoidance of its terms or any attempt to accomplish by indirection what the statute forbids, should be favored (*172 Cal. App. 3d 604, 608)* .

[c] Canons of Construction Subordinate to Intent

In *People v. Caudillo (1978) 21 Cal. 3d 562, 146 Cal. Rptr. 859, 580 P.2d 274* , the Supreme Court, construing the provisions of a Penal Code section relating to enhanced punishment for rape in case of great bodily injury, noted that although the decisional law has established many rules of statutory construction, they are all basically guidelines in the judicial quest to determine the Legislature's intent so that the purpose of the legislation may be effectuated (*21 Cal. 3d 562, 576)* .

[d] Secondary Rules of Construction May Be Applied When Legislative Intent Cannot Be Determined Directly From Statute in Context

In *Samantar v. Yousuf (2010) ___ U.S. ___, 130 S. Ct. 2278, 176 L. Ed. 2d 1047* , the Supreme Court held that the Foreign Sovereign Immunities Act, which immunizes foreign states from the jurisdiction of United States courts (*see 28 U.S.C. § 1604*), does not immunize individual officials of foreign states. In so holding, the Court construed the Act's definition of "foreign state" as not including individual foreign officials (*see 28 U.S.C. § 1603(a)*) (*176 L. Ed. 2d 1047, 1060-1062)* . The Court also looked to the legislative history to confirm its reading of the statutory text. The Court acknowledged that consulting the legislative history might not have been strictly necessary, but the Court said: "As for the propriety of using legislative history at all, common sense suggests that inquiry benefits from reviewing additional information rather than ignoring it ... . Legislative history materials are not generally so misleading that jurists should never employ them in a good-faith effort to discern legislative intent. Our precedents demonstrate that the Court's practice of utilizing legislative history reaches well into its past. We suspect that the practice will likewise reach well into the future" (*176 L. Ed. 2d 1047, 1061 n.9* (citation omitted)).

In *Brock v. First South Savings Ass'n (1992) 8 Cal. App. 4th 661, 10 Cal. Rptr. 2d 700* , a seller of real property sued to establish priority for a vendor's lien, pursuant to *Civ. Code § 3046*, over a purchase-money deed of trust that a savings and loan association asserted had priority pursuant to *Civ. Code § 2898*. Both security interests arose from a single transaction and therefore were considered as arising simultaneously. Each statute apparently gave priority to the lien that it governed. Both statutes were enacted in the 1872 Civil Code. No California case had decided which lien would have priority in this situation. Each party cited general rules of construction in contending for predominance of the statute under which the party claimed priority. The court of appeal concluded that the general rules of construction were not helpful. The court resolved the issue of priority by citing the history of the two statutes. The court said, "Since the parties' proposed constructions of sections 2898(a) and 3048 fail to answer the question [of] which statute controls here, and no case law on point exists, we turn to the history of the provisions" (*8 Cal. App. 4th 661, 672)* .

California Points & Authorities

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 217 STATUTORY INTERPRETATION
PART II. FORMS
A. GENERAL RULES

21-217 California Points & Authorities § 217.21

§ 217.21 Supporting Contention That Statute Should Be Construed to Give Effect to Purpose When Literal Interpretation Would Defeat Apparent Purpose or Lead to Absurdity

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with the general points and authorities set out in § 217.20.*]

THE COURT SHOULD NOT CONSTRUE _____ [*specify statute*] LITERALLY, BECAUSE A LITERAL INTERPRETATION WOULD BE CONTRARY TO THE APPARENT PURPOSE OF THE STATUTE [AND WOULD LEAD TO AN ABSURD RESULT].

A. Give Effect to Purpose Rather Than Strict Letter of Statute. Once a particular legislative intent has been ascertained, it must be given effect even though it may not be consistent with the strict letter of the statute. The mere literal construction of a section in a statute ought not to prevail if that construction is opposed to the Legislature's intention apparent by the statute; and if the words are sufficiently flexible to admit of some other construction, that construction is to be adopted to effectuate that intention. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act (*Friends of Mammoth v. Board of Supervisors (1972) 8 Cal. 3d 247, 259, 104 Cal. Rptr. 761, 502 P.2d 1049*).

[*Optional*] **B. Disregard Literal Meaning to Avoid Absurd Results Not Intended by Legislature.** The language of a statute should not be given a literal meaning if doing so would result in absurd consequences that the Legislature did not intend (*California School Employees Assn. v. Governing Board (1994) 8 Cal. 4th 333, 340, 33 Cal. Rptr. 2d 109, 878 P.2d 1321* ; *Hall v. Regents of the University of California (1996) 43 Cal. App. 4th 1580, 1586, 51 Cal. Rptr. 2d 387* ; *Looney v. Superior Court (1993) 16 Cal. App. 4th 521, 532, 20 Cal. Rptr. 2d 182* ; *Cooperrider v. Civil Service Com. (1979) 97 Cal. App. 3d 495, 502, 158 Cal. Rptr. 801*).

[*Optional*] **D. No Deference Owed to Agency Interpretation Embodied in Void Regulations.** The general rule of deference to an agency interpretation of a statute does not apply if the interpretation was not adopted in accordance with

applicable legal requirements (*Church v. Jamison (2006) 143 Cal. App. 4th 1568, 1577-1583, 50 Cal. Rptr. 3d 166*).

[*Set forth additional points and authorities relating to other rules of statutory interpretation that aid in ascertaining legislative intent behind statute and support interpretation desired (see §§ 217.22 -217.24, 217.40 -217.46, 217.60 -217.63, 217.81 -217.86, 217.88).*]

[2] Comments

[a] Use of Form

These may be submitted in support of a party's contention that a statute should be construed in a particular manner. The form sets out the rule of statutory interpretation that a statute should not be interpreted literally if such an interpretation would be contrary to the apparent purpose of the statute. Such an argument might be made in any type of action or proceeding in which a question arises concerning how a statute should be construed. Although it has been suggested that the rule is only applied as part of the interpretive process when the language being considered is unclear [*Cadiz v. Agricultural Labor Relations Bd. (1979) 92 Cal. App. 3d 365, 376-377, 155 Cal. Rptr. 213]* , it has also been held that ambiguity is not necessarily a prerequisite to judicial interpretation in accordance with the rule [*Henreid v. Superior Court (1976) 59 Cal. App. 3d 552, 558, 130 Cal. Rptr. 892* ; *see California School Employees Assn. v. Governing Board (1994) 8 Cal. 4th 333, 340, 33 Cal. Rptr. 2d 109, 878 P.2d 1321* (literal meaning may be disregarded if contrary to apparent legislative purpose, even though statutory language is not ambiguous)]. The appropriate paragraphs of this form should be combined with the general form *set forth in § 217.20*, which relate to the construction of statutes to ascertain and effectuate the legislative intent.

Counsel should also insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing the purpose of the statute and demonstrate that a literal interpretation of the statutory language would defeat, or at least not further, that purpose or that it would lead to an absurd result.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 217.25* may be used to oppose the contention supported by the points and authorities in this form.

[3] Discussion of Authorities

[a] Give Effect to Purpose Rather Than Strict Letter of Statute

In ***Friends of Mammoth v. Board of Supervisors*** *(1972) 8 Cal. 3d 247, 104 Cal. Rptr. 761, 502 P.2d 1049* , the superior court denied a petitionfor a writ of administrative mandamus to review the issuance of a conditional use permit by defendant, and plaintiffs appealed. The issue before the Supreme Court was whether or not *Pub. Res. Code § 21151*, which, in part, requires one category of counties, including defendant, to make an environmental impact report on "any project they intend to carry out which may have a significant effect on the environment," requires a municipality to submit an environmental impact report before issuing a use or building permit. In determining that "project" is not restricted to public works, but includes private activities subject to governmental regulation, the Court looked to the broad intent of the California Environmental Quality Act (*Pub. Res. Code § 21000 et seq.*) to protect the environment. Citing Dickey v. Raisin Proration Zone No. 1 *(1944) 24 Cal. 2d 796, 802, 151 P.2d 505* , the Court stated that once a particular legislative intent has been ascertained, it must be given effect even though it may not be consistent with the strict letter of the statute. Quoting *In re Haines (1925) 195 Cal. 605, 613, 234 P. 883* , the Court further stated that the mere literal construction of a section in a statute ought not to prevail if it is opposed to the Legislature's intention apparent by the statute, and if the words are sufficiently flexible to admit of some other construction that construction is to be adopted to effectuate that intention. The intent prevails over the letter, and the letter will, if possible, be so read as

to conform to the spirit of the act (*8 Cal. 3d 247, 259)* . The Court proceeded to determine that the word "project" was sufficiently flexible that private activities could be brought within the ambit of the act (*8 Cal. 3d 247, 259-266)* .

[b] Disregard Literal Meaning to Avoid Absurd Results Not Intended by Legislature

California School Employees Assn. v. Governing Board *(1994) 8 Cal. 4th 333, 33 Cal. Rptr. 2d 109, 878 P.2d 1321* , was a mandate proceeding brought by a public employee union against a community college district. The union sought to compel the district to recognize the "Days of Thanksgiving" proclaimed by President Bush at the end of the Gulf War (April 5-7, 1991) as paid district holidays and to compensate classified employees accordingly. The trial court granted the writ, and the court of appeal affirmed, but the California Supreme Court reversed.

The Court noted that *Educ. Code § 88203* entitles classified employees of the community colleges to holiday pay on nine specified recurring holidays, plus any day "appointed by the President ... for a public fast, thanksgiving or holiday." The Court observed that under the plain language of the statute, a presidential decree designating a certain day as a "day of thanksgiving" would trigger an entitlement to a paid holiday for community college employees, but a literal interpretation of the statute would give no entitlement to holiday pay if the days were designated as something other than a day of thanksgiving, such as a "day of prayer" (*8 Cal. 4th 333, 339)* . The Court observed that focusing solely on the President's choice of words might be appropriate if the Legislature believed that the President knew and intended that the precise words he chose would have particular legal consequences in California (i.e., the creation of a paid holiday for community college employees). Because, however, there was no reason to believe that the President is aware of the consequences that attach to his use of particular words, there appeared to be no correlation between the particular words the President uses and his intention to designate a day of nationwide significance. Consequently, the Court concluded, a literal interpretation of the statute produces the absurd result that a paid holiday is recognized not because of the President's designation of a day of nationwise significance, but rather through a "semantic lottery" in which the determinative factor is that the "winning" words appear in the President's proclamation. The Court noted that, ordinarily, if the statutory language is clear, there is no need for judicial construction, but that a court may nonetheless determine whether the literal meaning of a statute comports with its purpose. The Court observed that it need not follow the plain meaning of a statute if to do so would frustrate the mainfest purposes of the legislation or lead to absurd results (*8 Cal. 4th 333, 340)* . Applying this rule, the Court went beyond the literal words of the statute to ascertain the Legislature's purpose and held that the statute should be construed as authorizing a paid holiday for community college employees only when the President has declared a corresponding holiday for federal employees. Under this test, the "Days of Thanksgiving" proclaimed by President Bush did not result in an entitlement to a paid holiday under *Educ. Code § 88203* because the President did not declare a holiday for federal employees on those dates (*8 Cal. 4th 333, 342-347)* .

Hall v. Regents of the University of California *(1996) 43 Cal. App. 4th 1580, 51 Cal. Rptr. 2d 387* , involved a patient who had been tested for human immunodeficiency virus (HIV) and received a false positive result. She sued various defendants, including the regents of the university hospital at which a subsequent test was performed, alleging that the defendants had been negligent in failing to timely inform her of the false positive. The regents sought a voluntary dismissal from plaintiff and agreed to waive costs. She declined, citing the tactical necessity of maintaining the regents in the action. The regents then filed a motion for summary judgment, which was granted by the trial court. The regents subsequently moved to recover defense costs under *Code Civ. Proc. § 1038*, which provides that a party may avoid paying defense costs only if he or she has pursued an action with "reasonable cause and in the good faith belief" that there was a justifiable controversy under the facts. The trial court construed the statute and declined to award costs to the regents, agreeing with plaintiff that as a tactical matter, she had cause to not dismiss the regents because it would have compromised her position, vis-a-vis other defendants in the action.

The court of appeal reversed and remanded to the trial court for a determination of costs. The appellate court stated that the trial court had misconstrued the statute by permitting the plaintiff's tactical concerns to satisfy the definition of reasonable cause under the statute. The court stated that the recognized legislative purpose behind Section 1038 was to

provide an economic disincentive to the filing of frivolous lawsuits. The court explained that statutes must be construed in a way that renders them reasonable, fair and harmonious with their manifest legislative purpose, and the literal meaning of the words must give way to avoid harsh results and mischievous or absurd consequences. The appellate court stated that the trial court's construction of the statute created a potential loophole that would effectively undermine the statutory purpose by allowing plaintiffs to maintain meritless actions for purely tactical reasons (*43 Cal. App. 4th 1580, 1585-1587)* .

Looney v. Superior Court *(1993) 16 Cal. App. 4th 521, 20 Cal. Rptr. 2d 182* , was an action against a medical center and two doctors. Plaintiffs sought punitive damages. Defendants moved to strike the punitive damages allegations, arguing that under *Code Civ. Proc. § 425.13* plaintiffs were required to seek leave of court to amend their pleadings to assert the punitive damages claims. Basing its decision on the then-accepted interpretation of *Code Civ. Proc. § 425.13*, the trial court denied the motion to strike. Plaintiffs sought, and were granted, preferential trial dates because of doubt that they would live more than six months. Subsequently, the California Supreme Court overruled prior case law interpreting *Code Civ. Proc. § 425.13*. Defendants again moved to strike the punitive damages allegations. This time, after a petition for writ of mandate to the court of appeal, defendants succeeded. Plaintiffs sought leave to amend under *Code Civ. Proc. § 425.13*, but the trial court denied the motion on the basis that plaintiffs did not meet the requirement of that statute that the motion be brought at least nine months before the date first set for trial. Plaintiff petitioned for a writ of mandate.

The court of appeal acknowledged that the nine-month time limit in *Code Civ. Proc. § 425.13* was in conflict with *Code Civ. Proc. § 36*, which provides the statutory right of an aged or terminally ill plaintiff to a preferential trial date. The court sought to give effect to the fundamental purpose of both statutes, and stated that "courts resist blind obedience to the putative 'plain meaning' of a statutory phrase where literal interpretation would defeat the Legislature's central objective" (*16 Cal. App. 4th 521, 532)* . The court also stated that "the language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend" (*16 Cal. App. 4th 521, 532)* . The court held that there is an implied exception to *Code Civ. Proc. § 425.13* that permits the granting of a motion brought less than nine months prior to the first assigned trial date when it is necessary to protect a plaintiff's right to a preferential trial date and the defendant receives or has had a reasonable opportunity to conduct discovery regarding the punitive damage claim (*16 Cal. App. 4th 521, 536)* .

Plaintiff in ***Cooperrider v. Civil Service Com.*** *(1979) 97 Cal. App. 3d 495, 158 Cal. Rptr. 801* , obtained a writ of mandate from the superior court compelling defendant to consider her application for employment by the City and County of San Francisco, which defendant had refused to do because plaintiff had not resided in San Francisco for one year prior to the date of her application, as required by ordinance. Defendant appealed. The court of appeal affirmed, holding that the one-year residency requirement violated former Cal. Const., art. XI, § 10.5 (*now see Cal. Const., art. XI, § 10(b)*), which prohibits chartered cities from requiring employees to be residents of the city in which they work. In holding that the word "employees" included applicants, the court stated that the literal language of enactments may be disregarded to avoid absurd results and to fulfill the apparent intent of the framers. If the word "employee" were interpreted to exclude applicants, an absurd situation would result: individuals could be required to be residents of a city in order to apply for a position, but they would be permitted to move out of the city the day after being employed (*97 Cal. App. 3d 495, 502)* .

[4] Additional Authorities

[a] Give Effect to Purpose Rather Than Strict Letter of Statute

In *Southland Mechanical Constructors Corp. v. Nixen (1981) 119 Cal. App. 3d 417, 173 Cal. Rptr. 917* , the court of appeal affirmed a judgment dismissing plaintiff's complaint against defendant attorneys for legal malpractice on the ground, in part, that the action was barred by the statute of limitations, *Code Civ. Proc. § 340.6(a)*, which relates to actions against attorneys "for a wrongful act or omission ... arising in the performance of professional services." In

determining that the phrase "wrongful act or omission" encompassed both the tort and breach of contract aspects of malpractice, the court stated the proposition set forth in Paragraph A of the foregoing form, and found that the court's task was to determine whether or not the words "wrongful act or omission" were sufficiently flexible to effectuate the legislative intent that breach-of-contract actions be included within the scope of *Code Civ. Proc. § 340.6* (*119 Cal. App. 3d 417, 430)* .

[b] Disregard Literal Meaning to Avoid Absurd Results Not Intended by Legislature

The Supreme Court in County of San Diego v. Muniz (1978) 22 Cal. 3d 29, 148 Cal. Rptr. 584, 583 P.2d 109 , reversed judgment for plaintiff under *Welf. & Inst. Code § 17403*, which provides that a county may recover public moneys expended for a person's support if the person acquires property. The issue on appeal was whether or not "property" included wages. The Court noted several anomalous consequences inconsistent with the legislative purpose of encouraging welfare recipients to be self-supporting that would result from construing "property" to include everything which is subject to ownership and stated that the literal meaning of a statute's words must give way to avoid harsh results and mischievous or absurd results (*22 Cal. 3d 29, 36)* . Thus, the Court held that "property" only included wages retained by the former welfare recipient after meeting the support needs of himself or herself and his or her family (*22 Cal. 3d 29, 37)* .

Los Angeles Taxpayers Alliance v. Fair Political Practices Com. (1993) 14 Cal. App. 4th 1214, 18 Cal. Rptr. 2d 472 , involved construction of the statutory definition of "slate mailers" in *Gov. Code § 82048.3*, a provision of the Political Reform Act of 1974 (*Gov. Code § 81000 et seq.*). The court of appeal rejected a construction of *Gov. Code § 82048.3* urged by appellant, explaining that a court "may look beyond the literal words of a statute when plain meaning leads to unreasonable results inconsistent with the purposes of the legislation" (*14 Cal. App. 4th 1214, 1219)* .

In *Coastal Care Centers, Inc. v. Meeks (1986) 184 Cal. App. 3d 85, 228 Cal. Rptr. 883* , the court of appeal affirmed the denial of a petition for writ of mandate to compel the Office of Statewide Health Planning and Development to hold a hearing on a competing health facility's application for a certificate of need. The court stated that to determine the Legislature's intent in enacting a statute, courts should look first to the words of the statute, but that the statutory language should not be given a literal meaning if doing so would result in absurd consequences that the Legislature did not intend (*184 Cal. App. 3d 85, 95)* .

Additional cases stating that the court will decline to follow the plain meaning of a statute when it would frustrate the intent of the legislation or lead to absurd results include *Atlantic Richfield Co. v. Workers' Comp. Appeals Bd. (1982) 31 Cal. 3d 715, 726, 182 Cal. Rptr. 778, 644 P.2d 1257* ; *Referendum Committee v. City of Hermosa Beach (1986) 184 Cal. App. 3d 152, 159, 229 Cal. Rptr. 51* ; and *Barnes v. Chamberlain (1983) 147 Cal. App. 3d 762, 766, 195 Cal. Rptr. 417* .

California Points & Authorities

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 217 STATUTORY INTERPRETATION
PART II. FORMS
A. GENERAL RULES

21-217 California Points & Authorities § 217.22

§ 217.22 Supporting Contention That Rules of Statutory Interpretation Apply to Constitutional Provisions, Charter Provisions, Ordinances, and Administrative Regulations

[1] FORM

[*The following may be included in a memorandum supporting or opposing a motion, or in a trial or appellate brief. It should be combined with the general form set out in § 217.20.*]

THE RULES OF STATUTORY INTERPRETATION APPLY TO _____ [CONSTITUTIONAL PROVISIONS *or* CHARTER PROVISIONS *or* ORDINANCES *or* ADMINISTRATIVE REGULATIONS].

[*EITHER*]

Constitutional Provisions. The rules of statutory construction apply to constitutional provisions (*Greene v. Marin County Flood Control & Water Conservation Dist. (2010) 49 Cal. 4th 277, 290-291, 109 Cal. Rptr. 3d 620, 231 P.3d 350* ; *County of Fresno v. Malmstrom (1979) 94 Cal. App. 3d 974, 979, 156 Cal. Rptr. 777*).

[*OR*]

Charter Provisions. The rules of statutory construction apply to city charters (*Castaneda v. Holcomb (1981) 114 Cal. App. 3d 939, 942, 170 Cal. Rptr. 875*).

[*OR*]

Ordinances. The rules of statutory construction apply to ordinances (*County of Madera v. Superior Court (1974) 39 Cal. App. 3d 665, 668, 114 Cal. Rptr. 283*).

[*OR*]

Administrative Regulations. The rules of statutory construction apply to rules and regulations of administrative agencies (*In re Richards (1993) 16 Cal. App. 4th 93, 97-98, 19 Cal. Rptr. 2d 797*).

[*Set forth additional points and cite authorities relating to other rules of statutory interpretation that aid in ascertaining intent of the provision and support interpretation desired (see §§ 217.21, 217.23, 217.24, 217.40 -217.46, 217.60 -217.63, 217.80 -217.86, 217.88).*]

[2] Comments

[a] Use of Form

The foregoing form may be submitted in support of a party's contention that an ordinance, an administrative regulation, or aprovision of a constitution or a city charter should be construed in a particular manner. The form sets out the rule that the same rules of interpretation apply in such cases as in the case of the interpretation of statutes. Such an argument might be made in any type of action or proceeding in which a question arises concerning how an ordinance, administrative regulation, constitutional provision, or city charter provision should be construed. These points and authorities should be combined with the general points and authorities *set forth in § 217.20*, which relate to the construction of statutes to ascertain and effectuate the legislative intent.

The foregoing form may be combined with a memorandum relating to the procedural context in which the issue of interpretation arises. This form may also be adapted for use in a trial or appellate brief.

Counsel should also insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Constitutional Provisions

In ***Greene v. Marin County Flood Control & Water Conservation Dist.*** *(2010) 49 Cal. 4th 277, 109 Cal. Rptr. 3d 620, 231 P.3d 350* , the California Supreme Court held that *Cal. Const., art. XIII D, § 6*, which requires voter approval for new or increased property-related fees, does not incorporate the secret-ballot requirements applicable to elections under *Cal. Const., art. II, § 7*. In construing the constitutional provisions, the Court said that the principles of constitutional interpretation are similar to those governing statutory construction, and the Court provided some examples of the tenets of constitutional construction. Thus, in interpreting a constitution's provision, the paramount task is to ascertain the intent of those who enacted it. To determine that intent, the Court looks first to the language of the constitutional text, giving the words their ordinary meaning. If the language is clear, there is no need for construction. If the language is ambiguous, the Court considers extrinsic evidence of the enacting body's intent (*49 Cal. 4th 277, 289-290)* .

When constitutional provisions can reasonably be construed so as to avoid conflict, such a construction should be adopted; as a means of avoiding conflict, a recent, specific provision is deemed to carve out an exception to and thereby limit an older, general provision (*49 Cal. 4th 277, 290)* .

In a case of ambiguous constitutional language, the Court may also consult any contemporaneous constructions of the constitutional provision made by the Legislature or by administrative agencies. For example, there is a presumption of constitutionality accorded to legislative acts, particularly when the Legislature has enacted a statute with the relevant

constitutional prescriptions clearly in mind. In such a case, the statute represents a considered legislative judgment as to the appropriate reach of the constitutional provision. Although the ultimate constitutional interpretation rests with the judiciary, a focused legislative judgment on the question enjoys significant weight and deference by the courts (*49 Cal. 4th 277, 290-291)* .

In ***County of Fresno v. Malmstrom*** *(1979) 94 Cal. App. 3d 974, 156 Cal. Rptr. 777* , the court of appeal exercised its original jurisdiction to issue a writ of mandate in a dispute over the effect of Cal. Const., art. XIIIA, which imposes a limitation on property tax. In holding that Article XIIIA did not apply to special assessments and bonds levied pursuant to certain statutes, the court cited *Winchester v. Mabury (1898) 122 Cal. 522, 527, 55 P. 393* , for the proposition that rules of construction and interpretation that are applicable when considering statutes are equally applicable in interpreting constitutional provisions (*94 Cal. App. 3d 974, 979)* .

[b] Charter Provisions

Castaneda v. Holcomb *(1981) 114 Cal. App. 3d 939, 170 Cal. Rptr. 875* , involved an action for a declaratory judgment to construe a provision of the charter of the City of San Bernardino. In affirming the trial court's judgment, the court of appeal held that the rules of statutory interpretation are to be applied to charters and the court proceeded to apply such rules in reaching its decision (*114 Cal. App. 3d 939, 942, 945-946)* .

[c] Ordinances

In ***County of Madera County v. Superior Court*** *(1974) 39 Cal. App. 3d 665, 114 Cal. Rptr. 283* , the court of appeal refused to issue a writ of mandate to compel the superior court to declare that an ordinance enacted by petitioner was valid. The court began its reasoning by stating several rules of statutory construction and citing *Welshans v. City of Santa Barbara (1962) 205 Cal. App. 2d 304, 308, 23 Cal. Rptr. 108* , to note that the rules applying to the construction of statutes apply equally to ordinances (*8 Cal. App. 4th 661, 668)* .

[d] Administrative Regulations

In re Richards *(1993) 16 Cal. App. 4th 93, 19 Cal. Rptr. 2d 797* , was an appeal from a trial court's granting of a writ of habeas corpus, ordering new calculations regarding a prisoner's sentence. At issue on appeal was the construction of *15 Cal. Code Reg. § 3375.3*, which relates to certain adjustments made to the classification of a prisoner based on the prisoner's behavior during prior periods of incarceration. The court quoted from *California Drive-in Restaurant Ass'n v. Clark (1943) 22 Cal. 2d 287, 292, 140 P.2d 657* , stating that "[g]enerally, the same rules of construction and interpretation which apply to statutes govern the construction and interpretation of rules and regulations of administrative agencies" (*16 Cal. App. 4th 93, 97-98)* . The court went on to apply rules of statutory construction in interpreting the administrative regulation.

[4] Additional Authorities

[a] Constitutional Provisions

In *In re Lance W. (1985) 37 Cal. 3d 873, 210 Cal. Rptr. 631, 694 P.2d 744* , the Supreme Court determined whether *Cal. Const., art. I, § 28(d)* (Truth-in-Evidence provision), in ensuring that all relevant evidence be admitted, abrogates the court's power to adopt exclusionary rules that are not authorized by statute or mandated by the constitution, if those rules afford greater protection to a criminal defendant than the *U.S. Const., amend. IV* affords (*37 Cal. 3d 873, 881-888)* . The Court stated that, in construing constitutional and statutory provisions, whether enacted by the Legislature or by initiative, the intent of the enacting body is the paramount consideration (*37 Cal. 3d 873, 889)* . The Court proceeded to hold that the vicarious exclusionary rule is not compelled by *U.S. Const., amend. IV*, and further, that the intent of *Cal. Const., art. I, § 28(d)* was to disallow the rule (*37 Cal. 3d 873, 890)* .

In *ABS Institute v. City of Lancaster (1994) 24 Cal. App. 4th 285, 29 Cal. Rptr. 2d 224* , the court of appeal affirmed a trial court's ruling that, in reviewing a city's adopted findings in support of an ordinance that deviated from the state's building code, the trial court was not required to exercise its independent judgment in reviewing the evidence. The fact that the Health and Safety Code required findings to support such an ordinance does not transform a legislative act into an adjudicatory process. A legislative act generally predetermines what the rules shall be for regulation of future cases falling under its provisions, while an adjudicatory act applieslaw to determine specific rights based on specific facts ascertained from evidence produced at a hearing. The court concluded that the adoption of an ordinance is a legislative act (*24 Cal. App. 4th 285, 295)* .

In *State Bd. of Equalization v. Board of Supervisors (1980) 105 Cal. App. 3d 813, 164 Cal. Rptr. 739* , the court of appeal, in determining whether or not a constitutional amendment enacted by referendum applied retroactively, stated that the rules of statutory construction apply to the interpretation of such constitutional amendments (*105 Cal. App. 3d 813, 823)* . The court proceeded to apply such rules in holding that the amendment did apply retroactively (*105 Cal. App. 3d 813, 823-825)* .

[b] Ordinances

In *City of Berkeley v. Cukierman (1993) 14 Cal. App. 4th 1331, 18 Cal. Rptr. 478* the court of appeal applied several general rules of statutory construction in construing an ordinance enacted by the City of Berkeley (*14 Cal. App. 4th 1331, 1338-1341)* .

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CHAPTER 217 STATUTORY INTERPRETATION
PART II. FORMS
A. GENERAL RULES

21-217 California Points & Authorities § 217.23

§ 217.23 Supporting Contention That Constitutional Construction of Statute Preferred

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with the general points and authorities set out in § 217.20.*]

THE COURT SHOULD CONSTRUE _____ [*specify statute*] SO AS TO PRESERVE ITS CONSTITUTIONALITY AND RESOLVE ALL DOUBTS IN FAVOR OF ITS VALIDITY.

A. Constitutional Construction Preferred to Avoid Constitutional Issue in Contrary Construction. Legislation should be construed, if reasonably possible, to preserve its constitutionality and thus avoid the constitutional issue inherent in a contrary construction (*Department of Corrections v. Workers' Comp. Appeals Bd. (1979) 23 Cal. 3d 197, 207, 152 Cal. Rptr. 345, 589 P.2d 853*).

[*Optional*] **B. Construction to Preserve Statute's Constitutionality.** If feasible within bounds set by their words and purpose, statutes should be construed to preserve their constitutionality (*Conservatorship of Hofferber (1980) 28 Cal. 3d 161, 175, 167 Cal. Rptr. 854, 616 P.2d 836* ; *Rowe v. Superior Court (1993) 15 Cal. App. 4th 1711, 1722, 19 Cal. Rptr. 2d 625*). Legislation is presumptively constitutional, and all doubts are to be resolved in favor of its validity. It is axiomatic that legislation must be sustained whenever it is susceptible of a reasonable interpretation consistent with controlling constitutional provisions (*Kizziah v. Department of Transportation (1981) 121 Cal. App. 3d 11, 18, 175 Cal. Rptr. 112*).

[*Optional*] **C. Construe to Give Specificity to Vague Terms.** The judiciary bears an obligation to construe enactments to give specific content to terms that might otherwise be unconstitutionally vague. Thus, a statute will not be held void for uncertainty if any reasonable and practical construction can be given its language. If by fair and reasonable interpretation the court can construe a statute to sustain its validity, it must adopt that interpretation, even if departure from prior precedent that fastened an unconstitutionally broad interpretation on the statute would result (*Pryor v. Municipal Court (1979) 25 Cal. 3d 238, 253-254, 158 Cal. Rptr. 330, 599 P.2d 636*).

[*Set forth additional points and authorities relating to other rules of statutory interpretation that aid in ascertaining legislative intent behind statute and support interpretation desired (see §§ 217.21, 217.22, 217.24, 217.40 -217.46, 217.60 -217.63, 217.80 -217.86, 217.88).*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that a statute should be construed in a particular manner. They may also be combined with points and authorities in support of a party's contention that a statute is constitutional. The form sets out the rule of statutory interpretation that statutes should be construed to preserve their constitutionality if feasible within the bounds set by their words and purpose. Such an argument might be made in any type of action or proceeding in which a question arises concerning how a statute should be construed, and in which the constitutionality of a statute is at issue. These points and authorities should be combined with the general points and authorities *set forth in § 217.20*, which relate to the construction of statutes to ascertain and effectuate the legislative intent.

These points and authorities may be combined with a memorandum of points and authorities relating to the procedural context in which the issue of statutory interpretation arises. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth an argument, applying rules of statutory construction,that demonstrates that the statute can be construed in a constitutional manner, and counsel should present an argument that a contrary interpretation would render the statute unconstitutional.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 217.26* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Constitutional Construction Preferred to Avoid Constitutional Issue in Contrary Construction

Petitioner department in ***Department of Corrections v. Workers' Comp. Appeals Bd.*** *(1979) 23 Cal. 3d 197, 152 Cal. Rptr. 345, 589 P.2d 853* , sought review of respondent board's decision awarding death benefits to respondent daughter of decedent, who had been employed by petitioner. Decedent's widow had elected to receive a special death benefit under *Gov. Code §§ 21363* and *21364* (repealed in 1995; *now see Gov. Code §§ 21537, 21541*), part of the Public Employees' Retirement System. Respondent board had awarded a death benefit to decedent's daughter of a prior marriage pursuant to *Lab. Code § 4701*, despite the provisions of *Lab. Code § 4707*, which, prior to its amendment in 1989, precluded an award of workers' compensation benefits when a special death benefit was to be paid to the decedent's widow or children under age 18. Respondent board interpreted *Lab. Code § 4707* as allowing an award to the daughter because she had not received any benefit from the Public Employees' Retirement System. Petitioner petitioned for review on the ground that *Lab. Code § 4707* precluded respondent board from awarding any benefit to the daughter.

The Supreme Court held that respondent had interpreted *Lab. Code § 4707* incorrectly, and that that section did preclude an award to the child of a former marriage when the surviving spouse received a special death benefit under *Gov. Code §§ 21363* and *21364*. The Court held, however, that an award might be authorized under *Lab. Code § 4704*, which allows for the award of death benefits to dependents not otherwise entitled to them on a showing of good cause (

23 Cal. 3d 197, 204-205) . Interpretation of *Lab. Code §§ 4707* and *4704* to deny death benefits to the daughter because her parent was a Public Employees' Retirement System safety employee when such benefits were available to all other surviving dependent children would raise a serious constitutional question of denial of equal protection of the law. Citing *Kash Enterprises, Inc. v. City of Los Angeles (1977) 19 Cal. 3d 294, 305, 138 Cal. Rptr. 53, 562 P.2d 1302* , and *Palmero v. Stockton Theatres, Inc. (1948) 32 Cal. 2d 53, 60, 195 P.2d 1* , the Court concluded that by interpreting *Lab. Code § 4704* to authorize an award to the daughter, it adhered to the maxim that legislation should be construed, if reasonably possible, to preserve its constitutionality and thus avoid the constitutional issue inherent in a contrary construction (*23 Cal. 3d 197, 207)* .

[b] Construction to Preserve Statute's Constitutionality

Conservatee in ***Conservatorship of Hofferber*** *(1980) 28 Cal. 3d 161, 167 Cal. Rptr. 854, 616 P.2d 836* , was charged with murder after a preliminary hearing. He was found incompetent to stand trial and was committed to a state hospital. In periodic reviews he was repeatedly found to be incompetent. Civil conservatorship proceedings were initiated in which conservatee was found to be "gravely disabled," and a conservator was appointed and authorized to place conservatee in a state hospital or other mental health facility. Conservatee appealed from the judgment and order establishing the conservatorship.

On appeal, conservatee argued in part that he could not be committed for reasons and under procedures different from those applicable to other mentally disordered persons on the basis of his being charged with a violent felony and being found mentally incompetent to stand trial. Although reversing, the Supreme Court held that the state could confine incompetent criminal defendants, when a magistrate or grand jury has found probable cause to believe that they have committed a violent felony, on the ground that they remain violently dangerous (*28 Cal. 3d 161, 174)* . *Welf. & Inst. Code § 5008(h)(2)*, however, appeared to permit indefinite maintenance of a conservatorship solely because the incompetence is continuing and the violent felony charges have not been dismissed. Citing *Pryor v. Municipal Court (1979) 25 Cal. 3d 238, 253-254, 158 Cal. Rptr. 330, 599 P.2d 636* , and *In re M. (1975) 14 Cal. 3d 727, 736-737, 122 Cal. Rptr. 574, 537 P.2d 406* , for the statement that, if feasible within bounds set by their words and purpose, statutes should be construed to preserve their constitutionality, the Court proceeded to construe *Welf. & Inst. Code § 5008(h)(2)* as including a "dangerousness" requirement so that every judgment creating or renewing a conservatorship for an incompetent criminal defendant would have to reflect written findings that, by reason of mental disease, defect, or disorder, the person represents a substantial danger of physical harm to others. The Court upheld the statute as so construed (*28 Cal. 3d 161, 175-177)* .

Rowe v. Superior Court *(1993) 15 Cal. App. 4th 1711, 19 Cal. Rptr. 2d 625* , was an action against a religious organization. The trial court denied plaintiffs leave to amend their complaint to allege claims for punitive damages, basing its denial on *Code Civ. Proc. § 425.14*. That statute requires leave of court before the pleading of a claim for punitive damages against a religious organization, and provides that a court may grant suchleave on a finding "that the plaintiff has established evidence which substantiates that plaintiff will meet the clear and convincing standard of proof." One of the plaintiffs' arguments on their petition for writ of mandate to the court of appeal was that *Code Civ. Proc. § 425.14* was unconstitutional because it deprived them of their constitutionally protected right to trial by jury. The court of appeal, in construing the statute, followed the rule that "if feasible within bounds set by their words and purposes, statutes should be construed to preserve their constitutionality" (*15 Cal. App. 4th 1711, 1722)* . The court held that *Code Civ. Proc. § 425.14* requires "only that a plaintiff demonstrate the existence of sufficient evidence to establish a prima facie case for punitive damages, having in mind the higher clear and convincing standard of proof" (*15 Cal. App. 4th 1711, 1723)* .

Kizziah v. Department of Transportation *(1981) 121 Cal. App. 3d 11, 175 Cal. Rptr. 112* , involved an action for declaratory and injunctive relief challenging the constitutionality of the allocation of funds derived from the lease of land acquired for future highway purposes by the Department of Transportation to local government agencies under *Sts. & Hy. Code §§ 104.10* and *104.13*. Defendants appealed from a judgment invalidating the sections and enjoining their

further implementation.

In reversing, the court of appeal prefaced its discussion of the case by stating that a constitutional attack on the validity of legislative enactments invokes the basic principles of constitutional construction that legislation is presumptively constitutional and that all doubts are to be resolved in favor of its validity, citing United States Supreme Court and California precedents. The court also stated that it is axiomatic that the challenged legislation must be sustained whenever it is susceptible of a reasonable interpretation consistent with controlling constitutional provisions (*121 Cal. App. 3d 11, 18)* . The court found that *Sts. & Hy. Code § 104.10* was completely consistent with *Cal. Const., art. XIX, § 3*, which restricts the use of revenues from state taxes on motor vehicle fuels and from state taxes and fees on vehicles or their use (*121 Cal. App. 3d 11, 19-21)* . *Sts. & Hy. Code § 104.13*, which allows a lessee of land acquired for future highway use to apply for a credit against rental payments of the amount of the possessory interest tax, was also challenged as constituting an unconstitutional gift of public funds under *Cal. Const., art. XVI, § 6*. The court stated that whether or not there was consideration adequate to satisfy the Constitution either in the form of a valid public purpose served or through the rental agreement would ordinarily present a question of fact for the trial court. Since the challenged statute was clothed with a presumption of constitutional validity, the court could not say that the legislation on its face failed to serve a valid public purpose. Thus, the court held that, because there was not an adequate record of those pivotal factual findings, they were unable to determine whether or not in fact the requisite consideration was lacking, so the presumption of facial validity was not rebutted and had to stand (*121 Cal. App. 3d 11, 23-24)* .

[c] Construe to Give Specificity to Vague Terms

Pryor v. Municipal Court *(1979) 25 Cal. 3d 238, 158 Cal. Rptr. 330, 599 P.2d 636* , involved a petition for a writ of prohibition to bar respondent court from retrying petitioner on a charge of violating *Penal Code § 647(a)*, which provides that a person "[w]ho solicits anyone to engage in or who engages in lewd or dissolute conduct in any public place ..." is guilty of disorderly conduct. Petitioner argued that the statute was unconstitutionally vague. The Supreme Court determined that neither the facial language of the statute nor the statute as construed by prior California decisions was sufficiently certain to satisfy constitutional due process requirements, but stated that the case was not disposed of by that conclusion. The judiciary bears an obligation to construe enactments to give specific content to terms that might otherwise be unconstitutionally vague. A statute will not be held void for uncertainty if any reasonable and practical construction can be given its language. Thus, the Court stated that if by fair and reasonable interpretation they could construe *Penal Code § 647(a)* to sustain its validity, they had to adopt that interpretation, even if that course required them to depart from prior precedent that fastened an unconstitutionally broad interpretation on the statute (*25 Cal. 3d 238, 253-254)* . The Court proceeded to construe the statute very narrowly, holding that "lewd" and "dissolute" were synonymous, and referred to conduct involving the touching of the genitals, buttocks, or female breasts for the purpose of sexual arousal, gratification, annoyance, or offense when the actor knows or should know of the presence of persons who might be offended by his or her conduct. Further, the solicitation prohibited by the statute was restricted to solicitation of conduct to be performed in a public place (*25 Cal. 3d 238, 254-257)* . Since *Penal Code § 647(a)* was constitutional as construed, the Court denied relief to petitioner (*25 Cal. 3d 238, 258)* .

[4] Additional Authorities

[a] Constitutional Construction Preferred to Avoid Constitutional Issue in Contrary Construction

People v. Scott (1993) 20 Cal. App. 4th Supp. 5 , *26 Cal. Rptr. 2d 179* concerned the reasonableness of a municipal ordinance prohibiting camping in city parks. The court of appeal discussed the constitutional requirements of due process. It explained that in order to withstand a facial vagueness challenge under the due process clause, a statute must satisfy two basic requirements: (1) a statute must be sufficiently definite to provide adequate notice of the conduct proscribed, and (2) a statute must provide sufficiently definite guidelines for the police in order to prevent arbitraryand discriminatory enforcement. Reasonable certainty is all that is required. A statute will not be held void for vagueness if any reasonable and practical construction can be given its language or if its terms may be made reasonably certain by

reference to other definable sources. All that is required is that the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.

The court further explained that many, probably most, statutes are ambiguous in some respect, and instances invariably arise under which the application of statutory language may be unclear. So long as a statute does not threaten to infringe on the exercise of the *United States Constitution, First Amendment*, or other constitutional rights, ambiguities, even if numerous, do not justify the invalidation of a statute on its face. In order to succeed on a facial vagueness challenge to a legislative measure that does not threaten constitutionally protected conduct, a party must do more than identify some instances in which the application of the statute may be uncertain or ambiguous; the party must demonstrate that the law is impermissibly vague in all of its applications (*20 Cal. App. 4th Supp. 5, 11)* .

The court of appeal in *Conservatorship of Davis (1981) 124 Cal. App. 3d 313, 177 Cal. Rptr. 369* , affirmed a judgment dismissing a petition to establish a conservatorship under the Lanterman-Petris-Short Act (*Welf. & Inst. Code § 5000 et seq.*) on the ground that respondent was gravely disabled. The issue on appeal related to the elements that had to be proved to the trier of fact under *Welf. & Inst. Code § 5350(d)* (providing that a proposed conservatee has the right to a court or jury trial on the issue of whether or not he or she is "gravely disabled"). The court noted that to accept petitioner's contention that the sole issue to be tried by the jury was whether or not a person was "gravely disabled" in the narrow sense of being able to provide food, shelter, or clothing unaided by others, would seriously infringe on her due process rights. In construing the section to provide for a right to a jury trial on all essential questions involved in a trial on the question of imposing a conservatorship, and not merely on the narrow issue of whether or not he or she is "gravely disabled," the court relied on the cornerstone of statutory construction that requires courts to interpret statutes so as to preserve their constitutionality whenever possible (*124 Cal. App. 3d 313, 324)* .

In *Hooper v. Deukmejian (1981) 122 Cal. App. 3d 987, 176 Cal. Rptr. 569* , the court of appeal reversed a judgment dismissing plaintiffs' complaint for declaratory and injunctive relief relating to the destruction of records of certain marijuana-related offenses under *Health & Safety Code § 11361.5*, and to the prohibition on public agencies and employers from inquiring about or considering such convictions under *Health & Safety Code § 11361.7* and *Lab. Code § 432.8*. In sustaining plaintiffs' contention that the statutes extended relief to persons who had been charged with possession of marijuana, but who had entered a plea of guilty to a violation of former Health & Safety Code § 11557 (*now Health & Safety Code § 11366*; maintaining a place for the sale, giving away, or use of narcotics) when that violation was stipulated to be a lesser included offense to the charge of possession of marijuana, the court found that plaintiffs' interpretation of the statute was supported by the rule that legislation should be construed to preserve its constitutionality if reasonably possible and thus avoid the constitutional issue inherent in a contrary construction (*122 Cal. App. 3d 987, 1003, 1006)* . Thus, even though the court also found that the principal rule of statutory construction, admonishing against judicial construction of clear and unambiguous statutes, supported defendants' position that convictions of offenses of former Health & Safety Code § 11557 were not subject to the remedial provisions at issue, it sustained plaintiffs' interpretation because it found that defendants' interpretation would be unconstitutional (*122 Cal. App. 3d 987, 1006-1015)* .

[b] Construction to Preserve Statute's Constitutionality

Jutzi v. County of Los Angeles (1987) 196 Cal. App. 3d 637, 242 Cal. Rptr. 74 , was an action against a county hospital for malpractice in rendering emergency medical services, in which the court of appeal, in affirming judgment for defendant, construed *Health & Safety Code § 1799.110(c)*. The court stated that, whenever possible, a statute will be construed in harmony with the constitution (*196 Cal. App. 3d 637, 650)* .

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CHAPTER 217 STATUTORY INTERPRETATION
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A. GENERAL RULES

21-217 California Points & Authorities § 217.24

§ 217.24 Supporting Contention That Court Not to Insert Omitted Terms Into or to Omit Terms From Statutes [Code Civ. Proc. § 1858]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It may be combined with the general points and authorities set out in §§ 217.20 or 217.25.*].

IN CONSTRUING _____ [*specify statute*], THE COURT SHOULD NOT INSERT TERMS OMITTED BY THE LEGISLATURE, NOR OMIT TERMS INSERTED BY THE LEGISLATURE.

A. Courts Not to Insert Omitted Terms or to Omit Inserted Terms. In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted (*Code Civ. Proc. § 1858*).

[*Optional*] **B. Words Not to Be Altered to Accomplish Purpose Not Apparent on Statute's Face or From Its History.** If the words of a statute are clear, the court should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history (*California Teachers Assn. v. Los Angeles Community College Dist. (1981) 123 Cal. App. 3d 947, 954, 177 Cal. Rptr. 168*).

[*Optional*] **C. Courts May Not Insert Qualifying Provisions.** In construing a statute, courts may not insert qualifying provisions not already included and may not rewrite the statute to conform to or accomplish a purpose or assumed intention that does not appear on the statute's face, or from its language or legislative history (*In re Hoddinott (1996) 12 Cal. 4th 992, 1002, 50 Cal. Rptr. 2d 706, 911 P.2d 1381*).

[*Set forth additional points and authorities relating to other rules of statutory interpretation that support interpretation desired (see §§ 217.21 -217.23, 217.40 -217.46, 217.60 -217.63, 217.80 -217.86, 217.88).*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a party's contention that a statute should be construed in a particular manner. The form sets out the rule of statutory interpretation that courts should not insert terms omitted or omit terms inserted by the Legislature. Such an argument might be made in any type of action or proceeding in which a question arises concerning how a statute should be construed. These points and authorities may be combined with the general points and authorities *set forth in § 217.25*, which relate to the impropriety of construing statutes that are not ambiguous.

These points and authorities may be combined with a memorandum of points and authorities relating to the procedural context in which the issue of statutory interpretation arises. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should also insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, counsel might show that the statute to be construed did not envision a situation such as that presented by the facts of the case, and therefore made no provision for it, so that the court should leave the situation for the Legislature to address rather than try to fill in the gaps in the law by attempting to make the statute conform to a presumed intent not expressed in the statutory language [*see Cemetery Bd. v. Telophase Society of America (1978) 87 Cal. App. 3d 847, 858, 151 Cal. Rptr. 248]* .

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 217.21* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Words Not to Be Altered to Accomplish Purpose Not Apparent on Statute's Face or From Its History

In ***California Teachers Assn. v. Los Angeles Community College Dist.*** *(1981) 123 Cal. App. 3d 947, 177 Cal. Rptr. 168* , the superior court granted a writ of mandate to compel defendant to reclassify certain substitute teachers, and defendant appealed.

The court of appeal affirmed. The court recognized that, if possible, it was obligated to reconcile the two statutes that related to reclassification of substitute teachers. Although the court could properly rely on extrinsic aids to construe the statutes, it should first turn to the words of the statute to determine the intent of the Legislature. Noting that one of the statutes began with the words "Except as provided [in the other statute]" and that no legislative history pointed to an intent contrary to that explicit statutory language, the court found that the Legislature could not have used clearer language to denote its intent. The court applied the rule that if the words of the statute are clear, the court should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history. The court also applied the rule that courts cannot disregard the provisions of statutes that may be reconciled (*123 Cal. App. 3d 947, 954)* .

[b] Courts May Not Assert Qualifying Provisions

In re Hoddinott *(1996) 12 Cal. 4th 992, 50 Cal. Rptr. 2d 706, 911 P.2d 1381* , involved an interpretation of *Penal Code § 1203.2a*, setting forth sentencing procedures for people who, while on probation for one offense, are committed to prison for a second offense. Petitioner Robert Hoddinott was on probation for one offense in Marin County, when he was sentenced to prison for another offense committed in San Francisco. Subsequently, pursuant to *Penal Code § 1203.2a*, Hoddinott notified his Marin County probation officer in writing of his commitment to prison for the San Francisco offense. However, she failed to notify the superior court within 30 days of receipt of the written notice of his

incarceration. Subsequently,the Marin County Superior Court revoked Hoddinott's probation and imposed a two-year prison sentence. Hoddinott filed a writ of habeas corpus, asserting that under the plain language of *Penal Code § 1203.2a*, the Marin County Superior Court was deprived of jurisdiction to impose the two-year prison sentence because of the probation officer's failure to notify the court of the San Francisco incarceration. The superior court denied the petition, relying on *People v. Willett (1993) 15 Cal. App. 4th 1, 18 Cal. Rptr. 2d 603* . However, the court of appeal agreed with Hoddinott and vacated his sentence. The California Supreme Court granted review to resolve conflicting appellate court interpretations of *Penal Code § 1203.2a* and its language.

The language of the statute provided that a probation officer, after receiving written notice of a probationer's incarceration in another matter, must notify the court which granted probation of the incarceration within 30 days or the court loses jurisdiction in the matter. However, in *People v. Willett (1993) 15 Cal. App. 4th 1, 18 Cal. Rptr. 2d 603* , the court held that the 30-day period cannot begin to run unless and until the defendant has formally requested revocation of his probation and that sentencing be imposed instead. The Willett court held that it was contrary to legislative intent for the court to lose jurisdiction when notice of incarceration has been provided to a probation officer, but the defendant has not requested sentencing. However, the California Supreme Court held that in seeking to effectuate its interpretation of legislative intent, the Willett court had rendered portions of the statutory language without effect. The California Supreme Court found that there was no requirement that a defendant formally request imposition of sentencing, in addition to notifying the probation officer of incarceration, before the 30-day period commenced. Accordingly, the court stated that by its interpretation, the Willett court had rewritten the express language of the statute, citing the rule that in construing a statute, courts may not insert qualifying provisions not already included and may not rewrite the statute to conform to or accomplish a purpose or assumed intention that does not appear on the statute's face, or from its language or legislative history (*12 Cal. 4th 992, 1002)* .

[4] Additional Authorities

[a] Courts Not to Insert Omitted Terms or to Omit Inserted Terms

Suman v. BMW of North America, Inc. (1994) 23 Cal. App. 4th 1, 28 Cal. Rptr. 2d 133 , concerned an action by a purchaser against a car manufacturer and dealer for failure to replace the car or refund the purchase price after numerous attempts to repair it. The court of appeal found that the trial court committed reversible error concerning its instructions regarding plaintiff's entitlement to penalties under *Civil Code § 1790 et seq.* The court stated that it was a well-recognized principle of statutory construction that when the Legislature has carefully employed a term in one place and excluded it in another, it should not be implied where it is excluded (*23 Cal. App. 4th 1, 11)* .

In *Burnsed v. State Bd. of Control (1987) 189 Cal. App. 3d 213, 234 Cal. Rptr. 316* , which involved construction of the term "any other source" as used in former Gov. Code § 13960(d), part of the Victims of Violent Crime Act (*now see Gov. Code § 13950 et seq.*), the court of appeal said that a court may not insert into a statute qualifying provisions not intended by the Legislature and may not rewrite a statute to conform to an assumed legislative intent not apparent in the statute (*Burnsed v. State Bd. of Control (1987) 189 Cal. App. 3d 213, 217, 234 Cal. Rptr. 316*).

[b] Words Not to Be Altered to Accomplish Purpose Not Apparent on Statute's Face or From Its History

City of Sacramento v. Public Employees' Retirement System (1994) 22 Cal. App. 4th 786, 27 Cal. Rptr. 2d 545 , concerned an action by a city against the Public Employees' Retirement System. The trial court determined that an amendment to the relevant statute, former Gov. Code § 20021 (*now see Gov. Code § 20433*), was binding on the city without its election. The court of appeal modified the judgment and affirmed it as so modified. The court explained that, in construing the terms of a statute, courts resort to the legislative history of the measure only if its terms are ambiguous. An ambiguity arises only if there is more than one construction in issue that is semantically permissible, that is, more than one usage that makes sense of the statutory language given the context and applicable rules of usage (*City of Sacramento v. Public Employees' Retirement System (1994) 22 Cal. App. 4th 786, 795, 27 Cal. Rptr. 2d 545*).

In *Simpson v. Unemployment Ins. Comp. Appeals Bd. (1986) 187 Cal. App. 3d 342, 231 Cal. Rptr. 690* , a worker sought state disability insurance benefits. At the time of her disability she was employed by a private employer, whereas during her base disability period she was employed by the University of California. In reversing the trial court's grant of a petition for writ of mandate ordering the Unemployment Insurance Appeals Board to award state disability insurance benefits to the worker, the court of appeal, although noting that while employed by the university the worker was covered under the university's nonindustrial disability insurance plan under which no benefits could be paid for any day after separation from service, held that to qualify for state disability insurance the base period wages for employment (*Lab. Code § 2652*) had to be wages that were subject to the state disability insurance tax, and, because they were not, the worker was not entitled to benefits (*Simpson v. Unemployment Ins. Comp. Appeals Bd. (1986) 187 Cal. App. 3d 342, 350-354, 231 Cal. Rptr. 690*). The court recognized that the result was contrary to the legislativepurpose of disability insurance law set forth in *Lab. Code § 2601*, which is to mitigate the evils and burdens that fall on the unemployed and disabled, but that this was a situation to be remedied by the Legislature (*Simpson v. Unemployment Ins. Comp. Appeals Bd. (1986) 187 Cal. App. 3d 342, 354-355, 231 Cal. Rptr. 690*). The court said that, although the result in the case may appear to be inequitable, it could not, under the guise of liberal construction, enlarge the clear provisions of the statute (*Lab. Code § 2652*) and that liberality of interpretation cannot accomplish an end outside the terms of the statute, however desirable such a result might be (*Simpson v. Unemployment Ins. Comp. Appeals Bd. (1986) 187 Cal. App. 3d 342, 351, 231 Cal. Rptr. 690*). The court concluded that it could not, under the guise of statutory construction, rewrite the law to provide benefits for the worker where none was authorized (*Simpson v. Unemployment Ins. Comp. Appeals Bd. (1986) 187 Cal. App. 3d 342, 354, 231 Cal. Rptr. 690*).

Public Utilities Com. v. Energy Resources Conservation & Dev. Com. (1984) 150 Cal. App. 3d 437, 197 Cal. Rptr. 866 , involved a jurisdictional dispute involving a private utility company, the Public Utilities Commission, and the Energy Resources Conservation and Development Commission. The dispute centered on interpretation of former Pub. Res. Code § 25107, governing jurisdiction over electric transmission lines. The Energy Commission appealed the issuance of a peremptory writ of mandate ordering it to cease its jurisdiction over certain proposed transmission lines. Affirming the judgment, the court of appeal discussed statutory construction rules. It stated that in ascertaining the intent of the Legislature, the court must first look to the words of the statute. A court should not add to or alter the words of the statute to accomplish a purpose that does not appear on the face of the statute or from its legislative history if the words of the statute are clear, nor should a court seek hidden meanings not suggested by the statute or by available extrinsic aids used in interpretation (*Public Utilities Com. v. Energy Resources Conservation & Dev. Com. (1984) 150 Cal. App. 3d 437, 444, 197 Cal. Rptr. 866*).

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21-217 California Points & Authorities § 217.25

§ 217.25 Opposing Contention That Statute Should Be Construed to Ascertain and Effectuate Legislative Intent--Clear Statute Not to Be Construed

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE COURT SHOULD NOT CONSTRUE _____ [*specify statute*], BUT SHOULD GIVE EFFECT TO IT ACCORDING TO THE USUAL MEANING OF THE LANGUAGE USED IN FRAMING IT BECAUSE ITS LANGUAGE IS CLEAR AND UNAMBIGUOUS.

A. No Construction of Clear Statute. When statutory language is clear and unambiguous, there is no need for construction, and courts should not indulge in it (*DaFonte v. Up-Right, Inc. (1992) 2 Cal. 4th 593, 601, 7 Cal. Rptr. 2d 238, 828 P.2d 140*). The meaning of clear and unambiguous language in a statute should generally be followed (*Rhiner v. Workers' Comp. Appeals Bd. (1993) 4 Cal. 4th 1213, 1226, 18 Cal. Rptr. 2d 129, 848 P.2d 244*). When clear and unambiguous statutory language conflicts with a clear, specific constitutional provision, the court has no alternative but to find the statute unconstitutional (*County of Riverside v. Superior Court (2003) 30 Cal. 4th 278, 285-295, 132 Cal. Rptr. 2d 713, 66 P.3d 718*).

B. Give Statute Effect According to Usual Meaning of Its Language. Courts are bound to give effect to statutes according to the usual, ordinary import of the language employed in framing them (*Walnut Creek Manor v. Fair Employment & Housing Com. (1991) 54 Cal. 3d 245, 268, 284 Cal. Rptr. 718, 814 P.2d 704* ; *People v. Belleci (1979) 24 Cal. 3d 879, 884, 157 Cal. Rptr. 503, 598 P.2d 473*).

[*Optional*] **C. Plain Language of Statute Adhered to When Legislative History Creates Conflicting Inferences.** When the legislative history gives rise to conflicting inferences, it does not justify departing from the plain language of the statute (*People v. Boyd (1979) 24 Cal. 3d 285, 295, 155 Cal. Rptr. 367, 594 P.2d 484*).

[*Optional*] **D. Burden to Show That Statute Should Not Be Applied According to Natural Import of Language.**

The party contending that a provision of an act must not be applied according to the natural or customary purport of its language must show either that some other section of the act expands or restricts its meaning, that the provision itself is repugnant to the general purview of the act, or that the act considered in pari materia with other acts, or with the legislative history of the subject matter, imports a different meaning (*Great Lakes Properties, Inc. v. City of El Segundo (1977) 19 Cal. 3d 152, 155-156, 137 Cal. Rptr. 154, 561 P.2d 244*).

[*Set forth additional points and authorities relating to other rules of statutory interpretation which support contention that the statute is clear and that its language should be given usual meaning (see §§ 217.24, 217.26, 217.40, and 217.41).*]

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in opposition to a party's contention that a statute should be construed in a particular manner. The form sets out the rule of statutory interpretation that the language of the statute is clear and should not be construed. Such an argument might be made in any type of action or proceeding in which a question arises concerning how a statute should be construed.

The foregoing points and authorities may be combined with a memorandum of points and authorities relating to the procedural context in which the issue of statutory interpretation arises. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should also insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Counsel may wish to include discussion demonstrating that application of the statutory language according to its plain meaning will produce a reasonable result consistent with the purposes of the statute because courts may refuse to follow the plain meaning of a statute if it would frustrate the manifest purposes of the legislation as a whole or lead to absurd results [*see People v. Belleci (1979) 24 Cal. 3d 879, 884, 157 Cal. Rptr. 503, 598 P.2d 473* ; *see also § 217.21*]. Although it has been suggested that this rule is only applied as part of the interpretive process when the language being considered is unclear [*Cadiz v. Agricultural Labor Relations Bd. (1979) 92 Cal. App. 3d 365, 376-377, 155 Cal. Rptr. 213]* , it has also been held that ambiguity is not a prerequisite to judicial interpretation in accordance with the rule of following a manifest purpose or avoiding an absurd result [*Henreid v. Superior Court (1976) 59 Cal. App. 3d 552, 558, 130 Cal. Rptr. 892]* .

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 217.20* and *217.21* may be used to oppose the contention supported by the foregoing points and authorities.

[3] Discussion of Authorities

[a] No Construction of Clear Statute

In ***DaFonte v. Up-Right, Inc.*** *(1992) 2 Cal. 4th 593, 7 Cal. Rptr. 2d 238, 828 P.2d 140* , the plaintiff was injured while working on a mechanical grape harvester. After receiving workers' compensation benefits, he brought suit against the manufacturer of the harvester for negligence and product defect. In a special verdict, the jury allocated fault among the parties: 15 percent to the plaintiff, 45 percent to the employer, and 40 percent to the manufacturer. Among the adjustments the trial court made in determining the judgment, it reduced the plaintiff's noneconomic damages by $135,000, representing the employer's 45 percent comparative fault. This reduction was based on *Civ. Code § 1431.2*, which provides that a plaintiff's noneconomic damages are several only, not joint, and that each defendant is responsible only for the percentage of noneconomic damages that corresponds to that defendant's proportionate share of fault. Both

the plaintiff and the manufacturer appealed (*2 Cal. 4th 593, 596-597)* . The court of appeal, in modifying the judgment, held that *Civ. Code § 1431.2* did not apply to the case (*2 Cal. 4th 593, 597)* . The defendant petitioned for review.

The Supreme Court reversed the court of appeal, reasoning that *Civ. Code § 1431.2* contains no ambiguity that would permit resort to the extrinsic constructional aids that the court of appeal had relied on (*2 Cal. 4th 593, 602)* . The section plainly and clearly limited the joint liability of every defendant to economic damages and it shielded every defendant from any share of noneconomic damages beyond that attributable to his or her own comparative fault (*2 Cal. 4th 593, 601-602)* .

Rhiner v. Workers' Comp. Appeals Bd. *(1993) 4 Cal. 4th 1213, 18 Cal. Rptr. 2d 129, 848 P.2d 244* , was a workers' compensation case in which the issue involved the construction of *Lab. Code § 5814*. That statute provides for penalties to be assessed against employers who unreasonably delay or refuse to pay workers' compensation benefits. The question was whether the amount of the penalty to be assessed should be calculated based on the entire amount awarded to the employee, or on the amount awarded to the employee with a credit for the amount of timely payments made by the employer before the formal award. The Workers' Compensation Appeals Board had computed the penalty after crediting the employer for amounts paid before the formal award. The court of appeal reversed the Workers Compensation Appeals Board, and the Supreme Court affirmed the court of appeal, basing its holding primarily on the language of *Lab. Code § 5814*, which it found to be clear and unambiguous. The Supreme Court stated that when "the language of a statute is clear and unambiguous, its meaning should generally be followed" (*4 Cal. 4th 1213, 1226)* . Operative June 1, 2004, *Lab. Code § 5814* was revised to provide that the penalty is calculated on "the amount of the payment unreasonably delayed or refused" (*Lab. Code § 5814(a)*, (*i*), as added by Stats. 2004, ch. 34, § 43).

In ***County of Riverside v. Superior Court*** *(2003) 30 Cal. 4th 278, 132 Cal. Rptr. 2d 713, 66 P.3d 718* , the Supreme Court considered the constitutionality of statutes requiring counties and other local agencies to submit, under certain circumstances, to binding arbitration of economic issues arising during negotiations with unions representing firefighters orlaw enforcement officers. The statutes authorized a union representing public safety employees (firefighters or law enforcement officers) to declare an impasse in labor negotiations and require a local agency to submit unresolved economic issues to binding arbitration. Each party chooses an arbitrator, and those two arbitrators choose a third arbitrator. The panel then chooses, without alteration, between each side's last best offer, based on a designated list of factors (*see Code Civ. Proc. § 1299 et seq.*).

In this case, the Supreme Court considered whether the statutes violated *Cal. Const., art. XI, §§ 1(b)* and *11 . Section 1(b)* states that a county's "governing body shall provide for the ... compensation ... of employees." Section 11 forbids the Legislature to "delegate to a private person or body power to ... interfere with county or municipal corporation ... money ... or perform municipal functions."

The Supreme Court concluded that the statutes violated both constitutional provisions by depriving counties of the authority to provide for the compensation of their employees and by delegating to a private body the power to interfere with county financial affairs and thus perform a municipal function (*30 Cal. 4th 278, 285-295)* . The Court found no room to construe the statutes in a way that would eliminate the conflict with the constitutional provisions. For example, the Court rejected an argument that would have construed the statutes as making the arbitrators a public body so as to avoid a violation of Section 11's prohibition against delegating municipal powers to private persons. The statutes contained no requirement that the arbitrators be public officials; on the contrary, the statutory language appeared to contemplate that the arbitrators would be private persons. Thus, there was no basis to conclude that by empowering the arbitration panel to render a binding arbitration decision, the statutes made such a panel a public body (*30 Cal. 4th 278, 293-295)* .

[b] Give Statute Effect According to Usual Meaning of Its Language

The facts and procedural background of ***Walnut Creek Manor v. Fair Employment & Housing Com.*** *(1991) 54 Cal.*

3d 245, 284 Cal. Rptr. 718, 814 P.2d 704 , are discussed in *§ 217.20[3][a]*. In *Walnut Creek*, the Supreme Court cited Webster's New International Dictionary and Black's Law Dictionary in construing the term "unlawful practice" as it appears in the California Fair Employment and Housing Act. The Court concluded that the plain meaning of the term "practice" meant a course of conduct or repeated acts, so that defendants were liable for only one punitive damage award when guilty of multiple acts of discrimination against one plaintiff (*54 Cal. 3d 245, 268-270)* .

Defendant in ***People v. Belleci*** *(1979) 24 Cal. 3d 879, 157 Cal. Rptr. 503, 598 P.2d 473* , was charged with two counts of possessing restricted drugs for sale. Defendant's motion to suppress the evidence relating to one count was successful, and the prosecution did not seek review of that ruling. The evidence was considered, however, in the presentence report relating to the other count, to which defendant pleaded guilty. The trial court denied defendant's motion to strike the evidence from the presentence report and committed defendant to the Youth Authority rather than granting him probation, and defendant appealed.

The Supreme Court held that the issue was resolved by *Penal Code § 1538.5(d)*, which provides in part that "If a search or seizure motion [to suppress] is granted ... the property or evidence shall not be admissible against the movant at any trial or other hearing. ..." The Court had no serious doubt that the sentencing phase of a prosecution constitutes a hearing (*24 Cal. 3d 879, 883)* . Thus, the Court reversed, citing *Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified Sch. Dist. (1978) 21 Cal. 3d 650, 658, 147 Cal. Rptr. 359, 580 P.2d 1155* , for the settled rule that it was required to give effect to statutes according to the usual, ordinary import of the language employed in framing them. The Court noted that it had declined to follow the plain meaning of a statute only when it would inevitably have frustrated the manifest purposes of the legislation as a whole or led to absurd results, and found that neither of those consequences was threatened in the case before it (*24 Cal. 3d 879, 884)* .

[c] Plain Language of Statute Adhered to When Legislative History Creates Conflicting Inferences

In ***People v. Boyd*** *(1979) 24 Cal. 3d 285, 155 Cal. Rptr. 367, 594 P.2d 484* , the People appealed from an order setting aside the criminal information that charged defendant with being an ex-felon in possession of a firearm. The information had been dismissed on the ground that it was based solely on incompetent evidence. It had been based on a prior conviction for possession of marijuana which, pursuant to *Health & Safety Code § 11361.7(b)*, could not be used by any public agency to deny, revoke, or condition any license, privilege, or right of the convicted person. The Supreme Court affirmed, finding that the meaning of *Health & Safety Code § 11361.7* was plainly written on its face, and stating that when statutory language is thus clear and unambiguous there is no need for construction, and the courts should not indulge in it. The People contended that the plain meaning of the statute should be disregarded because the legislative history demonstrated a contrary intent (*24 Cal. 3d 285, 294)* . The Court, however, found the legislative history to be subject to two equally rational interpretations as to legislative intent, and rejected the People's contention, holding that when the legislative history gives rise to two conflicting inferences, it does not justify departing from the plain language of the statute (*24 Cal. 3d 285, 295)* .

[d] Burden to Show That Statute Should Not Be Applied According to Natural Import of Language

Great Lakes Properties, Inc. v. City of El Segundo *(1977) 19 Cal. 3d 152, 137 Cal. Rptr. 154, 561 P.2d 244* , involved the interpretation of former Pub. Res. Code § 27428, which provided that "Any person who prevails in a civil action brought to enjoin a violation of [the California Coastal Zone Conservation Act of 1972] or to recover civil penalties shall be awarded his costs, including reasonable attorneys fees." In former Pub. Res. Code § 27105 (now *Pub. Res. Code § 30111*), the act also defined "person" to include individuals and business and governmental entities. The trial court awarded attorneys' fees to successful cross defendants, and cross plaintiff appealed from the orders making the awards.

The Supreme Court affirmed, rejecting cross plaintiff's contention that the "person" to whom attorneys' fees could be awarded under Pub. Res. Code § 27428 were restricted to plaintiffs. The Court stated that when the language of a statute

is clear, its plain meaning should be followed, and cited *Leroy T. v. Workmen's Comp. Appeals Bd. (1974) 12 Cal. 3d 434, 438, 115 Cal. Rptr. 761, 525 P.2d 665* , for the proposition that the party contending that a provision of an act must not be applied according to the natural or customary purport of its language must show either that some other section of the act expands or restricts its meaning, that the provision itself is repugnant to the general purview of the act, or that the act considered in pari materia with other acts, or with the legislative history of the subject matter, imports a different meaning (*19 Cal. 3d 152, 155-156)* . Relying on the broad definition of "person" in former Pub. Res. Code § 27105, the Court found nothing in the act to limit the meaning of the term "person" in Pub. Res. Code § 27428 to plaintiffs (*19 Cal. 3d 152, 156-158)* .

[4] Additional Authorities

[a] No Construction of Clear Statute

In *West Covina Hospital v. Superior Court (1986) 41 Cal. 3d 846, 226 Cal. Rptr. 132, 718 P.2d 119* , plaintiff brought an action against a hospital for negligence in granting surgical privileges. Plaintiff desired to call as a witness a physician who had served on a medical staff review committee that evaluated the allegedly negligent surgeon. The hospital objected to the testimony on the ground that *Evid. Code § 1157* does not allow such a review committee member to testify about the evaluation of a doctor reviewed by the committee. The trial court stated that the doctor could testify so long as he did so voluntarily. The hospital sought a writ of mandate to compel the trial court to vacate its order allowing the testimony, and the court of appeal granted the writ. The Supreme Court granted review, and held that *Evid. Code § 1157* does not preclude a hospital medical review staff committee member from testifying about committee proceedings, if he or she does so voluntarily. The Court stated that it gives effect to statutes according to the usual, ordinary import of the language employed in framing them. When statutory language is clear and unambiguous there is no need for construction, and courts should not indulge in it. The Court pointed out that the statutory provision stating that a member of a hospital medical staff committee may not be "required" to testify is not the same as either providing that the member may not testify or that the hospital or committee has a privilege to preclude such testimony (*41 Cal. 3d 846, 850)* .

In *Lamberton v. Rhodes-Jamieson (1988) 199 Cal. App. 3d 748, 245 Cal. Rptr. 162* , the court of appeal affirmed the denial of a motion under *Code Civ. Proc. § 876(a)* seeking to require contribution from joint judgment debtor tortfeasors. With respect to *Code Civ. Proc. § 876(a)*, the court said: (1) the provisions were clear and there was nothing to interpret; (2) the Legislature has power to prescribe legal definitions of its own language, and when the meaning to be given to particular terms is prescribed by the Legislature, it is binding on the courts; (3) it is a cardinal rule that a court is not justified in ignoring the plain words of a statute unless it clearly appears that the language used is contrary to what, beyond question, was the intent of the Legislature; and (4) if the words of a statute are clear, the court should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history (*199 Cal. App. 3d 748, 754)* .

Terminal Plaza Corp. v. City and County of San Francisco (1986) 186 Cal. App. 3d 814, 230 Cal. Rptr. 875 , concerned the interpretation of a city planning commission resolution requiring a developer to build a 12-foot-wide pedestrian way adjacent to its new building and requiring the developer to obtain plaintiff's consent before building any part of the pedestrian way on an adjacent parcel co-owned by plaintiff and the developer. The developer failed to build the pedestrian way. Plaintiff, anticipating a possible eminent domain action by the city, brought a mandate action to compel the city to enforce the resolution and require the developer to build the structure on his own land. Reversing the trial court's denial of the writ of mandate, and directing the trial court to issue the writ, the court of appeal held that the normal rules of statutory construction would apply to the interpretation of the resolution. The court found the resolution to be straightforward and unambiguous, and it rejected extrinsic evidence offered by the developer and the city that purportedly clarified the meaning of the resolution (*186 Cal. App. 3d 814, 826-830)* .

In *Flood v. Wyeth Laboratories, Inc. (1986) 183 Cal. App. 3d 1272, 228 Cal. Rptr. 700* , the court was faced with the

question of whether *Health & Safety Code § 429.36* (repealed in 1995; *now see Health & Safety Code § 120455*), providing that no person shall be liable for any injury causedby an act or omission in the administration of a vaccine or other immunizing agent to a minor, including the residual effects of the vaccine or immunizing agent, applied to vaccine manufacturers so as to immunize them from products liability, including strict liability in tort. In holding that it did not apply, the court said that the first step in the process of statutory construction is the examination of the language of the statute for ambiguity, and that if the statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it (*183 Cal. App. 3d 1272, 1277)* .

Mitchell v. Franchise Tax Board (1986) 183 Cal. App. 3d 1133, 228 Cal. Rptr. 750 , was an action against the Franchise Tax Board for negligence, slander of title, and interference with credit relations arising out of a personal income tax proposed assessment and a tax lien placed on plaintiffs' property. The trial court sustained a demurrer to the complaint without leave to amend on the ground the action was barred by *Gov. Code § 860.2*, providing that neither a public entity nor a public employee is liable for injury caused by (1) instituting any judicial or administrative proceeding or action for or incidental to the assessment or collection of a tax, or (2) an act or omission in the interpretation or application of any law relating to the tax. Plaintiffs appealed from the subsequent judgment of dismissal, contending that § 860.2 confers immunity on public employees and entities only for their discretionary acts in the administration of the tax laws and not for ministerial acts. In affirming the judgment, the court of appeal rejected the argument on the ground that the statute contains no such limitation but grants immunity whether the act or omission is discretionary or ministerial. When statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it (*183 Cal. App. 3d 1133, 1136)* .

Additional cases stating that courts should not indulge in statutory construction when statutory language is clear and unambiguous include *Atlantic Richfield Co. v. Workers' Comp. Appeals Bd. (1982) 31 Cal. 3d 715, 726, 182 Cal. Rptr. 778, 644 P.2d 1257* ; *Referendum Committee v. City of Hermosa Beach (1986) 184 Cal. App. 3d 152, 159, 229 Cal. Rptr. 51* ; and *Carl S. v. Commission for Teacher Preparation & Licensing (1981) 126 Cal. App. 3d 365, 372, 178 Cal. Rptr. 753* .

[b] Give Statute Effect According to Usual Meaning of Its Language

Dubins v. Regents of University of California (1994) 25 Cal. App. 4th 77, 30 Cal. Rptr. 2d 336 , concerned the interpretation of the Fair Employment and Housing Act (*Gov. Code § 12900 et seq.*). The court of appeal reversed a trial court's sustaining of a demurrer without leave to amend. The appellate court determined that the mere fact that the Legislature enacts an amendment indicates that it thereby intended to change the original act by creating a new right or withdrawing an existing one. Therefore, any material change in the language of the original act is presumed to indicate a change in legal rights (*25 Cal. App. 4th 77, 85)* .

In *Gray v. Firthe (1987) 194 Cal. App. 3d 202, 239 Cal. Rptr. 389* , the court of appeal, construing *Code Civ. Proc. § 583.310*, held that statutes are required to be given effect according to the usual, ordinary import of the language used in framing them (*194 Cal. App. 3d 202, 208)* .

[c] Plain Language of Statute Adhered to When Legislative History Creates Conflicting Inferences

In *Pearce v. Superior Court (1983) 149 Cal. App. 3d 1058, 197 Cal. Rptr. 238* , the trial court sustained defendants' demurrers without leave to amend in a shareholder's derivative action based on plaintiff's lack of standing to sue. On plaintiff's petition for an alternative writ of mandate, the court of appeal directed the order to be vacated, finding that plaintiff did have standing under *Corp. Code § 800*. Noting that legislative history gave rise to conflicting inferences about plaintiff's standing, the court of appeal cited the rule that when the language of a statute is clear, its plain meaning should be followed, and legislative history giving rise to conflicting inferences does not justify departing from the plain language of the statute (*149 Cal. App. 3d 1058, 1067)* .

California Points & Authorities

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 217 STATUTORY INTERPRETATION
PART II. FORMS
A. GENERAL RULES

21-217 California Points & Authorities § 217.26

§ 217.26 Opposing Contention That Court Should Construe Statute To Preserve Its Constitutionality--Avoid Wholesale Rewriting of Statute

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE COURT SHOULD NOT ENGAGE IN THE WHOLESALE REWRITING OF _____ [*specify statute*] IN ORDER TO PRESERVE ITS CONSTITUTIONALITY.

No Wholesale Rewriting to Preserve Constitutionality. A court may not engage in the wholesale rewriting of a statute in order to preserve its constitutionality (*Blair v. Pitchess (1971) 5 Cal. 3d 258, 282, 96 Cal. Rptr. 42, 486 P.2d 1242* ; *Bayscene Resident Negotiators v. Bayscene Mobilehome Park (1993) 15 Cal. App. 4th 119, 134, 18 Cal. Rptr. 2d 626*).

[*Set forth additional points and authorities relating to other rules of statutory interpretation that support interpretation desired (see §§ 217.24, 217.25, 217.40, and 217.41.*]

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of a party's contention that a statute is unconstitutional. It may be combined with other points and authorities in support of a party's contention that a statute is unconstitutional. The form sets out the rule of statutory interpretation that a court may not engage in the wholesale rewriting of a statute in order to preserve its constitutionality. Such an argument might be made in any type of action or proceeding in which a question arises concerning how a statute should be construed, and in which the constitutionality of a statute is at issue.

The foregoing points and authorities may be combined with a memorandum of points and authorities relating to the

procedural context in which the issue of statutory interpretation arises. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should also insert argument in the foregoing form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should show that the statute cannot be construed in a manner preserving its constitutionality, other than by wholesale rewriting of the statute.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 217.23* may be used to oppose the contention supported by the foregoing points and authorities.

[3] Discussion of Authorities

[a] No Wholesale Rewriting to Preserve Constitutionality

In ***Blair v. Pitchess*** *(1971) 5 Cal. 3d 258, 96 Cal. Rptr. 42, 486 P.2d 1242* , the Supreme Court was presented with the issue of the constitutionality of California's former claim and delivery law (former Code Civ. Proc. §§ 509-521, now *Code Civ. Proc. § 511.010 et seq.*). Plaintiffs, residents and taxpayers of Los Angeles County, won a summary judgment in the trial court. The judgment included a permanent injunction. Defendants appealed.

Defendants argued on appeal that in some instances the execution of the claim and delivery process would not violate constitutional protections. The Court, however, found that it could not narrow the scope of the claim and delivery law without completely redrafting its provisions (*5 Cal. 3d 258, 282-283)* . The Court quoted from *Seaboard Acceptance Corp. v. Shay (1931) 214 Cal. 361, 369, 5 P.2d 882* : "This court cannot, as already pointed out, in the exercise of its power to interpret, rewrite the statute. If this court were to insert in the statute all or any of the above qualifying provisions, it would in no sense be interpreting the statute as written, but would be rewriting the statute in accord with the presumed legislative intent. That is a legislative and not a judicial function" (*5 Cal. 3d 258, 282)* .

Bayscene Resident Negotiators v. Bayscene Mobilehome Park *(1993) 15 Cal. App. 4th 119, 18 Cal. Rptr. 2d 626* , involved the constitutionality of a Chula Vista City mobilehome rent control ordinance. On a petition to affirm an arbitration award, the trial court dismissed the petition in its entirety on finding that the binding arbitration requirement in the ordinance was unconstitutional. On appeal, the court of appeal stated that "to find the arbitration provision constitutional, this court would be required to delete the word 'binding' or to add a requirement for a trial de novo or judicial review of the arbitration award for sufficiency of the evidence." A court "may not engage in the wholesale rewriting of a statute in order to preserve its constitutionality" (*15 Cal. App. 4th 119, 134)* . The court concluded that the binding arbitration provision of the ordinance was unconstitutional (*15 Cal. App. 4th 119, 135)* .

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CHAPTER 217 STATUTORY INTERPRETATION
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21-217 California Points & Authorities §§ 217.27-217.39

[Reserved]

§§ 217.27[Reserved]

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CHAPTER 217 STATUTORY INTERPRETATION
PART II. FORMS
B. INTERPRETATION OF WORDS OF STATUTE

21-217 California Points & Authorities § 217.40

§ 217.40 Supporting Contention That Words of Statute Be Accorded Usual Meaning

[1] FORM

[*The following may be included in a memorandum supporting or opposing a motion, or in a trial or appellate brief. It should be combined with the general memorandum set out in § 217.20.*]

IN CONSTRUING _____ [*specify statute*] THE COURT SHOULD TURN TO THE WORDS FIRST, ACCORDING THEM THEIR USUAL MEANING [AND CHOOSING THE ONE OF SEVERAL MEANINGS THAT WILL BEST ATTAIN THE PURPOSES OF THE STATUE].

A. Turn First to Words to Determine Intent. In determining legislative intent, the court turns first to the words themselves for the answer (*People v. Cruz (1996) 13 Cal. 4th 764, 775, 55 Cal. Rptr. 2d 117, 919 P.2d 731* ; *Walnut Creek Manor v. Fair Employment & Housing Com. (1991) 54 Cal. 3d 245, 268, 284 Cal. Rptr. 718, 814 P.2d 704* ; *Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified Sch. Dist. (1978) 21 Cal. 3d 650, 658, 147 Cal. Rptr. 359, 580 P.2d 1155*).

B. Words to Be Given Usual Meaning. The words of a statute should be accorded their usual, ordinary, and commonsense meaning as understood when the statute was enacted, keeping in mind the purpose for which the statute was adopted (*Astrue v. Ratliff (2010) ___ U.S. ___, 130 S. Ct. 2521, 177 L. Ed. 2d 91, 2010 U.S. LEXIS 4763, at *12-*15* ; *Carcieri v. Salazar (2009) ___ U.S. ___, 129 S. Ct. 1058, 172 L. Ed. 2d 791, 800-802* ; *Ali v. Federal Bureau of Prisons (2008) 552 U.S. 214, 128 S. Ct. 831, 169 L. Ed. 2d 680, 689-692* ; *Koons Buick Pontiac GMC, Inc. v. Nigh (2004) 543 U.S. 50, 125 S. Ct. 460, 467-468, 160 L. Ed. 2d 389* ; *People v. Cruz (1996) 13 Cal. 4th 764, 775, 55 Cal. Rptr. 2d 117, 919 P.2d 731* ; *Walnut Creek Manor v. Fair Employment & Housing Com. (1991) 54 Cal. 3d 245, 268, 284 Cal. Rptr. 718, 814 P.2d 704* ; *Hamilton v. State Bd. of Education (1981) 117 Cal. App. 3d 132, 141, 172 Cal. Rptr. 748*).

[*Optional*] **C. Word With More Than One Meaning to Be Construed to Attain Purposes of Statute.** The objective sought to be achieved by a statute as well as the evil to be prevented is of prime consideration in the word's

interpretation, and when a word of common usage has more than one meaning, the one that will best attain the purposes of the statute should be adopted, even though the ordinary meaning of the word is thereby enlarged or restricted (*Sierra Club v. City of Hayward (1981) 28 Cal. 3d 840, 860-861 n.12, 171 Cal. Rptr. 619, 623 P.2d 180*).

[*Set forth additional points and cite authorities relating to other rules of statutory interpretation that aid in ascertaining legislative intent behind statute and support interpretation desired (see §§ 217.21 -217.24, 217.41 -217.46, 217.60 -217.63, 217.80 -217.86, 217.88).*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a party's contention that a statute should be construed in a particular manner. The form sets out the rule of statutory interpretation that a word or words in a statute should be interpreted in accordance with their usual and ordinary meaning. When a word has more than one such meaning, the form may also be used to support the contention that the meaning that will best attain the statute's purpose should be adopted. Such an argument might be made in any type of action or proceeding in which a question arises concerning how a statute should be construed. This form should be combined with the general form *set forth in § 217.20*, which relate to the construction of statutes to ascertain and effectuate legislative intent.

Counsel should note that the proposition that a court should turn first to the words of a statute to determine the Legislature's intent is a starting point in statutory interpretation. Thus, the court may go on from this proposition to find an ambiguity in the words that requires the application of further rules of interpretation [*see Moyer v. Workmen's Comp. Appeals Bd. (1973) 10 Cal. 3d 222, 230-231, 110 Cal. Rptr. 144, 514 P.2d 1224* (word with two possible definitions)] or may apply the rule that when the words of a statute are clear, the court should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history [*see California Teachers Assn. v. San Diego Community College Dist. (1981) 28 Cal. 3d 692, 698, 170 Cal. Rptr. 817, 621 P.2d 856* ; *see also § 217.25*].

This form may be combined with a memorandum relating to the procedural context in which the issue of statutory interpretation arises. This form may also be adapted for use in a trial or appellate brief.

Counsel should also insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion pointing to dictionary definitions of the relevant word or words used in the statute and, if appropriate, demonstrate how the context and purpose of the legislation argues in favor of applying one of multiple possible meanings.

[b] Opposing Memoranda

In an appropriate case, the forms *set out in §§ 217.41 -217.44* may be used to oppose the contentions supported by the foregoing form.

[3] Discussion of Authorities

[a] Turn First to Words to Determine Intent

People v. Cruz *(1996) 13 Cal. 4th 764, 55 Cal. Rptr. 2d 117, 919 P.2d 731* , is discussed in *§ 217.20[3][a]*.

The facts and procedural background of ***Walnut Creek Manor v. Fair Employment & Housing Com.*** *(1991) 54 Cal. 3d 245, 284 Cal. Rptr. 718, 814 P.2d 704* , are discussed in *§ 217.20[3][a]*. In reversing the court of appeal, the Supreme Court held that in ascertaining legislative intent, the court must look first to the words of the statute

themselves, giving to the language its usual, ordinary import (*54 Cal. 3d 245, 268)* . The Court then turned to the statutory language and construed the relevant term, "unlawful practice." Citing Webster's New International Dictionary and Black's Law Dictionary, the Court concluded that the plain meaning of the term "practice" meant a course of conduct or repeated acts. Thus, defendants were liable for only one punitive damage award resulting from a single unlawful practice even though defendants were guilty of multiple acts of discrimination against one plaintiff (*54 Cal. 3d 245, 268-270)* .

The procedural background of ***Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified Sch. Dist.*** *(1978) 21 Cal. 3d 650, 147 Cal. Rptr. 359, 580 P.2d 1155* , is discussed in *§ 217.20[3][a]*. In affirming, the Supreme Court cited *Moyer v. Workmen's Comp. Appeals Bd. (1973) 10 Cal. 3d 222, 230, 110 Cal. Rptr. 144, 514 P.2d 1224* (*discussed under § 217.40[4][c]*), for the rule that in determining legislative intent the courts turn first to the words themselves for the answer and must give effect to statutes according to the usual, ordinary import of the language employed in framing them (*21 Cal. 3d 650, 658)* . The Court compared the language of former Educ. Code § 13506 (*now see Educ. Code § 45028*), which provided that teachers "shall be classified on the salary schedule on the basis of uniform allowance for years of training and years of experience" with earlier language that it had replaced by amendment, which had provided that "uniform allowance may be made in any schedule of salaries for years of training and years of experience." The Court, also applying a rule of construction that the Legislature's intent to change a law is inferred from an amendment making substantial changes in statutory language previously construed by the courts, held that the statute required teachers to be classified wholly on a uniform basis of years of training and years of experience (*21 Cal. 3d 650, 659-661)* .

[b] Words to Be Given Usual Meaning

The issue in ***Astrue v. Ratliff*** *(2010) ___ U.S. ___, 130 S. Ct. 2521, 177 L. Ed. 2d 91, 2010 U.S. LEXIS 4763* , was whether an award of attorney's fees under a provision of the Equal Access to Justice Act (EAJA) is payable to the prevailing litigant, rather than to the litigant's attorney, and is therefore subject to an offset to satisfy the litigant's debt to the government. The EAJA provides in pertinent part that "a court shall award to a prevailing party ... fees and other expenses ... in any civil action ... brought by or against the United States ... unless the court finds that the position of the United States was substantially justified" (*28 U.S.C. § 2412(d)*). Relying on the plain text of the statute, the Court held that a fee award is payable directly to the litigant (*2010 U.S. LEXIS 4763, at *14-*15)* .

The Supreme Court noted that the term "prevailing party" in fee statutes is a "term of art" that refers to the prevailing litigant, and nothing in the EAJA supports a different reading. Indeed, other subsections within the same EAJA provision underscore that the term "prevailing party" in carries its usual and settled meaning. Those provisions, for example, distinguish the litigant who receives the fee award from the attorney who performed the work that generated the fees (*see, e.g., 28 U.S.C. § 2412(d)(1)(B)* (the "prevailing party" must apply for the fees award and "sho[w]" that he or she "is a prevailing party and is eligible to receive an award" by, among other things, submitting "an itemized statement from any attorney ... representing or appearing in behalf of the party" that details the attorney's hourly rate and time spent on the case)) (*2010 U.S. LEXIS 4763, at *10-*12)* .

The Supreme Court rejected an argument that the EAJA's use of the verb "award" should be interpreted as making EAJA fees payable directly to a prevailing party's attorney. Quoting from Black's Law Dictionary, the Court explained that the transitive verb "award" has a settled meaning in the litigation context: "[t]o give or assign by sentence or judicial determination" (*see* Black's Law Dictionary 125 (5th ed. 1979)). The Court concluded that the plain meaning of the word "award" in this EAJA provision is that the court must "give or assign by ... judicial determination" to the "prevailing party" attorney's fees in the amount sought and substantiated under the EAJA (*see 28 U.S.C. § 2412(d)(1)(A),(B)*) (*2010 U.S. LEXIS 4763, at *12-*13)* . The Court also rejected an argument that the EAJA's reference to "attorney's fees" establishes that the fees are payable to the prevailing party's attorney. That an attorney may have a beneficial interest or a contractual right in fees awarded under the EAJA to the prevailing party does not establish that the statute "awards" the fees directly to the attorney (*2010 U.S. LEXIS 4763, at *14-*15)* .

The plaintiffs in ***Carcieri v. Salazar*** *(2009) ___ U.S. ___, 129 S. Ct. 1058, 172 L. Ed. 2d 791* , disputed the authority of the Secretary of the Interior to acquire property for the use of a certain Indian tribe pursuant to the Indian Reorganization Act (IRA; *see 25 U.S.C. § 465*). The IRA authorizes such acquisitions for the benefit of tribes "now under Federal jurisdiction" (*25 U.S.C. § 479*). The tribe involved in this case was under federal jurisdiction when the Secretary made the disputed acquisition, but the tribe had not been under federal jurisdiction when the IRA was enacted in 1934. The precise issue, therefore, was whether the statutory word "now" refers to the time of the relevant acquisition of property or to the time of the statute's enactment (*172 L. Ed. 2d 791, 796)* .

The Supreme Court held that the statutory term "now under Federal jurisdiction" unambiguously refers to those tribes that were under federal jurisdiction at the time of enactment of the statute. The Court started with the ordinary meaning of the word "now," as understood when the IRA was enacted. Citing the 1934 edition of Webster's New International Dictionary, the Court said the primary definition of "now" was "[a]t the present time; at this moment; at the time of speaking." The Court also noted that the 1933 edition of Black's Law Dictionary stated that "'[n]ow' as used in a statute ordinarily refers to the date of its taking effect..." (*172 L. Ed. 2d 791, 800)* .

The Court went on to observe that the statutory context of the IRA makes clear that "now" does not mean "now or hereafter" or "at the time of application." The Court reasoned that if Congress had intended to legislate such a definition, it could have done so explicitly, as it did in other provisions of the IRA (see *25 U.S.C. §§ 468, 472*), or it could have omitted the word "now" altogether. Instead, Congress limited the statute by the word "now," and the Court stated that it was obliged to give effect, if possible, to every word Congress used (*172 L. Ed. 2d 791, 801-802)* .

Lastly, the Court refused to consider an argument that there was no policy justification for limiting the Secretary's authority under the IRA to those tribes that were under federal jurisdiction in 1934. The Court explained that such policy arguments need not be considered, because Congress's use of the word "now" speaks for itself, and the courts must presume that Congress meant what it said in the statute (*172 L. Ed. 2d 791, 802)* .

In ***Ali v. Federal Bureau of Prisons*** *(2008) 552 U.S. 214, 128 S. Ct. 831, 169 L. Ed. 2d 680* , the United States Supreme Court considered the scope of *28 U.S.C. § 2680*, which specifies exceptions to the general waiver of sovereign immunity under the Federal Tort Claims Act (FTCA) (*see 28 U.S.C. §§ 1346, 2671 et seq.*). The FTCA generally authorizes "claims against the United States, for money damages ... for injury or loss of property ... caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment" (*28 U.S.C. § 1346(b)(1)*). In *28 U.S.C. § 2680(c)*, the FTCA exempts from this waiver certain categories of claims, including "any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer."

The plaintiff in this case was a federal prisoner who sued the Federal Bureau of Prisons, as well as Bureau officials, claiming that they were responsible for the loss of the plaintiff's personal property when he was transferred between prisons. The plaintiff contended that the government had waived its immunity from claims based on the negligent acts of Bureau officials, arguing that Section 2680(c) preserved immunity only as to officers acting in a customs or excise capacity.

The Supreme Court rejected the plaintiff's contention and held that Section 2680(c) preserves immunity for claims arising out of the detention of property by any federal law enforcement officers, not just customs or excise officers (*169 L. Ed. 2d 680, 692)* .

The Court initially observed that Section 2680(c)'s reference to "any other law enforcement officer" suggests a broad meaning and is most naturally read to mean law enforcement officers "of whatever kind" (*169 L. Ed. 2d 680, 686-687)* .

The Court explained that *ejusdem generis* (the principle that when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration) does not apply to the phrase "any other law enforcement officer" in Section 2680(c). The principle applies when a phrase includes a list of specific items that share a common attribute. In such a case, the general term may be construed as sharing the common attribute. However, in Section 2680(c) the phrase "any officer of customs or excise or any other law enforcement officer" is not a list of specific items followed by a general term. Rather, it is a disjunctive phrase, with one specific and one general category. The absence of a list of specific items thus undercuts any inference that Congress focused on some common attribute when it used the catchall words "any other law enforcement officer" (*169 L. Ed. 2d 680, 689-691)* .

The Supreme Court also noted that the canon *noscitur a sociis* (a word is known by the company it keeps) is inapplicable, because of the absence of contextual cues that would shed light on the intended meaning of "any other law enforcement officer." The Court acknowledged that "customs" and "excise" are mentioned twice in Section 2680(c), but it found nothing in the overall statutory context to suggest that customs and excise officers were the exclusive focus of the provision. The emphasis on customs and excise is not inconsistent with a broad interpretation of "any other law enforcement officer" (*169 L. Ed. 2d 680, 691)* .

Finally, the Supreme Court pointed out that a broad reading of the phrase "any other law enforcement officer" does not violate the rule against superfluities. It does not render the phrase "any officer of customs or excise" superfluous, because Congress may have used the phrase to remove any doubt that officers of customs or excise were included in "law enforcement officers." Moreover, the plaintiff's proposed interpretation would render "any other law enforcement officer" superfluous because it is not clear when, if ever, "any other law enforcement officer" acts in a customs or excise capacity (*169 L. Ed. 2d 680, 691)* .

In ***Koons Buick Pontiac GMC, Inc. v. Nigh*** *(2004) 543 U.S. 50, 125 S. Ct. 460, 160 L. Ed. 2d 389* , the United States Supreme Court interpreted the language of *15 U.S.C. § 1640(a)(2)*, the civil damages provision of the Truth in Lending Act. As amended in 1995, Section 1640(a)(2) provided for statutory damages equal to the following:

> (2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease ... 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000 ... .

The issue in this case was whether the clause-(ii) limiting provision "except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000," was also applicable to the circumstances described in clause (i). The Supreme Court held that the limiting provision did apply to both clauses. In arriving at that conclusion, the Court relied on the conventional meaning of the word "subparagraph." The Court noted that Congress ordinarily adheres to a hierarchical scheme in subdividing statutory sections. This hierarchy is set forth in the drafting manuals prepared by the legislative counsel's offices in the House and the Senate. The manuals provide for subdivision of statutory sections into subsections (starting with (a)), paragraphs (starting with (1)), subparagraphs (starting with (A)), and clauses (starting with (i)). Thus, applying the conventional meaning of the word "subparagraph," it was clear that the limiting provision was intended to apply to the circumstances described in clause (i) as well as clause (ii) (*543 U.S. 50, 60-62*).

People v. Cruz *(1996) 13 Cal. 4th 764, 55 Cal. Rptr. 2d 117, 919 P.2d 731* , is discussed in *§ 217.20[3][a]*.

Walnut Creek Manor v. Fair Employment & Housing Com. *(1991) 54 Cal. 3d 245, 268, 284 Cal. Rptr. 718, 814 P.2d 704* , is *discussed under § 217.40[3][a]*.

Hamilton v. State Bd. of Education *(1981) 117 Cal. App. 3d 132, 172 Cal. Rptr. 748* , involved a petition for a writ of

mandate to compel defendant to grant plaintiffs' petition for formation of two new school districts. The superior court denied the petition for a writ of mandate, and plaintiffs appealed.

The issue on appeal was whether or not defendant board has discretion to deny a petition for formation of a school district when the petition meets the criteria guidelines established for review of such petitions. The court of appeal affirmed, holding that defendant did have such discretion. At issue was the language of former Educ. Code § 35500, providing that "[t]he State Board of Education shall establish minimum standards for the formation of districts which it shall apply in approving or disapproving petitions for the formation of new districts." The court found that the language of the statute was sufficiently ambiguous as to require interpretation consistent with legislative intent (*117 Cal. App. 3d 132, 136)* . Citing *In re Rojas (1979) 23 Cal. 3d 152, 155, 151 Cal. Rptr. 649, 588 P.2d 789* , and *People ex rel. Younger v. Superior Court (1976) 16 Cal. 3d 30, 43, 127 Cal. Rptr. 122, 544 P.2d 1322* , the court noted that the words of a statute should be accorded their usual, ordinary, and commonsense meaning, keeping in mind the purpose for which the statute was adopted. The court then pointed to the phrase "minimum standards" in *Educ. Code § 35500* as an indication that the statute has reference to minimal threshold requirements for consideration of a petition and as supporting the interpretation that defendant may not approve a petition that fails to comply with the requirements, but is not under any compulsion to approve a petition that meets those requirements (*117 Cal. App. 3d 132, 141)* .

[c] Word With More Than One Meaning to Be Construed to Attain Purposes of Statute

The plaintiffs in ***Sierra Club v. City of Hayward*** *(1981) 28 Cal. 3d 840, 171 Cal. Rptr. 619, 623 P.2d 180* , sought a writ of mandamus to set aside defendant city council's resolution partially cancelling an agricultural land preservation agreement under the California Land Conservation Act of 1965 (*Gov. Code § 51200 et seq.*). Under the act, owners of agricultural land may contract with local public entities to restrict their land to agricultural use or compatible uses for a 10-year period in return for favorable property tax treatment. Such contracts automatically renew every year until notice of nonrenewal is given, and the land remains restricted for 10 years after that while the tax benefits are gradually diminished. Cancellation is an exception to this general procedure for terminating an agreement by nonrenewal. The superior court entered judgment denying the writ, and plaintiffs appealed.

The Supreme Court, in reversing, considered language of *Gov. Code § 51282*, which at that time provided that "[a] potential alternative use of the land may be considered [as grounds for cancellation] only if there is no proximate, noncontracted land suitable for the use to which it is proposed the contracted land be put." In construing the words "proximate" and "use" the Court stated the well-established principle that the purpose of a statute is a guiding star in defining the language it employs, quoting *People ex rel. S.F. Bay etc. Com. v. Town of Emeryville (1968) 69 Cal. 2d 533, 543-544, 72 Cal. Rptr. 790, 446 P.2d 790* , for the statement that the objective sought to be achieved by a statute as well as the evil to be prevented is of prime consideration in a word's interpretation, and that when a word of common usage has more than one meaning, the one which will best attain the purposes of the statute should be adopted, even though the ordinary meaning of the word is thereby enlarged or restricted (*28 Cal. 3d 840, 860-861 n.12*). The Court accordingly defined "proximate" as referring to spatial rather than causal relationships, and as meaning property close enough to the restricted parcel to serve as a practical alternative for the proposed use rather than meaning contiguous property (*28 Cal. 3d 840, 861)* . The Court also gave "use" a flexible meaning focusing on whether or not another parcel or combination of parcels could serve a use substantially similar to that proposed for the restricted parcel, rather than focusing on the suitability of another parcel for the identical use (*28 Cal. 3d 840, 862)* .

[4] Additional Authorities

[a] Turn First to Words to Determine Intent

Dubins v. Regents of University of California (1994) 25 Cal. App. 4th 77, 30 Cal. Rptr. 2d 336 , concerned the interpretation of the Fair Employment and Housing Act (*Gov. Code § 12900 et seq.*). The court of appeal reversed a trial court's order sustaining a demurrer without leave to amend. The appeals court explained that the meaning of the

words of a statute can only be determined with reference to the context in which the words are used; that is, with reference to such purpose as may be discerned from examining the entire enactment of which the words are part. A statutory phrase may be said to be clear and unambiguous if the meaning assigned to it is not in conflict with other language in the same act. Thus, in analyzing the legislative usage of certain words, the objective sought to be achieved by a statute, as well as the evil to be prevented, is of prime consideration (*25 Cal. App. 4th 77, 83)* .

Jutzi v. County of Los Angeles (1987) 196 Cal. App. 3d 637, 242 Cal. Rptr. 74 , was an action against a county hospital for malpractice in rendering emergency medical services, in which the court of appeal, in affirming judgment for defendant, construed *Health & Safety Code § 1799.110(c)*. The court stated that, in construing a statute to determine the legislative intent, the court first looks to the language of the statute, attempting to give effect to the usual, ordinary import of that language and seeking to avoid making any language mere surplusage. Significance if possible should be attributed to every word, phrase, sentence and part of an act in pursuance of the legislative purpose (*196 Cal. App. 3d 637, 650)* .

In *Los Angeles County Safety Police Assn. v. County of Los Angeles (1987) 192 Cal. App. 3d 1378, 237 Cal. Rptr. 920* , the court of appeal, in holding that former Penal Code § 830.4, relating to peace officers, was intended by the Legislature to apply to a charter county, said that to determine legislative intent a court should turn first to the statute's words (*192 Cal. App. 3d 1378, 1387)* .

[b] Words to Be Given Usual Meaning

In *George M. v. Superior Court (1988) 201 Cal. App. 3d 755, 247 Cal. Rptr. 330* , an adoption proceeding, the court of appeal held that a father who was found to have a "legitimate" child under Arizona law was entitled to certain statutory parental rights, including the necessity of his consent to adoption, and to a special custodial preference. The father's entitlement to such rights depended on his being "a father as to whom the child is a legitimate child under prior law of this state or under the law of another jurisdiction," under former Civ. Code § 7017(a)(1) (*now see Fam. Code § 7660*). In construing the term "legitimate" as used in the applicable Arizona statute and in former Civ. Code § 7017(a)(1), courts are bound to give effect to statutes according to the usual, ordinary import of the language employed in framing them. Although a court may properly rely on extrinsic aids, it should first turn to the words of the statute to determine the intent of the Legislature. Because the language of former § 7017(a) was clear, its plain meaning was required to be followed; thus, the section's reference to a "legitimate" child under another jurisdiction's law properly applied to the Arizona judgment (*201 Cal. App. 3d 755, 759)* .

In *CEJA v. J.R. Wood, Inc. (1987) 196 Cal. App. 3d 1372, 242 Cal. Rptr. 531* , the court of appeal, in construing *Lab. Code § 4558* (relating to workers' compensation), said that (1) when construing the meaning of a word in a statute, a court should first look to the plain dictionary meaning of the word unless it has a specific legal definition; and (2) each word, phrase, and provision in a statute is presumed to have a meaning and to perform a useful function (*196 Cal. App. 3d 1372, 1375-1376)* .

In *Flood v. Wyeth Laboratories, Inc. (1986) 183 Cal. App. 3d 1272, 228 Cal. Rptr. 700* , the court was faced with the question of whether former Health & Safety Code § 429.36 (*now see Health & Safety Code § 120455*), providing that no person shall be liable for any injury caused by an act or omission in the administration of a vaccine or other immunizing agent to a minor, including the residual effects of the vaccine or immunizing agent, applied to vaccine manufacturers so as to immunize them from products liability, including strict liability in tort. In holding that it did not so apply because the statute was limited to persons who administer vaccines, the court said that courts must give statutory language its usual, ordinary meaning (*183 Cal. App. 3d 1272, 1277)* .

[c] Word With More Than One Meaning to Be Construed to Attain Purposes of Statute

In *Moyer v. Workmen's Comp. Appeals Bd. (1973) 10 Cal. 3d 222, 110 Cal. Rptr. 144, 514 P.2d 1224* , petitioner

sought a review of respondent's determination of his permanent disability rating. Respondent had rated petitioner based on his age and occupation at the time of making the determination rather than as of the time of injury because petitioner had undergone rehabilitation training. Petitioner argued that his acceptance of the rehabilitation program was not voluntary, as required by *Lab. Code § 139.5* (later repealed as of Jan. 1, 2009, and until that date applicable only to injuries occurring before Jan. 1, 2004), because he was not told that the retraining would result in a different or lesser disability rating and that he had an election to participate in the rehabilitation and take a lesser sum or to not participate and receive his regular and higher disability rating. The Supreme Court annulled respondent's decision and remanded the case. The Court found that "voluntary" could either mean freedom from compulsion or it could mean deliberate, in the sense of acting with full knowledge of the intended action (*10 Cal. 3d 222, 231)* . Stating the rule set out in Paragraph C of the foregoing form, the Court looked to the general purpose of *Lab. Code § 139.5* in determining that the Legislature had used the term "voluntary" in the sense of deliberate (*10 Cal. 3d 222, 232-234)* .

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CHAPTER 217 STATUTORY INTERPRETATION
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B. INTERPRETATION OF WORDS OF STATUTE

21-217 California Points & Authorities § 217.41

§ 217.41 Supporting Contention That Statutory Definition of Word Binding on Court

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with the general points and authorities set out in § 217.20.*]

IN CONSTRUING _____ [*specify statute*] THE DEFINITION OF THE WORD "_____" [*specify*] IN _____ [*specify statute defining word*] IS BINDING ON THE COURT.

Statutory Definition Binding on Court. When a statute prescribes the meaning to be given to a particular term used by it, that meaning is generally binding on the court (*Urban Renewal Agency v. California Coastal Zone Conservation Com. (1975) 15 Cal. 3d 577, 584-585, 125 Cal. Rptr. 485, 542 P.2d 645*).

[*Set forth additional points and authorities relating to other rules of statutory interpretation that aid in ascertaining legislative intent behind statute and support interpretation desired (see §§ 217.21 -217.24, 217.40, 217.42 -217.46, 217.60 -217.63, 217.80 -217.86, 217.88).*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a party's contention that a statute should be construed in a particularmanner. The form sets out the rule of statutory interpretation that when a statute defines a word used in the statute, the court should follow that meaning. Such an argument might be made in any type of action or proceeding in which a question arises concerning how a statute should be construed. These points and authorities should be combined with the general points and authorities *set forth in § 217.20*, which relate to the construction of statutes to ascertain and effectuate the legislative intent.

These points and authorities may be combined with a memorandum of points and authorities relating to the procedural context in which the issue of statutory interpretation arises. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should also insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set out the statutory definition of the word or words in question and specify how the statute in which the word or words are used should be applied, given that definition.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 217.40* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Statutory Definition Binding on Court

In ***Urban Renewal Agency v. California Coastal Zone Conservation Com.*** *(1975) 15 Cal. 3d 577, 125 Cal. Rptr. 485, 542 P.2d 645* , plaintiff public agency and the City of Monterey sought judicial review by mandamus of defendant commission's decision denying plaintiffs an exemption from the permit requirement of the California Coastal Zone Conservation Act (former Pub. Res. Code § 27000 et seq.; *now see* California Coastal Act of 1976, *Pub. Res. Code § 30000 et seq.*). Plaintiffs sought the exemption on the basis of a grandfather clause provided for by former Pub. Res. Code § 27404, which exempted from its permit requirements persons who had obtained a vested right under a building permit prior to adoption of the act by initiative in 1972. The superior court granted relief to plaintiffs, and defendants appealed.

Although the Supreme Court reversed on other grounds, it rejected defendants' contention that plaintiffs, as municipal corporations, could not acquire vested rights against the state. The Court acknowledged that under common law it might be that plaintiffs, as creatures of the state, could not acquire such vested rights, but the Court looked to the language of former Pub. Res. Code § 27404, which defined vested rights as extending to any "person" who has diligently and in good faith performed substantial work and incurred substantial liabilities. The Court then addressed the question whether or not "person" as used in former Pub. Res. Code § 27404 was intended to include municipal corporations. The answer was clear because the act, in former Pub. Res. Code § 27105, expressly defined "person" for purposes of the act as including any agency of federal, state, and local government. The Court adhered to this definition, holding that when a statute prescribes the meaning to be given to particular terms used by the statute, generally that meaning is binding on the courts (*15 Cal. 3d 577, 583-585)* .

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21-217 California Points & Authorities § 217.42

§ 217.42 Supporting Contention That Previously Construed Words of Statute on Same or Analogous Subject Presumed to Have Been Used in Same Sense in New Statute

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with the general points and authorities set out in § 217.20.*]

THE COURT SHOULD PRESUME THAT THE WORD[S] "_____" [*specify*] AS USED IN _____ [*specify statute to be construed*] WAS/WERE USED BY THE LEGISLATURE IN THE SAME SENSE IT/THEY WAS/WERE CONSTRUED TO HAVE BEEN USED IN _____ [*specify previously construed statute using same word(s)*], WHICH RELATES TO _____ [THE SAME *or* AN ANALOGOUS] SUBJECT.

A. Previously Construed Words Presumed to Be Used in Same Sense. After the courts have construed the meaning of particular words, and the Legislature subsequently undertakes to use those same words in a later enactment, it is presumed that the Legislature intended the subject language would be accorded the same meaning (*People v. Wells (1996) 12 Cal. 4th 979, 986, 50 Cal. Rptr. 2d 699, 911 P.2d 1374* ; *In re D. (1980) 28 Cal. 3d 210, 216, 168 Cal. Rptr. 455, 617 P.2d 1087*).

[*Optional*] **B. Adoption of Previous Construction of Federal Legislation on Which State Statute Patterned.** The well-recognized principle of statutory interpretation that, when legislation has been judicially construed and a subsequent statute on the same or an analogous subject is framed in the identical language, it will ordinarily be presumed that the Legislature intended that thelanguage as used in the later enactment would be given a like interpretation, is applicable to state statutes that are patterned after federal statutes (*Kaplan's Fruit & Produce Co. v. Superior Court (1979) 26 Cal. 3d 60, 73, 160 Cal. Rptr. 745, 603 P.2d 1341*).

[*Set forth additional points and authorities relating to other rules of statutory interpretation that aid in ascertaining legislative intent behind statute and support interpretation desired (see §§ 217.21 -217.24, 217.40, 217.41, 217.43*

-217.46, 217.60 -217.63, 217.80 -217.86, 217.88).]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a party's contention that a statute should be construed in a particular manner. The form sets out the rule of statutory interpretation that when a word or expression has been construed by the courts and is subsequently used in another statute in the same connection, it is presumed to have been used in the same sense as it was previously construed. Such an argument might be made in any type of action or proceeding in which a question arises concerning how a statute should be construed. These points and authorities should be combined with the general points and authorities *set forth in § 217.20*, which relate to the construction of statutes to ascertain and effectuate the legislative intent.

These points and authorities may be combined with a memorandum of points and authorities relating to the procedural context in which the issue of statutory interpretation arises. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should also insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion showing that before the statute containing the word or expression to be construed was enacted, a court had construed the same word or expression in another statute on the same or an analogous subject.

[3] Discussion of Authorities

[a] Previously Construed Words Presumed to Be Used in Same Sense

The defendant in ***People v. Wells*** *(1996) 12 Cal. 4th 979, 50 Cal. Rptr. 2d 699, 911 P.2d 1374* , was convicted of vehicular manslaughter, under *Penal Code § 192(c)*, defined as driving a vehicle while in the commission of an unlawful act. The defendant's car struck another vehicle, injuring the driver and killing the passenger. At trial, evidence was presented that the defendant was speeding and otherwise driving recklessly, in violation of several Vehicle Code provisions. The trial court instructed the jury that an "unlawful act" is one inherently dangerous to human life or safety and further instructed the jury that defendant's several misdemeanor Vehicle Code violations were inherently dangerous to human life and safety. The court of appeal reversed and remanded, finding that defendant's speeding did not qualify as an inherently dangerous unlawful act under *Penal Code § 192(c)*.

In interpreting the meaning of the phrase "unlawful act," the court of appeal relied on *People v. Stuart (1956) 47 Cal. 2d 167, 302 P.2d 5* , and identical language in *Penal Code § 192(b)*. The court of appeal understood the holding of Stuart to say that the "unlawful act" in question must be inherently dangerous to human life in the abstract. The California Supreme Court reversed the court of appeal, disagreeing with the lower court's reading of Stuart. The Supreme Court said that Stuart stood for the proposition that the "unlawful act" must simply be dangerous to human life and safety, not dangerous in the abstract (*12 Cal. 4th 979, 986)* . The Supreme Court also stated that use of the phrase "unlawful act" in *Penal Code § 192(b), (c)*, reflected that the Legislature intended the phrase be given the same meaning in both sections, citing the rule that courts presume the Legislature intended similar phrases be accorded the same meaning, unless a contrary intent appears. Accordingly, the Supreme Court found that under both sections, "unlawful act" meant conduct inherently dangerous under the circumstances of its commission, rather than in the abstract, and found that defendant's speeding and recklessness thus satisfied the definition (*12 Cal. 4th 979, 988-989)* .

Petitioner in ***In re D.*** *(1980) 28 Cal. 3d 210, 168 Cal. Rptr. 455, 617 P.2d 1087* , sought a writ of habeas corpus on the ground that she had been improperly sentenced to prison when she should have been first remanded to the California Youth Authority (hereinafter referred to as "CYA") for evaluation. The court of appeal ordered the writ to issue, and the

Supreme Court granted the Attorney General's petition for hearing.

The Supreme Court rejected the Attorney General's contention that petitioner was ineligible for commitment to the CYA because she had been sentenced to life in prison. The Court held that petitioner's sentence was an indeterminate one of 25 years to life, so that she was not ineligible for CYA commitment. Noting that the statute under which petitioner was sentenced, by providing for a term of "25 years to life," employed language that had been commonly and uniformly utilized in California to denote an indeterminate sentence, the Court quoted *City of Long Beach v. Payne (1935) 3 Cal. 2d 184, 191, 44 P.2d 305* , for the well-recognized rule of construction that after the courts have construed the meaning of anyparticular word of expression, and the Legislature subsequently undertakes to use those exact words in the same connection, the presumption is almost irresistible that it used them in the precise and technical sense that had been placed on them by the courts (*28 Cal. 3d 210, 216)* .

[b] Adoption of Previous Construction of Federal Legislation on Which State Statute Patterned

Petitioner in ***Kaplan's Fruit & Produce Co. v. Superior Court*** *(1979) 26 Cal. 3d 60, 160 Cal. Rptr. 745, 603 P.2d 1341* , unsuccessfully sought a preliminary injunction to restrain pickets of real party in interest from obstructing ingress and egress from petitioner's wholesale facility. Petitioner filed a petition for a writ of mandate to compel the superior court to issue the injunction.

One issue before the Supreme Court was whether or not the injunctive relief sought from the superior court was precluded by the Agricultural Labor Relations Act (*Lab. Code § 1140 et seq.*). *Lab. Code § 1160.9* makes the procedures under that act the exclusive method of redressing unfair labor practices, so that if the picketing constituted an unfair labor practice, the superior court would not have jurisdiction to issue the injunction. Real party in interest argued that picketing that obstructs customers' access to the employer's place of business constituted an unfair labor practice under *Lab. Code § 1154(d)*, which prohibits unions from threatening, coercing, or restraining any person from using or otherwise dealing with the products of any other producer, processor, or manufacturer or to cease doing business with any other person. The Court relied on the United States Supreme Court's interpretation of the substantially identical language of *29 U.S.C. § 158(b)(4)* to hold that *Lab. Code § 1154(d)* did not apply to primary picketing (picketing of the employer with which the union has a dispute, as opposed to secondary picketing of other employers who do business with the employer involved in the dispute). In so holding, the Court quoted *Belridge Farms v. Agricultural Labor Relations Bd. (1978) 21 Cal. 3d 551, 557, 147 Cal. Rptr. 165, 580 P.2d 665* (*discussed under § 217.42[3][a]*), for the proposition stated in Paragraph B of the foregoing form (*26 Cal. 3d 60, 73)* .

[4] Additional Authorities

[a] Previously Construed Words Presumed to Be Used in Same Sense

In *Belridge Farms v. Agricultural Labor Relations Bd. (1978) 21 Cal. 3d 551, 147 Cal. Rptr. 165, 580 P.2d 665* , the Supreme Court held that decisions of the general counsel of the Agricultural Labor Relations Board not to issue unfair labor practice complaints are not reviewable. The Court held that such decisions are not final orders of the board that would be subject to review under the provisions of the Agricultural Labor Relations Act, relying on the construction of the National Labor Relations Act by federal courts. The Court noted that the relevant language of the two acts was identical, and stated that when legislation has been judicially construed and a subsequent statute on the same or an analogous subject is framed in the identical language, it will ordinarily be presumed that the Legislature intended that the language as used in the later enactment would be given a like interpretation (*21 Cal. 3d 551, 557)* .

In *Estate of Sax (1989) 214 Cal. App. 3d 1300, 263 Cal. Rptr. 190* , the court of appeal held that a surviving putative spouse is a "surviving spouse" for purposes of former Prob. Code § 6560 (*now see Prob. Code § 21610 et seq.*), which applies when a testator omits from a will his or her "surviving spouse who married the testator after the execution of the will" (*214 Cal. App. 3d 1300, 1306)* . In construing the statute, the court noted that there was no case law or legislative

history on the issue (*214 Cal. App. 3d 1300, 1302-1304)* . Therefore, the court applied the principle of statutory construction that a legislature is presumed to be aware of the judicial interpretation of words dealing with the same or analogous topics and is further presumed to intend the same well-settled meaning of these words, unless it expressly states otherwise (*214 Cal. App. 3d 1300, 1304)* . At the time the statute was enacted, courts had held that the term "surviving spouse" included a putative spouse for purposes of intestate succession under former *Prob. Code § 201* (now *Prob. Code § 6401*); receipt of worker's compensation death benefits under *Lab. Code § 4702*; standing under *Code Civ. Proc. § 337* to bring a wrongful death action; and the application of other state and federal statutes (*214 Cal. App. 3d 1300, 1304-1305)* . With this wealth of cases, the court held, the Legislature would have indicated if it had intended a different meaning (*214 Cal. App. 3d 1300, 1305)* .

The court of appeal in *Allis-Chalmers Corp. v. City of Oxnard (1981) 126 Cal. App. 3d 814, 179 Cal. Rptr. 159* , affirmed a judgment denying plaintiff injunctive relief against defendant city's issuance of bonds. Plaintiff argued that the bond issue was invalid because the interest rate exceeded the statutorily imposed maximum of 8 percent. The court noted a previous case construing the meaning of another statute that imposed a maximum rate of interest on public bonds. The Legislature is presumed to have knowledge of existing judicial decisions and to have enacted statutes in light of the decisions. When words used in a new statute have been construed as having been used in a particular sense in a former statute on the same or an analogous subject, they are presumed to have been used in the same sense in the new statute unless there is a clearly expressed intention to the contrary (*126 Cal. App. 3d 814, 819)* .

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21-217 California Points & Authorities § 217.43

§ 217.43 Supporting Contention That Words of Statute Be Construed in Context

[1] FORM

[*The following may be included in a memorandum supporting or opposing a motion, or in a trial or appellate brief. It should be combined with the general memorandum set out in § 217.20.*]

THE WORD(S) "_____" [*specify*] IN _____ [*specify statute*] SHOULD BE CONSTRUED IN CONTEXT, KEEPING IN MIND THE NATURE AND OBVIOUS PURPOSE OF THE STATUTE.

A. Statutory Language to Be Construed in Context. In interpreting particular words, phrases, or clauses in a statute, the entire substance of the statute or that portion relating to the subject under review should be examined in order to determine the scope and purpose of the provision containing such words, phrases, or clauses. The words in question must be construed in context, keeping in mind the nature and obvious purpose of the statute in which they appear (*Tripp v. Swoap (1976) 17 Cal. 3d 671, 679, 131 Cal. Rptr. 789, 552 P.2d 749* ; *Frazier v. City of Richmond (1986) 184 Cal. App. 3d 1491, 1496-1497, 228 Cal. Rptr. 376* ; *see Kucana v. Holder (2010) ___ U.S. ___, 130 S. Ct. 827, 175 L. Ed. 2d 694, 705-706* ; *Lamie v. United States Tr. (2004) 540 U.S. 526, 124 S. Ct. 1023, 157 L. Ed. 2d 1024, 1034-1036)* .

[*Optional*] **B. Noscitur a Sociis.** Under the rule of noscitur a sociis, the meaning of a word may be enlarged or restrained by reference to the object of the whole clause in which it is used (*People v. Stout (1971) 18 Cal. App. 3d 172, 177, 95 Cal. Rptr. 593*).

[*Optional*] **C. Last Antecedent Rule.** Qualifying words, phrases, and clauses are to be applied to the words or phrases immediately preceding them and not to words or phrases more remote (*White v. County of Sacramento (1982) 31 Cal. 3d 676, 680, 183 Cal. Rptr. 520, 646 P.2d 191*).

[*Optional*] **D. Words Grouped in List.** Words grouped in a list should be given related meaning (*Droeger v. Friedman, Sloan & Ross (1991) 54 Cal. 3d 26, 38, 283 Cal. Rptr. 584, 812 P.2d 931*).

[*Optional*] **E. General Words Used in Conjunction With Specific Words.** If a statute uses a general word in conjunction with other words describing specific acts that would ordinarily be within the ambit of the general word, the court may then infer that the general word refers to conduct other than those specific acts (*Estate of Griswold (2001) 25 Cal. 4th 904, 911, 108 Cal. Rptr. 2d 165, 24 P.3d 1191*).

[*Optional*] **F. Adverb Modifying Transitive Verb Usually Also Applies to Verb's Object.** When a sentence in a statute contains a transitive verb that has an object, an adverb that modifies the verb is commonly understood to apply to the entire action conveyed by the complete predicate, including the object of the verb (*Flores-Figueroa v. United States (2009) ___ U.S. ___, 129 S. Ct. 1886, 173 L. Ed. 2d 853, 857-859, 862)* .

[*Set forth additional points and authorities relating to other rules of statutory interpretation that aid in ascertaining legislative intent behind statute and support interpretation desired (see §§ 217.21 -217.24, 217.40 -217.42, 217.44 -217.46, 217.60 -217.63, 217.80 -217.86, 217.88).*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a party's contention that a statute should be construed in a particular manner. The form sets out the rule of statutory interpretation that a word or words used in a statute should be construed in context, keeping in mind the nature and obvious purpose of the statute in which they appear. Such an argument might be made in any type of action or proceeding in which a question arises concerning how a statute should be construed. This form should be combined with the general form *set forth in § 217.20*, which relate to the construction of statutes to ascertain and effectuate the legislative intent.

This form may be combined with a memorandum relating to the procedural context in which the issue of statutory interpretation arises. This form also may be adapted for use in a trial or appellate brief.

Counsel should also insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set out the definition or definitions of the word or words in question, and demonstrate how giving them the desired interpretation is consistent with and will further the purpose of the statute.

This form may be used in conjunction with or in opposition to the contention supported by the form *set out in § 217.40*. If combined with § 217.40, counsel should demonstrate how the usual meaning of the word or one of several possible meanings of the word, construed in context, will further the purpose of the statute. If used to oppose § 217.40, counsel should demonstrate how application of the usual meaning of the word would be inconsistent with the purposes of the statute, so that the word should be read, in context, as having a different meaning. In opposing § 217.40, counsel should also consider combining this form with those *set out in §§ 217.21*, *217.42*, and *217.44 -217.46*.

[3] Discussion of Authorities

[a] Statutory Language to Be Construed in Context

In ***Tripp v. Swoap*** *(1976) 17 Cal. 3d 671, 131 Cal. Rptr. 789, 552 P.2d 749* , plaintiff instituted administrative mandamus proceedings to challenge the determination of defendant Director of the State Department of Social Welfare that plaintiff was ineligible for disability welfare benefits. Defendant appealed from a judgment awarding plaintiff retroactive payment of benefits with attorneys' fees and prejudgment interest.

On appeal, defendant contended that prejudgment interest was not allowable because it was not authorized to be awarded under *Welf. & Inst. Code § 10962*, which relates to judicial review of benefit determinations. Plaintiff argued

that the interest had been properly awarded on the basis of *Civ. Code § 3287(a)*, relating to interest on damages generally. The Supreme Court, after noting the fundamental rule that courts should ascertain the intent of the Legislature so as to effectuate the purpose of the law, quoted *West Pico Furniture Co. v. Pacific Finance Loans (1970) 2 Cal. 3d 594, 608, 86 Cal. Rptr. 793, 469 P.2d 665* , in stating that in interpreting particular words, phrases, or clauses in a statute, the entire substance of the statute or that portion relating to the subject under review should be examined in order to determine the scope and purpose of the provision containing those words, phrases, or clauses. The Court additionally quoted *Moyer v. Workmen's Comp. Appeals Bd. (1973) 10 Cal. 3d 222, 230, 110 Cal. Rptr. 144, 514 P.2d 1224* (discussed in *§ 217.40[4][c]*), for the proposition that the words in question must be construed in context, keeping in mind the nature and obvious purpose of the statute in which they appear (*17 Cal. 3d 671, 679)* . When two codes are construed, they must be read together and effect given to all their provisions, if possible. The Court held that the failure of the Legislature to mention interest in *Welf. & Inst. Code § 10962* did not reveal any intent to deny such interest to recipients of wrongfully withheld benefits, and that *Civ. Code § 3287(a)* provided clear authority for awarding such interest. Thus, the Court affirmed the judgment, although modifying it on other grounds (*17 Cal. 3d 671, 679-685)* .

In ***Frazier v. City of Richmond*** *(1986) 184 Cal. App. 3d 1491, 228 Cal. Rptr. 376* , the court of appeal affirmed a trial court judgment that defendant city's payments to plaintiff city employees for insurance and medical plan contributions should not be deemed "salary" under the city charter for retirement computation purposes. The court noted that the contexts in which the term "salary" was used in the charter suggested that the drafters specifically intended to exclude payments for insurance and medical plan contributions from the retirement computation formulas (*184 Cal. App. 3d 1491, 1496-1497)* .

Kucana v. Holder *(2010) ___ U.S. ___, 130 S. Ct. 827, 175 L. Ed. 2d 694* , involved the interpretation of a federal statute that bars judicial review of decisions of the Attorney General "the authority for which is specified under this subchapter to be in the discretion of the Attorney General" (*8 U.S.C. § 1252(a)(2)(B)(ii)*). The parties in the case disagreed over whether the statutory word "under" referred only to the Attorney General's discretionary authority specified "in" the statute, or whether it encompassed matters made discretionary under regulations adopted "pursuant to" the statute. Looking to the context surrounding the word "under," the United States Supreme Court concluded that the word referred only to matters specified in the statute. In so holding, the Court remarked that "[t]he word 'under' is chameleon; it 'has many dictionary definitions and must draw its meaning from its context'" (*175 L. Ed. 2d 694, 705-706* (quoting *Ardestani v. INS (1991) 502 U.S. 129, 135, 112 S. Ct. 515, 116 L. Ed. 2d 496*)).

In ***Lamie v. United States Tr.*** *(2004) 540 U.S. 526, 124 S. Ct. 1023, 157 L. Ed. 2d 1024* , the petitioner was an attorney who had performed legal services for the debtor in a Chapter 7 bankruptcy proceeding, despite lacking the bankruptcy trustee's authorization to do so. When the petitioner filed an application for an award of fees the trustee objected. After the bankruptcy court, the district court, and the Fourth Circuit denied the fee request, the Supreme Court affirmed, holding that *Section 330(a)(1) of the Bankruptcy Code* (*11 U.S.C. § 330(a)(1)*) prohibits an award of fees unless the attorney was retained with the trustee's approval in accordance with *Section 327 of the Bankruptcy Code* (*11 U.S.C. § 327*).

Section 330(a)(1) regulates the award of fees for services rendered by attorneys in connection with bankruptcy proceedings (*see 11 U.S.C. § 330(a)(1)*). Section 330(a)(1) was amended by the Bankruptcy Reform Act of 1994 (108 Stat. 4106). Prior to the 1994 amendment, Section 330(a)(1) provided that the court could award "to a trustee, *to* an examiner, *to* a professional person employed under section 327 or 1103 *of this title, or to the debtor's attorney* ... reasonable compensation for actual, necessary services rendered by *such* trustee, examiner, professional person, or attorney" (emphasis added to highlight material deleted in 1994 amendment). After the 1994 amendment, Section 330(a)(1) provided that the court could award "to a trustee, an examiner, a professional person employed under section 327 or 1103 ... reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney." The 1994 amendment, therefore, contained apparent legislative drafting errors. It left Section 330(a)(1) with a missing "or." Also, the deletion of the first, but not the second, reference to "attorney" destroyed the

former parallelism that existed in the former version of the statute and so cast doubt on the meaning of the second reference to "attorney" (*see 157 L. Ed. 2d 1024, 1031-1032)* . (Section 330(a)(1) was later amended in 2005 to authorize compensation to persons appointed to serve as ombudsmen under *11 U.S.C. §§ 332* and *333*, but the 2005 amendment did not correct the apparent legislative drafting errors described above [*see* Pub. L. 109-8, 119 Stat. 23 (effective Oct. 17, 2005)]).

In this case, the Supreme Court held that despite the grammatical deficiencies created by the 1994 amendment of Section 330(a)(1), the statute clearly prohibited an award of fees in a Chapter 7 bankruptcy case to an attorney who had not been retained in accordance with *Bankruptcy Code Section 327*.

The Supreme Court found that the then-current text of Section 330(a)(1) is not ambiguous. The Court acknowledged that the statute was awkward, and even ungrammatical; but that did not make it ambiguous on the point at issue. In its first part, the statute authorized an award of compensation to one of three types of persons: trustees, examiners, and Section 327 professional persons. A debtor's attorney not engaged in accordance withSection 327 was simply not included within the class of persons eligible for compensation. The statute then went on to define what type of compensation may be awarded: compensation that is (1) reasonable; (2) for actual, necessary services; and (3) rendered by four types of persons (the same three persons plus an "attorney"). Thus, under the clear terms of the statute, unless the applicant for compensation was one of three types of persons listed in the first part, the kind of service rendered by the applicant was irrelevant (*157 L. Ed. 2d 1024, 1034)* .

The Court found that the missing "or" in the then-current text of the statute did not make it ambiguous. There are numerous federal statutes that inadvertently lack a conjunction. Such statutes nevertheless are read for their plain meaning. In the case of Section 330(a)(1), the missing conjunction neither altered the text's substance nor obscured its meaning. In contrast, the meaning of a statute might be altered or obscured if a "not" were missing or if an "or" were inadvertently substituted for an "and" (*157 L. Ed. 2d 1024, 1034)* .

The Supreme Court also found that Section 330(a)(1)'s nonparalleled fourth category of persons who could render compensable services did not cloud the statute's meaning. The word "attorney" could be read in straightforward fashion to refer to attorneys qualified as Section 327 professional persons. Although this reading would render the word "attorney" surplusage, the Court noted that surplusage does not always produce ambiguity, and the preference for avoiding surplusage constructions is not absolute. If there are two ways to read statutory text (either "attorney" was surplusage, in which case the text was plain; or "attorney" was nonsurplusage, in which case the text was ambiguous), applying the rule against surplusage is generally inappropriate. In such an instance, the plain-meaning approach is preferable, because that approach respects the words of Congress (*157 L. Ed. 2d 1024, 1034-1035)* .

The Supreme Court went on to find that applying the plain meaning of the then-current text of Section 330(a)(1) did not lead to any absurd result that would require treating the statute as ambiguous. The Court rejected a contention that the plain words of the statute eliminated compensation for debtors' attorneys. The Court pointed out that fees could be recovered by a debtor's attorney so long as he or she was engaged in accordance with Section 327. In particular, Section 327's limitation on a Chapter 7 debtor's incurring debts for professional services without the trustee's approval was not absurd (*157 L. Ed. 2d 1024, 1032-1035)* .

Because Section 330(a)(1) was unambiguous, the Supreme Court concluded that the statute should be construed in accordance with its plain, nonabsurd meaning. Accordingly, the Court held that the statute did not authorize compensation awards to bankruptcy debtors' attorneys from estate funds, unless they were employed as authorized by Section 327. In the context of a Chapter 7 case, that meant the attorney must have been employed by the trustee and approved by the bankruptcy court (*157 L. Ed. 2d 1024, 1035-1036* ; *see 11 U.S.C. § 327(a), (e)*).

The Court closed its analysis by reviewing the legislative history behind the 1994 amendment to Section 330(a)(1), even though the lack of ambiguity in the statutory text made it unnecessary to rely on the legislative history. The Court

observed that the legislative history provided no clear guidance on the congressional intent. For example, the unexplained deletion of "or the debtors [sic] attorney" from a draft of the 1994 legislation lent credibility to the argument that the deletion was a scrivener's error that should not be given any effect. On the other hand, other aspects of the legislative record suggested that the amendment was part of an effort to curtail abuses in fee awards (*157 L. Ed. 2d 1024, 1036-1038)* .

[b] Noscitur a Sociis

Defendant in ***People v. Stout*** *(1971) 18 Cal. App. 3d 172, 95 Cal. Rptr. 593* , appealed from his conviction for possessing and exhibiting obscene matter in violation of *Penal Code § 311.2(a).* In the court of appeal defendant argued that he was exempt from the statute under former Penal Code § 311.2(b), which provided in part that the statute did "not apply to a motion picture operator or projectionist." Defendant argued that since he was the cashier and supervisor of the physical surroundings of the theater, he was within the exception applicable to motion picture operators. The court rejected defendant's contention, however, finding that "motion picture operator" is stated in the alternative to "projectionist" and is in close relationship to that term. The court quoted *Vilardo v. County of Sacramento (1942) 54 Cal. App. 2d 413, 420, 129 P.2d 165* , to state that under the rule of noscitur a sociis the meaning of a word may be enlarged or restrained by reference to the object of the whole clause in which it is used. Applying that canon of construction and reviewing the statute's legislative history, the court held that "motion picture operator" had to be understood in terms of the associated word "projectionist," and that it did not include defendant, who had duties as cashier and janitor in addition to being projectionist (*18 Cal. App. 3d 172, 177)* .

[c] Last Antecedent Rule

In ***White v. County of Sacramento*** *(1982) 31 Cal. 3d 676, 183 Cal. Rptr. 520, 646 P.2d 191* , plaintiff peace officer was assigned by defendants to a lower paying position based on plaintiff's alleged deficient performance. Plaintiff requested a hearing before the Sacramento County Civil Service Commission, but the request was denied. Plaintiff filed a petition for a writ of mandate to compel the commission to grant plaintiff a hearing. Relying on the *Bill of Rights* Act (*Gov. Code § 3300 et seq.*), plaintiff contended that the Department could not reassign him to a lower paying position without affording him an administrative appeal. *Gov. Code § 3304(b)* provided thatno "punitive action" could be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal. *Gov. Code § 3303* defined "punitive action" as "any action which may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment." The trial court denied plaintiff's petition and plaintiff appealed.

The Supreme Court reversed. Defendants argued that the "for purposes of punishment" clause in *Gov. Code § 3303* qualified each of the terms preceding it, so that a demotion or reduction in salary would need to be "for purposes of punishment" (not for deficient performance) in order to be deemed an appealable "punitive action." The Court noted that, under the last antecedent rule of statutory construction, qualifying words, phrases and clauses are to be applied to the words or phrases immediately preceding and are not to be construed as extending to or including others more remote. Under this rule, the Court found that "for purposes of punishment" was intended to modify only the term "transfer." In support of its conclusion, the Court indicated that "for purposes of punishment" was not set off from the preceding terms by a comma; instead, the entire phrase "transfer for purposes of punishment" was set off from the preceding terms by a comma followed by the word "or." The Court found that this use of the word "or" indicated an intention to use it disjunctively so as to designate alternative or separate categories (*31 Cal. 3d 676, 680)* .

[d] Words Grouped in List

In ***Droeger v. Friedman, Sloan & Ross*** *(1991) 54 Cal. 3d 26, 283 Cal. Rptr. 584, 812 P.2d 931* , a wife brought a marital dissolution action against her husband, retaining a law firm to represent her. While the dissolution action was pending, the wife executed a promissory note and deed of trust on community real property to secure the firm's fees.

The husband, who had not joined in the execution of the note or deed of trust, brought an action against the law firm to quiet title in the community real property. The law firm demurred to the husband's complaint, claiming that the deed of trust was enforceable against the wife's one-half interest in the property. The court sustained the demurrer without leave to amend and entered a judgment of dismissal. The court of appeal reversed, holding that under former Civ. Code § 5127 (now *Fam. Code § 1102*), both spouses must consent to the transfer of community real property. Thus, the husband was entitled to void the encumbrance in its entirety (*54 Cal. 3d 26, 30-31)* . The Supreme Court granted review.

The Supreme Court affirmed the court of appeal, construing former Civ. Code § 5127, which states in part that both spouses "must join in executing any instrument by which ... community real property or any interest therein is leased for a period longer than one year, or is sold, conveyed, or encumbered." Citing the rule that words grouped in a list should be given related meaning, the Court held that the term "encumbered" could not be interpreted to have a different effect from the terms "leased," "sold," or "conveyed" (*54 Cal. 3d 26, 38)* .

[e] General Words Used in Conjunction With Specific Words

Estate of Griswold *(2001) 25 Cal. 4th 904, 108 Cal. Rptr. 2d 165, 24 P.3d 1191* , involved the interpretation of *Probate Code § 6452,* which bars a "natural parent" or a relative of that parent from inheriting through a child born out of wedlock on the basis of the parent-child relationship unless the parent or relative "acknowledged the child" and "contributed to the support or the care of the child." The Supreme Court concluded that "acknowledged the child" refers to conduct other than contributing to the support or care of the child, since the statute specifically requires such contribution *plus* acknowledgement before a natural parent may inherit from a child who was born out of wedlock. The Court explained that a different interpretation of the statute would make the "acknowledged the child" language surplusage and unnecessary (*25 Cal. 4th 904, 911)* .

[f] Adverb Modifying Transitive Verb Usually Also Applies to Verb's Object

In ***Flores-Figueroa v. United States*** *(2009) ___ U.S. ___, 129 S. Ct. 1886, 173 L. Ed. 2d 853* , the United States Supreme Court construed a federal statute that imposed criminal penalties on any person who "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person" (*see 18 U.S.C. § 1028A(a)(1)*). The Court rejected the government's argument that a violation of the statute was established by the defendant's knowing possession of identification, even if the defendant thought the identification was fake and did not know that it actually belonged to another person. The Court explained that when a sentence in a statute contains a transitive verb that has an object, an adverb that modifies the verb is commonly understood to apply to the entire action conveyed by the complete predicate, including the object of the verb. Thus, under the statute in question, punishment could be imposed only if the government proved not only that the defendant knew that he or she was transferring, possessing, or using something, but also that the defendant knew the something was another person's means of identification (*173 L. Ed. 2d 853, 857-859, 862)* .

[4] Additional Authorities

[a] Statutory Language to Be Construed in Context

Jutzi v. County of Los Angeles (1987) 196 Cal. App. 3d 637, 242 Cal. Rptr. 74 , was an action against a county hospital for malpractice in rendering emergency medical services, in which the court of appeal, in affirming judgment for defendant, construed *Health & Safety Code § 1799.110(c)*. The court stated that the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole (*196 Cal. App. 3d 637, 650)* .

The court of appeal in *M Restaurants, Inc. v. San Francisco Local Joint Exec. Bd. Culinary etc. Union (1981) 124 Cal. App. 3d 666, 177 Cal. Rptr. 690* , upheld the trial court's refusal to dissolve a preliminary injunction enjoining defendant

unions from, among other things, blocking entrances and threatening customers and suppliers of plaintiff employer. Stating the rule that when used in a statute, words must be construed in context, keeping in mind the nature and obvious purpose of the statute in which they appear, the court held that *Code Civ. Proc. § 527.3*, restricting the equity jurisdiction of the courts over labor disputes did not prevent the court from issuing the injunction (*124 Cal. App. 3d 666, 679)* . The court held that the language of the statute, which bars courts from enjoining anyone from publicizing a labor dispute by any method "not involving fraud, violence or breach of the peace," and which further provides that the section does not intend to permit "breach of the peace, disorderlyconduct, the unlawful blocking of access or egress to premises where a labor dispute exists, or other similar unlawful activity," allows the courts to enjoin such conduct (*124 Cal. App. 3d 666, 680-681)* .

In *Clinton v. County of Santa Cruz (1981) 119 Cal. App. 3d 927, 174 Cal. Rptr. 296* , the court of appeal reversed the trial court's determination that zoning classification as a timber preserve zone depended on the active use of the land or the subjective intent of the owner to use the land for the growing and harvesting of timber. The court looked to the purpose of the Forest Taxation Reform Act (*Gov. Code § 51100 et seq.*) to encourage timber production and harvesting and to protect forest resources, and the rule, among others, that statutory language must be read in context, keeping in mind the nature and purpose of the enactment, in rejecting the landowner's contention that his land did not contain any "timber," defined as trees "maintained for eventual harvest." "Maintained" could be read in either an active or a passive sense. In light of the context, it should be read in a passive sense that does not require any affirmative action or intent on the part of the landowner as a prerequisite for trees constituting "timber" subject to the act (*119 Cal. App. 3d 927, 933-935)* .

[b] Noscitur a Sociis

Coffee-Rich, Inc. v. Fielder (1972) 27 Cal. App. 3d 792, 104 Cal. Rptr. 252 , appeal dismissed, 411 U.S. 979, 93 S. Ct. 2268, 36 L. Ed. 2d 955 , involved appeals by both parties in a case that, in part, dealt with the constitutionality of several statutes regulating products resembling milk products. The court of appeal applied the rule of noscitur a sociis to hold that use of the word "imports" in *Food & Agric. Code § 35191*, imposing record-keeping requirements on every person that manufactures or "imports" any such products, was not intended to apply to an individual making a retail purchase in another state (*27 Cal. App. 3d 792, 812-813)* .

[c] Last Antecedent Rule

In *City of Victorville v. County of San Bernardino (1991) 233 Cal. App. 3d 1312, 285 Cal. Rptr. 206* , the court interpreted the following phrase from a criminal statute: "[a]ll fines ... collected upon conviction ... in any municipal court or justice court ..." [*quoting from* former Penal Code § 1203.1 (superseded by *Penal Code § 1463*, which now has other wording)]. The county argued that the provision applied only to fines "collected" in municipal or justice courts. Applying the last antecedent rule, the court held that it was the "conviction," not the "collection," that must occur in the municipal court or justice court (*233 Cal. App. 3d 1312, 1322)* .

In *Mayo v. Department of Motor Vehicles (1987) 193 Cal. App. 3d 406, 238 Cal. Rptr. 465* , the sole issue on appeal was the interpretation of a part of *Veh. Code § 13352.3(a)*, before its 1992 amendment, providing that "the department shall immediately revoke the privilege to operate a motor vehicle of any person upon [a] showing that the person was convicted of a violation of § 23152 or 23153 while under 18 years of age." Defendant, who committed a drunk driving offense while he was under 18 years of age but was convicted after his 18th birthday, contended that the statute only applies to persons who suffered a drunk driving *conviction* before 18 years of age. The court of appeal disagreed, finding that under the last antecedent rule of statutory construction, the phrase "while under 18 years of age" pertains to and qualifies the word "violation," which immediately precedes the phrase, rather than the more remote word "convicted." Accordingly, the statute refers to a person who commits a violation while under 18 years of age (*193 Cal. App. 3d 406, 409)* .

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 217 STATUTORY INTERPRETATION
PART II. FORMS
B. INTERPRETATION OF WORDS OF STATUTE

21-217 California Points & Authorities § 217.44

§ 217.44 Supporting Contention That General Words Following Enumeration of Particular Classes of Persons or Things Should Be Construed as Applicable Only to Persons or Things of Same General Nature

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with the general points and authorities set out in § 217.20.*]

IN CONSTRUING _____ [*specify statute*], THE COURT SHOULD APPLY THE DOCTRINE OF EJUSDEM GENERIS, THAT WHEN GENERAL WORDS FOLLOW THE ENUMERATION OF PARTICULAR CLASSES OF PERSONS OR THINGS, THE GENERAL WORDS WILL BE CONSTRUED AS APPLICABLE ONLY TO PERSONS OR THINGS OF THE SAME GENERAL NATURE OR CLASS AS THOSE ENUMERATED.

A. Particular Qualifies General. Particular expressions qualify those which are general (*Civ. Code § 3534*).

B. Ejusdem Generis. The doctrine of ejusdem generis states that when general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. The rule is based on the obvious reason that if the Legislature had intended the general words to be used in their unrestricted sense, it would not have mentioned the particular things or classes of things that would in that event be mere surplusage (*Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters (1979) 25 Cal. 3d 317, 331 n.10, 158 Cal. Rptr. 370, 599 P.2d 676 , cert. denied, 447 U.S. 935, 100 S. Ct. 3038, 65 L. Ed. 2d 1130*).

[*Set forth additional points and authorities relating to other rules of statutory interpretation that aid in ascertaining legislative intent behind statute and support interpretation desired (see §§ 217.21 -217.24, 217.40 -217.43, 217.45, 217.46, 217.60 -217.63, 217.80 -217.86, 217.88).*]

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of a party's contention that a statute should be construed in a particular manner. The form sets out the rule of statutory interpretation that general words following a specific enumeration of persons or things should be construed as applying only to similar persons or things. Such an argument might be made in any type of action or proceeding in which a question arises concerning how a statute should be construed. These points and authorities should be combined with the general points and authorities *set forth in § 217.20*, which relate to the construction of statutes to ascertain and effectuate the legislative intent.

The foregoing points and authorities may be combined with a memorandum of points and authorities relating to the procedural context in which the issue of statutory interpretation arises. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should also insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should demonstrate that, even though the person or thing that he or she does not want to have included within the scope of the statute falls within the general words of the statute, the person or thing is dissimilar to the specific persons or things enumerated before the general words, and therefore should not be included within the scope of the statute.

Counsel should note that the rule of ejusdem generis is merely an extrinsic aid to interpretation for use only when the clear meaning of the words used in the statute is doubtful, and that the rule cannot be used to create doubts or offset the plain meaning of the statute [*People v. Fields (1980) 105 Cal. App. 3d 341, 344, 164 Cal. Rptr. 336* (not applied because it would restrict phrase to less than its fair import and commonly understood meaning)].

[3] Discussion of Authorities

[a] Ejusdem Generis

Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters *(1979) 25 Cal. 3d 317, 158 Cal. Rptr. 370, 599 P.2d 676 , cert. denied, 447 U.S. 935, 100 S. Ct. 3038, 65 L. Ed. 2d 1130* , involved defendant's appeal from an order granting a preliminary injunction against defendant's peaceful picketing on plaintiff's property. In reversing, the Supreme Court rejected plaintiff's contention that the injunction was authorized by *Code Civ. Proc. § 527.3*, which provides, in part, that "[i]t is not the intent of [Section 527.3] to permit conduct that is unlawful including breach of the peace, disorderly conduct, the unlawful blocking of access or egress to premises where a labor dispute exists, or other similar unlawful activity." The Court quoted *Scally v. Pacific Gas & Electric Co. (1972) 23 Cal. App. 3d 806, 819, 100 Cal. Rptr. 501* , for the proposition stated in Paragraph B of the foregoing form, and also cited *Civ. Code § 3534* and *In re Johnson (1914) 167 Cal. 142, 138 P. 740* (*25 Cal. 3d 317, 331 n.10*). Applying the canon of construction of ejusdem generis, the Court held that the statute's reference to "conduct that is unlawful" must be limited to conduct that constitutes breach of the peace, disorderly conduct, the blocking of access or egress, or other "similar unlawful activity," and does not apply to peaceful picketing on private sidewalks because it does not involve violence or substantially impair the rights of others (*25 Cal. 3d 317, 330-331)* .

[4] Additional Authorities

[a] Ejusdem Generis

Playboy Enterprises, Inc. v. Superior Court (1984) 154 Cal. App. 3d 14, 201 Cal. Rptr. 207 , involved an attempt by defendant to compel a nonparty magazine publisher to produce in discovery all records and editorial materials concerning a magazine interview of plaintiffs in the case. The magazine asserted that it was immune from contempt for failure to produce the materials under *Evid. Code § 1070* and *Cal. Const., art. I, § 2*, which provide immunity to newspersons from being held in contempt for failure to disclose sources and unpublished information. In construing the constitutional provision, one of the rules of statutory construction the court used was that when general words follow a

specific enumeration of particular classes of persons or things, the general words will be presumed to apply to persons or things of the same general nature or class as those enumerated (*154 Cal. App. 3d 14, 21)* . In applying the rule, the court held that the statutory language defining protected material that lists "other data of whatever sort" was intended to refer to physical source items of the same general nature as the particular source items enumerated previously in the section (*154 Cal. App. 3d 14, 21-22)* .

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 217 STATUTORY INTERPRETATION
PART II. FORMS
B. INTERPRETATION OF WORDS OF STATUTE

21-217 California Points & Authorities § 217.45

§ 217.45 Supporting Contention That Legislature's Inclusion of One Thing in Statute Excludes Any Other

[1] FORM

[*The following may be included in a memorandum supporting or opposing a motion, or in a trial or appellate brief. It should be combined with the general memorandum set out in § 217.20.*]

IN CONSTRUING _____ [*specify statute*], THE COURT SHOULD APPLY THE DOCTRINE OF EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS, THAT THE EXPRESSION OF ONE THING IN A STATUTE IMPLIES THE INTENTIONAL EXCLUSION OF THE OMITTED THING.

[*EITHER*]

Expressio Unius Est Exclusio Alterius. The enumeration of particulars in a statute suggests the application of the doctrine of expressio unius est exclusio alterius, under which the expression of one thing in a statute implies the intentional exclusion of the omitted thing (*Garson v. Juarique (1979) 99 Cal. App. 3d 769, 774, 160 Cal. Rptr. 461*).

[*OR*]

Expressio Unius Est Exclusio Alterius. Under the familiar rule of construction, expressio unius est exclusio alterius, when exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed (*In re Lance W. (1985) 37 Cal. 3d 873, 888, 210 Cal. Rptr. 631, 694 P.2d 744* ; *Wildlife Alive v. Chickering (1976) 18 Cal. 3d 190, 195, 132 Cal. Rptr. 377, 553 P.2d 537* ; *Bearden v. U.S. Borax, Inc. (2006) 138 Cal. App. 4th 429, 436-437, 41 Cal. Rptr. 3d 482*).

[*Set forth additional points and authorities relating to other rules of statutory interpretation that aid in ascertaining legislative intent behind statute and support interpretation desired (see §§ 217.21 -217.24, 217.40 -217.44, 217.46,*

217.60 -217.63, 217.80 -217.86, 217.88).]

[2] Comments

[a] Use of Form

The foregoing memorandum may be submitted in support of a party's contention that a statute should be construed in a particular manner. The form sets out the rule of statutory interpretation that the expression of one thing in a statute implies the intentional exclusion of things omitted from the statute. Such an argument might be made in any type of action or proceeding in which a question arises concerning how a statute should be construed. This memorandum should be combined with the general memorandum *set forth in § 217.20,* which relates to the construction of statutes to ascertain and effectuate the legislative intent.

The foregoing form may be combined with a memorandum relating to the procedural context in which the issue of statutory interpretation arises. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should also insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show that the statute enumerates particulars that are covered by the statute or that are excepted from it, and further show how the facts of the case relate to the enumeration of particulars in the statute.

[3] Discussion of Authorities

[a] Expressio Unius Est Exclusio Alterius

In ***Garson v. Juarique*** *(1979) 99 Cal. App. 3d 769, 160 Cal. Rptr. 461* , plaintiff appealed from a judgment for defendant in an action for personal injuries sustained when defendant's dog caused plaintiff to fall down. The dog had been sitting on defendant's unenclosed front lawn in accordance with defendant's command when plaintiff walked by with her dog. Defendant's dog bolted across the lawn and ran into either plaintiff or her dog. The trial court had found that defendant had violated a Glendale city ordinance prohibiting animal owners from allowing their animals to run at large, giving rise to a rebuttable presumption of negligence on defendant's part, but that the presumption was rebutted by proof that defendant had acted as would a person of ordinary prudence who desired to comply with the law. The ordinance provided in part that "[d]ogs shall not be considered to be at large if they are in the custody and control of a competent person and restrained by a chain or leash not over six feet in length attached to a collar or harness, or confined within an automobile."

The court of appeal reversed, finding that the trial court's determination that the presumption of negligence had been rebutted was based on an erroneous interpretation of the ordinance. The trial court had found that defendant had been in compliance with the statute while his dog had been sitting in his unenclosed front yard on defendant's command, and that the violation had not occurred until the dog leapt up and ran at plaintiff and her dog, and the trial court's finding that the presumption of negligence was rebutted was based on this interpretation. The court of appeal, however, noted that the ordinance enumerated several particular ways to restrain a dog, and did not refer to the possibility that other ways, such as the psychological restraint of commanding a trained dog to sit, might also satisfy the ordinance. The court held that the enumeration of particulars suggested that the doctrine of expressio unius est exclusio alterius applied. The court cited *Wildlife Alive v. Chickering (1976) 18 Cal. 3d 190, 196, 132 Cal. Rptr. 377, 553 P.2d 537* , and *County of Madera v. Superior Court (1974) 39 Cal. App. 3d 665,670, 114 Cal. Rptr. 283* , for the definition of the doctrine, that the expression of one thing in a statute implies the intentional exclusion of the omitted thing (*99 Cal. App. 3d 769, 774)* . Since the trial court had misapprehended the manner in which defendant had violated the ordinance, the court of appeal held that it had also erred in determining that the presumption of negligence arising from the violation had been rebutted (*99 Cal. App. 3d 769, 774-775)* .

In ***In re Lance W.*** *(1985) 37 Cal. 3d 873, 210 Cal. Rptr. 631, 694 P.2d 744* , a juvenile defendant was arrested and searched, and police officers found evidence of illegal drugs. Defendant moved to suppress the evidence, alleging that the warrantless search was conducted without probable cause. Although the trial court concluded that the arrest and search were illegal and that the evidence should be suppressed because of lack of probable cause, it held that *Cal. Const. art. I, § 28(d),* eliminated any independent state ground for suppression of the evidence [*see Cal. Const. art. I, § 28(d)* ("Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding")]. The trial court thus denied defendant's motion to suppress, sustained the allegations of the juvenile petition, and ruled that the maximum confinement for the violation would be three years.

The Supreme Court affirmed, holding in part that Section 28(d) requires that relevant evidence must not be excluded in any criminal proceeding with limited, enumerated exceptions to that command. The Court concluded that the exception claimed by the juvenile, the vicarious exclusionary rule, did not fall within the enumeration. Thus, under the familiar rule of construction expressio unius est exclusio alterius, when exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed (*37 Cal. 3d 873, 888)* .

Plaintiffs in ***Wildlife Alive v. Chickering*** *(1976) 18 Cal. 3d 190, 132 Cal. Rptr. 377, 553 P.2d 537* , petitioned for a writ of mandate to require the Fish and Game Commission to suspend the hunting season for black bear for failure to have prepared an environmental impact report under the California Environmental Quality Act of 1970 (*Pub. Res. Code § 21000 et seq.*). Defendants prevailed in superior court, and plaintiffs appealed.

The Supreme Court reversed. The Court found that the act was expressly made applicable to all state agencies, and that while a number of specific exemptions were provided for, none was expressly applicable to defendant commission. Citing *State Board of Education v. Levit (1959) 52 Cal. 2d 441, 461, 343 P.2d 8* , and *Estate of Pardue (1937) 22 Cal. App. 2d 178, 181, 70 P.2d 678* , the Court held that under the familiar rule of construction, expressio unius est exclusio alterius, when exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed. Although the Court noted that this rule is inapplicable when its operation would contradict a discernible and contrary legislative intent, the Court found that the application of the rule was consistent with the act in the case before it (*18 Cal. 3d 190, 195)* . One factor considered by the Court was the presence in the act of an alternative procedure to environmental impact reports for qualified state agencies having important environmental protection responsibilities. Based on the presence of this provision, the Court stated that under the doctrine of expressio unius est exclusio alterius the creation of a limited express exemption suggests that a broader implied exemption could not have been intended. Thus, the express exemption that was provided for certain agencies that followed abbreviated procedures could be said to imply a rejection of other exemptions not expressly granted in the act (*18 Cal. 3d 190, 196)* .

Bearden v. U.S. Borax, Inc. *(2006) 138 Cal. App. 4th 429, 41 Cal. Rptr. 3d 482* , concerned the validity of an administrative "wage order" issued by the Industrial Welfare Commission (IWC) that provided an exception from the general statutory requirement that two meal breaks be allowed for employees who work 12-hour shifts. (The California Legislature de-funded the IWC effective July 1, 2004. However, the IWC wage orders remain in effect, and the Division of Labor Standards Enforcement will continue to enforce the provisions of the wage orders (*see Lab. Code § 61*).

Generally, the IWC had the power under *Labor Code § 516* to adopt or amend working condition orders with respect to break periods and meal periods, except as provided by *Labor Code § 512*. Section 512 generally requires employers to provide meal periods, but it specifies certain exemptions from the meal-period requirements. For example, the statute provides exemptions for waivers of certain meal periods by employees, and for the wholesale baking industry, the motion picture industry, and the broadcasting industry (*see Lab. Code § 512(a), (c), (d)*).

This case involved an IWC order that created an additional exemption from the statutory meal-period requirements for

certain collective bargaining agreements (*see* Wage Order No. 16-2001, *8 Cal. Code Reg. § 11160*, P 10(E)). The court of appeal held that the IWC lacked authority to enact the order creating the additional exemption. Because the introductory clause of *Labor Code § 516* reads "[e]xcept as provided in Section 512 ...," the court held that the IWC's authority to adopt or amend orders under Section 516 could only be exercised in manner consistent with *Labor Code § 512*. Applying the maxim *expressio unius est exclusio alterius*, the court concluded that because Section 512 specifies certain exceptions to the general meal-break requirements, the IWC's creation of an addition exception was inconsistent with Section 512 and was therefore barred by Section 516 (*138 Cal. App. 4th 429, 434-440)* .

[4] Additional Authorities

[a] Expressio Unius Est Exclusio Alterius

One of the causes of action alleged in a cross complaint in *Cianci v. SuperiorCourt (1985) 40 Cal. 3d 903, 221 Cal. Rptr. 575, 710 P.2d 375* , was for conspiracy to violate the Cartwright Act (*Bus. & Prof. Code § 16700 et seq.*) in relation to a medical department in a hospital. The trial court sustained a demurrer to that cause of action on the ground the Cartwright Act does not apply to the medical profession. In reversing and holding that the Cartwright Act does apply to the medical profession, the Supreme Court looked to the comprehensive breadth of the act (*40 Cal. 3d 903, 916-918)* . The Court noted that even if the act's plain language did not compel the conclusion that it covered professions, the act had to be construed to cover them given the comprehensive scope of the statutory language; it would do violence to that language to limit the act's applicability on the ground that because they are not expressly included they are necessarily excluded. Indeed, the Court noted that under the rule of expressio unius est exclusio alterius, the act should be construed to apply to professions because labor unions were expressly excluded from the statute, so that other groups not excluded should be deemed included (*40 Cal. 3d 903, 918)* .

In *Conservatorship of Romo (1987) 190 Cal. App. 3d 279, 235 Cal. Rptr. 377* , the court of appeal held that *Prob. Code § 2580* does not permit a conservatee's will to be made and executed by his or her conservator, by his or her attorney, or by the probate court. The court reversed an order approving and confirming a conservatee's will written by the conservators of her person. The court examined the list of matters about which a conservator may exercise a "substituted judgment" for the conservatee, as set forth in *Prob. Code § 2580 et seq.* It was significant that the making of conservatee's will by a conservator was not listed. If that were the legislative purpose, it must reasonably be assumed that the Legislature would have said so. When a statute enumerates things on which it is to operate it is to be construed as excluding from its effect all those not expressly mentioned (*190 Cal. App. 3d 279, 284-285)* . Note that *Prob. Code § 2580* was later amended by the Legislature [*see* Stats. 1995, ch. 730, § 4], and now expressly authorizes a conservator or other interested person to petition the court for an order authorizing or requiring the conservator to make a will for the conservatee [*see Prob. Code § 2580(a), (b)(13)*].

In *De Weese v. Unick (1980) 102 Cal. App. 3d 100, 162 Cal. Rptr. 259* , approximately four years after a judgment declaring defendant to be the natural father of plaintiff's child was entered pursuant to defendant's stipulation, defendant made a motion for an order to compel plaintiff and her child to submit to a newly developed blood test. The court of appeal affirmed the trial court's order denying the motion, on the ground that res judicata precluded relitigation of the issue due to the final judgment of paternity despite defendant's argument that the judgment was not final because it included an order for child support, which was subject to modification or revocation under former Civ. Code § 4700(a) (*now Fam. Code § 3650 et seq.*). The court applied the maxim expressio unius est exclusio alterius in holding that the determination of paternity was final and not subject to modification or revocation, since former § 4700(a) referred to "[a]ny order for child support" and nowhere mentioned the modifiability or revocability of a judgment determining paternity (*102 Cal. App. 3d 100, 104-106)* .

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 217 STATUTORY INTERPRETATION
PART II. FORMS
B. INTERPRETATION OF WORDS OF STATUTE

21-217 California Points & Authorities § 217.46

§ 217.46 Supporting Contention That Statute Be Construed to Produce Internal Harmony and Avoid Surplusage [Code Civ. Proc. § 1858]

[1] FORM

[*The following may be included in a memorandum supporting or opposing a motion, or in a trial or appellate brief. It should be combined with the general memorandum set out in § 217.20.*]

_____ [*Specify statute*] SHOULD BE CONSTRUED TO PRODUCE INTERNAL HARMONY AND ACCORD MEANING TO EVERY WORD AND PHRASE.

A. All Provisions to Be Given Effect. In the construction of a statute, the office of the judge when there are several provisions or particulars is to adopt such a construction, if possible, as will give effect to all (*Code Civ. Proc. § 1858*; *Parris v. Zolin (1996) 12 Cal. 4th 839, 845, 50 Cal. Rptr. 2d 109, 911 P.2d 9*).

B. Preference for Interpretation Producing Internal Harmony and Avoiding Surplusage. Wherever reasonable, interpretations that produce internal harmony, avoid redundancy, and accord significance to each word and phrase are preferred (*Pacific Legal Foundation v. Unemployment Ins. Appeals Bd. (1981) 29 Cal. 3d 101, 114, 172 Cal. Rptr. 194, 624 P.2d 244*). An interpretation that renders particular terms of a statute surplusage ordinarily should be rejected; instead, every word should be given some significance (*Ste. Marie v. Riverside County Reg'l Park & Open-Space Dist. (2009) 46 Cal. 4th 282, 289-290, 93 Cal. Rptr. 3d 369, 206 P.3d 739* ; *City of San Jose v. Superior Court (1993) 5 Cal. 4th 47, 55, 19 Cal. Rptr. 2d 73, 850 P.2d 621* ; *Pugliese v. Superior Court (2007) 146 Cal. App. 4th 1444, 1451, 53 Cal. Rptr. 3d 681*).

[*Set forth additional points and authorities relating to other rules of statutory interpretation that aid in ascertaining legislative intent behind statute and support interpretation desired (see §§ 217.21 -217.24, 217.40 -217.45, 217.60 -217.63, 217.80 -217.86, 217.88).*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a party's contention that a statute should be construed in a particular manner. The form sets out the rule of statutory interpretation that a statute should be interpreted to produce internal harmony and to avoid making words and phrases used in the statute surplusage. Such an argument might be made in any type of action or proceeding in which a questionarises concerning how a statute should be construed. This form should be combined with the general memorandum presented in § 217.20, which relates to the construction of statutes to ascertain and effectuate the legislative intent. This form may also be combined with a memorandum relating to the procedural context in which the issue of statutory interpretation arises.

Counsel should also insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should demonstrate how the interpretation of the statute that he or she favors produces internal harmony and accords meaning to every word and phrase without redundancy. Counsel should demonstrate how, in contrast, the opposition's interpretation produces internal discord and makes some of the words or phrases redundant or surplusage.

[3] Discussion of Authorities

[a] All Provisions to Be Given Effect

Parris v. Zolin *(1996) 12 Cal. 4th 839, 50 Cal. Rptr. 2d 109, 911 P.2d 9* , is discussed in *§ 217.20[3][b]*.

[b] Preference for Interpretation Producing Internal Harmony and Avoiding Surplusage

Pacific Legal Foundation v. Unemployment Ins. Appeals Bd. *(1981) 29 Cal. 3d 101, 172 Cal. Rptr. 194, 624 P.2d 244* , involved an action for declaratory relief to overturn a precedent decision of defendant board. Plaintiff was a third party that had not been a party to the administrative proceedings, but challenged the validity of the decision as precedent pursuant to *Unemp. Ins. Code §§ 409-409.2*, which authorize such actions. Defendant board had awarded benefits to a claimant, but the superior court sustained plaintiff's contention that benefits should have been denied pursuant to *Unemp. Ins. Code § 1253(c)*, which requires claimants to be "available for work," because the claimant had failed to take initiative in seeking work beyond complying with the instructions given to him by the Employment Development Department pursuant to *Unemp. Ins. Code § 1253(e)*. Defendant board appealed to challenge this interpretation.

The Supreme Court reversed, holding that the superior court had erred in holding that even if a claimant did comply with seek-work instructions under *Unemp. Ins. Code § 1253(e)*, he or she may be ineligible under *Unemp. Ins. Code § 1253(c)* for failure to make a diligent search on his or her own initiative for all suitable work. The established meaning of "availability for work" under *Unemp. Ins. Code § 1253(c)* relates to restrictions the claimant imposes on the type of work he or she will accept, rather than to the search for work. This interpretation was supported by settled principles of statutory construction, including the rule that whenever reasonable, interpretations that produce internal harmony, avoid redundancy, and accord significance to each word and phrase are preferred. Noting that *Unemp. Ins. Code § 1253(e)* set forth specific work-search responsibilities and was the only part of the statute to expressly refer to the claimant's seek-work responsibilities, the Court held that to infer a broader seek-work obligation from the "availability" language of subdivision (c) than that stated in subdivision (e) would strain the former and render the latter pointless. Additionally, the specification of availability and seek-work requirements in separate subdivisions implied that the Legislature considered them to be discrete tests (*29 Cal. 3d 101, 114)* .

Ste. Marie v. Riverside County Reg'l Park & Open-Space Dist. *(2009) 46 Cal. 4th 282, 93 Cal. Rptr. 3d 369, 206 P.3d 739* , involved the interpretation of *Public Resources Code Sections 5540* and *5565*. Section 5540 provides, in part, that a regional-park or open-space district "may not validly convey any interest in any real property *actually dedicated* and used" for park or open-space purposes, without either (1) the consent of a majority of the voters of the district at a

special election, or (2) authorization by the Legislature issued after a resolution of intention has been adopted by at least a two-thirds vote of the board of directors of the district (emphasis added to quotation). Section 5565 provides, in part, that legal title to all property acquired by a district "shall immediately and by operation of law vest in the district, and shall be held by the district in trust for, and is *dedicated* and set apart for, the uses and purposes set forth in this article" (emphasis added). The question for the California Supreme Court in this case was whether real property acquired and "dedicated" under Section 5565 was also "actually dedicated" so as to trigger the consent or approval requirements of Section 5540 when the district decides to convey an interest in the property.

The Supreme Court noted that the same word--"dedicated"--is used in both statutes, and one rule of statutory construction specifies that a word given a particular meaning in one part of a law should be given the same meaning in other parts of the same law. However, the Court concluded that this axiom of construction did not control in this situation, because, although the same word is used in both statutes, the Legislature did not use it in the same way. Section 5565 states that land is "dedicated," while Section 5540 imposes conveyance restrictions on land that is "actually dedicated." Treating these two usages of "dedicated" as meaning the same thing would render the qualifying word "actually" surplusage, thus violating the rule of statutory construction that courts should, if possible, accord meaning to every word and phrase in a statute so as to better effectuate the Legislature's intent (*46 Cal. 4th 282, 289)* .

The Court found it significant that Section 5540 also provides that "[a]n easement or other interest in real property may be dedicated for park or open-space purposes, or both, by the adoption of a resolution by the board of directors, and any interest so dedicated may be conveyed only as provided in this section." The Court reasoned that if under Section 5565 real property is deemed dedicated for park or open-space purposes at the moment of acquisition, Section 5540's provision for dedication by adopting a resolution would be unnecessary and superfluous. The Court concluded that this anomaly strongly suggested that the Legislature could not have intended that real property should be deemed actually dedicated at the moment a district acquires it (*46 Cal. 4th 282, 289-290)* .

The Court found support for its conclusion in the established practices of regional-park and open-space districts, which for decades have interpreted Section 5540 as giving them (1) the option of acquiring land without formally dedicating it for park or open-space purposes, (2) the ability to hold land in a "land bank" until it is deemed appropriate for formal dedication, and (3) the authorization to later dedicate such property in perpetuity for park purposes (*46 Cal. 4th 282, 294)* .

City of San Jose v. Superior Court *(1993) 5 Cal. 4th 47, 19 Cal. Rptr. 2d 73, 850 P.2d 621* , involved the question whether a juvenile charged with resisting arrest and assault on a police officer could discover certain portions of police personnel records pertaining to the arresting officers. The trial court ordered disclosure of prior complaints alleging incidents of excessive force and racial prejudice by two of the arresting officers, as well as the results of the investigations of those complaints. The city sought, by petition for writ of mandate, to compel the trial court to vacate its order to the extent it required disclosure of the results of the police department's investigations. The court of appeal denied the petition. The city then petitioned the Supreme Court for the same relief.

The Supreme Court also denied the city's petition. The case was governed by *Evid. Code §§ 1043-1045*, which provide the procedure for the discovery of peace officers' personnel records. A portion of *Evid. Code § 1045(a)* provides that "[n]othing in this article shall be construed to affect the right of access to records of complaints, or investigations of complaints, or discipline imposed as a result of such investigations ... ." The Court found that that language clearly supported the order for disclosure of discipline imposed on the arresting officers. The city contended that another portion of *Evid. Code § 1045* compelled a different result. The city's interpretation, however, would have rendered the above-quoted language surplusage. The Court rejected the city's interpretation, stating "[w]e ordinarily reject interpretations that render particular terms of a statute mere surplusage, instead giving every word some significance" (*City of San Jose v. Superior Court (1993) 5 Cal. 4th 47, 55, 19 Cal. Rptr. 2d 73, 850 P.2d 621*).

In ***Pugliese v. Superior Court*** *(2007) 146 Cal. App. 4th 1444, 53 Cal. Rptr. 3d 681* , the issue was whether the

three-year statute of limitations for the tort of domestic violence barred a plaintiff from recovering damages for acts of domestic violence occurring during her marriage to the defendant, but more than three years before the filing of the complaint. Specifically, *Code of Civil Procedure § 340.15(a)* provides as follows: "In any civil action for recovery of damages suffered as a result of domestic violence, the time for commencement of the action shall be the later of the following: [P] (1) Within three years from the date of thelast act of domestic violence by the defendant against the plaintiff. ..." Construing this language, the court of appeal emphasized that in ascertaining the legislative intent, courts will adopt a statutory interpretation that avoids making any language mere surplusage. Thus, the court in this case held that the words "last act" in Section 340.15(a) would be rendered superfluous unless the statute is interpreted as adopting the continuing tort theory, allowing a domestic violence victim to recover damages for all acts of domestic violence occurring during the marriage, provided the victim proves a continuing course of abusive conduct and files suit within three years of the "last act" of domestic violence (*146 Cal. App. 4th 1444, 1451)* .

[4] Additional Authorities

[a] Preference for Interpretation Producing Internal Harmony and Avoiding Surplusage

Gay Law Students Assn. v. Pacific Tel. & Tel. Co. (1979) 24 Cal. 3d 458, 156 Cal. Rptr. 14, 595 P.2d 592 , involved, in part, a class action for declaratory and injunctive relief against defendant telephone company's alleged employment discrimination against homosexuals. The trial court sustained a demurrer to the complaint, and entered judgment favoring defendant. In reversing, the Supreme Court applied the rule of interpretation that in attempting to ascertain legislative intent, effect should be given, whenever possible, to the statute as a whole and to every word and clause thereof, leaving no part of the provision useless or deprived of meaning. The Court held that *Pub. Util. Code § 453(a)*, which prevents public utilities from subjecting any person to any prejudice or disadvantage as to rates, charges, service, facilities, *or in any other respect*, could not be narrowly interpreted to relate only to service-related discrimination, butthat it extended to discrimination in *any* respect, including employment (*Gay Law Students Assn. v. Pacific Tel. & Tel. Co. (1979) 24 Cal. 3d 458, 478, 156 Cal. Rptr. 14, 595 P.2d 592*).

Campbell v. Zolin (1995) 33 Cal. App. 4th 489, 39 Cal. Rptr. 2d 348 , involved a mandate proceeding to review a decision by the Department of Motor Vehicles (DMV) to suspend the petitoner's license for failing to comply with financial responsibility laws under the Vehicle Code. Petitioner had been involved in an accident on private property (a parking lot in an apartment complex) that resulted in damage to both the vehicle driven by petitioner and another vehicle, but no injuries. The primary issue on appeal was whether this accident was "a reportable off-highway accident" that was required to be reported to the DMV under *Veh. Code § 16000(a)*.

The court of appeal noted that *Veh. Code § 16000.1(a)* defines a reportable off-highway accident as one that (1) occurs off the street or highway, (2) involves a vehicle subject to registration under the Vehicle Code, and (3) results in damage to the property of any one person in excess of the statutory amount (at the time, $500) or in injury or death. However, *Veh. Code § 16000.1(b)* excludes from the definition any accident that "occurs off-highway in which damage occurs only to the property of the driver or owner of the motor vehicle and no bodily injury or death of a person occurs." The petitioner argued that § 16000.1(b) excluded *all* off-highway accidents that involve only property damage and that therefore the accident in this case was not reportable. The DMV argued that the accident was reportable because the § 16000.1(b) exclusion applies only when the accident involves no injury or death and all of the property damage is sustained by the driver whose compliance with financial responsibility laws is in question (*Campbell v. Zolin (1995) 33 Cal. App. 4th 489, 494-495, 39 Cal. Rptr. 2d 348*). The court of appeal noted that in construing a statute to ascertain legislative intent, the court must first look to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every, word, phrase, and sentence in pursuance of the legislative purpose. The court observed that a construction that makes some words surplusage is to be avoided. The court further stated that the words of the statute must be construed in context, keeping in mind the statutory purpose, and that statutes relating to the same subject must be harmonized, both internally and with each other, to the extent possible. Applying these rules of construction, the court held that petitioner's construction of *Veh. Code § 16000.1(b)*

was unsupportable because it would render as mere surplusage the portion of *Veh. Code § 16000.1(a)* defining a reportable off-highway accident as one that results in property damage exceeding $500. Had the Legislature intended to exclude from the reporting requirements all off-highway accidents involving only property damage, it would not have included property damage as a component of the general definition of a reportable off-highway accident (*33 Cal. App. 4th 489, 495)* . The court further held that petitioner's interpretation clashed with the Legislature's clear purpose of broadening financial responsibility laws to include off-highway accidents resulting in damage to vehicles, buildings, and other property (*Campbell v. Zolin (1995) 33 Cal. App. 4th 489, 495-496, 39 Cal. Rptr. 2d 348*).

In *Clavell v. North Coast Business Park (1991) 232 Cal. App. 3d 328, 283 Cal. Rptr. 419* , the court construed *Lab. Code § 98.2*, which provides a 10-day limit on notice of appeals from administrative rulings and, by a 1988 amendment, incorporates the mail-extension provisions of *Code Civ. Proc. § 1013*. A literal reading of the statutes seemed to make the incorporation meaningless because § 1013 excepted "appeals" from its coverage. The court held that "appeals" refer only to appeals from judicial decisions, reasoning that a literal reading would make the 1988 amendment a meaningless act of the Legislature (*Clavell v. North Coast Business Park (1991) 232 Cal. App. 3d 328, 331-332, 283 Cal. Rptr. 419*).

In *Los Angeles County Safety Police Assn. v. County of Los Angeles (1987) 192 Cal. App. 3d 1378, 237 Cal. Rptr. 920* , the court of appeal held that former Penal Code § 830.4, relating to peace officers, was intended by the Legislature to apply to a charter county. In reaching this holding, the court said that the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole, that a statute should not be given a construction that results in rendering one of its provisions inconsequential, that an interpretation that would render terms surplusage should be avoided, and that every word should be given some significance, leaving no part useless or devoid of meaning (*Los Angeles County Safety Police Assn. v. County of Los Angeles (1987) 192 Cal. App. 3d 1378, 1390, 237 Cal. Rptr. 920*).

In *Leeth v. Workers' Comp. Appeals Bd. (1986) 186 Cal. App. 3d 1550, 231 Cal. Rptr. 468* , the appellate court interpreted *Lab. Code § 4453(c)(2)*, relating to the average weekly earnings of a worker injured in the lower paying of two jobs that he held. The court said that (1) a statute should not be given a construction that results in rendering one of its provisions inconsequential; (2) in attempting to ascertain the legislative intention, effect should be given, whenever possible, to the statute as a whole and to every word and clause of it, leaving no part of the provision useless or deprived of meaning; and (3) in short, a statute should be construed so that effect is given to all its provisions, leaving no part superfluous or inoperative, or void or insignificant, and so that one section will not destroy another (*Leeth v. Workers' Comp. Appeals Bd. (1986) 186 Cal. App. 3d 1550, 1556, 231 Cal. Rptr. 468*).

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[Reserved]

§§ 217.47[Reserved]

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C. INTERPRETATION IN RELATION TO OTHER STATUTES

21-217 California Points & Authorities § 217.60

§ 217.60 Supporting Contention That Statute Be Construed in Harmony With Whole System of Law of Which It Is Part So That All May Have Effect

[1] FORM

[*The following may be included in a memorandum supporting or opposing a motion, or in a trial or appellate brief. It should be combined with the general form set out in § 217.20.*]

_____ [*Specify statute*] SHOULD BE CONSTRUED IN THE CONTEXT OF THE WHOLE SYSTEM OF LAW OF WHICH IT IS PART SO THAT ALL MAY BE HARMONIZED AND HAVE EFFECT.

A. Construe Statutes on Same Subject Together. Statutes in pari materia are those that relate to the same person or thing, or to the same class of persons or things. In the construction of a particular statute, or in the interpretation of any of its provisions, all acts relating to the same subject, or having the same general purpose, should be read in connection with the particular statute or provisions, as together constituting one law (*Isobe v. Unemployment Ins. Appeals Bd. (1974) 12 Cal. 3d 584, 590, 116 Cal. Rptr. 376, 526 P.2d 528* ; *Kendall-Brief Co. v. Superior Court (1976) 60 Cal. App. 3d 462, 466, 131 Cal. Rptr. 515*).

B. Construe in Harmony With Whole System of Law. Every statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect (*Landrum v. Superior Court (1981) 30 Cal. 3d 1, 14, 177 Cal. Rptr. 325, 634 P.2d 352* ; *O'Brien v. Dudenhoeffer (1993) 16 Cal. App. 4th 327, 332, 19 Cal. Rptr. 2d 826*). Whenever possible, statutes must be reconciled and interpretations that would require one or another to be ignored must be avoided. When the relevant statutes may be reconciled, their provisions cannot be disregarded (*Fuentes v. Workers' Comp. Appeals Bd. (1976) 16 Cal. 3d 1, 7, 128 Cal. Rptr. 673, 547 P.2d 449*).

[*Optional*] **C. Statutes Enacted in Same Legislative Session Especially to Be Construed Together.** Application of the rule that statutes in pari materia should be construed together is most justified, and has the greatest probative force, in the case of statutes relating to the same subject matter that were passed at the same session of the Legislature, especially if they were passed or approved or take effect on the same day (*International Business Machines v. State*

Bd. of Equalization (1980) 26 Cal. 3d 923, 932, 163 Cal. Rptr. 782, 609 P.2d 1).

[*Optional*] **D. Repeal by Implication Not Favored.** Repeal by implication, the rule that gives effect to the more recently enacted of laws that are in irreconcilable conflict, is not favored and is recognized only when there is no rational basis for harmonizing the potentially conflicting laws (*Nickelsberg v. Workers' Comp. Appeals Bd. (1991) 54 Cal. 3d 288, 298, 285 Cal. Rptr. 86, 814 P.2d 1328* ; *Fuentes v. Workers' Comp. Appeals Bd. (1976) 16 Cal. 3d 1, 7, 128 Cal. Rptr. 673, 547 P.2d 449*). It should not be presumed that the Legislature in the enactment of statutes intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication (*Fuentes v. Workers' Comp. Appeals Bd. (1976) 16 Cal. 3d 1, 7, 128 Cal. Rptr. 673, 547 P.2d 449*).

[*Optional*] **E. No Implied Repeal of Statutes Enacted by Same Bill.** When both statutes are part of the same bill, enacted and chaptered together, the rule requiring the courts to reconcile the statutes is even more compelling, for neither can be viewed as an implied repeal of the other (*International Business Machines v. State Bd. of Equalization (1980) 26 Cal. 3d 923, 932, 163 Cal. Rptr. 782, 609 P.2d 1*).

[*Optional*] **F. Different Codes and Legislative Acts To Be Construed Together.** The different codes blend into each other and constitute a single statute for the purposes of statutory construction, and the legislative intent may be determined not only from an individual code but the whole body of law (*Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal. App. 3d 120, 125, 174 Cal. Rptr. 744*). Similarly, if two potentially conflicting statutes are contained in different legislative acts, the courts will strive to effectuate the purpose of each by harmonizing them, if possible, in a way that allows both to be given effect (*Chavez v. City of Los Angeles (2010) 47 Cal. 4th 970, 986, 104 Cal. Rptr. 3d 710, 224 P.3d 41*).

[*Set forth additional points and cite authorities relating to other rules of statutory interpretation that aid in ascertaining legislative intent behind statute and support interpretation desired (see §§ 217.21 -217.24, 217.40 -217.46, 217.63, 217.80 -217.86, 217.88).*]

[2] Comments

[a] Use of Form

The foregoing form may be submitted in support of a party's contention that a statute should be construed in a particular manner. The form sets out the rule of statutory interpretation that every statutemust be construed with reference to the whole system of law of which it is part so that all may be harmonized and be given effect. Such an argument might be made in any type of action or proceeding in which a question arises concerning how a statute should be construed. These points and authorities should be combined with the general form *set forth in § 217.20*, which relates to the construction of statutes to ascertain and effectuate the legislative intent.

The foregoing form may be combined with a memorandum relating to the procedural context in which the issue of statutory interpretation arises. This form may also be adapted for use in a trial or appellate brief.

Counsel should also insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set out all the statutory provisions bearing on the issue presented in the case and demonstrate how the construction he or she advocates allows all the relevant statutes to be given effect. When the statute to be construed is part of a code or act that includes sections setting forth definitions and rules of construction that govern or relate to interpretation of that code or act, counsel may wish to include reference to those sections [*see, e.g., Civ. Code §§ 1802-1802.21* (Unruh Act definitions); *Prob. Code § 1 et seq.* (Probate Code preliminary provisions and definitions)].

[b] Opposing Memoranda

In an appropriate case, the forms *set out in §§ 217.61* and *217.62* may be used to oppose the contention supported by the foregoing form.

[3] Discussion of Authorities

[a] Construe Statutes on Same Subject Together

In ***Isobe v. Unemployment Ins. Appeals Bd.*** *(1974) 12 Cal. 3d 584, 116 Cal. Rptr. 376, 526 P.2d 528* , one category of plaintiffs had been awarded disability benefits by a referee. More than 10 days after the referee's decision, defendant board assumed jurisdiction over the disability claims and reversed the referee's decision on the ground that plaintiffs actually discontinued work because of a trade dispute. Plaintiffs appealed from a judgment denying writ of mandate to set aside defendant's decision.

The Supreme Court reversed as to the disability category of plaintiffs, holding that defendant board lacked authority to assume jurisdiction under *Unemp. Ins. Code § 1336* because under *Unemp. Ins. Code § 1334* the referee's decision became final when there was no appeal pursuant to *Unemp. Ins. Code § 1336* within 10 days after the decision was mailed. Applying the rule of statutory construction set forth in Paragraph A of the foregoing form, the Court held that the 10-day time limit provided for in *Unemp. Ins. Code § 1334* (since amended to provide a 20-day limit) applied to reviews initiated by defendant board on its own motion as well as to appeals by parties or the Director of Human Resources Development under *Unemp. Ins. Code § 1336* (*12 Cal. 3d 584, 590-591)* .

Kendall-Brief Co. v. Superior Court *(1976) 60 Cal. App. 3d 462, 131 Cal. Rptr. 515* , involved a dispute over petitioner's right to use a private street as an easement over the property of the real parties in interest. Real parties in interest recorded a notice of pendency of action (lis pendens) against the property to which petitioner claimed the easement was appurtenant, as well as against the road. Petitioner moved to expunge the lis pendens as to its property, and when the superior court denied the motion, petitioner sought a writ of mandate from the court of appeal.

In denying the writ, the court of appeal noted that while former Code Civ. Proc. § 409 allowed a lis pendens to be recorded in an action concerning real property or affecting the title or right of possession of real property, former Code Civ. Proc. § 409.1 provides only that if the action does not affect title to or the right of possession to real property, the lis pendens may be expunged. Real parties in interest argued that the underlying litigation concerned real property, so that the lis pendens could not be expunged under former Code Civ. Proc. § 409.1. The court rejected this argument, noting that the argument overlooked the fact that former Code Civ. Proc. §§ 409 and 409.1 relate to the same subject matter and are to be interpreted together under the usual rule of statutory construction. Stating the rule set out in Paragraph A of the foregoing form, the court read the two sections together to hold that the phrase "concerning real property" had the same meaning as "affecting the title or the right of possession of real property" (*60 Cal. App. 3d 462, 466-467)* . The court went on, however, to hold that an action involving the existence of an easement over the servient tenement affects the title or the right of possession of the dominant tenement, and that, therefore, the lis pendens should not be expunged (*60 Cal. App. 3d 462, 467-469)* . Note that the lis pendens law, including Sections 409 and 409.1, was repealed and reenacted in substantially revised form in 1992 [*see Code Civ. Proc. § 405 et seq.*]. "Use of an easement" is now expressly within the definition of "real property claim" for which a lis pendens may be recorded [*see Code Civ. Proc. § 405.4*].

[b] Construe in Harmony With Whole System of Law

In ***Landrum v. Superior Court*** *(1981) 30 Cal. 3d 1, 177 Cal. Rptr. 325, 634 P.2d 352* (discussed in *§ 217.20[4][a]*), defendant sought a writ of prohibition to prevent prosecution on a burglary information that had been made against him after the magistrate dismissed a previous complaint charging the identical offense. The Supreme Court was confronted

with thequestion of whether the 10-day period within which a criminal defendant's preliminary examination had to be held under former Penal Code § 859b (prior to its 1980 amendment) was required to be calculated from the time of defendant's first arraignment or could be measured from the time of his or her arraignment on the second complaint. This question turned on the magistrate's authority to dismiss a complaint without hearing evidence. The Court analyzed two statutes in this regard, concluding that under Penal Code § 871 the magistrate could only dismiss after a hearing. The Court found authority, however, under former Penal Code § 1385 (now *Penal Code § 1385(a)*), which allowed dismissals in the furtherance of justice, and overruled a previous Supreme Court decision that had held that former § 1385 did not apply to magistrates. The Court found repudiation of the prior case's interpretation of former § 1385 to be necessary in order to give effect to *Penal Code § 859b* and reconcile it with *Penal Code § 871*, citing previous Supreme Court cases for the cardinal rule of statutory construction that every statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect (*30 Cal. 3d 1, 14)* .

O'Brien v. Dudenhoeffer *(1993) 16 Cal. App. 4th 327, 332, 19 Cal. Rptr. 2d 826* , involved the question of whether the appointment of a temporary conservator under *Prob. Code § 1872* is a judicial determination of incapacity to give away real property. In construing *Prob. Code § 1872* the court took note of *Civ. Code § 40*, which provides that the establishment of a conservatorship "is a judicial determination of the incapacity of the conservatee." The court held that when the two statutes are read together they "inexorably compel the conclusion that an order for conservatorship, temporary or permanent, is a judicial determination of incapacity to give away real property." The court based its construction on the rule that a statute must be construed in the context of the entire statutory scheme of which it is a part, in order to achieve harmony among its parts. The court stated that "[t]his principle applies even though the two provisions are in separate codes" (*16 Cal. App. 4th 327, 332)* .

The petitioner in ***Fuentes v. Workers' Comp. Appeals Bd.*** *(1976) 16 Cal. 3d 1, 128 Cal. Rptr. 673, 547 P.2d 449* , sought review of an award of benefits made by the respondent board for a permanent disability caused by an industrial injury. The petitioner challenged the method used by respondent to compute the amount of the award under *Lab. Code § 4658* to take into account petitioner's previous permanent disability, for which compensation could not be awarded because of former Lab. Code § 4750 (repealed as of Apr. 19, 2004). Former Section 4750 provided that employers were liable to compensate only for the portion of disability caused by an industrial injury, as though no prior disability had existed.

The Supreme Court affirmed the award as calculated, finding that the method favored by petitioner for computing the award would improperly enhance the benefits on the basis of preexisting disabilities. Use of those methods to calculate an award under *Lab. Code § 4658* would have effectively repealed part of former Section 4750 (*16 Cal. 3d 1, 6-7)* . The petitioner urged that there was an irreconcilable conflict between the two sections, and that Section 4658, as the more recently enacted provision, had to be given effect. The Court rejected this contention, however, stating that whenever possible, courts must reconcile statutes and seek to avoid interpretations that would require one statute or the other to be ignored, and that the rule giving precedence to the later statute is invoked only if the two cannot be harmonized (*16 Cal. 3d 1, 7)* . The Court found that the statutes, as applied by the board, were complementary rather than contradictory, and the Court concluded that when relevant statutes may be reconciled, their provisions cannot be disregarded (*16 Cal. 3d 1, 7-8)* .

[c] Statutes Enacted in Same Legislative Session Especially to Be Construed Together

In ***International Business Machines v. State Bd. of Equalization*** *(1980) 26 Cal. 3d 923, 163 Cal. Rptr. 782, 609 P.2d 1* , plaintiff recovered a sales tax refund for sales tax paid on leases of personal property. Former Rev. & Tax. Code § 6006.3 provided that taxable leases included only original or renewals of original leases entered into after August 1, 1965, and *Rev. & Tax. Code § 6391* provides for a sales tax exemption for rentals payable under a lease of personal property when the lessor is unconditionally obligated to lease the property for an amount fixed by the lease prior to August 1, 1965. Plaintiff's refund related to sales tax on leases executed prior to August 1, 1965, but subject to modification or cancellation. Defendant board appealed from the judgment in plaintiff's favor.

The Supreme Court reversed, rejecting plaintiff's contention that former Rev. & Tax. Code § 6006.3 provided a broader exemption than that provided by *Rev. & Tax. Code § 6391*. The Court sustained defendant's contention that the two statutes had to be construed together, reading the § 6006.3 exemption in a narrow sense to avoid inconsistency with § 6391 (*26 Cal. 3d 923, 930-935)* . Both sections were enacted simultaneously as part of the same bill; the Court applied the established rule of statutory construction that similar statutes should be construed in light of one another. The Court cited *People v. Caudillo (1978) 21 Cal. 3d 562, 585, 146 Cal. Rptr. 859, 580 P.2d 274* , for the statement that application of the rule that statutes in pari materia should be construed together is most justified and has the greatest probative force when statutes relating to the same subject matter were passed at the same session of the Legislature, especially if they were passed or approved or took effect on the same day (*26 Cal. 3d 923, 932)* .

[d] Repeal by Implication Not Favored

In ***Nickelsberg v. Workers' Comp. Appeals Bd.*** *(1991) 54 Cal. 3d 288, 285 Cal. Rptr. 86, 814 P.2d 1328* , a workers' compensation petitioner sought to reopen an award based on new and further temporary disability more than nine years after the initial award. The Appeals Board held that the original award of medical treatment did not implicitly carry with it a commensurate award of temporary total disability after the time and jurisdictional limits of *Lab. Code §§ 5410* and *5804* had expired.

In upholding the board, the Supreme Court construed amendments to *Lab. Code § 4656*, eliminating a 240-week limit within five years on temporary total disability (*Lab. Code § 4656* was later amended to impose a different limit on temporary total disability payments for some injuries), so as not to impliedly repeal the time and jurisdictional limits of *Lab. Code §§ 5410* and *5804* (*54 Cal. 3d 288, 298)* . The Court harmonized the three provisions by analyzing the legislative placement and classification given them and related provisions in the Labor Code. Section 4656 is in Part 2, "Computation of Compensation," Chapter 2, "Compensation Schedules." Section 5410 is found in Part 4, "Compensation Proceedings," Chapter 2, "Limitations of Proceedings;" and Section 5804 is found in Part 4, "Compensation Proceedings," Chapter 6, "Findings and Awards." The Court concluded that these classifications made it unlikely that the Legislature intended the amendment to § 4656 to implicitly alter either the time limitations for initiating proceedings under § 5410 or the jurisdictional restrictions of § 5804. The Legislature was presumed to be aware of the long history of judicial interpretation of §§ 5410 and 5804 (*54 Cal. 3d 288, 298 n.7*).

The facts and procedural background of ***Fuentes v. Workers' Comp. Appeals Bd.*** *(1976) 16 Cal. 3d 1, 128 Cal. Rptr. 673, 547 P.2d 449* , are *discussed under § 217.60[3][b]*. In *Fuentes*, the Supreme Court noted that two of the possible constructions of *Lab. Code § 4658* would require the Court to discern a legislative intent to effect a repeal or partial repeal of former Lab. Code § 4750 (later repealed as of Apr. 19, 2004). The Court stated that repeals by implication are not favored and are recognized only when there is no rational basis for harmonizing two potentially conflicting laws, citing *In re White (1969) 1 Cal. 3d 207, 212, 81 Cal. Rptr. 780, 460 P.2d 980* . Quoting *Theodor v. Superior Court (1972) 8 Cal. 3d 77, 92, 104 Cal. Rptr. 226, 501 P.2d 234* , the Court further stated that it should not be presumed that the Legislature in the enactment of statutes intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication. Applying the rule of statutory construction that a specific statute prevails over a general one, the Court held that *Lab. Code §§ 4658* and *4750* were complementary, rather than contradictory, and functioned together quite harmoniously (*16 Cal. 3d 1, 6-7)* .

[e] No Implied Repeal of Statutes Enacted by Same Bill

The facts and procedural background of ***International Business Machines v. State Bd. of Equalization*** *(1980) 26 Cal. 3d 923, 163 Cal. Rptr. 782, 609 P.2d 1* , are *discussed under § 217.60[3][c]*. There, in reversing, the Supreme Court noted that both statutes were part of the same bill, enacted and chaptered together, and held that the rule requiring the courts to reconcile the statutes is even more compelling in such a case, for neither can be viewed as an implied repeal of the other (*26 Cal. 3d 923, 932)* .

[f] Different Codes and Legislative Acts To Be Construed Together

In ***Winzler & Kelly v. Department of Industrial Relations*** *(1981) 121 Cal. App. 3d 120, 174 Cal. Rptr. 744* , plaintiffs sought a writ of mandate to review defendant department's determination that a certain class of workers was covered by the prevailing wage law applicable to public contractors and to review defendant's determination of the rate. The superior court granted relief to plaintiffs on the ground that administrative hearings should have been held before the determinations had been issued, and defendant appealed.

In reversing, the court of appeal held that in order to determine the issue of whether or not a prior hearing was required before making a coverage determination under the prevailing wage law, it was necessary to consider the Administrative Procedure Act (*Gov. Code § 11370 et seq.*), which establishes minimum procedural requirements applicable to quasi-legislative and quasi-judicial actions by state agencies, together with the prevailing wage law. The court stated that in considering them together, it followed the established principles that hold that the different codes blend into each other and constitute a single statute for the purposes of statutory construction and that the legislative intent may be determined not only from an individual code but from the whole body of law (*121 Cal. App. 3d 120, 124-125)* .

In ***Chavez v. City of Los Angeles*** *(2010) 47 Cal. 4th 970, 104 Cal. Rptr. 3d 710, 224 P.3d 41* , the California Supreme Court dealt with a potential conflict between *Code Civ. Proc. § 1033(a)* and *Gov. Code § 12965(b).* Section 1033(a) authorizes a trial court to deny costs to a prevailing plaintiff in an unlimited civil case if the judgment could have been recovered in a limited civil case. Section 12965(b), which is part of the California Fair Employment and Housing Act (FEHA), gives the trial court discretion to award attorney's fees and costs to a prevailing plaintiff in a FEHA action. The Court explained that even if two potentially conflicting statutes are contained in different legislative acts, the courts will strive to effectuate the purpose of each by harmonizing them, if possible, in a way that allows both to be given effect (*47 Cal. 4th 970, 986)* . Applying that approach in this case, the Court gave effect to both provisions, concluding that section 1033(a) gives a trial court discretion to deny attorney's fees to a plaintiff who prevails on a FEHA claim but recovers an amount that could have been recovered in a limited civil case. In exercising that discretion, however, the trial court must give due consideration to the policies and objectives of the FEHA in general and of its fee-shifting provision in particular (*47 Cal. 4th 970, 986-989)* .

[4] Additional Authorities

[a] Construe Statutes on Same Subject Together

In *Summers v. Newman (1999) 20 Cal. 4th 1021, 86 Cal. Rptr. 2d 303, 978 P.2d 1225* , an employee appealed a trial court's order that the employer was entitled to recover attorney fees and costs in addition to full reimbursement for workers' compensation benefits. The parties had settled a lawsuit against a third party for damages to compensate the employee for injuries sustained in a motor vehicle accident. The court of appeal affirmed the trial court's award and the Supreme Court granted review. The issue before the Court was how attorney fees and costs are to be allocated when an injured employee and his employer hire separate attorneys, both of whom actively participate in litigation against the third party tortfeasor that terminates successfully by settlement. The employer argued that *Lab. Code § 3860(e)* unambiguously established the employer's right to recover all reimbursable compensation costs without deduction for litigationexpenses. The Court disagreed that the language of section 3860 was unambiguous. To resolve ambiguities, the Court stated, courts may employ a variety of extrinsic construction aids, including legislative history, and will adopt the construction that best harmonizes the statute both internally and with related statutes (*20 Cal. 4th 1021, 1026)* . In this case, the Court looked to related statutory provisions that the Court had authoritatively construed. Section 3860, the Court observed, is closely related to *Lab. Code § 3856* (distribution of proceeds of settlement with third party tortfeasor), which the Court construed in *Quinn v. State of California (1975) 15 Cal. 3d 162, 124 Cal. Rptr. 1, 539 P.2d 761* . Under *Quinn*, the employer and the employee were viewed as having equivalent claims against the third party, comparable to co-beneficiaries under a will seeking to recover an amount owed to the estate. The Court was aware of no analogous situation in which all attorney fees and other litigation expenses are charged against the share of

just one of the parties benefiting from the litigation (*20 Cal. 4th 1021, 1031-1032)* . Thus, the Court concluded that construing section 3860(e) to require that the fee paid to the employer's attorney be deducted from the employer's reimbursable compensation costs is more consistent with general principles of law applied in analogous situations (*20 Cal. 4th 1021, 1031)* .

In *Ohio Farmers Ins. Co. v. Quin (1988) 198 Cal. App. 3d 1338, 244 Cal. Rptr. 359* , an insurer brought an action for declaratory relief to determine whether coverage was excluded, based on entrustment of the automobile by a person expressly excluded from coverage. The court of appeal, in affirming the existence of coverage, interpreted the 1982 version of *Ins. Code § 11580.1(d)(1)* and *(e)* (exclusion of named persons) in the context of the statutory insurance scheme regarding coverage of permissive users. The court held, in part, that language in one section of a statute should be construed consistently with language of other sections and with the purpose of the entire statutory scheme (*198 Cal. App. 3d 1338, 1348)* .

[b] Construe in Harmony With Whole System of Law

In *California Mfrs. Assn. v. Public Utilities Com. (1979) 24 Cal. 3d 836, 157 Cal. Rptr. 676, 598 P.2d 836* , the Supreme Court stated that statutes must be harmonized both internally and with each other, to the extent possible. The Court applied this rule in holding that rebates received by utilities from suppliers had to be refunded to the utilities' customers on the basis of prior usage under *Pub. Util. Code § 453.5*, rather than placed in a reserve account so as to offset future rates under *Pub. Util. Code § 792.5* (*24 Cal. 3d 836, 844)* . The Court found that its construction of *Pub. Util. Code § 453.5* was reasonably inferable from that section's own language and reflected its purpose while not impairing the implementation of § 792.5 (*24 Cal. 3d 836, 848)* .

In *Neumarkel v. Allard (1985) 163 Cal. App. 3d 457, 209 Cal. Rptr. 616* , certificated employees of a county superintendent of schools, who had been dismissed from their administrative and supervisory positions, filed a writ of mandate to compel the superintendent to comply with termination procedures set forth in *Educ. Code §§ 44949* and *44955*. By their own terms, these statutes limit their benefits to probationary or permanent school employees. *Educ. Code § 1296*, applicable to employees of a county superintendent, limits permanent status to persons employed for the requisite period "in a teaching position." In contrast, *Educ. Code § 44897*, applicable to school district employees, requires only that the employee be in a position requiring certification, which includes administrative and other nonteaching positions. Applying the principle that various parts of a statutory enactment must be harmonized by considering the particular clause or section in a context of the statutory framework as a whole, the court refused to apply a broader meaning to "teaching position" as used in *Educ. Code § 1296*, so as to include administrative and other nonteaching positions (*163 Cal. App. 3d 457, 465)* . The court also applied the principle that a statute dealing expressly with a particular subject controls and takes priority over a general statute, and held that the employees must have permanent or probationary status to receive the termination benefits of *Educ. Code § 44949* or *44955* (*163 Cal. App. 3d 457, 463)* . Since the county superintendent employees did not have the requisite teaching positions to attain permanent or probationary status, they were not entitled to the termination benefits (*163 Cal. App. 3d 457, 464-466)* .

[c] Repeal by Implication Not Favored

Board of Supervisors v. Lonergan (1980) 27 Cal. 3d 855, 167 Cal. Rptr. 820, 616 P.2d 802 , cert. denied, 450 U.S. 918, 101 S. Ct. 1362, 67 L. Ed. 2d 344 (1981) , involved a dispute over the application of Cal. Const., art. XIIIA. Plaintiff argued that art. XIIIA applied to property on the unsecured tax roll for 1978-1979, consisting of personal property and a limited number of possessory interests in real property, as well as to property on the secured tax roll, which includes most real property. In reversing a declaratory judgment in plaintiff's favor, the Supreme Court found that art. XIIIA could only apply to property on the 1978-1979 unsecured roll if art. XIIIA had repealed *Cal. Const., art. XIII, § 2*. Applying the rule that the law shuns repeal by implication, the Court held that Cal. Const., art. XIIIA did not apply to such property. The presumption against implied repeals is so strong that when a new enactment conflicts with an existing provision, in order for the second law to repeal or supersede the first, the former must constitute a revision of

the entire subject so that the court may say that it was intended to be a substitute for the first (*27 Cal. 3d 855, 868)* .

Defendant in *Hays v. Wood (1979) 25 Cal. 3d 772, 160 Cal. Rptr. 102, 603 P.2d 19* , was a city councilman who challenged the disclosure requirements of the conflict-of-interest provisions of the Political Reform Act of 1974 (*Gov. Code § 81000 et seq.*). He argued, among other things, thatformer Gov. Code § 87207, which required disclosure of the names of persons who paid legal or brokerage fees to a business entity in which a person required to make disclosures had an interest, conflicted with the attorney-client privilege provided for in *Evid. Code § 950 et seq.* The Supreme Court stated there is a presumption against repeals by implication, and that they will occur only when the two acts are so inconsistent that there is no possibility of concurrent operation, or when the later provision gives undebatable evidence of an intent to supersede the earlier, and that the courts are bound to maintain the integrity of both statutes if they may stand together. The Court, although subsequently holding former Gov. Code § 87207 unconstitutional for violating attorneys' and real estate brokers' rights to equal protection, first held that there was no conflict between former Gov. Code § 87207 and *Evid. Code §§ 950-962*, because the privilege does not ordinarily protect the client's identity. In the limited situations when the privilege does apply to the client's identity, that identity may be protected by the public agency charged with the enforcement of former Gov. Code § 87207 (*25 Cal. 3d 772, 784-785)* .

In *Sanford v. Garamendi (1991) 233 Cal. App. 3d 1109, 284 Cal. Rptr. 897* , the court held that the repeal of *Ins. Code § 1643* by Proposition 103 did not impliedly repeal *Fin. Code §§ 772* and *1208*. The court reasoned that repeal by implication will be found only if (1) the two acts are so inconsistent that there is no possibility of concurrent operation, or (2) the later provision gives undebatable evidence of an intent to supersede the earlier. Further, the court stated that a claim of repeal by implication is even more suspect when the Legislature repeals certain acts and excludes mention of other acts that refer to the same subject (*233 Cal. App. 3d 1109, 1122)* . Analyzing ballot materials for Proposition 103 and for Proposition 100, which expressly repealed *Fin. Code § 772*, the court reasoned that reconciliation was possible because, although Proposition 103 permitted banks to enter the insurance business, the electorate may have intended the prohibition of bank subsidiaries under former Fin. Code § 772(b) (deleted operative Jan. 1, 2004) to continue (*233 Cal. App. 3d 1109, 1123-1124)* . The remainder of *Fin. Code § 772* was repealed effective January 1, 2009 (Stats. 2008, ch. 125, § 49).

California State Auto. Assn. v. Franchise Tax Bd. (1987) 191 Cal. App. 3d 1253, 237 Cal. Rptr. 44 , involved interpretation of *Rev. & Tax. Code § 24405*, which provides a deduction for organizations operated on a cooperative or mutual basis. The Franchise Tax Board contended that the automobile association was not eligible for the deduction for the taxable years 1968-1971 because it was not organized under *Corp. Code § 12200 et seq.*, governing cooperative corporations. Both parties agreed that during the relevant period, the association could not have been organized under the cooperative corporations statutes because it was neither an ultimate producer or consumer. The court of appeal said that the Board's argument required the assumption that, in enacting the cooperative corporations statutes in 1939, the Legislature, without expressly saying so, intended to repeal the deduction for organizations that were operated cooperatively or mutually but could not become a "cooperative corporation" under the 1939 law. In affirming the allowance of the deduction, the court said it was fundamental that amendments or repeals by implication are disfavored and are to be recognized only when there is an irreconcilable conflict between statutes. Moreover, it should not be presumed that the Legislature, in enacting statutes, intends to overthrow long-established principles of law unless such intention is made clear by declaration or necessary implication (*191 Cal. App. 3d 1253, 1261-1262)* .

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 217 STATUTORY INTERPRETATION
PART II. FORMS
C. INTERPRETATION IN RELATION TO OTHER STATUTES

21-217 California Points & Authorities § 217.61

§ 217.61 Supporting Contention That Specific Provision Governs General Provision Broad Enough to Cover Same Subject

[1] FORM

[*The following may be included in a memorandum supporting a motion, or in a trial or appellate brief. It should be combined with the general memorandum set out in § 217.20.*]

THE COURT SHOULD APPLY _____ [*specify statute*] TO THIS CASE BECAUSE IT IS A SPECIFIC PROVISION RELATING TO THE PARTICULAR SUBJECT INVOLVED AND THEREFORE GOVERNS _____ [*specify general statute*], WHICH IS A GENERAL STATUTE, EVEN THOUGH _____ [*specify general statute*] STANDING ALONE WOULD BE BROAD ENOUGH TO INCLUDE THE PARTICULAR SUBJECT INVOLVED.

A. Specific Provision Governs General. When a general and particular provision are inconsistent, the latter is paramount to the former (Code Civ. Proc. § 1859). A specific provision relating to a particular subject will govern a general provision, even though the general provision standing alone would be broad enough to include the subject to which the specific provision relates (*San Francisco Taxpayers Assn. v. Board of Supervisors (1992) 2 Cal. 4th 571, 577, 7 Cal. Rptr. 2d 245, 828 P.2d 147* ; *Jones v. Pierce (1988) 199 Cal. App. 3d 736, 742, 245 Cal. Rptr. 149*).

[*Optional*] **B. Specific Provision as Exception to General Provision Regardless of Which Enacted First.** The special act will be considered as an exception to the general statute whether it was passed before or after such general enactment (*Agricultural Labor Relations Bd. v. Superior Court (1976) 16 Cal. 3d 392, 420, 128 Cal. Rptr. 183, 546 P.2d 687* ; *Nunes Turfgrass, Inc. v. Vaughan-Jacklin Seed Co., Inc. (1988) 200 Cal. App. 3d 1518, 1539, 246 Cal. Rptr. 823*).

[*Set forth additional points and authorities relating to other rules of statutory interpretation that aid in ascertaining legislative intent behind statute and support interpretation desired (see §§ 217.21 -217.24, 217.40 -217.46, 217.62, 217.80 -217.86, 217.88).*]

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of a party's contention that a statute should be construed in a particular manner. The form sets out the rule of statutory interpretation that specific provisions govern general provisions that, standing alone, would apply to the same subject. Such an argument might be made in any type of action or proceeding in which a question arises concerning how a statute should be construed. These points and authorities should be combined with the general points and authorities *set forth in § 217.20*, which relate to the construction of statutes to ascertain and effectuate the legislative intent.

The foregoing points and authorities may be combined with a memorandum of points and authorities relating to the procedural context in which the issue of statutory interpretation arises. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should also insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include discussion showing that the statute he or she desires to have applied to the case relates to the particular subject matter involved and therefore should govern over another statute or statutes that might apply but are of broader application. Counsel should note that the rule giving precedence to particular over general provisions applies only when the provisions cannot be reconciled, because the courts must maintain the integrity of both statutes if an apparent conflict can be reconciled [*see § 217.60*]. A specific statute will repeal a general statute by implication only to the extent that they are irreconcilable and only when there is no rational basis for harmonizing them [*see State Compensation Ins. Fund v. Workers' Comp. Appeals Bd. (1979) 88 Cal. App. 3d 43, 58, 152 Cal. Rptr. 153]* . Thus, counsel should also demonstrate that the provisions are irreconcilable or that, as reconciled, the more specific statute applies to the case. If the statutes may be reconciled, counsel may combine the foregoing points and authorities with those *set out in § 217.60*.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 217.60* may be used to oppose the contention supported by the foregoing points and authorities.

[3] Discussion of Authorities

[a] Specific Provision Governs General

In ***San Francisco Taxpayers Assn. v. Board of Supervisors*** *(1992) 2 Cal. 4th 571, 7 Cal. Rptr. 2d 245, 828 P.2d 147* , the Board of Supervisors for San Francisco City and County (Board) interpreted the Cal. Const. art. XIIIB, § 5, limit on governmental appropriations to retirement funds as not applying to appropriations for certain mandatory employee benefits, including retirement contributions, which it claimed came within the Cal. Const. art. XIIIB, § 9, debt service exception to the limitation. Plaintiff brought suit to challenge the Board's exclusion of retirement contributions from the spending limit. Plaintiff alleged that the Board's action violated § 5 (*2 Cal. 4th 571, 574-576)* . After the superior court granted plaintiff's motion for summary judgment, it entered judgment declaring the Board's action invalid and ordering the Board, by injunction and writ of mandate, to revise its appropriations limit to include retirement contributions. On the Board's appeal, the court of appeals reversed. The Supreme Court granted review to resolve a conflict among the courts of appeal (*2 Cal. 4th 571, 576)* .

The Supreme Court reversed the court of appeal, holding that the more specific of the two provisions, § 5, controlled over the more general provision, § 9. The basis for the Court's decision was the ordinary principle of interpretation that "a specific provision relating to a particular subject will govern in respect to that subject, as against a general provision, although the latter, standing alone, would be broad enough to include the subject to which the more particular provision

relates" (*2 Cal. 4th 571, 577)* .

Jones v. Pierce *(1988) 199 Cal. App. 3d 736, 245 Cal. Rptr. 149* , involved the question whether a California resident who owned a motorhome, which was based and registered in Oregon but was incidentally driven in California, was required to register the vehicle under *Veh. Code § 4000(a)*. Holding that the motorhome was excepted from the registration requirement by *Veh. Code § 4000.4*, the court of appeal said that a special statute dealing with a particular subject constitutes an exception so as to control and take precedence over a conflicting general statute on the same subject. This is so notwithstanding that the general provision, standing alone, would be broad enough to include the subject to which the more particular one relates (*199 Cal. App. 3d 736, 742)* .

[b] Specific Provision as Exception to General Provision Regardless of Which Enacted First

In ***Agricultural Labor Relations Bd. v. Superior Court*** *(1976) 16 Cal. 3d 392, 128 Cal. Rptr. 183, 546 P.2d 687* , petitioner board sought a writ of mandate from the Supreme Court to compel respondent courts to vacate orders enjoining petitioner from enforcing a regulation regarding farm labor organizers' access to agricultural property. The regulation was promulgated under the Agricultural Labor Relations Act (*Lab. Code § 1140 et seq.*). One of the attacks on its validity was that it conflicted with the general trespass statute of the Penal Code, *Penal Code § 602*. The Court recognized that administrative regulations cannot contravene statutory provisions, but applied the rule of *Code Civ. Proc. § 1859* that when a special and a general statute are in conflict, the former controls. Citing previous Supreme Court decisions, the Court further stated that the special act will be considered as an exception to the general statute whether it was passed before or after such general enactment. The Court extended this proposition to hold that a regulation validly adopted pursuant to a delegation of authority under a special statute likewise prevails over the terms of a general statute, and that the access regulation expressed the Legislature's intent in the Agricultural Labor Relations Act (*16 Cal. 3d 392, 420)* .

The court of appeal in ***Nunes Turfgrass, Inc. v. Vaughan-Jacklin Seed Co., Inc.*** *(1988) 200 Cal. App. 3d 1518, 246 Cal. Rptr. 823* , held that the alleged unconscionability and unenforceability of a limitation on consequential damages in a commercial contract should be tested under *Com. Code § 2719(3)*, rather than under *Civ. Code § 1668*. The court stated that a special statute is considered an exception to a general statute whether it was passed before or after the general enactment (*200 Cal. App. 3d 1518, 1539)* .

[4] Additional Authorities

[a] Specific Provision Governs General

In *People v. DeLaCruz (1993) 20 Cal. App. 4th 955, 20 Cal. Rptr. 2d 202* , defendant, a restaurant security guard, was convicted of violating *Penal Code § 375(d)*, which prohibits the use of a gas such as chemical Mace in a public place. Although defendant was certified to use Mace, he was convicted after he was found to have not acted in self-defense in spraying a patron. The court of appeal reversed, holding that prosecution under *Penal Code § 375(d)* was barred, because the alleged conduct was covered under a more specific statute, *Penal Code § 12403.7(a)(7)*. The court reasoned that because of the comprehensive nature of *Penal Code § 12403.7*, its express recognition that there may be other conflicting provisions within the law, and its provision of punishment consistent with the scope and intent of the law, it was intended to preclude prosecution under the more general provisions of *Penal Code § 375(d)*, when the person certified to possess and use tear gas was in defendant's type of situation. Thus, the court held that prosecution under a general statute is precluded when the facts of the alleged offense parallel the acts proscribed by a special statute.

The court reasoned that when a general statute standing alone would include the same matter as a special act, and consequently conflict with it, the special act will be considered as an exception to the general statute whether it was passed before or after the general enactment. It also defined the term "Notwithstanding other provisions of law" in *Penal Code § 12403.7*, which it said has been read as an expression of legislative intent to have the specific statute

control despite the existence of other law that might otherwise govern. Accordingly, it is not necessary that *Penal Code § 12403.7* contain all the elements of *Penal Code § 375* for it to take precedence as a special statute (*20 Cal. App. 4th 955, 962)* .

The court in *Neumarkel v. Allard (1985) 163 Cal. App. 3d 457, 209 Cal. Rptr. 616* (discussed in *§ 217.60[4][b]*), applied the principle that a statute dealing expressly with a particular subject controls and takes priority over a general statute (*163 Cal. App. 3d 457, 463)* .

In *Fleming v. Kent (1982) 129 Cal. App. 3d 887, 181 Cal. Rptr. 361* , the court of appeal reversed a judgment of dismissal, holding that plaintiffs' action was not barred by the statute of limitations. Applying the axiom of statutory construction that a particular or specific provision will take precedence over a conflicting general provision, the court held that the case was governed by Educ. Code § 4026, which provides that changes in school district boundaries become conclusive after one year, rather than by *Code Civ. Proc. § 349.1*, which provides for a six-month statute of limitations for challenging boundary changes of public entities in general (*129 Cal. App. 3d 887, 891-892)* .

[b] Specific Provision as Exception to General Provision Regardless of Which Enacted First

In *Tafoya v. Hastings College (1987) 191 Cal. App. 3d 437, 236 Cal. Rptr. 395* , which involved the applicability of the Bagley-Keene Open Meeting Act (*Gov. Code § 11120 et seq.*) to the Board of Directors and faculty of Hastings College of the Law, the court of appeal held that it did not apply, because under *Educ. Code § 92201* Hastings is an affiliate of the University of California and only the meetings of the Regents of the University and certain of its committees are subject to the act [*see Educ. Code §§ 92020, 92030, 92032*]. The court said that a statute must be construed toward giving it meaning and effect, and that when the same subject matter is covered by inconsistent provisions, one of which is special and the othergeneral, the special one, whether or not enacted first, is an exception to the general statute and controls unless an intent to the contrary clearly appears (*191 Cal. App. 3d 437, 447-448)* .

In *Fleming v. Kent (1982) 129 Cal. App. 3d 887, 181 Cal. Rptr. 361* (*discussed under § 217.61[4][a]*), the court stated that a special statute constitutes an exception to a general statute and governs whether enacted before or after the general statute (*129 Cal. App. 3d 887, 892)* .

California Points & Authorities

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 217 STATUTORY INTERPRETATION
PART II. FORMS
C. INTERPRETATION IN RELATION TO OTHER STATUTES

21-217 California Points & Authorities § 217.62

§ 217.62 Supporting Contention That When Statutes Irreconcilable Later-Enacted One Governs

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with the general points and authorities set out in § 217.20.*]

THE COURT SHOULD APPLY _____ [*specify later-enacted statute*], WHICH IS IN IRRECONCILABLE CONFLICT WITH _____ [*specify earlier-enacted statute*] AND WHICH THEREFORE REPEALED _____ [*specify earlier statute*] BY IMPLICATION.

Repeal by Implication. When two or more statutes concern the same subject matter and are in irreconcilable conflict, the doctrine of implied repeal provides that the most recently enacted statute expresses the will of the Legislature and thus, to the extent of the conflict, impliedly repeals the earlier enactment (*In re S. (1977) 19 Cal. 3d 727, 744, 139 Cal. Rptr. 708, 566 P.2d 610*).

[*Set forth additional points and authorities relating to other rules of statutory interpretation that aid in ascertaining legislative intent behind statute and support interpretation desired (see §§ 217.21 -217.24, 217.20 -217.46, 217.61, 217.80 -217.86, 217.88).*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that a statute should be construed in a particular manner. The form sets out the rule of statutory interpretation that a later-enacted statute repeals an earlier statute that is irreconcilable with the later statute. Such an argument might be made in any type of action or proceeding in which a question arises concerning how a statute should be construed. These points and authorities should be combined with the general points and authorities *set forth in § 217.20*, which relate to the construction of statutes to ascertain and effectuate the legislative intent.

These points and authorities may be combined with a memorandum of points and authorities relating to the procedural context in which the issue of statutory interpretation arises. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should also insert argument in the form showing the relationship between the facts of the case and the point of law stated. Thus, counsel should include discussion demonstrating that the statute on which he or she is relying was enacted subsequent to the statute that he or she does not want to be applied to the case and is irreconcilable, clearly repugnant, and so inconsistent with the earlier statute that there is no rational basis for harmonizing the statutes [*see In re S. (1977) 19 Cal. 3d 727, 744-745, 139 Cal. Rptr. 708, 566 P.2d 610* (repeal by implication found); *Fuentes v. Workers' Comp. Appeals Bd. (1976) 16 Cal. 3d 1, 7, 128 Cal. Rptr. 673, 547 P.2d 449* (repeal by implication not found)]. Alternatively, if counsel is relying on language included in an earlier-enacted statute, he or she must show that the language was added to that statute by amendment subsequent to the enactment of the statute that he or she does not want to have applied to the case [*see McGriff v. County of Los Angeles (1973) 33 Cal. App. 3d 394, 398-399, 109 Cal. Rptr. 186]* .

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 217.60* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Repeal by Implication

Defendant in ***In re S.*** *(1977) 19 Cal. 3d 727, 139 Cal. Rptr. 708, 566 P.2d 610* , was declared a ward of juvenile court on the basis of a misdemeanor. Defendant appealed, arguing that his arrest without a warrant was illegal because the offense was not committed in the arresting officer's presence. The Supreme Court reversed. The Court noted that while former Welf. & Inst. Code § 625.1 imposed an "in the presence of the arresting officer" requirement for warrantless juvenile misdemeanor arrests, *Welf. & Inst. Code § 625* did not contain that requirement. To resolve the conflict between the two statutes, the Court turned to the doctrine of implied repeal, stating that when two or more statutes concern the same subject matter and are in irreconcilable conflict, the doctrine of implied repeal provides that the most recently enacted statute expresses the will of the Legislature and thus to the extent of the conflict impliedly repealsthe earlier enactment. The Court recognized that repeals by implication are not favored and that they are recognized only when there is no rational basis for harmonizing the two potentially conflicting statutes and the statutes are irreconcilable, clearly repugnant, and so inconsistent that they cannot have concurrent operation (*19 Cal. 3d 727, 744)* . Nonetheless, the Court found that there was no rational way to reconcile *Welf. & Inst. Code §§ 625* and *625.1* and gave effect to § 625.1 as the more recently enacted statute (*19 Cal. 3d 727, 744-745)* .

[4] Additional Authorities

[a] Repeal by Implication

In *Governing Board v. Mann (1977) 18 Cal. 3d 819, 135 Cal. Rptr. 526, 558 P.2d 1* , the Supreme Court reversed a judgment upholding the authority of plaintiff school board to dismiss defendant teacher under former Educ. Code § 13403(h) (*now see Educ. Code §§ 44932(a)(8), 87732(g)*) on the basis of a criminal conviction for possession of marijuana. Educ. Code § 13403(h) authorized school districts to terminate teachers who are convicted of felonies or crimes involving moral turpitude, but the Court held that it was impliedly repealed as to defendant's marijuana conviction by the subsequent enactment of *Health & Safety Code § 11361.7(b)*, which provides that public agencies may not impose any collateral sanctions on individuals for specified marijuana-related convictions. The Court noted that although *Health & Safety Code § 11361.7(b)* did not specifically refer to Educ. Code § 13403(h), and although repeals

by implication are not favored, when a subsequently enacted specific statute directly conflicts with an earlier, more general provision, it is settled that the subsequent legislation effects a limited repeal of the former statute to the extent that the two are irreconcilable (*18 Cal. 3d 819, 827-828)* .

Petitioner in *Wolfe v. Board of Medical Quality Assurance (1981) 124 Cal. App. 3d 703, 177 Cal. Rptr. 538* , a podiatrist who graduated from podiatry school in 1951 and was licensed in three states, sought a writ of mandate to compel defendant to grant him a license by reciprocity to practice podiatric medicine in California. Defendant had denied the license on the basis of former Bus. & Prof. Code §§ 2487 and 2488 (both later repealed; a different *Bus. & Prof. Code § 2488* was enacted operative Jan. 1, 2004). The court of appeal, although affirming a judgment denying the relief sought, noted a conflict between *Bus. & Prof. Code § 2487*, which entirely excluded pre-1958 graduates from reciprocity, and *Bus. & Prof. Code § 2488*, a later-enacted statute that did not totally exclude pre-1958 graduates, and held that § 2488 repealed by implication the language of § 2487 referring to the total exclusion of pre-1958 graduates. The court recognized that repeals by implication are not favored but held that when a subsequently enacted specific statute directly conflicts with an earlier, more general provision, it is settled that the subsequent legislation effects a limited repeal of the former statute to the extent that the two are irreconcilable (*124 Cal. App. 3d 703, 709)* .

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CHAPTER 217 STATUTORY INTERPRETATION
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21-217 California Points & Authorities § 217.63

§ 217.63 Supporting Contention That Inclusion of Provision in One Statute or Part of Statute, but Not in Other Part of Statute or in Other Related Statute, Shows Different Intent

[1] FORM

[*The following may be included in a memorandum supporting or opposing a motion, or in a trial or appellate brief. It should be combined with the general memorandum set out in § 217.20.*]

[*EITHER*]

IN CONSTRUING _____ [*specify statute*], THE COURT SHOULD APPLY THE RULE THAT WHEN A STATUTE WITH REFERENCE TO ONE SUBJECT CONTAINS A GIVEN PROVISION, THE OMISSION OF SUCH PROVISION FROM A SIMILAR STATUTE CONCERNING A RELATED SUBJECT IS SIGNIFICANT TO SHOW THAT A DIFFERENT INTENTION EXISTED.

[*OR*]

IN CONSTRUING _____ [*specify statute*], THE COURT SHOULD APPLY THE RULE THAT WHEN ONE PART OF A STATUTE CONTAINS A TERM OR PROVISION, THE OMISSION OF THAT TERM OR PROVISION FROM ANOTHER PART OF THE SAME STATUTE INDICATES THAT THE LEGISLATURE INTENDED TO CONVEY A DIFFERENT MEANING.

Omission of Provision Included in Statute on Related Subject or in Other Part of Same Statute. When a statute with reference to one subject contains a given term or provision, the omission of that term or provision from another part of the same statute, or from a similar statute concerning a related subject, is significant to show that a different legislative intention existed (*Murphy v. Kenneth Cole Prods., Inc. (2007) 40 Cal. 4th 1094, 1106-1108, 56 Cal. Rptr. 3d 880, 155 P.3d 284* ; *Cornette v. Department of Transp. (2001) 26 Cal. 4th 63, 73, 109 Cal. Rptr. 2d 1, 26 P.3d 332*

; *Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1, 26, 10 Cal. Rptr. 2d 183, 832 P.2d 899* ; *City of Dublin v. County of Alameda (1993) 14 Cal. App. 4th 264, 280, 17 Cal. Rptr. 2d 845*).

[*Set forth additional points and authorities relating to other rules of statutory interpretation that aid in ascertaining legislative intent behind statute and support interpretation desired (see §§ 217.21 -217.24, 217.40 -217.46, 217.60, 217.80 -217.86, 217.88).*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a party's contention that a statute should be construed in a particular manner. The form sets out the rule of statutory interpretation that when a statute or portion of a statute omits a provision that is included in another statute or in another portion of the same statute, the omission shows that a different meaning was intended. Such an argument might be made in any type of action or proceeding in which a question arises concerning how a statute should be construed. This form should be combined with the general memorandum presented in § 217.20, which relates to the construction of statutes to ascertain and effectuate the legislative intent. This form may also be combined with a memorandum relating to the procedural context in which the issue of statutory interpretation arises.

Counsel should also insert argument in the foregoing form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should compare the language of two or more statutes on the same or a related subject and demonstrate that the Legislature, by including a particular provision in one or more of the statutes and omitting it in the statute to be construed, must have intended that the provision not apply to the statute to be construed.

[3] Discussion of Authorities

[a] Omission of Provision Included in Statute on Related Subject or in Other Part of Same Statute

Murphy v. Kenneth Cole Prods., Inc. *(2007) 40 Cal. 4th 1094, 56 Cal. Rptr. 3d 880, 155 P.3d 284* , involved a claim that the plaintiff's former employer had violated California wage laws by failing to compensate the plaintiff for overtime work, failing to provide meal and rest periods, and failing to provide itemized pay statements. In May 2004, the trial court filed its statement of decision and a judgment awarding the plaintiff unpaid overtime, payments for missed meal and rest periods, penalties for failing to furnish itemized pay statements, waiting time penalties, and prejudgment interest. In awarding payments for missed meal and rest periods under *Labor Code § 226.7*, the court applied the three-year statute of limitations in *Code of Civil Procedure § 338* and awarded payments dating from October 2000. On appeal, the employer contended, among other things, that the payments for the meal and rest periods were penalties and therefore subject to the one-year statute of limitations in *Code of Civil Procedure § 340*. The court of appeal agreed with the employer on this point and reversed the trial court's judgment. The Supreme Court granted review and ultimately reversed the court of appeal's judgment.

Labor Code § 226.7(a) provides that "[n]o employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission." Subdivision (b) of the statute further provides that "[i]f an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided" (*Lab. Code § 226.7(b)*).

The major substantive issue before the Supreme Court in this case was whether an award of "one additional hour of pay" under *Labor Code § 226.7(b)* constitutes a wage or a penalty. Wage claims are subject to the three-year limitation of *Code of Civil Procedure § 338(a)* (governing "[a]n action upon a liability created by statute, other than a penalty or forfeiture"). But penalties are subject to the one-year limitation of *Code Civ. Proc. 340(a)* or (governing "[a]n action

upon a statute for a penalty or forfeiture").

The Supreme Court concluded that the "additional hour of pay" under *Labor Code § 226.7(b)* constitutes a wage and is therefore subject to the three-year limitations period of *Code of Civil Procedure § 338(a)* (*40 Cal. 4th 1094, 1102-1111)* . In coming to this conclusion, the Court reviewed the statutory language and the legislative and administrative history. One important circumstance cited by the Court was that the legislature did not use the term "penalty" to describe the "additional hour of pay" in Section 226.7, while simultaneously establishing penalties explicitly labeled as such in other provisions enacted as part of the same bill (*see Lab. Code §§ 203.1, 226*). In addition, several other Labor Code provisions expressly impose "penalties" for various violations of the wage laws (*see, e.g., Lab. Code §§ 226.3, 230.8, 1197.1*). Under the circumstances, therefore, the Legislature's decision not to call the Section 226.7 remedy a "penalty," while using that word to describe remedies provided in other statutes, is evidence that the Legislature did not intend Section 226.7 to constitute a penalty for statute-of-limitations purposes *40 Cal. 4th 1094, 1108-1109)* .

Cornette v. Department of Transp. *(2001) 26 Cal. 4th 63, 109 Cal. Rptr. 2d 1, 26 P.3d 332* , arose from an automobile accident. The plaintiffs sued the Department of Transportation (Caltrans), alleging that the accident resulted from a dangerous highway condition created by the Caltrans's decision not to have a median barrier at the location where the accident occurred. Caltrans asserted the affirmative defense of design immunity. Over the objection of the plaintiffs, the trial court ruled that it would try to determine all issues relating to the design immunity. On appeal from a judgment for Caltrans, the plaintiffs contended that all but one of the design immunity issues should have been tried to the jury. The court of appeal reversed and remanded for a new trial.

Under *Gov. Code § 830.6*, a public entity may avoid liability for injuriescaused by a dangerous condition on its property by raising the affirmative defense of design immunity. Section 830.6 provides that a showing of design immunity consists of the following elements: (1) a causal relationship between the plan or design and the accident, (2) discretionary approval of the plan or design prior to the accident, and (3) a determination by "the trial or appellate court" that there is substantial evidence supporting the reasonableness of the plan or design. Section 830.6 goes on to provide that design immunity, once established, may be lost if (1) the plan or design has become dangerous because of a change in physical conditions; (2) the public entity had actual or constructive notice of the dangerous condition thus created; and (3) the public entity had a reasonable time to obtain the funds and carry out the necessary remedial work to bring the property back into conformity with a reasonable plan or design, or if the public entity, unable to remedy the condition because of impossibility or lack of funds, had not reasonably attempted to provide adequate warnings.

The Supreme Court in this case observed that the statute clearly requires the third element of design immunity (the existence of substantial evidence supporting the reasonableness of the design) to be determined by the court. However, because the statute does not contain any similar language requiring the court to determine the existence of any necessary element of a *loss* of design immunity, the Court held that immunity-loss issues are triable by a jury. The Court stated that when one part of a statute contains a term or provision, the omission of that term or provision from another part of the same statute indicates that the Legislature intended to convey a different meaning. Therefore, the Court held that the trial court had erred in interpreting the statute as requiring a bench trial on design immunity issues other than the third element of immunity. Accordingly, the Supreme Court affirmed the court of appeal's judgment remanding the case for a jury trial (*26 Cal. 4th 63, 68-73, 80)* .

In ***Moncharsh v. Heily & Blase*** *(1992) 3 Cal. 4th 1, 10 Cal. Rptr. 2d 183, 832 P.2d 899* , an arbitrator made a binding award against an attorney in favor of his former law firm regarding attorney's fees collected by the attorney for cases originally retained by the firm. The attorney petitioned the superior court to vacate and modify the arbitration award. The superior court ruled that the arbitrator's rulings on questions of fact and law were conclusive and subject to review only if an error of law appeared on the face of the award. The court also held that there was no such error in this case. The court of appeal affirmed but stated the rule differently: arbitration awards are not subject to review unless "an error of law appears on the face of the ruling and then only if the error would result in substantial injustice" (*3 Cal. 4th 1,*

6-8) .

The Supreme Court granted review on the limited issue of whether, and on what circumstances, a trial court may review an arbitrator's award (*3Cal. 4th 1, 8)* . The Court determined legislative intent by comparing a provision in a related statute [*Code Civ. Proc. § 1296*], permitting judicial review of an arbitration award, with the provision applying in this case [*Code Civ. Proc. § 1286.2*], permitting vacation of arbitration award only for acts amounting to fraud or corruption. The Court concluded: "[b]y specifically providing [in *Code Civ. Proc. § 1296*] for judicial review and correction of error, but not in section 1286.2, we may infer that the Legislature did not intend to confer traditional judicial review in private arbitration cases. 'Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject ... is significant to show that a different intention existed' " (*3 Cal. 4th 1, 26)* .

In ***City of Dublin v. County of Alameda*** *(1993) 14 Cal. App. 4th 264, 17 Cal. Rptr. 2d 845* , the court of appeal faced the issue whether the California Integrated Waste Management Act of 1989 (*Pub. Res. Code § 40000 et seq.*) precludes local action by initiative. The trial court had granted a writ of mandate invalidating a county initiative measure approved by the voters of Alameda County regulating solid waste disposal. One of the bases on which the trial court invalidated the initiative measure was a holding that the act precluded local action by initiative. The court of appeal reversed. The court noted that no legislative intent to preclude action by the electorate is perceptible in most of the act's provisions. The court compared those many provisions to one particular provision of the act, *Pub. Res. Code § 40059*, which had language precluding local action by initiative in certain circumstances not before the court (*14 Cal. App. 4th 264, 279-280)* . The court stated that "when a statute contains a particular provision, the omission of that provision from similar statutes on the same or a related subject reveals a different intent" (*14 Cal. App. 4th 264, 280)* .

[4] Additional Authorities

[a] Omission of Provision Included in Statute on Related Subject

Mitchell v. City of Indio (1987) 196 Cal. App. 3d 881, 242 Cal. Rptr. 235 , was an action to invalidate an annexation of land by the city. The city's notice of a public hearing on the annexation was given 14 days before the hearing date, rather than 15 days as required by statute at that time (see former Gov. Code §§ 56154 and 57002 [*now see Gov. Code § 56154* (requiring 21 days' notice)]. Plaintiffs failed to show that the one day would have made any difference in the outcome of the matter. Defendants were granted a summary judgment, and plaintiffs appealed. They contended that the 15-day notice requirement for public hearings on annexation was mandatory under *Gov. Code § 56106* and that the city's failure to comply with it should have invalidated the annexation. *Gov. Code § 56106* provides that any provisions governing the time within which an official, a conducting authority, or the commission is to act shall in all instances, "except for notice requirements," be deemed directory, rather than mandatory. The court of appeal affirmed the judgment, pointing out that *Gov. Code § 56107* contains no exception for notices and provides that no reorganization "shall be invalidated because of any defect, error, irregularity, or omission in any act, determination or procedure which does not adversely and substantially affect the rights of any person ... ." If the Legislature had intended to except cases with notice defects from *Gov. Code § 56107*'s prejudice requirement, it presumably would have so stated. When a statute, with reference to one subject, contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed, and that so it was in the case before it. The inclusion of the notice provision in *Gov. Code § 56106* and its omission from *Gov. Code § 56107* shows that the Legislature intended to except notice requirements from the general rule of *Gov. Code § 56106* (time provisions are directory), but did not intend to except notice requirements from the general rule of *Gov. Code § 56107* (harmless irregularities will not invalidate reorganization) (*196 Cal. App. 3d 881, 888)* .

Balboa Ins. Co. v. Aguirre (1983) 149 Cal. App. 3d 1002, 197 Cal. Rptr. 250 , involved a breach-of-indemnity-agreement action in which defendants successfully moved to dismiss under former Code Civ. Proc. § 583(d) for plaintiff's failure to bring the action to trial within three years. On appeal, plaintiff contended that a

provision contained in former Code Civ. Proc. § 583(c) that precluded mandatory dismissal before five years had passed from the time the complaint was filed should apply to dismissals under former Code Civ. Proc. § 583(d) as well. The court of appeal rejected plaintiff's argument and affirmed the trial court's dismissal, holding that when a statute on a particular subject omits a particular provision, inclusion of that provision in another statute concerning a related matter indicates legislative intent that the provision is not applicable to the statute from which it was omitted (*Balboa Ins. Co. v. Aguirre (1983) 149 Cal. App. 3d 1002, 1008, 197 Cal. Rptr. 250*).

Plaintiff in Allis-Chalmers Corp. v. City of Oxnard (1981) 126 Cal. App. 3d 814, 179 Cal. Rptr. 159 , an action for declaratory and injunctive relief to challenge a bond issue, appealed from a summary judgment entered in defendant's favor. The court of appeal affirmed. Plaintiff contended that the bond issue violated *Sts. & Hy. Code § 10602*, which provides that certain municipal improvement bonds may be issued and sold as the legislative body directs, subject to a maximum interest rate of 8 percent, because while the bonds were to bear interest at 8 percent, they were additionally to be sold at a 5 percent discount. In holding that the 8 percent rate specified in *Sts. & Hy. Code § 10602* applied only to the interest rateappearing on the face of the bonds, and not to the net interest rate yielded by the discount sale of the bonds, the court applied the rule stated in this form. The court reasoned that since some statutes relating to the issuance of bonds expressly limit the net rate of interest on bonds, such as *Gov. Code §§ 43655* and *43727*, while *Sts. & Hy. Code § 10602* contains no similar provision, it had to be presumed that the Legislature did not intend that limitation to apply in the issuance of bonds under *Sts. & Hy. Code § 10602* (*Allis-Chalmers Corp. v. City of Oxnard (1981) 126 Cal. App. 3d 814, 820-821, 179 Cal. Rptr. 159*).

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21-217 California Points & Authorities § 217.64

§ 217.64 Supporting Contentions That Statute Should Be Construed as Cross Referring to Another Statute as It Existed When Originally Enacted or as It Presently Exists

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with the general points and authorities set out in § 217.20.*]

[*EITHER*]

_____ [*Specify statute*] SHOULD BE CONSTRUED AS INCORPORATING _____ [*specify other statute*] AS IT EXISTED AT THE TIME THAT _____ [*specify first statute*] WAS _____ [ORIGINALLY ENACTED *or* FIRST AMENDED TO INCLUDE THE CROSS-REFERENCE].

[*OR*]

_____ [*Specify statute*] SHOULD BE CONSTRUED AS INCORPORATING _____ [*specify other statute*] AS IT PRESENTLY EXISTS BECAUSE _____ [*specify first statute*] CROSS REFERS TO A WHOLE SYSTEM OR BODY OF LAWS OF WHICH _____ [*specify other statute*] IS A PART, RATHER THAN TO _____ [*specify other statute*] SPECIFICALLY.

Effect of Cross-Reference to Other Statutes. When a statute adopts by specific reference the provisions of another statute, regulation, or ordinance, the provisions are incorporated in the form in which they exist at the time of the reference and not as subsequently modified; however, if the reference is general instead of specific, such as to a system or body of laws, then the referring statute takes the law or laws referred to not only in their contemporary form, but also

as they may be changed from time to time (*People v. Cooper (2002) 27 Cal. 4th 38, 44, 115 Cal. Rptr. 2d 219, 37 P.3d 403* ; *People v. Eddy (1995) 32 Cal. App. 4th 1098, 1105, 38 Cal. Rptr. 2d 563*).

[*Set forth additional points and authorities relating to other rules of statutory interpretation that aid in ascertaining legislative intent behind the statute and support interpretation desired (see §§ 217.21 -217.24, 217.40 -217.46, 217.60, 217.80 -217.86, 217.88).*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of either of two possible alternative contentions concerning the interpretation of a statute that contains a cross reference to another statute. If the reference to the provisions of the other statute is specific, this form may be submitted in support of the contention that the referring statute should be construed as incorporating the other statute as it existed when the first statute was initially enacted (or when the cross reference was first added). Alternatively, if the reference is to a general body or system of laws, the points and authorities in this form may be submitted in support of the contention that the reference should be construed as incorporating the second statute as it presently exists.

These points and authorities should be combined with the general points and authorities *set forth in § 217.20* concerning the construction of statutes to ascertain and effectuate legislative intent. They may also be combined with points and authorities pertaining to the procedural context in which thew issue of statutory interpretation arises, or they may be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, if counsel is arguing for a construction of the statute that incorporates a prior version of the statute referred to, counsel should show that the reference contained in the first statute is narrow and specific. By contrast, if counsel is arguing for a construction of the first statute that incorporates the present version of the second statute, counsel should demonstrate that the reference in the first statute is to a general system or body of laws of which the second statute is a part, rather than to provisions of the second statute specifically.

[3] Discussion of Authorities

[a] Effect of Cross-Reference to Other Statutes

In ***People v. Cooper*** *(2002) 27 Cal. 4th 38, 115 Cal. Rptr. 2d 219, 37 P.3d 403* , the question before the Supreme Court was the proper amountof presentence conduct credits to be awarded to the defendant, who had been convicted of second-degree murder. The resolution depended on the interaction of three statutory provisions: former Penal Code §§ 190, 2933.1, and 4019. As in effect at the relevant time, § 190 prescribed the punishment for second-degree murder and provided for credits as follows: "Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 [of the Penal Code] shall apply to reduce any minimum term ... imposed pursuant to this section, but the person shall not otherwise be released on parole prior to that time." This portion of § 190 was enacted by voter initiative and thus could not be amended without voter approval. When this version of § 190 was enacted, Article 2.5 contained no provisions relating to presentence conduct credits, but the Legislature subsequently amended Article 2.5 by adding § 2933.1, which limited presentence credits for certain felonies (including second-degree murder). The defendant argued that, at the time of his offense, § 190 incorporated by specific reference the code sections contained in Article 2.5. Because § 190 expressly authorized Article 2.5 credits to reduce the minimum term imposed and § 2933.1 later limited the availability of credits without voter approval, the defendant claimed that § 2933.1 was inapplicable to his sentence.

The Supreme Court rejected this argument. The Court acknowledged the general principle that when a statute adopts by specific reference the provisions of another statute, those provisions are incorporated in the form in which they exist at

the time of the reference, not as subsequently amended. However, there is a cognate rule to the effect that if the reference is general instead of specific, such as a reference to a system or body of laws or to a general law relating to a particular subject, the referring statute takes the law or laws referred to not only in their contemporary form, but also as they may be changed from time to time or even repealed (*People v. Cooper (2002) 27 Cal. 4th 38, 44, 115 Cal. Rptr. 2d 219, 37 P.3d 403*). Applying this rule, the Court explained that, when the relevant version of § 190 was adopted, Article 2.5 authorized only postsentence prison conduct credits. *Penal Code Section 4019*, which authorized presentence credits, was contained in a different Article. Thus, the addition of § 2933.1 to Article 2.5 did not authorize presentence credits, but rather just limited the credits available under § 4019. Because § 190 did not specifically authorize or prohibit presentence credits, and only generally referred to Article 2.5, the Supreme Court held that the Legislature's enactment of § 2933.1 was not an invalid modification of § 190 as adopted by the electorate (*People v. Cooper (2002) 27 Cal. 4th 38, 46-47, 115 Cal. Rptr. 2d 219, 37 P.3d 403*).

The Court distinguished this case from *In re Oluwa (1989) 207 Cal. App. 3d 439, 255 Cal. Rptr. 35* , which involved a legislative amendment of Article 2.5 *postsentence* conduct credits. The Supreme Court approved the *Oluwa* court's holding that the legislative amendment was inconsistent with the intent of the electorate and therefore invalid (*People v. Cooper (2002) 27 Cal. 4th 38, 45, 48, 115 Cal. Rptr. 2d 219, 37 P.3d 403*).

In ***People v. Eddy*** *(1995) 32 Cal. App. 4th 1098, 38 Cal. Rptr. 2d 563* , the defendant was initially sentenced to four years in state prison after being convicted of vehicle theft and of possessing a controlled substance for sale, based on crimes committed in 1991 and 1992. The trial court subsequently stayed the criminal proceedings and committed to the defendant to the California Rehabilitation Center (CRC). After spending 504 days in the CRC, defendant was excluded from the facility, and the four-year prison term was reinstated. The trial court granted defendant credit for the time actually spent in the CRC, but did not grant the defendant any good behavior and participation credit under *Penal Code § 2931* or worktime credit under *Penal Code § 2933* for the time he was in the CRC. Defendant appealed, contending he was entitled to such credit, but the court of appeal affirmed.

Welf. & Inst. Code § 3201(c) provides that CRC committees may not be confined for a period exceeding that which they would have spent in prison had sentence been executed, "including application of good behavior and participation credit provisions of Article 2.5 (commencing with *Section 2930) of Chapter 7 of Title I of Part 3 of the Penal Code* [*Penal Code § 2930 et seq.*]." In 1982, the Penal Code was amended to make good behavior and participation credit under *Penal Code § 2931* inapplicable to crimes committed on and after January 1, 1983, and instead substituted a worktime credit system under *Penal Code § 2933*. On appeal, defendant contended among other things that he was entitled to good behavior and participation credit under *Penal Code § 2931* because *Welf. & Inst. Code § 3201* incorporates § 2931 as it existed in 1980, when § 3201 was first amended to make specific reference to the conduct credit system under *Penal Code § 2930 et seq.* In so arguing, defendant relied on the maxim of statutory construction that when a statute adopts by specific reference the provisions of another statute, regulation, or ordinance, the provisions are incorporated in the form in which they exist at the time of the reference and not as subsequently modified (citing *Palermo v. Stockton Theatres, Inc. (1948) 32 Cal. 2d 53, 58-59, 195 P.2d 1*). However, the court of appeal, also citing *Palermo*, noted a converse rule of statutory construction, which the court believed to be more appropriate to this case: if the reference is general instead of specific, such as to a system or body of laws, then the referring statute takes the law or laws referred to not only in their contemporary form, but also as they may be changed from time to time (*People v. Eddy (1995) 32 Cal. App. 4th 1098, 1105, 38 Cal. Rptr. 2d 563*). The court held that the reference in *Welf. & Inst. Code § 3201* was to an entire system or body of laws (namely *Penal Code § 230 et seq.*), rather than to § 2931 specifically, and therefore § 3201 adopted the entire pertinent system of laws not only in its contemporary form, but also as it may beamended in the future (*People v. Eddy (1995) 32 Cal. App. 4th 1098, 1106, 38 Cal. Rptr. 2d 563*).

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21-217 California Points & Authorities § 217.65

§ 217.65 Opposing Contention That Specific Provision Governs General Provision--Neither Provision Is More Specific

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with the general points and authorities set out in § 217.20.*]

THE PRINCIPLE THAT A SPECIFIC PROVISION TAKES PRECEDENCE OVER A GENERAL PROVISION IS INAPPLICABLE IN THIS CASE.

Principle That Specific Provision Governs General Provision Is Inapplicable if Neither Provision Is More Specific. The principle that a specific provision takes precedence over a general provision has no application if neither provision under consideration is significantly more specific than the other, such as provisions that govern different subject areas (*Mejia v. Reed (2003) 31 Cal. 4th 657, 666, 3 Cal. Rptr. 3d 390, 74 P.3d 166*).

[2] Comments

[a] Use of Form

This form of points and authorities may be used to oppose a contention that the court should apply a given statutory provision because it is more specific than another.

Counsel should insert argument in this form showing the relationship between the circumstances of the case and the point of law stated. Thus, counsel should establish that neither of the conflicting statutory provisions is more specific than the other, for example because each provides specific regulation of a different subject area (*see* *Mejia v. Reed (2003) 31 Cal. 4th 657, 666, 3 Cal. Rptr. 3d 390, 74 P.3d 166*).

[b] Opposing Points and Authorities

In an appropriate case, this form of points and authorities may be used in opposition to the points and authorities *set forth in § 217.61*.

[3] Discussion of Authorities

[a] Principle That Specific Provision Governs General Provision Is Inapplicable if Neither Provision Is More Specific

In ***Mejia v. Reed*** *(2003) 31 Cal. 4th 657, 3 Cal. Rptr. 3d 390, 74 P.3d 166* , the plaintiff was the mother of a child whose father was married to another woman. In a later divorce proceeding, the father and his wife entered into a marital settlement agreement under which the father transferred all his interest in jointly held real property to his wife. The plaintiff brought the present action, claiming that the purpose of this transfer was to prevent her from collecting child support. The plaintiff sought to impose a lien on the transferred real property pursuant to the Uniform Fraudulent Transfer Act (UFTA) (*Civ. Code § 3439.07*; *see Civ. Code § 3439 et seq.*). The trial court assumed that assumed that the UFTA applied to the marital settlement agreement, but it granted the father's summary judgment motion on the grounds that no evidence was presented of actual intent to defraud, and that constructive fraud under the UFTA was not established because the transfer had not rendered the father insolvent (*see Civ. Code § 3439.05*). The court of appeal reversed, holding that although the UFTA applies to marital settlement agreements, triable issues of fact precluded summary judgment.

The Supreme Court reversed the judgment of the court of appeal. The Supreme Court held that the UFTA does apply to marital settlement agreements (*31 Cal. 4th 657, 668-669)* . The Court also found that there was no triable issue of constructive fraud under the UFTA, because the transfer had not rendered the father insolvent (*31 Cal. 4th 657, 669-672)* . However, further proceedings were necessary to determine the existence of actual intent to defraud (*31 Cal. 4th 657, 672)* . Accordingly, the Supreme Court remanded the case for further proceedings (*31 Cal. 4th 657, 672)* .

Whether the UFTA applies to transfers made under marital settlement agreements was a question of first impression in this case. The Supreme Court was faced with an apparent conflict between the provisions of the UFTA and the Family Code. The UFTA provides remedies for present and future creditors in the case of a debtor's transfer that is actually or constructively fraudulent (*see Civ. Code §§ 3439.04(a), 3439.05*). On its face, the UFTA applies to all transfers. It defines "transfer" as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset. ..." (*Civ. Code § 3439.01 (i)*). The UFTA excepts only certain transfers resulting from lease terminations or lien enforcement (*Civ. Code § 3439.08(e)*). Thus, the UFTA on its face encompasses transfers made under a marital settlement agreement.

On the other hand, the Family Code provides that property received by a married person in a division of property under a marital settlement agreement "is not liable for a debt incurred by the person's spouse before or during marriage, and the person is not personally liable for the debt, unless the debt was assigned for payment by the person in the division of the property" (*Fam. Code § 916(a)(2)*). The only statutory exception to this grant of immunity from liability is a provision that preserves the liability of property subject to a preexisting lien (*Fam. Code § 916(a)(2)*); the statute does not mention fraudulent transfers. Thus, on its face, the Family Code provision would appear to protect transfers of marital property incident to dissolution from being set aside under the UFTA.

Faced with this apparent conflict, the Supreme Court looked first at the statutory text, but the Court found that the statutory language was not sufficient to resolve the conflict. In particular, the Court found that the principle that a specific provision takes precedence over a general provision was not helpful in this instance. That principle is inapplicable if neither provision under consideration is significantly more specific than the other. In this case, the Family Code provision governing the validity of marital settlement agreements might be viewed as more specific than the UFTA, since the UFTA applies to all transactions, not just those made as part of marital settlements. On the other hand, the UFTA could be viewed as more specific because it deals only with fraudulent transfers, whereas the

marital-settlement provision regulates all transfers made in marital settlement agreements. The Court concluded that the Legislature's failure to address the rare instance in which these provisions overlap does not suggest any legislative intent as to which one should prevail (*31 Cal. 4th 657, 666-667)* .

Ultimately, the Supreme Court found that neither the statutory language nor the legislative history was sufficient to resolve the conflict (*31 Cal. 4th 657, 666-668)* . Under the circumstances, the Court turned to a consideration of the relevant policy considerations bearing on the question of legislative intent. Based on the general legislative policy of protecting creditors from fraudulent transfers, including transfers between spouses, the Court concluded that the UFTA applies to transfers made under marital settlement agreements (*31 Cal. 4th 657, 668-669)* .

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[Reserved]

§§ 217.66[Reserved]

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21-217 California Points & Authorities § 217.80

§ 217.80 Supporting Contention That Legislative Committee Report May Be Considered in Interpreting Statute

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with the general points and authorities set out in § 217.20.*]

THE COURT MAY CONSIDER THE REPORT OF _____ [*specify legislative committee*] IN INTERPRETING _____ [*specify statute*].

Consideration of Legislative Committee Reports. Statements in legislative committee reports concerning the statutory objects and purposes that are in accord with a reasonable interpretation of the statute are legitimate aids in determining legislative intent (*Southern Cal. Gas Co. v. Public Utilities Com. (1979) 24 Cal. 3d 653, 658-659, 156 Cal. Rptr. 733, 596 P.2d 1149*).

[*Set forth additional points and authorities relating to other rules of statutory interpretation that aid in ascertaining legislative intent behind statute and support interpretation desired (see §§ 217.21 -217.24, 217.40 -217.46, 217.60 -217.63, 217.81 -217.86, 217.88).*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that a statute should be construed in a particular manner. The form sets out the rule of statutory interpretation that courts may rely on statements in legislative committee reports in interpreting a statute. Such an argument might be made in any type of action or proceeding in which a question arises concerning how a statute should be construed. These points and authorities should be combined with the general points and authorities *set forth in § 217.20*, which relate to the construction of statutes to ascertain and effectuate the legislative intent.

The foregoing points and authorities may be combined with a memorandum of points and authorities relating to the procedural context in which the issue of statutory interpretation arises. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should also insert argument in the foregoing form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should set out the report or parts of it on which he or she seeks to rely.

Legislative analyses that have been looked to by courts in addition to Assembly and Senate committee reports include the Legislative Counsel's Digest, committee bill digests, the Assembly Office of Research's Digest for the third assembly reading, the Senate Democratic Caucus Analysis, the Enrolled Bill Memorandum to the Governor, and the Enrolled Bill Report to the Governor's office [*see Southland Mechanical Constructors Corp. v. Nixen (1981) 119 Cal. App. 3d 417, 427-428, 173 Cal. Rptr. 917* ; *but see Allis-Chalmers Corp. v. City of Oxnard (1981) 126 Cal. App. 3d 814, 820, 179 Cal. Rptr. 159* (questioning evidentiary value of Legislative Counsel's Digest)]. The court may take judicial notice of such materials [*see Southland Mechanical Constructors Corp. v. Nixen (1981) 119 Cal. App. 3d 417, 428 n.7, 173 Cal. Rptr. 917]* . In addition to legislative materials, courts may also consider the wider historical circumstances of a law's enactment in determining legislative intent. For example, the purpose of a statute may be determined from statements in law review articles or other cases [*see Industrial Risk Insurers v. Rust Engineering Co. (1991) 232 Cal. App. 3d 1038, 1043, 283 Cal. Rptr. 873]* .

[3] Discussion of Authorities

[a] Consideration of Legislative Committee Report

Petitioners in ***Southern Cal. Gas Co. v. Public Utilities Com.*** *(1979) 24 Cal. 3d 653, 156 Cal. Rptr. 733, 596 P.2d 1149* , sought review of a decision of defendant commission. The decision required petitioners to institute home insulation assistance and financing programs pursuant to *Pub. Util. Code § 2782*, which directs defendant to permit utilities to institute such programs. The Supreme Court, in reversing and holding that *Pub. Util. Code § 2782* was permissive only and did not allow defendant to make such programs mandatory for utilities, relied on legislative committee analyses of the bill that created the act and which specifically and repeatedly stated that the bill would merely permit rather than require utility participation (*24 Cal. 3d 653, 658-659)* . The analyses included those prepared for the Assembly Committee on Energy and Diminishing Materials, the Assembly Ways and Means Committee, and the Senate Public Utilities, Transportation, and Energy Committee. The Court also noted analyses prepared by the Assembly Office of Research for the Assembly vote of concurrence with Senate amendments, by the Senate Democratic Caucus for the Senate third reading, and by the Legislative Analyst (*24 Cal. 3d 653, 658 n.4*). Citing *Southern Pacific Co. v. Industrial Acci. Com. (1942) 19 Cal. 2d 271, 275, 120 P.2d 880* , the Court held that statements in legislative committee reports concerning the statutory objects and purposes that are in accord with a reasonable interpretation of the statute are legitimate aids in determining legislative intent (*24 Cal. 3d 653, 659)* .

[4] Additional Authorities

[a] Consideration of Legislative Committee Reports

In *Altaville Drug Store, Inc. v. Employment Development Department (1988) 44 Cal. 3d 231, 242 Cal. Rptr. 732, 746 P.2d 871* , the Supreme Court, which was concerned with the meaning of the word "spouse" as used in *Unemp. Ins. Code § 1032*, quoted in part a legislative committee report on the 1979 amendment to *Unemp. Ins. Code § 1032* (*44 Cal. 3d 231, 235-236)* . The Court said that statements of legislative committees pertaining to the purpose of legislation are presumed to express the legislative intent of statutes as enacted (*44 Cal. 3d 231, 238)* .

Milligan v. City of Laguna Beach (1983) 34 Cal. 3d 829, 196 Cal. Rptr. 38, 670 P.2d 1121 , was an action by a landowner that alleged that a dangerous condition on unimproved public property had damaged his property adjacent to the public property. The defendant successfully argued in the trial court that it was immune under *Gov. Code § 831.2* to

an action by a landowner, but the Supreme Court reversed. In examining the applicability of *Gov. Code § 831.2* to the situation before it, the Court examined the comments to the Government Claims Act adopted by the Assembly and Senate Committees and held that the comments clearly stated the purpose of the act (*34 Cal. 3d 829, 831-832)* . The Court held that such an expressed legislative purpose supersedes all other rules of construction, and the enactment must be applied in accordance with the legislative direction expressed in the comments (*34 Cal. 3d 829, 831)* .

In *Mir v. Charter Suburban Hospital (1994) 27 Cal. App. 4th 1471, 33 Cal. Rptr. 2d 243* , one of the issues concerned the interpretation of *Bus. & Prof. Code § 809.9*, which allows an award of attorney's fees to the prevailing party in certain actions to challenge the decision of a hospital peer review committee "if the other party's conduct in bringing, defending, or litigating the suit was frivolous, unreasonable, without foundation, or in bad faith." The physician, who had prevailed in a mandate proceeding challenging a hospital's disciplinary action against him, argued that a physician should be able to recover fees under this statute whenever a hospital's disciplinary decision is reversed in a mandate proceeding as unsupported by substantial evidence. The hospital argued that the lack of substantial evidence does not in itself mean that the action was unreasonable or without foundation so as to entitle the physician to attorney's fees. In holding that the hospital's interpretation of the statute was correct, the court of appeal relied in part on various legislative committee reports issued in connection with the bill that enacted *Bus. & Prof. Code § 809.9*,each of which emphasized that the purpose of fee awards was to act as a sanction for frivolous or bad faith prosecution or defense of a peer review proceeding (*27 Cal. App. 4th 1471, 1483-1484)* .

In *Southland Mechanical Constructors Corp. v. Nixen (1981) 119 Cal. App. 3d 417, 173 Cal. Rptr. 917* , the court of appeal affirmed a judgment dismissing plaintiff's complaint against defendant attorneys for legal malpractice on the ground, in part, that the action was barred by the statute of limitations, *Code Civ. Proc. § 340.6(a)*, which relates to actions against attorneys "for a wrongful act or omission ... arising in the performance of professional services." In determining that the Legislature intended the phrase "wrongful act or omission" to encompass both the tort and breach of contract aspects of malpractice, the court followed the general rule that the legislative records may be looked at to determine legislative intention, and that it will be presumed that the Legislature adopted the proposed legislation with the intent and meaning expressed in committee reports (*119 Cal. App. 3d 417, 427)* . The court looked to several analyses, including the Legislative Counsel's Digest, the Bill Digest of the Assembly Committee on the Judiciary, the Assembly Office of Research's Digest for the third assembly reading, the Senate Committee on the Judiciary Analysis, the Senate Democratic Caucus Analysis, the Enrolled Bill Memorandum to the Governor, and the Enrolled Bill Report to the Governor's office (*119 Cal. App. 3d 417, 428)* .

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21-217 California Points & Authorities § 217.81

§ 217.81 Supporting Contention That Report of Commissioners Who Drafted Statute May Be Considered in Interpreting Statute

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with the general points and authorities set out in § 217.20.*]

IN CONSTRUING _____ [*specify statute*], THE COURT SHOULD GIVE SUBSTANTIAL WEIGHT TO THE REPORT OF _____ [*specify commission or drafter of statute*] BECAUSE IT PROPOSED THE STATUTE SUBSEQUENTLY ADOPTED BY THE LEGISLATURE.

Consideration of Reports of Commissions That Propose Statutes. Reports of commissions that have proposed statutes that are subsequently adopted are entitled to substantial weight in construing the statutes. This is particularly true when the statute proposed by the commission is adopted by the Legislature without any change whatsoever and when the commission's comment is brief, because in such a situation there is ordinarily strong reason to believe that the legislators' votes were based in large measure on the explanation of the commission proposing the bill (*Owens v. Superior Court (1980) 28 Cal. 3d 238, 246, 168 Cal. Rptr. 466, 617 P.2d 1098*).

[*Set forth additional points and authorities relating to other rules of statutory interpretation that aid in ascertaining legislative intent behind statute and support interpretation desired (see §§ 217.21 -217.24, 217.40 -217.46, 217.60 -217.63, 217.80, 217.82 -217.86, 217.88).*]

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of a party's contention that a statute should be construed in a particular manner. The form sets out the rule of statutory interpretation that the report of a commission that proposed the statute is entitled to substantial weight in construing the statute. Such an argument might be made in

any type of action or proceeding in which a question arises concerning how a statute should be construed. These points and authorities should be combined with the general points and authorities *set forth in § 217.20*, which relate to the construction of statutes to ascertain and effectuate the legislative intent.

The foregoing points and authorities may be combined with a memorandum of points and authorities relating to the procedural context in which the issue of statutory interpretation arises. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should also insert argument in the foregoing form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should discuss the drafting of the statute by the commission and set out its report or the parts of its report on which he or she seeks to rely. If appropriate, counsel should point out that the statute was enacted as proposed without any change and that the commission's report on the proposed enactment was brief, because these factors may increase the probative value of the report in establishing the legislative intent.

[3] Discussion of Authorities

[a] Consideration of Reports of Commissions That Propose Statutes

In ***Owens v. Superior Court*** *(1980) 28 Cal. 3d 238, 168 Cal. Rptr. 466, 617 P.2d 1098* , petitioner sought a writ of mandate or prohibition to compeldefendant court to dismiss the information against him pursuant to *Penal Code § 1382* for failure to bring him to trial within 60 days of the filing of felony charges against him in superior court. The contested issue was whether or not the 60-day period was stayed by continuances requested by defendant. The Supreme Court noted that, on its face, the statute had no provision for suspending the running of the 60-day period and found that the legislative history substantiated the import of the language. The Court reviewed the confusion in the meaning of the statute that prevailed prior to its amendment in 1959, in which year the Judicial Council outlined the ambiguities that afflicted the section and proposed an amendment to the section that was adopted verbatim by the Legislature. The Judicial Council's recommendation stated, in part, that the amendment would clarify the law by establishing that dismissal under *Penal Code § 1382* may be had even though defendant previously consented to a delay beyond the statutory period and by eliminating the possibility that delays attributable to a defendant that are wholly within the statutory period may prevent dismissal. Quoting *Van Arsdale v. Hollinger (1968) 68 Cal. 2d 245, 249-250, 66 Cal. Rptr. 20, 437 P.2d 508* , the Court held that reports of commissions that have proposed statutes that are subsequently adopted are entitled to substantial weight in construing the statutes. This is particularly true when the statute proposed by the commission is adopted by the Legislature without any change whatsoever and when the commission's comment is brief, because in such a situation there is ordinarily strong reason to believe that the legislators' votes were based in large measure on the explanation of the commission proposing the bill. Thus, reasoning that the Judicial Council's explanation of its recommendation could leave little doubt that the Legislature also had the same intent, and that the effects desired were incompatible with a rule that the running of the 60-day period is tolled by delays requested by defendant, the Court ordered a peremptory writ of mandate to issue to compel dismissal of the information (*28 Cal. 3d 238, 246)* . It should be noted that *Penal Code § 1382* has since been amended to provide certain exceptions to the 60-day requirement, including one applying when the defendant requests or consents to the setting of a trial date beyond the 60-day period [*Penal Code § 1382(a)(2)*].

[4] Additional Authorities

[a] Consideration of Reports of Commissions That Propose Statutes

The Supreme Court in *Brian W. v. Superior Court (1978) 20 Cal. 3d 618, 143 Cal. Rptr. 717, 574 P.2d 788* , denied a petition for a writ of mandate that sought to compel defendant court to exclude the press from a hearing to determine petitioner's fitness to be dealt with under the juvenile court law. In determining that the juvenile court law policy favoring confidentiality of proceedings did not require exclusion of the press, the Court relied on the comments of a special study commission on juvenile justice that had been created by the Governor. *Welf. & Inst. Code § 676*, relating

to persons who may be admitted to juvenile hearings, was adopted verbatim by the Legislature from the draft statute proposed by the study commission. The Court held that explanatory comments by a law revision commission are persuasive evidence of the intent of the Legislature in subsequently enacting its recommendations into law (*20 Cal. 3d 618, 622-623)* .

In *Hong v. Somerset Associates (1984) 161 Cal. App. 3d 111, 207 Cal. Rptr. 597* , and *Guthman v. Moss (1984) 150 Cal. App. 3d 501, 198 Cal. Rptr. 54* , the 1976 report of the California Law Revision Commission was relied on to uphold the reasonableness of a liquidated damage clause in a commercial real estate transaction and to allow an uninitialled clause to be enforced by a defaulting buyer in a residential real estate transaction, respectively. Both cases involved *Civ. Code § 1671 et seq.* (Stats. 1977, ch. 198, § 5), which adopted without change the recommendations of the commission. Both stated that a report of Law Revision Commission proposing a statute that is subsequently adopted without change is entitled to substantial weight in determining legislative purpose and intent (*161 Cal. App. 3d 111, 115 n.6* ; *150 Cal. App. 3d 501, 510* , respectively).

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21-217 California Points & Authorities § 217.82

§ 217.82 Supporting Contention That Legislator's Statement of Legislature's Intent Should Be Considered in Interpreting Statute

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with the general points and authorities set out in § 217.20.*]

THE STATEMENT OF _____ [*name of legislator*] SHOULD BE CONSIDERED IN INTERPRETING _____ [*specify statute*] BECAUSE THE STATEMENT REFLECTS THE LEGISLATURE'S COLLECTIVE INTENT BECAUSE _____ [*specify, e.g.,* IT IS A REITERATION OF THE DISCUSSION AND EVENTS THAT TRANSPIRED IN THE LEGISLATURE *or* WAS PRINTED PURSUANT TO A MOTION TO PUBLISH IT AS A LETTER OF LEGISLATIVE INTENT].

Consideration of Legislator's Statement Reflecting Legislature's Intent. An individual legislator's statement may be considered in construing a statute if the circumstances indicate that theletter reflects the Legislature's collective intent (*City of Long Beach v. Department of Indus. Relations (2004) 34 Cal. 4th 942, 952-953, 22 Cal. Rptr. 3d 518, 102 P.3d 904*). For example, a legislator's statement that is a reiteration of the discussion and events that transpired in the Legislature when the statute was under consideration, or was printed pursuant to a motion to publish it as a letter of legislative intent, may be considered in construing a statute (*Sierra Club v. California Coastal Comm'n (2005) 35 Cal. 4th 839, 853* & n.8, *28 Cal. Rptr. 3d 316, 111 P.3d 294* ; *City of Long Beach v. Department of Indus. Relations (2004) 34 Cal. 4th 942, 952-953, 22 Cal. Rptr. 3d 518, 102 P.3d 904* ; *In re Marriage of Bouquet (1976) 16 Cal. 3d 583, 590, 128 Cal. Rptr. 427, 546 P.2d 1371*).

[*Set forth additional points and authorities relating to other rules of statutory interpretation that aid in ascertaining legislative intent behind statute and support interpretation desired (see §§ 217.21 -217.24, 217.40 -217.46, 217.60 -217.63, 217.80, 217.81, 217.84 -217.86, 217.88).*]

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of a party's contention that a statute should be construed in a particular manner. The form sets out the rule of statutory interpretation that a legislator's statement that reiterates the discussion and events in the Legislature when the statute was under consideration or that was published as a letter of legislative intent may be considered in interpreting the statute. Such an argument might be made in any type of action or proceeding in which a question arises concerning how a statute should be construed. These points and authorities should be combined with the general points and authorities *set forth in § 217.20*, which relate to the construction of statutes to ascertain and effectuate the legislative intent.

The foregoing points and authorities may be combined with a memorandum of points and authorities relating to the procedural context in which the issue of statutory interpretation arises. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should also insert argument in the foregoing form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should point out the aspects of the legislator's statement that make it reflective of the intent of the Legislature as a whole rather than only of the individual legislator.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 217.83* may be used to oppose the contention supported by the foregoing points and authorities.

[3] Discussion of Authorities

[a] Consideration of Legislator's Statement Reflecting Legislature's Intent

In ***City of Long Beach v. Department of Indus. Relations*** *(2004) 34 Cal. 4th 942, 22 Cal. Rptr. 3d 518, 102 P.3d 904* , the Supreme Court considered whether a January 1, 2001, amendment of California's prevailing wage law was retroactive. The amendment expanded the definition of "public works" to include the design and preconstruction phases of construction [*Lab. Code § 1720(a)(1)*]. In determining that the Legislature had not intended the amendment to have retroactive application, the Court relied in part on a letter from the amendment's author, Senator John Burton, seeking to respond to interested parties' "concerns" regarding its operation. The letter recited that the amendment was "intended only to operate prospectively and therefore will only apply to contracts for public works entered into on and after the effective date of the legislation which will be January 1, 2001." The Court remarked that letters from individual legislators are usually given little weight unless they reflect the Legislature's *collective* intent. In this case, the Court found it significant that the Burton letter was presented, *prior* to the bill's enactment, to the full Senate, which carried his motion to print it in the Senate Daily Journal. Under these circumstances, the letter carried more weight as indicative of probable legislative intent (*34 Cal. 4th 942, 952)* .

Sierra Club v. California Coastal Comm'n *(2005) 35 Cal. 4th 839, 28 Cal. Rptr. 3d 316, 111 P.3d 294* , involved the construction of certain provisions of the California Coastal Act of 1976 (*Pub. Res. Code § 30000 et seq.*). In construing an ambiguous provision of the Act, the Supreme Court considered a letter from Senator Smith, the author of the legislation, to the Secretary of the Senate. The Court noted that although it generally does not consider the understanding of individual legislators in construing statutes, the letter from Senator Smith was relevant because it purported to reiterate statements made to the Legislature during consideration of the legislation and because it had been printed with the Senate's consent pursuant to Senator Smith's motion (*35 Cal. 4th 839, 853* & n.8).

On appeal, the husband relied on a Senate resolution incorporating a letter written by the assemblyman who wrote the amendment. The letter expressed the author's view that the amendment was intended to operate retroactively and noted

that he had so argued in obtaining its passage. The Supreme Court recognized that the letter was irrelevant to the extent that it merely reflected the author's personal views. The Court found, however, that the letter did more than reflect the author's views; it stated that he had argued those views in obtaining the bill's passage. The Court cited Rich v. State Board of Optometry (1965) 45 Cal. Rptr. 512 , in which an assemblyman's testimony was admitted as an indicator of legislative intent because the testimony was not an expression of individual opinion but a reiteration of the discussion and events that transpired in the Assembly committee hearing when the amendments were under consideration. Thus, the Court held that since the author's letter alluded to the argument he had presented in securing passage of the amendment as well as to his personal views, it could be considered because it shed light on the legislative debate (*16 Cal. 3d 583, 589-590)* . The Court also held that the letter was relevant because it was printed pursuant to another senator's motion to publish it as a letter of legislative intent (*16 Cal. 3d 583, 590)* .

The Court did note that the letter was not conclusive and that in the face of conflicting indicia of legislative intent, a motion to print a letter of legislative intent would command less respect than a formal resolution of legislative intent and that an individual legislator's recount of argument preceding passage of a bill probably merits less weight then extensive committee reports on the bill or a formal record of the legislative debates. Those problems were not presented by the case, however, because the author's letter was the only legislative history available on the statute, and the Court reversed (*16 Cal. 3d 583, 590-591)* .

[4] Additional Authorities

[a] Consideration of Legislator's Statement Reflecting Legislature's Intent

In *Billings v. California Coastal Com. (1980) 103 Cal. App. 3d 729, 163 Cal. Rptr. 288* , the court of appeal, in construing the California Coastal Act of 1976 (*Pub. Res. Code § 30000 et seq.*), relied on a letter the Speaker of the Assembly sent to all members of the Assembly prior to the final vote on the bill that contained the act. Citing *In re Marriage of Bouquet (1976) 16 Cal. 3d 583, 589-590, 128 Cal. Rptr. 427, 546 P.2d 1371* (*discussed under § 217.82[3][a]*), the court held that it could consider the letter because it summarized the Legislature's discussion and events prior to final passage of the bill. The letter referred to many revisions, negotiations, and compromises that led to the final version and detailed the final 22 major revisions (*103 Cal. App. 3d 729, 738)* .

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21-217 California Points & Authorities § 217.83

§ 217.83 Supporting Contention That Legislator's Statement of Intent of Statute Should Not Be Considered in Interpreting Statute

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It may be combined with the general points and authorities set out in § 217.20 or 217.25.*]

THE STATEMENT OF _____ [*name of legislator*] SHOULD NOT BE CONSIDERED IN INTERPRETING _____ [*specify statute*], BECAUSE IT IS MERELY A STATEMENT OF HIS/HER INDIVIDUAL MOTIVES OR UNDERSTANDING.

Legislator's Statement of Intent Not to Be Considered. In interpreting a statute, courts will not rely on evidence of the individual views of proponents of the legislation (*People v. Cruz (1996) 13 Cal. 4th 764, 780, n.9, 55 Cal. Rptr. 2d 117, 919 P.2d 731*). Nor is there any exception to this principle simply because the legislator whose motives are proffered actually authored the bill in controversy, as there is no guarantee that those who supported the proposal shared the author's view of its compass (*Williams v. Garcetti (1993) 5 Cal. 4th 561, 569, 20 Cal. Rptr. 2d 341, 853 P.2d 507* ; *California Teachers Assn. v. San Diego Community College Dist. (1981) 28 Cal. 3d 692, 699-701, 170 Cal. Rptr. 817, 621 P.2d 856*).

[*Set forth additional points and authorities relating to other rules of statutory interpretation that aid in ascertaining legislative intent behind statute and support interpretation desired (see §§ 217.21 -217.24, 217.40 -217.46, 217.60 -217.63, 217.80, 217.81, 217.84 -217.86, 217.88).*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a party's contention that a statute should be construed in a particularmanner. The form sets out the rule of statutory interpretation that an individual legislator's statement of his

or her personal opinion and understanding regarding the statute is not to be considered even if the legislator authored the statute. Such an argument might be made in any type of action or proceeding in which a question arises concerning how a statute should be construed. These points and authorities should be combined with the general points and authorities *set forth in § 217.20,* which relate to the construction of statutes to ascertain and effectuate the legislative intent. They may also be combined with the general points and authorities *set forth in § 217.25* relating to the impropriety of construing a statute that is not ambiguous.

These points and authorities may be combined with a memorandum of points and authorities relating to the procedural context in which the issue of statutory interpretation arises. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should also insert argument in the form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should analyze the statement to show that it expresses only the legislator's personal opinion. Counsel should also show that the statement does not reiterate the legislative discussion and events leading to the adoption of amendments, and that it was not adopted by the Legislature as a letter of legislative intent [*see In re Marriage of Bouquet (1976) 16 Cal. 3d 583, 590, 128 Cal. Rptr. 427, 546 P.2d 1371]* .

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 217.82* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Legislator's Statement of Intent Not to Be Considered

See discussion of ***People v. Cruz*** *(1996) 13 Cal. 4th 764, 55 Cal. Rptr. 2d 117, 919 P.2d 731* , in § 217.20[3][a].

In ***Williams v. Garcetti*** *(1993) 5 Cal. 4th 561, 20 Cal. Rptr. 2d 341, 853 P.2d 507* , plaintiff taxpayers sought injunctive and declaratory relief to stop enforcement of an amendment to *Penal Code § 272,* which imposed on parents the duty to "exercise reasonable care, supervision, protection, and control over their minor child." Plaintiffs alleged that the statute as amended was unconstitutionally vague and overbroad and impinged on the right to privacy. The trial court granted summary judgment to defendants, and the court of appeal reversed, determining that the amended statute was unconstitutionally vague.

The Supreme Court reversed, with directions to affirm the judgment of the trial court. In the course of its analysis, the Court rejected an argument made by defendants that the Court should consider a declaration of a legislative assistant to the author of the amendment. Defendants sought to show with that declaration that the purpose of the amendment was only to clarify existing law. The Court stated that in construing a statute it would not consider the motives or understandings of an individual legislator, even if he or she authored the statute (*5 Cal. 4th 561, 568-569)* .

In ***California Teachers Assn. v. San Diego Community College Dist.*** *(1981) 28 Cal. 3d 692, 170 Cal. Rptr. 817, 621 P.2d 856* , plaintiff sought reclassification and back pay for a certain category of defendant district's employees. The superior court granted a peremptory writ of mandate directing defendants to reclassify the employees but denied the writ as to back pay, and plaintiff and defendants appealed.

The Supreme Court reversed. On the issue of the amount of back pay, the Court addressed former Educ. Code § 13503.1 (*now see Educ. Code § 45025*), which provided for part-time employees' compensation to be fixed in accordance with the ratio between "time actually served" by the part-time employees and full-time employees. The Court held that the phrase "time actually served" clearly encompassed the employee's duties outside the classroom, and

noted that the scanty legislative history of the statute appeared to support its plain meaning (*28 Cal. 3d 692, 698)* . Plaintiff relied on a statement made by the author of amendments to the statute to support an interpretation limited to time actually served teaching in the classroom. The Court held, however, quoting *In re Marriage of Bouquet (1976) 16 Cal. 3d 583, 589-590, 128 Cal. Rptr. 427, 546 P.2d 1371* , that use of the statement would violate the settled principle of statutory construction that in construing a statute courts do not consider the motives or understandings of an individual legislator, even when the legislator was the author of the bill in question (*28 Cal. 3d 692, 699-700)* .

[4] Additional Authorities

[a] Legislator's Statement of Intent Not to Be Considered

Dubins v. Regents of University of California (1994) 25 Cal. App. 4th 77, 30 Cal. Rptr. 2d 336 concerned the interpretation of the Fair Employment and Housing Act (*Gov. Code § 12900 et seq.*). The court of appeal reversed a trial court's order sustaining a demurrer without leave to amend. The appellate court reasoned that, while it is true that courts inquiring into legislative purpose give consideration to statements made by the sponsor of a bill, the rule that legislative intent may be inferred from a statement of the sponsor only applies when that statement itself is unambiguous. Isolated, ambiguous remarks by the sponsor about a bill are not sufficient to demonstrate legislative intent. Also, the principle that legislative intentmay be inferred from the statements of a sponsor of a bill only applies when that statement is consistent with the statutory language and other legislative history (*25 Cal. App. 4th 77, 86-87)* .

In *Flood v. Wyeth Laboratories, Inc. (1986) 183 Cal. App. 3d 1272, 228 Cal. Rptr. 700* , the court of appeal was faced with the question of whether former Health & Safety Code § 429.36 (*now see Health & Safety Code § 120455*), providing that no person shall be liable for any injury caused by an act or omission in the administration of a vaccine or other immunizing agent to a minor, including the residual effects of the vaccine or immunizing agent, applied to vaccine manufacturers so as to immunize them from products liability, including strict liability in tort. In holding that it did not so apply, the court said that it did not consider the motives or understandings of individual legislators in construing a statute, nor did it carve an exception to this principle simply because the legislator whose motives are in question actually authored the bill in controversy, because there is no guarantee that those who supported the proposal shared the author's view of its limits (*183 Cal. App. 3d 1272, 1279)* .

The court of appeal in *California Coastal Com. v. Quanta Investment Corp. (1980) 113 Cal. App. 3d 579, 170 Cal. Rptr. 263* , reversed the trial court's order denying plaintiff commission's application for a preliminary injunction to restrain defendant from converting apartments to stock cooperatives without obtaining permits from plaintiff. The court had to determine whether or not the conversion constituted a "development" under *Pub. Res. Code § 30106* so as to be subject to the permit requirements of the California Coastal Act of 1976 (*Pub. Res. Code § 30000 et seq.*). While the appeal was pending, legislation was enacted to expressly include such conversions. The legislation included a grandfather clause specifying the scope of the legislation's application to past and pending conversions. The court considered a declaration by the author of the legislation regarding his intent in relation to the grandfather clause, but chose to disregard it. The declaration was of miniscule probative value because it failed to show at what point in the legislative process the author's views were made known to the committee considering the bill, which was substantially amended in the course of its passage. As a result, the court held that the declaration was not a reliable index of the collective legislative intent (*113 Cal. App. 3d 579, 604-605)* .

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21-217 California Points & Authorities § 217.84

§ 217.84 Supporting Contention That Statute Should Not Be Construed to Include Provision Rejected by Legislature

[1] FORM

[*The following may be included in a memorandum supporting or opposing a motion, or in a trial or appellate brief. It should be combined with the general memorandum set out in § 217.20.*]

THE COURT SHOULD NOT CONSTRUE _____ [*specify statute*] TO _____ [*describe construction sought to be avoided*], BECAUSE THE LEGISLATURE CONSIDERED AND FAILED TO ENACT A PROVISION EXPRESSLY TO THAT EFFECT.

Failure to Enact Specific Provision. The Legislature's rejection of a specific provision contained in an act as originally introduced is most persuasive to the conclusion that the act should not be construed to include the omitted provision (*Murphy v. Kenneth Cole Prods., Inc. (2007) 40 Cal. 4th 1094, 1106-1108, 56 Cal. Rptr. 3d 880, 155 P.3d 284* ; *Cooper v. Swoap (1974) 11 Cal. 3d 856, 865, 115 Cal. Rptr. 1, 524 P.2d 97* ; *California Coastal Com. v. Quanta Investment Corp. (1980) 113 Cal. App. 3d 579, 602, 170 Cal. Rptr. 263*).

[*Set forth additional points and authorities relating to other rules of statutory interpretation that aid in ascertaining legislative intent behind statute and support interpretation desired (see §§ 217.21 -217.24, 217.40 -217.46, 217.60 -217.63, 217.80 -217.83, 217.85, 217.86, 217.88).*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a party's contention that a statute should be construed in a particular manner. The form sets out the rule of statutory interpretation that a statute should not be construed to include a specific provision that was considered and rejected by the Legislature. Such an argument might be made in any type of action or proceeding in which a question arises concerning how a statute should be construed. This form should be combined

with the general memorandum presented in § 217.20, which relates to the construction of statutes to ascertain and effectuate the legislative intent. This form may also be combined with a memorandum relating to the procedural context in which the issue of statutory interpretation arises.

The foregoing points and authorities may be combined with a memorandum of points and authorities relating to the procedural context in which the issue of statutory interpretation arises. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should also insert argument in the foregoing form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should trace the legislative history of the statute to show that the interpretation sought to be avoided was the subject of an express provision of the original bill or a proposed amendment to it that would have adopted that interpretation but which was rejected by the Legislature. Other than in the case of the Legislature rejecting provisions contained in bills or offered as amendments, the failure of the Legislature to pass a bill is of little value as evidence of legislative intent. Thus, the failure of the Legislature to enact one bill containingan express provision on a subject is not persuasive that another bill on the same subject, but not containing the provision, should not be construed to achieve the result that would have prevailed under the unpassed bill [*see Agricultural Labor Relations Bd. v. Superior Court (1976) 16 Cal. 3d 392, 417-418, 128 Cal. Rptr. 183, 546 P.2d 687* ; *State Compensation Ins. Fund v. Workers' Comp. Appeals Bd. (1979) 88 Cal. App. 3d 43, 62-63, 152 Cal. Rptr. 153]* .

[3] Discussion of Authorities

[a] Failure to Enact Specific Provision

The factual and procedural background of ***Murphy v. Kenneth Cole Prods., Inc.*** *(2007) 40 Cal. 4th 1094, 56 Cal. Rptr. 3d 880, 155 P.3d 284* , are discussed in *§ 217.63[3][a]*. The major substantive issue before the Supreme Court in this case was whether an award under *Labor Code § 226.7(b)* (which requires that an employer pay "one additional hour of pay" per day to an employee who has been denied meal and rest periods) constitutes a wage or a penalty. Wage claims are subject to the three-year limitation of *Code of Civil Procedure § 338(a)* (governing "[a]n action upon a liability created by statute, other than a penalty or forfeiture"). But penalties are subject to the one-year limitation of *Code Civ. Proc. 340(a)* or (governing "[a]n action upon a statute for a penalty or forfeiture").

The Supreme Court concluded that the "additional hour of pay" under *Labor Code § 226.7(b)* constitutes a wage and is therefore subject to the three-year limitations period of *Code of Civil Procedure § 338(a)* (*40 Cal. 4th 1094, 1102-1111)* . In coming to this conclusion, the Court reviewed the statutory language and the legislative and administrative history. One factor that the Court found significant was that in enacting Section 226.7, the Legislature amended the original bill to eliminate a "penalty" that would have been collected by the Labor Commissioner in addition to a payment to the employee. The Court reasoned that the Legislature's "rejection of a specific provision contained in an act as originally introduced is 'most persuasive' that the act should not be interpreted to include what was left out" (*40 Cal. 4th 1094, 1106-1108)* .

Cooper v. Swoap *(1974) 11 Cal. 3d 856, 115 Cal. Rptr. 1, 524 P.2d 97* , involved a class action challenging a regulation of the State Department of Social Welfare relating to aid to families with dependent children (AFDC). The regulation deemed housing shared by AFDC recipients with a recipient of an adult aid program, such as aid to the disabled, to constitute a "noncash economic benefit" and treated it as income warranting reduction of AFDC benefits. Plaintiffs appealed after summary judgment was granted in defendants' favor.

The Supreme Court reversed, holding that the regulation was incompatible with the governing statutory scheme, the Welfare Reform Act of 1971 [Stats. 1971, ch. 578]. The Court noted that a bill including a section expressly adopting the substance of the regulation was introduced and died in the 1971 session of the Legislature, and that the same section was subsequently offered as an amendment to the bill that ultimately became the Welfare Reform Act of 1971, but was

rejected in committee, on the floor, and in final negotiations on the bill (*11 Cal. 3d 856, 864 n.11*). The Legislature's specific rejection of the substance of the challenged regulation provided the clearest indication that the measure was not consistent with legislative intent (*11 Cal. 3d 856, 865)* .

The court of appeal in ***California Coastal Com. v. Quanta Investment Corp.*** *(1980) 113 Cal. App. 3d 579, 170 Cal. Rptr. 263* , reversed the trial court's order denying plaintiff commission's application for a preliminary injunction to restrain defendant from converting apartments to stock cooperatives without obtaining permits from plaintiff. The court had to determine whether or not the conversion constituted a "development" under *Pub. Res. Code § 30106* so as to be subject to the permit requirements of the California Coastal Act of 1976 (*Pub. Res. Code § 30000 et seq.*). While the appeal was pending, legislation was enacted to expressly include such conversions. As originally introduced, the bill provided that it was declaratory of existing law, but in the course of amendment this provision was deleted and a grandfather clause specifying the scope of the legislation's application to past and pending conversions was added. In holding that the legislation did not apply to the case before it, the court noted that the deletion of the flat statement that the bill was declaratory of existing law, which had been included in the original proposed bill and which survived the *first amendment* but which did not appear in the final version of the bill that was enacted, strongly signified that there was no legislative concurrence in that policy statement. The court cited *Madrid v. Justice Court (1975) 52 Cal. App. 3d 819, 825, 125 Cal. Rptr. 348* , for the principle that the Legislature's rejection of a specific provision contained in an act as originally introduced is most persuasive to the conclusion that the act should not be construed to include the omitted provision (*113 Cal. App. 3d 579, 601-602)* .

[4] Additional Authorities

[a] Failure to Enact Specific Provision

In *Ventura v. City of San Jose (1984) 151 Cal. App. 3d 1076, 199 Cal. Rptr. 216* , the court of appeal reversed the lower court's decision upholding local ordinances banning the sale of fireworks. The court found that in enacting *Health & Safety Code § 12541*, by deleting manufacture and sale from areas in which local governments may regulate, the Legislature intended that the state preempt those areas. When the Legislature has rejected a specific provision which was part of an act when originally introduced, the law as enacted should not be construed to contain that provision (*151 Cal. App. 3d 1076, 1080)* .

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21-217 California Points & Authorities § 217.85

§ 217.85 Supporting Contention That Amendment Substantially Changing Previously Construed Statute Shows Legislative Intent to Change Law

[1] FORM

[*The following may be included in a memorandum supporting or opposing a motion, or in a trial or appellate brief. It should be combined with the general form set out in § 217.20.*]

THE COURT SHOULD CONSTRUE _____ [*specify statute*] TO _____ [*describe desired interpretation of statute*] BECAUSE IT IS PRESUMED THAT THE LEGISLATURE WAS AWARE OF THE PREVIOUS CONTRARY JUDICIAL INTERPRETATION OF _____ [*specify statute*] AND INTENDED TO ALTER THE LAW WHEN IT AMENDED THE STATUTE TO MAKE SUBSTANTIAL CHANGES IN THE STATUTORY LANGUAGE.

Intent to Alter Law Inferred From Substantial Changes in Statutory Language. When the Legislature amends a statute that has been the subject of judicial construction, it is presumed that the Legislature was fully cognizant of the construction, and when substantial changes are made in the statutory language it is usually inferred that the lawmakers intended to alter the law in those particulars affected by the changes (*Goodman v. Lozano (2010) 47 Cal. 4th 1327, 1336-1337, 104 Cal. Rptr. 3d 219, 223 P.3d 77* ; *Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified Sch. Dist. (1978) 21 Cal. 3d 650, 659, 147 Cal. Rptr. 359, 580 P.2d 1155*).

[*Set forth additional points and cite authorities relating to other rules of statutory interpretation that aid in ascertaining legislative intent behind statute and support interpretation desired (see §§ 217.21 -217.24, 217.40 -217.46, 217.60 -217.63, 217.80 -217.84, 217.86, 217.88).*]

[2] Comments

[a] Use of Form

The foregoing form may be submitted in support of a party's contention that a statute should be construed in a particular

manner. The form sets out the rule of statutory interpretation that when the Legislature amends a statute that has been judicially construed and makes substantial changes in the statutory language, a legislative intent to alter the law is inferred. Such an argument might be made in any type of action or proceeding in which a question arises concerning how a statute should be construed. This form should be combined with the general form *set forth in § 217.20,* which relates to the construction of statutes to ascertain and effectuate the legislative intent.

The foregoing form may be combined with forms relating to the procedural context in which the issue of statutory interpretation arises. This form may also be adapted for use in a trial or appellate brief.

Counsel should also insert argument in the foregoing form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should contrast the prior judicial construction of the statute with the subsequent changes made by the Legislature in the statutory language to demonstrate that the manner in which the language was changed reveals an intent to alter the law.

[b] Opposing Memorandum

In an appropriate case, the form *set out in § 217.88* may be used to oppose the contention supported by the foregoing form.

[3] Discussion of Authorities

[a] Intent to Alter Law Inferred From Substantial Changes in Statutory Language

In ***Goodman v. Lozano*** *(2010) 47 Cal. 4th 1327, 104 Cal. Rptr. 3d 219, 223 P.3d 77* , the California Supreme Court considered whether a statutory amendment was intended to overrule a judicial construction of the statute's pre-amendment language (the statute was *Code Civ. Proc. § 1032*, as repealed and added in 1986). The Court noted that it was not dispositive that the Legislature did not explicitly address the particular judicial decision. Even in the absence of the specific rejection of a judicial decision, the circumstances may indicate that the amendment was intended to reject the judicial construction of the statute. Rather, the Legislature's repeal of a prior statute, together with its enactment of a new statute on the same subject with significant differences in language, strongly suggests the Legislature intended to change the law (*47 Cal. 4th 1327, 1336-1337)* .

The facts and procedural background of ***Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified Sch. Dist.*** *(1978) 21 Cal. 3d 650, 147 Cal. Rptr. 359, 580 P.2d 1155* , are discussed in *§ 217.20[3][a]*. The Supreme Court affirmed the trial court's judgment issuing a writ of mandate, construing former Educ. Code § 13506 (now *Educ. Code § 45028*) as requiring plaintiff to be placed on the salary schedule as he requested. The Court applied the principle of statutory construction that when the Legislature, in amending a statute, makes substantial changes in statutory language that had earlier been the subject of judicial construction, it is usually inferred that the lawmakers intended to alter the law in the particulars affected by the changes. Application of this rule indicated that the Legislature in former Educ. Code § 13506 had intended to require that salary classifications of teachers proceed wholly on a uniform basis of years of training and years of experience and to change a previous interpretation of that section that had allowed "reasonable" classifications (*21 Cal. 3d 650, 659-661)* .

[4] Additional Authorities

[a] Intent to Alter Law Inferred From Substantial Changes in Statutory Language

In *Gray v. Firthe (1987) 194 Cal. App. 3d 202, 239 Cal. Rptr. 389* , the court of appeal, construing *Code Civ. Proc. § 583.310*, said that an intention to change the law or the meaning of a statute will generally be inferred or presumed from a material change in the statutory language, and that such an intent is inferred when the existing law is amended by deletion of an express provision of the previous statute and the substitution of an alternative provision (*194 Cal. App.*

3d 202, 208) .

In *County of Los Angeles v. State of California (1987) 43 Cal. 3d 46, 233 Cal. Rptr. 38, 729 P.2d 202* , plaintiff local governments contended that they were entitled to reimbursement from the State of California forincreases in workers' compensation benefits mandated by the State of California. At issue was the interpretation of a statute requiring state reimbursement when the state requires a local government to provide an "increased level of service." The applicable law did not define "increased level of service," but under a repealed statute that had governed reimbursement prior to extensive changes in reimbursement law in 1975, "increased level of service" included any requirement mandated by state law that made necessary expanded or additional costs to a local agency. Plaintiffs argued that this definition of "increased level of service" continued to apply. The court rejected plaintiffs' argument, noting that one cannot reasonably conclude that the statutory definition of a phrase of art continues after it has been specifically repealed. A change must have been intended; otherwise deletion of the preexisting definition makes no sense (*County of Los Angeles v. State of California (1987) 43 Cal. 3d 46, 54-55, 233 Cal. Rptr. 38, 729 P.2d 202*). On examining the legislative intent behind the 1975 legislation that repealed the defining statute and established new reimbursement law, the court concluded that the prior definition of "increased level of service" was no longer valid (*County of Los Angeles v. State of California (1987) 43 Cal. 3d 46, 55-56, 233 Cal. Rptr. 38, 729 P.2d 202*).

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CHAPTER 217 STATUTORY INTERPRETATION
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21-217 California Points & Authorities § 217.86

§ 217.86 Supporting Contention That Legislature Adopted Judicial Interpretation of Statute by Reenacting Previously Construed Portions Without Change

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with the general points and authorities set out in § 217.20.*]

THE COURT SHOULD FOLLOW THE PREVIOUS JUDICIAL INTERPRETATION OF _____ [*specify statute*] BECAUSE THE LEGISLATURE IS PRESUMED TO HAVE BEEN AWARE OF AND TO HAVE ACQUIESCED IN THE PREVIOUS JUDICIAL INTERPRETATION OF _____ [*specify statute*] BY REENACTING IT WITHOUT ALTERING PORTIONS OF IT THAT HAD BEEN CONSTRUED.

Adoption of Judicial Interpretation by Reenactment Without Change. When the Legislature amends a statute without altering portions of the provision that have previously been judicially construed, the Legislature is presumed to have been aware of and to have acquiesced in the previous judicial construction. Accordingly, reenacted portions of the statute are given the same construction they received before the amendment (*Marina Point, Ltd. v. Wolfson (1982) 30 Cal. 3d 721, 734, 180 Cal. Rptr. 496, 640 P.2d 115 , cert. denied, 459 U.S. 858, 103 S. Ct. 129, 74 L. Ed. 2d 111*). Moreover, the Legislature's failure to adopt a proposed amendment to an existing statute is of little weight in determining the relevant intent of the earlier Legislature that enacted that law (*Lolley v. Campbell (2002) 28 Cal. 4th 367, 378-379, 121 Cal. Rptr. 2d 571, 48 P.3d 1128*).

[*Set forth additional points and authorities relating to other rules of statutory interpretation that aid in ascertaining legislative intent behind statute and support interpretation desired (see §§ 217.21 -217.24, 217.40 -217.46, 217.60 -217.63, 217.80 -217.85, 217.88).*]

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of a party's contention that a statute should be construed in a particular manner. The form sets out the rule of statutory interpretation that when the Legislature reenacts statutory language that has been judicially construed, it is presumed to have acquiesced in the previous judicial construction. Such an argument might be made in any type of action or proceeding in which a question arises concerning how a statute should be construed. These points and authorities should be combined with the general points and authorities *set forth in § 217.20*, which relate to the construction of statutes to ascertain and effectuate the legislative intent.

The foregoing points and authorities may be combined with a memorandum of points and authorities relating to the procedural context in which the issue of statutory interpretation arises. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should also insert argument in the foregoing form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should specify the statutory language and the case law interpreting it on which he or she is relying and show that the statute of which the language is part has been amended but that the Legislature left the language in question intact. Each of the California codes includes a section to the effect that its provisions are to be construed as restatements and continuations, and not as new enactments, insofar as they are substantially the same as existing statutory provisions, and counsel may wish to cite the section to that effect pertaining to the code that contains the statute to be construed [*see, e.g., Civ. Code § 5*; *Code Civ. Proc. § 5*; *Educ. Code § 3*].

[3] Discussion of Authorities

[a] Adoption of Judicial Interpretation by Reenactment Without Change

In ***Lolley v. Campbell*** *(2002) 28 Cal. 4th 367, 121 Cal. Rptr. 2d 571, 48 P.3d 1128* , the Supreme Court held that a superior court may assess attorney's fees against an employer who unsuccessfully appeals an administrative order to pay wages under *Lab. Code § 98.2(c)*, even if the employee could not afford counsel and was represented on appeal without charge by the Labor Commissioner. Arguing that the employee had not "incurred" fees within the meaning of the statute, the employer pointed to recent legislation that amended the statute but did not change the relevant portion of it. The employer contended that one proposed change in the statute, which was deleted from the final version of the bill, would have provided expressly for an award of fees to the commissioner for representing an employee. The employer maintained that the failed amendment was intended to change pre-existing law and thus was evidence of what that law was. The Supreme Court rejected this argument, holding that a later Legislature's failure to adopt a proposed amendment to an existing law is of little weight in determining the relevant intent of the earlier Legislature that enacted that law. The Court stated that "no clear inference may be drawn from the failed amendment about the Legislature's understanding of [*Lab. Code § 98.2(c)*] at the time that it was enacted ... . [T]he statute presently in effect [is binding], not ... a legislative statement of intent that failed to become law" (*Lolley v. Campbell (2002) 28 Cal. 4th 367, 378-379, 121 Cal. Rptr. 2d 571, 48 P.3d 1128*).

Defendant tenants in ***Marina Point, Ltd. v. Wolfson*** *(1982) 30 Cal. 3d 721, 180 Cal. Rptr. 496, 640 P.2d 115 , cert. denied, 459 U.S. 858, 103 S. Ct. 129, 74 L. Ed. 2d 111* , resisted plaintiff landlord's action for unlawful detainer on the ground that their eviction, based on their having a child, was in violation of the Unruh Civil Rights Act (*Civ. Code § 51*). The municipal court rejected defendants' contention, holding that *Civ. Code § 51* did not protect families with children from discrimination but was limited to protected classes specifically designated by statute or judicial determination. Defendants appealed.

The Supreme Court reversed, holding that *Civ. Code § 51* does extend its protection to families with children. The Court held that the municipal court's interpretation of the statute, restricting its coverage to designated classes, directly conflicted with *In re Cox (1970) 3 Cal. 3d 205, 216, 90 Cal. Rptr. 24, 474 P.2d 992* , which had held that the identification of particular bases of discrimination in the statute is illustrative rather than restrictive, and that the

protection of the act extends to prohibit all arbitrary discrimination by business establishments (*Marina Point, Ltd. v. Wolfson (1982) 30 Cal. 3d 721, 732, 180 Cal. Rptr. 496, 640 P.2d 115 , cert. denied, 459 U.S. 858 (1982))* . Subsequent to *Cox*, the Legislature amended *Civ. Code § 51* to add sex to the enumerated bases of discrimination proscribed by the section. The Court applied the rule of statutory interpretation set out in the foregoing form. The Court found the rule particularly applicable because they did not need to simply presume that the Legislature knew of the *Cox* interpretation, as *Cox* was referred to in the legislative history. If the Legislature had disagreed with *Cox*, it would presumably have altered the preexisting language to so indicate, but instead the Legislature had reenacted the previously construed language verbatim and simply added an explicit reference to sex discrimination to highlight the statute's application in that area and thereby endorsed the *Cox* interpretation (*Marina Point, Ltd. v. Wolfson (1982) 30 Cal. 3d 721, 734-735, 180 Cal. Rptr. 496, 640 P.2d 115 , cert. denied, 459 U.S. 858 (1982))* .

Some two decades later, the Legislature reaffirmed the Supreme Court's holding in **Marina Pt., Ltd. v. Wolfson**. In adding marital status and sexual orientation to the bases of discrimination expressly proscribed by the Unruh Civil Rights Act [*Civ. Code § 51(b), (c), (e)(5),(6)*], the Legislature expressly stated that (1) the addition of prohibited bases of discrimination was not intended to affect the Supreme Court's holding in **Marina Pt., Ltd. v. Wolfson,** and (2) the bases of discrimination enumerated in the Act are illustrative rather than restrictive [Stats. 2005, ch. 420, § 2].

[4] Additional Authorities

[a] Adoption of Judicial Interpretation by Reenactment Without Change

After the court of appeal in *In re Marriage of Skelley (1976) 18 Cal. 3d 365, 134 Cal. Rptr. 197, 556 P.2d 297* , granted respondent's motion to dismiss petitioner's appeal from an order modifying temporary spousal support, the Supreme Court granted hearing and denied the motion. In holding that orders modifying temporary support are appealable under *Code Civ. Proc. § 904.1*, the Court reviewed the judicial interpretation of former Code Civ. Proc. § 963, under which temporary support orders had been held appealable. Noting that *Code Civ. Proc. § 904.1* utilized language virtually identical to former Code Civ. Proc. § 963, the Court stated that when a statute that has been construed by the courts is reenacted in the same or substantially the same terms, the Legislature is presumed to be familiar with that construction and to have adopted it as part of the law (*In re Marriage of Skelley (1976) 18 Cal. 3d 365, 369, 134 Cal. Rptr. 197, 556 P.2d 297*).

In *Orange County Employees Assn., Inc. v. County of Orange (1993) 14 Cal. App. 4th 575, 17 Cal. Rptr. 2d 695* , the court of appeal applied the rule set forth in the foregoing form to statutory interpretations in AttorneyGeneral's opinions. The issue in the case was whether *Penal Code §§ 830.33, 830.35*, and *830.36* allowed a county or its municipal courts to preclude airport law enforcement officers, deputy coroners, and court service officers from carrying concealed firearms while off duty. In concluding that the statutes did not allow the county or its municipal courts to do so, the court relied in large part on the fact that the Attorney General had interpreted language identical to that in *Penal Code §§ 830.33, 830.35*, and *830.36* prior to the enactment of those statutes. The Attorney General had interpreted the language to apply only to on-duty officers. The court held that when *Penal Code §§ 830.33, 830.35*, and *830.36* were passed, "the Legislature was presumably aware of the Attorney General's opinions" (*Orange County Employees Assn., Inc. v. County of Orange (1993) 14 Cal. App. 4th 575, 581-582, 17 Cal. Rptr. 2d 695*).

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21-217 California Points & Authorities § 217.87

§ 217.87 Supporting Contention That Voters' Pamphlet May Be Considered in Interpreting Statute or Constitutional Amendment Enacted by Voters

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with the general points and authorities set out in § 217.20.*]

IN CONSTRUING _____ [*specify statute or constitutional amendment adopted by voters*], THE COURT SHOULD CONSIDER THE OFFICIAL BALLOT PAMPHLET BECAUSE IT PROVIDES INDICIA OF THE INTENT OF THE VOTERS.

Consideration of Arguments Contained in Voters' Pamphlets. In interpreting ambiguous language in a statute or constitutional amendment enacted by the voters, it is appropriate to consider indicia of voters' intent other than the language of the provision itself. Such indicia include the analysis and arguments contained in the official voters' pamphlet (*Legislature v. Eu (1991) 54 Cal. 3d 492, 504-505, 286 Cal. Rptr. 283, 816 P.2d 1309* ; *White v. Davis (1975) 13 Cal. 3d 757, 775 n.11, 120 Cal. Rptr. 94, 533 P.2d 222*).

[*Set forth additional points and authorities relating to other rules of statutory interpretation that aid in ascertaining legislative intent behind statute or amendment and support interpretation desired (see §§ 217.21 -217.24, 217.40 -217.46, 217.60 -217.63, 217.81 -217.86, 217.88).*]

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of a party's contention that a statute or constitutional amendment adopted by the voters should be construed in a particular manner. The form sets out the rule of construction that a court may consider the analysis and arguments presented in a voters' pamphlet in determining the intent of the voters. These indicia of voters' intent may be used in any proceeding when the language of a statute or constitutional

amendment, adopted through the initiative or referendum process, is ambiguous in itself. These points and authorities should be combined with the general points and authorities *set forth in § 217.20*, which relate to the construction of statutes to ascertain and effectuate legislative intent. The points and authorities in this form may also be adapted for use in a trial or appellate brief.

Counsel should also insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set out the voters' pamphlet or the parts of it on which he or she seeks to rely. Courts may take judicial notice of materials contained in voters' pamphlets [*In re Quinn (1973) 35 Cal. App. 3d 473, 484 n.4, 110 Cal. Rptr. 881]* .

[3] Discussion of Authorities

[a] Consideration of Arguments Contained in Voters' Pamphlets

In ***Legislature v. Eu*** *(1991) 54 Cal. 3d 492, 286 Cal. Rptr. 283, 816 P.2d 1309* , the Supreme Court was asked to decide a constitutional attack on Proposition 140, The Political Reform Act of 1990. After the voters adopted the act in the November 1990 election, petitioners sought a writ of mandate in the Supreme Court, which exercised its original jurisdiction because of the importance to the public of the issues presented. Part of the attack challenged the provisions regarding term limits. Specifically, the issue was whether Proposition 140 imposed a lifetime ban on officers who had served the specified number of terms or merely limited the number of consecutive terms an officer could serve. In holding that a lifetime ban was intended, the Court considered arguments contained in the voters' pamphlet both for and against the provision. The Court was especially influenced by the arguments against the provision, which repeatedly stressed the lifetime nature of the ban (*54 Cal. 3d 492, 504-505)* .

In ***White v. Davis*** *(1976) 13 Cal. 3d 757, 120 Cal. Rptr. 94, 533 P.2d 222* , petitioners brought a taxpayers' suit against the Los Angeles police chief, seeking a permanent injunction barring the police from spendingpublic funds to conduct covert intelligence gathering activities at the University of California at Los Angeles. The superior court sustained defendant's demurrer without leave to amend, entered judgment in defendant's favor, and dismissed the suit. Petitioners appealed.

In addition to asserting that the police's conduct infringed their constitutional freedoms of speech and association, the petitioners claimed that the conduct abridged their right to privacy, which had been added to the California Constitution by amendments enacted in 1972 [*Cal. Const. art. I, § 1*]. After reviewing the voters' pamphlet to determine the principal objectives of the newly adopted amendment, the Supreme Court concluded that the police activity epitomized the kind of governmental conduct the amendment condemned. The Court reversed the trial court's ruling sustaining defendant's demurrer.

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21-217 California Points & Authorities § 217.88

§ 217.88 Opposing Contention That Amendment Substantially Changing Previously Construed Statute Shows Legislative Intent to Change Law--Mere Change in Phraseology

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with the general points and authorities set out in § 217.20.*]

THE COURT SHOULD FOLLOW THE PREVIOUS JUDICIAL INTERPRETATION OF _____ [*specify statute*] BECAUSE THE MERE CHANGE IN ITS PHRASEOLOGY INCIDENT TO ITS REVISION DID NOT CHANGE ITS MEANING, SINCE THE INTENT TO CHANGE ITS MEANING DOES NOT CLEARLY APPEAR.

Mere Change in Phraseology. A mere change in phraseology, incident to a revision of the Constitution or a statute, does not result in a change of meaning unless the intent to make such a change clearly appears (*Mosk v. Superior Court (1979) 25 Cal. 3d 474, 493, 159 Cal. Rptr. 494, 601 P.2d 1030* ; *DeCastro West Chodorow & Burns, Inc. v. Superior Court (1996) 47 Cal. App. 4th 410, 418* , 54 Rptr. 2d 792).

[*Set forth additional points and authorities relating to other rules of statutory interpretation that aid in ascertaining legislative intent behind statute and support interpretation desired (see §§ 217.21 -217.24, 217.40 -217.46, 217.60 -217.63, 217.80 -217.84, 217.86).*]

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a party's contention that a statute should be construed in a particular manner. The form sets out the rule of statutory interpretation that a mere change in phraseology, incident to a revision of a statute, does not result in a change of meaning unless the intent to make such a change clearly appears. Such an argument might be made in any type of action or proceeding in which a question arises concerning how a

statute should be construed. These points and authorities should be combined with the general points and authorities *set forth in § 217.20*, which relate to the construction of statutes to ascertain and effectuate the legislative intent.

These points and authorities may be combined with a memorandum of points and authorities relating to the procedural context in which the issue of statutory interpretation arises. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should also insert argument in the form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should show that the change in the statute was a mere change in phraseology incident to a major revision of the statute or was intended to clarify the law rather than change it.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 217.85*.

[3] Discussion of Authorities

[a] Mere Change in Phraseology

In ***Mosk v. Superior Court*** *(1979) 25 Cal. 3d 474, 159 Cal. Rptr. 494, 601 P.2d 1030* , petitioner sought a writ of mandate to quash a subpoena ordering him to appear as a witness at a public hearing before the Commission on Judicial Performance on the ground that a public investigation was unconstitutional. In sustaining this contention, the Supreme Court noted that former Cal. Const, art. VI, § 10b, had expressly provided that all proceedings before the commission "shall be confidential," and that, as part of an overall revision of the California Constitution, this language had been replaced with new § 18(e) (*now see Cal. Const, art. VI, § 18(f)*), which provides that "[t]he Judicial Council shall make rules implementing this section and providing for confidentiality of proceedings." The Court recognized the general rule that a substantial change in the language of a statute or constitutional provision by an amendment indicates an intention to change its meaning. However, citing prior California appellate cases, theCourt held that a mere change in phraseology, incident to a revision of the Constitution or a statute, does not result in a change of meaning unless the intent to make such a change clearly appears (*25 Cal. 3d 474, 493)* . The Court proceeded to reject the Commission's contention that under the new language it had discretion to determine when proceedings are to be confidential, finding no intent to change the constitutional requirement of confidentiality (*25 Cal. 3d 474, 499)* .

In ***DeCastro West Chodorow & Burns, Inc. v. Superior Court*** *(1996) 47 Cal. App. 4th 410* , 54 Rptr. 2d 792, defendants in a legal malpractice action sought a writ of mandate to compel the superior court to vacate its order denying summary adjudication on the issue of plaintiffs' entitlement to so-called "lost opportunity" damages. The issue presented on appeal was whether *Code Civ. Proc. § 437c(f)(1)* permitted summary adjudication on one of two or more parts of a plaintiff's compensatory damages claim in the wake of a 1993 amendment. The court of appeal affirmed denial of the motion, finding that *Code Civ. Proc. § 437c* does not permit summary adjudication of part of a cause of action. Because defendants' motion for summary adjudication would only have disposed of one portion of plaintiffs' compensatory damages claim, rather than the entire claim, the appellate court found it was properly denied.

In 1993 *Code Civ. Proc. § 437c, subdivision* f, was amended, *inter alia,* to permit summary adjudication of "one or more claims for damages." Defendants argued that the meaning of the statute was changed by the amendment to permit disposal of part of a plaintiff's claim for damages, and thus was a departure from the earlier rule. However, the appellate court pointed out that a mere change in the phraseology of a statute, incident to a revision, does not result in a change of meaning unless the intent to make such a change clearly appears (*47 Cal. App. 4th 410, 418)* . Not finding any evidence of a change in meaning, the court held that the 1993 amendment did not alter *Code of Civ. Proc. § 437c*, but was merely an attempt to clarify the meaning of the prior enactment (*47 Cal. App. 4th 410, 422-423)* .

[4] Additional Authorities

[a] Mere Change in Phraseology

The facts and procedural background of *Jones v. Tracy School Dist. (1980) 27 Cal. 3d 99, 165 Cal. Rptr. 100, 611 P.2d 441* , are discussed in *§ 217.111[3][b]*. In determining that the award of attorneys' fees is mandatory rather than discretionary under *Lab. Code § 1197.5*, the Supreme Court reviewed the legislative history of the section and found that the bill that amended the statute to add the attorneys' fees provision, as introduced in the Legislature, contained two sentences, the second of which unequivocally mandated an award of attorneys' fees. The Court noted that in the course of passage, the bill was amended and the two sentences condensed into one, and held that even though the Assembly altered the phraseology of the original bill, it demonstrated no intent to change the original bill's mandatory award of attorneys' fees (*27 Cal. 3d 99, 110-111)* .

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21-217 California Points & Authorities § 217.89

§ 217.89 Opposing Contention That Legislature Adopted Judicial Interpretation of Statute by Reenacting Previously Construed Portions Without Change

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with the general points and authorities set out in § 217.20.*]

THE COURT IS NOT REQUIRED TO FOLLOW THE PREVIOUS JUDICIAL INTERPRETATION OF _____ [*specify statute*] NOTWITHSTANDING THE FACT THAT THE LEGISLATURE HAS SUBSEQUENTLY REENACTED THAT STATUTE WITHOUT ALTERING THE INTERPRETED PORTIONS.

A. Exceptions to Rule That Reenactment of Statute Without Changing Portions Previously Interpreted by Judiciary Adopts Judicial Interpretation. The doctrine concerning the implied adoption of a judicial construction of a statute by reenactment of the statute is not without exceptions; the persuasion that lies behind the doctrine is merely one factor in the total effort to give fair meaning to statutory language (*I. J. Weinrot & Son, Inc. v. Jackson (1985) 40 Cal. 3d 327, 336, 220 Cal. Rptr. 103, 708 P.2d 682*).

[*Optional*] **B. Prior Judicial Construction of Statute Not Mandated When Subsequent Reenactment Not Concerned With Topic of Judicial Construction.** The reenactment of a statute does not incorporate a prior judicial interpretation of the meaning of the statute when it is clear that the legislative enactment had nothing to do with the topic of the judicial decision (*see I. J. Weinrot & Son, Inc. v. Jackson (1985) 40 Cal. 3d 327, 336, 220 Cal. Rptr. 103, 708 P.2d 682*).

[*Set forth additional points and authorities relating to other rules of statutory interpretation that aid in ascertaining legislative intent behind statute and support interpretation desired (see §§ 217.21 -217.24, 217.40 -217.46, 217.60 -217.63, 217.80 -217.85, 217.88).*]

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of a party's contention that a statute should be construed in a manner opposed to the way in which it was interpreted by a judicial decision prior to the statute's reenactment. The form sets out the rule of statutory construction that the intent of the Legislature is paramount and the fact that a statute was given a certain construction by the judiciary prior to its reenactment without change in the relevant portions does not require a finding that the Legislature intended to adopt the judicial construction. Such an argument might be made in any type of action or proceeding in which a question arises concerning how a statute should be construed. Of course, a party seeking to overcome prior judicial interpretation of a statute is faced with a formidable burden under the rule of stare decisis, although to the extent the interpretation is dicta, the burden of it is lessened [*see I. J. Weinrot & Son, Inc. v. Jackson (1985) 40 Cal. 3d 327, 339, 220 Cal. Rptr. 103, 708 P.2d 682]* . These points and authorities should be combined with the general points and authorities *set forth in § 217.20*, which relate to the construction of statutes in general.

The foregoing points and authorities may be combined with a memorandum of points and authorities relating to the procedural context in which the issue of statutory interpretation arises. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. For example, in arguing that the reenactment of a statute did not incorporate a prior judicial interpretation because the Legislature's purpose was totally unrelated to the topic of the judicial decision and other factors indicate that the Legislature intended a different interpretation, the facts supporting such a position should be specifically noted.

[3] Discussion of Authorities

[a] Exceptions to Rule That Reenactment of Statute Without Changing Portions Previously Interpreted by Judiciary Adopts Judicial Interpretation

Plaintiff's employee in ***I. J. Weinrot & Son, Inc. v. Jackson*** *(1985) 40 Cal. 3d 327, 220 Cal. Rptr. 103, 708 P.2d 682* , was injured by the negligence of defendant, and plaintiff sought damages under *Civ. Code § 49* for injury to an employee. The trial court sustained a demurrer to the cause of action.

A divided Supreme Court affirmed. It rejected plaintiff's contention that *Civ. Code § 49* provided a cause of action for an employer seeking recovery for lost profits and expenses resulting from the negligent injury to its employee even though the court of appeal in 1933 interpreted this statute as providing such a cause of action [*see Darmour Prod. Corp. v. H.M. Baruch Corp. (1933) 135 Cal. App 351, 352-353, 27 P.2d 664]* , and the Legislature subsequently, in 1939, reenacted the relevant provisions of *Civ. Code § 49* without change. The Supreme Court noted that the presumption that a reenactment of a statute adopts a prior judicial interpretation is merely one factor in the total effort to give fair meaning to statutory language. The Court held that the prior judicial interpretation of *Civ. Code § 49* was incorrect and that the subsequent reenactment of that section did not incorporate that prior interpretation since "[e]ven a cursory review of the 1939 amendments indicates that the Legislature's purpose in amending section 49 had nothing to do with broadening the master's right of action for injuries to a servant" (*40 Cal. 3d 327, 335-336)* .

[b] Prior Judicial Construction of Statute Not Mandated When Subsequent Reenactment Not Concerned With Topic of Judicial Construction

I.J. Weinrot & Son, Inc. v. Jackson *(1985) 40 Cal. 3d 327, 220 Cal. Rptr. 103, 708 P.2d 682* , is *discussed under § 217.89[3][a]*.

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21-217 California Points & Authorities § 217.90

§ 217.90 Opposing Contention That Legislative Silence After Court Has Construed Statute Gives Rise to Presumption of Legislative Awareness of and Acquiescence in Construction

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with the general points and authorities set out in § 217.20.*]

THE COURT SHOULD NOT FOLLOW THE PREVIOUS JUDICIAL INTERPRETATION OF _____ [*specify statute*] BECAUSE THE LEGISLATURE IS NOT PRESUMED TO HAVE BEEN AWARE OF AND TO HAVE ACQUIESCED IN THE INTERPRETATION BY VIRTUE OF ITS SILENCE ON _____ [*specify statute*].

A. Legislative Silence After Court Has Construed Statute as Not Indicative of Approval. The Legislature's failure to act on a statute after a court has construed the statute may indicate many things other than approval of the construction of the statute (*Cianci v. Superior Court (1985) 40 Cal. 3d 903, 924, 221 Cal. Rptr. 575, 710 P.2d 375*).

B. Legislative Silence After Court Has Construed Statute as Giving Rise to Arguable Inference of Approval, at Most. Legislative silence after a court has construed a statute gives rise, at most, to an arguable inference of acquiescence or passive approval, but something more than mere silence should be required before that acquiescence is elevated into a species of implied legislation (*Cianci v. Superior Court (1985) 40 Cal. 3d 903, 923, 221 Cal. Rptr. 575, 710 P.2d 375*).

[*Optional*] **C. Legislative Silence After Judicial Construction as Not Indicative of Approval Despite Subsequent Legislative Action on Other Parts of Same Act.** When a court has construed statutory language in an act, and the Legislature subsequently amends that act, but takes no action on the previously construed part, the Legislature is not presumed to have been aware of and to have acquiesced in the judicial construction (*Moradi-Shalal v. Fireman's Fund Ins. Companies (1988) 46 Cal. 3d 287, 300-301, 250 Cal. Rptr. 116, 758 P.2d 58* ; *Cianci v. Superior Court (1985) 40 Cal. 3d 903, 922-923, 923 n.7, 221 Cal. Rptr. 575, 710 P.2d 375*).

[*Set forth additional points and authorities relating to other rules of statutory interpretation that aid in ascertaining legislative intent behind statute and support interpretation desired (see §§ 217.21 -217.24, 217.40 -217.46, 217.60 -217.63, 217.80 -217.84).*]

[2] Comments

[a] Use of Form

The foregoing points and authorities may be submitted in support of a party's contention that a statute should be construed in a particular manner. The form sets out the rule of statutory interpretation that legislative silence after a court has construed a statute gives rise, at most, to an arguable inference of acquiescence or passive approval, but that something more than mere silence is required before that acquiescence is elevated into a species of implied legislation. This argument might be made in any type of action or proceeding in which a question arises concerning how a statute should be construed. These points and authorities should be combined with the general points and authorities *set forth in § 217.20*, which relate to the construction of statutes to ascertain and effectuate the legislative intent.

The foregoing points and authorities may be combined with a memorandum of points and authorities relating to the procedural context in which the issue of statutory interpretation arises. For example, the points and authorities set forth in this form may be submitted in support of a petition for a peremptory writ of mandate seeking to overrule a trial court's order sustaining a demurrer to a complaint [*see Cianci v. Superior Court (1985) 40 Cal. 3d 903, 908, 221 Cal. Rptr. 575, 710 P.2d 375]* . They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and points of law stated. For example, counsel should insert argument showing that the Legislature's failure to act on a statute after a court has construed the statute indicates something other than approval of the construction of the statute.

[3] Discussion of Authorities

[a] Legislative Silence After Court Has Construed Statute as Not Indicative of Approval

In ***Cianci v. Superior Court*** *(1985) 40 Cal. 3d 903, 221 Cal. Rptr. 575, 710 P.2d 375* , plaintiff physicians sued defendant physicians and a corporation, seeking dissolution of a limited partnership, an accounting, damages, and the imposition of a constructive trust. The action arose out of a dispute among the parties over the establishment, funding, and operation of a hyperbaric medicine department at a hospital. Petitioner answered and cross complained, alleging, among other things, conspiracy to violate the Cartwright Act (*Bus. & Prof. Code § 16700 et seq.*). Real parties demurred to this cause of action on the ground that the Cartwright Act does not apply to the medical profession, and the trial court sustained the demurrer on that ground. Petitioner then sought review in the Supreme Court, by way of prerogative writ, of the trial court's ruling.

The Supreme Court issued a peremptory writ of mandate, holding that the Cartwright Act applied to the medical profession and that the demurrer should have been sustained (*40 Cal. 3d 903, 925)* . In so holding, the Court overruled *Willis v. Santa Ana etc. Hospital Assn. (1962) 58 Cal. 2d 806, 26 Cal. Rptr. 640, 376 P.2d 568* , which held that the professions were not within the Cartwright Act's coverage (*40 Cal. 3d 903, 921, 925)* . The *Willis* holding was based, in part, on that Court's reasoning that *Bus. & Prof. Code § 16720* does not expressly include the professions (*40 Cal. 3d 903, 921)* . In overruling *Willis,* the Court addressed what it termed real parties' "implicit contention" that the doctrine of stare decisis prevented the Court from reconsideration of the issue decided in *Willis.* The Court found that contention to be without merit (*40 Cal. 3d 903, 923)* . The Court concluded that not only was it altogether proper for it to reexamine *Willis,* but also that it would be improper not to do so. Since *Willis,* the Legislature had not acted on the precise matter addressed in both that case and the instant case. Relying on *County of Los Angeles v. Workers' Comp. Appeals Bd. (1981) 30 Cal. 3d 391, 404, 179 Cal. Rptr. 214, 637 P.2d 681* , the Court held that the Legislature's failure

to act mayhave indicated many things other than approval of *Willis'* construction of *Bus. & Prof. Code § 16720* (*40 Cal. 3d 903, 924)* .

[b] Legislative Silence After Court Has Construed Statute as Giving Rise to Arguable Inference of Approval, at Most

The facts and procedural background of ***Cianci v. Superior Court*** *(1985) 40 Cal. 3d 903, 221 Cal. Rptr. 575, 710 P.2d 375* , are *discussed under § 217.90[3][a]*. In *Cianci*, the Supreme Court held that the Cartwright Act applied to the medical profession. In so holding, the Court addressed the fact that since *Bus. & Prof. Code § 16720* had been previously construed in *Willis v. Santa Ana etc. Hospital Assn. (1962) 58 Cal. 2d 806, 26 Cal. Rptr. 640, 376 P.2d 568* , to exclude the medical profession from coverage under the Cartwright Act, the Legislature had not acted on *Bus. & Prof. Code § 16720*. Relying on *People v. Daniels (1969) 71 Cal. 2d 1119, 1127-1128, 80 Cal. Rptr. 897, 459 P.2d 225* , the Court held that legislative silence after a court has construed a statute gives rise, at most, to an arguable inference of acquiescence or passive approval. But something more than mere silence should be required before that acquiescence is elevated into a species of implied legislation (*40 Cal. 3d 903, 923)* . Finding nothing more than mere silence on the Legislature's part, the Court overruled *Willis* and its construction of *Bus. & Prof. Code § 16720* (*40 Cal. 3d 903, 923-925)* .

[c] Legislative Silence After Judicial Construction as Not Indicative of Approval Despite Subsequent Legislative Action on Other Parts of Same Act

In ***Moradi-Shalal v. Fireman's Fund Ins. Companies*** *(1988) 46 Cal. 3d 287, 250 Cal. Rptr. 116, 758 P.2d 58* , a statutory bad-faith action by a third-party claimant against the insurer of the tortfeasor, the Supreme Court defined the procedural prerequisite for a statutory third-party action under *Ins. Code § 790.03(h)* (unfair claims-settlement practices of insurers), but, more importantly, prospectively overturned a prior Supreme Court case, *Royal Globe Ins. Co. v. Superior Court (1979) 23 Cal. 3d 880, 885-888, 153 Cal. Rptr. 842, 592 P.2d 329* . The decision in *Royal Globe* had established private standing under that statute. The Court noted that the Legislature had modified *Ins. Code § 790.03* (prohibited acts of insurers) without changing the claims-settlement subdivision, or addressing the *Royal Globe* standing issue. The Court held that although the Legislature may have passively acquiesced in *Royal Globe*, it never expressly or impliedly adopted its holding; consequently, the Supreme Court was free to reexamine it (*46 Cal. 3d 287, 300-301)* .

The facts and procedural background of ***Cianci v. Superior Court*** *(1985) 40 Cal. 3d 903, 221 Cal. Rptr. 575, 710 P.2d 375* , are discussed in *§ 217.90[3][a]*. In *Cianci*, the Supreme Court held that the Cartwright Act applied to the medical profession. In so holding, the Court addressed real parties' contention that because the Legislature acted twice on the Cartwright Act subsequent to the decision in *Willis v. Santa Ana etc. Hospital Assn. (1962) 58 Cal. 2d 806, 809, 26 Cal. Rptr. 640, 376 P.2d 568* (Cartwright Act not applicable to professions and construing *Bus. & Prof. Code § 16720*), without altering the provision that *Willis* had construed, the Legislature must be presumed to have been aware of and to have acquiesced in the *Willis* holding. The Court found this argument unpersuasive. Legislative silence after a court has construed a statute gives rise, at most, to an arguable inference of acquiescence or passive approval. But something more than mere silence should be required before that acquiescence is elevated into a species of implied legislation (*40 Cal. 3d 903, 923)* . The Court noted that even though the Legislature enacted *Bus. & Prof. Code §§ 16721* and *16721.5* (prohibiting exclusionary discrimination in business transactions, letters of credit, and contracts for goods and services) subsequent to *Willis*, the Legislature did not act on *Bus. & Prof. Code § 16720*. According to the Court, this inaction implied no approval of the *Willis* decision. The Court noted that *Bus. & Prof. Code §§ 16721* and *16721.5* appeared, in fact, to have arisen in response to the Arab boycott against Israel, as a means to prevent California firms' compliance with the boycott (*40 Cal. 3d 903, 923 n.7*).

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21-217 California Points & Authorities § 217.91

§ 217.91 Opposing Contention That Report of Commissioners Who Drafted Statute Establishes Legislative Intent

[1] FORM

[*The following may be included in a memorandum supporting or opposing a motion, or in a trial or appellate brief. It should be combined with the general form set out in § 217.20.*]

IN CONSTRUING _____ [*specify statute*], THE COURT NEED NOT TREAT THE REPORT OF _____ [*specify commission or drafter of statute*] AS EVIDENCE OF THE LEGISLATURE'S INTENT IN ADOPTING THE STATUTE.

Commission Report Does Not Necessarily Reflect Legislative Intent. If a law revision commission's comment on a given statutory provision is just one item in a lengthy report, there may be alegitimate question whether the Legislature was aware of and endorsed that comment in enacting the statute (*Conservatorship of Wendland (2001) 26 Cal. 4th 519, 542, 110 Cal. Rptr. 2d 412, 28 P.3d 151*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a party's contention that a statute should be construed in a particular manner. The form reflects the principle that a comment in a law revision commission's report need not be deemed to manifest legislative intent if it is doubtful whether the Legislature was aware of and endorsed the comment in enacting the statute (*Conservatorship of Wendland (2001) 26 Cal. 4th 519, 542, 110 Cal. Rptr. 2d 412, 28 P.3d 151*). Such an argument might be made in any type of action or proceeding in which a question arises concerning how a statute should be construed. These points and authorities may be combined with the general points and authorities *set forth in § 217.20*, which relate to the construction of statutes to ascertain and effectuate the legislative intent.

These points and authorities may be combined with a memorandum of points and authorities relating to the procedural

context in which the issue of statutory interpretation arises. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should also insert argument in the form, showing the relationship between the facts of the case and the principle of statutory interpretation stated. Thus, counsel should show that the law revision report was lengthy and the particular comment at issue was a minor component of that report.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 217.81*.

[3] Discussion of Authorities

[a] Commission Report Does Not Necessarily Reflect Legislative Intent

In ***Conservatorship of Wendland*** *(2001) 26 Cal. 4th 519, 110 Cal. Rptr. 2d 412, 28 P.3d 151* , the issue was whether a conservator may withhold artificial nutrition and hydration from a conscious conservatee who is not terminally ill, comatose, or in a persistent vegetative state, and who has not given formal instructions for health care or appointed an agent or surrogate for health-care decisions. *Prob. Code § 2355(a)* required that, in making such health-care decisions, the conservator follow the conservatee's wishes, if known. In this case, the trial court ordered the conservator not to withhold nutrition and hydration, holding that the evidence did not meet a "clear and convincing" standard necessary to establish that the conservatee wished to die. The court of appeal endorsed the "clear and convincing" standard of proof but reversed on other grounds. The Supreme Court reversed the court of appeal's decision and reinstated the trial court's judgment. The Supreme Court agreed with the lower courts' application of the "clear and convincing" standard of proof, at least as to decisions to withdraw life-sustaining treatment from conscious conservatees who have left no formal health-care directions.

However, the Court rejected an argument that *Prob. Code § 2355(a)* should be interpreted to require only a preponderance of the evidence to establish the conservatee's wishes. This argument was based on the Law Revision Commission Report to the 1999 Health Care Decisions Law, which amended Section 2355. That Report expressly stated that "the standard is by preponderance of the evidence. Proof is not required by clear and convincing evidence." The Supreme Court did not find a strong inference that the Legislature approved that comment, however; the Court noted that "one may legitimately question whether the Legislature can fairly be assumed to have read and endorsed every statement in the commission's 280-page report on the Health Care Decisions Law." To minimize the possibility of Section 2355's unconstitutional application, the Court construed the statute as requiring clear and convincing evidence of a conscious conservatee's wish to refuse life-sustaining treatment when the conservator relies on that wish to justify withholding life-sustaining treatment (*26 Cal. 4th 519, 542)* .

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21-217 California Points & Authorities §§ 217.92-217.109

[Reserved]

§§ 217.92[Reserved]

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E. ADMINISTRATIVE INTERPRETATION

21-217 California Points & Authorities § 217.110

§ 217.110 Supporting Contention That Administrative Agency's Interpretation of Statute Entitled to Great Weight

[1] FORM

[*The following may be included in a memorandum supporting or opposing a motion, or in a trial or appellate brief. It should be combined with the general memorandum set out in § 217.20.*]

IN CONSTRUING _____ [*specify statute*], THE COURT SHOULD FOLLOW THE INTERPRETATION OF THE _____ [*specify administrative agency*], BECAUSE, AS THE AGENCY _____ [CHARGED WITH ITS ENFORCEMENT *or* THAT PUT THE STATUTORY MACHINERY INTO EFFECT *or* THAT PUT THE STATUTORY MACHINERY INTO EFFECT AND IS CHARGED WITH ITS ENFORCEMENT], ITS INTERPRETATION IS ENTITLED TO GREAT WEIGHT AND SHOULD BE FOLLOWED UNLESS CLEARLY ERRONEOUS.

A. Great Weight of Administrative Interpretation. When an administrative agency is charged with enforcing a particular statute, its interpretation of the statute will be accorded great respect by the courts and will be followed if not clearly erroneous (*Judson Steel Corp. v. Workers' Comp. Appeals Bd. (1978) 22 Cal. 3d 658, 668, 150 Cal. Rptr. 250, 586 P.2d 564* ; *see* *Federal Express Corp. v. Holowecki (2008) 552 U.S. 389, 128 S. Ct. 1147, 1154-1158, 170 L. Ed. 2d 10* ; *Barnhart v. Walton (2002) 535 U.S. 212, 218-222, 122 S. Ct. 1265, 152 L. Ed. 2d 330* ; *Jevne v. Superior Court (2005) 35 Cal. 4th 935, 958, 28 Cal. Rptr. 3d 685, 111 P.3d 954*). Consistent administrative construction of a statute over many years, particularly when it originated with those charged with putting the statutory machinery into effect, is entitled to great weight (*Gay Law Students Assn. v. Pacific Tel. & Tel. Co. (1979) 24 Cal. 3d 458, 491, 156 Cal. Rptr. 14, 595 P.2d 592*).

[*Optional*] **B. Reenactment of Statute After Administrative Construction.** Reenactment of a statutory provision after it has been interpreted by an administrative agency is persuasive of a legislative intent to adopt the administrative construction (*Western Oil & Gas Assn. v. Air Resources Board (1984) 37 Cal. 3d 502, 520, 208 Cal. Rptr. 850, 691 P.2d 606* ; *Division of Industrial Safety v. Municipal Court (1976) 61 Cal. App. 3d 696, 701, 132 Cal. Rptr. 573*).

[*Set forth additional points and cite authorities relating to other rules of statutory interpretation that aid in ascertaining legislative intent behind statute and support interpretation desired (see §§ 217.21 -217.24, 217.40 -217.46, 217.60 -217.63, 217.80 -217.86, 217.88, 217.130, 217.131, 217.133).*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a party's contention that a statute should be construed in a particular manner. The form sets out the rule of statutory interpretation that courts should give great weight to the interpretation given to a statute by an administrative agency charged with its implementation or enforcement, and should follow that interpretation unless it is clearly erroneous. Such an argument might be made in any type of action or proceeding in which a question arises concerning how a statute should be construed. This form should be combined with the general form *set forth in § 217.20*, which relate to the construction of statutes to ascertain and effectuate the legislative intent.

This form may be combined with a memorandum relating to the procedural context in which the issue of statutory interpretation arises. This form may also be adapted for use in a trial or appellate brief.

Counsel should also insert argument in the foregoing form, showing the relationship between the facts of the case and the points of the law stated. Thus, counsel should show that the administrative agency charged with the implementation or enforcement of the law has interpreted it in the same manner in which counsel wishes the court to construe it. If the administrative interpretation is of long standing and its reversal would render numerous transactions questionable, those factors should be pointed out [*see Castaneda v. Holcomb (1981) 114 Cal. App. 3d 939, 945-946, 170 Cal. Rptr. 875]* .

[b] Opposing Memoranda

In an appropriate case, the form *set out in § 217.111* may be used to oppose the contentions supported by the foregoing form.

[3] Discussion of Authorities

[a] Great Weight of Administrative Interpretation

Petitioner in ***Judson Steel Corp. v. Workers' Comp. Appeals Bd.*** *(1978) 22 Cal. 3d 658, 150 Cal. Rptr. 250, 586 P.2d 564* , terminated the seniority rights and then the employment of an employee who was absent from his job for over 12 months because of an industrial injury. A workers' compensation judge ruled that petitioner had violated *Lab. Code § 132a*, which prohibits discrimination against workers who are injured in the course and scope of their employment, and increased the employee's compensation by one-half. Defendant board denied reconsideration, and petitioner sought judicial review.

In the Supreme Court petitioner contended that *Lab. Code § 132a* had to be strictly construed because it imposed a penalty. The Court, however, citing *Bodinson Mfg. Co. v. California E. Com. (1941) 17 Cal. 2d 321, 325-326, 109 P.2d 935* , stated that when an administrative agency is charged with enforcing a particular statute, its interpretation of the statute will be accorded great respect by the courts and will be followed if not clearly erroneous. Noting that defendant board had interpreted *Lab. Code § 132a* as expressing a policy opposing all discrimination against workers based solely on their having been injured in the course of employment, the Court affirmed and upheld defendant board's conclusion that an employer may not discharge an employee for absence from the job because of an injury sustained in the course and scope of employment (*Judson Steel Corp. v. Workers' Comp. Appeals Bd. (1978) 22 Cal. 3d658, 668-669, 150 Cal. Rptr. 250, 586 P.2d 564*).

Federal Express Corp. v. Holowecki *(2008) 552 U.S. 389, 128 S. Ct. 1147, 170 L. Ed. 2d 10* , arose under the Age Discrimination in Employment Act (ADEA) (*see 29 U.S.C. § 621 et seq.*). The case presented the question of what constitutes an employee's "charge" of unlawful discrimination filed with the Equal Employment Opportunity Commission (EEOC) so as to commence the statutory 60-day waiting period, which must expire before the employee can sue the employer (*see 29 U.S.C. § 626(d)*).

The Supreme Court noted when a federal agency with statutory authority to issue regulations invokes that authority to issue regulations interpreting ambiguous statutory terms, the courts defer to the agency's reasonable interpretations (*see Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc. (1984) 467 U.S. 837, 843-845, 104 S. Ct. 2778, 81 L. Ed. 2d 694*). Further, the agency is entitled to further deference when it adopts a reasonable interpretation of a regulation it has put in force; in such a case, a court will accept the agency's position unless it is plainly erroneous or inconsistent with the regulation (*see Auer v. Robbins (1997) 519 U.S. 452, 461, 117 S. Ct. 905, 137 L. Ed. 2d 79*). In this case, however, the EEOC's formally adopted regulations did not define "charge," so this level of deference was not applicable (*128 S. Ct. 1147, 1154-1155)* .

Even in the absence of regulations, an agency's interpretation of a statute is entitled to a "measure of respect" if it has been applied consistently by the agency and reflects a body of experience and informed judgment to which courts and litigants may properly resort for guidance (*see Skidmore v. Swift & Co. (1944) 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124*). The Court in this case applied that level of deference to the EEOC's interpretation of "charge" as embodied in the agency's compliance manual and internal directives, which had been binding on EEOC staff for at least five years. Finding the EEOC's interpretation reasonable, the Supreme Court adopted it in this case, concluding that a filing that alleges unlawful discrimination and specifies the name of the charged party is to be deemed a "charge" if it can be reasonably construed as a request for the EEOC to take remedial action to protect the employee's rights or otherwise to settle a dispute between the employer and employee (*128 S. Ct. 1147, 1156-1158)* .

Barnhart v. Walton *(2002) 535 U.S. 212, 122 S. Ct. 1265, 152 L. Ed. 2d 330* , involved a dispute over the application of Social Security Act provisions authorizing the payment of disability insurance benefits and Supplemental Security Income to certain persons with disabilities. Specifically, the dispute was over the proper interpretation of the statutory definition of "disability." The relevant statutes defined "disability" as an "[i]nability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months" (*see 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A)*). Acting pursuant to statutory rulemaking authority (*see 42 U.S.C. §§ 405(a), 1383(d)(1)*), the Social Security Administration (the Agency) issued regulations interpreting the relevant statutory provisions. The Agency read the term "inability" as including a 12-month requirement: in its view, the "inability" (to engage in any substantial gainful activity) must last, or must be expected to last, for at least 12 months. Second, the Agency read the term "expected to last" as applicable only if the "inability" has not yet lasted 12 months. In the case of a later Agency determination--in which the "inability" did not last 12 months--the Agency would automatically assume that the claimant failed to meet the duration requirement. It would not look back to decide hypothetically whether, despite the claimant's actual return to work before 12 months expired, the "inability" nonetheless might have been expected to last that long (*see* 20 C.F.R. §§ 1520(b), 1592(d)(2)).

The United States Supreme Court upheld the Social Security Administration's interpretation. The Court noted that it is settled that if a statute speaks clearly to the precise question of interpretation at issue, the courts must give effect to the unambiguously expressed intent of Congress. However, if the statute is silent or ambiguous with respect to the specific issue, the courts must sustain the administrative agency's interpretation of the statute if it is based on a permissible (i.e., reasonable) construction of the statute (*Barnhart v. Walton (2002) 535 U.S. 212, 218-222, 122 S. Ct. 1265, 152 L. Ed. 2d 330*).

A major issue in ***Jevne v. Superior Court*** *(2005) 35 Cal. 4th 935, 28 Cal. Rptr. 3d 685, 111 P.3d 954* , was whether the federal Securities Exchange Act of 1934 (*15 U.S.C. § 78a et seq.*) preempts California's Ethics Standards for Neutral

Arbitrators in Contractual Arbitration (Cal Rules of Ct., Ethics Stds. Neutral Arbitrators [*formerly* Cal. Rules of Ct., Appen., Div. VI]; *see Code Civ. Proc. § 1281.85(a)*) in arbitrations conducted under the National Association of Securities Dealers (NASD) Code of Arbitration Procedure, which has been approved by the federal Securities and Exchange Commission (SEC). In deciding the preemption issue, it was necessary for the California Supreme Court to determine whether the detailed disclosure requirements of the California Standards conflict with the NASD standards by significantly impeding or impairing accomplishment of the goals of the NASD Code, and thereby the goals of the Securities Exchange Act. In deciding that question, the Court relied heavily on the SEC's opinion that the California Standards' disclosure requirements will adversely affect NASD arbitrations in three ways: by increasing administrative costs associated with the more detailed disclosure requirements, by reducing the number of available arbitrators (because many will be unwilling to comply with the California requirements), and by reducing the nationwide uniformity and consistency of NASD arbitrations by imposing special disclosure requirements applicable in only one state. Based on the views of the SEC, the Court concluded that the Securities Exchange Act preempts the California Standards' rules on arbitrator disclosure (*35 Cal. 4th 935, 956-958)* . In explaining its reliance on the SEC's opinion, the Supreme Court remarked that "[i]n deciding whether a state law conflicts with a federal law by hindering the complete accomplishment of the federal law's objective, we give considerable weight to the views of the federal agency charged with administering the federal law" (*35 Cal. 4th 935, 958)* .

Gay Law Students Assn. v. Pacific Tel. & Tel. Co. *(1979) 24 Cal. 3d 458, 156 Cal. Rptr. 14, 595 P.2d 592* , involved, in part, a class action for declaratory relief and mandate to compel defendant California Fair Employment Practice Commission toaccept jurisdiction over complaints of employment discrimination based on homosexuality. The superior court denied plaintiffs' request for relief and entered judgment for defendants.

The Supreme Court affirmed as to defendant commission, sustaining defendant's contention that the California Fair Employment Practice Act (former Lab. Code § 1410 et seq.; *now see Gov. Code § 12900 et seq.*) did not prohibit discrimination against homosexuals. Plaintiffs argued that discrimination on the ground of sexual orientation constituted discrimination on the basis of sex, which was prohibited by former Lab. Code § 1420(a) (*now see Gov. Code § 12940(a)*). In rejecting plaintiffs' argument, the Court noted that defendant commission, the agency charged with administering the act, had, since the prohibition on discrimination based on sex was added to the statute, consistently refused to accept jurisdiction over complaints charging discrimination based on sexual orientation. Quoting *Di Giorgio Fruit Corp. v. Department of Employment (1961) 56 Cal. 2d 54, 61-62, 13 Cal. Rptr. 663, 362 P.2d 487* , the Court stated that such consistent administrative construction of a statute over many years, particularly when it originated with those charged with putting the statutory machinery into effect, is entitled to great weight (*Gay Law Students Assn. v. Pacific Tel. & Tel. Co. (1979) 24 Cal. 3d 458, 491, 156 Cal. Rptr. 14, 595 P.2d 592*).

[b] Reenactment of Statute After Administrative Construction

Western Oil & Gas Assn. v. Air Resources Board *(1984) 37 Cal. 3d 502, 208 Cal. Rptr. 850, 691 P.2d 606* , involved the validity of standards of ambient air quality adopted by the Air Resources Board, pursuant to the authority granted the Board by *Health & Safety Code § 39606(b)*. Complaining that the standards established by Board regulations were invalid because, in part, the Board refused to consider the economic effects of the regulations, plaintiff oil companies and trade associations sought writs of mandate commanding the Board to rescind its resolutions adopting the standards. The trial court decided in favor of plaintiffs and ordered issuance of the requested writs of mandate. Contending that *Health & Safety Code § 39606(b)* does not require the Board, in adopting standards of ambient air quality, to consider the economic consequences of compliance with the standards, the Board appealed.

The Supreme Court reversed the trial court's judgment. Acknowledging that the statute is ambiguous and that reasonable minds may differ as to whether the Legislature intended economic consequences to be taken into account at the state or local levels, the Court held that the Legislature did not intend to impose on the Board the obligation to consider the economic consequences of the standards it proposes to adopt prior to their promulgation (*Western Oil & Gas Assn. v. Air Resources Board (1984) 37 Cal. 3d 502, 524, 208 Cal. Rptr. 850, 691 P.2d 606*). In so holding, the

Court noted that the Board's long-established administrative interpretation of *Health & Safety Code § 39606(b)* supported the Board's contention. As a contemporaneous construction of a statute by an administrative agency charged with its enforcement, the Board's interpretation was entitled to great weight. Legislative reenactment of the critical statutory language, essentially without change, constituted at least some evidence that the Board's construction was acceptable to the Legislature (*Western Oil & Gas Assn. v. Air Resources Board (1984) 37 Cal. 3d 502, 520, 209 Cal. Rptr. 850, 691 P.2d 606*).

Division of Industrial Safety v. Municipal Court *(1976) 61 Cal. App. 3d 696, 132 Cal. Rptr. 573* , involved a dispute over plaintiff's jurisdiction to enforce safety conditions in workplaces. Plaintiff obtained a warrant from defendant court to investigate noise at a railroad yard belonging to real party in interest, but that court subsequently granted the motion of real party in interest to quash the warrant. Plaintiff petitioned the superior court for a writ of mandate, and the superior court issued a peremptory writ directing the municipal court to vacate its order quashing the warrant. Real party in interest appealed.

The court of appeal reversed. The court reviewed the jurisdictional and definitional provisions of the Labor Code relating to plaintiff's jurisdiction and found that jurisdiction over employees of steam railroads was governed by *Lab. Code § 6800* (prior to its 1978 amendment), which extended only to shop employees. Employee safety generally was covered by other sections of the Labor Code prior to the 1973 enactment of the California Occupational Safety and Health Act, which replaced the relevant general sections in nearly identical terms but did not amend *Lab. Code § 6800 et seq.* dealing with railroads. The court determined that the specific provisions of *Lab. Code § 6800* granting limited jurisdiction over railroad workers had to be held to control over the general provisions of the pre-1973 Labor Code sections dealing with plaintiff's jurisdiction in general, and noted that this was the construction given the statutory scheme by plaintiff's previous administrative action. In holding that the 1973 act did not change this result, the court held that the reenactment of the pre-1973 jurisdictional provisions of the Labor Code in the California Occupational Safety and Health Act of 1973 in light of the administrative interpretation of the prior sections by plaintiff was persuasive of a legislative intent to adopt the administrative construction (*Division of Industrial Safety v. Municipal Court (1976) 61 Cal. App. 3d 696, 701, 132 Cal. Rptr. 573*).

[4] Additional Authorities

[a] Great Weight of Administrative Interpretation

Water Quality Assn. v. Santa Barbara County (1996) 44 Cal. App. 4th 732, 52 Cal. Rptr. 2d 184 was a suit by a trade organization against the city and county of Santa Barbara challenging more stringent water softening requirements imposed by those entities than under state law. The central question in the case was whether the local ordinances were preempted by state law. In making its determination, the court looked to the interpretation of relevant state law by the Water Resources Control Board. The court stated the general rule that the contemporaneous construction of a statute by an agency charged with enforcement is entitled to great weight by the courts; however, in this instance, the court declined to follow the agency's reading of the legislative history and held that the ordinances were preempted (*Water Quality Assn. v. Santa Barbara County (1996) 44 Cal. App. 4th 732, 744, 52 Cal. Rptr. 2d 184*).

County of Alameda v. State Bd. of Control (1993) 14 Cal. App. 4th 1096, 18 Cal. Rptr. 2d 487 , involved the construction of former Gov. Code § 13960(d), a provisionof the Victims of Violent Crime Act (*now see Gov. Code § 13950 et seq.*). The act established a Restitution Fund, out of which certain payments are made to victims of crime. The issue was whether an indigent victim of crime who was treated at a county hospital, or a victim eligible for assistance through the County Medical Services Program, suffered a "pecuniary loss" within the meaning of *Gov. Code § 13960*. The State Board of Control, charged with enforcing and interpreting the act, took the position that, because the county provided medical care as a form of public assistance, the indigent crime victim did not suffer pecuniary loss within the meaning of *Gov. Code § 13960*. The court of appeal accepted the Board's interpretation, stating that the Board's interpretation of statutes it is charged with enforcing and interpreting is entitled to great weight and should be followed

unless clearly erroneous (*County of Alameda v. State Bd. of Control (1993) 14 Cal. App. 4th 1096, 1106, 18 Cal. Rptr. 2d 487*).

In *Anderson v. San Francisco Rent Stabilization & Arbitration Bd. (1987) 192 Cal. App. 3d 1336, 237 Cal. Rptr. 894* , the trial court granted a peremptory writ of mandate overturning the decision, which had been followed since 1974, of the San Francisco Rent Stabilization and Arbitration Board that residential landlords could, under San Francisco's Residential Rehabilitation Loan Program, pass through to tenants under a prescribed rent formula increased "monthly loan payments" secured by the property at the time the loan is made, including payments unrelated to rehabilitation of the property. The superior court judgment directed that only rehabilitation-related payments be included. In reversing the judgment granting the writ, the court of appeal said that the courts construe ordinances by the same rules they apply to statutes. Additionally, although the interpretation of a statute is ultimately the responsibility of the courts, the contemporaneous construction of a statute by an administrative agency charged with its administration and interpretation, while not necessarily controlling, is entitled to great weight and should be respected by the courts unless it is clearly erroneous or unauthorized. This is particularly true when there has been continued public reliance on and acquiescence in such interpretations (*Anderson v. San Francisco Rent Stabilization & Arbitration Bd. (1987) 192 Cal. App. 3d 1336, 1343, 237 Cal. Rptr. 894*).

The court of appeal in *Engs Motor Truck Co. v. State Bd. of Equalization (1987) 189 Cal. App. 3d 1458, 235 Cal. Rptr. 117* , affirmed the trial court's and the State Board of Equalization's interpretation of *Rev. & Tax. Code § 6396*, which provides an exemption from sales and use tax for property "shipped to a point outside this state." The court agreed with the interpretation given by *18 Cal. Code Reg. § 1620* requiring actual delivery outside California in order for the exemption to apply (*Engs Motor Truck Co. v. State Bd. of Equalization (1987) 199 Cal. App. 3d 1458, 1471, 235 Cal. Rptr. 117*). The court said that in interpreting a statute and testing the validity of a regulation, the administrative agency's construction is entitled to great weight and should be upheld if it is reasonable (*Engs Motor Truck Co. v. State Bd. of Equalization (1987) 199 Cal. App. 3d 1458, 1466, 235 Cal. Rptr. 117*).

Castaneda v. Holcomb (1981) 114 Cal. App. 3d 939, 170 Cal. Rptr. 875 , involved an action for a declaratory judgment to construe a provision of the charter of the City of San Bernardino, which required resolutions to pass the Common Council by four votes and to be approved by the mayor or, if the mayor did not approve, to pass the Common Council by five votes. The issue was whether a resolution passed by five votes automatically became effective notwithstanding the mayor's disapproval or would have to be reconsidered and passed by the Common Council by five votes subsequent to the mayor's disapproval. The evidence showed that the former interpretation had been followed by city officials for at least 25 years, and the court of appeal inferred that the same interpretation had prevailed since 1905. It was likely that numerous transactions had been entered into in reliance on the long-standing interpretation of the charter; invalidation of the interpretation would require major readjustments and extensive litigation. For these and other reasons, consistent administrative construction of a statute over many years, particularly when it originated with those charged with putting the statutory machinery into effect, is entitled to great weight, and courts will generally not depart from such a construction unless it is clearly erroneous. Finding that the city's interpretation was not clearly erroneous, the court followed it (*Castaneda v. Holcomb (1981) 114 Cal. App. 3d 939, 945-946, 170 Cal. Rptr. 875*).

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E. ADMINISTRATIVE INTERPRETATION

21-217 California Points & Authorities § 217.111

§ 217.111 Opposing Contention That Administrative Agency's Interpretation of Statute Entitled to Great Weight

[1] FORM

[*The following may be included in a memorandum supporting or opposing a motion, or in a trial or appellate brief. It should be combined with the general memorandum set out in § 217.20.*]

IN CONSTRUING _____ [*specify statute*], THE COURT SHOULD NOT FOLLOW THE INTERPRETATION OF THE _____ [*specify administrative agency*], BECAUSE THE ULTIMATE INTERPRETATION OF A STATUTE IS AN EXERCISE OF JUDICIAL POWER, AND IT IS THE COURT'S RESPONSIBILITY TO DECLARE THE STATUTE'S TRUE MEANING EVEN IF THIS REQUIRES REJECTION OF AN EARLIER ERRONEOUS ADMINISTRATIVE CONSTRUCTION.

A. Overthrowing Administrative Interpretation. Despite the great weight to which an administrative interpretation is entitled, the ultimate interpretation of a statute is an exercise of judicial power, and it is the responsibility of the courts to declare the statute's true meaning even if this requires rejection of an earlier erroneous administrative interpretation (*Murphy v. Kenneth Cole Prods., Inc. (2007) 40 Cal. 4th 1094, 1105 n.7, 56 Cal. Rptr. 3d 880, 155 P.3d 284* ; *Wheeler v. Board of Administration (1979) 25 Cal. 3d 600, 605, 159 Cal. Rptr. 336, 601 P.2d 568* ; *Wilcox v. Enstad (1981) 122 Cal. App. 3d 641, 652-653, 176 Cal. Rptr. 560*).

[*Optional*] **B. Internal Agency Memorandum Not Controlling.** Deference to an administrative interpretation of a statute is not appropriate when the interpretation is contained in an internal memorandum rather than in an administrative regulation that might be subject to the notice and hearing requirements of proper administrative procedure. This is particularly true when the memorandum was composed andcirculated after the agency has become a party or amicus curiae in the case (*Jones v. Tracy School Dist. (1980) 27 Cal. 3d 99, 107, 165 Cal. Rptr. 100, 611 P.2d 441* ; *Campbell v. Arco Marine, Inc. (1996) 42 Cal. App. 4th 1850, 1860, 50 Cal. Rptr. 2d 626*).

[*Optional*] **C. Agency May Not Enlarge Legislative Enactment.** Fundamentally, an administrative agency and its employees may not enlarge the scope of a legislative enactment through internal agency memoranda or other methods

of statutory interpretation (*Department of Transportation v. Superior Court (1996) 47 Cal. App. 4th 852, 858*).

[*Optional*] **D. No Deference Owed to Agency Interpretation Embodied in Void Regulations.** The general rule of deference to an agency interpretation of a statute does not apply if the interpretation was not adopted in accordance with applicable legal requirements (*Church v. Jamison (2006) 143 Cal. App. 4th 1568, 1577-1583*).

[*Set forth additional points and cite authorities relating to other rules of statutory interpretation that aid in ascertaining legislative intent behind statute and support interpretation desired (see §§ 217.21 -217.24, 217.40 -217.46, 217.60 -217.63, 217.80 -217.86, 217.88, 217.130, 217.131, 217.133).*]

[2] Comments

[a] Use of Form

This form may be submitted in opposition to a party's contention that an administrative agency's interpretation of a statute should be followed by the court. The form sets out the rule of statutory interpretation that despite the great weight to which the administrative interpretation of a statute is entitled, the ultimate interpretation of a statute is an exercise of judicial power, and it is the responsibility of the courts to declare the statute's true meaning even if it requires rejection of an earlier erroneous administrative interpretation. The appropriate paragraphs of this form should be combined with the general form set forth in *§ 217.20*, which relate to the construction of statutes to ascertain and effectuate the legislative intent.

The appropriate paragraphs of this form may be combined with a memorandum relating to the procedural context in which the issue of statutory interpretation arises. This form may also be adapted for use in a trial or appellate brief.

Counsel should also insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should formulate an argument based on other rules of statutory construction showing that the administrative agency's interpretation was erroneous.

In an appropriate case, this form may be submitted in opposition to the contention supported by the form *set out in § 217.110*.

[3] Discussion of Authorities

[a] Overthrowing Administrative Interpretation

The factual and procedural background of ***Murphy v. Kenneth Cole Prods., Inc.*** *(2007) 40 Cal. 4th 1094, 56 Cal. Rptr. 3d 880, 155 P.3d 284* , are discussed in *§ 217.63[3][a]*. The major substantive issue before the Supreme Court in this case was whether an award under *Labor Code § 226.7(b)* (which requires that an employer pay "one additional hour of pay" per day to an employee who has been denied meal and rest periods) constitutes a wage or a penalty. Wage claims are subject to the three-year limitation of *Code of Civil Procedure § 338(a)* (governing "[a]n action upon a liability created by statute, other than a penalty or forfeiture"). But penalties are subject to the one-year limitation of *Code Civ. Proc. 340(a)* or (governing "[a]n action upon a statute for a penalty or forfeiture").

The Supreme Court concluded that the "additional hour of pay" under *Labor Code § 226.7(b)* constitutes a wage and is therefore subject to the three-year limitations period of *Code of Civil Procedure § 338(a)* (*40 Cal. 4th 1094, 1102-1111)* . In coming to this conclusion, the Court reviewed the statutory language and the legislative and administrative history. The Court observed that the Department of Labor Standards Enforcement (DLSE) construction had made inconsistent interpretations of the statute, and for that reason the DLSE's interpretations were not entitled to significant deference. In any event, the Court pointed out that whether or not it is owed deference, an administrative interpretation of a given statute is not binding on the courts. Ultimately, it is for the judiciary to ascertain the correct

interpretation of statutes (*40 Cal. 4th 1094, 1105 n.7*).

In ***Wheeler v. Board of Administration*** *(1979) 25 Cal. 3d 600, 159 Cal. Rptr. 336, 601 P.2d 568* , defendant board calculated plaintiff's benefit under California's Public Employees' Retirement System by deducting $288, the maximum amount of benefit for which the federal Social Security Administration found plaintiff eligible, despite the Social Security Administration's reduction of that maximum benefit to $106 for so long as plaintiff was receiving payments under a California workers' compensation award. Plaintiff appealed from the superior court's denial of a writ of mandate.

The issue before the Supreme Court was whether former Gov. Code § 21293.5, which requires reduction of certain disability retirement benefits by amounts a retired state employee is "entitled to receive" in federal retirement or disability benefits, requires reduction by the maximum amount of federal benefit the retiree could be entitled to receive or by the amount actually received after reductions are made from the maximum amount of federal benefit for overlapping state benefits. The Court recognized that great weight should be given to the administrative interpretation of the Board of Retirement unless clearly erroneous, quoting *Neeley v. Board of Retirement (1974) 36 Cal. App. 3d 815, 820, 111 Cal. Rptr. 841* . The Court went on, however, to quote *Crumpler v. Board of Administration (1973) 32 Cal. App. 3d 567, 578, 108 Cal. Rptr. 293* , to state that the ultimate interpretation of a statute is of course an exercise of judicial power, and that it is the responsibility of the courts to declare its true meaning even if it requires rejection of an earlier erroneous administrative interpretation (*Wheeler v. Board of Administration (1979) 25 Cal. 3d 600, 605, 159 Cal. Rptr. 336, 601 P.2d 568*). TheCourt then applied other rules of statutory interpretation to determine that the federal benefits that a retiree is "entitled to receive" means benefits actually paid to him or her after deduction of the federally mandated offset for workers' compensation benefits (*Wheeler v. Board of Administration (1979) 25 Cal. 3d 600, 605-607, 159 Cal. Rptr. 336, 601 P.2d 568*).

Petitioner in ***Wilcox v. Enstad*** *(1981) 122 Cal. App. 3d 641, 176 Cal. Rptr. 560* , sought a writ of mandate in an original proceeding in the court of appeal to compel respondent, as Kern County Clerk, to take no further action on a recall petition brought by real parties in interest to remove petitioner from her elective office. The issue involved the operation of *Elec. Code § 27215*, relating to the clerk's examination of petitions for recall elections to determine their sufficiency. That section provides for a random sample to be checked and if it shows the number of valid signatures to be within 90 to 110 percent of the number of signatures required for a sufficient petition, the clerk is required to examine and verify each signature filed. If the petition is insufficient, no action is to be taken on it. Respondent, taking a random sampling pursuant to *Elec. Code § 27215*, had found the petition to contain less than 90 percent of the number of valid signatures required to qualify the petition for the ballot. Rather than taking no further action, however, respondent informed the proponents of the petition that they could file a supplemental petition, a procedure allowed under *Elec. Code § 27214*, which relates to an alternative method of verifying petitions by checking signatures individually. Respondent pointed out that the office of the Secretary of State, charged with oversight of the elections process in California, interprets *Elec. Code § 27215* to allow a supplemental filing period. In holding to the contrary, the court of appeal stated that while an administrative interpretation or practical construction by the officials who are required to administer a statute is entitled to great weight, it is the duty of the court, when such a question of law is properly presented, to state the true meaning of the statute, even though this requires the overthrow of an earlier erroneous administrative construction (*Wilcox v. Enstad (1981) 122 Cal. App. 3d 641, 652-653, 176 Cal. Rptr. 560*).

[b] Internal Agency Memorandum Not Controlling

Defendant in ***Jones v. Tracy School Dist.*** *(1980) 27 Cal. 3d 99, 165 Cal. Rptr. 100, 611 P.2d 441* , reclassified plaintiff employee, a female, so that she received a decreased salary while continuing to perform the same work as her male coworkers. After six years, defendant reinstated plaintiff but refused to give her back pay. Defendant refused to accept the recommendation of the United States Department of Labor that it owed plaintiff back pay for six years, and plaintiff sued for the back pay under *Lab. Code § 1197.5*, the California "equal pay" provision. The superior court granted plaintiff's motion for summary judgment but restricted her recovery to the two years preceding the filing of the

complaint pursuant to *Lab. Code § 1197.5(h),* and plaintiff appealed.

The Supreme Court, although reversing because the statute of limitations might have been tolled by plaintiff's pursuit of a federal remedy, held that *Lab. Code § 1197.5(h),* in addition to constituting a statute of limitations for filing an action for pay discrimination based on gender, restricts recovery of back pay to the two years preceding filing of the complaint. In arguing that she was entitled to recover back pay for the entire six-year period during which she was discriminated against, plaintiff observed that her position was supported by a policy statement of the Department of Industrial Relations that recovery under *Lab. Code § 1197.5* includes the balance of wages for the entire period of discrimination. The Court noted that it ordinarily deferred to the administrative interpretation of a statute adopted by the agency charged with its enforcement, but held that such deference was not appropriate in the case before it. The interpretation on which plaintiff relied occurred in an internal memorandum, rather than in an administrative regulation that might be subject to the notice and hearing requirements of proper administrative procedure. Moreover, the memorandum was composed and circulated after the department had become amicus curiae in the case, and after its issuance was cited by both plaintiff and the department in their respective briefs. The Court held that the chronology substantially diluted the authoritative force of the memorandum (*Jones v. Tracy School Dist. (1980) 27 Cal. 3d 99, 107, 165 Cal. Rptr. 100, 611 P.2d 441*).

In ***Campbell v. Arco Marine, Inc.*** *(1996) 42 Cal. App. 4th 1850, 50 Cal. Rptr. 2d 626* , an out-of-state resident, employed by a California based corporation, sued under the Fair Employment and Housing Act (*Gov. Code § 12900 et seq.*) for sexual harassment. The employer argued that the California Legislature did not intend the act to apply to conduct directed toward citizens of other states which takes place outside the boundaries of California. The trial court granted summary judgment against the plaintiff on the grounds that the statute was intended to protect California residents exclusively and therefore was not designed to apply extra-territorially. The plaintiff appealed and argued that the statute was intended to apply to non-residents if they are employed by California-based companies.

In affirming summary judgment, the court of appeal examined the legislative history of the statute and subsequent enactments. The court found that the "findings and declarations of policy" contained in *Gov. Code § 12920* stated that the protections of the statute were designed for the people of California. In addition, the court cited a 1984 amendment which explicitly provided that the statute was intended to protect "the civil rights of California citizenry." The plaintiff argued that the court should look instead to an internal memorandum from the Department of Fair Employment and Housing, the agency authorized to adopt rules and regulations to carry out the function of the Fair Employment and Housing Act. The internal memorandum implied that where the disputed conduct occurred outside California, the agency would accept complaints which potentially could establish a connection between the alleged harm and some action ofthe employer within the state. In rejecting that argument, the court of appeal stressed that courts are obliged to construe statutes according to the legislature's own statement of purpose whenever possible. It added that an internal agency memorandum, as opposed to an administrative regulation which would ordinarily be subject to notice and hearing requirements, is entitled to only "slight deference." Furthermore, the court stated that an interpretation of a statute that is not contemporaneous with its enactment, but undertaken years later is not entitled to great weight. Accordingly, the court of appeal was unpersuaded to defer to the agency memorandum, given that it was in informal policy decision prepared years after the statute's enactment (*Campbell v. Arco Marine, Inc. (1996) 42 Cal. App. 4th 1850, 1859-1861, 50 Cal. Rptr. 2d 626*).

[c] Agency May Not Enlarge Legislative Enactment

In ***Department of Transportation v. Superior Court*** *(1996) 47 Cal. App. 4th 852, 55 Cal. Rptr. 2d 2* , plaintiffs sued the California Department of Transportation (CALTRANS) for personal injuries arising out of a traffic collision which occurred when a third-party vehicle crossed over a center lane divider and struck plaintiffs' vehicle. Plaintiffs sought discovery of certain categories of records and information maintained by CALTRANS. The trial court ordered production and CALTRANS petitioned for writ of mandate, challenging the order.

CALTRANS argued that *23 U.S.C. § 409*, which precludes discovery or evidentiary admission of reports and other data compiled for safety purposes, preempted California law and prevented disclosure of the information. The court of appeal disagreed, finding that although the statute expressly preempted state law, CALTRANS had the burden of proving the specific information at issue was subject to preemption. It held that CALTRANS had failed to meet its burden. CALTRANS had argued for an expansive interpretation of *23 U.S.C. § 409*, based upon regulations adopted by the U.S. Department of Transportation for highway safety improvement, at *23 C.F.R. § 924.1 et seq.* Accordingly, CALTRANS claimed these regulations provided criteria to determine the types of documents and other information falling within the scope of the exclusions specified in *23 U.S.C. § 409*. CALTRANS further relied on a memorandum from an official of the Federal Highway Administration who asserted that the information sought by plaintiffs was allegedly compiled pursuant to *23 C.F.R. § 924.1* and thus was not discoverable. The appellate court dismissed this argument on the ground that an administrative agency and its employees may not enlarge the scope of a legislative enactment and so denied the petition (*Department of Transportation v. Superior Court (1996) 47 Cal. App. 4th 852, 857-858, 55 Cal. Rptr. 2d 2*).

[d] No Deference Owed to Agency Interpretation Embodied in Void Regulations

One of the issues presented in ***Church v. Jamison*** *(2006) 143 Cal. App. 4th 1568, 50 Cal. Rptr. 3d 166* , was the proper application of *Labor Code Section 227.3*. Section 227.3 generally provides that if an employee is terminated without having used all of his or her vested vacation time, the unused vested vacation must be paid to the employee as wages. One question raised in this case was whether the appropriate statute of limitations (*e.g., Code Civ. Proc. §§ 337(1), 338(a), 339(1)*) should be applied not just to limit the time after termination for the employee to file suit, but also "in reverse," to limit the years for which unused vested vacation may be claimed. The court of appeal in this case held that the statute of limitations should only limit the time for filing suit, not the number of years for which unused vested vacation pay could be claimed (*143 Cal. App. 4th 1568, 1580* -1583).

In so holding, the court of appeal rejected the contrary holding of another court of appeal (*see Sequeira v. Rincon-Vitova Insectaries, Inc. (1995) 32 Cal. App. 4th 632, 637, 38 Cal. Rptr. 2d 264* (holding that if employment relationship was governed by written contract, four-year statute of limitations, *Code Civ. Proc. § 337(1)*, limits right to vacation pay to that which vested within four years prior to termination of employment)).

The court of appeal's holding in this case was also contrary to the position taken in the enforcement manual of the California Division of Labor Standards Enforcement (DLSE). The court of appeal explained that the general rule of deference to an agency interpretation does not apply if the interpretation was not adopted in accordance with applicable legal requirements. As relevant in this case, the California Supreme Court has held that the interpretive policies contained in the DLSE enforcement manual are void as regulations, because they were not promulgated in accordance with the Administrative Procedure Act (*see Tidewater Marine Western, Inc. v. Bradshaw (1996) 14 Cal. 4th 557, 572, 59 Cal. Rptr. 2d 186, 927 P.2d 296* ; *see Gov. Code § 11340 et seq.* (Administrative Procedure Act)). As a result, the court of appeal did not give any weight to the statutory interpretations in the DLSE's enforcement manual (*143 Cal. App. 4th 1568, 1578-1580)* .

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[Reserved]

§§ 217.112[Reserved]

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F. RETROACTIVITY

21-217 California Points & Authorities § 217.130

§ 217.130 Supporting Contention That Statute Should Be Applied Retroactively--Retroactive Application Necessary to Effectuate Legislative Intent

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It may be combined with the general points and authorities set out in § 217.20.*]

_____ [*Specify statute or* THE _____ (*year*) AMENDMENT TO _____ (*specify statute*)] SHOULD BE APPLIED RETROACTIVELY BECAUSE RETROACTIVE APPLICATION IS NECESSARY TO EFFECTUATE THE LEGISLATIVE INTENT.

A. Statute Given Retroactive Effect If Necessary to Effectuate Legislative Intent. Although legislative enactments are generally presumed to operate prospectively and not retroactively, this presumption is rebuttable. If the legislature clearly intended a statute to operate retroactively, the court must carry out that intent unless due process considerations prevent the court from doing so. The court may infer the Legislature's intent from the express provisions of the statute as well as from extrinsic sources such as the legislative history (*Preston v. State Bd. of Equalization (2001) 25 Cal. 4th 197, 221-222, 105 Cal. Rptr. 2d 407, 19 P.3d 1148* ; *In re Marriage of Bouquet (1976) 16 Cal. 3d 583, 587, 128 Cal. Rptr. 427, 546 P.2d 1371* ; *Mannheim v. Superior Court (1970) 3 Cal. 3d 678, 686, 91 Cal. Rptr. 585, 478 P.2d 17* ; *Yoshioka v. Superior Court (1997) 58 Cal. App. 4th 972, 980, 68 Cal. Rptr. 2d 553*).

[*Optional*] **B. Constitutional Infirmity of Former Law as Indication of Legislative Intent.** When a new statute is enacted to replace an old statute, the probable constitutional infirmity of the old law is one factor indicating legislative intent that the new law be applied retroactively (*In re Marriage of Bouquet (1976) 16 Cal. 3d 583, 588, 128 Cal. Rptr. 427, 546 P.2d 1371* ; *Dandona v. Araluce (In re Marriage of Dandona & Araluce) (2001) 91 Cal. App. 4th 1120, 1125-1126, 111 Cal. Rptr. 2d 390*).

[*Set forth additional points and authorities relating to the particular statute in question and that support retroactive application of it. In addition, counsel may wish to set forth points and authorities relating to other rules of statutory*

interpretation that aid in ascertaining legislative intent behind statute and support retroactive application (see §§ 217.21 -217.25, 217.40 -217.46, 217.60 -217.63, 217.80 -217.86, 217.88, 217.110, 217.111, 217.131).]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that a statute should be given retroactive effect, that is, should be applied to facts and circumstances arising prior to its enactment. Such an argument might be made in any type of action or proceeding in which a party seeks to have a newly enacted statute applied to his or her case. These points and authorities may be combined with the general points and authorities *set forth in § 217.20*, which relate to the construction of statutes to ascertain and effectuate the legislative intent.

These points and authorities may be combined with a memorandum of points and authorities relating to the procedural context in which counsel wishes to raise the substantive issue of the retroactivity of a statute. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the foregoing form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion of any evidence of legislative intent, such as the legislative history behind the particular statute, showing why retroactive application of the statute is necessary to effectuate that intent.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 217.133* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Statute Given Retroactive Effect If Necessary to Effectuate Legislative Intent

Preston v. State Bd. of Equalization *(2001) 25 Cal. 4th 197, 105 Cal. Rptr. 2d 407, 19 P.3d 1148* , involved the application of a sales-tax exemption under *Rev. & Tax. Code §§ 6011(c)(10)* and *6012(c)(10)*. The Supreme Court held that the general presumption that statutes operate prospectively, and not retroactively, is rebuttable. If the legislature clearly intended a statute to operate retroactively, the court must carry out that intentunless due process considerations prevent the court from doing so. The Legislature's intent to have a statute operate retroactively may be inferred from the express provisions of the statute, as well as from extrinsic sources, including the legislative history (*Preston v. State Bd. of Equalization (2001) 25 Cal. 4th 197, 221-222, 105 Cal. Rptr. 2d 407, 19 P.3d 1148*).

After reviewing the statutory text, including the Legislature's official statement of intent, as well as the legislative history, the Court concluded that the tax provisions involved in this case were intended to apply retroactively (*Preston v. State Bd. of Equalization (2001) 25 Cal. 4th 197, 222-224, 105 Cal. Rptr. 2d 407, 19 P.3d 1148*). The court then considered whether giving the statutes retroactive effect would violate due process requirements. The Court concluded that due process was not violated, because retroactive application of the statutes could only reduce a claimant's tax liability and therefore could not impair any vested right. Furthermore, the Court found that applying the statute's tax exemption retroactively did not constitute a gift of public funds in violation of *Cal. Const., art. XVI, § 6*. Although the Legislature generally cannot provide retroactive relief for taxes that have become fixed and vested, a retroactive tax exemption will be upheld if it is based on the Legislature's reasonable determination that the exemption serves a public purpose (*Preston v. State Bd. of Equalization (2001) 25 Cal. 4th 197, 224-225, 105 Cal. Rptr. 2d 407, 19 P.3d 1148*). In this case, the Court held that the exemption was enacted to further the public purpose of providing certainty to business taxpayers and improving the business climate in California (*Preston v. State Bd. of Equalization*

(2001) 25 Cal. 4th 197, 225, 105 Cal. Rptr. 2d 407, 19 P.3d 1148).

The facts and procedural background of ***In re Marriage of Bouquet*** *(1976) 16 Cal. 3d 583, 128 Cal. Rptr. 427, 546 P.2d 1371* , are *set out in § 217.82[3][a]*. On appeal, the Supreme Court reversed. The Court noted that although legislative enactments are generally presumed to operate prospectively and not retroactively, this presumption does not defy rebuttal. Relying on *Mannheim v. Superior Court (1970) 3 Cal. 3d 678, 686, 91 Cal. Rptr. 585, 478 P.2d 17* (discussed *below*), the Court observed that it has explicitly subordinated the presumption against the retroactive application of statutes to the transcendent canon of statutory construction that the design of the Legislature be given effect (*In re Marriage of Bouquet (1976) 16 Cal. 3d 583, 587, 128 Cal. Rptr. 427, 546 P.2d 1371*). The Court examined several pertinent factors bearing on the legislative intent and concluded that the Legislature intended that former amended Civ. Code § 5118 (*now see Fam. Code § 771*) be applied retroactively (*In re Marriage of Bouquet (1976) 16 Cal. 3d 583, 587-591, 128 Cal. Rptr. 427, 546 P.2d 1371*). The Court also held that the retroactive application of the statute was not unconstitutional (*In re Marriage of Bouquet (1976) 16 Cal. 3d 583, 591-594, 128 Cal. Rptr. 427, 546 P.2d 1371*).

Mannheim v. Superior Court *(1970) 3 Cal. 3d 678, 91 Cal. Rptr. 585, 478 P.2d 17* , arose out of the administration of the estate of an intestate decedent. Petitioner, as attorney for the heirs of decedent's predeceased husband, filed a petition in probate court to determine heirship. In response to this petition, the probate court entered a decree providing that (1) decedent left no surviving spouse, issue, or descendants of issue, (2) the entire estate consisted of property formerly held in joint tenancy by decedent and her predeceased husband, and (3) petitioner's clients were entitled to one-half of the estate. The probate court made no allocation of the remainder of the estate.

Under the laws of intestate succession that were in effect at the time of decedent's death and at the time the above decree was entered [former Prob. Code §§ 230, 231 (*now see Prob. Code §§ 240, 6402, 6404, 6800, 6806*); former Prob. Code § 228 (*now see Prob. Code § 6402.5*)], one-half of decedent's property was properly distributed to the heirs of her predeceased husband, and the remaining half should have been distributed to the state of California under former Prob. Code § 1027 (*now see Prob. Code § 11902*), to be held for five years, during which it could be claimed by unknown heirs of the decedent. If none appeared by the end of that period, the property would permanently escheat to the state. Shortly after the decree was entered, the Legislature amended former Prob. Code § 228 to provide that if any property subject to that section would otherwise escheat to the state because there is no relative, including next of kin of the decedent or his or her predeceased spouse, the property should be distributed in accordance with Prob. Code § 296.4 (governing distribution of community property of spouses who die simultaneously). Prob. Code § 296.4 had itself previously been amended and the effect of this amendment was to prevent the escheat of any community property of a husband and wife who die simultaneously if either leaves any heirs. By incorporating that distribution scheme into former Prob. Code § 228, the Legislature effectively provided the same treatment for community property of spouses who die at different times. After this amendment became effective, petitioner moved in the probate proceedings for an order decreeing that no portion of the estate escheat to the state and that the remaining one-half of the estate be distributed to petitioner's clients. When the probate court denied the motion, petitioner sought a writ of mandate to compel the probate court to enter such an order.

The Supreme Court granted the writ. It held, inter alia, that the amendment of former Prob. Code § 228 should be applied retroactively to any estate that had not vested absolutely in the state on the effective date of the amendment, regardless of when the decedent died (*Mannheim v. Superior Court (1970) 3 Cal. 3d 678, 687, 91 Cal. Rptr. 585, 478 P.2d 17*). The Court observed that one rule of statutory construction counsels that statutes are not to be given a retrospective operation unless it is clearlymade to appear that such was the legislative intent. But this canon expressly subordinates its effect to the fundamental rule of construction that a statute must be interpreted so as to effectuate legislative intent. The act that amended Prob. Code § 296.4 provided that it applied to any portion of an estate that had not vested in the state or permanently escheated to the state on the effective date of the act, regardless of when the decedent died (*Mannheim v. Superior Court (1970) 3 Cal. 3d 678, 686, 91 Cal. Rptr. 585, 478 P.2d 17*). When the Legislature amended former Prob. Code § 228, it expressly fashioned its revision in reference to the provisions of Prob.

Code § 296.4. Thus, the Court reasoned, the Legislature must have been fully aware of the latter section and must be deemed to have been conscious of the statutory provision for its retroactive application. In the absence of any indication to the contrary, the Court concluded that the Legislature intended to make former Prob. Code § 228, as amended, operate in the same manner as Prob. Code § 296.4, that is, retroactively (*Mannheim v. Superior Court (1970) 3 Cal. 3d 678, 687, 91 Cal. Rptr. 585, 478 P.2d 17*).

In ***Yoshioka v. Superior Court*** *(1997) 58 Cal. App. 4th 972, 68 Cal. Rptr. 2d 553* , the petitioner and real parties in interest were involved in an automobile accident, and the petitioner had no auto insurance at the time of the accident. The petitioner filed his complaint in superior court, alleging that he was rear-ended by real parties and subsequently sustained serious injuries. After the petitioner filed his action, Proposition 213 was passed, creating *Civ. Code § 3333.4*. The initiative prohibits uninsured motorists and drunk drivers from collecting noneconomic damages in any action arising out of the operation or use of a motor vehicle. It also prohibits recovery of any damages by felons for injuries caused in the commission of or flight from a felony. The matter was set for trial. Based on Proposition 213, the real party brought a motion in limine to exclude all evidence of general damages and bar all jury instructions on that issue. The trial court granted the motion in limine because he refused to rule that Proposition 213 was unconstitutional in its retroactive application and looked for appellate review on that issue. Further, he granted the real parties' request to amend their answer to add Proposition 213 as an affirmative defense. The trial was continued and the petitioner filed a petition for writ of mandate.

The court of appeal denied the petition for writ of mandate. Proposition 213 was applied to the petitioner by the concept of secondary retroactivity, defined as retroactivity that affects the future legal consequences of past transactions. The petitioner's case involved an accident occurring prior to Proposition 213's passage, yet encompassed a trial set following its effective date. Since the initiative did not expressly state that it will apply retroactively, the court stated that it must determine the electorate's intent. In order to determine such intent, stated the court, it is best to look at the language of the initiative itself. Generally, "[t]he presumption is very strong that a statute was not meant to act retrospectively, [wherein] [i]t ought not receive such a construction unless the words used are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied" (quoting from *U.S. Fidelity Co. v. Struthers Wells Co. (1908) 209 U.S. 306, 314, 28 S. Ct. 537, 539, 52 L. Ed. 804*). Although the petitioner argued that the words, "provisions shall apply to all actions in which the initial trial has not commenced prior to January 1, 1997" are susceptible to an alternate interpretation that the voters wanted to give uninsured motorists sufficient time to bring their case to trial if the case was already pending, the court stated that other sections of the initiative support a clear finding of retroactive intent. The initiative specifically states, "A Yes vote on this measure means: Uninsured drivers or drivers convicted of driving under the influence of alcohol or drugs at the time of an accident could no longer sue someone who was at fault for the accident for non-economic losses (such as pain and suffering)." The court concluded that on its face, the words "no longer" in this context can only be interpreted as the initiative no longer allowing the uninsured to sue for noneconomic losses (*Yoshioka v. Superior Court (1997) 58 Cal. App. 4th 972, 981, 68 Cal. Rptr. 2d 553*). The court also considered whether the retroactive application of Proposition 213 violated the petitioner's constitutional rights, and held that it did not (*Yoshioka v. Superior Court (1997) 58 Cal. App. 4th 972, 993, 68 Cal. Rptr. 2d 553*).

[b] Constitutional Infirmity of Former Law as Indication of Legislative Intent

The facts and procedural background of ***In re Marriage of Bouquet*** *(1976) 16 Cal. 3d 583, 128 Cal. Rptr. 427, 546 P.2d 1371* , are *set out in §§ 217.82[3][a]*, and *217.130[3][a]*. On appeal, the Supreme Court reversed. In holding that the former amended Civ. Code § 5118 (*now see Fam. Code § 771*) applied retroactively, the Court noted that former § 5118 would be subject to strong constitutional challenge. The probable constitutional infirmity of the former law lends some support to the conclusion that the Legislature intended the amendment to have retroactive effect, based on the inference that the Legislature wished to replace the possibly infirm law with its constitutionally unobjectionable successor as soon as possible. Although noting that this inference is not conclusive, the Court did state that it is of some value in ascertaining the Legislature's intent (*In re Marriage of Bouquet (1976) 16 Cal. 3d 583, 588, 128 Cal. Rptr.*

427, 546 P.2d 1371).

In ***Dandona v. Araluce (In re Marriage of Dandona & Araluce)*** *(2001) 91 Cal. App. 4th 1120, 111 Cal. Rptr. 2d 390* , the court of appeal held that the 2000 amendment of what is now *Fam. Code § 3653(d)* (formerly Fam.Code § 3653(c)) could be applied retroactively. That amendment gave the superior court discretion, when reducing or terminating spousal or child support, to order reimbursement of amounts previously overpaid. A 1999 amendment to the statute had eliminated this discretion, which had existed under previous law. The court of appeal held that the 2000 amendment could constitutionally be applied retroactively to authorize reimbursement of amounts overpaid while the 1999 amendment was in effect. In so holding, the court noted that although a retroactive application of a law may violate due process if it interferes with a vested property interest, the Legislature may constitutionally use its police power to abrogate rights that derive from unfair former laws. In this case, the 1999 amendment had created an unfair situation because it deprived support obligors of a right to reimbursement and created a windfall for overpaid obligees (*Dandona v. Araluce (In re Marriage of Dandona & Araluce) (2001) 91 Cal. App. 4th 1120, 1125-1126, 111 Cal. Rptr. 2d 390*).

[4] Additional Authorities

[a] Statute Given Retroactive Effect If Necessary to Effectuate Legislative Intent

Negrette v. California State Lottery Com. (1994) 21 Cal. App. 4th 1739, 26 Cal. Rptr. 2d 809 , was an action by a lottery player against the Lottery Commission seeking the prize money for a ticket that he allegedly mailed rather than redeeming it. The trial court granted summary judgment for defendant, properly applying the definition of "substantial proof," which is required under *Gov. Code § 8880.32(b)*. The court of appeal affirmed, finding that, although the definition of the term had been added after appellant's claim had been denied, it had merely clarified existing law, and not imposed additional requirements for the discretionary validation of a claim. The court found that a statute is retroactive if it substantially changes the legal effect of past events, and an amendment that merely clarifies existing law may be given retroactive effect, even without an expression of legislative intent for retroactivity (*Negrette v. California State Lottery Com. (1994) 21 Cal. App. 4th 1739, 1744, 26 Cal. Rptr. 2d 809*).

In *Nelson v. Flintkote Co. (1985) 172 Cal. App. 3d 727, 218 Cal. Rptr. 562* , the court of appeal held that *Code Civ. Proc. § 340.2* (limitations statute for asbestos-related injuries and illness) applies to complaints for damages for injuries and illness caused by exposure to asbestos that are filed after the effective date of *Code Civ. Proc. § 340.2* by a plaintiff who is not yet disabled but who received an informed diagnosis of asbestos is more than one year before the enactment of *Code Civ. Proc. § 340.2*. *Code Civ. Proc. § 340.2* applies to a plaintiff in the foregoing circumstances if the timeliness of the claim has not been adjudicated prior to the effective date of *Code Civ. Proc. § 340.2*. The court found the legislative history supported the conclusion that the Legislature intended *Code Civ. Proc. § 340.2* to be remedial in purpose, subject not only to liberal construction but also to retroactive application in a manner that would encompass the causes of action of as many asbestosis victims as possible (*Nelson v. Flintkote Co. (1985) 172 Cal. App. 3d 727, 732, 218 Cal. Rptr. 562*). The court held that a statute of limitations for a common law tort, such as at issue in the case at bench, is a procedural rule, and as such, not subject to the general rule that statutes should not be retroactive. A statute that is procedural in nature may be given effect as to pending and future litigation even if the event underlying the cause of action occurred before the statute took effect (*Nelson v. Flintkote Co. (1985) 172 Cal. App. 3d 727, 733, 218 Cal. Rptr. 562*).

In *Hudson Properties Co. v. Governing Board (1985) 168 Cal. App. 3d 63, 213 Cal. Rptr. 909* , the court of appeal, in adjudicating the rights of the parties to a dispute involving the purchase of school property, held that former Educ. Code § 39369.5, which granted to former owners of school property a right of first refusal, applied retroactively. The court reached this result even though there was no express statement of legislative intent on the issue of retroactivity of former Educ. Code § 39369.5, and even though the court stated that it could not infer from the statutory language itself that a retroactive application was intended (*Hudson Properties Co. v. Governing Board (1985) 168 Cal. App. 3d 63,*

70-71, 213 Cal. Rptr. 909). After determining the apparent purpose of the statute, the court inferred that the Legislature intended that it apply retroactively because there was no apparently good or logical reason to limit or restrict accomplishment of the statutory purposes by a prospective interpretation (*168 Cal. App. 3d 63, 70-71)* .

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 217 STATUTORY INTERPRETATION
PART II. FORMS
F. RETROACTIVITY

21-217 California Points & Authorities § 217.131

§ 217.131 Supporting Contention That Statute Should Be Applied Retroactively--Retroactive Application of Provision Clarifying Law

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It may be combined with the general points and authorities set out in § 217.20. It may also be combined with the points and authorities set out in § 217.130.*]

_____ [*Specify statute or* THE _____ (*year*) AMENDMENT TO _____ (*specify statute*)] SHOULD BE APPLIED RETROACTIVELY BECAUSE IT MERELY CLARIFIES EXISTING LAW AND THEREFORE IS NOT PRESUMED TO OPERATE PROSPECTIVELY ONLY.

A. Retroactive Application of Provision Clarifying Law. Despite the general rule that a statute is presumed to operate prospectively only, an amendment that merely clarifies existing law applies retroactively (*Colmenares v. Braemar Country Club, Inc. (2003) 29 Cal. 4th 1019, 1028-1031* , Cal. Rptr. 2d 662, *63 P.3d 220* ; *Arcadia Redevelopment Agency v. Ikemoto (1993) 16 Cal. App. 4th 444, 457, 20 Cal. Rptr. 2d 112* ; *State Bd. of Equalization v. Board of Supervisors (1980) 105 Cal. App. 3d 813, 824, 164 Cal. Rptr. 739*).

B. Clarifying Amendment Applies to Existing Cause of Action. When a statute provides that it clarifies or declares existing law, the provision indicates a legislative intent that the amendment apply to all existing causes of action from the date of its enactment. In accordance with the general rules of statutory construction, the court must give effect to this intention unless there is some constitutional objection thereto (*Western Security Bank v. Superior Court (1997) 15 Cal. 4th 232, 244, 62 Cal. Rptr. 2d 243, 933 P.2d 507* ; *see* *Carter v. California Dept. of Veterans Affairs (2006) 38 Cal. 4th 914, 44 Cal. Rptr. 3d 223, 229, 135 P.3d 637*).

[*Set forth additional points and authorities relating to other rules of statutory interpretation that aid in ascertaining legislative intent behind statute and support interpretation desired (see §§ 217.21 -217.25, 217.40 -217.46, 217.60 -217.63, 217.80 -217.86, 217.88, 217.110, 217.111)*].

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that a statute should be given retroactive effect, that is, should be applied to facts and circumstances arising prior to its enactment, on the ground that the statute merely clarifies existing law and thus is not subject to the usual presumption of prospective operation. Such an argument might be made in any type of proceeding in which a party seeks to have a newly enacted statute applied to his or her case. These points and authorities may be combined with the general points and authorities *set forth in § 217.20*, which relate to the construction of statutes to ascertain and effectuate the legislative intent.

These points and authorities may be combined with a memorandum of points and authorities relating to the procedural context in which the issue of statutory interpretation arises. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should also insert argument in this form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should demonstrate that the statute to be applied retroactively in fact merely clarifies existing law.

CAUTION:

The foregoing form is not for use when the Legislature enacts a clarifying provision subsequent to a contrary judicial interpretation by a court higher than that to which the memorandum or brief is presented. In such a case, the lower court is bound by stare decisis to follow the prior judicial interpretation rather than to apply the legislative clarification retroactively [*see McClung v. Employment Dev. Dep't (2004) 34 Cal. 4th 467, 475-476, 20 Cal. Rptr. 3d 428, 99 P.3d 1015* (once California Supreme Court has finally and definitively interpreted statute, Legislature has no power to decide that subsequent amendment merely declares existing law); *People v. Savala (1981) 116 Cal. App. 3d 41, 58-61, 60 n.11, 171 Cal. Rptr. 882]* .

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 217.133* may be used to oppose the contention supported by the foregoing points and authorities.

[3] Discussion of Authorities

[a] Retroactive Application of Provision Clarifying Law

In ***Colmenares v. Braemar Country Club, Inc.*** *(2003) 29 Cal. 4th 1019, 130 Cal. Rptr. 2d 662, 63 P.3d 220* , the plaintiff sued his former employer, alleging discrimination based on physical disability in violation of the Fair Employment and Housing Act (FEHA) (*Gov. Code § 12900 et seq.*). While the case was on appeal, the FEHA provision defining "physical disability" was amended (*see Gov. Code § 12926(k)*). The question for the Supreme Court, therefore, was whether the amended version of the statute applied to the plaintiff's claim, which was based on conduct that occurred prior to the amendment of the statute.

Prior to the amendment, the FEHA provided that "a '[p]hysical disability' includes ... [h]aving" a "disease, disorder, condition, cosmetic disfigurement, or anatomical loss" that both "[a]ffects one or more" of certain enumerated "body systems" and "[l]imits an individual's ability to participate in major life activities." The amendment changed the FEHA's requirement that a physical disease or condition limit "major life activities" to the singular "a major life activity." The act also included a legislative declaration that the FEHA definition of "physical disability" requires a "limitation" upon a major life activity, but does not require, as does the federal Americans With Disabilities Act, a "substantial limitation" (

Gov. Code § 12926.1(c)). The Legislature further declared that it intended state law to require a "limitation" rather than a "substantial limitation," despite language in a prior Supreme Court decision that could have been read as interpreting the FEHA provision as requiring a "substantial limitation" (*Gov. Code § 12926.1(d)*; *see Cassista v. Community Foods (1993) 5 Cal. 4th 1050, 1060, 22 Cal. Rptr. 2d 287, 856 P.2d 1143*). In the same act, the Legislature also amended other, non-FEHA statutes to delete the term "substantial" from thelimitation test for physical disability under those statutes (*see, e.g.,* Civ. Code § 54(b), Gov. Code § 19231). The legislative history showed an intention to standardize statutory definitions of disability to clarify that California's disability protections are broader than federal protections (*29 Cal. 4th 1019, 1026-1027)* .

Based on this pattern of legislative action, the Supreme Court concluded that the Legislature intended not to make a retroactive change, but only to clarify the degree of limitation required to be physical disabled under the FEHA. The Court also found it significant that the FEHA provision used the term "limits," not "substantially limits," both before and after the amendment (*29 Cal. 4th 1019, 1027-1028)* . Finally, the Court reviewed its decision in *Cassista* and found that the comment in that case that might be read to require a "substantial" limitation was dictum and did not accurately reflect the law on that point (*29 Cal. 4th 1019, 1028-1029)* . Accordingly, because the amendment did not change the law but merely clarified it, the Supreme Court held that the FEHA provision as amended was applicable to the plaintiff's claim in this case, even though the claim was based on events occurring prior to the amendment (*29 Cal. 4th 1019, 1031-1032)* .

Arcadia Redevelopment Agency v. Ikemoto *(1993) 16 Cal. App. 4th 444, 20 Cal. Rptr. 2d 112* involved the issue whether 1992 amendments to *Rev. & Tax. Code § 97.5* applied retroactively. Those amendments included community redevelopment agencies within the reach of the statute and subjected them to apportionment of property tax revenues. The court of appeal held that the legislative history indicated plainly that the amendments clarified rather than changed existing law. The court stated: "A statute will not be retroactively applied unless the Legislature clearly intended it to be retroactive. The requirement of legislative intent for retroactivity, however, does not apply to an amendment that merely clarifies existing law" (*16 Cal. App. 4th 444, 457)* .

State Bd. of Equalization v. Board of Supervisors *(1980) 105 Cal. App. 3d 813, 164 Cal. Rptr. 739* , involved a dispute over the validity of a regulation for the implementation of Proposition 13 (Cal. Const., art. XIIIA), enacted by initiative in June 1978. Proposition 13 ties property taxes to the acquisition value rather than to the market value of property. In November 1978, the voters approved Proposition 8, which amended the California Constitution to expressly provide for reduction in the acquisition value to reflect a decline in the value of property. The issue in this case was whether Proposition 8 applied retroactively.

The court of appeal held that it did. The court acknowledged the rule of statutory construction providing that a statute will be presumed to operate prospectively unless the intent that it is to be retroactive clearly appears from the statute itself, except that a statute may be applied retroactively to comport with presumed legislative intent. The court held that a further exception to the general rule arises when the Legislature merely clarifies existing law (*105 Cal. App. 3d 813, 824)* . Relying on the voter's pamphlet for Proposition 8 and on the Legislative Counsel's Digest, the court found that Proposition 8 was a clarifying provision, which was intended to go into effect at the same time as Proposition 13 (*105 Cal. App. 3d 813, 823-825)* .

[b] Clarifying Amendment Applies to Existing Cause of Action

Carter v. California Dept. of Veterans Affairs *(2006) 38 Cal. 4th 914, 44 Cal. Rptr. 3d 223, 135 P.3d 637* , involved the question whether the 2003 amendment of *Gov. Code § 12940(j)(1)* was declaratory of existing law. Prior to the amendment, Section 12940(j)(1) made employers liable under certain conditions for unlawful on-the-job harassment suffered by their employees. The 2003 amendment, which expressly made employers liable for sexual harassment committed by nonemployees against employees, included a legislative statement that the amendment was declaratory of existing law. The Supreme Court held that, because it had not yet definitively interpreted *Gov. Code § 12940(j)(1)* with

respect to employer liability for sexual harassment of employees by nonemployees, the legislative statement was entitled to "due consideration" in determining the effect of the amendment (*44 Cal. Rptr. 3d 223, 229)* . The Court distinguished *McClung v. Employment Development Dept. (2004), 34 Cal. 4th 467, 475-476, 20 Cal. Rptr. 3d 428, 99 P.3d 1015* (*see § 217.133[3][e]*), which involved a statutory provision that *had* been definitively interpreted by the California Supreme Court (*44 Cal. Rptr. 3d 223, 229)* . In the present case, the Court ultimately held that the amendment of Section 12940(j)(1) was declaratory of existing law and was applicable to conduct occurring before the operative date of the amendment (*44 Cal. Rptr. 3d 223, 235-236)* .

In ***Western Security Bank v. Superior Court*** *(1997) 15 Cal. 4th 232, 244, 62 Cal. Rptr. 2d 243, 933 P.2d 507* , a bank attempted to draw on standby letters of credit, of which it was a beneficiary, after a judicial foreclosure of real property security for its loan left a deficiency. The issuer of the letters of credit refused to honor the bank's demand on the letters of credit and filed an action for declaratory relief seeking a declaration that it was not obligated to honor the bank's tender of the letters of credit. The trial court filed a judgment decreeing that the Bank was entitled to recover from the issuer of the letters of credit, and the issuer could seek reimbursement from the borrowers. The issuer appealed and the borrowers cross appealed.

The court of appeal, after rehearing, reversed the trial court, holding that the trial court's judgment indirectly imposed on the borrower an equivalent of a prohibited deficiency judgment. The Legislature soon acted to express a clear, contrary intent, and enacted an urgency measure specifically meant to abrogate the court of appeal's holding. After the Legislature's action, the Supreme Court returned the case to the court of appeal for reconsideration in light of the statutory changes. The court of appeal concluded that the Legislature's action wasprospective only and had no impact on the court's earlier analysis of the parties' rights and obligations, and reiterated its former conclusions.

The Supreme Court again granted review and reversed. In considering the effect of the Legislature's action on the case, the Court reviewed principles of retroactivity and clarification. The Court quoted from *California Emp. Etc. Com. v. Payne (1947) 31 Cal. 2d 210, 213, 187 P.2d 702* , that "whether a statute should apply retrospectively or only prospectively is, in the first instance, a policy question for the legislative body enacting the statute." Thus, when a statute provides that it clarifies or declares existing law, "it is obvious that such a provision is indicative of a legislative intent that the amendment apply to all existing causes of action from thedate of its enactment. In accordance with the general rules of statutory construction, we must give effect to this intention unless there is some constitutional objection thereto" (*15 Cal. 4th 232, 244)* . According to the Court, the court of appeal erred in concluded that the Legislature's enactment had no effect on the case, because the Legislature explicitly intended to abrogate the court of appeal's prior decision and make certain the parties obligations when letters of credit supported loans also secured by real property (*15 Cal. 4th 232, 252)* . Thus, the Court held that the Legislature manifestly intended the respective obligations of the parties to a letter of credit transaction should remain unaffected by the antideficiency laws, whether those obligations arise before or after the enactment (*15 Cal. 4th 232, 252, 253)* .

[4] Additional Authorities

[a] Retroactive Application of Provision Clarifying Law

In *American Psychometric Consultants, Inc. v. Workers' Comp. Appeals Bd. (1995) 36 Cal. App. 4th 1626, 43 Cal. Rptr. 2d 254* , several employers and workers' compensation carriers sought restitution of amounts that they had paid for medical-legal fees to medical evaluators several years earlier. In each case, the fees had been incurred before the employer/carrier had had an opportunity to respond to the employee's workers' compensation claim, but in each case the fees were paid by the employer/carrier after negotiation and without protest. One issue on appeal was whether 1993 amendments to *Lab. Code §§ 4620* and *4621,* which provided that employers/carriers are not liable for medical-legal evaluations performed prior to the time that the workers' compensation claim was in dispute, could be applied to the issues in this case. The court of appeal noted that legislation ordinarily will not be applied retroactively unless the Legislature has clearly expressed an intent to do so. However, the court observed, in connection with a number of the

amendments involved in this case, the Legislature had declared that the changes were "declaratory of existing law." The court observed that, theoretically, changes of this sort do not result in retroactive application at all, but merely clarify the law that is already in existence (*36 Cal. App. 4th 1626, 1643)* . The court concluded that the amendments at issue were merely intended to clarify the law that was already in existence and that they could thereby be applied to the issues in the case (*36 Cal. App. 4th 1626, 1643)* . However, the court concluded that restitution of the fees was not equitable under the circumstances of this case (*36 Cal. App. 4th 1626, 1645-1647)* .

In *Borden v. Division of Medical Quality (1994) 30 Cal. App. 4th 874, 35 Cal. Rptr. 2d 905* , petitioner, a physician, brought an administrative mandate proceeding to review a decision of the Division of Medical Quality revoking petitioner's license to practice medicine. While administrative proceedings against petitioner were pending, the Legislature amended *Bus. & Prof. Code § 2229*, which sets forth guidelines for the exercise of the Division's disciplinary authority over licensed physicians. The amendments provided that protection of the public, rather than rehabilitation of the physician, is to be the highest priority for the Division in exercising its disciplinary authority. Although the Division initially placed petitioner on probation, the Division later reconsidered its decision and revoked petitioner's license, citing the amendments to *Bus. & Prof. Code § 2229*. The trial court issued a writ of mandate ordering the Division to reverse its decision, ruling that the amendments to § 2229 could not be applied retroactively, but the court of appeal reversed. The court noted that although statutes are generally not construed to apply retroactively, a well-recognized exception exists when the legislation merely clarifies existing law (*30 Cal. App. 4th 874, 882)* . After reviewing the background and purpose of the physician disciplinary statutes as they existed prior to the amendments, the court concluded public protection was already a high priority under existing law and that it was always within the Division's power to revoke a physician's license in order to protect the public. The court therefore concluded that the amendment merely clarified existing law and was not a substantive change in the law. Therefore, the amended statute could be applied to this case (*30 Cal. App. 4th 874, 882-885)* .

In *Mahon v. Safeco Title Ins. Co. (1988) 199 Cal. App. 3d 616, 245 Cal. Rptr. 103* , the court of appeal was concerned with the question of whether *Unemp. Ins. Code § 1960* applied retroactively to litigation pending at the time of its enactment. It is a maxim that no statute is to be given retroactive effect unless the Legislature has expressly so declared. Nevertheless, the court explained that the rule disfavoring retroactivity is meant to avoid the unfairness that attends changing the law after the action has been taken in justifiable reliance on the former law and that the characterization of the application of a statute as retroactive depends on the propensity for unfairness (*199 Cal. App. 3d 616, 620-621)* . The doctrine of nonretroactivity is qualified with exceptions for circumstances that ordinarily do not give rise to a substantial claim of unfairness. For example, the court said that procedural rules amended during the pendency of a proceeding apply as amended. Similarly, an exception to the general rule that statutes are not construed to apply retroactively arises when the legislation merely clarifies existing law (*199 Cal. App. 3d 616, 621)* .

California Points & Authorities

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CHAPTER 217 STATUTORY INTERPRETATION
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F. RETROACTIVITY

21-217 California Points & Authorities § 217.132

§ 217.132 Supporting Contention That Statute Should Be Applied Retroactively--Amended Statute Consists Only of Procedural Rule

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It may be combined with the general points and authorities set out in § 217.20. It may also be combined with the points and authorities set out in §§ 217.130 and 217.131.*]

_____ [*Specify statute or* THE _____(*year*) AMENDMENT TO _____(*specify statute*)] SHOULD BE APPLIED RETROACTIVELY BECAUSE IT MERELY CHANGES A PROCEDURE AND THEREFORE IS NOT PRESUMED TO OPERATE PROSPECTIVELY ONLY.

A. Change in Procedural Law Applicable Retroactively. A new procedural statute or an amendment to an existing procedural statute that changes a procedural rule is applicable to causes of action existing at the time of its enactment (*Strauch v. Superior Court (1980) 107 Cal. App. 3d 45, 48-49, 165 Cal. Rptr. 552*).

[*Optional*] **B. Procedural Statute Does Not Create New Action or Destroy Defense.** A statute is procedural when it neither creates a new cause of action nor deprives the defendant of any defense on the merits (*Owens v. Superior Court (1959) 52 Cal. 2d 822, 833, 345 P.2d 921*).

[*Optional*] **C. Statute Regulating Costs May Be Applied to Pending Actions.** Whether a particular cost, including attorney's fees, is allowed a litigant depends on the terms of the statute that is in effect at the time the judgment is rendered, not on the law that existed when the action was commenced, unless the Legislature has clearly indicated its intent in the new legislation that costs will not be recoverable in actions pending when the new statute becomes operative. Application to pending actions of new statutes regarding costs is not considered to be giving "retroactive" effect to that legislation (*Mir v. Charter Suburban Hospital (1994) 27 Cal. App. 4th 1471, 1478, 33 Cal. Rptr. 2d 243*).

[*Set forth additional points and authorities relating to the particular statute in question and that support retroactive application of it. In addition, counsel may wish to set forth points and authorities relating to other rules of statutory interpretation that aid in ascertaining legislative intent behind statute and support retroactive application (see §§ 217.21 -217.25, 217.40 -217.46, 217.60 -217.63, 217.80 -217.86, 217.88, 217.110, 217.111).*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that a statute should be given retroactive effect, that is, should be applied to facts, circumstances, and causes of action arising prior to its enactment, on the ground that the statute merely changes a procedural rule. Such an argument might be made in any type of proceeding in which a party seeks to have a newly enacted statute applied to his or her case. These points and authorities may be combined with the general points and authorities *set forth in § 217.20*, which relate to the construction of statutes to ascertain and effectuate the legislative intent.

These points and authorities may be combined with a memorandum of points and authorities relating to the procedural context in which the issue of statutory interpretation arises. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth the impact of the legislative enactment, describing its effect on procedure rather than on a substantive right.

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 217.133* may be used to oppose the contention supported by the points and authorities in this form.

[3] Discussion of Authorities

[a] Change in Procedural Law Applicable Retroactively

In ***Strauch v. Superior Court*** *(1980) 107 Cal. App. 3d 45, 165 Cal. Rptr. 552* , plaintiff filed a complaint for medical malpractice against defendant but did not accompany it with a certificate of merit or a certificate of inability to comply in timely fashion, as was then required by former Code Civ. Proc. § 411.30. Plaintiff sought and was granted relief from late filing for mistake of law, and filed the certificate. Defendant unsuccessfully moved to strike the complaint, claiming plaintiff's failure was jurisdictional. After the trial court's ruling, former Code Civ. Proc. § 411.30 was amended to authorize the filing of a certificate of merit after the filing ofa medical malpractice complaint. Defendant petitioned for a writ of mandate directing the trial court to enter an order granting his motion to strike the complaint and denying plaintiff's motion for relief. Defendant claimed that the trial court had abused its discretion, and sought to have statutory provisions applicable at the time of the trial court's decision but later repealed enforced against plaintiff.

The court of appeal denied the petition. Before concluding that plaintiff had complied with the policy underlying former Code Civ. Proc. § 411.30, which was that a plaintiff provide some independent support of the merits of the action before pursuing that action, the court explained the effects of statutory amendments. *Civ. Code § 3* provides that statutes are presumed to operate prospectively. A statute is not made retroactive merely because it draws on facts existing prior to its enactment. Thus, changes in procedural law are applicable to existing causes of action. The effect of such statutes is actually prospective in nature since they relate to the procedure to be followed in the future. An amendment of a procedural statute applies to cases pending at the time of its enactment, providing vested rights are not affected (*107 Cal. App. 3d 45, 48-49)* . The court explained that a statute is procedural when it neither creates a new cause of action

nor deprives the defendant of any defense on the merits. It concluded that the amendments to former Code Civ. Proc. § 411.30 were procedural because they did not create a new cause of action or deprive a malpractice defendant of any defense on the merits or affect vested rights (*107 Cal. App. 3d 45, 49)* .

[b] Procedural Statute Does Not Create New Action or Destroy Defense

In ***Owens v. Superior Court*** *(1959) 52 Cal. 2d 822, 345 P.2d 921* , plaintiff brought an action for damages against defendant for injuries suffered after he was bitten by defendant's dog. Although the cause of action arose in California while defendant was a resident, he became a permanent resident of Arizona before the action was commenced. After he was served in Arizona, defendant moved to quash service of summons on the ground that it was ineffective to give the trial court jurisdiction over him. The court denied his motion and he filed a petition for a writ of prohibition to prevent further proceedings against him.

The California Supreme Court denied the peremptory writ. Defendant contended that former Code Civ. Proc. § 417(b) (now *Code Civ. Proc. § 410.10*), which enables a court to render a personal judgment against a defendant (if he or she was personally served) absent from the state but who was domiciled in the state at the time the cause of action arose, was inapplicable because it was enacted not only after the cause of action arose and after he had changed his domicile, but after the action was commenced (*52 Cal. 2d 822, 827)* . The Court disagreed with defendant. The statute governed procedure only because it neither created a new cause of action nor deprived the defendant of any defense on the merits. Defendant had no vested right to have the jurisdiction of the California courts limited as it was at the time he left the state. Accordingly, the Court concluded that former Code Civ. Proc. § 417(b) permitted entry of a personal judgment pursuant to service made after its effective date (*52 Cal. 2d 822, 833)* .

[c] Statute Regulating Costs May Be Applied to Pending Actions

In ***Mir v. Charter Suburban Hospital*** *(1994) 27 Cal. App. 4th 1471, 33 Cal. Rptr. 2d 243* , a physician brought a mandate proceeding to challenge a disciplinary action imposed by a hospital's peer review committee. The trial court ruled in favor of the physician, finding that the committee's decision was not supported by substantial evidence. While the mandate proceeding was pending in the trial court, the Legislature enacted *Bus. & Prof. Code § 809.9,* which allows the prevailing party in a proceeding to challenge certain medical committee actions to recover costs, including attorney's fees, under certain circumstances. After the trial court's judgment was affirmed on appeal, the physician moved for an order awarding attorney's fees under this statute. The trial court granted the motion, and the hospital appealed.

One of the issues on appeal was whether *Bus. & Prof. Code § 809.9* could be applied "retroactively" to the case. The court of appeal noted that, generally, a new statute is not to be given retroactive application unless it clearly appears that the Legislature so intended. However, whether a particular cost, including attorney's fees, is allowed a litigant depends on the terms of the statute that is in force at the time that the judgment is rendered, not on the law that existed when the suit commenced, unless a provision in the new legislation clearly indicates the Legislature's intent that such costs not be recoverable in actions pending when the new statute becomes operative. The court observed that application to pending suits of new statutes regarding costs is not regarded as giving retroactive effect to such legislation (*27 Cal. App. 4th 1471, 1478)* . In this case, *Bus. & Prof. Code § 809.9* was potentially applicable because it became operative on January 1, 1990, and the trial court issued its ruling in favor of the physician on January 10, 1990. Since there was no clear indication that the Legislature did not intend *Bus. & Prof. Code § 809.9* to apply to pending suits, the court held that the statute was fully applicable to this case (*27 Cal. App. 4th 1471, 1478)* . The court concluded, however, that the physician was not entitled to attorney's fees under § 809.9 merely because the committee lacked substantial evidence to support its decision and that a new hearing was required to determine whether the hospital's action was so lacking in merit as to be frivolous or in bad faith. The court therefore reversed the order and remanded the action for a new hearing on the motion for attorney's fees (*27 Cal. App. 4th 1471, 1481-1488)* .

[4] Additional Authorities

[a] Change in Procedural Law Applicable Retroactively

In *Department of Health Services v. Fontes (1985) 169 Cal. App. 3d 301, 215 Cal. Rptr. 14* , the court of appeal affirmed a judgment for the Department of Health Services in a creditor's claim proceeding against the estate of a Medi-Cal recipient for the amount of benefits that had been received by her. The court framed the issue as whether *Welf. & Inst. Code § 14009.5* authorized the department to claim reimbursement for Medi-Cal benefits from the estate of a Medi-Cal recipient, when the recipient died after its effective date, but the benefits were received before its effective date. It said that a statute is not retroactive in its application merely because it draws on antecedent facts for its operation. The ultimate test is whether the statute as applied changes the legal effect of past transactions. Application of a statute that changes existing rights would be retroactive because the legal effects of past events would be changed. But a statute's application that merely affects procedures to be followed in the future is prospective because it does not deprive a person of any right that he or she had prior to the effective date of the statute (*169 Cal. App. 3d 301, 304)* . The court held that the application of *Welf. & Inst. Code § 14009.5* to estates that arose after its effective date did not affect any existing rights and accordingly, had no impermissibly retroactive effect, even when the benefits had been received prior to its effective date (*169 Cal. App. 3d 301, 305)* .

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21-217 California Points & Authorities § 217.133

§ 217.133 Opposing Contention That Statute Be Given Retroactive Application

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief. It should be combined with the general points and authorities set out in § 217.20.*]

_____ [*Specify statute or* THE _____ (*year*) AMENDMENT TO _____ (*specify statute*)] SHOULD NOT BE APPLIED RETROACTIVELY, BECAUSE IT DOES NOT CLEARLY APPEAR THAT THE LEGISLATURE INTENDED IT TO APPLY RETROACTIVELY AND IT IS NOT A MERE CLARIFICATION OF EXISTING LAW.

A. No Retroactive Operation Absent Clear Intent. As a general rule of construction, statutes are not to be given retroactive effect unless the intent of the Legislature cannot be otherwise satisfied, or unless the new statute merely clarifies existing law. The Legislature, of course, is well acquainted with this fundamental rule, and when it intends a statute to operate retroactively, it uses clear language to accomplish that purpose (*Balen v. Peralta Junior College Dist. (1974) 11 Cal. 3d 821, 828, 828 n.8, 114 Cal. Rptr. 589, 523 P.2d 629* ; *Harpole v. Conrad N. Hilton Foundation (1996) 44 Cal. App. 4th 890, 906-907, 52 Cal. Rptr. 2d 491* ; *Nelson v. A.H. Robins Co. (1983) 149 Cal. App. 3d 862, 870, 197 Cal. Rptr. 179*).

[*Optional*] **B. Destruction of Previously Acquired Interest Disfavored.** Application of a statute to destroy interests that matured prior to its enactment is generally disfavored, absent specific legislative provision for retroactivity or other indication of legislative intent (*Balen v. Peralta Junior College Dist. (1974) 11 Cal. 3d 821, 830, 114 Cal. Rptr. 589, 523 P.2d 629* ; *see In re Marriage of Buol (1985) 39 Cal. 3d 751, 759, 218 Cal. Rptr. 31, 705 P.2d 354*).

[*Optional*] **C. Statute Modifying Civil Liability Not to Be Construed Retroactively.** Absent some clear policy requiring the contrary, statutes modifying liability in civil cases are not to be construed retroactively (*Robinson v. Pediatric Affiliates Medical Group, Inc. (1979) 98 Cal. App. 3d 907, 912, 159 Cal. Rptr. 791*).

[*Optional*] **D. Statute Shortening Period of Limitations Not to Be Construed Retroactively.** To avoid the unconstitutional effect of retroactive application, a statute of limitations cannot be applied retroactively to destroy an accrued caused of action that is not barred by the then applicable statute of limitations (*Krusesky v. Baugh (1982) 138 Cal. App. 3d 562, 566, 188 Cal. Rptr. 57*).

[*Optional*] **E. Erroneous Characterization of Statute as "Declaratory of Existing Law" Not Sufficient Evidence of Retroactive Intent.** When a statute is amended in response to a judicial interpretation of the statute, an erroneous statement by the Legislature that the amendment merely declares existing law is not sufficient to overcome the strong presumption against retroactively applying the amendment [*McClung v. Employment Dev. Dep't (2004) 34 Cal. 4th 467, 472-475, 20 Cal. Rptr. 3d 428, 99 P.3d 1015]* .

[*Set forth additional points and authorities relating to other rules of statutory interpretation that aid in ascertaining legislative intent behind statute and support interpretation desired (see §§ 217.21 -217.25, 217.40 -217.46, 217.60 -217.63, 217.80 -217.86, 217.88, 217.110, 217.111).*]

[2] Comments

[a] Use of Form

This of points and authorities may be submitted in opposition to a party's contention that a statute should be given retroactive effect, that is, should be applied to facts and circumstances arising prior to its enactment. Such an argument might be made in any type of proceeding in which a party seeks to have a newly enacted statute applied to his or her case. These points and authorities may be combined with the general points and authorities *set forth in § 217.20*, which relate to the construction of statutes to ascertain and effectuate the legislative intent.

These points and authorities may be combined with a memorandum of points and authorities relating to the procedural context in which the issue of statutory interpretation arises. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should also insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should set forth the facts showing that the statute in question was enacted subsequent to the occurrences that are the subject of dispute and that there is no indication that the statute was intended to apply retroactively.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in §§ 217.130* and *217.131*.

[3] Discussion of Authorities

[a] No Retroactive Operation Absent Clear Intent

Plaintiff in ***Balen v. Peralta Junior College Dist.*** *(1974) 11 Cal. 3d 821, 114 Cal. Rptr. 589, 523 P.2d 629* , a school teacher, was dismissed by defendant district without cause or hearing. Plaintiff brought an action for reinstatement, lost salary, and damages. The superior court granted defendant's motion for summary judgment and dismissed plaintiff's action on the ground that plaintiff was a temporary employee dischargeable at will under former Educ. Code § 13446 (*now see Educ. Code § 44954*). Plaintiff appealed.

The Supreme Court reversed, holding that plaintiff was not a temporary employee but a probationary employee under former Educ. Code §§ 13334 (*now see Educ. Code §§ 44915, 87476*), 13336 (*now see Educ. Code § 44917, 87478*), and 13337 (*now see Educ. Code § 44919, 87480*), and as such was entitled to pretermination notice and hearing. The Court relied on the provisions of those statutes as of 1965, when defendant hired plaintiff. Defendant argued that plaintiff's

status was changed to that of a temporary employee by a later statute, former Educ. Code § 13337.5 (*now see Educ. Code § 87482*). The Court rejected this contention, citing *Interinsurance Exchange v. Ohio Cas. Ins. Co. (1962) 58 Cal. 2d 142, 149, 23 Cal. Rptr. 592, 373 P.2d 640* , and *Di Genova v. State Bd. of Education (1962) 57 Cal. 2d 167, 176, 18 Cal. Rptr. 369, 367 P.2d 865* , for the general rule of construction that statutes are not to be given retroactive effect unless the intent of the Legislature cannot be otherwise satisfied, that the Legislature is well acquainted with this fundamental rule, and that when it intends a statute to operate retroactively, it uses clear language to accomplish that purpose. The Court found nothing in former Educ. Code § 13337.5 to indicate that it was intended to be applicable to employment rendered prior to its enactment (*11 Cal. 3d 821, 828)* . The Court also noted that former Educ. Code § 13337.5 substantially changed the system for classification of teachers so that the exception to the general rule of nonretroactivity applicable to legislation merely clarifying existing law did not apply to the case (*11 Cal. 3d 821, 828-829 n.8*).

Harpole v. Conrad N. Hilton Foundation *(1996) 44 Cal. App. 4th 890, 52 Cal. Rptr. 2d 491* , involved claims by attorneys for the personal representative of the estate of Conrad Hilton, under *Prob. Code § 18100 et seq.*, for fees. The attorneys had previously been awarded substantial "ordinary" and "extraordinary" fees for services rendered to the estate in the course of a special administration that ended in 1980. The attorneys petitioned for additional extraordinary fees and the estate sought disgorgement of portions of fees already paid. The trial court denied the petition for the additional fees, but also denied the estate's claim for repayment of fees. Both sides appealed. The questions presented on appeal were: does the court have the power to order repayment of any portion of fees previously awarded, and can the court take into account, in determining the amount of any future payments, the effect of prior fee awards from which no appeal was taken?

The statutory scheme for determining attorney compensation rates in probate matters was modified in 1987. The estate argued that the allowable attorney fees should be recalculated on the basis of the 1987 modification. The court of appeal stated the rule that a change in the law which deprives a person of a vested right or substantially impairs such a right is invalid, to the extent it purports to be retroactive, because it denies due process. The court added, however, that the rule does not equally apply when the change is merely "procedural" and not "substantive." But the court qualified that exception by adding that even procedural statutes will ordinarily, for reasons of fairness, be given only prospective application unless a clear legislative intent appears. Because the court found that modification of a prior statutory fee award would affect substantial vested rights, the 1987 modification could not be applied retroactively to deprive the attorneys of those fees already awarded. However, the court determined that while theycould not be retroactively modified, the prior fee awards could be considered in determining the amount of any future compensation sought by attorneys, and thus denied further compensation (*44 Cal. App. 4th 890, 906-908)* .

In ***Nelson v. A.H. Robins Co.*** *(1983) 149 Cal. App. 3d 862, 197 Cal. Rptr. 179* , plaintiff brought an action alleging injuries from a defective IUD device, naming a family planning clinic and several Does as defendants. Subsequently, plaintiff filed an amended complaint naming the manufacturer of the device and several others as defendants. More than three years elapsed from the date of filing of the original complaint to service of defendants first named in the amended complaint. The newly named defendant manufacturer moved to dismiss the action as to it for failure to prosecute prior to trial, under former Code Civ. Proc. § 581a(a) (*now see Code Civ. Proc. §§ 583.210, 583.250*). The trial court granted the motion, and plaintiff appealed from the judgment dismissing her action.

The court of appeal reversed the order of dismissal and remanded the case to the trial court. Preliminarily, the court held that former Code Civ. Proc. § 581a(a) was applicable to the case, since under the facts before it the three-year period within which defendants named in a complaint must be served under had run with respect to the newly named defendants by the time they were served (*149 Cal. App. 3d 862, 867-868)* . The court stated that a plaintiff may be excused from dismissal when he or she had exercised reasonable diligence in serving the defendants. However, the court noted that after the action had already been brought the Legislature had eliminated reasonable diligence as an excuse by enacting former Code Civ. Proc. § 581a(f) (*now see Code Civ. Proc. § 583.240(d)*), whose effect was to make dismissal mandatory except under the conditions set out in that section (*149 Cal. App. 3d 862, 869-870)* . In

determining whether or not former Code Civ. Proc. § 581a(f) should have been applied retroactively to plaintiff's action, the court stated that there was no language in the section itself or in its legislative history implying that that section should operate retroactively. The court held that the silence of the enactment as to retroactive application is an authoritative statement that the Legislature intended it to have prospective application only. Additionally, an explicit rule calling for prospective application of former Code Civ. Proc. § 581a(f) appears in *Code Civ. Proc. § 3*, which states that no part of the Code of Civil Procedure is retroactive unless explicitly so declared (*149 Cal. App. 3d 862, 870)* .

The court also noted that former Code Civ. Proc. § 581a(f) was a procedural statute since its enactment neither created a new right nor eliminated a defense. There is authority suggesting that rules against retroactivity should not be applied to procedural statutes. However, the court held that such rules are applicable to a statute, even if it is procedural in form, when the substantive effect of the statute would be to change the legal effects of past events. In the case before it, the trial court's failure to hold a hearing to determine whether or not plaintiff had exercised reasonable diligence had taken place before the enactment of former Code Civ. Proc. § 581a(f), and was therefore a past event whose effect would be changed by a retroactive application of the section.

The court concluded that former Code Civ. Proc. § 581a(f) did not apply retroactively so as to reach the case before it, and that the trial court should therefore on remand conduct a hearing to determine whether or not the plaintiff had exercised reasonable diligence under pre-existing case law (*149 Cal. App. 3d 862, 870-871)* .

[b] Destruction of Previously Acquired Interest Disfavored

The facts and procedural background of ***Balen v. Peralta Junior College Dist.*** *(1974) 11 Cal. 3d 821, 114 Cal. Rptr. 589, 523 P.2d 629* , are *discussed under § 217.133[3][a]*. In reversing, the Supreme Court rejected defendant's contention that former Educ. Code § 13337.5 (*now see Educ. Code § 87482*) should be applied to plaintiff prospectively from the time of its passage so as to reclassify him as a temporary teacher from that time. The Court held that application of a statute to destroy interests that matured prior to its enactment is generally disfavored. Absent specific legislative provision for retroactivity or other indication of legislative intent, it would manifestly be unjust to interpret the new section in a manner that would strip petitioner of his previously acquired status (*11 Cal. 3d 821, 830)* .

In re Marriage of Buol *(1985) 39 Cal. 3d 751, 218 Cal. Rptr. 31, 705 P.2d 354* , involved a marital dissolution proceeding in which the only issue was the status of the home as separate or community property. Although title was taken in joint tenancy, the wife had made all the payments with her separate property money. The trial court found that the parties had an enforceable oral agreement and entered judgment awarding the home to the wife. The husband appealed from the judgment. While the appeal was pending, former Civ. Code § 4800.1 (*now see Fam. Code § 2580*) was enacted, providing that evidence of a written agreement to the contrary is required to rebut the presumption that property acquired during marriage in joint tenancy is community property.

The Supreme Court affirmed. It framed the issue as whether former Civ. Code § 4800.1 was to be given retroactive effect. The Court found that applied retroactively, former Civ. Code § 4800.1 unquestionably was substantive. A statute is substantive in effect when it imposes a new or additional liability and substantially affects existing rights and obligations. The Court noted that former Civ. Code § 4800.1 imposed a statute of frauds where there was none before, penalizing the unwary for relying onthe law as it existed at the time the property rights were created rather than at the time dissolution proceedings were underway. By eliminating the means by which one might prove the existence of the vested property right, imposing instead an evidentiary requirement with which it is impossible to comply, the Court found the statute affected the vested property right itself (*39 Cal. 3d 751, 758-759)* .

[c] Statute Modifying Civil Liability Not to Be Construed Retroactively

Plaintiff father in ***Robinson v. Pediatric Affiliates Medical Group, Inc.*** *(1979) 98 Cal. App. 3d 907, 159 Cal. Rptr. 791* , recovered a judgment for medical expenses incurred on behalf of his minor daughter, who was injured by

defendant's medical malpractice. The medical expenses had already been paid by an insurance company at the time of trial. Defendant appealed, contending that recovery of medical expenses was barred by *Civ. Code § 3333.1*, which abolishes the collateral source rule and thus allows reduction of damages by compensation received from other sources.

The court of appeal affirmed. The court noted that plaintiff's cause of action arose several months before *Civ. Code § 3333.1* was enacted, and held that *Civ. Code § 3333.1* did not apply retroactively. Citing *White v. Lyons (1871) 42 Cal. 279, 284-285* , and a New York case, the court held that absent some clear policy requiring the contrary, statutes modifying liability in civil cases are not to be construed retroactively. The court found this rule to be applicable, since *Civ. Code § 3333.1* may result in the reduction of damages for which a defendant is liable (*98 Cal. App. 3d 907, 912)* .

[d] Statute Shortening Period of Limitations Not to Be Construed Retroactively

On November 13, 1980, plaintiff in ***Krusesky v. Baugh*** *(1982) 138 Cal. App. 3d 562, 188 Cal. Rptr. 57* , filed an action for legal malpractice arising out of her attorney's failure to secure her community property rights to part of her former husband's military retirement pension in a 1969 divorce proceeding. The trial court granted defendant's demurrer to the complaint on the ground that *Code Civ. Proc. § 340.6*, the statute of limitations for legal malpractice actions, barred her action. *Code Civ. Proc. § 340.6* generally limits the time in which to bring a legal malpractice action to one year from discovery, or four years from the occurrence. The statute became effective January 1, 1978. (The statute was amended effective January 1, 2009, to provide a special limitation period for a malpractice plaintiff who must establish his or her factual innocence of an underlying criminal charge as an element of his or her claim against an attorney; in such a case the time to commence the malpractice action is two years after the plaintiff achieves postconviction exoneration in the form of a final judicial disposition of the criminal case (*see Code Civ. Proc. § 340.6(a)*).)

The plaintiff in this case appealed, contending, among other things, that she remained unaware of her rights for many years after the divorce, until less than one year before suit was filed.

The court of appeal reversed the judgment of the trial court with instructions to the trial court to overrule the demurrer based on the statute of limitations. Citing prior California law, the court stated that a statute is presumed to be prospective only and will not be applied retroactively unless such intention clearly appears in the language of the statute itself. Moreover, a shortened period of limitations cannot be applied retroactively to wipe out an accrued cause of action that is not barred by the then applicable statute of limitations. To avoid the unconstitutional effect of retroactive application, a statute of limitations must be applied prospectively to such causes of action. The court concluded that since *Code Civ. Proc. § 340.6* contains no expression of legislative intent on retroactivity, the presumption is that the Legislature intended the limitations period to operate prospectively. Consequently, since plaintiff filed her action less than three years after the effective date of the statute, she was not barred by the four-year occurrence rule of the statute (*138 Cal. App. 3d 562, 566-567)* .

[e] Erroneous Characterization of Statute as "Declaratory of Existing Law" Not Sufficient Evidence of Retroactive Intent

McClung v. Employment Dev. Dep't *(2004) 34 Cal. 4th 467, 20 Cal. Rptr. 3d 428, 99 P.3d 1015* , involved the interpretation of an amendment of *Gov. Code § 12940(j)*, the Fair Employment and Housing Act provision that prohibits an employer's harassment of an employee. In 1999 the Supreme Court interpreted the provision as not imposing personal liability on a nonsupervisory employee who harasses another employee (*see Carrisales v. Department of Corrections (1999) 21 Cal. 4th 1132, 1140, 90 Cal. Rptr. 2d 804, 988 P.2d 1083*). The next year, the Legislature amended the statute by adding *Gov. Code § 12940(j)(3)* to impose personal liability on any employee who harasses a fellow employee. Section 12940(j) also contained a provision stating that "[t]he provisions of this subdivision are declaratory of existing law" (*Gov. Code § 12940(j)(2)*).

The question presented in this case was whether Section 12940(j)(3) was applicable to make a nonsupervisor liable for

harassment occurring before the January 1, 2001, effective date of Section 12940(j)(3). The Supreme Court held that Section 12940(j)(3) was not applicable to conduct occurring prior its effective date (*34 Cal. 4th 467, 476, 20 Cal. Rptr. 3d 428, 436)* .

The Court emphasized that the Legislature had no power to state that the amendment of *Gov. Code § 12940(j)* was "declaratory of existing law," because the amendment unquestionably *changed* the law by overruling a definitive and final judicial interpretation of the statute. The Court explained that the interpretation of a statute is an exercise of the judicial power the California Constitution assigns to the courts. The Legislature has no authority to interpret a statute, because that is a judicial task. If the courts have not yet finally and conclusively interpreted a statute and are in the process of doing so, a declaration of a later Legislature as to whatan earlier Legislature intended is entitled to consideration. But even then, a legislative declaration of an existing statute's meaning is but a factor for a court to consider and is neither binding nor conclusive in construing the statute. Moreover, once the California Supreme Court has finally and definitively interpreted a statute, the Legislature has the power (subject to constitutional restraints) to overrule the decision by amending the statute, but it has no power to decide that the amendment merely declares existing law (*34 Cal. 4th 467, 472-476, 20 Cal. Rptr. 3d 428*).

The Supreme Court went on to hold that the change in the law represented by Section 12940(j)(3) did not operate retroactively. Generally, a statute that interferes with antecedent rights will not operate retroactively in the absence of a clear expression of legislative intent to apply the statute retroactively. In this case, the Court found nothing to overcome the strong presumption against retroactivity. In particular, the Court rejected a contention that an intent to apply Section 12940(j)(3) retroactively was shown by the statement that the subdivision's provisions merely declared existing law. The Court explained that when a statute is amended in response to a judicial interpretation of the statute, an erroneous statement by the Legislature that the amendment merely declares existing law is not sufficient to overcome the strong presumption against retroactively applying the amendment (*34 Cal. 4th 467, 476, 20 Cal. Rptr. 3d 428*). The Court also noted that any inference of legislative intent to have Section 12940(j)(3) apply retroactively was weakened by the fact that Section 12940(j)(2), which contains the "declaratory of existing law" language, predated the enactment of Section 12940(j)(3) (*34 Cal. 4th 467, 476, 20 Cal. Rptr. 3d 428*).

[4] Additional Authorities

[a] No Retroactive Operation Absent Clear Intent

In *Evangelatos v. Superior Court (1988) 44 Cal. 3d 1188, 246 Cal. Rptr. 629, 753 P.2d 585* , plaintiff high school student brought a tort action against several defendants after he sustained personal injuries while using certain chemicals. After the action was filed, but before the time of trial, Proposition 51, which modified the joint and several liability doctrine, and limited an individual tortfeasor's liability for noneconomic damages to a proportion of those damages equal to the tortfeasor's own percentage of fault, was passed by the voters. The parties sought a determination of whether or not Proposition 51 was applicable to their action. Both the trial court and court of appeal found it applicable.

The Supreme Court did not, and reversed. The Court explained that the first rule of construction is that legislation must be considered as addressed to the future, not to the past. A retrospective operation will not be given to a statute that interferes with antecedent rights unless that is the unequivocal and inflexible import of the terms, and the manifest intention of the legislature (*44 Cal. 3d 1188, 1207)* . The Court observed that nothing in the language of Proposition 51 expressly indicated that the statute was to apply retroactively, rather, the subject of retroactivity or prospectivity was not addressed. It said that under *Civ. Code § 3* and the general principle of prospectivity, the absence of any express provision directing retroactive application strongly supported prospective operation of the measure (*44 Cal. 3d 1188, 1209)* . The presumption of prospectivity assures that reasonable reliance on current legal principles would not be defeated in the absence of a clear indication of a legislative intent to override such reliance (*44 Cal. 3d 1188, 1214)* . In the absence of an express declaration of retroactivity, the Court concluded that the proposition must be interpreted as

prospective (*44 Cal. 3d 1188, 1227)* .

In *Cole v. Fair Oaks Fire Protection Dist. (1987) 43 Cal. 3d 148, 233 Cal. Rptr. 308, 729 P.2d 743* , the Supreme Court affirmed a trial court decision holding that 1982 amendments to the Labor Code were inapplicable to an action by a firefighter against his employer for damages for intentional infliction of emotional distress resulting in a disabling stroke that occurred prior to the effective date of the amendments. The Court noted that even in the case of a procedural statute, in the absence of a showing that the Legislature clearly intended the amendments to be applied retroactively, they will be applied prospectively only. While there would be no constitutional bar to retroactivity of the statutes if the Legislature so desired, there was no legislative history to support retroactive application (*43 Cal. 3d 148, 153)* .

In re Marriage of Reuling (1994) 23 Cal. App. 4th 1428, 28 Cal. Rptr. 2d 726 , was a marital dissolution proceeding in which the court of appeal upheld a trial court's valuation of community property stock and stock options as of the time of trial. It rejected a former wife's contention that amendments to former Civ. Code § 5125(e) [*now see Fam. Code § 1100(e)*], which imposes a higher fiduciary standard on management and control of community property, should have been applied retroactively to the proceeding.

The court of appeal reasoned that a statute is retroactive if it affects rights, obligations, acts, transactions, and conditions performed or existing prior to adoption of the statute and substantially changes the legal effect of those past events. There is a strong presumption that statutes are to operate prospectively, absent a clear indication to the contrary. This long-established presumption applies particularly to laws creating new obligations, imposing new duties, or exacting new penalties because of past transactions. The rationale behind the presumption is that retroactive laws are characterized by want of notice and lack of knowledge of past conditions, and they disturb feelings of security in past transactions. Also, the purpose of a legislative alterations would not often attain significant advancement by application of the amended legislation to transactions that preceded the legislative change (*23 Cal. App. 4th 1428, 1439)* .

In *Russell v. Superior Court (1986) 185 Cal. App. 3d 810, 230 Cal. Rptr. 102* , the court of appeal reversed a decision of the trial court that the Fair Responsibility Act of 1986 could be applied retroactively. Plaintiff's personal injury action against several defendants was awaiting trial on June 3, 1986, when the California voters passed the act (Proposition 51). The act eliminates joint and several liability for noneconomic damages, substituting a law of several liability only. Plaintiff and defendants filed motions in limine in the trial court on whether the act would be applied retroactively to plaintiff's action and the trial court ruled that it would be so applied. Plaintiff petitioned the Supreme Court for a writ of mandate and the Supreme Court transferred the matter to the court of appeal. The court of appeal reversed the trial court, holding that Proposition 51 applies only to causes of action arising after the effective date. The court relied on the presumption against retroactivity that applies when there is no clear legislative intent that the law apply retroactively, and on the fact that *Civ. Code § 3* provides that no part of the Civil Code is to be retroactively applied in the absence of an express declaration. In addition, the language of the statute supported a finding of prospective application, and the stated goal of the statute, to lower insurance premiums, would not be furthered by a retroactive application (*185 Cal. App. 3d 810, 818-821)* .

[b] Statute Modifying Civil Liability Not to Be Construed Retroactively

In *Perry v. Heavenly Valley (1985) 163 Cal. App. 3d 495, 209 Cal. Rptr. 771* , an action for injuries sustained by a former ski resort employee allegedly caused by the negligent attachment of ski bindings by another employee, the court of appeal reversed summary judgment for defendant. The court held that *Lab. Code § 3602*, as amended to abolish the dual capacity doctrine, was subject to the presumption against retroactivity. If the presumption was applied, it would bar a right of action that plaintiff previously had (*163 Cal. App. 3d 495, 503-504)* . Additionally, the statute is not expressly retroactive (*163 Cal. App. 3d 495, 500-501)* , and the Legislature was not clarifying existing law (*163 Cal. App. 3d 495, 502-503)* .

California Points & Authorities

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 217 STATUTORY INTERPRETATION
PART II. FORMS
F. RETROACTIVITY

21-217 California Points & Authorities § 217.134

§ 217.134 Supporting Contention That Application of Statute Does Not Constitute Retroactive Effect

[1] FORM

[*The following may be included in a memorandum supporting or opposing a motion, or in a trial or appellate brief. It should be combined with the general memorandum set out in § 217.20.*]

_____ [*Specify statute or* THE _____ (*year*) AMENDMENT TO _____ (*specify statute*)] SHOULD BE APPLIED TO THE PRESENT CASE, BECAUSE ITS APPLICATION WOULD NOT AMOUNT TO A RETROACTIVE APPLICATION OF THE STATUTE.

A. Statute Does Not Have Retroactive Effect Unless It Substantially Changes Legal Consequences of Past Events. A statute affecting the consequences of past events is not considered to have retroactive effect if it does not impair legal rights that arose when the events occurred (*Californians for Disability Rights v. Mervyn's, LLC (2006) 39 Cal. 4th 223, 230-233, 46 Cal. Rptr. 3d 57, 138 P.3d 207* ; *Myers v. Philip Morris Cos. (2002) 28 Cal. 4th 828, 847, 123 Cal. Rptr. 2d 40, 50 P.3d 751*).

B. Application of Statute Is Not Retroactive If It Is Triggered by Event Occurring After Statute's Effective Date. The critical question for determining retroactivity of a statute usually is whether the last act or event necessary to trigger application of the statute occurred before or after statute's effective date. If in a given case that last act or event occurs after the effective date of the statute, then applying the statute in that case does not constitute a retroactive application (*In re E.J. (2010) 47 Cal. 4th 1258, 1273-1274, 104 Cal. Rptr. 3d 165, 223 P.3d 31*).

[2] Comments

[a] Use of Form

This memorandum may be used to support a contention that applying a given statute to the present case would not constitute a retroactive application of the statute. This form may be combined with the general memorandum *set forth in § 217.20*, which relates to the construction of statutes to ascertain and effectuate the legislative intent.

This form may be combined with a memorandum relating to the procedural context in which the issue of statutory interpretation arises. It may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should explain how the application of the statute would not impair any legal rights that existed before the enactment of the statute.

[b] Opposing Memorandum

In an appropriate case, the memorandum *set out in § 217.133* may be used to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] Statute Does Not Have Retroactive Effect Unless It Substantially Changes Legal Consequences of Past Events

In ***Californians for Disability Rights v. Mervyn's, LLC*** *(2006) 39 Cal. 4th 223, 46 Cal. Rptr. 3d 57, 138 P.3d 207* , the California Supreme Court approved the application of Proposition 64 to cases pending on the measure's effective date, because that did not constitute an impermissible "retroactive" application. Proposition 64, which took effect with its passage on November 2, 2004, added a standing requirement to California's unfair competition and false advertisinglaws (*Bus. & Prof. Code §§ 17200 et seq., 17500 et seq.*). Specifically, a private plaintiff can no longer bring a class or representative action under those laws unless he or she suffered injury in fact and lost money or property as a result of the alleged unfair competition or false advertising (*Bus. & Prof. Code §§ 17203, 17204, 17535*, as amended by Proposition 64). The Supreme Court held that applying Proposition 64's standing provisions to cases pending on the measure's effective date did not constitute a "retroactive" application, because the measure did not change the legal consequences of past conduct by imposing any new or different liabilities based on such conduct. The measure left entirely unchanged the substantive rules governing business and competitive conduct. Nothing that was lawful before Proposition 64 became unlawful, and nothing that was unlawful before the proposition was made lawful. Moreover, the measure did not eliminate any right to recover. Although applying Proposition 64's standing rules to pending cases could be seen as impairing the settled rights and expectations of uninjured plaintiffs to continue prosecution of their actions, that consequence was relatively insignificant and did not make such application of the measure "retroactive" (*39 Cal. 4th 223, 230-233)* .

In ***Myers v. Philip Morris Cos.*** *(2002) 28 Cal. 4th 828, 123 Cal. Rptr. 2d 40, 50 P.3d 751* , the plaintiff, who smoked from 1956 to 1997 and lived in smoke-filled environments until August 1998, was diagnosed with lung cancer in April 1998. In 1999, she filed a products-liability suit in federal court against several tobacco companies. Answering a question certified to it by the Ninth Circuit, the California Supreme Court considered the applicability of *Civ. Code § 1714.45*, which formerly granted tobacco companies complete immunity in certain product liability suits as of January 1, 1988, but was amended to remove that immunity as of January 1, 1998. Noting the absence of a clear indication of legislative intent to have the repealing statute act retroactively, the Court held that the repeal of the immunity statute did not remove any immunity for conduct occurring while the immunity statute was in effect (*28 Cal. 4th 828, 840-847, 123 Cal. Rptr. 2d 40, 50 P.3d 751*). However, the Court also held that the repealing statute did remove protection that had been available under the immunity statute for conduct occurring before the immunity statute's effective date. In effect, the repealing statute restored the law to what it had been prior to the effective date of the (later-repealed) immunity statute. Thus, the removal of protection for conduct predating the immunity statute was not an impermissible retroactive effect of the repealing statute, because a retroactive effect is one that impairs rights a party possessed when he or she acted (*28 Cal. 4th 828, 847)* .

[b] Application of Statute Is Not Retroactive If It Is Triggered by Event Occurring After Statute's Effective

Date

In ***In re E.J.*** *(2010) 47 Cal. 4th 1258, 104 Cal. Rptr. 3d 165, 223 P.3d 31* , the California Supreme Court held that *Penal Code § 3003.5(b)*, which places restrictions on where paroled sex offenders subject to lifetime registration may reside, applies to persons who were convicted of registrable offenses before the effective date of the statute but were paroled--and sought housing--after that date. The Court noted that often, the critical question for determining retroactivity is whether the last act or event necessary to trigger application of the statute occurred before or after the statute's effective date. The Court explained that under Section 3003.5(b), the pivotal "last act or event" that must occur before the mandatory residency restrictions come into play is the registered sex offender's securing of a residence upon his or her release from custody on parole. If that last act or event occurs after the effective date of *Penal Code § 3003.5(b)*, then a conclusion that it was a violation of the registrant's parole does not constitute a retroactive application of the statute (*47 Cal. 4th 1258, 1273-1274)* .

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CHAPTER 218 SUBPOENA

21-218 California Points & Authorities 218.syn

§ 218.syn Synopsis to Chapter 218: SUBPOENA

§ 218.01 Scope of Chapter

§ 218.02 Governing Law

§ 218.03 Related Pleading and Practice Chapters

§ 218.04 Related Points and Authorities Chapters

§§ 218.05-218.19 [Reserved]

§ 218.20 Supporting Motion for Order Quashing or Modifying Subpoena or Subpoena Duces Tecum [Code Civ. Proc. § 1987.1]--Authority for Motion

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

[d] Opposing Memoranda

§ 218.21 Supporting Motion for Order Quashing or Modifying Subpoena Duces Tecum [Code Civ. Proc. § 1987.1]--Motion to Prevent Release of Personal Records [Code Civ. Proc. § 1985.3(g)] or Employment Records [Code Civ. Proc. § 1985.6(f)], or Personally Identifying Information Sought In Connection With Action Involving Person's Free Speech Rights [Code Civ. Proc. § 1987.1(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Patient May Move to Quash or Modify Subpoena of Medical Records

§ 218.22 Supporting Motion for Order Quashing or Modifying Subpoena or Subpoena Duces Tecum [Code Civ. Proc. § 1987.1]--Service of Subpoena Is Untimely

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points and Authorities

§ 218.23 Supporting Motion for Order Quashing or Modifying Subpoena or Subpoena Duces Tecum [Code Civ. Proc. § 1987.1]--Person Not Subject to Service of Subpoena

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Immunity of California Legislator

§ 218.24 Supporting Motion for Order Quashing or Modifying Subpoena or Subpoena Duces Tecum [Code Civ.

Proc. § 1987.1]--Improper Service on Public Employee

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Service on Superior of Resident Peace Officers and Other Public Employees

[b] Service on Office of Nonresident Member of California Highway Patrol

§ 218.25 Supporting Motion for Order Quashing or Modifying Subpoena Duces Tecum [Code Civ. Proc. § 1987.1]--Insufficiency of Affidavit [Code Civ. Proc. §§ 1985(b), 1987.5]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

[3] Discussion of Authorities

[a] Affidavit Accompanying Subpoena Duces Tecum Must Show Good Cause

[b] Affidavit Accompanying Subpoena Duces Tecum Must Show Materiality of Requested Matter

[c] Request for All Documents Improper

[d] Omnibus Description Improper

§ 218.26 Supporting Motion for Order Quashing or Modifying Subpoena Duces Tecum [Code Civ. Proc. § 1987.1]--Unauthorized Disclosure of Consumer's Personal Records [Code Civ. Proc. § 1985.3] or Employee's Employment Records [Code Civ. Proc. § 1985.6]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Production of Private Records of Public Employees Improper Without Service on Employee

[4] Additional Authorities

[a] Production of Medical Records Improper Without Service on Patient

§ 218.26A Supporting Motion for Order Quashing or Modifying Subpoena [Code Civ. Proc. § 1987.1]--Motion to Prevent Release of Electronically Stored Information [Code Civ. Proc. § 1985.8(d)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Memoranda

§ 218.26B Supporting Motion for Order Quashing or Modifying Subpoena [Code Civ. Proc. § 1987.1]--Electronically Stored Information Is Not From Source That Is Reasonably Accessible [Code Civ. Proc. § 1985.8(d)]--No Good Cause Exists for Production of Electronically Stored Information From Source That Is Not Reasonably Accessible [Code Civ. Proc. § 1985.8(e)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

[d] Opposing Memoranda

§ 218.27 Supporting Motion for Order Directing Compliance With Subpoena or Subpoena Duces Tecum [Code Civ. Proc. § 1987.1]--Authority for Motion

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

[d] Opposing Memoranda

§ 218.28 Supporting Motion for Order Directing Compliance With Subpoena or Subpoena Duces Tecum [Code Civ. Proc. § 1987.1]--Person Is Not a Nonresident Witness [Code Civ. Proc. § 1989]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

[d] Opposing Memoranda

[3] Discussion of Authorities

[a] Nondomiciliary May Be Obliged to Attend as Witness

[b] Service on Resident Partner in Lieu of Nonresident Custodian of Records Is Proper

§ 218.29 Supporting Motion for Order Directing Compliance With Subpoena or Subpoena Duces Tecum [Code Civ. Proc. § 1987.1]--Shortening or Waiving of Service Requirements on Consumer or Employee

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

[3] Discussion of Authorities

[a] Patient Waives Doctor-Patient Privilege by Inaction

[4] Additional Authorities

[a] Patient Waives Doctor-Patient Privilege by Inaction

§ 218.30 Supporting Motion for Order Directing Compliance With Subpoena or Subpoena Duces Tecum [Code Civ. Proc. § 1987.1]--Subpoenaing Party Has Properly Notified Consumer of Need for Production of Personal Records [Code Civ. Proc. § 1985.3] or Employee of Need for Production of Employment Records [Code Civ. Proc. § 1985.6]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

§ 218.30A Supporting Motion for Order Directing Compliance With Subpoena or Subpoena Duces Tecum [Code Civ. Proc. § 1987.1]--Requiring Production of Electronically Stored Information for Inspection, Copying, Testing, or Sampling in Forms Specified [Code Civ. Proc. § 1985.8(a)(1), (b)].

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

§ 218.30B Supporting Motion for Order Directing Compliance with Subpoena or Subpoena Duces Tecum [Code Civ. Proc. § 1987.1] for Production of Electronically Stored Information [Code Civ. Proc. § 1985.8(a)(1), (e)]--Information Is From Source That Is Reasonably Accessible [Code Civ. Proc. § 1985.8(a)(1), (e)] or Good Cause Exists for Production of Information From Source That Is Not Reasonably Accessible [Code Civ. Proc. § 1985.8(a)(1), (f)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Court May Limit Production Even If It Finds Good Cause for Discovery or That Electronically Stored Information Is Readily Accessible

[c] Related Pleading and Practice Forms

[d] Related Memoranda

[e] Opposing Memoranda

§ 218.31 Supporting Motion for Discretionary Award of Costs [Code Civ. Proc. § 1987.2(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

§ 218.32 Supporting Motion for Mandatory Award of Costs--Person Whose Personally Identifying Information Is Sought In Connection With Action Involving That Person's Free Speech Rights [Code Civ. Proc. § 1987.2(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

§§ 218.33-218.39 [Reserved]

§ 218.40 Opposing Motion for Order Quashing or Modifying Deposition Subpoena Notice [Code Civ. Proc. §§ 2020.010 et seq., 2020.210 et seq.]--Affidavit Showing Good Cause Is Not Required to Be Served With Deposition Subpoena [Code Civ. Proc. §§ 2020.410(c), 2020.510(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Memoranda

[3] Discussion of Authorities

[a] Affidavit Showing Good Cause Is Not Required

[b] General Subpoena Provisions Are Preempted by Civil Discovery Act With Respect to Deposition Subpoenas

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CHAPTER 218 SUBPOENA
PART I. INTRODUCTION

21-218 California Points & Authorities § 218.01

§ 218.01 Scope of Chapter

This chapter contains memoranda relating to subpoenas for use before a court at trial. The forms include memoranda for use in supporting a motion to quash or modify a subpoena or subpoena duces tecum (*see §§ 218.20*-218.26B) and for use in support of a motion to compel compliance with a subpoena or subpoena duces tecum, which also may be used in opposition to a motion to quash or modify (*see §§ 218.27*-218.30B). Section 218.31 contains a memorandum in support of an award of costs in supporting or opposing a motion to quash, modify or comply with a subpoena or subpoena duces tecum. Generally, this chapter does not contain memoranda relating to deposition subpoenas, which are set out in Ch. 83, *Discovery: Depositions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeGeneral OverviewCivil ProceduresPleading & PracticeMotion PracticeSupporting MemorandaCivil ProceduresPretrial MattersSubpoenas

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21-218 California Points & Authorities § 218.02

§ 218.02 Governing Law

Subpoenas are the "process" used by courts to compel the production of evidence, including the attendance of a witness and books, documents or other things in the witness's control [*Code Civ. Proc. § 1985(a)*]. This process is governed by *Code of Civil Procedure § 1985 et seq.* Subpoenas for electronically stored information and access to that information by the party serving the subpoena are governed specifically by *Code Civ. Proc. § 1985.8*. Special rules apply to public employees [*Gov. Code §§ 68097.1, 68097.3*].

Legal Topics:

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

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21-218 California Points & Authorities § 218.03

§ 218.03 Related Pleading and Practice Chapters

For discussion and forms relating to subpoenas generally, see Ch. 535, *Subpoena* in California Forms of Pleading and Practice (Matthew Bender).

For discussion and forms relating to deposition subpoenas, see Ch. 193, *Discovery: Depositions* , in California Forms of Pleading and Practice (Matthew Bender).

For discussion and forms relating to electronically stored evidence, see California Forms of Pleading and Practice, Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)* (Matthew Bender); see also Matthew Bender(R) Practice Guide: California E-Discovery and Evidence.

Legal Topics:

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

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CHAPTER 218 SUBPOENA
PART I. INTRODUCTION

21-218 California Points & Authorities § 218.04

§ 218.04 Related Points and Authorities Chapters

For points and authorities relating to deposition subpoenas, see Ch. 83, *Discovery: Depositions* , in this publication.

Legal Topics:

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

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21-218 California Points & Authorities §§ 218.05-218.19

[Reserved]

§§ 218.05[Reserved]

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21-218 California Points & Authorities § 218.20

§ 218.20 Supporting Motion for Order Quashing or Modifying Subpoena or Subpoena Duces Tecum [Code Civ. Proc. § 1987.1]--Authority for Motion

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF MOTION FOR
Plaintiff,	)	ORDER _____ [QUASHING *or*
vs.	)	MODIFYING] SUBPOENA (DUCES TECUM)
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD GRANT _____ [*name of moving party*] AN ORDER UNDER SECTION 1987.1 OF THE CODE OF CIVIL PROCEDURE TO _____ [QUASH THE SUBPOENA (DUCES TECUM) ENTIRELY *or* MODIFY THE SUBPOENA (DUCES TECUM) BY _____ (*specify terms, conditions or limitations sought*)] BECAUSE _____ [*specify grounds, see §§ 218.22 -218.26*].

[*EITHER*]

A. Motion to Quash. If a subpoena requires the attendance of a witness or the production of books, documents, or

other things before a court, or at trial, the court, on motion reasonably made by the party, the witness, a consumer described in *Code of Civil Procedure Section 1985.3*, an employee described in *Code of Civil Procedure Section 1985.6*, or a person whose personally identifying information, as defined in *Civil Code Section 1798.79*.8, is sought in connection with action involving that person's free speech rights, may make an order quashing the subpoena entirely (*Code Civ. Proc. § 1987.1(a)*).

[*OR*]

A. Motion to Modify. If a subpoena requires the attendance of a witness or the production of books, documents, or other things before a court, or at trial, the court, on motion reasonably made by the party, the witness, a consumer described in *Code of Civil Procedure Section 1985.3*, an employee described in *Code of Civil Procedure Section 1985.6*, or a person whose personally identifying information, as defined in *Civil Code Section 1798.79*.8, may make an order modifying the subpoena (*Code Civ. Proc. § 1987.1(a)*).

[*Add appropriate contentions from §§ 218.22-218.26 to support the motion to quash or modify the subpoena or subpoena duces tecum. Add memorandum from § 218.31 to support an award of costs.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum is for use by a party, the witness, a consumer described in *Code Civ. Proc. § 1985.3*, an employee described in *Code Civ. Proc. § 1985.6*, or a person whose personally identifying information, as defined in *Civ. Code § 1798.79.8*, is sought in connection with an underlying action involving that person's exercise of free speech rights, to support a motion for an order quashing or modifying a subpoena or subpoena duces tecum pursuant to *Code Civ. Proc. § 1987.1* before a court or at trial. The *form in § 218.21* should be used by any person eligible for the protections of *Code Civ. Proc. § 1987.1* to prevent his or her personal records from being disclosed by a party or witness.

This form should be combined with the appropriate memoranda specifying different grounds for making the motion *set out in §§ 218.22 -218.26*. If requesting costs, include one of the memoranda in §§ 218.31 or 218.32. Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

A "consumer" as described in *Code Civ. Proc. § 1985.3* means any individual, partnership of five or fewer persons, association, or trust which has transacted business with, or has used the services of, the witness, or for whom the witness has acted as agent or fiduciary [*Code. Civ. Proc. § 1985.3(a)(2)*]. An "employee" as described in *Code Civ. Proc. § 1985.6* means any individual who is or has been employed by a witness subject to a subpoena duces tecum, or any individual who is or has been represented by a labor organization that is a witness subject to a subpoena duces tecum [*Code. Civ. Proc. § 1985.6(a)(2)*].

The "personally identifying information" referred to in *Code Civ. Proc. § 1987.1(a)* includes [*Civ. Code § 1798.79*.8]:

- First and last name or last name only.

- Home or other physical address, including, but not limited to, a street name or ZIP Code, other than an address obtained pursuant to the California Safe At Home program or a business mailing address for the victim service provider.

- Electronic mail address or other online contact information, such as an instant messaging user identifier or a screen name that reveals an individual's electronic mail address.

- Telephone number, other than a business telephone number for the victim service provider.

- Social security number.

- Date of birth, with the exception of the year of birth.

- Internet protocol address or host name that identifies an individual.

- Any other information, including, but not limited to, the first and last names of children and relatives, racial or ethnic background, or religious affiliation, that, in combination with any other nonpersonally identifying information, would serve to identify any individual.

[b] Related Pleading and Practice Forms

For forms and discussion related to obtaining an order quashing or modifying a subpoena pursuant to Code Civ. Proc. § 1987.1, see California Forms of Pleading and Practice, Ch. 535, *Subpoena* (Matthew Bender).

[c] Related Memoranda

For memoranda relating to deposition subpoenas, see Ch. 83, *Discovery: Depositions* , in this publication.

[d] Opposing Memoranda

§ 218.27 may be used to oppose this motion and to direct compliance with a subpoena.

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21-218 California Points & Authorities § 218.21

§ 218.21 Supporting Motion for Order Quashing or Modifying Subpoena Duces Tecum [Code Civ. Proc. § 1987.1]--Motion to Prevent Release of Personal Records [Code Civ. Proc. § 1985.3(g)] or Employment Records [Code Civ. Proc. § 1985.6(f)], or Personally Identifying Information Sought In Connection With Action Involving Person's Free Speech Rights [Code Civ. Proc. § 1987.1(a)]

[1] FORM

[*Caption. See § 218.20[1].*]

THE COURT SHOULD GRANT _____ [*name of moving party*] AN ORDER UNDER CODE OF CIVIL PROCEDURE SECTION 1987.1(a) TO _____ [QUASH THE SUBPOENA DUCES TECUM ENTIRELY *or* MODIFY THE SUBPOENA DUCES TECUM BY _____ (*specify terms, conditions or limitations sought*)] PRIOR TO THE DATE OF PRODUCTION OF _____ [*specify type of records, e.g.,* PERSONAL RECORDS *or* EMPLOYMENT RECORDS] *or* PERSONALLY IDENTIFYING INFORMATION SOUGHT IN CONNECTION WITH AN ACTION INVOLVING _____ (*name of moving party*)'S FREE SPEECH RIGHTS] BECAUSE _____ [*name of person subpoenaed*] IS NOT AUTHORIZED TO RELEASE THE RECORDS OF _____ [*name of moving party*] UNDER _____ [*specify statute, e.g.,* CODE OF CIVIL PROCEDURE SECTION 1985.3 *or* CODE OF CIVIL PROCEDURE SECTION 1985.6] *or* CODE OF CIVIL PROCEDURE SECTION 1987.1(a)] BECAUSE _____ [*specify grounds; see §§ 218.22, 218.25, and 218.26*].

[*EITHER*]

A. Consumer May Move to Quash or Modify Subpoena of Personal Records. A consumer whose personal records are subpoenaed may, before the date for production, bring a motion under *Code of Civil Procedure Section 1987.1(a)* to quash or modify the subpoena duces tecum (*Code Civ. Proc. § 1985.3(g)*).

[*OR*]

A. Employee May Move to Quash or Modify Subpoena of Employment Records. An employee whose employment records are subpoenaed may, before the date for production, bring a motion under *Code of Civil Procedure Section 1987.1(a)* to quash or modify the subpoena duces tecum (*Code Civ. Proc. § 1985.6(f)(1)*).

[*OR*]

A. Person Whose Personally Identifying Information Is Sought In Connection With Action Involving Free Speech Rights May Move to Quash or Modify Subpoena. A person whose personally identifying information, as defined in *Civil Code Section 1798.79*.8, is sought in connection with action involving that person's free speech rights may bring a motion under *Code of Civil Procedure Section 1987.1(a)* to quash or modify the subpoena (*Code Civ. Proc. § 1987.1(a)*).

[*CONTINUE*]

[*Optional*] **B. Consumer Must Consent to Release of Telephone Records.** A consumer whose telephone records are subpoenaedmust consent to the release of the records pursuant to *Public Utilities Code Section 2891* before a telephone company that is a public utility as defined in *Public Utilities Code Section 216* can be compelled to produce the records (*Code Civ. Proc. § 1985.3(f)*).

[*Optional*] **C. Patient May Move to Quash or Modify Subpoena of Medical Records.** A patient whose medical records are subpoenaed may, before the date for production, bring a motion to quash or modify the subpoena duces tecum (*Inabnit v. Berkson (1988) 199 Cal. App. 3d 1230, 1235, 245 Cal. Rptr. 525*).

[*Optional*] **D. Public Employee May Move to Quash or Modify Subpoena of Public Records Containing Personal Information.** When public records containing personal information as defined in *Civil Code Section 1798.3*, which is otherwise exempt from public disclosure under the Public Records Act (*Gov. Code § 6250 et seq.*), are subpoenaed, the public employee to whom the information relates may, before the date for production, bring a motion to quash or modify the subpoena duces tecum (*Code Civ. Proc. § 1985.4*).

[*Add appropriate contentions from §§ 218.22, 218.25, and 218.26 to support the motion to quash or modify the subpoena or subpoena duces tecum. Add the form § 218.31 or 218.32, as appropriate, to support an award of costs.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum is for use in support of a motion for an order quashing or modifying a subpoena duces tecum of records pursuant to *Code Civ. Proc. § 1987.1(a)* by the person whose records are being subpoenaed, including a consumer described in *Code Civ. Proc. § 1985.3*, an employee described in *Code Civ. Proc. § 1985.6*, a public employee described in *Code Civ. Proc. § 1985.4*, or a person whose personally identifying information, as defined in *Civ. Code § 1798.79*.8, is sought in connection with action involving that person's free speech rights, as described in

Code Civ. Proc. § 1987.1. This form should be combined with other appropriate memoranda specifying different grounds for making the motion [*see §§ 218.22*, *218.25*, and 214.26]. Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms and discussion related to the obtaining of an order quashing or modifying a subpoena pursuant to Code Civ. Proc. § 1987.1, see California Forms of Pleading and Practice Ch. 535, *Subpoena* (Matthew Bender).

[c] Related Points and Authorities

For forms relating to deposition subpoenas, see Ch. 83, *Discovery: Depositions* , in this publication.

[d] Opposing Points and Authorities

In an appropriate case, some contentions *set out in § 218.30* may be used to oppose the motion supported by this memorandum.

[3] Discussion of Authorities

[a] Patient May Move to Quash or Modify Subpoena of Medical Records

Inabnit v. Berkson *(1988) 199 Cal. App. 3d 1230, 245 Cal. Rptr. 525* , is discussed in *§ 218.29[3][a]*. The court of appeal held that a patient had waived the doctor-patient privilege by failing to object to the subpoena after receiving notice under *Code Civ. Proc. § 1985.3* that her records were being sought by a witness (*199 Cal. App. 3d 1230, 1239)* .

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21-218 California Points & Authorities § 218.22

§ 218.22 Supporting Motion for Order Quashing or Modifying Subpoena or Subpoena Duces Tecum [Code Civ. Proc. § 1987.1]--Service of Subpoena Is Untimely

[1] FORM

[*The following should be combined with a general memorandum in support of a motion to quash or modify a subpoena (see §§ 218.20, 218.21).*]

SERVICE OF THE SUBPOENA WAS NOT TIMELY, IN THAT _____ [*specify circumstances, e.g.,* THE WITNESS DOES NOT HAVE REASONABLE TIME TO PREPARE RECORDS AND/OR TRAVEL].

[*EITHER*]

A. Reasonable Time for Preparation or Travel. Service must be made in sufficient time to allow the witness a reasonable time for preparation and travel (*Code Civ. Proc. § 1987(a)* [*add, if witness is a consumer:*; *Code Civ. Proc. § 1985.3(d)*]).

[*AND/OR*]

B. Time for Service on Nonresident Member of California Highway Patrol. The subpoenaing party must serve a nonresident member of the California Highway Patrol at least five days before the date of the member's required attendance (*Gov. Code § 68097.3*).

[*OR*]

B. Service on Consumer When Personal Records Are Subpoenaed, or on Employee When Employment Records Are Subpoenaed. The subpoenaing party must serve notice to the consumer whose personal records are being sought,

or to the employee whose employment records are being sought, with copies of the subpoena duces tecum and supporting affidavit not less than 10 days before the date of production specified in the subpoena, plus the additional time provided for by *Code of Civil Procedure Section 1013* if service is by mail (*Code Civ. Proc. §§ 1985.3(b)(2)* (consumer), 1985.6 (employee)).

[*OR*]

B. Service on Consumer or Employee When Records Are Subpoenaed From Custodian of Records. The subpoenaing party must serve notice to the consumer whose personal records are being sought, or to the employee whose employment records are being sought, with copies of the subpoena duces tecum and supporting affidavit not less than 5 days before service on the custodian of the records, plus the additional time provided for by *Code of Civil Procedure Section 1013* if service is by mail (*Code Civ. Proc. § 1985.3(b)(3)* (consumer), 1985.6 (employee)).

[2] Comments

[a] Use of Form

This memorandum is for use in support of a motion for an order quashing or modifying a subpoena or subpoena duces tecum pursuant to *Code Civ. Proc. § 1987.1* on the grounds that the subpoenaing party failed to serve the subpoena in a timely manner. This form can combined with § 218.20 for use by a party or witness who has not been timely served. The form also can be combined with § 218.21 for use by a consumer or employee whose personal records or employment records, respectively, have been subpoenaed but who has not received timely service under *Code Civ. Proc. § 1985.3* (consumer) or *Code Civ. Proc. § 1985.6* (employee).

Although service generally is limited to California residents (*see Code Civ. Proc. § 1989*), service on nonresident members of the California Highway Patrol is permitted under *Gov. Code § 68097.3* [*see § 218.28* for discussion of residency for purposes of a subpoena], and the form can be used to challenge untimely service to a nonresident member. Other contentions supporting a motion to quash or modify a subpoena are contained in §§ 218.23-218.26.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms and discussion related to the obtaining of an order quashing or modifying a subpoena pursuant to Code Civ. Proc. § 1987.1, see California Forms of Pleading and Practice Ch. 535, *Subpoena* (Matthew Bender).

[c] Related Points and Authorities

For memoranda relating to deposition subpoenas, see Ch. 83, *Discovery: Depositions* , in this publication.

[d] Opposing Points and Authorities

In an appropriate case, some contentions *set out in § 218.29* may be used to oppose the motion supported by these points and authorities.

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21-218 California Points & Authorities § 218.23

§ 218.23 Supporting Motion for Order Quashing or Modifying Subpoena or Subpoena Duces Tecum [Code Civ. Proc. § 1987.1]--Person Not Subject to Service of Subpoena

[1] FORM

[*The following should be combined with a general memorandum in support of a motion to quash or modify a subpoena (see § 218.20).*]

_____ [*Name of person subpoenaed*] IS _____ [A NONRESIDENT NOT SUBJECT TO SERVICE OF THE SUBPOENA *or* A CALIFORNIA LEGISLATOR IMMUNE FROM PROCESS].

[*EITHER*]

Nonresident Is Not Obliged to Attend as Witness. A person is not obliged to attend as a witness before any court, judge, justice or other officer, unless the witness is a California resident at the the time of service (*Code Civ. Proc. § 1989*).

[*OR*]

Immunity of California Legislator. California legislators are immune from service of process during a session of the Legislature or for five days before and after a session (*Cal. Const., art. IV, § 14*; *see Harmer v. Superior Court (1969) 275 Cal. App. 2d 345, 348, 79 Cal. Rptr. 855*). Subpoenas are a "process" (*Code Civ. Proc. § 1985(a)*).

[2] Comments

[a] Use of Form

This memorandum is for use in support of a motion for an order quashing or modifying a subpoena or subpoena duces tecum pursuant to *Code Civ. Proc. § 1987.1(a)* on the grounds that the subpoena power of the court does not extend to

the person subpoenaed. This form should be used by a witness or party in combination with § 218.20, which sets forth the statutory authority for the motion.

In general, service is limited to California residents [*see Code Civ. Proc. § 1989*], but there are limited exceptions that permit service on nonresident members of the California Highway Patrol under *Gov. Code § 68097.3* [*see § 218.22*] and nonresident custodians of records under *Code Civ. Proc. § 1987.3* [*see § 218.28*].

Although not subject to a subpoena *as witnesses*, nonresidents are subject to service of a summons while in California [*Severn v. Adidas Sportschuhfabriken (1973) 33 Cal. App. 3d 754, 762-763, 109 Cal. Rptr. 328]* . On the other hand, persons who are immune from service of a summons are also not subject to the subpoena power of California courts. Subpoenas are a "process" [*Code Civ. Proc. § 1985(a)*]. Accordingly, persons immune from service of process could move to have service of the subpoena quashed. For further discussion, see Ch. 132, *Jurisdiction: Personal Jurisdiction and Inconvenient Forum* in this publication.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms and discussion related to the obtaining of an order quashing or modifying a subpoena pursuant to Code Civ. Proc. § 1987.1, California Forms of Pleading and Practice Ch. 535, *Subpoena* (Matthew Bender). For forms and discussion related to quashing service of a summons on this ground, see Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances* , in that publication.

[c] Related Memoranda

For forms and discussion related to a motion to quash service of a summons on grounds of immunity which may be adapted for use to quash service of the subpoena, see Ch. 132, *Jurisdiction: Personal Jurisdiction and Inconvenient Forum* in this publication. For forms relating to deposition subpoenas, see Ch. 83, *Discovery: Depositions* , in this publication.

[d] Opposing Memoranda

In an appropriate case, contentions *set out in § 218.28* may be used to oppose the motion supported by this memorandum.

[3] Discussion of Authorities

[a] Immunity of California Legislator

Harmer v. Superior Court *(1969) 275 Cal. App. 2d 345, 79 Cal. Rptr. 855* , was a proceeding for a writ of prohibition by three California state senators and a California state assemblyman, all members of the Advisory Commission on Indian Affairs, to restrain the superior court from proceeding against them in a civil class action, on behalf of American Indians residing in California. One of the legislators was served with a subpoena. The Legislature was in session at the time of service (and at the time that the appellate decision was rendered). The trial court denied a motion to quash service based on a California Legislator's state constitutional immunity from process.

The court of appeal reversed, and granted the writ. The exemption from civil process in the California Constitution for California Legislators (*Cal. Const., art. IV, § 14*), creates an exemption from civil process without qualification as to the kind or subject matter of the lawsuit, including one relating to a Legislator's personal affairs. Although immunity may convey some incidental personal advantage, the immunity is designed to protect legislators from distraction and

interference during the legislative session. The immunity is not restricted to a class of lawsuits that involve legislative functions (*275 Cal. App. 2d 345, 348)* .

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21-218 California Points & Authorities § 218.24

§ 218.24 Supporting Motion for Order Quashing or Modifying Subpoena or Subpoena Duces Tecum [Code Civ. Proc. § 1987.1]--Improper Service on Public Employee

[1] FORM

[*The following should be combined with a general memorandum in support of a motion to quash or modify a subpoena (see § 218.20).*]

_____ [*Name of person subpoenaed*] IS _____ [*specify status e.g.,* A PUBLIC EMPLOYEE WHO WAS NOT SERVED PERSONALLY *or* A PEACE OFFICER NOT SERVED IN ACCORDANCE WITH GOVERNMENT CODE SECTION 68097.1 *or* A NONRESIDENT MEMBER OF THE CALIFORNIA HIGHWAY PATROL NOT SERVED IN ACCORDANCE WITH GOVERNMENT CODE SECTION 68097.3].

[*EITHER*]

A. Personal Service Generally Required. Except as provided in *Government Code Sections 68097.1-68097.8*, the subpoena must be delivered to the witness personally (*Code Civ. Proc. § 1987(a)*).

[*AND/OR*]

B. Service on Superior of Resident Peace Officers and Other Public Employees. A resident public or state employee or employee of the trial courts listed in *Government Code § 68097.1*, in this case a _____ [*specify status, e.g.,* peace officer], is subject to a subpoena in connection with a matter occurring in the course of his or her duties when personally served or if two copies are served to the individual's immediate superior or an agent designated to receive service by that superior (*Gov. Code § 68097.1(a), (b)*).

[*OR*]

B. Service on Office of Nonresident Member of California Highway Patrol. A nonresident member of the California Highway Patrol is subject to a subpoena in connection with a matter occurring in the course of his or her duties when he or she is personally served or if service is made, during usual office hours to the person in charge of the office where the member filed his or her report, at least five days before the date of the member's required attendance (*Gov. Code § 68097.3*).

[2] Comments

[a] Use of Form

This memorandum is for use in support of a motion for an order quashing or modifying a subpoena or subpoena duces tecum pursuant to *Code Civ. Proc. § 1987.1* on the grounds that the subpoenaing party has not properly served a subpoena on a public employee. This form should be used by a witness or party in combination with § 218.20, which sets forth the statutory authority for the motion.

In general, personal service of a subpoena is required [*Code Civ. Proc. § 1987*]. Under certain circumstances, however, government employees can be required to attend if service is made as required by the statute. This form is for use when personal service has not been made, or when service has not been made as provided for public employees defined in *Gov. Code § 68097.1* as provided by that statute, or service has not been made for attendance of a nonresident Highway Patrol officer as provided by *Gov. Code § 68097.3*.

This form may be combined with other memoranda supporting a motion to quash or modify a subpoena contained in §§ 218.22, 218.23, 218.25 and 218.26. Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms and discussion related to the obtaining of an order quashing or modifying a subpoena pursuant to Code Civ. Proc. § 1987.1, see California Forms of Pleading and Practice Ch. 535, *Subpoena* (Matthew Bender).

[c] Related Points and Authorities

For memoranda relating to deposition subpoenas, see Ch. 83, *Discovery: Depositions* , in this publication.

[3] Discussion of Authorities

[a] Service on Superior of Resident Peace Officers and Other Public Employees

Under *Gov. Code § 68097.1*, enumerated public employees may be obliged to attend court as witnesses to duty-related events or transactions even if they have not been served personally provided that two copies of the subpoena have been served on an employee's immediate superior, or an agent designated to receive service by that superior. The following public employees are covered by this provision: (1) peace officers; (2) membersof the California Highway Patrol, State Police or State Fire Marshal's Office; (3) sheriffs; (4) deputy sheriffs; (5) marshals; (6) deputy marshals; (7) district attorneys; (8) inspectors; (9) probation officers; (10) building inspectors; (11) firefighters; (12) city police officers; (13) other state employees; and (14) employees of the trial courts [*Gov. Code § 68097.1*].

[b] Service on Office of Nonresident Member of California Highway Patrol

Under *Gov. Code § 68097.3*, a nonresident member of the California Highway Patrol may be obliged to attend court as

a witness if personally served or if service is made, during usual office hours, to the person in charge of the office where the member filed his or her report, at least five days before the date of the member's required attendance. This is an exception to the general rule that nonresidents are not subject to service of a subpoena [*see Code Civ. Proc. § 1989*].

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21-218 California Points & Authorities § 218.25

§ 218.25 Supporting Motion for Order Quashing or Modifying Subpoena Duces Tecum [Code Civ. Proc. § 1987.1]--Insufficiency of Affidavit [Code Civ. Proc. §§ 1985(b), 1987.5]

[1] FORM

[*The following should be combined with a general memorandum in support of a motion to quash or modify a subpoena (see §§ 218.20, 218.21).*]

THE AFFIDAVIT ON WHICH THE SUBPOENA IS BASED IS INSUFFICIENT BECAUSE IT _____ [*specify, e.g.,* IS TOO BROAD *or* IS TOO GENERAL].

[*EITHER*]

A. Affidavit Accompanying Subpoena Duces Tecum Must Show Good Cause. The affidavit that must be served with a subpoena duces tecum must show good cause for the production of the matters and things described in the subpoena (*Code Civ. Proc. § 1985(b)*; *Grannis v. Board of Medical Examiners (1971) 19 Cal. App. 3d 551, 564, 96 Cal. Rptr. 863*).

[*AND/OR*]

B. Affidavit Accompanying Subpoena Duces Tecum Must Show Materiality of Requested Matter. The affidavit that must be served with a subpoena duces tecum must set forth in full detail the materiality of the requested matter to the issues involved in the case (*Code Civ. Proc. § 1985(b)*; *Lee v. Superior Court (2009) 177 Cal. App. 4th 1108, 1126-1130, 99 Cal. Rptr. 3d 712* ; *People v. Schmitt (1957) 155 Cal. App. 2d 87, 105-106, 317 P.2d 673*).

[*AND/OR*]

C. Affidavit Accompanying Subpoena Duces Tecum Must Describe Items. The affidavit that must be served with a subpoena duces tecum must specify the exact matters or things desired to be produced (*Code Civ. Proc. § 1985(b)*; *see Code Civ. Proc. § 1987.5*).

[*Optional*] **D. Request for All Documents Improper.** A request for all correspondence, records, and documents is too broad (*Pacific Auto Ins. Co. v. Superior Court (1969) 273 Cal. App. 2d 61, 69-70, 77 Cal. Rptr. 836*).

[*Optional*] **E. Omnibus Description Improper.** An "omnibus" description that does not reasonably apprise the subpoenaed person what must be produced is inadequate (*Flora Crane Service, Inc. v. Superior Court (1965) 234 Cal. App. 2d 767, 786, 45 Cal. Rptr. 79*).

[2] Comments

[a] Use of Form

This memorandum is for use in support of a motion for an order quashing or modifying a subpoena duces tecum pursuant to *Code Civ. Proc. § 1987.1(a)* on the grounds that the subpoena was not served with a sufficient affidavit under *Code Civ. Proc. § 1985(b)*. This form can combined with the *form in § 218.20* for use by a party witness. The form also can be combined with the *form in § 218.21* for use by any of the persons specified in *Code Civ. Proc. § 1987.1(b)* who are challenging a subpoena requesting personal or employment records or, in certain circumstances, personally identifying information [*see Code Civ. Proc. § 1987.1(a), (b)*].

A subpoena is invalid if a copy of the affidavit is not served at the time of service of the subpoena [*Code Civ. Proc. § 1987.5*]. The affidavit must show good cause for the production of the matters and things specified in the subpoena. The exact matters or things must be set forth, their materiality to the issues of the cases must be specified in full detail, and the affidavit must state that the desired matters are in possession of or under the control of the witness [*see Code Civ. Proc. § 1985(b)*].

CAUTION--Deposition Subpoenas:

A court of appeal decision has held that the provisions in *Code Civ. Proc. §§ 1985* and *1987.5* providing that a subpoena is invalid if a copy of the affidavit showing good cause is not served at the time of service of the subpoena are inconsistent with and therefore superseded by *Code Civ. Proc. § 2020.510* to the extent that they apply to deposition subpoenas [*see Terry v. SLICO (2009) 175 Cal. App. 4th 352, 355, 95 Cal. Rptr. 3d 900* (Civil Discovery Act provisions supersede general subpoena provisions)]. Therefore, use of this form appears to be inappropriate if the subpoena at issue is a deposition subpoena. For a memorandum to be used to oppose a memorandum asserting application of *Code Civ. Proc. § 1987.5* in relation to a deposition subpoena, see § 218.40.

This form may be combined with other memoranda supporting a motion to quash or modify a subpoena contained in §§ 218.22-218.24 and 218.26. Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms and discussion related to obtaining an order quashing or modifying a subpoena pursuant to Code Civ. Proc. § 1987.1, see California Forms of Pleading and Practice, Ch. 535, *Subpoena* (Matthew Bender).

[c] Related Memoranda

For a memorandum in opposition to this motion, on the grounds that there is no requirement under *Code Civ. Proc. §§ 2020.410(c)* or *2020.510(b)* that a deposition subpoena be accompanied by an affidavit or declaration showing good

cause for the production of the documents and things designated, see § 218.40. For additional memoranda relating to deposition subpoenas, see Ch. 83, *Discovery: Depositions* .

[3] Discussion of Authorities

[a] Affidavit Accompanying Subpoena Duces Tecum Must Show Good Cause

In ***Grannis v. Board of Medical Examiners*** *(1971) 19 Cal. App. 3d 551, 96 Cal. Rptr. 863* , the Board of Medical Examiners disciplined a physician, after holding an administrative hearing, for unprofessional conduct based on the physician's alcoholism. In a mandamus proceeding, the trial court affirmed the order of the Board revoking the physician's certificate to practice. The court also granted the Board's motion to quash a subpoena duces tecum which sought to compel the production of any documents in the possession of the Board's executive secretary regarding actions taken by the board against physicians convicted of drunk driving misdemeanors and "what, if any, discipline or penalties were imposed" (*19 Cal. App. 3d 551, 564* (emphasis omitted)).

The court of appeal held that the trial court did not abuse its discretion in granting the board's motion to quash the subpoena duces tecum. The affidavit served with the subpoena duces tecum was made on "information and belief" without specifying additional supporting facts. The court held that this did not satisfy the good cause requirement of *Code Civ. Proc. § 1985* even under the liberal standards of modern discovery law. The court noted that the request did not specify any specific records of other disciplinary action, or any actions taken against a specific doctor, such as the defendant. The affidavit did not even specify the nature of penalties "if any" imposed. The subpoena would have required the board to conduct a burdensome blanket search of records having dubious relevance to the case (*19 Cal. App. 3d 551, 564-566)* .

[b] Affidavit Accompanying Subpoena Duces Tecum Must Show Materiality of Requested Matter

In ***Lee v. Superior Court*** *(2009) 177 Cal. App. 4th 1108, 99 Cal. Rptr. 3d 712* , proceedings under California's Sexually Violent Predator Act (SVPA) (*Welf. & Inst. Code, § 6600 et seq.*), the superior court denied motions by five defendants to quash subpoenas duces tecum issued by the district attorney. Each defendant filed a petition for writ of prohibition/mandate, and the petitions were consolidated. The subpoenas duces tecum sought a wide range of information including medical and psychological records, visitor logs, activity logs, patient arrival and departure logs, disciplinary records, mail logs, patient property requests and inventories, and trust accounts records.

The court of appeal held that the subpoenas were ineffective because each failed to include a declaration containing a sufficient statement of materiality, as required by *Code Civ. Proc. § 1985(b)*. With respect to the medical records, declarations that lacked any factual bases for the legal conclusion that documents were material to the proceedings failed to comply with *Code Civ. Proc. § 1985(b)* (*177 Cal. App. 4th 1108, 1129)* . While the declarations of the subpoenas requesting nonmedical records included a fuller statement of materiality than the declarations supporting the subpoenas seeking medical records, they failed to contain sufficient factual bases or explanations for the conclusion that all of those types of documents were material to the narrow issues presented in an SVPA proceeding (*177 Cal. App. 4th 1108, 1130)* . The superior court therefore erred by ordering compliance with the subpoenas (*177 Cal. App. 4th 1108, 1129-1131)* .

People v. Schmitt *(1957) 155 Cal. App. 2d 87, 317 P.2d 673* , was a prosecution for conspiracy to commit theft and the crime of false advertising. The defendant was a licensed chiropractor who advertised that he could cure cancer with a device (an oscilloclast) that harmonized the electronic oscillations of the human body. He alleged that he was being persecuted by a local television station that televised an expose of his treatment methods, and subpoenaed the station's financial records, reports and correspondence relating to the expose including records of payment to the American Cancer Society. The trial court granted the People's motion to quash the subpoena.

The court of appeal affirmed the defendant's conviction, and ruled that the trial court did not err in quashing the subpoena duces tecum. The allegations in the defendant's affidavit regarding the supposed conspiracy to persecute him were indefinite and insufficient to show that the documents were material to some disputed issue of fact at the trial (*155 Cal. App. 2d 87, 105-106)* .

[c] Request for All Documents Improper

Pacific Auto Ins. Co. v. Superior Court *(1969) 273 Cal. App. 2d 61, 77 Cal. Rptr. 836* , arose from an action for interference with contract filed by a county against defendants for money allegedly paid by the county to one of the defendants for medical services relating to injuries which he received when he was involved in an accident with one of the other defendants. The county served a subpoena duces tecum on an investigator who investigated the accident for the defendant insurance company. The subpoena required the investigator to produce all records and correspondence between him and the insurance company prior to the filing of the complaint which concerned the accident and related settlement negotiations. The trial court denied the insurance company's motion to quash the subpoena.

The court of appeal issued a writ of mandate requiring the court to vacate its order denying the motion to quash the subpoena duces tecum and to enter its order granting the motion. The court held that the subpoena was overbroad and did not sufficiently identify the material to be produced. The moving party had made no attempt to specify any particular documents or records, or their contents (*273 Cal. App. 2d 61, 68-70)* .

[d] Omnibus Description Improper

Flora Crane Service, Inc. v. Superior Court *(1965) 234 Cal. App. 2d 767, 45 Cal. Rptr. 79* , arose out of an action for breach of contract in which it was alleged that the individual defendant was the alter ego of the corporate defendant. The trial court granted the defendant's motion to quash a subpoena duces tecum "without prejudice to the right to seek a new subpoena," and the plaintiff filed a petition for a writ of mandate.

In denying the writ, the court noted that the requisite identification may be defeated by the generality of the description, as in a so-called omnibusdescription. The unlimited characteristics of such a description may impair or destroy exactitude so that the custodian of records is not reasonably apprised of what he or she must produce (*234 Cal. App. 2d 767, 786-787)* .

California Points & Authorities

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Volume 21 Chapters 210-219 SCHOOLS---to---SUBPOENA
CHAPTER 218 SUBPOENA
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21-218 California Points & Authorities § 218.26

§ 218.26 Supporting Motion for Order Quashing or Modifying Subpoena Duces Tecum [Code Civ. Proc. § 1987.1]--Unauthorized Disclosure of Consumer's Personal Records [Code Civ. Proc. § 1985.3] or Employee's Employment Records [Code Civ. Proc. § 1985.6]

[1] FORM

[*The following should be combined with a general memorandum in support of a motion to quash or modify a subpoena (see § 218.21).*]

THE WITNESS IS NOT AUTHORIZED TO DISCLOSE _____ [*specify, e.g.,* THE CONSUMER'S PERSONAL RECORDS *or* THE EMPLOYEE'S EMPLOYMENT RECORDS].

A. Production of Consumer's Personal Records or Employee's Employment Records Improper Without Service on or Authorization by Consumer or Employee. No witness can be required to produce a consumer's personal records or an employee's employment records unless the subpoenaing party gives the consumer or employee whose records are sought proper notice of the subpoena under *Code of Civil Procedure Section 1985.3* or *1985.6*, and provides the witness with proof of service on the consumer or employee, or a written authorization to release records signed by the consumer or employee (*Code Civ. Proc. §§ 1985.3(c), (g), 1985.6(c), (f), 1987.1*).

[*Optional*] **B. Production of Medical Records Improper Without Service on Patient.** No witness can be required to produce a patient's medical records unless the subpoenaing party gives the patient proper notice of the subpoena under *Code of Civil Procedure Section 1985.3*, and provides the witness with proof of service on the patient, or a written authorization to release records signed by the patient (Civ. Code § 56.10(b)(3)).

[*Optional*] **C. Production of Private Records of Public Employees Improper Without Service on Employee.** No state or local agency can be required to produce records containing personal information as defined in *Civil Code Section 1798.3* about public employees, which is otherwise exempt from public disclosure under the Public Records Act (*Gov. Code § 6250 et seq.*), unless the subpoenaing party gives the employee proper notice of the subpoena under *Code of Civil Procedure Section 1985.3*, and provides the state or local agency with proof of service on the employee, or a written authorization to release records signed by the employee (*Code Civ. Proc. § 1985.4*).

[*Optional*] **D. Production of Telephone Records Improper Without Consumer Consent.** No telephone company that is a public utility as defined in *Public Utilities Code Section 216* can be required to produce telephone records unless, pursuant to *Public Utilities Code Section 2891*, the consumer whose records are requested has signed a consent to release (*Code Civ. Proc. § 1985.3(f)*).

[2] Comments

[a] Use of Form

This memorandum is for use in support of a motion for an order quashing or modifying a subpoena duces tecum pursuant to *Code Civ. Proc. § 1987.1(a)* on the grounds that subpoenaing party was not authorized to disclose information that is personal and private. They should be combined with § 218.21, when appropriate, for use by a consumer or employee who, pursuant to *Code Civ. Proc. § 1985.3* or *1985.6*, is challenging the subpoena of his or her personal or employment records.

The court may make an order modifying the subpoena as appropriate to protect the parties, witnesses, consumers, or employees from unreasonable or oppressive demands, including unreasonable violations of a witness's, consumer's, or employee's right of privacy [*Code Civ. Proc. § 1987.1(a)*]. However, nothing in *Code Civ. Proc. § 1987.1* requires an person to quash, modify, or condition any subpoena duces tecum of personal records of any consumer served under *Code Civ. Proc. § 1985.3(b)(1)* or employment records of any employee served under *Code Civ. Proc. § 1985.6(b)(1)* [*Code Civ. Proc. § 1987.1(c)*]. For forms relating to prohibiting disclosure on the basis of the nonstatutory right of privacy, see Ch. 81, *Discovery: Privileges and Other Discovery Limitations* in this publication.

Under *Code Civ. Proc. § 1985.3* (consumer) and *Code Civ. Proc. § 1985.6* (employee), a consumer or employee, or his or her representative, has a right to receive notice from the subpoenaing party that the subpoenaing party has requested production of the consumer's personal records or the employee's employment records by a witness. Before the witness is required to produce the records, the subpoenaing party must either (1) serve upon the witness proof of service on the consumer or employee in accordance with *Code Civ. Proc. §§ 1985.3(b)* and *1985.6(b)*; or *(2)* furnish the witness with a written authorization to release the records [*Code Civ. Proc. §§ 1985.3(c)* (consumer), 1985.6 (employee)]. However, if the subpoenaing party is the consumer or the employee, and the consumer or employee isthe only subject of the subpoenaed records, notice to the consumer or to the employee and the delivery of the other documents specified in *Code Civ. Proc. § 1985.3(b)* or in *Code Civ. Proc. § 1985.6(b)* are not required [*Code Civ. Proc. § 1985.3*(*l*) (consumer); *Code Civ. Proc. § 1985.6(k)* (employee)].

This general notice requirement also applies when the personal records of a public employee are subpoenaed from a state or local agency [*Code Civ. Proc. § 1985.4*]. *Pub. Util. Code § 2891* has a similar requirement applicable when phone records of a consumer are subpoenaed [*Code Civ. Proc. § 1985.3(f)*]. The consumer or employee also may bring a motion to quash or modify the subpoena duces tecum before the date for production of the records [*Code Civ. Proc. §§ 1985.3(g)*, 1985.6(f)(1); *see § 218.21*].

This form may be combined with other memoranda supporting a motion to quash or modify a subpoena contained in §§ 218.22-218.25. Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms and discussion related to the obtaining of an order quashing or modifying a subpoena pursuant to Code Civ. Proc. § 1987.1, see California Forms of Pleading and Practice, Ch. 535, *Subpoena* (Matthew Bender).

[c] Related Memoranda

For memoranda relating to deposition subpoenas, see Ch. 83, *Discovery: Depositions* , in this publication. For memoranda relating to the right of privacy, see Ch. 183, *Privacy: State Constitutional Rights* , Ch. 184, *Privacy: Invasion of Privacy* , and Ch. 185, *Privacy: Collection, Dissemination, and Inspection of Information* .

[d] Opposing Memoranda

In an appropriate case, contentions *set out in §§ 218.29* and *218.30* may be used to oppose the motion supported by these points and authorities.

[3] Discussion of Authorities

[a] Production of Private Records of Public Employees Improper Without Service on Employee

Under *Civ. Code § 1798.3*, the term "personal information" means any information that is maintained by an agency that identifies or describes an individual, including, but not limited to, his or her name, social security number, physical description, home address, home telephone number, education, financial matters, and medical or employment history. It includes statements made by, or attributed to, the individual.

Gov. Code § 6254 establishes exemptions from the requirement of disclosure under the Public Records Act [*Gov. Code § 6250 et seq.*]. *Gov. Code § 6254(c)* sets out exemptions for personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy. Other provisions of the Act also provide for exemption from disclosure. For example, *Gov. Code § 6255* provides that an agency may withhold any record by demonstrating that on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosing the record. For detailed discussion of the Public Records Act, see California Forms of Pleading and Practice, Ch. 429, *Privacy* (Matthew Bender), and DeMeo, California Deposition and Discovery Practice, Ch. 30, *Right to Privacy* (Matthew Bender).

[4] Additional Authorities

[a] Production of Medical Records Improper Without Service on Patient

In *Colleen M. v. Fertility and Surgical Assoc. of Thousand Oaks (2005) 132 Cal. App. 4th 1466, 34 Cal. Rptr. 3d 439* , plaintiff patient, who paid for in her vitro fertilization treatment using her ex-fiance's credit card, sued defendant health care provider for invasion of privacy and infliction of emotional distress, alleging the provider wrongfully disclosed the contents of her medical records to her ex-fiance and to his attorney. The trial court granted the provider's motion for summary judgment, and the patient appealed. The appellate court held, in part, that the provider was not liable for disclosure of the patient's medical records to the ex-fiance's attorney, because disclosure was compelled under *Civ. Code § 56.10(b)(3)* (*132 Cal. App. 4th 1466, 1478)* . Undisputed evidence showed the ex-fiance's attorney complied with the requirements *Code Civ. Proc. § 1985.3(e)*, including that the patient be given notice of her right to object and to seek the services of an attorney in order to protect her privacy rights, and the patient did not file an objection. This evidence was sufficient to establish a complete defense to cause of action under *Civ. Code § 56.10(b)(3)* (*132 Cal. App. 4th 1466, 1479)* . Plaintiff's attorney's "weasel worded" testimony he was never "made aware" of the subpoena and notice of right to object would not support a finding by the trier of fact the documents were not received at the attorney's office (*132 Cal. App. 4th 1466, 1480)* .

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21-218 California Points & Authorities § 218.26A

§ 218.26A Supporting Motion for Order Quashing or Modifying Subpoena [Code Civ. Proc. § 1987.1]--Motion to Prevent Release of Electronically Stored Information [Code Civ. Proc. § 1985.8(d)]

[1] FORM

[*Caption. See § 218.20[1]* .]

THE COURT SHOULD GRANT _____[*name of moving party*] AN ORDER UNDER CODE OF CIVIL PROCEDURE SECTION 1987.1(a) TO _____ [QUASH THE SUBPOENA (DUCES TECUM) ENTIRELY *or* MODIFY THE SUBPOENA (DUCES TECUM) BY _____(*specify conditions or limitations sought*)] BEFORE THE DATE OF PRODUCTION OF THE SUBPOENAED ELECTRONICALLY STORED INFORMATION BECAUSE _____[*specify grounds; see § 218.26B*].

Subpoenaed Person May Move to Quash or Modify Subpoena Seeking [Access to] Electronically Stored Information. A subpoenaed party or person may move to quash or modify a subpoena seeking [access to] electronically stored information (*see Code Civ. Proc. §§ 1987.1(a), 1985.8(a)*).

[*Add appropriate contentions from § 218.26B to support a motion to quash or modify a subpoena or subpoena duces tecum. Add the memorandum from § 218.31 to support an award of costs.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*printed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be used to support a motion for an order quashing or modifying a subpoena or subpoena duces tecum of records pursuant to *Code Civ. Proc. §§ 1987.1(a)* and *1985.8(a)* by the party or person from whom discovery of electronically stored information is sought. This form should be combined with other appropriate memoranda specifying the grounds for making the motion [*see, e.g., § 218.26B*]. Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms and discussion related to the obtaining of an order quashing or modifying a subpoena pursuant to *Code Civ. Proc. § 1987.1(a)*, see California Forms of Pleading and Practice, Ch. 535, *Subpoena* (Matthew Bender). For forms and discussion related to a demand for production of electronically stored evidence, and response to the demand, see California Forms of Pleading and Practice, Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)* (Matthew Bender), §§ 195A.62 and 195.63; see also Matthew Bender(R) Practice Guide: California E-Discovery and Evidence.

[c] Related Points and Authorities

For memoranda relating to deposition subpoenas, see Ch. 83, *Discovery: Depositions* .

[d] Opposing Memoranda

The *form in § 218.30A* may be used to oppose this motion.

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§ 218.26B Supporting Motion for Order Quashing or Modifying Subpoena [Code Civ. Proc. § 1987.1]--Electronically Stored Information Is Not From Source That Is Reasonably Accessible [Code Civ. Proc. § 1985.8(d)]--No Good Cause Exists for Production of Electronically Stored Information From Source That Is Not Reasonably Accessible [Code Civ. Proc. § 1985.8(e)]

[1] FORM

[*The following should be combined with a general memorandum in support of a motion to quash or modify a subpoena for electronically stored information (see § 218.26A).*]

EITHER

A. Subpoenaed Person Opposing Inspection, Copying, Testing, or Sampling of Electronically Stored Information Has Burden of Demonstrating Unavailability. The subpoenaed person opposing inspection, copying, testing, or sampling on the basis that the electronically stored information is from a source that is not reasonably accessible because of undue burden or expense bears the burden of demonstrating that inaccessibility (*Code Civ. Proc. § 1985.8(d)*).

AND/OR

B. Court May Not Order Discovery of Electronically Stored Information From Source That Is Not Reasonably Accessible Unless Subpoenaing Party Shows Good Cause. The subpoenaing party must show good cause for the production of electronically stored information from a source that is not readily accessible because of undue burden or expense (*Code Civ. Proc. § 1985.8(e)*).

[2] Comments

[a] Use of Form

This form is for use in combination with the *form in § 218.26A* to support a motion for an order quashing or modifying a subpoena or a subpoena duces tecum pursuant to *Code Civ. Proc. 1987.1* on the grounds that either:

- The subpoenaed person opposing inspection, copying, testing, or sampling of electronically stored information on the basis that the information is from a source that is not reasonably accessible because of undue burden or expense has met its burden of demonstrating that inaccessibility [*see Code Civ. Proc. § 1985.8(d)*], or

- The subpoenaing person has not shown good cause for the production of electronically stored information from a source that is not reasonably accessible because of undue burden or expense [*see Code Civ. Proc. § 1985.8(e)*].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms and discussion related to the obtaining of an order quashing or modifying a subpoena pursuant to *Code Civ. Proc. § 1987.1(a)*, see California Forms of Pleading and Practice, Ch. 535, *Subpoena* (Matthew Bender). For forms and discussion related to a demand for production of electronically stored evidence, and response to the demand, see California Forms of Pleading and Practice, Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)* (Matthew Bender), §§ 195A.62 and 195.63. For detailed discussion of the production of electronically stored evidence under California law, see also Matthew Bender(R) Practice Guide: CAlifornia E-Discovery and Evidence.

[c] Related Memoranda

For memoranda relating to deposition subpoenas, see Ch. 83, *Discovery: Depositions* .

[d] Opposing Memoranda

In an appropriate case, contentions in § 218.30B may be used to oppose the motion supported by this memorandum.

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21-218 California Points & Authorities § 218.27

§ 218.27 Supporting Motion for Order Directing Compliance With Subpoena or Subpoena Duces Tecum [Code Civ. Proc. § 1987.1]--Authority for Motion

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF ORDER DIR-
Plaintiff,	)	ECTING COMPLIANCE WITH SUBPOENA
vs.	)	(DUCES TECUM)
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge:_____]
	)	Date Action Filed: _____
		[Trial Date:_____]

_____

THE COURT SHOULD GRANT _____ [*name of moving party*] AN ORDER UNDER CODE OF CIVIL PROCEDURE SECTION 1987.1 DIRECTING _____ [*name of person subpoenaed*] TO COMPLY WITH THE SUBPOENA (DUCES TECUM) BECAUSE _____ [*specify grounds, see §§ 218.28 -218.30*].

A. Motion to Comply. If a subpoena requires the attendance of a witness or the production of books, documents, or other things before a court, or at trial, the court, on motion reasonably made by any person described *Code of Civil Procedure Section 1987.1(b)*, may make an order directing compliance with the subpoena (*Code Civ. Proc. § 1987.1*).

[*Add appropriate contentions from §§ 218.28-218.30 to support the motion to comply with the subpoena or subpoena duces tecum. Add appropriate memorandum in § 218.31 or § 218.32 to support an award of costs.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum is for use to support a motion for an order directing compliance with a subpoena or a subpoena duces tecum pursuant to *Code Civ. Proc. § 1987.1(a)* before a court or at trial. This form should be combined with other memoranda specifying different grounds for making the motion [*see §§ 218.28 -218.30*]. It may also be modified for use in opposition to a motion to quash or modify a subpoena or subpoena duces tecum. Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms and discussion related to the obtaining of an order quashing or modifying a subpoena pursuant to Code Civ. Proc. § 1987.1, see California Forms of Pleading and Practice, Ch. 535, *Subpoena* (Matthew Bender).

[c] Related Memoranda

For memoranda relating to deposition subpoenas, see Ch. 83, *Discovery: Depositions* , in this publication.

[d] Opposing Memoranda

The *forms in § 218.20* or *§ 218.21* may be used to oppose this motion and to quash or modify a subpoena or subpoena duces tecum.

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21-218 California Points & Authorities § 218.28

§ 218.28 Supporting Motion for Order Directing Compliance With Subpoena or Subpoena Duces Tecum [Code Civ. Proc. § 1987.1]--Person Is Not a Nonresident Witness [Code Civ. Proc. § 1989]

[1] FORM

[*The following should be combined with a general form of memorandum in support of a motion to direct compliance with a subpoena (see § 218.27).*]

THE SUBPOENAED PARTY IS SUBJECT TO SERVICE OF A SUBPOENA (DUCES TECUM) AND IS NOT A NONRESIDENT WITNESS UNDER CODE OF CIVIL PROCEDURE SECTION 1989 BECAUSE HE/SHE/IT IS A _____ [NONDOMICILIARY WHO IS NOT A NONRESIDENT *or* NONRESIDENT CUSTODIAN OF RECORDS WHOSE PERSONAL ATTENDANCE IS NOT REQUIRED].

[*EITHER*]

A. Nondomiciliary May Be Obliged to Attend as Witness. Residence, forpurposes of a subpoena, means residence in fact and not domicile. The sojourning relationship must be of a type and duration related to the status of the witness which does not make attendance a hardship (*see Code Civ. Proc. § 1989*; *In re Morelli (1970) 11 Cal. App. 3d 819, 831, 91 Cal. Rptr. 72*).

[*OR*]

A. Nonresident Custodian of Records Must Comply With Subpoena Duces Tecum If Attendance Not Required. When a subpoena duces tecum is served on a custodian of records or other qualified witness as provided by *Evidence Code Section 1560 et seq.* and his or her personal attendance is not required by the terms of the subpoena, then the residency limitations of *Code of Civil Procedure Section 1989* do not apply (*Code Civ. Proc. § 1987.3*).

[*AND/OR*]

A. Service on Resident Partner in Lieu of Nonresident Custodian of Records Is Proper. A subpoena duces tecum served on the California partner of a national corporation is proper even though the corporation has designated an out-of-state custodian of records (*see Boal v. Price Waterhouse & Co. (1985) 165 Cal. App. 3d 806, 810-811, 212 Cal. Rptr. 42*).

[2] Comments

[a] Use of Form

This memorandum is for use in combination with § 218.27 to support a motion for an order directing compliance with a subpoena duces tecum on the grounds that the person served is subject to a subpoena. This memorandum also may be used to oppose a motion to quash or modify a subpoena on the grounds that the person subpoenaed is not subject to service [*see § 218.23*]. This form also may be combined with other memoranda supporting an order directing compliance [*see §§ 218.29, 218.30*]. Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms and discussion related to the obtaining of an order quashing or modifying a subpoena pursuant to Code Civ. Proc. § 1987.1, see California Forms of Pleading and Practice, Ch. 535, *Subpoena* (Matthew Bender).

[c] Related Memoranda

For forms relating to deposition subpoenas, see Ch. 83, *Discovery: Depositions* , in this publication.

[d] Opposing Memoranda

§ 218.23 may be used to oppose this motion.

[3] Discussion of Authorities

[a] Nondomiciliary May Be Obliged to Attend as Witness

In re Morelli *(1970) 11 Cal. App. 3d 819, 91 Cal. Rptr. 72* , was a proceeding in which an intended nonparty expert witness in a personal injury action was found guilty of contempt for failing to appear. In a habeas corpus proceeding, the petitioner alleged, among other things, that the contempt complaint was inadequate because the papers failed to allege the petitioner's residence so as to indicate that he was subject to subpoena at the time of service.

In denying habeas corpus, the court of appeal noted that no California decision had construed residency for purposes of subpoena power. The court interpreted residence under *Code Civ. Proc. § 1989* as residence in fact and not domicile. The court noted that residence is commonly interpreted as an "abode" or "address," and a person may have more than one residence at the same time. In contrast, domicile connotes a more settled and permanent presence, and a person has but one. The sojourning connection required under *Code Civ. Proc. § 1989* is not as permanent as a domiciliary relationship. A mere "resident" (even if a nondomiciliary) has a sojourning connection of a type and duration which makes it not a hardship for attendence as a witness to be required (*11 Cal. App. 3d 819, 831)* .

[b] Service on Resident Partner in Lieu of Nonresident Custodian of Records Is Proper

In ***Boal v. Price Waterhouse & Co.*** *(1985) 165 Cal. App. 3d 806, 212 Cal. Rptr. 42* , the plaintiff, a former partner of a

national brokerage firm, sought to recover retirement benefits allegedly due. The trial court entered judgment against the plaintiff.

The court of appeal reversed on the ground that the plaintiff was improperly denied a jury trial. The court discussed an issue relating to a subpoena duces tecum served on a resident partner of the defendant because that matter may also arise on retrial (*see Code Civ. Proc. § 43*). The defendant contended that the subpoena was never properly served on the custodian of records for the firm located in New York. The court found this contention patently "ridiculous." The subpoena in this case was served on a resident partner who (1) was a party to the lawsuit, and (2) over whom the court had personal jurisdiction. Such a person may be required by service of a subpoena in California to produce documents wherever located. Other means must be used to secure documents when the subpoena has been served on a nonparty, nonresident custodian of records if the personal appearance of the custodian is required (*165 Cal. App. 3d 806, 810-811)* .

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21-218 California Points & Authorities § 218.29

§ 218.29 Supporting Motion for Order Directing Compliance With Subpoena or Subpoena Duces Tecum [Code Civ. Proc. § 1987.1]--Shortening or Waiving of Service Requirements on Consumer or Employee

[1] FORM

[*The following should be combined with a general memorandum in support of a motion to direct compliance with a subpoena (see § 218.27).*]

_____ [SHORTENING *or* WAIVING] THE SERVICE REQUIREMENTS FOR SUBPOENAING _____ [CONSUMER'S PERSONAL RECORDS UNDER CODE OF CIVIL PROCEDURE SECTION 1985.3(b) *or* EMPLOYEE'S EMPLOYMENT RECORDS UNDER CODE OF CIVIL PROCEDURE SECTION 1985.6(b)] PRESERVES THE _____ [CONSUMER'S *or* EMPLOYEE'S] RIGHT OF NOTICE AND TO MOVE TO QUASH OR MODIFY A SUBPOENA [DUCES TECUM] UNDER CODE OF CIVIL PROCEDURE [SECTION 1985.3(g) *or* SECTION 1985.6(f)] AND _____ [GOOD CAUSE *and/or* DUE DILIGENCE] HAS BEEN SHOWN.

[*EITHER*]

A. Subpoenaing Party Has Shown Good Cause to Shorten Time for Service on Consumer or Employee. On good cause shown, the time for service of notice of the subpoena duces tecum on the consumer under *Code of Civil Procedure Section 1985.3(b)*, or on the employee under *Code of Civil Procedure Section 1985.6(b)*, can be shortened provided that the rights of the consumer or employee are preserved (*Code Civ. Proc. §§ 1985.3(h), 1985.6(g)*).

[*AND/OR*]

B. Subpoenaing Party Has Shown Due Diligence for Waiver of Proof of Service Requirements. By showing due diligence, the subpoenaing party may obtain a waiver of requirements of constructive notice and proof of service on the consumer under *Code of Civil Procedure Section 1985.3(c)*, or on the employee under *Code of Civil Procedure Section*

1985.6(b), provided that the rights of the consumer or employee are preserved (*Code Civ. Proc. §§ 1985.3(h), 1985.6(g)*).

[*AND/OR*]

C. Notice Is Not Required When Subpoenaing Party is [Consumer *or* Employee] and [He *or* She] Is Only Subject of Subpoenaed Records. If the subpoenaing party is the consumer or the employee, and he or she is the only subject of the subpoenaed records, notice to the consumer or to the employee and the delivery of the other documents specified in *Code of Civil Procedure Section 1985.3(b)* to the consumer, or *Code of Civil Procedure Section 1985.6(b)* to the employee, are not required [*Code Civ. Proc. § 1985.3*(*l*); *Code Civ. Proc. § 1985.6(k)*].

[*Optional*] **D. Patient Waives Doctor-Patient Privilege by Inaction.** A patient's failure to take action after receiving proper notice of the subpoena under *Code of Civil Procedure Section 1985.3* constitutes a waiver of doctor-patient privilege so that disclosure may be compelled under Civil Code Section 56.10(b)(3) (*Inabnit v. Berkson (1988) 199 Cal. App. 3d 1230, 1238-1239, 245 Cal. Rptr. 525*).

[2] Comments

[a] Use of Form

This form is for use in combination with the *form in § 218.27* to support a motion for an order directing compliance with a subpoena duces tecum to compel production of a consumer's personal records or an employee's employment records pursuant to *Code Civ. Proc. § 1987.1* on the grounds that the subpoenaing party may shorten, or the consumer or employee has waived service requirements under *Code Civ. Proc. § 1985.3* (consumer) or *Code Civ. Proc. § 1985.6* (employee). Good cause or due diligence must be shown.

This form also may be used to support a motion for an order directing compliance with a subpoena duces tecum to compel production of a consumer's personal records or an employee's employment records pursuant to *Code Civ. Proc. § 1987.1* on the grounds that, because the subpoenaing party is the consumer or the employee, and the consumer or employee is the only subject of the subpoenaed records, notice to the consumer or to the employee and the delivery of the other documents specified in *Code Civ. Proc. § 1985.3(b)* or in *Code Civ. Proc. § 1985.6(b)* are not required [*see Code Civ. Proc. § 1985.3*(*l*) (consumer); *Code Civ. Proc. § 1985.6(k)* (employee)].

This form also may be used to oppose a motion to quash or modify a subpoena duces tecum initiated by a consumer or employee [*see § 218.21*], or a witness [*see § 218.20*], on grounds that disclosure of personal or employment records is unauthorized [*see § 218.26*]. This form should be combined with the memorandum seeking compliance on the grounds that the subpoenaing party has complied with the procedures under *Code Civ. Proc. § 1985.3* that are designed to protect the privacy rights of consumers in their personal records, or similarly under *Code Civ. Proc. § 1985.6* for the employment records of employees [*see § 218.30*]. Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms and discussion related to the obtaining of an order quashing ormodifying a subpoena pursuant to Code Civ. Proc. § 1987.1, see California Forms of Pleading and Practice, Ch. 535, *Subpoena* (Matthew Bender).

[c] Related Memoranda

For memoranda relating to deposition subpoenas, see Ch. 83, *Discovery: Depositions* , in this publication.

[3] Discussion of Authorities

[a] Patient Waives Doctor-Patient Privilege by Inaction

Inabnit v. Berkson *(1988) 199 Cal. App. 3d 1230, 245 Cal. Rptr. 525* , was an action against a physician specializing in psychiatry brought by a mother and daughter seeking damages for the disclosure of their medical records to the attorney for a defendant in a separate wrongful death action brought by plaintiffs. The trial court granted summary judgment for the defendant.

The court of appeal affirmed. Plaintiffs, through their attorneys, received notice pursuant to *Code Civ. Proc. § 1985.3* that the medical records were being sought pursuant to a subpoena duces tecum in the wrongful death action. The plaintiffs then did nothing to claim the psychotherapist-patient privilege. This inaction constituted a waiver of the patient's right to confidentiality of medical information under Civ. Code. § 56 et seq., which left the defendant in the position of being compelled to disclose the medical records (*199 Cal. App. 3d 1230, 1236-1239)* .

[4] Additional Authorities

[a] Patient Waives Doctor-Patient Privilege by Inaction

In *Colleen M. v. Fertility and Surgical Assoc. of Thousand Oaks (2005) 132 Cal. App. 4th 1466, 34 Cal. Rptr. 3d 439* , plaintiff patient, who paid for in her vitro fertilization treatment using her ex-fiance's credit card, sued defendant health care provider for invasion of privacy and infliction of emotional distress, alleging the provider wrongfully disclosed the contents of her medical records to her ex-fiance and to his attorney. The superior court granted the provider's motion for summary judgment, and the patient appealed. The appellate court held, in part, that the provider was not liable for disclosure of the patient's medical records to the ex-fiance's attorney, because disclosure was compelled under *Civ. Code § 56.10(b)(3)* (*132 Cal. App. 4th 1466, 1478)* . Undisputed evidence showed the ex-fiance's attorney complied with the requirements of *Code Civ. Proc. § 1985.3(e)*, and the patient did not file an objection. This evidence was sufficient to establish a complete defense to cause of action under *Civ. Code § 56.10(b)(3)* (citing *Inabnit*, discussed in *§ 218.29[3][a]*) (*132 Cal. App. 4th 1466, 1479)* .

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21-218 California Points & Authorities § 218.30

§ 218.30 Supporting Motion for Order Directing Compliance With Subpoena or Subpoena Duces Tecum [Code Civ. Proc. § 1987.1]--Subpoenaing Party Has Properly Notified Consumer of Need for Production of Personal Records [Code Civ. Proc. § 1985.3] or Employee of Need for Production of Employment Records [Code Civ. Proc. § 1985.6]

[1] FORM

[*The following should be combined with a general memorandum in support of a motion to direct compliance with a subpoena (see § 218.27).*]

THE SUBPOENAING PARTY HAS COMPLIED WITH REQUIREMENTS OF _____ [CODE OF CIVIL PROCEDURE SECTION 1985.3 FOR SUBPOENAING A CONSUMER'S PERSONAL RECORDS *or* CODE OF CIVIL PROCEDURE SECTION 1985.6 FOR THE SUBPOENAING AN EMPLOYEE'S EMPLOYMENT RECORDS].

[*EITHER*]

A. Subpoenaing Party Has Complied With Procedures Protecting Consumer's or Employee's Privacy Interest in Personal or Employment Records. The subpoenaing party has complied with *Code of Civil Procedure Sections 1985.3* (consumer) or 1985.6 (employee) by properly serving notice of the subpoena duces tecum on the consumer or employee whose records are being sought (*Code Civ. Proc. §§ 1985.3, 1985.6*).

[*AND/OR*]

B. Privacy Interests Are Not Implicated When Identifying Information Deleted. Consumers and employees have no actionable privacy interest when the subpoena duces tecum does not request records of a particular consumer or employee and requires that all identifying information be deleted (*Code Civ. Proc. §§ 1985.3(i), 1985.6(h)*).

[2] Comments

[a] Use of Form

This memorandum is for use in combination with the *form in § 218.27* to support a motion for an order directing compliance with a subpoena duces tecum to compel production of a consumer's personal records or an employee's employment records pursuant to *Code Civ. Proc. § 1987.1* on the grounds that the subpoenaing party has complied with the procedures under *Code Civ. Proc. § 1985.3* that are designed to protect the privacy rights of consumers in their personal records, or similarly under *Code Civ. Proc. § 1985.6* for the employment records of employees. For discussion of the right of privacy, see Ch. 81, *Discovery: Privileges and Other Discovery Limitations* , in this publication.

This form also may be used to oppose a motion to quash or modify a subpoena duces tecum initiated by a consumer or employee [*see § 218.21*], or a witness [*see § 218.20*], on grounds that disclosure of a consumer's personal records or an employee's employment records is unauthorized [*see § 218.26*]. This form should be combined with the memorandum seeking a waiver or modification of service requirements on a consumer when his or her personal records are sought, or on an employee whose employment records are sought [*see § 218.29*]. Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms and discussion related to obtaining an order quashing or modifying a subpoena pursuant to Code Civ. Proc. § 1987.1, see California Forms of Pleading and Practice, Ch. 535, *Subpoena* (Matthew Bender).

[c] Related Memoranda

For memoranda relating to deposition subpoenas, see Ch. 83, *Discovery: Depositions* , in this publication. For forms relating to the right of privacy, see Ch. 183, *Privacy: State Constitutional Rights* , Ch. 184, *Privacy: Invasion of Privacy* , and Ch. 185, *Privacy: Collection, Dissemination, and Inspection of Information* .

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21-218 California Points & Authorities § 218.30A

§ 218.30A Supporting Motion for Order Directing Compliance With Subpoena or Subpoena Duces Tecum [Code Civ. Proc. § 1987.1]--Requiring Production of Electronically Stored Information for Inspection, Copying, Testing, or Sampling in Forms Specified [Code Civ. Proc. § 1985.8(a)(1), (b)].

[1] FORM

[Caption. See § 218.27[1].]

THE COURT SHOULD GRANT _____[*name of moving party*] AN ORDER UNDER CODE OF CIVIL PROCEDURE SECTION 1985.8 DIRECTING COMPLIANCE WITH THE SUBPOENA [DUCES TECUM] FOR PRODUCTION OF ELECTRONICALLY STORED INFORMATION FOR _____[INSPECTION *and/or* COPYING *and/or* TESTING *and/or* SAMPLING] IN THE FORMS SPECIFIED.

A. Party, or Party's Agent, May Move to Subpoena Electronically Stored Information and Specify Form or Forms in Which Information Is to Be Produced. A party, or a party's agent, may move to subpoena electronically stored information and may specify the form or forms in which each type of information is to be produced (*Code Civ. Proc. § 1985.8(a)(1), (b)*).

B. Party May Move to Compel Compliance with Subpoena Requesting Production of Electronically Stored Information in Specified Forms. When a party has complied with the requirements of *Code of Civil Procedure § 1985 et seq.* (means of production), the court may order the production of the electronically stored information (*see Code Civ. Proc. §§ 1987.1, 1985.8(a)*).

[*Add appropriate contentions from § 218.30B to support the motion to comply with the subpoena or subpoena duces tecum. Add the memorandum from § 218.31 to support an award of costs.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*printed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be used to support a motion for an order directing compliance with a subpoena or a subpoena duces tecum pursuant to *Code Civ. Proc. § 1985.8(a)(1), (b)* before a court or at trial. This form should be combined with other memoranda specifying the grounds for making the motion [*see § 218.30B*]. It may also be modified for use in opposition to a motion to quash or modify a subpoena or subpoena duces tecum. Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms and discussion related to obtaining an order quashing or modifying a subpoena pursuant to *Code Civ. Proc. § 1987.1*, see California Forms of Pleading and Practice, Ch. 535, *Subpoena* (Matthew Bender). For forms and discussion related to a demand for production of electronically stored evidence, and response to the demand, see California Forms of Pleading and Practice, Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)* (Matthew Bender), §§ 195A.62 and 195.63. For detailed discussion of the production of electronically stored evidence under California law, see also Matthew Bender(R) Practice Guide: California E-Discovery and Evidence.

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21-218 California Points & Authorities § 218.30B

§ 218.30B Supporting Motion for Order Directing Compliance with Subpoena or Subpoena Duces Tecum [Code Civ. Proc. § 1987.1] for Production of Electronically Stored Information [Code Civ. Proc. § 1985.8(a)(1), (e)]--Information Is From Source That Is Reasonably Accessible [Code Civ. Proc. § 1985.8(a)(1), (e)] or Good Cause Exists for Production of Information From Source That Is Not Reasonably Accessible [Code Civ. Proc. § 1985.8(a)(1), (f)]

[1] FORM

[*The following should be combined with a general memorandum in support of a motion to direct compliance with a subpoena for electronically stored information (see § 218.30A).*]

EITHER

A. Subpoenaed Person Opposing Inspection, Copying, Testing, or Sampling Has Burden of Demonstrating Inaccessibility of Electronically Stored Information. The subpoenaed person opposing inspection, copying, testing, or sampling on the basis that the information is from a source that is not reasonably accessible because of undue burden or expense bears the burden of demonstrating that inaccessibility (*see Code Civ. Proc. § 1985.8(d)*).

AND/OR

B. Court May Order Discovery of Electronically Stored Information From Source That Is Not Reasonably Accessible For Good Cause. If subpoenaing party shows good cause for the production of electronically stored information from a source that is not reasonably accessible because of undue burden or expense, the court may order discovery (*Code Civ. Proc. § 1985.8(e)*).

[2] Comments

[a] Use of Form

This memorandum is for use in combination with the *form in § 218.30A* to support a motion for an order compelling compliance with a subpoena or subpoena duces tecum for production of the requested electronically stored information (ESI) in accordance with *Code Civ. Proc. § 1985.8(a)* on the grounds that [*see Code Civ. Proc. § 1985.8(d), (e)*]:

- The party or person opposing inspection, copying, testing, or sampling of ESI on the basis that the information is from a source that is not reasonably accessible because of undue burden or expense has not met its burden of demonstrating that inaccessibility, or

- Good cause has been shown for the production of ESI from a source that is not reasonably accessible because of undue burden or expense.

This form also may be used to oppose a motion to quash or modify a subpoena [*see § 218.26A*], on grounds that the requested information is reasonably accessible or that no good cause has been shown to justify compelling production of ESI that is not reasonably accessible because of undue burden or expense [*see § 218.26B*]. Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Court May Limit Production Even If It Finds Good Cause for Discovery or That Electronically Stored Information Is Readily Accessible

If the court finds good cause for the production of ESI from a source that is not reasonably accessible, the court may set conditions for discovery, including allocation of the expense of discovery [*Code Civ. Proc. § 1985.8 (f)*]. Further, the court *must* limit the frequency or extent of discovery of ESI, even from a source that is reasonably accessible, if the court determines that any of the following conditions exists [*Code Civ. Proc. § 1985.8(g)*]:

- It is possible to obtain the information from some other source that is more convenient, less burdensome, or less expensive.

- The discovery sought is unreasonably cumulative or duplicative.

- The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought.

- The likely burden or expense of the proposed discovery outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues in the litigation, and the importance of the requested discovery in resolving the issues.

[c] Related Pleading and Practice Forms

For forms and discussion related to a demand for production of electronically stored evidence, and response to the demand, see California Forms of Pleading and Practice, Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)* (Matthew Bender), §§ 195A.62 and 195.63. For detailed discussion of the production of electronically stored evidence under California law, see also Matthew Bender(R) Practice Guide: California E-Discovery and Evidence.

[d] Related Memoranda

For memoranda relating to deposition subpoenas, see Ch. 83, Discovery: Depositions.

[e] Opposing Memoranda

In an appropriate case, the contentions in § 218.26B may be used to oppose the motion supported by this memorandum.

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21-218 California Points & Authorities § 218.31

§ 218.31 Supporting Motion for Discretionary Award of Costs [Code Civ. Proc. § 1987.2(a)]

[1] FORM

[*The following should be combined with a general memorandum in support of a motion to quash, modify or comply with a subpoena (see §§ 218.20, 218.21 and 218.27).*]

THE COURT SHOULD AWARD _____ [*name of moving party*] REASONABLE EXPENSES, INCLUDING REASONABLE ATTORNEY FEES, AGAINST _____ [*name of party, witness, consumer, employee, or person whose personally identifying information is sought in connection with an underlying action involving that person's exercise of free speech rights*] UNDER CODE OF CIVIL PROCEDURE SECTION 1987.2(a) BECAUSE _____ [*name of person*] _____ [MADE *or* OPPOSED] THE MOTION TO _____ [QUASH *or* MODIFY *or* COMPLY WITH] THE SUBPOENA (DUCES TECUM) _____ [IN BAD FAITH *and/or* WITHOUT SUBSTANTIAL JUSTIFICATION *and/or* WHEN THE SUBPOENA WAS OPPRESSIVE].

[*EITHER*]

A. Award Proper When Motion Made or Opposed in Bad Faith. The court has discretion to award reasonable expenses incurred in making or opposing a motion to quash, modify or comply under *Code of Civil Procedure Section 1987.1*, including reasonable attorney fees, when the motion was made or opposed in bad faith (*Code Civ. Proc. § 1987.2(a)*).

[*AND/OR*]

B. Award Proper When Motion Made or Opposed Without Substantial Justification. The court has discretion to award reasonable expenses incurred in making or opposing a motion to quash, modify or comply under *Code of Civil Procedure Section 1987.1*, including reasonable attorney fees, when the motion was made or opposed in without

substantial justification (*Code Civ. Proc. § 1987.2(a)*).

[*AND/OR*]

C. Award Proper When Subpoena Was Oppressive. The court has discretion to award reasonable expenses incurred in making a motion to quash or modify, or in opposing a motion to comply under *Code of Civil Procedure Section 1987.1*, including reasonable attorney fees, when the one or more of the requirements of the subpoena was oppressive (*Code Civ. Proc. § 1987.2(a)*).

[2] Comments

[a] Use of Form

This memorandum supports a motion for a discretionary award of costs consisting of reasonable expenses, including reasonable attorney fees, incurred in supporting or opposing a motion to quash, modify, or comply with a subpoena or subpoena duces tecum [*Code Civ. Proc § 1987.2(a)*; *compare Code Civ. Proc. § 1987.2(b)* (mandatory award under specified circumstances), discussed in *§ 218.32*]. This form should be used in combination with §§ 218.20, 218.21, or 218.27. Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms and discussion related to the obtaining of an order quashing or modifying a subpoena pursuant to Code Civ. Proc. § 1987.1, see in California Forms of Pleading and Practice, Ch. 535, *Subpoena* (Matthew Bender).

[c] Related Memoranda

For a memorandum supporting a mandatory award of costs to a person whose personally identifying information is sought, as specified in *Code Civ. Proc. § 1987.2(b)*, see *§ 218.32*. For memoranda relating to deposition subpoenas, see Ch. 83, *Discovery: Depositions* , in this publication. For memoranda relating to the right of privacy, see Ch. 183, *Privacy: State Constitutional Rights* , Ch. 184, *Privacy: Invasion of Privacy* , and Ch. 185, *Privacy: Collection, Dissemination, and Inspection of Information* .

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21-218 California Points & Authorities § 218.32

§ 218.32 Supporting Motion for Mandatory Award of Costs--Person Whose Personally Identifying Information Is Sought In Connection With Action Involving That Person's Free Speech Rights [Code Civ. Proc. § 1987.2(b)]

[1] FORM

[*The following should be combined with a general memorandum in support of a motion to quash or modify a subpoena (see §§ 218.20, 218.21).*]

THE COURT MUST AWARD _____ [*name of moving party*] REASONABLE EXPENSES, INCLUDING REASONABLE ATTORNEY FEES, AGAINST _____ [*name of respondent*] UNDER CODE OF CIVIL PROCEDURE SECTION 1987.2(b) BECAUSE _____ [*name of moving party*] PREVAILED ON HIS/HER MOTION TO _____ [QUASH or MODIFY] THE SUBPOENA, AND THE SUBPOENA (1) WAS ISSUED BY A CALIFORNIA COURT; (2) SOUGHT PERSONALLY IDENTIFYING INFORMATION (AS DEFINED IN *CIVIL CODE SECTION 1798.79.8(B)*) FOR USE IN AN ACTION PENDING IN _____ [ANOTHER _____ (STATE *or* TERRITORY *or* DISTRICT) OF THE UNITED STATES *or* A FOREIGN NATION]; (3) WAS SERVED ON AN INTERNET SERVICE PROVIDER, OR ON THE PROVIDER OF ANOTHER INTERACTIVE COMPUTER SERVICE AS DEFINED IN *47 UNITED STATES CODE SECTION 230(f)(2)*; (4) THE UNDERLYING ACTION ARISES FROM THE MOVING PARTY'S EXERCISE OF FREE SPEECH RIGHTS ON THE INTERNET; AND (5) THE RESPONDENT HAS FAILED TO MAKE A PRIMA FACIE SHOWING OF A CAUSE OF ACTION.

A. Award Proper Under *Code Civ. Proc. § 1987.2(b)*. If a motion is filed under *Code of Civil Procedure Section 1987.1* for an order to quash or modify a subpoena from the state of California for personally identifying information as defined in *Civil Code Section 1798.79*.8(b), for use in an action pending in another state or territory or district of the United States, or in a foreign nation, and that subpoena has been served on any Internet service provider, or on the provider of any other interactive computer service, as defined in *47 United States Code Section 230(f)(2)*, the court must award the amount of the reasonable expenses incurred in making the motion, including reasonable attorney's fees, if the moving party prevails and if the underlying action arises from the moving party's exercise of free speech rights on the Internet, and the respondent has failed to make a prima facie showing of a cause of action (*Code Civ. Proc. § 1987.2(b)*).

[2] Comments

[a] Use of Form

This memorandum supports a motion for an award of costs consisting of reasonable expenses, including reasonable attorney fees, incurred in supporting a motion to quash or modify a subpoena from the state of California for personally identifying information [*see Civ. Code § 1798.79*.8(b) (definition)], for use in an action pending in another state, territory, or district of the United States, or in a foreign nation, when that subpoena has been served on any Internet service provider, or on the provider of any other interactive computer service [*see 47 U.S.C. § 230(f)(2)* (definition) [*Code Civ. Proc § 1987.2(b)*]. The court must award the amount of the reasonable expenses incurred in making the motion, including reasonable attorney's fees, if the moving party prevails, and if the underlying action arises from the moving party's exercise of free speech rights on the Internet, and the respondent has failed to make a prima facie showing of a cause of action [*Code Civ. Proc. § 1987.2(b)*].

This form should be used in combination with the *form in § 218.20* or *§ 218.21*. Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For forms and discussion related to the obtaining of an order quashing or modifying a subpoena pursuant to *Code Civ. Proc. § 1987.1*, see California Forms of Pleading and Practice, Ch. 535, *Subpoena* (Matthew Bender).

[c] Related Memoranda

For a memorandum supporting a discretionary award of costs to a party, witness, consumer, or person from whom personally identifying information has been sought, as specified, under *Code Civ. Proc. § 1987.2(a)*, see *§ 218.31*. For memoranda relating to deposition subpoenas, see Ch. 83, *Discovery: Depositions* . For memoranda relating to the right of privacy, see Ch. 183, *Privacy: State Constitutional Rights* , Ch. 184, *Privacy: Invasion of Privacy* , and Ch. 185, *Privacy: Collection, Dissemination, and Inspection of Information* .

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[Reserved]

§§ 218.33-[Reserved]

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21-218 California Points & Authorities § 218.40

§ 218.40 Opposing Motion for Order Quashing or Modifying Deposition Subpoena Notice [Code Civ. Proc. §§ 2020.010 et seq., 2020.210 et seq.]--Affidavit Showing Good Cause Is Not Required to Be Served With Deposition Subpoena [Code Civ. Proc. §§ 2020.410(c), 2020.510(b)]

[1] FORM

[*This form should be combined with a general memorandum opposing a motion to quash or modify a deposition subpoena notice (see, e.g., § 83.70).*]

IF A DEPOSITION SUBPOENA COMMANDS [_____ ONLY THE PRODUCTION OF BUSINESS RECORDS FOR COPYING *or* THE DEPONENT'S ATTENDANCE AND TESTIMONY AND THE PRODUCTION OF DOCUMENTS AND THINGS], AN AFFIDAVIT SHOWING GOOD CAUSE FOR THE PRODUCTION OF THE _____ [BUSINESS RECORDS *or* DOCUMENTS AND THINGS DESIGNATED] IS NOT REQUIRED.

[*EITHER*]

A. Affidavit Showing Good Cause Is Not Required. If a deposition subpoena commands only the production of business records for copying, an affidavit or declaration showing good cause for the production of the business records is not required (*Code Civ. Proc. § 2020.410(c)*; *see Terry v. SLICO (2009) 175 Cal. App. 4th 352, 355, 95 Cal. Rptr. 3d 900*).

[*OR*]

A. Affidavit Showing Good Cause Is Not Required. If a deposition subpoena commands the attendance and testimony of the deponent, and the production of documents and things, an affidavit or declaration showing good cause for the production of the documents and things designated is not required (*Code Civ. Proc. § 2020.510(b)*; *Terry v. SLICO (2009) 175 Cal. App. 4th 352, 355, 95 Cal. Rptr. 3d 900*).

[*CONTINUE*]

B. General Subpoena Provisions Are Preempted by Civil Discovery Act With Respect to Deposition Subpoenas. The requirement in *Code Civ. Proc §§ 1987.5* and *1985* that a subpoena is invalid unless a copy of the affidavit upon which the subpoena is based is served on the person served with the subpoena is inapplicable to deposition subpoenas because those provisions are preempted by the Civil Discovery Act, specifically *CCP §§ 2020.410(c), 2020.510(b),* which state that such a subpoena need not be accompanied by an affidavit or declaration (*Terry v. SLICO (2009) 175 Cal. App. 4th 352, 358-360, 95 Cal. Rptr. 3d 900*).

[2] Comments

[a] Use of Form

This memorandum is for use in opposition to a motion for an order quashing or modifying a deposition subpoena pursuant to *Code Civ. Proc. § 1987.1(a).* The grounds for the motion are that under the Civil Discovery Act there is no requirement that the subpoena be accompanied by an affidavit or declaration showing good cause for the production of the documents and things designated, and that contrary requirements in the general subpoena provisions of the Code of Civil Procedure are preempted [*see Code Civ. Proc. §§ 2020.410(C), 2020.510(b)*; *Terry v. SLICO (2009) 175 Cal. App. 4th 352, 355, 95 Cal. Rptr. 3d 900* (provisions of *Code Civ. Proc. §§ 1985* and *1987.5* requiring affidavit do not apply to deposition subpoenas)].

This form may be combined with the memorandum opposing a motion for an order staying taking of deposition and quashing the deposition notice contained in § 83.70.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For coverage of deposition subpoenas under *Code Civ. Proc. §§ 2020.010-2020.510*, see California Forms of Pleading and Practice, Ch. 193, *Discovery: Depositions* (Matthew Bender). For forms and discussion relating to a motion for an order pursuant to *Code Civ. Proc. § 2025.410* to stay the taking of a deposition and to quash the deposition notice, and to obtain a monetary sanction for the expenses incurred pursuant to *Code Civ. Proc. §§ 2023.030(a)* and *2020.410*, see California Forms of Pleading and Practice, Ch. 193, *Discovery: Depositions* (Matthew Bender).

[c] Related Memoranda

For memoranda related to deposition subpoenas, see Ch. 83, *Discovery: Depositions* .

[3] Discussion of Authorities

[a] Affidavit Showing Good Cause Is Not Required

Terry v. SLICO *(2009) 175 Cal. App. 4th 352, 95 Cal. Rptr. 3d 900* , is discussed in 218.40[3][b], below.

[b] General Subpoena Provisions Are Preempted by Civil Discovery Act With Respect to Deposition Subpoenas

In ***Terry v. SLICO*** *(2009) 175 Cal. App. 4th 352, 95 Cal. Rptr. 3d 900* , a percipient nonparty witness challenged a

superior court order that imposed sanctions on him for failing to appear at a deposition after being served with a subpoena demanding his testimony and the production of documents. The subpoena was unaccompanied by a supporting affidavit or declaration. The nonparty witness opposed a motion to compel his attendance on the ground that the subpoena served on him was invalid (*175 Cal. App. 4th 352, 355)* .

The court of appeal held that service of the deposition subpoena on the witness was effective despite the absence of a supporting affidavit or declaration, and therefore the trial court did not abuse its discretion in imposing reasonable monetary sanctions for failure to comply with the subpoena (*175 Cal. App. 4th 352, 359)* .

The general provisions of the Code of Civil Procedure dealing with the issuance of subpoenas, *Code Civ. Proc. § 1985 et seq.*, apply to deposition subpoenas only to the extent that those provisions are not modified by provisions in the *nonparty* discovery chapter of the Civil Discovery Act, *Code Civ. Proc. § 2020.010 et seq.* (*175 Cal. App. 4th 352, 356)* . *Code Civ. Proc. § 1987.5* provides that in the case of a subpoena duces tecum requiring appearance and the production of matters and things at the taking of a deposition, the subpoena is not valid unless a copy of the affidavit on which the subpoena was based is attached to the deposition notice served on each party or its attorney. *Code Civ. Proc. § 2020.510(b)*, however, provides that a deposition subpoena commanding the attendance and the testimony of the deponent, and the production of business records, documents, or tangible things, need not be accompanied by an affidavit or declaration showing good cause. Faced with these two contradictory and irreconcilable provisions, the court of appeal held, as a matter of first impression, that *Code Civ. Proc. § 2020.510(b)* controls (*175 Cal. App. 4th 352, 355)* . Treating *Code Civ. Proc. §§ 1985* and *1987.5* as the controlling would be at odds with *Code Civ. Proc. § 2020.030* (providing that general subpoena provisions that include *Code Civ. Proc. §§ 1985* and *1987.5* apply to a deposition subpoena "[e]xcept as modified in this chapter") and with the "fundamental understanding" that the provisions of the Civil Discovery Act prevail, to the extent that its provisions concerning nonparty discovery overlap or conflict with other provisions of more general application (*175 Cal. App. 4th 352, 359)* .

California Points & Authorities

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CHAPTER 220 SUBROGATION

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[a] Use of Form

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[c] Related Points and Authorities

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[3] Discussion of Authorities

[a] When Equitable Subrogation Lies

[b] Liberal Application of Doctrine

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[1] FORM

[2] Comments

[a] Use of Form

[b] Rights of Redeemer of Property From Lien

[c] Related Pleading and Practice Chapters

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[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Subrogation of Payor of Mortgage or Trust Deed to Mortagee's or Beneficiary's Right Against Mortgagor or Trustor

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[2] Comments

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[c] Duty of Principal to Reimburse Surety

[d] Related Pleading and Practice Chapters

[e] Related Points and Authorities

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[3] Discussion of Authorities

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[4] Additional Authorities

[a] Waiver of Subrogation Rights

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[1] FORM

[2] Comments

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[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

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[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[d] Opposing Points and Authorities

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[b] Insurer's Right to Subrogation

[4] Additional Authorities

[a] Insurer's Right to Subrogation

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[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

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[4] Additional Authorities

[a] Subrogation of Indemnitee's Insurer Against Indemnitor

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[1] FORM

[2] Comments

[a] Use of Form

[b] Nature and Extent of Excess Insurer's Rights Against Primary Insurer

[c] Related Pleading and Practice Chapters

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[a] Prior Excess Judgment Is Not Prerequisite to Equitable Subrogation Action Between Insurers

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[a] Prior Excess Judgment Is Not Prerequisite to Equitable Subrogation Action Between Insurers

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[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Cross Complaint by Potential Subrogee for Declaration of Right to Be Indemnified by Third-Party Tortfeasor as Proper

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[1] FORM

[2] Comments

[a] Use of Form

[b] Rights Generally Not Assignable

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

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[3] Discussion of Authorities

[a] Nonassignable Actions as Not Subject to Subrogation in Absence of Statute

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[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Defenses Against Subrogor

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[1] FORM

[2] Comments

[a] Use of Form

[b] When Cross Demand as Money Judgment Barred

[c] When Defense of Payment Barred

[d] Related Pleading and Practice Chapters

[e] Related Points and Authorities

[3] Discussion of Authorities

[a] Right to Setoff in Subrogated Action

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[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Applicable Statute of Limitations

[b] Action for Injury to Real or Personal Property

[c] Action for Personal Injury

[d] Action to Recover Workers' Compensation Benefits Paid

[e] Disability of Minority Tolling Statute of Limitations as Not Subrogated

[4] Additional Authorities

[a] Applicable Statute of Limitations

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[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Insurer Cannot Recover From One Insured Amount Paid to Another Insured Pursuant to Separate Policy

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[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Action Not Timely Filed After Rejection of Claim as Barred

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[1] FORM

[2] Comments

[a] Use of Form

[b] Partial Subrogee or Subrogor

[c] Nature of Objection and Waiver

[d] How to Avoid Defense That Action Has Been Split

[e] Related Pleading and Practice Chapters

[f] Related Points and Authorities

[3] Discussion of Authorities

[a] Right of Action and Cause of Action Distinguished

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[c] Action is Res Judicata

[4] Additional Authorities

[a] Right of Action and Cause of Action Distinguished

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[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Obligor's Liability to Subrogor as Required to Be Alleged and Proved

[b] Recovery in Subrogated Action Prohibited If Subrogor's Liability Not Established

[4] Additional Authorities

[a] Obligor's Liability to Subrogor as Required to Be Alleged and Proved

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[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Subrogation as Derivative Right

[b] Subrogee as Limited to Recovering No More Than Amount Recoverable by Subrogor

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[1] FORM

[2] Comments

[a] Use of Form

[b] Example

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Double Recovery or Liability Prohibited

[b] Amount Paid to Subrogated Insurer May Be Offset Against Subrogor's Claim

[c] Setoff of Amount of Workers' Compensation Lien Assigned to Obligor

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[2] Comments

[a] Use of Form

[b] Illustrations of Application of Doctrine of Comparative Negligence

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Tortfeasor's Right to Contest Liability and Causation of Injuries.

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[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Obligor's Right to Seek Affirmative Relief

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[1] FORM

[2] Comments

[a] Use of Form

[b] Single Cause of Action Against Defendant

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Complaint in Intervention Is Subject to Mandatory-Dismissal Period Applicable to Original Complaint if Same Causes of Action Asserted

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[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Prerequisites for Equitable Subrogation

[4] Additional Authorities

[a] Prerequisites for Equitable Subrogation

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[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Payment as Required to Be Alleged and Proved

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[1] FORM

[2] Comments

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[c] Related Points and Authorities

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[a] Inapplicability of Doctrine of Subrogation to Mere Volunteer

[4] Additional Authorities

[a] Excess Insurer Barred From Maintaining Action Against Primary Insurer

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[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Subrogation Not Available if Inequitable

[b] When Surety or Insurer May Recover From Third Person

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[d] Burden of Proof and Imputed Negligence

[e] Subrogation as Not Enforced When Equities Are Equal or Rights Are Not Clear

[f] Effect of Formal Assignment of Insured's Claim

[4] Additional Authorities

[a] Subrogation as Not Enforced When Equities Are Equal or Rights Are Not Clear

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[2] Comments

[a] Use of Form

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[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

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[3] Discussion of Authorities

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[b] Waiver of Subrogation Rights

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[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Kinds of Subrogation

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[d] Inapplicability of Legal Subrogation to Override Insurance Policy

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[a] Use of Form

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[c] Related Points and Authorities

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[2] Comments

[a] Use of Form

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[a] Insurance Clause Requiring Reimbursement of Medical Payments From Proceeds of Settlement or Judgment as Valid and Enforceable

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[c] Cross Claim by Obligor

[d] Uninsured-Motorist Limitations Period Constitutional

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[a] Purpose of Extended Period of Limitation

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[a] Purpose of Extended Period of Limitations

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[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

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[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Applicable Statute of Limitation

[b] When Subrogated Action to Recover Uninsured Motorist Benefits Paid Accrues

[c] Claim Filed Within Six Months After Insurer's Subrogated Action Accrued as Timely

[d] Liability of Public Entity

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[2] Comments

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[c] Related Points and Authorities

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[b] Claim-Presentment Requirements Liberally Construed

[c] Failure to Plead Compliance With Claims Statutes Can Be Cured by Amendment to Complaint

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[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Intervention by Workers' Compensation Insurer Subrogee Permissible When Subrogee Has Not Filed Claim

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[a] Intervention by Workers' Compensation Insurer Subrogee Permissible When Subrogee Has Not Filed Claim

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[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

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[a] Lab. Code § 3852 as Authorizing Action for Indemnity

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[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

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[a] Rights of Insurer Should Be Determined in Action Against Tortfeasors

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[c] Payment on Surety Bond Creates Assignment by Operation of Law

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22-220 California Points & Authorities § 220.01

§ 220.01 Scope of Chapter

This chapter contains points and authorities supporting and opposing various contentions with respect to subrogation. Included are points and authorities supporting [*see §§ 220.20 -220.27*] and opposing [*see §§ 220.41 -220.47*] contentions by a subrogee or obligor, respectively, that subrogation lies. It also includes points and authorities supporting [*see § 220.28*] and opposing [*see §§ 220.49, 220.50*] contentions by the obligor and subrogee, respectively, that the action is for injury to the person and hence not subject to subrogation. Finally, it includes points and authorities supporting [*see §§ 220.29 -220.40, 220.48*] and opposing [*see §§ 220.51 -220.57*] contentions by the obligor and subrogee, respectively, that the subrogated action is subject to a specified defense.

For a discussion of how to write memoranda of points and authorities or trial and appellate briefs, and for a sample of a completed memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawThird PartiesSubrogationWorkers' Compensation & SSDIThird Party ActionsSubrogation

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22-220 California Points & Authorities § 220.02

§ 220.02 Governing Law

Subrogation is governed by a variety of miscellaneous statutes and by case law.

Miscellaneous statutes governing subrogation include *Bus. & Prof. Code § 10479* (subrogation of Real Estate Commissioner to rights of judgment creditor for payments made from Real Estate Fund for education, research, and recovery); *Civ. Code §§ 2848, 2849* (rights of surety on satisfying principal's obligation); *Civ. Code § 2903* (subrogation of redeemer of property from lien to all benefits of lien); *Civ. Code § 2904* (subrogation of junior lienor redeeming property from superior lien); *Com. Code § 4407* (subrogation of payor bank on improper payment of item over stop payment order); *Corp. Code § 316(f)* (subrogation of corporate director liable to corporation under *Corp. Code § 316*, relating to illegal distributions to shareholders, loans, or guaranties, to rights of corporation against shareholders who received illegal distribution or person who received illegal loan or guaranty); *Educ. Code §§ 24500-24505* (subrogation of State Teachers' Retirement System to recover from tortfeasor amounts paid as disability or family allowance for injury or death of covered member); *Gov. Code § 20250 et seq.* (subrogation of Board of Administration of California's Public Employees' Retirement System to recover from tortfeasor portion of benefits payable for injury or death of covered member); *Gov. Code §§ 31820-31823* (subrogation of county retirement association to recover from tortfeasor portion of benefits paid for injury or death of covered member); *Harb. & Nav. Code § 661(d)* (subrogation of vessel owner to rights of person injured or whose property has been injured against vessel operator); *Ins. Code § 1063.2* (subrogation of California Insurance Guarantee Association with respect to payment or discharge of covered claims); *Ins. Code § 1996* (subrogation of marine insurer to insured's right to contribution); *Ins. Code § 2071* (Standard Form Fire Insurance Policy; subrogation of fire insurer to insured's right of recovery against person who caused loss); *Ins. Code § 11580.2(g)* (subrogation of liability insurer to insured's right against uninsured motorist to recover amount of payment made by it to insured under uninsured motorist coverage); *Ins. Code § 11662* (subrogation of workers' compensation insurer to rights of employer to recover losses paid); *Ins. Code § 11871* (subrogation of State Compensation Insurance Fund to rights of state agencies); *Lab. Code §§ 3850-3864* (subrogation of employer or employer's insurer against tortfeasor for payments made under Workers' Compensation Law); and *Veh. Code § 17153* (subrogation of vehicle owner, owner's bailee, or decedent's personal representative to rights of person injured or whose property has been injured against negligent operator of vehicle).

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesCauses of ActionGeneral OverviewCivil ProcedureRemediesJudgment LiensGeneral OverviewInsurance LawClaims & ContractsSubrogationGeneral OverviewPensions & Benefits LawGovernmental EmployeesGeneral OverviewWorkers' Compensation & SSDIThird Party ActionsSubrogation

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22-220 California Points & Authorities § 220.03

§ 220.03 Subrogation Defined

Subrogation is the substitution of one person (the subrogee) who by reason of some obligation or to preserve an interest has paid a creditor (the subrogor) a claim for which another person (the obligor) is primarily liable. Application of the doctrine enables the subrogee to recover from the obligor the amount of the claim paid to the subrogor [*see Offer v. Superior Court (1924) 194 Cal. 114, 118, 228 P. 11* ; *Redington v. Cornwell (1891) 90 Cal. 49, 58, 27 P. 40* ; *Crowley Maritime Corp. v. Boston Old Colony Ins. Co. (2008) 158 Cal. App. 4th 1061, 1068, 70 Cal. Rptr. 3d 605* (insurance context); *Hartford Cas. Ins. Co. v. Mt. Hawley Ins. Co. (2004) 123 Cal. App. 4th 278, 287, 20 Cal. Rptr. 3d 128* ; *Ferraro v. Southern Cal. Gas Co. (1980) 102 Cal. App. 3d 33, 47, 162 Cal. Rptr. 238]* . Subrogation is broadly defined as the substitution of one person in the place of another with reference to a lawful claim or right. It is a substitution of one person in place of another with reference to a lawful claim, demand or right, so that the person substituted succeeds to the rights of the other in relation to a debt or claim, and its rights remedies, or securities [*State Bar of Cal. v. Statile (2008) 168 Cal. App. 4th 650, 662-663, 86 Cal. Rptr. 3d 72* (regarding statutory rights of subrogation)].

Legal Topics:

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

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22-220 California Points & Authorities § 220.04

§ 220.04 Kinds of Subrogation

Subrogation has been said to be of two sorts, "legal" (or equitable) and "conventional" (or contractual). Legal subrogation has its source in equity and arises by operation of law. Conventional subrogation arises by the act of the parties and rests in contract [*Fifield Manor v. Finston (1960) 54 Cal. 2d 632, 638, 7 Cal. Rptr. 377, 354 P.2d 1073* ; *Knight v. Alefosio (1984) 158 Cal. App. 3d 716, 723, 205 Cal. Rptr. 42]* .

Subrogation has also been classified as "common law subrogation" or "statutory subrogation" [*see Commercial Union Assurance Co. v. City of San Jose (1982) 127 Cal. App. 3d 730, 734, 736-737, 179 Cal. Rptr. 814* ; *Phoenix of Hartford Ins. Cos. v. Colony Kitchens (1976) 57 Cal. App. 3d 140, 144-145, 128 Cal. Rptr. 893* ; *see also County of San Diego v. Sanfax Corp. (1977) 19 Cal. 3d 862, 875-876 n.7, 140 Cal. Rptr. 638, 568 P.2d 363]* . Common law subrogation is nonstatutory, or merely confirmed by statute, and arises from common law equitable principles. Statutory subrogation is allowed only when authorized by statute.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawThird PartiesSubrogationGovernmentsCourtsCommon Law

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§ 220.05 Small Claims Courts

Small claims courts lack jurisdiction of actions in subrogation by reason of the fact that subrogation operates as an equitable assignment and former Code Civ. Proc. § 117.5 (*now see Code Civ. Proc. § 116.420*) provides that no claim shall be filed or prosecuted in the small claims court by the assignee of the claim [*Allianz Ins. Co. v. Municipal Court (1981) 126 Cal. App. 3d 1043, 1046, 179 Cal. Rptr. 334]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawThird PartiesSubrogationGovernmentsCourtsSmall Claims Courts

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22-220 California Points & Authorities § 220.06

§ 220.06 Related Pleading and Practice Chapters

For a discussion and forms of complaints and affirmative defenses for use in actions in subrogation, see California Forms of Pleading and Practice, Ch. 536, *Subrogation* (Matthew Bender).

For discussion or forms for use in specific actions involving subrogation, see the following chapters in California Forms of Pleading and Practice (Matthew Bender):

- Ch. 88, *Automobiles: Automobile Insurance*.
- Ch. 100, *Boats and Boating*.
- Ch. 103, *Brokers*.
- Ch. 104, *Building Contracts*.
- Ch. 160, *Corporations*.
- Ch. 246, *Emergency Vehicles*.
- Ch. 300, *Indemnity and Contribution*.
- Ch. 342, *Liens and Wage Preferences*.
- Ch. 344, *Life Estates and Remainders*.
- Ch. 361, *Mechanics' Liens*.
- Ch. 415, *Physicians: Medical Malpractice*.

- Ch. 464, *Public Entities and Officers: California Tort Claims Act*.
- Ch. 465, *Public Entities and Officers: Civil Claims Arising from Criminal Acts*.
- Ch. 467, *Public Entities and Officers: Enforcement of Judgments Against Public Entities*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawThird PartiesSubrogationReal Property LawConstruction LawContractsTortsMalpractice & Professional LiabilityHealthcare ProvidersTortsProcedureMultiple DefendantsContributionGeneral OverviewTortsProcedureMultiple DefendantsIndemnityGeneral Overview

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22-220 California Points & Authorities § 220.07

§ 220.07 Related Points and Authorities Chapters

For a memorandum of points and authorities supporting the contention that an omitted partial assignee or subrogee should be joined as a party to the action, see Ch. 168, *Parties* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderGeneral OverviewContracts LawPerformanceAssignmentGeneral OverviewContracts LawThird PartiesSubrogation

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[Reserved]

§§ 220.08[Reserved]

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22-220 California Points & Authorities § 220.20

§ 220.20 Supporting Contention That Subrogation Lies--Doctrine of Equitable Subrogation Is Liberally Applied to Promote Justice and Actual Loss to Subrogor Is Not Required

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THIS IS A PROPER CASE FOR APPLICATION OF THE DOCTRINE OF EQUITABLE SUBROGATION BECAUSE THE DOCTRINE APPLIES WHENEVER A PERSON, NOT ACTING AS A MERE VOLUNTEER OR INTRUDER, PAYS A DEBT FOR WHICH ANOTHER IS PRIMARILY LIABLE, AND WHICH IN EQUITY AND GOOD CONSCIENCE SHOULD HAVE BEEN DISCHARGED BY THE LATTER; THE DOCTRINE IS LIBERALLY APPLIED TO PROMOTE JUSTICE. [ACTUAL LOSS TO THE SUBROGOR IS NOT REQUIRED].

A. When Equitable Subrogation Lies. The doctrine of equitable subrogation includes every instance in which one person, not acting as a mere volunteer or intruder, pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter (*Meyer Koulish Co. v. Cannon (1963) 213 Cal. App. 2d 419, 424, 28 Cal. Rptr. 757* ; *Estate of Kemmerrer (1952) 114 Cal. App. 2d 810, 814, 251 P.2d 345*).

B. Liberal Application of Doctrine. The doctrine of equitable subrogation is liberally applied to promote justice (*Meyer Koulish Co. v. Cannon (1963) 213 Cal. App. 2d 419, 424, 28 Cal. Rptr. 757*).

[*Optional*] **C. Actual Loss to Subrogor Not Required.** Actual loss to a subrogor is not a prerequisite to equitable subrogation; all that is required is that the subrogor would have suffered loss had not the subrogee discharged the liability or paid the loss (*Northwestern Mut. Ins. Co. v. Farmers' Ins. Group (1978) 76 Cal. App. 3d 1031, 1044, 143 Cal. Rptr. 415*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the doctrine of equitable subrogation is

liberally applied to promote justice. The argument may be used in any proceeding in which it is contended that subrogation lies.

These points and authorities may be used alone or combined with a memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue. For example, they may be combined with a memorandum of points and authorities in support of a motion for summary judgment by plaintiff in a subrogated action when it can be indisputably shown that there is no defense to the action, or in support of a motion for a new trial if the trial court erroneously ruled that subrogation does not lie [*see Code Civ. Proc. §§ 437c* (summary judgment), 657(6), (7) (new trial)]. They may also be combined with a memorandum of points and authorities in opposition to: (1) a general demurrer to a complaint in subrogation [*see Code Civ. Proc. § 430.10(e)*]; (2) a nonstatutory motion by defendant in a subrogated action for judgment on the pleadings; or (3) a motion by defendant for summary judgment in a subrogated action [*see Code Civ. Proc. § 437c*]. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, if the contention is made in support of or in opposition to a motion, other than a motion for judgment on the pleadings or new trial, counsel should present the facts showing subrogation lies and that allowing subrogation will promote justice in the case. The facts would normally be presented in one or more supporting affidavits or declarations under penalty of perjury to which reference may be made in this memorandum [*see Code Civ. Proc. §§ 2009, 2015.5*; *see also Code Civ. Proc. § 437c(b)*]. If the contention is made in opposition to a demurrer or motion for judgment on the pleadings, counsel should show that the complaint sufficiently alleges the facts. For the papers on which a motion for new trial may be based, see *Code Civ. Proc. § 658*.

[b] Related Pleading and Practice Chapters

For forms of complaints in subrogation and for indemnity, see California Forms of Pleading and Practice, Ch. 300, *Indemnity and Contribution* , and Ch. 536, *Subrogation* (Matthew Bender). For forms relating to demurrers and motions for judgment on the pleadings, motions for new trial, and motions for summary judgment, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , Ch. 371, *Motions After Trial* , and Ch. 537, *Summary Judgment* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities generally supporting and opposing a demurrer to a complaint or a motion for judgment on the pleadings, a motion for new trial, or a motion for summary judgment, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* , Ch. 155, *Motions After Trial* , and Ch. 221, *Summary Judgments* .

[d] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 220.41 -220.44* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] When Equitable Subrogation Lies

Meyer Koulish Co. v. Cannon *(1963) 213 Cal. App. 2d 419, 28 Cal. Rptr. 757* , was an action in subrogation by an insurer in the names of its insureds against a partnership and one of the partners for damages for breach of contract. Plaintiff insureds had shipped jewelry to defendants on consignment pursuant to consignment memoranda which placed the risk of loss from all hazards on defendants. While defendant partner was on a sales trip, his trunk containing the jewelry was stolen from the baggage room of a railway station while the trunk was checked on the railroad claim ticket.

Plaintiffs' motion for summary judgment was granted, and defendants appealed, contending that neither an insurance company nor a reimbursed insured can recover against anyone other than a wrongdoer who caused the loss.

Holding the insurer was properly subrogated to the claims of its insureds against defendants, the court of appeal affirmed the summary judgment as to one plaintiff and modified it as to the other to reduce the amount recovered to that prayed for in the complaint. The court said the principle on which the right of subrogation is founded applies in all cases in which one person, not a volunteer, pays a debt for which another is primarily answerable, and which, in equity and good conscience, should have been discharged by the latter, and that the principle is applied in favor of those who are legally bound to pay debts of others, such as sureties, guarantors, and insurers (*213 Cal. App. 2d 419, 423-424)* . The court said that this result is not affected by either the fact the obligor was not guilty of any negligence or wrongdoing or the fact the right involved was a contractual one, rather than a right founded in tort (*213 Cal. App. 2d 419, 425)* .

Estate of Kemmerrer *(1952) 114 Cal. App. 2d 810, 251 P.2d 345* , was an appeal from a probate order denying a widow's petition that the decedent's entire estate be set aside to her. An order setting aside the estate to the widow was and is authorized by Prob. Code § 645 (for estates of decedents dying on or after July 1, 1987, *see Prob. Code § 6609*) with respect to estates that do not exceed a specified amount after payment of the expenses of the last illness, funeral charges, and the expenses of administration. Decedent died testate, survived by his widow, three children, and his mother. He disinherited his widow and did not provide for his children, stating they were amply provided for by his life insurance. By his will, he left his estate to a friend. The estate consisted of $400 in cash, a car worth $200, and accounts receivable totaling $1,441.73. Decedent's mother paid $335 toward the funeral expenses and filed a creditor's claim. The friend also filed a claim for $816.75 paid by her for hospital and nursing services during decedent's last illness. Both claims were allowed and approved. The executor filed a petition for instructions and first account, requesting permission to pay attorney fees and the claims for funeral and last illness expenses on a pro rata basis. The widow filed objections, asserting the payments made by the friend and mother were voluntary, and requested that the estate be set aside to her. The trial court approved the executor's accounts, overruled the widow's objections, and denied her petition to set aside the estate. The widow appealed, contending that Prob. Code § 645 (for estates of decedents dying on or after July 1, 1987, *see Prob. Code § 6609*), requiring that funeral and last illness expenses be paid before an estate may be assigned to the widow or children, contains no requirement of reimbursement to those who have voluntarily paid the expenses as a prerequisite to the assignment.

The court of appeal affirmed. The court held that neither the mother nor the friend was a volunteer or intermeddler or acting officiously, within the intent and purpose of the equitable policies governing subrogation, and said it perceived no difficulty in applying the doctrine of subrogation to their claims (*114 Cal. App. 2d 810, 813-814)* . The court said as now applied, the doctrine of equitable subrogation is broad enough to include every instance in which one person, not acting as a mere volunteer or intruder, pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter (*114 Cal. App. 2d 810, 814)* .

[b] Liberal Application of Doctrine

The facts and procedural background of ***Meyer Koulish Co. v. Cannon*** *(1963) 213 Cal. App. 2d 419, 28 Cal. Rptr. 757* , are discussed in *§ 220.20[3][a]*. In affirming the summary judgment for one plaintiff and modifying it as to the other plaintiff, the court said the equitable doctrine of subrogation will be liberally applied to promote justice (*213 Cal. App. 2d 419, 424)* .

[c] Actual Loss to Subrogor Not Required

Northwestern Mut. Ins. Co. v. Farmers' Ins. Group *(1978) 76 Cal. App. 3d 1031, 143 Cal. Rptr. 415* , was a subrogated action by one insurer against another insurer to recover the loss resulting from defendant's alleged bad faith failure to accept reasonable settlement offers within their policy limits. Plaintiff's insured was involved in a rear-end accident while driving a pickup truck owned by his father who was defendant's insured. Plaintiff's insured, as a

permissive user of the truck, was also insured under an omnibus clause in defendant's policy. Defendant's policy provided liability limits in the amount of $10,000 for injury or death of one person and $20,000 for injury or death arising out of one accident. Plaintiff's policy provided liability limits in the amounts of $25,000/$50,000. Under California law, defendant was the primary insurer and plaintiff the excess insurer [*see Ins. Code § 11580.9(d)*].

At the time of the accident, the occupants of the pickup were plaintiff's insured (who was an adult son of defendant's insured), an adult brother of plaintiff's insured, the brother's minor son, and a minor friend of the son. All the occupants were thrown from the truck and killed. The estates of the two minors each filed a wrongful death action against the truck owner and the estate of plaintiff's insured and estate of the brother (which was subsequently dismissed from the cases after its motion for nonsuit was granted). Defendant, as the primary insurer, undertook the defense of all the defendants in those actions. The offers of plaintiffs in the wrongful death cases to settle each case for $3,500 apparently did not reach defendant's file; their subsequent offers to settle each case for $4,500 was rejected by defendant, who offered $1,000 in each case on a take-it-or-leave-it basis. The wrongful death cases were consolidated for trial and the jury returned verdicts against the estate of plaintiff's insured in the amount of $30,000 for one plaintiff and $20,000 for the other. Judgments were entered accordingly. Defendant paid $10,000 on each judgment. Plaintiff paid the balance of each of the judgments, then sued defendant. Judgment in the subrogated action was for plaintiff and defendant appealed.

The court of appeal affirmed. The court held that a permissive user of an automobile who is insured under the omnibus clause of the vehicle owner's liability insurance policy has a right of action against the owner's insurer for its bad faith refusal to effect settlement within policy limits (*76 Cal. App. 3d 1031, 1036, 1041-1044)* . The cause of action is assignable (*76 Cal. App. 3d 1031, 1041)* . In addition, the permissive user's automobile liability insurer, whose coverage constitutes excess insurance, may be subrogated to the permissive user's right of action and recover from the owner's insurer, whose coverage constitutes the primary insurance, the amount the excess insurer was required to pay on a judgment against the permissive user as a result of the primary insurer's bad faith refusal to settle (*76 Cal. App. 3d 1031, 1036, 1044-1053)* . In response to defendant's contention that the decedent's estate had no right of action against it for bad faith refusal to settle because there was no judgment against the estate in excess of all applicable insurance and the estate was never threatened with or suffered any loss, the court said it is not a prerequisite to equitable subrogation that the subrogor suffered actual loss; it is required only that the subrogor would have suffered loss had the subrogee not discharged the liability or paid the loss (*76 Cal. App. 3d 1031, 1044)* .

[4] Additional Authorities

[a] When Equitable Subrogation Lies

Caito v. United Cal. Bank (1978) 20 Cal. 3d 694, 144 Cal. Rptr. 751, 576 P.2d 466 , is discussed in *§ 220.41[3][a]*]. The Supreme Court, although holding there was no right to subrogation in the case before it, said that the doctrine of equitable subrogation is broad enough to include every instance in which one person, not acting as a mere volunteer or intruder, pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter (*20 Cal. 3d 694, 704)* .

St. Paul Fire & Marine Ins. Co. v. Murray Plumbing & Heating Corp. (1976) 65 Cal. App. 3d 66, 135 Cal. Rptr. 120 , is discussed in *§ 220.45[3][a]*]. The court of appeal, although holding that there was no right to subrogation in the case before it, said that generally the right of subrogation applies in all cases in which a person, not a volunteer, pays a debt for which another is primarily answerable, and which, in equity and good conscience, should have been discharged by the latter (*65 Cal. App. 3d 66, 72)* .

[b] Liberal Application of Doctrine

St. Paul Fire & Marine Ins. Co. v. Murray Plumbing & Heating Corp. (1976) 65 Cal. App. 3d 66, 135 Cal. Rptr. 120 , is discussed in *§ 220.45[3][a]*]. The court of appeal, although holding that there was no right to subrogation in the case

before it, said the equitable doctrine of subrogation is to be liberally applied to promote justice (*65 Cal. App. 3d 66, 72)* .

[c] Actual Loss to Subrogor Not Required

Troost v. Estate of DeBoer (1984) 155 Cal. App. 3d 289, 202 Cal. Rptr. 47 , is discussed in *§ 220.24[3][a]*]. The court of appeal quoted the rule that it is not a prerequisite to equitable subrogation that the subrogor have suffered actual loss; it is required only that the subrogor would have suffered loss had the subrogee not discharged the liability or paid the loss (*155 Cal. App. 3d 289, 294-295)* .

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22-220 California Points & Authorities § 220.21

§ 220.21 Supporting Contention That Subrogation Lies--Payor of Note Secured by Mortgage or Trust Deed at Instance of Mortgagor or Trustor Is Subrogated to Mortgagee's or Beneficiary's Right Against Mortgagor or Trustor

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE DOCTRINE OF EQUITABLE SUBROGATION APPLIES IN THIS CASE BECAUSE PLAINTIFF _____ [PAID OFF *or* ADVANCED MONEY FOR THE PAYMENT OF] A NOTE SECURED BY A _____ [MORTGAGE *or* TRUST DEED] AT THE REQUEST OF THE _____ [MORTGAGOR *or* TRUSTOR] WITH THE UNDERSTANDING THAT HE/SHE WAS TO _____ [HAVE A FIRST LIEN ON THE PROPERTY AS SECURITY FOR REPAYMENT *or* BE PAID OUT OF THE PROCEEDS OF THE SUBSEQUENT SALE OF THE PROPERTY].

Subrogation of Payor of Mortgage or Trust Deed to Mortagee's or Beneficiary's Right Against Mortgagor or Trustor. A person who, having no previous interest and being under no obligation, pays off a note secured by a mortgage or trust deed, or advances money for its payment, at the instance of a debtor party and for his or her benefit, is subrogated to the right of the mortagee or beneficiary against the mortgagor or trustor (*see Simon Newman Co. v. Fink (1928) 206 Cal. 143, 146, 273 P. 565* (chattel mortgage); *Grant v. De Otte (1954) 122 Cal. App. 2d 724, 729, 265 P.2d 952* (trust deed)).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the doctrine of equitable subrogation applies to a person who, having no previous interest, and being under no obligation, pays off a note secured by a mortgage or trust deed, or advances money for its payment at the request of a debtor party and for his or her benefit.

These points and authorities may be used alone or combined with a memorandum of points and authorities relating to

the specific procedural context in which counsel wishes to raise the issue. For example, they may be combined with a memorandum of points and authorities in support of a motion for summary judgment by plaintiff in a subrogated action when it can be indisputably shown that there is no defense to the action, or in support of a motion for a new trial if the trial court erroneously ruled that subrogation does not lie [*see Code Civ. Proc. §§ 437c* (summary judgment), 657(6), (7) (new trial)]. They may also be combined with a memorandum of points and authorities in opposition to: (1) a general demurrer to a complaint in subrogation [*see Code Civ. Proc. § 430.10(e)*]; (2) a nonstatutory motion by defendant in a subrogated action for judgment on the pleadings; or (3) a motion by defendant for summary judgment in a subrogated action [*see Code Civ. Proc. § 437c*]. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, if the contention is made in support of or in opposition to a motion, other than a motion for judgment on the pleadings or new trial, counsel should present the facts establishing that the plaintiff, in making payment, did not act as a volunteer and that subrogation lies. The facts would normally be presented in one or more supporting affidavits or declarations under penalty of perjury to which reference may be made in this memorandum [*see Code Civ. Proc. §§ 2009, 2015.5*; *see also Code Civ. Proc. § 437c(b)*]. If the contention is made in opposition to a demurrer or motion for judgment on the pleadings, counsel should show that the complaint sufficiently alleges the facts. For the papers on which a motion for new trial may be based, see *Code Civ. Proc. § 658*.

[b] Rights of Redeemer of Property From Lien

A closely analogous problem is the right of a person to redeem property from a lien and to be subrogated to the benefits of the lien. Statute provides that every person having an interest in property subject to a lien has the right to redeem it from the lien at any time after the claim is due and before his or her right of redemption is foreclosed and, by such redemption, becomes subrogated to all the benefits of the lien as against all owners of other interests in the property, except insofar as he or she was bound to make redemption for their benefit [*Civ. Code § 2903*]. Statute further provides that one who has a lien inferior to another on the same property has a right (1) to redeem the property in the same manner as its owner might from the superior lien, and (2) to be subrogated to all the benefits of the superior lien, when necessary for the protection of his or her interests, on satisfying the claim secured thereby [*Civ. Code § 2904*; see *Riley v. Turpin (1956) 47 Cal. 2d 152, 156-157, 301 P.2d 834* ; *Stein v. Simpson (1951) 37 Cal. 2d 79, 83-84, 230 P.2d 816]* .

[c] Related Pleading and Practice Chapters

For forms of complaints in subrogation and for indemnity, see California Forms of Pleading and Practice, Ch. 300, *Indemnity and Contribution* , and Ch. 536, *Subrogation* (Matthew Bender). For forms relating to demurrers and motions for judgment on the pleadings, motions for new trial, and motions for summary judgment, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , Ch. 371, *Motions After Trial* , and Ch. 537, *Summary Judgment* (Matthew Bender).

[d] Related Points and Authorities

For memoranda of points and authorities generally supporting and opposing a demurrer to a complaint or a motion for judgment on the pleadings, a motion for new trial, or a motion for summary judgment, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* , Ch. 155, *Motions After Trial* , and Ch. 221, *Summary Judgments* .

[e] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 220.41 -220.44* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Subrogation of Payor of Mortgage or Trust Deed to Mortagee's or Beneficiary's Right Against Mortgagor or Trustor

Simon Newman Co. v. Fink *(1928) 206 Cal. 143, 273 P. 565* , was an action by a lender against a borrower, a bank, and the bank's cashier to revive and foreclose a first mortgage on personal property. The borrower had given the bank the mortgage to secure payment of two promissory notes aggregating $2,400. The bank's cashier handled the loan transactions. Subsequently, the borrower executed and delivered personally to the bank's cashier a note for $2,500 and a mortgage covering the same personal property. Both mortgages were recorded. Later, the borrower arranged with plaintiff for another loan. With the bank cashier's knowledge, it was agreed that with the funds borrowed from plaintiff the borrower would pay off the note and mortgage to the bank and give plaintiff a new mortgage on the same personal property. During the negotiations, plaintiff requested of the bank's cashier a report of how the borrower "stood." The cashier sent plaintiff a copy of the chattel mortgage and a statement that the amount due the bank was $2,400 plus interest. He also wrote that he, personally, held two notes from the borrower, one for $400 plus interest and one for $325 plus interest, which were unsecured. No mention was made of the $2500 note and the mortgage given to secure it. Plaintiff replied by letter requesting the cashier to prepare a release of the chattel mortgage held by the bank and stating it was not concerned with the borrower's indebtedness to the cashier personally and would not pay it. Plaintiff paid the borrower's debt to the bank and recorded both the release of the first mortgage and the mortgage given plaintiff by the borrower to secure the amount of his indebtedness to it. Evidence of the $2,500 note to the cashier and mortgage given to secure it was introduced at trial. The borrower testified he did not know he had given the note and mortgage to the cashier personally but believed he was dealing with him as an officer of the bank and that the second note and mortgage was a renewal of the first. Judgment was for plaintiff, and defendants appealed.

The Supreme Court affirmed. The Court said the general rule is that one who advances money to pay off an encumbrance on realty at the instance of either the owner of the property or the holder of the incumbrance, either on the express understanding, or under circumstances from which an understanding will be implied, that the advance made is to be secured by a first lien on the property, is not a mere volunteer. In the event the new security is for any reason not a first lien on the property, the holder of the new security, if not chargeable with culpable and inexcusable neglect, will be subrogated to the rights of the prior encumbrancer under the security held by the latter, unless the superior or equal equities of others would be prejudiced by it, and to this end equity will set aside a cancellation of the security, and revive it for the benefit of the holder of the new security (*206 Cal. 143, 146)* . The Court held the rule applies to mortgages on personal property as well as to mortgages on real property (*206 Cal. 143, 145, 147)* .

Grant v. De Otte *(1954) 122 Cal. App. 2d 724, 265 P.2d 952* , was an action by a deceased attorney's executor for equitable subrogation of a claimed lien to a lien of a trust deed, or in the alternative to declare an equitable lien on the proceeds of the sale of real property covered by the trust deed. The trust deed had been executed by a husband and wife to secure payment of a promissory note. The husband subsequently died and the wife was charged with his murder. Plaintiff's deceased was employed to defend her, and she was acquitted. She was unable to pay the attorney's fees and orally agreed to sell the property and pay plaintiff's deceased from the proceeds. She employed plaintiff's deceased to assist her in selling the property. He listed the property with real estate agents and spent a substantial amount of his own money advertising the property but was unable to effect a sale. During this period the wife was unable to pay the monthly installments of principal and interest on the note and trust deed and defaulted; she was also unable financially to keep up the property as required by the trust deed. She asked plaintiff's deceased to make the necessary payments and he did so in order to prevent the loss of the money owed him for fees that would result from the foreclosure and in reliance on the wife's promise to repay him from the proceeds of the sale. The wife subsequently died and her executor requested plaintiff's deceased to continue the former payments since the estate had no assets. Plaintiff's deceased continued to make the payments until his death. The note and trust deed then became delinquent and the trustee gave notice of default and sale. At the request of defendant executor, plaintiff executor purchased the trust deed and note so the property could be sold and pay preferred claims against the estate of defendant's deceased. The property was

subsequently sold. Since the present action was a cloud on the title, it was stipulated by plaintiff and defendant that on payment to plaintiff of the principal and interest accrued on the trust deed plaintiff would release his trust deed lien, that $9,500 of the proceeds of the sale would be impounded by the court until final judgment, and that this sum would constitute the only fund or property of the estate of defendant's deceased to which resort might be had to satisfy any judgment obtained. The complaint prayed that the $9,500 be declared subject to the lien of the trust deed in lieu of the real property formerly subjected to it, that plaintiff be subrogated to the rights of the trustee with respect to the payments made by plaintiff's deceased plus interest, and that the lien of the trust deed be revived for that purpose. Defendant's demurrer to the complaint was sustained without leave to amend and plaintiff appealed from the judgment of dismissal.

The court of appeal reversed. The court held the complaint stated a cause of action for the imposition of an equitable lien. The court stated that the doctrine of equitable subrogation applies to one who, having no previous interest and being under no obligation, pays off a mortgage, or advances money for its payment, at the instance of a debtor party and for his or her benefit; such a person is in no true sense a mere stranger and volunteer and, therefore, may be subrogated to the right of the mortagee against the mortgagor. The court added that it is a general rule that one who, acting in a representative capacity, satisfies obligations for the benefit of his or her principal, is subrogated to the rights of the creditor against the principal (*122 Cal. App. 2d 724, 729)* .

[4] Additional Authorities

[a] Subrogation of Payor of Mortgage or Trust Deed to Mortagee's or Beneficiary's Right Against Mortgagor or Trustor

Katsivalis v. Serrano Reconveyance Co. (1977) 70 Cal. App. 3d 200, 138 Cal. Rptr. 620 , was an action by a widow against a lender to cancel a promissory note that had been executed, together with a trust deed, by her deceased husband for himself individually, and for her as attorney in fact pursuant to a power of attorney previously executed by her, in order to refinance two preexisting obligations secured by property held by the husband and widow in joint tenancy. The court of appeal reversed the trial court's judgment that imposed an equitable lien on the property in favor of defendant measured by the terms of the refinancing trust deed. The court of appeal held that imposition of an equitable lien in the amount of the new loan was error, but that the lender was entitled to relief on the general principles stated in *Simon Newman Co. v. Fink (1928) 206 Cal. 143, 273 P. 565* [*see § 220.21[3][a]*]. The general rule applies in situations involving both a fraud perpetrated on the new security holder or involving a mistake of fact (*70 Cal. App. 3d 200, 210-211)* . That is, the court held the lender was equitably subrogated to the rights of the former lenders whose loans it had discharged. The court instructed the trial court to determine the amount for which the lender could properly claim a lien by subrogation to those rights (*70 Cal. App. 3d 200, 215)* .

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Volume 22 Chapters 220-229 SUBROGATION---to---TRESPASS
CHAPTER 220 SUBROGATION
PART II. FORMS

22-220 California Points & Authorities § 220.22

§ 220.22 Supporting Contention That Subrogation Lies--Surety on Payment to Creditor of Principal Debtor's Obligation Is Subrogated to Any Cause of Action Creditor or Debtor Has Against Third Parties Responsible for Loss

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THIS IS A PROPER CASE FOR SUBROGATION BECAUSE PLAINTIFF SURETY, PURSUANT TO THE TERMS OF ITS BOND, PAID _____ [*identify creditor to whom payment was made*] AS THE RESULT OF _____ [*identify loss*] AND IS THEREFORE SUBROGATED TO ANY CAUSE OF ACTION _____ [THE CREDITOR *or* THE DEBTOR *or* EITHER THE CREDITOR OR THE DEBTOR] HAS AGAINST THIRD PARTIES RESPONSIBLE FOR THE LOSS[, AS WELL AS TO THE CREDITOR'S RIGHTS TO PRIORITIES OR SECURITIES].

Subrogation of Surety. A surety who pays a principal debtor's obligation to a creditor is subrogated to any cause of action either the creditor or debtor has against third parties responsible for the loss, as well as to the creditor's rights to priorities or securities (*see Civ. Code §§ 2848, 2849*; *Regents of Univ. of Cal. v. Hartford Accident & Indem. Co. (1978) 21 Cal. 3d 624, 638 n.6, 147 Cal. Rptr. 486, 581 P.2d 197* ; *Commercial Standard Ins. Co. v. Bank of Am. (1976) 57 Cal. App. 3d 241, 247, 247 n.1, 129 Cal. Rptr. 91*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a surety who pays a principal debtor's obligation to a creditor is subrogated to any cause of action either the creditor or debtor has against third parties responsible for the loss, as well as to the creditor's rights to priorities or securities.

These points and authorities may be used alone or combined with a memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue. For example, they may be combined with a

memorandum of points and authorities in support of a motion for summary judgment by plaintiff in a subrogated action when it can be indisputably shown that there is no defense to the action, or in support of a motion for a new trial if the trial court erroneously ruled that subrogation does not lie [*see Code Civ. Proc. §§ 437c* (summary judgment), 657(6), (7) (new trial)]. They may also be combined with a memorandum of points and authorities in opposition to: (1) a general demurrer to a complaint in subrogation [*see Code Civ. Proc. § 430.10(e)*]; (2) a nonstatutory motion by defendant in a subrogated action for judgment on the pleadings; or (3) a motion by defendant for summary judgment in a subrogated action [*see Code Civ. Proc. § 437c*]. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, if the contention is made in support of or in opposition to a motion, other than a motion for judgment on the pleadings or new trial, counsel should present the facts (1) establishing that the plaintiff paid a loss sustained by its principal or on account of its principal's default, (2) that subrogation lies, and (3) that a cause of action exists against defendant to which plaintiff is subrograted. The facts would normally be presented in one or more supporting affidavits or declarations under penalty of perjury to which reference may be made in this memorandum [*see Code Civ. Proc. §§ 2009, 2015.5*; *see also Code Civ. Proc. § 437c(b)*]. If the contention is made in opposition to a demurrer or motion for judgment on the pleadings, counsel should show that the complaint sufficiently alleges the facts. For the papers on which a motion for new trial may be based, see *Code Civ. Proc. § 658*.

[b] Surety Defined and Surety Insurance

A surety, or guarantor, is defined as one who promises to answer for the debt, default, or miscarriage of another, or hypothecates property as security therefor [*Civ. Code § 2787*]. Surety is a class of insurance defined in *Ins. Code § 105* [*Ins. Code § 100(5)*].

[c] Duty of Principal to Reimburse Surety

A surety who pays the principal debt extinguishes the obligation and thus cannot as subrogee sue the debtor on the original debt [*Regents of Univ. of Cal. v. Hartford Accident & Indem. Co. (1978) 21 Cal. 3d 624, 637-638, 147 Cal. Rptr. 486, 581 P.2d 197]* . The principal is, however, bound to reimburse a surety who satisfies the principal obligation or any part of it for what the surety has disbursed, including necessary costs and expenses [*Civ. Code § 2847*]. For further discussion and forms of complaints for use by a surety to secure reimbursement from a principal and to compel contribution by cosureties, see California Forms of Pleading and Practice, Ch. 538, *Suretyship, Bonds, and Undertakings* (Matthew Bender).

[d] Related Pleading and Practice Chapters

For forms of complaints in subrogation and for indemnity, see California Forms of Pleading and Practice, Ch. 300, *Indemnity and Contribution* , and Ch. 536, *Subrogation* (Matthew Bender). For forms relating to demurrers and motions for judgment on the pleadings, motions for new trial, and motions for summary judgment, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , Ch. 371, *Motions After Trial* , and Ch. 537, *Summary Judgment* (Matthew Bender).

[e] Related Points and Authorities

For memoranda of points and authorities generally supporting and opposing a demurrer to a complaint or a motion for judgment on the pleadings, a motion for new trial, or a motion for summary judgment, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* , Ch. 155, *Motions After Trial* , and Ch. 221, *Summary Judgments* .

[f] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 220.41 -220.45* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Subrogation of Surety

Regents of Univ. of Cal. v. Hartford Accident & Indem. Co. *(1978) 21 Cal. 3d 624, 147 Cal. Rptr. 486, 581 P.2d 197* , was an action by the owner of a married student apartment project against the architect who designed the project, the general contractor, and the surety on the contractor's performance bond for damages because of latent construction defects. The trial court rendered summary judgment for defendants based on the ten-year period of limitation on the commencement of actions set forth in *Code Civ. Proc. § 337.15*. Plaintiff appealed from that portion of the judgment in favor of the surety.

The Supreme Court reversed on the ground a construction surety was not among those parties protected by *Code Civ. Proc. § 337.15* and said a statute of limitations that describes only an action against the principal does not bar suits against the surety (*21 Cal. 3d 624, 629, 632)* . (*Code Civ. Proc. § 337.15* was amended in 1980 to include sureties.) The Court characterized the surety's argument that a surety compelled to pay after the statute of limitations has run on the principal debt is denied its right to recover from the principal as the subrogee of the creditor's claim as betraying a misunderstanding of California suretyship law. The Court explained that under California decisions a surety who pays the principal debt extinguishes that obligation and thus cannot sue the debtor as subrogee of the original debt (*21 Cal. 3d 624, 637)* . Thus, subrogation in California suretyship law is not the surety's primary remedy for recourse against the principal but refers instead to a variety of rights which the surety may assert against third parties, cosureties, and property, most of which are unaffected by the running of the statute of limitations on the principal debt (*21 Cal. 3d 624, 637-638)* . The Court, in a footnote, explained: (1) the surety may be subrogated to any causes of action either the creditor or the debtor has against third parties responsible for the loss, and such causes of action should not be affected by the period of limitation governing the original debt; (2) the surety may also rely on *Civ. Code § 2848* to seek contribution from cosureties; and (3) the surety may be subrogated to the creditor's rights to priorities or securities (*21 Cal. 3d 624, 638 n.6*).

Commercial Standard Ins. Co. v. Bank of Am. *(1976) 57 Cal. App. 3d 241, 129 Cal. Rptr. 91* , arose out of an action by a property owner against a building contractor and its surety resulting from the contractor's default on an agreement to construct a duplex. Prior to executing the contract, the owner had entered into an agreement with a bank for a construction loan for which the owner agreed to pay the bank a loan fee and a specified percent per annum on the outstanding loan balance. The bank agreed to disburse the loan funds to the contractor for work completed on the project as evidenced by inspection reports supplied by bank employees. As a condition to granting the loan, the bank required the contractor to post performance and labor and material payment bonds. Thereafter, the contractor, as principal, and the surety executed and delivered to the owner, as creditor, a performance bond in the amount of the construction loan and a labor and materials payment bond in a specified amount. After a substantial start had been made on the project, the contractor defaulted. The owner filed a complaint against the surety and contractor for damages for fraud and a declaration that the performance and payment bonds were valid and binding as against the contractor and surety. The surety answered and cross complained against the bank for a declaration of the surety's right to be indemnified by the bank and to be subrogated to the owner's claims against the bank to recover damages for the bank's alleged negligent disbursement of the loan proceeds. The surety alleged: (1) the bank disbursed an excessive amount of the loan proceeds to the contractor; (2) the excessive disbursements were allegedly caused either by the bank's failure properly to inspect the construction project to ascertain the amount of work completed, or by the bank's failure to disburse funds in accordance with correct inspection reports; (3) because of the bank's negligent disbursement of funds there were, when the contractor defaulted, insufficient funds held by the bank to complete the project; and (4) the surety incurred liability as a direct and proximate result of the bank's negligence. The bank's demurrer to the cross complaint was sustained without leave to amend, and the surety appealed, contending it became subrogated to the owner's rights

against all malefactors, including the bank, on making good the owner's loss resulting from the contractor's default. The bank contended the surety's right to subrogation was negated by *Civ. Code §§ 2847* and *2848*, that is, the surety was subrogated to the rights of the owner against the contractor, but not against third persons, including the bank.

The court of appeal affirmed the trial court's judgment of dismissal of the cause of action based on implied indemnity but reversed as to the causes for equitable subrogation and negligence. With respect to the bank's contention, the court said that *Civ. Code § 2848* does not comprehensively and exclusively measure a surety's rights to subrogation, but is merely declaratory of the common law on the subject and controlling only so far as it goes. The court noted that: (1) California cases have approved application of the doctrine of subrogation to the creditor's rights against third persons when the surety's equities are superior to those of the third-party wrongdoer [*see § 220.44*]; (2) having agreed to and undertaken to disburse the loan proceeds in accordance with the value of the construction as it progressed, the bank owed the owner the duty to exercise reasonable care in so doing; and (3) the cross complaint alleged that it was the bank's negligence that caused the loss. Accordingly the court held the surety should be subrogated to the rights of the owner against the bank (*57 Cal. App. 3d 241, 247-248)* . The court further held that the cross complaint stated an independent cause of action for negligence against the bank (*57 Cal. App. 3d 241, 248-249)* .

[4] Additional Authorities

[a] Waiver of Subrogation Rights

In *Cathay Bank v. Lee (1993) 14 Cal. App. 4th 1533, 18 Cal. Rptr. 2d 420* , a lender sued a loan guarantor to recover a deficiency between the amount of the loan and the amount the lender obtained at a private foreclosure sale. The issue was whether the guarantor had explicitly waived his rights under *Union Bank v. Gradsky (1968) 265 Cal. App. 2d 40, 71 Cal. Rptr. 64* , which held that a lender is estopped to recover a deficiency judgment against the guarantor when it elects a remedy (nonjudicial foreclosure) that cuts off the guarantor's subrogation rights against the debtor.

The court of appeal reversed a summary judgment for the lender and ordered that summary judgment be entered in favor of the guarantor. While the guaranty agreement informed the guarantor that he might lose subrogation rights, it failed to inform the guarantor that the loss of subrogation rights gives the guarantor immunity from a deficiency judgment, in the form of the estoppel defense, and that the guarantor was waiving that defense under the terms of the agreement. Noting that waiver is the intentional relinquishment of a known right, the court concluded that the guaranty agreement failed to contain a sufficiently "explicit" or "specific" waiver of the estoppel defense.

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Volume 22 Chapters 220-229 SUBROGATION---to---TRESPASS
CHAPTER 220 SUBROGATION
PART II. FORMS

22-220 California Points & Authorities § 220.23

§ 220.23 Supporting Contention That Subrogation Lies--Cause of Action for Tortious Damage to Property Is Assignable [Civ. Code § 954] and Subject to Subrogation

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THIS IS A PROPER CASE FOR SUBROGATION BECAUSE THE CAUSE OF ACTION SUED ON IS FOR TORTIOUS INJURY TO PROPERTY WHICH IS ASSIGNABLE AND THEREFORE SUBJECT TO SUBROGATION.

A. Assignability of Action. A thing in action, arising out of the violation of a right of property, or out of an obligation, may be transferred by the owner (*Civ. Code § 954*; *see Civ. Code § 953*).

B. Assignable Cause of Action as Subject to Subrogation. A person may be subrogated to another person's cause of action against a third person if. the cause of action is assignable (*Offer v. Superior Court (1924) 194 Cal. 114, 120-121, 228 P. 11* ; *Royal Indem. Co. v. Security Truck Lines (1963) 212 Cal. App. 2d 61, 64-65, 27 Cal. Rptr. 858*).

[*Optional*] **C. Applicability of Rule to Property Insurers.** An insurer that pays its insured a loss under an insurance policy covering property is subrogated to the insured's cause of action against a third party who tortiously caused the loss (*Offer v. Superior Court (1924) 194 Cal. 114, 118, 228 P. 11* ; *Automobile Ins. Co. v. Union Oil Co. (1948) 85 Cal. App. 2d 302, 305, 193 P.2d 48* ; *see Ins. Code § 2071*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a cause of action for tortious injury to property is assignable under *Civ. Code § 954* and is therefore subject to subrogation.

These points and authorities may be used alone or combined with a memorandum of points and authorities relating to

the specific procedural context in which counsel wishes to raise the issue. For example, they may be combined with a memorandum of points and authorities in support of a motion for summary judgment by plaintiff in a subrogated action when it can be indisputably shown by affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice must or may be taken that there is no defense to the action, or in support of a motion for a new trial if the trial court erroneously ruled that subrogation does not lie [*see Code Civ. Proc. §§ 437c* (summary judgment), 657(6), (7) (new trial)]. They may also be combined with a memorandum of points and authorities in opposition to: (1) a general demurrer to a complaint in subrogation [*see Code Civ. Proc. § 430.10(e)*]; (2) a nonstatutory motion by defendant in a subrogated action for judgment on the pleadings; or (3) a motion by defendant for summary judgment in a subrogated action [*see Code Civ. Proc. § 437c*]. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, if the contention is made in support of or in opposition to a motion, other than a motion for judgment on the pleadings or new trial, counsel should present the facts establishing that (1) the plaintiff paid a loss sustained by, for example, its insured for damage to property, (2) the loss was caused by the tortious conduct of the defendant, and (3) a cause of action exists in favor of plaintiff's insured against defendant to which plaintiff is subrogated. The facts would normally be presented in one or more supporting affidavits or declarations under penalty of perjury to which reference may be made in this memorandum [*see Code Civ. Proc. §§ 2009, 2015.5*; for the papers on which a motion for summary judgment may be based or opposed, *see Code Civ. Proc. § 437c(b)*]. If the contention is made in opposition to a demurrer or motion for judgment on the pleadings, counsel should show that the complaint sufficiently alleges the facts. For the papers on which a motion for new trial may be based, see *Code Civ. Proc. § 658*.

[b] Related Pleading and Practice Chapters

For forms of complaints in subrogation and for indemnity, see California Forms of Pleading and Practice, Ch. 300, *Indemnity and Contribution* , and Ch. 536, *Subrogation* (Matthew Bender). For forms relating to demurrers and motions for judgment on the pleadings, motions for new trial, and motions for summary judgment, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , Ch. 371, *Motions After Trial* , and Ch. 537, *Summary Judgment* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities generally supporting and opposing a demurrer to a complaint or a motion for judgment on the pleadings, a motion for new trial, or a motion for summary judgment, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* , Ch. 155, *Motions After Trial* , and Ch. 221, *Summary Judgments* .

[d] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 220.42, § 220.43, § 220.45*, or *§ 220.46* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Assignable Cause of Action as Subject to Subrogation

Offer v. Superior Court *(1924) 194 Cal. 114, 228 P. 11* , was a proceeding in prohibition arising out of a superior court action by an insurance carrier to recover a sum of money it had paid its insured for damage to the insured's car allegedly caused by defendant's negligence. The amount sought was below the minimum jurisdiction of the superior court, and the defendant demurred to the complaint on that ground. Plaintiff contended an action in subrogation is an equitable action and that under the provisions of the California Constitution (as it then read) and former Code Civ. Proc. § 112, the superior court had original jurisdiction of all actions in equity. The demurrer was overruled and defendant

filed for a writ of prohibition.

The Supreme Court granted the writ. In holding that the superior court did not have subject matter jurisdiction of the action, the Court said (1) under *Civ. Code § 954*, a thing in action arising out of the violation of a property right or an obligation may be transferred by the owner; (2) the insured's cause of action arose out of the violation of a right of property; (3) under *Civ. Code § 954* the cause of action was assignable; and (4) plaintiff's cause of action arose by way of subrogation or equitable assignment which is an assignment by operation of law (*194 Cal. 114, 121)* .

Royal Indem. Co. v. Security Truck Lines *(1963) 212 Cal. App. 2d 61, 27 Cal. Rptr. 858* , was an action by an insurance carrier against a truck company to recover a sum paid by plaintiff to its insured pursuant to the terms of its policy for the replacement of a sign at a gasoline service station. The complaint alleged the sign was irreparably damaged by a truck owned by defendant and operated by its employee. Defendant filed a counterclaim for an amount substantially in excess of that sued for by plaintiff which allegedly was owed defendant by plaintiff's insured (subrogor) for the wrongful removal of a sign at another service station which plaintiff's insured had previously leased from defendant. Plaintiff stipulated to the verity of the counterclaim, authorized judgment to be entered accordingly, and preserved its right to appeal. The trial court accordingly entered judgment that plaintiff was entitled to its judgment against defendant and that defendant was entitled to a setoff against the judgment in its entirety [*see § 220.30*]. On appeal, plaintiff contended, among other things, that although a counterclaim could be asserted against an assignee it could not be asserted against a subrogee.

The court of appeal rejected plaintiff's argument and affirmed the judgment. With respect to defendant's contention that plaintiff was not an assignee, the court pointed out that under *Civ. Code § 954* a thing in action arising out of the violation of a right of property, or out of an obligation, may be transferred by the owner. Under this section the insured's right of action was assignable, and the insurer merely had a cause of action by way of subrogation or equitable assignment, which is an assignment by operation of law (*212 Cal. App. 2d 61, 64-65)* .

NOTE:

Counterclaims have been abolished and causes formerly asserted by counterclaim are now asserted by cross complaint [*see Code Civ. Proc. § 428.80*]. However, a setoff is asserted by pleading the defense of payment [*Code Civ. Proc. § 431.70*].

[b] Applicability of Rule to Property Insurers

The facts and procedural background of ***Offer v. Superior Court*** *(1924) 194 Cal. 114, 228 P. 11* , are discussed in *§ 220.23[3][a]*. In ordering the writ of prohibition issued, the Supreme Court said the principle on which the right of subrogation is founded applies to cases of suretyship, but is applied in all cases in which one party pays a debt for which another is primarily answerable and which, in equity and good conscience, should have been discharged by the latter. Thus, insurance companies are given the right. This right of the insurer against the wrongdoer does not rest on any relation of contract or of privity between them but arises out of the nature of the contract of insurance as a contract of indemnity. The right arises independent of a provision in the contract of insurance which gives the insurer the right to recover damages from the person responsible for the loss (*194 Cal. 114, 118)* .

Automobile Ins. Co. v. Union Oil Co. *(1948) 85 Cal. App. 2d 302, 193 P.2d 48* , was an action by fire insurers to recover the amounts paid their insured under their policies for damages to the insured's plant by a fire caused by a cleaning product manufactured and sold by defendant to the insured for cleaning greasy and oily floors. It was alleged the product was highly flammable and the fire occurred while the plant floors were being cleaned with the product by a regularly employed janitor, when, not knowing the product was flammable, he lit a match. Defendant's objection to the introduction of evidence on the ground the action was barred by the statute of limitations was sustained and judgment was entered for defendant.

The court of appeal reversed on the ground the trial court had applied the wrong statute of limitations. In reaching its decision, the court acknowledged that *Ins. Code § 2070* requires that all fire insurance policies be on a standard form and that the standard form is set forth in *Ins. Code § 2071*, which contains a subrogation provision. Nevertheless, the court held the insurer's right against a third-party wrongdoer does not arise out of or depend on any contractual relation or of privity between them, but emanates from the nature of the insurance contract as a contract of indemnity (*85 Cal. App. 2d 302, 305)* . Quoting *Offer v. Superior Court (1924) 194 Cal. 114, 118, 228 P. 11* , the court said the right of subrogation arises independent of a provision in the contract of insurance that gives the insurer the right to recover damages from the person responsible for the loss (*85 Cal. App. 2d 302, 305-306)* .

NOTE:

Additional cases stating that a cause of action for tortious injury to property is assignable and hence subject to subrogation include: *Fifield Manor v. Finston (1960) 54 Cal. 2d 632, 640, 7 Cal. Rptr. 377, 354 P.2d 1073* [*see § 220.28[3][a]*]; *Commercial Union Assurance Co. v. City of San Jose (1982) 127 Cal. App. 3d 730, 739, 179 Cal. Rptr. 814* [*see §§ 220.29[3][a], 220.33[3][a]*]; and *Peller v. Liberty Mut. Fire Ins. Co. (1963) 220 Cal. App. 2d 610, 612, 34 Cal. Rptr. 41* [*see § 220.28[4][a]*].

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CHAPTER 220 SUBROGATION
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22-220 California Points & Authorities § 220.24

§ 220.24 Supporting Contention That Subrogation Lies--Insurer Is Subrogated to Rights of Its Insured When Conditions for Subrogation Are Met

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THIS ACTION IN SUBROGATION IS PROPER BECAUSE ALL THE ELEMENTS FOR EQUITABLE SUBROGATION OF PLAINTIFF INSURER TO THE RIGHTS OF ITS INSURED AGAINST THE DEFENDANT HAVE BEEN MET.

A. Elements of Equitable Subrogation. The elements of an insurer's cause of action based on equitable subrogation are as follows: (1) the insured has suffered a loss for which the party to be charged is liable, either because he or she is a wrongdoer whose act or omission caused the loss or because he or she is legally responsible to the insured for the loss caused by the wrongdoer; (2) the insurer, in whole or in part, has compensated the insured for the same loss for which the party to be charged is liable; (3) the insured has an existing, assignable cause of action against the party to be charged, which action the insured could have asserted for his or her own benefit had he or she not been compensated for the loss by the insurer; (4) the insurer has suffered damages caused by the act or omission on which the liability of the party to be charged depends; (5) justice requires that the loss should be entirely shifted from the insurer to the party to be charged, whose equitable position is inferior to that of the insurer; and (6) the insurer's damages are in a stated sum, usually the amount it has paid to its insured, assuming the payment was not voluntary and was reasonable (*Troost v. Estate of DeBoer (1984) 155 Cal. App. 3d 289, 294, 202 Cal. Rptr. 47*).

B. Insurer's Right to Subrogation. In the case of insurance, subrogation takes the form of an insurer's right to be put in the position of the insured to pursue recovery from third parties legally responsible to the insured for a loss that the insurer has both insured and paid (*Fire Ins. Exch. v. Hammond (2000) 83 Cal. App. 4th 313, 317, 99 Cal. Rptr. 2d 596*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that plaintiff insurer is properly subrogated to the rights of its insured against defendant because all the elements for equitable subrogation are present. For a memorandum of points and authorities for use by a property insurer subrogated to the rights of its insured against a third party tortfeasor who damaged or destroyed the property, see *§ 220.23*. For a memorandum of points and authorities for use by an insurer subrogated to the rights of its insured against defendant indemnitor, see *§ 220.25*. For a form of memorandum of points and authorities for use by an insurer in an action against it by its insured to support the propriety of a cross complaint for declaratory relief against a third party tortfeasor for a declaration of the insurer's right to be indemnified by the cross defendant, see *§ 220.27*.

These points and authorities may be used alone or combined with a memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue. For example, they may be combined with a memorandum of points and authorities in support of a motion for summary judgment by plaintiff in a subrogated action when it can be indisputably shown that there is no defense to the action, or in support of a motion for a new trial if the trial court erroneously ruled that subrogation does not lie [*see Code Civ. Proc. §§ 437c* (summary judgment), 657(6), (7) (new trial)]. They may also be combined with a memorandum of points and authorities in opposition to: (1) a general demurrer to a complaint in subrogation [*see Code Civ. Proc. § 430.10(e)*]; (2) a nonstatutory motion by defendant in a subrogated action for judgment on the pleadings; or (3) a motion by defendant for summary judgment in a subrogated action [*see Code Civ. Proc. § 437c*]. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, if the contention is made in support of or in opposition to a motion, other than a motion for judgment on the pleadings or new trial, counsel should present the facts establishing that all the elements for equitable subrogation are present. The facts would normally be presented in one or more supporting affidavits or declarations under penalty of perjury to which reference may be made in this memorandum [*see Code Civ. Proc. §§ 2009, 2015.5*; *see also Code Civ. Proc. § 437c(b)*]. If the contention is made in opposition to a demurrer or motion for judgment on the pleadings, counsel should show that the complaint sufficiently alleges the existence of all the elements for equitable subrogation. For the papers on which a motion for new trial may be based, see *Code Civ. Proc. § 658*.

[b] Related Pleading and Practice Chapters

For forms of complaints in subrogation and for indemnity, see California Forms of Pleading and Practice, Ch. 300, *Indemnity and Contribution* , and Ch. 536, *Subrogation* (Matthew Bender). For forms relating to demurrers and motions for judgment on the pleadings, motions for new trial, and motions for summary judgment, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , Ch. 371, *Motions After Trial* , and Ch. 537, *Summary Judgment* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities generally supporting and opposing a demurrer to a complaint or a motion for judgment on the pleadings, a motion for new trial, or a motion for summary judgment, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* , Ch. 155, *Motions After Trial* , and Ch. 221, *Summary Judgments* .

[d] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 220.42 -220.45* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Elements of Equitable Subrogation

Troost v. Estate of DeBoer *(1984) 155 Cal. App. 3d 289, 202 Cal. Rptr. 47* , was an action by an insured to recoup from an insurance agent the amount of the gap between an insured's primary liability coverage and the excess liability coverage resulting from the agent's negligent failure, as agent for the insured, to have procured sufficient primary coverage. The amount of the gap was $150,000 and was discovered when plaintiff was sued by a third party for damages for personal injuries resulting from an automobile accident involving one of plaintiff's employees. The insured was financially unable to pay the $150,000 and sued both the primary and excess insurers and the agent. The underlying personal injury case was settled for $300,000. The primary insurer paid $100,000. The excess insurer was liable for amounts in excess of $250,000, that is, for $50,000, and the insured was liable for the full amount of the gap, $150,000. The excess insurer agreed to pay the full $200,000 over the $100,000 paid by the primary insurer and plaintiff agreed to dismiss it as a defendant from the action, to pursue the action against the agent to recoup the $150,000, and to pay the excess insurer any moneys recovered. Judgment was entered for plaintiff pursuant to a directed verdict, and defendant appealed.

The court of appeal affirmed. The court said that only the legal conclusions to be drawn from the facts, and not the facts, were in dispute, and the court listed the elements of an insurer's cause of action based on equitable subrogation (*155 Cal. App. 3d 289, 294)* . The court held the elements were met. The court rejected defendant's argument that the insured suffered no loss because the insurer paid the amount of the gap. It is not a prerequisite to equitable subrogation that the subrogor have suffered actual loss; it is required only that the subrogor would have suffered loss had the subrogee not discharged the liability or paid the loss (*155 Cal. App. 3d 289, 294-295)* . The court also rejected the argument that the action was not assignable, holding that it was assignable as provided in *Civ. Code §§ 953* and *954* (*155 Cal. App. 3d 289, 296-297)* . Defendant also argued that the excess insurer had no equity superior to that of defendant, but the court said the excess insurer was not contractually bound to indemnify the insured for the amounts between $ l00,000 and $250,000, nor was defendant, but it was defendant's wrong that created the potential liability both as to defendant and as to the excess insurer; manifestly, the excess insurer's equity was superior to that of defendant (*155 Cal. App. 3d 289, 297)* . Finally, the court held that the excess insurer was not a stranger or intermeddler who had no interest to protect. Aside from its interest in seeing that the reasonable expectations of its insured were fulfilled, the excess insurer was faced with a lawsuit claiming it was liable on the basis of an estoppel to deny coverage resulting from the representations (that plaintiff had $1 million automobile liability coverage) of defendant agent, who was clearly the excess insurer's agent for some purposes (*155 Cal. App. 3d 289, 297)* . The court concluded that the trial court properly ruled the doctrine of equitable subrogation applied (*155 Cal. App. 3d 289, 298)* .

The court also rejected defendant's argument that the insured had no recoverable claim because there was insurance coverage based on defendant's representations as the excess insurer's agent that there was coverage (thus estopping the insurer from denying coverage) and the insured's settlement with the excess insurer constituted a release of its agent as well. The court said defendant was not acting as agent for the insurer in representing to the insured that the insured had $1 million of insurance coverage and therefore the excess insurer was not estopped to deny coverage. The dual agency relationship was also the answer to the contention that the dismissal of the excess insurer from the lawsuit also constituted a release of defendant agent. Defendant negligently failed, as agent for the insured, to procure the required insurance. Thus defendant's liability to the insured was entirely independent of his capacity as agent for the insurer, and the release of the excess insurer did not release defendant (*155 Cal. App. 3d 289, 298-299)* .

[b] Insurer's Right to Subrogation

In ***Fire Ins. Exch. v. Hammond*** *(2000) 83 Cal. App. 4th 313, 99 Cal. Rptr. 2d 596* , the insureds maintained a fire insurance policy on a dwelling that they owned. They leased the dwelling pursuant to a rental agreement that did not expressly require either party to maintain fire insurance. The lessees did not obtain fire insurance. During their occupancy of the dwelling, the lessees negligently started a fire, causing damage to the property that was covered under the insured's fire insurance policy. The insurer paid the benefits covering the loss to the insureds, then sued the lessees

for negligence and breach of contract under a subrogation theory. The rental agreement provided:

> MAINTENANCE, REPAIRS, OR ALTERATIONS: Tenant shall, at [the tenant's] own expense, and at all times, maintain the premises in a clean and sanitary manner including all equipment, appliances, furniture and furnishings therein and shall surrender the same, at termination hereof, as in good condition as received, normal wear and tear excepted. Tenant shall be responsible for damages caused by [the tenant's] negligence and that of [the tenant's] family or invitees and guests. ...
>
> DAMAGES TO PREMISES: if the premises are ... damaged by fire or from any other cause as to render them untenantable, then either party shall have the right to terminate this Lease as of the date on which such damage occurs, through written notice to the other party, to be given within fifteen ... days after the occurrence of such damage; except that should such damage or destruction occur as a result of the abuse or negligence of Tenant, or its invitees, then Owner only shall have the right of termination. ... If this lease is not terminated, the Owner shall promptly repair the premises and there shall be a proportionate deduction of rent until the premises are repaired and ready for Tenant's occupancy. The proportionate reduction shall be based on the extent to which the making of repairs interferes with Tenant's reasonable use of the premises.

The lessees moved for summary judgment, arguing that subrogation was unavailable as a matter of law, on the ground that the lessor's fire policy was for the mutual benefit of the lessor and the lessees. The court entered judgment for the lessees, finding that the "DAMAGES TO PREMISES" section of the agreement "adverts to fire damage ... and there is no specific obligation placed upon [the lessees] to obtain insurance." The insurer appealed.

The court of appeal reversed, holding that the rental agreement contained no term expressly or impliedly overriding the provision holding the lessees liable for their negligence or the negligence of their guests or invitees, whatever the cause. The insurer's subrogation action was therefore viable, and the lessees were not entitled to judgment as a matter of law (*83 Cal. App. 4th 313, 321)* . Initially, the court noted that in the case of insurance, subrogation takes the form of an insurer's right to be put in the position of the insured to pursue recovery from third parties legally responsible to the insured for a loss that the insurer has both insured and paid. The right of subrogation is purely derivative. An insurer entitled to subrogation is in the same position as an assignee of the insured's claim and succeeds only to the rights of the insured. The subrogated insurer is said to "stand in the shoes" of its insured, because it has no greater rights than the insured and is subject to the same defenses that can be asserted against the insured. Thus, an insurer cannot acquire by subrogation anything to which the insured has no rights, and an insurer may claim no rights that the insured does not have. The court also noted that in California, a lessee is not responsible for negligently caused fire damages if the lessor and lessee intended the lessor's fire policy to be for their mutual benefit (*83 Cal. App. 4th 313, 317)* . However, under the rental agreement in this case, the parties had no reasonable expectation that the lessees were exculpated from liability for negligently caused fire damages, or that the lessor's fire insurance policy was for their mutual benefit. The agreement contained no term expressly or impliedly overriding the provision holding the lessees liable for their negligence or the negligence of their guests or invitees, whatever the cause, nor did the lessors and lessees have any other understanding to that effect. Accordingly, the court held that the insurer's subrogation action was viable and that the lessees were not entitled to judgment as a matter of law (*83 Cal. App. 4th 313, 321)* .

[4] Additional Authorities

[a] Insurer's Right to Subrogation

In *Interstate Fire & Cas. Ins. Co. v. Cleveland Wrecking Co. (2010) 182 Cal. App. 4th 23, 105 Cal. Rptr. 3d 606*, the insurer issued a CGL policy to the steel subcontractor on a construction project; the policy named the general contractor as an additional insured. Although the other subcontractor, which provided demolition services, was also obligated by agreement to provide indemnity and defense coverage to the general contractor, it failed to do so. An employee of the steel subcontractor was injured on the project because of negligence by an employee of the demolition subcontractor.

The injured person filed suit against the demolition subcontractor and the general contractor, alleging, among other things, the demolition subcontractor's negligence. The general contractor sought indemnity and defense from the demolition subcontractor, which refused; and from the steel subcontractor's insurer, which accepted. The general contractor filed a cross-complaint against both subcontractors for indemnification and breach of contract. The general contractor and injured person entered into a good-faith settlement; the steel contractor's insurer funded the settlement payment. The demolition subcontractor also entered into a good-faith settlement with the injured person. The insurer then filed an action for subrogation against the demolition subcontractor, alleging breach of its contract with the general contractor by failing to defend and indemnify it. The trial court entered a dismissal, sustaining a demurrer to the complaint on the ground that the underlying good-faith settlement prevented the general contractor from suing the subcontractor for indemnity or contribution for its alleged negligent conduct; and that the general contractor could not claim breach of the duty to defend because of the lack of consequential damages. The trial court held that the insurer's equitable position was not superior to that of the subcontractor (*182 Cal. App. 4th 23, 31*). The appellate court reversed, holding that a good-faith settlement order does not bar a nonsettling tortfeasor from asserting an indemnification claim against the settling defendants based on an express contract. Because an insurer stands in the shoes of its insured, the insurer can pursue a cause of action against the settling tortfeasor for breach of an express contractual indemnification clause (*182 Cal. App. 4th 23, 32-33, 50*). The elements of subrogation are met by the following: (1) the insured general contractor suffered a loss for which the defendant is liable; (2) the loss was one for which the insurer was not primarily liable; (3) the insurer compensated the insured for the loss; (4) the insured has a cause of action against the defendant; (5) the insurer suffered damages arising from the defendant's act or omission; and (6) the insurer's equitable position is superior to the defendant's (*182 Cal. App. 4th 23, 34-49*).

In *Crowley Maritime Corp. v. Boston Old Colony Ins. Co. (2008) 158 Cal. App. 4th 1061, 70 Cal. Rptr. 3d 605* , a maritime case involving several insurers, the insured corporation received indemnification for claims from two of plaintiff's insurers. Those insurers sought equitable contribution from other insurers of the plaintiff, including two foreign insurers, one of which petitioned to compel arbitration of the equitable contribution claim under English law, based on arbitration agreements. The trial court denied the petition on the grounds that the equitable contribution claim did not arise from contract; and the indemnifying insurers were not signatories to the arbitration agreements. The appellate court affirmed, holding that the equitable contribution claims arose from equity, rather than from contract. Exceptions to the general rule against compelling nonsignatories to arbitrate did not apply in this case (*158 Cal. App. 4th 1061, 1066-1067*). In so holding, the court stated that the insurers seeking equitable contribution confused that doctrine with equitable subrogation. In the insurance context, equitable subrogation generally involves the substitution of the insurer in the position of its insured to seek reimbursement from responsible third parties for the loss paid the insured by the insurer. An insurer entitled to subrogation is in the same position as an assignee of the insured's claim, and succeeds only to the rights of the insured case (*158 Cal. App. 4th 1061, 1067)* .

California Points & Authorities

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Volume 22 Chapters 220-229 SUBROGATION---to---TRESPASS
CHAPTER 220 SUBROGATION
PART II. FORMS

22-220 California Points & Authorities § 220.25

§ 220.25 Supporting Contention That Subrogation Lies--Insurer of Indemnitee as Subrogated to Claim Against Indemnitor

[1] FORM

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

THIS ACTION IS PROPER BECAUSE PLAINTIFF HAS PAID THE TORT LIABILITY OF ITS INSURED WHO WAS INDEMNIFIED AGAINST THE LOSS BY DEFENDANT INDEMNITOR.

Subrogation of Indemnitee's Insurer Against Indemnitor. An insurer that pays a tort liability of its insured who is expressly indemnified against the loss by another is subrogated to the insured's claim for indemnity against the other (*Rossmoor Sanitation, Inc. v. Pylon, Inc. (1975) 13 Cal. 3d 622, 633-635, 119 Cal. Rptr. 449, 532 P.2d 97*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that an insurer that pays a claim or judgment against its insured who is indemnified against the loss by another, is subrogated to its insured's claim against the indemnitee.

These points and authorities may be used alone or combined with a memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue. For example, they may be combined with a memorandum of points and authorities in support of a motion for summary judgment by plaintiff in a subrogated action when it can be indisputably shown that there is no defense to the action, or in support of a motion for a new trial if the trial court erroneously ruled that subrogation does not lie [*see Code Civ. Proc. §§ 437c* (summary judgment), 657(6), (7) (new trial)]. They may also be combined with a memorandum of points and authorities in opposition to: (1) a general demurrer to a complaint in subrogation [*see Code Civ. Proc. § 430.10(e)*]; (2) a nonstatutory motion by defendant in a subrogated action for judgment on the pleadings; or (3) a motion by defendant for summary judgment in a subrogated action [*see Code Civ. Proc. § 437c*]. These points and authorities may also be adapted for use in a trial or

appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, if the contention is made in support of or in opposition to a motion, other than a motion for judgment on the pleadings or new trial, counsel should present the facts establishing that the plaintiff insured the indemnitee, the indemnitee was liable on the tort claim or judgment, the plaintiff paid the claim or judgment, and the indemnitee was indemnified against that specific liability by defendant indemnitor. The facts would normally be presented in one or more supporting affidavits or declarations under penalty of perjury to which reference may be made in this memorandum [*see Code Civ. Proc. §§ 2009, 2015.5*; *see also Code Civ. Proc. § 437c(b)*]. If the contention is made in opposition to a demurrer or motion for judgment on the pleadings, counsel should show that the complaint sufficiently alleges the facts. For the papers on which a motion for new trial may be based, see *Code Civ. Proc. § 658*.

[b] Related Pleading and Practice Chapters

For forms of complaints in subrogation and for indemnity, see California Forms of Pleading and Practice, Ch. 300, *Indemnity and Contribution* , and Ch. 536, *Subrogation* . For forms relating to demurrers and motions for judgment on the pleadings, motions for new trial, and motions for summary judgment, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , Ch. 371, *Motions After Trial* , and Ch. 537, *Summary Judgment* .

[c] Related Points and Authorities

For memoranda of points and authorities generally supporting and opposing a demurrer to a complaint or a motion for judgment on the pleadings, a motion for new trial, or a motion for summary judgment, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* , Ch. 155, *Motions After Trial* , and Ch. 221, *Summary Judgments* . For memoranda of points and authorities supporting and opposing demurrers to complaints for indemnity and motions for summary judgment or summary adjudication of issues, see Ch. 115, *Indemnity and Contribution* .

[3] Discussion of Authorities

[a] Subrogation of Indemnitee's Insurer Against Indemnitor

Rossmoor Sanitation, Inc. v. Pylon, Inc. *(1975) 13 Cal. 3d 622, 119 Cal. Rptr. 449, 532 P.2d 97* , was a declaratory relief action by a sanitation district and its insurer against a sewage facility contractor and its insurer for indemnity to recover sums expended in satisfying a prior tort judgment against the district. The district had employed the contractor to construct a sewage pump station and sewer lines. In the employment contract, the contractor agreed to indemnify the district against all claims for damages arising out of the work and for attorney fees and costs that might be incurred in the event of a damage suit. The contractor also agreed to obtain insurance for itself and to name the district in the policy as an additional insured, and did so. The district also had independent coverage under a policy issued by plaintiff insurer. Both policies contained "other insurance" clauses, each stating that an apportionment would be made if the insured had other insurance against a loss covered by the policy. One of the contractor's employees was killed and another injured in the cave-in of a trench which they had entered without shoring it, although shoring material was available. The injured employee and the deceased employee's heirs sued the district and recovered judgment which was paid by plaintiff insurer. The trial court (1) concluded defendant insurer's policy was primary insurance because it was part of the consideration for the job and plaintiff insurer's policy was excess; (2) declared the indemnity agreement was sufficiently explicit to cover the accident; (3) found that any negligence by the district was of a passive nature; (4) was of the opinion that each insurer was subrogated to the rights of their respective insureds; and (5) rendered judgment in favor of plaintiffs. Defendants appealed.

The Supreme Court affirmed. The Court said the indemnity clause was a general indemnity provision which indemnified against passive but not active negligence and concluded the evidence, although conflicting, supported the

trial court's finding that the district's negligence was passive (*13 Cal. 3d 622, 629-631)* . An insurer on paying a loss is subrogated in a corresponding amount to the insured's right of action against any person responsible for the loss, and insurance companies may be subrogated to the rights of their insureds (*13 Cal. 3d 622, 633-634)* . It would thus appear that the trial court could properly find that plaintiff insurer was subrogated to the district's right of indemnification since it had paid the tort judgment for the district and the district had a right of indemnity against the contractor (*13 Cal. 3d 622, 634)* . The Court concluded that notwithstanding the "other insurance" clauses, the right of indemnity and subrogation must control. Because defendant insurer's policy was part of the consideration for the construction job, it was the primary insurer under the facts of the case, and plaintiff insurer was subrogated to the rights of the district (*13 Cal. 3d 622, 634-635)* .

[4] Additional Authorities

[a] Subrogation of Indemnitee's Insurer Against Indemnitor

In *Century Indem. Co. v. London Underwriters (1993) 12 Cal. App. 4th 1701, 16 Cal. Rptr. 2d 393* , a primary and an excess insurer filed a complaint in intervention to determine the priority of their subrogation rights in a contractor's action against a subcontractor for indemnification following the settlement of a wrongful death action in which the primary insurer paid policy limits of $500,000 and the excess insurer paid $600,000. The court of appeal held that the excess insurer was entitled to reimbursement with the $500,000 in indemnification funds received by the insured from the subcontractor. Although both policies had subrogation clauses, the primary insurer was below the excess insurer in order of preference because it had agreed to absorb the first $500,000 of loss, and because it stood in the shoes of the insured and was therefore bound by a clause in the excess policy giving the excess insurer preference over any primary insurer to any available reimbursement from a third party (*12 Cal. App. 4th 1701, 1709-1710)* .

NOTE:

In *Reliance Nat'l Indem. Co. v. General Star Indem. Co. (1999) 72 Cal. App. 4th 1063, 85 Cal. Rptr. 2d 627* , the court of appeal recognized that *Rossmoor* held that if parties have express contracts with respect to the duty to indemnify, the extent of that duty must be determined from the contract and not by reliance on the independent doctrine of equitable indemnity [*Reliance Nat'l Indem. Co. v. General Star Indem. Co. (1999) 72 Cal. App. 4th 1063, 1080, 85 Cal. Rptr. 2d 627* ; *see also Rossmoor Sanitation, Inc. v. Pylon, Inc. (1975) 13 Cal. 3d 622, 628, 119 Cal. Rptr. 449, 532 P.2d 97]* . The court in *Reliance* noted, however, that *Rossmoor* was an action between insureds on a contract for indemnity in which apportionment of loss between two primary carriers was raised in a cross action. *Reliance,* by contrast, was an action between two insurers (primary and excess). The court in *Reliance* pointed out that *Rossmoor* did not establish that in all cases in which a contract for indemnity exists, an insurer is entitled to bring a subrogation action on the agreement. It did not purport to establish a general rule that a contractual indemnity agreement between an insured and a third party takes precedence over well-established general rules of primary and excess coverage in an action between insurers [*Reliance Nat'l Indem. Co. v. General Star Indem. Co. (1999) 72 Cal. App. 4th 1063, 1081, 85 Cal. Rptr. 2d 627]* .

Similarly, *JPI Westcoast Constr., L.P. v. RJS & Assoc., Inc. (2007) 156 Cal. App. 4th 1448, 68 Cal. Rptr. 3d 91* , involved a dispute between two primary carriers, each of whose policies contained an "other insurance" clause, on the issue of whether their respective liability on the loss should be settled on the standard basis of apportionment, or by subrogation to an insured's right to indemnity. Indeed, an "other insurance" issue can arise only between carriers on the same level of coverage. This case involved a subrogation claim by a secondary or excess carrier, and a primary carrier. Hence, *Rossmoor* was inapplicable (*156 Cal. App. 4th 1448, 1460)* .

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CHAPTER 220 SUBROGATION
PART II. FORMS

22-220 California Points & Authorities § 220.26

§ 220.26 Supporting Contention That Subrogation Lies--Excess Insurer Has Subrogation Claim Against Primary Insurer Based on Primary Insurer's Wrongful Failure to Settle Within Primary Policy Limits and Excess Insurer's Resultant Payment of Excess Policy Benefits in Ultimate Settlement of Claim

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with other appropriate forms of memorandum of points and authorities supporting the contention that a subrogation action lies (see, e.g., § 220.20).*]

PLAINTIFF, AS EXCESS INSURER, MAY SEEK RECOVERY AGAINST DEFENDANT, AS PRIMARY INSURER, BECAUSE DEFENDANT WRONGFULLY FAILED TO SETTLE THE UNDERLYING CLAIM WITHIN THE LIMITS OF THE PRIMARY POLICY, RESULTING IN AN ULTIMATE SETTLEMENT UNDER THE TERMS OF WHICH PLAINTIFF MADE A PAYMENT OF BENEFITS UNDER THE EXCESS POLICY. AN EXCESS JUDGMENT IN THE UNDERLYING ACTION IS NOT A PREREQUISITE TO THIS CAUSE OF ACTION IN SUBROGATION.

A. Prior Excess Judgment Is Not Prerequisite to Equitable Subrogation Action Between Insurers. A prior excess judgment is not a prerequisite to a subrogation action based on the subrogation rights of an excess insurer against the primary insurer, when those rights arise from the primary insurer's allegedly wrongful failure to settle and the excess insurer's resultant payment of benefits under the excess insurance policy pursuant to an ultimate settlement (*Fortman v. Safeco Inc. Co. (1990) 221 Cal. App. 3d 1394, 1399-1402, 271 Cal. Rptr. 117*).

[*Optional*] **B. Prior Excess Judgment Is Not Prerequisite to Equitable Subrogation Assigned to Third Party.** A third-party claimant who obtains an assignment of the excess insurer's subrogation rights against the primary insurer, on the basis of the primary insurer's allegedly wrongful failure to settle the claim within the limits of the primary insurance policy, and the excess insurer's resultant payment to the third party of benefits under the excess policy under an ultimate settlement, may state a cause of action in subrogation against the primary insurer without first obtaining an excess judgment against the insured (*Fortman v. Safeco Inc. Co. (1990) 221 Cal. App. 3d 1394, 1399-1402, 271 Cal. Rptr. 117*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a subrogation action lies, when it is based on the rights of an excess insurer against a primary insurer that arise from an underlying claim against the insured in which the primary insurer wrongfully fails to settle within policy limits while having an opportunity to do so, resulting in an ultimate settlement under which the excess insurer pays benefits to the third party [*see Fortman v. Safeco Inc. Co. (1990) 221 Cal. App. 3d 1394, 1399-1402, 271 Cal. Rptr. 117]* . Optional Paragraph B is for use if the excess insurer assigned its equitable subrogation claim against the primary insurer to the third party.

These points and authorities may be used alone or combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the existence of a cause of action in subrogation. For example, they may be used in opposition to defendant's motion for summary judgment and combined with points and authorities regarding summary judgments generally. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form and in any other relevant points and authorities combined with this form, to show the relationship between the facts of the case and the points of law stated. For example, counsel should state facts showing that the excess insurer has a subrogation claim against the primary insurer, on the basis of the primary insurer's conduct with regard to the underlying third-party claim.

[b] Nature and Extent of Excess Insurer's Rights Against Primary Insurer

An excess insurer's ability to sue a primary insurer for breach of the implied covenant of good faith and fair dealing rests exclusively on equitable subrogation principles, not on any independent duty to the excess carrier [*Fireman's Fund Ins. Co v. Maryland Cas. Co. (1994) 21 Cal. App. 4th 1586, 1601, 26 Cal. Rptr. 2d 762* ; *Commercial Union Assurance Cos. v. Safeway Stores (1980) 26 Cal. 3d 912, 917-918, 164 Cal. Rptr. 709, 610 P.2d 1038* ; *Wallbrook Ins. Co. v. Liberty Mut. Ins. Co. (1992) 5 Cal. App. 4th 1445, 1454, 7 Cal. Rptr. 2d 513* ; *Continental Cas. Co. v. Royal Ins. Co. (1990) 219 Cal. App. 3d 111, 117, 268 Cal. Rptr. 193]* . Moreover, the excess insurer ordinarily is not a third party beneficiary of the contract between the primary insurer and the insured [*see Fireman's Fund Ins. Co v. Maryland Cas. Co. (1994) 21 Cal. App. 4th 1586, 1600, 26 Cal. Rptr. 2d 762]* .

A subrogated insurer stands in the shoes of its insured, and has no greater rights against the third party than did the insured [*Fireman's Fund Ins. Co v. Maryland Cas. Co. (1994) 21 Cal. App. 4th 1586, 1596, 26 Cal. Rptr. 2d 762* ; *Continental Mfg. Corp. v. Underwriters at Lloyd's London (1960) 185 Cal. App. 2d 545, 556, 8 Cal. Rptr. 276]* . Thus, it is subject to all defenses the third party (in this case, the primary insurer) could have asserted against the insurer [*Fireman's Fund Ins. Co v. Maryland Cas. Co. (1994) 21 Cal. App. 4th 1586, 1596, 26 Cal. Rptr. 2d 762]* . For example, an excess carrier cannot maintain a bad faith claim against a primary carrier when the insured has released the primary carrier from liability [*Fireman's Fund Ins. Co v. Maryland Cas. Co. (1994) 21 Cal. App. 4th 1586, 1595-1598, 26 Cal. Rptr. 2d 762* (action alleging that primary carrier allocated its portion of settlement contribution among various policy years in manner that compelled excess carrier to pay disproportionate amount of total cost; in connection with settlement, insured released primary carrier from bad faith liability)]. Since the only basis on which an excess carrier can sue for breach of the implied covenant is by way of equitable subrogation to the insured's rights, the insured's release of those rights precludes the primary carrier from maintaining such an action. Thus, before using this form, counsel should attempt to ascertain whether the primary carrier has any potential defenses against the insured that might defeat an action by the excess carrier.

[c] Related Pleading and Practice Chapters

For discussion and forms regarding improper insurance claims settlement practices and regarding rights between excess and primary insurers, see California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender). For discussion and forms regarding subrogation generally, see California Forms of Pleading and Practice, Ch. 536, *Subrogation* (Matthew Bender). For discussion and forms regarding summary judgment generally, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[d] Related Points and Authorities

For memoranda of points and authorities relating to improper insurance claims settlement practices, see Ch. 120, *Insurance* . For memoranda of points and authorities relating to summary judgments generally, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Prior Excess Judgment Is Not Prerequisite to Equitable Subrogation Action Between Insurers

In ***Fortman v. Safeco Inc. Co.*** *(1990) 221 Cal. App. 3d 1394, 271 Cal. Rptr. 117* , an injured third party brought an action against the primary insurer of one of the defendants in her underlying personal injury action. The action against the insurer was based on subrogation rights that were assigned to her by the excess insurer and that arose from the primary insurer's conduct in the course of the settlement negotiations. A child who was injured in a jeep accident brought an underlying action against the manufacturers of the jeep and the jeep shell, and the supplier of the door handle of the jeep shell. The primary insurer of the supplier of the door handle refused to settle within its policy limits before trial, failed to apprise the excess insurer of settlement negotiations or the trial schedule, and failed to retain experts to evaluate the claim. During trial, the primary insurer agreed to a settlement that included payments by the excess insurer. The plaintiff in that case proceeded in trial exclusively against the jeep manufacturer and sought to exonerate the settling defendant. Pursuant to a special verdict in the underlying action, the injured child's mother, who was driving, was found 75 percent responsible, the jeep manufacturer 25 percent responsible, and the supplier of the door handle (referred to as the "insured") zero percent responsible for the injuries. No judgment was entered regarding the insured. The excess insurer contributed $1.125 million of its $2 million excess policy limits, and assigned its equitable subrogation claim against the primary insurer to the third party, who brought a subrogation action against the primary insurer. The primary insurer successfully moved for summary judgment, on the ground that an excess judgment against the insured, and a conclusive judicial determination of the insured's liability, are prerequisites to the subrogation action. Plaintiff appealed.

The court of appeal reversed, holding that neither an excess judgment against the insured, nor a conclusive judicial determination of the insured's liability, is a prerequisite to the subrogation action (*221 Cal. App. 3d 1394, 1399-1402)* . The court rejected the primary insurer's assertion that an excess judgment is a legal prerequisite, because that argument ignores the substantial distinction between a claimant's action against a tortfeasor's liability insurer, and a suit between insurers to determine and prorate their respective responsibilities for an insured event. Injured claimants may sue the tortfeasor's insurer because they are considered third-party beneficiaries of the insurance contract, and the prior-judgment requirement prevents claimants' actions unless they first perfect their third-party beneficiary status by securing a judgment against the insured tortfeasor. In contrast, actions between liability insurers are not based on contract. Insurers' respective obligations flow from equitable principles that do not stem from an agreement between the insurers, and the application of those principles is not controlled by the language of their contracts with the respective policy holders. Therefore, insurers are able to resolve disputes regarding their respective rights and duties by direct actions among themselves without the limits imposed in other contexts by the direct-action proscription. The court held that the California Supreme Court's decision in *Moradi-Shalal v. Fireman's Fund Ins. Cos. (1988) 46 Cal. 3d 287, 250 Cal. Rptr. 116, 758 P.2d 58* , holding that a conclusive judicial determination of the insured's liability is a prerequisite to viable third-party statutory actions against the insurer, is not a factor, because an equitable action between insurers to adjust their respective rights and duties is distinct from the statutory bad-faith actions formerly permitted under *Ins.*

Code § 790.03 [*see* Ch. 120, *Insurance*] (*221 Cal. App. 3d 1394, 1399)* .

Moreover, this case was a first-party action (*221 Cal. App. 3d 1394, 1401)* . The court rejected defendant's argument that a settling excess insurer cannot sue a primary insurer for bad faith, holding that an excess insurer that has settled and discharged the insured's liability may recover from the primary insurer an amount in excess of the primary insurer's policy limits if the excess insurer can prove that the primary insurer's unreasonable refusal to settle within its policy limits resulted in loss to the excess insurer in an amount in excess of the primary limits that it would not otherwise have had (*221 Cal. App. 3d 1394, 1399-1400)* . In this case, defendant repeatedly, and allegedly in bad faith, refused settlement offers below its policy limits. Had the case been settled for any of those amounts, the excess insurer would have paid nothing. Instead, the excess insurer paid over a million dollars toward the eventual settlement. The defendant's reasoning would result in the excess insurer suffering a loss without a remedy. On the other hand, an excess insurer that proceeded to trial and was required to pay a portion of a resulting judgment would be able to prosecute a similar action, and doing so might expose the excess insurer to a bad-faith claim by the insured. Such a rule would encourage trials in cases that otherwise might settle (*221 Cal. App. 3d 1394, 1401)* . Although defendant claimed that the court's ruling would encourage sham settlements and collusive agreements between excess insurers and tort plaintiffs, the court stated that those possibilities were not present in the instant case. The excess insurer made its payment because of the defendant's refusal to settle within its primary policy limits. In cases inviting collusion, cited by defendant, the insured must show the existence, not actual payment, of an excess judgment. In the equitable subrogation context, the excess insurer must show it actually paid an amount in excess of the primary insurer's policy limits. The court stated that courts can easily distinguish equitable subrogation cases, with facts suggesting a collusive settlement, from cases like the one before it, in which the excess insurer actually paid a settlement (*221 Cal. App. 3d 1394, 1402)* .

[b] Prior Excess Judgment Is Not Prerequisite to Equitable Subrogation Assigned to Third Party

Fortman v. Safeco Inc. Co. *(1990) 221 Cal. App. 3d 1394, 271 Cal. Rptr. 117* , is discussed in *§ 220.26[3][a]*.

[4] Additional Authorities

[a] Prior Excess Judgment Is Not Prerequisite to Equitable Subrogation Action Between Insurers

In *Continental Cas. Co. v. Royal Ins. Co. (1990) 219 Cal. App. 3d 111, 268 Cal. Rptr. 193* , an excess insurer sued a primary insurer for breach of the covenant of good faith and fair dealing, and unfair claims practices, on the basis of the excess insurer's payment of benefits under the terms of an ultimate settlement, following the primary insurer's allegedly bad-faith refusal to settle within the primary policy limits. Although the issue of the absence of an excess judgment did not arise, the court of appeal affirmed judgment for plaintiff on the basis of the excess insurer's payment of benefits under a settlement. The main issue in the case was whether the primary insurer could raise as an affirmative defense the excess insurer's settlement conduct. The court held that it could not, because of the excess insurer's lack of control over settlement negotiations conducted by the primary insurer (*219 Cal. App. 3d 111, 117-120)* .

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Volume 22 Chapters 220-229 SUBROGATION---to---TRESPASS
CHAPTER 220 SUBROGATION
PART II. FORMS

22-220 California Points & Authorities § 220.27

§ 220.27 Supporting Contention That Cross Complaint by Insurer as Potential Subrogee for Declaration of Right to Indemnification Against Third-Party Tortfeasor Is Proper

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

THE CROSS COMPLAINT IN THIS ACTION IS PROPER BECAUSE AN INSURER, AS THE POTENTIAL SUBROGEE OF ITS INSURED, MAY, IN AN ACTION AGAINST IT BY ITS INSURED, FILE A CROSS COMPLAINT FOR A DECLARATION OF ITS RIGHT TO BE INDEMNIFIED BY A THIRD-PARTY TORTFEASOR IN THE EVENT JUDGMENT IN THE MAIN ACTION IS RENDERED IN FAVOR OF THE INSURED.

A. Declaratory Relief Action Authorized. Any person who desires a declaration of his or her rights or duties with respect to another may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action or cross-complaint in the superior court for a declaration of his or her rights and duties. He or she may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of these rights or duties, whether or not further relief is or could be claimed at the time. The declaration may be either affirmative or negative in form and effect, and the declaration shall have the force of a final judgment. The declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought (*Code Civ. Proc. § 1060*).

B. Cross Complaint by Potential Subrogee for Declaration of Right to Be Indemnified by Third-Party Tortfeasor as Proper. In an action by an insured against its insurer to recover insurance benefits, the filing of a cross complaint by the insurer as the potential subrogee of its insured for a declaration of its right to be indemnified by the third-party tortfeasor for any judgment rendered against it in the main action by its insured is proper even though neither an indemnitor nor a surety may recover damages from a third person unless the indemnitor or surety has actually made the payment required by its contract of indemnity or surety (*Liberty Mut. Ins. Co. v. Harris, Kerr, Forster & Co. (1970) 10 Cal. App. 3d 1100, 1102-1103, 89 Cal. Rptr. 437*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a cross complaint, filed by an insurer in an action by an insured against the insurer to recover policy benefits, for a declaration of the insurer's right to be reimbursed by the cross defendant, a third-party tortfeasor, in the event judgment in the main action is rendered for plaintiff insured is proper even though the insurer has not paid the insured's claim.

The argument set out in this form may be used in any proceeding in which it is contended that the cross complaint is improper. For a memorandum of points and authorities supporting the contention that payment is normally a condition precedent to the filing of an action in subrogation, see *§ 220.42*.

These points and authorities may be used alone or combined with a memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue. For example, they may be combined with a memorandum of points and authorities in support of a motion for leave to file a cross complaint not timely filed [*see Code Civ. Proc. §§ 428.10, 428.50(c)* (permissive cross complaints)]. They may also be combined in a memorandum of points and authorities (1) in opposition to a motion to strike the cross complaint [*see Code Civ. Proc. §§ 435-437*]; (2) in opposition to a general demurrer to the cross complaint [*see Code Civ. Proc. § 430.10(e)*]; or (3) in opposition to a nonstatutory motion by the cross defendant for judgment on the pleadings. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. If the contention is made in support of a motion for leave to file a cross complaint, the facts showing that granting the motion would be in the interest of justice [*see Code Civ. Proc. § 428.50(c)*] should be set forth in one or more separate affidavits or declarations under penalty of perjury to which reference may be made in this memorandum [*see Code Civ. Proc. §§ 2009, 2015.5*].

[b] Related Pleading and Practice Chapters

For forms of complaints for declaratory relief and complaints in subrogation, see California Forms of Pleading and Practice, Ch. 182, *Declaratory Relief* and Ch. 536, *Subrogation* (Matthew Bender). For forms of notices of motion to file a late cross complaint and related papers, see California Forms of Pleading and Practice, Ch. 123, *Complaints and Cross Complaints* (Matthew Bender). For forms of demurrers and notices of motions to strike or for judgment on the pleadings, and related papers, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* and Ch. 375, *Motions to Strike* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities generally supporting and opposing a motion to file a late cross complaint or to strike a cross complaint, see Ch. 61, *Cross Complaints* . For memoranda of points and authorities generally supporting and opposing a motion to strike a pleading, see Ch. 160, *Motions to Strike* . For memoranda of points and authorities generally supporting and opposing a demurrer to a complaint or cross complaint or a motion for judgment on the pleadings, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Cross Complaint by Potential Subrogee for Declaration of Right to Be Indemnified by Third-Party Tortfeasor as Proper

Liberty Mut. Ins. Co. v. Harris, Kerr, Forster & Co. *(1970) 10 Cal. App. 3d 1100* , *89 Cal. Rptr. 437* , arose out of an action by an insured who had suffered a loss by the dishonesty of an employee against its insurers on their refusal to indemnify the insured for the loss. The insurers denied liability, but each cross complained against an accounting firm

for a declaration that if the insurer were held liable to the insured, the accounting firm was liable to the insurer based on the alleged negligence of the firm in auditing the insured's books. It was alleged that if the firm had exercised ordinary care in auditing the insured's books, the employee's dishonesty would have been discovered by the insured in time to prevent or drastically reduce the insured's loss, and that by reason of the insured's reliance on the firm, the employee's defalcations were not discovered until a specified date. Cross defendant's demurrers to the cross complaints were sustained without leave to amend. The insurers appealed from the order of dismissal, contending their cross actions were proper in that they were proceeding through the declaratory relief action on a sort of "presubrogation" theory.

The court of appeal reversed. The court noted that had the allegations in the cross complaints been made by the insured, they would have stated (as against a general demurrer) a cause of action for malpractice, and the issue was whether or not the insurers could assert the insured's rights against the accounting firm. The court said it was undisputed that neither an indemnitor nor a surety may recover damages from a third person unless the indemnitor or surety has actually made the payment required by the contract of indemnity or surety, and noted that neither insurer had paid the insured (*10 Cal. App. 3d 1100, 1102)* . The court nevertheless pointed out that the action for declaratory relief as to one's right to indemnity was clearly established under California case law and reversed the order of dismissal (*10 Cal. App. 3d 1100, 1103-1104)* .

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CHAPTER 220 SUBROGATION
PART II. FORMS

22-220 California Points & Authorities § 220.28

§ 220.28 Supporting Obligor's Contention That Cause of Action for Tortious Injury to Person Is Not Subject to Subrogation

[1] FORM

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

PLAINTIFF HAS NO STANDING, AS SUBROGEE, TO MAINTAIN THIS ACTION FOR DAMAGES FOR PERSONAL INJURIES BECAUSE AN ACTION FOR TORTIOUS INJURY TO PERSON IS NOT ASSIGNABLE AND NOT SUBJECT TO SUBROGATION IN THE ABSENCE OF A STATUTE AUTHORIZING IT.

A. Actions Required to Be Prosecuted by Real Party in Interest. Every action, with exceptions not here applicable, must be prosecuted in the name of the real party in interest (*Code Civ. Proc. § 367*).

B. Nonassignability of Actions for Personal Injury. Although no cause of action is lost by reason of the death of any person, causes of action for tortious injury to person are not assignable (*see Code Civ. Proc. §§ 377.20, 377.22*).

C. Nonassignable Actions as Not Subject to Subrogation in Absence of Statute. Because causes of action for tortious injury to person are not assignable they are not, in the absence of a statute authorizing it, subject to subrogation (*see Fifield Manor v. Finston (1960) 54 Cal. 2d 632, 639-640, 7 Cal. Rptr. 377, 354 P.2d 1073* ; *Fireman's Fund Ins. Co. v. McDonald, Hecht & Solberg (1994) 30 Cal. App. 4th 1373, 1383, 36 Cal. Rptr. 2d 424* ; *Peller v. Liberty Mut. Fire Ins. Co. (1963) 220 Cal. App. 2d 610, 34 Cal. Rptr. 41*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to support a contention that plaintiff, as subrogee of a right of action for damages for personal injury, is not the real party in interest and has no standing to maintain the action because the action is not assignable and, hence, not subject to subrogation.

These points and authorities may be used alone or combined with a memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue. For example, they may be combined with a memorandum of points and authorities (1) in support of a general demurrer to the complaint [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*], or (2) in support of a nonstatutory motion by defendant for judgment on the pleadings. They may also be combined with a memorandum of points and authorities in support of a motion by defendant or in opposition to a motion by plaintiff for summary judgment [*see Code Civ. Proc. § 437c* (summary judgment)]. Should the trial court erroneously rule that plaintiff is entitled to maintain the action, these points and authorities may be combined with a memorandum of points and authorities in support of a petition for writ of mandate to compel the trial court to vacate its ruling [*see Code Civ. Proc. §§ 1085, 1086*] and for a writ of prohibition to restrain the trial court from proceeding with the action [*see Code Civ. Proc. §§ 1102, 1103*]. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, if the contention is made in support of a demurrer to the complaint or a motion by defendant for judgment on the pleadings, counsel should simply point out that the complaint is by the plaintiff as subrogee and it seeks recovery of damages for tortious injury to a person. If the contention is made in support of or in opposition to a motion, other than a motion for judgment on the pleadings, any facts not appearing from the face of the complaint may be presented in one or more supporting affidavits or declarations under penalty of perjury to which reference may be made in this memorandum [*see Code Civ. Proc. §§ 2009, 2015.5*; *see also* Code Civ. Proc. § 437c(b) (summary judgment papers)]. If the contention is made in support of a petition for a writ of mandate and/or a writ of prohibition, counsel should show, in addition to the above, that the contention relating to plaintiff's lack of standing was properly raised in and rejected by the trial court. This would normally be shown by attaching to the petition authenticated copies of the appropriate trial court records.

[b] Rights Generally Not Assignable

The only causes or rights of action that are not transferable or assignable in any sense are those founded on wrongs of a purely personal nature, such as negligent personal injuries, slander, assault and battery, malicious prosecution, and others of like nature. All other demands, claims, and rights of action whatever are generally held to be transferable [*Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 834, 69 Cal. Rptr. 321, 442 P.2d 377]* .

[c] Related Pleading and Practice Chapters

For forms of demurrers and motions for judgment on the pleadings, and related papers, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For forms of notices of motion for summary judgment and related papers, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender). For forms of petitions for writ of mandate and writ of prohibition, and related papers, see California Forms of Pleading and Practice, Ch. 358, *Mandate and Prohibition* (Matthew Bender).

[d] Related Points and Authorities

For memoranda of points and authorities generally supporting and opposing a demurrer to a complaint or a motion for judgment on the pleadings, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For memoranda of points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* . For memoranda of points and authorities generally supporting and opposing a petition for writ of mandate or a petition for prohibition, see Ch. 150, *Mandate and Prohibition* .

[e] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 220.49* and *220.50* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Nonassignable Actions as Not Subject to Subrogation in Absence of Statute

Fifield Manor v. Finston *(1960) 54 Cal. 2d 632, 7 Cal. Rptr. 377, 354 P.2d 1073* , was an action to recover the cost of essential medical care rendered a deceased person pursuant to a life-care contract. The decedent's injuries and death resulted from a car accident allegedly caused by defendants' negligence. The complaint alleged that plaintiff, a nonprofit corporation, had entered into a life-care contract with the decedent in which it had expressly agreed to provide the decedent with all essential medical care. Thereafter, the decedent was struck by a car negligently operated by one of the defendants and died some six weeks later as the result of his injuries. Pursuant to the contract, plaintiff provided the decedent with essential medical services, including treatment by doctors, nursing care, medication, and hospitalization, valued at a specified amount for which plaintiff prayed recovery. Plaintiff claimed both a direct right of recovery from defendants based on the negligent interference with a contractual relation, and a right of subrogation, under an express assignment in the life-care contract, for all expenses it incurred as the result of the injuries to the decedent. A general demurrer to the complaint was sustained without leave to amend and plaintiff appealed.

The Supreme Court affirmed. The Court rejected both of plaintiff's claims. The Court held the action was not assignable under former Civ. Code § 956 (providing for survival of certain actions and stating that nothing in the section shall be construed as making such actions assignable), and hence not subject to subrogation in the absence of a statute authorizing it (*54 Cal. 2d 632, 639, 643)* . In reaching this conclusion, the Court traced the history of former Civ. Code § 956. (Former Civ. Code § 956 was repealed in 1961 and incorporated in substantially the same language in the 1961 amendment to *Prob. Code § 573*; in 1992, *Prob. Code § 573* was repealed and replaced by *Code Civ. Proc. § 377.20 et seq.*, relating to survival of causes of action; *Code Civ. Proc § 377.22* provides that nothing in the chapter will be construed as affecting the assignability of causes of action.) The Court said historically at common law the assignability of tort causes of action depended on survivability; so causes of action for damage to property, since they survived death, were assignable and causes of action for injury to the person, since they did not survive, were not assignable. This rule prevailed until the Supreme Court in 1946 held under former Prob. Code § 574 that a cause of action for injury to the estate of the person, which resulted from the injury to his person, did survive. Former Civ. Code § 956 was enacted in 1949 and expressly provided against the assignability of the causes of action specified in it (actions for physical injury to person) (*54 Cal. 2d 632, 638-639)* . The Court said the question presented was whether a third party may be subrogated either by the operation of equitable principles (legal subrogation) or by contract with the injured party (conventional subrogation) to any part of a cause of action for injury to the person in view of the fact that under the law no such cause of action may be assigned. The Court pointed out that plaintiff had not cited any California case in which a right of subrogation to a cause of action for tortious injury to the person had been recognized, except in cases when the right of subrogation has been expressly granted by statute, and that the legislature, when it has desired to give a right of subrogation in such cases, has done so in express language (*54 Cal. 2d 632, 639)* . While subrogation and assignment have certain technical differences, each operates to transfer from one person to another a cause of action against a third, and the reasons of policy which make certain causes of action nonassignable operate as forcefully against the transfer of such causes of action by subrogation (*54 Cal. 2d 632, 640)* . The Court declared itself satisfied that subrogation should not be applied in view of the express reservation against assignment in former Civ. Code § 956 [*now see Code Civ. Proc. § 377.20 et seq.*] (*54 Cal. 2d 632, 643)* .

In ***Fireman's Fund Ins. Co. v. McDonald, Hecht & Solberg*** *(1994) 30 Cal. App. 4th 1373, 36 Cal. Rptr. 2d 424* , the plaintiff insurers paid more than $10 million to settle a lawsuit against their insureds involving misrepresentations in the sale of residential units. The insureds then sued their attorneys for legal malpractice, contending that the attorneys caused those representations to be made. The insurers joined the legal malpractice suit as plaintiffs under a subrogation theory. The trial court dismissed the insurers as plaintiffs on the grounds that legal malpractice claims are nonassignable and the insurers could not be subrogated to a nonassignable claim. The trial court entered judgment dismissing the insurers as plaintiffs, and they appealed.

On appeal, the insurers acknowledged that existing case law holds that legal malpractice claims generally are not assignable, and that nonassignable claims are not subject to subrogation. However, they argued that the public policies articulated in those cases were not applicable to a subrogation claim by an insurer who paid a claim against its insured resulting from the attorney's negligence. The insurers argued that their interests were directly affected by the attorney's malpractice and were "aligned" or "virtually identical" with the insured's interests against the attorney. The insurers contended that under these circumstances, the trial court's ruling was inequitable in light of other public policies favoring reasonable settlements, encouraging liability carriers to meet their insureds' reasonable expectations, transferring risks to actual tortfeasors, and spreading loss among tortfeasors (*30 Cal. App. 4th 1373, 1380)* .

The court of appeal held that however forceful the equities supporting the insurer's public policy contentions might be, it could not depart from settled law. Under that law, the law firm owed its client a "duty of undivided loyalty and diligence" (*30 Cal. App. 4th 1373, 1383)* . That duty was owed solely to the insureds, and the insurers were not clients of the law firm (*30 Cal. App. 4th 1373, 1383)* . The court reiterated that California courts have uniformly held that nonassignable claims are not subject to subrogation absent express statutory authorization (*30 Cal. App. 4th 1373, 1384)* . Accordingly, the trial court's judgment was affirmed.

Peller v. Liberty Mut. Fire Ins. Co. *(1963) 220 Cal. App. 2d 610, 34 Cal. Rptr. 41* , was a declaratory relief action by insureds against their insurer to determine the validity of subrogation provisions of automobile insurance policies. Each policy contained the provision that the insurer agreed to pay all reasonable expenses incurred within one year from the date of accident for medical services. However, in connection with the payment of medical services, the policies further provided, under the heading "Subrogation," that in the event of any payment under the medical expense coverage of the policy, the company would be subrogated to all the right of recovery therefor which the injured person or anyone receiving that payment may have against any person or organization, and that person is required to execute and deliver instruments and papers and do whatever is necessary to secure those rights. Plaintiffs were injured and incurred medical expenses that the insurer refused to pay unless and until each plaintiff assigned to it his or her right of recovery to the extent of the payments. Plaintiffs' motion for judgment on the pleadings was granted on the ground the subrogation provisions were invalid and contrary to the long established rule of common law that causes of action arising out of personal injuries are not assignable. Defendant appealed, contending the right of subrogation provided in the policies was distinguishable from an assignment in that it constituted an indemnity.

The court of appeal held the legal effect of the policy provisions was the same regardless of what term was attached to the procedure, since the result was to transfer the insured's cause of action against a third-party tortfeasor to the insurer, and affirmed the judgment (*220 Cal. App. 2d 610, 611-612)* . The court said the legislature enacted *Civ. Code § 954* providing for the assignment of a thing in action arising out of a violation of a property right, but by former Civ. Code § 956 [*now see Code Civ. Proc. § 377.20 et seq.*] expressly provided against the assignability of causes of action arising out of personal injuries. Since the legislature had recognized the common law rule against the assignability of causes of action arising out of personal injuries, any change in the rule must be by legislative action (*220 Cal. App. 2d 610, 612)* .

NOTE:

Additional cases stating the general rule that actions for personal injuries are not subject to assignment or subrogation include: *Lee v. State Farm Mut. Auto. Ins. Co. (1976) 57 Cal. App. 3d 458, 465, 129 Cal. Rptr. 271* ; and *West v. State Farm Mut. Auto. Ins. Co. (1973) 30 Cal. App. 3d 562, 565, 106 Cal. Rptr. 486* [*see § 220.50[3][a]*].

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22-220 California Points & Authorities § 220.29

§ 220.29 Supporting Obligor's Contention That Subrogee Is Subject to All Defenses That Obligor Has Against Subrogor

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF IN THIS ACTION, AS SUBROGEE, IS, EXCEPT AS OTHERWISE EXPRESSLY PROVIDED BY STATUTE, SUBJECT TO THE SAME DEFENSES THAT WOULD BE AVAILABLE TO DEFENDANT IN AN ACTION BY THE SUBROGOR.

Defenses Against Subrogor. Except as otherwise provided by statute, a subrogee is subject to any defenses the obligor has against the subrogor (*Commercial Union Assurance Co. v. City of San Jose (1982) 127 Cal. App. 3d 730, 733, 179 Cal. Rptr. 814* ; *Iusi v. City Title Ins. Co. (1963) 213 Cal. App. 2d 582, 588, 28 Cal. Rptr. 893*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the general contention that, except as otherwise provided by statute, plaintiff as subrogee is subject to all defenses the obligor has against the subrogor. The form is for use when a more specific form set out in this chapter is not applicable. Statutes providing otherwise would include those granting an extended period of limitations on the commencement of subrogated actions by specified entities [*see § 220.51*]. For memoranda of points and authorities based on specific defenses, see *§§ 220.30 -220.33*, and *§ 220.38*. For forms of memoranda of points and authorities for use in raising defenses the obligor may have against the subrogee, see *§§ 220.34 -220.37*. For other forms containing points that may be used in support of a defense the obligor may have against the subrogee, see *§§ 220.41 -220.45*.

These points and authorities may be used alone or combined with a memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue. For example, they may be combined with a memorandum of points and authorities (1) in opposition to a demurrer to the answer [*see Code Civ. Proc. §§ 430.20(a),*

430.50(b)], or (2) in opposition to a motion by plaintiff to strike the affirmative defense [*see Code Civ. Proc. § 435(b)*]. They may also be combined with a memorandum of points and authorities in support of a motion by defendant or in opposition to a motion by plaintiff for summary judgment [*see Code Civ. Proc. § 437c*]. Should the trial court erroneously rule that the defense may not be raised, these points and authorities may be combined with a memorandum of points and authorities in support of a petition for writ of mandate to compel the trial court to vacate its ruling [*see Code Civ. Proc. §§ 1085, 1086*] and for a writ of prohibition to restrain the trial court from proceeding with the action [*see Code Civ. Proc. §§ 1102, 1103*]. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, if the contention is made in opposition to a demurrer to the answer or a motion by plaintiff to strike the affirmative defense, counsel need only show that the defense is properly alleged. The points and authorities will establish its propriety. If the contention is made in support of or in opposition to a motion, other than a motion to strike, counsel for defendant should present the facts establishing the existence of the defense. The facts would normally be presented in one or more supporting affidavits or declarations under penalty of perjury to which reference may be made in the memorandum of points and authorities [*see Code Civ. Proc. §§ 2009, 2015.5*; *see also Code Civ. Proc. § 437c(b)* (summary judgment)]. If the contention is made in support of a petition for a writ of mandate and/or a writ of prohibition, counsel should show, in addition to the above, that the trial court erroneously ruled on the availability of the defense. This would normally be shown by attaching to the petition authenticated copies of the appropriate trial court records.

[b] Related Pleading and Practice Chapters

For a table of common affirmative defenses, see California Forms of Pleading and Practice, Ch. 26, *Answers* (Matthew Bender). For forms of demurrers and motions to strike, and related papers, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , and Ch. 375, *Motions to Strike* (Matthew Bender). For forms of notices of motion for summary judgment and related papers, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender). For forms of petitions for writ of mandate and writ of prohibition, and related papers, see California Forms of Pleading and Practice, Ch. 358, *Mandate and Prohibition* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities generally supporting and opposing a demurrer to an answer, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For memoranda of points and authorities generally supporting and opposing a motion to strike, see Ch. 160, *Motions to Strike* . For memoranda of points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* . For memoranda of points and authorities generally supporting and opposing a petition for writ of mandate or a petition for prohibition, see Ch. 150, *Mandate and Prohibition* .

[d] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 220.51 -220.56* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Defenses Against Subrogor

The facts and procedural background of ***Commercial Union Assurance Co. v. City of San Jose*** *(1982) 127 Cal. App. 3d 730, 179 Cal. Rptr. 814* , are discussed in *§ 220.33[3][a]*. This was an action by an insurer against a city to recover

as the subrogee of its insured amounts paid under the insured's policy for property damage. The city's demurrer to the complaint was sustained on the ground that more than six months had elapsed between the date the city rejected the insured's claim for damages and the commencement of the action, and plaintiff appealed from the subsequent judgment of dismissal. In affirming the judgment, the court of appeal said that generally the insurer's subrogated right is its right to be put in the position of its insured against third parties legally responsible to its insured for the loss which the insurer has both insured and paid, and the tortfeasor is usually permitted to assert all defenses available against the insured (*127 Cal. App. 3d 730, 733)* .

The facts and procedural background of ***Iusi v. City Title Ins. Co.*** *(1963) 213 Cal. App. 2d 582, 28 Cal. Rptr. 893* , are discussed in *§ 220.31[3][a]*. This was an appeal from a judgment entered in favor of plaintiff, a real estate broker, against defendant title company, for breach of an agreement as to which the broker claimed to be a third party beneficiary to the extent of the amount of his claimed commission. In attempting to uphold the judgment on appeal, plaintiff suggested the trial court had, in awarding him judgment, applied the theory of subrogation. The court of appeal reversed. It held that the judgment could not be supported on a subrogation theory because that theory was completely outside the issues raised by the pleadings (*213 Cal. App. 2d 582, 585-586)* . The court added, however, that even assuming plaintiff's pleadings could possibly encompass such a theory, plaintiff, as subrogee, had no greater rights than his subrogors and would be subject to the same defenses the title companies (obligors) would have against the subrogors (*213 Cal. App. 2d 582, 588)* . The court said the subrogors' action would have been barred by an affirmative defense (*213 Cal. App. 2d 582, 588-589)* .

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Volume 22 Chapters 220-229 SUBROGATION---to---TRESPASS
CHAPTER 220 SUBROGATION
PART II. FORMS

22-220 California Points & Authorities § 220.30

§ 220.30 Supporting Obligor's Contention That Subrogee's Action Is Subject to Setoff Against Subrogor

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S SUBROGATED CLAIM FOR MONEY COEXISTED WITH AN INDEPENDENT CLAIM FOR MONEY BY DEFENDANT OBLIGOR AGAINST PLAINTIFF'S SUBROGOR AT A TIME WHEN NEITHER CLAIM WAS BARRED BY THE STATUTE OF LIMITATIONS, AND DEFENDANT IS THEREFORE ENTITLED IN THIS ACTION TO ASSERT THAT PLAINTIFF'S CLAIM HAS BEEN PAID TO THE EXTENT THE TWO CLAIMS EQUAL EACH OTHER.

A. When Setoff Exists. When cross demands for money have existed between persons at any point in time when neither was barred by the statute of limitations and an action is thereafter commenced by one of the persons, the other person may assert in the answer the defense of payment in that the two demands are compensated so far as they equal each other, notwithstanding that an independent action asserting the person's claim would at the time of filing the answer be barred by the statue of limitations (*Code Civ. Proc. § 431.70*).

B. Right to Setoff Not Defeated by Assignment. Neither person can be deprived of the benefits of *Section 431.70 of the Code of Civil Procedure* by the assignment or death of the other (*Code Civ. Proc. § 431.70*; *see also Code Civ. Proc. § 368*).

C. Right to Setoff in Subrogated Action. Subrogation is the equivalent of an equitable assignment, and hence an obligor's claim for money from the subrogor that coexisted with the subrogor's claim against the obligor may be claimed by the obligor in an action against it by the subrogee (*see Royal Indem. Co. v. Security Truck Lines (1963) 212 Cal. App. 2d 61, 64-66, 27 Cal. Rptr. 858*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that an unrelated claim for money by the obligor against the subrogor that coexisted with the subrogor's claim may be asserted by the obligor in a subsequent action by the subrogee.

These points and authorities may be used alone or combined with a memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue. For example, they may be combined with a memorandum of points and authorities in support of a motion by defendant obligor for summary adjudication of the issue of defendant's right to claim a setoff against plaintiff's claim in a subrogated action when it can be indisputably shown that the setoff is a valid claim against the subrogor and that both claims coexisted at a time when neither was barred by the statute of limitations [*see Code Civ. Proc. §§ 437c, 431.70*]. These points and authorities may also be combined with a memorandum of points and authorities in opposition to: (1) a demurrer to the answer challenging the right to a setoff [*see Code Civ. Proc. §§ 430.20(a), 430.50(b)*]; or (2) a motion by plaintiff in a subrogated action to strike the defense [*see Code Civ. Proc. § 436(a)*]. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, if the contention is made in support of or in opposition to a motion, counsel should present the facts establishing that defendant has a valid claim for money against the subrogor and that both the subrogor's claim, to which plaintiff has become subrogated, and defendant's claim coexisted at a point in time when neither was barred by the statute of limitations [*see Code Civ. Proc. § 431.70*]. The facts would normally be presented in one or more supporting affidavits or declarations under penalty of perjury to which reference may be made in the memorandum of points and authorities [*see Code Civ. Proc. §§ 2009, 2015.5*]. If the contention is made in opposition to a demurrer, counsel should show that the answer sufficiently alleges the facts.

[b] When Cross Demand as Money Judgment Barred

For the purposes of *Code Civ. Proc. § 431.70*, a money judgment is a demand for money and, as applied to a money judgment, the demand is barred by the statute of limitations when enforcement of the judgment is barred under *Code Civ. Proc. §§ 683.010-683.320*, relating to period for enforcement and renewal of judgments [*Code Civ. Proc. § 431.70*].

[c] When Defense of Payment Barred

The defense of payment (setoff) authorized by *Code Civ. Proc. § 431.70* is not available if the cross demand is barred for failure to have asserted it in a prior action under *Code Civ. Proc. § 426.30*, relating to compulsory cross complaints [*Code Civ. Proc. § 431.70*].

[d] Related Pleading and Practice Chapters

For forms of notices of motion for summary judgment and related papers, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender). For a form of answer pleading payment (setoff) as a defense, see California Forms of Pleading and Practice, Ch. 26, *Answers* (Matthew Bender). For forms of demurrers and motions to strike, and related papers, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* and Ch. 375, *Motions to Strike* (Matthew Bender).

[e] Related Points and Authorities

For memoranda of points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* . For memoranda of points and authorities generally supporting and opposing a demurrer to an answer, including a demurrer on the ground that the affirmative defense of payment as a setoff is barred, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For memoranda of points and authorities generally supporting

and opposing a motion to strike, see Ch. 160, *Motions to Strike* .

[3] Discussion of Authorities

[a] Right to Setoff in Subrogated Action

The facts and procedural background of ***Royal Indem. Co. v. Security Truck Lines*** *(1963) 212 Cal. App. 2d 61, 27 Cal. Rptr. 858* , are discussed in *§ 220.23[3][a]*. On appeal, plaintiff subrogee contended the trial court erred in allowing the counterclaim because: its insured (the subrogor) was not a party to the action; the counterclaim (now affirmative defense [*see Code Civ. Proc. § 431.70*]) was entirely unrelated to the present action; the facts alleged did not sufficiently state a counterclaim; and plaintiff was not an assignee of its insured's rights and the counterclaim could not be asserted against plaintiff as the subrogee of its insured. The court of appeal rejected plaintiff's arguments and affirmed the judgment. After holding the counterclaim was proper and sufficiently alleged, the court said it has long been held that subrogation is the equivalent of an equitable assignment (*212 Cal. App. 2d 61, 64)* . The court pointed out that had the action been brought by the insured, there was no question that defendant would have been able to assert its counterclaim and that any defense the wrongdoer has against the insured is good against the insurer (*212 Cal. App. 2d 61, 65-66)* . There appeared to be no reason why plaintiff as the equitable assignee or subrogee of its insured should not be subject to the same right of counterclaim by defendant. In the absence of equitable considerations which would militate against the subrogee or equitable assignee, the right attained is the same as that held by the subrogor or equitable assignor and is subject to the same qualifications, limitations, and burdens (*212 Cal. App. 2d 61, 66)* .

California Points & Authorities

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Volume 22 Chapters 220-229 SUBROGATION---to---TRESPASS
CHAPTER 220 SUBROGATION
PART II. FORMS

22-220 California Points & Authorities § 220.31

§ 220.31 Supporting Obligor's Contention That Action Is Barred--Statute of Limitations Has Run on Subrogor's Action

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S ACTION IN SUBROGATION IS BARRED BY THE PROVISIONS OF _____
[*specify applicable statute of limitations, e.g.,* CODE OF CIVIL PROCEDURE SECTION 338(2)].

A. Applicable Statute of Limitations. Except as otherwise expressly provided by statute, a subrogation action is subject to the same statute of limitations that applies to the subrogor's action against the obligor and commences to run at the same time (*see Iusi v. City Title Ins. Co. (1963) 213 Cal. App. 2d 582, 588, 28 Cal. Rptr. 893* ; *Automobile Ins. Co. v. Union Oil Co. (1948) 85 Cal. App. 2d 302, 304-305, 193 P.2d 48*).

[*Set forth statute of limitations that applies to subrogor's action. The following are examples.*]

[*EITHER*]

B. Action for Injury to Real or Personal Property. If the subrogor's action arises out of injury to real property or to goods or chattels, the action is, unless otherwise expressly provided by statute, governed by *Code of Civil Procedure Section 338(b)* or *(c)*, and thus must be commenced against the tortfeasor within three years (*Automobile Ins. Co. v. Union Oil Co. (1948) 85 Cal. App. 2d 302, 307, 193 P.2d 48*).

[*OR*]

B. Action for Personal Injury. If the subrogor's action arises from a personal injury as the result of a wrongful act, the

action is, unless otherwise expressly provided by statute, governed by *Code of Civil Procedure Section 335.1*, and thus must be commenced against the tortfeasor within two years (one year, prior to 2003) (*see County of San Diego v. Sanfax Corp. (1977) 19 Cal. 3d 862, 869, 871-886, 140 Cal. Rptr. 638, 568 P.2d 363* ; *see also* former Code Civ. Proc. § 340(3)).

[*OR*]

B. Action to Recover Workers' Compensation Benefits Paid. A subrogation action under *Labor Code Section 3852* by an employer against a tortfeasor to recover a sum equivalent to the benefits the employer was required to provide the employee under the Workers' Compensation Law is controlled by *Code of Civil Procedure Section 335.1*, and thus must be commenced within two years (one year, prior to 2003) after the date the employee was injured (*County of San Diego v. Sanfax Corp. (1977) 19 Cal. 3d 862, 868, 140 Cal. Rptr. 638, 568 P.2d 363* ; *see also* former Code Civ. Proc. § 340(3)).

[*CONTINUE*]

[*Optional*] **C. Disability of Minority Tolling Statute of Limitations as Not Subrogated.** The disability of a minor which tolls the statute of limitations under *Code of Civil Procedure Section 352(a)* is personal and is not subject to transfer by assignment or subrogation (*Amie v. Superior Court (1979) 99 Cal. App. 3d 421, 426, 160 Cal. Rptr. 271*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that an action by the subrogee, unless otherwise expressly provided by statute, is subject to the same statute of limitations that applies to the subrogor's action and that under the applicable statute the action is barred. With respect to the second alternative Paragraph B, see *§ 220.28* for the general rule that actions for damages for personal injuries are not subject to subrogation, and see *§§ 220.49* and *220.50* for discussion of when such actions may be subrogated.

These points and authorities may be used alone, or combined with a memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue. For example, if the bar of the statute appears from the face of the complaint or from matter of which the court must or may take judicial notice, they may be combined with a memorandum of points and authorities (1) in support of a general demurrer to the complaint [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*], or (2) in support of a nonstatutory motion by defendant for judgment on the pleadings. They may also be combined with a memorandum of points and authorities in support of a motion by defendant or in opposition to a motion by plaintiff for summary judgment [*see Code Civ. Proc. § 437c*]. Should the trial court erroneously rule that the action is not barred, these points and authorities may be combined with a memorandum of points and authorities in support of a petition for writ of mandate to compel the trial court to vacate its ruling or make an appropriate order [*see Code Civ. Proc. §§ 1085, 1086*] and for a writ of prohibition to restrain the trial court from proceeding with the action [*see Code Civ. Proc. §§ 1102, 1103*]. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, if the contention is made in support of a demurrer to the complaint or a motion by defendant for judgment on the pleadings, counsel should simply point out that it appears from the complaint itself or from matters of which the court must or may take judicial notice when the cause of action arose and when the complaint was filed. The points and authorities should establish the statute of limitations that applies. If the contention is made in support of or in

opposition to a motion, other than a motion for judgment on the pleadings, counsel for defendant should present the facts establishing that the action is barred. The facts would normally be presented in one or more supporting affidavits or declarations under penalty of perjury to which reference may be made in the memorandum of points and authorities [*see Code Civ. Proc. §§ 2009, 2015.5*]. If the contention is made in support of a petition for a writ of mandate and/or a writ of prohibition, counsel should show, in addition to the above, that the bar of the statute was properly raised and ruled against in the trial court. This would normally be shown by attaching to the petition authenticated copies of the appropriate trial court records.

[b] Related Pleading and Practice Chapters

For forms of affirmative defenses that an action is barred by the statute of limitations for use in an answer to a complaint, as well as forms of allegations for use in a complaint showing that the applicable statute was tolled or for some other reason does not bar the action, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* (Matthew Bender). For forms of demurrers and motions for judgment on the pleadings, and related papers, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For forms of notices of motion for summary judgment and related papers, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender). For forms of petitions for writ of mandate and writ of prohibition, and related papers, see California Forms of Pleading and Practice, Ch. 358, *Mandate and Prohibition* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities generally supporting and opposing demurrers and motions relating to the bar of the statute of limitations, see Ch. 143, *Limitation of Actions* . For memoranda of points and authorities generally supporting and opposing a demurrer to a complaint or a motion for judgment on the pleadings, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For memoranda of points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* . For memoranda of points and authorities generally supporting and opposing a petition for a writ of mandate or a petition for a writ of prohibition, see Ch. 150, *Mandate and Prohibition* .

[d] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 220.51* and *220.52* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Applicable Statute of Limitations

Iusi v. City Title Ins. Co. *(1963) 213 Cal. App. 2d 582, 28 Cal. Rptr. 893* , was an appeal from a judgment for plaintiff, a real estate broker, against defendant title companies, for breach of an agreement as to which the broker claimed to be a third-party beneficiary. Plaintiff had acted as real estate broker for the sellers in the sale of two parcels of land owned by them. The nominal purchaser was one Frances King, acting as a "dummy" for a person, who was also represented by a real estate broker. Two standard form deposit receipt agreements were signed by the two brokers and purportedly by King. The agreements were presented to the sellers and they signed. Each agreement recited that plaintiff had received $1,000 from the title company as a deposit on the purchase price of the parcel therein described and each provided for additional amounts to be paid into escrow within 90 days. The agreements further provided that if the additional payments were not timely made, the deposit would be forfeited to the sellers, provided, however, that one half the deposit was to be paid plaintiff as his commission.

The sellers became unwilling to consummate the sales. Plaintiff sued them for the full amount of his commission

($4,574.25) on the theory he'd produced a purchaser ready, able, and willing to purchase the property. The sellers cross complained for their one-half of the deposit which they claimed had been forfeited by the purchaser. King also sued the sellers for specific performance, but lost her case because she had failed to make the additional downpayments within the time prescribed in the deposit agreements. In plaintiff's action, King testified she had not signed the deposit agreements or authorized anyone to sign them for her. Accordingly, the court held plaintiff had not produced a real purchaser and was not entitled to a commission. The court further held the $2,000 forfeited because additional downpayments were not made within the time prescribed. The court found plaintiff had not received the $2,000 deposit, had falsely represented to the sellers that he had, and was estopped to deny that he had. Judgment was rendered on the cross complaint for the sellers for one-half the total deposit plus costs ($1,038.70).

Plaintiff filed the present action against the notary who acknowledged the forged signatures of King and her surety (first count) and against the title companies on the theory they had breached their contract, of which plaintiff was a third-party beneficiary, with the real purchaser by their failure to have paid the additional monies into escrow as required by the deposit agreements (second count). The amount claimed in each count was the amount of plaintiff's claimed commission in full. Plaintiff obtained judgment under the first count and the insurance company satisfied the judgment in full. With respect to the title companies, the trial court held they were not liable for the commission but rendered judgment against them for $1,038.70, "the same being the amount due the [sellers] from the plaintiff herein." Defendants appealed.

The court of appeal reversed. The court pointed out that the quoted statement obviously referred to the judgment obtained by the sellers on their cross complaint against plaintiff in the prior action. The court said, however, there was no mention of this judgment anywhere in plaintiff's complaint and that the record did not show that any issue involving it was ever raised during the trial (*213 Cal. App. 2d 582, 585)* . The court rejected plaintiff's suggestion that the trial court had applied the theory of subrogation on the ground any recovery on such a theory was outside the issues raised by the pleadings (*213 Cal. App. 2d 582, 585-586)* . However, the court added that assuming plaintiff's pleadings could encompass such a theory, plaintiff, as subrogee, had no greater rights than his subrogors, the sellers, and would be subject to the same defenses the title companies would have against them. This would include the defense of the statute of limitations (*213 Cal. App. 2d 582, 588)* . Equity will enforce subrogation only when the action is brought within the time in which an action could have been brought to enforce the original obligation to which the right of subrogation is sought (*213 Cal. App. 2d 582, 588)* . The court said the statute of limitations had already run on any action the sellers had against the title companies by the time of the alleged subrogation and rejected plaintiff's argument that the title companies were estopped to plead the bar of the statute (*213 Cal. App. 2d 582, 588-589)* .

The facts and procedural background of ***Automobile Ins. Co. v. Union Oil Co.*** *(1948) 85 Cal. App. 2d 302, 193 P.2d 48* , are discussed in *§ 220.23[3][b]*. The court of appeal reversed the judgment for defendant on the ground the wrong statute of limitations had been applied. The court said an insurer subrogated to the rights of its insured against a third-party responsible for a loss by fire which the insurer paid is subject to the same statute of limitations that applies to its insured. Whatever period of limitation was applicable to the insured passed by subrogation to the insurance carriers, who by reason of such subrogation are put in the place of the party to whose rights they are subrogated (*85 Cal. App. 2d 302, 304-305)* .

[b] Action for Injury to Real or Personal Property

The facts and procedural background of ***Automobile Ins. Co. v. Union Oil Co.*** *(1948) 85 Cal. App. 2d 302, 193 P.2d 48* , are discussed in *§ 220.23[3][b]*. Defendant pleaded the action was barred by the provisions of *Code Civ. Proc. § 339(1)*, which provides a two-year period of limitation on actions on a contract, obligation, or liability not founded on an instrument in writing. Defendant's objection on that ground to the introduction of evidence was sustained and judgment was entered for defendant.

The court of appeal reversed. The court held the insured's action was ex delicto (arising from wrong or tort as opposed

to contract) for tortious damage to property, and held such actions are controlled by former Code Civ. Proc. § 338(2) and *(3)* [*now see Code Civ. Proc. § 338(b)* and *(c)*], providing a three-year period of limitations (*85 Cal. App. 2d 302, 307-309)* .

[c] Action for Personal Injury

County of San Diego v. Sanfax Corp. *(1977) 19 Cal. 3d 862, 140 Cal. Rptr. 638, 568 P.2d 363* , was an action by a county against a manufacturer to recover workers' compensation benefits paid and payable to two county employees injured in an explosion while using defendant's product. One of the injured employees was a county employee; the other was a United States Marine who, although on active duty, was working for the county as part of a civilian job training program established between the Marine Corps and the county. The county initially did not regard this man as its workers' compensation responsibility and did not provide him with benefits. Both employees sued the manufacturer within one year of the accident. The Marine in his action joined the county as a defendant. In this action, the county's motion for summary judgment on the ground it owed the Marine only workers' compensation benefits was granted. The county also filed a lien on its employee's action to recover its workers compensation expenses. Prior to the county's filing its action against the manufacturer, the employees, without the county's consent, settled their personal injury actions with the manufacturer. The county's action was filed within a year after the settlements and of the county's agreeing to pay benefits to the Marine but more than two years after the accident. Defendant's demurrer to the complaint was sustained without leave to amend on the ground the actions were barred by former Code Civ. Proc. § 340(3) [*now see Code Civ. Proc. § 335.1* (two-year limitations period, beginning in 2003)], which imposed a one-year statute of limitations on actions for injury caused by the wrongful act or neglect of another. Plaintiff appealed from the subsequent judgment of dismissal.

The Supreme Court affirmed. It held that the one year-period of limitations set forth in former Code Civ. Proc. § 340(3) [*now see Code Civ. Proc. § 335.1* (two-year limitations period, beginning in 2003)] governed the employee's action against the tortfeasor (*19 Cal. 3d 862, 874)* .

[d] Action to Recover Workers' Compensation Benefits Paid

The facts and procedural background of ***County of San Diego v. Sanfax Corp.*** *(1977) 19 Cal. 3d 862, 140 Cal. Rptr. 638, 568 P.2d 363* , are discussed in *§ 220.31[3][c]*. In affirming the judgment of dismissal on the ground the action was barred by former Code Civ. Proc. § 340(3) [*now see Code Civ. Proc. § 335.1* (two-year limitations period, beginning in 2003)], the Court rejected the county's contention that the action was on a liability created by statute and hence governed by the three-year period of limitation set forth in former Code Civ. Proc. § 338(1) [*now see Code Civ. Proc. § 338(a)*] (*19 Cal. 3d 862, 868-869)* . The Court noted that in granting employers the right to sue third parties, the legislature simply gave statutory recognition to principles of equitable subrogation (*19 Cal. 3d 862, 876 n.7*). The Court said that recognizing the procedural and substantive interchangeability of employee and employer third-party actions, the cases have consistently held that the same statute of limitations, former Code Civ. Proc. § 340(3) [*now see Code Civ. Proc. § 335.1* (two-year limitations period, beginning in 2003)], governs both employee and employer actions (*19 Cal. 3d 862, 874)* . The Court accordingly held that the one-year statute of limitations of former Code Civ. Proc. § 340(3) [*now see Code Civ. Proc. § 335.1* (two-year limitations period, beginning in 2003)] governed an employer's action under *Lab. Code § 3852* (*19 Cal. 3d 862, 878-879, 886)* . The Court further held that the statute runs from the date of injury and not from the date the employer agrees to pay, pays, or is ordered to pay workers' compensation benefits (*19 Cal. 3d 862, 879-884)* .

NOTE:

The Federal Employers' Liability Act, as distinguished from the California's Workers' Compensation Law, does not contain subrogation provisions. An action by the employer against a third-party tortfeasor under the federal act is one for indemnity, and thus the cause of action accrues and the statute of limitations commences to run when the employer pays the underlying claim [*see Southern Pac. Transp.*

Co. v. Ohbayashi Am. Corp. (1983) 147 Cal. App. 3d 233, 236-239, 195 Cal. Rptr. 63] .

[e] Disability of Minority Tolling Statute of Limitations as Not Subrogated

Amie v. Superior Court *(1979) 99 Cal. App. 3d 421, 160 Cal. Rptr. 271* , was a mandate proceeding arising out of an action against a father by a county seeking reimbursement for child support. The father demurred to the complaint on the ground the action was barred by the three-year period of limitations imposed by former Code Civ. Proc. § 338(1) [*now see Code Civ. Proc. § 338(a)*] on a liability created by statute, to the extent the complaint sought recovery for public assistance paid for support more than three years before the complaint was filed. The demurrer was overruled, and the father petitioned for a writ of mandate to require the trial court to enter an order sustaining the demurrer. In the writ proceeding, the county argued that its right of action was derived by way of assignment or subrogation from the child's right of action against her parent for support and that as the child's minority would toll the statute of limitations in an action commenced by her, the statute likewise tolled the statute as to the county's action (*99 Cal. App. 3d 421, 425)* .

The court of appeal rejected the argument and ordered the writ issued. The court said the disability of a minor which tolls the statute of limitations is personal and may not be transferred by assignment or subrogation (*99 Cal. App. 3d 421, 426, 428)* .

[4] Additional Authorities

[a] Applicable Statute of Limitations

In *Employers Ins. of Wausau v. Granite State Ins Co. (9th Cir. 2003) 330 F.3d 1214* , the primary insurer brought a subrogation action against the excess insurer after paying the third-party claim of a mutual insured. The federal district court vacated a judgment for the primary insurer after applying a two-year statute of limitations under Civ. Code § 339. On cross-appeal, the excess insurer contended that even if the action was not time-barred, it was not liable for any portion of the settlement because the primary policy was not exhausted. The Ninth Circuit reversed the dismissal of the action as time-barred, but also reversed the decision that the excess policy was triggered, remanding with instructions to enter judgment for the excess insurer. With respect to the applicable statute of limitations, the Ninth Circuit held that the statute of limitations in a subrogation action is the statute of limitations that would have been applicable if the insured had brought suit on the insured's own behalf. A direct action by the third party against the excess insurer would have been subject to a four-year statute of limitations under *Code Civ. Proc. § 337*. Accordingly, the primary insurer must be afforded a four-year period in which to enforce the third party's rights against the excess insurer (*330 F.3d 1214, 1218-1219)* .

Commercial Union Assurance Co. v. City of San Jose (1982) 127 Cal. App. 3d 730, 179 Cal. Rptr. 814 , is discussed in *§ 220.33[3][a]*]. The court of appeal said that in a subrogated action by an insurer, the tortfeasor is usually permitted to assert all defenses available against the insured, including the statute of limitations (*127 Cal. App. 3d 730, 733)* . Equity will enforce subrogation only when the action is brought within the time in which an action could have been brought to enforce the original obligation to which the right of subrogation is sought (*127 Cal. App. 3d 730, 734)* .

California Points & Authorities

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Volume 22 Chapters 220-229 SUBROGATION---to---TRESPASS
CHAPTER 220 SUBROGATION
PART II. FORMS

22-220 California Points & Authorities § 220.32

§ 220.32 Supporting Obligor's Contention That Action Is Barred--Insurer Cannot Recover From One Insured an Amount Paid to Another Insured Pursuant to Separate Policy

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF INSURER'S ACTION IN SUBROGATION, BASED ON ITS PAYMENTS TO ONE OF ITS INSUREDS, IS BARRED BECAUSE AT ALL RELEVANT TIMES DEFENDANT WAS INSURED BY PLAINTIFF UNDER A SEPARATE POLICY.

Insurer Cannot Recover From One Insured Amount Paid to Another Insured Pursuant to Separate Policy. An insurer is barred from recovering from one of its insureds an amount that it paid to another insured pursuant to a separate policy (*National Union Fire Ins. v. Engineering-Sci. (9th Cir. 1989) 884 F.2d 1208, 1210)* .

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of the contention that an action by the subrogee is barred, when the subrogee is an insurer seeking to recover amounts paid to one insured under a policy with respect to which defendant is a third party, and when defendant was also insured by plaintiff under a separate policy that was in effect at the time [*see National Union Fire Ins. v. Engineering-Sci. (9th Cir. 1989) 884 F.2d 1208, 1210]* .

These points and authorities may be used alone or combined with a memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the substantive issue that the action for subrogation is barred. For example, they may be combined with points and authorities relating to a motion for summary judgment. Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. For example, counsel should show that the defendant was insured by plaintiff under a separate policy when the event underlying plaintiff's action occurred.

[b] Related Pleading and Practice Chapters

For discussion and forms relating to subrogation generally, see California Forms of Pleading and Practice, Ch. 536, *Subrogation* (Matthew Bender). For discussion and forms relating to summary judgment motions, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Insurer Cannot Recover From One Insured Amount Paid to Another Insured Pursuant to Separate Policy

In ***National Union Fire Ins. v. Engineering-Sci.*** *(9th Cir. 1989) 884 F.2d 1208* , an insurer brought an action in subrogation against an engineering company, which it insured under a professional negligence policy, to recover amounts paid under a builder's risk insurance policy issued to a general contractor. A sewer pipeline, designed by defendant and constructed by a general contractor, sustained extensive damage in severe weather, repairs for which plaintiff paid $4 million under a builder's risk policy issued to the contractor. Plaintiff had also issued a professional negligence policy to the engineering company that designed the pipeline, insuring it against errors and omissions. In a subrogation action brought in federal court on diversity grounds, plaintiff sued the engineering company to recover benefits paid under the builder's risk policy. Defendant successfully moved for summary judgment, and plaintiff appealed.

The federal court of appeal affirmed, holding that an insurer cannot recover amounts paid under one insurance policy from another policy holder (*884 F.2d 1208, 1210)* . The court noted that no California court had addressed the precise issue whether an insurer, claiming subrogation for amounts paid an insured under one policy, is barred from suing a third party whom it has also insured under a separate policy. In a case in which an insurer sued a subcontractor that was a coinsured under a policy, the California court of appeal denied relief, holding that an insurer is barred from subrogating against its own insured for a loss against which it had insured [*see St. Paul Fire & Marine Ins. Co. v. Murray Plumbing & Heating Corp. (1976) 65 Cal. App. 3d 66, 75-77, 135 Cal. Rptr. 120* ; *see also § 220.45[3][a]*]. The federal court of appeal agreed with that opinion and concluded that California courts would probably bar a subrogation action by an insurance company against its own insured under the circumstances in the case before it (*884 F.2d 1208, 1210)* .

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Volume 22 Chapters 220-229 SUBROGATION---to---TRESPASS
CHAPTER 220 SUBROGATION
PART II. FORMS

22-220 California Points & Authorities § 220.33

§ 220.33 Supporting Obligor's Contention That Action Against Public Entity Is Barred--Plaintiff Subrogee Failed to File Action Within Time Prescribed by Statute After Rejection of Claim [Gov. Code § 945.6(a)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THIS ACTION IS BARRED BECAUSE PLAINTIFF SUBROGEE FAILED TO FILE IT WITHIN THE TIME REQUIRED BY SECTION 945.6(a) OF THE GOVERNMENT CODE AFTER THE CLAIM WAS REJECTED.

A. Time Within Which Action Must Be Commenced. With exceptions not here pertinent, any suit brought against a public entity on a cause of action for which a claim is required to be presented must, if written notice of rejection is given in accordance with *Gov. Code § 913*, be commenced not later than six months after the date the notice is personally delivered or deposited in the mail (*Gov. Code § 945.6(a)*).

B. Action Not Timely Filed After Rejection of Claim as Barred. In the absence of special considerations, an insurer's right to recover on the insured's cause of action against an alleged public entity tortfeasor for damages is barred when the statutory period prescribed by *Section 945.6(a) of the Government Code* has run on the insured's claim and no action has been filed (*Commercial Union Assurance Co. v. City of San Jose (1982) 127 Cal. App. 3d 730, 735, 179 Cal. Rptr. 814*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the action in subrogation against a public entity is barred because the subrogee's action was not timely filed after rejection of the subrogor's claim.

These points and authorities may be used alone or combined with a memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue. For example, they may be combined with a memorandum of points and authorities (1) in support of a general demurrer to the complaint [*see Code Civ. Proc. §§*

430.10(e), 430.30(a)], or (2) in support of a nonstatutory motion by defendant for judgment on the pleadings when the date the claim was rejected is alleged. They may also be combined with a memorandum of points and authorities in support of a motion by defendant or in opposition to a motion by plaintiff for summary judgment when the date the claim was rejected is not alleged or has been falsely alleged to make the filing of the action timely [*see Code Civ. Proc. § 437c*]. Should the trial court erroneously rule that plaintiff is entitled to maintain the action, these points and authorities may be combined with a memorandum of points and authorities in support of a petition for writ of mandate [*see Code Civ. Proc. §§ 1085, 1086*] to compel the trial court to vacate its ruling and for a writ of prohibition [*see Code Civ. Proc. §§ 1102, 1103*] to restrain the trial court from proceeding with the action. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, if the contention is made in support of a demurrer or a motion for judgment on the pleadings, counsel should simply show (from the court's records) that the complaint was filed more than six months after it alleges the claim was rejected. The points and authorities should establish that the action is barred. If the contention is made in support of or in opposition to a motion, other than a motion for judgment on the pleadings, counsel should present the facts showing the claim was rejected more than six months before the action was filed. The facts would normally be presented in one or more supporting affidavits or declarations under penalty of perjury to which reference may be made in this memorandum of points and authorities [*see Code Civ. Proc. §§ 2009, 2015.5*]. If the contention is made in support of a petition for a writ of mandate and/or a writ of prohibition, counsel should show, in addition to the above, that the objection was properly raised in and rejected by the trial court. This would normally be shown by attaching to the petition authenticated copies of the appropriate trial court records.

[b] Related Pleading and Practice Chapters

For forms of demurrers and motions for judgment on the pleadings, and related papers, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For forms of notices of motion for summary judgment and related papers, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender). For forms of petitions for writ of mandate and writ of prohibition, and related papers, see California Forms of Pleading and Practice, Ch. 358, *Mandate and Prohibition* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities generally supporting and opposing a demurrer to a complaint or a motion for judgment on the pleadings, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For memoranda of points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* . For memoranda of points and authorities generally supporting and opposing a petition for a writ of mandate or a petition for a writ of prohibition, see Ch. 150, *Mandate and Prohibition* .

For memoranda of points and authorities supporting and opposing motions for summary judgments on specific grounds in actions against public entities, see Ch. 196, *Public Entities* .

[3] Discussion of Authorities

[a] Action Not Timely Filed After Rejection of Claim as Barred

Commercial Union Assurance Co. v. City of San Jose *(1982) 127 Cal. App. 3d 730, 179 Cal. Rptr. 814* , was an action by an insurer against a city to recover as the subrogee of its insured amounts paid for property damage. The complaint alleged that plaintiff's insured suffered property damage from falling tree branches allegedly caused by the city's negligence; the damage was covered by an insurance policy then in force between the insurer and its insured; on April 14, 1978 the insured presented a claim to the city for $30,000 damages [*see Gov. Code § 905*]; on May 18, 1978 the city rejected the claim and gave notice of the rejection; on June 27, 1978 the insurer paid the insured $550 for lost

rents; on January 4, 1979 the insurer notified the city it would be pursuing its subrogation rights against the city after paying repair costs estimated in the range of $15,000 to $20,000; and on January 30, 1979 the city served on the insurer a "Notice of Insufficiency and/or Non-Acceptance of Claim." The complaint was filed on February 3, 1979 by the insurer as subrogee to recover damages to be ascertained. The city's demurrer to the complaint was sustained with leave to amend on the ground more than six months had elapsed between the date the city rejected the insured's claim for damages and the commencement of the action. Following plaintiff's failure to amend, a judgment of dismissal was entered, and plaintiff appealed. Plaintiff contended that it had no cause of action until it and its insured agreed on the amount of the loss and such sum was paid to the insured; its letter of January 4, 1979, constituted a timely claim for its own independent rights within the provisions of *Gov. Code § 911.2* (relating to the time for presenting a claim); and in any event, principles established in connection with the statutory rights of subrogation of uninsured motorist insurers established that plaintiff's action was not barred.

The court of appeal rejected the contentions and affirmed the judgment. The court said generally the insurer's subrogated right is its right to be put in the position of its insured against third parties legally responsible to its insured for the loss which the insurer has both insured and paid, and the tortfeasor is usually permitted to assert all defenses available against the insured including the statute of limitations (*127 Cal. App. 3d 730, 733)* . The court pointed out that under *Gov. Code § 945.6(a)* the insured's right to commence an action against the city expired on or about November 18, 1978 (*127 Cal. App. 3d 730, 733-734)* . The court explained that the right of an insurer to be subrogated to the rights of its insured is generally distinguished from a claim for contribution or indemnity or statutory subrogation. In the former cases the rule is that equity will enforce subrogation only when the action is brought within the time in which an action could have been brought to enforce the original obligation to which the right of subrogation is sought. This is also the general rule for common law subrogation as distinguished from indemnity or contribution. The same limitation is applied to an employer's statutory right to subrogation against a tortfeasor for workers' compensation benefits paid to an employee for injuries caused by the tortfeasor's negligence (*127 Cal. App. 3d 730, 734-735)* . The court concluded that in the absence of special considerations, the insurer's right to recover on the insured's cause of action against the alleged tortfeasor for the damages to the insured's property was barred when the statutory period ran on the insured's cause of action (*127 Cal. App. 3d 730, 735)* . The court distinguished those cases involving subrogation rights of an insurer paying uninsured motorist benefits [*see § 220.51*] on the ground those rights are governed by a special statute that does not apply in other cases (*127 Cal. App. 3d 730, 735-736)* .

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CHAPTER 220 SUBROGATION
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22-220 California Points & Authorities § 220.34

§ 220.34 Supporting Obligor's Contention That Partial Subrogee Suing on Split Cause of Action Is Barred by Doctrine of Res Judicata

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THIS ACTION IS BARRED BECAUSE A PRIOR ACTION ON THE SAME CAUSE WAS PROSECUTED BY PLAINTIFF'S SUBROGOR, AND A JUDGMENT WAS ENTERED IN THAT ACTION AND HAS BECOME FINAL.

A. Right of Action and Cause of Action Distinguished. Both the partial subrogee and the partial subrogor have a claim against the obligor and each may sue the obligor; that is, each has a right of action against the obligor, but there is only one cause of action (*Ventura County Employees' Ret. Ass'n v. Pope (1978) 87 Cal. App. 3d 938, 953, 151 Cal. Rptr. 695*).

B. Prohibition Against Splitting Cause of Action. A party may not split a single cause of action and make it the basis of separate suits (*see* *Wulfjen v. Dolton (1944) 24 Cal. 2d 891, 894, 151 P.2d 846* ; *Ferraro v. Southern Cal. Gas Co. (1980) 102 Cal. App. 3d 33, 41, 162 Cal. Rptr. 238*).

C. Action Is Res Judicata. When a partial subrogee and a partial subrogor have split the cause of action by each separately suing the obligor and a judgment in one of the actions has previously been entered and become final, the cause of action is res judicata and the second action is barred (*see* *Ferraro v. Southern Cal. Gas Co. (1980) 102 Cal. App. 3d 33, 41, 162 Cal. Rptr. 238* ; *Phillips v. Western Pac. R.R. Co. (1971), 22 Cal. App. 3d 441, 444, 99 Cal. Rptr. 451*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that an action by a partial subrogee is barred

by the doctrine of res judicata when a judgment has been rendered in a prior action on the same cause by plaintiff's partial subrogor.

These points and authorities may be used alone or combined with a memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of res judicata. For example, if it appears from the face of the complaint or judicially noticed matter that the action is barred by a prior judgment, they may be combined with a memorandum of points and authorities: (1) in support of the obligor's general demurrer to the partial subrogee's complaint [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*]; or (2) in support of a nonstatutory motion by defendant for judgment on the pleadings. If the obligor has filed an answer pleading that the action is barred by res judicata [*see Code Civ. Proc. § 431.30(b)(2)*], these points and authorities may be used in support of a motion by the obligor for a separate trial of that defense [*see Code Civ. Proc. § 597*], or these points and authorities may be combined with a memorandum of points and authorities in support of the obligor's motion for summary judgment on the ground the action has no merit because it is barred by the doctrine of res judicata [*see Code Civ. Proc. § 437c*]. In any of these proceedings, counsel for the obligor should ask the court to take judicial notice of the prior action [*see Code Civ. Proc. §§ 437c(b), 430.70*; *Evid. Code §§ 452(d), 453*]. Should the trial court erroneously rule against the defense, these points and authorities may be combined with a memorandum of points and authorities in support of a petition for writ of mandate [*see Code Civ. Proc. §§ 1085, 1086*] to compel the trial court to vacate its ruling and for a writ of prohibition [*see Code Civ. Proc. §§ 1102, 1103*] to restrain the trial court from proceeding with the action. These points and authorities may also be adapted for use in a trial or appellate brief.

With appropriate modifications, the points and authorities may be used in support of any of these proceedings when the action is by the partial subrogor and the prior action was by the partial subrogee.

If no final judgment has been entered in the prior action, whether by the partial subrogee or the partial subrogor, these points and authorities may, with appropriate modifications, be combined with points and authorities (1) in support of a motion to consolidate the actions [*see Code Civ. Proc. § 1048(a)*]; (2) in support of a demurrer to the complaint on the ground there is another action pending between the same parties on the same cause [*see Code Civ. Proc. § 430.10(c)*]; (3) for a separate trial of that defense [*see Code Civ. Proc. § 597*]; or (4) in support of a demurrer to the complaint on the ground there is a defect (nonjoinder) of parties plaintiff [*see Code Civ. Proc. § 430.10(d)*]. They may also be used in support of a motion to compel joinder of the partial subrogee or partial subrogor, as the case may be [*see Code Civ. Proc. § 389*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Partial Subrogee or Subrogor

When a third party (subrogee) pays the creditor (subrogor) only a portion of the obligation of the principal debtor or tortfeasor (obligor), there is but a partial subrogation; the third party is a partial subrogee and the creditor is a partial subrogor [*see, e.g., Ferraro v. Southern Cal. Gas Co. (1980) 102 Cal. App. 3d 33, 42-43, 162 Cal. Rptr. 238* ; *Bank of Orient v. Superior Court (1977) 67 Cal. App. 3d 588, 594, 136 Cal. Rptr. 741]* .

[c] Nature of Objection and Waiver

The splitting of a cause of action is not a jurisdictional defect but rather an affirmative defense that must be pleaded by the defendant or is waived [*Ferraro v. Southern Cal. Gas Co. (1980) 102 Cal. App. 3d 33, 43-44, 162 Cal. Rptr. 238]* . The same is true of the alternative objection that the partial subrogee or partial subrogor has failed to join the other as a party in his or her action against the obligor; the failure is not a jurisdictional defect in the fundamental sense, since it does not deprive the trial court of subject matter jurisdiction [*Ferraro v. Southern Cal. Gas Co. (1980) 102 Cal. App. 3d 33, 44-45, 162 Cal. Rptr. 238]* . The omitted party is not an indispensable party but only what would have been a

conditionally necessary party under *Code Civ. Proc. § 389* prior to its 1971 amendment [*Peerless Ins. Co. v. Superior Court (1970) 6 Cal. App. 3d 358, 361-363, 85 Cal. Rptr. 679]* . Hence, the objection of nonjoinder is waived if not timely and properly made [*Peerless Ins. Co. v. Superior Court (1970) 6 Cal. App. 3d 358, 361, 363, 85 Cal. Rptr. 679]* . A fortiori, the objection may not be raised for the first time on appeal from the judgment [*Ferraro v. Southern Cal. Gas Co. (1980) 102 Cal. App. 3d 33, 44-45, 162 Cal. Rptr. 238]* .

[d] How to Avoid Defense That Action Has Been Split

To avoid the defense that the cause of action has been split (as well as the issue of nonjoinder of a party), both the partial subrogee and partial subrogor should, each to enforce his or her own claim, join together as plaintiffs in a lawsuit against the debtor or tortfeasor. If either person is unwilling to be joined as a plaintiff in an action by the other, the other may sue the obligor and name the unwilling plaintiff as a defendant in that action, as authorized by *Code Civ. Proc. § 382* [*see* *Offer v. Superior Court (1924) 194 Cal. 114, 118-119, 228 P. 11* ; *Phillips v. Western Pac. R.R. Co. (1971) 22 Cal. App. 3d 441, 443, 99 Cal. Rptr. 451]* . If this is done, a cross complaint by the unwilling plaintiff as defendant on his or her partial claim against the codefendant (the principal debtor or tortfeasor), does not constitute, but rather prevents, an impermissible splitting of a cause of action [*Phillips v. Western Pac. R.R. Co. (1971) 22 Cal. App. 3d 441, 445, 99 Cal. Rptr. 451* ; *see* *Ferraro v. Southern Cal. Gas Co. (1980) 102 Cal. App. 3d 33, 42-43, 162 Cal. Rptr. 238]* .

[e] Related Pleading and Practice Chapters

For forms of the affirmative defense of another action pending and defect of parties and motions for separate trial of an affirmative defense, see California Forms of Pleading and Practice, Ch. 3, *Abatement of Actions* (Matthew Bender). For forms of demurrers and motions for judgment on the pleadings, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For forms of motions to compel joinder of a party, and for use by a party seeking leave to intervene in an action, see California Forms of Pleading and Practice, Ch. 395, *Parties* (Matthew Bender). For forms of the defense of res judicata, see California Forms of Pleading and Practice, Ch. 491, *Res Judicata* (Matthew Bender). For forms of motions for *Summary Judgment,* see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender). For forms of petitions for writs of mandate and prohibition and related forms, see California Forms of Pleading and Practice, Ch. 358, *Mandate and Prohibition* (Matthew Bender).

[f] Related Points and Authorities

For memoranda of points and authorities supporting and opposing a motion for separate trial of a plea in abatement, see Ch. 10, *Abatement and Survival of Actions* . For memoranda of points and authorities supporting and opposing a demurrer to a complaint on the grounds of nonjoinder of parties, another action pending, or failure to state a cause of action, and supporting and opposing motions for judgment on the pleadings, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For a memorandum of points and authorities supporting the contention that an omitted partial assignee or subrogee should be joined as a party to the action, see Ch. 168, *Parties* . For memoranda of points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* . For memoranda of points and authorities generally supporting and opposing a petition for a writ of mandate or a petition for writ of prohibition, see Ch. 150, *Mandate and Prohibition* .

[3] Discussion of Authorities

[a] Right of Action and Cause of Action Distinguished

Ventura County Employees' Ret. Ass'n v. Pope *(1978) 87 Cal. App. 3d 938, 151 Cal. Rptr. 695* , was an action by a county employees' retirement association against an alleged third-party tortfeasor to recover one-half the disability benefits payable to an employee-member of the association who was injured in an automobile collision with defendant.

The employee had settled her personal claim against defendant for $20,000 and executed a general release in his favor. The association was not a party to the settlement. Prior to the settlement, the employee had applied to the association for disability benefits and, after the settlement, was found by the association to be totally disabled for the performance of her duties, and was granted benefits. Thirteen months after the accident, the association notified defendant's insurance adjusters of its intention to seek subrogation. Without adjudicating the wrongfulness of defendant's conduct or determining his tort liability, the trial court gave judgment for plaintiff for $17,000, and defendant appealed.

The court of appeal reversed. The court held reversal was mandated by the trial court's failure to make any factual determinations of defendant's liability (*87 Cal. App. 3d 938, 943)* . In holding the claims of the association and of the employee constituted but a single cause of action, the court said our legal vocabulary may be deficient in failing to differentiate sufficiently between the operative facts that form the basis for a legal claim [*Code Civ. Proc. §§ 307, 425.10*] and the right of the person entitled to pursue the claim [*Code Civ. Proc. §§ 367, 378*]. The deficiency becomes particularly pronounced when multiple claimants are pursuing a single wrong. The court suggested we employ the term "cause of action" to identify the operative facts giving rise to a claim for relief, and the term "right of action" to identify the right of a person entitled to pursue all or part of a particular claim for relief. The court observed that such differentiation in vocabulary was hinted at in *Smith v. County of Los Angeles (1969) 276 Cal. App. 2d 156, 162-164, 81 Cal. Rptr. 120* , in which the court, in referring to separate suits against third parties by an employer and by an employee, declared that each of the two plaintiffs had a separate right of action, which the court then distinguished from what it referred to as the total action involving the totality of recovery. The court in *Ventura* explained that if it made a similar differentiation, it would see that one cause of action containing various facets had been separately pursued by different claimants, each of whom possessed a right of action. By using a precise vocabulary, the court could, it said, identify the association's right of action as part of the employee's cause of action (*87 Cal. App. 3d 938, 953)* .

[b] Prohibition Against Splitting Cause of Action

Wulfjen v. Dolton *(1944) 24 Cal. 2d 891, 151 P.2d 846* , did not involve subrogation, but is the leading case on the splitting of causes of action. Plaintiff had filed a prior action against individuals and a corporation in which she alleged the individuals were the organizers and promoters of the corporation, and that they controlled the corporation and the corporation was their alter ego. Additionally, through the fraud of the individuals she was induced to advance substantial sums of money to the corporation which she later learned to be insolvent, and she'd given notice of rescission. The complaint in that action alleged causes of action for fraud, rescission, and money had and received. The trial court found the rescission was effective against the corporation, but that the corporation was not the alter ego of the individual defendants and all money advanced by plaintiff went to the corporation. Judgment in that action was entered in favor of plaintiff against the corporation, and plaintiff appealed. While the appeal was pending, she filed the present action for damages for conspiracy to defraud arising out of the same matters alleged in the prior action. Defendants were the same individuals sued in the prior action amid another person who was not a party to the prior action. Defendants invoked the defenses of pendency of the former action, election of remedies, and estoppel. Judgment was for the defendants, and plaintiff appealed.

The Supreme Court affirmed the judgment in part and reversed it in part. The Court said it is clearly established that a party may not split up a single cause of action and make it the basis of separate suits, and in such case the first action may be pleaded in abatement of any subsequent suit on the same claim (*24 Cal. 2d 891, 894)* . The rule against splitting a cause of action is based on two reasons: (1) defendant should be protected against vexatious litigation; and (2) it is against public policy to permit litigants to consume the time of the courts by relitigating matters already judicially determined, or by asserting claims which properly should have been settled in some prior action (*24 Cal. 2d 891, 894-895)* . With respect to the individuals sued in both actions, the Court held the case fell within the scope of this principle of law and plaintiff was simply seeking a different form of relief based on the same cause of action (*24 Cal. 2d 891, 895)* . The violation of one primary right constitutes a single cause of action, though it may entitle the injured party to many forms of relief; the relief is not to be confounded with the cause of action, one not being determinative of the other (*24 Cal. 2d 891, 895-896)* . Accordingly, the Court affirmed the judgment as to those defendants sued in both

actions and reversed it as to the defendant who had not been joined in the prior action (*24 Cal. 2d 891, 897)* .

Ferraro v. Southern Cal. Gas Co. *(1980) 102 Cal. App. 3d 33, 162 Cal. Rptr. 238* , was an action arising out of the destruction of buildings by an explosion caused by a gas service connection being pulled loose by a backhoe operator laying a new electrical line. After the explosion, the owners of the buildings settled their claims with their fire insurance carrier and executed a subrogation agreement with it. The insurer then filed a complaint against the electrical utility, the contractor, and the gas company. About six months later, the owners of the property filed the present action against the same defendants. Consistent with their subrogation agreement, plaintiff owners alleged they had received insurance benefits in the amount of $70,000 from their insurer. They did not attempt to join the insurer, nor did the insurer seek to join. At the conclusion of the liability phase of the trial, the jury determined the electrical utility and the contractor were 85 percent at fault and the gas company was 15 percent at fault. At the beginning of the damage phase, plaintiff owners settled their claim with the electrical utility and the contractor for $35,000, and the case continued against the gas company only. Counsel for plaintiffs stipulated that the court could deduct the sum of $65,500 (the $70,000 insurance proceeds received minus $4,500 for the costs of collecting it) from any damage verdict rendered in their favor. The jury returned a verdict for plaintiffs for $91,081.12, but judgment was entered for zero dollars due to deductions for the insurance proceeds and the settlement received by plaintiffs. Plaintiffs appealed. Defendant moved to dismiss the appeal on the ground plaintiffs had split their cause of action.

The court denied the motion to dismiss on the ground the defense was waived by failure to have raised it in the trial court, but affirmed the judgment on the ground defendant could not be subjected to double liability [*see § 220.37*] (*102 Cal. App. 3d 33, 43-44, 46-47, 53)* . The court nevertheless said it has become axiomatic that a single cause of action cannot be split and made the basis for several suits and that the policy behind the rule was set out in *Wulfjen v. Dolton (1944) 24 Cal. 2d 891, 894-895, 151 P.2d 846* . Quoting that case, the court said the rule against splitting a cause of action has two bases: (1) defendant should be protected against vexatious litigation; and (2) it is against public policy to permit litigation to consume the time of the courts by relitigating matters already judicially determined, or by asserting claims which properly should have been settled in some prior action (*102 Cal. App. 3d 33, 41)* .

[c] Action is Res Judicata

The facts and procedural background of ***Ferraro v. Southern Cal. Gas Co.*** *(1980) 102 Cal. App. 3d 33, 162 Cal. Rptr. 238* , are discussed in *§ 220.34[3][b]*. In affirming the judgment, the court said the rule against splitting a cause of action is both a rule of abatement of actions--a defendant in a second suit may plead the pendency of the first in abatement--and a rule involving the application of the doctrine of res judicata--a defendant in a second suit, if a previous suit has been concluded and judgment rendered on the merits, may plead that judgment as a bar (*102 Cal. App. 3d 33, 41)* .

Phillips v. Western Pac. R.R. Co. *(1971), 22 Cal. App. 3d 441, 99 Cal. Rptr. 451* , was an action by an insurance carrier as the partial subrogee of its insureds to recover the amount paid the insureds on account of losses sustained by the destruction of property caused by a fire for which the railroad was alleged to be responsible. Plaintiff joined the insureds as defendants under the provisions of *Code Civ. Proc. § 382* (unwilling plaintiff sued as defendant). The railroad filed a general denial. The insureds filed an answer to the complaint denying they had refused to join as plaintiffs and a cross complaint against the railroad for negligence and damages greatly in excess of the amount of the insurance company's claim. The railroad served and filed an offer of judgment in the amount of the insurer's claim, and the insurance company accepted it. Judgment was entered accordingly. The railroad then filed its answer to the cross complaint, pleading, as an affirmative defense, that the insureds were proceeding on a split cause of action and were barred by the judgment in favor of the insurer. The insureds' general demurrer to the affirmative defense was sustained without leave to amend. The matter was tried and judgment was for the cross complainants, with the railroad being allowed to offset against the judgment the amount it had previously paid the insurer. The railroad appealed, contending the cross complaint was a splitting of the cause originally brought by the insurer.

The court of appeal pointed out that the affirmative defense was based on the long-established rule that a single cause of action cannot be split. Otherwise, stated, an entire claim cannot be divided and made the basis of several suits (*22 Cal. App. 3d 441, 444)* . The court said if an effort is made to split a cause of action into more than one lawsuit, the defendant in the second suit may plead the pendency of the first in abatement. If the judgment has previously been rendered on the merits in the first suit, the defendant in the second suit can plead the judgment as a bar, based on res judicata (*22 Cal. App. 3d 441, 444)* . The court, however, held the procedure followed by the insurer (joining the insureds as defendants) allowed determination of the entire liability of the railroad in a single lawsuit and, therefore, prevented, rather than caused, a splitting of the action and, accordingly, affirmed the judgment (*22 Cal. App. 3d 441, 445-446)* .

[4] Additional Authorities

[a] Right of Action and Cause of Action Distinguished

The facts and procedural background of *Ferraro v. Southern Cal. Gas Co. (1980) 102 Cal. App. 3d 33, 162 Cal. Rptr. 238* , are discussed in *§ 220.34[3][b]*. In affirming the judgment, the court cited *Ventura County Employees' Ret. Ass'n v. Pope (1978) 87 Cal. App. 3d 938, 953, 151 Cal. Rptr. 695* [*see § 220.34[3][a]*], for a discussion of the problems in differentiating sufficiently between the operative facts that form the basis of a legal claim and the right of the person entitled to pursue that claim. The court said it adopted the approach in *Ventura* by using the terms "cause of action" and "right of action" to so differentiate (*102 Cal. App. 3d 33, 41 n.3*).

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Volume 22 Chapters 220-229 SUBROGATION---to---TRESPASS
CHAPTER 220 SUBROGATION
PART II. FORMS

22-220 California Points & Authorities § 220.35

§ 220.35 Supporting Obligor's Contention That Subrogee Cannot Recover From Obligor Without Pleading and Proving Subrogor's Cause of Action Against Obligor

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF IS PRECLUDED FROM RECOVERING IN THIS ACTION AS SUBROGEE BECAUSE PLAINTIFF HAS FAILED TO _____ [PLEAD *or* PROVE] ANY CAUSE OF ACTION IN FAVOR OF _____ [*name of plaintiff's subrogor*] AGAINST DEFENDANT.

A. Burden of Proof. Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he or she is asserting (*Evid. Code § 500*).

B. Degree of Care. The party claiming a person did not exercise a requisite degree of care has the burden of proof on that issue (*Evid. Code § 521*).

C. Issues of Fact as Arising on Pleadings. An issue of fact arises on a material allegation in the complaint controverted by the answer (*Code Civ. Proc. § 590(1)*).

D. Obligor's Liability to Subrogor as Required to Be Pleaded and Proved. A subrogee must plead and prove the facts establishing the liability of the defendant obligor to the subrogor (see *Breese v. Price (1981) 29 Cal. 3d 923, 926-927, 930-931, 176 Cal. Rptr. 791, 633 P.2d 987* (required to be proved); *Campan v. Molle (1899) 124 Cal. 415, 416-417, 57 P. 208* (required to be pleaded)).

E. Recovery in Subrogated Action Prohibited if Subrogor's Liability Not Established. If the obligor is not liable to the subrogor, the subrogee cannot recover. For example, if it is found in the case of an alleged liability based on negligence that the subrogor's loss or harm was not caused by defendant's negligence, the subrogee cannot prevail (*Breese v. Price (1981) 29 Cal. 3d 923, 930, 176 Cal. Rptr. 791, 633 P.2d 987* ; *Mendenhall v. Curtis (1980) 102 Cal. App. 3d 786, 792, 162 Cal. Rptr. 569*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that in order for the subrogee to recover, he or she must, in addition to pleading and proving a right to subrogation, plead and prove the subrogor's cause of action against the defendant obligor.

The foregoing points and authorities may be used alone or combined with a memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue. For example if the elements of the subrogor's cause of action against the obligor are not alleged, they may be combined with a memorandum of points and authorities (1) in support of a general demurrer to the complaint [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*], or (2) in support of a nonstatutory motion for judgment on the pleadings. They may also be cited orally to the court in support of an objection by defendant to the introduction of any evidence by plaintiff. If plaintiff fails to prove a cause of action in favor of the subrogor against defendant, these points and authorities may be cited in support of a motion for nonsuit or judgment or combined with a memorandum of points and authorities in support of a motion for new trial if the verdict or judgment is for plaintiff [*see Code Civ. Proc. §§ 581c* (motion for nonsuit), 631.8 (motion for judgment), 657(6) (motion for new trial on ground of insufficiency of evidence or verdict or decision is against law)]. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, if the contention is made in support of a demurrer, motion for judgment on the pleadings, or objection to the introduction of evidence, counsel for defendant should show that the complaint fails to state one or more of the essential elements of the subrogor's cause of action against the obligor. If the contention is made in support of a motion for nonsuit or judgment, counsel should show that it appears from plaintiff's opening statement or after the close of plaintiff's evidence, as the case may be, that defendant is not liable to the subrogor, or in the case of a subrogated cause of action based on tort that the tort was not the proximate cause of the subrogor's loss. If the contention is made in support of a motion for new trial on the ground of insufficiency of the evidence, counsel should show that there was no evidence or insufficient evidence presented to establish either that the defendant was liable to the subrogor or that the defendant's tort was a proximate cause of the subrogor's loss.

[b] Related Pleading and Practice Chapters

For forms of general demurrers and notices of motion for judgment on the pleadings, and related papers, and a discussion and procedural guide for use on a motion for nonsuit or judgment, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , and Ch. 389, *Nonsuit and Motions for Judgment* (Matthew Bender). For forms of notice of intention to move for new trial and related papers, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities generally supporting and opposing a general demurrer to the complaint or motion for judgment on the pleadings, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For memoranda of points and authorities generally supporting and opposing a motion for new trial, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] Obligor's Liability to Subrogor as Required to Be Alleged and Proved

Breese v. Price *(1981) 29 Cal. 3d 923, 176 Cal. Rptr. 791, 633 P.2d 987* , was an action by an employee against a

third-party tortfeasor for alleged damages resulting from an automobile accident in which the employer's insurer intervened seeking reimbursement for the amount of its payment to the employee pursuant to a compromise of his workers' compensation claim. The Workers' Compensation Appeals Board had found the employee suffered neither temporary nor permanent disability and required no medical treatment and rendered an award of $25 to cover "medical-legal" expenses. Nevertheless, the workers' compensation carrier negotiated a "compromise and release of claim" which recited the carrier's offer to pay the employee $10,885 including medical expenses of $735, and the board subsequently approved the compromise. The third party admitted responsibility for the automobile accident, but denied any resultant damages to the employee or employer. The trial court, concluding the third party was barred from challenging the reasonableness of the compromise, entered judgment in favor of the employer for the full amount of the settlement, and the third party appealed.

The Supreme Court reversed. The Court held a defendant who was not a party to the compensation proceedings and who has had neither notice nor opportunity to be heard is not bound by the terms of the settlement (*29 Cal. 3d 923, 925-926)* . The Court said in the personal injury action, the burden remains on the carrier (subrogee) to prove defendant (obligor) was negligent; defendant's negligence was the proximate cause of the injuries of plaintiff-employee (subrogor); and the amount of defendant's tort liability for such injuries (*29 Cal. 3d 923, 926)* . An employer (or its carrier) seeking reimbursement for compensation payments bears the burden of establishing that a defendant's negligence is the proximate cause of an employee's injuries and the amount of tort damages reasonably resulting therefrom. A defendant in the third-party tort action must be permitted the opportunity of presenting evidence to the contrary, whether the claim is asserted by an employee for his or her own injury, or by an employer (or carrier) for reimbursement of compensation paid (*29 Cal. 3d 923, 930-931)* . The Court disapproved any inconsistency in *State Comp. Ins. Fund v. Williams (1974) 38 Cal. App. 3d 218, 112 Cal. Rptr. 226* , and *Board of Admin. v. Ames (1963) 215 Cal. App. 2d 215, 29 Cal. Rptr. 917* .

Campan v. Molle *(1899) 124 Cal. 415, 57 P. 208* , was an action to cancel a homestead and apply the property to the payment of a prior judgment rendered for plaintiff against defendants on a note executed by defendants to plaintiff. The note was for a loan in the amount necessary to enable defendants to purchase a parcel of land and given to plaintiff with a promise to execute a mortgage on the land to secure the note when title to the land was obtained. However, after receiving title, defendants refused to execute the mortgage and filed a declaration of homestead on the premises. Defendants' demurrer to the complaint was sustained. Plaintiff appealed from the subsequent judgment, claiming he was subrogated to the rights of the vendor of the land and was entitled to enforce the claim against the land as fully as could the vendor.

The Supreme Court affirmed. The Court said the complaint did not contain the contract between the vendor and defendants or show the relation between them, and it did not appear from the complaint that the vendor had any rights he could enforce against defendants (*124 Cal. 415, 416)* . The complaint merely showed that defendants had the right to purchase the land for a given sum of money. Nor did it appear when defendants paid the money to the vendor or when the land was conveyed to them. The Court said that as the vendor was to retain title to the land until full payment was made, there was no vendor's lien to which plaintiff could be subrogated. The Court concluded the transaction between plaintiff and defendants was merely a loan of money on their agreement to give him security, which they afterwards refused to do (*124 Cal. 415, 417)* .

[b] Recovery in Subrogated Action Prohibited If Subrogor's Liability Not Established

The facts and procedural background of ***Breese v. Price*** *(1981) 29 Cal. 3d 923, 176 Cal. Rptr. 791, 633 P.2d 987* , are discussed in *§ 220.35[3][a]*. In reversing the judgment for the employer, the Supreme Court, quoting *Mendenhall v. Curtis (1980) 102 Cal. App. 3d 786, 792, 162 Cal. Rptr. 569* , said if in an action by the employer (subrogee) to recover workers' compensation benefits paid, the court finds the injuries of the employee (subrogor) were not caused by the negligence of the defendant (obligor), the employer cannot prevail (*29 Cal. 3d 923, 930)* .

Mendenhall v. Curtis *(1980) 102 Cal. App. 3d 786, 162 Cal. Rptr. 569* , was an action by an employee for personal injuries allegedly sustained in an automobile accident in which the employer, a self-insured county, intervened in order to recover workers' compensation benefits paid to the employee. Before commencement of trial, the county's motion in limine for a ruling that defendant be precluded from contesting either the reasonableness of the amount of compensation benefits paid or that such payments were the proximate result of the accident was granted over defendant's objection. The court based its ruling on *Lab. Code §§ 3854* and *3855*, relating to evidence and proof. The court instructed the jury that the workers' compensation benefits paid shall be considered as proximately caused by the accident and that the issues the county had the burden of proving were defendant's negligence and the amount of workers' compensation benefits paid. By special verdicts the jury found, as to plaintiff, that defendant was negligent but the negligence was not a proximate cause of any injury to plaintiff and, as to the county, defendant was 100 percent negligent and plaintiff was not negligent. On the basis of the special verdicts, the court entered judgment that plaintiff take nothing on his complaint and that the county recover $23,769.10 and costs from defendant. Defendant appealed from the judgment in favor of the county.

The court of appeal reversed. The court quoted and explained the interpretations given to *Lab. Code §§ 3854* and *3855* (*102 Cal. App. 3d 786, 790-792)* , and added it had found no cases construing these sections as foreclosing the third party from litigating the question of whether or not his tortious conduct was a proximate cause of any injury to the employer. The court said a third party's liability is not determined in the Industrial Accident Commission (the predecessor to the Workers' Compensation Appeals Board) proceeding but rather in the action against the third party. If the trial court had found the employee's injuries were not caused by the third party's negligence, the employer could not have prevailed. In order to establish defendant's liability for the workers' compensation benefits paid by the county, it was incumbent on the county to prove not only that defendant was negligent but that such negligence was a proximate cause of the employee's injuries (*102 Cal. App. 3d 786, 792)* . The court concluded that the trial court had erred in its interpretation of *Lab. Code § 3854* and that the jury finding that defendant's negligence was not a proximate cause of any injury to plaintiff was inconsistent with the judgment in favor of the county for the amount of workers' compensation benefits paid to plaintiff (*102 Cal. App. 3d 786, 793-794)* .

[4] Additional Authorities

[a] Obligor's Liability to Subrogor as Required to Be Alleged and Proved

The factual background of *Ventura County Employees' Ret. Ass'n v. Pope (1978) 87 Cal. App. 3d 938, 151 Cal. Rptr. 695* , is discussed in *§ 220.34[3][a]*. In reversing the judgment for plaintiff, the court said it started with the basic claim: an automobile collision, assertedly the fault of Pope (obligor), resulted in personal injuries to Temple (subrogor). This claim contains the elements of a tort cause of action in favor of Temple against Pope, one whose component parts consist of Pope's liability for fault and Temple's damages for personal injuries incurred as a consequence of Pope's fault. Thus far, Pope's liability extends solely to Temple and consists of damages for personal injuries proximately caused by his wrong. These damages may include such elements as pain and suffering, medical expenses, loss of earnings, future pain and suffering, future medical expenses, loss of future earnings, and loss of future earning power. Each element of damage stems from personal injuries suffered by Temple, and even the most remote, the loss of future earning power, is merely an aspect of the damages that resulted to Temple from her personal injuries (*87 Cal. App. 3d 938, 950)* .

The court said external matters soon complicated its analysis, since various agencies may underwrite portions of the costs of Temple's personal injuries and compensate her for these losses. These agencies include employers, compensation carriers, medical service groups, medical insurers, and such disability insurers as pension funds and retirement associations, which may compensate the injured person for loss of ability to work. Each agency carrying a portion of the costs of the injured person's personal injuries reduces the injured person's own losses, but this reduction is not designed to absolve a wrongdoer from full liability in damages for his or her wrong, and, under present tort theory, the wrongdoer still bears the ultimate loss. Hence current practice and procedure authorize a carrying agency to obtain reimbursement from the wrongdoer for its costs in compensating the injured person for personal injuries caused by the

wrongdoer. The mechanism used to achieve this result is subrogation, a legal device which transfers a portion of the injured person's claim for damages against the wrongdoer to the agency that carried that portion of the costs of personal injuries (*87 Cal. App. 3d 938, 950)* . But regardless of substitution of parties and subrogation of claimants who have borne portions of the costs of personal injuries, all claims of third parties for damages for personal injuries to an injured person derive from the injured person's claims against the tortfeasor for damages for personal injuries (*87 Cal. App. 3d 938, 951)* . The court concluded that all damage claims against Pope are portions of one cause of action in tort for personal injuries, no matter how fragmented, subdivided, or subrogated they have become, and that plaintiff's claim against Pope is not a separate cause of action, but remains a subdivision of Temple's claim for damages for personal injuries, and that a claim for damages for personal injuries continues as an action in tort, no matter who prosecutes the cause of action (*87 Cal. App. 3d 938, 952-953, 955)* .

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CHAPTER 220 SUBROGATION
PART II. FORMS

22-220 California Points & Authorities § 220.36

§ 220.36 Supporting Oblilgor's Contention That Subrogee May Not Recover Amount Greater Than That Which Could Have Been Recovered by Subrogor

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF IS PRECLUDED FROM RECOVERING IN THIS ACTION ANY AMOUNT IN EXCESS OF THAT WHICH COULD HAVE BEEN RECOVERED IN AN ACTION BY ITS SUBROGOR.

A. Subrogation as Derivative Right. Rights under subrogation are derivative rights (*Board of Admin. v. Glover (1983) 34 Cal. 3d 906, 915, 196 Cal. Rptr. 330, 671 P.2d 834* ; *Ventura County Employees' Ret. Ass'n v. Pope (1978) 87 Cal. App. 3d 938, 952, 151 Cal. Rptr. 695*).

B. Subrogee as Limited to Recovering No More Than Amount Recoverable by Subrogor. A subrogee succeeds only to the rights of the subrogor and may not recover an amount greater than that which could have been recovered by the subrogor (*see Breese v. Price (1981) 29 Cal. 3d 923, 926, 928, 176 Cal. Rptr. 791, 633 P.2d 987*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a subrogee may not recover any amount in excess of that which could have been recovered in an action by the subrogor.

These points and authorities may be used alone or combined with a memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue. For example, they may be combined with a memorandum of points and authorities in support of a motion for an order striking as irrelevant the allegations of a complaint seeking an amount in excess of the amount that is recoverable by the subrogor [*see Code Civ. Proc. §§ 435-437*]. They may also be combined with points and authorities in support of a motion after trial to vacate the judgment awarding plaintiff an excessive amount and enter a judgment for the correct amount [*see Code Civ. Proc. §*

663 (motions to vacate)]. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, if the contention is made in support of a motion to strike, counsel should show that plaintiff is seeking to recover an amount in excess of that which could be recovered in an action by the subrogor. This fact must, however, appear from the face of the complaint or from judicially notice matter [*see Code Civ. Proc. § 437*]. If the contention is made in support of a motion to vacate the judgment and enter another and different judgment, counsel should show the legal basis for the decision is not consistent with or supported by the facts presented at trial or the judgment is not supported by the jury's special verdict, as the case may be [*see Code Civ. Proc. § 663*].

[b] Related Pleading and Practice Chapters

For forms of notices of motion to strike and related papers, see California Forms of Pleading and Practice, Ch. 375, *Motions to Strike* (Matthew Bender). For forms of notices of motion to vacate a judgment and enter another and different judgment and related papers, see Ch. 371, *Motions After Trial* in California Forms of Pleading and Practice (Matthew Bender).

[c] Related Points and Authorities

For points and authorities generally supporting and opposing a motion to strike, see Ch. 160, *Motions to Strike* . For points and authorities generally supporting and opposing a motion to vacate a judgment and enter another and different judgment, see Ch. 155, *Motions After Trial* .

[d] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 220.56* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Subrogation as Derivative Right

Board of Admin. v. Glover *(1983) 34 Cal. 3d 906, 196 Cal. Rptr. 330, 671 P.2d 834* , was an action by the Board of Administration of the Public Employees' Retirement System (PERS) against a third-party tortfeasor to recover a portion of the disability retirement benefits it had awarded to a county employee who was injured when her car was struck by a vehicle driven by defendant. Although PERS had informed the employee that any settlement she might reach with a third party responsible for her injuries would require its consent, the employee, without notifying PERS or obtaining its consent, a few days before expiration of the one-year statute of limitations of former Code Civ. Proc. § 340(3) [*now see Code Civ. Proc. § 335.1* (two-year statute of limitations, beginning in 2003)], settled her personal injury claim against defendant for $15,000, the policy limit of defendant's automobile liability insurance, and executed a general release in defendant's favor. At the time of settlement, neither defendant nor his insurance carrier knew of the employee's claim for disability retirement benefits or, therefore, of the possibility that PERS or any other party would have a claim for reimbursement against any settlement proceeds. After learning that the employee had settled her third-party claim, and under the authority of *Gov. Code § 21453*, PERS sued defendant pursuant to *Lab. Code § 3852* (relating to workers' compensation) to recoup its payments to the employee. Defendant cross complained against the employee for indemnification of any judgment that might be rendered against him in the PERS action. The trial court rendered judgment in favor of defendant in the primary action and in favor of the employee on his cross complaint. Plaintiff appealed.

The Supreme Court affirmed. The Court said having previously held *Lab. Code § 3852*, pursuant to which PERS sued defendant, simply gave statutory recognition to principles of equitable subrogation, it concluded those principles

sustained the trial court's judgment in favor of defendant (*34 Cal. 3d 906, 911)* . The Court pointed out that because the employee's settlement with defendant, effected without PERS' consent, did not purport to exclude the disability retirement benefits the employee received from PERS, the employer was relegated to its derivative right of subrogation which depended on the employee's primary right to recover from the defendant (*34 Cal. 3d 906, 914)* . Quoting *Ventura County Employees' Ret. Ass'n v. Pope (1978) 87 Cal. App. 3d 938, 952, 151 Cal. Rptr. 695* , the Court said the nature of subrogation and its prohibition against double recovery make it abundantly clear that subrogation involves a succession to the rights of others. Rights under subrogation are derivative rights, and succession to another's rights, like water, cannot rise higher than its source (*34 Cal. 3d 906, 915)* .

The facts and background of ***Ventura County Employees' Ret. Ass'n v. Pope*** *(1978) 87 Cal. App. 3d 938, 151 Cal. Rptr. 695* , are discussed in *§ 220.34[3][a]*. In reversing the judgment for plaintiff, the court stated that the nature of subrogation and its prohibition against double recovery make it abundantly clear that subrogation involves a succession to the rights of others. Rights under subrogation are derivative rights, and succession to another's rights, like water, cannot rise higher than its source (*87 Cal. App. 3d 938, 952)* .

[b] Subrogee as Limited to Recovering No More Than Amount Recoverable by Subrogor

The facts and procedural background of ***Breese v. Price*** *(1981) 29 Cal. 3d 923, 176 Cal. Rptr. 791, 633 P.2d 987* , are discussed in *§ 220.35[3][a]*. In reversing the judgment for the employer's insurance carrier, the Supreme Court said that if in the personal injury action the trier finds the tort liability of defendant (obligor) equals or exceeds the amount of the settlement made by the workers' compensation insurance carrier (subrogee) with the injured employee (subrogor), then the carrier is entitled to full reimbursement, but if defendant's tort liability is less than the settlement amount, the carrier is entitled to reimbursement only up to the amount of defendant's tort liability (*29 Cal. 3d 923, 926)* . The Court added the employer (or its carrier) is entitled to full reimbursement provided the tort liability of the defendant (obligor), in an amount equal to or in excess of the employer's expenditures, is otherwise established (*29 Cal. 3d 923, 929)* .

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CHAPTER 220 SUBROGATION
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22-220 California Points & Authorities § 220.37

§ 220.37 Supporting Obligor's Contention That Double Recovery or Double Liability Is Prohibited

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF IS PRECLUDED FROM RECOVERING IN THIS ACTION [FOR _____ (*specify item of loss*)] BECAUSE SUCH RECOVERY _____ [WOULD CONSTITUTE DOUBLE RECOVERY FOR THE SAME ITEM OF LOSS *or* SUBJECT DEFENDANT TO DOUBLE LIABILITY FOR THE SAME ITEM OF INJURY].

A. Double Recovery Prohibited. Only one totality of recovery of damages for loss or injury is allowed, and only one totality of liability can be imposed on the tortfeasor. Duplicate recovery of damages is barred, and neither double recovery of the same item of loss nor double liability for the same item of injury is permitted [*Board of Admin. v. Glover (1983) 34 Cal. 3d 906, 915, 196 Cal. Rptr. 330, 671 P.2d 834* ; *Ventura County Employees' Ret. Ass'n v. Pope (1978) 87 Cal. App. 3d 938, 951, 151 Cal. Rptr. 695]* .

[*Optional*] **B. Amount Paid to Subrogated Insurer May Be Offset Against Subrogor's Claim.** An insured (a partial subrogor) may not collect from the obligor-tortfeasor the full amount of his or her claim without an offset for the amount the obligor paid to the insurer (a partial subrogee) which reimbursed the insured for a portion of his or her loss and was pro tanto subrogated to the insured's cause of action against the obligor, as that would subject the obligor to double liability on the same claim [*Ferraro v. Southern Cal. Gas Co. (1980) 102 Cal. App. 3d 33, 46-47, 162 Cal. Rptr. 238]* .

[*Optional*] **C. Setoff of Amount of Workers' Compensation Lien Assigned to Obligor.** A workers' compensation carrier (a partial subrogee) which has paid benefits to an injured employee may assign its lien on any recovery that might be obtained by the injured employee in an action against a third-party tortfeasor to the third-party tortfeasor, who may then set off the face amount of the lien against any recovery by the injured employee, even though the lien was assigned for less than its face value [*Quinn v. Warnes (1983) 144 Cal. App. 3d 309, 317-318, 192 Cal. Rptr. 660]* .

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that double recovery for the same loss or double liability for the same injury is prohibited. The double recovery alternative should be used if plaintiff has already recovered for the loss or the same item of loss; the double liability alternative should be used when, for example, both the subrogee and subrogor sue in the same action and each seeks to recover for the same injury or item of injury, or when the subrogor is suing to recover the full amount of the loss from the obligor who has already paid the claim of the partial subrogee. Optional Paragraph B should be included if the obligor has paid the partial subrogee's claim and the obligor seeks to recover the full amount of the loss. Optional Paragraph C should be included if the obligor took an assignment of the partial subrogee's claim for less than its face value which it wishes to assert against the partial subrogor.

These points and authorities may be used alone or combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue. For example if it appears from the face of the complaint or from judicially noticed matter that plaintiff seeks double recovery for the same loss, they may be combined with a memorandum of points and authorities: (1) in support of a general demurrer to the complaint [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*]; or (2) in support of a nonstatutory motion for judgment on the pleadings. In such case, they may also be cited orally to the court at trial in support of an objection by defendant to the introduction of any evidence by plaintiff. If the ground of objection does not appear from the face of the complaint, they may be combined with points and authorities in support of a motion for summary judgment [*see Code Civ. Proc. § 437c*]. If it appears at trial after plaintiff's opening statement or presentation of evidence that any recovery by plaintiff would constitute double recovery or subject the defendant to double liability, these points and authorities may be cited in support of a motion for nonsuit or judgment [*see Code Civ. Proc. §§ 581c* (motion for nonsuit), 631.8 (motion for judgment)]. If judgment is rendered for plaintiff and awards a double recovery or imposes a double liability, or both, they may be combined with points and authorities: (1) in support of a motion to vacate the judgment and enter another and different judgment [*see Code Civ. Proc. § 663*]; or (2) in support of a motion for new trial on the ground of insufficiency of the evidence to justify the verdict or decision or the verdict or decision is against the law [*see Code Civ. Proc. § 657(6)*]. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, if the contention is made in support of a demurrer, motion for judgment on the pleadings, or objection to the introduction of evidence, counsel for defendant should show, either from the face of the complaint itself or from judicially noticed matter, that plaintiff seeks double recovery or that any recovery would subject defendant to double liability for the same loss. If the contention is made in support of a motion for summary judgment, counsel should show the action has no merit because any recovery would constitute a double recovery or subject defendant to double liability for the same loss [*see Code Civ. Proc. § 437c(a)*]. If the contention is made in support of a motion for nonsuit or judgment, counsel should show that it appears from plaintiff's opening statement or evidence, as the case may be, that plaintiff is seeking double recovery or that any recovery would subject defendant to double liability for the same loss. If the contention is made in support of a motion to vacate the judgment and enter another and different judgment or a motion for new trial, counsel should show, on the basis of the evidence presented at trial, that the judgment results in a double recovery or subjects the defendant to double liability. For the papers on which a motion for new trial may be based, see *Code Civ. Proc. § 658*.

[b] Example

If the total amount of an insured's loss from a fire is $100,000, the liability of the tortfeasor who caused the fire is $100,000. If the insurer pays the insured the policy limit of $50,000, the tortfeasor is still liable for the full amount of $100,000. Of this amount, $50,000 would go to reimburse the partial subrogee and the balance would go to the partial subrogor. That is, the tortfeasor would not be liable for the sum of $150,000 ($50,000 to the partial subrogee and $100,000 to the partial subrogor). To impose such liability would subject the obligor to double liability, and to allow the

partial subrogor to collect $50,000 from its insurer and $100,000 from the obligor would constitute double recovery as well [*see Ferraro v. Southern Cal. Gas Co. (1980) 102 Cal. App. 3d 33, 46-47, 162 Cal. Rptr. 238]* .

[c] Related Pleading and Practice Chapters

For forms of general demurrers and notices of motion for judgment on the pleadings, and related papers, and a discussion and procedural guide for use on a motion for nonsuit or judgment, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , and Ch. 389, *Nonsuit and Motions for Judgment* (Matthew Bender). For forms of notices of motion for summary judgment and related papers, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender). For forms of notice of intention to move for new trial or a notice of motion to vacate and set aside a judgment and enter another and different judgment, and related papers, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[d] Related Points and Authorities

For memoranda of points and authorities generally supporting and opposing a general demurrer to the complaint or a motion for judgment on the pleadings, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For memoranda of points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* . For memoranda of points and authorities generally supporting and opposing a motion for new trial or a motion to vacate and set aside a judgment and enter another and different judgment, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] Double Recovery or Liability Prohibited

The facts and background of ***Board of Admin. v. Glover*** *(1983) 34 Cal. 3d 906, 196 Cal. Rptr. 330, 671 P.2d 834* , are discussed in *§ 220.36[3][a]*. In affirming the judgment for plaintiff, the Court quoted *Ventura County Employees' Ret. Ass'n v. Pope (1978) 87 Cal. App. 3d 938, 951-952, 151 Cal. Rptr. 695* , for the rule that prohibits double recovery of damages, a rule of special importance in the prosecution of subrogation claims because the proration of damages among those who have shared the costs of personal injuries increases the possibility of duplicate claims for the same loss. Only one totality of recovery of damages for personal injuries is allowed, and only one totality of liability may be imposed on the tortfeasor. Duplicate recovery of damages is barred, and neither double recovery of the same item of loss nor double liability for the same item of injury is permitted. Whether an action is brought by an employer, a compensation carrier, an employee, or a county retirement association, the burden on the tortfeasor remains the same (*34 Cal. 3d 906, 915-916)* . The Court held that the burden of failure to comply with the statutory obligation of notice to PERS of the employee's settlement is on the employee. The Court said that to impose on a settling third-party defendant, who in the context of a settlement is merely an alleged tortfeasor, the duty to give notice under the statute or be subject to the employer's subrogation claim unfairly creates a legal obligation which would be impossible to fulfill when, as here, defendant was unaware of the existence of the employer subrogee. In addition, it violates the acknowledged statutory purpose of avoiding double liability, and the principle that acts of others over whom the tortfeasor has no control, and which occur after commission of the tort, ought not to extend his or her liability (*34 Cal. 3d 906, 916)* . The Court added that relieving an unknowing alleged tortfeasor of the consequences of the settlement's invalidity is a necessary adjunct of the rule of subrogation prohibiting both double recovery and double liability (*34 Cal. 3d 906, 917)* .

However, the Court added that when the third-party tortfeasor prior to settlement is or reasonably should be aware of the possibility of the employer's claim, such tortfeasor may also incur liability to the employer under the statutory scheme because of his or her failure to notify the employer of the settlement and to obtain its consent to it (*34 Cal. 3d 906, 919)* .

The facts and procedural background of ***Ventura County Employees' Ret. Ass'n v. Pope*** *(1978) 87 Cal. App. 3d 938, 151 Cal. Rptr. 695* , are discussed in *§ 220.34[3][a]*. The court concluded that plaintiff association (subrogee), in assuming a portion of the costs of personal injuries suffered by Temple (subrogor) as a consequence of the accident (specifically, the loss of her ability to work), underwrote the costs of her disability to the extent it compensated her for that loss, and thereby succeeded to her claim for damages against Pope (obligor) for loss of future earning power. Temple and plaintiff cannot both recover damages from Pope for the same loss of her ability to work, for that would be double recovery. Double recovery is avoided by identifying plaintiff as an agency subrogated to Temple's claim against the tortfeasor sanctioning only one total recovery for loss of future earning power, and requiring the injured person and plaintiff to divide this recovery between themselves as their interests appear (*87 Cal. App. 3d 938, 952)* .

[b] Amount Paid to Subrogated Insurer May Be Offset Against Subrogor's Claim

The facts and procedural background of ***Ferraro v. Southern Cal. Gas Co.*** *(1980) 102 Cal. App. 3d 33, 162 Cal. Rptr. 238* , are discussed in *§ 220.34[3][b]*. To preclude defendant from further arguing to the jury plaintiffs' receipt of insurance benefits covering the loss from the explosion and fire, plaintiffs asked the court to include an instruction to the jury defining collateral source and instructing the jury that it should make no deduction for the recovered insurance proceeds as they were recovered from a collateral source. The trial court refused to do so (*102 Cal. App. 3d 33, 39)* . On appeal, plaintiff argued that the trial court's refusal to so instruct was error. The court of appeal rejected the argument and affirmed the judgment. The court said the $70,000 insurance proceeds could not be considered a collateral source recovery because of the subrogation agreement with the insurer. The court explained that when an insurance carrier becomes subrogated to the claim of an insured against a third-party tortfeasor the payment of insurance proceeds is no longer a collateral source. To so characterize the receipt of the $70,000 would violate the rule against double recovery, since both the subrogee and the subrogor have a right of action against the tortfeasor, and the tortfeasor would have potential double liability if payment of insurance benefits by the subrogee to the subrogor were designated a collateral source. The court concluded that the trial judge properly denied plaintiffs' request for a collateral source jury instruction, and similarly that it correctly denied plaintiffs' motion to be relieved from their stipulation with defendant regarding the deduction of $65,500 (the amount of the insurance proceeds less the cost of their collection) from any verdict in their favor. The court said the effect of this stipulation was to prevent double liability of the gas company in accordance with proper legal principles (*102 Cal. App. 3d 33, 47)* .

[c] Setoff of Amount of Workers' Compensation Lien Assigned to Obligor

Quinn v. Warnes *(1983) 144 Cal. App. 3d 309, 317, 192 Cal. Rptr. 660* , was an action by an employee who had been injured in an automobile accident against the alleged negligent driver of the other car. The employee had received workers' compensation benefits for temporary disability, and the compensation carrier filed a notice of lien claim in the employee's action. The carrier became insolvent, and defendant and his liability insurer purchased the lien claim for half its face amount. Plaintiff's attorney waived his fee on that portion of the judgment subject to the lien. Judgment was for plaintiff. On defendant's motion, the trial court ordered that defendant and his insurer be allowed a setoff or credit against the judgment in the full amount of the lien. Plaintiff appealed.

The court of appeal affirmed. The court pointed out that the waiver by plaintiff's attorney of attorney's fees on that portion of the judgment subject to the compensation carrier's lien was not rendered ineffective by *Lab. Code § 3856(b)*, giving plaintiff a right to reasonable attorney fees as a reduction of the employer's carrier's lien amount. The court held the statute does not require that the amount which could otherwise have gone to the attorney should go to plaintiff. Since the lien amount represented benefits already paid to plaintiff, to give him a portion of the lien amount would result in prohibited double recovery by the employee (*144 Cal. App. 3d 309, 313)* . The court held the settlement between the insurance carrier and defendant's insurer was valid, notwithstanding the lack of presettlement notice to the employee [*see Lab. Code § 3860*] and notwithstanding the lack of his written consent [*see Lab. Code § 3859*], since plaintiff was in no way adversely affected by it (*144 Cal. App. 3d 309, 317)* . The court further pointed out that to allow the defendant an offset only in the amount paid for the lien, as opposed to its face amount, would also result in

prohibited double recovery to the employee (*144 Cal. App. 3d 309, 312 n.2, 318)* .

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Volume 22 Chapters 220-229 SUBROGATION---to---TRESPASS
CHAPTER 220 SUBROGATION
PART II. FORMS

22-220 California Points & Authorities § 220.38

§ 220.38 Supporting Obligor's Contention That Tortfeasor May Contest Both Liability and Causation of Injuries and Assert Comparative Negligence

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT IN THIS ACTION HAS THE SAME RIGHT TO CONTEST LIABILITY AND CAUSATION OF INJURIES TO PLAINTIFF'S SUBROGOR, INCLUDING THE RIGHT TO RAISE THE ISSUE OF COMPARATIVE NEGLIGENCE, THAT HE/SHE WOULD HAVE WERE THE ACTION BROUGHT BY THE SUBROGOR.

Tortfeasor's Right to Contest Liability and Causation of Injuries. A defendant third-party tortfeasor in an action by the subrogee is entitled to contest liability to the same extent as in an action brought by the injured subrogor, and implicit in the right to contest liability are rights to raise the issue of comparative negligence and to contest the causality of the subrogor's injuries (*Breese v. Price (1981) 29 Cal. 3d 923, 930, 176 Cal. Rptr. 791, 633 P.2d 987* ; *Ventura County Employees' Ret. Ass'n v. Pope (1978) 87 Cal. App. 3d 938, 943, 945, 151 Cal. Rptr. 695*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the alleged tortfeasor in an action by the subrogee has the same right to contest both his or her liability and causation of injuries, including the issue of comparative negligence, that he or she could do in an action by the subrogor.

These points and authorities may be used alone or combined with a memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue. For example, if the complaint fails to allege the essential elements of the tort cause of action [*see § 220.35*], they may be combined with a memorandum of points and authorities (1) in support of a general demurrer to the complaint [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*], or (2) in support of a nonstatutory motion by defendant for judgment on the pleadings. They may also be combined with a memorandum of points and authorities in opposition to a demurrer to the answer in which nonliability and noncausation

are alleged or in opposition to a motion to strike the portions of the answer so alleging [*see Code Civ. Proc. §§ 430.20(a), 430.50(b)* (demurrers to answer), 435(b) (motions to strike)]. Should the trial court erroneously rule that such issues may not be litigated, these points and authorities may be combined with a memorandum of points and authorities in support of a petition for writ of mandate to compel the trial court to vacate its ruling or make an appropriate order [*see Code Civ. Proc. §§ 1085, 1086*] and for a writ of prohibition to restrain the trial court from proceeding with the action [*see Code Civ. Proc. §§ 1102, 1103*]. They may also be combined with a memorandum of points and authorities in support of a motion for new trial on the same ground [*see Code Civ. Proc. § 657(6), (7)*)]. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, if the contention is made in support of a demurrer to the complaint or a motion by defendant for judgment on the pleadings, counsel should show that the complaint fails to state facts sufficient to constitute a cause of action by the subrogor against the defendant. If the contention is made in opposition to a demurrer to the answer or a motion to strike the issues from the answer, defendant should show that the issues are properly alleged. If the contention is made in support of a motion for new trial, defendant should show that the trial court ruled against defendant's contention and, if appropriate, that defendant excepted to the court's ruling. For matters that are deemed reserved without exception, see *Code Civ. Proc. § 647*. If the contention is made in support of a petition for a writ of mandate and/or a writ of prohibition, counsel should show, in addition to the above, that the contention was properly made in the trial court and that the trial court ruled against it. This would normally be shown by attaching to the petition authenticated copies of the appropriate trial court records.

[b] Illustrations of Application of Doctrine of Comparative Negligence

Under the doctrine of comparative negligence, the third-party tortfeasor is liable to the subrogee only to the extent of the tortfeasor's proportional share of responsibility, regardless of the amount the subrogee has paid [*see Finney v. Manpower, Inc. (1981) 123 Cal. App. 3d 1066, 1071, 177 Cal. Rptr. 74]* . For example, if a fire caused $100,000 worth of damage to insured property, the insurer, on paying the insured $100,000, would be subrogated to the rights of the insured against the person whose negligence caused the fire [*see Ins. Code § 2071*]. If in that action, the trier of fact concluded that the defendant was only 60 percent at fault and the insured was 40 percent at fault, the $100,000 recovery would be reduced 40 percent; that is, the insurer would recover judgment for $60,000 only on its subrogated claim.

As another example, if an employee were injured by a third-party tortfeasor and the insurer's compensation insurer paid benefits as a result of the injury, either the employee or the employer (or the employer's insurer) could sue the third-party tortfeasor, or they could join in an action against the tortfeasor, or one could intervene in the other's action against the tortfeasor, or, if the employee alone sued, the employer's insurer could secure a lien on any judgment recovered [*see Lab. Code §§ 3852-3856*; *County of San Diego v. Sanfax Corp. (1977) 19 Cal. 3d 862, 872-873, 140 Cal. Rptr. 638, 568 P.2d 363]* . If in an action by the employee and the employer's insurer the jury awards the injured plaintiff employee total damages in the sum of $550,000 and it finds the tortfeasor was 22 percent negligent, the employee 78 percent negligent, and the employer zero percent negligent, and the employer's insurer paid benefits in the sum of $52,423, the total damages awarded would be reduced by the amount of $429,000 (78 percent attributable to the employee), leaving a difference of $121,000 as the total amount to be paid by defendant tortfeasor. Of this amount, the employer would recover $52,423, which, subtracted from $121,000, leaves $68,577, which would be the employee's net recovery [*see Jarvis v. Southern Pac. Transp. Co. (1983) 142 Cal. App. 3d 246, 259, 191 Cal. Rptr. 29]* .

[c] Related Pleading and Practice Chapters

For forms of demurrers, motions to strike, and motions for judgment on the pleadings, and related papers, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , and Ch. 375, *Motions to Strike* (Matthew Bender). For forms of notices of motion for new trial and related papers, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender). For forms of petitions for

writ of mandate and writ of prohibition, and related papers, see California Forms of Pleading and Practice, Ch. 358, *Mandate and Prohibition* (Matthew Bender).

[d] Related Points and Authorities

For memoranda of points and authorities generally supporting and opposing a demurrer to a complaint or a motion for judgment on the pleadings, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For memoranda of points and authorities generally supporting and opposing a motion to strike, see Ch. 160, *Motions to Strike* . For memoranda of points and authorities generally supporting and opposing a motion for new trial, see Ch. 155, *Motions After Trial* . For memoranda of points and authorities generally supporting and opposing a petition for a writ of mandate or a petition for a writ of prohibition, see Ch. 150, *Mandate and Prohibition* .

[3] Discussion of Authorities

[a] Tortfeasor's Right to Contest Liability and Causation of Injuries.

The facts and procedural background of ***Breese v. Price*** *(1981) 29 Cal. 3d 923, 176 Cal. Rptr. 791, 633 P.2d 987* , are discussed in *§ 220.35[3][a]*. In reversing the judgment for plaintiff, the Supreme Court held that a defendant who was not a party to the compensation proceedings and who has had neither notice nor opportunity to be heard is not bound by the terms of the settlement (*29 Cal. 3d 923, 925-926)* . Furthermore, the Court quoted *Ventura County Employees' Ret. Ass'n v. Pope (1978) 87 Cal. App. 3d 938, 943, 945, 151 Cal. Rptr, 695* , for the rule that a defendant may contest liability in a subrogation action by an employer (subrogee) to the same extent as in an action brought by the injured employee (subrogor), and that implicit in the right to contest liability are rights to raise the issue of comparative negligence and to contest the causality of the employee's injuries; that is, defendant may contest both liability and causation of injuries to the same extent as if the injured employee had brought the action (*29 Cal. 3d 923, 930)* .

The facts and procedural background of ***Ventura County Employees' Ret. Ass'n v. Pope*** *(1978) 87 Cal. App. 3d 938, 151 Cal. Rptr. 695* , are discussed in *§ 220.34[3][a]*. In reversing the judgment for plaintiff, the court said it is clear a defendant may contest liability in a subrogation action by an employer to the same extent as in an action brought by the injured employee. Implicit in the right to contest liability are rights to raise the issue of comparative negligence and to contest the causality of the employee's injuries. The court said it thought that similar rules apply to a subrogation action by a county retirement association (*87 Cal. App. 3d 938, 943)* . The court rejected as erroneous defendant's contention that the failure of the retirement board to notify him of the liability hearing and to allow him to be heard at its meeting violated the guarantee of procedural due process. Defendant had a basic misconception that allowance of disability benefits constituted an adjudication of defendant's tort liability for the accident, a misconception paralleled by the trial court's erroneous conclusion that evidence of fault and comparative negligence could not be considered at trial. The initial determination of the Association to initiate suit against the asserted third-party tortfeasor was merely a determination to seek in court through subrogation recovery of benefits payable to a member. Defendant may contest both liability and causation of injuries to the same extent as if the injured employee herself had brought the action (*87 Cal. App. 3d 938, 945)* .

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Volume 22 Chapters 220-229 SUBROGATION---to---TRESPASS
CHAPTER 220 SUBROGATION
PART II. FORMS

22-220 California Points & Authorities § 220.39

§ 220.39 Supporting Obligor's Contention That Affirmative Relief Otherwise Barred by Statute of Limitations May Be Sought by Cross Complaint in Action by Insurer Subrogee to Recover Payments Made Under Uninsured Motorist Provisions of Policy

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT HAS THE SAME RIGHT TO SEEK AFFIRMATIVE RELIEF IN THIS ACTION THAT HE/SHE WOULD HAVE HAD WERE THE ACTION BROUGHT BY PLAINTIFF'S INSURED, NOTWITHSTANDING THE STATUTE OF LIMITATIONS HAS RUN ON DEFENDANT'S CLAIM.

Obligor's Right to Seek Affirmative Relief. A defendant sued by an insurer subrogee under the extended period of limitations set out in *Section 11580.2(g) of the Insurance Code* to recover uninsured motorist benefits paid to its insured may by cross complaint seek affirmative relief arising out of the accident giving rise to defendant's liability to the same extent he or she could have done in an action by the subrogor, notwithstanding the statute of limitations may have run on the defendant's cross claim (see *Liberty Mut. Ins. Co. v. Fales (1973) 8 Cal. 3d 712, 717, 719, 106 Cal. Rptr. 21, 505 P.2d 213*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a defendant obligor, in an action by an insurer subrogee under the extended period of limitations provided in *Ins. Code § 11580.2(g)* to recover payments made to its insured subrogor under the uninsured motorist provisions of its policy, may seek affirmative relief to the same extent he or she could have done were the action brought by the insured, and that plaintiff may not rely on the two-year statute of limitations for personal injury actions imposed by *Code Civ. Proc. § 335.1* (one-year statute of limitations, prior to 2003, under former Code Civ. Proc. § 340(3)) to cut off this right. For a memorandum of points and authorities supporting a claim to setoff, as opposed to a claim for affirmative relief, see *§ 220.30*.

These points and authorities may be used alone or combined with a memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue. For example, they may be combined with a memorandum of points and authorities (1) in support of a motion for leave to file a late cross complaint seeking affirmative relief [*see Code Civ. Proc. §§ 426.10, 426.30, 426.50*], (2) in opposition to a motion to strike a timely filed cross complaint seeking affirmative relief [*see Code Civ. Proc. §§ 435(b), 436(b)*], or (3) in opposition to a general demurrer to the cross complaint on the ground the cross action is barred by the statute of limitations [*see Code Civ. Proc. § 430.10(e)*]. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the point of law stated. Thus, if the contention is made in support of a motion to file a late cross complaint, counsel for defendant should show that the cross action arose out of the accident sued on and is therefore a compulsory cross complaint [*see Code Civ. Proc. §§ 426.10(c), 426.30(a)*] and that defendant acted in good faith in failing to timely file the cross complaint [*see Code Civ. Proc. § 426.50*]. The facts would normally be presented in one or more supporting affidavits or declarations under penalty of perjury [*see Code Civ. Proc. §§ 2009, 2015.5*]. If the contention is made in opposition to a motion to strike or a general demurrer to the cross complaint, counsel should show from the court's records that the cross complaint was timely filed and that the cause of action stated arose out of the same accident and hence constitutes a compulsory cross complaint. The supporting points and authorities will establish that the cross complaint is proper.

[b] Related Pleading and Practice Chapters

For a form of notice of motion for leave to file a late compulsory cross complaint and related papers, see California Forms of Pleading and Practice, Ch. 123, *Complaints and Cross Complaints* (Matthew Bender). For forms of demurrers and motions to strike, and related papers, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* and Ch. 375, *Motions to Strike* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities generally supporting and opposing a motion for leave to file a late cross complaint, see Ch. 61, *Cross Complaints* . For memoranda of points and authorities generally supporting and opposing a motion to strike, see Ch. 160, *Motions to Strike* . For memoranda of points and authorities generally supporting and opposing a demurrer to an answer, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Obligor's Right to Seek Affirmative Relief

Liberty Mut. Ins. Co. v. Fales *(1973) 8 Cal. 3d 712, 106 Cal. Rptr. 21, 505 P.2d 213* , was an action in subrogation by an insurer against an uninsured motorist to recover the amount of a claim plaintiff had, under the uninsured motorist provision in its policy, paid to its insured and a passenger in the insured's car. The action had been timely filed under *Ins. Code § 11580.2(g)*, providing an extended limitation period (three years after payment of the uninsured motorist claim) [*see § 220.51*] in which to commence the action, but after the one-year statute of limitations of former Code Civ. Proc. § 340(3) [(*now see Code Civ. Proc. § 335.1* (two-year limitations period, beginning in 2003)] had run on the defendant's action against the insured. Defendant challenged the constitutionality of *Ins. Code § 11580.2(g)*. The trial court ruled the section constitutional and rendered judgment for plaintiff. Defendant appealed, asserting he was precluded from seeking affirmative relief in the insurer's action because the one-year limitation on actions for damages for personal injuries of former Code Civ. Proc. § 340(3) [*now see Code Civ. Proc. § 335.1* (two-year limitations period, beginning in 2003)] had run before the insurer's action was filed, and that *Ins. Code § 11580.2(g)* was unconstitutional insofar as it allowed an insurer subrogated to the claim of its insured to file suit against an uninsured motorist three years from the time it pays the claim, whereas the uninsured motorist is precluded from seeking affirmative relief unless he or she sues within one year after the accident.

Without reaching the constitutional issue, the Supreme Court held defendant had the right to seek affirmative relief by means of a cross complaint in the trial court but waived the right by not attempting to do so and affirmed the judgment (*8 Cal. 3d 712, 719)* . The Court said that an insurer, in its role as subrogee, has no greater rights than those possessed by its insured and its claims are subject to the same defenses. Had the insured and his passenger filed a timely action, defendant could have sought affirmative relief for any injuries he had suffered in the same collision. The legislature did not intend by the enactment of *Ins. Code § 11580.2(g)* to afford the insurer advantages over the uninsured motorist which its own insured did not enjoy--that is, the power, by delayed filing, to preclude the uninsured motorist from seeking affirmative relief for personal injuries by cross claim. The Court held the insurer could not rely on the defense of the statute of limitations as to the cross claim when its action is filed more than one year from the date of the accident, and could not rely on former Code Civ. Proc. § 340(3) [*now see Code Civ. Proc. § 335.1* (two-year limitations period, beginning in 2003)] to bar defendant's right to seek affirmative relief (*8 Cal. 3d 712, 717)* .

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CHAPTER 220 SUBROGATION
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22-220 California Points & Authorities § 220.40

§ 220.40 Supporting Obligor's Contention That Insurer's Complaint in Intervention Is Subject to Mandatory-Dismissal Rule [Code Civ. Proc. §§ 583.310, 583.360]--Complaint in Intervention to Recover Subrogated Property Loss Is Subject to Running of Dismissal Statute From Time of Filing of Original Complaint--Subrogee Insurer's Claim States Essentially Same Causes of Action as Original Complaint

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

SUBROGEE INSURER'S COMPLAINT IN INTERVENTION TO RECOVER A SUBROGATED PROPERTY LOSS AGAINST DEFENDANT SHOULD BE DISMISSED PURSUANT TO CODE OF CIVIL PROCEDURE SECTIONS 583.310 AND 583.360, BECAUSE THE MATTER HAS NOT BEEN BROUGHT TO TRIAL WITHIN FIVE YEARS SINCE THE FILING OF THE SUBROGOR INSURED'S COMPLAINT, AND THE COMPLAINT IN INTERVENTION INVOLVES ESSENTIALLY THE SAME CAUSES OF ACTION AS PLAINTIFF'S CLAIM AGAINST DEFENDANT.

A. Five-Year Limitations Period for Trial of Action. An action shall be brought to trial within five years after the action is commenced against the defendant (*Code Civ. Proc. § 583.310*).

B. Mandatory Dismissal of Action Not Timely Brought to Trial. An action shall be dismissed by the court on its own motion or on motion of the defendant, after notice to the parties, if the action is not brought to trial within the time prescribed under *Code of Civil Procedure Sections 583.310-583.260*. The requirements of these provisions are mandatory and are not subject to extension, excuse, or exception except as expressly provided by statute (*Code Civ. Proc. § 583.360*).

C. Complaint in Intervention Is Subject to Mandatory-Dismissal Period Applicable to Original Complaint if Same Causes of Action Asserted. A subrogee insurer seeking to recover a subrogated property loss in an action brought by the subrogor insured against the tortfeasor is subject to dismissal of its complaint in intervention if the action is not brought to trial within five years of the filing of the original complaint pursuant to *Code of Civil Procedure Sections 583.310* and *583.360*, and the complaint in intervention involves essentially all the same causes of action as the

subrogor's claim (*Bright v. American Termite Control Co. (1990) 220 Cal. App. 3d 1464, 1468-1469, 269 Cal. Rptr. 793*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of the contention that a complaint in intervention, brought by a subrogee insurer to recover a subrogated property loss from the tortfeasor defendant, is subject to the five-year mandatory-dismissal provisions of *Code Civ. Proc. §§ 583.310* and *583.360*. The grounds for the contention are that the action has not been brought to trial within five years of the filing of the original complaint, and the complaint in intervention involves essentially the same causes of action as the subrogor insured's claim against the tortfeasor [*see Bright v. American Termite Control Co. (1990) 220 Cal. App. 3d 1464, 1468-1469, 269 Cal. Rptr. 793]* .

These points and authorities may be used alone or combined with a memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the substantive issue that the complaint in intervention is subject to mandatory dismissal. For example, they may be combined with points and authorities relating to a motion for dismissal under *Code Civ. Proc. §§ 583.310* and *583.360*. Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. For example, counsel should show that the complaint in intervention involves essentially the same causes of action as those asserted by the subrogor insured against the defendant tortfeasor in the original complaint.

[b] Single Cause of Action Against Defendant

This form is based on the contention that the subrogee insurer and the plaintiff in the original complaint have a single, rather than a separate, cause of action against the defendant, in that the rights and interests of the insurer as the plaintiff in intervention are substantially similar and "not adverse" to those of the plaintiffs vis-a-vis the defendants [*see Bright v. American Termite Control Co. (1990) 220 Cal. App. 3d 1464, 1469, 269 Cal. Rptr. 793]* . By contrast, a complaint in intervention brought by a subrogee insurer that possesses a distinct and separate cause of action against the defendant would be subject to its own independent time frame for the purposes of the mandatory-dismissal statute [*see Bright v. American Termite Control Co. (1990) 220 Cal. App. 3d 1464, 1468, 269 Cal. Rptr. 793* ; *see also § 220.40[3][a]*].

[c] Related Pleading and Practice Chapters

For discussion and forms relating to subrogation generally, see California Forms of Pleading and Practice, Ch. 536, *Subrogation* (Matthew Bender). For discussion and forms relating to mandatory dismissal, see California Forms of Pleading and Practice, Ch. 212, *Dismissal* (Matthew Bender).

[d] Related Points and Authorities

For memoranda of points and authorities generally supporting and opposing a motion for mandatory dismissal, see Ch. 90, *Dismissal* .

[3] Discussion of Authorities

[a] Complaint in Intervention Is Subject to Mandatory-Dismissal Period Applicable to Original Complaint if Same Causes of Action Asserted

In ***Bright v. American Termite Control Co.*** *(1990) 220 Cal. App. 3d 1464, 269 Cal. Rptr. 793* , insureds under a policy covering property loss brought an action against the tortfeasor to recover damages arising from the defendant's

alleged misapplication of a chemical when their house was treated to exterminate termites. Approximately two months after the at-issue memorandum was filed, the insurer filed a complaint in intervention to recover subrogated property loss. Both the complaint in intervention and the original complaint stated numerous identical causes of action pertaining to negligence, strict liability, and other issues. The original complaint alleged additional causes of action personal to the plaintiff insureds. Approximately four years later, plaintiffs settled with defendants but filed no motion to dismiss. Rather, the trial date was continued. The subrogee insurer successfully moved to strike the at-issue memorandum and to remove the case from the trial calendar, and several months later, or almost six years after the filing of the original complaint, moved to set the case specially for trial. The court denied the motion and issued an order to show cause why the court should not dismiss the complaint in intervention pursuant to *Code Civ. Proc. § 583.360(a)* (dismissal if action not brought to trial within prescribed time). In dismissing the action and the complaint in intervention, the trial court found that the complaint in intervention had alleged the same causes of action as had been alleged by the plaintiffs in their complaint, and that the insurer had no separate cause of action. The court therefore concluded that the five-year dismissal statute commenced with respect to the insurer, not with the filing of the complaint in intervention, but with the filing of the original complaint, and that the five-year period had elapsed. The insurer appealed.

The court of appeal affirmed, holding that inasmuch as the subrogee insurer had no separate claim against the defendants, the complaint in intervention was subject to the five-year dismissal rule from the date of the filing of the original complaint (*220 Cal. App. 3d 1464, 1468-1470)* . The court noted that the test for determining whether a subsequently filed claim has a life independent of the original complaint for purposes of the five-year mandatory-dismissal rule [*Code Civ. Proc. §§ 583.310, 583.360*] is whether the claim asserts a separate cause of action. Although the California Supreme Court has not applied the test of a separate cause of action to complaints in intervention, it has applied this test in the context of cross-complaints, counterclaims, and separate lawsuits subsequently consolidated. The Court has held that the time for bringing the claim to trial runs from the filing of the cross-complaint, counterclaim, or separate but consolidated lawsuit, because each claim states a separate cause of action that can be separately brought and tried, and the claims are thus distinct though simultaneous actions with their own independent time frames for the purposes of the mandatory-dismissal statute. In this case, the court of appeal noted that in contrast, the subrogee insurer's situation involved a property subrogation claim with essentially the same causes of action as alleged by plaintiff. The court recognized that in a property subrogation matter, the subrogor insured and the subrogee insurer each possess a separate right of action, and the insurer is not limited to an action in intervention but may bring a separate independent action to recover directly from the third-party tortfeasor [*see Deutschmann v. Sears, Roebuck & Co. (1982) 132 Cal. App. 3d 912, 915-916, 183 Cal. Rptr. 573]* . Nonetheless, apart from the existence of a separate "right of action," the proscription against splitting a single "cause of action" is impermissibly violated, unless waived by the defendant, when the insurer attempts to maintain a separate suit against the defendant [*see Ferraro v. Southern Cal. Gas Co. (1980) 102 Cal. App. 3d 33, 41 n.3, 43-44, 162 Cal. Rptr. 238* ; *see also § 220.34[3][a]*] (*220 Cal. App. 3d 1464, 1468-1469)* . The court concluded that the insurer's complaint in intervention to recover a subrogated property loss states essentially the same causes of action. The running of the time period for the five-year dismissal rule on filing of the plaintiff's original complaint is supported by one of the purposes of intervention. Intervention is permitted to avoid delay and multiplicity of actions when claims are the same or substantially similar and arise out of the same facts. If *Code Civ. Proc. §§ 583.310* and *583.360* were construed to mean that the date of an intervener's cause of action is the date to bring the five-year period for bringing causes to trial, an intervener could file its complaint and extend the time in which defendant would be subject to litigation to close to ten years. This would defeat the purpose of avoiding delay (*220 Cal. App. 3d 1464, 1469)* . Moreover, the strong public policy in favor of expediting and disposing of litigation supports the holding that the three-year discretionary-dismissal statute [*Code Civ. Proc. §§ 583.410, 583.420*] begins to run from the date of the filing of the original complaint and not from the date of the subsequent complaint in intervention. That policy supports the same conclusion with regard to the five-year dismissal statute in the instant case. The court noted that the intervener has theoretical independence as a separate party in other contexts, for example, with regard to the right to demand a jury trial, and to object to the court's jurisdiction. Moreover, when an intervener has a subrogation claim, the dismissal of the plaintiff's complaint for failure to serve and return summons in a timely manner does not affect the intervener's independent right to continue the action. However, the court held that even an acknowledgment of the independent and separate nature of the intervener's right of action in

certain contexts does not detract from its recognition of the essentially parallel causes of action filed in the present case, the mutuality of interests between the plaintiff and the plaintiff in intervention vis-a-vis the defendants, the policy of avoiding delays in litigation, and the inadvisability of extending the time from five years to ten years in which the defendants would be subject to litigation (*220 Cal. App. 3d 1464, 1470)* .

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CHAPTER 220 SUBROGATION
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22-220 California Points & Authorities § 220.41

§ 220.41 Opposing Contention That Subrogation Lies--Prerequisites for Equitable Subrogation to Rights of Secured Creditor Have Not Been Satisfied

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

THE DOCTRINE OF EQUITABLE SUBROGATION TO THE RIGHTS OF A SECURED CREDITOR DOES NOT APPLY IN THIS CASE BECAUSE THE PREREQUISITES FOR APPLICATION OF THE DOCTRINE HAVE NOT BEEN SATISFIED IN THAT _____ [*specify, e.g.,* THERE IS NO SHOWING THAT PLAINTIFF WAS NOT PRIMARILY LIABLE ON THE OBLIGATION PAID].

Prerequisites for Equitable Subrogation. One who claims to be equitably subrogated to the rights of a secured creditor must satisfy the following prerequisites: (1) payment must have been made by the subrogee to protect his or her own interest; (2) the subrogee must not have acted as a volunteer; (3) the debt must be one for which the subrogee was not primarily liable; (4) the entire debt must have been paid; and (5) subrogation must not work any injustice to the rights of others (*Caito v. United Cal. Bank (1978) 20 Cal. 3d 694, 704, 144 Cal. Rptr. 751, 576 P.2d 466*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the action is one in which the doctrine of equitable subrogation applies. The ground of opposition is that the person seeking to be subrogated to the rights of a secured creditor has failed to satisfy one or more of the prerequisites for application of the doctrine. For memoranda of points and authorities relating to the absence of a specific element which may be incorporated with these points and authorities, see *§§ 220.42 -220.44*.

These points and authorities may be used alone or in combination with a memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue. For example, they may be combined with points and authorities in opposition to a motion by plaintiff for summary judgment under *Code Civ. Proc. § 437c*. They

may also be combined with points and authorities in support of a motion by defendant for summary judgment when the omission of an essential prerequisite can be indisputably established. If the omission of one of the essential prerequisites appears from the face of the complaint or from judicially noticed matter, these points and authorities may be combined with a memorandum of points and authorities (1) in support of a general demurrer to the complaint [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*], or (2) in support of a nonstatutory motion for judgment on the pleadings. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, if the contention is made in opposition to a motion by plaintiff for summary judgment, defendant should show that one or more of the essential prerequisites have not been met or that there are disputed fact questions as to whether they have been met. If the contention is made in support of a motion for summary judgment, defendant should show the indisputable facts establishing that one or more of the essential prerequisites for application of the doctrine of equitable subrogation have not been satisfied. For papers on which a motion for summary judgment may be based or opposed, see *Code Civ. Proc. § 437c(b)*. If the contention is made in support of a general demurrer to a complaint or a motion for judgment on the pleadings, defendant should show that it appears from the face of the complaint or from judicially noticed matter that the one or more of the prerequisites have not been satisfied.

In an appropriate case, these points and authorities may be submitted in opposition to the contentions supported by the points and *authorities in §§ 220.20 -220.23*.

[b] Related Pleading and Practice Chapters

For forms of notices of motion for summary judgment and related papers, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender). For forms of demurrers and motions for judgment on the pleadings, and related papers, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* . For memoranda of points and authorities generally supporting and opposing a demurrer to a complaint or a motion for judgment on the pleadings, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Prerequisites for Equitable Subrogation

Caito v. United Cal. Bank *(1978) 20 Cal. 3d 694, 144 Cal. Rptr. 751, 576 P.2d 466* , was an action by two cotenants of a farm for partition, an accounting, and a declaration of the rights and priorities of the parties. Defendants were (1) the other two cotenants, (2) a lending bank that was beneficiary and trustee of a first trust deed on the property, and (3) a second bank that was beneficiary and trustee of a second trust deed. Plaintiffs had signed the loan instruments to the first bank as comakers, but had intended to sign merely to accommodate defendant cotenants to whom the loan was made. Plaintiffs later loaned defendant cotenants $6,000 to keep the bank loan in a current status and further paid over to the first bank $17,500 in farm rentals as required by an assignment of the rentals to the bank. The second trust deed was subsequently given by defendant cotenants without plaintiffs' knowledge or consent to secure extension of an independent loan approximating $140,000 made to them. While the action was pending, the first bank nonjudicially foreclosed the first trust deed and caused the farm to be sold for $130,000. The bank retained approximately $44,500 in satisfaction of the balance due it on the first note, deposited the balance of the sale proceeds (approximately $85,500) into court, and was dismissed from the action. The trial court found plaintiffs had acted as accommodation parties. It concluded that the $44,500 was to be charged only to defendant cotenants' one-half interest ($65,000) of the proceeds

from the sale. As to the $20,500 balance of that interest, the court ruled that plaintiffs' right to reimbursement from defendant cotenants for the $6,000 loan and $17,500 farm rentals had priority over the claim of the second bank on the second trust deed, with the result that the second bank was awarded nothing. The second bank appealed.

The Supreme Court reversed on the ground plaintiffs had signed the instruments to the first bank as comakers and acquired no rights as accommodating parties against either bank, each of which was a bona fide encumbrancer for value. The Court held that both plaintiffs and defendant cotenants were liable as principal obligors to the first bank, that the surplus (approximately $85,500) deposited in court was to be divided equally between them, and that the second bank's claim against the proceeds paid to defendant cotenants was superior to plaintiffs' claim (*20 Cal. 3d 694, 701-703)* . Plaintiffs contended that their loan of $6,000 to defendant cotenants to keep the first bank's loan current and their payment of $17,500 in farm rentals to the first bank reduced the amount of the loan secured by the first trust deed and that they were therefore entitled to be subrogated to the right of the first bank in that amount against defendant cotenants' share of the surplus [*see § 220.21*]. The Court said that one who claims to be equitably subrogated to the rights of a secured creditor must satisfy certain prerequisites. Quoting *Grand v. De Otte (1954) 122 Cal. App. 2d 724, 728, 265 P.2d 952* [*see § 220.21[3][a]*], the Court said that these prerequisites are as follows: (1) payment must have been made by the subrogee to protect his or her own interest; (2) the subrogee must not have acted as a volunteer; (3) the debt paid must be one for which the subrogee was not primarily liable; (4) the entire debt must have been paid; and (5) subrogation must not work an injustice to the rights of others (*20 Cal. 3d 694, 704)* . By way of illustration, the Court said it was obvious a debtor-landowner, having granted to creditors successive security interests in his or her lands, cannot be subrogated to the priority position of the senior creditor when the debtor satisfies the obligation owed that creditor as the debtor has not, in such a case, satisfied the third prerequisite that the debt paid be one for which he or she was not primarily liable (*20 Cal. 3d 694, 704)* . The Court held the third prerequisite was lacking since plaintiffs were comakers of the note and therefore primarily liable on the debt owed to the lending bank (*20 Cal. 3d 694, 705)* . The Court added that even if this rule were not strictly applied, plaintiffs still were not entitled to subrogation. With respect to the $17,500 payment of rentals, the Court held there could be no subrogation for two reasons: first, because the rentals were paid to the lending bank pursuant to an assignment of rents and plaintiffs were merely agents of the bank in collecting and paying them over; and second, because secret, undisclosed equities existing between cotenants cannot be used to defeat the rights of a bona fide encumbrancer for value (*20 Cal. 3d 694, 706)* . With respect to the $6,000 loan, the Court held subrogation would not lie because the loan was made before the second trust deed was executed and was an undisclosed claim and hence did not in any way alter the security position of the second bank's lien. The Court said that to permit subrogation in such a case would work an injustice to the bank, thereby violating the fifth requirement for equitable subrogation, listed above. The Court concluded the doctrine of equitable subrogation was not applicable to any of plaintiffs' claims and therefore declined to consider the defendant bank's argument that the doctrine of equitable subrogation was inapplicable because the entire debt to the first bank was not retired by plaintiffs' advances (*20 Cal. 3d 694, 707)* .

In reaching this result, the Court distinguished the situation in which there are codebtors who are equally obligated cotenants of land pledged as security. In such a case, there is the initial problem of who is primarily liable for the debt owed the senior creditor. If the record shows, for instance, that each cotenant is personally obligated for half of the debt, and if one cotenant is required to pay the full debt in order to protect his or her position, then it appears he or she should be subrogated to the senior creditor's security position, but only to the extent of the half payment made on behalf of the defaulting cotenant, assuming all other prerequisites for equitable subrogation are satisfied. The person cannot be subrogated to the full amount of the payment because half of it was made on his or her own account as the primary obligor (*20 Cal. 3d 694, 704-705)* .

[4] Additional Authorities

[a] Prerequisites for Equitable Subrogation

In *Gulf Ins. Co. v. TIG Ins. Co. (2001) 86 Cal. App. 4th 422, 103 Cal. Rptr. 2d 305* , an insurer (the plaintiff) executed

a performance bond for a contractor as principal and the county as obligee. During the course of the construction work, the contractor damaged adjacent real property. The county declared the contractor in default under the construction contract, and the plaintiff performed the contractor's remaining obligations under the performance bond, which allegedly included the repair and restoration of the damage caused to the owner of the adjacent real property, by paying $47,000 to another company that performed the work. The contractor allegedly maintained commercial general liability insurance written by another insurer (the CGL insurer) at all relevant times. The plaintiff sued the contractor's CGL insurer, alleging that it became subrogated to the contractor's and the county's rights as insureds under the CGL policy. The trial court sustained the CGL insurer's demurrers to a cause of action for breach of the implied covenant of good faith and fair dealing. The amended complaint asserted causes of action for declaratory relief, equitable indemnity, and contribution. On appeal, the plaintiff claimed error in the sustaining of the demurrer to its claim for breach of the implied covenant of good faith and fair dealing. The appellate court held that the plaintiff was not equitably subrogated to the contractor's rights as insured with respect to the contractor's CGL insurer, because the contractor did not suffer an injury for which the plaintiff (as surety) paid, such that the CGL insurer should be held liable. That is, the plaintiff was not equitably subrogated to the contractor's rights with respect to the bad faith claim against the CGL insurer because the CGL insurer's allegedly wrongful conduct did not result in any injury to the contractor (*86 Cal. App. 4th 422, 432)* .

In *Herrick Corp. v. Canadian Ins. Co. (1994) 29 Cal. App. 4th 753, 34 Cal. Rptr. 2d 844* , an injured worker sued both the general contractor and two subcontractors. The insurer for one subcontractor paid an amount on behalf of its insured, based on the insured's promise to indemnify the general contractor. The insurer that made this payment then sought equitable contribution from the insurer for the other subcontractor. The court held that the risk insured against--a subcontractor's contractual obligation to indemnify a general contractor for any liability the general contractor incurred for bodily injury--is not the same risk as the general contractor's tort liability to the subcontractor's employee (*29 Cal. App. 4th 753, 762)* . Since the two risks are not the same, the insurer is subrogated only to the rights of its own insured subcontractor, not to the rights of the general contractor against another insurer (*29 Cal. App. 4th 753, 765)* . However, the right to defense costs paid by the subcontractor's insurer is subrogated unless the general contractor expressly released the other subcontractor for claims for defense costs (*29 Cal. App. 4th 753, 766)* .

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22-220 California Points & Authorities § 220.42

§ 220.42 Opposing Contention That Subrogation Lies--Plaintiff Has Failed to Allege or Prove Payment of Obligation

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

THE DOCTRINE OF EQUITABLE SUBROGATION DOES NOT APPLY IN THIS CASE BECAUSE PLAINTIFF HAS FAILED TO _____ [ALLEGE *or* PROVE] THAT PLAINTIFF PAID THE OBLIGATION FOR WHICH SUBROGATION IS SOUGHT.

Payment as Required to Be Alleged and Proved. With exceptions not here applicable, a complaint in subrogation must allege payment by the subrogee. The failure of the subrogee to plead or prove that he or she paid the debt will prevent his or her recovery as subrogee (*Iusi v. City Title Ins. Co. (1963) 213 Cal. App. 2d 582, 587-588, 28 Cal. Rptr. 893*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the action is one in which the doctrine of equitable subrogation applies. The ground of opposition is that plaintiff has failed to allege or prove that he or she paid the obligation for which subrogation is sought. The exceptions to the requirement of alleging or proving payment referred to in the form would occur in the case of statutory subrogation when the subrogee is authorized to recover, for example, an actuarial equivalent of payments to be made [*see, e.g., Gov. Code § 21451* (subrogation of Public Employees Retirement System to recover portion of actuarial equivalent of benefits for which system is liable because of death or injury of employee member caused by defendant)].

These points and authorities may be used alone or combined with a memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue. For example if plaintiff has failed to allege payment, they may be combined with points and authorities either (1) in support of a general demurrer to a complaint [

Code Civ. Proc. § 430.10(e)], or (2) in support of a nonstatutory motion for judgment on the pleadings. They may also be combined with points and authorities in support of a motion by defendant for summary judgment when the failure to pay the obligation can be indisputably established, or in opposition to a motion by plaintiff for summary judgment if there are disputed fact issues as to whether payment was made [*see Code Civ. Proc. § 437c*]. If plaintiff fails to prove payment at trial, these points and authorities may be cited in support of an oral motion for nonsuit or judgment or combined with a memorandum of points and authorities in support of a motion for new trial [*see Code Civ. Proc. §§ 581c* (motion for nonsuit), 631.8 (motion for judgment), 657(6) (motion for new trial)]. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, if the contention is made in support of a general demurrer to a complaint or a motion for judgment on the pleadings, defendant should show that the complaint fails to allege payment. If the contention is made in support of a motion for summary judgment, counsel should show that payment was in fact not made, or, if the contention is made in opposition to plaintiff's motion for summary judgment, that payment was not made or there are disputed fact issues as to whether payment was made [*see Code Civ. Proc. § 437c(b)*]. If the contention is made in support of a motion for nonsuit or judgment or in support of a motion for new trial, counsel should show that no evidence of payment was introduced.

In an appropriate case, these points and authorities may be submitted in opposition to the contentions supported by the points and *authorities in §§ 220.20 -220.23*.

[b] Related Pleading and Practice Chapters

For forms of demurrers and motions for judgment on the pleadings, and related papers, and a discussion and procedural guide for use on a motion for nonsuit or judgment, see in California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings,* and Ch. 389, *Nonsuit and Motions for Judgment* (Matthew Bender). For forms of notices of motion for summary judgment and related papers, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender). For forms of notice of intention to move for a new trial and related papers, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities generally supporting and opposing a demurrer to a complaint or a motion for judgment on the pleadings, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For memoranda of points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* . For memoranda of points and authorities generally supporting and opposing a motion for new trial, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] Payment as Required to Be Alleged and Proved

The facts and procedural background of ***Iusi v. City Title Ins. Co.*** *(1963) 213 Cal. App. 2d 582, 587, 28 Cal. Rptr. 893* , are discussed in *§ 220.31[3][a]*. In reversing the judgment for plaintiff, the court of appeal rejected plaintiff's argument in support of the judgment that the trial court applied the theory of subrogation. The appellate court said the judgment could not be sustained on this ground because subrogation was completely outside the issues raised by the pleadings (*213 Cal. App. 2d 582, 586)* . The court added, however, that even assuming plaintiff's pleadings could possibly encompass such a theory, any recovery on this theory would be prevented by plaintiff's failure to either plead or prove that he had paid the sellers' judgment (the obligation) and thereby acquired a right, as a subrogee, to proceed against the title company (the obligor) on this theory (*213 Cal. App. 2d 582, 587)* . Quoting *Arp v. Blake & Cohn (1923) 63 Cal. App 362, 367, 218 P. 773* , the court said that the doctrine of subrogation requires that the person seeking

its benefit must have paid a debt due to a third person before he or she can be substituted to that person's rights; it is not the liability to pay, but an actual payment to the creditor, that raises the equitable right (*213 Cal. App. 2d 582, 587-588)* .

California Points & Authorities

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Volume 22 Chapters 220-229 SUBROGATION---to---TRESPASS
CHAPTER 220 SUBROGATION
PART II. FORMS

22-220 California Points & Authorities § 220.43

§ 220.43 Opposing Contention That Subrogation Lies--Plaintiff in Making Payment Was Mere Volunteer

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

THE DOCTRINE OF EQUITABLE SUBROGATION DOES NOT APPLY IN THIS CASE BECAUSE PLAINTIFF, IN PAYING _____ [*specify obligation paid*], WAS ACTING AS A MERE VOLUNTEER.

Inapplicability of Doctrine of Subrogation to Mere Volunteer. Subrogation does not apply in favor of one who has officiously and as a mere volunteer paid the debt of another that the payor was under no obligation to pay, nor will it be allowed when it will work any injustice to the rights of others (see *Stein v. Simpson (1951) 37 Cal. 2d 79, 84, 230 P.2d 816* ; *McMillan v. O'Brien (1934) 219 Cal. 775, 779-782, 29 P.2d 183*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the action is one in which the doctrine of equitable subrogation applies. The ground of opposition is that plaintiff in making payment acted as a mere volunteer and, therefore, is not entitled to subrogation.

These points and authorities may be used alone or combined with a memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue. For example, they may be combined with a memorandum of points and authorities in opposition to a motion for summary judgment under *Code Civ. Proc. § 437c*. They may also be combined with points and authorities in support of a motion by defendant for summary judgment when the voluntariness of the payment can be indisputably established. If the fact plaintiff acted as a mere volunteer in making payment appears from the face of the complaint or from judicially noticed matter, these points and authorities may be combined with a memorandum of points and authorities (1) in support of a general demurrer to the complaint [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*], or (2) in support of a nonstatutory motion for judgment on the pleadings. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, if the contention is made in opposition to a motion by plaintiff for summary judgment, defendant should show that in making payment plaintiff acted as a mere volunteer or that there are disputed fact questions as to whether the payment was voluntary. If the contention is made in support of a motion for summary judgment, defendant should show the facts indisputably establishing the nature of the payment as voluntary [*see Code Civ. Proc. § 437c(b)*]. If the contention is made in support of a general demurrer to a complaint or a motion for judgment on the pleadings, defendant should show that it appears from the face of the complaint or from judicially noticed matter that the payment was voluntary.

In an appropriate case, these points and authorities may be submitted in opposition to the contentions supported by the points and *authorities in §§ 220.20 -220.23*.

[b] Related Pleading and Practice Chapters

For forms of notices of motion for summary judgment and related papers, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender). For forms of demurrers and motions for judgment on the pleadings, and related papers, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* . For memoranda of points and authorities generally supporting and opposing a demurrer to a complaint or a motion for judgment on the pleadings, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Inapplicability of Doctrine of Subrogation to Mere Volunteer

Stein v. Simpson *(1951) 37 Cal. 2d 79, 230 P.2d 816* , was an action to quiet title to real property. Plaintiffs were the owners of the property which had a value of over $50,000. It was encumbered by a first trust deed securing a debt owed a bank amounting to $18,000. Defendant loaned plaintiffs $20,000 at a usurious rate of interest which was to be paid back at the rate of $2,000 per month for four months with the balance becoming due and payable in the fifth month, and took a second trust deed on the property to secure repayment of the note. Plaintiffs paid $8,000 on the note reducing the principal to $12,000. Plaintiffs properly tendered the balance due, but defendant refused to accept it. Defendant gave notice of default under his trust deed and election to sell. An hour before the sale, plaintiffs' agent offered defendant the full amount claimed by him to be due, but defendant refused to accept it, saying he wanted the property, not the money. Defendant bid $36,000 for the property and plaintiffs' agent bid $50,000. However, the agent had only $17,000 with him. At defendant's request, all bids were declared off and a new sale was started. It was then announced that defendant had paid the bank the note secured by the first trust deed and the sale would be for the amount represented by both trust deeds (however, the notice of sale had stated that the sale would be subject to the bank's first trust deed). Defendant had paid the bank the amount due on the first trust deed that morning, but did not secure from the bank an assignment of the indebtedness. The request of plaintiffs' agent for a 24-hour postponement of the sale to obtain funds to cover the $50,000 bid was refused at defendant's direction. The sale proceeded. Plaintiffs' agent bid $17,000 and defendant bid $18,000. The property was sold to defendant. The trial court found the sale invalid, that plaintiffs owed defendant only $12,000, and that this amount was due without interest. The court further found that defendant ad no property interest to protect in paying off the first trust deed, that he had acted as a volunteer in doing so, and that his purpose was to spring a surprise on plaintiffs at the sale and enable him to secure the property for himself. Judgment was entered for plaintiffs quieting their title to the property, subject to their paying defendant the $12,000 within 30 days. Defendant appealed,

contending he was entitled to be repaid the amount he'd paid the bank ($17,380.85) in addition to the $12,000.

The Supreme Court affirmed. The Court said defendant was seeking subrogation. The principle on which subrogation is founded applies in all cases in which one person, not a volunteer, pays a debt for which another is primarily answerable, and which, in equity and good conscience, should have been discharged by the latter (*37 Cal. 2d 79, 83)* . The rule has found express application with reference to payment by a junior lien holder of a senior lien on the same property pursuant to the provisions of *Civ. Code §§ 2903* and *2904* (discussed in *§ 220.21[2][b]*). It is the general rule that a junior lien holder who pays the debt secured by a senior lien to protect his or her interest thereby becomes subrogated to the rights of the senior lienholder as against the owner of the property, even though he or she takes no assignment of the senior lien (*37 Cal. 2d 79, 83-84)* . However, the Court said the one invoking subrogation must not have been a volunteer, an officious intermeddler, in making the payment, and that he or she must have had some interest to protect. The Court held that defendant had no such interest because his interest was extinguished when plaintiff tendered full payment on the second deed of trust (*37 Cal. 2d 79, 84)* . The Court acknowledged the rule that when a person discharges a lien not incurred by the person on property not his or her own, but which the person mistakenly believes to be his or hers, is subrogated to the rights of the lienholder. However, there was no mistake of fact or law on defendant's part since his purpose was to acquire the property for less than its value and not to protect any supposed interest he had in it (*37 Cal. 2d 79, 84-86)* .

McMillan v. O'Brien *(1934) 219 Cal. 775, 29 P.2d 183* , was an action between adjoining landowners in which plaintiff sought to quiet title to a narrow strip of real property between the adjoining landowners' lots. Defendant in his answer pleaded that he and his predecessors in interest had for many years been assessed and paid taxes on the strip of land and sought recovery of the amount of taxes paid if it was determined that plaintiff was the true owner. A California Supreme Court decision some 25 years earlier had quieted title to this strip in plaintiff's predecessor in interest. Judgment was entered quieting plaintiff's title and adjudging that defendant had no right, title, claim, or interest or estate in the property and forever barring him from asserting any claim to it. Defendant appealed.

The Supreme Court affirmed. The Court held that a person who pays taxes on another's property, which appears of record as belonging to the other person, in the honest but mistaken belief that the land belongs to him or her is a mere volunteer and may not recover the amount paid from the true owner under the doctrine of equitable subrogation (*219 Cal. 775, 779-782)* .

[4] Additional Authorities

[a] Excess Insurer Barred From Maintaining Action Against Primary Insurer

In *Fireman's Fund Ins. Co. v. Maryland Cas. Co. (1994) 21 Cal. App. 4th 1586, 26 Cal. Rptr. 2d 762* , the court held that an excess insurer that contended it was not liable because the damages in question manifested themselves prior to inception of its policies, but that nevertheless settled with a third party claimant after the claimant, the insured, and the primary insurer had already entered into a settlement and release that discharged all parties except excess insurer from further liability, acted as a mere volunteer and was not entitled to equitable subrogation from the primary insurer because its payment represented amounts for which the excess insurer itself claimed it was not liable, and for which no other party was liable since the obligation of all other parties had been discharged by the prior settlement (*21 Cal. App. 4th 1586, 1597-1598)* .

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Volume 22 Chapters 220-229 SUBROGATION---to---TRESPASS
CHAPTER 220 SUBROGATION
PART II. FORMS

22-220 California Points & Authorities § 220.44

§ 220.44 Opposing Contention That Subrogation Lies--Plaintiff's Equities Are Not Superior to Those of Defendant

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

THE DOCTRINE OF EQUITABLE SUBROGATION DOES NOT APPLY IN THIS CASE BECAUSE PLAINTIFF'S EQUITIES ARE NOT SUPERIOR TO THOSE OF DEFENDANT.

A. Subrogation Not Available if Inequitable. Subrogation is a creation of equity and is, therefore, subject to the limitation that it will not be allowed when it would be inequitable to third persons (*Federal Ins. Co. v. Allen (1970) 13 Cal. App. 3d 648, 650, 92 Cal. Rptr. 125*).

B. When Surety or Insurer May Recover From Third Person. To recover through subrogation against a third person when a wrongdoer causes loss both to a surety or insurer by reason of its bond or insurance policy and to the third person, the surety or insurer must have an equity superior to that of the third person (*Continental Ins. Co. v. Morgan, Olmstead, Kennedy & Gardner, Inc. (1978) 83 Cal. App. 3d 593, 602, 148 Cal. Rptr. 57* ; *see Federal Ins. Co. v. Allen (1970) 13 Cal. App. 3d 648, 650, 92 Cal. Rptr. 125*).

C. Fault of Third Person Must Be Related to Primary Cause of Loss for Surety or Insurer to Prevail. In order for the surety or insurer suing in subrogation to have an equity superior to that of a third person, the fault of the third person must be related to the primary cause of the loss; it is only when the third person dealing with the wrongdoer is in a better position to avoid the loss than the insured or the surety that the surety has a superior equity permitting it to recover as subrogee (*Fireman's Fund Ins. Co. v. Morse Signal Devices (1984) 151 Cal. App. 3d 681, 687, 198 Cal. Rptr. 756* ; *Continental Ins. Co. v. Morgan, Olmstead, Kennedy & Gardner, Inc. (1978) 83 Cal. App. 3d 593, 603-604, 148 Cal. Rptr. 57*).

D. Burden of Proof and Imputed Negligence. The burden is on the surety or insurer to establish its superior equity and, for the purpose of weighing the equities, the negligence or other fault of the insured is imputed to the surety or

insurer seeking subrogation (*Continental Ins. Co. v. Morgan, Olmstead, Kennedy & Gardner, Inc. (1978) 83 Cal. App. 3d 593, 602, 148 Cal. Rptr. 57*).

[*Optional*] **E. Subrogation as Not Enforced When Equities Are Equal or Rights Are Not Clear.** Subrogation will not be enforced when the equities are equal or the rights not clear (*Meyers v. Bank of America etc. Assn. (1938) 11 Cal. 2d 92, 101, 77 P.2d 1084* ; *Fireman's Fund Ins. Co. v. Morse Signal Devices (1984) 151 Cal. App. 3d 681, 686, 198 Cal. Rptr. 756*).

[*Optional*] **F. Effect of Formal Assignment of Insured's Claim.** A formal assignment to the insurer of the insured's claim adds nothing to the right of the insurer to recover from the third person and does not convert an action for equitable subrogation into an action at law so as to defeat defenses otherwise available to the third person (*Meyers v. Bank of Am. Nat'l Trust & Sav. Ass'n (1938) 11 Cal. 2d 92, 94, 77 P.2d 1084* ; *Federal Ins. Co. v. Allen (1970) 13 Cal. App. 3d 648, 650, 92 Cal. Rptr. 125*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that plaintiff is entitled to recover on its subrogated claim. The ground of opposition is that the surety or insurer seeking to be subrogated to the rights of its insured against a third party has no equity superior to that of the third-party defendant and, therefore, is not entitled to recover. Optional Paragraph E should be included if the equities between plaintiff and defendant are equal or if plaintiff's rights are not clear. Optional Paragraph F should be included if plaintiff claims its right to sue derives from a written assignment to it by its insured of any cause of action the insured has against third persons for the loss covered by the bond or insurance.

These points and authorities may be used alone or combined with a memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue. For example, they may be combined with points and authorities in opposition to a motion by plaintiff for summary judgment under *Code Civ. Proc. § 437c*. They may also be combined with points and authorities in support of a motion by defendant for summary judgment when the nonexistence of any superior equity in plaintiff can be indisputably established. If the lack of any superior equity in plaintiff appears from the face of the complaint or from judicially noticed matter, these points and authorities may be combined with a memorandum of points and authorities (1) in support of a general demurrer to the complaint [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*], or (2) in support of a nonstatutory motion for judgment on the pleadings. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, if the contention is made in opposition to a motion by plaintiff for summary judgment, defendant should show either plaintiff has failed to establish any superior equity in it or there are disputed fact questions as to whether a superior equity exists in plaintiff. If the contention is made in support of a motion for summary judgment, defendant should show the indisputable facts establishing that plaintiff has no equity superior to that of defendant [*see Code Civ. Proc. § 437c(b)*]. If the contention is made in support of a general demurrer to a complaint or a motion for judgment on the pleadings, defendant should show that the complaint fails to state facts sufficient to constitute a cause of action in that it fails to allege any facts showing that plaintiff's equities are superior to those of defendant.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in §§ 220.20 -220.23*.

[b] Related Pleading and Practice Chapters

For forms of notices of motion for summary judgment and related papers, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender). For forms of demurrers and motions for judgment on the pleadings, and related papers, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender).

[c] Related Points and Authorities

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[3] Discussion of Authorities

[a] Subrogation Not Available if Inequitable

Federal Ins. Co. v. Allen *(1970) 13 Cal. App. 3d 648, 92 Cal. Rptr. 125* , was an action by a fidelity surety which had paid an employee-theft claim for stolen tires to recover their value from the tire dealers who had purchased them. Plaintiff had issued the fidelity bond to a tire and rubber company indemnifying the company against the theft or embezzlement of its property by any of its employees. The thefts were committed over a two-year period by the employer's warehouse foreman who concealed the thefts by juggling the books. The trial court found: (1) neither defendant had any reason to question the employee's ownership of the tires or knew that the employee, formerly an independent tire dealer, was in the tire company's employ; (2) nothing in the price or other circumstances of the employee's offers or sales to them could have put either purchaser on notice or inquiry of the employee's lack of title; and (3) the tire company in fact was negligent in its supervision of its employee and early in the series of the thefts was put on notice of facts that should have permitted it to prevent them. Judgment was for defendants, and plaintiff appealed.

The court of appeal affirmed. The court said a surety for compensation on a fidelity bond, on its payment to the employer, is subrogated to the employer's rights, but subrogation, as a creation of equity, is subject to the limitation that it will not be allowed when it will be inequitable to third persons. Because the purchasers had no notice of the employee's thefts, and there was nothing to put them on inquiry, implying that to order repayment would be inequitable (*13 Cal. App. 3d 648, 650)* .

[b] When Surety or Insurer May Recover From Third Person

Continental Ins. Co. v. Morgan, Olmstead, Kennedy & Gardner, Inc. *(1978) 83 Cal. App. 3d 593, 148 Cal. Rptr. 57* , was an action by a surety, as the subrogee of a bank, against a broker that had acted as principal or agent in purchasing United States treasury bills stolen from the bank. On July 28, 1970, more than $3,000,000 in treasury bills were stolen. During July 1970 the bank's security broke down and millions of dollars in bearer treasury bills were left unattended on a desk top. Sign-in procedures were not followed. Employees of the bank and purported workmen coming on the premises had access to the treasury bills on the unattended desk top at times when other employees in the section were socializing. On the date of the theft, treasury bills piled on a desk top were unattended for 45 minutes. Two purported Western Union repairmen were in the vicinity of the desk on that day. A bank employee of 13 years did not report on July 29th to her work station at the desk where the bills were left and never again reported for work. Supervisory personnel of the bank originally believed that because of some operational error the treasury bills merely appeared to be missing. However, as a precautionary measure, the bank informed plaintiff on July 28th that the bills were missing. On July 30th the bank undertook to determine the serial numbers of the missing bills and asked the Federal Reserve to assemble a list of identification numbers of stolen treasury bills. It received the list on August 7th and on that date circulated an internal bulletin that treasury bills had been stolen. It also notified a stock clearing corporation which sent out a limited "flier" to its members communicating the information. On August 10th the bank phoned a notice to R.L.

Polk & Co., a national bank directory publisher, which included the serial numbers of the missing treasury bills in a widely circulated notice. A total of $500,000 of the bills were negotiated through defendant broker by an individual using a fictitious name who first contacted defendant on July 21st, stating he wished to liquidate United States Treasury bills. The man was informed of defendant's policy to require that the bills be in hand before defendant would sell them. Shortly thereafter on the same day, the man brought five $10,000 bearer treasury bills and one $10,000 bearer FNMA certificate to defendant for sale. Defendant checked the securities against a list of stolen government securities and found them to be legitimate. It bought the FNMA certificate as principal and sold the five treasury bills as agent for the man. On July 31st, August 6th, and August 19th, it bought $200,000, $100,000, and $200,000, respectively, in treasury bills from the man and immediately resold them. Payment to the man was in the form of certified checks generally in $10,000 denominations. On August 27th defendant was notified by the FBI that $500,000 in stolen treasury bills had been negotiated through it. On August 28th, it received R. L. Polk's notice of the stolen securities issued by Polk in response to the bank's communication. Defendant was able to stop payment on $30,000 of the checks issued to the man in the August 19th transaction, but the remainder of the checks cleared. The trial court found that defendant was not at fault, that the bank was, and that, in any event, by reason of its failure to establish a superior equity, plaintiff was not entitled to relief except to the extent that a small portion of the loss had been prevented by defendant's action in stopping payment on its checks after the fraud was discovered. Plaintiff appealed.

The court of appeal affirmed. The court said that in ***Meyers v. Bank of Am. Nat'l Trust & Sav. Ass'n*** *(1938) 11 Cal. 2d 92, 98, 102-103, 77 P.2d 1084* [*see § 220.44[3][e]*], the California Supreme Court followed the rule in the majority of jurisdictions in adopting the principle that when a wrongdoer causes loss both to a surety by reason of its bond and to a third person, the surety's normal right of recovery through subrogation against the third person is limited to situations in which the surety's equity is superior to that of the third person (*83 Cal. App. 3d 593, 602)* . The court said the trial court's conclusion that plaintiff had not established a superior equity to defendant was correct (*83 Cal. App. 3d 593, 604)* .

The facts and procedural background of ***Federal Ins. Co. v. Allen*** *(1970) 13 Cal. App. 3d 648, 92 Cal. Rptr. 125* , are discussed in *§ 220.44[3][a]*. In affirming the judgment for defendants, the court said plaintiff in effect vouched for the employee's integrity and accepted a premium for its agreement to indemnify against his defalcations. Defendants had no notice whatever of the employee's thefts, and there were no facts to put either defendant on inquiry. The court concluded that plaintiff had thus failed to show a superior, or even an equal, equity, and held it could not recover from either defendant (*13 Cal. App. 3d 648, 650)* .

[c] Fault of Third Person Must Be Related to Primary Cause of Loss for Surety or Insurer to Prevail

Fireman's Fund Ins. Co. v. Morse Signal Devices *(1984) 151 Cal. App. 3d 681, 198 Cal. Rptr. 756* , was an action against various burglar and fire alarm companies by an insurance company, as subrogee of its insureds for losses arising from property damage sustained by its insureds, allegedly as a result of the failure of the alarm systems. Each of plaintiff's insureds had contracted with one of the alarm companies to have burglar or fire alarm systems maintained. Each of the alarm companies' contracts contained various disclaimers and a liquidated damages clause limiting the company's liability to a refund of a specified portion of the amount paid for the company's services. In each of 11 separate incidents, a fire or burglary occurred at an insured's premises, and the alarm system failed to function properly either because of a mechanical failure or because of the failure of the company's personnel to notify police or fire departments on receiving signals from otherwise properly functioning systems. Plaintiff alleged that when the alarm companies received alarm signals but failed to notify the proper officials, such "knowing" failure amounted to gross negligence and that, as a proximate result of the alarm companies' breach of their contractual duty or negligent or grossly negligent acts, the fires or burglaries were not aborted. Defendants' demurrers to the complaint were sustained without leave to amend, and plaintiff appealed.

The court of appeal affirmed. Quoting *Continental Ins. Co. v. Morgan, Olmstead, Kennedy & Gardner, Inc. (1978) 83 Cal. App. 3d 593, 603-604, 148 Cal. Rptr. 57* , the court said that only if the person dealing with the wrongdoer is in a

better position to avoid the loss than is the insured or the surety does the surety have the superior equity permitting it to recover as a subrogee. In the case of the check forged by a bonded employee, the primary cause of the loss is the conduct of the dishonest employee. The action of the bank in paying the check is secondary. Absent some negligent conduct of a character which promotes or encourages the employee's fraud, the bank is not in a better position to avoid the loss than is the insured's employer (*151 Cal. App. 3d 681, 687-688)* . Applying this statement to the case before it, the court said the primary cause of the loss was the creator of the fire or the burglar. The alarm companies' alleged negligence would be secondary to the creation of the perils (*151 Cal. App. 3d 681, 688)* . Thus, while the alarm companies may have been negligent in performance of their contractual duties, their negligence did not create the harm (*151 Cal. App. 3d 681, 687)* .

The facts and procedural background of ***Continental Ins. Co. v. Morgan, Olmstead, Kennedy & Gardner, Inc.*** *(1978) 83 Cal. App. 3d 593, 148 Cal. Rptr. 57* , are discussed in *§ 220.44[3][b]*. In affirming the judgment for defendant, the court of appeal said that the fault of the third person that creates the superior equity in the surety suing in subrogation must be related to the "primary cause" of the loss. Only if the person dealing with the wrongdoer is in a better position to avoid the loss than is the insured or the surety does the surety have the superior equity permitting it to recover as a subrogee (*83 Cal. App. 3d 593, 603-604)* . The court said the primary cause of the loss was the theft of the treasury bills by the bank's employees or invitees, and, contributing to the loss, were the bank's negligence in failing to undertake minimal measures to protect the millions in dollars of negotiable securities and its negligent delay in reporting the loss. Defendant's negligence, if any, was secondary as the bank's loss occurred prior to the time defendant had anything to do with the stolen treasury bills (*83 Cal. App. 3d 593, 604)* .

[d] Burden of Proof and Imputed Negligence

The facts and procedural background of ***Continental Ins. Co. v. Morgan, Olmstead, Kennedy & Gardner, Inc.*** *(1978) 83 Cal. App. 3d 593, 148 Cal. Rptr. 57*), are discussed in *§ 220.44[3][b]*. In affirming the judgment for defendant, the court said the burden of proof is on the surety to establish its superior equity and, in weighing the equities, the negligence or other fault of the insured is imputed to the surety seeking subrogation (*83 Cal. App. 3d 593, 602)* . The court concluded that defendant's negligence, if any, was certainly no greater than the bank's negligence, which is imputed to its subrogee, and on those facts the trial court's conclusion that plaintiff had not established a superior equity to defendant was correct (*83 Cal. App. 3d 593, 604)* .

[e] Subrogation as Not Enforced When Equities Are Equal or Rights Are Not Clear

Meyers v. Bank of Am. Nat'l Trust & Sav. Ass'n *(1938) 11 Cal. 2d 92, 77 P.2d 1084* , was an action by a bonding company (the surety) on a fidelity bond in the name of its insured against a bank to recover losses resulting from the forgery of the insured's name on numerous checks made payable to the insured. The forgeries were committed by the insured's office manager who received the checks in the course of the insured's business. After forging the insured's signature, the office manager negotiated the checks with an individual who paid full value for them in the ordinary course of business and deposited them in his bank account with defendant bank which presented them to the respective drawees and received full payment. Judgment was for plaintiff, and defendant appealed.

The Supreme Court reversed. The Court said subrogation is equity's second method of compelling the ultimate payment by one who in justice and good conscience ought to make it--of putting the charge where it justly belongs. It is not an absolute right but depends on the superiority of the equities of the one who asserts it over those of the one against whom it is sought; it will never be enforced when the equities are equal or the rights not clear (*11 Cal. 2d 92, 101)* . The Court pointed out that the indemnitor had discharged its primary contract liability by paying what it had contracted to pay, that it had retained to its own use the premiums and benefits of the contract, and that it was seeking to recover from the bank the amount thus paid. The Court said it must be conceded the bank was an innocent third party whose duty to the employer was based on an entirely different theory of contract, with which the indemnitor was not in privity, and neither the indemnitor nor the bank was the wrongdoer, but by independent contract obligation each was liable to the

employer. The Court concluded that, in equity, it could not be said the satisfaction by the bonding company of its primary liability should entitle it to recover against the bank on a totally different liability (*11 Cal. 2d 92, 102)* . The Court held the surety had no superior equities and was not entitled to be subrogated to any claim plaintiff might have had against the bank (*11 Cal. 2d 92, 103)* .

The facts and procedural background of ***Fireman's Fund Ins. Co. v. Morse Signal Devices*** *(1984) 151 Cal. App. 3d 681, 198 Cal. Rptr. 756* , are discussed in *§ 220.44[3][c]*. In affirming the judgment for defendants, the court said that subrogation is equity's second method of compelling the ultimate payment by one who in justice and good conscience ought to make it--of putting the charge where it justly belongs. It is not an absolute right but depends on the superiority of the equities of the one who asserts it over those of the one against whom it is sought; it will never be enforced when the equities are equal or the rights not clear (*151 Cal. App. 3d 681, 686)* . The court said the insureds are in the best position to place a value on the contents of their premises, and the insurance company, which charges its premiums based on the extent of insurance coverage, is in the best position to spread the risks assumed. The court added that the insureds procured insurance for the very losses that were suffered and concluded that plaintiff was not equitably subrogated to any of the insureds' causes of action based on breach of contract or negligence (*151 Cal. App. 3d 681, 688)* .

[f] Effect of Formal Assignment of Insured's Claim

The facts and procedural background of ***Meyers v. Bank of Am. Nat'l Trust & Sav. Ass'n*** *(1938) 11 Cal. 2d 92, 77 P.2d 1084* , are discussed in *§ 220.44[3][e]*. The bonding company (the surety), on reimbursement of the insured's losses, took an assignment of any cause of action the insured had against the bank, together with the right to maintain an action at law thereon in the insured's name. On appeal, plaintiff contended the action was assignable, the insured had a legal right to assign it, and that, because both the legal right to assign and the right of action were legal in nature, the action was at law and the equitable doctrine of subrogation was inapplicable. The Supreme Court rejected the contention. The Court said assignment of an assignable cause of action is but one of the recognized forms of subrogation and when one is entitled to substitution in the place of one entitled to institute and maintain an action, neither a written nor an oral contract is necessary to effect transfer of the right. Consequently, a formal written assignment of the claim adds nothing to its enforceability by the assignee and the action is subject to the same defenses as though no assignment of any sort had been made (*11 Cal. 2d 92, 94)* . Thus, the defense which the plaintiff sought to preclude by suing at law (that plaintiff had no equities superior to defendant) was permitted to be raised (*11 Cal. 2d 92, 96-97, 100-103)* .

The facts and procedural background of ***Federal Ins. Co. v. Allen*** *(1970) 13 Cal. App. 3d 648, 92 Cal. Rptr. 125* , are discussed in *§ 220.44[3][a]*. On payment of the loss, plaintiff took from the tire company an assignment of all its rights against those who might be liable to the company in connection with the loss and argued that the action was one at law for conversion, to be treated as though brought by the tire company, and that negligence was not a defense to the action. In affirming the judgment for defendants, the court pointed out that a surety for compensation on a fidelity bond does not stand in the shoes of the employer whose loss it has paid; such a surety, on its payment to the employer, is subrogated to the employer's rights. The court said a formal written assignment adds nothing to the enforceability by the assignee of the cause of action, and it is subject to the same defenses as though no assignment had been made. The court concluded that the surety could recover only if it showed an equity superior to that of the defendants (*13 Cal. App. 3d 648, 650)* .

[4] Additional Authorities

[a] Subrogation as Not Enforced When Equities Are Equal or Rights Are Not Clear

In *Morgan Creek Residential v. Kemp (2007) 153 Cal. App. 4th 675, 63 Cal. Rptr. 3d 232 , rev. denied, 2007 Cal. LEXIS 13272 (2007)* , a land development company brought an action against a developer/builder seeking equitable

contribution and subrogation under the California Uniform Commercial Code. Plaintiff had paid monies pursuant to a letter of credit as security for a loan to complete a construction project; the debtors defaulted on the loan. The court dismissed the complaint without leave to amend; and the appellate court affirmed, holding with regard to the subrogation claim that subrogation depends on the superiority of the equities of the party that asserts it over those of the one against whom it is sought. The plaintiff claimed merely equal rights, not superior rights over defendants. Yet the defendants, as mere guarantors, bargained for limited exposure. To allow plaintiff to recover from them on plaintiff's letter of credit would work an injustice to the defendants' rights. Plaintiff's attempt to use a subrogation theory to obtain apportionment from others who were not primarily liable is inconsistent with the aim of subrogation. *Comm. Code § 5117* might allow plaintiff to go after the debtors on the underlying obligation, but it does not allow plaintiff to go after defendants as mere guarantors (*153 Cal. App. 4th 675, 690-695)* .

In *Maryland Cas. Co. v. Nationwide Mut. Ins. Co. (2000) 81 Cal. App. 4th 1082, 97 Cal. Rptr. 2d 374* , an action between insurers of the same insured, the court of appeal refused to apply the doctrine of equitable subrogation to allocate defense costs between them, because both insurers had issued primary policies regarding the loss. Therefore, the doctrine of equitable contribution applied (*81 Cal. App. 4th 1082, 1092-1093)* .

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Volume 22 Chapters 220-229 SUBROGATION---to---TRESPASS
CHAPTER 220 SUBROGATION
PART II. FORMS

22-220 California Points & Authorities § 220.45

§ 220.45 Opposing Contention That Subrogation Lies--Loss Caused by Negligence of Coinsured

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

THE DOCTRINE OF EQUITABLE SUBROGATION DOES NOT APPLY IN THIS CASE BECAUSE DEFENDANT WAS A COINSURED OF PLAINTIFF'S SUBROGOR UNDER THE SAME LIABILITY POLICY.

Loss Caused by Negligence of Coinsured. No right of subrogation can arise in favor of an insurer against its own insured since, by definition, subrogation exists only with respect to rights of the insurer against third persons to whom the insurer owes no duty; hence, an insurance company that has paid a loss to one insured under its policy cannot as subrogee recover from a coinsured under the policy the amount paid by it even though the coinsured's negligence may have caused the loss, there being no fraud or design on his or her part (*St. Paul Fire & Marine Ins. Co. v. Murray Plumbing & Heating Corp. (1976) 65 Cal. App. 3d 66, 75-77, 135 Cal. Rptr. 120*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the action is one in which the doctrine of equitable subrogation applies. The ground of opposition is that an insurer, on paying an insured for the loss from a peril insured against by a policy may not, as subrogee of the insured, sue under the same policy a coinsured whose negligence caused the loss.

These points and authorities may be used alone or combined with a memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue. For example, they may be combined with a memorandum of points and authorities in opposition to a motion by plaintiff for summary judgment under *Code Civ. Proc. § 437c*. They may also be combined with points and authorities in support of a motion by defendant for summary judgment. If the fact that defendant was a coinsured under the same policy appears from the face of the complaint or from judicially noticed matter, these points and authorities may be combined with a memorandum of points and

authorities (1) in support of a general demurrer to the complaint [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*], or (2) in support of a nonstatutory motion for judgment on the pleadings. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, if the contention is made in opposition to a motion by plaintiff or in support of a motion by defendant for summary judgment, defendant should show he or she was a coinsured under the same insurance policy as plaintiff's subrogor [*see Code Civ. Proc. § 437c(b)*]. If the contention is made in support of a general demurrer to a complaint or a motion for judgment on the pleadings, defendant should show that the complaint fails to state facts sufficient to constitute a cause of action because it shows on its face that defendant was a coinsured under the same insurance policy as plaintiff's subrogor.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 220.22* or § 220.224.

[3] Discussion of Authorities

[a] Loss Caused by Negligence of Coinsured

St. Paul Fire & Marine Ins. Co. v. Murray Plumbing & Heating Corp. *(1976) 65 Cal. App. 3d 66, 135 Cal. Rptr. 120* , was an action against subcontractors by a builder's risk insurer, as subrogee of its insured, a general contractor, for reimbursement of the sum ($283,000) paid for water damage to property located on the insured project while the building was under construction. Plaintiff paid the money to the general contractor who thereafter disbursed a portion of it to the various subcontractors suffering property damage. Plaintiff alleged that as a result of defendants' negligence, strict liability, breach of warranty, and breach of contract a four inch cast iron pipe broke causing extensive flooding. Plaintiff's insurance policy listed the insured as the general contractor "for its account and/or the account of its subcontractors" and insured against all risks of direct physical loss, damage, or destruction of property of the insured or of others in the custody or control of the insured. On the case being called for trial the court preliminarily determined a special defense raised by the defendants, ruling as a matter of law that plaintiff could not maintain a subrogation action against defendants since they were also insureds under the terms of the policy. Plaintiff appealed.

The court of appeal affirmed. The court said the policy was obviously procured by the general contractor for the mutual benefit of the subcontractors and clearly extended coverage to them as additional assureds (*65 Cal. App. 3d 66, 74)* . The court said that the bulk of authority elsewhere establishes the principle that an insurer may not subrogate against a coinsured of its subrogor and saw no reason not to follow that authority (*65 Cal. App. 3d 66, 75)* . The court said no right of subrogation can arise in favor of an insurer against its own insured since, by definition, subrogation exists only with respect to rights of the insurer against third persons to whom the insurer owes no duty (*65 Cal. App. 3d 66, 75)* . The court also said that the courts have consistently held that where an insurance company has paid a loss to one insured under its policy it cannot as subrogee recover the amount so paid from a coinsured under the policy even though the latter's negligence may have caused the loss, there being no fraud or design on his or her part (*65 Cal. App. 3d 66, 76)* . The court then said that cases in which an insurance company attempts to recover, as a subrogee, against a party for whose benefit the insurance was written and whose negligence has occasioned the loss, are concededly rare, but there are some, mostly in the field of builder's risk insurance. The courts have consistently held, in the builder's risk cases, that the insurance company, having paid a loss to one insured, cannot, as subrogee, recover from another of the parties for whose benefit the insurance was written, even though the latter's negligence may have occasioned the loss, there being no design or fraud on his or her part (*65 Cal. App. 3d 66, 76-77)* .

[4] Additional Authorities

[a] Loss Caused by Negligence of Coinsured

Rokeby-Johnson v. Aquatronics Int'l, Inc. (1984) 159 Cal. App. 3d 1076, 206 Cal. Rptr. 232 , was a subrogated action by an insurer to recover a sum paid to its insured for loss of equipment caused by a fire on board a vessel at sea against the operator of the ship to whom the insured had furnished the equipment. Plaintiff contended the loss resulted from defendant's negligence and failure to provide a seaworthy vessel. In the written agreement between the insured and the ship operator for the insured to furnish services and equipment, the insured had undertaken to provide insurance protection for the operator. The agreement was executed some three weeks after insurance coverage of the equipment had been bound by the brokers. At the mandatory settlement conference before trial, defendant advised plaintiff it would assert as a defense that it was an implied-in-law coinsured of the insured which defense, if established, would defeat the insurer's subrogation action. Plaintiff filed a notice of motion in limine to exclude testimony at trial on this defense on the ground it was new matter and should have been pleaded as an affirmative defense. The court denied the motion and, although unpersuaded that the defense had to be pleaded, allowed defendant to amend its answer to do so. At trial, the judge bifurcated the issues and, relying on *Liberty Mut. Fire Ins. Co. v. Auto Spring Supply Co. (1976) 59 Cal. App. 3d 860, 865-866, 131 Cal. Rptr. 211* (a subrogated action by an insurer of a commercial building against the named insured's sublessee arising out of damage to the building by fire, in which the court held the sublessee was an implied-in-law coinsured of the named insured), ruled that defendant was an implied-in-law coinsured and thus the insurer could have no right of subrogation against him. The court said the language of the contract between the parties was clear, that it specifically provided that the named insured would, at its own expense, obtain insurance coverage and listed a number of coverages, including personal property insurance, which applied to the equipment. The court said it had to assume that the purpose of providing for the insuring of the equipment was to assure defendant that it would have no liability in the event there was a loss of that equipment and the carrier would take care of the loss, and, thus, it followed that the clear purpose of the provision was for the benefit of defendant. The court concluded the commercial expectation of the parties was that the named insured's insurance would cover any loss of the equipment, and if subrogation were permitted, defendant would become the source of the funds used to cover the lost equipment which would be contrary to the expressed intent of plaintiff's named insured. Plaintiff appealed, contending it was entitled to subrogation because defendant was not named as an additional insured; there was no waiver of subrogation in the parties' agreement; the agreement did not absolve defendant from the consequences of its own negligence; and the agreement did not absolve defendant from the consequences of its failure to furnish a seaworthy vessel. The court of appeal rejected plaintiff's contentions and affirmed the judgment. The court quoted with approval the trial court's explanation of its decision, including the statements set forth above (*159 Cal. App. 3d 1076, 1080-1084)* . A surety which is subrogated to the rights of the principal against a third person takes the rights subject to all defenses which the third person has as against the principal (*159 Cal. App. 3d 1076, 1083)* . If the rights of the assured have been limited by lawful contract, the rights of the insurer are likewise limited (*159 Cal. App. 3d 1076, 1086)* .

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CHAPTER 220 SUBROGATION
PART II. FORMS

22-220 California Points & Authorities § 220.46

§ 220.46 Opposing Contention That Subrogation Lies--Plaintiff Insurer's Subrogor Waived Subrogation Rights for Damage by Fire to Leased Premises

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

PLAINTIFF MAY NOT, AS THE SUBROGEE OF ITS INSURED, RECOVER FROM DEFENDANT THE AMOUNT PAID FOR _____ [LOSS OF *or* DAMAGE TO] THE INSURED'S PROPERTY BY FIRE BECAUSE PLAINTIFF'S INSURED, IN LEASING THE PROPERTY TO DEFENDANT, WAIVED ANY SUBROGATION RIGHTS AGAINST DEFENDANT FOR DAMAGE BY FIRE.

A. Right of Insurer as Subrogee. A subrogation as applied to an insurer is the right to be put in the position of its insured against third parties legally responsible to its insured for the loss which the insurer has both insured and paid (*Parsons Mfg. Corp. Inc. v. Superior Court (1984) 156 Cal. App. 3d 1151, 1158, 203 Cal. Rptr. 419*).

B. Waiver of Subrogation Rights. Provisions in a lease that place on the lessor the burden of insuring the leased premises against fire caused by either the lessor or lessee's negligence constitute a waiver of subrogation, and the lessor's fire insurer may not, as subrogee of its insured, recover from the lessee payments made on account of fire loss or damage caused by the lessee's negligence (*Parsons Mfg. Corp., Inc. v. Superior Court (1984) 156 Cal. App. 3d 1151, 1162-1163, 203 Cal. Rptr. 419*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that plaintiff fire insurer is entitled to recover on its subrogated claim against its insured's lessee who negligently caused the fire. The ground of opposition is that any right to subrogation against the lessee was waived by the agreement of plaintiff's insured to insure the premises against loss or damage by fire caused by either the lessor's or lessee's negligence. The contention in this form is closely related to the contention that an alleged obligor is an implied-in-law coinsured [*see* *Rokeby-Johnson v. Aquatronics*

Int'l, Inc. (1984) 159 Cal. App. 3d 1076, 1084-1085, 206 Cal. Rptr. 232 [*see also § 220.45[4][a*]]. Consequently, it might be advisable for the alleged obligor in a fact situation presented by this form to plead as an affirmative defense to the action both a waiver of subrogation and that the defendant is an implied-in-law coinsured of plaintiff's insured.

These points and authorities may be used alone or combined with a memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue. For example, they may be combined with a memorandum of points and authorities in opposition to a motion by plaintiff in surer for summary judgment under *Code Civ. Proc. § 437c*. They may also be combined with a memorandum of points and authorities in support of a motion by defendant lessee for summary judgment when the lessor's agreement to have the property insured against loss or damage by fire for the benefit of both the lessor and lessee can be indisputably established. If the waiver of subrogation appears from the face of the complaint or from judicially noticed matter, these points and authorities may be combined with a memorandum of points and authorities (1) in support of a general demurrer to the complaint [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*], or (2) in support of a nonstatutory motion for judgment on the pleadings. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, if the contention is made in opposition to a motion by plaintiff for summary judgment, defendant should show either that subrogation was waived or that there are disputed fact questions as to whether subrogation was waived. If the contention is made in support of a motion for summary judgment, defendant should show the indisputable facts establishing that subrogation was waived [*see Code Civ. Proc. § 437c(b)*]. If the contention is made in support of a general demurrer to a complaint or a motion for judgment on the pleadings, defendant should simply point out that the complaint fails to state facts sufficient to constitute a cause of action in that it shows on its face, or it appears from judicially noticed matter, that any right the insurer might have had to subrogation against the lessee was waived by the lessor.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 220.23*.

[b] Related Pleading and Practice Chapters

For forms of complaints in subrogation, see California Forms of Pleading and Practice, Ch. 536, *Subrogation* (Matthew Bender). For forms of notices of motion for summary judgment and related papers, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender). For forms of demurrers and motions for judgment on the pleadings, and related papers, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* . For memoranda of points and authorities generally supporting and opposing a demurrer to a complaint or a motion for judgment on the pleadings, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Right of Insurer as Subrogee

Parsons Mfg. Corp. Inc. v. Superior Court *(1984) 156 Cal. App. 3d 1151, 203 Cal. Rptr. 419* , was a mandate proceeding arising out of an action by an insurer against its insured's lessee to recover the amount paid by the insurer on account of damage by fire to the leased premises allegedly caused by defendant's negligence. Defendant entered a general denial to the complaint and asserted as an affirmative defense that the lessor in the lease had waived subrogation

against the lessee for damage to the leased premises by fire. The lease agreement provided for return of the premises in the same condition as received, "damage by fire, act of God or by the elements excepted." It also contained other provisions suggesting that the lessor would provide fire insurance for the building. Plaintiff moved for partial summary judgment, seeking a determination that the lessor had not waived subrogation. Defendant countered with its own motion for summary judgment, seeking to establish as a complete defense the asserted waiver of subrogation. The primary evidence presented by each party in support of its motion was the lease agreement. The trial court ruled in plaintiff's favor on both motions, and defendant petitioned the court of appeal for a writ of mandate.

The court of appeal granted the petition and ordered issuance of a writ directing the trial court to vacate its rulings on the motions for summary judgment and partial summary judgment and to enter summary judgment for defendant. In reaching its conclusion, the court held plaintiff's showing in support of its motion for partial summary judgment was insufficient. The lease agreement alone was a sufficient showing by the lessee in support of its motion, and the matters presented by plaintiff in opposition to defendant's motion failed to rebut the inference from the language of the lease that the lessor would procure insurance for the benefit of both the lessor and lessee (*156 Cal. App. 3d 1151, 1163-1164)* . The court said that a subrogation as applied to an insurer is its right to be put in the position of its insured against third parties legally responsible to its insured for the loss which the insurer has both insured and paid (*156 Cal. App. 3d 1151, 1158)* .

[b] Waiver of Subrogation Rights

The facts and procedural background of ***Parsons Mfg. Corp. Inc. v. Superior Court*** *(1984) 156 Cal. App. 3d 1151, 203 Cal. Rptr. 419* , are discussed in *§ 220.46[3][a]*. In reaching its conclusion to grant the writ, the court stated the principle that a lessee may, by contract with the lessor, establish protection against suit for negligently caused fire damage, that is, that subrogation may be waived, but added what is not answered by the California cases is what contractual provisions are required to secure such protection (*156 Cal. App. 3d 1151, 1160)* . A lease provision merely excepting "damage by fire" from the lessee's duty to return the premises in good condition may not protect the lessee; on the other hand, an express requirement that the lessor maintain fire insurance for the premises may provide such protection (*156 Cal. App. 3d 1151, 1160)* . The court held that when the lease agreement adverts to the possibility of fire and there is no clear language or other admissible evidence showing an agreement to the contrary, the agreement should be read to place on the lessor the burden of insuring the premises (as distinguished from the lessee's personal property) against lessor and lessee negligence and when the lease has been drawn by the lessor its language will be construed strictly against the lessor and its insurer (*156 Cal. App. 3d 1151, 1162)* . The court said the lease agreement was rife with hints the lessor would procure insurance on the premises and the lessee was entitled to expect that the insurance would be for its benefit as well as for the lessor's (*156 Cal. App. 3d 1151, 1162-1163)* .

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22-220 California Points & Authorities § 220.47

§ 220.47 Opposing Contention That Subrogation Lies--Insurer May Not Intervene in Insured's Action Against Obligor for Damages if Insurance Contract Failed to Provide for Subrogation of Benefits in Question

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

THE INSURER MAY NOT, AS THE SUBROGEE OF ITS INSURED, INTERVENE IN ITS INSURED'S ACTION FOR DAMAGES, INCLUDING LOSS OF INCOME, TO RECOVER FROM THE OBLIGOR THE AMOUNT IT PAID ITS INSURED AS _____ [*describe benefits in question, e.g.,* INCOME CONTINUATION BENEFITS] UNDER THE TERMS OF ITS LIABILITY POLICY BECAUSE IT DID NOT RESERVE THE RIGHT TO SUBROGATION TO SUCH PAYMENTS IN THE INSURANCE POLICY, ALTHOUGH IT EXPRESSLY RESERVED THE RIGHT TO SUBROGATION AS TO OTHER COVERAGES.

A. Kinds of Subrogation. There are two sorts of subrogation, "legal" (or equitable) and "conventional" (or contractual). Legal subrogation has its source in equity and arises by operation of law (*Knight v. Alefosio (1984) 158 Cal. App. 3d 716, 723, 205 Cal. Rptr. 42*).

B. Conventional Subrogation. Conventional subrogation arises by contract; conversely, a right to conventional subrogation does not exist in the absence of a contractual provision (see *Knight v. Alefosio (1984) 158 Cal. App. 3d 716, 723, 205 Cal. Rptr. 42*).

C. Legal Subrogation. Legal subrogation has its source in equity and arises by operation of law; it does not arise from any contractual relationship between the parties, but takes place as a matter of equity with or without an agreement to that effect when a person having a liability or a right or a fiduciary relationship pays a debt due by another under such circumstances that the person is in equity entitled to the security or obligation held by the creditors whom he or she has paid (*Knight v. Alefosio (1984) 158 Cal. App. 3d 716, 723, 205 Cal. Rptr. 42*).

D. Inapplicability of Legal Subrogation to Override Insurance Policy. The principle of legal or equitable subrogation does not apply in favor of an insurer to override a policy that fails to provide for such subrogation, although

it provides for subrogation with respect to other coverages, so as to permit the insurer to intervene in the insured's action against the tortfeasor to recover damages for personal injuries, including the loss to which the insurer claims to be subrogated (*Knight v. Alefosio (1984) 158 Cal. App. 3d 716, 724, 205 Cal. Rptr. 42*).

[2] Comments

[a] Use of Form

These points and authorities are for use by an insured in a memorandum of points and authorities in opposition to a motion by an insurer, asserting a right to both conventional and legal subrogation, to intervene in the insured's action against the third-party tortfeasor on the narrow ground the insurance contract gives no right to subrogation as to the specific claim to which the insurer claims to be subrogated although it contains provisions for subrogation with respect to other coverages. These points and authorities may also used by the insured in an action against him or her by the insurer to recoup its payments from the proceeds of a judgment recovered by the insured against the third-party tortfeasor in combination with a memorandum of points and authorities: (1) in support of a general demurrer to the complaint [*see Code Civ. Proc. § 430.10(e)*]; (2) in support of the insured's nonstatutory motion for judgment on the pleadings; or (3) in support of a motion by the insured for summary judgment when the inapplicability of the doctrine of subrogation does not appear from the face of the complaint [*see Code Civ. Proc. § 437c*]. With appropriate modifications, these points and authorities may also be used in a trial or appellate brief.

[b] Related Pleading and Practice Chapters

For a form of notice of motion to intervene in an action and related papers, see California Forms of Pleading and Practice, Ch. 395, *Parties* (Matthew Bender). For forms of demurrers and notices of motion for judgment on the pleadings, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For forms of notices of motion for summary judgment and related papers, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities generally supporting and opposing a motion to intervene, see Ch. 124, *Intervention* . For memoranda of points and authorities generally supporting and opposing demurrers and motions for judgment on the pleadings, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For memoranda of points and authorities generally supporting and opposing motions for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Kinds of Subrogation

Knight v. Alefosio *(1984) 158 Cal. App. 3d 716, 205 Cal. Rptr. 42* , was an action by an insured for damages for personal injuries resulting from an automobile accident against the driver of the other vehicle. The demand included a claim for loss of income. Plaintiff was insured under a policy providing coverage under "Personal Injury Protection" for income continuation benefits, pursuant to which the insurer paid such benefits to the insured. The insurer's motion under *Code Civ. Proc. § 387(a)* to intervene in the action on the ground it was subrogated to the insured's right to recover from defendant payments made for income continuation benefits was denied, and the insurer appealed.

The court of appeal affirmed. The court said subrogation is of two sorts: "legal" (or equitable) and "conventional" (or contractual) (*158 Cal. App. 3d 716, 723)* .

[b] Conventional Subrogation

The facts and procedural background of ***Knight v. Alefosio*** *(1984) 158 Cal. App. 3d 716, 205 Cal. Rptr. 42* , are discussed in *§ 220.47[3][a]*. The insurer claimed a right to conventional subrogation based on the insurance policy it issued to plaintiff. The court rejected the claim on the ground the policy did not contain a reservation of the right to subrogate with respect to the income continuation benefits as it did with respect to liability and uninsured motorist coverage set forth in other sections of the insurance contract and, therefore, the insurer did not have a contractual subrogation right (*158 Cal. App. 3d 716, 721, 723)* . The court held that when the insurance contract is silent as to subrogation rights it means that such a right was not bargained for and hence not acquired by the insurance company. The court said in so holding it was only giving effect to the carrier's probable intent as expressed in the policy it drafted. It, therefore, followed that the insurer was not a person who had an interest in the matter in litigation or in the success of either of the parties or an interest against both, and the trial court did not abuse its discretion in denying intervention (*158 Cal. App. 3d 716, 723)* .

[c] Legal Subrogation

The facts and procedural background of ***Knight v. Alefosio*** *(1984) 158 Cal. App. 3d 716, 205 Cal. Rptr. 42* , are discussed in *§ 220.47[3][a]*. The insurer also contended it was entitled to legal subrogation. In rejecting this contention, the court said legal subrogation has its source in equity and arises by operation of law when a person having a liability or a right or a fiduciary relationship in the premises pays a debt due by another under such circumstances that the person is in equity entitled to the security or obligation held by the creditors whom he or she has paid. It does not arise from any contractual relationship between the parties, but takes place as a matter of equity with or without an agreement to that effect. The court declared itself satisfied that the principle of legal or equitable subrogation should not be applied (*158 Cal. App. 3d 716, 723)* .

[d] Inapplicability of Legal Subrogation to Override Insurance Policy

The facts and procedural background of ***Knight v. Alefosio*** *(1984) 158 Cal. App. 3d 716, 205 Cal. Rptr. 42* , are discussed in *§ 220.47[3][a]*. In affirming the order denying the insurer's motion to intervene, the court said the doctrine of subrogation cannot be invoked to override the contract of the parties and does not apply when its enforcement would be inconsistent with the terms of the contract or if the contract expressly or by implication forbids its application. The court rejected the insurer's contention that it enjoyed a right of equitable subrogation notwithstanding its failure to reserve the right under the policy. This would in effect permit the company to rewrite the policy to the detriment of its insured, who had paid a premium for a designated benefit without the company's right of subrogation. The reasonable expectation of the insured had to be that the company had no right of recovery (subrogation) in respect to income continuation benefits. The court said that when the policy reserves the right of subrogation with respect to claims paid under certain policy coverages, it does not have the right as to other coverages that do not reserve the right (*158 Cal. App. 3d 716, 724)* .

[4] Additional Authorities

[a] Inapplicability of Legal Subrogation to Override Insurance Policy

In *Continental Ins. Co. v. American Prot. Indus. (1987) 197 Cal. App. 3d 322, 242 Cal. Rptr. 784* , an insured filed an action against a burglar-alarm company, seeking contract, tort, and equitable remedies based on losses suffered from burglaries in the insured's warehouses. The plaintiff's insurer joined in the action, alleging a cause of action in fraud based on the defendant's conduct toward the insured, and asserting an interest by right of subrogation. The court of appeal affirmed summary judgment against the insurer, holding that the doctrine of equitable subrogation is inapplicable when the insured is a party plaintiff in an action against a third-party tortfeasor, and no contractual right of subrogation is in evidence or admitted by the parties (*197 Cal. App. 3d 322, 327)* .

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Volume 22 Chapters 220-229 SUBROGATION---to---TRESPASS
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22-220 California Points & Authorities § 220.48

§ 220.48 Supporting Obligor's Contention That Subrogation Is Unavailable--Insurer's Subrogation Claim Barred by Insured's Release of Obligor

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

WHEN AN INSURED HAS RELEASED AN OBLIGOR FROM LIABILITY WITH RESPECT TO A CLAIM, THE INSURER HAS NO RIGHT OF SUBROGATION AGAINST THE OBLIGOR WITH RESPECT TO MATTERS COVERED BY THE RELEASE [*Add if used in connection with motion for summary judgment or summary adjudication:* AND SUMMARY _____ (JUDGMENT *or* ADJUDICATION) THEREFORE IS APPROPRIATE].

A. Limitation on Insurer's Rights as Subrogee. A subrogated insurer stands in the shoes of its insured, and has no greater rights against a third-party obligor than did its insured (*Fireman's Fund Ins. Co. v. Maryland Cas. Co. (1994) 21 Cal. App. 4th 1586, 1596-1597, 26 Cal. Rptr. 2d 762* ; *Continental Mfg. Corp. v. Underwriters at Lloyd's London (1960) 185 Cal. App. 2d 545, 556, 8 Cal. Rptr. 276*).

B. Insurer Subject to Defenses. A subrogated insurer is subject to all defenses that the third-party obligor could have asserted against the insured (*Fireman's Fund Ins. Co. v. Maryland Cas. Co. (1994) 21 Cal. App. 4th 1586, 1596-1597, 26 Cal. Rptr. 2d 762*).

C. Effect of Release. When an insured has released a third-party obligor, neither the insured nor the subrogated insurer has any rights to recover from the third party (*Fireman's Fund Ins. Co. v. Maryland Cas. Co. (1994) 21 Cal. App. 4th 1586, 1596-1597, 26 Cal. Rptr. 2d 762* ; *Continental Mfg. Corp. v. Underwriters at Lloyds London (1960) 185 Cal. App. 2d 545, 556, 8 Cal. Rptr. 276* ; *Mitchell v. Holmes (1935) 9 Cal. App. 2d 461, 463-464, 50 P.2d 473*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted to support the contention that an insurer is not entitled to subrogation because its insured has released the third-party obligor from liability. This situation can arise, for example, when an insurer advances funds to cover its insured's medical expenses, the insured thereafter settles with the third party tortfeasor (or the tortfeasor's insurer) and releases the tortfeasor from further liability in connection with the settlement, and the insurer subsequently seeks to recover from the tortfeasor the amounts the insurer advanced to its insured. It can also arise when an insured settles with and releases its primary insurer, and an excess insurer subsequently seeks to assert a claim against the primary insurer arising out of the subject matter covered by the release [*see, e.g., Fireman's Fund Ins. Co. v. Maryland Cas. Co. (1994) 21 Cal. App. 4th 1586, 26 Cal. Rptr. 2d 762]* .

This issue typically will be raised in connection with a defendant's motion for summary judgment [*see Code. Civ. Proc. § 437c(a)*] or summary adjudication [*see Code. Civ. Proc. § 437c(f)*] in an action by a plaintiff insurer seeking subrogation. When used in either of these contexts, this form may be combined, when appropriate, with general points and authorities supporting a motion for summary judgment or summary adjudication [*see* Ch. 221, *Summary Judgments*]. The existence of a release barring a subrogation claim may be asserted as an affirmative defense in a subrogation action.

Counsel should insert these arguments following a statement of the case reciting the factual and procedural posture of the litigation. It will be necessary to demonstrate that the basis of plaintiff's claim is an alleged right of subrogation. To establish this, the complaint or answers to contention interrogatories should be incorporated into the statement of the case, and attached as exhibits to the moving papers. In addition, the existence of a release of claims from the insured-subrogor must be proven. The preferable method for doing this is to introduce the release as an exhibit, with an accompanying declaration laying the necessary foundation for introduction of the release into evidence.

[b] Related Pleading and Practice Chapters

For a form raising the affirmative defense that an insurer's subrogation claim is barred by its insured's release of a third party, see California Forms of Pleading and Practice, Ch. 536, *Subrogation* ,. For a general form raising a release as an affirmative defense, and for general discussion regarding the validity, scope, and effect of releases, see California Forms of Pleading and Practice, Ch. 520, *Settlement and Release* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities generally supporting and opposing a motion for summary judgment or summary adjudication, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Limitation on Insurer's Rights as Subrogee

In ***Fireman's Fund Ins. Co. v. Maryland Cas. Co.*** *(1994) 21 Cal. App. 4th 1586, 26 Cal. Rptr. 2d 762* , litigation between a condominium homeowners' association, a developer, and a contractor terminated by way of settlement. Among other things, the settlement agreement provided that the developer would release its primary insurance carrier from further liability. Subsequently the developer's excess carrier, which made payments in connection with a separate settlement, sought equitable subrogation rights in an action against the primary carrier. The trial court granted summary judgment dismissing the action.

The Court of Appeal affirmed, ruling that because the subrogated insurer stands in the shoes of its insured, the insurer has no greater rights against a third party than did the insured, and its therefore subject to all defenses the third party could have asserted against the insured (*21 Cal. App. 4th 1586, 1596-1597)* .

In ***Continental Mfg. Corp. v. Underwriters at Lloyds London*** *(1960) 185 Cal. App. 2d 545, 8 Cal. Rptr. 276* , an

insured lessor leased an aircraft to a lessee under an agreement specifying that the lessee would not be responsible for in-flight damage to the aircraft and would be held harmless in the event of damage. When the plane was involved in an aerial mishap, the insurer refused to pay the lessor's claim on the ground that the lessor's contractual release of the lessee had foreclosed the insurer's subrogation rights against the lessee, in violation of the terms of the policy under which the insurer was required to be subrogated to any rights of the insured against third parties. The court agreed, holding that since the insured had contractually released the lessee, it could not place any claim against the lessee. "Unquestionably, [the insurer], as subrogee of [the insured], could have no rights that [the insured] did not have and, therefore, could not maintain an action against [the lessee]. ... In other words, the defendant-insurer merely stands in the shoes of [the insured] and has no greater rights against a third person than it has" (*185 Cal. App. 2d 545, 555-556)* .

[b] Insurer Subject to Defenses

The facts in ***Fireman's Fund Ins. Co. v. Maryland Cas. Co.*** *(1994) 21 Cal. App. 4th 1586, 26 Cal. Rptr. 2d 762* , are discussed in *§ 220.48[3][a]*. The court of appeal ruled that as a corollary of the principle that a subrogated insurer stands in the shoes of its insured, the insurer is subject to all defenses the third party could have asserted against the insured (*21 Cal. App. 4th 1586, 1596-1597)* .

[c] Effect of Release

Fireman's Fund Ins. Co. v. Maryland Cas. Co. *(1994) 21 Cal. App. 4th 1586, 26 Cal. Rptr. 2d 762* , is discussed in *§ 220.48[3][a]*. The court of appeal held that since a subrogee-insurer steps into the shoes of its insured and is subject to all the claims and defenses that could have been asserted against its insured, a release executed by the insured cuts off the subrogation rights of the insurer (*21 Cal. App. 4th 1586, 1596-1597)* .

Continental Mfg. Corp. v. Underwriters at Lloyds London *(1960) 185 Cal. App. 2d 545, 8 Cal. Rptr. 276* , is discussed in *§ 220.48[3][a]*. The court of appeal held that since a subrogee-insurer steps into the shoes of its insured and is subject to all the claims and defenses that could have been asserted against its insured, a release executed by the insured cuts off the subrogation rights of the insurer (*185 Cal. App. 2d 545, 555-556)* .

In ***Mitchell v. Holmes*** *(1935) 9 Cal. App. 2d 461, 50 P.2d 473* , the insured was involved in an auto accident with a third party. The insured's vehicle was a total loss, and that loss was paid by the insured' auto insurer. At the same time the third party paid the insured $2,000 for bodily injury and in return received a general release of claims from the insured. The insurer later sued the third party to recover the amounts it paid the insured for property damage. The trial court entered judgment in favor of the third party, citing the release. The insurer's assignee appealed.

The court of appeal affirmed. Citing out-of-state authority, the court simply stated that because the insured, as subrogor, had released the third party from further liability, the insurer-subrogee could not recover from the third party (*9 Cal. App. 2d 461, 463-464)* .

NOTE:

The court in *Mitchell* seemed to imply that for a release to defeat a subrogee's rights, the release had to have been executed without knowledge of the subrogee's potential claim [*see* ***Mitchell v. Holmes*** *(1935) 9 Cal. App. 2d 461, 463-464, 50 P.2d 473]* . A number of subsequent cases have also stated that a release will not bar the insured's subrogation rights if the tortfeasor obtained the release from the insured with knowledge that the insured had already been indemnified by the insurer [*see, e.g.,* *Conservatorship of Edwards (1988) 198 Cal. App. 3d 1176, 1184, 244 Cal. Rptr. 330]* . However, none of the reported decisions has actually permitted an insurer's subrogation rights to survive a release executed by a party to the underlying claim [*see* *California Insurance Law and Practice, Ch. 35, § 35.11[5][b]* (Matthew Bender)].

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22-220 California Points & Authorities § 220.49

§ 220.49 Opposing Obligor's Contention That Cause of Action for Tortious Injury to Person Is Not Subject to Subrogation--Subrogated Action Is Authorized by Statute

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

ALTHOUGH ACTIONS FOR TORTIOUS INJURY TO PERSON ARE NOT AS A GENERAL RULE SUBJECT TO SUBROGATION, THIS ACTION IS PROPER BECAUSE IT IS EXPRESSLY AUTHORIZED BY LAW. [MOREOVER, THE STATUTES AUTHORIZING THE ACTION BY THE RETIREMENT SYSTEM DO NOT VIOLATE THE *EQUAL PROTECTION CLAUSES* OF THE STATE AND FEDERAL CONSTITUTIONS].

[*EITHER*]

A. Insurer Against Uninsured Motorist Tortfeasor. An insurer paying a claim under an uninsured motorist endorsement or coverage is subrogated to the rights of its insured against the uninsured motorist to the extent of the payment made (*Ins. Code § 11580.2(g)*).

[*OR*]

A. Workers' Compensation Insurer Against Tortfeasor. The employer or employer's insurer who has paid or becomes obligated to pay worker's compensation is subrogated to the injured employee's cause of action against the tortfeasor responsible for the injuries (*see Ins. Code § 11662*; *Lab. Code §§ 3850, 3852*).

[*OR*]

A. Owner of Motor Vehicle Against Operator. The owner of a motor vehicle liable for tortious injuries caused by a

person operating the owner's vehicle with the owner's consent is subrogated to the rights of the injured person against the operator (*Veh. Code § 17153*).

[*OR*]

A. California State Retirement System Against Tortfeasor. The California State Retirement System is subrogated to the claim of its member against a third-party tortfeasor to recover a portion of the benefits paid on account of injury to or death of the member (*see Gov. Code §§ 20250, 20252, 20253*).

[*OR*]

A. County Employees' Retirement Association Against Tortfeasor. A county employees' retirement association is subrogated to the claim of its member against a third-party tortfeasor to recover a portion of the benefits paid on account of injury to or death of the member (*Gov. Code § 31820*).

[*CONTINUE*]

[*Optional*] **B. Statutes Authorizing Subrogation by Statutory Pension or Retirement System as Not Denying Equal Protection.** The legislative classification allowing a statutory pension or retirement system to pursue subrogation against a third-party tortfeasor for disabling injuries to an employee-member does not violate the *equal protection clauses* of the state and federal constitutions (*see Ventura County Employees' Ret. Ass'n v. Pope (1978) 87 Cal. App. 3d 938, 946, 151 Cal. Rptr. 695*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a cause of action for personal injuries is not subject to subrogation. The ground of opposition is that the action is expressly authorized by statute. Alternative Paragraphs A set forth various statutes that expressly authorize subrogation. Optional Paragraph B may be used if the obligor has argued that the statute authorizing subrogation by a pension or retirement system violates the *equal protection clause* of the federal or state constitution.

These points and authorities may be used alone or combined with a memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue. For example, they may be combined with a memorandum of points and authorities (1) in opposition to a general demurrer to the complaint [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*], or (2) in opposition to a nonstatutory motion by defendant for judgment on the pleadings. They may also be combined with a memorandum of points and authorities in opposition to a motion for summary judgment [*see Code Civ. Proc. § 437c*]. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 220.28*.

[b] Related Pleading and Practice Chapters

For forms of demurrers and motions for judgment on the pleadings, and related papers, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For forms of notices of motion for summary judgment and related papers, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender). For discussion and a form regarding subrogation rights in uninsured motorist claims under Ins. Code § 11580.2(g), see California Forms of Pleading and Practice, Ch. 88A, *Automobiles: Uninsured Motorist Claims* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities generally supporting and opposing a demurrer to a complaint or a motion for judgment on the pleadings, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For memoranda of points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Statutes Authorizing Subrogation by Statutory Pension or Retirement System as Not Denying Equal Protection

The facts and procedural background of ***Ventura County Employees' Ret. Ass'n v. Pope*** *(1978) 87 Cal. App. 3d 938, 946, 151 Cal. Rptr. 695* , are discussed in *§ 220.34[3][a]*. In reversing the judgment for plaintiff retirement association on the ground the trial court erred in rendering judgment without adjudicating the wrongfulness of defendant's conduct or determining his tort liability, the court of appeal said a legislative classification which allows a statutory pension or retirement system to pursue subrogation against a third-party tortfeasor for disabling injuries to an employee-member does not violate the *equal protection clauses* of the federal and state constitutions [*U.S. Const. amend. XIV*; *Cal. Const. art. I, § 7*] (*87 Cal. App. 3d 938, 946)* .

NOTE:

The court's holding in *Ventura* that the action by the county retirement association was governed by the one-year period of limitation set out in former Code Civ. Proc. § 340(3) [*now see Code Civ. Proc. § 335.1* (two-year limitations period, beginning in 2003)] has been superseded by the 1981 enactment of *Gov. Code § 31823* [*see § 220.51[3][b]*].

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22-220 California Points & Authorities § 220.50

§ 220.50 Opposing Obligor's Contention That Cause of Action for Tortious Injury to Person Is Not Subject to Subrogation--Policy Provision Requiring Insured to Reimburse Insurer for Medical Payments From Proceeds of Settlement or Judgment Recovered

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

ALTHOUGH ACTIONS FOR TORTIOUS INJURY TO PERSON ARE NOT AS A GENERAL RULE SUBJECT TO SUBROGATION, THIS ACTION IS PROPER BECAUSE IT SEEKS, IN ACCORDANCE WITH THE TERMS OF THE POLICY, REIMBURSEMENT OF MEDICAL PAYMENTS FROM THE _____ [SETTLEMENT *or* JUDGMENT] PROCEEDS RECEIVED BY THE INSURED FROM THE THIRD-PARTY TORTFEASOR.

Insurance Clause Requiring Reimbursement of Medical Payments From Proceeds of Settlement or Judgment as Valid and Enforceable. Provisions in an insurance contract requiring reimbursement of medical payments under the label of subrogation but providing only access to the proceeds of settlement or judgment resulting from the exercise of rights of recovery by the injured person are valid and enforceable (*Lee v. State Farm Mut. Auto. Ins. Co. (1976) 57 Cal. App. 3d 458, 465-466, 129 Cal. Rptr. 271* ; *West v. State Farm Mut. Auto. Ins. Co. (1973) 30 Cal. App. 3d 562, 565-566, 106 Cal. Rptr. 486*).

[2] Comments

[a] Use of Form

These memorandum of points and authorities may be submitted in opposition to the contention that a policy provision requiring the insured to reimburse the insurer for medical payments made by it under the terms of the policy out of any recovery received by the insured from a third-party tortfeasor constitutes a prohibited assignment or subrogation of a nonassignable cause of action and is, therefore, void.

These points and authorities may be used alone or combined with a memorandum of points and authorities relating to

the specific procedural context in which counsel wishes to raise the issue. For example, they may be combined with a memorandum of points and authorities (1) in opposition to a general demurrer to the complaint [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*], or (2) in opposition to a nonstatutory motion by defendant for judgment on the pleadings. They may also be combined with a memorandum of points and authorities in opposition to or in support of a motion for summary judgment [*see Code Civ. Proc. § 437c*]. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 220.28*.

[b] Related Pleading and Practice Chapters

For forms of demurrers and motions for judgment on the pleadings, and related papers, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For forms of notices of motion for summary judgment and related papers, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities generally supporting and opposing a demurrer to a complaint or a motion for judgment on the pleadings, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For memoranda of points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Insurance Clause Requiring Reimbursement of Medical Payments From Proceeds of Settlement or Judgment as Valid and Enforceable

Lee v. State Farm Mut. Auto. Ins. Co. *(1976) 57 Cal. App. 3d 458, 129 Cal. Rptr. 271* , was an appeal from that portion of a summary judgment declaring valid provisions in automobile insurance policies issued by defendant insurer requiring plaintiff insureds to reimburse defendant from the proceeds of any settlement or judgment against a third-party tortfeasor for medical payments made by defendant pursuant to the terms of the policies. The policies, under the heading medical payment coverage, required defendant insurer to pay reasonable medical expenses incurred within one year from the date of accident. Under the heading "subrogation," the policies provided that on payment of the medical coverage, the company shall be subrogated to the extent of such payment to the proceeds of any settlement or judgment that may result from the exercise of any rights of recovery which the injured person or anyone receiving such payment may have against any person or organization and such person shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights and do nothing after loss to prejudice the rights. Pursuant to cross motions for summary judgment, the trial court rendered its judgment in favor of defendant insurer on the validity of the subrogation or reimbursement provisions of the policies.

The court of appeal affirmed. The court acknowledged the well-established rule in California that an assignment of a cause of action for personal injuries is void and in the absence of statutory authority a cause of action for personal injury is not subject to subrogation (*57 Cal. App. 3d 458, 465)* . However, the court also said that it is clearly established that insurance contract provisions requiring reimbursement of medical payments under the label of subrogation, but providing only access to the proceeds of settlement or judgment resulting from the exercise of rights of recovery by the injured person, are valid and enforceable (*57 Cal. App. 3d 458, 465-466)* . The court explained that subrogation or

assignment of a cause of action for personal injury operates to transfer from one person to another that cause against a third party and, hence, the policy provision, though labeled subrogation, was not a true subrogation. The court said the right given the insurer was not the chose in action but the proceeds of any settlement or judgment resulting from the exercise of the injured party's rights of recovery against a third-party tortfeasor, and the right of repayment, reimbursement, or subrogation did not arise until the proceeds of settlement or judgment came into existence (*57 Cal. App. 3d 458, 466)* .

West v. State Farm Mut. Auto. Ins. Co. *(1973) 30 Cal. App. 3d 562, 106 Cal. Rptr. 486*) was a declaratory relief action by plaintiff insureds, a husband and wife, to establish their right to recover from their insurer reimbursement for medical treatment received and paid for by them as a result of an automobile accident. The day after the accident plaintiffs notified defendant's local agent of the accident, but there was no contact between them and the insurer until after they had settled their claim against the driver of the other vehicle. They then made demand on defendant for payment of the medical expenses incurred based on the policy clause requiring defendant to pay reasonable medical expenses incurred within one year from the date of the accident. The policy, however, also included the condition that, on payment of medical expenses, the insurer shall be subrogated to the extent of such payment to the proceeds of any settlement or judgment that may result from the exercise of any rights of recovery which the injured person or anyone receiving such payment may have against any person or organization. Judgment was for defendant. Plaintiffs appealed, contending the policy condition, by use of the word "subrogated," was invalid as constituting a prohibited assignment of a cause of action to recover damages for personal injuries insofar as medical specials were involved.

The court of appeal affirmed. The court acknowledged the well-settled rule that an assignment of a cause of action for damages for personal injuries is prohibited by former Prob. Code § 573 [*now see Code Civ. Proc. § 377.20 et seq.*] as well as at common law, but held that an agreement to reimburse an insurer in the event of recovery of damages by an insured from a third-party tortfeasor by either judgment or settlement is valid. There is no legal prohibition against the insurer requiring its insured to provide it with a lien to the extent of benefits paid under the policy against any recovery by the insured from a third party (*30 Cal. App. 3d 562, 565)* . The court said plaintiffs' contention failed because the subrogation was not to the chose in action but to the proceeds of any settlement or judgment that might result from the exercise of any rights of recovery the injured person might have against third persons. The "subrogation" does not arise until proceeds of settlement or judgment come into existence (*30 Cal. App. 3d 562, 565-566)* .

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22-220 California Points & Authorities § 220.51

§ 220.51 Opposing Obligor's Contention That Action Is Barred by Statute of Limitations--Special Statute of Limitation Applies

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

THIS ACTION WAS TIMELY FILED BECAUSE IT IS GOVERNED BY _____ [*specify, statutory provision, e.g.,* SECTION 11580.2(g)] OF THE INSURANCE CODE], WHICH EXPRESSLY PROVIDES THAT THE ACTION MAY BE FILED AT ANY TIME WITHIN _____ [YEAR(S)] AFTER _____ [*specify event, e.g.,* THE DATE PAYMENT WAS MADE].

[*Set forth the applicable period of limitations; for example, EITHER*]

A. Action by Insurer to Recover Payment Made Under Uninsured Motorist Provision of Policy. An action in subrogation by a liability insurer to recover the amount paid its insured under the uninsured motorist provision of its policy is timely if commenced within three years from the date the payment was made (*Ins. Code § 11580.2(g)*).

[*OR*]

A. Action by Board of Administration on Behalf of California's Public Retirement System. An action in subrogation by the State Board of Administration on behalf of the Public Employees' Retirement System against a tortfeasor for injury to or death of an employee-member to recover the authorized portion of benefits paid as disability retirement allowances and special death benefits is timely if commenced within three years after the system's liability to pay benefits is fixed (*Gov. Code §§ 20250, 20255*).

[*OR*]

A. Action by County Retirement Association. An action in subrogation by a county retirement association against a tortfeasor for injury to or death of an employee-member to recover the authorized portion of benefits paid is timely if commenced within three years after the liability of the retirement system to pay benefits is fixed (*Gov. Code § 31823*).

[*CONTINUE*]

B. Purpose of Extended Period of Limitation. The purpose of the extended period of limitation is to protect the subrogation rights of the subrogee where the statute of limitations on the subrogor's cause of action might expire before the subrogee's cause of action arises (*Liberty Mut. Ins. Co. v. Fales (1973) 8 Cal. 3d 712, 716, 106 Cal. Rptr. 21, 505 P.2d 213* (construing *Ins. Code § 11580.2(g)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that an action by the subrogee is subject to the same statute of limitations that applies to the subrogor's action and that the action is barred by the applicable statute. The ground of opposition is that the action is governed by a special statute of limitations and under the statute the action was timely filed.

These points and authorities may be used alone or combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue. For example, they may be combined with points and authorities (1) in opposition to a general demurrer to the complaint [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*], or (2) in opposition to a nonstatutory motion by defendant for judgment on the pleadings. They may also be combined with points and authorities in opposition to a motion by defendant for summary judgment [*see Code Civ. Proc. § 437c*]. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 220.31*.

[b] Extended Period of Limitations on Statutory Right to Subrogation

A purely statutory right to subrogation may, if an applicable statute expressly so provides, be subject to a different, more extended statute of limitations than that applicable to the subrogor. In this event the subrogee has a greater right than that of the subrogor [*see Commercial Union Assurance Co. v. City of San Jose (1982) 127 Cal. App. 3d 730, 735-736, 179 Cal. Rptr. 814* ; *Allstate Ins. Co. v. County of Alameda (1973) 33 Cal. App. 3d 418, 421, 109 Cal. Rptr. 53]* . However, an action not brought within the longer period provided by the statute is barred [*see Phoenix of Hartford Ins. Cos. v. Colony Kitchens (1976) 57 Cal. App. 3d 140, 144-145, 128 Cal. Rptr. 893* (action by insurer under *Ins. Code § 11580.2(g)*)].

[c] Cross Claim by Obligor

The subrogee may not, however, in any such action rely on the statute of limitations applicable to the subrogor's cause of action to cut off the obligor's right to seek affirmative relief by a cross claim [*Liberty Mut. Ins. Co. v. Fales (1973) 8 Cal. 3d 712, 716-717, 106 Cal. Rptr. 21, 505 P.2d 213* (action by insurer under *Ins. Code § 11580.2(g)*); *see § 220.39*].

[d] Uninsured-Motorist Limitations Period Constitutional

The three-year limitations period under *Ins. Code § 11580.2(g)*, regarding an insurer's subrogation action against an uninsured driver, was found to be constitutional on the ground that it bears a rational relationship to the state's purpose of permitting insurers that are required to write insurance based on the risk of their insureds' being injured by uninsured drivers to seek reimbursement from those drivers [*West Am. Ins. Co. v. Chalk (1989) 213 Cal. App. 3d 825, 831, 261 Cal. Rptr. 837]* .

[e] Related Pleading and Practice Chapters

For forms of demurrers and motions for judgment on the pleadings, and related papers, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For forms of notices of motion for summary judgment and related papers, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender). For discussion and a form regarding subrogation rights in uninsured motorist claims under Ins. Code § 11580.2(g), see California Forms of Pleading and Practice, Ch. 88A, *Automobiles: Uninsured Motorist Claims* (Matthew Bender).

[f] Related Points and Authorities

For points and authorities generally supporting and opposing demurrers and motions relating to the bar of the statute of limitations, see Ch. 143, *Limitation of Actions* . For points and authorities generally supporting and opposing a demurrer to a complaint or a motion for judgment on the pleadings, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Purpose of Extended Period of Limitation

The facts and procedural background of ***Liberty Mut. Ins. Co. v. Fales*** *(1973) 8 Cal. 3d 712, 716, 106 Cal. Rptr. 21, 505 P.2d 213* , which involved *Ins. Code § 11580.2(g)*, are discussed in *§ 220.39[3][a]*. The action involved a subrogated claim of an insured that had paid an uninsured motorist claim under a policy. In affirming the judgment for plaintiff, the Supreme Court said the purpose of these extended periods of limitation is to protect the subrogation rights of the subrogee when the statute of limitations on the subrogor's cause of action might expire before the subrogee's cause of action arises (*8 Cal. 3d 712, 716-717)* .

The Court declined to rule on the constitutionality of *Ins. Code § 11580.2(g)*, because it was unnecessary to its opinion (*8 Cal. 3d 712, 715)* .

[4] Additional Authorities

[a] Purpose of Extended Period of Limitations

In *West Am. Ins. Co. v. Chalk (1989) 213 Cal. App. 3d 825, 261 Cal. Rptr. 837* , an automobile-liability insurer filed an action against an uninsured motorist within the three-year limitations period of *Ins. Code § 11580.2(g)*, to recover benefits paid to three insureds, one of whom settled the claim with the insurer within one year of the accident, and two of whom preserved their rights by filing suit against the tortfeasor within one year of the accident (although they never served the complaint), and later settled with the insurer. The court of appeal affirmed judgment for the insurer, rejecting the defendant's contention that the insurer is not entitled to assert a claim as subrogee after its subrogors can no longer do so (pursuant to the one-year limitations period applicable to actions by the insured against the uninsured motorist), because the subrogation right is statutory rather than pursuant to common law. The court held that the extended

limitation period of *Ins. Code § 11580.2(g)* was intended to protect the subrogation rights of the insurer from being barred before they actually accrue (*213 Cal. App. 3d 825, 829-831)* .

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CHAPTER 220 SUBROGATION
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22-220 California Points & Authorities § 220.52

§ 220.52 Opposing Obligor's Contention That Action Is Barred by Statute of Limitations--Joinder Under Workers' Compensation Law After Statute of Limitations Has Run Is Authorized

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

THE COMPLAINT IN INTERVENTION BY THE _____ [EMPLOYER *or* EMPLOYEE] FILED IN THE TIMELY-FILED ACTION OF THE _____ [EMPLOYEE *or* EMPLOYER] AGAINST THE THIRD-PARTY TORTFEASOR IS PROPER, ALTHOUGH FILED AFTER THE STATUTE OF LIMITATIONS HAS RUN ON THE ACTION AGAINST THE THIRD-PARTY TORTFEASOR, BECAUSE THE JOINDER IS EXPRESSLY AUTHORIZED BY STATUTE.

A. Joinder Authorized. Under the Workers' Compensation Law, if an action against a third-party tortfeasor for injury to an employee is brought by either the employer or employer, the other may, at any time before trial on the facts, join as party plaintiff or shall consolidate the action if brought independently (*Lab. Code § 3853*).

B. Joinder Authorized Although Statute of Limitation Has Run. When an action is brought against a third-party tortfeasor by either the employer or the employee, the other is permitted at any time before trial on the facts to join as a party plaintiff under *Section 3853 of the Labor Code*, and this is true even though the statute of limitations may have run on the other's claim after the complaint was filed and before intervention is sought (*Jordan v. Superior Court (1981) 116 Cal. App. 3d 202, 206-210, 172 Cal. Rptr. 30* ; *Harrison v. Englebrick (1967) 254 Cal. App. 2d 871, 874, 62 Cal. Rptr. 831*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a complaint in intervention by the subrogee employer (or its workers' compensation insurer) or by the subrogor employee filed in the other's timely-filed action against a third-party tortfeasor more than two years after the injury to the employee is barred by the statute of

limitations for personal injury actions [*Code Civ. Proc. § 335.1*; *see* former Code Civ. Proc. § 340(3) (one-year limitations period, prior to 2003)]. The ground of opposition is that joinder of the employer or employee as a party plaintiff in the other's timely-filed action is expressly authorized by statute.

These points and authorities may be used alone or combined with a memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue. For example, they may be combined with a memorandum of points and authorities (1) in opposition to a general demurrer to the complaint in intervention [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*], or (2) in opposition to a nonstatutory motion by defendant for judgment on the pleadings. They may also be combined with a memorandum of points and authorities in opposition to a motion by defendant for summary judgment [*see Code Civ. Proc. § 437c*]. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 220.31*.

[b] Related Pleading and Practice Chapters

For forms of demurrers and motions for judgment on the pleadings, and related papers, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For forms of notices of motion for summary judgment and related papers, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities generally supporting and opposing demurrers and motions relating to the bar of the statute of limitations, see Ch. 143, *Limitation of Actions* . For memoranda of points and authorities generally supporting and opposing a demurrer to a complaint or a motion for judgment on the pleadings, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For memoranda of points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] Joinder Authorized Although Statute of Limitation Has Run

Jordan v. Superior Court *(1981) 116 Cal. App. 3d 202, 172 Cal. Rptr. 30* , arose out of an action by a workers' compensation carrier that had paid disability and medical benefits to an employee who had fallen and injured himself on the premises of a third-party customer to whom the employee was making a delivery on behalf of his employer. The employer's action against the customer was filed two days before the one-year statute of limitation had run on the action under former Code Civ. Proc. § 340(3) [*now see Code Civ. Proc. § 335.1* (two-year limitations period, beginning in 2003)]. Three weeks later, after the statute had run, the employee filed a complaint in intervention against the third-party customer for general and special damages for his injuries. The third party successfully demurred to the complaint in intervention on the ground the action was barred by the statute of limitation, and the employee filed for a writ of mandate to compel the trial court to vacate its order of dismissal.

The court of appeal ordered the writ issued. The court said an the injury is caused by a third party, both the employer and employee are entitled to sue the third party [*Lab. Code § 3852*]. A workers' compensation insurer has the same right to sue as an employer [*Lab. Code § 3850(b)*]. The time for bringing suit, whether commenced by the employer or employee, was governed by the one-year period of limitation in former Code Civ. Proc. § 340(3) [*now see Code Civ.*

Proc. § 335.1 (two-year limitations period, beginning in 2003)] (*116 Cal. App. 3d 202, 206)* . The court, however, added that under *Lab. Code § 3853*, when an action is brought against a third party by either the employer or the employee, the other may at any time before trial on the facts join as party plaintiff. Quoting *Harrison v. Englebrick (1967) 254 Cal. App. 2d 871, 875, 62 Cal. Rptr. 831* , the court said the law was clearly established that when the employer's action is timely filed the employee may intervene and press his or her complaint in intervention to recover damages for personal injuries, even though the employee does not appear and make such a claim until more than one year after the injury (*116 Cal. App. 3d 202, 206-207)* .

Harrison v. Englebrick *(1967) 254 Cal. App. 2d 871, 62 Cal. Rptr. 831* , arose out of a timely-filed action by an employee who was injured in the course of his employment by the alleged negligent conduct of the third-party defendants. Almost three years after the accident, the employer's compensation carrier filed a complaint in intervention to recover worker's compensation benefits paid. Defendants' demurrer to the complaint in intervention was sustained without leave to amend on the ground the action was barred by the one-year period of limitation set forth in former Code Civ. Proc. § 340(3) [*now see Code Civ. Proc. § 335.1* (two-year limitations period, beginning in 2003)], and the carrier appealed from the subsequent judgment of dismissal.

The court of appeal reversed. The court said it had been held that if the carrier files suit before the employee, and does so within one year of the date of injury, the injured employee's complaint in intervention was timely even though filed well after the one-year period. The court saw no reason not to apply this rule equally to the situation where the employee's action is timely filed and it is the carrier who seeks to intervene after expiration of the one-year period (*254 Cal. App. 2d 871, 874)* .

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CHAPTER 220 SUBROGATION
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22-220 California Points & Authorities § 220.53

§ 220.53 Opposing Obligor's Contention That Action Against Public Entity Is Barred for Failure to File Timely Claim--Claim Was Timely Filed After Accrual of Action in Subrogation to Recover Uninsured Motorist Benefits Paid

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

THIS ACTION IN SUBROGATION TO RECOVER UNINSURED MOTORIST BENEFITS PAID BY PLAINTIFF IS NOT BARRED BY PLAINTIFF'S FAILURE TO HAVE FILED A CLAIM WITHIN 100 DAYS AFTER THE ACCIDENT BECAUSE THE CLAIM WAS FILED WITHIN 100 DAYS AFTER PLAINTIFF'S CAUSE OF ACTION ACCRUED.

A. Claim Requirement. A claim against a public entity relating to a cause of action for death or injury to person, personal property, or growing crops shall be presented not later than six months after accrual of the cause of action (*Gov. Code § 911.2*).

B. When Cause of Action Accrues. A cause of action accrues within the meaning of *Section 911.2 of the Government Code* on the date the cause of action would be deemed to have accrued within the meaning of the statute of limitation that would apply if there were no requirement that a claim be presented and acted on by the public entity before an action could be commenced (*Gov. Code § 901*).

C. Applicable Statute of Limitation. The statute of limitation that applies to a liability insurer's subrogated action to recover benefits paid under the uninsured motorist provisions of its policy is *Section 11580.2(g) of the Insurance Code*, which provides that the action may be brought within three years from the date the payment was made (*Allstate Ins. Co. v. County of Alameda (1973) 33 Cal. App. 3d 418, 420-421, 109 Cal. Rptr. 53* .

D. When Subrogated Action to Recover Uninsured Motorist Benefits Paid Accrues. A liability insurer's subrogated action to recover payments made under the uninsured motorist provisions of its policy accrues, within the meaning of (*Ins. Code § 11580.2(g)*, on the date it pays the claim (*Allstate Ins. Co. v. County of Alameda (1973) 33*

Cal. App. 3d 418, 421, 109 Cal. Rptr. 53).

E. Claim Filed Within Six Months After Insurer's Subrogated Action Accrued as Timely. A claim by the insurer against the public entity presented within six months after the subrogated cause of action accrues is timely (*see Allstate Ins. Co. v. County of Alameda (1973) 33 Cal. App. 3d 418, 421, 109 Cal. Rptr. 53* (decided prior to 1987 legislation that changed claim presentation period to six months for acts or omissions occurring on or after January 1, 1988)).

[*Optional*] **F. Liability of Public Entity.** The term "any person," as used in *Section 11580.2(g) of the Insurance Code*, authorizing the insurer to recover from any person legally liable for the injury or death to the extent that payment was made, includes a governmental entity (*Allstate Ins. Co. v. County of Alameda (1973) 33 Cal. App. 3d 418, 421, 109 Cal. Rptr. 53*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a subrogated action against a public entity by an insurer which has paid a claim under the uninsured motorist provisions of its policy is barred because no claim was presented within six months of the date of injury. The ground of opposition is that the claim was filed within six months after the insurer's cause of action against the public entity accrued by its payment of the claim.

These points and authorities may be used alone or combined with a memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue. For example, they may be combined with a memorandum of points and authorities (1) in opposition to a general demurrer to the complaint [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*], or (2) in opposition to a nonstatutory motion by defendant for judgment on the pleadings. They may also be combined with a memorandum of points and authorities in opposition to a motion by defendant for summary judgment [*see Code Civ. Proc. § 437c*]. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Chapters

For forms of demurrers and motions for judgment on the pleadings, and related papers, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For forms of notices of motion for summary judgment and related papers, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender). For discussion and forms relating to claims against public entities, see California Forms of Pleading and Practice, Ch. 467, *Public Entities and Officers: Enforcement of Judgments Against Public Entities* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities generally supporting and opposing a demurrer to a complaint or a motion for judgment on the pleadings, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For memoranda of points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* .

For memoranda of points and authorities supporting a petition for relief from the claim filing requirement and supporting and opposing motions for summary judgments on specified grounds in actions against public entities, see Ch. 196, *Public Entities* .

[3] Discussion of Authorities

[a] Applicable Statute of Limitation

Allstate Ins. Co. v. County of Alameda *(1973) 33 Cal. App. 3d 418, 109 Cal. Rptr. 53* , was an action in subrogation against a county by an insurance company to recover the amount of a claim it had paid under the uninsured motorist provisions of its policy. Plaintiff alleged that on a specified date a minor (plaintiff's insured) was riding in an uninsured automobile driven by another on a county road; the road had been negligently designed, constructed, and maintained, and was in a dangerous condition; and, as a proximate result, the car went out of control, left the road, and injured the insured. The insured did not file a claim with the county. Almost 20 months after the accident, plaintiff reached a minor's compromise with the insured which was approved by the superior court. About a month later, plaintiff filed a claim in subrogation against the county which was rejected. About four and a half months later, plaintiff filed the present action. The county demurred to the complaint on the ground the claim was barred by the claims presentation requirements of *Gov. Code § 911.2* and moved for summary judgment. The motion for summary judgment was granted, and plaintiff appealed.

The court of appeal reversed. The court said under *Gov. Code § 901* the statute of limitation that would be applicable to plaintiff's cause of action but for the claims requirements of the Government Code is set forth in *Ins. Code § 11580.2(g),* which provides the action may be brought within three years from the date payment was made by the insurer (*33 Cal. App. 3d 418, 420-421)* .

[b] When Subrogated Action to Recover Uninsured Motorist Benefits Paid Accrues

The facts and procedural background of ***Allstate Ins. Co. v. County of Alameda*** *(1973) 33 Cal. App. 3d 418, 109 Cal. Rptr. 53* , are discussed in *§ 220.53[3][a]*. In reversing the summary judgment for the county, the court said that under *Ins. Code § 11580.2(g),* plaintiff's cause of action accrued on the date it paid the minor's claim (*33 Cal. App. 3d 418, 421)* .

NOTE:

Allstate was discussed by way of analogy with approval by the California Supreme Court in *People ex rel. Dep't of Transp. v. Superior Court of Los Angeles County (1980) 26 Cal. 3d 744, 754-755* . This Supreme Court case did not, however, involve the issue as to when an action in equitable subrogation under *Ins. Code § 11580.2(g)* accrues for the purposes of the claims statutes, but rather the issue as to when a tort defendant's equitable indemnity action against a governmental entity accrues for these purposes. The Court's opinion was subsequently modified by the 1981 amendment of *Gov. Code § 901* to expressly provide that the date a cause of action for equitable indemnity or partial equitable indemnity accrues is the date on which defendant is served with the complaint giving rise to defendant's claim for equitable indemnity or partial equitable indemnity against the public entity (Stats. 1981, ch 856).

[c] Claim Filed Within Six Months After Insurer's Subrogated Action Accrued as Timely

The facts and procedural background of ***Allstate Ins. Co. v. County of Alameda*** *(1973) 33 Cal. App. 3d 418, 109 Cal. Rptr. 53* , are discussed in *§ 220.31[3][a]*. In reversing the summary judgment for the county, the court held the insurer's claim was timely filed because it was presented within 100 days after its subrogated cause of action accrued, which was the date the claim was paid, as required by *Gov. Code § 911.2* (*33 Cal. App. 3d 418, 421)* .

NOTE:

The claim-presentation period has been extended to six months for actions based on acts or omissions occurring after January 1, 1988 [*see Gov. Code § 911.2*].

[d] Liability of Public Entity

The facts and procedural background of ***Allstate Ins. Co. v. County of Alameda*** *(1973) 33 Cal. App. 3d 418, 109 Cal. Rptr. 53* , are discussed in *§ 220.31[4][a]*. In reversing the summary judgment for the county, the court held the term "any person," as used in *Ins. Code § 11580.2(g),* authorizing the insurer to recover from any person legally liable for the injury or death to the extent that payment was made, includes a governmental entity (*33 Cal. App. 3d 418, 421)* .

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22-220 California Points & Authorities § 220.54

§ 220.54 Opposing Obligor's Contention That Action Against Public Entity Is Barred for Failure to File Timely Claim--Subrogor Satisfied Claim-Filing Requirements, and Subrogee-Insurer Has Same Rights as Subrogor

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THIS ACTION IN SUBROGATION FOR INDEMNITY IS NOT BARRED BY SUBROGEE-INSURER'S FAILURE TO HAVE FILED A CLAIM WITH THE PUBLIC ENTITY _____ [*specify, e.g.,* DEFENDANT], BECAUSE THE SUBROGOR-INSURED HAS ALREADY SATISFIED THE CLAIM REQUIREMENTS, AND THE SUBROGEE-INSURER HAS A RIGHT OF ACTION EQUAL TO THAT OF THE SUBROGOR.

A. Subrogee-Insurer Acquires Rights of Subrogee Against Public Entity. A subrogee-insurer's right of action is equal to and limited by the right of action possessed by its insured, and if the insured has already satisfied the claims requirements against a public entity for indemnity, a subrogee-insurer that pays the injured party on behalf of the insured has a cause of action against the public entity without first independently satisfying the claims requirements or filing a separate claim (*Smith v. Parks Manor (1987) 197 Cal. App. 3d 872, 880-881, 243 Cal. Rptr. 256*).

B. Claim-Presentment Requirements Liberally Construed. The Government Tort Claims Act should not be applied to snare the unwary when its purpose of apprising the governmental body of pending claims is satisfied; courts employ a test of substantial rather than strict compliance in evaluating whether the demands of the act have been met (*Smith v. Parks Manor (1987) 197 Cal. App. 3d 872, 879, 243 Cal. Rptr. 256*).

[*Optional*] **C. Failure to Plead Compliance With Claims Statutes Can Be Cured by Amendment to Complaint.** A subrogee that fails to plead timely compliance with the claims statutes may amend the complaint to plead the requisite facts (*Smith v. Parks Manor (1987) 197 Cal. App. 3d 872, 881-882, 243 Cal. Rptr. 256*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a subrogated action against a public entity by an insurer that has paid a claim on behalf of the insured is barred because it did not separately satisfy the claims requirements, if the insured had already satisfied those requirements [*see Smith v. Parks Manor (1987) 197 Cal. App. 3d 872, 880-881, 243 Cal. Rptr. 256]* . For a form in opposition to a contention that a subrogated action is barred by untimely filing, based on uninsured motorist statutes, see *§ 220.53*.

These points and authorities may be used alone or combined with a memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the points and authorities, for example, in opposition to a general demurrer to the complaint [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*; *see also Smith v. Parks Manor (1987) 197 Cal. App. 3d 872, 243 Cal. Rptr. 256* (reversing sustaining of demurrer)]. If optional Paragraph C is used, it may be combined with a general contention that sustaining a demurrer without leave to amend when the defect can be cured by amendment constitutes an abuse of discretion.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should set forth the dates on which the action against the insured was filed, and on which the insured filed a claim against the public entity, and show that the intervening time was less than the controlling limitations period.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 220.32*.

[b] Related Pleading and Practice Chapters

For forms of demurrers and motions for judgment on the pleadings, and related papers, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For forms regarding motions for summary judgment, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender). For discussion and forms relating to claims against public entities, see California Forms of Pleading and Practice, Ch. 467, *Public Entities and Officers: Enforcement of Judgments Against Public Entities* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities generally supporting and opposing a demurrer to a complaint or a motion for judgment on the pleadings, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For memoranda of points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* . For memoranda of points and authorities supporting a petition for relief from the claim-filing requirement and supporting and opposing motions for summary judgments on specified grounds in actions against public entities, see Ch. 196, *Public Entities* .

[3] Discussion of Authorities

[a] Subrogee-Insurer Acquires Rights of Subrogor Against Public Entity

In ***Smith v. Parks Manor*** *(1987) 197 Cal. App. 3d 872, 243 Cal. Rptr. 256* , a developmentally disabled person who was injured in an automobile accident brought an action for negligent supervision against the residential facility responsible for his care, and one of its employees. The employer's insurer provided the defense in the action, and caused the defendants to file cross complaints seeking comparative and equitable indemnity from a county hospital that treated the plaintiff for the injuries. The insured filed its cross complaint within the limitations period of *Gov. Code § 911.2*, although its employee filed his cross complaint after the period had lapsed. The cause of action, according to case law

controlling at the time, accrued when the defendants suffered a loss through payment of a judgment or debt [*now see Gov. Code § 901* (cause of action accrues when defendant is served with complaint giving rise to indemnity liability)]. The insurer ultimately paid the plaintiff the amount of the negotiated settlement. The defendants filed a claim against the cross defendant. The cross defendant denied the claim, and filed a motion for judgment on the pleadings on the cross complaint, contending that the cross complainants failed to state a cause of action for indemnity. The trial court granted the motion on the ground that the insurer had become subrogated to the rights of the cross complainants, and the employee had failed to comply with claims-filing procedures. The trial court granted the motion. Subsequently, the insurer sought and obtained leave to intervene. The cross defendant demurrered to the complaint in intervention, contending that the intervenor (insurer) had failed to comply with the claims-filing requirements of *Gov. Code § 911.2*, and that the action was therefore barred by the statute of limitations. The trial court sustained the demurrer without leave to amend. Intervenor appealed.

The court of appeal reversed, holding that as subrogee, the insurer acquired the rights of the insured, and therefore was not required to file an independent claim against the public entity (*197 Cal. App. 3d 872, 880-881)* . The defendant insured complied with the limitations provisions under *Gov. Code § 911.2* by filing the cross complaint prior to the accrual of the cause of action for equitable indemnity (that is, prior to the payment of the settlement), which excused and took the place of timely filing of a claim with the cross defendant county (*197 Cal. App. 3d 872, 881)* . The court reasoned that the primary function of the Government Tort Claims Act is to apprise the governmental body of imminent legal action, so that it may investigate and evaluate the claim and, when appropriate, avoid litigation by settling meritorious claims. The act should not be applied to snare the unwary when its purpose has been satisfied. Consequently, courts employ a test of substantial rather than strict compliance in evaluating whether the demands have been met (*197 Cal. App. 3d 872, 879)* . The court rejected cross defendant's contention that the insurer may not rely on the insured's timely satisfaction of the claims statutes, because it was required to file an independent and timely claim on its own behalf (*197 Cal. App. 3d 872, 880)* . Although a party with a separate and distinct injury must independently comply with the claims statutes, a subrogee's right of action is not independent and separate, but is equal to and limited by the right of action possessed by its insured. Requiring the filing of a separate claim would in that case be redundant and superfluous if the requirements of the claims statutes had already been satisfied by the subrogor. In the instant case, the insured's filing of a cross complaint prior to the accrual of the cause of action for equitable indemnity excused and took the place of timely filing of a claim with the cross defendant county. The substitution of intervenor as subrogee of the insured's cause of action did not change the nature of the claim and, hence, required no filing of an independent claim by intervenor (*197 Cal. App. 3d 872, 881)* . Further, although the intervenor failed to plead timely compliance with the claims statutes, it may nevertheless amend the complaint to plead the requisite facts. It is an abuse of discretion to sustain a demurrer without leave to amend when there is a reasonable possibility that the defect in the complaint can be cured by amendment (*197 Cal. App. 3d 872, 881-882)* .

[b] Claim-Presentment Requirements Liberally Construed

Smith v. Parks Manor *(1987) 197 Cal. App. 3d 872, 243 Cal. Rptr. 256* , is discussed in *§ 220.54[3][a]*.

[c] Failure to Plead Compliance With Claims Statutes Can Be Cured by Amendment to Complaint

Smith v. Parks Manor *(1987) 197 Cal. App. 3d 872, 243 Cal. Rptr. 256* , is discussed in *§ 220.54[3][a]*.

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22-220 California Points & Authorities § 220.55

§ 220.55 Opposing Obligor's Contention That Intervention in Action Against Public Entity Is Barred for Failure to File Claim--Claim by Subrogor Sufficient

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THIS ACTION IN INTERVENTION TO RECOVER WORKERS' COMPENSATION BENEFITS PAID BY INTERVENOR-SUBROGEE IS NOT BARRED BY INTERVENOR'S FAILURE TO HAVE FILED A CLAIM WITHIN SIX MONTHS AFTER PLAINTIFF-SUBROGOR'S CAUSE OF ACTION ACCRUED BECAUSE THE CLAIM FILED BY PLAINTIFF FULFILLED THE PURPOSE OF THE CLAIM FILING REQUIREMENT AND NO ADDITIONAL CLAIM BY INTERVENOR IS NECESSARY.

A. Claim Requirement. [*See § 220.53, Paragraph A.*]

B. Intervention by Workers' Compensation Insurer Subrogee Permissible When Subrogee Has Not Filed Claim. An insurance carrier who has paid workers' compensation benefits to an injured employee may intervene as subrogee in a personal injury action brought by that injured employee against a public entity without first complying with the claim filing requirements of the *California Tort Claims Act (San Diego Unified Port Dist. v. Superior Court (1988) 197 Cal. App. 3d 843, 851-852, 243 Cal. Rptr. 163*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that intervention by an insurer in an action against a public entity is barred because the insurer did not present a claim against the public entity within six months after accrual of the cause of action. The ground of opposition is that the injured individual, to whom the insurer paid workers' compensation benefits, timely filed the requisite claim, and that such claim fulfilled the purpose of the claim filing requirement, which is to provide the public entity sufficient information to enable it to investigate claims adequately and to settle them, if appropriate, without the expense of litigation. Permitting intervention by the insurance

carrier, in addition to fulfilling the purpose of the claim filing requirement, is also in keeping with the comprehensive and rational statutory scheme established by the legislature for reimbursing an employer or carrier for compensation benefits paid [*see Lab. Code §§ 3850-3864*].

These points and authorities may be used alone or combined with a memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the issue. For example, they may be combined with a memorandum of points and authorities in opposition to a general demurrer to the intervention complaint [*see Code Civ. Proc. §§ 430.10(e), 430.50*]. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Chapters

For forms of demurrers and related papers, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For forms for use in intervention in a pending action, see California Forms of Pleading and Practice, Ch. 395, *Parties* (Matthew Bender). For discussion and forms relating to claims and actions against public entities, see California Forms of Pleading and Practice, Ch. 467, *Public Entities and Officers: Enforcement of Judgments Against Public Entities* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities generally supporting and opposing a demurrer to a complaint, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For memoranda of points and authorities generally supporting and opposing a motion for intervention, see Ch. 124, *Intervention* . For memoranda of points and authorities pertaining to claims and actions against public entities, see Ch. 196, *Public Entities* .

[3] Discussion of Authorities

[a] Intervention by Workers' Compensation Insurer Subrogee Permissible When Subrogee Has Not Filed Claim

In ***San Diego Unified Port Dist. v. Superior Court*** *(1988) 197 Cal. App. 3d 843, 243 Cal. Rptr. 163* , while working in a cafeteria located in an airport owned by defendant public entity, plaintiff sustained serious injuries. Plaintiff was paid a substantial amount of workers' compensation benefits by her employer's insurance carrier, and filed a timely claim against defendant pursuant to the California Tort Claims Act. After defendant rejected the claim, plaintiff timely filed suit. Her employer's insurance carrier, without filing a separate claim against defendant, intervened in plaintiff's suit to recover compensation benefits. The carrier alleged plaintiff's compliance with the filing requirements excused it from those requirements. After its demurrer on the ground the carrier failed to allege compliance with the claims requirement was overruled by the trial court, defendant sought a writ of mandate.

The court of appeal denied the writ. Defendant contended that the written claim filing requirement is mandatory and that the filing of a claim by one party, with respect to a prospective cause of action, cannot relieve another party from having to file an independent action. The court distinguished the case from *Pacific Tel. & Tel. Co. v. County of Riverside (1980) 106 Cal. App. 3d 183, 165 Cal. Rptr. 29* , in which the carrier had timely filed for reimbursement of workers' compensation benefits and the widow, seeking damages for wrongful death, sought to intervene without having filed a claim. In that case the filing of the carrier's claim did not meet the filing requirements for the widow's wrongful death action, and intervention was barred. The *Pacific Telephone* court reasoned that the carrier's claim did not indicate the extent of potential damages under the wrongful death action, and did not provide the entity with the information necessary to make an informed decision on settlement. Confronted with the complex litigation and high damages possible in a wrongful death suit, rather than liability to an employer under the Labor Code, the entity's posture

on settlement may have been significantly different. The court dismissed defendant's reliance on language from *Pacific Telephone* to the effect that the right of subrogation in *Lab. Code § 3853* is subject to the claims filing requirement of the Government Code, noting that to the extent *Pacific Telephone* addresses subrogation rights it is dictum. There the widow had no subrogation rights. It is the employer or carrier subrogee who enjoys the right of subrogation (*197 Cal. App. 3d 843, 851)* . After distinguishing *Pacific Telephone*, the court concluded that there was no reason to defeat the comprehensive and rational statutory scheme established by the legislature to reimburse an employer or carrier by requiring what would be in effect a duplicate written claim against the public entity. It said its decision not only furthered the purposes of the Labor Code's statutory scheme to reimburse carriers for compensation benefits paid, but was consistent with the nonfault nature of workers' compensation law. The court explained that the overall purpose of workers' compensation law is to provide compensation to injured employees regardless of fault. Therefore, on notification of a claim a carrier does not normally institute a full scale investigation into the circumstances of the worker's injury, but normally relies on the employee to pursue actions against third-party tortfeasors. The court opined that if the carrier is unable to rely on an employee's claim filed against a governmental entity, the carrier would be required to expeditiously investigate any accident to determine whether a public entity was involved. This would not only create a difficult administrative burden, but would result in increased costs for the carrier that must ultimately be borne by the employer. The court concluded that since the purposes of the claims statute are served by the filing of the employee's claim, there is no reason to impose this added burden on the workers' compensation system (*197 Cal. App. 3d 843, 852)* .

[4] Additional Authorities

[a] Intervention by Workers' Compensation Insurer Subrogee Permissible When Subrogee Has Not Filed Claim

In *Pacific Tel. & Tel. Co. v. County of Riverside (1980) 106 Cal. App. 3d 183, 165 Cal. Rptr. 29* , after two of its employees were killed in a vehicle accident, plaintiff telephone company timely filed a claim against defendant county to recover workers' compensation benefits paid on account of those deaths. When defendant rejected the claim, plaintiff timely filed an action against defendant. Some time later the widow of one of the deceased employees filed a complaint in intervention for wrongful death in plaintiff's action. She alleged plaintiff's compliance with the claims filing requirement. The trial court sustained defendant's demurrer on the ground that widow had failed to allege compliance with the claims filing requirement, and dismissed her complaint. Widow appealed.

The court of appeal affirmed. Widow maintained that pursuant to *Lab. Code § 3850*, she and plaintiff employer were members of a class whose common interest was established by plaintiff's claim seeking damages occasioned by the death of two employees requiring workers' compensation and death benefits to be paid. The court did not reach that question, but explained that even assuming that plaintiff filed a claim as a representative of a class, it did not follow that the claim for damages filed by plaintiff satisfied the claims statute with respect to another member of the class who suffered different damages as a result of the same tortious event. The court explained that a class claim must pass two tests to comply with the claims statute. First, there must be some compliance with all the required elements. Second, the claim must also satisfy the substantial compliance test. Widow argued that the claim filed by plaintiff constituted substantial compliance regarding the claim for wrongful death because the policy behind the claim requirement had been substantially satisfied. The court disagreed, explaining that plaintiff's claim merely averred the circumstances of the accident and sought reimbursement of workers' compensation benefits paid. That claim did not notify defendant that widow claimed damages for the wrongful death of her husband or of the extent of the damages she claimed (*106 Cal. App. 3d 183, 190-191)* . The court said the purpose of the claims statutes is to provide the public entity sufficient information to enable it to investigate claims adequately and to settle them, if appropriate, without the expense of litigation. The statutes must be satisfied even in the face of the public entity's actual knowledge of the circumstances surrounding the claim. Such knowledge--standing alone--constitutes neither substantial compliance nor a basis for estoppel (*106 Cal. App. 3d 183, 191)* . The court cited with approval the reasoning in *Roberts v. State of California (1974) 39 Cal. App. 3d 844* , 114 Cal. Rpr. 518, a factually identical case. That court said that notice to a public entity

that a workers' compensation carrier and an employer may sue alerts it to possible liability under the Labor Code, but does not alert the public entity to a possible wrongful death action by a wife. The court went on to say that exposure to liability under the Labor Code is different in kind and nature from exposure to a wrongful death action, with all the attendant possibilities of complex litigation and extremely high damages if liability is established. It said that widow's contention overlooked one of the purposes of the claims statute, which is to provide the entity with the opportunity for orderly fiscal planning by advance knowledge of potential claims and to rectify promptly a condition that resulted in injury in order to prevent further losses. The court concluded that even if plaintiff's action could be regarded as a class action, the claim filed by plaintiff did not relieve widow of the necessity of filing a claim for damages for wrongful death (*106 Cal. App. 3d 183, 191-192)* . The court also responded to a contention by widow that *Lab. Code §§ 3850* and *3853* constitute a special statutory subrogation authority that gives an employee the right to join an action against a public entity third party even after the period for filing a claim has passed. It said that in the absence of any showing to the contrary, it must be presumed that the legislature intended the right of subrogation in *Lab. Code § 3853* to be read in the context of and subject to the claims filing requirement of the Government Code (*106 Cal. App. 3d 183, 194)* .

California Points & Authorities

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Volume 22 Chapters 220-229 SUBROGATION---to---TRESPASS
CHAPTER 220 SUBROGATION
PART II. FORMS

22-220 California Points & Authorities § 220.56

§ 220.56 Opposing Obligor's Contention That Subrogee May Not Recover Amount Greater Than That Which Subrogor Could Have Recovered--Action Under Lab. Code § 3852 Against Third-Party Tortfeasor Is for Indemnity and Not Subrogation to Extent It Seeks to Recover Amount Paid to Department of Industrial Relations Under Lab. Code § 4706.5(a) for Death of Employee Without Dependents

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

PLAINTIFF IS EXPRESSLY AUTHORIZED BY STATUTE TO RECOVER FROM THE THIRD-PARTY TORTFEASOR THE AMOUNT [REQUIRED TO BE] PAID TO THE DEPARTMENT OF INDUSTRIAL RELATIONS ON ACCOUNT OF THE DEATH OF ITS [INSURED'S] EMPLOYEE WITHOUT DEPENDENTS, AND TO THAT EXTENT THE STATUTE PROVIDES FOR INDEMNITY RATHER THAN EQUITABLE SUBROGATION.

A. Payment of Death Benefit to Department of Industrial Relations. Whenever any fatal injury is suffered by an employee under such circumstances as to entitle the employee to compensation benefits, but for his or her death, and the employee does not leave surviving any person entitled to a dependency death benefit, the employer shall pay a sum to the Department of Industrial Relations equal to the total dependency death benefit that would be payable to a surviving spouse with no dependent children (*Lab. Code § 4706.5(a)*).

B. Right of Employer to Recover Death Benefit Paid to Department of Industrial Relations. Any employer who pays or becomes obligated to pay an amount to the Department of Industrial Relations pursuant to *Section 4706.5 of the Labor Code* may make a claim or bring an action against the third-party tortfeasor and may recover in the same suit, in addition to the total amount of compensation, damages for which he or she was liable (*Lab. Code § 3852*).

C. *Lab. Code § 3852* as Authorizing Action for Indemnity. To the extent that *Section 3852 of the Labor Code* authorizes recovery by an employer (or the employer's insurer) from a third-party tortfeasor of the amount paid to the Department of Industrial Relations pursuant to *Section 4706.5(a) of the Labor Code* on the death of an employee without dependents, it provides an action for indemnity, rather than an action in equitable subrogation (*Travelers Ins.*

Co. v. Sierra Pac. Airlines (1983) 149 Cal. App. 3d 1144, 1154, 197 Cal. Rptr. 416 ; *Associated Indem. Corp. v. Pacific Sw. Airlines (1982) 128 Cal. App. 3d 898, 907, 180 Cal. Rptr. 685*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a subrogee may not recover any amount in excess of that which could have been recovered in an action by the subrogor. The ground of opposition is that recovery of the excess amount is a form of indemnity and is expressly authorized by statute.

These points and authorities may be used alone or combined with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue. For example, they may be combined with points and authorities (1) in opposition to a demurrer to the complaint [*see Code Civ. Proc. § 430.10(e)*], (2) in opposition to a motion for an order striking as irrelevant the allegations of a complaint seeking an amount in excess of the amount that would be recoverable by a subrogor [*see Code Civ. Proc. §§ 435-437*], or (3) in opposition to a motion for summary judgment [*see Code Civ. Proc. § 437c*]. They may also be combined with points and authorities in opposition to a motion after trial to vacate the judgment to the extent it awards plaintiff an amount in excess of that which could have been recovered by the subrogor and to enter judgment in a different amount [*see Code Civ. Proc. § 663*]. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 220.36*.

[b] Related Pleading and Practice Chapters

For forms of demurrers and notices of motion to strike and related papers, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , and Ch. 375, *Motions to Strike* (Matthew Bender). For forms of notices of motion for summary judgment and related papers, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender). For forms of notices of motion to vacate a judgment and enter another and different judgment and related papers, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial* (Matthew Bender).

[c] Related Points and Authorities

For points and authorities generally supporting and opposing demurrers to the complaint, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For points and authorities generally supporting and opposing a motion to strike, see Ch. 160, *Motions to Strike* . For points and authorities generally supporting and opposing a motion for summary judgment, see Ch. 221, *Summary Judgments* . For points and authorities generally supporting and opposing a motion to vacate a judgment and enter another and different judgment, see Ch. 155, *Motions After Trial* .

[3] Discussion of Authorities

[a] Lab. Code § 3852 as Authorizing Action for Indemnity

Travelers Ins. Co. v. Sierra Pac. Airlines *(1983) 149 Cal. App. 3d 1144, 197 Cal. Rptr. 416* , was an action by a workers' compensation insurer against an airline under *Lab. Code § 3852* to recover a payment required to be made to the state Department of Industrial Relations under *Lab. Code § 4706.5* on account of the death of an employee without

dependents who was killed in the crash of one of defendant's aircraft. Judgment was for plaintiff, and defendant appealed, contending plaintiff had no right to recover under *Lab. Code § 3852* because that statute is simply a recognition of the doctrine of equitable subrogation and is not an indemnity statute. Defendant argued that since the statute deals with equitable subrogation, plaintiff cannot stand in the shoes of a subrogee because its payments were not made to an "injured person," but rather to the Department of Industrial Relations.

The court of appeal affirmed. Relying in part on *Associated Indem. Corp. v. Pacific Sw. Airlines (1982) 128 Cal. App. 3d 898, 180 Cal. Rptr. 685* , and in part on its own analysis, the court held the recovery under *Lab. Code § 3852* of payments made to the Department of Industrial Relations under *Lab. Code § 4706.5* was an action for indemnity and not in subrogation (*149 Cal. App. 3d 1144, 1152, 1154)* . The court further held that *Lab. Code § 4706.5* does not open the door to double liability and it does not violate constitutional equal protection or due process requirements (*149 Cal. App. 3d 1144, 1158-1160)* .

Associated Indem. Corp. v. Pacific Sw. Airlines *(1982) 128 Cal. App. 3d 898, 907, 180 Cal. Rptr. 685* , was an action by a workers' compensation carrier for reimbursement under *Lab. Code § 3852* of the sums it was required to pay to the state Department of Industrial Relations under the provisions of *Lab. Code § 4706.5(a),* in lieu of benefits to dependents, resulting from the death of certain passengers, acting within the scope of their employment, killed in the crash of one of defendant's aircraft. Following the trial court's judgment granting defendant's motion for partial summary judgment, *Lab. Code § 3852* was amended to mandate that reimbursement by adding "or who pays or becomes obligated to pay an amount to the Department of Industrial Relations pursuant to Section 4706.5" of the Labor Code in the second sentence of the statute. The legislature expressly declared, however, that the amendment did not change existing law [Stats. 1981, ch 21, § 12].

The court of appeal reversed the partial summary judgment. The court said the legislature, by amending *Lab. Code § 3852,* permitted an employer or the employer's insurer who pays an amount to the state when an employee entitled to workers' compensation dies without dependents, to make a claim or bring an action against the third-party tortfeasor, and that this is the same conclusion the court reached in analyzing the provisions of the prior law (*128 Cal. App. 3d 898, 908)* . Defendant claimed, among other things, that *Lab. Code § 3852* (prior to its amendment) was merely a legislative recognition of the doctrine of equitable subrogation. (That is, the insurer merely stepped into the shoes of the injured or deceased employee and could recover from the tortfeasor only what could have been recovered by the employee.) The court rejected the contention and held that while *Lab. Code § 3852* does serve as a subrogation statute under certain applicable circumstances, it is actually much more, notwithstanding its location in the code under a "subrogation" title, and that, as involved in the case, it was more akin to the equitable doctrine of indemnity (*128 Cal. App. 3d 898, 905-906)* . The court explained that indemnity rests on a difference between the primary and secondary liability of two parties and inures to a person who, without active fault, has been compelled by some legal obligation to pay money due to the initial negligence of another, which, in equity and good conscience, should be borne by the other (*128 Cal. App. 3d 898, 906)* . The court said tortfeasors should bear responsibility for all the consequences of their wrongs, including statutorily mandated payments under *Lab. Code § 4706.5,* and held that *Lab. Code § 3852,* to the extent it authorizes the employer or the employer's insurer to recover from the defendant the "damages" the plaintiff is required to pay in the award pursuant to *Lab. Code § 4706.5(a),* provides an action for indemnity (*128 Cal. App. 3d 898, 906, 907)* .

NOTE:

The court in *Travelers Ins. Co. v. Sierra Pac. Airlines (1983) 149 Cal. App. 3d 1144, 197 Cal. Rptr. 416* , stated that the analysis in *Associated Indemnity Corp.* was undermined by that court's reliance on *State Comp. Ins. Fund v. Williams (1974) 38 Cal. App. 3d 218, 112 Cal. Rptr. 226* , which had been explicitly and implicitly disapproved in *Breese v. Price (1981) 29 Cal. 3d, 923, 931, 176 Cal. Rptr. 791, 633 P.2d 987* , and in *County of San Diego v. Sanfax Corp. (1977) 19 Cal. 3d 862, 876 n.7, 140 Cal. Rptr. 638, 568 P.2d 363* .

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CHAPTER 220 SUBROGATION
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22-220 California Points & Authorities § 220.57

§ 220.57 Opposing Contention That Insured May Compromise Claim Against Third-Party Tortfeasor in Action in Which Surety Is Joined--Insured May Not Derogate Rights of Surety Against Third-Party Tortfeasors

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*specify, e.g.,* PLAINTIFF], THE INSURED UNDER A SURETYSHIP, MAY NOT COMPROMISE ITS CLAIM AGAINST _____ [*specify, e.g.,* DEFENDANT], AS THIRD-PARTY TORTFEASOR WITH RESPECT TO THE SURETYSHIP, BECAUSE THE SURETY HAS NOT CONSENTED TO THE COMPROMISE, AND THE RIGHTS OF THE SURETY WITH RESPECT TO THE THIRD-PARTY TORTFEASOR HAVE NOT YET BEEN DETERMINED.

A. Rights of Insurer Should Be Determined in Action Against Tortfeasors. After the insurer has intervened in an action against a wrongdoer, and has shown a monetary interest in the result of the action, the court will not permit a settlement between the insured and the wrongdoer to the detriment of the insurer, but will protect the rights of all parties (*Conservatorship of Edwards (1988) 198 Cal. App. 3d 1176, 1185, 244 Cal. Rptr. 330*).

B. Insured May Not Compromise Claim Against Third-Party Tortfeasor in Action Including Surety, to Detriment of Rights of Surety Against Third-Party Tortfeasor. In an action in which the parties include a surety, the insured, and a third-party tortfeasor, the insured may not compromise its claim against the third party without either the consent of the surety, or a prior determination of the rights of the surety against the third party must be determined prior to any settlement between the insured and the third party (*Conservatorship of Edwards (1988) 198 Cal. App. 3d 1176, 1183-1185, 244 Cal. Rptr. 330*).

[*Optional*] **C. Payment on Surety Bond Creates Assignment by Operation of Law.** In equity, the payment on a surety bond creates an assignment of a portion of the claim against the third party by operation of law, and no formal assignment or transfer is necessary (*Conservatorship of Edwards (1988) 198 Cal. App. 3d 1176, 1181, 244 Cal. Rptr. 330*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that an insured may compromise a claim against a tortfeasor, in an action in which the surety is joined [*see Conservatorship of Edwards (1988) 198 Cal. App. 3d 1176, 1183-1185, 244 Cal. Rptr. 330]* .

These points and authorities may be used alone or combined with a memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the points and authorities. For example, they may be used in opposition to a probate petition requesting approval of compromise of a third-party claim against the estate [*see Conservatorship of Edwards (1988) 198 Cal. App. 3d 1176, 244 Cal. Rptr. 330]* .

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should set forth the terms of the suretyship agreement, and show right to subrogation against the third party.

[b] Related Pleading and Practice Chapters

For discussion and forms regarding subrogation generally, see California Forms of Pleading and Practice, Ch. 536, *Subrogation* (Matthew Bender). For discussion of suretyship and bonds generally, see California Forms of Pleading and Practice, Ch. 538, *Suretyship, Bonds, and Undertakings* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities regarding actions involving suretyship contracts, see Ch. 222, *Suretyship* .

[3] Discussion of Authorities

[a] Rights of Insurer Should Be Determined in Action Against Tortfeasors

In ***Conservatorship of Edwards*** *(1988) 198 Cal. App. 3d 1176, 244 Cal. Rptr. 330* , the initial conservator of an estate posted a surety bond at the time of his appointment. In the course of his administration of the estate, he deposited estate funds into two banks, in blocked accounts that should have prevented the funds from being released without court order. However, both banks allowed the conservator to withdraw funds from the accounts without court order, and he misappropriated a large portion of the withdrawn funds. The probate court suspended the conservator's powers, and appointed a successor, who filed objections to the first conservator's accounts in the instant action. The successor also filed actions on behalf of the estate against both banks. In the instant action, she filed a motion to enforce the surety bond. Initially, the surety objected on the ground that the actions against the banks were pending, and that the surety's rights to subrogation should first be determined in those actions. Ultimately, the surety paid the amount of the bond, pursuant to a stipulation providing that the surety "enjoy all rights to subrogation or other indemnity, provided by law." The conservator filed petitions for orders authorizing her to compromise the estate's claims against the two banks. The surety objected, claiming a right to subrogation, and a right to a lien against the settlement. The amount of the surety-bond proceeds added to the settlement amounts did not total the amount lost by the estate. The trial court granted the conservator's petitions and approved the settlements, over the objections of the surety, and disallowed the surety's lien. The surety appealed.

The court of appeal reversed, holding that the insured may not compromise third-party claims in an action that involves a surety, without prior determination of the surety's rights against the third party (*198 Cal. App. 3d 1176, 1183-1185)* . In order to clarify the issue, the court asked the following question: what are the rights of the surety when an insured, without the consent of the surety that is also a party to the insured's actions against the tortfeasors, has settled with third-party tortfeasors for an amount that, when added to the sum paid by the surety, will not compensate the insured for its entire loss? The court first corrected the surety's misconception that due to the insured's release to the banks, the

surety had no standing to recover from them. Ordinarily, an insurer stands in the shoes of its insured, and if an action of the insured is barred, the action of the insurer is also barred. However, when the tortfeasor obtains a release from the insured with knowledge that the insured has already been indemnified by the insurer, the release of the tortfeasor does not bar the right of subrogation of the insurer. The court discussed California cases brought under the Workers' Compensation Act (*Lab. Code §§ 3850-3864*) that recognized the right of a surety to claim reimbursement from either its insured or a third-party tortfeasor that has settled in bad faith. On the other hand, when a tortfeasor settles with an insured in good faith without knowledge that the insured has received benefits from the insurer, the insurer's right to recovery from the tortfeasor is barred, but the insurer may be able to recover from its insured (*198 Cal. App. 3d 1176, 1184)* . With respect to the surety's right to a determination vis-a-vis the third-party tortfeasors, the California Supreme Court has stated that the liability of the tortfeasor and the totality of recovery for the tortfeasance, including any subrogation rights, should be determined in one action [*see* Board of Administration v. Glover (1983), ; *see also § 220.36[3][a]*]. Courts in other jurisdictions have also held that the rights of the surety should be determined in the actions against the tortfeasors. After the insurer has intervened in an action by the insured against the wrongdoer, and has shown a monetary interest in the result of the action, the court will not permit a settlement between the insured and the wrongdoer to the detriment of the insurer, but will protect the rights of all parties (*198 Cal. App. 3d 1176, 1185)* . Consequently, the court reversed the orders approving the settlement on the ground that a prior determination of the rights of the surety is required. Inasmuch as the motion for approval of the settlement by the probate court was premature, the surety's motion for a lien on the settlement proceeds was also premature. A party having only a prospective right of subrogation is not entitled to a lien on settlement proceeds (*198 Cal. App. 3d 1176, 1185)* .

[b] Insured May Not Compromise Claim Against Third-Party Tortfeasor in Action Including Surety, to Detriment of Rights of Surety Against Third-Party Tortfeasor

Conservatorship of Edwards *(1988) 198 Cal. App. 3d 1176, 244 Cal. Rptr. 330* , is discussed in *§ 220.57[3][a]*.

[c] Payment on Surety Bond Creates Assignment by Operation of Law

Conservatorship of Edwards *(1988) 198 Cal. App. 3d 1176, 244 Cal. Rptr. 330* , is discussed in *§ 220.57[3][a]*.

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CHAPTER 221 SUMMARY JUDGMENTS

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§ 221.syn Synopsis to Chapter 221: SUMMARY JUDGMENTS

§ 221.01 Scope of Chapter

§ 221.02 Governing Law

§ 221.03 Use of This Chapter

§ 221.04 Page Limits on Memoranda

§ 221.05 Summary Judgment in Personal Injury or Property Damage Actions Involving Multiple Defendants

§ 221.06 Effect of Summary Adjudication as Distinguished From Final Judgment

§ 221.07 Related Discussion and Forms

§§ 221.08-221.19 [Reserved]

§ 221.20 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Trial Court's Power to Consider Arguments Not Presented

[d] Remedy When Motion Improperly Denied

[e] Summary Judgment as Res Judicata

[f] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Burden of Production

[b] Negation of Element of Plaintiff's Cause of Action Not Required

[c] Reliance on Absence of Evidence to Support Nonmoving Party's Case

[d] Evidence and Inferences Considered by Court

[e] Effect of Admission Against Interest Obtained During Discovery

[f] Effect of Judicial Admission

[g] Presumption Eliminates Triable Issue When No Contradictory Evidence Offered

[h] Only Material Issue Presented Is Question of Law

[i] No Merit if Essential Element of Case Lacking

[j] No Merit if Complete Defense

[k] Responsive Evidence Giving Rise to Mere Speculation Is Insufficient to Establish Triable Issue of Material Fact

[l] Determining Triable Issue of Fact Does Not Turn on Trial Court's Discretion

[m] Party Cannot Create Issue of Fact by Contracting Prior Discovery Responses.

[4] Additional Authorities

[a] Summary Judgment for Defendant

[b] Summary Judgment for Plaintiff

[c] Burden of Proof

[d] Reliance on Absence of Evidence to Support Nonmoving Party's Case

[e] Evidence and Inferences Considered by Court

[f] No Merit If Essential Element of Case Lacking

[g] Effect of Admission Against Interest Obtained During Discovery

[h] No Merit If Essential Element of Case Lacking

[i] No Merit if Complete Defense

[j] Responsive Evidence Giving Rise to Mere Speculation Insufficient to Establish Triable Issue of Material Fact

§ 221.21 Supporting Motion for Summary Adjudication [Code Civ. Proc. § 437c(f)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Summary Adjudication of Cause of Action, Defense, Claim for Punitive Damages, or Issue of Duty

[d] Related Memoranda

[e] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Court Not Limited to Negligence Causes of Action to Rule on Issue of Duty, but May Also Do So in Context of Contractual Obligations

[b] A Ruling That Completely Disposes of an Issue of Duty, but Which Has No Dispositive Impact on Other Issues, Is Appropriate

[c] Reliance on Absence of Evidence to Support Nonmoving Party's Case

[4] Additional Authorities

[a] Reliance on Absence of Evidence to Support Nonmoving Party's Case

[b] Court May Grant Summary Adjudication on Issue of Duty

§ 221.22 Supporting Motion for Summary Judgment or Summary Adjudication--Reply Memorandum Objecting to Evidence Contained in Opposing Party's Papers [Code Civ. Proc. § 437c(b), (c)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Waiver of Evidentiary Objections

[3] Discussion of Authorities

[a] Opposing Party's Papers May Not Create Issue Outside Pleadings

§ 221.23 Supporting Motion for Summary Judgment or Summary Adjudication--Reply Memorandum Objecting to Evidence Contained in Opposing Party's Papers [Code Civ. Proc. § 437c(b), (c)]--Inadequacy or Lack of Statement of Disputed or Undisputed Material Facts [Code Civ. Proc. § 437c(b)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Inadequacy or Lack of Statement of Disputed or Undisputed Material Facts

[b] Lack of Knowledge Insufficient to Create Dispute

[4] Additional Authorities

[a] Inadequacy or Lack of Statement of Disputed or Undisputed Material Facts

§ 221.23A Supporting Motion for Summary Judgment or Summary Adjudication--Reply Memorandum Objecting to Evidence Contained in Opposing Party's Papers--Affidavit or Declaration of Opposing Party's Expert Witness Conflicts With Expert's Earlier Statements

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Statements in Affidavit or Declaration of Expert Conflict With Earlier Statements by Same Expert and Conflict Is Not Explained

§ 221.24 Supporting Motion for Summary Judgment or Summary Adjudication--Reply Memorandum Objecting to Continuance Sought by Opposing Party to Obtain Additional Facts [Code Civ. Proc. § 437c(h)]--Insufficient Showing of Need for Continuance

[1] FORM

[2] Comments

[a] Use of Form

[b] Request for Continuance

[3] Discussion of Authorities

[a] Evidence Sought to Be Produced Is Not Essential to Justify Opposition

[b] Request for Continuance Must Be Supported by Good-Faith Showing by Affidavit

[c] Party Seeking Continuance Must Make Showing It Has Been Diligent in Conducting Discovery

[4] Additional Authorities

[a] Request for Continuance Must Be Supported by Good-Faith Showing by Affidavit

§ 221.25 Supporting Motion for Summary Judgment or Summary Adjudication--Reply Memorandum Objecting to Continuance Sought by Opposing Party to Obtain Additional Facts [Code Civ. Proc. § 437c(h)]--Request for Continuance Untimely Filed

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Request for Continuance Must Be Brought in a Timely Manner

§ 221.26 Supporting Motion for Summary Judgment or Summary Adjudication--Reply Memorandum Seeking Continuance to Depose Opposing Party's Expert Regarding Foundation of Expert's Opinion

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Continuance to Depose Expert Who Has Supplied Declaration Concerning Foundation of Opinion

§ 221.27 Supporting Motion for Summary Judgment or Summary Adjudication--Reply Memorandum of Points and Authorities [Code Civ. Proc. § 437c(b)]--Timely Motion [Code Civ. Proc. § 437c(a)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Trial Date as Used in Code of Civil Procedure Section 437c(a) Includes Continued Trial Date

[b] Motion Heard More Than 60 Days After General Appearance Is Timely

§ 221.28 Supporting Motion for Summary Adjudication--Reply Memorandum of Points and Authorities [Code Civ. Proc. § 437c(b)]--Adjudication Sought of Separate Cause of Action [Code Civ. Proc. § 437c(f)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Cause of Action as Separate and Distinct Wrongful Act

[b] Challenge to Declaratory Relief Action by Summary Adjudication Appropriate

§ 221.29 Opposing Motion for Summary Judgment--Triable Issue of Material Fact Exists [Code Civ. Proc. § 437c]

[1] FORM

[2] Comments

[a] Use of Form

[b] Existence of Triable Issue of Material Fact

[c] Analysis Required of Court

[d] Related Pleading and Practice Forms

[e] Related Points and Authorities

[3] Discussion of Authorities

[a] Rules Governing Summary Judgment Procedure

[b] Burden on Moving Party

[c] Defendant's Motion Based on Affirmative Defense

[d] No Need to Review Counter Declaration Unless Moving Party's Declaration Is Sufficient to Support Motion

[e] Sufficiency of Opponent's Response Papers

[f] Moving Party's Pleadings Will Not Support Motion

[g] Moving Party's Burden of Eliminating All Triable Issues of Fact

[h] Defendant's Burden to Refute Material Issues Raised By the Pleadings When Complaint Alleges Facts to Refute An Affirmative Defense

[i] Strict Standards Apply To Defendant's Attempt to Disprove Element of Plaintiff's Cause of Action

[j] Sole Declaration of Party Raising Triable Issue of Fact Sufficient

[k] Moving Party's Burden to Eliminate All Triable Issue Notwithstanding Absence of Opposition

[l] No Need To Look at Plaintiff's Opposing Papers Until Defendant Makes Requisite Showing

[m] Plaintiff Need Not Demonstrate Triable Issue of Fact When Defendant Fails to Meet its Burden

[n] Motion Based on Issues Asserted in Prior Unsuccessful Motion for Summary Adjudication

[o] Deposition Statement Obtained During Discovery is Not an Unequivocal Admission That Would Support Granting of Summary Judgment

[4] Additional Authorities

[a] Rules Governing Summary Judgment Procedure

[b] Burden on Moving Party

[c] Defendant's Motion Based on Affirmative Defense

[d] Moving Party's Burden to Eliminate All Triable Issues of Fact

[e] No Need to Look at Plaintiff's Opposing Papers Until Defendant Makes Requisite Showing

[f] Plaintiff Need Not Demonstrate Triable Issue of Fact When Defendant Fails to Meet its Burden

§ 221.30 Opposing Motion for Summary Adjudication--Triable Issue of Material Fact Exists [Code Civ. Proc. § 437c(f)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Summary Adjudication Not Proper When Triable Issue of Fact Exists

[b] Triable Issues of Fact Relating to Cause of Action

[4] Additional Authorities

[a] Summary Adjudication Not Proper When Triable Issue of Fact Exists

§ 221.31 Opposing Motion for Summary Adjudication--Disposition of Cause of Action, Affirmative Defense, Claim for Damages, or Issue of Duty Not Complete [Code Civ. Proc. § 437c(f)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Summary Adjudication Not Proper Unless It Completely Disposes of Cause of Action, Defense, Damage Claim, or Duty Issue

[b] Summary Adjudication Not Proper When Disposition of Issue of Contractual Duty Is Not Complete

[c] Summary Adjudication of Component of Damages Not Proper Unless It Completely Disposes of Cause of Action

[d] Piecemeal Adjudication of Claim for Punitive Damages Prohibited

§ 221.32 Opposing Motion for Summary Judgment or Summary Adjudication--Request for Sanctions for Presenting Affidavits or Declarations in Bad Faith or Solely for Purposes of Delay [Code Civ. Proc. § 437c(j)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Uses

[c] Payment of Expenses for Frivolous Actions

[d] Related Federal Rule

§ 221.33 Opposing Motion for Summary Judgment or Summary Adjudication--Motion Untimely Filed [Code Civ. Proc. § 437c(a)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Untimely Notice

§ 221.34 Opposing Motion for Summary Judgment or Summary Adjudication--Objection to Evidence Contained in Moving Party's Papers [Code Civ. Proc. § 437c(c)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Waiver of Evidentiary Objections

§ 221.35 Opposing Motion for Summary Judgment or Summary Adjudication--Inference Reasonably Deducible From Evidence Raises Triable Issue [Code Civ. Proc. § 437c(c)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Inference of Triable Issue Reasonably Deducible From Evidence

[b] Court Must Consider Inferences Favoring Opposing Party

[c] Failure to Raise Argument in Statement of Undisputed Material Facts Is Not Sufficient Reason to Grant Summary Judgment

[4] Additional Authorities

[a] Inference of Triable Issue Reasonably Deducible From Evidence

[b] Failure to Raise Argument in Statement of Undisputed Material Facts Is Not Sufficient Reason to Grant Summary Judgment

§ 221.36 Opposing Motion for Summary Judgment or Summary Adjudication--Contradictory Inference Raises Triable Issue [Code Civ. Proc. § 437c(c)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Supporting Inference Contradicted by Other Inference Which Raises Triable Issue

[b] Expert Witness Declaration Provides Triable Issue of Causation When Opinion Properly Supported

[4] Additional Authorities

[a] Supporting Inference Contradicted by Other Inference Which Raises Triable Issue

§ 221.37 Opposing Motion for Summary Judgment or Summary Adjudication--Supporting Affidavit or Declaration Not Made on Personal Knowledge [Code Civ. Proc. § 437c(d)]

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[3] Discussion of Authorities

[a] Personal Knowledge Required

[4] Additional Authorities

[a] Personal Knowledge Required

§ 221.38 Opposing Motion for Summary Judgment or Summary Adjudication--Supporting Affidavit of Declaration Contains Inadmissible Evidence [Code Civ. Proc. § 437c(d)]

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[b] Inability to Recall Exact Words Spoken

[3] Discussion of Authorities

[a] Admissible Evidence Required

[b] Hearsay

[c] Best-Evidence Rule

[d] Unauthenticated Writing

[4] Additional Authorities

[a] Admissible Evidence Required

[b] Hearsay

[c] Best-Evidence Rule

§ 221.39 Opposing Motion for Summary Judgment or Summary Adjudication--Supporting Affidavit or Declaration Does Not Affirmatively Show Affiant Competent to Testify [Code Civ. Proc. § 437c(d)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Nature of Showing Competence

[i] Related Uses

[3] Discussion of Authorities

[a] Showing of Competency to Testify Required

[4] Additional Authorities

[a] Showing of Competency to Testify Required

§ 221.40 Opposing Motion for Summary Judgment or Summary Adjudication--Supporting Affidavit or Declaration Contains Ultimate Facts and Conclusions

[1] FORM

[2] Comments

[a] Use of Form

[i] Related Uses

[3] Discussion of Authorities

[a] Evidentiary Facts Required

[4] Additional Authorities

[a] Evidentiary Facts Required

§ 221.41 Opposing Motion for Summary Judgment or Summary Adjudication--Supporting Affidavit or Declaration

of Sole Witness as Only Proof of Material Fact [Code Civ. Proc. § 437c(e)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Sole Witness to Material Fact

§ 221.42 Opposing Motion for Summary Judgment or Summary Adjudication--State of Mind Established Solely by Individual's Affirmation [Code Civ. Proc. § 437c(e)]

[1] FORM

[2] Comments

[a] Use of Form

§ 221.43 Opposing Motion for Summary Judgment or Summary Adjudication--Facts Essential to Opposition Currently Unavailable [Code Civ. Proc. § 437c(h)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Unavailability of Opposing Facts

[b] Continuance to Depose Expert Who Has Supplied Declaration Concerning Foundation of Opinion

[c] Lack of Diligence Alone Does Not Preclude Continuance

§ 221.44 Opposing Motion for Summary Judgment or Summary Adjudication--Inadequacy or Lack of Statement of Undisputed Material Facts [Code Civ. Proc. § 437c(b)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Inadequacy of Lack of Statement of Undisputed Material Facts

§ 221.45 Opposing Motion for Summary Judgment or Summary Adjudication--Failure to Meet Clear and Convincing Burden of Proof [Code Civ. Proc. § 437c(p)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Evidence and Inferences Reasonably Drawn Fail to Meet Standard

[4] Additional Authorities

[a] Evidence and Inferences Reasonably Drawn Fail to Meet Standard

[b] Clear and Convincing Standard in Summary Adjudication of Punitive Damages Claim

§ 221.46 Supporting or Opposing Motion for Summary Judgment or Summary Adjudication--Request That Court Take Judicial Notice [Code Civ. Proc. § 437c(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Use of Judicially Noticed Matters

[b] Matters Subject to Mandatory Judicial Notice

[c] Matters Subject to Permissive Judicial Notice

[d] Matters Subject to Permissive Judicial Notice Conditionally Mandatory on Request

§ 221.47 Supporting or Opposing Appeal of Summary Judgment--Standard of Review

[1] FORM

[2] Comments

[a] Use of Form

[b] Standard of Appellate Review

[i] Independent Review

[ii] Abuse of Discretion Standard Abrogated

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Independent Appellate Review

[4] Additional Authorities

[a] Independent Appellate Review

§ 221.48 Opposing Motion for Summary Adjudication--Superseding Pleading Rendered Motion Moot

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

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CHAPTER 221 SUMMARY JUDGMENTS
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22-221 California Points & Authorities § 221.01

§ 221.01 Scope of Chapter

This chapter contains points and authorities that may be submitted in civil actions to support or oppose motions for summary judgment or for summary adjudication of a cause of action, affirmative defense, claim for punitive damages, or the issue whether one or more defendants owed a duty to one or more plaintiffs.

It includes general forms for use in supporting [*see § 221.20*] and opposing [*see § 221.29*] motions for summary judgment and for supporting [*see § 221.21*] and opposing [*see § 221.30*] motions for summary adjudication on the ground of whether or not there is any triable issue as to any material fact, and opposing summary adjudication on the ground that summary adjudication would not completely dispose of the cause of action, affirmative defense, claim for damages, or issue of duty [*see § 221.31*].

It also includes general forms of evidentiary objection for use by the moving party [*see § 221.22*] and the opposing party [*see § 221.34*], forms of objection to the adequacy of a statement of disputed or undisputed material facts for use by the moving party [*see § 221.23*] or the opposing party [*see § 221.44*], a form for use by the moving party to oppose a contention that a continuance is needed to obtain facts essential to justify opposition to the motion [*see § 221.24*], a form for use by the moving party to oppose a request for an untimely motion for continuance [*see § 221.25*], a form for use by the moving party to oppose a contention that the motion is untimely because it cannot be heard within 30 days before the original trial date [*see § 221.27*], a form for use by the supporting party to oppose the objection that a motion for summary adjudication will not completely dispose of a cause of action [*see § 221.28*], a form for use by the opposing party in requesting sanctions [*see § 221.32*], a form for use by the opposing party objecting to the motion as untimely, a form for use by the moving or opposing party in requesting that judicial notice be taken [*see § 221.46*], and a form for use by the moving party or the opposing party in an appellate brief setting forth the standard for appellate review of a grant of summary judgment [*see § 221.47*].

Finally, the chapter includes specific forms for use in combination with the general forms in opposing motions for summary judgment or summary adjudication based on inferences reasonably deducible from the evidence that raise triable issues as to any material fact [*see §§ 221.35, 221.36*], based on evidence and inferences reasonably deducible from the evidence in an action carrying a higher standard of proof [*see § 221.45*], based on specific objections to matters contained in the moving party's affidavits or declarations [*see §§ 221.37 -221.42*], and based on the ground that

facts essential to justify opposition may exist but cannot be presented at the time of the motion [*see § 221.43*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedureSummary JudgmentEvidenceCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentOppositionGeneral OverviewCivil ProcedureSanctionsBaseless FilingsGeneral Overview

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22-221 California Points & Authorities § 221.02

§ 221.02 Governing Law

Motions for summary judgment or summary adjudication are governed by *Code Civ. Proc. § 437c* and *Cal. Rules of Ct., Rule 3.1350*. Objections to evidence in the papers in a summary judgment proceeding are governed by Cal. Rules of Ct., Rules 3.132 and *3.1354*. Local court rules should always be consulted, as these commonly affect summary judgment proceedings [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rule 9.21].

Summary judgment proceedings in particular cases are also governed by *Civ. Code § 1781(c)* (separate proceeding similar to summary judgment in consumer class actions); *Code Civ. Proc. §§ 1029.6(e), (f)* (defendant in medical malpractice action may move to require plaintiff to file undertaking or for summary judgment, but not both), 1038 (recovery of defense costs in certain situations), 1170.7 (expedited summary judgment procedures in unlawful detainer or forcible entry action).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentEvidenceCivil ProcedureSummary JudgmentOppositionGeneral OverviewGovernmentsCourtsRule Application & Interpretation

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22-221 California Points & Authorities § 221.03

§ 221.03 Use of This Chapter

With appropriate modifications, the moving party may combine his or her memorandum of points and authorities in support of a motion for summary judgment [*see § 221.20*] or summary adjudication [*see § 221.21*] with individual points and authorities relating to inferences reasonably deducible from evidence [*see § 221.35*], and to a request that the court take judicial notice of certain matters [*see § 221.46*].

The forms of memoranda of points and authorities in this chapter for use in opposing motions for summary judgment [*see § 221.29*] or summary adjudication [*see § 221.30*] on the ground that a triable issue of material fact exists may be combined with the individual points and authorities relating to a request for sanctions [*see § 221.32*], objections to the evidence contained in the moving party's papers [*see § 221.34*], inferences that raise triable issues [*see §§ 221.35, 221.36*], objections to specific matters contained in the moving party's affidavits or declarations [*see §§ 221.37 -221.42*], the unavailability of essential opposition facts [*see § 221.43*], an objection to the adequacy of the moving party's statement of material facts contended to be undisputed [*see § 221.44*], the applicability of a higher standard of proof in an action carrying a higher burden [*see § 221.45*], and a request that the court take judicial notice of certain matters [*see § 221.46*].

The trial court has discretion to permit the filing of supplemental affidavits or declarations, for example, by the moving party in response to the opposing party's counteraffidavits or counterdeclarations [*see Johnson v. Banducci (1963) 212 Cal. App. 2d 254, 259-260, 27 Cal. Rptr. 764]* . Thus, the moving party may file a reply memorandum objecting to evidence contained in the opposing party's papers [*see Code Civ. Proc. § 437c(b)(4)*]; [*see § 221.22*]. This reply memorandum may becombined with individual points and authorities relating to the adequacy of the opposing party's statement in response to the material facts contended to be undisputed by the moving party [*see § 221.23*], and with the appropriately modified individual points and authorities relating to objections that the opposing affidavits or declarations are not made on personal knowledge [*see § 221.37*], contain inadmissible evidence [*see § 221.38*], do not affirmatively show that the affiant is competent to testify [*see § 221.39*], or contain ultimate facts or conclusions [*see § 221.40*], and relating to a request for sanctions [*see § 221.32*].

The chapter also contains a form for use by either party in an appellate brief to set forth the standard for appellate review [*see § 221.47*].

Each form in this chapter may also be combined with memoranda of points and authorities that relate to the particular causes of action and grounds involved. See the specific chapters in this set for particular substantive areas, such as contracts, fraud, indemnity and contribution, and libel and slander.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentAppellate ReviewGeneral OverviewCivil ProcedureSummary JudgmentEvidenceCivil ProcedureSummary JudgmentOppositionGeneral OverviewCivil ProcedureSummary JudgmentOppositionMemoranda in OppositionCivil ProcedureSummary JudgmentStandardsMateriality

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22-221 California Points & Authorities § 221.04

§ 221.04 Page Limits on Memoranda

A memorandum supporting or opposing a motion for summary judgment or summary adjudication may not exceed 20 pages in length. A reply or closing memorandum may not exceed 10 pages in length [*see Cal. Rules of Ct., Rule 3.1113(d)*]. Any party desiring to file a longer memorandum must obtain leave of court [*see Cal. Rules of Ct., Rule 3.1113(d)*]. For discussion of the page limitations under *Cal. Rules of Ct., Rule 3.1113*, and of other basic format requirements of memoranda, see *Ch. 1, Writing Legal Memoranda and Briefs, § 1.05*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentOppositionMemoranda in OppositionCivil ProcedureSummary JudgmentSupporting MaterialsMemoranda of Law

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22-221 California Points & Authorities § 221.05

§ 221.05 Summary Judgment in Personal Injury or Property Damage Actions Involving Multiple Defendants

In actions that arise out of an injury to the person or to property, when a motion for summary judgment was granted on the basis that the defendant was without fault, no other defendant during trial, over plaintiff's objection, may attempt to attribute fault to or comment on the absence or involvement of the defendant who was granted the motion [*Code Civ. Proc. § 437c*(*l*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentGeneral OverviewTortsProcedureMultiple DefendantsGeneral Overview

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22-221 California Points & Authorities § 221.06

§ 221.06 Effect of Summary Adjudication as Distinguished From Final Judgment

Summary adjudication under *Code Civ. Proc. § 437c(f)* disposes of less than the entire action. Specifically, if any party contends that one or more causes of action within an action has no merit or that there is no defense thereto, or that there is no merit to an affirmative defense as to any cause of action, or both, or that there is no merit to a claim for damages under *Civ. Code § 3294*, or that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs, then he or she may move for summary adjudication as to that cause or causes of action, that affirmative defense, that claim for damages, or that issue of duty [*Code Civ. Proc. § 437c(f)(1)*; for further discussion, *see § 221.21[2]*].

If a motion for summary adjudication is granted, at the trial of the action, the cause or causes of action within the action, affirmative defense or defenses, claim for damages, or issue or issues of duty as to the motion which has been granted, are deemed to be established and the action will proceed as to the cause or causes of action, affirmative defense or defenses, claim for damages, or issue or issues of duty remaining [*Code Civ. Proc. § 437c(n)(1)*]. At trial, the fact the motion was granted will not bar any cause of action, defense, claim for damages, or issue of duty as to which summary adjudication was not sought or was denied [*Code Civ. Proc. § 437c(n)(2)*]. In addition, at trial, neither a party, nor a witness, nor the court is allowed to comment to a jury on the grant or denial of a motion for summary adjudication [*Code Civ. Proc. § 437c(n)(3)*].

Except when a separate judgment may properly be awarded in the action, no final judgment may be entered on a motion for summary adjudication prior to termination of the action, but the final judgment must, in addition to any matters determined in the action, award judgment as established by the summary adjudication proceeding [*see Code Civ. Proc. § 437c(k)*]. Thus, a summary adjudication essentially has the same evidentiary effect as a summary judgment; it is binding on the trial court prior to judgment, unless it is vacated by an appellate court on pretrial review or by the trial court on reconsideration of its ruling [*see Abadjian v. Superior Court (1985) 168 Cal. App. 3d 363, 370, 214 Cal. Rptr. 234* (decided under former Code Civ. Proc. § 437c; trial court erred in ignoring summary adjudication of issue when ruling on subsequent, separate pretrial motion)].

An order granting summary adjudication is not an appealable order. The method for obtaining appellate review of such an order is through a writ of mandate [*see Jacobs-Zorne v. Superior Court (1996) 46 Cal. App. 4th1064, 54 Cal. Rptr. 2d 385]* . In most cases, an interim order must await review on appeal from the final judgment. However, in cases of

significant legal impact, appellate courts may consider a petition for an extraordinary writ. The adequacy of an appellate remedy depends on the circumstances of the case, vesting a large measure of discretion in the appellate court to grant or deny a writ [*see City of Oakland v. Superior Court (1996) 45 Cal. App. 4th 740, 750, 53 Cal. Rptr. 2d 120]* .

When a summary adjudication would dispose of a cause of action that is independent of and severable from the remaining causes of action, it may be possible to obtain a separate, final, and appealable summary judgment with regard to that cause of action, sometimes called a partial summary judgment [*see Code Civ. Proc. § 437c(k)*; *James Talcott, Inc. v. Short (1979) 100 Cal. App. 3d 504, 506 n.1, 161 Cal. Rptr. 63* ; *see also De Grandchamp v. Texaco, Inc. (1979) 100 Cal. App. 3d 424, 431-436, 160 Cal. Rptr. 899]* . However, at least one court has held that the entry of a separate judgment is void when a second cause of action is still pending between the parties and the causes of action have never been severed into separate lawsuits [*Trani v. R.G. Hohman Enterprises, Inc. (1975) 52 Cal. App. 3d 314, 315-316, 125 Cal. Rptr. 34]* . Therefore, if the moving party desires a separate, final judgment in such a case, he or she should first sever the causes of action under *Code Civ. Proc. § 1048(b)* [*see* Ch. 45, *Consolidation, Severance, and Coordination of Actions*], and then seek summary judgment rather than for summary adjudication.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentAppellate ReviewAppealabilityCivil ProcedureSummary JudgmentPartial Summary JudgmentsCivil ProcedureJudgmentsEntry of JudgmentsMultiple Claims & PartiesCivil ProcedureAppealsAppellate JurisdictionInterlocutory Orders

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22-221 California Points & Authorities § 221.07

§ 221.07 Related Discussion and Forms

For a discussion and forms for use in moving for or opposing summary judgment, see Ch. 537, *Summary Judgment* , in California Forms of Pleading and Practice (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentOppositionGeneral OverviewCivil ProcedureSummary JudgmentOppositionMemoranda in OppositionCivil ProcedureSummary JudgmentOppositionSupporting Materials

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22-221 California Points & Authorities §§ 221.08-221.19

[Reserved]

§§ 221.08[Reserved]

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22-221 California Points & Authorities § 221.20

§ 221.20 Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c]--General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN SUPPORT OF MOTION FOR SUMMARY
vs.	)	JUDGMENT
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

_____ [DEFENDANT *or* PLAINTIFF] MAY MOVE FOR SUMMARY JUDGMENT WHEN HE/SHE CONTENDS THAT _____ [*for motion by defendant* THE ACTION HAS NO MERIT *or for motion by plaintiff* THERE IS NO DEFENSE TO THE ACTION]. SUMMARY JUDGMENT MUST BE GRANTED WHEN THE PAPERS SUBMITTED SHOW THAT THERE IS NO TRIABLE ISSUE AS TO ANY MATERIAL FACT AND THAT _____ [DEFENDANT *or* PLAINTIFF] IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

[*EITHER*]

A. Summary Judgment for Defendant. A defendant may move for summary judgment in any action or proceeding if it is contended that the action has no merit (*Code Civ. Proc. § 437c(a)*). A cause of action has no merit if (1) one or more of the elements of the cause of action cannot be separately established, even if that element is separately pleaded, or (2) a defendant establishes an affirmative defense to the cause of action (*Code Civ. Proc. § 437c(o)*). The motion shall be granted if all of the papers submitted show that there is no triable issue as to any material fact and that defendantis entitled to a judgment as a matter of law (*Code Civ. Proc. § 437c(c)*).

[*OR*]

A. Summary Judgment for Plaintiff. A plaintiff may move for summary judgment in any action or proceeding if it is contended that there is no defense to the action. Such motion must be granted if all of the papers submitted show that there is no triable issue as to any material fact and that plaintiff is entitled to a judgment as a matter of law (*Code Civ. Proc. § 437c(a), (c)*).

[*EITHER*]

B. Burden of Production. A _____ [plaintiff *or* cross complainant] has met his or her burden of showing that there is no defense to a cause of action if he or she has proved each element of the cause of action entitling him or her to judgment on that cause of action. Once the _____ [plaintiff *or* cross complainant] has met that burden, the burden shifts to the _____ [defendant *or* cross defendant] to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto (*Code Civ. Proc. § 437c(p)(1)*; *see Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 850, 107 Cal. Rptr. 2d 841, 24 P.3d 493*).

[*OR*]

B. Burden of Production. A _____ [defendant *or* cross defendant] has met his or her burden of showing that a cause of action has no merit if he or she has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the _____ [defendant *or* cross defendant] has met that burden, the burden shifts to the _____ [plaintiff *or* cross complainant] to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto (*Code Civ. Proc. § 437c(p)(2)*; *see Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 850, 107 Cal. Rptr. 2d 841, 24 P.3d 493*).

[*Optional*] **C. Negation of Element of Plaintiff's Cause of Action Not Required.** A moving defendant is not required to conclusively negate an element of the plaintiff's cause of action. All that is required is that the defendant show that one or more elements of the cause of action cannot be established by the plaintiff (*Code Civ. Proc. § 437c(p)(2)*; *Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 853, 107 Cal. Rptr. 2d 841, 24 P.3d 493*). The defendant may do this by showing that the plaintiff does not possess and cannot reasonably obtain, needed evidence (*Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 854, 107 Cal. Rptr. 2d 841, 24 P.3d 493* ; *see* Saelzler v. Advanced Group 400 *(2001) 25 Cal. 4th 763, 780-781, 107 Cal. Rptr. 2d 617*).

[*Optional*] **D. Reliance on Absence of Evidence to Support Nonmoving Party's Case.** A moving defendant may rely on factually devoid discovery responses to shift the burden of production pursuant to *Code Civ. Proc. § 437c(p)(2)*. Once the burden has shifted as a result of factually devoid discovery responses, the plaintiff must set forth the specific facts that prove the existence of a triable issue of a material fact (*Union Bank v. Superior Court (1995) 31 Cal. App.*

4th 573, 590, 37 Cal. Rptr. 2d 653 ; *Hunter v. Pacific Mechanical Corp. (1995) 37 Cal. App. 4th 1282, 1287, 44 Cal. Rptr. 2d 335* (disapproved in *Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 850, 855 n.23, 107 Cal. Rptr. 2d 841, 24 P.3d 493* to the extent language in it would purportedly allow a defendant moving for summary judgment simply to point out through argument an *absence of evidence* to support an element of the plaintiff's cause of action)).

[Discovery responses are factually devoid when the plaintiff is asked a specific question about the matter at issue and, although the matter would be in plaintiff's personal knowledge, responds that he or she does not recall (*see Chaknova v. Wilbur-Ellis Co. (1999) 69 Cal. App. 4th 962, 975-976 n.12, 81 Cal. Rptr. 2d 871*)].

[*Optional*] **E. Evidence and Inferences Considered by Court.** In determining whether the supporting papers show that there is no triable issue as to any material fact, the court must consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the court, and all inferences reasonably deducible from such evidence, if not contradicted by other inferences or evidence which raise a triable issue as to any material fact (*Code Civ. Proc. § 437c(c)*; *Hirsch v. Blish (1977) 76 Cal. App. 3d 163, 166, 142 Cal. Rptr. 646* (use of inference)).

[*Optional*] **F. Effect of Admission Against Interest Obtained During Discovery.** An admission against interest by the party opposing a motion for summary judgment is extended a very high credibility value in determining whether or not triable issues of fact exist; when such an admission demonstrates that there is no factual issue to be tried, certain requirements of summary judgment procedure, such as the liberal construction of the opposing party's counteraffidavits, are relaxed or altered in their operation (*D'Amico v. Board of Medical Examiners (1974) 11 Cal. 3d 1, 21-22, 112 Cal. Rptr. 786, 520 P.2d 10*). The court may give great weight to admissions made in depositions and disregard contradictory and self-serving affidavits of that party (*Benavidez v. San Jose Police Dept. (1999) 71 Cal. App. 4th 853, 860-861, 84 Cal. Rptr. 2d 157* ; *see Wilkins v. National Broadcasting Co. (1999) 71 Cal. App. 4th 1066, 1082, 84 Cal. Rptr. 2d 329* (deposition admissions valued so highly that controverting affidavits may be disregarded as irrelevant, inadmissible or evasive)).

[*Optional*] **G. Effect of Judicial Admission.** A defendant who moves for summary judgment may rely on allegations contained in the plaintiff's complaint, which constitute judicial admissions. As such they are conclusive concessions of the truth of a matter and have the effect of removing it from the issues. Contradictory evidence is limited to that which collaterally attacks the prior judicial admission on the basis of mistake, inadvertence, or lack of authority (*Barr v. ACandS, Inc. (1997) 57 Cal. App. 4th 1038, 1055-1056, 67 Cal. Rptr. 2d 494*).

[*Optional*] **H. Presumption Eliminates Triable Issue When No Contradictory Evidence Offered.** A presumption which affects the burden of producing evidence and operates in favor of the moving party may eliminate the existence of a triable issue of fact and thus justify summary judgment when no contradictory evidence is offered by the opposing party; such a presumption requires the trier of fact to assume the existence of a presumed fact unless, and until, evidence is introduced by the opposing party which would support a finding of its nonexistence (*see Evid. Code § 604*; *Security Pac. Nat. Bank v. Associated Motor Sales (1980) 106 Cal. App. 3d 171, 178-180, 165 Cal. Rptr. 38*).

[*Optional*] **I. Only Material Issue Presented Is Question of Law.** When the only material issue presented is a question of law, it is appropriate for the trial court to resolve the legal issue and grant summary judgment (*Morales v. Fansler (1989) 209 Cal. App. 3d 1581, 1584, 258 Cal. Rptr. 96*).

[*Optional*] **J. No Merit If Essential Element of Case Lacking.** A cause of action has no merit if one or more of the elements of the cause of action cannot be separately established, even if that element is separately pleaded (*Code Civ. Proc. § 437c(o)(1)*). Summary judgment may not be defeated because there are disputed factual issues which are unnecessary to the determination of a case; when the defendant's showing negates an essential element of the plaintiff's case, then no amount of factual conflict on other aspects of the case will preclude summary judgment (*Yurick v. Superior Court (1989) 209 Cal. App. 3d 1116, 1120, 257 Cal. Rptr. 665*).

[*Optional*] **K. No Merit If Complete Defense.** A cause of action has no merit if a defendant establishes an affirmative defense to that cause of action (*Code Civ. Proc. § 437c(p)(2)*; *City of Emeryville v. Superior Court (1991) 2 Cal. App. 4th 21, 24-25, 2 Cal. Rptr. 2d 826*).

[*Optional*] **L. Responsive Evidence Giving Rise to Mere Speculation Is Insufficient to Establish Triable Issue of Material Fact.** When parties have had sufficient opportunity adequately to develop their factual cases through discovery and the defendant has made a sufficient showing to establish a prima facie case in the defendant's favor, to avert summary judgment the plaintiff must produce substantial responsive evidence sufficient to establish a triable issue of material fact on the merits of defendant's showing. For this purpose, responsive evidence that gives rise to no more than mere speculation cannot be regarded as substantial, and is insufficient to establish a triable issue of material fact (*Sangster v. Paetkau (1998) 68 Cal. App. 4th 151, 162-163, 80 Cal. Rptr. 2d 66*).

[*Optional*] **M. Determining Triable Issue of Fact Does Not Turn on Trial Court's Discretion.** Whether there is a triable issue of material fact does not turn on the trial court's discretion. A motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law (*Fretland v. County of Humboldt (1999) 69 Cal. App. 4th 1478, 1490, 82 Cal. Rptr. 2d 359*).

[*Optional*] **N. Party Cannot Create Issue of Fact by Contradicting Prior Discovery Responses.** A party cannot create an issue of fact by a declaration which contradicts the party's own prior discovery responses (*Whitmire v. Ingersoll-Rand Co. (2010) 184 Cal. App. 4th 1078, 1087-1090* (deposition and interrogatory responses)). In determining whether a triable issue of material fact exists, the trial court may give great weight to admissions made in discovery and disregard contradictory and self-serving affidavits of the party (*Whitmire v. Ingersoll-Rand Co. (2010) 184 Cal. App. 4th 1078, 1087)* .

[*Add points and authorities from other chapters in this set supporting a summary judgment for the particular type of action or proceeding involved according to the facts of the case.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted by a defendant or plaintiff in any action or proceeding in support of a motion for summary judgment when the defendant contends that the action has no merit or when plaintiff contends there is no defense to the action. The motion must be granted if all of the papers submitted show that there is no triable issue as to any material fact and that the defendant or plaintiff is entitled to a judgment as a matter of law [*Code Civ. Proc. § 437c(a), (c)*]. Counsel should note, however, that summary judgment may not be used in proceedings to terminate parental rights under *Fam. Code §§ 7826, 7827* [*see In re Mark K. (1984) 159 Cal. App. 3d 94, 102-103, 205 Cal. Rptr. 393* (construing former Civ. Code §§ 232(a)(5), (6))].

Optional Paragraph C may be included when the moving defendant does not present evidence to conclusively negate an element of the plaintiff's cause of action, but can show that the plaintiff does not possess and cannot reasonably obtain evidence to prove plaintiff's case.

Optional Paragraph D may be used when the defendant moves for summary judgment and the plaintiff has failed to produce evidence supporting one or more elements of his or her case. The optional bracketed sentence at the end of Paragraph D is for use when the basis for arguing that discovery is factually devoid is that plaintiff was asked specific material questions and responded that he or she could not recall. Optional Paragraph E may be used when arguing for the court to consider specific evidence or presumptions. The paragraphs might both be used in addressing different issues underlying the motion.

Optional Paragraph F should be included when the motion is based in whole or in part on an admission against interest by the opposing party which shows that there is no factual issue to be tried.

Optional Paragraph G should be included when the motion is based in whole or in part on a judicial admission by the plaintiff which shows there is no factual issue to be tried.

Optional Paragraph H should be included when the motion is supported by a presumption affecting the burden of producing evidence which operates in favor of the moving party to eliminate the existence of a triable issue of fact.

Optional Paragraph I should be included when the only material issue raised by the parties is a legal issue to be resolved by the court.

Optional Paragraph J should be included when the motion is by a defendant whose showing negates an essential element of the plaintiff's case but defendant wishes to concede that a factual conflict exists on other aspects of the case. Optional Paragraph J may also be used in a separate supplemental memorandum of points and authorities when defendant's showing in support of the motion negates an essential element of plaintiff's cause of action but the plaintiff, in his or her opposing papers, insists the summary judgment motion should be denied because factual conflict exists on other aspects of the case.

Optional Paragraph K should be included when the motion is by a defendant who demonstrates a complete defense to the action, or, in the case of summary adjudication, a complete defense to a cause of action.

Optional Paragraph L may be used when the defendant moves for summary judgment and plaintiff's responsive evidence gives rise to no more than mere speculation.

Optional Paragraph M may be used to reenforce the point that the court is required to grant summary judgment when all the papers submitted show there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Counsel should also attach affidavits, declarations, or other papers that support the motion. The supporting papers must include a separate statement of material facts that the moving party contends are undisputed, along with supporting evidence for each fact [*Code Civ. Proc. § 437c(b)*]. Counsel may attach copies of any necessary documents if the originals are produced at the hearing and made available for inspection by the adverse party [*Dugar v. Happy Tiger Records, Inc. (1974) 41 Cal. App. 3d 811, 816, 116 Cal. Rptr. 412* ; *see Evid. Code § 1520 et seq.*].

For points and authorities which may be combined with this form in support of motions for summary judgment relating to particular causes of action and grounds, see the specific chapter in this set relating to the particular substantive area, such as Ch. 50, *Contracts;* Ch. 105, *Fraud and Deceit;* Ch. 115, *Indemnity and Contribution;* and Ch. 142, *Libel and Slander (Defamation*).

[b] Related Uses

As "any party" may move for summary judgment under *Code Civ. Proc. § 437c*, this form may be adapted for use by a cross complainant or cross defendant [*see, e.g., IT Corp. v. Superior Court (1978) 83 Cal. App. 3d 443, 446, 147 Cal. Rptr. 828* (summary judgment for cross defendant); *Nationwide Investment Corp. v. California Funeral Service, Inc. (1974) 40 Cal. App. 3d 494, 504, 114 Cal. Rptr. 77* (summary judgment for cross complainant)].

[c] Trial Court's Power to Consider Arguments Not Presented

In ruling on a motion for summary judgment, the trial court is not required to limit its decision to an analysis of the specific arguments presented. If another valid and legal reason that would support the summary judgment motion exists, the trial court may consider it when it can do so without depriving the responding party of a fair hearing [*Barczewski v. Commonwealth Land Title Ins. Co. (1989) 210 Cal. App. 3d 406, 413, 258 Cal. Rptr. 386]* .

[d] Remedy When Motion Improperly Denied

A writ of mandate is a proper remedy to compel a trial court to grant a motion for summary judgment when the affidavits in support of the moving party are sufficient to sustain a judgment in his or her favor, and the opponent does not by counteraffidavit show facts sufficient to present a triable issue of fact [*Rose v. Fife (1989) 207 Cal. App. 3d 760, 764-765 n.4, 255 Cal. Rptr. 440* ; *see Code Civ. Proc. § 437c(m)(1)* (procedure for seeking review by peremptory writ)].

[e] Summary Judgment as Res Judicata

A judgment entered on a motion for summary judgment is a determination that there is no factual dispute and that one party is entitled to judgment as a matter of law. Such a judgment is as final and conclusive a determination of the merits as a judgment after trial and, when final, is res judicata [*Stuart v. Lilves (1989) 210 Cal. App. 3d 1215, 1219, 258 Cal. Rptr. 780* (reversing order denying defendant's motion to vacate sister state judgment entered in California after sister-state refused to give full faith and credit to a California summary judgment on ground that the California judgment was not a judgment on the merits and, instead, entered judgment for plaintiff against defendant)].

[f] Related Pleading and Practice Forms

For forms of notice of motion and supporting papers for summary judgment, see Ch. 537, *Summary Judgment* , in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Burden of Production

The burden for the moving party plaintiff is to prove each element of the cause of action entitling plaintiff to judgment on that cause of action [*Code Civ. Proc. § 437c(p)(1)*].

The burden for a moving party defendant is to prove that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action [*Code Civ. Proc. § 437c(p)(2)*].

After the moving party has met this burden, the burden shifts to the opposing party to show that a triable issue of material fact exists as to that cause of action or a defense to it [*Code Civ. Proc. § 437c(p)(1), (2)*].

In ***Aguilar v. Atlantic Richfield Co.*** *(2001) 25 Cal. 4th 826, 107 Cal. Rptr. 2d 841, 24 P.3d 493* , an individual brought an antitrust action on behalf of herself and other consumers of gasoline against petroleum companies alleging

an unlawful conspiracy under the Cartwright Act (*Bus. & Prof. Code § 16720 et seq.*). The trial court granted the defendants' motions for summary judgment, but later granted the plaintiff's motion for a new trial. The court of appeal reversed the superior court's order and remanded the case to the superior court with directions to issue an order granting summary judgment to the defendants.

The Supreme Court affirmed the court of appeal. The Court clarified the 1992 and 1993 amendments to *Code Civ. Proc. § 437c*, noting that the amendments largely, but not completely, conformed California summary judgment law to its federal counterpart (*25 Cal. 4th 826, 849)* . The Court then explained the two types of burden on the motion, a burden of persuasion and a burden of production (*25 Cal. 4th 826, 850)* .

First, from commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he or she is entitled to judgment as a matter of law (*25 Cal. 4th 826, 850)* . The moving party's burden is more properly one of persuasion rather than of proof, since he or she must persuade the court that there is no material fact for a reasonable trier of fact to find, and not prove any such fact to the satisfaction of the court itself as though it were sitting as the trier of fact (*25 Cal. 4th 826, 850 n.11*). There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. Thus, a plaintiff bears the burden of persuasion that each element of the cause of action in question has been proved, and hence that there is no defense thereto (Code Civ. Proc. § 437c(o)(1); *see now Code Civ. Proc. § 437c(p)(1)*). A defendant bears the burden of persuasion that one or more elements of the cause of action in question cannot be established, or that there is a complete defense thereto (Code Civ. Proc. § 437c(o)(2); *see now Code Civ. Proc. § 437c(p)(1)*) (*25 Cal. 4th 826, 850)* .

Second, the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he or she carries this burden of production,the moving party causes a shift, and the opposing party is then subjected to a burden of production to make a prima facie showing of the existence of a triable issue of material fact (*25 Cal. 4th 826, 850)* .

How the parties moving for, and opposing, summary judgment may each carry their burden or persuasion and/or production depends on which would bear what burden of proof at trial. For example, if a plaintiff who would bear the burden of proof by a preponderance of evidence at trial moves for summary judgment, he or she must present evidence that would require a reasonable trier of fact to find any underlying material fact more likely than not--otherwise, he or she would not be entitled to judgment as a matter of law (*25 Cal. 4th 826, 850-851)* .

[b] Negation of Element of Plaintiff's Cause of Action Not Required

The facts and procedural background of ***Aguilar v. Atlantic Richfield Co.*** *(2001) 25 Cal. 4th 826, 107 Cal. Rptr. 2d 841, 24 P.3d 493* , are *discussed under § 221.20[3][a]*.

In affirming the court of appeal, the Supreme Court held that summary judgment law no longer requires a defendant moving for summary judgment to conclusively negate an element of the plaintiff's cause of action (*25 Cal. 4th 826, 826, 853)* .

However, California continues to require a defendant moving for summary judgment to present evidence, and not simply point out, that the plaintiff does not possess, and cannot reasonably obtain, needed evidence. Whereas, under federal law, "pointing out through argument" may be sufficient, under state law, it is not (*25 Cal. 4th 826, 854-855)* . The defendant must support the motion with evidence including "affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice" must or may be taken. (*Code Civ. Proc. § 437c(b)(1)*). The defendant may present evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence--as through admissions by the plaintiff following extensive discovery to the effect that he or she has discovered nothing. But the defendant must indeed present "evidence." The court disapproved *Hunter v. Pacific*

Mechanical Corp. (1995) 37 Cal. App. 4th 1282, 1288, 44 Cal. Rptr. 2d 335 , to the extent that language in it purportedly allowed a defendant moving for summary judgment simply to point out, "an *absence of evidence* to support" an element of the plaintiff's cause of action (*25 Cal. 4th 826, 855 n.23*).

At trial the plaintiff would have borne the burden of proof by a preponderance of the evidence as to her Cartwright Act cause of action. The defendants carried their initial burden of production to make a prima facie showing of the absence of any conspiracy through the declarations by their officers, managers, and similar employees, and through material from others including third parties that would require a reasonable jury not to find any conspiracy more likely than not. Plaintiff did not carry the burden of production that shifted to her to make a prima facie showing of the presence of unlawful conspiracy since her evidence was at best ambiguous as were the inferences that she drew from it (*25 Cal. 4th 826, 861-862)* .

In **Saelzler v. Advanced Group 400** *(2001) 25 Cal. 4th 763, 107 Cal. Rptr. 2d 617* , the plaintiff sued the owners of an apartment complex after she was criminally assaulted on the premises. Plaintiff claimed that defendant's failure to take proper security precautions was the proximate cause of her damages. Defendant filed a motion for summary judgment, arguing that plaintiff was unable to establish a causal link between defendant's omissions and her injuries. Plaintiff had no evidence showing the identity of her assailants, whether they were trespassers or tenants, whether the security gate was broken, or whether defendant could reasonably have warned the public of unspecified dangers from unknown assailants. The trial court granted summary judgment for defendant. The court of appeal reversed the trial court, but the Supreme Court reversed the court of appeal and affirmed the trial court. The Supreme Court held that the defendant had met its burden of showing that one element of plaintiff's cause of action, causation, could not be established. The court further held that the declaration of plaintiff's security expert based on the same evidence was equally speculative since he equally unaware of assailants' identities, and his opinion regarding causation was too tenuous to create a triable issue. Therefore, the burden shifted to plaintiff to show that a triable issue of fact existed as to causation. Plaintiff could not meet that burden (*25 Cal. 4th 763, 780-781)* .

[c] Reliance on Absence of Evidence to Support Nonmoving Party's Case

The litigation in ***Union Bank v. Superior Court*** *(1995) 31 Cal. App. 4th 573, 37 Cal. Rptr. 2d 653 (Second Dist. Div. Five)* , arose out of a transaction for the lease of medical equipment and involved numerous causes of action and defendants. One defendant, the lender that repossessed the equipment, moved for summary judgment relying on the plaintiffs' responses to requests for admissions and interrogatories. The plaintiffs refused to admit that the defendant had not defrauded them. However, in related interrogatories seeking facts underlying their refusal to make the admission, the plaintiffs merely stated that they believed that the defendant acted knowingly and fraudulently and reserved the right to further respond. The defendant included these responses to admissions and interrogatories in its statement of undisputed facts. The plaintiffs' response to the separate statement of undisputed facts relied on declarations that attached documents relating to the loan, and included statements about financial losses, a belief that the defendant was responsible for the losses, and that therewere unanswered questions about the where funds had gone. The trial court denied summary judgment, and the defendant sought a writ of mandate.

The court of appeal issued the writ and directed the trial court to grant summary judgment. The defendant argued that the factually devoid answers to the Judicial Council form interrogatories were sufficient to require plaintiffs to prove their case concerning the alleged misrepresentations and fraudulent conspiracy. Defendant also argued that the plaintiffs failed to provide substantial evidence of misrepresentations or a conspiracy in the declarations and documents cited in their opposition separate statement, and the court agreed (*31 Cal. App. 4th 573, 580-581)* . The court extensively analyzed the 1992 and 1993 amendments to *Code Civ. Proc. § 437c*, and concluded that the Legislature had intended the burden-shifting characteristics of *Fed. R. Civ. P., Rule 56*, as interpreted in *Celotex Corp. v. Catrett (1986) 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed 2d 265* , to be applied to California summary judgment motions when a defendant relied on a plaintiff's factually inadequate discovery answers to seek summary judgment (*31 Cal. App. 4th 573, 581-590)* . Applying these principles, the court held that the defendant was entitled to summary judgment. Defendant's

separate statement cited facts proving that repossession took place in accordance with the lending documents, and included plaintiffs' interrogatory responses, which demonstrated that they had no evidence. That was sufficient to shift the burden to the plaintiff, and the plaintiffs' conclusory declarations were not sufficient to raise a triable issue (*31 Cal. App. 4th 573, 592-593)* .

The court expressly limited their holding to the narrow issue before it and noted that they were not addressing other issues concerning the application of Rule 56 or *Celotex Corp.* to California summary judgment motions (*31 Cal. App. 4th 573, 591-592)* .

In ***Hunter v. Pacific Mechanical Corp.*** *(1995) 37 Cal. App. 4th 1282, 44 Cal. Rptr. 2d 335* (disapproved in *Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 850, 855 n.23, 107 Cal. Rptr. 2d 841, 24 P.3d 493* to the extent language in it would purportedly allow a defendant moving for summary judgment simply to point out through argument an *absence of evidence* to support an element of the plaintiff's cause of action), plaintiff sued multiple defendants alleging injuries resulting from his occupational exposure to asbestos. One of the defendants moved for summary judgment, relying on plaintiff's deposition testimony that he could not recall ever working in the same area with that defendant's employees. The plaintiff offered evidence showing overlap in work sites with the defendant during various time frames, suggesting that it was possible plaintiff could have been at the same job sites as defendant's employees. The trial court granted the motion for summary judgment, reasoning that the defendant had shown that the plaintiff could not establish liability on defendant's behalf and that plaintiff had submitted no facts to refute this.

The court of appeal affirmed. The court first noted that the 1992 and 1993 amendments of *Code Civ. Proc. § 437c* had moved toward the federal standard for the burden of proof. Thus, if the nonmoving party has the burden of proof at trial, the moving party need not support its summary judgment motion with evidence negating an essential element of the nonmoving party's case to satisfy its burden. The moving party need only point to the absence of evidence to support the nonmoving party's case. The nonmoving party must then set forth specific facts showing that there is a genuine issue for trial (*37 Cal. App. 4th 1282, 1286)* . The court noted that *Union Bank v. Superior Court (1995) 31 Cal. App. 4th 573, 37 Cal. Rptr. 2d 653* , had described the new framework for summary judgment practice in California under *Code Civ. Proc. § 437c(o)(2)*. Specifically, a moving defendant may now rely on factually devoid discovery responses to shift the burden of proof under Section 437c(o)(2). Once the burden has shifted as a result of factually devoid discovery responses, the plaintiff must set forth the specific facts that prove the existence of a triable issue of a material fact (*37 Cal. App. 4th 1282, 1287)* . Plaintiff urged the court of appeal not to follow the *Union Bank* decision. However, noting that plaintiff's argument relied on evidence of legislative intent considered and found unpersuasive in *Union Bank*, the court choose not to reanalyze the issues and stated that it found *Union Bank* persuasive. The court thus reviewed the trial court's grant of summary judgment using the same standards as set out in *Union Bank*, found the plaintiff's evidence to be only speculation and conjecture, and affirmed the summary judgment (*37 Cal. App. 4th 1282, 1289-1290)* .

Hunter has been criticized in *Hagen v. Hickenbottom (1995) 41 Cal. App. 4th 168, 48 Cal. Rptr. 2d 197 (Sixth Dist.)* , discussed in *§ 221.29[4][b]*. *Hagen* dealt with the version of Section 437c including the 1992, but not the 1993 amendments. The *Hagen* court nonetheless ventured to disagree with those who would be understood to suggest that a moving defendant may shift the burden by simply suggesting the possibility that the plaintiff cannot prove its case. The court stated that Section 437c requires the defendant to make some affirmative showing in support of his or her motion, more than pointing out the "absence of evidence." Thus, if a defendant cannot negate an element of the plaintiff's case, the defendant should be required to produce direct or circumstantial evidence that the plaintiff not only does not have but cannot reasonably expect to obtain a prima facie case. The court interpreted *Union Bank, above*, as satisfying that criteria because there the interrogatories demanded all facts substantiating plaintiff's refusal to admit. Plaintiffs' answers strongly supported an inference that plaintiffs had no facts to support their theory. The *Hagen* court particularly questioned the result in *Hunter* [*Hagen v. Hickenbottom (1995) 41 Cal. App. 4th 168, 185-187, 48 Cal. Rptr. 2d 197* ; *see* *Rio Linda Unified School Dist. v. Superior Court (1997) 52 Cal. App. 4th 732, 735, 60 Cal. Rptr. 2d 710* (Third Dist. court noted that moving party not now limitedto supporting its motion with affirmative evidence; it may also

establish its prima facie entitlement to judgment by demonstrating that its opponent's discovery responses are devoid of evidence to support an element of the opponent's case; however, court also noted in footnote 1 that *Sixth District in Addy v. Bliss & Glennon (1996) 44 Cal. App. 4th 205, 214, 51 Cal. Rptr. 2d 642* , held that moving party must also produce evidence that the opponent cannot reasonably expect to produce evidence supporting the infirm element; because infirmity in the cause of action before it was irremedial court did not have to reach issue of whether *Addy* is correct); *see also* *Addy v. Bliss & Glennon (1996) 44 Cal. App. 4th 205, 214, 51 Cal. Rptr. 2d 642* (discussed in *§ 221.29[4*][b])].

In *Certain Underwriters at Lloyd's of London v. Superior Court (1997) 56 Cal. App. 4th 952, 65 Cal. Rptr. 2d 821* , the court did not read *Hunter* (as had the court in *Addy v. Bliss & Glennon (1996) 44 Cal. App. 4th 205, 214, 51 Cal. Rptr. 2d 642*) to suggest that a moving defendant may shift the burden simply by suggesting the possibility that the plaintiff cannot prove its case. In the court's view, *Hunter* does no more than express its agreement with *Union Bank*. According to the court, quoting from *Hunter*, the defendant was not required to come forward with evidence of its own to demonstrate affirmatively that the plaintiff could not prevail. Rather, it was enough to show through factually vague discovery responses that the plaintiff lacked any significant probative evidence. In other words the defendant could effectively show that the element of causation could not be established by pointing to an absence of evidence to support that element [*Certain Underwriters at Lloyd's of London v. Superior Court (1997) 56 Cal. App. 4th 952, 960 n.6, 65 Cal. Rptr. 2d 821 (Second Dist, Div. One)]* . The court also noted that although defendant's initial burden can be met by the presentation of factually vague discovery responses or otherwise, no cases suggest that *Code Civ. Proc. § 437c* permits the moving defendant to meet its initial burden without any showing at all [*Certain Underwriters at Lloyd's of London v. Superior Court (1997) 56 Cal. App. 4th 952, 956, 65 Cal. Rptr. 2d 821]* .

Ultimately, the California Supreme Court disapproved language in decisions purportedly allowing a defendant moving for summary judgment simply to point out through argument an absence of evidence to support an element of the plaintiff's cause of action, specifically giving *Hunter* as an example [*Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 850, 855 n.23, 107 Cal. Rptr. 2d 841, 24 P.3d 493]* .

In ***Chaknova v. Wilbur-Ellis Co.*** *(1999) 69 Cal. App. 4th 962, 81 Cal. Rptr. 2d 871* , involving an action for asbestos-related injuries, the trial court granted summary judgment in defendant's favor. The court of appeal affirmed, holding that defendant met its burden of establishing that it was not liable for the plaintiffs' injuries and that the plaintiffs failed to create triable issues of material fact (*69 Cal. App. 4th 962, 965, 978)* . In reaching this conclusion, the court noted that a moving defendant may rely on factually devoid discovery responses to shift the burden of proof pursuant to Code Civ. Proc. § 437c(o)(2) (*see now Code Civ. Proc. § 437c(p)(1)*). Once the burden shifts as a result of the factually devoid discovery responses, the plaintiff must set forth specific facts that prove the existence of a triable issue of material fact (*69 Cal. App. 4th 962, 974)* . If the plaintiff fails to make that showing, summary judgment must be granted (*69 Cal. App. 4th 962, 975)* . The court distinguished *Villa v. McFerren (1995) 35 Cal. App. 4th 733, 41 Cal. Rptr. 2d 719* , and *Hagen v. Hickenbottom (1995) 41 Cal. App. 4th 168, 48 Cal. Rptr. 2d 197* , in which defendant's reliance on plaintiff's factually devoid discovery responses was inadequate to shift the burden of proof because plaintiff could not be expected to have knowledge of matters particularly within defendant's own knowledge or within plaintiff's decedent's knowledge. The court followed *Hunter v. Pacific Mechanical Corp. (1995) 37 Cal. App. 4th 1282, 1287, 44 Cal. Rptr. 2d 335* , and held that specific questions to which the plaintiff responded that he could not recall were sufficient to support a showing of factually devoid discovery responses, which distinguished *Scheiding v. Dinwiddie Construction Co. (1999) 69 Cal. App. 4th 64, 81 Cal. Rptr. 2d 360* , in which the plaintiff had never been asked the relevant specific questions (*69 Cal. App. 4th 962, 975-976, n.12*).

The court also rejected plaintiffs' argument that certain general discovery responses supported an inference that asbestos products brokered by defendant might have been present at job sites where plaintiff's decedent worked, finding that the evidence was neither actually nor hypothetically susceptible to such an inference. First, plaintiff' deposition testimony was more specific in stating that he had no such knowledge or recollection, and second, under *Hunter*, the evidence presented by plaintiffs was insufficient, as it offered only speculation and conjecture regarding exposure to

asbestos-containing products brokered by defendant (*69 Cal. App. 4th 962, 976-977)* .

For discussion of *Scheiding v. Dinwiddie Construction Co. (1999) 69 Cal. App. 4th 64, 81 Cal. Rptr. 2d 360* , see *§ 221.29[3][b]*.

[d] Evidence and Inferences Considered by Court

Hirsch v. Blish *(1977) 76 Cal. App. 3d 163, 142 Cal. Rptr. 646* , was an action for property damage and personal injuries resulting from an automobile accident. Plaintiff filed the complaint one year and three days after the accident. After the property damage claim was settled and dismissed, defendant moved for summary judgment on the personal injury cause of action on the ground that it was barred by the one-year statute of limitations contained in Code Civ. Proc. § 340(3) (*see now Code Civ. Proc. § 335.1*, which extends statute of limitations to two years for personal injury actions). Plaintiff argued that the statute was tolled for a two-week periodafter the date of the accident during which defendant was absent from the state while driving to and from St. Louis on vacation. The trial court granted summary judgment, and plaintiff appealed from the judgment.

The court of appeal affirmed summary judgment for defendant. It construed the provision of *Veh. Code § 17463*, which excludes from the time limited for commencement of certain actions the period a person is out of state and cannot be located through the exercise of reasonable diligence, as requiring plaintiff to actively exercise reasonable diligence to locate defendant. The court stated that the lack of a triable issue of fact may be established by an inference if the inference is the only reasonable one that may be drawn from the evidence presented for and against the motion for summary judgment. The court held that total failure of contact of anyone seeking defendant with defendant's neighbors, business associates, and relatives, and the failure of any notice directed to defendant's long-time place of residence supports only one reasonable inference--that no one, including plaintiff, was diligently seeking defendant's whereabouts during his absence from the state (*76 Cal. App. 3d 163, 166)* .

[e] Effect of Admission Against Interest Obtained During Discovery

D'Amico v. Board of Medical Examiners *(1974) 11 Cal. 3d 1, 112 Cal. Rptr. 786, 520 P.2d 10* , was a mandamus proceeding by graduates of out-of-state osteopathic colleges to compel state medical and osteopathic boards to examine and license plaintiffs as physicians and surgeons. The Supreme Court affirmed summary judgment for plaintiffs, declaring enactments which forbid licensure of such graduates in California regardless of individual qualifications to be unconstitutional because they deny plaintiffs equal protection of the laws, and ordered the issuance of a peremptory writ of mandate directing the osteopathic board to furnish, receive, and process application forms and to examine and license plaintiffs and others in their class who are found to be qualified. Although the Court held that the trial court improperly employed the strict scrutiny test in reviewing the legislative classification in question under the *equal protection clause*, it sustained the judgment because plaintiffs had demonstrated that the classification did not bear a rational relationship to any conceivable legitimate state interest. In reaching this holding, the Court used admissions filed by the Attorney General on behalf of the medical board during discovery proceedings. The Court noted that when discovery has produced an admission on the part of the party opposing summary judgment which demonstrates that there is no factual issue to be tried, certain requirements of summary judgment procedure, such as the liberal construction of an opposing party's counteraffidavits, are relaxed or altered in their operation. Admissions against interest obtained during discovery have a very high credibility value. Accordingly, the Court stated that when such an admission becomes relevant to the determination, on motion for summary judgment, of whether or not there exist triable issues of fact between the parties, it is entitled to and should receive a kind of deference not normally accorded evidentiary allegations in affidavits (*11 Cal. 3d 1, 21-22)* .

In ***Wilkins v. National Broadcasting Co.*** *(1999) 71 Cal. App. 4th 1066, 84 Cal. Rptr. 2d 329* , two National Broadcasting Company, Inc., producers (defendants) responded to a company's advertisement for investors and arranged to meet with a company salesperson. They met with the plaintiffs, who were company representatives, at a

restaurant and videotaped the lunch meeting with hidden cameras. Portions of the videotape appeared in a subsequent television broadcast. Plaintiffs alleged causes of action for physical intrusion on solitude or into private affairs, unlawful eavesdropping on or recording of confidential communications, fraud, and various other causes of action. The trial court granted summary judgment in favor of the defendants. Judgment was entered and plaintiff appealed.

The court of appeal affirmed. In affirming, the court noted that California courts do not permit a party to defeat summary judgment by contradicting in a declaration that party's previous deposition testimony. On a motion for summary judgment, the credibility of deposition admissions are valued so highly that the controverting affidavits may be disregarded as irrelevant, inadmissible or evasive (*71 Cal. App. 4th 1066, 1082)* .

In ***Benavidez v. San Jose Police Dept.*** *(1999) 71 Cal. App. 4th 853, 84 Cal. Rptr. 2d 157* , plaintiffs were a mother and son. After the mother was attacked on three separate occasions by her live-in boyfriend within one twenty four hour period, plaintiffs sued the defendants for negligence, intentional infliction of emotional distress, negligence per se, and violation of *42 U.S.C. § 1983* for failing to take adequate precautions to protect her and her son. The trial court granted summary judgment in favor of the defendants. Plaintiffs appealed from the judgment only as to the causes of action for negligence and negligent infliction of emotional distress (*71 Cal. App. 4th 853, 856, 868)* .

The court of appeals affirmed (*71 Cal. App. 4th 853, 856)* . Plaintiffs' causes of action for negligence were premised on the police department's failure to protect them from the final attack (*71 Cal. App. 4th 853, 859)* . The plaintiff mother argued that she produced evidence that a special relationship was created, specifying, among other things, her declaration in opposition to summary judgment. In analyzing the statements made in the declaration, the court noted that it was constrained by the well-settled rule that a party cannot create an issue of fact by a declaration that contradicts his or her prior discovery responses. In determining whether any triable issue of material facts exists, the trial court may, in its discretion, give great weight to admissions made in deposition and disregard contradictory and self-serving affidavits of the party (*71 Cal. App. 4th 853* ,860). This is because, as explained in *D'Amico v. Board of Medical Examiners (1994) 11 Cal. 3d 1* , when there is a clear and unequivocal admission by the plaintiff in his or her deposition the trial court is forced to conclude there is no substantial evidence of the existence of a triable issue of fact notwithstanding a contradictory declaration in opposition to summary judgment. Admissions against interest have a very high credibility value. This is especially true when, as in this case, the admission is obtained not in the normal course of human activities and affairs but in the context of an established pretrial procedure whose purpose is to elicit facts. Accordingly, when such an admission becomes relevant to the determination, on motion for summary judgment, of whether or not there exists triable issues of fact (as opposed to legal issues) between the parties, it is entitled to and should receive a kind of deference not normally accorded evidentiary allegations in affidavits (*71 Cal. App. 4th 853, 861)* . With these rules in mind, plaintiff's statement in her declaration that she told the officers she wanted to go to a shelter and that they ignored her directly and unequivocally contradicted her deposition testimony that she did not say anything and that she did not tell them she wanted to leave her apartment. Under the case law, her latter statement must be disregarded (*71 Cal. App. 4th 853, 861)* . Similarly, plaintiff's statement in her declaration that the officers told her "Don't worry, we're here!" which led her to believe that they would remain to protect her and her son is belied in her deposition testimony (*71 Cal. App. 4th 853, 862)* .

The court distinguished two cases that held that declarations that contradict earlier discovery responses may sometimes be considered. *Price v. Wells Fargo Bank (1989) 213 Cal. App. 3d 465, 261 Cal. Rptr. 735* involved admissions that were circumstantial, tacit, or fragmentary and equivocal concessions, whereas in contrast, the admissions in the earlier deposition in this case were not equivocal. They directly and unequivocally contradicted the later statements. *Niederer v. Ferreira (1987) 189 Cal. App. 3d 1485, 234 Cal. Rptr. 779* , involved a plaintiff's misunderstanding of a legal term of art. The contradiction in the instant case cannot be explained based on plaintiff's lack of understanding of a legal term of art (*71 Cal. App. 4th 853, 862)* . Plaintiff's responses were contradictory and mutually exclusive. Under these circumstance, the trial court did not abuse its discretion in ruling that the contradictory statements in plaintiff's declaration must be disregarded, and therefore that those statements failed to raise a triable issue of fact (*71 Cal. App. 4th 853, 862)* .

[f] Effect of Judicial Admission

Barr v. ACandS, Inc. *(1997) 57 Cal. App. 4th 1038, 67 Cal. Rptr. 2d 494* involved three consolidated cases. The trial court determined as a matter of law that the plaintiffs' claims arising out of occupational exposure to asbestos were barred by the statute of limitations set forth in *Code Civ. Proc. § 340.2* as a result of the filing of prior suits involving the same exposure. Plaintiffs appealed (*57 Cal. App. 4th 1038, 1042)* .

The court of appeal affirmed the trial court judgments in defendants' favor. In one of the cases plaintiff contended that plaintiff's second action sought damages for a different and distinct injury from that alleged in the first action. In the trial court, as well as on appeal, defendant argued that the second suit did not arise from a separate injury but sought damages instead for the very same injuries alleged in plaintiff's first action. The trial court in deciding the issue looked no further than the pleadings in the first action, particularly the allegations that plaintiff's exposure to asbestos or asbestos containing products at the defendant site cause plaintiff severe and permanent injury, including cancer. Therefore, the trial court would not consider evidence plaintiff offered contradicting plaintiff's prior pleading in an effort to raise a material issue of fact as to when plaintiff's cause of action against defendant commenced (*57 Cal. App. 4th 1038, 1054-1055)* . Plaintiff referred to the same extrinsic evidence on appeal, arguing a triable issue of fact existed as to whether plaintiff had actually been diagnosed with cancer when plaintiff filed the first action in 1993. Plaintiff once again relied on a declaration of an expert witness indicating that the results of the witness's 1996 examination of plaintiff first revealed cancer and the preliminary fact sheet attached to plaintiff's complaint in the first action which identified plaintiff's injuries as asbestosis and asbestos-related pleural disease. Plaintiff argued that plaintiff had a separate claim and a separate one-year limitation period for each distinct injury. The court concluded that it did not have determine the issue of whether asbestos-caused cancer constitutes a separate and distinct injury to which a separate limitations period applies. The court agreed with the trial court that plaintiff was bound by the allegations contained in plaintiff's first complaint that plaintiff had contracted asbestos-induced cancer (*57 Cal. App. 4th 1038, 1055)* . The court quoting *Uram v. Abex Corp. (1990) 217 Cal. App. 3d 1425, 1433, 266 Cal. Rptr. 695* , and citing other cases, noted that a defendant moving for summary judgment may rely on allegations in plaintiff's complaint which are judicial admissions. As such, they are conclusive concessions of truth of a matter and have the effect of removing it from the issues (*57 Cal. App. 4th 1038, 1055-1056)* . The court further noted that contradictory evidence is limited to that which collaterally attacks the prior judicial admission on the basis of mistake, inadvertence, or lack of authority (*57 Cal. App. 4th 1038, 1056)* .

There is some authority that has not given a judicial admission conclusive effect [*see* *Kirby v. Albert D. Seeno Construction Co. (1992) 11 Cal. App. 4th 1059, 1066-1067, 14 Cal. Rptr. 2d 604* (court refused to give conclusive effect to ambiguous statement in an unverified complaint when statement was explained in deposition testimony under oath; summary judgment should not be entered on mistaken legal conclusions in complaint when facts submitted in opposition indicate existence of materialfactual issue); *see also* *24 Hour Fitness, Inc. v. Superior Court (1998) 66 Cal. App. 4th 1199, 1211, 78 Cal. Rptr. 2d 533* (admission in complaint that party acted within course and scope of employment will not bind plaintiff on summary judgment if plaintiff offers countervailing evidence in opposition to summary judgment motion); *Prilliman v. United Air Lines, Inc. (1997) 53 Cal. App. 4th 935, 961, 62 Cal. Rptr. 2d 142* (judicial admission has not been accorded as broad application as discovery admission; judicial admission, however, not involved in case)].

[g] Presumption Eliminates Triable Issue When No Contradictory Evidence Offered

Security Pac. Nat. Bank v. Associated Motor Sales *(1980) 106 Cal. App. 3d 171, 165 Cal. Rptr. 38* , was an action by a bank against a commercial checking account customer for the recovery of an overdraft resulting from the dishonor by payor banks of checks indorsed and deposited in defendant's account, and to impose indorser's liability on defendant in respect of the same dishonored checks. Plaintiff 's motion for summary judgment was granted by the trial court, and defendant appealed from the judgment.

The court of appeal affirmed summary judgment for plaintiff as to the second cause of action to impose indorser's liability, deeming it unnecessary to discuss the sufficiency of plaintiff's showing of its right to recover under the first cause of action. As defendant admitted its indorsement of the checks in its answer, the court stated that plaintiff's right to recover required only that it prove that the checks were dishonored and that timely notice of dishonor was given by it to defendant. As proof of dishonor, plaintiff submitted the returned checks bearing insufficient funds stamps. The stamps created a presumption of dishonor under former Com. Code § 3510 (*now see Com. Code § 3505(a)*), which presumption affects the burden of producing evidence under former Com. Code § 1210. Such presumptions under *Evid. Code § 604* require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence. As defendant failed to present any evidence to contradict the presumption of dishonor, there was no triable issue of fact in that respect (*106 Cal. App. 3d 171, 176-180)* . Since timely notice of dishonor was established by plaintiff's uncontradicted declarations, the court held that summary judgment was properly granted.

[h] Only Material Issue Presented Is Question of Law

In ***Morales v. Fansler*** *(1989) 209 Cal. App. 3d 1581, 258 Cal. Rptr. 96* , defendants had leased premises to tenants for use as a restaurant. The lease required the tenants to obtain personal injury liability insurance in the minimum amount of $500,000 per injured person and $1 million per occurrence. The tenants obtained liability insurance for only $300,000 per person. Plaintiff minor was seriously burned when his parents and he and his siblings were having lunch at the restaurant; he wandered into the kitchen where he fell or was knocked into a large pot of soup, which had been left on the kitchen floor, and was seriously burned. Plaintiffs received $300,000 in settlement from the tenants' insurance carrier, and sued defendants for negligence in failing to make sure the tenants obtained the required $500,000 insurance policy. The trial court granted defendants' motion for summary judgment. The court of appeal affirmed. The court said that where the only material issue presented is a question of law, it is appropriate for the court to resolve the legal issue and grant summary judgment (*209 Cal. App. 3d 1581, 1584)* . The court said the only material issue involved in the case was whether defendants had a legal duty to the plaintiffs to see to it that their tenants obtained insurance in the full amount agreed to, that this was a question of law (*209 Cal. App. 3d 1581, 1585)* , and that, as a matter of law, the defendants owed plaintiffs no such duty (*209 Cal. App. 3d 1581, 1585-1589)* .

[i] No Merit if Essential Element of Case Lacking

Yurick v. Superior Court *(1989) 209 Cal. App. 3d 1116, 257 Cal. Rptr. 665* , was an action by a former hospital employee against a hospital alleging sex discrimination, unlawful retaliation, intentional infliction of emotional distress, wrongful discharge, and age harassment, and against her former supervisor for age harassment and intentional infliction of emotional distress. Some 10 months before the supervisor had become plaintiff's supervisor, plaintiff had filed with the Department of Fair Employment and Housing a charge against the hospital alleging unlawful sex discrimination in employment, but failed to amend it to include an allegation of age discrimination or any other subsequent event. The motion of the supervisor for summary judgment was denied, and he petitioned for a writ of mandate. In granting the writ, the court of appeal, although it acknowledged the rule that summary judgment may not be granted if the papers submitted show a triable issue of material fact, said that summary judgment may not be defeated merely because there are disputed factual issues; if the defendant's showing negates an essential element of the plaintiff's case, then no amount of factual conflict on other aspects of the case will preclude summary judgment (*209 Cal. App. 3d 1116, 1120)* . The court held that (1) plaintiff's claim of sex discrimination did not encompass the cause of action alleged against the supervisor and that plaintiff had failed to exhaust her administrative remedy as to that cause (*209 Cal. App. 3d 1116, 1123)* ; and (2) the defendant's showing completely negated an essential element of the action for intentional infliction of emotional distress, namely, outrageous conduct (*209 Cal. App. 3d 1116, 1130)* .

[j] No Merit if Complete Defense

A 1992 amendment of *Code Civ. Proc. § 437c(f)* (that part of subsection (f) was moved to *Code Civ. Proc. § 437c(n)* in

1993, *see now Code Civ. Proc. § 437c(o)* effective in 2003) codifies the holding of ***City of Emeryville v. Superior Court*** *(1991) 2 Cal. App. 4th 21, 2 Cal. Rptr. 2d 826* . In that case, cross defendant City of Emeryville moved for summary adjudication in an automobile accident case arising out of a police pursuit, claiming immunity because it had adopted a vehicle pursuit policy under standards set by the Vehicle Code. The trial court ruled that it had no jurisdiction to decide the merits of an affirmative defense, interpreting *Code Civ. Proc. § 437c(f)*, as amended by Stats. 1990, ch. 1561, as defining "no merit" exclusively in terms of elements of a cause of action.

The court of appeal reversed, clarifying an ambiguity caused by the Legislature's 1990 amendment of *Code Civ. Proc. § 437c(f)* regarding when summary adjudication is available. The summary adjudication statute provides that a party may move for summary adjudication if it contends that one or more causes of action has "no merit" or that "there is no defense thereto," and "a cause of action has no merit if one or more of the elements of the cause of action ... cannot be established." Discussing the legislative history of the statute, the court concluded that the definition of "no merit" in *Code Civ. Proc. § 437c(f)* was not intended to be exclusive, and held that, in keeping with well-established case law, a defendant may still show "no merit" by establishing a complete defense to a cause of action (*2 Cal. App. 4th 21, 25)* .

[k] Responsive Evidence Giving Rise to Mere Speculation Is Insufficient to Establish Triable Issue of Material Fact

In ***Sangster v. Paetkau*** *(1998) 68 Cal. App. 4th 151, 80 Cal. Rptr. 2d 66* , plaintiff filed a complaint for malicious prosecution against defendants arising from an underlying cross complaint for fraud and breach of fiduciary duty filed by the defendants against the plaintiff. The plaintiff had prevailed as cross-defendant on the underlying cross complaint after a lengthy trial. Defendants moved for summary judgment arguing, among other things, that the undisputed facts established probable cause for the defendants to prosecute the underlying cross complaint against the plaintiff. The trial court found that no triable issue of material fact existed as to defendants' having probable cause to initiate the underlying cross complaint against the plaintiff. It granted defendants' motion for summary judgment on that basis. Judgment was entered, and plaintiff appealed (*68 Cal. App. 4th 151, 157-160)* .

The court of appeal affirmed judgment for the defendants. In so doing the court noted that under *Code Civ. Proc. § 437c(c)*, a trial court is required to grant summary judgment if all the papers and affidavits submitted, together with all inferences reasonable deducible from the evidence and uncontradicted by other inferences or evidence, show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law (*68 Cal. App. 4th 151, 161)* . The plaintiff opposing a summary judgment motion cannot rely on his or her pleadings alone, but must file opposition to the motion, with affidavits setting forth specific facts showing a triable issue of material fact exists as to cause of action or defense (*68 Cal. App. 4th 151, 162)* . The purpose of the summary judgment procedure is to identify those cases in which there is no triable issue as to any material fact. For practical purposes, an issue of material fact is one which in the context and circumstances of the case warrants the time and cost of factfinding by trial. In other words, not every issue of fact is worth submission to a jury. The purpose of summary judgment is to separate cases in which there are material issues of fact meriting trial from those in which there are no such issues (*68 Cal. App. 4th 151, 162)* . When the parties have had sufficient opportunity adequately to develop their factual cases through discovery and the defendant has made a sufficient showing to establish a prima facie case in the defendant's favor, in order to avert summary judgment the plaintiff must produce substantial responsive evidence sufficient to establish a triable issue of material fact on the merits of the defendant's showing. For this purpose, responsive evidence that gives rise to no more than mere speculation cannot be regarded as substantial and is insufficient to establish a triable issue of material fact (*68 Cal. App. 4th 151, 162-163)* .

With regard to the malicious prosecution action the court noted that the probable cause element of a malicious prosecution action requires an objective judicial determination of the reasonableness of the defendant's prior lawsuit. The existence or absence of probable cause is a question of law to be determined by the trial court from the facts. The question for the trial court is whether, on the basis of the facts known to the defendant, the prosecution of the prior action was legally tenable (*68 Cal. App. 4th 151, 164)* . The fact there may be some disputed facts relevant to the

merits of the underlying action does not of itself defeat a motion for summary judgment in a malicious prosecution action. If undisputed facts in the record do establish an objectively reasonable basis for bringing the underlying action, the existence of other, allegedly disputed facts is immaterial (*68 Cal. App. 4th 151, 167)* . Viewed objectively, the evidence clearly established probable cause for all the three causes of action alleged in the underlying cross-complaint. The court concluded that the plaintiff failed to meet the threshold requirement for the malicious prosecution action of demonstrating an absence of probable cause and thus the defendants were entitled to prevail on their motion for summary judgment (*68 Cal. App. 4th 151, 172)* .

[l] Determining Triable Issue of Fact Does Not Turn on Trial Court's Discretion

In ***Fretland v. County of Humboldt*** *(1999) 69 Cal. App. 4th 1478, 82 Cal. Rptr. 2d 359* , the trial court granted a summary judgment which disposed of plaintiff's action against plaintiff's former employer. Plaintiff appealed from the judgment. Plaintiff contended triable issues of fact existed as to plaintiff's claims for discrimination in violation of the California Fair Employment and Housing Act (*Gov. Code § 12900 et seq*; hereafter FELA), assault and battery, and emotional distress. The court of appeal initially held that the plaintiff's claims were barred by the exclusive remedy provisions of the workers' compensation law and affirmed the judgment, but the California Supreme Court granted review and thereafter transferred the case to the court of appeal with directions to vacate its earlier decision and to reconsider the case in light of *Moorpark v. Superior Court (1998) 18 Cal. 4th 1143, 77 Cal. Rptr. 2d 445, 959 P.2d 752* .

The court of appeal then vacated its earlier decision and reversed judgment in defendant's favor holding that plaintiff's FEHA and emotional distress claims were not barred by the exclusive remedy provisions of the workers' compensation law. The court of appeal however, affirmed summary judgment against the plaintiff on plaintiff's assault and battery claim on the basis that it was barred by the exclusive remedy provisions (*69 Cal. App. 4th 1478, 1481, 1492-1493)* . One argument defendant raised on appeal was that the trial court properly exercised its discretion in determining there was no triable issue as to the material fact that there was no ratification (by the defendant of alleged wrongful conduct by its employee). In rejecting this argument, the court noted that whether there is a triable issue of material fact does not turn on the trial court's discretion. A motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial court's summary judgment is subject to independent review. The only exception to the independent review standard applies when the court of appeal reviews a trial court's exercise of discretion as allowed by *Code Civ. Proc. § 437c(e)*. Under all other circumstances, it is legally and procedurally incorrect to apply an abuse of discretion standard (*69 Cal. App. 4th 1478, 1490)* . For discussion of standard of review and issues for which an abuse of discretion standard on appeal may apply, [*see § 221.47[2*][a]; *see also* discussion in California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender)].

[m] Party Cannot Create Issue of Fact by Contracting Prior Discovery Responses.

In ***Whitmire v. Ingersoll-Rand Co.*** *(2010) 184 Cal. App. 4th 1078* , plaintiff, on her own behalf and as successor in interest to her husband, sued defendants, *inter alia*, for, *inter alia*, negligence and strict liability related to the husband's exposure to asbestos. The husband had been employed as an electrician at a public utility's power plants. After he contracted mesothelioma, plaintiffs sued defendants, among other defendants, alleging that the husband had contracted mesothelioma from exposure at the power plants to asbestos-containing products for which defendants were responsible. He had worked at three locations in Northern California. Although in the complaint plaintiffs alleged that he had been exposed to asbestos as a result of defendants' conduct at all three sites, in opposition to defendants' motion for summary judgment, plaintiffs produced no evidence that he was exposed to asbestos at either the second or third site. On appeal, they did not contend that he was injured by exposure to asbestos attributable to defendants at either the second or third site. Plaintiffs thereby forfeited any claim against defendants with respect to exposure to asbestos at the second or third site (*184 Cal. App. 4th 1078, 1081* ; *see North Coast Business Park v. Nielsen Construction Co. (1993) 17 Cal. App. 4th 22, 31, 21 Cal. Rptr. 2d 104* (possible theories not fully developed or factually presented to trial

court cannot create triable issue on appeal); *Hoffman v. Sports Car Club of America (1986) 180 Cal. App. 3d 119, 126, 225 Cal. Rptr. 359* (where plaintiff failed to present evidence supporting claim in opposition to summary judgment motion, claim was not preserved)). In their complaint, plaintiffs alleged causes of action for negligence, strict liability, false representation, and intentional tort/intentional failure to warn. They alleged generally that defendants negligently and with conscious disregard for the safety of exposed persons "researched, manufactured, fabricated, designed, modified, tested or failed to test, abated or failed to abate, warned or failed to warn of the health hazards, labeled, assembled, distributed, leased, bought, offered for sale, supplied, sold, inspected, serviced, installed, contracted for installation, repaired, marketed, warranted, re-branded, manufactured for others, packaged, and advertised" asbestos and asbestos-containing products. Defendants served "all-facts" interrogatories on plaintiffs requesting the details of the husband's alleged exposure to asbestos specifically attributable to defendants, and in their responses, plaintiffs set forth two theories of such exposure: The first was that defendants were collectively an outside contractor that performed modification and overhaul work to power plant boilers, including the removal or "ripout" of asbestos-containing insulation from the boilers and resulting in the husband inhaling heavy dust. In a declaration later submitted in opposition to defendants' summary judgment motion, the husband stated that defendants' repair work took place at the first site. However, plaintiffs' responses to special interrogatories stated unequivocally that defendants collectively were an outside contractor at the third facility, not the first one. The second was that defendants exposed the husband to asbestos as the general contractor responsible for the construction of the first site, and the husband was exposed to asbestos fibers released from work he performed on the various asbestos-containing materials, products and equipment, and from work performed by others on the various asbestos-containing products, material and equipment in his immediate vicinity, at the first site. Defendants moved for summary judgment on the issue of causation, contending that plaintiffs had not produced and could not produce evidence that the husband was ever exposed to asbestos attributable to defendants, much less that asbestos attributable to defendants was a substantial factor in the causation of his alleged injury. In opposition, plaintiffs argued that defendants failed to meet the initial moving burden of demonstrating the absence of a triable issue of material fact and, in the alternative, submitted evidence that plaintiffs contended was sufficient to create a triable controversy as to whether the husband was exposed to asbestos as a result of defendants' conduct. At the hearing, the trial court's tentative ruling was to grant summary judgment; the court proposed to disregard the husband's declaration alleging exposure at the first plant because it was inconsistent with prior discovery responses in which the husband declared he had been exposed at the third facility. It appeared from the hearing that this was the court's ultimate ruling, although the judgment did not state the reasons (*184 Cal. App. 4th 1078, 1080-1083)* .

The Court of Appeals affirmed. The court first reviewed the summary judgment standard generally and the causation standard with regard to asbestos litigation (*184 Cal. App. 4th 1078, 1083-1084)* . The court found that plaintiffs did not present sufficient evidence to raise a triable issue of fact regarding exposure at the first site, noting that plaintiffs had forfeited any argument that defendants failed to meet their initial burden of production with respect to exposure at the first site by failing to so argue in their opening brief (*184 Cal. App. 4th 1078, 1084-1085* ; *see Fidelity National Title Ins. Co. v. Schroeder (2009) 179 Cal. App. 4th 834, 847, n.11, 101 Cal. Rptr. 3d 854* ; *Tilton v. Reclamation Dist. No. 800 (2006) 142 Cal. App. 4th 848, 864, n.12, 48 Cal. Rptr. 3d 366*). The court held that reasonable jurors could not find that, as to the first site, plaintiffs had produced sufficient evidence to create a triable issue of fact that the husband was exposed to such asbestos-containing materials with enough frequency and regularity as to show a reasonable medical probability that the exposure was a factor in causing his illness. In contending that the husband was exposed to asbestos from insulation disturbed by defendants at the first site, plaintiffs primarily relied on a declaration from the husband submitted in opposition to defendants' summary judgment motion, in which he claimed that he was exposed to asbestos dust in the early 1960's when defendants performed work on boilers at the first site. However, the trial court properly disregarded the declaration on the basis that it contradicted his previous deposition testimony and interrogatory responses, and thus did not create a triable issue of fact, because a party cannot create an issue of fact by a declaration contradicting the party's own prior discovery responses (*184 Cal. App. 4th 1078, 1087* ; *see Shin v. Ahn (2007) 42 Cal. 4th 482, 500, n. 12, 64 Cal. Rptr. 3d 803, 165 P.3d 581* ; *see also Preach v. Monter Rainbow (1993) 12 Cal. App. 4th 1441, 1451, 16 Cal. Rptr. 2d 320* (party cannot create issue of fact by declaration contradicting party's prior pleadings)). Because the declaration submitted in opposition to defendants' motion for summary judgment clearly contradicted the husband's earlier deposition testimony and interrogatory responses, the trial court could fairly disregard

the declaration and conclude there was no substantial evidence of the existence of a triable issue of fact (184 Cal. App. 4th 1078, 1087; *see D'Amico v. Board of Medical Examiners (1974) 11 Cal. 3d 1, 21, 112 Cal. Rptr. 786, 520 P.2d 10*). Further, the trial court's decision to disregard the declaration was well justified, given that the declaration did not even acknowledge the contrary interrogatory responses and that plaintiffs provided no explanation for the contradiction at the time the declaration was submitted (*184 Cal. App. 4th 1078, 1088)* . A careful examination in light of the entire record yielded no explanation for the discrepancy and no basis for concluding that the interrogatory responses were obviously mistaken (*184 Cal. App. 4th 1078, 1088* ; *see Price v. Wells Fargo Bank (1989) 213 Cal. App. 3d 465, 482, 261 Cal. Rptr. 735*). The trial court was perfectly entitled to give plaintiffs' answers to special interrogatories special consideration (*184 Cal. App. 4th 1078, 1088* ; *see Girard v. Ball (1981) 125 Cal. App. 3d 772, 781, 178 Cal. Rptr. 406*), and to conclude that the husband's contradictory declaration did not constitute substantial evidence of the existence of a triable issue of fact (*184 Cal. App. 4th 1078, 1088)* . The trial court did not erroneously fail to consider other evidence they submitted besides the declaration, to find that plaintiffs had raised a triable issue as to whether defendants' activities as outside contractor exposed the husband to asbestos, because, without considering the declaration concerning exposure from boiler work at the first site, plaintiffs failed to present sufficient other evidence to raise a triable issue of fact whether the husband was exposed to asbestos at the site that was disturbed by defendants in their capacity as outside contractor (*184 Cal. App. 4th 1078, 1089-1090)* . Plaintiffs also failed to create a triable issue as to whether the husband was exposed to asbestos specified by defendants at the first site, because liberally construing plaintiffs' evidence, the most the court could conclude was that asbestos likely would have been found in some of the insulation in two buildings at the site and the husband worked in those buildings, which was not of sufficient weight to support a reasonable inference of causation. Further, plaintiffs presented insufficient evidence that the husband was actually exposed to asbestos attributable to defendants in other buildings at the site with sufficient frequency to create a reasonable probability that this exposure contributed to his disease, since nothing in the record established that he worked in those buildings at all (*184 Cal. App. 4th 1078, 1090-1094)* .

[4] Additional Authorities

[a] Summary Judgment for Defendant

In *Wyckoff v. State of California (2001) 90 Cal. App. 4th 45, 108 Cal. Rptr. 2d 198* , plaintiff in an automobile accident case sued the State for damages for personal injury and wrongful death, claiming that the center median barrier at the collision site constituted a dangerous condition of public property. The trial court granted the State's motion for summary judgment on the ground of design immunity under *Gov. Code § 830.6*. The court of appeal affirmed. The court held that the normal rules requiring denial of summary judgment if any triable issue of fact appears were not fully applicable in the case of a claim of design immunity. In a claim of design immunity, the defendant public entity is not required to prove that the design was a reasonable one. Instead, the defendant must only show some substantial evidence that a reasonable public employee or legislative body could have approved the design. Therefore, on a motion for summary judgment, the existence of a possible conflict in the evidence regarding the reasonableness of the design will not defeat summary judgment, as long as there is substantial evidence of reasonableness, even if contradicted (*90 Cal. App. 4th 45, 50-51)* .

Johnson v. Stratlaw, Inc. (1990) 224 Cal. App. 3d 1156, 274 Cal. Rptr. 363 , was a wrongful death action against a pizza parlor owner by the parents of a 16-year-old employee of the parlor who had been killed in a single-car accident on his way home from work. Plaintiffs alleged that the defendant had been negligent in requiring their son to work a 5:00 p.m. until after 2:00 a.m. shift on a non-schoolday, in violation of the hours prescribed for minors by *Lab. Code § 1391*, causing the minor to become tired and involved in the accident. The trial court granted defendant's motion for summary judgment, and plaintiffs appealed. The court of appeal affirmed, holding that the accident came within the special risk exception to the coming and going rule (barring workers' compensation for injuries received while traveling to and from work) and that the action was, therefore, barred by the exclusive remedy provisions (*Lab. Code § 3600*) of the workers' compensation law (*224 Cal. App. 3d 1156, 1160-1164)* .

In *Trerice v. Blue Cross of California (1989) 209 Cal. App. 3d 878, 257 Cal. Rptr. 338* , the appellate court affirmed summary judgment for the defendant in an action by an employee against her former employer for intentional infliction of emotional distress, arising out of a company reorganization by the employer in which it had first presented the employee with a termination package, later withdrew the package, retained plaintiff as an employee, but required her to do work that was previously below her rank, and ultimately terminated her employment with conditions less advantageous than those originally offered. Although the court said that summary judgment is appropriate when the evidence in support of the moving party establishes that there is no triable issue of fact and that the moving party is entitled to judgment as a matter of law (*209 Cal. App. 3d 878, 882)* , it added that when there is no material issue of fact to be tried and the sole question remaining is one of law, the trial court must determine the issue of law (*209 Cal. App. 3d 878, 883)* . The court explained thatto state a cause of action for intentional infliction of emotional distress, plaintiff must, among other things, show outrageous conduct by the defendant, that to be outrageous the conduct must be so extreme as to exceed all bounds of that usually tolerated in a civilized society, and that the trial court correctly found that, as a matter of law, the employer's conduct was not outrageous (*209 Cal. App. 3d 878, 883)* .

In *Kurokawa v. Blum (1988) 199 Cal. App. 3d 976, 245 Cal. Rptr. 463* , the court of appeal, in affirming a summary judgment for the defendant on the ground that the action for breach of contract and fraud based on defendant's alleged promises to cohabit with plaintiff in a nonmarital relationship, help her in her business ventures, and jointly to accumulate, share, and account for property and income was barred by the statute of limitations, said that summary judgment is proper only if the affidavits in support of the defendant would be sufficient to sustain a judgment in his favor and plaintiff does not by affidavit show facts which present a triable issue (*199 Cal. App. 3d 976, 988)* .

In *Stalnaker v. Boeing Co. (1986) 186 Cal. App. 3d 1291, 231 Cal. Rptr. 323* , a deceased employee's heirs appealed a grant of summary judgment in favor of the deceased's employer on the ground that plaintiffs' sole and exclusive remedy was workers' compensation. In affirming the trial court judgment, the court of appeal noted that while the defendant's declarations establish a complete defense to plaintiffs' action or demonstrate an absence of an essential element of plaintiffs' case, and the plaintiffs' opposition papers do not show that a triable issue of fact with respect to that defense or that essential element exists, no amount of factual conflicts on other aspects of the case will affect the result (citing *Frazier, Dame, Doherty, Parrish & Hanawalt v. Boccardo, Blum, Lull, Niland, Teerlink & Bell (1977) 70 Cal. App. 3d 331, 338, 138 Cal. Rptr. 670*). Defendants' declarations established that the deceased's injuries arose out of and in the course of his employment and that therefore the provisions under the workers' compensation law provided his sole and exclusive remedy. The court of appeal rejected plaintiffs' contentions that the allegations in their complaint gave rise to a cause of action independent of a workers' compensation claim and thus raised a triable issue of fact (*186 Cal. App. 3d 1291, 1301)* .

In *Columbus Line, Inc. v. Gray Line Sight-Seeing Companies Associated, Inc. (1981) 120 Cal. App. 3d 622, 174 Cal. Rptr. 527* , an action for personal injuries by passengers against a vessel owner, a shore excursion manager, and a sightseeing trade association, the vessel owner and excursion manager filed a cross complaint for equitable indemnity against the trade association. The trade association moved for and obtained a summary judgment on the complaint on the ground that it was not negligent towards plaintiffs nor vicariously liable for the negligence of any codefendant. As cross defendant, the trade association then moved for and obtained summary judgment on the cross complaint. The court of appeal affirmed summary judgment for the trade association on the cross complaint, holding that collateral estoppel applied to preclude litigation of the indemnity issues which had been determined by the prior adjudication of the summary judgment on the complaint (*120 Cal. App. 3d 622, 631)* . Accordingly, the trial court had correctly determined that there was no triable issue of material fact and that the trade association was entitled to judgment on the cross complaint as a matter of law (*120 Cal. App. 3d 622, 633)* .

In *Barnes v. State Bd. of Equalization (1981) 118 Cal. App. 3d 994, 173 Cal. Rptr. 742* , an action for declaratory relief and refund of sales and use tax, the court of appeal affirmed a summary judgment for defendant on the ground that plaintiff failed to exhaust his administrative remedies by refusing to present the factual issues to defendant so that it could render a decision on the merits. Because such a failure is a jurisdictional procedural defect which bars court

action, there were no issues of fact or law left for the trial court (*118 Cal. App. 3d 994, 1001-1002)* .

In *O'Connor v. Bloomer (1981) 116 Cal. App. 3d 385, 172 Cal. Rptr. 128* , an action for personal injuries brought by a patient against a hospital, a surgeon, and assistant surgeons, the court, in affirming the grant of summary judgment for the assistant surgeons, explained that the summary judgment procedure is designed to resolve causes of action where no triable issue exists as to any material fact. The court held that the supporting papers proved that defendants had no responsibility concerning the availability of a replacement aortic valve discovered to be missing during surgery, and that because they had no such responsibility, the doctrine of res ipsa loquitor did not apply (*116 Cal. App. 3d 385, 391-392)* .

In *Warren v. Herndon (1981) 115 Cal. App. 3d 141, 171 Cal. Rptr. 220* , an action for damages for slander, the court affirmed summary judgment for defendants because of plaintiff's inability to prove malice on the part of defendants. After determining from the supporting declarations that the allegedly slanderous statements were not made with knowledge of their falsity or with a reckless disregard of whether they were true or false, the court held that defendants were entitled as a matter of law to summary judgment because the opposing declarations failed to raise any triable issues of material fact regarding the declarant's state of mind in making the allegedly slanderous statements (*115 Cal. App. 3d 141, 149)* .

In *Orsetti v. City of Fremont (1978) 80 Cal. App. 3d 961, 146 Cal. Rptr. 75* , an action for inverse condemnation, the court affirmed summary judgment for defendant and held that such an action does not lie for the mere declaration of an intent to amend a general plan, nor does it lie for zoning actions in which the effect is mere reduction in market value through regulation of the land's use. The court stated that if a moving party shows that he or she is entitled to summary judgment, the opponent ofthe motion cannot rely on his or her pleadings, but must make an independent showing that he or she has sufficient proof of the matters alleged to raise a question of fact. Plaintiff did not file any declarations which presented a question of fact as to whether defendants' actions constituted a property-taking device (*80 Cal. App. 3d 961, 966, 969-970)* .

In *Versa Technologies, Inc. v. Superior Court (1978) 78 Cal. App. 3d 237, 142 Cal. Rptr. 570* , an action for damages for personal injuries allegedly caused by a defective product, plaintiff had conceded that he had named the wrong party, but did not file a voluntary dismissal. In directing that a peremptory writ of mandate be issued requiring that the denial of defendant's motion for summary judgment be vacated and that a new order granting the motion be entered, the court stated that where a question of identity of one of the parties is raised in the form of a motion for summary judgment, then the opposing party should be required, at the very least, to file a counteraffidavit under penalty of perjury setting forth the facts on which he or she bases his or her good-faith belief that the party is the actual manufacturer of the product involved (*78 Cal. App. 3d 237, 240)* .

Frazier, Dame, Doherty, Parrish & Hanawalt v. Boccardo, Blum, Lull, Niland, Teerlink & Bell (1977) 70 Cal. App. 3d 331, 138 Cal. Rptr. 670 , was an action for tortious interference with contractual relations brought by a law firm against another law firm, an insurance company, and an investigator. The court of appeal, after reversing the grant of summary judgment in favor of defendant law firm and the investigator, affirmed summary judgment for defendant insurance company because the investigator's conduct in "capping" for a particular law firm was beyond the scope of his relationship with the insurance company, and there was no evidence to subject the company to liability under any theory of vicarious liability. The court noted that if the defendants' declarations in support of the motion for summary judgment establish a complete defense to plaintiff's case, and the plaintiff's declaration in reply does not show that a triable issue of fact with respect to that defense or that an essential element exists, then no amount of factual conflicts on other aspects of the case will affect the result and the motion should be granted (*70 Cal. App. 3d 331, 338)* .

County of Los Angeles v. Security Ins. Co. (1975) 52 Cal. App. 3d 808, 125 Cal. Rptr. 701 , was an action brought against developers on alleged breaches of agreements to complete street improvements and against defendant on alleged breaches of payment bonds entered into by defendant's predecessor in interest. The court reversed the denial of

defendant's motion for summary judgment and ordered that a peremptory writ of mandate be issued directing the trial court to grant defendant's motion. It held that the cause of action against defendant was barred by the four-year statute of limitations on written obligations contained in *Code Civ. Proc. § 337(1)*, which defendant had asserted as an affirmative defense in its answer. The court referred to the general rule that a defendant is entitled to a summary judgment when the record establishes as a matter of law that a cause of action asserted against him or her cannot prevail (*52 Cal. App. 3d 808, 816)* .

In *Wood v. Brown (1974) 39 Cal. App. 3d 232, 114 Cal. Rptr. 63* , an action filed during decedent's lifetime to recover sums of money on various theories, defendant executrix was substituted as the party defendant. The court of appeal affirmed the grant of summary judgment for defendant on the ground that plaintiff neither filed a creditor's claim with the clerk of the court in the probate proceeding nor presented a claim to the special administrator within the four-month filing period as required by former Prob. Code § 707 [*now see Prob. Code §§ 9002* (claim filing requirement), 9100 (time for filing claim)]. The court summarized the general rule that summary judgment is proper if the affidavits filed by the moving party state facts sufficient to sustain a judgment in his or her favor and the counteraffidavits do not set forth competent and sufficient evidence to present a triable issue of fact (*39 Cal. App. 3d 232, 239)* .

Craig v. Earl (1961) 194 Cal. App. 2d 652, 15 Cal. Rptr. 207 , was an action for damages and for an injunction based on an alleged trespass on plaintiff's land and the construction and maintenance of a pipeline thereon. The court of appeal affirmed summary judgment for defendants because defendants had made an adequate showing that they were entitled to judgment in their favor, and plaintiff failed to show facts which, if proved, would support a finding that defendants performed the actions on which the suit was based. The court noted that the counteraffidavits filed in response to defendant's motion may not create issues outside the pleadings, are not a substitute for an amendment to the pleadings, and are an ineffective defense to the motion unless they set forth facts showing that a good cause of action exists on the merits (*194 Cal. App. 2d 652, 656)* .

[b] Summary Judgment for Plaintiff

In *Northern Cal. Psychiatric Society v. City of Berkeley (1986) 178 Cal. App. 3d 90, 223 Cal. Rptr. 609* , several psychiatric associations and an individual psychiatrist and taxpayer brought an action against a city for declaratory and injunctive relief concerning a city ordinance banning the use of electric shock treatment on any person within the city. The court of appeal upheld the trial court's granting of plaintiff's motion for summary judgment on grounds that state law preempted the city ordinance, and that the ordinance was unconstitutional (*178 Cal. App. 3d 90, 99-109)* .

The facts and procedural background of *Security Pac. Nat. Bank v. Associated Motor Sales (1980) 106 Cal. App. 3d 171, 165 Cal. Rptr. 38* , are *discussed under § 221.20[3][g]*. The court of appeal affirmed summary judgment for plaintiff as to its action to impose indorser's liability on defendant, partly on the ground that defendant failed to present any evidence to contradict a presumption that the checks in question weredishonored. In so holding, the court stated that a presumption that operates so as to preclude the trier of fact from finding contrary to the presumption absent contrary evidence operates to eliminate the existence of a triable issue of fact when no contrary evidence is offered (*106 Cal. App. 3d 171, 179-180)* .

In *People v. One 1964 Chevrolet Corvette Convertible (1969) 274 Cal. App. 2d 720, 79 Cal. Rptr. 447* , a forfeiture proceeding against an automobile alleged to have been unlawfully used for the possession of marijuana, the court affirmed summary judgment for the People because the driver's prior criminal conviction necessarily established his knowing possession of the drug in the car and collaterally estopped him and the owner from relitigating this issue. The court noted that summary judgment may be entered in the discretion of the trial court if the moving party's affidavits are sufficient to sustain a judgment in his or her favor and the opposing party does not show facts which may be deemed sufficient to present a triable issue (*274 Cal. App. 2d 720, 729)* .

[c] Burden of Proof

In *Weseloh Family Limited Partnership v. K.L. Wessel Construction Co. (2004) 125 Cal. App. 4th 152, 22 Cal. Rptr. 3d 660* , defendant design engineers contracted with the builder of retaining walls to design walls for an automobile dealership project. When the walls failed, plaintiff property owners and general contractor sued the design engineers for negligence. The trial court granted summary judgment in favor of defendants on the ground that defendants did not owe a duty of care to plaintiffs. The court of appeal affirmed. The court held that defendants had satisfied their burden of production under *Code Civ. Proc. § 437c(p)(2)* by submitting undisputed evidence showing they did not owe plaintiffs a duty of care. The burden then shifted to plaintiffs to show either that such a duty existed or that there was a triable issue of material fact on the duty issue. Because plaintiffs did not meet their burden of showing a triable issue pursuant to *Code Civ. Proc. § 437c(p)(2)*, the court affirmed summary judgment for the defendants (*125 Cal. App. 4th 152, 172-173)* .

In *Renna v. County of Fresno (2000) 78 Cal. App. 4th 1, 92 Cal. Rptr. 2d 586* , the trial court granted defendant's motion for summary judgment as to all three of plaintiff's causes of action. Plaintiff appealed claiming the trial court improperly granted summary judgment as to plaintiff's third cause of action, for alleged failure to pay plaintiff overtime wages in violation of the Fair Labor Standard's Act (*29 U.S.C. § 201 et seq.*). The court of appeal affirmed judgment for defendants. In so doing, the court noted that on appeal from a grant of summary judgment, the appellate court reviews the record de novo and independently determines if the motion was properly granted. The appellate court uses the same standards and rules as the trial court in deciding the propriety of the motion in evaluating the propriety of a grant of summary judgment. In a case in which the defendant was the moving party, the defendant must demonstrate through admissible evidence that one or more essential elements of the cause of action cannot be established. Once the defendant has made such a showing, the burden shifts to the plaintiff to produce evidence that a triable issue of fact exists as to an essential element of the cause of action (*78 Cal. App. 4th 1, 5)* .

In *Ostayan v. Serrano Reconveyance Co. (2000) 77 Cal. App. 4th 1411, 92 Cal. Rptr. 2d 577* , which involved a seven count complaint, plaintiff claimed that he had been mislead into purchasing a parcel of income property at a trust deed foreclosure and sought to undo the transaction or, in the alternative, recover damages. The trial court granted summary judgment in favor of the defendants. The court of appeal affirmed. In so doing the court noted that the moving party bears the burden of establishing, by declarations and evidence, a complete defense to plaintiff's action or the absence of an essential element of plaintiff's case. The moving party must demonstrate that under no hypothesis is there a material factual issue requiring a trial. When the moving party makes that showing, the burden shifts to the opposing party to show, by responsive separate statement and admissible evidence, that triable issues of fact exist (*77 Cal. App. 4th 1411, 1418)* .

In Riverside County Community Facilities Dist. v. Bainbridge 17 *(1999) 77 Cal. App. 4th 644, 92 Cal. Rptr. 2d 29* , involving a complaint to foreclose liens of special taxes, the trial court granted summary judgment in plaintiff's favor. The court of appeal affirmed. In so doing the court noted that in evaluating the propriety of a grant of summary judgment appellate review is de novo, and the appellate court independently reviews the record before the trial court. In practical effect, the appellate court assumes the role of a trial court and applies the same rules and standards that govern a trial court's determination of a motion for summary judgment. When the plaintiff is the moving party, the appellate court determines whether the plaintiff has met its burden under *Code Civ. Proc. § 437c(o)(1)* (*see now Code Civ. Proc. § 437c(p)(1)*) of showing there is no defense to a cause of action because the admissible evidence produced by the plaintiff proves each element of the cause of action entitling the party to judgment on that cause of action. If the moving party has met its statutory burden of proof and the summary judgment motion prima facie justifies a judgment, the burden shifts to the opposing party and the appellate court determines whether that party has met its burden under section 437c. When the defendants are the opposing parties, the appellate court determines whether they have met their burden under *Code Civ. Proc. § 437c(o)(1)* of producing admissible evidence showing that a triable issue of one or more material facts exists as to that cause of action or a defense to it (*77 Cal. App. 4th 644, 653)* .

In *Hanson v. Lucky Stores, Inc. (1999) 74 Cal. App. 4th 215, 87 Cal. Rptr. 2d 487* , plaintiff sought damages for

discrimination in violation of the Fair Employment and Housing Act (FEHA) (*Gov. Code § 12900 et seq.*) and wrongful termination in violation of public policy. The trial court granted defendant's motion for summary judgment. The court of appeal affirmed. In so doing, the court of appeal set forth the burdens of proof in defense motions for summary judgment in employment discrimination actions (*see 74 Cal. App. 4th 215, 223-225)* .

[d] Reliance on Absence of Evidence to Support Nonmoving Party's Case

In *Wilkins v. National Broadcasting Co. (1999) 71 Cal. App. 4th 1066, 84 Cal. Rptr. 2d 329* , involving causes of action for physical intrusion on solitude or into private affairs, unlawful eavesdropping on or recording of confidential communications, fraud, and various other causes of action, the court of appeal, in affirming summary judgment in the defendants' favor, noted that under the current version of the summary judgment statute, a moving defendant need not support his or her motion with affirmative evidence negating an essential element of the responding party's case. Instead, the moving defendant may, through factually vague discovery responses or otherwise, point to the absence of evidence to support the plaintiff's case. When that is done, the burden shifts to the plaintiff to present evidence showing there is a triable issue of material fact. If the plaintiff is unable to meet his or her burden of proof regarding an essential element of his or her case, all other facts are rendered immaterial (*71 Cal. App. 4th 1066, 1074)* .

[e] Evidence and Inferences Considered by Court

In *Basich v. Allstate Insurance Co. (2001) 87 Cal. App. 4th 1112, 105 Cal. Rptr. 2d 153* , the appellate court affirmed the trial court's grant of defendant's motion for summary adjudication as to punitive damages. Plaintiff argued that defendant Allstate's motion was procedurally defective because defendant failed to cite specifically to evidence in the record to support its claim that plaintiff could not prove that Allstate had acted with malice, oppression, or fraud. The court of appeal held that, although Allstate's memorandum of points and authorities did not repeat specific citations to the record, Allstate had submitted a comprehensive statement of undisputed material facts, which separately identified the punitive damages claim and each supporting material fact claimed to be without dispute. Citation to the record in the separate statement was sufficient; nothing more was required (*87 Cal. App. 4th 1112, 1118)* .

The court of appeal in *Haskell v. Carli (1987) 195 Cal. App. 3d 124, 240 Cal. Rptr. 439* , reversed the trial court's grant of plaintiffs' motion for summary judgment, based on an earlier grant of motion for adjudication of issues, in a case seeking specific performance of an ambiguous contract. The trial court had admitted parol evidence in the form of a will and an affidavit of a party to the contract. Although plaintiffs had objected to their admission, the trial court had not heard or ruled on an objection based on the parol evidence rule. The court of appeal reversed, holding that the will and affidavit created an ambiguity that should have been permitted to go to trial for resolution. The evidence may not have been proper evidence, but as no objection was made on the basis of parol evidence, the trial court was bound to consider them in ruling on summary adjudication [*see Code Civ. Proc. § 437c(b)(5), (c)*] (*195 Cal. App. 3d 124, 129-132)* .

In *Hoover Community Hotel Development Corp. v. Thomson (1985) 167 Cal. App. 3d 1130, 213 Cal. Rptr. 750* , an action for breach of contract and conspiracy based on tortious injury to business relations was brought by plaintiff after one of the defendants refused to sell certain real property to plaintiff and sold it instead to one of the other defendants. The court of appeal affirmed the summary judgment granted to defendants. In holding that plaintiff had raised no triable issue of fact in opposition to the motion for summary judgment, the court held that (1) a declaration in the form of a legal conclusion is not sufficient to create a triable issue of fact (*167 Cal. App. 3d 1130, 1137)* ; (2) in ruling on motions for summary judgment, a trial court is permitted to draw inferences from related facts set forth in the declarations (*167 Cal. App. 3d 1130, 1139)* ; and (3) a declaration of fact by a party is not necessarily sufficient to create a factual issue if that declaration is contradicted by a prior admission of the declaring party (*167 Cal. App. 3d 1130, 1141)* .

In *Hooks v. Southern Cal. Permanente Medical Group (1980) 107 Cal. App. 3d 435, 165 Cal. Rptr. 741* , while

summarizing summary judgment rules, the court stated that in determining such a motion it must consider presumptions and draw inferences from the facts adduced where the inference is the only reasonable one that may be drawn, except that the court has no power in a summary proceeding to weigh one inference against another or against other evidence (*107 Cal. App. 3d 435, 441-442)* .

In *C.L. Smith Co. v. Roger Ducharme, Inc. (1977) 65 Cal. App. 3d 735, 135 Cal. Rptr. 483* , an action for breach of contract by which plaintiff allegedly was supposed to perform masonry work for defendant general contractor, and for defendant's negligent failure to list plaintiff's name on the bid proposal form, the court affirmed summary judgment for defendant. Concerning the cause of action for breach of contract, the court stated that it could reasonably be inferred that the parties intended to reduce the terms of their agreement to writing. The court observed that the trial court is now permitted to draw inferences from related facts set forth in the declarations in ruling on summary judgment motions. The evidence supporting the motion showed that no written agreement was ever signed by defendant, thus no contract was entered into and there was nothing tobreach. As plaintiff only presented different conclusions of ultimate fact in his opposing papers, the court held that summary judgment was proper as to the first count (*65 Cal. App. 3d 735, 742)* .

[f] No Merit If Essential Element of Case Lacking

In *Armato v. Baden (1999) 71 Cal. App. 4th 885, 84 Cal. Rptr. 2d 294* , plaintiff, after settling with a managed care corporation and one of its employees for negligent treatment of a broken wrist, filed another action against four doctors who worked part-time as independent contractors for the managed care corporation and who did not treat plaintiff. Plaintiff asserted the theory that even though defendants never met or treated plaintiff and did not supervise the treatment, their conduct in allowing their names and status as doctors to be used in connection with the managed care corporation led plaintiff to believe that the treating employee was a medical doctor, and had plaintiff known that the employee was only a physician assistant, plaintiff would not have let the employee treat plaintiff. Thus, the issue before the court was whether an independent contractor of a professional service corporation which permits his or her name and status to be associated with the corporation creates an "ostensible partnership" so as to make him or her liable for the torts of the corporation's employee. The trial court granted defendants' motions for summary judgment. In affirming the summary judgments in defendants' favor, the court of appeal, noted that if respondents' declarations in support of the motions for summary judgment demonstrate an absence of an essential element of appellant's case, and appellant's declarations submitted in reply do not show that a triable issue of fact exists with respect to that essential element, no amount of factual conflicts on other aspects of the case will affect the result and the motion for summary judgment should be granted (*71 Cal. App. 4th 885, 893)* .

[g] Effect of Admission Against Interest Obtained During Discovery

In *Golden Eagle Refinery Co., Inc. v. Associated Intern. Ins. Co. (2001) 85 Cal. App. 4th 1300, 102 Cal. Rptr. 2d 834* , the plaintiff brought an action against its insurer to recover remediation costs incurred for environmental clean up of groundwater contamination. Defendant brought a motion for summary adjudication on the ground that plaintiff could not establish one element of its case, i.e., damages. The motion was based on plaintiff's interrogatory responses in which it admitted that it was unable to attribute damages to any particular cause, event, or time. The trial court granted defendant's motion, and the court of appeal affirmed, on the ground that plaintiff's admission that it would not be able to establish an essential element of its case, damages, was fatal to its cause of action for breach of contract (*85 Cal. App. 4th 1300, 1310-1312)* .

Thompson v. Williams (1989) 211 Cal. App. 3d 566, 259 Cal. Rptr. 518 , was an action by one attorney against another attorney to recover a referral fee. Defendant's motion for summary judgment was granted on the ground that an accord and satisfaction sufficient to establish a complete defense to plaintiff's complaint were shown, and hence, there remained triable fact issues to be determined. The court of appeal affirmed, holding that the requirement that the debtor make clear that acceptance of what he or she tendered was subject to the condition that it was to be in full satisfaction of the creditor's unliquidated claim was established by plaintiff's deposition testimony (*211 Cal. App. 3d 566, 573)* , and

holding that plaintiff's own deposition testimony established that he, the creditor, clearly understood when accepting the tendered negotiated amount that such monies were intended to constitute payment in full of his claim (*211 Cal. App. 3d 566, 574)* . The court said that admissions against interest have high credibility value, particularly when they are made in the context of proceedings designed to elicit the facts. Accordingly, when such an admission becomes relevant to the determination, on motion for summary judgment, of whether or not there exist triable issues of fact between the parties, it is entitled to and should receive a kind of deference not normally accorded evidentiary allegations in affidavits, that after-the-fact attempts to reverse prior admissions are impermissible because a party cannot rely on contradictions in his or her own testimony to create a triable issue of fact, and that the assertion of facts contrary to prior testimony does not constitute substantial evidence of the existence of a triable issue of fact (*211 Cal. App. 3d 566, 573-574)* .

Nunez v. R'Bibo (1989) 211 Cal. App. 3d 559, 260 Cal. Rptr. 1 , was an action for damages for personal injuries sustained by a self-employed gardener hired by defendant to trim the branches of some trees in front of defendant's house. Plaintiff sustained severe back and head injuries when the limb of a tree he was cutting swung down, striking the ladder on which he was standing and causing him to fall. The ladder was owned by defendant. Plaintiff had asked and been given permission to use it because it was taller than his own. Plaintiff noticed the ladder was shaky or loose and he considered it dangerous, but nevertheless used it. Defendant's motion for summary judgment was granted on the ground of implied assumption of risk by plaintiff, and plaintiff appealed. The court of appeal affirmed. A portion of one of the declarations submitted by a witness in opposition to the motion was contradicted by his earlier deposition to the contrary, and the deposition evidence was corroborated by plaintiff's deposition. The court said that not all forms of evidence in connection with a summary judgment motion are of equal weight, and that when a defendant can establish a part of his defense with the admissions offered by plaintiff, the admissions are considered so valuable that contradictory affidavits may be disregarded (*211 Cal. App. 3d 559, 563)* .

In *Advanced Micro Devices, Inc. v. Great American Surplus Lines Ins. Co. (1988) 199 Cal. App. 3d 791, 245 Cal. Rptr. 44* , a manufacturer brought an action against its primary and excess insurers asserting wrongful rejection of a claim for costs incurred in cleaning up toxic waste. The court of appeal affirmed the trial court's granting of summary judgment in favor of the insurers, noting that affidavits submitted by plaintiff contained repudiation of the affiant's previous deposition testimony. When an admission against interest is relevant to the determination of the existence of a triable issue of fact, it is entitled to and should receive a kind of deference not normally accorded evidentiary allegations in affidavits (*199 Cal. App. 3d 791, 800)* .

[h] No Merit If Essential Element of Case Lacking

In *Brunelle v. Signore (1989) 215 Cal. App. 3d 122, 263 Cal. Rptr. 415* , the court of appeal affirmed a summary judgment for defendant homeowner in an action by a guest who had been bitten by a violin spider while spending a weekend at defendant's vacation home which abutted the desert. Neither party had seen the spider before it bit the plaintiff, and defendant was unaware that violin spiders had migrated into California. After pointing out that the essential elements of a cause of action for negligence are (1) a legal duty of care owed by the defendant to the plaintiff, (2) a breach of that duty, and (3) the breach was the proximate or legal cause of plaintiff's injury (*215 Cal. App. 3d 122, 127)* , the court held that an owner or occupier of a private residence has no duty to protect or prevent bites from harmful insects [or spiders] when: (1) it is not generally known that the specific insect [or spider] is indigenous to the area; (2) the homeowner has no knowledge that a specific harmful insect [or spider] is prevalent in the area where his or her residence is located; (3) the homeowner has on no occasion seen the specific type of harmful insect [or spider] either outside or inside the home; and (4) neither the homeowner nor the injured guest had seen the specific insect [or spider] that bit the guest either before or after the bite occurred, and that to impose a duty under these circumstances, where the owner or occupier of the premises had no reason to anticipate or guard against such an occurrence would be unfair and against public policy (*215 Cal. App. 3d 122, 129)* .

Mitsui Manufacturers Bank v. Superior Court (1989) 212 Cal. App. 3d 726, 260 Cal. Rptr. 793 , was a proceeding in

mandate arising out of an action by a bank against a commercial borrower and its guarantors for money, enforcement of continuing guaranties, and foreclosure of its security interest resulting from an arm's-length routine lender/borrower contract. The defendants cross complained against the plaintiff for tort damages for alleged breach of the covenant of good faith and fair dealing by reneging on its alleged oral promise to renew short term credit indefinitely until the borrower was able to secure substitute long-term financing from another lender or, failing that, to provide the long-term financing itself. The cross defendant's motion for summary judgment was denied, and it petitioned the court of appeal for a writ of mandate. In granting the writ directing the trial court to vacate its order denying the motion for summary judgment and to grant the motion, the court of appeal held, in effect, that the essential element of duty necessary to invoke the covenant of good faith and fair dealing was lacking, that the ordinary arm's-length commercial lender/borrower relationship was insufficient as a matter of law to generate tort damages for the breach of the covenant of good faith and fair dealing, and that the application of this doctrine was limited to cases involving unique fiduciary-like relationships between the parties, such as the kind that exists between an insurer and its insured (*212 Cal. App. 3d 726, 729-733)* .

[i] No Merit if Complete Defense

In *Bay Area Rapid Transit Dist. v. Superior Court (1996) 46 Cal. App. 4th 476, 53 Cal. Rptr. 2d 906* , plaintiff brought an action against BART for negligent maintenance based on injuries she received after a train she was riding jerked back and forth. BART moved for summary judgment on the basis of statutory design immunity, introducing evidence of a design which may cause lurching during acceleration. In opposition to this motion, plaintiff offered an expert declaration stating that there had been a failure of one of the elements of the system, and that this could be caused by negligent maintenance or supervision. In reply to the opposition, BART set forth the undisputed fact that the car in question had received preventive maintenance six days before the accident. The trial court denied BART's motion, and BART sought a writ of mandate. The court of appeal noted that recent amendments of the summary judgment statute changed the burden of proof, so that a defendant moving for summary judgment meets the burden of proof of showing that the action has no merit if that party shows that there is a complete defense to the action. If the defendant does this, the burden shifts back to the plaintiff to show that a triable issue of one or more material facts exists as to that defense. At this point, the plaintiff cannot rely on the mere allegations or denial of the pleadings, but must set forth specific facts showing that a triable issue of material facts exists (*46 Cal. App. 4th 476, 481)* . The court then reasoned that in this situation, BART had demonstrated that the accident was caused by the design of the train, because the acceleration system could cause lurching. The burden then shifted to plaintiff to show that something other than the acceleration design produced the lurching that caused the accident in question. The court concluded that the declaration by plaintiff's expert failed to raise a triable issue of fact (*46 Cal. App. 4th 476, 481-482)* . The court thus issued a pemptory writ of mandate directing the trial court to enter a new order granting the motion for summary judgment.

[j] Responsive Evidence Giving Rise to Mere Speculation Insufficient to Establish Triable Issue of Material Fact

In *Fisher v. Gibson (2001) 90 Cal. App. 4th 275, 109 Cal. Rptr. 2d 145* , plaintiff moved for summary judgment or adjudication in an action to set aside certain fraudulent transfers. Defendant opposed the motion, but submitted no supporting evidence. Instead, defendant argued that he should not be required to substantively oppose the motion because he was the target of an ongoing grand jury investigation and was therefore entitled to assert his privilege against self incrimination. The trial court held that defendant had not satisfied the requirements of *Code Civ. Proc. § 437c(h)*, and the court proceeded to rule on the motion. The appellate court affirmed, on the ground that defendant had not demonstrated by way of affidavit that facts essential to justify opposition might exist but could not then be presented; defendant had not presented any evidence that he was the subject of a grand jury proceeding or that even if he were, he was therefore precluded from presenting substantive opposition to the motion for summary judgment (*90 Cal. App. 4th 275, 283-284)* .

See *Chaknova v. Wilbur-Ellis Co. (1999) 69 Cal. App. 4th 962, 81 Cal. Rptr. 2d 871 , discussed under § 221.20[3][c]*.

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Volume 22 Chapters 220-229 SUBROGATION---to---TRESPASS
CHAPTER 221 SUMMARY JUDGMENTS
PART II. FORMS

22-221 California Points & Authorities § 221.21

§ 221.21 Supporting Motion for Summary Adjudication [Code Civ. Proc. § 437c(f)]--General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION
vs.	)	
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

[*EITHER*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION FOR SUMMARY ADJUDICATION BECAUSE THERE IS NO MERIT TO _____ [*identify one or more causes of action within an action, e.g.,* THE THIRD CAUSE OF ACTION OF PLAINTIFF'S FIRST AMENDED COMPLAINT], AND THE PAPERS SUBMITTED SHOW THAT NO TRIABLE ISSUE EXISTS AS TO ANY MATERIAL FACT AND THAT THE DEFENDANT IS ENTITLED TO ADJUDICATION IN HIS/HER FAVOR AS A MATTER OF LAW.

[*AND/OR*]

THE COURT SHOULD GRANT PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION BECAUSE THERE IS _____ [NO AFFIRMATIVE DEFENSE *or* _____ NO MERIT TO DEFENDANT'S _____ [(*identify affirmative defense, e.g.,* FIRST AFFIRMATIVE DEFENSE)] TO THE [*identify cause of action, e.g.,* THIRD CAUSE OF ACTION OF PLAINTIFF'S FIRST AMENDED COMPLAINT], AND THE PAPERS SUBMITTED SHOW THAT NO TRIABLE ISSUE EXISTS AS TO ANY MATERIAL FACT AND THAT THE PLAINTIFF IS ENTITLED TO ADJUDICATION IN HIS/HER FAVOR AS A MATTER OF LAW.

[*AND/OR*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION FOR SUMMARY ADJUDICATION BECAUSE THERE IS NO MERIT TO _____ [*identify claim for punitive damages under Civ. Code § 3294, e.g.,* THE CLAIM FOR PUNITIVE DAMAGES SET OUT IN THE THIRD CAUSE OF ACTION OF PLAINTIFF'S FIRST AMENDED COMPLAINT], AND THE PAPERS SUBMITTED SHOW THAT NO TRIABLE ISSUE EXISTS AS TO ANY MATERIAL FACT AND THAT THE DEFENDANT IS ENTITLED TO ADJUDICATION IN HIS/HER FAVOR AS A MATTER OF LAW.

[*AND/OR*]

THE COURT SHOULD GRANT _____ [PLAINTIFF'S *or* DEFENDANT'S] MOTION FOR SUMMARY ADJUDICATION BECAUSE DEFENDANT _____ [*name*] _____ [OWED A *or* DID NOT OWE ANY] DUTY TO PLAINTIFF _____ [*name*] WITH RESPECT TO _____ [*identify cause of action alleging existence of duty owed by defendant to plaintiff, e.g.,* THE THIRD CAUSE OF ACTION OF PLAINTIFF'S FIRST AMENDED COMPLAINT], AND THE PAPERS SUBMITTED SHOW THAT NO TRIABLE ISSUE EXISTS AS TO ANY MATERIAL FACT AND _____ [PLAINTIFF *or* DEFENDANT] IS ENTITLED TO ADJUDICATION IN HIS/HER FAVOR AS A MATTER OF LAW.

[*CONTINUE*]

A. Summary Adjudication. A party may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty, if that party contends that the cause of action has no merit or that there is no affirmative defense thereto, or that there is no merit to an affirmative defense as to any cause of action, or both, or that there is no merit to a claim for damages, as specified in *Civil Code Section 3294,* or that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs (*Code Civ. Proc. § 437c(f)(1)*). [*If defendant is moving party, include:* A cause of action has no merit if (1) one or more of the elements of the cause of action cannot be separately established, even if that element is separately pleaded, or (2) a defendant establishes an affirmative defense to the cause of action (*Code Civ. Proc. § 437c(o)*)].

[*CONTINUE*]

B. Procedure on Motion for Summary Adjudication. A motion for summary adjudication may be made by itself or as an alternative to a motion for summary judgment and shall proceed in all procedural respects as a motion for summary judgment (*Code Civ. Proc. § 437c(f)(2)*). Hence, a motion for summary adjudication must be granted if all the

papers submitted show that there is no triable issue as to any material fact with respect to the matter sought to be adjudicated, and that the moving party is entitled to summary adjudication as a matter of law (*see Code Civ. Proc. § 437c(c)* (stating rule applicable to motions for summary judgment)).

C. Burden of Proof. [*See § 221.20, Paragraph B*].

[*Optional*] **D. Court Not Limited to Negligence Causes of Action to Rule on Issue of Duty, but May Also Do So in Context of Contractual Obligations.** The Legislature did not intend the words "an issue of duty" in *Code of Civil Procedure § 437c(f)* to apply only to negligence causes of action. If, under the facts and circumstances of a given case, a court finds it appropriate to determine the existence or nonexistence of a duty in the nature of a contractual obligation, it may properly do so by ruling on that issue presented by a motion for summary adjudication (*Linden Partners v. Wilshire Linden Associates (1998) 62 Cal. App. 4th 508, 518-519, 73 Cal. Rptr. 2d 708*).

[*Optional*] **E. A Ruling That Completely Disposes of an Issue of Duty, but Which Has No Dispositive Impact on Other Issues, Is Appropriate.** The substantive areas which may be challenged under *Code of Civil Procedure § 437c(f)* are stated in the disjunctive, that is, "a cause of action, an affirmative defense, a claim for damages or an issue of duty." The plain meaning of this language is that a motion for summary adjudication may be granted or denied as to any of these substantive areas, standing alone, and without reference to the dispositive effect of such ruling on any of the companion substantive issues. A ruling that completely disposes of an issue of duty as required by the last sentence of the section, but which has no dispositive impact on other issues, is in full conformance with legislative intent and the straight-forward, unambiguous language of the *Code of Civil Procedure § 437c(f)*. Thus, on a motion for summary adjudication, the court may rule whether a defendant owes or does not owe a duty to plaintiff without regard for the dispositive effect of such ruling on other issues in the litigation, except that the ruling must completely dispose of the issue of duty (*Linden Partners v. Wilshire Linden Associates (1998) 62 Cal. App. 4th 508, 519-522, 73 Cal. Rptr. 2d 708*).

[*Optional*] **F. Reliance on Absence of Evidence to Support Nonmoving Party's Case.** On a motion for summary adjudication, a defendant may rely on a plaintiff's factually inadequate discovery answers to seek summary adjudication of a particular cause of action. If plaintiff fails to adduce evidence during discovery to support the factual allegations of his or her complaint, the burden shifts to the plaintiff and the motion may be granted if the plaintiff does not set forth specific facts to show a triable issue of material fact (*Lazar v. Hertz Corp. (1999) 69 Cal. App. 4th 1494, 1508, 82 Cal. Rptr. 2d 368*).

[*Optional*] **G. Evidence and Inferences Considered by Court.** [*See § 221.20, Paragraph E.*]

[*Optional*] **H. Effect of Admission Against Interest Obtained During Discovery.** [*See § 221.20, Paragraph F.*]

[*Optional*] **I. Presumption Eliminates Triable Issue When No Contradictory Evidence Offered.** [*See § 221.20, Paragraph H.*]

[*Optional*] **J. No Merit If Essential Element of Case Lacking.** [*See § 221.20, Paragraph J.*]

[*Optional*] **K. No Merit If Complete Defense.** [*See § 221.20, Paragraph K.*]

[*Optional*] **L. Only Material Issue Presented Is Question of Law.** [*See § 221.20, Paragraph I.*]

[*Add points and authorities from other chapters in this set supporting summary adjudication of the particular issue in question according to the facts of the case.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted by a defendant or plaintiff in any action or proceeding in support of a motion for summary adjudication of a cause of action or causes of action within an action, an affirmative defense, a claim for punitive damages under *Civ. Code § 3294*, or the issue of whether or not one or more defendants owed a duty to one or more plaintiffs [*Code Civ. Proc. § 437c(f)(1)*].

As noted in Paragraph B, a motion for summary adjudication may be made separately or as an alternative to a motion for summary judgment [*Code Civ. Proc. § 437c(f)(2)*]. If made in the alternative, this form should be combined with a memorandum supporting a motion for summary judgment [*see § 221.20*].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Counsel should also attach affidavits, declarations, or other papers that support the motion. The supporting papers must include a separate statement of material facts that the moving party contends are undisputed, along with supporting evidence for each fact [*Code Civ. Proc. § 437c(b)(1)*]. Counsel may attach copies of any necessary documents if the originals are produced at the hearing and made available for inspection by the adverse party [*Dugar v. Happy Tiger Records, Inc. (1974) 41 Cal. App. 3d 811, 816, 116 Cal. Rptr. 412* ; *see Evid. Code § 1520*].

A motion for summary adjudication is not to be procedurally defective when the supporting memorandum does not repeat specific citations to the record, but the moving papers include a comprehensive statement of undisputed material facts, which separately identify the claim that was the subject of the motion and each supporting material fact claimed to be without dispute with respect to that claim [*Basich v. Allstate Ins. Co. (2001) 87 Cal. App. 4th 1112, 1118-1119, 105 Cal. Rptr. 2d 153* (separate statement of undisputed material facts specifically identified evidence in support of each undisputed fact with appropriate citation to the record, nothing more was required and defendant fully complied with *Code Civ. Proc § 437c(b)* and *Cal. Rules of Ct., Rule 3.1350(c), (d)*, enumerating requirements for papers filed in support of motion for summary judgment or summary adjudication of issues)]. *Cal. Rules of Ct., Rule 3.1350(d)* governs the format for motions for summary adjudication. *Cal. Rules of Ct., Rule 3.1350(h)* governs the format for motions for summary judgment [*Truong v. Glasser (2009) 181 Cal. App. 4th 102, 118, 103 Cal. Rptr. 3d 811* (because defendant's motion sought summary judgment, rather than summary adjudication of subissue, his separate statement met requirements of *Cal. Rules of Ct., Rule 3.1350* without necessity of separately listing subissues as to which summary adjudication was sought)]. Even if additional headings are required, the court's power to deny summary judgment on the basis of failure to comply with *Cal. Rules of Court, Rule 3.1350* is discretionary, not mandatory [*Truong v. Glasser (2009) 181 Cal. App. 4th 102, 118, 103 Cal. Rptr. 3d 811* (trial court did not abuse its discretion by declining to reject defendant's summary judgment motion based on absence of headings within separate statement of material facts, where facts critical to ruling were adequately identified, and plaintiffs did not explain how any alleged deficiency in defendant's separate statement of material facts impaired plaintiffs' ability to marshal evidence to show that material facts were in dispute as to proper application of statute of limitations); *see Cadlo v. Owens-Illinois, Inc. (2004) 125 Cal. App. 4th 513, 523, 23 Cal. Rptr. 3d 1* ; *cf. San Diego Watercrafts, Inc. v. Wells Fargo Bank (2002) 102 Cal. App. 4th 308, 315-316, 125 Cal. Rptr. 2d 499]* .

[b] Related Uses

Because "any party" may move for summary judgment or summary adjudication of a cause of action, duty issue, punitive damages claim, or defense under *Code Civ. Proc. § 437c*, this form may be adapted for use by a cross-complainant or cross-defendant [*see, e.g., 580 Folsom Associates v. Prometheus Development Co. (1990) 223 Cal. App. 3d 1, 19, 272 Cal. Rptr. 227* (summary judgment for cross defendant); *Nymark v. Heart Fed. Savings & Loan Assn. (1991) 231 Cal. App. 3d 1089, 1094, 283 Cal. Rptr. 53* (summary judgment for cross complainant)].

[c] Summary Adjudication of Cause of Action, Defense, Claim for Punitive Damages, or Issue of Duty

If any party contends that one or more causes of action within an action has no merit or that there is no defense thereto, or that there is no merit to an affirmative defense as to any cause of action, or both, or that there is no merit to a claim for damages under *Civ. Code § 3294* (that is, a claim for punitive damages), or that one or more defendants either owed or did not owe a duty to the plaintiff orplaintiffs, then he or she may move for summary adjudication as to that cause or causes of action, that affirmative defense, that claim for damages, or that issue of duty [*Code Civ. Proc. § 437c(f)(1)*]. A cause of action has no merit if one or more of the elements of the cause of action, even if not separately pleaded, cannot be established, or if there is a complete defense to the cause of action [*Code Civ. Proc. § 437c(o)*; *see also Nazaroff v. Superior Court (1978) 80 Cal. App. 3d 553, 558, 145 Cal. Rptr. 657* (peremptory writ issued to set aside partial summary judgment on a cause of action because of triable issues of fact)].

A motion for summary adjudication must proceed in all procedural respects as a motion for summary judgment [*Code Civ. Proc. § 437c(f)(2)*]. Hence, it appears that, by analogy to a motion for summary judgment, a motion for summary adjudication must be granted if all the papers submitted show that there is no triable issue as to any material fact with respect to the matter sought to be adjudicated, and that the moving party is entitled to summary adjudication as a matter of law [*see Code Civ. Proc. § 437c(c)*; *see also Haskell v. Carli (1987) 195 Cal. App. 3d 124, 130, 240 Cal. Rptr. 439* (decided prior to amendment effective January 1, 1991, holding that motions for summary adjudication are governed by *Code Civ. Proc. § 437c(b), (c)*)].

The court will not grant a motion for summary adjudication unless it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty [*Code Civ. Proc. § 437c(f)(1)*].

If a motion for summary adjudication is granted, at the trial of the action, the cause or causes of action within the action, affirmative defense or defenses, claim for damages, or issue or issues of duty as to the motion which has been granted, shall be deemed to be established and the action shall proceed as to the cause or causes of action, affirmative defense or defenses, claim for damages, or issue or issues of duty remaining [*Code Civ. Proc. § 437c(n)(1)*].

In trying the action, the fact that a motion for summary adjudication has been granted as to one or more causes of action, affirmative defenses, claims for damages, or issues of duty within the action will not operate to bar any cause of action, affirmative defense, claim for damages, or issue of duty as to which summary adjudication was not sought or was denied [*Code Civ. Proc. § 437c(n)(2)*]. Moreover, at trial, neither a party, nor a witness, nor the court is allowed to comment to a jury on the grant or denial of a motion for summary adjudication [*Code Civ. Proc. § 437c(m)(3)*].

[d] Related Memoranda

For memoranda in support of motions for summary adjudication of issues (or partial summary judgment) relating to particular causes of actions and grounds, see specific, substantive chapters in this set, such as Ch. 50, *Contracts;* Ch. 66, *Death and Survival Actions;* Ch. 115, *Indemnity and Contribution;* and Ch. 142, *Libel and Slander (Defamation).*

[e] Related Pleading and Practice Forms

For forms and discussion relating to summary adjudication, see Ch. 537, *Summary Judgment* , in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Court Not Limited to Negligence Causes of Action to Rule on Issue of Duty, but May Also Do So in Context of Contractual Obligations

In ***Linden Partners v. Wilshire Linden Associates*** *(1998) 62 Cal. App. 4th 508, 73 Cal. Rptr. 2d 708* , plaintiffs agreed to buy a medical office building from the defendants. The purchase agreement obligated the defendants to furnish, but not until close of escrow, estoppel certificates signed by each tenant attesting to the space occupied, the date of the current lease, length of the terms, the amount of current monthly rent, and other information that would serve as a relatively full disclosure of the terms and conditions of the landlord/tenant relationship between the defendants (as landlords) and the tenants. A further condition of plaintiff's obligation under the agreement was the approval of estoppel certificates signed by at least 75 percent of the tenants and dated not more than 20 days before the close of escrow. Defendants agreed to provide estoppel certificates signed by defendants for the balance of the tenants. One tenant in the building had a subtenant. The subtenant refused to sign an estoppel certificate. The sublessor also refused to sign an estoppel certificate for its subtenant. A month before the escrow period, defendants broached to plaintiffs an idea concerning a buy-out of the tenant's lease. Defendant suggested to plaintiffs if the tenant was brought off, the space occupied by the tenant could be leased at a higher rate. There was no word about the amount of the subtenant's rent in the tenant's lease and in the sublease there was a paragraph which stated an amount of base rental and then described the methodology for calculating the total rental. Ultimately, the parties held a meeting to discuss the tenant's buy out. At that meeting the plaintiffs asked how to calculate the subtenant's rent. One of the defendants present at the meeting described how to make the calculations. Plaintiffs followed defendants directions and calculated the subtenant's monthly rental to be $9,327.61. On or about the day of the close of escrow, defendants put an estoppel certificate for the subtenant in escrow, showing the subtenant's monthly rental to be $9,327.61. Escrow closed and now the plaintiffs were the subtenant's landlord. Plaintiffs inquired and finally received the subtenant's first rent check which was for $6,177.60. Both parties had made the same mistake of applying the figure of the subtenant's pro rata share of operating expenses to the amount of such expenses attributable to the sublessordating back to the base year of 1972, instead of the much smaller amount of such expenses dating back only to 1982, as provided for in the sublease. Plaintiffs immediately called the error to the defendants' attention and demanded that the defendants make up the difference. They refused and a suit was filed. Plaintiff alleged causes of action for intentional and negligent misrepresentation, breach of written contract and money had and received. A jury trial followed with the jury finding for defendants on the fraud and money claims and for plaintiffs on the breach of contract claim awarding damages in the sum of $131,000 plus interest. Defendants appealed (*62 Cal. App. 4th 508, 512-515)* .

The court of appeal affirmed. One issue before the court of appeal was whether the law and motion judge had erred in granting plaintiffs motion for summary adjudication regarding the issue of duty. Defendants argued that the judge's ruling on the issue of duty was improper as a matter of law in that the issue of duty as determined by the law and motion judge in the case was not the kind of issue of duty contemplated by *Code Civ. Proc. § 437c(f)*. In support of its argument, defendants relied principally on *Regan Roofing Co. v. Superior Court (1994) 24 Cal. App. 4th 425, 29 Cal. Rptr. 2d 413* (*62 Cal. App. 4th 508, 517)* . The court concluded that such reliance was misplaced noting that *Regan* does not support the defendants in the argument that normal and customary contractual performance obligations are not duties under *Code Civ. Proc. § 437c(f)* (*62 Cal. App. 4th 508, 517-518)* . Neither this court nor the *Regan* court believes that the Legislature intended the word "an issue of duty" in *Code Civ. Proc. § 437c(f)* to apply only to negligence causes of action (*62 Cal. App. 4th 508, 518)* . Rather, if under the facts and circumstances of a given case, a court finds it appropriate to determine the existence or nonexistence of a duty in the nature of a contractual obligation, it may properly do so by ruling on that issue presented by a motion for summary adjudication (*62 Cal. App. 4th 508, 519)* . In the case before the court, the agreement did not specifically provide that defendants had a duty (*i.e.*, contractual obligation) to deliver to plaintiffs an estoppel certificate containing an accurate statement of the current monthly rental from the subtenant. Such language was, however, implicit in the obligatory language of the agreement and the court was asked to declare and define such duty by motion for summary adjudication. Thus, the court held that under the facts and circumstance of the case, such motion was a proper subject for summary adjudication and the duty

that was found was the kind of duty to which the Legislature intended *Code Civ. Proc. § 437c(f)* to apply (*62 Cal. App. 4th 508, 519)* .

Note that *Regan Roofing Co. v. Superior Court (1994) 24 Cal. App. 4th 425, 29 Cal. Rptr. 2d 413* is discussed in *§ 221.30[3][a]*.

[b] A Ruling That Completely Disposes of an Issue of Duty, but Which Has No Dispositive Impact on Other Issues, Is Appropriate

The facts and procedural background of ***Linden Partners v. Wilshire Linden Associates*** *(1998) 62 Cal. App. 4th 508, 73 Cal. Rptr. 2d 708* , are *discussed under § 221.21[3][a]*. One issue before the court of appeal was whether the law and motion judge had erred in granting plaintiffs motion for summary adjudication regarding the issue of duty. Defendants argued that, to be consonant with the legislative purpose of *Code Civ. Proc. § 437c(f),* a ruling on summary adjudication which determines an issue of duty must, in the words of *Regan Roofing Co. v. Superior Court (1994) 24 Cal. App. 4th 425, 436, 29 Cal. Rptr. 2d 413* , "dispose of an entire cause of action or affirmative defense ... [or] terminate [some] portion of [an] action" (*62 Cal. App. 4th 508, 519)* . Defendants asserted that the judge's ruling on the issue of duty did not have such dispositive effect and that, based on the language of *Regan*, such ruling failed to meet the legislative requirement of the section (*62 Cal. App. 4th 508, 519)* . The court rejected this argument noting that the language from *Regan*, on which defendants based their argument, seems clearly at variance from the language of *Code Civ. Proc. § 437c(f)* (*62 Cal. App. 4th 508, 519)* . Rather, the court noted that the substantive areas which may be challenged under *Code Civ. Proc. § 437c(f)* are stated in the disjunctive, *i.e.*, "... a cause of action, an affirmative defense, a claim for damages or an issue of duty." The plain meaning of this language is that a motion for summary adjudication may be granted or denied as to any of these substantive areas, standing alone, and without reference to the dispositive effect of such ruling on any of the companion substantive issues. A ruling that completely disposes of an issue of duty as required by the last sentence of the section, but which has no dispositive impact on other issues would appear to be fully in conformance with legislative intent and the straightforward, unambiguous language of the *Code Civ. Proc. § 437c(f)* (*62 Cal. App. 4th 508, 519-520)* . The court concluded that it could not accept *Regan* as controlling precedent (*62 Cal. App. 4th 508, 520)* and held that on a motion for summary adjudication, the court may rule whether a defendant owes or does not owe a duty to plaintiff without regard for the dispositive effect of such ruling on other issues in the litigation, except that the ruling must completely dispose of the issue of duty (*62 Cal. App. 4th 508, 522)* .

Note that *Regan Roofing Co. v. Superior Court (1994) 24 Cal. App. 4th 425, 29 Cal. Rptr. 2d 413* is discussed in *§ 221.30[3][a]*.

[c] Reliance on Absence of Evidence to Support Nonmoving Party's Case

In ***Lazar v. Hertz Corp.*** *(1999) 69 Cal. App. 4th 1494, 82 Cal. Rptr. 2d 368* , plaintiff filed a class action complaint for damages and injunctive relief against four rental companies alleging they refused to rent automobiles to persons underage 25 or unreasonably restricted such rentals. The trial court sustained demurrers to four of the seven causes of action alleged without leave to amend. Plaintiff voluntarily dismissed two additional causes of action, leaving only one cause of action alleging unfair business practices by defendants against plaintiff and those younger drivers who were charged a surcharge because of their age. Ultimately, the trial court granted a motion for summary adjudication filed by two of the defendants on the last cause of action. The trial court then entered judgment in favor of the defendants, all of the alleged causes of action having been adjudicated against plaintiff, and plaintiff appealed (*69 Cal. App. 4th 1494, 1499-1500)* .

The court of appeal affirmed the judgment. With regard to summary adjudication, in the trial court the defendants argued that plaintiff's discovery responses were factually devoid of evidence and thus, plaintiff had no evidence to support the factual allegations of the plaintiff's complaint. On appeal, as in the trial court, plaintiff argued that plaintiff

was not obligated to bring forth any evidence of unfair surcharges to survive a summary adjudication motion. In rejecting this argument, the court of appeal noted that on a motion for summary adjudication, a defendant may rely on a plaintiff's factually inadequate discovery answers to seek summary adjudication of a particular cause of action. If plaintiff fails to adduce evidence during discovery to support the factual allegations of his or her complaint, the burden shifts to the plaintiff, and the motion may be granted if the plaintiff does not set forth specific facts to show a triable issue of material fact. Plaintiff did not put forth any evidence in the trial court or on appeal in support of plaintiff's claim that the surcharge was unreasonably high or unreasonably imposed on younger drivers such that it constituted an unfair business practice. Because plaintiff failed to meet this burden, the defendants were entitled to summary adjudication in their favor as a matter of law (*69 Cal. App. 4th 1494, 1508)* .

[4] Additional Authorities

[a] Reliance on Absence of Evidence to Support Nonmoving Party's Case

In *Certain Underwriters at Lloyd's of London v. Superior Court (1997) 56 Cal. App. 4th 952, 65 Cal. Rptr. 2d 821* , involving an insurance coverage dispute, the trial court denied defendant's motion for summary adjudication of issues and defendant filed a petition for writ of mandate. Although the court of appeal denied the petition and refused to read the 1993 amendment to *Code Civ. Proc. § 437c* as a wholesale adoption of *Fed. R. Civ. P., Rule 56* (*56 Cal. App. 4th 952, 960-962)* , the court, quoting from *Leslie G. v. Perry & Associates (1996) 43 Cal. App. 4th 472, 482, 50 Cal. Rptr. 2d 785* , noted that a moving defendant may, through factually vague discovery responses or otherwise, point to the absence of evidence to support the plaintiff's case. When that is done, the burden shifts to the plaintiff to present evidence showing there is a triable issue of material fact. If the plaintiff is unable to meet its burden of proof regarding an essential element of its case, all other facts are rendered immaterial (*56 Cal. App. 4th 952, 956)* . In noting that the defendant's initial burden can be met by the presentation of factually vague discovery responses or otherwise, the court, however, also noted that no case suggests that *Code Civ. Proc. § 437c* permits the moving defendant to meet its initial burden without any showing at all (*56 Cal. App. 4th 952, 956)* .

[b] Court May Grant Summary Adjudication on Issue of Duty

Public Utilities Com. v. Superior Court (2010) 181 Cal. App. 4th 364, 105 Cal. Rptr. 3d 234 , was a mandate proceeding challenging the trial court's denial of a motion for summary adjudication or judgment brought by defendant, which was a public agency, in a wrongful death action arising out of a fatal accident at a railroad crossing. The crossing was controlled by flashing lights. Plaintiffs claimed that the railroad crossing constituted a dangerous condition because a recommendation by defendant to upgrade the crossing's warning devices by installing a gate was not implemented. Plaintiffs conceded that defendant did not own the property on which the railroad crossing was located, but contended that defendant controlled the property within the meaning of *Gov. Code § 830* because of its regulatory power over the crossing, including its authority over installation of safety devices. The trial court adopted that analysis and denied defendant's motion (*181 Cal. App. 4th 364, 366-372)* . The Court of Appeal found that a public entity's ability to regulate property it neither owned nor possessed was not equivalent to a public entity having control of the property within the meaning of § 830 and concluded that as a matter of law that defendant did not control the railroad crossing. The court issued a writ of mandate directing the trial court to summarily adjudicate in favor of defendant the issue whether it owed a duty to plaintiffs based upon the allegation that it controlled the railroad crossing. The question whether the crossing was controlled by defendant within the meaning of Gov. Code § section 830 was an issue of law. The trial court therefore erred in concluding that there was a triable issue of material fact on this issue. *Code of Civil Procedure section 437c(f)(1)* permits a trial court to summarily adjudicate an issue of duty (*181 Cal. App. 4th 364, 380-381)* .

California Points & Authorities

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Volume 22 Chapters 220-229 SUBROGATION---to---TRESPASS
CHAPTER 221 SUMMARY JUDGMENTS
PART II. FORMS

22-221 California Points & Authorities § 221.22

§ 221.22 Supporting Motion for Summary Judgment or Summary Adjudication--Reply Memorandum Objecting to Evidence Contained in Opposing Party's Papers [Code Civ. Proc. § 437c(b), (c)]--General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	REPLY MEMORANDUM OBJECTING TO EVID-
Plaintiff,	)	ENCE SUBMITTED BY OPPOSING PARTY
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

EVIDENCE CONTAINED IN THE PAPERS OPPOSING A MOTION FOR SUMMARY _____ [JUDGMENT *or* ADJUDICATION] TO WHICH OBJECTIONS HAVE BEEN MADE AND SUSTAINED MAY NOT BE CONSIDERED BY THE COURT IN DETERMINING WHETHER THERE IS NO TRIABLE ISSUE OF MATERIAL FACT.

A. Exclusion of Evidence to Which Objections Have Been Sustained. Evidence contained in any of the papers submitted in opposition to a motion for summary judgment or summary adjudication, to which evidentiary objections have been made and sustained by the court, must not be considered by the court in determining whether all the papers show that there is no triable issue as to any material fact (*Code Civ. Proc. § 437c(c)*).

B. Objections to Evidence. _____ [*Specify objecting party, e.g.*, Defendant] _____ [*name*] objects to _____'s [*specify opposing party, e.g.*, Plaintiff] evidence as set forth in Written Objections to Evidence, filed concurrently with this Reply.

[*Optional*] **C. Reliance on Pleadings Is Inadequate.** The party opposing a motion for _____ [summary judgment *or* summary adjudciation] may not rely on the mere allegations or denial of its pleadings to show that a triable issue of material fact exists but, instead, must set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto (*Code Civ. Proc. § 437c(p)*).

[*Optional*] **D. Opposing Party's Papers May Not Create Issue Outside Pleadings.** The party opposing a motion for _____ [summary judgment *or* summary adjudication] may not create issues outside the pleadings (*Laabs v. City of Victorville (2008) 163 Cal. App. 4th 1242, 1257, 78 Cal. Rptr. 3d 372* ; *Allyson v. Department of Transportation (1997) 53 Cal. App. 4th 1304, 1318-1321, 62 Cal. Rptr. 2d 490* ; *Sutherland v. Barclays American/Mortgage Corp. (1997) 53 Cal. App. 4th 299, 317, 61 Cal. Rptr. 2d 614*).

[*Optional*] **E. Conflict in Evidence Required to Create Issue of Fact.** An issue of fact can only be created by a conflict in the evidence. It is not created by speculation, conjecture, imagination, or guess work, nor is it raised by cryptic, broadly phrased, and conclusory assertions or mere possibilities (*Myricks v. Lynwood Unified School Dist. (1999) 74 Cal. App. 4th 231, 237, 87 Cal. Rptr. 2d 734*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This reply memorandum may be used by a party moving for summary judgment or summary adjudication to point out the fact that evidence to which objections have been made and sustained must not be considered by the court in determining whether the papers show there is no triable issue of material fact. Optional Paragraph C should be used if the opposing party seeks to rely improperly on its pleadings in opposing the motion [*see Code Civ. Proc. § 437c(p)*]. On the other hand, counter affidavits filed in response to a defendant's motion for summary judgment may not create issues outside the pleadings and are not a substitute for an amendment to the pleadings [*Malmstrom v. Kaiser Aluminum & Chemical Corp. (1986) 187 Cal. App. 3d 299, 313, 231 Cal. Rptr. 820]* .

Any reply to the opposition must be served and filed by the moving party not less than five days preceding the noticed or continued date of hearing, unless for good cause the court orders otherwise [*Code Civ. Proc. § 437c(b)(4)*].

It is recommended that objections raised orally at the hearing be accompanied by the objections in writing, as well as by a supporting memorandum. Effective January 1, 2007, the California Rules of Court contain specific format requirements for written objections to evidence in support of or in opposition to a motion for summary judgment. All written objections to evidence must be served and filed separately from the other papers in support of or in opposition to the motion. Each written objection must be numbered consecutively and must:

(1) Identify the name of the document in which the specific material objected to is located;

(2) State the exhibit, title, page, and line number of the material objected to;

(3) Quote or set forth the objectionable statement or material; and

(4) State the grounds for each objection to that statement or material.

The objections must also follow one of two formats specified in Rule 3.1354 [*Cal. Rules of Ct., Rule 3.1354(b)*]. Written objections must be served and filed at the same time as the objecting party's opposition or reply papers are served and filed [*Cal. Rules of Ct., Rule 3.1354(a)*]. A party submitting written objections to evidence must also submit with the objections a proposed order, which also must follow one of two formats shown in Rule 3.1354(c).

CAUTION:
Objections on specific evidence may be referenced by the objection number in the right column of a separate statement in opposition or reply to a motion, but the objections must not be restated or reargued in the separate statement [*Cal. Rules of Ct., Rule 3.1354(b)*].

For forms of objections to evidence and proposed order, see Ch. 537, *Summary Judgment* , §§ *537.86, 537.87* in California Forms of Pleading and Practice (Matthew Bender).

A party desiring to make objections to evidence in the papers on a motion for summary judgment must either submit objections in writing pursuant to *Cal. Rules of Ct., Rule 3.1354*, or make arrangements for a court reporter to be present at the hearing [*Cal. Rules of Ct., Rule 3.1352*].

[b] Waiver of Evidentiary Objections

Evidentiary objections not made at the hearing on the motion are deemed waived [*Code Civ. Proc. § 437c(b)(5), (d)*].

The provision relating to waiver of evidentiary objection set out in *Code Civ. Proc. § 437c(b)*, was amended effective January 1, 1991, and the same legislation added the similar provision set out in *Code Civ. Proc. § 437c(d)*. In connection with these amendments, the Legislature expressly noted its intent that all objections to the form and substance of the moving and opposing papers must be first made in the trial court and not on appeal by the parties or by the appellate court, and that the rules to contrary stated in *Witchell v. De Korne (1986) 179 Cal. App. 3d 965, 225 Cal. Rptr. 176* , and *Zuckerman v. Pacific Savings Bank (1986) 187 Cal. App. 3d 1394, 232 Cal. Rptr. 458* were abrogated [Stats. 1990, Ch. 1561, § 1]. These decisions had held that, notwithstanding the waiver of evidentiary objections set out in *Code Civ. Proc. § 437c(b)*, a party had a right to object on appeal to matters relating to the competency of the witness or the sufficiency of the affidavits, and that this right was not waived by failure to object at the trial level [*see Zuckerman v. Pacific Savings Bank (1986) 187 Cal. App. 3d 1394, 1404, 232 Cal. Rptr. 458* (objection on ground that declaration was not based on personal knowledge); *Witchell v. De Korne (1986) 179 Cal. App. 3d 965, 974, 225 Cal. Rptr. 176* (objection to sufficiency of supporting affidavit)].

Evidentiary objections submitted in proper written form before the hearing, as well as oral objections made during the hearing, preserve the evidentiary issues for appeal; the trial court has a duty to rule on objections presented in proper form, and if the trial court fails to rule then the objections are preserved on appeal [Reid v. Google, Inc. (2010) 50 Cal. 4th 512, 531, 235 P.3d 988, 113 Cal. Rptr. 3d 327].

[3] Discussion of Authorities

[a] Opposing Party's Papers May Not Create Issue Outside Pleadings

Laabs v. City of Victorville *(2008) 163 Cal. App. 4th 1242, 78 Cal. Rptr. 3d 372* was a personal injury action arising out of an automobile accident. Plaintiff sued various parties, including the City of Victorville and the County of San

Bernardino. She alleged her injuries were caused by a dangerous condition of public property. The accident in question occurred at the intersection of a four-lane, north/south road and a two-lane, east/west road. The two-lane road has a stop side at the westbound intersection. The accident occurred when a northbound vehicle on the larger road collided with a westbound vehicle turning from the smaller road onto the larger road. Plaintiff was a passenger in the vehicle traveling northbound. The other vehicle was turning left from the two-lane road when the two vehicles collided. The vehicle plaintiff was riding in, which was traveling at an estimated 74 miles per hour, spun around, jumped a curb, and crashed into a light pole on the adjacent sidewalk. In her First Amended Complaint, Plaintiff alleged that the City and County were negligent in designing, constructing, and maintaining the roads in that there was inadequate sight distance for the turning car to see the northbound car. The City moved for summary judgment on the grounds that the intersection was not a dangerous condition as a matter of law and on the basis of various immunities. Plaintiff opposed the motion on various grounds, but also argued that the placement of the light pole constituted a dangerous condition that contributed to the severity of her injuries. The court granted the City's motion for summary judgment, and the plaintiff appealed.

On appeal, the City argued that because Plaintiff did not make allegations regarding the placement of the light pole in her complaint, the court could not properly consider this argument on appeal. Plaintiff argued that although the light pole was not specifically mentioned in the complaint, the City's dangerous condition liability was mentioned and the light pole fit into that allegation. The court noted that in summary judgment proceedings, the pleadings delimit the issues to be considered and an opposing plaintiff may not bring up new, unpleaded issues in the opposing papers. Plaintiff should have sought to amend her complaint prior to the summary judgment hearing or at the hearing itself in order to raise the allegations about the light pole, as amendments to pleadings are readily allowed in the context of a summary judgment motion. Because the complaint attempted to predicate liability on a totally different condition, it was not broad enough to encompass the light pole theory of liability. The court of appeal affirmed the trial court's grant of summary judgment in defendant's favor (*163 Cal. App. 4th 1242, 1257)* .

Allyson v. Department of Transportation *(1997) 53 Cal. App. 4th 1304, 1318-1321, 62 Cal. Rptr. 2d 490* , involved a personal injury action, in which the plaintiff suffered personal injuries in a roadside, motor vehicle accident during an early spring snowstorm. The theory of the plaintiff's action was that the defendant, for many reasons, was responsible for the slippery and therefore dangerous condition of the highway. The defendant pleaded the weather immunity defense of *Gov. Code § 831*. The trial court granted summary judgment in the defendant's favor.

The court of appeal affirmed, noting that the defendant's filings in support of its motion were sufficient to provide the factual basis to make its affirmative defense available and thereby shift the burden to the plaintiff to demonstrate a triable issue of material fact with reference to that defense (*53 Cal. App. 4th 1304, 1317-1318)* . Although the plaintiff's filings in an effort to carry the plaintiff's burden were extensive, none of the plaintiff's filings were even remotely addressed to the dispositive issue framed by the pleadings, *i.e.*, whether theimmunity provided for in *Gov. Code § 831* was factually available. The plaintiff's filings were all addressed to nonissues and were based on the fallacious theory that the defendant had an unqualified duty to remedy the allegedly dangerous condition existing at the time of the plaintiff's injury on the state route at the location in question (*53 Cal. App. 4th 1304, 1318)* .

Sutherland v. Barclays American/Mortgage Corp. *(1997) 53 Cal. App. 4th 299, 61 Cal. Rptr. 2d 614* , involved an action against a mortgage company. The plaintiff owned a condominium that sustained severe damage in an earthquake. The mortgage company agreed to put a "stop" on the plaintiff's account for three months during which time the plaintiff did not have to make any payments. The plaintiff thought that the mortgage payments would resume at the regular amount at the end of the three month period thereby extending the life of the mortgage by three months. A week before the end of the "stop" period, the mortgage company informed the plaintiff that the next scheduled payment had to include not only the regular monthly amount, but also the sum of the three months' payments not made during the "stop" period. The plaintiff sent the mortgage company a check for one month only which was returned as an improper partial payment, and the mortgage company declared the plaintiff in default. The plaintiff filed an action against the mortgage company, alleging several causes of action, and seeking declaratory and injunctive relief to prevent foreclosure of the plaintiff's home. The trial court granted summary judgment for the defendant mortgage company.

The court of appeal reversed the summary judgment, with directions to enter summary adjudication as to certain claims. The court concluded that some but not all of the plaintiff's causes of action raised triable issues of fact. On appeal, the plaintiff argued that the court should recognize a new cause of action when a mortgagee false declares a mortgagor to be in default with intent of assigning the load to HUD and collecting on federal mortgage insurance. According to the plaintiff, the mortgagee in that situation is attempting to defraud the federal government. The court of appeal declined to address this contention because it was raised for the first time on appeal. In this regard the court noted that the complaint did not plead such a theory of liability and the issue was not addressed during the summary judgment proceedings. Quoting from *Nash v. Fifth Amendment (1991) 228 Cal. App. 3d 1106, 1116, 279 Cal. Rptr. 465* , the court stated that it is well established that a motion for summary judgment must be directed to the issues raised by the pleadings. The papers filed in response to a defendant's motion for summary judgment may not create issues outside the pleadings, and are not a substitute for an amendment to the pleadings. A defendant is not required to refute liability on some theoretical possibility not included in the pleading (*53 Cal. App. 4th 299, 317)* .

Myricks v. Lynwood Unified School Dist. *(1999) 74 Cal. App. 4th 231, 87 Cal. Rptr. 2d 734* , involved a personal injury action. Based on the evidence, the trial court granted summary judgment in favor of defendants finding no basis for imposing liability against them for plaintiffs' injuries. Plaintiffs appealed (*74 Cal. App. 4th 231, 234-237)* .

The court of appeal affirmed. The sole issue on appeal was whether sufficient evidence existed to create a triable issue of fact regarding the defendant's potential liability for the accident which gave rise to the personal injuries (*74 Cal. App. 4th 231, 234)* . In concluding that there was no legal basis to expose the defendants to potential liability for the accident (*74 Cal. App. 4th 231, 234)* , the court noted that an issue of fact can only be created by a conflict in the evidence. It is not created by speculation, conjecture, imagination, or guess work, nor is it raised by cryptic, broadly phrased, and conclusory assertions or mere possibilities (*74 Cal. App. 4th 231, 237)* .

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22-221 California Points & Authorities § 221.23

§ 221.23 Supporting Motion for Summary Judgment or Summary Adjudication--Reply Memorandum Objecting to Evidence Contained in Opposing Party's Papers [Code Civ. Proc. § 437c(b), (c)]--Inadequacy or Lack of Statement of Disputed or Undisputed Material Facts [Code Civ. Proc. § 437c(b)]

[1] FORM

[*Caption. See § 221.22.*]

THE COURT SHOULD GRANT _____ [*specify moving party, e.g.,* PLAINTIFF'S *or* DEFENDANT'S] MOTION FOR SUMMARY _____ [JUDGMENT *or* ADJUDICATION] BECAUSE _____ [*specify opposing party, e.g.,* DEFENDANT *or* PLAINTIFF] HAS _____ [SUBMITTED AN INADEQUATE *or* NOT SUBMITTED A] SEPARATE STATEMENT IN RESPONSE TO _____ [*specify moving party, e.g.,* PLAINTIFF'S *or* DEFENDANT'S] STATEMENT OF MATERIAL FACTS CONTENDED TO BE UNDISPUTED.

A. Inadequacy or Lack of Statement of Disputed or Undisputed Material Facts. The opposing papers must include a separate statement that responds to each of the material facts contended by the moving party to be undisputed, indicating whether the opposing party agrees or disagrees that those facts are undisputed (*Mills v. Forestex Co. (2003) 108 Cal. App. 4th 625, 640-641, 134 Cal. Rptr. 2d 273* ; *Frazee v. Seely (2001) 95 Cal. App. 4th 627, 635-636, 115 Cal. Rptr. 2d 780*). The statement also must set forth plainly and concisely any other material facts that the opposing party contends are disputed. Each material fact contended by the opposing party to be disputed must be followed by a reference to the supporting evidence. The failure to comply with this requirement of a separate statement may constitute a sufficient ground, in the court's discretion, for granting the motion (*Code Civ. Proc. § 437c(b)(3)*). When the moving party hasmet its initial burden of proof, the court has discretion under *Code of Civil Procedure Section 437c(b)* to grant summary judgment based on the opposing party's failure to file a proper separate statement (*Collins v. Hertz Corp. (2006) 144 Cal. App. 4th 64, 74-75, 50 Cal. Rptr. 3d 149* ; *Thatcher v. Lucky Stores, Inc. (2000) 79 Cal. App. 4th 1081, 1083, 1086, 94 Cal. Rptr. 2d 575*).

[*Optional*] **B. Lack of Knowledge Insufficient to Create Dispute.** A separate statement of disputed facts that asserts a lack of knowledge and a claim that a fact is "disputed" is insufficient when the opposing party has not requested a continuance to conduct further discovery or otherwise explained its ignorance (*City of Hope Nat. Medical Center v.*

Superior Court (1992) 8 Cal. App. 4th 633, 636 n.1, 10 Cal. Rptr. 2d 465).

[*Optional*] **C. Reliance on Pleadings Is Inadequate.** [*See § 221.22, Paragraph C.*]

[*Optional*] **D. Opposing Party's Papers May Not Create Issue Outside Pleadings.** [*See § 221.22, Paragraph D.*]

[*Optional*] **E. Conflict in Evidence Required to Create Issue of Fact.** [*See § 221.22, Paragraph E.*]

[*When appropriate, this form should be combined with a general form of supplemental memorandum objecting to evidence contained in the opposing party's papers (see § 221.22).*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This reply memorandum of points and authorities may be used by a party moving for summary judgment or summary adjudication in order to raise objections to the adequacy or lack of the opposing party's statement of disputed or undisputed facts [*see Code Civ. Proc. § 437c(b)*]. When appropriate, this form should be combined with a general reply memorandum objecting to evidence contained in the opposing party's papers [*see § 221.22*].

Any reply to the opposition must be served and filed by the moving party not less than five days preceding the noticed or continued date of hearing, unless the court for good cause orders otherwise. Evidentiary objections not raised in such a written reply or orally at the hearing are deemed waived [*Code Civ. Proc. § 437c(b)(4)*].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show by specific reference if the opposing party (1) has not responded or has responded inadequately to each material fact that the moving party contends is undisputed, (2) has not set forth plainly and concisely any material facts that the opposing party contends are disputed, (3) has not referred to supporting evidence for each material fact contended to be disputed, or (4) has failed completely to respond to the moving party's statement of undisputed facts.

With regard to paragraph A, some cases have upheld the granting of summary judgment based on the opposing party's failure to file a separate statement as required under *Code Civ. Proc. § 437c(b)(3)* without specifying any requirement that the moving party first satisfy its burden of proof [*see, e.g., Kaplan v. LaBarbera (1997) 58 Cal. App. 4th 175, 179, 67 Cal. Rptr. 2d 903* (failure to submit separate statement in opposition to motion alone is sufficient to uphold grant of motion; summary judgment for defendant upheld); *Blackman v. Burrows (1987) 193 Cal. App. 3d 889, 893, 238 Cal. Rptr. 642* (trial court did not abuse its discretion in granting summary judgment motion based on opposing party's failure to submit separate statement); *see also Gilbertson v. Osman (1986) 185 Cal. App. 3d 308, 315 316, 229 Cal. Rptr. 2d 627* (trial courts may grant motion if opposing party fails to submit separate statement of material facts if failure significantly interferes with court's mission of seeking truth and justice; plaintiff's failure to submit separate statement did not justify order granting summary judgment; *disapproved on other grounds* in *Woods v. Young (1991) 53 Cal. 3d 315, 328 n.4, 279 Cal. Rptr. 613, 807 P.2d 455*)].

Other cases have held, however, that the court does not have discretion under *Code Civ. Proc. § 437c(b)(3)* to grant summary judgment based on the opposing party's failure to file a proper separate statement unless the moving party has met its initial burden of proof [*Thatcher v. Lucky Stores, Inc. (2000) 79 Cal. App. 4th 1081, 1086, 94 Cal. Rptr. 2d 575* ; *see Kulesa v. Castleberry (1996) 47 Cal. App. 4th 103, 111-112, 54 Cal. Rptr. 669* (court's discretion to grant motion under *Code Civ. Proc. § 437c(b)* does not override court's *Code Civ. Proc. § 437c(c)* duty to review all papers filed in conjunction with motion); *see also Pepperell v. Scottsdale Ins. Co. (1998) 62 Cal. App. 4th 1045, 1055 n.7, 73 Cal. Rptr. 2d 164* (because defendant did not make prima facie showing of entitlement to summary judgment, plaintiffs' failure to file opposition papers, including a responding separate statement, was irrelevant; although trial court has discretion to grant summary judgment when opposing party fails to comply with statutory requirement of separate statement, appellate court will not affirm granting of summary judgment solely on that basis); *Cravens v. State Bd. of Equalization (1997) 52 Cal.App. 4th 253, 255, 257, 60 Cal. Rptr. 2d 436* (trial court had power to grant unopposed defense motion for summary judgment when moving papers had met its burden, and plaintiff could not avoid entry of summary judgment by filing request for dismissal without prejudice on day before scheduled hearing date)]. Thus, when the circumstance warrant, counsel may consider revising paragraph A.

[3] Discussion of Authorities

[a] Inadequacy or Lack of Statement of Disputed or Undisputed Material Facts

In ***Mills v. Forestex Co.*** *(2003) 108 Cal. App. 4th 625, 134 Cal. Rptr. 2d 273* , plaintiffs filed a complaint against the builder of their home for breach of express warranty, breach of implied warranty and strict product liability after the siding began to warp and buckle. They also sued the manufacturer of the siding. The defendants brought a motion for summary judgment on the ground that the applicable statute of limitations had run on all of the causes of action. The trial court granted the motion and the plaintiffs appealed.

During the appeal, plaintiffs attempted to introduce facts regarding the timing of their discovery of the defect that they did not set forth in their separate statement. The appellate court concluded that it would not consider these new facts that were not in the separate statement and affirmed the motion for summary judgment against plaintiffs. The court reiterated the rule that the statutory requirement for a separate statement mandates that the party specify within that document any facts he or she deems disputed. If the fact is not set forth in the separate statement, it is considered not to exist. The court noted that it t is irrelevant if the fact is buried in all of the papers filed with the court; it must be set forth in the separate statement (*108 Cal. App. 4th 625, 640-641)* .

In ***Frazee v. Seely*** *(2001) 95 Cal. App. 4th 627, 115 Cal. Rptr. 2d 780* , plaintiff client filed a malpractice action against defendants, attorneys and law firms. A motion for summary judgment was filed by one of the law firms and their attorneys, and the court permitted another firm and its attorneys to join in the motion. The trial court granted the motion but was reversed on appeal because the court erred by allowing the other law firm to join in the motion for summary judgment without filing a separate statement. A simple notice of joinder in a motion for summary judgment is insufficient to satisfy the requirements of *Code Civ. Proc. 437c(b)*; each moving party must support their motion for summary judgment with a separate statement responding to each of the material facts contended by the moving party to be undisputed, and indicating whether the opposing party agrees or disagrees that those facts are undisputed. The motion for summary judgment filed by the first law firm included a separate statement that mentions the other law firm only in terms of their initial involvement in the dissolution action. It did not set forth facts relating to the second firm's alleged malpractice that they contend are not in dispute. Without such factual assertions, the court's grant of summary judgment was improper (*95 Cal. App. 4th 627, 635-637)* .

In ***Collins v. Hertz Corp.*** *(2006) 144 Cal. App. 4th 64, 50 Cal. Rptr. 3d 149* , two employees sued their former employer along with individual employees and supervisors for workplace harassment, retaliation, and various other causes of action. Defendants moved for summary judgment. In response, the plaintiffs (there were three plaintiffs at the outset) filed three opposing memoranda and four separate statements. Defendant objected that plaintiffs' papers failed to

comply with the Code of Civil Procedure or the Rules of Court. The court agreed, and ordered plaintiffs' counsel to re-file opposing papers which complied with the rules. Plaintiffs submitted amended papers; however, the separate statement still failed to comply with the applicable rules. For example, plaintiffs' separate statement failed to unequivocally state whether Hertz's undisputed facts were disputed or undisputed. Therefore, the court deemed the facts undisputed and granted summary judgment in Hertz's favor. Plaintiffs appealed the ruling.

The court of appeal affirmed (*144 Cal. App. 4th 64, 80)* . The court held that the trial court had properly stricken portions of plaintiffs' separate statement for failure to comply with the summary judgment statute. The statute requires an opposing party's separate statement to respond specifically to each purportedly undisputed fact with a statement indicating whether the party agrees or disagrees the fact is undisputed and, for each fact she disputes, a citation to the evidence supporting her position. Additionally, the trial court was correct in not permitting plaintiffs to file individual separate statements. The court gave plaintiffs a chance to cure the defects in their opposition papers, but the amended papers still did not comply with the statute. Therefore, it could not be said that the court abused its discretion in granting summary judgment (*144 Cal. App. 4th 64, 74-75)* .

Thatcher v. Lucky Stores, Inc. *(2000) 79 Cal. App. 4th 1081, 94 Cal. Rptr. 2d 575* , involved a personal injury action. The trial court granted defendant's summary judgment motion on the ground "plaintiffs failed to file any opposition or opposing separate statement of undisputed facts to the motion." The ruling was consistent with a local court rule. Plaintiffs appealed.

The court of appeal affirmed (*79 Cal. App. 4th 1081, 1087)* . The court concluded that defendant met its initial burden of proof, and due to plaintiffs' failure to file opposition, summary judgment was proper (*79 Cal. App. 4th 1081, 1083)* . In reaching its conclusion, the court, however, addressed the trial court's order and the local court rule. Reviewing the *Code Civ. Proc. § 437c(c)* standard for granting summary judgment, and defendant's burden of proof under *Code Civ. Proc. § 437c(o)(2)* (*see now Code Civ. Proc. § 437c(p)(2)*) the court found that although these provisions do not expressly state that the court is prohibited from granting summary judgment when the moving party has not met its initial burdenof proof, to conclude otherwise would be contrary to the statute's apparent intent and strong policy against disposing of cases on procedural deficiencies rather than trying cases on the merits (*79 Cal. App. 4th 1081, 1085)* .While *Code Civ. Proc. § 437c(b)* [*now see Code Civ. Proc. § 437c(b)(3)*] allows the court, in its discretion, to grant summary judgment if the opposing party fails to file a proper separate statement, this provision does not authorize doing so without first determining that the moving party has met its initial burden of proof. In *Kulesa v. Castleberry (1996) 47 Cal. App. 4th 103, 106, 113, 54 Cal. Rptr. 2d 669* , the court stated that a trial court must consider all of the papers submitted before exercising its discretion to grant a summary judgment based on the failure to file an adequate separate statement and concluded that when the most cursory view of all the papers shows the motion to be utterly without factual or legal merit, the court has no discretion to grant summary judgment (*79 Cal. App. 4th 1081, 1086)* . Accordingly, unless the moving party has met its initial burden of proof, the court does not have discretion under *Code Civ. Proc. § 437c(b)* to grant summary judgment based on the opposing party's failure to file a proper separate statement (*79 Cal. App. 4th 1081, 1086)* .

The court concluded that the local rule was invalid as applied to summary judgment motions since it authorized the court to grant summary judgment based solely on the absence of opposition, without a preliminary finding that the moving party met its initial burden of proof. Such a result is contrary to the statutory law and case law construing *Code Civ. Proc. § 437c* (*79 Cal. App. 4th 1081, 1086-1087)* . Lack of opposition was thus an improper ground on which to grant summary judgment, absent a finding that defendant met its initial burden of proof (*79 Cal. App. 4th 1081, 1087)* . The court, however, found that defendant met its initial burden of proof and affirmed the judgment (*79 Cal. App. 4th 1081, 1083, 1087)* .

[b] Lack of Knowledge Insufficient to Create Dispute

In ***City of Hope Nat. Medical Center v. Superior Court*** *(1992) 8 Cal. App. 4th 633, 10 Cal. Rptr. 2d 465* , plaintiff

insurer sought to recover money paid by mistake to defendant hospital, a bona fide creditor of the insured. Defendant moved for summary judgment, contending that the insurer was not entitled to reimbursement unless the payments made to the hospital were induced by the hospital's fraudulent conduct. Plaintiff submitted a separate statement of disputed facts in which it asserted a lack of knowledge to support a claim that a fact was disputed. The trial court denied the motion, and defendant filed a petition for writ of mandate (*8 Cal. App. 4th 633, 636)* .

The court of appeal granted the writ, thus reversing the trial court's holding. In commenting on the adequacy of plaintiff's separate statement of disputed facts, the court noted that an assertion of lack of knowledge and a claim that a fact is "disputed" is not enough. Further, because plaintiff did not request a continuance to conduct further discovery or otherwise explain its lack of knowledge, plaintiff's ignorance sounds more imagined than real (*8 Cal. App. 4th 633, 636 n.1*).

[4] Additional Authorities

[a] Inadequacy or Lack of Statement of Disputed or Undisputed Material Facts

In *Wall Street Network, Ltd. v. New York Times Co. (2008) 164 Cal. App. 4th 1171, 80 Cal. Rptr. 3d 6* , plaintiff sued defendants for breach of contract and misrepresentation arising out of an internet marketing agreement. Defendant moved for summary judgment, contending plaintiff could not establish that it had performed under the agreement. The trial court granted defendants' motion for summary judgment, and plaintiff appealed. On appeal, plaintiff argued the trial court had erred by refusing to consider deposition testimony set forth in oral argument but not included with plaintiff's opposition. The deposition had taken place three days before plaintiff's opposition was due, but plaintiff neither included the testimony in its opposition nor submitted a declaration from the deponent. The appellate court noted the split of authority regarding courts' authority to consider evidence not included in a party's separate statement. However, in this case there was no abuse of discretion in the trial court's refusal to consider the testimony at the summary judgment hearing. The deponent was available to provide a declaration, but none was submitted with the opposition. Although the deposition took place prior to the due date for the opposition, plaintiff did not include the testimony in support of its contention that there was a triable issue of fact (*164 Cal. App. 4th 1171, 1189-1190)* .

In *Frank and Freedus v. Allstate Ins. Co. (1996) 45 Cal. App. 4th 461, 52 Cal. Rptr. 2d 678* , plaintiff brought an action against its insurer for failure to defend it in a suit by an ex-employee for wrongful termination. The trial court found that the insurer had no duty to defend, and granted its motion for summary judgment. On appeal, plaintiff claimed that the summary judgment was improperly limited to the complaint in the underlying action, failing to take into account extrinsic evidence which revealed facts bringing the action into the terms of the policy. However, plaintiff failed to demonstrate any language in the policy providing a duty to defend. The court of appeal stated that in defending against a summary judgment motion, the opposing party asserting a material factual dispute must present the facts through declarations or affidavits. A mere assertion in a complaint that such evidence exists is not sufficient to raise a material issue of fact meriting a trial (*45 Cal. App. 4th 461, 475-476)* . Concluding that plaintiffs failed to show any potential for coverage under the policy, the court affirmed the judgment.

In *Lyons v. Security Pacific Nat. Bank (1995) 40 Cal. App. 4th 1001, 48 Cal. Rptr. 2d 174* , a defendant bank successfully moved for summary judgment in an action alleging conspiracy in connection with a loan transaction. The trial court permitted the plaintiff to oppose the motion orally at the hearing on the motion. In opposing the motion, plaintiff presented no separate statement, affidavits or declarations or other documentary evidence to dispute or contradict the facts presented by defendant in its supporting papers. In upholding the summary judgment, the court of appeal stated that when no affidavits are filed in opposition to a motion for summary judgment, the trial court is entitled to accept as true the facts alleged in the movant's affidavits. Allegations and promises to prove facts are inadequate (*40 Cal. App. 4th 1001, 1014)* . Additionally, the court held that a party may not orally oppose a motion for summary judgment, since without at least a separate statement and evidence in the form of supporting affidavits or declarations, it is impossible to demonstrate disputed facts (*40 Cal. App. 4th 1001, 1006, 1013)* .

Plaintiff in *Sacks v. FSR Brokerage, Inc. (1992) 7 Cal. App. 4th 950, 9 Cal. Rptr. 2d 306* , sued the defendant sellers and brokers for fraud, breach of contract, and other causes of action arising from the defective condition of property plaintiff had purchased. Defendant brokerage moved for summary judgment based on the absence of any triable factual issues. Plaintiff filed a brief response and opposition to the motion based exclusively on the lack of jurisdiction because of purportedly inadequate service (*7 Cal. App. 4th 950, 954)* . The trial court granted the motion, and stated in its order that the moving party had adequately supported each of its issues and plaintiff failed to offer any contrary evidence or arguments in opposition (*7 Cal. App. 4th 950, 960)* . Plaintiff appealed, in part because the trial court did not specifically refer to evidence proffered in support of the motion that indicated that no triable issue exists. The court of appeal affirmed the judgment and rejected plaintiff's argument regarding the inadequacy of the order. The court of appeal noted that plaintiff had filed no substantive opposition, and thus had not provided a separate statement of disputed facts. The trial court did not err in not specifically referring to evidence bearing upon the conclusion that no triable issues of fact existed, and its granting of the motion was consistent with the procedural requirements of the summary judgment statute (*7 Cal. App. 4th 950, 960-961)* .

Barisich v. Lewis (1990) 226 Cal. App. 3d 12, 275 Cal. Rptr. 331 , was a quiet title action in which the trial court granted plaintiff's motion for summary judgment, the defendant appealed and the court of appeal affirmed. The appellate court said that opinions or conclusions in the opposing party's declaration were not sufficient to create a triable issue of fact so as to defeat summary judgment, that the opposing party's burden is to set forth "evidentiary" facts which disclose the existence of a triable, factual issue, and that the defendant had failed to do so (*226 Cal. App. 3d 12, 22)* .

In *Buehler v. Alpha Beta Co. (1990) 224 Cal. App. 3d 729, 274 Cal. Rptr. 14* , the trial court granted a summary judgment for defendant in a slip and fall case on the ground defendant had established a prima facie defense of no liability and that plaintiff had failed to file a separate statement of undisputed material facts which, by itself, constituted a basis for the summary judgment. The court of appeal affirmed on both grounds. With respect to the separate statement, the court pointed out that *Code Civ. Proc. § 437c(b)*, requires that (1) the opposition papers include a separate statement which responds to each of the material facts contended by the moving party to be undisputed, indicating whether the opposing party agrees or disagrees that those facts are undisputed; (2) the statement also set forth plainly and concisely any other material facts which the opposing party contends are disputed; and (3) that each material fact contended by the opposing party to be disputed be followed by a reference to the supporting evidence, and provides that failure to comply with this requirement of a separate statement may constitute a sufficient ground, in the court's discretion, for granting the motion (*224 Cal. App. 3d 729, 734-735)* . The court said that this explicitly gives the trial court discretion to grant a motion for summary judgment when an opposing party fails to comply with the requirement of a separate statement. It is not an appellate court's function to substitute its own view as to the proper decision. To find an abuse of discretion, it must appear that the trial court acted arbitrarily, capriciously, or without any basis in reason (*224 Cal. App. 3d 729, 735)* . The court concluded that to the extent that the summary judgment was based on *Code Civ. Proc. § 437c(b)* [*now see Code Civ. Proc. § 437c(b)(3)*], the trial court acted well within its discretion (*224 Cal. App. 3d 729, 735)* .

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Volume 22 Chapters 220-229 SUBROGATION---to---TRESPASS
CHAPTER 221 SUMMARY JUDGMENTS
PART II. FORMS

22-221 California Points & Authorities § 221.23A

§ 221.23A Supporting Motion for Summary Judgment or Summary Adjudication--Reply Memorandum Objecting to Evidence Contained in Opposing Party's Papers--Affidavit or Declaration of Opposing Party's Expert Witness Conflicts With Expert's Earlier Statements

[1] FORM

[*Caption. See § 221.22*]

THE COURT SHOULD GRANT _____ [specify moving party, e.g., PLAINTIFF'S or DEFENDANT'S] MOTION FOR SUMMARY _____ [JUDGMENT or ADJUDICATION] BECAUSE STATEMENTS IN THE EXPERT'S AFFIDAVIT OR DECLARATION SUBMITTED BY _____ [specify opposing party, e.g., DEFENDANT or PLAINTIFF] CONFLICT WITH EARLIER STATEMENTS BY THE SAME EXPERT AND THE CONFLICT IS NOT EXPLAINED.

Statements in Expert's Affidavit or Declaration Conflict with Earlier Statements by Same Expert and Conflict Is Not Explained. In a motion for summary judgment or summary adjudication, when an expert's declaration contains statements that conflict with statements the expert made previously, such as in a previous report on a material issue, and the conflict is unexplained, the declaration or affidavit does not establish a triable issue of fact (*141 Cal. App. 4th 525, 565-566)*).

[2] Comments

[a] Use of Form

This reply memorandum may be used by a party moving for summary judgment or summary adjudication in order to raise objections to an affidavit or declaration of an expert submitted by the opposing party, when statements in the expert's affidavit or declaration conflict with earlier statements by the same expert, and the conflict is not explained. When appropriate, this form should be combined with a general reply memorandum objecting to evidence contained in the opposing party's papers [*see § 221.22*].

Any reply to the opposition must be served and filed by the moving party not less than five days preceding the noticed

or continued date of hearing, unless the court for good cause orders otherwise. Evidentiary objections not raised in a written reply or orally at the hearing are deemed waived [*Code Civ. Proc. § 437c(b)(4)*].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show by specific reference how the statements of the expert in the affidavit or declaration submitted in opposition to the motion for summary judgment conflict with earlier statements by the same expert, and how the conflict is not explained.

[3] Discussion of Authorities

[a] Statements in Affidavit or Declaration of Expert Conflict With Earlier Statements by Same Expert and Conflict Is Not Explained

Alvis v. County of Ventura *(2009) 178 Cal. App. 4th 536, 100 Cal. Rptr. 3d 494* , arose from a massive landslide after heavy rains in 2005. Plaintiffs suffered injuries or were relatives of persons who died as a result of the slide. They sued the county, alleging causes of action for a dangerous condition of public property, nuisance and inverse condemnation. The county moved for summary adjudication on all causes of action except inverse condemnation, resting on the county's design immunity (*see Gov. Code § 830.6*). In opposition to the count's motion, plaintiffs submitted the declaration of a registered geotechnical and civil engineer. The county objected to the declaration on the ground, *inter alia*, that its conclusions were contradicted by an earlier report by him and submitted the affidavit of a registered civil and geotechnical engineer to that effect. Although the trial court overruled the county's objection to the declaration, it found the declaration did not constitute substantial evidence so as to raise a triable issue of fact and granted the county's motion. Plaintiffs dismissed the inverse condemnation cause of action and appealed the judgment arising from the summary adjudication (*178 Cal. App. 4th 536, 538-547)* .

The Court of Appeal affirmed. The court reviewed the motion for summary adjudication de novo and reached the same conclusion as the trial court. Most significantly, a statement in the expert's declaration asserting that the slide started at the bottom of the cliff when the wall failed directly contradicted his prior statement in a report to an insurance company that the "[f]ailure started as a landslide in the upper reaches and then flowed at a rapid rate down to the developed area below." The statement that the slide started in the upper reaches of the cliff directly undercut the premise on which his entire declaration was based, and he offered no explanation. Although the prior statement was not in the form of testimony under oath, the court could not accept as substantial evidence of a triable issue of fact a declaration that directly contradicted the declarant's prior statement, where the contradiction was unexplained (*178 Cal. App. 4th 536, 547-549)* .

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Volume 22 Chapters 220-229 SUBROGATION---to---TRESPASS
CHAPTER 221 SUMMARY JUDGMENTS
PART II. FORMS

22-221 California Points & Authorities § 221.24

§ 221.24 Supporting Motion for Summary Judgment or Summary Adjudication--Reply Memorandum Objecting to Continuance Sought by Opposing Party to Obtain Additional Facts [Code Civ. Proc. § 437c(h)]--Insufficient Showing of Need for Continuance

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	REPLY MEMORANDUM OF POINTS AND AUTHORITIES OBJECTING TO REQUEST BY OPPOSING PARTY FOR CONTINUANCE OF MOTION FOR SUMMARY _____ [JUDGMENT *or* ADJUDICATION]
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	Date: _____
	)	Time: _____
	)	Location: _____
		[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

THE COURT SHOULD DENY _____ [*specify opposing party, e.g.,* PLAINTIFF'S *or* DEFENDANT'S] REQUEST FOR A CONTINUANCE OF _____ [*specify moving party, e.g.,* DEFENDANT'S *or* PLAINTIFF'S] MOTION FOR SUMMARY _____ [JUDGMENT *or* ADJUDICATION] BECAUSE _____ [*specify opposing party, e.g.,* PLAINTIFF *or* DEFENDANT] HAS NOT SUFFICIENTLY SHOWN THAT THE CONTINUANCE IS NECESSARY FOR HIM/HER TO OBTAIN ADDITIONAL FACTS ESSENTIAL TO JUSTIFY HIS/HER OPPOSITION TO THE MOTION.

[*EITHER*]

A. Evidence Sought to Be Produced Is Not Essential to Justify Opposition. A continuance under *Section 437c(h) of the Code of Civil Procedure* is not required if the evidence sought to be produced by the opposing party is not sufficiently essential to justify opposition (*Yuzon v. Collins (2004) 116 Cal. App. 4th 149, 167, 10 Cal. Rprt. 3d 18* ; *Hartenstine v. Superior Court (1987) 196 Cal. App. 3d 206, 221, 241 Cal. Rptr. 756 , cert. denied, 488 U.S. 899*).

[*AND/OR*]

B. Request for Continuance Must Be Supported by Good-Faith Showing by Affidavit. To obtain a continuance under *Section 437c(h) of the Code of Civil Procedure*, a party opposing the motion for summary _____ [judgment *and/or* adjudication of issues] must make a good-faith showing by affidavit that he/she needs more time to _____ [obtain affidavits *and/or* conduct discovery]; an allegation of need in conclusory terms is insufficient for this purpose (*see American Continental Ins. Co. v. C & Z Timber Co. (1987) 195 Cal. App. 3d 1271, 1280, 241 Cal. Rptr. 466*).

[*AND/OR*]

C. Party Seeking Continuance Must Make Showing It Has Been Diligent in Conducting Discovery. To obtain a continuance under *Section 437c(h) of the Code of Civil Procedure*, the party requesting a continuance must make a sufficient showing as to what facts essential to oppose the motion may have existed and why such facts could not have been discovered sooner, and that the requesting party has been diligent in completing discovery (*Cooksey v. Alexakis (2004) 123 Cal. App. 4th 246, 257, 19 Cal. Rptr. 3d 810*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This reply memorandum of points and authorities may be used by a party moving for summary judgment or summary adjudication to object to a request by the opposing party for a continuance in the motion proceeding. The ground for the objection is that the opposing papers do not adequately show that the continuance is needed for the opposing party to gather facts essential to his or her opposition to the motion [*see Code Civ. Proc. § 437c(h)*].

In an appropriate case, these points and authorities may be submitted in reply to the contention supported by the points and authorities *set out in § 221.43*.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. For example, counsel should show by specific reference that the evidence sought to be discovered is not sufficiently essential to justify opposition.

[b] Request for Continuance

If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained, or discovery to be had, or may make any other order as may be just [*Code Civ. Proc. § 437c(h)*].

[3] Discussion of Authorities

[a] Evidence Sought to Be Produced Is Not Essential to Justify Opposition

In ***Yuzon v. Collins*** *(2004) 116 Cal. App. 4th 149* , 10 Cal. Rprt. 3d 18, an invitee was bitten by a dog at an apartment complex. The plaintiff filed an action against the landlord. In his opposition to the summary judgment motion, plaintiff requested a continuance of the summary judgment hearing. Plaintiff contended that his animal behavior expert, Richard H. Polsky, Ph.D., needed more time to review discovery materials and prepare his declaration.

After the plaintiff's continuance request was denied and the landlord's motion for summary judgment was granted, the injured party sought review.

The appellate court affirmed the denial of the continuance, holding that the power to determine when a continuance should be granted is generally within the discretion of the court, and there is no right to a continuance as a matter of law. However, *Code Civ. Proc. § 437c(h)* mandates a continuance of a summary judgment hearing upon a good faith showing by affidavit that a continuance is needed to obtain facts essential to justify opposition to the motion. In this case, plaintiff sought a continuance to obtain Dr. Polsky's expert declaration regarding the landlord's' actual knowledge of the dog's vicious propensities. While the subject matter (Collins' knowledge of the dog's vicious propensities) was essential to plaintiff's opposition to the summary judgment motion, the trial court was ultimately proven correct in concluding Dr. Polsky's declaration has no material relevance regarding that issue. Dr. Polsky's declaration, when reviewed by the trial court with regard to the motion for reconsideration, failed to create a triable issue of material fact. Accordingly, there was no error in denying the motion for continuance (*116 Cal. App. 4th 149, 167)* .

In affirming, the court determined that the landlord only had a duty of care to protect the invitee if he had actual knowledge of the dog's vicious nature in time to protect against the dangerous condition on his property. He did not have a duty to inspect the premises. The evidence showed that the landlord allowed the tenants to have a dog. The landlord thought that the tenants still owned a dog that had died. He was not aware that they owned the dog involved in the incident. The dog in question was kept inside of the apartment, and the landlord rarely visited. The dog's act of pushing on a door and barking constituted normal animal behavior; it was not enough to put the landlord on notice of the dog's existence or its allegedly violent propensities. The landlord was not aware of any acts of aggression by the dog. Finally, the motion to reconsider was properly denied because an expert witness did not raise an issue of fact about the landlord's knowledge.

In ***Hartenstine v. Superior Court*** *(1987) 196 Cal. App. 3d 206, 241 Cal. Rptr. 756* , a hospital brought an action against a federal employee to recover the cost of hospital expenses that the employee had failed to pay. The employee cross complained against his insurance company, which had denied benefits under his claim. In the cross complaint, the insured set forth causes of action for breach of contract, common-law bad-faith breach of the implied covenant of fair dealing, and statutory bad faith under *Ins. Code § 790.03(h)*. The insurer filed a motion for summary adjudication under former Code Civ. Proc. § 437c(f) of the issue of subject matter jurisdiction over the stated causes of actions in tort, on the ground that they were preempted by federal statute (Federal Employee Health Benefits Act, specifically *5 U.S.C. § 8902(m)(1)*). The trial court granted the motion.

The court of appeal affirmed, rejecting, among other things, the insured's contention that the trial court should have

granted a continuance in order to allow the insured to obtain a copy of his employee's insurance contract and other documentation. In the instant case, the insurer had attached a copy of the insurance contract to its motion. Moreover, it is a document that should have originally been attached to the insured's cross complaint. The insured failed to show either that the evidence sought was essential to justify opposition, or that he could not have obtained it in the two-year period between the filing of the insured's second amended cross complaint and the insurer's motion for summary adjudication. Consequently, the insured's contention that the trial court should have granted a continuance was without merit (*196 Cal. App. 3d 206, 221)* .

[b] Request for Continuance Must Be Supported by Good-Faith Showing by Affidavit

In ***American Continental Ins. Co. v. C & Z Timber Co.*** *(1987) 195 Cal. App. 3d 1271, 241 Cal. Rptr. 466* , an insurer brought an action against the insured seeking declaratory relief to determine its liability with regard to an airplane insurance policy. The airplane had crashed while carrying a paying passenger, and while operated by a pilot specifically named in the pilot-clause endorsement. The policy expressly excluded coverage for flights carrying paying passengers. The defendant contended that plaintiff was estopped from enforcing the exclusion because of its negligence in specifically insuring an incompetent pilot. The plaintiff filed a motion for summary judgment on the cause of action regarding denial of coverage. The defendant filed a memorandum in opposition to the motion, making various assertions but failing to support them with declarations or affidavits. The trial court granted plaintiff's motion for summary judgment.

The court of appeal affirmed, rejecting defendant's contention that the matter should have been continued to allow discovery, and holding that no triable issue of fact remained for determination (*195 Cal. App. 3d 1271, 1279-1281)* . Pursuant to *Code Civ. Proc. § 437c(h)*, if it appears from the affidavits submitted in opposition to a motion for summary judgment that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had, or may make any other order as may be just. Generally, power to determine when a continuance should be granted is within the discretion of the court, and there is no right to a continuance as a matter of law. The need for a continuance must be made by a good-faith showing by affidavit. It is not enough merely to raise the issue in an opposition memorandum. Defendant alleged in conclusional terms in its memorandum that much discovery remained to be done, but failed to provide supporting affidavits or declarations detailing facts establishing the existence of controverting evidence, and the reasons why that evidence could not be presented at the time of the hearing. Moreover, defendant had over one year from the filing of the complaint until the filing of the motion in which to conduct discovery, but failed to offer an explanation for not obtaining discovery in that time (*195 Cal. App. 3d 1271, 1280)* . The moving party must only negate the existence of triable issues of fact in a fashion that entitles it to judgment on the issues raised by the pleadings; it is not required to refute liability on some theoretical possibility not included in the pleadings (*195 Cal. App. 3d 1271, 1281)* .

[c] Party Seeking Continuance Must Make Showing It Has Been Diligent in Conducting Discovery

In ***Cooksey v. Alexakis*** *(2004) 123 Cal. App. 4th 246, 19 Cal. Rptr. 3d 810* , an orthopedic patient was suing her doctor for medical negligence following treatment for a knee injury. Defendant filed a motion for summary judgment, and plaintiff filed a request for continuance along with her opposition. In support of the request, plaintiff's attorney submitted a declaration stating that he had retained an expert who needed to review responses to outstanding written discovery and defendant's deposition testimony prior to finalizing his opinions (*123 Cal. App. 4th 246, 252)* .

On the scheduled date of the summary judgment hearing, plaintiff filed an ex parte application for an order continuing the motion and the trial, which was less than 30 days away. In support of this application, plaintiff submitted two declarations: one from her expert, stating that defendant's treatment fell below the standard of care, and one from her attorney, stating that he needed to depose defendant because his progress notes were illegible.

At the hearing on the application, plaintiff's counsel admitted that he had made a tactical decision not to depose defendant earlier. He also stated that he had not submitted his expert's declaration in opposition to defendant's summary judgment motion because he had not wanted to disclose his expert's opinions before defendant's deposition. The trial court denied plaintiff's request for a continuance and granted defendant's summary judgment motion. The trial court specifically stated that plaintiff's counsel failed to present any explanation in his declaration as to why the allegedly necessary discovery had not been completed sooner. Moreover, at the hearing on the ex parte application, plaintiff's counsel acknowledged that he had withheld his expert's declaration as a tactical decision (*123 Cal. App. 4th 246, 253-254)* .

The appellate court affirmed the denial of the continuance, holding that plaintiff failed to make a good showing as to what facts essential to oppose the motion may have existed and why such facts could not have been discovered sooner. The court further held that a trial court may consider whether a party requesting a continuance under *Code Civ. Proc. § 437c(h)* has been diligent in completing discovery (*123 Cal. App. 4th 246, 257)* .

The court's analysis was two-fold. First, the court held that the declarations submitted by plaintiff's counsel failed to show how the outstanding discovery was related to plaintiff's opposition (*123 Cal. App. 4th 246, 254)* . Counsel's initial declaration simply stated that the expert needed to review written discovery responses and defendant's deposition testimony in order to finalize his opinions and prepare a declaration in opposition to the motion. Similarly, the expert's declaration, while stating that defendant's conduct fell below the standard of care, did not show that the expert needed to review discovery results in order to confirm or augment his opinion (*123 Cal. App. 4th 246, 257-258)* .

Second, noting there is a split of opinion on the issue in the courts of appeal, the Second District held that a lack of diligence in completing discovery may be a ground for denying a request for a continuance of asummary judgment motion. The court noted that the appellate courts in the First, Second, and Sixth Districts have upheld such diligence requirements, while the Fourth District has questioned whether diligence in conducting discovery should be a factor in ruling on a continuance request (*123 Cal. App. 4th 246, 255)* . While acknowledging that the summary judgment statute does not mention diligence, the court noted that *Code Civ. Proc. § 437c(h)* requires a party seeking a continuance to declare why "facts essential to justify opposition ... cannot, for *reasons stated, then* be presented" (*123 Cal. App. 4th 246, 257* , quoting *Code Civ. Proc. § 437c(h)*, italics in original). The court also cited a line of cases requiring the declarations to be in good faith in support of its holding that the party seeking a continuance must set forth a justifiable reason why essential facts cannot be presented. In the instant case, plaintiff's counsel had admitted that he delayed discovery for tactical reasons. This was not a justifiable reason for a continuance under *Code Civ. Proc. § 437c(h)* (*123 Cal. App. 4th 246, 257)* .

[4] Additional Authorities

[a] Request for Continuance Must Be Supported by Good-Faith Showing by Affidavit

The facts and procedural background of *Thatcher v. Lucky Stores, Inc. (2000) 79 Cal. App. 4th 1081, 94 Cal. Rptr. 2d 575* are *discussed under § 221.23[3][a]*. In affirming summary judgment for defendant, the court concluded that the trial court was not required to continue the summary judgment motion under *Code Civ. Proc. § 437c(h)*, because plaintiffs' continuance request was not included in timely opposition to the summary judgment motion and plaintiffs failed to establish that facts essential to justifying opposition might exist but could not be presented before the hearing (*79 Cal. App. 4th 1081, 1083)* .

In *Scott v. CIBA Vision Corp. (1995) 38 Cal. App. 4th 307, 44 Cal. Rptr. 2d 902* , plaintiff filed a products liability action against the maker of a contact lens cleaning product. Defendant moved for summary judgment on the ground that the product was regulated exclusively by the Food and Drug Administration, so that state claims were preempted. Plaintiff moved to continue the matter for further discovery. The trial court denied the continuance and granted the summary judgment. With regard to the motion for continuance, the court of appeal noted that the trial court stated as its

reason for denial of the motion that no affidavit had been filed in support of the request, pursuant to *Code Civ. Proc. § 437c(h)*. Plaintiff claimed that various discovery orders amounted to affidavits within the meaning of the statute. However, the court ruled that it was incumbent upon plaintiff to show by affidavit that the requested discovery could reasonably lead to evidence which would refute the essential facts of preemption. Since plaintiff did not submit any such affidavit, the conditions of *Code Civ. Proc. § 437c(h)* were not met and continuance was not mandatory (*38 Cal. App. 4th 307, 326)* . Also agreeing with the trial court on the issue of preemption, the court of appeal affirmed the judgment.

Hill v. Physicians & Surgeons Exchange (1990) 225 Cal. App. 3d 1, 274 Cal. Rptr. 702 , was an action by a medical patient against her doctor's insurer. The patient had previously sued the doctor, settling that case for $284,303.21, with payment of $15,000 by the doctor and an assignment of his rights against the insurer for reimbursement under the policy and for failure to appear and defend him. The trial court granted the insurer's motion for summary judgment, and plaintiff appealed, contending, among other things, that the trial court erred in failing to grant a continuance to allow her to take the doctor's out-of-state deposition under *Code Civ. Proc. § 437c(h)*. In affirming the judgment, the court of appeal, after quoting *Code Civ. Proc. § 437c(h)*, said that *Code Civ. Proc. § 437c* mandates a continuance of a summary judgment hearing on a good-faith showing by *affidavit* that a continuance is needed to obtain facts essential to justify opposition to the motion, and that it is not enough to merely raise the issue in the opposition memorandum (*225 Cal. App. 3d 1, 7-8)* .

In *O'Laskey v. Sortino (1990) 224 Cal. App. 3d 241, 273 Cal. Rptr. 674* , a personal injury action, the complaint was filed eight days after the statute of limitations had run. The case languished for approximately two years during which time plaintiff's attorney hired an investigator, who, through a ruse, secured from the defendant over the telephone an admission that defendant had been absent from the state for two weeks in July of "last year." If this statement was true and "last year" was during the limitations period, the two-week absence would have triggered application of the tolling period provided in *Code Civ. Proc. § 351*, and the complaint would have been timely filed. The conversation was tape-recorded without the defendant's knowledge. However, in his deposition defendant denied he had been out of the state for more than one weekend and, based on this testimony, defendant moved for summary judgment. In opposition, plaintiff submitted a transcript of the taped conversation and his lawyer's declaration purporting to authenticate the transcript and the tape, and requested a continuance to depose his investigator. The trial court denied the request for a continuance, refused to receive the transcript in evidence, and granted the motion for summary judgment. The tape itself was not offered in evidence. Chronologically, the action was filed on February 27, 1986; plaintiff obtained the transcript from his investigator on June 16, 1986; on March 18, 1988, plaintiff filed an amended complaint to allege that the defendant had been out of the state for at least eight days during the statutory period; defendant answered the complaint on August 4, 1988; on September 9, 1988, plaintiff took defendant's deposition; plaintiff's deposition of his investigator was scheduled for December 9, 1988, but unilaterally canceled by plaintiff; and the summary judgment motion was heard on December 13, 1988 (*224 Cal. App. 3d 241, 244-245, 251)* .

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22-221 California Points & Authorities § 221.25

§ 221.25 Supporting Motion for Summary Judgment or Summary Adjudication--Reply Memorandum Objecting to Continuance Sought by Opposing Party to Obtain Additional Facts [Code Civ. Proc. § 437c(h)]--Request for Continuance Untimely Filed

[1] FORM

[*Caption. See § 221.24.*]

THE COURT SHOULD DENY _____ [*specify opposing party, e.g.,* PLAINTIFF'S *or* DEFENDANT'S] REQUEST FOR A CONTINUANCE OF _____ [*specify moving party e.g.,* DEFENDANT'S *or* PLAINTIFF'S] MOTION FOR SUMMARY _____ [JUDGMENT *or* ADJUDICATION] BECAUSE _____ [*specify opposing party, e.g.,* PLAINTIFF *or* DEFENDANT] HAS NOT FILED THE REQUEST FOR CONTINUANCE IN A TIMELY MANNER.

A. Request for Continuance Must Be Brought in a Timely Manner. Failure to request a *Code of Civil Procedure Section 437c(h)* continuance in a timely manner is, in itself, an adequate basis for denial of the request for continuance (*Roth v. Rhodes (1994) 25 Cal. App. 4th 530, 547, 30 Cal. Rptr. 2d 706*).

[*AND/OR*]

B. Unlimited Number of Continuances Not Mandated by Statute. *Code of Civil Procedure Section 437c(h)* does not provide for an unlimited number of continuances to be granted (*Roth v. Rhodes (1994) 25 Cal. App. 4th 530, 547, 30 Cal. Rptr. 2d 706*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This reply memorandum of points and authorities may be used by a party moving for summary judgment or summary adjudication to object to a request by the opposing party for a continuance in the motion proceeding. The ground for the objection is that the request for the continuance was not filed in a timely manner and/or that a previous request for continuance was already granted [*see Code Civ. Proc. § 437c(h)*; *Roth v. Rhodes (1994) 25 Cal. App. 4th 530, 30 Cal. Rptr. 2d 706]* .

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. For example, counsel should show by specific reference that a previous request for continuance by the moving party has been granted.

In appropriate circumstances, this form may be combined with the points and *authorities in § 221.24*.

[3] Discussion of Authorities

[a] Request for Continuance Must Be Brought in a Timely Manner

In ***Roth v. Rhodes*** *(1994) 25 Cal. App. 4th 530, 30 Cal. Rptr. 2d 706* , Roth, a doctor of podiatry wishing to lease office space in a medical building operated by defendants, brought suit against defendants attacking their policy limiting tenants to medical doctors. The suit alleged violations of the Cartwright Act and common law prohibitions on restraint of trade, unfair competition, interference with prospective business advantage, and intentional interference with the right to practice a profession, and violations of the Unruh Civil Rights Act. The trial court granted judgment on the pleadings on the cause of action for interference with prospective business advantage and granted summary adjudication on all other causes of actions (*25 Cal. App. 4th 530, 535-536)* .

At the time of the hearing on the motions, Roth's counsel presented the trial court with a declaration requesting a continuance. The declaration stated Roth needed time to conduct further discovery and time to obtain and interview his expert witnesses. The court denied the continuance on grounds the request was untimely and the declaration was insufficient to support a continuance (*25 Cal. App. 4th 530, 536, 547)* .

On appeal Roth argued that his complaint stated sufficient facts to constitute a cause of action and also that the trial court had a mandatory duty to continue the hearing as requested. The court of appeal disagreed on all counts and stated that there was no such mandatory duty under the facts of the case and that the trial court did not abuse its discretion in denying the request (*25 Cal. App. 4th 530, 536)* .

Addressing the issue of the request for continuance, the court of appeal noted that the trial court did not hear the motion until six weeks after it had been filed. Next, the trial court had already once continued the hearing at Roth's request to permit him to file late opposition. The court of appeal stated that the statute does not provide for an unlimited number ofcontinuances. At the time of the motion, the case had been pending two and one-half years, well beyond the goals of the Trial Court Delay Reduction Act of 1990. The case was close to trial. Although the trial was subsequently continued, at the time the motion was noticed, it was scheduled to be heard near the last day permitted by *Code Civ. Proc. § 437c(a)*, which requires the motion to be heard no later than 30 days before the date of trial. Roth did not request the continuance until the time of the hearing. The court of appeal stated that this in and of itself was an adequate basis for denial of the continuance. Furthermore, no reason was given for the lateness of the request. This too, was sufficient basis for the denial of the continuance. Finally, the declaration failed to satisfy the requirement of *Code Civ. Proc. § 437c(h)* that makes it a condition that the party moving for a continuance show "facts essential to justify opposition may exist." The declaration indicated that two depositions remained to be completed and Roth had not yet

received his expert opinions. However, there was no statement which suggested what facts might have existed to support the opposition to the motions. The trial court was fully justified in finding the declaration insufficient to support a continuance (*25 Cal. App. 4th 530, 547-548)* .

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22-221 California Points & Authorities § 221.26

§ 221.26 Supporting Motion for Summary Judgment or Summary Adjudication--Reply Memorandum Seeking Continuance to Depose Opposing Party's Expert Regarding Foundation of Expert's Opinion

[1] FORM

[*Caption, see § 221.24.*]

THE COURT SHOULD GRANT _____ [*specify moving party, e.g.,* DEFENDANT's *or* PLAINTIFF'S] REQUEST FOR A CONTINUANCE OF _____ [*specify moving party, e.g.,* DEFENDANT's *or* PLAINTIFF'S] MOTION FOR SUMMARY _____ [JUDGMENT *or* ADJUDICATION] BECAUSE _____ [AN EXPERT or EXPERTS] FOR _____ [*specify opposing party, e.g.,* PLAINTIFF(S) *or* DEFENDANT(S)] _____ [HAS *or* HAVE] SUPPLIED _____ [A DECLARATION *or* AN AFFIDAVIT *or* DECLARATIONS *or* AFFIDAVITS] IN OPPOSITION TO SUMMARY _____ [JUDGMENT *or* ADJUDICATION] AND THERE IS A LEGITIMATE QUESTION REGARDING THE FOUNDATION OF THE OPINION OF THE EXPERT(S).

Continuance to Depose Expert Who Has Supplied Declaration Concerning Foundation of Opinion. Under proper circumstances, although there has been no exchange of experts pursuant to Code of Civil Procedure *Section 2034 Civil* Discovery Act of 1986 [Civil Discovery Act, *Code Civ. Proc. § 2016.010 et seq.* (operative July 1, 2005)], a continuance may be granted to permit a party to depose an expert who supplies _____ [a declaration *or* an affidavit] in support of _____ [summary judgment *or* summary adjudication] when there is a legitimate question regarding the foundation of the expert's opinion (*see St. Mary Medical Center v. Superior Court (1997) 50 Cal. App. 4th 1531, 1539-1540, 58 Cal. Rptr. 2d 182*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This reply memorandum of points and authorities may be used by the moving party when a party opposing a motion for summary judgment or summary adjudication submits declarations or affidavits from an expert in opposition to the motion, and there is a legitimate question regarding the foundation of the expert's opinion. Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Continuance to Depose Expert Who Has Supplied Declaration Concerning Foundation of Opinion

The facts, procedural background, and discussion of ***St. Mary Medical Center v. Superior Court*** *(1997) 50 Cal. App. 4th 1531, 58 Cal. Rptr. 2d 182* are set forth under § 221.43[3][b] [*Code Civ. Proc. § 437c(h)*]. In *St. Mary Medical Center*, plaintiffs submitted a declaration from an expert doctor in opposition to the defendants' motion for summary judgment. The court of appeal issued a writ of mandate ordering the trial court to (1) set aside its order denying the deposition of plaintiffs' expert doctor, and (2) enter a different order granting the motion with the deposition to be limited to foundational issues relating to the opinions rendered by the doctor in the doctor's declaration in opposition to the motion for summary judgment (*50 Cal. App. 4th 1531, 1541)* . In so ruling, the court noted that it believed that in proper circumstances the court should allow a party to a summary proceeding the opportunity to take limited discovery which may effectively dispose of the proceeding (*50 Cal. App. 4th 1531, 1538-1539)* . Although there has been no exchange of experts pursuant to Code Civ. Proc. § 2034 (*Code Civ. Proc. § 2034.210 et seq.* operative July 1, 2005), under proper circumstances the parties should be allowed to depose an expert who supplies a declaration or affidavit in support of or in opposition to summary judgment or summary adjudication when there is a legitimate question regarding the foundation of the expert's opinion (*50 Cal. App. 4th 1531, 1540)* . Whether to grant discovery in a given case falls within the trial court's sound discretion based on all the facts presented. There must be objective facts presented that create a significant question regarding the validity of the affidavit or declaration which, if successfully pursued, will impeach the foundational basis of the affidavit or declaration in question (*50 Cal. App. 4th 1531, 1540-1541)* .

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22-221 California Points & Authorities § 221.27

§ 221.27 Supporting Motion for Summary Judgment or Summary Adjudication--Reply Memorandum of Points and Authorities [Code Civ. Proc. § 437c(b)]--Timely Motion [Code Civ. Proc. § 437c(a)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*]	)	REPLY MEMORANDUM OF POINTS AND AU-
Plaintiff,	)	THORITIES DETERMINING TIMELINESS OF
vs.	)	MOTION
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

[*EITHER*]

A MOTION FOR SUMMARY JUDGMENT NOTICED FOR HEARING NO LATER THAN 30 DAYS BEFORE THE DATE TO WHICH THE TRIAL HAS BEEN CONTINUED IS TIMELY.

Trial Date as Used in *Code of Civil Procedure Section 437c(a)* Includes Continued Trial Date. The 30-day time

limit specified in *Code of Civil Procedure Section 437c(a)*, providing that the motion for summary judgment shall be heard no later than 30 days before the trial date, is calculated based on the trial date in existence when the motion is noticed, regardless of whether or not that date is the original date (*Green v. Bristol Myers Co. (1988) 206 Cal. App. 3d 604, 609, 253 Cal. Rptr. 745*).

[*OR*]

A MOTION FOR SUMMARY JUDGMENT HEARD MORE THAN 60 DAYS AFTER THE GENERAL APPEARANCE OF THE PARTY AGAINST WHOM THE MOTION IS DIRECTED IS TIMELY.

Motion Heard More Than 60 Days After General Appearance Is Timely. A motion for summary judgment is permitted eventhough it has been filed less than 60 days after the general appearance if the hearing is held after the 60-day period (*Sadlier v. Superior Court (1986) 184 Cal. App. 3d 1050, 1054, 229 Cal. Rptr. 374*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

The foregoing reply memorandum of points and authorities may be submitted by a party moving for summary judgment when it is contended in the opposition papers that the motion is untimely (*see § 221.33*). The first alternative paragraph may be used to respond to the objection that the motion is untimely because it cannot be heard within 30 days before the original trial date. The second alternative paragraph may be used to respond to the objection that the motion was filed prematurely, before the expiration of 60 days after the general appearance of the party against whom the motion is directed.

See also *§ 221.22[2]*.

[3] Discussion of Authorities

[a] Trial Date as Used in Code of Civil Procedure Section 437c(a) Includes Continued Trial Date

Green v. Bristol Myers Co. *(1988) 206 Cal. App. 3d 604, 253 Cal. Rptr. 745* , was a product liability action, in which defendant's motion for summary judgment was noticed for hearing more than 30 days before the continued trial date then in effect but after the original trial date. The motion was granted, and plaintiff appealed from the judgment, contending that the requirement of *Code Civ. Proc. § 437c(a)* that the summary judgment motion be heard no later than 30 days before the date of trial, unless the court for good cause orders otherwise, means that the summary judgment motion must be heard no later than 30 days prior to the initial trial date and that any continuance of that date will not extend the time within which a motion may be heard.

The court of appeal rejected the contention and affirmed the judgment. The court held that, in keeping with the legislative intent to dispose of meritless claims prior to trial, the inescapable conclusion is that the 30-day time limit on summary judgment hearings should be calculated based on the trial date in existence when the motion is noticed regardless of whether or not that date is the original trial date. To construe the statute otherwise would unduly bar

otherwise meritorious motions such as the one presented from being heard and requiring the wasteful expenditure of time and money in the unnecessary litigation of a baseless claim (*206 Cal. App. 3d 604, 609)* .

[b] Motion Heard More Than 60 Days After General Appearance Is Timely

In ***Sadlier v. Superior Court*** *(1986) 184 Cal. App. 3d 1050, 229 Cal. Rptr. 374* , an action on promissory notes, one of the defendants sought a writ of mandate to compel the trial court to vacate its order granting a motion for summary adjudication of the issues because the motion was filed and served prior to 60 days from the defendant's first general appearance and prior to the defendant's filing of an answer.

The court of appeal affirmed the trial court's order, holding that the court did not err in permitting the motion even though it had been filed less than 60 days after the general appearance because the hearing was held after the 60-day period. The court also held that the filing of an answer by the defendant is not a prerequisite to the filing of a motion for summary adjudication of the issues (*184 Cal. App. 3d 1050, 1054-1056)* .

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22-221 California Points & Authorities § 221.28

§ 221.28 Supporting Motion for Summary Adjudication--Reply Memorandum of Points and Authorities [Code Civ. Proc. § 437c(b)]--Adjudication Sought of Separate Cause of Action [Code Civ. Proc. § 437c(f)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____ _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	REPLY MEMORANDUM IN SUPPORT OF SUM-
vs.	)	MARY ADJUDICATION
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THE ALLEGATIONS RELATING TO _____ [*identify allegations at issue*] CONSTITUTE A SEPARATE AND DISTINCT WRONGFUL ACT, WHICH, ALTHOUGH ALLEGED IN THE SAME CAUSE OF ACTION AS ANOTHER WRONGFUL ACT, IS A SEPARATE CAUSE OF ACTION THAT MAY BE CHALLENGED BY SUMMARY ADJUDICATION.

A. Cause of Action as Separate and Distinct Wrongful Act. Allegations relating to two separate matters involving acts performed at different times, with different and distinct obligations, involve two separate and distinct causes of action, regardless of how pleaded in the complaint (*Lilienthal & Fowler v. Superior Court (1993) 12 Cal. App. 4th 1848, 1854, 16 Cal. Rptr. 2d 458*).

B. Challenge to Separate Act by Summary Adjudication Appropriate. A party may move for summary adjudication challenging a separate and distinct wrongful act, even though that act is combined with other wrongful acts alleged in the same cause of action (*Lilienthal & Fowler v. Superior Court (1993) 12 Cal. App. 4th 1848, 1853, 16 Cal. Rptr. 2d 458*).

[*Optional*] **C. Challenge to Declaratory Relief Action by Summary Adjudication Appropriate.** A party may move for summary adjudication of a properly pled cause of action for declaratory relief even though the controversy between the parties in the declaratory relief action spills over into other causes of action. For example, the fact that the same issue of contract interpretation is also raised in other causes of action does not in itself bar declaratory relief or summary adjudication of the declaratory relief cause of action (*Southern Cal. Edison Co. v. Superior Court (1995) 37 Cal. App. 4th 839, 846-847, 44 Cal. Rptr. 2d 227*).

[2] Comments

[a] Use of Form

This reply memorandum of points and authorities may be submitted by a party moving for summary adjudication when the opposition contends in its papers that a favorable ruling regarding one transaction of two alleged in the same cause of action will not dispose of the entire cause of action [*see Code Civ. Proc. § 437c(f)* (summary adjudication of one or more causes of action within an action)]. In an appropriate case, these points and authorities may be submitted in reply to the contention supported by the points and authorities *set out in § 221.30*.

Any reply to the opposition must be served and filed by the moving party not less than five days preceding the noticed or continued date of hearing, unless the court for good cause orders otherwise [*Code Civ. Proc. § 437c(b)(4)*].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show by specific reference how the transactions described under the same cause of action are separate and distinct from one another, regardless of how they are pleaded in the complaint.

[3] Discussion of Authorities

[a] Cause of Action as Separate and Distinct Wrongful Act

In ***Lilienthal & Fowler v. Superior Court*** *(1993) 12 Cal. App. 4th 1848, 16 Cal. Rptr. 2d 458* , real parties in interest filed a legal malpractice complaint in which they alleged a cause of action for breach of contract relating to two separate and distinct matters, and one for negligence relating to the same two matters. Petitioners filed a motion for summary adjudication on the ground that any claim relating to the earlier of the two matters was barred by the statute of limitations. The trial court denied the motion on the ground that a favorable ruling would not completely disposeof a cause of action as required by *Code Civ. Proc. § 437c(f)* (*12 Cal. App. 4th 1848, 1851)* .

The court of appeal reversed, holding that although *Code Civ. Proc. § 437c(f)* does not specifically define "cause of action," allegations relating to two separate matters involving acts performed at different times, with different and distinct obligations, involve two separate and distinct causes of action, regardless of how pleaded in the complaint (*12 Cal. App. 4th 1848, 1854)* . Summary adjudication is appropriate to challenge a separate and distinct wrongful act, even though that act is combined with other wrongful acts alleged in the same cause of action (*12 Cal. App. 4th 1848, 1853)* .

[b] Challenge to Declaratory Relief Action by Summary Adjudication Appropriate

In ***Southern Cal. Edison Co. v. Superior Court*** *(1995) 37 Cal. App. 4th 839, 44 Cal. Rptr. 2d 227* , the parties

disputed the meaning of certain contract language. The plaintiff's complaint stated causes of action for declaratory relief, specific performance, and breach of contract. After discovery, plaintiff moved for summary adjudication of its declaratory relief cause of action, and the court granted the motion. Defendant challenged the trial court's authority to grant the motion because the issue of the meaning of the contract language that was the basis of the declaratory relief action was also raised in the specific performance and breach of contract claims.

Although reversing the trial court on substantive grounds, the court of appeal rejected the defendant's procedural argument. The court characterized defendant's position as a misunderstanding of *Hood v. Superior Court (1995) 33 Cal. App. 4th 319, 39 Cal. Rptr. 2d 296* , in which the court of appeal had issued a writ of mandate directing the trial court to set aside its order granting summary adjudication of a declaratory relief action. In *Hood,* the moving party had plucked certain issues out of the existing complaint and cross complaint and placed them in a purported declaratory relief cause of action solely for the purpose of moving for summary adjudication on that cause of action and thereby make an end run around the *Code Civ. Proc. § 437c(f)* requirement that a summary adjudication motion dispose of a complete cause of action. The court expressed its view that *Hood* does not prohibit a trial court from granting summary adjudication in a properly pled cause of action for declaratory relief merely because the controversy between the parties spills over into other causes of action. Rather, *Hood* teaches that parties will not be allowed to misuse the declaratory relief cause of action in an attempt to subvert the requirement that a motion for summary adjudication must completely dispose of a cause of action (*37 Cal. App. 4th 839, 846)* . The court noted that the interpretation of a contract is clearly a proper subject of declaratory relief, and concluded that the fact that the same issue of contract interpretation is also raised in other causes of action does not in itself bar declaratory relief of summary adjudication of that cause of action (*37 Cal. App. 4th 839, 847)* .

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Volume 22 Chapters 220-229 SUBROGATION---to---TRESPASS
CHAPTER 221 SUMMARY JUDGMENTS
PART II. FORMS

22-221 California Points & Authorities § 221.29

§ 221.29 Opposing Motion for Summary Judgment--Triable Issue of Material Fact Exists [Code Civ. Proc. § 437c]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN OPPOSITION TO MOTION FOR SUM-
vs.	)	MARY JUDGMENT
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

SUMMARY JUDGMENT IS IMPROPER WHEN A TRIABLE ISSUE OF MATERIAL FACT EXISTS AND THE MOVING PARTY IS NOT ENTITLED TO A JUDGMENT AS A MATTER OF LAW.

A. Rules Governing Summary Judgment Procedure. It is proper for a court to grant a motion for summary judgment only if the supporting papers are sufficient to sustain a judgment as a matter of law in favor of the moving party and the opposing party has not presented any facts which give rise to a triable issue as to any material fact (*Code Civ. Proc. § 437c(c)*). In examining the supporting and opposing papers, the moving party's affidavits or declarations are strictly construed and those of the opposing party are liberally construed. Statements of fact contained in the affidavits or declarations in opposition to the motion should be accepted as true, and doubts as to the propriety of granting the

motion should be resolved in favor of the party opposing the motion. Summary judgment is a drastic procedure and should be used with caution so that it does not become a substitute for the open trial method of determining facts (*Corwin v. Los Angeles Newspaper Service Bureau, Inc. (1971) 4 Cal. 3d 842, 851-852, 94 Cal. Rptr. 785, 484 P.2d 953* ; *Jos. Schlitz Brewing Co. v. Downey Distributor (1980) 109 Cal. App. 3d 908, 914, 916, 167 Cal. Rptr. 510*).

[*EITHER*]

B. Burden on Moving Party. A _____ [plaintiff *or* cross complainant] moving for summary judgment has met his or her burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on that cause of action. Once the _____ [plaintiff *or* cross complainant] has met that burden, the burden shifts to the _____ [defendant *or* cross defendant] to show that a triable issue of one or more material facts exists as to that cause of action (*Code Civ. Proc. § 437c(o)(1)*).

[*OR*]

B. Burden on Moving Party. A _____ [defendant *or* cross defendant] moving for summary judgment has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the _____ [defendant *or* cross defendant] has met that burden, the burden shifts to the _____ [plaintiff *or* cross complainant] to show that a triable issue of one or more material facts exists as to that cause of action (*Code Civ. Proc. § 437c(p)(2)*; *Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 850, 107 Cal. Rptr. 2d 841*). A moving defendant may not shift the burden simply by suggesting the possibility that the plaintiff cannot prove its case. A _____ [defendant *or* cross defendant] moving for summary judgment is not required to conclusively negate an element of the plaintiff's cause of action but the _____ [defendant *or* cross defendant] must show that the plaintiff cannot establish at least one element of the cause of action--for example, that the plaintiff cannot prove element X. The _____ [defendant *or* cross defendant] must also show that the _____ [plaintiff *or* cross plaintiff] cannot reasonably obtain needed evidence, because he or she must be allowed a reasonable opportunity to oppose the motion under *Code of Civil Procedure Section 437c(h)* (*Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 853-854, 107 Cal. Rptr. 2d 841*). A moving _____ [defendant *or* cross defendant] must present evidence, and not simply point out, that the plaintiff does not possess, and cannot reasonably obtain, needed evidence. The _____ [defendant *or* cross defendant] must support the motion with evidence including "affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice" must or may be taken (Code Civ.Proc. § 437c(b)(1); *Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 854-855, 107 Cal. Rptr. 2d 841, 24 P.3d 493*). [*Add if defendant contends there is an absence of evidence on a material issue, but the issue was not addressed at all in discovery:* Although one case has stated that this circumstantial evidence requirement may be supported by inferring from factually devoid discovery responses that there is no further evidence available to support the motion, that case also stated that no inference can be made with respect to questions that were neither asked nor answered. Thus, when defendant has not directed a question to a relevant issue, factually devoid discovery responses as to that issue cannot support the defendant's motion (*see Scheiding v. Dinwiddie Construction Co. (1999) 69 Cal. App. 4th 64, 71, 76, 80, 83, 81 Cal. Rptr. 2d 360* ; *see also Gulf Ins. Co. v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone (2000) 79 Cal. App. 4th 114, 133-136, 93 Cal. Rptr. 2d 534* (following *Scheiding*; plaintiff's nonresponsive answer to interrogatory did not constitute "factually devoid" discovery to shift burden to plaintiff on question of causation of plaintiff's damages, since discovery did not call for information on that subject, or for other information from which information on that subject could be deduced))]. In the present case, _____ [*add argument identifying the element as to which defendant contends there is an absence of evidence, and the absence of any question posed in discovery that should have elicited evidence on that issue*].

[*Optional*] **C. Defendant's Motion Based on Affirmative Defense.** The burden on a defendant moving for summary judgment based on the assertion of an affirmative defense is heavier than the burden to show one or more elements of plaintiff's action cannot be established. Instead of merely submitting evidence to negate a single element of plaintiff's cause of action, or offering evidence, such as vague or insufficient discovery responses, that the plaintiff does not have evidence to create an issue of fact as to one or more elements of his or her case, the defendant has the initial burden to show that undisputed facts support each element of the affirmative defense. The defendant must demonstrate that under no hypothesis is there a material factual issue requiring trial. If the defendant does not meet this burden, the motion must be denied. Only if the defendant meets this burden does the burden shift to plaintiff to show an issue of fact concerning at least one element of the defense (*Anderson v. Metalclad Insulation Corp. (1999) 72 Cal. App. 4th 284, 289-290, 85 Cal. Rptr. 2d 331*). [Moreover, the submission of evidence which is equivocal, or from which conflicting inferences may be drawn is insufficient to meet the movant's burden (*Anderson v. Metalclad Insulation Corp. (1999) 72 Cal. App. 4th 284, 297, 85 Cal. Rptr. 2d 331*)]. Thus, there is no obligation on the plaintiff to establish anything by affidavit unless and until the moving party has by affidavit stated facts establishing every element of the affirmative defense necessary to sustain a judgment in his or her favor (*Huynh v. Ingersoll-Rand (1993) 16 Cal. App. 4th 825, 830, 20 Cal. Rptr. 2d 296* ; *see Anderson v. Metalclad Insulation Corp. (1999) 72 Cal. App. 4th 284, 289-290, 297, 85 Cal. Rptr. 2d 331*).

[*Optional*] **D. No Need to Review Counter Declaration Unless Moving Party's Declaration Is Sufficient to Support Motion.** The trial court need not look to the opposing party's counter affidavits or counterclaims to evaluate their sufficiency unless the moving party's declaration standing alone, but considered in light of the pleading, would support the summary judgment motion (*Rawlings v. D.M. Oliver Inc. (1979) 97 Cal. App. 3d 890, 896, 159 Cal. Rptr. 119*).

[*Optional*] **E. Sufficiency of Opponent's Response Papers.** The opposing party need not include undisputed material in the separate statement of disputed facts which is not listed in the moving parties' separate statement of undisputed material facts (*Assad v. Southern Pacific Transportation Co. (1996) 42 Cal. App. 4th 1609, 1614, 50 Cal. Rptr. 2d 443*).

[*Optional*] **F. Moving Party's Pleadings Will Not Support Motion.** If the evidence accompanying the summary judgment motion is deficient, the moving party cannot rely on the unsupported allegations in his or her pleadings to support the motion (*Lipson v. Superior Court (1982) 31 Cal. 3d 362, 374, 182 Cal. Rptr. 629, 644 P.2d 822*).

[*Optional*] **G. Moving Party's Burden of Eliminating All Triable Issues of Fact.** If a plaintiff pleads several theories, the defendant has the burden of demonstrating there are no material facts requiring trial on any of them. The moving defendant whose declarations omit facts as to any such theory permits that portion of the complaint to be unchallenged. Even if no opposition is presented, the moving party still has the burden of eliminating all triable issues of fact (*Wright v. Stang Manufacturing Co. (1997) 54 Cal. App. 4th 1218, 1228, 63 Cal. Rptr. 2d 422*).

[*Optional*] **H. Defendant's Burden to Refute Material Issues Raised by the Pleadings When Complaint Alleges Facts to Refute an Affirmative Defense.** The defendant has the initial burden to show that the undisputed facts support each element of the affirmative defense. If, in anticipation of an affirmative defense, the complaint alleges facts to refute it, the pleadings themselves create a material issue that defendant would have to refute to obtain summary judgment (*Bacon v. Southern Cal. Edison Co. (1997) 53 Cal. App. 4th 854, 858, 62 Cal. Rptr. 2d 16*).

[*Optional*] **I. Strict Standards Apply to Defendant's Attempt to Disprove Element of Plaintiff's Cause of Action.** If the defendant claims that the plaintiff cannot establish the cause of action pled because the defendant's affirmative evidence discloses facts that negate the existence of an essential element of the plaintiff's claim by proving the contrary is true, the court should evaluate the defendant's evidence under the same strict standards which were held to apply to a defendant's attempt to disprove an element of the plaintiff's cause of action before the 1992 and 1993 amendments to *Code of Civil Procedure Section 437c*, in order to avoid unjustly depriving the plaintiff of a trial (*Tibor v. Superior*

Court (1997) 52 Cal. App. 4th 1359, 1368, 61 Cal. Rptr. 2d 326).

[*Optional*] **J. Sole Declaration of Party Raising Triable Issue of Fact Sufficient.** The sole declaration of a party opposing a summary judgment motion which raises a triable issue of fact is sufficient to deny the motion. *Code of Civil Procedure Section 437c(e)* does not allow a trial court to weigh the credibility of a declaration submitted by the party opposing a summary judgment motion and then grant the motion, except where the declaration is facially so incredible as a matter of law that the moving party otherwise would be entitled to summary judgment (*Estate of Housley (1997) 56 Cal. App. 4th 342, 359-360, 65 Cal. Rptr. 2d 628*).

[*Optional*] **K. Moving Party's Burden to Eliminate All Triable Issues Notwithstanding Absence of Opposition.** Even if no opposition is presented, the moving party still has the burden of eliminating all triable issues of fact (*Nazir v. United Airlines (2009) 178 Cal. App. 4th 243, 290, 100 Cal. Rptr. 3d 296* ; *Teselle v. McLoughlin (2009) 173 Cal. App. 4th 156, 173, 92 Cal. Rptr. 3d 696* ; *Wright v. Stang Manufacturing Co. (1997) 54 Cal. App. 4th 1218, 1228, 63 Cal. Rptr. 2d 422*).

[*Optional*] **L. No Need to Look at Plaintiff's Opposing Papers Until Defendant Makes Requisite Showing.** Only if the defendant makes the requisite showing does the court need to examine the plaintiff's opposing papers to determine if they demonstrate the existence of a triable issue of material fact (*Salazar v. Southern Cal. Gas Co. (1997) 54 Cal. App. 4th 1370, 1376, 63 Cal. Rptr. 2d 522*).

[*Optional*] **M. Plaintiff Need Not Demonstrate Triable Issue of Fact When Defendant Fails to Meet its Burden.** Unless the moving defendant meets its burden, plaintiff has no obligation to demonstrate that there is a triable issue of fact (*LeVine v. Weis (1998) 68 Cal. App. 4th 758, 763, 80 Cal. Rptr. 2d 439*).

[*Optional*] **N. Motion Based on Issues Asserted in Prior Unsuccessful Motion for Summary Adjudication.** When there has been an earlier denial of a summary adjudication motion either filed alone, or as an alternative to a summary judgment motion, a party may not thereafter move for summary judgment based on issues asserted in the earlier denied summary adjudication motion unless that party establishes, to the court's satisfaction, newly discovered facts or circumstances or a change of law supporting the issues reasserted in the summary judgment motion. The specific requirements of the summary judgment statute contained in *California Code of Civil Procedure Section 437c(f)(2)* govern such a motion rather than the general provisions of the reconsideration statute contained in *Code of Civil Procedure Section 1008* (*Cal. Civ. Proc. § 437c(f)(2)*; *Le Francois v. Goel (2005) 35 Cal. 4th 1094, 1099, 29 Cal. Rptr. 3d 249* ; *Nieto v. Blue Shield of California Life & Health Ins. Co. (2010) 181 Cal. App. 4th 60, 71-74* ; *Coffman Specialties, Inc. v. Dept. of Transp. (2009) 176 Cal. App. 4th 1135, 1144, 98 Cal. Rptr. 3d 643* ; *Bagley v. TRW, Inc. (1999) 73 Cal. App. 4th 1092, 1096 n.3, 86 Cal. Rptr. 2d 909*).

[*Optional*] **O. Deposition Statement Obtained During Discovery is Not an Unequivocal Admission That Would Support Granting of Summary Judgment.** Deposition answers are evidence to be weighed in conjunction with other evidence and do not constitute judicial admissions under the *D'Amico* rule (*D'Amico v. Board of Medical Examiners (1974) 11 Cal. 3d 1, 21-22, 112 Cal. Rptr. 786, 520 P.2d 10*) because the *D'Amico* rule has never stood for the proposition that highly inculpatory testimony elicited from a party in a deposition may be sufficient by itself to warrant summary judgment, or that it relieves the moving party of its ordinary burden of showing the absence of a genuine factual dispute (*Scalf v. D.B. Log Homes, Inc. (2005) 128 Cal. App. 4th 1510, 1522-1523, 27 Cal. Rptr. 3d 826*).

[*Add memoranda that which set forth any grounds for opposition based on the existence of a triable issue of material fact on substantive grounds according to the particular causes of action and facts involved; also add memoranda that set forth anyevidentiary or procedural objections to the motion for summary judgment (see §§ 221.32, 221.34- 30).*]
Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted by a plaintiff or defendant in opposition to a motion for summary judgment such as the one supported by the memorandum *set out in § 221.20*. Any opposition to a motion for summary judgment must be served and filed not less than 14 days preceding the noticed or continued date of hearing, unless the court for good cause orders otherwise [*Code Civ. Proc. § 437c(b)(2)*].

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated, including argument showing the insufficiency of the supporting affidavits or declarations, the existence of a triable issue, or both. In addition, counsel should attach affidavits or declarations that oppose the motion, along with the opposing party's separate statement in response to the moving party's statement of undisputed material facts [*see Code Civ. Proc. § 437c(b)(2), (c)*].

With regard to optional paragraph C, the bracketed material may be inserted if the facts warrant.

[b] Existence of Triable Issue of Material Fact

The general ground for the opposition set out in this form is that a triable issue of material fact exists [*Code Civ. Proc. § 437c(c)*]. This is shown when the moving party fails to meet its burden, or when the opposing party has presented facts which give rise to a triable issue of material fact [*see Code Civ. Proc. § 437c(p)*].

[c] Analysis Required of Court

The trial court and any reviewing court use the same three-step analysis to evaluate a motion for summary judgment [*Perkins v. Howard (1991) 232 Cal. App. 3d 708, 712, 283 Cal. Rptr. 764]* : (1) identifying the issues as framed by the pleadings, as it is those allegations to which the motion must respond by establishing a complete defense or by showing that there is no factual basis for relief on any theory reasonably contemplated by the opponent's pleading; (2) determining whether the moving party's showing has established facts which negate the opponent's claim and justify a judgment in movant's favor; and (3) determining whether the opposition demonstrates the existence of a triable, material factual issue.

[d] Related Pleading and Practice Forms

For forms of declarations in opposition to a motion for summary judgment, see Ch. 537, *Summary Judgment* , in California Forms of Pleading and Practice (Matthew Bender).

[e] Related Points and Authorities

For points and authorities in opposition to motions for summary judgment relating to particular causes of actions and grounds, see substantive chapters in this set, such as Ch. 50, *Contracts;* Ch. 105, *Fraud and Deceit;* Ch. 115, *Indemnity and Contribution;* and Ch. 142, *Libel and Slander (Defamation).*

[3] Discussion of Authorities

[a] Rules Governing Summary Judgment Procedure

Corwin v. Los Angeles Newspaper Service Bureau, Inc. *(1971) 4 Cal. 3d 842, 94 Cal. Rptr. 785, 484 P.2d 953* , was an action for violations of *Bus. & Prof. Code §§ 16720, 16726* (prohibited restraints of trade under Cartwright Act). Plaintiffs, operators of a publication service and legal advertising business, contended that defendants, a countywide newspaper service bureau and its members, entered into representation agreements which constituted illegal restraints of trade and tying arrangements. The trial court granted defendants' motion for summary judgment, and plaintiffs appealed from the judgment entered in favor of defendants.

The Supreme Court concluded that the trial court had erroneously granted the summary judgment and reversed the judgment. The Court held that the representation agreements constituted restraints on trade, and that whether less restrictive means were available and whether justifications existed were questions which should not have been decided on a summary judgment motion. It also held that the question whether the processing of legal advertising by defendants was a single product or separate products tied together was one of fact which remained to be resolved at trial. In reviewing the trial court's actions, the Court commented that summary judgment is proper only if the supporting affidavits would be sufficient to sustain a judgment in the moving party's favor andthe opposing party does not, by affidavit, show such facts as may be deemed by the judge hearing the motion to be sufficient to present a triable issue. The Court stated that the aim of the procedure is to discover, through the media of affidavits, whether the parties possess evidence requiring the weighing procedures of a trial. In examining the sufficiency of the affidavits, the moving party's affidavits are strictly construed and those of the opposing party are liberally construed, and doubts as to the propriety of granting the motion should be resolved in favor of the opposing party. The Court noted that such summary procedure is drastic and should be used with caution so that it does not become a substitute for the open trial method of determining facts (*4 Cal. 3d 842, 851-852)* .

Jos. Schlitz Brewing Co. v. Downey Distributor *(1980) 109 Cal. App. 3d 908, 167 Cal. Rptr. 510* , was an action by a beer manufacturer against a wholesale distributor of its beer for the balance owing on defendant's open account and against defendant distributor's sole stockholders on their written guaranties. Defendants cross complained against plaintiff for breach of contract, interference with a business advantage, fraud, and conspiracy, based on an alleged oral agreement with plaintiff that defendant had the assignable right to be the wholesale distributor in a given area and on plaintiff's covenant to deal in good faith, both of which plaintiff violated by terminating defendant's rights to its substantial damage after defendant had received an oral offer to purchase the distributorship. Plaintiff and cross defendant moved for summary judgment on its complaint as well as the cross complaint, and defendants and cross complainants also moved for summary judgment. The trial court denied defendants' motion and instead granted plaintiff's motion for summary judgment. Defendants appealed from the judgment.

The court of appeal reversed judgment for plaintiff. After examining the facts in the supporting and opposing papers, the court held that defendant distributor's opposing declaration contained the germ of a potential cause of action by defendant/cross complainant for intentional interference with prospective business or economic advantage. Existing triable issues of fact included whether or not a business or economic advantage existed as a result of the oral offer or state of negotiations, whether plaintiff had knowledge of the offer or negotiations, and whether there existed a motivation on plaintiff's part to intentionally interfere with that relationship so as to gain an advantage for itself. Also, inferences drawn from defendant's opposing declaration raised triable issues of material fact as to the existence and breach of the oral agreement, and as to the claims of fraud and conspiracy.

The court based its holdings on *Code Civ. Proc. § 437c* which provides that summary judgment must be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In examining the supporting and opposing papers, the court applied the general rule that summary judgment is proper only if the supporting affidavits are sufficient to sustain a judgment for the moving party and the opposing affidavits do not show facts sufficient to present a triable issue of fact. The moving party's affidavits are strictly construed and the opponent's liberally construed, and doubts as to the propriety of summary judgment are

resolved against granting the motion (*109 Cal. App. 3d 908, 914)* . When looking at defendant distributor's declaration concerning triable issues as to the intentional interference cause of action, the court stated that it is the better rule that the facts alleged in opposing papers be accepted as true and that such papers to be sufficient need not necessarily be composed wholly of strictly evidentiary facts (*109 Cal. App. 3d 908, 916-917* ; *but see Overland Plumbing, Inc. v. Transamerica Ins. Co. (1981) 119 Cal. App. 3d 476, 483-484, 174 Cal. Rptr. 1* , discussed in *§ 221.37[4][a]*).

[b] Burden on Moving Party

The burden of proof for the moving party plaintiff is to prove each element of the cause of action entitling plaintiff to judgment on that cause of action [*Code Civ. Proc. § 437c(p)(1)*].

The burden of proof for a moving party defendant is to prove that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action [*Code Civ. Proc. § 437c(o)(1), (2)*]. After the moving party has met this burden of proof, the burden shifts to the opposing party to show that a triable issue of material fact exists as to that cause of action or a defense to it [*Code Civ. Proc. § 437c(o)(1), (2)*]. The meaning of this language has been the subject of much debate [*see Scheiding v. Dinwiddie Construction Co. (1999) 69 Cal. App. 4th 64, 72-73, 81 Cal. Rptr. 2d 360]* .

The language regarding burden of proof was added to *Code Civ. Proc. § 437c* in 1992 [*see* Stats. 1992, Ch. 1348, § 1] and moves California summary judgment law closer to the federal standard under *Fed. R. Civ. P., Rule 56*, as interpreted by *Celotex Corp. v. Catrett (1986) 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265* [*Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 848, 107 Cal. Rptr. 2d 841, 24 P.3d 493* ; *see also* Saelzler v. Advanced Group 400 *(2001) 25 Cal. 4th 763, 767-768, 107 Cal. Rptr. 2d. 617, 23 P.3d 1143]* (1992 and 1993 amendments to *Code Civ. Proc. § 437c* have changed summary judgment law dramatically and like its federal counterpart, statute now places initial burden on moving party, and shifts it to opposing party on showing that one or more elements of cause of action cannot be established). It has been noted that the Legislature intended that the burden-shifting characteristics of *Fed. R. Civ. P., Rule 56*, as interpreted by *Celotex*, were to be applied to California summary judgment motions when a defendant relied on a plaintiff's factually inadequate discovery answers to seek summary judgment [*Union Bank v. Superior Court (1995) 31 Cal. App. 4th 573, 590-592, 37 Cal. Rptr. 2d 653* (court declined to address other issues concerning how federal rule or *Celotex* analysis may apply); *see Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 854, 107 Cal. Rptr. 2d 841, 24 P.3d 493* (California summary judgment law now conforms largely, but not completely with its federal counterpart; must at least show that moving party does not possess and cannot reasonably obtain needed evidence)]. More properly, the burden may be described as [*Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 850, 107 Cal. Rptr. 2d 841, 24 P.3d 493]* :

- First, that from commencement to conclusion of the motion the moving party has the burden of persuasion that there is no triable issue of fact and that he or she is entitled to judgment as a matter of law, and

- Second, that the burden that shifts is a burden of production. The moving party has the initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact, and if he or she carries that burden, the burden shifts, and the opposing party has a burden of production to make a prima facie showing of the existence of a triable issue of fact.

How the parties moving for, and opposing, summary judgment may each carry their burden of persuasion and/or production depends on which would bear what burden of proof at trial. For example, if a plaintiff who would bear the burden of proof by a preponderance of evidence at trial moves for summary judgment, he or she must present evidence that would require a reasonable trier of fact to find any underlying material fact more likely than not; otherwise, he or she would not be entitled to judgment as a matter of law [*Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 851, 107 Cal. Rptr. 2d 841, 24 P.3d 493]* .

In ***Aguilar v. Atlantic Richfield Co.*** *(2001) 25 Cal. 4th 826, 107 Cal. Rptr. 2d 841, 24 P.3d 493* , an individual brought an antitrust action on behalf of herself and other consumers of gasoline against petroleum companies alleging an unlawful conspiracy under the Cartwright Act (*Bus. & Prof. Code § 16720 et seq.*) The trial court granted the defendants' motions for summary judgment, but later granted the plaintiff's motion for a new trial. The court of appeal reversed the superior court's order and remanded the case to the superior court with directions to issue an order granting the defendants summary judgment.

The Supreme Court affirmed the judgment of the court of appeal. The Court held that summary judgment law no longer requires a defendant moving for summary judgment to conclusively negate an element of the plaintiff's cause of action. All that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action--for example that the plaintiff cannot prove element X (*25 Cal. 4th 826, 853)* . However, California continues to require a defendant moving for summary judgment to present evidence, and not simply point out through argument, that the plaintiff does not possess, and cannot reasonably obtain, needed evidence. Whereas, under federal law, "pointing out through argument" may be sufficient, under state law, it is not (*25 Cal. 4th 826, 854-855)* . The defendant must support the motion with evidence including "affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice" must or may be taken (*Code Civ. Proc. § 437c(b)*), for example, admissions by the plaintiff following extensive discovery to the effect that he or she has discovered nothing. But the defendant must indeed present "evidence." The court disapproved language in certain cases, giving *Hunter v. Pacific Mechanical Corp. (1995) 37 Cal. App. 4th 1282, 1288, 44 Cal. Rptr. 2d 335* as an example, purportedly allowing a defendant moving for summary judgment simply to point out, "an *absence of evidence* to support" an element of the plaintiff's cause of action (*25 Cal. 4th 826, 855 n.23*).

At trial the plaintiff would have borne the burden of proof by a preponderance of the evidence as to her Cartwright Act cause of action. The defendants carried their initial burden of production to make a prima facie showing by presenting evidence that would require a reasonable jury not to find in their favor on the issue of conspiracy. Plaintiff did not carry the burden of production that shifted to her to make a prima facie showing of the presence of unlawful conspiracy since her evidence and the inferences she drew from it were at best ambiguous (*25 Cal. 4th 826, 861-862)* .

In ***Scheiding v. Dinwiddie Construction Co.*** *(1999) 69 Cal. App. 4th 64, 81 Cal. Rptr. 2d 360* , plaintiff husband and wife sued hundreds of defendants for damages after the husband was diagnosed with asbestosis and asbestos-related pleural disease. The complaint alleged that plaintiff husband was exposed to asbestos fibers at various work sites during his career. In responses to interrogatories and in the husband's deposition, the plaintiffs did not identify any job site at which the defendant Dinwiddie was the general contractor. At the deposition neither Dinwiddie nor any other defendant asked the husband to identify any job site where Dinwiddie had been present. Dinwiddie asked no questions at the deposition and conducted no other discovery. Dinwiddie moved for summary judgment, arguing lack of causation because the husband, in his deposition, had not identified any job site where Dinwiddie was general contractor. Dinwiddie supported the motion with a declaration by its defense counsel that plaintiff husband failed to mention Dinwiddie in the course of discovery. Plaintiff's opposed the motion on the basis that Dinwiddie had not shown that the element of causation could not be established. The trial court granted summary judgment in defendant's favor, and plaintiffs appealed.

In reversing the judgment, the court of appeal found that it was confronted with a record that arguably disclosed no affirmative evidence insupport of the motion and none in opposition. The court framed the issue as what quantum of evidence is needed to trigger the evidentiary burden shifting on a summary judgment motion (*69 Cal. App. 4th 64, 70)* .

The court noted that although the 1992 and 1993 amendments to California's summary judgment law adopted the federal mechanism of burden shifting, they did not change California's fundamental requirement that the moving party prove its right to summary judgment (*69 Cal. App. 4th 64, 71)* . Code Civ. Proc. § 437c(c), (o)(2) (*see now Code Civ.*

Proc. § 437c(p)(2)) implies a need for concrete evidence from the moving party and expressly requires the moving party to supply more than bare assertions, whether alleged in a pleading or by way of argument, that the opposing party has no evidence to support a particular claim (*69 Cal. App. 4th 64, 75-76)* .

The court noted that an apparent majority of the appellate courts accept the proposition that a defendant can meet the burden of proof by showing that a plaintiff has no evidence to support plaintiff's case. A minority view does not disagree with this general proposition but suggests that a defendant must do more than merely argue there is an absence of evidence and must produce affirmative evidence to show that the plaintiff cannot establish a prima facie case. The Supreme Court has not directly considered the issue (*69 Cal. App. 4th 64, 81)* .

The *Scheiding* court attempted to reconcile the two views based on the inferences available from California's Civil Discovery Act of 1986 [Code Civ. Proc. § 2016 et seq. (*Code Civ. Proc. § 2016.010 et seq.*, operative July 1, 2005)], which imposed on the plaintiffs in *Union Bank v. Superior Court (1995) 31 Cal. App. 4th 573, 37 Cal. Rptr. 2d 653* , a duty to answer interrogatories in a straightforward fashion, and as completely as possible, given the information available to them. The court in *Union Bank* could therefore presume that the plaintiffs had answered "fully and truthfully," and could infer that they had no other evidence to support their claims. The plaintiffs had not asked for a continuance to obtain further evidence (*69 Cal. App. 4th 64, 81)* . In *Hunter v. Pacific Mechanical Corp. (1995) 37 Cal. App. 4th 1282, 44 Cal. Rptr. 2d 335* , the court inferred a lack of evidence from discovery responses, which was an extension of the inference that supported the court's conclusion in the *Union Bank* case: since the plaintiff had a statutory duty to respond fully, plaintiff's factually devoid answers showed plaintiff had no facts (*69 Cal. App. 4th 64, 78-79)* . The court stated that *Hagen v. Hickenbottom (1995) 41 Cal. App. 4th 168, 186, 51 Cal. Rptr. 2d 642* , which is often cited for its criticism of the expansive boundary delineated by *Hunter*, actually argues caution more than disagreement. The *Hagen* court noted in part that (1) a defendant must make an affirmative showing in support of his or her motion, which connotes something significantly more than simply pointing out to the court that there is an absence of evidence, and (2) before the burden of producing even a prima facie case should be shifted to the plaintiff in advance of trial, a defendant who cannot negate an element of the plaintiff's case should be required to produce direct or circumstantial evidence that the plaintiff not only does not have but cannot reasonably expect to obtain a prima facie case (*69 Cal. App. 4th 64, 82-83)* . The court concluded that it agreed with *Hunter* that the circumstantial evidence which would be required by *Hagen* can consist of "factually devoid" discovery responses from which an absence of evidence can be inferred. The court also agreed with the view in *Hagen* that the burden should not shift without stringent review of the direct, circumstantial and inferential evidence. Reconciliation of the two views is not difficult once the inferential reasoning expressly permitted by *Code Civ. Proc. § 437c* is considered (*69 Cal. App. 4th 64, 83)* .

Ultimately the court did not decide whether the more cautious view is the better one because the trial court's ruling was incorrect even under the more circumspect approach. Because defendant conducted no discovery and in plaintiff's deposition, plaintiff was not asked a single question concerning the defendant, there was not a sufficient basis for an inference that plaintiffs could not produce further evidence to support an element crucial to their claims. The duty to answer completely only extended so far as the reasonable ambit of the questions asked. The plaintiff had no duty to volunteer information that was not requested. The initial burden cannot be shifted without the evidence and inferences described by the statute, and Dinwiddie's motion, unlike the motions in *Union Bank* and *Hunter*, relied on argument rather than on evidence. (*69 Cal. App. 4th 64, 82-83)* .

Gulf Ins. Co. v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone *(2000) 79 Cal. App. 4th 114, 93 Cal. Rptr. 2d 534* , involved an action for legal malpractice and breach of contract against defendants concerning their defense of plaintiff's insureds in a previous lawsuit. The trial court granted defendants' motion for summary judgment, ruling that plaintiff lacked standing and failed to present a triable issue of fact with regard to causation. Judgment was entered, and plaintiff appealed.

The court of appeal reversed. The court first concluded that plaintiff had standing to sue the defendants (*see 79 Cal. App. 4th 114, 125-133)* . The court then addressed the causation issue. With respect to whether there was a triable issue

regarding causation, the motion for summary judgment was based solely on one interrogatory response by plaintiff (*79 Cal. App. 4th 114, 123-124)* . The court discussed *Union Bank v. Superior Court (1995) 31 Cal. App. 4th 573, 37 Cal. Rptr. 2d 653* , and *Scheiding v. Dinwiddie Construction Co. (1999) 69 Cal. App. 4th 64, 80, 83, 81 Cal. Rptr. 2d 360* , regarding reliance on and what constitutes "factually devoid" discovery responses. The court noted how *Scheiding* (which it referred to as *Dinwiddie*) distinguished *Union Bank* because the discovery in *Dinwiddie*, unlike *Union Bank*, failed to reveal any facts relevant to a particularissue because no discovery was directed at that issue. Thus, the court could not infer from the discovery responses that there was no other evidence on the disputed issue (*79 Cal. App. 4th 114, 134)* . The court concluded that to grant summary judgment, a court must be able to infer from the record that the plaintiff could produce no other evidence on the disputed point (*79 Cal. App. 4th 114, 134)*

The court held that the discovery proffered by the defendants consisting of plaintiff's nonresponsive answer to the interrogatory did not constitute "factually devoid" discovery to shift the burden to the plaintiff on the question of causation of plaintiff's damages, because it did not call for information on that subject, or for other information from which information on that subject could be deduced. Moreover, to the extent that nonresponsive information was provided which might have born on the question of causation, since it was not called for by the interrogatory, it would be speculation to determine what response would have been provided to a question squarely asking about plaintiff's damages. The court cannot assume that all information was provided to an interrogatory that was not propounded (*79 Cal. App. 4th 114, 135-136)* .

[c] Defendant's Motion Based on Affirmative Defense

Anderson v. Metalclad Insulation Corp. *(1999) 72 Cal. App. 4th 284, 85 Cal. Rptr. 2d 331* , involved an action for asbestos related personal injuries. Plaintiff filed the complaint on June 14, 1996. The trial court granted defendant's motion for summary judgment on the ground that plaintiff's complaint was filed after the limitation period specified in *Code Civ. Proc. § 340.2*. Plaintiff appealed (*72 Cal. App. 4th 284, 286-289)* .

The court of appeal reversed (*72 Cal. App. 4th 284, 297)* . In so doing the court stated that the burden on a defendant moving for summary judgment based on the assertion of an affirmative defense is heavier than the burden to show one or more elements of plaintiff's action cannot be established. Instead of merely submitting evidence to negate a single element of plaintiff's cause of action, or offering evidence, such as vague or insufficient discovery responses, that the plaintiff does not have evidence to create an issue of fact as to one or more elements of his or her case, the defendant has the initial burden to show that undisputed facts support each element of the affirmative defense. The defendant must demonstrate that under no hypothesis is there a material factual issue requiring trial. If the defendant does not meet this burden, the motion must be denied. Only if the defendant meets this burden does the burden shift to plaintiff to show an issue of fact concerning at least one element of the defense (*72 Cal. App. 4th 284, 289-290)* .

To prevail on its summary judgment motion based on the affirmative defense that the action was barred by *Code Civ. Proc. § 340.2*, defendant bore the burden of submitting uncontradicted evidence of three elements triggering the statutory period; (1) the plaintiff was disabled within the meaning of the statute, (2) the disability was caused or contributed to by plaintiff's exposure to asbestos, and (3) the plaintiff knew, or in the exercise of reasonable diligence should have known, the causes or contributing factors of his disability (*72 Cal. App. 4th 284, 292)* . The court noted that the only logical inference from the evidence that plaintiff filed a workers' compensation claim based on injury described as asbestosis was that, as of the date of filing, plaintiff knew, or through the exercise of reasonable diligence should have known, that he had an injury and that the injury was caused, or contributed to, by exposure to asbestos. Knowledge that exposure to asbestos is a cause or contributing cause of plaintiff's condition is, however, only one element of the defense. Defendant also had the burden of presenting evidence which, if uncontradicted, would establish that plaintiff's injury rendered him disabled as defined in *Code Civ. Proc. § 340.2(b)* (*72 Cal. App. 4th 284, 292)* . The court concluded that although defendant offered evidence that, at least as of February or April 1995, plaintiff knew he had been injured by asbestos, defendant failed to meet its additional burden to submit evidence which, if undisputed, would support that, as of that same date, or earlier, plaintiff was permanently precluded from performing his regular

occupation. The submission of evidence which is equivocal, or from which conflicting inferences may be drawn, is insufficient to meet the movant's burden. The trial court therefore should have denied the motion, rather than shifting the burden to plaintiff to present evidence that he was not disabled (*72 Cal. App. 4th 284, 297)* .

Huynh v. Ingersoll-Rand *(1993) 16 Cal. App. 4th 825, 20 Cal. Rptr. 2d 296* , was a personal injury action against the manufacturer of a hand-held power grinder. The manufacturer moved for summary judgment based on the affirmative defense of misuse. The alleged misuse was using improper attachments contrary to a warning inscribed on the grinder's handle in tiny print. The trial court granted summary judgment, and the plaintiff appealed.

The court of appeal reversed. In so doing the court noted that the burden on the moving party, when as is typical that party is a defendant, becomes even heavier when the summary judgment motion is based on an affirmative defense. Instead of merely supplying enough evidence to negate a single element of plaintiff's cause of action, the moving party must produce evidence which proves a *complete* defense. There is no obligation on the plaintiff to establish anything by affidavit unless and until the moving party has by affidavit stated facts establishing every element of the affirmative defense necessary to sustain a judgment in his or her favor (*16 Cal. App. 4th 825, 830)* . The court held that a triable issue of fact remained on the misuse defense because the defendant had failed to offer evidence on one element of the defense, that the misuse was the actual cause of the plaintiff's injury (*16 Cal. App. 4th 825, 831-832)* . The court went on to notethat even if the defendant had sustained its burden on the misuse issue, a triable issue remained on another element of the defense, the adequacy of the warning (*16 Cal. App. 4th 825, 833-835)* .

[d] No Need to Review Counter Declaration Unless Moving Party's Declaration Is Sufficient to Support Motion

Rawlings v. D.M. Oliver, Inc. *(1979) 97 Cal. App. 3d 890, 159 Cal. Rptr. 119* , was an action for damages for personal injury based on strict liability in tort and negligence. Plaintiff was injured while cleaning an allegedly defective kelp dryer when a coworker activated the machine. The dryer had been manufactured according to the plans and specifications of the owners by a corporation which was then purchased by defendant. Defendant moved for summary judgment on the grounds that the manufacturer had complied with the owner's plans and specifications, and that as a successor to the business of the manufacturer, defendant was not liable for its predecessor's defective products. No counterdeclarations were filed, and summary judgment was granted for defendant.

The court of appeal reversed, holding that the dangerousness of the product and the duty to warn its users remained as triable issues, despite the manufacturer's compliance with the owner's plans, and that strict liability may be imposed even though the product is not mass-produced. The court also held that due to the ambiguity of the sales agreement and the lack of extrinsic evidence to interpret it, defendant had not eliminated the reasonable inferences that support the existence of either an express or implied assumption of liabilities by the defendant, and that the case came within the exception to the general rule against imposition on a successor corporation of its predecessor's liabilities. In summarizing summary judgment rules, the court stated that the trial court need not look to any counteraffidavits or counterdeclarations unless the moving party's declaration standing alone, but considered in light of the pleadings, would support the summary judgment motion (*97 Cal. App. 3d 890, 896)* .

[e] Sufficiency of Opponent's Response Papers

In ***Assad v. Southern Pacific Transportation Co.*** *(1996) 42 Cal. App. 4th 1609, 50 Cal. Rptr. 2d 443* , a personal injury action, plaintiff and defendant had entered into a stipulation to accomplish a partial settlement of the case. As part of the stipulation, defendant conceded negligence on one of the claims, while reserving the right to dispute any issues relating to damage causation and the existence and extent of any injuries. Thereafter, defendant moved for summary judgment on the ground that the firefighter's rule applied and defeated an element of plaintiff's cause of action, without mentioning the stipulation or that it had conceded negligence. Plaintiff set forth the stipulation in full in his opposition, but did not list it in a statement of disputed facts, and made no argument with respect to it. The trial court granted the

motion, stating that plaintiff offered no evidence which raised a substantial controversy as to the applicability of the firefighter's rule.

The court of appeal reversed, holding that applicability of the firefighter's rule, as an issue relevant to duty, had not been reserved for dispute by the stipulation and thus could not be the basis for summary judgment (*42 Cal. App. 4th 1609, 1613, 1616)* . In so holding, the court rejected the defendant's argument that in order to argue the stipulation plaintiff was required to set forth the agreement in a counter, separate statement of material facts. *Code Civ. Proc. § 437c(b)* [*now see Code Civ. Proc. § 437c(b)(3)*] requires a party opposing a summary judgment to respond to each of the material facts the moving party contends to be undisputed, indicating whether the opposing party agrees or disagrees that those facts are disputed. The section further requires the opposing party to list any other material facts which the opposing party considers disputed. However, since the moving party did not list the stipulation as an undisputed fact (or refer to it at all) and the existence of the stipulation was not in dispute, plaintiff had no obligation to include it in his separate statement, and thus waived nothing by not including it (*42 Cal. App. 4th 1609, 1614)* . The court stated that what plaintiff was required to do was place the stipulation in evidence in the opposition to the motion for summary judgment, and noted that plaintiff had done this (*42 Cal. App. 4th 1609, 1615)* .

[f] Moving Party's Pleadings Will Not Support Motion

The facts and procedural background of ***Lipson v. Superior Court*** *(1982) 31 Cal. 3d 362, 182 Cal. Rptr. 629, 644 P.2d 822* , are set out under Burden of Moving Party, *above.* In that case, the Supreme Court noted that defendant had not introduced any evidence to support its contention that plaintiff 's injuries were proximately caused by the chemical boil-over, which plaintiff fireman had come to contain, and not by any misrepresentation by defendant as to the nature of the substances involved in the boil-over (*31 Cal. 3d 362, 374)* . The Court then cited *Joslin v. Marin Mun. Water Dist. (1967) 67 Cal. 2d 132, 147, 60 Cal. Rptr. 377, 429 P.2d 889* , for the rule that if the evidence accompanying the motion for summary judgment is deficient, the moving party cannot rely on the unsupported allegations in his or her pleadings to prove the case (*31 Cal. 3d 362, 374)* .

[g] Moving Party's Burden of Eliminating All Triable Issues of Fact

Nazir v. United Airlines *(2009) 178 Cal. App. 4th 243, 100 Cal. Rptr. 3d 296* was a wrongful discharge lawsuit in which plaintiff, a Pakistani man, sued United Airlines and his supervisor for harassment, discharge, discrimination, retaliation and several other causes of action. United terminated plaintiff after he allegedly violated United's policy with respect to a female employee of an outside service provider. Defendants filed a motion for summary judgment or, in the alternative, summary adjudication. Defendants' moving papers totaled 1,056 pages and plaintiff's opposition totaled over 3,000 pages. Defendants' motion sought adjudication of 44 issues. Defendants also filed a reply, which included a nearly 300 page "reply separate statement" along with 153 pages of exhibits and evidence in support of that reply. The trial court granted summary judgment for defendants with little comment, except a blanket statement to the effect that plaintiff's opposition was mostly verbiage, and utterly lacking in the identification and presentation of evidence demonstrating a disputed issue of fact. The court overruled all of plaintiff's evidentiary objections without comment and sustained all except one of defendants' objections, again without comment.

The court of appeals began its opinion, which reversed the grant of summary judgment on 8 of the 14 causes of action, by noting that the case was a "poster child" for the criticism that courts are too often making determinations properly reserved for the factfinder, especially in employment law cases in which courts sometimes require the employee to essentially prove his or her case at the summary judgment stage. The trial court's order stated that "alternatively," it found that plaintiff's response to defendants' separate statement failed to confirm to the requirements of the Code of Civil Procedure and Rules of Court. On appeal, defendants argued that the court of appeals should affirm summary judgment on this ground. The court of appeals disagreed, noting the trial court had only said it would be at liberty to disregard plaintiff's separate statement. Under the applicable case law, a grant of summary judgment is too harsh a consequence for a separate statement that fails to conform to requirements (*see, e.g.,* *Collins v. Hertz Corp. (2006) 144*

Cal. App. 4th 64, 74, 50 Cal. Rptr. 3d 149). The proper response, rather, is to give the opposing party an opportunity to file a proper separate statement (*see, e.g.,* *Parkview Villas Assn., Inc. v. State Farm Fire & Casualty Co. (2005) 133 Cal. App. 4th 1197, 1211, 35 Cal. Rptr. 3d 411*).

The trial court granted summary adjudication of plaintiff's harassment claim on the basis that plaintiff failed to exhaust his administrative remedies and the harassment allegations were untimely. The court of appeals disagreed, finding that the materials plaintiff submitted to the Department of Fair Employment and Housing were adequate to demonstrate a triable issue as to whether plaintiff exhausted his administrative remedies. Plaintiff also demonstrated a triable issue as to the "continuing violation" doctrine developed by the U.S. Supreme Court. Furthermore, plaintiff raised a triable issue as to his discrimination claims. As to those claims, the trial court ruled that defendants had presented a legitimate, non-discriminatory basis for terminating plaintiff, which shifted the burden to plaintiff to present evidence that the reason for termination was pretext. The court of appeals disagreed, holding that plaintiff's evidence created a triable issue as to the pretext issue.

The court concluded its opinion by theorizing that the trial court had not read all of the papers, which totaled over 5,000 pages, and referred to the misleading picture painted by the mass of paper before the trial court, and to the error that resulted. And the two are undoubtedly related, as what apparently happened is that the trial court did not read all the papers, shown, for example, by the facts that it sustained "objections" to evidence where no objection was set forth. While not reading the papers cannot be condoned, it can perhaps be understood, as we hesitate to speculate how long it would take a trial court to meaningfully digest over 2,200 pages of separate statements, analyze and rule on 764 objections set out in 325 pages, review it all in light of the applicable law, and then write a proper order. The court used its opinion to remind trial courts of their inherent powers to insure the orderly administration of justice and control summary judgment procedures (*178 Cal. App. 4th 243, 290)* .

Teselle v. McLoughlin *(2009) 173 Cal. App. 4th 156, 92 Cal. Rptr. 3d 696* arose out of a complex estate planning dispute. Plaintiff was the sister of two deceased brothers, George and Charles. The "George" trust provided that upon the death of either brother, the deceased brother's 50% share of certain jointly owned properties would be deeded to the other trust. Plaintiff was granted a 20% share of the estate in the George trust. An amendment to the George trust, however, deleted any reference to three of the properties (the "Waterloo properties"), due to the settlor's desire to sell the properties. Shortly after the amendment, Charles died. George died shortly thereafter. Following Charles' death, plaintiff deeded the George trust's 50% interest in the Waterloo properties to the Charles trust, without knowing of the amendment. Plaintiff filed an action as successor trustee to the George trust, seeking to recover half of the Waterloo properties on behalf of George's heirs. Plaintiff alleged that because of the amendment, the Waterloo properties were no longer subject to the exchange agreement of the trusts. Plaintiff alleged numerous causes of action against defendants, who were individuals with interests in the "Charles" trust. Defendants moved for summary judgment, relying on the unamended trust and not addressing the amendment to the trust. Plaintiff filed a response to defendants' separate statement one day late, and did not file a points and authorities. The court granted defendants' motion on the basis that plaintiff's opposition did not comply with *Code Civ. Proc. § 437c*. The court cited section (b), which states that the court may grant summary judgment in its discretion for failure to comply with "this requirement" of a separate statement.

The court of appeals reversed. Read in context, section (b) of the summary judgment statute requires that "each material fact contended by the opposing party to be disputed shall be followed by a reference to the supporting evidence." Thus, the court's discretion to grant summary judgment for failure to comply with (b) only applies where the opposing party fails to cite supporting evidence in opposition to a disputed material fact. The court noted that the statute requires the moving party to address the material facts as set forth in the complaint. Under *Code Civ. Proc. § 437c(p)(2)*, the opposing party is only obligated to show a triable issue of fact once the moving party makes a prima facie showing of the nonexistence of a material fact. The court may not grant summary judgment in its discretion under § 437c(b) for failure to comply with the separate statement requirement unless the moving party has met its initial burden of proof. In this case, the George trust amendment was a material fact, set forth in the complaint, that was ignored by defendants' motion for summary judgment. The complaint alleged that due to the amendment, George's interest in the Waterloo

property was no longer subject to the exchange agreement. Defendants failed to address this material fact, instead setting forth the unamended trust in their separate statement. Therefore, defendants failed to comply with the summary judgment statute, which requires a moving party to set forth the material facts it contends are disputed (*173 Cal. App. 4th 156, 173)* .

Wright v. Stang Manufacturing Co. *(1997) 54 Cal. App. 4th 1218, 63 Cal. Rptr. 2d 422* , involved a product liability action against the defendants. The plaintiff, a firefighter employed by the city of Glendale, wasinjured when a "deck gun" or water cannon mounted on a fire truck broke loose while under pressure from the water pump, throwing the plaintiff in the air and on the ground with the deck gun landing on him. The plaintiff's wife asserted a claim for loss of consortium. The trial court granted summary judgment in favor of the defendants, and the plaintiffs appealed.

The court of appeal reversed. In discussing summary judgment principles, the court stated that if a plaintiff pleads several theories, the defendant has the burden of demonstrating there are no material facts requiring trial on any of them. The moving defendant whose declarations omit facts as to any such theory permits that portion of the complaint to be unchallenged. Even if no opposition is presented, the moving party still has the burden of eliminating all triable issues of fact (*54 Cal. App. 4th 1218, 1228)* . The court found that to the extent that the plaintiffs were asserting a design defect theory of strict products liability, the motion for summary judgment should have been denied in that there was a triable issue of fact as to whether the deck gun was defectively designed. In their moving papers, the defendants failed to provide sufficient authority or evidence to negate the design theory of product defect (*54 Cal. App. 4th 1218, 1229)* . Moreover, the defendants failed to counter the declaration of the plaintiffs' expert or otherwise negate the plaintiffs' allegations that the manufacturer of the deck gun did not provide an adequate warning against the potential dangerous and foreseeable "mismatch" of the deck gun and riser pipe attachments which did not have adequate strength or design to withstand the water pressures generated with the use of the deck gun, and the alleged foreseeable danger that the deck gun or its attachments may become separated from the fire truck under such pressures. Thus, the court concluded that triable issues of fact existed on the "warning defect" aspect of strict products liability (*54 Cal. App. 4th 1218, 1236)* .

[h] Defendant's Burden to Refute Material Issues Raised By the Pleadings When Complaint Alleges Facts to Refute An Affirmative Defense

Bacon v. Southern Cal. Edison Co. *(1997) 53 Cal. App. 4th 854, 62 Cal. Rptr. 2d 16* , an action by a minor who at the age of 13 sustained permanent injuries when he climbed to the top of an electrical transmission tower, received a shock and was knocked to the ground. The defendant owned the tower and real property under it. The tower was located in a residential neighborhood, near a park and under a paved pathway. The trial court ruled that the defendant was immune from liability under *Civ. Code § 846*, and that the plaintiff failed to show an issue of fact as to whether the defendant wilfully and maliciously failed to maintain the electrical transmission tower or warn or guard against a dangerous condition of the tower where the plaintiff was injured, and granted summary judgment in favor of the defendant.

The court of appeal affirmed, noting the rule that a defendant has the initial burden to show that the undisputed facts support each element of the affirmative defense. If, in anticipation of an affirmative defense, the complaint alleges facts to refute it, the pleadings themselves create a material issue that the defendant would have to refute to obtain summary judgment (*53 Cal. App. 4th 854, 858)* . The court concluded, however, that the defendant refuted the plaintiff's allegation of willful and malicious conduct by presenting evidence that it placed barbed wire and a warning sign at the tower, and that the warning sign and barriers were extant at the time the plaintiff climbed the tower (*53 Cal. App. 4th 854, 857)* .

[i] Strict Standards Apply To Defendant's Attempt to Disprove Element of Plaintiff's Cause of Action

In ***Tibor v. Superior Court*** *(1997) 52 Cal. App. 4th 1359, 61 Cal. Rptr. 2d 326* , the plaintiff had been charged in an earlier criminal case with forcible rape using a deadly weapon. Initially, the accused was represented by one deputy

public defender until the case was turned over to another deputy public defender. Eventually, the accused sought and received permission to represent himself. During the criminal trial, the victim testified on direct examination, but refused to be cross-examined. The case was dismissed, and the accused was released from jail. Thereafter, he sued the two deputy public defenders who had represented him in the criminal matter for legal malpractice in connection with DNA testing that the plaintiff requested, and locating alibi witnesses, claiming that the malpractice cost plaintiff 655 days of freedom. The court granted summary judgment in favor of only one of the defendants. The other defendant sought a writ of mandate directing the superior court to set aside its order denying that defendant's summary judgment motion.

The court of appeal granted the writ, directing the superior court to set aside the order denying the defendant's summary judgment motion and to enter a new and different order granting the motion. The court in reaching its conclusion, however, quoted as follows from *Brantley v. Pisaro (1996) 42 Cal. App. 4th 1591, 1601, 50 Cal. Rptr. 2d 431* : "The task of resolving a defendant's motion for summary judgment will be facilitated by identifying at the outset the ground relied upon by the moving defendant. Is the defendant claiming the plaintiff cannot establish the cause of action pled (1) because the plaintiff's factually insufficient discovery responses demonstrate the plaintiff cannot prove an essential element of the cause of action; or (2) because the defendant's affirmative evidence discloses facts which negate the existence of an essential element of the plaintiff's claim by proving the contrary is true. If it is the latter, the court should evaluate defendant's evidence under the same strict standards which were held to apply to a defendant's attempt to disprove an element of the plaintiff's cause of action before the 1992 and 1993 amendmentsto section 437(c), in order to avoid unjustly depriving the plaintiff of a trial" (*52 Cal. App. 4th 1359, 1368)* . The court pointed out that the defendant, in support of his motion, did not rely on factually insufficient discovery responses by the plaintiff. Rather, the defendant argued that the plaintiff's causes of action for legal malpractice could not be established as a matter of law because the relevant undisputed facts proved that the defendant did not breach his duty of care to the plaintiff. In the alternative, the defendant argued that even if there was a breach of the duty of care, the relevant undisputed facts proved that the breach did not cause the defendants's damages. In other words, the defendant maintained that he disproved two essential elements of the plaintiff's claim, *i.e.*, breach of duty, and casation (*52 Cal. App. 4th 1359, 1368-1369)* .

Ultimately, the court concluded that the defendant's papers failed to satisfy his burden of proof with respect to the breach of duty element (*52 Cal. App. 4th 1359, 1369)* . However, with regard to causation in a legal malpractice case, the court held that a former criminal defendant, to establish proximate cause, must prove by a preponderance of the evidence not only that the plaintiff's former attorney was negligent in the representation, but that the plaintiff was innocent of the criminal charges filed against him. A public defender charged with legal malpractice, in bringing a summary judgment motion, is required to demonstrate that a reasonable cause exists to believe that the plaintiff committed the offense for which the arrest was made. The burden then shifts to the plaintiff to establish that facts exist that would lead no person of ordinary care and prudence to believe or conscientiously entertain any honest and strong suspicion that the plaintiff is guilty of the crime charged. The court would then be required to make a finding as a matter of law as to factual innocence. Should the court find that a reasonable cause exists to believe that the plaintiff committed the offense for which the arrest was made, the court would be required to grant the public defender's motion for summary judgment since such a finding in effect means that the plaintiff cannot, as a matter of law, prove by a preponderance of the evidence that he is innocent of the criminal charges filed against him. Thus, the question of factual innocence is wholly one for the trial court, and not for the jury (*52 Cal. App. 4th 1359, 1373)* . The court concluded as a matter of law that reasonable cause existed to believe that the plaintiff committed the rape for which he was arrested (*52 Cal. App. 4th 1359, 1368)* .

[j] Sole Declaration of Party Raising Triable Issue of Fact Sufficient

In ***Estate of Housley*** *(1997) 56 Cal. App. 4th 342, 65 Cal. Rptr. 2d 628* , the decedent had executed a will and inter vivos trust in 1989, naming the plaintiff as a beneficiary. In 1994, the decedent executed a codicil and amended the trust to remove the plaintiff as a beneficiary in each. After the decedent died and the decedent's will and codicil were admitted to probate, the plaintiff filed a petition in probate seeking to place a constructive trust on the decedent's estate,

and an order declaring the plaintiff to be a beneficiary of the trust based on the plaintiff's detrimental reliance on the deceased's alleged promises to leave all of the deceased property to the plaintiff. The plaintiff alleged that the decedent breached an oral agreement to leave all of the decedent's property to the plaintiff. The trial court found that equitable estoppel did not preclude the successor executor of the decedent's will form asserting the applicable statute of frauds, and granted summary judgment in favor of the successor executor. The plaintiff appealed.

The court of appeal reversed, agreeing that the plaintiff's papers opposing the summary judgment motion presented sufficient evidence to create triable issues of material fact on whether equitable estoppel should apply. The court noted that contrary to the success executor's contention, the sole declaration of a party opposing a summary judgment motion which raises a triable issue of fact is sufficient to deny the motion. *Code Civ. Proc. § 437c(e)* does not allow a trial court to weigh the credibility of a declaration submitted by the party opposing a summary judgment motion and then grant the motion, except where the declaration is facially so incredible as a matter of law that the moving party otherwise would be entitled to summary judgment (*56 Cal. App. 4th 342, 359-360)* .

[k] Moving Party's Burden to Eliminate All Triable Issue Notwithstanding Absence of Opposition

The facts and procedural background of ***Wright v. Stang Manufacturing Co.*** *(1997) 54 Cal. App. 4th 1218, 63 Cal. Rptr. 2d 422* , are set out under Moving Party's Burden of Eliminating All Triable Issues of Fact, *above*. In reversing summary judgment in favor of the defendants, the court of appeal noted the rule that even if no opposition is presented, the moving party still has the burden of eliminating all triable issues of fact (*54 Cal. App. 4th 1218, 1228)* .

[l] No Need To Look at Plaintiff's Opposing Papers Until Defendant Makes Requisite Showing

Salazar v. Southern Cal. Gas Co. *(1997) 54 Cal. App. 4th 1370, 63 Cal. Rptr. 2d 522* , involved a personal injury action in which summary judgment was entered in favor of the defendant, and the plaintiffs appealed. The court of appeal affirmed, but in so doing stated the following rules concerning summary judgment: when it is the defendant who moves for summary judgment, summary judgment is proper if the defendant either proves an affirmative defense or disproves at least one essential element of the plaintiff's cause of action, or if the defendants shows that an elementof the cause of action cannot be established. The defendant must show that under no possible hypothesis within the reasonable purview of the allegations of the complaint is there a material question of fact which requires examination by trial. Only if the defendant makes the requisite showing does the court need to examine the plaintiff's opposing papers to determine if they demonstrate the existence of a triable issue of material fact (*54 Cal. App. 4th 1370, 1376)* .

[m] Plaintiff Need Not Demonstrate Triable Issue of Fact When Defendant Fails to Meet its Burden

LeVine v. Weis *(1998) 68 Cal. App. 4th 758, 80 Cal. Rptr. 2d 439* , involved, among other causes of action, wrongful termination under the False Claims Act (*Gov. Code § 12650 et seq.*). The trial court granted summary adjudication in favor of defendants and later plaintiff's entire action was dismissed. Plaintiff appealed. The court of appeal reversed the grant of summary adjudication for the cause of action based on the False Claims Act, but in all other respects affirmed the judgment. In so doing the court stated that summary judgment or summary adjudication is properly granted only when there is no triable issue of fact and the moving party is entitled to judgment as a matter of law. When the defendant is the moving party, defendant bears the burden of showing that one or more elements of the cause of action cannot be established or that there is complete defense. Unless the defendant meets its burden, plaintiff has no obligation to demonstrate that there is a triable issue of fact (*68 Cal. App. 4th 758, 763)* .

[n] Motion Based on Issues Asserted in Prior Unsuccessful Motion for Summary Adjudication

Le Francois v. Goel *(2005) 35 Cal. 4th 1094, 29 Cal. Rptr. 3d 249* involved causes of action for misrepresentation and false promises. Plaintiffs sued their former employer and three of its officers. All defendants moved for summary judgment or, in the alternative, summary adjudication and the trial court denied the motion. Over a year later, the individual defendants filed a second motion for summary judgment based on the same grounds as the first motion.

Plaintiffs argued that the second motion violated *Code Civ. Proc. § 437c(f)(2)*. The court granted defendants' motion, and plaintiffs appealed. The court of appeals held that although the motion violated both *Code Civ. Proc. § 437c(f)(2)* and *Code Civ. Proc. § 1008*, the trial court had inherent power to rule on the second motion even though it was not based on new facts or law.

The court briefly addressed the interplay between *Code Civ. Proc. § 437c(f)(2)* and *Code Civ. Proc. § 1008*, noting that while it seemed logical that the more specific provisions of the summary judgment statute governed, it was inconsequential as the two statutes say essentially the same thing. Turning to separation of powers principles, the court held that *Code Civ. Proc. § 437c(f)(2)* clearly limits the parties' ability to file repetitive motions not based on new facts or law, and that this was a permissible exercise of the Legislature's authority. However, the statute does not limit the court's ability to reconsider its prior rulings on its own motion. In fact, *Code Civ. Proc. § 437c(f)(2)* specifically states only that "a party may not" file a second motion not based on new facts or law. Accordingly, any reconsideration of a prior ruling not based on new facts or law must formally begin with the court on its own motion. The second summary judgment motion was improper and the court's ruling was reversed. The court specifically stated that, on remand, nothing precluded the trial court from reconsidering its initial ruling on its own motion (*35 Cal. 4th 1094, 1109)* .

In *Holland v. Morse Diesel Internat., Inc., 86 Cal. App. 4th 1443, 1447, 104 Cal. Rptr. 2d 239 (2001)* , plaintiff failed to disclose information about her medical condition and treatment on a health insurance application she submitted to defendant. She filed an action against defendant after it rescinded her insurance policy, asserting claims for breach of contract, breach of the implied covenant of good faith and fair dealing, declaratory relief and violation of *Bus. & Prof. Code § 17200*. She alleged that the rescission of her policy constituted unlawful postclaims underwriting in violation of *Ins. Code § 10384* and was an unreasonable use of her insurance application in violation of *Ins. Code § 10381.5*. Defendant answered and cross-complained, seeking a declaratory judgment that it rightfully rescinded the insurance contract, thereby precluding plaintiff from maintaining her action on the ground that plaintiff made material false representations and omitted material facts in her application concerning her medical condition and history and that it would not have issued the policy had she provided complete and accurate information. The trial court granted defendant's motion for summary judgment on the complaint and cross-complaint, on the ground that defendant had no duty to further investigate plaintiff's medical history because her application did not provide notice of any concerns; however, the trial court vacated its own order on the basis of new case law, reconsidered its prior order and denied it without prejudice. The trial court denied defendant's renewed motion for summary judgment on the ground that, although, even given recent authority, an insurer retains the right to rescind an insurance policy due to the insured's fraud, defendant's separate statement failed to establish that the material facts were undisputed with respect to each element of fraud. The trial court granted defendant's subsequent motion for summary judgment, ruling that it was entitled to rescission as a matter of law in view of the undisputed evidence that plaintiff made material misrepresentations and omissions regarding her medical history (***Holland v. Morse Diesel Internat., Inc.*** *(2001) 86 Cal. App. 4th 1443, 104 Cal. Rptr. 2d 239* .

The Court of Appeal affirmed. With regard to plaintiff's challenge that the summary judgment motion was improperly refiled in violation of *Code Civ. Proc. § 437c(f)(2)*, even disregarding that defendant's motion for summary judgment fell outside the scope of *Code Civ. Proc. § 437c(f)(2)*, because the prior motion was one for summary judgment rather than summary adjudication, the trial court properly exercised its discretion in determining that this provision did not bar summary judgment because the operative motion addressed an issue not raised by the prior motion. In its order denying the prior motion the trial court expressly stated that the motion's failure to address the elements of fraud was the basis for its denial. The operative summary judgment motion addressed this previously omitted issue, asserting that defendant was entitled to judgment because plaintiff committed fraud on the application and specifically identified the elements of fraud established by the undisputed evidence. The trial court had no reason to reach the question of whether the operative summary judgment motion relied on the same facts and law presented in the prior motion because the motion targeted an issue, plaintiff's fraud, not previously asserted. Even assuming that the operative summary judgment motion did not assert a new issue, the court nevertheless concluded that the trial court had inherent authority to reconsider sua sponte its prior order denying defendant's second motion for summary judgment, citing *Le Francois v. Goel (2005) 35*

Cal. 4th 1094, 1096-1097, 1105, 29 Cal. Rptr. 3d 249, 112 P.3d 636 , in which the California Supreme Court concluded a trial court has the authority to reconsider sua sponte an earlier interim ruling on a motion for summary judgment even though the moving party may not have asserted any new issues or newly discovered facts or law that would support the filing of a second or renewed motion for summary judgment pursuant to *Code Civ. Proc. §§ 437c(f)(2)* or *1008*. The record supported the conclusion that the trial court effectively sua sponte reconsidered its prior order denying defendant's second motion for summary judgment. In the prior order, the trial court indicated that it would consider whether defendant was entitled to summary judgment on the ground that the undisputed evidence satisfied the elements of fraud. It characterized defendant's second summary judgment motion as seeking adjudication on the theory that plaintiff's concealment of material information entitled defendant to rescind coverage and found that theory insufficient. Though the trial court observed that the unstated inferences from the evidence identified in the separate statement might support the existence of fraud, the trial court believed that each of the elements of fraud (as enumerated in CACI No. 1900) had to be set forth explicitly in the separate statement and defendant's separate statement was insufficient to support summary judgment or summary adjudication. At the time it denied the second summary judgment motion, the trial court had already determined that it would reconsider its order if defendant could demonstrate that there was no triable issue of fact as to each element of fraud. That reconsideration may have been prompted by a motion filed in violation of § 437c(f)(2) did not alter the trial court's inherent authority to reconsider its prior order denying summary judgment (*181 Cal. App. 4th 60, 71-74)* .

Bagley v. TRW, Inc. *(1999) 73 Cal. App. 4th 1092, 86 Cal. Rptr. 2d 909* , involved several causes of action based on plaintiff having been fired from employment. Defendant initially moved for summary judgment or, in the alternative summary adjudication of 130 issues. The trial court denied the summary judgment motion, granted summary adjudication in part as to each cause of action and denied summary adjudication in part as to each cause of action. The case was later reassigned to another judge. Relying on the same facts and the same law, the defendant thereafter made a second motion for summary judgment or, in the alternative, summary adjudication of each of plaintiff's causes of action which was heard by the new judge, who granted summary judgment. Plaintiff appealed (*73 Cal. App. 4th 1092, 1093-1096)* .

The court of appeal reversed (*73 Cal. App. 4th 1092, 1098)* . The court initially noted that under *Code Civ. Proc. § 437c(f)(2)*, a party may not move for summary judgment based on issues asserted in an earlier denied motion for summary adjudication, unless that party establishes to the court's satisfaction, newly discovered facts or circumstances or a change of law supporting the issues reasserted in the summary judgment motion (*73 Cal. App. 4th 1092, 1096)* . Although neither party cited *Code Civ. Proc. § 437c(f)(2)* in their briefs and directed the court's attention to *Code Civ. Proc. § 1008*, the statute generally governing reconsideration motions, the court noted that quite clearly the case before it must be decided by the specific requirements of the summary judgment statute rather than the general provisions of the reconsideration statute (*73 Cal. App. 4th 1092, 1096 n.3*). The court held that the second motion for summary judgment was improper because it was not based on new facts or law, or, indeed, on anything that had not already been presented at the time of the first motion (*73 Cal. App. 4th 1092, 1096-1097)* .

[o] Deposition Statement Obtained During Discovery is Not an Unequivocal Admission That Would Support Granting of Summary Judgment

For discussion of ***D'Amico v. Board of Medical Examiners*** *(1974) 11 Cal. 3d 1, 21-22, 112 Cal. Rptr. 786, 520 P.2d 10* , see *§ 221.20[3][e]*.

Scalf v. D.B. Log Homes, Inc. *(2005) 128 Cal. App. 4th 1510, 27 Cal. Rptr. 3d 826* arose out of the construction of a log cabin home. Scalf sold the log home kit and D.B. Log Homes ("Lodge Log") manufactured the kit. Litigation commenced when the home's builder filed a complaint against the homeowners to foreclose a mechanic's lien. Scalf and Lodge Log each filed cross-complaints against the other. During discovery, Lodge Log took Walter Scalf's deposition. Lodge Log's counsel elicited testimony from Scalf to the effect that there was nothing wrong with the Lodge Log home kit and that Scalf did not attribute any of the eventual problems with the home to Lodge Log. Lodge Log moved for

summary judgment on Scalf's cross-complaint. In its moving papers, Lodge Log asserted that Scalf's deposition testimony constituted judicial admissions that he was "perfectly happy" with the Lodge Log product and had "no criticisms" of Lodge Log's conduct. In opposition, Scalf produced evidence from other depositions to the effect that the material Lodge Log provided was defective and that material was missing. The trial court granted summary judgment, ruling that under *D'Amico* Scalf's deposition testimony constituted "conclusive judicial admissions" that the Lodge Log kit was not defective and that it was disregarding opposing evidence which undermined Scalf's admissions. Scalf appealed (*128 Cal. App. 4th 1510, 1518)* .

The court of appeals reversed. The court noted that in order to obtain summary judgment on its express indemnity claim, Lodge Log had to demonstrate that it was entirely free of negligence. In order to do so, Lodge Log relied entirely on Scalf's deposition testimony, and the trial court ruled that Lodge Log had carried its burden of showing it was free from fault. The court of appeals disagreed, stating that Scalf's testimony fell short of demonstrating that none of the problems with the home were attributable to Lodge Log. The court held that Lodge Log misinterpreted the *D'Amico* case in asserting that Scalf's testimony was an unequivocal admission exonerating Lodge Log from all wrongdoing in the case. The *D'Amico* rule is limited to instances where credible discovery admissions are contradicted only by self-serving declarations of a party. The court distinguished between written discovery admissions made under the "direction and supervision of counsel" and "easily misunderstood answers" given by a lay deponent (*128 Cal. App. 4th 1510, 1522)* . The court clarified that deposition answers are evidence to be weighed in conjunction with other evidence and do not constitute judicial admissions, stating that "*D'Amico* has never stood for the proposition that highly inculpatory testimony elicited from a party in a deposition may be sufficient by itself to warrant summary judgment, or that it relieves the moving party of its ordinary burden of showing the absence of a genuine factual dispute" (*128 Cal. App. 4th 1510, 1522-1523)* . Scalf's testimony that he had found nothing wrong with the kit and that he had no criticisms of Lodge Log's conduct were not equivalent to judicial admissions that Lodge Log was free from fault. Furthermore, it was error for the trial court to refuse to consider evidence which contradicted Scalf's testimony in opposition to the motion. Evidence in the form of other deposition testimony showed there was a triable issue of fact as to Lodge Log's liability. The *D'Amico* rule does not permit a trial court to disregard contrary evidence; it instead permits a trial court to disregard declarations by a party which contradict that party's own discovery responses (*128 Cal. App. 4th 1510, 1524-1525)* .

[4] Additional Authorities

[a] Rules Governing Summary Judgment Procedure

In *Great American Ins. Companies v. Gordon Trucking, Inc. (2008) 165 Cal. App. 4th 445, 81 Cal. Rptr. 3d 65* , plaintiff insurer sued defendant for negligence after a truck fire damaged the vehicle of one of plaintiff's insureds. Defendant moved for summary judgment on the basis that plaintiff could not establish breach of duty or causation. The trial court granted defendant's motion for summary judgment, and plaintiff appealed. The court of appeals reversed. Defendants had offered plaintiff's insured's interrogatory responses as evidence of the lack of causation. Although a defendant may rely on plaintiff's factually devoid discovery responses to show that plaintiff's cause of action has no merit, it was improper for defendant to rely on plaintiff's insured's discovery responses. An insurer is not bound by discovery responses made by its insured during the insured's litigation with a third party tortfeasor (*165 Cal. App. 4th 445, 452)* .

Crookall v. Davis, Punelli, Keathley & Willard (1998) 65 Cal. App. 4th 1048, 77 Cal. Rptr. 2d 250 , involved a legal malpractice action in which the trial court had granted summary judgment in favor of the defendants. The court of appeal in reversing the judgment noted, in part, that on appeal it independently assesses the correctness of the trial court's ruling, applying same legal standard as the trial court. The appellate court construes the moving party's affidavits strictly, the opponents affidavits liberally, and resolves doubts about the propriety of granting of the motion in favor of party opposing it (*65 Cal. App. 4th 1048, 1057)* .

Pay'N Pak Stores, Inc. v. Superior Court (1989) 210 Cal. App. 3d 1404, 258 Cal. Rptr. 816 , arose out of an action for breach of contract in connection with a lease of commercial property. The trial court granted summary adjudication on the issue of whether the landlord of a shopping center had a legal right to refuse the tenants' requests to sublease. On petition of the landlord, the court of appeal found the declarations of the parties presented factual disputes and raised factual issues making summary adjudication inappropriate, and ordered issuance of a writ of mandate directing the trial court to enter an order denying the motion for summary adjudication (*210 Cal. App. 3d 1404, 1408-1412)* .

In *Spradlin v. Cox (1988) 201 Cal. App. 3d 799, 247 Cal. Rptr. 347* , a personal injury action against a worker and the worker's employer, the court of appeal reversed a summary judgment for defendants on the ground that there was a conflict in the evidence and that the conflict convinced it that a triable issue remained. The court stated that summary judgment is proper only if the affidavits in support of the moving party would be sufficient to sustain a judgment in his or her favor and the opponent does not by affidavit show facts sufficient to present a triable issue of fact. The affidavits of the moving party are strictly construed andthose of the opponent liberally construed, and doubts as to the propriety of summary judgment should be resolved against granting the motion (*201 Cal. App. 3d 799, 805)* . The court added that the summary procedure is drastic and should be used with caution so that it does not become a substitute for the open trial method of determining facts (*201 Cal. App. 3d 799, 805-806)* .

Walker v. County of Los Angeles (1987) 192 Cal. App. 3d 1393, 238 Cal. Rptr. 146 , was a personal injury action against a county. Plaintiff alleged that an abandoned dog bit off his thumb as he was trying to capture the dog at the express request of one of the animal control officers of defendant, who failed to give plaintiff proper equipment and support and otherwise failed to exercise due care in connection with plaintiff's attempt to capture the dog. In reversing, on the ground that a triable fact existed in regard to whether the officer and through her the county owed a duty of due care toward plaintiff, the court said that (1) the summary judgment procedure, inasmuch as it denies the adverse party's right to a trial, is drastic and should be used with caution; (2) summary judgment is properly granted only when the evidence in support of the moving party establishes that there is no issue of fact to be tried; (3) the affidavits of the moving party are strictly construed and those of the opponent liberally construed; and (4) doubts about the propriety of summary judgment should be resolved against granting the motion (*192 Cal. App. 3d 1393, 1396)* .

In *Perry v. Medina (1987) 192 Cal. App. 3d 603, 237 Cal. Rptr. 532* , the trial court granted summary judgment for defendants in a wrongful death action on the ground that plaintiff parent was not a dependent of her deceased son [*see* former Code Civ. Proc. § 377(b)(2); *now see Code Civ. Proc. § 377.60(b)*]. In reversing the judgment on the ground that whether plaintiff was or was not a dependent presented factual issues not subject to resolution on a summary judgment motion, the court of appeal said that the rules for adjudication of a motion for summary judgment are as follows: (1) the matter to be determined by the trial court is whether facts have been presented that give rise to a triable factual issue; (2) the court may not pass on the issue itself; (3) summary judgment is proper only if the affidavits or declarations in support of the motion would be sufficient to sustain a judgment in favor of the moving party and the opponent does not by affidavits show facts sufficient to present a triable issue of fact; (4) the affidavits of the moving party are strictly construed; and (5) doubts about the propriety of summary judgment should be resolved against granting the motion (*192 Cal. App. 3d 603, 606)* . The court added that such summary procedure is drastic and should be used with caution so that it does not become a substitute for the open trial method of determining facts (*192 Cal. App. 3d 603, 606-607)* .

In *Twohig v. Briner (1985) 168 Cal. App. 3d 1102, 214 Cal. Rptr. 729* , an automobile passenger brought an action against the driver and owner for damages resulting from personal injuries sustained in a traffic accident. Defendant, who may not have been at fault in the accident, had allegedly removed the seat belts after purchasing the automobile. The court of appeal reversed the trial court's grant of defendant's summary judgment motion, holding that whether or not defendant breached a duty of due care in operating and maintaining the vehicle by removing the seatbelts constituted two triable factual issues: whether the risk of the particular harm incurred was reasonably foreseeable under the circumstances and, if so, whether it was unreasonable to remove the seat belts in light of the risk involved (*168 Cal. App. 3d 1102, 1105-1109)* .

Harding v. State of California ex rel. Dept. of Transportation (1984) 159 Cal. App. 3d 359, 205 Cal. Rptr. 561 , involved actions for inverse condemnation, nuisance, and violation of civil rights. Plaintiffs appealed from the trial court order sustaining a demurrer to and ordering entry of judgment of dismissal on the nuisance and civil rights actions, and the grant of summary judgment on the inverse condemnation action. The court of appeal affirmed dismissal of the nuisance and civil rights actions, but reversed summary judgment on the inverse condemnation action, holding plaintiffs had alleged unique damage to their property and should be allowed to establish that they suffered from a peculiar and substantial burden as a result of their proximity to a state highway (*159 Cal. App. 3d 359, 367)* . The court noted that summary judgment is proper only if the movant's affidavits would be sufficient to sustain judgment in his or her favor and his or her opponent does not, by affidavit, show facts that may be deemed by the judge hearing the motion sufficient to present a triable issue. The aim of summary judgment is to discover, through the media of affidavits, whether the parties possess evidence requiring the weighing procedures of a trial. The movant's affidavits are strictly construed and those of his or her opponent liberally construed, and doubts as to the propriety of granting the motion should be resolved in favor of the party opposing the motion. This summary procedure is drastic and should be used with caution so that it does not become a substitute for the open trial method of determining facts (*159 Cal. App. 3d 359, 363-364)* .

[b] Burden on Moving Party

In Saelzler v. Advanced Group 400 *(2001) 25 Cal. 4th 763, 107 Cal. Rptr. 2d. 617, 23 P.3d 1143* , a deliverywoman brought a negligence action against the owners of an apartment complex in which she alleged that she was assaulted on the premises by unknown assailants after she attempted to deliver a package to an apartment resident in the midafternoon. The trial court found that the plaintiff failed to show that the defendants' breach of duty to safeguard the premises was a proximate cause of her assault and granted defendants' motion for summary judgment. The court of appeal reversed, holding that the plaintiff's showing was sufficient to raise a triable causation issue.

The Supreme Court reversed the court of appeal with directions to affirm the award of summary judgment in the defendants' favor, holding that the trial court properly granted summary judgment to the defendants based on the plaintiff's failure adequately to demonstrate that the defendants' negligence was an actual, legal cause of her injuries. The Court noted that the 1992 and 1993 amendments to *Code Civ. Proc. § 437c* have changed summary judgment law dramatically and, like its federal counterpart, the statute now places the initial burden on the moving party, and shifts it to opposing party on a showing that one or more elements of the cause of action cannot be established (*25 Cal. 4th 763, 767-768)* . The Court pointed out that most of the assaults and similar incidents of crime the plaintiff had cited occurred during nighttime, and the record indicated the defendants did provide extensive nighttime security. Moreover, the plaintiff's own evidence showed that that the defendants at least attempted to keep all security gates in working order, performing regular inspections and repairs.

Assuming that a triable issue existed regarding the extent or reasonableness of the defendants' security efforts, even a flagrant failure to provide such measures would not justify shifting to the defendants the burden of conclusively proving the absence of causation. No matter how inexcusable a defendant's act or omission might appear, the plaintiff must show the act or omission caused, or substantially contributed to, her injury. Otherwise, the defendants might be held liable for conduct which actually caused no harm, contrary to the recognized policy against making landowners the insurer of the absolute safety of anyone entering their premises The Court noted that under the current version of the summary judgment statute, a moving defendant need not support his or her motion with affirmative evidence negating an essential element of the responding party's case. In short, concluded the Court, the plaintiff could not prove that the defendants' omissions were a substantial factor in causing her injuries, and no proper basis existed for shifting the burden of proof on that issue to the defendants (*25 Cal. 4th 763, 780-781)* . Although finding no such facts were indicated in the present case, the court noted in dicta that, in a given case, direct or circumstantial evidence may show an assailant took advantage of the landowner's lapse (such as a failure to keep a security gate in repair) in the course of committing an attack, and that the omission was a substantial factor in causing the injury. Eyewitnesses, security cameras, even fingerprints or recent signs of break-in or unauthorized entry, might show what transpired at the scene (

25 Cal. 4th 763, 779) .

In *Weber v. John Crane, Inc. (2006) 143 Cal. App. 4th 1433, 50 Cal. Rptr. 3d 71* , plaintiffs sued various manufacturers, suppliers and contractors based on plaintiff Weber's alleged exposure to asbestos over the course of nearly 40 years. John Crane was one of the defendants named, based on products allegedly manufactured, sold or supplied by John Crane from 1960-1964. Crane moved for summary judgment, claiming there was no triable issue of material fact that John Crane was a cause of plaintiff's injuries. In support of the motion, Crane cited plaintiff's deposition testimony that he had not heard of the name "John Crane, Inc." and did not associate any product or service with that name. Plaintiff also stated in deposition that he did not recall working around a product manufactured by John Crane. The court granted defendant's motion, stating that the fact that plaintiff himself had no idea about a connection between himself and defendant was enough to shift the burden to plaintiffs. Plaintiffs appealed after their motion for reconsideration was denied.

The court of appeal reversed, holding that defendant's evidence that Weber was unfamiliar with the name John Crane, Inc. and could not associate any product with that name was insufficient to meet its burden. Rather, defendant's evidence showed only that plaintiffs would be unable to prove their case with Weber's deposition testimony. Under *Aguilar* and *Scheiding*, the defendant must make an affirmative showing that plaintiff will be unable to prove his case by any means, not just by a single means. John Crane produced no evidence allowing an inference that plaintiffs neither possess, nor reasonably can obtain, evidence that Weber was exposed to a John Crane product containing asbestos. Thus, the burden did not shift to plaintiffs to make a prima facie showing of a triable issue of material fact (*143 Cal. App. 4th 1433, 1442)* .

See Rubenstein v. Rubenstein (2000) 81 Cal. App. 4th 1131, 1142, 1151-1152, 97 Cal. Rptr. 2d 707 , discussed under § 221.29[4][f].

See Thatcher v. Lucky Stores, Inc. (2000) 79 Cal. App. 4th 1081, 94 Cal. Rptr. 2d 575 discussed under § 221.23[3][a].

In *Neverkovec v. Fredericks (1999) 74 Cal. App. 4th 337, 87 Cal. Rptr. 2d 856* , the court examined the problem that occurs when an injured party settles with an alleged tortfeasor's insurer, signing a general release agreement that appears to excuse everyone in the world from liability, and thereafter proceeds against a different alleged tortfeasor who raises the general release as a defense. Under these circumstances, the trial court granted summary judgment for the defendant (*74 Cal. App. 4th 337, 341-343)* .

The court of appeal reversed. The court concluded that the defendant did not meet the burden of showing that he was a third party beneficiary of the release (*74 Cal. App. 4th 337, 341)* . With regard to the burden of proof, the court noted that a defendant moving for summary judgment may meet the burden of showing the action is meritless by establishing a complete defense. If the defendant makes a sufficient showing, the burden shifts to the plaintiff to present specific facts showing a triable issue of material fact (*74 Cal. App. 4th 337, 344)* . To obtain summary judgment on the ground that a general release has discharged him or her from liability, a third party to the release agreement must affirmatively show the parties intended to release him or her. The burden of proof is on third party under both contract law and the summary judgment statute. Because the court mustconsider the circumstances of the contracting parties' negotiations to determine whether a third party not named in the release was an intended beneficiary, it will seldom be sufficient for the third party to simply rely on a literal application of the terms of the release (*74 Cal. App. 4th 337, 344)* . Accordingly, when defendant moved for summary judgment contending the general release operated to relieve defendant from any liability and the plaintiff responded that the extrinsic evidence showed that the parties never intended to release defendant, even if the general release was sufficient to shift the burden of proof to plaintiff, the extrinsic evidence before the court raised a triable issue regarding the parties intent to release defendant (*74 Cal. App. 4th 337, 343-344)* .

In *City of San Jose v. Department of Health Services (1998) 66 Cal. App. 4th 35, 77 Cal. Rptr. 2d 609* , the trial court

granted summary judgment in plaintiff's favor. Although the court of appeal affirmed the judgment, the court noted with regard to the standard of review that the appellate court determines if the moving party's showing has established facts that negate the opponent's claim and justify a judgment in the movant's favor. The motion must stand self-sufficient and cannot succeed because the opposition is weak. A party cannot succeed without disproving even those claims on which the opponent would have the burden of proof at trial (*66 Cal. App. 4th 35, 40)* .

Travelers Casualty & Surety Co. v. Superior Court (1998) 63 Cal. App. 4th 1440, 75 Cal. Rptr. 2d 54 , involved an issue of coverage of third party claims under a general liability policy. Insurers moved for summaryadjudication of their duty to indemnify plaintiff arguing that plaintiff's claim for indemnification for particular site damages was barred by the affirmative defense of the pollution exclusion contained in their insurance policies (*63 Cal. App. 4th 1440, 1447)* . The trial court denied the insurers' motion, on among other grounds, that they had failed to meet their burden of proof. Defendants' sought review by a petition for a writ of mandate (*63 Cal. App. 4th 1440, 1449-1450)* .

The court of appeal issued a peremptory writ of mandate directing the trial court to enter a new order granting the motion (*63 Cal. App. 4th 1440, 1464)* . Quoting from *Addy v. Bliss & Glennon (1996) 44 Cal. App. 4th 205, 214, 51 Cal. Rptr. 2d 642* , which quoted *Hagen v. Hickenbottom (1995) 41 Cal. App. 4th 168, 186, 48 Cal. Rptr. 2d 197* , the court noted that it is clear from the 1992 amendment that a defendant have "shown that one or more elements of the cause of action ... cannot be established" (§ 437c, former subd. (n)(2), Stats. 1992, ch. 1348, § 1, now subd. (o)), that a defendant must make an affirmative showing in support of defendants motion. Such a showing connotes something significantly more than simply pointing out to the court that there is an absence of evidence. Before the burden of producing even a prima facie case should be shifted to plaintiff in advance of trial, a defendant who cannot negate an element of the plaintiff's case should be required to produce direct or circumstantial evidence that the plaintiff not only does not have but cannot reasonably expect to obtain a prima facie case. If that showing can be made it is both fair to defendant and consistent with efficient administration of justice that the plaintiff be called upon, on risk of summary judgment, to make a prima facie case (*63 Cal. App. 4th 1440, 1452-1453)* . The court further noted, with regard to coverage of third party claims under a general liability policy, that the burden of proof regarding the sudden and accidental exception to the pollution exclusion is different in a motion for summary adjudication than at trial. When an insurer moves for summary adjudication of the duty to indemnify based on the affirmative defense of the qualified pollution exclusion, the insurer has the burden of establishing tht affirmative defense as a matter of law pursuant to *Code Civ. Proc. § 437c(o)(2)* (*see now Code Civ. Proc. § 437c(p)(2)*). Having met that initial burden, the insurer than has the additional burden, pursuant to *Code Civ. Proc. § 437c(o)(2)* (*see now Code Civ. Proc. § 437c(p)(2)*) of making an affirmative showing that the insured cannot establish that the claims fall within the sudden and accidental exception to the pollution exclusion. To show that the sudden and accidental exception cannot be established, the insurer must show by direct or circumstantial evidence that the insured cannot reasonably be expected to make a prima facia showing that the claimed environmental damage arose from a sudden and accidental discharge, dispersal, release, or escape of pollutants. The insurer may point to the insured's interrogatory answers as evidence that the insured has no facts to support its theory of liability (*i.e.*, the theory that damages are covered because they arose from sudden and accidental pollution discharges). If the insurer meets this burden, the burden shifts to the insured to show a triable issue of material fact exists as to the application of either the pollution exclusion or the sudden and accidental exception (*63 Cal. App. 4th 1440, 1456)* . The court concluded that the insurers had met their burden in their motion for summary adjudication causing the burden of proof to shift to the plaintiff and that plaintiff failed to meet its burden (*63 Cal. App. 4th 1440, 1460-1463)* .

In ***Addy v. Bliss & Glennon*** *(1996) 44 Cal. App. 4th 205, 51 Cal. Rptr. 2d 642 (Sixth Dist.)* , the plaintiff brought an action for employment discrimination. The trial court granted summary judgment in favor of the defendant, and the plaintiff appealed.

The court of appealed affirmed. In doing so, however, the court of appeal rejected the defendant's argument that it may show a cause of action has no merit merely by pointing out the absence of essential evidence to support some element of the plaintiff's case. Rather, the court agreed with the plaintiff that a moving defendant may not shift the burden to the

plaintiff to put on a prima facie case simply by pointing out the absence of essential evidence to support the plaintiff's case, and that a defendant must make an affirmative showing in support of a motion for summary judgment (*44 Cal. App. 4th 205, 210, 214)* . The court followed *Hagen v. Hickenbottom (1995) 41 Cal. App. 4th 168, 48 Cal. Rptr. 2d 197 (Sixth Dist.)* . Although *Hagan* dealt only with the 1992 amendments to the summary judgment statute, and not the 1993 amendments, the court believed its reasoning was equally sound with respect to the latter amendments. Thus, a moving defendant must make an affirmative showing in support of his or her motion (*44 Cal. App. 4th 205, 214)* . However, the court concluded that the defendant had made a satisfactory showing by submitting evidence that the plaintiff had received the same training as other people in her position, and that her demotion was due to her inability to successfully satisfy job requirements (*44 Cal. App. 4th 205, 219)* .

In ***Hagen v. Hickenbottom*** *(1995) 41 Cal. App. 4th 168, 48 Cal. Rptr. 2d 197 (Sixth Dist.)* , plaintiffs, grandchildren of a decedent, brought an action to set aside a revocable living trust in favor of defendant on the grounds of undue influence. Defendant moved for summary judgment on the basis that plaintiffs had offered no evidence that she had done or said anything wrong. Defendant's "defense of truth" consisted of admitting having made the statements to decedent alleged by plaintiff, but asserting that the statements were true. The trial court, holding that plaintiffs had not shown a triable issue of fact to dispute that what defendant told decedent was true or specifying any other wrongful conduct, granted the summary judgment.

The court of appeal reversed, concluding that defendant neither demonstrated the legal validity of a "defense of truth" nor made a showingsufficient to require plaintiffs to put on a prima facie factual case at the summary judgment stage. The court held that in light of the 1992 amendment, a defendant must make an affirmative showing in support of his or her motion. Such a showing connotes something significantly more than simply pointing out to the court that there is an absence of evidence. Before the burden of producing even a prima facie case should be shifted to the plaintiff in advance of trial, a defendant who cannot negate an element of the plaintiff's case should be required to produce direct or circumstantial evidence that the plaintiff not only does not have, but cannot reasonably expect to obtain, a prima facie case. When such a showing can be made, the plaintiff may be called upon, on risk of summary judgment, to make a prima facie case (*41 Cal. App. 4th 168, 186)* . Applying these criteria, the court concluded that defendant did not make a showing that plaintiff's case could not be established sufficient to shift the burden in the summary judgment proceedings (*41 Cal. App. 4th 168, 187)* . The *Hagan* court interpreted *Union Bank v. Superior Court (1995) 31 Cal. App. 4th 573, 37 Cal. Rptr. 2d 653 (Second Dist., Div. Five)* , as satisfying the circumstance of the above criteria, but disagreed with those that suggest that a moving defendant may shift the burden simply by suggesting the possibility that the plaintiff cannot prove its case (*41 Cal. App. 4th 168, 186)* . *Union Bank* is discussed in *§ 221.20[3][c]*.

[c] Defendant's Motion Based on Affirmative Defense

In *Consumer Cause, Inc. v. Smilecare (2001) 91 Cal. App. 4th 454, 110 Cal. Rptr. 2d 627* , plaintiff's complaint alleged that defendant, a dental care provider, had violated the warning provisions of the Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65) [*Health & Safety Code §§ 25249.5-25249.13*] by failing to warn employees and patients that certain types of fillings contained mercury. In its answer, defendant raised the affirmative defense that it was exempt, under the terms of the Act, from its warning provisions. Defendant brought a motion for summary judgment which relied on plaintiff's admission in discovery responses that plaintiff did not have any evidence to dispute the applicability of the exemption. The trial court granted the motion. The court of appeal reversed. The court held that a moving defendant may point to the absence of evidence to support plaintiff's case and shift the burden to plaintiff; if the plaintiff is unable to meet its burden of proof regarding an essential element of its case, the motion should be granted. However, the court held that in this case, defendant was not seeking to negate an element of plaintiff's case. Rather, the motion was based on an affirmative defense, and therefore the moving defendant had the initial burden to show that undisputed facts support each element of the affirmative defense. If defendant does not meet this initial burden, plaintiff has no obligation to establish anything (*91 Cal. App. 4th 454, 467-468)* .

[d] Moving Party's Burden to Eliminate All Triable Issues of Fact

In *Juarez v. Boy Scouts of America, Inc. (2000) 81 Cal. App. 4th 377, 97 Cal. Rptr. 2d 12* , plaintiff alleged that while he was a member of a boy scout troop he had been sexually molested by a scoutmaster. Plaintiff's complaint contained causes of action based on breach of fiduciary duty, various forms of negligence, intentional infliction of emotional distress, and premises liability. The trial court granted defendants' motions for summary judgment and plaintiff appealed. The court of appeal affirmed summary judgment for defendants except as to one cause of action for negligence against two of the defendants, as to which the court reversed summary judgment (*see 81 Cal. App. 4th 377, 385, 411-413)* . In so doing, the court noted that a defendant is not entitled to summary judgment unless that moving party negates all theories of liability pleaded by the plaintiff (*81 Cal. App. 4th 377, 397)* .

In *Campbell v. Derylo (1999) 75 Cal. App. 4th 823, 89 Cal. Rptr. 2d 519* , a negligence action involving injuries sustained from defendant's runaway snowboard, the trial court granted summary judgment for defendant. The court of appeal reversed. The court of appeal noted that the moving party bears the burden of proving that the claims of the adverse party are entirely without merit on any legal theory. The opposition must demonstrate only the existence of at least one triable issue of fact and all doubts as to propriety of granting motion must be resolved in favor of the party opposing the motion (*75 Cal. App. 4th 823, 826)* .

[e] No Need to Look at Plaintiff's Opposing Papers Until Defendant Makes Requisite Showing

See Rubenstein v. Rubenstein (2000) 81 Cal. App. 4th 1131, 1142, 1151-1152, 97 Cal. Rptr. 2d 707 , discussed under § 221.29[4][f].

The facts and procedural background of *Thatcher v. Lucky Stores, Inc. (2000) 79 Cal. App. 4th 1081, 94 Cal. Rptr. 2d 575* are *discussed under § 221.23[3][a].* Although the court concluded that the defendant met its initial burden of proof and due to plaintiff's failure to file opposition affirmed summary judgment in defendant's favor (*79 Cal. App. 4th 1081, 1083, 1087)* , the court also stated that unless the moving party has met its initial burden of proof, the court does not have discretion under *Code Civ. Proc. § 437c(b)* [*now see Code Civ. Proc. § 437c(b)(3)*] to grant summary judgment based on the opposing party's failure to file a proper separate statement (*79 Cal. App. 4th 1081, 1086)* .

[f] Plaintiff Need Not Demonstrate Triable Issue of Fact When Defendant Fails to Meet its Burden

In *Rubenstein v. Rubenstein (2000) 81 Cal. App. 4th 1131, 97 Cal. Rptr. 2d 707* , an action to set aside on grounds of fraud and perjury a judgmentin a marital dissolution obtained in family court, and to recover damages, the trial court had granted defendant's motion for summary judgment and plaintiff appealed. In reversing the judgment, the court of appeal noted that on summary judgment motions, once the moving defendant has met his or her initial burden, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists (*81 Cal. App. 4th 1131, 1142)* . The trial court, in granting summary judgment, had based its decision in part on plaintiff's failure to file a proper opposing separate statement and the untimeliness of plaintiff's papers. However, it was defendant's burden, in the first instance, to establish defendant's right to the relief defendant sought. Until that was done, plaintiff had no burden to produce opposing evidence or to disprove anything at all. Accordingly, the procedural defects in plaintiff's opposition did not entitled defendant to summary judgment and the grant of summary judgment was error (*81 Cal. App. 4th 1131, 1151-1152)* .

Binder v. Aetna Life Ins. Co. (1999) 75 Cal. App. 4th 832, 89 Cal. Rptr. 2d 540 , involved a suit against an employer for breach of the implied-in-fact contract not to terminate except for "good cause," and for age discrimination. The trial court granted summary judgment for the defendant. The court of appeal reversed. In so doing, the court of appeal stated that even though plaintiff bears the burden of proof at trial, the moving defendant bears the initial burden of showing the lack of any triable factual issue. A responding plaintiff has no evidentiary burden unless the moving defendant has first met its initial burden. Only after the moving defendant meets its initial burden does the burden shift to the plaintiff to demonstrate the existence of a triable issue (*75 Cal. App. 4th 832, 839-840)* .

California Points & Authorities

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Volume 22 Chapters 220-229 SUBROGATION---to---TRESPASS
CHAPTER 221 SUMMARY JUDGMENTS
PART II. FORMS

22-221 California Points & Authorities § 221.30

§ 221.30 Opposing Motion for Summary Adjudication--Triable Issue of Material Fact Exists [Code Civ. Proc. § 437c(f)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN OPPOSITION TO MOTION FOR SUM-
vs.	)	MARY ADJUDICATION
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

SUMMARY ADJUDICATION AS TO _____ [*specify matter sought to be adjudicated, e.g.,* THE THIRD CAUSE OF ACTION OF PLAINTIFF'S FIRST AMENDED COMPLAINT] IS IMPROPER WHEN A TRIABLE ISSUE OF MATERIAL FACT EXISTS AS TO THAT _____ [*specify, e.g.,* CAUSE OF ACTION] AND THE MOVING PARTY IS NOT ENTITLED TO SUMMARY ADJUDICATION AS A MATTER OF LAW.

A. Summary Adjudication Not Proper When Triable Issue of Fact Exists. A motion for summary adjudication proceeds in all procedural respects as a motion for summary judgment (*Code Civ. Proc. § 437c(f)(2)*). Hence, a motion for summary adjudication should be granted only if all the papers submitted show that there is no triable issue as to any

material fact with respect to the matter sought to be adjudicated, and that the moving party is entitled to summary adjudication as a matter of law (*see Code Civ. Proc. § 437c(c)* (stating rule applicable to motions for summary judgment); *Tauber-Arons Auctioneers Co. v. Superior Court (1980) 101 Cal. App. 3d 268, 273-274, 161 Cal. Rptr. 789* (decided under former Code Civ. Proc. § 437c(f)).

[*Optional*] **B. Triable Issues of Fact Relating to Cause of Action.** An order granting summary adjudication of a cause of actionmay be set aside when triable issues of material fact exist as to that cause of action (*see Nazaroff v. Superior Court (1978) 80 Cal. App. 3d 553, 557, 567, 145 Cal. Rptr. 657* (decided under former Code Civ. Proc. § 437c(f)).

[*Add points and authorities which set forth any particular evidentiary or procedural objections to the motion for summary adjudication (see §§ 221.32, 221.34 -221.44) and any grounds for opposition based on the existence of a triable issue of material fact on substantive grounds according to the particular issue and facts involved.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted by any party to oppose a motion for summary adjudication of a cause of action, affirmative defense or claim for punitive damages under *Civ. Code § 3294* [*see Code Civ. Proc. § 437c(f)*].

The cases cited in the form were decided under former Code Civ. Proc. § 437c(f), which provided for summary adjudication of "issues" [*see also* discussion in *§ 221.21[2][c]*]. They are cited as persuasive authority to the extent that they appear to remain consistent with *Code Civ. Proc. § 437c(f)*, as amended.

A motion for summary adjudication must proceed in all procedural respects as a motion for summary judgment [*Code Civ. Proc. § 437c(f)(2)*]. Hence, any opposition to a motion for summary adjudication must be served and filed not less than 14 days preceding the noticed or continued date of hearing, unless the court for good cause orders otherwise [*Code Civ. Proc. § 437c(b)*].

Optional Paragraph B is for use in any procedural setting in which the party is seeking to have an order granting summary adjudication reconsidered or set aside. If it is being used, the form should be modified to reflect that procedural setting.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated, including argument showing either the insufficiency of the supporting affidavits or declarations or the existence of a triable issue of fact. In addition, counsel should attach affidavits or declarations that oppose the motion [*Code Civ. Proc. § 437c(b)(2)*].

[b] Related Pleading and Practice Forms

For forms of declarations in opposition to a motion for summary judgment, see Ch. 537, *Summary Judgment* , in California Forms of Pleading and Practice.

[c] Related Points and Authorities

For points and authorities in opposition to motions for summary adjudication relating to particular causes of actions and grounds, see the specific, substantive chapters in this set, such as Ch. 33, *Carriers* and Ch. 66, *Death and Survival Actions*.

[3] Discussion of Authorities

[a] Summary Adjudication Not Proper When Triable Issue of Fact Exists

Because a motion for summary adjudication is required to proceed in all procedural respects as a motion for summary judgment [*Code Civ. Proc. § 437c(f)*], it appears that it is subject to the general provisions governing summary judgment motions. Thus, by analogy to summary judgment motions, it is proper to grant a motion for summary adjudication only when all the papers submitted show that there is no triable issue as to any material fact with respect to the matter sought to be adjudicated, and that the moving party is entitled to summary adjudication as a matter of law (*see Code Civ. Proc. § 437c(c)* (stating rule applicable to motions for summary judgment)). For additional rules for opposing a motion for summary judgment, see *§ 221.29*.

Tauber-Arons Auctioneers Co. v. Superior Court *(1980) 101 Cal. App. 3d 268, 161 Cal. Rptr. 789* , arose from an action in which plaintiff sought damages for personal injuries allegedly suffered while operating a defective planer which his employer had purchased at an auction sale conducted by defendant. Plaintiff moved for summary adjudication of issues under former Code Civ. Proc. § 437c(f), to establish the issues that defendant sold the planer and, as a seller, was subject to the rule of strict liability. The trial court granted the motion, determining that petitioner was engaged in the sale and distribution of the planer as a commercial marketer participating as an integral part of the business enterprise of marketing. Defendant then initiated a proceeding for a peremptory writ of mandate to compel the trial court to vacate its order.

After determining that relief by writ of mandate was appropriate, the court of appeal held that it was not appropriate for the trial court to declare that petitioner, as a marketer, was strictly liable on account of any defect in the planer. The court ordered that a peremptory writ of mandate issue requiring the trial court's order to be set aside, and that an order denying the motion be entered. The court reasoned that the policy of the doctrine of strict liability does not justify the imposition of strict liability on every dealer in secondhand goods for defects created by innumerable manufacturers of the class or classes of products with which he or she may deal. Additionally, if the defect was a design defect created by the original manufacturer, the facts adduced did not support liability because they showed that defendant had no special position with the original manufacturer and played no more than a random and accidental role in the distribution of the planer. In reviewing a trial court's order declaring an issue to be without substantial controversy, the court stated that it was bound by the rules generally applicable to review of summary judgments. Relying on *Nazaroff v. Superior Court (1978) 80 Cal. App. 3d 553, 558, 145 Cal. Rptr. 657* (*discussed under § 221.30[3][b]*), it referred to the general rule that summary judgment is proper only if the supporting papers, strictly construed, contain facts sufficient to entitle the moving party to judgment, and the opposing papers, liberally construed, show that there is no issue of fact to be tried (*101 Cal. App. 3d 268, 273-274)* .

[b] Triable Issues of Fact Relating to Cause of Action

In ***Nazaroff v. Superior Court*** *(1978) 80 Cal. App. 3d 553, 145 Cal. Rptr. 657* , the plaintiff, the mother of a young child who died from the effects of near drowning in a swimming pool, brought an action for wrongful death and her emotional distress at witnessing the injury to her son, against the owners of the pool. The record indicated that the mother was away from the pool when she heard a shout, went to the scene, and observed her child being pulled from the swimming pool. The owners moved for and were granted a partial summary judgment on the cause of action for emotional distress. The plaintiff petitioned for writ of mandate, seeking to set aside the partial summary judgment for

emotional distress.

The court of appeal granted the petition, commanding the trial court to set aside and vacate its order granting summary judgment as to the cause of action for emotional distress and to enter an order denying the motion as to that cause of action. The court balanced the criteria stated in *Dillon v. Legg (1968) 68 Cal. 2d 728, 740, 69 Cal. Rptr. 72, 441 P.2d 912* , particularly the "sensory and contemporaneous observance of the accident" requirement. The reviewing court could not say as a matter of law that the injuries resulting from the defendant's negligence, that is, the near drowning of the child, were not still being experienced at the time the mother first observed her son. Therefore, the court concluded, the record demonstrated that there were triable issues of fact to carry to the jury as to whether the alleged physical harm to the mother resulted from emotional shock proximately caused by the direct emotional impact from the contemporaneous observation of the immediate consequence of defendant's negligence (*80 Cal. App. 3d 553, 557, 566-567)* .

[4] Additional Authorities

[a] Summary Adjudication Not Proper When Triable Issue of Fact Exists

In *Mason v. Superior Court (1985) 163 Cal. App. 3d 989, 210 Cal. Rptr. 63* , plaintiffs sought in the first count cancellation of a deed to real property, quiet title, ejectment, and declaratory relief, and in the second count damages. Plaintiffs also recorded and filed a lis pendens. Defendants moved for summary judgment and for summary adjudication of issues in the alternative under former Code Civ. Proc. § 437c(f), and also moved to expunge plaintiffs' lis pendens. The trial court granted defendants' motion for summary judgment on count one only, and granted the motion to expunge the lis pendens. Plaintiffs filed a petition for writ of mandate requesting issuance of the writ only with respect to the order expunging the lis pendens. The court of appeal issued the peremptory writ in regard to both orders, holding that partial summary judgment was precluded by the existence of a triable issue of fact based on evidence presented with respect to construction of the deed (*163 Cal. App. 3d 989, 993-994, 997-999)* .

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Volume 22 Chapters 220-229 SUBROGATION---to---TRESPASS
CHAPTER 221 SUMMARY JUDGMENTS
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22-221 California Points & Authorities § 221.31

§ 221.31 Opposing Motion for Summary Adjudication--Disposition of Cause of Action, Affirmative Defense, Claim for Damages, or Issue of Duty Not Complete [Code Civ. Proc. § 437c(f)]

[1] FORM

[*Caption. See § 221.30.*]

SUMMARY ADJUDICATION AS TO _____ [*specify matter sought to be adjudicated, e.g.,* THE THIRD CAUSE OF ACTION OF PLAINTIFF'S FIRST AMENDED COMPLAINT] IS IMPROPER BECAUSE IT DOES NOT COMPLETELY DISPOSE OF A CAUSE OF ACTION, AFFIRMATIVE DEFENSE, CLAIM FOR DAMAGES, OR AN ISSUE OF DUTY AND THE MOVING PARTY IS NOT ENTITLED TO SUMMARY ADJUDICATION AS A MATTER OF LAW.

A. Summary Adjudication Not Proper Unless It Completely Disposes of Cause of Action, Defense, Damage Claim, or DutyIssue. A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty (*Code Civ. Proc. § 437c(f)(1)*; *see Hood v. Superior Court (1995) 33 Cal. App. 4th 319, 324, 39 Cal. Rptr. 2d 296*). For purposes of determining whether a complaint in fact asserts one or more causes of action for pleading purposes depends on whether it alleges invasion of one or more primary rights, and the manner in which a plaintiff elects to organize his or her claims within the body of the complaint is irrelevant to determining the number of causes of action alleged under the primary right theory (*Hindin v. Rust (2004) 118 Cal. App. 4th 1247, 1257-1258, 13 Cal. Rptr. 3d 668*).

[*Optional*] **B. Summary Adjudication Not Proper When Disposition of Issue of Contractual Duty Is Not Complete.** An interpretation of a contractual duty that does not fully dispose of any portion of the action is not a proper subject of summary adjudication (*Regan Roofing Co. v. Superior Court (1994) 24 Cal. App. 4th 425, 437, 29 Cal. Rptr. 2d 413* ; *see Code Civ. Proc. § 437c(f)(1)*).

[*Optional*] **C. Summary Adjudication of Component of Damages Not Proper Unless It Completely Disposes of Cause of Action.** A motion for summary adjudication of a single item of compensatory damage may not be granted unless the motion disposes of an entire cause of action (*DeCastro West Chodorow & Burns, Inc. v. Superior Court (1996) 47 Cal. App. 4th 410, 422, 54 Cal. Rptr. 2d 792*).

[*Optional*] **D. Piecemeal Adjudication of Claim for Punitive Damages Prohibited.** *Code of Civil Procedure section 437c(f)* disallows piecemeal adjudication of a claim for punitive damages. The basic concept of summary adjudication is meant to dispose of an entire substantive area. Thus, a grant of summary adjudication in this area must cover the entire claim. Summary adjudication is not properly granted as a piecemeal disposition of some of the asserted facts within a claim for punitive damages, but may only be granted when the entire claim for punitive damages is eliminated. According, when a claim for punitive damages is based on an interrelated set of facts and circumstances, if any one or more of the facts would support a claim for punitive damages, then summary judgment is not available to eliminate from trial other facts relating to the claim for punitive damages (*Catalano v. Superior Court (2000) 82 Cal. App. 4th 91, 92, 95, 97-98, 97 Cal. Rptr. 2d 842*).

[*Add points and authorities which set forth any particular evidentiary or procedural objections to the motion for summary adjudication (see §§ 221.32, 221.34 -221.44) and any grounds for opposition based on an issue of duty not resolved on substantive grounds according to the particular issue and facts involved.*]
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted by any party to oppose a motion for summary adjudication of a cause of action, an affirmative defense, a claim of damages, or the issue of whether or not one or more defendants owes a duty to one or more plaintiffs, such as one supported by the points and authorities *set out in § 221.21* [*see Code Civ. Proc. § 437c(f)*].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated, including argument showing either the insufficiency of the supporting affidavits or declarations, or the existence of an unresolved cause of action, affirmative defense, claim for damages, or issue of duty. In addition, counsel should attach affidavits or declarations that oppose the motion [*Code Civ. Proc. § 437c(b)(2)*].

[b] Related Pleading and Practice Forms

For forms of declaration in opposition to a motion for summary judgment, see Ch. 537, *Summary Judgment* , in California Forms of Pleading and Practice (Matthew Bender).

[c] Related Points and Authorities

For points and authorities in opposition to motions for summary adjudication relating to particular causes of actions and grounds, see the specific, substantive chapters in this set, such as Ch. 33, *Carriers*, and Ch. 66, *Death and Survival Actions.*

[3] Discussion of Authorities

[a] Summary Adjudication Not Proper Unless It Completely Disposes of Cause of Action, Defense, Damage Claim, or Duty Issue

In ***Hood v. Superior Court*** *(1995) 33 Cal. App. 4th 319, 39 Cal. Rptr. 2d 296* , an insurer filed an action against an agent for breach of a noncompetition agreement. After the trial court denied defendant's motion for summary adjudication of the agent's cross complaint, plaintiff amended its complaint to add a cause of action for declaratory relief as to issues raised in the cross complaint, and successful moved for summary adjudication of the declaratory relief cause of action. The court of appeal issued a writ of mandate.

The appellate court acknowledged that the amended statute permitted summary adjudication of a cause of action relating to a separate and distinct wrongful act, even though the charging pleading combined it with other wrongful acts in a single pleaded cause of action. On the other hand, a party cannot select issues (other than duty and punitive damages) implicated in one or more causes of action, amend its pleading to add a cause of action for declaratory relief as to those issues, then obtain a summary adjudication of the declaratory relief cause of action. The result would fully subvert *Code Civ. Proc. § 437c(f)(1)*, which restricts the summary adjudication remedy to motions that would adjudicate an entire cause of action or affirmative defense, or the issues of duty or punitive damages. When the adjudication of a declaratory relief action does not adjudicate the entirety of any cause of action, it is prohibited by the statute. Failure to deny the motion is an abuse of discretion (*33 Cal. App. 4th 319, 321-324)* .

In ***Hindin v. Rust*** *(2004) 118 Cal. App. 4th 1247, 13 Cal. Rptr. 3d 668* plaintiffs had made an uninsured motorist claim against defendant State Farm Insurance Co. Plaintiffs were awarded $34,000 and State Farm subsequently filed a superior court petition to vacate the award. The petition was later dismissed, but plaintiffs filed a bad faith/discrimination suit against State Farm. This suit was settled for $30 million. As a part of that settlement, the Los Angeles Superior Court ordered that plaintiffs were not precluded by the settlement agreement from copying, publishing, or disseminating any document or information procured from State Farm during the litigation. After the settlement, State Farm obtained information that plaintiffs' uninsured motorist claim had been fraudulent. The fraud investigation was eventually turned over to the FBI and Los Angeles District Attorney. At one point, State Farm made a motion to suppress various documents, claiming that plaintiffs' attorneys had illegally provided copies to Arizona plaintiff's counsel in violation of the settlement agreement. After a copy of the Los Angeles Superior Court order was presented, State Farm withdrew its motion and the court issued sanctions against State Farm for submitting such a motion without merit. Following this turn of events, State Farm filed a federal court restitution action to recover the $30 million and to seek return of the internal State Farm documents. Plaintiffs filed motions to dismiss State Farm's action on various grounds, one of which was that the Los Angeles Superior Court order was controlling with respect to the documents. State Farm's counsel then amended its complaint to strike the document claims. The federal court granted plaintiffs' motion to dismiss, and this order was affirmed by the Ninth Circuit Court of Appeal. Thereafter, plaintiffs and plaintiffs' attorneys filed the instant malicious prosecution lawsuits against State Farm. The litigation went through numerous motions and appeals therefrom, but this particular opinion arose from State Farm's summary adjudication motion.

The issue on appeal was whether State Farm could property seek summary adjudication of plaintiffs' malicious prosecution action as to whether State Farm had probable cause to bring one of its two federal court claims. The trial court had granted summary adjudication as to one of the two underlying claims, and the court of appeal held that this was impermissible. *Code Civ. Proc. § 437c(f)(1)* provides that a "motion for summary adjudication shall be granted only if it completely disposes of a cause of action. ..." This statute was the result of a 1990 amendment to the summary judgment statute designed to " 'stop the practice of adjudication of facts or adjudication of issues that do not completely dispose of a cause of action or a defense.' " (*118 Cal. App. 4th 1247, 1255* , quoting *DeCastro West Chodorow & Burns, Inc. v. Superior Court (1996) 47 Cal. App. 4th 410, 418-19, 54 Cal. Rptr. 2d 792*). The court of appeals stated that whether a complaint asserts one or more causes of action depends on whether it alleges invasion of one or more primary rights. A primary right is the plaintiff's right to be free from the particular injury suffered, and therefore is distinguishable from the legal theory on which liability is premised. The court held that plaintiffs' malicious prosecution action sought to vindicate a single primary right--the right to be free from defending against a lawsuit initiated with malice. Therefore, a summary adjudication motion seeking to "establish that some but not all of the multiple grounds for

liability asserted in the prior action were brought with probable cause is improper for failure to completely dispose of an entire cause of action." (*118 Cal. App. 4th 1247, 1259)* .

[b] Summary Adjudication Not Proper When Disposition of Issue of Contractual Duty Is Not Complete

In ***Regan Roofing Co. v. Superior Court*** *(1994) 24 Cal. App. 4th 425, 29 Cal. Rptr. 2d 413* , plaintiffs were several subcontractors against whom a cross complaint for express indemnity, breach of contract, implied indemnity, equitable indemnity, contribution, and declaratory relief wasbrought by a developer sued for various construction defects in its development of a condominium project. Each of the subcontracts between the developer and subcontractors contained an indemnity clause favoring the developer. The developer then brought a motion for summary adjudication under *Code Civ. Proc. § 437c(f)* with regard to the type of indemnity provision included in the subcontracts and whether the subcontractors owed the developer a duty to defend pursuant to the subcontracts. The trial court summarily adjudicated in favor of the developer on the issue that the indemnity provision contained in the subcontract agreement was a type which would cover the developer's own negligence in the construction of the condominium project. The trial court also ruled that the subcontractors had a current duty to defend the developer regardless of any determination of their duty to indemnify it under the subcontracts.

The court of appeal issued a writ of mandate directing the lower court to vacate its order granting in part the summary adjudication motion and to enter a new order denying the motion in full (*24 Cal. App. 4th 425, 438)* . On appeal, the subcontractors argued that the lower court's ruling was not a proper subject of summary adjudication under *Code Civ. Proc. § 437c(f)* because it did not completely dispose of any cause of action or defense of the cross complaint, nor was it a proper adjudication of an issue of duty owed by the subcontractors to the developer, as allowed by statute (*24 Cal. App. 4th 425, 429)* . In its ruling, the court stated that the dispositive issue presented in the case concerned the proper interpretation of *Code Civ. Proc. § 437c(f)* as to the "type of issue" which may be summarily adjudicated (*24 Cal. App. 4th 425, 432)* . The appellate court noted that the trial court expressly stated it was not adjudicating the specific contractual duties, rights, and/or liability as pertaining to each individual subcontractor, as it was not clear that each of them had signed a subcontract. Therefore, the ruling on summary adjudication was essentially an interpretation of contract provisions and had certain advisory qualities, as it did not dispose of an entire cause of action or affirmative defense, nor did it terminate any portion of the action with its determination of an issue of duty (*24 Cal. App. 4th 425, 435-436)* . Thus, although the ruling attempted to resolve certain elements of the cause of action for breach of contract provisions, i.e., those concerning the nature of the contract and possibly the subcontractors' performance or excuse of nonperformance, it left unresolved the issues of the subcontractors' breach and the general damages (*24 Cal. App. 4th 425, 436)* .

The court further stated that summary adjudication of the duty to defend and its relationship to the duty to indemnify was premature, as no determination had yet been made as to whether the subcontractors were negligent in the performance of their work, thereby giving rise to a duty to indemnify and a related duty to defend (*24 Cal. App. 4th 425, 436)* . The developer had not clearly established that under the indemnity clause the duty to defend against claims of liability is entirely free-standing of the duty to indemnify for liability arising out of the subcontractors' negligence (*24 Cal. App. 4th 425, 436)* . It was also unclear as to whether the subcontractors were expected to defend the developer against claims for which it may be strictly liable, but for which the subcontractors are not strictly liable (*24 Cal. App. 4th 425, 436-437)* .

Furthermore, as a practical matter the trial court's ruling did not finally resolve the duty to defend issue. Since there were approximately 24 subcontractors doing different work at different phases of the construction, their duty to defend would be limited to the issues concerning the type of work they did. Although this would not present particular problems with regard to the ultimate division of the costs of defense, it does pose practical problems for an immediate or current duty to defend up to and including trial (*24 Cal. App. 4th 425, 437)* . The trial court's ruling is thus preliminary or advisory in character and does not fully dispose of any portion of the action; furthermore, it is inconsistent with the legislative intent of *Code Civ. Proc. § 437c(f)* to stop the practice of adjudication of facts or

adjudication of issues that do not completely dispose of a cause of action or a defense [*see City of Emeryville v. Superior Court (1991) 2 Cal. App. 4th 21, 25, 2 Cal. Rptr. 2d 826]* (*24 Cal. App. 4th 425, 433, 437)* .

The court of appeal also concluded that the trial court's labeling of the subject indemnity provision as a particular type was also essentially advisory in nature. Although a trial court may interpret a contractual provision as a matter of law, where such interpretation of contractual duties does not fully dispose of any portion of the action, it is not a proper subject for summary adjudication (*24 Cal. App. 4th 425, 437)* .

Note that in *Linden Partners v. Wilshire Linden Associates (1998) 62 Cal. App. 4th 508, 519-522, 73 Cal. Rptr. 2d 708* , the court rejected *Regan Roofing Co. v. Superior Court (1994) 24 Cal. App. 4th 425, 29 Cal. Rptr. 2d 413* as controlling precedent, with regard to summary adjudication of an issue of duty. The *Linden* court held the on a motion for summary adjudication, the court may rule whether a defendant owes or does not owe a duty to plaintiff without regard for the dispositive effect of such ruling on other issues in the litigation, except that the ruling must completely dispose of the issue of duty (*62 Cal. App. 4th 508, 522)* . *Linden Partners v. Wilshire Linden Associates (1998) 62 Cal. App. 4th 508, 73 Cal. Rptr. 2d 708* is discussed in *§ 221.21[3][b]*.

[c] Summary Adjudication of Component of Damages Not Proper Unless It Completely Disposes of Cause of Action

In ***DeCastro West Chodorow & Burns, Inc. v. Superior Court*** *(1996) 47 Cal. App. 4th 410, 54 Cal. Rptr. 2d 792* , plaintiffs brought an actionfor legal malpractice based on an advised tax plan involving the transfer of assets of a hotel. The complaint sought damages for money paid to a business associate as a result of the alleged negligence, as well as damages for lost opportunity to sell or refinance the hotel during a time when there was a cloud on the title. Defendants moved for summary adjudication on the ground that the claim for damages for an alleged lost opportunity could not be established. After the trial court denied the motion, defendants moved for reconsideration, contending the 1993 amendments to *Code Civ. Proc. § 437c(f)(1)* permitted the court to adjudicate a claim for damages. The court denied the motion for reconsideration, and defendants filed a petition for writ of mandate.

The court of appeal reviewed the history of *Code Civ. Proc. § 437c(f)(1)* and concluded that the reference in the statute allowing court to dispose of "one or more claims for damages" is limited to punitive damages (*47 Cal. App. 4th 410, 421)* . Defendants claimed that their interpretation was supported by case law with *Lilienthal & Fowler v. Superior Court (1993) 12 Cal. App. 4th 1848, 16 Cal. Rptr. 2d 458* . However, the court stated that *Lilienthal* was not applicable because that case involved two separate and distinct claims rather than a single item of compensatory damage which did not dispose of the entire cause of action (*47 Cal. App. 4th 410, 421-422)* . The court was sympathetic to defendants' concerns that without a summary adjudication they would have to prepare for trial on an unmeritorious issue, but reasoned that these concerns were best addressed to the Legislature (*47 Cal. App. 4th 410, 423)* . Concluding that *Code Civ. Proc. § 437c(f)(1)* does not permit summary adjudication of a single item of compensatory damage which does not dispose of an entire cause of action, the court denied the petition for writ of mandate.

[d] Piecemeal Adjudication of Claim for Punitive Damages Prohibited

In ***Catalano v. Superior Court*** *(2000) 82 Cal. App. 4th 91, 97 Cal. Rptr. 2d 842* , plaintiffs originally filed suit against defendants for attorney fees under a contingent fee contract. Defendants (cross complainants) filed a cross complaint against plaintiffs (cross defendants) and others alleging, among other things, a cause of action for fraudulent breach of fiduciary duty and a cause of action for intentional misrepresentation and seeking punitive damages. Cross defendants filed a motion for summary adjudication concerning the claim for punitive damages. The motion was presented as five separate issues which contained factual allegations. The trial court followed the format propounded in cross defendants' motion ruling separately on each factual allegation. The court granted summary adjudication on four issues but denied it on the fifth issue. The court also granted cross defendants' motion for summary adjudication on all causes of action against one of the cross complainants. Cross complainants, except the one against whom summary adjudication on all

causes of action had been granted, filed a petition for writ of mandate challenging the trial court's partial granting of cross defendants' summary adjudication motion.

The court of appeal granted the petition issuing a peremptory writ of mandate directing the trial court to vacate its order granting partial summary adjudication and enter an order denying summary judgment with regard to punitive damages (*82 Cal. App. 4th 91, 98)* . In issuing a peremptory writ, the court noted that *Code Civ. Proc. § 437c(f)* disallows piecemeal adjudication of a claim for punitive damages. Although a claim for punitive damages is specifically set forth as an area which may properly be the subject of summary adjudication, in keeping with the purposes of *Code Civ. Proc. § 437c(f)*, a grant of summary adjudication in this area must cover the entire claim. The purpose of the enactment of *Code Civ. Proc. § 437c(f)* was to stop the practice of piecemeal adjudication of facts that did not completely dispose of a substantive area (*82 Cal. App. 4th 91, 95)* . Thus, summary adjudication is not properly granted as a piecemeal disposition of some of the asserted facts within a claim for punitive damages, but may only be granted when the entire claim for punitive damages is eliminated. Accordingly, when a claim for punitive damages is based on an interrelated set of facts and circumstances, if any one or more of the facts would support a claim for punitive damages, then summary judgment is not available to eliminate from trial other facts relating to the claim for punitive damages (*82 Cal. App. 4th 91, 97-98)* . The court, however, did not decide whether summary adjudication must eliminate all claims for punitive damages in one action if there are separate and distinct claims for punitive damages, having nothing to do with one another, contained within one complaint (*82 Cal. App. 4th 91, 98 n.5*).

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22-221 California Points & Authorities § 221.32

§ 221.32 Opposing Motion for Summary Judgment or Summary Adjudication--Request for Sanctions for Presenting Affidavits or Declarations in Bad Faith or Solely for Purposes of Delay [Code Civ. Proc. § 437c(j)]

[1] FORM

[*This form should be combined with a general form of memorandum of points and authorities opposing a motion for summary judgment (see § 221.29) or summary adjudication (see § 221.30*)].

IF _____ [AFFIDAVITS *or* DECLARATIONS] ARE PRESENTED IN BAD FAITH OR SOLELY FOR PURPOSES OF DELAY, THE COURT MUST ORDER THE PARTY PRESENTING SUCHPAPERS TO PAY THE REASONABLE EXPENSES INCURRED BY THE OTHER PARTY.

A. Sanctions for Filing Papers in Bad Faith. If the court determines, at any time, that any of the affidavits or declarations are presented in bad faith or solely for purposes of delay, the court must order the party presenting such papers to pay the other party the amount of the reasonable expenses that the filing of the papers caused the other party to incur (*Code Civ. Proc. § 437c(j)*).

B. Request for Sanctions. _____ [*Specify party, e.g.,* Plaintiff] _____ [*name*] requests that the reasonable expenses that he/she incurred in the amount of $_____ as a result of the filing of the _____ [affidavit(s) *or* declaration(s)] of _____ [*specify name(s) of declarant(s)*] by _____ [*name of filing party*] be assessed against _____ [*name of filing party*] because such papers were filed _____ [in bad faith *or* solely for purposes of delay], as appears more fully from the following: _____ [*set out arguments that support claim that affidavits or declarations were filed in bad faith or solely for purposes of delay*].

[2] Comments

[a] Use of Form

These points and authorities may be combined with a general form of memorandum of points and authorities in opposition to a motion for summary judgment or summary adjudication [*see §§ 221.29, 221.30*] when the opposing

party claims that the moving party has presented any affidavits or declarations in bad faith or solely for purposes of delay. If the court determines the claim to be valid, it must order the moving party to pay the opposing party the amount of the reasonable expenses which the filing of the papers caused the opposing party to incur [*Code Civ. Proc. § 437c(j)*].

Sanctions are not to be imposed pursuant to *Code Civ. Proc. § 437c(j)* except on notice contained in a party's papers, or on the court's own noticed motion, and after an opportunity to be heard [*Code Civ. Proc. § 437c(j)*].

[b] Related Uses

This form may be adapted for use as a supplemental memorandum of points and authorities by a party moving for summary judgment or summary adjudication who claims that the opposing party has presented affidavits or declarations in bad faith or solely for purposes of delay.

Because *Code Civ. Proc. § 437c(j)* permits the court to determine "at any time" that an affidavit or declaration was presented in bad faith or solely for purposes of delay, these points and authorities may also be adapted for use by the moving or opposing party to support a motion for expenses after trial, during which the bad faith of the party filing affidavits or declarations relating to a motion for summary judgment became apparent.

[c] Payment of Expenses for Frivolous Actions

In appropriate cases, it appears that the applicable statute governing sanctions generally [*see Code Civ. Proc. §§ 128.5-128.7*], may also be cited as authority for the imposition of sanctions. For detailed discussion of these statutes and their applicability, see California Forms of Pleading and Practice, Ch. 510, *Sanctions* . For form of memoranda of points and authorities based on these statutes, see Ch. 207, *Sanctions* , in this publication.

[d] Related Federal Rule

Because *Code Civ. Proc. § 437c(j)* provides for sanctions for bad faith filing similar to those which have been provided for under *Fed. R. Civ. P., Rule 56(g)*, federal cases decided under the federal rule should apply in determining whether the papers were filed in bad faith or solely for purposes of delay (note that *Fed. R. Civ. P., Rule 56(g)*, also provides for attorney's fees and contempt proceedings) [*see Scripps Memorial Hosp., Inc. v. California Employment Comm'n (1944) 24 Cal. 2d 669, 677, 151 P.2d 109* ; *State of Cal. ex rel. Dep't of Employment v. General Ins. Co. (1970) 13 Cal. App. 3d 853, 859 n.3, 96 Cal. Rptr. 744* ; Moore's Federal Practice, Ch. 56 (Matthew Bender)].

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22-221 California Points & Authorities § 221.33

§ 221.33 Opposing Motion for Summary Judgment or Summary Adjudication--Motion Untimely Filed [Code Civ. Proc. § 437c(a)]

[1] FORM

[*This form should be combined with a general form of memorandum of points and authorities opposing a motion for summary judgment (see § 221.29) or summary adjudication (see § 221.30).*]

SUMMARY _____ [JUDGMENT *or* ADJUDICATION] SHOULD BE DENIED BECAUSE THE _____ [MOTION WAS UNTIMELY FILED *or* NOTICE OF MOTION WAS UNTIMELY SERVED] IN THAT _____ [FEWER THAN 60 DAYS HAVE ELAPSED SINCE DEFENDANT'S GENERAL APPEARANCE IN THE ACTION *or* IT CANNOT BE HEARD WITHIN 30 DAYS BEFORE THE ORIGINAL TRIAL DATE *or* THE MINIMUM 75-DAY NOTICE PERIOD WAS NOT MET BY THE SERVICE OF THE NOTICE OF MOTION].

[*EITHER*]

A. Premature Filing. A motion for summary judgment may be made at any time after 60 days have elapsed since the general appearance in the action or proceeding of each party against whom the motion is directed or at such earlier time after such general appearance as the court, with or without notice and on good cause shown, may direct (*Code Civ. Proc. § 437c(a)*).

[*OR*]

A. Timeliness of Motion. A motion for summary judgment must be heard no later than 30 days before the date of trial, unless the court for good cause orders otherwise (*Code Civ. Proc. § 437c(a)*).

[*OR*]

A. Untimely Notice. A notice of motion for summary judgment must be given at least 75 days before the time appointed for the hearing, and the trial court has no authority to shorten that time (*Code Civ. Proc. § 437c(a)*; *Urshan v. Musicians' Credit Union (2004) 120 Cal. App. 4th 758, 764, 15 Cal. Rptr. 3d 839* ; *McMahon v. Superior Court (2003) 106 Cal. App. 4th 112, 115-118, 130 Cal. Rptr. 2d 407* ; *Robinson v. Woods (2008) 168 Cal. App. 4th 1258, 1262, 86 Cal. Rptr. 3d 241*).

[2] Comments

[a] Use of Form

These points and authorities may be combined with a general form of memorandum of points and authorities in opposition to a motion for summary judgment or summary adjudication [*see §§ 221.29, 221.30*] when the opposing party contends that the motion was untimely filed or the notice of motion was untimely served. For a form of reply memorandum responding to this contention, see *§ 221.27*.

[3] Discussion of Authorities

[a] Untimely Notice

In ***Urshan v. Musicians' Credit Union*** *(2004) 120 Cal. App. 4th 758, 15 Cal. Rptr. 3d 839* , the trial court offered to shorten the time limits to accommodate a motion for summary judgment before the scheduled trial date. Without consulting one of the parties (the "borrower"), the court set a briefing schedule that allowed the other party (the "lender") three days to file a motion and the borrower two days to file an opposition.

On appeal, the court held that a trial court has discretion to shorten the initial 60-day period to bring a motion for summary judgment on a showing of good cause. Similarly, a trial court has discretion to shorten the 30-day period in which a motion for summary judgment must be heard before trial where circumstances warrant. However, the legislature did not similarly authorize a trial court to shorten the minimum notice period for hearings on summary judgment motions. Such discretionary language is notably absent from the statute. Moreover, the statutory language regarding minimum notice is mandatory, not directive (*120 Cal. App. 4th 758, 764)* .

In reversing the subsequent summary judgment for the lender, the appellate court held that the trial court did not have authority to shorten the former minimum 28-day notice period for hearing a motion for summary judgment (now 75-day notice) in the absence of the parties' express consent. Not only was the shortened time period violative of the statute, notice and opportunity to prepare to be heard was so minimal that the procedure was tantamount to a denial of due process. The court also declined to infer from the borrower's silence a waiver of the right to the statutorily mandated minimum notice period (*120 Cal. App. 4th 758, 766)* .

In ***McMahon v. Superior Court*** *(2003) 106 Cal. App. 4th 112, 130 Cal. Rptr. 2d 407* , the trial court had issued an order shortening time for any notice of motion of a summary judgment to be filed. The plaintiffs sought a petition for writ of mandate, arguing that the court had no such authority. The court of appeal granting the peremptory writ of mandate directing the trial court to vacate its order, holding that *Code Civ. Proc. § 437c(a)* gives no authority to the trial court to shorten the 75-day notice period of the statute. The court of appeal noted that the statute gives trial courts authority to shorten the 60-day and 30-day periods of the statute, regarding the filing of the motion, but not the 75-day period (*106 Cal. App. 4th 112, 115-118)* .

In ***Robinson v. Woods*** *(2008) 168 Cal. App. 4th 1258, 86 Cal. Rptr. 3d 241* was a quiet title action. Defendant filed and mailed a motion for summary judgment but provided only 76 days notice, rather than the statutorily required 80, and set the hearing only 18 days before trial without seeking court approval. Plaintiffs' opposition pointed out these

procedural errors and did not argue the merits of the motion or file a separate statement of undisputed and disputed facts. The trial court, noting procedural mistakes on both sides, continued the hearing to the 80th day after mailing, directed defendants to file a declaration stating why the motion should be heard within 30 days of trial and invited plaintiffs to file a separate statement. At the hearing, the court ruled defendants had set forth valid reasons for the motion to be heard within 30 days of trial. Plaintiffs did not file an additional opposition. Because plaintiffs had failed to file a substantive opposition, the court granted defendants' motion for summary judgment. Plaintiffs appealed.

The court of appeals reversed, and began by stating that "the importance of providing the minimum statutory notice of a summary judgment hearing cannot be overemphasized" (*168 Cal. App. 4th 1258, 1262)* . In *McMahon v. Superior Court (2003) 106 Cal. App. 4th 112, 130 Cal. Rptr. 2d 407* , the court held that trial courts do not have the authority to shorten the minimum notice period for summary judgment motions. The court erred in continuing the hearing for four days, and that error constituted an abuse of discretion. The court also erred in ruling at the hearing that it would hear the motion within 30 days of trial. In doing so, it provided plaintiffs with no time to prepare an opposition on the merits (*168 Cal. App. 4th 1258, 1268)* .

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22-221 California Points & Authorities § 221.34

§ 221.34 Opposing Motion for Summary Judgment or Summary Adjudication--Objection to Evidence Contained in Moving Party's Papers [Code Civ. Proc. § 437c(c)]

[1] FORM

[*This form should be combined with a general form of memorandum of points and authorities opposing a motion for summary judgment (see § 221.29) or summary adjudication (see § 221.30), as well as with forms relating to specific procedural or evidentiary objections (see §§ 221.37 -221.42).*]

EVIDENCE CONTAINED IN THE PAPERS SUPPORTING A MOTION FOR SUMMARY _____ [JUDGMENT *or* ADJUDICATION] TO WHICH OBJECTIONS HAVE BEEN MADE AND SUSTAINED MAY NOT BE CONSIDERED BY THE COURT IN DETERMINING WHETHER THERE IS NO TRIABLE ISSUE OF MATERIAL FACT.

A. Exclusion of Evidence to Which Objections Have Been Sustained. Evidence contained in any of the papers submitted in support of a motion for summary judgment [or summary adjudication] to which evidentiary objections have been made and sustained by the court must not be considered by the court in determining whether the papers show that there is no triable issue as to any material fact (*Code Civ. Proc. § 437c(c)*).

B. Objections to Evidence. _____ [*Specify objecting party, e.g.*, Plaintiff] _____ [*name*] objects to _____'s [*specify moving party, e.g.*, Defendant] evidence as set forth in Written Objections to Evidence, filed concurrently with this Opposition.

[2] Comments

[a] Use of Form

This memorandum may be combined with a general memorandum of points and authorities in opposition to a motion for summary judgment or summary adjudication [*see §§ 221.29, 221.30*] when the opposing party seeks point out the fact that evidence to which objections have been made and sustained must not be considered by the court in determining whether the papers show there is no triable issue of material fact. For objections to matters contained in the moving

party's affidavits or declarations on the ground of lack of personal knowledge, inadmissibility of evidence, or incompetency to testify [*see §§ 221.37 -221.39*].

Any oral objection at the hearing would most likely be any objections to the opposing papers. The best practice is for the opposing party to raise objections to the supporting papers in writing, such as by the foregoing form, supported by points and authorities. Effective January 1, 2007, the California Rules of Court contain specific format requirements for written objections to evidence in support of or in opposition to a motion for summary judgment. All written objections to evidence must be served and filed separately from the other papers in support of or in opposition to the motion. Each written objection must be numbered consecutively and must:

(1) Identify the name of the document in which the specific material objected to is located;

(2) State the exhibit, title, page, and line number of the material objected to;

(3) Quote or set forth the objectionable statement or material; and

(4) State the grounds for each objection to that statement or material.

The objections must also follow one of two formats specified in Rule 3.1354 [*Cal. Rules of Ct., Rule 3.1354(b)*]. Written objections must be served and filed at the same time as the objecting party's opposition or reply papers are served and filed [*Cal. Rules of Ct., Rule 3.1354(a)*]. A party submitting written objections to evidence must also submit with the objections a proposed order, which also must follow one of two formats shown in Rule 3.1354(c).

CAUTION:
Objections on specific evidence may be referenced by the objection number in the right column of a separate statement in opposition or reply to a motion, but the objections must not be restated or reargued in the separate statement [*Cal. Rules of Ct., Rule 3.1354(b)*].

For forms of objections to evidence and proposed order, see Ch. 537, *Summary Judgment* , §§ *537.86, 537.87* in California Forms of Pleading and Practice (Matthew Bender).

A party desiring to make objections to evidence in the papers on a motion for summary judgment must either submit objections in writing pursuant to *Cal. Rules of Ct., Rule 3.1354*, or make arrangements for a court reporter to be present at the hearing [*Cal. Rules of Ct., Rule 3.1352*].

[b] Waiver of Evidentiary Objections

Evidentiary objections not raised at the hearing on the motion are deemed waived [*Code Civ. Proc. § 437c(b)(5), (d)*; *see also* discussion in *§ 221.22[2][b]*].

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22-221 California Points & Authorities § 221.35

§ 221.35 Opposing Motion for Summary Judgment or Summary Adjudication--Inference Reasonably Deducible From Evidence Raises Triable Issue [Code Civ. Proc. § 437c(c)]

[1] FORM

[*This form should be combined with a general form of memorandum of points and authorities opposing a motion for summary judgment (see § 221.29) or summary adjudication (see § 221.30).*]

SUMMARY _____ [JUDGMENT *or* ADJUDICATION] IS IMPROPER WHEN AN INFERENCE REASONABLY DEDUCIBLE FROM THE EVIDENCE SET FORTH IN THE SUPPORTING OR OPPOSING PAPERS RAISES A TRIABLE ISSUE AS TO A MATERIAL FACT.

A. Inference of Triable Issue Reasonably Deducible From Evidence. Summary judgment [or summary adjudication] is improper when an inference reasonably deducible from the evidence contained in the supporting or opposingpapers, except evidence to which objections have been made and sustained by the court, raises a triable issue as to a material fact (*Code Civ. Proc. § 437c(c)*; *Maxwell v. Colburn (1980) 105 Cal. App. 3d 180, 184-185, 163 Cal. Rptr. 912*).

[*Optional*] **B. Court Must Consider Inferences Favoring Opposing Party.** The court must consider the bare evidence and the reasonable inferences deducible from the evidence, and determine whether the evidence is sufficient to support a potential judgment in favor of the opposing party. The moving party's evidence must be strictly construed, while the opposing party's evidence must be liberally construed. The court must therefore consider what inferences favoring the opposing party a factfinder could reasonably draw from the evidence. If the evidence is in conflict, the factual issues must be resolved by trial. [A trial court may not grant summary judgment for a defendant simply on its opinion that plaintiff's claims are "implausible," if a reasonable factfinder could find for plaintiff on the evidence presented] (*Binder v. Aetna Life Ins. Co. (1999) 75 Cal. App. 4th 832, 838-840, 89 Cal. Rptr. 2d 540*).

[*Optional*] **C. Failure to Raise Argument in Statement of Undisputed Material Facts Is Not Sufficient Reason to Grant Summary Judgment.** The court's discretion under *Code of Civil Procedure Section 437c(b)* to grant a summary judgment based on the failure of the opposing party to file an adequate separate statement does not preempt the court's

duty under *Code Civil Procedure Section 437c(c)* to consider all the submitted papers when determining whether the moving party is entitled to a judgment. Thus, a trial court must consider all of the papers submitted to determine whether triable issues of fact exist before exercising its discretion under *Code of Civil Procedure Section 437c(b)* to grant a summary judgment based on the opposing party's failure to file an adequate separate statement (*Kulesa v. Castleberry (1996) 47 Cal. App. 4th 103, 111-112, 54 Cal. Rptr. 2d 669*).

[*Optional*] **D. Expert Witness Declaration Provides Triable Issue of Causation When Opinion Properly Supported.** An expert witness declaration is sufficient to raise a triable issue of fact regarding causation if the declaration establishes the matters relied upon in expressing the opinion, that the opinion rests on matters of a type reasonably relied upon, and the bases for the opinion are set forth (*Sanchez v. Hillerich & Bradsby Co. (2002) 104 Cal. App. 4th 703, 718, 128 Cal. Rptr. 2d 529*).

[2] Comments

[a] Use of Form

These points and authorities should be combined with a general form of memorandum of points and authorities in opposition to a motion for summary judgment or summary adjudication [*see §§ 221.29, 221.30*] when the opposing party claims that an inference reasonably deducible from the evidence contained in the supporting or opposing papers raises a triable issue as to a material fact [*Code Civ. Proc. § 437c(c)*]. For an opposing memorandum for use when a supporting inference reasonably deducible from the evidence is contradicted by other inferences or evidence, see *§ 221.36*.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Inference of Triable Issue Reasonably Deducible From Evidence

Maxwell v. Colburn *(1980) 105 Cal. App. 3d 180, 163 Cal. Rptr. 912* , was an action for damages for personal injuries sustained when plaintiffs were struck by defendant's automobile while plaintiffs were crossing a street. Defendant moved for summary judgment on the ground that there was no triable issue of fact because there was no evidence of negligence on his part. He supported the motion by his declaration that he applied the car's brakes as soon as he saw plaintiffs step into his lane of traffic. Plaintiffs did not file opposing papers, and defendant's motion was granted. Plaintiffs appealed from the judgment.

The court of appeal reversed judgment for defendant. The court referred to the provision of *Code Civ. Proc. § 437c* which requires the court to consider all of the evidence set forth in the papers and "all inferences reasonably deducible from such evidence" (*now see Code Civ. Proc. § 437c(c)*; "such" in the quoted phrase now reads "the"). The court stated that the fact that plaintiffs' attorney did not urge the trial court to draw certain inferences of negligence did not relieve the trial or appellate courts from a duty to take those inferences into account. The court then held that the trial court erred in granting the summary judgment because reasonable inferences of defendant's negligence could be drawn from defendant's declaration. Referring to the "radius of lights" doctrine, the court stated that a rational inference of negligence arose under the particular circumstances of the case from the fact that defendant was unable to stop his vehicle in time to avoid hitting plaintiffs. Thus, factual questions remained for the jury as to whether defendant was negligent in failing to drive at a speed that would have enabled him to stop in time to avoid the collision or whether he was excused because plaintiffs suddenly stepped in front of him, and whether defendant should have applied his brakes immediately on seeing plaintiffs in the center of the road rather than waiting until they walked in front of his car (*105 Cal. App. 3d 180, 184-186)* . The court approved the observation that courts are very reluctant to uphold asummary judgment in comparative negligence cases, and that negligence is a question of fact if different conclusions can be

rationally drawn from the evidence (*105 Cal. App. 3d 180, 186)* .

[b] Court Must Consider Inferences Favoring Opposing Party

Binder v. Aetna Life Ins. Co. *(1999) 75 Cal. App. 4th 832, 89 Cal. Rptr. 2d 540* , involved a suit against an employer for breach of the implied-in-fact contract not to terminate except for "good cause," and for age discrimination. The trial court granted summary judgment for the defendant. The court of appeal reversed. In so doing, the court of appeal noted that a court must consider the bare evidence and the reasonable inferences deducible from the evidence, and determine whether the evidence is sufficient to support a potential judgment in favor of opposing party. The moving party's evidence must be strictly construed, while the opposing party's evidence must be liberally construed. The court must therefore consider what inferences favoring the opposing party a factfinder could reasonably draw from the evidence. While viewing the evidence in this manner, the court must bear in mind that its primary function is to identify issues rather than to determine issues. Only when inferences are indisputable may the court decide the issues as a matter of law. If the evidence is in conflict, the factual issues must be resolved by trial (*75 Cal. App. 4th 832, 838-840)* . The court further stated that the trial court may not weigh the evidence in the manner of a factfinder to determine whose version is more likely true. Nor may trial the court grant summary judgment based on the court's evaluation of credibility. Nor may the trial court grant summary judgment for a defendant simply on its opinion that plaintiff's claims are "implausible," if a reasonable factfinder could find for plaintiff on the evidence presented (*75 Cal. App. 4th 832, 840)* .

[c] Failure to Raise Argument in Statement of Undisputed Material Facts Is Not Sufficient Reason to Grant Summary Judgment

In ***Kulesa v. Castleberry*** *(1996) 47 Cal. App. 4th 103, 54 Cal. Rptr. 2d 669* , plaintiffs brought an action for legal malpractice against their former attorneys for failure to pursue a personal injury claim. The trial court granted defendant's motion for summary judgment on the ground that the action was barred by the statute of limitations. The court of appeal reversed the judgment on this ground, finding that the running of the statute had been tolled. In argument on appeal, in addition to the statute of limitations issue, defendants contended that even if their position on the statute of limitations were not upheld, they were entitled to summary judgment because plaintiffs had failed to raise the tolling argument in their separate statement of undisputed material facts.

The court of appeal found against defendants on this issue also. The court recognized that *Code Civ. Proc. § 437c(b)* [*now see Code Civ. Proc. § 437c(b)(3)*] gives a trial court discretion to grant a summary judgment motion when the opposing party fails to comply with the statutory requirements of a separate statement. However, the court held that the court's discretion under *Code Civ. Proc. § 437c(b)* does not preempt its duty under *Code Civ. Proc. § 437c(c)* to consider all the submitted papers when determining whether the moving party is entitled to a judgment (*47 Cal. App. 4th 103, 111)* . The court thus concluded that a trial court may not grant a summary judgment motion based on an inadequate separate statement until it reviews all of the papers filed in conjunction with the motion (*47 Cal. App. 4th 103, 112)* . Although plaintiffs' separate statement was inadequate in that it failed to raise the issue of the tolling of the statute of limitations, information relating to the tolling issue appeared in plaintiffs' points and authorities and their evidentiary exhibits. The court thus reversed the judgment and remanded for further proceedings.

Finally, the court noted that in this case the legal argument was simple and easy to find and cautioned that a court may have discretion to grant the motion when the case is complex and the opposing party buries its triable issues of fact in voluminous exhibits or convoluted rhetoric. Thus, thc court warned that to say that the court has a duty to look at all the papers submitted is not to say that the court has a duty to grope its way through a maze of arguments and reams of documents searching for obscure traces of triable issues of material fact (*47 Cal. App. 4th 103, 117)* .

[4] Additional Authorities

[a] Inference of Triable Issue Reasonably Deducible From Evidence

Bryant v. Bakshandeh (1991) 226 Cal. App. 3d 1241, 277 Cal. Rptr. 379 , was an action for wrongful death resulting from the death of the plaintiffs' infant son from an infection resulting from procedures carried out in preparing him for elective surgery. The procedure required the insertion of a catheter in the boy's urethra. The doctors' attempts to insert it failed. A urologist, who was in the hospital attending to his own patient, answered a "stat" call for assistance. He also attempted several times but failed to insert the catheter, and then said he could not complete the catheterization without cystoscoping the child. One of the doctors ascertained that the urologist had experience with this procedure and told him to proceed. The urologist left the room for several minutes, returned, performed the cystoscopy, and made several more unsuccessful attempts to insert the catheter. The operation was then postponed. Three days later the boy died from an infection resulting from perforation of his rectal pouch during the preoperative procedures. In his motion for summary judgment, the urologistclaimed that he had performed the procedures on an emergency basis and that he was exempt from liability under the Good Samaritan statutes (*Bus. & Prof. Code §§ 2395, 2396*). His motion was granted. The court of appeal reversed. The court said that summary judgment is properly granted only when the evidence in support of the moving party establishes that there is no issue of fact to be tried, that mere conclusions of law or fact are insufficient to satisfy the evidentiary requirements for summary judgment, and that summary judgment may not be based on inferences which are contradicted by other inferences (*226 Cal. App. 3d 1241, 1245)* . The court held that the urologist did not, as a matter of law, come within the protection of the Good Samaritan statutes and that a material issue of fact existed as to whether the urologist had a reasonable good-faith belief that he was responding to an emergency situation when he performed the requested procedure or whether, under the circumstances, a physician acting in good faith would have reasonably concluded that his immediate assistance was not required because no emergency existed (*226 Cal. App. 3d 1241, 1245-1247)* .

Fidelity National Title Ins. Co. v. Miller (1989) 215 Cal. App. 3d 1163, 264 Cal. Rptr. 17 , was an action by a title insurance company against a seller of real property to recover what it had paid to the purchaser of the property after the discovery of a recorded restrictive covenant by which the seller had granted a view easement over the property. The seller had conveyed the property by unrestricted grant deed, thereby triggering application of the statutorily implied covenant against encumbrances (*see Civ. Code § 1113*). Prior to sale, the seller had informed the buyer of the possible existence of the easement, and the buyer had asked the title company to check it out. The title company failed to find any recorded easement and issued a preliminary report not mentioning the encumbrance and a subsequent title policy that also failed to mention the encumbrance. After escrow closed, the buyer discovered the covenant had been recorded and sued the title insurer, which paid him $125,000 under the policy for diminution in the value of the property resulting from the encumbrance. The buyer executed a release and assignment of rights to the insurer, which then sued the seller. The seller's motion for summary judgment was granted, and defendant appealed. The court of appeal reversed. After quoting the provisions of *Code Civ. Proc. § 437c(c)* set out in the foregoing form, the court said that in ruling on a summary judgment motion, the trial court under *Code Civ. Proc. § 437c* is not limited to a search for facts on a particular issue, but may draw inferences regarding that issue from the relevant facts set forth in the affidavits; hence, the trial court is to consider all inferences reasonably deducible from the evidence, and the lack of a triable issue of fact may be established by inference when a particular inference is the only reasonable one that can be drawn from the evidence for and against the motion (*215 Cal. App. 3d 1163, 1172)* . The court added, however, that summary judgments are reversible on the finding of factual issues based on inferences first drawn by the appellate court (*215 Cal. App. 3d 1163, 1172)* , and then proceeded to identify the several factual issues that required trial (*215 Cal. App. 3d 1163, 1171-1176)* .

In *Caudel v. East Bay Mun. Utility Dist. (1985) 165 Cal. App. 3d 1, 211 Cal. Rptr. 222* , plaintiff brought an action in negligence for injuries sustained on the job site against a utility district that had employed, as an independent contractor, the company for which defendant worked. The trial court granted summary judgment in favor of defendant on the ground that an employer is not liable in negligence for torts of the independent contractor. In reversing the judgment, the court of appeal noted that, although nonliability of an employer in those circumstances is the general rule, recognized exceptions exist, including the "peculiar risk of harm" exception (*165 Cal. App. 3d 1, 6-8)* . The court held that plaintiff's papers raised the inference that the peculiar risk doctrine applied, and that triable issues of fact were

raised thereby; the fact that respondent's evidence raised inferences negating the application of the exception did not resolve the factual issues precluding summary judgment (*165 Cal. App. 3d 1, 9-10)* .

In *People v. Rath Packing Co. (1974) 44 Cal. App. 3d 56, 118 Cal. Rptr. 438* , an action by the government to enjoin a meat processor from selling allegedly short-weight packages of bacon at the retail level, the court of appeal reversed summary judgment granting the People the injunction. The court stated that the trial court must look to all facts presented in the parties' affidavits in determining whether or not an issue is triable; the court is not limited to a search for "facts" regarding a particular issue but may draw inferences regarding that issue from related facts set forth in the affidavits. Although former Code Civ. Proc. § 437c was still in effect, the court applied this test from *Code Civ. Proc. § 437c* as amended in 1973, as the former statute did not prescribe a procedure for the evaluation of affidavits. The court held that defendant's declaration contained facts from which a reasonable inference could be drawn that plaintiff had erred in weighing defendant's bacon products, sufficiently countering the People's statement of fact regarding the accuracy of the weighings (*44 Cal. App. 3d 56, 64)* .

[b] Failure to Raise Argument in Statement of Undisputed Material Facts Is Not Sufficient Reason to Grant Summary Judgment

The facts and procedural background of *Thatcher v. Lucky Stores, Inc. (2000) 79 Cal. App. 4th 1081, 94 Cal. Rptr. 2d 575* are *discussed under § 221.23[3][a]*. Although the court concluded that the defendant met its initial burden of proof and due to plaintiff's failure to file opposition affirmed summary judgment in defendant's favor (*79 Cal. App. 4th 1081, 1083, 1087)* , the court also concluded that unless the moving party hasmet its initial burden of proof, the court does not have discretion under *Code Civ. Proc. § 437c(b)* [*now see Code Civ. Proc. § 437c(b)(3)*] to grant summary judgment based on the opposing party's failure to file a proper separate statement (*79 Cal. App. 4th 1081, 1086)* .

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22-221 California Points & Authorities § 221.36

§ 221.36 Opposing Motion for Summary Judgment or Summary Adjudication--Contradictory Inference Raises Triable Issue [Code Civ. Proc. § 437c(c)]

[1] FORM

[*This form should be combined with a general form of memorandum of points and authorities opposing a motion for summary judgment (see § 221.29) or summary adjudication (see § 221.30).*]

SUMMARY _____ [JUDGMENT *or* ADJUDICATION] BASED ON INFERENCES REASONABLY DEDUCIBLE FROM EVIDENCE CONTAINED IN SUBMITTED PAPERS MUST NOT BE GRANTED WHEN THE INFERENCES ARE CONTRADICTED BY OTHER INFERENCES OR EVIDENCE WHICH RAISE A TRIABLE ISSUE AS TO ANY MATERIAL FACT.

A. Supporting Inference Contradicted by Other Inference Which Raises Triable Issue. Summary judgment [or summary adjudication] must not be granted by the court based on inferences reasonably deducible from evidence contained in supporting or opposing papers, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact (*Code Civ. Proc. § 437c(c)*; *Jos. Schlitz Brewing Co. v. Downey Distributor (1980) 109 Cal. App. 3d 908, 918, 167 Cal. Rptr. 510*).

[*Optional*] **B. Court Must Consider Inferences Favoring Opposing Party.** [*See § 221.35, Paragraph B.*]

[2] Comments

[a] Use of Form

These points and authorities should be combined with a general form of memorandum of points and authorities in opposition to a motion for summary judgment [*see § 221.29*] or summary adjudication [*see § 221.30*] when the opposing party claims that an inference which supports the motion is contradicted by other inferences or evidence which raise a triable issue as to any material fact [*Code Civ. Proc. § 437c(c)*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law

stated.

[3] Discussion of Authorities

[a] Supporting Inference Contradicted by Other Inference Which Raises Triable Issue

Jos. Schlitz Brewing Co. v. Downey Distributor *(1980) 109 Cal. App. 3d 908, 167 Cal. Rptr. 510* , involved an action by a beer manufacturer against a wholesale distributor of its beer for the balance owing on defendant's open account. Defendant cross complained for breach of contract, interference with a business advantage, fraud, and conspiracy, based on an alleged oral agreement with plaintiff providing that defendant had the assignable right to be the wholesale distributor in a given area and on plaintiff's covenant to deal in good faith, both of which plaintiff violated by terminating defendant's rights when defendant had received an offer to purchase the distributorship. The trial court granted plaintiff's motion for summary judgment, and defendant appealed from the judgment.

The court of appeal reversed judgment for plaintiff. The court's discussion of defendant's action for interference with a business advantage and of general summary judgment rules are *found in § 221.29[3][a]*. As to defendant's action for breach of contract, the court stated that defendant's declaration, at least by inference, contradicted plaintiff's declaration which had negated the existence of any oral agreements. The court referred to the provision of *Code Civ. Proc. § 437c(c)* that states that "summary judgment shall not be granted by the court based on inferences reasonably deducible from such evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact." Pursuant to this language, the court held that by virtue of defendant's opposing declaration, triable issues remained as to the existence of an oral agreement and whether or not the agreement had been breached. As to defendant's claim of fraud and conspiracy, the court stated that a possible inference of fraud and conspiracy could be gleaned from defendant's declaration in contradiction to plaintiff's declarations, based on plaintiff's actions after learning that defendant had received an offer to purchase the distributorship. Looking to the same provision of *Code Civ. Proc. § 437c(c)* and to the rule that the moving party's declarations are strictly construed and the opponent's liberally construed, the court held that triable issues of material facts remained as to the fraud and conspiracy claims (*109 Cal. App. 3d 908, 918-919)* .

[b] Expert Witness Declaration Provides Triable Issue of Causation When Opinion Properly Supported

In ***Sanchez v. Hillerich & Bradsby Co.*** *(2002) 104 Cal. App. 4th 703, 128 Cal. Rptr. 2d 529* , a pitcher was seriously injured when struck by a line drive hit by an aluminum bat. He filed suit against the bat manufacturer and others alleging that the design and use of this particular batsignificantly increased the inherent risk in the sport of baseball that a pitcher would be hit by a line drive. Defendants moved for summary judgment asserting primary assumption of the risk and that the pitcher would be unable to prove causation. The trial court concluded that the pitcher would be unable to prove that his injuries resulted from the alleged increased risk the particular bat posed to pitchers. The plaintiff appealed and the trial court's decision was reversed.

The appellate court stated that while a court may dismiss an expert declaration in connection with a summary judgment motion, if the declaration establishes that the expert's opinion is speculative, lacks foundation, or is stated without sufficient certainty, the expert witness opinion may raise a triable issue of fact regarding causation if the expert declaration establishes the matters relied upon in expressing the opinion, that the opinion rests on matters of a type reasonably relied upon, and the bases for the opinion (*104 Cal. App. 4th 703, 718)* . The plaintiffs did not challenge the expert's credentials. He was a kinesiologist who, since 1983, has specialized "in the analysis of biomechanics of trauma." His declaration establishes that in forming his opinions he reviewed plaintiff's medical records, relied upon "literature regarding skull fracture and traumatic brain injury biomechanics," undertook a quantitative analysis regarding "velocity necessary to cause Mr. Sanchez's injury pattern" and "utilizing basic principles of dynamics related to the flight of a baseball" reached an opinion about the range of speed of the ball which hit appellant. While he does not spell out the actual calculations he used, the declaration was not deficient for purposes of summary judgment. If

respondents had desired to do so, they could have deposed the expert in an attempt to demonstrate his opinions had no basis in fact or science. The expert also relied upon literature from the NCAA regarding reaction times, which provided: "Game conditions using high powered aluminum bats often result in speeds well in excess of 100 mph. At 100 mph, the ball will travel 52 feet in .354 seconds; at 110 mph, a ball will travel 52 feet in .321 seconds. The NCAA Baseball Rules Committee is aware that there is some risk even with wood bats, but believes that the increased risk of injury resulting from the use of high powered aluminum bats is clear. To ignore this risk would, in our opinion, be irresponsible." The appellate court concluded that these factors provided independent corroboration for some of the facts relied upon by the expert and provided further facts relevant to the issue of causation sufficient to raise a triable issue of fact regarding causation (*104 Cal. App. 4th 703, 718-719)* .

[4] Additional Authorities

[a] Supporting Inference Contradicted by Other Inference Which Raises Triable Issue

In *Pieper v. Commercial Underwriters Ins. Co. (1997) 59 Cal. App. 4th 1008, 69 Cal. Rptr. 2d 551* , the court of appeal, in affirming the trial court's granting of summary judgment in favor of the defendant, noted that the court must consider presumptions and draw inferences from the facts adduced where the inference is the only reasonable one that may be drawn. The court has no power in a summary proceeding to weigh one inference against another or against other evidence, however (*59 Cal. App. 4th 1008, 1015)* .

See *Bryant v. Bakshandeh (1991) 226 Cal. App. 3d 1241, 1245, 277 Cal. Rptr. 379* , discussed in *§ 221.35[4][a]*.

In *Garcia v. Rockwell Internat. Corp (1986) 187 Cal. App. 3d 1556, 232 Cal. Rptr. 490* , an employee sued his employer, alleging that the employer wrongfully suspended him without pay and demoted him in retaliation for reporting to a federal agency the employer's mischarging activities on an Air Force contract. The trial court granted summary judgment in favor of defendant employer, who claimed that the employee was suspended for mischarging time and not for "whistle-blowing." The court reversed, holding in part that a triable issue of fact existed regarding the reason for the employee's suspension and that thus summary judgment was inappropriate. The court applied *Code Civ. Proc. § 437c*, which prohibits the granting of summary judgment in a case involving conflicting inferences reasonably deducible from the facts. Because the affidavits of the employer and the employee lacked direct evidence for either conflicting theory of the case and contained circumstantial evidence supportive of both, the court held that the determination of the true reason for the employee's suspension and demotion should be resolved by the trier of fact and not on motion for summary judgment (*187 Cal. App. 3d 1556, 1562)* . See also *Bryant v. Bakshandeh (1991) 226 Cal. App. 3d 1241, 1245, 277 Cal. Rptr. 379* , discussed in *§ 221.35[4][a]*.

In *Hepp v. Lockheed-California Co. (1978) 86 Cal. App. 3d 714, 150 Cal. Rptr. 408* , plaintiff sued his former employer for breach of contract and fraud. Defendant had failed to offer available positions to plaintiff in violation of its policy to offer job openings to qualified persons who had been laid off within two years. Defendant's motion for summary judgment was granted on the grounds that the rehiring policies were only directives to assist supervision, were not contracts, and were not made for the employee's benefit. In reversing judgment for defendant, the court applied the provision of *Code Civ. Proc. § 437c* that prohibits the grant of summary judgment based on inferences if they are contradicted by other inferences which raise a triable issue of fact. Defendant's papers supported an inference that the policies were management guidelines only and not intended for the benefit of the employees. However, the court held that a contrary factual inference could be drawn that the policies were intended to benefit employees and be a positive inducement for employees to take and continue employment, in light of the risk of periodic layoffs in the aerospace industry. Thus, the court held that a triable issue of fact existedas to the intent of the policy regulations, and that summary judgment should have been denied (*86 Cal. App. 3d 714, 718-719)* .

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22-221 California Points & Authorities § 221.37

§ 221.37 Opposing Motion for Summary Judgment or Summary Adjudication--Supporting Affidavit or Declaration Not Made on Personal Knowledge [Code Civ. Proc. § 437c(d)]

[1] FORM

[*This form should be combined with a general form of memorandum of points and authorities in support of a motion for summary judgment (see § 221.29) or summary adjudication (see § 221.30), and with a form of objection to evidence (see § 221.34).*]

SUMMARY _____[JUDGMENT *or* ADJUDICATION] IS IMPROPER WHEN THE SUPPORTING _____ [AFFIDAVIT(S) *or* DECLARATION(S)] _____ [IS *or* ARE] NOT MADE ON PERSONAL KNOWLEDGE.

Personal Knowledge Required. Summary judgment [or summary adjudication] is improper when supporting affidavits or declarations are not made on personal knowledge of the affiant or declarant (*Code Civ. Proc. § 437c(d)*; *Bowden v. Robinson (1977) 67 Cal. App. 3d 705, 719-720, 136 Cal. Rptr. 871*).

[2] Comments

[a] Use of Form

These points and authorities should be combined with a general memorandum in opposition to a motion for summary judgment [*see § 221.29*] or summary adjudication [*see § 221.30*], and with a form of objection [*see § 221.34*], when the opposing party claims that the affidavit or declaration submitted by the moving party in support of the motion is not made on personal knowledge [*Code Civ. Proc. § 437c(d)*; *see Evid. Code § 702*].

Supporting and opposing affidavits or declarations must be made by any person on personal knowledge. However, any objections based on the failure to comply with this requirement must be made at the hearing or will be deemed waived [*Code Civ. Proc. § 437c(d)*; *see also* discussion in *§ 221.22[2][b]*]. Moreover, a summary judgment might properly be granted even when the supporting declaration is not based on personal knowledge if there is other relevant and proper evidence before the court showing that there is no cause of action, or defense to the cause of action, as the case may be [

see Korens v. R. W. Zukin Corp. (1989) 212 Cal. App. 3d 1054, 1062, 261 Cal. Rptr. 137] .

Some local courts require that declarations supporting a motion for summary judgment or summary adjudication state that the facts set forth are personally known to the declarant and that he or she has firsthand knowledge of the same, and state facts which the declarant relies on as establishing his or her personal knowledge of the substantive facts asserted [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rule 9.21(c)].

Counsel should insert argument in the foregoing form showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

With appropriate modifications, these points and authorities may be incorporated by the moving party into a supplemental memorandum to object that the opposing affidavits or declarations are not made on personal knowledge of the affiant or declarant [*Code Civ. Proc. § 437c(b), (d)*; *Overland Plumbing Inc. v. Transamerica Ins. Co. (1981) 119 Cal. App. 3d 476, 483-484, 174 Cal. Rptr. 1* ; *Pepper Indus., Inc. v. Home Ins. Co. (1977) 67 Cal. App. 3d 1012, 1017, 134 Cal. Rptr. 904* (*discussed under § 221.37[4]* [a])]. The moving party would file the supplemental memorandum as a separate paper after receipt of the opposing party's affidavits or declarations, if supplemental memoranda are permitted by local court rules and practice [*see § 221.22*].

[3] Discussion of Authorities

[a] Personal Knowledge Required

Bowden v. Robinson *(1977) 67 Cal. App. 3d 705, 136 Cal. Rptr. 871* , was an action for common law fraud, fraud under the Corporate Securities Act of 1968, and money had and received, based on an alleged false representation made by defendants to plaintiff that defendants were qualified to issue California stock. Plaintiff relied on the representation and paid defendants cash for shares, but did not receive any certificates. After both parties moved for summary judgment, the trial court denied plaintiff's motion and granted defendants' motion, from which judgment plaintiff appealed.

The court of appeal reversed judgment for defendants and remanded the case for further proceedings. The court disagreed with defendants' argument that the Corporate Securities Law of 1968 superseded all other claims previously cognizable at common law relating to securities transactions. Although it held that plaintiff's common count for money had and received was barred by the applicable statute of limitations, it also held that the complaint stated a cause of action for common law fraud and for fraudunder *Corp. Code § 25401*. With respect to these two causes of action, the court held that triable issues of fact remained. In examining defendants' supporting declarations, the court held that statements made "to the best of my knowledge" by the declarant did not satisfy the requirement for personal knowledge under *Code Civ. Proc. § 437c*, but, rather, implied something similar to information and belief. Strictly construing defendants' supporting papers, the court found that many unresolved issues of fact remained. It also determined that the trial court had not erred in denying plaintiff's motion, as his affidavits contained averments not within his personal knowledge, which constituted inadmissible hearsay, conclusion, and opinion (*67 Cal. App. 3d 705, 719-721)* .

[4] Additional Authorities

[a] Personal Knowledge Required

Garibay v. Hemmatt (2008) 161 Cal. App. 4th 735, 74 Cal. Rptr. 3d 715 , regarding improper expert testimony, is *discussed under § 221.38[3][a]*.

Lopez v. University Partners (1997) 54 Cal. App. 4th 1117, 63 Cal. Rptr. 2d 359 , involved an action for personal

injuries. The trial court granted summary judgment in favor of the defendants, and the court of appeal affirmed. The court held that declarations on information and belief submitted by the plaintiff and the plaintiff's construction expert in opposition to the motion were insufficient to raise a triable issue of fact. Declarations based on information and belief are insufficient to satisfy the burden of either the moving or opposing party on a motion for summary judgment or adjudication. Thus, the declarations submitted by the plaintiff were insufficient to satisfy its burden under *Code Civ. Proc. § 437c(o)(2)* (*see now Code Civ. Proc. § 437c(p)(2)*) of showing the existence of a triable issue of fact (*54 Cal. App. 4th 1117, 1124-1125)* .

In *Overland Plumbing, Inc. v. Transamerica Ins. Co. (1981) 119 Cal. App. 3d 476, 174 Cal. Rptr. 1* , an action by an insured against its insurer to recover a loss covered by a policy of theft insurance, the court of appeal affirmed the grant of summary judgment for plaintiff. The court held that portions of defendant's counterdeclaration made to the best of the declarant's knowledge and belief failed to satisfy the personal knowledge requirement of *Code Civ. Proc. § 437c*. Disagreeing with the language in *Jos. Schlitz Brewing Co. v. Downey Distributor (1980) 109 Cal. App. 3d 908, 916, 167 Cal. Rptr. 510* , to the effect that opposing papers need not necessarily be composed wholly of strictly evidentiary facts, the court stated that since the 1973 amendment to *Code Civ. Proc. § 437c*, opposing as well as supporting papers must be made and affirmatively shown to be on personal knowledge and based on admissible evidence (*119 Cal. App. 3d 476, 483-484)* .

Pepper Indus., Inc. v. Home Ins. Co. (1977) 67 Cal. App. 3d 1012, 134 Cal. Rptr. 904 , was an action by an insured for declaratory relief against its primary and excess insurers. Plaintiff moved for summary judgment to determine that the general liability insurance policies issued by the two companies provided coverage for plaintiff's liability, if any, to a city for an explosion and fire allegedly resulting from plaintiff's discharge of gasoline into the city sewer system, and that the pollution endorsements in each policy did not exclude coverage. The court of appeal affirmed judgment for plaintiff, holding that the policy in question, on appeal, afforded coverage for plaintiff's liability resulting from the fire and explosion, and that the pollution endorsement did not exclude liability for that type of accident. In examining the opposing declaration by one of defendant's claims representatives for excess insurance, the court observed that the declarant's statement relating to his "understanding" about the amount of the premium charged in relation to the coverage provided was not a statement of fact within his personal knowledge (*67 Cal. App. 3d 1012, 1017)* .

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22-221 California Points & Authorities § 221.38

§ 221.38 Opposing Motion for Summary Judgment or Summary Adjudication--Supporting Affidavit of Declaration Contains Inadmissible Evidence [Code Civ. Proc. § 437c(d)]

[1] FORM

[*This form should be combined with a general form of memorandum of points and authorities opposing a motion for summary judgment (see § 221.29) or summary adjudication (see § 221.30), and with a form of objection (see § 221.34).*]

[A] SUPPORTING _____ [AFFIDAVIT(S) *or* DECLARATION(S)] WHICH CONTAIN[S] INADMISSIBLE EVIDENCE MAY NOT BE CONSIDERED BY THE COURT IN DETERMINING A MOTION FOR SUMMARY _____ [JUDGMENT *or* ADJUDICATION].

A. Admissible Evidence Required. Affidavits or declarations supporting a motion for summary judgment [or summary adjudication] must set forth admissible evidence (*Code Civ. Proc. § 437c(d)*; *Franklin v. Benevolent & Protective Order of Elks (1979) 97 Cal. App. 3d 915, 930, 159 Cal. Rptr. 131*).

[*Optional*] **B. Hearsay.** Hearsay evidence contained in supporting affidavits or declarations may not be considered by the court in determining a motion for summary judgment [or summary adjudication] (*see Evid. Code § 1200*; *Garibay v. Hemmatt (2008) 161 Cal. App. 4th 735, 743, 74 Cal. Rptr. 3d 715* ; *Franklin v. Benevolent & Protective Order of Elks (1979) 97 Cal. App. 3d 915, 930, 159 Cal. Rptr. 131*).

[*Optional*] **C. Best-Evidence Rule.** Generally, averments in the supporting affidavits or declarations which depend on written documentation are incompetent and cannot be considered unless the original document or certified or authenticated copies of such instruments are attached, an excuse for nonproduction is shown, or the originals are produced for inspection by the adverse party at the hearing on the motion (*Dugar v. Happy Tiger Records, Inc. (1974) 41 Cal. App. 3d 811, 815-817, 116 Cal. Rptr. 412*).

[*Optional*] **D. Unauthenticated Writing.** An unauthenticated writing incorporated by reference into supporting affidavits or declarations may not be considered by the court in determining a motion for summary judgment [or

summary adjudication] (*see Evid. Code §§ 1400, 1401*; *Garibay v. Hemmatt (2008) 161 Cal. App. 4th 735, 743, 74 Cal. Rptr. 3d 715* ; *Dixon v. Grace Lines, Inc. (1972) 27 Cal. App. 3d 278, 290, 103 Cal. Rptr. 595*).

[2] Comments

[a] Use of Form

These points and authorities should be combined with a general memorandum in opposition to a motion for summary judgment [*see § 221.29*] or summary adjudication of an issue [*see § 221.30*], and with a form of objection [*see § 221.34*], when the opposing party claims that the affidavit or declaration of the moving party in support of the motion does not set forth admissible evidence [*Code Civ. Proc. § 437c(d)*]. It should be noted that the presence of inadmissible evidence regarding an immaterial fact in a paper supporting a motion for summary judgment is not a valid ground for denying the motion [*Overland Plumbing, Inc. v. Transamerica Ins. Co. (1981) 119 Cal. App. 3d 476, 481, 174 Cal. Rptr. 1* (discussed in *§ 221.37[4*][a])].

Supporting and opposing affidavits or declarations must set forth admissible evidence. However, any objections based on the failure to comply with this requirement must be made at the hearing or will be deemed waived [*Code Civ. Proc. § 437c(d)*; *see also § 221.22[2][b]*].

The optional paragraphs in this form contain potential evidentiary objections affecting admissibility. In reviewing the adverse party's papers, counsel should consider all evidentiary objections.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

With appropriate modifications, these points and authorities may be incorporated by the moving party into a supplemental memorandum to object that the opposing affidavits or declarations contain inadmissible evidence [*Code Civ. Proc. § 437c(b), (d)*; *see, e.g.,* *Wilkinson v. Norcal Mut. Ins. Co. (1979) 98 Cal. App. 3d 307, 314, 159 Cal. Rptr. 416* (*discussed under § 221.38[3*][b])]. The moving party would file the supplemental memorandum as a separate paper after receipt of the opposing party's affidavits or declarations, if supplemental memoranda are permitted by local court rules and practice [*see § 221.22*].

[b] Inability to Recall Exact Words Spoken

If the matters stated in an affidavit or declaration in support or opposition to a summary judgment motion are within the affiant's or declarant's personal knowledge, then his or her inability to recall the exact words spoken goes only to the weight, not the admissibility, of the evidence [*Buehler v. Oregon-Washington Plywood Corp. (1976) 17 Cal. 3d 520, 528-529, 131 Cal. Rptr. 394, 551 P.2d 1226]* .

[3] Discussion of Authorities

[a] Admissible Evidence Required

In ***Garibay v. Hemmatt*** *(2008) 161 Cal. App. 4th 735, 74 Cal. Rptr. 3d 715* , plaintiff sued defendant for medical malpractice after her tubal ligation failed and she became pregnant. Defendant filed a motion for summary judgment. The sole evidence in support of the motion consisted of an expert declaration from an obsetrician/gynecologist who had reviewed medical records from defendant's office and from the hospital where plaintiff had her tubal ligation. The expert's declaration opined that defendant's actions were within the standard of care and not medical malpractice based on medical that were not admitted into evidence and for which no foundation was offered to admit the records under the

business records exception to the hearsay rule. The trial court granted defendant's motion for summary judgment, and plaintiff appealed.

The court of appeals reversed. The court began by noting that defendant's motion for summary judgment was supported solely by the expert declaration and not by deposition testimony or a declaration on the part of defendant. Although the expert's declaration stated he had reviewed medical records and hospital records, these records were not in evidence. The expert did not have personal knowledge of the facts stated in the records. The court stated that without testimony providing for the authentication of the medical records, the expert declaration had no evidentiary value, and therefore, defendant's motion had no evidentiary basis (*161 Cal. App. 4th 735, 743)* .

Franklin v. Benevolent & Protective Order of Elks *(1979) 97 Cal. App. 3d 915, 159 Cal. Rptr. 131* , was an action by a public school teacher against the Elks and a local lodge for publication of a libelous statement, in defendants' national magazine, concerning plaintiff's prior teaching experience. The trial court granted defendants' motion for summary judgment on the grounds that because plaintiff was a public figure, actual malice was an essential element of her action, and that the record demonstrated as a matter of law that defendants had published the statement without actual malice. Plaintiff appealed from the judgment for defendants.

The court of appeal reversed judgment for defendants. The court agreed with the trial court's determination that a public school teacher is not a public official within the meaning of *New York Times Co. v. Sullivan (1964) 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686* . However, contrary to the trial court, it held that plaintiff was not a public figure and, therefore, defendants did not have a qualified constitutional privilege and plaintiff was not required to prove publication with actual malice. Plaintiff had not voluntarily and actively sought, in connection with the controversy surrounding her choice of teaching materials, to influence the resolutions of the issues involved. The court held that defendants' voluminous collection of clippings, offered in support of their summary judgment motion, relating to a similar controversy over plaintiff's teaching methods while working for another school district, was inadmissible hearsay. The court stated that it is elementary that affidavits in support of a motion for summary judgment must contain, and may be considered only to the extent that they contain, admissible evidence (*97 Cal. App. 3d 915, 930)* . The court deemed it unnecessary to consider the validity of the trial court's determination that there was no triable issue of fact with respect to actual malice.

[b] Hearsay

Franklin v. Benevolent & Protective Order of Elks *(1979) 97 Cal. App. 3d 915, 159 Cal. Rptr. 131* , is *discussed under § 221.38[3][a]*.

[c] Best-Evidence Rule

Dugar v. Happy Tiger Records, Inc. *(1974) 41 Cal. App. 3d 811, 116 Cal. Rptr. 412* , was an action on a debt by an assignor, alleging both common counts and fraudulent misrepresentation. Plaintiff moved for summary judgment. One supporting affidavit contained statements by the affiant that he had examined the documents attached to the affidavit and incorporated them by reference, and that they were accurate. However, the business records in question, showing the commercial transactions between plaintiff's assignor and defendant, were not attached. A second affiant stated that he also had reviewed copies of the business documents which were attached to the first affidavit, and concluded that the sum in question was due and owing to plaintiff. The trial court granted the unopposed motion and rendered judgment in plaintiff's favor.

The court of appeal reversed judgment for plaintiff. The court held that although plaintiff subsequently attempted to add the documents in question as an exhibit and incorporate them by reference into the affidavits by the declaration of her attorney, the declaration was unverified and thus could not support the motion. In discussing defendant's other contentions raised on appeal, the court noted that materials incorporated by reference into an affidavit must conform to

the rules of evidence. It stated the general rule that averments in the movant's affidavits which depend on written documents are incompetent under the best evidence rule and cannot be considered, unless the original documents or certified or authenticated copies of them are annexed to the affidavits, or excuse for nonproduction of them is shown. The court decided that the documents did not fall within the business records exception of former Evid. Code § 1550 so as to permit use of the photostatic copies. Further, former Evid. Code § 1510 permits the use of copies only where the originals are themselves produced at the hearing and made available for inspection by the adverse party, but the record did not disclose whether the originals were in fact produced [*see now Evid. Code § 1520 et seq.*]. The court held that such a blank record does not give rise to the inference that the section was complied with or was even relied on to make copies admissible. Thus, the trial court's consideration of the photostatic copies violated the best evidence rule and constituted reversible error (*41 Cal. App. 3d 811, 815-818)* .

[d] Unauthenticated Writing

Dixon v. Grace Lines, Inc. *(1972) 27 Cal. App. 3d 278, 103 Cal. Rptr. 595* , was an action for damages under the Jones Act for negligence and, under general maritime law, for unseaworthiness and for maintenance, cure, and wages, for personal injuries sustained by plaintiff while employed as a seaman by defendant. Plaintiff was injured on a private pier while attempting to board a private launch to return to defendant's ship. Defendant's motion for summary judgment was granted, and plaintiff appealed from the judgment.

The court of appeal reversed judgment for defendant. After examining the substantive issues relating to the Jones Act and general maritime law, the court held that defendant's declaration in support of its motion for summary judgment failed to set forth facts showing that plaintiff was not entitled to maintenance, cure, and wages under his second cause of action. Further, it did not appear that the declarant, if sworn as a witness, could testify competently to the facts, as there was no showing that the matters stated were within his personal knowledge. The supporting declaration incorporated a letter from a shipping firm which stated that there was no relationship between the launch and defendant's ship. However, the court held that the letter could not properly be considered in support of the motion. The letter was unauthenticated, there was no stipulation as to its authenticity, and the declarant did not state, nor did the letter show, who the declarant was or how he came to have knowledge of the matters set forth in the letter (*27 Cal. App. 3d 278, 290)* .

[4] Additional Authorities

[a] Admissible Evidence Required

See *Guthrey v. State of California (1998) 63 Cal. App. 4th 1108, 75 Cal. Rptr. 2d 27* , which is discussed in *§ 221.40[3][a]*.

In *Kramer v. Barnes (1963) 212 Cal. App. 2d 440, 27 Cal. Rptr. 895* , an action based on negligence for damages arising from personal injuries sustained in a multiple-car collision, the trial court granted a motion for summary judgment brought by one of the defendants. In reversing judgment for defendant, the court of appeal stated the general rules that an affidavit's sufficiency must be tested by the same rules as those applicable to oral testimony, and that an affidavit which sets forth only conclusions, opinions, or ultimate facts is insufficient. The court held that one of defendant's supporting affidavits contained only hearsay, and the affiant thus could not competently testify to the matters stated (*212 Cal. App. 2d 440, 446)* .

[b] Hearsay

Wilkinson v. Norcal Mut. Ins. Co. (1979) 98 Cal. App. 3d 307, 159 Cal. Rptr. 416 , was an action for damages by a doctor against his medical malpractice carrier by reason of the rate charged and conditions imposedin his policy. The court of appeal affirmed judgment for defendant, granted on the ground that plaintiff had failed to exhaust his available administrative remedies. The court held that the oral hearsay statement made to plaintiff by an employee of the

Department of Insurance, to the effect that they could not help plaintiff, was insufficient to exhaust the administrative remedy. Moreover, the statement was hearsay and thus inadmissible under former Code Civ. Proc. § 437c (which did not provide for waiver of evidentiary objections) to prove the truth of the facts asserted (*98 Cal. App. 3d 307, 314)* .

[c] Best-Evidence Rule

In *Ritchey v. Villa Nueva Condominium Ass'n (1978) 81 Cal. App. 3d 688, 146 Cal. Rptr. 695* , an action for injunctive and declaratory relief, and for damages for malicious prosecution, abuse of process, and interference with a contractual relationship, plaintiff challenged the validity of an amendment to the bylaws of the homeowners association which restricted occupancy to adults only, preventing plaintiff from leasing his condominium to a woman with two children. The trial court granted summary judgment for defendant. The court of appeal affirmed the judgment and held that, although the amendment was a restraint on the right of alienation and a limitation on the right of occupancy, the amendment was reasonable. Plaintiff argued that the association was bound by the condition to his federally insured loan for the purchase of his condominium, which required him to certify that he would not discriminate against families with children in leasing or selling the unit. However, plaintiff failed to attach a copy of the loan agreement to any of his declarations. Citing *Dugar v. Happy Tiger Records, Inc. (1974) 41 Cal. App. 3d 811, 815-816, 116 Cal. Rptr. 412* (*discussed under § 221.38[3][c]*), the court stated that averments in an affidavit or declaration which depend on written documentation are incompetent and cannot be considered, unless the original document or certified or authenticated copies of such instruments are annexed thereto or unless excuse for nonproduction is shown. As plaintiff failed to attach essential documents, the court held that his declarations were insufficient to raise a triable issue of fact on the question (*81 Cal. App. 3d 688, 696-697)* .

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Volume 22 Chapters 220-229 SUBROGATION---to---TRESPASS
CHAPTER 221 SUMMARY JUDGMENTS
PART II. FORMS

22-221 California Points & Authorities § 221.39

§ 221.39 Opposing Motion for Summary Judgment or Summary Adjudication--Supporting Affidavit or Declaration Does Not Affirmatively Show Affiant Competent to Testify [Code Civ. Proc. § 437c(d)]

[1] FORM

[*This form should be combined with a general form of memorandum of points and authorities opposing a motion for summary judgment (see § 221.29) or summary adjudication (see § 221.30), and with a form of objection (see § 221.34).*]

SUMMARY JUDGMENT IS IMPROPER WHEN THE SUPPORTING _____ [AFFIDAVIT(S) *or* DECLARATION(S)] _____ [DOES *or* DO] NOT AFFIRMATIVELY SHOW THAT THE _____ [AFFIANT *or* DECLARANT] IS COMPETENT TO TESTIFY TO THE MATTERS STATED THEREIN.

Showing of Competency to Testify Required. Summary judgment [or summary adjudication] is improper when the supporting affidavit or declaration does not affirmatively show that the affiant or declarant is competent to testify to the matters stated therein (*Code Civ. Proc. § 437c(d)*; *Dixon v. Grace Lines, Inc. (1972) 27 Cal. App. 3d 278, 290, 103 Cal. Rptr. 595* ; *Fisher v. Cheeseman (1968) 260 Cal. App. 2d 503, 506, 67 Cal. Rptr. 258*).

[2] Comments

[a] Use of Form

These points and authorities should be combined with a general memorandum in opposition to a motion for summary judgment [*see § 221.29*] or summary adjudication [*see § 221.30*], and with a form of objection [*see § 221.34*], when the opposing party claims that the affidavit or declaration of the moving party in support of the motion does not affirmatively show that the affiant or declarant is competent to testify to the matters stated therein [*Code Civ. Proc. § 437c(d)*].

Supporting and opposing affidavits or declarations must show affirmatively that the affiant is competent to testify to the matters stated therein. However, any objections based on the failure to comply with this requirement must be made at

the hearing or will be deemed waived [*Code Civ. Proc. § 437c(d)*; *see also* discussion in *§ 221.22[2][b]*]. Moreover, a summary judgment might properly be granted even when the supporting declaration is not based on personal knowledge if there is other relevant and proper evidence before the court showing that there is no cause of action, or defense to the cause of action, as the case may be [*see Korens v. R.W. Zukin Corp. (1989) 212 Cal. App. 3d 1054, 1062, 261 Cal. Rptr. 137]* .

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Nature of Showing Competence

It should be noted that the affirmative showing required by *Code Civ. Proc. § 437c(d)* may be made without actually reciting the conclusion inthe declaration or affidavit that the maker is competent to testify as to the matters stated in the paper if sworn as a witness. It is sufficient that the declaration set forth facts which show the declarant's competence and firsthand knowledge. Failure to state conclusions as to competence and firsthand knowledge will not render the affidavit or declaration unacceptable even if local rules of court state that it should contain such conclusions [*Roy Brothers Drilling Co. v. Jones (1981) 123 Cal. App. 3d 175, 181-182, 176 Cal. Rptr. 449* ; *see* Los Angeles Co. Super. Ct. Rules, Rule 9.21(c) (declaration as required to state facts showing that facts set forth are within declarant's firsthand knowledge)].

[i] Related Uses

With appropriate modifications, the foregoing points and authorities may be incorporated by the moving party into a supplemental memorandum to object that the opposing affidavits or declarations fail to affirmatively show that the affiant or declarant is competent to testify to the matters stated therein [*Code Civ. Proc. § 437c(b), (d)*; *Apodoca v. Schiffahrtsgesellschaft De Vries & Co. (1962) 199 Cal. App. 2d 605, 607, 18 Cal. Rptr. 869* (opposing affidavits contained only hearsay matters to which affiants would not be competent to testify)]. The moving party would file the supplemental memorandum as a separate paper after receipt of the opposing party's affidavits or declarations, if supplemental memoranda are permitted by local court rules and practice [*see § 221.22*].

[3] Discussion of Authorities

[a] Showing of Competency to Testify Required

The facts and procedural background of ***Dixon v. Grace Lines, Inc.*** *(1972) 27 Cal. App. 3d 278, 103 Cal. Rptr. 595* , are discussed in *§ 221.38[3][d]*. In holding that the declaration in support of defendant's motion for summary judgment was insufficient, the court stated that it did not appear that the declarant, if sworn as a witness, could testify competently to the facts concerning the connection of defendant's ship with the private launch which plaintiff was attempting to board to return to defendant's ship when the injury occurred. Although the declarant was one of the attorneys for defendant, there was no showing that the matters were within his personal knowledge (*27 Cal. App. 3d 278, 290)* .

Fisher v. Cheeseman *(1968) 260 Cal. App. 2d 503, 67 Cal. Rptr. 258* , was an action to recover on a promissory note which plaintiff became holder of after several payments were allegedly in default. Plaintiff's motion for summary judgment was granted, and defendant appealed from the judgment.

The court of appeal reversed judgment for plaintiff. The court held that defendant's opposing affidavit defeated plaintiff's motion by presenting the special defense of novation, in that a corporation had been substituted as the one obligated to pay the note, releasing defendant of his obligation (*260 Cal. App. 2d 503, 506-507)* . In examining plaintiff's supporting affidavits, the court stated the general rule that each affidavit must affirmatively show that the affiant, if sworn as a witness, can testify competently to the matters stated. The affidavit by plaintiff's assignor failed to show that the affiant knew whether or not any payments were made after the assignment. The second supporting

affidavit by the assignor's attorney also failed to show that the affiant was competent to testify that the balance claimed due on the note had not been paid in full after the assignment (*260 Cal. App. 2d 503, 506)* .

[4] Additional Authorities

[a] Showing of Competency to Testify Required

In *Salasguevara v. Wyeth Laboratories, Inc. (1990) 222 Cal. App. 3d 379, 271 Cal. Rptr. 780* , the court of appeal reversed a summary judgment in favor of a laboratory and a physician in an action against them by a minor for injuries incurred following the administration of a vaccine manufactured by the laboratory and administered by the physician. Plaintiff alleged that the laboratory was negligent both in marketing the vaccine and for failing to warn of the vaccine's known dangers, and that the physician was liable for immunizing plaintiff without taking a complete medical history and by failing to warn of the dangers inherent in the vaccine. The defendants' summary judgment motion was based on the fact that plaintiff was precluded from giving required expert testimony in support of his complaint based on his failure to file a designation of expert witnesses for trial and the subsequent denial by the trial court of plaintiff's motion for an extension of time in which to file the designation. The laboratory's motion was supported solely by reference to portions of the deposition of one of the doctors who had treated plaintiff to the effect that he personally didn't think plaintiff's disabilities were related to the vaccine based on his understanding of plaintiff's condition. The physician's motion was not supported by any declarations at all. After pointing out that (1) on a summary judgment motion the burden is on the moving party to make a sufficient showing that the claim is entirely without merit and that if that showing is deficient summary judgment must be denied (*222 Cal. App. 3d 379, 384)* , and (2) medical causation can only be determined by expert medical testimony (*222 Cal. App. 3d 379, 385)* , the court discussed the kind of medical testimony required on the issue of causation (*222 Cal. App. 3d 379, 385)* . The court noted that, prior to the motion, defendant laboratory had designated four expert witnesses, each of whom was highly qualified, to testify concerning liability issues, including causation, and that no declaration from any of them had been submitted in support of the motion (*222 Cal. App. 3d 379, 385-386)* . The court further pointed outthat the deposition excerpts relied on were by a doctor who had been designated not on liability issues, but as one of the treating doctors who was to testify as to plaintiff's condition and present complaints, that the doctor saw the plaintiff for a routine physical examination, that the child was being seen by other doctors for his neurological problems, that declarations from these other doctors had been submitted in support of the motion, and that there was no showing from the excerpts that the deposed doctor had any training, experience, or skill that would qualify him to give an opinion about the vaccine or the causation issues (*222 Cal. App. 3d 379, 386)* . The court further held that, while expert testimony is required to establish negligence in a medical malpractice case, a party need not rely on his or her own designated experts, but may, instead, call as a witness an expert designated by another party who has been deposed (*222 Cal. App. 3d 379, 387)* .

The facts and procedural background of *Bowden v. Robinson (1977) 67 Cal. App. 3d 705, 136 Cal. Rptr. 871* , are discussed in *§ 221.37[3][a]*. In examining defendant's declaration in support of his motion for summary judgment, the court stated that the declarant's legal conclusion concerning the stock issuance was not admissible evidence of which the declarant had personal knowledge, and that there was no affirmative showing that the declarant was competent to testify to the matters stated therein (*67 Cal. App. 3d 705, 720)* .

In *Kramer v. Barnes (1963) 212 Cal. App. 2d 440, 27 Cal. Rptr. 895* , an action for damages for personal injuries sustained in a multiple-car collision, the court of appeal reversed judgment granting defendant summary judgment. In examining the supporting affidavit by one of defendant's passengers, the court noted that it merely stated an opinion that another affidavit by defendant's second passenger was true and correct and, hence, amounted to nothing more than hearsay and conclusion. In testing the first affidavit's sufficiency by the rules applicable to oral testimony, the court stated that it was obvious that the affiant could not competently testify to the matters if she took the stand during trial (*212 Cal. App. 2d 440, 446)* .

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Volume 22 Chapters 220-229 SUBROGATION---to---TRESPASS
CHAPTER 221 SUMMARY JUDGMENTS
PART II. FORMS

22-221 California Points & Authorities § 221.40

§ 221.40 Opposing Motion for Summary Judgment or Summary Adjudication--Supporting Affidavit or Declaration Contains Ultimate Facts and Conclusions

[1] FORM

[*This form should be combined with a general form of memorandum of points and authorities opposing a motion for summary judgment (see § 221.29) or summary adjudication (see § 221.30), and with a form of objection to evidence (see § 221.34).*]

SUMMARY _____ [JUDGMENT *or* ADJUDICATION] IS IMPROPER WHEN A SUPPORTING _____ [AFFIDAVIT *or* DECLARATION] ONLY STATE(S) ULTIMATE FACTS AND CONCLUSIONS.

Evidentiary Facts Required. The supporting affidavits or declarations must state all the requisite evidentiary facts and not merely the ultimate facts. Moreover, neither conclusions of law nor conclusions of fact are sufficient to support summary judgment [or summary adjudication] (*Colby v. Schwartz (1978) 78 Cal. App. 3d 885, 889, 144 Cal. Rptr. 624* ; *Rodes v. Shannon (1961) 194 Cal. App. 2d 743, 748, 15 Cal. Rptr. 349* ; *see Guthrey v. State of California (1998) 63 Cal. App. 4th 1108, 1119-1120, 75 Cal. Rptr. 2d 27*).

[2] Comments

[a] Use of Form

These points and authorities should be combined with a general memorandum in opposition to a motion for summary judgment [*see § 221.29*] or summary adjudication [*see § 221.30*], and with a form of objection [*see § 221.34*], when the opposing party claims that an affidavit or declaration of the moving party in support of the motion contains ultimate instead of evidentiary facts, or merely conclusions of law or fact.

Some local courts require that declarations supporting a motion for summary judgment or summary adjudication set forth statements of fact with particularity and not set forth conclusions, except where a proper foundation for them has been established [*see* Los Angeles Co. Super. Ct. Rules, Rule 9.21(c)].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[i] Related Uses

With appropriate modifications, the foregoing points and authorities may be incorporated by the moving party into a supplemental memorandum to object that the opposing affidavits or declarations contain ultimate facts or conclusions [*see, e.g., Weaver v. Superior Court (1979) 95 Cal. App. 3d 166, 187, 156 Cal. Rptr. 745* ; *Whitney's at the Beach v. Superior Court (1970) 3 Cal. App. 3d 258, 270-271, 83 Cal. Rptr. 237]* . The moving party would file this memorandum as a separate paper after receipt of the opposing party's affidavits or declarations, if supplemental memoranda are permitted by local court rules and practice [*see § 221.22*].

[3] Discussion of Authorities

[a] Evidentiary Facts Required

The facts and procedural background of ***Travelers Casualty & Surety Co. v. Superior Court*** *(1998) 63 Cal. App. 4th 1440, 75 Cal. Rptr. 2d 54* , are discussed in *§ 221.29[4][b]*. In concluding that an expert's declaration that the plaintiff had submitted in opposition to a summary adjudication motion was insufficient, the court noted that expert declarations cannot create a triable question of fact if the expert's opinion is based on factors that are remote, speculative, or conjectural (*63 Cal. App. 4th 1440, 1462)* .

Guthrey v. State of California *(1998) 63 Cal. App. 4th 1108, 1120, 75 Cal. Rptr. 2d 27* , involved an employment discrimination case. The trial court granted defendants motion for summary judgment finding that plaintiff failed to present any admissible evidence to dispute defendants' referenced facts and plaintiff appealed.

The court of appeal affirmed. The court noted that a motion for summary judgment must be decided on admissible evidence in the form of affidavits, declarations, admissions, answers to interrogatories, depositions and matters of which judicial notice can be taken (*63 Cal. App. 4th 1108, 1119-1120)* . Quoting from *Hayman v. Block (1986) 176 Cal. App. 3d 629, 638, 222 Cal. Rptr. 293* , the court further noted that personal knowledge and competency must be shown in the supporting and opposing affidavits and declarations, and that the affidavits (and declarations) must cite evidentiary facts, not ultimate facts or legal conclusions (*63 Cal. App. 4th 1108, 1120)* . The evidence offered in the trial court to support plaintiff's gender discrimination contention had included plaintiff's declaration and the declarations of other employees who had worked under plaintiff's supervisor. These declarations were objected to and the objections were sustained. The court concluded that the declarations of the other employees were properly excluded since they were purely conclusional and based on opinion, not facts (*63 Cal. App. 4th 1108, 1119)* . Similarly, plaintiff's declaration was objectionable because it was based on opinion and conclusions instead of evidentiary fact (*63 Cal. App. 4th 1108, 1120)* .

Colby v. Schwartz *(1978) 78 Cal. App. 3d 885, 144 Cal. Rptr. 624* , was an action for damages allegedly resulting from defendant doctors' negligent diagnosis, care for, and treatment of plaintiff's decedent following an automobile accident. Three defendants successfully moved for summary judgment based on good samaritan legislation. Plaintiff appealed from the order dismissing two defendants from the action after granting their motions for summary judgment.

The court of appeal reversed the order dismissing defendants. The court held that the good samaritan legislation is not applicable when physicians are rendering emergency medical care as part of their normal course of practice. The court also held that summary judgment was improper because the question of whether defendants fulfilled their duty of care to the decedent remained a material triable issue of fact, particularly as to the timeliness of diagnosis and remedial steps taken. It stated that defendants' supporting declarations were deficient in that they contained, in part, only conclusions

by merely asserting without supportive factual allegations that defendants met the standard of care required of them (*78 Cal. App. 3d 885, 889)* .

Rodes v. Shannon *(1961) 194 Cal. App. 2d 743, 15 Cal. Rptr. 349* , was an action by a purchaser for specific performance of a contract to convey real property. Plaintiff moved for summary judgment, and defendant opposed the motion on the ground that plaintiff failed to allege facts showing that the contract was fair, the consideration adequate, and that it would be inequitable to enforce it. Plaintiff filed a second supporting affidavit in which she asserted that the consideration was full, adequate, fair, just, and equitable under the circumstances. The motion was granted, and defendant appealed from the judgment.

The court of appeal reversed judgment for plaintiff. The court held that the defect in the pleading did not preclude the granting of a motion for summary judgment if the supporting affidavits were factually sufficient. The court stated that a moving party's affidavits or declarations must state facts establishing every element necessary to sustain a judgment in his or her favor. Thus, the movant's affidavits or declarations must state all the requisite evidentiary facts and not merely the ultimate facts, and neither conclusions of law nor conclusions of fact are sufficient to satisfy the required showing. The court held that plaintiff's affidavit which merely repeated the general allegations of the pleading was insufficient, and that it did not allege evidentiary facts (*194 Cal. App. 2d 743, 748-749)* .

[4] Additional Authorities

[a] Evidentiary Facts Required

Johnson v. Superior Court (2006) 143 Cal. App. 4th 297, 49 Cal. Rptr. 3d 52 was a medical malpractice action arising from allegedly negligent treatment for prostate cancer. Plaintiff alleged that defendants implanted an excessive amount of radioactive material in him, resulting in damage to surrounding tissues and organs. Defendants filed a motion for summary judgment, alleging their treatment was within the standard of care. The court granted defendants' motion, and after the court denied plaintiff's motion for reconsideration, plaintiff appealed. The court of appeals reversed, holding that defendants did not meet their burden of presenting evidence that would preclude a reasonable trier of fact from finding it was more likely than not that their treatment fell below the standard of care. The expert declaration relied on by defendants was inadequate in containing merely two conclusory statements: a statement that the treatment plan for plaintiff was within the standard of care and a statement that an evaluation done nearly six months after the radiation was implanted showed the treatment had been adequate. The declaration, therefore, only stated that what was planned before the operation and what was done at the time the radiation was implanted was within the standard of care. The declaration failed to set forth a standard for a proper dosage of the radiation or explain why the radiation implanted deviated from the treatment plan. All the declaration stated was that what was done was within the standard of care, without explaining how the amount of radiation implanted is normally determined. Therefore, the declaration was insufficient to establish the nonexistence of a triable issue of material fact (*143 Cal. App. 4th 297, 308)* .

The facts and procedural background of *Benavidez v. San Jose Police Dept. (1999) 71 Cal. App. 4th 853, 84 Cal. Rptr. 2d 157* , are discussed in *§ 221.20[3][e]*. The trial court granted summary judgment in favor of defendants. In affirming the judgment, the court of appeal noted that the ultimate issue, whether the police owed a duty to the plaintiffs, is a question of law for the trial court. Courts have been highly critical and must be cautious when an expert offers legal conclusions as to ultimate facts in the guise of an expert opinion. Accordingly, to the extent a retired field training police officer's declaration submitted by the plaintiff in opposition to the motion draws legal conclusions, the court rejected the declaration (*71 Cal. App. 4th 853, 864-865)* .

See also *Bryant v. Bakshandeh (1991) 226 Cal. App. 3d 1241, 1245, 277 Cal. Rptr. 379* , discussed in *§ 221.35[4][a]*.

Pacific Architects Collaborative v. State of California (1979) 100 Cal. App. 3d 110, 166 Cal. Rptr. 184 , was an action to recover expenses incurred in preparing mobile trailers pursuant to a bid solicitation by a state agency. The trial court

granted defendant's motions for judgment on the pleadings and summary judgment. In affirming the judgment, the court of appeal held that governmental immunity precluded the imposition of any liability based on a tort theory, and that there was no implied promise to award the contract to the lowest bidder so as to support a cause of action on a promissory estoppel theory. In reviewing the law applicable to summary judgments, the court stated the general rule that the movant's affidavits or declarations must state all of the requisite evidentiary facts and not merely the ultimate facts. Moreover, neither conclusions of law nor conclusions of fact are sufficient to satisfy the statutory requirements (*100 Cal. App. 3d 110, 119-120)* .

In *Fuller v. Goodyear Tire & Rubber Co. (1970) 7 Cal. App. 3d 690, 86 Cal. Rptr. 705* , an action for personal injury based on negligent and careless manufacture, assembly, and inspection and on improper design of a tire, the court of appeal reversed the grant of summary judgment for defendant. The court held that defendant's supporting declarations by two expert witnesses were insufficient because they did not negate defective design as a basis for negligence or strict liability. Further, the court found a more fundamental deficiency in defendant's declarations in that they both relied for their effect on conclusions and opinions. The court stated the general rule that affidavits or declarations which set forth only conclusions, opinions, or ultimate facts are insufficient. It explained that the sufficiency of an affidavit or declaration is to be tested by whether the affiant or declarant could be charged with perjury if any of the material allegations proved false. An affidavit or declaration stating opinions and conclusions would not come within this rule (*7 Cal. App. 3d 690, 693)* .

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CHAPTER 221 SUMMARY JUDGMENTS
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22-221 California Points & Authorities § 221.41

§ 221.41 Opposing Motion for Summary Judgment or Summary Adjudication--Supporting Affidavit or Declaration of Sole Witness as Only Proof of Material Fact [Code Civ. Proc. § 437c(e)]

[1] FORM

[*This form should be combined with a general form of memorandum of points and authorities opposing a motion for summary judgment (see § 221.29) or summary adjudication (see § 221.30).*]

SUMMARY _____ [JUDGMENT *or* ADJUDICATION] IS IMPROPER WHEN THE ONLY PROOF OF A MATERIAL FACT OFFERED IN SUPPORT OF THE SUMMARY JUDGMENT IS A[N] _____ [AFFIDAVIT *or* DECLARATION] MADE BY THE SOLE WITNESS TO SUCH FACT.

Sole Witness to Material Fact. If a party is otherwise entitled to a summary judgment [or summary adjudication], it must not be denied on grounds of credibility or for want of cross examination of witnesses furnishing affidavits or declarations in support of the motion, except that summary judgment [or summaryadjudication] may be denied in the discretion of the court when the only proof of a material fact offered in support of the motion is an affidavit or declaration made by an individual who was the sole witness to the fact (*Code Civ. Proc. § 437c(e)*; *Times Mirror Co. v. Superior Court (1988) 198 Cal. App. 3d 1420, 1430, 244 Cal. Rptr. 556*).

[2] Comments

[a] Use of Form

These points and authorities should be combined with a general memorandum in opposition to a motion for summary judgment [*see § 221.29*] or summary adjudication [*see § 221.30*] when the opposing party claims that the only proof of a material fact offered in support of the motion is an affidavit or declaration made by an individual who was the sole witness to the fact [*Code Civ. Proc. § 437c(e)*]. Although present case law has not yet construed the phrase "sole witness," if it is construed to mean the only available witness, then *Evid. Code § 240* would apply to determine when other witnesses to the facts in question are unavailable.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law

stated.

[3] Discussion of Authorities

[a] Sole Witness to Material Fact

In *Times Mirror Co. v. Superior Court (1988) 198 Cal. App. 3d 1420, 244 Cal. Rptr. 556* , a witness to a murder brought an invasion-of-privacy action against a newspaper for publishing her name in the early stages of the criminal investigation, after efforts had been made by her and on her behalf to protect her identity.

The court of appeal affirmed the trial court's denial of the defendant's motion for summary judgment, holding, inter alia, that *Code Civ. Proc. § 437c(e)* authorizes the court to deny summary judgment when there is only one witness to a material fact, and noting that the only witness regarding the source of the plaintiff's identity was the reporter (*198 Cal. App. 3d 1420, 1430)* .

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22-221 California Points & Authorities § 221.42

§ 221.42 Opposing Motion for Summary Judgment or Summary Adjudication--State of Mind Established Solely by Individual's Affirmation [Code Civ. Proc. § 437c(e)]

[1] FORM

[*This form should be combined with a general form of memorandum of points and authorities opposing a motion for summary judgment (see § 221.29) or summary adjudication (see § 221.30).*]

SUMMARY _____ [JUDGMENT *or* ADJUDICATION] IS IMPROPER WHEN AN INDIVIDUAL'S [LACK OF A] STATE OF MIND IS A MATERIAL FACT WHICH IS SOUGHT TO BE ESTABLISHED SOLELY BY THE INDIVIDUAL'S AFFIRMATION OF IT.

Sole Evidence of Individual's State of Mind. If a party is otherwise entitled to a summary judgment [or summary adjudication], it must not be denied on grounds of credibility or for want of cross examination of witnesses furnishing affidavits or declarations in support of the motion, except that summary judgment [or summary adjudication] may be denied, in the discretion of the court, when a material fact is an individual's state of mind, or lack thereof, and such fact is sought to be established solely by the individual's affirmation of it (*Code Civ. Proc. § 437c(e)*).

[2] Comments

[a] Use of Form

These points and authorities should be combined with a general memorandum in opposition to a motion for summary judgment [*see § 221.29*] or summary adjudication [*see § 221.30*] when the opposing party claims that an individual's state of mind, or lack thereof, is a material fact which is sought to be established solely by the individual's affirmation of it [*Code Civ. Proc. § 437c(e)*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

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22-221 California Points & Authorities § 221.43

§ 221.43 Opposing Motion for Summary Judgment or Summary Adjudication--Facts Essential to Opposition Currently Unavailable [Code Civ. Proc. § 437c(h)]

[1] FORM

[*This form should be combined with a general form of memorandum of points and authorities opposing a motion for summary judgment (see § 221.29) or summary adjudication (see § 221.30).*]

SUMMARY _____ [JUDGMENT *or* ADJUDICATION] IS IMPROPER WHEN FACTS ESSENTIAL TO JUSTIFY OPPOSITION MAY EXIST BUT CANNOT BE PRESENTED AT THE TIME OF THE MOTION.

A. Unavailability of Opposing Facts. If it appears from the affidavits or declarations submitted in opposition to a motion for summary judgment [or summary adjudication] that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had, or may make such other order as may be just (*Code Civ. Proc. § 437c(h)*). The use of the words "may" and "shall" in subdivision (h) leaves little room for doubt that continuances are to be liberally granted. Indeed, an opposing party can compel continuance of a summary judgment motion by making a declaration meeting the requirements of *Code of Civil Procedure section 437c(h)* (*Bahl v. Bank of America (2001) 89 Cal. App. 4th 389, 395, 107 Cal. Rptr. 2d 270*). *Code Civ. Proc. § 437c* provides that if, after granting a continuance to allowed specified additional discovery, the courtdetermines that the party seeking summary judgment has unreasonably failed to allow the discovery to be conducted, the court shall grant a continuance to permit the discovery to go forward or deny the motion for summary judgment or summary adjudication [*Code Civ. Proc. § 437c(i)*].

[*Optional*] **B. Continuance to Depose Expert Who Has Supplied Declaration Concerning Foundation of Opinion.** Under proper circumstances, although there has been no exchange of experts pursuant to Code of Civil Procedure Section 2034 (*Code Civ. Proc. § 2034.210 et seq.* operative July 1, 2005), a continuance may be granted to permit a party to depose an expert who supplies a declaration *or* affidavit in support of _____ [summary judgment *or* summary adjudication] when there is a legitimate question regarding the foundation of the expert's opinion (*see St. Mary Medical Center v. Superior Court (1997) 50 Cal. App. 4th 1531, 1539-1540, 58 Cal. Rptr. 2d 182*).

[*Optional*] **C. Lack of Diligence Alone Does Not Preclude Continuance.** Although the court may deny the continuance when lack of diligence results in the party having insufficient information to know if facts essential to opposition may exist, which renders the party unable to provide the affidavit required under *Code of Civil Procedure section 437c(h)*, the court's discretion to deny a continuance is strictly limited when a party submits an affidavit demonstrating that facts essential to justify opposition exist, but have not been presented to the court because the party has not been diligent in search for the facts through discovery. The strong policy favoring disposition of cases on the merits outweighs the competing policy favoring judicial efficiency (*Bahl v. Bank of America (2001) 89 Cal. App. 4th 389, 398, 107 Cal. Rptr. 2d 270*).

[2] Comments

[a] Use of Form

These points and authorities should be combined with a general memorandum in opposition to a motion for summary judgment [*see § 221.29*] or summary adjudication [*see § 221.30*] when the opposing party claims that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented [*Code Civ. Proc. § 437c(h)*].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. For example, counsel should indicate to the court what additional evidence he or she expects to discover if a continuance were granted [*see Vanderbilt Growth Fund, Inc. v. Superior Court (1980) 105 Cal. App. 3d 628, 638, 164 Cal. Rptr. 621]* . The relevancy of the facts sought should be shown to demonstrate that they are essential to justify opposition [*see Evid. Code § 210* (relevant evidence defined); *Pacific Architects Collaborative v. State of California (1979) 100 Cal. App. 3d 110, 126-127, 166 Cal. Rptr. 184* ; *Coast-United Advertising, Inc. v. Long Beach (1975) 51 Cal. App. 3d 766, 772-773, 124 Cal. Rptr. 487]* . Additionally, counsel should show that he or she has diligently used the discovery procedures or other available means to obtain the facts essential to opposition [*see James Talcott, Inc. v. Short (1979) 100 Cal. App. 3d 504, 509-510, 161 Cal. Rptr. 63* (failure to seek access to business records or to obtain limited use immunity); *Wiler v. Firestone Tire & Rubber Co. (1979) 95 Cal. App. 3d 621, 628, 157 Cal. Rptr. 248]* . Local court rules may require that a request for a continuance or denial be supported by an affidavit or declaration stating the reasons that the opposing evidence cannot then be presented, an estimate of the time required, and the procedures necessary to obtain such evidence [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rule 9.21(g)].

The party claiming lack of access to facts essential to justify opposition may request the court to deny the motion for summary judgment or summary adjudication of an issue, to order a continuance to permit affidavits or declarations to be obtained or discovery to be had, or to make such other order as may be just [*Code Civ. Proc. § 437c(h)*]. It should be noted that the discretionary power of the court to "make such other order as may be just" includes the power to grant a motion for summary judgment conditionally, unless the opposing party can demonstrate within a specified period of time that a triable issue exists concerning the matters in question [*see, e.g., Mamola v. California ex rel. Dep't of Transp. (1979) 94 Cal. App. 3d 781, 784-785, 156 Cal. Rptr. 614]* .

Code Civ. Proc. § 437c(h) does not compel the court to grant a continuance to allow the opposing party to bring its papers into conformity with format requirements when the party does not present the affidavits that the time is needed to obtain new facts. Whether to grant a continuance in this situation remains in the court's discretion [*Lucas v. George T. R. Murai Farms, Inc. (1993) 15 Cal. App. 4th 1578, 1586, 19 Cal. Rptr. 2d 436* (denial of continuance is not abuse of discretion when motion was made at hearing seven weeks after reply papers raised format issue)].

[b] Related Pleading and Practice Forms

For discussion and forms for use in formally moving for a continuance under Code Civ. Proc. § 594a, see Ch. 136, *Continuances* , in California Forms of Pleading and Practice (Matthew Bender).

[3] Discussion of Authorities

[a] Unavailability of Opposing Facts

In ***Bahl v. Bank of America*** *(2001) 89 Cal. App. 4th 389, 107 Cal. Rptr. 2d 270* , an action against a bank on multiple causes of action arising out of the termination of plaintiff's employment, the plaintiff requested a continuance because discovery was still ongoing; for example, transcripts of depositions essential to justify opposition had not yet been received from the court reporter, and the defendant produced over 600 pages of documentation after the plaintiff filed her opposition to the motion. The court denied the requests for a continuance and granted the defendant's motion for summary judgment.

Reversing, the court of appeal held that the plaintiff submitted sufficient affidavits in connection with both her initial request for a continuance and her subsequent requests. The court noted that the drafter's inclusion of the words "may" and "shall" in the statute left little room for doubt that the continuances are to be liberally granted and that the opposing party may compel a continuance by making a declaration that meets the requirements of *Code Civ. Proc. § 437c(h)* (*89 Cal. App. 4th 389, 395)* . The court proceeded to find that the plaintiff's affidavits were sufficient to support a continuance. At the time of the plaintiff's initial request for a continuance, her counsel declared that a witness had testified in conflict with statements made in the declarations supporting defendant's motion. Counsel also informed the court that he would not be receiving copies of the witness' deposition transcript for another week. In addition, counsel indicated he had noticed the deposition of witness who was the most knowledgeable as to certain facts and that witness still had to be deposed. Both witnesses were declarants in support of defendant's motion, and the court said that it was hard-pressed to imagine evidence more "essential to justify opposition" than that which might undermine the weight or credibility of declarations made in support of a motion for summary judgment (*89 Cal. App. 4th 389, 395-396)* . Moreover, plaintiff had demanded production of certain documents but did not receive the hundreds of pages of documents from defendant until after having filed her initial opposition and request for continuance. The court stated that plaintiff was entitled to a meaningful opportunity to review and evaluate those documents (*89 Cal. App. 4th 389, 396)* .

The court then pointed out that the trial court had denied the continuance requests in part because it felt that the plaintiff had been dilatory in conducting discovery (the case was roughly 18 months old when the court denied the continuance). The court recognized that when lack of diligence results in a party's having insufficient information to know if facts essential to justify opposition may exist, and the party is therefore unable to provide the requisite affidavit under *Code Civ. Proc. § 437c(h)*, the trial judge may deny the request for continuance of the motion. However, when a party submits an affidavit demonstrating that facts essential to justify opposition exist, but have not been presented to the court because the party has not been diligent in search for the facts through discovery, the court's discretion is strictly limited (*89 Cal. App. 4th 389, 397-398)* . The court recognized that the trial judge is confronted with opposing responsibilities when a continuance of a summary judgment motion hearing is requested. These are the policy of the Trial Court Delay Reduction Act (*Gov. Code § 68600 et seq.*) requiring the judge to actively assume and maintain control of the pace of the litigation, and the guiding principle of deciding cases on the merits rather than on procedural deficiencies. When these policies collide head-on, the court held that the strong public policy favoring disposition on the merits outweighs the competing policy favoring judicial efficiency (*89 Cal. App. 4th 389, 398)* . In this case, the court held that the denial of plaintiff's request for a continuance abused the court's limited discretion where the plaintiff's affidavit informed the court of outstanding discovery matters and why essential facts could not be presented at the time, the defendant did not suggest that it suffered any prejudice on account of the plaintiff's due diligence deficit, and the parties had provided no indication that there was a special reason to protect the trial date (*89 Cal. App. 4th 389, 399)* .

[b] Continuance to Depose Expert Who Has Supplied Declaration Concerning Foundation of Opinion

St. Mary Medical Center v. Superior Court *(1997) 50 Cal. App. 4th 1531, 58 Cal. Rptr. 2d 182* , involved a medical

malpractice action. After answering the complaint, the defendants filed a motion for summary judgment. No trial date had yet been set. The defendants raised the issue of the statute of limitations, and also asserted that none of them were negligent in the care and treatment of the plaintiffs. In opposition to the motion, the plaintiffs relied on the declaration of their expert, a board certified internist, to establish triable issues of fact relating to the defendants' negligence. The defendants noticed the deposition of the plaintiffs' expert, and at the same time took their motion for summary judgment off calendar. The plaintiffs' counsel instructed the expert not to appear for the deposition, and explained to the defendants' counsel that the expert was a retained expert, and therefore the terms of Code Civ. Proc. § 2034 applied and that until there had been an exchange of experts, the deposition of the expert was premature (*50 Cal. App. 4th 1531, 1535)* . The defendants moved to compel the deposition of the expert. The trial court denied the motion, and defendants filed a petition for writ of mandate seeking to have the trial court's order reversed.

The court of appeal issued a writ of mandate ordering the trial court to set aside the order denying the deposition of the plaintiffs' expert doctorand enter a different order granting the motion with the deposition to be limited to foundational issues relating to the opinions rendered by the doctor in the doctor's declaration in opposition to the motion for summary judgment (*50 Cal. App. 4th 1531, 1541)* . The court of appeal noted that it believed that in proper circumstances, the court should allow a party to a summary proceeding the opportunity to take limited discovery which may effectively dispose of the proceeding (*50 Cal. App. 4th 1531, 1538-1539)* . The court pointed out that *Code Civ. Proc. § 437c(h)* contemplates that the party opposing a motion for summary judgment or summary adjudication may request a continuance for purposes of discovery. On the other hand, *Code Civ. Proc. § 437c(h)* has no comparable provision for the moving party. The moving party, however, controls when the motion is brought, and except for expert witnesses, will have had a chance to depose the necessary witnesses prior to noticing the motion. This obviously cannot be the situation when one or more witnesses to the action will be experts, and there has not as of yet been a designation called for under Code Civ. Proc. § 2034 (*Code Civ. Proc. § 2034.210 et seq.* operative July 1, 2005) (*50 Cal. App. 4th 1531, 1539)* . Here there has been a form of designation of experts, those identified in the motion for summary judgment and the opposition. While it is true that motions for summary judgment are to be heard on affidavits or declarations, contradictions raised by discovery may require the trial court to disregard the declarations or affidavits. This applies equally to party and nonparty deponents. Thus, under proper circumstances, although there has been no exchange of experts pursuant to Code Civ. Proc. § 2034 (*Code Civ. Proc. § 2034.210 et seq.* operative July 1, 2005), the parties should be allowed to depose an expert who supplies a declaration or affidavit in support of or in opposition to summary judgment or summary adjudication when there is a legitimate question regarding the foundation of the expert's opinion (*50 Cal. App. 4th 1531, 1540)* . Whether to grant discovery in a given case falls within the trial court's sound discretion based on all the facts presented. There must be objective facts presented that create a significant question regarding the validity of the affidavit or declaration which, if successfully pursued, will impeach the foundational basis of the affidavit or declaration in question (*50 Cal. App. 4th 1531, 1540-1541)* .

[c] Lack of Diligence Alone Does Not Preclude Continuance

Bahl v. Bank of America *(2001) 89 Cal. App. 4th 389, 107 Cal. Rptr. 2d 270* , is *discussed under § 221.43[3][a]*.

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22-221 California Points & Authorities § 221.44

§ 221.44 Opposing Motion for Summary Judgment or Summary Adjudication--Inadequacy or Lack of Statement of Undisputed Material Facts [Code Civ. Proc. § 437c(b)]

[1] FORM

[*This form should be combined with a general form of memorandum of points and authorities opposing a motion for summary judgment (see § 221.29) or summary adjudication (see § 221.30). When appropriate, it may also be combined with a form of objection to evidence contained in the moving party's papers (see § 221.34).*]

_____ [*Specify moving party, e.g.,* PLAINTIFF'S *or* DEFENDANT'S] MOTION FOR SUMMARY _____ [JUDGMENT *or* ADJUDICATION OF AN ISSUE] SHOULD BE DENIED BECAUSE _____ [*specify moving party, e.g.,* PLAINTIFF *or* DEFENDANT] HAS _____ [SUBMITTED AN INADEQUATE *or* NOT SUBMITTED A] SEPARATE STATEMENT SETTING FORTH MATERIAL FACTS THAT _____ [*specify moving party, e.g.,* PLAINTIFF *or* DEFENDANT] CONTENDS ARE UNDISPUTED.

Inadequacy or Lack of Statement of Undisputed Material Facts. The papers supporting a motion for summary judgment or summary adjudication must include a separate statement setting forth plainly and concisely all material facts that the moving party contends are undisputed. Each of the material facts stated must be followed by a reference to the supporting evidence. Failure to comply with this requirement of a separate statement may in the court's discretion constitute a sufficient ground for denial of the motion (*Code Civ. Proc. § 437c(b)(1)*; *see also Zimmerman v. Larson (2005) 131 Cal. App. 4th 1466, 1475, 33 Cal. Rptr. 3d 111*).

[2] Comments

[a] Use of Form

These points and authorities should be combined with a general memorandum in opposition to a motion for summary judgment [*see § 221.29*] or summary adjudication of an issue [*see § 221.30*], and, when appropriate, with a form of objection to evidence [*see § 221.34*], when the opposing party claims that the moving party has submitted an inadequate, or failed to submit a separate, statement of material facts that the moving party contends are undisputed [*see*

Code Civ. Proc. § 437c(b)].

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counselshould show that the moving party (1) has not plainly and concisely set forth the material facts contended to be undisputed, (2) has not referred to supporting evidence for each material fact contended to be undisputed, or (3) has failed completely to include a separate statement of undisputed facts.

[3] Discussion of Authorities

[a] Inadequacy of Lack of Statement of Undisputed Material Facts

In *Zimmerman v. Larson (2005) 131 Cal. App. 4th 1466, 33 Cal. Rptr. 3d 111* , a law firm sued its former client, Larson, for payment of fees incurred when the firm represented Larson in a divorce action. During the course of the divorce proceedings, Larson had filed for bankruptcy protection under Chapter 11. The trial court granted summary judgment in favor of Larson on the ground that the firm had failed to file a statement of compensation paid or agreed to be paid with the bankruptcy court as required by bankruptcy laws and, furthermore, that the firm failed to see a review of the reasonableness of its fees from the bankruptcy court. The law firm appealed. (*131 Cal. App. 4th 1466, 1469, 1474-1475)* .

The court of appeals disagreed with the trial court's ruling, stating that Larson did not present sufficient evidence to establish that the firm was required to comply with the bankruptcy statute at issue. However, the court affirmed summary judgment in favor of Larson on other grounds. In its opinion, the court discussed the separate statement requirement, noting that the language of *Code Civ. Proc. § 437c(b)* is discretionary in that it states a failure to comply with the separate statement requirement "may in the court's discretion constitute a sufficient ground for denial of the motion" (*Code Civ. Proc. § 437c(b)(1)*). This discretionary language has led appellate courts to hold that trial courts may consider evidence not referenced in a moving party's separate statement (*see, e.g.,* *San Diego Watercrafts, Inc. v. Wells Fargo Bank (2002) 102 Cal. App. 4th 308, 125 Cal. Rptr. 2d 499*). The court agreed with prior courts that trial courts have discretion to overlook procedural errors in moving and opposition papers, but only if the evidence presented warrants it. In this particular case, the court stated, the decision to overlook "glaring omissions and concessions" was not warranted (*131 Cal. App. 4th 1466, 1478)* . For example, Larson's contention was that the law firm's representation was in connection with the bankruptcy within the meaning of a particular bankruptcy statute. Larson made no effort to support this contention until his reply brief. No facts in support of the contention appeared in the separate statement. Although the trial court was permitted to look beyond the separate statement at the exhibits and other evidence, the evidence did not support Larson's contention. Because Larson failed to meet his burden of proving the legal work was in connection with the bankruptcy, the trial court should not have granted summary judgment on that ground (*131 Cal. App. 4th 1466, 1485*). The court of appeals affirmed the grant of summary judgment on two independent grounds (*131 Cal. App. 4th 1466, 1469)* .

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22-221 California Points & Authorities § 221.45

§ 221.45 Opposing Motion for Summary Judgment or Summary Adjudication--Failure to Meet Clear and Convincing Burden of Proof [Code Civ. Proc. § 437c(p)]

[1] FORM

[*This form should be combined with a general form of memorandum of points and authorities opposing a motion for summary judgment (see § 221.29) or summary adjudication (see § 221.30).*]

THE EVIDENCE AND INFERENCES REASONABLY DRAWN FROM THEM CONTAINED IN THE PAPERS SUPPORTING THE MOTION FOR SUMMARY _____ [JUDGMENT *or* ADJUDICATION] FAIL TO MEET THE CLEAR AND CONVINCING STANDARD PROOF REQUIRED FOR PLAINTIFF'S CLAIM IN THIS CASE.

A. Claim as Carrying a Clear and Convincing Burden of Proof. The standard of proof contained in _____ [*specify, e.g., Code of Civil Procedure Section 425.14*, allowing the filing of an amended pleading claiming punitive damages under *Civil Code Section 3294*] is clear and convincing proof.

B. Evidence and Inferences Reasonably Drawn Fail to Meet Standard. When a motion for summary judgment is made in a case in which the plaintiff's claim carries a clear and convincing burden of proof, the evidence and all inferences reasonably drawn them must meet that higher standard (*Rowe v. Superior Court (1993) 15 Cal. App. 4th 1711, 1724, 19 Cal. Rptr. 2d 625*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted by any party to oppose a motion for summary judgment or summary adjudication [*see §§ 221.29, 221.30*] in an action in which the plaintiff's claim carries a clear and convincing burden of proof [*see Code Civ. Proc. § 437c(p)*; *see, e.g., Code Civ. Proc. § 425.14*].

Counsel should insert the argument into the form showing the relationship between facts of the case and the points of law stated, including argument showing how the evidence or the inferences reasonably drawn from them, or both, fail to meet the higher standard of proof.

[b] Related Points and Authorities

For points and authorities in opposition to motions for summary judgment or summary adjudication relating to particular causes of actions and grounds, see the specific, substantive chapters in this set.

[3] Discussion of Authorities

[a] Evidence and Inferences Reasonably Drawn Fail to Meet Standard

In ***Rowe v. Superior Court*** *(1993) 15 Cal. App. 4th 1711, 19 Cal. Rptr. 2d 625* , plaintiff sought amend its complaint to assert a claim for punitive damages against a religious organization pursuant to *Code Civ. Proc. § 425.14*. The pre-pleading burden of proof set out in the statute is clear and convincing evidence. The trial court misapplied the overly stringent standard for weighing plaintiff's evidence and denied the motion to amend.

The court of appeal issued a peremptory writ of mandate vacating the order denying the motion to amend. In holding that the heightened standard did not impair the right to a jury trial, the court analogized the burden to that imposed on a plaintiff who responds to a summary judgment under *Rule 56 of the Federal Rules of Civil Procedure*, which has been upheld against claims that it violated the federal right to a jury trial. The court adopted the analysis of *Anderson v. Liberty Lobby, Inc. (1986) 477 U.S. 242, 254-255, 106 S. Ct. 2505, 2513, 91 L. Ed. 2d 202, 216* , which stated, "in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden." Thus, when a motion for summary judgment is made in a case in which the plaintiff's claim carries a clear and convincing burden of proof, the evidence and all inferences reasonably drawn them must meet that higher standard (*15 Cal. App. 4th 1711, 1724)* .

[4] Additional Authorities

[a] Evidence and Inferences Reasonably Drawn Fail to Meet Standard

In *Reader's Digest Assn. v. Superior Court (1984) 37 Cal. 3d 244, 208 Cal. Rptr. 137, 690 P.2d 610* , a church (The Synanon Church) and its founder filed an action for libel against a magazine publication and one of its reporters. Defendants moved for summary judgment, which the trial court denied. In granting defendants' writ of mandate, the court of appeal confirmed the standard of review in a summary judgment in a *First Amendment* action. Since a jury verdict in a defamation case can only be supported when actual malice is shown by clear and convincing evidence, rather than by a preponderance of evidence as in most cases, the evidence and all the inferences that can reasonably be drawn from it must meet the higher standard in a summary judgment motion (*37 Cal. 3d 244, 252)* .

[b] Clear and Convincing Standard in Summary Adjudication of Punitive Damages Claim

In *Basich v. Allstate Ins. Co. (2001) 87 Cal. App. 4th 1112, 1118, 105 Cal. Rptr. 2d 153* , involving an insured's action for breach of the implied covenant of good faith and fair dealing, judgment for nonsuit was entered in the insurer's favor on the ground that the insured had failed to file the action within the applicable limitation period, the insurer's motion

for summary adjudication on the issues of punitive damages was granted, and the insured appealed.

The court of appeal affirmed the judgment insofar as it granted the motion for summary adjudication, and reversed the judgment as to nonsuit on other grounds (*87 Cal. App. 4th 1112, 1115)* . With regard to summary adjudication, the insured argued that the trial court improperly evaluated the evidence he submitted to rebut the insured's showing that the handling of the claim was not malicious, oppressive, or fraudulent by the clear-and-convincing standard applicable at trial. The court rejected that contention, and held that if, in fact, the trial court viewed the evidence submitted by the insured in opposition to the motion for summary adjudication with the clear-and-convincing standard in mind, it did so properly (*87 Cal. App. 4th 1112, 1118)* . The court reasoned that the holding in *Reader's Digest Assn. v. Superior Court (1984) 37 Cal. 3d 244, 208 Cal. Rptr. 137, 690 P.2d 610* , should not be limited to public figure defamation cases, but should be applied to any summary judgment [or summary adjudication] motion involving a claim that must be proved by clear and convincing evidence, including a claim for punitive damages. The court concluded that if the plaintiff is going to prevail on a punitive damage claim, he or she can only do so by establishing malice, oppression, or fraud by clear and convincingevidence and thus, any evidence submitted in response to a motion for summary adjudication must necessarily meet that standard (*87 Cal. App. 4th 1112, 1119-1121)* .

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22-221 California Points & Authorities § 221.46

§ 221.46 Supporting or Opposing Motion for Summary Judgment or Summary Adjudication--Request That Court Take Judicial Notice [Code Civ. Proc. § 437c(b)]

[1] FORM

[*This form should be combined with a general form of memorandum of points and authorities supporting (see § 221.20) or opposing (see § 221.29) a motion for summary judgment or supporting (see § 221.21) or opposing (see § 221.30) a motion for summary adjudication.*]

A MOTION FOR SUMMARY _____ [JUDGMENT *or* ADJUDICATION] MAY BE _____ [SUPPORTED *or* OPPOSED] BY MATTERS OF WHICH JUDICIAL NOTICE _____ [MAY *and/or* MUST] BE TAKEN.

A. Use of Judicially Noticed Matters. A motion for summary judgment [or summary adjudication] may be supported or opposed by matters of which judicial notice must or may be taken (*Code Civ. Proc. § 437c(b)*; *see Parker v. Twentieth Century-Fox Film Corp. (1970) 3 Cal. 3d 176, 181, 89 Cal. Rptr. 737, 474 P.2d 689* ; *Stevens v. Cessna Aircraft Co. (1981) 115 Cal. App. 3d 431, 434, 170 Cal. Rptr. 925*).

[*EITHER*]

B. Matters Subject to Mandatory Judicial Notice. The court must take judicial notice of the matters specified in *Section 451 of the Evidence Code* (*Evid. Code §§ 11, 451*).

[*AND/OR*]

C. Matters Subject to Permissive Judicial Notice. The court may take judicial notice, to the extent that they are not embraced within *Section 451 of the Evidence Code* relating to mandatory judicial notice, of the matters specified in *Section 452 of the Evidence Code* (*Evid. Code §§ 11, 452*).

[*AND/OR*]

D. Matters Subject to Permissive Judicial Notice Conditionally Mandatory on Request. A trial court is, on proper request that it do so, required to take judicial notice of the matters specified in *Section 452 of the Evidence Code* (*Evid. Code §§ 11, 453*).

E. Request That Court Take Judicial Notice. The court is hereby requested to take judicial notice of _____ [*specify, e.g., Sections 91.3, 91.5*, and 91.31 of Title 14 of the Code of Federal Regulations], which may be taken under _____ [*specify, e.g., Section 452(b) of the Evidence Code*]. A copy of _____ [*specify, e.g.,* these federal regulations] is attached hereto and made a part hereof.

[2] Comments

[a] Use of Form

The foregoing points and authorities should be combined with a general memorandum supporting [*see § 221.20*] or opposing [*see § 221.29*] a motion for summary judgment or supporting [*see § 221.21*] or opposing [*see § 221.30*] a motion for summary adjudication when the moving or opposing party seeks to have the trial court take judicial notice of specified matters [*Code Civ. Proc. § 437c(b)(1), (2)*; *see Evid. Code §§ 450-460*].

Although this form cites no cases in support of the statutory grounds set forth, counsel may wish to do so, particularly where there is any doubt as to whether the specific matter of which counsel seeks to have the court take judicial notice comes within the statutory description. For example, a court may take judicial notice of its own records, including the prior pleadings in the case [*Evid. Code § 452(d)*; *People v. Cavanna (1989) 214 Cal. App. 3d 1054, 1058, 263 Cal. Rptr. 177]* . However, any incorporation by reference of matter in the court's file shall set forth with specificity the exact matter to which reference is being made and shall not incorporate the entire file [*Code Civ. Proc. § 437c(b)*].

[b] Related Pleading and Practice Forms

For forms relating to the use of experts to enable the court to take judicial notice of authorized matters, see Ch. 321, *Judicial Notice* , in California Forms of Pleading and Practice.

[c] Related Points and Authorities

For a form of points and authorities supporting a demurrer to a complaint on the ground that no cause of action is stated where the insufficiency of the complaint is established by facts of which the court may takejudicial notice, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* in this set.

[3] Discussion of Authorities

[a] Use of Judicially Noticed Matters

Parker v. Twentieth Century-Fox Film Corp. (1970) 3 Cal. 3d 176, 89 Cal. Rptr. 737, 474 P.2d 689 , involved an action by an actress against a movie production studio for money due under an employment contract and for damages for breach of the contract. The trial court granted plaintiff's motion for summary judgment, and defendant appealed from the ensuing judgment. The Supreme Court affirmed judgment for plaintiff, rejecting defendant's argument that plaintiff failed to mitigate her damages by accepting what the Court found to be inferior employment. In summarizing summary judgment procedures, the Court stated that the trial court may consider facts which are properly the subject of judicial notice (*3 Cal. 3d 176, 181* ; *see 3 Cal. 3d 176, 188-189* of dissenting opinion).

Stevens v. Cessna Aircraft Co. (1981) 115 Cal. App. 3d 431, 170 Cal. Rptr. 925 , was a wrongful death action brought against an airplane manufacturer. Plaintiff alleged that the plane crashed because it was overloaded, and that the plane was defective because it failed to contain a warning posted for passengers as to the load capacity. The court of appeal affirmed the grant of defendant's motion for summary judgment on the ground that defendant had no duty to provide such information to the passengers. In discussing the sufficiency of defendant's supporting declarations, the court stated that the pilot's responsibilities could be established by reference to the applicable federal regulations, of which judicial notice could be taken, as *Code Civ. Proc. § 437c* permits a motion to be supported by matters of which judicial notice must or may be taken (*115 Cal. App. 3d 431, 434)* .

[b] Matters Subject to Mandatory Judicial Notice

Judicial notice must be taken of the following matters [*Evid. Code §§ 11, 451*]:

(a) the decisional, constitutional, and public statutory law of California and of the United States and the provisions of any charter described in *Cal. Const., art. XI, §§ 3-5*;

(b) any matter made a subject of judicial notice by *Gov. Code §§ 11343.8, 11344.6*, or *18576* or by *44 U.S.C. § 1507*;

(c) rules of professional conduct for members of the bar adopted pursuant to *Bus. & Prof. Code § 6076* and rules of practice and procedure for the courts of California adopted by the Judicial Council;

(d) rules of pleading, practice, and procedure prescribed by the United States Supreme Court, such as the Rules of the United States Supreme Court, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Admiralty Rules, the Rules of the Court of Claims, the Rules of the Customs Court, and the General Orders and Forms in Bankruptcy;

(e) the true signification of all English words and phrases and of all legal expressions; and

(f) facts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute.

[c] Matters Subject to Permissive Judicial Notice

Judicial notice may be taken of the following matters to the extent that they are not embraced within *Evid. Code § 451* [*Evid. Code §§ 11, 452*]:

(a) the decisional, constitutional, and statutory law of any state of the United States and the resolutions and private acts of the United States Congress and of the California Legislature;

(b) regulations and legislative enactments issued by or under the authority of the United States or any public entity in the United States;

(c) official acts of the legislative, executive, and judicial departments of the United States or of any state of the United States;

(d) records of any court of California or any court of record of the United States or of any state of the United States;

(e) rules of court of any court of California or any court of record of the United States or of any state of the United States;

(f) the law of an organization of nations and of foreign nations and public entities in foreign nations;

(g) facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute; and

(h) facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.

[d] Matters Subject to Permissive Judicial Notice Conditionally Mandatory on Request

The trial court must take judicial notice of any matter specified in *Evid. Code § 452* if a party requests it and (a) gives each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request; and (b) furnishes the court with sufficient information to enable it to take judicial notice of the matter [*Evid. Code §§ 11, 453*]. The request may be made in the memorandumof points and authorities, as appears here. Alternatively, a separate request for judicial notice may be filed, or the request may be made in the supporting declaration [*see, e.g., Wood v. Brown (1974) 39 Cal. App. 3d 232, 235 n.3, 114 Cal. Rptr. 63]* .

California Points & Authorities

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Volume 22 Chapters 220-229 SUBROGATION---to---TRESPASS
CHAPTER 221 SUMMARY JUDGMENTS
PART II. FORMS

22-221 California Points & Authorities § 221.47

§ 221.47 Supporting or Opposing Appeal of Summary Judgment--Standard of Review

[1] FORM

COURT OF APPEAL OF CALIFORNIA
_____ APPELLATE DISTRICT
[DIVISION _____]

_____ [*name*]	)	
Plaintiff and _____	)	
[*e.g.*, Appellant],	)	
vs.	)	CIVIL NO. _____
_____ [*name*],	)	
Defendant and _____	)	
[*e.g.*, Respondent].	)	
	)	
	)	

_____

_____ [APPELLANT'S OPENING *or* RESPONDENT'S] BRIEF

Appeal from a Judgment of the Superior Court
of the State of California, in and for the
County of _____ [*county*]
Honorable _____ [*name*], Judge

* * * * *

THE STANDARD FOR REVIEW OF A GRANT OF SUMMARY JUDGMENT IS INDEPENDENT REVIEW.

Independent Appellate Review. The appellate court should review the grant of summary judgment independently, applying the same three-step analysis required of the trial court (*Catholic Healthcare West v. California Ins. Guarantee Assn. (2009) 178 Cal. App. 4th 15, 23, 100 Cal. Rptr. 3d 125* ; *Inter Mountain Mortgage, Inc. v. Sulimen (2000) 78 Cal. App. 4th 1434, 1439, 93 Cal. Rptr. 2d 790* ; *Burroughs v. Precision Airmotive Corp. (2000) 78 Cal. App. 4th 681, 688, 93 Cal. Rptr. 2d 124*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

CAUTION:
The foregoing partial form is intended primarily for use in an appellate brief. Counsel should refer to Ch. 50, *Appeal: Briefs,* in California Forms of Pleading and Practice for rules specific to the format of appellate briefs. Moreover, there are conflicting opinions concerning the showing required to shift the burden of proof and the standard of review to be applied [***see*** further discussion in California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender)]. Accordingly, the cases counsel cite in the appellate brief regarding the standard of review will depend on the facts of the case.

[a] Use of Form

This memorandum may be submitted in support of or in opposition to an appeal of summary judgment. This should be combined with § 221.20, adapting it for use in an appellate brief, and inserted as Paragraph B, re-lettering the subsequent paragraphs as appropriate.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should show by specific reference how the trial court did or did not correctly apply the three-step analysis in granting summary judgment.

See also *§ 221.20[2]*.

[b] Standard of Appellate Review

[i] Independent Review

Review of a trial court's determination involves pure matters of law, requiring a reassessment of the legal significance of the documents [*AARTS Productions, Inc. v. Crocker National Bank (1986) 179 Cal. App. 3d 1061, 1064, 225 Cal. Rptr. 203]* . Since a summary judgment motion raises only questions of law regarding the construction and effect of the supporting and opposing papers, the appellate court independently reviews them on appeal, applying the same analysis required of the trial court [*Catholic Healthcare West v. California Ins. Guarantee Assn. (2009) 178 Cal. App. 4th 15, 23, 100 Cal. Rptr. 3d 125* ; *Barisich v. Lewis (1990) 226 Cal. App. 3d 12, 15-16, 275 Cal. Rptr. 331* ; *Royster v.*

Cushman (1989) 213 Cal. App. 3d 65, 68, 261 Cal. Rptr. 458] . Likewise, an appellate court independently reviews a trial court's order denying summary adjudication [*Certain Underwriters at Lloyd's of London v. Superior Court (2001) 24 Cal. 4th 945, 972, 103 Cal. Rptr. 2d 672* (ruling denying summary adjudication resolves pure question of law: whether there is any triable issue as to any material fact and, if not, whether moving party is entitled to adjudication in his or her favor as matter of law)]. For discussion of independent review standard, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

The abuse of discretion standard of review applies in limited circumstances with respect to summary judgment. In particular, summary judgment may be denied in the court's discretion under certain circumstances related to the credibility or cross-examination of witnesses [*see Code Civ. Proc. § 437c(e)*], and the court also retains discretion regarding certain procedural matters, such as the filing of a separate statement and the time constraints for filing opposition or reply [*Code Civ. Proc. § 437c(b)*; *see Saldana v. Globe-Weis Systems Co. (1991) 233 Cal. App. 3d 1505, 1512 n.3, 285 Cal. Rptr. 385* ; *see also Centennial Ins. Co. v. United States Fire Ins. Co. (2001) 88 Cal. App. 4th 105, 111, 105 Cal. Rptr. 2d 559* (abuse of discretion standard applicable in motions for summary adjudication involving determination by trial court of appropriate method of allocating defense costs among multiple liability insurance carriers, each insuring same insured); *Fretland v. County of Humboldt (1999) 69 Cal. App. 4th 1478, 1490, 82 Cal. Rptr. 2d 359* (noting that only rulings under *Code Civ. Proc. § 437c(e)* are discretionary); *Scott v. CIBA Vision Corp. (1995) 38 Cal. App. 4th 307, 313-314, 326, 44 Cal. Rptr. 2d 902* (when continuance is not mandatory because conditions of *Code Civ. Proc. § 437c(h)* are not met, appellate court reviews trial court's denial of continuance under abuse of discretion standard); *Krieger v. Nick Alexander Imports, Inc. (1991) 234 Cal. App. 3d 205, 212 n.3, 285 Cal. Rptr. 717* (trial court has discretion when party seeks additional time for discovery under *Code Civ. Proc. § 437c(h)*)].

Evidentiary rulings on summary judgment may also be reviewed for an abuse of discretion [*see Nazir v. United Airlines (2009) 178 Cal. App. 4th 243, 100 Cal. Rptr. 3d 296* (recognizing split of authority as to standard of review of rulings on evidentiary objections but reviewing objections under abuse of discretion standard; for additional discussion, *see § 221.29[3][f]*); *see also Jackson v. County of Los Angeles (1997) 60 Cal. App. 4th 171, 192 n.15, 70 Cal. Rptr. 2d 96* (citing *Aguimatang v. California State Lottery (1991) 234 Cal. App. 3d 769, 797-798, 286 Cal. Rptr. 57*); *but see Gatton v. A.P. Green Services, Inc. (1998) 64 Cal. App. 4th 688, 692, 75 Cal. Rptr. 2d 523* (when trial court sustains objection to deposition transcript based on inadmissible hearsay in connection with summary judgment motion, appellate court independently reviews deposition's admissibility and legal effect of facts properly presented)].

[ii] Abuse of Discretion Standard Abrogated

Notwithstanding the Legislature's clear intent in the 1973 amendment of *Code Civ. Proc. § 437c* to abrogate the use of discretion in deciding whether to grant summary judgment, some courts may use the abuse of discretion standard as opposed to the independent appellate review standard [*Saldana v. Globe-Weis Systems Co. (1991) 233 Cal. App. 3d 1505, 1512, 285 Cal. Rptr. 385* (listing opinions applying abuse of discretion standard and noting the issue of which standard to use was not contested on appeal in these cases)].

In *Prata v. Superior Court (2001) 91 Cal. App. 4th 1128, 111 Cal. Rptr. 2d 296* , the trial court grated summary adjudication to a defendant in anaction brought under the unfair competition law [*Bus. & Prof. Code § 17200 et seq.*], terminating the individual plaintiff's cause of action brought on behalf of plaintiff and other consumers similarly situated. The trial court exercised its discretion in holding that the cause of action was not suitable as a representative action. The appellate court affirmed, holding that although the general rule on appeal requires a de novo review, in the circumstance where a trial court is required to exercise its discretion in passing on a motion for summary judgment, and grants or denies the motion on the basis of its equitable determination of a question as to which the exercise of judicial discretion is proper, the standard of review on appeal necessarily is whether the trial court's decision amounted to an abuse of discretion (*91 Cal. App. 4th 1128, 1135)* .

In *Centennial Insurance Co. v. United States Fire Insurance Co. (2001) 88 Cal. App. 4th 105, 105 Cal. Rptr. 2d 559* ,

the court held that in the limited and exceptional circumstances where a trial court is required to and properly does exercise its discretion in passing on a summary judgment motion, the standard of review on appeal is whether the trial court's decision amounted to an abuse of discretion. In that case, three insurers had issued liability policies to the same insured for various time periods; and each insured paid a portion of the settlement in the underlying action. Thereafter, two of the insurers filed an action against the third, claiming the third had not contributed its proper share to the settlement; plaintiffs argued that each insured should contribute a one third share. Defendant argued that it should contribute only its proportionate share, based upon its "time on the risk"; i.e., the proportion of the time that its policy was in effect. The trial court adopted the "time on the risk" theory. The appellate court held that the proper method of allocation was a matter for the trial court's equitable discretion, and on summary judgment, its review was limited to whether the trial court had abused that discretion (*88 Cal. App. 4th 105, 110)* .

[c] Related Pleading and Practice Forms

For forms and discussion relating to summary judgment, see Ch. 537, *Summary Judgment* , in California Forms of Pleading and Practice (Matthew Bender). For forms and discussion relating to appeal review standards in general, see California Forms of Pleading and Practice, Ch. 41, *Appeal: Review Standards and Appellate Rules of Law* .

[d] Related Points and Authorities

For points and authorities in support of motions for summary judgment adaptable for use in appellate briefs, see specific substantive chapters in this publication, such as Ch. 50, *Contracts*, Ch. 66, *Death and Survival Actions*, and Ch. 115, *Indemnity and Contribution.*

[3] Discussion of Authorities

[a] Independent Appellate Review

In ***Catholic Healthcare West v. California Ins. Guarantee Assn.*** *(2009) 178 Cal. App. 4th 15, 100 Cal. Rptr. 3d 125* , the California Insurance Guarantee Association (CIGA) cross-complained for indemnity, alleging that CIGA mistakenly believed that claims made by or on behalf of cross-defendant were covered claims, the claims were not covered claims and CIGA was not authorized to pay them, and defendant was legally obligated to return the $ 186,093.51 paid by CIGA, but had refused to return the payment as demanded by CIGA. CIGA then moved for summary judgment. The trial court granted summary judgment to CIGA on its cross-complaint for the return of payments made by CIGA, on the ground that CIGA was not statutorily authorized to pay the claims (*178 Cal. App. 4th 15, 17-23)* . In reversing, the Court of Appeal noted that appellate courts independently review a motion for summary judgment using the same legal standards that governed the trial court's determination of the motion. *Code of Civil Procedure § 437c* contains these standards, which courts apply using a three-step analysis. First, a court must identify the issues framed by the allegations in the pleadings. Second, a court must determine whether the moving party has satisfied its initial burden of producing evidence to make a prima facie showing of the nonexistence of any triable issue of material fact. Third, if the moving party has made the requisite showing, a court must examine the opposition and determine whether it demonstrates the existence of a triable issue of material fact (*178 Cal. App. 4th 15, 23)* .

In ***Inter Mountain Mortgage, Inc. v. Sulimen*** *(2000) 78 Cal. App. 4th 1434, 93 Cal. Rptr. 2d 790* , involving a complaint for fraud, negligence, and equitable indemnity, the trial court granted defendants' motion for summary judgment.

The court of appeal, in reversing the judgment for the defendants, noted that in determining whether the defendant has satisfied his or her initial burden of proof under *Code Civ. Proc. § 437c(o)(2)* (*see now Code Civ. Proc. § 437c(p)(2)*), the appellate court decides de novo whether an issue of material fact exists and whether the moving party was entitled to summary judgment as a matter of law. In other words, the appellate court must assume the role of the trial court and reassess the merits of the motion. In doing so, the appellate court will consider only the facts properly before the trial

court at the time it ruled on the motion. The appellate court carries out its appellate function by applying the same three-step analysis required of the trial court. First, the appellate court identities the issues framed by the pleadings. Second, the appellate court determines whether the moving party's showing has satisfied his or her burden of proof and justifies a judgment in the movant's favor. When a summary judgment motion prima facie justifies a judgment, the third and final step is to determine whether the opposition demonstrates the existence of a triable issue of material fact (*78 Cal. App. 4th 1434, 1439)* .

In ***Burroughs v. Precision Airmotive Corp.*** *(2000) 78 Cal. App. 4th 681, 93 Cal. Rptr. 2d 124* , plaintiffs were injured when a light aircraft crashed, allegedly due to a malfunction in the engine's carburetor. Their complaint alleged theories of negligence, strict liability and breach of warrant. Based on a recent federal statute of repose, the trial court initially granted defendant's motions for summary adjudication as to plaintiffs' theories of strict liability and breach of warranty, but denied it as to their negligence cause of action. Defendant thereafter filed a second motion for summary adjudication as to the remaining cause of action for negligence on the grounds that (1) it was a product liability claim that was barred and preempted by the federal statute of repose, (2) defendant owed no independent duty with regard to the product, and (3) even if it had a duty, defendant satisfied that duty. The trial court granted the motion and entered judgment in favor of defendant. Plaintiffs appealed.

In affirming, the court of appeal noted that on appeal from a summary judgment, an appellate court conducts an independent review, applying the same three-step process as the trial court. The appellate court first looks to the pleadings to identify the elements of the cause of action for which relief is sought. The appellate then examines the moving party's motion to see whether it shows that one or more elements of the causeof action cannot be established or that there is a complete defense to that cause of action. If the moving party has made the requisite showing, the burden shifts to the party opposing the motion to set forth specific facts to show that a triable issue of one or more material facts exists as to that cause of action or defense thereto. If the opposing party fails to sustain this burden, summary judgment is proper (*78 Cal. App. 4th 681, 688)* .

[4] Additional Authorities

[a] Independent Appellate Review

Wall Street Network, Ltd. v. New York Times Co. (2008) 164 Cal. App. 4th 1171, 80 Cal. Rptr. 3d 6 was an action for breach of contract and misrepresentation arising out of an internet marketing agreement between plaintiff's assignor and defendants. Defendants moved for summary judgment, and the trial court granted the motion. Plaintiff filed a motion for new trial, which the court denied. The court of appeals affirmed, noting that an order granting summary judgment is properly challenged by a motion for new trial. Although rulings on new trial motions are generally reviewed under an abuse of discretion standard, because the order denying the new trial followed a summary judgment determination, the court of appeals examined the matter de novo (*164 Cal. App. 4th 1171, 1176)* .

In *Assilzadeh v. California Federal Bank (2000) 82 Cal. App. 4th 399, 98 Cal. Rptr. 2d 176* , an action seeking damages for fraudulent concealment, negligence and breach of fiduciary duty, the trial court granted summary judgment in defendants' favor. In affirming, the court of appeal noted that as a summary judgment motion raises only questions of law regarding the construction and effect of supporting and opposing papers, the appellate court independently applies the same three-step analysis as required of the trial court. The court identifies the issues framed by the pleadings; determines whether the moving party's showing establishes facts that negate the opponent's claim and justify a judgment in the moving party's favor; and, if it does, the court finally determines whether the opposition demonstrates the existence of a triable, material factual issue (*82 Cal. App. 4th 399, 408)* .

In *Tahoe Vista Concerned Citizens v. Counter of Placer (2000) 81 Cal. App. 4th 577, 96 Cal. Rptr. 2d 880* , plaintiffs challenged the issuance of conditional use permits, claiming the permits had not undergone sufficient environmental review and violated governing parking regulations. The trial court granted summary judgment for defendants and

plaintiffs appealed. The court of appeal affirmed (*81 Cal. App. 4th 577, 580, 595)* . In so doing the court noted that because the trial court's determination is one of law based on the papers submitted, the appellate court must make its own independent determination regarding the construction and effect of the supporting and opposing papers. The appellate court applies the same three-step analysis required of trial court. The appellate court first begins by identifying the issues framed by the pleadings because it is these allegations to which the motion must respond. The court then determines whether the moving party's showing has established facts that justify a judgment in movant's favor. When a summary judgment motion prima facie justifies a judgment, the final step is to determine whether the opposition demonstrates the existence of a triable, material factual issue (*81 Cal. App. 4th 577, 587-588)* .

In *Renna v. County of Fresno (2000) 78 Cal. App. 4th 1, 92 Cal. Rptr. 2d 586* , the trial court granted defendant's motion for summary judgment as to all three of plaintiff's causes of action. Plaintiff appealed claiming the trial court improperly granted summary judgment as to plaintiff's third cause of action, for alleged failure to pay plaintiff overtime wages in violation of the Fair Labor Standard's Act (*29 U.S.C. § 201 et seq.*). The court of appeal affirmed. The court noted that on appeal from a grant of summary judgment, the appellate court reviews the record de novo and independently determines if the motion was properly granted. The appellate court uses the same standards and rules as the trial court in deciding the propriety of the motion. A three-step analysis is used in reviewing a motion for summary judgment. First, the appellate court must identity the issues framed by the pleadings. Second, the court determines whether the moving party has met its statutory burden of proof. In a case when the defendant was the moving party, the defendant must demonstrate through admissible evidence that one or more essential elements of the cause of action cannot be established. Once the defendant has made such a showing, the burden shifts to the plaintiff to produce evidence that a triable issue of fact exists as to an essential element of the cause of action. The third and final step is to determine if the opposing party has demonstrated that a triable issue of fact exists as to the cause of action. In determining whether the nonmoving party, in this case the plaintiff, has demonstrated a triable issue of fact, the court must strictly construe the moving party's evidence, and liberally construe the opposing party's evidence, with any doubt as to granting the motion being resolved in favor of the opposing party (*78 Cal. App. 4th 1, 5)* .

In Riverside County Community Facilities Dist. v. Bainbridge 17 *(1999) 77 Cal. App. 4th 644, 92 Cal. Rptr. 2d 29* , involving a complaint to foreclose liens of special taxes, the trial court granted summary judgment in plaintiff's favor. The court of appeal affirmed. In so doing the court noted that in evaluating the propriety of a grant of summary judgment appellate review is de novo, and the appellate court independently reviews the record before the trial court. In practical effect, the appellate court assumes the role of a trial court and applies the same rules and standards that govern a trial court's determination of a motion for summary judgment. Because the granting of a summary judgment motion involves pure questions of law, the appellate court is required to reassess the legal significance and effect of the papers presented by the parties in connection with the motion. The appellate court applies the same three-step analysis required of the trial court in ruling on a motion for summary judgment. First, the appellate court identities the issues framed by the pleadings because the court's sole function on a motion for summary judgment is to determine from the submitted evidence whether there is a triable issue as to any material fact. To be material for purposes of a summary judgment proceeding, a fact must relate to some claim or defense in issue under the pleadings, and it must also be essential to the judgment in some way. Second, the appellate court determines whether the moving party has met its statutory duty. When as here the plaintiff is the moving party, the appellate courtdetermines whether the plaintiff has met its burden under *Code Civ. Proc. § 437c(o)(1)*, of showing there is no defense to a cause of action because the admissible evidence produced by the plaintiff proves each element of the cause of action entitling the party to judgment on that cause of action. Finally, if the moving party has met its statutory burden of proof and the summary judgment motion prima facie justifies a judgment, the burden shifts to the opposing party and the appellate court determines whether that party has met its burden under *Code Civ. Proc. § 437c*. When as here the defendants are the opposing parties, the appellate court determines whether they have met their burden under *Code Civ. Proc. § 437c(o)(1)* (*see now Code Civ. Proc. § 437c(p)(1)*) of producing admissible evidence showing that a triable issue of one or more material facts exists as to that cause of action or a defense to it. In making this determination, he court strictly construes the evidence of the moving party and liberally construes that of the opponents, and any doubts as to the propriety of granting the motion should be resolved in favor of the party opposing the motion (*77 Cal. App. 4th 644, 652-653)* .

In *Aetna Health Plans of Cal., Inc. v. Yucaipa-Calimesa Joint Unified School Dist. (1999) 72 Cal. App. 4th 1175, 85 Cal. Rptr. 2d 672* , a cross-complaint was filed seeking recovery on theories of equitable indemnity, partial equitable indemnity, contribution, and similar theories. The trial court granted summary judgment in favor of cross-defendant. Cross-complainant appealed. The court of appeal affirmed. The court in discussing the standard of review noted that the appellate court exercises independent judgment as to the legal effect of the undisputed facts disclosed by the parties' papers. In so doing, the appellate court applies the same three-step analysis required of the trial court. The appellate court first identifies issues framed by the pleadings, since it is these allegations to which the motion must respond. Secondly, the court determines whether the moving party has established facts that negate the opponent's claim and justify a judgment in the movant's favor. Finally, if the summary judgment motion prima facie justifies a judgment, the court determines whether the opposition demonstrates the existence of a triable, material factual issue (*72 Cal. App. 4th 1175, 1186)* .

In *Pepperell v. Scottsdale Ins. Co. (1998) 62 Cal. App. 4th 1045, 73 Cal. Rptr. 2d 164* , the trial court granted summary judgment in the defendant's favor. The court of appeal reversed. The court of appeal in discussing the standard of review noted that because a summary judgment motions raise only questions of law regarding the construction and effect of the supporting and opposing papers, the appellate court independently reviews them on appeal applying the same three analysis required by the trial court. First, the court identifies the issues framed by the pleadings, since it is these allegations to which the motion must respond by establishing a complete defense or otherwise showing there is no factual basis for relief on any theory reasonably contemplated by the opponent's pleading. Second, the court determines whether the moving party has established facts which negate the opponent's claim and justify a judgment in the movant's favor. When a summary judgment motion prima facie justifies a judgment, the third and final step is to determine whether the opposition demonstrates the existence of a triable, material factual issue (*62 Cal. App. 4th 1045, 1054)* .

In *Romero v. American President Lines, Ltd. (1995) 38 Cal. App. 4th 1199, 45 Cal. Rptr. 2d 421* , a summary judgment in defendant's favor was upheld because the plaintiff produced no competent evidence to support her claims. However, as an initial matter on review, the parties disputed the applicable standard of review, with defendant contending that the court of appeal should review only for an abuse of discretion, and plaintiff contending that the review must be de novo. Although the court upheld the summary judgment for defendant, it agreed with plaintiff on this point, stating that on review from an order granting summary judgment, it must exercise de novo review. The court thus conducted an independent review of the questions in the case, rather than applying an abuse of discretion standard (*38 Cal. App. 4th 1199, 1202)* .

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Volume 22 Chapters 220-229 SUBROGATION---to---TRESPASS
CHAPTER 221 SUMMARY JUDGMENTS
PART II. FORMS

22-221 California Points & Authorities § 221.48

§ 221.48 Opposing Motion for Summary Adjudication--Superseding Pleading Rendered Motion Moot

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Plaintiff,	)	IES IN OPPOSITION TO MOTION FOR SUM-
vs.	)	MARY ADJUDICATION
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

SUMMARY ADJUDICATION AS TO _____ [*specify matter sought to be adjudicated, e.g.*, THE THIRD CAUSE OF ACTION OF PLAINTIFF'S FIRST AMENDED COMPLAINT] IS BECAUSE A SUPERSEDING PLEADING HAS RENDERED THE MOTION MOOT.

A. Summary Adjudication Is Not Proper When Superseding Pleading Has Rendered Motion Moot. An amendatory pleading supersedes the original one, which ceases to perform any function as a pleading (*State Compensation Insurance Fund v. Superior Court (2010) 184 Cal. App. 4th 1124, 1130-1131)* . Thus, an amended complaint supersedes all prior complaints (*State Compensation Insurance Fund v. Superior Court (2010) 184 Cal. App. 4th 1124, 1130-1131)* . An amended complaint furnishes the sole basis for the cause of action, and the original complaint ceases to have any effect either as a pleading or as a basis for judgment (*State Compensation Insurance*

Fund v. Superior Court (2010) 184 Cal. App. 4th 1124, 1131) . Because there is but one complaint in a civil action, the filing of an amended complaint moots a motion directed to a prior complaint (*State Compensation Insurance Fund v. Superior Court (2010) 184 Cal. App. 4th 1124, 1131)* . Thus, once an amended complaint is filed, it is error to grant summary adjudication on a cause of action contained in a previous complaint (*State Compensation Insurance Fund v. Superior Court (2010) 184 Cal. App. 4th 1124, 1131)* .
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted by any party to oppose a motion for summary adjudication of a cause of action on the ground that a superseding pleading has rendered the opposing party's motion moot.

A motion for summary adjudication must proceed in all procedural respects as a motion for summary judgment [*Code Civ. Proc. § 437c(f)(2)*]. Hence, any opposition to a motion for summary adjudication must be served and filed not less than 14 days preceding the noticed or continued date of hearing, unless the court for good cause orders otherwise [*Code Civ. Proc. § 437c(b)*].

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated, including argument showing how a superseding pleading has rendered the opposing party's motion for summary adjudication moot.

[b] Related Pleading and Practice Forms

For forms of declarations in opposition to a motion for summary judgment, *see* Ch. 537, *Summary Judgment* , in California Forms of Pleading and Practice.

[c] Related Points and Authorities

For points and authorities in opposition to motions for summary adjudication relating to particular causes of actions and grounds, see the specific, substantive chapters in this set, such as Ch. 33, *Carriers* and Ch. 66, *Death and Survival Actions*.

[3] Discussion of Authorities

In ***State Compensation Insurance Fund v. Superior Court*** *(2010) 184 Cal. App. 4th 1124* , State Compensation Insurance Fund (the Fund) sued real party in interest in superior court to collect unpaid premiums the Fund claimed were owed for workers' compensation insurance policies. The original complaint included a cause of action for fraud. Asserting that the three-year limitations period in *Code Civ. Proc. § 338(d)* barred the fraud claim, real party in interest moved for summary adjudication of that cause of action. The Fund later filed a first amended complaint that included expanded fraud allegations. Real party in interest did not file an amended motion in response to the first amended complaint, and did not renotice its original motion. The superior court granted the motion for summary adjudication, ruling that there was undisputed evidence that the Fund was on notice of the alleged fraud more than three years prior to the filing of this action. The Fund initially filed a petition for writ of mandate in the Court of Appeal, which the court

denied as premature. After receiving the superior court's final order on the motion for summary adjudication, the Fund filed a new petition to which real party in interest filed a preliminary opposition. The Court of Appeals filed an order issuing an alternative writ of mandate. Counsel informed the court that the superior court had declined to comply with the alternative writ and had elected instead to show cause. Real party in interest filed a return to the alternative writ, and the Fund filed a reply (*184 Cal. App. 4th 1124, 1127-1129)* .

The Court of Appeal granted the petition for writ of mandate. The court found that the first amended complaint superseded the prior complaint, and that it raised new issues of fact regarding when the statute of limitations began to run on the fraud claim. The first amended complaint alleged a cause of action for fraud in which real party in interest and others conspired to avoid paying the proper premium for real party in interest's policies, which continued long after real party in interest was notified that its policies would be cancelled (*184 Cal. App. 4th 1124, 1130-1134)* .

California Points & Authorities

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Volume 22 Chapters 220-229 SUBROGATION---to---TRESPASS
CHAPTER 222 SURETYSHIP

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§ 222.syn Synopsis to Chapter 222: SURETYSHIP

§ 222.01 Scope of Chapter

§ 222.02 Governing Law

§ 222.03 Parties to Suretyship Agreement

§ 222.04 Related Discussion and Forms

[1] Related Pleading and Practice Forms

[2] Related Points and Authorities

§§ 222.05-222.19 [Reserved]

§ 222.20 Supporting Contention That Suretyship [Civ. Code § 2787] Exists--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Surety Is One Who Promises to Answer for Another

[b] Suretyship Contracts Governed by General Rules Governing Interpretation of Contracts and Creation of Contract Preferred

[c] Intent Rather Than Format Establishes Suretyship

[d] Addition of Descriptive Words to Guarantor's Signature Does Not Nullify Guarantor's Personal Obligation

[4] Additional Authorities

[a] Surety Is One Who Promises to Answer for Another

§ 222.21 Opposing Contention That Suretyship [Civ. Code § 2787] Exists--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Suretyship Does Not Exist if No Promise to Answer for Another

[b] Promise to Protect Promisee From Its Liability to Third Persons Constitutes Indemnity Contract

[c] Person Signing Note as Maker Is Presume to Be Comaker and Not Surety

[4] Additional Authorities

[a] Suretyship Does Not Exist if No Promise to Answer for Another

§ 222.22 Opposing Contention That Suretyship [Civ. Code § 2787] Exists--Letter of Credit Is Not Suretyship Obligation

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

§§ 222.23-222.39 [Reserved]

§ 222.40 Supporting Contention That Suretyship Exists--Knowledge or Consent of Principal Debtor Is Not

Required [Civ. Code § 2788]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Knowledge of Principal Debtor Is Not Required for Suretyship Contract

[b] Principal Debtor Has No Part in Action on Suretyship Contract

§ 222.41 Supporting Contention That Suretyship Exists--Notice of Creditor's Acceptance Is Not Required [Civ. Code § 2795]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Absolute Suretyship Obligation Does Not Require Notice of Acceptance

[b] Suretyship Obligation Arises on Creditor's Acceptance, Not Necessarily on Creditor's Signature

§§ 222.42-222.59 [Reserved]

§ 222.60 Supporting Contention That Suretyship Exists--Liability of Surety Limited to Local Contract Terms [Civ. Code § 2799]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

§§ 222.61-222.79 [Reserved]

§ 222.80 Supporting Contention That Suretyship Exists--Apparent Principal Is in Fact Surety [Civ. Code § 2832]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Apparent Principal May Show Real Existence as Surety

[b] Proof of Surety Is Good Against One Who Does Not Come Within Good-Faith Exception

§ 222.81 Opposing Contention That Suretyship Exists--Apparent Principal Precluded From Showing Status as Surety When Third Person Has Acted on Faith of Character of Principal [Civ. Code § 2832]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] One Who Appears to Be Principal May Not Prove Role as Surety Against Those Who Have Acted on Apparent Character of Principal

[b] Apparent Surety Must Prove Creditor's Knowledge of Surety Relationship

§§ 222.82-222.99 [Reserved]

§ 222.100 Supporting Contention That Suretyship Exists--Necessary Consideration Exists [Civ. Code § 2792]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Suretyship Obligation That Is Part of Original Obligation Does Not Require Distinct Consideration

[b] Distinct Consideration for Suretyship Obligation

[c] Suretyship Obligation May Apply to Past Loans if Express Language Is Used

[d] Suretyship Obligation as Part of Single Transaction Is Supported by Consideration Even Though Not Executed Contemporaneously With Primary Contract

[e] Written Suretyship Obligation Is Presumed to Be Supported by Consideration

[f] Surety Deriving Benefit From Transaction Presumed to Have Received Consideration

[4] Additional Authorities

[a] Suretyship Obligation as Part of Single Transaction Is Supported by Consideration Even Though Not Executed Contemporaneously With Primary Contract

[b] Written Suretyship Obligation Is Presumed to Be Supported by Consideration

§§ 222.101-222.119 [Reserved]

§ 222.120 Supporting Contention That Suretyship Exists--Exception to Requirement That Suretyship Obligation Be in Writing [Civ. Code § 2794]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Writing Not Required if Promise Is on Consideration of Cancellation of Antecedent Obligation and Substitution of New Promise

[b] Writing Not Required if Promise Is on Consideration Beneficial to Promisor, as Determined by Main Purpose of Promisor

[4] Additional Authorities

[a] Writing Not Required if Promise Is on Consideration Beneficial to Promisor, as Determined by Main Purpose of Promisor

§ 222.121 Opposing Contention That Suretyship Exists--Suretyship Obligation Must Be in Writing [Civ. Code § 2793]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Suretyship Obligation Must Be in Writing

§§ 222.122-222.139 [Reserved]

§ 222.140 Supporting Contention That Continuing Suretyship Exists--Guaranty Is Continuing [Civ. Code § 2814]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Continuing Suretyship Obligation Establishes Surety's Continuing Liability for Principal's Future Transactions

[b] Standing Credit Is Continuing Suretyship Obligation

[c] Continuing Suretyship Obligation May Be for Limited Amount

[d] Suretyship Obligation for Prospective Transactions Is Implied to Be Continuing Unless Otherwise Specified

[e] Parol Evidence Admissible if Instrument Is Ambiguous

[f] Principal's Payments Do Not Discharge Surety Unless Full Debt Is Discharged

[4] Additional Authorities

[a] Continuing Suretyship Obligation Establishes Surety's Continuing Liability for Principal's Future Transactions

§ 222.141 Opposing Contention That Continuing Suretyship Exists

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Liability of Surety Is Limited and Not Continuing

[b] Use of Parol Evidence to Determine Parties' Intentions if Guaranty Is Ambiguous

[c] Guaranty Is Presumed Limited Unless Intent to Create Continuing Guaranty Is Unequivocal

[d] Payments Should Be Applied to Guaranteed Purchase Before Subsequent Unguaranteed Purchase

§§ 222.142-222.159 [Reserved]

§ 222.160 Supporting Contention That Guaranty of Collectibility Exists--Guaranty That Obligation Is Good or Collectible [Civ. Code §§ 2800-2802]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Guaranty of Collectibility Imports That Obligation Is Collectible by Usual Legal Proceedings

§ 222.161 Opposing Contention That Guarantor Is Liable on Guaranty of Collectibility--Creditor Did Not Pursue Usual Legal Proceedings Against Principal With Reasonable Diligence [Civ. Code §§ 2800-2802]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] No Liability Occurs Until Creditor Has Been Unable to Collect Through Due Diligence

§§ 222.162-222.179 [Reserved]

§ 222.180 Supporting Contention That Unconditional Suretyship Exists--Guaranty Is Unconditional [Civ. Code §

2806]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Suretyship Is Deemed Unconditional Unless Condition Precedent Is Imported by Its Terms

[b] Condition Precedent Will Not Be Implied Unless Suretyship Is Unclear

[c] Surety Is Liable When Complete Guaranty Is Received by Innocent Creditor

§ 222.181 Opposing Contention That Unconditional Suretyship Exists--Guaranty Is Conditional [Civ. Code § 2806]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Failure of Condition Precedent to Surety's Liability Precludes Recovery

[b] Intention to Create Condition Precedent

§§ 222.182-222.199 [Reserved]

§ 222.200 Supporting Contention That Surety Is Liable--Surety Is Liable Immediately on Principal's Default and Without Notice or Demand [Civ. Code § 2807]

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Surety Liable on Default of Principal Without Notice

[b] Creditor Need Not Exhaust Remedies Against Principal

[c] Surety of Installment Payments Liable as Each Installment Is Due

[d] Liability of Surety Equivalent to Principal's Liability

[e] Surety May Remain Liable After Principal Has Been Discharged

[4] Additional Authorities

[a] Surety Liable on Default of Principal Without Notice

[b] Creditor Need Not Exhaust Remedies Against Principal

[c] Liability of Surety Equivalent to Principal's Liability

§ 222.201 Supporting Contention That Surety Is Liable--Liability of Surety on Conditional Obligation and Notice of Default [Civ. Code § 2808]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Liability of Surety on Conditional Obligation Is Commensurate With Principal's Liability

[b] Surety on Conditional Obligation Is Not Entitled to Notice of Default Unless Surety Is Unable to Otherwise Acquire Notice

§ 222.202 Opposing Contention That Surety Is Liable--Surety Not Liable on Conditional Obligation if Principal Not Liable [Civ. Code §§ 2808, 2809]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Surety Not Liable on Conditional Obligation if Principal Not Liable

§§ 222.203-222.219 [Reserved]

§ 222.220 Supporting Contention That Surety Is Liable--Surety Not Exonerated by Statutory Remedies Available to Surety [Civ. Code § 2845]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Creditor Took All Steps Legally Required to Collect From Principal

[b] Surety Must Make Demand of Creditor Prior to Creditor's Action Against Surety

[c] Creditor's Failure to Pursue Remedies Against Principal Did Not Prejudice Surety

[d] Creditor Not Required to Pursue Remedies Against Principal That Are Available to Surety

§ 222.221 Supporting Contention That Surety Is Liable--Surety Waived Statutory Remedies [Civ. Code §§ 2845, 2849]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Surety May Waive Its Rights Against Creditor

[b] Waiver Not Against Public Policy

[4] Additional Authorities

[a] Surety May Waive Its Rights to Require Creditor to Act

§ 222.222 Opposing Contention That Surety Is Totally Liable--Surety Entitled to Have Creditor Proceed Against Principal [Civ. Code § 2845]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Surety Entitled to Have Creditor Proceed Against Principal

[4] Additional Authorities

[a] Surety Entitled to Have Creditor Proceed Against Principal

§ 222.223 Opposing Contention That Surety Is Totally Liable--Surety Entitled to Benefit of Every Security for Principal's Performance [Civ. Code § 2849]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

§ 222.224 Opposing Contention That Surety Is Totally Liable--Surety Entitled to Have Principal's Property First Applied to Discharge of Obligation [Civ. Code § 2850]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Surety Entitled to Have Principal's Property First Applied to Discharge

§§ 222.225-222.239 [Reserved]

§ 222.240 Supporting Contention That Surety Has Been Exonerated--Material Alteration of Original Obligation Without Consent of Surety [Civ. Code § 2819]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Alteration of Original Obligation Without Consent of Surety Exonerates Surety

[b] Alteration Must be Material by Affecting Rights, Interests, or Obligations of Parties

[c] Alteraton Benefiting Surety Serves to Exonerate

[d] Mere Entitlement to Indemnification Is Not Sufficient to Defeat Exoneration

§ 222.241 Supporting Contention That Surety Has Been Exonerated--Rescission of Exonerating Agreement Does Not Restore Surety's Liability [Civ. Code §§ 2819, 2821]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

§ 222.242 Opposing Contention That Surety Has Been Exonerated--Indemnification From Principal Precludes Exoneration [Civ. Code §§ 2819, 2824]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Surety Has Indemnified Principal

§ 222.243 Opposing Contention That Surety Has Been Exonerated--Surety Not Exonerated if Consented to Alteration, Alteration Not Material, or No Alteration Made [Civ. Code § 2819]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Alteration to Which Surety Gave Consent Does Not Exonerate

[b] Surety's Consent to Alteration May Be Given at Any Time

[c] Alteration in Performance Resulting From Principal's Acts Is Not Material Alteration in Obligation

[d] Void or Voidable Promise by Creditor Will Not Cause Exoneration Unless It Is Material Alteration

[e] Creditor's Attempt to Enforce Obligation Not Within Suretyship Agreement Does Not Constitute Alteration

[f] Alteration as Defense Must Be Pleaded at Trial

[4] Additional Authorities

[a] Alteration to Which Surety Gave Consent Does Not Exonerate

[b] Surety's Consent to Alteration May Be Given at Any Time

[c] No Alteration of Surety Obligation

§ 222.244 Opposing Contention That Surety Has Been Exonerated--Accord Does Not Exonerate Surety for Lesser Sum Agreed On [Civ. Code §§ 2819, 2822(b)]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Effect of Creditor's Agreement to Accept Lesser Sum

§§ 222.245-222.259 [Reserved]

§ 222.260 Supporting Contention That Surety Has Been Exonerated--Surety Has Revoked Continuing Guaranty [Civ. Code § 2815]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Surety May Revoke Future Liability on Continuing Guaranty

[b] Third-Party Pledge as Continuing Guaranty Under Civil Code Section 2815

[c] No Waiver of Continuing Guaranty Absent Explicit Waiver Language

§ 222.261 Opposing Contention That Surety Has Been Exonerated--Retroactive Revocation Ineffective or Continuing Consideration Not Renounced [Civ. Code § 2815]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Surety May Not Revoke Its Liability Retroactively

§§ 222.262-222.279 [Reserved]

§ 222.280 Supporting Contention That Surety Is Not Liable--Surety Entitled to Use Principal's Defenses to Avoid Liability [Civ. Code § 2810]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Surety May Invoke Principal's Defenses Existing at Execution of Underlying Contract

[b] Surety May Invoke Principal's Defenses That Terminate Principal's Liability on Underlying Contract After Execution

[4] Additional Authorities

[a] Surety May Invoke Principal's Defenses Existing at Execution of Underlying Contract

§ 222.281 Supporting Contention That Surety Is Not Liable--Nonjudicial Foreclosure Impairs Surety's Remedies Against Principal and Estops Creditor From Proceeding Against Surety (the "Gradsky Defense") [Civ. Code §§ 2810, 2819; Code Civ. Proc. § 580d]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Nonjudicial Foreclosure Terminates Surety's Liability

[b] Attempted Waiver of "Gradsky Defense" Not Sufficiently Explicit

[4] Additional Authorities

[a] Attempted Waiver of "Gradsky Defense" Not Sufficiently Explicit

§ 222.282 Opposing Contention That Surety Is Not Liable--Contract Is Void Against Principal Due to Personal Disability, Surety Assumed Liability With Knowledge of Principal's Defense, or Remedy Against Principal Is Barred [Civ. Code § 2810]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Surety Is Liable if Remedy Rather Than Right of Recovery Against Principal Is Barred

§ 222.283 Opposing Contention That Surety Is Not Liable--Suretyship Agreement Waived Defense Based on Section 580d Deficiency Prohibition ("Gradsky Defense") [Civ. Code §§ 2810, 2819; Code Civ. Proc. § 580d]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Waiver of "Gradsky Defense" Sufficiently Explicit

[4] Additional Authorities

[a] Waiver of "Gradsky Defense" Sufficiently Explicit

§§ 222.284-222.299 [Reserved]

§ 222.300 Supporting Contention That Surety Has Been Exonerated--Performance Exonerates Surety [Civ. Code § 2839]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Additional Authorities

[a] Performance Exonerates Surety

§ 222.301 Supporting Contention That Surety Has Been Exonerated--Creditor's Acceptance of Stock in Principal's Bankruptcy Proceedings [Civ. Code §§ 2822, 2839]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Creditor Must Accept Stock or Demand Cash and Subrogate Rights to Surety in Principal's Bankruptcy Proceedings

[b] Creditor's Acceptance of Stock Will Satisfy Surety's Obligation, Either Wholly or Partially

§ 222.302 Opposing Contention That Surety Has Been Exonerated--Neither Partial Satisfaction of Obligation Nor Creditor's Delay in Pursuing Available Remedies Exonerates Surety [Civ. Code §§ 2822, 2823]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Partial Satisfaction of Obligation Reduces Surety's Obligation But Does Not Exonerate Surety

[b] Creditor's Failure to Pursue Available Remedies Does Not Exonerate Surety

[4] Additional Authorities

[a] Creditor's Failure to Pursue Available Remedies Does Not Exonerate Surety

§ 222.303 Opposing Contention That Surety Has Been Exonerated--Discharge of Principal by Operation of Law Does Not Exonerate Surety [Civ. Code § 2825]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Surety Is Not Exonerated When Principal Is Discharged by Operation of Law

§ 222.304 Opposing Contention That Surety Has Been Exonerated--Creditor Demanded Cash and Subrogated Surety During Principal's Bankruptcy Proceedings [Civ. Code §§ 2822, 2839]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Principal's Discharge Through Bankruptcy Does Not Exonerate Surety

[b] When Creditor Must Demand Cash in Lieu of Accepting Securities in Principal's Bankruptcy Proceedings

[c] Manner of Indicating Creditor's Election to Demand Cash as Payment

§ 222.305 Opposing Contention That Surety Has Been Discharged--Creditor Had No Duty Under Circumstances to Disclose Facts to Surety of Revocable Continuing Guaranty

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Creditor Has No Duty to Disclose Facts to Surety of Revocable Continuing Guaranty Unless Three Prerequisites Are Established

[b] Creditor Need Not Investigate for Surety's Benefit

§§ 222.306-222.319 [Reserved]

§ 222.320 Supporting Contention That Surety May Bring Action Against Principal to Compel Performance or Seek Reimbursement [Civ. Code §§ 2846-2848; Code Civ. Proc. § 1050]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Surety May Compel Principal to Perform

[b] Creditor May Be Codefendant in Surety's Action

[c] Surety Entitled to Reimbursement From Principal if Surety Satisfies Any Part of Principal Obligation

[d] Statutory Subrogation Remedy Is Not Exclusive

[e] Subrogation Available to Surety When Premature Payment by Principal Increased Surety's Liability

[f] Surety's Rights Coextensive With Obligation Guaranteed

§ 222.321 Supporting Contention That Surety Is Entitled to Contribution From Cosureties [Civ. Code § 2848]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Surety Who Has Paid More Than Its Proportionate Share of Obligation May Seek Contribution From Cosureties

[b] Surety's Release of One Cosurety Does Not Affect Obligation of Other Cosureties

§ 222.322 Supporting Contention That Creditor Is Entitled to Securities Held by Surety [Civ. Code § 2854]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

§ 222.323 Supporting Contention That Surety Is Entitled to Relief in the Nature of Quia Timet

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Quia Timet Prevents Principal From Absconding

[4] Additional Authorities

[a] Quia Timet Is Equitable Remedy for Preventing Wrongs

§ 222.324 Opposing Contention That Surety Is Entitled to Reimbursement From Principal [Civ. Code § 2847]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Surety May Be Reimbursed Only for Disbursements Required by Principal's Default

[b] Surety Is Not Entitled to Reimbursement if Payment Was Made As Volunteer

[c] Express Agreement Between Surety and Principal Controls Over Implied Obligation of Principal to Reimburse Surety

§ 222.325 Opposing Contention That Surety Is Entitled to Contribution From Other Sureties--Sureties Are Successive Rather Than Cosureties [Civ. Code § 2848]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] No Right of Contribution When Sureties Are Successive Sureties Rather Than Cosureties

California Points & Authorities

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CHAPTER 222 SURETYSHIP
PART I. INTRODUCTION

22-222 California Points & Authorities § 222.01

§ 222.01 Scope of Chapter

This chapter contains memoranda of points and authorities relating to actions involving suretyship contracts governed by the Civil Code. It includes the following forms:

- Points and authorities supporting [*see § 222.20*] and opposing [*see §§ 222.21, 222.22*] general contentions that a suretyship exists.

- Points and authorities supporting [*see §§ 222.40, 222.41, 222.60, 222.80, 222.100, 222.120*] and opposing [*see §§ 222.81, 222.121*] contentions relating to the creation of a suretyship.

- Points and authorities supporting [*see §§ 222.140, 222.160, 222.180*] and opposing [*see §§ 222.141, 222.161, 222.181*] contentions about the existence of certain types of suretyship contracts.

- Points and authorities supporting [*see §§ 222.200, 222.201, 222.220, 222.221*] and opposing [*see §§ 222.202, 222.222*-224] contentions that a surety is liable.

- Points and authorities supporting [*see §§ 222.240, 222.241, 222.260, 222.280, 222.281, 222.300, 222.301*] and opposing [*see §§ 222.242 -222.244, 222.261, 222.282, 222.283, 222.302 -222.304*] contentions that a surety's liability has been terminated through exoneration or discharge.

- Points and authorities supporting [*see §§ 222.320 -222.323*] and opposing [*see §§ 222.324, 222.325*] contentions relating to the availability of relief to the surety and creditor.

The related concept of "accommodation parties" to negotiable instruments [*see Com. Code § 3419*] is addressed in Ch. 166, *Negotiable Instruments*. This chapter focuses on suretyship contracts, and does not address statutory bonds and undertakings, which are controlled by *Code Civ. Proc. §§ 995.010-996.560*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsSuretiesGeneral OverviewContracts LawTypes of ContractsGuaranty Contracts

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22-222 California Points & Authorities § 222.02

§ 222.02 Governing Law

Suretyship is governed by *Civ. Code §§ 2787-2855*. The statute of limitations in an action against a surety is contained in *Code Civ. Proc. § 359.5*. Additional statutes which might apply in particular cases are *Code Civ. Proc. §§ 1050* (action by surety to compel principal to pay), 1055 (procedure for giving notice to surety to defend action), and 1912 (circumstances when surety bound on notice of action).

Civ. Code § 2809 (amount of surety's obligation) has been used to support the awarding of attorney's fees [*see Withers v. Bousfield (1919) 42 Cal. App. 304, 320, 183 P. 855]* , costs [*see McConnell v. Herbert (1934) 2 Cal. 2d 66, 70-71, 38 P.2d 781]* , and interest [*see Burns v. Massachusetts etc. Ins. Co. (1944) 62 Cal. App. 2d 962, 146 P.2d 24]* when an action has been brought against the surety to enforce the suretyship contract.

Consumer contract guaranties are governed by the Consumer Contract Awareness Act of 1990 (*Civ. Code § 1799.200 et seq.*), particularly *Civ. Code § 1799.206*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsSuretiesGeneral OverviewContracts LawTypes of ContractsGuaranty ContractsGovernmentsLegislationStatutes of LimitationsTime Limitations

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22-222 California Points & Authorities § 222.03

§ 222.03 Parties to Suretyship Agreement

A suretyship obligation (sometimes referred to as a guaranty) is a tripartite relationship. The three parties involved are (1) the creditor (or the promissee or guarantee), who is the party to whom the obligation is owed; (2) the principal debtor (or the principal), who is the party originally liable on the obligation; and (3) the surety (or the guarantor), who is the party who guarantees the performance of the principal and is secondarily liable. The terms are often used interchangeably by the courts [*see Civ. Code § 2787*; *Wiener v. Van Winkle (1969) 273 Cal. App. 2d 774, 786, 78 Cal. Rptr. 761]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsSuretiesGeneral OverviewContracts LawTypes of ContractsGuaranty Contracts

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22-222 California Points & Authorities § 222.04

§ 222.04 Related Discussion and Forms

[1] Related Pleading and Practice Forms

For discussion and forms relating to suretyship contracts and bonds and undertakings, see California Forms of Pleading and Practice, Ch. 538, *Suretyship, Bonds, and Undertakings* (Matthew Bender).

Other related chapters in California Forms of Pleading and Practice (Matthew Bender) include:

- Ch. 140, *Contracts* (endorsement of promissory notes and contract actions)
- Ch. 300, *Indemnity and Contribution*
- Ch. 536, *Subrogation*

[2] Related Points and Authorities

For a discussion of how to use the forms in this chapter to draft a memorandum of points or authorities or a trial or appellate brief, and for a sample of a complete memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsSuretiesGeneral OverviewContracts LawThird PartiesSubrogationContracts LawTypes of ContractsGuaranty ContractsTortsProcedureMultiple DefendantsContributionGeneral OverviewTortsProcedureMultiple DefendantsIndemnityGeneral Overview

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22-222 California Points & Authorities §§ 222.05-222.19

[Reserved]

§§ 222.05[Reserved]

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PART II. FORMS
A. General Definition Of Suretyship

22-222 California Points & Authorities § 222.20

§ 222.20 Supporting Contention That Suretyship [Civ. Code § 2787] Exists--General Form

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

A SURETYSHIP RELATIONSHIP EXISTS BECAUSE _____ [*name*], THE SURETY, PROMISED TO ANSWER TO _____ [*name*], THE CREDITOR, FOR THE DEBT, DEFAULT, OR MISCARRIAGE OF _____ [*name*], THE PRINCIPAL.

A. Surety Is One Who Promises to Answer for Another. A surety (or guarantor) is one who promises to answer for the debt, default, or miscarriage of another, or hypothecates property as security therefor. The surety, or party secondarily liable, is part of a tripartite relationship with the party secured and the principal obligor (*Civ. Code § 2787*; *see Butterfield v. Northwestern National Ins. Co. (1980) 100 Cal. App. 3d 974, 978-979, 161 Cal. Rptr. 280*).

B. Suretyship Contracts Governed by General Rules Governing Interpretation of Contracts and Creation of Contract Preferred. Suretyship contracts are interpreted by the same rules as other contracts. Of two permissible constructions, one that establishes a valid suretyship contract is preferred to one that does not (*Civ. Code § 2837*; *Superior Wholesale Elec. Co. v. Cameron (1968) 264 Cal. App. 2d 488, 493, 70 Cal. Rptr. 636*).

C. Intent Rather Than Format Establishes Suretyship. No particular form of agreement is required to establish a suretyship contract. So long as the agreement establishes the intention to create a suretyship contract, no set words and form are required (*Superior Wholesale Elec. Co. v. Cameron (1968) 264 Cal. App. 2d 488, 493, 70 Cal. Rptr. 636*).

[*Optional*] **D. Addition of Descriptive Words to Guarantor's Signature Does Not Nullify Guarantor's Personal Obligation.** When a guaranty expressly describes a personal obligation on the part of the guarantor and raises no question about his or her individual liability, the addition of descriptive words to his or her signature does not, under the principle of descriptio personae, alter his or her personal obligation (*Sebastian International, Inc. v. Peck (1987) 195 Cal. App. 3d 803, 809, 240 Cal. Rptr. 911*).

[*Add additional points and authorities, if appropriate, supporting the contention that defendant is liable as surety (see, e.g., §§ 222.40, 222.60, 222.80, 222.100, 222.120, 222.140, 222.160, 222.180, 222.200, 222.201, 222.220, 222.221*)].

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that a suretyship relationship exists and that the surety is liable to plaintiff creditor for the default of the principal debtor. If the surety is otherwise challenging the fact that a surety relationship was created or that he or she is liable as a surety, counsel may desire to use additional contentions specific to the facts [*see, e.g., §§ 222.40, 222.60, 222.80, 222.100, 222.120, 222.140, 222.160, 222.180, 222.200, 222.201, 222.220, 222.221*]. Optional Paragraph D should be included in this form if the guaranty agreement expressly refers to the guarantor by name and specifies that he or she unconditionally and irrevocably guarantees the principal's obligation, but, in addition to signing the guaranty, the guarantor added to his or her signature words descriptive of him or herself.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of existence of the suretyship relationship. For example, this argument might arise in opposing a motion for summary judgment or an appeal premised on the argument that no suretyship relationship was created [*see, e.g., Superior Wholesale Elec. Co. v. Cameron (1968) 264 Cal. App. 2d 488, 493, 70 Cal. Rptr. 636]* . These points and authorities may also be adapted for use in a trial brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should show how the surety relationship was created and the capacity of each person to the agreement. For example, counsel might include a copy of a letter written by the surety, highlighting the surety's promise to pay the debt owed to plaintiff if the principal debtor remains unable to do so [*see, e.g., Superior Wholesale Elec. Co. v. Cameron (1968) 264 Cal. App. 2d 488, 70 Cal. Rptr. 636]* .

[b] Related Pleading and Practice Forms

For forms for use in revoking a continuing guaranty and for use in actions by and against sureties, see California Forms of Pleading and Practice, Ch. 538, *Suretyship, Bonds, and Undertakings* (Matthew Bender).

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 222.21* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Surety Is One Who Promises to Answer for Another

In ***Butterfield v. Northwestern National Ins. Co.*** *(1980) 100 Cal. App. 3d 974, 161 Cal. Rptr. 280* , the State Board of Equalization, in an effort to collect unpaid sales taxes due from a corporation, brought an action on a guaranty agreement executed by defendant on behalf of the corporation and in favor of the State of California. Defendant's signature on the agreement had been acknowledged by a notary public. Defendant cross complained for indemnity against the notary public and her corporate surety for damages he might sustain by reason of the notary's alleged misconduct. Defendant alleged that he had never appeared before the notary. The trial court sustained the surety's demurrer to the cross complaint without leave to amend on the ground that the action against the surety was barred by

the statute of limitations contained in former Code Civ. Proc. § 338(6) (*now see Code Civ. Proc. § 338(f)*). Defendant appealed.

The court of appeal affirmed (*now see Code Civ. Proc. § 338(f)*). Defendant contended that the language of former Code Civ. Proc. § 338(6), requiring action against a notary public on his or her bond, refers to a different bond than the surety bond the notary is required to file, and that sureties are not among those entitled to the protection of the statute. The court disagreed, saying that there was only one bond, the one issued by the surety, and it is under that bond that the surety may be sued by one injured as a consequence of defalcation by the notary. The court stated that, according to *Civ. Code § 2787*, a surety is one who promises to answer for the debt, default, or miscarriage of another, known as the principal. The suretyship relationship is a tripartite relationship between the party secured, the principal obligor, and the surety, or the party secondarily liable. Because of the nature of the relationship, an individual cannot be his or her own surety. The court noted that a notary's official bond is distinguishable from the usual surety bond only in that it applies to the acts of a public official (*100 Cal. App. 3d 974, 978-979)* .

[b] Suretyship Contracts Governed by General Rules Governing Interpretation of Contracts and Creation of Contract Preferred

In ***Superior Wholesale Elec. Co. v. Cameron*** *(1968) 264 Cal. App. 2d 488, 70 Cal. Rptr. 636* , an electrical contractor owed a large sum of money to plaintiff. In consideration of plaintiff's forbearance of suit and recordation of a mechanic's lien, the electrical contractor, and others with whom he did business, executed and delivered to plaintiff a letter for the amount owed. Plaintiff later sued them all for the amount owed. The trial court found the letter to be a written guaranty and not merely a confirmation of the loan arrangement. The action against the electrical contractor was dismissed after he filed for bankruptcy and the trial court judgment was for plaintiff. Only defendant general contractor appealed.

The court of appeal affirmed. *Civ. Code § 2837* provides that a suretyship contract is to be interpreted by the ordinary rules of contract construction. That construction does not mean that words are to be distorted out of their natural meaning, or that by implication something can be read into the contract that it will not reasonably bear. But it does mean that the contract shall be fairly construed with a view to effect the object for which it was given and to accomplish the purpose for which it was designed. If the intention of the parties cannot be ascertained with certainty from the instrument itself, it may be necessary to look at the surrounding circumstances to determine its meaning (*264 Cal. App. 2d 488, 492)* . Letters of guaranty should not be construed with nice and technical care; instead, they should be construed according to the facts and circumstances accompanying the transaction. No particular form of agreement is required to establish a suretyship contract. So long as the agreement establishes the intention to create such a contract, no set words and form are required. Any uncertainty or ambiguity in a contract prepared by the guarantor will be most strongly interpreted and construed against it. Of two permissible constructions, one that establishes a valid contract is preferred to one that does not (*264 Cal. App. 2d 488, 493*). It is no defense that the original obligor filed bankruptcy following the execution and delivery of the written guaranty. A surety remains fully liable when the obligation of the principal is discharged in bankruptcy (*264 Cal. App. 2d 488, 494*).

[c] Intent Rather Than Format Establishes Suretyship

The facts and procedural background of ***Superior Wholesale Elec. Co. v. Cameron*** *(1968) 264 Cal. App. 2d 488, 70 Cal. Rptr. 636* , are discussed in *§ 222.20[3][b]*.

[d] Addition of Descriptive Words to Guarantor's Signature Does Not Nullify Guarantor's Personal Obligation

In ***Sebastian International, Inc. v. Peck*** *(1987) 195 Cal. App. 3d 803* , the court of appeal affirmed a summary judgment for plaintiff in an action by a sublessor of commercial premises to recover unpaid rent against a corporate

officer of the sublessee, based on his personal guaranty of lease, which referred to the officer by name as "guarantor" and specified that he jointly, severally, unconditionally, and irrevocably guaranteed the corporation's rental obligations. The court held that the officer was individually liable under the guaranty for the corporation's unpaid rent and that the addition of the words "vice president" to his signature were merely descriptive and, as a matter of law under the principle of descriptio personae, did not alter his obligation (*195 Cal. App. 3d 803, 809*). The court said that the principle of descriptio personae is well recognized in California law and found the rationale of non-California cases persuasive (*195 Cal. App. 3d 803, 808)* . Quoting from out-of-state cases, the court said that a director, officer, or other agent, signing a corporate contract containing a promise in the proper form for an individual, is not relieved from personal liability by the addition to his or her name of terms such as "director," "president," or the like, and that these terms are regarded merely as descriptio personae, that is, a term descriptive of the person rather than the relationship in which he or she signs the agreement (*195 Cal. App. 3d 803, 808)* . Further quoting from a federal case quoting a New Mexico case, the court said that (1) where a writing in the nature of a contract is signed by a person and contains apt words to bind the person personally, the fact that to such signature is added such words as "trustee," "agent," "treasurer," "president," and the like does not change the character of the person so signing, but is considered as merely descriptive of the person; (2) the mere fact that a person sustains an agency relation to another does not prevent him from becoming personally liable on a contract with a third person; and (3), if it appears from the contract that he or she pledged his or her own credit or bound him or herself personally, the addition of such words as "president" and the like will be considered as mere descriptio personae (*195 Cal. App. 3d 803, 808)* .

The court further noted, however, that the guaranty before it would be rendered a nullity if the defendant had signed only in his corporate capacity, since the corporation was already bound under the terms of the sublease (*195 Cal. App. 3d 803, 809)* and, further, that the record contained no evidence that defendant had the authority as vice president to bind the corporation under the terms of the guaranty (*195 Cal. App. 3d 803, 809 n. 2*).

The court of appeal in *Home Federal Savings & Loan Assn. v. Ramos (1991) 229 Cal. App. 3d 1609, 284 Cal. Rptr. 1* , affirmed a judgment for the lender against an individual guarantor of a loan to a partnership. The borrower was a partnership having a corporation as the general partner. The signature line on the note referred to the individual defendant as "Ronald J. Ramos, President" of R/J Co. as general partner of Peacock Ridge, the development partnership. The guaranty agreement signature line was prepared for signature by "Ronald J. Ramos (Guarantor)" but was signed by defendant as "R.J. Ramos, Pres." The court's function was to interpret the document consistent with the expressed intent of the parties under an objective standard, and the court concluded that a reasonable lender in plaintiff's position would not have made the loan if it intended only the general partner to be bound as guarantor. Thus, the addition of the abbreviation "Pres." after defendant's signature did not change the legal effect of the document as defendant's personal guaranty of the Peacock Ridge partnership's liability under the note (*229 Cal. App. 3d 1609, 1613)* . To interpret the document as a guaranty by the corporate general partner was objectively unreasonable because the corporation was already liable without the guaranty, and that interpretation would render the guaranty a nullity (*229 Cal. App. 3d 1609, 1614)* .

[4] Additional Authorities

[a] Surety Is One Who Promises to Answer for Another

Trust One Mortgage Corp. v. Invest America Mortgage Corp. (2005) 134 Cal. App. 4th 1302, 37 Cal. Rptr. 3d 83 , was an action by a lender to enforce a loan broker's agreement with respect to what the broker would do for the lender's benefit in the event that the borrower defaulted on a loan. The lender contended that the broker had promised to indemnify the lender; the broker insisted that the promise was a guaranty. The court of appeal, concluding that the agreement was for indemnity, succinctly pointed out the distinction between an agreement to indemnify and a guaranty. Indemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person (*Civ. Code § 2772*). A surety or guarantor is one who promises to answer for the debt, default, or miscarriage of another, or hypothecates property as security therefor (*Civ. Code § 2787*). A guarantor makes

a direct promise to perform the principal's obligation in the event that the principal fails to perform. An indemnitor does not make a direct promise to perform the principal's obligation; the indemnitor promises to reimburse the indemnitee for losses suffered or to hold the indemnitee harmless (*134 Cal. App. 4th 1302, 1309)* .

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PART II. FORMS
A. General Definition Of Suretyship

22-222 California Points & Authorities § 222.21

§ 222.21 Opposing Contention That Suretyship [Civ. Code § 2787] Exists--General Form

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

NO SURETYSHIP RELATIONSHIP EXISTS BECAUSE _____ [*name*], THE ALLEGED SURETY, DID NOT PROMISE TO ANSWER TO _____ [*name*] FOR THE DEBT, DEFAULT, OR MISCARRIAGE OF _____ [*name*]. [INSTEAD, _____ (*name of alleged surety*) _____(PROMISED TO INDEMNIFY THE PROMISEE *or* SIGNED THE PROMISSORY NOTE AS A COMAKER, NOT AS A SURETY)].

A. Suretyship Contracts Interpreted by General Contract Rules. In interpreting the terms of a suretyship contract, the same rules are observed as in other contracts (*Civ. Code § 2837*).

B. Suretyship Does Not Exist if No Promise to Answer for Debt of Another. When an instrument does not promise to answer for the debt, default, or miscarriage of another person, or does not hypothecate property as security for such a debt, default, or miscarriage, it does not come within the definition of a suretyship (*Civ. Code § 2787*; Union Bank v. Winnebago Industries, Inc. (1975) *528 F.2d 95, 98* ; *Birkhofer v. Krumm (1935) 4 Cal. App. 2d 43, 50-51, 40 P.2d 553 , cert. denied, 305 U.S. 653, 59 S. Ct. 249, 83 L. Ed. 423 (1938))* .

[*Optional*] **C. Promise to Protect Promisee From Its Liability to Third Persons Constitutes Indemnity Contract.** The essential distinction between indemnity and suretyship is that the promisor in an indemnity contract undertakes to protect the promisee against loss or damage through a liability on the part of the promisee to a third person, while the undertaking of a surety is to the promisee against loss or damages through the failure of a third person to carry out obligations to the promisee (*Goodman v. Severin (1969) 274 Cal. App. 2d 885, 892-893, 79 Cal. Rptr. 555*).

[*Optional*] **D. Person Signing Note as Maker Is Presumed to Be Comaker and Not Surety.** When a person signs a note with others as a maker it will be presumed that they are comakers, and liable as such, and not as principal and

surety (*Holtman v. Ledford (1959) 170 Cal. App. 2d 481, 483, 339 P.2d 150*).

[*Add additional points and authorities, if appropriate, opposing the contention that defendant is a surety (see, e.g., §§ 222.22, 222.81, 222.121, 222.141, 222.181, 222.202, 222.222 -222.224).*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that a suretyship relationship exists. The ground of the opposition is that the party alleged to be the surety in fact stands in a different relationship. This form may be combined with other forms of contentions for use in opposing the existence of or liability as a surety [*see, e.g., §§ 222.22, 222.81, 222.121, 222.141, 222.181, 222.202, 222.222 -222.224*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the nonexistence of any suretyship. For example, this argument may arise in opposing a motion for summary judgment based on a defense specific to suretyships [*see, e.g., Union Bank v. Winnebago Industries, Inc. (1975) 528 F.2d 95]* . These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel might allege facts indicating that the person alleging to be a surety signed a promissory note as a comaker and never expressed an intention to be anything other than a comaker.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 222.20*.

[b] Related Pleading and Practice Forms

For forms relating to suretyship contracts, see California Forms of Pleading and Practice, Ch. 538, *Suretyship, Bonds, and Undertakings* (Matthew Bender).

Other related chapters in the publication include:

- Ch. 300, *Indemnity and Contribution* (indemnification)
- Ch. 385, *Negotiable Instruments* (promissory notes)

[c] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing actions by the holder against the maker of negotiable and nonnegotiable instruments, see Ch. 166, *Negotiable Instruments* . For forms of memoranda of points and authorities supporting and opposing indemnification by one party, see Ch. 115, *Indemnity and Contribution* .

[3] Discussion of Authorities

[a] Suretyship Does Not Exist if No Promise to Answer for Another

In ***Union Bank v. Winnebago Industries, Inc.*** *(1975) 528 F.2d 95* , defendant was a manufacturer of recreational motor vehicles, selling through franchised retail dealers who often financed their inventory by flooring arrangements with banks. Under a flooring arrangement the dealer ordered and received vehicles from the manufacturer, the

manufacturer's invoice was paid directly by the bank, and the dealer repaid that amount plus interest to the bank on reselling the vehicle at retail. Defendant prepared a repurchase agreement in which it promised to repurchase vehicles from plaintiff bank if a specific franchise dealer defaulted on its flooring arrangement. After the dealer defaulted, plaintiff notified defendant and demanded a repurchase. Plaintiff refused to comply with additional conditions defendant then attached to its repurchase, and liquidated the vehicles inventory, later bringing suit against defendant for the deficiency. Defendant removed the action to federal court because of diversity of citizenship. The district court granted plaintiff's motion for summary judgment. On a motion to reconsider, defendant offered affidavits alleging an intention on its part to create a surety relationship. The court rejected the motion.

The circuit court of appeal affirmed the summary judgment. Defendant contended that it was a surety pursuant to the repurchase agreement and was entitled to the protections afforded by statute, specifically *Civ. Code § 2845* (creditor must proceed against principal if surety so requests), *Civ. Code § 2849* (surety entitled to security held by creditor), and *Civ. Code § 2819* (exoneration of surety). The court found that the contract was not a surety but simply a promise to repurchase the vehicles on the dealer's default enforceable according to its terms without reference to suretyship principals. The express terms of the agreement were clear and bore no intimation of any surety relationship. The manifest purpose of the repurchase agreement was to induce additional extensions of credit to defendant's retail dealers. It provided that if defendant failed to repurchase after demand, defendant would pay any deficiency. Nor did the agreement require defendant to stand in the shoes of the defaulting principal. Defendant's duty to repurchase was severely limited. The agreement does not purport to guarantee any debt the dealer might owe plaintiff. In effect, defendant guaranteed the value and resale of only a portion of plaintiff's collateral; it did not guarantee dealer's debt (*528 F.2d 95, 98-99)* .

In ***Birkhofer v. Krumm*** *(1935) 4 Cal. App. 2d 43, 40 P.2d 553* , *cert. denied, 305 U.S. 653, 59 S. Ct. 249, 83 L. Ed. 423 (1938)* , a couple executed a promissory note secured by a deed of trust on property to plaintiff. Later they conveyed the property to defendant. The deed recited that it was subject to a deed of trust that defendant grantee assumed and agreed to pay. Plaintiff assigned his interest in the note and deed of trust to another who eventually assigned that interest to additional parties. After failing to make some of the payments, defendant requested an extension of time in the payment schedule, and executed an extension agreement guaranteeing the payment of the note and any extension. Defendant defaulted. Plaintiffs brought an action to secure judgment for the unpaid principal of the note against defendant. An attachment was issued and levied on defendant's property. Defendant moved to discharge the attachment on the ground that it was secured by a deed of trust on real property and that the security had not been exhausted or become valueless. The trial court granted the motion to discharge the attachment. Plaintiffs appealed.

The court of appeal affirmed. It disagreed with plaintiffs' contention that the extension agreement was a guaranty. The instrument did not promise to answer for the debt, default, or miscarriage of another person, and did not come within the definition of a guaranty. It contained no promise to answer for the mortgagor or any other person. The court also noted that the agreement materially changed the terms of the promissory note signed by the original grantors without their knowledge or consent and released them from liability for any deficiency judgment. There can be no guaranty without any debt, default, or miscarriage of another for which to answer (*4 Cal. App. 2d 43, 50-51)* .

[b] Promise to Protect Promisee From Its Liability to Third Persons Constitutes Indemnity Contract

In ***Goodman v. Severin*** *(1969) 274 Cal. App. 2d 885, 79 Cal. Rptr. 555* , cross complainants, owners of a small interest in the corporation in which they were officers, were indebted on a personal note secured by a pledge of their corporate stock. Unable to pay the entire debt, cross complainants obtained a loan from a bank, secured by the stock, written guaranties, and cross defendant's agreement to purchase the pledged stock at a price sufficient to discharge cross complainants' obligation in full if they defaulted. Cross complainants defaulted and the bank demanded that cross defendant purchase the remaining pledged stock. Cross defendant failed to do so, and the bank conducted a pledge sale. The bank brought action against cross complainants and joined cross defendant. Plaintiff's motion for summary judgment was granted. Cross complainants paid substantially all the awarded amount and then sought reimbursement

from cross defendant. The trial court awarded the reimbursement plus interest and attorney's fees. Cross defendant appealed.

The court of appeal deleted the award of attorney's fees but otherwise affirmed the judgment. Cross defendant contended that the trial court erroneously found against his claim that he was merely a surety of cross complainants' obligation to the bank. In response, the court analyzed the agreement, noting that cross defendant undertook to purchase the stock so that the principal balance owed by cross complainants to the bank might thereby be liquidated. Inherent in such undertaking is a promise to purchase the pledged stock at a specified price, in an amount sufficient to satisfy the obligation due. In indemnity contracts the engagement is to make good and save another from loss on some obligation which he or she has incurred or is about to incur to a third person, and is not, as in suretyship, a promise to one to whom another is answerable. The essential distinction between an indemnity contract and a suretyship contract is that the promisor in an indemnity contract undertakes to protect his or her promisee against loss or damage through a liability on the part of the latter to a third person, while the undertaking of a surety is to protect the promisee against loss or damages through the failure of a third person to carry out obligations to the promisee. Cross defendant undertook to protect cross complainants against loss or damage through their liability to the third person bank. The facts did not come within the definition of a contract of suretyship since there was no failure of a third person to carry out obligations to the promisee (*274 Cal. App. 2d 885, 892-893)* . The agreement provided that cross complainants were to be entirely discharged from any further liability arising under the transaction. None of the circumstances implied the existence of a surety principal relationship whereby cross defendant could have compelled cross complainants to pay the obligation when due and before he had paid it himself, as allowed by *Civ. Code § 2846* (*274 Cal. App. 2d 885, 894)* .

[c] Person Signing Note as Maker Is Presume to Be Comaker and Not Surety

In ***Holtman v. Ledford*** *(1959) 170 Cal. App. 2d 481, 339 P.2d 150* , defendant owned an equity in two vehicles which he had purchased from plaintiff. A bank held an installment note secured by a chattel mortgage on both vehicles which was signed by defendant alone. Later defendant sold the vehicles to another. A new note and chattel mortgage were drawn and signed by that buyer and defendant. Plaintiff signed the new note and mortgage as guarantor, and the old note and mortgage were cancelled by the bank as paid in full. Ownership of the vehicles and the insurance policy were transferred to the buyer. The buyer later died in an accident that caused extensive damage to the vehicles after only one payment had been made. After plaintiff's demand to defendant for payment of the deductible and the note payments in default was ignored, plaintiff paid the deductible and took possession of the vehicles. He repaired them, paid off the note and mortgage, and sold them. He then brought action against defendant to recover the deficiency. Defendant contended that he was a surety and *Civ. Code § 2845* applied to enable him to require his creditor to proceed against the principal. Defendant claimed he requested the bank to apply the insurance against the indebtedness and to let him sell the vehicles and pay the bank the difference. The trial court found that defendant signed the note as a maker and not as a surety. The trial court judgment was for plaintiff. Defendant appealed.

The court of appeal affirmed. When one signs a note with others as maker it will be presumed that they are comakers and are liable as such, not as principal and surety. Defendant sought to refute this presumption, but the evidence supported his being a maker. Defendant received consideration for the sale and for signing the note and further benefited because he was released from sole liability on the original note, and in effect substituted therefor a joint and several obligation with the buyer as another maker (*170 Cal. App. 2d 481, 483)* .

[4] Additional Authorities

[a] Suretyship Does Not Exist if No Promise to Answer for Another

In *Matthews v. Hinton (1965) 234 Cal. App. 2d 736, 44 Cal. Rptr. 692* , defendants, lessors of an unimproved tract of land, agreed to subordinate their title and to join in any deed of trust given to secure construction loans for improving the property. Sublessees gave defendants an assumption agreement guaranteeing performance of the lessee's obligation

under the master lease. The sublessees then borrowed money secured by a deed of trust with power of sale, executed by themselves and defendants, all of whom were collectively designated as trustor. After the sublessees defaulted on the note, the creditor commenced sale proceedings. The sublessees filed an unsuccessful suit to enjoin the sale. The property was sold at a trustee's sale. Defendants filed a cross complaint alleging that the creditor had wrongfully sold the property and sought damages. Defendants claimed that the deed of trust was signed by them as sureties only, and before selling the property the creditor should have resorted to other assets of the sublessees, the principal debtors. The trial court granted the creditor's motion for summary judgment. The court of appeal affirmed. Defendants claimed they were sureties as a matter of law and that Civil Code provisions requiring that the property of the principal debtors be resorted to first before selling defendants' interests applied. The court said that their claim to suretyship protections and immunities was at variance with the role in which they contracted. The suretyship relation arises when two persons are under obligation to the same creditor, but one of them bears the ultimate burden of the obligation. The obligor ultimately responsible for the debt is the principal and the other is the surety. Whether one is a surety depends not so much on the relation with the creditor as on the relation with the principal debtor. In that tripartite relationship one of the obligors may be a surety in the sense that, if called on to pay the debt, he or she may indemnify himself or herself by an action against the primary obligor; nevertheless, so far as the creditor is concerned, that person contracts for a primary liability. One who signs a security document or other contract as a principal will be held as such even though the creditor knows that as between the signer and the fellow obligor, the former is only a surety (*234 Cal. App. 2d 736, 740-741)* . In signing as trustor, defendants as principals entered into a direct contractual relationship with the creditor for their own financial benefit. Having signed the trust deed as principals, they subjected their reversionary interest to primary liability (*234 Cal. App. 2d 736, 741)* . The creditor's knowledge of the relationship between defendant and the sublessees did not make sureties of the former (*234 Cal. App. 2d 736, 742)* .

In *Torrey Pines Bank v. Hoffman (1991) 231 Cal. App. 3d 308, 282 Cal. Rptr. 354* , the bank sued the guarantors of a construction loan. The nominal borrower was a revocable living trust of which the defendants were trustors, trustees, and beneficiaries. At the time the deed of trust was executed to secure the construction loan, the defendants signed personal guaranties, in which they waived antideficiency protection [*see Code Civ. Proc. §§ 580a, 580b, 726,* discussed in Ch. 555, *Trust Deeds and Real Property Mortgages*]. After a nonjudicial foreclosure, the bank commenced this action to enforce the personal guaranties. Judgment was entered for the defendants. The court of appeal affirmed. It is well established that when a primary obligor purports to take on additional liability as a guarantor, nothing is added to the primary obligation (*231 Cal. App. 3d 308, 319-320)* . The correct inquiry is whether the purported debtor is anything other than an instrumentality used by the individuals who guaranteed the obligation, and whether that instrumentality actually removed the individuals from their status as obligors under another name. The evidence in this transaction demonstrated substantial identity between the individual guarantors and the debtor trustees. The bank was presented with substantially the same financial information for both the family trust and the individual guarantors, as an inducement to make the loan. It had a copy of the family trust naming the defendants as their own trustees and beneficiaries (along with their children). Although the guaranties were signed by the defendants as individuals, the bank was well aware of their trustor/trustee/beneficiary capacities and should have been aware of the rules regarding the purpose, usefulness, and limitations of an inter vivos trust (*231 Cal. App. 3d 308, 320)* . The next inquiry was whether the debt incurred by the family trust actually imposed any obligations on the individual trustees. The loan was made on February 7, 1986, before enactment of *Prob. Code § 18000,* and was thus governed by prior case law. Under that law, trustees are personally liable on a contract unless the contract stipulates that the trustee is not liable. The trust itself was silent on the issue. Accordingly, these trustees were personally liable on the construction loan to the trust, and there is a significant identity between the individuals and their inter vivos trust during their lifetimes. The trust should be considered a "mere instrumentality" through which the defendants operated, but which never served to remove them from the status of primary obligors. Accordingly, they were the primary obligors and could not be liable as guarantors (*231 Cal. App. 3d 308, 321)* .

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CHAPTER 222 SURETYSHIP
PART II. FORMS
A. General Definition Of Suretyship

22-222 California Points & Authorities § 222.22

§ 222.22 Opposing Contention That Suretyship [Civ. Code § 2787] Exists--Letter of Credit Is Not Suretyship Obligation

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general contention form opposing the existence of a suretyship (see, e.g., § 222.21).*]

NO SURETYSHIP RELATIONSHIP EXISTS BECAUSE _____ [*name*], THE ALLEGED SURETY, MERELY SIGNED A LETTER OF CREDIT. A LETTER OF CREDIT IS NOT A FORM OF SURETYSHIP OBLIGATION.

Letter of Credit Is Not Form of Suretyship Obligation. A letter of credit is not a form of suretyship obligation [*Civ. Code § 2787*; *see Western Security Bank v. Superior Court (1997) 15 Cal. 4th 232, 246-247, 62 Cal. Rptr. 2d 243, 933 P.2d 507* ; *DBJJJ, Inc. v. National City Bank (2004) 123 Cal. App. 4th 530, 534, 19 Cal. Rptr. 3d 904*)].. For purposes of *Civil Code Section 2787*, the term "letter of credit" means a "letter of credit" as defined in *Commercial Code Section 5102(a)(10)*, whether or not the engagement is governed by *Commercial Code Section 5101 et seq.* (letters of credit) (*Civ. Code § 2787*). Thus, a letter of credit is a definite undertaking that takes the form of a record that is authenticated by a signature or in accordance with the parties' agreement or the standard practice (*see Com. Code §§ 5104, 5108(e)*), by an issuer to a beneficiary at the request or for the account of an applicant (or in the case of a financial institution, to itself or for its own account), to honor a documentary presentation by payment or delivery of an item of value (*Com. Code § 5102(a)(10)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that a suretyship relationship exists.

The ground of the opposition is that a letter of credit is not a suretyship obligation [*Civ. Code § 2787*]. These points and authorities may be combined with other forms of contentions for use in opposing the existence or liability of a surety [*see, e.g., §§ 222.21, 222.81, 222.121, 222.141, 222.181, 222.202, 222.222 -222.224*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the nonexistence of any suretyship. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should add argument linking the points in this form with the facts of his or her case; for example, facts indicating that the person alleged to be a surety signed a letter of credit and not a promissory note, guaranty of collection, or other form of suretyship obligation.

[b] Related Pleading and Practice Forms

For forms relating to suretyship, see *California Forms of Pleading and Practice, Ch. 538, Suretyship, Bonds, and Undertakings, § 538.10 et seq.* (Matthew Bender). For forms relating t (Matthew Bender). For forms for assignment of letters of credit, see Ch. 60, *Assignments* for use in actions involving letters of credit by banks, see Ch. 95, *Banks, Deposits, and Checks* in that publication.

[3] Discussion of Authorities

In ***Western Security Bank v. Superior Court*** *(1997) 15 Cal. 4th 232, 62 Cal. Rptr. 2d 243, 933 P.2d 507* the California Supreme Court examined the use of standby letters of credit as additional collateral for loan obligations secured by real property. At issue was whether the respective obligations of the parties to a letter of credit should remain unaffected by the antideficiency laws, regardless of whether those obligations arose before or after the enactment of Stats. 1994, ch. 611. In examining whether that chapter effected a change in the law or merely a clarification of the law, the Supreme Court also reviewed the legislative changes made by that chapter to *Civ. Code § 2787*. The legislation added a statement reflecting an established formal distinction: a letter of credit is not a form of suretyship obligation (*see* Stats. 1994, ch. 611, § 1). The court noted that generally a surety's liability for an obligation is secondary to, and derivative of, the liability of the principal. By contrast, the liability of the issuer of a letter of credit to the letter's beneficiary is direct and independent of the underlying transaction between the beneficiary and the issuer's customer (*15 Cal. 4th 232, 246-247)* . Therefore, as the amendment to *Civ. Code § 2787* made clear, existing law viewed a letter of credit as an independent obligation of the issuing bank rather than as a form of guaranty or a surety obligation. The Court held that the legislature plainly intended that the enactment of Stats. 1994, ch. 611, did not effect a change in the law but simply clarified and confirmed the state of the law before the court of appeal's opinion in the case. The legislature manifestly intended that the respective obligations of the parties to a letter of credit should remain unaffected by the antideficiency laws, whether those obligations arose before or after the enactment of Stats. 1994, ch. 611 (*15 Cal. 4th 232, 252-253)* .

In ***DBJJJ, Inc. v. National City Bank*** *(2004) 123 Cal. App. 4th 530, 19 Cal. Rptr. 3d 904* the court noted that a letter of credit involves at least three separate, independent transactions: "(1) the undertaking from the issuer of the letter of credit to the beneficiary; (2) the agreement between the issuer and the credit applicant; and (3) the underlying contract between the applicant and the beneficiary" (*123 Cal. App. 4th 530, 534)* .

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A. General Definition Of Suretyship

22-222 California Points & Authorities §§ 222.23-222.39

[Reserved]

§§ 222.23[Reserved]

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CHAPTER 222 SURETYSHIP
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B. Creation Of Suretyship
1. Knowledge Of Principal And Notice Of Acceptance

22-222 California Points & Authorities § 222.40

§ 222.40 Supporting Contention That Suretyship Exists--Knowledge or Consent of Principal Debtor Is Not Required [Civ. Code § 2788]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general contention form supporting the existence of a suretyship (see, e.g., § 222.20).*]

A SURETYSHIP RELATIONSHIP EXISTS WHETHER OR NOT _____ [*name*], THE PRINCIPAL DEBTOR, HAS KNOWLEDGE OF OR HAS GIVEN CONSENT FOR THE SURETYSHIP. THE PRINCIPAL DEBTOR HAS NO PART IN THE ACTION ON THE SURETYSHIP CONTRACT.

A. Knowledge of Principal Debtor Is Not Required for Suretyship Contract. A person may become a surety even without the knowledge or consent of the principal (*Civ. Code § 2788*; *Erickson Motor Co. v. Russell (1922) 57 Cal. App. 307, 308-309, 207 P. 50* ; *see Kelley v. Goldschmidt (1920) 47 Cal. App. 38, 42-43, 190 P. 55*).

B. Principal Debtor Has No Part in Action on Suretyship Contract. A suretyship contract is an independent contract, entirely independent of any contract of debt, the payment of which is thereby assured, and an action on a suretyship contract is on an independent contract of the surety which does not involve the principal debtor (*Kelley v. Goldschmidt (1920) 47 Cal. App. 38, 42-43, 190 P. 55*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that a suretyship relationship exists even when the principal debtor did not consent to the suretyship contract and had no knowledge of it.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context

in which counsel wishes to raise the substantive issue of the principal debtor's consent not being necessary for the suretyship contract to exist. For example, this argument may arise in opposing a demurrer premised on the argument that no suretyship relationship exists [*see, e.g.,* *Erickson Motor Co. v. Russell (1922) 57 Cal. App 307, 207 P 50]* . These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel might allege facts illustrating a creditor's assignment of an installment contract in which the creditor guaranteed the principal debtor's payments without the principal's knowledge.

[b] Related Pleading and Practice Forms

For forms relating to suretyship, see California Forms of Pleading and Practice, Ch. 538, *Suretyship, Bonds, and Undertakings* (Matthew Bender).

[3] Discussion of Authorities

[a] Knowledge of Principal Debtor Is Not Required for Suretyship Contract

In ***Erickson Motor Co. v. Russell*** *(1922) 57 Cal. App 307, 207 P 50* , plaintiff and defendant contracted for the sale of an automobile. Under the terms of the conditional contract, defendant was to make monthly payments and plaintiff could declare the entire purchase price to be due if payments were not made. Plaintiff assigned the contract to a security company and guaranteed the prompt monthly payments by defendant. After defendant failed to make several payments, the security company demanded that plaintiff pay the balance due. Plaintiff did so and then brought an action against defendant for reimbursement. The trial court overruled defendant's general demurrer and rendered judgment for plaintiff. Defendant appealed.

The court of appeal affirmed. Defendant contended that plaintiff's complaint was a statement of a conclusion of law rather than facts alleging a cause of action. The court disagreed and explained that plaintiff, in addition to assigning the contract to the security company, guaranteed its prompt payment, and paid the amount due on demand after defendant failed to make the required payments. When plaintiff, as guarantor, paid to the creditor the amount due, it became subrogated to the rights of the creditor and to reimbursement of the amount paid. When a guarantor pays the principal's matured debt the guarantor has a right of action against the principal to be reimbursed for the amount paid, whether there is an express agreement by the principal to indemnify the guarantor or not. *Civ. Code § 2788* states that a person may become guarantor even without the knowledge or consent of the principal (*57 Cal. App 307, 308-309)* .

In ***Kelley v. Goldschmidt*** *(1920) 47 Cal. App 38, 190 P 55* , the principal debtor executed a promissory note payable on demand in favor of a bank. As a part of the same transaction, defendants executed a written guaranty, indorsed on the back of the note, in which they guaranteed the payment of the note and all expenses of collection. The bank assigned the note to plaintiff while more than half the note remained unpaid. Plaintiff brought an action against defendants as guarantors and the principal debtor, later dismissing the action against the principal. Plaintiff filed an affidavit for attachment after defendants did not pay, claiming that there was no security for repayment. Defendants alleged that after their guaranty, a corporation conveyed a trust deed on real property to secure the repayment, the bank accepted the declaration, and the property was still subject to that lien. A writ of attachment was issued and personal property levied by the sheriff. The trial court denied defendants' motion to discharge the attachment. Defendants appealed.

The court of appeal affirmed. The question on appeal was the meaning of the trust deed. Defendants contended that it was intended to secure payment not only of the promissory note, but also performance of the conditions of the guaranties endorsed on the note. The court disagreed, noting that former Civ. Code §§ 2787 and 2788 provided that a guaranty is a promise to answer for the debt, default, or miscarriage of another person and one may became a guarantor even without the knowledge or consent of the principal. A guaranty is an independent contract, entirely independent of

any contract of debt, the payment of which is thereby assured, and an action on a guaranty is on an independent contract of the guarantor with which the principal debtor has nothing to do. The liability of the guarantor depends entirely on the terms of the guaranty contract and there is no privity, mutuality, or joint liability between the principal debtor and the guarantor. Because a guaranty creates an obligation wholly independent of that of the debt it is given to secure, there would have to be a clear and unequivocal intent expressed in a trust deed given to secure payment, when there has also been given a guaranty for the payment of the same debt, to find that the purpose of the trust deed, given subsequent to the guaranty, was to secure payment not only of the promissory note evidencing that debt but also to secure the performance of the guaranty. This is because the guaranty is itself security for the payment of the same debt. There was no intent clearly and unequivocally expressed in the trust deed. "Debts" meant the debts created by the note and was not intended to refer to and include the obligations created by the guarantors (*47 Cal. App 38, 42-43)* .

It should be noted that this case was written prior to the 1939 amendment to *Civ. Code § 2787*, which eliminated the distinction between sureties and guarantors. The result might be different had *Civ. Code § 2850* (surety entitled to have principal's property applied first) been applicable.

[b] Principal Debtor Has No Part in Action on Suretyship Contract

Kelley v. Goldschmidt *(1920) 47 Cal. App 38, 190 P 55* , is discussed in *§ 222.40[3][a]*.

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1. Knowledge Of Principal And Notice Of Acceptance

22-222 California Points & Authorities § 222.41

§ 222.41 Supporting Contention That Suretyship Exists--Notice of Creditor's Acceptance Is Not Required [Civ. Code § 2795]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general contention form supporting the existence of a suretyship (see, e.g., § 222.20).*]

A SURETYSHIP RELATIONSHIP EXISTS BECAUSE THE OFFER OF _____ [*name*], THE SURETY, TO GUARANTEE THE PERFORMANCE OF _____ [*name*], THE PRINCIPAL DEBTOR, WAS ACCEPTED BY _____ [*name*], THE CREDITOR, AND THE OFFER DID NOT CONTAIN ANY EXPRESS REQUIREMENT FOR NOTIFYING THE SURETY OF ACCEPTANCE. NOTICE OF ACCEPTANCE [OR THE SIGNATURE OF THE CREDITOR ON THE CONTRACT] IS NOT REQUIRED UNDER THESE CIRCUMSTANCES.

A. Absolute Suretyship Obligation Does Not Require Notice of Acceptance. Unless notice of acceptance is expressly required, an offer to become a surety may be accepted by acting on it, or by acceptance on other consideration. An absolute suretyship obligation is binding on the surety without notice of acceptance (*Civ. Code § 2795*; *Davenport v. Stratton (1944) 24 Cal. 2d 232, 243-244, 149 P.2d 4* ; *Bank of Santa Ana v. Molina (1969) 1 Cal. App. 3d 607, 617-618, 81 Cal. Rptr. 885*).

[*Optional*] **B. Suretyship Obligation Arises on Creditor's Acceptance, Not Necessarily on Creditor's Signature.** The creditor must acccept the surety's guaranty, either by acting on it and extending credit, or by communicating its acceptance to the surety. Acceptance does not require that the creditor sign the suretyship contract (*Skaggs-Stone, Inc. v. LaBatt (1960) 182 Cal. App. 2d 142, 143-144, 5 Cal. Rptr. 882* ; *Hickey Pipe etc. Co. v. Fitzgerald (1934) 3 Cal. App. 2d 389, 390, 39 P.2d 472*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that a suretyship relationship exists and has existed from the time the creditor accepted the surety's offer to guarantee the principal debtor's performance [*see Civ. Code § 2795*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of existence of the suretyship relationship. For example, this argument may arise on a summary judgment motion or an appeal premised on the argument that no suretyship relationship exists [*see, e.g., Bank of Santa Ana v. Molina (1969) 1 Cal. App. 3d 607, 617-618, 81 Cal. Rptr. 885]* . These points and authorities may also be adapted for use in a trial brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel might illustrate the existence of the suretyship obligation by submitting a copy of the surety's written guaranty and present facts showing the creditor's acceptance of that offer by extending credit to the principal debtor.

[b] Related Pleading and Practice Forms

For forms relating to suretyship, see California Forms of Pleading and Practice, Ch. 538, *Suretyship, Bonds, and Undertakings* (Matthew Bender).

[3] Discussion of Authorities

[a] Absolute Suretyship Obligation Does Not Require Notice of Acceptance

In ***Davenport v. Stratton*** *(1944) 24 Cal. 2d 232, 149 P.2d 4* , the lessor of a commercial building had the lessee evicted and its possession restored when rental payments were in default. Thereafter the lessor exerted efforts to secure new tenants and was only partially successful. After giving the lessee credit for all payments or rents received, a substantial amount was claimed by the lessor to be due and unpaid. Defendant had guaranteed to pay the rent or any other sum to be paid by the lessee under the lease terms. Plaintiff, assignee of the lessor, brought action to recover the amount unpaid against defendant as one of the guarantors of the lease. The jury returned a verdict in favor of defendant and the trial court entered judgment accordingly. Plaintiff appealed.

The Supreme Court reversed. Among the issues addressed was defendant's contention that the lease was not physically attached to the guaranty at the time defendant signed the guaranty, and therefore he was released from any liability under the guaranty. The Court disagreed, explaining that the guaranty agreement expressly referred to both the lease and the later agreement and said that it was intended to apply to both documents. Defendant knew at the time of signing the guaranty that the lessor had required that it be guaranteed before it would deliver the lease. To permit him to deny annexation would be to perpetrate fraud. He was estopped to deny the plain and explicit terms of the document which he voluntarily executed (*24 Cal. 2d 232, 243)* . Defendant also contended that the judgment should be affirmed because he was never notified of his acceptance by the lessor as a guarantor of the lease. The guaranty was absolute in form and bound defendant without notice of his acceptance. Neither was defendant entitled to notice of the tenant's default (*24 Cal. 2d 232, 243-244)* .

In ***Bank of Santa Ana v. Molina*** *(1969) 1 Cal. App. 3d 607, 81 Cal. Rptr. 885* , a construction and land development business applied for a loan of credit with plaintiff. Plaintiff asked for continuing guaranties. Each of the three partners of the construction company and defendant, a guarantor, signed a separate form of guaranty provided by plaintiff. Plaintiff made a loan, and payments were made until only a small portion remained unpaid. Thereafter plaintiff made additional loans to the construction company. When they were not paid, plaintiff brought an action for the monies owed,

plus interest and attorney's fees. The trial court entered judgment against defendant. Defendant appealed.

The court of appeal affirmed. After the court addressed defendant's concern with the signature authenticity and delivery, it evaluated his contention that plaintiff had to notify him of its acceptance of the guaranty. Defendant claimed that plaintiff owed obligations to him and had affirmative duties of disclosure. He contended that plaintiff should have disclosed that defendant's continuing guaranty had been received, that the original obligation, which was limited as to purpose and time, was not repaid and extensions were requested, and that the obligation was paid down and was again being renewed. The court stated that since there was nothing to put plaintiff on notice that defendant would claim he had neither signed nor delivered the guaranty, it did not have any obligation to inform him it had received the guaranty. The record did not indicate that plaintiff had notice of any claim that the continuing guaranty applied only to the original loan. In the absence of anything putting plaintiff on notice that defendant requested that information, defendant's obligation was not affected by the fact that he was not informed that the original obligation had been reduced, that it was being renewed, and that new loans were being made (*1 Cal. App. 3d 607, 617-618)* .

[b] Suretyship Obligation Arises on Creditor's Acceptance, Not Necessarily on Creditor's Signature

In ***Skaggs-Stone, Inc. v. LaBatt*** *(1960) 182 Cal. App. 2d 142, 5 Cal. Rptr. 882* , a public employees' association owed plaintiff money for merchandise furnished by plaintiff at its request. Defendant had guaranteed the account in writing. In the action brought by plaintiff to recover the sums owed, defendant's motion for change of venue was denied. Defendant appealed the order denying its motion.

The court of appeal affirmed the order The guaranty was prepared by plaintiff and forwarded to defendant in another county. Defendant signed it and returned it to plaintiff by mail. Defendant charged that when he signed the guaranty and deposited it in the mail the contract was complete. Although that is the general rule of offer and acceptance, suretyship contracts differ in that the creditor must accept the surety's guaranty, either by acting on it and extending credit, or by communicating its acceptance to the surety. There does not appear to be any way in which a creditor can extend credit in reliance on a guaranty until the creditor has knowledge of the guarantor's undertaking. The contract reflected that defendant anticipated that the creditor required notice of the undertaking since it was addressed to plaintiff at its place of business (*182 Cal. App. 2d 142, 143-144)* .

In ***Hickey Pipe etc. Co. v. Fitzgerald*** *(1934) 3 Cal. App. 2d 389, 39 P.2d 472* , defendant signed and delivered a written instrument to plaintiff in which he guaranteed the payment by an oil company of credit for products received. The instrument contained a waiver of notice of acceptance, notice of sale, and indebtedness incurred, and notice of credit given. Plaintiff brought suit for monies owed. The trial court judgment was for plaintiff. Defendant appealed.

The court of appeal affirmed. Among defendant's contentions on appeal was that the instrument constituted a mere offer and of itself imposed no obligations on him. The court said that when plaintiff acted on it and extended the credit it became a completed contract. The acceptance by plaintiff was evidenced by the furnishing of goods on credit, and the instrument expressly waived note of acceptance. Nor was it essential to the validity of the contract that it be signed by plaintiff (*3 Cal. App. 2d 389, 390)* .

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[Reserved]

§§ 222.42[Reserved]

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22-222 California Points & Authorities § 222.60

§ 222.60 Supporting Contention That Suretyship Exists--Liability of Surety Limited to Local Contract Terms [Civ. Code § 2799]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general contention form supporting the existence of a suretyship (see, e.g., § 222.20).*]

BECAUSE _____ [*name*], THE SURETY, ASSUMED LIABILITY AS SURETY IN CONNECTION WITH AN UNSETTLED CONTRACT, HIS/HER/ITS LIABILITY IS LIMITED TO THE RISKS INCURRED UNDER THE TERMS OF SIMILAR CONTRACTS IN THE LOCALE IN WHICH THE PRINCIPAL CONTRACT IS TO BE PERFORMED.

Liability of Surety to Unsettled Contract Limited to Local Contract Terms. In an assumption of liability as surety in connection with a contract, the terms of which are not then settled, it is implied that its terms shall be such as will not expose the surety to greater risks than he or she would incur under those terms which are most common in similar contracts at the place where the principal contract is to be performed (*Civ. Code § 2799*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that because the surety assumed liability as a surety on an unsettled contract, the surety's liability is limited to the risks assumed in similar contracts in the locale in which the contract is to be performed [*see Civ. Code § 2799*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the conditions or amount of the surety's liability. For example, this argument may arise in opposing an appeal premised on the argument that the surety assumed liability for more than

is normally assumed in suretyship contracts. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel might allege facts illustrating that the surety assumed liability as surety on a building contract for which the penalty for noncompliance with the building time schedule was not settled. Counsel can determine the local penalty amounts on building contracts in that area to put a ceiling on the amount of the surety's liability.

[b] Related Pleading and Practice Forms

For forms relating to suretyship, see California Forms of Pleading and Practice, Ch. 538, *Suretyship, Bonds, and Undertakings* (Matthew Bender).

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[Reserved]

§§ 222.61[Reserved]

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22-222 California Points & Authorities § 222.80

§ 222.80 Supporting Contention That Suretyship Exists--Apparent Principal Is in Fact Surety [Civ. Code § 2832]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general contention form supporting the existence of a suretyship (see, e.g., § 222.20).*]

_____ [*Name*], AN APPARENT PRINCIPAL, MAY SHOW THAT HE/SHE/IT IS IN FACT A SURETY, WITHOUT ANY SHOWING THAT _____ [*name*], THE CREDITOR, ACCEPTED HIM/HER/IT AS SURETY.

A. Apparent Principal May Show Real Existence as Surety. One who appears to be a principal, whether by the terms of a written instrument or otherwise, may show that he or she is in fact a surety, except as against persons who have acted on the faith of his or her apparent character of principal. It is not necessary to show that the creditor accepted him or her as surety (*Civ. Code § 2832*; *Mead v. Sanwa Bank California (1998) 61 Cal. App. 4th 561, 571-572, 71 Cal. Rptr. 2d 625* ; *Wexler v. McLucas (1975) 48 Cal. App. 3d Supp 9, 12-13* , *121 Cal. Rptr. 453*).

[*Optional*] **B. Proof of Surety Is Good Against One Who Does Not Come Within Good Faith Exception.** The creditor's knowledge and acceptance of the signer's intention to be a surety, and not a principal or purchaser, enables the signer to show he or she is a surety rather than a principal. An agreement to pay only if the maker fails to pay, combined with the creditor's failure to come within the exception, support a finding of surety (*Civ. Code § 2832*; *Wexler v. McLucas (1975) 48 Cal. App. 3d Supp 9, 12-13* , *121 Cal. Rptr. 453*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that a suretyship relationship exists by showing that although a party appeared to be a principal, he or she was in fact a surety and that no one relied on his or

her apparent character of principal [*see Civ. Code § 2382*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of existence of the suretyship relationship. For example, this argument may arise on a summary judgment motion or an appeal premised on the argument that no suretyship relationship exists [*see, e.g., Wexler v. McLucas (1975) 48 Cal. App. 3d Supp 9 , 121 Cal. Rptr. 453]* . These points and authorities may also be adapted for use in a trial brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel might include a factual description of how the party signed an instrument with the intent to be a surety, responsible for payment only on the maker's failure to pay, with the creditor's knowledge that the party was signing in that capacity.

[b] Related Pleading and Practice Forms

For forms relating to suretyship, see *California Forms of Pleading and Practice, Ch. 538, Suretyship, Bonds, and Undertakings, § 538.10 et seq.* (Matthew Bender).

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 222.81* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Apparent Principal May Show Real Existence as Surety

In ***Mead v. Sanwa Bank California*** *(1998) 61 Cal. App. 4th 561, 71 Cal. Rptr. 2d 625* , the owners of property who signed a lease with a developer and executed a deed of trust in favor of the developer's construction lender sued the developer, the lender, and lender's assignee after the developer defaulted and the lender's assignee foreclosed on the owners' fee interest. As to the lender, the owners pleaded that they were sureties rather than principal obligors. The trial court dismissed their claim against the lender after a demurrer was sustained to each count alleged and the landowners did not amend their complaint. The owners appealed from the order of dismissal and from the post-judgment order awarding attorney's fees to the lender (*61 Cal. App. 4th 561, 566)* .

The appellate court held that the landowners sufficiently pleaded their status as sureties. Their allegations included the fact that the bank's officer considered them as third parties, the construction loan agreement and note were signed by the developer alone, and the deed of trust identified secured obligation as being that of developer and expressly provided that owners had no personal liability for debt. The complaint also alleged that the bank's officer considered the property owners to be third parties rather than principal obligors (*61 Cal. App. 4th 561, 571-572)* . The court also found, however, that the owners' complaint did not plead sufficient facts to constitute a cause of action against the lender (*61 Cal. App. 4th 561, 572)* .

In ***Wexler v. McLucas*** *(1975) 48 Cal. App. 3d Supp 9 , 121 Cal. Rptr. 453* , defendant's son and his wife, in order to purchase furniture from plaintiff's assignor, had defendant sign the sale contract and security agreement. Defendant thought she was signing as cosigner, although the agreement did not designate her as cosigner. After defendant's son was not able to maintain the original payment plan, plaintiff agreed to accept a lesser amount per installment. Plaintiff later brought an action against defendant for money owed, waiving its security interest in the furniture when defendant's son failed to pay the balance due on the furniture after it was delivered. The trial court entered judgment against defendant. Defendant appealed.

The court of appeal reversed. Among the issues addressed by the court was defendant's role as surety rather than principal. The court noted that *Civ. Code § 2832* was applicable. That section provides that one who appears to be a principal by the terms of a written instrument may show that he or she is in fact a surety except as against persons who have acted on the faith of his or her apparent character of principal. There was no evidence to indicate that plaintiff or his assignor were within the exception (*48 Cal. App. 3d Supp 9, 13)* .

[b] Proof of Surety Is Good Against One Who Does Not Come Within Good-Faith Exception

The facts and procedural background of ***Wexler v. McLucas*** *(1975) 48 Cal. App. 3d Supp 9* , *121 Cal. Rptr. 453* , are discussed in *§ 222.80[3][a]*. In *Wexler,* the court of appeal held that defendant was a surety rather than the principal. The evidence indicated that defendant intended to be a surety and not a principal or purchaser even though she was asked to sign as cosigner. She neither bought nor possessed the furniture and only agreed to pay for it if her son failed to do so. Such agreement is that of a surety: one who promises to answer for the default of another (*48 Cal. App. 3d Supp 9, 12-13)* . The court found that *Civ. Code § 2832* was applicable, and that there was no evidence to indicate that plaintiff or his assignor came within the exception of persons who have acted on the faith of the surety's apparent character as principal (*48 Cal. App. 3d Supp 9, 13)* .

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22-222 California Points & Authorities § 222.81

§ 222.81 Opposing Contention That Suretyship Exists--Apparent Principal Precluded From Showing Status as Surety When Third Person Has Acted on Faith of Character of Principal [Civ. Code § 2832]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general contention form opposing the existence of a suretyship (see, e.g., § 222.21).*]

_____ [*Name*], AN APPARENT PRINCIPAL, MAY NOT SHOW THAT HE/SHE/IT IS A SURETY AS AGAINST _____ [*name(s)*] BECAUSE _____ [THIS *or* THOSE] PERSON(S) _____ [HAS *or* HAVE] ACTED ON THE FAITH OF THE APPARENT CHARACTER OF _____ [*name of apparent principal*] AS PRINCIPAL.

A. One Who Appears to Be Principal May Not Prove Role As Surety Against Those Who Have Acted on Apparent Character of Principal. The maker of an instrument who appears by its terms to be a principal may not show that he or she is in fact a surety as against persons who have acted on the faith of the maker's apparent character of principal (*Civ. Code § 2832*; *Beverly Hills Nat. Bank v. Glynn (1968) 267 Cal. App. 2d 859, 868-869, 73 Cal. Rptr. 808*).

[*Optional*] **B. Apparent Surety Must Prove Creditor's Knowledge of Surety Relationship.** An apparent principal may show real character as surety only when the creditor knew that the third party (claimed to be the principal in fact) had agreed with the maker to pay the obligation to the creditor; [thus, a borrower's extension of credit using money loaned by the creditor, with the creditor's knowledge, does not make the borrower a surety as against the creditor] (*Civ. Code § 2832*; *Beverly Hills Nat. Bank v. Glynn (1968) 267 Cal. App. 2d 859, 868-869, 73 Cal. Rptr. 808*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that no suretyship relationship exists because the party attempting to show his or her character as surety appeared to be a principal and acted on the faith of this apparent character [*see Civ. Code § 2832*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the inapplicability of *Civ. Code § 2832* to allow an apparent principal to prove himself or herself to be in fact a surety. For example, this argument may arise on a motion for summary judgment or an appeal premised on the argument that no suretyship relationship exists [*see, e.g., Beverly Hills Nat. Bank v. Glynn (1968) 267 Cal. App. 2d 859, 73 Cal. Rptr. 808]* . These points and authorities may also be adapted for use in a trial brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Since an apparent principal may show his or her character as surety only against persons who have not acted on faith of his or her apparent character of principal, to disprove any claims of the existence of a suretyship, counsel must show reliance on the apparent character of principal. For example, counsel might describe a loan made in the principal's own name, the proceeds of which were given to the same person for whom the principal was acting as surety.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 222.80*.

[b] Related Pleading and Practice Forms

For forms relating to suretyship, see California Forms of Pleading and Practice, Ch. 538, *Suretyship, Bonds, and Undertakings* (Matthew Bender).

[3] Discussion of Authorities

[a] One Who Appears to Be Principal May Not Prove Role as Surety Against Those Who Have Acted on Apparent Character of Principal

In ***Beverly Hills Nat. Bank v. Glynn*** *(1968) 267 Cal. App. 2d 859, 73 Cal. Rptr. 808* , a borrower had obtained two loans from plaintiff, and on application for a third, he was told that he needed a continuing guaranty before the loan would be granted. The borrower went to defendant, his attorney, and asked for his assistance. After a meeting among the parties, plaintiff loaned the borrower the money, and defendant executed a continuing guaranty that guaranteed all sums of money which plaintiff had advanced or thereafter lent to the borrower. Defendant did not read the guaranty, but later claimed that his understanding of the content was different from the actual guaranty. In addition to the loans made by plaintiff to the borrower, defendant made loans to him with money borrowed in his name from plaintiff. Plaintiff brought action against defendant on the notes he guaranteed as well as on his own promissory notes. Defendant contended that in regard to the notes in his name, he was actually a surety and not the principal. He also contended that plaintiff did not provide information as to the true state of the borrower's poor financial condition. The trial court held that defendant had no liability for the notes executed prior to the guaranty, due to lack of consideration. But the court found defendant was liable for a note that was a partial renewal of an earlier note, with the bank's forbearance on the original note constituting consideration. Defendant was also liable for all the notes after the guaranty that were in the borrower's name as well as in defendant's name. Both plaintiff and defendant appealed.

The court of appeal affirmed the portion of the judgment in favor of plaintiff, reversed the portion in favor of defendant, and vacated and remanded the portion assessing attorney's fees and costs. Defendant asserted that it was error to find that he was a maker and not a surety of the promissory notes executed by him as maker. Parol evidence is admissible by the maker of an instrument who appears by its terms to be a principal to show that the maker is in fact a surety, except as against persons who have acted on the faith of the apparent character of principal. Plaintiff's awareness that the

monies were to be loaned by defendant to the borrower would not have made a difference. In the cases in which the doctrine of *Civ. Code § 2832* has been applied, there was also evidence that, to the knowledge of the creditor, the third party (claimed to be the principal in fact) had agreed with the maker to pay the obligation to the creditor. Nothing in the evidence proffered concerning those notes went that far. The mere fact that a lender knew that the proceeds of the loan were to be used to finance the borrower in lending transactions of his or her own does not, as between the creditor and the borrower, make the latter a surety for the borrower's customers (*267 Cal. App. 2d 859, 868-869)* .

In defendant's second appeal the court of appeal affirmed these results [*Beverly Hills Nat. Bank v. Glynn (1971) 16 Cal. App. 3d 274, 93 Cal. Rptr. 907]* .

[b] Apparent Surety Must Prove Creditor's Knowledge of Surety Relationship

The facts and procedural background of ***Beverly Hills Nat. Bank v. Glynn*** *(1968) 267 Cal. App. 2d 859, 73 Cal. Rptr. 808* , are discussed in *§ 222.81[3][a]*. In *Beverly Hills,* the court of appeal found defendant liable for notes he had guaranteed as well as notes obtained in his own name to be lent to the person whose payment he guaranteed. The court said that plaintiff's awareness that the monies were to be loaned by defendant to the borrower would not have made a difference. In the cases in which the doctrine of *Civ. Code § 2832* has been applied, there was also evidence that, to the knowledge of the creditor, the third party (claimed to be the principal in fact) had agreed with the maker to pay the obligation to the creditor. Nothing in the evidence proffered as to those notes went that far. The mere fact that a lender knew that the proceeds of the loan were to be used to finance the borrower in lending transactions of his or her own did not, as between the creditor and the borrower, make the latter a surety for the borrower's customers (*267 Cal. App. 2d 859, 868-869)* .

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22-222 California Points & Authorities §§ 222.82-222.99

[Reserved]

§§ 222.82[Reserved]

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4. Consideration

22-222 California Points & Authorities § 222.100

§ 222.100 Supporting Contention That Suretyship Exists--Necessary Consideration Exists [Civ. Code § 2792]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general contention form supporting the existence of a suretyship (see, e.g., § 222.20).*]

A SURETYSHIP OBLIGATION EXISTS AND IS AMPLY SUPPORTED BY THE PRESENCE OF CONSIDERATION BECAUSE _____ [CONSIDERATION WAS PRESENT IN THE ORIGINAL OBLIGATION *or* THERE WAS DISTINCT CONSIDERATION FOR THE SURETYSHIP].

[*EITHER*]

A. Suretyship Obligation That Is Part of Original Obligation Does Not Require Distinct Consideration. When a suretyship obligation is entered into at the same time with the original obligation, or with the acceptance of the latter by the creditor, and forms with that obligation a part of the consideration to the creditor, no other consideration need exist (*Civ. Code §§ 1605, 2792*; *Glickman v. Collins (1975) 13 Cal. 3d 852, 859-861, 120 Cal. Rptr. 76, 533 P.2d 204* ; *Gardena Valley Airport, Inc. v. All American Sports Enterprises, Inc. (1964) 230 Cal. App. 2d 478, 483-484, 41 Cal. Rptr. 93*).

[*AND/OR*]

B. Distinct Consideration for Suretyship Obligation. Consideration distinct from that of the original obligation must exist if a suretyship obligation is not entered into at the same time with the original obligation, or with the acceptance of the latter by the creditor, and does not form with that obligation a part of the consideration to the creditor (*Civ. Code §§ 1605, 2792*; see *Beverly Hills Nat. Bank v. Glynn (1968) 267 Cal. App. 2d 859, 867-868, 73 Cal. Rptr. 808* ; *Sharman*

v. Longo (1967) 249 Cal. App. 2d 948, 952, 58 Cal. Rptr. 79).

[*CONTINUE*]

[*Optional*] **C. Suretyship Obligation May Apply to Past Loans if Express Language Is Used.** A suretyship obligation may apply to loans made prior to the execution of the suretyship obligation when the language of the obligation is express to this effect. Forebearance to collect on a prior loan may serve as consideration for the suretyship obligation (*Beverly Hills Nat. Bank v. Glynn (1968) 267 Cal. App. 2d 859, 867-868, 73 Cal. Rptr. 808* ; *Perry v. Cassidy (1959) 170 Cal. App. 2d 175, 176-177, 338 P.2d 531*).

[*Optional*] **D. Suretyship Obligation as Part of Single Transaction Is Supported by Consideration Even Though Not Executed Contemporaneously With Primary Contract.** If the suretyship obligation was executed as a part of a single transaction, the consideration of the one promise supports the other and the obligation is valid, even though the suretyship obligation was not signed coincidentally with the signing of the primary contract in the transaction (*Donovan v. Wechsler (1970) 11 Cal. App. 3d 210, 215, 89 Cal. Rptr. 669* ; *Challenge-Cook Bros., Inc. v. Lantz (1967) 256 Cal. App. 2d 536, 539-540, 64 Cal. Rptr. 239*).

[*Optional*] **E. Written Suretyship Obligation Is Presumed to Be Supported by Consideration.** A presumption of consideration arises from the fact a suretyship obligation is in writing, and the burden of showing a want of consideration is on the surety seeking to invalidate the suretyship agreement (*Civ. Code §§ 1614, 1615*; *Glickman v. Collins (1975) 13 Cal. 3d 852, 859-861, 120 Cal. Rptr. 76, 533 P.2d 204* ; *Challenge-Cook Bros., Inc. v. Lantz (1967) 256 Cal. App. 2d 536, 539-540, 64 Cal. Rptr. 239*).

[*Optional*] **F. Surety Deriving Benefit From Transaction Presumed to Have Received Consideration.** When a surety derives a benefit from the transaction establishing the suretyship obligation, such as when stockholders of a corporation provide a guaranty for payment of a promissory note executed by the corporation, the benefit derived is sufficient consideration to support the suretyship obligation (*see Mortgage Guarantee Co. v. Chotiner (1936) 8 Cal. 2d 110, 112-113, 64 P.2d 138*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that a suretyship relationship exists and is supported by consideration. The necessary consideration may be shown in a variety of ways. Paragraph A may be used when the suretyship obligation is part of the original obligation and no distinct consideration need be shown. Paragraph B sets forth the necessity for consideration when the suretyship obligation is not part of the original obligation and may be used in conjunction with the optional paragraphs. Optional Paragraph C may be used when the suretyship obligation applies to past loans. Optional Paragraph D may be used when the suretyship obligation was not executed contemporaneously with the underlying obligation. Optional Paragraphs E and F present presumptions of the presence of consideration, as indicated by a written suretyship obligation and benefit to surety, respectively.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the requisite consideration to support the guaranty. For example, this argument may be used in support of a motion for summary judgment by plaintiff against a surety if there is a dispute as to whether there was consideration for the suretyship agreement [*see, e.g., Sharman v. Longo (1967) 249 Cal. App. 2d 948, 58 Cal. Rptr. 79]* . These points and authorities may also be adapted for use in a trial or appellate brief. If the issue of lack of consideration is raised for the first time on appeal by the alleged surety, a creditor who adequately pleaded consideration in his or her complaint can argue that the lack of consideration should have been

raised as an affirmative defense in the answer [*see, e.g., Elster's Sales v. Longo (1970) 4 Cal. App. 3d 216, 221-222, 84 Cal. Rptr. 83]* .

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel might illustrate the presence of consideration by describing the suretyship obligation as only one document in a single transaction, for which there was sufficient consideration.

[b] Related Pleading and Practice Forms

For forms relating to suretyship, see California Forms of Pleading and Practice, Ch. 538, *Suretyship, Bonds, and Undertakings* (Matthew Bender). For forms relating to the necessity of consideration, see Ch. 140, *Contracts* in that publication.

[3] Discussion of Authorities

[a] Suretyship Obligation That Is Part of Original Obligation Does Not Require Distinct Consideration

In ***Glickman v. Collins*** *(1975) 13 Cal. 3d 852, 120 Cal. Rptr. 76, 533 P.2d 204* , plaintiff's husband asked her for a divorce so he could marry defendant. They agreed to enter into an agreement whereby plaintiff would seek a divorce in Nevada, the property was divided, and monthly support payments were to be made by plaintiff's former husband. Before plaintiff would sign the agreement, out of concern that the support payments would not be made, she informed her husband and defendant that unless defendant agreed to guarantee the payment of the support obligations due, she would not sign the property settlement agreement. Defendant signed the guaranty agreement. A year after their marriage, defendant and plaintiff's former husband divorced and at that time the support payments to plaintiff ceased. Plaintiff obtained a judgment against her former husband for the past due payments. When that remained unpaid, plaintiff demanded the money from defendant, filing an action when defendant refused to pay. The trial court judgment was for plaintiff. Defendant appealed.

The Supreme Court modified the judgment by striking the sum for medical insurance payments, and otherwise affirmed. Defendant asserted that the guaranty agreement was unenforceable because there was no consideration, alleging that the stated consideration, plaintiff's execution of the property settlement agreement, was insufficient on two grounds. First, she claimed that since the property settlement agreement was dated earlier than the guaranty, it could not be consideration for the guaranty, asserting that even if they were contemporaneously executed, plaintiff was already obligated to comply with the terms of the property settlement agreement by virtue of the promise between the original spouses. The Court said that contention was without merit because the dates on the documents did not accurately reflect the chronology of their execution. The guaranty was actually executed before the property settlement and as part of the same transaction with it. The two instruments could be treated as if entered into contemporaneously and could serve as consideration for each other. When a suretyship obligation is entered into at the same time with the original obligation or with the acceptance of the latter by the creditor, and forms with that obligation a part of the consideration, no other consideration need exist [*Civ. Code § 2792*]. Defendant's second ground for alleging inadequate consideration was that plaintiff was already bound by the terms of the first agreement, and there was accordingly no new consideration. The Court responded that this is contradicted by the trial court's implied finding that there was sufficient new consideration. The obligations of both spouses under the final agreement differed from those under the original one, the new burdens thereby imposed on plaintiff and the new benefits thereby conferred on plaintiff's former husband furnished sufficient new consideration for defendant's promise to guarantee his undertaking. In any event, the written guaranty was itself presumptive evidence of consideration and defendant failed to sustain her burden of overcoming this presumption by showing an absence of new consideration in the second property settlement agreement. The Court said that consideration could also be found in plaintiff's statement that she would sign the settlement agreement and proceed with the divorce as soon as she received the executed guaranty. Her prompt execution of the final settlement agreement and filing for a divorce, bargained for in exchange for the guaranty, conferred sufficient benefit to satisfy the requirements

of new consideration (*13 Cal. 3d 852, 859-861)* .

In ***Gardena Valley Airport, Inc. v. All American Sports Enterprises, Inc.*** *(1964) 230 Cal. App. 2d 478, 41 Cal. Rptr. 93* , plaintiffs leased premises to defendant company, which then constructed a race track with necessary improvements at a substantial cost. The parties later executed another lease which cancelled the initial agreement and leased the premises for a longer time. This interim lease was to remain in effect until a 50-year lease, the escrow for which was opened the same day, was finalized. After defendant was in default in payment of rents and minimum guaranties, a promissory note was executed by defendant in favor of one of the plaintiffs for rentals due and advances made; the note was guaranteed by an officer of defendant. On the same day a chattel mortgage was also executed by defendant to secure payment of its note to the same plaintiff. Defendant defaulted and a renewal note was executed by defendant; the guaranty was continued and defendant's vice president joined as coguarantor. The renewal note was secured by a chattel mortgage. No payment of any kind was made on the renewal note and plaintiffs filed two actions. The property was attached and taken into the marshal's possession pursuant to a writ of attachment. After the marshal relinquished possession of the property, plaintiff in whose favor the note was executed took possession of it pursuant to the chattel mortgage to foreclose and sell. The actions were consolidated for trial. In the first action plaintiffs recovered monies due under the lease and defendant took nothing on its cross complaint for damages arising from plaintiffs' alleged conversion of personal property. In the other action plaintiffs were given judgment for the deficiency due on the promissory note against the coguarantors. The trial court denied any relief on defendants' cross complaint for damages resulting from alleged conversion. The appeals of defendants were consolidated.

The court of appeal affirmed. In addition to other arguments made, defendants asserted that the interim lease was executed without consideration. *Civ. Code § 1614* provides that a written instrument is presumptive evidence of a consideration. Therefore, defendants had the burden to establish a want of consideration. Not only did defendants not meet that burden, but plaintiffs made an affirmative showing that the lease carried the consideration required by law. The 50-year lease and the interim lease were executed on the same day. Defendants conceded that there was consideration for the 50-year lease; since both instruments were manifestly executed in consideration of each other, there was also consideration for the interim lease. *Civ. Code §§ 1614* and *1615* (burden of showing lack of consideration on party seeking to invalidate or avoid instrument) also govern the claim that there was no consideration for the undertaking of defendant's vice president as guarantor. Additionally, *Civ. Code § 2792* provides that when a suretyship obligation is entered into at the same time with the original obligation, no other consideration need exist. The original note was cancelled by mutual agreement. Thereafter the renewal note was executed by defendant; since it was guaranteed on the same date by defendant's vice president, *Civ. Code § 2792* was clearly applicable (*230 Cal. App. 2d 478, 483-484)* .

[b] Distinct Consideration for Suretyship Obligation

The facts and procedural background of ***Beverly Hills Nat. Bank v. Glynn*** *(1968) 267 Cal. App. 2d 859, 73 Cal. Rptr. 808* , are discussed in *§ 222.81[3][a]*. In *Beverly Hills Nat. Bank*, the court of appeal found defendant liable as a guarantor. The court said that a guaranty is not enforceable unless it was given for some consideration. That consideration may either be the contemporaneous or subsequent loaning of money, or the forbearance to collect on an obligation previously incurred. There was consideration for the guaranty as to all of the notes (*267 Cal. App. 2d 859, 867-868)* . Defendant also argued that the successive events were part of a single transaction and that the guaranty was not supported by consideration. The court found that there was consideration for the guaranty as applied to the note executed as a part of a single transaction (*267 Cal. App. 2d 859, 867-868)* .

In ***Sharman v. Longo*** *(1967) 249 Cal. App. 2d 948, 58 Cal. Rptr. 79* , plaintiff, a professional basketball player and coach, was hired by a newly formed basketball team. During the negotiations plaintiff indicated he had to be assured that he would earn his former salary. The contract was evidenced by three documents, the third of which was a surety agreement. The surety agreement was written when it was discovered the cost of a bond was prohibitive, and it was agreed that the corporation would substitute a surety agreement signed by two persons. Defendant and another signed

the third document, agreeing to serve as personal sureties for the promised salary. When the corporation become insolvent, plaintiff sought recourse under the guaranty agreement. The trial court granted plaintiff's motion for summary judgment and rendered judgment against both defendant and the other guarantor for the unpaid salary due plaintiff. Defendant appealed.

The court of appeal affirmed. Defendant contended that there was no consideration to support his promise of guaranty. He argued that a suretyship obligation entered into after the principal obligation has been incurred must have a new consideration to support it. Whether or not there is sufficient consideration is a question of fact and a guaranty entered into after the primary agreement has been executed and the consideration supporting it has passed requires a distinct consideration. The court said there was no issue of fact before the trial court to support that defense (*249 Cal. App. 2d 948, 952)* . Defendant did not allege any facts disputing plaintiff's statement that the guaranty was promised as part of the original contract of employment. Defendant alleged that he had no personal knowledge that plaintiff required a salary guaranty at the time of the original negotiations and that he was not a party to those negotiations. The court responded that was no defense against plaintiff's action on the guaranty (*249 Cal. App. 2d 948, 953)* . Since the agreement between plaintiff and the corporation required two guarantors, plaintiff was not bound to perform until the guarantors were supplied. Once defendant had signed the guaranty, plaintiff was no longer free to withdraw. This constituted the detriment to plaintiff which was the consideration for defendant's guaranty (*249 Cal. App. 2d 948, 954)* .

[c] Suretyship Obligation May Apply to Past Loans if Express Language Is Used

The facts and procedural background of ***Beverly Hills Nat. Bank v. Glynn*** *(1968) 267 Cal. App. 2d 859, 73 Cal. Rptr. 808* , are discussed in *§ 222.81[3][a]*. In *Beverly Hills Nat. Bank*, the court of appeal found defendant liable as a guarantor. The court explained its finding of consideration. The guaranty applied to all money which the bank had advanced; the language patently put defendant on notice that there had been earlier loans. The court referred to *Bank of America v. Granger (1931) 115 Cal. App 210, 1 P.2d 479* , in which the court held that prior loans were within the guaranty because of the express language contained in the document. A guaranty may apply to loans made prior to the execution of the guaranty (*267 Cal. App. 2d 859, 867-868)* .

In ***Perry v. Cassidy*** *(1959) 170 Cal. App. 2d 175, 338 P.2d 531* , defendant's husband borrowed money from a bank and executed a note in the bank's favor. After the note had become due, defendant's husband asked for another loan on an automobile he owned. The bank agreed to make another loan to defendant's husband if defendant would execute a continuing guaranty. She did so and the bank lent the money. The loan proceeds were applied to the note. After the automobile loan was paid, the note was assigned to plaintiff. Plaintiff brought an action against defendant and her husband to recover the balance due. The trial court judgment was for plaintiff. Defendant appealed.

The court of appeal affirmed. Defendant contended that the guaranty was executed without good and sufficient consideration. The court disagreed, stating that the guaranty unconditionally guaranteed any and all indebtedness of defendant's husband for any and all obligations already or later incurred and expressly stated that it was executed for a valuable consideration. By making the loan after presentation of the guaranty and delaying enforcement of the first note, the bank suffered detriment. The loan was consideration for the guaranty and the consideration would extend to the prior loan. The court cited *Bank of America v. Granger (1931) 115 Cal. App 210, 1 P.2d 479* , a case involving similar facts in which the court applied *Civ. Code § 1606* and held that by its delay in enforcing the collection of a prior loan, the bank suffered a prejudice which constituted a good consideration for the guaranty. An existing legal obligation resting on the promisor is a good consideration for a promise, to an extent corresponding with the extent of the obligation, but no further or otherwise (*170 Cal. App. 2d 175, 176-177)* .

[d] Suretyship Obligation as Part of Single Transaction Is Supported by Consideration Even Though Not Executed Contemporaneously With Primary Contract

In ***Donovan v. Wechsler*** *(1970) 11 Cal. App. 3d 210, 89 Cal. Rptr. 669* , plaintiff executed a written contract with a construction company for the conditional sale of construction equipment. Plaintiff required that defendant, a major shareholder of the construction company, execute a personal guaranty of the sale. Defendant executed a written guaranty prior to the delivery of the equipment which specifically guaranteed all the terms of the sale and was applicable to successors or assigns. Plaintiff assigned the sale to a credit company with recourse. When the construction company defaulted, the credit company declared a default, repossessed the equipment, and reassigned the sale to plaintiff together with the repossessed equipment and the guaranty. Plaintiff sold the equipment and brought action against defendant on the guaranty for the difference between the sale price and the resale price. The trial court judgment was for plaintiff. Defendant appealed.

The court of appeal affirmed. Defendant argued many points, among them that the guaranty was without consideration. The court disagreed, explaining that no sale would have been consummated except for defendant's guaranty. Even assuming the guaranty was executed a few days later, as defendant contended, and not concurrently with the sale, there was ample consideration for the guaranty. The guaranty was an intrinsic part of the sale. The guaranty was made to plaintiff and its assigns. There is no case which prevents the assignment of a guaranty. That the credit company was not damaged because it recovered its purchase price from plaintiff did not prevent plaintiff from recovering on the sale. The recourse arrangement between plaintiff and the credit company required plaintiff to take the sale back from the credit company (*11 Cal. App. 3d 210, 215)* .

In ***Challenge-Cook Bros., Inc. v. Lantz*** *(1967) 256 Cal. App. 2d 536, 64 Cal. Rptr. 239* , a corporation and plaintiff's assignor signed a three-year lease on a trencher and related equipment. The corporation made a security deposit and defendant signed a written guaranty in which he guaranteed its performance under the lease. After 10 payments the corporation defaulted. Plaintiff repossessed and resold most of the equipment. Plaintiff brought an action for damages and costs. The corporation defaulted in the action. Defendant alleged that the lease terminated with the repossession and that there was no consideration for his guaranty. The trial court judgment was for plaintiff. Defendant appealed.

The court of appeal affirmed. Defendant contended that there was no consideration for his guaranty because the lease was executed almost three weeks before he signed the guaranty, and the first month's rent had already been paid. He cited *Civ. Code § 2792* to support his claim. The court noted that the record was silent as to the circumstances under which the lease and guaranty were executed. Plaintiff relied on *Civ. Code §§ 1614* and *1615*, which establish a presumption of consideration from the fact a contract is in writing and place the burden of showing a want of consideration on the guarantor seeking to invalidate the instrument. If the guaranty agreement was requested and given orally, contemporaneously with the agreement to lease, the provisos (although unenforceable as to the promise to answer for the debt of another until reduced to writing) were given for a consideration which in turn supported the subsequently executed written agreement. Defendant failed to meet the burden of coming forward with evidence in support of his defense (*256 Cal. App. 2d 536, 539-540)* .

[e] Written Suretyship Obligation Is Presumed to Be Supported by Consideration

The facts and procedural background of ***Glickman v. Collins*** *(1975) 13 Cal. 3d 852, 120 Cal. Rptr. 76, 533 P.2d 204* , are discussed in *§ 222.100[3][a]*. In *Glickman,* the Supreme Court held the guaranty to be supported by consideration. After citing specific examples of the consideration in the case, the Court noted that in any event, the written guaranty was itself presumptive evidence of consideration and defendant failed to sustain her burden of overcoming this presumption by showing an absence of new consideration in the second property settlement agreement (*13 Cal. 3d 852, 859-861)* .

The facts and procedural background of ***Challenge-Cook Bros., Inc. v. Lantz*** *(1967) 256 Cal. App. 2d 536, 64 Cal. Rptr. 239* , are discussed in *§ 222.100[3][d]*. In *Challenge-Cook,* the court of appeal found the guaranty to be supported by consideration. Plaintiff relied on *Civ. Code §§ 1614* and *1615* for the presumption of consideration which arises when a contract is in writing, and the principle that the burden of showing a want of consideration is on the guarantor

who is seeking to invalidate the contract. Defendant failed to meet the burden of coming forward with evidence in support of his defense that consideration was lacking (*256 Cal. App. 2d 536, 539-540)* .

[f] Surety Deriving Benefit From Transaction Presumed to Have Received Consideration

In ***Mortgage Guarantee Co. v. Chotiner*** *(1936) 8 Cal. 2d 110, 64 P.2d 138* , a corporation executed a promissory note secured by a deed of trust. At the same time defendants, stockholders of the corporation, executed a written guaranty in which they waived notice of nonpayment and authorized extensions. The real property covered by the deed of trust was conveyed by the corporation to another. Prior to maturity, the note was transferred to plaintiffs. The real property was sold at a trustee's sale. Plaintiff brought an action for the stipulated deficiency. The trial court judgment was for defendants after finding, among other questions, that the guaranty was without consideration. Plaintiffs appealed.

The Supreme Court affirmed the opinion of the court of appeal that reversed the trial court judgment. One of plaintiffs' contentions was that the guaranty was executed coincidentally with the note, making a separate consideration unnecessary. The Court agreed with plaintiffs and said that inasmuch as the execution of the note and guaranty was coincidental, *Civ. Code § 2792* provides that no other consideration need exist. Furthermore, the guarantors were officers and stockholders of the family corporation which executed the note, and therefore, they derived a benefit from the transaction, of itself a good consideration for the guaranty (*8 Cal. 2d 110, 112-113)* .

[4] Additional Authorities

[a] Suretyship Obligation as Part of Single Transaction Is Supported by Consideration Even Though Not Executed Contemporaneously With Primary Contract

In *Miller v. Smith (1960) 179 Cal. App. 2d 114, 3 Cal. Rptr. 492* , plaintiffs leased their deep-sea fishing business and accompanying real and personal property to defendant principal for five years. Defendant guarantor signed a guaranty on the lease dated 11 days after the date on the lease. Plaintiffs repossessed the business and brought an action for damages after defendant principal failed to perform the terms of the lease. Defendant guarantor alleged that the guaranty had been executed without consideration. On appeal the court reversed the trial court's judgment in favor of defendant guarantor. The principal was permitted to occupy the property as of the date on the lease, even though the lease was neither fully executed nor delivered on that date. There was a conflict as to whether the lease was fully executed and delivered before the execution of the guaranty or at the same time as the guaranty; if the guaranty was executed as a part of the lease transaction the consideration for the lease furnished consideration for the contract of guaranty (*179 Cal. App. 2d 114, 116)* . The court found that the principal's entry while the lease was still being negotiated and before it was finally executed and delivered was not attributable to the unexecuted lease but created a mere tenancy at will. The subsequent execution and delivery of the written lease operated to enlarge the rights of defendant principal by converting that tenancy at will to a term for years and hence was supported by consideration (*179 Cal. App. 2d 114, 117)* .

[b] Written Suretyship Obligation Is Presumed to Be Supported by Consideration

Note that in a case of first impression, the court of appeal in *Rancho Santa Fe Pharmacy, Inc. v. Seyfert (1990) 219 Cal. App. 3d 875, 268 Cal. Rptr. 505* , held that the presumption of *Civ. Code § 1614* is one affecting the burden of producing evidence and not the burden of proof (*219 Cal. App. 3d 875, 884)* . Once evidence is admitted sufficient to call the existence of consideration into question, the proponent of the written instrument, usually the creditor, retains the burden of proving consideration (*219 Cal. App. 3d 875, 883)* . The holding required reversal of a judgment in favor of the creditor and against the guarantors because conflicting and erroneous instructions had been given regarding the burdens of proof.

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[Reserved]

§§ 222.101[Reserved]

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5. Necessity For Writing

22-222 California Points & Authorities § 222.120

§ 222.120 Supporting Contention That Suretyship Exists--Exception to Requirement That Suretyship Obligation Be in Writing [Civ. Code § 2794]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general contention form supporting the existence of a suretyship (see, e.g., § 222.20).*]

A SURETYSHIP OBLIGATION EXISTS EVEN THOUGH THE PROMISE IS NOT IN WRITING AND SIGNED BY _____ [*name*], THE SURETY, BECAUSE _____ [*specify facts showing promise contained within exception in Civ. Code § 2794 to writing requirement, e.g.,* THE PROMISE WAS ON A CONSIDERATION BENEFICIAL TO THE PROMISOR] AND THUS IS NOT REQUIRED TO BE IN WRITING PURSUANT TO THE EXCEPTION CONTAINED IN SECTION 2794 OF THE CIVIL CODE.

[*EITHER*]

A. Writing Not Required if Promisor Received Property or Received Discharge From Obligation as Consideration. A promise to answer for the debt of another is deemed an original obligation and is not required to be in writing pursuant to *Section 2793 of the Civil Code* when the promise is made by one who has received property of another on an undertaking to apply it pursuant to that promise; or by one who has received a discharge from an obligation, in whole or in part, in consideration of that promise (*Civ. Code § 2794(1)*).

[*AND/OR*]

B. Writing Not Required if Creditor's Obligation Renders Promisor the Principal Debtor and Beneficiary of Promise the Principal's Surety. A promise to answer for the debt of another is deemed an original obligation and is

not required to be in writing pursuant to *Section 2793 of the Civil Code* when the creditor parts with value, or enters into an obligation, in consideration of the obligation in respect to which the promise is made, in terms or under circumstances such as to render the promisor the principal debtor and the person in whose behalf it is made, the principal's surety (*Civ. Code § 2794(2)*).

[*AND/OR*]

C. Writing Not Required if Promise Is on Consideration of Cancellation of Antecedent Obligation and Substitution of New Promise. A promise to answer for the debt of another is deemed an original obligation and is not required to be in writing pursuant to *Section 2793 of the Civil Code* when the promise, being for an antecedent obligation of another, is made on the consideration that the party receiving it cancels the antecedent obligation, accepting the new promise as a substitute therefor (*Civ. Code § 2794(3)*; *California Viking Sprinkler Co. v. Pacific Indem. Co. (1963) 213 Cal. App. 2d 844, 852, 29 Cal. Rptr. 194*).

[*AND/OR*]

D. Writing Not Required if Promise Is for Antecedent Obligation and on Consideration of Release of Property or Person. A promise to answer for the debt of another is deemed an original obligation and is not required to be in writing pursuant to *Section 2793 of the Civil Code* when the promise, being for an antecedent obligation of another, is made on the consideration that the party receiving it releases the property of another from a levy, or his or her person from imprisonment under an execution on a judgment obtained on the antecedent obligation (*Civ. Code § 2794(3)*).

[*AND/OR*]

E. Writing Not Required if Promise Is on Consideration Beneficial to Promisor, as Determined by Main Purpose of Promisor. A promise to answer for the debt of another is deemed an original obligation and is not required to be in writing pursuant to *Section 2793 of the Civil Code* when the promise is on a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation, or from another person. A consideration is beneficial to the promisor when the leading and main purpose of the promisor is to subserve some purpose or interest of his or her own (*Civ. Code § 2794(4)*; *Schumm v. Berg (1951) 37 Cal. 2d 174, 187-188, 231 P.2d 39* ; *Farr & Stone Ins. Brokers, Inc. v. Lopez (1976) 61 Cal. App. 3d 618, 621-622, 132 Cal. Rptr. 641*).

[*AND/OR*]

F. Writing Not Required if Paid Factor Undertakes to Sell Merchandise and Act as Surety. A promise to answer for the debt of another is deemed an original obligation and is not required to be in writing pursuant to *Section 2793 of the Civil Code* when a factor undertakes, for a commission, to sell merchandise and act as surety in connection with the sale (*Civ. Code § 2794(5)*).

[*AND/OR*]

G. Writing Not Required if Promise Is Made by Holder of Instrument for Payment of Money During Transfer of Instrument for Payment of Debt or New Consideration. A promise to answer for the debt of another is deemed an original obligation and is not required to be in writing pursuant to *Section 2793 of the Civil Code* when the holder of an instrument for the payment of money, on which a third person is or may become liable, transfers it in payment to a

precedent debt of his or her own, or for a new consideration, and in connection with that transfer enters into a promise respecting that instrument (*Civ. Code § 2794(6)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that a suretyship relationship exists even though the promise is not in writing because the obligation is within one of the exceptions in *Civ. Code § 2794*, deeming it to be an original promise and not requiring a writing. Alternative paragraphs set forth the various exceptions of *Civ. Code § 2794* and may be used alone or in conjunction with each other. Paragraph A may be used when the promisor received consideration for the promise in the form of property or discharge from an obligation. Paragraph B may be used when the creditor's consideration renders the promisor the principal debtor and the person on whose behalf the promise is made the principal's surety. Paragraphs C and D may be used when the promise is made for an antecedent obligation of another, and has as its consideration either the cancellation of that obligation and substitution of the new promise or the release of property or person, respectively. Paragraph E may be used when the promise is on a consideration beneficial to the promisor. Paragraph F may be used when a factor, for a commission, sells merchandise, acting as a surety in connection with the sale. Paragraph G may be used when the promisor is the holder of an instrument for the payment of money and makes the promise in connection with the transfer of the instrument either in payment of an antecedent debt or for a new consideration.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that a writing is not required for the promise to answer for the obligation of another pursuant to an exception contained in *Civ. Code § 2794*. For example, this argument may arise in opposing a demurrer premised on the argument that no suretyship relationship exists [*see, e.g., Schumm v. Berg (1951) 37 Cal. 2d 174, 187-188, 231 P.2d 39]* . These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel might describe the promisor's main purpose in making the promise as being one to his or her own pecuniary benefit, as it would be if a major stockholder orally promised to pay the bills of the corporation to enable it to establish enough credit to retain a publicity campaign [*see Civ. Code § 2794(4)*].

[b] Related Pleading and Practice Forms

For forms relating to the statute of frauds, see California Forms of Pleading and Practice, Ch. 530, *Statute of Frauds* (Matthew Bender). For forms relating to suretyship, see Ch. 538, *Suretyship, Bonds, and Undertakings* in that publication.

[c] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing a writing required by the statute of frauds, see Ch. 216, *Statute of Frauds* .

[d] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 222.121* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Writing Not Required if Promise Is on Consideration of Cancellation of Antecedent Obligation and Substitution of New Promise

In ***California Viking Sprinkler Co. v. Pacific Indem. Co.*** *(1963) 213 Cal. App. 2d 844, 29 Cal. Rptr. 194* , a general contractor in an Air Force construction project supplied its required bond for the benefit of all persons supplying labor or materials. The subcontractor, as principal, and defendant, as surety, issued the subcontract bond, whereby defendant agreed to hold the general contractor, as sole obligee under the bond, harmless from all loss sustained by reason of the subcontractor's failure to perform. Later the subcontractor and plaintiff executed a contract in which plaintiff agreed to supply labor and materials for the subcontractor. When plaintiff was not reimbursed for the labor and materials it had supplied, it gave notice to the subcontractor of the amount unpaid, notifying the general contractor as well. After the subcontractor filed for bankruptcy, plaintiff instituted suit in federal court against the general contractor and its surety to recover from them, by virtue of their bond, the claimed balance. A settlement was reached between defendant's agent and plaintiff which was later repudiated by defendant. Thereafter plaintiff filed a state action for breach of the oral agreement to compromise a claim. The trial court denied defendant's motion for a new trial and denied a motion for judgment notwithstanding the verdict, rendering a verdict for plaintiff. Defendant appealed.

The court of appeal affirmed the order denying motion for judgment notwithstanding the verdict and reversed the judgment. Although the reversal was based on an error on an agency issue, the court addressed all of defendant's contentions. Defendant contended that the action was barred by the statute of frauds, claiming that the promise was a special promise to answer for the debt, default, or miscarriage of another and *Civ. Code § 1624* and former Code Civ. Proc. § 1973(2)) required it to be in writing, and that it was not within the exceptions in *Civ. Code § 2794*. The court agreed that it was a promise to take over the debt of another, but found that it came within the exception provided by *Civ. Code § 2794(3)*, and was an original obligation of the promisor and did not need to be in writing. The exception provides that a promise to answer for the obligation for another need not be in writing when the promise, being for an antecedent obligation of another, is made on the consideration that the party receiving it cancels the antecedent obligation, accepting the new promise as a substitute therefor. The consideration alleged was the dismissal with prejudice of the federal court action. The effect of that dismissal would cancel any obligation embraced in that action which might be owed to plaintiff. A judgment for plaintiff in the general action would render defendant liable on its indemnity bond. Thus plaintiff agreed to cancel the antecedent obligation asserted in the federal suit by dismissing that suit with prejudice and to accept defendant's promise of compromise as a substitute therefor. A new promise which discharges another obligation by novation, or one in which no obligation of the other exists or is contemplated, is necessarily original since there can be no debt of another (*213 Cal. App. 2d 844, 852)* .

[b] Writing Not Required if Promise Is on Consideration Beneficial to Promisor, as Determined by Main Purpose of Promisor

In ***Schumm v. Berg*** *(1951) 37 Cal. 2d 174, 231 P.2d 39* , plaintiff was the illegitimate son of an actor. When the actor refused to marry plaintiff's mother she demanded that he acknowledge his paternity or she would institute proceedings to have him declared the father. The actor, believing that a suit would be damaging to his social and professional standing, entered into an oral agreement with the mother for the support of plaintiff. The mother agreed to include the actor's first name in plaintiff's name. She married another man shortly before plaintiff was born. The actor made initial payments and then refused to comply with the agreement. When the actor died and a claim against his estate was rejected, plaintiff brought an action. The trial court sustained executors defendants' demurrer without leave to amend. Plaintiffs appealed.

The Supreme Court reversed. Among the other issues discussed in the case was the validity of the oral agreement. Defendants asserted that the oral contract was unenforceable because it was within the statute of frauds. They claimed that the contract was within the provision requiring a writing for a special promise to answer for the debt, default, or miscarriage of another. Their argument was premised on the idea that the actor promised to answer for the obligation of the mother's husband to support plaintiff; since they were married when plaintiff was born, plaintiff was presumed

legitimate and the husband was liable for his support. The Court said that argument was predicated on the incorrect assumption that the promise was to plaintiff. The promise was an original promise to the mother. Among other reasons why the statute did not apply is the rule provided by *Civ. Code § 2794(4)*, that a promise to answer for the debt of another is deemed an original obligation and not within the statute when the promise is on a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation, or from another person. Whenever a promise to answer an antecedent obligation of another is made on a fresh consideration beneficial to the promisor, no matter from what source it may move, the promise is an original one and valid though oral; or, whenever the leading and main object of the promisor is not to become surety of another, but to subserve some purpose or interest of his or her own, the promise is not within the statute, although the effect of this promise may be to pay the debt or discharge the obligation of another. The mother's promise to name the child after the actor and to refrain from instituting an action was beneficial to the actor. This accords with the basic principal that the important question is whether the promise made is in fact an assumption of another's liability or the primary obligation of the promisor himself or herself. In the former case, the promise is within the statute and must be in writing, but in the latter case the promise is valid though verbal. The precise language used in making the promise is important, as a slight change in phraseology may have the effect of changing a promise, intended to be conditional and collateral, into an independent undertaking (*37 Cal. 2d 174, 187-188)* .

In ***Farr & Stone Ins. Brokers, Inc. v. Lopez*** *(1976) 61 Cal. App. 3d 618, 132 Cal. Rptr. 641* , plaintiff insurance company provided comprehensive insurance to a company. When the company fell behind on its premium payments, plaintiff advanced money to the insurance carriers on the company's behalf. Defendants' children later assumed management of the company and defendant agreed to assist them. When defendant met with plaintiff to discuss the company's insurance obligations, it was agreed that the company would make regular payments on the past premiums and pay all future premiums when due. Defendant promised that if the company could not pay the premiums he would pay them on his own. The company made one payment; defendant sent a letter stating that he and his children were not associated with the company. Plaintiff brought an action for the amount owed on the premiums. The trial court judgment was for plaintiff. Defendant appealed.

The court of appeal affirmed. Defendant contended that the statute of frauds barred enforcement of his oral promise. Plaintiff relied on an exception provided by *Civ. Code § 2794(4)*, which states that a promise to answer for the obligation of another is deemed an original obligation of the promisor and need not be in writing when the promise is on a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation, or from another person. Defendant argued that the exception did not apply because there was no consideration beneficial to him because he received nothing of immediate and direct pecuniary benefit. The court disagreed. The forebearance of plaintiff to cancel the company's insurance policies was a detriment to plaintiff, which passed on the opportunity to obtain rebates on prepaid premiums, and a benefit to defendant's children, who had an ownership interest in the company. Defendant had a direct and personal concern in the welfare of his children and their economic venture. Additionally, his own business reputation was at stake since he assumed a position with the company. Whenever the leading and main object of the promisor is not to become surety of another but to subserve some purpose or interest of his or her own, the promise is not within the statue of frauds even though performance of the promise may pay the debt or discharge the obligation of another. The consideration required for *Civ. Code § 2794(4)* usually is, but need not be, pecuniary. The important question is whether the promise is only an assumption of another's liability or a new and primary obligation of the promisor (*61 Cal. App. 3d 618, 621-622)* .

[4] Additional Authorities

[a] Writing Not Required if Promise Is on Consideration Beneficial to Promisor, as Determined by Main Purpose of Promisor

In *Michael Distributing Co. v. Tobin (1964) 225 Cal. App. 2d 655, 37 Cal. Rptr. 518* , defendant was a major owner in a building corporation employed in building a major housing project. The corporation agreed to make its subcontractor's

building supplies payments. After the corporation fell behind in payments as a result of financial difficulties, defendant orally promised that if plaintiff would continue to deliver the supplies, he personally would supply funds to the corporation to enable it to pay plaintiff in full for all merchandise. Plaintiff relied on that promise and continued to deliver the supplies, later bringing an action for monies owed. The court of appeal affirmed the trial court's judgment for plaintiff. Defendant urged that the statute of frauds applied since he promised to answer for the debt of another and that promise was not in writing. The court reviewed cases examining the application of *Civ. Code § 2794(4)* in rejecting defendant's argument. The court explained that an exception to the statute occurs when the oral promise is made for a consideration beneficial to the promisor, in which it appears that the promise was given merely for the promisor's own pecuniary or business advantage. In that case it is deemed an original obligation of the promisor and need not be in writing. The test for determining if the new promise is excluded from the statute depends on the main purpose or leading object of the promisor. Although a third party is the original obligor or the primary debtor, the promisor may have a personal, immediate, and pecuniary interest in the transaction and is therefore a party to be benefited by the performance of the promisee. In those cases the reason which prompted the statutory provision fails, and the courts will give effect to the promise. In evaluating the consideration of that contract, they will use the main purpose or leading object rule. Whenever a promise to answer an antecedent obligation o another is made on a fresh consideration beneficial to the promisor, no matter from what source it may move, the promise is an original one and valid though oral; or, whenever the leading and main object of the promisor is not to become surety of another, but to serve some purpose or interest of his or her own, the promise is not within the statute, although the effect of the promise may be to pay the debt or discharge the obligation of another. Defendant was benefited personally by the contract, and his promise to pay for the building materials was supported by consideration consisting of plaintiff's continued delivery of building supplies (*225 Cal. App. 2d 655, 664-666)* .

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22-222 California Points & Authorities § 222.121

§ 222.121 Opposing Contention That Suretyship Exists--Suretyship Obligation Must Be in Writing [Civ. Code § 2793]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general contention form opposing the existence of a suretyship (see, e.g., § 222.21).*]

NO SURETYSHIP EXISTS BECAUSE THERE IS NO WRITTEN INSTRUMENT CREATING THE OBLIGATION SIGNED BY _____ [*name*], THE ALLEGED SURETY, AND NONE OF THE EXCEPTIONS TO THE WRITING REQUIREMENT CONTAINED IN SECTION 2794 OF THE CIVIL CODE APPLY.

Suretyship Obligation Must Be in Writing. Unless otherwise excepted under *Section 2794 of the Civil Code*, a suretyship obligation, or the agreement to guarantee the performance of another, must be in writing and signed by the surety (*Civ. Code §§ 1624(a)(2), 2793*; *Barnes v. Hartman (1966) 246 Cal. App. 2d 215, 221-223, 54 Cal. Rptr. 514* ; *Frudden v. Peppers Fruit Co. (1932) 126 Cal. App 544, 545-546, 14 P.2d 874*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that no suretyship exists because the writing required to create a suretyship obligation does not exist and none of the exceptions contained in *Civ. Code § 2794* apply [*see Civ. Code §§ 1624(a)(2), 2793*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the nonexistence of a suretyship due to lack of a written instrument. For example, this argument may arise on a motion for summary judgment or an appeal premised on the argument that no suretyship relationship exists because of the lack of writing [*see, e.g., Barnes v. Hartman (1966) 246*

Cal. App. 2d 215, 54 Cal. Rptr. 514] . These points and authorities may also be adapted for use in a trial brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should allege facts describing an oral promise to pay the debts of another not supported by any writing.

In an appropriate case, the points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 222.120*.

[b] Related Pleading and Practice Forms

For forms relating to the statute of frauds, see California Forms of Pleading and Practice, Ch. 530, *Statute of Frauds* (Matthew Bender). For forms relating to suretyship, see *Ch. 538, Suretyship, Bonds, and Undertakings, § 538.10* et seq. in that publication.

[c] Related Points and Authorities

For points and authorities supporting and opposing a writing required by the statute of frauds, see Ch. 216, *Statute of Frauds* .

[3] Discussion of Authorities

[a] Suretyship Obligation Must Be in Writing

In ***Barnes v. Hartman*** *(1966) 246 Cal. App. 2d 215, 54 Cal. Rptr. 514* , plaintiff property owner entered into a long term lease with lessee. The lease contained provisions for the lessee to make improvements on the land and for plaintiff to subordinate his interest in the property to a construction loan so long as there was no personal obligation on his part. Plaintiff signed the trust deed which secured the promissory note. Defendant was the payee of the note and named beneficiary. After the lessee defaulted in its payments on the note, plaintiff sold the property, using some of the proceeds to pay the demands of defendant, including a specific amount which was interest charged in excess of the legal rate. Plaintiff brought an action in usury and contended that he was a borrower by reason of signing the loan agreement and further became a surety by reason of signing the trust deed. Defendant argued that no cause of action resided in plaintiff since he did not fall within the class of persons protected by the usury code provisions. The trial court judgment was for defendant. Plaintiff appealed.

The court of appeal affirmed. In addressing defendant's contention that plaintiff was not entitled to bring an usury action the court touched on the requirements of a guaranty contract. Plaintiff contended that if he was not a borrower, he was a surety for the loan and could maintain the action. Plaintiff never signed an instrument or document guaranteeing the repayment of the loan as required by *Civ. Code § 2793*. The lease contract under the terms of which plaintiff agreed to subordinate his remaining estate in the property was independent of the loan agreement between the lessee and defendant. As to plaintiff, any legal consideration was embraced within the lease agreement. Defendant did not request or require any consideration from plaintiff. Plaintiff, by signing the deed of trust, was satisfying a legal obligation owed by him and arising out of the lease contract between him and the lessee (*246 Cal. App. 2d 215, 221-223)* .

In ***Frudden v. Peppers Fruit Co.*** *(1932) 126 Cal. App 544, 14 P.2d 874* , it was alleged that defendant corporation executed a written guaranty of the grocery account of an individual. The guaranty was revoked shortly thereafter, when the individual owed plaintiff money. Thereafter plaintiff continued to extend credit and received payments from the individual in excess of the balance due at the time of the revocation. When the individual failed to pay his account in full, plaintiff brought an action against defendant. Plaintiff sought an amount twice the amount owing at the time of revocation. Defendant denied that it executed any guaranty and alleged that the person who signed the purported guaranty did not have the authority to do so. The trial court judgment was for plaintiff. Defendant appealed.

The court of appeal reversed. *Civ. Code §§ 1624* and *2793* state that an agreement to answer for the debt of another must be in writing. As the one who signed the purported guaranty was an employee of defendant, his authority to execute the written agreement was also required to be in writing. Plaintiff contended that it was an original obligation of the corporation rather than an agreement to answer for the debt of another and therefore not required to be in writing by virtue of *Civ. Code § 2794(2)*. The evidence did not support plaintiff's contentions. *Civ. Code § 2794(2)* had no application unless the agreement was one to render the party making the promise the principal debtor, and the person in whose behalf it is made his or her surety (*126 Cal. App 544, 545-546)* .

California Points & Authorities

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CHAPTER 222 SURETYSHIP
PART II. FORMS
B. Creation Of Suretyship
5. Necessity For Writing

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[Reserved]

§§ 222.122[Reserved]

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CHAPTER 222 SURETYSHIP
PART II. FORMS
C. Types Of Suretyship
1. Continuing

22-222 California Points & Authorities § 222.140

§ 222.140 Supporting Contention That Continuing Suretyship Exists--Guaranty Is Continuing [Civ. Code § 2814]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general form, such as § 222.20, supporting the existence of a suretyship*].

A CONTINUING SURETYSHIP EXISTS BECAUSE _____ [*name*], THE SURETY, GUARANTEED TO ANSWER FOR THE FUTURE LIABILITY OF _____ [*name*], THE PRINCIPAL, INCURRED UNDER SUCCESSIVE TRANSACTIONS THAT _____ [CONTINUE THE PRINCIPAL'S LIABILITY *and/or* RENEW THE PRINCIPAL'S LIABILITY FROM TIME TO TIME AFTER IT HAS BEEN SATISFIED].

A. Continuing Suretyship Obligation Establishes Surety's Continuing Liability for Principal's Future Transactions. A continuing suretyship obligation is one relating to a future liability of the principal under successive transactions that either continue liability or from to time to time renew it after it has been satisfied (*Civ. Code § 2814*; *Central Building, LLC v. Cooper (2005) 127 Cal. App. 4th 1053, 1055, 26 Cal. Rptr. 3d 212* ; *Berg Metals Corp. v. Wilson (1959) 170 Cal. App. 2d 559, 569-570, 339 P.2d 869*).

[*Optional*] **B. Standing Credit Is Continuing Suretyship Obligation.** When, by the terms of an instrument, it is evident that the object is to give a standing credit to the principal, to be used from time to time either indefinitely or for a certain period, it is deemed a continuing suretyship obligation (*Berg Metals Corp. v. Wilson (1959) 170 Cal. App. 2d 559, 569-570, 339 P.2d 869* ; *Kierulff & Ravenscroft v. Koping (1928) 94 Cal. App 473, 479, 271 P 353*).

[*Optional*] **C. Continuing Suretyship Obligation May Be for Limited Amount.** When a surety contains a limitation as to the amount for which the surety will be bound, but contains no limitation as to time, it will be construed to be a continuing suretyship obligation operative without limitation, except as to the amount of liability, until revoked. The

limit has reference to the amount of the surety's liability, and not to the amount of the dealing between the principal and the creditor (*Goldman v. Dangerfield (1929) 101 Cal. App 67, 72-73, 281 P 400* ; *Lean v. Geagan (1912) 20 Cal. App 260, 262, 128 P 792*).

[*Optional*] **D. Suretyship Obligation for Prospective Transactions Is Implied to Be Continuing Unless Otherwise Specified.** A continuing suretyship obligation contemplates a succession of liabilities for which, as they accrue, the surety becomes liable. It is prospective in its operation, and is intended to provide security in respect to future transactions, within certain limits. Unless the words of the suretyship fairly imply that the liability of the surety is to be limited, it is generally regarded as continuing until the suretyship obligation is revoked (*Berg Metals Corp. v. Wilson (1959) 170 Cal. App. 2d 559, 570-571, 339 P.2d 869* ; *see Kierulff & Ravenscroft v. Koping (1928) 94 Cal. App 473, 476, 271 P 353*).

[*Optional*] **E. Parol Evidence Admissible if Instrument Is Ambiguous.** The character of the suretyship obligation is determined by reference to all relevant surrounding circumstances. Whether or not a guaranty is continuing must be determined from the language of the instrument, or, in case of ambiguity, by resort to parol evidence of the circumstances under which it was made (*Berg Metals Corp. v. Wilson (1959) 170 Cal. App. 2d 559, 569-570, 339 P.2d 869*).

[*Optional*] **F. Principal's Payments Do Not Discharge Surety Unless Full Debt Is Discharged.** If the contract is found to be a continuing suretyship obligation, payments by the principal do not discharge the surety unless they discharge the full debts to which the suretyship obligation attached (*Berg Metals Corp. v. Wilson (1959) 170 Cal. App. 2d 559, 570-571, 339 P.2d 869* ; *Goldman v. Dangerfield (1929) 101 Cal. App 67, 75, 281 P 400*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that a continuing suretyship exists and the surety's liability is prospective and includes future transactions [*see Civ. Code § 2814*].

- Optional Paragraph B may be used when the object of the transaction was to grant a standing credit for the principal.

- Optional Paragraph C may be used when a limitation as to amount, but not duration, was included in the suretyship obligation.

- Optional Paragraph D may be used when the suretyship obligation was for future transactions for an unspecified duration.

- Optional Paragraph E may be used to support the admission of parol evidence as to the continuing nature of the obligation.

- Optional Paragraph F may be used when the principal made some payments, but not in an amount sufficient to discharge the full amount owed.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the continuing liability of the surety. For example, this argument may arise in opposing a motion for a new trial premised on the argument that the suretyship was not continuing and defendant was not liable [*see, e.g., Lean v. Geagan (1912) 20 Cal. App 260, 260-261, 128 P 792]* . They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should present facts showing:

- That the suretyship obligation was signed by the surety.
- That the obligation was without time limitations.
- Whether or not a standing credit was provide.
- Whether or not the suretyship obligation was for a limited amount.

Counsel should also present any parol evidence of the circumstances under which the obligation was made.

[b] Related Pleading and Practice Forms

For forms relating to suretyship, see California Forms of Pleading and Practice, Ch. 538, *Suretyship, Bonds, and Undertakings* (Matthew Bender).

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 222.141* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Continuing Suretyship Obligation Establishes Surety's Continuing Liability for Principal's Future Transactions

In ***Central Building, LLC v. Cooper*** *(2005) 127 Cal. App. 4th 1053, 26 Cal. Rptr. 3d 212* , a corporation which was often late making its rent payments on leased premises negotiated a lease termination agreement, a new lease, and personal guaranty agreements by the individual principal shareholders. The new lease and lease termination agreements specifically referenced the personal guaranties as additional consideration for the lease. The corporation's payments continued to be late almost every month. Before the lease term expired, the parties entered into a *first amendment* to the lease, which provided that except as modified all terms and conditions of the lease remained unchanged. After expiration of the extended term, the corporation remained on the premises pursuant to the holdover provision of the lease. The parties thereafter executed a *second amendment* to the lease, and except as modified, the original lease terms remained in effect. The corporation never paid rent after the date of the second lease amendment and the lessor filed a complaint for breach of contract against the guarantors and the corporation. Although the corporation admitted that it owed unpaid rent and other fees, the guarantors denied any liability. The trial court entered judgment against the corporation and the guarantors (*127 Cal. App. 4th 1053, 1058)* .

Defendants argued that the guaranty agreements did not extend beyond the term of the new lease, or into the period of the holdover tenancy, and that they should not be held for the corporation's admitted defaults. The lessor contended that the agreement was a continuing guaranty, applicable to future transactions, which remained in effect, and the court of appeal agreed. After reviewing the general principles of suretyship and guaranty and the terms of the governing documents, it concluded that the guaranty agreements applied to the lease as amended (*127 Cal. App. 4th 1053*). The court initially noted that guaranty agreements may be limited or continuing. In this case, the agreement specifically stated that it was a continuing guaranty. Although a continuing guaranty may be revoked at any time, this guaranty was expressly made irrevocable and had no expiration date. Furthermore, no limiting language was present in the guaranty agreements. The language in the relevant documents plainly made the guaranty applicable to modifications in the lease

such as extensions of the lease term. The guarantors also expressly waived their statutory right under *Civ. Code § 2819* to exoneration when the original obligation is altered (*127 Cal. App. 4th 1053, 1060)* . The court stated that even without the express term in the guaranty allowing modification, a modification of the underlying obligation generally does not revoke a continuing guaranty, but only modifies the guaranty in the same way that the underlying obligation is modified. The fact that the lease termination agreement expressly terminated the prior guaranty agreements demonstrated that the parties knew how to terminate a personal guaranty when that was their intent (*127 Cal. App. 4th 1053*). The appellate court therefore concluded that the guaranty agreements were continuing guaranties of performance under the lease that applied to the lease amendments, and affirmed the judgment (*127 Cal. App. 4th 1053, 1065)* .

In ***Berg Metals Corp. v. Wilson*** *(1959) 170 Cal. App. 2d 559, 339 P.2d 869* , plaintiff's predecessor in interest was a company that acted as the broker for a business that bought and sold scrap iron and steel. The two companies made two written agreements by which plaintiff's predecessor became the sole broker for the business and provided for certain advances to be made by plaintiff's predecessor to the other business. The individual defendants, owners of the business, induced plaintiff's predecessor to make the two contracts and to furnish the additional funds. One of the contracts provided, among other things, that if the business failed to deliver specified securities, the individual defendants agreed to personally and individually indemnify plaintiff's predecessor and hold it harmless from any loss or damages. The other agreement stated that the business was in debt to plaintiff's predecessor. Defendants executing the agreements expressly agreed that the guaranty would pertain to advances up to $15,000; for anything beyond that amount they would not be responsible under the guaranty. Plaintiff eventually brought an action on the written guaranty. The trial court judgment was for plaintiff. Defendants appealed.

The court of appeal affirmed. The court thoroughly examined the nature of a continuing guaranty. Defendants argued that the two instruments were to be construed as a single agreement, a guaranty limited to a single loan of $15,000, which was paid, resulting in a release of their obligation as guarantors. However, the court accepted plaintiff's contention that it was a continuing guaranty on which less than $15,000 was due at the time of suit, and that the guarantors were not released, even though the total of the fluctuating loan exceeded that amount at times. The guaranty agreement referred to loss for any money remaining unpaid pursuant to the loans up to $15,000. At the time the guaranty was made the indebtedness actually amounted to more than $15,000; defendants' contention would strangle their obligation at birth. There was never any intention that a single lump sum loan should be made (*170 Cal. App. 2d 559, 568-569)* .

The court states that question of whether a guaranty is a continuing one is to be determined by reference to all relevant surrounding circumstances. A continuing guaranty is one relating to a future liability of the principal under successive transactions which either continue liability or from time to time renew it after it has been satisfied. Whether or not a guaranty is continuing must be determined from the language of the instrument, or, in case of ambiguity, by resort to parol evidence of the circumstances under which it was made. Unless the words of the guaranty fail to imply that the guarantor's liability is to be limited, it will be regarded as continuing until the guaranty is revoked. A guarantor may limit the amount for which he or she will be liable, or the time for which the guaranty will run, or may limit liability to a single transaction between the principal debtor and the creditor, as distinguished from a continuing guaranty. However, a limitation on the amount for which the guarantor will be liable does not necessarily mean that the guaranty is not continuing. That type of limitation s not considered a condition to the extent of the credit to be given the debtor, breach of which would release the guarantor; and the guarantor may still be liable although the principal debtor has at various times contracted and paid debts equal or greater than the amount of the guaranty (*170 Cal. App. 2d 559, 569-570)* .

When the guaranty contains a limitation as to te amount for which the guarantor will be boun, but contains no limitation as to time, and there is nothing in the circumstances surrounding the execution to evince a contrary intention, it will be construed to be a continuing guaranty and operative without limitation, except as to the amount of liability, until revoked. The limit has reference to the amount of the guarantor's liability, and not to the amount of dealing between the principal and the guarantee, and the guarantor will be held liable to the extent of the guaranty, notwithstanding the fact

that the principal debtor may have contracted debts to an amount equal to or greater than the sum named in the guaranty, and paid them. But when it is apparent, whether from the guaranty language or from language in connection with the circumstances, that the intention was to limit the guaranty to the amount specified for the first transaction, or series of transactions, it is not a continuing one and will not extend to other transactions after that limit has been reached. A continuing guaranty contemplates a succession of liabilities for which as they accrue, the guarantor becomes liable. It is prospective in its operation, and is generally intended to provide security in respect to future transactions, within certain limits. Unless the words in a which a guaranty is expressed fairly imply that the liability of the guarantor is to be limited, it is generally regarded as continuing until the guaranty is revoked. If the contract is found to be a continuing guaranty, the payment by the principal does not discharge the guarantor unless the principal discharges the full debts to which the guaranty attaches (*170 Cal. App. 2d 559, 570-571)* .

[b] Standing Credit Is Continuing Suretyship Obligation

The facts and procedural background of ***Berg Metals Corp. v. Wilson*** *(1959) 170 Cal. App. 2d 559, 339 P.2d 869* , are discussed in *§ 222.140[3][a]*. In *Berg*, the court of appeal affirmed plaintiff's judgment. The court explained what constitutes a continuing guaranty. When by the terms of an instrument it is evident that the object is to give a standing credit to the principal, to be used from time to time either indefinitely or for a certain period, it is deemed a continuing guaranty (*170 Cal. App. 2d 559, 569-570)* .

In ***Kierulff & Ravenscroft v. Koping*** *(1928) 94 Cal. App. 473, 271 P. 353* , defendant executed a written guaranty to establish the credit of her husband in which she guaranteed his debts up to $500. In the course of business with plaintiff, defendant's husband, the principal, accrued a balance in excess of the amount of the guaranty. Plaintiff brought suit against defendant when the principal defaulted. The trial court judgment awarded plaintiff $500. Defendant appealed.

The court of appeal affirmed. The court identified the main issue as whether or not the guaranty was a continuing guaranty. If it was, defendant was liable even though her principal purchased goods of more than twice the amount specified as the extent of defendant's liability. A guaranty limiting the amount for which the guarantor will be bound, but without limitation as to time, and without circumstances to evince a contrary intention, will in general be construed to be a continuing guaranty and operative until revoked (*94 Cal. App. 2d 473, 476)* . When, by the terms of the guaranty, it is evident that the object is to give a standing credit to the principal, to be used from time to time, either indefinitely or for a certain period, it is generally deemed a continuing guaranty. Whether a contract of guaranty is a continuing undertaking is a question of intention which must be gathered from the instrument itself or from the course of dealings between the parties, or from both (*94 Cal. App. 2d 473, 478)* . The guaranty in question was executed simultaneously with an order for an amount less than one fifth the value of the guaranty. It was not reasonable to hold that the guaranty was executed simply to cover that specific order, or any other particular specific order. If that was not the case, then it necessarily followed that the purpose of the instrument was to establish the credit of the principal and charge defendant with liability for her dealings with plaintiffs to the extent of the guaranty (*94 Cal. App. 2d 473, 479)* .

[c] Continuing Suretyship Obligation May Be for Limited Amount

In ***Goldman v. Dangerfield*** *(1929) 101 Cal. App. 67, 281 P. 400* , defendants executed a guaranty of payment for merchandise purchased from a company by the owner of a woman's dress store, up to a specified amount. After execution of the guaranty, the owner opened an account with the company and bought merchandise from time to time, purchasing merchandise in excess of the amount of the guaranty. Sometime later, defendants terminated the guaranty. Plaintiff, assignee of the company, brought an action to recover on the guaranty. The trial court found that the purported guaranty was not in fact a guaranty and entered judgment for defendants. Plaintiff appealed.

The court of appeal reversed. The issue on appeal was whether the guaranty was a continuing guaranty. The evidence showed that the guaranty was not intended to cover a single purchase; by its terms it referred to all merchandise purchased, and thus *Civ. Code § 2814* applied. The guaranty covered the successive transactions of the principal, the

owner. Her liability was renewed from time to time as she purchased merchandise on the open account. There was no time limit in the guaranty. The only limitation was as to the extent of the obligation (*101 Cal. App. 67, 71)* . When a guaranty contains a limitation as to the amount for which the guarantor will be bound, but contains no limitation as to time, and there is nothing in the circumstances surrounding the execution of the contract to evince a contrary intention, it will be construed to be a continuing guaranty and operative without limitation, except as to the amount of liability, until revoked. The limit mentioned in defendants' guaranty referred to the amount of dealing between the principal and the creditor. The guarantor was to be held liable to the extent of the guaranty, notwithstanding the fact that the principal debtor may have, during the existence of the contract, contracted debts to an amount equal to or greater than the sum named in the guaranty and paid them. But when it is apparent, either from the language of the guaranty itself or from the language used in connection with the circumstances that the intention is to limit the guaranty as to the amount specified for the first transaction or series of transactions, it is not a continuing one and will not extend to other transactions after that limit has once been reached. There was nothing in the surrounding circumstances to show that the intention was to limit the guaranty to any particular transaction (*101 Cal. App. 67, 73)* . Whether a guaranty is a continuing undertaking is a question of intention which must be gathered from the instrument itself or from the course of dealing between the parties, or from both. If it appears that a future course of dealing for a definite time or a succession of credits to be given was contemplated by the parties, the contract will be construed as a continuing guaranty. The guaranty contemplated a succession of liabilities for which, as they accrued, the guarantor became liable. It was prospective in its operation, and was generally intended to provide security in respect to future transactions, within certain limits. As the court found the contract to be a continuing guaranty, the payments by the principal did not discharge the guarantor unless they discharged the full debts to which the guaranty attached (*101 Cal. App. 67, 75)* .

In ***Lean v. Geagan*** *(1912) 20 Cal. App. 260, 128 P. 792* , defendant executed and delivered to plaintiff's predecessor a guaranty for the indebtedness of the principal for merchandise received. The guaranty provided that the amount due or to become due would at no time exceed $1000. Merchandise valued at $1100 was delivered to the principal. Plaintiff brought action against defendant for the amount of the guaranty. The trial court judgment was for plaintiff. Defendant's motion for a new trial was granted. Plaintiff appealed from that order.

The court of appeal reversed the order granting a new trial, and held the contract to be a continuing guaranty. The court said that the mere extension of credit beyond the sum named did not exonerate the obligor. When a guaranty contains a limitation as to the amount for which the guarantor will be bound, but contains no limitation as to the time, and there is nothing in the circumstances surrounding the execution to evince a contrary intention, it will be construed to be a continuing guaranty and operative until revoked. The guarantor will be held liable to the extent of the guaranty, notwithstanding the fact that the principal debtor may have contracted debts to an amount greater than the sum named in the guaranty. The limitation mentioned in the guaranty has reference to the amount of the guarantor's liability, and not to the amount of the dealing between the purchaser and the creditor. Any ambiguity in a guaranty contract, concerning the liability of the guarantor, will be resolved in favor of protecting the creditor to the extent of the sum named therein. Such a provision will be construed as a limitation on the amount of the guarantor's liability rather than as a condition on which any liability whatever attaches (*20 Cal. App. 260, 262)* .

[d] Suretyship Obligation for Prospective Transactions Is Implied to Be Continuing Unless Otherwise Specified

The facts and procedural background of ***Berg Metals Corp. v. Wilson*** *(1959) 170 Cal. App. 2d 559, 339 P.2d 869* , are discussed in *§ 222.140[3][a]*. In *Berg*, the court of appeal affirmed plaintiff's judgment. The court stated that a continuing guaranty contemplates a succession of liabilities for which, as they accrue, the guarantor becomes liable. It is prospective in its operation, and is generally intended to provide security in respect to future transactions, within certain limits. Unless the words in a which a guaranty is expressed fairly imply that the liability of the guarantor is to be limited, it is generally regarded as continuing until the guaranty is revoked (*170 Cal. App. 2d 559, 570-571)* .

The facts and procedural background of ***Kierulff & Ravenscroft v. Koping*** *(1928) 94 Cal. App 473, 271 P. 353* , are

discussed in *§ 222.140[3][b]*. In *Kierulff*, the court of appeal affirmed the judgment for plaintiff. The court explained that even when the amount is limited, the liability under a guaranty will be regarded as continuing when, by the terms of the contract, it is evident that the object is to give a standing credit to the principal debtor, to be used from time to time either indefinitely or until a certain period has passed. The guaranty in question was executed simultaneously with an order for an amount less than one fifth the value of the guaranty. The court found that it was not reasonable to hold that the guaranty was executed simply to cover that specific order, or any other particular specific order. If that was not the case, then it necessarily followed that the purpose of the instrument was to establish the credit of the principal and charge defendant with liability for her dealings with plaintiffs to the extent of the guaranty (*94 Cal. App 473, 479)* .

[e] Parol Evidence Admissible if Instrument Is Ambiguous

Berg Metals Corp. v. Wilson *(1959) 170 Cal. App. 2d 559, 339 P.2d 869* is discussed in *§ 222.140[3][a]*.

[f] Principal's Payments Do Not Discharge Surety Unless Full Debt Is Discharged

The facts and procedural background of ***Berg Metals Corp. v. Wilson*** *(1959) 170 Cal. App. 2d 559, 339 P.2d 869* , are discussed in *§ 222.140[3][a]*. In *Berg*, the court of appeal affirmed plaintiff's judgment. In reviewing the law governing continuing guaranties, the court stated that if a contract is found to be a continuing guaranty, the payment by the principal does not discharge the guarantor unless the principal discharges the full debts to which the guaranty attaches (*170 Cal. App. 2d 559, 570-571)* .

The facts and procedural background of ***Goldman v. Dangerfield*** *(1929) 101 Cal. App. 67, 281 P. 400* , are discussed in *§ 222.140[3][c]*. In *Goldman*, the court of appeal reversed the judgment in favor of defendant. The court reviewed the guaranty and the relation between the parties and found that the guaranty was continuing. The guaranty contemplated a succession of liabilities for which, as they accrued, the guarantor became liable. It was prospective in its operation and was generally intended to provide security in respect to future transactions, within certain limits. If a contract is a continuing guaranty, the payments by the principal do not discharge the guarantor unless they discharge the full debts to which the guaranty attached (*101 Cal. App. 67, 75)* .

[4] Additional Authorities

[a] Continuing Suretyship Obligation Establishes Surety's Continuing Liability for Principal's Future Transactions

The court of appeal in *Champion Home Builders Co. v. Sipes (1990) 219 Cal. App. 3d 1415, 269 Cal. Rptr. 75* , affirmed a judgment for the creditor against the surety based in part on a finding that the defendants' obligation was a continuing guaranty. The guaranty provided that it extended to "any and all indebtedness of Dealer as may be owing to you. This is a continuing Guaranty relating to any indebtedness, including that arising under successive transactions which shall either continue the indebtedness or from time to time renew it after it has been satisfied." The court found that the guaranty applied to successive security agreements, not just the one executed simultaneously with the guaranty (*219 Cal. App. 3d 1415, 1424)* .

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§ 222.141 Opposing Contention That Continuing Suretyship Exists

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general contention form opposing the existence of a suretyship (see, e.g., § 222.21).*]

THE OBLIGATION OF _____ [*name*], THE SURETY, UNDER THE SURETYSHIP CREATED WAS LIMITED TO _____ [A SPECIFIED TIME PERIOD *and/or* A SPECIFIC TRANSACTION *and/or* A SPECIFIC AMOUNT]. [ACCORDING TO THE CIRCUMSTANCES SURROUNDING THE EXECUTION OF THE AGREEMENT], IT WAS NOT THE INTENTION OF _____ [*name*], THE SURETY, OR _____ [*name*], THE PRINCIPAL, TO CREATE A CONTINUING UNLIMITED SURETYSHIP.

A. Liability of Surety Is Limited and Not Continuing. A surety's guaranty is not continuing as to successive transactions by the principal if the suretyship obligation does not continue the surety's liability and does not renew it from time to time after it has been satisfied. An obligation may be limited as to the time it will run or the amount for which the surety will be liable, or may be limited to a single transaction (*see Civ. Code § 2814*; *Berg Metals Corp. v. Wilson (1959) 170 Cal. App. 2d 559, 569-570, 339 P.2d 869*).

[*Optional*] **B. Use of Parol Evidence to Determine Parties' Intentions if Suretyship Obligation Is Ambiguous.** The trial court may resort to the circumstances surrounding the execution of a suretyship obligation in order to determine the parties' intentions as to whether or not the obligation is continuing (*R. N. Nason & Co. v. Kennedy (1919) 40 Cal. App. 159, 162, 180 P. 349*).

[*Optional*] **C. Suretyship Obligation Is Presumed Limited Unless Intent to Create Continuing Obligation Is Unequivocal.** An intention to guarantee payment on a continuing basis ought to appear unequivocally, and in doubtful cases the presumption ought to be against finding a continuing suretyship obligation (*R. N. Nason & Co. v. Kennedy*

(1919) 40 Cal. App 159, 162, 180 P 349).

[*Optional*] **D. Payments Should Be Applied to Guaranteed Purchase Before Subsequent Unguaranteed Purchase.** When a creditor sells goods to a customer under a limited suretyship obligation, and afterwards sells other goods, the first money the creditor receives from the purchaser should be applied to the payment of the goods covered by the suretyship obligation (*R. N. Nason & Co. v. Kennedy (1919) 40 Cal. App 159, 161-162, 180 P 349*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that a continuing suretyship obligation exists. The ground of the opposition is that the obligation created was limited in some way, usually to a period of time, specific transaction, or specific amount, and thus was not a continuing suretyship obligation [*see Civ. Code § 2814*; *Berg Metals Corp. v. Wilson (1959) 170 Cal. App. 2d 559, 339 P.2d 869* ; *R. N. Nason & Co. v. Kennedy (1919) 40 Cal. App 159, 180 P 349]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the specific and limited extent of the suretyship. For example, this argument may arise on a summary judgment motion or an appeal premised on the argument that the suretyship obligation was limited [*see, e.g.,* *R. N. Nason & Co. v. Kennedy (1919) 40 Cal. App 159, 180 P 349]* . These points and authorities may also be adapted for use in a trial brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should allege facts describing how the guaranty was limited, for example, by limitations on time or amount, or on the transactions to which it applied. If the guaranty does not contain express limitations demonstrating the parties' intent, counsel should refer to any appropriate circumstances surrounding the execution of the instrument to indicate that the parties intended a limited guaranty [*see* *R. N. Nason & Co. v. Kennedy (1919) 40 Cal. App 159, 162, 180 P 349]* .

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 222.140*.

[b] Related Pleading and Practice Forms

For forms relating to suretyship, see California Forms of Pleading and Practice, Ch. 538, *Suretyship, Bonds, and Undertakings* (Matthew Bender).

[3] Discussion of Authorities

[a] Liability of Surety Is Limited and Not Continuing

The facts and procedural background of ***Berg Metals Corp. v. Wilson*** *(1959) 170 Cal. App. 2d 559, 339 P.2d 869* , are discussed in *§ 222.140[3][c]*. Although the court of appeal found that the suretyship obligation in question was continuing, rather than limited, its description of a continuing obligation provides a distinct contrast to the elements of a limited obligation. Unless the words of the guaranty fail to imply that the guarantor's liability is to be limited, it will be regarded as continuing until the guaranty is revoked. A guarantor may limit the amount for which he or she will be liable, or the time for which the guaranty will run, or may limit liability to a single transaction between the principal debtor and the creditor, as distinguished from a continuing guaranty (*170 Cal. App. 2d 559, 569-570)* .

[b] Use of Parol Evidence to Determine Parties' Intentions if Guaranty Is Ambiguous

In ***R. N. Nason & Co. v. Kennedy*** *(1919) 40 Cal. App 159, 180 P 349* , defendant executed a written guaranty in which she guaranteed the account of her son up to the sum of $750 for goods purchased. The guaranty was executed after defendant's son placed an initial order for goods with plaintiff's agent. Plaintiff said that it could not ship the goods unless payment was guaranteed and sent a guaranty form for defendant to sign. Plaintiff had thought the original order too large and had reduced it to $750. There was no arrangement or understanding for the purchase of goods other than the initial order which the guaranty was intended to cover. After the initial purchase, defendant's son from time to time did buy other goods from plaintiff, on which he paid all but $740. Plaintiff brought an action against defendant as guarantor for that amount. The trial court judgment was for defendant. Plaintiff appealed.

The court of appeal affirmed. Plaintiff contended that the guaranty was a continuing guaranty as defined by *Civ. Code § 2814*. Defendant contended that it was a guaranty for goods bought to the extent only of $750, and since that sum was paid by defendant's son, the obligation of the guaranty was discharged. While defendant guaranteed the account and agreed to pay if he did not, the guaranty was silent as to what particular account or bill it had reference to. There was nothing contained in the guaranty disclosing with certainty the parties' intention. By reason of that uncertainty the trial court properly resorted to the circumstances surrounding the execution of the instrument to determine the intent (*40 Cal. App 159, 161-162)* . The language of the guaranty was equally susceptible of two interpretations, and thus was ambiguous as to whether the guaranty was or was not continuing. Reviewing the parol evidence of the initial order, plaintiff's refusal to sell without a guaranty, the absence of an arrangement for a line of credit, and the absence of an understanding that other purchases were to be made or contemplated, the court held that it could be fairly understood and intended that the guaranty cover the initial order only (*40 Cal. App 159, 162)* .

[c] Guaranty Is Presumed Limited Unless Intent to Create Continuing Guaranty Is Unequivocal

The facts and procedural background of ***R. N. Nason & Co. v. Kennedy*** *(1919) 40 Cal. App 159, 180 P 349* , are discussed in *§ 222.141[3][b]*. In *Nason*, the court of appeal affirmed a judgment in favor of defendant guarantor. Addressing the issue of whether the guaranty was continuing or limited to a single transaction, the court noted that it ought to appear unequivocally that it was the intention of defendant to guarantee payment for goods to be purchased from time to time, and in every doubtful case the presumption ought to be against holding a guaranty to be continuing (*40 Cal. App 159, 162)* .

[d] Payments Should Be Applied to Guaranteed Purchase Before Subsequent Unguaranteed Purchase

The facts and procedural background of ***R. N. Nason & Co. v. Kennedy*** *(1919) 40 Cal. App 159, 180 P 349* , are discussed in *§ 222.141[3][b]*. In *Nason*, the court of appeal found that the guaranty was limited to the initial order and affirmed a judgment in favor of defendant guarantor. The court stated that when a creditor sells goods to a customer under a guaranty from a third person for payment, and afterwards sells other goods, the first money the creditor receives from the purchaser should be applied to the payment of the goods covered by the guaranty (*40 Cal. App 159, 161-162)* .

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22-222 California Points & Authorities §§ 222.142-222.159

[Reserved]

§§ 222.142[Reserved]

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22-222 California Points & Authorities § 222.160

§ 222.160 Supporting Contention That Guaranty of Collectibility Exists--Guaranty That Obligation Is Good or Collectible [Civ. Code §§ 2800-2802]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general contention form supporting the existence of a suretyship (see, e.g., § 222.20).*]

A GUARANTY OF COLLECTIBILITY, RATHER THAN A SURETYSHIP OBLIGATION, WAS CREATED BECAUSE _____ [*name*], THE GUARANTOR, GUARANTEED THAT THE OBLIGATION OF _____ [*name*], THE PRINCIPAL DEBTOR, WAS GOOD, OR COLLECTIBLE.

A. Guaranty of Collectibility Imports That Obligation Is Collectible by Usual Legal Proceedings. When a guaranty is to the effect that an obligation is good, or collectible, it imports that the debtor is solvent, and that the demand is collectible by the usual legal proceedings, if taken with reasonable diligence (*Civ. Code § 2800*; *see Ohio Electric Car Co. v. Le Sage (1920) 182 Cal. 450, 454-455, 188 P 982*).

[*Optional*] **B. No Discharge for Failure to Proceed Against Principal if No Collection Would Have Resulted.** A guaranty is not discharged by an omission to take proceedings on the principal debt, or on any collateral security for its payment, if no part of the debt could have been collected thereby (*Civ. Code § 2801*).

[*Optional*] **C. Principal's Removal From State Equivalent to Insolvency.** The removal of the principal from the state, leaving no property therein from which the obligation might be satisfied, is equivalent to the insolvency of the principal in its effect on the rights and obligations of the guarantor (*Civ. Code § 2802*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that a guaranty of collectibility was created, and that the guarantor is liable to the creditor for the amount of the obligation because the creditor has used due diligence in trying to collect from the principal debtor [*see Civ. Code § 2800*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the existence of a guaranty of collectibility rather than a guaranty of payment or performance. For example, this argument may arise on an appeal premised on the argument that the obligation created was a guaranty of collectibility rather than a suretyship [*see, e.g., Ohio Electric Car Co. v. Le Sage (1920) 182 Cal. 450, 188 P 982]* . These points and authorities may also be adapted for use in a trial brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should describe the terms of the guaranty that indicate that the guarantor guaranteed that the obligation was good or collectible. For example, counsel could describe a guarantor's agreement to hold the creditor harmless from any loss sustained by reason of doing business with the debtor, implying the condition that the creditor must first pursue legal remedies against the principal debtor [*see, e.g., Ohio Electric Car Co. v. Le Sage (1920) 182 Cal. 450, 188 P 982]* .

[b] Related Pleading and Practice Forms

For forms relating to suretyship, see California Forms of Pleading and Practice, Ch. 538, *Suretyship, Bonds, and Undertakings* (Matthew Bender).

[3] Discussion of Authorities

[a] Guaranty of Collectibility Imports That Obligation Is Collectible by Usual Legal Proceedings

In ***Ohio Electric Car Co. v. Le Sage*** *(1920) 182 Cal. 450, 188 P 982* , plaintiff brought a complaint on five counts against several defendants. The action against the individual defendant was based on his guaranty of a contract between plaintiff and principal company. The contract between plaintiff and the principal company provided that the principal would have the exclusive right to sell plaintiff's electric automobiles. In the guaranty, defendant guaranteed to hold plaintiff whole and harmless from any and all loss or damage by reason of any transaction with the principal. When the debt remained unpaid, plaintiff brought an action. The trial court judgment was for plaintiff. Defendant appealed.

The Supreme Court reversed. The Court defined a guaranty of collectibility and distinguished it from a guaranty of payment or performance. Defendant's guaranty was not an unconditional guaranty and did not come within the rule described by *Civ. Code §§ 2806* and *2807*, that a guarantor of payment or performance is liable to the guarantee immediately on the default of the principal and without demand or notice. The guaranty clearly imported a condition, that plaintiff must suffer some loss or damage from the transactions guaranteed, in order to make the guaranty operative. Citing *Civ. Code §§ 2800-2802*, the Court described it as a guaranty of collection and imported that the debtor was solvent and that the demand was collectible by the usual legal proceedings, if taken with reasonable diligence. If those proceedings were not taken, the guarantor was discharged unless no part of the debt could have been collected thereby or unless the principal obligor had removed from the state, leaving no property from which the obligation might be satisfied. The Court made a distinction between a guaranty and guaranty of collection. In the first case the liability of the guarantor is fixed by the failure of the principal debtor to pay at maturity, or at the time when payment was guaranteed. In the second, no liability is incurred until after, by the use of due and reasonable diligence, the creditor has been unable to collect the debt from the principal debtor (*182 Cal. 450, 454-455)* .

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22-222 California Points & Authorities § 222.161

§ 222.161 Opposing Contention That Guarantor Is Liable on Guaranty of Collectibility--Creditor Did Not Pursue Usual Legal Proceedings Against Principal With Reasonable Diligence [Civ. Code §§ 2800-2802]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general contention form opposing the existence of a suretyship (see, e.g., § 222.21).*]

_____ [*Name*], THE GUARANTOR, IS NOT LIABLE BECAUSE _____ [*name*], THE CREDITOR, DID NOT USE REASONABLE DILIGENCE TO PURSUE THE USUAL LEGAL PROCEEDINGS TO COLLECT THE OBLIGATION OF WHICH THE GUARANTOR GUARANTEED THE COLLECTIBILITY.

No Liability Occurs Until Creditor Has Pursued Usual Legal Proceedings With Due Diligence. In a guaranty of collectibility, no liability is incurred until after, by the use of due and reasonable diligence, the creditor has been unable to collect the debt from the principal debtor. The mere nonpayment of a debt when it becomes due does not constitute loss or damage within the meaning of a guaranty of collection (*Ohio Electric Car Co. v. Le Sage (1920) 182 Cal. 450, 454-456, 188 P 982* ; *Citizens' Nat'l Trust & Sav. Bank v. Seaboard Surety Corp. (1935) 4 Cal. App. 2d 766, 769, 41 P.2d 956* ; *see Civ. Code § 2800*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the guarantor is liable on a guaranty of collectibility. The ground of the opposition is that the creditor did not use reasonable diligence and pursue the usual legal proceedings to collect from the principal [*see Civ. Code § 2800*; *Citizens' Nat'l Trust & Sav. Bank v. Seaboard Surety Corp. (1935) 4 Cal. App. 2d 766, 41 P.2d 956]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the existence of a guaranty of collectibility rather than a guaranty of payment or performance and the necessity that the creditor pursue the usual legal proceedings to collect from the principal before the guarantor is liable. For example, this argument may arise on an appeal premised on the argument that the guarantor is not liable because the obligation created was a guaranty of collectibility rather than a suretyship [*see, e.g., Citizens' Nat'l Trust & Sav. Bank v. Seaboard Surety Corp. (1935) 4 Cal. App. 2d 766, 769, 41 P.2d 956]* . These points and authorities may also be adapted for use in a trial brief. Apparently the usual legal proceedings required of the creditor prior to seeking recovery from the guarantor might include an action for breach of contract, or, if a money judgment has been rendered, an attempt to enforce the judgment against the debtor.

Counsel should insert argument in these form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel might describe a guaranty in which the guarantor conditioned its liability on the creditor's being unable to recover any of the amount owed directly from the principal.

[b] Related Pleading and Practice Forms

For forms relating to actions on contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender). For forms relating to writs of execution and related proceedings, see Ch. 254, *Executions and Enforcement of Judgments* (Matthew Bender). For forms relating to suretyship, see Ch. 538, *Suretyship, Bonds, and Undertakings* in that publication.

[3] Discussion of Authorities

[a] No Liability Occurs Until Creditor Has Been Unable to Collect Through Due Diligence

The facts and procedural background of ***Ohio Electric Car Co. v. Le Sage*** *(1920) 182 Cal. 450, 188 P 982* , are discussed in *§ 222.160[3][a]*. In *Ohio Electric Car*, the Supreme Court reversed the judgment finding defendant liable on its guaranty. The Court explained that due diligence by the creditor is required before the guarantor of collectibility will be found liable. It was a guaranty of collection and imported that the debtor was solvent and that the demand was collectible by the usual legal proceedings, if taken with reasonable diligence. If those proceedings were not taken, *Civ. Code §§ 2800-2802* provide that the guarantor was discharged unless no part of the debt could have been collected thereby or unless the principal obligor had removed from the state, leaving no property from which the obligation might be satisfied. In a guaranty of collection, no liability is incurred until after, by the use of due and reasonable diligence, the creditor has been unable to collect the debt from the principal debtor (*182 Cal. 450, 454-455)* . The mere nonpayment of a debt when it becomes due is sufficient foundation for an action to recover the debt, but it does not constitute loss or damage within the meaning of a guaranty of collection (*182 Cal. 450, 456)* .

In ***Citizens' Nat'l Trust & Sav. Bank v. Seaboard Surety Corp.*** *(1935) 4 Cal. App. 2d 766, 41 P.2d 956* , a corporation's note payable to itself and guaranteed by three individuals was transferred to plaintiff bank, together with defendant's bond. Naming the corporation and the individual guarantors as principals and itself as surety, defendant's bond provided that defendant was bound to the holders of the note on the condition that if the obligee collected the note from the principals or any of them, then the bond obligation would be void, otherwise it remained in full force and effect. When the note was due, plaintiff made demand on the maker and guarantors. Plaintiff notified defendant of the nonpayment and demanded payment from it as surety. When payment was not forthcoming, plaintiff brought an action against the maker and guarantors of the note. That judgment was for plaintiff. Defendants appealed that judgment but without filing any bond staying execution. That appeal was pending and undetermined. When again before the trial court, defendant claimed it was a guaranty of collectibility and not a guaranty of payment. The trial court judgment was for defendant, finding the action on the guaranty was prematurely brought. Plaintiff appealed.

The court of appeal affirmed. When the guaranty is of the collection or collectibility of the note, it is generally held to

be a conditional guaranty; equivalent to a guaranty that the note is collectible by due course of law, and the guarantor is bound only on condition that the payee of the note use due diligence to collect the debt from the maker and give the guarantor notice of the principal's default. A guaranty of the collection of the amount of a debt as it becomes due is an undertaking that the debt will be paid if the principal is prosecuted with reasonable diligence. A guaranty of payment is very different from a guaranty of collectibility. *Civ. Code § 2807* provides for the guarantor's liability immediately on the principal's default, without notice or demand. *Civ. Code § 2800* provides that a guaranty of collectibility imports that the demand is collectible by the usual legal proceedings, if taken with reasonable diligence. (*4 Cal. App. 2d 766, 768-769)* . Defendant's obligation was a guaranty of collectibility, and the liability of defendant did not accrue immediately on the default of the principal. When there was no attempt to show that either the maker or the guarantor was insolvent, or that the debt could not be collected from them, the action on the guaranty was premature (*4 Cal. App. 2d 766, 769)* .

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[Reserved]

§§ 222.162[Reserved]

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3. Unconditional Guaranty

22-222 California Points & Authorities § 222.180

§ 222.180 Supporting Contention That Unconditional Suretyship Exists--Guaranty Is Unconditional [Civ. Code § 2806]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general contention form supporting the existence of a suretyship (see, e.g., § 222.20).*]

THE SURETYSHIP CREATED IS ABSOLUTE AND _____ [*name*], THE SURETY, IS LIABLE WITHOUT CONDITION BECAUSE NONE OF THE CONTRACT TERMS OR SURROUNDING CIRCUMSTANCES IMPORT ANY CONDITION PRECEDENT TO THE SURETY'S LIABILITY.

A. Suretyship Is Deemed Unconditional Unless Condition Precedent Is Imported by Its Terms. A suretyship obligation is deemed unconditional unless its terms import some condition precedent to the liability of the surety. The facts and surrounding circumstances may be examined if there is some contract ambiguity as to the parties' intent in importing any condition precedent to the liability of the surety (*Civ. Code § 2806*; *Cooke v. Mesmer (1912) 164 Cal. 332, 342, 128 P 917* ; *Neumeyer v. Union Bank (1974) 43 Cal. App. 3d 873, 877-878, 118 Cal. Rptr. 116*).

[*Optional*] **B. Condition Precedent Will Not Be Implied Unless Suretyship Agreement Is Unclear.** The liability of the surety depends entirely on the terms of the suretyship agreement, and when there is nothing confusing, ambiguous, or uncertain in the terms of the guaranty, conditions will not be implied (*see Pacific M. & T. Co. v. Bonding & Ins. Co. (1923) 192 Cal. 278, 282-284, 219 P 972* ; *Standard Oil Co. v. Houser (1950) 101 Cal. App. 2d 480, 486, 225 P.2d 539*).

[*Optional*] **C. Surety Is Liable When Complete Guaranty Is Received by Innocent Creditor.** When the surety's undertaking is complete and regular on its face and the creditor has no notice of conditions imposed by the surety, the surety will be liable without regard to any conditions. The creditor may rely on the natural inference which would be drawn under the circumstances, as might be indicated by an omission of an item which appears unnecessary, when there

is nothing imposing a duty of inquiry by the surety (*Pacific M. & T. Co. v. Bonding & Ins. Co. (1923) 192 Cal. 278, 284, 219 P 972* ; *Busse v. Pacific Employers Ins. Co. (1974) 43 Cal. App. 3d 558, 569-570, 117 Cal. Rptr. 718*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a creditor's contention that an unconditional suretyship exists and the surety is liable without the necessity for the occurrence of any alleged condition precedent [*see Civ. Code § 2806*]. Optional Paragraph B may be used to counter an attempt to imply a condition precedent when the suretyship agreement is clear. Optional Paragraph C may be used when a complete suretyship obligation was received by an innocent creditor who had no notice of any purported conditions and no duty to inquire after a missing term.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the absolute nature of the suretyship. For example, this argument may arise on a summary judgment motion or an appeal premised on the argument that the suretyship obligation was absolute [*see, e.g., Busse v. Pacific Employers Ins. Co. (1974) 43 Cal. App. 3d 558, 117 Cal. Rptr. 718]* . These points and authorities may also be adapted for use in a trial brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should refer to the terms of the contract to show that the guaranty is unconditional. If there is any ambiguity in the contract, counsel should also refer to the facts and surrounding circumstances to demonstrate that the parties intended the guaranty be unconditional, or that the creditor did not have constructive notice of any unstated conditions.

[b] Related Pleading and Practice Forms

For forms relating to suretyship, see California Forms of Pleading and Practice, Ch. 538, *Suretyship, Bonds, and Undertakings* (Matthew Bender).

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 222.181* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Suretyship Is Deemed Unconditional Unless Condition Precedent Is Imported by Its Terms

In ***Cooke v. Mesmer*** *(1912) 164 Cal. 332, 128 P 917* , plaintiff was the assignee of a bank. Defendants were guarantors of 36 promissory notes deposited with the bank as security for money loaned by the bank to the principal. Plaintiff brought an action to recover the amount due on the notes in an amount to discharge the obligations of the principal to the bank. The trial court judgment was for plaintiff for the full amount claimed. One defendant appealed the judgment and an order denying the motion for a new trial.

The Supreme Court modified the judgment by striking the award of attorney's fees and otherwise affirmed. In addition to other issues, the Court discussed the unconditional nature of the guaranty. The action was against defendants on their absolute and unconditional guaranty, endorsed on the back of each note. The Court said that the words "with all costs of collection, including reasonable attorneys fees" were words of extension rather than of limitation, and in no degree implied that the guaranty was to be effective only in the event that plaintiff was unable to collect from the makers. An action on a guaranty is one on an independent contract of the guarantor, with which the principal debtor has nothing to

do. The Court noted defendant's unsuccessful attempt to apply *Civ. Code § 2809* (surety's excessive obligation as reducible in proportion to principal's obligation) to limit its liability, and went on to discuss the unconditional nature of the obligation. *Civ. Code § 2806* says that a guaranty is to be deemed unconditional unless its terms import some condition precedent to the liability of the guarantor. There was nothing in the terms of the guaranty or in the facts and circumstances of the case to import any condition precedent to the liability of the guarantors. It was not disputed that if the guaranty was an absolute and unconditional guaranty of payment, an effort to collect from the makers was not a prerequisite to the guarantors' liability (*164 Cal. 332, 342)* .

In ***Neumeyer v. Union Bank*** *(1974) 43 Cal. App. 3d 873, 118 Cal. Rptr. 116* , plaintiff was the executrix for a deceased person, whose accommodation pledge of a corporation served as partial security for a loan made by defendant to the major shareholders. The pledge was embodied in an agreement contained in two documents. The agreement provided that defendants would give the deceased written notice of the debtors' default, and for a period of 30 days subsequent to that notice the deceased would have an option to purchase the loan. It also provided that during the 30-day period defendant would have unlimited right and privilege to exercise any and all rights and remedies available to it. When the default occurred, defendant provided the requisite notice and notified the deceased that a sale of collateral would be held. The deceased attended the sale after advising defendant that he was not going to buy the loan. Plaintiff brought an action, alleging that defendant breached its agreement when it held the sale of collateral less than 30 days after the notice, thereby exonerating the junior note pledged by the deceased, and resulting in damages to the deceased in the amount of the fair market value of the junior note. The trial court found that the parties intended that the 30-day option was expressly subordinate to defendant's right to foreclose on all collateral, including the stock and the note, and that defendant did not breach its agreement by failing to defer its foreclosure sale for 30 days. The trial court judgment was for defendant. Plaintiff appealed.

The court of appeal affirmed. Plaintiff raised several contentions on appeal, none of them successful. Plaintiff argued that the deceased was in the position of an exonerated surety. Disagreeing, the court referred to *Civ. Code § 2806*, which provides that a suretyship obligation is to be deemed unconditional unless its terms purport some condition precedent to the liability of the surety. The deceased's obligation was not conditional. The passage of the 30-day period was not a condition precedent to his obligation, in the event of a default, to the extent of the junior notes which he had pledged (*43 Cal. App. 3d 873, 878)* .

[b] Condition Precedent Will Not Be Implied Unless Suretyship Is Unclear

In ***Pacific M. & T. Co. v. Bonding & Ins. Co.*** *(1923) 192 Cal. 278, 219 P 972* , plaintiff and a lumber company contracted for the company to provide its output of lumber from its lumber mill to plaintiff. The second paragraph called for plaintiff to accept a draft drawn on it by the company for a stipulated sum as payment on account. A bond was given to secure the faithful performance of the terms and conditions of that paragraph. It was executed by an authorized agent of the bonding company, and delivered to its agent with instructions to have the company sign as principal and then to deliver the bond to plaintiff. The agent delivered the bond to plaintiff without the company's signature. The company's draft on plaintiff was accepted by plaintiff. That draft was later changed to four smaller ones, the total value of which equaled the original sum. These drafts were negotiated to innocent purchasers for value before maturity by the company and were all paid by plaintiff at maturity, at which time plaintiff learned that the company had failed in its contract and was insolvent. Because of the company's default, plaintiff was compelled to purchase lumber in the open market to fulfill its agreements. Plaintiff brought an action for damages and the amount of the bond. The trial court found that the bond was not signed by the principal or delivered to plaintiff and that there was a material change in the terms of the agreement to the detriment of defendant. The trial court judgment was for defendant. Plaintiff appealed.

The Supreme Court reversed. Plaintiff raised three separate contentions on appeal. The Court agreed with its contention that the evidence did not support the finding that the bond was not properly executed and delivered. Plaintiff argued that the bond was binding on the surety regardless of the fact that it was not signed by the principal, because the principal was bound by the terms of the main contract which the bond was given to secure, and because the surety was bound by

the acts of its agent in delivering the bond. Defendant claimed that its liability was conditioned on the principal's liability, that it was not a completed bond because the principal failed to sign it, and that it was the intention of the surety that the bond should not be effective and not be delivered until that signature had been affixed. The Court said that the bond was binding without the signature of the principal. It was a joint and several obligation guaranteeing the faithful performance by the principal of the terms and conditions of the main contract. That contract obligated the principal to perform certain specified acts and to comply with certain specified terms and conditions. The principal signed the main contract and thereby assumed the same obligations and liabilities as those covered by the bond; its signature on the bond would have added nothing to either its obligation or its liability. When the failure of a principal to sign the instrument affects the surety injuriously, the surety is not bound. But when the failure of a principal to sign the instrument in no way affects the rights or liability of the surety, the instrument is valid, and the surety is bound, unless the surety signed on the express condition that the principal should also sign before delivery of the instrument to the creditor, or the statute absolutely requires the principal to sign (*192 Cal. 278, 282-284)* . When the bond was delivered to the creditor without the principal's signature, the creditor did not have constructive notice of an condition attached to its execution by the surety. The natural inference which the creditor would draw under the circumstances would be that the principal's signature was omitted because it was not necessary (*192 Cal. 278, 284)* .

In ***Standard Oil Co. v. Houser*** *(1950) 101 Cal. App. 2d 480, 225 P.2d 539* , defendant executed a continuing guaranty for the account of a freight company. The guaranty specified that it was for debts of whatever nature, and for goods sold and delivered, and was effective until the creditor received a written revocation. After the execution of the guaranty plaintiff issued two credit cards to the freight company. Defendant, a director of the company, had issued the guaranty when he was told it was needed in order to save money by buying gasoline on credit. After the freight company was in arrears on payment and filed for bankruptcy, plaintiff brought an action against defendant to recover the amount owed. The trial court judgment was for plaintiff. Defendant appealed.

The court of appeal affirmed. Defendant raised several contentions specific to the language of the guaranty. One of the contentions was that sales made by dealers other than plaintiff were limited to the terms of the credit cards, and that defendant was not liable because those terms had not been strictly observed. The court disagreed, noting that the guaranty was one of all charges of whatever nature. That terminology included without limitation all charges of any and every kind made by plaintiff against the freight company (*101 Cal. App. 2d 480, 485-486)* . Defendant contended that two separate types of sale were covered by the guaranty: charges for goods sold by plaintiff and charges for goods sold by independent dealers pursuant to the credit cards. The court disagreed. There was nothing confusing, ambiguous, or uncertain in the terms of the guaranty. There was no condition precedent that charges must have been made on the credit cards. The credit cards were not a part of the guaranty nor were they regarded by defendant as such since no credit cards were issued until after the guaranty had been signed. Plaintiff determined the terms to be inserted in the cards and defendant did not know what those terms would be when the guaranty was executed. The condition on which the cards might be used were subject to change by plaintiff from time to time and at any time. The terms and conditions of the credit cards did not enter into the guaranty (*101 Cal. App. 2d 480, 486)* . The intent of the parties to a suretyship contract is ascertained, first, by resort to the contract itself. If the intention of the parties cannot be ascertained with certainty from the contract, then resort may be had to the surrounding circumstances to determine its meaning. But if the contract is so precise and express that there can be no doubt as to the intention of its terms the court cannot do otherwise than follow the declared intention of the parties. *Civ. Code § 2806* provides that a suretyship obligation is to be deemed unconditional unless its terms import some condition precedent to the liability of the surety (*101 Cal. App. 2d 480, 487-488)* .

[c] Surety Is Liable When Complete Guaranty Is Received by Innocent Creditor

Pacific M. & T. Co. v. Bonding & Ins. Co. *(1923) 192 Cal. 278, 219 P 972* is discussed in *§ 222.180[3][b]*.

In ***Busse v. Pacific Employers Ins. Co.*** *(1974) 43 Cal. App. 3d 558, 117 Cal. Rptr. 718* , plaintiff had made a loan to two individuals for the construction of a house on a lot they owned. The loan was secured by a deed of trust and a

performance bond was executed. The individuals were partners in a construction company. An escrow was opened among various parties, including plaintiff and the individuals, whereby another dwelling would be built on another vacant lot owned by the individuals. The escrow instructions provided that plaintiff would recover the deed of trust on the property securing the first loan. From the proceeds in escrow plaintiff would be paid a small amount and on close of escrow plaintiff would be issued a new note in the remaining amount secured by a deed of trust on the second property. Plaintiff's loan was conditioned on a performance bond. When the individuals' construction company applied to defendant for the bond, defendant's agent said that it would not write a construction bond when the property owners and the contractor were the same people. Therefore, among the bond recitations was a statement that one individual as principal had entered into a written contract with the other individual as owner for the construction of a house and that the right of the mortgagee was conditioned on the owner's payments to the contractor as called for in their contract. No written contract between the individuals existed. When the residence was not finished and a foreclosure sale took place, plaintiff sustained damages, for which he brought an action against defendant on the bond. The trial court found that the bond was conditioned on the owner's making payments to the contractor as provided in the nonexistent contract, and because that condition was not met, defendant was not liable on the bond. The trial court judgment was for defendant. Plaintiff appealed.

The court of appeal reversed and remanded. The court stated that when a surety seeks to avoid liability on the ground that the undertaking was delivered conditionally and the conditions were not performed, one of two rules will be applied. When the surety's undertaking is complete and regular on its face and the creditor has no notice of conditions imposed by the surety, the surety will be liable; on the other hand, when the undertaking is so incomplete on its face as to suggest nonperformance of some condition imposed by a surety, it carries notice to the creditor and relieves the surety. When a surety signs an obligation regular on its face and turns it over to the principal on the condition others also sign it, the surety is bound even though it is delivered by the principal in violation of the condition if the guaranty is accepted by the creditor without notice of the condition (*192 Cal. 278, 288-289)* . In effect, defendant's bond was delivered to plaintiff who became the innocent creditor, without knowledge of the condition, the moment the escrow was closed and his consideration had been delivered to the individual contractor. The court cited *Pacific M. & T. Co. v. Bonding & Ins. Co. (1923) 192 Cal. 278, 219 P 972* (discussed in *§ 222.180[3][b]*), for the general rule that when a bond is delivered to the creditor without the principal's signature, the creditor does not have constructive notice of any condition attached to its execution by the surety. The natural inference which a creditor would draw under the circumstances is that the principal's signature was omitted because it was not necessary. The court will look to the face of the bond or the transaction itself to see if there is anything that would impose a duty on the creditor to ask the surety whether any conditions had been imposed before delivery made (*192 Cal. 278, 289)* .

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22-222 California Points & Authorities § 222.181

§ 222.181 Opposing Contention That Unconditional Suretyship Exists--Guaranty Is Conditional [Civ. Code § 2806]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general contention form opposing the existence of a suretyship (see, e.g., § 222.21).*]

THE SURETYSHIP CREATED IS CONDITIONAL AND _____ [*name*], THE SURETY, IS NOT LIABLE BECAUSE THE SPECIFIED CONDITION PRECEDENT HAS NOT OCCURRED.

A. Failure of Condition Precedent to Surety's Liability Precludes Recovery. When a suretyship contract stipulates a condition to the surety's liability, failure to comply with that condition will prevent recovery from the surety (*Union Indemnity Co. v. Lang (9th Cir. 1934) 71 F.2d 901, 905-906* ; *Schwab v. Bridge (1915) 27 Cal. App. 204, 206-207, 149 P. 603*).

B. Intention to Create Condition Precedent. Parties may agree that any matter shall be a condition precedent, and if the words used in the contract are so precise, express, and strong that that intention only is compatible with the terms employed, a court can only give effect to that declared intention (*Federated Mortgage Investors v. Hunt (1970) 7 Cal. App. 3d 371, 86 Cal. Rptr. 687* ; *Schwab v. Bridge (1915) 27 Cal. App 204, 206-207, 149 P. 603*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a surety's contention that the suretyship obligation was conditional, and since the condition did not occur, the surety is not liable [*see Civ. Code § 2806*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context

in which counsel wishes to raise the substantive issue of the conditional nature of the guarantor's liability. For example, this argument may arise on a motion for summary judgment or an appeal premised on the argument that the suretyship obligation was conditional [*see, e.g., Schwab v. Bridge (1915) 27 Cal. App. 204, 149 P. 603]* . These points and authorities may also be adapted for use in a trial brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a description of the conditions to the surety's liability, such as the surety's liability only occurring if the note was owing and presented to him or her by a specified date.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 222.180*.

[b] Related Pleading and Practice Forms

For forms relating to suretyship, see California Forms of Pleading and Practice, Ch. 538, *Suretyship, Bonds, and Undertakings* (Matthew Bender).

[3] Discussion of Authorities

[a] Failure of Condition Precedent to Surety's Liability Precludes Recovery

In ***Union Indemnity Co. v. Lang*** *(9th Cir. 1934) 71 F.2d 901* , plaintiff, a general contractor, subcontracted with welders for the welding of a gas pipe line. In accordance with the subcontract, the welders furnished a faithful performance bond, executed by defendant. The bond provided that as a condition precedent to the right of recovery, the owner would notify defendant of any breach by the principal of the contract, and also of any act or omission which might cause a loss for which the surety might become liable immediately after that breach or act or omission became known to the owner. Both the bond and contract stated that time was of the essence. The subcontractor began work late, performed slowly, and eventually abandoned the project. Plaintiff was unhappy with the subcontractor's slow performance throughout the job, wrote advising it that it had failed to abide by the terms and specifications of the subcontract, and notified it that plaintiff was exercising its privilege to work on the job. Plaintiff sent defendant a copy of the notice; this was defendant's first indication of any failure of the subcontractor to perform. One month later plaintiff notified defendant that the subcontractor was in default and demanded payment of the extra payroll. Plaintiff brought an action to recover the cost of completing the subcontractor's work and the amount it paid for labor and material. The trial court judgment was for plaintiff. Defendant appealed.

The court of appeal reversed. The court confined its inquiry to whether or not plaintiff failed to notify defendant of any breach by the subcontractor and of any act or omission which might have caused a loss for which the surety might become liable. The court observed that plaintiff had knowledge from the onset of the subcontractor's failure to perform in a timely manner and had reason to believe that it would not complete performance, but did not inform defendant for more than five weeks. Plaintiff asserted that defendant had not shown that it had been prejudiced because of lack of notice. The court concluded that the rule of strictissimi juris applies in the interpretation of conditions precedent in a suretyship contract. It said that to read into the contract the necessity for prejudice to the surety by failure to receive the requested notice would be to hold the surety beyond the express terms of the contract, to read something into the contract that it would not reasonably bear, and to impose a burden not clearly inferable from the language of the contract. When a suretyship contract stipulates that notice shall be given to the surety of the principal's default, failure to comply with the condition or to give notice within the time specified will prevent recovery from the surety (*71 F.2d 901 905-906)* .

In ***Schwab v. Bridge*** *(1915) 27 Cal. App 204, 149 P 603* , the principal assigned funds held in trust to defendant as security for advances made by defendant to him. The company of which the principal was the major stockholder was in

debt, and to secure this indebtedness the principal requested defendant to guarantee the account. Defendant executed a guaranty in the amount of $1500, with the proviso that it must be due and presented to him by a specified date. The debt was not paid, and the guaranty contract was assigned to plaintiff, who brought action to recover $1500 with interest. The trial court judgment was for plaintiff. Defendant appealed.

The court of appeal reversed. Defendant contended that the guaranty contract was conditional, dependent on presentation of a demand and that the presentation and demand had to be made within the time limited in the guaranty; since the demand was not made until after the time specified, no liability accrued. The court agreed. When a suretyship contract stipulates that notice shall be given to the surety of the principal's default, failure to comply with that condition within the time specified will prevent recovery from the surety (*27 Cal. App 204, 206-207)* .

[b] Intention to Create Condition Precedent

In ***Federated Mortgage Investors v. Hunt*** *(1970) 7 Cal. App. 3d 371, 86 Cal. Rptr. 687* , a limited partnership owned an apartment building which was encumbered by two deeds of trust, held by two different companies. Both loans went into default for nonpayment of taxes. The general partner in the limited partnership developed a plan to convert the building into condominiums, and an agreement was reached among the three parties to achieve that end. One holder was willing to advance the delinquent taxes, depending on certain conditions specified in the agreement. In a separate written instrument, defendant guaranteed partial repayment to that holder of the taxes by a certain date. The holder paid the taxes, and plaintiff, its successor in interest, brought suit to recover the monies paid, alleging four causes of action. The trial court found that defendant's obligation to reimburse the holder for the payment of taxes was conditioned on the payment of the taxes by the holder, as provided in the agreement among the three parties. Since those conditions were not fulfilled, neither the holder nor anyone else was required to pay the taxes under the provisions of the agreement. The trial court judgment was for defendant. Plaintiff appealed.

The court of appeal affirmed. Plaintiff contended that the trial court erred in finding that the conditions to the holder's obligations set forth in the agreement were also conditions to defendant's obligation. The court disagreed, stating that the intention of the parties as expressed in the contract is the source of contractual rights and duties. A court must ascertain and give effect to that intention by determining what the parties meant by the words they used (*7 Cal. App. 3d 371, 378-379)* . The court found that the holder had no duty to pay the taxes until the conditions had been met, and because they were not all met, the holder paid the taxes at its own risk (*7 Cal. App. 3d 371, 379)* .

The facts and procedural background of ***Schwab v. Bridge*** *(1915) 27 Cal. App 204, 149 P 603* , are discussed in *§ 222.181[3][a]*. In *Schwab*, the court of appeal found that a condition precedent to defendant's liability had not occurred and defendant was not liable. While it is true that conditions precedent are not favored by the law, and are to be strictly construed against one seeking to avail himself or herself of them, it is equally true that parties to a contract may, if they think proper, agree that any matter shall be a condition precedent. If the words used in the contract are so precise, express, and strong that such intention only is compatible with the terms employed, a court can only give effect to that declared intention of the parties. The only question in every case is whether that intention is so declared, and when that intention is sufficiently expressed to make the fulfillment of that act a condition precedent, it will be one (*27 Cal. App 204, 206-207)* .

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[Reserved]

§§ 222.182[Reserved]

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1 Accrual And Amount Of Liability

22-222 California Points & Authorities § 222.200

§ 222.200 Supporting Contention That Surety Is Liable--Surety Is Liable Immediately on Principal's Default and Without Notice or Demand [Civ. Code § 2807]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general contention form supporting the existence of a suretyship (see, e.g., § 222.20).*]

_____ [*Name*], THE SURETY, IS LIABLE FOR THE FULL AMOUNT ON THE OBLIGATION, THE PERFORMANCE OF WHICH HE/SHE/IT UNCONDITIONALLY GUARANTEED, BECAUSE _____ [*name*], THE PRINCIPAL, HAS DEFAULTED AND LIABILITY ACCRUED IMMEDIATELY ON THE DEFAULT OF _____ [*name*], THE PRINCIPAL, AND NO NOTICE OR DEMAND IS REQUIRED OF _____ [*name*], THE CREDITOR.

A. Surety Liable On Default of Principal Without Notice. A surety who has assumed liability for payment or performance is liable to the creditor immediately on the default of the principal, and without demand or notice. The bringing of an action, with its attendant process, constitutes sufficient notice of default (*Civ. Code § 2807*; *Bloom v. Bender (1957) 48 Cal. 2d 793, 799-800, 313 P.2d 568* ; *State Bd. of Equalization v. Balboa Ins. Co. (1978) 89 Cal. App. 3d 499, 504, 155 Cal. Rptr. 205*).

B. Creditor Need Not Exhaust Remedies Against Principal. The liability of a surety of an absolute and unconditional guaranty is fixed when the principal obligation matures; it is not predicated on the exhaustion by the creditor of available remedies against the principal, or the exhaustion of other security for the debt (*Civ. Code § 2807*; *Ralston-Purina Co. v. Carter (1962) 210 Cal. App. 2d 372, 379-380, 26 Cal. Rptr. 690* ; *Bank of America v. McRae (1947) 81 Cal. App. 2d 1, 7, 183 P.2d 385*).

[*Optional*] **C. Surety of Installment Payments Liable as Each Installment Is Due.** The liability of the surety of installment payments becomes fixed and unconditional as each payment becomes due (*Glickman v. Collins (1975) 13*

Cal. 3d 852, 862-863, 120 Cal. Rptr. 76, 533 P.2d 204).

D. Liability of Surety Equivalent to Principal's Liability. The obligation of a surety must not be larger in amount or in other respects more burdensome than that of the principal; when the surety has guaranteed the principal's entire obligation, the surety's obligation will include all the elements of the principal's obligation (*Civ. Code § 2809*; *Moore v. Ohio Casualty Ins. Co. (1983) 140 Cal. App. 3d 988, 994-995, 189 Cal. Rptr. 829* ; *Boliver v. Surety Co. (1977) 72 Cal. App. 3d Supp. 22, 30-31*).

[*Optional*] **E. Surety May Remain Liable After Principal Has Been Discharged.** Although the surety is not liable when the principal has not incurred any obligation or has fully performed its obligation, the surety can contract to remain liable if the principal has been discharged without full performance of its incurred obligation (*Bloom v. Bender (1957) 48 Cal. 2d 793, 801-805, 313 P.2d 568*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a creditor's contention that the surety is liable on the full amount of the obligation, the performance of which was guaranteed by the surety, and that the liability accrued immediately on the principal's default and without notice from the creditor [*see Civ. Code §§ 2807, 2809*]. Optional Paragraph C may be used if the obligation involves installment payments. Optional Paragraph E may be used when the principal has been discharged and the creditor seeks payment from the surety.

Civ. Code § 2808 provides that if the suretyship obligation is conditional and the surety cannot otherwise acquire knowledge of the principal's default, the creditor may need to provide notice of default to the surety before liability will accrue. Whether or not a suretyship is conditional may also arise as an issue. For contentions supporting and opposing the presence of a condition, see *§§ 222.180, 222.181*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of liability without notice. For example, this argument may arise in opposing a summary judgment premised on the argument that the surety was not liable due to lack of notice, [*see, e.g., State Bd. of Equalization v. Balboa Ins. Co. (1978) 89 Cal. App. 3d 499, 504, 155 Cal. Rptr. 205]* . The points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel might include facts describing the surety's guaranty of the principal debtor's obligation for monthly child support payments and the installment dates which have accrued, leading to the liability of the surety on those dates. Counsel need not allege notice to the surety [*see, e.g., Glickman v. Collins (1975) 13 Cal. 3d 852, 120 Cal. Rptr. 76, 533 P.2d 204]* .

[b] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 222.202* may be used to oppose the contention supported by these points and authorities.

[c] Related Pleading and Practice Forms

For forms relating to suretyship, see *California Forms of Pleading and Practice, Ch. 538, Suretyship, Bonds, and Undertakings, § 538.10 et seq.*, (Matthew Bender).

[3] Discussion of Authorities

[a] Surety Liable on Default of Principal Without Notice

In ***Bloom v. Bender*** *(1957) 48 Cal. 2d 793, 313 P.2d 568* , defendant executed a guaranty that unconditionally guaranteed the payment of all amounts that the principal might owe to an unlimited extent. No notice of the various obligations was required. Immediately on notice of default defendant was obligated to pay without question the amount owed, and defendant's liability would not be affected by any composition or other settlement. The principal became indebted for $5000. The creditor signed a compromise of creditors and agreed to accept its pro rata dividend as an accord and satisfaction and release of all its claims against the principal, receiving $320. The creditor assigned its interest to plaintiff, who brought an action against defendant to recover the amount due. The trial court judgment was for plaintiff for the full amount owed. Defendant appealed.

The Supreme Court affirmed. The Court addressed several of defendant's arguments, including that notice of default was a condition precedent to her liability. The Court said that neither the law nor the agreement require notice. *Civ. Code § 2807* provides that a surety who has assumed liability for payment or performance is liable to the creditor immediately on the default of the principal, and without demand or notice. The agreement specifically provided that notice was not required of the several obligations or failure to meet them as they matured, and that immediately on notice of default in the payment, defendant would pay the amount due. The bringing of suit, with its attendant process, constituted sufficient notice of default (*48 Cal. 2d 793, 799-800)* .

In ***State Bd. of Equalization v. Balboa Ins. Co.*** *(1978) 89 Cal. App. 3d 499, 155 Cal. Rptr. 205* , defendant executed a bond as security for the payment of the sales and use taxes incurred by a company. When the company incurred tax liability, a lien certificate was recorded. After the company refused to pay, plaintiff demanded that defendant pay under the terms of the bond, later bringing an action. Defendant alleged that no demand was made, other than notice given by plaintiff to defendant more than three years after its notice of cancellation to plaintiff. The trial court granted summary judgment for plaintiff. Defendant appealed.

The court of appeal affirmed. The case centered around the applicable statute of limitations. However, defendant also contended that the notice given to it was not equivalent to a demand and that by waiting an unreasonable time plaintiff increased the interest and made defendant's liability greater than that of the principal. The court disagreed, referring to *Civ. Code § 2807* for the point that a surety who has assumed liability for payment is liable to the creditor immediately on the default of the principal, and without demand or notice. Citing *Bloom v. Bender (1957) 48 Cal. 2d 793, 313 P.2d 568* (discussed *above*), the court said that the bringing of the action constituted sufficient notice of default and that neither the law not the agreement between the parties provided that notice was required (*89 Cal. App. 3d 499, 504)* .

[b] Creditor Need Not Exhaust Remedies Against Principal

In ***Ralston-Purina Co. v. Carter*** *(1962) 210 Cal. App. 2d 372, 26 Cal. Rptr. 690* , defendant guaranteed the payment for merchandise received by the principal debtor, a turkey grower. The guaranty provided that defendant would be responsible for the payment of the purchase price of the merchandise to a stated amount. Thereafter the principal entered into a contract with plaintiff. Plaintiff brought suit for the balance due against the principal debtor and defendant as guarantor. The trial court judgment was for plaintiff. Defendant guarantor appealed.

The court of appeal remanded and directed the trial court to modify the judgment by striking certain charges, including attorney's fees. The appeal dealt with several contentions. Defendant demanded that plaintiff pursue its remedies against the principal and claimed that by plaintiff's refusal to comply with that demand its failure to exhaust its remedies, plaintiff failed to take a judgment against the principal. The court responded that the liability of the guarantor of an absolute and unconditional guaranty is fixed when the principal obligation matures and is not predicated on the exhaustion by the creditor of available remedies against the principal, or the exhaustion of other security for the debt. It is immaterial whether the debtor can or cannot pay the debt (*210 Cal. App. 2d 372, 379-380)* .

In ***Bank of America v. McRae*** *(1947) 81 Cal. App. 2d 1, 183 P.2d 385* , plaintiff, as the executor an estate, brought suit against defendant on several counts, including four promissory notes due to the estate, and an indebtedness due to the bank. Prior to his death, the deceased had guaranteed payment of the notes which were originally payable to the bank and renewed in the name of the executor of the estate after the claims were allowed. Defendant, son of the deceased and a legatee under his will, assigned to the bank all his interest in his father's estate to secure payment of that indebtedness. Defendant cross complained with a charge of mismanagement of the estate. After the bank was appointed executor of the will, the claims were approved by the probate judge and filed in the estate for the amounts of notes on the theory that the estate became liable therefor as a guarantor. The trial court judgment was for plaintiff. Defendant appealed.

The court of appeal affirmed. In its decision, among the other issues addressed, the court discussed when the guarantor's liability arises in an unconditional guaranty. The original notes matured according to their express terms prior to the guarantor's death. There was then an absolute liability of the estate to pay the notes since the maker had defaulted. It was not necessary for the bank to first exhaust its remedy by suit, foreclosure of the lien, or otherwise as a prerequisite to liability of the guarantor. The guaranty was absolute and unconditional. *Civ. Code § 2807* dictates that the liability of a guarantor of an absolute and unconditional guaranty is fixed when the principal obligation matures and is not predicated on the exhaustion by the creditor of his or her remedies against the principal debtor, or the exhaustion of other security for the debt. It is also immaterial whether the debtor can or cannot pay the debt. A guaranty is unconditional unless its terms import some condition precedent to the guarantor's liability (*81 Cal. App. 2d 1, 7)* .

[c] Surety of Installment Payments Liable as Each Installment Is Due

The facts and procedural background of ***Glickman v. Collins*** *(1975) 13 Cal. 3d 852, 120 Cal. Rptr. 76, 533 P.2d 204* , are discussed in *§ 222.100[3][a]*. In *Glickman*, the Supreme Court modified the amount of the judgment for plaintiff. It said that defendant was liable under the guaranty for the payment of the required monthly payments. Prior to the time the monthly payments became due, plaintiff had no duty to pursue the principal as defendant's liability for each monthly payment became fixed and unconditional as each payment became due, without regard to plaintiff's remedies against the principal. This result was required by *Civ. Code § 2807* (*13 Cal. 3d 852, 862-863)* .

[d] Liability of Surety Equivalent to Principal's Liability

In ***Moore v. Ohio Casualty Ins. Co.*** *(1983) 140 Cal. App. 3d 988, 189 Cal. Rptr. 829* , a proceeding involving the enforcement of an undertaking, the trial court granted plaintiff's motion for summary judgment in an unlawful detainer action. The trial court issued a writ of execution and ordered the tenants to surrender possession of the property and to pay rent from the end of the lease period until they vacated the premises. The tenants appealed and obtained an order staying execution of the judgment. The order granted a further stay contingent on the tenants posting an undertaking. They obtained the undertaking from defendant. The trial court issued a notice of intended ruling, finding that the bond had nothing to do with the appeal. The trial court awarded plaintiff the full amount of the undertaking issued by defendant as surety guaranteeing compliance by the tenants. Defendant appealed.

The court of appeal modified the amount of the award, but otherwise affirmed. Among other points, the court said that both *Civ. Code §§ 2787* and *2809* and the terms of the instrument itself lead to the conclusion that plaintiff should not have been awarded the full face value of the bond. Common law bonds and undertakings are treated as sureties. *Civ. Code § 2809* limits the surety's liability to that of the principal. The extent of plaintiff's damages limited the amount owed on the surety bond (*140 Cal. App. 3d 988, 994-995)* .

The facts and procedural background of ***Boliver v. Surety Co.*** *(1977) 72 Cal. App. 3d Supp. 22, 28-29* , are discussed in *§ 222.201[3][a]*. In *Boliver*, the court upheld the liability of the surety for the entire award granted. *Civ. Code § 2809* provides that the obligation of a surety must be neither larger in amount nor in other respects more burdensome than that of the principal. The liability of the principals included attorneys' fees. If the obligation of the surety is

commensurate with that of each of the principals, it properly should include their burden of attorneys' fees as well as the basic liability. If the principal contract provided that the owner is entitled to attorneys' fees if the contractor is successfully sued, the principal may recover attorneys' fees incurred in a successful suit against the surety on the contractor's bond (*72 Cal. App. 3d Supp. 22, 30-31)* .

[e] Surety May Remain Liable After Principal Has Been Discharged

The facts and procedural background of ***Bloom v. Bender*** *(1957) 48 Cal. 2d 793, 313 P.2d 568* , are discussed in *§ 222.200[3][a]*. In *Bloom*, the Supreme Court upheld defendant's liability as surety and provided a very thorough analysis of *Civ. Code § 2809*. Defendant claimed that *Civ. Code § 2809*, which provides that the obligation of a surety must be neither larger in amount nor in other respects more burdensome than that of the principal, applied to eliminate its liability. It also said that a surety contract wherein the surety agreed to remain liable even though the principal is released is a contract which imposed greater obligations on the surety than on the principal, and the surety's obligations must be reduced to an amount not exceeding those of the principal. The Court discussed this contention at length, explaining the historical antecedents to the statutes and concluding that defendant's argument would logically require that under *Civ. Code § 2809* every surety contract be unenforceable to the extent that it contemplated continuing liability of the surety after termination of the principal's liability, requiring a construction of *Civ. Code § 2809* which is inharmonious with other code provisions relating to suretyship, and with established common law rules on the subject. While a surety is not liable when the principal does not incur any obligation under the base contract or when the principal has fully performed the contract obligation, the Court stated that no case dealing with *Civ. Code § 2809* has been found in which it was suggested that when the principal incurs an actual obligation, the surety may not agree to remain liable if the principal is discharged by an arrangement such as a composition of creditors without having fully performed the contract obligation. It is a general suretyship principle that while a surety cannot be held beyond the express terms of the contract, the contract is to be interpreted by the same rules used in construing other types of contracts. *Civ. Code § 2837* is to the same effect, and *Civ. Code § 3268*, applicable to the suretyship statutes, further provides that the ascertained intent of the parties controls the contrac nterpretation. The terms of the agreement indicate that the parties intended that defendant should not be released by a composition such as the one effected. Construction of *Civ. Code § 2809* to give effect to the agreement was not contrary to the basic policy of the statute; furthermore, carrying out the specific intent of the parties accords with the basic rules of suretyship law. The parties by their contract specifically agreed that the liability of the surety was not to be terminated by the discharge of the debtor through a composition of creditors. This expressed intention alone might well be controlling under the provision of *Civ. Code §§ 2837* and *3268*, but even if a waiver of the limitation of *Civ. Code § 2809* was necessary, the language of the contract adequately expressed such a waiver. By guaranteeing a debt the surety assumes liability if the principal is unable to pay. If the principal is totally insolvent, the surety will be compelled to pay the entire debt, but if the principal is able to make some payment on the debt the obligation of the surety is correspondingly reduced. The surety cannot be held to be prejudiced when by consensual agreement he or she undertakes to remain liable after the obligation of the principal is discharged through a composition (*48 Cal. 2d 793, 801-805)* .

[4] Additional Authorities

[a] Surety Liable on Default of Principal Without Notice

In *Baralat Development Co. v. Lichter (1987) 191 Cal. App. 3d 933, 236 Cal. Rptr. 701* , plaintiff obtained a judgment for recovery of defaulted rent payments and attorney's fees against the corporate lessee and its two coguarantors, who signed their names to the lease individually in that capacity. One defendant guarantor, who had sold his interest in the corporation prior to the default, and had unsuccessfully attempted to extricate himself from the lease obligations, appealed, contending that plaintiff did not notify him of the default until the amount owing was substantial. The court of appeal affirmed, noting that *Civ. Code §§ 2807* and *2808* place the primary burden to discover the default on the surety, and that notice of default to the surety is not a requirement under either statute (*191 Cal. App. 3d 933, 936)* .

[b] Creditor Need Not Exhaust Remedies Against Principal

In *McDonald v. Gravenstein etc. Assn. (1941) 42 Cal. App. 2d 329* , plaintiff leased his ranch on a share rental basis and signed a marketing contract with defendant on behalf of his lessee. After plaintiff brought an action against defendant, defendant cross complained against plaintiff for the monies remaining unpaid by the lessee. The court of appeal affirmed a judgment for defendant on his cross complaint. The court stated that plaintiff could be held primarily liable as a guarantor. Plaintiff signed the contract, not as a principal, but as a guarantor, in order that his tenant could procure the capital and supplies for the commission of the lease. The guaranty arose out of the original contract, and the delivery of the goods, on the faith of a guaranty that they would be paid for, constituted a sufficient consideration for the guaranty. The promise to pay was absolute and unconditional; therefore, the liability of the guarantor was fixed when the principal obligation matured, and was not predicated on the exhaustion by the creditor of his remedy against the original debtor (*42 Cal. App. 2d 329, 332-333)* .

[c] Liability of Surety Equivalent to Principal's Liability

In *National Technical Systems v. Superior Court (2002) 97 Cal. App. 4th 415* , a subcontractor sought to enforce a stop notice release bond against the bond surety. The subcontractor also obtained a judgment against the general contractor in a related breach of contract action. The trial court granted the surety's motions in limine to preclude evidence of the previous trial and judgment against the general contractor, and to preclude evidence of certain damages, including attorney fees. The subcontractor filed a petition for writ of mandate. With respect to whether the subcontractor was entitled to recover attorney fees from the surety based on the attorney fees clause in the contract, the court found that the trial court erred in granted the motion in limine to exclude evidence of the attorney fees the subcontractor had incurred. All of the elements set forth in *Boliver v. Surety Co. (1977) 72 Cal. App. 3d Supp. 22, 30-31* , discussed *above*, were present. There was a construction contract, providing for attorney fees to the prevailing party, supported by a surety bond issued by a third party which did not specifically provide for the surety's liability for attorney fees. Therefore, the subcontractor could recover from the surety on the stop notice release bond the attorney fees provided for in its subcontract, provided that the total recovery did not exceed the amount of the bond (*97 Cal. App. 4th 415, 425-426)* .

In *Cates Construction, Inc. v. Talbot Partners (1999) 21 Cal. 4th 28, 86 Cal. Rptr. 2d 855, 980 P.2d 407* , the contractor on a condominium project and its performance surety sued the developer and the developer's lender for breach of construction contract and to foreclose on a mechanic's lien. The developer and lender asserted cross-complaints, including one by the developer as obligee against the surety for bad faith. The trial court ruled against the contractor and surety on all of their claims. It also awarded compensatory damages to the developer and lender on their contract claims, and awarded punitive damages to the developer against the surety on the bad faith claim. The surety and contractor appealed. The court of appeal affirmed in part, modified in part, and remanded. The supreme court granted review. On the issue of whether the surety was contractually liable under the performance bond for damages attributable to the general contractor's failure to complete the project by an agreed date, the court held that the bond and construction contract construed together permitted the developer to recover delay damages from the surety. It first noted that performance bonds, like all contracts of surety, are construed with reference to the same rules that govern interpretation of other types of contracts. The court also noted that as a general rule, the obligation of a surety must be neither larger in amount nor in other respects more burdensome than that of the principal, citing *Civ. Code § 2809*. Here, the construction contract between the contractor and developer explicitly contemplated that all time limits specified therein were of the essence of the contract, and required the developer to obtain a performance bond in the full amount of the contract sum as security for the faithful performance of the contract documents. Taken together as a whole, the bond and underlying construction contract were fairly and reasonably read as requiring the surety to answer for damages suffered by the developer as a direct result of the contractor's failure to promptly and faithfully perform the contract. Although the bond did not explicitly mention the subject of delay damages, the surety knew from the construction contract, which had been "made a part" of the bond, that time was of the essence of the contract and that the bond's purpose was to provide security for the faithful performance of the contract in the event of the contractor's default (*21 Cal. 4th 28, 39-43)* .

In *Washington International Insurance Co. v. Superior Court (1998) 62 Cal. App. 4th 981, 73 Cal. Rptr. 2d 282* , the subcontractor on a public contract filed suit against the surety seeking to recover on a public works payment bond after the contractor failed to make progress payments. The superior court denied the surety's motion to strike portions of the first amended complaint to delete the subcontractor's claim that the surety was liable for certain sums which the contractor had failed to pay to the subcontractor. The sums represented a statutory "interest penalty" imposed pursuant to *Pub. Con. Code § 10262.5*, which the contractor was required to pay to the subcontractor because of the contractor's failure to make timely payments on the subcontract. The surety filed a petition for writ of mandate, which the court of appeal denied. The court held that the surety was obligated to pay the subcontractor the statutory "interest penalty" for the contractor's failure to make timely payments on the subcontract. Whether the two percent per month interest penalty was interest or a penalty, it was an amount that the principal was obligated to pay, and the surety was obligated to pay amounts the principal should have paid but did not (*62 Cal. App. 4th 981, 990-991)* .

In *Pacific Employers Ins. Co. v. City of Berkeley (1984) 158 Cal. App. 3d 145* , *204 Cal. Rptr. 387* , the court of appeal upheld plaintiff surety's liability for liquidated damages. Plaintiff had issued a performance bond for a contractor who later abandoned the building project. After another contractor completed the project, the city claimed an offset against the balance due plaintiff for liquidated damages caused by the principal's delay. The court found that because plaintiff surety assumed the principal contractor's obligations under the contract and completed the work, it stood in the same position to the contract as did the original contractor. Since the principal contractor would have been liable for liquidated damages had it, rather than the surety completed the work, the requirements of *Civ. Code § 2809*, which provide that the obligation of a surety be no greater than that of its principal, are satisfied if plaintiff surety is held liable for the liquidated damages (*158 Cal. App. 3d 145, 156)* .

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22-222 California Points & Authorities § 222.201

§ 222.201 Supporting Contention That Surety Is Liable--Liability of Surety on Conditional Obligation and Notice of Default [Civ. Code § 2808]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general contention form supporting the existence of a suretyship (see, e.g., § 222.20).*]

_____ [*Name*], THE SURETY, IS LIABLE FOR THE FULL AMOUNT OF THE CONDITIONAL OBLIGATION, THE PERFORMANCE OF WHICH HE/SHE/IT GUARANTEED, BECAUSE THE CONDITION OCCURRED AND _____ [*name*], THE SURETY, WAS ABLE TO ACQUIRE KNOWLEDGE OF THE DEFAULT OF _____ [*name*], THE PRINCIPAL BY THE EXERCISE OF REASONABLE DILIGENCE.

A. Liability of Surety on Conditional Obligation Is Commensurate With Principal's Liability. The liability of the surety on a conditional obligation is commensurate with that of the principal (*Civ. Code § 2808*; *Boliver v. Surety Co. (1977) 72 Cal. App. 3d Supp 22, 28-29,).*

[*Optional*] **B. Surety on Conditional Obligation Is Not Entitled to Notice of Default Unless Surety Is Unable to Otherwise Acquire Notice.** The surety on a conditional obligation is not entitled to notice of the default of the principal unless the surety is unable, by the exercise of reasonable diligence, to acquire information of that default and the creditor has actual notice. [When the surety can require the principal to provide notice of default directly to the surety, the creditor will not be required to provide notice to the surety] (*Civ. Code § 2808*; *American Fidelity Fire Ins. Co. v. State Bd. of Equalization (1973) 34 Cal. App. 3d 51, 55-56, 109 Cal. Rptr. 545 , cert. denied, 415 U.S. 990, 94 S. Ct. 1589, 39 L. Ed. 2d 887 (1974))* .

[*Optional*] **C. Surety May Remain Liable After Principal Has Been Discharged.** [*See § 222.200, Paragraph E.*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a creditor's contention that the surety is liable because the condition on which the obligation depended occurred. Optional Paragraph B may be used if the surety was able to acquire knowledge of the principal's default by the exercise of reasonable diligence without notice by the creditor [*see Civ. Code § 2808*].

Civ. Code § 2808 provides that if the suretyship obligation is conditional and the surety cannot otherwise acquire knowledge of the principal's default, the creditor may need to provide notice of default to the surety before liability will accrue. Whether or not a suretyship is conditional may also arise as an issue. For contentions supporting and opposing the presence of a condition, see *§§ 222.180* and *222.181*, respectively.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the surety's liability on a conditional obligation. For example, this argument may arise in opposing an appeal premised on the argument that the surety was liable immediately on the principal's default without any notice [*see, e.g., American Fidelity Fire Ins. Co. v. State Bd. of Equalization (1973) 34 Cal. App. 3d 51, 55-56, 109 Cal. Rptr. 545 , cert. denied, 415 U.S. 990, 94 S. Ct. 1589, 39 L. Ed. 2d 887 (1974)]* . These points and authorities may also be adapted for use in a trial brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel might include facts showing that the surety guaranteed the principal's payment of delinquent tax penalties conditioned on the principal's being delinquent in its payment and that the surety could have acquired notice of the default directly from the principal [*see, e.g., American Fidelity Fire Ins. Co. v. State Bd. of Equalization (1973) 34 Cal. App. 3d 51, 55-56, 109 Cal. Rptr. 545 , cert. denied, 415 U.S. 990, 94 S. Ct. 1589, 39 L. Ed. 2d 887 (1974)]* .

[b] Related Pleading and Practice Forms

For forms relating to suretyship, see California Forms of Pleading and Practice, Ch. 538, *Suretyship, Bonds, and Undertakings* (Matthew Bender).

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 222.202* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Liability of Surety on Conditional Obligation Is Commensurate With Principal's Liability

In ***Boliver v. Surety Co.*** *(1977) 72 Cal. App. 3d Supp 22, 140 Cal. Rptr. 259* , defendant surety company issued contractor's bonds for defendant contractor and his employee. Plaintiff contracted with defendant contractor for the construction of a home. Plaintiff brought an action against all defendants for breach of contract, claiming a failure of completion and substantial defects in the construction. The municipal court judgment was for plaintiff. Defendant surety company appealed.

The superior court appellate department affirmed. In addition to its other contentions, defendant surety argued that it could not be held liable for the attorney's fees. The construction contract had a unilateral attorney's fees clause (*72 Cal. App. 3d Supp 22, 28-29)* . The court noted that as a surety, defendant was bound by the provisions of the Civil Code governing suretyships. *Civ. Code § 2808* provides that when one assumes liability as surety on a conditional obligation, liability is commensurate with that of the principal. *Civ. Code § 2809* provides that the obligation of a surety must be

neither larger in amount nor in other respects more burdensome than that of the principal. The liability of the principals included attorney's fees based on the application of *Civ. Code § 1717* (reciprocal attorney's fees). Because the obligation of the surety was commensurate with that of each of the principals, it properly included their burden of attorney's fees as well as the basic liability. If the principal contract provides that the owner is entitled to attorney's fees if he or she successfully sues the contractor, the principal may recover attorney's fees incurred in a successful suit against the surety on the contractor's bond (*72 Cal. App. 3d Supp 22, 30-31)* .

[b] Surety on Conditional Obligation Is Not Entitled to Notice of Default Unless Surety Is Unable to Otherwise Acquire Notice

In ***American Fidelity Fire Ins. Co. v. State Bd. of Equalization*** *(1973) 34 Cal. App. 3d 51, 109 Cal. Rptr. 545 , cert. denied, 415 U.S. 990, 94 S. Ct. 1589, 39 L. Ed. 2d 887 (1974)* , plaintiff insurance company executed surety bonds in guaranteeing the payment of use and sales taxes due from retailers primarily liable for the taxes. Plaintiff paid the principal, interest, and the penalties due on some bonds when their principals defaulted, but refused to pay the penalty assessments on the bonds of defaulting taxpayers when the default occurred prior to the time the bond was issued. Plaintiff brought a class action suit against defendant for declaratory relief and for the refund of specified sums paid. Defendant filed a cross complaint for taxes owed. The trial court judgment was for defendant. Plaintiff appealed.

The court of appeal affirmed. In addition to other contentions, plaintiff asserted that notice to it as the surety was required by *Civ. Code § 2808*. The court disagreed, saying that the surety could acquire information concerning the default by requiring it from the principal and the *Civ. Code § 2808* notice requirement due to the surety's inability to acquire that information did not apply to plaintiff's situation (*34 Cal. App. 3d 51, 55-56)* .

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22-222 California Points & Authorities § 222.202

§ 222.202 Opposing Contention That Surety Is Liable--Surety Not Liable on Conditional Obligation if Principal Not Liable [Civ. Code §§ 2808, 2809]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general contention form opposing the existence of a suretyship (see, e.g., § 222.21).*]

_____ [*Name*], THE SURETY, IS NOT LIABLE ON THE CONDITIONAL OBLIGATION, THE PERFORMANCE OF WHICH HE/SHE/IT GUARANTEED, BECAUSE HIS/HER/ITS OBLIGATION AS SURETY IS THE SAME AS THAT OF _____ [*name*], THE PRINCIPAL, AND THE PRINCIPAL DID NOT ACCRUE ANY LIABILITY.

Surety Not Liable on Conditional Obligation if Principal Not Liable. Since the liability of a surety on a conditional obligation is commensurate with that of the principal, when the principal is not liable on the obligation, neither is the surety. The liability of a surety, in the absence of a different contractual provision, accrues at the same time as that of the principal, or on default of the principal (*Civ. Code §§ 2808, 2809*; *U.S. Leasing Corp. v. duPont (1968) 69 Cal. 2d 275, 290, 295, 70 Cal. Rptr. 393, 444 P.2d 65* ; *Michel & Pfeffer v. Oceanside Properties, Inc. (1976) 61 Cal. App. 3d 433, 441, 132 Cal. Rptr. 179*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a surety's contention that he or she is not liable on the conditional obligation guaranteed because the principal's liability never accrued [*see Civ. Code §§ 2808, 2809*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the surety's lack of liability. For example, this argument may

arise in opposing an appeal premised on the argument that the surety was liable [*see, e.g., Michel & Pfeffer v. Oceanside Properties, Inc. (1976) 61 Cal. App. 3d 433, 441, 132 Cal. Rptr. 179]* . These points and authorities may also be adapted for use in a trial brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel might include facts demonstrating that the creditor is seeking compensation from the surety for an obligation of the principal which was not part of the contract that the surety guaranteed [*see, e.g., U.S. Leasing Corp. v. duPont (1968) 69 Cal. 2d 275, 70 Cal. Rptr. 393, 444 P.2d 65]* .

In an appropriate case, these points and authorities may be submitted in opposition to the contentions supported by the points and authorities *set out in §§ 222.200, 222.201*.

[b] Related Pleading and Practice Forms

For forms relating to suretyship, see California Forms of Pleading and Practice, Ch. 538, *Suretyship, Bonds, and Undertakings* (Matthew Bender).

[3] Discussion of Authorities

[a] Surety Not Liable on Conditional Obligation if Principal Not Liable

In ***U.S. Leasing Corp. v. duPont*** *(1968) 69 Cal. 2d 275, 70 Cal. Rptr. 393, 444 P.2d 65* , plaintiff, a leasing corporation, executed with the principal lessee a lease commitment letter for the lease of restaurant and kitchen equipment for eight years. The commitment to lease required a deposit and was subject to several conditions, among them a continuing guaranty from defendants. A lease was written and defendants executed a guaranty in which they expressly assumed to pay all rents and all other sums reserved in the lease on demand, including all schedules made a part thereof, and to perform all of the terms therein required to be performed by the lessee. The guaranty contained a provision permitting plaintiff and the principal lessee to increase the amount of the principal lessee's indebtedness above defendants' maximum liability and consenting to changes of the terms of the lease without affecting defendants' liability, but made no reference to any rents or conditions other than those set forth in the lease. After the principal lessee defaulted and filed a petition for bankruptcy, plaintiff demanded of defendants the rent claimed to be past due under the lease. When defendants refused to pay, plaintiff brought an action for declaratory relief to establish and enforce defendants' liability. The trial court's judgment was for plaintiff. Defendants appealed.

The Supreme Court reversed and remanded. Defendants raised several contentions on appeal. After defining what the surety's liability was, the Court considered whether defendants' liability under their guaranty had accrued. The obligation of a surety must be neither larger in amount nor in other respects more burdensome than that of a principal. Therefore, since the liability of a surety is commensurate with that of the principal, when the principal is not liable on the obligation, neither is the surety. No liability could be imposed on defendants as sureties unless the principal was liable under the lease (*69 Cal. 2d 275, 290)* . The Court found that the provisions in the guaranty relating to modification of the lease could not be construed to encompass such a fundamental and radical change in the nature of the principal's obligation, and concluded that no payment schedule as was contemplated in the lease was even issued for the principal's approval and that when it filed for bankruptcy, no payment on the rental of the subject equipment was yet due (*69 Cal. 2d 275, 292)* . Plaintiff sued to recover not on the basis of the lease provisions, which were devoid of any rent schedules, but rather on the basis of schedules which were collateral to the lease and not encompassed within the terms of defendant's guaranty (*69 Cal. 2d 275, 295)* .

In ***Michel & Pfeffer v. Oceanside Properties, Inc.*** *(1976) 61 Cal. App. 3d 433, 132 Cal. Rptr. 179* , plaintiff subcontractor brought an action against a contractor, its surety, and the property owner for payment on a bond, foreclosure of a mechanic's lien, and common count based on work performed. The action was based on a multi-party

construction contract, and two subcontracts in which the performance was guaranteed by defendant surety. The trial court judgment ordered the contractor and surety to pay plaintiff and gave plaintiff a lien on the property.

The court of appeal reversed. The case discussed many issues, and in its discussion of suretyship, the court explained the accrual of the surety's liability. *Civ. Code § 2809* provides that the obligation of a surety must be neither larger in amount nor in other respects more burdensome than that of the principal. Therefore, since the liability of a surety is commensurate with that of the principal, when the principal is not liable on the obligation, neither is the surety. The liability of a surety, in the absence of a different contractual provision, accrues at the same time as that of the principal, or on default of the principal. The contractor had not defaulted, as the final payment under the two contracts was not then due. The deferred final payment agreed to by plaintiff precluded recovery on any mechanic's lien on the property (*61 Cal. App. 3d 433, 441)* .

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[Reserved]

§§ 222.203[Reserved]

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2. Reduction Of Liability

22-222 California Points & Authorities § 222.220

§ 222.220 Supporting Contention That Surety Is Liable--Surety Not Exonerated by Statutory Remedies Available to Surety [Civ. Code § 2845]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general contention form supporting the existence of a suretyship (see, e.g., § 222.20).*]

_____ [*Name*], THE SURETY, IS LIABLE ON THE OBLIGATION, THE PERFORMANCE OF WHICH HE/SHE/IT GUARANTEED, BECAUSE _____ [_____ (*name*), THE CREDITOR, HAS DONE ALL THAT HE/SHE/IT IS LEGALLY REQUIRED TO DO IN ORDER TO COLLECT FROM _____ (*name*), THE PRINCIPAL *and/or* THE SURETY DID NOT DEMAND THAT _____ (*name*), THE CREDITOR, PURSUE ITS OTHER REMEDIES AVAILABLE AGAINST _____ (*name*), THE PRINCIPAL *and/or* THE FAILURE OF _____ (*name*), THE CREDITOR, TO PURSUE OTHER REMEDIES DID NOT PREJUDICE THE SURETY *and/or* THE SURETY HAS ATTEMPTED TO REQUIRE _____ (*name*), THE CREDITOR, TO PURSUE A REMEDY THAT IS AVAILABLE TO THE SURETY].

[*EITHER*]

A. Creditor Took All Steps Legally Required to Collect From Principal. Although a surety may require the creditor to proceed against the principal, or to pursue any other remedy in the creditor's power that the surety cannot pursue, and that would lighten the surety's burden, the surety is still completely liable on the guaranty if the creditor has taken all steps legally required to collect from the principal (*see Civ. Code § 2845*; *Wiener v. Van Winkle (1969) 273 Cal. App. 2d 774, 783-784, 78 Cal. Rptr. 761*).

[*AND/OR*]

B. Surety Must Make Demand of Creditor Prior to Creditor's Action Against Surety. The surety must make a demand on the creditor, prior to the creditor's action against the surety, to proceed against the principal or pursue other available remedies in order to claim any exoneration pursuant to *Section 2845 of the Civil Code* (*Sukut-Coulson, Inc. v. Allied Canon Co. (1978) 85 Cal. App. 3d 648, 654-655, 149 Cal. Rptr. 711* ; *Garrett v. Bomash (1935) 10 Cal. App. 2d 288, 291, 51 P.2d 1100*).

[*AND/OR*]

C. Creditor's Failure to Pursue Remedies Against Principal Did Not Prejudice Surety. If a creditor fails to pursue remedies against the principal on demand of the surety, the surety is still liable on its guaranty if the creditor's failure did not prejudice the surety (*see Civ. Code § 2845*; *Glickman v. Collins (1975) 13 Cal. 3d 852, 862-863, 120 Cal. Rptr. 76, 533 P.2d 204*).

[*AND/OR*]

D. Creditor Not Required to Pursue Remedies Against Principal That Are Available to Surety. A surety may not require the creditor to pursue a remedy against the principal that is available to the surety (*see Civ. Code § 2845*; *Katz v. Haskell (1961) 196 Cal. App. 2d 144, 152-153, 16 Cal. Rptr. 453*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that the surety is liable on the obligation. Although the surety is entitled to require the creditor to pursue certain remedies against the principal, that pursuit must be requested, and unless it totally discharges the obligation, it does not exonerate the surety [*see Civ. Code § 2845*]. Paragraph A sets forth the creditor's compliance with all the steps required of it. Paragraph B may be used when the surety has not made the demand of the creditor prior to the creditor's bringing an action against the surety. Paragraph C may be used if the creditor failed to act as the surety requested, but no prejudice occurred to the surety thereby. Paragraph D may be used if the surety requested the creditor to pursue a remedy which was available to the surety.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the remedies available to the surety. For example, this argument may arise in opposing a motion for summary judgment or an appeal premised on the argument that the surety was not liable because there was another remedy available to the creditor [*see, e.g., Garrett v. Bomash (1935) 10 Cal. App. 2d 288, 290, 51 P.2d 1100]* . These points and authorities may also be adapted for use in a trial brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel might include facts alleging that the creditor had mechanic's liens on the property, the purchase payment price of which the surety had guaranteed. Although the surety did not demand that the creditor exercise its rights under those liens, had it done so, the surety's obligation would be reduced by the amount recovered on the liens [*see, e.g., Sukut-Coulson, Inc. v. Allied Canon Co. (1978) 85 Cal. App. 3d 648, 149 Cal. Rptr. 711]* .

[b] Related Pleading and Practice Forms

For forms relating to suretyship, see California Forms of Pleading and Practice, Ch. 538, *Suretyship, Bonds, and Undertakings* (Matthew Bender).

[3] Discussion of Authorities

[a] Creditor Took All Steps Legally Required to Collect From Principal

In ***Wiener v. Van Winkle*** *(1969) 273 Cal. App. 2d 774, 78 Cal. Rptr. 761* , defendants sold real property for which they received a promissory note secured by a purchase money deed of trust on the property sold. Defendants sold the note to plaintiffs, assigning it with recourse, and guaranteeing its payment. The makers of the note requested an extension of time for payment which plaintiffs refused to grant. Plaintiffs so informed defendants and asked them to take the note, trust deed, and personal guaranty in exchange for the amount due. Defendants did not comply with that request and plaintiff filed an action when the note was in default. Both the complaint and answer underwent several amendments. The trial court judgment was for plaintiffs for the deficiency remaining after foreclosure and denied plaintiffs' request for attorney's fees. Both parties appealed.

The court of appeal affirmed, except as to the denial of attorney's fees, concerning which it reversed the judgment. After a thorough discussion of the complex factual and procedural machinations, the court addressed defendants' many contentions. Defendants claimed that plaintiffs' refusal to accept a conditionally offered payment from the makers was an unreasonable refusal and exonerated defendants. Defendants reasoned that since plaintiffs knew that defendants were unable to pay the note and had reason to believe that the land was of insufficient value to satisfy the amount due, their failure to accept the makers' offer was unreasonable. As support they cited *Civ. Code § 2845*, which provides that a surety may require the creditor to proceed against the principal, or to pursue any other remedy in the creditor's power which the surety cannot itself pursue, and which would lighten the surety's burden; and if in such case the creditor neglects to do so, the surety is exonerated to the extent to which it is thereby prejudiced. The court disagreed, observing that the offer by the makers was made with the condition that plaintiffs compromise their claim for attorney's fees. Plaintiff did not act unreasonably in refusing this conditional offer. The makers refused plaintiffs' counteroffer and at no time unqualifiedly tendered the amount due on the note. Under the circumstances, plaintiffs did all they were legally required to do in order to collect the amount due from the makers (*273 Cal. App. 2d 774, 783-784)* .

[b] Surety Must Make Demand of Creditor Prior to Creditor's Action Against Surety

In ***Sukut-Coulson, Inc. v. Allied Canon Co.*** *(1978) 85 Cal. App. 3d 648, 149 Cal. Rptr. 711* , plaintiff subcontracted with defendant contractor to do construction work on a public improvement project. Defendant obtained the necessary bonds from two bonding companies. When defendant contractor defaulted on a later loan, the loan company became owner of record through a nonjudicial foreclosure on the trust deed. Prior to that time, plaintiff recorded mechanic's liens. Plaintiff filed an action seeking recovery on sums due and foreclosure of its mechanic's liens and later, in another action, sought recovery against the sureties on their bonds. The loan company filed a declaratory relief action seeking a determination that the surety bonds, not the mechanic's liens, were plaintiff's primary source of recovery. The three actions were consolidated for trial, after which the court entered a judgment for plaintiff on the construction contract, ordered foreclosure of the mechanic's liens, and held the bonding companies liable for any deficiency after foreclosure. One of the bonding companies and plaintiff cross appealed the judgment.

The court of appeal reversed that portion of the judgment limiting the sureties' liability to any lien deficiencies and remanded. The court found that the trial court erred when it ordered foreclosure on the mechanic's liens prior to any recovery on the surety bonds; plaintiff was entitled to judgment against one or both sets of defendants and entitled to pursue on execution whichever set of defendants best served its interests. The surety bonds were issued as required by statute and they inured to the benefit of contractors or subcontractors (*85 Cal. App. 3d 648, 653)* . Defendant contended that a contractor should be required to pursue foreclosure of the mechanic's liens prior to recovery on the bond. *Civ. Code § 2849* provides that a surety is entitled to the benefit of every security held or acquired by a creditor to

secure the principal's obligation, and *Civ. Code § 2845* allows a surety to require a creditor to proceed against the principal or pursue other remedies not available to the surety. The court cautioned that even though defendant was entitled to the benefit of plaintiff's security and to become subrogated to their benefits on its payment of the underlying obligation, this did not ipso facto require plaintiff to pursue foreclosure of the mechanic's liens as its primary remedy. To hold so would emasculate the clear requirement under *Civ. Code § 2845* that a surety make formal demand on its principal's creditor to pursue alternative remedies. That requirement is no mere formality, for implicit in such a demand is recognition by the surety of its obligation under the bond and, in effect, its admission of liability to the creditor. Defendant made no demand, and in fact, the sureties consistently denied any liability to plaintiff under the bonds. Defendant elected to resist the claims and deny liability, and having made that election, defendant could not require plaintiff to satisfy its judgment against other sources first, for at that point plaintiff could choose whichever defendant or cause of action it wished to pursue to satisfy its judgment (*85 Cal. App. 3d 648, 654-655)* .

In ***Garrett v. Bomash*** *(1935) 10 Cal. App. 2d 288, 51 P.2d 1100* , defendants, husband and wife, executed a promissory note. Defendant husband transferred the note to plaintiff's assignor as additional security for another note, the payment of which defendant husband and another guaranteed. Other security was also pledged. Plaintiff brought suit on the promissory note when it was past due and unpaid. Defendant husband was eliminated by bankruptcy proceedings and the trial court judgment was against defendant wife. Defendant wife appealed.

The court of appeal affirmed. In addition to defendant wife's contentions that she was not liable for the note, the court addressed her contention that she was not liable due to the other security for the note. No claim was made, nor was any evidence offered, that defendant had made any demand on the creditor that the property of the principal should first be applied to the discharge of the debt. The surety has the unquestioned right to make that demand, but there is no rule that the creditor may not sue the surety until the creditor has first proceeded against the principal (*10 Cal. App. 2d 288, 291)* .

[c] Creditor's Failure to Pursue Remedies Against Principal Did Not Prejudice Surety

The facts and procedural background of ***Glickman v. Collins*** *(1975) 13 Cal. 3d 852, 120 Cal. Rptr. 76, 533 P.2d 204* , are discussed in *§ 222.100[3][a]*. In *Glickman*, the Supreme Court affirmed the judgment for plaintiff creditor. Among the other issues in the case, defendant claimed that plaintiff failed to pursue her available remedies against the principal, in accordance with a demand made by defendant that she do so. The demand, allowed by *Civ. Code § 2845*, was made after the action had already commenced. Prior to that time plaintiff had no duty to pursue the principal as defendant's liability for each monthly payment became fixed and unconditional as each payment became due, without regard to plaintiff's remedies against the principal. Plaintiff had attempted to collect from the principal before filing the action and had obtained a judgment against him but was unable to satisfy it. Defendant did not indicate what other remedies she would have plaintiff pursue, but in view of the principal's impecuniousness, it appeared that pursuit would be futile. Moreover, defendant remained liable on the guaranty whether or not plaintiff complied with defendant's demand, for according to *Civ. Code § 2845*, plaintiff's noncompliance would have exonerated defendant in any event only to the extent that she was prejudiced thereby (*13 Cal. 3d 852, 862-863)* .

[d] Creditor Not Required to Pursue Remedies Against Principal That Are Available to Surety

In ***Katz v. Haskell*** *(1961) 196 Cal. App. 2d 144, 16 Cal. Rptr. 453* , when defendant sold the apartment building he owned, he received a note secured by a third deed of trust as part of the purchase price. The note contained an acceleration clause in the event of a subsequent sale. Defendant assigned the note to plaintiff for value and guaranteed the payments. The property underwent several transfers of ownership, and ultimately was transferred to a second defendant. After default on the note, plaintiff sued the first defendant to foreclose the third deed of trust. The trial court ordered foreclosure and declared that defendant was personally liable on the guaranty. After defendant was granted credit for the sale price, the deficiency was charged to him. Defendant appealed.

The court of appeal affirmed. The case was combined with a companion matter on appeal. In addition to considering the many points raised by defendant in both the cases, the court addressed defendant's arguments concerning plaintiff's actions. Defendant contended that the failure of plaintiff to resort to the security by the most expeditious method on the default, and on defendant's demand, exonerated defendant from liability to the extent of his injury. Defendant cited *Civ. Code § 2845* as the authority for his position. However, defendant himself had ample funds with which to satisfy his obligations to plaintiff and therefore could have instituted his own foreclosure proceedings. Defendant had secured refinancing of the third trust deed and was in a position to pay off plaintiff, take back the trust deed, and immediately proceed with his own action (*196 Cal. App. 2d 144, 152-153)* .

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22-222 California Points & Authorities § 222.221

§ 222.221 Supporting Contention That Surety Is Liable--Surety Waived Statutory Remedies [Civ. Code §§ 2845, 2849]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general contention form supporting the existence of a suretyship (see, e.g., § 222.20).*]

_____ [*Name*], THE SURETY, IS LIABLE ON THE OBLIGATION, THE PERFORMANCE OF WHICH HE/SHE/IT GUARANTEED, BECAUSE _____ [*name*], THE SURETY, WAIVED HIS/HER/ITS RIGHT _____ [TO DEMAND THAT _____(*name*), THE CREDITOR, PURSUE OTHER REMEDIES AGAINST _____(*name*), THE PRINCIPAL *and/or* TO DEMAND ENTITLEMENT TO THE BENEFIT OF EVERY SECURITY FOR THE PERFORMANCE OF _____(*name*), THE PRINCIPAL, HELD BY _____(*name*), THE CREDITOR].

A. Surety May Waive Its Rights Against Creditor. A surety may waive the statutory rights afforded it under *Section 2845 of the Civil Code*, allowing it to require a creditor to proceed against the principal or pursue other remedies prior to claiming a remedy against the surety, as well as those rights afforded by *Section 2849 of the Civil Code*, entitling it to the benefit of every security for the performance of the principal held by the creditor (*Guild Wineries & Distilleries v. Land Dynamics (1980) 103 Cal. App. 3d 966, 972-973, 163 Cal. Rptr. 348* ; *Brunswick Corp. v. Hays (1971) 16 Cal. App. 3d 134, 137-139, 93 Cal. Rptr. 635* ; *see Civ. Code §§ 2845, 2849*).

B. Waiver Not Against Public Policy. A waiver of these rights by the surety is not against public policy (*Union Bank v. Ross (1976) 54 Cal. App. 3d 290, 294-295, 126 Cal. Rptr. 646* ; *Wiener v. Van Winkle (1969) 273 Cal. App. 2d 774, 786-787, 78 Cal. Rptr. 761*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that the surety is liable on the obligation because the surety waived its right to require the creditor to first proceed against the principal or its right to the security held by the creditor for the performance of the principal [*see Civ. Code §§ 2845, 2849*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the waiver of the surety's statutory rights. For example, this argument may arise in opposing an appeal premised on the argument that the creditor was required to act against the principal first, as demanded by the surety [*see, e.g., Brunswick Corp. v. Hays (1971) 16 Cal. App. 3d 134, 93 Cal. Rptr. 635]* . These points and authorities may also be adapted for use in a trial brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should describe the circumstances under which the waiver took place, and include the language in the guaranty in which the surety waived its rights to demand the creditor to first proceed against the principal [*see, e.g., Guild Wineries & Distilleries v. Land Dynamics (1980) 103 Cal. App. 3d 966, 163 Cal. Rptr. 348]* .

[b] Related Pleading and Practice Forms

For forms relating to suretyship, see California Forms of Pleading and Practice, Ch. 538, *Suretyship, Bonds, and Undertakings* (Matthew Bender).

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 222.224* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Surety May Waive Its Rights Against Creditor

In ***Guild Wineries & Distilleries v. Land Dynamics*** *(1980) 103 Cal. App. 3d 966, 163 Cal. Rptr. 348* , plaintiff granted defendant an option to purchase a winery. That option was assignable, but the agreement provided that on assignment defendant would become liable under a continuing guaranty, in favor of plaintiff, of the assignee's performance. Defendant, with plaintiff's consent, did assign its rights. Plaintiff sold the winery to the assignee, aware that it had some licensing difficulties. Defendant executed a continuing guaranty, undertaking to be a surety on the assignee's promissory notes. Defendant agreed that if the assignee was unable to obtain the license, it would acquire the winery. Defendant acquired the winery and later sold it. Plaintiff demanded an acceleration of the debt and the proceeds from the two sales as additional security. When defendant did not pay, plaintiff brought suit. The trial court judgment was for defendant. Plaintiff appealed.

The court of appeal reversed. In addition to its other remarks, the court observed that under the agreement between the assignee and plaintiff, a default occurred when the collateral was transferred without plaintiff's written consent and the proceeds from the sale were not immediately delivered to plaintiff. Defendant's liability to plaintiff because of the assignee's defaults was based on its continuing guaranty executed in plaintiff's favor; that instrument providing a continuing guaranty of any and all indebtedness of the assignee. The court said that *Civ. Code §§ 2845* and *2849*, requiring a creditor to proceed against the principal debtor or pursue other remedies (for example, exhausting mortgaged property) prior to claiming against a guarantor, may be waived by a guarantor. In the case at hand, the court held that the continuing guaranty did waive those statutory requirements (*103 Cal. App. 3d 966, 972-973)* .

In ***Brunswick Corp. v. Hays*** *(1971) 16 Cal. App. 3d 134, 93 Cal. Rptr. 635* , the principal purchased bowling lanes and equipment from plaintiff. The purchase required a small down payment, with the balance represented by a promissory note and conditional sales contract. As additional security defendant executed an individual written guaranty. When the principal failed to make the required payments, plaintiff accelerated the total amount of the note, repossessed, and resold the equipment. After defendant refused to pay the difference between the amount obtained through resale and the amount owing on the note, plaintiff brought an action to recover the deficiency. The court concluded that the application of the monies recovered from resale was not payment as contemplated in the guaranty contract. The trial court judgment was for plaintiff. Defendant appealed.

The court of appeal affirmed. The court said that *Civ. Code §§ 2845* and *2849*, which give a surety the benefit of all security held by the creditor for performance of the obligation and the power to require the creditor to proceed against that security, did not assist defendant. These protections may be waived by a guarantor. The contract provided that it was absolute, unconditional, and continuing, and payment of the sums for which guarantor was liable would be made notwithstanding that plaintiff held credits, security, or other guaranties against which it might be entitled to resort for payment. The court found that to be a waiver of *Civ. Code §§ 2845* and *2849*. After such a total waiver of those protections, defendant could not require plaintiff to exonerate him entirely because it resorted to other security and obtained only partial satisfaction (*16 Cal. App. 3d 134, 137-139)* . The court also said that when the performance of the primary obligor is involuntary, a guarantor has no right to direct the application of the proceeds and the court is not obliged to apply them so as to exonerate third persons. In the absence of a specific provision to the contrary in the guaranty contract, proceeds from the sale of the equipment could only be applied to exonerate the limited guaranty to the extent that the proceeds of the sale exceeded the amount of that portion of the original debt not covered by the limited guaranty (*16 Cal. App. 3d 134, 137-139)* .

[b] Waiver Not Against Public Policy

In ***Union Bank v. Ross*** *(1976) 54 Cal. App. 3d 290, 126 Cal. Rptr. 646* , a promissory note executed by a company was guaranteed by four continuing guaranties executed by defendant, director of the company, and defendant stockholders. Defendant pledged his personal savings account and the other defendants pledged company stock. Defendant director did not read the guaranty which was provided by plaintiff before signing it. After the company defaulted, plaintiff set off some money from defendant's accounts, but returned the money in consideration for additional collateral and a second continuing guaranty. Plaintiff brought an action on the guaranties. Defendant counterclaimed against plaintiff for several causes. Plaintiff's motion for judgment under *Code Civ. Proc. § 631.8* was granted. Defendant cross complained against defendant stockholders for indemnity and judgment was for defendant. The trial court judgment on the original action was against all defendants. Defendant director appealed.

The court of appeal affirmed. Defendant argued that a creditor is required to sell collateral on demand if it is sufficient to satisfy the obligation. The court agreed, but said that defendants had waived their rights under *Civ. Code §§ 2819* and *2845* by agreeing that the bank could alter, accelerate, or exchange their time and money for payment and by agreeing to waive all rights to require the bank to apply any security it might hold at any time or to pursue any other remedy. Defendants argued that the creditor's obligation to sell collateral could not be waived by the surety because it is against public policy. The court discussed defendants' reference to *Durgin v. Kaplan (1968) 68 Cal. 2d 81, fn. 8, 65 Cal. Rptr. 158, 436 P.2d 70* (discussed in *§ 222.302*), in which dicta indicated the Supreme Court's belief that a waiver of *Civ. Code §§ 2822* and *2839* was against public policy. The court in *Union Bank* noted that although it was persuasive, courts have clearly held that a guarantor is permitted to waive the right by contract to require the creditor to proceed against security provided by the principal debtor. A waiver of the right to proceed against collateral is valid. If a surety can waive the right to have the creditor proceed against someone else's collateral, a surety should be able to waive the right to have the creditor proceed against his or her own collateral (*54 Cal. App. 3d 290, 294-295)* .

The facts and procedural background of ***Wiener v. Van Winkle*** *(1969) 273 Cal. App. 2d 774, 78 Cal. Rptr. 761* , are discussed in *§ 222.220[3][a]*. In *Wiener*, the court of appeal found the guarantors to be liable. The court said the

guaranty agreement was subject to *Civ. Code §§ 2845* and *2849*, which provide a surety with the power to require the creditor to pursue the primary obligor and entitle the surety to the benefit of every security for performance of the principal debt. The guaranty agreement waived those statutory rights by providing that plaintiffs need not take any action against the debtors or resort to any other security held by it at any time before proceeding against defendants. Citing cases upholding similar waivers, the court said that the waiver of the guarantor's rights was not against public policy (*273 Cal. App. 2d 774, 786-787)* .

[4] Additional Authorities

[a] Surety May Waive Its Rights to Require Creditor to Act

In *American Guaranty Corp. v. Stoody (1964) 230 Cal. App. 2d 390, 41 Cal. Rptr. 69* , the court of appeal upheld the denial of defendant's motion to dissolve an attachment. Plaintiff creditor had secured the issuance of the writ of attachment after filing a complaint for breach of contract against defendant guarantor. Among the other arguments made, defendant asserted that *Civ. Code §§ 2845* and *2849* applied to give him the benefit of the security given by the principal lessees under the original contract. Plaintiff argued that defendant expressly waived those statutory rights. The court found that in the contract defendant waived any right to require the lessor creditor to proceed against the principal lessees, proceed against or exhaust any security held from lessees, or pursue any other remedy in lessor's power, and noted that the waiver was not violative of public policy (*230 Cal. App. 2d 390, 394-396)* .

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§ 222.222 Opposing Contention That Surety Is Totally Liable--Surety Entitled to Have Creditor Proceed Against Principal [Civ. Code § 2845]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general contention form opposing the existence of a suretyship (see, e.g., § 222.21).*]

_____ [*Name*], THE SURETY, IS NOT [TOTALLY] LIABLE FOR THE AMOUNT OF THE OBLIGATION OF _____ [*name*], THE PRINCIPAL, BECAUSE _____ [*name*], THE SURETY, REQUESTED _____ [*name*], THE CREDITOR, _____ [TO PROCEED AGAINST _____ (*name*), THE PRINCIPAL *and/or* TO PURSUE ANY OTHER AVAILABLE REMEDY WHICH WOULD LIGHTEN THE BURDEN OF _____ [*name*], THE SURETY. [_____ (*Name*), THE SURETY, IS _____ (TOTALLY *or* PARTIALLY) EXONERATED FROM LIABILITY BECAUSE THE FAILURE OF _____ (*name*), THE CREDITOR, TO PROCEED AS REQUESTED RESULTED IN PREJUDICE TO _____ (*name*), THE SURETY, IN AN AMOUNT _____ (EQUAL TO *or* LESS THAN) THE AMOUNT OF THE OBLIGATION].

Surety Entitled to Have Creditor Proceed Against Principal. The surety may require the creditor, subject to *Section 996.440 of the Code of Civil Procedure*, to proceed against the principal, or to pursue any other remedy in the creditor's power which the surety cannot pursue, and which would lighten the surety's burden. The surety is exonerated to the extent to which he or she is prejudiced by the creditor's failure to proceed as requested (*Civ. Code § 2845*; *Moffett v. Miller (1953) 119 Cal. App. 2d 712, 713-714, 260 P.2d 215*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that the surety is entirely liable for the amount of the principal's default. The ground of the opposition is that the surety is entitled to have the creditor pursue any other remedy in the creditor's power which the surety cannot pursue and which would lighten the surety's burden. If the creditor fails to act as requested, the surety is exonerated to the extent to which he or she is thereby prejudiced. The surety's request of the creditor is subject to the provisions of *Code Civ. Proc. § 996.440*, which sets forth the procedures for a motion to enforce liability on a bond [*see Civ. Code § 2845*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the creditor's obligation to pursue other remedies against the principal. For example, this argument may arise in opposing an appeal of a dismissal for nonsuit based on the creditor's failure to proceed as requested [*see, e.g., Moffett v. Miller (1953) 119 Cal. App. 2d 712, 260 P.2d 215]* . These points and authorities may also be adapted for use in a trial brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel might allege facts describing the other remedies available to the creditor, the surety's request to the creditor to pursue them, the creditor's failure to act, and the resultant prejudice to the surety [*see, e.g., Moffett v. Miller (1953) 119 Cal. App. 2d 712, 260 P.2d 215]* .

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 222.220*.

[b] Related Pleading and Practice Forms

For forms relating to suretyship, see California Forms of Pleading and Practice, Ch. 538, *Suretyship, Bonds, and Undertakings* (Matthew Bender).

[3] Discussion of Authorities

[a] Surety Entitled to Have Creditor Proceed Against Principal

In ***Moffett v. Miller*** *(1953) 119 Cal. App. 2d 712, 260 P.2d 215* , defendants guaranteed payment to plaintiff of a promissory note. The note was not paid at the time of maturity or thereafter, except for a small amount. Plaintiff gave notice to the principal debtor and defendants that the note was overdue and payment was required. Defendants made written demand on plaintiff to sue or first pursue the principal. No effort was made by plaintiff to collect from the principal. Plaintiff brought an action against defendants on the guaranty. Defendant's motion for nonsuit based on plaintiff's failure to follow its demand was granted, and the trial court dismissed the case. Plaintiff appealed.

The court of appeal affirmed. The court quoted *Civ. Code § 2845* as controlling resolution of the case. Plaintiff was required after the demand made by defendants as guarantors to proceed against the principal before being able to secure a judgment against defendants. There was no pleading or proof of a lack of prejudice to defendants justifying the action against them without proceeding against the principal (*119 Cal. App. 2d 712, 713-714)* .

[4] Additional Authorities

[a] Surety Entitled to Have Creditor Proceed Against Principal

In *Price v. Fireman's Fund Ins. Companies (1987) 193 Cal. App. 3d 1536, 239 Cal. Rptr. 158* , the court of appeal held that a ward who sought recovery against a surety on a guardian's bond was not relieved of the requirement of obtaining an accounting and surcharge order against the guardian before bringing suit against the surety. Several exceptions to this requirement are recognized, such as when the guardian has died, has absconded, is removed before a final accounting, or is beyond the court's jurisdiction. Similarly, when an accounting is impossible or unnecessary, or the amount of

liability can be ascertained without an accounting, none will be required. However, the guardian's mere avoidance of service of process and failure to appear in an action by the ward for conversion of estate assets does not render the guardian outside the court's jurisdiction and does not constitute absconding for this purpose (*193 Cal. App. 3d 1536, 1541-1542)* .

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22-222 California Points & Authorities § 222.223

§ 222.223 Opposing Contention That Surety Is Totally Liable--Surety Entitled to Benefit of Every Security for Principal's Performance [Civ. Code § 2849]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general contention form opposing the existence of a suretyship (see, e.g., § 222.21).*]

_____ [*Name*], THE SURETY, IS NOT [TOTALLY] LIABLE FOR THE AMOUNT OF THE OBLIGATION OF _____ [*name*], THE PRINCIPAL, BECAUSE _____ [_____ (*name*), THE CREDITOR, *and/or* _____ (*name*), THE COSURETY] HOLDS SECURITY FOR THE PERFORMANCE OF THE PRINCIPAL.

Surety Entitled to Benefit of Security. The surety is entitled to the benefit of every security for the performance of the principal obligation held by the creditor, or by a cosurety at the time of entering into the contract of suretyship, or acquired by him or her afterwards, whether the surety was aware of the security or not (*Civ. Code § 2849*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that the surety is entirely liable for the amount of the principal's default. The ground of the opposition is that the surety is entitled to the benefit of every security for the performance of the principal obligation held by the creditor or a cosurety, whether the surety was aware of the security or not [*see Civ. Code § 2849*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the surety's entitlement to the benefit of every security for the performance of the principal obligation. For example, this contention may arise in opposing an appeal premised on the

argument that the surety was entirely liable for the principal's obligation. These points and authorities may also be adapted for use in a trial brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel might allege facts describing the other securities held by the creditor or a cosurety for the performance of the principal obligation, such as a deed of trust to the principal's house [*see Civ. Code § 2849*].

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 222.220*.

[b] Related Pleading and Practice Forms

For forms relating to suretyship, see California Forms of Pleading and Practice, Ch. 538, *Suretyship, Bonds, and Undertakings* (Matthew Bender).

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§ 222.224 Opposing Contention That Surety Is Totally Liable--Surety Entitled to Have Principal's Property First Applied to Discharge of Obligation [Civ. Code § 2850]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general contention form opposing the existence of a suretyship (see, e.g., § 222.21).*]

_____ [*Name*], THE SURETY, IS NOT TOTALLY LIABLE FOR THE AMOUNT OF THE OBLIGATION OF _____ [*name*], THE PRINCIPAL, BECAUSE BOTH _____ [*name*], THE SURETY, AND _____ [*name*], THE PRINCIPAL, HYPOTHECATED PROPERTY FOR THE OBLIGATION AND THE SURETY IS ENTITLED TO HAVE THE PROPERTY OF _____ [*name*], THE PRINCIPAL, APPLIED FIRST TO DISCHARGE THAT OBLIGATION.

Surety Entitled to Have Principal's Property First Applied to Discharge. Whenever the property of a surety is hypothecated with property of the principal, the surety is entitled to have the property of the principal first applied to the discharge of the obligation, and the creditor will be required to apply the principal's property first when requested to do so by the surety (*Civ. Code § 2850*; *State Ath. Com. v. Mass. Bonding etc. Co. (1941) 46 Cal. App. 2d 823, 829, 117 P.2d 75*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that the surety is entirely liable for the amount of the principal's default. The ground of the opposition is that the surety is entitled to have the property of the principal first applied to the discharge of the obligation before any property the surety posted as security is applied [*see Civ. Code § 2850*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the creditor's obligation to first apply the property of the principal to the obligation. For example, this argument may arise in opposing an appeal premised on the argument that the surety was primarily liable and that the surety's pledged property should be applied first to discharge the principal's obligation [*see, e.g., State Ath. Com. v. Mass. Bonding etc. Co. (1941) 46 Cal. App. 2d 823, 828-829, 117 P.2d 75]* . These points and authorities may also be adapted for use in a trial brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel might allege facts illustrating that property of the principal was given as partial security for the obligation, that property of the surety was also hypothecated and the surety demanded that the creditor first apply that property toward the obligation before seeking recovery from the surety [*see, e.g., State Ath. Com. v. Mass. Bonding etc. Co. (1941) 46 Cal. App. 2d 823, 117 P.2d 75]* .

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 222.221*.

[b] Related Pleading and Practice Forms

For forms relating to suretyship, see *California Forms of Pleading and Practice, Ch. 538, Suretyship, Bonds, and Undertakings, § 538.10 et seq.* (Matthew Bender).

[3] Discussion of Authorities

[a] Surety Entitled to Have Principal's Property First Applied to Discharge

In ***State Ath. Com. v. Mass. Bonding etc. Co.*** *(1941) 46 Cal. App. 2d 823, 117 P.2d 75* , a state athletic commission required that sponsors of a boxing events furnish a surety bond to guarantee payment of boxers. The principal was a promoter of boxing contests and kept on file with the commission a bond furnished by defendant. Prior to a large program the commission notified the principal that the amount of the bond was insufficient and that he would have to furnish an additional bond. The principal deposited cash with the commission in lieu of an additional bond. Payment was withheld from the main event fighter due to a dispute as to expenses. He complained to the commission that he had not been paid. The commission demanded that defendant surety pay the fighter. Defendant surety did not pay, and the fighter brought action against the principal and levied an attachment on the money held by the commission. After judgment was entered against the principal, the commission joined the fighter in suing defendant surety on the amount of that award. By cross complaint defendant alleged payment by its principal of the money, retention of that amount by the commission, and the failure to apply that money to the payment of fighter. The trial court denied the relief sought on the cross complaint and awarded judgment in favor of plaintiffs. Defendant surety appealed.

The court of appeal reversed. Defendant did not deny liability on the bond, but contended that the judgment awarded was in excess of its liability, and that it was entitled to have received credit for the sum of money paid in cash by the principal to the commission and held by the commission for the purpose for which defendant became surety on the bond. The court agreed and said that defendant surety was entitled to have the cash deposited by the principal applied in reduction of its liability on the bond. The deposit was made with the funds of the principal; as between the principal and surety the principal is primarily liable; and the surety who is called on to pay the debt of the principal may seek reimbursement. Citing *Civ. Code § 2845*, the court said that a surety may require the creditor to proceed against the principal, or to pursue any other remedy in the creditor's power which the surety cannot itself pursue, and which would lighten its burden; and if in such case the creditor neglects to do so, the surety is exonerated to the extent to which the surety is thereby prejudiced. Furthermore, *Civ. Code § 2850* provides that when property of a surety is hypothecated with property of the principal, the surety is entitled to have the property of the principal first applied to the discharge of

the obligation. *Civ. Code § 2849* provides that a surety is entitled to the benefit of every security for the performance of the principal obligation held by the creditor, or by a cosurety at the time of entering into the contract of suretyship, or acquired by it afterwards, whether the surety was aware of the security or not. The surety gave its personal obligation in the form of a bond and the principal delivered to the commission money to be applied to the specific purpose for which the bond was given (*46 Cal. App. 2d 823, 829)* . The money was not given as collateral security for the bond and the surety was entitled to have the money applied to the purpose for which it was paid and accepted (*46 Cal. App. 2d 823, 830)* .

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22-222 California Points & Authorities §§ 222.225-222.239

[Reserved]

§§ 222.225[Reserved]

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E. Termination Of Surety's Liability
1. Exoneration Through Alteration

22-222 California Points & Authorities § 222.240

§ 222.240 Supporting Contention That Surety Has Been Exonerated--Material Alteration of Original Obligation Without Consent of Surety [Civ. Code § 2819]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

_____ [*Name*], THE SURETY, HAS BEEN EXONERATED FROM HIS/HER/ITS OBLIGATION AS SURETY BECAUSE _____ [THE ORIGINAL OBLIGATION OF _____ (*name*), THE PRINCIPAL, WAS MATERIALLY ALTERED WITHOUT THE CONSENT OF _____ (*name*), THE SURETY *and/or* THE REMEDIES AND RIGHTS OF _____ (*name*), THE CREDITOR, AGAINST _____ (*name*), THE PRINCIPAL, WERE IMPAIRED OR SUSPENDED].

A. Alteration of Original Obligation Without Consent of Surety Exonerates Surety. A surety is exonerated, except so far as he or she may be indemnified by the principal, if by any act of the creditor, without the consent of the surety, the original obligation of the principal is altered in any respect or the remedies or rights of the creditor against the principal are in any way impaired or suspended. The alteration may occur in various ways, including an extension of the payment period, a release of a security interest, or an execution of a consent to compromise and the acceptance of a smaller amount from the principal (*Civ. Code § 2819*; *Coutin v. Nessanbaum (1971) 17 Cal. App. 3d 156, 162-163, 94 Cal. Rptr. 453* ; *Wexler v. McLucas (1975) 48 Cal. App. 3d Supp. 9, 14* , *121 Cal. Rptr. 453* ; *R.P. Richards, Inc. v. Chartered Construction Corporation (2000) 83 Cal. App. 4th 146, 99 Cal. Rptr. 2d 425*).

B. Alteration Must be Material by Affecting Rights, Interests, or Obligations of Parties. An alteration in any material respect without consent of the surety exonerates the surety. A material alteration is one which works some change in the rights, interests, or obligations of the parties to the writing (*V.I.P. Agency of No. Cal., Inc. v. Duffy Electronics, Inc. (1979) 92 Cal. App. 3d 849, 852-853, 155 Cal. Rptr. 45* ; *Hill & Morton, Inc. v. Coughlan (1963) 214 Cal. App. 2d 545, 548-549, 29 Cal. Rptr. 550*).

[*Optional*] **C. Alteration Benefiting Surety Serves to Exonerate.** It is the fact of alteration, rather than its effect, which is decisive; an alteration which is to the surety's benefit will exonerate the surety of liability (*Coutin v. Nessanbaum (1971) 17 Cal. App. 3d 156, 162-163, 94 Cal. Rptr. 453* ; *Hill & Morton, Inc. v. Coughlan (1963) 214 Cal. App. 2d 545, 548-549, 29 Cal. Rptr. 550*).

[*Optional*] **D. Voidable Promise May Result in Alteration.** A creditor's promise may alter the obligation or suspend or impair the remedy within the meaning of *Civil Code Section 2819*, even if that promise is for any cause void or voidable by the creditor at his or her option (*Civ. Code § 2820*).

[*Optional*] **E. Mere Entitlement to Indemnification Is Not Sufficient to Defeat Exoneration.** In order to come within the exception to exoneration provided by *Civil Code Section 2819* to the extent that the surety may be indemnified by the principal, the surety must have received the indemnified amount, physical collateral, or a lien on property. A mere promise that the principal will indemnify the surety is not sufficient (*Texaco Refining & Marketing v. Aetna Cas. & Sur. (9th Cir. 1990) 895 F.2d 637, 640)* .

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that the surety has been exonerated due to an alteration in the original obligation [*see Civ. Code § 2819*]. Although *Civ. Code § 2819* provides that any alteration triggers an exoneration, the cases appear to require a material alteration before exoneration occurs [*see, e.g., Hill & Morton, Inc. v. Coughlan (1963) 214 Cal. App. 2d 545, 29 Cal. Rptr. 550]* . In addition, *Civ. Code §§ 2819* and *2822(b)* provide that the creditor's agreement with the debtor to accept a lesser sum than the balance owed on the original obligation does not exonerate the surety for the agreed-on lesser sum, even if the agreement is made without the surety's consent [*see § 222.244*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of exoneration. For example, this argument may arise in opposing a summary judgment motion or an appeal premised on the argument that the surety was liable for the principal's obligation [*see, e.g., Hill & Morton, Inc. v. Coughlan (1963) 214 Cal. App. 2d 545, 548, 29 Cal. Rptr. 550* (appeal)]. These points and authorities may also be adapted for use in a trial brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, counsel might include facts illustrating that the original obligation which called for payment directly to the creditor by the principal's customers was changed by the creditor and principal to an alternate method of payment without the surety's consent [*see, e.g., Hill & Morton, Inc. v. Coughlan (1963) 214 Cal. App. 2d 545, 29 Cal. Rptr. 550* (appeal)].

[b] Related Pleading and Practice Forms

For forms relating to suretyship, see California Forms of Pleading and Practice, Ch. 238, *Suretyship, Bonds, and Undertakings* (Matthew Bender).

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 222.243* and *222.244* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Alteration of Original Obligation Without Consent of Surety Exonerates Surety

In ***Coutin v. Nessanbaum*** *(1971) 17 Cal. App. 3d 156, 94 Cal. Rptr. 453* , defendant's son-in-law executed a promissory note to a bank. As a part of the same transaction, plaintiff guaranteed payment in writing on the reverse side of the note. When the note became due and payable defendant's son-in-law refused to pay any part of the sum owed. Plaintiff was obligated and did pay the amount then due. The bank transferred to plaintiff its interest in the note. Plaintiff and defendant then signed a document entitled Unconditional and Absolute Guaranty, prepared by plaintiff's attorney, in which defendant guaranteed payment on her son-in-law's note. Later, plaintiff signed a Consent to Compromise consenting and agreeing with defendant's son-in-law to compromise and settle its claim against him in consideration of a smaller sum. Pursuant to that instrument, plaintiff received and accepted a check for slightly less than one half the amount owed. Thereafter plaintiff brought an action against defendant for the difference between the compromise and the total amount owed on the note. Judgment was for defendant. Plaintiff appealed.

The court of appeal affirmed. The court said that a guaranty had been created by the document signed by plaintiff and defendant in which defendant guaranteed payment on her son-in-law's note. *Civ. Code § 2819* may apply to exonerate defendant from any obligations in the guaranty agreement. The court found that defendant was exonerated of her obligations by the Consent to Compromise executed by plaintiff and the acceptance of the check for the smaller amount. The court disagreed with plaintiff's argument that defendant remained liable for the full amount owed, and was benefited by the application of the proceeds of the compromise check. The parties to an obligation may not alter its terms without the guarantor's consent, even though it may be to the guarantor's advantage (*17 Cal. App. 3d 156, 162-163)* .

The result in *Coutin v. Nessanbaum (1971) 17 Cal. App. 3d 156, 94 Cal. Rptr. 453* , was codified, although the reasoning may be abrogated, by amendments to *Civ. Code §§ 2819* and *2822(b)* specifying that, even if done without the surety's consent, the creditor's agreement with the debtor to accept a lesser sum than the balance owed on the original obligation does not exonerate the surety for the agreed-on lesser sum. The amendments did not constitute a change in, but were declarative of, existing law [Stats. 1993, ch. 149, § 3].

The facts and procedural background of ***Wexler v. McLucas*** *(1975) 48 Cal. App. 3d Supp. 9* , *121 Cal. Rptr. 453* , are discussed in *§ 222.80[3][a]*. In *Wexler*, the court of appeal reversed the trial court judgment against defendant surety. After finding that defendant was a surety rather than a principal debtor, the court found that plaintiff creditor materially altered the contract without defendant's consent by extending the payment period, and thereby discharged the surety through the application of *Civ. Code § 2819*. Plaintiff also altered the original contract by releasing his security interest in the furniture without defendant's consent. *Civ. Code § 2849* entitles the surety to the benefit of every security for the performance of the principal obligation whether the surety was aware of the security or not. By releasing the security, plaintiff also released the surety (*48 Cal. App. 3d Supp. 9, 14)* .

In ***R.P. Richards, Inc. v. Chartered Construction Corporation*** *(2000) 83 Cal. App. 4th 146, 99 Cal. Rptr. 2d 425* , a subcontractor sued the general contractor and surety to enforce a stop notice and stop notice release bond. The subcontractor settled with the general contractor, obtained a judgment to enforce the settlement, and continued to prosecute the claim against the surety. The trial court found that the original obligation had been altered without the surety's consent, thereby exonerating it as surety under *Civ. Code § 2819*, and entered judgment for the surety. The subcontractor appealed, and the court of appeal affirmed. The court noted that a promisee's release of the principal extinguishes the principal obligation and impairs the promisee's rights and remedies against the principal within the meaning of *Civ. Code § 2819*. In this case, the subcontractor fully released the general contractor from its claim for payment under the bonded obligation and accepted instead an unbonded obligation under the settlement agreement. Although the subcontractor notified the surety of the proposed settlement agreement before execution, it did not request or receive the surety's consent. The court found that the negotiated release fully extinguished the general contractor's bonded obligation to the subcontractor, which constituted an impairment of the subcontractor's rights and remedies against the surety on that bonded obligation. Under *Civ. Code § 2819*, this had the legal consequence of exonerating the

surety. Further, under *Civ. Code § 2810*, the general's liability on the original obligation ceased when the subcontractor released it, resulting in exoneration of the surety (*83 Cal. App. 4th 146, 154-155)* .

The court also addressed the subcontractor's argument that *Civ. Code § 3225* expressly provides that an alteration of the original obligation does not exonerate the surety on a bond relating to a work of improvement. The court held that, based on the statutory text and purpose,*Civ. Code § 3225* does not apply when the promisee releases the principal obligation. The court construed that section to apply to a change, alteration, or modification of the principal obligation, but not to its release (*83 Cal. App. 4th 146, 156-158)* .

[b] Alteration Must be Material by Affecting Rights, Interests, or Obligations of Parties

In ***V.I.P. Agency of No. Cal., Inc. v. Duffy Electronics, Inc.*** *(1979) 92 Cal. App. 3d 849, 155 Cal. Rptr. 45* , plaintiff filed an action against defendant principal seeking recovery for services rendered. The trial court issued a writ of attachment authorizing sequestration of two assets. Defendant presented a bond executed by defendant surety for the amount in question and the attachment was released. Plaintiff and defendant principal stipulated for judgment in a lower amount on the condition that execution be stayed pending payment of the judgment in installments. Later, plaintiff moved for judgment against defendant surety, alleging that the payments on the judgment had lapsed, leaving unpaid the amount requested. The trial court judgment was for plaintiff. Defendant appealed.

The court of appeal reversed. Defendant surety referred to *Civ. Code § 2819* as applying to exonerate it due to the alteration caused by the stipulation. Defendant principal's obligation was modified in two ways by the stipulated judgment. The amount of the obligation was reduced and enforcement of the judgment was deferred. The reduction modification reduced the surety's exposure but was not an alteration of the obligation. Therefore, no exoneration resulted from it. However, the second alteration, transforming an immediate obligation to pay into an obligation that was enforceable only according to a schedule of deferred payments, was a substantial alteration of the original obligation of the principal. It also altered the remedies or rights of the creditor against the principal. Defendant surety did not consent to the alteration; therefore its obligation as surety was exonerated. The extension of time for payment postponed and perhaps depreciated the value of the surety's remedy to satisfy the debt (*92 Cal. App. 3d 849, 852-853)* .

In ***Hill & Morton, Inc. v. Coughlan*** *(1963) 214 Cal. App. 2d 545, 29 Cal. Rptr. 550* , plaintiff, a wholesale lumber dealer, contracted to supply lumber to defendant, a retail lumber dealer. The method of payment was for defendant to invoice all its customers for lumber supplied to them, with a notation that payment was to be made to plaintiff. Defendants, officers of defendant dealer, individually and jointly guaranteed defendant dealer's faithful performance. Plaintiff later decided that the method of payment was too cumbersome and orally agreed with defendant to change to a simple open book account. When defendant's account became substantially delinquent, plaintiff brought an action to enforce the guaranties of payment. The trial court judgment was for plaintiff. One defendant guarantor appealed.

The court of appeal reversed. In addition to a contract interpretation question, the court analyzed the rules concerning exoneration of the guarantor. *Civ. Code § 2819* provides that a surety is exonerated, except so far as he or she may be indemnified by the principal, if by any act of the creditor, without the consent of the surety, the original obligation of the principal is altered in any respect or the remedies or rights of the creditor against the principal, in respect thereto, are in any way impaired or suspended. Defendant guarantor contended that he was exonerated because the contract between plaintiff and defendant dealer was altered in a material respect without his consent and because plaintiff extended the time of payment. An alteration in any material respect without consent of the surety exonerates the surety. When a contract and a guaranty of performance thereunder are entered into at the same time, they are properly read and interpreted as an entire contract. Thus, if the main contract is altered without the consent of the guarantor and is changed in respects so material as to change the substantial rights of the parties and in effect to make a new contract, the guarantor is exonerated. This is true whether the effect of the alteration is to increase or to lessen the obligation, the performance of which is guaranteed. The materiality of the change does not depend on whether or not the party not consenting to the change will be benefited or injured, but on whether or not the change works any alteration in the

meaning or legal effect of the contract. A material alteration is one that works some change in the rights, interests, or obligations of the parties to the writing. The contract was materially changed when the method of payment provided by the contract was changed. Since the change was effected without defendant's knowledge, it was without his consent (*214 Cal. App. 2d 545, 548-549)* . The oral agreement having been executed, the surety was discharged (*214 Cal. App. 2d 545, 550)* .

[c] Alteraton Benefiting Surety Serves to Exonerate

Coutin v. Nessanbaum *(1971) 17 Cal. App. 3d 156, 94 Cal. Rptr. 453* , is discussed in *§ 222.240[3][a]*.

Hill & Morton, Inc. v. Coughlan *(1963) 214 Cal. App. 2d 545, 29 Cal. Rptr. 550* , is discussed in *§ 222.240[3][b]*.

[d] Mere Entitlement to Indemnification Is Not Sufficient to Defeat Exoneration

Plaintiff in ***Texaco Refining & Marketing v. Aetna Cas. & Sur.*** *(9th Cir. 1990) 895 F.2d 637* , entered into an agreement in 1978 to sell oil to Oasis Petroleum Corp. Defendant issued a bond guaranteeing payment for Oasis' purchases under the contract. In 1985, plaintiff and Oasis entered into the *seventh amendment* of the contract. As part of the amendment, Oasis paid $7.2 million on account and executed two notes totaling $9.4 million. Defendant never consented to the *seventh amendment*, which plaintiff admitted constituted a material modification of the principal obligation, and in fact warned plaintiff not to rely on the bond if the proposed *seventh amendment* was executed. Oasis filed bankruptcy a month after execution of the *seventh amendment*, and the trustee in bankruptcy sought to require plaintiff to disgorge the $7.2 million payment as a voidable preference. Plaintiff brought a diversity action against defendant on the bond for the unpaid balance and to require defendant to reimburse plaintiff for any part of the payment it was required to disgorge. Judgment was for defendant, and plaintiff appealed.

The court of appeals affirmed. One of plaintiff's contentions was that defendant was not exonerated because *Civ. Code § 2819* provides that a surety is exonerated by modification, "except so far as he may be indemnified by the principal," and that defendant came within that exception to exoneration because it was entitled to indemnification by Oasis and its parent company. The appellate court agreed with the district court that the only reasonable interpretation of that exception is that it requires the surety to have actually received the indemnified amount, physical collateral, or a lien on property. A mere promise that the principal will indemnify the surety is not sufficient. That promise is already imposed by law by *Civ. Code § 2847*. Thus, any other interpretation would create an exception that would swallow the rule and every case would be one in which the surety was indemnified. The court also relied on a reference in the Legislature's note to *Civ. Code § 2819* referring to a New York case in which the surety had received the whole amount to become due (*895 F.2d 637, 640)* .

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22-222 California Points & Authorities § 222.241

§ 222.241 Supporting Contention That Surety Has Been Exonerated--Rescission of Exonerating Agreement Does Not Restore Surety's Liability [Civ. Code §§ 2819, 2821]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Name*], THE SURETY, WAS EXONERATED FROM HIS/HER/ITS OBLIGATION AS SURETY BECAUSE AN AGREEMENT WAS MADE EXONERATING HIM/HER/IT OF LIABILITY THROUGH THE APPLICATION OF *CIVIL CODE SECTION 2819*. THE RESCISSION OF THAT AGREEMENT DOES NOT RESTORE THE LIABILITY OF _____ [*name*], THE SURETY.

Rescission of Exonerating Agreement Does Not Restore Surety's Liability. The rescission of an agreement which exonerated the surety through the application of *Civil Code Section 2819* does not restore the liability of the surety, who thereby remains exonerated (*Civ. Code § 2821*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that the surety has been exonerated due to an alteration in the original obligation and that the rescission of that altering agreement does not restore liability to the surety [*see Civ. Code §§ 2819, 2821*]. The elements of *Civ. Code § 2819*, describing when exoneration results from an alteration, are *set forth in § 222.240*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue of exoneration. For example, this argument may arise in opposing an appeal premised on the argument that the surety was liable for the principal's obligation. The points and authorities may also be adapted for use in a trial brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, counsel might include facts illustrating that the payment schedule of the original obligation was changed by the creditor and the principal to an alternate method of payment without the surety's consent and, although that agreement between the creditor and the principal was later rescinded, no restoration of the surety's liability took place [*see Civ. Code § 2821*].

[b] Related Pleading and Practice Forms

For forms relating to suretyship, see Ch. 538, *Suretyship, Bonds, and Undertakings* in California Forms of Pleading and Practice (Matthew Bender).

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22-222 California Points & Authorities § 222.242

§ 222.242 Opposing Contention That Surety Has Been Exonerated--Indemnification From Principal Precludes Exoneration [Civ. Code §§ 2819, 2824]

[1] FORM

The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.]

_____ [*Name*], THE SURETY, HAS NOT BEEN EXONERATED FROM HIS/HER/ITS OBLIGATION AS SURETY BY AN ALTERATION OF THE ORIGINAL OBLIGATION OR IMPAIRMENT OF THE RIGHTS AND REMEDIES OF _____ [*name*], THE CREDITOR, AGAINST _____ [*name*], THE PRINCIPAL, BECAUSE _____ [_____ (*name*), THE SURETY HAS BEEN INDEMNIFIED BY _____, (*name*), THE PRINCIPAL].

[*EITHER*]

Surety Has Indemnified Principal. A surety is not exonerated by an alteration of the original obligation or impairment or suspension of the creditor's rights or remedies against the principal to the extent that the surety has been indemnified by the principal (*Civ. Code § 2819*; *see Texaco Refining & Marketing v. Aetna Cas. & Sur. (9th Cir. 1990) 895 F.2d 637, 640)* .

[*AND/OR*]

Indemnified Surety Remains Liable. A surety who has been indemnified by the principal is liable to the creditor to the extent of the indemnity, notwithstanding that the creditor, without the assent of the surety, may have modified the contract or released the principal (*Civ. Code § 2824*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that the surety has not been exonerated because of an alteration in the original obligation or impairment of the creditor's rights or remedies against the principal when the surety has already been indemnified by the principal [*see Civ. Code §§ 2819, 2824*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of exoneration. For example, this argument may arise in opposing an appeal premised on the argument that the surety was exonerated from liability due to an alteration of the original obligation without the surety's consent. These points and authorities may also be adapted for use in a trial brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel might include facts demonstrating that even though changes were made in the original obligation, the surety has already been indemnified by the principal for the amount of liability incurred as a result thereof. Indemnification is likely to be in the form of receipt of the indemnified amount, physical collateral, or a lien on property [*see Texaco Refining & Marketing v. Aetna Cas. & Sur. (9th Cir. 1990) 895 F.2d 637, 640]* .

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 222.240*.

[b] Related Pleading and Practice Forms

For forms relating to suretyship, see California Forms of Pleading and Practice, Ch. 538, *Suretyship, Bonds, and Undertakings* (Matthew Bender).

[3] Discussion of Authorities

[a] Surety Has Indemnified Principal

The exact words used in *Civ. Code § 2819* provide that a surety "is exonerated, except so far as he may be indemnified by the principal, by any act ... ." However, as discussed in *§ 222.240[3][d]*, a federal court applying California law in a diversity action has held that this exception to exoneration requires the surety to have actually already indemnified the principal [*Texaco Refining & Marketing v. Aetna Cas. & Sur. (9th Cir. 1990) 895 F.2d 637, 640]* .

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22-222 California Points & Authorities § 222.243

§ 222.243 Opposing Contention That Surety Has Been Exonerated--Surety Not Exonerated if Consented to Alteration, Alteration Not Material, or No Alteration Made [Civ. Code § 2819]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

_____ [*Name*], THE SURETY, HAS NOT BEEN EXONERATED FROM HIS/HER/ITS OBLIGATION AS SURETY BECAUSE _____ [THE ORIGINAL OBLIGATION OF _____ (*name*), THE PRINCIPAL, WAS ALTERED WITH THE CONSENT OF _____ (*name*), THE SURETY *or* THE REMEDIES OR RIGHTS OF _____ (*name*), THE CREDITOR, AGAINST _____ (*name*), THE PRINCIPAL, WERE IMPAIRED AND/OR SUSPENDED WITH THE CONSENT OF _____(*name*), THE SURETY *or* THE ALTERATION OF THE ORIGINAL OBLIGATION WAS NOT MATERIAL *or* THE CREDITOR'S ATTEMPT TO ENFORCE AN OBLIGATION NOT WITHIN THE SURETYSHIP AGREEMENT IS NOT AN ALTERATION].

[*EITHER*]

A. Alteration to Which Surety Gave Consent Does Not Exonerate. When a surety consents to an alteration of the original obligation of the principal, or the impairment or suspension of any of the creditor's rights or remedies against the principal, the surety is not exonerated (*Bloom v. Bender (1957) 48 Cal. 2d 793, 800-801, 313 P.2d 568* ; *see Southern Cal. First Nat. Bank v. Olsen (1974) 41 Cal. App. 3d 234, 240, 116 Cal. Rptr. 4*).

[*Optional*] **B. Surety's Consent to Alteration May Be Given at Any Time.** The surety's consent may be given in advance of the alteration of the principal's obligation as well as at or after the time of that act (*Bloom v. Bender (1957) 48 Cal. 2d 793, 800-801 , 313 P.2d 568* ; *see Southern Cal. First Nat. Bank v. Olsen (1974) 41 Cal. App. 3d 234, 240, 116 Cal. Rptr. 4*).

[*AND/OR*]

C. Alteration in Performance Resulting From Principal's Acts Is Not Material Alteration in Obligation. An alteration in performance necessitated by the principal's actions will not be deemed a material alteration, especially when the surety obligated itself to pay any additional costs resulting from the principal's failure to render an adequate performance (*City of Sacramento v. Trans Pacific Industries, Inc. (1979) 98 Cal. App. 3d 389, 399-401, 159 Cal. Rptr. 514*).

[*AND/OR*]

D. Void or Voidable Promise by Creditor Will Not Cause Exoneration Unless It Is Material Alteration. Although a creditor's promise that is void or voidable may alter the original obligation within the meaning of *Section 2819 of the Civil Code*, such a promise does not act as an alteration in all cases. The promise must result in a material alteration, thereby operating to discharge the surety as a matter of law (*Civ. Code § 2820*; *Wise v. Clapper (1968) 257 Cal. App. 2d 770, 775-776, 65 Cal. Rptr. 231*).

[*AND/OR*]

E. Creditor's Attempt to Enforce Obligation Not Within Suretyship Agreement Does Not Constitute Alteration. A creditor's attempt to collect from the surety something for which the surety is not liable under the suretyship agreement is not an alteration and does not exonerate the surety (*Glickman v. Collins (1975) 13 Cal. 3d 852, 862, 120 Cal. Rptr. 76, 533 P.2d 204* ; *see Ralston-Purina Co. v. Carter (1962) 210 Cal. App. 2d 372, 378, 26 Cal. Rptr. 690*).

[*CONTINUE*]

[*Optional*] **F. Alteration as Defense Must Be Pleaded at Trial.** The defense of exoneration through alteration is a special defense which must be raised and pleaded at trial (*Newhouse v. Getz (1935) 8 Cal. App. 2d 113, 114, 47 P.2d 306*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that the surety has not been exonerated due to an alteration in the original obligation, because the alteration was made with the consent of the surety [Paragraph A], the alteration was a result of the principal's actions [Paragraph C], the alteration was not a material one [Paragraph D], or the creditor's attempt to enforce an obligation not within the obligation was not an alteration [Paragraph E]. Optional Paragraph B may be used when Paragraph A is used and sets forth when the surety's consent may be given. Optional Paragraph F may be used to argue that alteration is a special defense. The requirements of an alteration which results in exoneration are set forth in *Civ. Code § 2819*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of exoneration. For example, this argument may arise in opposing a summary judgment motion or an appeal premised on the argument that the surety was exonerated from liability on the principal's obligation [*see, e.g., Newhouse v. Getz (1935) 8 Cal. App. 2d 113, 114, 47 P.2d 306* (appeal)]. These points

and authorities may also be adapted for use in a trial brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel might include facts demonstrating that even though changes were made in the original obligation, the changes were made with the surety's consent, as indicated in the suretyship agreement in which the surety waived its right to plead exoneration by agreeing to allow changes to be made [*see, e.g., City of Sacramento v. Trans Pacific Industries, Inc. (1979) 98 Cal. App. 3d 389, 159 Cal. Rptr. 514]* .

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 222.240*.

[b] Related Pleading and Practice Forms

For forms relating to suretyship, see California Forms of Pleading and Practice, Ch. 538, *Suretyship, Bonds, and Undertakings* (Matthew Bender).

[3] Discussion of Authorities

[a] Alteration to Which Surety Gave Consent Does Not Exonerate

The facts and procedural background of ***Bloom v. Bender*** *(1957) 48 Cal. 2d 793, 313 P.2d 568* , are discussed in *§ 222.200[3][a]*. In *Bloom,* the Supreme Court held that defendant surety was not released from its liability by an alteration because it had consented to the alteration. Defendant argued that when the creditor released the principal from further liability pursuant to the composition of creditors, the obligations of the surety were likewise terminated. But the Court explained that a surety is not discharged by release of the principal when the surety consents to remain liable notwithstanding the release. *Civ. Code § 2819* provides that a surety is exonerated, except so far as he or she may be indemnified by the principal, if by any act of the creditor, without the consent of the surety, the original obligation of the principal is altered in any respect or the remedies or rights of the creditor against the principal are in any way impaired or suspended. The logical corollary to the statute is that when the surety consents to an alteration of the original obligation of the principal, or the impairment or suspension of any of the creditor's rights or remedies against the principal, the surety is not exonerated. The release of a debtor following a composition of creditors was an alteration of the original obligation of the principal within the contemplation of *Civ. Code § 2819,* and that when that alteration is consented to by the surety, the release of the principal does not exonerate the surety (*48 Cal. 2d 793, 800-801)* .

In ***Southern Cal. First Nat. Bank v. Olsen*** *(1974) 41 Cal. App. 3d 234, 116 Cal. Rptr. 4* , defendants, in consideration of a loan by plaintiff to a company, of which one of the defendants was a director, guaranteed the payment of the loan by executing a continuing guaranty. They were not aware of what they were signing. The company executed a promissory note in plaintiff's favor. Later, defendants orally informed plaintiff that they would not agree to a renewal of the note and would not be further bound on their continuing guaranty; this was followed with a written revocation. Plaintiff continued to create new indebtedness in future transactions with the company, and increased the interest rate on the company's obligations. The trial court found that all of the promissory notes executed after defendant's revocation represented indebtedness created after plaintiff received notice of revocation and that defendants were released from liability. The trial court judgment was for defendants. Plaintiff appealed.

The court of appeal affirmed. The court cited *Civ. Code § 2819* and said that an increase in the rate of interest on an obligation constituted an alteration within the meaning of *Civ. Code § 2819* and the surety was thereby exonerated if an increase was made without his or her consent. A surety is not exonerated from liability by a change in the contract between the principal and the creditor which is made with his or her consent (*41 Cal. App. 3d 234, 240)* . Although the court held that defendants were relieved of liability as to any indebtedness created after plaintiff received written notice of revocation in regard to future transactions, defendants had given advance consent to alterations by the terms of the

guaranty and thus could have been held liable for obligations up to the revocation (*41 Cal. App. 3d 234, 240-241)* .

[b] Surety's Consent to Alteration May Be Given at Any Time

The facts and procedural background of ***Bloom v. Bender*** *(1957) 48 Cal. 2d 793, 313 P.2d 568* , are discussed in *§ 222.200[3][a]*. In *Bloom*, the Supreme Court held that defendant surety was not released from its liability by an alteration because it had consented to the alteration. The Court said that consent may be given in advance of the alteration of the principal's obligation as well as at or after the time of that act. The guaranty agreement specifically provided that the liability of the guarantor would not be affected by the acceptance of any settlement or composition. That provision plainly gave advance consent to the release of the principal by means of an arrangement such as the composition agreement and it did not operate to discharge defendant as guarantor unless discharge was effected by some overriding rule of law (*48 Cal. 2d 793, 800-801)* .

The facts and procedural background of ***Southern Cal. First Nat. Bank v. Olsen*** *(1974) 41 Cal. App. 3d 234, 116 Cal. Rptr. 4* , are discussed in *§ 222.243[3][a]*. In *Southern Cal.*, the court of appeal held that defendant guarantors were not liable. A surety is not exonerated from liability by a change in the contract between the principal and the creditor which is made with his or her consent; that consent may be given in advance of the alteration of the principal's obligation as well as at or after the time of the act. Defendant gave advance consent to an increase in the rate of interest on the company's obligation to plaintiffs (*41 Cal. App. 3d 234, 240)* . Nevertheless, the court held that defendants were relieved from liability for any transactions that occurred after plaintiff received their written notice of revocation of the guaranty as to future transactions (*41 Cal. App. 3d 234, 241)* .

[c] Alteration in Performance Resulting From Principal's Acts Is Not Material Alteration in Obligation

In ***City of Sacramento v. Trans Pacific Industries, Inc.*** *(1979) 98 Cal. App. 3d 389, 159 Cal. Rptr. 514* , plaintiff city and defendant developer executed a subdivision agreement in which plaintiff agreed to approve defendant's subdivision map for development of specified parcels subject to certain conditions. Among the conditions was a time deadline in which all the public improvements had to be completed. An extension of time allowed by plaintiff would not release the surety on the bond filed by defendant pursuant to the agreement; the surety waived *Civ. Code § 2819*. If defendant failed to complete the improvements within the allotted time, plaintiff had the right to complete any unfinished work and recover its costs from either defendant or its surety. Defendant surety issued a performance bond. Defendant developer sold some of the parcels. After the purchase the buyer learned that water and electrical improvements would have to be installed before he could proceed with development plans. He made no demand on defendant, well aware of its precarious financial position. Unable to develop the land, and informed by plaintiff that it would not install the missing improvements, the buyer contracted with plaintiff and agreed to construct all the improvements on his parcels in exchange for plaintiff's promise to reimburse him from any judgment it received from either defendant. Plaintiff brought an action for breach of contract against both defendants. Defendant surety cross complained for indemnity from the buyer. The trial court judgment was for plaintiff against both defendants and for cross defendant buyer. Defendants' motion for a new trial was denied. Defendants appealed the judgment against them.

The court of appeal affirmed. Among the issues addressed by the court was exoneration of the surety. Defendant surety claimed it was exonerated on the surety bond because plaintiff materially altered the principal's obligations under the subdivision agreement without defendant's consent. Alternatively, defendant argued it was not indemnified by the principal within the meaning of *Civ. Code § 2819*, which provides that a surety is exonerated, except so far as he or she may be indemnified by the principal, if by any act of the creditor the original obligation is altered. The issue was not raised at trial even though exoneration should have been pleaded and proved as an affirmative defense. Defendant's failure to introduce any evidence regarding indemnification precluded consideration of that argument on appeal. The court rejected on the merits defendant's claim of material alteration of the principal's obligations. Defendant alleged a material alteration through the relocation of a water main. The alteration was necessary because the defendant had not performed its work in a workmanlike manner and any additional costs were precisely what defendant had obligated

itself to pay. Its other basis for exoneration, a 12-month time extension, was specifically waived in the agreement. The agreement provided for extensions of time, and the surety's obligation was measured by the terms of that agreement considered in conjunction with the bond (*98 Cal. App. 3d 389, 399-401)* .

[d] Void or Voidable Promise by Creditor Will Not Cause Exoneration Unless It Is Material Alteration

In ***Wise v. Clapper*** *(1968) 257 Cal. App. 2d 770, 65 Cal. Rptr. 231* , an unsecured promissory note was executed and delivered to defendants. Defendants sold and assigned the note to plaintiffs and guaranteed its payment. After plaintiffs informed defendants that the note remained unpaid at maturity, plaintiffs and the principal arranged for an immediate partial payment, with the balance paid two months after the original due date. Defendants had no knowledge of these arrangements. When the balance on the note remained unpaid, plaintiffs brought an action against the principal as maker and defendants as guarantors. The trial court found that plaintiffs agreed to and did grant a valid extension of time to the principal and that the agreement was made without the knowledge or consent of defendants, thereby materially altering the original obligation and discharging the guarantors. The trial court judgment was for defendants. Plaintiffs appealed.

The court of appeal reversed and remanded to the trial court to decide whether or not the agreement to extend time was for a definite period. Plaintiffs contended that they did not agree to grant an extension of time for payment for a definite period, and claimed that the evidence established the acceptance of a partial payment coupled with a delay in the enforcement of the obligation, and that neither of these exonerated defendant. The court thoroughly analyzed the law regarding an extension of time and partial payment in relation to exoneration of the surety. *Civ. Code § 2822* provides that the acceptance by a creditor of partial payment reduces to that extent the obligation of a surety, but does not otherwise affect it or exonerate the surety. And *Civ. Code § 2823* provides that a mere delay on the part of the creditor to proceed against the principal does not exonerate the surety. But an extension of time of payment without the surety's consent constitutes a material alteration of the original obligation and discharges the surety. Injury to the surety is presumed as a matter of law, and is not a matter into which the creditor may inquire (*257 Cal. App. 2d 770, 774)* . *Civ. Code § 2820* also provides that the fact that a promise by a creditor is for any cause void, or voidable by the creditor or at the creditor's option, shall not prevent it from altering the obligation or suspending or impairing the remedy within the meaning of *Civ. Code § 2819*. Thus, the fact that an extension agreement is subject to rescission at the option of the creditor does not preclude it from discharging the surety. However, an agreement to extend time does not exonerate a surety unless the extension is for a definite period. *Civ. Code § 2820* does not dispense with the requirement that the extension agreement be for a definite period. Conceivably, a void or voidable promise might alter an obligation or impair a remedy when the rights of third parties intervene or other circumstances have occurred which prejudicially affect the surety. Nevertheless, *Civ. Code § 2820* must be read in the context of *Civ. Code § 2819*, which requires a material alteration in the original obligation in order to exonerate the surety. Thus, before it can be deemed to be a material alteration which, without a showing of detriment or prejudice to the surety, operates to discharge the surety as a matter of law, the agreement to extend time, though void or voidable at the option of the creditor, must be for a definite period. Plaintiffs contended that they did not promise to extend the time of payment for a definite period. Because the trial court merely found that plaintiffs agreed to grant a valid extension of time, and did not consider the necessity for a definite period of time, the court of appeal could not construe its meaning (*257 Cal. App. 2d 770, 775-776)* .

[e] Creditor's Attempt to Enforce Obligation Not Within Suretyship Agreement Does Not Constitute Alteration

The facts and procedural background of ***Glickman v. Collins*** *(1975) 13 Cal. 3d 852, 120 Cal. Rptr. 76, 533 P.2d 204* , are discussed in *§ 222.100[3][a]*. In *Glickman,* the Supreme Court upheld defendant's liability on a guaranty she executed. Defendant claimed, among other contentions, that as the guaranty did not encompass the principal's obligation to provide medical insurance, plaintiff's attempt to recover those payments altered the obligation of the principal so as to discharge defendant as guarantor. The Court disagreed, stating that the provision for medical insurance was included in the settlement agreement and plaintiff's inclusion of it in her claim on the guaranty did not alter either defendant's liability or that of the principal. Thus, defendant was not discharged of her obligation by reason of plaintiff's attempt to

recover them from her. Since defendant never agreed to guarantee those payments, the judgment against defendant was reduced by that amount (*13 Cal. 3d 852, 862)* .

The facts and procedural background of ***Ralston-Purina Co. v. Carter*** *(1962) 210 Cal. App. 2d 372, 26 Cal. Rptr. 690* , are discussed in *§ 222.200[3][b]*. Although the court of appeal in *Ralston-Purina* reversed a judgment against defendant guarantor, on grounds other than exoneration, the court addressed that issue at length, and found that no exoneration of the guarantor's liability had occurred. The guaranty was for merchandise only and did not include a guaranty of cash given to the principal, even though cash was used to reimburse the principal for merchandise which he bought from other sources. Defendant contended that the receipt of cash terminated his liability; the court did not agree. The guaranty was only for merchandise and, while the principal was responsible for the notes he signed for cash received, the guarantor was not responsible for anything other than merchandise (*210 Cal. App. 2d 372, 377-378)* . *Civ. Code § 2819* provides that a guarantor is released if the original obligation is altered. Additionally, a guarantor is not liable on any contract not within the terms of the guaranty. There was no alteration of the guaranty in this case, but merely an attempt by the creditor to charge the guarantor with items for which the guarantor was not liable under the guaranty. The guaranty covered any and all types of merchandise if they were received by the principal, but it did not include financing charges other than lawful interest (*210 Cal. App. 2d 372, 378)* .

[f] Alteration as Defense Must Be Pleaded at Trial

In ***Newhouse v. Getz*** *(1935) 8 Cal. App. 2d 113, 47 P.2d 306* , plaintiff sued to collect a deficiency on a note after the sale of property described in a deed of trust which was given as security for the note. Defendants were the corporation which executed the note and an individual defendant who endorsed the note. After the note had been executed and payments were in arrears, defendant corporation made an oral agreement whereby plaintiff was to receive an assignment of rents from the property in payment of the interest. The individual defendant claimed that this agreement released him from liability. The trial court judgment was for plaintiff. Defendant appealed.

The court of appeal affirmed. The court stated, among other points raised on appeal, that the discharge of a guarantor under *Civ. Code § 2819* was a special defense to the suit on the note. That defense must be pleaded and tried. As it was not raised at the trial level, it could not be raised on appeal. The evidence of alteration was in direct conflict, and the court had to assume that if there had been findings on that issue, they would have been adverse to defendant (*8 Cal. App. 2d 113, 114)* .

[4] Additional Authorities

[a] Alteration to Which Surety Gave Consent Does Not Exonerate

The court of appeal in *State Bd. of Equalization v. Carleton (1990) 223 Cal. App. 3d 1607, 273 Cal. Rptr. 436* , reversed the trial court's judgment for a guarantor of sales and use tax liability, holding that the guarantor had previously consented to alterations. The guarantor relied on Com. Code § 2819 and contended that the taxpayer's execution of waivers, which allowed the SBE to issue a deficiency determination beyond the statutory deadline, amounted to material alterations of the obligation and thus exonerated him (*223 Cal. App. 3d 1607, 1609)* . The court of appeal agreed that the waivers were material alterations of the original obligation and that they would have exonerated the guarantor if the guarantor had not consented to the waivers. The guarantee agreement said that the guarantor's liability is "coextensive with that of the taxpayer and no change in the law or extensions, waivers, or modifications of the liability negotiated between the taxpayer and the State Board of Equalization shall in any way relieve" guarantor of this obligation (*223 Cal. App. 3d 1607, 1610)* . This constituted an unconditional promise to pay the taxpayer's liability even if the principal obligation was materially altered without the knowledge or express consent of the surety (*223 Cal. App. 3d 1607, 1609-1610)* .

[b] Surety's Consent to Alteration May Be Given at Any Time

The facts and procedural background of *State Bd. of Equalization v. Carleton (1990) 223 Cal. App. 3d 1607, 273 Cal. Rptr. 436* , are discussed in *§ 222.243[4][a]*. In its analysis, the court of appeal stated that the surety's consent to changes in the contract between the principal and the debtor may be given in advance in the contract for performance of the suretyship obligation (*223 Cal. App. 3d 1607, 1610)* .

[c] No Alteration of Surety Obligation

In *FM Conner v. Conner (1999) 76 Cal. App. 4th 646, 90 Cal. Rptr. 2d 687* , two brothers had founded a business. One brother, the creditor, sold his stock for a promissory note executed by the business and personally guaranteed and secured by a deed of trust on real property by the second brother, the surety. The business later filed a Chapter 11 bankruptcy petition. The surety brought an action to declare the rights and liabilities of the parties. The promissory note was subject to an offset for a preference payment which the creditor was required to make to the bankruptcy trustee. The business filed a second reorganization plan which the creditor believed to be a fraud. The business offered to waive the preference claim if the creditor withdrew his claim on the note. The creditor, however, feared that withdrawal of the creditor's claim would exonerate the surety's personal guarantee. After approval of the bankruptcy plan, the creditor requested that the surety make him whole as required by the personal guarantee and filed a cross-complaint to enforce the guarantee. The trial court found that nothing the creditor did or failed to do in the bankruptcy proceeding rose to the level of prejudicing the surety or exonerating the surety on the guarantee, and it entered judgment for the creditor (*76 Cal. App. 4th 646, 648-649)* .

On appeal, the surety claimed that the creditor's rejection of the settlement offer "altered" his obligation as a surety. The court disagreed. His acceptance of the settlement offer would have extinguished the personal guarantee. By rejecting the offer, the creditor left the personal guarantee just as it was bargained for 10 years earlier. He was not required to waive his creditor's claim if it would jeopardize enforcement of the personal guarantee. The court of appeal therefore affirmed the judgment (*76 Cal. App. 4th 646, 650-652)* .

California Points & Authorities

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Volume 22 Chapters 220-229 SUBROGATION---to---TRESPASS
CHAPTER 222 SURETYSHIP
PART II. FORMS
E. Termination Of Surety's Liability
1. Exoneration Through Alteration

22-222 California Points & Authorities § 222.244

§ 222.244 Opposing Contention That Surety Has Been Exonerated--Accord Does Not Exonerate Surety for Lesser Sum Agreed On [Civ. Code §§ 2819, 2822(b)]

[1] FORM

[*The following should be included in a memorandum of points and authorities or a trial or appellate brief.*]

THE AGREEMENT BY _____ [*Name*], AS CREDITOR, WITH DEBTOR, TO ACCEPT A LESSER SUM THAN THE BALANCE OWING HAS NOT EXONERATED _____ [*Name*], AS SURETY, FOR THAT LESSER SUM.

Effect of Accord Between Creditor and Debtor. For purposes of *Sections 2819* and *2822 of the Civil Code*, an agreement by a creditor to accept from the principal debtor a sum less than the balance owed on the original obligation, without the prior consent of the surety and without any other change to the underlying agreement between the creditor and principal debtor, does not exonerate the surety for the lesser sum agreed on by the creditor and the principal debtor (*Civ. Code §§ 2819, 2822(b)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted after the creditor has agreed with the debtor to settle for a lesser sum than owed on the original obligation, to support the creditor's contention that the surety remains liable for that lesser sum [*Civ. Code §§ 2819, 2822(b)*].

The points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the surety is not exonerated for the amount agreed on.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law

stated. The agreement to accept a lesser sum should be quoted or referred to, followed by a statement that the there has been no other change in the underlying agreement between the creditor and the principal.

[3] Discussion of Authorities

[a] Effect of Creditor's Agreement to Accept Lesser Sum

Civ. Code § 2819 provides in part that nothing in that section shall be construed to supersede *Civ. Code § 2822(b)*.

These amendments to *Civ. Code §§ 2819* and *2822* were enacted as an urgency measure, effective July 19, 1993 [Stats. 1993, ch. 149, § 4], and did not constitute a change in law but were declaratory of existing law [Stats. 1993, ch. 149, § 3].

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CHAPTER 222 SURETYSHIP
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22-222 California Points & Authorities §§ 222.245-222.259

[Reserved]

§§ 222.245[Reserved]

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2. Exoneration Through Revocation

22-222 California Points & Authorities § 222.260

§ 222.260 Supporting Contention That Surety Has Been Exonerated--Surety Has Revoked Continuing Guaranty [Civ. Code § 2815]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Name*], THE SURETY, HAS BEEN EXONERATED FROM HIS/HER/ITS OBLIGATION AS SURETY BECAUSE HE/SHE/IT REVOKED HIS/HER/ITS CONTINUING GUARANTY IN RESPECT TO FUTURE TRANSACTIONS AND THE OBLIGATION FOR WHICH PERFORMANCE IS SOUGHT WAS INCURRED AFTER THAT REVOCATION.

A. Surety May Revoke Future Liability on Continuing Guaranty. A continuing guaranty may be revoked at any time by the surety, in respect to future transactions, unless there is a continuing consideration as to those transactions which is not renounced (*Civ. Code § 2815*; *White Sewing Machine Co. v. Courtney (1904) 141 Cal. 674, 676-677, 75 P. 296* ; *Southern Cal. First Nat. Bank v. Olsen (1974) 41 Cal. App. 3d 234, 240, 116 Cal. Rptr. 4*).

[*Optional*] **B. Third-Party Pledge as Continuing Guaranty Under *Civil Code Section 2815*.** A pledge agreement under which a party hypothecates property as security for the debts of another is a guaranty for purposes of the suretyship provisions of the Civil Code, including the revocation provisions of *Civil Code Section 2815* (*Pearl v. General Motors Acceptance Corp. (1993) 13 Cal. App. 4th 1023, 1028, 16 Cal. Rptr. 2d 805*).

[*Optional*] **C. No Waiver of Continuing Guaranty Absent Explicit Waiver Language.** Waiver of the right to revoke a continuing guaranty pursuant to *Civil Code Section 2815* will not be found absent a clear and explicit waiver by the guarantor (*Pearl v. General Motors Acceptance Corp. (1993) 13 Cal. App. 4th 1023, 1032, 16 Cal. Rptr. 2d 805*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that the surety for a continuing guaranty has been exonerated due to an effective revocation of the surety's liability [*see Civ. Code § 2815*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of exoneration due to revocation. For example, this argument may arise in opposing an appeal premised on the argument that the surety is liable for the obligation of the principal obligation [*see, e.g., White Sewing Machine Co. v. Courtney (1904) 141 Cal. 674, 676, 75 P. 296* (appeal)]. These points and authorities may also be adapted for use in a trial brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel might include facts illustrating the surety's written revocation of the suretyship agreement and describing the obligation that was incurred on a date subsequent to that revocation, as well as showing there was no continuing consideration that was not renounced [*see Civ. Code § 2815*].

[b] Related Pleading and Practice Forms

For forms relating to suretyship, see California Forms of Pleading and Practice, Ch. 538, *Suretyship, Bonds, and Undertakings* (Matthew Bender).

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 222.261* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Surety May Revoke Future Liability on Continuing Guaranty

In ***White Sewing Machine Co. v. Courtney*** *(1904) 141 Cal. 674, 75 P. 296* , defendant principal debtor became a sales agent for plaintiff. Defendant surety executed a bond which provided that if the principal debtor paid to plaintiff all indebtedness then existing or thereafter incurred, the bond would be void. Plaintiff's sewing machines were sold to the principal on consignment. When the principal became insolvent, defendant surety demanded of plaintiff to be released from the bond, and thereafter, with plaintiff's and the principal's consent, a release was executed and ratified by plaintiff. Sometime later plaintiff and the principal executed a second agreement, not involving defendant surety, for machines sold. Plaintiff brought suit for the amount owing on the second agreement against both defendant principal debtor and defendant surety. The trial court judgment was against defendant principal, and in favor of defendant surety. Plaintiff appealed the judgment.

The Supreme Court affirmed. Plaintiff contended that defendant surety had no right to revoke the contract of suretyship, nor to demand and receive a release as surety as to future transactions between the principal and plaintiff, and that defendant surety was bound to continue to be responsible under the bond for all time, and for all future transactions, so long as plaintiff chose to continue business with the principal. The Court disagreed, saying that was not the effect of the transaction. If the bond had recited that the principal was appointed agent of plaintiff for a definite time, and the obligation of defendant was to stand as his surety during that time, defendant surety could neither revoke the contract nor would he be entitled to a release without plaintiff's consent. And the same would be true with respect to a contract to become surety for the performance of any definite contract, such as the erection of a building or the administration of an estate. But the contract was one to become surety for any liability which might thereafter exist or be incurred by the principal to plaintiff. *Civ. Code § 2815* governed. It provides that a continuing guaranty may be revoked at any time by the guarantor, in respect to future transactions, unless there is a continuing consideration as to those transactions which is not renounced. Defendant surety's bond was a continuing guaranty. As a surety on a contract contemplating a future

liability of the principal under successive transactions, defendant had a right at any time to revoke the contract with respect to liability on any transaction which was not at that time begun. The demand for a release and the consent by plaintiff, followed by the execution of the release, constituted a revocation of the contract by the surety. The second sale was a future transaction with relation to which the contract of suretyship was revoked, and for which defendant could not be held responsible (*141 Cal. 674, 676-678)* .

The facts and procedural background of ***Southern Cal. First Nat. Bank v. Olsen*** *(1974) 41 Cal. App. 3d 234, 116 Cal. Rptr. 4* , are discussed in *§ 222.243[4][a]*. In *Southern Cal.,* the court of appeal upheld a finding that defendant surety was not liable for liability incurred after its revocation of the suretyship agreement. After defendants revoked their guaranty, the creation of a new note at a new interest rate was a future transaction. A continuing guaranty does not cover renewals, after revocation, of obligations which were covered by the guaranty at the time of revocation (*41 Cal. App. 3d 234, 240)* .

[b] Third-Party Pledge as Continuing Guaranty Under Civil Code Section 2815

In ***Pearl v. General Motors Acceptance Corp.*** *(1993) 13 Cal. App. 4th 1023, 16 Cal. Rptr. 2d 805* , plaintiff executed a guaranty and separate pledge agreement on behalf of a car dealer. The guaranty, drafted by defendant creditor, stated that it was a continuing guaranty that would remain in full force and effect until defendant received a notice of termination from plaintiff. The pledge agreement, also drafted by defendant creditor, pledged 20,000 shares of stock to secure a revolving line of credit for the dealer that would involve repayments and future extensions of credit. With respect to revocation, the agreement stated, in pertinent part "[t]his Agreement ... shall remain in full force and effect until all obligations owing to Pledgee by Borrowers have been satisfied ... Upon satisfaction of all such obligations, this agreement shall terminate ..." Several weeks after executing the guaranty and pledge agreement, plaintiff delivered to defendant a letter revoking and terminating the continuing guaranty and pledge agreement. Defendant acknowledged plaintiff's termination of the guaranty as to future advances, but it advised plaintiff that the pledge agreement continued in effect. Plaintiff then sought declaratory relief regarding the pledge agreement, asking the court to confirm that his purported termination of the agreement was effective to preclude his responsibility for future loans made by defendant to the dealer. The trial court entered summary judgment for defendant.

The court of appeal reversed the judgment. With respect to the pledge agreement, the trial court first addressed plaintiff's assertion that *Civ. Code § 2815* applies to pledge agreements executed by nondebtors. Under *Civ. Code § 2787*, the term "guarantor" includes one who promises to answer for a debt of another, or hypothecates property as security therefor. The statute further provides that guaranties of collection and continuing guaranties are forms of suretyship obligations, and except in so far as necessary in order to give effect to provisions specifically relating thereto, guaranties are subject to all provisions of law relating to suretyships in general. The court stated that because under the pledge agreement, plaintiff hypothecated or pledged his stock as security for the debts of the dealer, pursuant to the express terms of *Civ. Code § 2787*, plaintiff was a "guarantor" and the pledge agreement was implicitly a "guaranty" for purposes of the suretyship provisions of the Civil Code, including *Civ. Code § 2815*. Under *Civ. Code § 2814*, a "continuing guaranty" is a guaranty relating to a future liability of the principal, under successive transactions, which either continue his liability or from time to time renew it after it has been satisfied. Thus, since the pledge agreement secured a revolving line of credit for the dealer, the pledge agreement must be considered a "continuing guaranty" for purposes of *Civ. Code §§ 2814* and *2815*. The court concluded that absent a possible waiver or other considerations, *Civ. Code § 2815* would allow plaintiff to revoke the pledge agreement at any time as to future extensions of credit (*13 Cal. App. 4th 1023, 1028)* .

[c] No Waiver of Continuing Guaranty Absent Explicit Waiver Language

The facts and procedural background of ***Pearl v. General Motors Acceptance Corp.*** *(1993) 13 Cal. App. 4th 1023, 16 Cal. Rptr. 2d 805* , are discussed in *§ 222.260[3][b]*. In *Pearl,* the defendant creditor claimed that plaintiff effected a waiver of his right to revoke the pledge agreement. The court of appeal held that the right to revoke indeed was

waivable (*13 Cal. App. 4th 1023, 1030)* . The court determined, however, that the terms of the pledge agreement did not effect the waiver of plaintiff's revocation rights. The pledge agreement was ambiguous with respect to waiver. It did not mention *Civ. Code § 2815* by name. Furthermore, it did not specifically state that plaintiff may not revoke the continuing security interest at any time as to future advances made by defendant to the dealer. The court stated that in light of the important rights granted guarantors by *Civ. Code § 2815*, any waiver language must be clear, so that a guarantor knows on execution of the document that he or she will not have any right to revoke the guaranty as to any future advances and, thus, that the guarantor may essentially have no control over his or her ultimate responsibility for the debtor's borrowings. The provisions of the pledge agreement did not affirmatively establish an intent to waive the benefits of *Civ. Code § 2815*, according to the court. To the extent that the agreement contained ambiguity, the court was required to interpret the agreement most strongly against defendant, the drafting party. The court concluded that plaintiff's revocation rights were not waived by the language contained in the pledge agreement, and that plaintiff's termination letter effectively revoked his responsibility under the agreement for advances made to the dealer after defendant received it (*13 Cal. App. 4th 1023, 1031-1033)* .

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22-222 California Points & Authorities § 222.261

§ 222.261 Opposing Contention That Surety Has Been Exonerated--Retroactive Revocation Ineffective or Continuing Consideration Not Renounced [Civ. Code § 2815]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Name*], THE SURETY, HAS NOT BEEN EXONERATED FROM HIS/HER/ITS OBLIGATION AS SURETY BECAUSE HIS/HER/ITS REVOCATION _____ [DOES NOT APPLY TO OBLIGATIONS INCURRED PRIOR TO THE REVOCATION *and/or* DID NOT RENOUNCE A CONTINUING CONSIDERATION THAT EXISTS FOR FUTURE TRANSACTIONS].

[*EITHER*]

A. Surety May Not Revoke Its Liability Retroactively. A surety may not revoke its liability retroactively; a surety remains liable if the purpose for which the suretyship was required has been obtained (*American City Bank v. Tourtelot (1978) 86 Cal. App. 3d 585, 591-592, 150 Cal. Rptr. 361* ; *Nielsen v. Davidson (1924) 66 Cal. App 442, 444, 226 P 835*).

[*AND/OR*]

B. Continuing Consideration for Future Transactions Not Renounced by Surety. A continuing guaranty is not revoked by the surety if there is a continuing consideration for future transactions that was not renounced by the surety (*see Civ. Code § 2815*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a surety's contention that he or she has been exonerated due to revocation. The ground of opposition is that there was no exoneration because the revocation attempted to revoke the surety's liability retroactively (Paragraph A) or because a continuing consideration for future transactions was renounced by the surety (Paragraph B) [*see Civ. Code § 2815*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of exoneration. For example, this argument may arise in opposing a summary judgment premised on the argument that the surety was not liable for the principal's obligation [*see, e.g., American City Bank v. Tourtelot (1978) 86 Cal. App. 3d 585, 586, 150 Cal. Rptr. 361]* . These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should present facts showing that the surety attempted to revoke its liability retroactively, or that a continuing consideration exists that was not renounced by the surety [*see Civ. Code § 2815*].

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 222.260*.

[b] Related Pleading and Practice Forms

For forms relating to suretyship, see California Forms of Pleading and Practice, Ch. 538, *Suretyship, Bonds, and Undertakings* (Matthew Bender).

[3] Discussion of Authorities

[a] Surety May Not Revoke Its Liability Retroactively

In ***American City Bank v. Tourtelot*** *(1978) 86 Cal. App. 3d 585, 150 Cal. Rptr. 361* , defendant, a director of a trust company, executed a continuing guaranty for money owed by the trust company to plaintiff. The guaranty, in addition to those made by other directors, was executed when the trust company executed two promissory notes to plaintiff. Within the guaranty there were provisions allowing plaintiff to alter, compromise, or change the time or manner for payment, change the interest rate, release or add guarantors, and accept or release security without notice to defendant. It was a continuing guaranty and would remain effective until revoked in writing. The guaranty bound the guarantor's heirs, executor, and assigns. The trust company defaulted and eventually plaintiff offered it a repayment program calling for monthly installment payments, and notified all the guarantors of the program. The notice was sent to defendant even though plaintiff knew of his death. When the installments were not paid, plaintiff requested payment of the guarantors. Plaintiff brought an action to enforce the guaranty when decedent defendant's executrix refused to pay. The executrix asserted that the indebtedness had been renewed and extended after defendant's death, of which plaintiff had knowledge. A summary judgment for plaintiff was granted. The executrix of defendant's estate appealed.

The court of appeal affirmed. The court did not accept plaintiff's premise that the guaranty provision binding the makers's heirs, executor, and assigns was intended to prevent notice of the maker's death from acting as a revocation of the guaranty. A creditor's knowledge of a guarantor's death will result in the revocation of a continuing guaranty with respect to future advances. Had the parties wished to change this rule, they could have done so by more explicit language. The language of the guaranty merely established that the guarantor's estate would remain responsible after the guarantor's death for any liability incurred by him under the guaranty during his lifetime (*86 Cal. App. 3d 585, 590)* . Decedent's executrix argued that the repayment program resulted in the creation of a subsequent indebtedness for which decedent's estate was not responsible because his guaranty had been revoked. The court distinguished *Southern Cal.*

First Nat. Bank v. Olsen (1974) 41 Cal. App. 3d 234, 116 Cal. Rptr. 4 (discussed in *§ 222.243[3][a]*), and found that the executrix's reliance on it was misplaced. So far as the rights of a guarantor are concerned, there is no essential difference between an extension of the time of payment of the old note and a renewal. All of the indebtedness incurred for which plaintiff sought to hold decedent's estate liable was advanced to the trust company prior to the time that decedent's guaranty was revoked by notice of his death. Plaintiff's decision to extend or renew the obligations following that revocation did not, pursuant to the terms of the guaranty, create a subsequent indebtedness for which decedent's estate is not responsible (*86 Cal. App. 3d 585, 591-592)* .

In ***Nielsen v. Davidson*** *(1924) 66 Cal. App 442, 226 P 835* , plaintiff agreed to sell his dairy to two purchasers who asked plaintiff to accept two promissory notes to cover one-half the purchase price. Plaintiff agreed, provided the arrangement was acceptable to the bank handling the transaction. Defendant told the bank that he was a silent partner in the dairy and would guarantee the notes, and sent a letter to that effect. After the sale was completed and the purchasers took possession, defendant attempted to revoke his guaranty. The notes had been made payable to the bank, which assigned the notes to plaintiff, when defendant attempted to revoke. Plaintiff brought an action to recover the amount on the notes. The trial court judgment was for plaintiff. Defendant appealed.

The court of appeal affirmed. Defendant argued that the guaranty was revoked. Defendant attempted to revoke the guaranty long after it had been acted on and the purpose for which it had been executed obtained by his associates. As soon as the sale was consummated the guaranty became irrevocable so far as plaintiff was concerned (*66 Cal. App 442, 444)* .

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[Reserved]

§§ 222.262[Reserved]

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22-222 California Points & Authorities § 222.280

§ 222.280 Supporting Contention That Surety Is Not Liable--Surety Entitled to Use Principal's Defenses to Avoid Liability [Civ. Code § 2810]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Name*], THE SURETY, IS NOT LIABLE FOR HIS/HER/ITS OBLIGATION AS SURETY BECAUSE THERE IS NO LIABILITY ON THE PART OF _____ [*name*], THE PRINCIPAL.

[*EITHER*]

A. Surety May Invoke Principal's Defenses Existing at Execution of Underlying Contract. The surety is not liable if for any reason other than the mere personal disability of the principal there is no liability on the part of the principal at the time of the execution of the contract. If the underlying contract is unenforceable, the defenses available to the principal, such as illegality and usury, are also available to the surety (*Civ. Code § 2810*; *Lewis & Queen v. N.M. Ball Sons (1957) 48 Cal. 2d 141, 154-155, 308 P.2d 713* ; *Rochester Capital Leasing Corp. v. K & L Litho Corp. (1970) 13 Cal. App. 3d 697, 705, 91 Cal. Rptr. 827*).

[*AND/OR*]

B. Surety May Invoke Principal's Defenses That Terminate Principal's Liability on Underlying Contract After Execution. The surety is not liable if for any reason other than the mere personal disability of the principal the liability of the principal ceases. The available defenses include things which exonerate once the liability has been incurred, such as performance, since the surety is in no worse position than the principal would be if sued separately (*Civ. Code § 2810*; *Post Bros. Constr. Co. v. Yoder (1977) 20 Cal. 3d 1, 8, 141 Cal. Rptr. 28, 569 P.2d 133* ; *Flickinger v.*

Swedlow Engineering Co. (1955) 45 Cal. 2d 388, 394, 289 P.2d 214).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that the surety has been released from liability because the principal, other than from a mere personal disability, was not liable at the time the underlying contract was executed (Paragraph A) or because the principal, other than from a mere personal disability, ceased to be liable (Paragraph B) [*see* Civ. Code § 2010].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the surety's lack of liability. For example, this argument may arise in opposing a motion for summary judgment or an appeal premised on the argument that the surety was liable for the principal's obligation [*see, e.g., Lewis & Queen v. N.M. Ball Sons (1957) 48 Cal. 2d 141, 145, 308 P.2d 713]* . These points and authorities may also be adapted for use in a trial brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel might include facts demonstrating that the original obligation between the creditor and principal was unenforceable because it was usurious [*see, e.g., Rochester Capital Leasing Corp. v. K & L Litho Corp. (1970) 13 Cal. App. 3d 697, 91 Cal. Rptr. 827]* .

[b] Related Pleading and Practice Forms

For forms relating to suretyship, see California Forms of Pleading and Practice, Ch. 538, *Suretyship, Bonds, and Undertakings* (Matthew Bender).

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 222.282* or *§ 222.303* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Surety May Invoke Principal's Defenses Existing at Execution of Underlying Contract

In ***Lewis & Queen v. N.M. Ball Sons*** *(1957) 48 Cal. 2d 141, 308 P.2d 713* , after defendant contractor was awarded contracts for the construction of a parkway, it contracted with plaintiff for services and equipment. Defendant surety executed the required labor and material bonds. Plaintiff brought an action against both defendants for damages for breach of the equipment rental contracts. Defendant contractor cross complained, alleging breach of contract and seeking recovery of overpayments. The trial court judgment was for defendants on the complaint and for plaintiff on the cross complaint. Plaintiff appealed.

The Supreme Court affirmed. The Court ruled that plaintiff's behavior in acting as a contractor without the license required of it barred plaintiff from maintaining any action for compensation. Plaintiff contended that even if it could not recover on the contracts from defendant contractor, the defense of a lack of a license was not available to defendant surety. The Court disagreed, saying that no action was allowed. Moreover, even in the absence of the statute requiring a license to maintain an action, the defense of illegality was available to the surety if it was available to the principal. The obligation of the surety on defendant's bonds was not to pay for labor merely by virtue of the fact that it had been expended; it was an obligation to pay only if plaintiff established, without reference to the bond, a legal and valid claim for compensation (*48 Cal. 2d 141, 154-155)* .

In ***Rochester Capital Leasing Corp. v. K & L Litho Corp.*** *(1970) 13 Cal. App. 3d 697, 91 Cal. Rptr. 827* , defendants were organizers of a printing company. As a method of financing, defendants and plaintiff agreed that defendants would convey title to the printing equipment to plaintiff and plaintiff would lease the same equipment to defendants. Under the lease-back arrangement, defendants retained the use of the equipment and received from plaintiff a large sum of money. Defendants as individuals with their wives were to execute guaranties. Later the equipment was assigned to another person by defendants, with plaintiff's permission. The successor lessee was in arrears for some time and an involuntary bankruptcy petition was filed against it. Plaintiff sold the equipment and brought an action for breach of contract. The trial court found that the agreements made in the form of lease-backs were not lease-backs, but transactions representing loans of money made by plaintiff to defendants at usurious rates of interest and that the security for the loans was the equipment which defendants conveyed to plaintiffs. The trial court judgment was for defendants. Plaintiff appealed.

The court of appeal affirmed. In addition to a discussion of the law applicable to the agreements, the court considered the argument raised by defendants as guarantors. Plaintiff contended that the guaranties provided independent grounds for recovery. Defendant guarantors contended that the guaranties they severally executed were made for a lease-back agreement, which due to technical flaws enforced by plaintiff were never executed. Plaintiff contended that two new and separate lease-back agreements were executed as substitutes. Defendant guarantors did not sign the new guaranties. The court said that it did not need to decide if it was the intention of the parties that the new guaranties be applied to the two new lease-back agreements. As the agreements were held to be usurious, the principal obligation which plaintiff contended was guaranteed was usurious. Citing *Civ. Code § 2810*, the court said that under the circumstances at hand, any guaranties, even if extant, were unenforceable (*13 Cal. App. 3d 697, 705)* .

[b] Surety May Invoke Principal's Defenses That Terminate Principal's Liability on Underlying Contract After Execution

In ***Post Bros. Constr. Co. v. Yoder*** *(1977) 20 Cal. 3d 1, 141 Cal. Rptr. 28, 569 P.2d 133* , defendant was the owner of a tract of land for which its subsidiary served as general contractor. The subsidiary subcontracted with defendant subcontractor for grading work on the tract. The subcontractor rented the necessary equipment from plaintiff, with whom it had done business in the past. Prior to commencement of the work, defendant owner as principal and its surety executed a labor and material bond, providing that if the principal, contractor, or subcontractor failed to pay for materials or labor, the surety would pay the amount due. Defendant subsidiary issued checks totalling the amount due under the contract, jointly naming the subcontractor, other materialmen, and plaintiff as payees. They were endorsed by each named payee, including plaintiff, then deposited in the subcontractor's bank account. Pursuant to their usual business arrangement, plaintiff credited the checks received from the subcontractor to the earliest unpaid invoices, but there remained money owing. Plaintiff brought an action against the subcontractor for the amount due, and after recovering a default judgment against the insolvent subcontractor, brought action against defendant surety. The trial court judgment was for defendant. Plaintiff appealed.

The Supreme Court affirmed. The Court first addressed the method of payment before addressing the suretyship rules. The Court noted that the use of joint checks is well established by custom and practice in the construction industry and is deemed payment to those named. Because the joint check is deemed payment to the materialman, the paid materialman may not recover on the owner's or contractor's surety bond. The application of the governing statutes dictates this result. Under *Civ. Code § 2810*, the surety is entitled to the principal's defenses other than personal defenses unless the surety assumed liability with knowledge of the defense; under *Civ. Code § 2839*, performance exonerates the surety. To hold otherwise would mean that the principal would be the one ultimately liable, and required to pay twice because a surety is entitled to reimbursement from its principal by the provisions of *Civ. Code § 2847*. To so hold would preclude effective use of joint checks in all cases when there is a surety bond, defeating the simple, speedy, and fair method of payment open to the owner and contractor who wish to pay fully once and only once for labor and material in a manner offering protection to the materialman. Plaintiff argued that the bond provided for payment when subcontractors fail to pay for material, and reasoned that even if it had been deemed paid by the owner and contractor, it

has not been paid by the subcontractor and may proceed on the bond. However, plaintiff was deemed paid under the joint check rule as among itself, the owner, and the principal on the bond, and the surety was entitled to the principal's defenses (*20 Cal. 3d 1, 8)* .

In ***Flickinger v. Swedlow Engineering Co.*** *(1955) 45 Cal. 2d 388, 289 P.2d 214* , plaintiff, a licensed contractor, contracted with defendant general contractor to perform a portion of defendant's contract for the construction of a highway. Defendant surety issued a performance bond for defendant contractor. Thereafter plaintiff assigned the contract to a partnership comprised of himself and another licensed contractor, although the partnership itself was not licensed. The partnership performed the work, but a controversy arose between the parties after completion. Defendant general contractor sued plaintiffs for damages for breach of contract. Plaintiff partnership counterclaimed for monies owed it. The trial court judgment allowed neither party recovery. Later plaintiff brought an action against defendants, principal and surety, seeking payment alleged to be due under the bonds. The trial court judgment was for plaintiff. Defendants' motion for a new trial was denied. Defendants appealed.

The Supreme Court reversed. The Court decided the case on application of former Code Civ. Proc. § 439 (superseded by *Code Civ. Proc. §§ 426.10* and *426.30-426.60*), which stated the law as to when counterclaims arising out of the same transaction need to be brought. The Court examined the law pertaining to cross complaints and the law's abhorrence of multiplicity of actions. While plaintiff had the option to file a cross complaint on the bond, and thereby bring in the surety as a party in the prior action, he was clearly compelled to assert by way of counterclaim, in the prior action, any right which he had against defendant principal under the contract. Plaintiff was barred from relitigating his alleged rights under the contract as the basis for an action against defendant as the principal on the bond. And as that defense to the action was available to defendant as principal, it was likewise available to defendant surety as the surety on the bond. Sureties on a bond have a legal right to avail themselves of all defenses that would be allowed the principal and are generally in no worse position than the surety would be if sued separately (*45 Cal. 2d 388, 394)* .

[4] Additional Authorities

[a] Surety May Invoke Principal's Defenses Existing at Execution of Underlying Contract

In *Wells v. Comstock (1956) 46 Cal. 2d 528, 297 P.2d 961* , plaintiffs, officers in a corporation, agreed to sell to defendant, general manager of that corporation, shares of corporate stock. Defendant guaranteed defendant buyer's performance. Plaintiffs brought an action for breach of contract. Defendants' main contention was that the contract was unenforceable because the shares were illegally issued. The trial court found that plaintiffs had caused the shares to be issued in violation of its corporate permit, that defendant buyer participated in the issuance of the stock with knowledge of the violation, and that defendant buyer was estopped from asserting illegality. The trial court judgment was for plaintiff against both defendants. The Supreme Court reversed. The Court discussed both contract law and the Corporate Securities Act, finding that estoppel did not apply and that the contract was unenforceable. With regard to defendant guarantor, the Court cited *Civ. Code § 2810* and said that since the principal obligation of the contract was unenforceable because of illegality, the guaranty was also unenforceable (*46 Cal. 2d 528, 533)* .

The court of appeal in *WRI Opportunity Loans II, LLC v. Cooper (2007) 154 Cal. App. 4th 525, 65 Cal. Rptr. 3d 205* , resolving an issue not previously addressed by California appellate courts, held that insofar as a guaranteed debt for interest is unenforceable on the ground of usury, the guarantor's contract cannot be construed or enforced so as to waive the guarantor's right to raise that defense, since a promise to pay usurious interest is illegal and therefore cannot be enforced on any theory (*154 Cal. App. 4th 525, 542-544)* .

The court of appeal in *Kalfountzos v. Hartford Fire Ins. (1995) 37 Cal. App. 4th 1655, 44 Cal. Rptr. 2d 714* , affirmed a judgment for cross-defendant surety in a cross-action by a subcontractor. The court held that the fact that the contractor's corporate status had been suspended, causing it to default in the subcontractor's action against it, did not preclude the surety from raising the contractor's defenses and setoffs (*37 Cal. App. 4th 1655, 1659)* . Because those

defenses and setoffs were valid, the surety was not liable to the subcontractor (*37 Cal. App. 4th 1655, 1661)* .

The court of appeal in *Bennett v. Leatherby (1992) 3 Cal. App. 4th 449, 4 Cal. Rptr. 2d 340* , affirmed a judgment for guarantors of a lease and sublease, holding that under *Civ. Code § 2819*, plaintiff/lessor's settlement and general release of partners of the sublessee for sums owed for breach of the sublease exonerated guarantors of the lease and sublease because the lessor/creditor, and thus the guarantors, would no longer have any rights against the sublessee (*3 Cal. App. 4th 449, 452-453)* [*see also Civ. Code §§ 2819, 2822(b)* (discussed in *§ 222.244*)].

The court of appeal in *Schmitt v. Insurance Co. of North America (1991) 230 Cal. App. 3d 245, 281 Cal. Rptr. 261* , reversed a judgment against defendant surety, the issuer of a statutory motor vehicle dealer's bond. Plaintiff bought and paid for a used vehicle but never obtained possession or title to it due to the fraudulent acts of third persons who were not parties to the action. The dealer was in violation of certain Vehicle Code provisions in failing to report the transfer. Plaintiff considered defendant, rather than the dealer, to be primarily liable. After obtaining a default judgment against the dealer, plaintiff released the dealer in return for the dealer's assignment of its claim against defendant surety. The court of appeal relied on *Civ. Code §§ 2810* and *2819* (*set forth in § 222.240*) in holding that as of the date of the assignment and release, any obligation the dealer had to plaintiff pertaining to the original transaction was extinguished and, thus, no further liability on the surety bond ran from defendant to plaintiff (*230 Cal. App. 3d 245, 259)* .

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22-222 California Points & Authorities § 222.281

§ 222.281 Supporting Contention That Surety Is Not Liable--Nonjudicial Foreclosure Impairs Surety's Remedies Against Principal and Estops Creditor From Proceeding Against Surety (the "Gradsky Defense") [Civ. Code §§ 2810, 2819; Code Civ. Proc. § 580d]

[1] FORM

[*The following should be included in a memorandum of points and authorities or a trial or appellate brief.*]

_____ [*Name*], THE SURETY IS NOT LIABLE FOR HIS/HER/ITS OBLIGATION BECAUSE THE NONJUDICIAL FORECLOSURE OF THE REAL PROPERTY COLLATERAL PRECLUDES ENTRY OF A PERSONAL JUDGMENT AGAINST _____ [*name*], THE PRINCIPAL DEBTOR, AND THUS DESTROYS SURETY'S REMEDIES AGAINST PRINCIPAL.

A. Nonjudicial Foreclosure Terminates Surety's Liability. The creditor cannot recover the unpaid balance of an obligation from the surety following the creditor's nonjudicial sale of any real property that was security for the obligation (*Union Bank v. Gradsky (1968) 265 Cal. App. 2d 40, 41, 71 Cal. Rptr. 64* ; *see Civ. Code §§ 2810, 2819*).

[*Optional*] **B. Attempted Waiver of "Gradsky Defense" Not Sufficiently Explicit.** An agreement waiving the "Gradsky defense" must inform the surety that the surety waives all rights and defenses arising out of an election of remedies by the creditor, even though that election of remedies, such as nonjudicial foreclosure with respect to security for a guaranteed obligation, has destroyed the surety's rights of subrogation and reimbursement against the principal by operation of *Code Civ. Proc. § 580d* or otherwise (*Civ. Code § 2856(d)*; *see Cathay Bank v. Lee (1993) 14 Cal. App. 4th 1533, 1539, 18 Cal. Rptr. 2d 420* ; *Union Bank v. Gradsky (1968) 265 Cal. App. 2d 40, 48, 71 Cal. Rptr. 64* ; *see also Civ. Code §§ 2810, 2819*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the surety has been released from liability because the creditor foreclosed nonjudicially on real property that secured the primary obligation [*Civ. Code § 2856*; *see Civ. Code §§ 2810, 2819*; *Code Civ. Proc. § 580d*]. A contractual provision that expresses an intent to waive any or all suretyship rights and defenses will be effective to waive these rights and defenses without regard to the inclusion of any particular language or phrases in the contract to waive any rights and defenses or any references to statutory provisions or judicial decisions [*Civ. Code § 2856(b)*], and whether or not it would be an effective waiver of all rights and defenses that the guarantor or other surety may have in respect of his or her obligations as a surety by reason of the creditor's election of remedies [*Civ. Code § 2856(d)*]. Optional Paragraph B contains the statutory language set forth in *Civ. Code § 2856(d)* and may be used to establish that the suretyship agreement is not explicit enough to constitute waiver by the surety of this defense. *Civ. Code § 2856(b)-(d)*, however, does not apply to a guaranty or other type of suretyship obligation made in respect of a loan secured by a deed of trust or mortgage on a dwelling for not more than four families when the dwelling is occupied, entirely or in part, by the borrower and that loan was in fact used to pay all or part of the purchase price of that dwelling [*Civ. Code § 2856(e)*].

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the surety is released from liability. Counsel should add argument linking the points in this form with the facts of his or her case. The agreement should be quoted or referred to.

[b] Related Points and Authorities

The points and authorities in this form may be opposed by those in § 222.283, which required less explicit waiver language.

Counsel may also wish to incorporate points and authorities from Ch. 230, *Trust Deeds and Real Property Mortgages*, that address deficiency judgment prohibitions.

[3] Discussion of Authorities

[a] Nonjudicial Foreclosure Terminates Surety's Liability

In ***Union Bank v. Gradsky*** *(1968) 265 Cal. App. 2d 40, 71 Cal. Rptr. 64* , defendant Bess Gradsky borrowed $112,500 from plaintiff and executed a note payable to plaintiff Bank, secured by a first deed of trust and a construction loan disbursement agreement. Guarantor, defendant Max Gradsky, although having the same surname as maker, Defendant Bess Gradsky, was not related. Their sole relationship was that of owner (Bess) of the property on which surety, as general contractor (Max), had been engaged to construct a building. The due date of the note was extended twice after completion of the building. Both times, guarantor's specific consent to the extension was obtained. Bank foreclosed at the trustee's sale at which Bank bid $112,500, the fair market value of the property. After paying costs of sale and delinquent taxes, the proceeds were less than the remaining principal and interest owing on the note by $11,566. When Bank sued guarantor to recover the $11,566, Guarantor demurred. The trial court dismissed the action on the ground that *Code Civ. Proc. § 580d* shields a guarantor from a deficiency judgment remaining after a nonjudicial foreclosure sale. Bank appealed, but the court of appeal affirmed.

At the time the Bank foreclosed, the court of appeal reasoned, it has three options: (1) to proceed against Bess and Max together in a judicial foreclosure action; (2) to proceed against Max on the guaranty for the full amount of the obligation, without proceeding against Bess or the security; or (3) to realize on the security by way of a nonjudicial sale (*265 Cal. App. 2d 40, 43)* .

If Bank proceeded by judicial foreclosure action, it could have obtained a deficiency judgment against Bess in the judicial foreclosure proceeding. Had the Bank chosen the second course, and proceeded against Max alone, on the guaranty, neither *Code Civ. Proc. § 726* (the "one-action" rule) (*265 Cal. App. 2d 40, 43-44 n.3*), nor *Code. Civ. Proc.*

§ 580d would have applied. *Code. Civ. Proc. § 580d* would not have applied, because an action on a guaranty is neither an action "on a note" nor one "to recover a deficiency." Despite the fact that Max could not have used *Code. Civ. Proc. § 580d* defensively had he been sued on the guaranty before the Bank resorted to the security, *Code. Civ. Proc. § 580d* would have had a critical affect on the rights of the parties, because it would have limited Max' rights against Bess (*265 Cal. App. 2d 40, 43)* . If Max paid the debt to Bank before Bank resorted to the security, Max would have acquired all Bank's rights against Bess by way of subrogation [*see Civ. Code §§ 2848, 2849*]. Max would have obtained by subrogation the right to pursue recovery from Bess by either judicial or nonjudicial sale of the security. If he proceeded by judicial sale, he could have obtained a deficiency judgment against Bess. However, Max could stand no better against Bess than Bank did with respect to the rights he acquired by subrogation (*265 Cal. App. 2d 40, 45)* .

By exercising the third option, nonjudicial foreclosure of the security, *Code. Civ. Proc. § 580d* prevents either the Bank or the guarantor from thereafter recovering any deficiency judgment against Bess. When the creditor makes the election between possible remedies, it alone has the option of preserving its own and the surety's rights by way of subrogation to realize a personal judgment against the principal. The creditor has the duty not to impair the surety's remedies [*see Civ. Code §§ 2810, 2819*] (*265 Cal. App. 2d 40, 46)* . By electing a remedy that destroys both the security and the possibility of the surety's reimbursement from the principal debtor, the creditor is thereafter estopped from pursuing the guarantor for a deficiency judgment following a nonjudicial sale of the security (*265 Cal. App. 2d 40, 46-47)* .

The court of appeal noted that there are cases holding that the antideficiency statutes do not protect guarantors or endorsers; however, those cases are factually distinguishable. The result in this situation is not solely based on the antideficiency statutes but on the application of suretyship statutes, namely *Civ. Code §§ 2810, 2819, 2848-2849,* to the rights of the parties after judicial foreclosure sale (*265 Cal. App. 2d 40, 47-48)* .

A guarantor may waive any defense he or she may have based on the creditor's election to proceed by nonjudicial foreclosure. The waiver can be by express contract or by subsequent actions. The language in this agreement stated that the guarantor waived "any right to require the holder of this within instrument to proceed against maker or against any other person or to apply any security it may hold or to pursue any other remedy." The court of appeal found that language insufficiently explicit to waive the guarantor's defense. The court said that whatever language was used, it should specifically waive the guarantor's defense based on the creditor's election of a remedy that destroyed both the guarantor's (1) subrogation rights and (2) right to proceed against the principal for reimbursement (*265 Cal. App. 2d 40, 48)* . The court was unwilling to strain to imply a waiver where none was explicit (*265 Cal. App. 2d 40, 48)* .

[b] Attempted Waiver of "Gradsky Defense" Not Sufficiently Explicit

Defendant in ***Cathay Bank v. Lee*** *(1993) 14 Cal. App. 4th 1533, 18 Cal. Rptr. 2d 420* , guaranteed a $5.2 million loan made by plaintiff Bank. The loan was secured by a hotel owned by a firm of which defendant was the corporate secretary and a director. The firm defaulted. The Bank foreclosed in a private sale. There was a deficiency between the amount realized at the sale and the amount owing on the loan. The Bank sued defendant to recover the deficiency, and obtained a judgment in its favor. Defendant appealed.

The court of appeal reversed. The only issue on appeal was whether defendant had waived the "Gradsky defense" [*see Union Bank v. Gradsky (1968) 265 Cal. App. 2d 40, 41, 71 Cal. Rptr. 64* (§ 222.281[3][a])], prevents a creditor from proceeding against a surety after it has elects a particular remedy (nonjudicial foreclosure) that cuts off the guarantor's subrogation rights against the principal (*14 Cal. App. 4th 1533, 1535)* . The "Gradsky defense" can be waived; and Bank claimed that its agreement with defendant waived the defense. The court of appeal found that the parties' agreement was not explicit enough to waive the "Gradsky defense" (*14 Cal. App. 4th 1533, 1542)* .

Paragraph 4 of the parties' agreement provided that the guarantor authorized Bank at its sole discretion to "exercise any right or remedy it may have with respect to the Creditor or any collateral securing the Credit ... including ... exercise of power of sale ... and Guarantor shall be liable to Bank for any deficiency resulting from the exercise by it of any such

remedy, even though any rights which Guarantor may have against others ... might be ... destroyed."

A sentence in Paragraph 5 that Bank claimed constituted waiver of the "Gradsky defense" read: "Guarantor waives any defense arising by reason of any disability or other defense of Debtor, its successor or endorser or co-maker or other guarantor or by reason of the cessation from any cause whatsoever of the liability of Debtor or endorser of co-maker, or other guarantor."

The court of appeal discussed the three primary cases at that time dealing with attempted waiver, in the guaranty agreement, of the so-called "Gradsky defense": *Gradsky* itself (*Union Bank v. Gradsky (1968) 265 Cal. App. 2d 40, 71 Cal. Rptr. 64*); *Mariners Sav. & Loan Assn. v. Neil (1971) 22 Cal. App. 3d 232, 99 Cal. Rptr. 238* (discussed in *§ 222.283[3][a]*); and *Indusco Management Corp. v. Robertson (1974) 40 Cal. App. 3d 456, 114 Cal. Rptr. 47* . *Only Mariners Sav. & Loan Assn. v. Neil (1971) 22 Cal. App. 3d 232, 236, 99 Cal. Rptr. 238* , found the language sufficiently explicit to waive the defense. The court of appeal commented that it was easy to see why the *Indusco* language did not pass muster. All that agreement said was that the guarantor waives "all suretyship defenses and defenses in that nature thereof." Such general language could not be construed to be a specific wavier of the guarantor's defense (*14 Cal. App. 4th 1533, 1538)* .

To constitute an explicit waiver, it is not enough that the language imply that the guarantor has a right to compel the Lender to select a particular remedy (judicial foreclosure); the waiver must explicitly state the true legal consequences of what would otherwise happen if the lender selected another method (nonjudicial foreclosure). The agreement must inform the guarantor that if the Lender forecloses by private sale (nonjudicially), the guarantor would otherwise have a defense, based on *Civ. Code §§ 2810, 2819* (destruction of surety's rights and remedies against principal; destruction of subrogation rights) but that it is just this defense that the guarantor is being asked to waive in advance (and will waive by signing this agreement). All this agreement did, the court felt, was say: "You will be liable for a deficiency judgment even if our exercise of one of our remedies destroys your subrogation rights." That's not enough (*14 Cal. App. 4th 1533, 1538-1539)* . While it tells the guarantor that he or she may lose subrogation rights, it does nothing to tell the guarantor that the very fact of the loss of those subrogation rights itself has legal significance--namely, that it confers immunity from a deficiency. The closest Bank's agreement came was the statement that the guarantor "shall be liable to Bank for any deficiency resulting from the exercise by it of any such remedy, even though any rights which Guarantor may have against others might be destroyed" (*14 Cal. App. 4th 1533, 1539)* .

Remarking that the classic test for waiver is "the intentional relinquishment of a known right," the court of appeal said the language required to waive "the Gradsky defense" must state that (1) the destruction of the surety's subrogation rights creates a defense to a deficiency judgment, and (2) the guarantor is now waving that *specific* defense. The court was unwilling to imply any waiver. Paragraphs 4 and 5 would not give anyone actual knowledge and awareness of what is being waived, and general principles require resolution against waiver (*14 Cal. App. 4th 1533, 1539)* . Paragraph 4 does not provide the reader with any actual awareness of the "Gradsky defense" (*i.e.*, the legal consequences of the destruction of subrogation rights by nonjudicial foreclosure) and even if the matter is arguable, doubt should be resolved against waiver (*14 Cal. App. 4th 1533, 1540)* . The court's conclusion was buttressed by the failure of the guaranty agreement to mention *Code Civ. Proc. § 580d* (*14 Cal. App. 4th 1533, 1541)* .

Even though most contracts of guaranty are contracts of adhesion, in that the guarantor needs the loan proceeds and is not in a position to negotiate changes to the lender's standard form guaranty agreement, they are enforceable if the provisions being construed against the guarantor are within the guarantor's (as party in weaker bargaining position) reasonable expectations. This need not enter into the equation if the ambiguities are resolved against the drafter, the bank, not the guarantor (*14 Cal. App. 4th 1533, 1540)* .

Union Bank v. Gradsky *(1968) 265 Cal. App. 2d 40, 71 Cal. Rptr. 64* , is discussed in *§ 222.281[3][a]*.

[4] Additional Authorities

[a] Attempted Waiver of "Gradsky Defense" Not Sufficiently Explicit

In *Resolution Trust Corp. v. Titan Fin. Corp. (9th Cir. 1994) 22 F.3d 923* , the Resolution Trust Corporation, as receiver for a failed financial corporation, sued the personal guarantor of a promissory note for a deficiency judgment after foreclosure on the collateral in a nonjudicial sale. The district court awarded summary judgment to the guarantor, and the RTC appealed. The 9th Circuit held that *Cathay Bank v. Lee (1993) 14 Cal. App. 4th 1533, 18 Cal. Rptr. 2d 420* (discussed in *§ 222.281[3][b]*) is controlling authority on the waiver language of the guaranty in this case and that the guaranty was not sufficiently explicit to waive the guarantor's "Gradsky defense" (*22 F.3d 923, 925)* . The court compared the language in the *Cathay Bank* guaranty with the language of the guaranty in this case and noted that neither guaranty informed the guarantor about subrogation rights that would be destroyed if the lender elected the remedy of nonjudicial foreclosure and that the guarantor would have immunity from a deficiency judgment under *Code Civ. Proc. § 580d*, the "Gradsky defense." Although this case was decided before the enactment of *Civ. Code § 2856*, it is doubtful that the result would have different since *Civ. Code § 2856* did not represent a change in, but was merely declarative of, existing law [Stats. 1994, ch. 1204].

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22-222 California Points & Authorities § 222.282

§ 222.282 Opposing Contention That Surety Is Not Liable--Contract Is Void Against Principal Due to Personal Disability, Surety Assumed Liability With Knowledge of Principal's Defense, or Remedy Against Principal Is Barred [Civ. Code § 2810]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

_____ [*Name*], THE SURETY, IS LIABLE ON ITS OBLIGATION BECAUSE _____ [THE CONTRACT IS VOID AGAINST THE PRINCIPAL ONLY BECAUSE OF A MERE PERSONAL DISABILITY OF THE PRINCIPAL *and/or* THE SURETY HAS ASSUMED LIABILITY WITH KNOWLEDGE OF THE EXISTENCE OF A DEFENSE THAT THE PRINCIPAL HAS AGAINST THE CREDITOR *and/or* ONLY A REMEDY AGAINST THE PRINCIPAL, NOT THE RIGHT OF RECOVERY, IS BARRED].

[*EITHER*]

A. Surety Is Liable if Contract Is Void Against Principal Only Because of Mere Personal Disability. If the contract is void against the principal only because of a mere personal disability of the principal, the surety is liable (*Civ. Code § 2810*).

[*AND/OR*]

B. Surety Is Liable if Assumed Liability With Knowledge of Principal's Defense Against Creditor. If the surety assumed liability with knowledge of the existence of a defense that the principal has against the creditor, the surety is liable (*Civ. Code § 2810*).

[*AND/OR*]

C. Surety Is Liable if Remedy Rather Than Right of Recovery Against Principal Is Barred. If only the remedy against the principal rather than the right of recovery is barred, the surety is liable (*Civ. Code § 2810*; *Gottschalk v. Draper Companies (1972) 23 Cal. App. 3d 828, 831, 100 Cal. Rptr. 434* ; *see Heckes v. Sapp (1964) 229 Cal. App. 2d 549, 552-553, 40 Cal. Rptr. 485*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a party's contention that the surety is liable under the circumstances outlined in *Civ. Code § 2810*. Paragraph A may be used when the contract is void against the principal only because of a mere personal disability. Paragraph B may be used when the surety assumed liability with knowledge that the principal has a defense against the creditor. Paragraph C may be used when the creditor's remedy against the principal has been barred, because as long as the right of recovery against the principal exists, the surety is liable.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the surety's liability. For example, this argument may arise in opposing a summary judgment motion premised on the argument that the surety was not liable for the principal's obligation [*see, e.g., Gottschalk v. Draper Companies (1972) 23 Cal. App. 3d 828, 829, 100 Cal. Rptr. 434]* . This form may also be adapted for use in a trial or appellate brief.

Counsel should add argument linking the points in this form with the facts of his or her case; for example, facts indicating that the creditor was unable to collect from the principal due to the operation of *Code Civ. Proc. § 580b*, and therefore was seeking recovery from the surety [*see, e.g., Heckes v. Sapp (1964) 229 Cal. App. 2d 549, 40 Cal. Rptr. 485]* .

[b] Related Pleading and Practice Forms

For forms relating to suretyship, see *California Forms of Pleading and Practice, Ch. 538, Suretyship, Bonds, and Undertakings, § 538.10 et seq.* (Matthew Bender). For forms relating to foreclosure sales and deficiency judgments, see Ch. 555, *Trust Deeds and Real Property Mortgages* in that publication.

[c] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing the existence of mortgage security for a note, see Ch. 230, *Trust Deeds and Real Property Mortgages* .

[3] Discussion of Authorities

[a] Surety Is Liable if Remedy Rather Than Right of Recovery Against Principal Is Barred

The facts and procedural background of ***Gottschalk v. Draper Companies*** *(1972) 23 Cal. App. 3d 828, 100 Cal. Rptr. 434* , are discussed in *§ 222.303[3][a]*. In *Gottschalk*, the court of appeal upheld the guarantors' liability. The sale of real property under a deed of trust does not erase the indebtedness, and the debt technically survives a default so that enforcement of collateral securities may be had. The obligation of the maker of a note secured by a deed of trust is not discharged by *Code Civ. Proc. § 580b* (antideficiency statute). Instead, any recovery against him or her on the note is barred. A bar of remedy against the principal debtor does not prevent the right of recovery against the guarantor and the creditor is not precluded from seeking redress on or enforcing any other security. Since the principal debtor, the buyer,

remained liable after the foreclosure sale and *Code Civ. Proc. § 580b* barred only plaintiffs' remedy against it, defendants could not avail themselves of a defense based on *Civ. Code § 2810*, which requires the nonexistence or cessation of the principal's liability to make the surety also exempt (*23 Cal. App. 3d 828, 831)* .

In ***Heckes v. Sapp*** *(1964) 229 Cal. App. 2d 549, 40 Cal. Rptr. 485* , a corporation purchased real property from plaintiffs by making a sizeable down payment and executing a promissory note. The note was secured by a deed of trust on the property. Defendants, principal officers of the corporation, signed the note as individual guarantors. Sometime later the holders of a senior deed of trust foreclosed and sold the property. As a result of the sale, plaintiffs' security was rendered worthless. When the corporation defaulted on the note, plaintiffs brought an action against defendants for the entire unpaid balance. Defendants asserted that *Code Civ. Proc. § 580b* (antideficiency statute) barred a judgment against them. The trial court judgment was for defendants. Plaintiffs appealed.

The court of appeal reversed. The court stated that the major purpose of *Code Civ. Proc. § 580b* is to prevent aggravation of the downturn in depression times. This purpose dictates that a guarantor not be shielded from a deficiency judgment by *Code Civ. Proc. § 580b*. The purpose of the antideficiency statute is served by relieving the purchaser of personal liability to any person who finances the purchase and takes as security a trust deed or mortgage on the property purchased, provided the financier intended the loan to be used to pay all or part of the purchase price. The scope of protection afforded by *Code Civ. Proc. § 580b* must be confined to the purchaser debtor's obligation which is secured by the purchased property. The guarantor's obligation is not within this delineation. It is not secured by the purchased security and is not the debtor's obligation. The guarantor's obligation is not a variation of the standard purchase money mortgage transaction within the purpose of *Code Civ. Proc. § 580b*, and the guarantor should not be protected against a deficiency judgment. A guaranty is simply additional security for the obligor's debt, and can be exhausted notwithstanding the antideficiency legislation (*229 Cal. App. 2d 549, 552-553)* .

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22-222 California Points & Authorities § 222.283

§ 222.283 Opposing Contention That Surety Is Not Liable--Suretyship Agreement Waived Defense Based on Section 580d Deficiency Prohibition ("Gradsky Defense") [Civ. Code §§ 2810, 2819; Code Civ. Proc. § 580d]

[1] FORM

[*The following should be included in a memorandum of points and authorities or a trial or appellate brief.*]

THE AGREEMENT EXECUTED BY _____ [*name*], AS SURETY EXPLICITLY CONSENTED TO, AND WAIVED ANY DEFENSES BASED ON _____'S [*name of creditor*] _____ [NONJUDICIAL FORECLOSURE *or* EXERCISE OF POWER OF (PRIVATE) SALE *or* RELINQUISHMENT OF COLLATERAL] IN A WAY THAT PRECLUDED ENTRY OF A PERSONAL JUDGMENT AGAINST _____ [*name*], THE PRINCIPAL DEBTOR.

Waiver of "Gradsky Defense" Sufficiently Explicit. Any guarantor or other surety, including a guarantor of a note or other obligation secured by real property or an estate for years, may waive (1) the surety's rights of subrogation, reimbursement indemnification, and contribution, and any other rights and defenses available to the guarantor by reason of *Civil Code Section 2787 et seq.* (governing suretyship), (2) any rights or defenses the surety may have to the guaranty obligation by reason of an election of remedies by the creditor, and (3) any rights or defenses the guarantor or other surety may have because the principal's note or other obligation is secured by real property or an estate of years, including any rights or defenses that are directly or indirectly based on the application of *Code of Civil Procedure Sections 580a*, *580b*, *580d*, and *726* to the principal's note or other obligation (*Civ. Code § 2856(a)*). A contractual provision that expresses an intent to waive any suretyship rights or defenses will be an effective waiver of the surety's defense to a recovery by the creditor by reason of the creditor's election of remedies, whether or not it contains references to statutory provisions or judicial decisions (*Civ. Code § 2856(b), (d)*; *see Mariners Sav. & Loan Assn. v. Neil (1971) 22 Cal. App. 3d 232, 236-237, 99 Cal. Rptr. 238* ; *see also Civ. Code §§ 2810, 2819*; *cf. Cathay Bank v. Lee (1993) 14 Cal. App. 4th 1533, 1539, 18 Cal. Rptr. 2d 420* ; *Union Bank v. Gradsky (1968) 265 Cal. App. 2d 40, 48, 71 Cal. Rptr. 64*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in opposition to the contention that the surety's liability has been terminated by application of *Civ. Code §§ 2810, 2819* and *Code Civ. Proc. § 580d* after the creditor foreclosed nonjudicially on real property that secured the primary obligation. The contention is based on the ground that the suretyship agreement constitutes a waiver of the "Gradsky defense." *Civ. Code § 2856(d)* gives effect to any language that expresses a waiver of the surety's defense to a recovery by the creditor by reason of the creditor's election of remedies. Language effective for this purpose is contained in § 222.281, Optional Paragraph B. A creditor or any guarantor or other surety, however, may use any other language to express an intent to waive all rights and defenses of the surety by reason of any election of remedies by the creditor [*Civ. Code § 2856(d)* (effective January 1, 1997); *see Civ. Code § 2856(f)* (validity of waiver executed before January 1, 1997, determined under law applicable when waiver was executed)].

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the surety remains liable for a deficiency judgment.

Counsel should add argument linking the points in this form with the facts of his or her case. The agreement should be quoted or referred to.

[b] Related Points and Authorities

The points and authorities in this form may be opposed by those in § 222.281, which required more explicit waiver language.

Counsel may also wish to incorporate points and authorities from Ch. 230, *Trust Deeds and Real Property Mortgages,* that address deficiency judgment prohibitions.

[3] Discussion of Authorities

[a] Waiver of "Gradsky Defense" Sufficiently Explicit

Plaintiff in ***Mariners Sav. & Loan Assn. v. Neil*** *(1971) 22 Cal. App. 3d 232, 99 Cal. Rptr. 238* , loaned money to defendant's spouse. The note was secured by a deed of trust on the spouse's separate real property. Defendant guaranteed the note. The loan proceeds were used for community purposes unrelated to the property that secured the note. When the spouse failed to make the required payments, plaintiff exercised its power of sale under the deed of trust and commenced this action against defendant on the guaranty. The property was sold at trustee's sale in 1970. Defendant argued that *Code Civ. Proc. § 580d* and *Union Bank v. Gradsky (1968) 265 Cal. App. 2d 40, 71 Cal. Rptr. 64* (discussed in *§ 222.281[3][a]*), precluded entry of judgment against him on the guaranty. The contract of guaranty contained a number of waivers, including waiver of "any defense based on *Sections 580* and *726 of the Code of Civil Procedure* of the State of California, or either of them." The agreement further provided that defendant waived "any right to require Association to (a) proceed against Borrowers; (b) proceed against or exhaust any security held from Borrowers; or (c) pursue any other remedy in Association's power whatsoever." Judgment was entered for plaintiff, and defendant appealed.

The court of appeal affirmed. The court first criticized *Gradsky* as running contrary to the objectives of *Civ. Code §§ 2809* and *2845* by encouraging creditors to bring actions directly against guarantors without first exhausting the remedies against the principal or resorting to the security. The court noted *Gradsky*'s explanation that *Code Civ. Proc. § 580d* was not directly applicable and that a guarantor could, by express agreement or subsequent action either waive or be estopped from raising the defense to a creditor's action to recover a deficiency judgment after a nonjudicial

foreclosure sale (*22 Cal. App. 3d 232, 236)* . The court of appeal found the waivers in the contract of guaranty explicit, and held further, that the waiver was not invalidated by *Civ. Code § 2953*, which prevents waiver of certain of guarantors' rights deemed to be contrary to public policy. *Civ. Code § 2953* does not embrace *Code Civ. Proc. § 580d* (*22 Cal. App. 3d 232, 236)* . The court also found defendant's conduct persuasive in finding that defendant could not assert the "Gradsky defense." Before the trustee's sale, plaintiff offered to assign the note and deed of trust to defendant if he paid the balance owed. Defendant's failure to do so indicated to the court that he had no interest in any rights of subrogation (*22 Cal. App. 3d 232, 236-237)* .

[4] Additional Authorities

[a] Waiver of "Gradsky Defense" Sufficiently Explicit

For a discussion of *Resolution Trust Corp. v. Titan Financial Corp. (9th Cir. 1994) 22 F.3d 923* , see *§ 222.281[4][a]*.

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[Reserved]

§§ 222.284[Reserved]

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4. Exoneration In Miscellaneous Circumstances

22-222 California Points & Authorities § 222.300

§ 222.300 Supporting Contention That Surety Has Been Exonerated--Performance Exonerates Surety [Civ. Code § 2839]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Name*], THE SURETY, HAS BEEN EXONERATED FROM HIS/HER/ITS OBLIGATION AS SURETY BECAUSE _____ [*name*], THE PRINCIPAL, _____ [PERFORMED THE OBLIGATION *or* DULY MADE A VALID OFFER OR PERFORMANCE].

Performance of Principal Obligation Exonerates Surety. Performance of the principal obligation, or an offer of performance, duly made as provided in the Civil Code, exonerates a surety (*Civ. Code § 2839*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a party's contention that the surety has been exonerated from liability due to performance of the principal obligation or an offer of performance duly made as provided in the Civil Code [*see Civ. Code § 2839*]. Presumably, an offer of performance duly made meets the requirements set forth in *Civ. Code §§ 1485-1505*.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of performance of the principal obligation exonerating the surety. For example, this argument may arise in opposing an appeal premised on the argument that the surety remains liable even though the principal obligation has been performed. This form may also be adapted for use in a trial brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel might allege facts demonstrating the principal's performance on the obligation for which the surety guaranteed performance; for example, by showing the completion of an office building by the principal contractor within the time set for completion [*see Civ. Code § 2839*].

[b] Related Pleading and Practice Forms

For forms relating to suretyship, see *California Forms of Pleading and Practice, Ch. 538, Suretyship, Bonds, and Undertakings, § 538.10 et seq.*, (Matthew Bender).

[3] Additional Authorities

[a] Performance Exonerates Surety

In *Quality Wash Group v. Hallak (1996) 50 Cal. App. 4th 1687, 58 Cal. Rptr. 2d 592* , the purchaser of a car wash business located on leased property sued the sellers for breach of contract and negligent misrepresentation after improvements and fixtures were found to encroach on adjoining property. The purchaser also sought to hold the sellers liable as joint and several co-obligors on a promissory note that the purchasers had assumed from the sellers as part of the purchase price of the car wash and eventually paid off in settlement of a collection action brought by the holders of the note against the seller and purchaser. The purchaser also cross-complained against the seller seeking to collect on a separate promissory noted executed by the purchaser in favor of the seller, also as part of the purchase price of the car wash. The superior court entered judgment for the sellers.

The court of appeals found that the sellers could assert surety status against the purchasers under *Civ. Code § 2832*. The trial court's implied finding that the sellers signed the note as guarantors of the purchaser's principal obligation to pay the note was substantially supported by the evidence, including the sales documents and the parties' stipulated facts and testimony showing that the purchasers assumed the note as part of the purchase price of the car wash. As guarantors of the purchaser's obligation to pay the note, the sellers were exonerated by the purchaser's satisfaction of that obligation under *Civ. Code § 2839*. The purchaser, as principal obligor under the note, had no right to seek reimbursement or contribution from the sellers as guarantors (*50 Cal. App. 4th 1687, 1699-1700)* .

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22-222 California Points & Authorities § 222.301

§ 222.301 Supporting Contention That Surety Has Been Exonerated--Creditor's Acceptance of Stock in Principal's Bankruptcy Proceedings [Civ. Code §§ 2822, 2839]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Name*], THE SURETY, HAS BEEN _____ [WHOLLY *or* PARTIALLY] EXONERATED FROM HIS/HER/ITS OBLIGATION AS SURETY BECAUSE _____ [*name*], THE CREDITOR, ACCEPTED STOCK IN SATISFACTION OF THE OBLIGATION OF _____ [*name*], THE PRINCIPAL, DURING THE PRINCIPAL'S BANKRUPTCY PROCEEDINGS.

A. Creditor Must Accept Stock or Demand Cash and Subrogate Rights to Surety in Principal's Bankruptcy Proceedings. A creditor, before acceptance of stock in bankruptcy proceedings, may reserve the option of demanding full cash payment from its surety and subrogating the surety to its rights in the securities. The creditor must act promptly and clearly to exercise its option at a time before the benefits of stock appreciation will accrue to it, and to avoid being charged with acceptance of the stock in either partial or total satisfaction of the obligation. Normally this time will be the date of the final decree of the bankruptcy court confirming the plan of arrangement (*Durgin v. Kaplan (1968) 68 Cal. 2d 81, 89-92, 65 Cal. Rptr. 158, 436 P.2d 70*).

B. Creditor's Acceptance of Stock Will Satisfy Surety's Obligation, Either Wholly or Partially. The creditor accepted the stock, evidenced by its retention of and benefit from the stock, its failure to exercise its option to demand cash, and its affirmative election of the value theory of recovery at trial. The surety's obligation was wholly extinguished by the creditor's acceptance of stock equal in value to that of the debt. That acceptance rendered the contract of guaranty fully executed and terminated any contractual relationship between the parties (*Civ. Code §§ 2822, 2839*; *Durgin v. Kaplan (1968) 68 Cal. 2d 81, 87-89, 65 Cal. Rptr. 158, 436 P.2d 70*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that the surety has been released from liability due to the creditor's acceptance of stock during the principal's bankruptcy proceedings, the acceptance of which either wholly or partially satisfied the principal's obligation [*see, e.g., Durgin v. Kaplan (1968) 68 Cal. 2d 81, 65 Cal. Rptr. 158, 436 P.2d 70]* .

The bankruptcy of the principal will not release the surety from its obligation, since bankruptcy is an operation of law and *Civ. Code § 2825* provides that a surety is not exonerated if the principal is discharged by operation of law [*see, e.g., Durgin v. Kaplan (1968) 68 Cal. 2d 81, 65 Cal. Rptr. 158, 436 P.2d 70]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the creditor's acceptance of stock in the principal's bankruptcy. For example, this argument may arise in opposing a summary judgment motion or an appeal premised on the argument that the creditor had not accepted the stock and the surety remained liable for the full amount of the obligation [*see, e.g., Durgin v. Kaplan (1968) 68 Cal. 2d 81, 83, 65 Cal. Rptr. 158, 436 P.2d 70]* . These points and authorities may also be adapted for use in a trial brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel might allege facts demonstrating that the creditor accepted stock at the time of the bankruptcy proceedings in satisfaction of its claim against the principal and did not indicate any intention to exercise its option to demand cash until sometime after the final decree of the bankruptcy court when the value of the stock had plummeted [*see, e.g., Durgin v. Kaplan (1968) 68 Cal. 2d 81, 65 Cal. Rptr. 158, 436 P.2d 70]* .

[b] Related Pleading and Practice Forms

For forms relating to a creditor's rights in bankruptcy proceedings, see California Forms of Pleading and Practice, Ch. 94, *Bankruptcy* (Matthew Bender). For forms relating to suretyship, see Ch. 538, *Suretyship, Bonds, and Undertakings* in that publication.

[c] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing the debtor's discharge in bankruptcy, see Ch. 30, *Bankruptcy* .

[d] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 222.320* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Creditor Must Accept Stock or Demand Cash and Subrogate Rights to Surety in Principal's Bankruptcy Proceedings

In ***Durgin v. Kaplan*** *(1968) 68 Cal. 2d 81, 65 Cal. Rptr. 158, 436 P.2d 70* , plaintiff's predecessor supplied materials to the principal company, of which defendant was the principal stockholder and director. In order for the principal to obtain credit, defendant executed a continuing guaranty, covering purchases by the principal. When the principal filed for bankruptcy, the court approved its plan of arrangement. The plan provided for the issuance of one share of stock to each creditor for each dollar of indebtedness in full satisfaction of the creditors' claims against the principal debtor. Plaintiff filed a claim in the bankruptcy court and received stock. Plaintiff later brought an action against the principal

and defendant guarantor on the agreement and guaranty. Defendant pleaded as an affirmative defense plaintiff's receipt of the stock in the bankruptcy proceeding. Plaintiff tried to prove that the stock was valueless. The trial court instructed the jury that if judgment was for plaintiff, it should be in the amount of the debt less the fair market value of the stock. The trial court judgment was for defendant. Plaintiff appealed.

The Supreme Court affirmed. The major issue discussed by the Court was the effect to be given plaintiff's receipt of stock in the bankruptcy arrangement proceeding. Plaintiff had not sought to exercise its remedial theory of subrogation on full cash payment, and raised it only on appeal. Plaintiff proceeded on the theory that the stock was worthless rather than on its subsequent subrogation theory that the value of the stock was irrelevant. Plaintiff's failure to raise its subrogation theory of recovery at trial was a substantive, nor merely procedural, matter evidencing its acceptance of the stock. Plaintiff could not later prevail on its subrogation theory because its acceptance of the stock, evidenced by its retention of and benefit from the stock, its failure to exercise its option to demand cash, and its affirmative election of the value theory of recovery at trial brought into operation *Civ. Code §§ 2822* and *2839*. *Civ. Code § 2822* provides that the creditor's acceptance of anything in partial satisfaction of an obligation of a principal reduces the guarantor's obligation in the same measure. *Civ. Code § 2839* states that actual payment of an obligation by a principal exonerates the guarantor. Defendant did not agree to waive the protection of these provisions, and his obligation was wholly extinguished by plaintiff's acceptance of stock equal in value to that of the debt. That acceptance rendered the contract of guaranty fully executed and terminated any contractual relationship between the parties (*68 Cal. 2d 81, 87-89)* . Plaintiff contended that it should not be held to acceptance of the stock in the settlement because its participation in the Chapter XI proceeding was involuntary and it merely made the best of a bad situation. The Court believed that plaintiff's actions and inaction during the bankruptcy and trial proceedings constituted a acceptance of the stock. Plaintiff, as the offeree of alternative modes of performance, sought to treat its silence as both acceptance and rejection, subject to its ultimate choice unlimited as to time. If plaintiff was to receive the benefit of appreciation in value of the stock, it must have born the risk of depreciation. If it wished to protect itself against the risk, it must exercise its option of rejection before acquiring the opportunity for gain. The Court held that plaintiff accepted the stock within the meaning of *Civ. Code § 2822* not only expressly, by choosing the value theory of recovery at trial, but impliedly by as well, by remaining silent while accepting the benefits of the stock. There is no conflict with the rule that a creditor, before acceptance of stock in bankruptcy proceedings, may reserve the option of demanding full cash payment from its guarantor and subrogating the guarantor to its rights in the securities. That option may not be exercised for the first time years after receipt of the stock, much less after a jury determination that its fair market value at the time of the receipt equalled the value of the principal debt. If a creditor is to avoid the operation of *Civ. Code § 2822* and retain its option to demand cash instead of accepting securities, the creditor must act promptly and clearly to exercise its option at a time before the benefits of appreciation will accrue to it. Normally this time will be the date of the final decree of the bankruptcy court confirming the plan of arrangement (*68 Cal. 2d 81, 89-92)* . All of the circumstances constituting acceptance cannot be defined, nor can exclusive means of exercising the option be listed. Appropriate procedures may include, if the securities are transferable, their tender to the guarantor, or, if the securities are not transferable except by operation of law, written notice to the guarantor demanding full cash payment and offering subrogation of the rights in the securities, prayer for that relief in pleadings, and indication of the election of such a theory of recovery in connection with a motion for summary judgment. Needless to say, that actio must be taken before acceptance of the securities by the creditor (*68 Cal. 2d 81, 92)* .

[b] Creditor's Acceptance of Stock Will Satisfy Surety's Obligation, Either Wholly or Partially

Durgin v. Kaplan *(1968) 68 Cal. 2d 81, 89-92, 65 Cal. Rptr. 158, 436 P.2d 70* , is discussed in *§ 222.301[3][a]*.

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22-222 California Points & Authorities § 222.302

§ 222.302 Opposing Contention That Surety Has Been Exonerated--Neither Partial Satisfaction of Obligation Nor Creditor's Delay in Pursuing Available Remedies Exonerates Surety [Civ. Code §§ 2822, 2823]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Name*], THE SURETY, HAS NOT BEEN EXONERATED FROM HIS/HER/ITS OBLIGATION AS SURETY BECAUSE _____ [ACCEPTANCE OF PARTIAL SATISFACTION OF THE OBLIGATION BY _____ (*name*), THE CREDITOR, *and/or* THE FAILURE OF _____ (*name*), THE CREDITOR, TO PURSUE AVAILABLE REMEDIES] DOES NOT EXONERATE _____ [*name*], THE SURETY.

[*EITHER*]

A. Partial Satisfaction of Obligation Reduces Surety's Obligation But Does Not Exonerate Surety. The acceptance by a creditor of anything in partial satisfaction of an obligation reduces the obligation of a surety, in the same measure as that of the principal, but does not otherwise exonerate the surety (*Civ. Code 2822*; *Oleson v. Tellson (1971) 21 Cal. App. 3d 671, 673-674, 98 Cal. Rptr. 668* ; *Wise v. Clapper (1968) 257 Cal. App. 2d 770, 774, 65 Cal. Rptr. 231*).

[*AND/OR*]

B. Creditor's Delay in Pursuing Available Remedies Does Not Exonerate Surety. The mere delay of a creditor to proceed against a principal or to enforce any other remedy does not exonerate the surety; forbearance alone does not release a surety (*Civ. Code § 2823*; *Administrative Management Services, Inc. v. Fidelity & Deposit Co. (1979) 89 Cal.*

App. 3d 532, 535-536, 152 Cal. Rptr. 620 ; *Oleson v. Tellson (1971) 21 Cal. App. 3d 671, 673-674, 98 Cal. Rptr. 668*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a surety's contention that it was exonerated. The ground of the opposition is that exoneration does not result from partial satisfaction of the obligation (Paragraph A) [*see Civ. Code § 2822*] or the creditor's delay in pursuing available remedies (Paragraph B) [*see Civ. Code § 2823*]. Although these arguments do not necessarily arise in the same case, it is possible that they might arise in the same case and be argued simultaneously.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of exoneration. For example, this argument may arise in opposing a demurrer premised on the argument that the surety was exonerated from liability on the principal's obligation [*see, e.g., Administrative Management Services, Inc. v. Fidelity & Deposit Co. (1979) 89 Cal. App. 3d 532, 533-535, 152 Cal. Rptr. 620]* . These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should present facts showing that the creditor only accepted partial satisfaction of the obligation [*see Civ. Code § 2822*] or that the creditor merely delayed in pursuing a remedy against the surety [*see Civ. Code § 2823*]. For example, if the creditor only accepted partial satisfaction of the obligation but did not otherwise exonerate the surety, counsel might include facts illustrating that the creditor accepted payments from the principal equivalent to the amount of accrued interest only, without any payment of the principal amount [*see, e.g., Wise v. Clapper (1968) 257 Cal. App. 2d 770, 65 Cal. Rptr. 231]* .

[b] Related Pleading and Practice Forms

For forms relating to suretyship, see California Forms of Pleading and Practice, Ch. 538, *Suretyship, Bonds, and Undertakings* (Matthew Bender).

[3] Discussion of Authorities

[a] Partial Satisfaction of Obligation Reduces Surety's Obligation But Does Not Exonerate Surety

In ***Oleson v. Tellson*** *(1971) 21 Cal. App. 3d 671, 98 Cal. Rptr. 668* , defendants purchased a business and executed a promissory note as payment. The sellers assigned the note to plaintiffs. After notice to plaintiffs, defendants sold the business and the buyers agreed to assume the note obligation. Although the promissory note contained an acceleration clause that gave the holder the option of declaring the whole principal and interest immediately due on transfer of the business, plaintiffs did not exercise it. Plaintiffs accepted one payment in full from the buyers and thereafter accepted payments of interest only. Defendants were not informed that only interest payments were being accepted. When the payments were in default, plaintiffs brought an action on the note. The buyers were discharged because of bankruptcy. The trial court entered judgment for plaintiffs for the amount unpaid on the note, with interest and attorneys' fees. Defendants appealed.

The court of appeal affirmed. Among defendants' contentions was that their obligation as sureties had been exonerated by plaintiffs' acceptance of the interest payments only, without notification to defendants. Without so finding, the court assumed that a suretyship relation had been created. Plaintiffs did not exonerate defendants by their conduct in accepting the buyers as obligors, nor by accepting from them payments of interest only. *Civ. Code § 2822* provides that the acceptance by a creditor of partial payments reduces to that extent the obligation of a surety, but does not otherwise

exonerate the surety. The court also held that plaintiffs' failure to exercise their rights under the acceleration clause did not exonerate defendants, as is discussed in *§ 222.302[3][b]*.

The facts and procedural background of ***Wise v. Clapper*** *(1968) 257 Cal. App. 2d 770, 65 Cal. Rptr. 231* , are discussed in *§ 222.243[3][d]*. In *Wise*, the court of appeal reversed a holding that defendant surety had been exonerated. The court agreed with plaintiffs' contention that its acceptance of partial payment of the obligation, through accepting payments covering only the interest and not the principal, did not exonerate defendant surety. *Civ. Code § 2822* provides that the acceptance by a creditor of partial payment reduces to that extent the obligation of a surety, but does not otherwise affect it or exonerate the surety (*257 Cal. App. 2d 770, 774)* .

[b] Creditor's Failure to Pursue Available Remedies Does Not Exonerate Surety

In ***Administrative Management Services, Inc. v. Fidelity & Deposit Co.*** *(1979) 89 Cal. App. 3d 532, 152 Cal. Rptr. 620* , a couple owned a convalescent hospital, administration of which was taken over by a receiver appointed during the couple's marital dissolution proceedings. Prior to his appointment, the receiver posted a bond provided by defendant. During the receivership, plaintiff filed an action alleging that its contract with the couple had been breached by the receiver. The husband bought his wife's share of the hospital and ousted the receiver. The receiver filed a motion in the dissolution proceeding for termination of receivership. The trial court approved, discharged the receiver, and exonerated the bond. In the meantime, plaintiff had obtained a judgment against the receiver. Plaintiff filed an action against defendant surety for the amount of the judgment against the receiver. Defendant demurred on the ground that it had no liability by virtue of the court order exonerating the bond. The trial court sustained the demurrer without leave to amend. Plaintiff appealed.

The court of appeal reversed and found that plaintiff had adequately stated a cause of action. Prior to the order exonerating the bond, plaintiff had obtained a judgment in which it was specifically found that the receiver failed and refused during his receivership to faithfully execute the duties of his trust according to law. Since the receiver violated his duty during the period the bond was in effect, plaintiff stated a cause of action against the surety. The court said that no surety is released from damages or liabilities for acts, omissions, or causes existing or arising before the making of the order releasing the surety. Although plaintiff neglected to present its judgment to the court having jurisdiction of the receivership for enforcement, that did not bar recovery against the surety. *Civ. Code § 2823* provides that mere delay on the part of a creditor to proceed against the principal, or to enforce any other remedy, does not exonerate a surety (*89 Cal. App. 3d 532, 535-536)* .

The facts and procedural background of ***Oleson v. Tellson*** *(1971) 21 Cal. App. 3d 671, 98 Cal. Rptr. 668* , are discussed in *§ 222.302[3][a]*. In *Oleson*, the court of appeal upheld a finding that plaintiff creditors were entitled to performance by defendant sureties. Plaintiffs' failure to exercise their rights under the acceleration clause did not operate to exonerate defendants. The holder of a note with an optional acceleration clause may bring an action to have the entire amount declared due if he or she chooses, but the holder is not required to sue. Under *Civ. Code § 2823*, the mere delay of a creditor to proceed against a principal or to enforce any other remedy does not exonerate the surety; forbearance alone does not release a surety (*21 Cal. App. 3d 671, 673-674)* .

[4] Additional Authorities

[a] Creditor's Failure to Pursue Available Remedies Does Not Exonerate Surety

In *Crumrine v. Dizdar (1943) 59 Cal. App. 2d 783, 140 P.2d 101* , the administrator of an estate furnished a bond signed by defendant as surety. The administrator died without completing the administration proceedings in the estate and it was shown that he owed the estate money. Plaintiff succeeded the first administrator as administrator of the estate and later brought action against defendant surety to recover the amount of the bond. Defendant raised many defenses, among them laches. The trial court judgment was for defendant, but the court of appeal reversed. The court held that

plaintiff was not guilty of laches. An administrator or surety who asserts that an action against him or her on the bond is barred by laches or equitable estoppel must show an unreasonable and unexplained delay; mere delay short of the full period of limitation will not defeat an action on the bond. Mere passive delay and forbearance cannot discharge the sureties nor affect their obligation. The court noted that several legal proceedings and investigations were necessary before commencing the action, and it could not be concluded that there was a delay amounting to laches (*59 Cal. App. 2d 783, 792)* .

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22-222 California Points & Authorities § 222.303

§ 222.303 Opposing Contention That Surety Has Been Exonerated--Discharge of Principal by Operation of Law Does Not Exonerate Surety [Civ. Code § 2825]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Name*], THE SURETY, HAS NOT BEEN EXONERATED FROM HIS/HER/ITS OBLIGATION AS SURETY BECAUSE _____ [*name*], THE PRINCIPAL, WAS DISCHARGED SOLELY BY OPERATION OF LAW, WITHOUT ANY INTERVENTION OR OMISSION BY _____ [*name*], THE CREDITOR.

Surety Is Not Exonerated When Principal Is Discharged by Operation of Law. A surety is not exonerated by the discharge of its principal by operation of law, without the intervention or omission of the creditor. Operation of law is the manner in which rights devolve on a person by the mere application to the particular transaction of the established rules of law, without the act or cooperation of the party (*Civ. Code § 2825*; *Bloom v. Bender (1957) 48 Cal. 2d 793, 802, 313 P.2d 568* ; *Gottschalk v. Draper Companies (1972) 23 Cal. App. 3d 828, 831-832, 100 Cal. Rptr. 434*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a surety's contention that he or she has been exonerated. The ground of the opposition is that exoneration of the surety does not occur even though the principal was discharged because the discharge of the principal was by operation of law, without the intervention or omission of the creditor [*see Civ. Code § 2825*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the surety was not exonerated. For example, this argument

may arise in opposing a summary judgment premised on the argument that the surety was exonerated from the principal's obligation [*see, e.g., Gottschalk v. Draper Companies (1972) 23 Cal. App. 3d 828, 829-830, 100 Cal. Rptr. 434]* . These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel might allege facts indicating that the creditor was unable to collect from the principal due to the operation of *Code Civ. Proc. § 580b*, and therefore was seeking recovery from the surety [*see, e.g., Gottschalk v. Draper Companies (1972) 23 Cal. App. 3d 828, 100 Cal. Rptr. 434]* .

[b] Related Pleading and Practice Forms

For forms relating to suretyship, see California Forms of Pleading and Practice, Ch. 538, *Suretyship, Bonds, and Undertakings* (Matthew Bender). For forms relating to periods of limitation on various actions, see Ch. 345, *Limitation of Actions* in that publication. For forms relating to foreclosure sales and deficiency judgments, see Ch. 555, *Trust Deeds and Real Property Mortgages* in that publication.

[c] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing the existence of mortgage security for a note, see Ch. 166, *Negotiable Instruments* . For forms of memoranda of points and authorities supporting and opposing demurrers alleging the action is barred by the statute of limitations, see Ch. 143, *Limitation of Actions* . For forms of memoranda of points and authorities supporting and opposing foreclosure actions, see Ch. 230, *Trust Deeds and Real Property Mortgages* .

[3] Discussion of Authorities

[a] Surety Is Not Exonerated When Principal Is Discharged by Operation of Law

The facts and procedural background of ***Bloom v. Bender*** *(1957) 48 Cal. 2d 793, 313 P.2d 568* , are discussed in *§ 222.200[3][a]*. In *Bloom,* the Supreme Court affirmed a finding in favor of plaintiff, the creditor's successor. Among the many points discussed, the Court referred to *Civ. Code § 2825* as stating the general rule that a surety is not discharged when the liability of its principal is extinguished by operation of law (*48 Cal. 2d 793, 802)* .

It should be noted that in *Bloom* the operation of law discharging the principal was the statute of limitations. The enactment of *Code Civ. Proc. § 359.5* in 1982 would have changed the result in this case, but not the reasoning.

In ***Gottschalk v. Draper Companies*** *(1972) 23 Cal. App. 3d 828* , *100 Cal. Rptr. 434* , plaintiffs sold real property to the principal debtor. As payment, the principal debtor executed two promissory notes secured by purchase money deeds of trust also executed by the principal. Defendants unconditionally guaranteed all payments due under the two notes. The trust deeds were junior to another encumbrance on the same property. As the result of a foreclosure sale by the trustee of the senior deed of trust, plaintiffs' security for the two notes was extinguished. Plaintiffs brought suit against defendants on the written guaranties. Plaintiffs' motion for summary judgment, asserting that there was no defense to the action, was granted, and the trial court judgment was for plaintiffs. Defendants appealed.

The court of appeal affirmed. The court discussed the implications of *Code Civ. Proc. § 580b* (antideficiency legislation), and then addressed the issues concerning the suretyship statutes. Defendants argued that they were protected by *Civ. Code § 2810*, which provides that a surety is liable, notwithstanding any mere personal disability of the principal, though the disability be such as to make the contract void against the principal; but the surety is not liable if for any other reason there is no liability on the part of the principal at the time of the execution of the contract, or the liability of the principal thereafter ceases, unless the surety has assumed liability with knowledge of the existence of the defense. The court disagreed, setting forth two different reasons; one based on an interpretation of *Civ. Code § 2810*,

which did not release the surety; the other based on application of *Civ. Code § 2825*. Even assuming that the foreclosure sale terminated the liability of the principal, defendants still could not prevail. *Civ. Code § 2825* sets up a well known exception to *Civ. Code § 2810*, and provides that a surety is not exonerated by the discharge of the principal by operation of law, without the intervention or omission of the creditor. Ordinarily whatever discharges the principal debtor will discharge the surety, but that rule does not apply when the discharge is by operation of law or when the defense is personal. Operation of law is the manner in which rights, and sometimes liabilities, devolve on a person by the mere application to the particular transaction of the established rules of law, without the act or cooperation of the party himself or herself. If any discharge of the principal's liability took place, it took place by a mere application of the relevant code provisions without any intervention or omission of plaintiffs' creditors. Since the bar of the remedy against the principal came about by operation o law, *Civ. Code § 2825* was clearly applicable and prohibited defendants from exoneration (*23 Cal. App. 3d 828, 831-832)* .

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22-222 California Points & Authorities § 222.304

§ 222.304 Opposing Contention That Surety Has Been Exonerated--Creditor Demanded Cash and Subrogated Surety During Principal's Bankruptcy Proceedings [Civ. Code §§ 2822, 2839]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Name*], THE SURETY, HAS NOT BEEN _____ [WHOLLY *or* PARTIALLY] EXONERATED FROM HIS/HER/ITS OBLIGATION AS SURETY BECAUSE _____ [*name*], THE CREDITOR, EXERCISED HIS/HERS/ITS OPTION TO DEMAND CASH IN LIEU OF STOCK OR SECURITIES AND SUBROGATED THE SURETY TO ITS RIGHTS IN THE SECURITIES DURING THE BANKRUPTCY PROCEEDINGS OF _____ [*name*], THE PRINCIPAL.

A. No Exoneration of Surety if No Actual Payment or Partial Satisfaction of Obligation. A surety is not exonerated by performance or partial satisfaction of an obligation if there is no actual payment of the obligation or acceptance of partial satisfaction by the creditor [*see Civ. Code §§ 2822, 2839*].

B. Principal's Discharge Through Bankruptcy Does Not Exonerate Surety. The surety remains liable even when the principal debtor has been discharged through bankruptcy (*Superior Wholesale Elec. Co. v. Cameron (1968) 264 Cal. App. 2d 488, 494, 70 Cal. Rptr. 636* ; *see Civ. Code § 2825*).

C. When Creditor Must Demand Cash in Lieu of Accepting Securities in Principal's Bankruptcy Proceedings. If a creditor wishes to retain its option to demand cash and subrogate the surety to its rights instead of accepting securities in the principal's bankruptcy proceedings, the creditor must act promptly and clearly to exercise its option at a time before the benefits of appreciation will accrue to it. Although this is normally the time of the final decree of the bankruptcy court confirming the plan of arrangement, if the creditor's claim is not allowed until after that order, the creditor will not automatically be deemed to have accepted the benefits of the plan of arrangement in satisfaction of the

obligation (*Civ. Code § 2822*; *Zellner v. Lasky (1970) 13 Cal. App. 3d 787, 794-795, 91 Cal. Rptr. 810*).

D. Manner of Indicating Creditor's Election to Demand Cash as Payment. Procedures The option to accept cash rather than stock may be exercised by the tender of the securities to the surety if the securities are transferable, or, if the securities are not transferable except by operation of law, by written notice to the surety demanding full cash payment and offering subrogation of the rights in the securities, prayer for such relief in pleadings, and indication of the election of that theory of recovery in connection with a motion for summary judgment (*Zellner v. Lasky (1970) 13 Cal. App. 3d 787, 794-796, 91 Cal. Rptr. 810*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the surety has been exonerated by acceptance of stock in the principal's bankruptcy proceedings. The ground of opposition is that the creditor exercised its option to demand cash in lieu of stock and to subrogate the surety to its rights, and the surety has not been exonerated [*see, e.g.,* *Zellner v. Lasky (1970) 13 Cal. App. 3d 787, 794-795, 91 Cal. Rptr. 810]* .

The bankruptcy of the principal will not release the surety from its obligation, since bankruptcy is an operation of law and *Civ. Code § 2825* controls its impact on the surety. This form may be combined with a memorandum of points and authorities supporting the contention that an operation of law which discharges the principal does not exonerate the surety [*see* Form § 222.303].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the creditor's demand of cash in the principal's bankruptcy, for which the surety remains liable. For example, this argument may arise in opposing a summary judgment premised on the argument that the surety was not liable because the creditor was issued stock in the bankrupt principal's company [*see, e.g.,* *Zellner v. Lasky (1970) 13 Cal. App. 3d 787, 789, 91 Cal. Rptr. 810]* . These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel might allege facts indicating that the creditor sent the surety timely notice of election to subrogate, advising him that it did not elect to receive any stock in satisfaction of the principal's obligation [*see, e.g., Zellner v. Lasky (1970) 13 Cal. App. 3d 787, 91 Cal. Rptr. 810]* .

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 222.303*.

[b] Related Pleading and Practice Forms

For forms relating to a creditor's rights in bankruptcy proceedings, see California Forms of Pleading and Practice, Ch. 94, *Bankruptcy* (Matthew Bender). For forms relating to suretyship, see Ch. 538, *Suretyship, Bonds, and Undertakings* in that publication.

[c] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing the debtor's discharge in bankruptcy, see Ch. 30, *Bankruptcy* .

[3] Discussion of Authorities

[a] Principal's Discharge Through Bankruptcy Does Not Exonerate Surety

The facts and procedural background of ***Superior Wholesale Elec. Co. v. Cameron*** *(1968) 264 Cal. App. 2d 488, 70 Cal. Rptr. 636* are discussed in *§ 222.20[3][c]*. In *Cameron*, the court of appeal upheld the surety's liability after the principal debtor had been discharged through bankruptcy. The court cited the rule that it is no defense that the original obligor filed bankruptcy following the execution and delivery of the written guaranty. A surety remains fully liable when the obligation of the principal is discharged in bankruptcy (*264 Cal. App. 2d 488, 494)* .

[b] When Creditor Must Demand Cash in Lieu of Accepting Securities in Principal's Bankruptcy Proceedings

In ***Zellner v. Lasky*** *(1970) 13 Cal. App. 3d 787, 91 Cal. Rptr. 810* , the nominal plaintiff was the creditor's assignee. Plaintiff's assignor entered into a sale and option agreement with the principal company. Defendants guaranteed the principal's performance. The principal defaulted on its obligation and it and a coguarantor filed Chapter XI bankruptcy petitions. The two proceedings were consolidated and the consolidated plan of arrangement was confirmed. Among its provisions was the transfer of stock of equivalent value to the debt owed each of the creditors in full and complete satisfaction of their claims. Each creditor was enjoined from prosecuting claims against the debtors. Plaintiff's assignor filed with the bankruptcy court its claim of damages, which was approved. In the meantime, the nominal plaintiff filed an action against the principal and defendant guarantors for moneys due under the original agreement. The nominal plaintiff voluntarily dismissed the action against those adjudicated bankrupt. Pursuant to the confirmed plan of arrangement, stock was issued to plaintiff's assignor. Plaintiff's assignor sent defendant guarantor a notice of election to subrogate, advising him as guarantor that the stock issued in the name of plaintiff's assignor was to be deposited in escrow for its benefit, that it did not elect or intend to receive any of the stock in satisfaction of any obligation owed, that it looked solely to him for payment, and that once payment in full had been made, plaintiff's assignor would transfer to him all of its interest in the stock. Defendant rejected the election of plaintiff's assignor to subrogate. The nominal plaintiff filed a supplement to the complaint, asking that defendant be subrogated to the rights of plaintiff's assignor in the stock. The trial court granted defendant's motion for summary judgment. The nominal plaintiff appealed.

The court of appeal reversed. In its discussion of the complex fact situation and applicable law, the court reviewed the statutes governing bankruptcy of a principal and exoneration of guarantors. Both the Bankruptcy Act (*11 U.S.C. § 34*) and *Civ. Code § 2825* result in the surety's not being exonerated by the discharge of the principal by operation of law, such as bankruptcy, without the intervention or omission of the creditor. According to *Civ. Code § 2839*, actual payment of an obligation exonerates the guarantor, and according to *Civ. Code § 2822*, a creditor's acceptance of anything in partial satisfaction of an obligation reduces the guarantor's obligation in the same manner. The creditor is not prejudiced by filing a proof of claim or by accepting a dividend in a Chapter XI proceeding. A creditor who obtains a cash dividend in partial satisfaction of its claim may recover the balance from the guarantor. If the dividend is paid in securities, the creditor has a choice, and may retain the securities and sue the guarantor for the difference or, to avoid the difficulties of valuation, the creditor may recover the full amount of the claim from the guarantor and subrogate the guarantor to its rights in the securities. But the creditor cannot receive securities, hold them for speculative purposes, and later seek to subrogate the guarantor to its rights therein. Under those circumstances, the creditor is deemed to have accepted the stock; once the choice is made, the right to demand cash and let the guarantor be subrogated to the securities is lost. The court framed the issue as whether plaintiff's assignor made a choice by its participation in the arrangement proceeding which resulted in the issuance of stock in its name (*13 Cal. App. 3d 787, 792-793)* . The court relied heavily on *Durgin v. Kaplan (1968) 68 Cal. 2d 81, 65 Cal. Rptr. 158, 436 P.2d 70* , although it ultimately distinguished the facts of *Durgin*. If the creditor is to avoid the operation of *Civ. Code § 2822* and retain its option to demand cash instead of accepting securities, the creditor must act promptly and clearly to exercise its option at a time before the benefits of appreciation will accrue to it. Normally, this time will be the date of the final decree of the bankruptcy court confirming the plan of arrangement (*13 Cal. App. 3d 787, 794-795)* . The court noted that the statements in *Durgin* indicating that the choice must be made at the time of the order confirming the plan of arrangement appear to be dicta. A plan of arrangement affects only unsecured creditors, and only those unsecured

creditors whose claims have been allowed may participate in and vote at the meeting of creditors at which the plan is being considered. The confirmation of a plan of arrangement is binding on all creditors, whether or not they are affected by the arrangement or have accepted it or have filed their claims, and whether or not their claims have been scheduled or allowed and are allowable. Since the claim of plaintiff's assignor was not allowed until several months after the order confirming the plan, it could be assumed that prior to that date it had not participated in any of the proceedings in connection with the plan of arrangement and that it had not given its consent thereto. Until that time plaintiff's assignor did not know whether it would be entitled to the stock to be distributed under the plan. It was during the period of uncertainty about its status and rights that plaintiff's assignor filed the action against the guarantor. Accordingly, the court held that triable issues of fact were present in regard to whether plaintiff's assignor accepted the securities before its offer to subrogate, and that the granting of the motion was erroneous (*13 Cal. App. 3d 787, 796)* .

[c] Manner of Indicating Creditor's Election to Demand Cash as Payment

The facts and procedural background of ***Zellner v. Lasky*** *(1970) 13 Cal. App. 3d 787, 91 Cal. Rptr. 810* , are discussed in *§ 222.304[3][b]*. In *Zellner*, the court of appeal overturned an order granting summary judgment because there was a question of fact as to whether the creditor accepted the securities prior to its order to subrogate. In a bankruptcy proceeding by the principal debtor, the creditor must exercise its option to choose between returning the securities and suing the guarantor for the difference in value or recovering the full amount of the claim from the guarantor and subrogating the guarantor to its rights in the securities. Having made the choice in a timely manner, the creditor will not be able to change its mind if the other option proves more advantageous to it. Quoting from *Durgin v. Kaplan (1968) 68 Cal. 2d 81, 92, 65 Cal. Rptr. 158, 436 P.2d 70* , the court noted that it was impossible to describe all of the circumstances which might indicate exercise of the option to accept cash. Appropriate procedures might include, if the securities are transferable, their tender to the guarantor, or, if the securities are not transferable except by operation of law, written notice to the guarantor demanding full cash payment and offering subrogation of the rights in the securities, prayer for such relief in pleadings, and indication of the election of that theory of recovery in connection with a motion for summary judgment (*13 Cal. App. 3d 787, 794-795)* . The court stated that plaintiff's assignor had filed the complaint against the surety during a period when it did not know whether it would be entitled to the stock to be distributed under the plan. Accordingly, it held that there were triable issues of fact as to whether plaintiff's assignor had accepted the securities before its offer to subrogate (*13 Cal. App. 3d 787, 796)* .

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22-222 California Points & Authorities § 222.305

§ 222.305 Opposing Contention That Surety Has Been Discharged--Creditor Had No Duty Under Circumstances to Disclose Facts to Surety of Revocable Continuing Guaranty

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Name*], THE SURETY, HAS NOT BEEN DISCHARGED FROM HIS/HER/ITS OBLIGATION AS SURETY UNDER THE REVOCABLE CONTINUING GUARANTY BECAUSE _____ [*name*], THE CREDITOR, DID NOT OWE ANY DUTY UNDER THE CIRCUMSTANCES TO DISCLOSE FACTS CONCERNING THE RISK OF GUARANTEEING THE PERFORMANCE OF _____ [*name*], THE PRINCIPAL.

A. Creditor Has No Duty to Disclose Facts to Surety of Revocable Continuing Guaranty Unless Three Prerequisites Are Established. On a revocable continuing guaranty, the creditor only has a duty to disclose facts it knows about the debtor to the surety prior to every new extension of credit to the principal if three conditions are established: (1) the creditor has reason to believe that those facts materially increase the risk beyond that which the surety intends to assume; (2) the creditor has reason to believe that the facts are unknown to the surety; and (3) the creditor has a reasonable opportunity to communicate the facts to the surety. The creditor's failure to disclose will discharge the surety from liability on the subsequent loan only if all three conditions are satisfied (*Sumitomo Bank of Cal. v. Iwasaki (1968) 70 Cal. 2d 81, 92-94, 73 Cal. Rptr. 564, 447 P.2d 956* ; *Bank of Santa Ana v. Molina (1969) 1 Cal. App. 3d 607, 619-622, 81 Cal. Rptr. 885*).

[*Optional*] **B. Creditor Need Not Investigate for Surety's Benefit.** The creditor is not required to investigate for the surety's benefit or to take any unusual steps to assure itself that the surety is acquainted with facts which the creditor may assume are known to both of them (*Sumitomo Bank of Cal. v. Iwasaki (1968) 70 Cal. 2d 81, 90-91, 73 Cal. Rptr. 564, 447 P.2d 956*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that the creditor owed a duty to disclose facts about the debtor to the surety of a revocable continuing guaranty. The ground of opposition is that the three prerequisites to such a duty were not all established [*see Sumitomo Bank of Cal. v. Iwasaki (1968) 70 Cal. 2d 81, 92-94, 73 Cal. Rptr. 564, 447 P.2d 956]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the nonexistence of the creditor's duty of disclosure. For example, this argument may arise in opposing an appeal premised on the argument that the surety was discharged because of the creditor's failure to disclose facts about the debtor to the surety [*see, e.g., Bank of Santa Ana v. Molina (1969) 1 Cal. App. 3d 607, 615, 81 Cal. Rptr. 885]* . These points and authorities may also be adapted for use in a trial brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should present facts showing that none of the prerequisites for disclosure are present. For example, if the creditor has no idea of the risk the surety intends to assume, it cannot be liable for failing to disclose facts which might increase that risk [*see, e.g., Sumitomo Bank of Cal. v. Iwasaki (1968) 70 Cal. 2d 81, 73 Cal. Rptr. 564, 447 P.2d 956]* .

[b] Related Pleading and Practice Forms

For forms relating to suretyship, see California Forms of Pleading and Practice, Ch. 538, *Suretyship, Bonds, and Undertakings* (Matthew Bender).

[3] Discussion of Authorities

[a] Creditor Has No Duty to Disclose Facts to Surety of Revocable Continuing Guaranty Unless Three Prerequisites Are Established

In ***Sumitomo Bank of Cal. v. Iwasaki*** *(1968) 70 Cal. 2d 81, 73 Cal. Rptr. 564, 447 P.2d 956* , plaintiff made three loans to the principal debtors after defendant had executed a continuing guaranty guaranteeing all their present and future indebtedness. Plaintiff was aware that defendant, its customer for many years, did not read the guaranty, because he knew plaintiff's officer and trusted him. Knowing that the principals were in financial difficulty, plaintiff granted a loan to them to pay their federal taxes, without informing defendant of the principals' financial difficulty. Defendant never issued a written revocation of the guaranty, and did not know of the principal's financial difficulties until after the loan had been made. Plaintiff brought an action on the guaranty. The trial court judgment awarded plaintiff damages for the amount owed on two of the loans, rejecting its claim on the third, finding that defendant was discharged from liability by plaintiff's failure to disclose the financial difficulties of the principals. Plaintiff appealed.

The Supreme Court reversed the judgment as to the third loan. The Court summarized the issue as whether a creditor owes a duty of disclosure to a surety on a continuing suretyship relationship, and if so, the nature and extent of that duty. The Court noted that it was a question of first impression. In all suretyship relations, the creditor owes to the surety a duty of continuing good faith and fair dealing. The creditor must not misrepresent or conceal facts so as to induce or permit the surety to enter or continue in the relationship in reliance on a false impression as to the nature of the risk. A creditor's fraud, which may consist of intentional or negligent misrepresentation or active suppression of the truth, will discharge the surety as to any subsequently incurred liability (*70 Cal. 2d 81, 84-85)* . When the creditor, rather than the debtor, solicited the surety, a greater duty of disclosure is imposed on the creditor because it may not then assume that the surety will acquire all material information from the debtor. Circumstances other than solicitation of the surety by the creditor may give the creditor reason to believe that the surety will rely on it, rather than the debtor,

to receive information material to the risk, thereby imposing a duty to disclose facts materially affecting the surety's risk. But solicitation by the creditor does constitute a prime example of the cases in which the creditor must, without request, disclose material facts because the relationship of the parties gives the creditor reason to believe that the surety neither possesses nor will affirmatively seek knowledge of those facts (*70 Cal. 2d 81, 88-90)* . Whether a creditor owes a duty of voluntary disclosure to the surety depends on the nature of the risk guaranteed and the relationship of the parties involved. The creditor is not required to investigate for the surety's benefit or to take any unusual steps to assure itself that the surety is acquainted with facts which the creditor may assume are known to both of them (*70 Cal. 2d 81, 90-91)* . The creditor owes the same duty of disclosure during the course of the suretyship relationship as is owed at its inception. Citing *Civ. Code § 2815*, the Court said that the surety on a continuing guaranty of credit who has not received independent consideration binding him for a given period of time may revoke the guaranty as to future liability at any time merely by giving written notice to the creditor. The creditor does not owe a continuous duty of disclosure to a surety guaranteeing credit. However, on a revocable continuing guaranty of credit, the creditor does owe a duty of disclosure to a surety prior to every new extension of credit to the principal. Each extension of credit creates a new suretyship contract because a revocable continuing guaranty is merely a continuing offer which the creditor accepts each time he extends credit to the principal. The creditor owes the same duty of disclosure immediately prior to each new extension of credit as it owes at the inception of the suretyship relationship (*70 Cal. 2d 81, 92-93)* . The Court cited with approval the Restatement of Security and its prescription of three conditions prerequisite to the imposition of a duty on a creditor to disclose facts it knows about the debtor to the surety. Those conditions are: (1) the creditor has reason to believe that the facts materially increase the risk beyond that which the surety intends to assume; (2) the creditor has reason to believe that the facts are unknown to the surety; and (3) the creditor has a reasonable opportunity to communicate the facts to the surety. The creditor's failure to disclose those facts to the surety prior to an extension of further credit to the debtor will discharge the surety from liability on the subsequent loan only if all three conditions are satisfied. If the evidence fails to establish any one of the three factors, any judgment discharging a surety from liability because of a breach of a duty of disclosure cannot stand (*70 Cal. 2d 81, 93-94)* . The Court, in reviewing the evidence, said that it established that plaintiff knew about the principal's inability to pay their federal taxes without a loan, but it did not establish that plaintiff had reason to believe that this fact materially increased the risk beyond that which defendant intended to assume. No evidence disclosed the financial condition of the principals at the time the guaranty was executed. Moreover, no evidence described the risk defendant intended to assume or whether plaintiff had reason to know what risk defendant intended to assume. Thus, evidence could not support a finding that the principals' inability to pay their taxes without a loan materially increased defendant's risk, nor that plaintiff had reason to believe this fact materially increased defendant's risk (*70 Cal. 2d 81, 95-96)* .

In ***Bank of Santa Ana v. Molina*** *(1969) 1 Cal. App. 3d 607, 81 Cal. Rptr. 885* , a construction business applied for a loan of credit with plaintiff. Plaintiff asked for continuing guaranties. Each of the three partners of the business and defendant signed a separate form of guaranty provided by plaintiff. Plaintiff made a loan, and payments were made until only a small portion remained unpaid. Thereafter plaintiff made additional loans to the principal business. When they were not paid, plaintiff brought an action for the monies owed. The trial court entered judgment against defendant. Defendant appealed.

The court of appeal affirmed. Defendant raised many contentions on appeal. The court cited *Sumitomo Bank of Cal. v. Iwasaki (1968) 70 Cal. 2d 81, 73 Cal. Rptr. 564, 447 P.2d 956* , discussed *above*, in rejecting defendant's contention that plaintiff failed in its duty of disclosure to defendant. Defendant failed to show by a preponderance that the facts known to plaintiff and unknown to defendant materially increased the risk beyond that which the creditor had reason to believe the surety intended to assume. The only evidence introduced by defendant was rejected by the jury, indicating that plaintiff received a general continuing guaranty not limited to a specific loan, containing language that permitted renewals and additional loans, furnished and solicited by the debtor. The essence of the nondisclosure defense is that the creditor has reason to know that certain risks were not within the contemplation of the guarantor, and has reason to believe that information possessed by the creditor was unknown to guarantor and that the information concerned activity of the debtor that might materially increase those risks. Since plaintiff had no information that defendant would deny that he had executed the guaranty, no source of information as to what risks he contemplated was shown except

the contents of the guaranty itself (*1 Cal. App. 3d 607, 619-622)* .

[b] Creditor Need Not Investigate for Surety's Benefit

Sumitomo Bank of Cal. v. Iwasaki *(1968) 70 Cal. 2d 81, 73 Cal. Rptr. 564, 447 P.2d 956* is discussed in *§ 222.305[3][a]*.

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22-222 California Points & Authorities §§ 222.306-222.319

[Reserved]

§§ 222.306[Reserved]

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F. Procedures Available To Parties In Suretyship Relationship

22-222 California Points & Authorities § 222.320

§ 222.320 Supporting Contention That Surety May Bring Action Against Principal to Compel Performance or Seek Reimbursement [Civ. Code §§ 2846-2848; Code Civ. Proc. § 1050]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Name*], THE SURETY, IS ENTITLED TO BRING AN ACTION AGAINST _____ [*name*], THE PRINCIPAL, TO _____ [COMPEL THE PRINCIPAL TO PERFORM ITS OBLIGATION *and/or* COLLECT REIMBURSEMENT FROM THE PRINCIPAL FOR ALL DISBURSEMENTS MADE ON ITS BEHALF], BECAUSE _____ [THE PRINCIPAL'S OBLIGATION HAS BECOME DUE *or* THE SURETY HAS PAID THE OBLIGATION TO _____(*name*), THE CREDITOR].

[*EITHER*]

A. Surety May Compel Principal to Perform. A surety may compel the principal to perform the obligation when it becomes due and before the surety has paid it (*Civ. Code § 2846*; *Code Civ. Proc. § 1050*; *Kreling v. Kreling (1897) 118 Cal. 413, 419, 50 P. 546* ; *Karn v. Wills (1942) 50 Cal. App. 2d 604, 606-609, 123 P.2d 640*).

[*Optional*] **B. Creditor May Be Codefendant in Surety's Action.** The creditor may be made a codefendant in an action brought by the surety to compel the debtor to perform the obligation, provided the creditor can itself enforce performance and neglects or refuses to do so (*Eastin v. Roberts, Carpenter & Co. (1937) 19 Cal. App. 2d 567, 571, 66 P.2d 224* ; *Josephian v. Lion (1924) 66 Cal. App. 650, 657, 227 P. 204*).

[*AND/OR*]

C. Surety Entitled to Reimbursement From Principal if Surety Satisfies Any Part of Principal Obligation. If a surety satisfies all or any part of the principal obligation, whether with or without legal proceedings, the principal is bound to reimburse what the surety has disbursed, including necessary costs and expenses; the surety is entitled to enforce every remedy that the creditor then has against the principal to the extent of reimbursing what the surety has expended (*Civ. Code §§ 2847, 2848*; *Anchor Casualty Co. v. Strube (1963) 221 Cal. App. 2d 29, 32, 34 Cal. Rptr. 295* ; *Filippi v. McMartin (1961) 188 Cal. App. 2d 135, 140, 10 Cal. Rptr. 180*).

[*Optional*] **D. Statutory Subrogation Remedy Is Not Exclusive.** *Section 2848 of the Civil Code* is not the exclusive measure of a surety's rights to subrogation; it is merely declaratory of the common law on the subject (*Estate of Elizalde (1920) 182 Cal. 427, 432-433, 188 P. 560* ; *Commercial Standard Ins. Co. v. Bank of America (1976) 57 Cal. App. 3d 241, 246-247, 129 Cal. Rptr. 91*).

[*Optional*] **E. Subrogation Available to Surety When Premature Payment by Principal Increased Surety's Liability.** The surety has the right to subrogation in the amount of its increased liability following a premature payment by the principal debtor that increases the surety's liability (*Civ. Code §§ 2847, 2848*; *United States Fid. & Guar. Co. v. Oak Grove Union School Dist. (1962) 205 Cal. App. 2d 226, 231-233, 22 Cal. Rptr. 907*).

[*Optional*] **F. Surety's Rights Coextensive With Obligation Guaranteed.** A guarantor who pays the principal obligation and receives an assignment of that obligation from the creditor is entitled to enforce that obligation against the principal in accordance with its terms[, including "default interest" and attorney's fees required incurred in the action against the principal even if the guarantor did not pay default interest to the creditor or incur attorney's fees in its dealings with the creditor] (*Flojo Internat., Inc. v. Lassleben (1992) 4 Cal. App. 4th 713, 721-723, 6 Cal. Rptr. 2d 99* ; *see Civ. Code § 2848*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that the surety may bring an action against the principal. *Civ. Code § 2846* and *Code Civ. Proc. § 1050* permit the surety to compel the principal to perform on the principal contract. *Civ. Code § 2847* permits the surety to require reimbursement from the principal for disbursements made on his or her behalf on the underlying obligation, whether or not the creditor brought legal proceedings to require payment by the surety. *Civ. Code § 2848* permits the surety to be subrogated to the creditor's rights and enforce every remedy that the creditor has against the principal if the surety has satisfied the principal's obligation. Alternative Paragraph A may be used by the surety to compel the principal to perform the obligation when it is due and before the surety has paid any part of it. Optional Paragraph B may be used when the surety wishes to include the creditor as a codefendant in an action to compel the principal's performance. Alternative Paragraph C may be used by the surety when the surety has satisfied all or any part of the principal obligation. Optional Paragraph D may be used if the surety wishes to employ other remedies against the principal in addition to its statutory right to subrogation. Optional Paragraph E may be used if the principal debtor made a premature payment, thereby increasing the surety's liability and the surety seeks reimbursement for that amount. Counsel may use both Alternative Paragraphs A and C if only part of the principal's obligation has been satisfied by the surety, and the surety wants reimbursement for that paid portion and wants to compel the principal to perform on the remaining obligation rather than pay and seek reimbursement later.

The authority in Optional Paragraph F goes further than reimbursement and holds that a surety that receives an assignment of the debt from the creditor after having paid the debt can enforce that obligation against the principal in accordance with its terms.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context

in which counsel wishes to raise the substantive issue of the remedies available to the surety. For example, this argument may arise in opposing a demurrer premised on the argument that reimbursement and subrogation pursuant to *Civ. Code §§ 2847* and *2848* are not available to the surety [*see, e.g., Commercial Standard Ins. Co. v. Bank of America (1976) 57 Cal. App. 3d 241, 246-247, 129 Cal. Rptr. 91]* . These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel might include facts illustrating that the principal's debt for which the surety guaranteed performance had become due and that the surety had been notified by the creditor that it held the surety liable [*see Civ. Code § 2846*]. If the surety has paid any or all of the principal obligation, counsel should present evidence of the amount, form, and date of payment, as well as any necessary costs and expenses [*see Civ. Code § 2847*].

[b] Related Pleading and Practice Forms

For forms relating to suretyship, see California Forms of Pleading and Practice, Ch. 538, *Suretyship, Bonds, and Undertakings* (Matthew Bender). For forms relating to subrogation, see Ch. 536, *Subrogation* in that publication.

[c] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing the occurrence of subrogation, see Ch. 220, *Subrogation* .

[d] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 222.324* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Surety May Compel Principal to Perform

In ***Kreling v. Kreling*** *(1897) 118 Cal. 413, 50 P 546* , plaintiff's husband died intestate. Plaintiff was appointed administratrix of his estate. Prior to his death, the deceased was in partnership with defendant, his father, engaged in various enterprises, and with his brothers in operating a theater. A large amount of the property owned by the firms was recorded in the name of the deceased. After plaintiff was appointed administratrix, several suits were commenced by defendant and the deceased's brothers to determine the ownership of various properties claimed as part of his estate. The parties entered into a written agreement by which they compromised all their differences. The court approved the agreement, which provided that plaintiff convey to defendant money and parcels of land and that defendant pay two promissory notes executed on the partnership's behalf. Defendant did not pay the notes, although requested to do so by plaintiff and the holder bank. The bank brought an action against plaintiff to recover the amount due and foreclose a mortgage on other land owned by plaintiff. Plaintiff brought an action against defendant to compel him to pay the notes. Defendant's demurrer, based on several grounds, was overruled. The trial court entered a decree directing defendant to specifically perform the agreement. Defendant appealed.

The Supreme Court affirmed. In addition to its other findings, the Court upheld the appropriateness of the action. By the terms of the agreement, defendant assumed the payment of notes to the bank. By doing so, defendant became the principal debtor in regard to the estate, and the estate became a surety. Plaintiff was authorized to bring an action to enforce the payment without first making payment herself (*118 Cal. 413, 419)* .

In ***Karn v. Wills*** *(1942) 50 Cal. App. 2d 604, 123 P.2d 640* , defendant partnership operated a tire store. Plaintiff and defendant contracted for plaintiff's procuring tires for the partnership for a percentage of the store's profits. Plaintiff

contracted with defendant tire company for the tires, guaranteeing payment by defendant partnership. Defendant tire company delivered tires to defendant store and defendant store agreed to make installment payments and executed a promissory note. On default in the first monthly payment, plaintiff brought action against defendant partnership, joining it and defendant tire company. The trial court issued a wit of attachment. The trial court later denied defendant's motion to discharge the writ of attachment. Defendant partnership appealed.

The court of appeal affirmed. The court framed the issue as whether an attachment could properly issue in an action by a surety to compel the principal obligors to pay and satisfy the principal obligation due another when the surety has not paid the principal obligation and there is no allegation of any indebtedness due and payable to plaintiff. While *Civ. Code § 2846* permits a surety to maintain an action against the debtor after an obligation becomes due and before that surety has paid it, defendant maintained that such action is wholly equitable in nature and will not support an attachment. The court explained that the theory underlying *Civ. Code § 2846* is of equitable origin, and is based on the duty of every person to perform his or her agreements; acting on this consideration a court of equity will enforce the actual accomplishment of a thing stipulated for on the ground that what is lawfully agreed to be done ought to be done. Under this rule a surety may bring an action to enforce payment of the obligation by the principal without first making payment himself or herself. The court said a surety against whom a judgment has been rendered may, without making payment itself, proceed in equity against the principal to subject the estate of the latter to the payment of the debt; a surety need not defer the action until the creditor has obtained judgment against the surety, or until the surety has paid the debt. Defendant tire company relied on its contract of guaranty with plaintiff by the terms of which plaintiff guaranteed payment of all goods sold by defendant company to defendant partnership. The action was one for the recovery of a specific sum of money on an express contract, and therefore an attachment should issue regardless of the fact that the exercise of the equitable power of the court is also incidentally involved (*50 Cal. App. 2d 604, 606-609)* .

[b] Creditor May Be Codefendant in Surety's Action

In ***Eastin v. Roberts, Carpenter & Co.*** *(1937) 19 Cal. App. 2d 567, 66 P.2d 224* , plaintiff brought an action against the copartners of a firm to recover on a promissory note executed to her by the firm. The firm had undergone many changes in partners since the obligation was incurred. One defendant filed a cross complaint, alleging that cross defendant had promised to pay plaintiff's note through the articles of partnership. Cross defendant's motion to strike the cross complaint was denied, as was his demurrer. The trial court judgment was in favor of plaintiff and against cross defendant. Cross defendant appealed.

The court of appeal affirmed. Defendant was clearly liable to plaintiff. The court went on to say that by virtue of an enforceable promise to a debtor to pay the debt, the promisor becomes the true debtor between the parties, while the promisee occupies the relation of surety, and the creditor may enforce the original obligation against either or both. *Civ. Code § 2846* permits the surety to maintain an action against the debtor to compel the debtor to pay the debt after it becomes payable or to perform the principal obligation. The surety may bring the action before he or she has paid it and whether he or she has been sued by a creditor or not. The creditor may be made a codefendant, provided the creditor can itself enforce performance and neglects or refuses to do so (*19 Cal. App. 2d 567, 571)* .

In ***Josephian v. Lion*** *(1924) 66 Cal. App 650, 227 P 204* , plaintiff claimed to be a surety on the obligation on which she alleged that defendant was the principal. Plaintiff brought suit to compel defendant to perform the obligation that was due. The obligation arose out of a transaction in which plaintiff executed a promissory note and offered as security a mortgage on her real property. Defendant was plaintiff's son-in-law and asked her for a loan, promising to pay the note and hold her harmless if she would borrow the money, execute a note, and mortgage her property as security for the note. The mortgage was later transferred to defendant creditor, who was a made a party defendant as creditor of defendant. The trial court judgment was for plaintiff and decreed that defendant pay the note to defendant Conn, that defendant Conn accept the payment, cancel the note, and release the property. Defendant appealed.

The court of appeal affirmed. The court's discussion of the case was thorough and addressed all of defendant's varied

contentions. That a surety may maintain a suit in equity to compel the principal to pay the obligation is unquestionably allowed by *Civ. Code § 2846*. The theory underlying *Civ. Code § 2846* is of equitable origin, and proceeds on the consideration of natural justice that a person must perform his or her agreement. A court of equity, exercising its discretion, will enforce the actual accomplishment of a thing that has been stipulated to on the ground that what is lawfully agreed to be done ought to be done. After an obligation becomes payable, the surety, before he or she has paid it, and whether he or she has been sued by the creditor or not, may maintain a suit in equity against the debtor to compel him or her to pay the debt or perform the obligation, provided the creditor can itself enforce the payment or performance and neglects or refuses to do so. The creditor is, of course, made a codefendant (*66 Cal. App 650, 657)* . Defendant contended that the remedy of *Civ. Code § 2846* was not available to plaintiff, because he never executed a writing, or promised to pay the mortgagee, or at any time ever became a debtor, principal or otherwise, to the mortgagee, concluding that plaintiff could not be a surety for him (*66 Cal. App 650, 658)* . The court responded that on consummation of the loan and the agreement of plaintiff to secure and assure the repayment thereof, the relation between them became that of principal and surety: defendant as principal, because it was his debt and he promised to repay it; plaintiff as surety, because she executed the note and hypothecated her property as security for the repayment of the debt, thus becoming a surety in a double sense (*66 Cal. App 650, 661)* . The complaint stated a case under *Civ. Code § 2846*. The decree, by it own term, became a lien on any property of defendant not exempt from execution (*66 Cal. App 650, 665)* .

[c] Surety Entitled to Reimbursement From Principal if Surety Satisfies Any Part of Principal Obligation

In ***Anchor Casualty Co. v. Strube*** *(1963) 221 Cal. App. 2d 29, 34 Cal. Rptr. 295* , the corporation of which defendant was president instituted a claim and delivery action for which plaintiff, as surety, issued a claim and delivery bond. Defendant signed as an individual a separate indemnity agreement that provided that he would indemnify the surety against all loss and expenses that plaintiff might sustain by reason of the undertaking on the bond. In the ensuing litigation, judgment was against the corporation for which plaintiff issued the bond. When the corporation went bankrupt, recovery was against plaintiff. Plaintiff brought action to recover from defendant the damages it incurred. The trial court judgment was for plaintiff. Defendant appealed.

The court of appeal affirmed. *Civ. Code §§ 2847* and *2848* give a surety a cause of action against the principal when the surety has satisfied the principal obligation. Furthermore, the indemnification agreement set out charges for which defendant promised to pay plaintiff. While the indemnification agreement spelled out in more detail the extent of plaintiff's rights, it added little to the substance of those rights (*221 Cal. App. 2d 29, 32)* .

In ***Filippi v. McMartin*** *(1961) 188 Cal. App. 2d 135, 10 Cal. Rptr. 180* , plaintiffs were subcontractors who furnished labor and material in the construction of a building on defendant's land. In their action for recovery of money due them and for foreclosure of mechanic's liens that each had recorded, plaintiffs also named the contractor and the contractor's surety as defendants. Among the cross complaints filed was one by defendant owner against the contractor and surety, in which she requested that they be required to pay plaintiffs directly or to reimburse her in the amount of any judgment for plaintiffs against her. Defendant surety answered the cross complaint by asserting that defendants contractor and owner committed fraud by misrepresenting defendant contractor's assets, and claimed that the suretyship was not enforceable by defendant owner. The trial court rendered judgment that provided, among other things, that plaintiff recover from defendants contractor and surety, that defendant owner take nothing against defendant surety, but that she recover from contractor any loss she sustained, and that if defendant surety paid the amount due plaintiffs, defendant surety would be subrogated to all of the rights of plaintiffs under the judgment, including liens. Defendant owner appealed.

The court of appeal affirmed. Absent an owner's fraud in bringing about the issuance of the bond, a surety who has paid the claims of valid lien claimants is subrogated to the rights of former lien claimants as against the principal but not as against the property. However, the surety may proceed against the property of the owner whose fraud gave rise to the surety's liability to laborers or materialmen. In partial support of her position that defendant surety can have no lien

against her property, defendant owner cited *Civ. Code §§ 2847*, *2848*, and *2909* (extinction of lien by performance). The court recognized that the codes are silent on the subject of fraud committed on the surety by the owner of the bond. However, in the absence of a clearly expressed legislative intent to the contrary, they cannot be construed as designed to reward or to place a protective cloak around those guilty of fraud (*188 Cal. App. 2d 135, 139)* . The prerequisites to subrogation are (1) payment must have been made by the subrogee to protect its own interest; (2) the subrogee must not have acted as a volunteer; (3) the debt paid must be one for which the subrogee was not primarily liable; (4) the entire debt must have been paid; and (5) subrogation must not work any injustice to the rights of others. The court found each element to be present (*188 Cal. App. 2d 135, 140)* .

[d] Statutory Subrogation Remedy Is Not Exclusive

In ***Estate of Elizalde*** *(1920) 182 Cal. 427, 188 P 560* , a deceased had died intestate, leaving his widow and daughter as his heirs. The administrator of his estate died without a final accounting, although he had filed four separate accounts. After the daughter was appointed administratrix, she filed an action against the sureties on the administrator's bond, to which suit the former administrator's administrator became a party defendant. The trial court judgment was against the sureties. The sureties paid the judgment in fulfillment of their bond obligations and then appealed the decision, seeking to be credited with the amount of advances made by the administrator to the widow and the amount of his commissions. The court of appeal held that such credits, if proper, could only be allowed on the settlement of the final account and decree of distribution. When the administratrix filed the final account, the sureties filed a contest and requested the credits. The trial court judgment was for the contestants. The court found the contestants were subrogated to the rights of the administrator and should recover the credits from the estate. The heirs appealed.

The Supreme Court affirmed. The heirs argued that the court was wrong in concluding that the contestants were entitled to be subrogated to the rights of their principal to a setoff against the estate. They argued that *Civ. Code § 2848* defines and limits the right of subrogation of sureties and that as so defined and limited it does not permit the sureties to claim the benefit of any rights that their principal might have had against the estate. *Civ. Code § 2848* provides that a surety, on satisfying the obligation of the principal, is entitled to enforce every remedy that the creditor then has against the principal to the extent of reimbursing what has been expended, and also to require all cosureties to contribute thereto, without regard to the order in which they became cosureties. The heirs reasoned that the contestants, by virtue of their suretyship and the doctrine of subrogation, on payment by them of the judgment obtained against them as sureties, became subrogated to only the remedies that the administratrix had against the administrator or his estate, and not to any rights of the administrator against the estate. The Court observed that the heirs' reasoning might be true if *Civ. Code § 2848* comprehensively and exclusively measured the rights of sureties to subrogation. That is not the case, and it is merely declaratory of the common law on the subject and controlling only so far as it goes. It does not appear that the Legislature intended to announce all the law on the subject. The common law, except so far as it was inapplicable because of court-imposed conditions or statutory modifications, still remains in force (*182 Cal. 427, 432-433)* . The construction advocated by the heirs, which would confine the surety's rights of subrogation to those derivable from the creditor, is not the true rule. The contestants had a right to adjudication of their rights and obligations under the bond, without thereby losing their equitable right of subrogation (*182 Cal. 427, 434)* .

In ***Commercial Standard Ins. Co. v. Bank of America*** *(1976) 57 Cal. App. 3d 241, 129 Cal. Rptr. 91* , landowners contracted with a contractor for the construction of a duplex. The landowners obtained a construction loan from cross defendant bank. As a condition to granting the loan, cross defendant required the contractor to post performance and labor and material payment bonds. The contractor, as principal, and cross complainant, as surety, executed the bonds. After the contractor defaulted, the owner filed a complaint against defendants surety and contractor, seeking damages. Defendant surety cross complained against the owner and contractor, and against cross defendant bank, alleging implied indemnification, equitable subrogation, and negligence. The trial court sustained cross defendant's general demurrer without leave to amend. Cross complainant appealed.

The court of appeal reversed the decisions in the equitable subrogation and negligence causes of action. In relation to

subrogation, cross complainant contended that on making good the owner's loss resulting from the contractor's default, it became subrogated to the owner's rights against all malefactors, including cross defendant. Cross defendant contended cross complainant's right to subrogation was negated by *Civ. Code §§ 2847* and *2848*, and cited the language saying that the surety has no claim for reimbursement against persons other than the principal and cosureties, though others may have been benefited by its act. Cross defendant contended that cross complainant was subrogated to the right of owner against the contractor, but not against third persons, including itself. The court was not persuaded by cross defendant's argument. *Civ. Code § 2848* does not comprehensively and exclusively measure a surety's rights to subrogation; it is merely declaratory of the common law on the subject and controlling only so far as it goes. Moreover, the court cited cases that approved application of the doctrine of subrogation to the creditor's rights against third persons when the surety's equities were superior to those of the third-party wrongdoer (*57 Cal. App. 3d 241, 246-247)* .

[e] Subrogation Available to Surety When Premature Payment by Principal Increased Surety's Liability

In ***United States Fid. & Guar. Co. v. Oak Grove Union School Dist.*** *(1962) 205 Cal. App. 2d 226, 22 Cal. Rptr. 907* , defendant school district contracted with a building contractor who had obtained a bond from plaintiff. After progress payments had been earned and paid, a final payment was made to the contractor even though several subcontractors had filed stop notices. The sum was insufficient to pay the remaining claims of laborers and materialmen, including those who had filed stop notices. Plaintiff paid all claims. Then, contending that it was subrogated to the rights of the stop notice claimants, it brought an action against defendant for the amount represented by the stop notices. The trial court overruled defendant's demurrer and its motion for nonsuit and rendered judgment for plaintiff. Defendant appealed.

The court of appeal affirmed. Initially the court explained the function of stop notices. In a public works contract there can be no lien; stop notices provide protection to subcontractors against defaulting contractors. When the notice is filed, the claimant immediately has a right against those earnings held by the public agency (*205 Cal. App. 2d 226, 230-231)* . Before addressing defendant's other contentions, the court considered the subrogation issue and held that plaintiff was subrogated to the stop notice rights of the claimants. When a surety discharges a claim against its principal, any lien that secures that claim is likewise discharged. Plaintiff contended that it could be subrogated to the rights of the stop claimants whose claims it paid. The court agreed. The right of a surety to be subrogated to the rights of the laborers and materialmen whose claims it has paid pursuant to the terms of its bond is declared in *Civ. Code § 2848* (*205 Cal. App. 2d 226, 231-232)* . Defendant had paid the contractor prematurely and in disregard of the stop notices. The surety's obligation was to secure the owner against default by the contractor in paying for material and labor contributed to the improvement of the owner's premises. When the owner makes a premature payment to the contractor in disregard of a stop notice, the surety is relieved from protecting the owner pro tanto and is entitled to receive from the owner the amount that the owner has contributed to the contractor's default, which amount the surety would not have been required to pay had the owner complied with the stop notice (*205 Cal. App. 2d 226, 232-233)* . By paying the subcontractors, plaintiff was subrogated to the subcontractors' rights. To allow defendant to pay a contractor after stop notice and then say that the funds as well as the right to recover against it are all gone would strip any value from the stop notice procedure and from the right of subrogation. Defendant's position would make the right of subrogation very hollow, for the surety would be in the position of having no assurance that whatever contract funds remained would be available to mitigate its liability for labor and material (*205 Cal. App. 2d 226, 233-234)* .

[f] Surety's Rights Coextensive With Obligation Guaranteed

Flojo Internat., Inc. v. Lassleben *(1992) 4 Cal. App. 4th 713, 6 Cal. Rptr. 2d 99* , was a declaratory relief action between a corporation and one of its former principals arising out of obligations undertaken by each in connection with a reorganization and buyout. Defendant, by separate guaranty agreement, guaranteed a $75,000 note payable by the corporation to California First Bank. The note provided for interest at the bank's prime rate plus two percent; however, interest on the unpaid balance following maturity increased to prime plus four percent. The note also contained an attorney's fee provision. When the note came due and was not paid, the bank contacted defendant, who paid the full amount to the bank. Without marking the note "paid," the bank delivered the note to defendant with an assignment of all

its right, title, and interest in the note. Defendant assigned the note to his son, who cross-complained on it. The trial court granted judgment in accordance with a summary judgment, awarding the son the amount paid on the note plus interest at the legal rate from the date of payment. Cross-complainant appealed, contending he was entitled to the increased rate of interest and to attorney's fees in accordance with the terms of the note.

The court of appeal agreed with cross-complainant and reversed and remanded for recalculation of interest at the increased rate to the date of judgment (*4 Cal. App. 4th 713, 723)* . The opinion analyzed the issue under the Commercial Code, stating that it involved a transferee's rights under that statute (*4 Cal. App. 4th 713, 716)* . and that defendant was an accommodation party under former Com. Code § 3415 [*see now Com. Code § 3419*]. However, to avoid deciding whether an accommodation party must sign the instrument itself [*see Com. Code § 3419(a)* (party who signs instrument as accommodation party)], the court based its conclusion on *Civ. Code § 2848* (*4 Cal. App. 4th 713, 722)* . Under the Commercial Code, the court said, cross-complainant was entitled to enforce the note in accordance with its terms. Those terms included an increased default interest rate and an award of attorney's fees (*4 Cal. App. 4th 713, 721)* . Under *Civ. Code § 2848*, a surety who satisfies the obligations of the principal is subrogated to the rights of the holder and "is entitled to enforce every remedy that the creditor then has against the principal ..." The concept of subrogation puts the surety in the shoes of the creditor whose claim it has paid, according to the surety all the creditor's collection rights. Defendant as a surety therefore acquired and was entitled to enforce the rights to interest and attorney's fees provided by the note (*4 Cal. App. 4th 713, 722)* .

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CHAPTER 222 SURETYSHIP
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22-222 California Points & Authorities § 222.321

§ 222.321 Supporting Contention That Surety Is Entitled to Contribution From Cosureties [Civ. Code § 2848]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Name*], THE SURETY, HAS PAID _____ [ALL *or* MORE THAN HIS/HER/ITS PROPORTIONATE SHARE] OF THE PRINCIPAL'S OBLIGATION AND THUS IS ENTITLED TO REQUIRE _____ [*name(s*)], THE _____ [COSURETY *or* COSURETIES], TO CONTRIBUTE _____ [HIS/HER/ITS *or* THEIR] PROPORTIONATE SHARE(S), WITHOUT REGARD TO THE ORDER IN WHICH THEY BECAME COSURETIES [AND DESPITE THE FACT THAT ONE COSURETY HAS BEEN RELEASED].

A. Surety Who Has Paid More Than Its Proportionate Share of Obligation May Seek Contribution From Cosureties. A surety who pays more than his or her proportionate share of an obligation of the principal is entitled to require all of his or her cosureties to contribute their proportionate share of the obligation, without regard to the order in which they became cosureties (*Civ. Code § 2848*; *Overholser v. Glynn (1968) 267 Cal. App. 2d 800, 807, 73 Cal. Rptr. 628* ; *Jans v. Nelson (2000) 83 Cal. App. 4th 848, 855-856, 100 Cal. Rptr. 2d 106*).

[*Optional*] **B. Surety's Release of One Cosurety Does Not Affect Obligation of Other Cosureties.** When a surety has released a cosurety, the other cosureties remain under the same duty of contribution that they had originally. The obligation of the other cosureties is neither increased nor diminished by the fact that the surety entitled to contribution has agreed to forgo or postpone payment by one of them (*Overholser v. Glynn (1968) 267 Cal. App. 2d 800, 809, 73 Cal. Rptr. 628*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a party's contention that the surety is entitled to

contribution from cosureties when the surety has paid more than its proportionate share of the principal's obligation [*see Civ. Code § 2848*].

They may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of contribution among cosureties. For example, this argument may arise in opposing a motion for summary judgment or an appeal premised on the argument that the cosurety is not responsible for any part of the principal's obligation that was paid by the surety [*see, e.g., Overholser v. Glynn (1968) 267 Cal. App. 2d 800, 809, 73 Cal. Rptr. 628]* . This argument may also arise after judgment on a motion made pursuant to *Code Civ. Proc. §§ 882* and *883* (contribution among joint nontort debtors). These points and authorities may also be adapted for use in a trial brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, counsel might include facts showing that two or more persons executed separate guaranties, each for an equal, proportionate share of the amount of the principal's liability, that the creditor brought action against all the cosureties, and that the creditor recovered the total amount from one of them.

[b] Related Pleading and Practice Forms

For forms relating to contribution among joint obligors, see California Forms of Pleading and Practice, Ch. 300, *Indemnity and Contribution* (Matthew Bender). For forms relating to suretyship, see Ch. 538, *Suretyship, Bonds, and Undertakings* in that publication.

[c] Related Points and Authorities

For memoranda of points and authorities supporting and opposing contribution among joint obligors, see Ch. 115, *Indemnity and Contribution* in this publication.

[d] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 222.325* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Surety Who Has Paid More Than Its Proportionate Share of Obligation May Seek Contribution From Cosureties

In ***Overholser v. Glynn*** *(1968) 267 Cal. App. 2d 800, 73 Cal. Rptr. 628* , plaintiff and defendants were stockholders in an automobile rental business that financed its purchases through a bank with promissory notes secured by chattel mortgages on the vehicles. To provide additional security, the shareholders executed as individuals separate continuing guaranties. The business defaulted in its payment and the bank notified the guarantors of the default. The bank and the guarantors agreed that the business would sell the automobiles, thereby reducing the obligation to the bank. Plaintiff, the only shareholder with collateral acceptable to the bank, deposited securities with the bank on behalf of the guarantors. After the sale, the bank credited the business with the amount received and liquidated plaintiff's assets. When plaintiff paid the small amount remaining, the bank assigned to him the obligations secured by the guarantors and a promissory note executed by one defendant for the price of one of the automobiles. Plaintiff brought an action against the guarantors to obtain payment of their respective proportionate shares of the business debt. One of the coguarantors was not a part of the action. The trial court determined that each defendant was liable for his original share and that the defendant who had executed the promissory note was additionally liable for his note. That defendant appealed.

The court of appeal affirmed. Among the many contentions raised by defendant was the argument that plaintiff was not

entitled to contribution. The court disagreed, finding that the concept was well established. When one or several joint judgment debtors pays more than its proportionate share of the judgment, it is entitled to obtain a proportionate contribution from those jointly liable and may bring suit against one or more codefendants on the implied contract of each obligor to the others that they will share the burden equally. The doctrine applies to coguarantors who are jointly and severally liable to pay the principal obligation. The right of a guarantor to contribution against coguarantors is an obligation implied by law and is governed by equitable principles (*267 Cal. App. 2d 800, 807)* . When a guarantor has released a coguarantor, the other coguarantors remain under the same duty of contribution as they had originally; the release is a matter solely between the parties. The obligation of the other coguarantors is neither increased nor diminished by the fact that the guarantor entitled to contribution has agreed to forgo or postpone payment by one of them (*267 Cal. App. 2d 800, 809)* .

In ***Jans v. Nelson*** *(2000) 83 Cal. App. 4th 848, 100 Cal. Rptr. 2d 106* , a partnership borrowed $750,000 from a predecessor of Bank of America. The bank required each owner of the partnership to execute a general continuing guarantee in favor of the bank. After the partnership business ceased operations, the loan went into default and the bank sued all of the guarantors. The bank obtained judgments against some partners and entered into settlement agreements with others. Ultimately, one partner who had paid to the bank a portion of partnership debt for which all partners were coguarantors brought an action for contribution against the other partners. The trial court concluded that each solvent guarantor was responsible in equity for an equal share of the total sum paid to the bank. The court of appeal reversed. It first stated that the question presented--what is the appropriate contributory share among partners who are sureties of a partnership debt--had not been decided in any known published opinion (*83 Cal. App. 4th 848, 851)* . The court examined the "proportionate contribution" concept set forth in *Civ. Code §§ 1432, 2848* (*83 Cal. App. 4th 848, 855-856)* . It concluded that in a circumstance in which all limited partners execute guaranties of a partnership debt and there is no other express agreement concerning rights of contribution, equity requires the proportionate obligation for contribution to be based upon the ownership interest of the various guarantors. Thus, plaintiff was entitled to recover contribution from other solvent partners but the amount of contribution was limited to the excess of his actual payments over his own fair share of the debt (*83 Cal. App. 4th 848, 852, 858-859)* .

[b] Surety's Release of One Cosurety Does Not Affect Obligation of Other Cosureties

Overholser v. Glynn *(1968) 267 Cal. App. 2d 800, 73 Cal. Rptr. 628* , is discussed in *§ 222.321[3][a]*.

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22-222 California Points & Authorities § 222.322

§ 222.322 Supporting Contention That Creditor Is Entitled to Securities Held by Surety [Civ. Code § 2854]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Name*], THE CREDITOR, IS ENTITLED TO THE BENEFIT OF EVERYTHING THAT _____ [*name*], THE SURETY, HAS RECEIVED FROM _____ [*name*], THE PRINCIPAL, AS SECURITY FOR THE PERFORMANCE ON THE OBLIGATION [AND MAY COMPEL THE APPLICATION OF THAT SECURITY TO HIS/HER/ITS SATISFACTION].

Creditor Entitled to Security Held by Surety. The creditor is entitled to the benefit of everything which the surety has received from the principal debtor as security for the principal's performance on the obligation, and may compel the application of that security to his or her satisfaction on the maturity of the principal's obligation (*Civ. Code § 2854*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a creditor's contention that he or she is entitled to the benefit of the security that the surety received from the principal, and on the maturity of the obligation, may compel the application of it to the creditor's own satisfaction [*see Civ. Code § 2854*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the creditor's entitlement to securities held by the surety. For example, this argument may arise in opposing an appeal premised on the argument that the creditor is not entitled to the security given to the surety by the principal. The points and authorities may also be adapted for use in a trial brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel might allege the circumstances under which the principal gave surety a lien against certain

property as security for the performance of the obligation for which the surety guaranteed the principal's performance [*see Civ. Code § 2854*].

[b] Related Pleading and Practice Forms

For forms relating to suretyship, see California Forms of Pleading and Practice, Ch. 538, *Suretyship, Bonds, and Undertakings* (Matthew Bender).

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22-222 California Points & Authorities § 222.323

§ 222.323 Supporting Contention That Surety Is Entitled to Relief in the Nature of Quia Timet

[1] FORM

[*The following may be inserted in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Name*], AS SURETY FOR _____ [*name of creditor*] IS ENTITLED TO RELIEF IN THE NATURE OF A BILL OF QUIA TIMET, SPECIFICALLY _____ [*specify, e.g.,* TO HAVE _____ (*name of debtor*) ENJOINED FROM SPENDING, USING, CONVERTING, OR DISBURSING THE FUNDS S/HE TOOK FROM CREDITOR'S ESCROWS NUMBERS _____ (*specify*)].

A. Quia Timet Prevents Principle From Absconding. An action in the nature of a bill of quia timet allows a surety to prevent the principal from dissipating the funds necessary to pay or perform the bonded obligation if the surety (1) knows it will be called on to pay the debt or perform the obligation on bond, (2) suspects that the principal has some or all of the necessary funds to do so, and (3) fears that the principal may abscond with those funds (*Escrow Agents' Fidelity Corp. v. Superior Court (1992) 4 Cal. App. 4th 491, 493, 496, 5 Cal. Rptr. 2d 698*).

[*Optional*] **B. Quia Timet Is Equitable Remedy for Preventing Wrongs.** Quia timet is an action for equitable relief in the nature of a writ of prevention to accomplish the ends of preventionary justice. The remedy is applied to prevent wrongs or anticipated mischief and not merely to redress them when done (*Escrow Agents' Fidelity Corp. v. Superior Court (1992) 4 Cal. App. 4th 491, 494-495, 5 Cal. Rptr. 2d 698*).

C. Requisites for Relief by Quia Timet. To be entitled to relief by quia timet, the surety's obligation must have matured, but the surety need not yet have paid that obligation, and relief otherwise available must be inadequate (*Escrow Agents' Fidelity Corp. v. Superior Court (1992) 4 Cal. App. 4th 491, 494-496, 5 Cal. Rptr. 2d 698*).

[2] Comments

[a] Use of Form

These memorandum of points and authorities may be used to support the contention that a surety is entitled to relief in the nature of a bill in equity for quia timet (literally "because he fears"). This prejudgment remedy is often implemented by injunction, initially a temporary restraining order, preventing disbursement of funds, or by imposition of a constructive trust to prevent disbursement of funds pending final determination of the issue [*see, e.g.,* Fireman's Fund Insurance Co. v. S.E.K. Construction Co. (10th Cir 1971) *436 F.2d 1345 (TRO)* ; *Escrow Agents' Fidelity Corp. v. Superior Court (1992) 4 Cal. App. 4th 491, 5 Cal. Rptr. 2d 698* (constructive trust)]. Quia timet will not lie when some other remedy, such as attachment, can provide the necessary relief [*see, e.g., Karn v. Wills (1942) 50 Cal. App. 2d 604, 606-609, 123 P.2d 640* (action to compel principal's performance under *Civ. Code § 2846*; attachment available if principal and surety (quarantor) have contract out of which obligation arises)].

Older cases require that plaintiff's "fears be real" in the sense that the threat or impeding injury must be more than theoretical. There must be some reasonable basis for apprehension that cannot be remedied equally well by some other action, such as one to remove a cloud from title or to quiet title by setting aside a foreclosure sale or execution sale [*see, e.g., Archbishop of S.F. v. Shipman (1886) 69 Cal. 586, 589-590, 11 P. 343* (would not restrain execution sale at request of legal owner without evidence that any sale was scheduled or that any purchaser seemed interested when judgment debtor was stranger to title)].

Counsel should combine the points and authorities in this form with points and authorities relating to the procedural context in which he or she wishes to raise the issue of entitlement to this unique remedy [*see, e.g.,* Ch. 116, *Injunctions*]. Authorities related to other remedies may also be appropriately included to demonstrate that the relief available would not adequately protect the plaintiff's interests [*see, e.g.,* Ch. 12, *Accounting* , Ch. 40, *Claim and Delivery* , Ch. 95, *Eminent Domain* , Ch. 198, *Quieting Title* and Ch. 230, *Trust Deeds and Real Property Mortgages*].

[b] Related Pleading and Practice Forms

The prejudgment remedy of quia timet may be sought in an action for imposition of a constructive trust. Discussion of constructive trusts and forms for complaints may be found in California Forms of Pleading and Practice, Ch. 560, *Trusts* (Matthew Bender).

[3] Discussion of Authorities

[a] Quia Timet Prevents Principal From Absconding

Plaintiffs in ***Escrow Agents' Fidelity Corp. v. Superior Court*** *(1992) 4 Cal. App. 4th 491, 5 Cal. Rptr. 2d 698* , were a nonprofit corporation created pursuant to the Escrow Law (*Fin. Code § 17000 et seq.*) and its insurer. Plaintiff Escrow Agents' Fidelity Corp was formed to act as fidelity surety for the trust obligations of California licensed escrow agents to indemnify member agents against loss of trust obligations as a result of embezzlement, theft, or mysterious disappearance. Defendant was alleged to have embezzled $4 million from two escrow companies which filed Chapter 11 petitions in bankruptcy on November 11, 1990. One of the trustees in bankruptcy made a claim with plaintiffs for the $4 million, which claim plaintiffs are statutorily obligated to pay [*see Fin. Code §§ 17330, 17314*]. On November 21, 1990, plaintiffs filed suit against defendant alleging 8 causes of action: (1) quia timet and imposition of constructive trust; (2) subrogation, (3) unjust enrichment, (4) fraud and deceit, (5) negligence, (6) accounting, (7) implied indemnity, and (8) statutory reimbursement under *Civ. Code § 2847*. The trial court sustained the demurrer to the first cause of action without leave to amend, overruled the demurrer to the 7th cause of action for indemnity, and sustained the demurrer with respect to the other causes of action with leave to file a first amended complaint within 30 days after either, or both, if the plaintiffs paid any money to the trustee in bankruptcy. The trial court believed that the remedy of quia timet no longer existed in California, but had been replaced by other remedies such as injunction and attachment. Plaintiffs petitioned for writ of mandate.

The court of appeal issued a peremptory writ of mandate directing the trial court to vacate the portion of the trial court's order that sustained, without leave to amend, defendant's demurrer to the cause of action for quia timet (*4 Cal. App. 4th 491, 496)* . Although quia timet has by and large been abandoned in favor of other legal and equitable prejudgment remedies, it is by no means obsolete. Although rarely utilized in general practice, it is widely and effectively used in fidelity and surety bond cases (*4 Cal. App. 4th 491, 493)* . The court traced the origin of quia timet (literally "because he fears") as an action for equitable relief in the nature of a writ of prevention to accomplish the ends of preventionary justice. The remedy is applied to prevent wrongs or anticipated mischief and not merely to redress them when done. The party seeks the aid of the court because he or she fears some future probable injury to his or her rights or interests and not because an injury has already occurred which requires compensation or other relief (*4 Cal. App. 4th 491, 494)* . The court listed California cases applying the remedy, mostly involving real property, between 1886 and 1925, noting that even then it was used sparingly (*4 Cal. App. 4th 491, 494-495)* . To a great extent statutory remedies such as injunction, lis pendens, attachment, and claim and delivery now provide the necessary relief. However, these statutory remedies have not replaced quia timet in the fidelity and insurance industry. The court of appeal noted that several judges of the Los Angeles Superior Court have granted relief in cases similar to this one. The court cited federal cases for the proposition that no principle in equity is more familiar, or more firmly established, than the one that holds that a surety, *after the debt for which it is liable has become due,* without paying or being called on to pay it, may file a bill in equity in the nature of a bill in quia timet to compel the principal to exonerate it from liability for its payment, provided no rights of the creditor are rejudiced thereby. The doctrine is not premised on the mere fear of loss or liability prior to an obligation's maturity. Rather, only after the obligation becomes due, may the surety, before it pays, maintain a bill in equity against the debtor to pay the debt or perform the obligation, provided the creditor could enforce payment or performance but neglects or refuses to do so. Thus, quia timet is especially suited to surety cases (*4 Cal. App. 4th 491, 495)* .

The court noted that a surety is obligated by law to pay the creditor of its defaulting principal immediately on the principal's default or defalcation [*see* Civ. Code § 2708]. Although a surety may file an action at law to compel its principal to perform the obligation on bond when due [*see Civ. Code § 2846*], the fact that it may eventually obtain a judgment against the principal is of little comfort to the surety if, in the interim, the principal has absconded with the very funds that could have been used to satisfy the bond. Quia timet allows the surety to prevent the principal from dissipating those funds if the surety knows it will be called on to "pay the debt or perform the obligation" on bond, suspects that the principal has some or all of the necessary funds to do so, and fears that the principal may abscond with those funds (*4 Cal. App. 4th 491, 496)* .

[4] Additional Authorities

[a] Quia Timet Is Equitable Remedy for Preventing Wrongs

The court of appeal in *Gagossian v. Arakelian (1908) 9 Cal. App. 571, 99 P. 1113* , reversed a judgment for plaintiff to whom stock had been transferred, but who could not get the corporation to reissue the shares in plaintiff's name because defendant had obtained a judgment against the transferor and levied on and purchased the shares at the sheriff's sale. The court concluded that plaintiff might have a cause of action against the corporation, but none against the defendant. Although the action was one under the first part of *Code Civ. Proc. § 1050* (determining adverse claim), rather than under the part generally used by sureties (compelling one to satisfy a debt for which plaintiff is surety), the court said that *Code Civ. Proc. § 1050* provides for an action in the nature of a bill of quia timet, the object of which is to prevent a party from anticipated future probable injury to his or her rights or interests, for example when a surety is fearful of injury from neglect of its principal to pay the debt. *Code Civ. Proc. § 1050* incorporates only part of the remedy (*9 Cal. App. 571, 573)* .

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CHAPTER 222 SURETYSHIP
PART II. FORMS
F. Procedures Available To Parties In Suretyship Relationship

22-222 California Points & Authorities § 222.324

§ 222.324 Opposing Contention That Surety Is Entitled to Reimbursement From Principal [Civ. Code § 2847]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Name*], THE SURETY, IS NOT ENTITLED TO REIMBURSEMENT FROM _____ [*name*], THE PRINCIPAL, FOR ANY PAYMENTS MADE BY _____ [*name*], THE SURETY, BECAUSE _____ [_____ (*name*), THE SURETY, DID NOT DISBURSE ANY FUNDS *and/or* _____ (*name*), THE PRINCIPAL, HAD NOT DEFAULTED ON ITS OBLIGATION TO _____ (*name*), THE CREDITOR *and/or* ANY PAYMENTS TO _____ (*name*), THE CREDITOR, WERE MADE VOLUNTARILY *and/or* THE AGREEMENT BETWEEN _____ (*name*), THE SURETY, AND _____ (*name*), THE PRINCIPAL, TAKES PRECEDENCE OVER ANY IMPLIED REIMBURSEMENT OBLIGATION AND IT SETS FORTH DIFFERENT REPAYMENT TERMS].

[*EITHER*]

A. Surety May Be Reimbursed Only for Disbursements Required by Principal's Default. Reimbursement is available only if the surety has disbursed funds on behalf of the principal because the principal defaulted on its obligation. If the surety has not disbursed funds or the principal has not defaulted, reimbursement will not be allowed, even for costs and expenses (*Civ. Code § 2847*; *Pacific Indemnity Co. v. Harper (1939) 14 Cal. 2d 379, 385-387, 94 P.2d 586* (principal did not default); *Burge v. Michael (1963) 213 Cal. App. 2d 780, 784-785, 29 Cal. Rptr. 290* (no disbursement made)).

[*AND/OR*]

B. Surety Is Not Entitled to Reimbursement if Payment Was Made as Volunteer. When payment by the surety is made without submitting to suit, reimbursement will be allowed only when it can be shown that the principal's liability was clearly established and that the suit would have been a mere formality. When the surety pays the obligation as a volunteer, there is no entitlement to reimbursement from the principal (*Civ. Code § 2847*; *Ragghianti v. Sherwin (1961) 196 Cal. App. 2d 345, 351, 16 Cal. Rptr. 583*).

[*AND/OR*]

C. Express Agreement Between Surety and Principal Controls Over Implied Obligation of Principal to Reimburse Surety. When a surety pays a debt for which it is liable as surety, the payment extinguishes the debt, and the surety's remedy is not on the original obligation but against the principal on the principal's implied obligation to reimburse the surety. If there is an express agreement between the principal and surety governing reimbursement, the agreement will control as opposed to the implied agreement (*Berrington v. Williams (1966) 244 Cal. App. 2d 130, 134, 244 Cal. App. 2d 130, 134* ; *see Civ. Code § 2847*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that the surety is entitled to reimbursement from the principal. Paragraph A may be used when the surety makes a request for reimbursement prematurely, either before the principal defaulted or before an actual disbursement of funds. Paragraph B may be used when the surety voluntarily paid before payment was needed. Paragraph C may be used when an agreement exists between the principal and the surety that provides for repayment other than reimbursement.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the surety's right to reimbursement. For example, this argument may arise in support of a summary judgment based on the theory that there is no right to reimbursement [*see, e.g., Ragghianti v. Sherwin (1961) 196 Cal. App. 2d 345, 347, 16 Cal. Rptr. 583]* . These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel might allege facts illustrating that although the surety paid the amount requested by the creditor, payment was voluntary because the principal's obligation had not arisen, and there was no default by the principal necessitating payment.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 222.320*.

[b] Related Pleading and Practice Forms

For forms relating to suretyship, see California Forms of Pleading and Practice, Ch. 538, *Suretyship, Bonds, and Undertakings* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing the occurrence of subrogation, see Ch. 220, *Subrogation* .

[3] Discussion of Authorities

[a] Surety May Be Reimbursed Only for Disbursements Required by Principal's Default

In ***Pacific Indemnity Co. v. Harper*** *(1939) 14 Cal. 2d 379, 94 P.2d 586* , plaintiff issued a fidelity bond in which it agreed to pay any financial loss that defendant's employer sustained by reason of any dishonest act committed by defendant. Later, defendant's employer brought an action against plaintiff for damages on the bond by reason of financial losses it allegedly sustained because of defendant employee, who was not made a party to the action. Plaintiff surety prevailed in that action. Plaintiff surety then brought an action against defendant employee for the expenses sustained in connection with its defense in the earlier action. Plaintiff had not paid any part of the principal obligation of the bond, nor had defendant indemnified plaintiff for expenses. The trial court sustained defendant's demurrer without leave to amend and entered judgment accordingly. Plaintiff appealed.

The Supreme Court affirmed. The Court provided an exhaustive analysis of out-of-state precedent and authority on the issue of whether a surety sued alone on a suretyship contract who successfully defends the action so that it is not required to pay any part of the principal sum of the bond, but does incur defense expenses, is entitled to recover its disbursements from the principal. Finding no right to recovery, the court explained that the theory of law that implies an obligation on the part of a principal to reimburse the surety, if and when the surety pays the obligation of the principal, is based on equitable considerations. The liability of the principal depends on the damages suffered by the surety because of the default of the principal. When the surety has satisfied the principal's obligation, it is equitable that the principal should reimburse the surety. However, when the surety has not been called on to answer for the default of the principal and has not paid any part of the principal's obligation, no recovery of expenses should be imposed against the principal when the litigation out of which the expenses arose resulted, in effect, in a determination that there was no default on the part of the principal. When the contingency against which the surety had contracted does not arise, and the surety sustained no damages and incurred no liability on account of the acts, neglect, or default of the principal, in the absence of any express contract of indemnity the principal ought not to be charged with the payment of expenses incurred by the surety in an action brought by a third person. Quoting *Civ. Code § 2847*, the Court found that it presupposes the existence of a legal obligation against the principal and the subsequent satisfaction or discharge of some part of that obligation by the surety before necessary costs and expenses of the surety may be recovered. It only provides for a recovery of costs when the surety has disbursed some amount including necessary costs and expenses. *Civ. Code § 2847* also refers to what the surety has "disbursed," which in that term's general usage has reference to the paying out or the expending of money (*14 Cal. 2d 379, 385-387)* .

In ***Burge v. Michael*** *(1963) 213 Cal. App. 2d 780, 29 Cal. Rptr. 290* , defendant was accountant for plaintiff's restaurant. Because the financial condition of the business was precarious from the outset, to keep it operating, defendant personally guaranteed bank credits for plaintiff. Defendant also advanced money to plaintiff for which plaintiff executed a promissory note and a pledge of restaurant stock as security. Plaintiff brought an action seeking to quiet title to the stock. Defendant filed a cross complaint on the open-book account. The trial court entered judgment against plaintiff on the quiet title and in favor of defendant on his cross complaint. Plaintiff appealed. Another case was consolidated with the quiet title case at trial, but because the only relation was the parties, the court discussed them separately on appeal.

The court of appeal modified the judgment by deleting certain interest amounts, including interest charged for a blocked account. One of plaintiff's contentions disputed the interest on the blocked savings account. After defendant guaranteed plaintiff's credit at a bank, the bank demanded that defendant deposit $5,000 in a blocked savings account, the bank having the right to draw on the money if necessary. No withdrawal was made by the bank and the account was eventually unblocked, intact. During the period it was blocked, defendant charged plaintiff with interest on the money just as though plaintiff had received the money, and he credited plaintiff with a $5,000 payment when the account was unblocked by the bank. Defendant claimed that he made an advance of the money held in the blocked account. The court felt he acted as surety in posting the money. The rights of a surety for reimbursement from the principal are

specified in *Civ. Code § 2847*, which provides that if a surety satisfies the principal obligation, or any part thereof, whether with or without legal proceedings, the principal is bound to reimburse what the surety has disbursed, including necessary costs and expenses. The bank released the account intact, so there was no disbursement by defendant within the contemplation of *Civ. Code § 2847*. Unless the parties agree otherwise, a surety may sue only for reimbursement; the surety cannot recover interest on the surety deposit so long as it remains intact as a deposit only (*213 Cal. App. 2d 780, 784-785)* .

[b] Surety Is Not Entitled to Reimbursement if Payment Was Made As Volunteer

In ***Ragghianti v. Sherwin*** *(1961) 196 Cal. App. 2d 345, 16 Cal. Rptr. 583* , plaintiff and defendant entered into a contract whereby plaintiff would sell his real property to defendant and comply with all development and county requirements to enable defendant to construct houses on the property. Pursuant to that contract, plaintiff entered into a written agreement with the county for the construction of street improvements and drainage, and posted a bond for faithful performance. When the street contractor demanded payment from defendant and no payment was forthcoming, it brought an action against plaintiff. After the trial court held that the contractor had a valid lien on the subdivision for the work, the bond company paid the contractor and proceeded against plaintiff. Plaintiff paid the amount in dispute and then brought action against defendant. The trial court judgment was for defendant after granting defendant's motion for summary judgment. Plaintiff appealed.

The court of appeal affirmed. Defendant contended that the payment made by plaintiff was voluntary and did not furnish plaintiff with a right to reimbursement against defendant. The court agreed. Plaintiff based his right to reimbursement solely on the theory that he filed a bond with the county at defendant's request and that he was thus entitled to recover from defendant any payments made under the bond on defendant's implied promise of indemnity. Nowhere in the bond or in the agreement with the county did plaintiff ever agree to incur liability to any party other than the county. Plaintiff contended that the bond in favor of the county also applied to the contractors, laborers, and materialmen who performed work and supplied materials in performance of the project for which the bond was given as security. The court noted that that was not the law (*196 Cal. App. 2d 345, 347-348)* . Under the terms of the bond and the agreement with the county, plaintiff was bound to the county alone, and his payments in settlement of the contractor's claim were not made under any legal compulsion, but as a mere volunteer (*196 Cal. App. 2d 345, 350)* . According to *Civ. Code § 2847*, a surety may be entitled to reimbursement by the principal whether or not the surety's payment on behalf of the principal was compelled by actual legal proceedings. When that payment is made without submitting to suit, however, reimbursement will be allowed only when it can be shown that liability was clearly established and that the suit would have been a mere formality. Plaintiff chose to pay the claim and must be viewed as a volunteer and not entitled to reimbursement from defendant (*196 Cal. App. 2d 345, 351)* .

[c] Express Agreement Between Surety and Principal Controls Over Implied Obligation of Principal to Reimburse Surety

In ***Berrington v. Williams*** *(1966) 244 Cal. App. 2d 130, 52 Cal. Rptr. 772* , defendant executed a promissory note to a bank, and defendant's brother, plaintiff's assignor, signed the note as guarantor. When defendant defaulted on payment, the bank demanded payment from the guarantor. Plaintiff sued defendant to recover the amount the guarantor was compelled to pay. Defendant alleged a private oral agreement between him and the guarantor, resulting in an understanding that the reimbursement funds would be the proceeds from the sale of defendant's property and that because the property remained unsold, his reimbursement obligation was not due. Plaintiff alleged that the bank loaned defendant money without spelling out in the note any conditions, relying solely on the general credit of defendant, and denied that there was any agreement about the source of reimbursement funds. The trial court granted plaintiff's motion for summary judgment. Defendant appealed.

The court of appeal reversed. The rights of a guarantor are those given by the law of suretyship, which include contribution from other sureties, if any, and reimbursement from the principal debtor. The surety is not a purchaser and

cannot sue on the instrument as a holder (*244 Cal. App. 2d 130, 133)* . When a surety pays a debt for which it is liable as surety, the surety extinguishes the debt, and its remedy is not on the original obligation but against the principal on the principal's implied obligation to reimburse the surety. Citing earlier case law, the court explained the rights of the surety and principal. Full payment and performance by the surety extinguish the primary obligation; new rights and liabilities then arise. The principal must reimburse the surety for the monies expended, with interest, though not according to the terms of the primary obligation. The surety obtains the right to an action in assumpsit on the implied promise of the principal to make the surety whole. Thus, no right of action on the principal obligation ordinarily will pass to the surety, since it is deemed extinguished by the payment, and its action is for reimbursement on implied assumpsit arising from the enforced advancement for the principal (*244 Cal. App. 2d 130, 134)* . Plaintiff's suit was on the implied agreement of defendant to reimburse, not on the promissory note that was extinguished by the guarantor's payment. Plaintiff's argument in reliance on the absence of conditions in the note was not valid. In the absence of any express agreement between the guarantor and the principal, the guarantor's action for reimbursement is on an agreement implied in law, but if an actual agreement between the parties existed, that agreement controls. Thus, if it provided that reimbursement is to be made out of certain funds, that agreement may constitute a defense (*244 Cal. App. 2d 130, 135)* .

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22-222 California Points & Authorities § 222.325

§ 222.325 Opposing Contention That Surety Is Entitled to Contribution From Other Sureties--Sureties Are Successive Rather Than Cosureties [Civ. Code § 2848]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

_____ [*Name*], THE SURETY, DOES NOT HAVE THE RIGHT TO RECEIVE CONTRIBUTION FROM _____ [*name(s*)], THE ALLEGED _____ [COSURETY *or* COSURETIES], FOR ANY PART OF THE OBLIGATION OF _____ [*name*], THE PRINCIPAL, BECAUSE THE SURETY AND THE ALLEGED _____ [COSURETY *or* COSURETIES] ARE SUCCESSIVE SURETIES RATHER THAN COSURETIES AND NO RIGHT OF CONTRIBUTION EXISTS.

No Right of Contribution When Sureties Are Successive Sureties Rather Than Cosureties. If one surety in equity should bear the ultimate burden rather than the other surety, they stand in the position of successive sureties rather than cosureties. Whether they are cosureties or successive sureties depends on the inferences to be drawn from their contracts and the circumstances of the case. If they are successive sureties, there is no right of subrogation and the surety whose principal's default occasioned the loss will be liable (*Continental Casualty Co. v. Hartford Acci. & Indem. Co. (1966) 243 Cal. App. 2d 565, 571, 52 Cal. Rptr. 533*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that the surety may recover contribution from another surety. The ground of the opposition is that the relationship was that of successive sureties rather than cosureties [*see Continental Casualty Co. v. Hartford Acci. & Indem. Co. (1966) 243 Cal. App. 2d 565, 52 Cal. Rptr. 533]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of no contribution among sureties. For example, this argument may arise in supporting a demurrer by one alleged to be a cosurety claiming to be a successive surety without liability because there was nothing owing by its principal [*see, e.g., Continental Casualty Co. v. Hartford Acci. & Indem. Co. (1966) 243 Cal. App. 2d 565, 566-568, 52 Cal. Rptr. 533]* . These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should describe the circumstances under which the sureties guaranteed the performance of different principals for the payment of materialmen and the default by only one of the principals leading to liability for the surety who guaranteed that principal's performance [*see, e.g., Continental Casualty Co. v. Hartford Acci. & Indem. Co. (1966) 243 Cal. App. 2d 565, 52 Cal. Rptr. 533]* .

In an appropriate case, the points and authorities *set out in § 222.321* may be used to oppose the contention supported by these points and authorities.

[b] Related Pleading and Practice Forms

For forms relating to contribution among joint nontort obligors, see California Forms of Pleading and Practice, Ch. 300, *Indemnity and Contribution* (Matthew Bender). For forms relating to suretyship, see Ch. 538, *Suretyship, Bonds, and Undertakings* in that publication.

[c] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing contribution among joint obligors, see Ch. 115, *Indemnity and Contribution* . For forms of memoranda of points and authorities supporting and opposing the occurrence of subrogation, see Ch. 220, *Subrogation* .

[3] Discussion of Authorities

[a] No Right of Contribution When Sureties Are Successive Sureties Rather Than Cosureties

In ***Continental Casualty Co. v. Hartford Acci. & Indem. Co.*** *(1966) 243 Cal. App. 2d 565, 52 Cal. Rptr. 533* , plaintiffs were surety for the prime contractor in an Air Force base construction project. The plumbing work on the project was subcontracted to a business for which defendant was surety. The subcontractor failed to pay debts incurred for goods and materials furnished by its suppliers. Plaintiff was obliged to and did discharge that indebtedness. Plaintiff brought an action against defendant alleging that it was subrogated as a matter of law to the rights of its principal and had succeeded to a cause of action against defendant on its bond. The trial court entered a dismissal judgment after sustaining defendant's general demurrer. Plaintiff appealed.

The court of appeal reversed. Initially the court noted that the payment of the unpaid suppliers of the plumbers was not a voluntary act, but one compelled by law. After an analysis of the relationship and indemnification responsibilities between the sureties and the contractor's and subcontractor's bonds, the court addressed the issue of ultimate liability. Under some circumstances two persons may be cosureties for the same debt and may be required to share the loss, even when their liabilities originate in separate contracts. On the other hand, if one of them in equity should bear the ultimate burden rather than the other, they stand in the position of successive sureties. Whether they are cosureties or successive sureties depends on the inferences to be drawn from their contracts and the circumstances of the case. If the first of two successive sureties is forced to pay the debt, that surety is subrogated to the creditor's rights on the bond and may enforce it against the second surety. If a subcontractor's bond is put up in order to indemnify the prime contractor for any claim for which the latter may be held liable and for the payment of which the subcontractor is primarily liable, the subcontractor's surety is required to indemnify the principal contractor or the latter's surety for any liability imposed on

it for labor and materials furnished to the subcontractor (*243 Cal. App. 2d 565, 570-571)* . Defendant became surety for the subcontractor whose default occasioned the loss. Plaintiff issued its bond to the prime contractor, and the loss was not occasioned by any default on the part of its principal. The two sureties were successive sureties, and the loss in equity should fall on defendant, whose principal's default occasioned it (*243 Cal. App. 2d 565, 571)* .

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§ 225.06 Related Points and Authorities

§§ 225.07-225.19 [Reserved]

§ 225.20 Definition of Trespass--Necessary Elements Exist

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[3] Discussion of Authorities

[a] Elements of Trespass

§§ 225.21-225.39 [Reserved]

§ 225.40 Supporting Contention That Defendant Committed Actionable Trespass--Requisite Intent Present

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Intent Necessary for Liability

[b] Intent to Be in Place Where Trespass Occurred Sufficient

[c] Intent to Cause Damage or Harm Not Necessary

§ 225.41 Supporting Contention That Defendant Committed Actionable Trespass--Requisite Intent Present--Substantial Certainty That Acts Would Cause Entry of Matter

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Requisite Intent Present if Substantial Certainty That Acts Will Result in Entry of Matter on Property

§ 225.42 Opposing Contention That Trespass Occurred--No Requisite Intent

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[3] Discussion of Authorities

[a] No Liability for Indirect Trespass When Requisite Intent Not Established

§§ 225.43-225.59 [Reserved]

§ 225.60 Supporting Contention That Plaintiff Is Proper Party to Bring Action in Trespass--Plaintiff as Possessor

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Person in Actual Possession of Real Property Is Proper Plaintiff in Trespass Action

[b] Act of Possession

[c] Possessor's Title May Not Be Attacked Unless Defendant Claims Title

[d] Possessor Has Right of Action Against Owner

§ 225.61 Supporting Contention That Plaintiff Was Proper Party to Bring Action in Trespass--Plaintiff Has Existing Future Possessory or Ownership Interest

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[3] Discussion of Authorities

[a] Person With Future Possessory Interest Presently Existing May Bring Action for Trespass

[b] Owner Not in Possession May Bring Action to Recover Damages to Ownership Interest

§ 225.62 Opposing Contention That Plaintiff Is Proper Party to Bring Action in Trespass--Owner Does Not Have Existing Possessory Interest

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Possession Rather Than Title Is Required for Trespass Action

§§ 225.63-225.79 [Reserved]

§ 225.80 Supporting Contention That Trespass Occurred--Deposit of Material

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Presence of Material on Property Without Possessor's Consent Is Trespass

[b] Continuing Presence of Materials Deposited by Former Owner Is Trespass

[c] Trespass Occurs Even if Property Value Is Increased by Unauthorized Entry

§ 225.81 Supporting Contention That Trespass Occurred--Deposit of Material Without Personal Entry

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Activities Causing Deposit of Materials as Trespass

§ 225.82 Supporting Contention That Trespass Occurred--Indirect Injury to Property

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Trespass by Indirect Injury

[b] Trespass Through Vibrations

[c] Trespass Through Fire

[4] Additional Authorities

[a] Trespass Through Vibrations

§ 225.83 Supporting Contention That Trespass Occurred--Invasion of Possessory Interest in Airspace

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Airspace Above Land as Part of Land

[b] Temporary Invasion of Airspace Is Privileged if Reasonable

[c] When Flights Incident to Takeoffs and Landings Constitute Trespass

§ 225.84 Opposing Contention That Trespass Occurred--Entry of Intangible Matter Without Injury

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Intangible Intrusion Alone Is Not Trespass

§ 225.85 Opposing Contention That Trespass Occurred--Entry of Airspace Was Privileged

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Flight Is Lawful Unless Altitude Regulations Are Violated or Imminent Danger Is Posed to Persons or Objects on Land

[b] Flight Allowed in Zone of Approach to Public Airport Without Restriction or Hazard

§§ 225.86-225.99 [Reserved]

§ 225.100 Supporting Award of Damages for Trespass--Nominal Damages Presumed for Every Trespass

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[3] Discussion of Authorities

[a] Nominal Damages Are Presumed for Every Trespass

[b] Nominal Damages Will Not Affect Award of Punitive Damages

§§ 225.101-225.119 [Reserved]

§ 225.120 Supporting Award of Damages for Trespass--Exemplary Damages Available for Malicious Trespass

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities Forms

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Exemplary Damages May Be Awarded When Trespassing Party Is Guilty of Oppression, Fraud, or Malice

[b] Award Will Not Be Disturbed When Supported by Sufficient Evidence

[4] Additional Authorities

[a] Exemplary Damages May Be Awarded When Trespass Was Malicious

§ 225.121 Opposing Award of Damages for Trespass--Exemplary Damages Unavailable if Not Based on Oppression, Fraud, or Malice

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[3] Discussion of Authorities

[a] Exemplary Damages Must Be Based on Oppression, Fraud, or Malice

§§ 225.122-225.139 [Reserved]

§ 225.140 Supporting Award of Damages for Trespass--Diminution in Value or Cost of Restoration [Civ. Code § 3333]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities Forms

[3] Discussion of Authorities

[a] Measure of Damages as Flexible in Order to Provide Fair Compensation to Injured Party

[b] Diminution in Value as Measure of Damages for Injury to Real Property

[c] Cost of Restoration as Measure of Damages

[d] Measure of Damages as Lesser of Diminution in Value or Cost of Restoration

[e] Reasonable Costs of Restoration in Excess of Diminution in Value May Be Awarded if Landowner Has Personal Reasons for Restoration

[f] Costs of Restoration as Available Even if Land Value Not Diminished

§ 225.141 Supporting Award of Damages for Trespass--Damages Available for Annoyance and Discomfort

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Damages for Annoyance and Discomfort Are Recoverable if Natural and Proximate Result of Trespass

[b] Damages for Emotional Distress Flowing Directly From Trespass Are Recoverable

[4] Additional Authorities

[a] Damages for Annoyance and Discomfort Are Recoverable if Natural and Proximate Result of Trespass

§ 225.142 Supporting Award of Damages for Trespass--Damages Allowable to Businesses Injured by Trespass

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Loss of Prospective Profits as Measure of Damages on Sufficient Proof

[b] Difference in Usable Value of Premises as Measure of Damages When Loss of Profits Cannot Be Sufficiently Proved

[c] One Measure of Damages Applied for Business Injuries

§ 225.143 Supporting Award of Damages for Trespass--Other Consequential Damages [Civ. Code § 3333]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Compensation Allowed for All Damages Proximately Caused by Trespass

[b] Intent to Cause Damages Not Element of Trespass

[c] Recovery of Costs to Prevent Further Harm

§ 225.144 Supporting Award of Damages for Trespass--Anticipation of Injury Not Required

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Possessor or Landowner Not Required to Anticipate Injury

§ 225.145 Supporting Award of Damages for Trespass--Continuing Trespass

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Continuing Trespass Affords Injunctive Relief or Successive Actions for Monetary Relief

[b] Accrued Damages Are Recoverable When Trespass Is Continuing

[c] Party May Bring Action for Prospective Damages and Waive Continuing Trespass

[d] Damages Are Available Up to Time of Injunctive Relief

[e] Plaintiff's Characterization of Trespass as Continuing Controls in Doubtful Cases

§ 225.146 Supporting Award of Damages for Trespass--Damages for Trespass as Available Although Activities Within Protected Commercial Zone Not Enjoinable [Code Civ. Proc. § 731a]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Acts Exempt From Injunction Are Not Barred From Trespass Actions

§ 225.147 Opposing Award of Compensatory Damages for Trespass--Statutory Damages for Wrongful Occupation of Real Property [Civ. Code § 3334]--Disgorgement of Benefits Obtained by Occupation of Property Limited to Financial or Business Advantage

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] "Benefits" Obtained Under Civil Code Section 3334(b) Require Financial or Business Advantage

[b] Restoration Costs Recoverable Only if Reasonable

[c] Specific Evidence Linking Profit to Trespass Required to Recover Profit as Damages

[d] Gross Profits is Appropriate Measure of Benefit Obtained When Defendant Provides Evidence of Expenses Incurred

§§ 225.148-225.159 [Reserved]

§ 225.160 Supporting Award of Damages for Production of Minerals in Trespass--Measure of Damages

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Harsh Rule of Damages Applies if Trespass to Minerals in Bad Faith

[b] Mild Rule of Damages Applies if Trespass to Minerals in Good Faith

§ 225.161 Supporting Award of Damages for Trespass to Timber--Multiple Damages Available

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Treble Damages for Wrongful Removal of or Injuries to Timber

[b] Double Damages for Casual or Involuntary Trespass to Timber

[c] Double Damages Mandatory When Timber Damaged by Fire Set or Spread Negligently

§ 225.162 Opposing Award of Damages for Trespass to Timber--Treble Damages Only Available for Malicious Injury or Removal of Timber

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[3] Discussion of Authorities

[a] Treble Damages Requires Malicious Intent

§§ 225.163-225.179 [Reserved]

§ 225.180 Supporting Contention for Issuance of Prohibitory Injunction Against Trespass--Equitable Relief Warranted

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] General Rule Regarding Availability of Injunctive Relief

[b] Facts of Specific Case Are Determinative

[c] Injunctive Relief Available if Difficulty in Estimating Damage Indicates Irreparable Injury

[d] Injunctive Relief Available if Legal Remedy Inadequate

[e] Injunctive Relief Available to Avoid Multiplicity of Suits

[f] Injunctive Relief Available to Prevent Creation of Easement

[g] Interference With Easement

[4] Additional Authorities

[a] Interference With Easement

§ 225.181 Supporting Contention for Issuance of Mandatory Injunction Against Encroachment--Equitable Relief Warranted

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Doubtful Encroachment Cases Seeking Mandatory Injunction Decided in Plaintiff's Favor

[b] Mandatory Injunction Will Be Granted Unless Defendant Is Innocent, Plaintiff Will Not Suffer Irreparable Injury, and Hardships Are Disproportionate

[c] Court Need Not Balance Conveniences if Defendant Acted Knowingly or if Defendant's Negligence Is Sole Proximate Cause of Encroachment

[d] Willfulness or Lack of Good Faith Indicate Lack of Innocence

[e] Irreparable Injury Determined by Present or Future Use

[4] Additional Authorities

[a] Court Need Not Balance Conveniences if Defendant Acted Knowingly or if Defendant's Negligence Is Sole Proximate Cause of Encroachment

§ 225.182 Opposing Contention for Issuance of Prohibitory Injunction Against Trespass--Equitable Relief Not Warranted

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Injunctive Relief Only Available When Legal Remedy Is Inadequate or Injury Is Irreparable

[b] Completed Trespass Does Not Warrant Injunctive Relief

§ 225.183 Opposing Contention for Issuance of Mandatory Injunction Against Encroachment--Equitable Relief Not

Warranted

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Mandatory Injunction Denied if Relative Hardships Balanced and Essential Elements for Issuance Not Satisfied

[b] Showing of Irreparable Injury to Defendant Requires Balancing

[c] Adequate Compensation in Damages Precludes Issuance of Mandatory Injunction

[d] Promise of Prior Owner As Evidence of Good Faith

[e] Mandatory Injunction Denied if Injury Minimal

[f] Mandatory Injunction Denied if Delay in Assertion of Right

§§ 225.184-225.199 [Reserved]

§ 225.200 Supporting Contention That No Trespass Occurred--Consent to Entry

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Entry After Express Consent Is Not Trespass

[b] Entry After Implied Consent Is Not Trespass

[c] Consent May Be Implied Beyond Express Consent

§ 225.201 Opposing Contention That No Trespass Occurred--No Consent to Entry

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[3] Discussion of Authorities

[a] Entry Without Consent Is Trespass

[b] Admission to Entering Property Without Consent

§ 225.202 Opposing Contention That No Trespass Occurred--Consent Given Was Ineffective Due to Lack of Authority

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[3] Discussion of Authorities

[a] Consent to Entry by Possessor Does Not Authorize Interference With Ownership Interests

[b] Owner Lacks Authority to Consent to Entry When Possessory Right Belongs to Another

[c] Entry Pursuant to Consent in Excess of Agent's Authority Constitutes Trespass

§ 225.203 Opposing Contention That No Trespass Occurred--Conditional Consent Given Was Exceeded

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[3] Discussion of Authorities

[a] Entry Made in Excess of Conditional Consent Constitutes Trespass

[b] Condition May Be Implied From Invitation

[c] Entry Complying With Condition Becomes Trespass When Condition Is Violated

[4] Additional Authorities

[a] Entry Made in Excess of Conditional Consent Constitutes Trespass

§§ 225.204-225.219 [Reserved]

§ 225.220 Supporting Contention That No Trespass Occurred--Entry by Necessity

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Entry Privileged if it Appears Reasonably Necessary to Prevent Harm

[b] Destruction of Property May Be Justified by Necessity

§ 225.221 Opposing Contention That No Trespass Occurred--Entry for Unlawful or Abusive Purpose

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[3] Discussion of Authorities

[a] Entry for Unlawful or Abusive Purpose Constitutes Trespass

[b] Unjustifiable Interference With Business Relations Is Abusive Entry

§§ 225.222-225.239 [Reserved]

§ 225.240 Supporting Contention That No Trespass Occurred--Action Barred by Statute of Limitations [Civ. Code § 3346(c); Code Civ. Proc. §§ 338(b), 349 3/4]--In General

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Action for Trespass on or Injury to Real Property Must Be Commenced Within Three Years

[b] Action for Underground Trespass by Drilling Well Must Be Commenced Within 180 Days

[c] Application of Statute of Limitations Not Affected by Procedure Used to Enforce Right

[d] Statute of Limitations Begins Running When Permanent Trespass Is Committed

§ 225.241 Supporting Contention That No Trespass Occurred--Action Barred by Statute of Limitations--Knowledge of Trespass Is Not Necessary for Statute of Limitations to Run

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Knowledge of Trespass Is Not Necessary for Statute of Limitations to Accrue

§ 225.242 Opposing Contention That No Trespass Occurred--Action Not Barred by Statute of Limitations--Trespass Is Continuing

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Statute of Limitations Does Not Begin Running From Date of Original Entry When Trespass Is Continuing

[b] Recovery for Continuing or Temporary Trespass as Measured by Damages Incurred Within Statutory Period Immediately Preceeding Action

[c] Right to Successive Actions Preferred

[4] Additional Authorities

[a] Statute of Limitations Does Not Begin Running From Date of Original Entry When Trespass Is Continuing

§ 225.243 Opposing Contention That No Trespass Occurred--Action Not Barred by Statute of Limitations--Damages Must Be Sufficiently Appreciable for Period of Limitation to Run

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Period of Limitation Begins to Run When Damage Is Sufficiently Appreciable to Reasonable Person

§ 225.244 Supporting Contention That No Trespass Occurred--Constitutional Right to Free Expression of Ideas in Public Forum

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Exercise of Constitutional Right to Free Expression of Ideas

[b] Private Property Is Public Forum

§ 225.245 Opposing Contention That No Trespass Occurred--No Constitutional Right to Free Expression of Ideas on Private Property That Is Not Public Forum

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[3] Discussion of Authorities

[a] Private Property Neither Open to Public Nor Equivalent of Traditional Public Forum

[b] Private Property Presenting No Significant Opportunity to Disseminate Ideas

[c] Prohibiting Activities on Property Does Not Curtail Opportunity for Exercise of Constitutional Right

[4] Additional Authorities

[a] Private Property Neither Open to Public Nor Equivalent of Traditional Public Forum

§§ 225.246-225.259 [Reserved]

§ 225.260 Supporting Contention That Trespass to Personal Property Occurred--Intermeddling With, Use of, or Damage to Personal Property

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Intermeddling With, Use of, or Damage to Personal Property Constitutes Trespass

[b] Actual Damages Are Allowed

[4] Additional Authorities

[a] Intermeddling With, Use of, or Damage to Personal Property Constitutes Trespass

§ 225.261 Opposing Contention That Trespass to Personal Property Occurred--Insufficient Evidence of Intentional Interference With Possession of Personal Property

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Substantial Evidence of Intentional Interference Is Necessary for Trespass to Personal Property

§ 225.262 Opposing Contention That Trespass to Personal Property Occurred--Interference Did Not Cause Actual Injury or Damage to Plaintiff's Personal Property

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Actual Damage Required

[b] No Recovery for Mass E-Mails That Do Not Damage or Impair Functioning of Computer System

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CHAPTER 225 TRESPASS
PART I. INTRODUCTION

22-225 California Points & Authorities § 225.01

§ 225.01 Scope of Chapter

This chapter contains memoranda of points and authorities relating to trespass actions in four groups of forms. Part II, Subpart A, includes forms pertaining to the general definition of a trespass [*see § 225.20*], and the elements of a cause of action for trespass, including memoranda for use in supporting [*see §§ 225.40 -225.41*] and opposing [*see § 225.42*] the existence of the element of intent, supporting [*see §§ 225.60 -225.61*] and opposing [*see § 225.62*] the existence of the element of possession, and supporting [*see §§ 225.80 -225.83*] and opposing [*see §§ 225.84 -225.85*] the existence of the element of entry. Part II, Subpart B, includes memoranda for use in alleging different measures of damages, including forms supporting nominal damages [*see § 225.100*], supporting [*see § 225.120*] and opposing [*see § 225.121*] exemplary damages, supporting [*see §§ 225.140 -225.146*] and opposing [*see § 225.147*] various compensatory measurements of damages and supporting [*see §§ 225.160 -225.161*] and opposing [*see § 225.162*] damages for trespass to minerals or timber. Part II, Subpart C, includes forms supporting [*see §§ 225.180 -225.181*] and opposing [*see §§ 225.182 -225.183*] the availability of injunctive relief, including a form supporting [*see § 225.181*] and opposing [*see § 225.183*] a mandatory injunction against encroachment. Part II, Subpart D, includes forms pertaining to defenses to a trespass action, including forms supporting [*see § 225.200*] and opposing [*see §§ 225.201 -225.203*] the contention that a trespass has not occurred based on the existence of consent, supporting [*see § 225.220*] and opposing [*see § 225.221*] the contention that a trespass has not occurred based on whether there was necessity for an entry on property, supporting [*see §§ 225.240 -225.241*] and opposing [*see §§ 225.242 -225.243*] the contention that the action for trespass is barred by the statute of limitations, and supporting [*see § 225.244*] and opposing [*see § 225.245*] the contention that a trespass has not occurred because of the constitutional right to free expression of ideas in a public forum. Part II, Subpart E, includes forms supporting [*see § 225.260*] and opposing [*see §§ 225.261* and *225.262*] a cause of action for trespass to personal property.

This chapter does not discuss the law of conversion, nuisance, negligence, or ultrahzardous activity, the points and authorities for which are covered in Ch. 51, *Conversion* , Ch. 167, *Nuisance* , Ch. 165, *Negligence* , and Ch. 234, *Ultrahazardous Activities* respectively.

Legal Topics:

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

GovernmentsLegislationStatutes of LimitationsTime LimitationsTortsPremises Liability & PropertyTrespassElementsTortsPremises Liability & PropertyTrespassRemediesDamagesCompensatory DamagesTortsPremises Liability & PropertyTrespassRemediesDamagesPunitive DamagesTortsPremises Liability & PropertyTrespassRemediesInjunctions

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22-225 California Points & Authorities § 225.02

§ 225.02 Governing Statutes

Damages for trespasses are governed by *Civ. Code §§ 3294, 3333,* and *3346* and *Code Civ. Proc. § 349* 3/4. The statutes of limitations for the various trespasses are governed by *Civ. Code § 3346* and *Code Civ. Proc. § 338(b). Code Civ. Proc. § 1021.9* governs the recovery of attorney's fees by a prevailing plaintiff in an action to recover for damages to personal or real property resulting from trespass on lands under cultivation or intended or used for raising livestock.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime LimitationsTortsPremises Liability & PropertyTrespassRemediesDamagesCompensatory DamagesTortsPremises Liability & PropertyTrespassRemediesDamagesPunitive Damages

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22-225 California Points & Authorities § 225.03

§ 225.03 Relation to Nuisance

Although the torts of trespass and nuisance are closely related, they are different torts and merit separate attention. The elements of trespass have developed through case law rather than statute and include an intended entry on property possessed by another. Nuisance is defined by statute and is generally anything that is injurious to health, indecent or offensive to the senses, or an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life or property [*see Civ. Code §§ 3479-3481*]. A trespass may be an obstruction to the free use of property and interfere with the comfortable use of that property, and thereby become a nuisance. For points and authorities relating specifically to nuisance, see Ch. 167, *Nuisance* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawTortsNuisanceGeneral OverviewReal Property LawTortsNuisanceElementsReal Property LawTortsTrespass to Real PropertyTortsPremises Liability & PropertyTrespassElements

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22-225 California Points & Authorities § 225.04

§ 225.04 How to Use Forms in This Chapter

[1] Page Limits on Points and Authorities

One of the more significant drafting requirements to keep in mind are page limits: supporting and opposing memoranda filed in discovery motion proceedings may not exceed 15 pages. A reply or closing memorandum may not exceed 10 pages. Exhibits, declarations, attachments, the table of contents, the table of authorities, and the proof of service are excluded from these page limits. Any party must obtain leave of court to file a longer memorandum [*see Cal. Rules of Ct., Rule 3.1113(d), (e)*]. These and other drafting requirements are discussed in further detail in Ch. 1, *Writing Legal Memoranda and Briefs* .

[2] Using the Forms to Build a Draft Memorandum

The forms in this chapter are in the form of contentions based on substantive points of law. They may be combined with each other as appropriate according to the facts of the case. The substantive contentions may also be combined with any appropriate procedural forms, depending on the procedural context in which the argument is raised, and may be adapted for use by a cross complainant and cross defendant. For a discussion of how to use the points and authorities in this chapter to draft a complete memorandum or a trial or appellate brief, see Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting Memoranda

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22-225 California Points & Authorities § 225.05

§ 225.05 Related Pleading and Practice Chapters

For discussion and forms relating to actions for trespass, see California Forms of Pleading and Practice, Ch. 550, *Trespass* (Matthew Bender). For discussion and forms relating to actions for negligence or nuisance, see California Forms of Pleading and Practice, Ch. 380, *Negligence* , and Ch. 391, *Nuisance* (Matthew Bender). For discussion and forms relating to the liability of the possessor of land to others for conditions on the land, see California Forms of Pleading and Practice, Ch. 421, *Premises Liability* (Matthew Bender). For additional discussion and forms relating to trespass actions, see the following chapters in California Forms of Pleading and Practice (Matthew Bender):

- Ch. 11, *Adjoining Landowners*.
- Ch. 101, *Boundaries*.
- Ch. 177, *Damages*.
- Ch. 240, *Easements*.
- Ch. 241, *Ejectment*.
- Ch. 266, *Fences*.
- Ch. 482, *Quieting Title*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersBoundariesReal Property LawTitle QualityAdverse Claim ActionsQuiet Title ActionsReal Property LawTortsNuisanceGeneral OverviewTortsNegligenceGeneral OverviewTortsPremises Liability & PropertyTrespassGeneral Overview

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22-225 California Points & Authorities § 225.06

§ 225.06 Related Points and Authorities

For points and authorities supporting and opposing demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For points and authorities supporting and opposing injunctions generally, see Ch. 116, *Injunctions* . For points and authorities supporting and opposing the barring of actions for lack of timeliness generally, see Ch. 143, *Limitation of Actions* . For points and authorities supporting and opposing the liability of the possessor of land to others for conditions on the land, see Ch. 178, *Premises Liability* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersGovernmentsLegislationStatutes of LimitationsTime LimitationsTortsPremises Liability & PropertyGeneral OverviewTortsPremises Liability & PropertyTrespassRemediesInjunctions

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22-225 California Points & Authorities §§ 225.07-225.19

[Reserved]

§§ 225.07[Reserved]

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PART II. FORMS
A. Elements of Cause of Action
1. Elements of Trespass Generally

22-225 California Points & Authorities § 225.20

§ 225.20 Definition of Trespass--Necessary Elements Exist

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE ESSENTIAL ELEMENTS OF ACTIONABLE TRESPASS ARE PRESENT IN THIS ACTION BECAUSE DEFENDANT WAS RESPONSIBLE FOR AN ENTRY ON THE PROPERTY IN THE EXCLUSIVE POSSESSION OF PLAINTIFF WITHOUT PLAINTIFF'S CONSENT.

Elements of Trespass. A trespass is: an entry, without consent, on the property in the exclusive possession of another (*Wilson v. Interlake Steel Co. (1982) 32 Cal. 3d 229, 233, 185 Cal. Rptr. 280, 649 P.2d 922* ; *MacLeod v. Fox W. Coast Theatres Corp. (1937) 10 Cal. 2d 383, 387, 74 P.2d 276*).

[*Add supporting points and authorities for each element of trespass which is at issue in the case (see, e.g., §§ 225.40 -225.41, 225.60 -225.61, 225.80 -225.83).*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that all essential elements of an actionable trespass are present in plaintiff's case. If any of the elements has been challenged, counsel may desire to combine these contentions with additional contentions specific to that element [*see, e.g., §§ 225.40 -225.41* (intent), 225.60-225.61 (possession), 225.80-225.83 (entry)].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the elements of trespass. This argument may arise in opposing a motion for summary judgment or nonsuit, a demurrer, or other similar procedure [*see, e.g., Allen v. McMillion*

(1978) 82 Cal. App. 3d 211, 214, 147 Cal. Rptr. 77 (summary judgment); *Smith v. Lockheed Propulsion Co. (1967) 247 Cal. App. 2d 774, 776, 56 Cal. Rptr. 128* (nonsuit); *La Com v. Pacific Gas & Elec. Co. (1955) 132 Cal. App. 2d 114, 115, 281 P.2d 894* (demurrer)]. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a description of plaintiff's possession, defendant's entry, and the fact that it occurred without plaintiff's consent. For example, counsel may show that plaintiff is an owner and in possession of a movie theater, that plaintiff was holding a private showing at the theater, and that defendant entered the theater to view the showing over plaintiff's objection [*see, e.g., MacLeod v. Fox W. Coast Theatres Corp. (1937) 10 Cal. 2d 383, 74 P.2d 276]* .

[b] Related Pleading and Practice Chapters

For forms relating to pleading a cause of action for trespass, see California Forms of Pleading and Practice, Ch. 550, *Trespass* (Matthew Bender).

[3] Discussion of Authorities

[a] Elements of Trespass

In ***Wilson v. Interlake Steel Co.*** *(1982) 32 Cal. 3d 229, 185 Cal. Rptr. 280, 649 P.2d 922* , plaintiffs were 22 retirees who resided near defendant's steel fabricating factory. The factory operated 24 hours per day, creating a very high level of noise which disturbed the neighbors, but in no way caused physical damage to their property. Plaintiffs filed a nuisance action seeking injunctive relief, and filed a separate trespass action while that action was pending. The nuisance action resulted in a judgment for defendants, as did the trespass action. Plaintiffs appealed the trespass case.

The Supreme Court denied plaintiffs a trespass remedy, but reversed the nuisance judgment, remanding the case to determine if relitigation was precluded and noting that plaintiffs had pled facts which supported a nuisance recovery. In reaching its decision the Court defined and distinguished trespass and nuisance. Trespass is an invasion of the interest in the exclusive possession of land, as by entry on it (*32 Cal. 3d 229, 233)* .

In ***MacLeod v. Fox W. Coast Theatres Corp.*** *(1937) 10 Cal. 2d 383, 74 P.2d 276* , defendant movie theater agreed with a film company to a preshowing of a new film at defendant's theater; admittance of only two groups of people was part of the agreement. The publicity representative of the film company invited a radio announcer for a rival motion picture producer and allowed him to bring some guests, among them plaintiff. Plaintiff was told by the district manager of defendant that he would not be admitted to the theater, and after plaintiff had been admitted, he was escorted from the lobby by police officers acting under the direction of defendant. Plaintiff brought an action for damages after being ejected from the theater. After the jury found that the removal of plaintiff was not justified, the trial court awarded damages for ejectment and lost wages proximately resulting from the ejectment. Defendants appealed.

The Supreme Court reversed the judgment. The Court discussed defendant's exclusive right to determine who should be permitted to attend its theater, which it had surrendered in part in its agreement with the film company. As plaintiff was not a member of either class to be invited, he was not entitled to admission. Since plaintiff's invitation was in excess of the authority of the film company, plaintiff had not been properly invited, but was a trespasser on the premises, or one who was on the land of others without their consent and against their will. Every wrongful entry on land in the possession of the owner is a trespass (*10 Cal. 2d 383, 387)* . The Court also addressed plaintiff's contention that the preshowing was a joint venture of defendant and the film company, noting that it was within the power of either partner to the joint venture at any time to revoke the right or license of plaintiff to be within the lobby and to order him to be removed from it. Plaintiff had no cause of action against defendants, as an owner has the right to forcibly eject

trespassers and if the force used is not excessive, the trespasser has no personal action against the owner (*10 Cal. 2d 383, 389)* .

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A. Elements of Cause of Action
1. Elements of Trespass Generally

22-225 California Points & Authorities §§ 225.21-225.39

[Reserved]

§§ 225.21[Reserved]

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A. Elements of Cause of Action
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22-225 California Points & Authorities § 225.40

§ 225.40 Supporting Contention That Defendant Committed Actionable Trespass--Requisite Intent Present

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general form of memorandum of points and authorities supporting the contention that defendant committed trespass (see, e.g., § 225.20).*]

DEFENDANT'S ACTIONS CONSTITUTED TRESPASS BECAUSE DEFENDANT ACTED WITH SUFFICIENT INTENT FOR LIABILITY TO OCCUR.

A. Intent Necessary for Liability. There is no liability for a trespass unless the trespass is intentional, the result of recklessness or negligence, or the result of injuries in an ultrahazardous activity (*Smith v. Lockheed Propulsion Co. (1967) 247 Cal. App. 2d 774, 784, 56 Cal. Rptr. 128*).

B. Intent to Be in Place Where Trespass Occurred Sufficient. The intent required as a basis for liability for trespass is simply an intent to be at a place on the land where the trespass allegedly occurred; the defendant is liable for an intentional entry even though he or she acted in good faith under the mistaken belief that he or she was not trespassing (*Miller v. National Broad. Co. (1986) 187 Cal. App. 3d 1463, 1480-1481, 232 Cal. Rptr. 668*).

C. Intent to Cause Damage or Harm Not Necessary. Intent to cause damage or harm is not necessary for there to be liability for trespass (*Meyer v. Pacific Employers Ins. Co. (1965) 233 Cal. App. 2d 321, 326, 43 Cal. Rptr. 542* ; *Roberts v. Permanente Corp. (1961) 188 Cal. App. 2d 526, 530-531, 10 Cal. Rptr. 519*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that defendant acted with sufficient intent to

support liability for trespass.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of defendant's intent. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include facts which demonstrate defendant's intent. For example, counsel could show that defendant built a road across plaintiff's land, knowing that plaintiff owned and was in possession of the land.

[b] Related Pleading and Practice Chapters

For forms relating to pleading a cause of action for trespass, see Ch. 550, *Trespass* in California Forms of Pleading and Practice (Matthew Bender).

[c] Related Points and Authorities

For memoranda or points and authorities supporting and opposing the ultrahazardous nature of the activity, see Ch. 234, *Ultrahazardous Activities* .

[d] Opposing Points and Authorities

The points and *authorities in § 225.42* may be used in an appropriate case to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Intent Necessary for Liability

In ***Smith v. Lockheed Propulsion Co.*** *(1967) 247 Cal. App. 2d 774, 56 Cal. Rptr. 128* , plaintiffs brought an action for damages to real property allegedly caused by seismic vibrations activated by rocket motor test firings. The trial court granted nonsuit for defendants. Plaintiffs appealed.

The court of appeal reversed the judgment of nonsuit with respect to plaintiff's causes of action against defendants, and affirmed it with respect to the causes of action against the contractors engaged by defendants to effect repairs on plaintiff's property. The court made a thorough examination of ultrahazardous activity and governmental immunity in addition to discussing liability for trespass. Actionable trespass may be committed indirectly through concussions or vibrations activitated by a defendant's conduct; it is immaterial whether the injuries were caused by the shaking of the earth or pulsation of the air or by physical projectiles or missiles. There is no liability for a trespass unless the trespass is intentional, the result of recklessness or negligence, or the result of injuries in an ultrahazardous activity. The court held that defendant's rocket testing was an ultrahazardous activity (*247 Cal. App. 2d 774, 784)* .

[b] Intent to Be in Place Where Trespass Occurred Sufficient

In ***Miller v. National Broad. Co.*** *(1986) 187 Cal. App. 3d 1463, 232 Cal. Rptr. 668* , plaintiff brought suit for trespass against a television broadcasting company. The action arose when defendant's film crew, while filming documentary on emergency rescue paramedics, entered plaintiff's home with the paramedics who were responding to a call to administer aid to plaintiff's husband, who had suffered a heart attack. The film crew entered plaintiff's home without her consent and filmed the attempts to save the husband's life. On motion for summary judgment, the trial court found that no trespass had occurred because defendants did not enter the plaintiff's home maliciously and because plaintiff suffered no actual damage.

The court of appeal reversed. The court noted that the essence of a cause of action for trespass is an unauthorized entry onto the land of another. The court held that the intent required as a basis for liability for trespass is simply an intent to be at a place on the land where the trespass allegedly occurred. Since the defendants intended to cross the threshold of the plaintiff's home, they committed a trespass notwithstanding the fact that they acted in good faith (*187 Cal. App. 3d 1463, 1480-1481)* .

[c] Intent to Cause Damage or Harm Not Necessary

In ***Meyer v. Pacific Employers Ins. Co.*** *(1965) 233 Cal. App. 2d 321, 43 Cal. Rptr. 542* , plaintiffs brought an action against a partnership, the insured of defendant, alleging that the partnership intentionally caused indirect trespasses to plaintiffs' land, which thereby sustained damages. Judgment was for plaintiffs, but defendants never paid. Thereafter, plaintiffs brought an action against the insurance company seeking a declaration of their rights and the liabilities of the insurer under a policy of liability insurance and recovery on the judgment against the insured. The trial court found that the acts were not accidental, but intentional, and that the insurance policy excluded coverage for property damage unless caused by accident, thereby excluding coverage for the acts which gave rise to the original court action. Plaintiffs appealed.

The court of appeal reversed. The court distinguished between intent as to the act and intent as to the consequential damages. The trial court had found that the trespass was intentional and the liability of defendant was established even though the consequences of the trespass were unintentional and unforeseeable. Intent to cause damages is not an element of the tort of trespass, and the trespasser is liable for any damage caused even though that damage was not intended or foreseen (*233 Cal. App. 2d 321, 326)* .

In ***Roberts v. Permanente Corp.*** *(1961) 188 Cal. App. 2d 526, 10 Cal. Rptr. 519* , plaintiff homeowner brought a trespass action for property damages allegedly caused by dust and other substances escaping from defendant's cement plant and quarry and settling on plaintiff's nearby home. The trial court entered judgment for defendants after the jury had returned a verdict in its favor. Plaintiffs appealed.

The court of appeal reversed the judgment. Among the other issues considered, the court analyzed the jury instructions given by the trial court. The court found error with the instruction that in the absence of negligence there must be an intent to cause damage or injury for the jury to find liability. That instruction was wrong because it did not reflect the law, which establishes that the performance of an act that will to a substantial certainty result in the entry of foreign matter on another's land suffices for an intentional trespass to land on which liability may be based. An intent to harm is not required (*188 Cal. App. 2d 526, 530-531)* .

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22-225 California Points & Authorities § 225.41

§ 225.41 Supporting Contention That Defendant Committed Actionable Trespass--Requisite Intent Present--Substantial Certainty That Acts Would Cause Entry of Matter

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general form of memorandum of points and authorities supporting the contention that defendant committed trespass, (see, e.g., § 225.20).*]

DEFENDANT'S ACTION[S] CONSTITUTED TRESPASS BECAUSE DEFENDANT ACTED WITH THE KNOWLEDGE THAT THERE WAS A SUBSTANTIAL CERTAINTY THAT THE ACT[S] WOULD RESULT IN ENTRY OF FOREIGN MATTER ON PLAINTIFF'S PROPERTY.

Requisite Intent Present if Substantial Certainty That Acts Will Result in Entry of Matter on Property. An act that will to a substantial certainty result in the entry of foreign matter on another's land suffices for an intentional trespass to land on which liability may be based (*Roberts v. Permanente Corp. (1961) 188 Cal. App. 2d 526, 530-531, 10 Cal. Rptr. 519*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that defendant acted with sufficient intent to support liability for trespass when defendant's acts would to a substantial certainty result in the entry of foreign matter on plaintiff's property.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of defendant's intent. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel might argue and present facts showing that defendant's cement-plant operations would, to a substantial certainty, result in the entry of dust, sand, and other particles on plaintiff's property.

[b] Opposing Points and Authorities

The points and *authorities in § 225.42* may be used in an appropriate case to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Requisite Intent Present if Substantial Certainty That Acts Will Result in Entry of Matter on Property

The facts and procedural background of ***Roberts v. Permanente Corp.*** *(1961) 188 Cal. App. 2d 526, 10 Cal. Rptr. 519* , are discussed in *§ 225.40[3][c]*. The court of appeal held that an act that will to a substantial certainty result in the entry of foreign matter on another's land suffices for an intentional trespass to land on which liability may be based (*188 Cal. App. 2d 526, 530-531)* .

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22-225 California Points & Authorities § 225.42

§ 225.42 Opposing Contention That Trespass Occurred--No Requisite Intent

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT'S ACTIONS WERE NOT A TRESPASS BECAUSE THE REQUISITE INTENT FOR TRESPASS WAS NOT PRESENT.

No Liability for Indirect Trespass When Requisite Intent Not Established. Although trespass may be committed by consequential and indirect injuries, there is no liability for this type of injury if it is not intentional, the result of recklessness or negligence, or the result of engaging in an ultrahazardous activity (*Gallin v. Poulou (1956) 140 Cal. App. 2d 638, 641-645, 295 P.2d 958*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted by defendant in opposition to plaintiff's contention that defendant committed a trespass because the consequential and indirect result of his or her actions was injury to plaintiff's property. The ground of opposition set forth is that although the consequence of defendant's actions was an injury to plaintiff's property, the act was not committed with the necessary intent.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of defendant's intent. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel might describe what defendant's intent was and how it was inadequate to result in liability. For

example, describing defendant's ignorance of an unusually susceptible condition on plaintiff's land would be indicative of a lack of intent to cause injury and trespass.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in §§ 225.40* and *225.41*.

[b] Related Pleading and Practice Chapters

For discussion and forms relating to damages, see California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender). For discussion and forms relating to trespass, see California Forms of Pleading and Practice, Ch. 550, *Trespass* (Matthew Bender).

[3] Discussion of Authorities

[a] No Liability for Indirect Trespass When Requisite Intent Not Established

In ***Gallin v. Poulou*** *(1956) 140 Cal. App. 2d 638, 295 P.2d 958* , plaintiff, a tenant in the apartment house owned by defendant, was injured when a piece of ceiling plaster fell on her. The ceiling had been cracked for several years prior to its falling, but no portion had ever fallen and the condition was never reported to defendant. Plaintiff brought an action in trespass, alleging that construction work performed in the basement on defendant's direction caused the building to vibrate, causing the plaster to fall, and that those actions were a trespass. The trial court granted defendant's motion for a nonsuit. Plaintiff appealed.

The court of appeal affirmed, discussing liability for trespass acts in great detail. The court said that there is no distinction between direct and indirect invasions and that trespass may be committed by consequential and indirect injuries as well as by direct and forcible injuries. Vibrations, under certain circumstances, can constitute a trespass (*140 Cal. App. 2d 638, 641)* . The court discussed and distinguished *McNeill v. Redington (1944) 67 Cal. App. 2d 315, 154 P.2d 428* [*see § 225.82[4][a]*]. While the *McNeill* court did not spell out the precise basis of liability, it was obvious from the facts of the case that it involved either an intentional or negligent trespass because a reasonable person knew or should have known that the operations would cause the adjoining properties to be subjected to vibrations. The court concluded that there is no liability for a trespass unless the trespass is intentional, the result of recklessness or negligence, or the result of engaging in an ultrahazardous activity (*140 Cal. App. 2d 638, 645)* . Because the construction was neither negligent nor ultrahazardous, the only basis for trespass liability was if defendant trespassed intentionally or acted with knowledge that the work would necessarily invade plaintiff's property rights. Defendant's lack of knowledge of the loose plaster precluded the implication of intent (*140 Cal. App. 2d 638, 646)* .

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22-225 California Points & Authorities §§ 225.43-225.59

[Reserved]

§§ 225.43[Reserved]

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A. Elements of Cause of Action
3. Possession

22-225 California Points & Authorities § 225.60

§ 225.60 Supporting Contention That Plaintiff Is Proper Party to Bring Action in Trespass--Plaintiff as Possessor

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general form of memorandum or points and authorities supporting the contention that defendant committed trespass (see, e.g., § 225.20).*]

PLAINTIFF IS THE PROPER PARTY TO BRING THIS ACTION FOR TRESPASS BECAUSE AT THE TIME OF THE ALLEGED TRESPASS PLAINTIFF WAS IN POSSESSION OF THE REAL PROPERTY ENTERED ON BY DEFENDANT.

A. Person in Actual Possession of Real Property Is Proper Plaintiff in Trespass Action. The proper plaintiff in an action for trespass to real property is the person in actual possession (*Lightner Mining Co. v. Lane (1911) 161 Cal. 689, 694* ; *see Smith v. Cap Concrete, Inc. (1982) 133 Cal. App. 3d 769, 774, 184 Cal. Rptr. 308*).

B. Act of Possession. Possession is the peaceable or quiet actual possession. Actual possession is usually evidenced by occupation, substantial enclosure, cultivation, or an appropriate use according to the locality and quality of the property, and is a question of fact (*Williams v. Goodwin (1974) 41 Cal. App. 3d 496, 508-509, 116 Cal. Rptr. 200*).

[*Optional*] **C. Possessor's Title May Not Be Attacked Unless Defendant Claims Title.** No averment of title in the plaintiff is necessary. A defendant who is a mere stranger to the title will not be allowed to question the title of a plaintiff in possession of the land. It is only when the trespasser claims title, or claims under the real owner, that he or she is allowed to attack the title of the plaintiff whose peaceable possession has been disturbed (*Lightner Mining Co. v. Lane (1911) 161 Cal. 689, 694-695, 120 P. 771*).

[*Optional*] **D. Possessor Has Right of Action Against Owner.** The cause of action for trespass affords protection for a possessory interest, but not necessarily an ownership interest. On proof of the elements of trespass, a possessor is

entitled to an award of at least nominal damages, even if the intruder is the owner of the property (*see Allen v. McMillion (1978) 82 Cal. App. 3d 211, 219, 147 Cal. Rptr. 77*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that plaintiff, as possessor of the real property, is the proper party to bring an action for trespass. If the alleged trespasser is the owner of the property, optional paragraph D may be used.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of plaintiff's possession. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel should allege plaintiff's possession of the land at the time of defendant's unauthorized entry, as evidenced by, for example, the installation of a mobile home, maintenance of a garden, and construction of a driveway for the use of plaintiff.

[b] Related Pleading and Practice Chapters

For forms relating to pleading a cause of action for trespass, see California Forms of Pleading and Practice, Ch. 550, *Trespass* (Matthew Bender). For forms relating to unlawful detainer, see California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing an unlawful detainer action, see Ch. 236, *Unlawful Detainer* .

[3] Discussion of Authorities

[a] Person in Actual Possession of Real Property Is Proper Plaintiff in Trespass Action

In ***Lightner Mining Co. v. Lane*** *(1911) 161 Cal. 689, 120 P. 771* , plaintiff brought an action in trespass against the owners of an adjoining mine to recover the value of ore extracted by defendants from plaintiff's mine. The trial court ordered judgment for plaintiff. Defendant appealed.

The Supreme Court found that the trial court had made errors in its instructions, but that the errors did not substantially affect the right of plaintiff to a lesser amount of damages. With the consent of plaintiff to accept a lower award, the Court modified the earlier judgment of the damage award and affirmed the denial of a new trial. The Court examined at length the issues of possession, damages, and the period of limitations. The proper plaintiff in an action for trespass to real property is the person in actual possession. No averment of title in the plaintiff is necessary (*161 Cal. 689, 694)* . A defendant who is a mere stranger to the title will not be allowed to question the title of a plaintiff in possesion of the land. It is only when the trespasser claims title, or claims under the real owner, that he or she is allowed to attack the title of the plaintiff whose peaceable possession has been disturbed. One who is in possession under an agreement to convey giving him or her the right of possession may maintain an action against a stranger to the title for a trespass which consists of the removal and conversion of the substance of the estate. As plaintiff was rightfully in possession under an agreement of sale, and defendants did not claim right of possession, any possible defect in title at the time the action was begun did not affect defendant's case (*161 Cal. 689, 695)* .

In ***Smith v. Cap Concrete, Inc.*** *(1982) 133 Cal. App. 3d 769, 184 Cal. Rptr. 308* , plaintiffs leased real property to a lessee who, without plaintiffs' knowledge, sublet it. Without plaintiffs' consent, the sublessee hired defendant's agent to deliver 70 loads of concrete fill material to the property. Plaintiffs brought an action for trespass, and after a stipulation of the facts, the trial court denied plaintiffs relief, based on the argument that one out of possession cannot complain of trespass. Plaintiffs appealed.

The court of appeal reversed and the case was remanded to determine damages. Likening actions in trespass and waste, the court discussed the elements of traditional actions in both causes. The cause of action for trespass is designed to protect possessory, not ownership, interests in land from unlawful interference. The proper plaintiff in a trespass action is the person in actual possession; no averment or showing of title is necessary (*133 Cal. App. 3d 769, 774)* . An out of possession property owner may recover for an injury to the land by a trespasser which damages the ownership interest. The inquiry in a case involving unlawful intrusion on property rights should focus on the nature of the injury and the damages sought: if the right to possession has been abridged and possessory rights damaged, the possessor may complain by way of an action for trespass; if an intruder harms real property in a manner which damages the ownership interest, the property owner may seek recovery whether the cause of action be technically labeled trespass or some other form of action, such as waste (*133 Cal. App. 3d 769, 774-775)* . Plaintiffs had no possessory interest in the property and had no right to complain of unlawful interference with possessory rights. Their claim rested on damage to their ownership interest. In addressing defendant's claim that the possessor had given consent, thereby disallowing an action, the court said that the possessor's consent to entry does not justify interference with plaintiff's ownership rights. By showing they gave no authorization, plaintiffs established the lack of consent necessary to support their action for injury to their ownership interests (*133 Cal. App. 3d 769, 778)* .

[b] Act of Possession

In ***Williams v. Goodwin*** *(1974) 41 Cal. App. 3d 496, 116 Cal. Rptr. 200* , plaintiff was knocked down and injured by a bull belonging to defendant while in the yard outside a mobile home in which he lived, which was located on the property belonging to his employers. Plaintiff brought an action against defendant based on negligence, strict liability for injuries inflicted by animals of dangerous propensities, and strict liability for damage by trespassing livestock. Defendant's motion for nonsuit was granted and judgment entered accordingly, and plaintiff appealed.

The court of appeal reversed the judgment. In its discussion of trespass, the court focused on the type of possession required to support an action for trespass, as the trial court based its finding on the insubstantial nature of plaintiff's possession. In an action for trespass a plaintiff must prove the fact of possession, but the right to possession is not involved unless a defendant tenders an issue on it. Defendant contended that plaintiff's relationship to the land was of a character so vagrant as not to confer a right of action for trespass. The court defined possession as peaceable or quiet possession, which could be shown by actual possession (*41 Cal. App. 3d 496, 508)* . Actual possession is usually evidenced by occupation, by substantial enclosure, by cultivation, or by appropriate use acccording to the locality and quality of the property, and is a question of fact for jury determination (*41 Cal. App. 3d 496, 508-509)* . In this case, the court found that there was sufficient evidence of plaintiff's possession of the land to require ultimate determination by the jury (*41 Cal. App. 3d 496, 509-510)* .

[c] Possessor's Title May Not Be Attacked Unless Defendant Claims Title

The facts and procedural background of ***Lightner Mining Co. v. Lane*** *(1911) 161 Cal. 689* , are discussed in *§ 225.60[3][a]*. The Supreme Court discussed the requisite possession in a trespass action and who may challenge a plaintiff's possession. A defendant who is a mere stranger to the title will not be allowed to question the title of a plaintiff in possession of the land. It is only when the trespasser claims title, or claims under the real owner, that he or she is allowed to attack the title of the plaintiff whose peaceable possession has been disturbed. One who is in possession under an agreement to convey giving him or her the right of possession may maintain an action against a

stranger to the title for a trespass which consists of the removal and conversion of the substance of the estate. As plaintiff was rightfully in possession under an agreement of sale, and defendants did not claim right of possession, any possible defect in title at the time the action was begun did not affect defendant's case (*161 Cal. 689, 695)* .

[d] Possessor Has Right of Action Against Owner

In ***Allen v. McMillion*** *(1978) 82 Cal. App. 3d 211, 147 Cal. Rptr. 77* , plaintiffs sued defendants, adjoining landowners, for trespass, adverse possession, declaratory relief, invasion of privacy, and to quiet title after defendants had removed a fence and surrounding foliage which had been the agreed boundary, but was actually on defendants' property as disclosed by a property survey. The court granted defendant's motion for summary judgment for all causes of action except adverse possession and entered dismissal accordingly. Plaintiff appealed.

The court of appeal affirmed the dismissal of all the causes of action except trespass, the dismissal of which was reversed. In its discussion of the trespass action, the court said that one in peaceable though wrongful possession of real property may sue in tort for forcible interference with that possession even in the absence of injury to the person or goods (*82 Cal. App. 3d 211, 214)* . The court held that plaintiffs stated a cause of action for trespass, or wrongful interference with peaceful possession, which is different from an infringement of ownership rights or from injury to real property (*82 Cal. App. 3d 211, 218)* . The action of trespass affords protection for a possessory, not necessarily an ownership, interest. The court noted that under the forcible entry statutes, if the forcible intruder were the owner of the property, the party in peaceable possession would be entitled to an award of at least nominal damages, notwithstanding that a plaintiff's possession was wrongful. On proof of the elements of trespass, a nonstatutory action for forcible entry, a plaintiff should be entitled to an award of at least nominal damages, just as would be true were the intruder a third party rather than the owner of the property (*82 Cal. App. 3d 211, 219)* . Here plaintiffs objected to the manner of dispossession rather than the fact of it, and showed a disinterest in regaining possession. Therefore any damage to the property resulting from the forcible entry was not recoverable (*82 Cal. App. 3d 211, 219-220)* .

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22-225 California Points & Authorities § 225.61

§ 225.61 Supporting Contention That Plaintiff Was Proper Party to Bring Action in Trespass--Plaintiff Has Existing Future Possessory or Ownership Interest

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general form of memorandum of points and authorities supporting the contention that defendant committed trespass (see, e.g., § 225.20).*]

PLAINTIFF IS PROPER PARTY TO BRING THE ACTION FOR TRESPASS BECAUSE PLAINTIFF HAS AN EXISTING _____ [FUTURE POSSESSORY *or* OWNERSHIP] INTEREST THAT HAS BEEN DAMAGED BY DEFENDANT'S TRESPASSORY ACTS.

[*EITHER*]

Person With Future Possessory Interest Presently Existing May Bring Action for Trespass. Although not in possession of the land at the time of trespass, a plaintiff with a future possessory interest under a presently existing and valid agreement is entitled to bring an action for injury to the land (*Wolfsen v. Hathaway (1948) 32 Cal. 2d 632, 643, 198 P.2d 1*).

[*OR*]

Owner Not in Possession May Bring Action to Recover Damages to Ownership Interest. An out-of-possession property owner may recover for an injury to the land by a trespasser that damages the ownership interest whether the cause of action is technically labeled trespass or some other form of action, such as waste (*Smith v. Cap Concrete, Inc. (1982) 133 Cal. App. 3d 769, 774-775, 184 Cal. Rptr. 308*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that plaintiff, as one with an existing interest in the real property, may bring an action for damages even when not in possession of the land. Plaintiff's interest may be through an agreement, such as a lease, or through nonpossessory ownership.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of an existing interest in the property enabling plaintiff to bring a trespass action. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel might allege facts showing the existence of a lease under which plaintiff's possession has not yet occurred, but under which plaintiff has an existing interest in the current crops.

[b] Related Pleading and Practice Chapters

For forms relating to pleading a cause of action for trespass, see California Forms of Pleading and Practice, Ch. 550, *Trespass* (Matthew Bender).

[3] Discussion of Authorities

[a] Person With Future Possessory Interest Presently Existing May Bring Action for Trespass

In ***Wolfsen v. Hathaway*** *(1948) 32 Cal. 2d 632, 198 P.2d 1* , plaintiffs, lessors of pasturage land, brought an action for damages for the destruction of grass and grain on the land. The damages resulted from the farming operations of defendants, who claimed to have acted in reliance on an oral agreement for the written lease of the land for farm cultivation. The trial court directed a verdict in favor of plaintiffs on actual and compensatory damages with the amount to be fixed by the jury, and left the issue of punitive damages entirely to the jury, which the jury awarded. Defendants appealed. Although the owners of the land were codefendants in the original action, the court ordered judgment in their favor, and they were not parties to the appeal.

The Supreme Court modified the damage award, but otherwise affirmed the trial court's judgment. Defendant contended that plaintiffs were not the proper persons to bring the action because they were not in possession of the property, nor entitled to possession, at the time of defendant's actions, and that the owners of the land were the proper parties to complain of the acts committed prior to the date of the commencement of plaintiffs' lease. The Court disagreed, explaining that defendants mistook the theory of plaintiffs' pleading that was premised on the principle that the destruction of the growing crops amounted to an invasion of plaintiff's future possessory interest under a presently existing and valid lease. The destruction of the growing crops constituted an invasion of plaintiffs' rights under the terms of their lease, depriving them of benefits thereby conferred, and they are entitled to pursue their remedy against defendants (*32 Cal. 2d 632, 643)* . As the real party in interest, sustaining the loss occasioned by defendants' acts in destroying the growing crops on the land, plaintiffs had a claim of redress from defendants which cannot be denied (*32 Cal. 2d 632, 644)* .

[b] Owner Not in Possession May Bring Action to Recover Damages to Ownership Interest

The facts and procedural background of ***Smith v. Cap Concrete, Inc.*** *(1982) 133 Cal. App. 3d 769, 184 Cal. Rptr. 308* , are discussed in *§ 225.60[3][a]*. The court of appeal said that an out-of-possession property owner may recover for an injury to the land by a trespasser which damages the ownership interest. The inquiry in a case involving unlawful intrusion on property rights should focus on the nature of the injury and the damages sought: if the right to possession

has been abridged and possessory rights damaged, the possessor may complain by way of an action for trespass; if an intruder harms real property in a manner which damages the ownership interest, the property owner may seek recovery whether the cause of action be technically labeled trespass or some other form of action, such as waste (*133 Cal. App. 3d 769, 774-775)* .

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22-225 California Points & Authorities § 225.62

§ 225.62 Opposing Contention That Plaintiff Is Proper Party to Bring Action in Trespass--Owner Does Not Have Existing Possessory Interest

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF IS NOT THE PROPER PARTY TO BRING AN ACTION FOR TRESPASS BECAUSE PLAINTIFF, ALTHOUGH THE OWNER OF THE PROPERTY, DOES NOT HAVE AN EXISTING POSSESSORY INTEREST WHICH IS SUPERIOR TO DEFENDANT'S RIGHT OF POSSESSION.

Possession Rather Than Title Is Required for Trespass Action. If an owner of land is not in possession of it, the owner may not bring an action for damages for trespass against a defendant who is in possession of the land (*Raffetto v. Fiori (1875) 50 Cal. 363, 364)* .

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that plaintiff, as the owner of the land, is the proper party to bring an action for trespass. The ground of opposition set forth is that, plaintiff, although the owner, is not in possession of the property against which the trespass occurred.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of plaintiff's lack of possession. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel might describe plaintiff's lack of possession of the land in question, as well as

defendant's possession of the land, even if not under color of authority.

[3] Discussion of Authorities

[a] Possession Rather Than Title Is Required for Trespass Action

In ***Raffetto v. Fiori*** *(1875) 50 Cal. 363* , plaintiffs were in possession of and claiming ownership of a mining claim. They also claimed ownership of an adjoining claim in which they did not have possession. Defendant, who obtained judgment against the possessor of the second claim and attached the claim, took possession of the second claim. Plaintiffs applied for a patent for their claim, including the claim held by the other party in the survey. Although defendant objected, plaintiffs obtained a patent for the entire claim. Defendant continued in possession of the claim, working it and claiming title. Plaintiffs sued for trespass, and sought damages and injunctive relief. The trial court awarded damages and injunctive relief to plaintiffs. Defendants appealed.

The Supreme Court reversed and remanded the case, noting that plaintiffs were not in possession of the premises in controversy when the action was brought. When a plaintiff is actually desseized of the land, and the defendant is in the adverse possession of it, an action for damages for trespass cannot be maintained (*50 Cal. 363, 364)* .

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22-225 California Points & Authorities §§ 225.63-225.79

[Reserved]

§§ 225.63[Reserved]

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22-225 California Points & Authorities § 225.80

§ 225.80 Supporting Contention That Trespass Occurred--Deposit of Material

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general form of memorandum of points and authorities supporting the contention that defendant committed trespass (see, e.g., § 225.20).*]

DEFENDANT TRESPASSED ON PLAINTIFF'S PROPERTY BY THE DEPOSIT OF MATERIALS ON THE PROPERTY WITHOUT THE KNOWLEDGE OR CONSENT OF PLAINTIFF.

A. Presence of Material on Property Without Possessor's Consent Is Trespass. The keeping of materials on property in which the owner of the materials has no right, title, or interest without the knowledge or consent of the possessor is a trespass (*Herond v. Bonsall (1943) 60 Cal. App. 2d 152, 154-155, 140 P.2d 121* ; *Dandoy v. Oswald Bros. Paving Co. (1931) 113 Cal. App 570, 571, 298 P. 1030*).

[*Optional*] **B. Continuing Presence of Materials Deposited by Former Owner Is Trespass.** A property owner may bring an action for a continuing trespass against a former owner for depositing contaminants on the property that remain after the former owner has sold or transferred the property (*Newhall Land & Farming Co. v. Superior Court (1993) 19 Cal. App. 4th 334, 345, 23 Cal. Rptr. 2d 377*).

[*Optional*] **C. Trespass Occurs Even if Property Value Is Increased by Unauthorized Entry.** Trespass occurs with an unauthorized entry, and the effect of the entry on the property value is relevant only to the measure of damages (*Dandoy v. Oswald Bros. Paving Co. (1931) 113 Cal. App 570, 571, 298 P. 1030*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that defendant's acts in depositing or retaining material on plaintiff's property without permission is a trespass. Optional Paragraph B is for use if the trespass involves a former owner's deposit of material that remains on the property. Optional Paragraph C is for use if the deposit increased or did not diminish the value of the property.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of trespass entry. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should describe defendant's deposit of excess soil on property in plaintiff's possession and indicate that plaintiff had not consented to that act.

[b] Related Pleading and Practice Chapters

For discussion and forms relating to trespass, see California Forms of Pleading and Practice, Ch. 550, *Trespass* (Matthew Bender).

[c] Opposing Points and Authorities

The points and *authorities in § 225.84* may be used in an appropriate case to oppose the contention supported by memorandum.

[3] Discussion of Authorities

[a] Presence of Material on Property Without Possessor's Consent Is Trespass

In ***Herond v. Bonsall*** *(1943) 60 Cal. App. 2d 152, 140 P.2d 121* , plaintiffs brought an action for claim and delivery and for money had and received. Defendants cross complained for recovery of the reasonable value of the use and occupation of real property, and for breach of agreement to pay money. Defendants were the owners of real property which was leased to plaintiffs and used in the restaurant and night club business. After termination of the lease plaintiff's equipment remained on the premises until defendants caused the equipment to be placed with a storage company subject to the order of plaintiffs. The trial court rendered judgment for defendants. Plaintiffs appealed.

The court of appeal affirmed. The court approved of the trial court's finding that plaintiffs did not have any right, title, or interest in or to the premises on termination of the lease and were not entitled to any notice to remove the equipment, and that by keeping their equipment on defendant's premises plaintiffs committed a continuing trespass (*60 Cal. App. 2d 152, 154)* . The court discussed the notice and equipment ownership issues as well. Plaintiffs had admitted ownership of the equipment in the original action, and could not avoid the cause of trespass by alleging that ownership remained in the tenants under a conditional sales contract from cross defendants as sellers (*60 Cal. App. 2d 152, 156)* .

In ***Dandoy v. Oswald Bros. Paving Co.*** *(1931) 113 Cal. App 570, 298 P. 1030* , defendant dumped materials remaining from street construction on plaintiff's property without the consent or knowledge of plaintiff. Plaintiff brought an action for damages for the complete destruction of the land as farm land. Defendant denied everything, and said that if anything had been placed on plaintiff's property, it increased the value of the land. The trial court ordered judgment for defendant. Plaintiffs appealed.

The court of appeal reversed and remanded the cause with instructions to establish the amount of damage resulting from the reasonable cost of removing the materials. The court said that a trespass had occurred when defendant, without the knowledge or consent of plaintiff, entered on plaintiff's land and deposited a large quantity of material. The only question of fact related to the quantity and description of the material and the amount of the resulting damage (*113*

Cal. App 570, 571) . The court noted that there was evidence that the value of the land was not diminished by the deposit of earth and soil on the land. However, to hold that plaintiff is without remedy merely because the value of the land was not diminished would be to decide that by the wrongful act of another, an owner of land may be compelled to accept a change in the physical condition of his or her property, or else perform the work of restoration at his or her own expense. Thus, the court allowed plaintiff to recover the reasonable cost of restoration (*113 Cal. App 570, 572-573)* .

[b] Continuing Presence of Materials Deposited by Former Owner Is Trespass

In ***Newhall Land & Farming Co. v. Superior Court*** *(1993) 19 Cal. App. 4th 334, 23 Cal. Rptr. 2d 377* , plaintiff brought an action against prior owners of plaintiff's real property for having discharged hazardous waste onto the property that was continuing to pollute the soil and groundwater. Defendants demurred and the trial court sustained the demurrer without leave to amend. Plaintiff appealed to the court of appeal.

The court of appeal reversed, rejecting the trial court's holding that defendants' use of their own land is not a trespass. The court held that this conclusion did not resolve whether plaintiff had stated a cause of action for continuing trespass. The court ruled that plaintiff had stated such a cause of action, because a trespass may be committed by the continued presence on the land of a thing that defendant has tortiously placed there, whether or not defendant has the ability to remove it. The court held that defendants had, by discharging hazardous waste on their property, created a public nuisance, which is tortious conduct (*19 Cal. App. 4th 334, 345)* . The court disagreed with the conclusion in *Capogeannis v. Superior Court (1993) 12 Cal. App. 4th 668, 675, 15 Cal. Rptr. 2d 796* , that an owner's creation of a public nuisance was not tortious conduct that would support an action for continuing trespass unless a private plaintiff could show a special injury that was different in kind from the injury suffered by the general public. The court ruled that one who causes a public nuisance is a tortfeasor and subject to tort liability whether or not a private person could have maintained a cause of action for a public nuisance (*19 Cal. App. 4th 334, 346-347)* .

[c] Trespass Occurs Even if Property Value Is Increased by Unauthorized Entry

The facts and procedural background of ***Dandoy v. Oswald Bros. Paving Co.*** *(1931) 113 Cal. App 570, 298 P. 1030* , are discussed in *§ 225.80[3][a]*. The court of appeal found that a trespass had occurred. Noting that the trial court had accepted evidence indicating that the property value had been increased through the deposit, the court said that to hold that plaintiff is without remedy merely because the value of the land was not diminished would be to decide that by the wrongful act of another, an owner of land may be compelled to accept a change in the physical condition of his or her property, or else perform the work of restoration at his or her own expense. The court awarded plaintiff the right to receive the reasonable value of the restoration, without regard to the fact that plaintiff had not yet removed the material from the land (*113 Cal. App 570, 572-573)* .

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22-225 California Points & Authorities § 225.81

§ 225.81 Supporting Contention That Trespass Occurred--Deposit of Material Without Personal Entry

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general form of memorandum of points and authorities supporting the contention that defendant committed trespass (see, e.g., § 225.20).*]

DEFENDANT COMMITTED A TRESPASS BY CONDUCTING ACTIVITIES WHICH LED TO THE DEPOSIT OF FOREIGN MATERIAL ON PLAINTIFF'S PROPERTY.

Activities Causing Deposit of Materials as Trespass. A defendant's activities, although lawful, if causing the entry of material on the plaintiff's property, are actionable as a trespass (*see Kornoff v. Kingsburg Cotton Oil Co. (1955) 45 Cal. 2d 265, 267-268, 288 P.2d 507* ; *Roberts v. Permanente Corp. (1961) 188 Cal. App. 2d 526, 530-531, 10 Cal. Rptr. 519*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that defendant's acts caused the entry of foreign matter on plaintiff's property, thereby constituting a trespass, although defendant did not actually enter the property in person.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of causing an entry on property sufficient to constitute a trespass. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of

law stated. For example, counsel may include a description of defendant's milling activities, describe how they caused the release of materials into the atmosphere, and how these materials entered plaintiff's property, causing injury.

[b] Related Pleading and Practice Chapters

For discussion and forms relating to trespass, see California Forms of Pleading and Practice, Ch. 550, *Trespass* (Matthew Bender).

[c] Opposing Points and Authorities

The points and *authorities in § 225.84* may be used in an appropriate case to oppose the contention supported by this memorandum.

[3] Discussion of Authorities

[a] Activities Causing Deposit of Materials as Trespass

In ***Kornoff v. Kingsburg Cotton Oil Co.*** *(1955) 45 Cal. 2d 265, 288 P.2d 507* , defendant operated a cotton gin adjacent to the property on which plaintiff resided and operated a planing mill. Defendant's ginning and processing operations lasted six months of each year. Plaintiffs sued for trespass, alleging that large quantities of fumes, vapors, dust, dirt, sediment, lint, and waste materials were emitted into the atmosphere and penetrated their house and shop, covering them with an offensive, injurious, and adhesive coating of dust, lint, and ginning waste and causing injury to their house, furniture, and persons during a six-month period. At trial, the jury found plaintiffs had suffered property damage but no personal injuries. A new trial was granted on the ground that the evidence was insufficient to justify the verdict regarding the damages. In the second trial the jury found that plaintiffs had suffered $9,500 damages, and judgment was entered accordingly. Defendant appealed.

The Supreme Court affirmed. Whether the entry and deposit of the materials was a trespass did not arise in the Court's opinion. The Court concentrated its discussion on damages, never questioning that defendant's acts were a trespass. The Court noted that the parties treated the trespass as permanent because of its recurrent character, rather than as a continuous trespass. When a trespass to land is of a permanent nature, all damages, past and prospective, are recoverable in one action, but when the trespass is temporary in character, only those damages may be recovered which have accrued up to the time of the commencement of the action, since it is not to be presumed that the trespass will continue (*45 Cal. 2d 265, 268-269)* . Plaintiffs' election to sue for all damages past, present, and future, and the recovery of such damages was upheld by the Court (*45 Cal. 2d 265, 271)* . An election to sue for damages past and prospective is deemed a waiver of the invasion and a consent to the continued occupancy of the land (*45 Cal. 2d 265, 269)* . The Court said that even though defendant's trespass did not cause fright, shock, or physical illness, it obviously was of the type to cause plaintiffs much annoyance and discomfort, and thus it allowed damages for it (*45 Cal. 2d 265, 273)* .

The facts and procedural background of ***Roberts v. Permanente Corp.*** *(1961) 188 Cal. App. 2d 526, 10 Cal. Rptr. 519* , are discussed in *§ 225.40[3][c]*. The court of appeal said that an act that will to a substantial certainty result in the entry of foreign matter on another's land suffices for an intentional trespass to land on which liability may be based (*188 Cal. App. 2d 526, 530-531)* .

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22-225 California Points & Authorities § 225.82

§ 225.82 Supporting Contention That Trespass Occurred--Indirect Injury to Property

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general form of memorandum of points and authorities supporting the contention that defendant committed trespass (see, e.g., § 225.20).*]

DEFENDANT'S ACTIONS LED TO A CONSEQUENTIAL AND INDIRECT INJURY TO PLAINTIFF'S PROPERTY AND THUS CONSTITUTED A TRESPASS, ALTHOUGH DEFENDANT DID NOT ACTUALLY ENTER THE PROPERTY OR CAUSE THE DEPOSIT OF MATERIAL ON THE PROPERTY.

A. Trespass by Indirect Injury. Trespass may be committed by consequential and indirect injury as well as by direct and forcible injury (*see Wilson v. Interlake Steel Co. (1982) 32 Cal. 3d 229, 232, 185 Cal. Rptr. 280, 649 P.2d 922*).

[*Optional*] **B. Trespass Through Vibrations.** Vibration intrusions may allow recovery under the doctrine of trespass if they are accompanied by the deposit of particulate matter on the property or actual physical property damage. It is immaterial whether the injuries were caused by the shaking of the earth or pulsation of the air, or by physical projectiles or missiles (*Wilson v. Interlake Steel Co. (1982) 32 Cal. 3d 229, 232, 185 Cal. Rptr. 280, 649 P.2d 922* ; *Smith v. Lockheed Propulsion Co. (1967) 247 Cal. App. 2d 774, 784, 56 Cal. Rptr. 128*).

[*Optional*] **C. Trespass Through Fire.** A negligent invasion by fire that causes damage to real property constitutes a trespass (*Elton v. Anheuser-Busch Beverage Group, Inc. (1996) 50 Cal. App. 4th 1301, 1305, 58 Cal. Rptr. 2d 303*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a trespass occurred as a consequence

and indirect result of defendant's actions.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of trespass as a consequential and indirect injury when there was no physical entry. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a description of defendant's actions and how they resulted in a consequential injury to plaintiff's property. For example, counsel could show how defendant's oil drilling caused subterranean vibrations that resulted in the destruction of plaintiff's water well.

[b] Related Pleading and Practice Chapters

For discussion and forms relating to trespass, see California Forms of Pleading and Practice, Ch. 550, *Trespass* (Matthew Bender).

[c] Opposing Points and Authorities

The points and *authorities in § 225.84* may be used in an appropriate case to oppose the contention supported by this memorandum.

[3] Discussion of Authorities

[a] Trespass by Indirect Injury

The facts and procedural background of ***Wilson v. Interlake Steel Co.*** *(1982) 32 Cal. 3d 229, 233, 185 Cal. Rptr. 280, 649 P.2d 922* , are discussed in *§ 225.20[3][a]*. The Supreme Court recognized that trespass may be committed by consequential and indirect injury as well as by direct and forcible injury. Vibration intrusions may allow recovery under the doctrine of trespass if they are accompanied by the deposit of particulate matter on the property or actual physical property damage (*32 Cal. 3d 229, 232)* .

[b] Trespass Through Vibrations

The facts and procedural background of ***Wilson v. Interlake Steel Co.*** *(1982) 32 Cal. 3d 229, 233, 185 Cal. Rptr. 280, 649 P.2d 922* , are discussed in *§ 225.20[3][a]*. The Supreme Court affirmed the denial of a trespass remedy, but reversed and remanded the denial of a nuisance remedy. It said that vibration intrusions may allow recovery under the doctrine of trespass if they are accompanied by the deposit of particulate matter on the property or actual physical property damage (*32 Cal. 3d 229, 232)* .

The facts and procedural background of ***Smith v. Lockheed Propulsion Co.*** *(1967) 247 Cal. App. 2d 774, 56 Cal. Rptr. 128* , are discussed in *§ 225.40[3][a]*. The court of appeal reversed the judgment of nonsuit. The court stated that an actionable trespass may be committed indirectly through concussions or vibrations activated by defendant's conduct; it is immaterial whether the injuries were caused by the shaking of the earth, pulsation of the air, or by physical projectiles or missiles (*247 Cal. App. 2d 774 784)* .

[c] Trespass Through Fire

In ***Elton v. Anheuser-Busch Beverage Group, Inc.*** *(1996) 50 Cal. App. 4th 1301, 58 Cal. Rptr. 2d 303* , plaintiffs were adjacent property owners whose property was damaged by a fire which escaped from defendant's land. Plaintiffs sued for trespass. The trial court found that the defendants negligence in allowing the fire to escape onto the plaintiff's land did not constitute a trespass and as a result would not allow the plaintiffs to recover attorney fees under *Code Civ.*

Proc. § 1021.9.

The court of appeal affirmed that portion of the judgment finding the defendant liable for the plaintiff's damages, and remanded for further proceedings on the issue of costs. The court held that (1) the negligent invasion by fire which causes damage to real property constituted a trespass, and (2) *Code Civ. Proc. § 1021.9*, which entitles the prevailing plaintiffs in actions to recover damages to real property resulting from a trespass on land to reasonable attorney fees, applied (*50 Cal. App. 4th 1301, 1304-1307)* . The court stated that under the rule of *Wilson v. Interlake Steel Co. (1982) 32 Cal. 3d 229, 185 Cal. Rptr. 280* , a trespass may be committed by consequential and indirect injury as well as by direct and forcible injury. It found no reason why a fire could not constitute the agent by which a trespass is committed. Since it was undisputed that the fire in this case caused actual damage to the plaintiff's property, and since the jury expressly found that those damages were caused by the defendant's negligence, the court held that the invasion of the fire onto the plaintiff's property constituted a trespass (*50 Cal. App. 4th 1301, 1307)* .

[4] Additional Authorities

[a] Trespass Through Vibrations

In ***McNeill v. Redington*** *(1944) 67 Cal. App. 2d 315, 154 P.2d 428* , plaintiffs, homeowners residing near defendant's drop forging plant, brought actions in nuisance and trespass, seeking injunctive relief and damages. The parties stipulated that the operations of defendant's plant transmitted injurious vibrations to the residences of plaintiffs and that actual physical damages had been caused by them. The trial court judgment was for defendant. The court of appeal reversed with directions to retry only the issue of damages. Discussing the trespass action, the court saw no reason for differentiating between responsibility for damages done by physical projectiles or missiles and responsibility for damages done by vibration or concussion (*67 Cal. App. 2d 315, 320)* .

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22-225 California Points & Authorities § 225.83

§ 225.83 Supporting Contention That Trespass Occurred--Invasion of Possessory Interest in Airspace

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general form of memorandum of points and authorities supporting the contention that defendant committed trespass (see, e.g., § 225.20).*]

TRESPASS OCCURRED BECAUSE DEFENDANT MADE AN UNPRIVILEGED ENTRY INTO THE AIRSPACE OVER THE LAND IN PLAINTIFF'S POSSESSION.

A. Airspace Above Land as Part of Land. The term "land" includes free or occupied space for an indefinite distance upwards, subject to limitations on the use of airspace imposed, and rights in the use of airspace granted, by law (*Civ. Code § 659*). Government declarations of sovereignty in the space above the land are not intended to and do not divest owners of the surface of the soil of their lawful rights incident to ownership in the airspace above the land (*Civ. Code § 659*; *Anderson v. Souza (1952) 38 Cal. 2d 825, 839, 243 P.2d 497*).

B. Temporary Invasion of Airspace Is Privileged if Reasonable. A temporary invasion of an air space is only privileged if it does not interfere unreasonably with the possessor's enjoyment of the land (*see La Com v. Pacific Gas & Elec. Co. (1955) 132 Cal. App. 2d 114, 116, 281 P.2d 894*).

[*Optional*] **C. When Flights Incident to Takeoffs and Landings Constitute Trespass.** When flying at low altitudes incident to landing or taking off causes more than mere apprehension of injury and presents danger to persons or property lawfully on the land, the flight is not privileged and may be a trespass (*Anderson v. Souza (1952) 38 Cal. 2d 825, 839, 243 P.2d 497* ; *La Com v. Pacific Gas & Elec. Co. (1955) 132 Cal. App. 2d 114, 116, 281 P.2d 894*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that defendant trespassed by invading the airspace above plaintiff's land. There are regulations which govern the flight of aircraft and grant a privilege to prescribed flights [*see, e.g., Pub. Util. Code § 21403*]. Trespass may occur when the flight is not otherwise privileged. *Pub. Util. Code § 21403(c)* grants the right of flight to safe access to public airport, which includes flight within the zone of approach of any public airport without restriction or hazard, when the zone of approach complies with federal regulations. Presumably, flights to a private airport, flights which are not in a complying zone of approach, or flights which do not otherwise comply with regulations are not privileged, and may be a trespass for which these points and authorities may be appropriate.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of an unprivileged invasion of airspace over another's land. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel may allege that aircraft landing at defendant's private airport approached at extremely low heights and invaded the airspace above plaintiff's home.

[b] Related Pleading and Practice Chapters

For discussion and forms relating to airplanes and airports, see California Forms of Pleading and Practice, Ch. 16 *Airplanes and Airports* (Matthew Bender). For discussion and forms relating to nuisance, see California Forms of Pleading and Practice, Ch. 391, *Nuisance* (Matthew Bender). For discussion and forms relating to trespass, see California Forms of Pleading and Practice, Ch. 550, *Trespass* (Matthew Bender).

[c] Related Points and Authorities

For a form of memorandum of points and authorities supporting a nuisance action involving airport noise, see Ch. 167, *Nuisance* .

[d] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 225.85* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Airspace Above Land as Part of Land

In ***Anderson v. Souza*** *(1952) 38 Cal. 2d 825, 243 P.2d 497* , plaintiffs, 50 homeowners residing near defendant's airport, brought a nuisance action against defendants, seeking damages and injunctive relief. Plaintiffs alleged that in the course of defendant's operation of the airport numerous aircraft of various types used the airport, and this use was continuous and frequent throughout the daylight hours, that the airplanes flew over the homes of plaintiffs at heights varying from 25 to 800 feet, creating a tremendous noise which interfered with the use, enjoyment, and occupancy of their land and caused great fear and apprehension. The trial court enjoined and restrained defendants from operating the airport on the premises, and awarded damages to a specified group of plaintiffs who had suffered damages from the operation of a flight school. Defendants appealed.

The Supreme Court, with minor modifications, adopted the opinion of the court of appeal, affirmed the damages judgment, and reversed and remanded the injunction. After discussions of defendant's ownership and control and evidentiary questions, the Court thoroughly analyzed the doctrine of nuisance as it relates to airports and airplanes. An

airport is not a nuisance per se, but it may become a nuisance either because of unsuitable location or improper operation (*38 Cal. 2d 825, 838)* . Regulations concerning flying operations do not determine the rights of the surface owners as to nuisance, and are not considered as granting leave to maintain a private nuisance (*38 Cal. 2d 825, 838-839)* . Federal and state government declarations of sovereignty in the space above the land are not controlling, as these declarations were not intended to and do not divest owners of the surface of the soil of their lawful rights incident to ownership. There is no definite yardstick that may be used in determining how low an airplane may fly over the property of others in landing or taking off; however, flying at low altitudes incident to landing and taking off may constitute trespass, as it may cause more than mere apprehension of injury. Extensive low flying, causing unreasonable annoyance to occupants of land below, is also a substantial interference with enjoyment of the property. The Court cited from the Restatement of the Law of Torts, which provides that an entry above the surface of the earth in the air space in the possession of another by a person traveling in an aircraft is privileged if the flight is conducted for a legitimate purpose, in a reasonable manner, at a height not to interfere unreasonably with the possessor's enjoyment of the surface, and in conformity with government regulations (*38 Cal. 2d 825, 839)* . The Court noted that contiguous property owners must to a reasonable degree yield their desired privacy to the general welfare to which the operation of legitimate businesses contribute (*38 Cal. 2d 825, 843)* .

[b] Temporary Invasion of Airspace Is Privileged if Reasonable

In ***La Com v. Pacific Gas & Elec. Co.*** *(1955) 132 Cal. App. 2d 114, 281 P.2d 894* , plaintiffs sued defendants airport and landowner for damages for personal injuries and damage to an airplane sustained when one plaintiff flew over defendant's land and crashed into overhead electrical wires. Due to plaintiffs' failure to plead about the installation of wires, the court presumed that the wires were lawfully installed and maintained prior to the construction of the airport, that they were plainly visible to aircraft approaching, and that plaintiffs knew of the dangerous character of the wires and their exact location. The demurrers of the airport and land owner were sustained without leave to amend. No appeal was taken from that order. An amended complaint was filed against the utility company alone, a demurrer to which was sustained, and, on plaintiffs' statement that no leave to amend was desired, judgment was entered for that defendant. Plaintiffs appealed.

The court of appeal affirmed. Citing case law, the Restatement of Torts, and *Pub. Util. Code §§ 21402* and *21403*, the court said that any aircraft flying over the land and the structures on the land of another is a trespasser. However, a temporary invasion of the air space by aircraft, as long as it does not interfere unreasonably with the possessor's enjoyment, is privileged. The plane in this case was operated at an altitude which was dangerous to persons or property lawfully on the land and was a trespasser (*132 Cal. App. 2d 114, 116)* . As a trespasser, plaintiff was guilty of contributory negligence as a matter of law. When contributory negligence appears on the face of the complaint a demurrer to the complaint is properly sustainable on that ground (*132 Cal. App. 2d 114, 117)* .

NOTE:
The *La Com* case was decided prior to *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828, 119 Cal. Rptr. 858, 532 P.2d 1226* , which established principles of comparative negligence.

[c] When Flights Incident to Takeoffs and Landings Constitute Trespass

Anderson v. Souza *(1952) 38 Cal. 2d 825, 243 P.2d 497* , is discussed in *§ 225.83[3][a]*.

La Com v. Pacific Gas & Elec. Co. *(1955) 132 Cal. App. 2d 114, 281 P.2d 894* , is discussed in *§ 225.83[3][b]*.

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4. Entry

22-225 California Points & Authorities § 225.84

§ 225.84 Opposing Contention That Trespass Occurred--Entry of Intangible Matter Without Injury

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT'S ACTIONS DID NOT CONSTITUTE A TRESPASS BECAUSE INTRUSION OF INTANGIBLES WITHOUT ANY DEPOSIT OF PARTICULATE MATTER OR ANY PROPERTY DAMAGE IS NOT AN ENTRY AS REQUIRED IN AN ACTION FOR TRESPASS.

Intangible Intrusion Alone Is Not Trespass. An intangible intrusion alone, such as noise, odor, or light, when not accompanied by the deposit of particulate matter on the property or any actual physical damage to the property, is not a sufficient entry to constitute a trespass (*San Diego Gas & Elec. v. Superior Court (1996) 13 Cal. 4th 893, 936, 55 Cal. Rptr. 2d 724* ; *Wilson v. Interlake Steel Co. (1982) 32 Cal. 3d 229, 232-233, 185 Cal. Rptr. 280, 649 P.2d 922*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that a trespass occurred. The ground of opposition set forth is that there was only an intangible intrusion on plaintiff's property without any deposit of particulate matter or actual physical damage, and thus there was an insufficient entry to constitute a trespass.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that there was only an intangible intrusion without any deposit of materials or physical damage to the property. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of

law stated. Thus, counsel should include facts which illustrate the intangible nature of the matter which was alleged to have intruded on plaintiff's property, for example, that defendant operated a merry-go-round which played music between the hours of one and three in the afternoon, and this music in no way caused any injury to plaintiff's property.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in §§ 225.80 -225.82*.

[b] Related Pleading and Practice Chapters

For discussion and forms relating to nuisance, see California Forms of Pleading and Practice , Ch. 391, *Nuisance* (Matthew Bender). For discussion and forms relating to trespass, see California Forms of Pleading and Practice , Ch. 550, *Trespass* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing the existence of a nuisance, see Ch. 167, *Nuisance* .

[3] Discussion of Authorities

[a] Intangible Intrusion Alone Is Not Trespass

In ***San Diego Gas & Elec. v. Superior Court*** *(1996) 13 Cal. 4th 893, 55 Cal. Rptr. 2d 724* , plaintiffs filed an action for damages and injunctive relief against a power company, alleging trespass through electromagnetic radiation onto plaintiff's property from power lines housed by the power company in an easement adjacent to plaintiff's property. The power company demurred to the complaint. The trial court overruled the demurrer, but on a petition for writ of mandate the court of appeal directed the trial court to enter a new order sustaining the demurrer.

The Supreme Court affirmed, stating that plaintiffs could not state facts sufficient to constitute a cause of action under *Wilson v. Interlake Steel Co. (1982) 32 Cal. 3d 229, 185 Cal. Rptr. 280* . First, electric and magnetic fields arising from power lines are intangible phenomena within the meaning of *Wilson*. Second, plaintiffs did not allege that the electric and magnetic fields caused any physical damage to their property (*13 Cal. 4th 893, 936)* .

The facts and procedural background of ***Wilson v. Interlake Steel Co.*** *(1982) 32 Cal. 3d 229, 185 Cal. Rptr. 280, 649 P.2d 922* , are discussed in *§ 225.20[3][a]*. The Supreme Court held that noise alone, without damage to the property, will not support a tort action for trespass. Recovery allowed in trespass actions predicated on noise, or other intangibles such as gas emissions or vibration intrusions, has been predicated on the deposit of particulate matter on the plaintiff's property or an actual physical damage to it. All intangible intrusions alone, such as noise, odor, or light, are analyzed as a nuisance, not a trespass. Actionable trespass will not be predicated on nondamaging noise, odor, or light intrusion (*32 Cal. 3d 229, 232-233)* .

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22-225 California Points & Authorities § 225.85

§ 225.85 Opposing Contention That Trespass Occurred--Entry of Airspace Was Privileged

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT'S ENTRY INTO THE AIRSPACE OVER THE LAND IN PLAINTIFF'S POSSESSION WAS PRIVILEGED AND THUS WAS NOT A TRESPASS.

A. Flight Is Lawful Unless Altitude Regulations Are Violated or Imminent Danger Is Posed to Persons or Objects on Land. Ownership of the airspace above the land, while vested in the owner of the land below, is subject to the statutory right of overflight. Aircraft flight over the land of another is lawful unless below federal altitude regulations, or unless it is so conducted as to be imminently dangerous to persons or property lawfully on the land (*Drennen v. County of Ventura (1974) 38 Cal. App. 3d 84, 87, 112 Cal. Rptr. 907* ; *see Pub. Util. Code § 21403*).

[*Optional*] **B. Flight Allowed in Zone of Approach to Public Airport Without Restriction or Hazard.** The right of overflight embraces the right of flight within the zone of approach to any public airport without restriction or hazard (*Drennen v. County of Ventura (1974) 38 Cal. App. 3d 84, 87, 112 Cal. Rptr. 907* ; *see Pub. Util. Code § 21403(c)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that a trespass occurred. The ground of opposition set forth is that there was no trespass because the flight through the airspace over plaintiff's property was privileged. There are regulations which govern the flight of aircraft and grant a privilege to prescribed flights [*see, e.g., Pub. Util. Code § 21403*]. These points and authorities would be used when the alleged trespass involved an aircraft within the privilege, either in general flight or adjacent to an airport.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of privileged entry. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel might include facts which demonstrate that defendant's flight met altitude and other applicable regulations and did not pose any type of threat to persons or objects on the land.

In an appropriate case, these points and authorities may be submitted in opposition to the contentions supported by the points and *authorities in § 225.83*.

[b] Related Pleading and Practice Chapters

For discussion and forms relating to airplanes and airports, see California Forms of Pleading and Practice , Ch. 16, *Airplanes and Airports* (Matthew Bender). For discussion and forms relating to nuisance, see California Forms of Pleading and Practice , Ch. 391, *Nuisance* (Matthew Bender). For discussion and forms relating to trespass, see California Forms of Pleading and Practice , Ch. 550, *Trespass* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing the existence of a nuisance, see Ch. 167, *Nuisance* .

[3] Discussion of Authorities

[a] Flight Is Lawful Unless Altitude Regulations Are Violated or Imminent Danger Is Posed to Persons or Objects on Land

In ***Drennen v. County of Ventura*** *(1974) 38 Cal. App. 3d 84, 112 Cal. Rptr. 907* , plaintiffs brought an inverse condemnation action against defendants. Defendants raised the special defense that the former owners of the Santa Susana Airport had acquired a specified prescriptive aviation easement over plaintiffs' land next to the airport and within the normal landing corridor to the airport's sole runway. The length of the runway was less than the minimum length generally required. Plaintiffs owned the land as a speculative investment, and did not occupy or use the land. Judgment was for defendants. Plaintiffs appealed.

The court of appeal reversed. In deciding that an aviation easement was not acquired, the court discussed trespass of airspace. A prescriptive easement is acquired only by means of an actionable invasion of the rights of the other in his or her land for the requisite period under the requisite conditions. The ownership of the airspace above the lands is vested in the several owners of the lands below, but this ownership is subject to the statutory right of overflight. Citing *Pub. Util. Code § 21403*, the court said that flight in aircraft over the land of another is lawful unless at altitudes below those prescribed by federal authority, or unless so conducted as to be imminently dangerous to persons or property lawfully on the land. The right of overflight embraces the right of a flight within the zone of approach of any public airport without restriction or hazard. Because the flights made within the claimed prescriptive period were at least qualifiedly privileged, no easement was acquired. The court also noted that flight by aircraft in the airspace above the land of another is a trespass only if an entry into the immediate reaches of the airspace next to the land is involved and the entry interferes substantially with the owner's actual use and enjoyment of his or her land (*38 Cal. App. 3d 84, 87-88)* .

[b] Flight Allowed in Zone of Approach to Public Airport Without Restriction or Hazard

Drennen v. County of Ventura *(1974) 38 Cal. App. 3d 84, 112 Cal. Rptr. 907* , is discussed in *§ 225.85[3][a]*.

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22-225 California Points & Authorities §§ 225.86-225.99

[Reserved]

§§ 225.86[Reserved]

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B. Damages
1. Nominal Damages

22-225 California Points & Authorities § 225.100

§ 225.100 Supporting Award of Damages for Trespass--Nominal Damages Presumed for Every Trespass

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general form of points and authorities supporting the contention that defendant committed trespass (see, e.g., § 225.20).*]

DEFENDANT COMMITTED A TRESPASS AGAINST PLAINTIFF'S REAL PROPERTY, AND THUS AN AWARD OF AT LEAST NOMINAL DAMAGES IS REQUIRED.

A. Nominal Damages Are Presumed for Every Trespass. For every trespass on real property the law presumes nominal damages, and judgment of at least nominal damages must be entered (*Empire Co. v. Bonanza Co. (1885) 67 Cal. 406, 408-409, 7 P. 810* ; *Daly v. Smith (1963) 220 Cal. App. 2d 592, 602, 33 Cal. Rptr. 920*).

[*Optional*] **B. Nominal Damages Will Not Affect Award of Punitive Damages.** Trespass always gives rise to nominal damages, even when there was no proof of actual damages. If punitive damages are appropriate, the nominal or minimal amount of actual damages will not matter (*Civic W. Corp. v. Zila Indus., Inc. (1977) 66 Cal. App. 3d 1, 18-19, 135 Cal. Rptr. 915*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of an award of damages, even if actual damages are minimal or nonexistent.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of damages for trespass. These points and authorities may also be

adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel may allege facts indicating the occurrence of a trespass, which alone is sufficient for an award of at least nominal damages; no actual damages need to be described.

[b] Related Pleading and Practice Chapters

For discussion and forms relating to damages, see California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender). For discussion and forms relating to trespass, see California Forms of Pleading and Practice, Ch. 550, *Trespass* (Matthew Bender).

[3] Discussion of Authorities

[a] Nominal Damages Are Presumed for Every Trespass

In ***Empire Co. v. Bonanza Co.*** *(1885) 67 Cal. 406, 7 P. 810* , plaintiff brought an action in trespass for damages and an injunction when defendant, an adjoining mine owner, encroached into plaintiff's property while working beneath the ground. The trial court judgment was for plaintiff. Defendant's motion for a new trial was denied. Defendant appealed.

The Supreme Court affirmed. Defendant's contention was that if the expense of mining equaled or exceeded the value of the gold extracted, judgment should be for defendant. Disagreeing with this, the Court said that the question of trespass or no trespass is not to be determined on the basis of profit and loss. For every trespass on real property the law presumes nominal damages. The Court said that the expense would be deducted from the value of the gold removed, but noted that that rule could not be extended to justify defendant's acts (*67 Cal. 406, 408-409)* .

In ***Daly v. Smith*** *(1963) 220 Cal. App. 2d 592, 33 Cal. Rptr. 920* , a suit was brought by plaintiffs to quiet title to mining claims in which title was claimed by reason of having relocated the identical mining claims owned by defendant. Defendant filed a cross complaint alleging trespass and conversion of minerals. The first trial resulted in a judgment for plaintiffs, which was reversed by the court of appeal, and retried on all of the issues. The second trial court found that a trespass had been committed, but refused to allow any damages because cross defendant acted in good faith, and had realized no profit on the removal of the ore. The second trial resulted in a judgment for defendant for title and ordered that both defendant and plaintiffs take nothing by the action. Plaintiffs appealed. Plaintiffs' appeal from the judgment awarding them no damages was later dismissed for failure to file an opening brief. Defendant appealed the decision disallowing any damages for trespass and conversion.

The court of appeal reversed the judgment on the cross complaint and remanded the issue of the attorney's involvement (the attorney had been named in the original action). Citing from several treatises on mining law, the court thoroughly discussed damages. A mining trespass is innocent when a person by mistake, or without an intention to trespass because of an honest belief that an existing right is being exercised, enters on the property of another and takes ore, coal, oil, or other minerals therefrom. When the trespass is innocent, the measure of damages is the value of the mineral in place, or the value of the mineral extracted from the ore, less the cost of mining and milling. When there is a willful trespass, if the taking is also willful, reckless, or intentional, or without claim of right or title, the trespasser is liable for the enhanced value of the product when and where it is finally converted to the use of the trespasser, without any deduction for expenses incurred, or for any value added (*220 Cal. App. 2d 592, 598-599)* . Citing *Empire Co. v. Bonanza Co. (1885) 67 Cal. 406, 7 P. 810* , the court said that there is no question that a judgment for at least nominal damages must be entered in favor of one against whom a trespass has been committed (*220 Cal. App. 2d 592, 602)* .

[b] Nominal Damages Will Not Affect Award of Punitive Damages

In ***Civic W. Corp. v. Zila Indus., Inc.*** *(1977) 66 Cal. App. 3d 1, 135 Cal. Rptr. 915* , plaintiff brought a complaint

against defendant alleging several causes of action based on promissory notes executed by defendant in favor of plaintiff and secured by defendant's business assets. The parties entered into a stipulation for permanent injunction which allowed plaintiff limited access to defendant's premises to sell the collateral and judgment was entered on the stipulation. Plaintiff entered defendant's premises, ejected the employees, and changed the locks on the doors. Defendant filed an answer alleging that the stipulation was obtained by fraud and duress and filed a cross complaint with five causes of action, among them trespass. Plaintiff's demurrer to the cross complaint was overruled as to trespass and three other causes of action. Plaintiff's motion for summary judgment on the cross complaint was initially denied, but was granted on its motion for reconsideration. Defendant appealed.

The court of appeal reversed judgment as to some of the causes of action, trespass and forcible entry among them. The court discussed all the causes of action as well as jurisdictional and procedural issues. The court discussed the situations in which a person exceeds a consent to entry, and held that plaintiff's privilege to enter was not extended to exclusive possession (*66 Cal. App. 3d 1, 17)* . The court then went on to the damage issue, stating that the tort of trespass has always given rise to nominal damages even when there was no proof of actual damages. Whether a party is entitled to more than nominal damages, should trespass be established, is for the trier of fact to decide. If punitive damages are appropriate, the nominal or minimal amount of actual damages will not matter (*66 Cal. App. 3d 1, 18-19)* .

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22-225 California Points & Authorities §§ 225.101-225.119

[Reserved]

§§ 225.101[Reserved]

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B. Damages
2. Exemplary Damages

22-225 California Points & Authorities § 225.120

§ 225.120 Supporting Award of Damages for Trespass--Exemplary Damages Available for Malicious Trespass

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general form of points and authorities supporting the contention that defendant committed trespass (see, e.g., § 225.20).*]

DEFENDANT'S ACTS IN TRESPASSING ON PLAINTIFF'S PROPERTY WERE MADE WITH MALICIOUS INTENT AND THUS WARRANT THE AWARD OF EXEMPLARY DAMAGES.

A. Exemplary Damages May Be Awarded When Trespassing Party Is Guilty of Oppression, Fraud, or Malice. Exemplary or punitive damages may be awarded when the defendant has been proven guilty by clear and convincing evidence of oppression, fraud, or malice (*Civ. Code § 3294(a)*; *Haun v. Hyman (1963) 223 Cal. App. 2d 615, 620-621, 36 Cal. Rptr. 84* ; *see Civ. Code § 3294(c)* (definitions of malice, oppression, and fraud)).

[*Optional*] **B. Award of Exemplary Damages Will Not Be Disturbed When Supported by Clear and Convincing Evidence.** An exemplary damage award must be supported by clear and convincing evidence of the defendant's conduct from which a jury could infer the defendant's wrongful intent. The amount awarded will not be disturbed unless the sum appears to be excessive or to have resulted from passion or prejudice (*Brenner v. Haley (1960) 185 Cal. App. 2d 183, 188-189, 8 Cal. Rptr. 224*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of an award of exemplary or punitive damages for trespass made with malicious intent.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of exemplary damages for malicious trespass. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, counsel may allege facts illustrating defendant's malice during a dispute over title to property by describing how defendant entered the disputed property and damaged it by building a road, tearing down trees, and emptying a gravel pit [*see, e.g., Haun v. Hyman (1963) 223 Cal. App. 2d 615, 620-621, 36 Cal. Rptr. 84]* .

[b] Related Pleading and Practice Chapters

For discussion and forms relating to damages, see California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender). For discussion and forms relating to trespass, see California Forms of Pleading and Practice, Ch. 550, *Trespass* (Matthew Bender).

[c] Related Points and Authorities Forms

For forms of memoranda supporting and opposing the award of exemplary damages, see Ch. 64, *Damages: Tort* .

[d] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 225.121* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

CAUTION:

After the cases that follow were decided, *Civ. Code § 3294(a)* was amended in 1987 to require clear and convincing evidence of oppression, fraud, or malice. Thus, these cases should be used with caution because it is not clear how the courts would have ruled under the new standard of proof.

[a] Exemplary Damages May Be Awarded When Trespassing Party Is Guilty of Oppression, Fraud, or Malice

In ***Haun v. Hyman*** *(1963) 223 Cal. App. 2d 615, 36 Cal. Rptr. 84* , defendants brought a quiet title action against plaintiff, the issue being the amount of land deeded to defendants by the adminstratrix of the estate of plaintiff's father. The trial court found that the deed conveyed a smaller number of acres than defendants sought and entered judgment for plaintiff. That judgment was affirmed on appeal. Pending that appeal defendants built a road and removed a large amount of gravel from a gravel pit on the disputed acreage, cutting down trees and dumping large piles of dirt in the river, all without plaintiff's permission. Plaintiff then brought an action to quiet her title to the land and sued for trespass. Defendants cross complained for a judgment quieting their title to the larger parcel of land. The trial court found that defendants acted deliberately and with malice in committing the trespass, considering that defendants ought to have known that the prior judgment was substantially against their claim, and considering that they did not act on the advice of counsel in trespassing. The trial court concluded that it was bound to a certain extent by the earlier decision. It quieted plaintiff's title to the land in dispute and awarded compensatory and exemplary damages for trespass. Defendants appealed.

The court of appeal affirmed. Among the points raised by defendants in their appeal was the exemplary damage award; they claimed that the evidence was insufficient as a matter of law to support the finding of malice. After noting that the principal attraction and value of the land were the trees and the natural beauty of the area, the court disagreed. It defined malice as the motive and willingness to vex, harass, annoy, or injure. When a trespass is committed from wanton or

malicious motives, or a reckless disregard of the rights of others, or under circumstances of great hardship or oppression, it is clear that exemplary damages may be awarded. Defendants acted with reckless or criminal indifference to plaintiff's right and claims (*223 Cal. App. 2d 615, 620-621)* .

In ***Roth v. Shell Oil Co.*** *(1960) 185 Cal. App. 2d 676, 8 Cal. Rptr. 514* , plaintiff operated a service station and restaurant on the same premises as her residence. As part of a contract with defendant, plaintiff sold defendant's oil products and defendant provided plaintiff with the company trademark advertisements. After seeing the station closed during normal business hours, defendant concluded that plaintiff's station was no longer open for business. Plaintiff's account was closed, the contract terminated, defendant's advertisements removed, without making any further inquiry or giving any written notice, and the advertising trademarks were removed or painted over on the pumps, building, and sign. Defendant then discovered there had been no termination of the contract by plaintiff and no actual cessation of the service. After defendant offered to restore the previous relation, plaintiff refused. Plaintiff brought an action in trespass against defendant. Plaintiff made no effort to reopen the station because she would have been required by the city building code to make improvements she could not afford and she feared defendant would terminate the contract at the time of the next renewal. The jury rendered a verdict in favor of plaintiff for compensatory and punitive damages. The trial court granted defendant's motion for a new trial, unless plaintiff consented to a reduction of the punitive damages awarded. Plaintiff consented and a new trial was denied. Defendant appealed. Plaintiff filed a cross appeal from the judgment and from the conditional order.

The court of appeal held that by consenting to the reduced award, plaintiff waived any appeal rights, and affirmed the judgment. The principal question on appeal was the sufficiency of the evidence to support exemplary damages. There must be some evidence of oppression or malice to justify the award. A tort committed by mistake, in the assertion of a supposed right, or without any wrong intention, and without such recklessness as evinces malice or a conscious disregard of the rights of others, does not warrant exemplary damages. The question is whether or not a jury might rightfully draw an inference from the evidence that there was a conscious disregard for the rights of others which constituted an act of subjecting plaintiffs to cruel and unjust hardship. The court said that an award of exemplary damages cannot be based on mere speculation; it depends on a definite showing of a willingness to vex, harass, or injure consistent with a wrongful intent to injure. The wrongful personal intention to injure calls for the penalty of exemplary damages. The court said that under the facts of the case, the jury might well have inferred malice or oppression on the part of defendant, and had the right to award exemplary damages. The court also saw no merit to the argument that the exemplary damages award was not commensurate with the compensatory damages awarded (*185 Cal. App. 2d 676, 681-683)* .

[b] Award Will Not Be Disturbed When Supported by Sufficient Evidence

In ***Brenner v. Haley*** *(1960) 185 Cal. App. 2d 183, 8 Cal. Rptr. 224* , plaintiff rented a fence and had been painting signs on it for advertising purposes for some time. Defendant secured the rights to a billboard in the same area, and contracted it out to an advertiser who claimed that plaintiff's fence was an interference; defendant experienced the loss of rental of the billboard. Defendant applied to the district attorney's office and the planning commission to take action against plaintiff on several occasions. The complaints were based on a zoning ordinance pertaining to advertisements. Plaintiff's nonconforming use was exempt from compliance by a special provision regarding preexisting uses. All of defendant's complaints were dismissed. Plaintiff's fence advertisements were painted out on several occasions. Plaintiff sued defendant for willful trespass and obliteration of advertising signs. The trial court rendered judgment in favor of plaintiff and awarded compensatory and exemplary damages. Defendant appealed.

The court of appeal affirmed. The court resolved all of the issues raised on appeal in plaintiff's favor. In responding to defendant's contention that a plaintiff is not entitled to bring a trespass action because of alleged problems with a lease, the court responded that the issue of the lease is not important because plaintiff was entitled to maintain an action merely on his possession and the judgment based on trespass is proper (*185 Cal. App. 2d 183, 187)* . The court examined the exemplary damage award and the evidence on which it was based. That evidence was predicated on the

conduct of defendant: the painting out of the signs and harassment by solicitation of actions (all of which were dismissed). The evidence clearly supported a finding of malice. The amounts awarded will not be disturbed unless the sum appears to be excessive or to have resulted from passion or prejudice (*185 Cal. App. 2d 183, 188-189)* .

[4] Additional Authorities

[a] Exemplary Damages May Be Awarded When Trespass Was Malicious

In *Goshgarian v. George (1984) 161 Cal. App. 3d 1214* , plaintiffs and defendants were neighbors in a residential area. Defendants owned a long narrow lot along the northern boundaries of all the residential lots. Plaintiffs built a swimming pool and drained water from the pool through hoses running over defendants' lot. Plaintiffs continued the draining through hoses hidden in the undergrowth after defendants and a sheriff told them to stop. Plaintiffs also constructed a wall encroaching on defendants' lot despite several warnings and a survey indicating the encroachment, and placed sod on defendants' parcel to prevent erosion without permission. Plaintiffs brought an action for damages for denial of an easement, and defendants cross complained for damages in trespass. On remand, the trial court granted judgment for defendants. The court of appeal remanded with directions regarding the amount of exemplary damages. Plaintiffs argued that the award of exemplary damages was improper because their conduct was no different from the conduct of others in the area, including defendants, before they owned the parcel bordering the lots. Defendants argued that plaintiffs' conduct demonstrated malice in that plaintiffs continued the siphoning long after they were told to desist, attempted to conceal their actions, made an improvement encroaching on defendant's land after a warning was given, and refused to remove the encroachment. Plaintiffs repeatedly disparaged defendants' interests and destroyed a survey monument. The court found that plaintiffs' actions manifested an unmistakably conscious disregard for the property rights of defendants and plaintiffs could reasonably be said to have acted with malice (*161 Cal. App. 3d 1214, 1224-1225)* .

In *McCormick v. Appleton (1964) 225 Cal. App. 2d 591* , the court of appeal affirmed a judgment for plaintiffs in a trespass action after defendant adjoining landowners had torn down a boundary fence. The court stated that there was sufficient evidence of malice and oppression to justify an award of exemplary damages. The evidence included defendants' destruction of the fence without any notice to plaintiffs, the status of plaintiffs' parcel as a residence while defendants' lot was unimproved and vacant, and one defendant's removal of the fence before a survey had been filed with the court despite the fact that this defendant, an attorney, had knowledge of a quiet-title action pending between the parties (*225 Cal. App. 2d 591, 597-598)* .

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22-225 California Points & Authorities § 225.121

§ 225.121 Opposing Award of Damages for Trespass--Exemplary Damages Unavailable if Not Based on Oppression, Fraud, or Malice

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

EXEMPLARY DAMAGES SHOULD NOT BE AWARDED TO PLAINTIFF BECAUSE DEFENDANT'S ALLEGED ACT OF TRESPASSING ONTO PLAINTIFF'S PROPERTY WAS NOT DONE WITH OPPRESSION, FRAUD, OR MALICE.

Exemplary Damages Must Be Based on Oppression, Fraud, or Malice. Exemplary damages may not be based on mere speculation, but are recoverable only when the defendant has been proven guilty by clear and convincing evidence of oppression, fraud, or malice. A defendant's tortious acts based wholly on a reasonable, though mistaken, belief does not indicate a malicious intent (*Civ. Code § 3294*; *Wolfsen v. Hathaway (1948) 32 Cal. 2d 632, 647-651, 198 P.2d 1* , *overruled on other grounds, Flores v. Arroyo (1961) 56 Cal. 2d 492, 496-497* ; *Roberts v. Permanente Corp. (1961) 188 Cal. App. 2d 526, 532, 10 Cal. Rptr. 519*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's request for exemplary damages for trespass. The ground of opposition set forth is that defendant was not guilty of oppression, fraud, or malice in committing the alleged acts of trespass.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the inappropriateness of exemplary damages. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel might include facts illustrating that defendants reasonably believed they had a valid right to use the land, acted in accord with that use, and that their actions were in no way directed against or in disregard of the plaintiff's rights.

In an appropriate case, this form may be submitted in opposition to a contention supported by the points and *authorities in § 225.120*.

[b] Related Pleading and Practice Chapters

For discussion and forms relating to damages, see California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender). For discussion and forms relating to trespass, see California Forms of Pleading and Practice, Ch. 550, *Trespass* (Matthew Bender).

[3] Discussion of Authorities

CAUTION:

After the cases that follow were decided, *Civ. Code § 3294(a)* was amended in 1987 to require clear and convincing evidence of oppression, fraud, or malice. These cases should still be of use in opposing an award of exemplary damages, because the new standard of proof requires an even stronger showing than former Civ. Code § 3294.

[a] Exemplary Damages Must Be Based on Oppression, Fraud, or Malice

The facts and procedural background of ***Wolfsen v. Hathaway*** *(1948) 32 Cal. 2d 632, 198 P.2d 1 , overruled on other grounds, Flores v. Arroyo (1961) 56 Cal. 2d 492, 496-497* , are discussed in *§ 225.61[3][a]*. The Supreme Court reversed an exemplary damage award. In so doing, the Court discussed the requirements of exemplary damages. An award of exemplary damages may not be based on mere speculation, but depends on a definite showing of a willingness to vex, harass, annoy, or injure consistent with the wrongful personal intention to injure. The record indisputably showed that defendants' tortious acts on the premises stemmed not from any malice, but wholly from a mistaken claim of right under the belief that the oral lease was valid and enforceable. The wrongful personal intention to injure that calls forth the penalty of punitive damages was not established and the court erred in submitting the matter of that award to the jury. Defendants' actions indicated their intent to farm the land pursuant to their claim of possession based on the alleged oral agreement, regardless of the identity of any other person claiming as lessee. They ceased operations after receiving notice of problems and did not resume until after consultation with an attorney and in reliance on his advice. Their actions were in no way based on the identity of the lessees and did not change once the identity of the lessees was made known (*32 Cal. 2d 632, 647-651)* .

The facts and procedural background of ***Roberts v. Permanente Corp.*** *(1961) 188 Cal. App. 2d 526, 10 Cal. Rptr. 519* , are discussed in *§ 225.40[3][c]*. The court of appeal reversed judgment for defendants, but found no error in the trial court's refusal to give jury instructions on exemplary damages. Exemplary damages are recoverable only when defendant has been guilty of oppression, fraud, or malice. The question of exemplary damages is generally for the trier of fact. Exemplary damages may be awarded when a trespass is done with an intent which is malicious. The court found none of the prerequisites that would support an allowance of exemplary damages, nor any evidence from which they might reasonably be inferred (*188 Cal. App. 2d 526, 532)* .

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[Reserved]

§§ 225.122[Reserved]

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3. Compensatory Damages

22-225 California Points & Authorities § 225.140

§ 225.140 Supporting Award of Damages for Trespass--Diminution in Value or Cost of Restoration [Civ. Code § 3333]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general form of memorandum or points and authorities supporting the contention that defendant committed trespass (see, e.g., § 225.20).*]

DEFENDANT'S TRESPASS RESULTED IN DAMAGE TO PLAINTIFF'S [REAL] PROPERTY, AND THUS PLAINTIFF IS ENTITLED TO AN AWARD OF DAMAGES ACCORDING TO THE _____ [DIMINUTION IN VALUE OF THE PROPERTY *and/or* COST OF RESTORATION OF THE PROPERTY (BECAUSE PLAINTIFF HAS PERSONAL REASONS FOR MAINTAINING THE PROPERTY IN ITS FORMER CONDITION)] [OR ACCORDING TO WHATEVER FORMULA IS MOST APPROPRIATE TO COMPENSATE PLAINTIFF FOR THE LOSS SUSTAINED].

A. Measure of Damages as Flexible in Order to Provide Fair Compensation to Injured Party. While diminution in market value and cost of restoration are common measures of damages, there is no fixed, inflexible rule for determining the measure of damages for injury to, or destruction of, property; whatever formula is most appropriate to compensate the injured party for all the detriment proximately caused will be adopted (*see Civ. Code § 3333*; *Mozzetti v. City of Brisbane (1977) 67 Cal. App. 3d 565, 576, 136 Cal. Rptr. 751* ; *Basin Oil Co. v. Baash-Ross Tool Co. (1954) 125 Cal. App. 2d 578, 606, 271 P.2d 122*).

[*EITHER*]

B. Diminution in Value as Measure of Damages for Injury to Real Property. The proper and usual measure of damages for injuries to real property is the diminution in its market value, or the difference between the fair market

value immediately before and immediately after the injury (*LeBrun v. Richards (1930) 210 Cal. 308, 319, 291 P. 825* ; *Hancock v. George R. Curtis Paving Co. (1931) 114 Cal. App 624, 628, 300 P. 65*).

[*AND/OR*]

C. Cost of Restoration as Measure of Damages. An alternative measure of damages to the diminution in market value is the reasonable cost of repair or restoration of the property to its original condition, together with the value of the lost use during the period of injury (*Raven's Cove Townhomes, Inc. v. Knuppe Dev. Co. (1981) 114 Cal. App. 3d 783, 801-802, 171 Cal. Rptr. 334* ; *Heninger v. Dunn (1980) 101 Cal. App. 3d 858, 862, 162 Cal. Rptr. 104*).

[*Optional*] **D. Measure of Damages as Lesser of Diminution in Value or Cost of Restoration.** If the cost of restoration is less than the diminution in the value of the property, that cost is the proper measure of damages; if the cost of restoration will exceed the diminution if value, then the value of the property is the proper measure of damages (*Green v. General Petroleum Corp. (1928) 205 Cal. 328, 336, 270 P. 952* ; *Charles v. Reuck (1960) 179 Cal. App. 2d 145, 147, 3 Cal. Rptr. 490*).

[*Optional*] **E. Reasonable Costs of Restoration in Excess of Diminution in Value May Be Awarded if Landowner Has Personal Reasons for Restoration.** Reasonable restoration costs may be awarded even though they exceed the diminution in market value if there is a reason personal to the owner for restoring the original condition or there is reason to believe that the plaintiff will, in fact, make the repairs (*Kelly v. CB&I Constructors, Inc. (2009) 179 Cal. App. 4th 442, 450-451, 102 Cal. Rptr. 3d 32* ; *Heninger v. Dunn (1980) 101 Cal. App. 3d 858, 863, 865, 162 Cal. Rptr. 104*).

[*Optional*] **F. Costs of Restoration as Available Even if Land Value Not Diminished.** Even if the value of the land was not diminished by the trespass, damages are allowable; an owner of land will not be compelled to accept a change in the physical condition of the property by the wrongful act of another. The reasonable cost of restoration may be recovered, without regard to the fact that the plaintiff has not yet restored the property (*Dandoy v. Oswald Bros. Paving Co. (1931) 113 Cal. App 570, 572-573, 298 P. 1030*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of an award for damages from trespass. There is no absolute rule for the measure of damages in trespass to real property, and the form provides the general measures, such as the diminution in value (alternative Paragraph B) and the cost of restoration (alternative Paragraph C). Rules specific to the measure of diminution in value or restoration costs are also included and may be used in determining which measure to use when one measure exceeds the other (optional Paragraphs D and E), and when the value of the land was not diminished by the trespass (optional Paragraph F).

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of damages for trespass. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel may allege facts illustrating defendant's trespass (the dumping of dirt on plaintiff's property). Counsel should then describe the resultant damages, calculated as the cost of restoration and repair to structures on the property.

[b] Related Pleading and Practice Chapters

For discussion and forms relating to damages, see California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender). For discussion and forms relating to trespass, see California Forms of Pleading and Practice, Ch. 550, *Trespass* (Matthew Bender).

[c] Related Points and Authorities Forms

For forms of memoranda supporting and opposing the award of tort damages, see Ch. 64, *Damages: Tort* .

[3] Discussion of Authorities

[a] Measure of Damages as Flexible in Order to Provide Fair Compensation to Injured Party

In ***Mozzetti v. City of Brisbane*** *(1977) 67 Cal. App. 3d 565, 136 Cal. Rptr. 751* , plaintiffs were the owners of a motel and trailer park which suffered damage from flooding caused by defendant city's project. After the construction of the project plaintiffs' property was left in a hole into which surface waters naturally drained; formerly surface waters had flowed through or around the premises. Plaintiffs brought suit against defendants premised on many legal theories. The trial court awarded damages to plaintiffs. Defendants appealed.

The court of appeal affirmed the finding of defendant's liability, and reversed and remanded the damage portion of the judgment. On appeal defendant challenged the damage instruction to the jury which stated that when property has been damaged by the wrongful action of another, the owner is entitled to recover the reasonable costs of necessary repairs and damages for the loss of rental during that time, and the difference between the market value of the property immediately before and after the damage, after making any necessary repairs. Finding problems with this instruction, the court stated the primary object of an award of damages in a civil action is just compensation or indemnity for the loss or injury sustained by plaintiff, and no more. There is no fixed, inflexible rule for determining the measure of damages for injury to, or destruction of, property, and whatever formula is most appropriate in the particular case will be adopted (*e.g.*, the difference in the value of real property immediately before and after the injury; cost of making repairs; loss of use of the property; loss of profits and prospective profits; increased operating expenses pending repairs; present and prospective damages that are the natural, necessary, or reasonable incident of the taking of property; cost of minimizing future damages). Nevertheless, the general rule is that if the cost of repairing the injury and restoring the premises to their original condition amounts to less than the diminution in value of the property, that cost is the proper measure of damages; and if the cost of restoration will exceed the diminution in value, then the diminution in value of the property is the proper measure (*67 Cal. App. 3d 565, 576)* . In making its award the jury might well have considered both the cost of repairs and the diminution value of the property. The computation of damages in this fashion was clearly improper, for it allowed recovery cumulatively for both the cost of repairs and the diminution in value of the property i violation of the general rules (*67 Cal. App. 3d 565, 577)* .

In ***Basin Oil Co. v. Baash-Ross Tool Co.*** *(1954) 125 Cal. App. 2d 578, 271 P.2d 122* , plaintiff purchased and rented oil well equipment from defendant. Three suspension plugs supplied by defendant failed, causing damage. Plaintiff brought an action for damages, alleging breach of an express and implied warranty and negligence in the design and manufacture of the plugs. After another plug failed, plaintiff brought a second action alleging the same causes. The cases were consolidated and the trial court judgment was for plaintiff. Defendant appealed.

The court of appeal affirmed the judgment in the first case, and reversed the other with directions to retry only the issue of damages. After a full discussion of the other issues raised, the court addressed the damage issue. Citing *Civ. Code § 3333*, the court observed that the measure of damages recoverable as the result of the tortious conduct of another is that amount which will compensate the injured party for all the detriment proximately caused thereby, whether it could have been anticipated or not. The compensation received shall be commensurate with the injury, and no more (*125 Cal.*

App. 2d 578, 605) . There is no fixed, inflexible rule for determining the measure of damages for injury to, or destruction of, property; whatever formula is most appropriate to compensate the injured party for the loss sustained will be adopted. If the cost of repairing the injury and restoring the premises to their original condition amounts to less than the value of the property prior to the injury, that cost is the proper measure of damages; and if the cost of restoration will exceed that value then the value of the property is the proper measure (*125 Cal. App. 2d 578, 606)* . Plaintiff's proof showed that the injury to the well was not reparable, that the cost of restoration of its flow would exceed the value of the remaining production, and that plaintiff was compelled to abandon the oil formation. Under those circumstances, plaintiff was entitled to recover an amount equal to the value of its well as it existed prior to the cessation of production, plus any reasonable expense incurred in its effort to restore the well to production up to the time of plaintiff's determination that further efforts at restoration were impractical, less the value of any salvage realized. A measure of damages based on these factors, which would have fully compensated plaintiff for the loss, as well as for other items of expense, was within the scope of the issues. The trial court did not apply this measure of damages. It made no finding of the value of the well prior to the time production ceased, nor of the reasonable cost of remedial operations before it was decided that restoration would be futile. The sum awarded was made without a determination that the amount did not exceed the value of the original well immediately prior to the cessation of production, plus the legitimate costs of operations to save the well (*125 Cal. App. 2d 578, 607-608)* .

[b] Diminution in Value as Measure of Damages for Injury to Real Property

In ***LeBrun v. Richards*** *(1930) 210 Cal. 308, 291 P. 825* , plaintiffs and defendant were adjoining landowners. Defendant constructed a ditch, embankment, and fence for irrigation purposes. After the city had improved the adjacent road, defendant's ditch was inadequate to carry off storm water and his embankment obstructed its further progress and caused it to back up and overflow plaintiff's property, causing considerable damage. Plaintiffs brought an action for damages. The trial court judgment was for plaintiffs. Defendant appealed.

The Supreme Court affirmed the judgment of the court of appeal and adopted its decision affirming the holding of the trial court. The Court discussed the law of water and its containment, finding that defendant interfered with the natural flow of water by his obstruction. The Court disagreed with defendant's allegation that the damage award was excessive. Noting that the parties tried the case on the theory that the proper measure of damages was the cost of repairs, the Court said that the proper measure of damages for injuries to real property is the difference, if any, in its market value before and immediately after the injury (*210 Cal. 308, 319)* . When the amount of compensation in dollars and cents is not susceptible of proof, it must be left to the sound discretion of the trial court, to be ascertained and adjudged after consideration of all the facts and circumstances established by the evidence (*210 Cal. 308, 320)* .

In ***Hancock v. George R. Curtis Paving Co.*** *(1931) 114 Cal. App 624, 300 P. 65* , plaintiffs, owners of a large lot, had posted a sign in one corner reading "dirt wanted--dump on fill." The lot was substantially level. Defendant construction company, in performing work on the adjacent street, dumped several thousand cubic yards of dirt, rocks, and debris on the lot near the house, damaging it and its foundation, destroying smaller buildings on the lot, and removing a tree in the process. The house and the debris deposited were some distance from the sign; the depression adjacent to the sign had been filled prior to defendant's acts. On the basis of this trespass, plaintiffs brought suit for damages. The trial court judgment was in favor of plaintiffs and awarded damages. Defendant appealed.

The court of appeal affirmed. The court disagreed with defendant's contention that it had merely complied with plaintiffs' invitation to deposit dirt. Citing *Civ. Code § 3333*, the court said that the measure of damages for the unlawful injury or destruction of buildings would ordinarily be the amount which will compensate for the detriment proximately caused. If the injury is to the freehold, the measure of damages is ordinarily the difference between the fair value of the property immediately before and immediately after the injury. This is particularly true when the detriment is permanent, or when the damages cannot be well expressed in specific items of injury (*114 Cal. App 624, 628)* .

[c] Cost of Restoration as Measure of Damages

In ***Raven's Cove Townhomes, Inc. v. Knuppe Dev. Co.*** *(1981) 114 Cal. App. 3d 783, 171 Cal. Rptr. 334* , plaintiff, a homeowner's association, brought suit against defendant development company for strict liability and breach of warranty, and against defendant and various other persons for breach of fiduciary duty. The action was based on serious defects in the landscaping due to poor drainage and irrigation systems and unpainted exterior siding and trim on individual units. The trial court granted a nonsuit from which plaintiffs appealed.

The court of appeal reversed. The court considered many questions on appeal, including the appropriate measure of damages. The court reviewed the law of damages for injuries to real property. *Civ. Code § 3333* sets forth the measure of damages for tort, the purpose of which is to make plaintiff whole. The normal measure of damages for injuries to real property is the difference between the market value of the land before and after the injury, although another permissible measure is the reasonable cost of repair or restoration of the property to its original condition, together with the value of the lost use during the period of injury. After noting that this is the correct and practical approach under the circumstances, the court held that the proper measure of damages is the cost of remedying the defects in the landscaping and repairing of the homeowners' individual properties, together with the value of the lost use (if any) during the period of injury (*114 Cal. App. 3d 783, 801-802)* .

In ***Heninger v. Dunn*** *(1980) 101 Cal. App. 3d 858, 162 Cal. Rptr. 104* , plaintiffs sued defendants, adjoining landowners in a mountainous area, for an injunction and damages for trespass after defendants bulldozed a road on plaintiffs' property. Defendants acted despite plaintiffs' objections, relying on the erroneous advice of an attorney who told them they held a valid easement. The bulldozing killed many trees and undergrowth, but the road provided additional access to plaintiffs' property, thereby increasing its market value. Plaintiffs liked the land in its natural state, intended to keep it that way, and had personal reasons for restoring the land to its original condition. The trial court granted injunctive relief but denied any award of damages because there was no depreciation in the value of plaintiffs' property. Plaintiffs appealed the denial of damages.

The court of appeal reversed. The court discussed theories of damages at length, including a discussion of *Civ. Code § 3346* and *Code Civ. Proc. § 733* (injury to trees or shrubbery), but its primary focus was on restoration costs. *Civ. Code § 3333* provides that the measure of damages for tortious injury to property is the amount which will compensate for all the deteriment proximately caused thereby, generally determined as the difference between the value of the property before and after the injury (*101 Cal. App. 3d 858, 861)* . Diminution in market value is not an absolute limitation; several other theories are available to fix appropriate compensation for a plaintiffs' loss. There is no fixed inflexible rule for determining the measure of damages for injury to, or destruction of, property; whatever formula is most appropriate to compensate the injured party for the loss sustained will be adopted. One alternative measure of damages is the cost of restoring the property to its condition prior to the injury. The court noted costs of restoration are normally not awarded if they exceed the diminution in property value (*101 Cal. App. 3d 858, 862)* . The court went on to review the personal-reason exception for determining which measure to apply [*see § 225.140[3][e]*].

[d] Measure of Damages as Lesser of Diminution in Value or Cost of Restoration

In ***Green v. General Petroleum Corp.*** *(1928) 205 Cal. 328, 270 P. 952* , defendant's oil drilling operations resulted in the blowing out of an oil well and the deposit of oil, sand, mud, and rocks on plaintiffs' nearby residential property. Plaintiffs brought an action based on trespass and negligence to recover damages for injuries to their property. The trial court found that defendant was not negligent in its drilling operations, but held defendant liable in damages for the trespass, and rendered judgment in favor of plaintiffs. Defendants appealed.

The Supreme Court affirmed. The fact that the act resulting in the blowout was lawful and not negligently done does not make the covering of plaintiffs' property with foreign matter any less an actual invasion of and a trespass on the premises (*205 Cal. 328, 334)* . When an injury arises out of, or is caused directly and proximately by the contemplated act or thing in question, without the interposition of any external or independent agency which was not or could not be

foreseen, there is an absolute liability for the consequential damage, regardless of any element of negligence either in the act or in the construction, use, or maintenance of the object or instrumentality that may have caused the injury (*205 Cal. 328, 334)* . Defendants contended that the trial court did not apply the proper measure in awarding damages to the property. The court found, in specific items, what it would cost to restore the premises to their original condition, and allowed the aggregate amount as damages. Defendant contended that the discovery of oil in its well gave a new value to the property of plaintiffs, greatly in excess of its previous value as residential property and that the restoration of the property to its original condition would add nothing to its value for its new use, and that plaintiffs suffered no loss by reason of the injury to the realty. Rejecting this argument, the Court said that the rule to be applied is: if the cost of repairing the injury by removing the debris deposited by the defendant, and otherwise restoring the premises to their original condition, amounts to less than the value of the property prior to the injury, such cost is the proper measure of damages; and if the cost of restoration will exceed such value, then the value of the property is the proper measure (*205 Cal. 328, 336)* .

In ***Charles v. Reuck*** *(1960) 179 Cal. App. 2d 145, 3 Cal. Rptr. 490* , plaintiffs, property owners, brought an action against several defendants for property damages caused by a traffic accident resulting in a logging truck entering plaintiffs' land and damaging their barn. The trial court judgment was for plaintiffs and awarded them damages. Defendants appealed.

The court of appeal affirmed. Among the issues raised by defendants was the proper measure of damages. The rule is that the amount of damages to be allowed for injury to realty is the value of the property prior to the injury unless the cost of restoration is less than that value, in which case the cost of repair is the proper measure of damages (*179 Cal. App. 2d 145, 147)* .

[e] Reasonable Costs of Restoration in Excess of Diminution in Value May Be Awarded if Landowner Has Personal Reasons for Restoration

In ***Kelly v. CB&I Constructors, Inc.*** *(2009) 179 Cal. App. 4th 442, 102 Cal. Rptr. 3d 32* , plaintiff owned a 34-acre ranch that was damaged when a brush fire that was negligently sparked by defendant spread to over 20,000 acres. The fire destroyed several structures on plaintiff's ranch, as well as a number of trees. Subsequent mudslides causing further property damage resulted from the destruction of vegetation by the fire. Plaintiff sued defendant and was awarded almost $3 million in compensatory damages to restore the property to a habitable state, even though the market value of the property before the damage occurred was estimated to be no more than $1.8 million. Defendant appealed.

The Court of Appeal held that there was substantial evidence to support the jury's award of restoration damages. Defendant argued that the damages were excessive because, when expressed as a percentage of the property's value, they far exceeded any other award of such damages approved by a California court in the past. The court rejected this argument, noting instead that the reasonableness of the restoration costs must be decided on a case-by-case basis and cannot be determined through a mechanical comparison of damage awards in other cases (*179 Cal. App. 4th 442, 453)* . In upholding plaintiff's restoration costs of almost $3 million, the court concluded that the evidence supported the finding that this was the amount that would be required to allow plaintiff to make the property safe and habitable by his family and restore it for use as a horse ranch. As the property was unmarketable in its current condition due to damage caused by the defendant, the court noted that a person in plaintiff's position was justified in incurring substantial restoration costs notwithstanding that these costs exceeded the market value of the property (*179 Cal. App. 4th 442, 454)* .

The facts and procedural background of ***Heninger v. Dunn*** *(1980) 101 Cal. App. 3d 858, 162 Cal. Rptr. 104* , are discussed in *§ 225.140[3][c]*. The court of appeal discussed the available measures of damages, and applied an exception to the general rule. Although courts will normally not award costs of restoration if they exceed the diminution in the value of the property, a personal-reason exception applies to this rule. Restoration costs may be awarded even though they exceed the decrease in market value if there is a reason personal to the owner for restoring the original

condition or where there is reason to believe that the plaintiff will, in fact, make the repairs (*101 Cal. App. 3d 858, 863)* . The personal-reason exception has been applied in the destruction of shade or ornamental trees that were of personal value to the owner. If restoration of the land to a reasonable approximation of its former condition is impossible or impracticable, the landowner may recover the value of the trees or shrubbery, either as timber or for their aesthetic qualities, without regard to the diminution in the value of the land. Guiding principles for the courts are flexibility of approach and full compensation to the owner, within the overall limitation of reasonableness (*101 Cal. App. 3d 858, 864-865)* . Only reasonable replacement costs may be recovered; replacement costs may be unreasonable or excessive in relation to the damage inflicted on the land or its value prior to the trespass. In those cases, the achievement of a reasonable approximation of the land's former condition may involve something less than substantially identical restoration (*101 Cal. App. 3d 858, 865)* . If the trial court determined that appellants had personal reasons for restoring their land to its original condition, and that restoration could be achieved at a cost that was not unreasonable in relation to the damage inflicted and the value of the land prior to the trespass, it should have exercised its discretion to award those restoration costs (*101 Cal. App. 3d 858, 866)* .

[f] Costs of Restoration as Available Even if Land Value Not Diminished

The facts and procedural background of ***Dandoy v. Oswald Bros. Paving Co.*** *(1931) 113 Cal. App 570, 298 P. 1030* , are discussed in *§ 225.80[3][a]*. The court of appeal reversed the trial court's judgment for defendants. Noting that there was evidence that the value of the land was not diminished by the deposit of earth and soil on the land, the court discussed the proper measure of damages. The materials deposited by defendant on plaintiff's land could be removed at a cost less than the value of the land. To hold that plaintiff is without remedy merely because the value of the land was not diminished would be to decide that by the wrongful act of another, an owner of land may be compelled to accept a change in the physical condition of his or her property, or else perform the work of restoration at his or her own expense. The reasonable cost of restoration may be recovered, without regard to the fact that plaintiff had not yet removed the material from the land (*113 Cal. App 570, 572-573)* .

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3. Compensatory Damages

22-225 California Points & Authorities § 225.141

§ 225.141 Supporting Award of Damages for Trespass--Damages Available for Annoyance and Discomfort

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general form of memorandum or points and authorities supporting the contention that defendant committed trespass (see, e.g., § 225.20).*]

PLAINTIFF SHOULD BE AWARDED DAMAGES FOR DEFENDANT'S TRESPASS ON PLAINTIFF'S PROPERTY BECAUSE DEFENDANT CAUSED ANNOYANCE AND DISCOMFORT TO PLAINTIFF WHICH WERE THE NATURAL AND PROXIMATE RESULT OF THE TRESPASS.

A. Damages for Annoyance and Discomfort Are Recoverable if Natural and Proximate Result of Trespass. When a trespass has been established, the occupant of the land may recover damages for annoyance and discomfort that would naturally ensue. Discomfort and annoyance may be suffered when there is no physical injury (*Kornoff v. Kingsburg Cotton Oil Co. (1955) 45 Cal. 2d 265, 272, 288 P.2d 507* ; *Herzog v. Grosso (1953) 41 Cal. 2d 219, 225, 259 P.2d 429*).

B. Damages for Emotional Distress Flowing Directly From Trespass Are Recoverable. Trespassers are liable for all direct consequences of the trespass, including emotional distress (*Miller v. National Broad. Co. (1986) 187 Cal. App. 3d 1463, 1481, 232 Cal. Rptr. 668*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of an award of damages for discomfort and annoyance resulting to plaintiff from defendant's trespass.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of damages for trespass. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel may allege facts describing defendant's actions in changing the grade of a road over which plaintiff has an easement, making the slope so steep as to be dangerous, thus threatening the safety of those using the road, and causing annoyance and discomfort to plaintiff.

[b] Related Pleading and Practice Chapters

For discussion and forms relating to damages, see California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender). For discussion and forms relating to mental distress, see California Forms of Pleading and Practice, Ch. 362, *Mental Suffering and Emotional Distress* (Matthew Bender). For discussion and forms relating to trespass, see California Forms of Pleading and Practice, Ch. 550, *Trespass* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda supporting and opposing the award of tort damages, see Ch. 64, *Damages: Tort* .

[3] Discussion of Authorities

[a] Damages for Annoyance and Discomfort Are Recoverable if Natural and Proximate Result of Trespass

The facts and procedural background of ***Kornoff v. Kingsburg Cotton Oil Co.*** *(1955) 45 Cal. 2d 265, 288 P.2d 507* , are discussed in *§ 225.81[3][a]*. The Supreme Court affirmed a trespass damage award. In their trespass action plaintiffs alleged that their comfort and enjoyment of their home were diminished and that they were unable to live normally and peacefully and follow ordinary pursuits. They also alleged that they had suffered severe nervous distress and mental anguish (*45 Cal. 2d 265, 271-272)* . The Court said that the discomfort and annoyance suffered by plaintiffs was an injury directly and proximately caused by defendant's invasion of their property and that those damages would naturally result from that invasion. Discomfort and annoyance may be suffered when there is no physical injury. The Court reaffirmed that once a cause of action for trespass is established, an occupant of land may recover damages for annoyance and discomfort that would naturally ensue therefrom. The suffering caused by fear for the safety of family and visitors was a natural consequence of defendant's conduct and an invasion of a protected interest of an occupant of real property (*45 Cal. 2d 265, 272)* . While defendant's trespass was not of the type to cause fright or shock or even physical illness, it was obviously of the type to cause plaintiffs much annoyance and discomfort. The annoyance and discomfort suffered by plaintiffs as a result of the injury to the real property was a natural consequence of the trespass (*45 Cal. 2d 265, 273)* . The Court held that when a person is entitled to a judgment for harm to land resulting from a past invasion not amounting to a total destruction in value, compensation for discomfort and annoyance to the occupants of the land are distinct grounds of compensation for which the possessor is allowed recovery in addition to the harm to his or her proprietary interests (*45 Cal. 2d 265, 273-274)* .

In ***Herzog v. Grosso*** *(1953) 41 Cal. 2d 219, 259 P.2d 429* , plaintiffs had an easement over defendant's property for road purposes. A series of confrontations developed between the parties, culminating in defendant's regrading the road, resulting in a passage which was narrow, steep, and dangerous. Plaintiffs brought an action to quiet title to the easement and for related relief, and obtained a temporary restraining order forbidding defendant from interfering with plaintiffs' use of the road. At trial plaintiffs presented evidence that the steep grade and incline created a condition of extreme fire hazard and safety hazard to all users and had depreciated the fair market value of plaintiffs' property. The trial court found that as a direct, natural, and proximate result of defendant's acts, plaintiffs suffered nervousness, worry, and mental distress for their safety and the safety of others obliged to use the road because of the dangerous conditions. The trial court entered judgment in favor of plaintiffs, awarding damages, and declaratory and injunctive relief. Defendants

appealed.

The court of appeal modified the judgment by deleting the requirement that defendants construct a road, but otherwise affirmed the judgment. In affirming the damage award for mental distress, the court reviewed the trial court's finding that plaintiffs' mental distress was a natural and proximate result of defendant's acts. Once a cause of action for trespass is established, an occupant of land may recover damages for annoyance and discomfort that would naturally ensue (*41 Cal. 2d 219, 225)* . The suffering caused by fear for safety was a natural consequence of defendant's conduct and an invasion of a protected interest of an occupant of real property (*41 Cal. 2d 219, 226)* . Defendant also contested the damage award based on the permanent depreciation in the value of plaintiffs' property, claiming that the amount was excessive. Defendant asserted that removal of the dirt would restore the parcel to its original condition, and that when the cost of restoration is less than the depreciation in value, the cost of restoration is the measure of damages. The court found fault with this contention, saying that plaintiffs established their damages by showing the depreciation in value. It was then incumbent on defendants to come forward with proof that the cost of restoration would be less. They failed to do so, and there is no evidence in the record showing the cost of restoring the parcel to its original condition (*41 Cal. 2d 219, 226-227)* .

[b] Damages for Emotional Distress Flowing Directly From Trespass Are Recoverable

The facts and procedural background of ***Miller v. National Broad. Co.*** *(1986) 187 Cal. App. 3d 1463, 232 Cal. Rptr. 668* , are discussed in *§ 225.40[3][b]*. The plaintiff sought to recover for emotional distress resulting from the trespass of a television film crew, who entered plaintiff's home without her consent and filmed unsuccessful attempts by emergency paramedics to save the life of plaintiff's husband, a heart attack victim. Plaintiff suffered the emotional distress when she later inadvertently viewed defendant's broadcast of a documentary that portrayed her husband's dying moments. The trial court, concluding that plaintiff suffered no actual damages, entered summary judgment for the defendants.

The court of appeal reversed. Noting the general rule that trespassers are liable for all direct consequences of the trespass including emotional distress, the court held that the consequences of defendants' actions included the plaintiff's emotional distress, which she suffered when she viewed her husband's dying moments (*187 Cal. App. 3d 1463, 1481)* . Although the court stated that emotional distress must be accompanied by physical injury to the person or the land, the court upheld plaintiff's action even though there was clearly no injury to the land and the only alleged physical injury to plaintiff was that she suffered "apprehension" and "nervousness" *187 Cal. App. 3d 1463, 1471 n.2, 1481)* .

[4] Additional Authorities

[a] Damages for Annoyance and Discomfort Are Recoverable if Natural and Proximate Result of Trespass

In ***Alonso v. Hills*** *(1950) 95 Cal. App. 2d 778, 214 P.2d 50* , the court of appeal affirmed judgment for plaintiff in an action for property damages and severe mental distress caused by defendant quarry's blasting operations near plaintiff's residence. The court held that an occupant is entitled to damages for discomfort and annoyance resulting from an invasion of real property rights. Discomfort and annoyance to an occupant of land and to members of the household are distinct grounds of compensation for which the possessor is allowed to recover in addition to any harm to proprietary interests. Among the bodily and mental harms which are compensable are the possessor's continual fear of damage in case of repetition of the offending acts (*95 Cal. App. 2d 778, 787-789)* .

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22-225 California Points & Authorities § 225.142

§ 225.142 Supporting Award of Damages for Trespass--Damages Allowable to Businesses Injured by Trespass

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general form of memorandum of points and authorities supporting the contention that defendant committed trespass (see, e.g., § 225.20).*]

PLAINTIFF'S BUSINESS WAS INTERRUPTED AS A RESULT OF DEFENDANT'S TRESPASS, RESULTING IN DAMAGES MEASURED BY _____ [THE PROFITS LOST DURING THE TIME THE PROPERTY IS BEING RESTORED *or* THE LOSS OF USE OF THE PROPERTY DURING THE TIME THE PROPERTY IS BEING RESTORED].

[*EITHER, if profits can be proved*]

A. Loss of Prospective Profits as Measure of Damages on Sufficient Proof. If there is a satisfactory basis for estimating what the probable earnings would have been had there been no trespass, damages for loss of prospective profits are available. Operating experience sufficient to permit a reasonable estimate of probable income and expense may provide a satisfactory basis for the profits lost during the time the property cannot be used while it is being restored to its condition prior to the trespass (*Natural Soda Prod. Co. v. City of Los Angeles (1943) 23 Cal. 2d 193, 199-201, 143 P.2d 12* ; *Razzano v. Kent (1947) 78 Cal. App. 2d 254, 261, 177 P.2d 612*).

[*OR, if profits cannot be proved*]

A. Difference in Usable Value of Premises as Measure of Damages When Loss of Profits Cannot Be Sufficiently Proved. When the property damage is temporary in character, and the proof is not sufficient to award loss of profits as

damages, the general rule is that the measure of damages for the loss of use during restoration is the difference in the rental or usable value of the premises before and after the injury (*Guttinger v. Calaveras Cement Co. (1951) 105 Cal. App. 2d 382, 387-389, 233 P.2d 914*).

[*CONTINUE*]

B. One Measure of Damages Applied for Business Injuries. The plaintiff may recover damages either for its loss of profits or for the diminution of property or leasehold value, according to the circumstances of the case (*Lucky Auto Supply v. Turner (1966) 244 Cal. App. 2d 872, 884-885, 53 Cal. Rptr. 628*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of an award for damages to plaintiff's business proximately caused by defendant's trespass. If there is sufficient proof to establish what the prospective profits would have been absent the trespass, counsel should use the first alternative of Paragraph A. But if insufficient proof of prospective profits exists, counsel should use the second alternative of Paragraph A.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the damages resulting from trespass. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel may include facts illustrating that plaintiff's flower shop earned $2,000 profit per month, and that plaintiff lost two months of business resulting from defendant's trespass and insecticide spraying.

[b] Related Pleading and Practice Chapters

For discussion and forms relating to damages, see California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender). For discussion and forms relating to trespass, see California Forms of Pleading and Practice, Ch. 550, *Trespass* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda supporting and opposing the award of tort damages, see Ch. 64, *Damages: Tort* .

[3] Discussion of Authorities

[a] Loss of Prospective Profits as Measure of Damages on Sufficient Proof

In ***Natural Soda Prod. Co. v. City of Los Angeles*** *(1943) 23 Cal. 2d 193, 143 P.2d 12* , defendant's aqueduct project diverted virtually all the flow from a lake into which it had previously emptied, resulting in the lake drying up and its subsurface becoming a crystalline cake impregnated with brines containing valuable chemicals. Plaintiff owned and operated plants on the shore of the lake bed to which brines pumped from wells on the bed were piped for the production of soda products. Defendant later caused a large amount of water to flow into the lake. The water inundated much of plaintiff's plants, causing substantial physical damage and reducing the value of the subsurface brines. Plaintiff's properties were wholly inaccessible for some time and plaintiff was unable to operate its plants. Plaintiff brought suits for an injunction and damages. After consolidating the cases, the trial court denied injunctive relief and awarded plaintiff damages. Defendant appealed.

The Supreme Court affirmed the judgment. In addition to addressing the theory of liability and the requirements of a claim against a government entity, the Court discussed the measurement of damages. Defendant found fault with the damage award for loss of profits. Affirming the trial court's award, the Court said that the award of damages for loss of profits depends on whether there is a satisfactory basis for estimating what the probable earnings would have been had there been no tort. If no such basis exists, it may be necessary to deny that form of recovery. If there has been operating experience sufficient to permit a reasonable estimate of probable income and expense, damages for loss of prospective profits are awarded. Plaintiff was able to provide sufficient evidence to support an estimate of profits. Since defendant made it impossible for plaintiff to realize any profits, it cannot complain if the probable profits are of necessity estimated (*23 Cal. 2d 193, 199-200)* . Defendant also argued that plaintiff's damages should be determined on the basis of evidence concerning the value of plaintiff's properties before and after the tort. The Court responded that while diminution of property value is the usual method for determining damages for trespass to real property, it yields to others if they are more appropriate to a particular situation. In the case of a reparable injury, a frequent measure of damages is the cost of making repairs plus the value of the use of the premises for the period during which the tort has deprived the owner of the property. The trial court awarded damages for the physical destruction resulting from the tort, and the value of the use of plaintiff's properties was properly estimated on the basis of the probable profits that would have derived from their operation. Plants like plaintiff's did not frequently change hands and in a sale the price would likely be based on considerations peculiar to the plant. Expert opinion as to the market value of such a plant is likely to be based on nothing more substantial than the probable returns from the operations of the plant. A more accurate assessment of damage can be obtained by estimating profits directly (*23 Cal. 2d 193, 200-201)* .

In ***Razzano v. Kent*** *(1947) 78 Cal. App. 2d 254, 177 P.2d 612* , plaintiff was the lessee of real property on which he dredged gold for a profit. Defendant carried on dredging operations on the property adjacent to plaintiff's property. Defendant's operations caused a mass of muddy water to flow into the pond used by plaintiff, making it impossible for him to continue his dredging operations profitably. Additionally, defendant, without plaintiff's consent, constructed a dam on the lower end of plaintiff's leasehold, causing the muddy water to be impounded on and to cover a substantial part of plaintiff's leasehold, making it impossible for him to carry on his dredging operations on that portion of the property. Plaintiff brought an action for damages for the two acts of trespass. The trial court found in favor of plaintiff and awarded damages. Defendant appealed the judgment and the order denying the motion for a new trial.

The court of appeal affirmed the judgment and dismissed the appeal from the order denying defendant's motion for a new trial. In response to defendant's arguments concerning required proof, the continuing nature of the trespass, and applicable damages, the court said that the wrongful act was completed as of the date when plaintiff was forced to abandon his dredging operations and move his equipment, and that plaintiff was entitled to recover for the loss of all prospective net profits (*78 Cal. App. 2d 254, 261)* .

[b] Difference in Usable Value of Premises as Measure of Damages When Loss of Profits Cannot Be Sufficiently Proved

In ***Guttinger v. Calaveras Cement Co.*** *(1951) 105 Cal. App. 2d 382, 233 P.2d 914* , defendant, operator of a cement plant, and plaintiffs, cattle raisers, were owners of property in the same vicinity. Plaintiffs used their land for grazing purposes. After defendant's plant expanded and increased its production, dust and gases escaping from the plant were carried over and deposited on portions of each plaintiff's land, causing damages. Plaintiffs brought an action to enjoin a nuisance and for damages. The trial court provided injunctive relief for all six plaintiffs and awarded damages to five of them. Four plaintiffs appealed. The trial court determined that the method of plant operation was a nuisance, rendered judgment for damages in specified sums to specified plaintiffs and granted injunctive relief. Some plaintiffs appealed.

The court of appeal affirmed. Among plaintiffs' contentions on appeal was that the court committed prejudicial error in instructing the jury on the measure of damages. The trial court's instructions included two measures of damages: the reasonable value of plaintiffs' loss of income and the difference in the fair rental values, with and without the injury

caused by defendant. The court noted that both methods of measuring damages are approved and both may be considered. There is no hard and fast rule for the measurement of damages. *Civ. Code § 3333* describes the desired result, rather than a method of reaching that result, and generally it is proper for the court to give the jury a more workable method for measuring damages than the broad language of the code. There was no permanent injury to the real property. The general measure of damages in this situation is the difference in the rental or usable value of the premises before and after the injury (*105 Cal. App. 2d 382, 387)* . Plaintiffs claimed that when an established business has been injured or interfered with, any loss of profits thus caused may be recovered. The court stated that lost profits may be awarded if the plaintiffs have been engaged in an established business for a long time. Although plaintiffs had been in business for some time, they did not prove that any loss of gross income actually occurred. To allow loss of profits from injury to an established business there must not only have been operating experience sufficient to permit a reasonable estimate of probable income and expense, but also evidence which proves the probable income and expenses made in respect to the business as a whole. If the proof is insufficient to enable the jury to arrive at a conclusion based on loss of profits, then the general rule of damages applies, which is the difference in the rental or usable value of the land before and after injury (*105 Cal. App. 2d 382, 388-389)* .

[c] One Measure of Damages Applied for Business Injuries

In ***Lucky Auto Supply v. Turner*** *(1966) 244 Cal. App. 2d 872, 53 Cal. Rptr. 628* , plaintiff operated several automobile supply stores and was a lessee in one of the buildings in which defendants, trustees of various trusts, eventually became the owners. The lease with the previous owners included the use of a parking lot adjoining the building, an extremely important adjunct to the conduct of plaintiff's business. After plaintiff denied permission to construct a building on the parking lot, defendants did so anyway. Plaintiff and its customers were unable to use the parking lot. Plaintiff sought a mandatory injunction to compel defendants to remove the building, which was denied on the hearing of an order to show cause. Thereafter plaintiff filed a complaint for damages for trespass. In response to defendant's allegation that plaintiff had continued to earn profits from the store, plaintiff presented evidence that the profits were less than they would have otherwise been. The trial court awarded judgment for plaintiff, including damages for loss of profits and exemplary damages. Defendant appealed.

The court of appeal affirmed. The conduct of defendants was a tortious act for which defendants became liable to plaintiff for damages proximately caused by that act (*244 Cal. App. 2d 872, 881)* . Damages for tort may include loss of anticipated profits when an established business has been injured. When the operation of an established business is prevented or interrupted by a tort, damages for loss of prospective profits that otherwise might have been made from its operation are ordinarily recoverable because their occurrence and extent may be ascertained with reasonable certainty from the working experience of the business, the past volume of business, and other probable data relevant to the probable future sales. The award for damages for loss of profits depends on whether there is a satisfactory basis for estimating what the probable earnings would have been had there been no tort. The general principle inherent in the recovery of damages for loss of prospective profits is that the evidence must be of reasonable reliability and make reasonably certain the occurrence, nature, and extent of the damages (*244 Cal. App. 2d 872, 882-883)* . Plaintiff could have also sought damages on the theory of depreciation in the value of its leasehold. However, under the circumstances, it could not recover damages for both its loss of profits and good will and depreciation in the value of its leasehold because this would amount to a double recovery (*244 Cal. App. 2d 872, 884-885)* .

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§ 225.143 Supporting Award of Damages for Trespass--Other Consequential Damages [Civ. Code § 3333]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general form of memorandum of points and authorities supporting the contention that defendant committed trespass (see, e.g., § 225.20), as well as with specific points and authorities supporting the award of particular damages (see, e.g., §§ 225.140 -225.142).*]

PLAINTIFF SHOULD RECOVER DAMAGES FOR ALL THE OTHER INJURIES ALLEGED BECAUSE THEY ARE ALL THE DIRECT AND PROXIMATE RESULT OF DEFANDANT'S TRESPASS.

A. Compensation Allowed for All Damages Proximately Caused by Trespass. The measure of damages recoverable as the result of the tortious conduct of another is that amount which will compensate the injured party for all the detriment proximately caused by such conduct, whether it could have been anticipated or not. The damages which accrue subsequent to the trespass, but of which the trespass is the primary cause, are not separate causes of action but are part of the same tort (*Civ. Code § 3333*; *Hawthorne v. Siegel (1891) 88 Cal. 159, 163, 166, 25 P. 1114* ; *Basin Oil Co. v. Baash-Ross Tool Co. (1954) 125 Cal. App. 2d 578, 605, 271 P.2d 122*).

B. Intent to Cause Damages Not Element of Trespass. Intent to cause damages is not an element of the tort of trespass; a trespasser is liable for any damage caused even though that damage was not intended or foreseen (*Meyer v. Pacific Employers Ins. Co. (1965) 233 Cal. App. 2d 321, 326, 43 Cal. Rptr. 542*).

[*Optional*] **C. Recovery of Costs Incurred to Prevent Further Harm.** When the plaintiff has already suffered injury by the tort of another, the plaintiff is entitled to recover the reasonable and necessary costs of preventing further harm (*Pacific Tel. & Tel. Co. v. Granite Constr. Co. (1964) 225 Cal. App. 2d 765, 769, 37 Cal. Rptr. 727*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of an award for damages proximately caused by defendant's trespass. Although damages are not restricted to injury to property, the damages must be the consequence of the trespass and not speculative or remote [*see Civ. Code § 3333*; *Hawthorne v. Siegel (1891) 88 Cal. 159, 163, 166, 25 P. 1114]* . This form may be combined, when appropriate, with other points and authorities supporting the award of specific damages according to the facts involved [*see, e.g., §§ 225.140 -225.142*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the damages resulting from trespass. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should present facts demonstrating what consequential damages were caused by defendant's trespass not otherwise supported by the specific points and *authorities in §§ 225.140 -225.142*.

[b] Related Pleading and Practice Chapters

For discussion and forms relating to damages, see California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender). For discussion and forms relating to trespass, see California Forms of Pleading and Practice, Ch. 550, *Trespass* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda supporting and opposing the award of tort damages, see Ch. 64, *Damages: Tort* .

[3] Discussion of Authorities

[a] Compensation Allowed for All Damages Proximately Caused by Trespass

In ***Hawthorne v. Siegel*** *(1891) 88 Cal. 159, 25 P. 1114* , plaintiffs, partners in the barber and bath business, were lessees in the basement of the same building in which defendant was a tenant. Claiming authority from the owner, defendant made alterations in the building, changed the structure so it was totally unfit for plaintiffs' business, and compelled plaintiffs to abandon the basement. Plaintiffs sued for damages from trespass, including damages for necessary moving expenses, improvements made to the basement by them, monthly business profits, money lost from a supply agreement, and damages incurred by reason of abandoning their leasehold. The trial court awarded damages for plaintiffs but at a reduced amount. Defendant appealed from that judgment and an order denying a new trial.

The Supreme Court affirmed the judgment and the order. Defendant argued that an erroneous measure of damages was used by the trial court. Citing *Civ. Code § 3333*, the Court said that as the trespass compelled plaintiffs' to abandon their place of business, they were entitled to recover whatever amount would compensate for all the detriment caused, whether it could have been anticipated or not (*88 Cal. 159, 163)* . Damages may not be awarded for injuries remote or speculative, but only for that detriment proximately caused by the wrongful acts of defendants (*88 Cal. 159, 165)* . The cause which set all the rest in motion was the trespass. The operation of the subsequent agencies of loss was the result of this wrongful injury. Damages which accrue subsequent to the tort, but of which it is the primary cause, are not separate causes of action, but are part of the tort itself (*88 Cal. 159, 166)* .

The facts and procedural background of ***Basin Oil Co. v. Baash-Ross Tool Co.*** *(1954) 125 Cal. App. 2d 578, 271 P.2d 122* , are discussed in *§ 225.140[3][a]*. The court of appeal stated that the measure of damages recoverable as the result of the tortious conduct of another is that amount which will compensate the injured party for all the detriment proximately caused thereby, whether it could have been anticipated or not. It is a fundamental principle of the law of

damages that the compensation received shall be commensurate with the injury, and no more (*125 Cal. App. 2d 578, 605)* . There is no fixed, inflexible rule for determining the measure of damages for injury to, or destruction of, property; whatever formula is most appropriate to compensate the injured party for the loss sustained will be adopted (*125 Cal. App. 2d 578, 606)* .

[b] Intent to Cause Damages Not Element of Trespass

The facts and procedural background of ***Meyer v. Pacific Employers Ins. Co.*** *(1965) 233 Cal. App. 2d 321, 43 Cal. Rptr. 542* , are discussed in *§ 225.40[3][c]*. The court of appeal distinguished intent of the act and intent of the consequential damages. The trial court found that the trespass was intentional and the liability of defendant was established even though the consequences of the trespass were unintentional and unforeseeable. Intent to cause damages is not an element of the tort of trespass, and the trespasser is liable for any damage caused even though that damage was not intended or foreseen (*233 Cal. App. 2d 321, 326)* .

[c] Recovery of Costs to Prevent Further Harm

In ***Pacific Tel. & Tel. Co. v. Granite Constr. Co.*** *(1964) 225 Cal. App. 2d 765, 37 Cal. Rptr. 727* , plaintiff installed an underground communications cable adjacent to a road pursuant to franchise rights it had been granted. The installation conformed to position and depth requirements necessary for anticipated road improvement and expansion. In its road construction activity defendants damaged plaintiff's cable on three different occasions, making repairs necessary. Plaintiff sued defendants for damages to its cable caused by negligence and trespass and for costs incurred in relocating the cable. The trial court judgment was for plaintiff and allowed recovery for the actual and reasonable costs of repairing and relocating its cable. Defendants appealed.

The court of appeal affirmed. The court concluded that defendants trespassed on plaintiff's franchise rights, and that they should be held solely responsible for the injuries to the cable proximately caused by defendants' negligent or intentional failure to use proper care in preventing or avoiding injury to the underground installation (*225 Cal. App. 2d 765, 769)* . Plaintiff was entitled to recover the reasonable and necessary cost of relocating the cable, as relocation was necessary to prevent further injuries to the cable. A person who has already suffered injury by the tort of another is entitled to recover for expenditures reasonably made or for harm suffered in a reasonable effort to avert further harm (*225 Cal. App. 2d 765, 769)* . When related to threatened property damage in connection with the operation of a business, it is sometimes known as business duress. The doctrine is invoked in situations when necessary steps are taken to protect property or business interests from threat of wrongful action by others and there are reasonable grounds for believing that such threats will be carried out (*225 Cal. App. 2d 765, 769-770)* .

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22-225 California Points & Authorities § 225.144

§ 225.144 Supporting Award of Damages for Trespass--Anticipation of Injury Not Required

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general form of memorandum of points and authorities supporting the contention that defendant committed trespass (see, e.g., § 225.20).*]

PLAINTIFF SHOULD BE AWARDED DAMAGES FOR DEFENDANT'S TRESPASS BECAUSE PLAINTIFF IS ENTITLED TO MAKE ANY LAWFUL USE OF HIS/HER/ITS PROPERTY AND IS UNDER NO DUTY TO ANTICIPATE ANY INJURY THAT COULD BE CAUSED BY A FUTURE TRESPASS.

Possessor or Landowner Not Required to Anticipate Injury. A possessor or landowner is entitled to make use of the property in any lawful manner, and is under no duty to anticipate that the land will be injured by another's negligence (*see Western Salt Co. v. City of Newport Beach (1969) 271 Cal. App. 2d 397, 401, 76 Cal. Rptr. 322*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of an award for damages when a possessor or landowner has not taken precautions to prevent any potential trespasses. A possessor or landowner is not required to anticipate a trespass, nor is he or she guilty of comparative negligence in failing to do so, except possibly in cases involving recurring intentional trespasses [*see Western Salt Co. v. City of Newport Beach (1969) 271 Cal. App. 2d 397, 401, 76 Cal. Rptr. 322]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of trespass damages. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel might allege facts illustrating plaintiff's lawful use of his or her land and defendant's construction of a road without proper drainage ditches next to plaintiff's land, which caused plaintiff's land to flood when it rained. Plaintiff would not be required to protect the land from possible flooding [*see, e.g., Western Salt Co. v. City of Newport Beach (1969) 271 Cal. App. 2d 397, 401, 76 Cal. Rptr. 322]* .

[b] Related Pleading and Practice Chapters

For discussion and forms relating to damages, see California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender). For discussion and forms relating to trespass, see California Forms of Pleading and Practice, Ch. 550, *Trespass* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda opposing the reduction of the damages award due to failure to mitigate, see Ch. 64, *Damages: Tort* .

[3] Discussion of Authorities

[a] Possessor or Landowner Not Required to Anticipate Injury

In ***Western Salt Co. v. City of Newport Beach*** *(1969) 271 Cal. App. 2d 397, 76 Cal. Rptr. 322* , plaintiff operated a salt plant, producing salt from ocean water by solar evaporation. Defendant city obtained use of a portion of the land of which plaintiff was the lessee by an easement for road purposes. When the road was built no ditch was constructed to provide drainage for the surface water and to prevent flooding of plaintiff's adjacent salt vat. When it rained, over a foot of water ran into plaintiff's plant, causing substantial damage. Plaintiff filed an action against defendants alleging strict liability and negligence. Defendants denied liability and alleged contributory negligence and assumption of risk. The trial court entered judgment for defendants. Plaintiff appealed.

The court of appeal reversed. It is not contributory negligence for a landowner to continue to make use of property in any lawful manner even though the landowner may know or suspect that such use may be interfered with by water carelessly diverted to the property by a neighbor. The landowner is under no duty to anticipate that the land will be flooded by a neighbor's negligence; the possessor is not obliged to protect the land, and failure on plaintiff's part to do so does not constitute contributory negligence (*271 Cal. App. 2d 397, 401)* . Most of the litigation over nontrespassory invasions of interest in the use and enjoyment of land involves situations in which there are continuing or recurrent invasions resulting from continuing or recurrent conduct. In those cases the first invasion may be either intentional or unintentional, but when the conduct is continued after the actor knows that the invasion is resulting from it, further invasions are intentional. In cases involving the intentional invasion of another's interest in land, one fact to be considered is the harmed person's burden of avoiding the harm. This burden applies only to intentional invasions (*271 Cal. App. 2d 397, 403)* .

NOTE:
The *Western Salt* case was decided prior to *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828, 119 Cal. Rptr. 858, 532 P.2d 1226* , which established principles of comparative negligence.

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22-225 California Points & Authorities § 225.145

§ 225.145 Supporting Award of Damages for Trespass--Continuing Trespass

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general form of memorandum of points and authorities supporting the contention that defendant committed trespass (see, e.g., § 225.20).*]

DEFENDANT'S TRESPASS ONTO PLAINTIFF'S PROPERTY IS CONTINUING AND THUS PLAINTIFF IS ENTITLED TO _____ [BRING SUCCESSIVE ACTIONS FOR ACCRUED DAMAGES AS THEY OCCUR *and/or* SEEK INJUNCTIVE RELIEF *and/or* WAIVE THE TRESPASS AND SEEK PERMANENT DAMAGES].

A. Continuing Trespass Affords Injunctive Relief or Successive Actions for Monetary Relief. The remedy for a continuing injury is either a suit for injunctive relief or successive actions for damages as new injuries occur (*Kornoff v. Kingsburg Cotton Oil Co. (1955) 45 Cal. 2d 265, 269-270, 288 P.2d 507* ; *Polin v. Chung Cho (1970) 8 Cal. App. 3d 673, 677-678, 87 Cal. Rptr. 591*).

[*Optional*] **B. Accrued Damages Are Recoverable When Trespass Is Continuing.** When the trespass is temporary in character, or is a continuing series of trespass acts, only those damages which have accrued up to the time of the commencement of the action may be recovered, since it is not to be presumed that the trespass will continue (*Kornoff v. Kingsburg Cotton Oil Co. (1955) 45 Cal. 2d 265, 268-269, 288 P.2d 507* ; *Polin v. Chung Cho (1970) 8 Cal. App. 3d 673, 677-678, 87 Cal. Rptr. 591*).

[*Optional*] **C. Party May Bring Action for Prospective Damages and Waive Continuing Trespass.** When a party elects to sue for past and prospective damages resulting from a trespass, that party is deemed to have waived the invasion and consented to the continued occupancy of the land (*Kornoff v. Kingsburg Cotton Oil Co. (1955) 45 Cal. 2d 265, 269, 288 P.2d 507* ; *Polin v. Chung Cho (1970) 8 Cal. App. 3d 673, 678, 87 Cal. Rptr. 591*).

[*Optional*] **D. Damages Are Available Up to Time of Injunctive Relief.** A party is entitled to damages up to the time of injunctive relief to avert further damage (*see Polin v. Chung Cho (1970) 8 Cal. App. 3d 673, 678, 87 Cal. Rptr. 591*).

[*Optional*] **E. Plaintiff's Characterization of Trespass as Continuing Controls in Doubtful Cases.** Because of the difficulties in characterizing an invasion as permanent or a series of continuing trespasses, and because the rules allowing different remedies are for the plaintiff's benefit, in doubtful cases the plaintiff should have an election to treat it as permanent or not (*Kornoff v. Kingsburg Cotton Oil Co. (1955) 45 Cal. 2d 265, 270-271, 288 P.2d 507* ; *Polin v. Chung Cho (1970) 8 Cal. App. 3d 673, 677-678, 87 Cal. Rptr. 591*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of an award for damages when the trespass consists of a continuing series of incidents. Plaintiff will be allowed to bring successive actions as these incidents occur, recovering for damages incurred within the statutory period immediately prior to bringing the action. Plaintiff might also seek injunctive relief to prevent future occurrence of the trespass. If damages for future as well as past injuries are sought, plaintiff will have waived the trespass and consented to its continuing. If a trespass to land is of a permanent nature or indefinite duration, not of a continuing nature, all past and prospective damages are recoverable in one action [*see Kornoff v. Kingsburg Cotton Oil Co. (1955) 45 Cal. 2d 265, 268-269, 288 P.2d 507* ; *Polin v. Chung Cho (1970) 8 Cal. App. 3d 673, 677-678, 87 Cal. Rptr. 591]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of damages from a continuing trespass. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel might allege facts illustrating defendant's seasonal operation of a factory which causes the entry of dust and lint on plaintiff's land during certain periods of operation each year.

[b] Related Pleading and Practice Chapters

For discussion and forms relating to damages, see California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender). For discussion and forms relating to trespass, California Forms of Pleading and Practice, see Ch. 550, *Trespass* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda supporting and opposing the award of tort damages, see Ch. 64, *Damages: Tort* .

[3] Discussion of Authorities

[a] Continuing Trespass Affords Injunctive Relief or Successive Actions for Monetary Relief

The facts and procedural background of ***Kornoff v. Kingsburg Cotton Oil Co.*** *(1955) 45 Cal. 2d 265, 288 P.2d 507* , are discussed in *§ 225.81[3][a]*. The Supreme Court likened trespass to nuisance and stated that the remedy for a continuing nuisance was either a suit for injunctive relief or successive actions for damages as new injuries occurred (*45 Cal. 2d 265, 269-270)* .

In ***Polin v. Chung Cho*** *(1970) 8 Cal. App. 3d 673, 87 Cal. Rptr. 591* , plaintiffs and defendants were adjoining landowners. Plaintiffs filed a complaint setting forth three causes of action against defendants. In the first cause of action plaintiffs alleged that defendants diverted a stream and storm drain from their property to plaintiffs' property by bulldozing a ditch on plaintiff's property, causing erosion with rainfall. Defendants pleaded the statute of limitations as a bar to the action. Defendants' motions for summary judgment on all causes were granted, and the trial court entered judgment for defendants. Plaintiffs appealed.

The court of appeal reversed the judgment on two causes of action, including the first which alleged the property injury, and affirmed judgment on the other cause. The court analyzed the statute of limitations and stated that it runs from the date the cause of action accrues. If the trespass is permanent, there is one cause of action. If the trespass is continuing, successive trespasses give rise to separate causes of action. A permanent trespass is different from a continuing series of temporary or isolated incident trespasses. When a trespass is deemed permanent a plaintiff may recover future damages in one lawsuit on the premise that the condition will exist forever. Because the rule is for the benefit of the plaintiff, a plaintiff will not be compelled to treat a condition as permanent when plaintiff prefers not to so treat it. In some cases, a plaintiff is not permitted to consider the trespass continuing, but is required to consider the trespass permanent as of the date of completion of construction; courts have held a plaintiff's cause of action barred if not brought within three years of that date. When from the character of the trespass it is not to be presumed that the wrongful conduct will be continued, successive trespasses give rise to successive causes of actions, and an action may be brought at any time to recover the damages which have accrued within the statutory period, although the original trespass occurred before that period. Every repetition of a continuing injury is a separate wrong for which the person injured may bring successive actions for damages until the wrong is abated, even though an action based on the original wrong may be barred. In doubtful cases a plaintiff should have an election to treat it as permanent or not (*8 Cal. App. 3d 673, 677-678)* . If a plaintiff recovers damages on the premise that the trespass is permanent, the plaintiff will be deemed to have waived the invasion and consented to the continued occupancy of the land. But if a plaintiff obtains an injunction that will avert further damage, the plaintiff is not entitled to damages beyond the date when the injunction is granted (*8 Cal. App. 3d 673, 678)* .

[b] Accrued Damages Are Recoverable When Trespass Is Continuing

The facts and procedural background of ***Kornoff v. Kingsburg Cotton Oil Co.*** *(1955) 45 Cal. 2d 265, 288 P.2d 507* , are discussed in *§ 225.81[3][a]*. The Supreme Court noted and upheld the parties' treatment of the trespass as permanent because of its recurrent character, rather than as a continuous trespass. When a trespass to land is of a permanent nature, all damages, past and prospective, are recoverable in one action, but when the trespass is temporary in character, only those damages may be recovered which have accrued up to the time of the commencement of the action, since it is not to be presumed that the trespass will continue (*45 Cal. 2d 265, 268-269)* .

Polin v. Chung Cho *(1970) 8 Cal. App. 3d 673, 87 Cal. Rptr. 591* , is discussed in *§ 225.145[3][a]*.

[c] Party May Bring Action for Prospective Damages and Waive Continuing Trespass

The facts and procedural background of ***Kornoff v. Kingsburg Cotton Oil Co.*** *(1955) 45 Cal. 2d 265, 288 P.2d 507* , are discussed in *§ 225.81[3][a]*. The Supreme Court ruled that even though the right to sue for ejectment and damages may be exercised in the same action, they are independent and inconsistent causes of action based on the same invasion of the same right. When a party elects to sue for damages past and prospective, that party is deemed to have waived the invasion and consented to the continued occupancy of the land (*45 Cal. 2d 265, 269)* .

Polin v. Chung Cho *(1970) 8 Cal. App. 3d 673, 87 Cal. Rptr. 591* , is discussed in *§ 225.145[3][a]*.

[d] Damages Are Available Up to Time of Injunctive Relief

Polin v. Chung Cho *(1970) 8 Cal. App. 3d 673, 87 Cal. Rptr. 591* , is discussed in *§ 225.145[3][a]*.

[e] Plaintiff's Characterization of Trespass as Continuing Controls in Doubtful Cases

The facts and procedural background of ***Kornoff v. Kingsburg Cotton Oil Co.*** *(1955) 45 Cal. 2d 265, 288 P.2d 507* , are discussed in *§ 225.81[3][a]*. The Supreme Court recognized the problems arising in cases in which injunctive relief is not appropriate or successive actions are undesirable, and said that some types of injuries should be considered permanent, and recovery of past and anticipated future damages allowed in one action. The clearest case of a permanent trespass is one in which the offending structure is maintained as a necessary part of the operations of a public utility. Since such conditions are ordinarily of indefinite duration and the utility, by making compensation, is entitled to continue them, it is appropriate that only one action should be allowed to recover for all damages inflicted (*45 Cal. 2d 265, 269-270)* . A more difficult problem is presented if a defendant is not privileged to continue a trespass but abatement is impractical, or if a plaintiff is willing that it continue if he or she can secure full compensation for both past and anticipated future injuries. To attempt categorically to classify a trespass as either permanent or not may lead to serious injustice to one or other of the parties. Because of the difficulties in doubtful cases plaintiff should have an election to treat it as permanent or not (*45 Cal. 2d 265, 270-271)* .

Polin v. Chung Cho *(1970) 8 Cal. App. 3d 673, 87 Cal. Rptr. 591* , is discussed in *§ 225.145[3][a]*.

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22-225 California Points & Authorities § 225.146

§ 225.146 Supporting Award of Damages for Trespass--Damages for Trespass as Available Although Activities Within Protected Commercial Zone Not Enjoinable [Code Civ. Proc. § 731a]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general form of memorandum of points and authorities supporting the contention that defendant committed trespass (see, e.g., § 225.20).*]

PLAINTIFF SHOULD RECOVER DAMAGES BECAUSE DEFENDANT TRESPASSED ON PLAINTIFF'S PROPERTY ALTHOUGH DEFENDANT'S CONDUCT WITHIN THE DESIGNATED ZONE IS NOT SUBJECT TO INJUNCTION.

Damages for Trespass Not Barred Although Conduct Within Designated Zone Exempt From Injunction. Although entities engaging in actions otherwise permitted within commercial zones or districts cannot be enjoined by injunction from the reasonable and necessary operation of the permitted use within that zone or district, there is no bar to recovery for damages for trespassory invasions of another's property occasioned by the conduct of that allowable use (*Wilson v. Interlake Steel Co. (1982) 32 Cal. 3d 229, 234, 185 Cal. Rptr. 280, 649 P.2d 922* ; *Roberts v. Permanente Corp. (1961) 188 Cal. App. 2d 526, 529, 10 Cal. Rptr. 519* ; *see Code Civ. Proc. § 731a*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of an award for damages for a trespass when defendant's acts causing the trespass are conducted within an appropriate zone and are not subject to an injunction. *Code Civ. Proc. § 731a* provides that manufacturing, commercial, or airport uses expressly permitted within a district or zone are not subject to injunction when the operation is reasonable and necessary, nor are such uses a nuisance without evidence of the employment of unnecessary and injurious methods of operation. It should be noted that the section expressly

excludes from its coverage canneries, fertilizing plants, refineries, and other similar establishments whose operations produce offensive odors.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of appropriate damages from an activity not subject to injunction. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel might allege facts illustrating that defendant's cement plant, although operated in a lawful manner and within an allowable zone, caused the entry of dust and rocks on plaintiff's land. Although plaintiff would not be able to obtain an injunction requiring defendant to cease operations, the damages to plaintiff from the trespassing rocks and dust are recoverable.

[b] Related Pleading and Practice Chapters

For discussion and forms relating to damages, see California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender). For discussion and forms relating to trespass, see California Forms of Pleading and Practice, Ch. 550, *Trespass* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda supporting and opposing the award of tort damages, see Ch. 64, *Damages: Tort* .

[3] Discussion of Authorities

[a] Acts Exempt From Injunction Are Not Barred From Trespass Actions

The facts and procedural background of ***Wilson v. Interlake Steel Co.*** *(1982) 32 Cal. 3d 229, 185 Cal. Rptr. 280, 649 P.2d 922* , are discussed in *§ 225.20[3][a]*. The Supreme Court remanded the nuisance issue, providing guidelines to the trial court in so doing. The Court stated that the purpose of *Code Civ. Proc. § 731a* is to eliminate injunctive relief when the business is operated in its appropriate zone and the only showing is an injury and nuisance to plaintiff in that operation. *Code Civ. Proc. § 731a* does not operate to bar a recovery for damages (*32 Cal. 3d 229, 234)* .

The facts and procedural background of ***Roberts v. Permanente Corp.*** *(1961) 188 Cal. App. 2d 526, 10 Cal. Rptr. 519* , are discussed in *§ 225.40[3][c]*. The court of appeal observed that defendant operated a plant located in a zone which permitted its operation. It came within the protection of *Code Civ. Proc. § 731a* which, subject to certain exceptions, generally provides that when a manufacturing or commercial operation is permitted by local zoning, no private individual can enjoin that operation. The court held, however, that this section does not operate to bar recovery for damages for trespassory invasions of another's property occasioned by the conduct of that manufacturing or commercial use (*188 Cal. App. 2d 526, 529)* .

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22-225 California Points & Authorities § 225.147

§ 225.147 Opposing Award of Compensatory Damages for Trespass--Statutory Damages for Wrongful Occupation of Real Property [Civ. Code § 3334]--Disgorgement of Benefits Obtained by Occupation of Property Limited to Financial or Business Advantage

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DISGORGEMENT UNDER *CIVIL CODE SECTION 3334(b)* OF THE BENEFITS OBTAINED BY DEFENDANT THROUGH A WRONGFUL OCCUPATION OF PLAINTIFF'S PROPERTY IS LIMITED TO DISGORGEMENT OF THE AMOUNT REPRESENTING THE FINANCIAL OR BUSINESS ADVANTAGE ACTUALLY PROVIDED TO THE DEFENDANT BY THE OCCUPATION OF THE PROPERTY.

A. Detriment For Wrongful Occupation of Real Property Defined by Statute. The detriment caused by the wrongful occupation of real property, in cases not embraced by the statutes governing eminent domain, holdover tenant, or unlawful detainer, is deemed to include the value of the use of the property for the time of occupation, not exceeding the five years preceding the commencement of the action to enforce the right to damages, the reasonable cost of repair or restoration of the property to its original condition, and the costs of recovering possession. For these purposes, the value of the use of the property is the greater of (1) the reasonable rental value of that property, or (2) the benefits obtained by the person wrongfully occupying the property by reason of that wrongful occupation. If the wrongful occupation of real property is the result of a mistake of fact by the wrongful occupier, the value of the use of the property is deemed to be the reasonable rental value of the property (*Civ. Code § 3334(a)-(c)*).

B. "Benefits" Obtained Under *Civil Code Section 3334(b)* Require Financial or Business Advantage. For purposes of determining the benefits obtained by the person wrongfully occupying property under *Civ. Code § 3334(b)*, "benefits" are not obtained unless the trespass provided the trespasser with a financial or business advantage (*Watson Land Co. v. Shell Oil Co. (2005) 130 Cal. App. 4th 69, 77, 29 Cal. Rptr. 3d 343*).

[*Optional*] **C. Restoration Costs Recoverable Only if Reasonable.** Restoration costs may be recovered under *Civil Code Section 3334* only if restoration is possible and economically feasible in light of all the competing interests (*Starrh & Starrh Cotton Growers v. Aera Energy LLC (2007) 153 Cal. App. 4th 583, 599-602, 63 Cal. Rptr. 3d 165*).

[*Optional*] **D. Specific Evidence Linking Profit to Trespass Required to Recover Profit as Damages.** In order to recover profits obtained by the trespasser by virtue of the decision to trespass as a "benefit obtained" under *Civil Code Section 3334*, the plaintiff must provide evidence specifically linking the profits to the decision to trespass (*Starrh & Starrh Cotton Growers v. Aera Energy LLC (2007) 153 Cal. App. 4th 583, 602-604, 63 Cal. Rptr. 3d 165*).

[*Optional*] **E. Gross Profits is Appropriate Measure of Benefit Obtained When Defendant Provides Evidence of Expenses Incurred.** While in some instances the trial court may award damages based on gross revenue as the benefit obtained by the trespass, if the defendant presents credible evidence of the expenses incurred, the trial court may offset those amounts against the gross income generated to determine gross profits (*Bailey v. Outdoor Media Group (2007) 155 Cal. App. 4th 778, 788, 66 Cal. Rptr. 3d 322*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in a trespass action in opposition to a plaintiff's claim made under *Civ. Code § 3334* for the disgorgement of benefits obtained by the defendant as a result of a wrongful occupation of real property. The basis for the opposition is that the plaintiff is seeking disgorgement of amounts that were not a "benefit" that the defendant obtained because of the occupation.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which these points are raised. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in the form showing the relationship between the facts of the case and the point of law stated. Thus, for example, counsel should include facts showing that the defendant did not obtain a financial or business advantage by virtue of the occupation of the plaintiff's property, or that the benefit obtained was not as great as the amount of disgorgement sought by the plaintiff.

[3] Discussion of Authorities

[a] "Benefits" Obtained Under Civil Code Section 3334(b) Require Financial or Business Advantage

In ***Watson Land Co. v. Shell Oil Co.*** *(2005) 130 Cal. App. 4th 69, 29 Cal. Rptr. 3d 343* , the plaintiff was the owner of a large tract of commercial property. Several pipelines ran under the property, and leaks from the pipelines caused extensive groundwater and soil contamination. The plaintiff sued several companies that ran petroleum products through the pipelines to recover the costs of cleaning up the contamination, and after trial against one defendant, a jury awarded the plaintiff an amount to compensate for those costs. The jury also awarded over $14 million as trespass damages under *Civ. Code § 3334(b)*, determining that the defendant derived a benefit in this amount when it failed to clean up the contamination itself. The defendant appealed, arguing that the plaintiff could not recover under *Civ. Code § 3334(b)* because the defendant did not obtain any benefit from the product that leaked from the pipelines.

The court of appeal reversed the award of damages under *Civ. Code § 3334(b)*. The court agreed with the defendant that for purposes of determining the benefits obtained by the person wrongfully occupying the property under *Civ. Code § 3334(b)*, "benefits" are not obtained unless the trespass provided the trespasser with a financial or business advantage (*130 Cal. App. 4th 69, 77)* . The court noted that not only did the gasoline leaks result in a loss of product, but the leaks

also meant that the defendant had to repair or replace the pipes at substantial costs, neither of which could be viewed as a "benefit" to the defendant (*130 Cal. App. 4th 69, 78)* . The court also noted, however, that although avoidance of remediation costs by a trespasser who dumps material on the property cannot be recovered as a "benefit obtained" by the trespasser, the remediation costs themselves can be recovered under *Civ. Code § 3334(a)*, which allows recovery for the reasonable costs of repair or restoration (*130 Cal. App. 4th 69, 78)* .

[b] Restoration Costs Recoverable Only if Reasonable

In *Starrh & Starrh Cotton Growers v. Aera Energy LLC (2007) 153 Cal. App. 4th 583, 63 Cal. Rptr. 3d 165* , plaintiff was a farm that sued an adjacent oil-producing field for a subsurface trespass. Defendant used unlined percolation pools to dispose of wastewater produced during the oil extraction process. This wastewater, which is high in salts and other minerals, seeped over time into the underground water on plaintiff's land, effectively reducing the quality of that water. A jury awarded plaintiff damages for the trespass, including damages avoided by defendant as a result of the trespass and restoration cost damages of $3.8 million. Defendant appealed, arguing that the action was time-barred as a permanent trespass. Plaintiff also appealed, arguing that the restoration cost award was insufficient and the trial court erred in excluding evidence of defendant's profits.

The court of appeal affirmed the judgment in so far as it held that the action was one for a continuing trespass and thus timely, but reversed for a retrial on damages. The court noted that under *Civ. Code § 3334*, when a trespass involves a wrongful occupation of land, restoration costs, that is, the costs to clean up the trespass, may be recovered only if reasonable (*153 Cal. App. 4th 583, 599-600)* . The court agreed that there was no evidence in the record to support the jury's award of $3.8 million as restoration costs. The court held that on retrial, the jury should be instructed that once it resolves the factual issue of how much it might cost to restore the groundwater under plaintiff's property to its original state, it must then determine whether the restoration costs are reasonable in light of all of the competing interests, including the current value and use of the land (*153 Cal. App. 4th 583, 601)* . While stopping short of deciding the issue as a matter of law, the court noted that the evidence of unreasonableness in the instant case was very strong. The estimated cost of restoration was more than $2 billion, while the estimated value of the water ranged from $100,000 to $10 million. In addition, even if restored to its original state, the groundwater had limited use as irrigation water because of its natural salt content (*153 Cal. App. 4th 583, 601-602)* .

[c] Specific Evidence Linking Profit to Trespass Required to Recover Profit as Damages

The procedural and factual background of *Starrh & Starrh Cotton Growers v. Aera Energy LLC (2007) 153 Cal. App. 4th 583, 63 Cal. Rptr. 3d 165* , is described in [b], *above.* The trial court had excluded evidence of defendant's profits and had concluded that "benefits obtained" measure of damages found in *Civ. Code § 3334* was restricted to the costs saved or avoided by defendant by virtue of the trespass. As the Legislature's goal in amending *Civ. Code § 3334* in 1992 was the removal of any economic incentive to choose illegal dumping over the proper disposal of toxic waste, the court of appeal concluded that the "benefits obtained" should not be limited to costs avoided, but could include profits obtained by virtue of the decision to trespass (*153 Cal. App. 4th 583, 602-604)* . However, the court stressed that a plaintiff is required to demonstrate a direct link between the profits and the trespass. This showing requires evidence that a portion of the profit earned by the trespasser was actually tied to the decision to trespass. This showing is not met merely by measuring the profits earned in any given time period or proportioning the profits to a particular part of the trespasser's business. For example, plaintiff could not simply take defendant's total profit for the applicable time period, determine the amount of water that was percolated through the pools adjacent to plaintiff's property as a percentage of the overall amount of wastewater created at the facility, and multiply that percentage of water by the amount of total profit. Such a showing would not account for the possibility that not all of the wastewater percolated through the adjacent pools ended up in plaintiff's subsurface basin. In addition, that method would ignore that alternate methods of disposal were available, the use of which would still allow defendant to reap a substantial profit. In fact, the evidence suggested that if defendant had utilized a more costly method for disposing of the wastewater without the trespass, defendant would still have realized over a billion dollars in profit. Thus, as the decision to trespass did not account for

all of defendant's profit, plaintiff was required to present evidence sufficient to allow the trier of fact to calculate the amount of profit directly linked to the decision to trespass (*153 Cal. App. 4th 583, 604-606)* .

[d] Gross Profits is Appropriate Measure of Benefit Obtained When Defendant Provides Evidence of Expenses Incurred

In *Bailey v. Outdoor Media Group (2007) 155 Cal. App. 4th 778, 66 Cal. Rptr. 3d 322* , plaintiff was the leaseholder of a strip of land that he had subleased to an advertising company, which constructed billboards on the property. When the original sublease expired, the advertising company continued to use the property for billboard rentals, although plaintiff and the company were unable to come to an agreement on a new sublease. Plaintiff sued the advertising company for damages based on the company's continued use of the land. Plaintiff prevailed, but the court denied plaintiff's cause of action for ejectment because new billboard construction had been outlawed in the city. The company thereafter continued to use the land for billboard rentals, even though it was unable to reach a new sublease agreement with plaintiff. The advertising company then sold its right to use the property to another advertising company, falsely representing at the time that it had a current sublease when it did not. The new advertising company made monthly lease payments to plaintiff, although plaintiff returned each payment with notification that no sublease was in place. The parties attempted to reach a sublease agreement, but failed to do so, apparently because of plaintiff's exorbitant demands. Plaintiff filed another lawsuit for trespass against both advertising companies and was awarded statutory damages under *Civ. Code § 3334*. When calculating damages from the first advertising company, the trial court measured the company's benefits obtained based on the company's gross profits, rather than from the company's gross revenues as plaintiff had argued. Damages awarded from the second advertising company were based on the reasonable rental value of the land, rather than on the company's net profit. Plaintiff appealed, seeking a higher measure of damages from each defendant.

The court of appeal modified the damage award against the second advertising company, but affirmed the calculation of the award levied against the first company. The court held that net profit was an appropriate measure of the benefits obtained by reason of the trespass of the first advertising company under *Civ. Code § 3334(b)*. The court reviewed the legislative history of the 1992 amendment to the statute, which added the provision allowing recovery of the benefits obtained by the trespasser, explaining that the purpose of the amendment was to eliminate the economic incentive to dump toxic waste on another's property when the rental value of the property being dumped on was cheaper than proper disposal of the waste. The court also noted, however, that the Legislature did not intend with the 1992 amendment to punish the wrongful occupier, merely discourage the dumping of toxic waste on vacant land with little or no rental value. In this context, the court concluded that it was proper to calculate the benefit obtained by calculating the trespasser's net profits from the wrongful occupation, rather than from gross revenues, at least when the defendant presents credible evidence of expenses associated with the wrongful activity, as defendant had done in this case. Absent evidence of associated costs, however, a court is free to calculate the benefits obtained based on gross revenues (*155 Cal. App. 4th 778, 787-788)* .

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22-225 California Points & Authorities §§ 225.148-225.159

[Reserved]

§§ 225.148[Reserved]

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22-225 California Points & Authorities § 225.160

§ 225.160 Supporting Award of Damages for Production of Minerals in Trespass--Measure of Damages

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general form of memorandum of points and authorities supporting the contention that defendant committed trespass (see, e.g., § 225.20).*]

DEFENDANT'S ENTRY ON PLAINTIFF'S PROPERTY, REMOVAL OF ORE, AND PRODUCTION OF MINERALS WAS A TRESPASS FOR WHICH THE _____ [HARSH *or* MILD] RULE FOR DETERMINING DAMAGES SHOULD BE APPLIED BECAUSE THE TRESPASS WAS IN _____ [BAD *or* GOOD] FAITH.

[*EITHER, if trespass was in bad faith*]

Harsh Rule of Damages Applies if Trespass to Minerals in Bad Faith. When the production of minerals in trespass is made in bad faith, as it is when a person acts maliciously, willfully, and oppressively with full knowledge of the plaintiff's right and the injury which the plaintiff would suffer, the defendant is liable for the net value of the minerals converted, without any deduction for the expenses in wrongfully taking it (*Martinez v. De Los Rios (1958) 165 Cal. App. 2d 102, 106, 331 P.2d 724*).

[*OR, if trespass was in good faith*]

Mild Rule of Damages Applies if Trespass to Minerals in Good Faith. A mining trespass is innocent when a person by mistake, or without an intention to trespass because of an honest belief that an existing right is being exercised, enters on the property of another and takes ore, coal, oil, or other minerals therefrom. When the trespass is innocent, the

measure of damages is the value of the mineral in place, or the value of the mineral extracted from the ore, less the cost of mining, transportation, and smelting (*Whittaker v. Otto (1967) 248 Cal. App. 2d 666, 675-676, 56 Cal. Rptr. 836* ; *Daly v. Smith (1963) 220 Cal. App. 2d 592, 598-599, 33 Cal. Rptr. 920*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of an award of damages for the production of minerals in trespass. When the trespass was in bad faith, the harsh rule of damages should be used (first alternative paragraph). When the trespass was in good faith, the mild rule of damages should be used (second alternative paragraph).

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of damages for the production of minerals in trespass. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should set forth facts indicating defendant's knowledge that plaintiff owned the property and that defendant willfully removed ore without permission, damaging improvements on the property [*see, e.g., Martinez v. De Los Rios (1958) 165 Cal. App. 2d 102, 331 P.2d 724]* .

[b] Related Pleading and Practice Chapters

For discussion and forms relating to damages, see California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender). For discussion and forms relating to mining and mining operations, see California Forms of Pleading and Practice, Ch. 363, *Mining* (Matthew Bender). For discussion and forms relating to trespass, see California Forms of Pleading and Practice, Ch. 550, *Trespass* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda supporting and opposing the award of tort damages, see Ch. 64, *Damages: Tort* .

[3] Discussion of Authorities

[a] Harsh Rule of Damages Applies if Trespass to Minerals in Bad Faith

In ***Martinez v. De Los Rios*** *(1958) 165 Cal. App. 2d 102, 331 P.2d 724* , plaintiff, owner of six mining claims, brought an action for damages for trespass on those mining claims, unlawful conversion of ore, and other related relief. Defendant, without plaintiff's consent, took ore from the claims, damaging improvements made. The trial court found that lessee defendant was not malicious, but that the acts of defendant companies were malicious, willful, and oppressive because they were made with full knowledge of plaintiff's rights in the premises. The trial court judgment was for plaintiff on all counts. Defendants appealed. Plaintiff cross appealed from that portion of the judgment which allowed defendants a deduction of expenses for transportation, milling, and marketing the ore.

The court of appeal modified the judgment to strike the exemplary damage award, and amended the general damage award to disallow the deduction of production expenses. The trial court had found defendants' acts to be malicious, willful, and oppressive and made with full knowledge of plaintiff's right and the injury which plaintiff would suffer. The court of appeal said that defendant had constructive notice that the claim belonged to plaintiff, and that defendant was a trespasser when defendant went on the property and removed ore that belonged to another. Under these circumstances the act was not in good faith without knowledge that the mine was the property of another, and defendant was liable for the value of the mineral taken, without any deduction for the expenses in wrongfully taking it (*165 Cal. App. 2d 102,*

106) . The court went on to explain that defendants ought not to be penalized twice. The rule denying deduction of production expenses is grounded on the principle of punitive damages and derives authority from *Civ. Code § 3294*. Examination of the trial court record indicated that there was no intent to award two separate types of punitive damages, and since the deduction could not be allowed, the special award of exemplary damages should fall. Exemplary damages ought to be reasonable. The rule depriving defendants of the production expenses deduction is a sufficiently strong penalty already without adding a special exemplary damage award (*165 Cal. App. 2d 102, 107)* .

[b] Mild Rule of Damages Applies if Trespass to Minerals in Good Faith

In ***Whittaker v. Otto*** *(1967) 248 Cal. App. 2d 666, 56 Cal. Rptr. 836* , plaintiff was lessee of some mining claims. A caretaker on the property prior to the lease executed a deed to a mining company. Plaintiff filed an action in ejectment against the caretaker. Judgment was for plaintiff, which was affirmed on appeal. Plaintiff then brought an action for trespass to the mining claims and conversion of iron ore against defendants mining company, the individual members of the company, and the purchaser of the ore. Although aware of the ejectment judgment, defendants had consulted an attorney before mining and acted on his advice. Defendants counterclaimed for the value of the improvements they made on the property. The trial court judgment was for defendants, and it denied plaintiff's motion for a new trial. Plaintiff appealed.

The court of appeal dismissed plaintiff's appeal from the order denying a new trial as nonappealable, affirmed the judgment in favor of defendant ore purchaser, and reversed and remanded the judgment in favor of the other defendants. The court first discussed the issue of possession, finding that plaintiff had the right to maintain a trespass action and had done so successfully (*248 Cal. App. 2d 666, 672-674)* . The court then focused on the issue of damages. Defendants contended alternatively that plaintiff did not suffer any damage by reason of trespass, or that plaintiff did not suffer any damage by reason of defendants' acts because defendants acted in good faith and their costs exceeded their profits. There are two rules for the measure of damages for the production of minerals in trespass: mild and harsh. The mild rule, applied when the trespass is by honest mistake and inadvertence, computes the measure of damages as the value of the ore extracted less the costs incurred by the defendants in the mining, transportation, and smelting of the converted ore, since this constitutes the value of the ore in place. The harsh rule is applicable when the trespass is willful or in bad faith, and measures damages as the net value of the ore converted without deduction for defendant's cost of mining, smelting, and transportation (*248 Cal. App. 2d 666, 675-676)* . The good faith required for application of the mild measure of damages is something more than the trespasser's assertion of a colorable claim to the converted minerals (*248 Cal. App. 2d 666, 676)* . In trespass to mining claims, as with all trespasses to real property, the law presumes nominal damages. The court found that the mild rule was appropriate and ordered that it be applied on remand. If the expense of production exceeds the reasonable value of the ore converted, the loss must be borne by defendants (*248 Cal. App. 2d 666, 677)* .

The facts and procedural background of ***Daly v. Smith*** *(1963) 220 Cal. App. 2d 592, 33 Cal. Rptr. 920* , are discussed in *§ 225.100[3][a]*. The court of appeal discussed when the mild rule of damages for production of minerals in trespass applies. A mining trespass is innocent when a person by mistake, or without an intention to trespass because of an honest belief that an existing right is being exercised, enters on the property of another and takes ore, coal, oil, or other minerals therefrom. When the trespass is innocent, the measure of damages is the value of the mineral in place, or the value of the mineral extracted from the ore, less the cost of mining, transportation, and smelting. Since the trial court's finding of a good faith trespass was supported by the facts, the court found the mild rule applicable (*220 Cal. App. 2d 592, 598-599)* .

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22-225 California Points & Authorities § 225.161

§ 225.161 Supporting Award of Damages for Trespass to Timber--Multiple Damages Available

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general form of memorandum or points and authorities supporting the contention that defendant committed trespass (see, e.g., § 225.20).*]

DEFENDANT'S ACTS IN ENTERING PLAINTIFF'S LAND AND _____ [REMOVING *and/or* CAUSING INJURY TO] TIMBER _____ [FROM *and/or* ON] THE PROPERTY WAS A TRESPASS, FOR WHICH PLAINTIFF IS ALLOWED TO RECOVER _____ [TREBLE *or* DOUBLE] DAMAGES FOR THE ACTUAL DETRIMENT.

[*EITHER, if trespass is malicious*]

Treble Damages for Wrongful Removal of or Injuries to Timber. The measure of damages for wrongful removal of or injuries to timber, trees, or underwood on the land of another is three times the sum that would compensate for the actual detriment. Wrongful removal or injuries to trees is evidenced by willful and malicious acts or acts in wanton and reckless disregard of and indifference to the rights of the plaintiff's interest in the land (*Civ. Code § 3346(a)*; *Code Civ. Proc. § 733*; *Caldwell v. Walker (1963) 211 Cal. App. 2d 758, 762, 766, 27 Cal. Rptr. 675* ; *Roche v. Casissa (1957) 154 Cal. App. 2d 785, 788-789, 316 P.2d 776*).

[*OR, if trespass is casual*]

Double Damages for Casual or Involuntary Trespass to Timber. When a trespass to timber, trees, or underwood was casual or involuntary, or when the defendant had probable cause to believe that the land trespassed on was his or

her own or the land of the person in whose service or by whose direction the act was done, the measure of damages is twice the sum as would compensate for the actual detriment (*Civ. Code § 3346(a)*; *Drewry v. Welch (1965) 236 Cal. App. 2d 159, 179-181, 46 Cal. Rptr. 65* ; *Lindroth v. Windbigler (1965) 232 Cal. App. 2d 844, 845-846, 43 Cal. Rptr. 355*).

[*Optional*] **B. Double Damages Mandatory When Timber Damaged by Fire Set or Spread Negligently.** Under the plain language of *Civil Code Section 3346(a)*, double damages are mandatory when trees are damaged as a result of a fire that spreads to the plaintiff's property negligently (*Kelly v. CB&I Constructors, Inc. (2009) 179 Cal. App. 4th 442, 462-463, 102 Cal. Rptr. 3d 32*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of an award of multiple damages for the trespass to plaintiff's timber, trees, or underwood. One of the alternatives for the measure of damages should be used, depending on the facts of the case indicating the intent of defendant. If defendant was malicious or willful, treble damages are available; if defendant's acts were casual or involuntary, double damages are appropriate.

It should be noted that actual damages are used as the measure when the timber was taken by the authority of highway officers for road or bridge repair [*see Civ. Code § 3346(a)*; *Code Civ. Proc. § 733*]. Additionally, actual damages are used as the measure for any trespass committed while acting in reliance on an erroneous survey: if (1) the trespass was committed by a defendant, or the defendant's principal, lessor, or immediate predecessor in title, who procured the survey; and (2) the survey was made by a licensed surveyor [*Civ. Code § 3346(b)*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of damages for trespass to timber. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel may allege facts indicating defendant's intent. For example, counsel should show that at the time of the trespass, defendant was aware of plaintiff's interest in the land by showing that there were "no trespassing" signs with the owner's name on them posted on the property and that plaintiff had sent written notice of his or her objections to defendant's logging operations, but defendant entered and removed timber.

[b] Related Pleading and Practice Chapters

For discussion and forms relating to damages, see California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender). For discussion and forms relating to logs and timber, see California Forms of Pleading and Practice, Ch. 350, *Logs and Timber* (Matthew Bender). For discussion and forms relating to trespass, see California Forms of Pleading and Practice, Ch. 550, *Trespass* (Matthew Bender).

[c] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 225.162* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Treble Damages for Wrongful Removal of or Injuries to Timber

In ***Caldwell v. Walker*** *(1963) 211 Cal. App. 2d 758, 27 Cal. Rptr. 675* , defendants contracted with plaintiffs' neighbors for the sale and logging of all the timber on their property. The contract was made by guardians of the incompetent owner, had an expiration date, and was never approved by the court or recorded. Defendants ceased operations after about a year. When the owner of the property died, plaintiffs became the eventual owners. At that time plaintiffs' attorney, after failing to locate defendants, inquired as to the status of the earlier contract and was told by the guardians that defendants had abandoned the contract and had no interest in the property. Thereafter, defendants still claimed an interest and resumed logging operations, ignoring no trespass signs and a notice sent to them by plaintiffs of their ownership. Plaintiffs brought an action against defendants seeking an injunction and treble damages. Defendants cross complained for damages for the logging which had been done by plaintiffs. Plaintiffs brought later actions in conversion against lumber purchasers. The trial court found that defendants' entry and logging was not based on any right and was an act of trespass which was willful and malicious. Judgment for plaintiffs was for treble damages, and defendants received nothing on their cross complaint. Defendants appealed.

The court of appeal affirmed. An award of treble damages for the cutting of, injury to, or removal of timber is authorized by *Code Civ. Proc. § 733* and *Civ. Code § 3346*. Although neither section expressly provides, to warrant such an award of treble damages it must be established that the wrongful act was willful and malicious. The statutes are permissive and not mandatory and while they prescribe the degree of penalty to be invoked, they commit to the sound discretion of the trial court the facts and circumstances under which it shall be invoked (*211 Cal. App. 2d 758, 762-763)* . The court reviewed the facts of the case, comparing them with the facts of earlier cases and concluded that under the circumstances any reasonable person would conclude that the owner of the property and the owner's attorney regarded him or her as a trespasser, especially after receiving written notice to that effect from the owner. Defendants did not attempt to contact the former owners or seek advice of counsel. Defendants made no real effort to determine that the title of the new owners was such that defendants were not precluded from entering thereon and resuming operations. The trial court could properly infer that defendants had acted in wanton and reckless disregard of and indifference to the rights of plaintiffs (*211 Cal. App. 2d 758, 766)* .

In ***Roche v. Casissa*** *(1957) 154 Cal. App. 2d 785, 316 P.2d 776* , defendants employed a tree trimmer to top trees, including 15 trees located on plaintiffs' property. Plaintiffs brought an action for treble damages for wrongful cutting of trees against defendant and the tree trimmer. The tree trimmer cross complained against defendant for his costs. The trial court judgment was for plaintiffs for treble damages, and for cross complainant. Defendant appealed.

The court of appeal affirmed. After addressing defendants' contentions concerning excessive damages and the admission of evidence, the court considered defendants' contention that the evidence did not support an award of treble damages. Although *Code Civ. Proc. § 733* and *Civ. Code § 3346* do not condition the award on willfulness or malice, recovery of treble damages cannot be had except on such a showing. What constitutes willful or malicious conduct under this rule has not been spelled out in decisions, and generally, the question of what circumstances warrant exemplary damages under these sections is committed to the sound discretion of the trial court. When there is a real question about plaintiff's title and defendant has a right to remove substantial parts of the trees because they extend over defendant's land, an award of more than actual damages will be reversed. When plaintiff's title is clear and known to defendant, an award of treble damages is within the discretion of the trial court. In this case defendants knew, before cutting the trees, that the trees were not on their land, yet they disregarded the rights of the adjoining owner and cut the trees for the sole purpose of improving the view from their own home. Defendants' belief that the landowner would not object was no exoneration. The evidence supported the finding that these acts were wanton and willful (*154 Cal. App. 2d 785, 788-789)* .

[b] Double Damages for Casual or Involuntary Trespass to Timber

In ***Drewry v. Welch*** *(1965) 236 Cal. App. 2d 159, 46 Cal. Rptr. 65* , plaintiffs contracted to sell timber to defendants' predecessors. Plaintiffs brought an action to quiet title and for an injunction and to recover damages for alleged trespass and conversion of timber. The trial court found that defendants had made false and mistaken representations as to the

amount of timber removed and the date of removal, in violation of the contract, but that these acts were not malicious. It found that removal of some of the timber was a trespass for which defendants were liable for double the amount of actual detriment. The judgment of the trial court was for plaintiffs. Defendants appealed.

The court of appeal affirmed. After a thorough analysis of the contract and the rights of each party, the court rejected defendant's contention that the portion of *Civ. Code § 3346* allowing double damages was invalid. The court discussed the provisions of *Code Civ. Proc. § 733* and *Civ. Code § 3346*, and found that the legislature intended to place a floor on the trial court's discretion to award damages at double damages, which must be applied whether the trespass is willful and malicious or casual and involuntary. There are now three measures of damages: (1) for willful and malicious trespass, the court may impose treble damages, but must impose double damages; (2) for casual and involuntary trespass, the court must impose double damages; and (3) for trespass under authority, the court may impose actual damages (*236 Cal. App. 2d 159, 179-181)* . Once liability has been established, the imposition of double damages for trespass to trees without authority is mandatory (*236 Cal. App. 2d 159, 181)* .

In ***Lindroth v. Windbigler*** *(1965) 232 Cal. App. 2d 844, 43 Cal. Rptr. 355* , defendants cut and removed timber from plaintiff's land without permission. Plaintiffs brought an action for treble damages, alleging malicious trespass. The trial court found that the trespass was casual and involuntary and was the result of reliance on an incorrect boundary, established by an unlicensed surveyor. Double damages were awarded plaintiffs by the trial court. Defendants appealed.

The court of appeal affirmed. It noted that defendants' appeal was based solely on the contention that the issue of double damages was not properly before the court. The court discussed the pleadings and proceedings which had clearly indicated that damages were the issue, and then summarized the validity of the trial court's award. Evidence was submitted by both sides on the issue of the measure of damages to apply, and the conflict between the triple and double measures was actually resolved in defendant's favor. The provision of *Civ. Code § 3346* providing for actual damages when the trespasser relies on a mistaken boundary line fixed by a licensed surveyor did not apply because the boundary line in question was not fixed by a licensed surveyor (*232 Cal. App. 2d 844, 845-847)* .

[c] Double Damages Mandatory When Timber Damaged by Fire Set or Spread Negligently

In ***Kelly v. CB&I Constructors, Inc.*** *(2009) 179 Cal. App. 4th 442, 102 Cal. Rptr. 3d 32* , plaintiff owned a 34-acre ranch that was damaged when a brush fire that was negligently sparked by defendant spread to over 20,000 acres. The fire destroyed several structures on plaintiff's ranch, as well as a number of trees. Subsequent mudslides causing further property damage resulted from the destruction of vegetation by the fire. Plaintiff sued defendant and was awarded compensatory damages to restore the property to a habitable state. As part of the award, plaintiff was awarded double the amount of actual damage to the trees pursuant to *Civ. Code § 3346(a)*. Defendant appealed.

The Court of Appeal affirmed the doubled award for damage to plaintiff's trees, disagreeing with the 1970 opinion in *Gould v. Madonna (1970) 5 Cal. App. 3d 404, 85 Cal. Rptr. 457* , that held that *Civ. Code § 3346(a)* did not apply to damage caused by a negligently spread fire. The court in the instant case concluded that the language of the statute was unambiguous and required an award of double damages for wrongful injuries to trees upon the land of another when the trespass is casual or involuntary. As there was no dispute that the fire was a trespass that was "casual or involuntary" within the meaning of the statute, double damages were properly awarded (*179 Cal. App. 4th 442, 462-463)* .

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22-225 California Points & Authorities § 225.162

§ 225.162 Opposing Award of Damages for Trespass to Timber--Treble Damages Only Available for Malicious Injury or Removal of Timber

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT, IN _____ [REMOVING *and/or* CAUSING INJURY TO] TIMBER _____ [FROM *and/or* ON] PLAINTIFF'S PROPERTY, DID NOT ACT WILLFULLY OR MALICIOUSLY, AND THUS SHOULD NOT BE HELD LIABLE FOR TREBLE DAMAGES.

Treble Damages Requires Malicious Intent. Treble damages may only be awarded for the wrongful removal of or injury to timber, trees, or underwood when the trespasser intentionally acts willfully or maliciously. There must be an intent to vex, harass, or annoy or injure the plaintiff; the defendant's reasonable belief that the plaintiff did not have title to the timber is evidence of a lack of malice (*Sills v. Siller (1963) 218 Cal. App. 2d 735, 743, 32 Cal. Rptr. 621* ; *Crofoot Lumber, Inc. v. Ford (1961) 191 Cal. App. 2d 238, 246, 12 Cal. Rptr. 639* ; see *Civ. Code § 3346(a)*; *Code Civ. Proc. § 733*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's request for treble damages for wrongful removal or injury to timber. The ground of opposition set forth is that treble damages are inappropriate because defendant did not act maliciously in removing timber from or causing injury to timber on plaintiff's property [*see Civ. Code § 3346(a)*; *Code Civ. Proc. § 733*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of damages for trespass to timber. These points and authorities

may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel might include facts illustrating that defendants reasonably believed they were dealing with the owners of the property when executing a contract for the logging of timber on the land and were not malicious in their acts.

In an appropriate case, these points and authorities may be used to oppose the contention supported by the points and authorities contained in § 225.161.

[b] Related Pleading and Practice Chapters

For discussion and forms relating to damages, see California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender). For discussion and forms relating to logs and timber, see California Forms of Pleading and Practice, Ch. 350, *Logs and Timber* (Matthew Bender). For discussion and forms relating to trespass, see California Forms of Pleading and Practice, Ch. 550, *Trespass* (Matthew Bender).

[3] Discussion of Authorities

[a] Treble Damages Requires Malicious Intent

In ***Sills v. Siller*** *(1963) 218 Cal. App. 2d 735, 32 Cal. Rptr. 621* , defendant, a joint enterprise, engaged to discover and obtain title to timberlands which had no ownership. In this endeavor, certain property and superficial assessor's documentation of ownership was shown to a logger employed by plaintiffs before any title had been obtained. Relying on that representation, plaintiffs paid for the timber on the land, and later discovered that property was owned by third parties. Settlement was made with the owners, but the guardian of the estate of a deceased owner was unable to obtain the consent of the superior court for a settlement. Plaintiffs brought an action against defendants for the monies paid in settlement to the owners as well as the money which would be paid to the estate, and a declaration of the amount due the estate. The guardian of the deceased owner's estate cross complained against plaintiffs for treble and punitive damages. The trial court found that plaintiffs believed they were dealing with the owners of the property and did not act with malice, and refused to award treble damages. Judgment was entered in favor of plaintiffs against defendants and in favor of cross complainant against plaintiffs. Defendants and cross complainant appealed.

The court of appeal reversed the judgment on the cross complaint with directions to the trial court to increase the damages to include interest charges, and affirmed the decision in favor of plaintiffs, with directions that those damages be increased in the same amount as that of cross complainant. The court addressed defendants' contentions concerning its representations, and then discussed the damage award. Cross complainant contended that the court erred in not awarding treble damages as allowed under *Civ. Code § 3346*. *Civ. Code § 3346* allows treble damages when the wrongdoer intentionally acted willfully or maliciously. The required intent is one to vex, harass, or annoy, and the existence of that intent is a question of fact for the trial court. The trial court finding was on substantial evidence and it did not err in refusing to award treble damages to cross complainant (*218 Cal. App. 2d 735, 743)* .

In ***Crofoot Lumber, Inc. v. Ford*** *(1961) 191 Cal. App. 2d 238, 12 Cal. Rptr. 639* , plaintiff lumber company contracted with defendant buyer for the sale of timber on plaintiff's land. The buyer breached, plaintiff rescinded the agreement, and brought suit against the buyer for rescission. While that action was pending, plaintiff discovered that the timber was being logged by defendant loggers under instructions from defendant copartners doing business as logging and lumber companies, who claimed to have obtained their right to cut the timber under a contract with defendant sellers, one of whom was the original buyer from plaintiff. Plaintiff brought a second action against all defendants, seeking an injunction against the trespass. In that action, defendant copartners cross complained against defendant sellers for indemnity for any loss arising from cutting the timber. Plaintiff's motion for a preliminary injunction was

denied. Defendants then logged the property. Judgment in the first case was for plaintiff and declared the contract rescinded and full title to the land and timber to be in plaintiff. The trial court in the second suit found that although defendant loggers were aware of plaintiff's rescission of the contract, they believed it ineffectual, and had reasonable grounds for this belief, and were not motivated by malice or ill will (*191 Cal. App. 2d 238, 244)* . Judgment was for plaintiff, and it awarded damages equivalent to actual damages. Cross complainants were denied relief on their cross complaint for indemnification. Plaintiff appealed on the issue of damages, while cross complainants appealed from that part of judgment entered in favor of cross defendants.

The court of appeal reversed the earlier damage award to plaintiff and affirmed the judgment in favor of cross defendants. In appealing the measure of damages used by the trial court, plaintiff contended that it should have been awarded multiple damages pursuant to *Code Civ. Proc. § 733* or *Civ. Code § 3346*, or in the alternative, that if it is not entitled to damages under *Civ. Code § 3346*, it would be entitled to damages under a conversion theory. Treble damages may only be awarded when the wrongdoer intentionally acts willfully or maliciously. The intent required is the intent to vex, harass, annoy, or injure the plaintiff. Intent is a question of fact for the trial (*191 Cal. App. 2d 238, 246)* . The question of title to the timber at the time of removal was one on which legal minds could well differ. Under these circumstances defendants were not charged with knowledge of plaintiff's title. The granting of treble damages is within the sound discretion of the trial court and failure to so provide will not be reversed except on a clear showing of abuse. Plaintiff sought to have the double damage award of *Civ. Code § 3346* applied if the treble award under that section was not available. The court dismissed that argument, explaining that the double damage provision, enacted by an amendment after the acts complained of, imposed a previously nonexistent liability, and because the provision is penal, it is not retroactive, and not applicable. The court found merit with plaintiff's final contention that if *Civ. Code § 3346* did not entitle it to damages, it is entitled to damages under conversion, and reversed the portion of judgment relating to the measure of damages on this ground (*191 Cal. App. 2d 238, 247)* .

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CHAPTER 225 TRESPASS
PART II. FORMS
B. Damages
4. Damages for Trespass to Minerals or Timber

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[Reserved]

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CHAPTER 225 TRESPASS
PART II. FORMS
C. Injunctive Relief

22-225 California Points & Authorities § 225.180

§ 225.180 Supporting Contention for Issuance of Prohibitory Injunction Against Trespass--Equitable Relief Warranted

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general form of memorandum of points and authorities supporting the contention that defendant committed trespass (see, e.g., § 225.20).*]

PLAINTIFF SHOULD BE GRANTED INJUNCTIVE RELIEF AGAINST DEFENDANT'S TRESPASS BECAUSE LEGAL REMEDIES ARE INADEQUATE AND PLAINTIFF WILL SUFFER IRREPARABLE INJURIES IF THE TRESPASS IS ALLOWED TO CONTINUE.

A. General Rule Regarding Availability of Injunctive Relief. Equitable relief in the form of an injunction may be granted to restrain trespasses or threatened continuing trespasses if the threatened injury would be irreparable and the legal remedy is inadequate (*Harmon v. De Turk (1917) 176 Cal. 758, 762, 169 P. 680* ; *Pierce v. Stablemen's Union (1909) 156 Cal. 70, 73, 103 P. 324* ; *see Code Civ. Proc. § 526(a)*).

B. Facts of Specific Case Are Determinative. Each case must stand on its own facts in determining whether equitable relief should be granted (*Union Oil Co. v. Domengeaux (1939) 30 Cal. App. 2d 266, 271, 86 P.2d 127*).

[*Optional*] **C. Injunctive Relief Available if Difficulty in Estimating Damage Indicates Irreparable Injury.** If the probable resultant injury of a threatened continuing trespass will be beyond any method of pecuniary estimation or will be extremely difficult to ascertain, the injury can be seen as irreparable and will warrant injunctive relief (*Civ. Code § 3422(2)*; *Code Civ. Proc. § 526*; *Uptown Enters. v. Strand (1961) 195 Cal. App. 2d 45, 52-53, 15 Cal. Rptr. 486* ; *Union Oil Co. v. Domengeaux (1939) 30 Cal. App. 2d 266, 270-272, 86 P.2d 127*).

[*Optional*] **D. Injunctive Relief Available if Legal Remedy Inadequate.** If the continued interference with the plaintiff's interest cannot be prevented by the available legal remedies such as damages, ejectment, or forcible or

unlawful detainer actions, injunctive relief is appropriate (*De Groot v. Peters (1899) 124 Cal. 406, 408, 57 P. 209* ; *Reitz v. Wollwert (1933) 217 Cal. 406, 409-410, 19 P.2d 3* ; *see Civ. Code § 3422(3)*).

[*Optional*] **E. Injunctive Relief Available to Avoid Multiplicity of Suits.** When a trespass is of a continuing nature, and its constant recurrence renders the remedy at law inadequate unless by a multiplicity of suits, there is sufficient ground for relief by way of injunction (*Civ. Code § 3422(3)*; Code Civ. Proc. § 526(a); *Slater v. Pacific Am. Oil Co. (1931) 212 Cal. 648, 655, 300 P. 31* ; *State of California v. Hansen (1961) 189 Cal. App. 2d 604, 611, 11 Cal. Rptr. 335*).

[*Optional*] **F. Injunctive Relief Available to Prevent Creation of Easement.** Equitable relief in the form of an injunction will issue to prevent a wrongful act if the continuance of that act will, in time, ripen into an easement or servitude which will deprive the owner of the use of the property or some part of it (*Fairrington v. Dyke Water Co. (1958) 50 Cal. 2d 198, 201, 323 P.2d 1001* ; *City of Dunsmuir v. Silva (1957) 154 Cal. App. 2d 825, 827, 317 P.2d 653*).

[*Optional*] **G. Interference With Easement.** A preliminary injunction may be granted to prevent interference with the use of an easement (*Continental Baking Co. v. Katz (1968) 68 Cal. 2d 512, 526-532, 67 Cal. Rptr. 761, 439 P.2d 889* ; *Keith v. Superior Court (1972) 26 Cal. App. 3d 521, 524-527, 103 Cal. Rptr. 314*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of injunctive relief of a prohibitory nature. Damages or ejectment is the usual remedy in a trespass action, and injunctive relief is granted only if the legal remedy is not sufficient. Optional Paragraph C should be used if the injury is irreparable because damages would be extremely difficult or impossible to estimate. Optional Paragraph D should be used if legal remedies such as damages, ejectment, or detainer actions would be inadequate. Optional Paragraph E should be used if the trespass is continuing and injunctive relief is needed to avoid a multiplicity of suits. Optional Paragraph F should be used if the trespass threatens to ripen into an easement. Optional Paragraph G should be used if preliminary injunctive relief is being sought against a trespass that is interfering with use of an existing easement.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of injunctive relief from trespass. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. For example, counsel may allege facts illustrating that defendant's past and threatened continued trespass interferes with plaintiff's business, and, if allowed to continue, will cause damages in an amount impossible to determine.

[b] Related Pleading and Practice Chapters

For discussion and forms relating to injunctions, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender). For discussion and forms relating to trespass, see California Forms of Pleading and Practice, Ch. 550, *Trespass* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing the granting of injunctive relief, see Ch. 116, *Injunctions* .

[d] Opposing Points and Authorities

If appropriate, the points and *authorities in § 225.182* may be used to oppose these points and authorities.

[3] Discussion of Authorities

[a] General Rule Regarding Availability of Injunctive Relief

In ***Harmon v. De Turk*** *(1917) 176 Cal. 758* , defendants were the owners of land leased to plaintiff. The lease gave plaintiff the exclusive right of excavating and removing minerals from the land and required him to erect a suitable plant, install equipment for the work, and remove a specified amount of material per month, of which defendants received a share. Plaintiff executed contracts with builders and suppliers and anticipated buyers in reliance on the lease. When plaintiff attempted to enter the property, he found it enclosed by a locked fence. He entered and had begun to comply with the lease terms when defendant wife ordered him off the premises, saying that she would not permit him to enter for any purpose. Plaintiff brought action for an injunction to restrain defendants from interfering with the free use and occupancy of the property, alleging that, unless restrained, defendants would prevent entry and performance under the lease and the carrying out of his obligations to those with whom he had made contracts, all to his great and irreparable damage. After their demurrer was overruled, defendant wife cross complained, attacking the validity of the lease, and asserting that she owned an interest in the land. Plaintiff's demurrer to the cross complaint was sustained with leave to amend, but no amendment was made. The trial court entered judgment granting plaintiff the relief sought. Defendant wife appealed the judgment and the rulings on the demurrers.

The Supreme Court affirmed the judgment and dismissed the appeals from the orders overruling and sustaining the demurrers. The Court said the only issue on appeal was whether the complaint stated facts entitling plaintiff to the relief sought. Defendant contended that there was no showing of irreparable injury to plaintiff, or of inadequacy of a remedy at law as to justify an injunction. In holding to the contrary, the Court reviewed the law of injunctions. An injunction will not lie to restrain mere trespasses on land, for the simple reason that an action at law will ordinarily afford an ample and adequate remedy for the wrong (*176 Cal. 758, 761)* . It is not the usual practice of courts to issue injunctions for the purpose of restoring land to a claimant out of possession or to permit an injunction suit to be substituted for an action of ejectment. However, the injunction may be granted even in those cases when the threatened injury would be irreparable and the legal remedy inadequate. Defendants' actions involved more than a threat of repeated trespasses, or a bare withholding of possession. Plaintiff is entitled to enter under the lease, and makes his right dependent on performance within a limited time. He was excluded from the land by physical obstructions wrongfully erected and threaten to be maintained. An action at law would not give him an undisturbed possession in time to enable him to carry out his obligations under the lease. These facts make out a case of irreparable damages sufficient to warrant injunctive relief (*176 Cal. 758, 762)* .

In ***Pierce v. Stablemen's Union*** *(1909) 156 Cal. 70, 103 P. 324* , plaintiff owned and operated a livery and feed stable. The officers of defendant requested plaintiff to unionize his stable. Plaintiff refused, and a strike was declared against him. Defendant's members picketed plaintiff's stable, threatening customers with boycotts of their own businesses and plaintiff's employees with bodily harm. Plaintiff brought an action for an injunction to restrain defendants from illegal interference with his business. The trial court granted an injunction ordering defendant to refrain from interfering with plaintiff's business in any way. Defendant appealed.

The Supreme Court directed the trial court to modify the injunction because it was too broad, but otherwise affirmed the judgment. Although equity will not attempt to restrain the commission of a crime, the fact that an act threatening irreparable injury to property rights is of itself criminal does not deprive a court of its right and power to enjoin the commission of the act. Similarly, while equity will not enjoin against a trespass as such, when the acts committed and threatened are in the nature of a continuing trespass, causing irreparable injury, they will be enjoined. The Court also discussed the union activities specifically, ultimately finding that the injunction was too broad against those activities (

156 Cal. 70, 73-74) .

[b] Facts of Specific Case Are Determinative

In ***Union Oil Co. v. Domengeaux*** *(1939) 30 Cal. App. 2d 266, 86 P.2d 127* , two cases involving various plaintiffs and bankrupt defendants and their trustees were consolidated. Defendants began operations for slant drilling for oil on land adjacent to the leaseholds of plaintiffs. Plaintiff served defendants with written notice warning them that they must not cause or permit the well to cross or be within the boundary lines of plaintiffs' land. Defendants' well entered plaintiffs' land at subsurface levels with full knowledge of the course their well was taking. Plaintiffs brought an action for trespass. The trial court granted injunctive relief. Defendants appealed.

The court of appeal affirmed. Among the many points raised by defendants on appeal was that even if a trespass took place, the damages were too inconsequential to justify the granting of injunctive relief, and that an injunction should only issue only on a showing of irreparable injury. Plaintiffs conceded that they could not prove actual damage to justify an award of damages in any specific amount. However, the court stated that this concession did not justify the conclusion that plaintiffs had suffered no injury. Citing *Civ. Code § 3422(2)*, the court said that injunctions can be issued when it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief. Each case must stand on its own facts in determining whether equitable relief should be granted. In some cases involving inconsequential surface encroachments, injunctive relief has been denied on the application of the maxim de minimus, but in those cases it was obvious that there was no appreciable damage or at least that the extent of the damages was easily ascertainable. In this trespass it was extremely difficult to ascertain the extent of the damages which had been suffered and which would be suffered. Under these circumstances injunctive relief should be available, especially since the trespass was of a continuing nature and might ripen into a prescriptive right, and since defendant was insolvent (*30 Cal. App. 2d 266, 270-272)* .

[c] Injunctive Relief Available if Difficulty in Estimating Damage Indicates Irreparable Injury

The facts and procedural background of ***Uptown Enters. v. Strand*** *(1961) 195 Cal. App. 2d 45, 15 Cal. Rptr. 486* , are discussed in *§ 225.221[3][a]*. The court of appeal reversed the trial court's judgment, and found that injunctive relief was appropriate to prevent future trespasses that would interfere and hamper plaintiff's business. The court discussed the appropriateness of injunctive relief. The threat of future interference is a proper subject for injunctive action. Injunction is a proper remedy against threatened repeated acts of trespass, particularly when the probable resultant injury will be beyond any method of pecuniary estimation and for this reason is irreparable (*195 Cal. App. 2d 45, 51-52)* .

Union Oil Co. v. Domengeaux *(1939) 30 Cal. App. 2d 266, 86 P.2d 127* , is discussed in *§ 225.180[3][b]*.

[d] Injunctive Relief Available if Legal Remedy Inadequate

In ***De Groot v. Peters*** *(1899) 124 Cal. 406, 57 P. 209* , plaintiff brought an action for dissolution and for an accounting, alleging that he and defendant were partners in a tailoring business and that defendant was guilty of misconduct in the business. Defendant cross complained and requested injunctive relief. He claimed that plaintiff was his employee and had begun to neglect his duties, necessitating his discharge, and that plaintiff held himself out to the public as a partner and intruded in defendant's office and business, collected and converted money from defendant's customers, and threatened and intended to continue these acts. The trial court granted defendant an injunction. Plaintiff's motion for a dissolution of the injunction was denied. Plaintiff appealed.

The Supreme Court affirmed. The evidence indicated that plaintiff was a trespasser in defendant's store and assumed a control over the business, intercepted money due defendant and held himself out to the public as a partner. Bodily ejection of plaintiff from the premises would not necessarily prevent the continuance of those injuries; nor would an action for damages afford adequate relief. For this reason, among others, it would be extremely difficult to ascertain in

pecuniary terms the amount of damages, and plaintiff was insolvent anyway (*124 Cal. 406, 408)* .

In ***Reitz v. Wollwert*** *(1933) 217 Cal. 406, 19 P.2d 3* , plaintiff, a frail 80-year-old man, brought his elderly sister to live with him in his apartment house. He placed the title in her name to be held in trust for him. After defendants, his sister's daughter and son in law, attempted to obtain the title to the property, plaintiff's sister reconveyed it to him. After defendant's daughter, as guardian ad litem for her mother, attempted unsuccessfully to have the reconveyance set aside due to fraud, defendants, without plaintiff's consent and against his will, resided in the apartment house, paid no rent, and prevented plaintiff from contacting his sister. Defendants interfered with the tenants, collected rent, and otherwise obstructed plaintiff's free use of his property. Plaintiff's demand that they leave and account for the rents collected was refused. Plaintiff brought an action, requesting damages and an injunction restraining defendants from further occupation. The trial court issued a temporary restraining order, enjoining defendants from interfering with plainitff's occupancy and unobstructed use of the property. Defendants' general demurrer was overruled. The trial court rendered judgment making the injunctive relief permanent and awarding damages. Defendants appealed.

The Supreme Court affirmed. The Court did not agree with defendants' contentions that plaintiff had an adequate remedy at law. Although defendants as trespassers did not commit injury or waste to the land, that is immaterial in view of their continued interference with all the rights of ownership, which could not be remedied by a future monetary award. Nor could plaintiff have secured adequate relief through ejectment proceedings, as defendants were at no time in possession of the property. They were occupying the rooms of the mother and plaintiff had no desire to remove her from the building. Nor could plaintiff have invoked forcible or unlawful detainer actions against defendants since they were not tenants (*217 Cal. 406, 409-410)* .

[e] Injunctive Relief Available to Avoid Multiplicity of Suits

In ***Slater v. Pacific Am. Oil Co.*** *(1931) 212 Cal. 648, 300 P. 31* , plaintiff owned valuable farm land downhill from where defendant and several other companies operated oil wells. After a rain storm the rainwater flowing down from the hills carried oil, salt, and other substances down to plaintiff's property where they were deposited. Plaintiff brought an action for the property damage sustained. The trial court judgment was for plaintiff, awarding damages and injunctive relief. Defendant appealed, and the court of appeal reversed the judgment, denying damages and injunctive relief.

The Supreme Court affirmed the reversal of the damage award but reversed the court of appeal's denial of the injunction. The Court discussed joint tortfeasor liability and contribution, noting the difficulty in ascertaining a specific amount of damages attributable to one tortfeasor. Even with the difficulties, it was not impossible for plaintiff to offer evidence on which defendant's proportionate liability could be fairly determined. However indefinite the measure, plaintiff sufficiently established that some portion of the substances causing injury came from the operation of defendant's wells. This showing is sufficient to warrant the granting of injunctive relief. The Court reaffirmed the trial court's findings that the continuance of the wrongful acts of defendant would cause a multiplicity of judicial proceedings; that the amount of compensation to afford plaintiff adequate relief if defendant's conduct was allowed to continue would be extremely difficult to ascertain; and that the continuance of defendant's acts would cause great and irreparable injury to plaintiff's land and pecuniary compensation would not afford plaintiff adequate relief. It is settled that a trespass of a continuing nature, the constant recurrence of which renders the remedy at law inadequate unless by a multiplicity of suits, affords sufficient ground for relief by way of injunction (*212 Cal. 648, 655)* .

In ***State of California v. Hansen*** *(1961) 189 Cal. App. 2d 604, 11 Cal. Rptr. 335* , defendant discovered a spring on a section of state-owned land completely surrounded by defendant's land. Defendant applied to the State Water Rights Board for a permit to appropriate the water from the spring. The permit was not granted. At the same time as the permit hearing, a proceeding was pending for the exchange of the spring land for other government-owned land. That proceeding was later terminated and the parcel put up for sale. Defendant went ahead and developed the spring by digging trenches, installing pipelines, and constructing a water sump. Defendant made no communication of his intent to develop the spring other than by his application. The state brought an action in trespass against defendant to eject him

from the property and to enjoin him from continuing to convey water from the property. Defendant cross complained that he was given a right of way across the state land for which the state should be awarded the fair value. The trial court judgment was for plaintiff, awarding it possession of the land and damages, and enjoining defendant from removing water. Defendant appealed.

The court of appeal affirmed. After discussing water appropriation rights and public policy, the court dealt with defendant's assertion of plaintiff's consent for entry. Finding no consent, the court addressed defendant's contentions that an injunction was not appropriate because plaintiff had been benefited and not damaged, no irreparable injury had occurred, and an injunction will not be granted to restrain a trespasser merely because he or she is a trespasser. It is settled that a trespass of a continuing nature, its constant recurrence rendering the remedy at law inadequate unless by a multiplicity of suits, affords sufficient ground for relief by way of injunction. The facts of the case indicate the necessity for injunctive relief to avoid a multiplicity of suits (*189 Cal. App. 2d 604, 611)* .

[f] Injunctive Relief Available to Prevent Creation of Easement

In ***Fairrington v. Dyke Water Co.*** *(1958) 50 Cal. 2d 198, 323 P.2d 1001* , defendant purchased a parcel of real property and was given permission to erect a sign on the adjoining land owned by the grantors. After the grantors' deaths, defendant posted a sign. Plaintiffs, heirs of the grantors, succeeded to the property where the sign was posted. After defendant refused to remove the sign, plaintiffs brought an action for a mandatory injunction to require removal and to quiet title to the property. The trial court found that defendant purchased the property and spent money in installing the sign in reliance on that permission, but with full knowledge that the permission was a revocable license; that the sign was a substantial benefit to defendant in carrying on its business; that the sign constituted no substantial detriment to plaintiffs and did not interfere with any use of the property; that the license was revoked by the grantors' deaths; and that relief to plaintiffs should be withheld. The trial court judgment was for defendant, and the court retained jurisdiction to entertain future application by plaintiffs for injunctive relief. Plaintiffs appealed.

The Supreme Court reversed. The Court discussed considerations in granting injunctive relief, and how the trial court's analysis was mistaken. The trial court did not conclude that the removal of the sign would result in hardship to defendant, but only that the sign was a substantial benefit to defendant in the carrying on of its business. The doctrine of balancing of conveniences is often invoked as a defense in a suit for an injunction when the plaintiff, seeking to vindicate a technical and unsubstantial right, would impose an unusual hardship on the public or defendant. Deprivation of a substantial benefit, however, falls short of the imposition of substantial hardship. When a court of equity balances conveniences to determine that an injunction, otherwise warranted, should be withheld, its action approaches an exercise of the right of eminent domain in favor of a private person. Thus, proof of irreparable injury is a necessary element of a defense based on a balancing of conveniences. The Court held that the findings were insufficient to support a balancing of the conveniences as a ground for the withholding of injunctive relief (*50 Cal. 2d 198, 200)* . Nonetheless, the conclusion that the conveniences cannot be balanced in favor of defendant did not determine plaintiff's right to a mandatory injunction. Since the deaths of the grantors terminated the license, the presence of defendant's sign was a continuing trespass on plaintiffs' land, which might ripen into an easement. It is settled that equity will enjoin a wrongful act which, if continuous, will give rise to an easement or servitude. Defendant had shown no equitable or other defense to the suit for a mandatory injunction, nor had it advanced any reason why plaintiffs' title should not be quieted (*50 Cal. 2d 198, 201)* .

In ***City of Dunsmuir v. Silva*** *(1957) 154 Cal. App. 2d 825, 317 P.2d 653* , plaintiffs and defendants owned property abutting on an unnamed alley that belonged to plaintiff city. The alley had long been a common method of ingress and egress to their lots. Plaintiff city, over the objections of the other plaintiffs, issued a building permit to defendants for construction of a garage on defendants' premises. When completed, the garage encroached on the alley and reduced the passageway. Plaintiffs brought an action seeking injunctive relief from the encroachment. The trial court noted that any damages suffered by plaintiffs were not ascertainable and were nominal. The court declared that plaintiffs were the owners of an easement over the alley for travel purposes and granted injunctive relief against the encroachment.

Defendants appealed.

The court of appeal affirmed. Defendants argued that the encroachment was slight, as there remained a passageway for automobiles, that no damages resulted, and that under the rule de minimus the court ought not to have granted a mandatory injunction, which to be obeyed would necessitate removal of part of the garage. The court disagreed. The findings regarding the difficulty of measuring money damages and that money damage had been nominal provided no reason why defendants should be allowed to maintain their encroachment. An injunction will issue to prevent a wrongful act if the continuance of that act will, in time, ripen into an easement which will deprive the owner of the use of the property or some part thereof or take from the owner the existence of the estate although the immediate damage is inappreciable (*154 Cal. App. 2d 825, 827)* . The facts indicated the inapplicability of that rule. There were constant protests by plaintiffs from the beginning of construction. The permit granted gave no authority to interfere with the easement rights of plaintiffs. Defendants defiantly continued to build their garage in a manner that encroached on the rights of plaintiffs. Defendants also contended that the court should have balanced the conveniences and refused to require the removal of the encroachment. The court responded that the encroachment could be rectified at a moderate cost in view of the number of persons whose rights were being invaded by the continuance of the structure (*154 Cal. App. 2d 825, 828)* .

[g] Interference With Easement

In ***Continental Baking Co. v. Katz*** *(1968) 68 Cal. 2d 512, 67 Cal. Rptr. 761, 439 P.2d 889* , both plaintiff and defendants sought to restrain each other from interfering with an easement. The superior court granted plaintiff a temporary restraining order and a preliminary injunction to restrain defendants from interfering with the use of the easement; it also issued an order denying defendants a preliminary injunction. Defendants appealed.

The California Supreme Court affirmed the orders. The pivotal issue in the action was the nature of an easement conveyed to plaintiff by a grant deed. After ruling that the trial court had erroneously admitted certain extrinsic evidence to explain the deed, the Court was still faced with the question of whether that error required the reversal of the order granting the preliminary injunction to plaintiff. It noted that plaintiff was probably the party that would ultimately succeed in the action, and that the denial of plaintiff's motion for the injunction would have resulted in substantial injury to plaintiff as compared with any injury that might result to defendants from issuing the injunction. Thus, the Court concluded that the order granting plaintiff the preliminary injunction was not an abuse of discretion because it could not be said that a result more favorable to the defendants would have occurred if the erroneously admitted extrinsic evidence had not been admitted (*68 Cal. 2d 512, 526-532)* .

In ***Keith v. Superior Court*** *(1972) 26 Cal. App. 3d 521, 103 Cal. Rptr. 314* , plaintiffs were the owners of two homes, access to which was over an easement that had been granted to plaintiffs by a deed. Defendant owned a large tract of land surrounding plaintiffs' lots, including the land across which the plaintiffs' easement passed. Ignoring plaintiff's warnings that they would stand on their rights, defendant began building an alternate road for plaintiffs to use and intended to close the existing easement and build a retention basin where the easement was located. Plaintiffs brought an action to enjoin interference with their easement and sought a preliminary injunction. The superior court denied the preliminary injunction, and plaintiffs sought a writ of mandate in the court of appeal to compel the superior court to grant the preliminary injunction.

The court of appeal granted the writ requiring the superior court to vacate its order denying the preliminary injunction, noting that plaintiff was entitled to a preliminary injunction to prohibit defendant's threatened closure of the easement. The court pointed out that denial of the injunction would leave defendant free to rip up plaintiff's road and construct a retention basin in its place; at the end of the trial, the court would be required to choose between a mandatory injunction requiring defendant to restore the premises at great expense or limit plaintiffs' recovery to monetary damages. Thus, to refuse an injunction in such a situation would be to give defendant a private right of eminent domain. The court observed that the doctrine of balancing of conveniences offered no justification for refusing to enjoin a prospective

willful trespass. The fact that courts are reluctant in some cases to order the destruction of an expensive encroaching structure was, it noted, an excellent additional reason for granting a preliminary injunction before the new structure was commenced (*26 Cal. App. 3d 521, 524-527)* .

[4] Additional Authorities

[a] Interference With Easement

Watson v. Heger (1941) 48 Cal. App. 2d 417, 120 P.2d 153 , involved the question of whether an easement of ingress and egress, that had been created by reservation in a grant deed and that had not been abandoned by acts of the present owner of the dominant tenement, entitled the present owner of the servient tenement to a permanent injunction restraining any trespass on her property beyond the strict limits of the easement. The superior court determined this question against plaintiff, but the court of appeal reversed and ordered the judgment amended to grant the injunctive relief sought. It stated that the only right that the owner of the dominant tenement had was to use the easement for ingress and egress strictly within the limits of the easement. Because the trial court specifically found that immediately prior to the time of trial defendants had continually trespassed on plaintiff's property but that the number of trespasses was unascertainable, the court of appeal held that there should have been a decree enjoining future trespasses (*48 Cal. App. 2d 417, 421)* .

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CHAPTER 225 TRESPASS
PART II. FORMS
C. Injunctive Relief

22-225 California Points & Authorities § 225.181

§ 225.181 Supporting Contention for Issuance of Mandatory Injunction Against Encroachment--Equitable Relief Warranted

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general form of memorandum of points and authorities supporting the contention that defendant committed trespass (see, e.g., § 225.20).*]

ISSUANCE OF A MANDATORY INJUNCTION FOR REMOVAL OF DEFENDANT'S ENCROACHMENT ON PLAINTIFF'S PROPERTY SHOULD BE GRANTED BECAUSE DEFENDANT WAS WILLFUL IN ERECTING THE ENCROACHMENT, WILL NOT SUFFER A DISPROPORTIONATE HARDSHIP BY ITS REMOVAL, AND PLAINTIFF WILL EXPERIENCE IRREPARABLE INJURY IF THE ENCROACHMENT IS ALLOWED TO CONTINUE.

A. Doubtful Encroachment Cases Seeking Mandatory Injunction Decided in Plaintiff's Favor. The court has some discretion in determining whether to grant or deny a mandatory injunction in an encroachment case. The court should begin with the premise that the defendant is a wrongdoer and that the plaintiff's property has been occupied, and should decide doubtful cases in favor of the plaintiff (*Christensen v. Tucker (1952) 114 Cal. App. 2d 554, 562, 250 P.2d 660*).

B. Mandatory Injunction Will Be Granted Unless Defendant Is Innocent, Plaintiff Will Not Suffer Irreparable Injury, and Hardships Are Disproportionate. A mandatory injunction for the removal of an encroachment should be granted unless the court makes three findings: that the defendant is innocent, that the plaintiff will not suffer irreparable injury, and that the hardship to the defendant by granting the injunction is greatly disproportionate to the hardship caused to the plaintiff (*D'Andrea v. Pringle (1966) 243 Cal. App. 2d 689, 695, 52 Cal. Rptr. 606* ; *Christensen v. Tucker (1952) 114 Cal. App. 2d 554, 562-563, 250 P.2d 660*).

[*Optional*] **C. Court Need Not Balance Conveniences if Defendant Acted Knowingly or if Defendant's Negligence**

Is Sole Proximate Cause of Encroachment. If the defendant encroaches on the plaintiff's adjoining property, and the court finds that there is irreparable injury or that the defendant was not innocent, it should grant an injunction. When the defendants acted knowingly, or if the defendant's negligence was the sole proximate cause of the encroachment, the court need not balance the conveniences, and a mandatory injunction is appropriate (*Brown Derby Hollywood Corp. v. Hatton (1964) 61 Cal. 2d 855, 858, 40 Cal. Rptr. 848, 395 P.2d 896* ; *Christensen v. Tucker (1952) 114 Cal. App. 2d 554, 564-565, 250 P.2d 660*).

D. Willfulness or Lack of Good Faith Indicate Lack of Innocence. The defendant is not innocent if the encroachment is willful. To be willful, the defendant must not only know that he or she is building on the plantiff's land, but act without a good faith belief that he or she has a right to do so (*Brown Derby Hollywood Corp. v. Hatton (1964) 61 Cal. 2d 855, 859-860, 40 Cal. Rptr. 848, 395 P.2d 896*).

[*Optional*] **E. Irreparable Injury Determined by Present or Future Use.** In determining whether or not irreparable injury will occur, the court may look to the plaintiff's future plans for the property when those plans are affected by the encroachment (*Brown Derby Hollywood Corp. v. Hatton (1964) 61 Cal. 2d 855, 860, 40 Cal. Rptr. 848, 395 P.2d 896*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of equitable relief in the form of a mandatory injunction to remove an encroachment. Legal relief in the form of damages or ejectment is the usual remedy in a trespass action, and injunctive relief will be granted only when defendant is not innocent, the harm to defendant is not disproportionate, and the damage to plaintiff is irreparable.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of removal of an encroachment. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel may allege facts illustrating that defendant knew that defendant's building was encroaching on plaintiff's land as it was being constructed, but ignored plaintiff's protests, and completed construction of the encroachment.

[b] Related Pleading and Practice Chapters

For discussion and forms relating to encroachments, see California Forms of Pleading and Practice, Ch. 11, *Adjoining Landowners* (Matthew Bender). For discussion and forms relating to easements, see California Forms of Pleading and Practice, Ch. 240, *Easements* (Matthew Bender). For discussion of Civ. Code §§ 3420-3423 and Code Civ. Proc. §§ 525-534, a procedural checklist, and forms relating to injunctions, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender). For discussion and forms relating to trespass, see California Forms of Pleading and Practice, Ch. 550, *Trespass* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing the granting of injunctive relief, see Ch. 116, *Injunctions* .

[d] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 225.183* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Doubtful Encroachment Cases Seeking Mandatory Injunction Decided in Plaintiff's Favor

In ***Christensen v. Tucker*** *(1952) 114 Cal. App. 2d 554, 250 P.2d 660* , plaintiff and defendants, adjoining landowners, had purchased their lots from the same person, although defendants acquired theirs some time before plaintiff. Relying on the seller's representation of the boundary, and making a measurement error, defendants constructed various structures which encroached by a small amount on plaintiff's land. All but one of the encroachments were built before plaintiff bought his lot. Although the encroachments did not adversely affect any existing use of plaintiff's unimproved land, he claimed they would interfere with unspecified future development plans. Some damage was caused by sand and water accumulating on plaintiff's land. Plaintiff brought an action for a mandatory injunction to compel removal and for damages. Defendants cross complained to quiet their title to the area occupied by the encroachments. The trial court found that the area encroached was of little value and that damage to plaintiff was minimal; that defendants were negligent in relying on the seller's statement and in their measurements; that it would be inequitable to compel defendants to remove the encroachments, the value of which greatly exceeded the land occupied; and that plaintiff's proposed use of the land would not be seriously impaired if title were quieted in favor of defendant. The trial court ruled that the encroachments were on plaintiff's land, and offered defendants an election either to accept a mandatory injunction for removal and to pay a small amount of damages, or pay a large amount of damages, accept an injunction prohibiting further intrusion, and secure a decree quieting their title. Defendants elected the latter alternative and the court entered that judgment. Plaintiff appealed.

The court of appeal reversed. The court made a thorough review of the law concerning encroachments, and noted that there is authority indicating that the trial court has no discretion, may not balance the hardships between the parties, and must grant the injunction compelling removal, regardless of the fact that the relative hardship and expense to defendants far outweighs the inconvenience to plaintiff caused by the continuance of the encroachment. However, the court agreed with the weight of authority that allows the trial court some discretion to determine whether to grant or deny a mandatory injunction. In exercising that discretion, and in weighing the relative hardships, a court should consider various factors. The court should start with the premise that defendant is a wrongdoer, and that the plaintiff's property has been occupied. Thus, doubtful cases should be decided in favor of the plaintiff. In order to deny the injunction, certain factors must be present: (1) the defendant must be innocent, the encroachment must not be the result of the defendant's willful act, and perhaps not the result of the defendant's negligence; (2) if the plaintiff will suffer irreparable injury by the encroachment, the injunction should be granted regardless of the injury to the defendant, except, perhaps, when the rights of the public will be adversely affected; and (3) the hardship to the defendant by the granting of the injunction must be greatly disproportionate to the hardship caused the plaintiff by the continuance of the encroachment and this must be clearly evident and proved by the defendant. If these factors exist, the injunction should be denied (*114 Cal. App. 2d 554, 562-563)* . Thus, for a defendant to be entitled to the benefits of the relative hardship doctrine, the trespass must not have been willful, but the result of an innocent mistake or inadvertence, which implies that the defendant must not have been negligent (*114 Cal. App. 2d 554, 563-564)* . If the defendant is negligent and that negligence is the sole proximate cause of the encroachment, that defendant should be barred from invoking the doctrine. But when a plaintiff's conduct also contributes to the situation, the trier of fact is entitled to weigh the hardships each may suffer, and the negligence of one against the other (*114 Cal. App. 2d 554, 564)* . In this case, the court found error with the trial court findings and resultant rulings that basically allowed defendant to choose between a mandatory injunction or damages (*114 Cal. App. 2d 554, 565)* .

[b] Mandatory Injunction Will Be Granted Unless Defendant Is Innocent, Plaintiff Will Not Suffer Irreparable Injury, and Hardships Are Disproportionate

In ***D'Andrea v. Pringle*** *(1966) 243 Cal. App. 2d 689, 52 Cal. Rptr. 606* , plaintiffs, adjoining landowners of defendants, brought an action to obtain the removal of that portion of a building constructed on adjoining land which encroached on plaintiffs' properties. Defendants were the owner of the land and his lessee, who constructed the building. Plaintiffs informed defendants of the encroachment from the time construction of the building was begun and provided copies of two surveys indicating the encroachment. Defendants claimed that their own survey revealed that the building was entirely within defendant's land and so they continued construction. The trial court found that the building did encroach, but refused to grant an injunction compelling removal and granted defendants an easement across plaintiff's property for the life of the building, subject to a payment of damages. Defendant appealed the amount of the damage award. Plaintiffs cross appealed the entire judgment.

The court of appeal reversed and remanded. The court cited the following rule: in actions between adjoining landowners, when the defendant occupies the plaintiff's property without privilege, an injunction is granted to remove the encroachment, but when the encroachment does not irreparably injure the plaintiff, was innocently made, and when the cost of removal would be great compared to the inconvenience caused the plaintiff by the continuance of the encroachment, the court may, in its discretion, deny the injunction and compel the plaintiff to accept damages (*243 Cal. App. 2d 689, 695)* . The court found the trial court's findings on these factors to be inconclusive, as they were not findings of ultimate fact but conclusions of law not supported by any facts found. Accordingly, they must be disregarded (*243 Cal. App. 2d 689, 695-696)* . The crucial issue was whether the encroachment was innocently made. A defendant is not innocent if the encroachment is willful; to be willful, a defendant must not only know that he or she is building on the plaintiff's land, but act without a good faith belief that he or she has a right to do so. The trial court made no conclusions about whether defendants' activities were done innocently or in good faith, and its findings were not determinative. It found that defendants were put on notice that construction was on plaintiffs' property and that the construction continued over their objections, which suggests a lack of good faith. Yet the finding that defendants relied on a survey by a licensed surveyor does not compel or warrant the conclusion that defendants acted innocently or in good faith. The trial court must determine whether defendants were justified in their reliance on their survey (*243 Cal. App. 2d 689, 696-698)* . The court also found that the damage award was not supported by the record, as no evidence was introduced as to the value of plaintiffs' land or the reasonable value of its use. The judgment must be reversed because the findings of fact as to whether the encroachment irreparably injured plaintiffs, whether it was innocently made, and whether the cost of removal would be great compared to the inconvenience caused plaintiff by the continuance were not decided by the trial court. The court ordered that they be decided on remand, and that the court may receive additional evidence (*243 Cal. App. 2d 689, 698-699)* .

Christensen v. Tucker *(1952) 114 Cal. App. 2d 554, 562-563, 250 P.2d 660* , is discussed in *§ 225.181[3][a]*.

[c] Court Need Not Balance Conveniences if Defendant Acted Knowingly or if Defendant's Negligence Is Sole Proximate Cause of Encroachment

In ***Brown Derby Hollywood Corp. v. Hatton*** *(1964) 61 Cal. 2d 855, 40 Cal. Rptr. 848, 395 P.2d 896* , defendant Haun leased a building to defendant restaurant. Haun later leased adjacent property to a parking lot. Shortly thereafter defendant restaurant began using a strip of the land leased to the parking lot for storing garbage. The lessee of the parking lot did not object and erected iron posts marking the strip. Later Haun leased the parking lot to defendant store, providing that defendant restaurant could enter on the land at reasonable hours for the removal of garbage. Later defendant store subleased to plaintiff, with the same garbage provision. After the iron posts were knocked down, plaintiff painted a white line to mark the strip. After notification from the health and fire departments that the continued storage was violative of code, with the permission of defendant Haun, defendant restaurant began construction of an extension of his building to enclose the strip. Plaintiff protested the encroachment on plaintiff's property and demanded that the work be stopped. Defendant disregarded the notice and completed the extension. Plaintiff brought an action seeking a mandatory injunction compelling defendant to remove the extension and asking for a declaration of rights and duties under the lease and sublease. The trial court found that defendant had acquired no right to construct the extension. The trial court denied the injunction, but awarded damages against defendant restaurant and entered

judgment for defendants Haun and defendant store. Plaintiff appealed.

The Supreme Court reversed and remanded with instructions to determine on the basis of the evidence whether the encroachment was innocent. When a defendant without privilege occupies the plaintiff's adjoining property, an injunction is granted to remove the encroachment. But when the encroachment does not irreparably injure the plaintiff, was innocently made, and when the cost of removal would be great compared to the inconvenience caused to the plaintiff by the continuance of the encroachment, the equity court may, in its discretion, deny the injunction and compel the plaintiff to accept damages. After disagreeing with defendant's contention that granting injunctions is only appropriate for injuries to freehold interests, the Court examined the trial court's finding that none of the factors necessitating an injunction existed. Plaintiff contended that defendant restaurant was not innocent. A defendant is not innocent if the encroachment on the plaintiff's land is willful. To be willful, a defendant must not only know that he or she is building on the plaintiff's land, but act without a good faith belief that he or she has a right to do so. The evidence on the good faith issue was conflicting; defendant alleged that plaintiff induced belief of the right to act, while plaintiff alleged that defendant's continued construction after objection suggested a lack of good faith. The trial court made no conclusive findings on the conflicting evidence, but only stated that the encroachment was not mere inadvertence and that plaintiff did not expressly consent to the construction. Noting that intent does not determine innocence and express consent is not the only way to induce belief, the Court stated that the issue was whether defendant restaurant acted in good faith or in willful disregard of plaintiff's rights. Since the trial court failed to make a finding on this crucial issue, the judgment was reversed (*61 Cal. 2d 855, 859-860)* . Plaintiff also contended that the trial court erred in finding no irreparable injury. It argued that it might make use of the property before its lease expired, although it had not yet done so. Because plaintiff had not contended that any of its present plans were hampered by the encroachment, the trial court properly relied on the present use and nature of the land in ascertaining whether there was irreparable injury (*61 Cal. 2d 855, 860)* .

Christensen v. Tucker *(1952) 114 Cal. App. 2d 554, 562-563, 250 P.2d 660* , is discussed in *§ 225.181[3][a]*.

[d] Willfulness or Lack of Good Faith Indicate Lack of Innocence

Brown Derby Hollywood Corp. v. Hatton *(1964) 61 Cal. 2d 855, 40 Cal. Rptr. 848, 395 P.2d 896* , is discussed in *§ 225.181[3][c]*.

[e] Irreparable Injury Determined by Present or Future Use

Brown Derby Hollywood Corp. v. Hatton *(1964) 61 Cal. 2d 855, 40 Cal. Rptr. 848, 395 P.2d 896* , is discussed in *§ 225.181[3][c]*.

[4] Additional Authorities

[a] Court Need Not Balance Conveniences if Defendant Acted Knowingly or if Defendant's Negligence Is Sole Proximate Cause of Encroachment

The facts and procedural background of *City of Dunsmuir v. Silva (1957) 154 Cal. App. 2d 825, 317 P.2d 653* , are discussed in *§ 225.180[3][f]*. The court of appeal affirmed injunctive relief. The court said that the facts indicated the inapplicability of the doctrine of balancing hardships. There were constant protests by plaintiffs from the beginning of construction, the permit granted gave no authority to interfere with plaintiffs' easement rights, and defendants defiantly continued to build their garage as an encroachment. The encroachment could be rectified at a moderate cost in view of the number of person whose rights were being invaded by the continuance of the structure (*154 Cal. App. 2d 825, 828)* .

California Points & Authorities

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Volume 22 Chapters 220-229 SUBROGATION---to---TRESPASS
CHAPTER 225 TRESPASS
PART II. FORMS
C. Injunctive Relief

22-225 California Points & Authorities § 225.182

§ 225.182 Opposing Contention for Issuance of Prohibitory Injunction Against Trespass--Equitable Relief Not Warranted

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF SHOULD BE DENIED ANY INJUNCTIVE RELIEF AGAINST DEFENDANT FOR THE ALLEGED TRESPASS BECAUSE _____ [THE INJURIES TO PLAINTIFF, IF ANY, ARE NOT IRREPARABLE *and/or* PLAINTIFF HAS AN ADEQUATE LEGAL REMEDY].

A. Injunctive Relief Only Available When Legal Remedy Is Inadequate or Injury Is Irreparable. If no irreparable injury will result from the trespass, or if there is a complete and adequate remedy at law, injunctive relief will not be granted. An irreparable injury can be indicated by the nature of the injury itself, or from the want of responsibility in the party threatening its commission (*Randall v. Freed (1908) 154 Cal. 299, 302, 97 P. 669* ; *Leach v. Day (1865) 27 Cal. 644, 645-647* ; *see Civ. Code § 3422(1), (2)*; *Code Civ. Proc. § 526(a)*).

[*Optional*] **B. Completed Trespass Does Not Warrant Injunctive Relief.** A court will not interpose to restrain a trespasser simply because he or she is a trespasser, unless the evidence indicates that the trespass already committed will probably be repeated indefinitely or is of a continuing nature (*Church of Christ of Long Beach v. Harper (1927) 83 Cal. App 41, 46, 256 P. 476*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that injunctive relief against a trespass is appropriate. The ground of opposition set forth is that there is no need for equitable relief as the legal remedies are adequate and the injury, if any, is not irreparable.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the adequacy of the legal remedies. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel might include facts describing an isolated incident of trespass with no threat of recurrence, as might result from an entry to recover an item of personal property on plaintiff's land.

In an appropriate case, these points and authorities may be used to oppose the contention supported by the points and *authorities in § 225.180*.

[b] Related Pleading and Practice Chapters

For discussion of Civ. Code §§ 3420-3423 and Code Civ. Proc. §§ 525-534, a procedural checklist, and forms relating to injunctions, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender). For discussion and forms relating to trespass, see California Forms of Pleading and Practice, Ch. 550, *Trespass* (Matthew Bender).

[c] Related Points and Authorities

For points and authorities supporting and opposing the granting of injunctive relief, see Ch. 116, *Injunctions* .

[3] Discussion of Authorities

[a] Injunctive Relief Only Available When Legal Remedy Is Inadequate or Injury Is Irreparable

In ***Randall v. Freed*** *(1908) 154 Cal. 299, 97 P. 669* , plaintiff brought an action for damages for battery against defendants. Defendant counterclaimed for trespass and nuisance, alleging that plaintiff wrongfully and maliciously entered his home, disturbed the peace of his family, and attacked defendant, and that he merely defended himself against plaintiff. Defendant also alleged that plaintiff made repeated threats to enter his home. The trial court judgment was for defendant on both causes, and included an injunction enjoining plaintiff from entering defendant's home or disturbing the peace of his family. Plaintiff appealed.

The Supreme Court modified the judgment by striking the injunctive relief, but otherwise affirmed it. The Court found that the facts afforded no basis for an injunction. The threatened acts consisted merely of repeated trespasses and the use of offensive language. It did not appear that any irreparable injury would result from the commission of the threatened acts, nor that, if they were committed, defendant would not have a complete and adequate remedy at law. Before a court will interfere to restrain a trespass, it must appear that the injury to result will be irreparable (*154 Cal. 299, 301-302)* .

In ***Leach v. Day*** *(1865) 27 Cal. 644* , defendant, under a claim of right, entered plaintiff's property, tore down some lengths of plaintiff's fence, and threatened to do it again if plaintiff should put the fence back up. Defendant's claim was based on a pretended order and was no defense. Plaintiff brought an action in trespass seeking damages and injunctive relief. Defendant's demurrer was overruled. The trial court awarded an injunction against defendant. Defendant appealed.

The Supreme Court reversed and remanded. The Court discussed in great detail the law concerning equitable relief in trespass cases and how plaintiff's case did not merit equitable relief. No reasons were given as to why plaintiff did not have an adequate and complete remedy at law, as was apparently available. When there is an adequate legal remedy, equity will not interfere, but will leave plaintiff to an action at law. Defendant's acts had none of those elements which lie at the foundation of equitable interference in trespass cases. There was no ground for saying that defendant will continue his acts after the court has once determined the right under which he claimed to act. The threatened trespass was also not irreparable, either from the nature of the injury itself, or from the want of responsibility of the party

threatening its commission (*27 Cal. 644, 645-646*) . Equity will interpose in a trespass case for the purpose of quieting a possession or preventing a multiplicity of actions, when the value of an inheritance is put in jeopardy, or when irreparable mischief is threatened. Defendant's acts did not come within any of these exceptions (*27 Cal. 644, 646-647)* .

[b] Completed Trespass Does Not Warrant Injunctive Relief

In ***Church of Christ of Long Beach v. Harper*** *(1927) 83 Cal. App 41, 256 P. 476* , two people allegedly interfered with Sunday services in a church by both trying to lead the singing and then trying to teach the Sunday school classes. Plaintiff parishioners brought an action for trespass, seeking injunctive relief. They alleged that defendants trespassed into the church, took control, and refused to allow plaintiffs to conduct their services, and that defendants would continue to so act. Plaintiffs did not indicate that defendants ever again interfered with or threatened to interfere with the Sunday services. The trial court judgment was for defendants. Plaintiffs appealed.

The court of appeal affirmed. Plaintiffs were not excluded from the church and the action did not cause them great or irreparable injury. An injunction should not issue if plaintiffs would not suffer great or irreparable injury if defendants were not enjoined, defendants had not threatened and did not intend to take possession of the church and exclude plaintiffs, and the only interference shown was a completed act (*83 Cal. App 41, 44)* . The acts of defendants amounted to no more than an act of trespass, not continuous, but completed on that day. Continuance not being threatened, the finding of the trial court was correct. A court will not interpose to restrain a trespasser simply because he or she is a trespasser, unless the evidence indicates that the trespass already committed will probably be repeated indefinitely or is of a continuing nature (*83 Cal. App 41, 46)* .

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CHAPTER 225 TRESPASS
PART II. FORMS
C. Injunctive Relief

22-225 California Points & Authorities § 225.183

§ 225.183 Opposing Contention for Issuance of Mandatory Injunction Against Encroachment--Equitable Relief Not Warranted

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

ISSUANCE OF A MANDATORY INJUNCTION TO PLAINTIFF FOR REMOVAL OF AN ENCROACHMENT BY DEFENDANT IS NOT WARRANTED BY THE CIRCUMSTANCES OF THE CASE BECAUSE DEFENDANT ACTED IN GOOD FAITH, PLAINTIFF SUSTAINED MINIMAL INJURIES FOR WHICH DAMAGES ARE ADEQUATE, [PLAINTIFF UNNECESSARILY DELAYED IN SEEKING AN INJUNCTION], AND DEFENDANT WOULD UNDERGO SEVERE HARDSHIP IF FORCED TO REMOVE THE ENCROACHMENT.

A. Mandatory Injunction Denied if Relative Hardships Balanced and Essential Elements for Issuance Not Satisfied. If the circumstances are appropriate to apply the doctrine of balancing the hardships, a mandatory injunction requiring the removal of an encroachment may be denied if the encroachment was innocently made, the cost of removal would be great in comparison to the inconvenience caused the plaintiff by the continuance of the encroachment, and the plaintiff is not irreparably injured by the encroachment (*Dolske v. Gormley (1962) 58 Cal. 2d 513, 520-521, 25 Cal. Rptr. 270, 375 P.2d 174* ; *Scheble v. Nell (1962) 200 Cal. App. 2d 435, 438, 19 Cal. Rptr. 375*).

B. Showing of Irreparable Injury to Defendant Requires Balancing. The showing of irreparable injury to defendant will require the court to balance the hardships (*Scheble v. Nell (1962) 200 Cal. App. 2d 435, 438, 19 Cal. Rptr. 375*).

[*Optional*] **C. Adequate Compensation in Damages Precludes Issuance of Mandatory Injunction.** Mandatory injunction is a drastic remedy and when its issuance will work an inequitable burden on the defendant, the court may, in the exercise of sound discretion, refuse to grant it when the injured party may be adequately compensated in damages (*Baglione v. Leue (1958) 160 Cal. App. 2d 731, 734, 325 P.2d 471*).

[*Optional*] **D. Promise of Prior Owner as Evidence of Good Faith.** The good faith or innocence of the party causing

the encroachment may be shown in various ways, among them the promise of the owner of the encroached land at the time of encroachment (*Scheble v. Nell (1962) 200 Cal. App. 2d 435, 438-439, 19 Cal. Rptr. 375*).

[*Optional*] **E. Mandatory Injunction Denied if Injury Minimal.** A mandatory injunction is not appropriate when the injury is so slight as to bring it within the maxim de minimis, or when full compensation can be made in damages, since a bare legal right will not support issuance of a mandatory injunction (*McKean v. Alliance Land Co. (1927) 200 Cal. 396, 399, 253 P. 134* ; *Nebel v. Guyer (1950) 99 Cal. App. 2d 30, 32-34, 221 P.2d 337*).

[*Optional*] **F. Mandatory Injunction Denied if Delay in Assertion of Right.** A mandatory injunction may be denied when there has been a long or unnecessary delay in asserting the right, coupled with an adequate legal remedy and minimal injury (*Dolske v. Gormley (1962) 58 Cal. 2d 513, 520-521, 25 Cal. Rptr. 270, 375 P.2d 174* ; *Rothaermel v. Amerige (1921) 55 Cal. App 273, 275-276, 203 P. 833*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that equitable relief in the form of a mandatory injunction is appropriate in a case of an encroachment. The ground of opposition set forth is that the relative hardships to the parties should be balanced, which shows that defendant acted innocently, that defendant's removal costs would be great in comparison to plaintiff's inconvenience, and that plaintiff is not irreparably injured by the encroachment. If appropriate, plaintiff's delay in seeking a mandatory injunction should also be raised.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the adequacy of the legal remedies or the burden to defendant of removal. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel might include facts describing a previous owner's acquiescence to the installation of pipes and the promise of execution of an easement as indications of good faith, which will require a balancing of the hardships by which defendant can show minimal injury to plaintiff and undue hardship to defendant if removal is required.

In an appropriate case, these points and authorities may be used to oppose the contention supported by the points and *authorities in § 225.181*.

[b] Related Pleading and Practice Chapters

For discussion and forms relating to encroachments, see California Forms of Pleading and Practice, Ch. 11, *Adjoining Landowners* (Matthew Bender). For discussion and forms relating to easements, see California Forms of Pleading and Practice, Ch. 240, *Easements* (Matthew Bender). For discussion of Civ. Code §§ 3420-3423 and Code Civ. Proc. §§ 525-534, a procedural checklist, and forms relating to injunctions, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender). For discussion and forms relating to trespass, see California Forms of Pleading and Practice, Ch. 550, *Trespass* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing the granting of injunctive relief, see Ch. 116, *Injunctions* .

[3] Discussion of Authorities

[a] Mandatory Injunction Denied if Relative Hardships Balanced and Essential Elements for Issuance Not Satisfied

In ***Dolske v. Gormley*** *(1962) 58 Cal. 2d 513, 25 Cal. Rptr. 270, 375 P.2d 174* , plaintiff was the owner of a dominant tenement and defendant was the owner of the adjoining servient tenement over which a driveway easement ran. Plaintiff's predecessor constructed a house and driveway, portions of which encroached on the grantor's property. After defendant acquired the adjoining servient tenement from the grantor, she built a fence on the property line, very close to plaintiff's house, making some types of access difficult. Plaintiff brought an action, seeking both an injunction enjoining defendant from obstructing the driveway and damages. Plaintiff alleged that defendant wrongfully obstructed the driveway with the fence, interfering with her sole access from the street to her garage. Defendant cross complained, alleging wrongful construction and maintenance on her property of portions of the house and other structures. She sought a mandatory injunction ordering the removal of all alleged encroachments, and damages. The trial court rendered judgment for defendant. In addition to finding that the fence did not unreasonably interfere with plaintiff's enjoyment of the driveway easement, the court ordered plaintiff to remove all encroachments from defendant's property; no damages were awarded. Plaintiff appealed.

The Supreme Court affirmed the judgment only as to the decrees that the grant conveyed a bare right to use the easement way for ingrees and egrees of vehicular traffic, and that the fence erected by defendant did not unreasonably impede the easement rights. In all other respects the judgment was reversed and remanded. The trial court abused its discretion in ordering removal of the encroachments on defendant's property instead of awarding damages because the encroachments were causing little or nominal damage to defendant and the cost of their removal would be proportionately great to plaintiff. Removal of the encroachments would involve considerable expense as well as disfigurement of plaintiff's house, which may be an irreparable injury to plaintiff (*58 Cal. 2d 513, 520)* . The relative hardship doctrine, which the court found to be applicable, requires a court, in determining whether a mandatory injunction should issue ordering removal of encroachments, to consider various factors, including the good faith of the party who constructed the encroachment and the proportional hardship to the parties. Also relevant were plaintiff's delay in seeking the mandatory injunction and whether plaintiff would suffer irreparable injury from the encroachment. The various facts of the case did not support the issuance of the injunction ordering removal of the encroachments: the encroachments were not constructed negligently or in willful disregard of the property rights of defendant; the cost of removal would be disproportionate to any damages caused to defendant's property; defendant delayed eight years before seeking legal relief; and defendant's property rights would not be irreparably injured by the continued encroachments. Plaintiff obtained no rights in fee in defendant's property, since on the removal of plaintiff's present structures, any encroachment rights terminate (*58 Cal. 2d 513, 520-521)* .

In ***Scheble v. Nell*** *(1962) 200 Cal. App. 2d 435, 19 Cal. Rptr. 375* , plaintiffs and defendants were adjoining landowners. By an agreement between defendants' and plaintiffs' predecessors in interest a public sewer line was placed on plaintiffs' private driveway; defendants then ran their sewer line across plaintiffs' property to connect with the public sewer line. Plaintiffs' predecessors had agreed to execute an easement for recording, but never did so. After plaintiffs purchased the property they filed an action to quiet title to their property and for an injunction requiring defendants to remove their sewer line. Plaintiffs' affidavit stated that they were unaware of the sewer line at the time of purchase and that its location would greatly hamper orderly development of the property, materially reducing its value. Defendants' affidavit stated that due to the contour of the land there was no other direction for sewage from defendants' property to flow, that it was necessary that the line be located where it was, and that plaintiffs should have known of the presence of the sewer line. Plaintiffs' motion for summary judgment and to strike defendants' answer was granted. The trial court judgment quieted title against any claim of defendants and ordered them to remove the sewer line from plaintiff's property. Defendants appealed.

The court of appeal reversed and said it was error for the court to issue a mandatory injunction for the removal of the sewer line. When the circumstances are appropriate, the trial court should consider the doctrine of balancing the hardships. That doctrine says that when the encroachment does not irreparably injure a plaintiff, was innocently made,

and when the cost of removal would be great compared to the inconvenience caused to the plaintiff by the continuance of the encroachment, the court may, in its discretion, deny the injunction and compel the plaintiff to accept damages. Defendant must show irreparable injury as a necessary element of a defense based on a balancing of hardships (*200 Cal. App. 2d 435, 438)* . Plaintiffs' affidavit made out an encroachment but gave no information about the extent of the encroachment, or its inconvenience to plaintiffs, except through a vague reference to orderly development. Defendant's affidavit was sufficient to show that it may be appropriate to balance the hardships or conveniences. The promise of plaintiffs' grantors to allow the pipes to be built on their land and to execute an easement may show that the encroachment was innocent (*200 Cal. App. 2d 435, 438-439)* .

[b] Showing of Irreparable Injury to Defendant Requires Balancing

Scheble v. Nell *(1962) 200 Cal. App. 2d 435, 438, 19 Cal. Rptr. 375* , is discussed in *§ 225.183[3][a]*.

[c] Adequate Compensation in Damages Precludes Issuance of Mandatory Injunction

In ***Baglione v. Leue*** *(1958) 160 Cal. App. 2d 731, 325 P.2d 471* , plaintiffs and defendants were adjoining landowners. Defendants' predecessors in interest had constructed a building at a point they believed to be five feet from the boundary between the properties; in fact, it was within inches of the line, and the corner eaves of the building protruded on plaintiffs' land by a little more than one foot. After a survey revealed the encroachment, plaintiffs brought an action seeking a mandatory injunction to compel the removal of the encroachment, rents for the use and occupation of the property, and, alternatively, damages. The trial court refused the injunction, granted an easement to defendants to the extent of the encroachment for the duration of the building, and awarded damages. Plaintiffs appealed.

The court of appeal affirmed. Plaintiffs contended that the trial court should have issued an injunction ordering removal. The court of appeal said that the remedy of injunction is a drastic one and when its issuance will work an inequitable burden on defendant, the court may, in the exercise of sound discretion, refuse to grant it when the injured party may be adequately compensated in damages. As applied in encroachment cases, if the injury suffered by the encroachment is small and the harm to be suffered by compelling its removal great, the courts have uniformly refused to issue an injunction, leaving the complaining party to an action for damages. The court cited *Christensen v. Tucker (1952) 114 Cal. App. 2d 554, 562-563, 250 P.2d 660* [*see § 225.181[3][a]*], for the basic premise that when the encroachment does not irreparably injure the plaintiff, was innocently made, and the cost of removal would be great compared to the inconvenience caused the plaintiff by the continuance, the court may deny the injunction (*160 Cal. App. 2d 731, 734)* . The court found that the evidence supported the trial court's findings that the former owners were without fault and not negligent in constructing the building; that the encroachment was the result of a mistake; that the cost of removal would be great; that the encroachment did not interfere with the present use of the property; that plaintiffs were not suffering any damage; and that the hardship to defendants if the injunction was granted would be disproportionate to the hardship caused plaintiffs by the encroachment (*160 Cal. App. 2d 731, 735)* . The court also noted that it was within the court's power to protect defendants in the use of the building by granting them an easement and awarding plaintiffs damages (*160 Cal. App. 2d 731, 735-736)* .

[d] Promise of Prior Owner As Evidence of Good Faith

Scheble v. Nell *(1962) 200 Cal. App. 2d 435, 438, 19 Cal. Rptr. 375* , is discussed in *§ 225.183[3][a]*.

[e] Mandatory Injunction Denied if Injury Minimal

In ***McKean v. Alliance Land Co.*** *(1927) 200 Cal. 396, 253 P. 134* , plaintiffs and defendants were adjoining landowners. Relying on their understanding of the boundary between the lots, defendants erected a garage which encroached on plaintiffs' lot by one half inch, according to their measurements. Plaintiffs sued to enjoin defendants from depriving them of their property, alleging an encroachment of closer to one foot than one half inch, for abatement of the nuisance, and for damages. The evidence concerning the actual boundary was conflicting. The court found the boundary

to be that asserted by defendants, the building encroaching by one half inch. The trial court awarded plaintiffs $10 in damages. Plaintiffs appealed.

The Supreme Court affirmed. The Court held that as a general rule a mandatory injunction should be denied when the injury is so slight as to bring it within the maxim de minimis, or when full compensation can be made in damages. If there is an adequate remedy at law, no relief will be granted, especially when there are no appreciable damages and its issuance would require the performance of an act which would be difficult and involve considerable expense (*200 Cal. 396, 399)* .

In ***Nebel v. Guyer*** *(1950) 99 Cal. App. 2d 30, 221 P.2d 337* , plaintiffs purchased the property on which they were formerly tenants. Plaintiffs participated in the measurement of the parcel, indicated by a notched fence and a pin. Defendants later purchased an adjoining lot from the former owner of plaintiffs' lot. After the purchase, defendants constructed a medical office building entirely within their lot as indicated by the markings. After the building was completed, plaintiffs had a survey taken and discovered that the lot sold to them extended three feet into the street. Plaintiffs sought to move the boundary to compensate for the three feet, thereby resulting in defendants' building encroaching on their property by approximately two feet. Plaintiffs brought an action to compel removal of that portion of the building. The court suggested that plaintiffs amend their complaint and convert their action into one for damages. Plaintiffs failed to amend. The trial court issued judgment for defendants. Plaintiffs appealed.

The court of appeal affirmed. Regardless of any encroachment, plaintiffs failed to show that they were damaged by the alleged encroachment. Plaintiffs felt imposed on only after the survey, and were relying on a bare legal right unsupported by any damages shown in asking for removal of the claimed encroachment (*99 Cal. App. 2d 30, 32-33)* . The court said that when the encroachment is slight, the cost of removal great, and the corresponding benefit to the adjoining owner small, or compensation in damages can be had, a court will usually decline to compel removal, and will leave plaintiff to a legal remedy (*99 Cal. App. 2d 30, 33-34)* . The court concluded that an order for removal was properly denied because plaintiffs could be compensated adequately for actual damages suffered, if any, and that no proper grounds for compelling a removal of defendant's building had been shown (*99 Cal. App. 2d 30, 34)* .

[f] Mandatory Injunction Denied if Delay in Assertion of Right

Dolske v. Gormley *(1962) 58 Cal. 2d 513, 25 Cal. Rptr. 270, 375 P.2d 174* , is discussed in *§ 225.183[3][a]*.

In ***Rothaermel v. Amerige*** *(1921) 55 Cal. App 273, 203 P. 833* , plaintiff's predecessor in interest erected a building within two inches of a boundary line of property later acquired by defendant. Shortly afterward, defendant's predecessor in interest built a brick wall along the boundary line, which later became part of a building on defendant's land. Plaintiff's predecessor brought an action in ejectment against defendant, contending that the foundation of the wall encroached by one and one half inches. The trial court directed defendant to vacate and restore to plaintiff the encroached land. Defendant did not remove the wall, but relinquished all right to the encroaching foundation and fixtures of the wall. After plaintiff acquired the property he brought an action seeking an affirmative judgment requiring defendant to remove the encroachment. The trial court judgment ordered defendant to remove the encroachment within six months. Defendants appealed.

The court of appeal reversed. The court characterized the action as one involving a bare legal right, unsupported by any damage shown, to be enforced by a mandatory writ requiring affirmative personal action to be taken. Plaintiff had no right to claim equitable relief. Mandatory injunctions are most frequently employed in trespasses of an irreparable nature, and as a general rule the court should not interfere by way of mandatory injunction, even though the injury is clearly established, when there has been a long delay in asserting the right and a remedy exists at law, or when the injury is so slight as to bring it within the maxim de minimus or when full compensation can be made in damages. If there is an adequate remedy at law, no relief will be granted, especially when there is no appreciable damage and the issuance of the injunction would require the performance of an act that is difficult and involve considerable expense (

55 Cal. App 273, 275-276) .

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22-225 California Points & Authorities §§ 225.184-225.199

[Reserved]

§§ 225.184[Reserved]

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1. Consent

22-225 California Points & Authorities § 225.200

§ 225.200 Supporting Contention That No Trespass Occurred--Consent to Entry

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT'S _____ [ENTRY *or* ACTS CAUSING AN ENTRY] ON PLAINTIFF'S LAND [WAS *or* WERE] NOT A TRESPASS BECAUSE THE ENTRY WAS MADE WITH PLAINTIFF'S CONSENT.

[*EITHER*]

A. Entry After Express Consent Is Not Trespass. A person who has the express permission of a possessor of property to enter the property does not commit a trespass. [Permission to enter may be expressly granted by contract] (*Civic W. Corp. v. Zila Indus., Inc. (1977) 66 Cal. App. 3d 1, 6, 16-17, 135 Cal. Rptr. 915*).

[*AND/OR*]

B. Entry After Implied Consent Is Not Trespass. Although not directly invited onto property, a person may be impliedly invited by the circumstances and habits of the vicinity. Custom determines the limit of an implied invitation. [A person may by implication invite others to come to his or her house as they may have proper occasion either for business, courtesy, information, or other purposes] (*Duval v. Rowell (1954) 124 Cal. App. 2d Supp. 897, 900-901 , 269 P.2d 142* ; *Cambou v. Marty (1929) 98 Cal. App 598, 601, 277 P. 365*).

[*CONTINUE*]

[*Optional*] **C. Consent May Be Implied Beyond Express Consent.** A person's consent to an act creating an impracticable situation necessarily implies consent to the acts necessary to remedy the situation (*Strodel v. Wilcox (1955) 137 Cal. App. 2d 781, 785-786, 291 P.2d 95*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that defendant committed a trespass by entering plaintiff's property. The ground of opposition set forth is that defendant's entry was made pursuant to an express or implied consent by plaintiff.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of entry pursuant to consent. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel might include facts establishing that express consent to entry was given by plaintiff through a written agreement with defendant.

[b] Related Pleading and Practice Chapters

For discussion and forms relating to trespass, see Ch. California Forms of Pleading and Practice, 550, *Trespass* (Matthew Bender).

[c] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 225.201 -225.203* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Entry After Express Consent Is Not Trespass

In ***Civic W. Corp. v. Zila Indus., Inc.*** *(1977) 66 Cal. App. 3d 1, 135 Cal. Rptr. 915* , defendant executed two promissory notes in plaintiff's favor. The notes were secured by defendant's business personal property, inventory, and accounts receivable as evidenced by security agreements executed by defendant. Included in the security agreements were express provisions allowing plaintiff, in the event of default, to enter onto defendant's premises to take possession of the collateral (*66 Cal. App. 3d 1, 6)* . Following defendant's default on the notes, plaintiff sued defendant and was granted a permanent injunction by the trial court restraining defendant from preventing or interfering with plaintiff's entrance on defendant's premises. Thereafter, plaintiff entered defendant's premises to recover the collateral and defendant filed a cross-complaint seeking damages for trespass. The trial court entered summary judgment for plaintiff and defendant appealed.

The court of appeal reversed. The court held that the trial court improperly entered summary judgment because there were triable issues of fact concerning whether or not plaintiff exceeded the consent to enter defendant's premises. However, the court stated that the essence of the cause of action for trespass is an unauthorized entry onto the land of another. The court noted that the security agreements expressly authorized plaintiff's entry onto defendant's premises for the purpose of recovering the collateral. Because plaintiff's entry was a consensual entry provided for by contract, no trespass occurred if plaintiff did not exceed the express consent conferred by the security agreements (*66 Cal. App. 3d 1, 16-17)* .

[b] Entry After Implied Consent Is Not Trespass

In ***Duval v. Rowell*** *(1954) 124 Cal. App. 2d Supp. 897 , 269 P.2d 142* , plaintiff raised chickens on a ranch owned by a third party who occasionally resided in a small house on the ranch. Defendants owned and operated a grocery store, and as they owned the only telephone in the area, were in the habit of accepting messages for their neighbors and delivering them at the end of the day. One defendant received a message for the ranch owner and drove to the ranch to transmit it. Rather than getting out of the car in the presence of two growling dogs, defendant honked the car horn. Plaintiff alleged that the horn frightened his chickens, resulting in their panic and the death of over 700 chickens. Plaintiff brought an action against defendants for damages resulting from trespass. The trial court judgment was for defendants. Plaintiff appealed.

The court of appeal affirmed. If defendant was a trespasser, his liability would result from all injurious consequences flowing from the trespass which were the natural and proximate result of his conduct. Defendant was not directly invited on the premises by plaintiff, but was impliedly invited by the circumstances and habits of the vicinity. Although defendant had never been on the premises before, his status as the owner of the only telephone in the neighborhood entitled him to assume that he would be welcome at isolated ranches for either business or social purposes. Every person, by implication, invites others to come to his or her house as they may have proper occasion for either business, courtesy, information, or other purpose. Custom must determine what the limit of that implied invitation is (*124 Cal. App. 2d Supp. 897, 899-901)* .

In ***Cambou v. Marty*** *(1929) 98 Cal. App. 598, 277 P. 365* , plaintiffs, ranch owners and the parents of two young sons, were related to defendants, and the homes of each had always open to each other. The younger defendant came to see plaintiffs on an urgent errand. While driving off the premises, defendant ran over and killed plaintiffs' younger son. Plaintiffs brought a negligence action against defendants. The trial court judgment was for plaintiffs. Defendants appealed.

The court of appeal affirmed. In examining whether the finding of negligence was proper, the court analyzed defendant's status on plaintiffs' land, as this was important to the law of negligence at that time. The court concluded that he was not a trespasser. Every person, by implication, invites others to come to his or her house as they may have proper occasion either for business, courtesy, information, or some other purpose. Custom must determine what the limit of that implied invitation is (*98 Cal. App. 598, 601)* .

[c] Consent May Be Implied Beyond Express Consent

In ***Strodel v. Wilcox*** *(1955) 137 Cal. App. 2d 781, 291 P.2d 95* , plaintiff and defendants were adjoining property owners. Defendants erected a building which encroached on plaintiff's property. Plaintiff waived the right to an injunction. During the construction and in order to meet the approval of the building inspector, the contractor attached metal flashing to the encroaching wall, extending the entire length and overlapping plaintiff's wall by two inches; this was done with the full knowledge of defendant. Plaintiff brought an action seeking a mandatory injunction compelling defendants to remove the flashing. Defendants argued that the flashing was erected and constructed with the consent of plaintiff, for the benefit of both parties, and to comply with safety provisions. The trial court found that the intruding flashing was not detrimental to plaintiff's property but was beneficial, and concluded that plaintiff was not entitled to an injunction but to a small amount of damages, and that defendants were entitled to an easement on plaintiff's property to the extent of the encroachment of the flashing. Plaintiff appealed.

The court of appeal affirmed. If the encroachment was a trespass, it was intentional, not innocent, and the trial court could not deny a mandatory injunction or balance the conveniences of the parties. The court concluded, however, that the encroachment was not a trespass, but was an act to which plaintiff consented. Although there was no evidence of any express consent being given by plaintiff to the erection of the flashing, plaintiff did consent to the sealing off of the areaway in such a manner that debris collecting therein could not be removed and that rain water would accumulate and

stagnate, which would have violated heath and safety provisions. Inasmuch as the only practicable manner to avoid this condition was to cover the top to prevent the entry of debris and water, plaintiff's consent thereto was necessarily implied. The parties did not intend to create a situation which could only lead to a violation by both of them of code provisions and which would be detrimental to both of them (*137 Cal. App. 2d 781, 785-786)* .

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22-225 California Points & Authorities § 225.201

§ 225.201 Opposing Contention That No Trespass Occurred--No Consent to Entry

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general form of memorandum of points and authorities supporting the contention that defendant committed trespass (see, e.g., § 225.20).*]

DEFENDANT'S _____ [ENTRY *or* ACTS CAUSING AN ENTRY] ON PLAINTIFF'S LAND [WAS *or* WERE] A TRESPASS BECAUSE [IT WAS *or* THEY WERE] MADE WITHOUT THE CONSENT OR AUTHORIZATION OF PLAINTIFF.

A. Entry Without Consent Is Trespass. One who enters the premises in possession of another without an invitation, express or implied, and does so out of curiosity, personal purposes, or convenience, and not in the performance of any duty to the owner is a trespasser (*see Bauman v. Beaujean (1966) 244 Cal. App. 2d 384, 389, 53 Cal. Rptr. 55*).

[*Optional*] **B. Admission to Entering Property Without Consent.** A person's admission to an entry on the premises of another without the permission or consent of the possessor is sufficient to support an award of damages for trespass (*see Cornell v. Sennes (1971) 18 Cal. App. 3d 126, 136, 95 Cal. Rptr. 728*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that an entry without plaintiff's consent occurred, resulting in a trespass.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of lack of consent for entry. They may also be adapted for use in a

trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel may allege facts illustrating that defendant entered plaintiff's property without an invitation or any authorization from plaintiff.

In an appropriate case, these points and authorities may be submitted in opposition to the contention *set out in § 225.200*.

[b] Related Pleading and Practice Chapters

For discussion and forms relating to trespass, see California Forms of Pleading and Practice, Ch. 550, *Trespass* (Matthew Bender).

[3] Discussion of Authorities

[a] Entry Without Consent Is Trespass

In ***Bauman v. Beaujean*** *(1966) 244 Cal. App. 2d 384, 53 Cal. Rptr. 55* , plaintiffs' young daughter had been bitten by a dog while in defendant's backyard. Plaintiffs brought a personal injury action. The trial court ordered judgment for defendants. Plaintiffs appealed.

The court of appeal affirmed the judgment. The case was governed by *Civ. Code § 3342*, which specifies liability for dog bites occurring when the victim is lawfully on the defendant dog owner's premises. The court focused on whether the girl was in defendants' backyard on the express or implied invitation of the defendants. The court found no invitation and defined a trespasser as one who goes on the premises of another without invitation, express or implied, and does so out of curiosity, or for his or her own purposes or convenience, and not in the performance of any duty to the owner. It is not necessary that one making such an entry should have any unlawful intent. A child, even of tender years, may be a trespasser (*244 Cal. App. 2d 384, 389)* .

[b] Admission to Entering Property Without Consent

In ***Cornell v. Sennes*** *(1971) 18 Cal. App. 3d 126, 95 Cal. Rptr. 728* , defendant owners leased their restaurant property to defendant corporation. One defendant, an officer of the company, in his individual capacity, contracted with plaintiff for the purchase and installation of air-conditioning units. The contract stated that the units were personal property, title remained in the seller until they were completely paid for, and the purchaser was to hold seller harmless for any damages in the installation or removal of the equipment. Shortly after installation, the corporation vacated the premises. Plaintiff recorded a claim of lien against the property and filed a court action. Plaintiffs entered the premises and removed the units without permission from defendant owners. Defendant officer defaulted and judgment was entered against him. He did not appeal. Defendant owners counterclaimed and cross complained, alleging that the units were affixed, plaintiffs entered wrongfully, and defendants' premises were damaged. They sought judgment for the value of the units allegedly converted by plaintiff, interest on that amount, and damages for trespass to realty. The trial court judgment was entered against defendant owners, establishing a mechanic's lien against the real property and declaring foreclosure of the lien. It ordered that defendant owners take nothing by their counterclaim and cross complaint. Defendant owners appealed.

The court of appeal reversed the judgment as to defendant owners, and ordered a retrial to determine whether the equipment became affixed to the realty. The court reviewed the rules regarding the assessment of damages, including for trespass. Although plaintiff admitted entering the premises and removing the equipment without the permission or consent of the owners, no finding was made on this issue. Such an admission is sufficient to support an award of damages for trespass (*18 Cal. App. 3d 126, 136)* .

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22-225 California Points & Authorities § 225.202

§ 225.202 Opposing Contention That No Trespass Occurred--Consent Given Was Ineffective Due to Lack of Authority

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general form of memorandum of points and authorities supporting the contention that defendant committed trespass (see, e.g., § 225.20).*]

DEFENDANT'S _____ [ENTRY *or* ACTS CAUSING AN ENTRY] ON PLAINTIFF'S PROPERTY [WAS *or* WERE] A TRESPASS BECAUSE [IT WAS *or* THEY WERE] MADE PURSUANT TO A CONSENT THAT WAS INEFFECTIVE DUE TO LACK OF PROPER AUTHORITY.

[*EITHER*]

Consent to Entry by Possessor Does Not Authorize Interference With Ownership Interests. The possessor of land controls the right to possession, and unauthorized interference supports a trespass action by the possessor; the property owner may recover for damage to the ownership interest. The possessor's consent to entry does not authorize interference with the property owner's rights (*Smith v. Cap Concrete, Inc. (1982) 133 Cal. App. 3d 769, 774-775, 778, 184 Cal. Rptr. 308*).

[*OR*]

Owner Lacks Authority to Consent to Entry When Possessory Right Belongs to Another. Permission to enter given by the owner after the right to possession of the land has been transferred to another is ineffective. An entry pursuant to an ineffective permission is a trespass (*Jensen v. Shadburne (1956) 145 Cal. App. 2d 624, 626, 302 P.2d*

824).

[*OR*]

Entry Pursuant to Consent in Excess of Agent's Authority Constitutes Trespass. An invitation in excess of the authority of an agent is not a proper invitation, and an entry pursuant to that invitation is a trespass (*MacLeod v. Fox W. Coast Theatres Corp. (1937) 10 Cal. 2d 383, 387, 74 P.2d 276*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a trespass occurred because the alleged consent was ineffective. Consent can be ineffective when given by one without proper authority, as by an owner with no right to possession or by an agent without that authority. Consent given by the possessor for entry is also ineffective to permit interference with ownership rights.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of lack of effective consent for entry. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel may allege facts indicating that the consent to enter was given by one without the proper authority, for example, consent given by the owner after the owner had transferred the right to possession to another who did not consent to the entry.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 225.200*.

[b] Related Pleading and Practice Chapters

For discussion and forms relating to trespass, see California Forms of Pleading and Practice, Ch. 550, *Trespass* (Matthew Bender).

[3] Discussion of Authorities

[a] Consent to Entry by Possessor Does Not Authorize Interference With Ownership Interests

The facts and procedural background of ***Smith v. Cap Concrete, Inc.*** *(1982) 133 Cal. App. 3d 769, 184 Cal. Rptr. 308* , are discussed in *§ 225.60[3][a]*. The court of appeal addressed defendant's claim that the possessor had given consent, thereby disallowing a trespass action. The court said that the possessor's consent to entry did not justify interference with plaintiff's ownership rights. A good faith belief that entry has been authorized or permitted provides no excuse for infringement of property rights if consent was not in fact given by the property owner whose rights are at issue. By showing that they gave no authorization, plaintiffs established the lack of consent necessary to support their action for injury to their ownership interest (*133 Cal. App. 3d 769, 778)* .

[b] Owner Lacks Authority to Consent to Entry When Possessory Right Belongs to Another

In ***Jensen v. Shadburne*** *(1956) 145 Cal. App. 2d 624, 302 P.2d 824* , plaintiffs' diversion works on a creek were destroyed by a storm, requiring the construction of new diversion works at a point upstream on the creek through the

extension of a ditch. Permission to extend the ditch was given by the owner of the property over which the extension was to be made. Before that permission was given, the property had been leased to a lumber company. Later that lease was assigned as security to a company, which went into possession and employed defendant as its agent in actual possession. Defendant was also a beneficiary of a deed of trust on the property. Acting on the permission given by the owner, plaintiffs extended their ditch. Defendant then had the ditch filled. Plaintiffs brought suit for damages and to prevent defendant from interfering with the ditch. Defendant counterclaimed for damages from trespass. The trial court found that plaintiffs had no right to change their diversion point and that the extension of the ditch was a trespass. The court awarded defendant damages. Plaintiffs appealed.

The court of appeal affirmed. Trespass was committed by plaintiffs because the permission granted to enter was ineffective (*145 Cal. App. 2d 624, 626)* . The assignment, coupled with the right to possession of the land, was a sufficient interest to justify the possessor's repelling the trespass by reasonable means. The filling-in of the ditch was a permissible act on the part of the lessee's assignee in possession (*145 Cal. App. 2d 624, 626-627)* .

[c] Entry Pursuant to Consent in Excess of Agent's Authority Constitutes Trespass

The facts and procedural background of ***MacLeod v. Fox W. Coast Theatres Corp.*** *(1937) 10 Cal. 2d 383, 74 P.2d 276* , are discussed in *§ 225.20[3][a]*. The Supreme Court discussed the apparent authority of an agent to invite persons on defendant's property. Since plaintiff's invitation was in excess of the authority of the film company, plaintiff had not been properly invited, but was a trespasser on the premises, or one who was on the land of others without their consent and against their will. Every wrongful entry on land in the possession of the owner is a trespass (*10 Cal. 2d 383, 387)* .

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1. Consent

22-225 California Points & Authorities § 225.203

§ 225.203 Opposing Contention That No Trespass Occurred--Conditional Consent Given Was Exceeded

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general form of memorandum of points and authorities supporting the contention that defendant committed trespass (see, e.g., § 225.20).*]

DEFENDANT'S _____ [ENTRY *or* ACTS CAUSING AN ENTRY], MADE PURSUANT TO A CONDITIONAL CONSENT, [WAS *or* WERE] A TRESPASS BECAUSE [IT *or* THEY] EXCEEDED THE CONDITION.

A. Entry Made in Excess of Conditional Consent Constitutes Trespass. A conditional or restricted consent to enter land creates a privilege to enter only as long as the condition or restriction is complied with. Divergent conduct which exceeds the restricted consent is a trespass (*Civic W. Corp. v. Zila Indus., Inc. (1977) 66 Cal. App. 3d 1, 17, 135 Cal. Rptr. 915*).

[*Optional*] **B. Condition May Be Implied From Invitation.** An invitation to enter property [and deposit materials] implies compliance with its terms, and an indiscriminate entry [and deposit] exceeds the consent to enter (*Hancock v. George R. Curtis Paving Co. (1931) 114 Cal. App 624, 626-627, 300 P. 65*).

[*Optional*] **C. Entry Complying With Condition Becomes Trespass When Condition Is Violated.** When a person is allowed to enter property for a particular purpose, the moment that privilege is abused or any act hostile to the interests of the possessor committed, a trespass occurs (*Rogers v. Duhart (1893) 97 Cal. 500, 506, 32 P. 570*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a conditional consent for an entry was exceeded by defendant, resulting in a trespass.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of exceeding the conditional consent for entry. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel may allege facts illustrating that defendant exceeded the conditional consent to enter property to protect his or her security interest by ejecting plaintiff's employees and changing the locks on the doors.

In an appropriate case, these points and authorities may be submitted in opposition to the contention *set out in § 225.200*.

[b] Related Pleading and Practice Chapters

For discussion and forms relating to trespass, see California Forms of Pleading and Practice, Ch. 550, *Trespass* (Matthew Bender).

[3] Discussion of Authorities

[a] Entry Made in Excess of Conditional Consent Constitutes Trespass

The facts and procedural background of ***Civic W. Corp. v. Zila Indus., Inc.*** *(1977) 66 Cal. App. 3d 1, 135 Cal. Rptr. 915* , are discussed in *§ 225.100[3][b]*. The court of appeal said that a trespass may occur if a party enters property pursuant to a limited consent, for example, limited as to purpose or place, and proceeds to exceed those limits by divergent conduct on the land. A conditional or restricted consent to enter land creates a privilege to do so only in so far as the condition or restriction is complied with. The privilege conferred must be exercised at a reasonable time and in a reasonable manner (*66 Cal. App. 3d 1, 17)* .

[b] Condition May Be Implied From Invitation

The facts and procedural background of ***Hancock v. George R. Curtis Paving Co.*** *(1931) 114 Cal. App. 624, 300 P. 65* , are discussed in *§ 225.140[3][b]*. The court of appeal disagreed with defendant's contention that it had merely complied with plaintiffs' invitation to deposit dirt. An indiscriminate deposit of a large number of cubic yards of earth and rocks over the entire unoccupied portion of a lot was not warranted by a mere invitation to furnish dirt to fill a depression. The owners were not consulted as to the quantity or location of the deposit. The only fill which had existed on the lot was situated where the sign was, and it had been previously filled to the top. Defendant was not warranted in dumping on another portion of the lot the quantity and character of material deposited (*114 Cal. App. 624, 626-627)* .

[c] Entry Complying With Condition Becomes Trespass When Condition Is Violated

In ***Rogers v. Duhart*** *(1893) 97 Cal. 500, 32 P. 570* , plaintiff took possession of a parcel of land under an eight-month lease. Defendant kept several thousand grazing animals on the land for several months without plaintiff's permission. Although defendant had the right to pasture his cattle on the land the previous year, in consideration of his watching over the land and keeping the cattle of all other parties off the land, he was told to remove the animals prior to the effective date of plaintiff's lease. Plaintiff brought an action in trespass seeking damages. The trial court judgment was for plaintiff. Defendant appealed.

The Supreme Court affirmed the judgment and an order denying a new trial. After discussing plaintiff's ability to maintain a trespass action, the Court said that defendant had committed a trespass. Although defendant had been on the

land for a particular purpose, the moment he abused the privilege, or committed any act hostile to the interests of his employer or licensor, he became a trespasser (*97 Cal. 500, 506)* .

[4] Additional Authorities

[a] Entry Made in Excess of Conditional Consent Constitutes Trespass

In *Mangini v. Aerojet-Gen. Corp. (1991) 230 Cal. App. 3d 1125, 281 Cal. Rptr. 827* , owners of real property brought an action on various theories against a party who leased the property from prior owners and who allegedly contaminated the property with hazardous waste during the lease. The defendant demurred, and the trial court sustained the demurrer without leave to amend. The court of appeal reversed. With regard to the plaintiffs' cause of action for trespass, the defendant contended that one cannot trespass on land in his or her own possession. The court observed, however, that the defendant's lease did not give the defendant unrestricted possession of the land. The court noted that a trespass may occur if the party, entering land pursuant to a limited consent (that is, limited as to purpose or place), proceeds to exceed those limits by divergent conduct on the land of another. Under the plaintiffs' construction of the lease, the defendant wrongfully deposited hazardous waste on the property and failed to clean it up as the lease required. These pleaded facts, concluded the court, are sufficient to state a cause of action for trespass (*230 Cal. App. 3d 1125, 1141)* .

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22-225 California Points & Authorities §§ 225.204-225.219

[Reserved]

§§ 225.204[Reserved]

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2. Necessity

22-225 California Points & Authorities § 225.220

§ 225.220 Supporting Contention That No Trespass Occurred--Entry by Necessity

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT'S _____ [ENTRY *or* ACTS CAUSING AN ENTRY] ON PLAINTIFF'S LAND WAS _____ [WAS *or* WERE] NOT A TRESPASS BECAUSE _____ [IT *or* THEY] REASONABLY APPEARED TO BE NECESSARY TO PREVENT SERIOUS HARM TO _____ [LIFE *and/or* PROPERTY] AND THUS _____ [WAS *or* WERE] PRIVILEGED.

A. Entry Privileged if it Appears Reasonably Necessary to Prevent Harm. A person is privileged to enter and remain on the land of another if the entry appears to be reasonably necessary to prevent serious harm to a person, land or chattels of the other party, unless the actor has reason to know that the one for whose benefit the entry is made is unwilling that the action be taken (*see People v. Roberts (1956) 47 Cal. 2d 374, 377, 303 P.2d 721* ; *People v. Parra (1973) 30 Cal. App. 3d 729, 732-733, 106 Cal. Rptr. 531*).

[*Optional*] **B. Destruction of Property May Be Justified by Necessity.** Property may be destroyed to prevent the spread of a disaster; if apparent or actual necessity can be shown, it justifies an act otherwise tortious (*Surocco v. Geary (1853) 3 Cal. 69, 73-74*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that defendant's entry was a trespass. The ground of opposition set forth is that defendant's entry reasonably appeared necessary to prevent serious harm to life or property.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of entry privileged by necessity. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel could include facts stating that defendant heard screams coming from plaintiff's apartment, and defendant entered the apartment after his or her offers to provide assistance went unanswered.

[b] Opposing Points and Authorities

In an appropriate case, these points and *authorities in § 225.221* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Entry Privileged if it Appears Reasonably Necessary to Prevent Harm

In ***People v. Roberts*** *(1956) 47 Cal. 2d 374, 303 P.2d 721* after a music store was burglarized, the police traced defendant, who had been seen near the store, to an apartment. Police officers went to the apartment, knocked on the door, and entered the apartment after hearing several moans or groans that sounded as if a person inside was in distress. While looking for the moaning person, they noticed a new radio and noted the serial number. When they discovered the serial number to be the same as part of the stolen merchandise, the police obtained a search warrant, served it, and seized the radio. The owner of the apartment testified that defendant had given her the radio. The trial court judgment was for conviction of second degree burglary. Defendant appealed.

The court of appeal affirmed. Defendant contended that the search warrant was the product of an illegal search. The court said that if the conduct of the officers in entering or searching was unlawful, the search warrant subsequently obtained was invalid. The court upheld the trial court finding that the officers reasonably believed that someone inside the apartment was in distress and in need of assistance and that they entered for the purpose of giving aid. Necessity often justifies an action which would otherwise constitute a trespass, as when the act is prompted by the motive of preserving life or property and reasonably appears to the actor to be necessary for that purpose (*47 Cal. 2d 374, 377)* . Because there was substantial evidence that the entry was lawful for the purpose of rendering aid, the officers were justified in entering each room of the apartment to look for someone in distress (*47 Cal. 2d 374, 380)* .

In ***People v. Parra*** *(1973) 30 Cal. App. 3d 729, 106 Cal. Rptr. 531* , police officers responded to a night report that the front door of defendant's florist shop was open. The officers entered the shop to secure it, contacting the owner, and finding out if everything was all right in the shop. During the search for the owner's identity an officer opened a desk drawer and saw what appeared to be narcotics. Narcotics officers were called and confirmed the substance as heroin. When defendant arrived he was arrested. The trial court judgment was for conviction of defendant for the possession of heroin for sale. Defendant's motion to suppress certain evidence essential to establish guilt was denied. Defendant appealed.

The court of appeal affirmed. The court responded to questions about the validity of the search and seizure, saying that the officers' sole purpose in entering the shop was to provide for security. The court paraphrased the Restatement Second of Torts, noting that one is privileged to enter and remain on the land in the possession of another if it reasonably appears necessary to prevent serious harm to the land or chattels of the other party, unless the actor has reason to know that the one for whose benefit the entry is made is unwilling that the action be taken. The court stated that necessity often justifies an action which would otherwise constitute a trespass, such as an act prompted by the motive of preserving life or property that reasonably appears to the actor to be necessary for that purpose. The court

found that the officers' entry to protect the shop and its contents was privileged (*30 Cal. App. 3d 729, 732-733)* .

[b] Destruction of Property May Be Justified by Necessity

In ***Surocco v. Geary*** *(1853) 3 Cal. 69* , defendant, mayor of a city, entered plaintiffs' building which served as a residence and a store, and ordered it destroyed to prevent the spread of a fire then raging through the city. After the building was blown up and totally destroyed, plaintiffs brought an action for damages. Defendant claimed that the fire was a public nuisance, that plaintiffs' building would have been destroyed anyway, and that its destruction was necessary to prevent the spread to adjacent buildings. The trial court judgment was for plaintiffs. Defendant appealed.

The Supreme Court reversed. The Court framed the question as whether the person who destroys the house of another in good faith and under apparent necessity during the time of a fire, for the purpose of saving the adjacent buildings, and stopping the fire's progress, can be held personally liable in an action by the owner of the property destroyed. The Court said that the common law adopts the principles of the natural law, which allows the right to destroy property to prevent the spread of disaster, and places the justification of an act otherwise tortious on the ground of necessity (*3 Cal. 69, 73)* . If a building is torn down without apparent or actual necessity, the actor would be liable in trespass. But in every case the necessity must be clearly shown (*3 Cal. 69, 74)* .

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22-225 California Points & Authorities § 225.221

§ 225.221 Opposing Contention That No Trespass Occurred--Entry for Unlawful or Abusive Purpose

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general form of memorandum of points and authorities supporting the contention that defendant committed trespass (see, e.g., § 225.20).*]

DEFENDANT'S _____ [ENTRY *or* ACTS CAUSING AN ENTRY] EXCEEDED ANY SEMBLANCE OF AUTHORITY OR NECESSITY AND [WAS *or* WERE] A TRESPASS BECAUSE [IT WAS *or* THEY WERE] MADE FOR AN _____ [UNLAWFUL *and/or* ABUSIVE] PURPOSE.

A. Entry for Unlawful or Abusive Purpose Constitutes Trespass. An entry on property in possession of another for an unlawful or abusive purpose is wrongful and constitutes a trespass (*see Foley v. Martin (1904) 142 Cal. 256, 259-260, 71 P. 165* ; *Uptown Enters. v. Strand (1961) 195 Cal. App. 2d 45, 52, 15 Cal. Rptr. 486*).

[*Optional*] **B. Unjustifiable Interference With Business Relations Is Abusive Entry.** An entry for the purpose of harassing an owner, giving a business a bad reputation, compelling an owner to change lawful business policies, or unjustifiably interfering with business relations is abusive and wrongful and constitutes a trespass (*Uptown Enters. v. Strand (1961) 195 Cal. App. 2d 45, 51-52, 15 Cal. Rptr. 486*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that an entry on property was for an unlawful or abusive purpose and was a trespass.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context

in which counsel wishes to raise the substantive issue of the unlawful purpose of the entry. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel may allege facts describing defendant's conduct in interfering with plaintiff's business by harassing patrons and implying that the business attracted persons who were lawbreakers.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 225.220*.

[b] Related Pleading and Practice Chapters

For discussion and forms relating to trespass, see California Forms of Pleading and Practice, Ch. 550, *Trespass* (Matthew Bender).

[3] Discussion of Authorities

[a] Entry for Unlawful or Abusive Purpose Constitutes Trespass

In ***Foley v. Martin*** *(1904) 142 Cal. 256, 71 P. 165* , defendants, a sheriff and deputies, were given a summons to deliver to plaintiff. The deputies went to plaintiff's residence, and after finding the front and back doors locked, one deputy climbed through a window in a back pantry closet by using a ladder and then let the other deputy in. Both of them searched the house. Plaintiff, an invalid, was confined to his bed. When the deputies arrived at his locked bedroom door they forced open the door, breaking the door knob and woodwork, after failing to open it through chiselling and kicking. Plaintiff brought an action for damages in trespass. The trial court judgment was for plaintiff. Defendants appealed from the judgment and from an order denying a new trial.

The Supreme Court affirmed the judgment, but reversed the exemplary damage award against the sheriff based on the malice of his deputies. The court found that defendants unlawfully entered the house and were guilty of gross and willful oppression and of willful abuse of their authority as law enforcement officers. A sheriff has no authority to break into a residence for the service of process in a civil action, and commits a trespass by so doing (*142 Cal. 256, 260)* .

In ***Uptown Enters. v. Strand*** *(1961) 195 Cal. App. 2d 45, 15 Cal. Rptr. 486* , plaintiff was the owner and operator of a drive-in theater. Defendants, county sheriffs, responded to a call from plaintiff to arrest a patron causing a disturbance, and ordered all patrons to leave the theater, ordered the theater closed, and searched the patrons' automobiles. Some months later defendants entered the theater, searched all the automobiles, and forced patrons to get out of their automobiles. Defendants caused the newspaper publication of two stories, one to the effect that they had closed plaintiff's theater, implying that the closure was permanent, and one describing the search in terms implying that plaintiff's patrons were habitual lawbreakers. On many occasions thereafter defendant entered the theater without invitation and without any legal process, patrolling the area, showing spotlights on the automobiles, and trespassing on plaintiff's premises. Plaintiff brought an action seeking injunctive relief, including an order enjoining threatened repeated trespasses. The trial court judgment was in favor of defendants after an order sustaining an objection to the introduction of any evidence by plaintiff on the ground that the complaint did not state facts sufficient to constitute a cause of action. Plaintiff appealed the judgment and the order denying plaintiff's motion for a new trial.

The court of appeal reversed the judgment, finding that the complaint alleged facts sufficient to constitute a cause of action against defendants, and dismissed the attempted appeal from the order denying the motion for a new trial. Plaintiff alleged that defendants went on his property, searched his patrons and ordered them to leave not for the purpose of enforcing the law but to harass plaintiff, give his business a bad reputation, and compel him to change his business operations, and that defendants' actions in entering plaintiff's premises was a trespass. Although the entry of a

law enforcement officer on the land of another in the lawful discharge of duties, as a general rule, is not wrongful or actionable, an entry for the purpose of harassing the owner, giving the business a bad reputation, compelling the owner to change lawful business policy, or unjustifiably interfering with the business relations is unauthorized, wrongful, and actionable. The facts alleged, by attaching an unlawful purpose to the entry, negated its lawful character (*195 Cal. App. 2d 45, 51-52)* .

[b] Unjustifiable Interference With Business Relations Is Abusive Entry

Uptown Enters. v. Strand *(1961) 195 Cal. App. 2d 45, 15 Cal. Rptr. 486* , is discussed in *§ 225.221[3][a]*.

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22-225 California Points & Authorities §§ 225.222-225.239

[Reserved]

§§ 225.222[Reserved]

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3. Statute of Limitations

22-225 California Points & Authorities § 225.240

§ 225.240 Supporting Contention That No Trespass Occurred--Action Barred by Statute of Limitations [Civ. Code § 3346(c); Code Civ. Proc. §§ 338(b), 349 3/4]--In General

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S ACTION FOR TRESPASS IS BARRED BECAUSE IT WAS NOT BROUGHT WITHIN THE PERIOD ESTABLISHED BY THE STATUTE OF LIMITATIONS.

[*EITHER*]

A. Action for Trespass on or Injury to Real Property Must Be Commenced Within Three Years. The period for the commencement of an action for trespass on or injury to real property is three years. If more than three years has elapsed before the commencement of the action, an action for trespass is barred (*Code Civ. Proc. § 338(b)*; *Gale v. McDaniel (1887) 72 Cal. 334, 335, 13 P. 871* ; *Castelletto v. Bendon (1961) 193 Cal. App. 2d 64, 65, 13 Cal. Rptr. 907*).

[*OR*]

A. Action for Trespass to Timber Must Be Commenced Within Five Years. An action for trespass or wrongful injuries to timber, trees, or underwood on another's land, or for their removal from another's land, [when committed in reliance on a survey of boundary lines made by a surveyor licensed under the laws of California], must be brought within five years after the date of trespass (*Civ. Code § 3346(c)*).

[*OR*]

A. Action for Underground Trespass by Drilling Well Must Be Commenced Within 180 Days. An action for underground trespass by means of a well drilled for oil or gas from a surface location on land other than real property in which plaintiff has some right, title, or interest must be brought within 180 days (*Code Civ. Proc. § 349* 3/4; *see also Travelers Indem. Co. v. City of Redondo Beach (1994) 28 Cal. App. 4th 1432, 1440-1441, 34 Cal. Rptr. 2d 337*).

[*CONTINUE*]

B. Application of Statute of Limitations Not Affected by Procedure Used to Enforce Right. The statutes providing periods of limitation for trespass actions refer to actions for the enforcement of various rights; the right sought to be enforced and the nature of the cause of action, not the form of procedure or action, determines the applicability of the statute of limitations (*Williams v. Southern P. R. Co. (1907) 150 Cal. 624, 628, 89 P. 599* (trespass action barred despite request for alternative equitable relief)).

[*Optional*] **C. Statute of Limitations Begins Running When Permanent Trespass Is Committed.** When the trespass is of a permanent nature, all damages, past and prospective, are recoverable in one action, and the entire cause of action accrues when the injury is suffered or the trespass committed. The action must be commenced within the statutory period after the doing of the wrongful act (*Rankin v. DeBare (1928) 205 Cal. 639, 641, 271 P. 1050* ; *Williams v. Southern P. R. Co. (1907) 150 Cal. 624, 626, 89 P. 599*).

[*Add points and authorities, if appropriate, concerning more specific issues regarding the effect of the statute of limitation (see, e.g., § 225.241).*]

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that defendant committed a trespass. The ground of opposition is that an action in trespass is barred by the statute of limitations. The type of trespass will determine the applicable statute of limitations.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the bar of the statute of limitations, for example, by demurrer. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel might include facts illustrating that the entry took place more than three years before plaintiff commenced the action.

[b] Related Pleading and Practice Chapters

For discussion and forms relating to demurrers, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For discussion and forms relating to the limitation of actions, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* (Matthew Bender). For discussion and forms relating to actions involving logs and timber, see California Forms of Pleading and Practice, Ch. 350, *Logs and Timber* (Matthew Bender). For discussion and forms relating to actions involving oil and gas wells, see California Forms of Pleading and Practice, Ch. 393, *Oil and Gas* (Matthew Bender). For discussion and forms relating to trespass, see California Forms of Pleading and Practice, Ch. 550, *Trespass* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For forms of memoranda of points and authorities supporting and opposing the barring of actions by the statute of limitations, see Ch. 143, *Limitation of Actions* .

[d] Opposing Points and Authorities

If appropriate, the points and *authorities in §§ 225.242* and *225.243* may be used to oppose these points and authorities.

[3] Discussion of Authorities

[a] Action for Trespass on or Injury to Real Property Must Be Commenced Within Three Years

In ***Gale v. McDaniel*** *(1887) 72 Cal. 334, 13 P. 871* , plaintiff's stable and saloon and the personal property in them were destroyed by a fire. Plaintiff brought an action for damages against defendant. The trial court sustained defendant's demurrer and entered judgment in favor of defendant. Plaintiff appealed.

The Supreme Court affirmed. More than three years elapsed before the commencement of the action. Whether it be considered as an action for trespass to real property or for injury to personal property, it was barred by limitation set forth in *Code Civ. Proc. § 338*. The fact that plaintiff did not know who did the wrong did not affect the running of the statute (*72 Cal. 334, 335)* .

In ***Castelletto v. Bendon*** *(1961) 193 Cal. App. 2d 64, 13 Cal. Rptr. 907* , three of defendants' buildings intruded on plaintiffs' adjoining land. Although the buildings had intruded for at least 12 years, neither defendants nor plaintiffs were aware of the intrusion. When plaintiffs learned of the intrusion they brought an action alleging trespass and nuisance, seeking the removal of the buildings. The trial court entered judgment in favor of plaintiffs, awarding damages and providing for the ultimate removal of the buildings. Defendants appealed.

The court of appeal reversed. Defendants alleged that the action was precluded by former Code Civ. Proc. § 338(2) [*now Code Civ. Proc. § 338(b)*]. Plaintiffs argued that the statute of limitations did not start to run until the facts were known to plaintiffs. The court responded that although that is the rule in some situations, it is not the rule in the case of this trespass. Some subsections of *Code Civ. Proc. § 338* state that the cause of action is not deemed to have accrued until discovery by the aggrieved party, but the subsection controlling trespass is not one of those, and that omission is intentional. When the location of the buildings is quite apparent, the failure of the owner of the trespassed property to know of the trespass does not toll the running of the time until he was aware of the trespass (*193 Cal. App. 2d 64, 65-66)* . Plaintiffs also argued that the trespass was not permanent in nature and did not come within the rule requiring that a trespass action be brought within three years of the trespassing act. In refuting this argument the court reviewed the cases interpreting permanent and continuing trespasses, and concluded that construction of a building partly on the land of another is a permanent encroachment and the entire cause of action for past as well as prospective damages accrues when the trespass occurs (*193 Cal. App. 2d 64, 66-67)* .

[b] Action for Underground Trespass by Drilling Well Must Be Commenced Within 180 Days

Travelers Indem. Co. v. City of Redondo Beach *(1994) 28 Cal. App. 4th 1432, 34 Cal. Rptr. 2d 337* , involved a winter storm in January 1988 that forced ocean waves over a breakwater in a city harbor, resulting in substantial damage to a nearby inn. Plaintiff, the inn's insurer, paid the loss and filed suit against the city in January 1989, claiming that the breakwater had not been constructed high enough to restrain the storm waves. Plaintiff subsequently learned that the breakwater had subsided due to oil drilling conducted beneath the harbor by defendants. In January 1992, the trial court granted plaintiff's motion to amend its complaint to add defendants and allege additional theories of recovery, including trespass. Defendants demurred to plaintiff's amended pleadings on the grounds that the 180-day statute of

limitations provided by *Code Civ. Proc. § 349* 3/4 barred the cause of action for trespass. The trial court sustained the demurrers and dismissed the action, and plaintiff appealed.

The court of appeal affirmed the dismissal of the cause of action for trespass, but held that *Code Civ. Proc. § 349* 3/4 did not apply to bar plaintiff's causes of action for nuisance, negligence, dangerous condition of public property, inverse condemnation, breach of lease, strict liability for ultrahazardous activity, or violation of *Harb. & Nav. Code § 294* (*28 Cal. App. 4th 1432, 1443)* . The court of appeal rejected plaintiff's claim that *Code Civ. Proc. § 349* 3/4 applied only to cases, unlike plaintiff's, involving an oil driller's unintentional underground trespass caused by "slant" or "whipstocking" drilling activities that succeeded in pumping oil from the property of another (*28 Cal. App. 4th 1432, 1440-1441)* . Citing both the plain language of the statute (which refers to actions for damages on account of an underground trespass by means of a well drilled for oil from a surface location on land other than real property in which the aggrieved party has some right, title, or interest) and its legislative history, the court held that plaintiff's cause of action for trespass was barred because it was not filed within the requisite 180-day period (*28 Cal. App. 4th 1432, 1441)* . However, the court noted that the plaintiffs' remaining causes of action did not involve a trespass onto plaintiff's land and were therefore not barred by *Code Civ. Proc. § 349* 3/4; the court characterized defendants' contention that the ocean waves amounted to an indirect trespass by their drilling activity as an "artfully creative way to try and escape responsibility for their alleged misconduct under cover of Section 349 3/4" (*28 Cal. App. 4th 1432, 1442-1443)* .

[c] Application of Statute of Limitations Not Affected by Procedure Used to Enforce Right

In ***Williams v. Southern P. R. Co.*** *(1907) 150 Cal. 624, 89 P. 599* , defendant railroad, without consent or condemnation proceedings, entered plaintiff's land while it belonged to plaintiff's predecessor, built a railroad track, and has ever since operated the railroad and occupied the land to the exclusion of plaintiff, depriving plaintiff of access to the adjoining street and diminishing the value of the premises. More than four years after the entry, plaintiff brought an action in trespass for damages or for a permanent injunction. Defendant demurrered on several grounds, among them the bar of the statute of limitations. The trial court sustained the demurrer and entered judgment for defendant. Plaintiff appealed.

The Supreme Court affirmed. The Court thoroughly discussed the statute of limitations applicable in trespass cases. *Code Civ. Proc. § 338* provides that a trespass action must be brought within three years after the accruing of the cause of action (*150 Cal. 624, 625)* . Plaintiff sought to avoid the statutory bar by contending that the injury complained of is continuing in nature and a new cause of action arises at each moment of its continuance, and that successive actions might be brought in which plaintiff might recover damages accruing up to the time of the commencement of the action. This rule properly applies when the trespass is temporary in character, since it is not presumed that the wrongful conduct will be continued. The plaintiff in such cases can recover only the damages which have accrued up to the institution of the action. It follows that an action may be brought at any time to recover the damages which have accrued within the statutory period, although the original trespass occurred before that period, provided that the plaintiff has not permitted such time to elapse as will vest in the defendant a right by prescription (*150 Cal. 624, 626)* . On the other hand, when the trespass is permanent in nature, all damages, past and prospective, are recoverable in one action, and the entire cause of action accrues when the injury is inflicted or the trespass committed. Whenever by one act a permanent injury is done, the damages are assessed once for all. The action must consequently be commenced within the statutory period after the commission of the wrongful act (*150 Cal. 624, 626)* . Authority indicates that the construction and operation of a railroad is permanent, and an action to recover damages must be commenced within the statutory period after the original infliction of the injury. An action is barred if not commenced within three years after the railroad was built and operated (*150 Cal. 624, 626)* . Plaintiff himself treated the injury as permanent by alleging that the acts of defendant diminished the value of the premises. This was intended to show a permanent injury to the land, not merely damage sustained up to the time of filing the complaint. The fact that plaintiff sought an injunction as alternative relief to damages did not affect the Court's conclusion that the action was barred. There is but one form of civil action. The sections providing periods of limitation refer to actions for the enforcement of various rights, and are to be applied so as to make the right sought to be enforced, and not a form of procedure, the test as to whether or not the statute applies.

The nature of the cause of action, and not the form of the actions, determines the applicability of the statute of limitations (*150 Cal. 624, 628)* .

[d] Statute of Limitations Begins Running When Permanent Trespass Is Committed

In ***Rankin v. DeBare*** *(1928) 205 Cal. 639, 271 P. 1050* , plaintiff and defendant were adjoining landowners. Defendant constructed a building on his lot, and a year later enlarged it. Four years later plaintiff informed defendant that the building was encroaching on plaintiff's property by inches and demanded its removal. When defendant refused, plaintiff brought an action for damages and restitution. Defendant cross complained and sought to quiet title. The trial court found against defendant on the cross complaint and entered judgment for plaintiff, awarding damages. Defendant and plaintiff both appealed.

The Supreme Court reversed. Defendant contended that the cause of action was barred by former Code Civ. Proc. § 338(2) [*now Code Civ. Proc. § 338(b)*]. The Court noted that defendant's building rested on plaintiff's lot, but was not of a character to vest title in defendant by adverse possession. The injury or trespass was permanent in character. When the injury or trespass is of a permanent nature, all damages, past and prospective, are recoverable in one action, and the entire cause of action accrues when the injury is suffered or the trespass committed. The action for trespass was not commenced until five years after the trespass was committed, and the action was barred (*205 Cal. 639, 641)* .

Williams v. Southern P..R. Co. *(1907) 150 Cal. 624, 89 P. 599* , is discussed in *§ 225.240[3][c]*.

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Volume 22 Chapters 220-229 SUBROGATION---to---TRESPASS
CHAPTER 225 TRESPASS
PART II. FORMS
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3. Statute of Limitations

22-225 California Points & Authorities § 225.241

§ 225.241 Supporting Contention That No Trespass Occurred--Action Barred by Statute of Limitations--Knowledge of Trespass Is Not Necessary for Statute of Limitations to Run

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and should be combined with general points and authorities supporting the contention that the action is barred by the statute of limitations (see, e.g., § 225.240).*]

PLAINTIFF'S ACTION FOR TRESPASS IS BARRED BY THE STATUTE OF LIMITATIONS BECAUSE PLAINTIFF'S PROFESSED IGNORANCE OF _____ [WHO COMMITTED THE TRESPASS *and/or* THE FACT THAT A TRESPASS OF A PERMANENT NATURE EXISTED] DOES NOT TOLL THE RUNNING OF THE STATUTE.

Knowledge of Trespass Is Not Necessary for Statute of Limitations to Accrue. The plaintiff's ignorance of who committed the trespass or of the fact that a permanent trespass existed does not toll the running of the statute of limitations; discovery by the aggrieved party is not necessary for the statute to run (*Gale v. McDaniel (1887) 72 Cal. 334, 335, 13 P. 871* ; *Castelletto v. Bendon (1961) 193 Cal. App. 2d 64, 65-66, 13 Cal. Rptr. 907*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that defendant committed a trespass. The ground of opposition is that an action in trespass is barred by the statute of limitations despite plaintiff's ignorance of who committed the trespass or the fact that a permanent trespass existed.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of action barred by the statute of limitations (for example, in a

demurrer). They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel might include facts showing that the entry took place more than three years before plaintiff commenced the action. Counsel might also include a description of the obvious and permanent nature of the trespass, such as a large building protruding on plaintiff's property, in anticipation of plaintiff's claim that the trespass was not apparent or was continuous.

[b] Related Pleading and Practice Chapters

For forms relating to demurrers, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For discussion and forms relating to the limitation of actions, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* (Matthew Bender). For discussion and forms relating to trespass, see California Forms of Pleading and Practice, Ch. 550, *Trespass* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda of points and authorities supporting and opposing demurrers, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For forms of memoranda of points and authorities supporting and opposing the barring of actions by the statute of limitations, see Ch. 143, *Limitation of Actions* .

[d] Opposing Points and Authorities

If appropriate, the points and *authorities in §§ 225.242* and *225.243* may be used to oppose these points and authorities.

[3] Discussion of Authorities

[a] Knowledge of Trespass Is Not Necessary for Statute of Limitations to Accrue

The facts and procedural background of ***Gale v. McDaniel*** *(1887) 72 Cal. 334, 13 P. 871* , are discussed in *§ 225.240[3][a]*. The Supreme Court found that the action was barred by the statute of limitations, and that plaintiff's ignorance of who did the wrong did not affect the running of the statute (*72 Cal. 334, 335)* .

The facts and procedural background of ***Castelletto v. Bendon*** *(1961) 193 Cal. App. 2d 64, 13 Cal. Rptr. 907* , are discussed in *§ 225.240[3][a]*. The court of appeal found that plaintiff's lack of knowledge of the facts did not toll the running of the statute of limitations. Although some subsections of *Code Civ. Proc. § 338* state that the cause of action is not deemed to have accrued until discovery by the aggrieved party, the subsection controlling trespass does not include the statement, and that legislative omission is intentional. When the location of the buildings is quite apparent, the failure of the owner of the trespassed property to know of the trespass does not toll the running of the time until he or she is aware of the trespass (*193 Cal. App. 2d 64, 65-66)* . The court also held that the building was of a permanent nature in order to invoke the rule that an action accrues when the injury is suffered or the trespass committed (*193 Cal. App. 2d 64, 66-67)* .

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22-225 California Points & Authorities § 225.242

§ 225.242 Opposing Contention That No Trespass Occurred--Action Not Barred by Statute of Limitations--Trespass Is Continuing

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general form of memorandum of points and authorities supporting the contention that defendant committed trespass (see, e.g., § 225.20).*]

PLAINTIFF'S ACTION FOR TRESPASS IS TIMELY AND NOT BARRED BY THE STATUTE OF LIMITATIONS BECAUSE DEFENDANT'S TRESPASS IS CONTINUING OR TEMPORARY AND THE ACTION WAS BROUGHT WITHIN THE STATUTORY PERIOD FOR THE ACTS BEING ALLEGED.

A. Statute of Limitations Does Not Begin Running From Date of Original Entry When Trespass Is Continuing. When a trespass consists of an entry of a character from which it is presumed that the trespass will be temporary rather than permanent, the statute does not begin to run from the date of original entry and successive trespasses give rise to successive causes of action (*Carbine v. Meyer (1954) 126 Cal. App. 2d 386, 390, 272 P.2d 849* ; *Lindberg v. Linder (1933) 133 Cal. App 213, 218, 23 P.2d 842*).

B. Recovery for Continuing or Temporary Trespass as Measured by Damages Incurred Within Statutory Period Immediately Preceding Action. In a continuing or temporary trespass, an action may be brought at any time to recover the damages which have accrued within the statutory period (*Carbine v. Meyer (1954) 126 Cal. App. 2d 386, 390, 272 P.2d 849* ; *Lindberg v. Linder (1933) 133 Cal. App 213, 218, 23 P.2d 842*).

C. Right to Successive Actions Preferred. In all cases of doubt regarding the permanency of an injury resulting from a trespass, the courts are inclined to favor the right of successive actions (*Polin v. Chung Cho (1970) 8 Cal. App. 3d 673, 678, 87 Cal. Rptr. 591* ; *Carbine v. Meyer (1954) 126 Cal. App. 2d 386, 390, 272 P.2d 849*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the statute of limitations does not bar an action for trespass to real property because the trespass consists of a continuing series of incidents, and the action is brought within the statutory period for the incident for which damages are claimed.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the effect of the continuing nature of the trespass on the period of limitations. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Counsel may include a description of defendant's periodic trespass by describing, for example, defendant's act of driving a truck across plaintiff's fields during extensive renovation and remodeling of defendant's property.

In an appropriate case, these points and authorities may be submitted in opposition to the contention *set out in §§ 225.240* and *225.241*.

[b] Related Pleading and Practice Chapters

For discussion and forms relating to the limitation of actions, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* (Matthew Bender). For discussion and forms relating to trespass, see California Forms of Pleading and Practice, Ch. 550, *Trespass* (Matthew Bender).

[c] Related Points and Authorities

For points and authorities supporting and opposing the barring of actions by the statute of limitations, see Ch. 143, *Limitation of Actions* .

[3] Discussion of Authorities

[a] Statute of Limitations Does Not Begin Running From Date of Original Entry When Trespass Is Continuing

In ***Carbine v. Meyer*** *(1954) 126 Cal. App. 2d 386, 272 P.2d 849* , the land of plaintiff and her husband, owned in joint tenancy, was between defendant's land and a county road. Plaintiff's husband granted the former owner of defendant's land an easement across the property. When the easement was granted, plaintiff and her husband did not have complete title to the land, but were purchasing it, and received a deed three years later. The evidence was conflicting but indicated that the easement road was closed and barricaded intermittently by plaintiff, and was used by defendant during different periods over the course of several years. Defendant brought a quiet title action concerning the easement and obtained a decree quieting her title to the easement. That order was later discharged by the court after plaintiff, who had not been included in the action, objected. Plaintiff brought an action in trespass seeking damages and injunctive relief restraining defendant from using the road. Defendant cross complained to quiet title to the easement. The trial court judgment was for plaintiff in both actions, but awarded no damages. Defendant appealed.

The court of appeal affirmed. Defendant contended that the action was barred by former Code Civ. Proc. § 338(2) [*now see Code Civ. Proc. § 338(b)*]), which provides that actions for trespass must be commenced within three years, since she began to use the road five years before the action was brought. The court stated that if a trespass consists of a physical entry on the lands of another and taking possession of the land under circumstances indicating an intention that the trespass shall be permanent, the law may regard the wrong-doing as complete at the time of the original entry and the statute of limitations runs from that time. On the other hand, if from the character of the trespass it is not to be presumed that the wrongful conduct will be continued, successive trespasses give rise to successive causes of action. In

this case an action may be brought at any time to recover the damages which have accrued within the statutory period although the original trespass occurred before that period, provided that the plaintiff has not permitted enough time to elapse as will vest in defendant a right by prescription. In all cases of doubt regarding the permanency of the injury, the courts are inclined to favor the right of successive actions (*126 Cal. App. 2d 386, 390)* . The circumstances of defendant's nonuse of the road for long periods of time seemed to negate any intention that the trespass was to be permanent. Neither she nor her predecessor built the road, and they permitted it to fall into a state of disrepair through neglect and nonuse of the road. Thus, plaintiff's action was not barred (*126 Cal. App. 2d 386, 391)* .

In ***Lindberg v. Linder*** *(1933) 133 Cal. App. 213, 23 P.2d 842* , defendants used plaintiffs' real property for storing lumber, machinery, and rubbish. Plaintiffs' lot adjoined another lot used by defendants for the same purpose with the owner's permission. Plaintiffs brought an action for trespass. Defendants alleged that the use of plaintiffs' lot was with their consent and knowledge. Plaintiffs alleged that they had requested defendants to clear the land on several occasions. The trial court refused to grant defendant's motions for nonsuit and a new trial and damages were awarded plaintiffs. Defendants appealed.

The court of appeal dismissed the appeal from the order requesting a new trial and affirmed the judgment. Among their other contentions, defendants argued that plaintiffs' action was barred by the three-year statute of limitations for trespass actions because defendants had used the property for more than six years. The court did not agree, finding that if there was a trespass, it was a continuing trespass and the statute does not begin to run from the date of original entry; recovery may be had for a period of time not exceeding the statutory period immediately preceding filing of the action (*133 Cal. App. 213, 218)* .

[b] Recovery for Continuing or Temporary Trespass as Measured by Damages Incurred Within Statutory Period Immediately Preceeding Action

Carbine v. Meyer *(1954) 126 Cal. App. 2d 386, 272 P.2d 849* , is discussed in *§ 225.242[3][a]*.

Lindberg v. Linder *(1933) 133 Cal. App. 213, 23 P.2d 842* , is discussed in *§ 225.242[3][a]*.

[c] Right to Successive Actions Preferred

Carbine v. Meyer *(1954) 126 Cal. App. 2d 386, 272 P.2d 849* , is discussed in *§ 225.242[3][a]*.

The facts and procedural background of ***Polin v. Chung Cho*** *(1970) 8 Cal. App. 3d 673, 87 Cal. Rptr. 591* , are discussed in *§ 225.145[3][a]*. The court of appeal reversed the summary judgment for defendant as to two causes of action, including the first which alleged the property injury, and affirmed as to the third cause. Former Code Civ. Proc. § 338(2) [*now see Code Civ. Proc. § 338(b)*] provided a three-year statute of limitations for actions for trespass or injury to real property. The statute runs from the date the cause of action accrues. Defendants claimed the action was barred because the work was done over three years before plaintiffs' action. Plaintiffs did not allege that physical entry caused any damage; instead they alleged that the rainfall since completion of the ditch caused erosion on their land. The court held the statute did not run from the time the act of diversion was committed but from the date the injury resulting from the diversion was sustained. When a trespass is deemed permanent plaintiff may recover future damages in one lawsuit on the premise that the condition will exist forever. Because the rule is for the benefit of the plaintiff, the plaintiff will not be compelled to treat a condition as permanent. Nonetheless, with respect to buildings or railroads tortiously placed on a plaintiff's land, plaintiff is not permitted to consider the trespass continuing, but is required to consider the trespass permanent as of the date of completion of construction. Courts have held a plaintiff's cause of action barred if not brought within three years of that date. But when from the character of the trespass it is not to be presumed that the wrongful conduct will be continued, successive trespasses give rise to successive causes of actions, and an action may be brought at any time to recover the damages which have accrued within the statutory period, although the original trespass occurred before that period. In cases of doubt regarding the permanency of the injury, the courts are inclined to

favor the right to successive actions. Every repetition of a continuing injury is a separate wrong for which the person injured may bring successive actions for damages until the wrong is abated, even though an action based on the original wrong may be barred. In doubtful cases the plaintiff should have an election to treat it as permanent or not (*8 Cal. App. 3d 673, 678)* . Defendants asserted that plaintiffs elected to treat the trespass as permanent since they sought future damages. The court responded that since plaintiffs sought an injunction against defendants, the future damages referred to must be construed to mean those occurring between the time of filing the action and the time of trial. If plaintiffs recover damages on the premise that the trespass is permanent, they will be deemed to have waived the invasion and consented to the continued occupancy of the land. But if they obtain an injunction which will avert further damage, they are not entitled to damages beyond the date when the injunction is granted (*8 Cal. App. 3d 673, 678)* . The court concluded that plaintiffs had pleaded a cause of action based on injury to real property (without regard to the trespass), but that if the cause of action must be deemed to be based on a trespass, the trespass alleged is continuing in nature (*8 Cal. App. 3d 673, 679)* .

[4] Additional Authorities

[a] Statute of Limitations Does Not Begin Running From Date of Original Entry When Trespass Is Continuing

In *Starrh & Starrh Cotton Growers v. Aera Energy LLC (2007) 153 Cal. App. 4th 583, 63 Cal. Rptr. 3d 165* , plaintiff was a farm that sued an adjacent oil-producing field for a subsurface trespass. Defendant used unlined percolation pools to dispose of wastewater produced during the oil extraction process. This wastewater, which is high in salts and other minerals, seeped over time into the underground water on plaintiff's land, effectively reducing the quality of that water. A jury awarded plaintiff damages for the trespass, including damages avoided by defendant as a result of the trespass and restoration cost damages. Defendant appealed, arguing that the action was time-barred as a permanent trespass. The court of appeal disagreed. The court of appeal held that the trespass was a continuing trespass, and as such, the action was not time-barred. The court noted that the subsurface trespass caused by defendant's activity was continuing even at the time of trial and the impact of the intrusion will worsen over time. In addition, the record indicated that the trespass could be abated by some means. Defendant chose to use the unlined percolation pools because it was the cheapest way to dispose of the wastewater, thus maximizing profits. While defendant argued that the pools were a large, permanent structure, the court noted that the trespass was not the pools, but the wastewater permeating through the pools that caused the trespass (*153 Cal. App. 4th 583, 594-597)* .

In *Capogeannis v. Superior Court (1993) 12 Cal. App. 4th 668, 15 Cal. Rptr. 2d 796* , a landowner sued his vendor and the vendor's tenant for damages based on nuisance and trespass in the form of toxic contamination of the soil and ground water. The contamination was caused by leakage from underground petroleum storage tanks that had been last used (by the tenant) about three years before the plaintiff purchased the land. The plaintiff did not know about the tanks until more than a year after purchasing the land. The widespread extent of the contamination became known, after extensive sampling and testing, about a year after the plaintiff learned about the tanks. A little more than three years thereafter, the plaintiff filed the complaint. The trial court granted a defense motion for summary adjudication on the ground that both the nuisance action and the trespass action were barred by the three-year limitation on actions for trespass or injury to real property [*see Code Civ. Proc. § 338(b)*]. On the plaintiff's petition for an extraordinary writ, the court of appeal directed the trial court to vacate its order and deny the defense motion. The issue was whether the nuisance and trespass were permanent (and therefore the actions were barred) or continuing (and the actions were not barred). The complaint did not reveal whether the plaintiff was proceeding on the theory of permanent nuisance/trespass or on the theory of continuing nuisance/trespass.

The court of appeal wrote its opinion with reference to the nuisance action. but stated that its opinion was equally applicable to the trespass action. The court observed that there is a judicial preference for viewing a nuisance as continuing and that if the question is close, the plaintiff should be allowed to elect one or the other characterization of the nuisance (*12 Cal. App. 4th 668, 678-679)* . In this case, the plaintiff expressly made that election, in favor of a

continuing nuisance, at the hearing on the defense motion for summary adjudication. (Arguably the plaintiff implicitly made the election by filing the complaint after expiration of the limitations period for an action based on a permanent nuisance (*12 Cal. App. 4th 668, 684)* .) The court of appeal concluded that the question was close and therefore the trial court should have allowed the plaintiff to proceed. This conclusion was influenced primarily by the strong policy consideration that toxic contamination should be cleaned up as promptly and thoroughly as possible. Allowing the plaintiff to proceed would encourage private clean-up of toxic contamination with appropriate financial support from responsible persons (*12 Cal. App. 4th 668, 682)* . The alternative would be enforcement proceedings by government agencies at public expense--at least in this case, because the plaintiff was not actually harmed by the toxic contamination, but only had a legal duty to clean it up (*12 Cal. App. 4th 668, 683)* .

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22-225 California Points & Authorities § 225.243

§ 225.243 Opposing Contention That No Trespass Occurred--Action Not Barred by Statute of Limitations--Damages Must Be Sufficiently Appreciable for Period of Limitation to Run

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief, and may be combined with a general form of memorandum of points and authorities supporting the contention that defendant committed trespass (see, e.g., § 225.20).*]

PLAINTIFF'S TRESPASS ACTION IS NOT BARRED BY THE STATUTE OF LIMITATIONS BECAUSE IT WAS COMMENCED WITHIN THE STATUTORY PERIOD FROM THE DATE THE INJURIES CAUSED BY THE TRESPASS BECAME SUFFICIENTLY APPRECIABLE TO A REASONABLE PERSON.

Period of Limitation Begins to Run When Damage Is Sufficiently Appreciable to Reasonable Person. The period of limitation in a trespass action begins to run when the damage caused by the trespass is sufficiently appreciable to a reasonable person; to hold otherwise would eliminate the injured party's remedy before he or she can know that an injury has occurred. [Thus, an action for consequential damages resulting from an underground trespass does not arise until there is surface damage that would put a reasonable person on notice] (*see Mehl v. People ex rel. Dep't of Pub. Works (1975) 13 Cal. 3d 710, 717, 119 Cal. Rptr. 625, 532 P.2d 489* ; *Oakes v. McCarthy Co. (1968) 267 Cal. App. 2d 231, 255, 73 Cal. Rptr. 127*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the statute of limitations does not bar an action for trespass to real property because the damages were not sufficiently appreciable to indicate to a reasonable person that a trespass had occurred. The case on which the contention is based involved an underground trespass, but there may be other types of trespass not readily apparent.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the period of limitations beginning when damages are appreciable. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the points of law stated. For example, counsel may allege facts describing defendant's trespass and the consequential damages which did not become obvious until much later than the date of entry, as might occur in a trespass beneath the surface of plaintiff's property.

In an appropriate case, these points and authorities may be submitted in opposition to the contention *set out in §§ 225.240* and *225.241*.

[b] Related Pleading and Practice Chapters

For discussion and forms relating to the limitation of actions, see California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions* (Matthew Bender). For discussion and forms relating to trespass, see California Forms of Pleading and Practice, Ch. 550, *Trespass* (Matthew Bender).

[c] Related Points and Authorities

For points and authorities supporting and opposing the barring of actions by the statute of limitations, see Ch. 143, *Limitation of Actions* .

[3] Discussion of Authorities

[a] Period of Limitation Begins to Run When Damage Is Sufficiently Appreciable to Reasonable Person

In ***Mehl v. People ex rel. Dep't of Pub. Works*** *(1975) 13 Cal. 3d 710, 119 Cal. Rptr. 625, 532 P.2d 489* , the state constructed a freeway near defendants' property, and to accommodate the natural drainage and freeway runoff, constructed a culvert which flowed on defendants' property. Shortly thereafter Los Angeles County condemned a drainage easement on defendants' land. The county filed an action to determine the compensation for its drainage easement on defendants' property. Defendants cross complained against the state in inverse condemnation for partial loss of their property as a result of the freeway construction. The trial court judgment awarded defendants damages, granted the state the right to discharge water on the property, and gave the county a drainage easement. The state appealed.

The Supreme Court reversed and remanded on the issue of damages and affirmed in all other respects. The Court rejected the state's contention that the action was barred by the statute of limitations set forth in former Code Civ. Proc. § 338(2) [*now see Code Civ. Proc. § 338(b)*]. Defendants had asserted that the state appropriated a drainage easement over their property. The date the taking occurred is not necessarily the date on which the period of limitation started to run. Rather, the period begins to run when the damage is sufficiently appreciable to a reasonable person. Although the state argued that the taking became appreciable when freeway drainage construction was completed, five years before the action was commenced, the Court agreed with the trial court's finding that defendants first became aware of the drainage system the year before the action was filed, and that prior to that time they had been unable to accurately determine the nature and extent of the taking. When the county informed them of the construction of a drainage system, defendants visited the property, inspected the state's culvert, and observed evidence of drainage flow on the property during heavy rains (*13 Cal. 3d 710, 717)* .

In ***Oakes v. McCarthy Co.*** *(1968) 267 Cal. App. 2d 231, 73 Cal. Rptr. 127* , plaintiffs brought an action to recover damages resulting from earth movement underlying their lot and home. Plaintiffs had acquired their home as original

purchasers in a subdivision in 1956, and brought an action for negligence at the end of 1960. The action was against several defendants involved in the construction of the house. The jury returned verdicts in favor of some defendants, and returned verdicts in favor of plaintiffs and against three defendants. One defendant's motion for judgment notwithstanding the verdict was denied. That defendant appealed from the judgment and from the order denying the motion. Another defendant's motion for a new trial was denied, and that defendant appealed from the judgment.

The court of appeal modified the compensatory damage award, but otherwise affirmed. Among other issues, both defendants contended that the action was barred by the statute of limitations. The court stated that in negligence cases, the statute of limitations ordinarily does not commence to run until the damage to plaintiff occurs. This has also been the traditional approach for cases involving damages to real property caused by removal of lateral support (*267 Cal. App. 2d 231, 254)* . A cause of action for consequential damages resulting from an underground trespass does not arise until there is surface damage which would put a reasonable person on notice. To require an owner to take notice of a trespass on his or her underlying real property at the time it takes place is to require an impossibility; to hold that the statute begins to run at the date of the trespass would in most cases take away the remedy of the injured party before he or she can know that an injury occurred. The initial damage caused by the slipping of the underlying soil resulting from negligent filling, compaction, and inspection was not open to view. Until there was a subsidence or lateral movement causing changes to the surface soil or structures erected on it, one could not be aware of defective filling and compaction. Only when the consequential damage is sufficiently appreciable to a reasonable person may the owner be held to a duty of expeditiously pursuing his or her remedies. The time at which the consequential damage reached this point was a question of fact. The ultimate issue of whether the cause of action for negligence was barred by the statute of limitations became a mixed question of law and fact. It was proper to submit the issue to the jury, and there was substantial evidence to support the jury's resolution (*267 Cal. App. 2d 231, 255)* .

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22-225 California Points & Authorities § 225.244

§ 225.244 Supporting Contention That No Trespass Occurred--Constitutional Right to Free Expression of Ideas in Public Forum

[1] FORM

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief.*]

DEFENDANT'S _____ [ENTRY *or* ACTS CAUSING AN ENTRY] ON PLAINTIFF'S PROPERTY _____ [WAS *or* WERE] NOT A TRES PASS BECAUSE PLAINTIFF'S PROPERTY IS A PUBLIC FORUM AND DEFENDANT WAS EXERCISING HIS/HER CONSTITUTIONAL RIGHT TO FREE EXPRESSION OF IDEAS.

A. Exercise of Constitutional Right to Free Expression of Ideas. A person who exercises his or her right to the free expression of ideas, guaranteed by the California Constitution (*Cal. Const. art. I, §§ 2, 3*), does not commit a trespass if the activities occur on private property that is a public forum, are orderly and reasonable, and do not interfere with normal business operations (*Robins v. Pruneyard Shopping Ctr. (1979) 23 Cal. 3d 899, 910-911, 153 Cal. Rptr. 854, 592 P.2d 341 , aff'd, (1980) 447 U.S. 74, 100 S. Ct. 2035, 64 L. Ed. 2d 741*).

B. Private Property Is Public Forum. Private property is a public forum if it is generally open to the public and if it functions as the equivalent of traditional public forums, such as the public streets and sidewalks of a town's or city's business center (*Robins v. Pruneyard Shopping Ctr. (1979) 23 Cal. 3d 899, 908-910, 153 Cal. Rptr. 854, 592 P.2d 341 , aff'd, (1980) 447 U.S. 74, 100 S. Ct. 2035, 64 L. Ed. 2d 741*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to plaintiff's contention that defendant committed a trespass by entering plaintiff's property. The ground of opposition is that plaintiff's property is a public forum and that defendant

was exercising his or her constitutional right to free expression of ideas.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the constitutional right to free expression of ideas in a public forum. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should assert facts establishing that the size, type, or use of the plaintiff's property made it a public forum, and that the defendant's activities were orderly and reasonable and did not interfere with normal business operations on plaintiff's property.

[b] Related Pleading and Practice Chapters

For discussion and forms relating to trespass, see California Forms of Pleading and Practice, Ch. 550, *Trespass* (Matthew Bender).

[c] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 225.245* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Exercise of Constitutional Right to Free Expression of Ideas

In ***Robins v. Pruneyard Shopping Ctr.*** *(1979) 23 Cal. 3d 899, 153 Cal. Rptr. 854, 592 P.2d 341 , aff'd, (1980) 447 U.S. 74, 100 S. Ct. 2035, 64 L. Ed. 2d 741* , plaintiffs requested an injunction to enjoin defendant from denying them access to defendant's private property, a shopping center, for the purpose of soliciting signatures for a petition to the government. The trial court denied the request, and plaintiffs appealed to the Supreme Court.

The Supreme Court reversed, holding that a private shopping center could not prohibit the distribution of leaflets or the solicitation of signatures on a petition, because the California Constitution [*Cal. Const. art. I, §§ 2, 3*] protects these activities if they are exercised reasonably in a manner that does not interfere with the shopping center's normal business operations. Although the shopping center was private property, the Court held that its regular use by large segments of the population (25,000 people each day) and its being generally open to the public made it an invaluable and essential forum for exercising the rights of speech and petition, the suburbs' functional equivalent to the traditional town center where the right to free expression of ideas has historically been exercised and scrupulously guarded (*23 Cal. 3d 899, 908-910)* . However, the Court emphasized that it was not giving free rein for the dissemination of ideas, noting that it was not considering the privacy rights of an individual homeowner or the proprietors of more modest retail establishments (*23 Cal. 3d 899, 910)* .

[b] Private Property Is Public Forum

Robins v. Pruneyard Shopping Ctr. *(1979) 23 Cal. 3d 899, 153 Cal. Rptr. 854, 592 P.2d 341 , aff'd, (1980) 447 U.S. 74, 100 S. Ct. 2035, 64 L. Ed. 2d 741* , is discussed in *§ 225.244[3][a]*.

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22-225 California Points & Authorities § 225.245

§ 225.245 Opposing Contention That No Trespass Occurred--No Constitutional Right to Free Expression of Ideas on Private Property That Is Not Public Forum

[1] FORM

[*The following may be included in a memorandum of points and authorities or in a trial or appellate brief*].

DEFENDANT'S _____ [ENTRY *or* ACTS CAUSING AN ENTRY] ON PLAINTIFF'S PROPERTY _____ [WAS *or* WERE] A TRESPASS BECAUSE DEFENDANT HAD NO CONSTITUTIONAL RIGHT TO FREE EXPRESSION OF IDEAS ON PRIVATE PROPERTY THAT WAS NOT A PUBLIC FORUM.

A. Private Property Neither Open to Public Nor Equivalent of Traditional Public Forum. Private property is not a public forum if it is not generally open to the public and if it does not function as the equivalent of traditional public forums such as the public streets and sidewalks of a city's business center (*see Robins v. Pruneyard Shopping Ctr. (1979) 23 Cal. 3d 899, 908-910, 153 Cal. Rptr. 854, 592 P.2d 341 , aff'd, (1980) 447 U.S. 74, 100 S. Ct. 2035, 64 L. Ed. 2d 741*).

B. Private Property Presenting No Significant Opportunity to Disseminate Ideas. Private property is not a public forum if the property presents no significant opportunity to disseminate ideas (*Allred v. Harris (1993) 14 Cal. App. 4th 1386, 1391, 18 Cal. Rptr. 2d 530*).

C. Prohibiting Activities on Property Does Not Curtail Opportunity for Exercise of Constitutional Right. Private property is not a public forum if the realistic opportunity of citizens to exercise their constitutional right to free expression of ideas is not curtailed by prohibiting that exercise on the property (*Allred v. Harris (1993) 14 Cal. App. 4th 1386, 1391, 18 Cal. Rptr. 2d 530*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that defendant's entry on plaintiff's property was a trespass because there is no constitutional right to free expression of ideas on private property that is not a public forum.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of no constitutional right to the free expression of ideas on private property that is not a public forum. These points and authorities may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should assert facts establishing that the property was not generally open to the public or the equivalent of traditional public forums, that the property presented no significant opportunity for the dissemination of ideas, and that enjoining the defendant's activities on the property would not curtail the realistic opportunity of defendant or other citizens to exercise the constitutional right to the free expression of ideas.

In an appropriate case, these points and authorities may be used to oppose the contention supported by the points and *authorities in § 225.244*.

[b] Related Pleading and Practice Chapters

For discussion and forms relating to trespass, see California Forms of Pleading and Practice, Ch. 550, *Trespass* (Matthew Bender).

[3] Discussion of Authorities

[a] Private Property Neither Open to Public Nor Equivalent of Traditional Public Forum

Robins v. Pruneyard Shopping Ctr. *(1979) 23 Cal. 3d 899, 153 Cal. Rptr. 854, 592 P.2d 341 , aff'd, (1980) 447 U.S. 74, 100 S. Ct. 2035, 64 L. Ed. 2d 741* , is discussed in *§ 225.244[3][a]*.

[b] Private Property Presenting No Significant Opportunity to Disseminate Ideas

In ***Allred v. Harris*** *(1993) 14 Cal. App. 4th 1386, 18 Cal. Rptr. 2d 530* , the trial court issued a permanent injunction prohibiting defendants' anti-abortion picketing in the private parking area of plaintiff's privately owned medical center. Defendants appealed to the court of appeal.

The court of appeal affirmed, ruling that plaintiff's property was not a public forum where defendants had a constitutional right to the free expression of ideas, because the relatively small center's architecture and use presented no significant opportunity for the dissemination of ideas and because prohibiting picketing on the premises did not curtail the realistic opportunity of citizens to exercise this right. The court distinguished this case from *Robins v. Pruneyard Shopping Ctr. (1979) 23 Cal. 3d 899, 153 Cal. Rptr. 854, 592 P.2d 341 , aff'd, (1980) 447 U.S. 74, 100 S. Ct. 2035, 64 L. Ed. 2d 741* [*see § 225.244[3][a]*], holding that the premises involved not only were not the equivalent of a public forum, but rather resembled the modest retail establishments to which *Pruneyard* specifically does not apply. The court noted that the medical center's tenants offered services only to specific clientele, rather than inviting members of the public to congregate, relax, seek out entertainment, browse, and shop. Moreover, unlike even a modest retail establishment, the medical center served mainly prearranged clientele, was not fully open to the local community, and did not provide services that are essential to all community members (*14 Cal. App. 4th 1386, 1391-1392)* .

[c] Prohibiting Activities on Property Does Not Curtail Opportunity for Exercise of Constitutional Right

Allred v. Harris *(1993) 14 Cal. App. 4th 1386, 18 Cal. Rptr. 2d 530* , is discussed in *§ 225.245[3][b]*.

[4] Additional Authorities

[a] Private Property Neither Open to Public Nor Equivalent of Traditional Public Forum

In *Planned Parenthood v. Wilson (1991) 234 Cal. App. 3d 1662, 286 Cal. Rptr. 427* , the court of appeal held that a privately owned medical center was not the functional equivalent of a traditional public forum. The court noted that the medical center's six tenants exclusively offered professional and personal services to specific clientele and therefore had not been devoted to general public use in a manner that impressed on that property a constitutional burden to guarantee individuals access to the exercise of free speech (*234 Cal. App. 3d 1662, 1671-1672)* .

In *Allred v. Shawley (1991) 232 Cal. App. 3d 1489, 284 Cal. Rptr. 140* , the court of appeal held that a privately owned parking lot of a professional center could not be used by the general public as a forum to reach patients of an abortion clinic. The court noted that the professional center, unlike a shopping mall, was not fully open to the local community nor did it provide services that were essential to all community members. Therefore, the professional center had continually maintained the private character of its parking lot and had not invited the public generally to use the property (*232 Cal. App. 3d 1489, 1501-1502)* .

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22-225 California Points & Authorities §§ 225.246-225.259

[Reserved]

§§ 225.246[Reserved]

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22-225 California Points & Authorities § 225.260

§ 225.260 Supporting Contention That Trespass to Personal Property Occurred--Intermeddling With, Use of, or Damage to Personal Property

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT COMMITTED A TRESPASS TO PLAINTIFF'S PERSONAL PROPERTY BECAUSE DEFENDANT _____ [INTERMEDDLED WITH *and/or* USED *and/or* CAUSED DAMAGE TO] THE PROPERTY WITHOUT SUBSTANTIALLY INTERFERING WITH PLAINTIFF'S RIGHT OF POSSESSION.

A. Intermeddling With, Use of, or Damage to Personal Property Constitutes Trespass. When the defendant's conduct consists of intermeddling with, using, or causing damage to the plaintiff's personal property, without otherwise substantially interfering with possession or the right to possession, plaintiff has a cause of action for trespass (*Jordan v. Talbot (1961) 55 Cal. 2d 597, 610, 12 Cal. Rptr. 488, 361 P.2d 20* ; *Zaslow v. Kroenert (1946) 29 Cal. 2d 541, 551, 176 P.2d 1*).

B. Actual Damages Awarded for Trespass to Personal Property. The owner of personal property may recover the actual damages suffered by reason of the impairment of the property or the loss of its use while the intermeddling took place. Liability for actual damages is in no way dependent on the intent or motive with which the trespass was committed (*Jordan v. Talbot (1961) 55 Cal. 2d 597, 610, 12 Cal. Rptr. 488, 361 P.2d 20* ; *Fresno Air Serv. v. Wood (1965) 232 Cal. App. 2d 801, 805-806, 43 Cal. Rptr. 276*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a trespass to personal property has occurred by intermeddling with, use of, or damage to the property.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of trespass to personal property. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel should include facts illustrating defendant's acts that intermeddled with plaintiff's possession of his or her property, as might result if defendant entered property to that plaintiff had a right to enter, removed plaintiff's property without permission, and informed plaintiff that it was available at a location other than where plaintiff had left it.

[b] Related Pleading and Practice Chapters

For discussion and forms relating to conversion of personal property, see California Forms of Pleading and Practice, Ch. 150, *Conversion* (Matthew Bender). For discussion and forms relating to trespass, see California Forms of Pleading and Practice, Ch. 550, *Trespass* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda of points and authorities relating to conversion, see Ch. 51, *Conversion* .

[d] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 225.261* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Intermeddling With, Use of, or Damage to Personal Property Constitutes Trespass

In ***Jordan v. Talbot*** *(1961) 55 Cal. 2d 597, 12 Cal. Rptr. 488, 361 P.2d 20* , plaintiff was a tenant in defendant's apartment house. The lease gave defendant a right of reentry on any breach and a lien on all personal property in the apartment to secure rental payments. After plaintiff was two months in arrears defendant entered the apartment, removed the furniture to a warehouse, and refused to allow plaintiff to enter the apartment. The items stored in a warehouse were in plaintiff's name, and other items, more difficult to move, were stored in defendant's basement and held for plaintiff. Plaintiff filed an action for forcible entry and detainer and for conversion of her personal property. The jury verdict was for plaintiff on both causes. The trial court granted defendant's motion for a new trial, based on error. Plaintiff appealed.

The court of appeal affirmed the order granting a new trial and dismissed the purported appeal from the order granting judgment nothwithstanding the verdict. Defendant did not use any of plaintiff's belongings or make any claim of ownership to them. The removal of another's property and storage of it in the owner's name without any other exercise of dominion or control is not a conversion. When the conduct complained of does not amount to a substantial interference with the possession or the right to possession, but consists of intermeddling with, use of, or damage to the personal property, the owner has a cause of action for trespass, and may recover only the actual damages suffered by reason of the impairment of the property or the loss of its use. Thus, plaintiff was entitled only to actual damages in an amount sufficient to compensate her for any impairment of the property or loss of its use (*55 Cal. 2d 597, 610)* .

In ***Zaslow v. Kroenert*** *(1946) 29 Cal. 2d 541, 176 P.2d 1* , plaintiff had obtained title to a parcel of real property by the foreclosure of a street assessment bond. One defendant was the grantee of the same parcel in a tax deed made by the state. Plaintiff had enjoyed the quiet and peaceable possession of the premises until defendants forcibly broke into and entered the premises. A sign was posted and the locks changed. Unable to enter these premises, plaintiff could not find

other housing. Defendant notified plaintiff that he could secure his personal property left on the premises by applying at defendants' attorney's office, and that if the goods were not called for within 10 days, they would be put in storage to be held at plaintiff's expense. These acts took place during a pending quiet title action between the same parties. Plaintiff sued defendants for trespass and conversion. The trial court judgment was for plaintiff. Defendant appealed.

The court of appeal reversed the judgment, with directions to redetermine the amount of damages, because the evidence did not support the damages awarded. The court found that the parties were cotenants of the parcel and defendants had committed an ouster. The court then distinguished conversion from trespass to personal property. Conversion is any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with the owner's rights. The liability of one in possession of real property for the conversion of personal property which he or she finds on it depends on a determination of whether the conduct of defendant indicates an assumption of control or ownership over the goods. Under some circumstances, refusal of one in possession of real property to permit, on demand, the owner of chattels which were left there to remove the goods constitutes conversion. If the possessor of the real estate appropriates the chattels to his or her own use in obvious defiance of the owner's rights, the possessor is liable to the owner for the conversion of them (*29 Cal. 2d 541, 549-550)* . However, every failure to deliver is not such a serious interference with the owner's dominion that defendant should be required to pay the full value of the goods. The act of taking possession of a building and locking it does not, of itself, constitute a conversion of the personal property in it. Nor does permission by the possessor of the realty to allow personal property to remain on the premises make him or her liable for the goods. To establish a conversion, it is incumbent on plaintiff to show an intention or purpose to convert the goods and to exercise ownership over them, or to prevent the owner from taking possession of the property. When the conduct complained of does not amount to a substantial interference with possession or the right to possession, but consists of intermeddling with, or use of, or damages to the personal property, the owner has a cause of action for trespass, and may recover only the actual damages suffered by reason of the impairment of the property or the loss of its use. As plaintiff was a cotenant and had the right of possession of the realty, which included the right to keep his personal property on it, defendant's act of placing the goods in storage, although not constituting the assertion of ownership nor a substantial interference with possession to the extent of a conversion, amounted to an intermeddling. Therefore plaintiff was entitled to actual damages in an amount sufficient to compensate him for any impairment of the property or loss of its use (*29 Cal. 2d 541, 550-551)* .

[b] Actual Damages Are Allowed

Jordan v. Talbot *(1961) 55 Cal. 2d 597, 12 Cal. Rptr. 488, 361 P.2d 20* , is discussed in *§ 225.260[3][a]*.

In ***Fresno Air Serv. v. Wood*** *(1965) 232 Cal. App. 2d 801, 43 Cal. Rptr. 276* , defendant chartered plaintiff's airplane. The pilot, having taken defendant on several occasions, was well aware that defendant had a drinking problem and was concerned about his health. Defendant had been taking flying lessons and the pilot permitted him to handle the controls of the airplane. On the return trip it was necessary to land due to fog. Both the pilot and defendant got out of the plane, the pilot leaving the keys in the plane, and not setting the brakes. When the pilot walked to a nearby house to call the weather bureau, he heard the airplane start and saw the plane go down the runway, hit two levees, land on its nose and stop in a dump. Defendant was in the plane, although he claimed to not remember starting the plane. Plaintiff filed an action for damages for destruction of the airplane. The trial court judgment was for plaintiff. Defendant appealed.

The court of appeal affirmed. The question raised on appeal was whether or not assumption of the risk was a proper issue. After describing the relationship between the assumption doctrine and conversion actions, the court also described the elements of conversion and trespass to personal property. The gist of an action in the nature of trespass is injury to plaintiff or to real or personal property in his or her possession. Liability for actual damages, in an action for injury caused by a trespass, is in no way dependent on the intent or motive with which the trespass was committed. Any unlawful interference with the personal property of another or exercise of dominion over it gives rise to an action in trespass. Conversion is the wrongful exercise of dominion over personal property of another. The property need not be appropriated to the use of defendant; it may be destroyed or merely damaged. Defendant's attempt to invoke assumption

of the risk as a defense was misplaced, and the court upheld the award of damages (*232 Cal. App. 2d 801, 805-806)* .

[4] Additional Authorities

[a] Intermeddling With, Use of, or Damage to Personal Property Constitutes Trespass

In *Jamgotchian v. Slender (2009) 170 Cal. App. 4th 1384, 89 Cal. Rptr. 3d 122* , the court of appeal held that a triable issue of fact existed as to whether conduct by a steward of the California Horse Racing Board to prevent the owner of a horse from removing the horse from the race grounds before a race constituted intentional interference with the owner's possession of the horse sufficient to support a cause of action for trespass to chattels. In that case, the owner had attempted to pull the horse from a race on the morning of the race, which required steward approval. The steward refused to grant approval, indicated he would not allow the owner to pull the horse from the race nor remove the horse from the grounds, and ordered the posting of security officers at the horse's stable. Against the owner's will, the horse was eventually taken to the track and raced, resulting in an injury to the horse's foot that rendered the horse lame. Although the owner had not confronted the officers and tried to force removal of the horse from the grounds before the race, the court of appeals held that a triable issue existed as to whether the steward's conduct supported a cause of action for trespass to chattels (*170 Cal. App. 4th 1384, 1401-1402)* .

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22-225 California Points & Authorities § 225.261

§ 225.261 Opposing Contention That Trespass to Personal Property Occurred--Insufficient Evidence of Intentional Interference With Possession of Personal Property

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT DID NOT COMMIT A TRESPASS TO PLAINTIFF'S PERSONAL PROPERTY BECAUSE PLAINTIFF HAS FAILED TO SHOW SUBSTANTIAL EVIDENCE THAT THERE WAS AN INTENTIONAL INTERFERENCE WITH HIS/HERS/ITS POSSESSION OF THE PROPERTY.

Substantial Evidence of Intentional Interference Is Necessary for Trespass to Personal Property. There must be substantial evidence that there was an intentional interference with the plaintiff's possession of the personal property which proximately caused the damage complained of to sustain a recovery for trespass to personal property (*Itano v. Colonial Yacht Anchorage (1968) 267 Cal. App. 2d 84, 90, 72 Cal. Rptr. 823*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a party's contention that defendant committed a trespass to personal property. The ground of opposition set forth is lack of substantial evidence of an intentional interference with plaintiff's property.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of substantial evidence of intentional interference with personal property. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. For example, counsel might include facts illustrating that there is no evidence that the moving of plaintiff's

boat by defendant was the proximate cause of the injury to plaintiff's boat.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 225.260*.

[b] Related Pleading and Practice Chapters

For discussion and forms relating to conversion of personal property, see California Forms of Pleading and Practice. Ch. 150, *Conversion* in (Matthew Bender). For discussion and forms relating to trespass, see California Forms of Pleading and Practice, Ch. 550, *Trespass* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda of points and authorities relating to conversion, see Ch. 51, *Conversion* .

[3] Discussion of Authorities

[a] Substantial Evidence of Intentional Interference Is Necessary for Trespass to Personal Property

In ***Itano v. Colonial Yacht Anchorage*** *(1968) 267 Cal. App. 2d 84, 72 Cal. Rptr. 823* , plaintiff purchased a boat which was moored at a wharf owned by defendant. Plaintiff's payments on the mooring lease were often delinquent, and after several warnings, defendant moved the boat to a work slip where it was discovered sunk one week later. Defendant did not prevent plaintiff from using or removing his boat, nor did defendant use or make any claim of ownership to the boat. There was no evidence of the cause of the technical failure which caused the boat to sink. Plaintiff brought an action for damages, employing several theories, including conversion and trespass to personal property. The trial court denied a motion for judgment notwithstanding the verdict and entered judgment for plaintiff. Defendant appealed.

The court of appeal reversed. The court first dealt with plaintiff's allegations sounding in landlord and tenant relations, but then discussed conversion and trespass to personal property. Conversion is any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with the owner's rights. To establish a conversion it is incumbent on plaintiff to show an intention or purpose to convert the goods and to exercise ownership over them, or to prevent the owner from taking possession of the property. The act of removing personal property from one place to another, without an assertion of ownership or preventing the owner from exercising all rights of ownership in that personal property, is not enough to constitute a conversion (*267 Cal. App. 2d 84, 89)* . When the conduct complained of consists of intermeddling with personal property the owner has a cause of action for trespass, and may recover only the actual damages suffered by reason of the impairment of the property or the loss of its use. To recover on the theory of trespass to personal property, there must be substantial evidence that there was intentional interference with the plaintiff's possession, which proximately caused the damage complained of. A defendant cannot be held liable for damages not proximately caused by its intermeddling. An essential element for a plaintiff's cause of action is that there be some reasonable connection between the act and the damages suffered by the plaintiff. The court concluded that defendant's acts did not amount to a conversion or a trespass (*267 Cal. App. 2d 84, 90)* .

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22-225 California Points & Authorities § 225.262

§ 225.262 Opposing Contention That Trespass to Personal Property Occurred--Interference Did Not Cause Actual Injury or Damage to Plaintiff's Personal Property

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT DID NOT COMMIT A TRESPASS TO PLAINTIFF'S PERSONAL PROPERTY BECAUSE DEFENDANT'S ACTIONS DID NOT CAUSE ACTUAL INJURY OR DAMAGE TO PLAINTIFF'S PERSONAL PROPERTY.

A. Actual Damage Required. Some actual injury must have occurred to state an action for trespass to personal property or chattels (*Intel Corp. v. Hamidi (2003) 30 Cal. 4th 1342, 1351, 1 Cal. Rptr. 3d 32, 71 P.3d 296*).

[*Optional*] **B. No Recovery for Mass E-Mails That Do Not Damage or Impair Functioning of Computer System.** The mass sending of e-mails to the employees of a large corporation does not support a cause of action for trespass to personal property if the e-mails neither damage nor impair the functioning of the corporation's computer system (*Intel Corp. v. Hamidi (2003) 30 Cal. 4th 1342, 1347, 1 Cal. Rptr. 3d 32, 71 P.3d 296*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that the defendant committed a trespass to personal property, also known as a trespass to chattels. The ground of opposition set forth is the lack of actual damage or harm to the plaintiff's personal property.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the lack of actual damage. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should include facts showing that the plaintiff suffered no real damage or harm as a result of the defendant's alleged interference.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 225.260*.

[b] Related Pleading and Practice Forms

For discussion and forms relating to conversion of personal property, see California Forms of Pleading and Practice, Ch. 150, *Conversion* (Matthew Bender). For discussion and forms relating to trespass, see California Forms of Pleading and Practice, Ch. 550, *Trespass* (Matthew Bender).

[c] Related Points and Authorities

For forms of memoranda of points and authorities relating to conversion, see Ch. 51, *Conversion* .

[3] Discussion of Authorities

[a] Actual Damage Required

In ***Intel Corp. v. Hamidi*** *(2003) 30 Cal. 4th 1342, 1 Cal. Rptr. 3d 32, 71 P.3d 296* , the plaintiff was a large corporation that maintained an internal computer network that was also connected to the Internet and through which the company's employees received e-mail. Over a two-year period, a former employee sent a series of thousands of e-mails to the plaintiff's employees. These e-mails were critical of the plaintiff's employee policies and directed the recipients to the former employee's web site for more information. The employees received these e-mails through the e-mail addresses and computers provided to them by the plaintiff. The plaintiff attempted to block the e-mail messages, but the former employee was able to evade this block by transmitting from different computers. The former employee did not otherwise breach the plaintiff's internal security to send his e-mails. Each message contained information on how the recipient could be removed from the mailing list, and the former employee complied with all requests for removal. There was no evidence that the plaintiff's computer system was damaged, slowed, or impaired in any way by the messages. Nonetheless, the plaintiff sued the former employee for trespass to personal property, also known as trespass to chattels, seeking injunctive relief to prevent the further dissemination of these e-mails through its e-mail system. The plaintiff argued that the disruption of its business caused by the efforts it took to attempt to block the messages, as well as the loss of productivity caused by the time required of its employees to read and respond to the messages, was sufficient to support a cause of action for trespass. The trial court granted summary judgment for the plaintiff and issued a permanent injunction. The defendant appealed, and the court of appeal affirmed. The defendant again appealed to the California Supreme Court, which reversed.

The California Supreme Court held that although a lesser interference may be actionable as a trespass to chattels than would be actionable as a conversion, some actual injury must have occurred to state a cause of action. There must be some interference with the possessor's use or possession of the personal property or interference with some other legally protected interest in that property (*30 Cal. 4th 1342, 1350-1352)* . The Court then held that the tort did not encompass the mass sending of e-mails to the employees of a large corporation if those e-mails neither damaged nor impaired the functioning of the corporation's computer system. The loss of employee time spent reading and responding to the messages was insufficient to support a cause of action (*30 Cal. 4th 1342, 1352-1353, 1359-1360)* . The Court distinguished cases in which mass e-mails sent in much greater quantities than those sent by the defendant actually adversely affected the performance of a computer system, or threatened to do so, which might support a cause of action for trespass to chattels (*30 Cal. 4th 1342, 1353-1356)* . The Court then declined to create a new extension of the law of trespass to chattels to cover an otherwise harmless electronic communication whose contents are objectionable (*30*

Cal. 4th 1342, 1360) .

[b] No Recovery for Mass E-Mails That Do Not Damage or Impair Functioning of Computer System

Intel Corp. v. Hamidi *(2003) 30 Cal. 4th 1342, 1 Cal. Rptr. 3d 32, 71 P.3d 296* is discussed in *§ 225.262[3][a]*.

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Volume 23 Chapters 230-239 TRUST DEEDS---to---WORKERS' COMPENSATION
CHAPTER 230 TRUST DEEDS AND REAL PROPERTY MORTGAGES

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[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

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[b] Right to Reconveyance After Discharge of Obligation

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Partial Payment

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[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Partial Payment Is Insufficient

[b] Separately Presented Partial Payments Aggregating to Full Payment

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[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Cotenant Unaware of Preexisting Debt

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[c] Unusual Provision

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Dragnet Clause Is Valid

[b] Obligations Are Related

§ 230.15 Dragnet Clause--Dragnet Clause Is Enforceable When Trustor or Successor Unreasonably Claims Unawareness of Clause's Scope or Effect

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Trustor Had Unreasonable Intent

[4] Additional Authorities

[a] Trustor Had Unreasonable Intent

§ 230.16 Due-On-Sale Clause--Transfer of Property Did Not Trigger Due-on-Sale Clause [12 U.S.C. § 1701j-3(d)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[d] Garn Act Exemptions

§ 230.17 Due-On-Sale Clause--Transfer of Property Triggered Due-on-Sale Clause [12 U.S.C. § 1701j-3(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[d] Garn Act Authority to Invoke Due-on-Sale Clause

§ 230.18 Merger of Interests--Trust Deed Was Extinguished by Merger

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Trust Deed Extinguished by Merger

§ 230.19 Merger of Interests--Trust Deed Has Not Been Extinguished by Merger

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] No Merger

§ 230.20 Unintentional Impairment of Security--Beneficiary May Not Foreclose and Must Allow Trustor to Rebuild After Insured Loss

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Beneficiary Must Allow Trustor to Rebuild When Security Would Not Be Impaired

§ 230.21 Unintentional Impairment of Security--Beneficiary May Foreclose Although Security Is Not Impaired [Civ. Code § 2924.7; Fin. Code §§ 882.020 et seq., 2911]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Control of Insurance Proceeds

§ 230.22 Limitation Period--Trust Deed Was Extinguished by Expiration of Limitation Period [Civ. Code §§ 882.020 et seq., 2911]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Application and Effect of Statute

[3] Discussion of Authorities

[a] Mortgage Limitation

[b] Limitation on Foreclosure Action

[4] Additional Authorities

[a] General Limitation

[b] Mortgage Limitation

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§ 230.30 Protections for Military Service Members--Stay of Foreclosure Proceedings and Relief From Installment Contract or Mortgage, Trust, or Other Security in Nature of a Mortgage on Real Property for Purchase of Real Property by Active Service Member [Mil. & Vet. Code §§ 407(a), (b), 408; 50 U.S.C. App. §§ 532, 533]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Application and Effect of State and Federal Statutes

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§ 230.40 Recovery of Deficiency Is Barred by Statute--Deficiency Judgment Is Barred After Nonjudicial Foreclosure Sale [Code Cov. Proc. § 580d]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] When "Sale" Occurs

[b] Statute Bars Recovery From Guarantor After Private Sale

[4] Additional Authorities

[a] Deficiency Is Barred After Nonjudicial Foreclosure Sale

[b] Statute Bars Recovery From Guarantor After Private Sale

§ 230.41 Recovery of Deficiency Is Barred by Statute--Deficiency Judgment on Purchase-Money Trust Deed Is Barred [Code Civ. Proc. § 580b]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Statute Bars Deficiency Judgment for Sold-Out Junior Lienholder

[b] Statute Applies to Residential Construction Loan by Third-Party Lender

[c] Refinancing Is Sale

[d] Loan Need Not Be Exclusively for Purchase Money

[4] Additional Authorities

[a] Deficiency Judgment on Purchase-Money Trust Deed Is Barred

[b] Statute Bars Deficiency Judgment for Sold-Out Junior Lienholder

§ 230.42 Recovery of Deficiency by Sold-Out Junior Lienholder After Purchase at Senior Lienholder's Private Foreclosure Sale--Sold-Out Junior Lienholder's Recovery Is Limited by Statute

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Limitation on Deficiency Judgment for Sold-Out Junior Lienholder

[b] Purchasing Junior Lienholder's Allowable Recovery

[4] Additional Authorities

[a] Limitation on Deficiency Judgment for Sold-Out Junior Lienholder

[b] Purchasing Junior Lienholder's Allowable Recovery

§ 230.43 Recovery of Deficiency by Sold-Out Junior Lienholder After Purchase at Senior Lienholder's Private Foreclosure Sale--Sold-Out Junior Lienholder Cannot Recover Because Action Was Not Commenced Within Three Months [Code Civ. Proc. § 580a]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Three-Month Limitation Period Applies to Junior Lienholder

§§ 230.44-230.49 [Reserved]

§ 230.50 Deficiency Judgment Is Not Barred or Limited by Statute--Trust Deed Is Variant Transaction That Is Not Subject to Statutory Bar [Code Civ. Proc. § 580b]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Antideficiency Statute Does Not Automatically Apply to Variant Transaction

[b] Recognized Purposes of Statute

[c] Antideficiency Statute Does Not Apply When Purchase-Money Trust Deed Is Subordinated to Commercial Construction Loan

[d] Antideficiency Statute Does Not Apply When Purchase-Money Trust Deed Covers Property Other Than That Being Purchased

[e] Antideficiency Statute Does Not Apply When Purchaser Cashes Out Equity

[4] Additional Authorities

[a] Antideficiency Statute Does Not Apply When Purchase-Money Trust Deed Is Subordinated to Commercial Construction Loan

[b] Antideficiency Statute Does Not Apply When Purchase-Money Trust Deed Covers Property Other Than That Being Purchased

§ 230.51 Deficiency Judgment Is Not Barred or Limited by Statute--Deficiency Judgment for Sold-Out or Defrauded Junior Lienholder Is Not Barred [Code Civ. Proc. §§ 580a, 580d, 726]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Statutory Limitations Do Not Apply to Sold-Out Junior Lienholder

[b] Fraud in Inducement

[c] Statutory Bar Against Recovery Does Not Apply to Sold-Out Junior Lienholder

[4] Additional Authorities

[a] Statutory Limitations Do Not Apply to Sold-Out Junior Lienholder

§ 230.52 Deficiency Judgment Is Not Barred or Limited by Statute--Three-Month Limitation Period in Code Civ. Proc. § 726 Does Not Apply to Mixed Collateral Creditor

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Three-Month Limitation Period Does Not Apply in Mixed Collateral Situation

§ 230.53 Trustor Waived Statutory Limitation

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Deficiency Limitation of Statute May Subsequently Be Waived

§ 230.54 Trustor Cannot Waive Statutory Bar

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Bar of Antideficiency Statute Cannot Be Waived

§ 230.55 Antideficiency Provisions Do Not Restrict Creditor's Ability to Exhaust Multiple Items of Collateral in Series of Nonjudicial Foreclosure Proceedings

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Antideficiency Provisions Do Not Apply When Creditor Exercises Right to Exhaust Multiple Items of Collateral

§§ 230.56-230.69 [Reserved]

§ 230.70 Private Foreclosure Sale Should Be Enjoined Due to Availability of Temporary and Preliminary Injunctive Relief [Code Civ. Proc. § 526(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Preliminary Injunction

[b] Judgment Ineffective

[4] Additional Authorities

[a] Preliminary Injunction

[b] Judgment Ineffective

§ 230.71 Private Foreclosure Sale Should Be Set Aside--Waiver of Right to Declare Default

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Acceptance of Late Payments Without Objection

§ 230.72 Private Foreclosure Sale Should Be Set Aside--Absence of Default

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] No Default

§ 230.73 Private Foreclosure Sale Should Be Set Aside--Gross Inadequacy of Price

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Inadequate Price Coupled With Irregularity

§ 230.74 Private Foreclosure Sale Should Be Set Aside--Violation of One-Form-of-Action Rule

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Statute May Be Asserted in Action to Set Aside Trustee's Sale

§ 230.75 Private Foreclosure Sale Should Be Set Aside--Failure to Acknowledge Junior Lienholder's Attempted Bid

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Trustee's Duty Extends to Bidders

[b] Failure to Acknowledge Attempted Bid

[4] Additional Authorities

[a] Trustee's Duty Extends to Bidders

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§ 230.90 Private Foreclosure Should Not Be Enjoined or Set Aside--Notice of Sale Was properly Given--Three-Month Reinstatement Period [Civ. Code § 2924(a)(2)] Was Not Stayed or Tolled

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Reinstatement Period Is Not Stayed or Tolled Under Code of Civil Procedure

[b] Reinstatement Period Is Not Stayed or Tolled Under Bankruptcy Code

§ 230.91 Private Foreclosure Should Not Be Enjoined or Set Aside--Trustee has No Independent Duty to Give Actual Notice After Satisfying Statutory Requirements

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Trustee's Statutory Duty to Provide Notice of Default and Sale Is Exclusive

[4] Additional Authorities

[a] Trustee's Statutory Duty to Provide Notice of Default and Sale Is Exclusive

§ 230.92 Private Foreclosure Should Not Be Enjoined or Set Aside--Trustee May Be Purchaser

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Trustee May Be Purchaser

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Sale May Not Be Set Aside as to Bona Fide Purchaser

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§ 230.100 One-Form-of-Action Rule [Code Civ. Proc. § 726(a)] Does Not Bar Recovery or Foreclosure

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[2] Comments

[a] Use of Form

[b] Argument

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[3] Discussion of Authorities

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[2] Comments

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[c] Related Memoranda

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[b] Antideficiency Provisions Do Not Prohibit Recovery

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[a] Antideficiency Provisions Do Not Prohibit Recovery

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[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Action Is Permitted on Underlying Obligation

§ 230.103 Full-Credit Bid Does Not Bar Action for Fraud or Negligence Against Nonborrower Third Parties

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Full-Credit Bid Does Not Bar Fraud Action Against Nonborrower Third Parties

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[4] Additional Authorities

[a] Full Credit Bid Does Not Bar Fraud Action Against Nonborrower Third Parties

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Beneficiary's Options Regarding Setoff

[3] Discussion of Authorities

[a] Waiver of Security

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§ 230.111 One-Form-of-Action Rule Bars Foreclosure [Code Civ. Proc. § 726(a)]--Prior Judicial Foreclosure of

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[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Judicial Foreclosure Against Personal Property or Fixtures Securing Debt

§ 230.112 Co-Obligor Who Is Not Also Trustor May Assert One-Form-of-Action Rule [Code Civ. Proc. § 726(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

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§§ 230.113-230.119 [Reserved]

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[2] Comments

[a] Use of Form

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§ 230.130 Damages Are Not Recoverable for Waste Impairing Security Interest--No Impairment Shown

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Measure of Damages for Waste Impairing Security Interest

[b] Beneficiary's Purchase at Foreclosure Sale on Full-Credit Bid Extinguishes Claim for Waste

[4] Additional Authorities

[a] Beneficiary's Purchase at Foreclosure Sale on Full-Credit Bid Extinguishes Claim for Waste

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Volume 23 Chapters 230-239 TRUST DEEDS---to---WORKERS' COMPENSATION
CHAPTER 230 TRUST DEEDS AND REAL PROPERTY MORTGAGES
PART I. INTRODUCTION

23-230 California Points & Authorities § 230.01

§ 230.01 Scope of Chapter

This chapter contains forms of points and authorities relating to proceedings based on the provisions of a deed of trust or real property mortgage [*see § 230.03*].

Part II, Subpart A, relating to the availability of foreclosure in general, includes forms supporting and opposing contentions that the remedy of foreclosure is available (§ 230.10 et seq.).

Part II, Subpart B, relating to the effect of antideficiency legislation, contains forms supporting and opposing contentions that a deficiency judgment is barred or limited by antideficiency legislation (§ 230.40 et seq.).

Part II, Subpart C, relating to actions to enjoin or set aside private foreclosure sales, contains forms supporting and opposing contentions that a private sale under a power of sale may be enjoined or set aside (§ 230.70 et seq.).

Part II, Subpart D, relating to the one-form-of-action rule of *Code Civ. Proc. § 726*, contains forms supporting and opposing contentions that the one-form-of-action rule bars foreclosure or recovery of a personal judgment (§ 230.100 et seq.).

Part II, Subpart E, relating to tortious impairment of security, contains forms supporting and opposing the contention that damages may be recovered for waste of the property subject to a deed of trust or mortgage (§ 230.120 et seq.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresDeficiency JudgmentsReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureReal Property LawTortsWasteGeneral Overview

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Volume 23 Chapters 230-239 TRUST DEEDS---to---WORKERS' COMPENSATION
CHAPTER 230 TRUST DEEDS AND REAL PROPERTY MORTGAGES
PART I. INTRODUCTION

23-230 California Points & Authorities § 230.02

§ 230.02 Governing Statutes

Real property security transactions are extensively regulated by statute. Chiefly, the governing provisions are:

- *Civ. Code § 2872 et seq.*, relating to liens in general.
- *Civ. Code § 2920 et seq.*, relating specifically to deeds of trust and mortgages and private sales.
- *Code Civ. Proc. §§ 580a et seq.* and *725a et seq.*, relating to foreclosure actions and deficiency judgments.

Institutional lenders' actions for recovery of damages arising from fraudulently induced loans are governed by *Fin. Code §§ 551*, *7459*, and *15102* (banks, savings and loan associations, and credit unions). Their rights to foreclose for defaults that do not impair the security are governed by *Fin. Code §§ 1227.2*, *1227.3*, *7461*, and *7462*.

Miscellaneous provisions include *Civ. Code § 882.020 et seq.*, relating to theexpiration of ancient deeds of trust or mortgages; *Civ. Code § 1169 et seq.*, relating to the recordation of security instruments and other interests in real property; *Code Civ. Proc. § 564(b)(2), (4), (11)*, and *(12)*, relating to the appointment of a receiver in foreclosure or assignment of rents proceedings; and the Garn Act, *12 U.S.C. § 1701j-3*, relating to the enforcement of due-on-sale clauses.

In addition, in 2002 the California Legislature enacted special protections for officers and enlisted members of the National Guard called or ordered into active state or federal service and reservists of the United States Military Reserve who have been called to full-time active service or duty [*see* 2002 Stats., ch. 60, § 1; *Mil. & Vet. Code § 400 et seq.*]. This legislation establishes special protection from foreclosure and other civil liabilities for active service members and reservists who are found by a court to need assistance because of the demands of their military service [*Mil. & Vet. Code § 408*], and it includes many provisions that are similar to those included in the federal Servicemembers Civil Relief Act [*50 U.S.C. App. § 501 et seq.*]. For a points and authorities and additional discussion, see *§ 230.30*. For a general discussion of protection from foreclosure and other similar types of relief for active service members, and additional forms, see California Forms of Pleading and Practice, Ch. 555, *Trust Deeds and Real Property Mortgages*

(Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesReceivershipsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresDeficiency JudgmentsReal Property LawFinancingMortgages & Other Security InstrumentsTransfersDue-on-Sale Clauses

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Volume 23 Chapters 230-239 TRUST DEEDS---to---WORKERS' COMPENSATION
CHAPTER 230 TRUST DEEDS AND REAL PROPERTY MORTGAGES
PART I. INTRODUCTION

23-230 California Points & Authorities § 230.03

§ 230.03 Deeds of Trust and Mortgages

There is a formal distinction between deeds of trust and mortgages. A deed of trust is a transfer of legal title to real property by an obligor (or a potential obligor, such as a guarantor), who is the owner, to a trustee for the purpose of securing the obligation, which is usually a debt. The beneficiary of the trust is the obligee (or potential obligee), usually a creditor [*see, e.g., Huckell v. Matranga (1979) 99 Cal. App. 3d 471, 481, 160 Cal. Rptr. 177* ; *Hohn v. Riverside County Flood Control etc. Dist. (1964) 228 Cal. App. 2d 605, 611, 39 Cal. Rptr. 647]* .

A mortgage is a contract by which the owner hypothecates real property as security for the performance of an act, which is usually payment of a debt. The mortgagor is the property owner; the mortgagee is the person to whom the hypothecation is made, who is usually a creditor [*see Civ. Code § 2920*; *Bechtel v. Wier (1907) 152 Cal. 443, 444, 93 P. 75]* . The mortgage imposes a lien on the property but does not effect passage of title or any other incident of ownership [*see Civ. Code §§ 2877, 2888, 2923*].

Despite the formal distinction, a deed of trust is generally considered to be practically and substantially the same as a mortgage with a power of sale, because the transfer of title to a trustee carries no incident of ownership other than the power to sell the property in the event of a default [*see Bank of Italy etc. Assn. v. Bentley (1933) 217 Cal. 644, 655-656, 20 P.2d 940]* . Because of this functional similarity, a deed of trust is often treated as a mortgage lien, and the same statutes and rules of law that are applied to mortgages are generally applied also to deeds of trust [*Domarad v. Fisher & Burke, Inc. (1969) 270 Cal. App. 2d 543, 553, 76 Cal. Rptr. 529]* .

Because of the prevalent use of deeds of trust in California and in view of their functional similarity to mortgages, this chapter uses terms applicable to deeds of trust in reference to both kinds of instruments. Thus, "deed of trust" or "trust deed"--the latter term being preferred generally--includes a mortgage, "trustor" includes a mortgagor, and "beneficiary" includes a mortgagee.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsGeneral OverviewReal Property LawFinancingMortgages & Other Security

InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale Foreclosure

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23-230 California Points & Authorities § 230.04

§ 230.04 How to Use the Forms in This Chapter

[1] Page Limits on Memoranda

One of the more significant drafting requirements to keep in mind is page limits: supporting memoranda must not exceed 15 pages (or 20 pages for a summary judgment motion or summary adjudication motion). A reply or closing memorandum may not exceed 10 pages. Exhibits, declarations, attachments, a table of contents, a table of authorities, and the proof of service are not included in the page limitation [*Cal. Rules of Ct., Rule 3.1113(d)*]. A party must apply to the court for permission to file a longer memorandum [*see Cal. Rules of Ct., Rule 3.1113(e)*]. These and other drafting requirements are discussed in detail in Ch. 1, *Writing Legal Memoranda and Briefs* .

[2] Using Forms to Build Draft Memorandum

The forms included in this chapter are designed to be combined with other points and authorities to form a complete memorandum. For a detailed discussion of how to select and use the forms in this publication to build a draft memorandum and complete the draft, with detailed discussion of all drafting requirements and strategic and stylistic considerations, see Ch. 1, *Writing Legal Memoranda and Briefs* . For a skeletal form of memorandum for use in creating a properly formatted outline in which to compile relevant forms from this publication, see also Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting Memoranda

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23-230 California Points & Authorities § 230.05

§ 230.05 Related Discussion and Forms

[1] Related Pleading and Practice Forms

For discussion and litigation forms relating to proceedings based on the provisions of a trust deed or real property mortgage, including foreclosure proceedings, proceedings to collect rents and profits, proceedings to establish equitable mortgages, and proceedings for damages or injunctive relief based on tortious impairment of the security, see California Forms of Pleading and Practice, Ch. 555, *Trust Deeds and Real Property Mortgages* (Matthew Bender).

For discussion and litigation forms relating to enforcement of a judgment of judicial foreclosure by writ of sale and relating to redemption of property after such a sale, see *California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments, § 254.130 et seq.* and *§ 254.150* et seq. (Matthew Bender).

[2] Related Points and Authorities

- For payment or enforcement of promissory notes, defaults under promissory notes, and defenses to actions for payment of promissory notes, see Ch. 166, *Negotiable Instruments* .

- For general contract principles, see Ch. 50, *Contracts* .

- For temporary restraining orders and preliminary and permanent injunctions, see Ch. 116, *Injunctions* .

- For the appointment of a receiver to take possession of or manage real property subject to a trust deed or mortgage, see Ch. 200, *Receivers* .

[3] Other Related Publications

For additional discussion, see California Real Estate Law and Practice, Ch. 111, *Deeds of Trust and Mortgages* (Matthew Bender), along with the following chapters in that set:

- Ch. 120, *Representing a Client After Default*.
- Ch. 121, *Priorities of Liens*.
- Ch. 122, *Antideficiency Legislation*.
- Ch. 123, *Nonjudicial Foreclosure*.
- Ch. 124, *Judicial Foreclosure*.

For additional discussion and transactional forms, see the following chapters in California Legal Forms--Transaction Guide (Matthew Bender):

- Ch. 25A, *Security Instruments for Real Estate Financing*.
- Ch. 25B, *Subordination, Assumption, and Assignment*.
- Ch. 25C, *Release and Reconveyance*.
- Ch. 25D, *Foreclosure*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesReceivershipsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresDeficiency JudgmentsReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresJudicial ForeclosuresReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale Foreclosure

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23-230 California Points & Authorities §§ 230.06-230.09

[Reserved]

§§ 230.06[Reserved]

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23-230 California Points & Authorities § 230.10

§ 230.10 Effect of Payment or Other Discharge of Secured Obligation--Right to Foreclose No Longer Exists When Trust Deed Has Been Extinguished by Discharge of Obligation

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE BENEFICIARY IS NOT ENTITLED TO FORECLOSE UNDER THE TRUST DEED BECAUSE THE TRUST DEED HAS BEEN EXTINGUISHED BY DISCHARGE OF THE OBLIGATION.

A. Trust Deed Extinguished by Discharge of Secured Obligation. Full payment of a debt secured by a trust deed discharges both the obligation and the security. Tender of the full amount due on a loan secured by a trust deed, made any time before foreclosure, extinguishes the lien on the property and halts foreclosure proceedings (*Winnett v. Roberts (1986) 179 Cal. App. 3d 909, 922, 225 Cal. Rptr. 82*).

[*Optional*] **B. Right to Reconveyance After Discharge of Obligation.** When an obligation secured by a trust deed has been discharged, the trustor is entitled to a full reconveyance of the property (*Winnett v. Roberts (1986) 179 Cal. App. 3d 909, 922, 225 Cal. Rptr. 82*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that a beneficiary is not entitled to foreclose under a trust deed. The ground for the contention is that the trustor paid or tendered the full amount of the underlying debt (or otherwise discharged the obligation) before foreclosure, and the trust deed has been extinguished by that discharge of the obligation.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel

wishes to raise the substantive issue. For example, in a foreclosure action, this contention might be raised in a motion for summary judgment by the trustor [*see, e.g.,* *Winnett v. Roberts (1986) 179 Cal. App. 3d 909, 914-915, 922, 225 Cal. Rptr. 82]* . This form also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should show that the trustor, before foreclosure, performed or made a tender of performance of the secured obligation.

[3] Discussion of Authorities

[a] Trust Deed Extinguished by Discharge of Secured Obligation

In ***Winnett v. Roberts*** *(1986) 179 Cal. App. 3d 909, 225 Cal. Rptr. 82* , a trust deed secured a promissory note for $7,000 plus interest at 40 percent. The trustors defaulted after the maturity date. The beneficiaries started private foreclosure proceedings. After the reinstatement period, but before the trustee's sale, the trustors tendered the full amount of the principal plus interest at the legal rate, but the defendants refused the tender. The trustors sued to enjoin the trustee's sale, alleging that the loan was usurious. The trial court granted a temporary restraining order conditioned on the trustors' paying the principal balance. They paid, but the trial court later ruled that the loan was not usurious and denied preliminary injunctive relief. The beneficiaries proceeded with the sale, and the trustors amended their complaint to have the sale set aside and recover damages. On the beneficiaries' motion, the trial court granted summary judgment against the trustors, who appealed.

The court of appeal reversed and remanded with directions to set aside the sale, cancel the trustee's deed and the trust deed, and quiet the trustors' title as against the beneficiaries (*179 Cal. App. 3d 909, 922)* . Under *Cal. Const., art. XV, § 1*, regarding usurious loans, the loan was usurious (*179 Cal. App. 3d 909, 916-921)* . The beneficiaries were consequently entitled to only repayment of the principal sum, and the trustors had made a valid tender exceeding that sum (*179 Cal. App. 3d 909, 921)* . The court, in reliance on *Civ. Code § 2903 et seq.*, concerning redemption, stated the rule that before foreclosure, a tender of the full amount properly due on a loan secured by a trust deed extinguishes the lien on the property, halting any foreclosure proceedings. The court also stated the rule, derived from *Civ. Code §§ 871* and *2279*, that full payment of a debt secured by a trust deed discharges both the obligation and the security, because the trust deed exists only as long as there is a valid trust purpose. Applying these rules, the court held that the trust deed was not in effect at the time of the sale; therefore, the trustors were entitled to have the sale set aside and obtain reconveyance of the property (*179 Cal. App. 3d 909, 922)* .

[b] Right to Reconveyance After Discharge of Obligation

The facts and procedural background of ***Winnett v. Roberts*** *(1986) 179 Cal. App. 3d 909, 225 Cal. Rptr. 82* , are discussed in [a], *above*. In that case the court of appeal, citing former Civ. Code § 2941(b) and *Huckell v. Matranga (1979) 99 Cal. App. 3d 471, 476, 160 Cal. Rptr. 177* , stated that when an obligation secured by a trust deed has been discharged, the trustor is entitled to a full reconveyance of the property. The court held that, in the case at bench, the property had been wrongfully sold at a private foreclosure sale after discharge of the secured obligation, and the trustors not only were entitled to damages under former Civ. Code § 2941(d) (*now see* revised *Civ. Code § 2941(d)*) but also were entitled to have the sale set aside and have the property reconveyed to them (*179 Cal. App. 3d 909, 922)* .

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23-230 California Points & Authorities § 230.11

§ 230.11 Effect of Payment or Other Discharge of Secured Obligation--Right to Foreclose Not Waived by Acceptance of Partial or Late Payment

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE BENEFICIARY DID NOT WAIVE HIS/HER RIGHT TO _____ [DECLARE A DEFAULT *or* PROCEED WITH THE FORECLOSURE SALE] BY ACCEPTING A _____ [PARTIAL *or* LATE] PAYMENT.

[*EITHER*]

A. Partial Payment. A beneficiary's mere acceptance of a partial payment does not discharge the balance due or modify the terms so as to effect a waiver of the right to declare a default, without some agreement or expression of a contrary intent (*R.G. Hamilton Corp., Ltd. v. Corum (1933) 218 Cal. 92, 97, 21 P.2d 413* ; *Hunt v. Smyth (1972) 25 Cal. App. 3d 807, 819-822, 101 Cal. Rptr. 4*).

[*OR*]

A. Late Payment. A beneficiary's acceptance of a late payment does not effect a waiver of the right to declare a default in the event of subsequent late payments (*Hunt v. Smyth (1972) 25 Cal. App. 3d 807, 822-823* ; *Bledsoe v. Pacific Ready Cut Homes, Inc. (1928) 92 Cal. App. 641, 645, 268 P. 697*).

[*CONTINUE*]

[*Optional*] **B. Acceptance of Partial Payment After Notice of Default.** Even after recordation of a notice of default and election to sell, a beneficiary may accept partial payment of an amount due, without waiving the default on the balance and without affecting the beneficiary's rights under an acceleration clause, at least in the absence of an express agreement to the contrary. No implied waiver results from the mere acceptance of a partial payment (*Birkhofer v. Krumm (1938) 27 Cal. App. 2d 513, 524, 81 P.2d 609* ; *Sellman v. Crosby (1937) 20 Cal. App. 2d 562, 564-565, 67 P.2d 706*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the right to declare a default, or to proceed with a foreclosure sale, still exists and has not been waived by acceptance of a late or partial payment. The opposing contention that acceptance of late payments has amounted to waiver of the right to declare default is *set forth in § 230.71[1]*.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive contention. For example, the beneficiary could use this contention in support of a motion for summary judgment in the trustor's suit to restrain or set aside a foreclosure sale [*see, e.g.,* *Hunt v. Smyth (1972) 25 Cal. App. 3d 807, 828-830, 101 Cal. Rptr. 4]* .

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should describe the trustor's defaults, noting the lack of any request or agreement to modify the payment terms.

[3] Discussion of Authorities

[a] Partial Payment

R.G. Hamilton Corp., Ltd. v. Corum *(1933) 218 Cal. 92, 21 P.2d 413* , was an action by a trustee for a declaration of the rights and duties of the parties under a trust deed securing a $170,000 loan. The trustor had never made a full payment under the terms of the note but had made irregular payments. The judgment for the trustee declared that giving a notice of default and electing to sell the property were proper. The trustor appealed.

The Supreme Court affirmed. The trustor, although making partial payments, was in default for more than 12 months. While it was true that the trustee could have dealt with the trustor in such a way as to estop the trustee from exercising the option to accelerate, the facts of this case indicated only an exercise of leniency and a forbearance to elect within a reasonable time (*218 Cal. 92, 97)* .

Hunt v. Smyth *(1972) 25 Cal. App. 3d 807, 101 Cal. Rptr. 4* , was an action by trustors to enjoin a private foreclosure sale on the ground that acceptance of late payments constituted a novation in the terms of the underlying note and that therefore there was no default. The trustors had missed 16 of 84 payments through December 1968, and those that were made were frequently late. The terms of the note called for payments to be increased from $250 a month to $350 a month as of January 1, 1968, but the trustors never made payments in excess of $250 a month. The beneficiary often called the trustors to request that payments be brought up to date. On March 19, 1969, the beneficiary wrote the trustors that he would no longer accept late partial payments and demanded that arrearages be paid by April 1. The trustors sent a single check for $250 on April 10. On April 11, the beneficiary recorded a notice of default and election to sell. On April 12 he returned the last check, and he returned two other checks that were tendered before commencement of the action. Judgment was for the beneficiary, but the sale was enjoined pending appeal.

The court of appeal affirmed, but allowed the trustors 13 days (the action was commenced 13 days before the expiration of the reinstatement period) to reinstate to loan. The burden of proving any novation was on the trustors (*25 Cal. App. 3d 807, 818)* . In the absence of an agreement to the contrary, mere acceptance of partial payments of what is due on an obligation does not discharge the balance or modify the terms of its payment. There must be some consideration flowing from the obligor before modification or novation can be found (*25 Cal. App. 3d 807, 819)* . Mere acceptance of the $250 in the absence of any agreement or expression of intent did not forgive the delinquency (*25 Cal. App. 3d 807, 820)* .

[b] Late Payment

The facts and procedural background of ***Hunt v. Smyth*** *(1972) 25 Cal. App. 3d 807, 101 Cal. Rptr. 4* , are discussed in [a], *above*. In regard to the late payments, the court, comparing *Bledsoe v. Pacific Ready Cut Homes, Inc. (1928) 92 Cal. App. 641, 268 P. 697* (discussed *below*), said that it is established that when a creditor has accepted late payments with notice, express or implied, of default, the provisions requiring prompt payment can be reinstated only by giving the debtor notice to that effect, and the letter of March 19 constituted an adequate notice (*25 Cal. App. 3d 807, 822-823)* .

Bledsoe v. Pacific Ready Cut Homes, Inc. *(1928) 92 Cal. App. 641, 268 P. 697* , was an action to set aside a trustee's sale. The note and trust deed in question called for monthly payments of $69 with balloon payments of $500 due on November 1, 1924, and every six months thereafter. The monthly payments were made, but the first balloon payment was never made. Eight notices demanding payment were sent by the trustee up to February 21, 1925. On March 14, 1925, default was declared. Judgment was for the trustor, and the trustee appealed.

The court of appeal reversed. The trustor contended that the $500 balloon payment had been waived. The court first stated that there was no novation in the absence of a writing and supporting consideration (*92 Cal. App. 641, 644-645)* . In regard to the claim of waiver, the court agreed that the trustee was first bound to make a formal demand and to allow a reasonable period for compliance with the demand before declaring a default. There was no evidence of waiver, numerous demands were made, and a reasonable period for compliance wasallowed before the default was declared (*92 Cal. App. 641, 645)* .

[c] Acceptance of Partial Payment After Notice of Default

Birkhofer v. Krumm *(1938) 27 Cal. App. 2d 513, 81 P.2d 609* , was an action for a deficiency judgment after a nonjudicial foreclosure. The antideficiency provisions did not apply because the transaction in question predated their enactment (*27 Cal. App. 2d 513, 524-541)* , so judgment was entered for the beneficiary. The trustor appealed.

The court of appeal affirmed. The trustor contended that the sale was in error because the beneficiary had waived the default by accepting interest payments after recordation of the notice of default and election to sell. The court disagreed, however, saying that acceptance of partial payment has been repeatedly held not to be a waiver of the breach described in the notice (*27 Cal. App. 2d 513, 524)* .

Sellman v. Crosby *(1937) 20 Cal. App. 2d 562, 67 P.2d 706* , was an action to set aside a trustee's sale and cancel a trustee's deed. The underlying note called for payments of $40 a month. The trustors failed to make 11 payments up to January 1934. There were discussions between the parties concerning the delinquencies, and the trustors assured the beneficiary that they were expecting to win a lawsuit and would pay the total amount due out of the award. Although the trustors did receive some of the money they had hoped for, they did not apply it to the indebtedness owed to the beneficiary. Between January 1934 and March 1935 one payment a month was made. Each was applied to the installment longest past due. Notice of default was recorded on April 20, 1935. Thereafter, the trustors made a $40 payment in April and one each month until August, when the trustee's sale was held. Those payments were credited to the installments longest past due. Judgment was for the beneficiary, and the trustors appealed.

The court of appeal affirmed. There had been no waiver of the right to accelerate (*20 Cal. App. 2d 562, 564)* . The trustors contended that acceptance of installments after the election to declare a default constituted waiver of default and of all rights under the acceleration clause. The court disagreed, stating that a beneficiary may accept partial payments on the amount due without waiving the default in regard to the balance and without affecting the beneficiary's rights under the acceleration clause, at least in the absence of an express agreement to the contrary. No implied waiver results from the mere acceptance of partial payments (*20 Cal. App. 2d 562, 564-565)* .

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23-230 California Points & Authorities § 230.12

§ 230.12 Effect of Payment or Other Discharge of Secured Obligation--Right to Foreclose Not Affected by Tender of Partial Payments [Civ. Code § 1468]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE BENEFICIARY IS ENTITLED TO FORECLOSE BECAUSE THE TRUSTOR'S SUBMISSION OF A PARTIAL PAYMENT DID NOT CONSTITUTE A TENDER OF THE AMOUNTS DUE.

A. Partial Payment Is Insufficient. An offer of partial performance is of no effect (*Civ. Code § 1486*; *Gaffney v. Downey Savings and Loan Assn. (1988) 200 Cal. App. 3d 1154, 1165, 246 Cal. Rptr. 421*).

[*Optional*] **B. Separately Presented Partial Payments Aggregating to Full Payment.** Submission of a number of partial payments that equal, in the aggregate, the full amount due does not constitute valid tender of the amount due when the borrower has made no attempt to notify the lender that payments would be submitted in that manner (*Gaffney v. Downey Savings and Loan Assn. (1988) 200 Cal. App. 3d 1154, 1165-1166, 246 Cal. Rptr. 421*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the right of foreclosure exists because tender of a partial payment does not cure a default. This is true even if separately submitted partial payments aggregate to a full payment, if the borrower did not inform the lender that the partial payments should be combined.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive contention. For instance, a beneficiary could use this contention to oppose a trustor's request for an injunction prohibiting the foreclosure sale. This form also may be adapted for use in a trial or appellate

brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus counsel should specify the amount of the default at the time the partial payment was tendered, attaching copies of any correspondence or notices from the lender to the beneficiary that set forth the full amount in default.

[3] Discussion of Authorities

[a] Partial Payment Is Insufficient

The trustors in ***Gaffney v. Downey Savings and Loan Assn.*** *(1988) 200 Cal. App. 3d 1154, 246 Cal. Rptr. 421* , fell behind in their installment payments and applied to another lender for another loan, to be secured by a second trust deed. They intended to use the proceeds of the second loan to pay the arrearages on the first loan. After the trustors had missed the July and August payments, the beneficiary wrote to them stating that failure to bring their loan current by September 8 would result in acceleration of all sums secured by the trust deed and commencement of foreclosure proceedings. In mid-September, the title company handling the escrow for the second loan forwarded the beneficiary a check for the July and August payments, including late charges. At the same time, the trustors forwarded a check for the September payment. Both arrived on September 16, but they were in separate envelopes and neither contained any notification that it should be combined with the other to make a complete payment. Because the beneficiary received between 5,000 and 7,000 loan payments on a given day, the two checks were not connected, and they were returned separately, each with a notice that the amount was insufficient and foreclosure was imminent, along with the name of the officer to contact for the amount due. The trustors commenced an action to extinguish their debt and the lien of the trust deed. The beneficiary commenced foreclosure after the suit was filed. The holder of the second trust deed cured the default. The trial court gave judgment for the trustors, including damages for emotional distress and punitive damages based on the conclusion that the beneficiary had breached its duty of good faith and fair dealing by filing the notice of default. The beneficiary appealed.

The court of appeal reversed. The court cited *Civ. Code § 1486* for the proposition that an offer of partial performance is of no effect. Nothing short of the full amount due is sufficient to constitute valid tender. The tenderer must do everything that is necessary on his or her part to complete the transaction, while making known his or her purpose without ambiguity, and the act of tender must be such that it needs only acceptance by the beneficiary. The court of appeal referred to the trial court's findings that the two checks constituted a tender of the full and correct amount due, the payment was rejected due to a defect in the beneficiary's payment processing procedures, and that the beneficiary failed to exercise due care and skill by rejecting the payments. The court of appeal ruled that these findings would have required the beneficiary to coordinate all of the thousands of separate payments it received each day to discover whether two separate part payments had been submitted that together equaled the amount due on a particular loan. The imposition of such an unreasonable burden was legally unwarranted. It was the trustors' responsibility to make an unambiguous tender of the entire amount due or else suffer the consequences that the tender was of no effect (*200 Cal. App. 3d 1154, 1165*). The trustors' submission of two partial payments, without any attempt to notify the beneficiary that payments would be submitted in that manner, did not constitute a tender of the amounts due (*200 Cal. App. 3d 1154, 1165-1166*).

The trustors also claimed that notices sent with the return checks were insufficient under *Civ. Code § 1501* and *Code Civ. Proc. § 2076*; therefore, the beneficiary had waived objection to partial payments. The court said that those provisions do not apply when the amount of the creditor's demand is known to the debtor and the amount of the tender is insufficient. Under those provisions, a notice of objection is sufficient as long as the debtor knows what is required for full performance (*200 Cal. App. 3d 1154, 1166)* .

Regarding the finding that the beneficiary had breached a duty of good faith and fair dealing, the court said that the standard for tort recovery requires a person to act with reasonable regard for the person's own interests. When the trustors stopped making payments on the loan and did not inform the beneficiary of their intention to bring the loan current with proceeds of the second loan, the beneficiary did not breach the covenant of good faith and fair dealing by recording the notice of default (*200 Cal. App. 3d 1154, 1171-1172)* .

[b] Separately Presented Partial Payments Aggregating to Full Payment

Gaffney v. Downey Savings and Loan Assn. *(1988) 200 Cal. App. 3d 1154, 246 Cal. Rptr. 421* , is discussed in [a], *above*.

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23-230 California Points & Authorities § 230.13

§ 230.13 Dragnet Clause--Dragnet Clause Does Not Secure Loan in Default--Trustor Was Unaware of Co-Owner's Debt, or Debt Was Purchased From Third Party

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE BENEFICIARY IS NOT ENTITLED TO FORECLOSE UNDER THE TRUST DEED BECAUSE THE OBLIGATION IN QUESTION IS NOT SECURED BY THE DRAGNET CLAUSE IN THE TRUST DEED.

[*EITHER*]

A. Cotenant Unaware of Preexisting Debt. A trust deed that is executed by tenants in common and contains a broadly worded dragnet clause should not be enforced to render one cotenant's interest liable for a preexisting unsecured debt of the other cotenant in the absence of evidence affirmatively establishing that the result was intended by the parties and that the cotenant whose interest is soughtto be charged had notice or actual knowledge of the other cotenant's debt (*Gates v. Crocker-Anglo Nat. Bk. (1968) 257 Cal. App. 2d 857, 859-861, 65 Cal. Rptr. 536*).

[*OR*]

A. Purchased Obligation. An ordinary dragnet clause does not secure repayment of notes of a third party that the trustor has endorsed and transferred to the beneficiary (*Moran v. Gardemeyer (1889) 82 Cal. 96, 100-101, 23 P. 6*).

[*CONTINUE*]

[*Optional*] **B. Unusual Provision.** When there is no evidence that the parties intended the trust deed to contain an unusual provision and no evidence that the parties discussed the unusual provision or knew that it was included in the trust deed, an unusual provision in a dragnet clause cannot be enforced (*Lomanto v. Bank of America (1972) 22 Cal. App. 3d 663, 669-670, 99 Cal. Rptr. 442*).

[*Optional*] **C. Failure Under Reliance-on-Security Test.** One test used to determine whether the parties intended a subsequent obligation to be secured by a dragnet clause in an earlier trust deed is whether the second loan was made in reliance on the original security. When a different security is taken for the second loan, an intent cannot be inferred that the parties relied on the security for the first loan (*Wong v. Beneficial Sav. & Loan Assn. (1976) 56 Cal. App. 3d 286, 296-297* ; *Union Bank v. Wendland (1976) 54 Cal. App. 3d 393, 404-405, 126 Cal. Rptr. 549*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of a trustor's contention that a dragnet clause in a trust deed does not cover a debt in question. The ground is either that the debt in question was a debt of a co-owner, of which the trustor was unaware, or that the debt in question was purchased from a third party.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of exempted transfer. For example, this contention might be made in opposition to a beneficiary's motion for summary judgment in an action for a declaration that the beneficiary is entitled to all the proceeds from the sale of the real property claimed to be security. This form also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus counsel should set forth the language of the clause in question and a description of the purchased trust deed or of the indebtedness of which the trustor was unaware.

[c] Opposing Points and Authorities

In an appropriate case, this form of points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 230.14[1]*.

[3] Discussion of Authorities

[a] Cotenant Unaware of Preexisting Debt

Gates v. Crocker-Anglo Nat. Bk. *(1968) 257 Cal. App. 2d 857, 65 Cal. Rptr. 536* , was an action to determine ownership of funds obtained from the sale of real property that was the subject of the trust deed in question. The plaintiffs had been co-owners of the property and sued their former co-owners and the bank that had been beneficiary of a trust deed of which all co-owners were trustors. The trust deed in question was ostensibly to secure a $60,000 note and contained a dragnet clause providing that it secured "the payment of all other moneys and indebtedness now and hereafter due or owing from Trustor or any of them to Beneficiary." Unbeknownst to the plaintiffs, at the time the trust deed was executed, the defendant owners were indebted to the bank on an unsecured personal note for $20,500 that was then in default. The trial court awarded the funds to the bank, and the plaintiffs appealed.

The court of appeal reversed and remanded. There was no evidence that the parties intended the dragnet clause to apply to the defendants' preexisting unsecured debt and no evidence that the parties discussed the clause or knew that it was

included in the trust deed. The trust deed made no reference to the defendants' preexisting obligation to the bank, although both the bank and the other defendants were aware of it. The plaintiffs were unaware of the defendants' preexisting unsecured debt and presumably would not have executed the trust deed had they known that it would render them liable as sureties for the defendants' debt (*257 Cal. App. 2d 857, 861)* .

[b] Purchased Obligation

Moran v. Gardemeyer *(1889) 82 Cal. 96, 23 P. 6* , was a mortgage foreclosure action with two causes of action on two notes. The first note, for $3,000, was secured by a mortgage that also secured "all further advances to the mortgagor by the mortgagee that may exist, arise, or be contracted before satisfaction hereof, such further advances and indebtedness not to exceed the sum of five hundred dollars, exclusive of interest." The second note, for $750, was made by a third party and payable to the mortgagor, who had endorsed it over to the mortgagee.The judgment decreed that the principal sum of $3,500 was owing, along with fixed interest, attorney's fees, and costs, and ordered foreclosure. The mortgagor appealed.

The Supreme Court reversed, saying that by no fair construction of the terms of the mortgage could it be held that the mortgagee could buy up the notes of third parties on which the mortgagor was a simple endorser, and hold them as though they were secured by the mortgage (*82 Cal. 96, 100-101)* .

[c] Unusual Provision

Lomanto v. Bank of America *(1972) 22 Cal. App. 3d 663, 99 Cal. Rptr. 442* , was an action by spouses for a declaration that two notes made by the husband were not secured by a dragnet clause in the trust deed of which both spouses were the trustors. The original note and trust deed for $11,500 were made in 1965. The trust deed provided that it secured payment of "such additional amounts as may hereafter be loaned by Beneficiary or its successors to the Trustor or any of them, or any successor in interest to the Trustor." The husband alone obtained loans of $11,500 and $5,500 respectively in 1967. A judgment of dismissal was entered after the bank's demurrer was sustained without leave to amend. The spouses appealed.

The court of appeal affirmed as to the husband but reversed as to the wife (*22 Cal. App. 3d 663, 670*). For the court's discussion of the affirmance as to the husband, see *§ 230.15[4][a]*. The spouses contended that the bank had a duty to call the dragnet clause to their attention. The court said that if the provision was in the usual form of a trust deed, there was no such duty, taking judicial notice that it was general business practice to have escrow instructions provide for delivery of a trust deed in usual form (*22 Cal. App. 3d 663, 669*). The critical issue was a question of fact, whether the usual form of such a clause would permit one of two trustors to further encumber the interest of the other so that the attention of the trustors need not have been drawn to the clause, whether orally, or by print of a distinctive size, or by placing it in a box with heavy borders. Saying that it would not attempt to declare what would be sufficient to state a cause of action, the court said the wife should be allowed to amend her complaint to show that the trust deed was to have been in usual form and that she was unaware of the presence of the questioned clause in the trust deed (*22 Cal. App. 3d 663, 670)* .

[d] Failure Under Reliance-on-Security Test

Wong v. Beneficial Sav. & Loan Assn. *(1976) 56 Cal. App. 3d 286* , is discussed in *§ 230.15[3][a]*.

Union Bank v. Wendland *(1976) 54 Cal. App. 3d 393, 126 Cal. Rptr. 549* , was an action by the bank on a promissory note, the third of three notes that the defendants had executed for three separate loans. The first note was secured by a first trust deed on the debtors' residence. At the time the third note was executed, a second trust deed was given to secure repayment of the third note. The first loan was used to pay off another loan on the property, with any remainder to be used in the debtors' business. The second loan was used for improvements to the property. The third

loan was used to pay off the second loan, with any remainder to be applied to payments due under the first note. The first trust deed provided that it secured all sums due with interest that may be paid or advanced under its provisions and payment of additional sums and interest under those provisions then or thereafter due or owing from the trustor to the beneficiary. The residence was purchased by the bank at its private foreclosure sale of the first trust deed. Thereafter the bank commenced an action on the third promissory note. The trial court ruled in favor of the bank on the ground that the second trust deed had become valueless after the foreclosure of the first. The debtors appealed.

The court of appeal reversed, finding that the two deeds of trust merged, that the third note was secured by the first trust deed by virtue of the "dragnet" clause, and that therefore the trial court's judgment was barred by *Code Civ. Proc. § 580d* (*54 Cal. App. 3d 393, 405-407)* . The court noted that the "reliance-on-security" test is one of the two tests used to determine whether the parties intended a subsequent obligation to be secured by a dragnet clause in an earlier trust deed. Under this test, inquiry centers on whether the second loan was made in reliance on the original security. When a different security is taken for the second loan, an intent cannot be inferred that the parties relied on the security for the first loan (*54 Cal. App. 3d 393, 404)* . The rationale is that the dragnet clause in the trust deed constitutes a continuing offer by the borrower to secure further loans under the trust deed and that when the lender accepts a different security, it does not accept that offer (*54 Cal. App. 3d 393, 404-405)* . The court of appeal concluded that under the reliance-on-security test, the bank relied on the real estate security in making the third loan. The defendant's offer in the dragnet clause was accepted by the bank when it specifically agreed to take the same security under the second trust deed. Having relied on the same security, the bank had no need for the execution of a second trust deed (*54 Cal. App. 3d 393, 405)* .

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23-230 California Points & Authorities § 230.14

§ 230.14 Dragnet Clause--Dragnet Clause Covers Loan in Default

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

THE LOAN IN DEFAULT IS SECURED UNDER THE TRUST DEED, DESPITE THE FACT THAT IT IS NOT THE PRIMARY LOAN SPECIFICALLY SECURED, BECAUSE THE TRUST DEED CONTAINS A STANDARD CLAUSE THAT HAS THE EFFECT OF MAKING IT SECURITY FOR ALL UNSPECIFIED DEBTS OWED BY THE TRUSTOR TO THE BENEFICIARY, AND BOTH PARTIES INTENDED THE LOAN TO BE SECURED PURSUANT TO THAT CLAUSE.

A. Dragnet Clause Is Valid. In a trust deed, a clause (sometimes referred to as a dragnet clause) intended to make the subject property security for the trustor's past, present, and future obligations to the beneficiary is valid (*Union Bank v. Wendland (1976) 54 Cal. App. 3d 393, 398, 126 Cal. Rptr. 549*).

[*Optional*] **B. Obligations Are Related.** In ascertaining whether the parties intended a subsequent obligation to be secured by a dragnet clause in a trust deed, the court will look for a connection between the obligations. For instance, if the first was a construction loan for improvements on the subject property, and the second was another construction loan for more improvements, it is likely that the two loans were intended to be secured by the one trust deed (*Wong v. Beneficial Sav. & Loan Assn. (1976) 56 Cal. App. 3d 286, 295-297* ; *Union Bank v. Wendland (1976) 54 Cal. App. 3d 393, 404, 126 Cal. Rptr. 549*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that a loan in default is secured under

a trust deed even though it is not the primary loan specifically secured under the trust deed, on the ground that the parties intended the loan to be secured under the trust deed pursuant to a standard dragnet clause.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive contention. For example, a trustor could use this contention defensively in support of a motion for summary judgment in a creditor's suit on the underlying obligation to establish that the obligation was secured by a dragnet clause in a trust deed that was previously foreclosed; thus, the action would be barred by *Code Civ. Proc. § 580d* [*see, e.g., Union Bank v. Wendland (1976) 54 Cal. App. 3d 393, 405-407, 126 Cal. Rptr. 549]* . This form also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus counsel should include a description of the trustor's default in payment of an unspecified debt that is covered by a dragnet clause included in the trust deed.

[c] Opposing Points and Authorities

In an appropriate case, this form of points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 230.13[1]*.

[3] Discussion of Authorities

[a] Dragnet Clause Is Valid

The facts, procedural background, and disposition of ***Union Bank v. Wendland*** *(1976) 54 Cal. App. 3d 393, 126 Cal. Rptr. 549* , are discussed in *§ 230.13[3][d]*. In discussing the dragnet clause, the court said that these clauses have the effect of making a trust deed security for the debtor's past, present, and future obligations to a particular creditor. Because a lien may be created to take immediate effect, as security for the performance of obligations not yet in existence, these clauses are valid (*54 Cal. App. 3d 393, 398-399)* .

[b] Obligations Are Related

Wong v. Beneficial Sav. & Loan Assn. *(1976) 56 Cal. App. 3d 286, 128 Cal. Rptr. 338* , is discussed in *§ 230.15[3][a]*.

The facts, procedural background, and disposition of ***Union Bank v. Wendland*** *(1976) 54 Cal. App. 3d 393, 126 Cal. Rptr. 549* , are discussed in *§ 230.13[5][d]*. No witness testified concerning the intent of the parties in regard to whether the third note was to be secured by the dragnet clause in the first trust deed. The court of appeal discussed two tests for determining whether the parties intended a subsequent obligation to be secured by a dragnet clause in a trust deed. Under the "relationship-of-the-loans" test, the courts will ascertain whether there is any connection between the loans. If there is little or no connection between the loans, or the loans are too different in nature, an inference can be drawn that the parties did not intend the second loan to fall under the security of the trust deed. On the other hand, if the first loan was a construction loan for improvements on the property and the second loan was for more improvements, it is likely that the two loans were intended to be secured by the one trust deed (*54 Cal. App. 3d 393, 404)* . Under the relationship-of-the-loans test, the parties intended the third note to be secured by the trust deed, and the inference to the contrary drawn by the trial court was wholly irreconcilable with the evidence (*54 Cal. App. 3d 393, 405)* .

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23-230 California Points & Authorities § 230.15

§ 230.15 Dragnet Clause--Dragnet Clause Is Enforceable When Trustor or Successor Unreasonably Claims Unawareness of Clause's Scope or Effect

[1] FORM

[*The following may be included in a memorandum of points and authorities or adapted for use in a trial or appellate brief.*]

THE DRAGNET CLAUSE IS ENFORCEABLE NOTWITHSTANDING THECLAIM THAT THE _____ [TRUSTOR *or* TRUSTOR'S SUCCESSOR IN INTEREST] WAS UNAWARE OF THE CLAUSE'S SCOPE OR EFFECT BECAUSE THERE IS NO REASONABLE BASIS FOR THIS CLAIM.

Trustor Had Unreasonable Intent. Implicit in holdings concerning the intention of the parties in regard to whether a loan is secured by a dragnet clause is the requirement that a party's intentions respecting the dragnet clause must not be unreasonable (*Wong v. Beneficial Sav. & Loan Assn. (1976) 56 Cal. App. 3d 286, 295-297, 128 Cal. Rptr. 338*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in reply to the contention that a loan in default is not secured under a trust deed pursuant to a standard dragnet clause, when the trustor or a successor in interest claims to have been unaware of the scope or effect of the clause.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus counsel should explain how the trustor's or successor's claim of being unaware of the scope or effect of the dragnet clause was manifestly unreasonable in the circumstances.

[3] Discussion of Authorities

[a] Trustor Had Unreasonable Intent

Wong v. Beneficial Sav. & Loan Assn. *(1976) 56 Cal. App. 3d 286, 128 Cal. Rptr. 338* , was an action by owners, the successors in interest of the original trustors, of an eight-building apartment complex. They sought damages for the beneficiary's refusal to allow them to redeem four of the eight deeds of trust. When the loan was made, to take advantage of the 80-percent loan limitation of *Fin. Code § 7153*, rather than be restricted to the 70-percent limitation of *Fin. Code § 7152*, eight separate notes and deeds of trust were executed. Each trust deed contained a dragnet clause, the effect of which was to make each trust deed security for all eight loans, and conversely, to secure each loan with all eight trust deeds. After notice of default had been given with respect to all eight trust deeds, the owners sought to reinstate the notes on the four front parcels while refusing to grant easements for access to the rear parcels. The tender was refused on the ground that the eight parcels constituted a single unit. At the trustee's sale, one of the defendants purchased all eight parcels. Judgment was for the defendants, and the plaintiffs appealed.

The court of appeal affirmed. The court discussed *Lomanto v. Bank of America (1972) 22 Cal. App. 3d 663, 99 Cal. Rptr. 442* (discussed in *§ 230.13[3][c]*), saying that implicit in the *Lomanto* holding was the necessity that a party's unawareness of the dragnet clause be reasonable and that in determining the intention of the parties, only their reasonable intention is to be considered (*56 Cal. App. 3d 286, 295)* . The court then discussed both the relationship-of-obligations test [*see § 230.14* [3][b]] and the reliance-on-security test [*see § 230.13* [3][d]] (*56 Cal. App. 3d 286, 295-296)* . Applying those principles, the court noted that although the plaintiffs testified that they were unaware of the dragnet provision, and they had not signed the notes or deeds of trust, the plaintiffs had assumed them and had made a physical inspection of the property. They could not have been misled about the "singleness" of the transaction. Although each note referred to only one trust deed, it was clear that the complex constituted an indivisible whole. Each lot depended for its market value on its access to the common facilities and on the ability of one owner to have control of maintenance, and so forth (*56 Cal. App. 3d 286, 296-297)* . Given these considerations, under both tests, the dragnet clauses were enforceable, and the plaintiffs were not entitled to redeem any parcel without redeeming them all (*56 Cal. App. 3d 286, 297)* .

[4] Additional Authorities

[a] Trustor Had Unreasonable Intent

The facts, procedural background, and disposition of *Lomanto v. Bank of America (1972) 22 Cal. App. 3d 663, 99 Cal. Rptr. 442* , are discussed in *§ 230.13[3][c]*. In sustaining the enforcement of the dragnet clause against the plaintiff husband, who alone had signed the two otherwise unsecured notes, the court of appeal found it unreasonable for him to think that the bank would lend him $11,500 and $5,500 on unsecured notes in 1967 when it had required security for the $11,500 loan made in 1965, which was still unpaid. In regard to the husband, the court said it had no hesitation in holding there was no abuse of discretion in sustaining the demurrer without leave to amend (*22 Cal. App. 3d 663, 668)* .

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23-230 California Points & Authorities § 230.16

§ 230.16 Due-On-Sale Clause--Transfer of Property Did Not Trigger Due-on-Sale Clause [12 U.S.C. § 1701j-3(d)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE BENEFICIARY IS NOT ENTITLED TO FORECLOSE UNDER THE TRUST DEED BASED ON A DEFAULT IN THE PAYMENT OF THE ENTIRE SECURED DEBT, HAVING IMPROPERLY EXERCISED THE OPTION TO ACCELERATE THIS DEBT AFTER A _____ [SALE *or* TRANSFER] THAT WAS EXPRESSLY EXEMPTED BY STATUTE FROM VIOLATINGTHE PROVISIONS OF THE TRUST DEED.

Beneficiary May Not Invoke Due-on-Sale Clause After Exempt Sale or Transfer. If the real property that is the subject of a trust deed is residential real property containing fewer than five dwelling units, [including a lien on the stock allocated to a dwelling unit in a cooperative housing association, or on a residential manufactured home], a lender may not exercise an option pursuant to a due-on-clause on the basis of a sale or transfer of the property that constitutes

[*EITHER*]

the creation of a lien or other encumbrance subordinate to the lender's security instrument that does not relate to a transfer of rights of occupancy in the property (*12 U.S.C. § 1701j-3(d)(1)*).

[*OR*]

the creation of a purchase-money security interest for household appliances (*12 U.S.C. § 1701j-3(d)(2)*).

[*OR*]

a transfer by devise, descent, or operation of law on the death of a joint tenant or tenant by the entirety (*12 U.S.C. § 1701j-3(d)(3)*).

[*OR*]

the granting of a leasehold interest of three years or less not containing an option to purchase (*12 U.S.C. § 1701j-3(d)(4)*).

[*OR*]

a transfer to a relative resulting from the death of a borrower (*12 U.S.C. § 1701j-3(d)(5)*).

[*OR*]

a transfer by which the spouse or children of the borrower become an owner of the property (*12 U.S.C. § 1701j-3(d)(6)*).

[*OR*]

a transfer resulting from a decree of dissolution of marriage, legal separation agreement, or an incidental property settlement agreement, by which the spouse of the borrower becomes an owner of the property (*12 U.S.C. § 1701j-3(d)(7)*).

[*OR*]

a transfer into an inter vivos trust of which the borrower is and remains a beneficiary and that does not relate to a transfer of rights of occupancy in the property (*12 U.S.C. § 1701j-3(d)(8)*).

[*OR*]

a transfer or disposition described in regulations prescribed by the Federal Home Loan Bank Board (*12 U.S.C. § 1701j-3(d)(9)*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the beneficiary is not entitled to exercise the option under a due-on-sale clause to accelerate the entire debt and foreclose based on an unauthorized transfer of the property. The ground is that the beneficiary improperly exercised the option to accelerate, because a statutory exception to the right to accelerate applies to the sale or transfer at issue [*see* [d], *below*; for coverage of an additional, "window period" exception that applies to the preemptive effect of federal law in this area but has become virtually immaterial, *see § 230.17[2][d]*].

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of exempted transfer. For example, this contention might be raised in support of an application for a preliminary injunction to enjoin a private foreclosure sale being conducted at the request of the beneficiary. This form also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus counsel should include a description of the sale or transfer that demonstrates that it is within one of the express exemptions of *12 U.S.C. § 1701j-3(d)*.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities in this form may be submitted in opposition to the contention supported by the points and *authorities in § 230.17[1]*.

[d] Garn Act Exemptions

The Garn Act [*12 U.S.C. § 1701j-3* (Garn-St. Germain Depository Institutions Act of 1982)] authorizes a trust deed beneficiary to accelerate the entire secured indebtedness pursuant to the terms of a due-on-sale clause in the trust deed. This right is subject to an exception, however, with respect to sales or transfers enumerated in this form [*12 U.S.C. § 1701j-3(b), (d)*].

The Federal Home Loan Bank Board, in consultation with the Comptroller ofthe Currency and the National Credit Union Administration Board, is authorized to issue rules and regulations and to publish interpretations governing the implementation of the Garn Act [*12 U.S.C. § 1701j-3(e)(1)*]. FHLBB regulations limit the enumerated exemptions in the following important respects [*see 12 C.F.R. § 591.5(b)*]:

- The exemption under *12 U.S.C. § 1701j-3(d)(1)* applies only to a subordinate lien or encumbrance that was not created pursuant to a contract for a deed [*12 C.F.R. § 591.5(b)(1)(I)*].

- The exemptions under *12 U.S.C. § 1701j-3(d)(5)-(7)* apply only if the transferee occupies or will occupy the encumbered property [*12 C.F.R. § 591.5(b)(1)(v)*].

- The exemption under *12 U.S.C. § 1701j-3(d)(8)* applies only if the borrower remains an occupant of the encumbered property and does not refuse, as a condition precedent to the transfer, to provide the lender with a reasonable means acceptable to the lender by which the lender will be notified in a timely manner of any subsequent transfer of the beneficial interest or change in occupancy [*12 C.F.R. § 591.5(b)(1)(vi)*].

In addition, an exemption is lost when an event later occurs that disqualifies a transfer for a previously applicable exemption [*12 C.F.R. § 591.5(b)(5)*].

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23-230 California Points & Authorities § 230.17

§ 230.17 Due-On-Sale Clause--Transfer of Property Triggered Due-on-Sale Clause [12 U.S.C. § 1701j-3(b)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE BENEFICIARY IS ENTITLED TO FORECLOSE UNDER THE TRUST DEED ON THE GROUND OF HAVING PROPERLY EXERCISED THE OPTION TO ACCELERATE THE ENTIRE OUTSTANDING SECURED INDEBTEDNESS AFTER (1) THE TRUSTOR _____ [SOLD *or* TRANSFERRED] THE REAL PROPERTY WITHOUT THE BENEFICIARY'S PRIOR WRITTEN CONSENT, IN VIOLATION OF THE PROVISIONS OF THE TRUST DEED, AND (2) THE TRUSTOR'S _____ [PURCHASER *or* TRANSFEREE] THEREAFTER DEFAULTED IN THE PAYMENT OF THE DEBT.

Beneficiary Is Entitled to Invoke Due-on-Sale Clause. A lender is entitled to enter into and enforce a loan transaction secured by a trust deed to real property that contains a due-on-sale clause, under which the lender has an option to declare immediately due and payable all outstanding secured sums, in the event that all or any part of the real property security is sold or transferred without the lender's prior written consent (*12 U.S.C. § 1701j-3(a)(1)-(3), (b)(1)*). Except as otherwise provided under Title *12 of the United States Code, Section 1701j-3(d),* the lender may exercise its option under a due-on-sale clause in accordance with the terms of the trust deed (*12 U.S.C. § 1701j-3(b)(2)*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that a lender is entitled to foreclose under a trust deed [*see Code Civ. Proc. §§ 725a, 726*] because the trustor sold or transferred the subject real property without the beneficiary's written consent, in violation of a due-on-sale clause in the trust deed. Counsel should be aware that some transfers do not provide a basis for exercising a due-on-sale clause [*see 12 U.S.C. § 1701j-3(d)*, discussed in *§ 230.16* [2]].

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the beneficiary's right to enforce the due-on-sale clause. For example, this contention might be made in support of the beneficiary's motion for summary judgment in the trustor's action to enjoin a private foreclosure sale. This form also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus counsel should include a description of the trustor's unauthorized sale or transfer in violation of a due-on-sale clause included in the trust deed.

[c] Opposing Points and Authorities

In an appropriate case, this form of points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 230.16[1]*.

[d] Garn Act Authority to Invoke Due-on-Sale Clause

The Garn Act [*12 U.S.C. § 1701j-3* (Garn-St. Germain Depository Institutions Act of 1982)] authorizes a lender to enter into and enforce a loan transaction secured by a trust deed that contains a due-on-sale clause [*12 U.S.C. § 1701j-3(b)(1)*; *see 12 U.S.C. § 1701j-3(a)(3)*]. A "due-on-sale clause" refers to a contract provision that authorizes a lender, at its option, to declare due and payable all sums secured by the trust deed in the event that all or any part of the real property, or an interest in it, is sold or transferred without the lender's prior written consent [*12 U.S.C. § 1701j-3(a)(1)*]. A lender's exercise of its optionunder such a clause is exclusively governed by the terms of the agreement, subject only to certain limitations specified under *12 U.S.C. § 1701j-3(d)* [*12 U.S.C. § 1701j-3(b)(2)*].

All state law to the contrary is preempted by the Garn Act [*12 U.S.C. § 1701j-3(b)(1)*]. Preempted state law includes a line of California decisions, beginning with *Wellenkamp v. Bank of America (1978) 21 Cal. 3d 943, 953, 148 Cal. Rptr. 379, 582 P.2d 970* , prohibiting enforcement of a due-on-sale clause unless the lender could demonstrate that it was reasonably necessary to protect the security from impairment or risk of default. This preemptive effect is limited only by the statutory "window period" exception [*12 U.S.C. § 1701j-3(b)(1), (c)*]. A window-period loan is one originated by an entity other than a federal association and made or assumed on or after August 25, 1978, and before October 15, 1982. The due-on-sale clause in a trust deed securing a window- period loan cannot be enforced with respect to a transfer made before October 15, 1985 [*12 U.S.C. § 1701j-3(c)*; *see Miranda v. Macias (1983) 141 Cal. App. 3d 188, 192, 191 Cal. Rptr. 177* ; *see also 12 C.F.R. § 591.2(p)*]. With the passage of time, however, this window-period exception has become virtually immaterial.

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23-230 California Points & Authorities § 230.18

§ 230.18 Merger of Interests--Trust Deed Was Extinguished by Merger

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE BENEFICIARY IS NOT ENTITLED TO FORECLOSE UNDER THE TRUST DEED BECAUSE IT WAS EXTINGUISHED BY MERGER INTO THE BENEFICIARY'S _____ [FEE INTEREST IN THE PROPERTY *or* SENIOR TRUST DEED].

Trust Deed Extinguished by Merger. Although the question is one of intent, actual or presumed, of the person in whom the interests are united, when the same person holds two or more interests in a single parcel of real property without any intermediate estate intervening, the lesser interest is merged into the greater, and is annihilated (*Union Bank v. Wendland (1976) 54 Cal. App. 3d 393, 406, 126 Cal. Rptr. 549* (second trust deed into first); *Ralph C. Sutro Co. v. Paramount Plastering, Inc. (1963) 216 Cal. App. 2d 433, 438, 31 Cal. Rptr. 174* (trust deed into fee)).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that a beneficiary is not entitled to foreclose under a trust deed. The ground is that the beneficiary's interest under the trust deed has been merged with some other, greater interest of the beneficiary in the same property, and thus the trust deed has been extinguished.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive contention. For example, a trustor could use this contention defensively in support of an application for a preliminary injunction to enjoin a private foreclosure sale being conducted at the request of the beneficiary. This form also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus counsel should include a description of the two estates held by the beneficiary and any facts supporting the presumed intent that they merge.

[c] Opposing Points and Authorities

In an appropriate case, this form of points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 230.19[1]*.

[3] Discussion of Authorities

[a] Trust Deed Extinguished by Merger

The facts, procedural background, and disposition of ***Union Bank v. Wendland*** *(1976) 54 Cal. App. 3d 393, 126 Cal. Rptr. 549* , are discussed in *§ 230.13[3][d]*. The second trust deed, the court concluded, had been merged into the first trust deed because the estates of the two trust deeds were united in the bank with no intervening interest (*54 Cal. App. 3d 393, 405-406)* . A merger occurs when a greater estate and a lesser estate coincide in the same person in one and the same right without any intermediate estate. The question is one of intent, actual or presumed, of the person in whom the interests are united, but the court concluded that here, *Code Civ. Proc. § 580d* required the inference as a matter of law that the bank intended the two instruments to merge (*54 Cal. App. 3d 393, 406)* .

Ralph C. Sutro Co. v. Paramount Plastering, Inc. *(1963) 216 Cal. App. 2d 433, 31 Cal. Rptr. 174* , was an interpleader action by a lender to determine the disposition of money held by it under a construction loan agreement. The loan agreement provided for disbursement in seven installments, with the last to be paid when the borrower established that all costs of labor, materials, and other expenses had been fully paid. In this, the borrower defaulted. After notice of default was filed, the lender sold the note and trust deed at the foreclosure sale. The building had been completed and there was no dispute as to the quality ortimely completion of construction. The trial court awarded the money pro rata to those with outstanding claims for services rendered or materials delivered for construction. The note holder appealed.

The court of appeal affirmed. After concluding that the materialmen were third party beneficiaries of the construction loan agreement, the court considered the note holder's contention that the undisbursed funds were to be applied to the indebtedness owing under provisions in the construction loan agreement and note. The court disagreed, saying said that the sale of the property had satisfied the secured claim and extinguished the lien of the trust deed (*216 Cal. App. 2d 433, 438)* . Also, a lien is extinguished under ordinary circumstances by merger of the lien and ownership of the land in one person, unless it is necessary for the protection of that person's rights that the lien be kept alive. No such necessity was found here (*216 Cal. App. 2d 433, 438)* .

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23-230 California Points & Authorities § 230.19

§ 230.19 Merger of Interests--Trust Deed Has Not Been Extinguished by Merger

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE BENEFICIARY IS ENTITLED TO FORECLOSE UNDER THE TRUST DEED BECAUSE IT HAS NOT BEEN EXTINGUISHED BY MERGER INTO THE BENEFICIARY'S _____ [FEE INTEREST IN THE PROPERTY *or* SENIOR TRUST DEED].

No Merger. Merger is a question of intent of the person in whom the interests are united. Equity will prevent or permit a merger as will best serve the purposes of justice and the actual and just intent of the parties. In the absence of an expression of intention, if the interest of the person in whom the several estates have been united would best be served by keeping them separate, the intent to keep them separate will ordinarily be inferred (*Anglo-Californian Bank v. Field (1905) 146 Cal. 644, 652-653, 80 P. 1080* ; *Strike v. Trans-West Discount Corp. (1979) 92 Cal. App. 3d 735, 743, 155 Cal. Rptr. 132*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the right of foreclosure exists on the ground that there has been no merger of the interest sought to be foreclosed with a superior interest of the beneficiary in the same property.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive contention. For example, the beneficiary could use this contention in support of a motion for summary judgment in the trustor's suit to enjoin a private foreclosure sale [*see, e.g.,* *Strike v. Trans-West Discount Corp. (1979) 92 Cal. App. 3d 735, 738, 155 Cal. Rptr. 132]* . This form also may be adapted for use in a trial or

appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus counsel should include a description of the two estates held by the beneficiary and any facts showing the beneficiary's intention that they should not be merged.

[c] Opposing Points and Authorities

In an appropriate case, this form of points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 230.18[1].*

[3] Discussion of Authorities

[a] No Merger

Strike v. Trans-West Discount Corp. *(1979) 92 Cal. App. 3d 735, 155 Cal. Rptr. 132* , was an action by spouses, as trustors, to enjoin a private foreclosure sale under a trust deed that had been purchased from the original beneficiary. The defendant originally lent money to the trustors' business. In connection with those loans, the husband signed a continuing guaranty. When the company became insolvent, the husband, on the advice of counsel, executed a confession of judgment in favor of the defendant. Later, when the first trust deed on the trustors' home was in foreclosure, the defendant purchased it and entered into an agreement with the trustors (the June agreement) under which the defendant was given a grant deed to the property, the foreclosure was postponed, and the trustors were given three months to pay the combined debts with interest. The trustors did not pay as agreed. After an unsuccessful unlawful detainer action in which it was determined that the grant deed and June agreement together constituted a security device, the defendant instructed the trustee to proceed with a trustee's sale. The trustors then commenced this action and obtained a temporary restraining order preventing the foreclosure sale. Although the final judgment vacated the notice of sale, it established that on filing of another notice of default, the defendant was entitled to foreclose. The trustors appealed.

The court of appeal affirmed. The trustors contended that the defendant intended to merge the acquired trust deed and the confession-of-judgment lien into the June agreement and grant deed. In regard to the grant deed, the court upheldthe trial court's finding and that of the unlawful detainer judgment, ruling that it was only a security device. Merger is a question of intent of the person in whom the interests are united and does not always follow from the union of a greater and lesser estate in the same person. Equity will prevent or permit a merger as will best serve the purposes of justice and the actual and just intent of the parties. In the absence of an expression of intent, if the interest of the person in whom the several estates have been united would best be served by keeping them separate, the intent to keep them separate will ordinarily be inferred. Clearly, the defendant's interests were best served by inferring no intent to effect a merger. Additionally, merger was inconsistent with the reconveyance provisions of the June agreement. Further, if there had been a merger, the confession-of-judgment lien, being the lesser, would have merged into the trust deed lien (*92 Cal. App. 3d 735, 743)* .

Anglo-Californian Bank v. Field *(1905) 146 Cal. 644, 80 P. 1080* , was a foreclosure action by a bank, with a cross complaint by another bank to foreclose its mortgage. After commencement of the action, the mortgagors sold the property to a third party who also purchased the plaintiff bank's note and mortgage. Judgment was for the cross-complaining bank on the ground that the mortgage had merged with the fee. The plaintiff bank and the third-party purchaser both appealed.

The Supreme Court reversed, finding no evidence of intent on the part of the third-party purchaser to extinguish the lien of the plaintiff bank's mortgage (*146 Cal. 644, 652, 655)* . The instrument by which the note and mortgage were

assigned contained a guaranty that the mortgage assigned was a first lien. The deed to the third-party purchaser declared that the land was subject to those two certain mortgages in favor of the two banks (*146 Cal. 644, 652*). The ordinary rule--when the holder of a mortgage acquires the estate of the mortgagor, the mortgage interest is merged in the fee and is extinguished--is never applied when there is an intervening lien on the property that it is in the interest of the purchaser to keep. Merger is a question of intent and will not be inferred if there is an intervening claim. Equity will keep the legal title and the mortgagee's interest separate, although they may be held by the same person, whenever necessary for the full protection of the mortgagee's just rights (*146 Cal. 644, 653*). The Court considered the advantage to the purchaser in there being no merger. Without a merger, the purchaser would take subject to the second mortgage but, in a foreclosure sale, would be entitled to receive out of the proceeds all the money due on the first mortgage (or could keep the property by paying only the excess it brought over the first mortgage). If there were a merger, the purchaser would have to pay the second mortgage in full in order to keep the property or obtain the proceeds of its sale (*146 Cal. 644, 654)* .

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23-230 California Points & Authorities § 230.20

§ 230.20 Unintentional Impairment of Security--Beneficiary May Not Foreclose and Must Allow Trustor to Rebuild After Insured Loss

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE BENEFICIARY IS NOT ENTITLED TO FORECLOSE UNDER THE TRUST DEED BECAUSE THE SECURITY HAS NOT BEEN IMPAIRED. THEREFORE, THE BENEFICIARY CANNOT REQUIRE INSURANCE PROCEEDS TO BE APPLIED IN PAYMENT OF THE LOAN BUT MUST ALLOW THE TRUSTOR TO REBUILD.

Beneficiary Must Allow Trustor to Rebuild When Security Has Not Been Impaired. The right of a beneficiary to apply insurance proceeds to a debt secured by a trust deed must be exercised in good faith and with fair dealing. To the extent that the security has not been impaired, the beneficiary must permit the proceeds to be used for rebuilding (Stats. 1988, ch. 179, § 3; Stats. 1987, ch. 397, § 5; *Schoolcraft v. Ross (1981) 81 Cal. App. 3d 75, 77, 80-81, 146 Cal. Rptr. 57*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the beneficiary is not entitled to foreclose because of a casualty that damaged the property covered by the trust deed and must allow the insurance proceeds to be applied to pay down the loan balance. The ground is a specific declaration of legislative intent that a trustor be allowed to use insurance proceeds to rebuild unless the beneficiary can show that the security would be impaired [*see* Stats. 1988, ch. 179, § 3; Stats. 1987, ch. 397, § 5]. Most trust deeds will contain contradictory provisions, one requiring the trustor to repair the damage and another allowing the beneficiary to apply the insurance proceeds to pay down the loan balance. The provisions must be construed in accordance with *Schoolcraft v. Ross (1981) 81 Cal.*

App. 3d 75, 146 Cal. Rptr. 57 (discussed in [3][a], *below*) [Stats. 1988, ch. 179, § 3; Stats. 1987, ch. 397, § 5].

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the beneficiary's lack of entitlement to institute foreclosure. For example, this contention might be raised in support of an application for a preliminary injunction to enjoin a private foreclosure sale being conducted at the request of the beneficiary. This form also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts ofthe case. Thus counsel should include a factual background to support the contention that the security would not be impaired if the trustor were allowed to rebuild.

[c] Opposing Points and Authorities

In an appropriate case, this form of points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 230.21[1]*.

[3] Discussion of Authorities

[a] Beneficiary Must Allow Trustor to Rebuild When Security Would Not Be Impaired

The plaintiffs in ***Schoolcraft v. Ross*** *(1981) 81 Cal. App. 3d 75, 146 Cal. Rptr. 57* , purchased a home from the defendant in 1974 and executed a note for $14,500 and a trust deed in favor of the defendant in payment of the purchase price. The house was destroyed by fire in January 1975. At that time the balance on the note was $13,585. Under the trustors' insurance policy, they could either accept $8,250 in cash, which represented the cash value of the house at the time of the loss, or rebuild the house and receive reimbursement of $14,100. The trust deed contained a provision requiring the trustors to repair or rebuild and a provision allowing the defendant to apply the insurance proceeds to decrease the loan balance. The trustors decided to rebuild and so informed the insurance company. The insurance company forwarded a check payable jointly to the trustors and the defendant in the amount of $8,250 and informed the trustors that $5,850 would be paid on completion of the new house. The defendant refused to permit the proceeds to be used to rebuild. The trustors were forced to rent an apartment and to cease making monthly payments on the note. The defendant foreclosed and purchased the property at foreclosure for $600. The defendant then resold the property for $6,000. The trustors sued the defendant for damages sustained because of the defendant's refusal to let them rebuild. They introduced evidence that a new home could have been constructed for $14,100, which would have had a market value of $20,000 on completion because of rising property values. Judgment was for the trustors for $4,500 plus costs. The defendant appealed.

The court of appeal affirmed, relying in part on *Milstein v. Security Pac. Nat. Bank (1972) 27 Cal. App. 3d 482, 487, 103 Cal. Rptr. 16* , which dealt with similar issues in the context of a partial taking by eminent domain. The implied covenant of good faith and fair dealing required the beneficiary not to cut off the trustors' right to use the borrowed funds, without a showing that the security was impaired (*81 Cal. App. 3d 75, 77, 80)* . The two clauses of the trust deed (requiring repair and allowing payment) must be construed to accomplish the basic intentions inherent in any loan and trust deed arrangement, namely that the loan be paid in the ordinary course of events to the end that the trustor enjoy full use of the house and the borrowed funds for the period and on the terms originally contemplated. The trust deed must be construed to avoid unintended acceleration of the note. As there was no evidence that the defendant's security was impaired or that the trustors would have been unwilling or unable to continue making payments, application of the insurance proceeds to pay down the loan was improper and a breach of the covenant of good faith and fair dealing (*81 Cal. App. 3d 75, 80-81)* .

The holding in *Schoolcraft* has been specifically declared to be a legislative exception to, or limitation on, the

beneficiary's rights conferred by *Civ. Code § 2924.7(b)* and *Fin. Code §§ 1227.3* and *7462, set forth in § 230.21[1]* [Stats. 1988, ch. 179, § 3; Stats. 1987, ch. 397, § 5; *see § 230.21[3]*].

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23-230 California Points & Authorities § 230.21

§ 230.21 Unintentional Impairment of Security--Beneficiary May Foreclose Although Security Is Not Impaired [Civ. Code § 2924.7; Fin. Code §§ 882.020 et seq., 2911]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE BENEFICIARY IS [AND WAS] ENTITLED TO _____ [DECLARE A DEFAULT *or* PROCEED WITH THE FORECLOSURE SALE] BECAUSE OF THE TRUSTOR'S FAILURE TO _____ [*specify nature of default, e.g.*, MAINTAIN HAZARD INSURANCE ON THE IMPROVEMENTS TO THE REAL PROPERTY ENCUMBERED BY THE TRUST DEED IN AN AMOUNT EQUAL TO THE REPLACEMENT VALUE OF THOSE IMPROVEMENTS].

[*EITHER*]

A. Provisions Enforceable Whether Security Is Impaired. The provisions of any trust deed or mortgage on real property which authorize any beneficiary, trustee, or mortgagee, or agent or successor in interest, to accelerate the maturity date of the principal and interest on any loan secured thereby or to exercise any power of sale or other remedy contained therein upon the failure of the trustor or mortgagor to pay, at the times provided for under the terms of the trust deed or mortgage, any taxes, rents, assessments, or insurance premiums with respect to the property or the loan, or any advances made by the beneficiary or mortgagee, or agent or successor in interest, shall be enforceable whether or not impairment of the security interest in the property has resulted from the failure of the trustor or mortgagor to pay the taxes, rents, assessments, insurance premiums, or advances (*Civ. Code § 2924.7(a)*).

[*Optional*] **B. Control of Insurance Proceeds.** The provisions of any trust deed or mortgage on real property which authorize any beneficiary, trustee, ormortgagee, or agent or successor in interest, to receive and control the disbursement of the proceeds of any policy of fire, flood, or other hazard insurance respecting the property shall be

enforceable whether or not impairment of the security interest in the property has resulted from the event that caused the proceeds of the insurance policy to become payable (*Civ. Code § 2924.7(b)*; *see Ford v. Manufacturers Hanover Mortgage Corporation (9th Cir. 1987) 831 F.2d 1520, 1525)* .

[*OR, if beneficiary is bank or successor*]

A. Provisions Enforceable Whether Security Is Impaired. The provisions of any trust deed or mortgage on real property which authorize any state or nationally chartered bank to accelerate the maturity date of the principal and interest on any loan secured thereby or to exercise any power of sale or other remedy contained in the trust deed or mortgage, upon the failure of the trustor or mortgagor to pay, at the times provided under the terms of the trust deed or mortgage, any taxes, rents, assessments, or insurance premiums with respect to the real property securing the loan, or upon the failure to pay any advances made with respect to the trust deed or mortgage by the state or nationally chartered bank, shall be enforceable whether or not an impairment of the security interest in the real property has resulted from the failure of the trustor or mortgagor to pay the taxes, rents, assessments, insurance premiums, or advances (*Fin. Code § 1227.2(a)*). "State or nationally chartered bank" includes any person authorized by the State of California to make or arrange loans secured by real property, or a holding company of a state or nationally chartered bank or any successor in interest (*Fin. Code § 1227.2(b)*).

[*Optional*] **B. Control of Insurance Proceeds.** The provisions of any trust deed or mortgage on real property which authorize any state or nationally chartered bank to receive and control the disbursement of the proceeds of any policy of fire, flood, or other hazard insurance respecting the real property shall be enforceable whether or not an impairment of the security interest in the property has resulted from the event that caused the proceeds of the insurance policy to become payable (*Fin. Code § 1227.3*; *see Ford v. Manufacturers Hanover Mortgage Corporation (9th Cir. 1987) 831 F.2d 1520, 1525)* .

[*OR, if beneficiary is savings and loan association or successor*]

A. Provisions Enforceable Whether Security Is Impaired. The provisions of any trust deed or mortgage on real property which authorize an association, federal association, affiliate or service corporation of an association or federal association, or any successor in interest thereto, to accelerate the maturity date of the principal and interest on any loan secured thereby or to exercise any power of sale or other remedy contained therein upon the failure of the trustor or mortgagor to pay, at the times provided for under the terms of the trust deed or mortgage, any taxes, rents, assessments, or insurance premiums with respect to the property or the loan, or any advances made by the association, federal association, affiliate or service corporation of an association or federal association, or any successor in interest thereto, shall be enforceable whether or not impairment of the security interest in the property has resulted from the failure of the trustor or mortgagor to so pay the taxes, rents, assessments, insurance premiums, or advances (*Fin. Code § 7461*).

[*Optional*] **B. Control of Insurance Proceeds.** The provisions of any trust deed or mortgage on real property which authorize an association, federal association, affiliate or service corporation of an association or federal association, or any successor in interest thereto, to receive and control the disbursement of the proceeds of any policy of fire, flood, or other hazard insurance respecting the property shall be enforceable whether or not impairment of the security interest in the property has resulted from the event that caused the proceeds of the insurance policy to become payable (*Fin. Code § 7462*; see *Ford v. Manufacturers Hanover Mortgage Corporation (9th Cir. 1987) 831 F.2d 1520, 1525)* .

[2] Comments

[a] Use of Form

This form of points and authorities may be used to support the contention that the beneficiary may declare a default and accelerate the debt even though the security is not impaired, if the default is one of those listed in *Civ. Code § 2924.7(a)* (or the equivalent *Fin. Code §§ 1227.2* and *7461*). The example of default that is used in the point paragraph is related to *Civ. Code § 2955.5*, which prohibits a lender from requiring hazard insurance coverage on the property in excess of the replacement value of the improvements [*see Civ. Code § 2955.5(a)*].

Optional Paragraph B supports the contention that the beneficiary may enforce a provision in the trust deed or mortgage that allows receipt or control of the proceeds of any insurance on the property. This right is severely limited by the holding in *Schoolcraft v. Ross (1981) 81 Cal. App. 3d 75, 146 Cal. Rptr. 57* (discussed in *§ 230.20[3][a]*), and that decision is not abrogated insofar as it holds that the lender may not prohibit the use of insurance proceeds for restoration of the property without a showing that the security has been impaired [Stats. 1988, ch. 179, § 3; *see* Stats. 1987, ch. 397, § 5].

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue of the beneficiary's right to have foreclosure or to apply insurance proceeds in payment of the debt. For example, this contention might be raised to support the beneficiary's motion for summary judgment in an action by the trustor to enjoin a private foreclosure sale. This form also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus counsel should include a description of the beneficiary's status and the particular default on which foreclosure is based.

[c] Opposing Points and Authorities

In an appropriate case, this form of points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 230.20[1]*.

[3] Discussion of Authorities

[a] Control of Insurance Proceeds

The plaintiff in ***Ford v. Manufacturers Hanover Mortgage Corporation*** *(9th Cir. 1987) 831 F.2d 1520* , sued the holder of the plaintiff's note and trust deed in federal court. The original amount of the note was $63,000, the purchase price. The note and trust deed were executed in July 1979. By September 4, 1980, the trustor was in default, and notice of default and election to sell were recorded. The trustor did not reinstate the loan; on the contrary, he declared bankruptcy. The holder of the note and trust deed obtained relief from the bankruptcy stay in order to conduct the foreclosure sale, but in October 1982, before the sale was held, the property was substantially damaged by a fire that was deliberately set. The insurance company issued a joint payee check for $31,100 to the trustor and the holder of the note and trust deed and agreed to pay an additional $39,000 in replacement coverage if the property was rebuilt. The trustor wanted to rebuild, but the defendant refused to allow it. The insurance proceeds were placed in a joint account and the litigation ensued. The district court gave judgment in favor of the defendant, and the trustor appealed.

The court of appeals affirmed. The court distinguished this case from *Schoolcraft v. Ross (1981) 81 Cal. App. 3d 75, 146 Cal. Rptr. 57* (discussed in *§ 230.20[3][a]*), noting that here, the long hiatus in payments had resulted in a debt balance that exceeded the original amount of the note, and that it was the trustor, not the note holder, that had frustrated the original intent of the parties, by not making payments. The defendant's security would be impaired if foreclosure were delayed while the trustor rebuilt; thus a finding that the defendant's security was not impaired would be clearly erroneous. In this situation, *Schoolcraft* did not require the defendant to let the trustor rebuild (*831 F.2d 1520, 1525)* .

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23-230 California Points & Authorities § 230.22

§ 230.22 Limitation Period--Trust Deed Was Extinguished by Expiration of Limitation Period [Civ. Code §§ 882.020 et seq., 2911]

[1] FORM

[*The following may be included in a memorandum or trial or appellate brief.*]

THE BENEFICIARY IS NOT ENTITLED TO FORECLOSE BECAUSE THE LIEN OF THE TRUST DEED HAS EXPIRED PURSUANT TO _____; [*CIVIL CODE SECTION 882.020 or CIVIL CODE SECTION 2911*].

A. General Limitation. The lien of a trust deed that has not previously expired pursuant to *Civil Code Section 2911* is not enforceable by _____ [a foreclosure action commenced *or* a power of sale exercised] after the last-expiring of the following period:

(1) If the final maturity date or the last date fixed for payment of the debt or performance of the obligation is ascertainable from the recorded evidence of indebtedness: 10 years after that date;

(2) If the final maturity date or the last date fixed for payment of the debt or performance of the obligation is not ascertainable from the recorded evidence of indebtedness, or if there is no final maturity date or last date fixed for payment of the debt or performance of the obligation: 60 years after the date the instrument that created the security interest was recorded;

(3) If an intent to preserve the security interest is recorded pursuant to *Civil Code Section 880.310 et seq.* and within the time prescribed in item (1) or (2): 10 years after the notice was recorded.

[*Optional*] **B. Mortgage Limitation.** A mortgage lien, and any power of sale contained in the mortgage, are extinguished by the lapse of the statutory period within which an action could be brought on the principal obligation (

Civ. Code § 2911; *Faxon v. All Persons (1913) 166 Cal. 707, 715-717, 137 P. 919*).

[*Optional*] **C. Limitation on Foreclosure Action.** The running of the statute of limitation on the debt secured by a trust deed bars an action to collect the debt and an action for judicial foreclosure (*Civ. Code § 2911*; *Flack v. Boland (1938) 11 Cal. 2d 103, 106, 77 P.2d 1090* ; *see Carson Redevelopment Agency v. Adam (1982) 136 Cal. App. 3d 608, 610-612, 186 Cal. Rptr. 615*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention thata beneficiary is not entitled to foreclose under a trust deed or mortgage. The ground is that the applicable limitation period has expired.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue. For example, in an action by the trustor to restrain a private foreclosure sale, this contention might be raised in opposition to a motion for summary judgment by the beneficiary. This form also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus counsel should show the facts by which the applicable limitation period is to be determined.

[c] Application and Effect of Statute

Civ. Code § 882.020 et seq. apply to trust deeds or mortgages executed or recorded before, on, or after the operative date of January 1, 1983 [*Civ. Code § 882.040(b)*]. The times prescribed by *Civ. Code § 882.020(a)* can be extended in the same manner and to the same extent as waiver made pursuant to *Code Civ. Proc. § 360.5*, except that the instrument is effective to extend the prescribed limitation period only if it is recorded before the expiration of the applicable period [*Civ. Code § 882.020(c)*]. Also, the beneficiary was allowed to record a notice of intent to preserve the security interest at any time before January 1, 1988, notwithstanding the requirement that this notice be recorded before expiration of the otherwise applicable period [*Civ. Code §§ 880.370, 882.040(a)*].

[3] Discussion of Authorities

[a] Mortgage Limitation

Faxon v. All Persons *(1913) 166 Cal. 707, 137 P. 919* , was a quiet title action. The defendant bank in its amended answer claimed that it owned a portion of the property in question by virtue of a deed from the purchaser at the sale the bank conducted in 1908 pursuant to a power of sale in a mortgage by the plaintiff's predecessors in 1888. The underlying note was due in 1889. Judgment was for the plaintiff, and the bank appealed.

The Supreme Court affirmed, saying that at the time the bank attempted to execute the power of sale, not only were both the mortgagors dead but also the debt, note, and mortgage had become barred by the statute of limitation, and any lien created by the mortgage had been extinguished by *Civ. Code § 2911* (*166 Cal. 707, 715)* . The power of sale is a mere incident or appurtenance of the mortgage lien, agreed on by the parties as a means of enforcing the lien, and can have no vitality or force when the lien itself no longer exists (*166 Cal. 707, 716)* . Further, this conclusion does not render *Civ. Code § 2911* invalid for depriving the bank of rights vested under a contract. The contract of mortgage must be read in the light of the statutory provisions. There was nothing in the contract to suggest that the parties intended the power of sale to outlast the time prescribed by law for the existence of a mortgage lien (*166 Cal. 707, 716-717)* .

[b] Limitation on Foreclosure Action

Flack v. Boland *(1938) 11 Cal. 2d 103, 77 P.2d 1090* , was a judicial foreclosure action commenced by the beneficiary's executor in 1934. The first note and trust deed were made in 1926. That note was payable in 1929. The trustors had made a second note and trust deed in favor of the cross complainant in 1931. That note was due in 1932. The trustors did not answer. The trial court rendered a decree foreclosing both trust deeds, establishing that the second trust deed had priority over the plaintiff's lien, and requiring the proceeds of the sale to be applied first to the defendant's lien, then to the plaintiff's, and that any surplus be paid to the trustors. The plaintiff appealed.

The Supreme Court affirmed, stating that although the statute of limitation does not run against a power of sale in a trust deed, the limitation does apply to the commencement of a legal action. (The Marketable Record Title Act now provides for the eventual expiration of a power of sale [*see Civ. Code § 882.020*].) Further, a subsequent mortgagee or attachment lienholder can assert the statute of limitation (*11 Cal. 2d 103, 106)* . If the trustors had not defaulted but had answered, setting forth the defense of the statute of limitation, the plaintiff's foreclosure action would have been defeated, the plaintiff's lien would have been extinguished, and judgment would have been rendered for the trustors. Although the trustors' default constituted waiver of the statute of limitation for their own benefit, their default could not prevent the second lienholder from raising the defense (*11 Cal. 2d 103, 107)* . The Court disposed of the plaintiff's contention that the doctrine of election of remedies should not be applied, saying that the plaintiff chose the remedy, and even after the filing of the cross complaint, the plaintiff could have dismissed the foreclosure action and proceeded with a trustee's sale (*11 Cal. 2d 103, 107-108)* .

Carson Redevelopment Agency v. Adam *(1982) 136 Cal. App. 3d 608, 186 Cal. Rptr. 615* , involved a dispute over condemnation proceeds. The trial court determined that the beneficiary of a trust deed had a compensable interest in the property and apportioned the proceeds between the holder and the trustor. The trustor claimed that the beneficiary had no right to a portion of the condemnation award because the statute of limitation had run on the underlying note.

The court of appeal affirmed, stating that although the running of the limitation period on the note underlying the trust deed barred an action to enforce the note itself and an action for judicial foreclosure, the power of sale in the trust deed was not barred (*136 Cal. App. 3d 608, 610)* . The general rule that the beneficiary ofa trust deed has a compensable interest in an eminent domain proceeding should not be altered when the underlying note is barred by the statute of limitation (*136 Cal. App. 3d 608, 613)* .

[4] Additional Authorities

[a] General Limitation

In *Schmidli v. Pearce (2009) 178 Cal. App. 4th 305, 100 Cal. Rptr. 3d 343* , the court of appeal reversed a judgment for plaintiffs, who brought this quiet title action to extinguish a lien on a deed of trust held by defendants against their property. Plaintiffs claimed that defendants' lien expired under the 10-year statute of limitations, which was triggered by defendant's recording of a notice of default. Defendants claimed that their notice of default did not trigger the 10-year statute, and their lien remained viable under the 60-year statute of limitations set forth in former *Civ. Code § 882.020*. The court agreed with the defendants that a notice of default is not "part of the record" and therefore does not trigger the 10-year statute of limitations. Defendants were entitled to the 60-year statute of limitations until they filed a notice of default, as they were required to do in order to enforce the deed of trust lien. If the notice of default made the maturity date ascertainable from the record, defendants would be compelled to surrender their right to the 60-year statute for the 10-year statute. Since all trust deed beneficiaries must file a notice of default before enforcing their lien, and since that notice must contain the obligation's maturity date, all beneficiaries would lose their right to claim the 60-year statute, and the 60-year would be rendered a nullity [*178 Cal. App. 4th 305, 315*]. The court followed the reasoning of *Ung v. Koehler (2005) 135 Cal. App. 4th 186, 37 Cal. Rptr. 3d 311* , discussed below [*178 Cal. App. 4th 305, 314-315*]. The court disagreed with *Slintak v. Buckeye Retirement Co., LLC, Ltd. (2006) 139 Cal. App. 4th 575, 43 Cal. Rptr. 3d*

131 , discussed below, which determined that the phrase "the record" in former Section 882.020 meant any recorded document [*178 Cal. App. 4th 305, 314-315*].

The court in *Schmidli* noted that former *Civ. Code § 882.020* was amended in 2007 to revised the phrase "ascertainable from the record" to read "ascertainable from the recorded evidence of indebtedness." It concluded that the amendment was intended to codify the holding in *Ung*. Thus, "recorded evidence of indebtedness" is a security, such as a deed of trust. A notice of default is not a security or evidence of indebtedness, but rather is an allegation of the existence of a debt, and thus cannot be an evidence of indebtedness for purposes of Section 882.020 [*178 Cal. App. 4th 305, 315-316*].

In *Slintak v. Buckeye Retirement Co., LLC, Ltd. (2006) 139 Cal. App. 4th 575, 43 Cal. Rptr. 3d 131* , a lis pendens recorded against a successive lender in connection with an action seeking cancellation of a trust deed to halt foreclosure on the property reset the limitations period under the Marketable Record Title Act. Under *Civ. Code § 880.260*, a real property interest does not expire or expire of record when (1) an action is commenced to enforce, establish, clear title to, or otherwise affect a real property interest, and (2) a notice of the pendency of the action is recorded within the original time limits of the Marketable Record Title Act. In *Slintak*, because the trust deed contained no due date for the obligation on the note, the running of the limitations period was reset and a new 10-year limitations period commenced on the date of recording of the lis pendens. After the expiration of the recommenced 10-year period, the power of sale in the trust deed would expire (*139 Cal. App. 4th 575, 587)* .

In *Ung v. Koehler (2005) 135 Cal. App. 4th 186, 37 Cal. Rptr. 3d 311* , the plaintiff borrowed money from the defendant. The loan was evidenced by a promissory note that was secured by a deed of trust to two real properties. More than 11 years after the note matured, an agent for the defendant recorded a notice of default against one of the two properties. The plaintiff then filed a lawsuit to prevent the defendant from enforcing the security interest provided by the deed of trust, contending that the statutory time period for enforcement had expired. The trial court enjoined the defendant from conducting a nonjudicial sale of the property. It concluded that the defendant's right to nonjudicial foreclosure under the deed of trust had expired four years, rather than 10 or 60 years, after the note became due, pursuant to (1) *Civ. Code § 882.030*, which provides that "expiration of the lien of a mortgage, deed of trust, or other security interest pursuant to this chapter or any other statute renders the lien unenforceable by any means commenced or asserted thereafter," and (2) *Civ. Code § 2911*, which extinguishes the remedy of judicial foreclosure on expiration of a four-year statute of limitations. The court reasoned that the expiration of the lien under *Civ. Code § 2911* renders a deed of trust "unenforceable by any means commenced or asserted thereafter," thereby precluding nonjudicial enforcement. The court of appeal reversed, reasoning that *Civ. Code § 882.030* precludes enforcement of the security interest that has been statutorily extinguished, not necessarily the entire instrument creating the security interest (*135 Cal. App. 4th 186, 196)* . The reference to a "lien" in *Civ. Code § 2911* has invariably been construed not to include the power of sale, which creates its security interest through passing title rather than imposing a lien (*135 Cal. App. 4th 186, 196)* . Giving effect to this long-standing judicial understanding of the term "lien" in § 2911, § 882.030 must be construed as making unenforceable only the right of judicial enforcement under *Code Civ. Proc. § 725a*, which is the only interest that is extinguished by § 2911 (*135 Cal. App. 4th 186, 196)* .

[b] Mortgage Limitation

Mix v. Sodd (1981) 126 Cal. App. 3d 386, 178 Cal. Rptr. 736 , was a quiet title action in which judgment was entered against the owner and in favor of the holder of two 36-year-old mortgages, on the ground that the owner had purchased the property with full knowledge of the two barred mortgages. The court of appeal reversed, saying that the owner was entitled to rely on *Civ. Code § 2911*. Although neither a mortgagor in possession, nor a transferee in privity with the mortgagor, nor one who took title before the limitation period expired, can maintain a quiet title action in the face of a debt that is unenforceable because of the statute of limitation, at some point a transferee is so removed from the original debtor that there is no good reason to disallow the remote taker from quieting title (*126 Cal. App. 3d 386, 389-390)* . In a state where nearly every conveyance of real property is preceded by a title search, the "bona fide purchaser"

distinction relied on by the trial court would only serve to perpetuate clouds on title (*126 Cal. App. 3d 386, 392)* .

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PART II. FORMS
A. Foreclosure Issues in General
1. Effect of Legal Rights and Specific Clauses

23-230 California Points & Authorities §§ 230.23-230.29

[Reserved]

§§ 230.23[Reserved]

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A. Foreclosure Issues in General
2. Protections for Military Service Members

23-230 California Points & Authorities § 230.30

§ 230.30 Protections for Military Service Members--Stay of Foreclosure Proceedings and Relief From Installment Contract or Mortgage, Trust, or Other Security in Nature of a Mortgage on Real Property for Purchase of Real Property by Active Service Member [Mil. & Vet. Code §§ 407(a), (b), 408; 50 U.S.C. App. §§ 532, 533]

[1] FORM

[*The following may be included in a memorandum or in a trial or appellate brief.*]

THE BENEFICIARY IS NOT ENTITLED TO FORECLOSE BECAUSE THE DEFENDANT IS AN ACTIVE MILITARY SERVICE MEMBER ENTITLED TO RELIEF FROM SUCH PROCEEDINGS PURSUANT TO _____ [MILITARY & VETERANS CODE SECTIONS 407 AND 408 *or 50 UNITED STATES CODE APPENDIX SECTIONS 532* AND *533*].

Court Has Authority to Stay Foreclosure Proceedings and Fashion Additional Remedies for Active Service Members. A court must stay proceedings to enforce mortgages and similar obligations on application of an active service member (or another person on the service member's behalf), and a court may stay such proceedings on the court's own motion. The court additionally has the authority to take any other action to conserve the interests of all parties if it finds that the ability of the defendant to comply with the terms of the obligation is materially affected by reason of the member's military service (*Mil. & Vet. Code § 408(a), (b)*; *50 U.S.C. App. § 533(a), (b)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a petition for stay of foreclosure proceedings and related relief with regard to an installment contract or mortgage for the purchase of real property. They may be filed with the court by an active member of the United States military who otherwise meets the requirements for this type of relief with regard to an installment contract or mortgage, trust deed, or other security in the nature of a mortgage on real

property [*Mil. & Vet. Code §§ 407(a), (b), 408*; *50 U.S.C. App. §§ 532, 533*; *see* [c], *below*].

[b] Argument

Counsel should add arguments linking the points in this form with the facts of the case. Thus, counsel should show that defendant is an active military service member as defined by statute, specifying reasons for why the foreclosure is harmful to defendant and the exact remedy the defendant is seeking.

[c] Application and Effect of State and Federal Statutes

A court has extensive latitude in handling claims against a person who has joined military service after the date when he or she has given a deposit or paid an installment of the purchase price under a contract for the purchase of real or personal property, or purchased property secured by a mortgage, deed of trust, or other similar security [*see Mil. & Vet. Code §§ 407, 408*; *50 U.S.C. App. §§ 532, 533*].

With regard to proceedings to enforce mortgages and similar obligations of active service members, on application by an active service member (or another person on the service member's behalf), a court must stay the proceedings and take any other action to conserve the interests of all parties if it finds that the ability of the defendant to comply with the terms of the obligation is materially affected by reason of the member's military service. The court may also take this action on its own motion [*Mil. & Vet. Code § 408(b)*; *see 50 U.S.C. App. § 533(b)*]. This applies to proceedings arising out of nonpayment of any sum due, or out of any other breach of the terms of the mortgage, commenced in any court during the period of military service to enforce the obligation. It covers obligations secured by a mortgage, trust deed, or other security in the nature of a mortgage on real property owned by a service member at the commencement of the period of the military service, and still owned by the service member whose obligations originated before the person's period of military service [*Mil. & Vet. Code § 408(a), (b)*; *see 50 U.S.C. App. § 533(a), (b)*].

An active service member is otherwise protected from foreclosure and similar actions. To be valid, any sale, foreclosure, or seizure of property for nonpayment of any sum due under any obligation, or for any other breach of the terms made during the member's period of military service or within three months thereafter, may only take place on an order previously granted by the court and a return made and approved by the court, except pursuant to an agreement between the parties [*Mil. & Vet. Code § 408(c)*; *see 50 U.S.C. App. § 533(c)*]. This is applicable to actions taken under a power of sale, a judgment entered on warrant of attorney to confess judgment contained in the warrant, or otherwise [*Mil. & Vet. Code § 408(c)*]. Any person who knowingly makes or causes to be made any invalid sale, foreclosure, or seizure of property, or attempts to do so, is guilty of a misdemeanor punishable by imprisonment not to exceed one year or by a fine not to exceed $1,000, or both [*Mil. & Vet. Code § 408(d)*; *see 50 U.S.C. App. § 533(d)*].

Similarly, with regard to installment contracts to purchase real property, the court may use its discretion, and on its own motion make any other disposition of the case as may be equitable to conserve the interests of all parties [*Mil. & Vet. Code § 407(b)*; *see 50 U.S.C. App. § 532(c)*]. If the court finds that terminating the contract and allowing the lender to resume possession of the property is an appropriate form of relief, the court may order the repayment of prior installments or deposits or any part of those as a condition of that relief [*Mil. & Vet. Code § 407(b)*; *50 U.S.C. App. § 532(c)*]. An active service member who meets the requirements for relief is protected by the law from any other actions from the lender or another party. Only by action of a court of competent jurisdiction may the selling party attempt to exercise any right or option under the contract to rescind or terminate the contract or resume possession of the property for nonpayment of any installment due, or for any other breach of its terms occurring before or during the period of the person's military service [*Mil. & Vet. Code § 407(a)*; *50 U.S.C. App. § 532(a)*]. A lender or seller who knowingly resumes possession of the subject property, or attempts to do so, is guilty of a misdemeanor, punishable by imprisonment not to exceed one year or by a fine not to exceed $1,000, or both [*Mil. & Vet. Code § 407(c)*; *see 50 U.S.C. App. § 532(b)(1)*].

For a general discussion of protection from foreclosure and other similar types of relief for active service members, and additional forms, see California Forms of Pleading and Practice, Ch. 555, *Trust Deeds and Real Property Mortgages* (Matthew Bender).

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23-230 California Points & Authorities §§ 230.31-230.39

[Reserved]

§§ 230.31[Reserved]

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B. Effect of Antideficiency Legislation

23-230 California Points & Authorities § 230.40

§ 230.40 Recovery of Deficiency Is Barred by Statute--Deficiency Judgment Is Barred After Nonjudicial Foreclosure Sale [Code Cov. Proc. § 580d]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE BENEFICIARY MAY NOT RECOVER A DEFICIENCY JUDGMENT ON THE NOTE SECURED BY THE TRUST DEED BECAUSE THE REAL PROPERTY HAS BEEN SOLD UNDER THE POWER OF SALE IN THE TRUST DEED.

A. Deficiency Is Barred After Nonjudicial Foreclosure Sale. No judgment shall be rendered for any deficiency on a note secured by a trust deed on real property or an estate for years in real property in any case in which the real property or estate for years in real property has been sold by the trustee under a power of sale contained in that trust deed (*Code Civ. Proc. § 580d*).

[*Optional*] **B. When "Sale" Occurs.** A sale, after which recovery on the underlying note is barred by *Code of Civil Procedure Section 580d*, is complete when the trustee accepts a bid, regardless of whether a trustee's deed is subsequently executed and delivered (*Ballengee v. Sadlier (1986) 179 Cal. App. 3d 1, 4-5, 224 Cal. Rptr. 301*).

[*Optional*] **C. Statute Bars Recovery From Guarantor After Private Sale.** After a private foreclosure sale, *Code of Civil Procedure Section 580d* bars any further recovery, including recovery from the trustor's guarantor. While the statute does not directly bar recovery from a guarantor, it does indirectly bar recovery because, when the beneficiary has elected to conduct a private foreclosure sale that destroys the guarantor's recourse against the trustor, the beneficiary is estopped as a matter of law from seeking recovery of any deficiency from the guarantor (*Union Bank v. Gradsky (1968) 265 Cal. App. 2d 40, 41, 71 Cal. Rptr. 64*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that a deficiency judgment is barred under *Code Civ. Proc. § 580d*, because the debt for which recovery is sought is evidenced by a note secured by a trust deed, and the real property or estate for years in real property has been sold under the power of sale contained in that trust deed.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue. For example, in an action by the beneficiary on the underlying debt, the contention may be raised in support of a motion for summary judgment by the trustor. This form also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus counsel should demonstrate that the debt for which recovery is sought was evidenced by a note secured by a trust deed, and that the real property was sold at a private foreclosure sale held pursuant to a power of sale contained in that trust deed.

[c] Related Points and Authorities

For forms relating to waiver of the guarantor's defense based on *Union Bank v. Gradsky (1968) 265 Cal. App. 2d 40, 71 Cal. Rptr. 64* (discussed in [3][b], *below*), see Ch. 222, *Suretyship* .

[d] Opposing Points and Authorities

The points and *authorities in §§ 230.50[1]*, and/or *230.51[1]*, or 230.53 may be used in an appropriate case to oppose the contention supported by this form.

[3] Discussion of Authorities

[a] When "Sale" Occurs

The plaintiffs in ***Ballengee v. Sadlier*** *(1986) 179 Cal. App. 3d 1, 224 Cal. Rptr. 301* , were the beneficiaries under a second trust deed. The defendants defaulted in payments on notes secured by both the first and second trust deeds. The plaintiffs and the holders of the first trust deed each started separate private foreclosure proceedings under their respective trust deeds. The sale under the plaintiffs' second trust deed was conducted first. The plaintiffs were the successful bidders. The trustee executed a "Declaration of Trustee's Sale" but did not execute and deliver a trustee's deed. Later, when the property was again sold under the first trust deed, the plaintiffs brought an action against the defendants on the underlying note. The trial court entered judgment for the defendants on the ground that recovery was barred under *Code Civ. Proc. § 580d*. The plaintiffs appealed, arguing that the sale under their second trust was never completed because no deed was ever executed or delivered. Their second trust deed was therefore still in effect until it was rendered worthless by the sale under the senior trust deed, and consequently *Code Civ. Proc. § 580d* did not apply to them under the exception afforded to sold-out junior lienholders [*see § 230.51*].

The court of appeal affirmed. The sale under the second trust deed was complete when the trustee accepted the plaintiffs' bid, as evidenced by the trustee's declaration. The subsequent execution and delivery of the trustee's deed evidencing the transfer of title were merely ministerial acts not necessary for completion of the sale. Therefore, *Code Civ. Proc. § 580d* clearly applied to bar recovery (*179 Cal. App. 3d 1, 4-5)* .

[b] Statute Bars Recovery From Guarantor After Private Sale

In ***Union Bank v. Gradsky*** *(1968) 265 Cal. App. 2d 40, 71 Cal. Rptr. 64* , the bank lent money to a third party, who

executed a note secured by a trust deed, and the defendant was the guarantor of the note. On the trustor's default, the trustor's interest was foreclosed at private sale. The bank then brought an action against the guarantor to recover the deficiency. The trial court sustained the guarantor's demurrer without leave to amend, and the bank appealed the judgment of dismissal.

The court of appeal affirmed. A creditor cannot recover from a guarantor the unpaid balance on a secured note after the creditor's private foreclosure sale of the property. Although the creditor's recovery was not directly barred by *Code Civ. Proc. § 580d*, it was indirectly barred by principles of estoppel. Estoppel arises as a matter of law to prevent the creditor from recovering from the guarantor after the creditor has exercised an election of remedies that destroys the guarantor's subrogation rights against the principal debtor. The destruction of the guarantor's subrogation rights follows from the combination of the creditor's election to subject the property to nonjudicial sale and the operation of *Code Civ. Proc. § 580d*, which prevents both the creditor and the guarantor from obtaining any deficiency judgment against the debtor after the nonjudicial sale (*265 Cal. App. 2d 40, 41)* . The creditor could have initially elected other remedies that would not have destroyed the guarantor's subrogation rights, that is, either a judicial foreclosure action in which the guarantor could have been joined, or an action on the written guaranty. Thus, the ultimate impact of loss should fall on the creditor, as the party that had the election of remedies and had a duty not to impair the guarantor's remedies against the debtor (*265 Cal. App. 2d 40, 43-47)* .

[4] Additional Authorities

[a] Deficiency Is Barred After Nonjudicial Foreclosure Sale

Passanisi v. Merit-McBride Realtors, Inc. (1987) 190 Cal. App. 3d 1496, 236 Cal. Rptr. 59 (discussed in *§ 230.100[3][c]*), considered whether the judgment for costs and attorney's fees awarded to the beneficiary in the trustor's previous action to enjoin the trustee's sale was rendered unenforceable under *Code Civ. Proc. § 580d* by the subsequent sale of the property. Neither the purpose nor the express language of *Code Civ. Proc. § 580d* made the attorney's fee award unenforceable. The judgment could not be considered a subterfuge for collection of a deficiency judgment. The award arose from an action commenced by the trustor and wasentirely removed from the problems addressed by the antideficiency legislation (*190 Cal. App. 3d 1496, 1509)* .

[b] Statute Bars Recovery From Guarantor After Private Sale

In *Consolidated Capital Income Trust v. Khaloghli (1986) 183 Cal. App. 3d 107, 227 Cal. Rptr. 879* , the plaintiff lent money to a corporation, which executed a note secured by a trust deed. The sole shareholder of the corporation was the guarantor of the note. On default by the corporation, the plaintiff sued on the guaranty. The plaintiff also conducted a private foreclosure sale under the trust deed during the pendency of that action. The guarantor thereafter obtained summary judgment. On appeal, the court of appeal reiterated the rule of *Union Bank v. Gradsky (1968) 265 Cal. App. 2d 40, 71 Cal. Rptr. 64* (discussed in [3][b], *above*), that a creditor is estopped as a matter of law from recovering a deficiency judgment from a guarantor after the creditor has elected the remedy of private foreclosure sale that, by operation of *Code Civ. Proc. § 580d*, destroys the guarantor's subrogation rights against the debtor (*183 Cal. App. 3d 107, 113*). However, the court went on to reverse the summary judgment, on the ground that a triable question of fact existed as to whether the guarantor had already waived his subrogation rights before the private sale (*183 Cal. App. 3d 107, 113-117*).

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23-230 California Points & Authorities § 230.41

§ 230.41 Recovery of Deficiency Is Barred by Statute--Deficiency Judgment on Purchase-Money Trust Deed Is Barred [Code Civ. Proc. § 580b]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE _____ [*specify party, e.g.*, PLAINTIFF] MAY NOT RECOVER A DEFICIENCY JUDGMENT BECAUSE THE FORECLOSURE SALE OF THE REAL PROPERTY WAS CONDUCTED UNDER A TRUST DEED SECURING PAYMENT OF THE PURCHASE PRICE OF THE REAL PROPERTY.

A. Deficiency Judgment on Purchase-Money Trust Deed Is Barred. No deficiency judgment shall lie in any event after any sale of real property or an estate for years for failure of the purchaser to complete the contract of sale, or under a trust deed given to the vendor to secure payment of the balance of the purchase price of real property, or under a trust deed on a dwelling for not more than four families given to a lender to secure repayment of a loan that was in fact used to pay all or part of the purchase price of that dwelling occupied, entirely or in part, by the purchaser. [When both a chattel mortgage and a trust deed have been given to secure payment of the balance of the combined purchase price of both real and personal property, no deficiency judgment shall lie at any time under any one of them if no deficiency judgment would lie under the trust deed on real property] (*Code Civ. Proc. § 580b*).

[*Optional*] **B. Statute Bars Deficiency Judgment for Sold-Out Junior Lienholder.** In the case of a purchase-money trust deed, the beneficiary may look only to the property for recovery of the debt. There can be no deficiency judgment when there has been a private sale or a judicial foreclosure sale under the purchase-money trust deed or when there has been no sale under the purchase-money trust deed because the security has been rendered valueless or is exhausted as a result of foreclosure of a senior trust deed (*Brown v. Jensen (1953) 41 Cal. 2d 193, 197-198, 259 P.2d 425* ; *Shepherd v. Robinson (1981) 128 Cal. App. 3d 615, 623, 180 Cal. Rptr. 342*).

[*Optional*] **C. Statute Applies to Residential Construction Loan by Third-Party Lender.** A trust deed in favor of a third-party lender given to secure repayment of a construction loan, if the proceeds are in fact used to pay all or part of

the cost of constructing a dwelling on the real property for occupation by the owner, constitutes a purchase-money trust deed subject to *Code of Civil Procedure Section 580b* to the same extent as a trust deed "on a dwelling for not more than four families given to a lender to secure repayment of a loan which was in fact used to pay all or part of the purchase price of such dwelling, occupied, entirely or in part, by the purchaser" (*Prunty v. Bank of America (1974) 37 Cal. App. 3d 430, 439-443, 112 Cal. Rptr. 370*).

[*Optional*] **D. Refinancing Is Sale.** A beneficiary under a refinanced trust deed who participates in the refinancing will be a vendor within the meaning of *Code of Civil Procedure Section 580b* and will be barred from recovering a deficiency judgment after foreclosure if the refinancing transaction is otherwise subject to the antideficiency statutes (*Costanzo v. Ganguly (1993) 12 Cal. App. 4th 1085, 1090-1092, 16 Cal. Rptr. 2d 55* ; *LaForgia v. Kolsky (1987) 196 Cal. App. 3d 1103, 1112-1113, 242 Cal. Rptr. 282*).

[*Optional*] **E. Loan Need Not Be Exclusively for Purchase Money.** A trust deed is a purchase-money trust deed within the meaning of *Code of Civil Procedure Section 580b* if the loan it secures is part of the consideration for, or necessary to the consummation of, a sale or exchange of real property. In order to bar a deficiency judgment, it is not necessary that all of the loan proceeds be used to pay the purchase price or expenses of the sale (*Bargioni v. Hill (1963) 59 Cal. 2d 121, 123-124, 28 Cal. Rptr. 321, 378 P.2d 593* ; *BMP Property Development v. Melvin (1988) 198 Cal. App. 3d 526, 529-532, 243 Cal. Rptr. 715*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of thecontention that a deficiency judgment is barred under *Code Civ. Proc. § 580b* because the debt for which recovery is sought is or was secured by a purchase-money trust deed.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue. For example, in an action by a sold-out junior lienholder on the underlying debt, the contention may be raised in support of the defendant's motion for summary judgment. This form also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus counsel should demonstrate that the debt for which recovery is sought is or was secured by a purchase-money trust deed subject to *Code Civ. Proc. § 580b*.

[c] Opposing Points and Authorities

The points and *authorities in §§ 230.50[1]*, and/or *230.51[1]*, 230.53 may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Statute Bars Deficiency Judgment for Sold-Out Junior Lienholder

In ***Brown v. Jensen*** *(1953) 41 Cal. 2d 193, 259 P.2d 425* , the plaintiff sold real property to the defendants. As part of the purchase price, the defendants gave two promissory notes: one, to a third-party lender, secured by a first trust deed on the property; the other, to the plaintiff, secured by a second trust deed on the property. The defendants defaulted on the notes, and the third-party lender sold the property at a nonjudicial foreclosure sale. The plaintiff, whose security had

been rendered valueless, brought an action to recover on her note and obtained a judgment. The defendants appealed, contending that *Code Civ. Proc. § 580b* barred the recovery.

The Supreme Court reversed with directions to enter judgment for the defendants. The plaintiff had clearly taken a purchase-money trust deed on the property when it was purchased; therefore, *Code Civ. Proc. § 580b* was applicable, and she could look only to the property (*41 Cal. 2d 193, 196, 197*). With purchase-money trust deeds, the character of the transaction is determined at the time the trust deed is executed. Its nature is then fixed for all time, and no deficiency judgment may be obtained regardless of whether the security later becomes valueless (*41 Cal. 2d 193, 197*). *Code Civ. Proc. § 580b* expressly refers to a deficiency judgment after a sale of the property, but that language also includes situations in which a sale would be an idle act because the security has been exhausted or rendered valueless (*41 Cal. 2d 193, 197-198)* . In other words, *Code Civ. Proc. § 580b* bars recovery of a deficiency by the beneficiary of a purchase-money trust deed, whether there is a private foreclosure sale under that trust deed, a judicial foreclosure sale, or no sale because the security has become valueless or is exhausted (*41 Cal. 2d 193, 198)* .

In 1969, the plaintiffs in ***Shepherd v. Robinson*** *(1981) 128 Cal. App. 3d 615, 180 Cal. Rptr. 342* (overruled on other grounds in *DeBerard Properties, Ltd. v. Lim (1999) 20 Cal. 4th 659, 671, 85 Cal. Rptr. 2d 292, 976 P.2d 843*), sold property to the purchasers, who executed a purchase-money note and trust deed. In 1973, those purchasers sold the property to the defendants. This sale involved refinancing in which a third-party lender took a first trust deed on the property. The proceeds of the third-party loan were used to pay down the original note. The plaintiffs took a new note secured by a second trust deed for the unpaid balance. After the plaintiffs' security was rendered worthless by foreclosure of the third-party lender's first trust deed, the plaintiffs brought an action to recover on the replacement note. The trial court granted partial summary judgment in their favor. The defendants appealed.

The court of appeal reversed to the extent that the trial court granted the plaintiffs a deficiency judgment, holding that a deficiency judgment was barred by statute (*128 Cal. App. 3d 615, 627)* . Under *Code Civ. Proc. § 580b*, a seller can look only to the property for the recovery of a purchase-money debt that is secured by the property. This is equally true when the debt in question is a second trust deed and the property has been foreclosed on by the senior lienholder, leaving the security exhausted (*128 Cal. App. 3d 615, 623*). The plaintiffs were the sellers in the 1973 transaction because they were necessary parties to the transaction, consented to it, and participated in it (*128 Cal. App. 3d 615, 623-624*).

[b] Statute Applies to Residential Construction Loan by Third-Party Lender

In ***Prunty v. Bank of America*** *(1974) 37 Cal. App. 3d 430, 112 Cal. Rptr. 370* , owners executed a trust deed to secure a construction loan for a residence on the property. The residence was constructed but was subsequently destroyed by a landslide. The owners obtained a declaratory judgment that *Code Civ. Proc. § 580b* barred the bank from recovering a deficiency judgment in the event of their default and a judicial foreclosure sale.

The court of appeal affirmed. *Code Civ. Proc. § 580b* bars a deficiency judgment after a sale under a trust deed on a dwelling given to a third-party lender "to secure repayment of a loan which was in fact used to pay all or part of the purchase price of such dwelling occupied, entirely or in part, by the purchaser" (*37 Cal. App. 3d 430, 439-440)* . Noting the liberal construction to be given to *Code Civ. Proc. § 580b*, the court held that this language included a trust deed onproperty given to a third-party lender to secure repayment of a loan that in fact was used to pay costs of constructing a dwelling on the property, which was occupied by the borrower (*37 Cal. App. 3d 430, 440-443)* .

[c] Refinancing Is Sale

In ***Costanzo v. Ganguly*** *(1993) 12 Cal. App. 4th 1085, 16 Cal. Rptr. 2d 55* , the plaintiff sold an apartment complex consisting of 11 buildings and took back a promissory note secured by a wrap-around second trust deed. The property was then sold with financing by a wrap-around third trust deed, which encompassed the first and second liens. After a

default on the last note, the property was sold again with financing under which a savings and loan provided $2 million secured by a new first lien and $400,000 financed by 11 promissory notes secured by the buildings and payable to the persons who had last sold the property. The plaintiff asked to have the deal restructured to avoid the tax consequences of having her note paid, which resulted in her exchanging her note for cash and an assignment of the 11 promissory notes. The property was then sold to the defendant, who executed 11 new notes on the same terms to the plaintiff. The defendant defaulted, and the senior lienholder foreclosed, extinguishing the plaintiff's liens. She sued the defendant for the balance due on the notes. The defendant invoked the antideficiency protection of *Code Civ. Proc. § 580b*. The trial court concluded that the statute was not applicable and entered judgment for the plaintiff. The defendant appealed.

The court of appeal reversed. The defendant contended that the notes were purchase-money notes when they were issued and remained purchase-money notes when they were assigned to the plaintiff and when they were replaced when the defendant purchased the property. According to the court, it was clear that notes retain their purchase-money character when they are assigned and when new notes on substantially similar terms are issued (*12 Cal. App. 4th 1085, 1089-1090)* , so that the key issue was whether the original notes were purchase-money notes. A lienholder who participates in a sale transaction and agrees to extend a loan to a new purchaser in an attempt to protect a security interest is considered to be a seller. The notes were created by a party who participated in the sale to protect its interests. It was thus a seller for the purpose of the statute (*12 Cal. App. 4th 1085, 1090-1091*). However, when the transaction is a variation of the standard purchase-money transaction, the antideficiency statute applies only to the extent necessary to promote the purposes of the statute. The primary purpose is to prevent overvaluation of land by placing the risk of inadequate security on the purchase-money lienholder. It was apparent that this property was being overvalued when the notes were created, because the amount of the first lien and the notes' lien exceeded the purchase price. Therefore, the enforcement of the antideficiency statute would effectuate its purpose. The court concluded that the plaintiff was barred from enforcing a deficiency against the defendant (*12 Cal. App. 4th 1085, 1091-1092*).

The plaintiff in ***LaForgia v. Kolsky*** *(1987) 196 Cal. App. 3d 1103, 242 Cal. Rptr. 282* , was originally the beneficiary of a second trust deed on residential property. The trust deed secured an improvement loan. The defendant was originally the beneficiary under a third trust deed on the same property. After notices of default had been recorded by the beneficiary of the first trust deed and the defendant, the owner declared bankruptcy. The bankruptcy court approved a refinancing arrangement, agreed to by all parties, under which the owner conveyed title to the defendant in return for $10,000 secured by a new third trust deed on the property. The first trust deed remained in place, the beneficiary's expenses were paid, and arrearages under the note were brought current. The plaintiff took a new note and second trust deed for the balance due on the original note. Later, the beneficiary of the first trust deed foreclosed, and the plaintiff sought to recover a deficiency judgment from the defendant. Judgment was for the plaintiff, and the defendant appealed.

The court of appeal reversed. The refinancing amounted to a sale within the meaning of *Code Civ. Proc. § 580b* (*196 Cal. App. 3d 1103, 1107, 1112-1113)* . The plaintiff's agent was a participant in the negotiations and discussions regarding the refinancing (*196 Cal. App. 3d 1103, 1107-1108)* . *Code Civ. Proc. § 580b* bars recovery of a deficiency judgment against the purchaser even by the beneficiary of a junior purchase-money trust deed whose security interest is lost through foreclosure of a senior lien (*196 Cal. App. 3d 1103, 1108*). When a transaction involves a variation of the standard purchase-money mortgage transaction, the antideficiency statute applies if the circumstances come within the purpose of the statute. The purpose of the antideficiency statute is to prevent overvaluation of land by placing the risk of inadequate security on the lender (*196 Cal. App. 3d 1103, 1109*). Here the refinanced purchase price exceeded the bankruptcy court's appraised value of the property (*196 Cal. App. 3d 1103, 1106)* . The court discussed *Shepherd v. Robinson (1981) 128 Cal. App. 3d 615, 623, 180 Cal. Rptr. 342* (discussed in [a], *above*), and acknowledged that in *Shepherd* the refinanced loan was originally a purchase-money trust deed, while in this case the plaintiff's original loan was not a purchase-money loan. Nevertheless, the same principles apply, namely, that the plaintiff was a necessary party in the refinancing transaction, which was for his benefit and would not have occurred without the plaintiff's participation. Thus, the plaintiff was a seller within the meaning of *Code Civ. Proc. § 580b* (*196 Cal. App. 3d 1103, 1109-1110)* . The court also discussed and distinguished *Goodyear v. Mack (1984) 159 Cal. App. 3d 654, 656-659, 205 Cal. Rptr. 702* (discussed in *§ 230.50[3][d]*), in which a second parcel, not the one originally sold by the beneficiary,

was given as security for the refinancing (*196 Cal. App. 3d 1103, 1111-1112)* . Here, the defendant lost both his original investment and the property and thus was in the position that *Code Civ. Proc.§ 580b* is designed to prevent, namely losing one's property and still being liable for the purchase price (*196 Cal. App. 3d 1103, 1112)* . The interests and positions of the parties in this transaction brought it within the purpose of *Code Civ. Proc. § 580b* and barred a deficiency judgment (*196 Cal. App. 3d 1103, 1112-1113)* .

[d] Loan Need Not Be Exclusively for Purchase Money

In ***Bargioni v. Hill*** *(1963) 59 Cal. 2d 121, 28 Cal. Rptr. 321, 378 P.2d 593* , the defendant purchased a motel and gave the plaintiff, who acted as broker in the transaction, a promissory note secured by a junior trust deed on the motel. After the senior lienholder's private foreclosure sale, the plaintiff sued to recover on the note. The Supreme Court rejected the defendant's contention that the judgment was barred by *Code Civ. Proc. § 580d*. That statute bars recovery only on the obligation secured by the trust deed that has been foreclosed, not recovery by a junior lienholder whose security has been rendered worthless by a senior lienholder's foreclosure (*59 Cal. 2d 121, 122)* . However, because the plaintiff's note was clearly intended as part payment of the purchase price, *Code Civ. Proc. § 580b* barred recovery of a deficiency (*59 Cal. 2d 121, 123-124)* .

In ***BMP Property Development v. Melvin*** *(1988) 198 Cal. App. 3d 526, 243 Cal. Rptr. 715* , after the first trust deeds were foreclosed, the beneficiary of five second trust deeds on five condominiums sought to have the trustors declared personally liable on the notes secured by its trust deeds. The plaintiff and the defendants had exchanged properties. The condominiums traded by the plaintiff had been unoccupied since their construction. To compensate for the negative cash flow caused by the vacancies, the plaintiff gave $10,000 cash per condominium, evidenced by a note and second trust deed. Some of the proceeds of the notes were used to pay real estate commissions, escrow fees, recording costs, and expenses. The remainder of the proceeds were used for personal obligations. Judgment was for the defendants, and the plaintiff appealed.

The court of appeal affirmed. The trial court found that the loans were part of the consideration for the sale (*198 Cal. App. 3d 526, 529)* . The court cited *Bargioni v. Hill (1963) 59 Cal. 2d 121, 123-124, 28 Cal. Rptr. 321, 378 P.2d 593* , discussed *above*, in which the proceeds of the loan were used to pay the broker's commission, for the proposition that the criterion for a purchase-money trust deed under *Code Civ. Proc. § 580b* is, not that the loan proceeds be used to pay the purchase price, but that the note and trust deed be integral elements in the transaction (*198 Cal. App. 3d 526, 530-531)* .

[4] Additional Authorities

[a] Deficiency Judgment on Purchase-Money Trust Deed Is Barred

In *Sherwood-Trimble Medical Group v. 10001 Venice Boulevard Partnership (1999) 75 Cal. App. 4th 872, 89 Cal. Rptr. 2d 533* , the court of appeal held that the meaning of "vendor," for purposes of *Code Civ. Proc. § 580b*, included a vendor of personal property (a medical practice) who sold the practice in a transaction along with a vendor of real property (the building where the practice was located). Both vendors took back from the buyer a single purchase money promissory note secured by a deed of trust on the real property and, by a security agreement, by the personal property. The court found that the deed of trust was a "deed of trust upon real property" for purposes of the antideficiency statutes despite the additional security in personal property (*75 Cal. App. 4th 872, 878*). The court noted that the initial note had been amended and made payable solely to Sherwood. The real property vendor (Vendunn) had liquidated and distributed its interest in the original note to its shareholders, and they had allowed their interest to go into limbo when the note was amended. Those same individuals, as partners of Sherwood, brought suit seeking a deficiency judgment that Vendunn, as the vendor of the real property, would have been denied. The court concluded that the shareholders were attempting an end run around § 580b (*75 Cal. App. 4th 872, 878*).

BMP Property Development v. Melvin (1988) 198 Cal. App. 3d 526, 243 Cal. Rptr. 715 (discussed in [3][d], *above*), also holds that a trust deed is a purchase-money trust deed under *Code Civ. Proc. § 580b* even if the sale or trade is handled through one escrow and the loan that the trust deed secures is disbursed through another escrow, when, under *Civ. Code § 1642*, the two escrows are parts of one transaction (*198 Cal. App. 3d 526, 531-532)* .

[b] Statute Bars Deficiency Judgment for Sold-Out Junior Lienholder

Palm v. Schilling (1988) 199 Cal. App. 3d 63, 76, 244 Cal. Rptr. 600 (discussed in *§ 230.42[3][a]*), held that a trustor cannot waive the protection of *Code Civ. Proc. § 580b* as a condition of refinancing.

LaForgia v. Kolsky (1987) 196 Cal. App. 3d 1103, 242 Cal. Rptr. 282 (discussed in [3][c], *above*), holds that *Code Civ. Proc. § 580b* bars recovery of a deficiency judgment against the purchaser even by the beneficiary of a junior purchase-money trust deed whose security interest is lost through foreclosure of a senior lien (*196 Cal. App. 3d 1103, 1108)* .

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23-230 California Points & Authorities § 230.42

§ 230.42 Recovery of Deficiency by Sold-Out Junior Lienholder After Purchase at Senior Lienholder's Private Foreclosure Sale--Sold-Out Junior Lienholder's Recovery Is Limited by Statute

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

BECAUSE PLAINTIFF PURCHASED THE PROPERTY, AS A JUNIORLIENHOLDER, AT THE PRIVATE FORECLOSURE SALE UNDER THE SENIOR TRUST DEED, CODE OF CIVIL PROCEDURE SECTION 580a LIMITS THE PLAINTIFF'S RECOVERY ON THE UNDERLYING DEBT.

A. Limitation on Deficiency Judgment for Sold-Out Junior Lienholder. The fair-value provisions of *Code of Civil Procedure Section 580a* limit the amount of a deficiency judgment recoverable by a sold-out junior lienholder who purchased the property at a senior lienholder's private foreclosure sale (*Walter E. Heller Western, Inc. v. Bloxham (1985) 176 Cal. App. 3d 266, 273-274, 221 Cal. Rptr. 425*).

B. Purchasing Junior Lienholder's Allowable Recovery. When a sold-out junior lienholder, who was the purchaser at the senior lienholder's private foreclosure sale, sues to recover a deficiency judgment on the underlying debt, *Code of Civil Procedure Section 580a* limits the amount of recovery to the excess of the combined debts of the senior and junior lienholders over the fair market value of the property, or over the selling price at the foreclosure sale if that price exceeded the fair market value (*Walter E. Heller Western, Inc. v. Bloxham (1985) 176 Cal. App. 3d 266, 273, 221 Cal. Rptr. 425*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that *Code Civ. Proc. § 580a* limits the amount of a deficiency judgment being sought by a sold-out junior lienholder whose security has been rendered worthless by a private foreclosure sale under a senior trust deed, because the junior lienholder was the purchaser at the

senior lienholder's sale.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue. For example, in an action by a sold-out junior lienholder on the underlying debt, the contention may be raised in support of a motion for summary judgment by the defendant, if the plaintiff is entitled to no further recovery after application of the fair-value limitations of *Code Civ. Proc. § 580a*. This form also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus counsel should demonstrate that the sold-out junior lienholder was the purchaser at the senior lienholder's private foreclosure sale.

[c] Opposing Points and Authorities

The points and *authorities in § 230.51[1]* or *§ 230.53* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Limitation on Deficiency Judgment for Sold-Out Junior Lienholder

In ***Walter E. Heller Western, Inc. v. Bloxham*** *(1985) 176 Cal. App. 3d 266, 221 Cal. Rptr. 425* , the plaintiff was the beneficiary under several junior trust deeds securing a loan. The trustor defaulted on the senior debt, and the property was sold at a nonjudicial foreclosure sale. The plaintiff was the purchaser. The plaintiff then sued the trustor to recover on the underlying debt. The trial court entered judgment for the plaintiff for the full amount of the outstanding debt. The defendant appealed, contending that the plaintiff's recovery constituted a deficiency judgment that should be either barred under *Code Civ. Proc. § 580d* or limited under *Code Civ. Proc. § 580a*.

The court of appeal reversed and remanded with directions to redetermine the amount of the deficiency in accordance with *Code Civ. Proc. § 580a* (*176 Cal. App. 3d 266, 274)* . The court noted the general rule, announced in *Roseleaf Corp. v. Chierighino (1963) 59 Cal. 2d 35, 39-44, 27 Cal. Rptr. 873, 378 P.2d 97* , that *Code Civ. Proc. §§ 580a* and *580d* do not prevent recovery by a sold-out junior lienholder whose security had been rendered worthless by a senior lienholder's private foreclosure sale (*176 Cal. App. 3d 266, 271-272)* . The court concluded that *Code Civ. Proc. § 580d* should not be applied against a sold-out junior lienholder even though the junior lienholder had purchased the property at the senior lienholder's private foreclosure sale (*176 Cal. App. 3d 266, 273)* . However, with respect to *Code Civ. Proc. § 580a*, the court distinguished the general rule, noting that previous decisions had applied it only to junior lienholders who had not purchased the property at the senior lienholder's private foreclosure sale, who therefore had no control over the amount of the successful bid. The court reasoned that it was equitable to apply *Code Civ. Proc. § 580a* to limit the recovery of a junior lienholder who was the successful bidder at the senior lienholder's sale because, in this situation, application of that statute served its general purpose to protect against a lienholder's buying the property with a bid below fair value, recovering a deficiency judgment, then achieving a recovery in excess of the debt by reselling the property at a profit. Therefore, the fair-value provisions of *Code Civ. Proc. § 580a* limited the amount of the deficiency recoverable by a sold-out junior lienholder who was the purchaser at the senior lienholer's private foreclosure sale (*176 Cal. App. 3d 266, 273-274)* .

[b] Purchasing Junior Lienholder's Allowable Recovery

The facts and procedural background of ***Walter E. Heller Western, Inc. v. Bloxham*** *(1985) 176 Cal. App. 3d 266, 221 Cal. Rptr. 425* , are discussed in [a], *above*. In that case, the court of appeal applied the fair-value provisions of *CodeCiv. Proc. § 580a* to limit the amount of a deficiency judgment recoverable by a sold-out junior lienholder who

was the purchaser at the senior lienholder's private foreclosure sale. In such a case, *Code Civ. Proc. § 580a* limits the amount of recovery to the excess of the combined debts of the senior and junior lienholders over the fair market value of the property, or over the selling price at the foreclosure sale if that price exceeded the fair market value (*176 Cal. App. 3d 266, 273)* .

[4] Additional Authorities

[a] Limitation on Deficiency Judgment for Sold-Out Junior Lienholder

In *Bank of Hemet v. United States (9th Cir. 1981) 643 F.2d 661* , the plaintiff, a junior lienholder, bought the property at a private foreclosure sale conducted by the senior lienholder. The United States, as a junior lienholder represented by the Internal Revenue Service, redeemed the property from the plaintiff under *I.R.C. § 7425*, tendering an amount equal to the plaintiff's bid plus statutory interest. The plaintiff sued for declaratory relief and to quiet title, challenging the IRS's redemption. The district court entered summary judgment for the defendant, and the plaintiff appealed. The court of appeals reversed and remanded with directions to redetermine the amount of the redemption to be paid by the defendant (*643 F.2d 661, 670)* . The major issue on appeal involved the proper amount for redemption pursuant to *28 U.S.C. § 2410*. To resolve this issue, it was necessary, in turn, to determine the extent to which the plaintiff was entitled to recover a deficiency judgment under state law. The court examined *Code Civ. Proc. §§ 580a, 580b, 580d*, and *726* and held that when a sold-out junior lienholder purchased the property at the senior lienholder's private foreclosure sale, any subsequent recovery of a deficiency judgment by the junior lienholder was subject to *Code Civ. Proc. § 580a*, because the purpose of that statute was to prevent excess recovery by a successful underbidder (*643 F.2d 661, 667-669)* .

[b] Purchasing Junior Lienholder's Allowable Recovery

The facts and procedural background of *Bank of Hemet v. United States (9th Cir. 1981) 643 F.2d 661* , are discussed in [a], *above*. In that case the court of appeals interpreted *Code Civ. Proc. § 580a* as it applied to limit recovery of a deficiency judgment by a sold-out junior lienholder who purchased the property at the senior lienholder's private foreclosure sale. The court held that in such a case the amount of recovery was limited to the amount by which the combined debts of the junior and senior lienholders exceeded the fair market value of the property, but in no event could the deficiency judgment exceed the amount by which the combined debts exceeded the actual price paid by the purchasing junior lienholder (*643 F.2d 661, 669)* .

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23-230 California Points & Authorities § 230.43

§ 230.43 Recovery of Deficiency by Sold-Out Junior Lienholder After Purchase at Senior Lienholder's Private Foreclosure Sale--Sold-Out Junior Lienholder Cannot Recover Because Action Was Not Commenced Within Three Months [Code Civ. Proc. § 580a]

[1] FORM

[*The following may be in included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE _____ [*specify party, e.g.,* PLAINTIFF] MAY NOT RECOVER A DEFICIENCY JUDGMENT BECAUSE HE/SHE/IT PURCHASED THE ENCUMBERED REAL PROPERTY AT A PRIVATE FORECLOSURE SALE UNDER THE SENIOR TRUST DEED AND DID NOT BRING THE ACTION FOR A DEFICIENCY WITHIN THREE MONTHS AFTER THE DATE OF SALE.

Three-Month Limitation Period Applies to Junior Lienholder. The three-month period for bringing an action for a deficiency in *Code of Civil Procedure Section 580a* is applicable to a sold-out junior lienholder who is the purchaser at a senior lienholder's private foreclosure sale (*Citrus State Bank v. McKendrick (1989) 215 Cal. App. 3d 941, 946-950, 263 Cal. Rptr. 781*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the three-month limitation period in *Code Civ. Proc. § 580a* is applicable to a sold-out junior lienholder who is the purchaser at a senior lienholder's private foreclosure sale.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive contention. For example, in an action by a sold-out junior lienholder who purchased at a senior lienholder's sale, the contention may be raised in support of a demurrer or a motion for a nonsuit when the action was not brought within three months of the sale.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus counsel should include the date of sale and the date the complaint was filed.

[3] Discussion of Authorities

[a] Three-Month Limitation Period Applies to Junior Lienholder

In ***Citrus State Bank v. McKendrick*** *(1989) 215 Cal. App. 3d 941, 263 Cal.Rptr. 781* , the plaintiff was a junior lienholder who purchased the property at a senior lienholder's private foreclosure sale. The plaintiff sued for a deficiency judgment in an action filed more than three months after the foreclosure sale. At trial, the defendant moved for nonsuit based on *Code Civ. Proc. § 580a*. The trial court ruled that *Code Civ. Proc. § 580a* was applicable and granted the motion. The plaintiff appealed.

The court of appeal affirmed. Although the limitations of *Code Civ. Proc. § 580a* do not extend to sold-out junior lienholders, juniors purchasing the property at a senior lienholder's private foreclosure sale are subject to the three-month limitation in that section. The fair value provisions of *Code Civ. Proc. § 580a* are applicable to a junior lienholder who purchases at a senior lienholder's sale, as held in *Walter E. Heller Western, Inc. v. Bloxham (1985) 176 Cal. App. 3d 266, 273-274, 221 Cal. Rptr. 425* (discussed in *§ 230.42[3][a]*). A junior lienholder who purchases the property effectively steps into the shoes of the senior lienholder. By the purchase, the junior lienholder's security is not rendered valueless, as the junior lienholder acquires title to the property and is protected by the right to a deficiency limited by the fair-value rules (*215 Cal. App. 3d 941, 946-950)* .

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[Reserved]

§§ 230.44[Reserved]

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23-230 California Points & Authorities § 230.50

§ 230.50 Deficiency Judgment Is Not Barred or Limited by Statute--Trust Deed Is Variant Transaction That Is Not Subject to Statutory Bar [Code Civ. Proc. § 580b]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE BENEFICIARY MAY RECOVER ON THE UNDERLYING DEBT NOTWITHSTANDING CODE OF CIVIL PROCEDURE SECTION 580b BECAUSE THE SECURITY TRANSACTION WAS A VARIATION OF THE STANDARD PURCHASE-MONEY TRUST DEED TRANSACTION AND IS NOT FACTUALLY WITHIN THE RECOGNIZED PURPOSES OF THE STATUTE.

A. Antideficiency Statute Does Not Automatically Apply to Variant Transaction. The antideficiency proscription of *Code of Civil Procedure Section 580b* applies automatically only to the standard purchase-money situation. If a purchase-money security transaction is a variation of the standard, application of the statute turns on whether the particular application would serve the recognized purposes of the statute (*Spangler v. Memel (1972) 7 Cal. 3d 603, 609-612, 102 Cal. Rptr. 807, 498 P.2d 1055* ; *Long v. Superior Court (1985) 170 Cal. App. 3d 499, 504, 216 Cal. Rptr. 337*).

B. Recognized Purposes of Statute. *Code of Civil Procedure Section 580b* places the risk of inadequate security on the creditor. The first purpose of the statute is to discourage the creditor from overvaluing the security, and thus to prevent precarious land schemes. The second purpose is to prevent aggravation of a depression in land values by not burdening purchasers with both the loss of the property and personal liability for the debt (*Spangler v. Memel (1972) 7 Cal. 3d 603, 612, 102 Cal. Rptr. 807, 498 P.2d 1055* ; *Roseleaf Corp. v. Chierighino (1963) 59 Cal. 2d 35, 42, 27 Cal. Rptr. 873, 378 P.2d 97*).

[*Optional*] **C. Antideficiency Statute Does Not Apply When Purchase-Money Trust Deed Is Subordinated to Commercial Construction Loan.** A transaction in which the purchaser has purchased the property for the purpose of commercial improvement, and the seller has agreed to subordinate the purchase-money lien to a lien securing a

construction loan, does not constitute a standard purchase-money security transaction in which it is expected that the purchaser will continue the same or a similar use of the property. In such a case the antideficiency proscription of *Code of Civil Procedure Section 580b* does not bar an action on the underlying obligation by the seller after the security has been rendered worthless by foreclosure of the senior construction lien, because the recognized purposes of the statute would not be served by its application (*Spangler v. Memel (1972) 7 Cal. 3d 603, 611-615, 102 Cal. Rptr. 807, 498 P.2d 1055* ; *Long v. Superior Court (1985) 170 Cal. App. 3d 499, 505-506, 216 Cal. Rptr. 337*).

[*Optional*] **D. Antideficiency Statute Does Not Apply When Purchase-Money Trust Deed Covers Property Other Than That Being Purchased.** In the standard purchase-money security transaction, it is expected that the seller will retain a security interest in the property being sold, and a purchase-money loan secured by a trust deed on property other than that being purchased is therefore a variant of the standard purchase-money security transaction. In the latter situation, if the security is rendered valueless by the foreclosure of a senior lien, *Code of Civil Procedure Section 580b* does not bar recovery on the underlying debt, because the recognized purposes of the statute would not be served by its application (*Roseleaf Corp. v. Chierighino (1963) 59 Cal. 2d 35, 41-43, 27 Cal. Rptr. 873, 378 P.2d 97* ; *Goodyear v. Mack (1984) 159 Cal. App. 3d 654, 658-659, 205 Cal. Rptr. 702*).

[*Optional*] **E. Antideficiency Statute Does Not Apply When Purchaser Cashes Out Equity.** When a purchaser, seizing an unusual advantage, manages to cash out all of the equity in the property by subsequent borrowing that, through a lapse of judgment by the seller, results in liens senior to the purchase-money trust deed, and the purchase-money trust deed is rendered valueless by foreclosureof the senior liens, *Code of Civil Procedure Section 580b* does not bar the seller's recovery on the underlying debt, because the recognized purposes of the statute would not be served by its application (*Bell v. Roy (1986) 187 Cal. App. 3d 694, 698-700, 232 Cal. Rptr. 83*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that a beneficiary of a purchase-money trust deed is not barred under *Code Civ. Proc. § 580b* from seeking a deficiency judgment. The ground is that § 580b does not automatically apply because the security transaction involved a variation of the standard purchase-money security transaction, and application of the statute would not serve the recognized purposes of the statute. Optional paragraphs describe the following types of variant transactions, which are not subject to § 580b:

- Subordination of the purchase-money trust deed to a construction loan (Paragraph C).
- Use of some other property, not the purchased property, as security (Paragraph D).
- Refinancing maneuvers by the purchaser through which the purchase-money security is destroyed (Paragraph E).

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue. For example, in an action by the beneficiary to recover on the underlying debt after the security has been rendered worthless by foreclosure of a senior construction loan, the contention may be raised in support of the beneficiary's application for prejudgment attachment [*see, e.g.,* *Long v. Superior Court (1985) 170 Cal. App. 3d 499, 500-502, 216 Cal. Rptr. 337]* . This form also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus counsel should include a description of the security transaction showing that it fits a recognized judicial exception to the standard situation for

application of *Code Civ. Proc. § 580b*.

[c] Opposing Points and Authorities

The points and *authorities in § 230.41[1]* may be used in an appropriate case to oppose the points and authorities in this form.

[3] Discussion of Authorities

[a] Antideficiency Statute Does Not Automatically Apply to Variant Transaction

Spangler v. Memel *(1972) 7 Cal. 3d 603, 102 Cal. Rptr. 807, 498 P.2d 1055* , involved improved residential property that was located in a commercial zone. The sellers took a cash down payment and the purchaser's promissory note for the balance of the price, secured by a trust deed. They agreed to subordinate their trust deed to a trust deed securing a third-party lender's construction loan to the purchasers. The purchasers in turn agreed to waive the antideficiency judgment protection of *Code Civ. Proc. § 580b*, so that the sellers would have recourse against them if the construction lender foreclosed on its encumbrance. Thereafter, the purchasers constructed an office building. They defaulted on the construction loans after failing to obtain tenants for the building. The third-party lender brought a judicial foreclosure action, naming the purchasers and the sellers as the defendants, and obtained a decree of foreclosure and deficiency judgment against the purchasers. The sellers filed an amended cross complaint against the purchasers to recover on their note. The trial court entered judgment for the sellers on the cross complaint, and the purchasers appealed, contending that the sellers' recovery constituted a deficiency judgment that was barred under *Code Civ. Proc. § 580b*.

The Supreme Court affirmed. The Court stated the general rule, announced in *Brown v. Jensen (1953) 41 Cal. 2d 193, 198, 259 P.2d 425* , that Code *Civ. Proc. § 580b* applies by its terms to sold-out junior lienholders holding a purchase-money trust deed. Nonetheless *Code Civ. Proc. § 580b* applies *automatically* only to the standard purchase-money transaction. With respect to variations from the standard purchase-money transaction, *Code Civ. Proc. § 580b* applies only if the factual circumstances come within the purposes of the section (*7 Cal. 3d 603, 609-611)* . In determining whether the present transaction constituted such a variation, the Court concluded that in a standard transaction, the purchaser will continue the same or a similar use of the property, and the present security value of the property is therefore a reliable indicator of the actual fair market value. When, as in the present case, a seller subordinates the purchase-money trust deed to the lien of a third-party lender's commercial construction loan, the present security value of the property is not a reliable indicator of the ultimate value of the property, which is to be determined by the success or failure of the development venture. A sale of real property for commercial development, in which the seller agrees to subordinate the purchase-money trust deed to the lien of a commercial construction loan, is sufficiently different from the standard purchase-money trust deed transaction to remove it from automatic application of *Code Civ. Proc. § 580b*. Therefore, it was necessary to examine the factual circumstances in lightof the purposes of *Code Civ. Proc. § 580b* to determine the applicability of the statute (*7 Cal. 3d 603, 611-612)* .

The Court restated the recognized purposes of *Code Civ. Proc. § 580b* to discourage land sales that are unsound because the land is overvalued and, in the event of a depression in land values, to prevent the aggravation of the downturn that would result if defaulting purchasers lost the land and were burdened with personal liability as well (*7 Cal. 3d 603, 612)* . Application of *Code Civ. Proc. § 580b* would not have served the first purpose in the present case. The security value did not indicate the true market value, so as to discourage overvaluation of the security, because of a radical improvement and changed use of the property. In fact, the market value depended ultimately on the efforts of the purchaser to develop the property, and in such a case the risk of failure should be borne by the purchaser rather than the seller who agreed to a subordinated lien in order to obtain the purchase price (*7 Cal. 3d 603, 613)* . In addition, application of *Code Civ. Proc. § 580b* would not have served the second purpose. In the present case both the purchaser and the seller had lost the property, and the sole question was who should also bear the burden of the unpaid balance of the purchase price (*7 Cal. 3d 603, 614)* . Thus, *Code Civ. Proc. § 580b* did not bar the sellers' recovery (*7 Cal. 3d*

603, 614-615) .

In ***Long v. Superior Court*** *(1985) 170 Cal. App. 3d 499, 216 Cal. Rptr. 337* , the plaintiff owned residential property worth approximately $150,000, which he sold for $252,000 to a builder, on the basis of its development value for the construction of five condominiums. The builder paid $134,000 down and gave a promissory note secured by a trust deed for the balance of the purchase price. The plaintiff agreed to subordinate his trust deed to a lender's trust deed securing a construction loan of $682,000. The builder constructed five condominium units, which the builder was unable to sell, and defaulted on the construction loan. The lender foreclosed, rendering the plaintiff's subordinated trust deed valueless. The plaintiff sued on the underlying note to recover the deficiency in the purchase price, but the trial court denied a motion for prejudgment attachment on the ground that *Code Civ. Proc. § 580b* barred any recovery of the deficiency. The plaintiff petitioned for a writ of mandate to vacate the order of denial.

The court of appeal issued a writ directing the trial court to grant the plaintiff's application for attachment (*170 Cal. App. 3d 499, 508-509)* . The antideficiency proscriptions of *Code Civ. Proc. § 580b* did not apply to the plaintiff's transaction with the builder because it came within the exception announced in *Spangler v. Memel (1972) 7 Cal. 3d 603, 102 Cal. Rptr. 807, 498 P.2d 1055* (discussed *above*). The court stated the rule of *Spangler* that *Code Civ. Proc. § 580b* applies automatically only to the standard purchase-money security transaction, in which the parties contemplate that the purchaser will continue the same or a similar use of the property, and the current value of the property is therefore a reliable indicator of its actual fair market value. In variant transactions, *Code Civ. Proc. § 580b* applies only if application would serve the recognized purposes of the statute (*170 Cal. App. 3d 499, 504)* . As in *Spangler*, the plaintiff's transaction constituted a variation of the standard purchase-money security transaction to which *Code Civ. Proc. § 580b* did not automatically apply because the parties contemplated a radical improvement and change in use of the property, so that its present security value did not reliably indicate its ultimate market value. Further, as in *Spangler*, application of *Code Civ. Proc. § 580b* to the plaintiff's transaction would not have served the purposes of that statute. The court rejected the builder's argument that the transaction was materially distinguishable on its facts from the one in *Spangler* (*170 Cal. App. 3d 499, 505-508)* .

[b] Recognized Purposes of Statute

Spangler v. Memel *(1972) 7 Cal. 3d 603, 102 Cal. Rptr. 807, 498 P.2d 1055* , is discussed in [3][a], *above*.

In ***Roseleaf Corp. v. Chierighino*** *(1963) 59 Cal. 2d 35, 27 Cal. Rptr. 873, 378 P.2d 97* , the defendants purchased a hotel from the plaintiff and executed three promissory notes that were each secured by second trust deeds on three other parcels owned by one of the defendants. Later those parcels were sold at a private foreclosure sale under the first trust deeds, and the plaintiff's second trust deeds were rendered valueless. The plaintiff sued to recover on the underlying notes, and the trial court entered judgment for the plaintiff. The defendants appealed, contending that the action was limited by *Code Civ. Proc. § 580a* or barred under *Code Civ. Proc. §§ 580b* and *580d*.

The Supreme Court affirmed. Regarding *Code Civ. Proc. § 580b*, the Supreme Court held that it did not bar the action on the debt. The statute contemplates the standard purchase-money security transaction, in which the seller retains an interest in the property to secure payment of part of the purchase price. Variations on this standard are subject to *Code Civ. Proc. § 580b* only if they come within the purpose of that statute (*59 Cal. 2d 35, 41)* . *Code Civ. Proc. § 580b* places the risk of inadequate security on the purchase-money creditor. One purpose is to discourage the seller from overvaluing the security, which in turn discourages precarious land schemes that result when the security value does not accurately reflect the true market value. If the security then proves insufficient, not from overvaluing but from a decline in property values during a general or local depression, another purpose is to prevent the aggravation of the downturn that would result if the purchasers lost the property and were also subject to personal liability (*59 Cal. 2d 35, 42)* . These purposes were not served by applying *Code Civ. Proc. § 580b* in the case at bench. There was no indication of overvaluation, and the purchaser was not in danger of losing the property while remaining liable for the price (*59 Cal. 2d 35, 42-43)* .

For coverage of the other components of the Court's holding in *Roseleaf Corp. v. Chierighino*, see *§ 230.51[3][1]*.

[c] Antideficiency Statute Does Not Apply When Purchase-Money Trust Deed Is Subordinated to Commercial Construction Loan

Spangler v. Memel *(1972) 7 Cal. 3d 603, 102 Cal. Rptr. 807, 498 P.2d 1055* , and ***Long v. Superior Court*** *(1985) 170 Cal. App. 3d 499, 216 Cal. Rptr. 337* , are discussed in [3][a], *above*.

[d] Antideficiency Statute Does Not Apply When Purchase-Money Trust Deed Covers Property Other Than That Being Purchased

Roseleaf Corp. v. Chierighino *(1963) 59 Cal. 2d 35, 27 Cal. Rptr. 873, 378 P.2d 97* is discussed in [3][a], *above*.

In ***Goodyear v. Mack*** *(1984) 159 Cal. App. 3d 654, 205 Cal. Rptr. 702* (overruled on other grounds in *DeBerard Properties, Ltd. v. Lim (1999) 20 Cal. 4th 659, 671, 85 Cal. Rptr. 2d 292, 976 P.2d 843*), the defendants purchased the Henderson property, which was encumbered by a purchase-money trust deed in the plaintiff's favor, and the plaintiff started foreclosure proceedings after the sale. These parties then came to an agreement under which the plaintiff canceled the note and reconveyed the trust deed, and the defendants executed a new note, equal to the unpaid balance of the canceled note, which was secured by a junior trust deed on the defendants' Figueroa property. This security was later rendered worthless by foreclosure of a senior lien, and the plaintiff sued to recover on the underlying note. The trial court granted the plaintiff's motion for summary judgment, and the defendants appealed.

The court of appeal affirmed because *Code Civ. Proc. § 580b* did not bar an action on the underlying note (*159 Cal. App. 3d 654, 659, 660)* . The statute applies automatically only to the standard purchase-money transaction, in which the seller retains a security interest in the property being sold. In variations of this standard, *Code Civ. Proc. § 580b* applies only if the factual circumstances come within the purposes of the statute to prevent overvaluation by placing the risk of inadequate security on the seller and to prevent aggravation of a depression in land values by not burdening purchasers with loss of the property plus personal liability (*159 Cal. App. 3d 654, 658-659)* . In the present case, the new note, which was used to refinance or pay off the purchase-money debt, was secured by property other than purchased property. The plaintiff retained no interest in the Henderson property, and there was no reason to burden him with the risk of the inadequacy of the Figueroa property as security, because there was no reason to assume that he had any greater knowledge of its value than the defendants. Moreover, while the defendants were burdened with personal liability under the new note, they were not also in a position to lose the Henderson property. Thus, the court concluded that *Code Civ. Proc. § 580b* did not apply, as the transaction constituted a variation of the standard purchase-money transaction that did not come within the purposes of that statute (*159 Cal. App. 3d 654, 659)* .

[e] Antideficiency Statute Does Not Apply When Purchaser Cashes Out Equity

Bell v. Roy *(1986) 187 Cal. App. 3d 694, 232 Cal. Rptr. 83* , was an action to recover damages under a second trust deed given to secure $86,600 of the $200,800 purchase price. The note provided that the plaintiff would subordinate the trust deed to "new secondary refinancing" at any time. A short time later, the defendant paid $25,000 on the note, resulting in the cancellation of the original note and trust deed and their replacement by a new note and trust deed for $61,600. Then the defendant obtained a $146,700 loan from an institutional lender by representing to it that the plaintiff's note had a balance owing of $50,000 and that the proceeds were to be used for improvements on the property. At the same time, the defendant offered to make another principal payment of $7,320 on the plaintiff's note. That payment was evidenced by a reconveyance and execution of a new note and trust deed to the plaintiff for $54,280. However, the defendant did not record the replacement trust deed until after the trust deed securing the new institutional loan had been recorded as the second. The plaintiff's replacement trust deed was therefore a third, but no equity remained in the property. The defendant then sold the property for $1; the purchaser made no payments on any of the

notes, and the holders of the first and second trust deeds foreclosed. Judgment was for the plaintiff, and the defendant appealed.

The court of appeal affirmed. The defendant contended that *Code Civ. Proc. § 580b* barred the plaintiff's recovery and that the fraud exception (which is an alternative point in § 230.51[1]) did not apply because the plaintiff had not pleaded a cause of action for fraud. However, whether or not the defendant was guilty of fraud, he would not be entitled to the protection of *Code Civ. Proc. § 580b* unless the situation were one to which it was intended to apply (*187 Cal. App. 3d 694, 698)* . The statute was designed to preclude the possibility that a seller might reclaim the property and yet require the purchaser to continue, vainly, to pay the price (*187 Cal. App. 3d 694, 699)* . Citing *Roseleaf Corp. v. Chierighino (1963) 59 Cal. 2d 35, 27 Cal. Rptr. 873, 378 P.2d 97* (discussed in [3][a], *above*, and § 230.51[3][a]), the court said that the goal of the statute was to discourage overvaluation of security and precarious land promotion schemes, with the further purpose of preventing the aggravation of the downturn that would result if defaulting purchasers were burdened with large personal liability. Another basis for *Code Civ. Proc. § 580b* was that the seller taking the trust deed knows the value of the property and assumes the risk that it may become inadequate. Thus, the statute is not applicable when, as in *Roseleaf*, both parties have equal knowledge concerning the value of the property, or, as in *Spangler v. Memel (1972) 7 Cal. 3d 603, 102 Cal. Rptr. 807, 498 P.2d 1055* (discussed in [3][a],*above*), when such a change in the use of the property is contemplated that its value at the time of the sale is not a reliable indicator of its ultimate value (*187 Cal. App. 3d 694, 699)* . The court cited *Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co. (1977) 66 Cal. App. 3d 101, 139* , as indicative of a third situation falling outside the intended purposes of the antideficiency statutes: tortious injury to the mortgagee's security interest (*187 Cal. App. 3d 694, 699-700)* .

The evidence clearly demonstrated that the defendant, by means of a large, surreptitiously obtained loan, cashed out the plaintiff's equity in the property, to the defendant's own considerable profit without ever having paid the purchase price. The plaintiff's consent to subordinate to refinancing did not contemplate such radical refinancing without his receiving appropriate notice. Further, the implied term of reasonableness necessarily imposed the condition that any new financing must not render the plaintiff's security valueless, although that was exactly the improper result achieved by the defendant, and it alone was a sufficient basis for refusal to extend to the defendant the protection of *Code Civ. Proc. § 580b* (*187 Cal. App. 3d 694, 700)* .

The plaintiff's failure to plead fraud as a separate cause of action was immaterial to the consideration of whether the purposes of the statute were applicable to the situation. If the defendant's conduct did amount to fraud, he could not escape the consequences through procedural nuances (*187 Cal. App. 3d 694, 700)* .

[4] Additional Authorities

[a] Antideficiency Statute Does Not Apply When Purchase-Money Trust Deed Is Subordinated to Commercial Construction Loan

In *Boyle v. Sweeney (1989) 207 Cal. App. 3d 998, 255 Cal. Rptr. 153* , the seller agreed to subordinate her trust deed, securing a $50,000 loan, to a construction loan for $580,000. The construction loan was to finance demolition of a single-family home and construction of a three-unit condominium. After the purchasers defaulted, the senior lienholder foreclosed on the property, exhausting the security. The holder of the subordinate trust deed sued for a deficiency, and the trial court entered judgment for the plaintiff. The court of appeal affirmed. The transaction was not a standard purchase-money transaction, and *Code Civ. Proc. § 580b* was not applicable. The fact that the residential use of the property did not change was not relevant. The key factor was whether the transaction varied from the standard purchase-money transaction. This transaction was not standard because the trust deed was subordinated to a large construction loan. In this situation, the developer should bear the risk of failure of the project (*207 Cal. App. 3d 998, 1002-1004)* .

In *Wright v. Johnston (1988) 206 Cal. App. 3d 333, 253 Cal. Rptr. 418* , Wright sold his property and agreed to

subordinate to loans to improve the land for farming. When a senior note was overdue, the holder of the Wright note agreed to subordinate to a new loan. After default, the trial court refused to enter a deficiency judgment. The court of appeal reversed. The court held that the transaction was not a standard purchase-money transaction in that the Wright trust deed was subordinated to a new, large loan that was available for any purpose and was largely used for purposes other than to improve the property or to resuscitate senior liens. The court held that *Code Civ. Proc. § 580b* is not applicable when a post-sale subordination agreement exposes the seller to new risks (*206 Cal. App. 3d 333, 338)* .

In *Roffinella v. Sherinian (1986) 179 Cal. App. 3d 230, 224 Cal. Rptr. 502* , the owners of certain run-down rental property sold the property to purchasers who contemplated developing the property. Pursuant to the agreement of sale, the sellers later subordinated their purchase-money trust deed to a trust deed securing a construction loan. The purchasers defaulted on both the purchase-money debt and the construction loan, and the sellers lost their security after a private sale of the property under the senior trust deed. In an action by the construction lender against the sellers, the sellers cross complained against the purchasers to recover on the underlying note. The trial court entered judgment on the cross complaint against the purchasers. The purchasers appealed, contending that recovery was barred by *Code Civ. Proc. § 580b*, and the court of appeal affirmed. The transaction came within the exception announced in *Spangler v. Memel (1972) 7 Cal. 3d 603, 102 Cal. Rptr. 807, 498 P.2d 1055* (discussed in [3][a], *above*), and the statute did not apply (*179 Cal. App. 3d 230, 236-240)* .

[b] Antideficiency Statute Does Not Apply When Purchase-Money Trust Deed Covers Property Other Than That Being Purchased

In *Scott v. Fidelity Dev. Co. (1974) 39 Cal. App. 3d 131, 113 Cal. Rptr. 855* , the plaintiff sold property to the defendants. As part of the purchase price, the defendants transferred other property to the plaintiff and agreed to repurchase that property on specified terms. The plaintiff later sued for specific performance of the repurchase agreement, and the defendants appealed from the judgment for the plaintiff. The court of appeal affirmed. The court rejected the defendants' primary contention, that the judgment violated *Code Civ. Proc. § 580b*. Disregarding the form of the purchase transaction and looking to its substance, the court noted that the fact situation was the same as if the defendants had purchased the one property on credit and had given the plaintiff a trust deed on the other property to secure payment of the purchase price. So viewed, the transaction was not governed by the statute. Citing *Roseleaf Corp. v. Chierighino (1963) 59 Cal. 2d 35, 27 Cal. Rptr. 873, 378 P.2d 97* (discussed in [3][b], *above*, and § 230.51[3][a]), the court reasoned that when the security given is on property other than the property sold,the transaction is ordinarily outside the purposes of the statute (*39 Cal. App. 3d 131, 135)* .

California Points & Authorities

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Volume 23 Chapters 230-239 TRUST DEEDS---to---WORKERS' COMPENSATION
CHAPTER 230 TRUST DEEDS AND REAL PROPERTY MORTGAGES
PART II. FORMS
B. Effect of Antideficiency Legislation

23-230 California Points & Authorities § 230.51

§ 230.51 Deficiency Judgment Is Not Barred or Limited by Statute--Deficiency Judgment for Sold-Out or Defrauded Junior Lienholder Is Not Barred [Code Civ. Proc. §§ 580a, 580d, 726]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE BENEFICIARY IS ENTITLED TO RECOVER ON THE DEBT SECURED BY THE BENEFICIARY'S JUNIOR TRUST DEED, NOTWITHSTANDING THE PROVISIONS OF _____ ; [CODE OF CIVIL PROCEDURE SECTIONS 580a AND 726 *or* CODE OF CIVIL PROCEDURE SECTION 580b *or* CODE OF CIVIL PROCEDURE SECTION 580d], BECAUSE _____ [THE BENEFICIARY WAS FRAUDULENTLY INDUCED TO EXTEND FINANCING THAT THE PURCHASER NEVER INTENDED TO REPAY *or* THE BENEFICIARY'S SECURITY HAS BEEN RENDERED WORTHLESS BY FORECLOSURE OF A SENIOR LIEN].

[*EITHER*]

Statutory Limitations Do Not Apply to Sold-Out Junior Lienholder. The one-form-of-action rule of *Code of Civil Procedure Section 726* does not apply to a sold-out junior lienholder, nor does the three-month limitation of *Code of Civil Procedure Section 580a*. The fair-value limitations of *Code of Civil Procedure Sections 580a* and *726* also do not apply to a sold-out junior lienholder (*Roseleaf Corp. v. Chierighino (1963) 59 Cal. 2d 35, 39-41, 27 Cal. Rptr. 873, 378 P.2d 97*).

[*OR*]

Fraud in Inducement. When a purchaser has fraudulently induced a seller to take back a note and trust deed that the purchaser never intended to pay, the seller is not barred by *Code of Civil Procedure Section 580b* from recovering damages, including punitive damages, for fraud or from recovering on the note (*Manson v. Reed (1986) 186 Cal. App.*

3d 1493, 1500-1504, 231 Cal. Rptr. 446).

[*OR*]

Statutory Bar Against Recovery Does Not Apply to Sold-Out Junior Lienholder. The bar of *Code of Civil Procedure Section 580d* against a deficiency judgment after a private foreclosure sale does not apply to a sold-out junior lienholder (*Roseleaf Corp. v. Chierighino (1963) 59 Cal. 2d 35, 43-44, 27 Cal. Rptr. 873, 378 P.2d 97*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the recovery of a deficiency judgment is not barred or limited by one of the antideficiency statutes [*see Code Civ. Proc. §§ 580a, 580b, 580d, 726*]. This form may be used when the statutory provisions do not apply because the action involves a sold-out junior lienholder whose security has been rendered worthless by the foreclosure of a senior lien or because the purchaser never intended to repay the underlying obligation. Counsel should be aware, however, that the fair-value limitation of *Code Civ. Proc. § 580a* applies to a junior lienholder who purchased at the senior lienholder's nonjudicial foreclosure [*Walter E. Heller Western, Inc. v. Bloxham (1985) 176 Cal. App. 3d 266, 273-274, 221 Cal. Rptr. 425* , discussed in *§ 230.42[3][a]*].

With the partial exception of *Manson v. Reed (1986) 186 Cal. App. 3d 1493, 231 Cal. Rptr. 446* , which included causes of action on the note and to recover damages for fraud, the authorities used in this form involved actions on the note. Counsel should consider the applicability of the cases and statutory authority establishing that an action to recover damages for fraud is not barred [*see Code Civ. Proc. §§ 580a, 580b, 580d, 726*; *see also § 230.101[3][d]*].

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue. For example, in an action by the beneficiary to recover on the underlying indebtedness after the security has been rendered worthless by foreclosure of the senior lien, the contention may be raised in opposition to the defendant's motion for summary judgment. This form also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus counsel should include a showing that the beneficiary's security has been rendered worthless by the foreclosure of a senior lien.

[c] Opposing Points and Authorities

In an appropriate case, this form of points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 230.40[1]* and *§ 230.42[1]*.

[3] Discussion of Authorities

[a] Statutory Limitations Do Not Apply to Sold-Out Junior Lienholder

The facts and procedural background of ***Roseleaf Corp. v. Chierighino*** *(1963)59 Cal. 2d 35, 27 Cal. Rptr. 873, 378 P.2d 97* , are discussed in *§ 230.50[3][b]*. In that case a sold-out junior lienholder was suing on the underlying debt. Although the junior trust deeds secured the purchase price of a hotel, they encumbered property other than the hotel being purchased. The Supreme Court noted that the general rule is that in the absence of any contrary statute, a creditor

of a defaulted debtor on a secured obligation may rely on the security or sue on the obligation or both, the obligation being an independent undertaking to pay. In California, this general rule is limited by statute. A creditor must rely on the security before enforcing the debt, under *Code Civ. Proc. §§ 580a, 725a*, and *726* (*59 Cal. 2d 35, 38)* . If the security is insufficient, the creditor's right to sue the debtor for the deficiency may be limited or barred by statute (*59 Cal. 2d 35, 38-39)* . *Code Civ. Proc. §§ 580a* and *726* require an action for a deficiency judgment to be commenced within three months after a private or judicial foreclosure sale, and they limit recovery to the difference between the total amount of secured indebtedness and the fair market value of the property at the time of the sale. The one-form-of-action rule of *Code Civ. Proc. § 726* does not apply to a sold-out junior lienholder, nor does the three-month limitation of *Code Civ. Proc. § 580a*. The Court noted that there is no reason to compel a junior lienholder to go through a foreclosure sale when there is nothing left to sell. Moreover, to compel a sold-out junior lienholder to sue for a deficiency within three months after a senior lienholder's sale would unnecessarily compel acceleration of the junior obligation, to the detriment of the debtor (*59 Cal. 2d 35, 39)* .

The Court also held that the fair-value limitations of *Code Civ. Proc. §§ 580a* and *726* do not apply to a sold-out junior lienholder who did not purchase at the senior lienholder's private foreclosure sale. First, the express language of these statutes limits only the recovery of a deficiency by a lienholder who actually caused the property to be sold by a private or judicial foreclosure sale (*59 Cal. 2d 35, 39-40)* . Also, applying these limitations to a sold-out junior lienholder would not serve the purpose of the limitations, which is to prevent creditors from buying in at their own sales at deflated prices and realizing double recoveries by holding debtors liable for large deficiencies. Thus, the fair-value statutes apply only if the creditor purchases at the sale (*59 Cal. 2d 35, 40)* . Finally, the position of a sold-out junior lienholder is different from that of a selling senior lienholder, who may, without investing any additional funds, buy in at the sale simply by bidding the amount of the outstanding debt or the fair market value of the property, whichever is less. The junior lienholder, however, is in no better position than the debtor and must invest additional funds to redeem or buy in at the sale. Equitable considerations favor placing the burden on the debtor, because it is the debtor's default that provokes the senior lienholder's sale, and the debtor has the benefit of the bargain with the junior lienholder, who, unlike the selling senior lienholder, might otherwise end up with nothing (*59 Cal. 2d 35, 41)* .

[b] Fraud in Inducement

Manson v. Reed *(1986) 186 Cal. App. 3d 1493, 231 Cal. Rptr. 446* , was an action by the sellers for fraud and to recover on a debt secured by a sold-out second trust deed. The defendants were neighbors of the plaintiffs and purchased the plaintiffs' home for $183,000, the value indicated by the first lender's appraisal. The first trust deed secured a $146,400 loan. The defendants, who were much more sophisticated than the plaintiffs in real estate matters, told the plaintiffs that creative financing would be required so they could take $46,000 cash from the transaction, which they promised to use to remodel the home. Unbeknownst to the plaintiffs, the defendants opened two escrows, mainly so that the institutional lender would not discover the cash-back. The plaintiffs received an $82,500 note and second trust deed. After making one payment on the second note and doing minimal "face lifting" on the property, the defendants abandoned the property. The holder of the first trust deed foreclosed. Judgment was for the plaintiffs, for principal, interest, attorney's fees, and punitive damages. The defendants appealed.

The court of appeal affirmed. Although the trial court made findings that the transaction was a "hard money" transaction, not a purchase-money security transaction governed by *Code Civ. Proc. § 580b*, the court of appeal said that the case did not turn on that issue (*186 Cal. App. 3d 1493, 1501)* . The evidence supported the trial court's findings of actual fraud in that the defendants executed the note and trust deed without any intention of making payments according to the terms of the note and never intended to renovate or remodel the home. Even assuming that the transaction was a purchase-money transaction, the court said, relying on *Joanaco Projects, Inc. v. Nixon & Tierney Constr. Co. (1967) 248 Cal. App. 2d 821, 57 Cal. Rptr. 48* (discussed in *§ 230.101[3][d]*), recovery of damages for fraud is a well recognized exception to *Code Civ. Proc. § 580b* applicable when the trustor has fraudulently induced the beneficiary to enter into a transaction, never intending to perform (*186 Cal. App. 3d 1493, 1500-1504)* . Also, the findings of fraud supported punitive damages under *Civ. Code § 3294* (*186 Cal. App. 3d 1493, 1504-1505)* . Finally,

the fact that the plaintiffs recovered under the theory of fraud instead of "on the contract" did not matter; the award of attorney's fees was proper (*186 Cal. App. 3d 1493, 1505-1506)* .

[c] Statutory Bar Against Recovery Does Not Apply to Sold-Out Junior Lienholder

The facts and procedural background of ***Roseleaf Corp. v. Chierighino*** *(1963) 59 Cal. 2d 35, 27 Cal. Rptr. 873, 378 P.2d 97* , are discussed in *§ 230.50[3][b]*. In that case the Supreme Court held that *Code Civ. Proc. § 580d* does not bar recovery of a deficiency judgment by a junior lienholder whose security has been rendered worthless by a senior lienholder's private foreclosure sale. The express language of the statute bars only the recovery of a deficiency by a lienholder whohas caused the security to be sold by private foreclosure sale (*59 Cal. 2d 35, 43)* . Barring recovery by a sold-out junior lienholder would not serve the purpose of the statute, which is to achieve parity between judicial and private foreclosure remedies by protecting the debtor while preserving the election of remedies. If the creditor prefers to recover a deficiency, the judicial foreclosure sale is subject to statutory redemption rights. If, however, the creditor elects a private foreclosure sale resulting in nonredeemable title, the creditor must forgo the right to a deficiency judgment. A junior lienholder has fewer rights after a senior lienholder's private sale than after a senior lienholder's judicial sale. A nonselling junior lienholder can redeem from the senior lienholder's judicial foreclosure sale [*now see Civ. Code § 2904* (applicable only before decree of foreclosure); *Code Civ. Proc. §§ 729.010, 729.020* (right of redemption after deficiency is decreed can be exercised only by judgment debtor or successor)] or seek a deficiency, but the junior lienholder has no right of redemption after a senior lienholder's private foreclosure sale. To apply *Code Civ. Proc. § 580d* against a sold-out junior lienholder would increase the disparity between junior and senior lienholders by eliminating a junior lienholder's only remedy after a senior lienholder's private foreclosure sale (namely, a deficiency). It would, in effect, deprive the junior lienholder of recovery at the whim of the senior lienholder (*59 Cal. 2d 35, 43-44)* .

[4] Additional Authorities

[a] Statutory Limitations Do Not Apply to Sold-Out Junior Lienholder

In *Bank of America v. Graves (1996) 51 Cal. App. 4th 607, 59 Cal. Rptr. 2d 288* , the defendants defaulted on loans that were secured by a second trust deed on the defendants' home. The bank recorded a notice of default and notice of trustee's sale. However, it postponed the foreclosure sale when it learned that the holder of the first trust deed on the property had also started foreclosure proceedings. The holder of the first trust deed completed the trustee's sale and was the highest bidder, having bid the amount owed on the senior debt. The bank then sued the defendants for the amount due on its loans. The trial court entered judgment for the bank, holding that the one-form-of-action rule of *Code Civ. Proc. § 726* did not bar the action because the bank's security as the junior lienholder was extinguished by the foreclosure of the senior lien. The defendants appealed.

The court of appeal affirmed. Relying on *Roseleaf Corp. v. Chierighino (1963) 59 Cal. 2d 35, 27 Cal. Rptr. 873, 378 P.2d 97* (discussed in [3][a], *above*), it held that the one-form-of-action rule does not apply to a sold-out junior lienholder. Further, the bank's postponement of its trustee's sale did not deprive it of junior lienholder status. The court distinguished *Hibernia S. & L. Soc. v. Thornton (1895) 109 Cal. 427, 429, 42 P. 447* , which held that a mortgagee that is deprived of the right to foreclose a mortgage by the mortgagee's own act or neglect is barred from suing on the note. The act or neglect referred to in *Hibernia* was the creditor's failure to file a claim with the estate of the deceased debtor, but there was no such failure to perform some legally required act in this case (*51 Cal. App. 4th 607, 613)* . Also, mere commencement of nonjudicial foreclosure proceedings was not an election of remedy precluding a suit for the deficiency (*51 Cal. App. 4th 607, 614)* .

In *Schwerin v. Shostak (1963) 213 Cal. App. 2d 37, 28 Cal. Rptr. 332* , the beneficiary of a third trust deed sued on the underlying notes. Before trial, the senior lienholder foreclosed by a private sale, rendering the third trust deed valueless. In affirming the judgment for the plaintiff, the court of appeal said that it did not matter that the senior lienholder's sale

took place after the junior lienholder's action was commenced; the one-form-of-action rule of *Code Civ. Proc. § 726* still did not apply to the plaintiff as a sold-out junior lienholder (*213 Cal. App. 2d 37, 43*). To require repleading to allege the subsequent sale by the senior lienholder would needlessly delay justice and burden the courts (*213 Cal. App. 2d 37, 44*).

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PART II. FORMS
B. Effect of Antideficiency Legislation

23-230 California Points & Authorities § 230.52

§ 230.52 Deficiency Judgment Is Not Barred or Limited by Statute--Three-Month Limitation Period in Code Civ. Proc. § 726 Does Not Apply to Mixed Collateral Creditor

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE _____ [*specify party, e.g.*, PLAINTIFF] MAY RECOVER A DEFICIENCY JUDGMENT EVEN THOUGH THE ACTION WAS NOT BROUGHT WITHIN THREE MONTHS OF THE SALE OF REAL PROPERTY SECURED BY THE UNDERLYING DEBT BECAUSE THE DEBT WAS SECURED BY MIXED COLLATERAL.

A. Three-Month Limitation Period Does Not Apply in Mixed Collateral Situation. When a debtor secures a single obligation with mixed collateral (i.e., with a combination of real and personal property), *Commercial Code Section 9604(a)(2)(A)* relieves the mixed collateral creditor entirely from complying with the three-month time limit imposed by *Code of Civil Procedure Section 726*. That time limit is a "provision" or "limitation" of a law respecting real property and, under *Commercial Code Section 9604*, such a limitation does not in any way apply to the obligation (*Florio v. Lau (1998) 80 Cal. Rptr. 2d 409*). The "obligation" is the debt that the mixed collateral secured, reduced by the amount realized from sales of the collateral or, in other words, it is the amount of money to which the creditor is entitled as a deficiency judgment. Accordingly, the three-month limitation does not apply in a mixed collateralcontext (*Florio v. Lau (1998) 80 Cal. Rptr. 2d 409*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a the three-month limitation period in *Code Civ. Proc. § 726* for obtaining a deficiency judgment after a real property foreclosure does not apply if there is a single obligation and it is secured with mixed collateral.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue. For example, if the debtor brings a motion for a deficiency judgment, this contention may be raised as a defense if the debtor asserts the debtor's motion is barred by *Code Civ. Proc. § 726*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should include a showing that mixed collateral secured the single obligation.

[3] Discussion of Authorities

[a] Three-Month Limitation Period Does Not Apply in Mixed Collateral Situation

In ***Florio v. Lau*** *(1998) 68 Cal. App. 4th 637, 80 Cal. Rptr. 2d 409* , a case of first impression, a creditor obtained a judgment following the debtor's default on an obligation secured by both real and personal property. The real property was sold at a sheriff's sale and some of the personal property was sold. More than three months after the foreclosure sale, the creditor filed a motion for a deficiency judgment. The debtor asserted the motion was barred by the three-month limitation period of *Code Civ. Proc. § 726*. The trial court found *Code Civ. Proc. § 726* applies to mixed collateral but also held the three-month period does not begin to run until the date of sale of the last item of collateral. Because the motion was filed less than three months after an unsuccessful attempt to sell some of the personal property, the court found the motion was timely and entered a deficiency judgment.

The court of appeal affirmed. It began its evaluation of the case with a brief overview of the law applicable to obligations secured with mixed collateral, particularly former Com. Code § 9501(4) (*now see Com. Code § 9604(a)*), the so-called mixed-collateral statute. The court noted that former Com. Code § 9501(4)(b)(i) (*now see Com. Code § 9604(a)(2)(A)*) explicitly addressed the interplay between real property rights and remedies and the rights and remedies under the Commercial Code when there was no unified sale *(68 Cal. App. 4th 637, 643). (The parties in this case agreed that the sale was not and could not have been unified.)* Former Com. Code § 9501(4)(b)(i) provided in part that "provisions and limitations of any law respecting real property and obligations secured by an interest in real property or an estate therein, including, but not limited to, *Section 726 of the Code of Civil Procedure* ...#x2026; do not apply to either (1) any personal property or fixtures [other than personal property or fixtures as to which the secured party is proceeding by way of a unified sale], or (2) the obligation."

The court then disagreed with the trial court's conclusion that the *Code Civ. Proc. § 726* three-month limitation period begins to run at the date of the sale of the last item of collateral, but held that former Com. Code § 9501(4)(b)(i) relieved a mixed-collateral creditor entirely from complying with that three-month time limit, which is a "provision" or "limitation" of a law respecting real property. Under former Com. Code § 9501, such a limitation did not in any way apply to the obligation (*68 Cal. App. 4th 637, 653)* .

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23-230 California Points & Authorities § 230.53

§ 230.53 Trustor Waived Statutory Limitation

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE DEFICIENCY JUDGMENT SOUGHT BY THE BENEFICIARY IS NOT LIMITED UNDER CODE OF CIVIL PROCEDURE SECTIONS 580a AND 726 BECAUSE THE TRUSTOR WAIVED THE STATUTORY PROTECTION FOR AN ADEQUATE CONSIDERATION, AFTER THE _____ [MAKING *or* RENEWAL] OF THE LOAN.

Deficiency Limitation of Statute May Subsequently Be Waived. Under *Civil Code Section 2953*, a trustor may not waive the deficiency-limiting provisions of *Code of Civil Procedure Sections 580a* and *726* at the time of, or in connection with, the making or renewal of a secured loan. This rule, however, does not preclude a trustor from subsequently waiving those provisions (*Salter v. Ulrich (1943) 22 Cal. 2d 263, 266-267, 138 P.2d 7* ; *see* *Morello v. Metzenbaum (1944) 25 Cal. 2d 494, 498-499, 154 P.2d 670*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the recovery of a deficiency judgment is not barred or limited by *Code Civ. Proc. §§ 580a, 726*, because the trustor has effectively waived the statutory protection after the making or renewal of the secured loan.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue. For example, in an action by the beneficiary to recover on the underlying debt after the security has been rendered worthless by foreclosure of the senior lien, the contention may be raised in opposition to the defendant's motion for summary judgment. This form also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus counsel should describe the circumstances showing waiver by the trustor.

This form does not include a contention that the protection of *Code Civ. Proc. § 580d* may subsequently be waived because there is no case law regarding such a waiver. Counsel should be aware, however, that the Supreme Court has held that the rule prohibiting *advance* waiver, which applies specifically to the protections of *Code Civ. Proc. §§ 580a* and *726* under *Civ. Code § 2953*, applies also to the protection of *Code Civ. Proc. § 580d* as a matter of public policy [*Freedland v. Greco (1955) 45 Cal. 2d 462, 467, 289 P.2d 463]* . It is therefore arguable, by analogy to the authorities for waiver under *Code Civ. Proc. §§ 580a* and *726*, that the rule permitting *subsequent* waiver applies to the protection of *Code Civ. Proc. § 580d* as well.

This form does not include a contention that the protection of *Code Civ. Proc. § 580b* may be waived because the *California Supreme Court, in DeBerard Properties, Ltd. v. Lim (1999) 20 Cal. 4th 659, 85 Cal. Rptr. 2d 292, 976 P.2d 843* , resolved a conflict in state law by holding that a purchaser may not waive, by contract term, the protection against deficiency judgments conferred by § 580b in exchange for new consideration following the original purchase money sale (*20 Cal. 4th 659, 662, 667)* . For discussion of this decision, see *§ 230.54[3][a]*.

[c] Opposing Points and Authorities

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 230.40[1]* and *§ 230.42[1]*.

[3] Discussion of Authorities

[a] Deficiency Limitation of Statute May Subsequently Be Waived

In ***Morello v. Metzenbaum*** *(1944) 25 Cal. 2d 494, 154 P.2d 670* , the plaintiff lent money to the defendants, who executed a note. On the defendants' default, the parties made an agreement under which the defendants gave the plaintiff a deed and assignment of oil production royalties, which the parties intended would be security for the note. By this agreement the plaintiff was empowered to sell the security after five days' prior notice to the defendant. The defendants defaulted again, and the plaintiff sold the security under the power of sale after providing the agreed notice. The plaintiff then sued to recover a deficiency judgment. The trial court entered judgment for the defendants on the ground that recovery of a deficiency was barred by *Code Civ. Proc. § 580d*.

The Supreme Court affirmed. The plaintiffs argued, among other things, that the defendants had waived their right to statutory notice before the sale under *Civ. Code § 2924*, but this waiver was void under *Civ. Code § 2953*. The plaintiff's sale was therefore ineffective and, as no valid sale had taken place, the plaintiffs were not barred by *Code Civ. Proc. § 580d* from recovering judgment on the note. The Court rejected this argument, concluding that the sale was valid and *Code Civ. Proc. § 580d* properly applied. The Court noted that *Civ. Code § 2953* invalidates any waiver of the provisions of *Civ. Code § 2924* that has been made at the time of or in connection with the making of or renewing of a secured loan. *Civ. Code § 2953* does not, however, invalidate a waiver such as that in the case at bench, which was made after the making of the loan and was not part of an agreement that constituted a renewal of the loan (*25 Cal. 2d 494, 498-500)* . The purpose of the waiver rule in *Civ. Code § 2953* was to protect debtors from the consequences of ruinous concessions made out of necessity to obtain a loan. This protection, however, was not necessary after the making of the loan, when the rights of the parties have been established and only the enforcement of those rights remains (*25 Cal. 2d 494, 499)* .

Although the facts of this case concern a waiver of the notice provisions under *Civ. Code § 2924*, the reasoning of the

case is equally applicable to all subsequent waivers of the other provisions specifically enumerated under *Civ. Code § 2953*, including the deficiency-limiting provisions of *Code Civ. Proc. §§ 580a* and *726*.

In ***Salter v. Ulrich*** *(1943) 22 Cal. 2d 263, 138 P.2d 7* , the defendant had lent money to a property owner, who executed a note secured by a trust deed. The defendant later sued on the note, omitting any reference to the trust deed in the complaint. The defendant obtained judgment by default and took title to the property through an execution sale. The plaintiff, meanwhile, had sued the owner to foreclose a street improvement lien on the same property but did not name or serve the defendant in that action. The plaintiff then obtained title through the foreclosure sale and sued to quiet title. The trial court found that the defendant had title through the execution sale, subject to the plaintiff's street improvement bond. The plaintiff appealed, arguing that the defendant's judgment, hence the execution sale as well, was invalid because the defendant violated the requirement of *Code Civ. Proc. § 726*, which prescribes foreclosure as the one form of remedy available for recovery on a debt secured by a trust deed.

The Supreme Court affirmed. The Court noted that the protection of *Code Civ. Proc. § 726* may not be waived in advance, because necessity often drives debtorsto make ruinous concessions to obtain a loan, and *Code Civ. Proc. § 726* should be applied to protect them and to prevent a waiver in advance (*22 Cal. 2d 263, 266-267)* . This reasoning, however, does not apply after the loan is made, when all rights have been established and there remains only the enforcement of those rights. Furthermore, *Civ. Code § 2953*, which codifies the rule against waiver in advance with respect to rights specified under certain code sections, including *Code Civ. Proc. §§ 580a* and *726*, is entirely consistent with the right of a trustor to make a subsequent waiver (*22 Cal. 2d 263, 267)* . The owner's failure in this case to raise the protection of *Code Civ. Proc. § 726* as an affirmative defense to the defendant's action on the note constituted an effective subsequent waiver of that protection (*22 Cal. 2d 263, 267-268)* . Therefore the judgment on the note was not void and was not subject to collateral attack by one who, like the plaintiff, was not the primary debtor protected by *Code Civ. Proc. § 726* (*22 Cal. 2d 263, 268)* .

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23-230 California Points & Authorities § 230.54

§ 230.54 Trustor Cannot Waive Statutory Bar

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

A DEFICIENCY JUDGMENT IS BARRED UNDER CODE OF CIVIL PROCEDURE SECTION 580b BECAUSE THE TRUSTOR CANNOT WAIVE THE STATUTORY PROTECTION IN EXCHANGE FOR NEW CONSIDERATION AFTER THE ORIGINAL PURCHASE MONEY SALE.

Bar of Antideficiency Statute Cannot Be Waived. A purchaser may not waive, by contract term, the protection against deficiency judgments conferred by *Code of Civil Procedure Section 580b* in exchange for new consideration following the original purchase money sale. Merely renegotiating the sale's terms in an effort to ease the terms of the trustor's obligation and salvage the transaction does not take the transaction outside the scope of Section 580b (*DeBerard Properties, Ltd. v. Lim (1999) 20 Cal. 4th 659, 662, 667, 85 Cal. Rptr. 2d 292, 976 P.2d 843* ; *Palm v. Schilling (1988) 199 Cal. App. 3d 63, 75-76, 244 Cal. Rptr. 600* ; *Lawler v. Jacobs (2000) 83 Cal. App. 4th 723, 736-738, 100 Cal. Rptr. 2d 52*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in reply to the points and *authorities in § 230.53*, or in an original memorandum, in support of the contention that the recovery of a deficiency judgment is barred by *Code Civ. Proc. § 580b* in spite of a purported waiver by the trustor, because the protection of the statute cannot be waived.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue. For example, in an action by the beneficiary to recover on the underlying debt after the security has been rendered worthless by foreclosure of the senior lien, the contention may be raised in support of the defendant's motion for summary judgment. This form also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus counsel should attack any circumstances put forward by the adverse party as tending to show waiver by the trustor.

[3] Discussion of Authorities

[a] Bar of Antideficiency Statute Cannot Be Waived

In ***DeBerard Properties, Ltd. v. Lim*** *(1999) 20 Cal. 4th 659, 85 Cal. Rptr. 2d 292, 976 P.2d 843* , the defendants financed their purchase of a shopping center from the plaintiff by assuming a large debt secured by a first trust deed to a bank and executing a second trust deed as security for a smaller debt, in addition to making a substantial down payment, to the plaintiff. When the defendants were forced by economic circumstances to negotiate a refinancing of the major debt a few years later, the plaintiff cooperated in exchange for the defendants' agreement to waive their rights under *Code Civ. Proc. § 580b*. Not long after the refinancing was in place, the defendants defaulted, and the bank's foreclosure under the first trust deed wiped out the plaintiff's second-lien security. The plaintiff sued on the defendants' note, and the trial court enforced the waiver agreement. The defendants appealed from a judgment for the plaintiff, and the court of appeal reversed.

The California Supreme Court affirmed. The Court noted the language of *Code Civ. Proc. § 580b* is plain--a vendor is barred from obtaining a deficiency judgment against a purchaser in a purchase money secured land transaction (*20 Cal. 4th 659, 663)* . The Court acknowledged that *Spangler v. Memel (1972) 7 Cal. 3d 603, 102 Cal. Rptr. 807, 498 P.2d 1055* created a narrow exception to the scope of § 580b, but declined to create another one here (*20 Cal. 4th 659, 664)* . For discussion of *Spangler*, see *§ 230.50[3][a]*. The *DeBerard* Court noted that *Spangler's* rule is limited to situations in which the following factors are found: (1) a pronounced intensification of the property's anticipated post-sale use requires and eventually results in construction financing that dwards the property's value at the time of sale; (2) the purchaser is in a much better position than the vendor to assess the property's possible value and to understand the risks involved in capitalizing on the property's potential; and (3) under all the circumstances of the sale, including the property's development and the financing for that development, conferring § 580b's protection would unfairly thrust therisk of the failure of the commercial development on the vendor, imposing on it a commercially unreasonable burden (*20 Cal. 4th 659, 666* , citing *Spangler v. Memel (1972) 7 Cal. 3d 603, 613, 102 Cal. Rptr. 807, 498 P.2d 1055*). Within its narrow confines, *Spangler* remains the law (*20 Cal. 4th 659, 667)* .

The *DeBerard* Court found that this case was unlike *Spangler*. The defendants purchased and continued to operate a shopping center and the center continued to secure the note. They did not obtain a construction loan that dwarded the property's value at the time of sale and then proceed to build a more intensive use. Further, there was no dramatic change in the financial arrangements that might conceivably have brought this case within *Spangler's* ambit. The plaintiff "began with a relatively risky subordinated security interest, and ended in the same position." Merely renegotiating the terms of the sale in an effort to salvage the transaction did not take it outside the scope of § 580b. The Court could not justify permitting a waiver in disregard of the statutory language just because the plaintiff eased the terms of the defendants' obligation to it. Only when the transaction is sufficiently similar to that in *Spangler* will the vendor's relatively poor knowledge of the property's value trump the basic rule, stated in *Brown v. Jensen (1953) 41 Cal. 2d 193, 197* , that the vendor is assumed to know the value of its security interest and act accordingly (*20 Cal. 4th 659, 667-668)* .

The Court recognized that there had been a conflict in state law on the question of the validity of such a waiver, with *Russell v. Roberts (1974) 39 Cal. App. 3d 390, 114 Cal. Rptr. 305* holding that waiver is available, but *Palm v. Schilling (1988) 199 Cal. App. 3d 63, 244 Cal. Rptr. 600* holding that it is not. The Court disapproved *Russell* and related dicta in *Goodyear v. Mack (1984) 159 Cal. App. 3d 654, 659-660* and *Shepherd v. Robinson (1981) 128 Cal. App. 3d 615, 626* , and cited with approval the portions of the *Palm* decision (discussed *below*) that disagreed with

Russell (*20 Cal. 4th 659, 661, 671)* .

Palm v. Schilling *(1988) 199 Cal. App. 3d 63, 244 Cal. Rptr. 600* , was an action on a promissory note originally secured by a sold-out junior's purchase-money trust deed. The plaintiffs had sold their home to the defendants. The defendants made a large down payment and executed notes secured by second and third trust deeds for the balance of the purchase price. The second was due four months after the purchase and sale; the third was due in two years. The defendants' original home did not sell, and when the second note was six months overdue, they obtained a loan from an institutional lender to pay it. That lender demanded priority over the plaintiffs' remaining trust deed. The plaintiffs agreed to subordinate in return for a retroactive increase in the interest rate. A year later, when the institutional loan was due, the defendants refinanced with another lender. The plaintiffs agreed to subordinate to that lender in return for a $25,000 reduction in the balance due as well as the defendants' personal guaranties and the defendants' waiver of their antideficiency protection under *Code Civ. Proc. § 580b*. After one of the senior lenders foreclosed, the plaintiffs sued on the note and personal guaranties. The trial court felt compelled to follow *Russell v. Roberts (1974) 39 Cal. App. 3d 390, 114 Cal. Rptr. 305* (discussed in the coverage of *DeBerard*, *above*) and gave judgment for the plaintiffs. The defendants appealed.

The court of appeal disagreed with *Russell* and held that trustors cannot waive the protection of *Code Civ. Proc. § 580b* as a condition of refinancing because such a waiver would be inconsistent with the explicit language of the statute and contrary to public policy (*199 Cal. App. 3d 63, 68, 75-76)* . In the case of a purchase-money trust deed, the character of the transaction is determined at the time the trust deed is executed and is then fixed for all time. Renegotiation of a purchase-money note, whether viewed as a renewal or a new transaction, will not support a waiver because *Code Civ. Proc. § 580b* does not change the character of a purchase-money trust deed (*199 Cal. App. 3d 63, 75-76)* .

In ***Lawler v. Jacobs*** *(2000) 83 Cal. App. 4th 723, 100 Cal. Rptr. 2d 52* , defendant developers purchased 91 acres of raw land for $6 million down and a $3 million purchase money note secured by the real property. They agreed to waive antideficiency protection under *Code Civ. Proc. § 580b*. Plaintiff vendor, in turn, subordinated his promissory note to that of a third party commercial lender. On defendants' default and the senior lender's foreclosure sale, plaintiff sued for his deficiency. Both parties claimed fraud.

The court held that none of the *DeBerard* factors for a permissible waiver were present, and thus the case concerned a standard transaction to which *Code Civ. Proc. § 580b* applied (*83 Cal. App. 4th 723, 735-736)* . It then held that a fraud action could not be based on the borrowers' agreement to waive the antideficiency protection of *Code Civ. Proc. § 580b* and promise to remain personally liable on the note (*83 Cal. App. 4th 723, 736)* . The antideficiency protections of § 580b may not be contractually waived by the debtor, and thus, the lender's fraud action was for nonperformance of an invalid waiver of *Code Civ. Proc. § 580b*. In seeking recovery of the $3 million deficiency the lender suffered as a sold-out junior plus punitive damages, the lender was attempting to accomplish by indirection what is prohibited by § 580b (*83 Cal. App. 4th 723, 737-738)* .

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23-230 California Points & Authorities § 230.55

§ 230.55 Antideficiency Provisions Do Not Restrict Creditor's Ability to Exhaust Multiple Items of Collateral in Series of Nonjudicial Foreclosure Proceedings

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE ANTIDEFICIENCY PROVISIONS OF CODE OF CIVIL PROCEDURE SECTIONS 580a AND 580d DO NOT RESTRICT THE BENEFICIARY'SABILITY TO EXHAUST MULTIPLE ITEMS OF COLLATERAL IN A SERIES OF NONJUDICIAL FORECLOSURE PROCEEDINGS.

Antideficiency Provisions Do Not Apply When Creditor Exercises Right to Exhaust Multiple Items of Collateral. *Code of Civil Procedure Sections 580a* and *580d* do not restrict a creditor's ability to exhaust multiple items of collateral in a series of nonjudicial foreclosure proceedings. These provisions are not implicated when a creditor merely exercises the right to exhaust all of the real property pledged to secure an obligation. Specifically, a creditor may proceed seriatim in foreclosing against multiple items of collateral without commencing a judicial action to determine the fair market value of each item sold, and crediting that amount to the debt, before proceeding with foreclosure sales of any additional collateral (*Dreyfuss v. Union Bank of California (2000) 24 Cal. 4th 400, 406, 101 Cal. Rptr. 2d 29, 11 P.3d 383*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the statutory antideficiency provisions do not restrict a beneficiary's ability to exhaust multiple items of collateral in a series of nonjudicial foreclosure proceedings.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue. For example, the contention may be raised in opposition to an action by the

defaulting borrowers seeking monetary and other relief for alleged violations of the antideficiency provisions.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should describe the circumstances showing the creditor holds two or more deeds of trust on separate parcels of property to secure the same debt and that he or she is foreclosing the liens on these parcels by non-judicial sales and not seeking to secure a personal judgment against the debtor.

[3] Discussion of Authorities

[a] Antideficiency Provisions Do Not Apply When Creditor Exercises Right to Exhaust Multiple Items of Collateral

In ***Dreyfuss v. Union Bank of California*** *(2000) 24 Cal. 4th 400, 101 Cal. Rptr. 2d 29, 11 P.3d 383* , the plaintiff borrowers defaulted on a loan secured by separate deeds of trust on three parcels of real property. The defendant bank conducted a nonjudicial foreclosure of one of the parcels and then proceeded with serial foreclosure sales of the remaining properties. Prior to each successive sale, the defendant did not seek a judicial determination of fair market value of the property sold or purport to credit such amount to the debt. The trial court granted the defendant summary judgment on the plaintiffs' complaint, which sought monetary and other relief and contended that the defendant violated the antideficiency provisions of *Code Civ. Proc. §§ 580a, 580d*. The court of appeal affirmed and the plaintiffs sought review.

The Supreme Court affirmed. The Court considered the following question: Do the antideficiency provisions of *Code Civ. Proc. §§ 580a* and *580d* restrict a creditor's ability to exhaust multiple items of collateral in a series of nonjudicial foreclosure proceedings? It found the answer was no; the provisions are not implicated when a creditor merely exercises its right to exhaust all of the real property pledged to secure an obligation. Specifically, a creditor may proceed seriatim in foreclosing against multiple items of collateral without commencing a judicial action to determine the fair market value of each item sold, and crediting that amount to the debt, before proceeding with foreclosure sales of the additional collateral (*24 Cal. 4th 400, 406)* .

The Court noted that, by their terms, *Code Civ. Proc. §§ 580a* and *580d* apply only when a personal judgment against the debtor is sought after a foreclosure (*24 Cal. 4th 400, 407)* . Further, it found that under settled decisional law, a creditor's resort to all security on a debt does not implicate these antideficiency provisions. It cited *Hatch v. Security-First Nat. Bank (1942) 19 Cal. 2d 254, 120 P.2d 869* for the proposition that *Code Civ. Proc. § 580a* applies only to shield a borrower from personal liability, and is not applicable when no attempt is made by the creditor to secure a personal judgment against a debtor for a deficiency remaining after a nonjudicial foreclosure (*24 Cal. 4th 400, 407-408* , citing *Hatch v. Security-First Nat. Bank (1942) 19 Cal. 2d 254, 258, 120 P.2d 869*). The *Dreyfuss* Court noted that this rule was subsequently reaffirmed in *Freedland v. Greco (1955) 45 Cal. 2d 462, 289 P.2d 463* , which expressly referred also to *Code Civ. Proc. § 580d*. According to the *Freedland* Court, when a note is secured by multiple items of security, the creditor has the right to exhaust the additional security, and need not follow the procedure prescribed by Section 580a. Nor is the creditor prevented from exhausting the other security when the trust deed is a purchase money one. By analogy this rule also applies to *Code Civ. Proc. § 580d*; the pursuit of additional security is not a deficiency judgment (*24 Cal. 4th 400, 408* , citing *Freedland v. Greco (1955) 45 Cal. 2d 462, 466, 289 P.2d 463*). Finally, the Court noted that this rule was reiterated more recently in *Western Security Bank v. Superior Court (1997) 15 Cal. 4th 232, 62 Cal. Rptr. 2d 243, 933 P.2d 507* . Specifically, the *Western Security Bank* Court held that a creditor that draws on additional security simply calls on all the security pledged for the debt, and by so doing does not violate the prohibition of deficiency judgments (*24 Cal. 4th 400,408* , citing *Western Security Bank v. Superior Court (1997) 15 Cal. 4th 232, 252, 62 Cal. Rptr. 2d 243, 933 P.2d 507*).

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Volume 23 Chapters 230-239 TRUST DEEDS---to---WORKERS' COMPENSATION
CHAPTER 230 TRUST DEEDS AND REAL PROPERTY MORTGAGES
PART II. FORMS
B. Effect of Antideficiency Legislation

23-230 California Points & Authorities §§ 230.56-230.69

[Reserved]

§§ 230.56[Reserved]

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CHAPTER 230 TRUST DEEDS AND REAL PROPERTY MORTGAGES
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C. Actions to Enjoin or Set Aside Private Foreclosure Sale

23-230 California Points & Authorities § 230.70

§ 230.70 Private Foreclosure Sale Should Be Enjoined Due to Availability of Temporary and Preliminary Injunctive Relief [Code Civ. Proc. § 526(a)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE PRIVATE FORECLOSURE SALE _____ [SET FOR *or* CONTEMPLATED IN ACCORDANCE WITH THE NOTICE OF DEFAULT AND ELECTION TO SELL DATED] _____ [*date*], SHOULD BE ENJOINED ON THE GROUND THAT _____ [*specify, e.g.*, THE UNDERLYING OBLIGATION WAS OBTAINED BY FRAUD FOR WHICH THE TRUSTOR HAS RESCINDED THE TRANSACTION].

A. Preliminary Injunction. Because loss of the real property will usually cause the trustor to suffer irreparable harm, a preliminary injunction restraining a threatened private foreclosure sale may be issued when either (1) there is an irregularity in the notice, (2) there is a dispute regarding the existence or amount of the claimed default in the underlying obligation, or (3) the underlying obligation is void or voidable (*Code Civ. Proc. § 526(a)(2)*; *More v. Calkins (1890) 85 Cal. 177, 188-190, 24 P. 729* ; *Lupertino v. Carbahal (1973) 35 Cal. App. 3d 742, 747-750, 111 Cal. Rptr. 112*).

[*Optional*] **B. Judgment Ineffective.** When a trustor has an election between damages and rescission, the beneficiary may be restrained from proceeding with foreclosure during the pendency of the action on the ground that if the judgment should be for damages rather than rescission, it would be rendered ineffective if the trustor had by then been deprived of the subject matter of the contract (*Code Civ. Proc. § 526(a)(3)*; *Stockton v. Newman (1957) 148 Cal. App. 2d 558, 564, 307 P.2d 56*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that a private sale may be enjoined on one or more of the grounds set forth in *Code Civ. Proc. § 526*, such as (1) the trustor will suffer irreparable harm if the sale is not enjoined [*see Code Civ. Proc. § 526(a)(2)*], or (2) it is necessary to preserve the status quo pending the outcome of litigation [*see Code Civ. Proc. § 526(a)(2), (3)*]. *Code Civ. Proc. § 526(a)(2)* provides that an injunction may be issued when it appears by the complaint or affidavit that the commission orcontinuance of some act during the litigation would produce waste, or great or irreparable injury, to a party to the action. *Code Civ. Proc. § 526(a)(3)* provides that an injunction may be granted when it appears, during the litigation, that a party to the action is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the rights of another party to the action respecting the subject matter of the action, and tending to render the judgment ineffectual.

Specific possible grounds include some defect in the notice or other irregularity in the proceeding [*see, e.g., Lupertino v. Carbahal (1973) 35 Cal. App. 3d 742, 749-750, 111 Cal. Rptr. 112]* , a dispute as to the amount of the default [*see, e.g., More v. Calkins (1890) 85 Cal. 177, 188-190, 24 P. 729]* , or that the trust deed is void or voidable [*see, e.g., Stockton v. Newman (1957) 148 Cal. App. 2d 558, 564, 307 P.2d 56]* , in whole or in part [*see, e.g., Strike v. Trans-West Discount Corp. (1979) 92 Cal. App. 3d 735, 744-745, 155 Cal. Rptr. 132]* . In order to obtain an injunction, the trustor will have to pay or tender any undisputed amount due [*Meetz v. Mohr (1904) 141 Cal. 667, 672-673, 75 P. 298]* .

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue. For example, in an action to restrain a private sale, the contention may be raised in support of the trustor's application for preliminary injunction. This form also may be adapted for use in a trial or appellate brief.

Any of the grounds in § 230.10 et seq. for denying the availability of foreclosure or in § 230.71 et seq. for setting aside a foreclosure sale also may be used to establish that the foreclosure sale should be enjoined.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, if a defect in the notice of sale is the ground for relief, counsel should demonstrate the particular irregularity in the notice of sale.

[c] Related Pleading and Practice Forms

For discussion and litigation forms relating to preliminary and permanent injunctions, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender).

[d] Related Points and Authorities

For discussion and forms of points and authorities relating to procedural aspects of preliminary and permanent injunctions, see Ch. 116, *Injunctions* .

[3] Discussion of Authorities

[a] Preliminary Injunction

More v. Calkins *(1890) 85 Cal. 177, 24 P. 729* , was an action for accounting, declaratory relief, and injunction based on contentions that the underlying instrument was void as not being supported by consideration and that the plaintiff could not give his consent to the contract because of his incapacity. Also there was a dispute as to the amount owing, which was one basis for the accounting. Judgment was entered for the defendant after a demurrer was sustained. The plaintiff appealed.

The Supreme Court reversed. Sales under powers in trust deeds are a harsh mode of foreclosing the rights of the trustor. They are to be scrutinized by courts with great care, and will not be sustained unless conducted with all fairness, regularity, and scrupulous integrity. A sale ought not to be made when the debt is uncertain or in dispute, but if made in such a case, a sale may be set aside. If there is doubt or dispute as to how much is due, or if the debt is unliquidated, a sale will be enjoined (*85 Cal. 177, 188)* . In this case, the complaint showed that the debt was unliquidated and uncertain and that $10,000 of the liquidated portion was claimed not to be supported by consideration (*85 Cal. 177, 189)* . The Court suggested that an accounting be ordered, that the sale be enjoined pending the accounting, and that the mode of sale be controlled by the trial court. The Court sustained the demurrer with respect to the count based on the decedent's incapacity and reversed with instructions to overrule the demurrer as to the other counts (*85 Cal. 177, 190)* .

In ***Lupertino v. Carbahal*** *(1973) 35 Cal. App. 3d 742, 111 Cal. Rptr. 112* , trustors obtained a temporary restraining order and sought a preliminary injunction to enjoin a foreclosure sale, on the ground that they were entitled to notice at their current address, rather than their address as given in the trust deed, because the trustee knew their current address. The plaintiffs had moved from the address given in the trust deed as the address to which notice was to be sent, but they had not filed a request for notice change of address as provided in *Civ. Code § 2924b*. In connection with an earlier default, the beneficiary's attorney had contacted them at their new address and the trustee had sent notice of that default and election to sell to their new address. That default was cured. As to the default in question, although the trustee's file reflected the current address, notice was only sent to the original address. The trustors did not learn of the scheduled trustee's sale until after the reinstatement period had expired. The trial court vacated the temporary restraining order and denied the preliminary injunction. The trustors appealed.

The court of appeal reversed. The court found that although statutory notice had been given, the previous conduct of the trustee and the beneficiary had misled thetrustors to their prejudice with respect to the second default. Thus, the defendants were equitably estopped from proceeding with the sale without giving notice to the trustors at their current address (*35 Cal. App. 3d 742, 747-750)* .

[b] Judgment Ineffective

Stockton v. Newman *(1957) 148 Cal. App. 2d 558, 307 P.2d 56* , was an action for damages for fraud and for restitution. The fraud was based on misrepresentations regarding the income from and value of real property that the defendants had sold to the plaintiff and that was encumbered by the trust deed at issue. The restitution claim covered amounts that the defendants would have to return to the plaintiff in accordance with a notice of rescission previously given by the plaintiff. The plaintiff's application for preliminary injunction was made on all of the usual grounds: that a sale before trial would result in irreparable injury, that it would be difficult to ascertain the amount of compensation that would afford adequate relief, that pecuniary compensation would not afford adequate relief, that unless the sale were restrained a multiplicity of suits was probable, and that grave and irreparable injury would result to the plaintiff if his investment was forfeited in that he would be without any substantial assets and life savings would be lost. The preliminary injunction was issued, and the defendants appealed.

The court of appeal affirmed. The defendants admitted that under *Code Civ. Proc. § 526(a)(3)*, an injunction may be used as a provisional or ancillary remedy to preserve the status quo pending a judgment (*148 Cal. App. 2d 558, 563)* . The plaintiff's notice of rescission was not a binding election. A defrauded purchaser may, in the same action, seek rescission or damages and should not be compelled to make an election during trial (*148 Cal. App. 2d 558, 563-564)* . It was obvious that if the judgment and election should be for damages and not rescission, it would be rendered ineffective if the plaintiff had by then been deprived of the subject matter of the contract. Making payments on the note might be construed as an affirmance of the contract and waiver of the right to rescind. Finally, being deprived of a particular piece of property is generally considered to amount to irreparable injury because in equity, each parcel of real property is considered unique. In conclusion, the court found no abuse of discretion in granting the preliminary injunction (*148 Cal. App. 2d 558, 564)* .

[4] Additional Authorities

[a] Preliminary Injunction

In *Strike v. Trans-West Discount Corp. (1979) 92 Cal. App. 3d 735, 155 Cal. Rptr. 132* (discussed in *§ 230.19[3][a]*), the plaintiffs also contended that the June agreement was usurious in that it called for interest at two percent per month. In affirming, the court of appeal upheld the trial court's finding that the June agreement was usurious and that no interest under it could be collected by the defendant. Nevertheless, the defendant was entitled to collect interest on the trust deed and on the judgment by confession because they were not tainted (*92 Cal. App. 3d 735, 744-745)* .

The court of appeal in *Daniels v. Williams (1954) 125 Cal. App. 2d 310, 270 P.2d 556* , affirmed the trial court's grant of an injunction pendente lite restraining the defendant holder of the note and trust deed from disposing of the note or foreclosing the trust deed during the pendency of the action to annul the note and trust deed on the ground that they had been procured by fraud. The court based its affirmance on *Code Civ. Proc. § 526*, saying that irreparable harm would be done to the plaintiffs if the note were sold or the trust deed were foreclosed during the action (*125 Cal. App. 2d 310, 312-313)* .

[b] Judgment Ineffective

In *Jessen v. Keystone Savings & Loan Assn. (1983) 142 Cal. App. 3d 454, 191 Cal. Rptr. 104* , the court of appeal distinguished *Stockton v. Newman (1957) 148 Cal. App. 2d 558, 307 P.2d 56* (discussed in [3][b], *above*), saying that the *Stockton* court stressed the inadequacy of the legal remedy because of the unique nature of the property and treated the foreclosure as tending to render the potential judgment ineffectual. The *Jessen* court said that the trial court could have granted the preliminary injunction on those grounds. However, the court of appeal was concerned only with whether it was an abuse of discretion not to have granted the injunction. Based on several considerations, including the likelihood of the plaintiff's prevailing, the balancing of the harm to be suffered by each party on account of the granting or refusal to grant the preliminary injunction, and the ability of the plaintiff to be adequately compensated by money damages, the court of appeal upheld the denial of the preliminary injunction (*142 Cal. App. 3d 454, 458-462)* .

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23-230 California Points & Authorities § 230.71

§ 230.71 Private Foreclosure Sale Should Be Set Aside--Waiver of Right to Declare Default

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE FORECLOSURE SALE HELD ON _____ [*date*] SHOULD BE SET ASIDE BECAUSE THE BENEFICIARY WAIVED THE RIGHT TO FORECLOSE IN THAT THE BENEFICIARY ACCEPTED LATE PAYMENTS WITHOUT OBJECTION OR NOTICE THAT TIMELY PAYMENTS WOULD BE REQUIRED.

Acceptance of Late Payments Without Objection. A beneficiary that has lulled the trustor into a sense of security by accepting late payments without protest or objection and has not given definite notice requiring strict compliancewith the time provisions of the underlying obligation has waived the right to declare a default (*Lopez v. Bell (1962) 207 Cal. App. 2d 394, 398-399, 24 Cal. Rptr. 626*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that a foreclosure sale should be set aside on the ground of waiver of the right to declare a default. In order to have a sale set aside, the trustor will have to pay or tender any undisputed amount that is due [*Karlsen v. American Sav. & Loan Assn. (1971) 15 Cal. App. 3d 112, 117-121, 92 Cal. Rptr. 851]* .

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue. For example, in an action to set aside a private sale, the contention may be raised in support of the trustor's motion for summary judgment. This form also may be adapted for use in a trial or appellate brief.

Any of the grounds discussed in *§ 230.10* et seq. for denying the availability of foreclosure or in § 230.70 for restraining

a foreclosure sale also may be used to establish that the foreclosure sale should be set aside.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus counsel should describe the pattern of accepting late payments.

[3] Discussion of Authorities

[a] Acceptance of Late Payments Without Objection

Lopez v. Bell *(1962) 207 Cal. App. 2d 394, 24 Cal. Rptr. 626* , was an action to set aside a trustee's sale on the ground that the beneficiary had waived the right to declare a default by accepting late and partial payments. (An additional ground, that the price paid by the purchaser was inadequate, is discussed in *§ 230.73[3][a]*.) It was alleged that all payments were made long after they were due; that the February 16 installment was paid on June 23; that on each occasion, the defendant sent a written request for payment; that the plaintiffs were lulled into a sense of security by reason of the acceptance of the late payments without any notice from the defendant insisting on prompt future payment; and that the highest bid price was $9,500, whereas market value was $50,000. The defendant's demurrer was sustained without leave to amend, and the plaintiff appealed from the judgment of dismissal.

The court of appeal reversed. Seven semiannual payments in succession were accepted after maturity without objection or protest of any kind. *Bledsoe v. Pacific Ready Cut Homes, Inc. (1928) 92 Cal. App. 641, 645, 268 P. 697* , held that after a waiver, definite notice must be given to reestablish the time element (*207 Cal. App. 2d 394, 398-399)* . In this case, the requests for payment did not amount to notice that strict performance of the time provisions of the note would be required in the future. To be definite enough, such a notice must state that unless payment is made on the date fixed for payment, the contract will be terminated and foreclosure will ensue; further, the notice must be given far enough in advance to give the trustor reasonable time and opportunity to comply (*207 Cal. App. 2d 394, 398-399)* .

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23-230 California Points & Authorities § 230.72

§ 230.72 Private Foreclosure Sale Should Be Set Aside--Absence of Default

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE FORECLOSURE SALE HELD ON _____ [*date*] SHOULD BE SET ASIDE BECAUSE IN FACT THERE WAS NO DEFAULT TO TRIGGER THE FORECLOSURE RIGHT.

No Default. A private foreclosure sale should be set aside when there was in fact no default under the trust deed at the time of the sale (*Hauger v. Gates (1954) 42 Cal. 2d 752, 755-756, 269 P.2d 609* ; *Bank of America N.A. v. La Jolla Group II (2005) 129 Cal. App. 4th 706, 712, 28 Cal. Rptr. 3d 825*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that a foreclosure sale should be set aside on the ground that no default occurred, therefore the right to foreclose did not arise. To have a sale set aside the trustor will have to pay or tender any undisputed amount that is due [*Karlsen v. American Sav. & Loan Assn. (1971) 15 Cal. App. 3d 112, 117-121, 92 Cal. Rptr. 851]* .

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue. For example, in an action to set aside a private sale, the contention may be raised in support of the trustor's motion for summary judgment. This form also may be adapted for use in a trial or appellate brief.

Any of the grounds discussed in *§ 230.10* et seq. for denying the availability of foreclosure or in § 230.70 for restraining a foreclosure sale also may be used to establish that the foreclosure sale should be set aside.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus counsel should describe the circumstances and explain why no default occurred.

[3] Discussion of Authorities

[a] No Default

Hauger v. Gates *(1954) 42 Cal. 2d 752, 269 P.2d 609* , was an action to set aside a private foreclosure sale under a trust deed. The trust deed arose out of a purchase transaction in which the seller was required to deliver certain personal property to the purchasers. The seller never delivered the personal property. The value of the personal property exceeded the amount of the installments due at the time a default was declared and at the time of sale. Judgment was entered for the seller after demurrers were sustained. The purchasers appealed.

The Supreme Court reversed. Because there were cross demands at the time notice of default was recorded and when the sale was held, even though one claim was unliquidated, neither party could be considered in default of the obligation owing to the other (*42 Cal. 2d 752, 755-756)* .

The seller contended that the right of setoff was not permitted to be exercised before nonjudicial foreclosure. That contention was upheld in later cases, some of which are discussed in *§ 230.110[3][b]*.

In ***Bank of America N.A. v. La Jolla Group II*** *(2005) 129 Cal. App. 4th 706, 28 Cal. Rptr. 3d 825* , borrowers owned a house encumbered by a deed of trust securing a loan of $15,000. The loan went into default due to missed payments. The lender and beneficiary under the deed of trust directed the trustee to record a Notice of Default and Election to Sell Under Deed of Trust and a Notice of Trustee's Sale. The sale was scheduled for November 12. The homeowners tendered a payment at a branch of the lender on November 8. A branch employee accepted the payment and reinstated the loan. However, the lender never notified the trustee that the loan had been reinstated, and the foreclosure sale proceeded as planned. An individual, acting on behalf of a partnership, submitted the high bid of $15,500. The individual, who was in the business of buying properties at foreclosure sales, estimated that the fair market value of the house was $115,000. The trustee issued a Trustee's Deed Upon Sale purporting to convey the property to the partnership, who recorded the deed. The lender subsequently notified the partnership that the sale should not have gone forward. The partnership refused to accept a refund check tendered by the lender. The lender brought an action seeking cancellation of the Trustee's Deed. The trial court granted summary adjudication to the lender on its claims for cancellation of the Trustee's Deed and for a declaration that the trustee's sale was invalid and conveyed no interest in the property to the partnership.

The court of appeal affirmed. The court agreed with *Bisno v. Sax (1959) 175 Cal. App. 2d 714, 718, 346 P.2d 814* that the tender and acceptance of a payment sufficient to cure a default on a loan secured by a deed of trust reinstates the loan and deprived the trustee of the power to foreclose (*129 Cal. App. 4th 706, 711)* . It was undisputed that the borrowers and lender entered into an agreement to cure the default. It followed that the beneficiary had no right to sell afterward. Therefore, the foreclosure sale was invalid (*129 Cal. App. 4th 706, 712)* . The fact that the agreement to cure the default did not take place within the time statutorily granted to a trustor to cure a default as a matter of right [*Civ. Code § 2924c(a)(1), (e)*]was irrelevant, because the homeowner and lender mutually consented to the cure and the loan's reinstatement (*129 Cal. App. 4th 706, 712)* .

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23-230 California Points & Authorities § 230.73

§ 230.73 Private Foreclosure Sale Should Be Set Aside--Gross Inadequacy of Price

[1] FORM

[*This form may be included in a memorandum, or in a trial or appellate brief.*]

THE FORECLOSURE SALE HELD ON _____ [*date*] SHOULD BE SET ASIDE BECAUSE THE PRICE OBTAINED WAS GROSSLY INADEQUATE AND THE CONDUCT OF THE SALE WAS UNFAIR AND IRREGULAR.

Inadequate Price Coupled With Irregularity. Although mere inadequacy of price, standing alone, will not justify setting aside a trustee's sale, gross inadequacy of price coupled with even slight unfairness or irregularity is a sufficient basis for setting the sale aside (*Millennium Rock Mortgage Inc. v. T.D. Service Co. (2009) 179 Cal. App. 4th 804, 811, 102 Cal. Rptr. 3d 544* ; *Angell v. Superior Court (1999) 73 Cal. App. 4th 691, 699-700, 86 Cal. Rptr. 2d 657* ; *Whitman v. Transtate Title Co. (1985) 165 Cal. App. 3d 312, 323, 211 Cal. Rptr. 582* ; *Lopez v. Bell (1962) 207 Cal. App. 2d 394, 398, 24 Cal. Rptr. 626*).

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of the contention that a foreclosure sale should be set aside on the ground of a grossly inadequate price coupled with unfairness or irregularity in the conduct of the sale. To have a sale set aside the trustor will have to pay or tender any undisputed amount that is due [*Karlsen v. American Sav. & Loan Assn. (1971) 15 Cal. App. 3d 112, 117-121, 92 Cal. Rptr. 851]* .

This form may be combined with points pertaining to the specific procedural context in which counsel wishes to raise the substantive issue. For example, in an action to set aside a private sale, the contention may be raised in support of the trustor's motion for summary judgment. This form also may be adapted for use in a trial or appellate brief.

Any of the grounds discussed in *§ 230.10* et seq. for denying the availability of foreclosure or in § 230.70 for restraining a foreclosure sale also may be used to establish that the foreclosure sale should be set aside.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should demonstrate that the price was grossly inadequate compared to the value of the property.

[3] Discussion of Authorities

[a] Inadequate Price Coupled With Irregularity

In ***Millennium Rock Mortgage Inc. v. T.D. Service Co.*** *(2009) 179 Cal. App. 4th 804, 102 Cal. Rptr. 3d 544* , the auctioneer at a foreclosure sale read the script for a different foreclosure but erroneously called out the street address for the subject property, and as a result opened the bidding with a credit bid that was only a fraction of what was actually owed on the subject property. The trustee discovered the error the same day and sought to conduct the sale again. The successful bidder sued to quiet title to the property. The trial court issued a preliminary injunction barring the trustee from conducting a new foreclosure sale. The court of appeal reversed, holding that in conjunction with the gross inadequacy of price, the auctioneer's mistake, discovered after the close of bidding but before the issuance of the trustee's deed, constituted an "irregularity" sufficient to give the trustee the right to rescind the sale (*179 Cal. App. 4th 804, 811)* .

In ***Angell v. Superior Court*** *(1999) 73 Cal. App. 4th 691, 86 Cal. Rptr. 2d 657* , a bank held a single deed of trust to secure payment of two promissory notes on an apartment building. One note was for $2,750,000 and the second note was for $350,000. The debtor advised the bank that it would be unable to make payments on the loans. The bank officer in charge of the account was under the impression that each loan was secured by its own deed of trust. She therefore directed the foreclosure trustee to foreclose the presumed second deed of trust for $350,000. The notice of default recited that the amount owed was $14,850.52 and that the debt was due to one note in the sum of $350,000. The notice of sale stated that the amount due was $377,011.75. However, because the deed of trust actually included both notes, the notice of default and the notice of sale were in error. The actual reinstatement amount was $124,429.93, and the actual unpaid balance was $2,938,542.21. At the sale, the property was sold to petitioners for $340,000.01. On the afternoon of the sale, petitioners were informed by the trustee that the total obligation against the property was over $2 million. The sale was cancelled and the checks returned. Petitioners contended that the checks were returned with the understanding that they had five days to consult legal counsel and return the money and confirm the sale. They later did so, claiming the security for the $2.4 million note was extinguished by the trustee's sale. Their subsequent tender of the amount bid at the sale was refused.

Petitioners filed an action alleging they were the true owners of the property. The trial court granted summary judgment for the defendants and the court of appeal affirmed. The court held that the defect in the notice, coupled with the gross inadequacy of price, was sufficient to set aside the sale. The conclusive presumption that petitioners were bona fide purchasers did not come into effect because the trust deed was never delivered (*73 Cal. App. 4th 691, 700)* .

Whitman v. Transtate Title Co. *(1985) 165 Cal. App. 3d 312, 211 Cal. Rptr. 582* , was an action for declaratory and injunctive relief, quiet title, specific performance, and damages based on breach of contract. The purchaser at a trustee's sale under a first trust deed sued the trustee and the purchasers at a prior foreclosure sale under the second and third trust deeds on the property.

The court of appeal affirmed a summary judgment for the trustee who had refused to deliver a deed to the plaintiff. After examining the propriety of the trustee's denial of a request for a postponement under the former version of Civ. Code § 2924g(c)(1) (subsequently amended to remove a postponement requirement), the court reviewed the adequacy

of the price. The property sold for $12,960, a fraction of its estimated value of at least $65,000. While mere inadequacy of price alone will not justify setting aside a trustee's sale, gross inadequacy of price coupled with even slight unfairness or irregularity is a sufficient basis for setting aside a sale. The court found the evidence sufficient to establish gross inadequacy (*165 Cal. App. 3d 312, 323)* .

The facts, procedural background, and disposition of ***Lopez v. Bell*** *(1962) 207 Cal. App. 2d 394, 24 Cal. Rptr. 626* , are discussed in *§ 230.71[3][a]*. With respect to the contention that the final bid was inadequate, the plaintiffs conceded that mere inadequacy of price, however gross, is not alone enough to set aside a sale, but argued that the additional irregularities justified setting the sale aside. *Winbigler v. Sherman (1917) 175 Cal. 270, 275-276* held that reasonable refusal by the trustee to postpone the sale in order for the trustor to obtain the money needed may constitute unfairness, which, coupled with an inadequate price, could justify setting aside the sale. Therefore, the *Lopez* court considered inadequacy of price in conjunction with the waiver contention discussed in *§ 230.71[3][a]* (*207 Cal. App. 2d 394, 398)* .

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23-230 California Points & Authorities § 230.74

§ 230.74 Private Foreclosure Sale Should Be Set Aside--Violation of One-Form-of-Action Rule

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

THE FORECLOSURE SALE HELD ON _____ [*date*] SHOULD BE SET ASIDE BECAUSE OTHERWISE THE ONE-FORM-OF-ACTION RULE OF CODE OF CIVIL PROCEDURE SECTION 726 WOULD BE VIOLATED.

Statute May Be Asserted in Action to Set Aside Trustee's Sale. A trustor is not restricted to raising the issue of the beneficiary's noncompliance with *Code of Civil Procedure Section 726* as an affirmative defense or by challenging the foreclosure proceedings. The issue may be raised in the trustor's action to set aside a foreclosure sale (*Aplanalp v. Forte (1990) 225 Cal. App. 3d 609, 617, 275 Cal. Rptr. 144*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that a foreclosure sale should be set aside on the ground that otherwise the one-form-of-action rule of *Code Civ. Proc. § 726* would be violated. To have a sale set aside the trustor will have to pay or tender any undisputed amount that is due [*Karlsen v. American Sav. & Loan Assn. (1971) 15 Cal. App. 3d 112, 117-121, 92 Cal. Rptr. 851]* .

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue. For example, in an action to set aside a private sale, the contention may be raised in support of the trustor's motion for summary judgment. This form also may be adapted for use in a trial or appellate brief.

Any of the grounds discussed in *§ 230.10* et seq. for denying the availability of foreclosure or in § 230.70 for restraining

a foreclosure sale also may be used to establish that the foreclosure sale should be set aside.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should explain how the one-form-of-action rule would be violated if the sale were permitted to stand.

[3] Discussion of Authorities

[a] Statute May Be Asserted in Action to Set Aside Trustee's Sale

The plaintiffs in ***Aplanalp v. Forte*** *(1990) 225 Cal. App. 3d 609, 275 Cal. Rptr. 144* , bought a mobilehome park from the defendants for $618,000. They made a down payment of $100,000 and gave a promissory note secured by a trust deed for the remainder of the purchase price. Later, the purchasers sued the sellers for fraudulent misrepresentations regarding the condition of the property and improvements on it. Meanwhile, they failed to make payments on the note. The sellers began nonjudicial foreclosure proceedings, and the purchasers obtained an injunction against the foreclosure. The purchasers recovered a judgment for $96,449. A few weeks later, the sellers obtained an order dissolving the injunction and compelling satisfaction of the judgment through setoff against payments owed by the purchasers to the sellers on the note. The day before the order, one of the purchasers filed a petition in bankruptcy, so the order was automatically stayed. After the bankruptcy court granted the sellers relief from the stay, the other purchaser filed a petition in bankruptcy. Again, the sellers moved for and were granted relief from the automatic stay. The judgment was set off against the note. Eight days after that, a trustee's sale was held under the trust deed. The sellers entered a credit bid, and the property was conveyed to them by the trustee. The purchasers then sued to cancel the trustee's deed and the note and trust deed, to quiet title in themselves, and to recover damages. They contended that under *Code Civ. Proc. § 726*, the equitable setoff extinguished their obligations under the note. The sellers moved for summary judgment, which was granted. The purchasers appealed, asserting that once the sellers set off the judgment against the note, *Code Civ. Proc. § 726* extinguished the purchasers' further obligations under the note.

The court of appeal reversed, relying in part on the holding in *Bank of America v. Daily (1984) 152 Cal. App. 3d 767, 770-771, 199 Cal. Rptr. 557* (discussed in *§ 230.110[3][b]*), that setoff is an "action" that invokes the sanction of *Code Civ. Proc. § 726* (*225 Cal. App. 3d 609, 615)* . (That case was subsequently disapproved on this point in *Security Pacific National Bank v. Wozab (1990) 51 Cal. 3d 991, 999-1000 n.7, 275 Cal. Rptr. 201, 800 P.2d 557* , discussed in *§ 230.72[3][a]*.) The court of appeal, however, distinguished *Daily*, noting that the sellers in this case did not exercise self-help, as in *Daily*, but obtained a court order to enforce their equitable right of setoff. The court relied on *Mark Briggs & Associates, Inc. v. Kinestar, Inc. (1983) 143 Cal. App. 3d 483, 486, 192 Cal. Rptr. 21* , for the proposition that postjudgment proceedings to satisfy a judgment are part of an action (*225 Cal. App. 3d 609, 615)* .

The decision in *Mark Briggs & Associates, Inc. v. Kinestar, Inc. (1983) 143 Cal. App. 3d 483, 192 Cal. Rptr. 21* , which was relied on by the court in *Aplanalp* for the proposition that postjudgment proceedings to satisfy a judgment are part of an action, arguably stands for the narrower proposition that a motion to enforce a judgment is an "action or proceeding" within the meaning of *Code Civ. Proc. § 996.440*. Moreover, under *Security Pacific National Bank v. Wozab (1990) 51 Cal. 3d 991, 275 Cal. Rptr. 201, 800 P.2d 557* (discussed in *§ 230.102[3][a]*), it should not matter whether a setoff was an "action"; setting aside the trustee's sale and deed and quieting title in the purchasers would be justified on the basis that resort to the judgment receivable failed to satisfy the "security-first" rule of *Code Civ. Proc. § 726*.

The sellers in *Aplanalp* also argued that the action to have the trustee's sale and deed set aside amounted to an invalid collateral attack on the trial court's order permitting the offset, on the ground that *Code Civ. Proc. § 726* is an affirmative defense that must be affirmatively pleaded or else is waived. The sellers conceded that instead of being restricted to use as an affirmative defense, *Code Civ. Proc. § 726* is available as a sanction, but they contended that as a

sanction, *Code Civ. Proc. § 726* had to be raised in a challenge during the foreclosure proceedings. The court of appeal, citing *Walker v. Community Bank (1974) 10 Cal. 3d 729, 733-734, 111 Cal. Rptr. 897, 518 P.2d 329* (discussed in *§ 230.111[3][a]*), found this contention meritless, and reversed the judgment for the sellers (*225 Cal. App.3d 609, 617)* . (The court in *Aplanalp* cited *Walker* as if it were only an action to set aside the trustee's sale, whereas in *Walker* the trustor-debtor had commenced an action to quiet title and to enjoin the trustee's sale.)

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23-230 California Points & Authorities § 230.75

§ 230.75 Private Foreclosure Sale Should Be Set Aside--Failure to Acknowledge Junior Lienholder's Attempted Bid

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE FORECLOSURE SALE HELD ON _____ [*date*] SHOULD BE SET ASIDE BECAUSE IT WAS UNFAIRLY CONDUCTED, WITH THE RESULT THAT THE PLAINTIFF, A JUNIOR LIENHOLDER, WAS DEPRIVED OF THE RIGHT TO BID ON THE PROPERTY.

A. Trustee's Duty Extends to Bidders. The trustee's duty at a sale conducted pursuant to a power of sale in a trust deed is to conduct the sale in a fair and open manner and to secure the best price for the trustor's benefit; and that duty extends to bidders (*Bank of Seoul & Trust Co. v. Marcione (1988) 198 Cal. App. 3d 113, 118, 244 Cal. Rptr. 1*).

B. Failure to Acknowledge Attempted Bid. Given the negligible difficulty that pursuing a fair and open procedure would have imposed on the trustee, and the severe detriment incurred by the junior lienholder, the trustee's failure resulting in the junior lienholder's being unable to complete a bid constitutes a ground to set aside the sale (*Civ. Code § 2924h(g)*; *Bank of Seoul & Trust Co. v. Marcione (1988) 198 Cal. App. 3d 113, 119-120, 244 Cal. Rptr. 1*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that a foreclosure sale should be set aside on the ground that the trustee ignored a bid, albeit one that was incomplete or improperly phrased, or denied the plaintiff the opportunity to complete a bid [*see Civ. Code § 2924 et seq.*; *Code Civ. Proc. §§ 725a, 726*]. *Civ. Code § 2924h(g)* provides in part that it is unlawful for any person to fix or restrain bidding in any manner, at a sale of property conducted pursuant to a power of sale in a trust deed or mortgage.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue. For example, in an action to set aside a private sale, the contention may be raised in support of the trustor's motion for summary judgment. This form also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, the substance of the attempted or incomplete bid should be set forth as well as what the plaintiff would have said if allowed to complete its bid.

[3] Discussion of Authorities

[a] Trustee's Duty Extends to Bidders

The plaintiff in ***Bank of Seoul & Trust Co. v. Marcione*** *(1988) 198 Cal. App. 3d 113, 244 Cal. Rptr. 1* , was the beneficiary of a junior trust deed securing a loan of more than $200,000. The defendants were beneficiaries of a senior trust deed on the same property. At a trustee's sale under the senior trust deed, only the plaintiff's representative and the defendants attended. Before the sale was complete, the plaintiff's representative said to the trustee, "We bid ...#x2026;," but the trustee ignored that attempt to bid and declared the property sold to the defendants for a $107,349 credit bid. The fair market value of the property was $330,000. The plaintiff sued to have the trustee's sale set aside, to cancel the trustee's deed, for damages, and for unjust enrichment. Judgment was entered for the defendants after their demurrer was sustained. The plaintiff appealed.

The court of appeal reversed. The court noted that the trustee's duty to conduct a fair and open sale and to obtain the best price for the trustor's benefit is a duty that extends to bidders as well (*198 Cal. App. 3d 113, 118)* . Under *Civ. Code § 2924h(a)* the statement of the plaintiff's representative, "We bid ...#x2026;," was not a valid bid because it did not include a statement of the amount bid (*198 Cal. App. 3d 113, 118-119)* . Thus, it was not effective to cancel the previous bid. However, it would have taken no more than a few minutes for the trustee to explain that to the plaintiff's representative. That would have ensured that the trustee satisfied the primary duty to create a free market for the property and to protect the interests of all parties to the sale. Given the negligible difficulty that pursuing a fair and open procedure would have imposed on the trustee, and the severe detriment incurred by the junior lienholder, the trustee's conduct was sufficiently unfair and irregular to provide a ground to set aside the sale. The trustee's wrongdoing could be imputed to the defendants (*198 Cal. App. 3d 113, 119-120)* .

[b] Failure to Acknowledge Attempted Bid

Bank of Seoul & Trust Co. v. Marcione *(1988) 198 Cal. App. 3d 113, 244 Cal. Rptr. 1* , is discussed in *§ 230.75[3][a]*.

[4] Additional Authorities

[a] Trustee's Duty Extends to Bidders

In *Ostayan v. Serrano Reconveyance Co. (2000) 77 Cal. App. 4th 1411, 1420,92 Cal. Rptr. 2d 577* , the court of appeal held that the trustee's duty to conduct the sale fairly and openly does not extend to a duty to bidders to provide detailed explanations concerning recorded encumbrances. Thus, a successful bidder could not state a cause of action for negligence based on the trustee's failure to provide specific details concerning a senior lien on the property. The bidder disregarded the following statement by the auctioneer: "We believe there is a senior lien outstanding on this property. ...#x2026; This lien is believed to have priority over the subject lien being foreclosed upon." The bidder assumed that the auctioneer's statement was unfounded, based on the bidder's erroneous conclusions derived from his own due

diligence investigations. The trustee owed no duty to protect the bidder from his own erroneous legal and economic conclusions (*77 Cal. App. 4th 1411, 1419-1420)* .

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23-230 California Points & Authorities §§ 230.76-230.89

[Reserved]

§§ 230.76[Reserved]

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23-230 California Points & Authorities § 230.90

§ 230.90 Private Foreclosure Should Not Be Enjoined or Set Aside--Notice of Sale Was properly Given--Three-Month Reinstatement Period [Civ. Code § 2924(a)(2)] Was Not Stayed or Tolled

[1] FORM

[*The following may be included in a memorandum or in a trial or appellate brief.*]

THE TRUSTOR MAY NOT _____ [ENJOIN *or* SET ASIDE] THE PRIVATE SALE ON THE GROUND THAT THE NOTICE OF SALE WAS GIVEN BEFORE EXPIRATION OF THE THREE-MONTH REINSTATEMENT PERIOD REQUIRED UNDER *CIVIL CODE SECTION 2924(a)(2)* BECAUSE THAT PERIOD IS NOT STAYED OR TOLLED BY _____ [CODE OF CIVIL PROCEDURE SECTION 312 ET SEQ. *or BANKRUPTCY CODE SECTION 362(a)*], AND THE NOTICE OF SALE WAS OTHERWISE TIMELY UNDER *CIVIL CODE SECTION 2924(a)(2).*

[*EITHER*]

A. Reinstatement Period Is Not Stayed or Tolled Under Code of Civil Procedure. The statutes of limitation, and particularly the provisions for staying or tolling, in Part II, Title 2, of the Code of Civil Procedure apply only to civil actions or proceedings. They do not apply to other statutory procedural time limits, such as the three-month reinstatement period required under *Civil Code Section 2924* (*Napue v. Gor-Mey West, Inc. (1985) 175 Cal. App. 3d 608, 615-616, 220 Cal. Rptr. 799*).

[*AND/OR*]

B. Reinstatement Period Is Not Stayed or Tolled Under Bankruptcy Code. During the pendency of a bankruptcy case, the automatic stay provision of Title *11 of the United States Code, Section 362(a),* does not stay or toll the three-month reinstatement period required under *Civil Code Section 2924(a)(2)* (*Napue v. Gor-Mey West, Inc. (1985)*

175 Cal. App. 3d 608, 617-619, 220 Cal. Rptr. 799).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a private sale should not be enjoined or set aside, when the ground asserted for that relief is that, because of the tolling of the three-month reinstatement period required under *Civ. Code § 2924(a)(2)*, the notice of sale was defective in that it was given before the expiration of that period. The ground for this contention is that the reinstatement period was not tolled or stayed, either by the tolling provisions of *Code Civ. Proc. § 312 et seq.* or by the automatic stay provision of *11 U.S.C. § 362(a)*.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue. For example, in an action to restrain a private sale, the contention may be raised in opposition to a trustor's motion for a preliminary injunction. This form also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should demonstrate that the notice of sale was otherwise properly given at least three months after the recordation of the notice of default [*see Civ. Code § 2924(a)(2)*].

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities in this form may be submitted in opposition to the contention supported by the points and *authorities in § 230.70 et seq*.

[3] Discussion of Authorities

[a] Reinstatement Period Is Not Stayed or Tolled Under Code of Civil Procedure

In ***Napue v. Gor-Mey West, Inc.*** *(1985) 175 Cal. App. 3d 608, 220 Cal. Rptr. 799* , the trustors defaulted in the payment of the secured debt, and the trustee recorded and mailed a notice of default and election to sell under the trust deed. Two of the trustors then filed petitions in bankruptcy. One trustor received a discharge in bankruptcy. In the other trustor's bankruptcy case, the court terminated the automatic stay to allow the foreclosure sale to proceed. After thedischarge and termination of the stay, the private sale was held. The trustors thereafter sued the beneficiaries, the trustee, and the purchasers at the private sale, to set aside the private sale and to quiet title. The trial court entered a judgment for the trustors conditioned on their making certain payments to the defendants. The defendants appealed.

The court of appeal reversed and remanded. The judgment was based on the trial court's conclusion that the trustors had not been provided with a three-month reinstatement period as required under *Civ. Code § 2924(a)(2)*, because this period had been tolled during the pendency of the bankruptcy cases pursuant to *Code Civ. Proc. § 356* (*175 Cal. App. 3d 608, 615)* . This conclusion was erroneous because the statutes of limitation in *Code Civ. Proc. § 312 et seq.*, including the tolling provision of *Code Civ. Proc. § 356*, fix the time within which civil suits or proceedings must be commenced, but do not apply to the procedural time limits of *Civ. Code § 2924* governing nonjudicial foreclosure sales (*175 Cal. App. 3d 608, 616)* . In fact, the reinstatement period, including an extension provided under *11 U.S.C. § 108(b)*, had expired without the trustors' having cured the default, and the private sale was therefore not untimely (*175 Cal. App. 3d 608, 620)* .

[b] Reinstatement Period Is Not Stayed or Tolled Under Bankruptcy Code

The facts and procedural background of ***Napue v. Gor-Mey West, Inc.*** *(1985) 175 Cal. App. 3d 608, 220 Cal. Rptr. 799* , are discussed in [a], *above*. In that case, the court of appeal rejected the contention that the three-month reinstatement period required under *Civ. Code § 2924(a)(2)* is stayed or tolled during the pendency of a bankruptcy case by the automatic stay provision of *11 U.S.C. § 362(a)*. That provision operates to stay automatically the commencement or continuation of a judicial or administrative proceeding, the enforcement of a judgment, or any other act to obtain property or enforce a lien against property of the debtor. The court reasoned that the running of the reinstatement period required under *Civ. Code § 2924* was not an act, proceeding, or enforcement of a right within the meaning of *11 U.S.C. § 362(a)*. Moreover, another section of the Bankruptcy Code, *11 U.S.C. § 108(b)*, expressly provided for a limited extension of statutory reinstatement periods. The court therefore held that *11 U.S.C. § 362(a)* did not stay or toll the reinstatement period required under *Civ. Code § 2924(a)(2)* (*175 Cal. App. 3d 608, 617-619)* .

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23-230 California Points & Authorities § 230.91

§ 230.91 Private Foreclosure Should Not Be Enjoined or Set Aside--Trustee has No Independent Duty to Give Actual Notice After Satisfying Statutory Requirements

[1] FORM

[*The following may be included in a memorandum or in a trial or appellate brief.*]

THE PRIVATE SALE CONDUCTED BY THE TRUSTEE MAY NOT BE CHALLENGED ON THE GROUND THAT THE TRUSTEE GAVE INADEQUATE NOTICE OF THE _____ [DEFAULT *or* SALE] BECAUSE THE TRUSTEE SATISFIED ALL STATUTORY REQUIREMENTS FOR NOTICE AND HAS NO INDEPENDENT DUTY TO PROVIDE ACTUAL NOTICE.

Trustee's Statutory Duty to Provide Notice of Default and Sale Is Exclusive. The statutory requirements for providing notice of a default or sale in a nonjudicial foreclosure proceeding are exclusive, and the trustee under a trust deed has no independent duty arising under common law agency principles to provide the trustor or the successors in interest with actual notice of the default or sale (*I.E. Associates v. Safeco Title Ins. Co. (1985) 39 Cal. 3d 281, 283, 285-289, 216 Cal. Rptr. 438, 702 P.2d 596*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a private sale should not be enjoined or set aside on the asserted ground that the trustee failed to provide the trustor with actual notice of default or sale. The ground for this contention is that the trustee had no duty except to satisfy the requirements in *Civ. Code § 2924b*.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue. For example, in an action by a trustor against a trustee to restrain a private foreclosure sale, the contention may be raised by the beneficiary in opposition to the trustor's application for a temporary restraining order. This form also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should include a description of the notice given by the trustee showing compliance with the requirements for notice provided under *Civ. Code § 2924b*.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities in this form may be submitted in opposition to the contention supported by the points and *authorities in § 230.70 et seq*.

[3] Discussion of Authorities

[a] Trustee's Statutory Duty to Provide Notice of Default and Sale Is Exclusive

In ***I.E. Associates v. Safeco Title Ins. Co.*** *(1985) 39 Cal. 3d 281, 216 Cal. Rptr. 438, 702 P.2d 596* , the trustee conducted a nonjudicial foreclosure sale of the real property following a default. The trustor subsequently sued for damages based on the trustee's alleged negligence and breach of trust in failing to take reasonable steps to provide the trustor with prior notice of the default and sale. The trustee moved for summary judgment, alleging compliance with the statutory requirements for notice, and the trial court granted the motion. The trustor appealed, arguing chiefly that the trustee, as common agent of both the trustor and the beneficiary under the trust deed, had an independent duty under common law agency principles to take reasonable steps to provide actual notice of the default and sale to the trustor.

The Supreme Court affirmed. The trustee had properly mailed notices of default and sale to the trustor's last known address in compliance with *Civ. Code § 2924b(b)* (*39 Cal. 3d 281, 284-285)* . The Court held that a trustee's statutory duty to provide notice of a default or sale is exclusive (*39 Cal. 3d 281, 283, 285-289)* . A nonjudicial foreclosure procedure constitutes private, not state, action, and is therefore exempt from the due process constraints of the federal and state constitutions (*39 Cal. 3d 281, 286-287)* . The Court noted the lack of any authority for the proposition that a trustee owes any duties with respect to the exercise of the power of sale beyond those specified in the trust deed and the statutes (*39 Cal. 3d 281, 287-288)* . Policy considerations militate against any judicial expansion of a trustee's statutory duty to provide notice of a default or sale. Trustees, to perform efficiently, should have clearly defined responsibilities. In addition, a duty requiring the trustee to take reasonable steps to discover the trustor's current address would result in undue costs and uncertainty, particularly when the beneficiary is required to notify the trustee of any known change of address by the trustor and when the trustor may also easily do the same (*39 Cal. 3d 281, 288-289)* .

[4] Additional Authorities

[a] Trustee's Statutory Duty to Provide Notice of Default and Sale Is Exclusive

In *Diediker v. Peelle Financial Corp. (1997) 60 Cal. App. 4th 288, 70 Cal. Rptr. 2d 442* , a title insurance company that issued a policy without excepting an Internal Revenue Service lien despite its knowledge of the lien's existence could not recover the amount eventually paid to the IRS on behalf of its policyholder from the trustee who, lacking knowledge of the existence of the lien, had conducted a foreclosure sale years earlier without providing notice to the IRS. State law does not require notice to be sent to the IRS. Further, the trustee was not required to notify the IRS under the terms of a federal statute providing that when a property on which the United States has or claims a lien or title under the IRS code is transferred pursuant to a nonjudicial sale, the sale is "made subject to and without disturbing such lien or title, if notice of such lien was filed or such title recorded in the place provided by law for such filing or recording more than 30 days before such sale and the United States is not given notice of such sale ...#x2026;" [*26 U.S.C. § 7425(b)(1)*]. The federal statute does not require the trustee to give notice to the United States, but merely provides that the lien will not be extinguished if the United States is not given notice of the sale. Because notice was not required, the trustee did not violate a duty owed under law by failing to give it (*60 Cal. App. 4th 288, 294)* . The court

declined to impose a common law duty on trustees owed to all future purchasers of property and their title insurers to locate all IRS liens of record and give notice to the IRS prior to conducting a foreclosure sale, on the ground the rights and powers of trustees in nonjudicial foreclosure proceedings are strictly limited and defined by the contract of the parties and the statutes (*60 Cal. App. 4th 288, 296-297)* .

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23-230 California Points & Authorities § 230.92

§ 230.92 Private Foreclosure Should Not Be Enjoined or Set Aside--Trustee May Be Purchaser

[1] FORM

[*The following may be included in a memorandum or in a trial or appellate brief.*]

THE TRUSTOR MAY NOT SET ASIDE A PRIVATE SALE ON THE GROUND THAT THE TRUSTEE WAS THE PURCHASER.

Trustee May Be Purchaser. A trustee under a trust deed is not prohibited from purchasing the trust property at the trustee's own sale. As long as there is no fraud, irregularity, or misconduct on the part of the trustee, a trustee's sale at which the trustee purchases the property is not invalid (*Stephens, Partain & Cunningham v. Hollis (1987) 196 Cal. App. 3d 948, 955-956, 242 Cal. Rptr. 251*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a private sale should not be set aside merely because the trustee purchased theproperty. The authorities are applicable when there is no showing of fraud, irregularity, or misconduct on the part of the trustee.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the trustee is entitled to purchase the property. For example, in an action to set aside a private sale, the contention may be raised in opposition to a trustor's motion for a summary judgment. This form also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should

demonstrate that the sale was conducted fairly and openly so that the highest possible price was obtained.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities in this form may be submitted in opposition to the contention supported by the points and *authorities in § 230.70 et seq*.

[3] Discussion of Authorities

[a] Trustee May Be Purchaser

Stephens, Partain & Cunningham v. Hollis *(1987) 196 Cal. App. 3d 948, 242 Cal. Rptr. 251* , was an unlawful detainer action. The plaintiff was a partnership composed of officers of a corporation that arranged a loan and acted as trustee under the trust deed securing the loan. The defendants were the borrowers. After the loan was in default and a notice of default had been recorded, the corporation hired a trust deed service company to conduct the sale and purchased the property at the trustee's sale. The corporation then sold the property to the plaintiff, and the plaintiff commenced the unlawful detainer action. Judgment was for the plaintiff, and the defendants appealed.

The court of appeal affirmed, first noting that at the time of the sale, neither the plaintiff nor the corporation was acting as a real estate loan broker for the defendants (*196 Cal. App. 3d 948, 952-953)* . A trustee under a trust deed is not an ordinary trustee. A trustee under a trust deed has neither the powers nor the obligations of a strict trustee but is a kind of common agent for the parties. It has long been recognized that a trustee under a trust deed is not prohibited from purchasing the trust property at the trustee's own sale (*196 Cal. App. 3d 948, 955)* . As long as there is no fraud, irregularity, or misconduct on the part of the trustee, a trustee's sale at which the trustee purchases the property is not invalid. In fact, the creditor may rightfully act as trustee and properly purchase at the sale. There was no evidence in this case that the trustee acted in any manner contrary to the interests of the defendants in conducting the foreclosure sale. The defendants' only cognizable interest at the time of the sale was to have the sale conducted fairly and openly, so that the highest possible price could be obtained (*196 Cal. App. 3d 948, 955)* . The trustee did that (*196 Cal. App. 3d 948, 956)* .

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Volume 23 Chapters 230-239 TRUST DEEDS---to---WORKERS' COMPENSATION
CHAPTER 230 TRUST DEEDS AND REAL PROPERTY MORTGAGES
PART II. FORMS
C. Actions to Enjoin or Set Aside Private Foreclosure Sale

23-230 California Points & Authorities § 230.93

§ 230.93 Private Foreclosure Should Not Be Enjoined or Set Aside--Buyer Was Bona Fide Purchaser

[1] FORM

[*The following may be included in a memorandum or in a trial or appellate brief*].

THE TRUSTOR MAY NOT SET ASIDE THE PRIVATE SALE BECAUSE THE BUYER IS A BONA FIDE PURCHASER OF THE REAL PROPERTY FOR VALUE WITHOUT NOTICE OF ANY ADVERSE INTEREST OR IRREGULARITY IN THE SALE PROCEEDINGS.

Sale May Not Be Set Aside as to Bona Fide Purchaser. The trustor may not set aside a private foreclosure sale when the buyer is a bona fide purchaser for value without notice of any adverse interest or of any irregularity in the sale proceedings, even if the buyer has experience in foreclosure sales and has purchased the property at less than fair market value (*Melendrez v. D & I Investment Inc. (2005) 127 Cal. App. 4th 1238, 1255, 26 Cal. Rptr. 3d 413*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a private sale should not be set aside, when the ground asserted for that relief is that the buyer was not a bona fide purchaser for value because the buyer is experienced in foreclosure sales and purchased the property for substantially less than market value.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue. This form also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should demonstrate that the buyer parted with consideration in exchange for the property and that the buyer had no knowledge

or notice of any adverse interest or irregularity in the sale proceedings.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities in this form may be submittedin opposition to the contention supported by the points and *authorities in § 230.70 et seq*.

[3] Discussion of Authorities

[a] Sale May Not Be Set Aside as to Bona Fide Purchaser

In ***Melendrez v. D & I Investment Inc.*** *(2005) 127 Cal. App. 4th 1238, 26 Cal. Rptr. 3d 413* , the borrowers defaulted on a loan secured by residential real property, and the lender initiated foreclosure proceedings. After receiving notice of the foreclosure sale, the borrowers contacted the lender and arranged to cure the default. The lender sent the borrowers a Repayment Agreement, which provided that the lender would not proceed with the trustee's sale provided that the borrowers made all payments required under the terms of the agreement and all other payments required under the promissory note. The borrowers believed that the agreement subsequently was orally modified to allow them to postpone one of the payments. Nevertheless, the trustee's sale was held when the borrowers missed that payment. The buyer, a licensed real estate broker with experience in buying properties at foreclosure sales, paid $197,100 for the property. The parties agreed that the property was worth approximately $380,000. The borrowers brought an action seeking to have the sale declared invalid on the ground it was conducted in violation of the repayment agreement.

The court of appeal affirmed a judgment for defendants. The court held that the trial court properly determined that the buyer was a bona fide purchaser for value ("BFP"). The conclusion flowing directly from that fact was that the trustee's sale was unassailable as to the buyer in the absence of fraud. Since there was no evidence of fraud chargeable to the buyer, the trial court properly rejected the borrowers' request to void the trustee's sale (*127 Cal. App. 4th 1238, 1242)* .

The court declined to hold that an experienced foreclosure buyer cannot qualify as a BFP if he or she buys property for substantially less than its value at a foreclosure sale. The court saw no reasoned basis for such a rule (*127 Cal. App. 4th 1238, 1253)* . It concluded that the proper standard to determine whether a buyer at a foreclosure sale is a BFP is whether the buyer (1) purchased the property for value, and (2) had no knowledge or notice of the asserted rights of another. The court found that the buyer qualified as a BFP under this test (*127 Cal. App. 4th 1238, 1255)* .

The court noted that *Civ. Code § 2924* provides that when the trustee delivers a deed to a bona fide purchaser at the foreclosure sale, and the deed recites that all procedural requirements for the default notice and sale notice have been satisfied, there is a statutory rebuttable presumption that such requirements have been fulfilled [*see Civ. Code § 2924(c)*]. The court concluded that this presumption applies only to challenges to statutory compliance with regard to default and sales notices, and did not preclude the borrowers' challenge to the foreclosure sale (*127 Cal. App. 4th 1238, 1256)* . Nevertheless, the court concluded that the buyer's status as a BFP rendered the sale invulnerable to the borrowers' challenge. There was no evidence that the buyer knew about either the Repayment Agreement or the alleged modification. Further, there were no facts sufficient to put the buyer on notice of the Agreement or its alleged modification. Finally, the buyer was not chargeable with any alleged fraud. The court therefore affirmed the judgment against the borrowers (*127 Cal. App. 4th 1238, 1258)* .

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23-230 California Points & Authorities §§ 230.94-230.99

[Reserved]

§§ 230.94[Reserved]

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Volume 23 Chapters 230-239 TRUST DEEDS---to---WORKERS' COMPENSATION
CHAPTER 230 TRUST DEEDS AND REAL PROPERTY MORTGAGES
PART II. FORMS
D. One-Form-of-Action Rule

23-230 California Points & Authorities § 230.100

§ 230.100 One-Form-of-Action Rule [Code Civ. Proc. § 726(a)] Does Not Bar Recovery or Foreclosure

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE BENEFICIARY IS ENTITLED TO _____ [*specify, e.g.*, JUDICIALLY FORECLOSE UNDER THE TRUST DEED] BECAUSE THE _____ [*specify, e.g.*, PRIOR NONJUDICIAL FORECLOSURE] DID NOT _____ [INVOLVE A DEBT SECURED BY A MORTGAGE ON REAL PROPERTY *or* CONSTITUTE AN ACTION FOR THE RECOVERY OF THE DEBT] WITHIN THE MEANING OF CODE OF CIVIL PROCEDURE SECTION 726.

A. One-Form-of-Action Rule. There can be but one form of action for the recovery of any debt or the enforcement of any right secured by a mortgage on real property or an estate for years therein, which action must be in accordance with the provisions of *Code of Civil Procedure Section 725a et seq.* In the action the court may, by its judgment, direct the sale of the encumbered property or estate for years therein (or so much of it as may be necessary) and application of the proceeds of the sale to the payment of the costs of the court, the expenses of levy and sale, and the amount due the plaintiff, including, when the mortgage provides for the payment of attorney's fees, such sum as the court shall find reasonable, not exceeding the amount named in the mortgage (*Code Civ. Proc. § 726(a)*).

[*Optional*] **B. Nonjudicial Foreclosure Is Not Action.** A nonjudicial foreclosure is not an action for the recovery of the debt within the meaning of *Code of Civil Procedure Section 726* and thus does not bar a subsequent judicial or nonjudicial foreclosure of separate real property securing the same obligation (*Hatch v. Security-First Nat. Bank (1942) 19 Cal. 2d 254, 258-262, 120 P.2d 869*).

[*Optional*] **C. Collateral Third-Party Note Secured by Real Property.** An obligation that is secured by the note of a third party that is itself secured by a trust deed is not considered to be a debt secured by real property within the meaning of *Code of Civil Procedure Section 726*. Thus a personal judgment on the primary obligation is proper (1) without first requiring foreclosure of the trust deed, or (2) unless and until the primary obligee succeeds to the obligor's

equity (*Bank of California v. Leone (1974) 37 Cal. App. 3d 444, 447-448, 112 Cal. Rptr. 394*).

[*Optional*] **D. Action Commenced by Trustor.** An action commenced by the trustor is not an action for the recovery of the debt within the meaning of *Code of Civil Procedure Section 726* and thus does not bar a subsequent judicial or nonjudicial foreclosure. This rule applies even if the beneficiary is considered the prevailing party in the action, for example, by virtue of being awarded a judgment for attorney's fees and costs (*Passanisi v. Merit-McBride Realtors, Inc. (1987) 190 Cal. App. 3d 1496, 1505-1507, 236 Cal. Rptr. 59*).

[*Optional*] **E. Attachment Is Not Action.** In an action to foreclose a mortgage or trust deed on real property or an estate for years in real property, pursuit of any remedy authorized by law relating to attachment does not constitute an action for the recovery of a debt secured by a mortgage or trust deed under *Code of Civil Procedure Section 726(a)* or a failure to comply with other statutory or judicial requirements to proceed first against security (*Code Civ. Proc. § 483.012*).

[*Optional*] **F. Senior and Junior Liens Assigned by One Lender to Two Different Creditors.** When a creditor that holds both the senior and junior liens on property assigns the liens to two different creditors, the one-form-of-action rule in *Code of Civil Procedure Section 726(a)* does not bar a separate action by the junior lienholder to recover its debt following the senior lienholder's judicial foreclosure of the property (*National Enterprises, Inc. v. Woods (2001) 94 Cal. App. 4th 1217, 1234, 115 Cal. Rptr. 2d 37*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the one-form-of-action rule [*Code Civ. Proc. § 726*] does not apply. Paragraph A states the one-form-of-action rule. The remainder of the form consists of the following optional provisions:

- Paragraph B establishes that a prior nonjudicial foreclosure against one property does not bar a subsequent foreclosure against separate real property.

- Paragraph C is for use when a third-party note secured by real property has been pledged as security.

- Paragraph D makes clear that an action commenced by the trustor is not an action within the meaning of the one-form-of-action rule.

- Paragraph E establishes that pursuit of an attachment remedy does not constitute an impermissible action for the recovery of a debt secured by a mortgage or trust deed under the one-form-of-action rule or a failure to comply with other statutory or judicial requirements to proceed first against security.

- Paragraph F is for use when a lender holds both senior and junior liens on the property and subsequently assigns the liens to two different creditors.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue. For example, in a beneficiary's action for judicial foreclosure, the contention may be raised in support of the beneficiary's motion for summary judgment. This form also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus counsel should describe the

situation that allegedly constitutes the "one action" or the "debt secured by a mortgage on real property."

[c] Application of Statute to Leasehold Mortgages

The statement of legislative intent in Stats. 1989, ch. 698, which added the phrase "or estate for years therein" to *Code Civ. Proc. § 726(a)*, is that the one-form-of-action rule applies to leasehold mortgages. The act states that it is specifically intended to abrogate the holding in *Taylor v. Bouissiere (1987) 195 Cal. App. 3d 1197, 1199-1200, 241 Cal. Rptr. 253* , that the enforcement of rights in leasehold mortgages is governed by the rules regarding personal property, which holding is inconsistent with the legislative history of *Code Civ. Proc. § 726* and other statutes and would result in a gap in the method of enforcement because the rules regarding enforcement of personal property interests are specifically made inapplicable to leasehold mortgages. However, the amendments made by Stats. 1989, ch. 698, are not to be construed to affect the applicability of the code sections amended by that chapter to the lien of mortgages or trust deeds in estates in real property specified in *Civ. Code § 761(1)* (estates of inheritance or perpetual estates) and *Civ. Code § 761(2)* (life estates) [Stats. 1989, ch. 698, § 15].

[3] Discussion of Authorities

[a] Nonjudicial Foreclosure Is Not Action

Hatch v. Security-First Nat. Bank *(1942) 19 Cal. 2d 254, 120 P.2d 869* , involved four consolidated actions to quiet title to real and personal property. The plaintiffs' mother died indebted to the bank on several loans. In a refinancing, the plaintiffs, as executors, delivered a note and trust deed on the estate's real property. On a subsequent renewal, they provided individual guaranties. In February 1937 the bank recorded a notice of default and an election to sell. Then the bank commenced actions on the individual guaranties, attaching the guarantors' property. The bank and the guarantors reached an agreement to postpone the trustee's sale until at least November 15, 1938, releasing the plaintiffs from personal liability on the guaranties, dismissing the bank's suits on the guaranties, and requiring the plaintiffs to execute a trust deed as individuals on parcels owned by them individually as additional security for the refinanced loan to the estate. In accordance with that agreement, the plaintiffs, as executors and with approval of the probate court, also pledged personal property of the estate as additional security. After nonjudicial foreclosure of the trust deed on the estate real property in December 1938, $128,000 remained due. Sale of the pledged estate personal property in February 1939 realized only $9,000. After application of the proceeds of the trustee's sale conducted in March 1939 under the plaintiffs' individual trust deed, $46,000 remained due, but the bank claimed no further security or right of action. The present action was to quiet title to the estate personal property and to the plaintiffs' individual real property. Judgment was for the plaintiffs on the ground that the February and March 1938 sales were invalid because the bank had taken no action pursuant to statute to establish a deficiency after the trustee's sale of the estate's real property. The bank appealed.

The Supreme Court reversed. The bank contended that because there was no attempt to obtain a personal judgment for the deficiency, *Code Civ. Proc. §§ 580a*, *725a*, and *726* did not apply. The Court first stated that because there was no judicial foreclosure, *Code Civ. Proc. §§ 725a* and *726* had no direct application (*19 Cal. 2d 254, 258)* . *Code Civ. Proc. § 726* requires a lender to exhaust any security before obtaining a personal judgment against the borrower. The lender may do so in either of two ways--by judicial foreclosure or by exercise of a power of sale under a trust deed or mortgage (*19 Cal. 2d 254, 259)* . The plaintiffs contended that once a lender resorts to judicial or nonjudicial foreclosure, the lender can take no further steps unless it proceeds within three months under one of those code sections to establish the existence of an actual deficiency in the amount realized from the foreclosed security. The Court, however, agreed with the bank, that when a creditor seeks merely to realize on additional security and not to obtain a personal judgment against the debtor for any unpaid balance, the statutes impose no such requirement (*19 Cal. 2d 254, 260-262)* .

[b] Collateral Third-Party Note Secured by Real Property

Bank of California v. Leone *(1974) 37 Cal. App. 3d 444, 112 Cal. Rptr. 394* , was an action on three promissory

notes. Two of the notes were secured by the defendant's reversionary interest as lessor in two leases of vending machines. U.C.C. financing statements were filed, and the lessee made the lease payments directly to the bank until 1970. The third note was originally unsecured, but to induce forbearance in collection efforts after the note matured, the defendant assigned to the bank as collateral a note payable to the defendant executed by a third party and secured by a trust deed on real property in Solano County. The bank tried to repossess the vending machines, but they could not be found. Judgment on all three notes was for the bank, and the defendant appealed.

The court of appeal affirmed. As to the notes secured by the vending machines, the defendant contended that the attempts at repossession were inadequate and thus recovery on those notes was barred by *Code Civ. Proc. § 726*. The courtdisagreed, citing former Com. Code § 9501(1) (*now see Com. Code § 9601(a)*) to the effect that a secured party under a security agreement may reduce the claim to judgment, foreclose, or otherwise enforce the security interest by any available remedy. *Code Civ. Proc. § 726* does not apply to a debt secured only by personal property and thus does not require exhaustion of security before obtaining a personal judgment (*37 Cal. App. 3d 444, 446-447)* . As to the note secured by the third party's note, the court said that note would not be governed by *Code Civ. Proc. § 726* unless and until the bank succeeded to the defendant's equity and undertook to recover from the third party (*37 Cal. App. 3d 444, 448)* . The court discussed former Com. Code § 9102(3) (*now see Com. Code § 9109(b)*) and the reporter's comment to that section, and the court concluded that the bank had a note secured by an instrument, not one secured by an interest in real property, and thus *Code Civ. Proc. § 726* did not apply. Thus, it was proper to give judgment on the note without requiring the bank to exercise its right as holder of the third-party note and foreclose the trust deed (*37 Cal. App. 3d 444, 448)* .

[c] Action Commenced by Trustor

In ***Passanisi v. Merit-McBride Realtors, Inc.*** *(1987) 190 Cal. App. 3d 1496, 236 Cal. Rptr. 59* , the plaintiffs had previously sued to enjoin a trustee's sale after the defendants had recorded notice of default. The plaintiffs were not successful in that action, and the defendants were awarded costs and attorney's fees. The trustee's sale was held, and the defendants were the successful bidders. The plaintiffs contended that the foreclosure sale discharged all of their debts to the defendants, including the judgment for costs and attorney's fees, and moved to compel the defendants to acknowledge satisfaction of the judgment. The motion was denied, and the plaintiffs appealed.

The court of appeal reversed and remanded. The plaintiffs' contentions on appeal included the claim that the foreclosure sale was void as violating *Code Civ. Proc. § 726*, in that the action to enjoin the foreclosure sale was a prior action within the meaning of that section. The court disagreed, saying that an action commenced by the trustor is not an action for the recovery of the debt within the meaning of *Code Civ. Proc. § 726* (*190 Cal. App. 3d 1496, 1505-1507)* . The defendants were not required to forgo their right to the judgment for costs and attorney's fees in order to rely on the security to satisfy the secured debt (*190 Cal. App. 3d 1496, 1507)* .

[d] Senior and Junior Liens Assigned by One Lender to Two Different Creditors

National Enterprises, Inc. v. Woods *(2001) 94 Cal. App. 4th 1217, 115 Cal. Rptr. 2d 37* concerned two notes secured by two deeds of trust on the same property and held by one creditor (County Savings). The borrower defaulted on the loans. The Resolution Trust Corporation (RTC) was appointed receiver to liquidate County Savings in 1992. RTC assigned the first note and first deed of trust to State Street Bank and retained the second note and the second deed of trust. In 1993, State Street commenced a judicial foreclosure action with regard to the first deed of trust. The court entered a judgment of foreclosure and ordered the property sold. It also found the borrowers (a general partnership) personally liable for the debt and subject to a deficiency judgment to be determined pursuant to *Code Civ. Proc. § 726*. The partners settled the deficiency for $500,000.

In 1996, the FDIC (RTC's successor) sold the second loan to NEI. In 1996, NEI brought an action against the borrowers for nonpayment of the second note. The court of appeal reversed a judgment for the defendants. It held that the

one-form-of-action rule (*Code Civ. Proc. § 726(a)*) did not bar recovery by the junior lienholder (*94 Cal. App. 4th 1217, 1232)* . The court stated that the one-form-of-action rule has not been, and should not be, applied to require two different creditors who hold separate debts to join in a single action, even if the two debts were once held by a single creditor--at least in the absence of evidence of a scheme to circumvent the rule (*94 Cal. App. 4th 1217, 1232)* .

The court stated that neither the language of *Code Civ. Proc. § 726* nor its purpose requires two debts owed by the same borrower and secured by the same property to be treated as one, merely because they once were held by the same creditor. First, the court stated that § 726 refers to a single debt or mortgage: It allows "but one form of action for the recovery of any debt or the enforcement of any right secured by mortgage." The court stated that by its plain language, § 726 does not prohibit separate actions to recover separate but related debts assigned to independent parties. Thus, the court stated that unless the separate debts are a subterfuge, two debts held by different creditors but owed by the same party cannot be deemed a single debt even if they are secured by the same property. If it were otherwise, § 726 would obligate two independent creditors to share and coordinate a single action to collect separate debts secured by the same property, simply because the two debts were once held by a single creditor (*94 Cal. App. 4th 1217, 1233)* .

Second, the court stated that the purposes of *Code Civ. Proc. § 726* would not be furthered by treating two bona fide debts as one when held by independent creditors, simply because they were once held by a single creditor. The purpose of limiting a secured creditor to only one lawsuit to enforce its security interest and collect its debt would not be upset by allowing one suit per debt, unless the two debts were a subterfuge for one. Furthermore, § 726's purpose of compelling the exhaustion of all security before the entry of a deficiency judgment would not be thwarted if an independent junior lienholder were permitted to bring an action after the senior lienholder had exhausted the security. In such an instance, the security has already been exhausted, and no purpose would be served in requiringthe junior lienholder to go through a meaningless foreclosure procedure (*94 Cal. App. 4th 1217, 1234)* .

The court held that the fact that NEI's predecessors-in-interest allowed State Street to foreclose did not require a different outcome (*94 Cal. App. 4th 1217, 1234-1235)* . The court cited *Bank of America v. Graves (1996) 51 Cal. App. 4th 607, 613, 59 Cal. Rptr. 2d 288* (discussed in *§ 230.51[4][a]*), in which a bank holding a second deed of trust on a residence permitted the holder of the first deed of trust on the property to complete its nonjudicial foreclosure first. The court of appeal rejected the debtors' claim that the bank's separate suit was barred by § 726, stating that "the sold-out non-purchase-money junior is free to pursue any remedy on the note without regard to the one-form-of-action limitation [*Code Civ. Proc. § 726*], fair market value deficiency limitation [*Code Civ. Proc. §§ 726, 580a*], and nonjudicial sale deficiency prohibitions [*Code Civ. Proc. § 580d*]." The court acknowledged that the facts differed in *Woods* because the debts were not only secured by the same property but also were once held by a single creditor at the time of the default. The court recognized that a single lender might structure a single debt into several promissory notes to preserve the right to bring multiple actions, but stated that this was not the case here because the two debts originated two years apart (*94 Cal. App. 4th 1217, 1235)* .

Finally, the court rejected the borrowers' argument that because NEI was a successor in interest of County Savings and of the RTC, it took the note and deed of trust subject to all defenses that the borrowers had against County Savings and RTC (*94 Cal. App. 4th 1217, 1237)* . The court stated that although an assignee acquires the rights and liabilities of the assignor and is subject to the defenses that could be asserted against the assignor, the restrictions arising from the one-form-of-action rule under § 726 cannot logically be triggered before the one action is commenced. In this case, at the time the first judicial foreclosure action was commenced by State Street, there were two bona fide creditors holding the two debts. Thus, at the time State Street brought and completed the judicial foreclosure action, the RTC (which held the second note) was under no disability concerning the right to bring a separate action under § 726 and it could assign (or its successor could assign) the loan free of any such restriction (*94 Cal. App. 4th 1217, 1237)* .

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D. One-Form-of-Action Rule

23-230 California Points & Authorities § 230.101

§ 230.101 Foreclosure, Antideficiency Statutes, and One-Form-of-Action Rule Cannot Bar Lender's Recovery for Fraud

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

BECAUSE THE _____ [BENEFICIARY WAS FRADULENTLY INDUCED TO MAKE A LOAN SECURED BY REAL PROPERTY *or* PLAINTIFF PURCHASED (A PORTION OF THE) INTEREST OF A BENEFICIARY IN A FRADULENTLY INDUCED LOAN], THE _____ [BENEFICIARY *or* PLAINTIFF] IS ENTITLED TO RECOVER ACTUAL AND EXEMPLARY DAMAGES [AFTER FORECLOSURE UNDER ANY TRUST DEED SECURING THE LOAN].

[*EITHER*]

A. Fraud Damages Authorized. Notwithstanding *Code of Civil Procedure Section 726*, [a successor in interest to] a person authorized by the State of California to make or arrange loans secured by real property, that originates, acquires, or purchases, in whole or in part, any loan secured directly or collaterally, in whole or in part, by a mortgage or trust deed on real property or an estate for years therein, may bring an action to recover damages, including actual damages and exemplary damages not to exceed 50 percent of the actual damages, against a borrower if the action is based on fraud under *Civil Code Section 1572* and the fraudulent conduct of the borrower induced the original lender to make the loan, provided the loan is not secured by single-family, owner-occupied residential real property, when the property is actually occupied by the borrower as represented to the lender in order to obtain the loan and the loan is for $150,000 or less, as adjusted annually, commencing on January 1, 1987, to the Consumer Price Index as published by the U.S. Department of Labor (*Code Civ. Proc. § 726(f), (g)*; *Alliance Mortgage Co. v. Rothwell (1995) 10 Cal. 4th 1226, 1237-1238, 44 Cal. Rptr. 2d 352, 900 P.2d 601* ; *Guild Mortgage Co. v. Heller (1987) 193 Cal. App. 3d 1505, 1511-1514, 239 Cal. Rptr. 59*).

[*Optional*] **B. Antideficiency Provisions Do Not Prohibit Recovery.** Any action maintained under *Code of Civil Procedure Section 726(f)* for damages shall not constitute a money judgment for a deficiency, or a deficiency judgment, within the meaning of *Code of Civil Procedure Sections 580a, 580b*, and *580d* (*Code Civ. Proc. § 726(h)*; *Guild Mortgage Co. v. Heller (1987) 193 Cal. App. 3d 1505, 1511-1514, 239 Cal. Rptr. 59*).

[*OR, if lender is bank*]

A. Fraud Damages Authorized. Notwithstanding *Code of Civil Procedure Section 726* or any other provision of law to the contrary, [a successor in interest to] a state or nationally chartered bank, or its subsidiaries or affiliates transacting business in California, that originates, acquires, or purchases, in whole or in part, any loan secured directly or collaterally, in whole or in part, by a mortgage or trust deed on real property, or any interest therein, may bring an action to recover damages, including actual damages and exemplary damages not to exceed 50 percent of the actual damages, against a borrower if the action is based on fraud under *Civil Code Section 1572* and the fraudulent conduct of the borrowerinduced the original lender to make the loan, provided the loan is not secured by single-family, owner-occupied residential real property, when the property is actually occupied by the borrower as represented to the lender in order to obtain the loan and the loan is for $150,000 or less, as adjusted annually, commencing on January 1, 1987, to the Consumer Price Index as published by the U.S. Department of Labor (*Fin. Code § 551(a), (b)*).

[*Optional*] **B. Antideficiency Provisions Do Not Prohibit Recovery.** Any action maintained under *Financial Code Section 551* for damages shall not constitute a money judgment for a deficiency, or a deficiency judgment, within the meaning of *Code of Civil Procedure Sections 580a, 580b*, and *580d* (*Fin. Code § 551(c)*).

[*OR, if lender is savings and loan association*]

A. Fraud Damages Authorized. Notwithstanding *Code of Civil Procedure Section 726* or any other provision of law to the contrary, [a successor in interest to] an association, a federal association, an affiliate of an association or federal association, or a service corporation, that originates, acquires, or purchases, in whole or in part, any loan secured directly or collaterally, in whole or in part, by a mortgage or trust deed on real property, or any interest therein, may bring an action to recover damages, including actual damages and exemplary damages not to exceed 50 percent of the actual damages, against a borrower if the action is based on fraud under *Civil Code Section 1572* and the fraudulent conduct of the borrower induced the original lender to make the loan, provided the loan is not secured by single-family, owner-occupied residential real property, when the property is actually occupied by the borrower as represented to the lender in order to obtain the loan and the loan is for $150,000 or less, as adjusted annually, commencing on January 1, 1987, to the Consumer Price Index as published by the U.S. Department of Labor (*Fin. Code § 7460(a), (b)*).

[*Optional*] **B. Antideficiency Provisions Do Not Prohibit Recovery.** Any action maintained under *Financial Code Section 7460* for damages shall not constitute a money judgment for a deficiency, or a deficiency judgment, within the meaning of *Code of Civil Procedure Sections 580a, 580b*, and *580d* (*Fin. Code § 7460(c)*).

[*OR, if lender is credit union*]

A. Fraud Damages Authorized. Notwithstanding *Code of Civil Procedure Section 726* or any other provision of law to the contrary, [a successor in interest to] a credit union, an affiliate of a credit union, or a credit union service organization, that originates, acquires, or purchases, in whole or in part, any loan secured directly or collaterally, in whole or in part, by a mortgage or trust deed on real property, or any interest therein, may bring an action to recover damages, including actual damages and exemplary damages not to exceed 50 percent of the actual damages, against a borrower if the action is based on fraud under *Civil Code Section 1572* and the fraudulent conduct of the borrower

induced the original lender to make the loan, provided the loan is not secured by single-family, owner-occupied residential real property, when the property is actually occupied by the borrower as represented to the lender in order to obtain the loan and the loan is for $150,000 or less, as adjusted annually, commencing on January 1, 1987, to the Consumer Price Index as published by the U.S. Department of Labor (*Fin. Code § 15102(a), (b)*).

[*Optional*] **B. Antideficiency Provisions Do Not Prohibit Recovery.** Any action maintained under *Financial Code Section 15102* for damages shall not constitute a money judgment for a deficiency, or a deficiency judgment, within the meaning of *Code of Civil Procedure Sections 580a, 580b*, and *580d* (*Fin. Code § 15102(c)*).

[*CONTINUE*]

[*Optional*] **C. Fraud Defined.** Actual fraud consists of _____ [the suggestion, as a fact, of that which is not true, by one who does not believe it to be true *or* the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, even though the person believes it to be true *or* the suppression of that which is true, by one having knowledge or belief of the fact *or* a promise made without any intention of performing it *or* any act fitted to deceive, such as _____ (*describe defendant's act in present case*)], committed by a party to the contract, or with a party's connivance, with the intent to deceive another party to the contract, or to induce that other party to enter into the contract (*Civ. Code § 1572*).

[*Optional*] **D. Fraud Inducing Purchase of Beneficial Interest.** The holder of the beneficial interest under a [second] trust deed, who was induced by fraudulent misrepresentations, concerning the value of the trust deed and the note that it secures, to purchase the note and beneficial interest is not prohibited by the antideficiency statutes from recovering damages for fraud (*Lassar & Gross International Inc. v. Dunham (1987) 196 Cal. App. 3d 496, 501-502, 241 Cal. Rptr. 854*).

[*Optional*] **E. Fraud Inducing Subordination.** The beneficiary of a trust deed who was induced by fraud to subordinate that trust deed to another trust deed on the same property is not prohibited by the antideficiency statutes from recovering damages for fraud (*Joanaco Projects, Inc. v. Nixon & Tierney Constr. Co. (1967) 248 Cal. App. 2d 821, 831-832, 57 Cal. Rptr. 48*).

[2] Comments

[a] Use of Form

This form may be submitted in support of thecontention that the recovery of damages for fraud in the inducement to make or purchase a loan secured by a trust deed or mortgage is not barred by the antideficiency statutes or the one-form-of-action rule [*see Code Civ. Proc. §§ 580a, 580b, 580d, 726*]. When the lender or investor seeks recovery of a judgment on the underlying debt in situations involving fraud or foreclosure of a senior lien, this form may be combined with the *authorities in § 230.51[1]*.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue. For example, in an action by the beneficiary to recover damages for fraud, the contention may be raised in opposition to the defendant's motion for summary judgment. This form also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should set forth the substance of the misrepresentations.

[c] Related Memoranda

For points and authorities relating to a full-credit bid as not barring an action for fraud or negligence against nonborrower third parties, see *§ 230.103*.

[3] Discussion of Authorities

[a] Fraud Damages Authorized

Alliance Mortgage Co. v. Rothwell *(1995) 10 Cal. 4th 1226, 44 Cal. Rptr. 2d 352, 900 P.2d 601* , is discussed in *§ 230.103[3][a]*.

In ***Guild Mortgage Co. v. Heller*** *(1987) 193 Cal. App. 3d 1505, 239 Cal. Rptr. 59* , the plaintiff made a $108,300 purchase-money loan to the defendants after they represented that they were making a $21,200 cash down payment and that they would retain the property for investment purposes. No down payment was made, and the defendants sold the property to the tenants. The plaintiff sold the loan to the Federal Home Loan Mortgage Corporation. Neither the borrowers nor their grantees made payments on the loan, so the FHLMC foreclosed, acquired title to the property, and required the plaintiff to repurchase it. The plaintiff sustained a $50,000 loss on resale and sued the original sellers, the purchaser-borrowers, the ultimate purchasers, the escrow company, and the brokers for breach of contract, fraud, and conspiracy. The demurrer of the purchasers-borrowers was sustained without leave to amend, and judgment was entered for the defendants. The plaintiff appealed.

The court of appeal reversed. The defendants argued that *Code Civ. Proc. §§ 580a, 580d,* and *726* prohibited recovery in that the plaintiff was limited to what was realized on the foreclosure. The court first distinguished *First Fed. Sav. & Loan Ass'n v. Lehman (1984) 159 Cal. App. 3d 537* , on the basis that in that case, no causal connection was shown between the misrepresentations and the lender's loss (*193 Cal. App. 3d 1505, 1510)* . The antideficiency statutes have long been held not to preclude suit for fraud because neither the intent nor the purpose of those statutes is frustrated by allowing a creditor to recover damages for fraud in the inducement of a loan (*193 Cal. App. 3d 1505, 1511-1512)* . The court noted the enactment of Financial Code sections [*see Fin. Code §§ 551, 7460, 15102*] that allow banks, saving and loan associations, and credit unions to maintain actions for damages for fraud. Those sections, to avoid ambiguity, expressly excepted actions under them from application of *Code Civ. Proc. §§ 580a, 580b, 580c,* and *726*. The legislative history of those Financial Code sections also makes clear that the Legislature disapproved the judicial use of the antideficiency statutes to insulate mortgagors from liability for fraudulently induced loan transactions. A separate action for fraud in no way frustrates the purpose of the antideficiency statutes (*193 Cal. App. 3d 1505, 1513)* . Therefore, the action for fraud could be maintained even though the misrepresentations did not go directly to the value of the property securing the loan (*193 Cal. App. 3d 1505, 1514)* . Even if a fraud action could not be maintained against the defendant-borrowers, a conspiracy cause of action could still be maintained (*193 Cal. App. 3d 1505, 1514-1515)* .

[b] Antideficiency Provisions Do Not Prohibit Recovery

Guild Mortgage Co. v. Heller *(1987) 193 Cal. App. 3d 1505, 239 Cal. Rptr. 59* , is discussed in [a], *above*.

[c] Fraud Inducing Purchase of Beneficial Interest

In ***Lassar & Gross International Inc. v. Dunham*** *(1987) 196 Cal. App. 3d 496, 241 Cal. Rptr. 854* , the plaintiff purchased a note and the beneficial interest under a second trust deed from the defendant, the original beneficiary of the second trust deed. Other defendants included the purchasers-borrowers on the note and the broker. All the defendants conspired to and did induce an institutional lender to make a loan secured by a first trust deed on the property, by misrepresenting the purchase price and that the purchasers had made a cash down payment. The second note was for $33,500 and was sold to the plaintiff for $20,000 after the defendant misrepresented to the plaintiff that the purchasers

were occupying the property and had $33,550 equity in it. After the plaintiff's interest was rendered worthless by foreclosure of the first trust deed, the plaintiff brought this action for damages for fraud and misrepresentation. The trial court gave judgment for the defendants after their motions for summary judgment were granted on the basis of *Code Civ. Proc. §§ 580b, 580d,* and *726*.

The court of appeal reversed. The court of appeal distinguished *First Fed. Sav. & Loan Ass'n v. Lehman (1984) 159 Cal. App. 3d 537* , which denied recovery to the beneficiary of a purchase-money first trust deed, on the ground that the firstlender, an institution, had been better able to protect itself, compared with the individual purchaser of a second trust deed. The institutional lender made an independent appraisal of the property. Regardless of whether the other parties to the transaction lied about the down payment, the lender's appraisal could have protected it. In addition, the no-down arrangement in *Lehman* appeared to be a single transaction, whereas in this case, the transaction was alleged to be one of many spawned by the original conspiracy between the seller-developer and the broker (*196 Cal. App. 3d 496, 499-501)* . The misrepresentations pertained to the value of the second trust deed note. If the court allowed the antideficiency statutes to become a shield for this type of fraudulent scheme, similar conspiracies would mushroom (*196 Cal. App. 3d 496, 501)* . The antideficiency statutes are in no way frustrated by permitting a lender to pursue a separate action against a borrower for fraud (*196 Cal. App. 3d 496, 502)* . The court stated that *Lehman* was no longer controlling in view of the enactment of Financial Code sections [*see Fin. Code §§ 551, 7460, 15102*] that allow banks, saving and loan associations, and credit unions to maintain actions for damages for fraud, including punitive damages, against a borrower who fraudulently induced the loan (*196 Cal. App. 3d 496, 501-502)* .

[d] Fraud Inducing Subordination

Joanaco Projects, Inc. v. Nixon & Tierney Constr. Co. *(1967) 248 Cal. App. 2d 821, 57 Cal. Rptr. 48* , was an action for damages for fraud and unjust enrichment against a corporate trustor and individual principals. The plaintiff sold two lots to the corporation for $18,750 each, taking back a note and trust deed on each for $12,500. The plaintiff agreed to subordinate each to a construction loan of not more than $35,000 on each lot, and did so. The homes constructed on the lots were inferior to others in the neighborhood. Combined construction costs amounted to only $35,200. The defendants retained the balance of $34,800 for themselves. No payments were made on any of the trust deeds, and the holder of the first trust deeds foreclosed. Judgment was for the defendants, and the plaintiff appealed.

The court of appeal reversed. Without discussing *Code Civ. Proc. § 580b* (except to say that it prevented a deficiency judgment on the notes), the court of appeal allowed recovery for fraud based on an interpretation of the promise in the subordinated trust deeds that required all of the proceeds of the construction loans to be used for improvements on the property and the fact that the defendants never intended to devote all or substantially all of the construction loan proceeds to the improvements (*248 Cal. App. 2d 821, 831-832)* .

[4] Additional Authorities

[a] Antideficiency Provisions Do Not Prohibit Recovery

In *Webber v. Inland Empire Investments (1999) 74 Cal. App. 4th 884, 902, 88 Cal. Rptr. 2d 594* , the plaintiff held a junior deed of trust and note on certain property. The mortgage company that held title to property had the funds to pay off the note secured by the junior deed of trust, but the owner of the mortgage company instead decided to (1) transfer title to another corporation he controlled, (2) use a third corporation he controlled (Inland) to purchase the senior note from the bank, (3) have the mortgage company default on the note, and (4) then have Inland foreclose on the property, eliminating the junior security on the parcel. The court held that the antideficiency provisions set forth in *Code Civ. Proc. § 580b* did not preclude plaintiff's action for conspiracy to intentionally interfere with contract. The court characterized these transactions as a "sham foreclosure" (*74 Cal. App. 4th 884, 902-903)* .

California Points & Authorities

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Volume 23 Chapters 230-239 TRUST DEEDS---to---WORKERS' COMPENSATION
CHAPTER 230 TRUST DEEDS AND REAL PROPERTY MORTGAGES
PART II. FORMS
D. One-Form-of-Action Rule

23-230 California Points & Authorities § 230.102

§ 230.102 Sanction for Violating Code Civ. Proc. § 726 Does Not Require Forfeiture of Right to Enforce Underlying Debt

[1] FORM

[*The following may be included in a memorandum, or in a trial or appellate brief.*]

ALTHOUGH THE BENEFICIARY _____ [SUED BEFORE FORECLOSURE *or* APPLIED OTHER ASSETS OF THE TRUSTOR TO REDUCE THE DEBT], HE/SHE/IT IS STILL ENTITLED TO PURSUE AN ACTION ON THE UNDERLYING OBLIGATION.

A. One-Form-of-Action Rule. There can be but one form of action for the recovery of any debt or the enforcement of any right secured by a mortgage on real property or an estate for years therein, which action must be in accordance with the provisions of *Code of Civil Procedure Section 725a et seq.* In the action the court may, by its judgment, direct the sale of the encumbered property or estate for years therein (or so much of it as may be necessary) and application of the proceeds of the sale to the payment of the costs of the court, the expenses of levy and sale, and the amount due the plaintiff, including, when the mortgage provides for the payment of attorney's fees, such sum as the court shall find reasonable, not exceeding the amount named in the mortgage (*Code Civ. Proc. § 726(a)*).

B. Action Is Permitted on Underlying Obligation. A beneficiary who violates *Code of Civil Procedure Section 726* [by proceeding against other assets of the trustor without first foreclosing under the trust deed] waives the security interest but is allowed to seek a judgment for the full balance of the underlying obligation. Allowing the beneficiary to sue on the underlying obligation does not violate the fundamental purposes of the statute (*Security Pacific National Bank v. Wozab (1990) 51 Cal. 3d 991, 1004-1006, 275 Cal. Rptr. 201, 800 P.2d 557*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that a beneficiary who has violated

Code Civ. Proc. § 726 is still entitled to pursue an action on the underlying debt.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue.

[b] Related Points and Authorities

For points and authorities relating to waiver of security and loss of priority suffered by a beneficiary who violates *Code Civ. Proc. § 726*, see *§ 230.110[1]*.

[3] Discussion of Authorities

[a] Action Is Permitted on Underlying Obligation

Security Pacific National Bank v. Wozab *(1990) 51 Cal. 3d 991, 275 Cal. Rptr. 201, 800 P.2d 557* , a four-to-three decision, was an action by the bank to enforce the defendants' personal guaranties of an unsecured corporate obligation. No aspects of that obligation were involved in the litigation. The personal guaranties were originally secured by a trust deed on the defendants' residence. The bank set off $2,804.82 in the defendants' demand deposit and savings accounts and $110,635.19 in the corporation's demand deposit accounts, leaving a balance due of $976,575.95. Thereafter, the corporation declared bankruptcy, and the defendants contended that the setoff against their personal accounts constituted waiver by the bank of its security interest in their home. The bank apparently agreed, because it reconveyed the trust deed, and commenced the action for personal judgment on the guaranties. Both parties filed cross-motions for summary judgment. The defendants, relying on *Bank of America v. Daily (1984) 152 Cal. App. 3d 767, 199 Cal. Rptr. 557* (discussed in *§ 230.110[3][b]*), contended that the setoff constituted not only waiver of the security interest but also waiver of the right to enforce the underlying obligation. The trial court granted judgment for the defendants. The court of appeal affirmed.

The Supreme Court reversed, distinguishing and disapproving in part the opinion in *Bank of America v. Daily (1984) 152 Cal. App. 3d 767, 199 Cal. Rptr. 557* (*51 Cal. 3d 991, 999-1000 n.7, 1003-1004, 1006)* . The Court noted that *Code Civ. Proc. § 726* may be interposed by the debtor as an affirmative defense or may operate as a sanction. If the debtor successfully raises *Code Civ. Proc. § 726* as an affirmative defense, the creditor will be forced to exhaust the security before obtaining a personal judgment for any deficiency. If the debtor does not raise *Code Civ. Proc. § 726* as an affirmative defense, the debtor may still invoke it as a sanction against the creditor on the ground that the creditor, by not foreclosing on the security in the action brought to enforce the debt, made an election of remedies and waived the security (*51 Cal. 3d 991, 997)* . Thus, the Court described *Code Civ. Proc. § 726* as establishing two rules: the one-form-of-action rule and the security-first rule. The Court then considered the definition of "action" in *Code Civ. Proc. § 22* and concluded that exercise of a setoff right is not an action within the scope of *Code Civ. Proc. § 726*. The defendants were right, the Court said, but for the wrong reason. The setoff was a violation of *Code Civ. Proc. § 726* but was not an "action" (*51 Cal. 3d 991, 998)* . Previous decisions invalidated bank setoffs, not because they were "actions" but because the security had not first been exhausted (*51 Cal. 3d 991, 999)* . The Court discussed *Mckean v. German-Am. Savings Bank (1897) 118 Cal. 334, 50 P. 656* and its progeny, which have construed bank setoffs as subject to *Code Civ. Proc. § 726*, but none of them involved an action to enforce the underlying obligation. The long-standing rule under *Code Civ. Proc. § 726* is that a bank may not take a unilateral setoff of funds in a depositor's demand account against a debt secured by the depositor's interest in real property (*51 Cal. 3d 991, 999-1000 n.7, 1000)* . (On this point the Court disapproved *Bank of America v. Daily (1984) 152 Cal. App. 3d 767, 199 Cal. Rptr. 557* , discussed in *§ 230.110[3][b],* to the extent that it construed a setoff to be an action.)

The most important question was the effect of an improper setoff on the underlying debt and security interest. The Court noted that its opinion was limited to the facts of the case. The defendants never asked to have their accounts credited; and the plaintiff, by reconveying the trust deed, implicitly agreed that its unilateral offset constituted waiver of its

security. The Court stressed that it did not decide whether a bank that perhaps inadvertently set off funds and voluntarily recredited the account could proceed with foreclosure. Furthermore, the bank's voluntary reconveyance effectively disposed of the question of whether a setoff in violation of *Code Civ. Proc. § 726* constitutes a waiver of the security interest (*51 Cal. 3d 991, 1001)* . Nevertheless, the bank contended that reimbursement of the funds, with interest and compensatory damages, should be sufficient sanction for the setoff. The Court said that such a solution would undermine the purpose of the one-form-of-action rule of *Code Civ. Proc. § 726*, which is to protect the debtor against having to defend multiple actions. In addition, the fact that the setoff was likely to be for an insignificant amount compared to the amount of the underlying debt, and the fact that the debtor would likely be without any liquid assets after the funds were taken, made it highly unlikely that the debtor would be able to obtain counsel to attack the setoff (*51 Cal. 3d 991, 1002)* .

The Court noted that no case had ever held that a bank's improper setoff requires a forfeiture of the underlying debt (*51 Cal. 3d 991, 1002)* . *Mckean v. German-Am. Savings Bank (1897) 118 Cal. 334, 50 P. 656* , was an action by the debtor's assignee to recover the amount set off (*51 Cal. 3d 991, 1002-1003)* . Similarly, *Woodruff v. California Republic Bank (1977) 75 Cal. App. 3d 108, 141Cal. Rptr. 915* , and *Gnarini v. Swiss American Bank (1912) 162 Cal. 181, 121 P. 726* , held that the setoffs were ineffective but did not hold or even suggest that the debts were unenforceable. Although there was dictum in *Bank of America v. Daily (1984) 152 Cal. App. 3d 767, 199 Cal. Rptr. 557* , that the balance of the debt is waived by the creditor's failure to exhaust its security, *Daily* was an action for foreclosure of the bank's security interest (*51 Cal. 3d 991, 1003)* . Accordingly, the question was one of first impression (*51 Cal. 3d 991, 1004)* .

The Court, citing *Salter v. Ulrich (1943) 22 Cal. 2d 263, 268, 138 P.2d 7* (discussed in *§ 230.52[1]*), found that when a secured creditor sues only on the underlying debt without seeking to foreclose on the security, the creditor is precluded by *Code Civ. Proc. § 726* from proceeding against the security in a subsequent action. The creditor is deemed to have waived the security. However, the judgment on the debt is unaffected by the creditor's failure to comply with the chronology required by *Code Civ. Proc. § 726*. The Court noted, citing *Walker v. Community Bank (1974) 10 Cal. 3d 729, 111 Cal. Rptr. 897, 518 P.2d 329* (discussed in *§ 230.111[3][a]*), that if the creditor has multiple security interests for a debt and proceeds against fewer than all of them in a judicial foreclosure action and obtains a deficiency judgment, the creditor cannot thereafter foreclose on the excluded security. In this case, the bank's setoff was not a judicial action, and the bank therefore did not obtain a judgment for the full amount of the debt (as in *Salter*) or for any deficiency after sale of the collateral (as in *Walker*). In both *Salter* and *Walker*, the creditors failed to comply with *Code Civ. Proc. § 726*, but in each case, the creditor obtained a judgment for the full amount of the debt. The only sanction was that the creditors lost their preferred position as secured creditors, a drastic sanction in the marketplace. By parity of reasoning, the Court said, the bank in this case also must be allowed to seek a judgment for the full balance of the debt (*51 Cal. 3d 991, 1004)* . The particular facts of the case also demonstrate that allowing the bank to recover on the debt is consistent with the purpose and operation of *Code Civ. Proc. § 726*. The operation of that statute is largely within the control of the debtor (*51 Cal. 3d 991, 1004)* . If the debtor interposes the statute as an affirmative defense, the debtor can require the creditor to exhaust the security before obtaining a personal judgment. If the debtor does not raise the statute as a defense, the creditor's action on the debt is allowed to go to judgment, but the creditor is precluded thereafter from foreclosing on the security. When in the present case the bank set off the defendants' accounts, the defendants were in the same functional position as a debtor defending a judicial action on the debt. They could have demanded that the bank proceed against the security before resorting to the defendants' personal assets. Instead, they notified the bank that in their view, the setoff had waived the security interest. The defendants then accepted reconveyance, and by doing so, they voluntarily relinquished the protection of the security-first rule. To allow the defendants now to claim that they were deprived of the benefits of the rule would be to encourage gamesmanship. Demanding reconveyance of the security and then demanding that the creditor resort to the security would be inconsistent (*51 Cal. 3d 991, 1005)* .

Allowing the bank to sue on the debt did not violate the two fundamental purposes of *Code Civ. Proc. § 726*, which are to prevent multiple suits against the debtor and to require exhaustion of the security before a creditor resorts to the debtor's unencumbered assets. The present action was the only suit against the defendants, and they freely chose not to

have the bank foreclose on the security interest (*51 Cal. 3d 991, 1005)* .

Finally, the result advocated by the defendants would have allowed them to evade their debt almost entirely and would have been a gross injustice to the bank and a corresponding windfall to the defendants (*51 Cal. 3d 991, 1005)* . The result advocated by the defendants would have constituted a penalty against the bank 300 times greater than the amount of the setoff (*51 Cal. 3d 991, 1006)* .

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Volume 23 Chapters 230-239 TRUST DEEDS---to---WORKERS' COMPENSATION
CHAPTER 230 TRUST DEEDS AND REAL PROPERTY MORTGAGES
PART II. FORMS
D. One-Form-of-Action Rule

23-230 California Points & Authorities § 230.103

§ 230.103 Full-Credit Bid Does Not Bar Action for Fraud or Negligence Against Nonborrower Third Parties

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

BECAUSE _____ [BENEFICIARY *or* PLAINTIFF] MADE A FULL CREDIT BID FOR MORE THAN THE VALUE OF THE PROPERTY IN RELIANCE ON DEFENDANT[S]' [FRAUDULENT *or* NEGLIGENT] MISREPRESENTATIONS AS TO THE PROPERTY'S VALUE, _____ [BENEFICIARY *or* PLAINTIFF] IS ENTITLED TO RECOVER ACTUAL [AND EXEMPLARY] DAMAGES.

[*EITHER*]

A. Full-Credit Bid Does Not Bar Fraud Action Against Nonborrower Third Parties. A lender's acquisition of the collateral by a full-credit bid at a nonjudicial foreclosure sale does not bar the lender from maintaining a fraud action to recover damages from nonborrower third parties who fraudulently induced the lender to make the loan (*Alliance Mortgage Co. v. Rothwell (1995) 10 Cal. 4th 1226, 1246-1248, 44 Cal. Rptr. 2d 352, 900 P.2d 601* ; *First Commercial Mortgage Co. v. Reece (2001) 89 Cal. App. 4th 731, 742-744, 108 Cal. Rptr. 2d 23*).

[*Optional*] **B. Fraud Defined.** Actual fraud consists of _____ [the suggestion, as a fact, of that which is not true, by one who does not believe it to be true or the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, even though the person believes it to be true or the suppression of that which is true, by one having knowledge or belief of the fact or a promise made without any intention of performing it or anyact fitted to deceive, such as _____ (*describe defendant's act in present case*)], committed by a party to the contract, or with a party's connivance, with the intent to deceive another party to the contract, or to induce that other party to enter into the contract (*Civ. Code § 1572*).

[*OR, if reliance is based on negligence*]

A. Full-Credit Bid Does Not Bar Negligence or Negligent Misrepresentation Claim Against Nonborrower Third Parties. A lender's acquisition of the collateral by a full-credit bid at a nonjudicial foreclosure sale does not bar the lender from maintaining an action for negligence or negligent misrepresentation to recover damages from nonborrower third parties whose negligence induced the lender to make the loan (*Kolodge v. Boyd (2001) 88 Cal. App. 4th 349, 371-372, 105 Cal. Rptr. 2d 749* ; *First Commercial Mortgage Co. v. Reece (2001) 89 Cal. App. 4th 731, 742-744, 108 Cal. Rptr. 2d 23*).

[*Optional*] **B. Negligent Misrepresentation Defined.** Negligent misrepresentation consists of the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he or she believes it to be true, such as _____ [*describe defendant's act in present case*] (*Civ. Code §§ 1572(2), 1710(2)*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that a lender who made a full credit bid for more than the actual value of the property is not barred from recovering damages for fraud or negligent misrepresentation from a nonborrower third party on whose valuation of the property the lender relied in making the bid.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue. For example, in an action by the beneficiary to recover damages for fraud, the contention may be raised in opposition to the defendant's motion for summary judgment. This form also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should set forth the substance of the misrepresentations.

[c] Related Points and Authorities

For points and authorities relating to a foreclosure, antideficiency statute, or the one-form-of-action rule as not barring a lender's recovery for fraud, see *§ 230.101*.

[3] Discussion of Authorities

[a] Full-Credit Bid Does Not Bar Fraud Action Against Nonborrower Third Parties

In ***Alliance Mortgage Co. v. Rothwell*** *(1995) 10 Cal. 4th 1226, 44 Cal. Rptr. 2d 352, 900 P.2d 601* , the plaintiff was induced to make loans on nine properties by the defendants' fraudulent misrepresentations including fictitious borrowers and false and misleading descriptions of the properties. After defaults, the plaintiff purchased many of the properties at foreclosure sales with full-credit bids then sued on claims of intentional and negligent misrepresentation, breach of contract, and breach of fiduciary duty. The trial court granted the defendant title company and title insurer judgment on the pleadings on the ground that the full-credit bids barred claims for damages resulting from fraudulent representations as to the security's adequacy. The court of appeal reversed, and the defendants appealed.

The Supreme Court affirmed, holding that the lender's acquisition of security property by full-credit bid at a nonjudicial foreclosure sale did not bar the lender from maintaining a fraud action to recover damages from third parties who

fraudulently induced the lender to make the loans (*10 Cal. 4th 1226, 1246-1248)* . The Court rejected the defendants' argument that the full-credit bids meant that the plaintiff could not show justifiable reliance. A lender generally bears the burden and risk of making an informed bid, but being materially misled by fiduciaries or agents as to the value of the property before even making the loan is not within the realm of that risk (*10 Cal. 4th 1226, 1246)* . To establish reliance, the plaintiff only had to demonstrate that making full-credit bids was a proximate result of the defendants' fraud, and that in the absence of fraud the plaintiff would not, in all reasonable probability, have made the bids (*10 Cal. 4th 1226, 1246-1247)* .

Generally, a full-credit bid establishes the value of the security as being equal to the outstanding debt and does not impair security (*10 Cal. 4th 1226, 1242)* . However, to the extent that the plaintiff's full-credit bids were proximately caused by the defendants' fraudulent misrepresentations, and insofar as the plaintiff's reliance without independent or additional inquiry was either appropriate given the context of the relationship or not otherwise manifestly unreasonable, the plaintiff's bids could not be deemed an admission of the properties' value. Thus, the full-credit-bid rule would not apply (*10 Cal. 4th 1226, 1247)* . Alternatively, if the plaintiff's full-credit bids were not proximately caused by the defendants' fraudulent misrepresentations, or reliance was either inappropriate given the context of the relationship or otherwise manifestly unreasonable, the full-credit-bid rule would apply, and the plaintiff's bid would constitute an irrevocable offer to purchase the property for that amount, under *Civ. Code § 2924h(a)* (*10 Cal. 4th 1226, 1247)* . In these circumstances, the plaintiff would not be entitled to recover the difference between the bid and the actual value of the property but would stillbe able to recover any other damages flowing from the defendants' fraud (*10 Cal. 4th 1226, 1247-1248)* .

The defendants also argued that the plaintiff failed to allege actual damages because the measure of damages for fraudulent inducement of a loan is the impairment of the lender's security or the balance of the outstanding debt. The Court disagreed. The plaintiff did not allege that the defendants impaired security or caused the value of the properties to decrease after the loans were made, but rather alleged that the defendants' intentional misrepresentations regarding the properties' characteristics and values induced the plaintiff to make loans that far exceeded the properties' actual worth at the time the loans were made, and as a result of these misrepresentations the plaintiff purchased the properties. In other words, the defendants did not damage or impair the plaintiff's security interest but rather deceived the plaintiff at the outset as to what that security was. The Court distinguished *Cornelison v. Kornbluth (1975) 15 Cal. 3d 590, 606-607, 125 Cal. Rptr. 557, 542 P.2d 981* (discussed in *§ 230.130[3][b]*), which held that a full-credit bid extinguishes a claim for waste, on the ground a lender's suit against fiduciaries or agents for fraudulent inducement to make loans and purchase property is a completely separate cause of action from a suit for impairment of security (*10 Cal. 4th 1226, 1249)* .

In ***First Commercial Mortgage Co. v. Reece*** *(2001) 89 Cal. App. 4th 731, 108 Cal. Rptr. 2d 23* , the plaintiff made a $207,593 purchase money loan secured by a deed of trust on real property. The plaintiff alleged it was induced to make the loan, in part, by an appraisal report that grossly inflated the property's value. The plaintiff sold the loan to Nationwide. After the borrowers defaulted, Nationwide foreclosed and acquired title to the property by making a full credit bid. Pursuant to contract, the plaintiff repurchased the loan so as to reimburse Nationwide for its loan loss. Nationwide reconveyed the property to the plaintiff, who subsequently sold the property and recovered $79,252. In holding that the plaintiff's causes of action for fraud, negligent misrepresentation, and breach of contract against the appraiser and the loan broker were not barred, the court of appeal noted that the plaintiff did not allege that it was fraudulently induced to make a full credit bid--the full credit bid was made by Nationwide. Rather, the plaintiff alleged it was fraudulently induced to make the loan by way of a misleading appraisal, and was damaged when it reacquired the property as a consequence of its alleged contractual obligation to indemnify Nationwide. The court stated that, under *Alliance*, the plaintiff's damages resulting from the compelled repurchase were incurred as a direct consequence of the fraud, and neither the repurchase nor the full credit bid by Nationwide precluded it from pursuing a fraud claim against the defendants (*89 Cal. App. 4th 731, 742-744)* .

[b] Full-Credit Bid Does Not Bar Action for Negligent Misrepresentation Against Nonborrower Third

Parties

In ***Kolodge v. Boyd*** *(2001) 88 Cal. App. 4th 349, 105 Cal. Rptr. 2d 749* , the plaintiff made a series of three loans in the total amount of $660,000, secured by two parcels of real property. Defendant appraised the value of the two properties at $1.8 million. When the borrower filed for bankruptcy, plaintiff's counsel obtained a new appraisal of the properties which stated that the combined value of both properties was $985,000. Plaintiff foreclosed on the third loan of $180,000. The "Trustee's Deed Upon Sale" stated that the $180,000 was "in full satisfaction of the indebtedness then secured by said Deed of Trust." Plaintiff then brought this action against defendant, alleging causes of action for negligence and negligent misrepresentation. The trial court granted defendant's motion for summary judgment, ruling that plaintiff's full credit bid barred his claims under *Alliance Mortgage Co. v. Rothwell (1995) 10 Cal. 4th 1226, 44 Cal. Rptr. 2d 352, 900 P.2d 601* . The trial court also held that plaintiff's action was barred because he did not reasonably rely on defendant's allegedly negligent misrepresentations at the time plaintiff entered his bid.

Plaintiff appealed, and the court of appeal reversed and remanded the action. The court first held that there was a triable issue as to whether plaintiff had in fact made a full credit bid in foreclosing on only one of the loans. In so holding, the trial court had relied on the recitals in the "Trustee's Deed Upon Sale." The court ruled that nothing bars a party from rebutting a recital in a trustee's deed pertaining to the amount of unpaid debt at the time of the trustee's sale by evidence showing that the amount was different from that stated in the deed (*88 Cal. App. 4th 349, 359)* .

The court further held that if on remand, the trial court determined that plaintiff had made a full credit bid, the full credit bid rule as construed by the Supreme Court in *Alliance Mortgage Co. v. Rothwell*, discussed in [a], *above*, did not as a matter of law bar plaintiff's causes of action for negligence and negligent misrepresentation (*88 Cal. App. 4th 349, 371-372)* . The court stated that although *Alliance* decided only that full credit bids do not as a matter of law bar claims for fraudulent misrepresentations as to the adequacy of the security, the rationale of *Alliance* as well as the authorities on which it relied strongly suggested that such bids also do not as a matter of law bar any other tort claims against third parties who are not borrowers or the successor in interest to a borrower (*88 Cal. App. 4th 349, 364)* . The court stated that the full credit bid rule is not concerned about the relationship between the lender and third parties but only the relationship between the lender and the borrower or a successor whose interests are also subject to the lien of a mortgage, citing *Alliance Mortgage Co. v. Rothwell (1995) 10 Cal. 4th 1226, 1238, 44 Cal. Rptr. 2d 352, 900 P.2d 601* ("it is clear that the Legislature intended that a properly conducted [nonjudicial] foreclosure sale should constitutea final adjudication of the rights of the borrower and the lender"). The court concluded that this language indicates that the bar of the full credit bid rule does not apply in actions that are not on the note, for damages not caused by breach of the loan agreement, from persons who are not borrowers or otherwise party to that agreement or the successor in interest of such a person (*88 Cal. App. 4th 349, 365-366)* . In so holding, the court refused to follow *Pacific Inland Bank v. Ainsworth (1995) 41 Cal. App. 4th 277, 283, 48 Cal. Rptr. 2d 489* , which concluded that *Alliance* applied only to fraud claims (*88 Cal. App. 4th 349, 369-370)* .

The court further held that even if it agreed that *Alliance* applied only to "fraud" claims, the type of negligent misrepresentation pled in this case was a type of "fraud" within the meaning of *Alliance* (*88 Cal. App. 4th 349, 372)* .

Finally, the court found that defendant had not conclusively negated the possibility that plaintiff would be able to establish the reasonableness of his reliance on defendant's appraisal. Accordingly, the court held there was a triable issue as to this matter (*88 Cal. App. 4th 349, 377)* .

The facts of ***First Commercial Mortgage Co. v. Reece*** *(2001) 89 Cal. App. 4th 731, 108 Cal. Rptr. 2d 23* are discussed in [a], *above*. In holding that a repurchasing lender could state a cause of action for negligent misrepresentation against an appraiser and loan broker, the court in *First Commercial* distinguished *Pacific Inland Bank*, *above*, on the ground that unlike in *Pacific Inland*, the plaintiff in *First Commercial* was not the lender that made the full credit bid but rather was a lender that sustained damages from a compelled repurchase of the loan. Under those circumstances, the rationale for applying the full credit bid rule was absent (*89 Cal. App. 4th 731, 744)* . Furthermore, because the plaintiff's

damages were incurred as a result of the compelled repurchase, there was no issue as to whether the plaintiff justifiably relied on the defendants' representations in making a full credit bid, or whether the full credit bid operated as an admission of the property's value by the plaintiff (*89 Cal. App. 4th 731, 744)* .

In addition, the court stated that *Pacific Inland Bank* was inapposite because the tort of negligent misrepresentation is a form of deceit, without the element of scienter. Thus, the court stated that if a repurchasing lender can show justifiable reliance for purposes of intentional fraud by demonstrating it relied on false representations in extending the loan and then selling it to another lender, by a parity of reasoning the same showing would be sufficient to establish justifiable reliance for purposes of a negligent misrepresentation claim. Similarly, the court stated that irrespective of whether the cause of action was intentional or negligent misrepresentation, the plaintiff in *First Commercial* could show it sustained damages as a consequence of the compelled repurchase, notwithstanding Nationwide's full credit bid. Therefore, the court held that Nationwide's full credit bid did not bar the plaintiff's cause of action for negligent misrepresentation (*89 Cal. App. 4th 731, 744-745)* .

[4] Additional Authorities

[a] Full Credit Bid Does Not Bar Fraud Action Against Nonborrower Third Parties

In *Michelson v. Camp (1999) 72 Cal. App. 4th 955, 85 Cal. Rptr. 2d 539* , the court held that the lenders could not recover for the alleged fraud of an appraiser who they claimed had misrepresented the value of the property at the time of the loan. Citing *Alliance Mortgage Co. v. Rothwell (1995) 10 Cal. 4th 1226, 1246-1247, 44 Cal. Rptr. 2d 352, 900 P.2d 601* , the court stated that to avoid the full credit bid rule, a lender must have been induced to enter into the loan by the false representation, and must have still been under the mistaken belief that the representation was true at the time it made the full credit bid. Fraud damages are not recoverable when the lender's reliance at the time of the full credit bid is manifestly unreasonable (*72 Cal. App. 4th 955, 969-970)* . The *Michelson* court held that the lenders' reliance on the old appraisal was manifestly unreasonable because a more recent one had been prepared and submitted in bankruptcy proceedings on the lenders' behalf (*72 Cal. App. 4th 955, 969-970)* .

California Points & Authorities

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Volume 23 Chapters 230-239 TRUST DEEDS---to---WORKERS' COMPENSATION
CHAPTER 230 TRUST DEEDS AND REAL PROPERTY MORTGAGES
PART II. FORMS
D. One-Form-of-Action Rule

23-230 California Points & Authorities §§ 230.104-230.109

[Reserved]

§§ 230.104[Reserved]

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CHAPTER 230 TRUST DEEDS AND REAL PROPERTY MORTGAGES
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23-230 California Points & Authorities § 230.110

§ 230.110 One-Form-of-Action Rule Bars Foreclosure [Code Civ. Proc. § 726(a)]--General Rule

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE BENEFICIARY IS NOT ENTITLED TO [JUDICIALLY] FORECLOSE UNDER THE TRUST DEED BECAUSE THE BENEFICIARY'S _____ [*specify, e.g.*, APPLICATION OF THE TRUSTOR'S DEPOSIT ACCOUNT TO PAY ARREARAGES] CONSTITUTED A VIOLATION OF CODE OF CIVIL PROCEDURE SECTION 726 [AND THUS WAS A WAIVER OF THE BENEFICIARY'S SECURITY AND RIGHT TO FORECLOSE].

A. One-Form-of-Action Rule. There can be but one form of action for the recovery of any debt or the enforcement of any right secured by a mortgage on real property or an estate for years therein, which action must be in accordance with the provisions of *Code of Civil Procedure Section 725a et seq.* In the action the court may, by its judgment, direct the sale of the encumbered property or estate for years therein (or so much of it as may be necessary) and application of the proceeds of the sale to the payment of the costs of the court, the expenses of levyand sale, and the amount due the plaintiff, including, when the mortgage provides for the payment of attorney's fees, such sum as the court shall find reasonable, not exceeding the amount named in the mortgage (*Code Civ. Proc. § 726(a)*).

B. Waiver of Security. The sanction for a violation of *Code of Civil Procedure Section 726* is that the creditor is held to have waived the security. The statute may be invoked as a sanction against the creditor [even if the beneficiary has not raised the statute as an affirmative defense], on the ground that the creditor, by not foreclosing on the security in the action to enforce the debt, made an election of remedies and waived the security (*Security Pacific National Bank v. Wozab (1990) 51 Cal. 3d 991, 997, 275 Cal. Rptr. 201, 800 P.2d 557* ; *Bank of America v. Daily (1984) 152 Cal. App. 3d 767, 772-773, 199 Cal. Rptr. 557 , disapproved on other grounds, Security Pacific National Bank v. Wozab (1990) 51 Cal. 3d 991, 999-1000 n.7, 275 Cal. Rptr. 201, 800 P.2d 557* ; *Scalese v. Wong (2000) 84 Cal. App. 4th 863, 869, 101 Cal. Rptr. 2d 40* ; *see C.J.A. Corp. v. Trans-Action Financial Corp. (2001) 86 Cal. App. 4th 664, 671-673, 103 Cal. Rptr. 2d 538*).

[*Optional*] **C. Setoff Against Deposit Account.** Under *Code of Civil Procedure Section 726*, a bank is not allowed to take a unilateral setoff of funds in a depositor's demand account against a debt secured by the depositor's interest in real property. Such a setoff constitutes a violation of the statute and a waiver of the security. Thereafter, the bank cannot foreclose (*Security Pacific National Bank v. Wozab (1990) 51 Cal. 3d 991, 1000, 275 Cal. Rptr. 201, 800 P.2d 557* ; *Bank of America v. Daily (1984) 152 Cal. App. 3d 767, 771, 199 Cal. Rptr. 557 , disapproved on other grounds, Security Pacific National Bank v. Wozab (1990) 51 Cal. 3d 991, 999-1000 n.7, 275 Cal. Rptr. 201, 800 P.2d 557*).

[*Optional*] **D. Equitable Setoff.** When the trustor and the beneficiary have cross demands, and the beneficiary obtains an order in a judicial proceeding compelling satisfaction of the claim against the beneficiary through setoff against the payments owed by the beneficiary on the note, that setoff constitutes a violation of *Code of Civil Procedure Section 726*. Thereafter, the beneficiary may not foreclose (*see* *Aplanalp v. Forte (1990) 225 Cal. App. 3d 609, 615, 275 Cal. Rptr. 144*).

[*Optional*] **E. Statute Overrides Permissive Cross Complaint Statutes.** *Code of Civil Procedure Section 428.10* is subject to and qualified by *Code of Civil Procedure Section 726*. Thus, one may file a cross complaint on an unsecured claim or a cross complaint to foreclose and use any resulting deficiency judgment as a setoff (*Aplanalp v. Forte (1990) 225 Cal. App. 3d 609, 616, 275 Cal. Rptr. 144*).

[*Optional*] **F. Loss of Priority in Action on Underlying Debt.** A creditor, by suing on the note to obtain a personal judgment in disregard of the security, makes an election of remedies that constitutes, under *Code of Civil Procedure Sections 580a* and *726*, a waiver of the lien and thus a waiver of the right to foreclose on the security or to proceed against the security in a subsequent action. A creditor in that position forfeits the priority of the lien and, in any action on the underlying debt, is relegated to the position of an ordinary judgment creditor (*Security Pacific National Bank v. Wozab (1990) 51 Cal. 3d 991, 1004, 275 Cal. Rptr. 201, 800 P.2d 557* ; *James v. P.C.S. Ginning Co. (1969) 276 Cal. App. 2d 19, 22-23, 80 Cal. Rptr. 457*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that a trust deed may not be foreclosed. The ground is that some act by the beneficiary constitutes a violation of *Code Civ. Proc. § 726* and thus amounts to waiver of the security.

This form may be combined with other forms of points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue. For example, in a beneficiary's action for judicial foreclosure, the contention may be raised in support of a trustor's motion for summary judgment. This form also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus, counsel should describe the act that constitutes the "one action."

[c] Beneficiary's Options Regarding Setoff

When a beneficiary that is a financial institution unilaterally exercises a right of setoff against an account of the trustor, to apply those funds to the obligation secured by the trust deed, the trustor may require repayment of the funds taken from the account [*Mckean v. German-Am. Savings Bank (1897) 118 Cal. 334, 339-341, 50 P. 656* ; *Woodruff v. California Republic Bank (1977) 75 Cal. App. 3d 108, 110-112, 141 Cal. Rptr. 915]* . It is apparently an open question

whether immediate return of the funds by the financial institution will allow the creditor to proceed against the security [*see* *Security Pacific National Bank v. Wozab (1990) 51 Cal. 3d 991, 1001, 275 Cal. Rptr. 201, 800 P.2d 557* (discussed in *§ 230.102[3][a*])].

[3] Discussion of Authorities

[a] Waiver of Security

Security Pacific National Bank v. Wozab *(1990) 51 Cal. 3d 991, 275 Cal. Rptr. 201, 800 P.2d 557* , is discussed in *§ 230.102[3][a]*.

The facts, procedural background, and disposition of ***Bank of America v. Daily*** *(1984) 152 Cal. App. 3d 767, 199 Cal. Rptr. 557* , *disapproved on other grounds*, *Security Pacific National Bank v. Wozab (1990) 51 Cal. 3d 991, 999-1000 n.7, 275 Cal. Rptr. 201, 800 P.2d 557* , are discussed in [b], *below*. In discussing the sanction for the bank's violation of *Code Civ. Proc. § 726*, the court noted that the fairest sanction would be to make the bank return the money from the checking account and to allow it to proceed with foreclosure. That would prevent the defendants from unfairly benefitting from the bank's action by being relieved of their obligation to pay the full amount of a debt for which they had personal liability (*152 Cal. App. 3d 767, 772)* . The fairest solution, however, would encourage future violations of *Code Civ. Proc. § 726*, thereby diluting the statutory protections afforded debtors (*152 Cal. App. 3d 767, 773)* . The classic sanction for violation of the one-form-of-action rule is that the creditor is held to have waived the security (*152 Cal. App. 3d 767, 772)* . In attempting to collect a projected deficiency before judicial foreclosure and before any hearing to establish the fair market value of the security, the bank reduced the likelihood that it would ever seek a later money judgment. This approach not only deprived the defendants of their funds pending an eventual judicial determination of deficiency, but it also reduced the bank's incentive to seek the highest possible price for the property at a foreclosure sale. Although that defect could be corrected if the bank later attempted to obtain a personal judgment, the bank's action placed the entire financial burden pending foreclosure on the defendants, contrary to the primary purpose of *Code Civ. Proc. § 726*. By its setoff, the bank waived its right to foreclose. It also became liable for attorney's fees and costs (*152 Cal. App. 3d 767, 773)* .

In ***Scalese v. Wong*** *(2000) 84 Cal. App. 4th 863, 101 Cal. Rptr. 2d 40* , the creditor, who held a note and deed of trust on the property, filed a complaint against the debtors that requested the alternate relief of specific performance and damages or judicial foreclosure. When forced by the trial court to make an election of remedies, the seller chose to pursue a personal judgment against the debtors. The trial court granted judgment for the seller.

On appeal, the court of appeal rejected the debtors' contention that the judgment had to be reversed because it constituted a deficiency judgment under *Code Civ. Proc. § 580b* and the seller's sole remedy at trial was foreclosure against the security. Citing *Walker v. Community Bank (1974) 10 Cal. 3d 729, 733-734, 111 Cal. Rptr. 897, 518 P.2d 329* (discussed in *§ 230.111[3][a]*) and *Security Pacific National Bank v. Wozab (1990) 51 Cal. 3d 991, 275 Cal. Rptr. 201, 800 P.2d 557* (discussed in *§ 230.102[3][a]*), the court stated that when the creditor sues the debtor seeking a money judgment before foreclosing on the property, the creditor has elected a personal action, and has thereby waived the security interest in the property (*84 Cal. App. 4th 863, 869)* . If the debtor raises the security interest as a defense, the creditor will be required to exhaust the security (i.e., go through with foreclosure proceedings) before proceeding against the debtor personally, assuming there is no bar to a deficiency (*84 Cal. App. 4th 863, 869)* . In *Scalese*, because the debtors did not assert *Code Civ. Proc. § 726* as a defense to the complaint and voiced no objection when the seller made the election at trial, they gave up their right to have the security exhausted before becoming potentially personally liable for any shortfall (*84 Cal. App. 4th 863, 869)* . Thus, because the seller elected to pursue a money judgment and because the debtors did not raise *Code Civ. Proc. § 726* as a defense, *Code Civ. Proc. § 580b* never came into play (*84 Cal. App. 4th 863, 870)* .

In ***C.J.A. Corp. v. Trans-Action Financial Corp.*** *(2001) 86 Cal. App. 4th 664, 103 Cal. Rptr. 2d 538* , Trans-Action

acquired property subject to a first deed of trust given to secure a loan on the property and held by Bank of America. Trans-Action obtained a loan secured by a second deed of trust. Trans-Action defaulted on the loan secured by the first deed of trust and Bank of America filed an action for judicial foreclosure against entities including Trans-Action and the holder of the second deed of trust (First Republic). First Republic cross-complained against Trans-Action and its general partners for breach of the note and second deed of trust and for judicial foreclosure. Bank of America subsequently dismissed its complaint. First Republic then assigned its loan to CJA, who brought the cross-complaint to trial and obtained a judgment of judicial foreclosure pursuant to *Code Civ. Proc. § 726*.

Thereafter Revere, to whom the Bank of America had assigned its loan, filed a second action for judicial foreclosure on the first deed of trust. After evidence was taken and the matter was under submission, Revere's attorney asked the trial court not to issue a decision. The action was dismissed. Revere's attorney then substituted in as attorney of record for junior lienholder CJA and, acting as trustee under the first deed of trust, noticed a trustee's sale of the property. Revere purchased the property at the trustee's sale. The attorney then filed a motion on behalf of CJA to convert CJA's judgment of judicial foreclosure from a judgment ordering foreclosure by sale with a possible monetary deficiency into a money judgment for the entire amount of the debt. CJA asserted that the modification of the judgment was appropriate because, as a result of the sale of the security at the trustee's sale, CJA was now a sold-out junior lien holder. After hearing, the trial court granted CJA's motion and ordered that the previously entered judgment of judicial foreclosure and order of sale be converted to a money judgment. Trans-Action appealed, and the court of appeal reversed.

The court stated that for its own tactical reasons, CJA elected to proceed by way of judicial foreclosure, knowing full well that the senior lienholder could foreclose first, thereby effectively terminating its judgment rights. The court held that once CJA pursued that remedy to judgment, it was estopped from changing course to the detriment of Trans-Action (*86 Cal. App. 4th 664, 671)* . In addition, the modification sought by CJA concerned issues that were not before the court in thejudicial foreclosure action. CJA sought to modify the judgment because, 15 months after judgment was entered, the senior lien holder, represented by the same attorney as CJA, foreclosed on the property, terminating CJA's right to enforce the judgment by sale. Based on these events, CJA contended it was a sold-out junior lien holder, entitled to avoid the one action rule. The court stated that to avail itself of the sold-out junior lien holder exception to the one action rule, CJA was required to prove that it had lost its security through no fault of its own (*86 Cal. App. 4th 664, 672*). The court stated that in the most fundamental way, the postjudgment modification based on issues beyond the scope of the trial absolved CJA of its burden of proving that it lost the security through no fault of its own and deprived Trans-Action of its right to present a defense (*86 Cal. App. 4th 664, 673*).

[b] Setoff Against Deposit Account

Security Pacific National Bank v. Wozab *(1990) 51 Cal. 3d 991, 275 Cal. Rptr. 201, 800 P.2d 557* , is discussed in *§ 230.102[3][a]*.

In ***Bank of America v. Daily*** *(1984) 152 Cal. App. 3d 767, 199 Cal. Rptr. 557* , the bank lent the defendants $340,000 in 1960. The loan was secured by a pledge of common stock. When the pledged stock declined in value, the defendants gave as additional security a trust deed on their 10-percent interest in a 245-acre ranch. The obligation was renewed until 1970. When the note went into default, the bank sold the pledged stock at private sale, realizing approximately $257,000, which it applied to the principal balance. Next, the bank set off from the defendants' checking account approximately $10,400 for accrued interest for the period from June 12 to October 16, 1970. Then the bank commenced the present foreclosure action. The trial court found that approximately $83,000 in principal and $88,200 in interest were due on the note and entered a judgment of foreclosure, retaining jurisdiction to determine the amount of any deficiency. The defendants appealed.

The court of appeal reversed. The court of appeal first considered whether the setoff was an "action" within the meaning of *Code Civ. Proc. § 726*, and determined that it was (*152 Cal. App. 3d 767, 771)* . This portion of the court's holding was later disapproved in *Security Pacific National Bank v. Wozab (1990) 51 Cal. 3d 991, 998-1000 n.7, 275 Cal.*

Rptr. 201, 800 P.2d 557 (discussed in *§ 230.102[3][a]*), which acknowledged that a setoff against a deposit account is a violation of *Code Civ. Proc. § 726*, and stated that other decisions have invalidated bank setoffs, not because they were "actions" but because the security had not first been exhausted. The *Bank of America* court concluded that when a depositor's obligation to a financial institution is represented by a note secured by a mortgage or trust deed, *Code Civ. Proc. § 726* prevents the institution from exercising a right of setoff; the institution must exhaust the security (*152 Cal. App. 3d 767, 771)* .

The portion of the decision considering the effect of the bank's violation of the one-form-of-action rule is discussed in [1], *above*.

[c] Equitable Setoff

The facts, procedural background, and relevant portion of the opinion in ***Aplanalp v. Forte*** *(1990) 225 Cal. App. 3d 609, 275 Cal. Rptr. 144* , are discussed in *§ 230.74[3][a]*.

[d] Statute Overrides Permissive Cross Complaint Statutes

The facts and procedural background of ***Aplanalp v. Forte*** *(1990) 225 Cal. App. 3d 609, 275 Cal. Rptr. 144* , are discussed in *§ 230.74[3][a]*. The defendants relied in part on *Code Civ. Proc. §§ 428.10* and *431.70*, arguing that those sections provide that when cross demands exist, equitable setoff is available to a creditor, regardless of *Code Civ. Proc. § 726*. However, the court pointed out that the Law Revision Commission report on *Code Civ. Proc. § 428.10* stated that *Code Civ. Proc. § 428.10* places no restrictions on the right of a defendant to assert by way of cross complaint either an unsecured claim if the original action is to foreclose a mortgage or a cause of action to foreclose on a secured claim subject to *Code Civ. Proc. § 726*. The court interpreted that language to mean that if a secured creditor cross complains on its secured claim, its must follow the procedures specified in *Code Civ. Proc. § 726*, and if it fails to do so, it is subject to the sanctions inherent in *Code Civ. Proc. § 726*. Requiring a party to follow *Code Civ. Proc. § 726* in raising a cross complaint would not invalidate *Code Civ. Proc. § 428.10* because the party would still have the right to raise the cross complaint. Moreover, as the Law Revision Commission indicated, if any conflict exists, the legislature intended *Code Civ. Proc. § 726* to prevail (*225 Cal. App. 3d 609, 616)* .

Even if *Code Civ. Proc. § 428.10* permits the filing of a cross complaint to foreclose under *Code Civ. Proc. § 726* and using any resulting deficiency judgment as a setoff, *Code Civ. Proc. § 428.10* did not apply to the facts of this case. The defendants did not file an action to foreclose and to request determination of a deficiency under *Code Civ. Proc. § 726*, nor did they file any cross complaint under *Code Civ. Proc. § 428.10* (*225 Cal. App. 3d 609, 616)* .

Nor did *Code Civ. Proc. § 431.70* assist the defendants. The court cited *Woodruff v. California Republic Bank (1977) 75 Cal. App. 3d 108, 111, 141 Cal. Rptr. 915* , for the proposition that *Code Civ. Proc. § 431.70* does not entitle a creditor to foreclose on a trust deed after having taken funds from the debtor's deposit account to offset past-due payments on a note secured by a trust deed on real property, because the cross demand referred to in *Code Civ. Proc. § 431.70* presumes a lawful and proper cross demand, which in this context can only arise after a judgment of foreclosure has been obtained and a deficiency judgment has been entered (*225 Cal. App. 3d 609, 616-617)* . The court of appeal also distinguished *Hauger v. Gates (1954) 42 Cal. 2d 752, 754-755, 269 P.2d 609* (discussed in *§ 230.72[3][a]*), in which the creditor refused to set off money the creditor owed the debtor against payments due on the note, saying that when the debtor asserts the right to setoff, *Code Civ. Proc. § 726* is not implicated. *Code Civ. Proc. §§ 428.10* and *431.70* did not change the result in this case (*225 Cal. App. 3d 609, 617)* .

[e] Loss of Priority in Action on Underlying Debt

Security Pacific National Bank v. Wozab *(1990) 51 Cal. 3d 991, 275 Cal. Rptr. 201, 800 P.2d 557* , is discussed in *§ 230.72[3][a]*.

In ***James v. P.C.S. Ginning Co.*** *(1969) 276 Cal. App. 2d 19, 80 Cal. Rptr. 457* , the plaintiffs sought to quiet their title against the judgment lien of the defendant. The defendant lent money to the plaintiffs, for which they executed a promissory note and a crop mortgage. As additional collateral, they executed security agreements that were, in effect, personal property mortgages covering farm equipment and that listed, along with the equipment, "equity in house." Later the plaintiffs filed a declaration of homestead on their house. When the plaintiffs defaulted on the loan, the defendant filed an action against them alleging the execution of the notes secured by the two agreements, and seeking possession of the items of personal property, but making no mention of the "equity in house." The plaintiffs defaulted, and a money judgment was entered for the defendant that also granted possession of the farming equipment and the $10,000 "equity in house." The plaintiffs then brought the present action to quiet their title to the home as against the defendant's purported purchase at the execution sale. Judgment was for the plaintiffs, and the defendant appealed.

The court of appeal affirmed. The court defined the question as whether the defendant, by electing to file a personal action and reduce the indebtedness to a personal judgment, made an election of remedies that, by operation of law, waived the equitable lien priority over the subsequent declaration of homestead. Under *Code Civ. Proc. § 726*, when a creditor elects to obtain a personal judgment rather than enforce the mortgage, the effect of the election is to waive the right to foreclose (*276 Cal. App. 2d 19, 22)* . Such a creditor loses all right to the security and is relegated to the position of an ordinary judgment creditor (*276 Cal. App. 2d 19, 23)* .

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Volume 23 Chapters 230-239 TRUST DEEDS---to---WORKERS' COMPENSATION
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D. One-Form-of-Action Rule

19-230 California Points & Authorities § 230.111

§ 230.111 One-Form-of-Action Rule Bars Foreclosure [Code Civ. Proc. § 726(a)]--Prior Judicial Foreclosure of Personal Property or Fixtures Securing the Debt [Com. Code § 9604(a)(3)(B), (6)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE BENEFICIARY IS NOT ENTITLED TO FORECLOSE UNDER THE TRUST DEED BECAUSE THE BENEFICIARY'S JUDICIAL FORECLOSURE AGAINST THE _____ [PERSONAL PROPERTY *or* FIXTURES] SECURING THE DEBT CAUSED THE LIEN ON THE REAL PROPERTY NOT INCLUDED IN THAT ACTION TO BECOME UNENFORCEABLE.

Judicial Foreclosure Against Personal Property or Fixtures Securing Debt. When a single debt is secured by both real property and personal property or fixtures, and the creditor first proceeds against only the personal property or fixtures in a judicial action in which the creditor also seeks a personal judgment on the debt, that action constitutes an action within the meaning of *Code of Civil Procedure Section 726*. When the personal judgment on the debt is obtained, the lien on the real property not included in that action is rendered unenforceable (*Com. Code § 9604(a)(3)(B),(6)*; *Walker v. Community Bank (1974) 10 Cal. 3d 729, 741, 111 Cal. Rptr. 897, 518 P.2d 329*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that a trust deed may not be foreclosed. The ground is that the beneficiary's judicial foreclosure judgment regarding the personal property security for the same obligation released the real property security [*see Com. Code § 9604(a)(3)(B)*].

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue. For example, in a trustor's action to restrain foreclosure under the trust deed, the contention may be raised in support of the trustor's application for preliminary injunction [*see, e.g.,* *Walker v.*

Community Bank (1974) 10 Cal. 3d 729, 741, 111 Cal. Rptr. 897, 518 P.2d 329] . This form also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus counsel should attach a copy of the personal property judicial foreclosure judgment.

[3] Discussion of Authorities

[a] Judicial Foreclosure Against Personal Property or Fixtures Securing Debt

In ***Walker v. Community Bank*** *(1974) 10 Cal. 3d 729, 111 Cal. Rptr. 897, 518 P.2d 329* , the bank lent money to the plaintiff's predecessor, and the loan was secured by a chattel mortgage on equipment and trucks as well as a trust deed on the real property that was later sold to the plaintiff. After the bank commenced ajudicial foreclosure action under the chattel mortgage, the trustor sold the property covered by the trust deed. The bank caused notice of default and an election to sell to be recorded regarding the trust deed, and thereafter a deficiency judgment for the bank was entered in the personal property foreclosure action. The plaintiff, purchaser of the real property, commenced the present action to quiet title and enjoin the trustee's sale. The trial court granted a temporary injunction barring the foreclosure, which was dissolved on entry of judgment for the bank. The plaintiff appealed.

The Supreme Court reversed, concluding that when there is a single debt secured by both real and personal property, and the creditor elects to judicially foreclose only on the personal property, the creditor thereby loses the security interest in the real property as against all parties, even though the debtor did not raise the one-form-of-action rule as an affirmative defense in the judicial foreclosure proceeding (*10 Cal. 3d 729, 741)* .

Subsequent legislation amending former Com. Code § 9501 (*now see Com. Code § 9604(a)(3)(B), (5),* and *(6)*) narrowed the application of the holding in *Walker* to situations in which a personal judgment against the debtor has been entered in the personal property judicial foreclosure action.

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23-230 California Points & Authorities § 230.112

§ 230.112 Co-Obligor Who Is Not Also Trustor May Assert One-Form-of-Action Rule [Code Civ. Proc. § 726(a)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

AS A CO-OBLIGOR WHO IS NOT ALSO A TRUSTOR, THE _____ [*specify party, e.g.,* DEFENDANT] MAY CLAIM THE BENEFIT OF CODE OF CIVIL PROCEDURE SECTION 726 TO PRECLUDE THE IMPOSITION OF PERSONAL LIABILITY ON THE UNDERLYING OBLIGATION.

A. One-Form-of-Action Rule. There can be but one form of action for the recovery of any debt or the enforcement of any right secured by a mortgage on real property or an estate for years therein, which action must be in accordance with the provisions of *Code of Civil Procedure Section 725a et seq.*. In the action the court may, by its judgment, direct the sale of the encumbered property or estate for years therein (or so much of it as may be necessary) and application of the proceeds of the sale to the payment of the costs of the court, the expenses of levy and sale, and the amount due the plaintiff, including, when the mortgage provides for the payment of attorney's fees, such sum as the court shall find reasonable, not exceeding the amount named in the mortgage (*Code Civ. Proc. § 726(a)*).

B. Waiver of Security. The sanction for a violation of *Code of Civil Procedure Section 726* is that the creditor is held to have waived the security. The statute may be invoked as a sanction against the creditor [even if the beneficiary has not raised the statute as an affirmative defense], on the ground that the creditor, by not foreclosing on the security in the action to enforce the debt, made an election of remedies and waived the security (*Security Pacific National Bank v. Wozab (1990) 51 Cal. 3d 991, 997, 275 Cal. Rptr. 201, 800 P.2d 557* ; *Bank of America v. Daily (1984) 152 Cal. App. 3d 767, 772-773, 199 Cal. Rptr. 557 , disapproved on other grounds, Security Pacific National Bank v. Wozab (1990) 51 Cal. 3d 991, 999-1000 n.7, 275 Cal. Rptr. 201, 800 P.2d 557*).

C. Assertion of Rule by Co-Obligor Who Is Not Also Trustor. Under *Code of Civil Procedure Section 726*, a co-maker of a note who is not also a trustor of the trust deed that secures the note does not make an absolute promise to pay the obligation but makes only a conditional promise to pay any deficiency that remains if a [judicial] foreclosure of

the property does not discharge the debt. Such a co-maker has the right to require the beneficiary to seek repayment first from the property. If the beneficiary fails to do that, the co-maker is absolved of any personal obligation on the note (*Pacific Valley Bank v. Schwenke (1987) 189 Cal. App. 3d 134, 140-146, 234 Cal. Rptr. 298*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that a payee of a note and beneficiary under a trust deed cannot recover a personal judgment against a co-maker of the note who is not also a trustor of the trust deed securing it. The ground is that the one-form-of-action rule of *Code Civ. Proc. § 726* can be asserted even by one who is not a trustor (Paragraph C).

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue. For example, in a beneficiary's action to impose personal liability, the contention may be raised in support of a co-maker's motion for summary judgment. This form also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus counsel should describe the waiver or reconveyance of the property in order to make clear that the co-maker did not agree to waive the protection of *Code Civ. Proc. § 726*.

[3] Discussion of Authorities

[a] Waiver of Security

Security Pacific National Bank v. Wozab *(1990) 51 Cal. 3d 991, 275 Cal.Rptr. 201, 800 P.2d 557* , is discussed in *§ 230.102[3][a]*.

Bank of America v. Daily *(1984) 152 Cal. App. 3d 767, 199 Cal. Rptr. 557 , disapproved on other grounds, Security Pacific National Bank v. Wozab (1990) 51 Cal. 3d 991, 999-1000 n.7, 275 Cal. Rptr. 201, 800 P.2d 557* , is discussed in *§ 230.110[3][a]*.

[b] Assertion of Rule by Co-Obligor Who Is Not Also Trustor

In ***Pacific Valley Bank v. Schwenke*** *(1987) 189 Cal. App. 3d 134, 234 Cal. Rptr. 298* , the bank made a loan to a partnership. The note was signed by two partners as co-makers, and one of those partners executed a trust deed on two of his individual properties to secure the note. About the time the partnership was breaking up and the bank was making other unsecured loans to the trustor-partner, the bank reconveyed the property to the trustor-partner. Later, the bank sued on the note. The former trustor-partner allowed his default to be entered. Judgment was for the bank against both co-makers. Only the nontrustor co-maker appealed.

The court of appeal reversed. *Code Civ. Proc. § 726* prevents an action against a co-maker of a promissory note after the beneficiary has reconveyed the real property to the other co-maker. A corollary principle of *Code Civ. Proc. § 726* is that, by signing a note secured by a trust deed, the borrower does not make an absolute promise to pay the obligation but makes only a conditional promise to pay any deficiency that remains if a judicial foreclosure of the encumbered property does not discharge the debt (*189 Cal. App. 3d 134, 140*). A co-maker who is not also a trustor still has the right to require the creditor to look to the property first (*189 Cal. App. 3d 134, 141-144*). The bank's failure to do that absolved that co-maker of any personal obligation on the note (*189 Cal. App. 3d 134, 146*).

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23-230 California Points & Authorities §§ 230.113-230.119

[Reserved]

§§ 230.113[Reserved]

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E. Tortious Impairment of Security

23-230 California Points & Authorities § 230.120

§ 230.120 Damages Are Recoverable for Waste Impairing Security Interest [Civ. Code § 2929]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF IS ENTITLED TO RECOVER DAMAGES FOR DEFENDANT'S WASTE RESULTING IN SUBSTANTIAL IMPAIRMENT OF PLAINTIFF'S SECURITY INTEREST.

A. Duty Not to Impair Security Interest of Mortgagee. No person whose interest is subject to the lien of a mortgage may do any act that will substantially impair the mortgagee's security (*Civ. Code § 2929*).

B. Action for Waste Impairing Security. Pursuant to the rule codified in *Civil Code Section 2929*, the holder of any security interest in real property may maintain an action to enjoin, or may recover damages for, waste that substantially impairs the security interest (*see Cornelison v. Kornbluth (1975) 15 Cal. 3d 590, 597-599, 125 Cal. Rptr. 557, 542 P.2d 981*).

[*Optional*] **C. Nonassuming Grantee's Duty Not to Impair Security Interest.** Although a nonassuming grantee is not personally liable on the underlying debt, or to comply with the obligations of the trust deed, a nonassuming grantee is under a duty not to commit waste that substantially impairs the beneficiary's security interest (*Cornelison v. Kornbluth (1975) 15 Cal. 3d 590, 596, 599, 125 Cal. Rptr. 557, 542 P.2d 981*).

[*Optional*] **D. Antideficiency Statutes Do Not Bar Recovery for Waste Committed in Bad Faith.** *Code of Civil Procedure Sections 580b* and *580d* do not bar recovery for waste that substantially impairs the security interest if the waste was not a result of economic pressures of a market depression but was committed in bad faith, that is, as a result of reckless, intentional, or malicious conduct. The determination of the extent to which waste resulted from a general decline in real estate values or to what extent it was caused by bad-faith acts of the trustor is to be made on a case-by-case basis (*Cornelison v. Kornbluth (1975) 15 Cal. 3d 590, 602-605, 125 Cal. Rptr. 557, 542 P.2d 981* ; *Hickman v. Mulder (1976) 58 Cal. App. 3d 900, 908-910, 130 Cal. Rptr. 304*).

[*Optional*] **E. Measure of Damages for Waste Impairing Security Interest.** The measure of damages for bad-faith waste that substantially impairs the security interest is the amount by which the value of the security is less than the outstanding debt, that is, the extent to which the security is rendered inadequate (*Cornelison v. Kornbluth (1975) 15 Cal. 3d 590, 606, 125 Cal. Rptr. 557, 542 P.2d 981*).

[*Optional*] **F. Agricultural Land.** To preserve the quality of agricultural lands requires affirmative effort, and a failure to do what is needed can uniquely be described as willful. Failure to cultivate, irrigate, fertilize, fumigate, prune, and do all other acts necessary to preserve the growing things is waste (*Hickman v. Mulder (1976) 58 Cal. App. 3d 900, 908-909, 130 Cal. Rptr. 304*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the beneficiary under a trust deed is entitled to recover damages for bad-faith waste under *Civ. Code § 2929*. Paragraph A sets forth the statutory obligation not to commit waste. Paragraph B establishes that the statutory duty applies regardless of the particular type of security device used. Optional provisions provide for the following:

- Paragraph C establishes that the duty is owed by successors in interest of the original trustor.

- Paragraphs D and E set forth two important limitations on the beneficiary's right of recovery, namely, that only bad-faith waste, as opposed to waste resulting from market decline, is compensable (Paragraph D), and only to the extent that the security becomes inadequate (Paragraph E).

The most drastic implication of this last requirement, which is the subject of § 230.130, is that purchase by the beneficiary at foreclosure for a full-credit bid will negate any impairment of security and bar recovery. Thus, a beneficiary seeking to recover for waste can do so only in a judicial foreclosure action [*see, e.g., Easton v. Ash (1941) 18 Cal. 2d 530, 538-539, 116 P.2d 433]* or after purchase for less than a full-credit bid at a nonjudicial foreclosure sale [*see, e.g., Hickman v. Mulder (1976) 58 Cal. App. 3d 900, 908-910, 130 Cal. Rptr. 304]* .

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue. For example, in an action by a beneficiary for damages for waste, against the trustor or the successor in interest, the points in this form could be used in support of the plaintiff's motion for summary judgment. This form also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus counsel should describe the acts constituting waste and the degree to which the security has been impaired.

[c] Opposing Points and Authorities

In an appropriate case, this form of points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 230.130*.

[3] Discussion of Authorities

[a] Action for Waste Impairing Security

In ***Cornelison v. Kornbluth*** *(1975) 15 Cal. 3d 590, 125 Cal. Rptr. 557, 542 P.2d 981* , the plaintiff, a beneficiary under a purchase-money trust deed on a single-family residence, alleged two causes of action for damages against the trustors' successors in interest, one for breach of contract and the other for waste impairing the security under *Civ. Code § 2929*. The defendants moved for summary judgment. In support of their motion they declared, among other things, that the plaintiff had caused the property to be sold at a private foreclosure sale and had purchased the property at this sale on a full-credit bid. The plaintiff filed no counteraffidavits. The trial court entered summary judgment for the defendants, and the plaintiff appealed.

The Supreme Court affirmed. The Court first discussed the defendant's status as a nonassuming grantee and the language of *Civ. Code § 2929*, stating that even though that statute refers only to "the lien of a mortgage" and to the impairment of "the mortgagee's security," it applies equally to a trust deed. Because the statute imposes the duty on any "person whose interest is subject to the lien," even a nonassuming grantee who is not personally liable on the debt is under the duty not to commit waste (*15 Cal. 3d 590, 599)* . Similarly, the Court continued, even though a nonassuming grantee is not personally liable on the underlying debt or to comply with the obligations of the trust deed, a nonassuming grantee is under a duty not to commit waste that substantially impairs the beneficiary's security interest (*15 Cal. 3d 590, 596, 599)* .

[b] Nonassuming Grantee's Duty Not to Impair Security Interest

Cornelison v. Kornbluth *(1975) 15 Cal. 3d 590, 125 Cal. Rptr. 557, 542 P.2d 981* , is discussed in [a], *above*.

[c] Antideficiency Statutes Do Not Bar Recovery for Waste Committed in Bad Faith

The facts and procedural background of ***Cornelison v. Kornbluth*** *(1975) 15 Cal. 3d 590, 125 Cal. Rptr. 557, 542 P.2d 981* , are discussed in [a], *above*. The defendant contended that even assuming that he was under a duty not to commit waste and that his action constituted waste so impairing the value of the property as to render it inadequate security for the debt, *Code Civ. Proc. §§ 580b* and *580d* barred recovery because any recovery would amount to a deficiency judgment. In considering this contention the Court said that a deficiency judgment is a personal judgment against the debtor for the difference between the fair market value of the property and the outstanding debt (*15 Cal. 3d 590, 603)* . After reviewing thehistory of the antideficiency statutes, the Court said that the purpose of *Code Civ. Proc. § 580b*, which is to prevent aggravation of depression in land values that would result if purchasers were personally liable on default, would in some instances be frustrated if damages for waste could be recovered following a foreclosure sale of property subject to a purchase-money mortgage. The Court considered the example of a purchaser compelled in the normal course of events to forgo general maintenance and repair of the property in order to keep up payments on the mortgage debt. When such a purchaser eventually defaults and loses the property, the purpose of *Code Civ. Proc. § 580b* would be frustrated if in addition the purchaser could be held liable for waste (*15 Cal. 3d 590, 603-604)* . Thus, the Court concluded that damages for waste following a foreclosure sale are only recoverable if the waste is committed in bad faith, that is, as a result of reckless, intentional, or malicious conduct (*15 Cal. 3d 590, 604)* . The determination of the extent to which erosion of the property's value resulted from a general decline in real estate vales or to what extent it was caused by bad-faith acts of the trustor is to be made on a case-by-case basis (*15 Cal. 3d 590, 604)* .

The Court noted that the purpose of *Code Civ. Proc. § 580d* was to put judicial and nonjudicial foreclosures on a parity by allowing the beneficiary a deficiency judgment after a judicial foreclosure sale but exacting in return the burden of statutory redemption (*15 Cal. 3d 590, 604)* . To maintain that parity, the Court concluded, in situations arising under *Code Civ. Proc. § 580d*, recovery for waste following a nonjudicial foreclosure sale is also barred when the waste actually results from the depressed condition of the general real estate market but not when the waste is caused by the bad-faith acts of the mortgagor (*15 Cal. 3d 590, 605)* .

[d] Measure of Damages for Waste Impairing Security Interest

The facts and procedural background of ***Cornelison v. Kornbluth*** *(1975) 15 Cal. 3d 590, 125 Cal. Rptr. 557, 542 P.2d 981* , are discussed in [a], *above*. In considering whether the plaintiff's purchase at the foreclosure sale on a full-credit bid barred recovery for waste (which is discussed in *§ 230.130[3][b]*), the Court cited *Robinson v. Russell (1864) 24 Cal. 467, 473* , for the rule that the measure of damages for waste is the extent of the impairment of the security, that is, the amount by which the value of the security is less than the outstanding debt (*15 Cal. 3d 590, 606)* .

[e] Agricultural Land

In ***Hickman v. Mulder*** *(1976) 58 Cal. App. 3d 900, 130 Cal. Rptr. 304* , the plaintiffs sought to recover damages for waste after purchasing grapefruit orchards and vineyards at a nonjudicial foreclosure sale for less than the full amount of the debt. The orchards and vineyards were subject to a purchase-money trust deed of which the plaintiffs were the beneficiaries. The plaintiffs alleged that the defendants had failed to cultivate, irrigate, fertilize, fumigate, prune, and do all other acts necessary to preserve the citrus trees and vines, and also alleged willful mismanagement. The defendants' demurrer was sustained without leave to amend. The plaintiffs appealed.

The court of appeal reversed. The defendants contended that allegations of affirmative behavior were required in order to plead bad-faith waste and that the plaintiffs' allegations of only omissions amounted to neglect of general maintenance and repair and did not bring them within the bad faith concept (*58 Cal. App. 3d 900, 908-909)* . The court of appeal disagreed, saying that waste arises in many ways by inaction when agricultural lands are concerned. To preserve the quality of agricultural lands requires affirmative effort, and a failure to do what is needed can uniquely be described as willful. Citing other cases for examples, the court noted that allowing arable land to lie untilled and become weed-infested is waste, failure to care for an orchard is waste, and failure to irrigate can be waste (*58 Cal. App. 3d 900, 909)* .

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23-230 California Points & Authorities §§ 230.121-230.129

[Reserved]

§§ 230.121[Reserved]

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23-230 California Points & Authorities § 230.130

§ 230.130 Damages Are Not Recoverable for Waste Impairing Security Interest--No Impairment Shown

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF IS NOT ENTITLED TO RECOVER DAMAGES FOR WASTE SUBSTANTIALLY IMPAIRING THE SECURITY INTEREST BECAUSE PLAINTIFF PURCHASED THE PROPERTY AT THE PRIVATE SALE BY MAKING A FULL-CREDIT BID, AND CONSEQUENTLY DEFENDANT'S WASTE, IF ANY, DID NOT IMPAIR PLAINTIFF'S SECURITY INTEREST AS A MATTER OF LAW.

A. Measure of Damages for Waste Impairing Security Interest. The measure of damages for bad-faith waste that substantially impairs the security interest is the amount by which the value of the security is less than the outstanding debt, that is, the extent to which the security is rendered inadequate (*Cornelison v. Kornbluth (1975) 15 Cal. 3d 590, 606, 125 Cal. Rptr. 557, 542 P.2d 981*).

B. Beneficiary's Purchase at Foreclosure Sale on Full-Credit Bid Extinguishes Claim for Waste. If the beneficiary acquires the property at a foreclosure sale by entering a full-credit bid, that is, a bid equal to the unpaid principal and interest of the secured debt, together with the costs, fees, and other expenses of the foreclosure sale, the beneficiary cannot recover damages for waste, because the purchase at a fair market value equal to the amount owed on the underlying debtestablishes as a matter of law that there has been no impairment of the security interest (*Cornelison v. Kornbluth (1975) 15 Cal. 3d 590, 606-607, 125 Cal. Rptr. 557, 542 P.2d 981* ; *Schumacher v. Gaines (1971) 18 Cal. App. 3d 994, 999-1000, 96 Cal. Rptr. 223*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that the beneficiary under a trust deed is not entitled to recover damages in an action for waste under *Civ. Code § 2929*, on the ground that the beneficiary

purchased the property on a full-credit bid and consequently cannot show any impairment of the security.

This form may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue. For example, in an action by a beneficiary for damages for waste, against the trustor or the successor in interest, the points in this form could be used in support of the defendant's motion for summary judgment, to show that the plaintiff suffered no damages and therefore has no cause of action [*see, e.g., Cornelison v. Kornbluth (1975) 15 Cal. 3d 590, 593, 608, 125 Cal. Rptr. 557, 542 P.2d 981]* . This form also may be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. Thus counsel should show the beneficiary's purchase of the real property at a foreclosure sale by means of a full-credit bid. For instance, if the trustee's deed recites the price paid, a copy of the recorded deed could be attached.

[c] Opposing Points and Authorities

In an appropriate case, this form of points and authorities may be submitted in opposition to the contention supported by the points and authorities in *§ 230.120*.

[3] Discussion of Authorities

[a] Measure of Damages for Waste Impairing Security Interest

The facts, procedural background, and disposition of ***Cornelison v. Kornbluth*** *(1975) 15 Cal. 3d 590, 125 Cal. Rptr. 557, 542 P.2d 981* , are discussed in *§ 230.120[3][a]*. In considering whether the plaintiff's purchase at the foreclosure sale on a full-credit bid barred recovery for waste, the Court cited *Robinson v. Russell (1864) 24 Cal. 467, 473* , for the rule that the measure of damages for waste is the extent of the impairment of the security, that is, the amount by which the value of the security is less than the outstanding debt (*15 Cal. 3d 590, 606)* .

[b] Beneficiary's Purchase at Foreclosure Sale on Full-Credit Bid Extinguishes Claim for Waste

The facts, procedural background, and disposition of ***Cornelison v. Kornbluth*** *(1975) 15 Cal. 3d 590, 125 Cal. Rptr. 557, 542 P.2d 981* , are discussed in *§ 230.120[3][a]*. The Supreme Court concluded that the plaintiff was not entitled to maintain an action for damages under *Civ. Code § 2929* because she had purchased the real property at a foreclosure sale with a full-credit bid. The Court reasoned that by making a full-credit bid, that is, a bid equal to the unpaid principal and interest of the secured debt, together with the costs, fees, and other expenses of the foreclosure sale, the plaintiff in effect established the value of the security as being equal to the outstanding debt and extinguished the security interest. Thus, even if the defendants had committed waste, the plaintiff was precluded from showing any impairment of her security entitling her to an award of damages (*15 Cal. 3d 590, 606-607)* .

In ***Schumacher v. Gaines*** *(1971) 18 Cal. App. 3d 994, 96 Cal. Rptr. 223* , the plaintiff was the beneficiary of a purchase-money trust deed on a 840-acre ranch. She purchased the property at a nonjudicial foreclosure sale on a full-credit bid, after having filed an action for waste, declaratory relief, mental suffering, and fraud the day before the sale. A jury awarded the plaintiff damages for waste and breach of contract. The defendant appealed.

The court of appeal reversed. The beneficiary had discharged the debt by purchasing the property at the trustee's sale for the full amount due. Therefore, she could not recover damages for impairment of the security (*18 Cal. App. 3d 994, 999-1000)* .

[4] Additional Authorities

[a] Beneficiary's Purchase at Foreclosure Sale on Full-Credit Bid Extinguishes Claim for Waste

In *Evans v. California Trailer Court, Inc. (1994) 28 Cal. App. 4th 540, 33 Cal. Rptr. 2d 646* , the plaintiffs held two trust deeds on real property. The plaintiffs exercised their power of sale under the senior trust deed and acquired the property with a bid that was less than the total indebtedness secured by the two trust deeds. The plaintiffs then sued seeking to recover damages under various theories, including waste. The trial court granted the defendants judgment on the pleadings, on the ground that the plaintiffs' causes of action were barred by the antideficiency statutes. The plaintiffs appealed.

The court of appeal reversed with respect to the plaintiffs' tort claims, including waste. The trial court had concluded that the plaintiffs made a full-credit bid when foreclosing their senior trust deed, thereby eliminating any claims for damages arising from waste. The court held that the plaintiffs did not make a full-credit bid,that is, one equivalent to the entire outstanding debt, because the bid did not include any portion of the debt secured by the junior lien (*28 Cal. App. 4th 540, 555)* . The court stated that the plaintiffs' exercise of their power of sale under the senior trust deed wiped out any lien of the junior lienholder, and thus the plaintiffs were not entitled to the equitable rule allowing a sold-out junior lienholder to seek judgment for the obligation secured by the junior trust deed (*28 Cal. App. 4th 540, 552)* . See *§ 230.51[1]* for authorities discussing recovery by a sold-out junior lienholder. However, the court concluded, treating the two trust deeds as merged for purposes of the antideficiency statutes did not justify ignoring the full amount of the obligation for purposes of the recovery of tort damages to the extent that the security interest had been impaired (*28 Cal. App. 4th 540, 555)* .

In *Sumitomo Bank v. Taurus Developers, Inc. (1986) 185 Cal. App. 3d 211, 229 Cal. Rptr. 719* , the bank made a construction loan to the developer/owner. After default, the bank purchased the property at a nonjudicial foreclosure sale for a full-credit bid. After the purchase, the bank discovered design and structural defects in retaining walls, drainage systems, roofs, abnormal cracking of concrete, and inadequate waterproofing. It expended $400,000 to correct the defects then sued for breach of contract, waste, fraud, negligence, and violation of *Bus. & Prof. Code § 17200 et seq.* Judgment of dismissal entered after a demurrer, and the bank appealed.

The court of appeal affirmed as to all causes of action except negligence. The general rule is that a beneficiary who enters a full-credit bid at the foreclosure sale cannot recover damages for waste (*185 Cal. App. 3d 211, 220)* . The bank argued that its full-credit bid was induced by the defendant's intentional concealment of the defects. The court said the bank was not entitled to rely on representations or nondisclosures occurring in the loan transaction or during the trustee's sale. A borrower in that situation cannot be characterized as a seller and is under no duty to disclose defects. The lender and trustor are not subject to the normal seller-purchaser relationship (*185 Cal. App. 3d 211, 221-222)* . The full-credit-bid rule exemplifies a policy determination to place the risk of loss on the creditor-purchaser, with the burden to assess accurately the value of the property. If the property is overvalued because of unknown defects, the creditor cannot recover a deficiency because the trustor owes no duty to disclose defects at a foreclosure sale (*185 Cal. App. 3d 211, 225)* .

California Points & Authorities

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Chapters 231through 233 RESERVED

23-231 California Points & Authorities Chapters 231through 233

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Chapters 231RESERVED

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Volume 23 Chapters 230-239 TRUST DEEDS---to---WORKERS' COMPENSATION
CHAPTER 234 ULTRAHAZARDOUS ACTIVITIES

23-234 California Points & Authorities 234.syn

§ 234.syn Synopsis to Chapter 234: ULTRAHAZARDOUS ACTIVITIES

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[2] Comments

[a] Use of Form

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[c] Related Points and Authorities

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[3] Discussion of Authorities

[a] Imposition of Strict Liability for Ultrahazardous Activity

[b] Definition of Ultrahazardous Activity

[c] Definition of Common Usage

[d] Determination of Strict Liability Is Question of Law for Court

[e] Issue of Whether Activity Ultrahazardous Cannot Be Decided on Demurrer

[f] Blasting in Populated Areas Is Ultrahazardous Activity

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[h] Drilling Oil Well Is Ultrahazardous Activity

[i] Use of Poisonous Gas Is Ultrahazardous Activity

[j] Welding on Waste Oil Tank Is Ultrahazardous Activity

[4] Additional Authorities

[a] Imposition of Strict Liability for Ultrahazardous Activity

[b] Definition of Ultrahazardous Activity

§ 234.21 Opposing Contention That Strict Liability Should Be Imposed--Activity Carried On in Pursuance of Public Duty

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Activity Carried On in Pursuance of Public Duty

§ 234.22 Opposing Contention That Strict Liability Should Be Imposed--Activity Not Proximate Cause of Injury

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Activity Not Proximate Cause

§ 234.23 Opposing Contention That Activity Is Ultrahazardous--Risk of Harm Can Be Eliminated by Exercise of

Care

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Risk of Harm Can Be Eliminated by Exercise of Care

[b] Blasting in Remote Areas Is Not Ultrahazardous Activity

[c] Operation of Airplane Is Not Ultrahazardous Activity

[d] Earth-Movement Operation Is Not Ultrahazardous Activity

[e] Subterranean Tunneling Is Not Ultrahazardous Activity

[f] Landlord's Furnishing of Water to Tenant Is Not Ultrahazardous Activity

[4] Additional Authorities

[a] Risk of Harm Can Be Eliminated by Exercise of Care

§ 234.24 Opposing Contention That Activity Is Ultrahazardous--Matter of Common Usage

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Matter of Common Usage

[b] Definition of Common Usage

[c] Earth-Moving Operation Is Not Ultrahazardous Activity

[d] Landlord's Furnishing of Water to Tenant Is Not Ultrahazardous Activity

[e] Construction Work Is Not Ultrahazardous Activity

[4] Additional Authorities

[a] Matter of Common Usage

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CHAPTER 234 ULTRAHAZARDOUS ACTIVITIES
PART I. INTRODUCTION

23-234 California Points & Authorities § 234.01

§ 234.01 Scope of Chapter

This chapter contains points and authorities relating to the imposition of strict liability for damages caused by ultrahazardous activities. It includes points and authorities supporting the contention that strict liability should be imposed for an ultrahazardous activity [*see § 234.20*]. Also included are points and authorities opposing the contentions that defendant should be held strictly liable [*see §§ 234.21*, *234.22*], and that the activity in question is ultrahazardous [*see §§ 234.23*, *234.24*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsStrict LiabilityAbnormally Dangerous ActivitiesGeneral Overview

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23-234 California Points & Authorities § 234.02

§ 234.02 Governing Law

This area of law is governed solely by case law, and there are no specifically applicable statutes. The leading case involving strict liability for an ultrahazardous activity is *Luthringer v. Moore (1948) 31 Cal. 2d 489, 190 P.2d 1* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsStrict LiabilityAbnormally Dangerous ActivitiesGeneral Overview

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23-234 California Points & Authorities § 234.03

§ 234.03 Plaintiff's Comparative Fault as Defense

Historically, plaintiff 's ordinary contributory negligence was not a defense to an action based on strict liability for an ultrahazardous activity [*see Luthringer v. Moore (1948) 31 Cal. 2d 489, 499, 190 P.2d 1* ; *see also* Restatement of Torts §§ 519-521, 523]. However, plaintiff's assumption of the risk and certain intentional or reckless acts, for example, intentionally causing the activity to miscarry, were complete defenses [*see Luthringer v. Moore (1948) 31 Cal. 2d 489, 499, 190 P.2d 1*].

It is not clear what effect the adoption of the rule of comparative negligence will have on these traditional defenses. No California case has expressly held the doctrine applicable to actions based on strict liability for an ultrahazardous activity, although it was held applicable to strict products liability actions in *Daly v. General Motors Corp. (1978) 20 Cal. 3d 725, 742, 144 Cal. Rptr. 380, 575 P.2d 1162* . However, it seems likely that the courts would find strict products liability sufficiently similar to ultrahazardous strict liability to warrant applying the doctrine to the latter. Under comparative negligence, plaintiff's ordinary contributory negligence would be a defense to the action, as would plaintiff's assumption of risk and intentional contributory acts such as causing the activity to miscarry [*see Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226* (defining comparative negligence as assignment of liability in direct proportion to negligence of each party)]. However, these defenses would only reduce plaintiff's recovery; they would not completely bar the action [*see Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226* (under comparative negligence, contributory negligence of plaintiff will not bar recovery, but will reduce amount of damages)]. For points and authorities relating to the defense of plaintiff's comparative negligence, see Ch. 165, *Negligence* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDefensesAssumption of RiskGeneral OverviewTortsNegligenceDefensesComparative NegligenceGeneral OverviewTortsNegligenceDefensesComparative NegligenceIntentional & Reckless ConductTortsStrict LiabilityAbnormally Dangerous ActivitiesGeneral Overview

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23-234 California Points & Authorities § 234.04

§ 234.04 Related Pleading and Practice Chapters

For a discussion and forms relating to strict liability for specific types of ultrahazardous activities, see California Forms of Pleading and Practice, Ch. 256, *Explosives* , and Ch. 418, *Pollution and Environmental Matters* (Matthew Bender). For a discussion of tort liability generally, see California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender). For a discussion of strict liability in general for other types of conduct, see California Forms of Pleading and Practice, Ch. 23, *Animals* , and Ch. 460, *Products Liability* (Matthew Bender). See also the following chapters in California Forms of Pleading and Practice (Matthew Bender) dealing with activities covered in this chapter, but discussing liability based on negligence:

Ch. 11, *Adjoining Landowners*.

Ch. 391, *Nuisance*.

Ch. 421, *Premises Liability*.

Ch. 550, *Trespass*.

Ch. 575, *Waters*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementCost Recovery ActionsStrict LiabilityEnvironmental LawLitigation & Administrative ProceedingsNuisances, Trespasses & Strict LiabilityReal Property LawAdjoining LandownersGeneral OverviewTortsProducts LiabilityStrict LiabilityTortsStrict LiabilityGeneral Overview

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23-234 California Points & Authorities § 234.05

§ 234.05 Related Points and Authorities

For points and authorities pertaining to strict liability for defective products, see Ch. 190, *Products Liability* . Points and authorities that may also be useful in actions involving ultrahazardous activities may be found in the following chapters:

Ch. 165, *Negligence*.

Ch. 167, *Nuisance*.

Ch. 178, *Premises Liability*.

Ch. 225, *Trespass*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawLitigation & Administrative ProceedingsNuisances, Trespasses & Strict LiabilityReal Property LawTortsNuisanceGeneral OverviewReal Property LawTortsTrespass to Real PropertyTortsProducts LiabilityStrict LiabilityTortsStrict LiabilityGeneral Overview

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23-234 California Points & Authorities §§ 234.06-234.19

[Reserved]

§§ 234.06[Reserved]

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PART II. FORMS

23-234 California Points & Authorities § 234.20

§ 234.20 Supporting Contention That Strict Liability Should Be Imposed--Injury Caused by Ultrahazardous Activity

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANT SHOULD BE HELD STRICTLY LIABLE FOR PLAINTIFF'S INJURY BECAUSE THE INJURY WAS DIRECTLY AND LEGALLY CAUSED BY AN ULTRAHAZARDOUS ACTIVITY CARRIED ON BY DEFENDANT.

A. Imposition of Strict Liability for Ultrahazardous Activity. A person who carries on an ultrahazardous activity is liable for any harm directly and legally caused by the activity if the person knew or should have known that injury was likely to result, even though the utmost care was exercised to prevent harm (*Luthringer v. Moore (1948) 31 Cal. 2d 489, 498, 500, 190 P.2d 1*).

B. Definition of Ultrahazardous Activity. An activity is ultrahazardous if: it (1) necessarily involves a risk of serious harm to the person, land, or chattels of others, which cannot be eliminated by the exercise of the utmost care; and (2) is not a matter of common usage (*Luthringer v. Moore (1948) 31 Cal. 2d 489, 498, 190 P.2d 1* ; *Smith v. Lockheed Propulsion Co. (1967) 247 Cal. App. 2d 774, 785, 56 Cal. Rptr. 128* ; *but see Travelers Indem. Co. v. City of Redondo Beach (1994) 28 Cal. App. 4th 1432, 1444, 34 Cal. Rptr. 2d 337*).

C. Definition of Common Usage. An activity is a matter of common usage if it is customarily carried on by the great mass of mankind or by many people in the community (*Luthringer v. Moore (1948) 31 Cal. 2d 489, 498, 190 P.2d 1*).

D. Determination of Strict Liability Is Question of Law for Court. Whether a case is a proper one for imposing strict liability is a question of law for the court (*Luthringer v. Moore (1948) 31 Cal. 2d 489, 496, 190 P.2d 1* ; *Balding v. D.B. Stutsman, Inc. (1966) 246 Cal. App. 2d 559, 564, 54 Cal. Rptr. 717*).

[*Optional*] **E. Issue of Whether Activity Ultrahazardous Cannot Be Decided on Demurrer.** A court determines

whether a particular activity is ultrahazardous by considering various factors and the weight each merits according to the facts in evidence; thus, by its very nature, the issue of whether a particular activity is ultrahazardous cannot properly be decided on demurrer (*Travelers Indem. Co. v. City of Redondo Beach (1994) 28 Cal. App. 4th 1432, 1444, 34 Cal. Rptr. 2d 337*).

[*Optional*] **F. Blasting in Populated Areas Is Ultrahazardous Activity.** Blasting in populated areas constitutes an ultrahazardous activity (*Alonso v. Hills (1950) 95 Cal. App. 2d 778, 783, 214 P.2d 50* ; *see* *Colton v. Onderdonk (1886) 69 Cal. 155, 158-159, 10 P. 395*).

[*Optional*] **G. Rocket Motor Testing Is Ultrahazardous Activity.** Rocket motor testing is an ultrahazardous activity (*Smith v. Lockheed Propulsion Co. (1967) 247 Cal. App. 2d 774, 785, 56 Cal. Rptr. 128*).

[*Optional*] **H. Drilling Oil Well Is Ultrahazardous Activity.** Drilling of an oil well is an ultrahazardous activity (*see Green v. General Petroleum Corp. (1928) 205 Cal. 328, 333-334, 270 P. 952* ; *see also* *Travelers Indem. Co. v. City of Redondo Beach (1994) 28 Cal. App. 4th 1432, 1444, 34 Cal. Rptr. 2d 337*).

[*Optional*] **I. Use of Poisonous Gas Is Ultrahazardous Activity.** Use and release of a poisonous gas is an ultrahazardous activity (*see* *Luthringer v. Moore (1948) 31 Cal. 2d 489, 494-495, 498, 500, 190 P.2d 1* (hydrocyanic acid gas)).

[*Optional*] **J. Welding on Waste Oil Tank Is Ultrahazardous Activity.** Welding on a waste oil tank is an ultrahazardous activity (*Garcia v. Estate of Norton (1986) 183 Cal. App. 3d 413, 420-421, 228 Cal. Rptr. 108*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that strict liability should be imposed because plaintiff's injury was caused by an ultrahazardous activity carried on by defendant.

These points and authorities may be combined, if appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of strict liability. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion showing that defendant knew or should have known that injury was likely to result from the performance of the ultrahazardous activity in question. Additionally, counsel should present facts establishing that the activity in question meets the definition of an ultrahazardous activity because it poses a risk of serious harm despite the exercise of the utmost care and is not a matter of common usage.

[b] Related Pleading and Practice Chapters

For forms and discussion regarding strict liability for ultrahazardous activities, see California Forms of Pleading and Practice, Ch. 256, *Explosives* (Matthew Bender).

[c] Related Points and Authorities

For memoranda of points and authorities supporting and opposing demurrers,see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[d] Opposing Points and Authorities

If appropriate, the points and *authorities in §§ 234.21 -234.24* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Imposition of Strict Liability for Ultrahazardous Activity

Luthringer v. Moore *(1948) 31 Cal. 2d 489, 190 P.2d 1* , was an action for personal injuries from hydrocyanic acid gas poisoning caused by defendant when he released hydrocyanic acid gas while fumigating the basement of a connected commercial building where plaintiff worked. Judgment was granted for plaintiff on his cause of action for strict liability, and defendant appealed.

On appeal, one of defendant's contentions raised the question of whether the case was a proper one for imposing strict liability. Relying on the Restatement of Torts §§ 519-521 and 523, the Supreme Court set forth the rule that a person who carries on an ultrahazardous activity is liable for harm proximately resulting when the person knew or should have known that harm was likely to result, even though the utmost care was exercised to prevent harm (*31 Cal. 2d 489, 498, 500)* . The Court held that defendant's use of hydrocyanic acid gas in a commercial building with a large number of tenants constituted an ultrahazardous activity for which strict liability should be imposed (*31 Cal. 2d 489, 498, 500)* . The judgment was affirmed (*31 Cal. 2d 489, 502)* .

[b] Definition of Ultrahazardous Activity

The facts and procedural background of ***Luthringer v. Moore*** *(1948) 31 Cal. 2d 489, 190 P.2d 1* , are discussed in *§ 234.20[3][a]*. The Supreme Court was presented with the question of whether strict liability for an ultrahazardous activity should be imposed. The activity in question was the use and release of hydrocyanic acid gas during fumigation. Quoting from the Restatement of Torts §§ 519-521 and 523, the Court stated that an activity is ultrahazardous if it: (1) necessarily involves a risk of serious harm to the person, land, or chattels of others, which cannot be eliminated by the exercise of the utmost care; and (2) is not a matter of common usage (*31 Cal. 2d 489, 498)* . The Court held that the use and release of hydrocyanic acid gas in the basement of a commercial building with a large number of tenants was an ultrahazardous activity (*31 Cal. 2d 489, 500)* .

Smith v. Lockheed Propulsion Co. *(1967) 247 Cal. App. 2d 774, 56 Cal. Rptr. 128* , was an action for damage to real property caused by seismic vibrations activated by a static firing rocket motor test conducted by defendant on adjoining land. Plaintiffs' complaint was based on negligence and strict liability for an ultrahazardous activity. Defendant's motion for nonsuit was granted, and plaintiffs appealed.

In determining whether to impose strict liability, the court of appeal quoted the definition of an ultrahazardous activity found in the Restatement of Torts § 520. The court concluded that rocket motor testing was an ultrahazardous activity (*247 Cal. App. 2d 774, 785-786)* and therefore reversed the part of the judgment concerning strict liability (*247 Cal. App. 2d 774, 792)* .

Travelers Indem. Co. v. City of Redondo Beach *(1994) 28 Cal. App. 4th 1432, 34 Cal. Rptr. 2d 337* , involved a winter storm that forced ocean waves over a breakwater in a city harbor, resulting in substantial damage to a nearby inn. Plaintiff, the inn's insurer, paid the loss and filed suit against the city, claiming that the breakwater had not been constructed high enough to restrain the storm waves. Plaintiff subsequently learned that the breakwater had subsided due to oil drilling conducted beneath the harbor by defendants. The trial court granted plaintiff's motion to amend its complaint to add defendants and allege additional theories of recovery, including strict liability for ultrahazardous activity. Defendants demurred to plaintiff's amended pleadings on the grounds that oil drilling was not, as a matter of law, ultrahazardous. The trial court sustained the demurrer and dismissed the action on other grounds, and plaintiff

appealed.

The court of appeal reversed the order of dismissal of plaintiff's cause of action for strict liability for ultrahazardous activity. Refusing to rule as a matter of law that defendants' oil drilling was not, as a matter of law, ultrahazardous, the court noted that determining whether an activity is ultrahazardous depends on consideration of the following factors: the existence of a high degree of risk of harm, the likelihood that resulting harm will be great, the inability to eliminate the risk by the exercise of reasonable care, the extent to which the activity is not a matter of common usage, the inappropriateness of the activity to the place where it is carried on, and the extent to which the activity's value to the community is outweighed by its dangerous attributes (*28 Cal. App. 4th 1432, 1444)* .

[c] Definition of Common Usage

The facts and procedural background of ***Luthringer v. Moore*** *(1948) 31 Cal. 2d 489, 190 P.2d 1* , are discussed in *§ 234.20[3][a]*. The Supreme Court was presented with the question of whether strict liability for an ultrahazardous activity should be imposed. After setting forth the definition of an ultrahazardous activity, the Court, quoting from Restatement of Torts §§ 519-521 and 523, stated that an activity is a matter of common usage if it is customarily carried on by the great mass of mankind or by many people in the community (*31 Cal. 2d 489, 498)* .

[d] Determination of Strict Liability Is Question of Law for Court

The facts and procedural background of ***Luthringer v. Moore*** *(1948) 31 Cal.2d 489* , *190 P.2d 1* , are discussed in *§ 234.20[3][a]*. The Supreme Court was presented with the question of whether strict liability for an ultrahazardous activity should be imposed. In deciding that issue, the Court stated that it was well settled that the question of whether a case is a proper one for imposing strict liability is one of law for the court (*31 Cal. 2d 489, 496)* .

Balding v. D.B. Stutsman, Inc. *(1966) 246 Cal. App. 2d 559, 54 Cal. Rptr. 717* , was an action for personal injuries caused by a blasting operation carried on by defendant. Plaintiff's case rested on the theory of strict liability for an ultrahazardous activity. Judgment was entered for plaintiff, and defendant appealed.

On appeal, defendant conceded that blasting in a residential area requires the imposition of strict liability but argued that the question of whether the area was residential was one of fact for the jury. The court of appeal disagreed, holding that the determination of whether a case is a proper one for the imposition of strict liability is one of law for the court (*246 Cal. App. 2d 559, 564)* . All defendant's other contentions were denied, and the judgment was affirmed (*246 Cal. App. 2d 559, 565)* .

[e] Issue of Whether Activity Ultrahazardous Cannot Be Decided on Demurrer

The facts and procedural background of ***Travelers Indem. Co. v. City of Redondo Beach*** *(1994) 28 Cal. App. 4th 1432, 34 Cal. Rptr. 2d 337* , are discussed in *§ 234.20[3][b]*. The court of appeal reversed the order of dismissal of plaintiff's cause of action for strict liability for ultrahazardous activity, rejecting defendants' argument that their oil drilling was not, as a matter of law, ultrahazardous. The court noted that determining whether an activity is ultrahazardous depends on consideration of six factors, each of which must be given the weight that it merits, based on the facts in evidence. The essential question is whether the risk created is so unusual that imposition of strict liability is justified despite the activity's being carried on with all reasonable care, or, in other words, whether the activity's dangers and inappropriateness for its locality outweigh any usefulness to the community. Because of this interplay of factors, the court held that the issue of whether a particular activity is ultrahazardous cannot, by its very nature, be properly decided on demurrer (*28 Cal. App. 4th 1432, 1444)* .

[f] Blasting in Populated Areas Is Ultrahazardous Activity

Colton v. Onderdonk *(1886) 69 Cal. 155, 10 P. 395* , was one of the first cases to enunciate the doctrine of strict

liability for an ultrahazardous activity. The case involved an action for damage to real property caused by defendant blasting out rocks on his adjoining lot. Judgment was entered for plaintiff. Defendant's motion for a new trial was denied, and defendant appealed.

The Supreme Court ruled that defendant's use of large quantities of gunpowder, a violent and dangerous explosive, to blast out rocks on his lot that was contiguous to another lot in a large city, was an unreasonable, unusual, and unnatural use of his own property, for which no care or skill in so doing could excuse him from liability for the damages proximately resulting (*69 Cal. 155, 158-159)* . The Court rejected defendant's contention that he had a right to blast the rocks on his own lot provided that he used care and skill in the act (*69 Cal. 155, 159)* . The Court modified the amount of damages and affirmed the judgment in all other respects (*69 Cal. 155, 160)* .

Alonso v. Hills *(1950) 95 Cal. App. 2d 778, 214 P.2d 50* , was an action for damage to real property and personal injuries caused by defendants' continual blasting operations in a nearby quarry. Plaintiff also sought an injunction to stop the blasting. Judgment awarding damages and an injunction was granted for plaintiff against one defendant, who subsequently appealed.

On appeal, defendant contended that because plaintiff pleaded negligence, he was restricted to that theory. The court of appeal disagreed, finding that the negligence allegation could be considered merely surplusage because the complaint also stated a cause of action for strict liability based on an ultrahazardous activity (*95 Cal. App. 2d 778, 783-784)* . The court determined that blasting in populated surroundings, in the vicinity of dwelling places or places of business, is considered an ultrahazardous activity for which strict liability is imposed regardless of the degree of care exercised (*95 Cal. App. 2d 778, 783)* . The court found that plaintiff's allegations were sufficient to come within that definition (*95 Cal. App. 2d 778, 783-784)* . The judgment was affirmed (*95 Cal. App. 2d 778, 789)* .

[g] Rocket Motor Testing Is Ultrahazardous Activity

Smith v. Lockheed Propulsion Co. *(1967) 247 Cal. App. 2d 774, 56 Cal. Rptr. 128* , was an action for damage to real property caused by seismic vibrations activated by a static firing rocket motor test conducted by defendant on adjoining land. Plaintiffs' complaint was based on negligence and strict liability for ultrahazardous activity. The trial court granted defendant's motion for nonsuit, and plaintiffs appealed.

The court of appeal held that rocket motor testing constitutes an ultrahazardous activity (*247 Cal. App. 2d 774, 785-786)* . The court rejected defendant's contention that strict liability should not be imposed because the testing was conducted in a remote area. Although the test site was in a generally undeveloped area, the court noted that portions of defendant's property bordered plaintiffs' land and that defendant was fully cognizant of the risk of harm to plaintiffs' property (*247 Cal. App. 2d 774, 786-787)* .

[h] Drilling Oil Well Is Ultrahazardous Activity

Green v. General Petroleum Corp. *(1928) 205 Cal. 328, 270 P. 952* , was anaction for damage to real property caused when an oil well that defendant was drilling suffered a "blow out" due to the pressure of underground gas. Plaintiffs' adjoining property was damaged by a stream of oil, gas, mud, and rocks that poured into the air for more than 24 hours. Judgment was awarded to plaintiffs on their cause of action for trespass based on strict liability, and defendant appealed.

On appeal, defendant contended that it was absolved from all liability because the trial court expressly found that it was not guilty of negligence in performing the drilling operation. However, the Supreme Court held that defendant was strictly liable for the damage proximately resulting from the drilling of the oil well, including the damage caused by the accidental "blow out" (*205 Cal. 328, 332-334)* . The Court stated that a person who does an act under known conditions and with knowledge that injury may result should be required to compensate any other person who is injured

as a direct and proximate consequence of the act, however carefully the act is performed (*205 Cal. 328, 334)* . In reaching its decision, the Court relied upon the maxim, "One must so use [his or her] own rights as not to infringe upon the rights of another" [*see Civ. Code § 3514*] (*205 Cal. 328, 333-334)* . The Court denied defendant's other contentions and affirmed the judgment (*205 Cal. 328, 335, 338)* .

NOTE:
Although the Court did not use the language "ultrahazardous activity," the *Green* case has generally been interpreted as one involving the doctrine of strict liability for an ultrahazardous activity [*see Smith v. Lockheed Propulsion Co. (1967) 247 Cal. App. 2d 774, 784, 56 Cal. Rptr. 128*].

Travelers Indem. Co. v. City of Redondo Beach *(1994) 28 Cal. App. 4th 1432, 34 Cal. Rptr. 2d 337* , is discussed in *§§ 234.20[3][b]* and *234.20[3][e]*.

[i] Use of Poisonous Gas Is Ultrahazardous Activity

The facts and procedural background of ***Luthringer v. Moore*** *(1948) 31 Cal. 2d 489, 190 P.2d 1* , are discussed in *§ 234.20[3][a]*. The Supreme Court held that the use and release of hydrocyanic acid gas in the basement of a commercial building with a large number of tenants, as part of a fumigation operation, constituted an ultrahazardous activity (*31 Cal. 2d 489, 500)* .

[j] Welding on Waste Oil Tank Is Ultrahazardous Activity

Garcia v. Estate of Norton *(1986) 183 Cal. App. 3d 413, 228 Cal. Rptr. 108* , was an action brought against a decedent's estate for personal injuries resulting when the decedent put a welding torch to the tank of a waste oil tanker truck without ascertaining whether the tank had been emptied. Plaintiff, who worked for decedent, was standing on the tank at the time and was injured in the ensuing explosion. The decedent had assured plaintiff that the tank was clean but failed to inspect the inside visually and smell for gasoline vapors. The trial court ruled that the activity of welding with a blowtorch on a waste oil tank was ultrahazardous and judgment was awarded to plaintiff. Decedent's estate appealed.

The court of appeal affirmed, upholding the trial court's ruling that the activity of welding with a blowtorch on a waste oil tank was ultrahazardous (*183 Cal. App. 3d 413, 418)* . The court found that (1) the activity was incredibly dangerous to defendant and anyone else within a relatively large area, and (2) the activity was neither commonplace or customary (*183 Cal. App. 3d 413, 419-420)* . The court also held that, even if the doctrine of comparative negligence applies to cases involving ultrahazardous activities, there was no evidence to support a jury instruction on the plaintiff's comparative negligence or assumption of risk (*183 Cal. App. 3d 413, 422)* .

[4] Additional Authorities

[a] Imposition of Strict Liability for Ultrahazardous Activity

The facts and procedural background of *Garcia v. Estate of Norton (1986) 183 Cal. App. 3d 413, 228 Cal. Rptr. 108* , are discussed in *§ 234.20[3][j]*. The court rejected the contention that strict liability for ultrahazardous activities cannot be applied when the defendant is unaware of the abnormally dangerous condition or activity and has voluntary engaged in or permitted it. Whether or not the defendant has actual knowledge of the true extent of the danger involved, the court held, one who carries on an ultrahazardous activity is liable for injuries to a person whom the actor reasonably should recognize as likely to be harmed by a miscarriage of the activity, even though the utmost care is exercised to prevent the harm (*183 Cal. App. 3d 413, 420-421)* .

[b] Definition of Ultrahazardous Activity

Nola v. Orlando (1932) 119 Cal. App 518, 6 P.2d 984 , was an action for damages to fixtures on plaintiffs' land,

which were injured when water escaped from a cement irrigation flume on defendants' nearby property. Judgment was awarded to plaintiffs on the theory of strict liability, and defendants appealed.

On appeal, the court upheld the imposition of strict liability, stating that the escape of water was caused solely by reason of the manner of the construction and maintenance of the irrigation flume and the act of pumping water through it (*119 Cal. App 518, 519)* . The court indicated that liability was predicated on the fact that defendants brought the water upon their land by an artificial rather than a natural means (*119 Cal. App 518, 519-520)* . The judgment was affirmed (*119 Cal. App 518, 520)* .

NOTE:

However, in *Clark v. Di Prima (1966) 241 Cal. App. 2d 823* , which was decided after *Luthringer v. Moore (1948) 31 Cal. 2d 489, 190 P.2d 1* , the court of appeal, applying the doctrine of strict liability for an ultrahazardous activity set forth in *Luthringer*, held that the normal and customary irrigation of crops, by transporting water along a ditch or canal, does not constitute an ultrahazadous activity for which strict liability should be imposed. For other reasons, the judgment in that case was reversed *Clark v. Di Prima (1966) 241 Cal. App. 2d 823, 829]* .

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Volume 23 Chapters 230-239 TRUST DEEDS---to---WORKERS' COMPENSATION
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PART II. FORMS

23-234 California Points & Authorities § 234.21

§ 234.21 Opposing Contention That Strict Liability Should Be Imposed--Activity Carried On in Pursuance of Public Duty

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT SHOULD NOT BE HELD STRICTLY LIABLE FOR PLAINTIFF'S INJURY BECAUSE DEFENDANT'S ACTIVITY WAS CARRIED ON IN PURSUANCE OF A PUBLIC DUTY IMPOSED ON DEFENDANT AS A _____ [PUBLIC OFFICER *or* PUBLIC EMPLOYEE *or* COMMON CARRIER].

Activity Carried On in Pursuance of Public Duty. The doctrine of strict liability for an ultrahazardous activity does not apply if the activity is carried on in pursuance of a public duty imposed on the actor as a public officer or employee or as a common carrier (*Luthringer v. Moore (1948) 31 Cal. 2d 489, 499, 190 P.2d 1* (dictum)).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that strict liability should be imposed for an ultrahazardous activity when the activity was carried on in pursuance of a public duty imposed on defendant as a public officer or employee or as a common carrier.

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of strict liability. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion showing that the activity in question was done by defendant in pursuance of a public duty, and that defendant was acting as a public officer or employee or as a common carrier while

performing the duty in question.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 234.20*.

[3] Discussion of Authorities

[a] Activity Carried On in Pursuance of Public Duty

The facts and procedural background of ***Luthringer v. Moore*** *(1948) 31 Cal. 2d 489, 190 P.2d 1* , are discussed in *§ 234.20[3][a]*. The Supreme Court was presented with the question of whether strict liability for an ultrahazardous activity should be imposed. Quoting from the Restatement of Torts §§ 519-521 and 523, the Court stated, in dictum, that the rule of strict liability for an ultrahazardous activity does not apply if the activity is carried on in pursuance of a public duty imposed upon the actor as a public officer or employee or as a common carrier (*31 Cal. 2d 489, 499)* .

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23-234 California Points & Authorities § 234.22

§ 234.22 Opposing Contention That Strict Liability Should Be Imposed--Activity Not Proximate Cause of Injury

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT SHOULD NOT BE HELD STRICTLY LIABLE FOR PLAINTIFF'S INJURY BECAUSE DEFENDANT'S ACTIVITY WAS NOT THE PROXIMATE CAUSE OF THE INJURY.

Activity Not Proximate Cause. Liability, strict or otherwise, cannot be imposed against defendant if defendant's activity or conduct was not the proximate cause of plaintiff's injury (*Rozewski v. Simpson (1937) 9 Cal. 2d 515, 520, 71 P.2d 72* ; *see Sutliff v. Sweetwater Water Co. (1920) 182 Cal. 34, 37-39, 186 P. 766*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that strict liability should be imposed for an ultrahazardous activity when defendant's activity is not the proximate cause of plaintiff's injury.

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of strict liability. The points and authorities set forth in this formmay also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion showing that defendant's conduct or activity was not the proximate cause of plaintiff's injury.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 234.20*.

[3] Discussion of Authorities

[a] Activity Not Proximate Cause

Rozewski v. Simpson *(1937) 9 Cal. 2d 515, 71 P.2d 72* , was an action for water damages allegedly caused by defendants' irrigation water overflowing onto plaintiffs' property. Judgment was entered for defendants, and after the denial of their motion for a new trial, plaintiffs appealed.

On appeal, plaintiffs contended that defendants were strictly liable for damages resulting from the keeping of water on their land, apparently relying upon the old English case of Fletcher v. Rylands (1868) 3 H.L. 330 (applying maxim, later adapted into doctrine of strict liability for ultrahazardous activity, that one must so use one's own property as not to infringe upon rights of another) [*see Clark v. Di Prima (1966) 241 Cal. App. 2d 823, 828* (doctrine of strict liability is generally presumed to stem from *Fletcher*)]. The Supreme Court ruled that it did not have to decide whether defendants' liability was strict or predicated on negligence because it was clear that it was the acts of plaintiffs themselves that caused the flooding of water onto their own property (*9 Cal. 2d 515, 520)* . The evidence showed, the Court stated, that the proximate and immediate cause of the flooding was not the impounding of water upon defendants' land, but the escape of the water through a hole cut in defendants' levees by plaintiffs in order to allow plaintiffs to take water from defendants' land (*9 Cal. 2d 515, 520-521)* . For this and other reasons, the judgment was affirmed (*9 Cal. 2d 515, 521)* .

Sutliff v. Sweetwater Water Co. *(1920) 182 Cal. 34, 186 P. 766* , was an action for damages caused when defendant's reservoir broke during an extraordinary and unprecedented flood. Judgment was awarded to defendant, and plaintiff appealed.

On appeal, plaintiff contended that defendant should be held strictly liable under the principles of the old English case of Fletcher v. Rylands (1868) 3 H.L. 330). The Supreme Court held that the rule of *Fletcher* was not applicable (*182 Cal. 34, 36-39)* . The Court stated that the proximate and immediate cause of the flooding was not the existence of defendant's reservoir or the manner of its use, but the overflowing of the reservoir by an agency beyond defendant's or anybody's control, that is, nature (*182 Cal. 34, 37)* . For this and other reasons, the judgment was affirmed (*182 Cal. 34, 40)* .

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23-234 California Points & Authorities § 234.23

§ 234.23 Opposing Contention That Activity Is Ultrahazardous--Risk of Harm Can Be Eliminated by Exercise of Care

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT SHOULD NOT BE HELD STRICTLY LIABLE FOR PLAINTIFF'S INJURY BECAUSE DEFENDANT'S ACTIVITY WAS NOT ULTRAHAZARDOUS BECAUSE THE RISK OF HARM CREATED BY THE ACTIVITY WAS A RISK THAT COULD BE ELIMINATED BY THE EXERCISE OF CARE.

A. Risk of Harm Can Be Eliminated by Exercise of Care. In order for an activity to be ultrahazardous, it must necessarily involve a risk of serious harm to the person, land, or chattels of others, which cannot be eliminated by the exercise of the utmost care (*see Luthringer v. Moore (1948) 31 Cal. 2d 489, 498, 190 P.2d 1*). Thus, an activity that ordinarily can be safely carried on if reasonable care is used is not an ultrahazardous activity (*Beck v. Bel Air Props., Inc. (1955) 134 Cal. App. 2d 834, 841-842, 286 P.2d 503*).

[*Optional*] **B. Blasting in Remote Areas Is Not Ultrahazardous Activity.** Blasting in a remote area is not an ultrahazardous activity (*see Houghton v. Loma Prieta Lumber Co. (1907) 152 Cal. 500, 504-506, 93 P. 82* ; *Smith v. Lockheed Propulsion Co. (1967) 247 Cal. App. 2d 774, 786, 56 Cal. Rptr. 128*).

[*Optional*] **C. Operation of Airplane Is Not Ultrahazardous Activity.** The operation of an airplane is not an ultrahazardous activity (*Boyd v. White (1954) 128 Cal. App. 2d 641, 655, 276 P.2d 92*).

[*Optional*] **D. Earth-Movement Operation Is Not Ultrahazardous Activity.** Earth movement operation conducted by bulldozing and grading is not an ultrahazardous activity (*see Beck v. Bel Air Props., Inc. (1955) 134 Cal. App. 2d 834, 841-842, 286 P.2d 503*).

[*Optional*] **E. Subterranean Tunneling Is Not Ultrahazardous Activity.** Subterranean tunneling is not an ultrahazardous activity (*see Marin Mun. Water Dist. v. Northwestern Pac. R.R. Co. (1967) 253 Cal. App. 2d 83, 98,*

61 Cal. Rptr. 520).

[*Optional*] **F. Landlord's Furnishing of Water to Tenant Is Not Ultrahazardous Activity.** A landlord's conduct in furnishing water to its tenant is not an ultrahazardous activity (*see Shanander v. Western Loan & Bldg. Co. (1951) 103 Cal. App. 2d 507, 510-512, 229 P.2d 864*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that strict liability should be imposed for an ultrahazardous activity when the activity complained of is not ultrahazardous because the risk of harm created by it is a risk that can be eliminated by the exercise of care.

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of strict liability. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion showing that the activity in question was one that ordinarily could be safely carried on if reasonable care was used.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 234.20*.

[3] Discussion of Authorities

[a] Risk of Harm Can Be Eliminated by Exercise of Care

The facts and procedural background of ***Luthringer v. Moore*** *(1948) 31 Cal. 2d 489, 190 P.2d 1* , are discussed in *§ 234.20[3][a]*. The Supreme Court set forth the doctrine of strict liability for an ultrahazardous activity. Quoting from the Restatement of Torts §§ 519-521 and 523, the Court defined an ultrahazardous activity as one that: (1) necessarily involves a risk of serious harm to the person, land, or chattels of others, which cannot be eliminated by the exercise of the utmost care; and (2) is not a matter of common usage (*31 Cal. 2d 489, 498)* .

Beck v. Bel Air Props., Inc. *(1955) 134 Cal. App. 2d 834, 286 P.2d 503* , was an action for personal injuries and property damage incurred when streams of mud, rock, and debris inundated plaintiffs' property during heavy rainfalls. Plaintiffs alleged that the damage was caused by defendants' bulldozing and grading of the lots above plaintiffs' property. Judgment was entered for plaintiffs, and five of the seven defendants appealed.

On appeal, one of defendants' contentions was that the trial court erred in instructing the jury on strict liability for an ultrahazardous activity. Relying on the definition of an ultrahazardous activity in the Restatement of Torts § 520, definition of an ultrahazardous activity, the court of appeal found that defendants' earth-movement operation, incident to subdividing and grading hills and slopes into building sites, was not an ultrahazardous activity (*134 Cal. App. 2d 834, 841-842)* . The court stated that if the activity was one that ordinarily could be safely carried on, if reasonable care was used, then it was not ultrahazardous (*134 Cal. App. 2d 834, 842)* . The court found that the earth-movement operation could be done in such a manner as to pose no risk of harm (*134 Cal. App. 2d 834, 842)* . Accordingly, the judgment was reversed (*134 Cal. App. 2d 834, 843)* .

[b] Blasting in Remote Areas Is Not Ultrahazardous Activity

Houghton v. Loma Prieta Lumber Co. *(1907) 152 Cal. 500, 93 P. 82* , was a negligence action for wrongful death caused by a blasting operation conducted by a contractor whom defendant had engaged. The blasting was part of a road-building project in a remote mountainous area, and the decedent was traveling on a nearby unused foot trail. Judgment was awarded to plaintiffs, and defendant appealed.

On appeal, defendant contended that the contractor was an independent contractor for whose negligence defendant was not liable. However, the Supreme Court found it unnecessary to decide that issue because it determined that certain jury instructions were erroneous in that they allowed the jury to find defendant liable regardless of the status of the contractor (*152 Cal. 500, 502)* . The jury instructions stated that defendant was liable if the jury found that the work being done by the contractor was intrinsically dangerous or would probably result in injury, regardless of any negligence by the contractor. The Court found that the facts did not warrant the instruction, stating that the weight of authority seems to be that blasting, without reference to the particular locality in which it is carried on, is not so intrinsically dangerous as to be ipso facto a nuisance so that the blaster is liable for injury whether or not he or she is guilty of any negligence (*152 Cal. 500, 505)* . Accordingly, the judgment was reversed (*152 Cal. 500, 505)* . Although the Court decided the case on a nuisance theory, it has generally been cited for the rule that strict liability may not be imposed for blasting in remote areas [*see Smith v. Lockheed Propulsion Co. (1967) 247 Cal. App. 2d 774, 786, 56 Cal. Rptr. 128*].

The facts and procedural background of ***Smith v. Lockheed Propulsion Co.*** *(1967) 247 Cal. App. 2d 774, 56 Cal. Rptr. 128* , are discussed in *§ 234.20[3][b]*. On appeal, defendant contended that strict liability should not be imposed because the rocket motor testing in question was conducted in a remote area. In discussing the issue, the court noted that blasting in a developed area calls for strict liability, while blasting in an isolated area may not, citing *Houghton v. Loma Prieta Lumber Co.* However, the court stated, the case was distinguishable from *Houghton*, because although the test site was in a generally undeveloped area, portions of defendant's property bordered plaintiffs' land and defendant was fully cognizant of the risk of harm to plaintiffs' property (*247 Cal. App. 2d 774, 786-787)* . Therefore, the court of appeal held that the rocket motor testinginvolved in this case constituted an ultrahazardous activity (*247 Cal. App. 2d 774, 785-786)* .

[c] Operation of Airplane Is Not Ultrahazardous Activity

Boyd v. White *(1954) 128 Cal. App. 2d 641, 276 P.2d 92* , was an action for personal injuries and property damage caused when an airplane owned by defendant crashed into plaintiff's home. One of plaintiff's causes of action was for trespass based on strict liability for an ultrahazardous activity. A judgment of nonsuit was entered, and plaintiff appealed.

The court of appeal reviewed the general law, which at that time held that aviation was an ultrahazardous activity, noting that the modern trend was away from that designation. The court ruled that the operation of an airplane in the year 1954 was not such a dangerous activity that it could be placed in the category of ultrahazardous activities (*128 Cal. App. 2d 641, 655)* . For this and other reasons, the judgment was affirmed.

[d] Earth-Movement Operation Is Not Ultrahazardous Activity

The facts and procedural background of ***Beck v. Bel Air Props., Inc.*** *(1955) 134 Cal. App. 2d 834, 286 P.2d 503* , are discussed in *§ 234.23[3][a]*. The court of appeal determined that an earth-movement operation conducted by bulldozing and grading incident to subdividing hills and slopes into building sites was not an ultrahazardous activity. The court found that the earth-movement operation could be done in such a manner as to pose no risk of harm (*134 Cal. App. 2d 834, 842)* .

[e] Subterranean Tunneling Is Not Ultrahazardous Activity

Marin Mun. Water Dist. v. Northwestern Pac. R.R. Co. *(1967) 253 Cal. App. 2d 83, 61 Cal. Rptr. 520* , was an action for damage to plaintiff's water pipes caused by the collapse of defendant's underground railroad tunnel located below the pipes. A judgment of dismissal was entered on the ground that plaintiff's complaint did not state any causes of action, and plaintiff appealed.

Plaintiff's fourth cause of action was based on strict liability for an ultrahazardous activity. The court of appeal ruled that plaintiff's bare allegation, that construction and maintenance of the tunnel was inherently dangerous, was not sufficient to bring the case within the rule of strict liability for an ultrahazardous activity. In addition, the court stated that it could not hold as a matter of law that subterranean tunneling was so hazardous an activity as to warrant application of the rule. Thus, the court ruled, the fourth cause of action was correctly dismissed. Since the other counts were also properly dismissed, the judgment was affirmed (*253 Cal. App. 2d 83, 98)* .

[f] Landlord's Furnishing of Water to Tenant Is Not Ultrahazardous Activity

Shanander v. Western Loan & Bldg. Co. *(1951) 103 Cal. App. 2d 507, 229 P.2d 864* , was an action by a tenant against a landlord for property damage suffered when the water pipes broke in the apartment above plaintiff's broke. Judgment was entered for plaintiff, and defendant appealed.

The court of appeal was asked to decide whether the instructions relating to strict liability were proper. Relying on the definition of an ultrahazardous activity in the Restatement of Torts § 520, definition of an ultrahazardous activity, the court found that there was nothing in defendant's conduct of furnishing water to its tenants that necessarily involved a risk of injury to plaintiff's property (*103 Cal. App. 2d 507, 510-511)* . Thus, the judgment was reversed (*103 Cal. App. 2d 507, 512)* .

[4] Additional Authorities

[a] Risk of Harm Can Be Eliminated by Exercise of Care

Ramsey v. Marutamaya Ogatsu Fireworks Co. (1977) 72 Cal. App. 3d 516, 140 Cal. Rptr. 247 , was a negligence action for personal injuries suffered as a result of a premature explosion of fireworks at a public display. Plaintiffs were awarded judgment, in addition to awards on several cross complaints, and defendants appealed.

In ruling on the case, the court of appeal stated, in dictum, that a fireworks display is not an ultrahazardous activity (*72 Cal. App. 3d 516, 528 n.2*). Relying on the definition of an ultrahazardous activity in the Restatement of Torts § 520, definition of an ultrahazardous activity, the court stated in further dictum that the risk of serious harm from the discharge of fireworks, such as the aerial bombs in this case, was one that could have been eliminated had the fireworks been manufactured in a nonnegligent manner (*72 Cal. App. 3d 516, 528 n.2*).

NOTE:

Several other cases have held, without stating the reasons for the decision, that the activity in question was not an ultrahazardous activity [*Reida v. Lund (1971) 18 Cal. App. 3d 698, 704, 96 Cal. Rptr. 102* (use of firearm); *McKenzie v. Pacific Gas & Elec. Co. (1962) 200 Cal. App. 2d 731, 736, 19 Cal. Rptr. 628* (maintenance of electric power lines)].

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23-234 California Points & Authorities § 234.24

§ 234.24 Opposing Contention That Activity Is Ultrahazardous--Matter of Common Usage

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

DEFENDANT SHOULD NOT BE HELD STRICTLY LIABLE FOR PLAINTIFF'S INJURY BECAUSE DEFENDANT'S ACTIVITY WAS NOT AN ULTRAHAZARDOUS ACTIVITY BECAUSE IT WAS A MATTER OF COMMON USAGE.

A. Matter of Common Usage. An activity is not ultrahazardous if it is a matter of common usage (*Gallin v. Poulou (1956) 140 Cal. App. 2d 638, 645, 295 P.2d 958*).

B. Definition of Commmon Usage. An activity is a matter of common usage if it is customarily carried on by the great mass of mankind or by many people in the community (*Luthringer v. Moore (1948) 31 Cal. 2d 489, 498, 190 P.2d 1*).

[*Optional*] **C. Earth-Moving Operation Is Not Ultrahazardous Activity.** Earth-moving operation conducted by bulldozing and grading is not an ultrahazardous activity (*see* *Beck v. Bel Air Props., Inc. (1955) 134 Cal. App. 2d 834, 841-842, 286 P.2d 503*).

[*Optional*] **D. Landlord's Furnishing of Water to Tenant Is Not Ultrahazardous Activity.** A landlord's conduct in furnishing water to its tenant is not an ultrahazardous activity (*see* *Shanander v. Western Loan & Bldg. Co. (1951) 103 Cal. App. 2d 507, 510-512, 229 P.2d 864*).

[*Optional*] **E. Construction Work Is Not Ultrahazardous Activity.** Construction work is not an ultrahazardous activity (*see* *Gallin v. Poulou (1956) 140 Cal. App. 2d 638, 645, 295 P.2d 958* (construction of garages in apartment building)).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that strict liability should be imposed for an ultrahazardous activity when the activity complained of is not ultrahazardous because it is a matter of common usage.

These points and authorities may be combined, when appropriate, with points and authorities relating to the specific procedural context in which counsel wishes to raise the issue of strict liability. The points and authorities set forth in this form may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include a discussion showing that the activity in question was a matter of common usage.

In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and *authorities in § 234.20*.

[3] Discussion of Authorities

[a] Matter of Common Usage

Gallin v. Poulou *(1956) 140 Cal. App. 2d 638, 295 P.2d 958* , was a trespass action for personal injuries suffered when a piece of plaster fell from plaintiff's ceiling and struck her. Plaintiff alleged that the plaster fell as a result of vibrations caused when a contractor engaged by defendant-landlord started construction of garages in the basement of the apartment building where plaintiff was a tenant. Defendant's motion for nonsuit was granted, and plaintiff appealed.

On appeal, plaintiff asserted that defendant was strictly liable for the trespass caused by the contractor's work regardless of negligence. The court of appeal stated the general rule that there is no liability for trespass unless it was intentional, the result of recklessness or negligence, or the result of engaging in an ultrahazardous activity. Quoting from the Restatement of Torts § 520, the court defined an ultrahazardous activity as one that (1) necessarily involves a risk of serious harm, and (2) is not a matter of common usage. The court held that the construction of garages in an apartment building was a matter of common usage (*140 Cal. App. 2d 638, 645)* . Since the court also found that there was no negligence and no intentional trespass, it affirmed the judgment (*140 Cal. App. 2d 638, 646)* .

[b] Definition of Common Usage

The facts and procedural background of ***Luthringer v. Moore*** *(1948) 31 Cal. 2d 489, 190 P.2d 1* , are discussed in *§ 234.20[3][a]*. The Supreme Court set forth the definition of an ultrahazardous activity, relying on the Restatement of Torts §§ 519-521, and 523 (*31 Cal. 2d 489, 498-499)* . Quoting further from the Restatement, the Court stated that an activity is a matter of common usage if it is customarily carried on by the great mass of mankind or by many people in the community (*31 Cal. 2d 489, 498)* .

[c] Earth-Moving Operation Is Not Ultrahazardous Activity

The facts and procedural background of ***Beck v. Bel Air Props., Inc.*** *(1955) 134 Cal. App. 2d 834, 286 P.2d 503* , are discussed in *§ 234.23[3][a]*. The court of appeal determined that an earth-movement operation conducted by bulldozing and grading incident to subdividing hills and slopes into building sites was not an ultrahazardous activity (*134 Cal. App. 2d 834, 842)* . Besides finding that the riskof harm imposed by the operation could be eliminated by the exercise of reasonable care, the court also found that defendant's activities were a matter of common usage (*134 Cal. App. 2d 834, 842)* .

[d] Landlord's Furnishing of Water to Tenant Is Not Ultrahazardous Activity

The facts and procedural background of ***Shanander v. Western Loan & Bldg. Co.*** *(1951) 103 Cal. App. 2d 507, 229 P.2d 864* , are discussed in *§ 234.23[3][f]*. The court of appeal held that defendant-landlord's conduct of furnishing water to its tenants was not an ultrahazardous activity (*103 Cal. App. 2d 507, 510-511)* . In addition to ruling that no risk of harm was involved, the court also ruled that defendant's activity was a matter of common usage (*103 Cal. App. 2d 507, 511)* .

[e] Construction Work Is Not Ultrahazardous Activity

The facts and procedural background of ***Gallin v. Poulou*** *(1956) 140 Cal. App. 2d 638, 295 P.2d 958* , are discussed in *§ 234.24[3][a]*. The court of appeal held that under the definition of an ultrahazardous activity in the Restatement of Torts § 520, the construction of garages in an apartment building was a matter of common usage and thus not an ultrahazardous activity (*140 Cal. App. 2d 638, 645)* .

[4] Additional Authorities

[a] Matter of Common Usage

The facts and procedural background of *Ramsey v. Marutamaya Ogatsu Fireworks Co. (1977) 72 Cal. App. 3d 516, 140 Cal. Rptr. 247* , are discussed in *§ 234.23[4][a]*. The court of appeal stated, in dictum, that a fireworks display is not an ultrahazardous activity (*72 Cal. App. 3d 516, 528 n.2*). Besides indicating that fireworks did not meet the requirement of a risk of serious harm, the court also noted that fireworks displays are a matter of common usage on appropriate occasions such as the Fourth of July (*72 Cal. App. 3d 516, 528 n.2*).

Clark v. Di Prima (1966) 241 Cal. App. 2d 823, 829, 51 Cal. Rptr. 49 , was an action for water damage to plaintiff's almond trees caused when defendant's irrigation ditch on adjoining land broke. Judgment was awarded to defendant, and plaintiff appealed.

On appeal, plaintiff contended that the trial court erred in refusing to instruct on strict liability. The court of appeal dismissed plaintiff's contention, holding that the normal and customary irrigation of crops, that is, by transporting water along a ditch or canal, does not constitute an ultrahazadous activity for which strict liability should be imposed (*241 Cal. App. 2d 823, 829)* . Applying the doctrine of strict liability for an ultrahazardous activity set forth in *Luthringer v. Moore (1948) 31 Cal. 2d 489, 498-499, 190 P.2d 1* , the court found that normal irrigation activities are a matter of ordinary and customary practice (*241 Cal. App. 2d 823, 828-829)* . For other reasons, the judgment was reversed (*241 Cal. App. 2d 823, 829)* .

NOTE:

By contrast, in *Nola v. Orlando (1932) 119 Cal. App 518, 519, 6 P.2d 984* , the court of appeal imposed strict liability for damage caused by water escaping from a cement flume used by defendants for irrigation purposes. The court indicated that liability was predicated on the fact that defendants brought the water upon their land by an artificial rather than a natural means. In addition, the court of appeal in *Clark v. Di Prima (1966) 241 Cal. App. 2d 823, 829, 51 Cal. Rptr. 49* expressly left open the question of whether irrigation by impounding water, that is, by means of a dam or a reservoir, is an ultrahazardous activity. However, in *Sutliff v. Sweetwater Water Co. (1920) 182 Cal. 34, 38-39, 186 P. 766* , the Supreme Court held that strict liability will not be imposed for damages caused when a reservoir or ditch is broken by a natural flood. The Court appeared to decide the case on the fact that the escape of water was caused by an act beyond defendant's control..

Several other cases have held, without stating the reasons for the decision, that the activity in question was not an ultrahazardous activity [*Reida v. Lund (1971) 18 Cal. App. 3d 698, 704, 96 Cal. Rptr. 102* (use of firearm); and *McKenzie v. Pacific Gas & Elec. Co. (1962) 200 Cal. App. 2d 731, 736, 19 Cal.*

Rptr. *628* (maintenance of electric power lines)].

California Points & Authorities

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CHAPTER 235 UNFAIR COMPETITION

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§§ 235.08-235.19 [Reserved]

§ 235.20 Supporting Contention That Complaint States Cause of Action for Locality Discrimination [Bus. & Prof. Code §§ 17031, 17040]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Chapters

[c] Related Points and Authorities Chapters

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Exception Need Not Be Negatived in Initial Pleading

§ 235.21 Opposing Contention That Complaint States Cause of Action for Locality Discrimination [Bus. & Prof. Code §§ 17031, 17040]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Seller Must Discriminate Between Sales in Two or More of Seller's Own Business Locations

[b] Prohibition Against Locality Discrimination Protects Only First-Line Competition

[c] Intent to Destroy Competition With Person Creating Locality Discrimination

§ 235.22 Supporting Contention That Complaint States Cause of Action for Sales Below Cost [Bus. & Prof. Code § 17043]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Schemes Prohibited

[b] Allegation Based on Information and Belief Regarding Costs Sufficient

§ 235.23 Supporting Contention That Fully Allocated Cost Method Establishes Sales Below Cost [Bus. & Prof. Code § 17043]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Bus. & Prof. Code § 17043 Supports Use of Fully Allocated Cost Method

[b] Fully Allocated Cost Method Described

[c] Fully Allocated Cost Method Is Not Arbitrary or Unreasonable

[d] Fully Allocated Cost Method Is Not Preempted by Federal Law

[4] Additional Authorities

[a] Fully Allocated Cost Method Described

§ 235.24 Opposing Contention That Complaint States Cause of Action for Sales Below Cost [Bus. & Prof. Code § 17043]--Service Furnished by Publicly Owned Public Utility [Bus. & Prof. Code § 17024(2)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Failure to Allege Activity Outside Exemption

§ 235.25 Opposing Contention That Complaint States Cause of Action for Sales Below Cost [Bus. & Prof. Code § 17043]--Failure to Allege Purpose Was to Injure Competitors or Destroy Competition

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Allegation of Purpose Required

[4] Additional Authorities

[a] Allegation of Purpose Required

§ 235.26 Opposing Contention That Complaint States Cause of Action for Sales Below Cost [Bus. & Prof. Code § 17043] and Use of Loss Leaders [Bus. & Prof. Code § 17044]--Failure to Allege Facts Showing Sale Below Cost

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Sale Below Cost Required

§ 235.27 Supporting Contention That Complaint States Cause of Action for Use of Loss Leader [Bus. & Prof. Code § 17044]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Use of Loss Leader May Include Sale of Service or Output of Trade

[b] Expansive Definition of Sale

§ 235.28 Opposing Contention That Complaint States Cause of Action for Use of Loss Leader [Bus. & Prof. Code § 17044]--Failure to Allege Purpose Was to Injure Competitors or Destroy Competition

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Wrongful Purpose Required

§ 235.29 Supporting Contention That Complaint States Cause of Action for Secret Payment or Allowance of Rebate, Refund, Commission, or Unearned Discount [Bus. & Prof. Code § 17045]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Protection Not Restricted to Competitors of Person Allowing an Unearned Discount

[b] Only Special Services or Privileges Not Extended to All Purchasers Require Proof That Purchase Was on Like Terms and Conditions

[4] Additional Authorities

[a] Protection Not Restricted to Competitors of Person Allowing an Unearned Discount

§ 235.30 Supporting Contention That Requisite Intent Exists for Violation of Unfair Practices Act--Presumptive Evidence of Intent [Bus. & Prof. Code § 17071]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points and Authorities

§ 235.31 Opposing Contention That Requisite Intent Exists for Violation of Unfair Practices Act--No Presumption of Intent [Bus. & Prof. Code § 17071] Absent Proof of Injurious Effect of Conduct

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] No Presumptive Evidence of Intent Absent Proof of Injurious Effect

§ 235.32 Supporting Contention That Injunctive Relief Is Available to Enjoin Violation of Unfair Practices Act [Bus. & Prof. Code §§ 17070, 17078]--Unclean Hands Doctrine Inapplicable

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Unclean Hands Doctrine Inapplicable

§ 235.33 Supporting Contention That Injunctive Relief Is Available to Enjoin Violation of Unfair Practices Act [Bus. & Prof. Code §§ 17070, 17078]--Preliminary Injunction Is Available to Enjoin Sale or Use of Loss Leader [Bus. & Prof. Code §§ 17030, 17044]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Injunction Against Loss Leader

§ 235.34 Supporting Contention That Treble Damages May Be Recovered for Violation of Unfair Practices Act [Bus. & Prof. Code § 17082]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] No Proof of Malice or Other Qualifying Condition Required

[b] Motion for New Trial Not Condition Precedent to Appeal

§ 235.35 Opposing Contention That Plaintiff May Elect Punitive Damages [Civ. Code § 3294] or Treble Damages for Violation of Unfair Practices Act [Bus. & Prof. Code § 17082]--Treble Damages as Mandatory When No Other Remedy Was Pursued

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] No Election When Only One Cause of Action Was Pursued

§§ 235.36-235.49 [Reserved]

§ 235.50 Supporting Contention That Cause of Action Exists for Statutory Unfair Competition [Bus. & Prof. Code §§ 17200, 17203]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Private Action for Relief From Statutory Unfair Competition Authorized

[b] Statutory Unfair Competition Is Not Limited to Anticompetitive Business Practices

[c] Determination of Unfair Business Practice Constituting Statutory Unfair Competition

[d] Unlawful Business Practice Constitutes Statutory Unfair Competition

[e] Determination of Fraudulent or Deceptive Business Practice Constituting Statutory Unfair Competition

[f] Buyer May Be Liable for Unfair Competition

[g] Personal Liability of Controlling Shareholder and Responsible Officer

[h] Unfair Insurance Practices Act Does Not Supersede or Displace Statutory Unfair Competition Action

[i] Insurance Code Sections 12414.26 and 12414.29 Do Not Supersede or Displace Statutory Unfair Competition Action Brought Against Title Insurer

[j] Restitution is Available Independent of Injunction

[k] Nonresident Business May Be Liable for Unfair Competition

[l] Conduct Not Constituting Violation of Unfair Business Practices Act May Nonetheless Be Subject to Action Under Unfair Competition Law

[m] Reliance on Specific Statements in Advertising Claim Not Required to Show Fraudulent Conduct

[4] Additional Authorities

[a] Statutory Unfair Competition Is Not Limited to Anticompetitive Business Practices

[b] Determination of Unfair Business Practice Constituting Statutory Unfair Competition

[c] Unlawful Business Practice Constitutes Statutory Unfair Competition

[d] Determination of Fraudulent or Deceptive Business Practice Constituting Statutory Unfair Competition

[e] Personal Liability of Controlling Shareholder and Responsible Officer

[f] Unfair Insurance Practices Act Does Not Supersede or Displace Statutory Unfair Competition Action

§ 235.51 Supporting Contention That Cause of Action Exists for Statutory Unfair Competition [Bus. & Prof. Code §§ 17200, 17203]--Unlawful Business Practice

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Unlawful Business Practice May Be Based on Violation of Virtually Any State, Local, or Federal Law

[b] Ongoing Wrongful Conduct

[c] Intent Unnecessary

[d] Forest Practice Act Violations

[e] Conditional Use Permit Violations

[f] Violations of Temporary Restraining Order

[g] Action Based on Transacting Insurance Without License Permitted

[h] Action Based on Violation of Fair Employment and Housing Act

[i] Action Based on Federal Violations Not Preempted

§ 235.52 Supporting Contention That Preliminary Injunction Is Proper to Enjoin Statutory Unfair Competition [Bus. & Prof. Code §§ 17200, 17203]--Misleading Advertising

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[3] Discussion of Authorities

[a] Misleading Use of Another Person's Advertising

§ 235.53 Supporting Contention That Restitution and Disgorgement of Profits Are Authorized Remedies for Unfair Competition [Bus. & Prof. Code § 17203]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Restitution and Disgorgement of Profits as Appropriate Remedies

[b] Business and Professions Cod Section 17203 Is Not Unconstitutionally Vague

[c] Back Wages May Be Recovered as Restitution

[d] Retail Consumer May Recover Restitution From Manufacturer

[e] Restitution May Be Based on Money Paid to Defendant's Agent

§ 235.54 Supporting Contention That Statutory Action for Unfair Competition May Be Prosecuted as Class Action and Seek Disgorgement of Profits Into Fluid Recovery Fund [Bus. & Prof. Code § 17200]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Statutory Unfair Competition Claim May Be Brought as Class Action

[b] Only Named Class Representatives Must Show Standing

[c] Class Certification Supports Disgorgement Into Fluid Recovery Fund as Remedy

§ 235.55 Supporting Contention That Action for Injunction [Bus. & Prof. Code § 17203] Is Not Barred by Federal Preemption--Unfair Marketing Activities by Health Maintenance Organization Soliciting Medicare-Eligible Individuals

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Federal Regulation of Marketing Activities by Health Maintenance Organizations as Not Barring Injunctive Relief Under State Law

§ 235.56 Supporting Contention That Action for Statutory Unfair Competition Is Not Barred by Res Judicata--Private Plaintiff May Bring Action Subsequent to Action Brought by Public Prosecutor

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Res Judicata Does Not Preclude Action

§ 235.56A Supporting Contention That Action for Statutory Unfair Competition is Not Barred by Litigation Privilege--Plaintiff Was Not Party to Underlying Litigation

[1] FORM

[2] Comments

[a] Use of Form

[b] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Litigation Privilege Not Defense if Plaintiff Was Not Party in Underlying Litigation

§ 235.57 Opposing Contention That Private Plaintiff May Recover Money Damages [Bus. & Prof. Code § 17203]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Recovery of Money Damages by Private Plaintiff Is Not Authorized

[b] Restitution Is Measured by Defendant's Gain

[4] Additional Authorities

[a] Recovery of Money Damages by Private Plaintiff Is Not Authorized

§ 235.58 Opposing Contention That Private Plaintiff May Maintain Action For Unfair Competition [Bus. & Prof. Code § 17200]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Liability Release Form Not Unlawful

[b] Liquidated Damages Clause Not Unlawful

[c] Unwitting Distribution of Contaminated Pet Food Not Act of Unfair Competition

[d] Conduct Specifically Lawful Under Other Statute May Not Be Basis for Action Under Unfair Competition Law

[4] Additional Authorities

[a] Conduct Specifically Lawful Under Other Statute May Not Be Basis for Action Under Unfair Competition Law

§ 235.59 Opposing Contention That Plaintiff May Bring Action for Statutory Unfair Competition [Bus. & Prof. Code § 17200]--Insurance Code Bars Action Against Insurance Company Based on Ratemaking Decisions

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Unfair Business Practices Claim for Disgorgement of Allegedly Excessive Insurance Premiums Barred

§ 235.59A Opposing Contention That Plaintiff May Bring Action for Statutory Unfair Competition [Bus. & Prof. Code § 17200]--Failure to Bring Claim Alleging Violation of Talent Agencies Act With Labor Commissioner Bars Unfair Competition Claim [Lab. Code § 1700.44]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Failure to File Timely Claim WIth Labor Commissioner Bars Action Under Unfair Competition Statute Based on Violation of Talent Agencies Act

§ 235.60 Opposing Contention That Disgorgement Into Fluid Recovery Fund Is Authorized Remedy in Non-Class-Action Representative Action for Statutory Unfair Competition [Bus. & Prof. Code § 17203]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities Chapters

[3] Discussion of Authorities

[a] Disgorgement Into Fluid Recovery Fund Is Not Authorized Remedy in Representative Action

§ 235.61 Opposing Contention That Plaintiff May Recover Disgorgement of Profits That Is Not Restitutionary [Bus. & Prof. Code § 17203]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Points and Authorities

[3] Discussion of Authorities

[a] Disgorgement of Profits Must Be Restitutionary

[b] Nonrestitutionary Disgorgement Prohibited in Class Action Suit

[c] Unpaid Wages Not Recoverable as Restitution From Employer's Owners, Officers, or Managers

[4] Additional Authorities

[a] Disgorgement of Profits Must Be Restitutionary

§ 235.62 Opposing Contention That Nonaggrieved Plaintiff May Bring Action for Statutory Unfair Competition [Bus. & Prof. Code § 17200]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Private Plaintiff Must Suffer Actual Injury to Have Standing to Sue

[b] Proposition 64 Applicable to Pending Actions

[c] Standing Not Conferred By Incurring Litigation-Related Expenses

[d] Eligibility for Restitution Required to Have Standing to Sue

[e] Standing to Sue Not Assignable

[f] Associational Standing Doctrine Inapplicable to Unfair Competition Actions

[4] Additional Authorities

[a] Private Plaintiff Must Have Actual Injury to Have Standing to Sue

§ 235.62A Opposing Contention That Representative Action May Be Brought Under Unfair Competition Statute Without Meeting Requirements for Class Action [Bus. & Prof. Code 17203]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Representative Action Must be Brought as Class Action

§ 235.63 Opposing Contention That Plaintiff May Bring Action for Statutory Unfair Competition [Bus. & Prof.

Code § 17200]--Insufficient Evidence of Causal Connection Between Defendant's Conduct and Harm

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Causal Connection Required

[b] Plaintiff Alleging Fraud Must Show Actual Reliance

[c] Showing of Reliance Required in Action for Unlawful Business Practices Based on Misrepresentations

[4] Additional Authorities

[a] Plaintiff Alleging Fraud Must Show Actual Reliance

§ 235.64 Opposing Contention That Litigant May Maintain Action for Statutory Unfair Competition [Bus. & Prof. Code § 17200]--Conduct Within Scope of Litigation Privilege [Civ. Code § 47(b)] Not Actionable

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Litigation Privilege May be Asserted as Defense in Unfair Competition Action

[b] Attorney Solicitation Falling Within Litigation Privilege Not Enjoinable

§ 235.65 Opposing Contention That Non-Resident Plaintiff May Bring Action for Statutory Unfair Competition [Bus. & Prof. Code § 17200]--Injury-Causing Conduct Occurred Outside California

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Non-Resident Plaintiff May Not Bring Action Under Unfair Competition Statute Against Defendant Whose Headquarters and Principal Place of Business is Out-of-State for Injuries Caused Out-of-State

§ 235.66 Opposing Contention That Action for Statutory Unfair Competition [Bus. & Prof. Code § 17200] May Be

Based on Securities Transactions

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Unfair Competition Statute Inapplicable to Securities Transactions

§ 235.67 Opposing Contention That Jury Trial is Guaranteed in Action Brought Solely Under Unfair Competition Statute [Bus. & Prof. Code § 17200]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] No Right to Jury Trial

§§ 235.68-235.79 [Reserved]

§ 235.80 Supporting Contention That Cause of Action Based on Unfair Competition Is Preempted by Federal Patent and Copyright Law--State Law Attempts to Prohibit Copying of Unpatented and Uncopyrighted Article

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Federal Preemption of State Law That Interferes With Federal Patent Laws

[b] Federal Law Preempts Any State Law That Attempts to Prohibit Copying of Unpatented and Uncopyrighted Article

[c] State Unfair Competition Claim Must Have "Extra Element" to Avoid Preemption

§ 235.81 Opposing Contention That Cause of Action Based on Unfair Competition Is Preempted by Federal Patent and Copyright Law--State Law May Protect Business in Use of Trademarks or Labels to Prevent Confusion of Content or Source

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Pleading and Practice Forms

[c] Related Points and Authorities

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] State Protection From Confusion of Content or Source

[b] State Protection From Palming Off

[c] Federal Law Does Not Preempt State Laws Prohibiting Reverse Palming Off

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PART I. INTRODUCTION

23-235 California Points & Authorities § 235.01

§ 235.01 Scope of Chapter

This chapter contains forms of points and authorities relating to actions based on unfair business practices or unfair competition. Sections 235.20 et seq. concern actions under the Unfair Practices Act (*Bus. & Prof. Code § 17000 et seq.*). They include: forms supporting [*see §§ 235.20, 235.22, 235.27, 235.29*] and opposing [*see §§ 235.21, 235.24 -235.26, 235.28*] the contention that a complaint states a cause of action under the Act; a form supporting the contention that the fully allocated cost method establishes sales below cost [*see § 235.23*]; forms supporting [*see § 235.30*] and opposing [*see § 235.31*] the contention that the requisite wrongful intent exists in an action under the Act; forms supporting the contention that an injunction should be issued [*see §§ 235.32, 235.33*]; a form supporting the contention that the plaintiff is entitled to treble damages [*see § 235.34*], and a form opposing the contention that a successful plaintiff may elect punitive damages or treble damages [*see § 235.35*].

Section 235.50 et seq. concerns actions for statutory unfair competition (*Bus. & Prof. Code § 17200 et seq.*), and include forms supporting the contention that a cause of action for statutory unfair competition exists [*see §§ 235.50 -235.52*], supporting the contention that restitution and disgorgement of profits are authorized remedies for unfair competition [*see § 235.53*], supporting the contention that an unfair competition claim may be brought as a class action and seek disgorgement of profits into a fluid recovery fund [*see § 235.54*], supporting the contention that an action for an injunction is not federally preempted [*see § 235.55*], supporting the contention that res judicata does not prevent a private plaintiff from prosecuting an action after a public prosecutor has pursued an action under the statute [*see § 235.56*], supporting the contention that the litigation privilege does not bar an action for statutory unfair competition if the plaintiff was not a party to the underlying litigation [*see § 235.56A*], opposing the contention that a private litigant may recover money damages [*see § 235.57*] or maintain an action [*see §§ 235.58, 235.59, 235.62, 235.65, 235.66*], opposing the contention that disgorgement into a fluid recovery fund is an authorized remedy in a non-class-action representative action [*see § 235.60*], opposing the contention that an individual plaintiff may recover the disgorgement of profits that is not restitutionary [*see § 235.61*], opposing the contention that a plaintiff may pursue a cause of action for unfair competition without evidence of a causal connection between the defendant's conduct and the harm [*see § 235.63*], and opposing the contention that a litigant may maintain an action for conduct that is protected by the litigation privilege [*see § 235.64*].

Section 235.80 et seq. concerns actions based on common law unfair competition, and include forms supporting [*see §*

235.80] and opposing [*see § 235.81*]the contention that an action for common law unfair competition is preempted by federal patent and copyright law. For additional points and authorities relating to the preemption of state actions by federal copyright law, see Ch. 146, *Literary Property, Copyright, and the Protection of Ideas* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawTrade Practices & Unfair CompetitionState RegulationClaimsAntitrust & Trade LawTrade Practices & Unfair CompetitionState RegulationCoverageCivil ProcedureClass ActionsGeneral OverviewCivil ProcedureRemediesDamagesGeneral OverviewCivil ProcedureRemediesInjunctionsGeneral Overview

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23-235 California Points & Authorities § 235.02

§ 235.02 Governing Law

Particular unfair business practices are actionable under the Unfair Practices Act (*Bus. & Prof. Code § 17000 et seq.*). Actions for unfair competition are governed generally by *Bus. & Prof. Code § 17200 et seq.* Actions based on common law theories of tort liability for unfair competition are governed by decisional law.

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawTrade Practices & Unfair CompetitionState RegulationClaimsAntitrust & Trade LawTrade Practices & Unfair CompetitionState RegulationCoverage

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23-235 California Points & Authorities § 235.03

§ 235.03 Notice of Appeal in Unfair Competition Actions

Bus. & Prof. Code § 17209 requires a party appealing a statutory unfair competition judgment to serve notice of the appeal, including a copy of appellant's opening brief or petition, on the Attorney General and on the district attorney of the county in which the lower court action or proceeding was originally filed, within three days after the commencement of the appellate proceeding, unless the time is extended for good cause. This statute is not jurisdictional and has been interpreted to mean that the Attorney General and local district attorney must be served with the appellant's opening brief within three days of its being filed. If the Attorney General and/or the local district attorney are not served with the opening briefs within three days of their being filed, and if time for serving the brief has not been extended for good cause shown, no judgment or relief may be granted by the court (*Californians for Population Stabilization v. Hewlett-Packard Co. (1997) 58 Cal. App. 4th 273, 285, 67 Cal. Rptr. 2d 621*).

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawTrade Practices & Unfair CompetitionState RegulationClaimsCivil ProcedureAppealsAppellate JurisdictionState Court Review

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23-235 California Points & Authorities § 235.04

§ 235.04 Racketeer Influenced and Corrupt Organizations Act

[1] Civil Actions

In addition to the remedies discussed in this chapter, counsel may also wish to consider whether the facts of the case would give rise to a civil action under the federal Racketeer Influenced and Corrupt Organizations Act (RICO) (*18 U.S.C.S. § 1961 et seq.*). Although the object of the act is to prevent and punish racketeering activity, its broad definitions may extend to otherwise law-abiding business persons and their respected and legitimate enterprises, that is, to conduct of legitimate business persons who engage in "garden variety" commercial fraud [*see Cianci v. Superior Court (1985) 40 Cal. 3d 903, 909, 221 Cal. Rptr. 575, 710 P.2d 375* ; *see also Douglas v. Superior Court (1989) 215 Cal. App. 3d 155, 159, 263 Cal. Rptr. 473]* .

The act authorizes a civil action by any person injured in his or her business or property by reason of a violation of *18 U.S.C.S. § 1962* for treble damages and costs of suit, including a reasonable attorney's fee [*18 U.S.C.S. § 1964(c)*]. For a full discussion of RICO and the available civil remedies authorized by it, see Smith & Reed, Civil RICO (Matthew Bender).

[2] Jurisdiction

RICO provides that any person injured in his or her business or property by reason of a violation of *18 U.S.C.S. § 1962* may sue in any appropriate United States District Court. This provision is not exclusive. State courts have concurrent jurisdiction over the civil action for damages authorized by *18 U.S.C.S. § 1964(c)* [*Tafflin v. Levitt (1990) 493 U.S. 455, 456-458, 467, 110 S. Ct. 792, 107 L. Ed. 2d 887* ; *Lou v. Belzberg (9th Cir. 1987) 834 F.2d 730, 736-739* ; *Cianci v. Superior Court (1985) 40 Cal. 3d 903, 907-916, 221 Cal. Rptr. 575, 710 P.2d 375]* . Civil RICO claims are arbitrable when the transaction is covered by an agreement that provides for arbitration of disputes between the parties [*Shearson/Am. Express, Inc. v. McMahon (1987) 482 U.S. 220, 238-242, 107 S. Ct. 2332, 96 L. Ed. 2d 185]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawTrade Practices & Unfair CompetitionState RegulationClaimsTortsBusiness TortsFraud &

MisrepresentationActual FraudGeneral Overview

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23-235 California Points & Authorities § 235.05

§ 235.05 How to Use Forms in This Chapter

[1] Page Limits on Points and Authorities

One of the more significant drafting requirements to keep in mind concerns page limits: supporting and opposing memoranda filed in discovery motion proceedings may not exceed 15 pages. A reply or closing memorandum may not exceed 10 pages. Exhibits, declarations, attachments, the table of contents, the table of authorities, and the proof of service are excluded from these page limits. Any party must obtain leave of court to file a longer memorandum [*see Cal. Rules of Ct., Rule 3.1113(d), (e)*]. These and other drafting requirements are discussed in further detail in Ch. 1, *Writing Legal Memoranda and Briefs* .

[2] Using Forms to Build Draft Memorandum

Forms in this chapter are in the form of contentions based on substantive points of law, and may be combined with each other depending on the facts and issues involved. These substantive contentions may also be combined with any appropriate procedural forms, depending on the context in which they are raised. For example, the forms supporting or opposing the contention that a particular cause of action is stated would commonly be raised in the context of a demurrer or summary judgment proceeding, and in that context might be combined with appropriate procedural forms in Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* , and Ch. 221, *Summary Judgments* . The contentions may also be adapted for use in a trial or appellate brief, or be used to research office memoranda and jury instructions. Whatever procedural context or paper is involved, counsel should add argument to the points and authorities being used,showing the relationship between the facts of the case and the points of law stated.

For a discussion of the format requirements governing memoranda generally, including page limits, discussion of how to use the forms in this chapter to draft a complete memorandum or brief, and a form of skeletal overall memorandum, see Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPleading & PracticeMotion

PracticeSupporting Memoranda

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23-235 California Points & Authorities § 235.06

§ 235.06 Related Pleading and Practice Chapters

For a discussion and forms relating to actions for unfair competition and actions under the Unfair Practices Act (Bus. & Prof. Code § 17000 et seq.), see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender). For discussion and forms concerning related actions based on other wrongful business practices, see the following chapters in that publication:

- Ch. 14, *Advertising.*
- Ch. 269, *Fraud and Deceit.*
- Ch. 340, *Libel and Slander*.
- Ch. 349, *Literary Property and Copyright.*
- Ch. 411, *Patents and Inventions.*
- Ch. 549, *Trademarks and Trade Names.*
- Ch. 565, *Unfair Competition*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawTrade Practices & Unfair CompetitionState RegulationClaimsCopyright LawCivil Infringement ActionsRemediesGeneral OverviewTortsBusiness TortsFraud & MisrepresentationActual FraudGeneral OverviewTortsIntentional TortsDefamationGeneral OverviewTrademark LawFederal Unfair Competition LawGeneral Overview

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23-235 California Points & Authorities § 235.07

§ 235.07 Related Points and Authorities Chapters

For forms of points and authorities concerning actions based on other wrongful business practices, see the following chapters in this publication:

- Ch. 14, *Advertising.*
- Ch. 105, *Fraud and Deceit.*
- Ch. 122, *Interference.*
- Ch. 146, *Literary Property, Copyright, and the Protection of Ideas.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionFalse AdvertisingState RegulationCopyright LawCivil Infringement ActionsGeneral OverviewCopyright LawSubject MatterIdeasGeneral OverviewTortsBusiness TortsCommercial InterferenceGeneral OverviewTortsBusiness TortsFraud & MisrepresentationActual FraudGeneral Overview

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23-235 California Points & Authorities §§ 235.08-235.19

[Reserved]

§§ 235.08[Reserved]

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23-235 California Points & Authorities § 235.20

§ 235.20 Supporting Contention That Complaint States Cause of Action for Locality Discrimination [Bus. & Prof. Code §§ 17031, 17040]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S COMPLAINT STATES A CAUSE OF ACTION FOR LOCALITY DISCRIMINATION BECAUSE IT ALLEGES DEFENDANT CREATED A LOCALITY DISCRIMINATION WITH THE INTENT TO DESTROY OR PREVENT COMPETITION.

A. Locality Discrimination Unlawful. It is unlawful for any person engaged in the production, manufacture, distribution, or sale of any article or product of general use or consumption, with intent to destroy the competition of any regular established dealer in the article or product, or to prevent the competition of any person who in good faith intends and attempts to become the dealer, to create locality discriminations (*Bus. & Prof. Code § 17040*).

B. Locality Discrimination Defined. Locality discrimination means a discrimination between different sections, communities, or cities or portions thereof, or between different locations in the sections, communities, cities, or portions thereof in California, by selling or furnishing an article or product, at a lower price in one section, community or city, or any portion thereof, or in one location in the section, community, city, or any portion thereof, than in another (*Bus. & Prof. Code § 17031*).

C. Article or Product Defined. Article or product includes any article, product, commodity, thing of value, service, or output of a service trade (*Bus. & Prof. Code § 17024*).

[*Optional*] **D. Exception Need Not Be Negatived in Initial Pleading.** The exception to liability for locality discrimination set out in *Business and Professions Code Section 17041* need not be negatived in the initial pleading (*G.H.I.I. v. MTS, Inc. (1983) 147 Cal. App. 3d 256, 273, 195 Cal. Rptr. 211*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention thata complaint states a cause of action for locality discrimination [*see Bus. & Prof. Code §§ 17031, 17040, 17070*; *G.H.I.I. v. MTS, Inc. (1983) 147 Cal. App. 3d 256, 273, 195 Cal. Rptr. 211]* . They may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they would most commonly be combined with general points and authorities opposing a general demurrer to a complaint. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Chapters

For discussion and a form of complaint for injunctive relief and treble damages based on a violation of the Unfair Practices Act (Bus. & Prof. Code §§ 17000-17101), see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender).

[c] Related Points and Authorities Chapters

For forms of points and authorities relating to demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[d] Opposing Points and Authorities

The points and *authorities in § 235.21* may be used in an appropriate case to oppose the contention supported by this memorandum.

[3] Discussion of Authorities

[a] Exception Need Not Be Negatived in Initial Pleading

In ***G.H.I.I. v. MTS, Inc.*** *(1983) 147 Cal. App. 3d 256, 195 Cal. Rptr. 211* , a retail record store and its owners brought an action against three large retail record enterprises to seek remedies based on several causes of action alleging various state statutory antitrust violations. Defendants filed demurrers to all causes of action, contending, inter alia, that the cause of action for locality discrimination under *Bus. & Prof. Code § 17040* was vague and defective. Defendants asserted lack of essential allegations that the price differences were not justified by differences in grade, quality, quantity, or cost of transportation, pursuant to the exception to liability provided in *Bus. & Prof. Code § 17041*. The trial court sustained demurrers to all causes of action without leave to amend, and the plaintiffs appealed.

The court of appeal reversed as to some causes of action, including that for locality discrimination (*147 Cal. App. 3d 256, 280)* . The court stated that, generally, a statutory cause of action must allege facts supporting each requirement of the statute on which it is based. When, however, an exception is found in a subsequent section, it need not be negatived in the initial pleading. Liability for locality discrimination is provided in *Bus. & Prof. Code § 17040*, and the exception for differences in grade, quality, quantity, or cost of transportation is provided in *Bus. & Prof. Code § 17041* (*147 Cal. App. 3d 256, 272)* . Consequently, the plaintiffs were not required to negative the exception under *Bus. & Prof. Code § 17041*, and their complaint was sufficient to withstand demurrer without such allegations (*147 Cal. App. 3d 256, 273-274)* .

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23-235 California Points & Authorities § 235.21

§ 235.21 Opposing Contention That Complaint States Cause of Action for Locality Discrimination [Bus. & Prof. Code §§ 17031, 17040]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S COMPLAINT DOES NOT STATE A CAUSE OF ACTION FOR LOCALITY DISCRIMINATION BECAUSE IT DOES NOT ALLEGE _____ [PROHIBITED PRICE DISCRIMINATION *or* INTENT TO DESTROY OR PREVENT COMPETITION].

[*EITHER*]

A. Seller Must Discriminate Between Sales in Two or More of Seller's Own Business Locations. To fall within the prohibition of *Sections 17031* and *17040 of the Business and Professions Code*, a seller must have at least two different places of business and must sell at a lower price in one than in the other (*Harris v. Capitol Records Distrib. Corp. (1966) 64 Cal. 2d 454, 460, 50 Cal. Rptr. 539, 413 P.2d 139*).

[*AND/OR*]

B. Prohibition Against Locality Discrimination Protects Only First-Line Competition. The Unfair Practices Act operates horizontally, and protects only first-line competition, that is, those in competition with the alleged discriminator, against predatory price cutting on an area basis. It does not proscribe price discriminations that only injure second or third-line competition, that is, those who are the alleged discriminator's customers or ultimate consumers (*Harris v. Capitol Records Distrib. Corp. (1966) 64 Cal. 2d 454, 461, 50 Cal. Rptr. 539, 413 P.2d 139* ; *Plotkin v. Tanner's Vacuums (1975) 53 Cal. App. 3d 454, 458, 125 Cal. Rptr. 697*).

[*AND/OR*]

C. Intent to Destroy Competition With Person Creating Locality Discrimination. *Section 17040 of the Business and Professions Code* applies only to discriminations that are made with the intent to destroy the competition of a dealer who competes with the person creating the discrimination, that is, the person engaged in the sale who creates the discrimination by selling at a lower price. The legislature did not intend to proscribe a sale at a lower price in one locality than in another when there is no intent to destroy competition with the person who makes the sale (*Harris v. Capitol Records Distrib. Corp. (1966) 64 Cal. 2d 454, 460-461, 50 Cal. Rptr. 539, 413 P.2d 139*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that a complaint states a cause of action for locality discrimination [*see Bus. & Prof. Code §§ 17031, 17040*; *Harris v. Capitol Records Distrib. Corp. (1966) 64 Cal. 2d 454, 460-462, 50 Cal. Rptr. 539, 413 P.2d 139]* . They may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they would most commonly be combined with general points and authorities supporting a general demurrer to a complaint. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, these points and authorities may be used to oppose the contention supported by the points and *authorities in § 235.20*.

[b] Related Pleading and Practice Forms

For discussion and a form of complaint for injunctive relief and treble damages based on a violation of the Unfair Practices Act (Bus. & Prof. Code §§ 17000-17101), see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender).

[c] Related Points and Authorities

For forms of points and authorities relating to demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Seller Must Discriminate Between Sales in Two or More of Seller's Own Business Locations

In ***Harris v. Capitol Records Distrib. Corp.*** *(1966) 64 Cal. 2d 454, 50 Cal. Rptr. 539, 413 P.2d 139* , a retail record store owner brought an action against several record companies and a subdistributor to seek damages and injunctive and declaratory relief under the Unfair Practices Act (*Bus. & Prof. Code §§ 17000-17101*). Plaintiff bought records from defendant record companies at the standard dealer discount. Defendant subdistributor received a greater discount than the plaintiff because he was a rack-jobber, who places records in stores in which records are an incidental sales item. He opened his own record store near plaintiff's, and priced records considerably lower than plaintiff. The complaint alleged that the subdistributor was allowed to buy his stock at a special discountfor distribution purposes, yet sold the goods as a retailer, thereby underselling plaintiff and damaging his business. Plaintiff contended, inter alia, that defendants created an unlawful locality discrimination in violation of *Bus. & Prof. Code §§ 17031* and *17040*. The action against

defendant subdistributor was dismissed after his business became insolvent. The trial court granted motions for summary judgment in favor of defendant record companies, and plaintiff appealed the judgment entered in their favor.

The Supreme Court affirmed, holding that there was no legal theory on which defendants could be held liable to plaintiff (*64 Cal. 2d 454, 456)* . *Bus. & Prof. Code §§ 17031* and *17040* prohibit selling at a lower price in one location than in another. To violate their provisions, a seller must have at least two different places of business and must sell at a lower price in one than in the other. The two outlets involved in the instant case are owned not by defendants, but by their retail customers, that is, by plaintiff and the subdistributor, among others (*64 Cal. 2d 454, 460)* . Additionally, *Bus. & Prof. Code § 17040* is intended to apply only to competition on the same level as the person allegedly creating the locality discrimination, as distinguished from competition between those who purchase from the alleged discriminator. In other words, it applies to primary, rather than secondary competition. Therefore, *Bus. & Prof. Code § 17040* applies only to discriminations that are made with intent to destroy the competition of a dealer who competes with the person creating the discrimination by selling at a lower price (*64 Cal. 2d 454, 460)* . The Legislature did not intend to declare unlawful a sale at a lower price in one locality than in another absent an intent to destroy competition with the person who was creating the locality discrimination (*64 Cal. 2d 454, 460-461)* . Nothing in *Bus. & Prof. Code § 17040* prohibits the meeting in good faith of a competitive price. A wholesaler is not in competition with a retailer. The Unfair Practices Act was enacted to discourage practices that harm the seller's competitors, while allowing the seller to meet competition's prices in good faith. Therefore, the act constitutes a horizontal concept of price regulation. It protects only first-line competition against predatory price cutting on an area basis and does not make illegal price discriminations that only injure second or third-line competition at the buyer level or lower. A seller can lawfully discriminate in favor of one purchaser to help that purchaser to meet competition, so long as there is no intent on the part of the seller to prevent or destroy the competition of other sellers at the seller's level (*64 Cal. 2d 454, 461-462)* .

[b] Prohibition Against Locality Discrimination Protects Only First-Line Competition

Harris v. Capitol Records Distrib. Corp. *(1966) 64 Cal. 2d 454, 50 Cal. Rptr. 539, 413 P.2d 139* , is discussed in *§ 235.21[3][a]*.

In ***Plotkin v. Tanner's Vacuums*** *(1975) 53 Cal. App. 3d 454, 125 Cal. Rptr. 697* , a retail vacuum cleaner company and its owner brought an action against a vacuum cleaner manufacturer and a retail store owner to seek remedies under the Unfair Practices Act (*Bus. & Prof. Code §§ 17000-17101*). Plaintiffs purchased vacuum cleaners directly from the manufacturer's factory and enjoyed credit and other privileges. Subsequently, the manufacturer named defendant retail store the exclusive distributor for the area encompassing plaintiffs' business. They informed plaintiffs to place all orders with the distributorship, and ultimately removed plaintiffs' name from the list of authorized service stations. The trial court sustained a demurrer to the complaint, and plaintiffs appealed.

The court of appeal affirmed, holding that the Act, although liberally construed, does not protect plaintiffs from the conduct described (*53 Cal. App. 3d 454, 457)* . Plaintiffs' complaint is based only on the fact that the manufacturer classified the retail store as its sole distributor in plaintiffs' geographical area. The manufacturer's action was simply vertical confinement of sales of its own merchandise, which is not prohibited under the Act (*53 Cal. App. 3d 454, 459)* . The Act protects only first-line competition against predatory price cutting on an area basis and does not prohibit price discriminations that only injure second or third-line competition at the buyer level or lower (*53 Cal. App. 3d 454, 458)* . The court also disallowed plaintiffs' cause of action under former Civ. Code § 3369 (now see *Bus. & Prof. Code § 17200*) (unfair competition). The essential test of unfair competition is whether the challenged activity is likely to deceive the public (*53 Cal. App. 3d 454, 459)* . Plaintiffs are not competitors of the manufacturer. Further, there are no allegations that the consumer has been damaged or that the distributorship is outside the scope of *Bus. & Prof. Code § 17042* (functional classifications permitted) of the manufacturer's right to vertical confinement in selling its product. Consequently, plaintiffs failed to state a cause of action under the Act (*53 Cal. App. 3d 454, 460)* .

[c] Intent to Destroy Competition With Person Creating Locality Discrimination

The facts and procedural background of ***Harris v. Capitol Records Distrib. Corp.*** *(1966) 64 Cal. 2d 454, 50 Cal. Rptr. 539, 413 P.2d 139* , are discussed in *§ 235.21[3][a]*.

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23-235 California Points & Authorities § 235.22

§ 235.22 Supporting Contention That Complaint States Cause of Action for Sales Below Cost [Bus. & Prof. Code § 17043]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S COMPLAINT STATES A CAUSE OF ACTION FOR SALES BELOW COST BECAUSE IT ALLEGES SALES BELOW COST FOR THE PURPOSE OF INJURING COMPETITORS OR DESTROYING COMPETITION.

A. Sales Below Cost Prohibited. It is unlawful for any person engaged in business within California to sell any article or product at less than the cost thereof to the vendor, or to give away any article or product, for the purpose of injuring competitors or destroying competition (*Bus. & Prof. Code § 17043*).

B. Article or Product Defined. [*See § 235.20[1], Paragraph C.*].

[*Optional*] **C. Schemes Prohibited.** The prohibitions of the Unfair Practices Act against sales below cost embrace any scheme of special rebates, collateral contracts, or any device of any nature whereby the discrimination or sale below cost is in substance or fact effected in violation of the spirit and intent of the Unfair Practices Act (*Bus. & Prof. Code § 17049*; *Paramount Gen. Hosp. Co. v. National Med. Enters., Inc. (1974) 42 Cal. App. 3d 496, 500-501, 117 Cal. Rptr. 42*).

[*Optional*] **D. Allegation Based on Information and Belief Regarding Costs Sufficient.** A complaint that fails to allege a definite cost of doing business may be sufficient to support a cause of action for sales below cost if plaintiff asserts on information and belief that the prices charged were below defendant's stated invoice costs plus the unstated cost of doing business, and plaintiff is unable to speculate on a supposed cost figure (*G.H.I.I. v. MTS, Inc. (1983) 147 Cal. App. 3d 256, 275-276, 195 Cal. Rptr. 211*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a complaint states a cause of action for sales below cost [*Bus. & Prof. Code §§ 17024* (article or product defined), 17043 (sales below cost prohibited); 17049 (schemes prohibited); 17070 (authorizing action for violation of act)]. They may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they would most commonly be combined with general points and authorities opposing a general demurrer to a complaint. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion and a form of complaint for injunctive relief and treble damages based on a violation of the Unfair Practices Act (Bus. & Prof. Code §§ 17000-17101), see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender).

[c] Related Points and Authorities

For forms of points and authorities relating to demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[d] Opposing Points and Authorities

The points and *authorities in §§ 235.24 -235.26* may be used in an appropriate case to oppose the contentions supported by this memorandum.

[3] Discussion of Authorities

[a] Schemes Prohibited

In ***Paramount Gen. Hosp. Co. v. National Med. Enters., Inc.*** *(1974) 42 Cal. App. 3d 496, 117 Cal. Rptr. 42* , the owners of a hospital complex brought an action against owners of a medical building to seek damages and injunctive relief under the Unfair Practices Act (*Bus. & Prof. Code §§ 17000-17101*). Plaintiffs rent office space to physicians and provide them with various services. Defendants were constructing a medical building near plaintiffs' facilities. They offered office space and services to several physicians, some of which accepted or intended to accept the offer. Plaintiffs allege that defendants are either giving away or selling below cost the office space and services, for the purpose of destroying competition from plaintiffs, in violation of *Bus. & Prof. Code § 17043*. The trial court sustained defendants' general demurrers to the complaint without leave to amend, and plaintiffs appealed.

The court of appeal reversed, holding that the complaint stated a cause of action under the Act (*42 Cal. App. 3d 496, 504)* . The court noted that the Act prohibits, inter alia: (1) selling below cost or giving away any article or product for the purpose of injuring competitors or destroying competition (*Bus. & Prof. Code § 17043*); and (2) selling or using any article or product as a loss leader (*Bus. & Prof. Code § 17044*). The Legislature provided that the Act be liberally construed to serve its beneficial purposes (*Bus. & Prof. Code § 17002*) (*42 Cal. App. 3d 496, 500)* . Further, the prohibitions of the Act against sales below cost embraceany scheme of special rebates, collateral contracts or any device of any nature whereby the sale below cost is in substance or fact effected in violation of the spirit and intent of the Act (*Bus. & Prof. Code § 17049*) (*42 Cal. App. 3d 496, 500-501)* . The court rejected defendants' contention that their offer involves nothing but leases to real property to which transactions covered by the Act are incidental (*42 Cal. App. 3d 496, 500)* . Defendants' offer includes a variety of sophisticated, specialized services in competition with plaintiffs as

well a lease. Every definition relevant to *Bus. & Prof. Code § 17043* is framed in terms of what the concept defined includes (*42 Cal. App. 3d 496, 501)* . For example, "article or product" includes any article, product, commodity, thing of value, service, or output of a service trade (*42 Cal. App. 3d 496, 501-502)* . With respect to the Act's purpose to foster and encourage competition, it cannot matter which element of a package is functionally ancillary to the other. What is vital is whether the part of the package clearly covered by the Act is so substantial that cost-cutting with respect to it can be used as a means to injure or destroy competition. Defendants' lease-service package fits into the inclusive definition of "article or product" of *Bus. & Prof. Code § 17024* (*42 Cal. App. 3d 496, 503)* .

[b] Allegation Based on Information and Belief Regarding Costs Sufficient

The facts and procedural background of ***G.H.I.I. v. MTS, Inc.*** *(1983) 147 Cal. App. 3d 256, 195 Cal. Rptr. 211* , are discussed in *§ 235.20[3][a]*. The court of appeal overruled a demurrer to a complaint with regard to a cause of action under *Bus. & Prof. Code § 17041* (locality discrimination), holding that the complaint need not negative exceptions to liability, because the exceptions are embodied in a subsequent section of the Unfair Practices Act (*Bus. & Prof. Code § 17000 et seq.*). The court also overruled the demurrer with respect to causes of action for sales below cost. Pursuant to *Bus. & Prof. Code §§ 17026* and *17029*, cost means invoice cost plus either the vendor's full cost of doing business or six percent. Therefore, to satisfy the pleading requirements of *Bus. & Prof. Code § 17043*, the various costs must be stated in other than conclusionary terms. The complaint, although specifically alleging the price at which defendants sold their products and invoice costs, did not allege a definite cost of doing business, but rather asserted on information and belief that the prices charged were below defendants' stated invoice costs plus the unstated cost of doing business (*147 Cal. App. 3d 256, 275)* . The court reasoned that, because plaintiffs were in a poor position to speculate on a supposed cost figure, it would serve no useful purpose to require a speculative allegation of cost that adds nothing to the notice given by the pleadings. Accordingly, the pleadings were sufficient to support a cause of action under *Bus. & Prof. Code § 17043* (*147 Cal. App. 3d 256, 276)* .

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23-235 California Points & Authorities § 235.23

§ 235.23 Supporting Contention That Fully Allocated Cost Method Establishes Sales Below Cost [Bus. & Prof. Code § 17043]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF HAS PROVED THAT DEFENDANT'S SALES WERE FOR PRICES BELOW ITS FULLY ALLOCATED COST AND DEFENDANT HAS NOT DEMONSTRATED ANY OTHER COST ALLOCATION METHOD THAT WOULD RESULT IN A PROFIT.

A. Sales Below Cost Prohibited. [*See § 235.22[1], Paragraph A.*]

B. *Bus. & Prof. Code § 17043* Supports Use of Fully Allocated Cost Method. Because *Sections 17026* and *17029 of the Business and Professions Code* define cost to include all variable and fixed costs, it appears that the Unfair Practices Act employs a fully allocated cost or fully distributed cost standard to determine whether a sale violated *Section 17043 of the Business and Professions Code* (*Turnbull & Turnbull v. ARA Transp., Inc. (1990) 219 Cal. App. 3d 811, 819-820, 268 Cal. Rptr. 856*).

C. Fully Allocated Cost Method Described. Variable costs are costs that vary with changes in output, while fixed costs are those that do not vary with changes in output. The concept of fully allocated cost has been equated with average total cost, which reflects that portion of the firm's total costs--both fixed and variable--attributable on an average basis to each unit of output. [A defendant is free to demonstrate to the trier of fact that its fully allocated cost, using another reasonable allocation method other than that used by plaintiff, is actually lower than plaintiff alleges and lower than defendant's sales or bid price. However, to be legally acceptable, the allocation of indirect and fixed overhead costs to a particular product or service must be reasonably related to the burden the product or service imposes on the overall cost of doing business] (*Turnbull & Turnbull v. ARA Transportation, Inc. (1990) 219 Cal. App. 3d 811, 820, 822-823, 268 Cal. Rptr. 856*).

[*Optional*] **D. Fully Allocated Cost Method Is Not Arbitrary or Unreasonable.** The fully allocated cost method,

when viewed in conjunction with the injurious intent requirement of *Section 17043 of the Business and Professions Code*, is rationally related to the valid legislative purpose enunciated in *Section 17001 of the Business and Professions Code*, which is to guard against the creation or perpetuation of monopolies and of fostering and encouraging competition (*Turnbull & Turnbull v. ARA Transp., Inc. (1990) 219 Cal. App. 3d 811, 823, 826, 268 Cal. Rptr. 856*).

[*Optional*] **E. Fully Allocated Cost Method Is Not Preempted by Federal Law.** There is no actual conflict between federal antitrust law and the application of the fully allocated cost method. Thus, the application of the fully allocated cost method is not preempted by federal antitrust law (*Turnbull & Turnbull v. ARA Transp., Inc. (1990) 219 Cal. App. 3d 811, 825-826, 268 Cal. Rptr. 856*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of the contention that the fully allocated cost method is the proper method for establishing that a sale was below cost and in violation of *Bus. & Prof. Code § 17043*. Paragraph B establishes that the fully allocated cost method is the cost allocation formula contemplated by the Unfair Practices Act (*Bus. & Prof. Code § 17000 et seq.*). Paragraph C describes the fully allocated cost method. Optional Paragraphs D and E are for use if the fully allocated cost method is being challenged as arbitrary or unreasonable or as having been preempted by federal law. Note that one reason the fully allocated cost method has not been preempted is that there is no clear federal standard for determining whether pricing is predatory in that the federal circuit courts disagree on the appropriate cost method, and the United States Supreme Court has not made a determination [*see Turnbull & Turnbull v. ARA Transp., Inc. (1990) 219 Cal. App. 3d 811, 825, 268 Cal. Rptr. 856]* . Thus, counsel should confirm that the holding in Paragraph E has not been abrogated by later cases.

Counsel should insert argument in this form showing the relationship between the facts and the points of law stated.

[3] Discussion of Authorities

[a] Bus. & Prof. Code § 17043 Supports Use of Fully Allocated Cost Method

Bus. & Prof. Code § 17026 provides that "cost" as applied to production includes the cost of raw materials, labor, and all overhead expenses of the producer. "Cost" as applied to distribution means the invoice or replacement cost, whichever is lower, of the article or products to the distributor or vendor, plus the cost of doing business by the distributor and vendor and, in the absence of proof of cost of doing business, a markup of six percent on the invoice or replacement cost. "Cost" as applied to warranty service agreements includes the cost of parts, transporting the parts, labor, and all overhead expenses of the service agency.

Bus. & Prof. Code § 17029 provides that "cost of doing business" over "overhead expense" means all costs of doing business incurred in the conduct of the business and includes, without limitation, the following items of expense: labor (including salaries of executives and officers), rent, interest on borrowed capital, depreciation, selling cost, maintenance of equipment, delivery costs, credit losses, all types of licenses, taxes, insurance, and advertising.

Plaintiff in ***Turnbull & Turnbull v. ARA Transp., Inc.*** *(1990) 219 Cal. App. 3d 811, 268 Cal. Rptr. 856* , sued a competitor for selling bus transportation services below its cost of providing those services for the purpose of injuring competitors or destroying competition in violation of *Bus. & Prof. Code § 17043*. The services involved were transportation of handicapped school children in San Joaquin County for the years 1978-1979, 1979-1980, 1980-1981, and 1981-1982. Defendant claimed it did not maintain records that allocated overhead and profits on a per contract basis, although a former area controller testified that figures which would establish per contract costs were destroyed after the operating statements were prepared at the end of each year. Plaintiff established that defendant's bid was below its cost of providing contract services in each year by analyzing defendant's operating statements and allocating

defendant's operating expenses per mile travelled. Defendant's operating costs for the year were divided by the total miles travelled to yield an average cost per mile. That figure was then multiplied by the contract mileage to determine the contract cost. The former executive vice president of defendant's transportation group testified that defendant's overall policy was to penetrate the market and to bid at any cost, even below cost, to eliminate competition. True cost figures would be submitted by the bidding division to the group transportation office, where they would be reduced to make it appear that the bid was above cost. The loss would be reallocated to some other profit-making division. Other officers of defendant testified that defendant was concerned with making a profit on each contract.

The trial court ruled that the claim for the 1978-1979 school year was barred by the statute of limitations, and that treble damages under *Bus. & Prof. Code § 17082* were barred by a one-year limitation period except for the claim relating to the 1981-1982 school year. The jury awarded plaintiff compensatory damages of $259,568 for contract years 1979-1980 and 1981-1982, nothing for 1980-1981, and $1 million in punitive damages. Plaintiff was allowed to elect to receive compensatory and punitive damages instead of treble damages. Defendant appealed, challenging application of the fully allocated cost method as unconstitutionally arbitrary and unreasonable and as preempted by federal law, and challenging the election of punitive damages.

The court of appeal found the use of the fully allocated cost method proper, but held that plaintiff was only entitled to trebled damages and reversed for a new trial limited to the issue of damages. Defendant contended that the Unfair Practices Act (*Bus. & Prof. Code § 17000 et seq.*) violates the due process clause of the California and United States Constitutions because its method for determining whether a service is sold below cost is arbitrary and irrational. The court of appealsaid that because *Bus. & Prof. Code §§ 17026* and *17029* define cost to include all variable and fixed costs, it appears that the Unfair Practices Act employs a fully allocated cost or fully distributed cost standard to determine whether a sale violated *Bus. & Prof. Code § 17043* (*219 Cal. App. 3d 811, 819-820)* .

[b] Fully Allocated Cost Method Described

The facts and procedural background of ***Turnbull & Turnbull v. ARA Transp., Inc.*** *(1990) 219 Cal. App. 3d 811, 268 Cal. Rptr. 856* , are discussed in *§ 235.23[3][a]*. The court of appeal went on to describe the fully allocated cost method, saying that variable costs are costs that vary with changes in output, while fixed costs are those that do not vary with changes in output. The concept of fully allocated cost has been equated with average total cost, which reflects that portion of the firm's total costs--both fixed and variable--attributable on an average basis to each unit of output (*219 Cal. App. 3d 811, 820)* .

[c] Fully Allocated Cost Method Is Not Arbitrary or Unreasonable

The facts and procedural background of ***Turnbull & Turnbull v. ARA Transp., Inc.*** *(1990) 219 Cal. App. 3d 811, 268 Cal. Rptr. 856* , are discussed in *§ 235.23[3][a]*. In considering the constitutional challenge, the court of appeal went on to discuss federal authorities that question the use of the fully allocated cost method or average total cost method to determine the costs below which a business may not sell its goods or services for federal antitrust purposes and instead propose the use of the average variable cost or long-run incremental cost method (*219 Cal. App. 3d 811, 820)* . Average variable cost is the sum of all variable costs divided by output. Long-run incremental cost measures all of the fixed and variable costs of adding a new product or service, but, unlike fully allocated cost, only measures those costs that are causally related to the service or product in question (*219 Cal. App. 3d 811, 821)* . There are variations even within the fully allocated cost method. Those variations account for one criticism of the method. For example, if a railroad transports gold, lead, and feathers and attempts to calculate its costs on a fully distributed cost basis, it would reach radically different results depending on whether it allocated joint and common costs on the basis of value, weight, or bulk of the commodities shipped. The Ninth Circuit has not adopted any particular cost method, but has held that whatever method is used only affects the burden of proof. If the plaintiff establishes that the defendant sold its product below its average total cost but above its average variable cost, then the plaintiff has the burden of proving defendant did so with a predatory intent. If the plaintiff establishes that the defendant sold its product below its average variable

cost, then the defendant has the burden of negating that it had a predatory intent [*William Inglis & Sons Baking Co. v. ITT Continental Baking Co. (9th Cir. 981) 668 F.2d 1014, 1035-1036]* (*219 Cal. App. 3d 811, 821)* . Even prices exceeding average total cost may be considered predatory if plaintiff provides clear and convincing evidence of defendant's predatory intent [*Transamerica Computer Co., Inc. v. IBM Corp. (9th Cir. 1983) 698 F.2d 1377, 1387-1388]* (*219 Cal. App. 3d 811, 821-822)* .

One criticism of the fully allocated cost method is that it improperly favors smaller, less efficient, single-product competitors. Under another method, such as the variable cost method, the multi-product competitor could allocate major indirect or fixed costs disproportionately among its products, and thus, for one or more products, claim a cost of manufacture far below that of a single-product competitor. After having driven the single-product competitor from the market, the multi-product competitor could reallocate its fixed costs to attack some other product line or market (*219 Cal. App. 3d 811, 822-823)* . The court of appeal dismissed this as nothing more than a challenge to the economic wisdom of the statute, a matter more properly addressed to the legislature. The court concluded that the fully allocated cost method, when viewed in conjunction with the injurious intent requirement of *Bus. & Prof. Code § 17043*, is rationally related to the valid legislative purpose enunciated in *Bus. & Prof. Code § 17001*, which is to guard against the creation or perpetuation of monopolies and of fostering and encouraging competition (*219 Cal. App. 3d 811, 823, 826)* . A defendant is free to demonstrate to the trier of fact that its fully allocated cost, using a reasonable allocation method other than that used by plaintiff, is actually lower than plaintiff alleges and lower than defendant's sales or bid price (*219 Cal. App. 3d 811, 822-823)* . However, to be legally acceptable, the allocation of indirect and fixed overhead costs to a particular product or service must be reasonably related to the burden the product or service imposes on the overall cost of doing business (*219 Cal. App. 3d 811, 822)* .

[d] Fully Allocated Cost Method Is Not Preempted by Federal Law

The facts and procedural background of ***Turnbull & Turnbull v. ARA Transp., Inc.*** *(1990) 219 Cal. App. 3d 811, 268 Cal. Rptr. 856* , are discussed in *§ 235.23[3][a]*. Defendant also contended that the fully allocated cost method was preempted by the Sherman Act (*15 U.S.C.S. § 1 et seq.*) because application of the fully allocated cost method prohibits conduct that is not injurious to competition, specifically that it makes rational, profitable, and nonpredatory pricing above long-run incremental cost presumptively unlawful (*219 Cal. App. 3d 811, 823-824)* . The court of appeal noted that state law is preempted to the extent that it actually conflicts with federal law. Such a conflict arises when compliance with both federal and state regulation is a physical impossibility or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress (*219 Cal. App. 3d 811, 824)* . The history of the Sherman Act makes clear that Congress did not intend that federal legislation preempt parallel state efforts to control unfair competitive practices. The possibility of proscription by California of conduct that federal law mightpermit is not sufficient to warrant preemption [*William Inglis & Sons Baking Co. v. ITT Continental Baking Co. (9th Cir. 1981) 668 F.2d 1014, 1049]* (*219 Cal. App. 3d 811, 824)* . The difference between the California and federal approaches is really only a matter of allocation of evidentiary burdens as follows: assuming proof of injury to a competitor has been made, California allows plaintiffs to establish a prima facie case with proof of prices below average total cost. The defendant then has the burden of negating the interference of illegal intent or establishing an affirmative defense. Under federal law, the plaintiff who relies on prices below average total cost, but above average variable cost, has not created a presumption of illegal intent. To establish such a presumption under federal law, the plaintiff must show that no legitimate business reason for the below-cost price exists. It follows that a price below average total cost but above average variable cost does not always violate California law, nor is such a price a guarantee of immunity under federal law [*William Inglis & Sons Baking Co. v. ITT Continental Baking Co. (9th Cir. 1981) 668 F.2d 1014, 1049-1050]* (*219 Cal. App. 3d 811, 824-825)* . Further, the federal circuit courts disagree on the appropriate cost method, and the United States Supreme Court has not made a determination that any particular formula or cost method should be used in determining whether pricing is predatory. Thus, there is no clear federal standard with which the Unfair Practices Act may be said to conflict (*219 Cal. App. 3d 811, 825)* .

[4] Additional Authorities

[a] Fully Allocated Cost Method Described

In *Western Union Fin. Servs., Inc. v. First Data Corp. (1993) 20 Cal. App. 4th 1530, 25 Cal. Rptr. 2d 341* , plaintiff sought injunctive relief against defendant, alleging that defendant sold its domestic money transfer services below cost in violation of *Bus. & Prof. Code §§ 17043* and *17044*. Plaintiff introduced evidence showing that the total costs of domestic money transfers exceeded the amount that defendant was charging for such transfers. In response, defendant introduced evidence that it made a profit on its California money transfer operations as a whole (both domestic and international operations). The trial court denied plaintiff's request for a preliminary injunction, and the court of appeal affirmed. Plaintiff claimed that the trial court erred because it failed to treat domestic money transfers as a separate "article" or "product" within the meaning of the Unfair Practices Act and to consider only those costs and charges directly associated with such transfers. In rejecting plaintiff's contention, the court explained the fully-allocated cost rule, as discussed in *Turnbull & Turnbull v. ARA Transportation, Inc. (1990) 219 Cal. App. 3d 811, 268 Cal. Rptr. 856* [*see § 235.23[3*][a]-[d]]. The court noted that the purpose of the rule is to prevent a large multiproduct company from allocating costs disproportionately among its products and then reducing its prices for an item manufactured by a small single-product competitor in order to drive that competitor out of business (*20 Cal. App. 4th 1530, 1537)* . The court noted that no such potential exists in this case because both companies are large multiproduct companies, and there was no evidence that the defendant attempted to shift costs from its money transfer business to any other products or services. The court saw no reason why plaintiff should be permitted to foist ts own accounting procedures on its competitors and require them to separately account for costs of domestic and international money transfers (*20 Cal. App. 4th 1530, 1537-1538)* . The court concluded that defendant's classification of all money transfers as one product was permissible and that defendant was not required to allocate costs according to some artificial subproduct standard dictated by its competitor (*20 Cal. App. 4th 1530, 1538)* .

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PART II. FORMS
A. Actions Based on Unfair Practices Act

23-235 California Points & Authorities § 235.24

§ 235.24 Opposing Contention That Complaint States Cause of Action for Sales Below Cost [Bus. & Prof. Code § 17043]--Service Furnished by Publicly Owned Public Utility [Bus. & Prof. Code § 17024(2)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S COMPLAINT DOES NOT STATE A CAUSE OF ACTION FOR SALES BELOW COST BECAUSE THE SERVICE IS FURNISHED BY A PUBLICLY OWNED PUBLIC UTILITY, AND THE COMPLAINT DOES NOT ALLEGE THAT DEFENDANT'S BUSINESS ACTIVITY IS OUTSIDE THE STATUTORY EXEMPTION.

A. Nonapplicability to Publicly Owned Public Utility. Nothing in the Unfair Practices Act applies to any service, article, or product sold or furnished by a publicly owned public utility and on which the rates would have been established under the jurisdiction of the Public Utilities Commission of California if the service, article, or product had been sold or furnished by a public utility corporation, or installation and repair services rendered in connection with any services, articles, or products (*Bus. & Prof. Code § 17024(2)*).

B. Failure to Allege Activity Outside Exemption. Allegations in a complaint concerning unfair competition do not state a cause of action against a public entity when they fail to show that defendant's business activity is outside the exemption contained in *section 17024 of the Business and Professions Code* (*Hladek v. City of Merced (1977) 69 Cal. App. 3d 585, 591, 138 Cal. Rptr. 194*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that a complaint states a cause of action for sales below cost pursuant to *Bus. & Prof. Code § 17043*, when the complaint is against a public entity and fails to allege that defendant's business activity is outside the exemption of *Bus. & Prof. Code § 17024(2)* [*see Hladek v. City of Merced (1977) 69 Cal. App. 3d 585, 591, 138 Cal. Rptr. 194]* . They may be combined, if appropriate, with other

specific grounds for opposition in §§ 235.25 and 235.26. They may also be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they would most commonly be combined with general points and authorities supporting a general demurrer to a complaint. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, these points and authorities may be used to oppose the contention supported by the points and *authorities in § 235.22*.

[b] Related Pleading and Practice Forms

For discussion and a form of complaint for injunctive relief and treble damages based on a violation of the Unfair Practices Act (Bus. & Prof. Code §§ 17000-17101), see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender).

[c] Related Points and Authorities

For forms of points and authorities relating to demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Failure to Allege Activity Outside Exemption

In ***Hladek v. City of Merced*** *(1977) 69 Cal. App. 3d 585, 138 Cal. Rptr. 194* , owners of a taxi service brought an action against a city to seek damages for inverse condemnation and unfair competition under the Unfair Practices Act (*Bus. & Prof. Code § 17000-17101*). Plaintiffs alleged that they operated a "dial-a-bus, dial-a-ride" service in defendant city for several years, and that defendant then commenced operating a "dial-a-ride" transportation service in direct competition with plaintiffs, and at a loss, forcing plaintiffs to close their business. The trial court sustained a general demurrer to the complaint without leave to amend, and plaintiffs appealed.

The court of appeal reversed with respect to the cause of action for unfair competition, and remanded the matter with directions to the trial court to give plaintiffs leave to amend their complaint (*69 Cal. App. 3d 585, 591-592)* . *Bus. & Prof. Code § 17024(2)* states that nothing in the Act applies to any service sold or furnished by a publicly owned public utility and on which the rates would have been established under the jurisdiction of the California Public Utilities Commission if the service had been sold or furnished by a public utility corporation (*69 Cal. App. 3d 585, 589-590)* . Defendant's transportation system appears to be a publicly owned public utility. Consequently, the pivotal issue is whether the Public Utilities Commission would have the jurisdiction to establish the rates for the service if it had been sold or furnished by a privately owned public utility. Plaintiffs failed to state a cause of action because they failed to allege that defendant's conduct is outside the exemption of *Bus. & Prof. Code § 17024(2)*, pursuant to relevant provisions in the California Constitution and Public Utilities Code (*69 Cal. App. 3d 585, 590-591)* . However, it is an abuse of discretion fora trial court to sustain a general demurrer without leave to amend if there is any reasonable possibility that the defect can be cured by amendment. Therefore, plaintiffs should be allowed to amend their complaint to attempt to state a cause of action against defendant for unfair competition (*69 Cal. App. 3d 585, 591)* .

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A. Actions Based on Unfair Practices Act

23-235 California Points & Authorities § 235.25

§ 235.25 Opposing Contention That Complaint States Cause of Action for Sales Below Cost [Bus. & Prof. Code § 17043]--Failure to Allege Purpose Was to Injure Competitors or Destroy Competition

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S COMPLAINT DOES NOT STATE A CAUSE OF ACTION FOR SALES BELOW COST BECAUSE IT FAILS TO ALLEGE THAT DEFENDANT'S PURPOSE WAS TO INJURE COMPETITORS OR TO DESTROY COMPETITION.

Wrongful Purpose Required. In order to violate *Business and Professions Code Section 17043*, a defendant must have acted purposely (that is, with a desire to injure a competitor or destroy competition), and it is not enough that the defendant may have acted with knowledge that competitors may be injured by its actions in selling below cost (*Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co. (1999) 20 Cal. 4th 163, 174-175, 83 Cal. Rptr. 2d 548, 973 P.2d 527*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that a complaint states a cause of action for sales below cost pursuant to *Bus. & Prof. Code § 17043*, when the complaint fails to allege defendant's purpose was to injure competitors or destroy competition. They may be combined, if appropriate, with other specific grounds for opposition in §§ 235.24 and 235.26. They may also be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, these points and authorities may be used to oppose the contention supported by the points and *authorities in § 235.22*.

[b] Related Pleading and Practice Forms

For discussion and a form of complaint for injunctive relief and treble damages based on a violation of the Unfair Practices Act (Bus. & Prof. Code §§ 17000-17101), see California Forms of Pleading and Practice, Ch. 565,*Unfair Competition* (Matthew Bender).

[c] Related Points and Authorities

For forms of points and authorities relating to demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Allegation of Purpose Required

In ***Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*** *(1999) 20 Cal. 4th 163, 83 Cal. Rptr. 2d 548, 973 P.2d 527* , plaintiffs were cellular telephone retailers that brought suit against a company that sold cellular telephones below cost in order to increase the number of subscribers to its cellular telephone services, and thus, to increase its overall profits. At the time relevant to the lawsuit, defendant shared a government-protected "duopoly" status with one other regional provider of cellular telephone service. Plaintiffs alleged that, because they were not allowed to also provide cellular telephone services, they could not compete fairly with defendant's strategy of selling telephones below cost and recovering the losses through increased profits on sales of its services. Plaintiffs alleged causes of action under the Unfair Practices Act (*Bus. & Prof. Code § 17000 et seq.*) as well as under the unfair competition law (*Bus. & Prof. Code § 17200 et seq.*). The action under the Unfair Practices Act alleged violations of *Bus. & Prof. Code § 17043* for unlawfully engaging in below-cost sales and violations of *Bus. & Prof. Code § 17044* for use of loss leaders. After plaintiffs presented their case before the court, and before defendants offered their defense, the trial court entered judgment for defendant. While the court found that defendant did engage in below-cost sales and used loss leaders, and that these actions harmed plaintiffs, the court also found that defendant did not intend to harm plaintiffs, but only to compete with its duopoly competitor for cellular telephone services. Thus, the trial court ruled that defendant lacked the requisite intent to injure plaintiffs necessary to prove a violation of the Unfair Practices Act. The trial court also ruled that the action brought under the unfair competition law necessarily failed as well. Plaintiffs appealed. The court of appeal reversed as to the cause of action brought under the unfair competition law, finding that defendant's conduct may have violated that statute even if a violation of the Unfair Practices Act was not shown, but otherwise affirmed. Both parties appealed.

The Supreme Court affirmed the decision of the court of appeal. In considering the defendant's potential liability under *Bus. & Prof. Code § 17043*, the Supreme Court noted that the language of the statute provides for liability only when the below-cost sales are made "for the purpose of injuring competitors or destroying competition." Plaintiffs argued that this language did not mandate that they demonstrate that defendant desired to injure them, but merely that defendant believed or knew that harm was substantially certain to result or that the manifest probability of harm was great. The Court noted that earlier court opinions often used the more general term "intent," or simply repeated the statutory phrasing, without defining the required mental state. After analyzing distinctions between the terms "purpose," "intent," and "knowledge" as used in the Model Penal Code and the Restatement of Torts, the Supreme Court concluded that the statutory use of the term "purpose" had a precise meaning that could not be equated with the more expansive terms "intent" or "knowledge." Thus, the Court held that in order to violate *Bus. & Prof. Code § 17043*, a defendant must have acted with the desire of injuring competitors or destroying competition. Since plaintiffs did not contend that defendant acted with that desire, judgment for the defendant on that cause of action was proper (*20 Cal. 4th 163, 172-175)* .

[4] Additional Authorities

[a] Allegation of Purpose Required

The factual and procedural background of *Western Union Fin. Servs., Inc. v. First Data Corp. (1993) 20 Cal. App. 4th 1530, 25 Cal. Rptr. 2d 341* , is discussed in *§ 235.23[4][a]*. In affirming the denial of plaintiff's request for a preliminary injunction, the court also rejected plaintiff's contention that the trial court erred in failing to find that defendant intended to injure plaintiff or to destroy competition. The court noted that *Bus. & Prof. Code §§ 17043* and *17044* each require an intent to injure competitors or destroy competition (*20 Cal. App. 4th 1530, 1539-1540* & n.10). The court observed that under *Bus. & Prof. Code § 17071* [*see § 235.30*], proof of one or more acts of selling or giving away any article or product below cost or at discriminatory prices, together with proof of the injurious effect of those acts, is presumptive evidence of the purpose or intent to injure competitors or destroy competition. However, the court held, even assuming that defendant had sold a product below cost and that plaintiff had proved damages, the obvious and only effect of the presumption created by *Bus. & Prof. Code § 17071* was to require defendant to go forward with proof to negate the presumption of wrongful intent. The court ruled that defendant had done so by presenting evidence of its good faith intent to use its promotional pricing of domestic money transfer services to increase and maintain its customer base. The court concluded that once the presumption is rebutted, the burden shifts back to the plaintiff to offer actual proof of injurious intent and that plaintiff's evidence did not meet this burden (*20 Cal. App. 4th 1530, 1540)* .

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23-235 California Points & Authorities § 235.26

§ 235.26 Opposing Contention That Complaint States Cause of Action for Sales Below Cost [Bus. & Prof. Code § 17043] and Use of Loss Leaders [Bus. & Prof. Code § 17044]--Failure to Allege Facts Showing Sale Below Cost

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S COMPLAINT DOES NOT STATE A CAUSE OF ACTION FOR SALES BELOW COST BECAUSE IT FAILS TO ALLEGE FACTS SHOWING A SALE BELOW COST.

Sale Below Cost Required. The omission of allegations that a sale below cost occurred prevents a complaint from stating a cause of action under either *section 17043* or *17044 of the Business and Professions Code* (*Independent Journal Newspapers v. United W. Newspapers, Inc. (1971) 15 Cal. App. 3d 583, 587, 93 Cal. Rptr. 299*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that a complaint states a cause of action for sales below cost pursuant to *Bus. & Prof. Code § 17043*, when the complaint fails to allege facts showing a sale below cost [*see Independent Journal Newspapers v. United W. Newspapers, Inc. (1971) 15 Cal. App. 3d 583, 587, 93 Cal. Rptr. 299]* . They may be combined, if appropriate, with other specific grounds for opposition in §§ 235.24, 235.25, and 235.28. They may also be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they would most commonly be combined with general points and authorities supporting a general demurrer to a complaint. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, these points and authorities may be used to oppose the contentions supported by the points and

authorities in §§ 235.22 and *235.27*.

[b] Related Pleading and Practice Forms

For discussion and a form of complaint for injunctive relief and treble damages based on a violation of the Unfair Practices Act (Bus. & Prof. Code §§ 17000-17101), see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender).

[c] Related Points and Authorities

For forms of points and authorities relating to demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Sale Below Cost Required

In ***Independent Journal Newspapers v. United W. Newspapers, Inc.*** *(1971) 15 Cal. App. 3d 583, 93 Cal. Rptr. 299* , one newspaper corporation brought an action against another for injunctive and monetary relief for alleged violations of *Bus. & Prof. Code §§ 17043* (sales below cost) and 17044 (prohibiting loss leaders). Plaintiff and defendants were in direct competition with each other in the publishing of weekly throwaways, and the sale of advertising for these publications. Plaintiff alleged that defendants offered free advertising in their weekly throwaways to those who purchase classified advertising in their daily newspaper. Plaintiff pleaded on information and belief that defendant sold advertising space below cost with the intent of injuring competitors and destroying competition. Defendants filed a special demurrer for uncertainty as to both causes of action. The trial court sustained the demurrer with leave to amend, and plaintiff failed to amend within the time specified. The trial court dismissed the complaint for failure to amend, and plaintiff appealed.

The court of appeal affirmed, holding that in order to have a violation of either *Bus. & Prof. Code § 17043* or *Bus. & Prof. Code § 17044*, a sale below cost must occur (*15 Cal. App. 3d 583, 587)* . Plaintiff's conclusion regarding defendant's sale below cost is meaningless unless its factual basis lies in specific facts (*15 Cal. App. 3d 583, 586)* . Plaintiff pleaded no facts tending to show a sale of classified advertising space by defendants in their weekly newspapers, thereby preventing it from stating a cause of action under the Unfair Practices Act (*Bus. & Prof. Code §§ 17000-17101*) (*15 Cal. App. 3d 583, 587)* .

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Volume 23 Chapters 230-239 TRUST DEEDS---to---WORKERS' COMPENSATION
CHAPTER 235 UNFAIR COMPETITION
PART II. FORMS
A. Actions Based on Unfair Practices Act

23-235 California Points & Authorities § 235.27

§ 235.27 Supporting Contention That Complaint States Cause of Action for Use of Loss Leader [Bus. & Prof. Code § 17044]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S COMPLAINT STATES A CAUSE OF ACTION FOR UNLAWFUL USE OF A LOSS LEADER BECAUSE IT ALLEGES THE SALE OR USE OF AN ARTICLE OR PRODUCT AS A LOSS LEADER AS DEFINED UNDER SECTION 17030 OF THE BUSINESS AND PROFESSIONS CODE.

A. Loss Leader Unlawful. It is unlawful for any person engaged in business within California to sell or use any article or product as a loss leader as defined under *section 17030 of the Business and Professions Code* (*Bus. & Prof. Code § 17044*).

B. Loss Leader Defined. Loss Leader means any article or product sold at less than cost: (1) if the purpose is to induce, promote, or encourage the purchase of other merchandise; (2) if the effect is a tendency or capacity to mislead or deceive purchasers or prospective purchasers; or (3) if the effect is to divert trade from or otherwise injure competitors (*Bus. & Prof. Code § 17030*).

C. Article or Product Defined. [*See § 235.20[1], Paragraph C.*].

[*Optional*] **D. Use of Loss Leader May Include Sale of Service or Output of Trade.** The sale or use of an article or product as a loss leader prohibited under *Business and Professions Code sections 17030* and *17044* includes the sale or use of a service or output of trade (*Garner v. Journeyman Barbers', Hairdressers', Cosmetologists' & Proprietors' Int'l Union (1963) 223 Cal. App. 2d 101, 107, 35 Cal. Rptr. 693*).

[*Optional*] **D. Expansive Definition of Sale.** The broad definition of "article or product" requires a corresponding expansion of the word "sell" within the meaning of *Business and Professions Code Sections 17043* and *17044* (*Los*

Angeles Check Sellers Ass'n v. United States Nat'l Bank (1969) 275 Cal. App. 2d 570, 573, 80 Cal. Rptr. 321).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a complaint states a cause of action for sale or use of a loss leader [*Bus. & Prof. Code §§ 17030, 17044, 17070*]. They may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they would most commonly be combined with general points and authorities opposing a general demurrer to a complaint. They may also be adapted for use in a trial or appellate brief.

Counsel should note that, although not expressly specified in *Bus. & Prof. Code § 17044*, wrongful intent is a necessary allegation in an action for unlawful use of a loss leader [*see Dooley's Hardware Mart v. Food Giant Mkts., Inc. (1971) 21 Cal. App. 3d 513, 516-517, 98 Cal. Rptr. 543* ; *see also § 235.28[3][a]*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion and a form of complaint for injunctive relief and treble damages based on a violation of the Unfair Practices Act (Bus. & Prof. Code §§ 17000-17101), see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender).

[c] Related Points and Authorities

For forms of points and authorities relating to demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[d] Opposing Points and Authorities

The points and *authorities in §§ 235.26* and *235.28* may be used in an appropriate case to oppose the contention supported by this memorandum.

[3] Discussion of Authorities

[a] Use of Loss Leader May Include Sale of Service or Output of Trade

In ***Garner v. Journeyman Barbers', Hairdressers', Cosmetologists' & Proprietors' Int'l Union*** *(1963) 223 Cal. App. 2d 101, 35 Cal. Rptr. 693* , the owner and operator of a barber shop brought an action against a barbers' trade union to seek injunctive relief based on defendant's use and sale of loss leaders. Members of defendant union approached potential customers of plaintiff outside plaintiff's shop and handed them paper redeemable at union shops for cash discounts. With the discount, a union shop undersold not only plaintiff, but also the minimum price set by the state board, as well as the minimum price agreed on by proprietor union members in that area. Plaintiff alleged that, as a result of defendant's activities, many of plaintiff's prospective customers are diverted to union shops for the purpose of injuring plaintiff as a competitor and destroying competition between him and the proprietor union members. The trial court overruled defendant's demurrer to the complaint, and granted a preliminary injunction enjoining defendant union from inducing any prospective customers ofplaintiff to patronize another barber shop by promise of cash discounts or rebates. Defendant appealed.

The court of appeal affirmed, holding that defendant's activities constituted use or sale of a loss leader within the meaning of *Bus. & Prof. Code §§ 17030* and *17044*, because the activity of selling a haircut involves a service or output of a service trade. The court noted that *Bus. & Prof. Code § 17044* prohibits any person from selling or using any article or product as a loss leader. The court rejected defendant's contention that only a commodity or product can be used as a loss leader, and that the labor of cutting one's hair is not a commodity. *Bus. & Prof. Code § 17024*, which defines an article or product, concerns not the actual work of the barber in cutting the hair, but rather the purchase and sale of a haircut, which clearly amounts to a service or output of a service trade (*223 Cal. App. 2d 101, 107)* . Since defendant's plan, admittedly employed as a competitive method, has injured plaintiff as a competitor and destroyed competition, the haircut that is undersold at a competitor union barber shop is a loss leader (*223 Cal. App. 2d 101, 107-108)* .

[b] Expansive Definition of Sale

In ***Los Angeles Check Sellers Ass'n v. United States Nat'l Bank*** *(1969) 275 Cal. App. 2d 570, 80 Cal. Rptr. 321* , a check sellers' trade association brought an action against a bank to obtain injunctive and related relief for violation of *Bus. & Prof. Code §§ 17043* (sales below cost) and 17044 (sale or use of loss leaders). Plaintiffs' members are licensed to sell and cash checks and money orders to the public through agents who are usually independent businesses such as retail stores. The public pays fees depending on the size of the check. The selling agent retains a portion of the fee as a commission, the amount of which is negotiated, and remits the remainder to the seller. Defendant began selling money orders through agents in the same geographical area as that served by plaintiffs, at the same price as plaintiff. However, defendant retained a smaller amount than plaintiffs' sellers, thereby allowing its sales agents to retain a larger commission than that of plaintiffs' agents. Plaintiffs allege that defendant's percentage is less than its cost of doing business, that defendant acted without regard whether it made a profit, for the purpose of attracting banking customers. Some of plaintiff's former customers allegedly patronize defendant in order to yield a greater commission. The trial court entered a judgment of dismissal after sustaining defendant's demurrer to the complaint without leave to amend. Plaintiffs appealed.

The court of appeal reversed, holding that the complaint alleged a cause of action under the Unfair Practices Act (*Bus. & Prof. Code §§ 17000-17101*) (*275 Cal. App. 2d 570, 574)* . The court rejected defendant's contention that its conduct does not come within the Act because it does not "sell" anything. The statute is designed to cover a great variety of transactions other than the conventional sale of real or personal property. The broad definition of "article or product" compels a corresponding expansion of the word "sell" as used in *Bus. & Prof. Code §§ 17043* and *17044*. A money order is a "thing of value," and the issuer renders a service by paying the face value to the holder of the instrument on presentation. According to the legislature's liberal interpretation of the statute, defendant is engaged in selling a product within the meaning of the Act (*275 Cal. App. 2d 570, 573)* . The court also addressed defendant's assertion that both plaintiffs and defendant sell money orders at the same price. The actions of plaintiffs' members are irrelevant. The commission earned by defendant's sales agents is part of defendant's cost. If the amount that defendant allegedly nets after paying the sales commission is too small, then the sale is below cost (*275 Cal. App. 2d 570, 574)* .

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23-235 California Points & Authorities § 235.28

§ 235.28 Opposing Contention That Complaint States Cause of Action for Use of Loss Leader [Bus. & Prof. Code § 17044]--Failure to Allege Purpose Was to Injure Competitors or Destroy Competition

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S COMPLAINT DOES NOT STATE A CAUSE OF ACTION FOR UNLAWFUL USE OF A LOSS LEADER BECAUSE IT FAILS TO ALLEGE THAT DEFENDANT'S PURPOSE WAS TO INJURE COMPETITORS OR TO DESTROY COMPETITION.

Wrongful Purpose Required. In order to violate *Business and Professions Code Section 17044*, defendant's use of a loss leader must have been done purposely, that is, with a desire to injure a competitor or destroy competition (*Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co. (1999) 20 Cal. 4th 163, 178, 83 Cal. Rptr. 2d 548, 973 P.2d 527*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that a complaint states a cause of action for unlawful use of a loss leader pursuant to *Bus. & Prof. Code § 17044*, when the complaint fails to allege defendant's purpose was to injure competitors or destroy competition. They may be combined, if appropriate, with other specific grounds for opposition in § 235.26. They should be combined with points and authorities pertaining to the specific procedural context in which they are raised. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, these points and authorities may be used to oppose the contention supported by the points and

authorities in § 235.27.

[b] Related Pleading and Practice Forms

For discussion and a form of complaint for injunctive relief and treble damages based on a violation of the Unfair Practices Act (Bus. & Prof. Code §§ 17000-17101), see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender).

[c] Related Points and Authorities

For forms of points and authorities relating to demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Wrongful Purpose Required

The facts and procedural background of ***Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*** *(1999) 20 Cal. 4th 163, 83 Cal. Rptr. 2d 548, 973 P.2d 527* , are discussed in *§ 235.25[3][a]*. In upholding the court of appeal's conclusion that the trial court was correct in entering judgment for the defendant on the action brought under *Bus. & Prof. Code § 17044*, the Supreme Court noted that, while the language of the statute does not suggest that a particular mental state is required in order to find a violation, California courts had since 1952 interpreted the statute as requiring the same mental state as required by *Bus. & Prof. Code § 17043*. The failure of the legislature to amend the statute to overrule those court holdings when it had the opportunities to do so, along with the longevity and unanimity of the holdings, convinced the Court that it was the responsibility of the legislature to amend the established rule if it so desired. Thus, since *Bus. & Prof. Code § 17043* required that a defendant act with the purpose of injuring competitors or destroying competition, which required that the defendant have acted with the desire to injure competitors or destroy competition [*see § 235.25[3][a]*], that same purpose or desire was necessary to constitute an illegal use of a loss leader under *Bus. & Prof. Code § 17044* (*20 Cal. 4th 163, 178)* .

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23-235 California Points & Authorities § 235.29

§ 235.29 Supporting Contention That Complaint States Cause of Action for Secret Payment or Allowance of Rebate, Refund, Commission, or Unearned Discount [Bus. & Prof. Code § 17045]

[1] FORM

[*The following may be included in a memorandum or points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S COMPLAINT STATES A CAUSE OF ACTION FOR VIOLATION OF THE UNFAIR PRACTICES ACT BECAUSE IT ALLEGES USE OF AN UNEARNED DISCOUNT BY A SELLER IN A MANNER THAT INJURED COMPETITION.

A. Secret Payments or Discounts Which Tend to Destroy Competition Unlawful. The secret payment or allowance of rebates, refunds, commissions, or unearned discounts, whether in the form of money or otherwise, or secretly extending to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions, to the injury of a competitor and where such payment or allowance tends to destroy competition, is unlawful (*Bus. & Prof. Code § 17045*).

[*Optional*] **B. Protection Not Restricted to Competitors of Person Allowing an Unearned Discount.** The prohibition of secret rebates under *Business and Professions Code Section 17045* is not restricted to competitors of the person allowing an unearned discount (the "primary" line of commerce), but applies as well to competitors of the person receiving it (the "secondary" line of commerce) (*ABC Int'l Traders, Inc. v. Matsushita Elec. Corp. (1997) 14 Cal. 4th 1247, 1254, 61 Cal. Rptr. 2d 112*).

[*Optional*] **C. Only Special Services or Privileges Not Extended to All Purchasers Require Proof That Purchase Was on Like Terms and Conditions.** It is not necessary to purchase "on like terms and conditions" in order to state a claim under *Business and Professions Code Section 17045* that a competitor received a secret rebate or unearned discount, because that phrase only attaches to the phrase "special services or privileges not extended to all purchasers" (*Eddins v. Sumner Redstone (2005) 134 Cal. App. 4th 290, 332, 35 Cal. Rptr. 3d 863*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of a contention that a complaint states a cause of action for use of an unearned discount by a seller [*Bus. & Prof. Code § 17045*].

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which this issue is raised. For example, they would most commonly be combined with general points and authorities opposing a general demurrer to a complaint. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence of a secret payment, rebate, refund, commission, or unearned discount, and should argue that this payment or allowance resulted in injury of a competitor or tended to destroy competition [*see Bus. & Prof. Code § 17045*].

[c] Related Pleading and Practice Forms

For discussion and a form of complaint for injunctive relief and treble damages based on a violation of the Unfair Practices Act (*Bus. & Prof. Code § 17000 et seq.*), see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender).

[d] Related Points and Authorities

For forms of points and authorities relating to demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Discussion of Authorities

[a] Protection Not Restricted to Competitors of Person Allowing an Unearned Discount

In ***ABC Int'l Traders, Inc. v. Matsushita Elec. Corp.*** *(1997) 14 Cal. 4th 1247, 61 Cal. Rptr. 2d 112* , plaintiff, a wholesale distributor, brought a cause of action for violation of the Unfair Practices Act against a manufacturer. Plaintiff alleged that defendant gave secret unearned discounts to other distributors, and that this discount tended to destroy competition among wholesalers in that favored wholesalers were able to offer retailers lower prices than those offered by disfavored wholesalers. Plaintiff contended that this practice violated the *Bus. & Prof. Code § 17045* prohibition against paying secret rebates not extended to all purchasers, to the injury of a competitor, where the payment tends to destroy competition. Defendant contended that the class of "competitors" protected under the statute is restricted to competitors of the person allowing an unearned discount (the "primary" line of commerce) as opposed to competitors of the person receiving the discount (the "secondary" line of commerce). The trial court granted defendant's demurrer, and the court of appeal affirmed.

The Supreme Court reversed, holding that for purposes of *Bus. & Prof. Code § 17045* the term "competition" includes competition among retailers, wholesalers, or producers (*14 Cal. 4th 1247, 1262)* . The court initially noted that the statutory language has no express restriction to the level of competition to be protected, and the court did not find an implied restriction by the absence of a specific reference (*14 Cal. 4th 1247, 1255)* . The court then reviewed the statutory purposes and historical background of the statute, and concluded that it was intended primarily to protect against competitive injury in the secondary line of commerce, which was just the injury alleged by the plaintiff (*14 Cal. 4th 1247, 1262)* .

[b] Only Special Services or Privileges Not Extended to All Purchasers Require Proof That Purchase Was on Like Terms and Conditions

In ***Eddins v. Sumner Redstone*** *(2005) 134 Cal. App. 4th 290, 35 Cal. Rptr. 3d 863* , the plaintiffs were independent video retailers who brought suit against a large chain-store competitor, its parent company and controlling shareholder, and the home-video affiliates of five major movie studios, based on an alleged conspiracy between the defendants to deny plaintiffs the same favorable terms and conditions that the studios provided to the large chain store. The suit alleged violations of the Cartwright Act, the Unfair Practices Act, and the California unfair competition statute. All of the causes of action were based on output revenue-sharing agreements entered into between each studio and the chain store retailer under which the retailer purchased video cassettes of the studio's movies for rental to consumers. Under the agreements, the retailer purchased videotapes at a much lower initial price than regularly charged to retailers, in exchange for providing to the studios a portion of the rental revenues and a long-term commitment to purchase the entire output of movies from each studio. The plaintiffs alleged that the defendants conspired with each other to deny the same favorable terms of purchase to smaller independent retailers such as themselves, in violation of the Cartwright Act, and that the agreements constituted a violation of *Bus. & Prof. Code § 17045* because by failing to offer comparable terms to other distributors, the studios effectively provided secret unearned discounts to the chain-store retailer. The trial court granted summary judgment for the defendants on all causes of action. The plaintiffs appealed.

The court of appeal reversed the summary judgment on the cause of action alleging a violation of *Bus. & Prof. Code § 17045*. As to that cause of action, the court of appeal held that the trial court erred in requiring that the plaintiffs show that they purchased "on like terms and conditions" in order to state a claim that each studio had given a secret, unearned discount to the chain store. The court concluded that if a purchaser has no choice but to purchase on fundamentally different terms and conditions, because the terms given to the favored purchaser are neither available to nor known by the disfavored purchaser, then it is difficult not to conclude that some form of price discrimination has occurred. If a supplier were free to give secret rebates or unearned discounts to select purchasers, and this was unknown to those purchasing under another, less favorable plan, the purpose behind the prohibition on price discrimination would be undermined. Therefore, purchasers, such as the plaintiffs, that bring an action based on the prohibition against secret rebates or unearned discounts need not show that they were purchasing "on like terms and conditions," because the very nature of their claim is that they were not given the opportunity to purchase on like terms and conditions. The court concluded that the phrase "on like terms and conditions" in *Bus. & Prof. Code § 17045* only attaches to the phrase "special services or privileges not extended to all purchasers," and that this conclusion was in accord with the only other court opinion to directly address the issue, with the plain language of the statute, and with the legislative directive that the Unfair Practices Act must be liberally construed (*134 Cal. App. 4th 290, 332-335)* .

[4] Additional Authorities

[a] Protection Not Restricted to Competitors of Person Allowing an Unearned Discount

The factual and procedural background of *Eddins v. Sumner Redstone (2005) 134 Cal. App. 4th 290, 35 Cal. Rptr. 3d 863* , is discussed in *§ 235.29[3][b]* . Several of the movie studios also argued that each one entered into the revenue-sharing agreements with the retailer chain in order to meet the competition of the other studios, and therefore their conduct tended to preserve rather than destroy competition. The studios argued that without a showing that their conduct tended to harm competition, no violation of *Bus. & Prof. Code § 17045* could be proved. The court of appeal disagreed. The court noted that although a competitor in a "primary" line of commerce may have taken a business action to remain competitive, such as enter into a revenue-sharing agreement or participate in a secret rebate or discount, this is not necessarily a defense to an action under *Bus. & Prof. Code § 17045*. This so-called "meeting the competition" defense does not establish as a matter of law that the conduct does not tend to destroy competition in a "secondary" line of commerce, and harm to this type of competition would be sufficient to overcome the defense. In this particular case, the court of appeal held that the trial court erred by not considering whether the revenue-sharing agreements tended to destroy competition in a secondary line of commerce. Specifically, the trial court should have considered the harm to

competition between the large video rental retailer and the smaller, independently owned rental outlets that were not doing business with the studios under the same revenue-sharing agreements (*134 Cal. App. 4th 290, 338-340)* .

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23-235 California Points & Authorities § 235.30

§ 235.30 Supporting Contention That Requisite Intent Exists for Violation of Unfair Practices Act--Presumptive Evidence of Intent [Bus. & Prof. Code § 17071]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THERE IS PRESUMPTIVE EVIDENCE OF DEFENDANT'S INTENT TO INJURE COMPETITORS OR DESTROY COMPETITION BECAUSE PLAINTIFF HAS PROVED (1) ONE OR MORE ACTS OF SELLING OR GIVING AWAY AN ARTICLE OR PRODUCT BELOW COST OR AT DISCRIMINATORY PRICES AND (2) THE INJURIOUS EFFECT OF THOSE ACTS.

Presumptive Evidence of Intent. In all actions under the Unfair Practices Act, proof of one or more acts of selling or giving away any article or product below cost or at discriminatory prices, together with proof of the injurious effect of those acts, is presumptive evidence of the purpose or intent to injure competitors or destroy competition (*Bus. & Prof. Code § 17071*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that the requisite intent, in an action under the Unfair Practices Act, has been shown by proof of facts giving rise to a presumption of intent [*Bus. & Prof. Code § 17071*]. They may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, the contention might be combined with general points and authorities supporting a motion of summary judgment. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion and a form of complaint for injunctive relief and treble damages based on a violation of the Unfair Practices Act (Bus. & Prof. Code §§ 17000-17101), see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender).

[c] Related Points and Authorities

For forms of points and authorities relating to motions for summary judgment generally, see Ch. 221, *Summary Judgments* .

[d] Opposing Points and Authorities

The points and *authorities in § 235.31* may be used in an appropriate case to oppose the contention supported by this memorandum.

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23-235 California Points & Authorities § 235.31

§ 235.31 Opposing Contention That Requisite Intent Exists for Violation of Unfair Practices Act--No Presumption of Intent [Bus. & Prof. Code § 17071] Absent Proof of Injurious Effect of Conduct

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THERE IS NO PRESUMPTIVE EVIDENCE OF DEFENDANT'S ALLEGED INTENT TO INJURE COMPETITORS OR DESTROY COMPETITION BECAUSE PLAINTIFF HAS FAILED TO PROVE ANY INJURIOUS EFFECT OF DEFENDANT'S ACTS.

No Presumptive Evidence of Intent Absent Proof of Injurious Effect. If there is insufficient evidence to find that one's conduct diverted trade from or otherwise injured defendant's competitors generally, or plaintiff in particular, no presumption of the purpose or intent to injure competitors or destroy competition arises pursuant to *section 17071 of the Business and Professions Code* (*Dooley's Hardware Mart v. Food Giant Mkts., Inc. (1971) 21 Cal. App. 3d 513, 517, 98 Cal. Rptr. 543*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that the requisite intent, in an action under the Unfair Practices Act, has been shown by proof of facts giving rise to a presumption of intent [*Bus. & Prof. Code § 17071*]. They may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, the contention might be combined with general points and authorities opposing a motion of summary judgment. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

In an appropriate case, these points and authorities may be used to oppose the contention supported by the points and *authorities in § 235.30*.

[b] Related Pleading and Practice Forms

For discussion and a form of complaint for injunctive relief and treble damages based on a violation of the Unfair Practices Act (Bus. & Prof. Code §§ 17000-17101), see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender).

[c] Related Points and Authorities

For forms of points and authorities relating to motions for summary judgment generally, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] No Presumptive Evidence of Intent Absent Proof of Injurious Effect

The facts and procedural background of ***Dooley's Hardware Mart v. Food Giant Mkts., Inc.*** *(1971) 21 Cal. App. 3d 513, 98 Cal. Rptr. 543* , are discussed in *§ 235.28[3][a]*. In an action under the Unfair Practices Act involving use of a loss leader, the court of appeal affirmed judgment for the defendant after holding that there was insufficient evidence to find that defendants' conduct diverted trade from or otherwise injured their competitors generally or plaintiff in particular. Consequently, the presumption of evidence of intent under *Bus. & Prof. Code § 17071* did not apply because plaintiff failed to prove one or more sales of an article or product below cost, together with the injurious effect of that practice (*21 Cal. App. 3d 513, 517)* .

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23-235 California Points & Authorities § 235.32

§ 235.32 Supporting Contention That Injunctive Relief Is Available to Enjoin Violation of Unfair Practices Act [Bus. & Prof. Code §§ 17070, 17078]--Unclean Hands Doctrine Inapplicable

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE DOCTRINE OF UNCLEAN HANDS IS INAPPLICABLE TO PREVENT THE ISSUANCE OF _____ [A TEMPORARY RESTRAINING ORDER *or* A PRELIMINARY INJUNCTION *or* AN INJUNCTION] TO ENJOIN ACTS THAT ARE PROHIBITED BY THE UNFAIR PRACTICES ACT.

A. Action for Injunctive Relief Authorized. Any person or trade association may bring an action to enjoin and restrain any violation of this chapter and, in addition, thereto, for the recovery of damages (*Bus. & Prof. Code § 17070*).

B. Issuance of Injunction. It if appears to the court on any application for a temporary restraining order, or on the hearing of any order to show cause why a preliminary injunction should not be issued, or on the hearing on any motion for a preliminary injunction, or if the court shall find, in any action, that any defendant therein is violating, or has violated, the Unfair Practices Act, then the court shall enjoin the defendant from doing all acts that are prohibited by the section or sections violated (*Bus. & Prof. Code § 17078*).

C. Unclean Hands Doctrine Inapplicable. The unclean hands doctrine, which states that equity will not aid one party or another to a transaction that is illegal or contrary to public policy if the parties are equally at fault, does not apply to prevent the granting of the preliminary injunction based on violation of the Unfair Practices Act (*Kofsky v. Smart & Final Iris Co. (1955) 131 Cal. App. 2d 530, 531, 281 P.2d 5*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that the equitable doctrine of unclean hands

does not apply in an action under the Unfair Practices Act to prevent the issuance of injunctive relief under *Bus. & Prof. Code §§ 17070, 17078* [*see Kofsky v. Smart & Final Iris Co. (1955) 131 Cal. App. 2d 530, 531, 281 P.2d 5]* . They may be combined, in an appropriate case, with additional points and authorities supporting the issuance of injunctive relief in § 235.33. They may be also combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be combined with general points and authorities supporting an application for a temporary restraining order and a preliminary injunction under *Code Civ. Proc. § 527*. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion and a form of complaint for injunctive relief and treble damages based on a violation of the Unfair Practices Act (Bus. & Prof. Code §§ 17000-17101), see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender). For discussion and forms relating to injunctive relief generally, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender).

[c] Related Points and Authorities

For forms of points and authorities relating to issuance of injunctive relief generally, see Ch. 116, *Injunctions* .

[3] Discussion of Authorities

[a] Unclean Hands Doctrine Inapplicable

Kofsky v. Smart & Final Iris Co. *(1955) 131 Cal. App. 2d 530, 281 P.2d 5* , was an action between competitors in the wholesale tobacco business, in which the trial court entered an order granting a preliminary injunction restraining defendant from violating *Bus. & Prof. Code § 17043* (sales below cost). Defendant appealed, contending that the unclean hands doctrine, which states that equity will not aid one party or another to a transaction that is illegal or contrary to public policy if the parties are equally at fault, applies to prevent the granting of the preliminary injunction.

The court of appeal affirmed, holding that the unclean hands doctrine does not apply to prevent the granting of a preliminary injunction based on violation of the Unfair Practices Act (*Bus. & Prof. Code §§ 17000-17101*). The purpose of the Act is to prevent activities that the legislature declares to be against the public interest. The Act's provisions should be liberally construed. Pursuant to *Bus. & Prof. Code § 17078*, plaintiff was entitled to a preliminary injunction restraining defendant from violating the provisions of *Bus. & Prof. Code § 17043* pending the trial of the action (*131 Cal. App. 2d 530, 531)* . The unclean hands doctrine has no application when the failure to restrain an act because the parties are *in pari delicto* would result in permitting an act declared by statute to be void or against public policy. Therefore, since in the instant case the acts that defendant was restrained from doing were against public policy, the rule is applicable, and theissue whether plaintiff had unclean hands is irrelevant (*131 Cal. App. 2d 530, 532)* .

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Volume 23 Chapters 230-239 TRUST DEEDS---to---WORKERS' COMPENSATION
CHAPTER 235 UNFAIR COMPETITION
PART II. FORMS
A. Actions Based on Unfair Practices Act

23-235 California Points & Authorities § 235.33

§ 235.33 Supporting Contention That Injunctive Relief Is Available to Enjoin Violation of Unfair Practices Act [Bus. & Prof. Code §§ 17070, 17078]--Preliminary Injunction Is Available to Enjoin Sale or Use of Loss Leader [Bus. & Prof. Code §§ 17030, 17044]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

A PRELIMINARY INJUNCTION SHOULD BE ISSUED TO RESTRAIN THE SALE OR USE OF ANY ARTICLE OR PRODUCT AS A LOSS LEADER.

A. Action for Injunctive Relief Authorized. [*See § 235.32[1], Paragraph A.*]

B. Issuance of Injunction. [*See § 235.32[1], Paragraph B.*]

C. Loss Leader Unlawful. [*See § 235.27[1], Paragraph A.*]

D. Loss Leader Defined. [*See § 235.27[1], Paragraph B.*]

E. Injunction Against Loss Leader. A preliminary injunction may be granted to restrain the sale or use of an article or product as a loss leader (*Garner v. Journeyman Barbers', Hairdressers', Cosmetologists' & Proprietors' Int'l Union (1963) 223 Cal. App. 2d 101, 107-108, 35 Cal. Rptr. 693*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a preliminary injunction should be issued to restrain the sale or use of any article or product as a loss leader [*see Bus. & Prof. Code §§ 17030, 17044, 17070, 17078*; *Garner v. Journeyman Barbers', Hairdressers', Cosmetologists' & Proprietors' Int'l Union (1963) 223 Cal.*

App. 2d 101, 107-108, 35 Cal. Rptr. 693] . They may be combined, in an appropriate case, with additional points and authorities supporting the issuance of injunctive relief in § 235.32. They may be also combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be combined with general points and authorities supporting an application for a preliminary injunction under *Code Civ. Proc. § 527*. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion and a form of complaint for injunctive relief and treble damagesbased on a violation of the Unfair Practices Act (Bus. & Prof. Code §§ 17000-17101), see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender). For discussion and forms relating to injunctive relief generally, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender).

[c] Related Points and Authorities

For forms of points and authorities relating to issuance of injunctive relief generally, see Ch. 116, *Injunctions* .

[3] Discussion of Authorities

[a] Injunction Against Loss Leader

The facts and procedural background of ***Garner v. Journeyman Barbers', Hairdressers', Cosmetologists' & Proprietors' Int'l Union*** *(1963) 223 Cal. App. 2d 101, 35 Cal. Rptr. 693* , are discussed in *§ 235.27[3][a]*. The court of appeal held that an article or product includes a service or output of a service trade, which encompasses the sale of a haircut. The court also held that defendant's activity, under the guise of peaceful picketing, is carried on by unlawful means, for which plaintiff is entitled to a preliminary injunction, without bond, pursuant to *Bus. & Prof. Code § 17078* (*223 Cal. App. 2d 101, 108)* .

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23-235 California Points & Authorities § 235.34

§ 235.34 Supporting Contention That Treble Damages May Be Recovered for Violation of Unfair Practices Act [Bus. & Prof. Code § 17082]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF IS ENTITLED TO TREBLE DAMAGES BECAUSE PLAINTIFF HAS PROVED ACTUAL DAMAGES, AND PLAINTIFF NEED NOT PROVE MALICE OR ANY OTHER QUALIFYING CONDITION ON THE PART OF DEFENDANT.

A. Action for Damages Authorized. Any person or trade association may bring an action to enjoin and restrain any violation of this chapter and, in addition, thereto, for the recovery of damages (*Bus. & Prof. Code § 17070*).

B. Recovery of Treble Damages. In any action under the Unfair Practices Act, in addition to injunctive relief, any plaintiff in any action shall be entitled to recover three times the amount of the actual damages, if any, sustained by the plaintiff, as well as three times the actual damages, if any, sustained by any person who has assigned to the plaintiff his claim for damages resulting from a violation of the Unfair Practices Act (*Bus. & Prof. Code § 17082*).

C. No Proof of Malice or Other Qualifying Condition Required. On plaintiff's proof of actual damages in an action under the Unfair Practices Act, *Section 17082 of the Business and Professions Code* requires the imposition of treble damages without regard to malice or any other judicially imposed qualifying condition (*Uneedus v. California Shoppers, Inc. (1978) 86 Cal. App. 3d 932, 942, 150 Cal. Rptr. 596*).

[*Optional*] **D. Motion for New Trial Not Condition Precedent to Appeal.** Failure to move for a new trial does not preclude a party from raising on appeal the issue of entitlement to treble damages under *Section 17082 of the Business and Professions Code* (*Uneedus v. California Shoppers, Inc. (1978) 86 Cal. App. 3d 932, 943, 150 Cal. Rptr. 596*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that plaintiff is entitled to treble damages after proving actual damages in an action brought under the Unfair Practices Act [*Bus. & Prof. Code § 17082*]. They may be combined with points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be combined with generalpoints and authorities supporting a motion for summary judgment. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion and a form of complaint for injunctive relief and treble damages based on a violation of the Unfair Practices Act (Bus. & Prof. Code §§ 17000-17101), see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender).

[c] Related Points and Authorities

For forms of points and authorities relating to motions for summary judgment generally, see Ch. 221, *Summary Judgments* .

[3] Discussion of Authorities

[a] No Proof of Malice or Other Qualifying Condition Required

Uneedus v. California Shoppers, Inc. *(1978) 86 Cal. App. 3d 932, 150 Cal. Rptr. 596* , was an action brought by one corporation against another to seek damages and injunctive relief for violation of *Bus. & Prof. Code § 17043* (sales below cost). After nonjury trial, the court awarded plaintiff judgment for general damages and attorney's fees. The court denied plaintiff's request for treble damages under *Bus. & Prof. Code § 17082*, on the ground that defendant did not act with malice or oppression toward plaintiff, and the acts were not of such magnitude to warrant imposition of treble damages. Plaintiff appealed from the court's ruling denying treble damages.

The court of appeal reversed, holding that *Bus. & Prof. Code § 17082* requires treble damages in actions brought pursuant to the Unfair Practices Act (*Bus. & Prof. Code § 17000 et seq.*) without regard to malice or any other judicially imposed qualifying condition (*86 Cal. App. 3d 932, 941-942)* . The court rejected defendant's contention that proof of actual damages qualifies a plaintiff for treble damages but does not automatically allow their award. Rather, a plaintiff qualifies for the right to mandatory treble damages after proving actual damages (*86 Cal. App. 3d 932, 943)* .

[b] Motion for New Trial Not Condition Precedent to Appeal

The facts and procedural background of ***Uneedus v. California Shoppers, Inc.*** *(1978) 86 Cal. App. 3d 932, 150 Cal. Rptr. 596* , are discussed in *§ 235.34[3][a]*. The court held that *Bus. & Prof. Code § 17082* requires treble damages in actions brought pursuant to the Unfair Practices Act without regard to malice or any other judicially imposed qualifying condition. The court noted that a motion for new trial is generally a condition precedent to raising the issue of inadequacy of damages on appeal. However, the general rule involves evaluation of the evidence, and does not apply to issues involving the interpretation of a statute (*86 Cal. App. 3d 932, 943)* .

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23-235 California Points & Authorities § 235.35

§ 235.35 Opposing Contention That Plaintiff May Elect Punitive Damages [Civ. Code § 3294] or Treble Damages for Violation of Unfair Practices Act [Bus. & Prof. Code § 17082]--Treble Damages as Mandatory When No Other Remedy Was Pursued

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF IS ONLY ENTITLED TO TREBLED DAMAGES AND MAY NOT ELECT PUNITIVE DAMAGES.

A. Recovery of Treble Damages. [*See § 235.34[1], Paragraph B.*]

B. No Election When Only One Cause of Action Was Pursued. A plaintiff who has pursued a single cause of action under the Unfair Practices Act and has established a malicious or oppressive violation of that Act is not entitled to elect whether to take punitive damages under *Section 3294 of the Civil Code* or treble damages under *Section 17082 of the Business and Professions Code*, but is only entitled to treble damages because both penalties serve the same purpose and Section 17082 is mandatory (*Turnbull & Turnbull v. ARA Transp., Inc. (1990) 219 Cal. App. 3d 811, 826-827, 268 Cal. Rptr. 856*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted to oppose the contention that a successful plaintiff who has pursued but one cause of action may elect between punitive damages [*see Civ. Code § 3294*] and trebled damages under *Bus. & Prof. Code § 17082*.

Counsel should insert argument in this form showing the relationship between the facts and the points of law stated. Thus, counsel should refer to the pleadings and the record to establish that no common law tort cause of action was pursued by plaintiff, because this authority would be inapplicable in that case [*see Marshall v. Brown (1983) 141 Cal.*

App. 3d 408, 419, 190 Cal. Rptr. 392] .

[3] Discussion of Authorities

[a] No Election When Only One Cause of Action Was Pursued

The facts and procedural background of ***Turnbull & Turnbull v. ARA Transp., Inc.*** *(1990) 219 Cal. App. 3d 811, 268 Cal. Rptr. 856* , are discussed in *§ 235.23[3][a]*. Defendant challenged plaintiff's right to elect compensatory and punitive damages instead of treble damages. The court of appeal agreed. The court said that ordinarily the fact that a statutory penalty is imposed for a wrongful act does not preclude recovery of punitive damages in a tort action when the necessary malice or oppression is shown. If the purpose of the statutory penalty is the same as that of punitive damages, however, the plaintiff cannot obtain double recovery and must elect to have judgment entered in an amount that reflects either the statutory trebling or the compensatory and punitive damages (*219 Cal. App. 3d 811, 826)* . An exception to this rule is that when a new right, not existing at common law, is created by statute and the statutory remedy for infringement of that right is provided, that remedy is exclusive of all others unless it is inadequate (*219 Cal. App. 3d 811, 826-827)* . The treble damages of provision of *Bus. & Prof. Code § 17082* is punitive and similar in purpose to *Civ. Code § 3294*; thus, plaintiff was not entitled to both. *Bus. & Prof. Code § 17082* is mandatory, and plaintiff was relying solely on that statutory remedy. The court of appeal distinguished *Marshall v. Brown (1983) 141 Cal. App. 3d 408, 419, 190 Cal. Rptr. 392* , which upheld a plaintiff's right to an election, on the ground that plaintiff in *Marshall* was pursuing two causes of action, one for slander and one authorized by *Lab. Code §§ 1050, 1054*. In this case, the plaintiff had not alleged or pursued any alternative theory of liability, and had not pursued a common law tort cause of action that existed prior to the enactment of the Unfair Practices Act. Thus, plaintiff was limited to recovery of treble damages (*219 Cal. App. 3d 811, 827)* .

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23-235 California Points & Authorities §§ 235.36-235.49

[Reserved]

§§ 235.36[Reserved]

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B. Actions Based on Statutory Unfair Competition

23-235 California Points & Authorities § 235.50

§ 235.50 Supporting Contention That Cause of Action Exists for Statutory Unfair Competition [Bus. & Prof. Code §§ 17200, 17203]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF MAY OBTAIN RELIEF UNDER BUSINESS AND PROFESSIONS CODE SECTION 17203, FOR ANY ACT OR PRACTICE BY DEFENDANT THAT CONSTITUTES UNFAIR COMPETITION AS DEFINED UNDER BUSINESS AND PROFESSIONS CODE SECTION 17200.

A. Private Action for Relief From Statutory Unfair Competition Authorized. Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as

may be necessary to prevent the use by any person of any practice that constitutes unfair competition, as defined in Chapter 5 of Part II, Division 7 (commencing with *Section 17200) of the Business and Professions Code*, or as may be necessary to restore to any person in interest any money or property, real or personal, that may have been acquired by means of the unfair competition (*Bus. & Prof. Code § 17203*).

B. Statutory Unfair Competition Defined. As used in Chapter 5 of Part II, Division 7 (commencing with *Section 17200), of the Business and Professions Code*, unfair competition shall mean and include any unlawful, unfair, or fraudulent business act or practice, and unfair, deceptive, untrue, or misleading advertising and any act prohibited by Chapter 1 (commencing with *Section 17500) of Part 3 of Division 7 of the Business and Professions Code* (*Bus. & Prof. Code § 17200*).

[*Optional*] **C. Statutory Unfair Competition Is Not Limited to Anticompetitive Business Practices.** Unfair competition, as defined under *Business and Professions Code Section 17200*, is not limited to anticompetitive business practices, but is equally directed toward the right of the public to protection from fraud and deceit (Committee on

Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 209, 197 Cal. Rptr. 783, 673 P.2d 660 ; *Consumers Union of United States, Inc. v. Fisher Dev., Inc. (1989) 208 Cal. App. 3d 1433, 1439, 257 Cal. Rptr. 151* ; *see also Barquis v. Merchants Collection Assn. (1972) 7 Cal. 3d 94, 110-111, 101 Cal. Rptr. 745, 496 P.2d 817* (decided under prior law)).

[*EITHER*]

[*Optional*] **D. Determination of Unfair Business Practice Constituting Statutory Unfair Competition.** The determination of whether a particular business practice is unfair, and thus comes within the definition of unfair competition under *Business and Professions Code Section 17200*, necessarily involves an examination of its impact on its alleged victim, balanced against the reasons, justifications, and motives of the alleged wrongdoer. The court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim (*Motors, Inc. v. Times Mirror Co. (1980) 102 Cal. App. 3d 735, 740, 162 Cal. Rptr. 543*).

[*OR*]

[*Optional*] **D. Determination of Unfair Business Practice Constituting Statutory Unfair Competition.** In order to show that a business has engaged in "unfair" conduct sufficient to support a cause of action for unfair competition under *Business and Professions Code Section 17200*, a consumer must show (1) substantial injury, (2) the injury is not outweighed by any countervailing benefits to consumers or competition, and (3) the injury is not one that consumers themselves could reasonably have avoided (*Camacho v. Automobile Club of So. California (2006) 142 Cal. App. 4th 1394, 1403, 48 Cal. Rptr. 3d 770*).

[*OR, IF ACTION BROUGHT BY DIRECT COMPETITOR OF DEFENDANT*]

[*Optional*] **D. Determination of Unfair Business Practice Constituting Statutory Unfair Competition.** When a plaintiff claims to have suffered injury from a direct competitor's "unfair" act or practice, as that term is defined for purposes of *Business and Professions Code Section 17200*, conduct is "unfair" if it threatens an incipient violation of an antitrust law, or violates the policy or spirit of an antitrust law because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition (*Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co. (1999) 20 Cal. 4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527*).

[*CONTINUE*]

[*Optional*] **E. Unlawful Business Practice Constitutes Statutory Unfair Competition.** Unfair competition, within the meaning of *Business and Professions Code Section 17200*, includes anything that can properly be called a business practice and that at the same time is forbidden by law (*People v. McKale (1979) 25 Cal. 3d 626, 634, 159 Cal. Rptr. 811, 602 P.2d 731* ; *Consumers Union of United States, Inc. v. Fisher Dev., Inc. (1989) 208 Cal. App. 3d 1433, 1438, 257 Cal. Rptr. 151* ; *see also Barquis v. Merchants Collection Assn. (1972) 7 Cal. 3d 94, 113, 101 Cal. Rptr. 745, 496 P.2d 817* (decided under prior law)). [It is not restricted to deceptive or fraudulent conduct, but extends to any unlawful business practice (Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 209-210, 197 Cal. Rptr. 783, 673 P.2d 660)].

[*Optional*] **F. Determination of Fraudulent or Deceptive Business Practice Constituting Statutory Unfair Competition.** To state a cause of action for deceptive business practice constituting unfair competition within the meaning of *Business and Professions Code Section 17200*, it is necessary only to show that members of the public are

likely to be deceived. Allegations of actual deception, reasonable reliance, and damage are unnecessary (Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 211, 197 Cal. Rptr. 783, 673 P.2d 660 ; *Allied Grape Growers v. Bronco Wine Co. (1988) 203 Cal. App. 3d 432, 451, 249 Cal. Rptr. 872*). [It is not necessary to plead the exact language of every deceptive statement. It is sufficient for plaintiff to describe a scheme to mislead customers, and allege that each misrepresentation to each customer conforms to that scheme (Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 212-213, 197 Cal. Rptr. 783, 673 P.2d 660)].

[*Optional*] **G. Buyer May Be Liable for Unfair Competition.** Nothing in *Business and Professions Code Section 17200* prohibits it from being appliedagainst a buyer (*Allied Grape Growers v. Bronco Wine Co. (1988) 203 Cal. App. 3d 432, 449-450, 249 Cal. Rptr. 872*).

[*Optional*] **H. Personal Liability of Controlling Shareholder and Responsible Officer.** When a majority stockholder and chief executive officer is responsible for ambiguously written contracts and misleading presentations of selling agents, he or she may be personally liable for violations of *Business and Professions Code Section 17200* (*People v. Dollar Rent-A-Car Sys., Inc. (1989) 211 Cal. App. 3d 119, 132, 259 Cal. Rptr. 191*).

[*Optional*] **I. Unfair Insurance Practices Act Does Not Supersede or Displace Statutory Unfair Competition Action.** The Unfair Insurance Practices Act (*Insurance Code Section 790 et seq.*) does not supersede or displace insurance industry-related claims under the Unfair Competition Act (*Manufacturers Life Ins. Co. v. Superior Court (1995) 10 Cal. 4th 257, 263, 41 Cal. Rptr. 2d 220, 895 P.2d 56*).

[*Optional*] **J. *Insurance Code Sections 12414.26* and *12414.29* Do Not Supersede or Displace Statutory Unfair Competition Action Brought Against Title Insurer.** In an action brought against a title insurer, *Insurance Code Sections 12414.26* and *12414.29* do not supersede or displace claims brought under the Unfair Competition Act when the claims do not involve ratemaking practices (*Quelimane Co. v. Stewart Title Guar. Co. (1998) 19 Cal. 4th 26, 43-46, 77 Cal. Rptr. 2d 709, 960 P.2d 513*).

[*Optional*] **K. Restitution is Available Independent of Injunction.** The availability of restitution under *Business and Professions Code Section 17203* is not contingent on the issuance of an injunction (*ABC Int'l Traders, Inc. v. Matsushita Elec. Corp. (1997) 14 Cal. 4th 1247, 1271, 61 Cal. Rptr. 2d 112*).

[*Optional*] **L. Nonresident Business May Be Liable for Unfair Competition.** Nonresident as well as resident businesses can be held to account for wrongful business conduct affecting California employers and employees under *Business and Professions Code Section 17200* (*Application Group, Inc. v. Hunter Group, Inc. (1998) 61 Cal. App. 4th 881, 908, 72 Cal. Rptr. 2d 73*).

[*Optional*] **M. Conduct Not Constituting Violation of Unfair Business Practices Act May Nonetheless Be Subject to Action Under Unfair Competition Law.** Conduct that is not specifically actionable under *Business and Professions Code Section 17000 et seq.* may nonetheless be actionable under *Business and Professions Code Section 17200 et seq.*, so long as no provision of law specifically provides that the challenged conduct is lawful (*Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co. (1999) 20 Cal. 4th 163, 187-188, 83 Cal. Rptr. 2d 548, 973 P.2d 527*).

[*Optional*] **N. Reliance on Specific Statements in Advertising Claim Not Required to Show Fraudulent Conduct.** If an unfair competition claim is based on fraud stemming from alleged false advertising and misrepresentations made to consumers, while the plaintiff must plead and prove actual reliance to satisfy requirements for standing to bring the action, the plaintiff need not show that those misrepresentations were the sole or even decisive cause of the injury and need not necessarily plead and prove individualized reliance on specific misrepresentations or false statements when those misrepresentations and false statements were part of an extensive and long-term advertising campaign (*In re Tobacco Cases (2009) 46 Cal. 4th 298, 328, 93 Cal. Rptr. 3d 559, 207 P.3d 20* ; *Morgan v. AT&T Wireless Services, Inc. (2009) 177 Cal. App. 4th 1235, 1258, 99 Cal. Rptr. 3d 768*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a cause of action exists for statutory unfair competition, that is, a cause of action for relief under *Bus. & Prof. Code § 17203* for unfair competition as defined under *Bus. & Prof. Code § 17200*. These points and authorities may be combined, if appropriate, with the additional points and *authorities in § 235.52*. They may also be combined with the points and authorities pertaining to the specific procedural context in which they are raised. For example, they may be combined with general points and authorities opposing a general demurrer to a complaint. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For further discussion of statutory unfair competition under Bus. & Prof. Code §§ 17200-17208, see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender). For a form of complaint for injunctive relief and restitution based on false advertising, including a count for unfair competition under Bus. & Prof. Code §§ 17200, 17203, see California Forms of Pleading and Practice, Ch. 14, *Advertising* (Matthew Bender). For a form of complaint for injunctive relief based on trade name infringement, including a count for unfair competition under Bus. & Prof. Code §§ 17200, 17203, see California Forms of Pleading and Practice, Ch. 549, *Trademarks and Tradenames* (Matthew Bender).

[c] Related Points and Authorities

For a form of points and authorities opposing a private plaintiff's right to recover damages under *Bus. & Prof. Code § 17203*, see *§ 235.57*.

For a form of points and authorities opposing a private plaintiff's cause of action under *Bus. & Prof. Code § 17200*, see *§ 235.58*.

For a form of points and authorities supporting a plaintiff's right to a judgment ordering restitution and/or disgorgement of profits in an action under *Bus. & Prof. Code § 17203*, see *§ 235.53*.

For a form of points and authorities supporting a demurrer to a complaint based on unfair competition under *Bus. & Prof. Code § 17200* and false advertising under *Bus. & Prof. Code § 17500* on the ground that neither statute applies to political election campaign practices, see Ch. 14, *Advertising* . For forms of points and authorities relating to demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* . For forms of points and authoritiesrelating to issuance of injunctive relief generally, see Ch. 116, *Injunctions* . For forms of points and authorities relating to the appointment of receivers generally, see Ch. 200, *Receivers* .

[3] Discussion of Authorities

[a] Private Action for Relief From Statutory Unfair Competition Authorized

Bus. & Prof. Code § 17203 authorizes a private action for unfair competition within the meaning of *Bus. & Prof. Code § 17200*, and provides for injunctive relief as well as any other order or judgment, including the appointment of a receiver, that may be necessary to prevent the use or enjoyment by a person of any practice constituting unfair competition [*Bus. & Prof. Code § 17203*]. *Bus. & Prof. Code § 17203* authorizes restitution and disgorgement of profits [*see § 235.53*]. *Bus. & Prof. Code §§ 17206* and *17207* also provide for civil penalties recoverable by public officers.

Although a private plaintiff may not recover money damages under *Bus. & Prof. Code § 17203* [*see § 235.57*], counsel might consider seeking damages under some other provision and injunctive relief under *Bus. & Prof. Code § 17203*, as was done successfully in *Allied Grape Growers v. Bronco Wine Co. (1988) 203 Cal. App. 3d 432, 249 Cal. Rptr. 872* [*see § 235.50[3][e]*], in view of the provision that the remedies under *Bus. & Prof. Code §§ 17200-17208* are cumulative to all other remedies [*Bus. & Prof. Code § 17205*].

[b] Statutory Unfair Competition Is Not Limited to Anticompetitive Business Practices

In **Committee on Children's Television, Inc. v. General Foods Corp.** (1983) 35 Cal. 3d 197, 197 Cal. Rptr. 783, 673 P.2d 660 , several organizations and individuals brought an action against a food manufacturer, a retail store, and advertising agencies to seek damages, injunctive relief, and related remedies for violation of the unfair competition law (*Bus. & Prof. Code §§ 17200-17208*), fraud, and deceptive advertising. In their cause of action for unfair competition, plaintiffs alleged that defendants engaged in a sophisticated advertising and marketing program designed to induce children to consume products that, although promoted and labeled as cereals, are in fact only sugar products. Plaintiffs listed many representations allegedly made in television commercials aimed at children. Plaintiffs asserted that defendants concealed material facts (for example, the sugar content of the products) and made affirmative misrepresentations, rendering the advertisements misleading and deceptive. The trial court sustained defendants' demurrers to the complaint without leave to amend, and dismissed the complaint, on grounds that the allegations did not identify with specificity the representations made or the particular media used. Plaintiffs appealed.

The Supreme Court reversed and remanded the matter for further proceedings. The Court concluded that, although the common law tort of unfair business competition required a competitive injury, *Bus. & Prof. Code § 17200* is not confined to anticompetitive business practice, but is equally directed toward the right of the public to protection from fraud and deceit (35 Cal. 3d 197, 209) . Further, the proscription of unfair competition under *Bus. & Prof. Code § 17200* is not restricted to deceptive or fraudulent conduct, but rather extends to any unlawful business practice (35 Cal. 3d 197, 209-210) . The Legislature apparently intended to permit courts to enjoin ongoing wrongful business conduct in whatever context the activity might occur (35 Cal. 3d 197, 210) . To state a cause of action under the consumer protection statutes for injunctive relief, it is necessary only to show that members of the public are likely to be deceived. Allegations of actual deception, reasonable reliance, and damage are unnecessary. The court may also order restitution without individualized proof of deception, reliance, and injury if it determines that the remedy is necessary to prevent the use of the unfair practice (35 Cal. 3d 197, 211) . Therefore, a plaintiff need not plead the exact language of every deceptive statement. It is sufficient for plaintiff to describe as scheme to mislead customers, and allege that each misrepresentation to each customer conforms to that scheme (35 Cal. 3d 197, 212-213) . Since there is no doubt as to what advertisements or deceptive practices are at issue, the allegations are sufficient to notify the defendants of the claim made against them, and to frame the issues for litigation (35 Cal. 3d 197, 213) .

Consumers Union of United States, Inc. v. Fisher Dev., Inc. *(1989) 208 Cal. App. 3d 1433, 257 Cal. Rptr. 151* . The court of appeal held that housing discrimination constituted unfair competition (*208 Cal. App. 3d 1433, 1438-1441)* .

In ***Barquis v. Merchants Collection Assn.*** *(1972) 7 Cal. 3d 94, 101 Cal. Rptr. 745, 496 P.2d 817* , retail store customers brought an action against a collection agency to seek injunctive and related relief on several theories of liability, including unfair competition under former Civ. Code § 3369 [*now see Bus. & Prof. Code §§ 17200-17208*]. Plaintiffs alleged that large retail establishments assigned their customers' obligations to defendant for collection. Defendant allegedly filed actions in improper counties, pursuant to statutorily inadequate complaints, in order to increase its number of default judgments. The trial court sustained defendant's demurrer to the complaint without leave to amend, and entered a judgment dismissing the action. Plaintiffs appealed.

The Supreme Court reversed with respect to the cause of action seeking injunctive relief under statutory unfair competition. Plaintiffs' allegations, if proved, would show that defendant is engaged in a mass abuse of process.

Moreover, defendant's behavior, when utilized as a general practice by a collection agency whose primary business is litigation, additionally constitutes anunlawful business practice. Therefore, the conduct may be enjoined under former Civ. Code § 3369 [*now see Bus. & Prof. Code §§ 17200-17208*] (*7 Cal. 3d 94, 103)* . The Court rejected defendant's contention that the statute's prohibition is confined to practices involving competitive injury, that is, injury to a competitor, and therefore does not apply to an injury to a consumer. Although under common law competitive injury was an element of unfair competition, the legislature broadened the scope of legal protection against wrongful business practices generally, and consequently extended to the entire consuming public the protection once afforded only to business competitors. Statutory unfair competition demonstrates a clear design to protect consumers as well as competitors, and is at least as equally directed toward the right of the public to protection from fraud and deceit as toward the preservation of fair business competition (*7 Cal. 3d 94, 110)* .

[c] Determination of Unfair Business Practice Constituting Statutory Unfair Competition

The facts and procedural background of ***Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*** *(1999) 20 Cal. 4th 163, 83 Cal. Rptr. 2d 548, 973 P.2d 527* , are discussed in *§ 235.25[3][a]*. Recognizing that the unfair competition law was written in intentionally broad terms in order to allow courts flexibility in determining whether specific conduct was unfair under the particular circumstances of the case, the Supreme Court concluded that businesses needed further guidance as to what was permissible under that statute. Turning to the analogous provisions of the Federal Trade Commission Act that govern "unfair methods of competition" [*see 15 U.S.C.S. § 45(a)*], the Supreme Court held that when a plaintiff claims to have suffered injury from a direct competitor's "unfair" act or practice, as that term is defined for purposes of *Bus. & Prof. Code § 17200*, conduct is "unfair" if it threatens an incipient violation of an antitrust law, or violates the policy or spirit of an antitrust law because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition (*20 Cal. 4th 163, 185-187)* . Under the procedural context of the case, the Court had no occasion to apply the standard, and the case was remanded to the trial court for litigation of the issue of whether defendant's conduct violated the unfair competition law (*20 Cal. 4th 163, 189)* .

In ***Camacho v. Automobile Club of So. California*** *(2006) 142 Cal. App. 4th 1394, 48 Cal. Rptr. 3d 770* , plaintiff was an uninsured motorist who rear-ended an insured driver. The insurer for the other motorist paid its insured's claim and then assigned to a debt collection company the responsibility for collecting over $9,000 from plaintiff. Plaintiff paid $500 towards the claim, but then filed a class action suit under *Bus. & Prof. Code § 17200* against the insurer, the collection agency, and related entities. Plaintiff alleged that the collection agency engaged in unfair business practices by sending harassing and misleading letters to uninsured motorists in order to intimidate them into paying asserted claims, even when there has been no determination in a court of law or by an arbitrator that the claim is actually owed. The trial court granted judgment on the pleadings in favor of the defendants on the grounds that the complaint failed to allege that the gravity of the harm to plaintiff outweighed the utility of the defendants' conduct, and that even if the defendants' conduct was theoretically unfair, plaintiff could not allege that he was actually harmed by the conduct. Plaintiff appealed.

The court of appeal affirmed, although the court held that the trial court employed an incorrect standard for determining whether defendants' conduct was "unfair" under the unfair competition statute. The court of appeal noted the Supreme Court's admonition in *Cel-Tech* to avoid earlier standards for determining what constitutes unfair conduct that were too amorphous and provided too little guidance to courts and businesses, as well as the Supreme Court's approval of considering standards adopted under the Federal Trade Commission Act (FTCA) when fashioning standards under *Bus. & Prof. Code § 17200* (*142 Cal. App. 4th 1394, 1400-1401)* . The court also concluded that tethering a finding of unfairness in consumer cases to a violation of specific provisions was too restrictive, given the broad scope of the unfair competition statute and the fact that separate provision is made in the statute for "unlawful" conduct. Moreover, while it might make sense to tie unfair, anticompetitive conduct among competitors to antitrust laws, the same cannot be said when the action is brought by a consumer, as the range of potentially unfair, harmful conduct is more broad (*142 Cal. App. 4th 1394, 1402-1403)* . The court concluded that the appropriate standard was the one used for consumer actions brought under the FTCA and held that in order to show that a business has engaged in "unfair" conduct sufficient to

support a cause of action for unfair competition under *Bus. & Prof. Code § 17200*, a consumer must show (1) substantial injury, (2) the injury is not outweighed by any countervailing benefits to consumers or competition, and (3) the injury is not one that consumers themselves could reasonably have avoided (*142 Cal. App. 4th 1394, 1403)* . Applying this test to the facts of the case, the court concluded that plaintiff could not show that he was injured by defendants' conduct, in light of the fact that plaintiff was actually at fault for the underlying car accident and owed the debt that the collection agency sought to collect. The court also concluded that plaintiff could not meet the second prong of the test, because the "injury" of paying a debt that was actually owed could not be outweighed by the benefit of actually collecting that debt. Finally, plaintiff could have avoided the "injury" by obtaining and carrying automobile insurance as required by law (*142 Cal. App. 4th 1394, 1405-1406)* .

In ***Motors, Inc. v. Times Mirror Co.*** *(1980) 102 Cal. App. 3d 735, 162 Cal. Rptr. 543* , a wholesale distributor of automobile products brought an action against a newspaper publisher to seek damages and injunctive relief for unfair competition, pursuant to former Civ.Code § 3369 [*now see Bus. & Prof. Code §§ 17200-17208*], and unreasonable restraint of trade. Plaintiff purchased stock from manufacturers, and resold it to jobbers who sell to consumers and others. A newspaper published by defendant sold display advertising according to a two-tiered rate system, based on whether the advertiser was a wholesale or retail concern. Plaintiff alleged that defendant's practice was unfair because, inter alia, the newspaper was the dominant print medium in defendant's geographical area, and the practice was discriminatory and unfairly rewarded large retail chains. The trial court sustained demurrers to the complaint and entered judgment for defendant. Plaintiff appealed.

The court of appeal reversed with respect to the cause of action for unfair competition, holding that, in determining whether defendant's practice was an unfair business practice constituting statutory unfair competition, the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim (*102 Cal. App. 3d 735, 740)* . The court reasoned that in permitting the restraining of all unfair business practices, former Civ. Code § 3369 [*now see Bus. & Prof. Code §§ 17200-17208*] establishes only a wide standard to guide courts of equity. Given the creative nature of the scheming mind, the legislature evidently concluded that a less inclusive standard would not be adequate (*102 Cal. App. 3d 735, 739-740)* . The determination of whether a particular business practice is unfair necessarily involves an examination of its impact on its alleged victim, balanced against the reasons, justifications, and motives of the alleged wrongdoer (*102 Cal. App. 3d 735, 740)* .

NOTE:

The standard articulated by the *California Supreme Court in Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal. 4th 163, 83 Cal. Rptr. 2d 548, 973 P.2d 527* , was specifically limited to claims of unfair competition brought by a competitor. It does not apply to actions brought by consumers or to actions brought by competitors alleging other kinds of violations of the unfair competition law, such as actions alleging fraudulent or unlawful business practices or unfair, deceptive, untrue, or misleading advertising [*Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co. (1999) 20 Cal. 4th 163, 187 n.12, 83 Cal. Rptr. 2d 548, 973 P.2d 527]* . The standard articulated in cases such as *Motors, Inc. v. Times Mirror Co. (1980) 102 Cal. App. 3d 735, 162 Cal. Rptr. 543* , arguably still applies in contexts other than an action brought by a competitor alleging unfair practices. However, although the standard of *Motors, Inc.* may still be appropriate in some cases, it would no longer apply to a fact situation such as that involved in the *Motors, Inc.* decision itself. That case involved a claim of unfair practices brought by a direct competitor, and any similar claim would now be subject to the standard set out in *Cel-Tech Communications*.

In fact, some more recent court of appeal opinions have questioned whether the earlier formulations for determining what constitutes unfair conduct in an action brought by a party who is not a competitor are now too broad in light of the Supreme Court's analysis in *Cel-Tech Communications.* These court opinions have suggested that to ensure that a court in an action brought by a party who is not a competitor will not merely apply its own subjective conception of fairness, the conduct alleged to be

unfair must be tethered to a specific constitutional, statutory, or regulatory provision, at least if the claim of unfairness is predicated on an alleged violation of public policy [*see, e.g.*, Scripps Clinic v. Superior Court (2003) 108 Cal. App. 4th 917, 939-940, 134 Cal. Rptr. 2d 101 ; Gregory v. Albertson's, Inc. (2002) 104 Cal. App. 4th 845, 854, 128 Cal. Rptr. 2d 389] .

The court of appeal in *Camacho v. Automobile Club of So. California (2006) 142 Cal. App. 4th 1394, 48 Cal. Rptr. 3d 770* , eschewed this path and adopted the test in consumer actions that is applicable in similar cases brought under the Federal Trade Commission Act, requiring the consumer to show (1) substantial injury, (2) the injury is not outweighed by any countervailing benefits to consumers or competition, and (3) the injury is not one that consumers themselves could reasonably have avoided [*Camacho v. Automobile Club of So. California (2006) 142 Cal. App. 4th 1394, 1403, 48 Cal. Rptr. 3d 770]* .

[d] Unlawful Business Practice Constitutes Statutory Unfair Competition

Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 197 Cal. Rptr. 783, 673 P.2d 660 , is discussed in *§ 235.50[3][b]*.

People v. McKale *(1979) 25 Cal. 3d 626, 159 Cal. Rptr. 811, 602 P.2d 731* , involved a public civil action brought against individuals operating a mobile home park, to seek civil penalties and injunctive relief under various causes of action,including unfair competition pursuant to former Civ. Code § 3369 [*now see Bus. & Prof. Code § 17200-17208*]. The alleged acts of misconduct concerned defendants' operation of the park, for example, dumping of waste water on the premises and imposition of unlawful fees on tenants, in violation of various statutes under different statutory schemes. The trial court sustained demurrers to the complaint without leave to amend, and entered judgment in favor of defendants. The People appealed.

The Supreme Court reversed and remanded with respect to the causes of action for unfair competition, holding that what constitutes unfair competition or unfair or fraudulent business practice under any given set of circumstances is a question of fact, and the essential test is whether the public is likely to be deceived (*25 Cal. 3d 626, 635)* . The Court noted that it is difficult to see any other legislative purpose for enacting former Civ. Code § 3369 [*now see Bus. & Prof. Code §§ 17200-17208*] than to extend the meaning of unfair competition to anything that can properly be called a business practice that at the same time is forbidden by law (*25 Cal. 3d 626, 634)* .

The facts and procedural background of ***Barquis v. Merchants Collection Assn.*** *(1972) 7 Cal. 3d 94, 101 Cal. Rptr. 745, 496 P.2d 817* , are discussed in *§ 235.50[3][b]*. The Court held that a complaint need not allege competitive injury to state a cause of action for statutory unfair competition under former Civ. Code § 3369 [*now see Bus. & Prof. Code §§ 17200-17208*]. The section does not limit its coverage to traditional deceptive or fraudulent practices, but instead explicitly extends to any unlawful, unfair, or deceptive business practice, thereby intending to permit tribunals to enjoin ongoing wrongful business conduct in whatever context the activity might occur (*7 Cal. 3d 94, 111)* . The statute applies to anything that can properly be called a business practice that at the same time is forbidden by law (*7 Cal. 3d 94, 113)* .

In ***Consumers Union of United States, Inc. v. Fisher Dev., Inc.*** *(1989) 208 Cal. App. 3d 1433, 257 Cal. Rptr. 151* , the court of appeal held that housing discrimination constituted an unlawful business practice (*208 Cal. App. 3d 1433, 1439-1441)* .

[e] Determination of Fraudulent or Deceptive Business Practice Constituting Statutory Unfair Competition

Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 197 Cal. Rptr. 783, 673 P.2d 660 , is discussed in *§ 235.50[3][b]*.

In ***Allied Grape Growers v. Bronco Wine Co.*** *(1988) 203 Cal. App. 3d 432, 249 Cal. Rptr. 872* , plaintiff, a grape growers cooperative, and defendant entered into a contract under which plaintiff was to supply defendant 30,000 tons of grapes per year. In 1982, the year of the largest grape crop in California history, defendant breached the contract by refusing to accept grapes or by downgrading them, thus paying lower prices for them. Plaintiff sued defendant on several theories, seeking damages under *Com. Code § 2706* and injunctive relief for violation of *Bus. & Prof. Code § 17200*. The trial court found defendant's practice of downgrading the grapes to be unfair, fraudulent, and in violation of *Food & Agric. Code §§ 55872, 55878,* and *55879*. Plaintiff was awarded damages under *Com. Code § 2706* and injunctive relief under *Bus. & Prof. Code § 17203,* and defendant appealed.

The court of appeal affirmed. Defendant contended that its downgrading of the grapes could not constitute a violation of *Bus. & Prof. Code § 17200* because it was a mere buyer, not a seller, and that the downgrading could not be fraudulent because there was no evidence that it had any tendency to induce plaintiff or others to enter into sales transactions. The court of appeal reviewed the history of *Bus. & Prof. Code § 17200* and its predecessor, former Civil Code § 3369, and concluded that *Bus. & Prof. Code § 17200* covers any practice that is unlawful *or* unfair *or* deceptive, and that nothing prevents an action being brought under that section against a buyer (*203 Cal. App. 3d 432, 449-450)* .

Regarding defendant's contention that the downgrading was not fraudulent, the court of appeal cited Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 211, 197 Cal. Rptr. 783, 673 P.2d 660 , for the proposition that actual deception, reliance, and damage are not necessary to establish a violation of *Bus. & Prof. Code § 17200*. Nor does a practice have to be both unfair and fraudulent. It is enough that the practice is unfair. Here the evidence showed that defendant was attempting to play the market when it overcontracted with growers, including plaintiff. Its downgrading practice was unconscionable and clearly unfair. Even if the trial court's finding that the practice was fraudulent was incorrect, the holding could be sustained on the basis of the unfairness (*203 Cal. App. 3d 432, 451)* .

[f] Buyer May Be Liable for Unfair Competition

Allied Grape Growers v. Bronco Wine Co. *(1988) 203 Cal. App. 3d 432, 249 Cal. Rptr. 872* , is discussed in *§ 235.50[3][e]*.

[g] Personal Liability of Controlling Shareholder and Responsible Officer

People v. Dollar Rent-A-Car Sys., Inc. *(1989) 211 Cal. App. 3d 119, 259 Cal. Rptr. 191* , was an action against several companies and their controlling shareholder and chief executive officer for violations of *Bus. & Prof. Code §§ 17200* and *17535* (false and misleading advertising), challenging several practices, including (1) charging a "retail repair rate" to the renter even though defendant rental company only paid the wholesale repair rate, and (2) ambiguous written contracts and misleading oral sales presentations relating to collision damage waivers. There were well over 500,000 misleading transactions and over1,500 false repair invoices. Judgment imposed a civil penalty of $100,000 under *Bus. & Prof. Code §§ 17206* and *17536*. Defendants appealed.

The court of appeal affirmed. The court noted that any violation of the false advertising statutes necessarily constitutes unfair business practices within the meaning of *Bus. & Prof. Code § 17200* (*211 Cal. App. 3d 119, 129)* . Regarding the imposition of the civil penalty on the majority shareholder and chief executive officer, the court noted that this person was the majority shareholder and chief executive officer of all the defendant companies; he was the one responsible for the terms and conditions of the collision damage waivers; he had authority to approve and did approve the ambiguous rental agreements; he either knew or reasonably should have known that the agents were selling collision damage waivers and customers were buying them without being properly advised of its purpose and limitations; he more than anyone else was responsible for the confusion over the collision damage waivers; he authorized the practice of billing customers more than the actual repair costs; and he personally approved the continued use of the deceptive

and ambiguous rental agreements. Because of this control over the policies and procedures followed by defendant corporations, the individual defendant participated in the unlawful practices as if he had personally made the misrepresentations, and thus the imposition of personal liability was proper (*211 Cal. App. 3d 119, 132)* .

[h] Unfair Insurance Practices Act Does Not Supersede or Displace Statutory Unfair Competition Action

In ***Manufacturers Life Ins. Co. v. Superior Court*** *(1995) 10 Cal. 4th 257, 41 Cal. Rptr. 2d 220, 895 P.2d 56* , an insurance agency asserted statutory causes of action against various insurance companies for violation of *Bus. & Prof. Code §§ 16720* and *17200*. The complaint alleged that plaintiff operated an insurance brokerage and consulting business in which it advised attorneys regarding settlement annuities, and that after it disclosed to those clients the actual costs of such annuities the defendant insurance companies boycotted plaintiff's brokerage. The complaint asserted that defendants' conduct was a per se violation of the Cartwright Act, constituted an unreasonable restraint intended to monopolize the business of insurance in violation of the Unfair Insurance Practices Act (UIPA), and thus involved unlawful, unfair or fraudulent business practices which violated the Unfair Competition Act (UCA). Defendants demurred, contending that the insurance industry is exempt from any antitrust and unfair business practices legislation other than the UIPA. The trial court sustained the demurrers with respect to the Cartwright Act causes of action, but overruled the demurrers with respect to the UCA and UIPA claims. In a consolidated review of appeals by both parties, the court of appeal held that the UIPA does not supersede or displace actions under the Cartwright Act, and that a private cause of action may be stated under the UCA for violations of the Cartwright Act, but not for violations of the UIPA.

The Supreme Court affirmed the judgment of the court of appeal. The Court rejected defendants' contention that in adopting the UIPA the legislature intended that only the Insurance Commissioner be authorized to remedy unlawful conduct by insurance companies, noting that this construction would render UIPA references to civil and criminal liability meaningless (*10 Cal. 4th 257, 273)* . The Court also noted that the applicable section of the UIPA was patterned after a draft of the Model Unfair Insurance Practices Act, which has been construed in other states as preserving remedies already available at the time the UIPA was adopted (*10 Cal. 4th 257, 276)* .

[i] Insurance Code Sections 12414.26 and 12414.29 Do Not Supersede or Displace Statutory Unfair Competition Action Brought Against Title Insurer

In ***Quelimane Co. v. Stewart Title Guar. Co.*** *(1998) 19 Cal. 4th 26, 77 Cal. Rptr. 2d 709, 960 P.2d 513* , plaintiffs, who were engaged in the holding, ownership, and financing of real property, brought suit against the only companies offering real estate title insurance in their county. Defendants had an established practice of refusing to issue title insurance on properties acquired at tax sales, despite the fact that titles of parcels purchased by tax sale are deeded free and clear by operation of law. This refusal, along with defendants' efforts to convince the public that title insurance was a necessity, caused a great reduction in the value and marketability of plaintiffs' land bought at tax sales and resulted in the attempted rescission and breach of contracts for sale of plaintiffs' land to third-party purchasers. In the suit, plaintiffs alleged, inter alia, that defendants had agreed among themselves to "redline" all property acquired by tax sale, had engaged in a scheme to deny title insurance to parcels of land purchased at a land auction when the seller of the parcels had acquired title at a tax sale, and had conspired together to deny title insurance to property obtained by tax sale. They also asserted that, by agreeing to refuse to issue title insurance to such property while making efforts to convince members of the public that title insurance was necessary, defendants had manipulated the market in the county area in which they were the only title insurers. One cause of action asserted that in three specific sales, defendants had engaged in unlawful, unfair, and fraudulent business practices actionable under *Bus. & Prof. Code § 17200*, without economic, actuarial, or other justification. The case was dismissed by stipulation as to two of the three defendants, and the remaining defendant successfully demurred to the remaining causes of action brought against it. The court of appeal affirmed, holding in part that *Ins. Code § 12414.26* limited actions against insurers for unlawful business practices to the remedies provided in that code and that, since the legislature had not made *Bus. & Prof. Code § 17200* expressly applicable toinsurers, no cause of action could be stated under that act.

The Supreme Court reversed the court of appeal. The Court held in part that the title insurers were subject to the Unfair Competition Law, *Bus. & Prof. Code § 17200 et seq.* Reaffirming the principles of *Manufacturers Life Ins. Co. v. Superior Court (1995) 10 Cal. 4th 257, 41 Cal. Rptr. 2d 220, 895 P.2d 56* [*see § 235.50[3][h]*], the Court rejected the conclusion that *Ins. Code §§ 12414.26* and *12414.29*, which expressly limits the actions that can brought title insurers, exempted title insurers from actions brought under the Unfair Competition Law, concluding that the Insurance Code provisions related only to ratemaking and rate regulation. In addition, the language of the provisions demonstrated a clear Legislative intent to preempt only local regulations and ordinances, not other state laws (*19 Cal. 4th 26, 44-46)* .

[j] Restitution is Available Independent of Injunction

The facts and procedural background of ***ABC Int'l Traders, Inc. v. Matsushita Elec. Corp.*** *(1997) 14 Cal. 4th 1247, 61 Cal. Rptr. 2d 112* , are discussed in *§ 235.29[3][a]*. Plaintiff also brought a cause of action for restitution, alleging that defendant violated the unfair competition law. Defendant contended that restitution is available under *Bus. & Prof. Code § 17203* only when it is requested ancillary to an injunction. Since no prayer was made for an injunction, defendant claimed that restitution was unavailable. The Supreme Court began its analysis by stating that nothing in the language of the statute indicates the availability of restitution is contingent on the issuance of an injunction. On its face, the statute appears to authorize injunctive relief and/or restitution. Furthermore, cases relied upon by defendant did not specifically hold that restitution was contingent on injunctive relief (*14 Cal. 4th 1247, 1269)* . Finally, the court reasoned that defendant's interpretation of the statute would frustrate the deterrent purposes of restitution by allowing a defendant who successfully opposed an injunction to retain its illicit profit (*14 Cal. 4th 1247, 1271)* . The court thus reversed the judgment of the court of appeal which had affirmed the granting of a demurrer.

[k] Nonresident Business May Be Liable for Unfair Competition

In ***Application Group, Inc. v. Hunter Group, Inc.*** *(1998) 61 Cal. App. 4th 881, 72 Cal. Rptr. 2d 73* ; a Maryland corporation appealed from a trial court judgment declaring that covenants not to compete contained in the employment contracts of their consultant's who did not reside in California were illegal in the circumstances of this case, and could not be enforced against a California-based corporation, and a Maryland resident and former consultant who was recruited to work for the California-based corporation.

The court of appeal concluded that the trial court did not err in finding that the Maryland corporation's use of covenants not to compete in its employment agreements with employees who were not California residents, in order to prevent them from obtaining employment in California, violated *Bus. & Prof. Code § 17200 et seq.* (*61 Cal. App. 4th 881, 908)* . The trial court had expressly found that the noncompetition agreement was an unenforceable contract to restrain trade, use of which constituted unfair competition in violation of *Bus. & Prof. Code § 17200 et seq.* The court stated that California law has recognized that an employer's business practices concerning its employees are within the scope of *Bus. & Prof. Code § 17200 et seq.* The twist in this case was that the employer whose practice was being challenged as unfair competition, was not a California-based employer. However, the court found no authority which held or suggested that nonresident businesses could not be held to account for wrongful business conduct affecting California employers and employees (*61 Cal. App. 4th 881, 908)* .

[l] Conduct Not Constituting Violation of Unfair Business Practices Act May Nonetheless Be Subject to Action Under Unfair Competition Law

The facts and procedural background of ***Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*** *(1999) 20 Cal. 4th 163, 83 Cal. Rptr. 2d 548, 973 P.2d 527* , are discussed in *§ 235.25[3][a]*. In upholding the court of appeal's conclusion that the trial court was in error in entering judgment for the defendant on the action brought under the unfair competition law [*see Bus. & Prof. Code § 17200 et seq.*], the Supreme Court rejected the defendant's argument that, since its conduct was not in violation of the Unfair Practices Act, that same conduct cannot constitute a violation of the

unfair competition law. The Court noted that the Unfair Practices Act proscribes specific conduct and provides stronger remedies, while the unfair competition law proscribes a broader range of anticompetitive practices, albeit in more general terms, but provides less severe sanctions than those provided under the Unfair Practices Act. The Court also noted that, under the language of *Bus. & Prof. Code § 17200* of the unfair competition law, a practice may be deemed "unfair" even if it is not specifically "unlawful" or "fraudulent," and that the legislature intended to keep the standards for determining liability under the unfair competition law flexible in order to respond to the innumerable range of unfair and anticompetitive business practices that might be challenged (*20 Cal. 4th 163, 179-181)* . However, the Court recognized that the scope of the unfair competition law, while broad, was not unlimited, and the courts could not declare conduct to be in violation of the statute if other legislation has specifically declared the conduct to be legal. The Court further concluded, however, that an action is not prohibited under the unfair competition law merely because some other statute on the subject does not, itself, provide for the action or prohibit the challenged conduct; rather, the other provision must actually bar suit or clearly permit the challenged conduct in order to prohibit an action under the unfair competition law (*20 Cal. 4th 163, 182-184)* .

Turning to the case before it, the Court concluded that the trial court erred in entering judgment for defendant on plaintiffs' claim brought under the unfair competition law merely because the conduct was not unlawful under *Bus. & Prof. Code §§ 17043* and *17044*. The Court concluded that those provisions of the Unfair Practices Act neither outlaw not affirmatively permit all nonpurposeful below-cost sales, and thus they do not preclude a court from finding such nonpurposeful conduct to be unfair under the unfair competition law. The Court contrasted those provisions with the "safe harbor" of *Bus. & Prof. Code § 17026.1*, which specifically provides that cellular phone service providers may sell cellular phones below cost if such sales are a good-faith attempt to meet the legal market prices of a competitor in the same locality or trade area (*20 Cal. 4th 163, 187-188)* . Since judgment was granted at trial before the defendant presented any evidence, the Court remanded to the trial court for litigation of the issue of whether defendant's conduct was unfair under the unfair competition law, requiring application of these principles and a new standard articulated by the Court for determining whether the challenged conduct violated the unfair competition law [*see § 235.50[3][c]*] (*20 Cal. 4th 163, 188-189)* .

[m] Reliance on Specific Statements in Advertising Claim Not Required to Show Fraudulent Conduct

The factual and procedural background of *In re Tobacco II Cases (2009) 46 Cal. 4th 298, 93 Cal. Rptr. 3d 559, 207 P.3d 20* , is provided in § 25.54[3][b]. After concluding that in a class action brought under the unfair competition statute, only the class representatives must demonstrate that they meet the requirements for standing (*46 Cal. 4th 298, 321)* , the California Supreme Court next addressed the issue of causation and the meaning of the provision that a statutory unfair competition may only be brought by a private person "who has suffered injury in fact and has lost money or property *as a result of* the unfair competition" contained in *Bus. & Prof. Code § 17204*. While declining to provide a meaning of the language "as a result of" that would govern in all cases, the Court held that if the unfair competition claim is based on fraud stemming from alleged false advertising and misrepresentations made to consumers, this statutory language means that the plaintiff must plead and prove actual reliance to satisfy requirements for standing to bring the action (*46 Cal. 4th 298, 328)* . However, the Court concluded that while a plaintiff in those circumstances must allege that the defendant's misrepresentations were an immediate cause of the injury, the plaintiff need not show that those misrepresentations were the sole or even decisive cause. Moreover, the plaintiff is not required to necessarily plead and prove individualized reliance on specific misrepresentations or false statements when those misrepresentations and false statements were part of an extensive and long-term advertising campaign. Finally, the Court suggested that an allegation of reliance is not defeated merely because there was alternative information available to the plaintiff that might have countered the defendant's alleged misrepresentations (*46 Cal. 4th 298, 328)* . The Supreme Court then remanded the case for further proceedings to determine whether the named plaintiffs could establish standing to bring the action (*46 Cal. 4th 298, 329)* .

In ***Morgan v. AT&T Wireless Services, Inc.*** *(2009) 177 Cal. App. 4th 1235, 99 Cal. Rptr. 3d 768* , plaintiffs had purchased a specific cellular telephone along with extended network service plans of one or two years. Plaintiffs alleged

that they purchased this specific telephone after extensive research on the Internet and through talking with other people. Plaintiffs also alleged that their purchase decisions were based on extensive advertising by defendant wireless carrier that promoted the capabilities of the telephone, which included Bluetooth and international roaming capability, and the accompanying network. However, shortly after purchase, the service available on the telephone began to deteriorate because defendant was making changes to its network to enable the use of frequency transmissions that were incompatible with the telephone purchased by plaintiffs. Plaintiffs alleged that when these network changes were made, their recently-purchased telephones became essentially useless. In addition, after the network changes were implemented, defendant sent purchasers of plaintiffs' telephone a new telephone that defendant referred to as an "upgrade," although it was actually a substantially cheaper telephone that lacked some of the advanced features that had been incorporated into plaintiffs' now-obsolete telephone. Plaintiffs brought a class action suit against defendant, which included a statutory unfair competition claim based on defendant's alleged misrepresentations about the capabilities of the telephone and future improvements to the wireless network that would support and improve the functioning of their telephone, as well as on the failure to disclose defendant's plans to alter its network to utilize frequencies that were known to be incompatible with and would in fact interfere with the performance of the telephone plaintiffs purchased. The trial court sustained defendant's demurrer, but plaintiffs appealed.

The court of appeal reversed, holding that plaintiffs had alleged sufficient facts to support an unfair competition claim based on alleged deceptive advertisements and other statements. The court of appeal noted that for purposes of the unfair competition statute, a fraudulent business practice is a practice that will tend to mislead or deceive members of the public, which can include statements that will tend to deceive based on the failure to reveal other relevant information. The court also noted that an unfair competition action based on fraud, unlike common-law fraud, does not require allegations of actual falsity and reasonable reliance pleaded with specificity (*177 Cal. App. 4th 1235, 1254-1257)* . The court also held that plaintiffs had alleged sufficient facts to support standing to sue under the changes imposed by Proposition 64. The court cited the analysis of the California Supreme Court in *In re Tobacco II Cases*, described *above*, and concluded that plaintiffs' allegations of reliance on defendant's advertising campaign when deciding to purchase their telephone were sufficient to show standing to sue (*177 Cal. App. 4th 1235, 1258)* .

NOTE:

As individualized proof of reliance and injury are not generally required for nonrepresentative class members when a class action seeks restitution for alleged misrepresentations in extensive, long-term advertising campaigns, as described above in *In re Tobacco II Cases (2009) 46 Cal. 4th 298, 93 Cal. Rptr. 3d 559, 207 P.3d 20* , issues concerning reliance by and injury to unnamed class members will not foreclose a class action in that context [*McAdams v. Monier, Inc. (2010) 182 Cal. App. 4th 174, 192, 105 Cal. Rptr. 3d 704]* . However, in advertising campaigns of shorter duration, for example, a campaign lasting only six months, evidence that many or most of the proposed class members were never actually exposed to alleged misrepresentations can defeat an attempt to certify a class by showing that there was no class-wide injury [Pfizer Inc. v. Superior Court (2010) 182 Cal. App. 4th 622, 631-633, 105 Cal. Rptr. 3d 795] .

[4] Additional Authorities

[a] Statutory Unfair Competition Is Not Limited to Anticompetitive Business Practices

In *Stoiber v. Honeychuck (1980) 101 Cal. App. 3d 903, 162 Cal. Rptr. 194* , a tenant brought an action against her landlords to obtain injunctive and related relief based on several causes of action, including unfair competition, to remedy defendants' inadequate maintenance of the premises. The trial court struck all causes of action except that for breach of warranty of habitability, and plaintiff appealed. The court of appeal reversed the judgments, holding that *Bus. & Prof. Code § 17200* is not confined to anticompetitive business practice, but is equally directed toward the right of the public to protection from fraud and deceit (*101 Cal. App. 3d 903, 927)* .

[b] Determination of Unfair Business Practice Constituting Statutory Unfair Competition

In Davis v. Ford Motor Credit Co. LLC (2009) 179 Cal. App. 4th 581, 101 Cal. Rptr. 3d 697 , plaintiff brought an unfair competition action against a car dealer based on the dealer's billing practices under a retail installment sales contract. Plaintiff had missed a month's payment, was assessed a late fee, made a single payment the following month that was applied to the earlier month, and was assessed another late fee for the new month. Plaintiff alleged that the defendant was effectively charging more than one late fee for the one delinquent payment, in violation of *Civ. Code § 2982(k)*. The trial court sustained defendant's demurrer, and the Court of Appeal affirmed. The Court of Appeal held that the dealer's conduct in allocating payments received to the earliest period for which a payment was due, and charging a single late fee for a more recent delinquent period if the amount received did not cover that period as well, did not violate *Civ. Code § 2982(k)*. Because the statute was not violated, plaintiff's unfair competition claim based on "unlawful" conduct failed (179 Cal. App. 4th 581, 591-592) . The court also rejected plaintiff's claim that the conduct was actionable as "unfair" conduct under the unfair competition statute. The court adopted the test for unfair conduct articulated by the court of appeal in *Camacho v. Automobile Club of So. California (2006) 142 Cal. App. 4th 1394, 48 Cal. Rptr. 3d 770* , which is discussed in [3][c], *above*. Under that test, a consumer seeking to recover for unfair conduct must show (1) substantial injury, (2) the injury is not outweighed by any countervailing benefits to consumers or competition, and (3) the injury is not one that consumers themselves could reasonably have avoided. The court concluded that because plaintiff could have avoided the alleged injury simply by making timely payments under the sales contract, plaintiff failed to show any unfair conduct under that test (179 Cal. App. 4th 581, 597-598) .

In *Progressive W. Ins. Co. v. Superior Court (2005) 135 Cal. App. 4th 263, 37 Cal. Rptr. 3d 434* , an insurance company had filed an action against its insured to recover money that the company had paid to the insured under a first-party medical payments provision of the insured's automobile insurance, after the insured had recovered damages from the person who caused the automobile accident. The insured filed a cross-complaint for breach of contract, bad faith, and unfair business practices against the insurance company. The insured argued that the insurance company, consistent with its general practice, sought to recover 100 percent of the money it paid out to the insured under the medical payments provision, despite the fact that the insurance company may have been restricted under California law from recovering the full 100 percent, and that the insurance company engaged in no investigation before attempting to recover the full amount that it had paid out. The court of appeal ruled that a demurrer to the cross complaint should have been sustained on the contractual and bad-faith claims, but concluded that the insured had stated a cause of action for fraudulent or unfair business practices. The court of appeal noted that court opinions, after *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co. (1999) 20 Cal. 4th 163, 83 Cal. Rptr. 2d 548, 973 P.2d 527* [*see § 235.50[3][c]*], had struggled with determining the appropriate test for deciding what constitutes an unfair business practice in an action brought by a consumer. However, the court was convinced that the test after *Cel-Tech* was the same as it had been before that opinion was issued. Therefore, determination of whether a business practice is "unfair" in a suit brought by a consumer requires examination of the effect of the practice or act on its victim, balanced against the reasons, justifications, and motives of the alleged wrongdoer (*135 Cal. App. 4th 263, 285-286)* . The court then held that it was premature to apply the test to the facts as developed in the current record of the case, and upheld the trial court's decision to overrule the demurrer as to that cause of action (*135 Cal. App. 4th 263, 287)* .

In *Pastoria v. Nationwide Ins. (2003) 112 Cal. App. 4th 1490, 6 Cal. Rptr. 3d 148* , the plaintiffs brought an action against their health insurer for unfair competition, fraud, and negligent failure to disclose. The plaintiffs based their claims on the fact that the insurer failed to disclose to them before they purchased their policy that the insurer was about to make substantial changes to the policy line, including new deductibles, new and increased co-payments, reduced drug benefits, and increased premiums. The defendant successfully demurred, arguing that its compliance with *Ins. Code § 10199.1*, which requires only 30 days notice before changing insurance benefits and premiums, precluded the action. The court of appeal reversed, concluding that given the procedural posture of the case, it was error for the trial court to sustain the defendant's demurrer. The court noted that the plaintiffs had alleged that the defendant had a duty to disclose the impending changes under *Ins. Code §§ 330, 331, 332, 334*, and *361*, and the court concluded that the plaintiffs' argument was not without merit under the literal language of those statutes. In addressing the plaintiffs' specific claim that the conduct was "unfair" under the meaning of the unfair competition statute, the court of appeal held that

determining unfairness in an action brought by a consumer under the unfair competition statute required weighing the competing interests of the effect of the defendant's conduct on the alleged victim against the reasons, justifications, and motives of the alleged wrongdoer. However, because the demurrer had been sustained, the defendant had not yet presented evidence of its motives and justification. Therefore, this determination would have to be made on remand (*112 Cal. App. 4th 1490, 1498)* .

[c] Unlawful Business Practice Constitutes Statutory Unfair Competition

The factual and procedural background of *Quelimane Co. v. Stewart Title Guar. Co. (1998) 19 Cal. 4th 26, 77 Cal. Rptr. 2d 709, 960 P.2d 513* , is discussed in *§ 235.50[3][i]*. In reversing the sustaining of defendant's demurrer, the Court held that plaintiffs sufficiently pleaded an alleged combination in restraint of trade in violation of the Cartwright Act, and that this alleged violation was a recognized basis for a civil action for damages and other relief under the Unfair Competition Law (*19 Cal. 4th 26, 42-43, 48-51)* .

In *Manufacturers Life Ins. Co. v. Superior Court (1995) 10 Cal. 4th 257, 41 Cal. Rptr. 2d 220, 895 P.2d 56* , an insurance agency sued various insurance companies, alleging conduct that was a per se violation of the Cartwright Act, and thus involved unlawful, unfair or fraudulent business practices which violated the Unfair Competition Act. The trial court sustained defendants' demurrers with respect to the Cartwright Act. The court of appeal then held that a private cause of action may be stated under the UCA for violations of the Cartwright Act, and the Supreme Court affirmed. The Supreme Court agreed with the reasoning of the court of appeal that an Unfair Competition Act cause of action may be predicated on a violation of the Cartwright Act because the Unfair Competition Act defines unfair competition as any unlawful, unfair or fraudulent business practice, and a violation of the Cartwright Act is such a practice (*10 Cal. 4th 257, 267-268)* .

In *Perdue v. Crocker Nat'l Bank (1985) 38 Cal. 3d 913, 216 Cal. Rptr. 345, 702 P.2d 503* , a bank depositor brought a class action against a bank on several causes of action, including statutory unfair competition (*Bus. & Prof. Code §§ 17200-17208*), based on charges imposed for checks drawn on accounts without sufficient funds. The trial court sustained all demurrers without leave to amend; plaintiff appealed. The court of appeal reversed, holding that *Bus. & Prof. Code § 17200* is intended to protect consumers as well as business competitors, and its prohibitory reach is not limited to deceptive or fraudulent conduct, butextends to any unlawful business conduct (*38 Cal. 3d 913, 929-930)* .

People v. Thomas Shelton Powers, M.D., Inc. (1992) 2 Cal. App. 4th 330, 3 Cal. Rptr. 2d 34 , is discussed in *§ 235.53[3][a]*. The court held that each sale of a condominium unit designated part of the city's low-income and moderate-income housing stock at a price exceeding the established ceiling constituted a violation of the San Francisco Subdivision Code, and thus an unfair business practice within the meaning of *Bus. & Prof. Code § 17000 et seq.* (*2 Cal. App. 4th 330, 338-339)* .

In *California Serv. Station & Auto. Repair Ass'n v. Union Oil Co. (1991) 232 Cal. App. 3d 44, 283 Cal. Rptr. 279* , the court of appeal affirmed a judgment in favor of trade association enjoining a petroleum products franchisor's policy of allowing three-year franchises with renewal options to franchisees who had previously held a franchise with the franchisor but only allowing one-year franchises terminable at any time for any reason to persons who had not previously held one of its franchises. The policy was found to violate *Bus. & Prof. Code § 21148* because its effect was to prevent franchisees from selling or assigning the unexpired portions of their franchises to anyone except persons who were or had previously been franchisees of the same franchisor (*232 Cal. App. 3d 44, 56-58)* .

In *Courtesy Temp. Serv., Inc. v. Camacho (1990) 222 Cal. App. 3d 1278, 272 Cal. Rptr. 352* , the court of appeal reversed the trial court's order denying plaintiff's petition for a preliminary injunction to prevent defendant from using plaintiff's confidential customer list and related information. The trial court had held that the customer list was not a protectable trade secret within the meaning of the Uniform Trade Secrets Act (*Civ. Code § 3426 et seq.*), but the court of appeal found that it was (*222 Cal. App. 3d 1278, 1287-1291)* . In addition, the court of appeal said that whether or

not the customer list is a trade secret, a former employee's use of confidential information obtained from his or her former employer to compete with the former employer and to solicit the business of the former employer's customers is also regarded as unfair competition and an unfair and deceptive business practice under *Bus. & Prof. Code § 17200 et seq.* (*222 Cal. App. 3d 1278, 1291-1292)* .

In *Shadoan v. World Sav. & Loan Ass'n (1990) 219 Cal. App. 3d 97, 268 Cal. Rptr. 207* , the court of appeal sustained the defendant's demurrer and dismissed the action because the allegations that financing without the challenged prepayment penalty was unavailable were conclusional rather than factual. However, the court provided an explanation of the relationship between unconscionability [*Civ. Code § 1670.5*] and unfair business practices [*Bus. & Prof. Code § 17200*]. Unconscionability is a defense to enforcement of a contract or contract term. A plaintiff who has performed or complied with the offending term cannot bring an action for restitution or injunction under *Civ. Code § 1670.5*. After having performed or complied with the offending term, one may, however, seek redress under *Bus. & Prof. Code § 17203* on the ground that the offending term constitutes an unfair business practice (*219 Cal. App. 3d 97, 101)* .

In BILJAC Assocs. v. First Interstate Bank (1990) 218 Cal. App. 3d 1410, 267 Cal. Rptr. 819 , the court of appeal affirmed judgments in favor of some defendants, but noted that a cause of action under *Bus. & Prof. Code § 17200* would be stated if the defendants' conduct violated the Cartwright Act [*Bus. & Prof. Code § 16720*] (218 Cal. App. 3d 1410, 1422-1423) .

In *People v. Landlords Professional Services (1989) 215 Cal. App. 3d 1599, 264 Cal. Rptr. 548* , the court of appeal affirmed a judgment imposing civil penalties against an eviction service that cloaked itself with an aura of expertise and provided more than clerical services by assisting clients in advancing their legal rights. The eviction service was engaged in unauthorized practice of law [*Bus. & Prof. Code §§ 6125, 6126*], which constituted unfair competition under *Bus. & Prof. Code § 17200 et seq.* (*215 Cal. App. 3d 1599, 1608-1610)* .

In *Wilkinson v. Times Mirror Corp. (1989) 215 Cal. App. 3d 1034, 264 Cal. Rptr. 194* , the court of appeal affirmed a judgment holding that the challenged conduct was not an unfair business practice. However, the challenge was based not on a statute, but on a constitutional provision [*Cal. Const., art. I, § 1* (privacy)] and on a regulation [*2 Cal. Code Reg. § 7294.0(b)(3)* (inquiry into employee's physical or mental condition must be related to job safety)]. The employer's practice of conditioning acceptance of offers of employment on the prospective employee's successful completion of a physical examination that included drug and alcohol testing was held not to violate the right to privacy or the regulation (*215 Cal. App. 3d 1034, 1052-1053)* .

In *Hernandez v. Stabach (1983) 145 Cal. App. 3d 309, 193 Cal. Rptr. 350* , tenants filed a class action based on statutory unfair competition laws against their landlord, and the trial court ordered preliminary injunctions against defendant, prohibiting him from evicting plaintiffs, and mandating him to make certain repairs. Defendant appealed, and the court of appeal affirmed, holding that unfair competition as the term is used in *Bus. & Prof. Code § 17200* includes any business practice that is forbidden by law, and therefore encompasses defendant's activity of alleged retaliatory eviction (*145 Cal. App. 3d 309, 314)* .

Stoiber v. Honeychuck (1980) 101 Cal. App. 3d 903, 162 Cal. Rptr. 194 , is discussed in *§ 235.50[4][a]*. The court of appeal stated that the proscription of unfair competition under *Bus. & Prof. Code § 17200* is not restricted to deceptive or fraudulent conduct, but extends to any unlawful business practice, and that the legislature apparently intended to permit courts to enjoin ongoing wrongful business conduct in whatever context the activity might occur (*101 Cal. App. 3d903, 927)* .

[d] Determination of Fraudulent or Deceptive Business Practice Constituting Statutory Unfair Competition

In *Williams v. Gerber Prods. Co. (9th Cir. 2008) 523 F.3d 934* , plaintiff parents brought suit under the California unfair competition statute and other statutes for deceptive advertising against the manufacturer of "fruit juice snacks"

made for toddlers. The product box showed pictures of a number of different fruits, and statements on the box suggested that the product was made with "fruit juice and other all natural ingredients" and was "nutritious." However, the first two ingredients listed on the side panel nutrition information were corn syrup and sugar, and the only juice used was white grape juice from concentrate. The trial court dismissed the suit, but the Ninth Circuit Court of Appeals reversed. The Court held that under the "reasonable consumer" standard, the plaintiffs had stated a cause of action under the applicable statutes because the elements of the packaging would likely deceive a reasonable consumer. The picture on the box potentially suggested that the juice of the fruits shown were contained in the product when they were not. Similarly, the statement that the product was made with "fruit juice and other all natural ingredients" could easily be interpreted to mean that the product was made with all-natural ingredients, which appeared to be false. Finally, the statement suggesting that the product was "nutritious" only added to the potential deception. The Court concluded that a reasonable consumer would not be expected to look beyond misleading representations on the front of the box to scan the small print of the ingredients list in order to discover the truth about the composition of the product (*523 F.3d 934, 938-940)* .

The facts and procedural background of *Perdue v. Crocker Nat'l Bank (1985) 38 Cal. 3d 913, 216 Cal. Rptr. 345, 702 P.2d 503* , are discussed in *§ 235.50[4][c]*. The Court held that because the plaintiff sought only injunctive relief under the cause of action for unfair competition, he need not show that he himself was misled; he need only prove that members of the public are likely to be deceived (*38 Cal. 3d 913, 929-930)* .

The facts and procedural background of *Morgan v. AT&T Wireless Services, Inc. (2009) 177 Cal. App. 4th 1235, 99 Cal. Rptr. 3d 768* , are discussed in *§ 235.50[3][m]*. The court of appeal held that plaintiffs had alleged sufficient facts to support an unfair competition claim based on alleged deceptive advertisements and other statements. The court of appeal noted that for purposes of the unfair competition statute, a fraudulent business practice is a practice that will tend to mislead or deceive members of the public, which can include statements that will tend to deceive based on the failure to reveal other relevant information. The court also noted that an unfair competition action based on fraud, unlike common-law fraud, does not require allegations of actual falsity and reasonable reliance pleaded with specificity (*177 Cal. App. 4th 1235, 1254-1257)* .

In *Blakemore v. Superior Court (2005) 129 Cal. App. 4th 36, 27 Cal. Rptr. 3d 877* , the plaintiffs were Avon sales representatives who brought suit against Avon under the Unfair Competition Statute and other common law theories. The suit was based on Avon's alleged practice of shipping unordered products to their sales representatives, charging their accounts for the unordered products, and forcing the representatives to either keep and pay for the products or pay to ship the items back to Avon. In addition, despite Avon's stated policy of accepting unordered items for return with a full credit, Avon allegedly had a practice of refusing to credit their representatives for the returns and then turning these delinquent accounts over to collection agencies. The trial court sustained demurrers for Avon, but the court of appeal reversed. Addressing the claims brought under the Unfair Competition Statute, the court held that the operative complaint sufficiently pleaded conduct that constituted an unfair or fraudulent business practice. The court noted that proving a fraudulent or deceptive business practice only required a showing that members of the public are likely to be deceived, and unlike common law fraud, does not require allegations of actual deception, reasonable reliance, and damage. In addition, because the allegations of the complaint were sufficient to state a claim based on fraudulent or deceptive practices, they were also sufficient to state a claim for unfair business practices (*129 Cal. App. 4th 36, 49)* .

In *Podolsky v. First Healthcare Corp. (1996) 50 Cal. App. 4th 632, 58 Cal. Rptr. 2d 89* , plaintiffs sued a nursing home operator on their own behalf and on behalf of the general public, contending that the nursing home's proposed third party guarantee agreement for private pay residents was deceptive and thus violated the Unfair Competition Act, *Bus. & Prof. Code § 17200 et seq.* The trial court granted summary judgment for defendants and plaintiffs appealed. The court of appeal reversed and remanded for further proceedings, holding that the guarantee agreement was deceptive. The agreement provided that the guarantor's signature was optional but that if they did sign they were personally guaranteeing payment to the home for all care, supplies or services provided to the resident. The court examined the existing protections afforded to family members of nursing home residents under federal and state law

and concluded that because the agreement offered little or no more protection than family members were already entitled to, the absence of any information about those protections rendered the guarantee agreement deceptive (*50 Cal. App. 4th 632, 651)* . In addition to finding the agreement itself deceptive, the court ruled that there was a triable issue of fact as to whether the manner in which the original guarantee agreements were presented and explained to potential guarantors, was deceptive. Declarations portrayed an admissions process in which a stack of documents was hurriedly presented to family members with little or no explanation. The court found that this procedure was likely to deceive consumers who would not be made aware of its provisions or who might be misled into believing that their signature was required (*50 Cal. App. 4th 632, 651)* .

[e] Personal Liability of Controlling Shareholder and Responsible Officer

Bus. & Prof. Code §§ 17206(b) and *17536(b)* provide that in assessing a civil penalty, a court shall consider any one or more of the following: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth. Those amendments were not intended to change the decisional law regarding the methods of determining the number of violations on which an award of civil penalties is based [Stats. 1992, ch. 430, § 6].

[f] Unfair Insurance Practices Act Does Not Supersede or Displace Statutory Unfair Competition Action

In *AICCO, Inc. v. Insurance Co. of N. Am. (2001) 90 Cal. App. 4th 579, 109 Cal. Rptr. 2d 359* , the plaintiffs brought an action under *Bus. & Prof. Code § 17200 et seq.* after the defendant, an insurance company seeking to jettison its liability under unprofitable asbestos and environmental coverage policies that it had issued, had divided into two entities as permitted under Pennsylvania law and transferred its obligations under those policies to the newly-created entities. Because the defendanthad not obtained the consent of its policyholders when making the transfer of obligations, the plaintiffs argued that the defendant's conduct was unlawful under *Civ. Code § 1457*, which provides that the burden of an obligation may only be transferred with the consent of the party entitled to its benefit. The court of appeal agreed with the plaintiffs that they had pleaded a violation of *Civ. Code § 1457*, which in turn was adequate to allow the plaintiffs to proceed under the theory that this was unlawful conduct under the unfair competition statute (*90 Cal. App. 4th 579, 588-589)* . In addition, the court concluded that the notice that the defendant had sent to its policyholders was deceptive and misleading and could support an action under the unfair competition statute based on fraud. The court also held that the unfair competition action was not barred merely because the acts that form the basis for the complaint might also violate the Unfair Insurance Practices Act, *Ins. Code § 790 et seq.* (*90 Cal. App. 4th 579, 589)* .

California Points & Authorities

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Volume 23 Chapters 230-239 TRUST DEEDS---to---WORKERS' COMPENSATION
CHAPTER 235 UNFAIR COMPETITION
PART II. FORMS
B. Actions Based on Statutory Unfair Competition

23-235 California Points & Authorities § 235.51

§ 235.51 Supporting Contention That Cause of Action Exists for Statutory Unfair Competition [Bus. & Prof. Code §§ 17200, 17203]--Unlawful Business Practice

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

DEFENDANTS CONDUCT IN _____ [*specify, e.g.,* CUTTING DOWN TREES TO CARRY OUT ITS PLAN TO DEVELOP ADDITIONAL SKI RUNS], WHILE A TEMPORARY RESTRAINING ORDER PROHIBITING SUCH ACTIVITY WAS IN EFFECT, CONSTITUTED AN UNLAWFUL BUSINESS PRACTICE UNDER BUSINESS AND PROFESSIONS CODE SECTION 17200, ENTITLING PLAINTIFF TO STATUTORY RELIEF.

A. Statutory Unfair Competition Defined. [*See § 235.50[1], Paragraph B*].

B. Unlawful Business Practice Constitutes Statutory Unfair Competition. Unlawful competition includes unlawful business practices (*Bus. & Prof. Code § 17200*).

C. Unlawful Business Practice May Be Based on Violation of Virtually Any State, Local, or Federal Law. An action for an unlawful business practice may be based on the violation of virtually any state, federal, or local law, unless the defendant's conduct is privileged, the defendant's conduct is immunized by another statute, or the underlying statute expressly bars its enforcement under the unfair competition statute (*Stevens v. Superior Court (1999) 75 Cal. App. 4th 594, 603-604, 89 Cal. Rptr. 2d 370*).

D. Ongoing Wrongful Conduct. *Bus. & Prof. Code § 17200* is directed at a pattern of ongoing wrongful conduct (*Hewlett v. Squaw Valley Ski Corp. (1997) 54 Cal. App. 4th 499, 519, 63 Cal. Rptr. 2d 118*).

E. Intent Unnecessary. Intent to engage in an unlawful business practice is not an element of unfair competition violation (*Hewlett v. Squaw Valley Ski Corp. (1997) 54 Cal. App. 4th 499, 520, 63 Cal. Rptr. 2d 118*).

[*Optional*] **F. Forest Practice Act Violations.** Violations of Forest Practice Act provisions constitute unlawful business practices under *Bus. & Prof. Code § 17200* (*Hewlett v. Squaw Valley Ski Corp. (1997) 54 Cal. App. 4th 499, 530, 63 Cal. Rptr. 2d 118*).

[*Optional*] **G. Conditional Use Permit Violations.** Violations of a conditional use permit can properly form the basis for a claim of unlawful business activity (*Hewlett v. Squaw Valley Ski Corp. (1997) 54 Cal. App. 4th 499, 532, 63 Cal. Rptr. 2d 118*).

[*Optional*] **H. Violations of Temporary Restraining Order.** Violations of a temporary restraining order may be prosecuted as an unlawful business practice (*Hewlett v. Squaw Valley Ski Corp. (1997) 54 Cal. App. 4th 499, 535, 63 Cal. Rptr. 2d 118*).

[*Optional*] **I. Monetary Penalties.** Persons who have engaged in acts of unfair competition are liable for civil penalties up to $2,500 for each unlawful business practice committed (*Bus. & Prof. Code § 17206(a)*).

[*Optional*] **J. Injunctive Relief Authorized.** The court may make such orders or judgment as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition (*Bus. & Prof. Code § 17203*).

[*Optional*] **K. Action Based on Transacting Insurance Without License Permitted.** An action may be brought by a private plaintiff for unlawful business practices based on violations of *Ins. Code § 1631* and *10* Cal. Code Reg. § 2110 et seq., which require that insurance agents, brokers, and automobile dealers be licensed to transact insurance (*Stevens v. Superior Court (1999) 75 Cal. App. 4th 594, 604, 89 Cal. Rptr. 2d 370*).

[*Optional*] **L. Action Based on Violation of Fair Employment and Housing Act.** An action for injunctive relief may be brought under the unfair competition statute if an employer is guilty of age discrimination under the Fair Employment and Housing Act (*Herr v. Nestle U.S.A., Inc. (2003) 109 Cal. App. 4th 779, 782, 135 Cal. Rptr. 2d 477*).

[*Optional*] **M. Action Based on Federal Violations Not Preempted.** An unfair competition action based on a violation of federal law will not generally be preempted by federal law, because the plaintiff is not seeking to impose different or additional requirements beyond those imposed under federal law (*McKell v. Washington Mutual, Inc. (2006) 142 Cal. App. 4th 1457, 1485-1486, 49 Cal. Rptr. 3d 227*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a cause of action exists for statutory unfair competition based on an unlawful business practice. These points and authorities may be combined, if appropriate, with the additional points and *authorities in § 235.52*. They may also be combined with the points and authorities pertaining to the specific procedural context in which they are raised. For example, they may combined with general points and authorities opposing a general demurrer to a complaint. They may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of his or her case. For example, counsel should provide facts showing that defendant engaged in an ongoing course of conduct and argue that the conduct constituted an unlawful business practice within the meaning of *Bus. & Prof. Code § 17200*.

[c] Related Pleading and Practice Forms

For discussion of statutory unfair competition under Bus. & Prof. Code § 17200, see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender).

[d] Related Points and Authorities

For a memorandum of points and authorities supporting a plaintiff's cause of action for statutory unfair competition generally, see *§ 235.50*.

[e] Opposing Points and Authorities

For a memorandum of points and authorities opposing a private plaintiff's right to recover damages under *Bus. & Prof. Code § 17200*, see *§ 235.57*.

[3] Discussion of Authorities

[a] Unlawful Business Practice May Be Based on Violation of Virtually Any State, Local, or Federal Law

In ***Stevens v. Superior Court*** *(1999) 75 Cal. App. 4th 594, 89 Cal. Rptr. 2d 370* , The plaintiff brought two related actions for unlawful business practices under the unfair competition statute on behalf of the general public against an insurance company, its agent, a car dealership, and others. The plaintiff based its actions on allegations that the defendants' program for providing physical damage insurance to uninsured car purchasers violated the provisions of *Ins. Code § 1631* and *10* Cal. Code Reg. § 2110 et seq., which require that insurance agents, brokers, and automobile dealers be licensed to transact insurance. In the two actions, the plaintiff sought restitution and disgorgement of profits, as well as injunctive relief. The trial court sustained demurrers in one action and entered a judgment of dismissal in the other, concluding that the legislature did not intend to allow a private right of action for violation of the Insurance Code provisions. The plaintiff petitioned for a writ of mandate challenging the sustaining of the demurrers in the first action and appealed the dismissal in the second action. The cases were consolidated for purposes of review.

The court of appeal reversed the trial court's ruling and granted the writ petition. The court of appeal reviewed case law precedent establishing that an action for an unlawful business practice may be based on the violation of virtually any state, federal, or local law, unless the defendant's conduct is privileged, thedefendant's conduct is immunized by another statute, or the underlying statute expressly bars its enforcement under the unfair competition statute (*75 Cal. App. 4th 594, 602-604)* . Therefore, an action for an unlawful business practice could be brought under the unfair competition statute based on violation of the licensing provisions, regardless of whether those latter provisions expressly create a private right of action, so long as those provisions do not expressly bar a private action under the unfair competition statute. The court then concluded that an action under the unfair competition statute was not barred, taking into consideration the language and statutory history of *Ins. Code § 1631* (*75 Cal. App. 4th 594, 604-605)* . The court also rejected the argument that the predicate insurance provisions could not support a private action under the unfair competition statute because the provisions were regulatory in nature, noting that the violation of a regulation may form the basis for an action under the unfair competition statute (*75 Cal. App. 4th 594, 606)* .

[b] Ongoing Wrongful Conduct

Hewlett v. Squaw Valley Ski Corp. *(1997) 54 Cal. App. 4th 499, 63 Cal. Rptr. 2d 118* , involved a continuing dispute between defendant Squaw Valley Ski Corporation and objecting parties over the development of ski runs in an area of Squaw Valley ski resort known as the "Tram Basin Bowl." When litigation threatened the planned project defendant in essence resorted to self-help and cut down more than 1800 trees. The trial court found defendant had engaged in unfair competition by committing unlawful business practices by violating provisions of the Z'berg-Nejedly Forest Practice Act (FPA), violating provisions of a conditional use permit and violating terms of a temporary restraining order. Defendant appealed.

The court of appeal affirmed the judgment of the trial court. On appeal defendant contended that the court erroneously equated a business practice with multiple violations of law predicated on a single project, the development of one ski run. The court found this characterization misconceived. According to the court, the phrase "business practice" in *Bus. & Prof. Code § 17200* indicated that the statute was directed at on-going wrongful conduct. In this case the court determined that: (1) the defendant's actions did not involve one event or a single episode, but instead, a large number of trees were cut over three different time periods; (2) these multiple violations related to a course of conduct, not one isolated incident; and (3) these actions could properly be termed business practices for purposes of *Bus. & Prof. Code § 17200* (*54 Cal. App. 4th 499, 520)* .

[c] Intent Unnecessary

Hewlett v. Squaw Valley Ski Corp. *(1997) 54 Cal. App. 4th 499, 63 Cal. Rptr. 2d 118* , is discussed in *§ 235.51[3][b]*. The defendant contended that it could not be guilty of violating *Bus. & Prof. Code § 17200* because it lacked the intent to engage in an unlawful business practice. The court ruled that such an intent was not an element of this violation. According to the court, the statute imposed strict liability and it was not necessary to show that the defendant intended to injure anyone. Here, defendant intended to cut down the trees and did so. The fact that it may have believed its conduct was lawful, was not a defense (*54 Cal. App. 4th 499, 520)* .

[d] Forest Practice Act Violations

Hewlett v. Squaw Valley Ski Corp. *(1997) 54 Cal. App. 4th 499, 63 Cal. Rptr. 2d 118* , is discussed in *§ 235.51[3][b]*. The trial court concluded that because defendant intended to sell the cut timber, a timber operation had taken place, necessitating a timber harvesting plan and a timberland conversion permit. The trial court found defendant's failure to obtain an approved timber harvesting plan violated the Forest Practice Act (FPA), *Public Resources Code § 4511 et seq.* and thus was an unlawful business practice. The court of appeal affirmed this ruling, concluding defendant's violations of FPA provisions constituted unlawful business practices (*54 Cal. App. 4th 499, 530)* .

[e] Conditional Use Permit Violations

Hewlett v. Squaw Valley Ski Corp. *(1997) 54 Cal. App. 4th 499, 63 Cal. Rptr. 2d 118* , is discussed in *§ 235.51[3][b]*. The trial court concluded that defendant had violated several conditions outlined in the conditional use permit issued to it. On appeal defendant contended that violations of a conditional use permit could not be deemed unlawful conduct because it does not have the force of law. The court of appeal disagreed, holding that defendant's violations of the conditional use permit could properly form the basis for a claim of unlawful business activity (*54 Cal. App. 4th 499, 532)* . The court stated first that the unlawful practices prohibited by *Bus. & Prof. Code § 17200* are any practices forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory or court made. Then the court explained that because conditional use permits were part of local zoning laws, a violation of a permit's conditions was also a violation of the zoning law, and was therefore invalid. Lastly, the court cited a county code provision that expressly made unpermitted uses within a zoning district unlawful.

[f] Violations of Temporary Restraining Order

Hewlett v. Squaw Valley Ski Corp. *(1997) 54 Cal. App. 4th 499, 63 Cal. Rptr. 2d 118* , is discussed in *§ 235.51[3][b]*. The defendant contended that violation of the temporary restraining order (TRO) issued against it in this case could not form the predicate for an unlawful business activity because the TRO was a nullity at the time it was allegedly violated and further suggested that any violation should have been addressed in contempt proceedings, not in an action for unlawful business practices. The court of appeal found neither contention to have merit. It held that defendant's violation of a temporary restraining order which was issuedimmediately after the trees were cut, could be prosecuted as an unlawful business practice (*54 Cal. App. 4th 499, 535)* .

[g] Action Based on Transacting Insurance Without License Permitted

Stevens v. Superior Court *(1999) 75 Cal. App. 4th 594, 89 Cal. Rptr. 2d 370* is discussed in *§ 235.51[3][a]*.

[h] Action Based on Violation of Fair Employment and Housing Act

In *Herr v. Nestle U.S.A., Inc. (2003) 109 Cal. App. 4th 779, 135 Cal. Rptr. 2d 477* , the plaintiff successfully sued his former employer for age discrimination in an action brought under the Fair Employment and Housing Act, *Gov. Code § 12900 et seq.* (FEHA). The plaintiff also asserted a cause of action under the unfair competition statute for the same discriminatory conduct. The jury returned a verdict for the plaintiff on the age discrimination claim, and the following day the trial court, sitting without a jury by stipulation, heard the unfair competition claim. The court issued an injunction under the unfair competition statute permanently enjoining the defendant from discriminating on the basis of age, requiring the defendant to issue a repudiation of a prior company memo that directed the company to focus its energy on finding and promoting "young people," and requiring the defendant to disseminate a copy of the judgment to all company employees. After numerous post-trial motions were denied, the defendant appealed.

The court of appeal affirmed. The court addressed the question of whether age discrimination in violation of the FEHA could be the basis for remedies under the unfair competition statute. The court concluded that the statute could be applied to conduct such as age discrimination, at least if the remedy sought is injunctive relief, which was the only remedy at issue in this particular case. The court noted that actionable conduct under the unfair competition statute includes conduct that is "unlawful" and that remedies under the unfair competition statute are cumulative rather than exclusive. The court also noted that the practice of age discrimination can provide an unfair competitive advantage, because it allows an employer to promote younger employees at salaries that are generally lower than the salaries of older employees with more seniority (*109 Cal. App. 4th 779, 789-790)* .

[i] Action Based on Federal Violations Not Preempted

In *McKell v. Washington Mutual, Inc. (2006) 142 Cal. App. 4th 1457, 49 Cal. Rptr. 3d 227* , plaintiffs brought suit against a mortgage company and its subsidiaries, alleging that defendants overcharged plaintiffs for underwriting, tax services, and wire transfer fees in conjunction with home loans in violation of an implied agreement to charge only the amount that defendants paid for these services. Plaintiffs asserted a cause of action under the unfair competition statute, arguing that defendants' conduct constituted an unlawful business practice. Plaintiffs' claimed that defendants' conduct violated various statutory provisions, including the federal Real Estate Settlement Procedures Act (RESPA) and related HUD regulations. The trial court sustained defendants' demurrer, without leave to amend, in part on the grounds that defendants were not obligated to charge borrowers only the amount defendants paid for the relevant services. Plaintiffs appealed.

The court of appeal reversed as to the cause of action for unfair competition. The court held in part that plaintiffs had stated a cause of action for unlawful business practices based on a violation of RESPA and that the unfair competition claims were not preempted by RESPA or other related federal provisions. While noting that the issue was unsettled, the court concluded that RESPA prohibited defendants from charging more for the underwriting, tax, and wire transfer services than the services cost the defendants (*142 Cal. App. 4th 1457, 1476-1479)* . On the issue of possible preemption by federal law, the court noted that RESPA and related regulations contained preemption clauses stating that state law is not preempted except to the extent that state law is inconsistent with federal law (*142 Cal. App. 4th 1457, 1481)* . Defendants also argued that plaintiffs claims were preempted under the federal Home Owners' Loan Act, which preempts the application of certain state law if that application would effectively regulate the lending practices of a federally chartered savings association (*142 Cal. App. 4th 1457, 1485-1486)* . However, the court concluded that, under the circumstances present in this case, an unfair competition action based on a violation of federal law would not be preempted, because plaintiffs were not seeking to impose different or additional requirements on defendant lenders beyond those imposed under federal law. The court noted that courts addressing other federal statutes had reached a

similar conclusion (*142 Cal. App. 4th 1457, 1485-1486)* .

California Points & Authorities

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B. Actions Based on Statutory Unfair Competition

23-235 California Points & Authorities § 235.52

§ 235.52 Supporting Contention That Preliminary Injunction Is Proper to Enjoin Statutory Unfair Competition [Bus. & Prof. Code §§ 17200, 17203]--Misleading Advertising

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

A PRELIMINARY INJUNCTION SHOULD BE GRANTED TO RESTRAIN, AS UNFAIR COMPETITION, THE MISLEADING USE OF ANOTHER PERSON'S ADVERTISING THAT HAS ACQUIRED A SECONDARY MEANING.

A. Private Action for Relief From Statutory Unfair Competition Authorized. [*See § 235.50[1], Paragraph A.*]

B. Statutory Unfair Competition Defined. [*See § 235.50[1], Paragraph B.*]

C. Misleading Use of Another Person's Advertising. The use of another person's advertising and publicity developments in a misleading manner is afforded protection within the law of unfair competition, and a preliminary injunction may be granted to enjoin the use of such advertising and publicity if it has acquired a secondary meaning (*Metro-Goldwyn-Mayer, Inc. v. Lee (1963) 212 Cal. App. 2d 23, 28-32, 27 Cal. Rptr. 833* (decided under prior law)).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that preliminary injunctive relief is available under *Bus. & Prof. Code § 17203* to enjoin unfair competition within the meaning of *Bus. & Prof. Code § 17200*, specifically, the use of another's advertising and publicity is a misleading manner. They may be combined, in an appropriate case, with the points and authorities generally supporting the existence of a cause of action under *Bus. & Prof. Code §§ 17200* and *17203* that are *set out in § 235.50*. They may also be combined with the points and authorities pertaining to the specific procedural context in which they are raised. For example, they would most commonly be

combined with general points and authorities supporting an application for a preliminary injunction [*see Code Civ. Proc. § 527*].

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

The primary discussion of *Bus. & Prof. Code §§ 17203* and *17535* in the context of false or deceptive advertising is in Ch. 14, *Advertising.* Additional points and authorities from that chapter should be incorporated when applicable to the particular type of deceptive advertising involved.

[b] Related Pleading and Practice Forms

For further discussion of statutory unfair competition under Bus. & Prof. Code §§ 17200-17208, see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender). For a form of complaint for injunctive relief and restitution based on false advertising, including a count for unfair competition under Bus. & Prof. Code §§ 17200 and 17203, see California Forms of Pleading and Practice, Ch. 14, *Advertising* (Matthew Bender). For discussion and forms relating to injunctive relief generally, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender).

[c] Related Points and Authorities

For a form of points and authorities supporting a demurrer to a complaint based on unfair competition under *Bus. & Prof. Code § 17200* and false advertising under *Bus. & Prof. Code § 17500*, see Ch. 14, *Advertising* . For forms of points and authorities relating to issuance of injunctive relief generally, see Ch. 116, *Injunctions* .

[3] Discussion of Authorities

[a] Misleading Use of Another Person's Advertising

In ***Metro-Goldwyn-Mayer, Inc. v. Lee*** *(1963) 212 Cal. App. 2d 23, 27 Cal. Rptr. 833* , plaintiffs were coproducers of a film. They brought the action to enjoin, as unfair competition, the use by defendants of an advertising slogan that they claimed traded and capitalized on advance publicity covering the title adopted for their film. Defendants' slogan was designed to advertise a film arising from the same subject matter as plaintiffs' film. The superior court granted plaintiffs a preliminary injunction, and defendants appealed on the ground that there was no evidence showing that the plaintiffs' title had acquired a secondary meaning that would entitle plaintiffs to its exclusive use for their film.

The court of appeal affirmed the order granting the preliminary injunction. The court concluded that under the circumstances, the trial court had not abused its discretion in deciding that sufficient public association arose from plaintiffs' publicity so that a secondary meaning existed entitling plaintiffs' to a preliminary injunction. In view of the virtually unlimited availability to defendants of other words and phrases to advertise their film, there was no abuse of discretion when the trial court enjoined the use of a phrase that had been adopted and used extensively by plaintiffs, because it appeared that irreparable damage might result to plaintiffs and there would be no corresponding damage to defendants (*212 Cal. App. 2d 23, 28-32)* .

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23-235 California Points & Authorities § 235.53

§ 235.53 Supporting Contention That Restitution and Disgorgement of Profits Are Authorized Remedies for Unfair Competition [Bus. & Prof. Code § 17203]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

SECTION 17203 OF THE BUSINESS AND PROFESSIONS CODE CONTEMPLATES SUCH BROAD REMEDIES AS RESTITUTION AND DISGORGEMENT OF PROFITS FROM DEFENDANTS WHO HAVE ENGAGED IN UNFAIR BUSINESS PRACTICES.

A. Private Action for Relief From Statutory Unfair Competition Authorized. [*See § 235.50[1], Paragraph A.*]

B. Restitution and Disgorgement of Profits as Appropriate Remedies. The broad range of remedies provided for in *Section 17203 of the Business and Professions Code* includes restitution or disgorgement of profits or both. The statute expressly entitles a court to take whatever action is necessary to prevent the use by any person of any unfair business practice, and to restore to any person in interest any property acquired by means of the unfair business practice. Restitutionary relief may be necessary to accomplish complete justice and to deter unfair practices by not allowing wrongdoers to keep their illicit profits (*People v. Thomas Shelton Powers, M.D., Inc. (1992) 2 Cal. App. 4th 330, 339-341, 3 Cal. Rptr. 2d 34*).

[*Optional*] **C. *Business and Professions Code Section 17203* Is Not Unconstitutionally Vague.** *Section 17203 of the Business and Professions Code* is not unconstitutionally vague in permitting "disgorgement to the State." The wrongdoer is not entitled to be made aware to whom restitution might later be made. A statute is not void for indefiniteness if it contains a reasonably adequate disclosure of the legislative intent regarding the evil to be combated in language that gives fair notice of the proscribed practices (*People v. Thomas Shelton Powers, M.D., Inc. (1992) 2 Cal. App. 4th 330, 343, 3 Cal. Rptr. 2d 34*).

[*Optional*] **D. Back Wages May Be Recovered as Restitution.** As restitution under *Business and Professions Code*

Section 17203, a defendant may be compelled to pay back wages that were unlawfully withheld from employees (*Cortez v. Purolator Air Filtration Prods. Co. (2000) 23 Cal. 4th 163, 176-178, 96 Cal. Rptr. 2d 518, 999 P.2d 706*).

[*Optional*] **E. Retail Consumer May Recover Restitution From Manufacturer.** A plaintiff who purchases a product because of false or misleading advertisements or product packaging statements is entitled to recover from the product manufacturer as restitution the revenue obtained from the sale of the product, even if the plaintiff purchased the product from a retailer rather than directly from the manufacturer (*Shersher v. Superior Court (2007) 154 Cal. App. 4th 1491, 1494, 65 Cal. Rptr. 3d 634*).

[*Optional*] **F. Restitution May Be Based on Money Paid to Defendant's Agent.** A defendant may be ordered to pay restitution even if plaintiff did not pay the money directly to that defendant, as for example, when the money was paid to an agent for the defendant or otherwise was paid to an enterprise of which defendant was an integral part and defendant directly benefited financially from the payments (*Troyk v. Farmers Group, Inc. (2009) 171 Cal. App. 4th 1305, 90 Cal. Rptr. 3d 589*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that restitution and disgorgement of profits are remedies authorized by *Bus. & Prof. Code § 17203*. Paragraph B sets forth the general statement of the law, while the optional paragraphs make additional points that may be used if appropriate.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Points and Authorities

Counsel may wish to incorporate authorities from Ch. 41, *Class and Representative Actions*, § 41.71, dealing with the fluid class recovery concept, which is one way of implementing judgments for restitution and disgorgement. The California Supreme Court has held that disgorgement into a fluid recovery fund is authorized only in a class action suit and may not be used in a representative action that has not been certified as a class action [*Kraus v. Trinity Management Services, Inc. (2000) 23 Cal. 4th 116, 137, 96 Cal. Rptr. 2d 485, 999 P.2d 718* ; *see § 235.60*].

[3] Discussion of Authorities

[a] Restitution and Disgorgement of Profits as Appropriate Remedies

People v. Thomas Shelton Powers, M.D., Inc. *(1992) 2 Cal. App. 4th 330, 3 Cal. Rptr. 2d 34* , was a decision issued after the Supreme Court vacated the original appellate decision and retransferred the matter for reconsideration. The underlying action was brought by the San Francisco district attorney against two related corporations for violation of San Francisco's Subdivision Code by selling seven condominium units designated as part of the city's low- or moderate-income housing stock at prices in excess of the ceiling. The district attorney sought injunctive relief, disgorgement of profits, restitution, an order requiring defendants to provide moderate-income housing in San Francisco equal to that removed from the city's stock by the defendants, and a penalty of $2,500 [*see Bus. & Prof. Code § 17206*] for each of the seven units. The trial court enjoined the corporations from further violations of the Subdivision Code and assessed the civil penalties, but did not believe it had authority to order disgorgement of profits, restitution, or replacement of the lost units. Both parties appealed, defendants contending that they were not bound by the 1979 amendments to San Francisco's Subdivision Code, and the district attorney seeking disgorgement and restitution.

The court of appeal agreed that the 1979 amendments controlled the situation, but held that relief under *Bus. & Prof.*

Code § 17203 need not be limited to injunction and civil penalties, and so reversed only to that extent and remanded for further proceedings. The apartment building to be converted into condominiums was owned by a partnership controlled by Dr. Powers. In 1978, as a condition of approval of the project, and one which the partnership agreed to, the planning commission required that the units remain part of the city's low- or moderate-income housing stock. The Subdivision Code was amended in 1979 to specify that the price ceilings for units designated as part of the city's low- or moderate-income housing stock applied to resales as well as to the initial sale after conversion. After tentative map approval, the partnership sold all its equity in the units to Thomas Shelton Powers, M.D., Inc., which took out a building permit and completed the work necessary for final map approval, which was given in May 1980. After the state issued the final subdivision report in September 1980, Thomas Shelton Powers, M.D., Inc. sold the units in bulk to another corporation formed by Dr. Powers at $61,531 each, which comported with the low- and moderate-income ceiling then in effect. That corporation, also a defendant in the action, sold one unit at the restricted price and the remaining seven at prices ranging from $80,000 to $99,000. Because each sale was a violation of the San Francisco Subdivision Code, each was an unfair business practice within the meaning of *Bus. &Prof. Code § 17000 et seq.* (*2 Cal. App. 4th 330, 338-339)* . The court of appeal said that the trial court was not required to limit relief to injunction and civil remedies and that *Bus. & Prof. Code § 17203* contemplates the type of relief sought by the district attorney. The court also noted that *Bus. & Prof. Code § 17204* permits prosecution of a 17203 action by a district attorney such as San Francisco's (*2 Cal. App. 4th 330, 339)* .

The court felt there was little question but that the broad range of remedies provided for in *Bus. & Prof. Code § 17203* includes restitution or disgorgement of profits or both restitution and disgorgement. The statute expressly entitles a court to take such actions as may be necessary to prevent the use by any person of any unfair business practice, and to restore to any person in interest any property acquired by means of the unfair business practice. Further, although it was not aware of any case that had decided if restitution and disgorgement could be ordered in an action brought under *Bus. & Prof. Code § 17203*, the court found it to be clear, from *Fletcher v. Security Pac. Nat'l Bank (1979) 23 Cal. 3d 442, 153 Cal. Rptr. 28, 591 P.2d 51* , that those remedies are proper in an action brought for false advertising, which is also an unfair practice (*2 Cal. App. 4th 330, 340)* . *Fletcher* was decided under *Bus. & Prof. Code § 17535*, the language of which is substantially similar to *Bus. & Prof. Code § 17203*. The court of appeal cited extensively from *Fletcher* for the proposition that the statutory language was intended by the legislature to arm trial courts with broad discretionary power to order restitutionary relief to accomplish complete justice and to deter unfair practices, which could not be done by allowing wrongdoers to keep their illicit profits (*2 Cal. App. 4th 330, 340-341)* . The court of appeal concluded that as a general rule a trial court in ruling on an unfair trade practice has the power to order disgorgement, restitution, or both as relief ancillary to an injunction (*2 Cal. App. 4th 330, 341)* . The court noted that restitution and disgorgement are not the same as damages, thus distinguishing Industrial Indem. Co. v. Superior Court (1989) *209 Cal. App. 3d 1093, 257 Cal. Rptr. 655* [*see § 235.57*] (*2 Cal. App. 4th 330, 341 n.8*).

[b] Business and Professions Cod Section 17203 Is Not Unconstitutionally Vague

The facts and procedural background of ***People v. Thomas Shelton Powers, M.D., Inc.*** *(1992) 2 Cal. App. 4th 330, 3 Cal. Rptr. 2d 34* , are discussed in *§ 235.53[3][a]*. Defendants also urged that *Bus. & Prof. Code § 17203* was unconstitutionally vague in permitting "disgorgement to the State." The court said this presumably amounted to a claim that a wrongdoer not only was entitled to be made aware that its wrongful act is wrong, but was entitled to know to whom restitution might later be made. The court was aware of no authority to support such a theory. Rather, a statute will not be declared void for indefiniteness if it contains a reasonably adequate disclosure of the legislative intent regarding the evil to be combated in language that gives fair notice of the proscribed practices (*2 Cal. App. 4th 330, 343)* . Nor did the court agree that its construction of Section 17203 in any way deprives defendants of property without notice (*2 Cal. App. 4th 330, 343-344)* . That property having been gained wrongfully, the defendant has no valid ownership interest in it (*2 Cal. App. 4th 330, 344)* .

[c] Back Wages May Be Recovered as Restitution

In ***Cortez v. Purolator Air Filtration Prods. Co.*** *(2000) 23 Cal. 4th 163, 96 Cal. Rptr. 2d 518, 999 P.2d 706* , the plaintiff filed an action under *Bus. & Prof. Code § 17200* and various Labor Code provisions seeking restitution, penalties, and attorney's fees from her former employer. These claims stemmed from the employer's failure to pay the plaintiff and other employees overtime wages allegedly owed for the years after the employer switched the work week from five 8-hour days to four 10-hour or longer days. The plaintiff alleged that under an applicable Industrial Welfare Commission wage order, overtime pay at a rate of time-and-a-half was owed for all hours worked in excess of eight on any day, and at double the rate of pay for hours worked in excess of 12, but that the employer had failed to pay this overtime. As part of her action, the plaintiff sought restitution to her and the other employees of the unpaid overtime under *Bus. & Prof. Code § 17203*. The trial court found that the defendant had failed to prove that it was exempt from the applicable wage order and awarded plaintiff the overtime pay, interest, and penalty she sought on her own behalf. However, the trial court denied the requested injunction, because the practice complained of had been discontinued, and denied restitution to the other employees, believing that such restitution could only be ordered ancillary to an injunction. Both parties appealed. Before the appeal was heard, the Supreme Court ruled in another case that restitution could be ordered under *Bus. & Prof. Code § 17203* even without an injunction. The defendant conceded that the Supreme Court's opinion overruled the trial court's basis for denying restitution to the other employees, but argued that the judgment should be upheld because the plaintiff lacked standing to seek restitution for the other employees and that a judgment ordering payment of unpaid overtime wages would be an award of damages not permitted under *Bus. & Prof. Code § 17203*.

The court of appeal reversed that part of the trial court's judgment that had denied restitution for the other employees. The appellate court rejected the defendant's challenge to the plaintiff's standing to seek relief for the other employees, ruling that a class action was not required under the facts of the case. The court of appeal also rejected the defendant's argument that an award of the unpaid wages would be an impermissible damage award. The defendant appealed, and the Supreme Court granted review.

The Supreme Court affirmed the court of appeal. In addressing the question of whether an award of back wages wrongfully withheld would constitute an impermissible award of damages, the Court ruled that it would not. The Court noted that although damages are not recoverable under *Bus. & Prof. Code § 17203*, the statute specifically authorizes recovery of restitution so that a plaintiff may recover money or property obtained from the plaintiff, or persons represented by the plaintiff, through unfair or unlawful business practices (*23 Cal. 4th 163, 173)* . The Court also noted that a monetary damage award in some tort cases may include an element of restitution. However, the Court concluded that an order for payment of wages that were unlawfully withheld from an employee could constitute restitution that is permissible under *Bus. & Prof. Code § 17203* and would not constitute an award of damages. Restitution, as used in the unfair competition law, is not limited to the return of moneyor property that was once in the possession of the plaintiff, but may include earned wages that are due and payable and have been earned in exchange for the labor of the employee (*23 Cal. 4th 163, 176-178)* .

[d] Retail Consumer May Recover Restitution From Manufacturer

In *Shersher v. Superior Court (2007) 154 Cal. App. 4th 1491, 65 Cal. Rptr. 3d 634* , plaintiff purchased wireless computer router products built by Microsoft Corp. These products contained statements on their packaging indicating that they were capable of wireless data transmission of either 11 Megabits per second or 54 Megabits per second, although the packaging did not reveal that the actual transmission speeds of these products were lower. Plaintiff brought suit for himself and other similar consumers under the unfair competition statute and related statutes based on these alleged false advertisements and misrepresentations, seeking, among other remedies, restitution under the unfair competition statute. Microsoft moved to strike the claim for restitution on the basis that the California Supreme Court had stated in *Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal. 4th 1134, 1149, 131 Cal. Rptr. 2d 29, 63 P.3d 937* , that "[a]ny award that plaintiff would recover from defendants would not be restitutionary as it would not replace any money or property that defendants took directly from plaintiff." Because plaintiff had purchased through a retailer, rather than directly from Microsoft, Microsoft argued that recovery of revenue they derived from the sale of the

wireless products would not be restitutionary as the revenue was not derived *directly* from plaintiff and the members of his class. The trial court agreed and struck the claim for restitution. Plaintiff filed a petition for writ of mandate.

The court of appeal granted the writ and ordered the trial court to reinstate the restitution claim. The court concluded that the trial court had read the Supreme Court's statement in *Korea Supply* too broadly, and that the proper lesson to be learned from that case was that "restitution means the return of money to those persons from whom it was taken or who had an ownership interest in it" (*154 Cal. App. 4th 1491, 1497)* . However, the court of appeal read nothing in that case to suggest that consumers would be precluded from seeking the return of money that they paid for a product that was not as represented by the manufacturer. The court noted that plaintiff and other members of the putative class clearly had held an ownership interest in the money sought to be recovered, even though the products were purchased from a retailer rather than directly from Microsoft *(154 Cal. App. 4th 1491, 1498-1500)* .

[e] Restitution May Be Based on Money Paid to Defendant's Agent

In ***Troyk v. Farmers Group, Inc.*** *(2009) 171 Cal. App. 4th 1305, 90 Cal. Rptr. 3d 589* , plaintiff filed a class action under the unfair competition statute alleging that defendant insurance entities violated *Ins. Code § 381(f)* by charging a $5 monthly "service charge" when an insured selected the insurer's monthly billing plan for automobile insurance. Plaintiff argued that this service charge constituted part of the premium, and as such, was required to be stated on the face of the policy. The trial court granted summary judgment in favor of plaintiff class and ordered restitution of $115,556,827 based on the amount of the service charges paid by the class during the relevant period. Defendants appealed.

The court of appeal reversed. The court first affirmed the trial court's finding that the service charge was properly considered part of the premium for the insurance provided by defendants and therefore should have been revealed on the policy in accordance with *Ins. Code § 381(f)* (*171 Cal. App. 4th 1305, 1323-1333)* . The court also held that an action under the unfair competition statute could be based on this violation of the Insurance Code (*171 Cal. App. 4th 1305, 1336)* . The court then held that the insurance entities could be ordered to pay restitution even though the monthly service charges were paid not to them, but to a separate entity created in order to handle the processing of monthly payments. The court noted that the servicing entity was incorporated and wholly owned by one of the insurance entities, and to the extent that the servicing entity profited by the service charges, its net worth increased and that value was passed on to the insurance entity through increased stock value. In addition, the record showed that the servicing entity paid the insurance entity for the use of equipment and personnel needed to perform the servicing. Thus, it could be inferred that the insurance entity actually received a substantial amount of the service charges, albeit indirectly. The court also noted that because the servicing entity was acting as the insurance entity's billing and collecting agent, the insurance entity could be ordered as a principal to pay restitution for the payments made to its agent (*171 Cal. App. 4th 1305, 1340-1342)* . However, the court concluded that plaintiff had not sufficiently alleged in the operative pleading that the Insurance Code violation caused him to lose money, that is, he had not alleged or shown that he would not have paid the service charges had the service charges been stated on the policy. Due to this failure, summary judgment in favor of plaintiff was inappropriate (*171 Cal. App. 4th 1305, 1350)* .

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23-235 California Points & Authorities § 235.54

§ 235.54 Supporting Contention That Statutory Action for Unfair Competition May Be Prosecuted as Class Action and Seek Disgorgement of Profits Into Fluid Recovery Fund [Bus. & Prof. Code § 17200]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

A CLAIM UNDER THE UNFAIR COMPETITION STATUTE MAY BE PROSECUTED AS A CLASS ACTION, IF THE STATUTORY REQUIREMENTS FOR CLASS CERTIFICATION ARE MET, AND IF A CLASS HAS PROPERLY BEEN CERTIFIED, PLAINTIFFS MAY SEEK DISGORGEMENT OF PROFITS INTO A FLUID RECOVERY FUND AS A REMEDY.

A. Statutory Unfair Competition Claim May Be Brought as Class Action. An action brought under the unfair competition statute may be prosecuted as a class action, if the requirements for class certification are met (*Corbett v. Superior Court (2002) 101 Cal. App. 4th 649, 654-655, 125 Cal. Rptr. 2d 46*).

B. Only Named Class Representatives Must Show Standing. So long as a class is otherwise properly certified, only the named class representatives must specifically show standing to bring the action and unnamed class members need not do so (*In re Tobacco II Cases (2009) 46 Cal. 4th 298, 321, 93 Cal. Rptr. 3d 559, 207 P.3d 20*).

C. Class Certification Supports Disgorgement Into Fluid Recovery Fund as Remedy. If an unfair competition action is prosecuted as a certified class action, the plaintiffs in that action may seek as a remedy the disgorgement of illegal profits into a fluid recovery fund (*Corbett v. Superior Court (2002) 101 Cal. App. 4th 649, 655, 125 Cal. Rptr. 2d 46*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of the contention that a claim under the unfair

competition statute may be prosecuted as a class action if the requirements for class certification are met, and that if a class is properly certified, the plaintiffs may properly seek disgorgement of illegal profits into a fluid recovery fund. It should be noted that pursuant to amendments made by Proposition 64, passed by the voters in 2004, representative actions under the unfair competition statute *must* be filed as class actions [*Bus. & Prof. Code § 17203*; *Code Civ. Proc. § 382*; *see Arias v. Superior Court (2009) 46 Cal. 4th 969, 980, 95 Cal. Rptr. 3d 588, 209 P.3d 923*].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. In the appropriate procedural context, the plaintiffs may want to include facts that would support the certification of a class of plaintiffs.

[b] Related Points and Authorities

For points and authorities opposing the contention that disgorgement of profits into a fluid recovery fund is available as a remedy in a representative action under the unfair competition statute that has not been certified as a class action, see *§ 235.60*.

For memoranda of points and authorities dealing with the fluid class recovery concept, and with class and representative actions generally, see Ch. 41, *Class and Representative Actions* .

[3] Discussion of Authorities

[a] Statutory Unfair Competition Claim May Be Brought as Class Action

In ***Corbett v. Superior Court*** *(2002) 101 Cal. App. 4th 649, 125 Cal. Rptr. 2d 46* , the plaintiff filed a class action suit against a car dealership and a bank based on allegations that when the dealership arranged car financing for the plaintiff and other buyers, the bank approved the financing at a rate approximately five percentage points below the rate the dealership charged the buyers, with the bank and the dealershipsharing the difference in the interest charges. Based on this practice, which was not revealed to the buyers, the plaintiff alleged multiple causes of action, including a cause of action under the unfair competition statute, *Bus. & Prof. Code § 17200 et seq.* The car dealership filed a motion relating to the unfair competition claim to strike the plaintiff's allegations seeking disgorgement of profits into a fluid recovery fund, arguing that such a remedy was not allowed under the unfair competition statute. The trial court granted the motion, ruling in part that the court could not as a matter of law certify a class to pursue a claim under the unfair competition statute, and without class certification, disgorgement into a fluid recovery fund was not permitted under the unfair competition statute. When the plaintiff's motion for class certification on the remaining claims was denied, the plaintiff filed a petition for writ of mandate, arguing that class certification was available under the unfair competition statute.

The court of appeal issued a writ of mandate ordering the trial court to vacate its order refusing to consider class certification under the unfair competition statute. The court recognized that although many courts had presumed that class certification was appropriate in an action brought under the unfair competition statute, no court had directly addressed the question of whether this presumption was correct. Faced squarely with the issue, the court of appeal held that a plaintiff may prosecute a claim brought under the unfair competition statute as a class action, if the requirements for class certification under *Code Civ. Proc. § 382* are met, and if a class is properly certified, a plaintiff may seek disgorgement of unlawful profits into a fluid recovery fund pursuant to the statutes governing class actions that provide for such a remedy (*101 Cal. App. 4th 649, 654-655)* . The court reviewed the California Supreme Court's opinion in *Kraus v. Trinity Management Services, Inc. (2000) 23 Cal. 4th 116, 96 Cal. Rptr. 2d 485, 999 P.2d 718* [*see § 235.60[3][a]*]. In that case, the Supreme Court held that disgorgement into a fluid recovery fund was not an appropriate remedy in a representative action brought under the unfair competition statute that was not a class action. However,the court of appeal rejected the defendants' argument that the Supreme Court's holding precluded prosecution of a class action under the unfair competition statute. The court of appeal interpreted the holding in *Kraus* as standing only for the

proposition that in the absence of actual class certification, disgorgement of profits into a fluid recovery fund was not available as a remedy. In fact, the court of appeal noted, the Supreme Court in an earlier case had implicitly agreed that an unfair competition claim could be brought as a class action by holding, in another case brought under the unfair competition statute, that the trial court had erroneously rejected class certification on the grounds that the plaintiff could not prove that each individual borrower lacked knowledge of a bank's unfair practice (*101 Cal. App. 4th 649, 658-661)* .

The court of appeal also reviewed the relevant legislative history and found no legislative intention to preclude the prosecution of unfair competition claims as class actions (*101 Cal. App. 4th 649, 663-670)* . Finally, the court concluded that allowing class certification and disgorgement of unlawful profits into a fluid recovery fund in a class action brought under the unfair competition statute was consistent with the purposes of the unfair competition statute and would not unduly burden defendants beyond the fact that it could force them to relinquish all profits they obtained through their illegal practices (*101 Cal. App. 4th 649, 671)* .

[b] Only Named Class Representatives Must Show Standing

In ***In re Tobacco II Cases*** *(2009) 46 Cal. 4th 298, 93 Cal. Rptr. 3d 559, 207 P.3d 20* , plaintiffs brought a class action suit against multiple tobacco companies based on allegations that the companies had violated the unfair competition and false advertising statutes by conducting a decades-long campaign of deceptive advertising and misleading statements designed to hide both the addictive nature of nicotine contained in cigarettes and the relationship between smoking and disease. Prior to the passage of Proposition 64 in 2004, the trial court certified a plaintiff class of those persons that smoked one or more cigarettes in California between June 1993 and April 2001 and were exposed to defendants' marketing and advertising activities in California. After passage of Proposition 64 and amendment to the standing requirements, however, the trial court decertified the class and concluded that each class member must show individually that he or she met the requirements for standing, that is, that he or she had suffered injury in fact and lost money or property as a result of defendant's conduct. The court of appeals affirmed this decertification.

The California Supreme Court reversed, holding that after passage of Proposition 64, assuming a proper class may otherwise be certified, only the named class representatives are required to show that they meet the requirements for standing to bring the action. Under the language used in the amended version of *Bus. & Prof. Code § 17203*, only the person pursuing the representative claim must meet the requirements for standing, although he or she must also meet the requirements for bringing a class action (*46 Cal. 4th 298, 315-316)* . Moreover, the Court concluded that nothing in the express language of Proposition 64 altered the accepted principles of class action procedure, under which the issue of standing applies only to class representatives and not to absent class members (*46 Cal. 4th 298, 316-317)* . The Court also noted the absence of any indication in the ballot pamphlet materials for Proposition 64 suggesting that an alteration in class action procedures was an intended result (*46 Cal. 4th 298, 318-319)* . Moreover, according to the court, requiring all class members to demonstrate standing is not necessary to prevent suits from being brought by attorneys without any plaintiff who was actually harmed by defendant's conduct, the problem that Proposition 64 was intended to address (*46 Cal. 4th 298, 321)* . The Court also noted that imposing a requirement that all class members demonstrate standing would effectively prevent the class action mechanism from being used in unfair competition actions, a result that would undermine the promise made by the proponents of Proposition 64 that the changes made by the proposition would not undermine the ability of the unfair competition statute to vindicate consumer rights (*46 Cal. 4th 298, 321)* . Finally, the Court noted that the remedies provisions of *Bus. & Prof. Code § 17203*, left unchanged by Proposition 64, provide for restitution to any person in interest of any money or property that "may have been acquired" by means of the actionable conduct, and this language imposes a less strenuous burden than the requirements for demonstrating standing to bring the action (*46 Cal. 4th 298, 320)* .

NOTE:

When certifying a plaintiff class under the current requirements imposed by Proposition 64, even though only the named plaintiff must meet the requirements to establish standing, the class certification process

still necessarily includes an inquiry into whether the material questions of law or fact common to the members of the class are substantially similar and predominate over questions affecting the individual class members [Steroid Hormone Product Cases (2010) 181 Cal. App. 4th 145, 158, 104 Cal. Rptr. 3d 329] . However, class certification should not be denied on the grounds that factual issues surrounding actual injury and causation are not substantially similar among the unnamed class members if those inquiries are not necessary to establishing a right to the remedy sought [Steroid Hormone Product Cases (2010) 181 Cal. App. 4th 145, 154-155, 104 Cal. Rptr. 3d 329] .

[c] Class Certification Supports Disgorgement Into Fluid Recovery Fund as Remedy

Corbett v. Superior Court *(2002) 101 Cal. App. 4th 649, 125 Cal. Rptr. 2d 46* , is discussed in *§ 235.54[3][a]*.

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23-235 California Points & Authorities § 235.55

§ 235.55 Supporting Contention That Action for Injunction [Bus. & Prof. Code § 17203] Is Not Barred by Federal Preemption--Unfair Marketing Activities by Health Maintenance Organization Soliciting Medicare-Eligible Individuals

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

AN ACTION FOR AN INJUNCTION UNDER BUSINESS AND PROFESSIONS CODE SECTION 17203 TO PREVENT UNFAIR COMPETITION BY A HEALTH MAINTENANCE ORGANIZATION (HMO) IN SOLICITING MEDICARE-ELIGIBLE INDIVIDUALS FOR SUBSCRIPTIONS AND MEDICARE SUPPLEMENTAL COVERAGE IS NOT BARRED, UNDER THE PREEMPTION DOCTRINE, BY FEDERAL REGULATION OF HMO MARKETING ACTIVITIES DIRECTED AT MEDICARE-ELIGIBLE INDIVIDUALS.

A. Private Action for Relief From Statutory Unfair Competition Authorized. [*See § 235.50[1], Paragraph A.*]

B. Federal Regulation of Marketing Activities by Health Maintenance Organizations as Not Barring Injunctive Relief Under State Law. An action for injunctive relief to prevent violations of state unfair trade practices laws (*Bus. & Prof. Code §§ 17200, 17500*; *Civ. Code § 1770*) in a health maintenance organization's marketing of subscriptions and Medicare supplemental plans to Medicare-eligible individuals (elderly and disabled individuals) is not preempted by federal regulation (*42 U.S.C.S. § 1395mm*; 42 C.F.R. § 417.223) of HMO activities in that area (*Solorzano v. Superior Court (1992) 10 Cal. App. 4th 1135, 1139-1149, 13 Cal. Rptr. 2d 161*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in support of the contention that an action for an injunction under *Bus. & Prof. Code § 17203*, to prevent unfair competition by a health maintenance organization (HMO) in soliciting Medicare-eligible individuals for subscriptions and Medicare supplemental coverage, is not barred,

under the preemption doctrine, by federal regulation of HMO marketing activities directed at Medicare-eligible individuals.

Counsel should insert argument in this form showing the relationship betweenthe facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Federal Regulation of Marketing Activities by Health Maintenance Organizations as Not Barring Injunctive Relief Under State Law

In ***Solorzano v. Superior Court*** *(1992) 10 Cal. App. 4th 1135, 13 Cal. Rptr. 2d 161* , elderly individuals sued a health maintenance organization (HMO) for injunctive relief and damages, alleging violations of unfair trade practices laws [*Bus. & Prof. Code §§ 17200, 17500*; *Civ. Code § 1770*] in the HMO's marketing activities by which the plaintiffs were induced to become members of the HMO and subscribe to a Medicare-supplemental plan sponsored by the HMO. The HMO obtained an order granting its motion for judgment on the pleadings with respect to the claim for injunctive relief, on the ground that the federal preemption doctrine barred state-law actions for injunctive relief.

In a mandate proceeding the court of appeal directed the trial court to vacate that order, holding that federal regulation of HMO marketing activities directed at Medicare-eligible individuals [*42 U.S.C.S. § 1395mm*; 42 C.F.R. § 417.223] does not preempt state-law actions for injunctive relief under unfair trade practices laws (*10 Cal. App. 4th 1135, 1139-1149)* . The court concluded that the federal regulation is not pervasive, the state laws in question do not conflict with the federal laws, and there is no evidence that Congress intended to preempt the field of regulating HMO marketing activities (*10 Cal. App. 4th 1135, 1146-1149)* .

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23-235 California Points & Authorities § 235.56

§ 235.56 Supporting Contention That Action for Statutory Unfair Competition Is Not Barred by Res Judicata--Private Plaintiff May Bring Action Subsequent to Action Brought by Public Prosecutor

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

A PRIVATE PLAINTIFF MAY MAINTAIN AN ACTION UNDER THE UNFAIR COMPETITION STATUTE EVEN THOUGH AN EARLIER ACTION WAS BROUGHT UNDER THE STATUTE BY A PUBLIC PROSECUTOR, IF THE PLAINTIFF DID NOT RECEIVE RESTITUTION FROM THE DEFENDANT THROUGH THE EARLIER ACTION.

A. Private Action for Relief From Statutory Unfair Competition Authorized. [*See § 235.50[1], Paragraph A.*]

B. Res Judicata Does Not Preclude Action. Because an unfair competition action brought by a public prosecutor is a law enforcement action primarily for the benefit of the public, res judicata principles do not prevent a person who has been defrauded from seeking restitution in a separate unfair competition suit brought subsequent to an action brought by a public prosecutor, at least if the private plaintiff did not receive restitution from the earlier action brought by the prosecutor (*Payne v. National Collection Sys., Inc. (2001) 91 Cal. App. 4th 1037, 1047, 111 Cal. Rptr. 2d 260*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that a private plaintiff may bring an action under the unfair competition statute even though an earlier action was prosecuted under the statute by the Attorney General or another public prosecutor. Under these circumstances, principles of res judicata do not prevent a private plaintiff from following an action brought on behalf of the people by a public prosecutor with an action to recover restitution for losses sustained by the plaintiff, at least if the private plaintiff did not recover restitution as a result of the earlier action.

Counsel should insert argument in the form, showing the relationship between the facts of the case and the point of law stated. Thus, counsel should include facts showing that the plaintiff did not receive restitution through the earlier actionbrought by the public prosecutor.

[3] Discussion of Authorities

[a] Res Judicata Does Not Preclude Action

In ***Payne v. National Collection Sys., Inc.*** *(2001) 91 Cal. App. 4th 1037, 111 Cal. Rptr. 2d 260* , the plaintiffs were 23 individuals who filed a class action against TWA Airlines and a collection corporation. The plaintiffs alleged that TWA advertised that jobs were available, although in fact immediate openings were not actually being offered. Instead, TWA required applicants to attend a training course, charged $2,800 for the course, and convinced applicants to enter into credit agreements for the costs of the course if they could not pay for it. However, TWA controlled who graduated form the course and who received jobs, even though all applicants who began the course and entered into the credit agreements were obligated to repay the costs of the course, often at high rates of interest. The collection corporation then acted as TWA's collection agency and aggressively pursued payment for the course, despite its knowledge of illegal and unfair conduct by TWA in running the course. The plaintiffs' suit alleged a cause of action under the unfair competition statute, *Bus. & Prof. Code § 17200 et seq.* The defendants successfully demurred to the class action on the grounds that judgments had already been rendered against them for the same conduct in a representative action brought by the Attorney General and a district attorney. The plaintiffs appealed.

The court of appeal reversed. The court held that principles of res judicata did not apply to preclude the private action under the circumstances of the case. An unfair competition action brought by a prosecutor is a law enforcement action primarily for the benefit of the public, and as such, a defendant is not entitled to the same safeguards to protect against multiple civil suits. Therefore, res judicata principles do not prevent a person who has been defrauded from seeking restitution in a separate unfair competition suit brought subsequent to the action brought by a public prosecutor (*91 Cal. App. 4th 1037, 1046-1047)* . Because none of the private plaintiffs who were members of the proposed class had received restitution through the earlier action brought by the prosecutor, they were entitled to seek restitution through a private action brought under the unfair competition statute (*91 Cal. App. 4th 1037, 1047)* .

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23-235 California Points & Authorities § 235.56A

§ 235.56A Supporting Contention That Action for Statutory Unfair Competition is Not Barred by Litigation Privilege--Plaintiff Was Not Party to Underlying Litigation

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE LITIGATION PRIVILEGE OF *CIVIL CODE SECTION 47(b)* IS NOT A DEFENSE IN AN ACTION BROUGHT UNDER BUSINESS AND PROFESSIONS CODE SECTION 17200 AGAINST AN ATTORNEY IF THE PLAINTIFF WAS NOT A PARTY TO THE EARLIER LITIGATION IN WHICH THE ALLEGEDLY PRIVILEGED CONDUCT OCCURRED.

Litigation Privilege Not Defense if Plaintiff Was Not Party in Underlying Litigation. The litigation privilege is not a defense in an unfair competition action brought against an attorney if the plaintiff was not a party to the earlier litigation in which the allegedly protected conduct occurred (*American Prods. Co., Inc. v. Law Offices of Geller, Stewart & Foley, LLP (2005) 134 Cal. App. 4th 1332, 1346, 37 Cal. Rptr. 3d 93*).

[2] Comments

[a] Use of Form

This form of points and authorities may be submitted in support of the contention that an attorney being sued for unfair competition under *Bus. & Prof. Code § 17200* may not defend the action by asserting the litigation privilege of *Civ. Code § 47(b)* if the plaintiff in the unfair competition action was not a party to the underlying litigation in which the allegedly privileged conduct occurred.

Counsel should insert argument in this form showing the relationship between the point of law stated and the facts of the case. Thus, counsel should include facts showing that the plaintiff was not a party to the underlying litigation in which the defendant's allegedly privileged conduct occurred.

[b] Opposing Points and Authorities

In an appropriate case, these points and authorities may be used to oppose the points and *authorities in § 235.64*.

[3] Discussion of Authorities

[a] Litigation Privilege Not Defense if Plaintiff Was Not Party in Underlying Litigation

In ***American Prods. Co., Inc. v. Law Offices of Geller, Stewart & Foley, LLP*** *(2005) 134 Cal. App. 4th 1332, 37 Cal. Rptr. 3d 93* , the plaintiff was the manufacturer of after-market automotive accessories sold by California retailers. The defendant, a law firm representing a consumer who bought some of these accessories, sent demand letters to two retailers alleging that the purchased accessories sold by the retailers were illegal to use in California. The letter requested payment of $2,500 to the consumer and $10,000 to the law firm. When the retailers failed to comply with the demands, the law firm filed suit against the retailers for violations of the unfair competition statute, *Bus. & Prof. Code§ 17200*. After being notified of the litigation, the plaintiff filed suit against the law firm, also basing this action on alleged violations of the unfair competition statute. The plaintiff alleged that the law firm had a practice of sending demand letters to, and then suing, California businesses without a good faith basis in order to coerce them into settlements. The defendant successfully moved for summary judgment, arguing that its conduct was absolutely privileged under the litigation privilege of *Civ. Code § 47(b)*. Plaintiff appealed.

The court of appeal reversed. The court reviewed the California Supreme Court's decision in *Rubin v. Green (1993) 4 Cal. 4th 1187, 17 Cal. Rptr. 2d 828, 847 P.2d 1044* [*see § 235.64[3][b]*]. In that opinion, the Supreme Court held that the litigation privilege was a defense to an action seeking an injunction under the unfair competition statute. In the course of its decision, the Supreme Court emphasized its concern with avoiding derivative litigation based on tactics taken in prior litigation between the same parties, and also noted that its holding did not fully protect a defendant because other parties who were not adversaries in the underlying litigation would have standing to bring suit under the unfair competition statute. A court of appeal opinion subsequent to *Rubin, Kashian v. Harriman (2002) 98 Cal. App. 4th 892, 120 Cal. Rptr. 2d 576* , interpreted the Supreme Court's statements to mean that the litigation privilege would not be a defense if the party asserting the unfair competition claim was not a party to the underlying litigation in which the allegedly privileged conduct took place. The court of appeal in this particular case agreed with that conclusion. The court of appeal held that the litigation privilege did not protect the law firm from the unfair competition suit because the plaintiff was not a party to the underlying litigation and the Supreme Court's analysis in *Rubin* was specifically limited to unfair competition actions brought by plaintiffs who had been parties to the underlying litigation. After concluding that the litigation privilege did not apply, the court ruled that the evidence failed to support summary judgment for the defendant (*134 Cal. App. 4th 1332, 1346)* .

NOTE:

The continued vitality of the court of appeal holding in *American Prods. Co., Inc. v. Law Offices of Geller, Stewart & Foley* is suspect, as the California Supreme Court, while not mentioning the case, subsequently rejected a broad exception to the litigation privilege for parties who did not participate in the underlying litigation [*Action Apartment Assn., Inc. v. City of Santa Monica (2007) 41 Cal. 4th 1232, 1248, 63 Cal. Rptr. 3d 398, 163 P.3d 89* ; *see People ex rel. Gallegos v. The Pacific Lumber Co. (2008) 158 Cal. App. 4th 950, 961* & n.5, *70 Cal. Rptr. 3d 501]* .

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23-235 California Points & Authorities § 235.57

§ 235.57 Opposing Contention That Private Plaintiff May Recover Money Damages [Bus. & Prof. Code § 17203]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

BUSINESS AND PROFESSIONS CODE SECTION 17203 DOES NOT AUTHORIZE AN AWARD OF MONEY DAMAGES TO A PRIVATE PLAINTIFF.

A. Private Action for Relief From Statutory Unfair Competition Authorized. [*See § 235.50[1], Paragraph A.*]

B. Recovery of Money Damages by Private Plaintiff Is Not Authorized. *Business and Professions Code Section 17203* does not authorize a court to award damages as well as injunctive relief to a private plaintiff (*Heller v. Norcal Mut. Ins. Co. (1994) 8 Cal. 4th 30, 45, 32 Cal. Rptr. 2d 200, 876 P.2d 999* ; *Industrial Indem. Co. v. Superior Court (1989) 209 Cal. App. 3d 1093, 1096-1097, 257 Cal. Rptr. 655*).

[*Optional*] **C. Restitution Is Measured by Defendant's Gain.** Because a plaintiff is not entitled to damages under *Business and Professions Code Section 17203,* the proper measure of restitution is the amount received by the defendant as a result of the improper conduct, even if the amount of monetary damages suffered by the plaintiff as a consequence of the conduct is greater (*Inline, Inc. v. Apace Moving Sys., Inc. (2005) 125 Cal. App. 4th 895, 903-904, 23 Cal. Rptr. 3d 216*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a contention that a private litigant may recover money damages under *Bus. & Prof. Code § 17203*. Note, however, that remedies under *Bus. & Prof. Code § 17200 et seq.* are cumulative [*Bus. & Prof. Code § 17205*], so a private litigant may recover damages under some other provision and injunctive relief under *Bus. & Prof. Code § 17203,* as was done successfully in *Allied Grape Growers v.*

Bronco Wine Co. (1988) 203 Cal. App. 3d 432, 249 Cal. Rptr. 872 [*see § 235.50[3][e]*]. Similarly, a private litigant may recover "restitutionary" damages pursuant to *Bus. & Prof. Code § 17203* [*see Bronco Wine Co. v. Frank A. Logoluso Farms (1989) 214 Cal. App. 3d 699, 704, 721, 262 Cal. Rptr. 899* (that portion of award was not challenged)].

Counsel should insert argument in this form, showing the relationship betweenthe facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Recovery of Money Damages by Private Plaintiff Is Not Authorized

In ***Heller v. Norcal Mut. Ins. Co.*** *(1994) 8 Cal. 4th 30, 32 Cal. Rptr. 2d 200, 876 P.2d 999* , plaintiff had sued defendants for damages, alleging violations of statutory and constitutional privacy rights and numerous common law torts arising out of allegedly improper ex parte discussions about plaintiff's medical condition between her treating physician and an insurance company that was defending a separate medical malpractice action brought by plaintiff against another physician. Among other things, plaintiff's complaint included a cause of action for conspiring to commit unfair business practices in violation of *Bus. & Prof. Code § 17200*. With little discussion, the Supreme Court held that the court of appeal had properly affirmed the trial court's judgment sustaining the defendants' demurrer to this cause of action. The Court noted that damages are not available for claims under the Unfair Business Practices Act (*8 Cal. 4th 30, 45)* .

In ***Industrial Indem. Co. v. Superior Court*** *(1989) 209 Cal. App. 3d 1093, 257 Cal. Rptr. 655* , the plaintiffs (real parties) were members of a homeowners association who owned a mobile home that was damaged by a mudslide. They sued the homeowners association, and the association's insurer defended and settled the lawsuit. Then plaintiffs brought an action against the insurer seeking compensatory and punitive damages alleging many causes of action, including one for violation of the Business and Professions Code provisions forbidding unfair competition, and one for violation of their rights as third-party beneficiaries under *Ins. Code § 790.03(h)*. The insurer's motion for summary judgment was denied as to these causes of action, and it sought review by writ of mandate.

The court of appeal directed issuance of a peremptory writ directing that the order denying summary judgment on those causes of action be vacated and an order granting summary adjudication of those issues be entered. The court first considered the language of *Bus. & Prof. Code § 17203*, and noted that it is very similar in wording and purpose to *Bus. & Prof. Code § 17535*, which prohibits false and misleading statements in advertising, and that both provisions were derived from former Civ. Code § 3369. The Supreme Court has held in *Chern v. Bank of Am. (1976) 15 Cal. 3d 866, 875, 127 Cal. Rptr. 110, 544 P.2d 1310* , that *Bus. & Prof. Code § 17535* does not support the award of compensatory damages to private individuals, but limits their relief to equitable remedies, namely injunction and restitutionary damages. The court noted two federal cases [*Kates v. Crocker Nat'l Bank (9th Cir. 1985) 776 F.2d 1396, 1398* ; *Newport Components v. NEC Home Elec. (C.D. Cal. 1987) 671 F. Supp. 1525, 1550-1551]* that held that if the *Chern* ruling was true of *Bus. & Prof. Code § 17535*, it must also be true of *Bus. & Prof. Code § 17203* (*209 Cal. App. 3d 1093, 1096)* .

The cases cited by plaintiffs did not compel a contrary result. In Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 215, 197 Cal. Rptr. 783, 673 P.2d 660 [*see § 235.50[3][b]*], the Supreme Court said it was not deciding whether or not damages were available to a private litigant under *Bus. & Prof. Code § 17203* (*209 Cal. App. 3d 1093, 1096)* . In *United Farm Workers of Am. v. Superior Court (1975) 47 Cal. App. 3d 334, 343-345, 120 Cal. Rptr. 904* (which was decided under former Civ. Code § 3369), damages were allowed, but only on the theory that the existence of a penal or regulatory statute made for the benefit of the class of consumers gave members of that class a right to sue in tort (*209 Cal. App. 3d 1093, 1096-1097)* . Even if that principle retains some validity in other areas of the law, the court said it is no longer valid in the present context after *Moradi-Shalal v. Fireman's Fund Ins. Cos. (1988) 46 Cal. 3d 287, 250 Cal. Rptr. 116, 758 P.2d 58* , which destroyed the private right of action under *Ins.*

Code § 790.03(h) (*209 Cal. App. 3d 1093, 1097)* .

[b] Restitution Is Measured by Defendant's Gain

In ***Inline, Inc. v. Apace Moving Sys., Inc.*** *(2005) 125 Cal. App. 4th 895, 23 Cal. Rptr. 3d 216* , the plaintiff was a judgment creditor seeking to attach assets owned by the judgment debtor, but many of these assets were hidden under an incorporated entity owned by the debtor's brother. These assets, which included several hundred thousand dollars worth of electronics equipment and office furniture, were eventually sold at a warehouseman's lien auction for $20 in an attempt to recover unpaid storage fees. The plaintiff subsequently purchased them from a third party for $100,000. The plaintiff then sued the warehouse, arguing that the auction was commercially unreasonable under *U.C.C. § 7210,* and sought restitution under *Bus. & Prof. Code § 17203*. The trial court found that the auction was commercially unreasonable, but limited restitution to the $20 received for the goods by the warehouse at auction. The plaintiff appealed, arguing that he was entitled, as restitution, to the $100,000 that he was required to pay to gain possession of the goods.

The court of appeal affirmed. The court concluded that the plain language of *Bus. & Prof. Code § 17203* did not permit recovery of more than $20 in restitution from the defendant. The court noted that the statute permitted recovery of amounts "necessary to restore to any person ... money or property ... [that] may have been acquired by means of such unfair competition." The only amount acquired by the defendant by means of the unfair competition--in this case, the commercially unreasonable auction--was the $20 paid for the goods at auction. To allow the plaintiff to recover the $100,000 that he paid to a third party to gain possession of the goods, even if payment of this amount was a consequence of the unreasonable auction, would be tantamount to allowing the plaintiff to recovercompensatory damages, which are not authorized under the statute (*125 Cal. App. 4th 895, 903-904)* .

[4] Additional Authorities

[a] Recovery of Money Damages by Private Plaintiff Is Not Authorized

E.W. French & Sons, Inc. v. General Portland, Inc. (9th Cir. 1989) 885 F.2d 1392 , involved pendent state claims of unfair competition. The jury found that defendants had engaged in unfair, unlawful, and fraudulent business practices, and awarded the plaintiff $175,000. On appeal, that award was reversed. The court of appeals concluded that it was bound to apply the reasoning of *Chern v. Bank of Am.(1976) 15 Cal. 3d 866, 127 Cal. Rptr. 110, 544 P.2d 1310* , that *Bus. & Prof. Code § 17203* does not authorize an award of compensatory damages to a private plaintiff, despite equivocal dicta in Committee on Children's Television, Inc. v. General Foods (1983) 35 Cal. 3d 197, 197 Cal. Rptr. 783, 673 P.2d 660 (*885 F.2d 1392, 1401-1402)* .

In *Bank of the West v. Superior Court (1992) 2 Cal. 4th 1254, 10 Cal. Rptr. 2d 538, 833 P.2d 545* , the California Supreme Court determined whether an insurance policy covering "advertising injuries," including unfair competition, covered a settlement the insured paid to private plaintiffs. After tracing the history of the unfair competition statutes, the Court noted that *Bus. & Prof. Code § 17203* provides for disgorgement and restitution, but does not allow a private plaintiff to recover damages (*2 Cal. 4th 1254, 1272-1273)* .

In *Safeco Ins. Co. v. Superior Court (1990) 216 Cal. App. 3d 1491, 265 Cal. Rptr. 585* , the court of appeal issued a peremptory writ of mandate compelling the superior court to grant the real party-defendant-insurance company's motion for summary judgment against the plaintiff, who was injured by defendant's insured. The court of appeal agreed that *Moradi-Shalal v. Fireman's Fund Ins. Cos. (1988) 46 Cal. 3d 287, 305-313, 250 Cal. Rptr. 116, 758 P.2d 58* , abolished a third party's private right of action for unfair claims settlement practices under *Ins. Code § 790.03(h)* (*216 Cal. App. 3d 1491, 1493)* . Consequently, plaintiff had no cause of action against the insurer for damages under *Bus. & Prof. Code § 17200* (*216 Cal. App. 3d 1491, 1494)* .

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23-235 California Points & Authorities § 235.58

§ 235.58 Opposing Contention That Private Plaintiff May Maintain Action For Unfair Competition [Bus. & Prof. Code § 17200]

[1] FORM

[*The following may be included in a memorandum or points and authorities, or in a trial or appellate brief.*]

DEFENDANT'S ACTION WAS NOT AN UNLAWFUL, UNFAIR, OR FRAUDULENT BUSINESS ACT OR PRACTICE AS DEFINED UNDER BUSINESS AND PROFESSIONS CODE SECTION 17200.

A. Statutory Unfair Competition Defined. As used in Chapter 5 of Part II, Division 7 (commencing with *Section 17200), of the Business and Professions Code*, unfair competition means and includes any unlawful, unfair, or fraudulent business act or practice, and unfair, deceptive, untrue, or misleading advertising and any act prohibited by Chapter 1 (commencing with *Section 17500) of Part 3 of Division 7 of the Business and Professions Code* (*Bus. & Prof. Code § 17200*).

[*Optional*] **B. Liability Release Form Not Unlawful.** *Business and Professions Code Section 17200* does not prohibit releases which do not expressly include strict liability claims or which exclude claims prohibited by law (*Olsen v. Breeze, Inc. (1996) 48 Cal. App. 4th 608, 620, 55 Cal. Rptr. 2d 818*).

[*Optional*] **C. Liquidated Damages Clause Not Unlawful.** The inclusion of a liquidated damages clause terms in an employment contract is not an unlawful business practice under *Bus. & Prof. Code § 17200* (*Californians for Population Stabilization v. Hewlett-Packard Co. (1997) 58 Cal. App. 4th 273, 290, 67 Cal. Rptr. 2d 621*).

[*Optional*] **D. Unwitting Distribution of Contaminated Pet Food Not Act of Unfair Competition.** The unwitting distribution of contaminated pet food into the stream of commerce is neither illegal, unfair nor fraudulent within the meaning of *Business and Professions Code Section 17200* (*Klein v. Earth Elements, Inc. (1997) 59 Cal. App. 4th 965, 967, 69 Cal. Rptr. 2d 623*).

[*Optional*] **E. Conduct Specifically Lawful Under Other Statute May Not Be Basis for Action Under Unfair Competition Law.** A plaintiff may not recover under *Business and Professions Code Section 17200 et seq.* if some other provision of law specifically legalizes the challenged conduct (*Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co. (1999) 20 Cal. 4th 163, 184, 83 Cal. Rptr. 2d 548, 973 P.2d 527*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition toa contention that a private plaintiff has stated a cause of action for statutory unfair competition as defined under *Bus. & Prof. Code § 17200*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to address the issue of whether plaintiff has stated a cause of action for statutory unfair competition. For example, they may be combined with general points and authorities in support of a general demurrer to a complaint, or a motion for summary judgment. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss the wording of the release, and should argue that the release either does not expressly include strict liability claims or that it excludes claims prohibited by law.

[c] Related Points and Authorities

For memoranda of points and authorities relating to summary judgment generally, see Ch. 21, *Summary Judgments* .

[d] Opposing Points and Authorities

If appropriate, the points and *authorities in § 235.50* may be used to oppose these points and authorities.

[3] Discussion of Authorities

[a] Liability Release Form Not Unlawful

In ***Olsen v. Breeze, Inc.*** *(1996) 48 Cal. App. 4th 608, 55 Cal. Rptr. 2d 818* , plaintiff brought an action for unfair competition based on a requirement by a ski shop that he sign a form release as a condition of the return of his ski equipment. Plaintiff had taken his skis to defendant to have the ski bindings adjusted. As a condition for the return of his equipment, plaintiff was required to sign a form releasing defendant from any liability for injury resulting from use of the equipment, including injury caused by negligence, breach of warranty, or product defect. Plaintiff brought an action under *Bus. & Prof. Code § 17200*, contending that the release was unlawful and could not be enforced, and thus constituted unfair competition. The trial court granted a motion by defendant for summary adjudication of the unfair competition cause of action, and entered a judgment of dismissal.

The court of appeal affirmed the dismissal, noting that when the public interest is not implicated, private parties are free among themselves to shift a risk elsewhere than where the law would otherwise place it (*48 Cal. App. 4th 608, 619)* . In an earlier case [*Westlye v. Look Sports, Inc. (1993) 17 Cal. App. 4th 1715, 22 Cal. Rptr. 2d 781]* , the court had held that the public interest does not preclude enforcement of an agreement to bar claims for negligent adjustment of ski bindings. However, the court also held in that case that an express disclaimer of liability will not insulate a distributor of ski equipment from strict liability for injuries caused by defective products. Plaintiff contended that defendant's release

was unlawful because it was ambiguous regarding product defect or strict liability claims, and that the release must expressly exclude such claims. However, the court held that defendants are under no duty to outline in their releases the details of their customers' legal rights, and that as long as the releases do not expressly include strict liability claims or, alternatively, do exclude claims prohibited by law, they comply with the requirements of *Westlye*.

[b] Liquidated Damages Clause Not Unlawful

In ***Californians for Population Stabilization v. Hewlett-Packard Co.*** *(1997) 58 Cal. App. 4th 273, 67 Cal. Rptr. 2d 621* , the defendant, a company that supplies Indian software engineers to California high tech corporations, was sued by a public interest group for statutory unfair competition under *Bus. & Prof. Code § 17200*. Plaintiff contended that the $30,000 liquidated damages provision contained in defendant's employment agreements violated *Bus. & Prof. Code § 16600* as well as *Civ. Code §§ 1670.5* and *1671*. It maintained that the inclusion of unlawful terms in a form contract constituted unfair competition and violated under *Bus. & Prof. Code § 17200*. The trial court concluded that defendant's use of the liquidated damages clause did not constitute an unlawful business practice.

The court of appeal affirmed, holding that given the current statutory policy which favors the validity of liquidated damages agreements except in certain consumer transactions, and which casts the burden on the opposing party to prove unreasonableness, the trial court correctly determined that defendant's use of the liquidated damages clause did not constitute an unlawful business practice. (*58 Cal. App. 4th 273, 290)* .

[c] Unwitting Distribution of Contaminated Pet Food Not Act of Unfair Competition

In ***Klein v. Earth Elements, Inc.*** *(1997) 59 Cal. App. 4th 965, 69 Cal. Rptr. 2d 623* , plaintiff argued that a pet food distributor committed an act of unfair competition within the meaning of *Bus. & Prof. Code § 17200* when it unwittingly caused contaminated pet food to be distributed into the stream of commerce. The trial court determined that defendant had not engaged in any prohibited conduct under the statute and plaintiff appealed.

The court of appeal affirmed, holding that the distributor's conduct was neither illegal, unfair nor fraudulent within the meaning of *Bus. & Prof. Code § 17200* (*59 Cal. App. 4th 965, 967)* . Plaintiff first argued that liability imposed under the doctrines of strict products liability and breach of the implied warranty of fitness, would support an independent action under the "unlawful" prong of *Bus. & Prof. Code § 17200*. The court determined that while these doctrines did provide for civil liability, they did not by themselves, describe acts or practices that were illegal. In its view the unintentional distribution of a defective product was beyond the scope of the "unlawful" prong of *Bus. & Prof. Code § 17200*. Plaintiff next argued that defendant's conduct was unfair. The court said that determination of whether a business practice was unfair entailed an examination of the impact of the practice on its victim, balanced against the reasons, justifications and motives of the alleged wrongdoer. Under this test, defendant's conduct was not unfair; while dogs got sick, the company's act was accidental and once discovered, it moved quickly to abate the harm. Finally, plaintiff argued that defendant's conduct was fraudulent because consumers would be deceived by a label on the defective product which assured them that they could feed the product to their pet with confidence that they were doing something good for their pet. The court responded that there was no deception here because defendant did nothing to cause the consuming public to accept the contaminated food as uncontaminated; indeed, by instituting a speedy and extensive recall effort, the company did what it could to inform the public of the problem (*59 Cal. App. 4th 965, 970)* .

[d] Conduct Specifically Lawful Under Other Statute May Not Be Basis for Action Under Unfair Competition Law

Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co. *(1999) 20 Cal. 4th 163, 83 Cal. Rptr. 2d 548, 973 P.2d 527* , is discussed in *§ 235.50[3][l]*.

[4] Additional Authorities

[a] Conduct Specifically Lawful Under Other Statute May Not Be Basis for Action Under Unfair Competition Law

In *Olszewski v. Scripps Health (2003) 30 Cal. 4th 798, 135 Cal. Rptr. 2d 1, 69 P.3d 927* , the plaintiff, a Medi-Cal beneficiary, brought a class action suit against her medical care provider based on the provider's assertion of a lien under *Welf. & Inst. Code §§ 14124.791* and *14124.74*. Those statutes allow a health care provider to assert a lien against any recovery from a third-party tortfeasor for the value of the health care provided to the Medi-Cal beneficiary, so long as the health care provider first reimburses the state for the amount of any Medi-Cal benefits received. The plaintiff, arguing that the lien was unenforceable because the state statutes conflicted with federal Medicaid law, brought several tort claims and a claim under the unfair competition statute. The trial court sustained the defendant's demurrer, the court of appeal affirmed as modified, and the California Supreme Court reversed in part and affirmed in part. The Supreme Court held that the plaintiff was correct that a lien asserted under the state statutes is invalid and unenforceable because it conflicts with federal provisions that restrict the right of health care providers to collect directly from Medi-Cal beneficiaries (*30 Cal. 4th 798, 819-821)* . However, the Court then held that the trial court was correct in dismissing the plaintiff's suit. According to the Court, the plaintiff's cause of action under the unfair competition statute could not be successfully prosecuted because the state statutory provisions authorizing the lien created a safe harbor protecting the defendant. After rejecting the plaintiff's claim that the asserted lien violated any federal law that was applicable to the health care provider, the Court rejected the attempt to apply retroactively its decision that the state statutes relied on by the defendant were invalid. The Court concluded that the defendant had a right to rely on the state statutes, and their presumed constitutionality, when deciding to assert the lien, and penalizing the defendant for that reliance would raise serious due process concerns (*30 Cal. 4th 798, 828-829)* . The Court then rejected the plaintiff's other tort claims on the grounds that the assertion of the statutory lien was protected by the litigation privilege of *Civ. Code § 47(b)* (*30 Cal. 4th 798, 831)* .

In *Chavez v. Whirlpool Corp. (2001) 93 Cal. App. 4th 363, 113 Cal. Rptr. 2d 175* , the plaintiff was a consumer who brought an action against an appliance manufacturer and a retail dealer alleging violations of the Cartwright Act, *Bus. & Prof. Code § 16700 et seq.*, and the unfair competition law, *Bus. & Prof. Code § 17200 et seq.* The plaintiff alleged that the manufacturer had announced minimum resale prices for its dishwashers, that it would refuse to sell to retailers who did not comply with the pricing policy, and that it would take steps to monitor which retailers were in compliance with the policy. The plaintiff also alleged that the retail dealer agreed to implement the manufacturer's policy, even though that retailer normally discounted its prices. The trial court sustained the defendants' demurrer, and the court of appeal affirmed. The court of appeal held that under established case law, the conduct alleged by the plaintiff was not an unreasonable restraint of trade under the Cartwright Act, but was in fact conduct that a manufacturer was permitted to take (*93 Cal. App. 4th 363, 373)* . Because the conduct was specifically allowed under case law interpreting the antitrust laws, the plaintiff could not bring an action under the unfair competition law alleging that the same conduct violated that statute because it unreasonably restrained competition and harmed consumers (*93 Cal. App. 4th 363, 374-375)* .

In *Shvarts v. Budget Group, Inc. (2000) 81 Cal. App. 4th 1153, 97 Cal. Rptr. 2d 722* , the court of appeal was faced with the same issue and agreed with the analysis of an earlier case [*Schnall v. Hertz Corp. (2000) 78 Cal. App. 4th 1144, 93 Cal. Rptr. 2d 439]* , but the court rejected a claim based on fraud because the amount of the refueling surcharge was clearly printed on the first page of the car rental agreement (*81 Cal. App. 4th 1153, 1159-1160)* .

In *Schnall v. Hertz Corp. (2000) 78 Cal. App. 4th 1144, 93 Cal. Rptr. 2d 439* ,the plaintiff brought a class action against a car rental company from which the plaintiff had rented a car. The action sought damages and injunctive relief under *Bus. & Prof. Code § 17200 et seq.*, based on a car refueling surcharge imposed but avoidable under the company's standard rental agreement. The court of appeal agreed with the trial court that *Civ. Code § 1936(m)(2)* [(*now see Civ. Code § 1936(n)(2)*], which permits rental car companies to impose charges for optional services if the car renter knows that the charge may be avoided, provided the rental car company with a "safe harbor" from claims under the unfair competition statute based on imposition of the refueling surcharge and the amount of the surcharge (*78 Cal. App. 4th*

1144, 1156, 1162) . By contrast, the court held that *Civ. Code § 1936* did not protect the company from a claim under the unfair competition statute that the company unfairly or fraudulently advised its customers of the fuel service surcharge in a manner designed to induce the customers to incur the charge (*78 Cal. App. 4th 1144, 1170)* .

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23-235 California Points & Authorities § 235.59

§ 235.59 Opposing Contention That Plaintiff May Bring Action for Statutory Unfair Competition [Bus. & Prof. Code § 17200]--Insurance Code Bars Action Against Insurance Company Based on Ratemaking Decisions

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

INSURANCE CODE SECTIONS 1860.1 AND 1860.2 BAR AN ACTION BROUGHT UNDER BUSINESS AND PROFESSIONS CODE SECTION 17200 FOR DISGORGEMENT OF ALLEGEDLY EXCESSIVE INSURANCE PREMIUMS IF THE STATE INSURANCE COMMISSIONER PREAPPROVED THE AMOUNT OF THOSE PREMIUMS.

Unfair Business Practices Claim for Disgorgement of Allegedly Excessive Insurance Premiums Barred. Because *Insurance Code Sections 1860.1* and *1860.2* give exclusive jurisdiction over issues relating to insurance ratemaking to the insurance commissioner, actions under *Business and Professions Code Section 17200* for disgorgement of allegedly excessive premium amounts are barred if the charged rates resulted from the administrative ratemaking process, the commissioner approved the rates, and the statutory procedures for challenging the commissioner's decision were not used (*Walker v. Allstate Indem. Co. (2000) 77 Cal. App. 4th 750, 754-759, 92 Cal. Rptr. 2d 132*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a contention that an action may be brought under *Bus. & Prof. Code § 17200* against an insurance company for disgorgement of allegedly excessive insurance premiums. The basis for the opposition is that *Ins. Code §§ 1860.1* and *1860.2* give exclusive jurisdiction over issues relating to insurance ratemaking to the insurance commissioner, that the insurance commissioner approved the rates charged pursuant to the appropriate administrative procedures, and that no challenges to the commissioner's decision were brought as specifically provided by the governing statutes.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include facts showing that the rates charged were the rates approved by the insurance commissioner and that the specified statutory procedures for challenging thecommissioner's decision were not used.

[3] Discussion of Authorities

[a] Unfair Business Practices Claim for Disgorgement of Allegedly Excessive Insurance Premiums Barred

In ***Walker v. Allstate Indem. Co.*** *(2000) 77 Cal. App. 4th 750, 92 Cal. Rptr. 2d 132* , the plaintiffs were representatives of a putative class of automobile insurance customers who brought suit against over 70 insurance companies and the state insurance commissioner. The claims against the insurance companies were based on allegedly excessive automobile insurance premiums and included claims brought under the Insurance Code, violation of *Bus. & Prof. Code § 17200*, unjust enrichment, and fraud. The defendants' demurrer to the complaint was granted without leave to amend. The trial court concluded that the case was essentially a ratemaking case and that because the Insurance Code gives exclusive jurisdiction over issues relating to insurance ratemaking to the insurance commissioner, challenges to rate applications must be timely raised during the administrative process and not through a class action brought long after the time for challenging an individual rate application has passed. The plaintiffs dismissed the insurance commissioner from the suit and appealed the judgment against two of the insurers.

The court of appeal affirmed. The court agreed that the plaintiffs' claims were barred by *Ins. Code § 1860.1*, which provides generally that actions taken pursuant to authority of the statutes governing insurance rates and rating practices could not be the basis for prosecution or civil proceedings brought under any other law that did not specifically refer to insurance, and by *Ins. Code § 1860.2*, which provides generally that the administration and enforcement of the relevant ratemaking statutes is governed solely by the provisions of those statutes and that no other statute applies unless that other statute expressly so provides that it applies to the insurance ratemaking procedures. The court noted that these provisions have historically been interpreted to provide exclusive original jurisdiction over ratemaking to the insurance commissioner, and the court concluded that such exclusive jurisdiction was not abrogated by Proposition 103, an insurance overhaul approved by the voters in 1989 (*77 Cal. App. 4th 750, 754-756)* . The court held that there was no violation of the law to support a claim brought under *Bus. & Prof. Code § 17200*, because the rates charged were the result of the appropriate administrative process and were approved by the insurance commissioner, no challenges were brought as specifically provided by the governing statutes, and the insurance companies then charged the approved rates (*77 Cal. App. 4th 750, 759)* . The court also concluded more generally that the charging of an approved rate cannot be deemed tortious, or "illegal" or "unfair" for purposes of the Unfair Business Practices Act (*77 Cal. App. 4th 750, 756)* .

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23-235 California Points & Authorities § 235.59A

§ 235.59A Opposing Contention That Plaintiff May Bring Action for Statutory Unfair Competition [Bus. & Prof. Code § 17200]--Failure to Bring Claim Alleging Violation of Talent Agencies Act With Labor Commissioner Bars Unfair Competition Claim [Lab. Code § 1700.44]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF MAY NOT PURSUE AN ACTION UNDER THE UNFAIR COMPETITION STATUTE BASED ON A VIOLATION OF THE TALENT AGENCIES ACT WITHOUT FIRST FILING A TIMELY CLAIM FOR DECISION ON THAT ALLEGED VIOLATION WITH THE LABOR COMMISSIONER.

Failure to File Timely Claim With Labor Commissioner Bars Action Under Unfair Competition Statute Based on Violation of Talent Agencies Act. The Talent Agencies Act vests exclusive original jurisdiction in the Labor Commissioner for all claims arguably coming under its provisions, and failure to meet this jurisdictional hurdle will bar an action under the unfair competition statute for a violation of the Act (*Blanks v. Seyfarth Shaw LLP (2009) 171 Cal. App. 4th 336, 364-365, 89 Cal. Rptr. 3d 710* ; *see Lab. Code § 1700.44*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that plaintiff may bring an action under the unfair competition statute based on a violation of the Talent Agencies Act [*see Lab. Code § 1700 et seq.*] without first bringing a timely claim for violation of that Act with the Labor Commissioner for decision.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the contention that the unfair competition action is barred. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law stated. Thus, counsel should include facts showing both that the unfair competition claim is based on facts arguably covered by the Talent Agencies Act and that plaintiff did not first file a timely claim with and receive a decision by the Labor Commissioner before suing under the unfair competition statute.

[3] Discussion of Authorities

[a] Failure to File Timely Claim WIth Labor Commissioner Bars Action Under Unfair Competition Statute Based on Violation of Talent Agencies Act

In ***Blanks v. Seyfarth Shaw LLP*** *(2009) 171 Cal. App. 4th 336, 89 Cal. Rptr. 3d 710* , plaintiff client sued a law firm and individual attorneys that represented him in underlying proceedings against the client's former business associate alleging violations of the Talent Agencies Act (TAA), *Lab. Code § 1700 et seq.* Plaintiff alleged that he lost the right to seek repayment of over $10,000,000 allegedly owed by the former business associate because the attorneys failed to file a timely claim under the TAA with the Labor Commissioner as required by that Act, and this failure was motivated by the desire to generate more attorney's fees. At trial, the jury found that defendant attorneys were liable and awarded plaintiff compensatory and punitive damages, as well as interest, costs, and attorneys fees. Defendants appealed, arguing that because the client could have recovered the same compensation from the former business associate under the unfair competition statute without first filing a claim for decision by the Labor Commissioner, the attorneys' failure to file a timely claim with the Commissioner did not cause the client's damages.

The court of appeal reversed for a new trial on other grounds, but disagreed with defendants that plaintiff could have recovered under the unfair competition statute for a violation of the TAA without first having filed a claim for decision with the Labor Commissioner. The court noted that the TAA contains an unambiguous requirement in *Lab. Code § 1700.44* that actions colorably arising under the TAA must first be presented within one year to the Labor Commissioner for a ruling, thus providing to the Labor Commissioner exclusive original jurisdiction over all such claims under the TAA. The court held that the client's failure to comply with the procedural requirement was an absolute bar to an action based on such a violation even if brought under the unfair competition statute (*171 Cal. App. 4th 336, 364-365)* .

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23-235 California Points & Authorities § 235.60

§ 235.60 Opposing Contention That Disgorgement Into Fluid Recovery Fund Is Authorized Remedy in Non-Class-Action Representative Action for Statutory Unfair Competition [Bus. & Prof. Code § 17203]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

IN AN ACTION BROUGHT UNDER THE UNFAIR COMPETITION STATUTE, DISGORGEMENT INTO A FLUID RECOVERY FUND IS AUTHORIZED AS A REMEDY ONLY IN A CLASS ACTION SUIT AND MAY NOT BE USED IN A REPRESENTATIVE ACTION THAT HAS NOT BEEN CERTIFIED AS A CLASS ACTION.

Disgorgement Into Fluid Recovery Fund Is Not Authorized Remedy in Representative Action. Although restitution and disgorgement of profits are appropriate to prevent a defendant from profiting from unfair business practices in an action brought under *Business and Professions Code Section 17200*, disgorgement into a fluid recovery fund is authorized only in a class action suit and may not be used in a representative action that has not been certified as a class action (*Kraus v. Trinity Management Services, Inc. (2000) 23 Cal. 4th 116, 137, 96 Cal. Rptr. 2d 485, 999 P.2d 718*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to the contention that disgorgement of profits into a fluid recovery fund is an appropriate remedy in a non-class-action representative action brought under the unfair competition statute. Disgorgement of profits into a fluid recovery fund is only available as a remedy under the unfair competition statute if the statutory requirements for class certification are met and the action is prosecuted as a class action [*Corbett v. Superior Court (2002) 101 Cal. App. 4th 649, 654-655, 125 Cal. Rptr. 2d 46]* .

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include facts showing that the action has not been certified as a class action and that the

remedy sought amounts to disgorgement into a fluid recovery fund.

[b] Related Points and Authorities Chapters

For memoranda of points and authorities dealing with the fluid class recovery concept, and with class and representative actions generally, see Ch. 41, *Class and Representative Actions* .

[3] Discussion of Authorities

[a] Disgorgement Into Fluid Recovery Fund Is Not Authorized Remedy in Representative Action

In ***Kraus v. Trinity Management Services, Inc.*** *(2000) 23 Cal. 4th 116, 96 Cal. Rptr. 2d 485, 999 P.2d 718* , six individual plaintiffs initiated an action on behalf of themselves and other present and former tenants of the defendants, who owned and managed rental properties in San Francisco. The plaintiffs had been required to pay a $100 non-refundable security and administrative fee at the time of entering into their leases, and those plaintiffs who had terminated their leases and vacated prior to lease expiration had been assessed liquidated damages equal to one month's rent and unpaid rent for the balance of the one-year lease term prior to sublease or release of the apartments. A security deposit equal to one-month's rent that each tenant was also required to pay was routinely applied to offset any liquidated damages. One of the causes of action alleged that the defendants' practice of assessing the $100 fee, and the practice of assessing both liquidated damages and the remainder of the rent when tenants terminated early, were unlawful and unfair business practices that violated the unfair competition statute.

The trial court found that the challenged practices constituted unfair business practices that violated the unfair competition statute, and the court ordered two of the defendants to disgorge almost $900,000 combined, which represented the sums unlawfully collected within the four-year statute of limitations period, plus interest. From that amount, after awarding $2,655 paid to the plaintiffs, the court ordered restitution of the $100 fee paid to those individuals who had been charged the fee, to the extent that those individuals could be located with due diligence. The judgment directed that the disgorged funds be placed into a fluid recovery fund organized and administered as a trust fund "for the purpose of providing financial assistance for the advancement of legal rights and interests of residential tenants in the City and County of San Francisco." The defendants appealed, arguing in part that the court did not have the authority to order payment into a fluid recovery fund in an action not certified as a class action. As pertinent to this issue, the court of appeal held that class certification was not required before disgorgement into a fluid recovery fund could be ordered. The defendants again appealed.

The Supreme Court reversed, holding that to the extent the trial court ordered the defendants to make any refunds other than to refund money to tenants and former tenants, the award was not authorized by the unfair competition statute. The Court recognized that it had never before addressed the question of whether, in a representative action under the unfair competition statute, the statuteauthorizes a fluid recovery remedy, which is necessary only if a defendant must disgorge money that is not to be returned to the persons from whom it was obtained. Two prior court of appeal decisions had held that it was an appropriate remedy. The Supreme Court noted that the legislature had authorized the use of a fluid recovery remedy in class actions in 1993, although it had not expressly authorized fluid recovery in actions brought under the unfair competition statute if restitution to a person in interest was the only monetary remedy authorized (*23 Cal. 4th 116, 127-128)* .

Construing the relevant remedial language of *Bus. & Prof. Code § 17203*, the Court concluded that nothing in the legislative history of the unfair competition statute suggested that fluid recovery was contemplated, even when the legislature added restitution as a remedy in 1976. Moreover, the Court recognized that although the concept of putting charitable trust funds to their next best use if the trust purpose can no longer be accomplished is well established, the extension of that principle into other areas of civil litigation was a relatively recent judicial development that had only been approved by the legislature in the context of class actions (*23 Cal. 4th 116, 129-132)* . The Court declined to hold

that disgorgement into a fluid recovery fund was within the broad equitable powers of the trial court when fashioning an appropriate remedy under *Bus. & Prof. Code § 17203*. Because the legislature has not expressly authorized monetary relief other than restitution in actions brought under the unfair competition statute, but has authorized disgorgement into a fluid recovery fund in class actions, the Court concluded that further extension of the use of a fluid recovery fund to representative actions that have not been certified as a class action should come from the legislature (*23 Cal. 4th 116, 137)* . The Court also noted that allowing fluid recovery in representative actions might implicate due process concerns raised by the defendants, concerns stemming from the fact that absent persons would not be bound by the judgment if there has been no class certification and that a defendant would be faced with the possibility of numerous future lawsuits based on the same conduct and for which liability has already been adjudicated (*23 Cal. 4th 116, 126, 137)* . Finally, the Court added that because representative actions are not subject to the same level of judicial scrutiny as class actions, disgorgement into a fluid recovery fund on behalf of absent persons in a representative action may not actually serve the public (*23 Cal. 4th 116, 137)* .

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23-235 California Points & Authorities § 235.61

§ 235.61 Opposing Contention That Plaintiff May Recover Disgorgement of Profits That Is Not Restitutionary [Bus. & Prof. Code § 17203]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief*].

IN AN ACTION BROUGHT UNDER THE UNFAIR COMPETITION STATUTE, PLAINTIFF MAY ONLY SEEK DISGORGEMENT OF PROFITS AS A REMEDY TO THE EXTENT THAT THE DISGORGEMENT IS RESTITUTIONARY, AND PLAINTIFF MAY NOT SEEK DISGORGEMENT OF PROFITS THAT WERE NOT RECEIVED FROM THE PLAINTIFF OR IN WHICH THE PLAINTIFF OTHERWISE HAS NO OWNERSHIP INTEREST.

A. Disgorgement of Profits Must Be Restitutionary. A defendant in an action under the unfair competition statute cannot be ordered to disgorge profits to an individual plaintiff if those profits were not taken from the plaintiff or if the plaintiff does not otherwise have an ownership interest in those profits, because disgorgement of profits in the absence of an ownership interest by the plaintiff goes beyond the restitution that is authorized by the statute (*Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal. 4th 1134, 1144-1148, 131 Cal. Rptr. 2d 29, 63 P.3d 937*).

[*Optional*] **B. Nonrestitutionary Disgorgement Prohibited in Class Action Suit.** Nonrestitutionary disgorgement of profits is not available as a remedy in a class action lawsuit brought under the unfair competition statute (*Feitelberg v. Credit Suisse First Boston, LLC (2005) 134 Cal. App. 4th 997, 1016-1020, 36 Cal. Rptr. 3d 592*).

[*Optional*] **C. Unpaid Wages Not Recoverable as Restitution From Employer's Owners, Officers, or Managers.** Although wages may be recovered from the actual employer, wages may not be recovered as restitution from the employer's owners, officers, or managers, unless the labor was performed for such persons personally or those persons appropriated funds from the employer that would otherwise have been used to pay the unpaid wages (*Bradstreet v. Wong (2008) 161 Cal. App. 4th 1440, 1460-1461, 75 Cal. Rptr. 3d 253*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to the contention that a defendant in an action under the unfair competition statute may be ordered to disgorge profits to a plaintiff if those profits were not taken from that plaintiff or if the plaintiff otherwise has no ownership interest in them.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should include facts necessary to show that the plaintiff has no ownership claim to profits that are the subject of an order for disgorgement sought by the plaintiff.

[b] Related Points and Authorities

For points and authorities opposing the contention that disgorgement of profits into a fluid recovery fund is available as a remedy in a representative action under the unfair competition statute that has not been certified into a class action, see *§ 235.60*.

[3] Discussion of Authorities

[a] Disgorgement of Profits Must Be Restitutionary

In ***Korea Supply Co. v. Lockheed Martin Corp.*** *(2003) 29 Cal. 4th 1134, 131 Cal. Rptr. 2d 29, 63 P.3d 937* , the plaintiff was a business that represented a company that competed for a contract to provide the Republic of Korea with military radar systems. Even though the plaintiff's client's bid was $50 million lower and its equipment allegedly superior, the contract went to a competing company. After evidence emerged suggesting that the contract was awarded because an agent for the competing company had extended bribes and sexual favors to key Korean officials, the plaintiff brought suitagainst the company that won the contract and the offending agent, asserting causes of action for conspiracy, intentional interference with prospective economic advantage, and unfair competition. The plaintiff alleged that but for the bribes and sexual favors extended by the agent, conduct that violated the Foreign Corrupt Practices Act, the contract would have been awarded to the plaintiff's client, and the client would have paid the plaintiff a commission of over $30 million. Moreover, the plaintiff alleged that the defendants knew of the plaintiff's relationship with its client and that the illegal conduct would cause the plaintiff substantial financial loss. The trial court sustained the defendants' demurrer to all counts. The court of appeal reversed, finding that the plaintiff had sufficiently stated causes of action for intentional interference with prospective economic advantage and statutory unfair competition.

The California Supreme Court granted review to address two specific issues, one of which was whether an individual plaintiff in an action under the unfair competition statute may seek disgorgement of profits even if the disgorgement sought does not represent restitution of money or property in which the plaintiff has an ownership interest. Contrary to the holding of the court of appeal, the Supreme Court held that this remedy was not available. The Court first reviewed its own recent case law on the remedies available under the unfair competition statute, including its decision in *Kraus v. Trinity Management Services, Inc. (2000) 23 Cal. 4th 116, 96 Cal. Rptr. 2d 485, 999 P.2d 718* [*see § 235.60[3][a]*]. Concluding that the court of appeal had misinterpreted language from that opinion, the Court held that only disgorgement of profits that is restitutionary may be ordered as a remedy under the unfair competition statute. The Court, noting that restitution is the only monetary remedy expressly authorized by the statute, rejected the plaintiff's claim that disgorgement of profits that were not taken from the plaintiff or in which the plaintiff does not otherwise have an ownership interest may be justified under a court's broad authority to fashion an equitable remedy. The Court concluded that nothing in the legislative history indicated an intent to provide courts with such broad equitable powers. Although that history evidenced an intent to deter unfair competition, that history also demonstrated an intent only to restore to a plaintiff what was taken from that plaintiff--that is, to provide for restitution (*29 Cal. 4th 1134, 1144-1148)* .

The Court then rejected the plaintiff's claim that the disgorgement of profits that the defendant obtained from the illegally-procured contract was a type of restitution. The money was not paid by the plaintiff, nor was it money that the plaintiff had any proprietary interest in. At most, the plaintiff had an expectancy of a commission to be paid by its own client, contingent on the awarding of the contract to the client. However, such an attenuated expectancy could not support the relief sought by the plaintiff (*29 Cal. 4th 1134, 1149-1150)* . Finally, the Court noted that the unfair competition statute, with its liberal standing requirements and relaxed liability standards, was not intended to be an all-purpose substitute for a tort or contract action. Therefore, its remedies are more limited, and due process concerns might arise if a potentially unlimited number of individual plaintiffs, without the traditional limits on standing provided in tort actions, all sought to recover non-restitutionary disgorgement (*29 Cal. 4th 1134, 1150-1152)* .

[b] Nonrestitutionary Disgorgement Prohibited in Class Action Suit

In ***Feitelberg v. Credit Suisse First Boston, LLC*** *(2005) 134 Cal. App. 4th 997, 36 Cal. Rptr. 3d 592* , the plaintiff brought a class action on behalf of himself and other stockholders against the defendant for allegedly issuing biased stock research reports designed to gain favor with investment banking clients. According to the plaintiff, these reports contained exaggerated or unwarranted claims regarding certain stocks, effectively depriving holders of those stocks of a sound basis for evaluating their investments. The complaint alleged violations of the unfair competition statute, *Bus. & Prof. Code § 17200 et seq.*, and sought class certification, injunctive relief, and disgorgement of profits. The trial court held that the plaintiff could not recover disgorgement of profits because defendant did not obtain those profits from the plaintiff class, and in the absence of an injury that could be remedied under the statutory remedies available, sustained the defendant's demurrer with leave to amend. The plaintiff chose not to amend, and the court dismissed the complaint. The plaintiff appealed.

The court of appeal affirmed. Relying on the Supreme Court's analysis in *Korea Supply Co. v. Lockheed Martin Corp.* [*see § 235.61[3][a]*], the court held that nonrestitutionary disgorgement of profits is not available as a remedy under the unfair competition statute, even if the suit is brought as a class action. Although an unfair competition complaint may be pursued as a class action, assuming the requirements for class certification are met, class action status does not enlarge the substantive remedies that are available under the unfair competition statute. As the Supreme Court made clear in its *Korea Supply* opinion, the unfair competition statute only provides for disgorgement of profits if that remedy is restitutionary in nature. Therefore, nonrestitutionary disgorgement of profits remains unavailable even in the class action context. Because the plaintiff was not seeking the disgorgement of profits that had been taken from the proposed plaintiff class, the remedy he sought was unavailable, and the trial court was correct to dismiss the action (*134 Cal. App. 4th 997, 1016-1020)* .

[c] Unpaid Wages Not Recoverable as Restitution From Employer's Owners, Officers, or Managers

In ***Bradstreet v. Wong*** *(2008) 161 Cal. App. 4th 1440, 75 Cal. Rptr. 3d 253* , three garment manufacturers, which were closely-held corporations owned and managed by a husband and wife, failed to meet their payroll obligations or pay other expenses. These companies told their employees that there was inadequate cash to pay wages, but that they would eventually be paid and encouraged them to keep working. Employees eventually complained to the Department of Labor, eventually resulting in the closing of the corporations and the seizure of assets. The corporations subsequently filed for bankruptcy. The California Labor Commissioner eventually filed suit for the unpaid wages, seeking to hold personally liable the husband and wife, as well as one other corporate director who also performed accounting duties for the corporations. A complaint in intervention was filed by an association and two former employees seeking unpaid wages under the unfair competition statute, *Bus. & Prof. Code § 17200 et seq.* The trial court found for defendants, holding that there were no facts to justify "piercing the corporate veil" and the individual defendants could not be heldpersonally liable for unpaid wages owed by the corporate employers.

The court of appeal affirmed. As to the unfair competition claims brought by the former employees, the court held that the individual defendants could not be held personally liable for restitution under that statute. The court noted that the

defendants were not themselves the actual employers and the employees made no claims that they had performed work for the defendants in their individual capacities. Moreover, there was no evidence that the defendants had taken any money from the corporations that would otherwise have been used to pay the unpaid wages. To the contrary, the evidence showed that the defendants had paid money to their corporations during the relevant period to try to keep the businesses solvent. Under those circumstances, the court concluded that the defendants had never personally obtained anything from the individual employees that could be returned to the employees as restitution (*161 Cal. App. 4th 1440, 1460-1461)* .

[4] Additional Authorities

[a] Disgorgement of Profits Must Be Restitutionary

In Reid v. Google, Inc. (2007) 155 Cal. App. 4th 1342, 66 Cal. Rptr. 3d 744 , plaintiff was terminated from his employment allegedly as a result of age discrimination. He sued his former employer under various legal theories, which included a cause of action brought under the unfair competition statute, *Bus. & Prof. Code § 17200 et seq.*, and a claim for restitution under that statute to recover stock options that had not yet vested at the time plaintiff was terminated. The trial court struck plaintiff's prayer for restitution to recover the stock options and the court of appeal affirmed. The court concluded that unvested stock options are not owned by the option holder. While plaintiff may have had an expectancy interest in the options, such interest did not constitute ownership for purposes of restitution. Because an ownership interest was required to seek restitution under the unfair competition statute, the court concluded that the trial court was correct in striking the claim for relief (155 Cal. App. 4th 1342, 1351-1352) .

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23-235 California Points & Authorities § 235.62

§ 235.62 Opposing Contention That Nonaggrieved Plaintiff May Bring Action for Statutory Unfair Competition [Bus. & Prof. Code § 17200]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF DOES NOT HAVE STANDING TO PURSUE AN ACTION UNDER THE UNFAIR COMPETITION STATUTE BECAUSE PLAINTIFF WAS NOT PERSONALLY INJURED BY DEFENDANT'S CONDUCT

A. Private Plaintiff Must Suffer Actual Injury to Have Standing to Sue. A private person may bring an action under *Business and Professions Code Section 17200 et seq.* only if that person has suffered injury in fact and has lost money or property as a result of unfair competition (*Bus. & Prof. Code § 17204*).

[*Optional*] **B. Proposition 64 Applicable to Pending Actions.** The changes to the requirements for standing enacted by Proposition 64 apply to unfair competition actions that were pending when Proposition 64 was passed (*Californians for Disability Rights v. Mervyn's, LLC (2006) 39 Cal. 4th 223, 232-233, 46 Cal. Rptr. 3d 57, 138 P.3d 207*).

[*Optional*] **C. Standing Not Conferred By Incurring Litigation-Related Expenses.** A plaintiff may not effectively avoid the changes made by Proposition 64 by claiming the expenses incurred in pursuing litigation against the defendant as "injury in fact" or money lost "as a result of the unfair competition" (*Buckland v. Threshold Enterprises, Ltd. (2007) 155 Cal. App. 4th 798, 815-818, 66 Cal. Rptr. 3d 543*).

[*Optional*] **D. Eligibility for Restitution Required to Have Standing to Sue.** Alleged damage for which no restitution could be recovered under the unfair competition statute is not a loss of "money or property" sufficient to confer standing to sue (*Citizens of Humanity, LLC v. Costco Wholesale Corp. (2009) 171 Cal. App. 4th 1, 22, 89 Cal. Rptr. 3d 455*).

[*Optional*] **E. Standing to Sue Not Assignable.** An injured party who would have standing cannot assign the right to sue under the unfair competition statute to another party who does not otherwise meet the requirements for standing to

sue (*Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court (2009) 46 Cal. 4th 993, 1002, 95 Cal. Rptr. 3d 605, 209 P.3d 937*).

[*Optional*] **F. Associational Standing Doctrine Inapplicable to Unfair Competition Actions.** An association, such as a labor union, does not have standing to sue on behalf of its individual members when the association itself cannot meet the requirements for standing (*Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court (2009) 46 Cal. 4th 993, 1003-1004, 95 Cal. Rptr. 3d 605, 209 P.3d 937*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to the contention that a plaintiff who was not personally injured by defendant's conduct may bring an action under the unfair competition statute.

Counsel should insert argument in the form showing the relationship between the facts of the case and the point of law stated. Therefore, counsel should include facts showing that the plaintiff was not personally injured by the defendant's allegedly actionable conduct.

[3] Discussion of Authorities

[a] Private Plaintiff Must Suffer Actual Injury to Have Standing to Sue

As amended by Proposition 64, which was passed by the voters in 2004, *Bus. & Prof. Code § 17204* provides that a private person may bring an action under *Bus. & Prof. Code § 17200 et seq.* only if that person has suffered injury in fact and has lost money or property as a result of unfair competition. Prior to the passage of Proposition 64, the standing requirements for a private plaintiff were much more liberal, and a private person or entity could sue for the interests of that person or entity, its members, or the general public, without necessarily having suffered actual injury [*see* former Bus. & Prof. Code § 17204; *Stop Youth Addiction, Inc. v. Lucky Stores, Inc. (1998) 17 Cal. 4th 553, 561, 71 Cal. Rptr. 2d 731, 950 P.2d 1086]* . If the action is brought by a private plaintiff on behalf of others, the requirements for pursuing the action as a class action must now be met [*Arias v. Superior Court (2009) 46 Cal. 4th 969, 980, 95 Cal. Rptr. 3d 588, 209 P.3d 923* ; *see Bus. & Prof. Code § 17203*; *Code Civ. Proc. § 382*]. However, assuming that a plaintiff class is properly certified, only the class representatives are required to show that they have standing to bring the action and unnamed class members are not required to do so [*In re Tobacco II Cases (2009) 46 Cal. 4th 298, 321, 93 Cal. Rptr. 3d 559, 207 P.3d 20* ; *see § 235.54*].

[b] Proposition 64 Applicable to Pending Actions

In ***Californians for Disability Rights v. Mervyn's, LLC*** *(2006) 39 Cal. 4th 223, 46 Cal. Rptr. 3d 57, 138 P.3d 207* , plaintiff was a nonprofit organization that brought a lawsuit under the unfair competition statute against a store chain based on allegations that the store's aisles were not wide enough for persons with disabilities who need assistance from devices such as wheelchairs or walkers. The trial court entered judgment for the store chain and plaintiff appealed. While the appeal was pending, Proposition 64, which is discussed in [a], *above*, was passed. However, the court of appeal held that the changes made by Proposition 64 did not apply to pending cases. Defendant appealed.

The California Supreme Court held that the changes to the requirements for standingenacted by Proposition 64 apply to unfair competition actions that were pending when Proposition 64 was passed (*39 Cal. 4th 223, 232-233)* . The Court noted that in recent opinions, it had established that application of a change in law to pending cases is not considered to be "retroactive" if the new law does not change the legal consequences of past conduct by imposing new or different liabilities based on that past conduct. Thus, a statute that establishes rules for the conduct of pending litigation without changing the legal consequences of past conduct is not "retroactive" merely because it draws on facts existing prior to

the new enactment (*39 Cal. 4th 223, 231)* . The Court then applied this principle to the changes in standing enacted with Proposition 64 and concluded that applying the new standing requirements to pending litigation is not retroactive because Proposition 64 does not change the legal consequences of past conduct by imposing new or different liabilities based on such conduct. The substantive rules governing unfair competition were not changed. Proposition 64 does prevent uninjured persons from suing on behalf of others, but the Court noted that application of Proposition 64 to pending litigation is consistent with the established rule that standing must exist at all times until judgment, not just when the complaint is first filed (*39 Cal. 4th 223, 232-233)* .

NOTE:

In a companion case to *Californians for Disability Rights v. Mervyn's, LLC*, the California Supreme Court also held that the ordinary rules governing the amendment of complaints and their relation back to the original complaint apply to lawsuits pending when Proposition 64 was passed [*Branick v. Downey Savings & Loan Assn. (2006) 39 Cal. 4th 235, 239, 46 Cal. Rptr. 3d 66, 138 P.3d 214]* . Thus, a complaint brought by a plaintiff who no longer has standing under Proposition 64 may be amended to name a new plaintiff who does meet the standing requirements, so long as the proposed new plaintiff is not stating facts that give rise to a wholly distinct and different cause of action against the defendant [*Branick v. Downey Savings & Loan Assn. (2006) 39 Cal. 4th 235, 243, 46 Cal. Rptr. 3d 66, 138 P.3d 214* ; *see, e.g., Foundation For Taxpayer & Consumer Rights v. Nextel Communications, Inc. (2006) 143 Cal. App. 4th 131, 136, 48 Cal. Rptr. 3d 836* (abuse of discretion for trial court to refuse to allow amendment)]. For purposes of meeting the applicable statute of limitations, any amendment would relate back to the original complaint if the amended complaint rests on the same general set of facts, involves the same injury, and refers to the same instrumentality as the original complaint [*Branick v. Downey Savings & Loan Assn. (2006) 39 Cal. 4th 235, 244, 46 Cal. Rptr. 3d 66, 138 P.3d 214]* .

Significantly, a plaintiff who has been given an opportunity to amend but cannot meet the requirements for standing, and who has not identified a substitute plaintiff who does meet the requirements for standing, may not have a right to precertification discovery in an attempt to locate an appropriate representative to continue the original plaintiff's action as a class action [*see, e.g., Cryoport Systems v. CNA Ins. Companies (2007) 149 Cal. App. 4th 627, 633-634, 57 Cal. Rptr. 3d 358]* . However, when a class action is brought, a plaintiff who is not a class member or is otherwise unqualified to serve as a class representative may, in appropriate cases, move for pre-certification discovery for the purposes of identifying a proper class representative [*Safeco Ins. Co. of America v. Superior Court (2009) 173 Cal. App. 4th 814, 828, 92 Cal. Rptr. 3d 814*]. The absence of a reasonable, good-faith belief that the plaintiff had standing under the law in effect at the time the plaintiff was first named as a plaintiff will ordinarily compel denial of a motion for pre-certification discovery. In other circumstances, however, a trial court should exercise its sound discretion to determine whether the potential for abuse in allowing pre-certification discovery outweighs the rights of the parties in the particular circumstances of the case [*Safeco Ins. Co. of America v. Superior Court (2009) 173 Cal. App. 4th 814, 833, 92 Cal. Rptr. 3d 814*].

If a plaintiff suffered actual injury sufficient to meet the requirements for standing under Proposition 64, but prior to the passage of Proposition 64 entered into a settlement agreement under which plaintiff released all claims for that injury at least partly in exchange for the right to pursue a claim for injunctive relief, the general rule applying the changes made by Proposition 64 to actions pending at the time of its passage in November 2004 does not bar such a plaintiff from prosecuting the action for injunctive relief [*Zermeno v. Precis, Inc. (2009) 180 Cal. App. 4th 773, 780, 103 Cal. Rptr. 3d 360]* .

In addition, as in class actions brought outside the unfair competition context [*see, e.g., Watkins v. Wachovia Corp. (2009) 172 Cal. App. 4th 1576, 1590, 92 Cal. Rptr. 3d 409]* , if a defendant in a class action brought under the unfair competition statute unilaterally pays to the named plaintiff after the lawsuit is filed an amount that compensates that plaintiff for the damage caused by the defendant's

actionable conduct, that plaintiff may still serve as the class representative if the court determines that the named plaintiff met the requirements for standing when the action was filed and he or she can still continue fairly to represent the class in light of the individual relief offered by the defendant [Wallace v. GEICO General Ins. Co. (2010) 183 Cal. App. 1390, 1398-1402, 108 Cal. Rptr. 3d 375] .

[c] Standing Not Conferred By Incurring Litigation-Related Expenses

In ***Buckland v. Threshold Enterprises, Ltd.*** *(2007) 155 Cal. App. 4th 798, 66 Cal. Rptr. 3d 543* , plaintiff was the executive director of a women's law center who purchased skin creams and lotions made by defendants that contained chemicals regulated by the Food and Drug Administration. By her own admission, plaintiff purchased these products because of suspicions that the manufacturers had improperly suppressed the fact that the products contained potentially unsafe chemicals and otherwise marketed the products as safe and healthful. When satisfied that her suspicions were well-founded, she brought suit against the manufacturers for fraud and related statutory causes of action, including a cause of action under the unfair competition statute. She admitted that she purchased the products with the intent to sue and that her only actual damages were the costs she paid for the products. The trial court sustained defendants' demurrer. Plaintiff appealed.

The court of appeal affirmed. With respect to the cause of action for unfair competition, the court held that plaintiff could not meet the requirements for standing under the changes made by Proposition 64. The court noted that, according to the text of Proposition 64, the "injury in fact" requirement was modeled on the standing requirements of the United States Constitution. The court of appeal adopted the majority view under those requirements that costs incurred to pursue litigation, in and of themselves, are insufficient injury to confer standing. Because plaintiff admitted that she purchased the products in order to facilitate litigation, the court of appeal held that this did not constitute "injury in fact" under the unfair competition statute (*155 Cal. App. 4th 798, 815-816)* . The court went on to conclude that the costs plaintiff incurred in purchasing the products was not money or property lost "as a result of the unfair competition." In reaching this conclusion, the court concluded that a plaintiff had to be eligible for restitution in order to meet the "money or property lost" requirement. Referencing the Restatement of Restitution, the court noted that eligibility for restitution requires that a plaintiff have expended money due to mistake, coercion, or request. Because plaintiff admitted she purchased the products only to facilitate litigation, she could not demonstrate an eligibility for restitution (*155 Cal. App. 4th 798, 817-818)* .

[d] Eligibility for Restitution Required to Have Standing to Sue

In ***Citizens of Humanity, LLC v. Costco Wholesale Corp.*** *(2009) 171 Cal. App. 4th 1, 89 Cal. Rptr. 3d 455* , plaintiff was the manufacturer of "high-end" clothing that sold its products only to retailers that plaintiff believed would convey a prestigious image and provide a high level of customer service. Plaintiff learned that some of its clothing was being sold by a large warehouse-style retail chain, even though plaintiff had not sold clothing to that chain and believed that the chain did not represent the image that plaintiff tried to foster when choosing its retailers. Plaintiff informed the chain that it believed that the clothing might be stolen merchandise and asked the chain to identify its sources for the clothing. The chain refused to identify its sources. Plaintiff then brought suit against the chain, alleging a statutory action for selling stolen goods, fraud and conspiracy to commit fraud, and statutory unfair competition. Plaintiff sought to compel discovery of the identity of defendant's sources, but the trial court denied this request on the grounds that defendant had shown that the supplier information was a protectable trade secret and plaintiff had failed to establish entitlement to the information. The trial court sustained defendant's demurrer, and plaintiff appealed.

The court of appeal affirmed in part and reversed in part. While the court held that plaintiff had stated a statutory cause of action for selling stolen goods sufficient to withstand demurrer (*171 Cal. App. 4th 1, 16-20)* , the court agreed that plaintiff had failed to show a need for discovery of the identity of the chain's sources, as plaintiff could identify whether the clothing was stolen from its own customers simply by asking them whether they had suffered any theft of plaintiff's brand of clothing (*171 Cal. App. 4th 1, 12-16)* . The court also agreed that plaintiff had not alleged a fraud cause of

action with sufficient particularity to withstand demurrer (*171 Cal. App. 4th 1, 20-21)* . As to the unfair competition cause of action, the court concluded that plaintiff did not have standing to sue under *Bus. & Prof. Code § 17204*. The harm alleged by plaintiff on the unfair competition claim was damage to its business goodwill. Because this was not the type of damage that would allow plaintiff to recover restitution from defendant under the unfair competition statute, the court held that the damage was not a loss of "money or property" as needed to confer standing to sue under that statute (*171 Cal. App. 4th 1, 22)* .

[e] Standing to Sue Not Assignable

In ***Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court*** *(2009) 46 Cal. 4th 993, 95 Cal. Rptr. 3d 605, 209 P.3d 937* , seventeen individual plaintiffs and two labor unions brought an action against three employers alleging unpaid wages and failure to provide meal and rest breaks. Plaintiffs asserted causes of action under the unfair competition statute, *Bus. & Prof. Code § 17200 et seq.*, as well as under the Labor Code. The labor unions alleged that they represented the employees of the defendants, that they were standing in as plaintiffs on behalf of themselves and all aggrieved industry employees currently or formerly employed by defendants, and that over 150 employees or former employees of the defendants had assigned to the unions their rights under the unfair competition statute and the Labor Code. The trial court ruled that the labor unions lacked standing to prosecute an action under the unfair competition statute because the unions had not suffered actual injury, that the employee assignment of rights did not confer standing to sue, and that the representative unfair competition claims had to be prosecuted as class actions. The labor unions petitioned for a writ of mandate, which the court of appeal denied. The California Supreme Court granted review.

The Supreme Court affirmed the judgment of the court of appeal. With respect to effectiveness of the assignment of rights, the Court held that a person with standing to sue under the unfair competition statute cannot effectively assign that right to sue to another party who does not otherwise have standing. The Court concluded that allowing an uninjured assignee on an unfair competition claim to stand in the shoes of the original, injured claimant would confer standing on the assignee in direct violation of the express statutory standing requirements imposed by the voters when passing Proposition 64, which limits the right to of private persons to bring an unfair competition action to only those persons who have suffered injury in fact and lost money or property as a result of the unfair competition (*46 Cal. 4th 993, 1002)* .

[f] Associational Standing Doctrine Inapplicable to Unfair Competition Actions

The factual and procedural background of ***Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court*** *(2009) 46 Cal. 4th 993, 95 Cal. Rptr. 3d 605, 209 P.3d 937* , is described in [3][e], *above*. The Supreme Court also held that labor unions could not pursue an action under the unfair competition statute on behalf of union members under the doctrine of associational standing. Under that doctrine, developed under federal law, an association that does not have standing in its own right may sue on behalf of its members, so long as the interests the association seeks to protect are germane to its organizational purposes. The Court rejected application of this doctrine to suits brought under the unfair competition statute, concluding that the amendments to the standing requirements of the unfair competition statute passed by Proposition 64 were inconsistent with the federal doctrine of associational standing, as Proposition 64 made explicitly clear that only plaintiffs who themselves had suffered injury in fact as a result of unfair competition have standing to sue (*46 Cal. 4th 993, 1003-1004)* .

[4] Additional Authorities

[a] Private Plaintiff Must Have Actual Injury to Have Standing to Sue

In *Peterson v. Cellco Partnership (2008) 164 Cal. App. 4th 1583, 80 Cal. Rptr. 3d 316* , cell phone purchasers brought suit under the unfair competition statute against their cell phone equipment vendor after the vendor sold cell phone insurance policies to plaintiffs in conjunction with the sale of cell phones. Plaintiffs predicated their suit on defendant's act of selling the insurance contracts without being licensed to sell insurance in California. The trial court sustained

defendant's demurrer and dismissed the suit on the grounds that plaintiffs did not have standing to sue under the unfair competition statute because they had not sustained actual injury as a result of the defendant's conduct. The court of appeal affirmed. Plaintiffs argued that they had sustained actual injury because defendant received a commission from each insurance sale, this commission came from the money plaintiffs paid during their transaction with defendant, and defendant could not legally receive this commission. The court rejected this argument. The court noted that plaintiffs did not allege that they paid more for the insurance due to the act of defendant collecting a commission, nor did they allege that they could have bought the same insurance for a lower price either directly from the insurer or from a licensed agent. Because plaintiffs received the insurance they bargained for at the price they agreed to pay, they suffered no actual injury from defendant's alleged violation of the Insurance Code and thus had no standing to sue under the unfair competition statute (*164 Cal. App. 4th 1583, 1590-1591)* .

In *Medina v. Safe-Guard Products, Internat., Inc. (2008) 164 Cal. App. 4th 105, 78 Cal. Rptr. 3d 672* , plaintiff purchased a tire and wheel service contract when he purchased a new car. Such a service contract may be considered an insurance contract, and unknown to plaintiff, the contract provider was not licensed to sell insurance in California. The Insurance Commissioner proceeded against the contract provider, who eventually paid a large fine. Plaintiff then filed a class action suit against the contract provider under the unfair competition statute, but the trial court sustained defendant's demurrer on the grounds that plaintiff had not suffered injury in fact or lost money or property as a result of the defendant selling a service contract to plaintiff without a license. The court of appeal affirmed. The court first concluded that the lack of a license to sell insurance would not prevent plaintiff or other similarly situated consumers from enforcing the service contract against defendant (*164 Cal. App. 4th 105, 109-112)* . The court then rejected plaintiff's argument that paying for the service contract was, in and of itself, "injury in fact" sufficient to confer standing. The court noted that plaintiff had not alleged that he did not want the service contract coverage, was provided unsatisfactory service under the contract, had a claim denied, or paid more for the contract than it was worth, because of defendant's unlicensed status. Moreover, plaintiff had not alleged causation, that is, he had not alleged that he had relied on defendant actually having a license as required by law when he purchased the service contract (*164 Cal. App. 4th 105, 114-115)* .

In *Hall v. Time Inc. (2008) 158 Cal. App. 4th 847, 70 Cal. Rptr. 3d 466* , plaintiff filed suit under *Bus. & Prof. Code § 17200 et seq.* against defendant publishing company, alleging that while defendant advertised that customers had a 21-day free trial period for reviewing books sent by defendant before deciding whether to keep the book, defendant billed customers immediately if they did not pay the invoice that accompanied each book and these bills misleadingly failed to mention the customer's free review period. However, plaintiff did not allege that he did not want the book sent to him or that it was unsatisfactory, nor did he pay for the book because of the quick billing. In fact, plaintiff did not pay for his book until 10 months after receipt. The trial court held that plaintiff did not meet the requirements for standing under the unfair competition statute and the court of appeal affirmed. The court held that plaintiff had not alleged an injury in fact as required by the statute, as he received the book heordered, it was satisfactory to him, and he eventually paid for it. The court also held that plaintiff failed to allege that he lost money or property "as a result of" the alleged wrongful conduct, that is, that any injury was caused to him by the immediate billing without notice of the free trial period (*158 Cal. App. 4th 847, 855)* .

In *Trujillo v. First American Registry, Inc. (2007) 157 Cal. App. 4th 628, 68 Cal. Rptr. 3d 732* , plaintiffs had submitted apartment rental applications that had been denied. As part of the tenant screening process, defendant credit reporting agency had provided tenant screening reports to the relevant property managers. While the reports correctly indicated that the plaintiffs had been the subject of unlawful detainer actions in the past, the reports failed to show that those actions had been dismissed. Plaintiffs sued under various statutes, including the unfair competition statute, *Bus. & Prof. Code § 17200 et seq.,* arguing that the incomplete reports had caused their applications to be rejected. The trial court granted summary adjudication and a final judgment in favor of defendant in light of uncontroverted evidence from the property managers that the applications would have been rejected even had the reports provided complete information about the fate of the unlawful detainer actions. The court of appeals affirmed. As to the unfair competition claims, the court held that plaintiffs had not raised a triable issue as to whether they suffered injury in fact or lost money

or property as a result of the incomplete reports. To the contrary, the evidence showed that the rental applications would have been rejected even had the reports been complete (*157 Cal. App. 4th 628, 639)* .

In *Daro v. Superior Court (2007) 151 Cal. App. 4th 1079, 61 Cal. Rptr. 3d 716* , plaintiffs were the tenants of an apartment building that was sold to new owners, who planned to remodel the 6 units and resell most of them as individual units. When plaintiffs were given notice of evictions, they filed suit under the unfair competition statute. Plaintiffs alleged that the new owners failed to comply with the Subdivided Lands Act, which required defendants to notify the Real Estate Commissioner of the intention to sell subdivided interests and obtain a public report from the Department of Real Estate before creating the subdivided interests and offering them for sale. The court of appeal held that plaintiffs had no standing to sue for an unlawful business practice under the unfair competition statute because they suffered no injury in fact, nor did they lose money or property, as a result of the alleged unlawful conduct. The court held that the tenants were not among the class of persons protected by the Subdivided Lands Act, and they suffered no harm caused by the alleged violation. The tenants loss of their leaseholds resulted from the owners' invocation of their statutory right to evict, which was not illegal. Moreover, there was nothing in the record indicating that defendants would be unable to comply with the Subdivided Lands Act. The mere fact that the owners' legal conduct in evicting plaintiffs was part of a larger course of conduct, some of which was illegal, was an insufficient basis for standing under the unfair competition statute if the illegal conduct did not actually cause plaintiffs any actual injury (*151 Cal. App. 4th 1079, 1098-1099)* .

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B. Actions Based on Statutory Unfair Competition

23-235 California Points & Authorities § 235.62A

§ 235.62A Opposing Contention That Representative Action May Be Brought Under Unfair Competition Statute Without Meeting Requirements for Class Action [Bus. & Prof. Code 17203]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF MAY NOT PURSUE A REPRESENTATIVE ACTION UNDER THE UNFAIR COMPETITION STATUTE WITHOUT MEETING THE REQUIREMENTS FOR A CLASS ACTION.

Representative Action Must be Brought as Class Action. Pursuant to amendments made by Proposition 64, passed by the voters in 2004, representative actions under the unfair competition statute must be filed as class actions (*Arias v. Superior Court (2009) 46 Cal. 4th 969, 980, 95 Cal. Rptr. 3d 588, 209 P.3d 923* ; *see Bus. & Prof. Code § 17203*; *Code Civ. Proc. § 382*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that a private plaintiff bringing a representative action under the unfair competition statute is not required to bring the action as a class action.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the issue that plaintiff's representative claim must meet the requirements for a class action. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the point of law stated. Thus, counsel should include facts showing that plaintiff is seeking relief in a representative capacity for other

private persons without first complying with the procedures for certifying the action as a class action.

[3] Discussion of Authorities

[a] Representative Action Must be Brought as Class Action

In ***Arias v. Superior Court*** *(2009) 46 Cal. 4th 969, 95 Cal. Rptr. 3d 588, 209 P.3d 923* , plaintiff brought an action against his former employer alleging, among other things, that the employer failed to pay overtime wages that were owed and that he had received no meal periods or rest breaks during his shifts. Plaintiff's action was brought under the unfair competition statute, *Bus. & Prof. Code § 17200 et seq.*, as well as under the Labor Code, and plaintiff sought damages and injunctive relief in a representative capacity for other current and former employees of the defendant. The trial court granted defendant's motion to strike the representative causes of action because plaintiff had failed to comply with the requirements for pleading a class action. Plaintiff filed for a writ of mandate. The court of appeal denied the writ as it pertained to the representative cause of action brought under the unfair competition statute, but granted it as to the representative cause of action under the Labor Code. The California Supreme Court granted review.

The Supreme Court affirmed the judgment of the court of appeal. The Court held that pursuant to amendments made to *Bus. & Prof. Code § 17203* by Proposition 64, passed by the voters in 2004, representative actions under the unfair competition statute must be pursued as class actions. The Court recognized that *Bus. & Prof. Code § 17203* merely states that a private plaintiff pursuing a representative claim or relief on behalf of others must "compl[y] with *Section 382 of the Code of Civil Procedure*," and while *Code Civ. Proc. § 382* authorizes representative claims, it does not in and of itself mandate that the class action mechanism be utilized. However, the Court noted that *Code Civ. Proc. § 382* has always been the primary statutory authority for class action in California. In addition, because the statutory language was arguably ambiguous, the Court resorted to the voters' intent as expressed in the official ballot pamphlet for Proposition 64, which clearly indicated that the intent of the change was to require that representative actions brought by private plaintiffs under the unfair competition statute be brought as class actions (*46 Cal. 4th 969, 977-980)* .

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23-235 California Points & Authorities § 235.63

§ 235.63 Opposing Contention That Plaintiff May Bring Action for Statutory Unfair Competition [Bus. & Prof. Code § 17200]--Insufficient Evidence of Causal Connection Between Defendant's Conduct and Harm

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE PLAINTIFF MAY NOT MAINTAIN AN ACTION FOR UNFAIR COMPETITION AGAINST THE DEFENDANT IN THE ABSENCE OF EVIDENCE SHOWING THAT THE DEFENDANT'S CONDUCT ACTUALLY CAUSED THE HARM OF WHICH THE PLAINTIFF COMPLAINS.

A. Causal Connection Required. In an action under the unfair competition statute, a plaintiff is required to provide evidence of a causal connection between a defendant's business practices and the alleged harm--that is, that the defendant's conduct caused or was likely to cause substantial injury (*In re Firearm Cases (2005) 126 Cal. App. 4th 959, 982-982, 24 Cal. Rptr. 3d 659*).

[*Optional*] **B. Plaintiff Alleging Fraud Must Show Actual Reliance**. If an unfair competition claim is based on fraud, the plaintiff must plead and prove actual reliance to satisfy requirements for standing to bring the action (*In re Tobacco II Cases (2009) 46 Cal. 4th 298, 328, 93 Cal. Rptr. 3d 559, 207 P.3d 20*).

[*Optional*] **C. Showing of Reliance Required in Action for Unlawful Business Practices Based on Misrepresentations.** The actual reliance requirements applicable to fraud-based actions apply not just to actions brought under the fraudulent business practices category of the unfair competition statute, but also to actions brought under the unlawful business practices category if based on alleged misrepresentations (*Hale v. Sharp Healthcare (2010) 183 Cal. App. 4th 1373, 1385, 108 Cal. Rptr. 3d 669* ; *Durell v. Sharp Healthcare (2010) 183 Cal. App. 4th 1350, 1363, 108 Cal. Rptr. 3d 682*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to the contention that an action may be maintained under the unfair competition statute even in the absence of evidence that the defendant's conduct actually caused the harm of which the plaintiff complains.

Counsel should insert argument in the form showing the relationship between the facts of the case and the point of law raised. Thus, counsel should include facts showing that the plaintiff lacks evidence of a causal connection between the defendant's allegedly unfair or unlawful business practices and the alleged harm.

[3] Discussion of Authorities

[a] Causal Connection Required

In ***In re Firearm Cases*** *(2005) 126 Cal. App. 4th 959, 24 Cal. Rptr. 3d 659* , the plaintiffs were several California cities and counties that brought consolidated suits under the unfair competition statute against multiple manufacturers, distributors, and retailers of handguns, as well as their trade associations. The plaintiffs alleged that the defendants' conduct of distributing firearms in a manner that enables criminals to acquire them constituted a pattern of unfair conduct that violated the unfair competition statute. More specifically, the plaintiffs alleged that the defendants marketed handguns using practices that encouraged sales to unauthorized users without adequately monitoring distributors and dealers or setting standards for distributors and dealers regarding how to legally and responsibly sell handguns. The trial court granted summary judgment for many of the manufacturers and distributors on the grounds that the plaintiffs failed to demonstrate any evidence showing a causal connection between the actions of these defendants and the alleged harm of criminalspossessing handguns. The plaintiffs appealed.

The court of appeal affirmed. The court rejected the plaintiffs' argument that an action under *Bus. & Prof. Code § 17200* requires only evidence that the defendant's conduct has created an unreasonable risk of harm to the public. Relying on principles applicable in cases brought under the Federal Trade Commission Act, the court instead held that a plaintiff is required to provide evidence of a causal connection between a defendant's business practices and the alleged harm--that is, that the defendant's conduct caused or was likely to cause substantial injury (*126 Cal. App. 4th 959, 980-981)* . The court noted that the only relevant business practice engaged in by these defendants was the manufacture, marketing, and sale of firearms in a lawful manner to federally-licensed dealers. The plaintiffs' evidence failed to show that any of these defendants had actual knowledge that specific retailers were illegally supplying guns to the crime gun market, and failed to show that these defendants took any action to aid or encourage that activity. At best, the plaintiffs' evidence showed inconclusive statistics linking illegal firearm trafficking to a small minority of retailers. Although this evidence might support further fact-finding and a trial against those retailers, it was insufficient evidence of causation to support an action against the manufacturers and distributors (*126 Cal. App. 4th 959, 984-985)* .

[b] Plaintiff Alleging Fraud Must Show Actual Reliance

The factual and procedural background of ***In re Tobacco II Cases*** *(2009) 46 Cal. 4th 298, 93 Cal. Rptr. 3d 559, 207 P.3d 20* , is provided in § 25.54[3][b]. After concluding that in a class action brought under the unfair competition statute, only the class representatives must demonstrate that they meet the requirements for standing (*46 Cal. 4th 298, 321)* , the California Supreme Court next addressed the issue of causation and the meaning of the provision that a statutory unfair competition may only be brought by a private person "who has suffered injury in fact and has lost money or property *as a result of* the unfair competition" contained in *Bus. & Prof. Code § 17204*. While declining to provide a meaning of the language "as a result of" that would govern in all cases, the Court held that if the unfair competition claim is based on fraud stemming from alleged false advertising and misrepresentations made to consumers, this statutory language means that the plaintiff must plead and prove actual reliance to satisfy requirements for standing to bring the action (*46 Cal. 4th 298, 328)* . However, the Court concluded that while a plaintiff in those circumstances must allege that the defendant's misrepresentations were an immediate cause of the injury, the plaintiff

need not show that those misrepresentations were the sole or even decisive cause. Moreover, the plaintiff is not required to necessarily plead and prove individualized reliance on specific misrepresentations or false statements when those misrepresentations and false statements were part of an extensive and long-term advertising campaign. Finally, the Court suggested that an allegation of reliance is not defeated merely because there was alternative information available to the plaintiff that might have countered the defendant's alleged misrepresentations (*46 Cal. 4th 298, 328)* . The Supreme Court then remanded the case for further proceedings to determine whether the named plaintiffs could establish standing to bring the action (*46 Cal. 4th 298, 329)* .

[c] Showing of Reliance Required in Action for Unlawful Business Practices Based on Misrepresentations

In ***Hale v. Sharp Healthcare*** *(2010) 183 Cal. App. 4th 1373, 108 Cal. Rptr. 3d 669* , plaintiff brought a putative class action suit against a hospital based on allegations that the hospital required plaintiff, who did not have health insurance, to sign an admission agreement stating that she would pay the hospital for the services rendered "in accordance with the regular rates and terms of the hospital." Plaintiff alleged, however, that the hospital charged her and other uninsured patients much more for the services than was normally accepted as payment from patients covered by Medicare or private insurance. The alleged misrepresentations made by defendant based on this disparity in rates formed the basis for plaintiff's suit, which included causes of action under the unfair competition statute, Consumer Legal Remedies Act, and contract law. After the filing of a second amended complaint, the trial court sustained defendant's demurrer without further leave to amend. Plaintiff appealed.

The court of appeal reversed as to the statutory causes of action, but affirmed on the contractual claims. The trial court had concluded that plaintiff failed to allege that she relied on defendant's charging its "regular rates" when she received treatment, but the court of appeals disagreed. The court of appeals reviewed the basic principles articulated by the Supreme Court in *In re Tobacco II Cases*, discussed in [b], *above*, under which a plaintiff much plead and prove actual reliance when pursuing a fraud claim under the unfair competition statute. Plaintiff argued that those requirements applied only to claims brought under the fraudulent business practices prong of the statute, and thus were inapplicable to her claims under the unlawful business practices prong alleging that defendants conduct violated specific Civil Code provisions. The court disagreed, holding that the requirements applicable to fraud-based actions applied not just to a cause of action based on the fraudulent business practices prong, but also to a cause of action based on the unlawful business practices prong to the extent the cause of action was based on alleged misrepresentations (*183 Cal. App. 4th 1373, 1385)* . However, the court agreed with plaintiff that she had reasonably pled reliance when pleading that, at the time she signed the admission contract, she was "expecting" to be charged regular rates and not the "grossly excessive" rates that she was subsequently billed. While this allegation was included only in the part of the complaint articulating the contractual claims, the unfair competition part of the complaint incorporated the allegations of all other causes of action (*183 Cal. App. 4th 1373, 1385-1386)* .

In ***Durell v. Sharp Healthcare*** *(2010) 183 Cal. App. 4th 1350, 108 Cal. Rptr. 3d 682* , plaintiff brought a putative class action suit against a hospital based on allegations that when plaintiff was taken to defendant's emergency room, he was required to sign agreements stating that he would pay the hospital's "usual and customary charges for ... services." However, plaintiff, who did not carry health insurance at the relevant times, did not bay the bills and his account was referred for collection. Plaintiff alleged that the hospital charged him and other uninsured patients up to four times more for the services than was normally accepted as payment from patients covered by Medicare or private insurance. Alleged misrepresentations made by defendant on its services forms and on its Internet site based on this disparity in rates formed the basis for plaintiff's suit, which included causes of action under the unfair competition statute, Consumer Legal Remedies Act, and contract law. After the filing of a second amended complaint, the trial court sustained defendant's demurrer without further leave to amend. Plaintiff appealed.

The court of appeal affirmed. Plaintiff had alleged that defendant's conduct was unlawful, unfair, and fraudulent under the unfair competition statute. Plaintiff based his claim of unlawful conduct on defendant's alleged violation of the Consumer Legal Remedies Act caused by misrepresentations published on the Internet site and on the services

agreements concerning the usual and customary rates that would be charged. The court held, however, that plaintiff had not alleged that he relied on any of these alleged misrepresentations when choosing to receive treatment. The court of appeals reviewed the basic principles articulated by the Supreme Court in *In re Tobacco II Cases*, discussed in [b], *above*, under which a plaintiff much plead and prove actual reliance when pursuing a fraud claim under the unfair competition statute. The court held that the requirements applicable to fraud-based actions applied not just to a cause of action based on the fraudulent business practices prong of the unfair competition statute, but also to a cause of action based on the unlawful business practices prong to the extent the cause of action was based on alleged misrepresentations. As plaintiff had not alleged that he relied on the statements in the services form or on the Internet site when going to defendant's hospital or accepting treatment there, he had not alleged a causal nexus between the alleged misrepresentations and his harm and dismissal of the claims based on unlawful business practices was proper (*183 Cal. App. 4th 1350, 1363)* .

[4] Additional Authorities

[a] Plaintiff Alleging Fraud Must Show Actual Reliance

In Princess Cruise Lines, Ltd. v. Superior Court (2009) 179 Cal. App. 4th 36, 101 Cal. Rptr. 3d 323 , plaintiffs who had been passengers on a cruise line brought a class action suit against the cruise line under the unfair competition statute, other statutes, and general tort law, for allegedly unfair conduct in charging more for ship-to-shore excursions than the cost to the cruise line of providing the excursions. The trial court denied summary judgment on the statutory causes of action, but the court of appeal vacated the order and remanded with instructions to grant summary judgment in favor of the defendant. Pursuant to the California Supreme Court's decision in *In re Tobacco II Cases*, discussed in [3][b], *above*, the plaintiffs conceded that actual reliance must be demonstrated in an unfair competition action based on fraud. The Court of Appeal then held that the discovery responses of one of the plaintiffs, who handled the purchasing for all of the named plaintiffs, demonstrated that she did not rely on any representations made by the defendant cruise line when electing to purchase the shore excursions as part of the cruise package. This plaintiff stated during discovery that no one from the cruise line made any representations to her prior to the cruise, and when her travel agent asked her if she wanted to book the shore excursions, this plaintiff stated that she wanted to book the same excursions that her traveling group had booked, whatever the cost. Under those circumstances, plaintiffs could not show that they relied on any representations directly or indirectly made by the cruise line (179 Cal. App. 4th 36, 40-44) .

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23-235 California Points & Authorities § 235.64

§ 235.64 Opposing Contention That Litigant May Maintain Action for Statutory Unfair Competition [Bus. & Prof. Code § 17200]--Conduct Within Scope of Litigation Privilege [Civ. Code § 47(b)] Not Actionable

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE LITIGATION PRIVILEGE OF *CIVIL CODE SECTION 47(b)* MAY BE ASSERTED AS A DEFENSE TO AN ACTION BROUGHT UNDER BUSINESS AND PROFESSIONS CODE SECTION 17200 ET SEQ.

A. Litigation Privilege May be Asserted as Defense in Unfair Competition Action. The litigation privilege of *Civ. Code § 47(b)* may be asserted as a defense to a cause of action brought under the unfair competition statute (*People ex rel. Gallegos v. The Pacific Lumber Co. (2008) 158 Cal. App. 4th 950, 958-963, 70 Cal. Rptr. 3d 501*).

[*Optional*] **B. Attorney Solicitation Falling Within Litigation Privilege Not Enjoinable.** A party against whom civil litigation is pending may not obtain an injunction under *Business and Professions Code Section 17204* for the purpose of preventing an attorney from soliciting other potential plaintiffs for that litigation because the absolute privilege of *Civil Code Section 47(b)* for statements made in the course of a judicial proceeding applies to such solicitation (*Rubin v. Green (1993) 4 Cal. 4th 1187, 1204, 17 Cal. Rptr. 2d 828, 847 P.2d 1044*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that that the litigation privilege does not apply when plaintiff brings a cause of action under the unfair competition statute.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Litigation Privilege May be Asserted as Defense in Unfair Competition Action

In *People ex rel. Gallegos v. The Pacific Lumber Co. (2008) 158 Cal. App. 4th 950, 70 Cal. Rptr. 3d 501* , a county district attorney brought suit seeking civil penalties and other relief under the unfair competition statute on behalf of the State of California against a lumber company. The state alleged that the lumber company presented knowingly false information during administrative proceedings conducted pursuant to the California Environmental Quality Act (CEQA) in order to gain approval for more timber harvesting than it would otherwise have received in conjunction with an agreement to sell ancient redwood forests to the state and federal governments. The trial court sustained defendant's demurrer in part on the grounds that defendant was immune from liability under the litigation privilege of *Civ. Code § 47(b)*. The State appealed.

The court of appeal affirmed. The court noted that the State's action under the unfair competition statute, *Bus. & Prof. Code § 17200 et seq.*, was premised on allegedly fraudulent conduct in communicating information to government agencies during the CEQA administrative proceedings held in conjunction with approval of the land sale agreements, and such conduct fell squarely within the litigation privilege of *Civ. Code § 47(b)*. The court rejected the State's argument that the privilege did not apply because suit was brought under the unfair competition statute rather than under general tort law. The court noted that an action under the unfair competition statute cannot be maintained when some other statute specifically shields the defendant from liability. In this case, the litigation privilege provided such a "safe harbor" for the lumber company (*158 Cal. App. 4th 950, 958-959)* . The court also rejected the argument that an exception to the litigation privilege existed in government enforcement actions, finding no basis for such an exception in either statutory or case law (*158 Cal. App. 4th 950, 962-964)* .

[b] Attorney Solicitation Falling Within Litigation Privilege Not Enjoinable

In ***Rubin v. Green*** *(1993) 4 Cal. 4th 1187, 17 Cal. Rptr. 2d 828, 847 P.2d 1044* , the plaintiff, a party defendant in an impending civil case, brought an action for tort damages and equitable relief against defendants on the ground that defendants wrongfully "solicited" the impending litigation against him. Plaintiff was the co-owner of a mobile home park. Defendants included a resident of the park and severalattorneys hired by the resident to represent her and other residents concerning grievances about park maintenance. Plaintiff's civil action against the resident and the attorneys sought, among other things, to enjoin the defendants from speaking with other park residents. Plaintiff hoped to prevent defendants from obtaining additional clients with respect to the residents' impending suit against him. Defendants demurred, claiming that their conduct was privileged under *Civ. Code § 47(b)*, which provides an absolute privilege for publications or broadcasts made in any judicial proceeding. The trial court sustained the general demurrer without leave to amend. A divided court of appeal reversed the judgment, ruling that the § 47(b) privilege did not apply to the defendants' acts. Defendants appealed to the California Supreme Court. On appeal, plaintiff contended that he was entitled to pursue injunctive relief against defendants because *Bus. & Prof. Code § 17204* grants any member of the public standing to seek such relief against "unfair competition."

The California Supreme Court reversed the court of appeal. A four-judge majority of the Court held that the acts of the defendants as alleged by plaintiff were communicative within the meaning of *Civ. Code § 47(b)*, and that the acts therefore were within the scope of the litigation privilege and immune from tort liability (*4 Cal. 4th 1187, 1193)* . The Court noted that plaintiff's claims were founded essentially on alleged misrepresentations made by defendants to residents of the park in the course of discussions over park conditions and the possibility of being retained to prosecute the failure-to-maintain action, and the subsequent filing of pleadings in the lawsuit itself. Whether the acts amounted to wrongful attorney solicitation or not, they were communicative within the privilege of *Civ. Code § 47(b)* (*4 Cal. 4th 1187, 1196)* . The Court opined that the immunity under *Civ. Code § 47(b)* would be undermined by permitting the defendants' communicative acts, which were absolutely immune from tort liability, to be the subject of an injunctive relief proceeding under *Bus. & Prof. Code § 17204* (*4 Cal. 4th 1187, 1203)* . If the policies underlying *Civ. Code §*

47(b) are sufficiently strong to support an absolute privilege, stated the Court, the resulting immunity should not evaporate merely because the plaintiff discovers a conveniently different label for pleading what is in substance an identical grievance arising from the identical conduct as that protected by *Civ. Code § 47(b)* (*4 Cal. 4th 1187, 1203)* . The Court noted in dicta that any improper solicitation that may have occurred could be remedied by multiple parties other than plaintiff under the broad standing provision of *Bus. & Prof. Code § 17204*; such parties would include an overreached client, the Attorney General, district attorneys, and certain city attorneys (*4 Cal. 4th 1187, 1204)* .

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23-235 California Points & Authorities § 235.65

§ 235.65 Opposing Contention That Non-Resident Plaintiff May Bring Action for Statutory Unfair Competition [Bus. & Prof. Code § 17200]--Injury-Causing Conduct Occurred Outside California

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE CALIFORNIA UNFAIR COMPETITION STATUTE, BEGINNING AT BUSINESS AND PROFESSIONS CODE SECTION 17200, MAY NOT BE APPLIED TO A DEFENDANT WHOSE HEADQUARTERS AND PRINCIPAL PLACE OF OPERATION ARE OUTSIDE CALIFORNIA IF THE INJURIES ARE SUFFERED BY A PERSON WHO IS NOT A CALIFORNIA RESIDENT AND ARE CAUSED BY CONDUCT OCCURRING OUTSIDE CALIFORNIA.

Non-Resident Plaintiff May Not Bring Action Under Unfair Competition Statute Against Defendant Whose Headquarters and Principal Place of Business is Outside California for Injuries Caused Outside California. To meet due process concerns, the California unfair competition statutes may not be applied to a defendant whose headquarters and principal place of operation are outside California if the injuries are suffered by a person who is not a resident of California and are caused by conduct occurring outside California (*Norwest Mortgage, Inc. v. Superior Court (1999) 72 Cal. App. 4th 214, 222-227, 85 Cal. Rptr. 2d 18*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to a contention that a plaintiff who is not a California resident may bring an action under the California unfair competition statute against a defendant whose headquarters and principal place of operation are outside California if the injuries are caused by conduct occurring outside California.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law

stated. Thus, counsel should include facts showing that the plaintiff is not a California resident, that the defendant is not headquartered in California, that California is not the defendant's principal place of operation, and that the conduct that allegedly caused injury to the plaintiff took place outside California.

[3] Discussion of Authorities

[a] Non-Resident Plaintiff May Not Bring Action Under Unfair Competition Statute Against Defendant Whose Headquarters and Principal Place of Business is Out-of-State for Injuries Caused Out-of-State

In ***Norwest Mortgage, Inc. v. Superior Court*** *(1999) 72 Cal. App. 4th 214, 85 Cal. Rptr. 2d 18* , the plaintiffs were borrowers who brought a class action against the defendant, a mortgage company. The complaint alleged that the defendant violated the California unfair competition statute by charging the plaintiffs inflated premiums for replacement insurance it procured for the plaintiffs upon lapse or cancellation of the insurance that the plaintiffs were required to maintain as borrowers. The defendant was incorporated in California, although its principal place of business was in Iowa and all decisions regarding the insurance program at issue were made in Iowa or Minnesota. The plaintiffs were California residents seeking nationwide class certification for similarly situated California residents and non-residents of California allegedly injured by the defendant's practices in charging for the replacement insurance. The trial court granted the motion for certification of the nationwide class, concluding that the California statute could constitutionally be applied to the claims brought by non-residents of California because the defendant did not show that the statute was in conflict with the laws of any other state in a manner that would affect the outcome of the litigation. The defendant appealed.

The court of appeal reversed the nationwide class certification, holding that class members who were not California residents could not bring claims against the defendant under the California unfair competition law based on injury-producing conduct that occurred outside California. The court rejected the argument that a 1992 amendment to the statute evinced the legislature's intent to expand the unfair competition law to encompass extraterritorial conduct by a defendant, concluding instead that the amendment merely clarified the scope of injunctive relief available to a plaintiff who was already entitled to pursue a claim under the unfair competition laws (*72 Cal. App. 4th 214, 223-224)* . The court also distinguished the California Supreme Court's holding in *Diamond Multimedia Sys., Inc. v. Superior Court (1999) 19 Cal. 4th 1036, 80 Cal. Rptr. 2d 828, 968 P.2d 539* , which stood merely for the proposition that California statutory remedies could be invoked by out-of-state parties who are injured by wrongful conduct that occurs in California (*72 Cal. App. 4th 214, 224-225)* .

Finally, the court of appeal concluded that allowing non-resident plaintiffs to assert California statutory claims against the defendant for conduct occurring outside California would raise significant constitutional due process problems. The court rejected the plaintiffs' claim that the fact that the defendant was incorporated in California and conducted business in the state was sufficient toallow the application of California law under the circumstances. The court of appeal stressed that although the defendant's California connections might be sufficient to give California courts personal jurisdiction over the defendant, the United States Supreme Court has specifically admonished that the existence of personal jurisdiction over a defendant is insufficient by itself to permit application of forum law to the claims of a nonresident plaintiff (*72 Cal. App. 4th 214, 226)* . The court then concluded that under the facts of the case, application of the California unfair competition law to the claims of those non-resident plaintiffs who were injured by conduct occurring outside of California would be arbitrary, unfair, and violate due process limitations (*72 Cal. App. 4th 214, 227)* .

California Points & Authorities

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Volume 23 Chapters 230-239 TRUST DEEDS---to---WORKERS' COMPENSATION
CHAPTER 235 UNFAIR COMPETITION
PART II. FORMS
B. Actions Based on Statutory Unfair Competition

23-235 California Points & Authorities § 235.66

§ 235.66 Opposing Contention That Action for Statutory Unfair Competition [Bus. & Prof. Code § 17200] May Be Based on Securities Transactions

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE CALIFORNIA UNFAIR COMPETITION STATUTE, BEGINNING AT BUSINESS AND PROFESSIONS CODE SECTION 17200, DOES NOT APPLY TO SECURITIES TRANSACTIONS.

Unfair Competition Statute Inapplicable to Securities Transactions. The California unfair competition statute, *Bus. & Prof. Code § 17200 et seq.*, is inapplicable to securities transactions (*Bowen v. Ziasun Techs., Inc. (2004) 116 Cal. App. 4th 777, 788-790, 11 Cal. Rptr. 3d 522*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to the contention that the unfair competition statute applies to securities transactions.

Counsel should insert argument in the form showing the relationship between the facts of the case and the point of law raised. Thus, counsel should include facts showing that the plaintiff's cause of action under the unfair competition statute is based on a securities transaction.

[3] Discussion of Authorities

[a] Unfair Competition Statute Inapplicable to Securities Transactions

In ***Bowen v. Ziasun Techs., Inc.*** *(2004) 116 Cal. App. 4th 777, 11 Cal. Rptr. 3d 522* , the plaintiffs were two securities

investors, one from Norway and one from Australia, who brought separate lawsuits in California against a Nevada corporation and other individuals based on alleged securities fraud. Both plaintiffs asserted essentially that they were deceived by a securities brokerage house into buying into a "pyramid" scheme--that is, that they were deceived into buying shares of stock in companies that had little or no market value, engaged in illegal activities, and paid returns only from the funds of new investors. Both plaintiffs included causes of action under the California unfair competition statute, *Bus. & Prof. Code § 17200 et seq.* Based on their similarity, the trial court consolidated the two actions. One of the defendants, a company in which one of the plaintiffs invested and which was allegedly involved in the so-called "pyramid" scheme, brought a motion for summary judgment on all causes of action. The trial courtgranted the motion, holding as to the causes of action brought under the unfair competition statute that the statute did not apply to securities transactions. The plaintiffs appealed.

The court of appeal affirmed, agreeing with the trial court in the published portion of the opinion that the California unfair competition statute is inapplicable to securities transactions. The court noted that the FTC has never applied the Federal Trade Commission Act, *15 U.S.C.S. § 45 et seq.*, on which the California statute was based, to securities transactions. In addition, federal court decisions, some published, have held that the California statute does not apply to securities transactions, and the courts of at least 15 other states have held that their own consumer protection statutes, similar or identical to the California unfair competition statute, did not apply to securities transactions. These authorities stressed that state consumer protection laws are usually designed to protect consumers from relatively small commercial injuries, and are not designed to deal with securities fraud, which falls under the comprehensive regulatory authority of the Securities and Exchange Commission. The court was convinced by these authorities that the California statute should not be applied to securities transactions (*116 Cal. App. 4th 777, 788-790)* .

California Points & Authorities

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CHAPTER 235 UNFAIR COMPETITION
PART II. FORMS
B. Actions Based on Statutory Unfair Competition

23-235 California Points & Authorities § 235.67

§ 235.67 Opposing Contention That Jury Trial is Guaranteed in Action Brought Solely Under Unfair Competition Statute [Bus. & Prof. Code § 17200]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THERE IS NO RIGHT TO A JURY TRIAL IN AN ACTION THAT IS BROUGHT SOLELY UNDER BUSINESS AND PROFESSIONS CODE SECTION 17200.

No Right to Jury Trial. There is no right to a jury trial in an action that is brought solely under the unfair competition statute, even if a jury trial would be available in an action to enforce directly a statute the violation of which forms the basis for the unfair competition action (*Hodge v. Superior Court (2006) 145 Cal. App. 4th 278, 284, 51 Cal. Rptr. 3d 519*).

[2] Comments

[a] Use of Form

This memorandum of points and authorities may be submitted in opposition to the contention that a party has a right to a jury trial in an action brought solely under the unfair competition statute.

Counsel should insert argument in the form showing the relationship between the facts of the case and the point of law raised. Thus, counsel should include facts showing that only causes of action under the unfair competition statute are alleged.

[3] Discussion of Authorities

[a] No Right to Jury Trial

In *Hodge v. Superior Court (2006) 145 Cal. App. 4th 278, 51 Cal. Rptr. 3d 519* , class action plaintiffs were current and former workers' compensation claims adjustors who brought suit against insurance entities following a failure of those entities to pay overtime pay to the adjustors. Plaintiffs alleged that the overtime pay was owed under the Labor Code, although defendants argued that the adjustors were exempt from the overtime pay requirements. Plaintiffs asserted causes of action directly under the relevant Labor Code provisions, as well as under the unfair competition statute, *Bus. & Prof. Code § 17200*, based on unlawful conduct premised on those same Labor Code violations. The case was tried to a jury, but a mistrial was declared after the jury was unable to reach a verdict. Plaintiffs then amended the complaint to state only the cause of action under the unfair competition statute in order to get a bench trial, rather than a jury trial. The trial court ruled that defendants were entitled to a jury trial, and plaintiffs filed a petition for writ of prohibition.

The court of appeal issued the writ restraining the trial court from enforcing its order granting the defendants a jury trial. The court of appeal held that there is no right to a jury trial in an action that is brought solely under the unfair competition statute, even if a jury trial would be available in an action to enforce directly a statute the violation of which forms the basis for the unfair competition action. The court noted that an action brought under the unfair competition statute is a separate cause of action, providing equitable, rather than legal, remedies. As such, no right to a jury trial exists (*145 Cal. App. 4th 278, 284-285)* . Defendants argued that a jury trial was guaranteed because they were asserting an affirmative defense requiring resolution of disputed factual issues related to the relevant Labor Code provisions. The court concluded, however, that because only equitable relief was being sought by plaintiffs, the existence of triable issues of fact relating to an affirmative defense was insufficient reason to require a jury trial (*145 Cal. App. 4th 278, 285-287)* .

California Points & Authorities

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CHAPTER 235 UNFAIR COMPETITION
PART II. FORMS
B. Actions Based on Statutory Unfair Competition

23-235 California Points & Authorities §§ 235.68-235.79

[Reserved]

§§ 235.68[Reserved]

California Points & Authorities

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Volume 23 Chapters 230-239 TRUST DEEDS---to---WORKERS' COMPENSATION
CHAPTER 235 UNFAIR COMPETITION
PART II. FORMS
C. Actions Based on Common-Law Unfair Competition

23-235 California Points & Authorities § 235.80

§ 235.80 Supporting Contention That Cause of Action Based on Unfair Competition Is Preempted by Federal Patent and Copyright Law--State Law Attempts to Prohibit Copying of Unpatented and Uncopyrighted Article

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S CAUSE OF ACTION IS BASED ON STATE UNFAIR COMPETITION LAW THAT SEEKS TO PROTECT AGAINST THE COPYING OF AN UNPATENTED AND UNCOPYRIGHTED ARTICLE, AND IS THEREFORE PREEMPTED BY FEDERAL LAW.

A. Federal Preemption of State Law That Interferes With Federal Patent Laws. A state cannot encroach on the federal patent laws directly, or give protection of a kind that clashes with the objectives of the federal patent laws (*Bonito Boats v. Thunder Craft Boats (1989) 489 U.S. 141, 156-157, 162-163,167-168* ; *Sears, Roebuck & Co. v. Stiffel Co. (1964) 376 U.S. 225, 231, 84 S. Ct. 784, 11 L. Ed. 2d 661*).

B. Federal Law Preempts Any State Law That Attempts to Prohibit Copying of Unpatented and Uncopyrighted Article. When an article is unpatented and uncopyrighted, federal patent and copyright laws preclude a state from prohibiting the copying of the article itself or awarding damages therefor (*Bonito Boats v. Thunder Craft Boats (1989) 489 U.S. 141, 156-157, 162-163, 167-168, 109 S. Ct. 971, 103 L. Ed. 2d 118* ; *Compco Corp. v. Day-Brite Lighting (1964) 376 U.S. 234, 237, 84 S. Ct. 779, 11 L. Ed. 2d 669* ; *Sears, Roebuck & Co. v. Stiffel Co. (1964) 376 U.S. 225, 232-233, 84 S. Ct. 784, 11 L. Ed. 2d 661*).

C. State Unfair Competition Claim Must Have "Extra Element" to Avoid Preemption. To determine whether a state-law unfair competition claim is preempted by federal patent or copyright law, the court must analyze whether the state-law claim contains an element not shared by the federal law, i.e., an extra element that changes the nature of the action so that it is qualitatively different from a copyright or patent infringement claim. If copying the plaintiff's product in itself infringes the state-created right, then the state-created right is preempted (*Summit Mach. Tool Mfg. v. Victor CNC Sys. (9th Cir. 1993) 7 F.3d 1434, 1439-1440, 1442* ; *Balboa Ins. Co. v. Trans Global Equities (1990) 218 Cal.*

App. 3d 1327, 1339-1340, 267 Cal. Rptr. 787).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a contention that a cause of action based on state unfair competition law is preempted by federal patent and copyright laws [*17 U.S.C.S. § 101 et seq.*; *35 U.S.C.S. § 1 et seq.*], when the state law on which it is based seeks to prohibit the copying of an article that is unpatented and uncopyrighted [*see Compco Corp. v. Day-Brite Lighting (1964) 376 U.S. 234, 237, 84 S. Ct. 779, 11 L. Ed. 2d 669* ; *Sears, Roebuck & Co. v. Stiffel Co. (1964) 376 U.S. 225, 231-233, 84 S. Ct. 784, 11 L. Ed. 2d 661]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which the points are raised. For example, they might be combined with general points and authorities opposing a general demurrer to a complaint. They may also be adapted for use in a trial or appellate brief.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion of common law unfair competition and the extent to which it is preempted by federal patent and copyright law, see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender). For discussion relating to federal patent and copyright laws, generally, including preemption of conflicting state laws, see California Forms of Pleading and Practice, Ch. 349, *Literary Property and Copyright* , and Ch. 411, *Patents and Inventions* (Matthew Bender).

[c] Related Points and Authorities

For additional points and authorities relating to the preemption of state actions by federal copyright law, see Ch. 146, *Literary Property, Copyright, and the Protection of Ideas* . For forms of points and authorities relating to demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[d] Opposing Points and Authorities

The points and *authorities in § 235.81* may be used in an appropriate case to oppose the contention supported by this memorandum.

[3] Discussion of Authorities

[a] Federal Preemption of State Law That Interferes With Federal Patent Laws

In ***Bonito Boats v. Thunder Craft Boats*** *(1989) 489 U.S. 141, 109 S. Ct. 971, 103 L. Ed. 2d 118* , the U.S. Supreme Court granted certiorari to resolve the conflict between *Interpart Corp. v. Italia (Fed. Cir. 1985) 777 F.2d 678, 685* , which upheld the validity of former Bus. & Prof. Code § 17300, and a Florida Supreme Court decision invalidating an almost identical statute (*489 U.S. 141, 143-144)* . Both statutes are referred to as "antidirect molding" statutes and prevent the use of the "direct molding process" to duplicate unpatented articles placed in commerce by their author or inventor. The U.S. Supreme Court said that a state law that substantially interferes with the enjoyment of an unpatented utilitarian or design concept that has been freely disclosed by its author to the public at large impermissibly contravenes the ultimate goal of public disclosure and use, which is the centerpiece of federal patent policy (*489 U.S. 141, 156-157)* . Such state statutes threaten the national uniformity promoted by the patent law and raise the specter of

state-created monopolies in a host of useful shapes and processes for which patent protection has been denied or is otherwise unobtainable (*489 U.S. 141, 163, 168)* . Indeed, a federal decision to forego regulation in a given area may imply an authoritative federal decision that the area is best left unregulated, and in that event would have as much preemptive force as a decision to regulate (*489 U.S. 141, 151-152)* .

Interpart Corp. v. Italia (Fed. Cir. 1985) 777 F.2d 678 had upheld former Bus. & Prof. Code § 17300 on the grounds that it prevents unscrupulous competitorsfrom obtaining a product and using it to make a mold, and that it did not prohibit copying the design of a product in any other way, thus leaving products that were in the public domain free for anyone to make, use, or sell. The U.S. Supreme Court said that appending the conclusionary label "unscrupulous" to the competitive behavior merely endorses a policy judgment that patent laws do not leave the States free to make. When an item in general circulation is unprotected by patent, reproduction of a functional attribute is legitimate competitive activity (*489 U.S. 141, 164)* . That includes reproduction by "reverse-engineering" (*489 U.S. 141, 160)* .

The U.S. Supreme Court concluded that antidirect molding statutes are invalid, as preempted by the Supremacy Clause (U.S. Const. art. VI) because they offer patent-like protection for ideas deemed unprotected under the federal patent scheme (*489 U.S. 141, 168)* .

NOTE:

In response to the Court's holding in *Bonito Boats,* former Bus. & Prof. Code § 17300 was repealed, effective January 1, 1992 [*see* Stats. 1991, ch. 647, § 4]. *Bonito Boats* also apparently abrogates *Gladstone v. Hillel (1988) 203 Cal. App. 3d 977, 989-990, 250 Cal. Rptr. 372* , to the extent that *Gladstone* upheld an injunction for violation of former Bus. & Prof. Code § 17300.

In ***Sears, Roebuck & Co. v. Stiffel Co.*** *(1964) 376 U.S. 225, 84 S. Ct. 784, 11 L. Ed. 2d 661* , a lamp manufacturer brought an action against a retail corporation to seek an injunction and damages for unfair competition. Plaintiff designed and manufactured a particular lamp. Defendant subsequently marketed a substantially identical lamp and sold it for a price roughly equivalent to plaintiff's wholesale cost. Plaintiff brought an action in the federal district court, claiming patent infringement and unfair competition under state law, by reason of confusion in the trade as to the source of the lamps. The trial court held the patents invalid, but found in favor of plaintiff on the cause of action for unfair competition. It enjoined defendant from selling or attempting to sell the articles, and ordered an accounting and damages. The court of appeals affirmed. Plaintiff filed a writ of certiorari, which the Supreme Court granted.

The Supreme Court reversed, holding that, just as a state cannot encroach on the federal patent laws directly, it cannot, under some other law, such as that forbidding unfair competition, give protection of a kind that clashes with the objectives of the federal patent laws (*376 U.S. 225, 231)* . The court of appeals had held defendant liable under state law for doing no more than copying and marketing an unpatented article (*376 U.S. 225, 227)* . U.S. *Const. art. I, § 8, cl. 8,*empowers Congress to enact patent laws (*376 U.S. 225, 228-229)* . State law that touches on the area of federal statutes may not interfere with the federal policy, or deny its benefits (*376 U.S. 225, 229)* . An unpatentable article is in the public domain and may be made and sold by anyone. Defendant had every right under federal patent laws to copy plaintiff's design and sell the articles (*376 U.S. 225, 231)* . To allow a state, by use of its unfair competition law, to prevent the copying of an unpatentable article would be to permit the state to deny the public something that federal law has said belongs to them (*376 U.S. 225, 231-232)* . Mere inability of the public to tell two identical articles apart is not enough to support an injunction against or an award of damages for copying that which the federal patent laws permit to be copied. A state may, however, in appropriate circumstances, require that goods, whether patented or unpatented, be labeled, or that other precautionary steps be taken to prevent customers from being misled as to the source. Similarly, it may protect businesses in the use of their trademarks, labels, or distinctive dress in the packaging of goods so as to prevent others, by imitating the markings, from misleading purchasers as to the source of the goods. However, when an article is unpatented and uncopyrighted, federal laws preclude a state from prohibiting the copying of the article itself or awarding damages therefor (*376 U.S. 225, 232-233)* .

[b] Federal Law Preempts Any State Law That Attempts to Prohibit Copying of Unpatented and Uncopyrighted Article

Bonito Boats v. Thunder Craft Boats *(1989) 489 U.S. 141, 109 S. Ct. 971, 103 L. Ed. 2d 118* , is discussed in *§ 235.80[3][a]*.

In ***Compco Corp. v. Day-Brite Lighting*** *(1964) 376 U.S. 234, 84 S. Ct. 779, 11 L. Ed. 2d 669* , one manufacturer of fluorescent lighting fixtures brought an action against another to seek an accounting and injunction based on state unfair competition laws. Plaintiff secured from the Patent Office a design patent of a certain reflector. It sought, but was refused, a mechanical patent on the same device. After plaintiff began selling its fixture, defendant's predecessor began making and selling fixtures very similar to plaintiff's. Plaintiff brought an action in federal district court alleging patent infringement and unfair competition based on confusion as to the source of the article. The trial court held the design patent invalid, but found for plaintiff on the cause of action for unfair competition. The Court of Appeal affirmed, holding that a design that identifies its maker to the trade is a protectable right under state law, even though the design is unpatentable. Plaintiff filed a writ of certiorari, which the Supreme Court granted.

The Supreme Court reversed, holding that when an article is unprotected by a patent or a copyright, state law may not forbid others to copy that article. To forbid copying would interfere with the federal policy in U.S. *Const. art. I, § 8, cl. 8,* and in the implementing federal statutes, allowing free access to copy whatever the federal patent and copyright laws leave in the public domain. Plaintiff's fixture has been held not to be entitled to a design or mechanical patent (*376 U.S. 234, 237)* . Under the federal patent laws it is, therefore, in the public domain and can be copied in every detail by anyone. Although the trial court found that theconfiguration of plaintiff's fixture acquired a secondary meaning by which the design was associated with plaintiff, if the design is not entitled to a patent or other federal statutory protection, it can be copied at will. Although the federal patent laws prevent a state from prohibiting the copying and selling of unpatented articles, they do not prohibit state law, statutory or decisional, that requires those who make and sell copies to identify their products as their own. A state has power to impose liability on those who, knowing that the public is relying on an original manufacturer's reputation for quality and integrity, deceive the public by palming off their copies as the original. Moreover, a state cannot hold a copier accountable in damages for failure to label or otherwise to identify goods unless the failure is in violation of valid state statutory or decisional law requiring the copier to label or take other precautions to prevent confusion of customers as to the source of the goods (*376 U.S. 234, 238-239)* .

Sears, Roebuck & Co. v. Stiffel Co. *(1964) 376 U.S. 225, 84 S. Ct. 784, 11 L. Ed. 2d 661* , is discussed in *§ 235.80[3][a]*.

[c] State Unfair Competition Claim Must Have "Extra Element" to Avoid Preemption

The plaintiff in ***Summit Mach. Tool Mfg. v. Victor CNC Sys.*** *(9th Cir. 1993) 7 F.3d 1434* had entered into a contract with a Chinese corporation (ZMTW), under which ZMTW was to manufacture lathes from plaintiff's designs. The agreement provided that plaintiff had the exclusive right to sell outside of China all lathes manufactured by ZMTW in accordance with plaintiff's design. A few years later, defendant purchased seven lathes from ZMTW for resale in the United States. When plaintiff learned of the purchase by defendant, it notified defendant of its contract and demanded that defendant cease reselling the lathes. When defendant refused to do so, plaintiff brought suit against defendant, alleging unfair competition in violation of the federal Lanham Act (*15 U.S.C.S. § 1125(a)*) and California statutory and common law, as well as California tort claims for interference with contract and prospective economic advantage. The trial court found the lathes purchased and resold by defendant were not substantially similar to the lathes produced by ZMTW for plaintiff. On that basis, the court found against the plaintiff on its federal and state unfair competition claims for "reverse palming off." The court also held that the state-law unfair competition claims were preempted by federal patent and copyright laws to the extent that they sought to prevent defendant from copying plaintiff's designs.

The U.S. Court of Appeals for the Ninth Circuit affirmed. With regard to the state unfair competition claims, the court noted that federal patent and copyright laws limit the states' ability to regulate unfair competition (*7 F.3d 1434, 1439)* . The court observed that preemption analysis involves determining whether the state law claim contains an element not shared by the federal law--that is, an element that changes the nature of the action so that it is qualitatively different from a copyright or patent infringement claim. Therefore, if copying the lathe or the plans for the lathe in itself infringes the state-created right, the state-created right is preempted (*7 F.3d 1434, 1439-1440)* .

The court noted that California unfair competition law has myriad branches each of which involve different elements and issues and each of which must be analyzed separately for preemption purposes. Plaintiff argued that it had been injured because defendant, rather than taking the time, effort, and expense to copy plaintiff's lathes, had instead simply purchased and marketed at a lesser cost lathes that were developed by plaintiff at considerable expense and effort (*7 F.3d 1434, 1440)* . The court observed that the common law tort of misappropriation is one branch of California's unfair competition law. The tort has three elements: (1) the plaintiff has invested substantial time and money in development of its property; (2) the defendant has appropriated the property at little or no cost; and (3) the plaintiff has been injured by the defendant's conduct. The court noted that an unfair competition action for misappropriation of time and effort may be congnizable if it contains an extra element that changes its nature from that of a copyright or patent infringement claim. Turning to plaintiff's claims, the court stated that to the extent that plaintiff complained that defendant had misappropriated the fruits of plaintiff's labor by marketing plaintiff's lathe with defendant's name on it, such a claim is really a claim for reverse palming off. State unfair competition laws that seek to prevent reverse palming off contain the requisite extra element and are not preempted by federal law (*7 F.3d 1434, 1441)* . However, the court concluded that plaintiff's state-law claim for reverse palming off failed for the same reason that its federal Lanham Act claim failed, i.e., because the trial court had found that the lathes purchased and marketed by defendant were not substantially similar to the lathes developed by plaintiff and hence there was no "bodily appropriation" of plaintiff's lathes (*7 F.3d 1434, 1438-1439, 1441-1442)* . The court further held that to the extent that plaintiff complained that defendant had "pirated" this lathe by employing a particularly unfair method of copying, such a claim is preempted by federal law (*7 F.3d 1434, 1442)* .

In ***Balboa Ins. Co. v. Trans Global Equities*** *(1990) 218 Cal. App. 3d 1327, 267 Cal. Rptr. 787* , a company (CPIS) had developed a computer program to help lenders track the insurance status of property that was collateral for loans. When CPIS defaulted on a loan obligation to plaintiff, CPIS agreed to give plaintiff's affiliate company (NMC) a perpetual, nonexclusive license to use the CPIS software. The agreement also gave NMC the right to modify the software and provided that any modification made by NMC would remain property of NMC. After the agreement was signed, NMC took over CPIS's loan tracking operations and hired a CPIS employee, Maashoff, to manage the operations. During this period, NMC made a number of enhancements to the CPIS software. Defendant and CPIS later formed a joint venture to establish a competing collateral insurance tracking service. CPIS licensed its software to defendant and hired Maashoff torun its operations. However, CPIS had not kept a copy of its base system when it licensed the program to NMC, and as a result the software licensed to defendant contained a number of the enhancements that had been developed by NMC. Defendant then began operating its center, using the CPIS software with NMC enhancements, and solicited some of plaintiff's employees to go to work for defendant. Defendant also solicited some of plaintiff's customers to switch their business to defendant. Plaintiff brought an action for unfair competition against defendant, seeking damages and injunctive relief. The trial court found that defendant had competed unfairly with plaintiff in several ways, including its use and sale of plaintiff's software modifications without its authorization, and entered judgment for plaintiff.

The court of appeal affirmed in part. Defendant argued on appeal that federal copyright law preempted plaintiff's unfair competition claim. Citing *17 U.S.C.S. § 301(a)*, the court noted that federal copyright law expressly preempts state laws that aim to protect legal or equitable rights that are equivalent to any of the exclusive rights granted under the federal copyright law. Quoting from *Nimmer on Copyright, § 1.01[B]* (Matthew Bender), the court stated that a right that is "equivalent to copyright" is one that is infringed by the mere act of reproduction, performance, distribution, or display (*218 Cal. App. 3d 1327, 1339)* . Thus, according to Nimmer, if under state law the act of reproduction, performance,

distribution, or display will in itself infringe the state-created right, then the state-created right is preempted. However, if other elements are required, in addition to or instead of the acts of reproduction, performance, distribution, or display, in order to constitute a state-created cause of action, then the state cause of action is not preempted (*218 Cal. App. 3d 1327, 1339-1340)* . The court observed that courts have generally accepted Nimmer's test, but have also required that the extra element be one that changes the nature of the action so that it is qualitatively different from a copyright infringement claim. Thus, to survive preemption, plaintiff's complaint for unfair competition must allege an element beyond unauthorized duplication or transfer of its software (*218 Cal. App. 3d 1327, 1341)* .

The court noted that unfair competition includes a broad range of claims and that copyright law preempts only some of the claims included in the term "unfair competition." Among the theories included are tort theories of breach of confidential relationship and fiduciary duty, interference with contract and prospective economic advantage, trade secrets, and misappropriation (*218 Cal. App. 3d 1327, 1341)* . Examining the allegations of plaintiff's complaint, the court noted that plaintiff claimed a right in certain confidential information essential to its business, of which the computer software was only a part. The court observed that the harm allegedly done to plaintiff was from the defendant's use of this confidential information to lure plaintiff's clients and employees and render valueless the consideration that CPIS had paid to plaintiff to settle the earlier debt. Plaintiff did not allege an improper reproduction, performance, distribution, or display; instead, plaintiff alleged that the knowledge gained from the confidential information allowed defendant an improper head start in its competition with plaintiff (*218 Cal. App. 3d 1327, 1343-1344)* . The court determined that the complaint arguably raised claims for breach of confidential relationship, breach of fiduciary duty, trade secrets, and misappropriation (*218 Cal. App. 3d 1327, 1344-1345)* . After discussing numerous cases from other jurisdictions, the court concluded that the breach of fiduciary duty and confidential relationship claims, as well as the trade secret claims, were not preempted by federal copyright law because they all generally involved the extra element of damages flowing from the disruption of an important relationship and breach of confidence (*218 Cal. App. 3d 1327, 1347-1352)* . The court concluded, however, a common law misappropriation claim for unauthorized use or transfer of the software was preempted because it added nothing to a potential copyright infringement claim (*218 Cal. App. 3d 1327, 1353)* .

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Volume 23 Chapters 230-239 TRUST DEEDS---to---WORKERS' COMPENSATION
CHAPTER 235 UNFAIR COMPETITION
PART II. FORMS
C. Actions Based on Common-Law Unfair Competition

23-235 California Points & Authorities § 235.81

§ 235.81 Opposing Contention That Cause of Action Based on Unfair Competition Is Preempted by Federal Patent and Copyright Law--State Law May Protect Business in Use of Trademarks or Labels to Prevent Confusion of Content or Source

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S CAUSE OF ACTION IS NOT PREEMPTED BY FEDERAL PATENT LAW BECAUSE IT IS NOT BASED ON STATE LAW THAT SEEKS TO PROTECT AGAINST THE COPYING OF AN UNPATENTED AND UNCOPYRIGHTED ARTICLE, BUT RATHER IS BASED ON STATE UNFAIR COMPETITION LAW THAT PROTECTS THE CONSUMER FROM BEING MISLED AS TO THE ARTICLE'S CONTENT OR SOURCE.

A. State Protection From Confusion of Content or Source. A state may protect a business in the use of trademarks or labels by requiring that appropriate steps be taken to prevent the consumer from being misled as to the content or source of the product (*Allied Artists Pictures Corp. v. Friedman (1977) 68 Cal. App. 3d 127, 133, 137 Cal. Rptr. 94* ; *see Bonito Boats v. Thunder Craft Boats (1989) 489 U.S. 141, 154-155, 109 S. Ct. 971, 103 L. Ed. 2d 118* (dicta)).

B. State Protection From Palming Off. State law, statutory or decisional, may in some circumstances grant relief when deceptive or fraudulent competitive practices are conducted, such as when one palms off products as those of a competitor, or unfairly appropriates for profit the valuable efforts of a competitor (*Capitol Records, Inc. v. Erickson (1969) 2 Cal. App. 3d 526, 537-538, 82 Cal. Rptr. 798* ; *see Bonito Boats v. Thunder Craft Boats (1989) 489 U.S. 141, 165-166, 109 S. Ct. 971, 103 L. Ed. 2d 118* (dicta)).

[*Optional*] **C. Federal Law Does Not Preempt State Laws Prohibiting Reverse Palming Off.** State unfair competition laws that seek to prevent reverse palming off (acquiring and marketing a competitor's goods under one's own name) are not preempted by federal copyright or patent law (*Summit Mach. Tool Mfg. v. Victor CNC Sys. (9th Cir. 1993) 7 F.3d 1434, 1441)* .

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that a cause of action based on state unfair competition law is preempted by federal copyright (*17 U.S.C.S. § 101 et seq.*) or patent laws (*35 U.S.C.S. § 1 et seq.*), when the state law on which it is based does not seek to prohibit the copying of an article that is unpatented and uncopyrighted, but rather seeks to protect consumers from confusion concerning the source or content of the article [*see Allied Artists Pictures Corp. v. Friedman (1977) 68 Cal. App. 3d 127, 133, 137 Cal. Rptr. 94* ; *Capitol Records, Inc. v. Erickson (1969) 2 Cal. App. 3d 526, 537-538, 82 Cal. Rptr. 798]* . They may be combined with points and authorities pertaining to the specific procedural context in which the substantive points are raised. For example, they might be combined with general points and authorities supporting a general demurrer to a complaint. They may also be adapted for use in a trial or appellate brief.

Optional Paragraph C should be included when the alleged unfair competition consists of "reverse palming off" (the acquisition and unauthorized marketing of a competitor's product under one's own name).

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Pleading and Practice Forms

For discussion of common law unfair competition and the extent to which it is preempted by federal patent and copyright law, see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender). For discussion relating to federal patent and copyright laws, generally, including preemption of conflicting state laws, see California Forms of Pleading and Practice, Ch. 349, *Literary Property and Copyright* , and Ch. 411, *Patents and Inventions* (Matthew Bender). For discussion of federal and state trademark laws, see California Forms of Pleading and Practice, Ch. 549, *Trademarks and Trade Names* (Matthew Bender).

[c] Related Points and Authorities

For additional points and authorities relating to the preemption of state actions by federal copyright law, see Ch. 146, *Literary Property, Copyright, and the Protection of Ideas* . For forms of points and authorities relating to demurrers generally, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[d] Opposing Points and Authorities

In an appropriate case, these points and authorities may be used to oppose the contention supported by the points and *authorities in § 235.80*.

[3] Discussion of Authorities

[a] State Protection From Confusion of Content or Source

The facts and procedural background of ***Bonito Boats v. Thunder Craft Boats*** *(1989) 489 U.S. 141, 109 S. Ct. 971, 103 L. Ed. 2d 118* , are discussed in *§ 235.80[3][a]*]. The U.S. Supreme Court invalidated the statute under review, butportions of the opinion discussing the lack of conflict between the federal patent and copyright laws and legitimate state trade secret and unfair competition laws may be useful in arguing to uphold a particular state law. The U.S. Supreme Court acknowledged that its holdings in *Compco Corp. v. Day-Brite Lighting (1964) 376 U.S. 234, 84 S. Ct. 779, 11 L. Ed. 2d 669* [*see § 235.80[3][b]*], and *Sears, Roebuck & Co. v. Stiffel Co. (1964) 376 U.S. 225, 84 S. Ct. 784, 11 L. Ed. 2d 661* [*see § 235.80[3][a]*], had been the subject of heated scholarly and judicial debate, and that their broadest reading would prohibit the states from regulating deceptive simulation of trade dress or the tortious appropriation of private information (*489 U.S. 141, 154)* . However, the Court stated that this broad reading is

inappropriate; the holdings in *Bonito Boats, Sears,* and *Compco* do not preclude all state restriction of unfair competition and trade secrets; and the states remain free to place limited regulations on the circumstances in which unpatentable designs are used in order to prevent consumer confusion regarding source, and to prohibit the tortious appropriation of private information (*489 U.S. 141, 154-155)* . The Court noted that the law of unfair competition has its roots in the common law tort of deceit; its general concern is with protecting consumers from confusion as to source. The common law of unfair competition is limited, however, to protection against copying nonfunctional aspects of consumer products that have acquired secondary meaning so that they operate as a designation of source. The Court said that Judge Learned Hand captured the distinction well in *Crescent Tool Co. v. Kilborn & Bishop Co. (2d Cir. 1917) 247 F. 299, 301* , in which he wrote "the plaintiff has the right not to lose its customers through false representations that those are its wares which in fact are not, but it may not monopolize any design or pattern, however trifling. The defendant, on the other hand, may copy plaintiff's goods slavishly down to the minutest detail, but may not represent itself as the plaintiff in their sale" (*489 U.S. 141, 157)* . The Court also noted that Section 43(a) of the Lanham Act (*15 U.S.C.S. § 1125(a)*) is an affirmative indication from Congress that both the law of unfair competition and trade secret protection are consistent with the balance struck by the patent laws (*489 U.S. 141, 165-166)* .

In ***Allied Artists Pictures Corp. v. Friedman*** *(1977) 68 Cal. App. 3d 127, 137 Cal. Rptr. 94* , a distributor of a foreign film brought an action for unfair competition against the distributor of a domestic film whose title was similar to that of the English title of the foreign film. The films are similar with regard to the general theme and name of the principal character, which appears in both titles. Plaintiff alleged that defendant's use of the similar title was calculated to deceive the public into believing that defendant's film was in fact plaintiff's film, which was widely publicized. After hearing, the trial court found that plaintiff had established a secondary meaning between the foreign film and the English title, and that the title of defendant's film was confusingly similar. The court granted plaintiff's petition for a temporary and permanent injunction preventing defendant from using its title, or any other confusingly similar title. The court also required defendant to include a phrase distinguishing the two films in all of its advertisements in California. Defendant appealed, and plaintiff cross-appealed, contending that the injunction should extend beyond the boundaries of California and should require defendant to change the name of his film.

The court of appeal affirmed with respect to the judgment's application to California, and remanded the matter for further consideration with regard to nationwide application. The court noted that the state's power to protect literary titles, which are not afforded protection by federal copyright laws, cannot be based on any theory of appropriation of a property right. A title of a literary product is, like a label on other types of products, simply a means of identifying a product. Anyone may use a title if there is no secondary significance. However, palming off one's goods as those of another constitutes unfair competition. A state may protect a business in the use of trademarks or labels by requiring that appropriate steps be taken to prevent the consumer from being misled as to the content or source of the product (*68 Cal. App. 3d 127, 133)* . Plaintiff, by virtue of its exclusive right to market the film in the United States, has a property right in the film sufficient to entitle it to protection against unfair competition, including protection against the use of deceptive or misleading titles (*68 Cal. App. 3d 127, 134)* .

[b] State Protection From Palming Off

Bonito Boats v. Thunder Craft Boats *(1989) 489 U.S. 141, 109 S. Ct. 971, 103 L. Ed. 2d 118* , is discussed in *§ 235.81[3][a].*

In ***Capitol Records, Inc. v. Erickson*** *(1969) 2 Cal. App. 3d 526, 82 Cal. Rptr. 798* , a major recording company brought an action against a company that recorded and sold plaintiff's products for injunctive relief based on unfair competition. Defendant purchased on the open market records and tapes of musical performances produced, recorded, and sold by plaintiff. Defendant then made master recordings from the records and tapes, and produced tape cartridges to sell to the general public. Defendant did not obtain permission from or remunerate plaintiff or the recording artists; and included a statement to that effect on the back of its packages. However, defendant did not alter the performances, the album title, or the performers' names. The trial court granted plaintiff's application for preliminary injunction, and

defendant appealed.

The court of appeal affirmed, holding that state law, statutory or decisional, may in some circumstances grant relief if deceptive or fraudulent competitive practices are conducted, for example, when one palms off products as those of a competitor, or when one unfairly appropriates for profit the valuable efforts of a competitor (*2 Cal. App. 3d 526, 537-538)* . The court rejected defendant's contention that the holdings in *Compco Corp. v. Day-Brite Lighting (1964) 376 U.S. 234, 84 S. Ct. 779, 11 L. Ed. 2d 669* , and *Sears, Roebuck & Co. v. Stiffel Co. (1964) 376 U.S. 225, 84 S. Ct. 784, 11 L. Ed. 2d 661* , preclude a state court from enjoining itsconduct on any theory, including that of unfair competition. Although these holdings preclude a state law from forbidding the copying of an article that is unprotected by a patent or copyright, an author or proprietor of an unpublished work is entitled to common law protection, and the application of state law of unfair competition in that field remains unaffected by those decisions and the principles set forth therein (*2 Cal. App. 3d 526, 530-535)* . Defendant's avoidance of expending skill and money in acquiring the artists and recording their performances constitutes unfair appropriation of plaintiff's efforts to produce artistic performances, and constitutes unfair competition. The disclaimer on defendant's products of itself does not negate unfair competition. Defendant's packages contain the same titles and names as appear on plaintiff's tapes and records, creating a question of fact whether defendant's conduct constitutes palming off or confusion as to the source of the recorded performances (*2 Cal. App. 3d 526, 537)* . Defendant erroneously considered plaintiff's right against the public, instead of the rights of plaintiff and defendant as competitors in business. Defendant not only copied discs or tapes, but also appropriated the product itself, e.g., performances embodied on the records, as well as the titles and names of the performers, entitling plaintiff to a preliminary injunction (*2 Cal. App. 3d 526, 538)* .

[c] Federal Law Does Not Preempt State Laws Prohibiting Reverse Palming Off

Summit Mach. Tool Mfg. v. Victor CNC Sys. *(9th Cir. 1993) 7 F.3d 1434* , is discussed in *§ 235.80[3][c]*. The U.S. Court of Appeals for the Ninth Circuit Court observed that "reverse palming off" occurs with the direct misappropriation of the services or goods of another. "Express reverse palming off" occurs when one party purchases or otherwise obtains a second party's goods, removes the second party's name, and then the markets the product under its own name. A defendant may also be guilty of reverse palming off by selling or offering for sale another's product that has been modified slightly and then labeled with a different name (*7 F.3d 1434, 1437)* . With respect to plaintiff's state-law unfair competition claims, the court stated that to the extent that plaintiff complained that defendant had misappropriated the fruits of plaintiff's labor by marketing plaintiff's lathe with defendant's name on it, such a claim is really a claim for reverse palming off. State unfair competition laws that seek to prevent reverse palming off are not preempted by federal patent and copyright laws (*7 F.3d 1434, 1441)* . However, the court concluded that plaintiff's state-law claim for reverse palming off failed for the same reason that its federal Lanham Act claim failed, i.e., because the trial court had found that the lathes purchased and marketed by defendant were not substantially similar to the lathes developed by plaintiff and hence there was no "bodily appropriation" of plaintiff's lathes (*7 F.3d 1434, 1438-1439, 1441-1442)* .

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Volume 23 Chapters 230-239 TRUST DEEDS---to---WORKERS' COMPENSATION
CHAPTER 236 UNLAWFUL DETAINER

23-236 California Points & Authorities 236.syn

§ 236.syn Synopsis to Chapter 236: UNLAWFUL DETAINER

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§ 236.03 Acts Constituting Unlawful Detainer

§ 236.04 Affirmative Defenses

[1] Possession of Property

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[1] Page Limits on Points and Authorities

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§ 236.06 Related Discussion and Forms

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§§ 236.07-236.09 [Reserved]

§ 236.10 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)]--Five-Day Summons

Insufficient When Additional Causes of Action Are Pleaded

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[3] Discussion of Authorities

[a] Five-Day Summons Is Insufficient to Confer Jurisdiction

§ 236.11 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Failure to Allege Service of Three-Day Notice When Required [Code Civ. Proc. §§ 1161(2)-(4), 1161a]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Service of Notice

[b] Lease Provision Ineffective

[4] Additional Authorities

[a] Service of Notice

[b] Lease Provision Ineffective

§ 236.12 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Failure to Allege That Three-day Notice Was Written [Code Civ. Proc. §§ 1161(2)-(4), 1161a]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Uses

[d] Related Pleading and Practice Chapters

[e] Related Points and Authorities

[3] Discussion of Authorities

[a] Failure to State Cause of Action

[b] Strict Compliance With Notice Requirements

[4] Additional Authorities

[a] Strict Compliance With Notice Requirements

§ 236.13 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Notice Fails to Demand Precise Amount Due [Code Civ. Proc. § 1161(2)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Failure to State Cause of Action

[b] Strict Compliance With Notice Requirements

[c] Demand for Precise Amount of Rent Due

[d] Demand for "Rent" Is Insufficient

[e] Demand in Excess of Amount Due Is Insufficient

[f] Demand in Excess of One Year's Rent Is Insufficient

[4] Additional Authorities

[a] Strict Compliance With Notice Requirements

[b] Demand in Excess of Amount Due Is Insufficient

§ 236.13A Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Notice Fails to State to Whom Payment Must Be Made [Code Civ. Proc. § 1161(2)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Failure to State Cause of Action

[b] Strict Compliance With Notice Requirements

[c] Three-day Notice Must State to Whom Rent Payment Must Be Made

§ 236.14 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Notice Not in the Alternative [Code Civ. Proc. § 1161(2), (3)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Uses

[d] Related Pleading and Practice Chapters

[e] Related Points and Authorities

[f] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Failure to State Cause of Action

[b] Strict Compliance With Notice Requirements

[c] Nonalternative Demand Is Insufficient

[4] Additional Authorities

[a] Strict Compliance With Notice Requirements

[b] Nonalternative Demand Is Insufficient

§ 236.15 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Equivocal Demand for Possession in Three-Day Notice

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Uses

[d] Related Pleading and Practice Chapters

[e] Related Points and Authorities

[3] Discussion of Authorities

[a] Failure to State Cause of Action

[b] Strict Compliance With Notice Requirements

[c] Unequivocal Demand for Possession Required

[4] Additional Authorities

[a] Strict Compliance With Notice Requirements

§ 236.16 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Failure to Allege Landlord-Tenant Relationship [Code Civ. Proc. § 1161(2)-(5)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Landlord-Tenant Relationship Must Be Alleged

[4] Additional Authorities

[a] Landlord-Tenant Relationship Must Be Alleged

§ 236.17 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Failure to Describe Premises With Reasonable Certainty [Code Civ. Proc. § 1166(a)(3)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Uses

[d] Related Pleading and Practice Chapters

[e] Related Points and Authorities

[f] Opposing Points and Authorities

§ 236.18 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--30-Day Notice Fails to Meet Statutory Requirements [Civ. Code §§ 789, 1946]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Uses

[d] Related Pleading and Practice Chapters

[e] Related Points and Authorities

[3] Discussion of Authorities

[a] Defective 30-Day Notice

[b] Notice in the Alternative

§ 236.19 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Failure to Allege that Tenant Remains in Possession of Premises [Code Civ. Proc. § 1161]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Uses

[d] Related Pleading and Practice Chapters

[e] Related Points and Authorities

[f] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Requirement of Allegation that Tenant Remains in Possession

[4] Additional Authorities

[a] Requirement of Allegation That Tenant Remains in Possession

§ 236.20 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(g)]--Failure to Allege Whether Lease Is Written or Oral or Implied by Conduct

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Lease as Contract

§ 236.21 Supporting Plaintiff's Motion to Strike Cross Complaint [Code Civ. Proc. §§ 435-437]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Striking Cross Complaint in Unlawful Detainer Proceeding

[b] Cross Complaint Is Improper in Unlawful Detainer

[c] Cross Complaint Is Improper When Possession Is at Issue

[4] Additional Authorities

[a] Cross Complaint Is Improper in Unlawful Detainer

§ 236.22 Supporting Motion to Strike Irrelevant Matter From Complaint [Code Civ. Proc. §§ 435-437]--Prayer for Nonallowable Damages [Code Civ. Proc. § 1174]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Uses

[d] Related Pleading and Practice Chapters

[e] Related Points and Authorities

[f] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Limitation on Recovery

[b] Lack of Statutory Authorization for Damages

[c] Recoverable Damages

[d] Strict Construction

[e] Damages During Period of Unlawful Detention

[f] Damages Before Unlawful Detention

[g] Future Damages

[h] Damages Before End of Tenancy Terminated by 30-Day Notice

[4] Additional Authorities

[a] Damages During Period of Unlawful Detention

[b] Future Damages

§ 236.23 Supporting Plaintiff's Motion to Strike Irrelevant Matter in Answer [Code Civ. Proc. §§ 435-437]--Affirmative Defense Not Related to Issue of Possession

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Affirmative Defense Unrelated to Possession Is Irrelevant

[b] Defense of Title Defect Is Improper

[c] Defense of Retaliatory Eviction for Strike Is Improper

§ 236.24 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--To Compel Court to Vacate

Order Continuing Trial of Unlawful Detainer Action

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Review of Order Continuing Unlawful Detainer Proceeding

[4] Additional Authorities

[a] Review of Order Continuing Unlawful Detainer Proceeding

§ 236.25 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--To Compel Court to Hear or Sustain Defense in Unlawful Detainer Proceeding

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Review of Refusal to Hear Defense

[b] Review of Refusal to Sustain Defense

[4] Additional Authorities

[a] Review of Refusal to Hear Defense

§ 236.26 Supporting Application for Relief From Forfeiture [Code Civ. Proc. § 1179]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Willful Breach Does Not Preclude Relief

[4] Additional Authorities

[a] Willful Breach Does Not Preclude Relief

§ 236.27 Supporting Contention That Unlawful Detainer Complaint Filed Prematurely--Time to Pay Rent Under Three-Day Notice Was Extended by Holiday

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Three Days Extended By Legal Holiday

§§ 236.28-236.39 [Reserved]

§ 236.40 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Three-Day Notice Not Required When Periodic Tenancy Terminated by Notice Under Civil Code Section 1946 [Civ. Code § 791]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Additional Authorities

[a] Three-Day Notice Unnecessary on Termination of Periodic Tenancy

§ 236.41 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Three-Day Notice Not Required When Tenant Fails to Deliver Possession After a Notice of Termination or Written Offer of Surrender [Code Civ. Proc. § 1161(5)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

§ 236.42 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Three-Day Notice Not Required After Expiration of Fixed-Term Lease [Code Civ. Proc. § 1161(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Three-Day Notice Unnecessary on Expiration of Fixed Term

[4] Additional Authorities

[a] Three-Day Notice Unnecessary on Expiration of Fixed Term

§ 236.43 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Three-Day Notice Not Required to Remove Former Servant, Employee, Agent, or Licensee [Code Civ. Proc. § 1161(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

§ 236.44 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Notice Not Required to Be in Alternative [Code Civ. Proc. §§ 1161(3), (4), 1161a]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Uses

[d] Related Pleading and Practice Chapters

[e] Related Points and Authorities

[f] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Violation of Zoning Ordinance Is an Unlawful Purpose

§ 236.45 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Premises Described With Reasonable Certainty

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Description by Name Is Reasonably Certain

[b] Description Under Which Possession Was Taken Is Sufficient

[c] Reasonable Certainty Despite Error

§ 236.46 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Complaint Was Filed More Than Three Days After Service of Three-Day Notice

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Time to Comply Is Not Extended When Three-Day Notice Is Posted and Mailed

[b] Service Is Effective When Posted and Mailed

§ 236.46A Code Civ. Proc. § 430.10(e)Code Civ. Proc. § 1161(2)Opposing Demurrer to Complaint []--Demand in Excess of One Year's Rent Is Not Insufficient []

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Demand of Rent Due for More than One Year Does Not Invalidate Notice

§ 236.47 Opposing Plaintiff's Motion to Strike Cross Complaint [Code Civ. Proc. §§ 435-437]--Defendant Has Vacated and Possession Is Not in Issue [Civ. Code § 1952.3(a)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Cross Complaint Is Proper When Possession Is No Longer Issue Because Tenant Surrendered Possession

[4] Additional Authorities

[a] Cross Complaint Is Proper When Possession Is No Longer Issue Because Tenant Surrendered Possession

§ 236.48 Opposing Motion to Strike Irrelevant Matter From Complaint [Code Civ. Proc. §§ 435-437]--Prayer for Damages for Fraud, Force, or Violence [Code Civ. Proc. § 1166(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

§ 236.49 Opposing Application for Relief From Forfeiture [Code Civ. Proc. § 1179]--Hardship on Respondent

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Hardship to Respondent Precludes Relief

[b] Factors to Be Considered When Covenant Breached Is Provision in Commercial Lease Against Assigning or Subletting Without Lessor's Prior Consent

[4] Additional Authorities

[a] Hardship to Respondent Precludes Relief

§§ 236.50-236.59 [Reserved]

§ 236.60 Opposing Plaintiff's Motion to Strike Irrelevant Matter in Answer [Code Civ. Proc. §§ 435-437]--Affirmative Defense Directly Related to Issue of Possession--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Affirmative Defense Is Not Barred by Statute

[b] Affirmative Defense Related to Possession Is Proper

[4] Additional Authorities

[a] Affirmative Defense Related to Possession Is Proper

§ 236.61 Opposing Plaintiff's Motion to Strike Irrelevant Matter in Answer [Code Civ. Proc. §§ 435-437]--Affirmative Defense of Breach of the Warranty of Habitability

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Affirmative Defense Is Not Barred by Statute

[b] Affirmative Defense Related to Possession Is Proper

[c] Defense of Breach of Warranty of Habitability Is Proper

[d] Defense of Breach of Warranty of Habitability Is Proper Because Dwelling Has Been Declared Substandard

[4] Additional Authorities

[a] Defense of Breach of Warranty of Habitability Is Proper

§ 236.62 Opposing Plaintiff's Motion to Strike Irrelevant Matter in Answer [Code Civ. Proc. §§ 435-437]--Affirmative Defense of Retaliatory Eviction [Civ. Code § 1942.5]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Affirmative Defense Related to Possession Is Proper

[b] Eviction in Retaliation for Participation in Tenant Organization or Exercise of Other Legal Rights

[c] Frustration of Public Policy by Retaliatory Eviction

[d] Frustration of Statutory Rights by Retaliatory Eviction

[e] Retaliatory Eviction Defense Is Available to Commercial Tenant

[f] Affirmative Defense of Retaliatory Eviction Is Available Without Exercise of Repair-and-Deduct Remedy or Complaints to Governmental Authorities

§ 236.63 Opposing Plaintiff's Motion to Strike Irrelevant Matter in Answer [Code Civ. Proc. §§ 435-437]--Affirmative Defense of Racial Discrimination

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Affirmative Defense Is Not Barred by Statute

[b] Affirmative Defense Related to Possession Is Proper

[c] Defense of Racial Discrimination Is Proper

§ 236.64 Opposing Plaintiff's Motion to Strike Irrelevant Matter in Answer [Code Civ. Proc. §§ 435-437]--Affirmative Defense That Notice Fails to Demand Precise Amount Due [Code Civ. Proc. § 1161(2)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Affirmative Defense Related to Possession Is Proper

[b] Strict Compliance With Notice Requirements

[c] Demand for Precise Amount of Rent Due

[d] Demand in Excess of Amount Due Is Insufficient

[e] Demand in Excess of Judgment

[f] Demand in Excess of One Year's Rent Is Insufficient

§ 236.65 Opposing Plaintiff's Motion to Strike Irrelevant Matter in Answer [Code Civ. Proc. §§ 435-437]--Affirmative Defense of Waiver of Breach

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Affirmative Defense Related to Possession Is Proper

[b] Waiver of Breach Bars Judgment for Possession

[c] Conduct Supporting Inference of Waiver

[d] Acceptance of Benefits Under Lease Constitutes Waiver

[e] Acceptance of Rent With Knowledge of Breach Constitutes Waiver

[4] Additional Authorities

[a] Acceptance of Rent With Knowledge of Breach Constitutes Waiver

§ 236.66 Opposing Plaintiff's Motion to Strike Irrelevant Matter in Answer [Code Civ. Proc. §§ 435-437]--Affirmative Defense of Good Faith Substantial Compliance With Condition

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Defense of Good Faith Substantial Compliance Is Proper

[4] Additional Authorities

[a] Defense of Good Faith Substantial Compliance Is Proper

§ 236.67 Opposing Plaintiff's Motion to Strike Irrelevant Matter in Answer [Code Civ. Proc. §§ 435-437]--Affirmative Defense of Lessor's Bad Faith in Causing Breach

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Affirmative Defense Related to Possession Is Proper

[b] Lessor's Bad Faith in Causing Breach Precludes a Forfeiture

§ 236.68 Opposing Plaintiff's Motion to Strike Irrelevant Matter in Answer [Code Civ. Proc. §§ 435-437]--Affirmative Defense of Fraud in Inducing Person Already in Possession to Enter Into Lease

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Affirmative Defense Is Not Barred by Statute

[b] Affirmative Defense Related to Possession Is Proper

[c] Defense of Fraud After Defendant Is in Possession Is Proper

§ 236.69 Opposing Plaintiff's Motion to Strike Irrelevant Matter in Answer [Code Civ. Proc. §§ 435-437]--Affirmative Defense of Part Performance of Oral Agreement to Lease

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Defense of Oral Agreement to Lease Is Proper

§ 236.70 Opposing Plaintiff's Motion to Strike Irrelevant Matter in Answer [Code Civ. Proc. §§

435-437]--Affirmative Defense of Performance of Agreement for Purchase of Business With Lease as Part Consideration

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Defense of Lease as Part Consideration for Purchase of Business Is Proper

§ 236.71 Opposing Plaintiff's Motion to Strike Irrelevant Matter in Answer [Code Civ. Proc. §§ 435-437]--Relationship Involving Sale of Interest in Property to Defendant

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Defense of Relationship Involving Sale of Interest in Property to Defendant Is Proper

§ 236.72 Opposing Plaintiff's Motion to Strike Irrelevant Matter in Answer [Code Civ. Proc. §§ 435-437]--Plaintiff Has Raised Issue of Title

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Challenge to Plaintiff's Title Is Proper When Plaintiff Has Raised Issue

§ 236.73 Opposing Plaintiff's Motion to Strike Irrelevant Matter in Answer [Code Civ. Proc. §§ 435-437]--Relationship Is a Partnership

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Defense of Partnership Is Proper

§ 236.74 Opposing Plaintiff's Motion to Strike Irrelevant Matter in Answer [Code Civ. Proc. §§ 435-437]--Landlord's Violation of Local Rent Control Legislation

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Violation of Local Rent Control Legislation by Landlord Is Proper Defense

[4] Additional Authorities

[a] Violation of Local Rent Control Legislation by Landlord Is Proper Defense

§ 236.75 Opposing Plaintiff's Motion to Strike Irrelevant Matter in Answer [Code Civ. Proc. §§ 435-437]--Affirmative Defense of Invalid Title in Action Under Code of Civil Procedure Section 1161a

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Chapters

[d] Related Points and Authorities

[e] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Defense of Invalid Title Is Proper to Extent Provided by Code of Civil Procedure Section 1161a

[b] Defenses Under Code of Civil Procedure Section 1161a(b)(3)

[c] Defenses Under Code of Civil Procedure Section 1161a(b)(4)

[4] Additional Authorities

[a] Defenses Under Code of Civil Procedure Section 1161a(b)(3)

[b] Defenses Under Code of Civil Procedure Section 1161a(b)(4)

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CHAPTER 236 UNLAWFUL DETAINER
PART I. INTRODUCTION

23-236 California Points & Authorities § 236.01

§ 236.01 Scope of Chapter

This chapter contains forms of points and authorities for use in actions involving landlord and tenant unlawful detainer proceedings. Part II includes the following forms:

- A form supporting a motion to quash service of a five-day summons [§ 236.10];
- Forms supporting [§§ 236.11-236.20] and opposing [§§ 236.40-236.46] a demurrer to a complaint in an unlawful detainer action;
- A form supporting a plaintiff's motion to strike a cross complaint in an unlawful detainer action [§ 236.21];
- Forms supporting a motion to strike irrelevant matter in an unlawful detainer proceeding [§§ 236.22-236.23];
- Forms supporting a petition for a writ of mandate [§§ 236.24-236.25];
- Forms supporting [§ 236.26] and opposing [§ 236.49] an application for relief from forfeiture;
- A form supporting the contention that an unlawful detainer action was filed prematurely [§ 236.27];
- A form opposing a plaintiff's motion to strike a cross complaint [§ 236.47] and a form opposing a motion to strike irrelevant matter from a complaint [§ 236.48]; and
- Forms setting forth affirmative defenses in unlawful detainer actions [§§ 236.60-236.75].

For a discussion and sample forms showing how to use the forms in this chapter to draft a complete memorandum of points and authorities or brief, and for further discussion of law and motion procedure and strategy, see Ch. 1, *Writing Legal Memoranda and Briefs* .

Numerous landlord-tenant related forms, including forms supporting and opposing the imposition of damages, are set forth in Ch. 141, *Landlord and Tenant* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeIrrelevant MattersCivil ProcedureRemediesWritsCommon Law WritsMandamusReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & Detainer

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23-236 California Points & Authorities § 236.02

§ 236.02 Governing Statutes

Unlawful detainer is governed generally by *Code Civ. Proc. §§ 1161-1179a*. Except as specifically provided in those sections, the provisions of *Code Civ. Proc. § 307 et seq.*, which govern civil actions generally, are applicable to and constitute the rules of practice in unlawful detainer proceedings [*Code Civ. Proc. § 1177*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & DetainerReal Property LawTitle QualityAdverse Claim ActionsUnlawful Detainer

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23-236 California Points & Authorities § 236.03

§ 236.03 Acts Constituting Unlawful Detainer

As originally enacted, the unlawful detainer statutes applied only to parties having the relationship of landlord and tenant. However, with the addition of *Code Civ. Proc. § 1161a*, the summary remedy has been expanded to include purchasers at an execution or foreclosure sale against a judgment debtor or mortgagor, or against a vendor who refuses to surrender possession of the premises. *Code Civ. Proc. § 1161(1)* was also amended providing the remedy to employers against employees, principals against agents, and licensors against licensees.

There are at least 13 different classes of persons and acts that constitute unlawful detainer, including the following:

- A tenant who continues in possession after expiration of his or her term or termination of his or her tenancy [*Code Civ. Proc. § 1161(1)*];

- A person who became the occupant of the premises as a servant, employee, agent, or licensee, and continues in possession after termination of the employment, agency, or license [*Code Civ. Proc. § 1161(1)*];

- A tenant who continues in possession after default in payment of rent and service on him or her of a three-day notice requiring payment of rent or surrender of possession [*Code Civ. Proc. § 1161(2)*];

- A tenant who continues in possession after a curable breach of covenant and service of a three-day notice to cure the breach or surrender possession [*Code Civ. Proc. § 1161(3)*];

- A tenant who continues in possession after a noncurable breach of covenant and service on him or her of a three-day notice to surrender possession [*Code Civ. Proc. § 1161(3)*];

- A tenant who continues in possession after subleasing, assigning, or committing waste contrary to covenants of the lease and service on him or her of a three-day notice demanding surrender of possesssion [*Code Civ. Proc. § 1161(4)*];

- A tenant who continues in possession after committing, or permitting the maintenance or commission of, a nuisance on the demised premises or using the premises for an unlawful purpose and service on him or her of a three-day notice to surrender possession [*Code Civ. Proc. § 1161(4)*];

- A tenant who continues in possession after terminating his or her tenancy either by proper notice or an offer to surrender possession accepted by the landlord in writing and expiration of the time specified in the notice or offer [*Code Civ. Proc. § 1161(5)*];

- A judgment debtor who continues in possession after sale had been held under execution levied against him or her, title of the purchaser at the execution sale has been perfected, and he or she has been served with a three-day notice to surrender possession [*Code Civ. Proc. § 1161a(b)(1)*];

- A mortgagor who continues in possession after mortgage foreclosure sale, the purchaser's title at the foreclosure sale whether by court foreclosure or power of sale has been perfected, and a three-day notice has been served on him or her requiring surrender of possession [*Code Civ. Proc. § 1161a(b)(2)*];

- A trustor under a deed of trust who continues in possession after title of a purchaser at a power of sale foreclosure sale has been perfected and a three-day notice has been served on him or her requiring surrender of possession [*Code Civ. Proc. § 1161a(b)(3)*];

- A person who sold real property and continues in possession of the property after title under the sale has been perfected and a three-day notice has been served on him or her requiring surrender of possession [*Code Civ. Proc. § 1161a(b)(4)*]; and

- A person whose property has been sold in accordance with *Health & Safety Code § 18037.5* under the default provisions of a conditional sales agreement or security agreement executed by that person, or a person under whom that person claims, when the title under the sale has been duly perfected, and a three-day written notice to quit has been served on the person [*Code Civ. Proc. § 1161a(b)(5)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresJudicial ForeclosuresReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & DetainerReal Property LawTitle QualityAdverse Claim ActionsUnlawful Detainer

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23-236 California Points & Authorities § 236.04

§ 236.04 Affirmative Defenses

[1] Possession of Property

A defense normally permitted because it arises out of the subject matter of the original suit is generally excluded in an unlawful detainer action if this defense is extrinsic to the narrow issue of possesssion, which the unlawful detainer procedure seeks speedily to resolve. However, a tenant is not prohibited from interposing a defense that does directly relate to the issue of possession and, if established, would result in the tenant's retention of the premises [*Green v. Superior Court (1974) 10 Cal. 3d 616, 632-633, 111 Cal. Rptr. 704, 517 P.2d 1168]* .

[2] Background: Equitable vs. Legal Classification

Formerly, a distinction was made based on the characterization of a defense as equitable or legal [*see, e.g., Union Oil Co. v. Chandler (1970)4 Cal. App. 3d 716, 721-722, 84 Cal. Rptr. 756]* . But this was inaccurate for two reasons. First, past cases did not permit the interposition of any conceivable equitable defense, but allowed only those defenses that, if established, would preclude the landlord from recovering possession of the property. For example, a court refused to permit a tenant to raise the equitable defense that the lease under which she held possession had been obtained by fraud, because even if the tenant established the lease's invalidity, she would not have been entitled to retain possession. Rather, she could only have rescinded and obtained damages [*see Smith v. Whyers (1923) 64 Cal. App. 193, 195, 221 P. 387]* . In contrast, a tenant was permitted to defend an unlawful detainer action on the ground that the lease was obtained by fraud because the tenant had been in possession before the lease and thus by demonstrating its invalidity would have been entitled to retain possession [*see Johnson v. Chely (1872) 43 Cal. 299, 305* ; *Rishwain v. Smith (1947) 77 Cal. App. 2d 524, 531-533, 175 P.2d 555]* .

A second objection to the equitable/legal classification of defenses is based on the fact that decisions have permitted the introduction of legal defenses whenever such defenses, if proven, would have preserved possession in the tenant. Several of the early cases permitted defenses that they characterized as equitable but that would more appropriately be termed legal [*see, e.g., Knight v. Black (1912) 19 Cal. App. 518, 526, 126 P. 512]* . Even when the defense has been recognized as legal, that has not been a complete bar to its introduction in unlawful detainer cases. For example, a tenant was permitted to raise the legal defense of partial eviction [*see Giraud v. Milovich (1938) 29 Cal. App. 2d 543, 547-549, 85 P.2d 182]* .

[3] Relief in Addition to Recovering Possession

If the plaintiff seeks relief in addition to recovery of possession, for example, the recovery of back rent, any affirmative defense to the relief that the defendant may have may, of course, be asserted. Thus, in *Gruzen v. Henry (1978) 84 Cal. App. 3d 515, 517-519, 148 Cal. Rptr. 573* , a proceeding in unlawful detainer, defendants contended that their rental agreement with the plaintiff landlord was void because plaintiff had not previously secured the certificate of occupancy required by city ordinance. The contention was rejected by the trial court, which rendered judgment for plaintiff. On appeal, the appellate court modified the judgment to delete the provisions for a money judgment and affirmed the judgment as modified. The court held that the city ordinance was, as construed by it in a prior opinion, valid. Because the purpose of the ordinance was to insure that property met the health and safety requirements of the city's code and hence was primarily for public protection, the landlord's failure to comply with its provisions rendered the rental agreement void. Further, while defendants were not entitled, without compensation, to continue to occupy the premises, plaintiff was not entitled to an award of rent. Similarly, in *Espinoza v. Calva (2008) 169 Cal. App. 4th 1393, 1400, 87 Cal. Rptr. 3d 492* , the lack of a certificate of occupancy rendered the lease illegal, and therefore the trial court erred in awarding a judgment for the landlord for past due rent.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & DetainerReal Property LawTitle QualityAdverse Claim ActionsUnlawful Detainer

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23-236 California Points & Authorities § 236.04A

§ 236.04A Stay of Unlawful Detainer Proceedings During Active Military Duty

State legislation offers temporary protection from the enforcement of civil liabilities for officers and enlisted members of the National Guard called or ordered into active state or federal service and reservists of the United States Military Reserve who have been on full-time active service or duty since September 11, 2001 [*see* 2002 Stats., ch. 60, § 1; *Mil. & Vet. Code § 400 et seq.*]. If premises are occupied primarily for dwelling purposes by the spouse, children, or other dependents of a service member called to active service or duty, no eviction or distress can be made until 30 days after the service member is released from active service or duty, except on leave of court granted on application therefor or granted in an action or proceeding affecting the right of possession [*Mil. & Vet. Code § 406(a)*; *see Mil. & Vet. Code § 400(a)* ("service member" defined), (b) ("military service" defined)]. Any person who knowingly takes part in any eviction or distress other than as permitted by *Mil. & Vet. Code § 406(a)*, or who attempts to do so, is guilty of a misdemeanor [*Mil. & Vet. Code § 406(c)*].

The court, on its own motion or on application, may stay the eminent domain proceedings for the period specified in *Mil. & Vet. Code § 406(a)* [*Mil. & Vet. Code § 406(b)*]. Rather than granting a complete stay, the court may require the tenant to make regular partial payments during the service member's period of military service, or the court may make any other order that it finds to be just [*Mil. & Vet. Code § 406(b)*]. The court may deny the stay if it finds that the ability of the tenant to pay the agreed rent is not materially affected by the military service [*Mil. & Vet. Code § 406(b)*].

These protections apply to service members on active service or duty since September 11, 2001. However, the protections apply prospectively from June 20, 2002 (date bill was signed into law) [*Mil. & Vet. Code § 409.11*]. Dependents of service members are also entitled to these benefits unless the court finds that the dependents' ability to comply with the terms of the obligation has not been materially impaired by the military service of the person on whom the applicants are dependent [*Mil. & Vet. Code § 409.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewMilitary & Veterans LawServicemembersHousingReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction

ActionsForcible Entry & DetainerReal Property LawTitle QualityAdverse Claim ActionsUnlawful Detainer

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23-236 California Points & Authorities § 236.05

§ 236.05 How to Use the Forms in This Chapter

[1] Page Limits on Points and Authorities

One of the more significant drafting requirements to keep in mind is page limits: supporting and opposing memoranda must not exceed 15 pages (or 20 pages in a summary judgment or summary adjudication proceeding). Exhibits, declarations, attachments, a table of contents, a table of authorities, and the proof of service are not included in the page limitation. A reply or closing memorandum may not exceed 10 pages [*see Cal. Rules of Ct., Rule 3.1113(d)*]. A party desiring to file a longer memorandum must obtain leave of court [*see Cal. Rules of Ct., Rule 3.1113(e)*]. These and other drafting requirements are discussed in detail in *Ch. 1, Writing Legal Memoranda and Briefs, § 1.05*.

[2] Using the Forms to Build a Draft Memorandum

The forms included in this chapter are designed to be combined with other points and authorities to form a complete memorandum. For a detailed discussion of how to select and use the forms in this publication to build a draft memorandum and complete the draft, with detailed discussion of all drafting requirements and strategic and stylistic considerations, see Ch. 1, *Writing Legal Memoranda and Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting Memoranda

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23-236 California Points & Authorities § 236.06

§ 236.06 Related Discussion and Forms

[1] Related Pleading and Practice Chapters

For detailed discussion and forms of notices, allegations, complaints, defenses, claims for damages, orders, and judgments involving landlord-tenant disputes, see California Forms of Pleading and Practice, Chs. 330-335, *Landlord and Tenant* (Matthew Bender). In particular:

- Unlawful detainer actions are covered in Ch. 333, *Landlord and Tenant: Eviction Actions* ;
- Damages are discussed in Ch. 334, *Landlord and Tenant: Claims for Damages* ; and
- Rent contol issues are covered in Ch. 335, *Landlord and Tenant: Rent Control* .

For discussion and forms for use in particular circumstances that may involve unlawful detainer, see the following chapters in California Forms of Pleading and Practice:

- Ch. 117, *Civil Rights: Housing Discrimination*.
- Ch. 190, *Discovery: Scope, Regulation, and Timing*.
- Ch. 191, *Discovery: Privileges and Other Discovery Limitations*.
- Ch. 192, *Discovery: Sanctions for Discovery Misuse*.
- Ch. 193, *Discovery: Depositions*.
- Ch. 194, *Discovery: Interrogatories*.
- Ch. 195, *Discovery: Inspection of Tangible Evidence*.

- Ch. 196, *Discovery: Requests for Admissions*.
- Ch. 197, *Discovery: Physical and Mental Examinations*.
- Ch. 198, *Discovery: Exchange of Expert Witness Information*.
- Ch. 199, *Discovery: Preservation of Evidence*.
- Ch. 200, *Discovery: Review of Discovery Orders*.
- Ch. 205, *Defaults and Default Judgments*.
- Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*.
- Ch. 254, *Executions and Enforcement of Judgments*.
- Ch. 357, *Malicious Prosecution and Abuse of Process*.
- Ch. 518, *Service of Summons and Papers*.
- Ch. 537, *Summary Judgment*.

[2] Related Points and Authorities Chapters

For landlord-tenant related points and authorities, including forms supporting and opposing the imposition of damages and supporting and opposing the constitutionality of rent control ordinances, see Ch. 141, *Landlord and Tenant* .

Related points and authorities that may be useful in particular cases where unlawful detainer is involved may be found in the following chapters in this publication:

- Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders*.
- Ch. 155, *Motions After Trial*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPretrial JudgmentsDefaultDefault JudgmentsReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & DetainerReal Property LawLandlord & TenantRent RegulationGeneral OverviewReal Property LawTitle QualityAdverse Claim ActionsUnlawful Detainer

California Points & Authorities

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Volume 23 Chapters 230-239 TRUST DEEDS---to---WORKERS' COMPENSATION
CHAPTER 236 UNLAWFUL DETAINER
PART I. INTRODUCTION

23-236 California Points & Authorities §§ 236.07-236.09

[Reserved]

§§ 236.07[Reserved]

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Volume 23 Chapters 230-239 TRUST DEEDS---to---WORKERS' COMPENSATION
CHAPTER 236 UNLAWFUL DETAINER
PART II. FORMS
PART A. Supporting Motions, Demurres, and Petitions

23-236 California Points & Authorities § 236.10

§ 236.10 Supporting Motion to Quash Service of Summons [Code Civ. Proc. § 418.10(a)(1)]--Five-Day Summons Insufficient When Additional Causes of Action Are Pleaded

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*], Plaintiff,	)	IES IN SUPPORT OF MOTION TO QUASH SER-
vs.	)	VICE OF SUMMONS
_____ [*name(s)*], Defendant(s).	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE MOTION TO QUASH SERVICE OF THE FIVE-DAY SUMMONS SHOULD BE GRANTED BECAUSE IT IS INSUFFICIENT TO CONFER JURISDICTION IN THIS CASE SINCE PLAINTIFF HAS PLEADED CAUSES OF ACTION IN ADDITION TO UNLAWFUL DETAINER.

A. Motion to Quash in Unlawful Detainer. A motion to quash service of summons is proper in an unlawful detainer proceeding (*Code Civ. Proc. § 1177*).

B. Motion to Quash. On or before the last day of his/her time to plead, or within any further time that the court may

for good cause allow, a defendant may serve and file a notice of motion to quash service of summons on the ground of the court's lack of jurisdiction over him/her (*Code Civ. Proc. § 418.10(a)(1)*).

C. Five-Day Summons Is Insufficient to Confer Jurisdiction. When a complaint pleads another cause of action in addition to one for unlawful detainer, a five-day summons is insufficient to confer jurisdiction in an unlawful detainer proceeding (*see Tropical Inv. Co. v. Brown (1919) 45 Cal. App. 205, 210, 187 P. 133*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities support a motion to quash service of summons in an unlawful detainer action when the five-day summons was served but when additional causes of action were pleaded, requiring a summons designating longer time in which to respond.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should provide an analysis of the allegations in plaintiff's complaint that demonstrates the complaint pleads a cause of action in addition to one for unlawful detainter.

[c] Related Pleading and Practice Chapters

For forms of a notice of motion to quash service of a summons, a declaration in support of such a motion, and an order quashing service, see California Forms of Pleading and Practice, Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances* (Matthew Bender). For alternative forms of this type of notice and order, and for a form of petition for writ of mandate to compel a lower court to quash service of summons, see California Forms of Pleading and Practice Ch. 518, *Service of Summons and Papers* .

[3] Discussion of Authorities

[a] Five-Day Summons Is Insufficient to Confer Jurisdiction

In ***Tropical Inv. Co. v. Brown*** *(1919) 45 Cal. App. 205, 187 P. 133* , the plaintiff filed a complaint containing two counts--the first in ejectment, the second based on unlawful detainer. The trial court entered judgment for the plaintiff, awarding damages. On appeal, the defendant contended that since the complaint contained a count in ejectment and a count in unlawful detainer, the three-day summons to appear [now five days; *see Code Civ. Proc. § 1167*] was insufficient. The court stated that when the defendant's demurrer to the complaint was overruled and she filed an answer within the four days thereafter required by the court, she appeared in the action (*45 Cal. App. 205, 210)* . The court conceded that the defendant was entitled to a longer time in which to appear on the count in ejectment. But having appeared generally and submitted to the court's jurisdiction without objection, she could not on appeal complain of the fact that the summons served was insufficient as to the time given her to appear. She should have moved to quash the summons (*45 Cal. App. 205, 210)* .

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PART A. Supporting Motions, Demurres, and Petitions

23-236 California Points & Authorities § 236.11

§ 236.11 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Failure to Allege Service of Three-Day Notice When Required [Code Civ. Proc. §§ 1161(2)-(4), 1161a]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*], Plaintiff,	)	IES IN SUPPORT OF DEMURRER TO COM-
vs.	)	PLAINT
_____ [*name(s)*], Defendant(s).	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT FAILS TO ALLEGE SERVICE OF A THREE-DAY NOTICE AS REQUIRED BY STATUTE.

A. Demurrer in Unlawful Detainer Proceeding. A defendant may demur in an unlawful detainer proceeding (*Code Civ. Proc. § 1170*).

B. Objection by Demurrer. The party against whom a complaint has been filed may object, by demurrer as provided in *Code of Civil Procedure Section 430.30*, to the complaint on the ground that it does not state facts sufficient to

constitute a cause of action (*Code Civ. Proc. § 430.10(e)*). When any ground for objection to a complaint appears on the face of the complaint [or from any matter of which the court is required to or may take judicial notice], the objection on that ground may be taken by a demurrer to the complaint (*Code Civ. Proc. § 430.30(a)*).

C. Basis for Recovery. A complaint in an unlawful detainer proceeding must set forth the facts on which the plaintiff seeks to recover (*Code Civ. Proc. § 1166(a)(2)*).

D. Service of Notice. A complaint in unlawful detainer must allege service of a three-day notice on the defendant in an unlawful detainer proceeding when this notice is required (*Zucco v. Farullo (1918) 37 Cal. App. 562, 568, 174 P. 929* (dictum)).

[*EITHER*]

E. Notice Required by *Code of Civil Procedure Section 1161(2)*. Service of a three-day notice to pay rent or quit is necessary for a cause of action for unlawful detainer under *Code of Civil Procedure Section 1161(2)* (*Code Civ. Proc. § 1161(2)*).

[*OR*]

E. Notice Required by *Code of Civil Procedure Section 1161(3)*. Service of a three-day notice to perform or quit is necessary for a cause of action for unlawful detainer under *Code of Civil Procedure Section 1161(3)* (*Code Civ. Proc. § 1161(3)*).

[*OR*]

E. Notice Required by *Code of Civil Procedure Section 1161(4)*. Service of a three-day notice to quit is necessary for a cause of action for unlawful detainer under *Code of Civil Procedure Section 1161(4)* (*Code Civ. Proc. § 1161(4)*).

[*OR*]

E. Notice Required by *Code of Civil Procedure Section 1161a*. Service of a three-day notice to quit is necessary for a cause of action for unlawful detainer under *Code of Civil Procedure Section 1161a* (*Code Civ. Proc. § 1161a*).

[*Optional*] **F. Lease Provision Ineffective.** A three-day notice required by statute must be served even if the lease contains a provision that purports to dispense with this requirement (*Haydell v. Silva (1962) 201 Cal. App. 2d 20, 23, 19 Cal. Rptr. 705*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities support a demurrer to a complaint in an unlawful detainer proceeding when the demurrer asserts that the complaint fails to state facts sufficient to constitute a cause of action in that it appears on the face of the complaint, or from any matter of which the court is required to or may take judicial notice, that the plaintiff has failed to allege service of a three-day notice in a situation when the notice is required by statute.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, the argument should establish that an analysis of the allegations in plaintiff's complaint demonstrates that the plaintiff failed to allege service of a three-day notice on the defendant.

[c] Related Pleading and Practice Chapters

For a discussion and general form of demurrer to complaint for failure to state a cause of action, see California Forms of Pleading and Practice Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For discussion and forms pertaining to unlawful detainer proceedings generally, see California Forms of Pleading and Practice Ch. 333, *Landlord and Tenant: Eviction Actions* .

[d] Related Points and Authorities

For related points and authorities, see in this set Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* (supporting demurrer to complaint on grounds that no cause of action has been stated).

[e] Opposing Points and Authorities

In an appropriate case, the points and *authorities in §§ 236.40 -236.43* may be used to oppose a demurrer to a complaint based on the failure to allege service of the three-day notice and supported by the points and authorities in [1], *above*.

[3] Discussion of Authorities

[a] Service of Notice

Zucco v. Farullo *(1918) 37 Cal. App. 562, 174 P. 929* , was an action primarily in unlawful detainer in which the defendant defaulted and judgment was entered for the plaintiff for possession of the premises and for damages. The defendant appealed, arguing that three causes of action were improperly united in the compaint. The unlawful detainer action was based on the breach of covenants to water and care for trees and the grounds and to furnish vegetables to the plaintiff from such grounds, and other covenants. The court of appeal affirmed, holding that, since the defendant failed to object to a misjoinder of causes of action on appeal, the judgment would not be reversed (*37 Cal. App. 562, 564)* . Further, the notice to quit was sufficient, although not in the alternative, because the defendant's breaches could not be cured. In dictum, the court noted that the allegations of the contents of the three-day notice were sufficient since it is not necessary to set out in full the notice served. It may be alleged either literally or according to its legal effect (*37 Cal. App. 562, 568)* . Also, the service was sufficiently alleged. It is only necessary for the plaintiff to allege that notice in writing was served on the defendant, not the method (*37 Cal. App. 562, 568)* .

[b] Lease Provision Ineffective

Haydell v. Silva *(1962) 201 Cal. App. 2d 20, 19 Cal. Rptr. 705* , was an action for wrongful termination of a lease and for recovery of personal property remaining on the leased premises. The defendant cross complained for payment of a promissory note. The court entered a judgment in the defendant's favor both in the original action and on his cross

complaint. The plaintiff was a tenant of the defendant. The defendant claimed she had failed to pay her rent for one month and on the first of the following month he padlocked the premises and posted a notice of the lease's termination on the outside of the premises. The lease contained a provision allowing reentry by the lessor in the event of a default in the payment of rent.

The court of appeal reversed the judgment, holding that the attempted lease termination was not legally effective for any purpose. A lessor is not entitled to take possession by forcible entry under a provision in the lease to the effect that, if rent is due and unpaid, the lessor may enter and remove all persons from the demised premises. The failure of the tenant to pay rent does not automatically work a forfeiture of the leasehold; it merely gives the lessor the right to terminate the lease in the manner provided by law. *Code Civ. Proc. § 1161(2)* requires a three-day notice in writing requiring the payment of rent, stating the amount due, or possession of the property, and this notice must be served on the tenant (*201 Cal. App. 2d 20, 23)* .

[4] Additional Authorities

[a] Service of Notice

In *Kwok v. Bergren (1982) 130 Cal. App. 3d 596, 181 Cal. Rptr. 795* , plaintiff had recognized two defendants as tenants in possession. Thereafter, when rent was not timely paid, plaintiff served a three-day notice on a person who was allegedly the manager of the premises but not on either defendant. After a judgment in favor of plaintiff, defendants appealed. The court of appeal reversed. It held that a three-day notice had to be served on tenants in possession and that it had not been properly served on such tenants. The superior court was directed to enter judgment in favor of defendants (*130 Cal. App. 3d 596, 600-601)* .

[b] Lease Provision Ineffective

Lamey v. Masciotra (1969) 273 Cal. App. 2d 709, 78 Cal. Rptr. 344 involved an action for damages for forcible entry and detainer. Judgment was entered for plaintiff. The plaintiff leased the premises from the defendants and fell behind in rent payments. The lease provided that, in the event the lessee was 10 days in arrears in rental payments, the lessors would have the right to reenter and take possession without written notice. The plaintiff received two registered letters about the late payments, including one which notified her that her tardy rental payments constituted defaults under the lease and that, if all rents then due and payable were not received by October 14th, the lessor would take possession of the property without further notice. In mid-October the plaintiff visited the defendant Masciotra to obtain his consent to a lease assignment. Defendant refused to discuss the matter and later on that day had the locks changed on the premises. As a result, the plaintiff was unable to operate her business on the premises.

The court of appeal affirmed the judgment and held that a tenant is entitled to a three-day notice to pay rent or quit and this notice is valid and enforceable only if the lessor strictly complies with the specifically described notice conditions (*273 Cal. App. 2d 709, 713)* . Unless the tenant cannot be found at the premises, the lessor must introduce evidence that the notice was personally served on the lessee. This was not done in this case and the registered letter was insufficient (*273 Cal. App. 2d 709, 713-714)* . Further, a landlord's summary reentry on leased premises for nonpayment of rent is not warranted, even though a clause expressly authorizing reenty appears in the lease unless the statutory three-day written notice is properly served on the tenant (*273 Cal. App. 2d 709, 714)* .

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23-236 California Points & Authorities § 236.12

§ 236.12 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Failure to Allege That Three-day Notice Was Written [Code Civ. Proc. §§ 1161(2)-(4), 1161a]

[1] FORM

[*Caption. See § 236.11[1].*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT FAILS TO ALLEGE THAT THE THREE-DAY NOTICE WAS WRITTEN AS REQUIRED BY STATUTE.

A. Demurrer in Unlawful Detainer Proceeding. [*See § 236.11]1], Paragraph A.*]

B. Objection by Demurrer. [*See § 236.11]1], Paragraph B.*]

C. Basis for Recovery. [*See § 236.11]1], Paragraph C.*]

D. Failure to State Cause of Action. When an insufficient three-day notice is served, the complaint fails to state a cause of action (*Baugh v. Consumers Associates, Ltd. (1966) 241 Cal. App. 2d 672, 675, 50 Cal. Rptr. 822*).

E. Strict Compliance With Notice Requirements. Strict compliance with the statutory provisions relating to the three-day notice to quit is a prerequisite to seeking the summary remedy of unlawful detainer (*Baugh v. Consumers Associates, Ltd. (1966) 241 Cal. App. 2d 672, 674, 50 Cal. Rptr. 822*).

F. Written Notice Required. The three-day notice required by *Code of Civil Procedure Section 1161(2) through (4)*, and *Code of Civil Procedure Section 1161a* must be written (*Code Civ. Proc. §§ 1161(2)-(4), 1161a*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____

[*name*]

[2] Comments

[a] Use of Form

These points and authorities support a demurrer to a complaint in an unlawful detainer action when the complaint fails to allege that the three-day notice required by statute was written.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should show that the plaintiff's complaint does not allege that the three-day notice was written.

[c] Related Uses

With appropriate modifications the points and authorities in [1], *above*, may be used to support a demurrer to complaint when it affirmatively appears on the face of the complaint that the notice was not written.

[d] Related Pleading and Practice Chapters

For a discussion and a general form of demurrer to complaint for failure to state a cause of action, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For discussion and forms pertaining to unlawful detainer proceedings generally, see California Forms of Pleading and Practice Ch. 333, *Landlord and Tenant: Eviction Actions* .

[e] Related Points and Authorities

For related points and authorities, see in this set Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* (supporting demurrer to complaint on grounds that no cause of action has been stated).

[3] Discussion of Authorities

[a] Failure to State Cause of Action

In ***Baugh v. Consumers Associates, Ltd.*** *(1966) 241 Cal. App. 2d 672, 50 Cal. Rptr. 822* , the defendant's default was entered in an unlawful detainer proceeding. The defendant moved to set aside the default and accompanied its motion with a copy of its proposed answer. The motion was denied and the court entered judgment granting the plaintiff possession of the premises and granting treble damages. The plaintiffs' complaint alleged the making of the lease and that the defendant had agreed to pay not less than $3,000 per month. It further alleged nonpayment of rent for the months of January and February, together with a written demand and notice to pay rent or quit. A copy of the notice was attached to the complaint and made a part of it. In the notice no amount of delinquent rent was stated and the period of the alleged delinquency was not mentioned.

The court of appeal reversed, holding that the complaint did not state a cause of action because the three-day notice did not specify the amount of rent claimed to be due (*241 Cal. App. 2d 672, 674)* . *Code Civ. Proc. § 1161* specifically

provides that a tenant of real property is guilty of unlawful detainer when he or she continues in possession after default in the payment of rent "and three days' notice, in writing, requiring its payment, stating the amount which is due" has been served on him or her. Strict compliance with this provision of the unlawful detainer statute is mandatory. The remedy of unlawful detainer is a summary proceeding to determine the right to possession of real property. Since it is purely statutory in nature, it is essential that a party seeking the remedy bring himself or herself clearly within the statute (*241 Cal. App. 2d 672, 674-675)* .

[b] Strict Compliance With Notice Requirements

Baugh v. Consumers Associates, Ltd. *(1966) 241 Cal. App. 2d 672, 50 Cal. Rptr. 822* , is discussed under [a], *above.*

[4] Additional Authorities

[a] Strict Compliance With Notice Requirements

Lamey v. Masciotra (1969) 273 Cal. App. 2d 709, 78 Cal. Rptr. 344 , involved an action for damages for forcible entry and detainer. Judgment was entered for plaintiff. The plaintiff leased the premises from the defendants and fell behind in rent payments. The lease provided that in the event the lessee was 10 days in arrears in rental payments the lessor would have the right to reenter and take possession without written notice. The plaintiff received two registered letters about the late payments, including one which notified her that her tardy rental payments constituted defaults under the lease and that if all rents then due and payable were not received by October 14th the lessor would take possession of the property without further notice. In mid-October the plaintiff visited the defendant Masciotra to obtain his consent to a lease assignment. Defendant refused to discuss the matter and later on that day had the locks changed on the premises. As a result, the plaintiff was unable to operate her business on the premises. The court of appeal affirmed the judgment.

The court held that a tenant is entitled to a three-day notice to pay rent or quit which may be enforced by summary legal proceedings, but that this notice is valid and enforceable only if the lessor strictly complies with the specifically described notice conditions (*273 Cal. App. 2d 709, 713)* . In the instant case, the registered letter was not sufficient service of the notice. Unless the tenant cannot be found at the premises, the lessor must introduce evidence that the notice was personally served on the lessee (*273 Cal. App. 2d 709, 713-714)* .

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23-236 California Points & Authorities § 236.13

§ 236.13 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Notice Fails to Demand Precise Amount Due [Code Civ. Proc. § 1161(2)]

[1] FORM

[*Caption. See § 236.11[1].*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT SHOWS ON ITS FACE THAT THE THREE-DAY NOTICE DOES NOT DEMAND THE PRECISE AMOUNT OF RENT DUE.

A. Demurrer in Unlawful Detainer Proceeding. [*See § 236.11]1], Paragraph A.*]

B. Objection by Demurrer. [*See § 236.11]1], Paragraph B.*]

C. Failure to State Cause of Action. When an insufficient three-day notice is served, the complaint fails to state a cause of action (*Baugh v. Consumers Associates, Ltd. (1966) 241 Cal. App. 2d 672, 675, 50 Cal. Rptr. 822*).

D. Strict Compliance With Notice Requirements. Strict compliance with the statutory provisions relating to the three-day notice to quit is a prerequisite to seeking the summary remedy of unlawful detainer (*Baugh v. Consumers Associates, Ltd. (1966) 241 Cal. App. 2d 672, 674, 50 Cal. Rptr. 822*).

E. Demand for Precise Amount of Rent Due. When an unlawful detainer is based on a default in the payment of rent, the notice to pay rent or quit must demand the exact amount of rent claimed to be due (*Baugh v. Consumers Associates, Ltd. (1966) 241 Cal. App. 2d 672, 674, 50 Cal. Rptr. 822*).

[*Optional*] **F. Demand for "Rent" Is Insufficient.** A demand for "the rent" is insufficient to support a forfeiture (*J.B. Hill Co. v. Pinque (1919) 179 Cal. 759, 762-763, 178 P. 952*).

[*Optional*] **G. Demand in Excess of Amount Due Is Insufficient.** A notice in which the demand for rent exceeds the amount due is insufficient (*Johnson v. Sanches (1942) 56 Cal. App. 2d 115, 118, 132 P.2d 853*).

[*Optional*] **H. Demand in Excess of One Year's Rent Is Insufficient.** A notice in which demand exceeds rent owed for more than one year is insufficient (*Bevill v. Zoura (1994) 27 Cal. App. 4th 694, 698, 32 Cal. Rptr. 2d 635*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____

[*name*]

[2] Comments

[a] Use of Form

These points and authorities support a demurrer to a complaint in an unlawful detainer proceeding when the demurrer alleges that the complaint fails to state a cause of action in that it appears on the face of the complaint that the three-day notice failed to demand the precise amount of rent due. This defect would appear on the face of the complaint if the notice is attached and incorporated by reference or if the complaint alleges the notice's contents in specific terms. This form may be used in any of the following circumstances:

- When the notice fails to demand any specific sum;

- When the amount demanded exceeds the amount owed and this is apparent from the face of the complaint (as when the lease is incorporated by reference); or

- When the amount demanded includes charges other than rent and the demand states that the amount is for rent and these other charges.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should show that the plaintiff's three-day notice does not demand the precise amount of rent due or that the amount demanded is more than the amount owed.

[c] Related Pleading and Practice Chapters

For discussion of a general form of demurrer to complaint for failure to state a cause of action, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For discussion and forms pertaining to unlawful detainer proceedings generally, see California Forms of Pleading and Practice Ch. 333, *Landlord and Tenant: Eviction Actions* .

[d] Related Points and Authorities

For related points and authorities, see in this set Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* (supporting demurrer to complaint on grounds that no cause of action has been stated).

[3] Discussion of Authorities

[a] Failure to State Cause of Action

In ***Baugh v. Consumers Associates, Ltd.*** *(1966) 241 Cal. App. 2d 672, 50 Cal. Rptr. 822* , the defendant's default was entered in an unlawful detainer proceeding. The defendant moved to set aside the default and accompanied its motion with a copy of its proposed answer. The motion was denied and the court entered judgment granting the plaintiff possession of the premises and granting treble damages. The plaintiff's complaint alleged the making of the lease and that the defendant had agreed to pay not less than $3,000 per month. It further alleged nonpayment of rent for the months of January and February, together with a written demand and notice to pay rent or quit. A copy of the notice was attached to the complaint and made a part of it. In the notice no amount of delinquent rent was stated and the period of the alleged delinquency was not mentioned. The court of appeal reversed, holding that the complaint did not state a cause of action because the three-day notice did not specify the amount of rent claimed to be due (*241 Cal. App. 2d 672, 674)* . *Code Civ. Proc. § 1161* specifically provides that a tenant of real property is guilty of unlawful detainer when he or she continues in possession after default in the payment of rent "and three days' notice, in writing, requiring its payment, stating the amount which is due" has been served on the tenant. Strict compliance with this provision of the unlawful detainer statute is mandatory. The remedy of unlawful detainer is a summary proceeding to determine the right to possession of real property. Since it is purely statutory in nature, it is essential that a party seeking the remedy bring himself or herself clearly within the statute (*241 Cal. App. 2d 672, 674)* .

[b] Strict Compliance With Notice Requirements

Baugh v. Consumers Associates, Ltd. *(1966) 241 Cal. App. 2d 672, 50 Cal. Rptr. 822* , is discussed under [a], *above.*

[c] Demand for Precise Amount of Rent Due

Baugh v. Consumers Associates, Ltd. *(1966) 241 Cal. App. 2d 672, 50 Cal. Rptr. 822* , is discussed under [a], *above.*

[d] Demand for "Rent" Is Insufficient

J.B. Hill Co. v. Pinque *(1919) 179 Cal. 759, 178 P. 952* , involved an action to recover the possession of certain premises, together with damages. Judgment was entered in the plaintiff's favor. The plaintiff alleged nonpayment of rent. The trial court found that the plaintiff demanded an exact sum of rent. The appellant contended that the evidence did not sustain the finding that such a demand was made. In reversing, the Supreme Court held that the plaintiff's demand for rent was insufficient to authorize a forfeiture of the lease. A demand for payment of the exact sum due is a necessary prerequisite to a forfeiture of a lease for nonpayment of rent. When the plaintiff just asks for the "rent" and does not demand any specified amount, it falls short of the specific demand required by law (*179 Cal. 759, 762)* . The evidence showed that the refusal was not absolute, but that the tenant merely declined to pay pending an adjustment of a dispute concerning the plaintiff's right to make certain changes in the premises. But even if the defendant had flatly refused to pay the rent, this would not authorize a forfeiture of her lease in the absence of a proper demand. The plaintiff failed to establish a ground for the forfeiture of the lease and recovery of the premises for nonpayment of rent (*179 Cal. 759, 762)* .

[e] Demand in Excess of Amount Due Is Insufficient

In ***Johnson v. Sanches*** *(1942) 56 Cal. App. 2d 115, 132 P.2d 853* , the plaintiff brought an action for unlawful detainer after serving a three-day notice to pay rent or surrender possession. The trial court entered judgment for the plaintiff. The defendant had leased two parcels from the plaintiff, one of 100 acres and the other was for 38 acres. The monthly rental for the 100-acre parcel was $208.34 and the annual rental for the 38-acre parcel was $950. The three-day notice demanded rent in the amount of $1,550.38. Included in the demand was $750 claimed to be due on the 38-acre parcel. The trial court found that $750 of the amount demanded was not owed by defendant. The court of appeal

reversed the judgment holding that, to work a forfeiture of a lease for nonpayment of rent, the landlord must demand of the tenant the payment of the exact sum due (*56 Cal. App. 2d 115, 116-117)* . The notice in the instant case did not comply with the requirements of *Code Civ. Proc. § 1161* in that the amount demanded as rent was $750 in excess of the amount then due (*56 Cal. App. 2d 115, 118)* .

[f] Demand in Excess of One Year's Rent Is Insufficient

In ***Bevill v. Zoura*** *(1994) 27 Cal. App. 4th 694, 32 Cal. Rptr. 2d 635* , the landlord filed an unlawful detainer action following service on the tenant of a three-day notice. The notice demanded payment of more than one year's rent. The court of appeal held that the notice was insufficient to support the unlawful detainer action because it did not correctly state the amount that is due and because it was not served within one year after the rent become due, both of which are required under *Code Civ. Proc. § 1161(2)* (*27 Cal. App. 4th 694, 697-698)* . The facts consitituting ineffective notice appeared on the face of the notice, that is, the demand included rent owed more than one year before the three-day notice was served. Accordingly, the tenant was not required to plead his theory of ineffective notice as an affirmative defense. The court noted that the tenant had raised the issue of ineffective notice in its trial brief, and that there was no assertion by the landlord that he was unfairly surprised or prejudiced by the tenant's failure to raise the issue as an affirmative defense (*27 Cal. App. 4th 694, 698)* .

[4] Additional Authorities

[a] Strict Compliance With Notice Requirements

Lamey v. Masciotra (1969) 273 Cal. App. 2d 709, 78 Cal. Rptr. 344 , involved an action for damages for forcible entry and detainer. Judgment was entered for plaintiff. The plaintiff leased the premises from the defendants and fell behind in rent payments. The lease provided that in the event the lessee was 10 days in arrears in rental payments the lessor would have the right to reenter and take possession without written notice. The plaintiff received two registered letters about the late payments, including one which notified her that her tardy rental payments constituted defaults under the lease and that if all rents then due and payable were not received by October 14th the lessor would take possession of the property without further notice. In mid-October the plaintiff visited the defendant Masciotra to obtain his consent to a lease assignment. Defendant refused to discuss the matter and later on that day had the locks changed on the premises. As a result, the plaintiff was unable to operate her business on the premises. The court of appeal affirmed the judgment.

The court held that a tenant is entitled to a three-day notice to pay rent or quit, which may be enforced by summary legal proceedings, but that this notice is valid and enforceable only if the lessor strictly complies with the specifically described notice conditions (*273 Cal. App. 2d 709, 713)* . In this case, the registered letter was not sufficient service of the notice. Unless the tenant cannot be found at the premises, the lessor must introduce evidence that the notice was personally served on the lessee (*273 Cal. App. 2d 709, 713-714)* .

[b] Demand in Excess of Amount Due Is Insufficient

In *Werner v. Sargeant (1953) 121 Cal. App. 2d 833, 264 P.2d 217* , an action for unlawful detainer based on nonpayment of rent, the defendant appealed from a summary judgment entered for the plaintiff. That judgment granted rent to the plaintiff at $300 a month, while the demand and notice to quit filed under *Code Civ. Proc. § 1161* had demanded rent at $350 per month. An affirmative defense that incorporated the lease and disputed the amount of actual "rent" being paid was struck on the grounds that such a defense could not be asserted in an unlawful detainer action. In fact, the demand for payment had been for seven months' rent at $350 per month, less several hundred dollars paid to the plaintiff or credited on defendant's obligation, while the judgment was for eight months' rent, without deductions of any kind, at $300 per month. Because, so far as the record was concerned, the notice to pay rent or quit did not correctly set forth the amount of rent due as required by *Code Civ. Proc. § 1161*, judgment was reversed by the court of appeal.

The court, emphasizing that the summary judgment process is purely statutory and to be employed only in cases when no material issue of fact is presented, held that *Code Civ. Proc. § 1161* requires that to work a forfeiture of a lease for nonpayment of rent the landlord must demand the precise sum due, and that a demand in excess of the judgment will not support the judgment (*121 Cal. App. 2d 833, 837)* .

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Volume 23 Chapters 230-239 TRUST DEEDS---to---WORKERS' COMPENSATION
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PART A. Supporting Motions, Demurres, and Petitions

23-236 California Points & Authorities § 236.13A

§ 236.13A Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Notice Fails to State to Whom Payment Must Be Made [Code Civ. Proc. § 1161(2)]

[1] FORM

[*Caption. See § 236.11[1].*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT SHOWS ON ITS FACE THAT THE THREE-DAY NOTICE DOES NOT SPECIFY TO WHOM THE RENT PAYMENT MUST BE MADE.

A. Demurrer in Unlawful Detainer Proceeding. [*See § 236.11]1], Paragraph A.*]

B. Objection by Demurrer. [*See § 236.11]1], Paragraph B.*]

C. Failure to State Cause of Action. When an insufficient three-day notice is served, the complaint fails to state a cause of action (*Baugh v. Consumers Associates, Ltd. (1966) 241 Cal. App. 2d 672, 675, 50 Cal. Rptr. 822*).

D. Strict Compliance With Notice Requirements. Strict compliance with the statutory provisions relating to the three-day notice to quit is a prerequisite to seeking the summary remedy of unlawful detainer (*Baugh v. Consumers Associates, Ltd. (1966) 241 Cal. App. 2d 672, 674, 50 Cal. Rptr. 822*).

E. Three-day Notice Must State to Whom Rent Payment Must Be Made. When an unlawful detainer is based on a default in the payment of rent, the three-day notice to pay rent or quit must set forth the name, telephone number, and address of the person to whom the rent payment is to be made, and the usual days and hours that person will be available to receive the payment or the number of an account or the name and street address of a financial institution into which the rental payment may be made. If an electronic funds transfer procedure has been previously established, the notice must state that payment may be made pursuant to that procedure (*Code Civ. Proc. § 1161(2)*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____

[*name*]

[2] Comments

[a] Use of Form

These points and authorities support a demurrer to a complaint in an unlawful detainer proceeding when the demurrer alleges that the complaint fails to state a cause of action in that it appears on the face of the complaint that the three-day notice failed to specify to whom the rent payment must be made and how such payment may be made. This defect would appear on the face of the complaint if the notice is attached and incorporated by reference or if the complaint alleges the notice's contents in specific terms.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should show that the plaintiff's three-day notice does not specify to whom payment must be made.

[c] Related Pleading and Practice Chapters

For discussion of a general form of demurrer to complaint for failure to state a cause of action, see California Forms of Pleading and Practice, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For discussion and forms pertaining to unlawful detainer proceedings generally, see California Forms of Pleading and Practice Ch. 333, *Landlord and Tenant: Eviction Actions* .

[d] Related Points and Authorities

For related points and authorities, see in this set Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* (supporting demurrer to complaint on grounds that no cause of action has been stated).

[3] Discussion of Authorities

[a] Failure to State Cause of Action

In ***Baugh v. Consumers Associates, Ltd.*** *(1966) 241 Cal. App. 2d 672, 50 Cal. Rptr. 822* , the defendant's default was entered in an unlawful detainer proceeding. The defendant moved to set aside the default and accompanied its motion with a copy of its proposed answer. The motion was denied and the court entered judgment granting the plaintiff possession of the premises and granting treble damages. The plaintiff's complaint alleged the making of the lease and that the defendant had agreed to pay not less than $3,000 per month. It further alleged nonpayment of rent for the months of January and February, together with a written demand and notice to pay rent or quit. A copy of the notice was attached to the complaint and made a part of it. In the notice no amount of delinquent rent was stated and the period of the alleged delinquency was not mentioned. The court of appeal reversed, holding that the complaint did not state a cause of action because the three-day notice did not specify the amount of rent claimed to be due (*241 Cal. App. 2d 672, 674)* . *Code Civ. Proc. § 1161* specifically provides that a tenant of real property is guilty of unlawful detainer when he or she continues in possession after default in the payment of rent "and three days' notice, in writing, requiring

its payment, stating the amount which is due" has been served on the tenant. Strict compliance with this provision of the unlawful detainer statute is mandatory. The remedy of unlawful detainer is a summary proceeding to determine the right to possession of real property. Since it is purely statutory in nature, it is essential that a party seeking the remedy bring himself or herself clearly within the statute (*241 Cal. App. 2d 672, 674)* .

[b] Strict Compliance With Notice Requirements

Baugh v. Consumers Associates, Ltd. *(1966) 241 Cal. App. 2d 672, 50 Cal. Rptr. 822* , is discussed under [a], *above*.

[c] Three-day Notice Must State to Whom Rent Payment Must Be Made

Code Civ. Proc. § 1161(2) requires that the notice set forth the name, telephone number, and address of the person to whom the rent payment is to be made. If the payment may be made personally, the notice must state the usual days and hours the person will be available to receive the payment or the number of an account and the name and street address of a financial institution into which the rental payment may be made (provided that the institution is located within five miles of the rental property). If an electronic funds transfer procedure has been previously established, the notice must state that payment may be made pursuant to that procedure.

If the address for payment does not allow for personal delivery, it will be conclusively presumed that on the mailing of any rent or notice to the owner by the tenant to the name and address provided, the notice or rent is deemed received by the owner on the date posted, if the tenant can show proof of mailing to the name and address provided by the owner (*Code Civ. Proc. § 1161(2)*).

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CHAPTER 236 UNLAWFUL DETAINER
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23-236 California Points & Authorities § 236.14

§ 236.14 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Notice Not in the Alternative [Code Civ. Proc. § 1161(2), (3)]

[1] FORM

[*Caption. See § 236.11[1].*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT SHOWS ON ITS FACE THAT THE DEMAND IN THE THREE-DAY NOTICE WAS NOT IN THE ALTERNATIVE AS REQUIRED BY STATUTE.

A. Demurrer in Unlawful Detainer Proceeding. [*See § 236.11]1], Paragraph A.*]

B. Objection by Demurrer. [*See § 236.11]1], Paragraph B.*]

C. Failure to State Cause of Action. If an insufficient three-day notice is served, the complaint fails to state a cause of action (*Baugh v. Consumers Associates, Ltd. (1966) 241 Cal. App. 2d 672, 675, 50 Cal. Rptr. 822*).

D. Strict Compliance With Notice Requirements. Strict compliance with the statutory provisions relating to the three-day notice to quit is a prerequisite to seeking the summary remedy of unlawful detainer (*Baugh v. Consumers Associates, Ltd. (1966) 241 Cal. App. 2d 672, 674, 50 Cal. Rptr. 822*).

[*EITHER*]

E. Alternative Demands Required by *Code of Civil Procedure Section 1161(2)*. When an unlawful detainer action is based on a default in rent, the three-day notice must include a demand for the payment of rent and, in the alternative, a demand to quit the premises (*Code Civ. Proc. § 1162(2)*).

[*OR*]

E. Alternative Demands Required by *Code of Civil Procedure Section 1161(3)* for Curable Breach of Covenant. When an unlawful detainer action is based on a breach of a condition or covenant of the lease when the breach can be cured, the three-day notice must include a demand to cure the breach and, in the alternative, a demand to quit the premises (*Code Civ. Proc. § 1162(3)*).

F. Nonalternative Demand Is Insufficient. When the demand in a three-day notice is required to be framed in the alternative, a notice that merely directs the tenant to quit is insufficient to render the tenant guilty of unlawful detainer on his/her continued possession (*Hinman v. Wagnon (1959) 172 Cal. App. 2d 24, 28-29, 341 P.2d 749*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____

[*name*]

[2] Comments

[a] Use of Form

These points and authorities support a defendant's demurrer to a complaint in an unlawful detainer proceeding when it appears on the face of the complaint that the demand contained in the required three-day notice is not in the alternative as prescribed by *Code Civ. Proc. § 1161(2)* (default in payment of rent) and *Code Civ. Proc. § 1161(3)* (breach of covenant when breach is curable). This defect would appear on the face of the complaint if the notice is attached and incorporated by reference or if the complaint alleges the contents of the notice in specific terms.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should show that the three-day notice demand did not include an alternative.

[c] Related Uses

With appropriate modifications the points and authorities in [1], *above*, may be used to support a motion for summary judgment based on an affirmative defense which alleges that the three-day notice is insufficient because the demand for possession was not in the alternative as required by *Code Civ. Proc. § 1161(2)* or *(3)*.

[d] Related Pleading and Practice Chapters

For discussion and a general form of demurrer to complaint for failure to state a cause of action, see California Forms of Pleading and Practice Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For discussion and forms pertaining to unlawful detainer proceedings generally, see California Forms of Pleading and PracticeCh. 333, *Landlord and Tenant: Eviction Actions* .

[e] Related Points and Authorities

For related points and authorities, see in this set Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* (supporting demurrer to complaint on grounds that no cause of action has been stated).

[f] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 236.44* (notice not required to be in alternative) may be used to oppose the demurrer to the complaint (notice not in alternative) supported by the points and authorities in [1], *above*.

[3] Discussion of Authorities

[a] Failure to State Cause of Action

In ***Baugh v. Consumers Associates, Ltd.*** *(1966) 241 Cal. App. 2d 672, 50 Cal. Rptr. 822* , the defendant's default was entered in an unlawful detainer proceeding. The defendant moved to set aside the default and accompanied its motion with a copy of its proposed answer. The motion was denied and the court entered judgment granting the plaintiff possession of the premises and granting treble damages. The plaintiff's complaint alleged the making of the lease and that the defendant had agreed to pay not less than $3,000 per month. It further alleged nonpayment of rent for the months of January and February, together with a written demand and notice to pay rent or quit. A copy of the notice was attached to the complaint and made a part of it. In the notice no amount of delinquent rent was stated and the period of the alleged delinquency was not mentioned.

The court of appeal reversed, holding that the complaint did not state a cause of action because the three-day notice did not specify the amount of rent claimed to be due (*241 Cal. App. 2d 672, 674)* . *Code Civ. Proc. § 1161* specifically provides that a tenant of real property is guilty of unlawful detainer when he or she continues in possession after default in the payment of rent "and three days' notice, in writing, requiring its payment, stating the amount which is due" has been served on him or her. Strict compliance with this provision of the unlawful detainer statute is mandatory and the remedy of unlawful detainer is a summary proceeding to determine the right to possession of real property. Since it is purely statutory in nature, the court found that it is essential that a party seeking the remedy bring himself or herself clearly within the statute (*241 Cal. App. 2d 672, 674)* .

[b] Strict Compliance With Notice Requirements

Baugh v. Consumers Associates, Ltd. *(1966) 241 Cal. App. 2d 672, 50 Cal. Rptr. 822* , is discussed under [a], *above*.

[c] Nonalternative Demand Is Insufficient

In ***Hinman v. Wagnon*** *(1959) 172 Cal. App. 2d 24, 341 P.2d 749* , the trial court entered a judgment of dismissal in an unlawful detainer proceeding after a demurrer to the second amended complaint was sustained without leave to amend. The plaintiff had leased property to the defendant and in the action alleged that the defendant failed to comply with various terms of the lease with respect to rental payments and other covenants. The plaintiff sent a written notice to the defendant demanding that he deliver up possession of the premises. The court of appeal affirmed the judgment. The court stated that for a person to avail himself or herself of the summary remedy of unlawful detainer, he or she must bring himself or herself within the terms of the statute establishing this relief (*172 Cal. App. 2d 24, 27)* . In the instant case, the plaintiff anchored his right of action on *Code Civ. Proc. § 1161(2)* and *(3)*, alleging that the defendant defaulted in the payment of rentals and did not comply with other covenants of the lease. The court found that the notice required under these two subdivisions must be framed in the alternative: pay the rent or quit, perform the covenant or quit. Accordingly, it then held that a notice which merely directs the tenant to quit is insufficient to render the tenant guilty of unlawful detainer on his or her continued possession (*172 Cal. App. 2d 24, 28-29)* .

[4] Additional Authorities

[a] Strict Compliance With Notice Requirements

Lamey v. Masciotra (1969) 273 Cal. App. 2d 709, 78 Cal. Rptr. 344 , involved an action for damages for forcible entry and detainer. Judgment was entered for plaintiff. The plaintiff leased the premises from the defendants and fell behind in rent payments. The lease provided that in the event the lessee was 10 days in arrears in rental payments the lessor would have the right to reenter and take possession without written notice. The plaintiff received two registered letters about the late payments, including one which notified her that her tardy rental payments constituted defaults under the lease and that if all rents then due and payable were not received by October 14th the lessor would take possession of the property without further notice. In mid-October the plaintiff visited the defendant Masciotra to obtain his consent to a lease assignment. Defendant refused to discuss the matter and later on that day had the locks changed on the premises. As a result, the plaintiff was unable to operate her business on the premises. The court of appeal affirmed the judgment.

The court held that a tenant is entitled to a three-day notice to pay or quit which may be enforced by summary legal proceedings, but that this notice is valid and enforceable only if the lessor strictly complies with the specifically described notice conditions. In the instant case, the registered letter was not sufficient service of the notice. Unless the tenant cannot be found at the premises, the lessor must introduce evidence that the notice was personally served on the lessee (*273 Cal. App. 2d 709, 713-714)* .

[b] Nonalternative Demand Is Insufficient

Feder v. Wreden Packing & Provision Co., Inc. (1928) 89 Cal. App. 665, 265 P. 386 , involved an unlawful detainer action in which there was judgment for the plaintiffs. The defendants had leased floor space in plaintiffs' storeroom for use as a store. The lease was for five years and the rent was to be 75 percent of the net profits made by the defendant in the store. The lease provided for the method of determining the amount of rent, including a requirement that stock in the store be inventoried at the actual cost prices to the defendant. This arrangement was satisfactory for a year and a half and then the plaintiffs served notice to quit and deliver up possession of the premises based on violation of covenants, including the computation of the profits.

The court of appeal reversed, holding that *Code Civ. Proc. § 1161* clearly requires that notice be given to the tenant that in the event of failure to pay delinquent rent or perform a defaulted covenant the landlord will exercise his or her right under the law to regain possession of the premises. The notice set forth in the complaint in this case did not meet these requirements and thus did not state a cause of action (*89 Cal. App. 665, 670)* .

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23-236 California Points & Authorities § 236.15

§ 236.15 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Equivocal Demand for Possession in Three-Day Notice

[1] FORM

[*Caption. See § 236.11[1].*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT SHOWS ON ITS FACE THAT THE DEMAND FOR POSSESSION IN THE THREE-DAY NOTICE WAS EQUIVOCAL.

A. Demurrer in Unlawful Detainer Proceeding. [*See § 236.11]1], Paragraph A.*]

B. Objection by Demurrer. [*See § 236.11]1], Paragraph B.*]

C. Failure to State Cause of Action. When an insufficient three-day notice is served, the complaint fails to state a cause of action (*Baugh v. Consumers Associates, Ltd. (1966) 241 Cal. App. 2d 672, 675, 50 Cal. Rptr. 822*).

D. Strict Compliance With Notice Requirements. Strict compliance with the statutory provisions relating to the three-day notice to quit is a prerequisite to seeking the summary remedy to unlawful detainer (*Baugh v. Consumers Associates, Ltd. (1966) 241 Cal. App. 2d 672, 674, 50 Cal. Rptr. 822*).

E. Unequivocal Demand for Possession Required. A demand for possession contained in a three-day notice must be unequivocal and without ambiguity (*Horton-Howard v. Payton (1919) 44 Cal. App. 108, 112, 186 P. 167*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____

[*name*]

[2] Comments

[a] Use of Form

These points and authorities support a demurrer to a complaint in an unlawful detainer proceeding when it appears on the face of the complaint that the demand for possession contained in the required three-day notice is equivocal. This defect would appear on the face of the complaint if the notice is attached and incorporated by reference or if the complaint alleges the contents of the notice in specific terms.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should provide facts showing that the demand for possession in the three-day notice was ambiguous.

[c] Related Uses

With appropriate modifications the points and authorities in [1], *above*, may be used to support a motion for summary judgment based on an affirmative defense which alleges that the three-day notice is insufficient because the demand for possession was equivocal.

[d] Related Pleading and Practice Chapters

For discussion and a general form of a demurrer to a complaint for failure to state a cause of action, see California Forms of Pleading and Practice Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For discussion and forms pertaining to unlawful detainer proceedings generally, see California Forms of Pleading and Practice Ch. 333, *Landlord and Tenant: Eviction Actions* .

[e] Related Points and Authorities

For related points and authorities, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* (supporting demurrer to complaint on grounds that no cause of action has been stated).

[3] Discussion of Authorities

[a] Failure to State Cause of Action

In ***Baugh v. Consumers Associates, Ltd.*** *(1966) 241 Cal. App. 2d 672, 50 Cal. Rptr. 822* , the defendant's default was entered in an unlawful detainer proceeding. The defendant moved to set aside the default and accompanied its motion with a copy of its proposed answer. The motion was denied and the court entered judgment granting the plaintiff possession of the premises and granting treble damages. The plaintiffs' complaint alleged the making of the lease and that the defendant had agreed to pay not less than $3,000 per month. It further alleged nonpayment of rent for the months of January and February, together with a written demand and notice to pay rent or quit. A copy of the notice was attached to the complaint and made a part of it. In the notice no amount of delinquent rent was stated and the period of the alleged delinquency was not mentioned.

The court of appeal reversed, holding that the complaint did not state a cause of action because the three-day notice did

not specify the amount of rent claimed to be due (*241 Cal. App. 2d 672, 674)* . *Code Civ. Proc. § 1161* specifically provides that a tenant of real property is guilty of unlawful detainer when he or she continues in possession after default in the payment of rent "and three days' notice, in writing, requiring its payment, stating the amount which is due" has been served on the tenant. Strict compliance with this provision of the unlawful detainer statute is mandatory. The remedy of unlawful detainer is a summary proceeding to determine the right to possession of real property. Since it is purely statutory in nature, it is essential that a party seeking the remedy bring himself or herself clearly within the statute (*241 Cal. App. 2d 672, 674)* .

[b] Strict Compliance With Notice Requirements

Baugh v. Consumers Associates, Ltd. *(1966) 241 Cal. App. 2d 672, 50 Cal. Rptr. 822* , is discussed under [a], *above.*

[c] Unequivocal Demand for Possession Required

In ***Horton-Howard v. Payton*** *(1919) 44 Cal. App. 108, 186 P. 167* , the plaintiff brought an action for unlawful detainer but judgment was entered for the defendants. The defendants leased a ranch from the plaintiff, agreeing to plant the entire ranch in beets and pay the lessors one-fourth of all the crops raised. The plaintiff alleged that the defendants breached their covenant to plant the beets and also that the defendants committed waste in diverting water from the leased premises. The plaintiff's attorney sent a letter to the defendants stating that they had repeatedly violated the terms of the lease and that the plaintiff demanded possession. The letter also asked the defendants to make a full statement giving details of water sold from the premises and asked to hear from the defendants at once.

The court of appeal affirmed the judgment, holding that no demand for possession as required by the statute was ever served on the defendants (*44 Cal. App. 108, 110)* . Service of such a demand is a condition precedent to the forfeiture of the defendants' leasehold interest. Since forfeitures are not favored by the courts, every intendment and presumption is against the person seeking to enforce the forfeiture. Statutes creating forfeitures must be strictly construed, and one who seeks the summary remedy of unlawful detainer allowed by the statute must bring himself or herself clearly within its terms. A sufficient notice to quit must clearly, positively, and unequivocally disclose the intention of the landlord to repossess the premises. It must be positive, decisive, and without ambiguity (*44 Cal. App. 108, 112)* . In this case, the letter with its requests to remit a statement of the water sold and asking to hear from the defendants was not unequivocal but might suggest some alternative arrangement, inviting the defendants to express themselves in regard to it. The letter was not a sufficient demand for possession (*44 Cal. App. 108, 113-114)* .

It should be noted that in *Horton-Howard* the notice required was not in the alternative since the action was based on waste [*see Code Civ. Proc. § 1161(4)*] and the breach of a covenant that could not be cured [*see Code Civ. Proc. § 1161(3)*].

[4] Additional Authorities

[a] Strict Compliance With Notice Requirements

Lamey v. Masciotra (1969) 273 Cal. App. 2d 709, 78 Cal. Rptr. 344 , involved an action for damages for forcible entry and detainer. Judgment was entered for plaintiff. The plaintiff leased the premises from the defendants and fell behind in rent payments. The lease provided that in the event the lessee was 10 days in arrears in rental payments the lessor would have the right to reenter and take possession without written notice. The plaintiff received two registered letters about the late payments, including one which notified her that her tardy rental payments constituted defaults under the lease and that if all rents then due and payable were not received by October 14th the lessor would take possession of the property without further notice. In mid-October the plaintiff visited the defendant Masciotra to obtain his consent to a lease assignment. Defendant refused to discuss the matter and later on that day had the locks changed on the premises. As a result, the plaintiff was unable to operate her business on the premises.

The court of appeal affirmed the judgment and held that a tenant is entitled to a three-day notice to pay rent or quit which may be enforced by summary legal proceedings, but that this notice is valid and enforceable only if the lessor strictly complies with the specifically described notice conditions. In the instant case, the registered letter was not sufficient service of the notice. Unless the tenant cannot be found at the premises, the lessor must introduce evidence that the notice was personally served on the lessee (*273 Cal. App. 2d 709, 713-714)* .

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PART A. Supporting Motions, Demurres, and Petitions

23-236 California Points & Authorities § 236.16

§ 236.16 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Failure to Allege Landlord-Tenant Relationship [Code Civ. Proc. § 1161(2)-(5)]

[1] FORM

[*Caption. See § 236.11[1].*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT FAILS TO ALLEGE THAT A LANDLORD-TENANT RELATIONSHIP EXISTED BETWEEN THE PARTIES.

A. Demurrer in Unlawful Detainer Proceeding. [*See § 236.11]1], Paragraph A.*]

B. Objection by Demurrer. [*See § 236.11]1], Paragraph B.*]

C. Landlord-Tenant Relationship Must Be Alleged. A complaint in an unlawful detainer proceeding must plead the fact that a landlord-tenant relationship exists between the parties (*Fredericksen v. McCosker (1956) 143 Cal. App. 2d 114, 117-118, 299 P.2d 908*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____

[*name*]

[2] Comments

[a] Use of Form

These points and authorities support a demurrer to a complaint in an unlawful detainer proceeding when the demurrer alleges that the complaint fails to plead that a landlord-tenant relationship exists between the parties but that this relationship is a prerequisite to relief under *Code Civ. Proc. § 1161(2)-(5)*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should show that the complaint did not allege a landlord-tenant relationship between the parties.

[c] Related Pleading and Practice Chapters

For a discussion and general form of a demurrer to a complaint for failure to state a cause of action, see California Forms of Pleading and Practice Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For discussion and forms pertaining to unlawful detainer proceedings generally, see California Forms of Pleading and Practice Ch. 333, *Landlord and Tenant: Eviction Actions* .

[d] Related Points and Authorities

For related points and authorities, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* (supporting general demurrer on grounds no cause of action stated).

[3] Discussion of Authorities

[a] Landlord-Tenant Relationship Must Be Alleged

Fredericksen v. McCosker *(1956) 143 Cal. App. 2d 114, 299 P.2d 908* , was an action in unlawful detainer in which judgment was entered for the defendants. Plaintiffs appealed the finding of the trial court which had held that because the defendants were not, in fact, tenants, the unlawful detainer action could not be maintained. The court of appeal affirmed the finding and the judgment. The court of appeal first discussed the nature of defendants' claim on the land of the plaintiffs. It found that the defendants were in possession as owners under a claim of title, and that a recorded judgment to that effect supplied the appellants with constructive notice of that fact. Because no tenancy had ever existed between the parties, the plaintiffs did not have a cause of action in unlawful detainer against the defendants (*143 Cal. App. 2d 114, 116-117)* . The burden, the court continued, was on the plaintiffs to prove the relationship of landlord and tenant, and a holding over after its termination. Failure to do so precluded the bringing of an unlawful detainer proceeding, for such an action is limited to those cases in which the tenant is estopped to deny the landlord's title (*143 Cal. App. 2d 114, 116-117)* .

[4] Additional Authorities

[a] Landlord-Tenant Relationship Must Be Alleged

Francis v. West Va. Oil Co. (1917) 174 Cal. 168, 162 P. 394 , was an unlawful detainer proceeding in which judgment was rendered for the defendant. Plaintiff contended on appeal that when the defendant corporation defaulted in one of its payments on the purchase price, pursuant to a contract of sale, that it immediately became a tenant at will subject to removal from the land through an unlawful detainer action. The Supreme Court rejected the plaintiff's argument and cited the rule that while it is not necessary to show an express demise or letting of lands to sustain an unlawful detainer action, the facts must show impliedly at least that the defendant occupies as tenant of the plaintiff, and that this must be something more than a mere quasi-tenancy (*174 Cal. 168, 169)* . The appellant also argued that since the contract in question did not in set terms give the defendant the right of possession of the property, its entry on the

premises was merely permissive and therefore that of a tenancy at will. The Court also rejected this contention because the agreement between the plaintiff and the defendant had clearly contemplated possession and occupancy of the land by the vendee. The Court concluded by saying that a vendee in possession is not a tenant in any sense of the word, and only a tenant could be sued under former Code Civ. Proc. § 1161(1), and that failure of performance of the vendee's part of the contract of sale by the vendee in possession does not make the vendee a tenant (*174 Cal. 168, 170-171)* .

California Points & Authorities

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Volume 23 Chapters 230-239 TRUST DEEDS---to---WORKERS' COMPENSATION
CHAPTER 236 UNLAWFUL DETAINER
PART II. FORMS
PART A. Supporting Motions, Demurres, and Petitions

23-236 California Points & Authorities § 236.17

§ 236.17 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Failure to Describe Premises With Reasonable Certainty [Code Civ. Proc. § 1166(a)(3)]

[1] FORM

[*Caption. See § 236.11[1].*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT FAILS TO DESCRIBE THE PREMISES WITH REASONABLE CERTAINTY.

A. Demurrer in Unlawful Detainer Proceeding. [*See § 236.11]1], Paragraph A.*]

B. Objection by Demurrer. [*See § 236.11]1], Paragraph B.*]

C. Description Required. A complaint in an unlawful detainer proceeding must describe the premises with reasonable certainty (*Code Civ. Proc. § 1166(a)(3)*).

D. Description of Land. In an action for the recovery of real property, the property must be described in the complaint with such certainty as to enable an officer, on execution, to identify it (*Code Civ. Proc. § 455*).
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

These points and authorities support a demurrer to a complaint in an unlawful detainer proceeding when the complaint fails to describe the premises with reasonable certainty.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should show that the complaint failed to give any reasonable description of the premises.

[c] Related Uses

It has been suggested that a three-day or 30-day notice would be open to objection if it omitted a description of the premises [*see* Moskovitz et al., California Eviction Defense Manual, Ch. 6, *Three-Day Notice,* § 6.12, Ch. 7, *30-Day Notice,* § 7.17 (2d ed. 1993)].

[d] Related Pleading and Practice Chapters

For a discussion and general form of a demurrer to a complaint for failure to state a cause of action, see California Forms of Pleading and Practice Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For discussion and forms pertaining to unlawful detainer proceedings generally, see California Forms of Pleading and Practice Ch. 333, *Landlord and Tenant: Eviction Actions* .

[e] Related Points and Authorities

For related points and authorities, see Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* (supporting general demurrer on grounds no cause of action stated).

[f] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 236.45* may be used to oppose a demurrer to a complaint for failure to describe premises with reasonable certainty supported by the points and authorities in [1], *above*.

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23-236 California Points & Authorities § 236.18

§ 236.18 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--30-Day Notice Fails to Meet Statutory Requirements [Civ. Code §§ 789, 1946]

[1] FORM

[*Caption. See § 236.11[1].*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT SHOWS ON ITS FACE THAT THE 30-DAY NOTICE FAILS TO MEET STATUTORY REQUIREMENTS.

A. Demurrer in Unlawful Detainer Proceeding. [*See § 236.11]1], Paragraph A.*]

B. Objection by Demurrer. [*See § 236.11]1], Paragraph B.*]

C. Defective 30-Day Notice. When a 30-day notice fails to conform to the statutory requirements, it is ineffective to terminate a tenancy and may not support a cause of action for possession (*Turney v. Collins (1941) 48 Cal. App. 2d 381, 392, 119 P.2d 954*).

[*EITHER*]

D. Termination of Tenancy at Will. A tenancy at will may be terminated by the landlord's giving written notice to the tenant to remove from the premises within a specified period of not less than 30 days (*Civ. Code § 789*).

[*OR*]

D. Termination of Periodic Tenancy. A hiring of real property for an unspecified term may be terminated if one of the parties gives written notice to the other of his/her intention to terminate the hiring, at least as long before the expiration of the term implied by law as the term itself, not exceeding 30 days (*Civ. Code § 1946*).

[*EITHER*]

[*Optional*] **E. Written Notice.** The notice required to terminate a tenancy at will must be written (*Civ. Code § 789*).

[*OR*]

[*Optional*] **E. Written Notice.** The notice required to terminate a periodic tenancy must be written (*Civ. Code § 789*).

[*Optional*] **F. Notice in the Alternative.** A 30-day notice is ineffective if it does not simply demand possession but is in the alternative (*Turney v. Collins (1941) 48 Cal. App. 2d 381, 392, 119 P.2d 954*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____

[*name*]

[2] Comments

[a] Use of Form

These points and authorities support a demurrer to a complaint in an unlawful detainer proceeding when the complaint fails to state a cause of action in that it appears on its face that the 30-day notice fails to meet statutory requirements and the action is based on the termination of a tenancy at will or periodic tenancy. This defect would appear on the face of the complaint when the 30-day notice is incorporated by reference or when it is alleged in specific terms.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should provide facts showing that the 30-day notice was not given to the tenant in writing.

[c] Related Uses

With appropriate modifications the points and authorities in [1], *above*, may be used to oppose a motion to strike an affirmative defense based on a defective 30-day notice when the defect does not appear on the face of the complaint.

[d] Related Pleading and Practice Chapters

For a discussion and general form of a demurrer to a complaint for failure to state a cause of action, see California Forms of Pleading and Practice Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For discussion and forms pertaining to unlawful detainer proceedings generally, see California Forms of Pleading and Practice Ch. 333, *Landlord and Tenant: Eviction Actions* .

[e] Related Points and Authorities

For related points and authorities, see in this set Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* (supporting general demurrer to complaint based on failure to state a cause of action).

[3] Discussion of Authorities

[a] Defective 30-Day Notice

Turney v. Collins *(1941) 48 Cal. App. 2d 381, 119 P.2d 954* , involved an action to recover the possession of property in which the trial court entered judgment in the defendant's favor. The plaintiffs held the property in joint tenancy subject to both a trust deed and a chattel mortgage, securing a note in the principal sum of $22,000, held by the defendant. The defendant was placed in possession by the plaintiffs. A dispute arose as to payments due the defendant and the plaintiff gave notice to the defendant to yield possession of the property to them at once and stating that if she did not do so she would be required to pay rent of $4,500 per month for each month during which she retained possession. One of the points considered on appeal was the effect of this notice. The court of appeal noted that the defendant was a tenant at will whose tenancy could only be terminated by the service of a 30-day notice on her. The notice in this case was ineffective for two reasons. First, it specified a removal "forthwith." Second, the notice canceled itself out when, on the one hand, it purported to demand possession and, on the other hand, demanded a specific sum if the defendant continued in possession. The court held that there was thus no foundation for a cause of action for possession based on that notice (*48 Cal. App. 2d 381, 392)* .

[b] Notice in the Alternative

Turney v. Collins (1941) (*48 Cal. App. 2d 381, 119 P.2d 954* , is discussed under [a], *above*.

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23-236 California Points & Authorities § 236.19

§ 236.19 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Failure to Allege that Tenant Remains in Possession of Premises [Code Civ. Proc. § 1161]

[1] FORM

[*Caption. See § 236.11[1].*]

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN THAT IT FAILS TO ALLEGE THAT THE DEFENDANT TENANT REMAINED IN POSSESSION OF THE PREMISES AT THE TIME OF THE ACTION'S COMMENCEMENT.

A. Demurrer in Unlawful Detainer Proceeding. [*See § 236.11]1], Paragraph A.*]

B. Objection by Demurrer. [*See § 236.11]1], Paragraph B.*]

C. Requirement of Allegation that Tenant Remains in Possession. Since an action in unlawful detainer involves a forfeiture of the tenant's right to possession, one of the matters that must be pleaded and proved for unlawful detainer is that the tenant remains in possession of the premises (*Briggs v. Electronic Memories & Magnetics Corp. (1975) 53 Cal. App. 3d 900, 906, 126 Cal. Rptr. 34* ; *Fontana Indus. v. Western Grain Co. (1959) 167 Cal. App. 2d 408, 412, 334 P.2d 611*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____

[*name*]

[2] Comments

[a] Use of Form

These points and authorities support a demurrer to a complaint in an unlawful detainer proceeding when the demurrer asserts that the complaint fails to state facts sufficient to constitute a cause of action in that it appears on the complaint's face, or from any matter of which the court is required to or may take judicial notice, that the plaintiff has failed to allege that the defendant remained in possession of the premises at the time the action was filed.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should show that the plaintiff's complaint does not allege that the defendant was in possession of the premises at the time the complaint was filed.

[c] Related Uses

With appropriate modifications the points and authorities in [1], *above*, may be used to support a motion for judgment under *Code Civ. Proc. § 631.8* made at the close of plaintiff's case in an unlawful detainer action [*see Fontana Indus. v. Western Grain Co. (1959) 167 Cal. App. 2d 408, 411, 334 P.2d 611* , discussed under [3][a], *below*].

[d] Related Pleading and Practice Chapters

For a discussion and general form of a demurrer to a complaint for failure to state a cause of action, see California Forms of Pleading and Practice Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For discussion and forms pertaining to unlawful detainer proceedings generally, see California Forms of Pleading and Practice Ch. 333, *Landlord and Tenant: Eviction Actions* .

[e] Related Points and Authorities

For related points and authorities, see in this set Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* (supporting demurrer to complaint on grounds that no cause of action has been stated).

[f] Opposing Points and Authorities

For a related form opposing a plaintiff's motion to strike a defendant's cross complaint on the grounds that the defendant had vacated the premises and that therefore, possession was not in issue, see *§ 236.47*.

[3] Discussion of Authorities

[a] Requirement of Allegation that Tenant Remains in Possession

In ***Briggs v. Electronic Memories & Magnetics Corp.*** *(1975) 53 Cal. App. 3d 900, 126 Cal. Rptr. 34* , defendant tenant appealed from a judgment for plaintiffs for damages in an unlawful detainer action. Plaintiffs had served defendant with a three-day notice to pay rent or quit after defendant had failed to pay the rent due for three months, and had served a copy of his notice on defendant's sublessee. Defendant's basic contention in plaintiff's subsequent unlawful detainer action was that it was not in possession of the subject premises at the time the action was filed and, therefore, the action was not properly maintainable against it. The trial court, in giving judgment for damages for nonpayment of the rent, including penalty damages under *Code Civ. Proc. § 1178*, found that defendant had not relinquished possession of the leased premises up to the date of trial. The court of appeal reversed the judgment.

The court found that in response to the three-day notice to pay rent or quit, defendant had done everything it could to surrender the premises to plaintiffs, which in this case was sending a letter to plaintiffs stating that it was not in possession of the subject premises and had surrendered to plaintiffs any and all right to possession which it had and, in addition, notifying defendant's sublessee that it had surrendered the premises and that further leasing arrangements would have to be made with plaintiffs (*53 Cal. App. 3d 900, 904-905)* . The court stated that defendant was not required further to oust the sublessee because no notice to pay rent or quit had been served on the sublessee by the landlord. Thus, the action came within the basic rule that, if a tenant vacates the premises and surrenders possession to the landlord before the time of the complaint's filing, then no action for unlawful detainer will lie even though the premises were not surrendered during the notice period (*53 Cal. App. 3d 900, 905-906)* . The court added with regard to this general rule that, since an action in unlawful detainer involves a forfeiture of the tenants right to possession, one of the matters which must be pleaded and proved for unlawful detainer is that the tenant remains in possession of the premises. Since plaintiffs could not establish this when defendant had surrendered the premises before the complaint's filing, the court held that the trial court had erred in treating the action as one in unlawful detainer (*53 Cal. App. 3d 900, 906)* .

It should be noted that the court in *Briggs* did not, however, completely reverse the trial court. Rather, without comment it sustained that portion of the judgment which gave damages to plaintiffs for nonpayment of the rent (*53 Cal. App. 3d 900, 906)* . It did hold, though, that with respect to the penalty damages under *Code Civ. Proc. § 1174*, since the action was not properly an unlawful detainer action, the trial court was in error in assessing such damages (*53 Cal. App. 3d 900, 907)* .

Fontana Indus. v. Western Grain Co. *(1959) 167 Cal. App. 2d 408, 334 P.2d 611* , was an action for unlawful detainer and damages, in which plaintiff sought to regain possession of certain premises that had been leased to defendants. Plaintiff's complaint included an allegation that defendants had abandoned the premises in their entirety, but had failed to remove certain buildings that defendants had promised to remove. In addition to damages for unpaid rent, plaintiff sought damages for the costs of removal. At the close of plaintiff's case, the trial court granted a nonsuit (now a motion for judgment under *Code Civ. Proc. § 631.8*) and plaintiff appealed from the judgment which was then entered. The court of appeal affirmed.

In pertinent part, the court stated that the statutory unlawful detainer proceedings are summary in nature. They are designed to determine or protect the landlord's right to possession in those situations specified in the statute and cannot be used for any other purpose. In this regard, the recovery of rent is a mere incident to the main object, and when that object fails, so do the incidents (*167 Cal. App. 2d 408, 411)* . The court held, therefore, that, because there was no pleading or proof that defendant was in possession of the subject property at the time the action was filed or that the defendant wrongfully or otherwise withheld possession of the property from plaintiff at that time, a judgment of nonsuit was proper (*167 Cal. App. 2d 408, 412)* .

[4] Additional Authorities

[a] Requirement of Allegation That Tenant Remains in Possession

Markham v. Frakick (1934) 2 Cal. 2d 221 , was an action in unlawful detainer. Defendants had been in default in the payment of rent and taxes on the property in controversy. They were in possession of the property only through their subtenants. Plaintiff, the property's owner, served a written notice on defendants to pay the rent and taxes or quit, but served no such notice on the subtenants. Defendants, thereafter, served notice on plaintiff of their surrender of the premises and had notified their agent not to collect any further rent from the subtenants. Defendants relied on as an affirmative defense to plaintiff's action their notice to plaintiff and the subtenants. The trial court found in accordance with this defense and rendered judgment in favor of defendants. On plaintiff's appeal, the Supreme Court affirmed.

The Court found that defendants had done all that was within their power to comply with plaintiff's demand for the surrender of the premises, except to oust their subtenants and turn over to plaintiff the premises in an absolutely vacant and tenantless condition (*2 Cal. 2d 221, 223-224)* . The Court found that, with respect to the subtenants, the failure to serve a three-day notice on the subtenants was a waiver of plaintiff's right to the possession of the premises insofar as the subtenants were concerned. Therefore, the Court concluded that, because plaintiff had waived any right to object to the fact of the subtenant's occupancy of the property, defendants were not in possession of the premises at the date of the action's commencement. In such circumstances, the Court held that an action of unlawful detainer will not lie (*2 Cal. 2d 221, 224-225)* .

It should be noted that the plaintiff in *Markham* made the further contention on appeal that, even though an action of unlawful detainer will not lie when defendants had vacated the premises, she was entitled to prosecute the action for the recovery of rent and taxes due under the lease. The Court rejected this contention, stating that since the primary purpose of an unlawful detainer action was the recovery of the possession of the property, and that the recovery of rent is a mere incident to the main object, when the main object of the action fails, the incidents must fall with it (*2 Cal. 2d 221, 227)* . It should also be noted, however, that this holding is inconsistent with the procedure followed in *Briggs v. Electronic Memories and Magnetics Corp. (1975) 53 Cal. App. 3d 900, 126 Cal. Rptr. 34* , discussed in [3][a], *above*, where the court of appeal upheld, in effect, the trial court's judgment awarding plaintiffs damages for the unpaid rent, even though the plaintiffs were found not to be in possession of the premises at the time of the commencement of the plaintiff's suit.

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23-236 California Points & Authorities § 236.20

§ 236.20 Supporting Demurrer to Complaint [Code Civ. Proc. § 430.10(g)]--Failure to Allege Whether Lease Is Written or Oral or Implied by Conduct

[1] FORM

	)	
	)	NO. _____
	)	MEMORANDUM OF POINTS AND AUTHORIT-
SUPERIOR COURT OF CALIFORNIA,	)	IES IN SUPPORT OF DEMURRER TO COM-
COUNTY OF _____	)	PLAINT
_____ [*name*], Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name(s)*], Defendant(s).	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE DEMURRER SHOULD BE SUSTAINED WHEN IT CANNOT BE ASCERTAINED FROM THE COMPLAINT WHETHER THE LEASE IS WRITTEN OR ORAL OR IMPLIED BY CONDUCT.

A. Demurrer in Unlawful Detainer Proceeding. [*See § 236.11]1], Paragraph A.*]

B. Objection by Demurrer. The party against whom a complaint has been filed may object, by demurrer as provided in *Code of Civil Procedure Section 430.30*, to the complaint on the ground that it cannot be ascertained from the complaint whether the contract on which the action is founded is written or oral or implied by conduct (*Code Civ. Proc. § 430.10(g)*). When any ground for objection to a complaint appears on the face of the complaint (*or* from any matter of which the court is required to or may take judicial notice), the objection on that ground may be taken by a demurrer to

the complaint (*Code Civ. Proc. § 430.30(a)*).

C. Lease as Contract. A lease has a dual character of contract and conveyance (*Medico-Dental Bldg. Co. of Los Angeles v. Horton & Converse (1942) 21 Cal. 2d 411, 418, 132 P.2d 457*).

[*EITHER*]

D. Breach of Lease as Basis for Unlawful Detainer Action. A tenant's breach of the covenant to pay rent is a basis for an unlawful detainer action (*Code Civ. Proc. § 1161(2)*).

[*OR*]

D. Breach of Lease as Basis for Unlawful Detainer Action. A tenant's breach of conditions or covenants of the lease other than payment of rent is a basis for an unlawful detainer action (*Code Civ. Proc. § 1161(3)*).

[*OR*]

D. Breach of Lease as Basis for Unlawful Detainer Action. A tenant's breach of a covenant or condition against assigning, subletting, or committing waste on the demised premises is a basis for an unlawful detainer action (*Code Civ. Proc. § 1161(4)*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____

[*name*]

[2] Comments

[a] Use of Form

These points and authorities support a demurrer to a complaint in an unlawful detainer proceeding when the complaint fails to allege whether the lease is written or oral or implied by conduct and the proceeding is based on a breach of that lease.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should show that the plaintiff's complaint does not allege that the lease was written or oral or implied by the conduct of the parties.

[c] Related Pleading and Practice Chapters

For a general form of special demurrer on the grounds that it cannot be determined whether the contract is written or oral, or implied by conduct, see Ch. California Forms of Pleading and Practice206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender).

[d] Related Points and Authorities

For related points and authorities, see in this set Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* (supporting demurrer to complaint on grounds it cannot be ascertained from complaint whether contract was written or oral or implied by conduct).

[3] Discussion of Authorities

[a] Lease as Contract

In ***Medico-Dental Bldg. Co. v. Horton & Converse*** *(1942) 21 Cal. 2d 411, 132 P.2d 457* , plaintiff brought a suit for rent due under a lease, for the amount of an electricity charge, and for money for renovation following defendant's removal from the premises. The trial court found that plaintiff's breach of a restrictive covenant in the lease prevented the maintenance of the action except as to the electricity charge and rendered judgment for defendant. Plaintiff had argued that a lease is a conveyance as distinguished from a contract so that any covenant on the part of the lessor is independent of the lessee's obligation to pay rent and the remedy for breach of covenant is an action for damages.

The Supreme Court affirmed the judgment, holding that while it is true that a lease is primarily a conveyance in that it transfers an estate to the lessee, it also presents the aspect of a contract. This dual character creates two distinct sets of rights and obligations. Those features of the lease which are strictly contractual in their nature should be construed according to the rules for the interpretations of contracts generally. In this case, the restrictive covenant by which the lessor agreed not to lease any other part of the building for use as a drug store ran to the entire consideration of the lease. The covenant not to lease for drug store purposes and the covenant to pay rent were mutual and dependent and the plaintiff's breach excused defendant's performance (*21 Cal. 2d 411, 419-420)* .

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23-236 California Points & Authorities § 236.21

§ 236.21 Supporting Plaintiff's Motion to Strike Cross Complaint [Code Civ. Proc. §§ 435-437]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*], Plaintiff,	)	IES IN SUPPORT OF MOTION TO STRIKE
vs.	)	CROSS COMPLAINT
_____ [*name(s)*], Defendant(s).	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

PLAINTIFF'S MOTION TO STRIKE THE CROSS COMPLAINT SHOULD BE GRANTED BECAUSE THIS IS AN UNLAWFUL DETAINER ACTION IN WHICH POSSESSION IS AT ISSUE.

A. Motion to Strike Cross Complaint. A cross complaint is subject to a motion to strike the whole cross complaint (*Code Civ. Proc. § 435*).

B. Striking Cross Complaint in Unlawful Detainer Proceeding. A court may strike a cross complaint as improper in an unlawful detainer proceeding when possession is an issue (*Knowles v. Robinson (1963) 60 Cal. 2d 620, 625-627, 36 Cal. Rptr. 33, 387 P.2d 833*).

C. Cross Complaint Is Improper in Unlawful Detainer. Generally, a cross complaint is not permissible in a proceeding for unlawful detainer (*Knowles v. Robinson (1963) 60 Cal. 2d 620, 625, 36 Cal. Rptr. 33, 387 P.2d 833*).

[*Optional*] **D. Cross Complaint Is Improper When Possession Is at Issue.** A cross complaint is improper in an unlawful detainer action, even when a defendant has surrendered possession before trial, if the defendant still claims the right to possession (*Erbe Corp. v. W & B Realty Co. (1967) 255 Cal. App. 2d 773, 778, 63 Cal. Rptr. 462*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff_____

[*name*]

[2] Comments

[a] Use of Form

These points and authorities support a plaintiff's motion to strike a cross complaint in an unlawful detainer proceeding when possession is an issue.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should show that the defendant has filed a cross complaint in an unlawful detainer action.

[c] Related Pleading and Practice Chapters

For a general discussion of the motion to strike and a moving party's procedural guide, see California Forms of Pleading and Practice Ch. 375, *Motions to Strike* (Matthew Bender). For discussion and forms pertaining to unlawful detainer proceedings generally, see California Forms of Pleading and Practice Ch. 333, *Landlord and Tenant: Eviction Actions* .

[d] Related Points and Authorities

For related points and authorities, see in this set Ch. 160, *Motions to Strike* (supporting motion to strike whole or part of complaint).

[e] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 236.47* may be used to oppose a plaintiff's motion to strike a cross complaint supported by the points and authorities in [1], *above*.

[3] Discussion of Authorities

[a] Striking Cross Complaint in Unlawful Detainer Proceeding

Knowles v. Robinson *(1963) 60 Cal. 2d 620, 36 Cal. Rptr. 33, 387 P.2d 833* , involved an unlawful detainer proceeding in which defendants filed a cross complaint seeking to bring in new parties who were alleged to have conspired with plaintiff to deprive defendants of certain rights under a partnership agreement. The trial court granted a motion to strike the cross complaint and judgment was entered for plaintiff. The defendants appealed.

The Supreme Court affirmed, holding that no cross complaint may survive in a proceeding for unlawful detainer if it is objected to. The Court explained that the remedy of unlawful detainer is designed to provide a summary proceeding to secure possession of premises that are wrongfully withheld from the owner. The summary character of the action would be defeated if, by cross complaint, issues irrelevant to the right of immediate possession could be introduced. A cross complaint may not be properly filed in a suit for unlawful detainer, even though the alleged cause of action grows out of the subject matter involved in the original suit. Thus, the motion to strike the cross complaint was properly granted (*60 Cal. 2d 620, 625)* .

[b] Cross Complaint Is Improper in Unlawful Detainer

Knowles v. Robinson *(1963) 60 Cal. 2d 620, 36 Cal. Rptr. 33, 387 P.2d 833* , is discussed under [a], *above*.

[c] Cross Complaint Is Improper When Possession Is at Issue

In ***Erbe Corp. v. W & B Realty Co.*** *(1967) 255 Cal. App. 2d 773, 63 Cal. Rptr. 462* , defendants leased a parking lot from plaintiff. Before the expiration of defendants' lease, plaintiff entered into a new lease with a third party. Even though informed of this fact, defendants' agents and employees prevented the new lessee from taking possession on the expiration of defendants' lease. For three months no parking business was conducted on the lot after the police had directed that the lot could not be operated until the dispute was settled, and plaintiff received no rent. At the end of the three-month period, defendants notified plaintiff that they were giving up possession due to continued interference by employees of plaintiff. However, they still maintained their right to possession of the premises. Plaintiff instituted an unlawful detainer proceeding. Defendants' cross complaint for forcible entry was struck by the trial court. Judgment was entered for plaintiff. Defendants appealed.

The court of appeal affirmed the judgment. The court held that the trial court was correct in striking the cross complaint. Although a cross complaint is permitted when a defendant surrenders possession before trial, in this case defendants steadfastly maintained their legal right to possession. An unlawful detainer action is the appropriate means to test any question of immediate possession to real property, whether defendant is in actual physical possession or merely claims the legal right to immediate possession. Thus, since defendants had not abandoned their claim to possession a cross complaint was improper as irrelevant to the right of immediate possession (*255 Cal. App. 2d 773, 778)* .

[4] Additional Authorities

[a] Cross Complaint Is Improper in Unlawful Detainer

Turem v. Texaco, Inc. (1965) 236 Cal. App. 2d 758, 46 Cal. Rptr. 389 , was an action for forcible entry and conversion in which the trial court granted defendants' motion for summary judgment. Before this action, defendants had prevailed in an unlawful detainer proceeding against plaintiff. In that proceeding, which in the instant case was set up as a defense of res judicata, the trial court had struck the present plaintiff's cross complaint alleging forcible entry and eviction. Plaintiff argued the invalidity of that action.

The court of appeal affirmed the judgment, stating that when possession is an issue, the trial court has jurisdiction to strike a cross complaint in an unlawful detainer proceeding. The court noted that *Code Civ. Proc. § 1170* provides that the defendant may answer or demur. This limits the defendant to an answer or demurrer and a cross complaint is inadmissible in an action in unlawful detainer. Moreover, former Code Civ. Proc. § 442 [*now see Code Civ. Proc. § 422.10*], which authorized the filing of a cross complaint, applied only to actions, not special proceedings. Therefore, no

cross complaint would be authorized in unlawful detainer, a special proceeding (*236 Cal. App. 2d 758, 762-763)* .

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Volume 23 Chapters 230-239 TRUST DEEDS---to---WORKERS' COMPENSATION
CHAPTER 236 UNLAWFUL DETAINER
PART II. FORMS
PART A. Supporting Motions, Demurres, and Petitions

23-236 California Points & Authorities § 236.22

§ 236.22 Supporting Motion to Strike Irrelevant Matter From Complaint [Code Civ. Proc. §§ 435-437]--Prayer for Nonallowable Damages [Code Civ. Proc. § 1174]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*], Plaintiff,	)	IES IN SUPPORT OF MOTION TO STRIKE IR-
vs.	)	RELEVANT MATTER FROM COMPLAINT
_____ [*name(s)*], Defendant(s).	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE MOTION TO STRIKE SHOULD BE GRANTED WHEN THE COMPLAINT CONTAINS A PRAYER FOR DAMAGES NOT OCCASIONED BY THE ALLEGED UNLAWFUL DETAINER.

A. Motion to Strike in Unlawful Detainer Proceeding. A motion to strike is proper in an unlawful detainer proceeding (*Code Civ. Proc. § 1177*).

B. Motion to Strike Irrelevant Matter. The court may, on motion made under *Code of Civil Procedure Section 435*, or at any time in its discretion, and on terms it deems proper, strike from any pleading any irrelevant, false, or improper

matter inserted in the pleading (*Code Civ. Proc. § 436*).

C. Limitation on Recovery. The mode and measure of the plaintiff's recovery in an unlawful detainer proceeding are limited to that expressly provided by statute (*Chase v. Peters (1918) 37 Cal. App. 358, 360, 174 P. 116*).

D. Lack of Statutory Authorization for Damages. In the absence of a statutory provision expressly authorizing it, damages cannot be recovered in an unlawful detainer action (*Harris v. Bissell (1921) 54 Cal. App. 307, 313, 202 P. 453*).

E. Recoverable Damages. A plaintiff in an unlawful detainer proceeding may recover only damages occasioned by the unlawful detainer (*Code Civ. Proc. § 1174(b)*; *Ben Lomond Wine Co. v. Sladky (1904) 141 Cal. 619, 622-623, 75 P. 332*).

F. Strict Construction. Unlawful detainer statutes, including provisions dealing with damages, are strictly construed (*Chase v. Peters (1918) 37 Cal. App. 358, 360, 174 P. 116*).

G. Damages During Period of Unlawful Detention. Only those damages accruing during the actual period of the unlawful detention are recoverable (*Chase v. Peters (1918) 37 Cal. App. 358, 360, 174 P. 116*).

[*Optional*] **H. Damages Before Unlawful Detention.** Damages accruing before the unlawful detention may not be recovered in the unlawful detainer proceeding (*Harris v. Bissell (1921) 54 Cal. App. 307, 313, 202 P. 453*).

[*Optional*] **I. Future Damages.** Future damages for use and occupation after trial are not authorized in an unlawful detainer proceeding (*Cavanaugh v. High (1960) 182 Cal. App. 2d 714, 722-723, 6 Cal. Rptr. 525*).

[*Optional*] **J. Damages Before End of Tenancy Terminated by 30-Day Notice.** When a 30-day notice is used to terminate a month-to-month tenancy, and a default in the payment of rents to that time is not claimed in a three-day notice to pay rent or quit, damages consisting of rents accrued and unpaid before the end of the tenancy may not be recovered in the unlawful detainer proceeding (*Castle Park No. 5 v. Katherine (1979) 91 Cal. App. 3d Supp. 6, 12 , 154 Cal. Rptr. 498*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____

[*name*]

[2] Comments

[a] Use of Form

These points and authorities support a motion to strike irrelevant matter from a complaint in an unlawful detainer action when the matter sought to be stricken is a prayer for damages which are not recoverable in such a proceeding.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should show that the plaintiff's complaint includes a request for damages that was not the result of the alleged unlawful detainer.

[c] Related Uses

It has been suggested that a prayer for nonallowable damages may also be challenged by a motion to quash service of the five-day summons on the basis that the action is a nonsummary one which calls for a 30-day summons [*see* Moskovitz et al., California Eviction Defense Manual, Ch. 11, *Service of Summons and Complaint; Motion to Quash Service of Summons,* § 11.30 (2d ed. 1993)]. The points and authorities in [1], *above*, may be adapted to support such a motion.

[d] Related Pleading and Practice Chapters

For a general discussion of the motion to strike and a moving party's procedural guide, see California Forms of Pleading and Practice Ch. 375, *Motions to Strike* (Matthew Bender). For discussion and forms pertaining to unlawful detainer proceedings generally, see California Forms of Pleading and Practice Ch. 333, *Landlord and Tenant: Eviction Actions* .

[e] Related Points and Authorities

For related points and authorities, see in this set Ch. 160, *Motions to Strike* (supporting motion to strike irrelevant, redundant, or immaterial matter from complaint).

[f] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 236.48* may be used to oppose the motion to strike supported by the points and authorities in [1], *above*.

[3] Discussion of Authorities

[a] Limitation on Recovery

In ***Chase v. Peters*** *(1918) 37 Cal. App. 358, 174 P. 116* , the plaintiff brought an unlawful detainer action against the defendants for failure to pay rent. A judgment was entered in the plaintiff's favor. The plaintiff had leased the premises to defendant Peters for 99 years. Four years later he assigned the lease to the Peters Investment Co. During that year, neither defendant paid taxes in the amount of $3,132.28. The plaintiff asked and was allowed judgment for the amount of the taxes, as well as for accrued rental.

The court of appeal modified the judgment entered by deducting the amount shown to have been awarded for this failure to pay taxes. The court noted that the summary proceeding provided for obtaining possession of real property is special and must be restricted in its use to the particular purposes expressed in the statutory provisions covering it (*37 Cal. App. 358, 360)* . The mode and measure of the plaintiff's recovery are therein limited and the law on this subject is construed with strictness (*37 Cal. App. 358, 360)* . Only those damages accruing during the actual period of the unlawful detention are recoverable. The statute does not authorize the recovery of any money, the right to which accrued before the unlawful detention began, except arrears of rents. The court held that the tax charges could not be recovered in an unlawful detainer suit. They could not be classed as damages, for damages could arise only after the retention of possession had become unlawful (*37 Cal. App. 358, 360)* .

[b] Lack of Statutory Authorization for Damages

Harris v. Bissell *(1921) 54 Cal. App. 307, 202 P. 453* , involved an action brought for unlawful detainer for breach of a covenant of the lease. The plaintiffs were given judgment awarding them damages as well as the amount of rent stipulated in the lease. The defendants had expressly covenanted to use the premises for sheep pasture purposes only but they raised a crop of grain on half of the land leased.

The court of appeal held that it was error to give judgment for both the value of the crop and the agreed rent, and reversed. The court noted that, in the absence of some statutory provision expressly authorizing it, damages cannot be recovered. Damages accruing before the unlawful detention may not be recovered in the proceeding. *Code Civ. Proc. § 1174* provides for the recovery of any rent due only in case of default in the payment of rent. In this case, the unlawful detainer was not based on any default in paying rent but on the breach of a covenant limiting the use of the premises. Therefore, rent accruing before the unlawful detainer would have to be recovered in an independent action (*54 Cal. App. 307, 313)* .

[c] Recoverable Damages

In ***Ben Lomond Wine Co. v. Sladky*** *(1904) 141 Cal. 619, 75 P. 332* , one of the defendants in an unlawful detainer action was the assignee of the original tenant. He had assigned his interest to another defendant. The action was tried with a jury which rendered a special verdict. Judgment in the defendants' favor was entered but the trial court granted the plaintiff's motion for a new trial. The defendants appealed from that order.

The Supreme Court reversed. The Court noted that it was immaterial whether or not the defendant Sladky had been guilty of a violation of covenants of the lease during the time he was in possession of the premises (*141 Cal. 619, 622)* . An action for unlawful detainer will not lie against the assignee of a lease who has himself or herself assigned and delivered possession to an assignee. Not being guilty of an unlawful detainer, Sladky could not be liable for damages in the summary proceeding provided by statute as the only damages recoverable in such a proceeding are the damages caused by the unlawful detainer. For damages suffered by the plaintiff by reason of any breach of the covenants of the lease by Sladky while he was a tenant under the lease, the plaintiff must resort to an ordinary action and cannot take advantage of the summary proceeding designed solely to enable him or her to speedily recover possession of the premises (*141 Cal. 619, 622-623)* .

[d] Strict Construction

Chase v. Peters *(1918) 37 Cal. App. 358, 174 P. 116* , is discussed under [a], *above*.

[e] Damages During Period of Unlawful Detention

Chase v. Peters *(1918) 37 Cal. App. 358, 174 P. 116* , is discussed under [a], *above*.

[f] Damages Before Unlawful Detention

Harris v. Bissel *(1921) 54 Cal. App. 307, 202 P. 453* , is discussed under [b], *above*.

[g] Future Damages

In ***Cavanaugh v. High*** *(1960) 182 Cal. App. 2d 714, 6 Cal. Rptr. 525* , judgment was entered for the plaintiff. The judgment included an award of $66 per month beginning on January 25, 1959, until the defendant surrendered possession to the plaintiff. The plaintiff contended that this was authorized by *Civ. Code § 3283* providing that damages may be awarded for detriment certain to result in the future.

The court of appeal modified the judgment to strike this award. The court noted that in cases of this character a defendant may hold possession, under certain conditions, pending appeal and that it may be months or even years before

the defendant is required to surrender possession. The value of the use and occupation may be greater or less than at the time of the trial and such future damages are not certain (*182 Cal. App. 2d 714, 722-723)* .

[h] Damages Before End of Tenancy Terminated by 30-Day Notice

Castle Park No. 5 v. Katherine *(1979) 91 Cal. App. 3d Supp. 6 , 154 Cal. Rptr. 498* , was a joint appeal prosecuted by plaintiffs in two consolidated unlawful detainer cases. The issue presented was whether a landlord who terminates a month-to-month tenancy may recover rent before the termination in the unlawful detainer proceeding. The appellate department of the superior court of Los Angeles stated that when a 30-day notice is used to terminate a month-to-month tenancy, and a default in the payment of rents to that time is not claimed in a three-day notice to pay rent or quit, the unlawful detainer proceeding thereon is not founded on a default in the payment of rent within the meaning of *Code Civ. Proc. § 1174(b)*. Thus, damages for the detention of the premises commencing with the end of the tenancy may be recovered, but rents accrued and unpaid before the end of the tenancy may not be recovered in the unlawful detainer proceeding.

The court held that the landlord could not recover such rent and affirmed the two trial courts (*91 Cal. App. 3d Supp. 6, 12)* . Emphasizing the language in *Code Civ. Proc. § 1174(b)* that the jury or court is to assess the damages occasioned by plaintiff in an unlawful detainer proceeding "and find the amount of any rent due, if the alleged unlawful detainer be after default in the payment of rent" and the lessor must clearly show that the statute allows rents as an incident to the primary purpose of trying the right to possession, the court reasoned that evidence respecting payment of rent is not relevant to the right to possession in an action based on a 30-day notice terminating a month-to-month tenancy. Thus, allowing recovery of pretermination rents in such a proceeding would enlarge the issues (*91 Cal. App. 3d Supp. 6, 11)* .

[4] Additional Authorities

[a] Damages During Period of Unlawful Detention

In *Roberts v. Redlich (1952) 111 Cal. App. 2d 566, 244 P.2d 933* , an action was brought to recover damages caused by the defendant's holding over after termination of his lease. The defendant raised a prior unlawful detainer action as a bar to the award of damages. The trial court entered judgment for the plaintiff, and the court of appeal affirmed. The court held that the former action was not a bar to the action at hand (*111 Cal. App. 2d 566, 570)* . The damages awarded accrued after the period of detention of the property by defendant and after the submission of that case and thus were not recoverable in the former action. The damages recoverable in an unlawful detainer are limited, when there are no circumstances of fraud, force, or violence, to those occasioned by the detention itself and which occur during the detention up to the time of trial (*111 Cal. App. 2d 566, 569-570)* .

[b] Future Damages

Pfitzer v. Candeias (1921) 53 Cal. App. 737, 200 P. 839 , involved an unlawful detainer action in which the plaintiffs were given judgment. The award was for damages to the lands leased and those occasioned by the unlawful withholding of the lands after the default on which the complaint was made. The court of appeal modified the judgment to exclude an award of $4.05 per day for each day after the judgment that the defendant occupied the premises. The court noted that there was no authority authorizing a judgment for future damages of this kind. The trial court would be unable to determine what damages are certain to result in the future since the value of the use and occupation would vary in the months or years pending appeal before the defendant surrendered possession (*53 Cal. App. 737, 741)* .

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23-236 California Points & Authorities § 236.23

§ 236.23 Supporting Plaintiff's Motion to Strike Irrelevant Matter in Answer [Code Civ. Proc. §§ 435-437]--Affirmative Defense Not Related to Issue of Possession

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*], Plaintiff,	)	IES IN SUPPORT OF MOTION TO STRIKE IR-
vs.	)	RELEVANT MATTER IN ANSWER
_____ [*name(s)*], Defendant(s).	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

PLAINTIFF'S MOTION TO STRIKE IRRELEVANT MATTER SHOULD BE GRANTED BECAUSE DEFENDANT'S ANSWER CONTAINS AN AFFIRMATIVE DEFENSE EXTRINSIC TO THE ISSUE OF POSSESSION.

A. Motion to Strike in Unlawful Detainer Proceeding. [*See § 236.22]1], Paragraph A.*]

B. Motion to Strike Irrelevant Matter. The court may strike irrelevant matter inserted in a pleading (*Code Civ. Proc. § 436*).

C. Affirmative Defense Unrelated to Possession Is Irrelevant. An affirmative defense is irrelevant and must be excluded in an unlawful detainer action if the defense is extrinsic to the narrow issue of possession (*Cheney v. Trauzettel (1937) 9 Cal. 2d 158, 159-160, 69 P.2d 832*).

[*Optional*] **D. Defense of Title Defect Is Improper.** Equitable defenses attacking the plaintiff's title are not permissible in an unlawful detainer action (*Cheney v. Trauzettel (1937) 9 Cal. 2d 158, 160, 69 P.2d 832*).

[*Optional*] **E. Defense of Retaliatory Eviction for Strike Is Improper.** An affirmative defense that plaintiff is unlawfully seeking to evict the defendants in retaliation for going on strike against the plaintiff is improper in an unlawful detainer action (*S.P. Growers Ass'n v. Rodriguez (1976) 17 Cal. 3d 719, 723, 131 Cal. Rptr. 761, 552 P.2d 721*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____

[*name*]

[2] Comments

[a] Use of Form

These points and authorities support a plaintiff's motion to strike irrelevant matter in an answer in an unlawful detainer action when the answer contains an affirmative defense which is extrinsic to the narrow issue of possession.

It should be noted that the Supreme Court has, perhaps, further refined the issues involved when a trial court is faced with the question of whether an affirmative defense may be included in a defendant's answer in an unlawful detainer action. In *S.P. Growers Ass'n v. Rodriguez (1976) 17 Cal. 3d 719, 724, 728-729, 131 Cal. Rptr. 761, 552 P.2d 721* , the Court stated that, in an action involving the affirmative defense of retaliatory eviction, it must engage in a balancing process and determine whether the public policies furthered by protecting the defendants from eviction outweigh the interests in preserving the summary nature of unlawful detainer proceedings. For a further discussion of *S.P. Growers*, see *§ 236.62[3][c]* and *[3][c], below*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should show that the defendant's answer includes an affirmative defense that is not related to the issue of possession of the premises.

[c] Related Pleading and Practice Chapters

For a discussion and general form of the notice of motion to strike and the order granting such a motion, see California Forms of Pleading and Practice Ch. 375, *Motions to Strike* (Matthew Bender). For discussion and forms pertaining to unlawful detainer proceedings generally, see California Forms of Pleading and Practice Ch. 333, *Landlord and Tenant: Eviction Actions* .

[d] Related Points and Authorities

For related points and authorities, see in this set Ch. 160, *Motions to Strike* (supporting motion to strike irrelevant, redundant, or immaterial matter from answer).

[e] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 236.48* and *§§ 236.60 -236.75* may be used to oppose a motion to strike irrelevant matter in an answer supported by the points and authorities in [1], *above*.

[3] Discussion of Authorities

[a] Affirmative Defense Unrelated to Possession Is Irrelevant

In ***Cheney v. Trauzettel*** *(1937) 9 Cal. 2d 158, 69 P.2d 832* , a purchaser of property brought an unlawful detainer proceeding under *Code Civ. Proc. § 1161a*. The defendants answered and cross complained, setting up the pendency of a quiet-title suit between the parties involving the same property as one of several defenses. The trial court on motion struck out the cross complaint and special defenses and gave judgment for plaintiff. The Supreme Court affirmed on appeal.

The Court held that irrespective of the merits of the defenses raised by the answer, the grounds of attack on the plaintiff's title had no place in the unlawful detainer proceeding. If such issues were permissible, the proceeding would lose its summary character. Although a purchaser under *Code Civ. Proc. § 1161a* must prove his or her acquisition of title by purchase, it is only to this limited extent that the title may be litigated in the proceeding. Matters affecting the validity of a trust deed or other defects in the plaintiff's title are not properly raised in a summary proceeding for possession (*9 Cal. 2d 158, 159-160)* .

[b] Defense of Title Defect Is Improper

The background of ***Cheney v. Trauzettel*** *(1937) 9 Cal. 2d 158, 69 P.2d 832* , is discussed under [a], *above*. The Supreme Court noted that although a purchaser at a trustee's sale who proceeds under *Code Civ. Proc. § 1161a* must prove his or her acquisition of title by purchase at the sale, it is only to this limited extent that the title may be litigated in such a proceeding. Matters affecting the validity of the trust deed or primary obligation itself or other basic defects in the plaintiff's title are not properly raised in a summary proceeding for possession (*9 Cal. 2d 158, 160)* .

[c] Defense of Retaliatory Eviction for Strike Is Improper

In ***S.P. Growers Ass'n v. Rodriguez*** *(1976) 17 Cal. 3d 719, 131 Cal. Rptr. 761, 552 P.2d 721* , defendants were agricultural workers under plaintiff, a farm labor contractor, who provided housing for defendants. Defendants went on strike and shortly thereafter filed suit against plaintiff in a federal district court charging violation of the federal Farm Labor Contractor Registration Act [*7 U.S.C. §§ 2041-2055*]. Plaintiff then immediately served defendants with eviction notices and, when defendants failed to leave the premises, filed unlawful detainer actions. The trial court granted plaintiff's motion in the subsequent unlawful detainer action to exclude evidence regarding two affirmative defenses, one of which was that plaintiff was unlawfully seeking to evict them in retaliation for their strike. Judgment was entered for plaintiff and defendants appealed.

Although the Supreme Court reversed, and defendants had in their petition for hearing before the Court and in oral argument abandoned this affirmative defense, the Court considered this defense and disposed of it summarily. The Court stated that in the circumstances shown, it was no defense to the unlawful detainer action that plaintiff had sought possession of the premises because defendants were on strike. It commented that while defendants have a right to strike, plaintiff may hire replacements and, as a corollary, may reserve company housing for those who are working (*17 Cal.*

3d 719, 723) .

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23-236 California Points & Authorities § 236.24

§ 236.24 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--To Compel Court to Vacate Order Continuing Trial of Unlawful Detainer Action

[1] FORM

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA,
_____ APPELLATE DIVISION
[DIVISION _____]
[*OR*]
SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*], Petitioner,	)	NO. _____
vs.	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDATE
THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE [CITY AND] COUNTY OF _____,	)	[*Code Civ. Proc. §§ 1085, 1086*]
[*OR*]	)	Date: _____
THE MUNICIPAL COURT OF THE _____ [JUDICIAL *OR* MUNICIPAL COURT] DISTRICT,	)	Time: _____
Respondent[,]	)	Location: _____
[_____ (*name*), Real Party in Interest].	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

A PETITION FOR A WRIT OF MANDATE IS PROPER TO REVIEW AN ORDER CONTINUING AN UNLAWFUL DETAINER PROCEEDING.

A. Review of Order Continuing Unlawful Detainer Proceeding. A writ of mandate is proper to test the validity of an order which continues an unlawful detainer proceeding, and a writ will be issued commanding the court to vacate the order and proceed with the trial of the action when the order constituted an abuse of discretion (*Kartheiser v. Superior Court (1959) 174 Cal. App. 2d 617, 623, 345 P.2d 135*).

B. Priority of Unlawful Detainer Action. In an unlawful detainer proceeding, the court in which the action is pending is required to give the action precedence over all other civil actions, except actions to which special precedence is given by law, in setting same for hearing or trial and in hearing the same, to the end that all such actions be quickly heard and determined (*Code Civ. Proc. § 1179a*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____

[*name*]

[2] Comments

[a] Use of Form

These points and authorities support a petition for a writ of mandate on appeal from a trial court decision when the trial court has continued an unlawful detainer action.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should show that an order continuing the unlawful detainer proceeding has been obtained and one of the parties is seeking to vacate that order and proceed with the trial.

[c] Related Pleading and Practice Chapters

For a general petition for a writ of mandate, see California Forms of Pleading and Practice Ch. 358, *Mandate and Prohibition* (Matthew Bender). For discussion and forms pertaining to unlawful detainer proceedings generally, see California Forms of Pleading and Practice Ch. 333, *Landlord and Tenant: Eviction Actions* .

[d] Related Points and Authorities

For related points and authorities, see in this set Ch. 150, *Mandate and Prohibition* (supporting petition for writ of mandate to correct abuse of discretion by inferior court).

[3] Discussion of Authorities

[a] Review of Order Continuing Unlawful Detainer Proceeding

In ***Kartheiser v. Superior Court*** *(1959) 174 Cal. App. 2d 617, 345 P.2d 135* , the petitioner-plaintiff sought a writ of mandate requiring the respondent court to vacate its order continuing the trial of an unlawful detainer action for 90 days. The court of appeal concluded that the action of the trial court was an abuse of its discretion and ordered that a peremptory writ issue directing that court to vacate its order of continuance and to proceed with the trial of the unlawful detainer action. The trial court had granted the continuance because of the pendency of an appeal in a declaratory relief action which, when final would be res judicata between the parties as to the validity of the plaintiff's purchase of the premises at a trustee's sale. However, another issue was not common to the two cases--the effect of a provision in the trust deed that the recital in the deed of any matters would be conclusive proof of the truthfulness of those matters. This issue remained open for the trial of the unlawful detainer action.

The court of appeal noted that *Code Civ. Proc. § 1179a* grants precedence to unlawful detainer actions. The purpose for the continuance was to await the outcome of the appeal to decide those issues common to both actions, but there was no certainty that the appeal would be decided within the time allowed or that such decision would not then be appealed to the Supreme Court. In any event, the petitioner would have been deprived of his right to early trial for an inordinate period in the face of *Code Civ. Proc. § 1179a*. The court concluded that it would not be sound discretion on its part to deny the writ and that the action of the trial court was an abuse of its discretion (*174 Cal. App. 2d 617, 623)* .

[4] Additional Authorities

[a] Review of Order Continuing Unlawful Detainer Proceeding

Lori, Ltd., Inc. v. Superior Court (1946) 74 Cal. App. 2d 442, 168 P.2d 982 , involved an application for a writ of mandate to compel the superior court to give precedence to an unlawful detainer action. The court of appeal granted the writ. The trial judge had signified his intention to continue the trial abiding final judgment in a reformation suit between the parties. Counsel for the petitioners declared at the hearing on the writ, his intention to appeal from the judgment rendered in the reformation suit. At least one issue presented by the plaintiffs' complaint for unlawful detainer was not tried in that case, a cause of action predicated on waste and the maintenance of a nuisance. Under *Code Civ. Proc. § 1179a*, proceedings brought to recover possession of real property are entitled to a preference in the matter of setting the same for hearing or trial, and in hearing the same, to the end that all such actions be quickly heard and determined. Thus, the court ordered that the peremptory writ issue directing the respondent judge to place the unlawful detainer action on his trial calendar and assign it for trial on May 15, or as soon thereafter as a trial department was available (*74 Cal. App. 2d 442, 443)* .

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PART A. Supporting Motions, Demurres, and Petitions

23-236 California Points & Authorities § 236.25

§ 236.25 Supporting Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--To Compel Court to Hear or Sustain Defense in Unlawful Detainer Proceeding

[1] FORM

[*Caption. See § 236.24[1].*]

A PETITION FOR A WRIT OF MANDATE IS PROPER TO COMPEL A TRIAL COURT TO PERMIT THE DEFENDANT IN AN UNLAWFUL DETAINER CASE TO RAISE A CRUCIAL DEFENSE.

[*EITHER*]

Review of Refusal to Hear Defense. A writ of mandate is proper to compel a court to permit a defendant in an unlawful detainer proceeding to raise a crucial defense when the defendant would otherwise be deprived of his or her only opportunity to litigate the action fully on its merits (*Schweiger v. Superior Court (1970) 3 Cal. 3d 507, 517-518, 90 Cal. Rptr. 729, 476 P.2d 97*).

[*OR*]

Review of Refusal to Sustain Defense. A writ of mandate is proper to compel a court to sustain an affirmative defense based on the landlord's violation of local rent control legislation (*see Gross v. Superior Court (1985) 171 Cal. App. 3d 265, 276, 217 Cal. Rptr. 284*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____

[*name*]

[2] Comments

[a] Use of Form

These points and authorities support a petition for a writ of mandate when a trial court has refused to allow a crucial defense in an unlawful detainer proceeding.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should show that the trial court has ruled against the defendant by refusing to allow him or her to raise a particular defense.

[c] Related Pleading and Practice Chapters

For a general petition for a writ of mandate, see California Forms of Pleading and Practice Ch. 358, *Mandate and Prohibition* (Matthew Bender). For discussion and forms pertaining to unlawful detainer proceedings generally, see California Forms of Pleading and Practice Ch. 333, *Landlord and Tenant: Eviction Actions* .

[d] Related Points and Authorities

For related points and authorities, see in this set Ch. 150, *Mandate and Prohibition* (supporting petition for writ of mandate to correct abuse of discretion by inferior court).

[3] Discussion of Authorities

[a] Review of Refusal to Hear Defense

In ***Schweiger v. Superior Court*** *(1970) 3 Cal. 3d 507, 90 Cal. Rptr. 729, 476 P.2d 97* , the petitioner sought a writ of mandate to compel the superior court to hear his defense based on the retaliatory motivation of his landlord in bringing an unlawful detainer action. The Supreme Court ordered that a peremptory writ of mandate issue. The Court determined that a defense of retaliatory eviction was valid and that the petitioner was entitled to relief by way of an extraordinary writ. The Court held that (1) the superior court committed reversible error in refusing to recognize the petitioner's defense, (2) that the petitioner had no adequate remedy by way of appeal to correct the error since the court of appeal refused to transfer the case despite certification by the superior court, and (3) that the effect was to deny petitioner a full hearing on the merits of his cause thus constituting an abuse of discretion (*3 Cal. 3d 507, 517-518)* .

The *Schweiger* decision established the common-law defense of retaliatory eviction. The Court took note of former Civ. Code § 1942.5, which had been recently enacted, but did not construe the statute because it became effective after the case was filed (*see 3 Cal. 3d 507, 516 n.4*). Former Civ. Code § 1942.5 was repealed and the present *Civ. Code § 1942.5* was enacted in 1979 (Stats. 1979, Ch. 652). *Civ. Code § 1942.5(h)* expressly states that the remedies provided by *Civ. Code § 1942.5* shall be in addition to any other remedies provided by statutory or *decisional* law. Hence, both the common-law doctrine of retaliatory eviction and the statutory doctrine coexist [*see Barela v. Superior Court (1981) 30 Cal. 3d 244, 250, 251, 178 Cal. Rptr. 618, 636 P.2d 582* ; *Western Land Office, Inc. v. Cervantes (1985) 175 Cal. App. 3d 724, 734-740, 220 Cal. Rptr. 784]* .

[b] Review of Refusal to Sustain Defense

The facts and procedural background of ***Gross v. Superior Court*** *(1985) 171 Cal. App. 3d 265, 217 Cal. Rptr. 284* , are discussed in *§ 236.74[4][a]*. In *Gross* both the municipal and superior courts had ruled in favor of plaintiff on the ground that the municipal rent control legislation asserted as a defense by defendants had been preempted by state law (*171 Cal. App. 3d 265, 268)* . Defendants filed a petition for writ of mandate. The court of appeal issued the writ of mandate directing the trial court not only to vacate its judgment but to enter judgment in favor of defendants (*171 Cal. App. 3d 265, 276)* .

[4] Additional Authorities

[a] Review of Refusal to Hear Defense

Carter v. Superior Court (1956) 142 Cal. App. 2d 350, 298 P.2d 598 (*disapproved on other grounds by Unruh v. Truck Insurance Exchange (1972) 7 Cal. 3d 616, 637, 102 Cal. Rptr. 815, 498 P.2d 1063*), involved an action to recover damages for an alleged assault and battery. Petitioner-defendant had attempted to plead the defense that plaintiff had filed a claim with the Industrial Accident Commission and thereby had deprived the superior court of jurisdiction. The court of appeal issued a writ of mandate requiring the trail court to reinstate the petitioner's defense. The court pointed out that the facts pleaded would constitute the defense of an election of remedies or of res judicata if the plaintiff could not prove facts constituting a waiver or estoppel. The excluded plea, if proven, would have compelled a judgment for the petitioner-defendant and therefore the superior court abused its discretion in striking the defense (*142 Cal. App. 2d 350, 358-360)* .

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23-236 California Points & Authorities § 236.26

§ 236.26 Supporting Application for Relief From Forfeiture [Code Civ. Proc. § 1179]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Petitioner,	)	NO. _____
vs.	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF APPLICATION FOR RELIEF FROM FORFEITURE
_____ [*name(s)*], Respondent(s).	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE APPLICATION FOR RELIEF FROM FORFEITURE SHOULD BE GRANTED BECAUSE A FORFEITURE WOULD WORK A HARDSHIP ON THE PETITIONER.

A. Application for Relief From Forfeiture. The court may relieve a tenant against a forfeiture of a lease, and restore the tenant to his/her former estate, in case of hardship (*Code Civ. Proc. § 1179*).

[*Optional*] **B. Willful Breach Does Not Preclude Relief.** The fact that the court at trial finds the breach of covenant in the lease to have been willful does not deprive the court of jurisdiction to hear the application for relief under *Code of Civil Procedure Section 1179* (*Hignell v. Gebala (1949) 90 Cal. App. 2d 61, 71, 202 P.2d 378*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____

[*name*]

[2] Comments

[a] Use of Form

These points and authorities support an application for relief from forfeiture of a lease when the forfeiture would work a "hardship" on the petitioner. This application is proper only after a forfeiture has been declared by a trial court's judgment in an unlawful detainer proceeding. The application may be made by a tenant or subtenant, or a mortgagee of the term, or any person interested in the continuance of the term [*Code Civ. Proc. § 1179*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should provide facts showing that his or her client has undergone a particular hardship.

[c] Related Pleading and Practice Chapters

For discussion and forms pertaining to unlawful detainer proceedings generally, see California Forms of Pleading and Practice Ch. 333, *Landlord and Tenant: Eviction Actions* (Matthew Bender).

[d] Opposing Points and Authorities

In an appropriate case, the points and *authorities in § 236.49* may be used to oppose the application supported by the memorandum of points and authorities in [1], *above*.

[3] Discussion of Authorities

[a] Willful Breach Does Not Preclude Relief

In ***Hignell v. Gebala*** *(1949) 90 Cal. App. 2d 61, 202 P.2d 378* , defendant appealed from an adverse judgment in an unlawful detainer proceeding and an order dismissing a petition for relief from forfeiture of the lease. The trial court had awarded judgment for restitution of the premises, attorney's fees, and declaring a forfeiture of the lease on the grounds that defendant had violated the lease's terms by operating a real estate business on the leased premises.

The court of appeal upheld the judgment but reversed the order dismissing the petition. It held that the trial court had erred in refusing to consider the petition on the grounds that it lacked jurisdiction because the breach had been willful. The appellate court distinguished *Code Civ. Proc. § 1179* from *Civ. Code § 3275* in holding that *Code Civ. Proc. § 1179* is special in nature, applying only to unlawful detainer actions, and that Code Civ. Proc. § 1179 requires that even a willful breach be "balanced" in the court's consideration of the relative hardships involved in a lease's forfeiture (*90 Cal. App. 2d 61, 71)* .

[4] Additional Authorities

[a] Willful Breach Does Not Preclude Relief

Thrifty Oil Co. v. Batarse (1985) 174 Cal. App. 3d 770, 220 Cal. Rptr. 285 , involved a gasoline station that had been leased to an oil company. The oil company subleased the station to one of the defendants. The sublease prohibited the sublessee from assigning the sublease or subletting the premises without the sublessor's prior written consent but did not prohibit the sublessor from unreasonably withholding consent. The sublease further provided that the sublessee's failure to observe and perform any provision of the sublease would be deemed a default and breach of the sublease. Some 28 months later, the sublessor assigned its leasehold estate to plaintiff oil company, which accepted the assignment and agreed to be bound by the obligations and duties of the sublease. The sublessee was given notice of the assignment. Some 20 months later, the sublessee, without notifying the assignee or seeking its consent, sublet his interest in the station to his codefendants. The assignee then served a written notice to quit the premises on the sublessee and the sublessee's sublessees and, on their failure to vacate the premises, sued them for unlawful detainer. Judgment was for plaintiff. The original sublease was declared forfeited and defendants' petition to be relieved of the forfeiture was denied. Defendants appealed.

The court of appeal affirmed the judgment with regard to the unlawful detainer on the ground that the sublessee, by subletting without having sought plaintiff's consent or notifying plaintiff of the subletting, had breached the covenant against subletting, but remanded the case for further consideration of the petition to be relieved of the forfeiture (*174 Cal. App. 3d 770, 775-776, 778)* . The court said the failure of a lessee to gain consent from a lessor relative to an assignment when required to do so by the lease will not be an absolute bar to relief under *Code Civ. Proc. § 1179*, but, rather, is one of many important factors to consider in a weighing process to determine whether it would be manifestly unjust to grant relief (*174 Cal. App. 3d 770, 777)* .

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23-236 California Points & Authorities § 236.27

§ 236.27 Supporting Contention That Unlawful Detainer Complaint Filed Prematurely--Time to Pay Rent Under Three-Day Notice Was Extended by Holiday

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief* .]

THE UNLAWFUL DETAINER COMPLAINT WAS FILED PREMATURELY BECAUSE THE TIME TO PAY RENT IN THE THREE-DAY NOTICE WAS EXTENDED BY A LEGAL HOLIDAY AND THE COMPLAINT WAS FILED BEFORE THE TIME EXPIRED.

A. Three-Day Notice Required. A tenant is guilty of unlawful detainer when he/she continues in possession after default in the payment of rent and three days notice requiring the payment of rent has been served on him/her (*Code Civ. Proc. § 1161(2)*).

B. Three Days Extended By Legal Holiday. When the last day of a three-day notice to pay rent falls on a legal holiday, the time to pay rent is extended through the first full day thereafter that is not a legal holiday (*Code Civ. Proc. §§ 12, 12a*; *Lamanna v. Vognar (1993) 17 Cal. App. 4th Supp. 4, 7-8* , *22 Cal. Rptr. 2d 501*).

[2] Comments

[a] Use of Form

These points and authorities support a party's contention that an unlawful detainer complaint was filed prematurely because the time to pay rent is extended when the last day of the three-day notice to pay rent falls on a legal holiday.

These points and authorities may be combined with a memorandum of points and authorities relating to the specific procedural context in which counsel wishes to raise the argument that an unlawful detainer complaint was filed prematurely because the time to pay rent was extended by a legal holiday. These points and authorities may also be adapted for use in a trial or appellate brief.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should show that a legal holiday should have extended the time to respond to the three-day notice to pay rent.

[3] Discussion of Authorities

[a] Three Days Extended By Legal Holiday

In ***Lamanna v. Vognar*** *(1993) 17 Cal. App. 4th Supp. 4 , 22 Cal. Rptr. 2d 501* , the tenant failed to pay rent and the landlord served a three-day notice on May 20, 1992, a Wednesday. The third day to pay rent was thus Saturday, May 23. Monday, May 25 was Memorial Day, a legal holiday. The unlawful detainer complaint was filed on Tuesday, May 26. The trial court entered a judgment for the landlord.

The Superior Court Appellate Department reversed. It held that a cause of action for unlawful detainer does not arise until the three days required for notice have expired without the tenant paying the rent (*17 Cal. App. 4th Supp. 4, 6)* . *Code Civ. Proc. § 12* provides that the time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last is a holiday and then it is excluded. *Code Civ. Proc. § 12a* provides that legal holidays are Saturday, Sunday, and those provided in the Government Code, which includes Memorial Day. The Appellate Department held that the tenant's right to pay overdue rent was a right provided by law within the meaning of § 12 (*17 Cal. App. 4th Supp. 4, 7)* . The right may not be waived and is a condition precedent to the filing of an unlawful detainer complaint. The court found that the third day after service of the notice was a Saturday, which was therefore excluded as a holiday, as was the next day Sunday. Monday, Memorial Day, was also a legal holiday. Therefore, the three-day notice expired at the end of the next day that was not a holiday, Tuesday. The complaint filed on that Tuesday was thus premature because the tenant had the right to pay rent on that day. The court reversed the judgment (*17 Cal. App. 4th Supp. 4, 7-8)* .

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23-236 California Points & Authorities §§ 236.28-236.39

[Reserved]

§§ 236.28[Reserved]

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23-236 California Points & Authorities § 236.40

§ 236.40 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Three-Day Notice Not Required When Periodic Tenancy Terminated by Notice Under Civil Code Section 1946 [Civ. Code § 791]

[1] FORM

	)	
	)	NO. _____
	)	MEMORANDUM OF POINTS AND AUTHORIT-
SUPERIOR COURT OF CALIFORNIA,	)	IES IN OPPOSITION TO DEMURRER TO COM-
COUNTY OF _____	)	PLAINT
_____ [*name*], Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name(s)*], Defendant(s).	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE DEMURRER SHOULD NOT BE SUSTAINED BECAUSE A THREE-DAY NOTICE IS NOT REQUIRED WHEN A PERIODIC TENANCY HAS BEEN TERMINATED BY 30 DAYS' NOTICE UNDER *CIVIL CODE SECTION 1946*.

A. Three-Day Notice Unnecessary on Termination of Periodic Tenancy. When an unlawful detainer action is based on a tenant's holding over after the termination of his/her periodic tenancy by 30 days' notice under *Civil Code Section 1946*, a three-day notice to quit is not necessary (*Civ. Code § 791*).

B. Notice Terminating Periodic Tenancy. A periodic tenancy may be terminated if one of the parties gives written notice to the other of his/her intention to terminate the tenancy at least as long before the expiration of the tenancy as the

term of the hiring itself, but not exceeding 30 days (*Civ. Code § 1946*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____

[*name*]

[2] Comments

[a] Use of Form

These points and authorities oppose a demurrer to a complaint in an unlawful detainer proceeding when the demurrer alleges that the complaint fails to state a cause of action in that it fails to allege service of a three-day notice to quit, but when the case involves a holding over after termination of a periodic tenancy by 30 days' notice under *Civ. Code § 1946*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should show that the plaintiff/landlord, served the requisite 30 days' notice on the holdover tenant, even though he or she did not serve a three-day notice to quit.

[c] Related Pleading and Practice Chapters

For a general discussion of a demurrer to a complaint for the failure to state a cause of action and a plaintiff's procedural guide, see California Forms of Pleading and Practice Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , Ch. 375, *Motions to Strike* , *and* Ch. 389, *Nonsuit and Motions for Judgment* (Matthew Bender). For discussion and forms pertaining to unlawful detainer proceedings generally, see California Forms of Pleading and Practice Ch. 333, *Landlord and Tenant: Eviction Actions* .

[d] Related Points and Authorities

For related points and authorities, see in this set Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* (opposing general demurrer to complaint based on failure to state a cause of action).

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities in [1], *above*, may be used to oppose a demurrer to a complaint based on the failure to allege service of a three-day notice and supported by the points and *authorities in § 236.11*.

[3] Additional Authorities

[a] Three-Day Notice Unnecessary on Termination of Periodic Tenancy

In *Hennessy v. Gleason (1947) 81 Cal. App. 2d 616, 184 P.2d 913* , the unsuccessful defendant in an unlawful detainer action sought a writ of prohibition to restrain a sheriff from executing a writ of possession and the superior court from

proceeding further in the matter. The court of appeal denied the petition. One of the points raised by the petitioner-defendant was that no notice was given to him other than a 30-day notice to vacate and terminating the month-to-month tenancy which had previously existed. The court noted that *Civ. Code § 791* provides that no three-day notice is necessary when the hiring of real property is for a term not specified by the parties, and when this hiring was terminated under and in accordance with the provisions of *Civ. Code § 1946*. The latter section provides that unless the rental agreement itself provides for a shorter notice period, a month-to-month tenancy may be terminated by a month's notice. Thereafter, an unlawful detainer action may be maintained under *Code Civ. Proc. § 1161(1)* without the necessity of first serving an additional three-day notice (*81 Cal. App. 2d 616, 620)* .

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23-236 California Points & Authorities § 236.41

§ 236.41 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Three-Day Notice Not Required When Tenant Fails to Deliver Possession After a Notice of Termination or Written Offer of Surrender [Code Civ. Proc. § 1161(5)]

[1] FORM

[*Caption. See § 236.40[1].*]

THE DEMURRER SHOULD NOT BE SUSTAINED BECAUSE A THREE-DAY NOTICE IS NOT REQUIRED WHEN THE TENANT HAS GIVEN WRITTEN NOTICE OF HIS/HER INTENT TO TERMINATE OR WHEN THE TENANT HAS MADE A WRITTEN OFFER TO SURRENDER WHICH HAS BEEN ACCEPTED IN WRITING BY THE LANDLORD.

A. Three-Day Notice Unnecessary When Tenant Terminates or Surrenders Possession. When an unlawful detainer action is commenced following a tenant's giving written notice, as provided in *Civil Code Section 1946*, of his/her intention to terminate the hiring of the property, or a tenant's making a written offer to surrender which is accepted in writing by the landlord, and the tenant's failure to deliver up possession at the time specified in the notice, a three-day notice to quit is not necessary (*Code Civ. Proc. § 1161(5)*).

B. Notice Terminating Periodic Tenancy. [*See § 236.40]1], Paragraph B.*]

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____

[*name*]

[2] Comments

[a] Use of Form

These points and authorities oppose a demurrer to a complaint in an unlawful detainer proceeding when the demurrer alleges that the complaint fails to state a cause of action in that it fails to allege service of a three-day notice to quit, but when the case falls within the provisions of *Code Civ. Proc. § 1161(5)*. This would include the situations when a tenant gives written notice as provided in *Civ. Code § 1946* of his or her intention to terminate the hiring of the real property, or makes a written offer to surrender which is accepted in writing by the landlord, but then fails to deliver up possession at the time specified in the written notice without the landlord's permission.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should provide facts showing that the tenant has given written notice to the landlord of his or her intent to terminate the lease.

[c] Related Pleading and Practice Chapters

For a general discussion of a demurrer to a complaint for failure to state a cause of action and a plaintiff's procedural guide, see California Forms of Pleading and Practice Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*, Ch. 375, *Motions to Strike, and* Ch. 389, *Nonsuit and Motions for Judgment* (Matthew Bender). For discussion and forms pertaining to unlawful detainer proceedings generally, see California Forms of Pleading and Practice Ch. 333, *Landlord and Tenant: Eviction Actions*.

[d] Related Points and Authorities

For related points and authorities, see in this set Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* (opposing general demurrer to complaint based on failure to state a cause of action).

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities in [1], *above*, may be used to oppose a demurrer to a complaint based on the failure to allege service of the three-day notice and supported by the points and *authorities in § 236.11*.

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23-236 California Points & Authorities § 236.42

§ 236.42 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Three-Day Notice Not Required After Expiration of Fixed-Term Lease [Code Civ. Proc. § 1161(1)]

[1] FORM

[*Caption. See § 236.40[1].*]

THE DEMURRER SHOULD NOT BE SUSTAINED BECAUSE A THREE-DAY NOTICE IS NOT REQUIRED AFTER THE EXPIRATION OF A FIXED-TERM LEASE.

Three-Day Notice Unnecessary on Expiration of Fixed Term. When an unlawful detainer action is based on a tenant's holding over after the expiration of a term fixed by a lease, a three-day notice to quit is not necessary (*Ryland v. Appelbaum (1924) 70 Cal. App. 268, 270, 233 P. 356*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____

[*name*]

[2] Comments

[a] Use of Form

These points and authorities oppose a demurrer to a complaint in an unlawful detainer proceeding when the demurrer

alleges that the complaint fails to state a cause of action in that it fails to allege service of a three-day notice to quit, but when the case involves a holding over after termination of a fixed-term lease that does not require a three-day notice to quit.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should provide facts showing that the tenant has held over after his or her fixed-term lease has expired.

[c] Related Pleading and Practice Chapters

For a general discussion of a demurrer to a complaint for the failure to state a cause of action and a plaintiff's procedural guide, see California Forms of Pleading and Practice Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , Ch. 375, *Motions to Strike* , *and* Ch. 389, *Nonsuit and Motions for Judgment* (Matthew Bender). For discussion and forms pertaining to unlawful detainer proceedings generally, see California Forms of Pleading and Practice Ch. 333, *Landlord and Tenant: Eviction Actions* .

[d] Related Points and Authorities

For related points and authorities, see in this set Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* (opposing general demurrer to complaint based on failure to state a cause of action).

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities in [1], *above*, may be used to oppose a demurrer to a complaint based on the failure to allege service of the three-day notice and supported by the points and *authorities in § 236.11*.

[3] Discussion of Authorities

[a] Three-Day Notice Unnecessary on Expiration of Fixed Term

Ryland v. Appelbaum *(1924) 70 Cal. App. 268, 233 P. 356* , was an unlawful detainer action in which the plaintiffs were given judgment for restitution of the premises and damages. The plaintiffs leased property to the defendants for a term of three years under a written lease which provided for a surrender of the premises at the term's expiration. Four months before the lease was to expire the plaintiffs served the defendants with written notice that they would be required to vacate the premises at the end of the term, and that the lease would not be renewed. The defendants continued in possession after that date.

The court of appeal affirmed, holding that the defendants' contention that a three-day notice had to be served before the suit could be properly commenced was wholly without merit (*70 Cal. App. 268, 270)* . It is the duty of a tenant, as soon as his or her tenancy expires by its own limitations, to surrender the possession of the premises. No notice of termination is necessary. If the tenant continues in possession without the landlord's permission, he or she is guilty of unlawful detainer and an action may be commenced against him or her at once under *Code Civ. Proc. § 1161(1)* without the service of any notice (*70 Cal. App. 268, 270)* .

It should be noted that if a tenant holds over after the expiration of his or her term and the landlord accepts monthly rental payments in the amount of the payments that the tenant had been making under the lease, the tenant becomes a month-to-month tenant [*Renner v. Huntington-Hawthorne Oil & Gas Co. (1952) 39 Cal. 2d 93, 102, 244 P.2d 895* ; *see Civ. Code § 1945*].

[4] Additional Authorities

[a] Three-Day Notice Unnecessary on Expiration of Fixed Term

In *Lee Chuck v. Quan Wo Chong & Co. (1891) 91 Cal. 593, 28 P. 45* , the defendant appealed from an order denying his motion for a new trial. On appeal the Supreme Court reversed on several grounds. However, the Court stated that in an action based on *Code Civ. Proc. § 1161(1)*, when the defendant holds over as a tenant at sufferance, no three-day notice is required (*91 Cal. 593, 597)* .

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23-236 California Points & Authorities § 236.43

§ 236.43 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Three-Day Notice Not Required to Remove Former Servant, Employee, Agent, or Licensee [Code Civ. Proc. § 1161(1)]

[1] FORM

[*Caption. See § 236.40[1].*]

THE DEMURRER SHOULD NOT BE SUSTAINED BECAUSE A THREE-DAY NOTICE IS NOT REQUIRED WHEN A _____ [SERVANT *or* EMPLOYEE *or* AGENT *or* LICENSEE] HOLDS OVER AFTER THE RELATION OF _____ [MASTER AND SERVANT *or* EMPLOYER AND EMPLOYEE *or* PRINCIPAL AND AGENT *or* LICENSOR AND LICENSEE] HAS BEEN LAWFULLY TERMINATED.

Three-Day Notice Unnecessary to Remove Former Servant, Employee, Agent, or Licensee. When an unlawful detainer action involves removing a person who became the occupant of the premises as a servant, employee, agent, or licensee and the relation of master and servant, employer and employee, principal and agent, or licensor and licensee has been lawfully terminated, a three-day notice to quit is not necessary (*Code Civ. Proc. § 1161(1)*].

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____

[*name*]

[2] Comments

[a] Use of Form

These points and authorities oppose a demurrer to a complaint in an unlawful detainer proceeding when the demurrer alleges that the complaint fails to state a cause of action, in that it fails to allege service of a three-day notice to quit, but when the case involves a holding over by a servant, employee, agent, or licensee after the relationship of master and servant, employer and employee, principal and agent, or licensor and licensee has been lawfully terminated.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should provide facts showing that a servant, employee, agent, or licensee has held over.

[c] Related Pleading and Practice Chapters

For a general discussion of a demurrer to a complaint for failure to state a cause of action and a plaintiff's procedural guide, see California Forms of Pleading and Practice Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , Ch. 375, *Motions to Strike* , *and* Ch. 389, *Nonsuit and Motions for Judgment* (Matthew Bender). For discussion and forms pertaining to unlawful detainer proceedings generally, see California Forms of Pleading and Practice Ch. 333, *Landlord and Tenant: Eviction Actions* .

[d] Related Points and Authorities

For related points and authorities, see in this set Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* (opposing general demurrer to complaint based on failure to state a cause of action).

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities in [1], *above*, may be used to oppose a demurrer to a complaint based on a failure to allege service of the three-day notice and supported by the points and *authorities in § 236.11*.

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23-236 California Points & Authorities § 236.44

§ 236.44 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Notice Not Required to Be in Alternative [Code Civ. Proc. §§ 1161(3), (4), 1161a]

[1] FORM

[*Caption. See § 236.40[1].*]

THE DEMURRER SHOULD NOT BE SUSTAINED BECAUSE THE DEMAND IN THE THREE-DAY NOTICE IS NOT REQUIRED TO BE IN THE ALTERNATIVE.

[*EITHER*]

A. Notice to Quit for Noncurable Breach of Covenant Under *Code of Civil Procedure Section 1161(3)*. When an unlawful detainer action is based on a breach of a condition or covenant when the breach cannot be cured, the three-day notice need not demand performance of the violated condition or covenant of the lease as an alternative to the demand to quit the premises (*Code Civ. Proc. § 1161(3)*).

[*OR*]

A. Notice to Quit Under *Code of Civil Procedure Section 1161(4)*. When an unlawful detainer action is based on _____ [a breach of a condition *or* covenant against (assigning *or* subletting *or* committing waste) *or* permitting the maintenance or commission of a nuisance *or* using the premises for an unlawful purpose], the three-day notice is sufficient if it makes a demand to quit the premises (*Code Civ. Proc. § 1161(4)*).

[*OR*]

A. Notice to Quit Under *Code of Civil Procedure Section 1161a*. When an unlawful detainer action is based on a

holding over after sale of the property, the three-day notice is sufficient if it makes a demand to quit the premises (*Code Civ. Proc. § 1161a*).

[*Optional*] **B. Acts Constituting Nuisance.** Anything that is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent, or offensive to the senses, or is an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance (*Civ. Code § 3479*).

[*Optional*] **C. Violation of Zoning Ordinance Is an Unlawful Purpose.** The use of demised premises in violation of a zoning ordinance is an unlawful purpose (*Haig v. Hogan (1947) 82 Cal. App. 2d 876, 877, 187 P.2d 426*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____

[*name*]

[2] Comments

[a] Use of Form

These points and authorities oppose a demurrer to a complaint in an unlawful detainer proceeding when the demurrer alleges that the complaint fails to state a cause of action in that it shows on its face that the demand in the three-day notice was not in the alternative but when the case involves a situation where a demand in the alternative is not required.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should provide facts showing that the landlord has instituted the unlawful detainer proceeding because of the tenant's breach of an incurable condition.

[c] Related Uses

With appropriate modifications, the points and authorities in [1], *above*, may be used to oppose a motion for summary judgment based on an affirmative defense which alleges that the three-day notice is insufficient because the demand for possession was not in the alternative but when the case involves a situation where a demand in the alternative is not required.

[d] Related Pleading and Practice Chapters

For a general discussion of a demurrer to a complaint for the failure to state a cause of action and a plaintiff's procedural guide, see California Forms of Pleading and Practice Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*, Ch. 375, *Motions to Strike, and*Ch. 389, *Nonsuit and Motions for Judgment* (Matthew Bender). For discussion and forms pertaining to unlawful detainer proceedings generally, see California Forms of Pleading and Practice Ch. 333, *Landlord and Tenant: Eviction Actions* .

[e] Related Points and Authorities

For related points and authorities, see in this set Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* (opposing general demurrer to complaint based on failure to state a cause of action).

[f] Opposing Points and Authorities

In an appropriate case, the points and authorities in [1], *above*, may be used to oppose a demurrer to complaint for the failure to state a cause of action (three-day notice not in the alternative) supported by the points and *authorities in § 236.14*.

[3] Discussion of Authorities

[a] Violation of Zoning Ordinance Is an Unlawful Purpose

Haig v. Hogan *(1947) 82 Cal. App. 2d 876, 187 P.2d 426* , was an unlawful detainer action tried before the court without a jury in which there was a judgment in the plaintiff's favor. The plaintiff gave a three-day notice to vacate the property to the defendant after the plaintiff purchased the property. The property was located in a zone which permitted use for single-family residences only. The defendant, in violation of the zoning ordinance, operated the premises as a hotel, and rooming and boarding house.

The court of appeal affirmed. One question on appeal was whether the plaintiff was entitled to maintain the action without complying with the federal rent regulations then in effect. The court held that it was unnecessary to comply with those provisions of the regulations if the party in possession was using the housing accommodations for an illegal purpose. The defendant's violation of the zoning ordinance was such an unlawful purpose (*82 Cal. App. 2d 876, 877)* .

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23-236 California Points & Authorities § 236.45

§ 236.45 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Premises Described With Reasonable Certainty

[1] FORM

[*Caption. See § 236.40[1].*]

THE DEMURRER SHOULD NOT BE SUSTAINED BECAUSE THE PREMISES WERE DESCRIBED WITH REASONABLE CERTAINTY.

[*EITHER*]

Description by Name Is Reasonably Certain. Real estate is described with reasonable certainty if the property is known by some particular name and is described by that name (*Hildreth v. White (1885) 66 Cal. 549, 550-551, 6 P. 454*).

[*OR*]

Description Under Which Possession Was Taken Is Sufficient. If a defendant takes possession of property under a certain description, that description is sufficient to inform him/her what property the plaintiff demands (*Olcovich v. Deremberg (1915) 27 Cal. App. 194, 196, 149 P. 375*).

[*OR*]

Reasonable Certainty Despite Error. The premises are described with reasonable certainty despite an error in the description if it was easily intelligible to the defendant what premises were demanded and if the defendant was not misled by its inexactness (*King v. Connolly (1872) 44 Cal. 236, 238-239)* .

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____

[*name*]

[2] Comments

[a] Use of Form

These points and authorities oppose a demurrer to a complaint in an unlawful detainer proceeding when the demurrer alleges that the complaint fails to state a cause of action in that it fails to describe the premises with reasonable certainty, but when the premises were in fact described with a reasonable certainty.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should provide facts showing that the landlord seeks to terminate the lease and he or she in fact describes the premises in a clear manner by, for example, providing the tenant with the address of the premises.

[c] Related Pleading and Practice Chapters

For a general discussion of a demurrer for the failure to state a cause of action and a plaintiff's procedural guide, see California Forms of Pleading and Practice Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , Ch. 375, *Motions to Strike* , *and* Ch. 389, *Nonsuit and Motions for Judgment* (Matthew Bender). For discussion and forms pertaining to unlawful detainer proceedings generally, see California Forms of Pleading and Practice Ch. 333, *Landlord and Tenant: Eviction Actions* .

[D] Related Points and Authorities

For related points and authorities, see in this set Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* (opposing general demurrer to complaint based on failure to state a cause of action).

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities in [1], *above*, may be used to oppose a demurrer to a complaint based on the failure to describe the premises with reasonable certainty and supported by the points and *authorities in § 236.17*.

[3] Discussion of Authorities

[a] Description by Name Is Reasonably Certain

Hildreth v. White *(1885) 66 Cal. 549, 6 P. 454* , was an action for ejectment in which judgment was entered for the plaintiffs. The defendants contended that the complaint was defective as to the property's description. The complaint described the property as real estate in Mendocino County, California, on the southwestern portion of the Round Valley Indian Reservation, the lands on which the house and corral known as "McKay's winter quarters" was situated.

The Supreme Court affirmed, holding that this description was adequate. The Court noted that it could not say that an officer, having a writ of restitution, could not find the property and deliver possession. A piece of real property known by some name may be sufficiently described by the use of the name. A deed containing the words, for example, "[t]he land on which the Occidental Hotel, in San Francisco, is situated" would contain a sufficient description (*66 Cal. 549, 550-551)* .

[b] Description Under Which Possession Was Taken Is Sufficient

Olcovich v. Deremberg *(1915) 27 Cal. App. 194, 149 P. 375* , involved an action for unlawful detainer in which judgment was rendered for the plaintiff. The main point on which the defendant relied for a reversal was that the lease sued on was void by reason of an impossible description of the premises and that until it was reformed by an independent equitable action the summary proceeding of unlawful detainer could not be maintained.

The court of appeal affirmed the judgment, holding that if the description afforded the defendant sufficient information to find his way in, it ought to be sufficient to enable him to find his way out. In other words, since the description was sufficient to enable the defendant to take possession of the property and to continue possession and pay rent during six months, it ought to be sufficient to enable him to know what property the plaintiff demanded that he surrender (*27 Cal. App. 194, 196)* .

[c] Reasonable Certainty Despite Error

In ***King v. Connolly*** *(1872) 44 Cal. 236* , an unlawful detainer action, the trial court entered judgment for the defendant. The notice to quit described the property as part of Mission Block, No. 24 of the City and County of San Francisco, beginning at the junction of Market and Guerrero Streets and running southwesterly along Market Street 130 feet, then east to Guerrero Street, and then north along the westerly line of Guerrero, 130 feet, more or less. The trial court excluded the notice on the ground that it did not describe the premises demised to the defendant. The premises were correctly described as included in Mission Block, No. 24, and as lying on Guerrero and Market Streets. However, the exact distances should have read 140 feet.

The Supreme Court reversed and remanded for a new trial. The Court held that the only question was whether or not the notice effected the purpose for which it was intended or whether the defendant was misled by its inexactness. The Court noted that although the length of the lot was erroneously given, the notice nevertheless indicated with reasonable certainty, and to a certainty easily intelligible to the defendant, that the premises involved in the action were the premises demanded of him (*44 Cal. 236, 238-239)* .

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23-236 California Points & Authorities § 236.46

§ 236.46 Opposing Demurrer to Complaint [Code Civ. Proc. § 430.10(e)]--Complaint Was Filed More Than Three Days After Service of Three-Day Notice

[1] FORM

[*Caption. See § 236.40[1].*]

THE DEMURRER SHOULD NOT BE SUSTAINED, BECAUSE _____ [THE TIME TO RESPOND WAS NOT EXTENDED BY MAIL SERVICE *and/or* SERVICE IS EFFECTIVE WHEN MAILED, NOT RECEIVED], AND THUS THE COMPLAINT WAS FILED MORE THAN THREE DAYS AFTER SERVICE OF THE THREE-DAY NOTICE.

[*EITHER*]

A. Time to Comply Is Not Extended When Three-Day Notice Is Posted and Mailed. *Code of Civil Procedure Section 1013(a)*, which extends the time to respond when a notice is served by mail, does not apply to three-day notices in unlawful detainer proceedings (*Walters v. Meyers (1990) 226 Cal. App. 3d Supp. 15, 17-19 , 277 Cal. Rptr. 316*).

[*AND/OR*]

B. Service Is Effective When Posted and Mailed. Service of a three-day notice is effective when it is posted and mailed, not when the tenant actually receives notice (*Walters v. Meyers (1990) 226 Cal. App. 3d Supp. 15, 19-20 , 277 Cal. Rptr. 316*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____

[*name*]

[2] Comments

[a] Use of Form

These points and authorities oppose a demurrer to a complaint in an unlawful detainer proceeding when the demurrer alleges that the complaint fails to state a cause of action because it was prematurely filed because of the operation of *Code Civ. Proc. § 1013(a)*, which extends the time for responding to service for five days when service is made by mail. The extension provided for under *Code Civ. Proc. § 1013(a)* applies in the absence of a specific exception provided for under the statute or by another statute or rule of court [*Code Civ. Proc. § 1013(a)*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should provide facts showing that the plaintiff/landlord is seeking to regain possession of his or her premises in accordance with the statutory unlawful detainer procedure.

[c] Related Pleading and Practice Chapters

For a general discussion of the demurrer to complaint for failure to state a cause of action and a plaintiff's procedural guide, see California Forms of Pleading and Practice Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , Ch. 375, *Motions to Strike* , *and* Ch. 389, *Nonsuit and Motions for Judgment* (Matthew Bender). For discussion and forms pertaining to unlawful detainer proceedings generally, see California Forms of Pleading and Practice Ch. 333, *Landlord and Tenant: Eviction Actions* .

[d] Related Points and Authorities

For related points and authorities, see in this set Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* (opposing general demurrer to complaint based on failure to state a cause of action).

[3] Discussion of Authorities

[a] Time to Comply Is Not Extended When Three-Day Notice Is Posted and Mailed

In ***Walters v. Meyers*** *(1990) 226 Cal. App. 3d Supp. 15* , *277 Cal. Rptr. 316* , the tenants failed to pay rent, and the landlord posted a three-day notice to pay rent or quit and mailed a copy to the tenants on November 13, 1989. The landlord filed an unlawful detainer action on November 17, 1989. The tenants contended that the action was filed prematurely because the time to comply with the three-day notice was extended by *Code Civ. Proc. § 1013(a)*, which provides that the time to respond to a notice or other paper served by mail is extended by five days. The tenants also contended that service of the three-day notice was not effective until the notice was received. The trial court dismissed the unlawful detainer action.

The Superior Court Appellate Department reversed. It found that *Code Civ. Proc. § 1013(a)* applies only to motions in pending actions and does not apply to three-day notices. The court held that extending time to respond would be contrary to the purpose of the unlawful detainer law, which is to create a summary procedure to allow landlords to

remove defaulting tenants in an expedited manner (*226 Cal. App. 3d Supp. 15, 17-19)* .

[b] Service Is Effective When Posted and Mailed

The facts and procedural background of ***Walters v. Meyers*** *(1990) 226 Cal. App. 3d Supp. 15* , *277 Cal. Rptr. 316* , are discussed under [a], *above*. The Superior Court Appellate Department held that a three-day notice is effective when it is served and posted, not when it is actually received by the tenant. The court noted that *Code Civ. Proc. § 1162* provides for various methods of substituted service for a three-day notice, and held that these would be rendered meaningless by an interpretation that service was effected only when actually received. Additionally, the court found that since mailing and posting may be employed only when the tenant is absent, it could not have been the Legislature's intent to require actual receipt to be effective (*226 Cal. App. 3d Supp. 15, 19-20)* .

Counsel should note that ***Davidson v. Quinn*** *(1982) 138 Cal. App. 3d Supp. 9* , *188 Cal. Rptr. 421* , holds that a three-day notice is not effective until it is actually received on due process grounds (*138 Cal. App. 3d Supp. 9, 14)* . However, the *Walters* court found the reasoning in *Davidson* to be unpersuasive (*226 Cal. App. 3d. Supp. 15, 19)* .

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23-236 California Points & Authorities § 236.46A

§ 236.46A Code Civ. Proc. § 430.10(e)Code Civ. Proc. § 1161(2)Opposing Demurrer to Complaint []--Demand in Excess of One Year's Rent Is Not Insufficient []

[1] FORM

[*Caption. See § 236.40[1]*]

THE DEMURRER SHOULD NOT BE SUSTAINED BECAUSE A THREE-DAY NOTICE DEMANDING PAYMENT OF RENTS DUE WITHIN ONE YEAR IS NOT INVALIDATED WHEN THE NOTICE ALSO DEMANDS RENT DUE MORE THAN A YEAR BEFORE THE NOTICE.

Demand of Rent Due for More than One Year Does Not Invalidate Notice. A three-day notice that demands payment of rents due within one year is not invalidated when the notice also demands rent due more than a year before the notice (*Levitz Furniture Co. v. Wingtip Communications, Inc. (2001) 86 Cal. App. 4th 1035, 1041, 103 Cal. Rptr. 2d 656*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____

[*name*]

[2] Comments

[a] Use of Form

These points and authorities oppose a demurrer to a complaint in an unlawful detainer proceeding when the demurrer alleges that the complaint fails to state a cause of action in that it shows on its face that the three-day notice demands rent due more than a year before the notice, when the three-day notice not only demands rent due more than a year before the notice but also demands rent due within one year.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should provide facts showing that the plaintiff/landlord demanded rent due within a year of the three-day notice.

[c] Related Pleading and Practice Chapters

For a general discussion of a demurrer to a complaint for the failure to state a cause of action and a plaintiff's procedural guide, see California Forms of Pleading and Practice Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). For discussion and forms pertaining to unlawful detainer proceedings generally, see California Forms of Pleading and Practice Ch. 333, *Landlord and Tenant: Eviction Actions* .

[d] Related Points and Authorities

For related points and authorities, see in this set Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* (opposing general demurrer to complaint based on failure to state a cause of action).

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities in [1], *above*, may be used to oppose a demurrer to a complaint based on a demand in excess of one year's rent and supported by the points and *authorities in § 236.13*.

[3] Discussion of Authorities

[a] Demand of Rent Due for More than One Year Does Not Invalidate Notice

In ***Levitz Furniture Co. v. Wingtip Communications, Inc.*** *(2001) 86 Cal. App. 4th 1035, 103 Cal. Rptr. 2d 656* , a commercial lessor served a three-day notice on July 30, 1999, which stated that rent was due in the "reasonably estimated sum of $99,025.40." That sum was derived from a single payment of $6,646 due in December 1997 and 12 payments of $7,310, due each month from August 1998 through July 1999. When the lessee neither paid the rent nor quit the premises, the lessor sued for unlawful detainer, seeking restoration of the premises and rent of $99,025.40. The trial court granted the lessee's motion for judgment on the pleadings without leave to amend, on the ground the inclusion of the December 1997 rent invalidated the three-day notice and precluded the wrongful detainer action.

The court of appeal reversed, holding that a three-day notice that includes a demand for payment of rents due within one year is not automatically invalidated because the notice also demands rent due more than a year before the notice (*86 Cal. App. 4th 1035, 1041)* . The court stated that its conclusion was not based on the fact that a three-day notice for a commercial lease may estimate the amount of rent due (*86 Cal. App. 4th 1035, 1040-1041)* . Rather, the court concluded that invalidation of an otherwise proper notice because it includes a demand for rent due for more than a year is not required by the terms of *Code Civ. Proc. § 1161(2)*, the policy underlying that statute, or the case law (*86 Cal. App. 4th 1035, 1041)* . The court stated that *Bevill v. Zoura (1994) 27 Cal. App. 4th 694, 32 Cal. Rptr. 2d 635* (discussed in *§ 236.13[3][f]*) does not establish the rule that the mere inclusion of rent due more than a year before a three-day notice automatically invalidates the notice, because that point was conceded by the lessor (*86 Cal. App. 4th 1035, 1040)* .

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23-236 California Points & Authorities § 236.47

§ 236.47 Opposing Plaintiff's Motion to Strike Cross Complaint [Code Civ. Proc. §§ 435-437]--Defendant Has Vacated and Possession Is Not in Issue [Civ. Code § 1952.3(a)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*], Plaintiff,	)	IES IN OPPOSITION TO MOTION TO STRIKE
vs.	)	CROSS COMPLAINT
_____ [*name (s)*], Defendant(s).	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

PLAINTIFF'S MOTION TO STRIKE THE CROSS COMPLAINT SHOULD BE DENIED BECAUSE DEFENDANT HAS VACATED THE PREMISES AND POSSESSION IS NOT IN ISSUE.

Cross Complaint Is Proper When Possession Is No Longer Issue Because Tenant Surrendered Possession. A cross complaint is proper in an unlawful detainer proceeding when, prior to the joining of issues of fact, the tenant voluntarily surrenders possession of the premises and the issue of possession is removed from the case (*Civ. Code § 1952.3(a)*; *Medford v. Superior Court (1983) 140 Cal. App. 3d 236, 189 Cal. Rptr. 227* (decided under statute); *Heller v. Melliday (1943) 60 Cal. App. 2d 689, 696, 141 P.2d 447* (decided under common law)).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____

[*name*]

[2] Comments

[a] Use of Form

These points and authorities oppose a motion to strike a cross complaint in an unlawful detainer proceeding when the defendant has surrendered possession of the premises and possession is not an issue in the proceeding [*see Civ. Code § 1952.3(a)*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should provide facts showing that the defendant has already surrendered possession of the property.

[c] Related Pleading and Practice Chapters

For a general discussion of the motion to strike and an opposing party's procedural guide, see California Forms of Pleading and Practice Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , Ch. 375, *Motions to Strike* , and Ch. 389, *Nonsuit and Motions for Judgment* (Matthew Bender). For discussion and forms pertaining to unlawful detainer proceedings generally, see California Forms of Pleading and Practice Ch. 333, *Landlord and Tenant: Eviction Actions* .

[d] Related Points and Authorities

For related points and authorities, see in this set Ch. 160, *Motions to Strike* (opposing motion to strike whole or part of complaint).

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities in [1], *above*, may be used in opposition to a motion to strike a cross complaint supported by the points and *authorities in § 236.21*.

[3] Discussion of Authorities

[a] Cross Complaint Is Proper When Possession Is No Longer Issue Because Tenant Surrendered Possession

In ***Medford v. Superior Court*** *(1983) 140 Cal. App. 3d 236, 189 Cal. Rptr. 227* , plaintiff instituted an unlawful detainer proceeding, alleging that defendant owed back rent on her apartment. Defendant moved out of the apartment shortly before the trial. The trial court required defendant to deposit with it the sum alleged to be owed as back rent as a condition for her filing a cross complaint. Defendant did so, and later moved to have the money returned to her. The trial court denied the motion.

The court of appeal granted a writ of mandate compelling the trial court to vacate its orders and return defendant's money (*140 Cal. App. 3d 236, 242)* . The court said that in an unlawful detainer proceeding, a cross complaint by the tenant is not allowed so long as he or she remains in possession of the premises. Here, once the tenant moved out, she became eligible to file a cross complaint under *Civ. Code § 1952.3*. The court observed that, although leave of court might be required before filing a cross complaint in other situations under Code Civ. Proc. § 428.50, Civ. Code § 1952.3 could be interpreted to mean that a defendant may file a cross complaint as a matter of right. However, it rendered no opinion on that issue, since it had not been raised (*140 Cal. App. 3d 236, 239)* . The court also held that the trial court abused its discretion in requiring defendant to make the deposit, because requiring a tenant to deposit into court alleged back rent or accrued damages has the same effect as a prejudgment attachment, which is prohibited by *Code Civ. Proc. § 483.010(c)* (*140 Cal. App. 3d 236, 239-240)* .

In ***Heller v. Melliday*** *(1943) 60 Cal. App. 2d 689, 141 P.2d 447* , plaintiff instituted an unlawful detainer proceeding against defendant to recover possession of and to collect unpaid rent for an apartment house leased to defendant. Defendant filed a cross complaint alleging that plaintiff had procured the lease through false representations. The jury verdict in favor of defendant was reduced with her consent. Plaintiff appealed.

The court of appeal affirmed the judgment, holding that it was not error for the trial court to allow a cross complaint for damages (*60 Cal. App. 2d 689)* . Although it is the general rule that a cross complaint is not permissible in an action in unlawful detainer, the purpose of the rule is to prevent tenants who have violated the covenants of their leases from frustrating the summary remedy provided by statute for the restitution of the premises. However, that rule is not absolute, and a cross complaint may be maintained when it appears that before the joining of the issues of fact the tenant has voluntarily surrendered possession of the premises, removing the issue of possession from the case (*60 Cal. App. 2d 689, 696)* . In this case, as completely as was possible for her to do so, defendant, at the time she asked leave to file the cross complaint, had relinquished possession of the property and the only issue was her liability for the payment of four months' rent. The filing of the cross complaint did not in any manner frustrate the lessor's remedy for restitution of the premises. The court further noted that the rule disallowing cross complaints in unlawful detainer is itself an exception to the general rule allowing such a pleading to be filed in other cases, and that this exception should not be extended beyond the reason which lies behind it (*60 Cal. App. 2d 689, 697)* .

[4] Additional Authorities

[a] Cross Complaint Is Proper When Possession Is No Longer Issue Because Tenant Surrendered Possession

Green v. Superior Court (1974) 10 Cal. 3d 616, 111 Cal. Rptr. 704, 517 P.2d 1168 , was an unlawful detainer proceeding that involved the warranty of habitability as a defense. In its opinion, the California Supreme Court observed that a defense normally permitted because it arises out of the subject matter of the original suit is generally excluded in an unlawful detainer action if that defense is extrinsic to the narrow issue of possession, which the unlawful detainer proceedings seek speedily to resolve (*10 Cal. 3d 616, 632-633)* . However, an exception to that rule arises when the tenant has voluntarily surrendered possession of the premises before the trial of the unlawful detainer proceeding (*10 Cal. 3d 616, 633 n.18*).

Green was decided before the 1977 enactment of *Civ. Code § 1952.3*.

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23-236 California Points & Authorities § 236.48

§ 236.48 Opposing Motion to Strike Irrelevant Matter From Complaint [Code Civ. Proc. §§ 435-437]--Prayer for Damages for Fraud, Force, or Violence [Code Civ. Proc. § 1166(b)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*], Plaintiff,	)	IES IN OPPOSITION TO MOTION TO STRIKE IR-
vs.	)	RELEVANT MATTER FROM COMPLAINT
_____ [*name (s)*], Defendant(s).	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

THE MOTION TO STRIKE SHOULD BE DENIED BECAUSE A PRAYER FOR DAMAGES ARISING FROM CIRCUMSTANCES OF FRAUD, FORCE, OR VIOLENCE IS PROPER.

Damages Arising From Fraud, Force, or Violence. The plaintiff in an unlawful detainer proceeding may set forth in his/her complaint any circumstances of fraud, force, or violence that may have accompanied the alleged unlawful detainer and may claim damages therefor (*Code Civ. Proc. § 1166(b)*).

Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Comments

[a] Use of Form

These points and authorities oppose a motion to strike irrelevant matter in a complaint in an unlawful detainer action when the matter sought to be stricken is a prayer for damages, but when the prayer is proper because the damages were occasioned by circumstances of fraud, force, or violence accompanying the unlawful detainer.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should show that the plaintiff is seeking damages because of the defendant's alleged fraud.

[c] Related Pleading and Practice Chapters

For a general discussion of the motion to strike and an opposing party's procedural guide, see California Forms of Pleading and Practice Ch. 375, *Motions to Strike* (Matthew Bender). For discussion and forms pertaining to unlawful detainer proceedings generally, see California Forms of Pleading and Practice Ch. 333, *Landlord and Tenant: Eviction Actions* .

[d] Related Points and Authorities

For related points and authorities, see in this set Ch. 160, *Motions to Strike* (opposing motion to strike irrelevant, redundant, or immaterial matter from complaint).

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities in [1], *above*, may be used in opposition to a motion to strike irrelevant matter supported by the points and *authorities in § 236.22*.

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PART B. Opposing Motions

23-236 California Points & Authorities § 236.49

§ 236.49 Opposing Application for Relief From Forfeiture [Code Civ. Proc. § 1179]--Hardship on Respondent

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Petitioner,	)	NO. _____
vs.	)	MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO APPLICATION FOR RELIEF FROM FORFEITURE
_____ [*name(s)*], Respondent(s).	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THE APPLICATION FOR RELIEF FROM FORFEITURE SHOULD BE DENIED BECAUSE SUCH RELIEF WOULD WORK A HARDSHIP ON RESPONDENT.

A. Hardship to Respondent Precludes Relief. Under *Code of Civil Procedure Section 1179*, the court in balancing the equities should take into consideration not only the circumstances of the case and the hardship, if any, to the lessee from the forfeiture, but also the hardship, if any, to the lessor from relieving the lessee from that forfeiture (*Hignell v. Gebala (1949) 90 Cal. App. 2d 61, 70-71, 202 P.2d 378*).

[*Optional*] **B. Factors to Be Considered When Covenant Breached Is Provision in Commercial Lease Against**

Assigning or Subletting Without Lessor's Prior Consent. In determining whether to grant relief from forfeiture, the trial court should consider the following: (1) the nature and character of the breach; (2) the hardship, if any, to the lessee from the forfeiture; (3) the hardship, if any, to the lessor from relieving the lessee from the forfeiture; (4) if consent was not sought, the reasons why it was not sought; (5) if consent was not sought, the knowledge (or whether there should have been knowledge) on the part of the assignee or sublessee that it was not requested; (6) the good faith or lack of it on the part of any party, whether lessor, lessee, assignee, or sublessee; (7) the extent of bad faith, if any, on the part of any party, whether lessor, lessee, assignee, or sublessee; (8) the degree of arbitrariness or unreasonableness on the lessor's part, if such exists, in not honoring the assignment or subletting; and (9) any other similar factors relevant to the issues to be resolved (*see Thrifty Oil Co. v. Batarse (1985) 174 Cal. App. 3d 770, 775, 220 Cal. Rptr. 285*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Respondent _____

[*name*]

[2] Comments

[a] Use of Form

These points and authorities oppose an application for relief from forfeiture of a lease when the granting of such relief would work a greater "hardship" on the lessor.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should provide facts indicating that the landlord will suffer a particular hardship if the tenant is allowed to continue the lease.

[c] Related Pleading and Practice Chapters

For discussion and forms pertaining to unlawful detainer proceedings generally, see California Forms of Pleading and Practice Ch. 333, *Landlord and Tenant: Eviction Actions* (Matthew Bender).

[d] Related Points and Authorities

In an appropriate case, the points and authorities in [1], *above*, may be used in opposition to an application supported by the points and *authorities in § 236.26*.

[3] Discussion of Authorities

[a] Hardship to Respondent Precludes Relief

In ***Hignell v. Gebala*** *(1949) 90 Cal. App. 2d 61, 202 P.2d 378* , defendant appealed from an adverse judgment in an unlawful detainer proceeding and an order dismissing a petition for relief from forfeiture of the lease. The trial court had awarded judgment for restitution of the premises, attorney's fees, and declaring a forfeiture of the lease on the grounds that defendant had violated the lease's terms by operating a real estate business on the leased premises.

The court of appeal upheld the judgment but reversed the order dismissing the petition. The trial court was instructed to hear and determine the petition. The court held that, although the willful breach of the lease covenant did not leave the trial court without jurisdiction to hear the petition, it did provide a weighty factor in the balancing of the equities required by *Code Civ. Proc. § 1179*. It concluded by pointing out that, under that section, the trial court in balancing the equities should take into consideration not only the circumstances of the case and any hardship to the lessee from the forfeiture, but also any hardship to the lessor from relieving the lessee from the forfeiture (*90 Cal. App. 2d 61, 70-71)* .

[b] Factors to Be Considered When Covenant Breached Is Provision in Commercial Lease Against Assigning or Subletting Without Lessor's Prior Consent

The factual background of ***Thrifty Oil Co. v. Batarse*** *(1985) 174 Cal. App. 3d 770, 220 Cal. Rptr. 285* , is discussed in *§ 236.26[4][a]*. In remanding the case for further consideration of the petition to be relieved of the forfeiture, the court in *Thrifty Oil* said that in determining whether to grant relief, the trial court should engage in a weighing process to determine whether denying relief would be manifestly unjust. The court said that examples of such considerations to be examined in the weighing process include the following (*174 Cal. App. 3d 770, 778)* :

- The nature and character of the breach;
- The hardship, if any, to the lessee from the forfeiture;
- The hardship, if any, to the lessor from relieving the lessee from the forfeiture;
- The reasons why consent for assignment was not sought;
- The knowledge (or whether there should have been knowledge) on the sublessee's part that consent for the sublease was not requested;
- The good faith or lack of it on the part of any party, whether lessor, lessee, or sublessee;
- The extent of bad faith, if any, on the part of any party, whether lessor, lessee, or sublessee;
- The degree of arbitrariness or unreasonableness on the lessor's part, if such exists, in not honoring the assignment; and
- Any other similar factors relevant to the issues to be resolved.

[4] Additional Authorities

[a] Hardship to Respondent Precludes Relief

The factual background of *Thrifty Oil Co. v. Batarse (1985) 174 Cal. App. 3d 770, 220 Cal. Rptr. 285* , is discussed in *§ 236.26[4][a]*. In remanding the case to the trial court for further consideration of the petition for relief from forfeiture, the court, quoting *Hignell v. Gebala (1949) 90 Cal. App. 2d 61, 70-71, 202 P.2d 378* , said that under *Code Civ. Proc. § 1179*, the court in balancing the equities should take into consideration the following (*174 Cal. App. 3d 770, 777)* :

- The circumstances of the case;
- The hardship, if any, to the lessee from the forfeiture;

- The hardship, if any, to the lessor from relieving the lessee from the forfeiture; and
- The willful or other character of the breach.

The court should then use its best discretion in determining whether relief will be granted (*174 Cal. App. 3d 770, 777)* .

In *Superior Motels v. Rinn Motor Hotels, Inc. (1987) 195 Cal. App. 3d 1032, 1052-1055, 241 Cal. Rptr. 487* , the trial court had refused to relieve a sublessee from forfeiture. The sublessee had not breached the sublease, but the lessee had breached the lease by the appointment of a receiver for the lessee. The effect of the receivership was to destroy the lessor's security for the lease. The court of appeal held that the trial court had not abused discretion in refusing to relieve the sublessee from forfeiture. The sublessee was bound by the terms of the original lease (*195 Cal. App. 3d 1032, 1065)* .

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23-236 California Points & Authorities §§ 236.50-236.59

[Reserved]

§§ 236.50[Reserved]

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23-236 California Points & Authorities § 236.60

§ 236.60 Opposing Plaintiff's Motion to Strike Irrelevant Matter in Answer [Code Civ. Proc. §§ 435-437]--Affirmative Defense Directly Related to Issue of Possession--General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*], Plaintiff,	)	IES IN OPPOSITION TO MOTION TO STRIKE IR-
vs.	)	RELEVANT MATTER FROM ANSWER
_____ [*name(s)*], Defendant(s).	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

PLAINTIFF'S MOTION TO STRIKE IRRELEVANT MATTER SHOULD BE DENIED BECAUSE AN AFFIRMATIVE DEFENSE THAT DIRECTLY RELATES TO THE ISSUE OF POSSESSION IS PROPER.

A. Affirmative Defense Is Not Barred by Statute. The statutory provisions governing unlawful detainer proceedings do not prohibit the assertion of an affirmative defense (*Green v. Superior Court (1974) 10 Cal. 3d 616, 632, 111 Cal. Rptr. 704, 517 P.2d 1168*).

B. Affirmative Defense Related to Possession Is Proper. A tenant may interpose an affirmative defense in an

unlawful detainer action when the defense directly relates to the issue of possession, and when the defense, if established, would result in the tenant's retention of the premises (*Green v. Superior Court (1974) 10 Cal. 3d 616, 633, 111 Cal. Rptr. 704, 517 P.2d 1168*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant_____

[*name*]

[2] Comments

[a] Use of Form

These points and authorities oppose a motion to strike irrelevant matter from an answer in an unlawful detainer action when the matter sought to be stricken is an affirmative defense that is directly related to the issue of possession.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should show that one of the defendant's affirmative defenses directly relates to the defendant retaining possession of the premises.

[c] Related Pleading and Practice Chapters

For a general discussion of the motion to strike and an opposing party's procedural guide, see California Forms of Pleading and Practice Ch. 375, *Motions to Strike* (Matthew Bender). For discussion and forms pertaining to unlawful detainer proceedings generally, see California Forms of Pleading and Practice Ch. 333, *Landlord and Tenant: Eviction Actions* .

[d] Related Points and Authorities

For related points and authorities, see in this set Ch. 160, *Motions to Strike* (opposing motion to strike irrelevant, redundant, or immaterial matter from answer).

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities in [1], *above*, may be used in opposition to a motion to strike irrelevant matter supported by the points and *authorities in § 236.23*.

[3] Discussion of Authorities

[a] Affirmative Defense Is Not Barred by Statute

In ***Green v. Superior Court*** *(1974) 10 Cal. 3d 616, 111 Cal. Rptr. 704, 517 P.2d 1168* , a landlord commenced an unlawful detainer action in small claims court seeking possession of the leased premises and back rent. The tenant raised the defense that the landlord had failed to maintain the premises in a habitable condition. The court awarded the

landlord possession and a money judgment. The superior court reached the same result after a trial de novo on the tenant's appeal. The tenant's request for certification and transfer of the case to a court of appeal was denied.

The Supreme Court issued a peremptory writ of mandate directing the superior court to vacate its judgment and to proceed with trial of the unlawful detainer action, allowing the defense of breach of the warranty of habitability (*10 Cal. 3d 616, 620)* . The Court noted that absolutely nothing in the statutory provisions governing unlawful detainer proceedings prohibits the assertion of any defense. *Code Civ. Proc. § 1170* provides that in summary unlawful detainer proceedings the defendant may appear and answer or demur, and under *Code Civ. Proc. § 431.30* an answer may contain a statement of any new matter constituting a defense but may not claim affirmative relief. Thus, a defendant is not precluded from interposing an affirmative defense in an unlawful detainer proceeding (*10 Cal. 3d 616, 633)* .

[b] Affirmative Defense Related to Possession Is Proper

The procedural background of ***Green v. Superior Court*** *(1974) 10 Cal. 3d 616, 111 Cal. Rptr. 704, 517 P.2d 1168* , is discussed under [a], *above*. The Supreme Court, after noting the absence of a statutory bar, held that no California decision prohibits a tenant from interposing a defense that directly relates to the issue of possession and which, if established, would result in the tenant's retention of the premises (*10 Cal. 3d 616, 633)* . The Court acknowledged a line of cases holding that a defense is generally excluded if it is extrinsic to the narrow issue of possession. The purpose of this rule is basically to prevent tenants from frustrating the summary statutory remedy through introduction of extraneous matter. This objective is accomplished by confining unlawful detainer actions to issues directly relevant to the ultimate question of possession. However, if an affirmative defense is relevant to that question, the Court found that the defense should be available to the defendant (*10 Cal. 3d 616, 634)* .

[4] Additional Authorities

[a] Affirmative Defense Related to Possession Is Proper

The California Supreme Court has, perhaps, further refined the issues involved when a trial court is faced with the question of whether an affirmative defense may be included in a defendant's answer in an unlawful detainer action. In *S.P. Growers Ass'n v. Rodriguez (1976) 17 Cal. 3d 719, 131 Cal. Rptr. 761, 552 P.2d 721* , the Court stated that, in an action involving the affirmative defense of retaliatory eviction, it must engage in a balancing process and determine whether the public policies furthered by protecting the defendants from eviction outweigh the interests in preserving the summary nature of unlawful detainer proceedings (*17 Cal. 3d 719, 724)* . The Court cited as authority the opinion in *Union Oil Co. v. Chandler (1970) 4 Cal. App. 3d 716, 84 Cal. Rptr. 756* . Although the issue involved was the affirmative defense of retaliatory eviction, it is arguable that in deciding whether to permit the raising of an affirmative defense, in addition to inquiring into the question of whether the affirmative defense directly relates to the issue of possession, the trial court should also determine whether the public policies furthered by defendant's affirmative defense outweigh the interests in preserving the summary nature of the unlawful detainer proceedings (*17 Cal. 3d 719, 724)* .

For a further discussion of *S.P. Growers,* see *§ 236.62[3][c]*.

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23-236 California Points & Authorities § 236.61

§ 236.61 Opposing Plaintiff's Motion to Strike Irrelevant Matter in Answer [Code Civ. Proc. §§ 435-437]--Affirmative Defense of Breach of the Warranty of Habitability

[1] FORM

[*Caption. See § 236.60[1].*]

PLAINTIFF'S MOTION TO STRIKE IRRELEVANT MATTER SHOULD BE DENIED BECAUSE AN AFFIRMATIVE DEFENSE OF BREACH OF THE WARRANTY OF HABITABILITY IS PROPER.

A. Affirmative Defense Is Not Barred by Statute. The statutory provisions governing unlawful detainer proceedings do not prohibit assertion of an affirmative defense (*Green v. Superior Court (1974) 10 Cal. 3d 616, 632, 111 Cal. Rptr. 704, 517 P.2d 1168*).

B. Affirmative Defense Related to Possession Is Proper. A tenant may interpose an affirmative defense in an unlawful detainer action when the defense is directly related to the issue of possession and when the defense, if established, would result in the tenant's retention of the premises (*Green v. Superior Court (1974) 10 Cal. 3d 616, 633, 111 Cal. Rptr. 704, 517 P.2d 1168*).

C. Defense of Breach of Warranty of Habitability Is Proper. A warranty of habitability is implied by law in residential leases and the breach of this warranty may be raised as a defense in an unlawful detainer action (*Green v. Superior Court (1974) 10 Cal. 3d 616, 637, 111 Cal. Rptr. 704, 517 P.2d 1168*).

[*Optional*] **D. Defense of Breach of Warranty of Habitability Is Proper Because Dwelling Has Been Declared Substandard.** A landlord may not issue a three-day notice to quit based on nonpayment of rent when the dwelling has been inspected by a public officer or employee and declared to be substandard (*Civ. Code § 1942.4(a)*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____

[*name*]

[2] Comments

[a] Use of Form

These points and authorities oppose a motion to strike irrelevant matter from an answer in an unlawful detainer action when the matter sought to be stricken is an affirmative defense that alleges plaintiff's breach of the warranty of habitability.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should show that the tenant has raised the breach of the implied warranty of habitability in his or her answer because the plaintiff has failed to maintain the habitability of the premises.

[c] Related Pleading and Practice Chapters

For a general discussion of the motion to strike and an opposing party's procedural guide, see California Forms of Pleading and Practice Ch. 375, *Motions to Strike* (Matthew Bender). For discussion and forms pertaining to unlawful detainer proceedings generally, see California Forms of Pleading and Practice Ch. 333, *Landlord and Tenant: Eviction Actions* .

[d] Related Points and Authorities

For related points and authorities, see in this set Ch. 160, *Motions to Strike* (opposing motion to strike irrelevant, redundant, or immaterial matter from answer) and Ch. 141, *Landlord and Tenant* (affirmative defense of breach of the warranty of habitability).

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities in [1], *above*, may be used in opposition to a motion to strike irrelevant matter supported by the points and *authorities in § 236.23*.

[3] Discussion of Authorities

[a] Affirmative Defense Is Not Barred by Statute

In ***Green v. Superior Court*** *(1974) 10 Cal. 3d 616, 111 Cal. Rptr. 704, 517 P.2d 1168* , a landlord commenced an unlawful detainer action in small claims court seeking possession of the leased premises and back rent. The tenant raised the defense that the landlord had failed to maintain the premises in a habitable condition. The court awarded the landlord possession and a money judgment. The superior court reached the same result after a trial de novo on the tenant's appeal. The tenant's request for certification and transfer of the case to a court of appeal was denied.

The Supreme Court issued a peremptory writ of mandate directing the superior court to vacate its judgment and to proceed with trial of the unlawful detainer action, allowing the defense of breach of the warranty of habitability (*10*

Cal. 3d 616, 620) . The Court noted that absolutely nothing in the statutory provisions governing unlawful detainer proceedings prohibits the assertion of any defense. *Code Civ. Proc. § 1170* provides that in summary unlawful detainer proceedings the defendant may appear and answer or demur, and under *Code Civ. Proc. § 431.30* an answer may contain a statement of any new matter constituting a defense but may not claim affirmative relief. Thus, a defendant is not precluded from interposing an affirmative defense in an unlawful detainer proceeding (*10 Cal. 3d 616, 633)* .

[b] Affirmative Defense Related to Possession Is Proper

The procedural background of ***Green v. Superior Court*** *(1974) 10 Cal. 3d 616, 111 Cal. Rptr. 704, 517 P.2d 1168* , is discussed under [a], *above*. The Supreme Court, after noting the absence of a statutory bar, held that no California decision prohibits a tenant from interposing a defense which directly relates to the issue of possession and which, if established, would result in the tenant's retention of the premises (*10 Cal. 3d 616, 633)* . The Court acknowledged a line of cases holding that a defense is generally excluded if it is extrinsic to the narrow issue of possession. The purpose of this rule is basically to prevent tenants from frustrating the summary statutory remedy through introduction of extraneous matter. This objective is accomplished by confining unlawful detainer actions to issues directly relevant to the ultimate question of possession. However, if an affirmative defense is relevant to that question, the Court found that the defense should be available to the defendant (*10 Cal. 3d 616, 634)* .

[c] Defense of Breach of Warranty of Habitability Is Proper

The procedural background in ***Green v. Superior Court*** *(1974) 10 Cal. 3d 616, 111 Cal. Rptr. 704, 517 P.2d 1168* , is discussed under [a], *above.* The Court held that a warranty of habitability is implied by law in residential leases in California and that the breach of such a warranty may be raised as a defense in an unlawful detainer action (*10 Cal. 3d 616, 620)* . Under this implied warranty, a residential landlord covenants that the premises he or she leases for living quarters will be maintained in a habitable state for the lease's duration. This warranty does not require that a landlord ensure that the leased premises are in perfect, aesthetically pleasing condition, but it does mean that bare living requirements must be maintained (*10 Cal. 3d 616, 637)* . The Court noted that there was no reason why the availability of a warranty of habitability defense should frustrate the summary procedure of an unlawful detainer action when the availability of other defenses relevant to the issue of possession has not. In this case, the tenant had already quit the premises and the only matter to be determined, on remand, was the question of money damages owing to the landlord (*10 Cal. 3d 616, 639)* .

In dictum, however, the Court stated that in unlawful detainer actions generally, if the trial court determines that the landlord's breach of warranty is total and that the tenant owes no rent, the court should enter judgment for the tenant. If the trial court determines that the damages from the breach of warranty justify only a partial reduction in rent, the tenant may maintain possession of the premises only if he or she pays that portion of the back rent that is owing, as directed by the court. If the tenant fails to pay this sum, the landlord is entitled to a judgment for possession (*10 Cal. 3d 616, 639)* .

[d] Defense of Breach of Warranty of Habitability Is Proper Because Dwelling Has Been Declared Substandard

Civ. Code § 1942.4 was amended in 2003 to provide that a landlord may not issue a three-day notice to quit based on nonpayment of rent [*Code Civ. Proc. § 1161(2)*] if the dwelling has been declared substandard as set forth in *Health & Safety Code § 17920.3* because (1) conditions listed in that section exist to an extent that endangers the life, limb, health, property, safety, or welfare of the public or the occupants of the dwelling; (2) the dwelling contains lead hazards as specified in *Health & Safety Code § 17920.10*; or *(3)* the dwelling substantially lacks any of the affirmative standard characteristics set forth in *Civ. Code § 1941.1* (*Civ. Code § 1942.4(a)(1)*). For *Civ. Code § 1942.4(a)(1)* to apply (1) a public officer or employee responsible for the enforcement of the housing law must have inspected the premises and notified the landlord or the landlord's agent in writing of his or her obligations to abate the nuisance or repair the substandard conditions, (2) the conditions must have existed and not have been abated 35 days beyond the date of

service of that notice, and (3) the delay must have been without good cause (*Civ. Code § 1942.4(a)(2), (3)*). In addition, the conditions must not have been caused by an act or omission of the tenant (*Civ. Code § 1942.4(a)(2), (3)*).

A landlord who institutes an unlawful detainer proceeding based on a tenant's nonpayment of rent and who is liable for violating *Civ. Code § 1942.4* will be liable to the tenant for reasonable attorneys' fees and costs of the suit (*Code Civ. Proc. § 1174.21*).

For further discussion of *Civ. Code § 1942.4* and a complaint by a tenant against a landlord for damages and a repair order for an untenantable dwelling, see *California Forms of Pleading and Practice, Ch. 334, Landlord and Tenant: Claims for Damages, § 334.60* (Matthew Bender).

[4] Additional Authorities

[a] Defense of Breach of Warranty of Habitability Is Proper

In *Landeros v. Pankey (1995) 39 Cal. App. 4th 1167, 46 Cal. Rptr. 2d 165* , an unlawful detainer action was resolved by a stipulated judgment between the landlord and tenants, with the tenants vacating the property. Subsequently, the tenants brought an action for damages against the landlord for breach of the warranty of habitability during their previous three-year tenancy. The trial court sustained the landlord's demurrer on the grounds of collateral estoppel since in the prior unlawful detainer action the tenants had raised the issue of breach of the warranty of habitability as an affirmative defense.

The court of appeal reversed, finding that the stipulated judgment did not specifically address any matter relative to an alleged breach of the warranty of habitability nor did it contain any language purporting to comprehensively settle all matters between the parties arising from the lease (*39 Cal. App. 4th 1167, 1171-1172)* . Additionally, collateral estoppel does not apply to an issue that could not have been raised in prior proceedings (*39 Cal. App. 4th 1167, 1174)* . In this case, tenants who were seeking damages based on their entire three-year tenancy, could not have raised an issue in unlawful detainer regarding the balance of their tenancy because their affirmative defense was relevant only to the three-month default period alleged in the unlawful detainer complaint.

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California Points & Authorities

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Volume 23 Chapters 230-239 TRUST DEEDS---to---WORKERS' COMPENSATION
CHAPTER 236 UNLAWFUL DETAINER
PART II. FORMS
PART C. Affirmative Defenses

23-236 California Points & Authorities § 236.62

§ 236.62 Opposing Plaintiff's Motion to Strike Irrelevant Matter in Answer [Code Civ. Proc. §§ 435-437]--Affirmative Defense of Retaliatory Eviction [Civ. Code § 1942.5]

[1] FORM

[*Caption. See § 236.60[1].*]

PLAINTIFF'S MOTION TO STRIKE IRRELEVANT MATTER SHOULD BE DENIED BECAUSE THE AFFIRMATIVE DEFENSE OF RETALIATORY EVICTION IS PROPER.

A. Affirmative Defense Related to Possession Is Proper. A tenant may interpose an affirmative defense in an unlawful detainer action when the defense directly relates to the issue of possession and when the defense, if established, would result in the tenant's retention of the premises (*Green v. Superior Court (1974) 10 Cal. 3d 616, 633, 111 Cal. Rptr. 704, 517 P.2d 1168*).

[*EITHER*]

B. Eviction in Retaliation for Action to Correct Tenantability of Leased Premises. When the lessor retaliates against the lessee because of the exercise by the lessee of his/her rights under *Civil Code Sections 1940-1954.1* (leasing land and dwellings), or because the lessee complained to an appropriate agency as to tenantability of a dwelling, and if the lessee of the dwelling is not in default as to the payment of his/her rent, the lessor may not recover possession of a dwelling within 180 days after _____ [the date on which the lessee, in good faith, gave notice under *Civil Code Section 1942 or* the date on which the lessee, in good faith, made an oral complaint to the lessor regarding tenantability *or* the date on which the lessee, in good faith, filed a written complaint with an appropriate agency, of which the lessor had notice, for the purpose of obtaining correction of a condition relating to tenantability *or* the date on which the lessee, in good faith, had filed an oral complaint which was registered or otherwise recorded in writing, with an appropriate agency, of which the lessor had notice, for the purpose of obtaining correction of a condition relating to tenantability *or* the date of an inspection or issuance of a citation, resulting from a tenant's _____ (written complaint *or* oral complaint that was registered or otherwise recorded in writing) of which the lessor did not

have notice *or* the filing of appropriate documents commencing a judicial or arbitration proceeding involving the issue of tenantability *or* entry of judgment or the signing of an arbitration award, if any, when in the judicial proceeding or arbitration the issue of tenantability is determined adversely to the lessor] (*Civ. Code § 1942.5(a)*).

[*AND/OR*]

C. Eviction in Retaliation for Participation in Tenant Organization or Exercise of Other Legal Rights. It is unlawful for a lessor to _____ [increase rent *and/or* decrease services *and/or* cause a lessee to quit involuntarily *and/or* bring an action to recover possession *and/or* threaten to _____ (increase rent *and/or* decrease services *and/or* cause a lessee to quit involuntarily *and/or* bring an action to recover possession)] for the purpose of retaliating against the lessee because he or she has _____ [lawfully organized or participated in a lessees' association or an organization advocating lessees' rights *and/or* lawfully and peaceably exercised any rights under the law] (*Civ. Code § 1942.5(c)*; *Barela v. Superior Court (1981) 30 Cal. 3d 244, 248-254, 178 Cal. Rptr. 618, 636 P.2d 582*).

[*AND/OR*]

D. Eviction in Retaliation for Tenant's Exercise of Rights Under *Health & Safety Code § 17031.5*. A tenant of a labor camp consisting only of permanent housing or permanent housing units within a labor camp (*see* Business and Professions Code Section 17008) has a defense of retaliation in any action for possession if the employer or landlord acted in violation of *Health and Safety Code Section 17031.5* (*Health & Safety Code § 17031.5(b)*).

[*AND/OR*]

E. Frustration of Public Policy by Retaliatory Eviction. A legitimate retaliatory eviction defense is raised when a statute or policy is in question that depends for its effectiveness on private initiative and that would thus be emasculated by allowing punitive eviction and when the interests in preserving the summary nature of the unlawful detainer proceeding are outweighed by the interests in furthering legislative policy (*Barela v. Superior Court (1981) 30 Cal. 3d 244, 250-251, 178 Cal. Rptr. 618, 636 P.2d 582* ; *S.P. Growers Ass'n v. Rodriguez (1976) 17 Cal. 3d 719, 728-729, 131 Cal. Rptr. 761, 552 P.2d 721*).

[*AND/OR*]

F. Frustration of Statutory Rights by Retaliatory Eviction. A landlord may not lawfully evict a tenant in retaliation for the tenant's exercise of statutorily protected rights and the tenant may raise the retaliatory nature of an attempted eviction as a defense in an unlawful detainer action (*Vargas v. Municipal Court (1978) 22 Cal. 3d 902, 914, 150 Cal. Rptr. 918, 587 P.2d 714*).

[*Optional*] **G. Retaliatory Eviction Defense Is Available to Commercial Tenant.** A commercial tenant may raise the defense of retaliatory eviction on the same basis as a residential tenant (Custom Parking, Inc. v. Superior Court (l982) *138 Cal. App. 3d 90, 100-101, 187 Cal. Rptr. 674*).

[*Optional*] **H. Affirmative Defense of Retaliatory Eviction Is Available Without Exercise of Repair-and-Deduct Remedy or Complaints to Governmental Authorities.** The affirmative defense of retaliatory eviction may be properly raised by a tenant who orally complained to the landlord about the conditions of the premises although the tenant did not exercise the repair-and-deduct remedy or complain to governmental authorities (*Kemp v. Schultz (1981)*

121 Cal. App. 3d Supp 13, 16-18, 175 Cal. Rptr. 412).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____

[*name*]

[2] Comments

[a] Use of Form

These points and authorities oppose a motion to strike irrelevant matter from an answer in an unlawful detainer action when the matter sought to be stricken is an affirmative defense alleging retaliatory eviction by the landlord.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should provide facts showing that the landlord seeks to evict the tenant because of the tenant's involvement with a tenant's association or because the tenant complained about the condition of the premises.

[c] Related Pleading and Practice Chapters

For a general discussion of the motion to strike and an opposing party's procedural guide, see California Forms of Pleading and Practice Ch. 375, *Motions to Strike* (Matthew Bender). For discussion and forms pertaining to unlawful detainer proceedings generally, see California Forms of Pleading and Practice Ch. 333, *Landlord and Tenant: Eviction Actions* .

[d] Related Points and Authorities

For related points and authorities, see in this set Ch. 160, *Motions to Strike*.

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities in [1], *above*, may be used in opposition to a motion to strike irrelevant matter supported by the points and *authorities in § 236.23*.

[3] Discussion of Authorities

[a] Affirmative Defense Related to Possession Is Proper

In ***Green v. Superior Court*** *(1974) 10 Cal. 3d 616, 111 Cal. Rptr. 704, 517 P.2d 1168* , a landlord commenced an unlawful detainer action in small claims court seeking possession of the leased premises and back rent. The tenant raised the defense that the landlord had failed to maintain the premises in a habitable condition. The small claims court awarded the landlord possession and a money judgment. The superior court reached the same result after a trial de novo on the tenant's appeal. The tenant's request for certification and transfer of the case to a court of appeal was denied.

The Supreme Court issued a peremptory writ of mandate directing the superior court to vacate its judgment and to proceed with trial of the unlawful detainer action, allowing the defense of breach of the warranty of habitability (*10 Cal. 3d 616, 620)* . The Court, after noting the absence of a statutory bar, held that no California decision prohibits a tenant from interposing a defense that directly relates to the issue of possession and which, if established, would result in the tenant's retention of the premises. The Court acknowledged a line of cases holding that a defense is generally excluded if it is extrinsic to the narrow issue of possession. The purpose of this rule is basically to prevent tenants from frustrating the summary statutory remedy through introduction of extraneous matter. This objective is accomplished by confining unlawful detainer actions to issues directly relevant to the ultimate question of possession. However, if an affirmative defense is relevant to that question, the defense should be available to the defendant (*10 Cal. 3d 616, 633-634)* .

[b] Eviction in Retaliation for Participation in Tenant Organization or Exercise of Other Legal Rights

In ***Barela v. Superior Court*** *(1981) 30 Cal. 3d 244, 178 Cal. Rptr. 618, 636 P.2d 582* , defendant complained to the police that plaintiff, her landlord, had molested her daughter. Plaintiff immediately tripled defendant's rent and then served a 30-day notice of eviction. Defendant raised the defense that the eviction was in retaliation for her complaint. The trial court found that the eviction was in retaliation for the complaint, but refused to find that such retaliation was in violation of law. The appellate department of the superior court upheld the trial court, and defendant sought a writ of mandate in the court of appeal. After the court of appeal denied the writ, defendant petitioned for a writ of mandate in the Supreme Court.

The Supreme Court granted the writ. It first pointed out that there were two parallel and independent sources for the doctrine of retaliatory eviction--the statutory basis in *Civ. Code § 1942.5* and the common-law basis (*30 Cal. 3d 244, 251)* . The Court then considered whether the case came within the statutory rule in *Civ. Code § 1942.5(c)* that eviction was unlawful for the purpose of retaliating against a tenant for the lawful and peaceful exercise of any rights under the law. The Court found that every citizen has the basic right and even duty to report crimes to the police. In light of this policy, the Court found that it was clear that the Legislature did not contemplate that summary eviction procedures should be used to punish a citizen who reports crimes to the police. This strong public policy outweighs any delay caused by raising the defense in the unlawful detainer proceeding (*30 Cal. 3d 244, 253)* .

[c] Frustration of Public Policy by Retaliatory Eviction

In ***Barela v. Superior Court*** *(1981) 30 Cal. 3d 244, 178 Cal. Rptr. 618, 636 P.2d 582* , the Supreme Court held that there are two parallel and independent bases for the defense of retaliatory eviction. The first is the statutory basis set forth in *Civ. Code § 1942.5*, and the second is based on case law. The Court then summarized the case-law test as whether, on balance, the public policies furthered by protecting a tenant from eviction outweigh the state's interest in ensuring that unlawful detainer proceedings are truly summary, relying on *S.P. Growers Ass'n v. Rodriguez (1976) 17 Cal. 3d 719, 131 Cal. Rptr. 761, 552 P.2d 721* (discussed *below*) (*30 Cal. 3d 244, 250)* . For further discussion of *Barela*, see [b], *above*.

In ***S.P. Growers Ass'n v. Rodriguez*** *(1976) 17 Cal. 3d 719, 131 Cal. Rptr. 761, 552 P.2d 721* , defendants were agricultural workers employed by plaintiff, a farm labor contractor, who provided housing for defendants. Defendants called a strike against plaintiff and shortly thereafter, filed suit against plaintiff in a federal district court, charging violation of the federal Farm Labor Contractor Registration Act [*7 U.S.C. §§ 2041-2055*]. Plaintiff then immediately served defendants with eviction notices and, when defendants failed to leave the premises, filed unlawful detainer actions. The trial court granted plaintiff's motion in the subsequent unlawful detainer proceeding to exclude evidence regarding two affirmative defenses, one of which was that the evictions were in retaliation for the federal suit filed by defendants. Judgment was entered against defendants, who appealed.

The Supreme Court reversed. In the pertinent part of the Court's opinion, it noted the exception to the general rule of the

inadmissibility of affirmative defenses when the plea was that the action amounted to a "retaliatory eviction" (*17 Cal. 3d 719, 724)* . The Court added that in evaluating whether defendants had raised a valid defense, it must engage in a balancing process. It must determine whether the public policies furthered by protecting defendants from eviction outweighed the interests in preserving the summary nature of unlawful detainer proceedings (*17 Cal. 3d 719, 724)* . In determining the public polices under the Farm Labor Contractor Registration Act, the Court noted former 7 U.S.C. § 2050b (*now see 29 U.S.C. § 1855(a)*) of the Act, which prohibits discrimination against a worker for filing suit under the Act and the fact that the Act thus relies in large part on the initiation of private litigation for its effectiveness. The Court stated that merely because exclusive jurisdiction to enforce the Act rests in the federal courts did not prevent a state court from enforcing the Act's policy, particularly in light of the supremacy clause which makes it the state court's duty to insure that the intent of the Congress is not ignored (*17 Cal. 3d 719, 727)* . The Court also stated that, even though the statute in question was enacted primarily to protect defendants as employees and not as tenants, it did not prevent defendants from raising the issue of the retaliatory eviction in the unlawful detainer proceedings, since the right not to be deprived in court of home and shelter because of the exercise of statutory rights is a broad equitable principle. This principle is as deserving of protection as the right to equal protection under the law which is present in actions involving retaliatory evictions for racial reasons. The Court thus concluded that the effectiveness of the act in question depends on private initiative and would be emasculated by allowing punitive eviction (*17 Cal. 3d 719, 728)* .

In deciding that the interests in preserving the summary nature of the unlawful detainer proceeding were outweighed by the interests in furthering congressional policy, the Court distinguished the opinion in *Union Oil Co. v. Chandler (1970) 4 Cal. App. 3d 716, 84 Cal. Rptr. 756* . It stated that unlike the action in *Union Oil* the trial court was not compelled to undertake the weighty task of determining whether there had been a violation of federal law since the policy of nondiscrimination for filing suit under the Act was clear, and the statute in question involved not a commercial lease, but eviction from a residential dwelling. The Court thus concluded that the defense presented in the case before it may be raised in an unlawful detainer proceeding. The Court added that this conclusion was unaltered by the fact that the housing agreement between plaintiff and defendants specified that shelter was provided only for employees, and by stating that, although a landlord may normally evict a tenant for no reason at all, he or she may not evict for an improper reason (*17 Cal. 3d 719, 729-730)* .

[d] Frustration of Statutory Rights by Retaliatory Eviction

In ***Vargas v. Municipal Court*** *(1978) 22 Cal. 3d 902, 150 Cal. Rptr. 918, 587 P.2d 714* , the Supreme Court resolved the question of the availability of defenses for retaliatory eviction beyond those provided by *Civ. Code § 1942.5* or deferal law [*see* [c], *above*]. In *Vargas*, the landlord terminated an employment relationship he had with his tenants and brought an unlawful detainer action. The employees, who were agricultural workers, then filed an unfair labor practice charge with the Agricultural Labor Relations Board. The trial court refused to admit the employees' evidence that the termination of employment and eviction were in retaliation for their exercise of rights specifically guaranteed by the Agricultural Labor Relations Act [*Lab. Code §§ 1140-1166.3*], and after a judgment in favor of the employer, the employees petitioned for a writ of mandate to vacate the trial court's judgment.

The Supreme Court granted the writ, holding that a landlord could not lawfully evict a tenant in retaliation for the tenant's exercise of statutorily protected rights and that a tenant may raise the retaliatory nature of the attempted eviction as a defense in an unlawful detainer action (*22 Cal. 3d 902, 913)* . The Court based this holding on its decisions in *Schweiger v. Superior Court (1970) 3 Cal. 3d 507, 517-518, 90 Cal. Rptr. 729, 476 P.2d 97* , and *S.P. Growers Ass'n v. Rodriguez (1976) 17 Cal. 3d 719, 131 Cal. Rptr. 761, 552 P.2d 721* (discussed under [c], *above*).

[e] Retaliatory Eviction Defense Is Available to Commercial Tenant

In **Custom Parking, Inc. v. Superior Court** (l982) *138 Cal. App. 3d 90, 187 Cal. Rptr. 674* , a commercial tenant attempted to raise the defense of retaliatory eviction in an unlawful detainer proceeding. The tenant offered to prove that the landlord's motive for its eviction was the refusal of defendant's employees to testify falsely in a libel action brought

by a third party against the landlord. The trial court ruled that the defense could not be raised in the unlawful detainer action and entered judgment for the landlord.

The court of appeal reversed. It noted that in some situations there was justification for treating commercial unlawful detainer actions differently from residential actions, such as the refusal to allow the defense of breach of an independent covenant in the commercial setting (*138 Cal. App. 3d 90, 96-101)* . It held, however, that there was no justification for not allowing the defense of retaliatory eviction in this situation because the strong public policy against false testimony outweighed the policy of summary unlawful detainer proceedings. The court also noted that the defense did not raise complex issues (*138 Cal. App. 3d 90, 101)* .

[f] Affirmative Defense of Retaliatory Eviction Is Available Without Exercise of Repair-and-Deduct Remedy or Complaints to Governmental Authorities

Kemp v. Schultz *(1981) 121 Cal. App. 3d Supp. 13, 175 Cal. Rptr. 412* , involved an unlawful detainer action by a landlord against the tenants in one of his apartments. The landlord had served the tenants with a notice of a rent increase. The tenants agreed to the increase, but asked that some repairs be made to the premises. No repairs were made, and the relationship deteriorated until the tenants were served with a 30-day notice to quit. After the tenants refused to quit, the landlord filed the present action in the municipal court. The tenants filed a general denial and several affirmative defenses, including the defense of retaliatory eviction. By a motion for judgment on the pleadings and a motion in limine at trial, the landlord contended that the retaliatory eviction defense was unavailable because the tenants had not made a claim to a governmental entity. The motions were denied, and the jury found for the tenants.

On appeal by the landlord to the superior court, the court affirmed the judgment. The court rejected the landlord's contention that a tenant must exercise his or her statutory right to deduct and repair under *Civ. Code § 1942* before using the retaliatory eviction defense. The court stated that the repair-and-deduct statute is explicitly independent of any other available remedy (*121 Cal. App. 3d Supp. 13, 16-17)* . The court also rejected the landlord's contention that a tenant must first complain to government officials before raising the defense. The court noted that the Legislature specifically provided for oral complaints concerning tenantability in *Civ. Code § 1942.5*, which governs the defense of retaliatory eviction. Thus, the court held that the defense may be raised on proof that an oral complaint had been made (*121 Cal. App. 3d Supp. 13, 17-18)* .

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23-236 California Points & Authorities § 236.63

§ 236.63 Opposing Plaintiff's Motion to Strike Irrelevant Matter in Answer [Code Civ. Proc. §§ 435-437]--Affirmative Defense of Racial Discrimination

[1] FORM

[*Caption. See § 236.60[1].*]

PLAINTIFF'S MOTION TO STRIKE IRRELEVANT MATTER SHOULD BE DENIED BECAUSE THE AFFIRMATIVE DEFENSE OF TERMINATION OF DEFENDANT'S TENANCY AS THE RESULT OF RACIAL DISCRIMINATION IS PROPER.

A. Affirmative Defense Is Not Barred by Statute. The statutory provisions governing unlawful detainer proceedings do not prohibit the assertion of an affirmative defense (*Green v. Superior Court (1974) 10 Cal. 3d 616, 632, 111 Cal. Rptr. 704, 517 P.2d 1168*).

B. Affirmative Defense Related to Possession Is Proper. A tenant may interpose an affirmative defense in an unlawful detainer action when the defense is directly related to the issue of possession and when the defense, if established, would result in the tenant's retention of the premises (*Green v. Superior Court (1974) 10 Cal. 3d 616, 633, 111 Cal. Rptr. 704, 517 P.2d 1168*).

C. Defense of Racial Discrimination Is Proper. An affirmative defense that a defendant's tenancy is being terminated because of racial discrimination is proper in an unlawful detainer proceeding (*Abstract Inv. Co. v. Hutchinson (1962) 204 Cal. App. 2d 242, 255, 22 Cal. Rptr. 309*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____

[*name*]

[2] Comments

[a] Use of Form

These points and authorities oppose a motion to strike irrelevant matter from an answer in an unlawful detainer action when the matter sought to be stricken is an affirmative defense which alleges that the defendant's tenancy is being terminated solely because of racial discrimination.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should provide facts showing that the landlord is seeking to evict the tenant because of his or her race.

[c] Related Pleading and Practice Chapters

For a general discussion of the motion to strike and an opposing party's procedural guide, see California Forms of Pleading and Practice Ch. 375, *Motions to Strike* (Matthew Bender). For discussion and forms pertaining to unlawful detainer proceedings generally, see California Forms of Pleading and Practice Ch. 333, *Landlord and Tenant: Eviction Actions* .

[d] Related Points and Authorities

For related points and authorities, see in this set Ch. 160, *Motions to Strike* (opposing motion to strike irrelevant, redundant, or immaterial matter from answer) and Ch. 35, *Civil Rights Unruh Civil Rights Act*.

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities in [1], *above*, may be used in opposition to a motion to strike irrelevant matter supported by the points and *authorities in § 236.23*.

[3] Discussion of Authorities

[a] Affirmative Defense Is Not Barred by Statute

In ***Green v. Superior Court*** *(1974) 10 Cal. 3d 616, 111 Cal. Rptr. 704, 517 P.2d 1168* , a landlord commenced an unlawful detainer action in small claims court seeking possession of the leased premises and back rent. The tenant raised the defense that the landlord had failed to maintain the premises in a habitable condition. The court awarded the landlord possession and a money judgment. The superior court reached the same result after a trial de novo on the tenant's appeal. The tenant's request for certification and transfer of the case to a court of appeal was denied.

The Supreme Court issued a peremptory writ of mandate directing the superior court to vacate its judgment and to proceed with trial of the unlawful detainer action, allowing the defense of breach of the warranty of habitability (*10 Cal. 3d 616, 620)* . The Court noted that absolutely nothing in the statutory provisions governing unlawful detainer proceedings prohibits the assertion of any defense. *Code Civ. Proc. § 1170* provides that in summary unlawful detainer proceedings the defendant may appear and answer or demur, and under *Code Civ. Proc. § 431.30* an answer may contain a statement of any new matter constituting a defense but may not claim affirmative relief. Thus, a defendant is

not precluded from interposing an affirmative defense in an unlawful detainer proceeding (*10 Cal. 3d 616, 632 n.16*).

[b] Affirmative Defense Related to Possession Is Proper

The procedural background of ***Green v. Superior Court*** *(1974) 10 Cal. 3d 616, 111 Cal. Rptr. 704, 517 P.2d 1168* , is discussed under [a], *above*. The Supreme Court, after noting the absence of a statutory bar, held that no California decision prohibits a tenant from interposing a defense which directly relates to the issue of possession and which, if established, would result in the tenant's retention of the premises (*10 Cal. 3d 616, 633)* . The Court acknowledged a line of cases holding that a defense is generally excluded if it is extrinsic to the narrow issue of possession. The purpose of this rule is basically to prevent tenants from frustrating the summary statutory remedy through introduction of extraneous matter. This objective is accomplished by confining unlawful detainer actions to issues directly relevant to the ultimate question of possession. However, if an affirmative defense is relevant to that question, the defense should be available to the defendant (*10 Cal. 3d 616, 633-634)* .

[c] Defense of Racial Discrimination Is Proper

In ***Abstract Inv. Co. v. Hutchinson*** *(1962) 204 Cal. App. 2d 242, 22 Cal. Rptr. 309* , the plaintiff instituted an unlawful detainer proceeding to obtain possession of premises leased to the defendant under a month-to-month tenancy. Defendant's answer acknowledged, in effect, that a proper notice to quit had been served and that the plaintiff was entitled to possession except for the facts alleged in the defendant's affirmative defenses. The trial court refused to admit any evidence on the allegations of the affirmative defenses and rendered judgment in the plaintiff's favor. On appeal to the appellate department of the superior court, the trial court's judgment was reversed on the ground that it was error to exclude evidence under the affirmative defenses. The case was certified on the superior court's own motion to the district court of appeal. Two of the defendant's affirmative defenses were based on the contention that his eviction was sought solely on the ground of his race.

The court of appeal reversed the judgment and remanded the case for retrial. The court held that the defendant should have been permitted to produce proof of the allegations of his special defenses of discrimination. If the allegations of racial discrimination were found true, the court would be proscribed from taking action under both the federal and state Constitutions. Judicial enforcement of the eviction of a tenant because of race constitutes state action violating the tenant's rights guaranteed by the *Fourteenth Amendment to the United States Constitution*, and *Article I, § 15 of the California Constitution*. The interest in preserving the summary nature of the unlawful detainer proceeding cannot outweigh the interest of doing substantial justice in a case involving such a constitutional defense (*204 Cal. App. 2d 242, 249)* .

Although the court in *Abstract Inv. Co.* referred to the Unruh Act, it declined to hold on the issue of whether a violation of this Act would constitute a proper affirmative defense in an unlawful detainer proceeding and decided the case on a constitutional basis. In *Flowers v. John Burnham & Co. (1971) 21 Cal. App. 3d 700, 98 Cal. Rptr. 644* , the court of appeal recognized the Unruh Act as a limitation on the power of landlords to terminate tenancy. However, in that case the court held that the lessor's regulation restricting children in its apartments to girls of all ages and boys under five was not unreasonable or arbitrary (*21 Cal. App. 3d 700, 703)* .

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Volume 23 Chapters 230-239 TRUST DEEDS---to---WORKERS' COMPENSATION
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23-236 California Points & Authorities § 236.64

§ 236.64 Opposing Plaintiff's Motion to Strike Irrelevant Matter in Answer [Code Civ. Proc. §§ 435-437]--Affirmative Defense That Notice Fails to Demand Precise Amount Due [Code Civ. Proc. § 1161(2)]

[1] FORM

[*Caption. See § 236.60[1].*]

PLAINTIFF'S MOTION TO STRIKE IRRELEVANT MATTER SHOULD BE DENIED BECAUSE THE AFFIRMATIVE DEFENSE THAT THE THREE-DAY NOTICE FAILS TO DEMAND THE PRECISE AMOUNT DUE IS PROPER.

A. Affirmative Defense Related to Possession Is Proper. A tenant may interpose an affirmative defense in an unlawful detainer action when the defense directly relates to the issue of possession, and when the defense, if established, would result in the tenant's retention of the premises (*Green v. Superior Court (1974) 10 Cal. 3d 616, 633, 111 Cal. Rptr. 704, 517 P.2d 1168*).

B. Strict Compliance With Notice Requirements. Strict compliance with the statutory provisions relating to the three-day notice to quit is a prerequisite to seeking the summary remedy of unlawful detainer (*Baugh v. Consumers Associates, Ltd. (1966) 241 Cal. App. 2d 672, 674, 50 Cal. Rptr. 822*).

C. Demand for Precise Amount of Rent Due. When an unlawful detainer is based on a default in the payment of rent, the notice to pay rent or quit must demand the exact amount of rent claimed to be due (*Baugh v. Consumers Associates, Ltd. (1966) 241 Cal. App. 2d 672, 674, 50 Cal. Rptr. 822*).

D. Demand in Excess of Amount Due Is Insufficient. A notice in which the demand for rent exceeds the amount due is insufficient (*Johnson v. Sanches (1942) 56 Cal. App. 2d 115, 118, 132 P.2d 853*).

E. Demand in Excess of Judgment. A demand for rent in excess of the judgment in an unlawful detainer proceeding will not support the judgment (*Werner v. Sargeant (1953) 121 Cal. App. 2d 833, 837, 264 P.2d 217*).

[*Optional*] **F. Demand in Excess of One Year's Rent Is Insufficient.** A notice in which demand exceeds rent owed for more than one year is insufficient (*Bevill v. Zoura (1994) 27 Cal. App. 4th 694, 698, 32 Cal. Rptr. 2d 635*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____

[*name*]

[2] Comments

[a] Use of Form

These points and authorities oppose a motion to strike irrelevant matter in an answer in an unlawful detainer action based on default in payment of rent, when the matter sought to be stricken is an affirmative defense that alleges that the three-day notice failed to demand the precise amount of rent due. The form would be used when (1) this defect does not appear on the face of the complaint (as when the tenant has paid part of the amount demanded), (2) when the demand includes charges other than rent but this does not appear on the face of the complaint, or (3) when the amount demanded has been incorrectly computed and this is not apparent from the complaint. If this defect appears on the face of the complaint, a demurrer would be the appropriate form of objection [*see § 236.13*].

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should show that the notice to pay rent or quit does not specifically demand the exact amount of rent claimed to be due.

[c] Related Pleading and Practice Chapters

For a general discussion of the motion to strike and an opposing party's procedural guide, see California Forms of Pleading and Practice, Ch. 375, *Motions to Strike* (Matthew Bender). For discussion and forms pertaining to unlawful detainer proceedings generally, see California Forms of Pleading and Practice Ch. 333, *Landlord and Tenant: Eviction Actions* .

[d] Related Points and Authorities

For related points and authorities, see in this set Ch. 160, *Motions to Strike* (opposing motion to strike irrelevant, redundant, or immaterial matter from answer).

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities in [1], *above*, may be used in opposition to a motion to strike irrelevant matter supported by the points and *authorities in § 236.23*.

[3] Discussion of Authorities

[a] Affirmative Defense Related to Possession Is Proper

In ***Green v. Superior Court*** *(1974) 10 Cal. 3d 616, 111 Cal. Rptr. 704, 517 P.2d 1168* , a landlord commenced an unlawful detainer action in small claims court seeking possession of the leased premises and back rent. The tenant raised the defense that the landlord had failed to maintain the premises in a habitable condition. The court awarded the landlord possession and a money judgment. The superior court reached the same result after a trial de novo on the tenant's appeal. The tenant's request for certification and transfer of the case to a court of appeal was denied.

The Supreme Court issued a peremptory writ of mandate directing the superior court to vacate its judgment and to proceed with trial of the unlawful detainer action, allowing the defense of breach of the warranty of habitability. The Court, after noting the absence of a statutory bar, held that no California decision prohibits a tenant from interposing a defense that directly relates to the issue of possession and, if established, would result in the tenant's retention of the premises (*10 Cal. 3d 616, 633)* . The Court acknowledged a line of cases holding that a defense is generally excluded if it is extrinsic to the narrow issue of possession. The purpose of this rule is basically to prevent tenants from frustrating the summary statutory remedy through introduction of extraneous matter. This objective is accomplished by confining unlawful detainer actions to issues directly relevant to the ultimate question of possession. However, if an affirmative defense is relevant to that question, the defense should be available to the defendant (*10 Cal. 3d 616, 632-634)* .

[b] Strict Compliance With Notice Requirements

In ***Baugh v. Consumers Associates, Ltd.*** *(1966) 241 Cal. App. 2d 672, 50 Cal. Rptr. 822* , the defendant's default was entered in an unlawful detainer proceeding. The defendant moved to set aside the default and accompanied its motion with a copy of its proposed answer. The motion was denied and the court entered judgment granting the plaintiff possession of the premises and granting treble damages. The plaintiffs' complaint alleged the making of the lease and that the defendant had agreed to pay not less than $3,000 per month. It further alleged nonpayment of rent for the months of January and February, together with a written demand and notice to pay rent or quit. A copy of the notice was attached to the complaint and made a part of it. In the notice no amount of delinquent rent was mentioned.

The court of appeal reversed, holding that the complaint did not state a cause of action because the three-day notice did not specify the amount of rent claimed to be due (*241 Cal. App. 2d 672, 674)* . *Code Civ. Proc. § 1161* specifically provides that a tenant of real property is guilty of unlawful detainer when he or she continues in possession after default in the payment of rent "and three days' notice, in writing, requiring its payment, stating the amount which is due" has been served on the tenant. Strict compliance with this provision of the unlawful detainer statute is mandatory. The remedy of unlawful detainer is a summary proceeding to determine the right to possession of real property. Since it is purely statutory in nature, it is essential that a party seeking the remedy bring himself or herself clearly within the statute (*241 Cal. App. 2d 672, 674)* .

[c] Demand for Precise Amount of Rent Due

Baugh v. Consumers Associates, Ltd. *(1966) 241 Cal. App. 2d 672, 50 Cal. Rptr. 822* , is discussed under [b], *above*.

[d] Demand in Excess of Amount Due Is Insufficient

In ***Johnson v. Sanches*** *(1942) 56 Cal. App. 2d 115, 132 P.2d 853* , the plaintiff brought an action for unlawful detainer after serving a three-day notice to pay rent or surrender possession. The trial court entered judgment for the plaintiff. The defendant had leased two parcels from the plaintiff, one of 100 acres and the other of 38 acres. The monthly rental for the 100 acre parcel was $208.34 and the annual rental for the 38 acre parcel was $950. The three-day notice demanded rent in the amount of $1,550.38. Included in the demand was $750 claimed to be due on the 38 acre parcel. The trial court found that $750 of the amount demanded was not owed by defendant.

The court of appeal reversed the judgment holding that to work a forfeiture of a lease for nonpayment of rent, the landlord must demand of the tenant the payment of the exact sum due (*56 Cal. App. 2d 115, 116-117)* . The notice in

the instant case did not comply with the requirements of *Code Civ. Proc. § 1161* in that the amount demanded as rent was $750 in excess of the amount then due (*56 Cal. App. 2d 115, 118)* .

[e] Demand in Excess of Judgment

In ***Werner v. Sargeant*** *(1953) 121 Cal. App. 2d 833, 264 P.2d 217* , an action for unlawful detainer based on nonpayment of rent, the defendant appealed from a summary judgment entered for the plaintiff. That judgment granted rent to the plaintiff at $300 a month, while the demand and notice to quit filed under *Code Civ. Proc. § 1161* had demanded rent at $350 per month. An affirmative defense that incorporated the lease and disputed the amount of actual rent being paid was struck on the ground that such a defense could not be asserted in an unlawful detainer action. In fact, the demand for payment had been for seven months' rent at $350 per month, less several hundred dollars paid to the plaintiff or credited on defendant's obligation, while the judgment was for eight months' rent, without deductions of any kind, at $300 per month.

The judgment was reversed by the court of appeal, because, so far as the record was concerned, the notice to pay rent or quit did not correctly set forth the amount of rent due as required by *Code Civ. Proc. § 1161*. The court, emphasizing that the summary judgment process is purely statutory and to be employed only in cases when no material issue of fact is presented, held that *Code Civ. Proc. § 1161* requires that to work a lease's forfeiture for nonpayment of rent the landlord must demand the precise sum due, and that a demand in excess of the judgment will not support the judgment (*121 Cal. App. 2d 833, 837)* .

[f] Demand in Excess of One Year's Rent Is Insufficient

In ***Bevill v. Zoura*** *(1994) 27 Cal. App. 4th 694, 32 Cal. Rptr. 2d 635* , the landlord filed an unlawful detainer action following service on the tenant of a three-day notice. The notice demanded payment of more than one year's rent. The court of appeal held that the notice was insufficient to support the unlawful detainer action because it did not correctly state the amount that was due and because it was not served within one year after the rent became due, both of which are required under *Code Civ. Proc. § 1161(2)* (*27 Cal. App. 4th 694, 697-698)* . The facts constituting ineffective notice appeared on the face of the notice, that is, the demand included rent owed more than one year before the three-day notice was served. Accordingly, the tenant was not required to plead his theory of ineffective notice as an affirmative defense. The court noted that the tenant had raised the issue of ineffective notice in its trial brief, and that there was no assertion by the landlord that he was unfairly surprised or prejudiced by the tenant's failure to raise the issue as an affirmative defense (*27 Cal. App. 4th 694, 698)* .

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23-236 California Points & Authorities § 236.65

§ 236.65 Opposing Plaintiff's Motion to Strike Irrelevant Matter in Answer [Code Civ. Proc. §§ 435-437]--Affirmative Defense of Waiver of Breach

[1] FORM

[*Caption. See § 236.60[1].*]

PLAINTIFF'S MOTION TO STRIKE IRRELEVANT MATTER SHOULD BE DENIED BECAUSE THE AFFIRMATIVE DEFENSE OF WAIVER OF THE BREACH OF A COVENANT OF THE LEASE IS PROPER.

A. Affirmative Defense Related to Possession Is Proper. A tenant may interpose an affirmative defense in an unlawful detainer action when the defense directly relates to the issue of possession and when the defense, if established, would result in the tenant's retention of the premises (*Green v. Superior Court (1974) 10 Cal. 3d 616, 633, 111 Cal. Rptr. 704, 517 P.2d 1168*).

B. Waiver of Breach Bars Judgment for Possession. A lessor's waiver of breach of a covenant in a lease bars a judgment for possession (*Bedford Inv. Co. v. Folb (1947) 79 Cal. App. 2d 363, 366-367, 180 P.2d 361*).

C. Conduct Supporting Inference of Waiver. Conduct of the lessor, with knowledge of a breach, consistent with the continued existence of the lease and inconsistent with its termination by forfeiture supports an inference that the lessor has waived the breach (*Salton Community Serv. Dist. v. Southard (1967) 256 Cal. App. 2d 526, 533, 64 Cal. Rptr. 246*).

[*Optional*] **D. Acceptance of Benefits Under Lease Constitutes Waiver.** A lessor's acceptance of benefits under the lease with knowledge of a breach supports an inference that the lessor has waived the breach (*Salton Community Serv. Dist. v. Southard (1967) 256 Cal. App. 2d 526, 533, 64 Cal. Rptr. 246*).

[*Optional*] **E. Acceptance of Rent With Knowledge of Breach Constitutes Waiver.** The acceptance of rent by a landlord from the tenant after the breach of a condition of the lease, with full knowledge of all the facts, is a waiver of the breach (*Kern Sunset Oil Co. v. Good Roads Oil Co. (1931) 214 Cal. 435, 440, 6 P.2d 71*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____

[*name*]

[2] Comments

[a] Use of Form

These points and authorities oppose a motion to strike irrelevant matter from an answer in an unlawful detainer action when the matter sought to be stricken is an affirmative defense alleging the plaintiff's waiver of the breach of covenant which is the basis for the action.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should provide facts showing that the landlord knew that the tenant had breached a particular provision of the lease but still accepted rent payments from the tenant.

[c] Related Pleading and Practice Chapters

For a general discussion of the motion to strike and an opposing party's procedural guide, see California Forms of Pleading and Practice Ch. 375, *Motions to Strike* (Matthew Bender). For discussion and forms pertaining to unlawful detainer proceedings generally, see California Forms of Pleading and Practice Ch. 333, *Landlord and Tenant: Eviction Actions* .

[d] Related Points and Authorities

For related points and authorities, see in this set Ch. 160, *Motions to Strike* (opposing motion to strike irrelevant, redundant, or immaterial matter from answer) and Ch. 141, *Landlord and Tenant* (affirmative defense of waiver of breach).

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities in [1], *above*, may be used in opposition to a motion to strike irrelevant matter supported by the points and *authorities in § 236.23*.

[3] Discussion of Authorities

[a] Affirmative Defense Related to Possession Is Proper

In ***Green v. Superior Court*** *(1974) 10 Cal. 3d 616, 111 Cal. Rptr. 704, 517 P.2d 1168* , a landlord commenced an unlawful detainer action in small claims court seeking possession of the leased premises and back rent. The tenant raised the defense that the landlord had failed to maintain the premises in a habitable condition. The court awarded the landlord possession and a money judgment. The superior court reached the same result after a trial de novo on the

tenant's appeal. The tenant's request for certification and transfer of the case to a court of appeal was denied.

The Supreme Court issued a peremptory writ of mandate directing the superior court to vacate its judgment and to proceed with trial of the unlawful detainer action, allowing the defense of breach of the warranty of habitability. The Court, after noting the absence of a statutory bar, held that no California decision prohibits a tenant from interposing a defense which directly relates to the issue of possession and which, if established, would result in the tenant's retention of the premises (*10 Cal. 3d 616, 633)* . The Court acknowledged a line of cases holding that a defense is generally excluded if it is extrinsic to the narrow issue of possession. The basic purpose of this rule is to prevent tenants from frustrating the summary statutory remedy through introduction of extraneous matter. This objective is accomplished by confining unlawful detainer actions to issues directly relevant to the ultimate question of possession. However, if an affirmative defense is relevant to that question, the defense should be available to the defendant (*10 Cal. 3d 616, 632-633)* .

[b] Waiver of Breach Bars Judgment for Possession

In ***Bedford Inv. Co. v. Folb*** *(1947) 79 Cal. App. 2d 363, 180 P.2d 361* , the lessor brought an action for unlawful detainer after having served a notice of termination of the lease and notice to quit on the ground that a sublease had been made without its consent in violation of a provision in the lease. The trial court entered judgment for the lessor for possession and damages. The lease provided that the lessees could not assign the lease or sublet any part of the premises without the lessor's written consent. However, it also provided that the lessor would not arbitrarily withhold approval. The lessees sublet a part of the premises after having requested, but without having received, respondent's consent.

The court of appeal reversed, ordering the trial court to enter a judgment in favor of the defendants and restoring to them all rights to which they were entitled under the lease (*79 Cal. App. 2d 363, 367)* . In addition to upholding the lessees' argument that the lessor had arbitrarily withheld his approval, the court also noted that the lessor had accepted rent after the action was filed. The lessor's right to declare a forfeiture of a lease, by reason of the making of a sublease without the lessor's consent in violation of the lease, is waived when the lessor, after knowledge of the sublease, accepts the rents specified in the lease. The payment of rent bars any judgment against the lessees for rent and it likewise bars a judgment either for damages or for possession (*79 Cal. App. 2d 363, 366-367)* .

[c] Conduct Supporting Inference of Waiver

Salton Community Serv. Dist. v. Southard *(1967) 256 Cal. App. 2d 526, 64 Cal. Rptr. 246* , involved an unlawful detainer action in which the defendants set forth defenses of waiver and estoppel. The plaintiff demurred to these defenses and the demurrer was sustained without leave to amend. At trial the defendants made offers of proof directed to the issues of waiver and estoppel and objections to these offers of proof were sustained. The defendants then stated they had no evidence to present other than that in support of their offers of proof which had been rejected. The plaintiff moved for and obtained a directed verdict. The plaintiff and defendants had executed a written sublease of property which provided that no camping was to be permitted on the premises. It was the duty of the defendants to enforce this provision. However, following the sublease's execution, camping occurred intermittently during defendants' occupancy and the plaintiff knew of the camping. Despite this knowledge, the plaintiff approved defendants' construction of permanent improvements and permitted them to engage in other expenditures. The defendants erected a sign stating that the plaintiff insisted no camping be allowed on the premises but plaintiff required them to remove the sign. The plaintiff even maintained a sign just outside the leased premises indicating that camping was available within the premises.

The court of appeal reversed and held that the trial court's refusal to permit the introduction of evidence on whether the lessor's conduct constituted a waiver of the breach was error (*256 Cal. App. 2d 526, 535)* . The court stated that conduct of the lessor, with knowledge of a breach, consistent with the continued existence of the lease and inconsistent with its termination by forfeiture supports an inference that the lessor has waived the breach. When the lessor's conduct, following execution of a lease, leads the lessee to believe compliance with a particular covenant will not be enforced,

the lessee's reliance on this belief in consequent performance by him or her of other covenants of the lease estops the lessor to declare a forfeiture of the lease on account of the particular breach (*256 Cal. App. 2d 526, 531)* .

[d] Acceptance of Benefits Under Lease Constitutes Waiver

Salton Community Serv. Dist. v. Southard *(1967) 256 Cal. App. 2d 526, 64 Cal. Rptr. 246* , is discussed in [c], *above*.

[e] Acceptance of Rent With Knowledge of Breach Constitutes Waiver

In ***Kern Sunset Oil Co. v. Good Roads Oil Co.*** *(1931) 214 Cal. 435, 6 P.2d 71* , the plaintiff brought an action to declare the forfeiture of a lease of oil lands. The trial court entered judgment for the defendants. The defendants had agreed in the lease to build two oil wells a year until 16 wells had been drilled. The defendants completed only 13 wells during a period of over 13 years. The plaintiff then served notice of forfeiture.

The Supreme Court held that the plaintiff waived the breach of the covenant (*214 Cal. 435, 443)* . For five years after the date on which the 16 wells should have been completed the plaintiff accepted and received regular monthly payments from the leased premises without making any complaint or objection to the default on the lessees' part. The Court stated that it is the general rule that the acceptance of rent by the landlord from the tenant, after the breach of a condition of the lease, with full knowledge of all the facts, is a waiver of the breach and precludes the landlord from declaring a forfeiture of the lease by reason of such breach (*214 Cal. 435, 440-443)* .

It should be noted that the acceptance of rent after the lessor has knowledge of the breach does not constitute a waiver if the lease expressly provides that it does not, especially when the landlord also gives notice that his or her acceptance of the rent is not to be construed as a waiver of the right to assert a forfeiture [*Karbelnig v. Brothwell (1966) 244 Cal. App. 2d 333, 342, 53 Cal. Rptr. 335]* . Also, a landlord's acceptance of HUD housing assistance payments made on behalf of a tenant after a tenant's breach does *not* waive the landlord's right to terminate the lease, at least when those payments do not constitute rent under the terms of the lease between the landlord and the tenant [*Savett v. Davis (1994) 29 Cal. App. 4th Supp. 13, 20* , *34 Cal. Rptr. 2d 550]* .

[4] Additional Authorities

[a] Acceptance of Rent With Knowledge of Breach Constitutes Waiver

Gray v. Maier & Zobelein Brewery (1906) 2 Cal. App. 653, 84 P. 280 , involved an unlawful detainer action. The trial court entered judgment for the defendants and denied a motion for a new trial. The plaintiffs' predecessor in title leased the premises to the defendants for a term of two years. The lease contained a clause that the premises would not be sublet without the lessor's consent. Shortly after the term's commencement the defendants sublet the premises. This was known to the plaintiffs' grantor and acquiesced in by her thereafter, receiving rent, until she transferred ownership of the premises to the plaintiffs. The plaintiffs served a three-day notice to quit on the defendants following a conflict over an option to extend the lease for another year.

The court of appeal affirmed the judgment. The court noted that the power of a court of equity is invoked by a plaintiff in an unlawful detainer action and this power extends to a full examination of all the equities involved. When all parties knew of the subletting and acquiesced in it, receiving rent with such knowledge, there is a waiver of any rights existing on account of the violation of the provision against subletting (*2 Cal. App. 653, 658)* .

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23-236 California Points & Authorities § 236.66

§ 236.66 Opposing Plaintiff's Motion to Strike Irrelevant Matter in Answer [Code Civ. Proc. §§ 435-437]--Affirmative Defense of Good Faith Substantial Compliance With Condition

[1] FORM

[*Caption. See § 236.60[1].*]

PLAINTIFF'S MOTION TO STRIKE IRRELEVANT MATTER SHOULD BE DENIED BECAUSE THE AFFIRMATIVE DEFENSE OF A GOOD FAITH SUBSTANTIAL COMPLIANCE WITH A CONDITION OF THE LEASE IS PROPER.

Defense of Good Faith Substantial Compliance Is Proper. An affirmative defense that a defendant has substantially complied with a condition in the lease when literal compliance is impossible is proper in an unlawful detainer proceeding (*Knight v. Black (1912) 19 Cal. App. 518, 525-527, 126 P. 512*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____

[*name*]

[2] Comments

[a] Use of Form

These points and authorities oppose a motion to strike irrelevant matter from an answer in an unlawful detainer action when the matter sought to be stricken is an affirmative defense alleging the defendant's good faith substantial compliance with a condition of the lease.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should provide facts showing that the tenant, although not in 100 percent compliance with a condition of the lease, has substantially complied with the condition.

[c] Related Pleading and Practice Chapters

For a general discussion of the motion to strike and an opposing party's procedural guide, see California Forms of Pleading and Practice Ch. 375, *Motions to Strike* (Matthew Bender). For discussion and forms pertaining to unlawful detainer proceedings generally, see California Forms of Pleading and Practice Ch. 333, *Landlord and Tenant: Eviction Actions* .

[d] Related Points and Authorities

For related points and authorities, see in this set Ch. 160, *Motions to Strike* (opposing motion to strike irrelevant, redundant, or immaterial matter from answer).

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities in [1], *above*, may be used in opposition to a motion to strike irrelevant matter supported by the points and *authorities in § 236.23*.

[3] Discussion of Authorities

[a] Defense of Good Faith Substantial Compliance Is Proper

In ***Knight v. Black*** *(1912) 19 Cal. App. 518, 126 P. 512* , the plaintiff brought an action in unlawful detainer based on the defendant's failure to furnish the leased premises with furniture worth $3,000 and to execute a note and chattel mortgage on the furniture to the plaintiff as security for the payment of rent as required by the lease. The defendant admitted this failure but set up as a defense, facts which, if true, would tend to show that literal compliance with the condition was temporarily impossible due to circumstances over which the defendant had no control. In addition, the defendant pleaded a tender to plaintiff of other security (a gold coin) to protect the plaintiff against any possible loss for nonpayment of rent until such time as the defendant could furnish the exact security called for by the lease's condition. The trial court granted the plaintiff's motion to strike out these parts of the defendant's answer and judgment was entered for the plaintiff.

The court of appeal reversed the judgment and remanded the case for a new trial. The court held that granting the motion to strike the defense of good faith substantial compliance with the condition was error since it was a valid defense to the unlawful detainer action (*19 Cal. App. 518, 526)* .

[4] Additional Authorities

[a] Defense of Good Faith Substantial Compliance Is Proper

Roth v. Morton's Chefs Services, Inc. (1985) 173 Cal. App. 3d 380, 218 Cal. Rptr. 684 , was a proceeding in unlawful detainer for breach of the covenant against subleasing. Plaintiff, without knowledge that defendant had already

subleased the entire premises without her consent, which fact defendant had concealed from her, gave her consent to sublease a portion of the premises. From a judgment for plaintiff, defendant appealed, arguing it had substantially complied with the covenant requiring the obtaining of prior consent to sublease.

The court of appeal affirmed. The court pointed out that the equitable defense of substantial compliance is a proper defense to a proceeding in unlawful detainer, but held that the defense was not sustained (*173 Cal. App. 3d 380, 387)* .

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23-236 California Points & Authorities § 236.67

§ 236.67 Opposing Plaintiff's Motion to Strike Irrelevant Matter in Answer [Code Civ. Proc. §§ 435-437]--Affirmative Defense of Lessor's Bad Faith in Causing Breach

[1] FORM

[*Caption. See § 236.60[1].*]

PLAINTIFF'S MOTION TO STRIKE IRRELEVANT MATTER SHOULD BE DENIED BECAUSE THE AFFIRMATIVE DEFENSE THAT THE PLAINTIFF ACTING IN BAD FAITH CAUSED THE BREACH IS PROPER.

A. Affirmative Defense Related to Possession Is Proper. A tenant may interpose an affirmative defense in an unlawful detainer action when the defense directly relates to the issue of possession and when the defense, if established, would result in the tenant's retention of the premises (*Green v. Superior Court (1974) 10 Cal. 3d 616, 633, 111 Cal. Rptr. 704, 517 P.2d 1168*).

B. Lessor's Bad Faith in Causing Breach Precludes a Forfeiture. When the lessor acts in bad faith to entrap the lessee into a technical breach of the lease, a court will refuse to enforce a forfeiture (*Strom v. Union Oil Co. (1948) 88 Cal. App. 2d 78, 83-85, 198 P.2d 347*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____

[*name*]

[2] Comments

[a] Use of Form

These points and authorities oppose a motion to strike irrelevant matter from an answer in an unlawful detainer action when the matter sought to be stricken is an affirmative defense alleging that the plaintiff acted in bad faith and caused the breach on which the action is based.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should provide facts showing that the landlord has done something to cause the tenant to breach the lease and then is seeking to evict the tenant because of the breach.

[c] Related Pleading and Practice Chapters

For a general discussion of the motion to strike and an opposing party's procedural guide, see California Forms of Pleading and Practice Ch. 375, *Motions to Strike* (Matthew Bender). For discussion and forms pertaining to unlawful detainer proceedings generally, see California Forms of Pleading and Practice Ch. 333, *Landlord and Tenant: Eviction Actions* .

[d] Related Points and Authorities

For related points and authorities, see in this set Ch. 160, *Motions to Strike* (opposing motion to strike irrelevant, redundant, or immaterial matter from answer).

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities in [1], *above*, may be used in opposition to a motion to strike irrelevant matter supported by the points and *authorities in § 236.23*.

[3] Discussion of Authorities

[a] Affirmative Defense Related to Possession Is Proper

In ***Green v. Superior Court*** *(1974) 10 Cal. 3d 616, 111 Cal. Rptr. 704, 517 P.2d 1168* , a landlord commenced an unlawful detainer action in small claims court seeking possession of the leased premises and back rent. The tenant raised the defense that the landlord had failed to maintain the premises in a habitable condition. The small claims court awarded the landlord possession and a money judgment. The superior court reached the same result after a trial de novo on the tenant's appeal. The tenant's request for certification and transfer of the case to a court of appeal was denied.

The Supreme Court issued a peremptory writ of mandate directing the superior court to vacate its judgment and to proceed with trial of the unlawful detainer action, allowing the defense of breach of the warranty of habitability (*10 Cal. 3d 616, 620)* . The Court, after noting the absence of a statutory bar, held that no California decision prohibits a tenant from interposing a defense that directly relates to the issue of possession and which, if established, would result in the tenant's retention of the premises. The Court acknowledged a line of cases holding that a defense is generally excluded if it is extrinsic to the narrow issue of possession. The purpose of this rule is basically to prevent tenants from frustrating the summary statutory remedy through introduction of extraneous matter. This objective is accomplished by confining unlawful detainer actions to issues directly relevant to the ultimate question of possession. However, if an affirmative defense is relevant to that question, the defense should be available to the defendant (*10 Cal. 3d 616, 633-634)* .

[b] Lessor's Bad Faith in Causing Breach Precludes a Forfeiture

In ***Strom v. Union Oil Co.*** *(1948) 88 Cal. App. 2d 78, 198 P.2d 347* , the plaintiffs brought an unlawful detainer action against the defendant. The trial court made findings that the defendant's repeated tenders of payment of rent were wrongfully refused by plaintiffs with the intent to inequitably and fraudulently claim a forfeiture of the lease. Judgment was entered for the defendant.

The plaintiffs had purchased the leased premises while the defendant was in possession under a long-term lease as assignee. This purchase of the premises had been preceded by plaintiff's unsuccessful attempts to secure the defendant's consent to an increase in the rent, accompanied by warnings to the defendant to comply with the terms of the lease to the letter. Defendant was informed of the purchase of the premises and that further payments of the rent were to be made to Mr. A.T. Strom at 1229Nevin Avenue, Richmond, California. The defendant attempted to get clarification of these instructions but there was no answer to his letter. On September 6, plaintiffs sent the defendant a letter requiring it to pay rent for the months of August and September or deliver up possession of the premises within three days after service of the notice, and electing forfeiture of the lease in case of noncompliance. The letter reached the defendant on September 7, a Saturday. On Monday, the defendant sent two checks for the two months' rent by registered mail to the address it had been given. The next day, the notice to pay rent was personally served on the defendant. The same morning the registered letter was offered by a postman at the given address and the person there refused to sign. The letter went back to the post office and a notice of arrival was left by the postman in the mailbox at Nevin Avenue. A second notice to the defendant was delivered in the same manner on September 13. The plaintiffs did not claim the registered letter or communicate with the defendant. On September 20, the letter was returned to the defendant as "unclaimed." The defendant tried to contact the plaintiffs personally at the Nevin Avenue address but was referred to another address where the checks were personally tendered and refused on September 24. The plaintiffs claimed they were received too late. Defendant was served with the summons in the unlawful detainer action on September 27. On October 7, the defendant tendered three months' rent to appellants personally and when they again refused, the amount was deposited in their name in a bank and written notice was served on them.

The court of appeal affirmed the judgment. The court held that the finding of bad faith, as supported by the evidence, was of primary importance in trying to enforce the forfeiture (*88 Cal. App. 2d 78, 81)* . Although the defendant may have been late in making the deposit of the rent in a bank, this shortcoming was trivial when compared to the plaintiffs' bad faith. The plaintiffs could have had timely payment if they had so desired, but they were intentionally evasive and uncooperative, hoping to induce some technical shortcoming on which to terminate a lease which they thought disadvantageous. Thus, the plaintiffs were not entitled to any payments except of the rents agreed on and the defendant remained in possession (*88 Cal. App. 2d 78, 84)* .

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23-236 California Points & Authorities § 236.68

§ 236.68 Opposing Plaintiff's Motion to Strike Irrelevant Matter in Answer [Code Civ. Proc. §§ 435-437]--Affirmative Defense of Fraud in Inducing Person Already in Possession to Enter Into Lease

[1] FORM

[*Caption. See § 236.60[1].*]

PLAINTIFF'S MOTION TO STRIKE IRRELEVANT MATTER SHOULD BE DENIED BECAUSE THE AFFIRMATIVE DEFENSE THAT DEFENDANT WAS INDUCED TO ENTER INTO THE LEASE BY PLAINTIFF'S FRAUD AFTER DEFENDANT WAS ALREADY IN POSSESSION OF THE PREMISES IS PROPER.

A. Affirmative Defense Is Not Barred by Statute. The statutory provisions governing unlawful detainer proceedings do not prohibit the assertion of an affirmative defense (*Green v. Superior Court (1974) 10 Cal. 3d 616, 632, 111 Cal. Rptr. 704, 517 P.2d 1168*).

B. Affirmative Defense Related to Possession Is Proper. A tenant may interpose an affirmative defense in an unlawful detainer action when the defense is directly related to the issue of possession and when the defense, if established, would result in the tenant's retention of the premises (*Green v. Superior Court (1974) 10 Cal. 3d 616, 633, 111 Cal. Rptr. 704, 517 P.2d 1168*).

C. Defense of Fraud After Defendant Is in Possession Is Proper. Fraud by the plaintiff in inducing the defendant to enter into a lease after the defendant is already in possession of the premises may be raised as a defense in an unlawful detainer action (*Johnson v. Chely (1872) 43 Cal. 299, 305)* .

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____

[*name*]

[2] Comments

[a] Use of Form

These points and authorities oppose a motion to strike irrelevant matter in an answer in an unlawful detainer action when the matter sought to be stricken is an affirmative defense which alleges that the plaintiff was induced to enter into the lease by fraud after he or she already was in possession of the premises.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should provide facts showing that the landlord fraudulently induced the tenant to enter the lease even though the tenant was already in possession.

[c] Related Pleading and Practice Chapters

For a general discussion of the motion to strike and an opposing party's procedural guide, see California Forms of Pleading and Practice Ch. 375, *Motions to Strike* (Matthew Bender). For discussion and forms pertaining to unlawful detainer proceedings generally, see California Forms of Pleading and Practice Ch. 333, *Landlord and Tenant: Eviction Actions* .

[d] Related Points and Authorities

For related points and authorities, see in this set Ch. 160, *Motions to Strike* (opposing motion to strike irrelevant, redundant, or immaterial matter from answer), Ch. 105, *Fraud and Deceit*, and Ch. 92, *Duress, Menace, Fraud, Undue Influence, and Mistake* (actionable fraud and deceit).

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities in [1], *above*, may be used in opposition to a motion to strike irrelevant matter supported by the points and *authorities in § 236.23*.

[3] Discussion of Authorities

[a] Affirmative Defense Is Not Barred by Statute

In ***Green v. Superior Court*** *(1974) 10 Cal. 3d 616, 111 Cal. Rptr. 704, 517 P.2d 1168* , a landlord commenced an unlawful detainer action in small claims court seeking possession of the leased premises and back rent. The tenant raised the defense that the landlord had failed to maintain the premises in a habitable condition. The court awarded the landlord possession and a money judgment. The superior court reached the same result after a trial de novo on the tenant's appeal. The tenant's request for certification and transfer of the case to a court of appeal was denied.

The Supreme Court issued a peremptory writ of mandate directing the superior court to vacate its judgment and to proceed with trial of the unlawful detainer action, allowing the defense of breach of the warranty of habitability (*10 Cal. 3d 616, 640)* . The Court noted that absolutely nothing in the statutory provisions governing unlawful detainer proceedings prohibits the assertion of any defense. *Code Civ. Proc. § 1170* provides that in summary unlawful detainer

proceedings the defendant may appear and answer or demur, and under *Code Civ. Proc. § 431.30* an answer may contain a statement of any new matter constituting a defense but may not claim affirmative relief. Thus, a defendant is not precluded from interposing an affirmative defense in an unlawful detainer proceeding (*10 Cal. 3d 616, 632)* .

[b] Affirmative Defense Related to Possession Is Proper

The procedural background of ***Green v. Superior Court*** *(1974) 10 Cal. 3d 616, 111 Cal. Rptr. 704, 517 P.2d 1168* , is discussed under [a], *above.* The Supreme Court, after noting the absence of a statutory bar, held that no California decision prohibits a tenant from interposing a defense which directly relates to the issue of possession and which, if established, would result in the tenant's retention of the premises (*10 Cal. 3d 616, 632-634)* . The Court acknowledged a line of cases holding that a defense is generally excluded if it is extrinsic to the narrow issue of possession. The basic purpose of this rule is to prevent tenants from frustrating the summary statutory remedy through introduction of extraneous matter. This objective is accomplished by confining unlawful detainer actions to issues directly relevant to the ultimate question of possession. However, if an affirmative defense is relevant to that question, the defense should be available to the defendant (*10 Cal. 3d 616, 632-634)* .

[c] Defense of Fraud After Defendant Is in Possession Is Proper

In ***Johnson v. Chely*** *(1872) 43 Cal. 299* , the plaintiffs brought an action to recover possession of premises leased to the defendant. The defendant's motion for a nonsuit was denied and the trial court refused to permit the defendant to prove that he was already in possession of the premises when he was induced to assume the relation of tenant to the plaintiffs by fraudulent misrepresentation that they were the owners of the premises. Judgment was entered for the plaintiffs.

The Supreme Court reversed and remanded for a new trial. The Court held that the failure to permit the defense of fraud under the facts was error (*43 Cal. 299, 305-306)* . If the defendant can show that he did not enter under the lease, but was already in possession when he was induced to enter into a lease with the plaintiff through the latter's deception, then in an unlawful detainer action he has a valid defense. If successful, the defense would result in the defendant's retention of possession of the premises (*43 Cal. 299, 305)* .

It should be noted that the *Johnson* decision does not apply to a case when the tenant was not in possession of the premises when the lease was executed and the tenant's only right to possession is the lease that he or she claims to be void by reason of fraud in its execution. *Kalmanovitz v. Rempp (1952) 111 Cal. App. 2d 242, 244 P.2d 457* , was an unlawful detainer action in which the defendants attempted to set up a defense of reliance on fraudulent representations of the plaintiff in entering into the lease. In dictum, the court of appeal acknowledged that a tenant who, while in possession, is fraudulently induced to enter into a lease may set up the fraud as a defense in an unlawful detainer action. However, the court held that in the case at hand, the tenants were not in possession at the time the lease was executed and their only right to possession was the lease which they claimed to be void by reason of fraud in its execution (*111 Cal. App. 2d 242, 246-247)* .

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23-236 California Points & Authorities § 236.69

§ 236.69 Opposing Plaintiff's Motion to Strike Irrelevant Matter in Answer [Code Civ. Proc. §§ 435-437]--Affirmative Defense of Part Performance of Oral Agreement to Lease

[1] FORM

[*Caption. See § 236.60[1].*]

PLAINTIFF'S MOTION TO STRIKE IRRELEVANT MATTER SHOULD BE DENIED BECAUSE THE AFFIRMATIVE DEFENSE OF DEFENDANT'S PART PERFORMANCE OF AN ORAL AGREEMENT TO EXECUTE A LEASE IS PROPER.

Defense of Oral Agreement to Lease Is Proper. The part performance of an oral agreement to lease can be raised as a defense in an unlawful detainer proceeding based on termination of a month-to-month tenancy (*Schubert v. Lowe (1924) 193 Cal. 291, 295-296, 223 P. 550*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____

[*name*]

[2] Comments

[a] Use of Form

These points and authorities oppose a motion to strike irrelevant matter from an answer in an unlawful detainer action when the matter sought to be stricken is an affirmative defense alleging the defendant's part performance of an oral agreement to execute a lease and when the basis for the action is the defendant's failure to vacate the premises after notice of the termination of a month-to-month tenancy.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should provide facts showing that the lease was oral as opposed to written and that the tenant has partially performed under the lease.

[c] Related Pleading and Practice Chapters

For a general discussion of the motion to strike and an opposing party's procedural guide, see California Forms of Pleading and Practice Ch. 375, *Motions to Strike* (Matthew Bender). For discussion and forms pertaining to unlawful detainer proceedings generally, see California Forms of Pleading and Practice Ch. 333, *Landlord and Tenant: Eviction Actions* .

[d] Related Points and Authorities

For related points and authorities, see in this set Ch. 160, *Motions to Strike* (opposing motion to strike irrelevant, redundant, or immaterial matter from answer).

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities in [1], *above*, may be used in opposition to a motion to strike irrelevant matter supported by the points and *authorities in § 236.23*.

[3] Discussion of Authorities

[a] Defense of Oral Agreement to Lease Is Proper

In ***Schubert v. Lowe*** *(1924) 193 Cal. 291, 223 P. 550* , the plaintiff brought an unlawful detainer action alleging that the defendant continued to occupy premises without the plaintiff's permission or consent after his month-to-month tenancy had been terminated by notice and possession of the premises demanded. The defendant answered, denying that property was occupied under a month-to-month tenancy, and, by way of cross complaint, alleged a cause of action for specific performance of a partially executed oral agreement to execute a written lease to the premises. The court overruled a general demurrer to the cross complaint and rendered judgment for the defendant and cross complainant, decreeing specific performance by plaintiff of the agreement.

The Supreme Court vacated that portion of the judgment decreeing specific performance but affirmed the remainder. While the defendant was not entitled to a judgment decreeing specific performance in an action in unlawful detainer, nevertheless the part performance of an oral agreement to execute the lease can be interposed as a defense to the plaintiff's attempt to obtain possession. Although the defendant's pleading was called a cross complaint for specific performance, it was sufficient to present this defense (*193 Cal. 291, 295)* .

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23-236 California Points & Authorities § 236.70

§ 236.70 Opposing Plaintiff's Motion to Strike Irrelevant Matter in Answer [Code Civ. Proc. §§ 435-437]--Affirmative Defense of Performance of Agreement for Purchase of Business With Lease as Part Consideration

[1] FORM

[*Caption. See § 236.60[1].*]

PLAINTIFF'S MOTION TO STRIKE IRRELEVANT MATTER SHOULD BE DENIED BECAUSE THE AFFIRMATIVE DEFENSE OF DEFENDANT'S PERFORMANCE OF AN AGREEMENT TO PURCHASE PLAINTIFF'S BUSINESS FOR WHICH A LEASE WAS PART CONSIDERATION IS PROPER.

Defense of Lease as Part Consideration for Purchase of Business Is Proper. The performance of an agreement to purchase a business that includes as part consideration a lease of the buildings in which the business had been conducted is a proper defense in an unlawful detainer proceeding (*Rishwain v. Smith (1947) 77 Cal. App. 2d 524, 531-532, 175 P.2d 555*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____

[*name*]

[2] Comments

[a] Use of Form

These points and authorities oppose a motion to strike irrelevant matter from an answer in an unlawful detainer action when the matter sought to be stricken is an affirmative defense alleging the defendant's performance of an agreement to purchase a business for which the lease was part consideration.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should provide facts showing that the lease was used as consideration to support a contract.

[c] Related Pleading and Practice Chapters

For a general discussion of the motion to strike and an opposing party's procedural guide, see California Forms of Pleading and Practice Ch. 375, *Motions to Strike* (Matthew Bender). For discussion and forms pertaining to unlawful detainer proceedings generally, see California Forms of Pleading and Practice Ch. 333, *Landlord and Tenant: Eviction Actions* .

[d] Related Points and Authorities

For related points and authorities, see in this set Ch. 160, *Motions to Strike* (opposing motion to strike irrelevant, redundant, or immaterial matter from answer).

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities in [1], *above*, may be used in opposition to a motion to strike irrelevant matter supported by the points and *authorities in § 236.23*.

[3] Discussion of Authorities

[a] Defense of Lease as Part Consideration for Purchase of Business Is Proper

In ***Rishwain v. Smith*** *(1947) 77 Cal. App. 2d 524, 175 P.2d 555* , the plaintiffs brought an unlawful detainer action and the defendants raised the defense of their performance of an agreement to purchase the plaintiffs' business of which the lease was part consideration. The trial court entered judgment for the defendants. The plaintiffs and defendants had executed a written agreement for the sale of the plaintiffs' business which included, as part consideration, a lease or agreement to lease the store buildings for two years on specified terms, with a provision that the plaintiffs would execute a more specific lease. The defendants took possession of the buildings in accordance with that agreement and paid the rent and performed all the conditions of the agreement. The plaintiffs later presented a proposed formal lease which the defendants rejected on the grounds that it omitted specific covenants contained in the agreement and added several onerous provisions not contained in the agreement. On the theory that the defendants were holding the property as tenants at will, a 30-day notice to vacate was served and the suit for unlawful detainer was commenced.

The court of appeal affirmed, holding that the defendants had a right to plead and prove their defense in an unlawful detainer proceeding (*77 Cal. App. 2d 524, 531-533)* . The defendants had partly performed the agreement to lease by their taking possession and paying the stipulated rent. If a more formal lease was contemplated by the parties, the burden was on the plaintiffs to execute and present to the defendants such a lease in substantial conformity with the express terms of the agreement and they failed to do so. It was immaterial that the defendants might not be entitled to specific performance of the agreement to lease in the unlawful detainer proceeding (*77 Cal. App. 2d 524, 532)* .

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23-236 California Points & Authorities § 236.71

§ 236.71 Opposing Plaintiff's Motion to Strike Irrelevant Matter in Answer [Code Civ. Proc. §§ 435-437]--Relationship Involving Sale of Interest in Property to Defendant

[1] FORM

[*Caption. See § 236.60[1].*]

PLAINTIFF'S MOTION TO STRIKE IRRELEVANT MATTER SHOULD BE DENIED BECAUSE THE AFFIRMATIVE DEFENSE THAT THE RELATIONSHIP INVOLVED PLAINTIFF'S SALE OF AN INTEREST IN PROPERTY TO DEFENDANT RATHER THAN THAT OF LANDLORD AND TENANT IS PROPER.

Defense of Relationship Involving Sale of Interest in Property to Defendant Is Proper. A defense that defendant is not the tenant of plaintiff but is the vendee of an interest in plaintiff's property is proper in an unlawful detainer proceeding (*Manning v. Franklin (1889) 81 Cal. 205, 207-208, 22 P. 550*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____

[*name*]

[2] Comments

[a] Use of Form

These points and authorities oppose a motion to strike irrelevant matter in an answer in an unlawful detainer action when the matter sought to be stricken is an affirmative defense which alleges that the relationship between the plaintiff and the defendant was not that of landlord and tenant but rather one involving a sale of an interest in property. It is important to note that the sale involved in this situation involves a "vendor-landlord" as plaintiff and a "purchaser-tenant" as defendant. If a case involves a purchaser as plaintiff, it may fall within the provisions of *Code Civ. Proc. § 1161a* allowing an unlawful detainer action when there is a refusal to turn over land to a purchaser after a sale. For a discussion of the acts constituting unlawful detainer, see *§ 236.03*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should provide facts showing that there was not a typical landlord-tenant relationship because one of the parties was asserting that he or she was actually a purchaser of an interest in the other party's property.

[c] Related Pleading and Practice Chapters

For a general discussion of the motion to strike and an opposing party's procedural guide, see California Forms of Pleading and Practice Ch. 375, *Motions to Strike* (Matthew Bender). For discussion and forms pertaining to unlawful detainer proceedings generally, see California Forms of Pleading and Practice Ch. 333, *Landlord and Tenant: Eviction Actions* .

[d] Related Points and Authorities

For related points and authorities, see in this set Ch. 160, *Motions to Strike* (opposing motion to strike irrelevant, redundant, or immaterial matter from answer).

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities in [1], *above*, may be used in opposition to a motion to strike irrelevant matter supported by the points and *authorities in § 236.23*.

[3] Discussion of Authorities

[a] Defense of Relationship Involving Sale of Interest in Property to Defendant Is Proper

In ***Manning v. Franklin*** *(1889) 81 Cal. 205, 22 P. 550* , the plaintiff brought an action in unlawful detainer after giving the defendant notice to quit. The trial court found for the plaintiff. The plaintiff had proposed to the defendant that he erect a house on part of plaintiff's lot and live there. In consideration for this, the defendant would pay half of the taxes and water charges, and would care for the plaintiff in sickness. This agreement was verbal. The defendant complied with all the terms of the contract on his part.

The Supreme Court reversed with instructions to render judgment in the defendant's favor. The Court held that the defendant was a vendee, not a tenant at will. Although the verbal agreement failed to comply with the statute of frauds, the defendant's part performance took the case out of the statute of frauds. The Court found that this doctrine, which would entitle the defendant to specific performance in a proper case, also protects him in his possession against an action for unlawful detainer (*81 Cal. 205, 208)* .

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23-236 California Points & Authorities § 236.72

§ 236.72 Opposing Plaintiff's Motion to Strike Irrelevant Matter in Answer [Code Civ. Proc. §§ 435-437]--Plaintiff Has Raised Issue of Title

[1] FORM

[*Caption. See § 236.60[1].*]

PLAINTIFF'S MOTION TO STRIKE IRRELEVANT MATTER SHOULD BE DENIED BECAUSE DEFENDANT IS NOT ESTOPPED TO DENY PLAINTIFF'S TITLE WHEN PLAINTIFF HAS PUT TITLE AT ISSUE BY SEEKING TO QUIET TITLE AGAINST DEFENDANT.

Challenge to Plaintiff's Title Is Proper When Plaintiff Has Raised Issue. A defense that defendant actually has title to the premises is proper when plaintiff has raised the issue of title by bringing an action or a cross complaint against defendant to quiet title to the premises (*Greenhut v. Wooden (1982) 129 Cal. App. 3d 64, 68-70, 180 Cal. Rptr. 786*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____

[*name*]

[2] Comments

[a] Use of Form

These memorandum of points and authorities oppose a motion to strike irrelevant matter from an answer in an unlawful detainer action when the matter sought to be stricken is an affirmative defense alleging that defendant is not estopped to challenge plaintiff's title to the premises. The ground of opposition presented is that defendant is not estopped to challenge plaintiff's title because plaintiff has affirmatively raised that issue by seeking to quiet title against defendant.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should show that the plaintiff has sought to quiet title against the defendant.

[c] Related Pleading and Practice Chapters

For a general discussion of the motion to strike and an opposing party's procedural guide, see California Forms of Pleading and Practice Ch. 375, *Motions to Strike* (Matthew Bender). For discussion and forms pertaining to unlawful detainer proceedings generally, see California Forms of Pleading and Practice Ch. 333, *Landlord and Tenant: Eviction Actions* .

[d] Related Points and Authorities

For related points and authorities, see in this set Ch. 160, *Motions to Strike*.

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities in [1], *above*, may be used in opposition to a motion to strike irrelevant matter supported by the points and *authorities in § 236.23*.

[3] Discussion of Authorities

[a] Challenge to Plaintiff's Title Is Proper When Plaintiff Has Raised Issue

In ***Greenhut v. Wooden*** *(1982) 129 Cal. App. 3d 64, 180 Cal. Rptr. 786* , defendant leased certain property from plaintiff for 18 months and promised to make certain improvements. Defendant also obtained an option to purchase the property on the lease's expiration. After defendant sent a notice of exercise of option, plaintiff disaffirmed the option and brought an action against defendant, which included a cause of action to quiet title. Defendant also brought an action against plaintiff to enforce the option. When the lease expired, plaintiff brought an action for unlawful detainer. Defendant unsuccessfully moved to consolidate the unlawful detainer proceeding with the other actions involving title to the property. At trial, plaintiff made a motion *in limine* to exclude all evidence of the option and defendant's claims to title. This motion was granted, and, after trial judgment was entered for plaintiff, defendant appealed, and the court of appeal reversed.

The court of appeal held that one of the exceptions to the rule that a tenant is estopped to challenge plaintiff's title in an unlawful detainer action arises when plaintiff has raised the issue of title by bringing an action or counterclaim to quiet title to the premises against the tenant. The court also stated that the quiet title actions should have been consolidated with the other actions involving title to the property (*129 Cal. App. 3d 64, 68-70)* .

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23-236 California Points & Authorities § 236.73

§ 236.73 Opposing Plaintiff's Motion to Strike Irrelevant Matter in Answer [Code Civ. Proc. §§ 435-437]--Relationship Is a Partnership

[1] FORM

[*Caption. See § 236.60[1].*]

PLAINTIFF'S MOTION TO STRIKE IRRELEVANT MATTER SHOULD BE DENIED BECAUSE THE AFFIRMATIVE DEFENSE THAT THE RELATIONSHIP BETWEEN PLAINTIFF AND DEFENDANT WAS A PARTNERSHIP RATHER THAN THAT OF LANDLORD AND TENANT IS PROPER.

Defense of Partnership Is Proper. A defense that the relationship between the plaintiff and the defendant was that of partners, and not of landlord and tenant, is proper in an unlawful detainer proceeding (*Pico v. Cuyas (1874) 48 Cal. 639, 642)* .

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____

[*name*]

[2] Comments

[a] Use of Form

These points and authorities oppose a motion to strike irrelevant matter in an answer in an unlawful detainer proceeding when the mater sought to be stricken is an affirmative defense which alleges that the relationship between the plaintiff and the defendant was not that of landlord and tenant but that of partners. It is important to note that this situation involves a partnership. If a case involves a servant, employee, agent, or licensee it falls within the provisions of *Code Civ. Proc. § 1161(1)*. For a discussion of the acts constituting unlawful detainer, see *§ 236.03*.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should provide facts showing that a partnership exists.

[c] Related Pleading and Practice Chapters

For a general discussion of the motion to strike and an opposing party's procedural guide, see California Forms of Pleading and Practice Ch. 375, *Motions to Strike* (Matthew Bender). For discussion and forms pertaining to unlawful detainer proceedings generally, see California Forms of Pleading and Practice Ch. 333, *Landlord and Tenant: Eviction Actions* .

[d] Related Points and Authorities

For related points and authorities, see in this set Ch. 160, *Motions to Strike* (opposing motion to strike irrelevant, redundant, or immaterial matter from answer) and Ch. 170, *Partnerships and Joint Ventures* (determining partnership relationship).

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities in [1], *above*, may be used in opposition to a motion to strike irrelevant matter supported by the points and *authorities in § 236.23*.

[3] Discussion of Authorities

[a] Defense of Partnership Is Proper

Pico v. Cuyas *(1874) 48 Cal. 639* , involved a second appeal in the same case. Plaintiff and defendant had entered into a partnership after the execution of a lease between them. Defendant never entered into possession of the premises or paid any rent. At the first trial plaintiff was put in possession of the premises in question. This decision was later reversed and the case remanded. Defendant then moved that he be restored to the possession of the premises. Plaintiff in the meantime had leased the premises to a third party, before the reversal and opposed the motion. The trial court denied the motion and defendant appealed.

The Supreme Court reversed and remanded with directions to sustain the motion. The Court stated that the existence of the partnership and the nonexistence of the lease when the action for unlawful detainer was brought constituted a defense to that action (*48 Cal. 639, 642)* .

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23-236 California Points & Authorities § 236.74

§ 236.74 Opposing Plaintiff's Motion to Strike Irrelevant Matter in Answer [Code Civ. Proc. §§ 435-437]--Landlord's Violation of Local Rent Control Legislation

[1] FORM

[*Caption. See § 236.60[1].*]

PLAINTIFF'S MOTION TO STRIKE IRRELEVANT MATTER SHOULD BE DENIED BECAUSE THE AFFIRMATIVE DEFENSE THAT THE LANDLORD IS IN VIOLATION OF LOCAL RENT CONTROL LEGISLATION IS PROPER.

Violation of Local Rent Control Legislation by Landlord Is Proper Defense. A defense that the landlord is in violation of municipal rent control legislation is proper in an unlawful detainer proceeding (*Birkenfeld v. City of Berkeley (1976) 17 Cal. 3d 129, 149, 130 Cal. Rptr. 465, 550 P.2d 1001* ; *Nourafchan v. Miner (1985) 169 Cal. App. 3d 746, 751-752, 215 Cal. Rptr. 450*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____

[*name*]

[2] Comments

[a] Use of Form

These points and authorities oppose a motion to strike irrelevant matter from an answer in an unlawful detainer proceeding when the matter sought to be stricken is an affirmative defense alleging the plaintiff's violation of municipal rent control legislation.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should show that the tenant lives in a rent controlled building.

[c] Related Pleading and Practice Chapters

For a general discussion of the motion to strike and an opposing party's procedural guide, see California Forms of Pleading and Practice Ch. 375, *Motions to Strike* (Matthew Bender). For discussion and forms pertaining to unlawful detainer proceedings generally, see California Forms of Pleading and Practice Ch. 333, *Landlord and Tenant: Eviction Actions* . Rent control in particular is covered in California Forms of Pleading and Practice Ch. 335, *Landlord and Tenant: Rent Control* .

[d] Related Points and Authorities

For related points and authorities, see in this set Ch. 160, *Motions to Strike* (opposing motion to strike irrelevant, redundant, or immaterial matter from answer). Additional rent control related points and authorities, including those addressing the constitutionality of rent control, can be found in Ch. 141, *Landlord and Tenant* .

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities in [1], *above*, may be used in opposition to a motion to strike irrelevant matter supported by the points and *authorities in § 236.23*.

[3] Discussion of Authorities

[a] Violation of Local Rent Control Legislation by Landlord Is Proper Defense

Birkenfeld v. City of Berkeley *(1976) 17 Cal. 3d 129, 130 Cal. Rptr. 465, 550 P.2d 1001* , was a class action brought by plaintiff landlords challenging an initiative amendment to the city charter providing for residential rent control. The trial court declared the amendment void and enjoined the city from enforcing it. Defendant appealed.

The California Supreme Court affirmed. The challenged initiative amendment would impose two kinds of restraint on eviction proceedings: (1) a limitation of the grounds on which a landlord may bring an action to repossess a rent-controlled unit, and (2) a requirement that a landlord obtain a certificate of eviction from the rent-control board before seeking such repossession (*17 Cal. 3d 129, 147)* . The Court found that the certificate requirement was invalid as preempted by state law (*17 Cal. 3d 129, 150-151)* . However, it found that the other requirement was valid. *Cal. Const., Art. XI, § 7*, confers on all cities and counties the power to make and enforce within their limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws (*17 Cal. 3d 129, 140)* . The purpose of the state unlawful detainer statutes is procedural; the local amendment's limitation of particular grounds for eviction is a limitation on the landlord's property rights under the police power, giving rise to a substantive ground of defense in unlawful detainer proceedings. A landlord's violations of a city's housing code may be the basis for the defense of breach of warranty in a summary proceeding instituted by the landlord to recover possession for nonpayment of rent. Similarly, the statutory remedies for recovery of possession and of unpaid rent (*Civ. Code §§ 1951-1952.3*; *Code Civ. Proc. §§ 1159-1179a*) do not preclude a defense based on municipal rent control legislation enacted pursuant to the

police power imposing rent ceilings and limiting the grounds for eviction for the purpose of enforcing those rent ceilings (*17 Cal. 3d 129, 149)* .

In ***Nourafchan v. Miner*** *(1985) 169 Cal. App. 3d 746, 215 Cal. Rptr. 450* , plaintiff brought an unlawful detainer proceeding against defendant for failure to pay rent after service of a three-day notice to pay or quit. The trial court entered judgment in plaintiff's favor, and defendant was evicted.

The court of appeal reversed. Defendant challenged the validity of the three-day notice on the ground that plaintiff violated local rent control law by failing to roll back the rent to the base rent, thereby charging an excessive rent. The court said that *Civ. Code §§ 1951-1952.3* and *Code Civ. Proc. §§ 1159-1179a*, the statutory remedies for recovery of possession and of unpaid rent, do not preclude a defense based on municipal rent control legislation enacted pursuant to the police power imposing rent ceilings and limiting the grounds for eviction for the purpose of enforcing those rent ceilings (*169 Cal. App. 3d 746, 751)* . The court concluded that defendant could raise a violation of the city's rent control law as a defense in an unlawful detainer proceeding for failure to pay rent (*169 Cal. App. 3d 746, 752)* . Although it did not condone defendant's failure to pay rent on time, due to plaintiff's failure to comply with local rent control law, the court said that plaintiff was not entitled to recover possession on the basis of the three-day notice to quit or pay. The court noted that a notice to pay rent or quit that overstates the rent due is ineffective and will not support an action for unlawful detainer (*169 Cal. App. 3d 746, 753)* .

[4] Additional Authorities

[a] Violation of Local Rent Control Legislation by Landlord Is Proper Defense

In *Gross v. Superior Court (1985) 171 Cal. App. 3d 265, 217 Cal. Rptr. 284* , plaintiff purchased a condominium at a trustee's sale conducted pursuant to a power of sale contained in the deed of trust, and later brought an unlawful detainer proceeding against the existing tenant defendants for restitution of the premises. Defendants claimed that none of the grounds to evict under the local rent stabilization ordinance existed. The trial court found in plaintiff's favor, concluding that the rent stabilization ordinance was preempted by *Code Civ. Proc. § 1161a*, which allows eviction by an unlawful detainer proceeding when the property has been sold through foreclosure or when the property has been sold under a power of sale contained in a deed of trust. Defendants filed a petition for writ of mandate.

The court of appeal issued the writ of mandate directing the trial court to vacate its judgment (*171 Cal. App. 3d 265, 276)* . The court said that the purpose of *Code Civ. Proc. § 1161a* was to make clear that one acquiring ownership through foreclosure could evict by a summary procedure (*171 Cal. App. 3d 265, 271)* . Citing *Birkenfeld v. City of Berkeley (1976) 17 Cal. 3d 129, 130 Cal. Rptr. 465, 550 P.2d 1001* , as precedent for *Code Civ. Proc. § 1161* not preempting a defense to an unlawful detainer proceeding on rent control legislation, the court found that it followed that *Code Civ. Proc. § 1161a* also does not preempt a defense (*171 Cal. App. 3d 265, 270-271)* .

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Volume 23 Chapters 230-239 TRUST DEEDS---to---WORKERS' COMPENSATION
CHAPTER 236 UNLAWFUL DETAINER
PART II. FORMS
PART C. Affirmative Defenses

23-236 California Points & Authorities § 236.75

§ 236.75 Opposing Plaintiff's Motion to Strike Irrelevant Matter in Answer [Code Civ. Proc. §§ 435-437]--Affirmative Defense of Invalid Title in Action Under Code of Civil Procedure Section 1161a

[1] FORM

[*Caption. See § 236.60[1].*]

PLAINTIFF'S MOTION TO STRIKE IRRELEVANT MATTER SHOULD BE DENIED BECAUSE THE AFFIRMATIVE DEFENSE OF PLAINTIFF'S INVALID TITLE IS PROPER IN AN UNLAWFUL DETAINER PROCEEDING UNDER CODE OF CIVIL PROCEDURE SECTION 1161a.

A. Defense of Invalid Title Is Proper to Extent Provided by *Code of Civil Procedure Section 1161a*. Defenses that the property has not been duly sold or title duly perfected may be raised in an unlawful detainer proceeding under *Code of Civil Procedure Section 1161a* (*Vella v. Hudgins (1977) 20 Cal. 3d 251, 255, 142 Cal. Rptr. 414, 572 P.2d 28* ; *Kessler v. Bridge (1958) 161 Cal. App. 2d Supp. 837, 841* , *327 P.2d 241*).

[*Optional*] **B. Defenses Under *Code of Civil Procedure Section 1161a(b)(3)*.** Defenses challenging the legality of the note, deed of trust, and the sale are proper in an unlawful detainer action under *Code of Civil Procedure Section 1161a(b)(3)* (*Seidell v. Anglo-California Trust Co. (1942) 55 Cal. App. 2d 913, 922, 132 P.2d 12*).

[*Optional*] **C. Defenses Under *Code of Civil Procedure Section 1161a(b)(4)*.** Defenses alleging that property has not been duly sold and title duly perfected are proper in an unlawful detainer proceeding under *Code of Civil Procedure Section 1161a(b)(4)* (*Kessler v. Bridge (1958) 161 Cal. App. 2d Supp. 837, 841* , *327 P.2d 241*).

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____

[*name*]

[2] Comments

[a] Use of Form

These points and authorities oppose a motion to strike irrelevant matter from an answer in an unlawful detainer proceeding when the matter sought to be stricken is an affirmative defense alleging plaintiff's defective title under *Code Civ. Proc. § 1161a(b)(4)* and the action is brought under that section.

[b] Argument

Counsel should add argument linking the points in this form with the facts of the case. For example, counsel should provide facts showing that the landlord's title to the property is in dispute.

[c] Related Pleading and Practice Chapters

For a general discussion of the motion to strike and opposing party's procedural guide, see California Forms of Pleading and Practice Ch. 375, *Motions to Strike* (Matthew Bender). For discussion and forms pertaining to unlawful detainer proceedings generally, see California Forms of Pleading and Practice Ch. 333, *Landlord and Tenant: Eviction Actions* .

[d] Related Points and Authorities

For related points and authorities, see in this set Ch. 160, *Motions to Strike* (opposing motion to strike irrelevant, redundant, or immaterial matter from answer).

[e] Opposing Points and Authorities

In an appropriate case, the points and authorities in [1], *above*, may be used in opposition to a motion to strike irrelevant matter supported by the points and *authorities in § 236.23*.

[3] Discussion of Authorities

[a] Defense of Invalid Title Is Proper to Extent Provided by Code of Civil Procedure Section 1161a

In ***Vella v. Hudgins*** *(1977) 20 Cal. 3d 251, 142 Cal. Rptr. 414, 572 P.2d 28* , plaintiff brought an action to set aside a trustee's sale, alleging that defendant, holder of a note secured by a second deed of trust on her residence, fraudulently induced her to default on the note. Defendant served plaintiff with a three-day notice to quit the premises and initiated an unlawful detainer proceeding under *Code Civ. Proc. § 1161a*. In the unlawful detainer proceeding plaintiff in the fraud action asserted as an affirmative defense the same allegations of fraud that formed the basis of the other pending action. The trial court rendered judgment for defendant and ordered plaintiff evicted. In the fraud action, defendant unsuccessfully urged the earlier unlawful detainer judgment as a bar to the fraud action. The trial court found in plaintiff's favor. The court of appeal reversed, holding that plaintiff's fraud claim had been conclusively adjudicated in the prior unlawful detainer proceedings.

The Supreme Court held that the unlawful detainer judgment was not res judicata, and transferred the case to the court of appeal for consideration of the remaining issues (*20 Cal. 3d 251, 254)* . The Court said that a qualified exception to

the rule that title cannot be tried in unlawful detainer is contained in *Code Civ. Proc. § 1161a*, which extends the summary eviction remedy beyond the conventional landlord-tenant relationship to include certain purchasers of property such as defendant. *Code Civ. Proc. § 1161a* provides for a narrow and sharply focused examination of title. To establish that he or she is a proper plaintiff, one who has purchased property at a trustee's sale and seeks to evict the occupant in possession must show that he or she acquired the property at a regularly conducted sale and thereafter duly perfected his or her title. To this limited extent, title may be litigated in such a proceeding (*20 Cal. 3d 251, 255)* .

Kessler v. Bridge *(1958) 161 Cal. App. 2d Supp. 837* , *327 P.2d 241* , was an action based on former Code Civ. Proc. § 1161a(4) (*now see Code Civ. Proc. § 1161a(b)(4)*) to remove the vendor from certain premises and for damages for withholding possession. The trial court refused to consider the defendant's defenses and judgment was entered for the plaintiff. The defendant had alleged defenses of (1) fraud in the inducement for the relinquishment of the property, (2) delivery of the deed to plaintiff in violation of the terms and conditions of the escrow, (3) unauthorized unilateral change in escrow instructions by plaintiff to effect the delivery of the deed, (4) failure of consideration, (5) cancellation of the escrow and hence withdrawal of the defendant's consent to the transfer before it was made, and (6) rescission of the transaction, effected before the institution of the proceeding.

The appellate department held that under *Code Civ. Proc. § 1161a* such defenses were proper and reversed the judgment. The court noted that in the case of the landlord-tenant relationship title will not be litigated in an unlawful detainer proceeding. But underlying that doctrine is the principle that a tenant is estopped to deny the title of his or her landlord. However, even then it is permissible to litigate title in connection with the questioned existence of the landlord-tenant relationship. *Code Civ. Proc. § 1161a* applies to situations when there is no landlord-tenant relationship (*161 Cal. App. 2d Supp. 837, 839)* . A court in an unlawful detainer action under that section can determine if the statutory requirements have been met (*161 Cal. App. 2d Supp. 837, 841)* .

[b] Defenses Under Code of Civil Procedure Section 1161a(b)(3)

Seidell v. Anglo-California Trust Co. *(1942) 55 Cal. App. 2d 913, 132 P.2d 12* , was an action to set aside a trustees' deed to property for alleged fraud and irregularities in the foreclosure proceedings on a trust deed which was executed to secure a debt. Two former judgments were pleaded as res judicata. The court rendered judgment against plaintiffs, holding that one of the former judgments was res judicata of the issues of the suit and, therefore, was a bar to the action. On appeal, the only question was whether the judgment which was rendered in a former suit of unlawful detainer under former Code Civ. Proc. § 1161a(3) (*now see Code Civ. Proc. § 1161a(b)(3)*) was res judicata of the issues involved in the case. In the unlawful detainer proceeding, plaintiffs filed an amended answer that alleged in detail irregularities in the foreclosure proceedings and sale of property under the deed of trust and the illegality of the trustees' deed. That action was determined on its merits adversely to the plaintiffs. In the instant action they contended that the judgment in the unlawful detainer proceeding was not res judicata of these issues because the action was merely possessory in its nature and could not determine alleged defects of title.

The court of appeal held that the doctrine of res judicata was applicable to the case (*55 Cal. App. 2d 913, 918)* . Title may be determined in an unlawful detainer case under *Code Civ. Proc. § 1161a* to the limited extent provided by that statute. The extent to which title is involved under former Code Civ. Proc. § 1161a(3) (*now see Code Civ. Proc. § 1161a(b)(3)*) requires a showing that the property has been duly sold in accordance with *Civ. Code § 2924* and that the title under the sale has been duly perfected. A defendant may challenge the regularity of the statutory proceeding on sale of land under a deed of trust in a proceeding under that section. The defendants alleged violations of the statute in failing to give the notice of sale required by *Civ. Code § 2924*, lack of consideration for the note secured by the trust deed, and other asserted defects going to the validity of the trust deed and to the proceedings on the sale of that property under the provisions of the deed. All those issues of law affecting the legality of the note, deed of trust, and sale were properly determined against the defendants in the unlawful detainer suit (*55 Cal. App. 2d 913, 922)* .

[c] Defenses Under Code of Civil Procedure Section 1161a(b)(4)

The background of ***Kessler v. Bridge*** *(1958) 161 Cal. App. 2d Supp. 837* , *327 P.2d 241* , is discussed under [a], *above.* The appellate department noted that there was a bona fide dispute as to whether the property had been duly sold and title duly perfected. Title is duly perfected when all steps have been taken to make it perfect, i.e., to convey to the purchaser that which he or she has purchased, valid and good beyond all reasonable doubt. This includes good record title but is not limited to it. If there is lack of performance or of true consent the title cannot be said to be perfected. The court in an unlawful detainer proceeding under former Code Civ. Proc. § 1161a(4) (*now see Code Civ. Proc. § 1161a(b)(4)*) has jurisdiction to determine the validity of such defenses (*161 Cal. App. 2d Supp. 837, 841)* .

[4] Additional Authorities

[a] Defenses Under Code of Civil Procedure Section 1161a(b)(3)

Kartheiser v. Superior Court (1959) 174 Cal. App. 2d 617, 345 P.2d 135 , involved a proceeding in mandamus to compel the superior court to vacate an order continuing for 90 days the trial of an unlawful detainer proceeding. The court of appeal granted the writ. In dictum the court noted that the general rule that title cannot be tried in an unlawful detainer proceeding is not applicable when the validity of a trustee's sale is attacked. An action for unlawful detainer under former Code Civ. Proc. § 1161a(3) (*now see Code Civ. Proc. § 1161a(b)(3)*) requires proof that the property was duly sold in accordance with *Civ. Code § 2924* and that the title under the sale has been duly perfected. Under this statute, title not only may, but must be tried if the provisions extending the remedy beyond the cases where the relation of landlord and tenants exists are not to be judicially nullified (*174 Cal. App. 2d 617, 620)* .

Old National Financial Services, Inc. v. Seibert (1987) 194 Cal. App. 3d 460, 239 Cal. Rptr. 728 , was a proceeding in unlawful detainer brought by the purchaser of real property at a trustee's sale under a deed of trust against the former owner. Although affirming a judgment for plaintiff for restitution and possession of the property, the court of appeal said that Code Civ. Proc. § 1161a makes the summary remedy of unlawful detainer available against persons holding over after the property has been sold under a power of sale in a trust deed (*Code Civ. Proc. § 1161a(b)(3)*), and that under this provision, the remedy is afforded when the property has been sold in accordance with *Civ. Code § 2924* and the title under the sale has been duly perfected (*194 Cal. App. 3d 460, 464)* . The court explained that as a general rule, only claims bearing directly on the right to possession are involved in unlawful detainer proceedings, but that when title is acquired through proceedings described in *Code Civ. Proc. § 1161a*, courts must make a limited inquiry into the basis of the plaintiff's title (*194 Cal. App. 3d 460, 465)* . The court said that the plaintiff need only prove a sale in compliance with the statute and deed of trust, followed by purchase at the sale, and the defendant may raise objections only on that phase of the issue of title (*194 Cal. App. 3d 460, 465)* . The court added that matters affecting the validity of the trust deed or primary obligation itself, or other basic defects in the plaintiff's title, are neither properly raised in the summary proceeding for possession, nor concluded by the judgment, and that further, the pendency of another action concerning title is immaterial to the resolution of an unlawful detainer proceeding (*194 Cal. App. 3d 460, 465)* .

[b] Defenses Under Code of Civil Procedure Section 1161a(b)(4)

Kelliher v. Kelliher (1950) 101 Cal. App. 2d 226, 225 P.2d 554 , involved an unlawful detainer proceeding. The trial court granted summary judgment for plaintiff. Defendant had conveyed her interest in the premises to a third party for the sole purpose of enabling him to borrow funds by mortgaging the premises. He allegedly agreed to reconvey the property immediately after the execution of the mortgage but he breached the agreement by conveying the property to plaintiff who had notice of the agreement and gave no consideration for it.

The court of appeal reversed, holding that summary judgment was improper because the affidavits of plaintiff were insufficient. The affidavits failed to make an averment of fact relative to a sale of the premises by defendant as alleged in his complaint. Since the action was instituted under former Code Civ. Proc. § 1161a(4) (*now see Code Civ. Proc. § 1161a(b)(4)*), the affidavits must show that the property has been duly sold by the person sought to be removed or by a

person under whom the defendant claims (*101 Cal. App. 2d 226, 231)* . The court noted that while the broad question of title cannot be raised in an unlawful detainer proceeding, to the extent required by *Code Civ. Proc. § 1161a* plaintiff must establish a sale of the property and a title perfected under the sale before recovery can be allowed (*101 Cal. App. 2d 226, 232)* .

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[1] Use of Terms in Determining Proper Court

[2] Local Actions

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[1] Statement of Facts Relating to Venue

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§ 238.12 Counter Motion to Retain Venue to Promote Convenience of Witnesses or Ends of Justice

[1] Authority

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§ 238.13 Related Pleading and Practice Chapters

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§§ 238.15-238.29 [Reserved]

§ 238.30 Supporting Motion for Change of Venue to Proper Court [Code Civ. Proc. §§ 396b, 397(a)] in County of Defendant's Residence [Code Civ. Proc. § 395(a)]--When Complaint Does Not Show Applicability of Exception

[1] FORM

[2] Comments

[a] Use of Form

[i] Supporting Affidavits

[3] Discussion of Authorities

[a] Proper Court as in County of Defendant's Residence

[b] Character of Action as Determined by Complaint and Nature of Judgment

[c] Venue When Complaint Does Not Show Applicability of Exception

[4] Additional Authorities

[a] Character of Action as Determined by Complaint and Nature of Judgment

[b] Venue When Complaint Does Not Show Applicability of Exception

§ 238.31 Supporting Motion for Change of Venue to Proper Court [Code Civ. Proc. §§ 396b, 397(a)] in County of Defendant's Residence [Code Civ. Proc. § 395(a)]--When Complaint Shows That Action Is Essentially Transitory and Any Local Issue Is Incidental

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Venue of Action as Local or Transitory

[b] Venue When Action Is Essentially Transitory

[c] Reformation of Real Property Agreement

[d] Specific Performance of Reformed Real Property Agreement

[e] Equitable Action to Set Aside Judgment Obtained by Fraud or Mistake

[f] Attack on Judgment in County Other Than Where Rendered

[g] Action for Damages for Trespass

[h] Vendor's Action for Breach of Real Property Sale Contract

[i] Action for Damages for Fraud With Incidental Real Property Rights Involved

[4] Additional Authorities

[a] Venue When Action Is Essentially Transitory

§ 238.32 Supporting Motion for Change of Venue to Proper Court [Code Civ. Proc. §§ 396b, 397(a)] in County of Defendant's Residence [Code Civ. Proc. § 395(a)]--When Transitory and Local Actions Have Been Joined in Single Complaint

[1] FORM

[2] Comments

[a] Use of Form

[b] Exceptions Under Code Civ. Proc. § 395

[c] Situations Assumed for Use of Form

[3] Discussion of Authorities

[a] Defendant as Entitled to Change of Venue on Any Joined Cause of Action

[b] Joined Local and Transitory Causes of Action Regarded as Transitory for Determination of Venue

[4] Additional Authorities

[a] Joined Local and Transitory Actions Regarded as Transitory for Determination of Venue

§ 238.33 Supporting Motion for Change of Venue to Proper Court [Code Civ. Proc. §§ 396b, 397(a)] in County of Defendant's Residence [Code Civ. Proc. § 395(a)]--When Complaint Joins Transitory Actions One of Which Entitles Defendant to Trial in County of His/Her Residence

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Venue When Transitory Actions Are Joined

[4] Additional Authorities

[a] Venue When Transitory Actions Are Joined

§§ 238.34-238.49 [Reserved]

§ 238.50 Supporting Motion for Change of Venue to Proper Court [Code Civ. Proc. §§ 396b, 397(a)] in County Where Local Cause of Action Arises--Proper County for Action Relating to Real Property Is in County Where Property Is Located [Code Civ. Proc. § 392]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Memoranda

[3] Discussion of Authorities

[a] Venue Determined by Subject Matter of Complaint

[b] Construction Defects

[4] Additional Authorities

[a] Venue Determined by Subject Matter of Complaint

§ 238.51 Supporting Motion for Change of Venue to Proper Court [Code Civ. Proc. §§ 396b, 397(a)] in County Where Local Cause of Action Arises--Main Relief Sought Is Local and Transitory Relief Is Only Incidental

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Memoranda

[3] Discussion of Authorities

[a] Venue When Main Relief Is Local and Transitory Issue Is Only Incidental

[4] Additional Authorities

[a] Venue When Main Relief Is Local and Transitory Issue Is Only Incidental

§ 238.52 Supporting Motion for Change of Venue to Proper Court [Code Civ. Proc. §§ 396b, 397(a)] in Neutral County When Nonresident Defendant Is Sued by Local Public Entity [Code Civ. Proc. § 394(a)]--General Form

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Transfer to Neutral County

[b] Defendant Corporation Reasonably Viewed as Outsider

[c] Assignment of Disinterested Judge From Neutral County

[d] Contractual Provisions Waiving The Right to Transfer to a Neutral County are Void

[4] Additional Authorities

[a] Transfer to Neutral County

§ 238.53 Supporting Motion for Change of Venue [Code Civ. Proc. § 397(a)] to Court Having Jurisdiction of Estate Represented by Executor, Administrator, Guardian, Conservator, or Trustee Sued in His/Her Official Capacity [Code Civ. Proc. § 395.1]

[1] FORM

[2] Comments

[a] Use of Form

§ 238.54 Supporting Motion for Change of Venue to Proper Court [Code Civ. Proc. §§ 396b, 397(a)] in Action Against Unincorporated Association [Code Civ. Proc. § 395.2]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Memoranda

§ 238.55 Supporting Motion for Change of Venue to Proper Court [Code Civ. Proc. §§ 396b, 397(a)] in County Where Injury Occurred--Action Against State [Gov. Code § 955.2]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Discretion to Change Venue

§§ 238.56-238.69 [Reserved]

§ 238.70 Opposing Motion for Change of Venue [Code Civ. Proc. §§ 396b, 397(a)] to County of Defendant's Residence [Code Civ. Proc. § 395(a)]--Action Commenced in County of Residence of Moving Defendant's Codefendant

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Propriety of Chosen Venue

[b] Venue in County of Necessary and Proper Codefendant's Residence

[c] Joinder of Actions and Parties

[d] Joinder of All Defendants in Motion for Change

[e] Filing of Cross-Complaint

[4] Additional Authorities

[a] Propriety of Chosen Venue

[b] Venue in County of Necessary and Proper Codefendant

[c] Joinder of All Defendants in Motion for Change

§ 238.71 Opposing Motion for Change of Venue [Code Civ. Proc. §§ 396b, 397(a)] to County of Defendant's Residence [Code Civ. Proc. § 395(a)--Resident Codefendant Properly Joined

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Good Faith Joinder of Defendant

[4] Additional Authorities

[a] Good Faith Joinder of Codefendant

§ 238.72 Opposing Motion for change of Venue [Code Civ. Proc. §§ 396b, 397(a)] to County of Defendant's Residence [Code Civ. Proc. § 395(a)--Action Commenced in County Where Real Property Which Is Subject of Action Is Located [Code Civ. Proc. § 392]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Memoranda

[3] Discussion of Authorities

[a] Venue When Main Relief Is Local and Transitory Issue Is Only Incidental

[b] Venue of Action for Slander of Title

[c] Action for Malicious Prosecution Resulting in Real Property Depreciation

[d] Action to Quiet Title and Cancel Instrument

[e] Action to Quiet Title to Real Property

[f] Action for Damages for Fraudulent Inducement to Dismiss Quiet Title Action

[g] Action for Consequential Injuries to Real Property

[h] Action Requiring Determination of Interest in Real Property

[i] Action for Damages for Physical Injury to Real Property

[j] Action for Damages to Growing Crops

[k] Action for Damages for Inverse Condemnation

[l] Action for Specific Performance by Vendee of Real Property

[m] Creditor's Action on Fraudulent Conveyance

[4] Additional Authorities

[a] Action for Specific Performance by Vendee of Real Property

§ 238.73 Opposing Motion for Change of Venue [Code Civ. Proc. §§ 396b, 397(a)] to County of Defendant's Residence [Code Civ. Proc. § 395(a)]--Tort Action Commenced in Proper County

[1] FORM

[2] Comments

[a] Use of Form

[b] "Injury to Person" and "Injury to Property" Defined

[3] Discussion of Authorities

[a] Action Commenced in One of Two Proper Counties

[b] Local Entity as Cross Defendant

§ 238.74 Opposing Motion for Change of Venue [Code Civ. Proc. §§ 396b, 397(a)] to County of Defendant's Residence [Code Civ. Proc. § 395(a)]--Contract Action Commenced in Proper County [Code Civ. Proc. § 395(a)].

[1] FORM

[2] Comments

[a] Use of Form

[b] Venue of Contract Actions

[i] Application of General Rule of Venue

[ii] Venue Under Statutory Exceptions

[iii] Burden on Defendant

[c] Related Memoranda

[3] Discussion of Authorities

[a] Contract Action Commenced in One of Several Proper Counties

[4] Additional Authorities

[a] Action Commenced in One of Several Proper Counties

§ 238.75 Opposing Motion for Change of Venue [Code Civ. Proc. §§ 396b, 397(a)] to County of Defendant's Residence [Code Civ. Proc. § 395(a)]--Consumer Contract Action Commenced in Proper County [Code Civ. Proc. § 395(b)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Memoranda

[3] Additional Authorities

§ 238.76 Opposing Motion for Change of Venue [Code Civ. Proc. §§ 396b, 397(a)] to County of Defendant's Residence [Code Civ. Proc. § 395(a)]--Action Arising From Transaction Consummated as Proximate Result of Unsolicited Telephone Call by Seller or Telephone Call or Electronic Transmission in Response to Solicitation [Code Civ. Proc. § 395(b)]

[1] FORM

[2] Comments

[a] Use of Form

§ 238.77 Opposing Motion for Change of Venue [Code Civ. Proc. §§ 396b, 397(a)] to County of Defendant's Residence [Code Civ. Proc. § 395(a)]--Installment Contract or Installment Account or Automobile Sales Contract Action Commenced in Proper County [Code Civ. Proc. § 395(b); Civ. Code §§ 1812.10, 2984.4]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Contract Action Commenced in One of Several Proper Counties

§ 238.78 Opposing Motion for Change of Venue [Code Civ. Proc. §§ 396b, 397(a)] to County of Defendant's Residence [Code Civ. Proc. § 395(a)]--Contract Action Against Corporation and Individual Defendant Sued on Alter Ego Theory Commenced in Proper County

[1] FORM

[2] Comments

[a] Use of Form

[b] Related Memoranda

[3] Discussion of Authorities

[a] Venue Proper Where Action Could Be Laid Against Either Individual or Corporate Defendant

§ 238.79 Opposing Motion for Change of Venue to Proper Court [Code Civ. Proc. §§ 396b, 397(a)] in Neutral County When Nonresident Defendant Is Sued by Local Public Entity [Code Civ. Proc. § 394(a); Code Civ. Proc. § 394] Action Not Brought By Public Entity Within Meaning of

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Code of Civil Procedure Section 394 Inapplicable When Action Is Not "Brought By" Public Entity Within Meaning of Section

§ 238.80 Opposing Motion for Change of Venue to Proper Court [Code Civ. Proc. §§ 396b, 397(a)]--Action Involving Statutory Duty.

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Actions Involving Statutory Duty

§§ 238.81-238.99 [Reserved]

§ 238.100 Supporting Counter Motion for Retention in County Where Action Commenced When Convenience of Witnesses or Ends of Justice Will Be Promoted Thereby [Code Civ. Proc. § 396b]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Uncontradicted Counter Motion

§§ 238.101-238.119 [Reserved]

§ 238.120 Supporting Motion for Change of Venue of County Other Than County in Which Suit Was Commenced--Impartial Trial Cannot Be Had [Code Civ. Proc. §§ 397(b), 398]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Widespread Prejudice Against Moving Party

[b] Motion by One Codefendant

[c] Change of Venue Not Prohibited by Mandatory Removal Statute for Local Governmental Entity Cases

[4] Additional Authorities

[a] Widespread Prejudice Against Moving Party

§ 238.121 Opposing Motion for Change of Venue to Court in County Other Than County Where Suit Was Commenced on Ground That Impartial Trial Cannot Be Had Therein [Code Civ. Proc. § 397(b)]--Fact That Such Trial Unavailable Cannot Be Clearly Established

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Establishing Unavailability of Fair and Impartial Trial

[b] Defendant's Right to Trial in County of Residence

[4] Additional Authorities

[a] Establishing Unavailability of Fair and Impartial Trial

§§ 238.122-238.139 [Reserved]

§ 238.140 Supporting Motion for Change of Venue to County Other Than County in Which Suit Was Commenced-- Convenience of Witnesses and Ends of Justice Would Be Promoted Thereby [Code Civ. Proc. §§ 397(c), 398]

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Competence of Witnesses

[b] Convenience of Witnesses

[c] Determination as to Ends of Justice

[d] Convenience of Party

[e] Convenience of Employees of Parties

[f] Convenience of Expert Witnesses

[4] Additional Authorities

[a] Convenience of Witnesses

[b] Convenience of Employees Of Parties

[c] Determination as to Ends of Justice

§ 238.141 Opposing Motion for Change of Venue to County Other Than County in Which Suit Was Commenced on Ground That Convenience of Witnesses and Ends of Justice Would Be Promoted Thereby [Code Civ. Proc. §§ 397(c), 398]--Moving Party Must Show Both Conditions Met

[1] FORM

[2] Comments

[a] Use of Form

[3] Discussion of Authorities

[a] Showing of Convenience and Justice

[b] Competence of Witnesses

[c] Showing by Moving Party

[d] Inconvenience to Nonmoving Party's Witnesses

[e] Convenience of Parties

[f] Convenience of Employees and Experts

[4] Additional Authorities

[a] Showing of Convenience and Justice

[b] Convenience of Parties

[c] Convenience of Employees and Experts

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23-238 California Points & Authorities § 238.01

§ 238.01 Scope of Chapter

This chapter contains memoranda for use in supporting or opposing motions for change of venue in civil actions. These memoranda are organized in separate parts corresponding to the basic grounds for change of venue.

Subpart A of Part I contains memoranda supporting [*see §§ 238.30 -238.33*] and opposing [*see §§ 238.70 -238.80*] motions for change of venue to the county of the defendant's residence and supporting [*see §§ 238.50 -238.55*] motions for change of venue to the court where a local cause of action should be tried. It also includes a memorandum supporting a counter motion for retention of the cause of action in the county where the action was commenced when the convenience of the witnesses or the ends of justice will be promoted thereby [*see § 238.100*].

Subpart B of Part I includes memoranda supporting [*see § 238.120*] and opposing [*see § 238.121*] a motion for change of venue for impartial trial.

Subpart C of Part I contains memoranda supporting [*see § 238.140*] and opposing [*see § 238.141*] a motion for change of venue on the ground that the convenience of witnesses and the ends of justice would be promoted.

For memoranda supporting and opposing motions for change of venue in actions for or concerning accounting or corporations, see Ch. 12, *Accounting* , and Ch. 52, *Corporations* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueCorporationsCivil ProcedureVenueMotions to TransferGeneral OverviewCivil ProcedureVenueMotions to TransferConvenience of Witnesses

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23-238 California Points & Authorities § 238.02

§ 238.02 Governing Law

The place of trial of civil actions in general is governed by *Code Civ. Proc. §§ 392-403*. Provisions for the coordination of civil actions involving common questions of law or fact are set forth in *Code Civ. Proc. §§ 404-404.8*.

Legal Topics:

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

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23-238 California Points & Authorities § 238.03

§ 238.03 Page Limits on Memoranda

Generally, a memorandum must not exceed 15 pages in length, or, in the case of a motion for summary judgment or summary adjudication, 20 pages in length. A reply or closing memorandum may not exceed 10 pages in length [*see Cal. Rules of Ct., Rule 3.1113(d)*]. The page limit does not include exhibits, declarations, attachments, the table of contents, the table of authorities, or the proof of service [*see Cal. Rules of Ct., Rule 3.1113(d)*]. Any party desiring to file a longer memorandum must obtain leave of court [*see Cal. Rules of Ct., Rule 3.1113(e)*]. For further discussion of the page limitations under *Cal. Rules of Ct., Rule 3.1113*, and of other basic format requirements of memoranda, see *Ch. 1, Writing Legal Memoranda and Briefs, § 1.01[4]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureSummary JudgmentSupporting MaterialsMemoranda of Law

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23-238 California Points & Authorities § 238.04

§ 238.04 Nature of Venue Requirement

Under *Code Civ. Proc. § 397(a)* the court may, on motion, change the place of trial when the court designated in the complaint is not the proper court. Historically, the term "place of trial" has been used synonymously with the term "venue" to denote the geographical location and political subdivision within which is situated the courthouse which will hear the cause [*Milliken v. Gray (1969) 276 Cal. App. 2d 595, 600, 81 Cal. Rptr. 525]* .

Except in a few cases in which the California Constitution makes the place of trial jurisdictional or a statute makes a local place of trial part of the grant of subject-matter jurisdiction, venue is not jurisdictional [*Barquis v. Merchants Collection Assn. (1972) 7 Cal. 3d 94, 121, 101 Cal. Rptr. 745, 496 P.2d 817* ; *Newman v. Sonoma County (1961) 56 Cal. 2d 625, 627, 15 Cal. Rptr. 914, 364 P.2d 850]* . Rather than having to do with the particular county or territorial area within the state or a political subdivision thereof in which the cause of prosecution must be brought or tried [*see Milliken v. Gray (1969) 276 Cal. App. 2d 595, 600, 81 Cal. Rptr. 525* ; *Arganbright v. Good (1941) 46 Cal. App. 2d Supp. 877, 878* , *116 P.2d 186]* , jurisdiction refers to the power of the court to hear and determine the case before it [*see Mueller v. Elba Oil Co. (1942) 21 Cal. 2d 188, 206, 130 P.2d 961* ; *People v. Brown (1970) 10 Cal. App. 3d 169, 175, 88 Cal. Rptr. 801]* .

However, venue is jurisdictional if it is a matter of absolute right. Thus, where a change of venue is a matter of absolute right, the denial of such change is an act in excess of the jurisdiction of the court [*Brock v. Superior Court (1947) 29 Cal. 2d 629, 637, 177 P.2d 273* (holding that prohibition is not available to review an order denying a change of venue where venue was not absolute right)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureVenueGeneral Overview

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23-238 California Points & Authorities § 238.05

§ 238.05 Description of Actions as "Local" or "Transitory"

[1] Use of Terms in Determining Proper Court

For the purposes of venue, an action is described as being "local," "transitory," or "mixed." The courts frequently use the words "personal" or "in personam" to mean "transitory." However, such terms would appear to be more appropriately applied to the issue of personal jurisdiction over a defendant as contrasted to an action in rem which results in no personal judgment. Since a "personal" action nevertheless may be a "local" action, the words "personal" and "in personam" are avoided in this chapter except in the discussions of the cases.

[2] Local Actions

Generally speaking, a local action is one that must be tried in a certain county regardless of the residence of the defendant. *Code Civ. Proc. §§ 392, 393,* and *394* deal with certain actions that are considered local rather than transitory. *Code Civ. Proc. § 392* deals with actions affecting realty, *Code Civ. Proc. § 393* deals with actions for statutory penalties and suits against public officials, and *Code Civ. Proc. § 394* with actions against counties and cities. *Code Civ. Proc. § 395.1* involves actions on claims for money or personal property against certain persons sued in a representative capacity, which are properly tried in the county having jurisdiction of the estate represented by that person [*see Haines v. Lamb (1962) 206 Cal. App. 2d 322, 324-326, 24 Cal. Rptr. 146]* .

[3] Transitory Actions

The term "transitory" is applied to all other actions. Transitory actions must be tried in the county of defendant's residence, subject, of course, to change of venue on statutory grounds [*Code Civ. Proc. § 397*]. These are the situations "except as otherwise provided by law" as stated in *Code Civ. Proc. § 395*, which, however, sets forth some exceptions, both by way of limitation (child support obligation) and by way of increasing the number of counties in which venue may in the actions specified be laid. With respect to actions against associations and corporations, venue of transitory actions is controlled by *Code Civ. Proc. §§ 395.2* and *395.5*.

[4] Mixed Actions

Mixed actions are those involving a joinder of either local and transitory actions or transitory actions requiring trial in different counties [*see Channell v. Superior Court (1964) 226 Cal. App. 2d 246, 248-249, 38 Cal. Rptr. 13* ; *see also Georgetown Divide Public Util. Dist. v. Bacchi (1962) 204 Cal. App. 2d 194, 200, 22 Cal. Rptr. 27]* . A mixed action has also been described as one in which the plaintiff has alleged two or more causes of action, each of which is governed by a different venue statute, or, two or more defendants are named who are subject to different venue standards [*Gallin v. Superior Court (1991) 230 Cal. App. 3d 541, 544, 281 Cal. Rptr. 304]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueIndividual Defendants

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23-238 California Points & Authorities § 238.06

§ 238.06 "Main Relief" Rule

Since the Legislature has classified cases for venue purposes according to the kind of relief sought, an additional problem arises when a pleader with a single cause of action asks for various forms of relief. In order to classify the action, it is necessary to look for the principal object of the action and of the main relief to which plaintiff would be entitled if he or she obtained a default judgment on his or her complaint [*Haines v. Lamb (1962) 206 Cal. App. 2d 322, 326, 24 Cal. Rptr. 146]* . This is known as the "main relief" rule. If the main relief sought is transitory and the local issue is only incidental, the action for purposes of venue will be classed as transitory [*Peiser v. Mettler (1958) 50 Cal. 2d 594, 606, 328 P.2d 953]* ; conversely, if the main relief sought is local and the transitory issue is only incidental, the action will be classed as a local action [*Grocers' etc. Union v. Kern etc. Co. (1907) 150 Cal. 466, 471-473, 89 P. 120]* .

The facts precipitating a plaintiff's right to recover will determine the statement of one or several causes of action [*Hammon v. American Exploration & Mining Co. (1962) 203 Cal. App. 2d 306, 308-309, 21 Cal. Rptr. 409]* , and when there is only one cause of action and different forms of relief are sought, the main relief rule determines the form of action for the purpose of venue [*Dreher v. Fidelity & Casualty Co. (1957) 148 Cal. App. 2d 695, 697, 307 P.2d 407]* . For example, in an action to recover damages for injuries to real property and growing crops, where the complaints are framed in various counts according to theories of negligent injury, negligent breach of contract, and breach of warranty, the addition of breach of warranty counts does not transform the suit into local-transitory--that is, mixed, actions triable at the dealer's residence. Because the subject matter of the action determines whether or not venue is governed by *Code Civ. Proc. § 392*, and the injury to the real property (growing crops) in such an action is the subject matter of the action, although the injury may have been caused by breach of warranty, the breach of warranty counts do not present a transitory cause of action [*Stauffer Chem. Co. v. Superior Court (1968) 265 Cal. App. 2d 1, 4, 71 Cal. Rptr. 202]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueIndividual Defendants

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23-238 California Points & Authorities § 238.07

§ 238.07 Transfer When Court Lacks Subject-Matter Jurisdiction

Code Civ. Proc. § 396 provides that an if the superior court lacks jurisdiction of an appeal or petition, and a court of appeal or the Supreme Court would have jurisdiction, the appeal or petition shall be transferred to the court having jurisdiction upon terms as to costs or otherwise as may be just, and proceeded with as if regularly filed in the court having jurisdiction. *Code Civ. Proc. § 396* thus reaches only the question of jurisdiction and is unrelated to venue [*Apartments, Inc. v. Trott (1959) 172 Cal. App. 2d 7, 13, 342 P.2d 32]* . For a discussion of the provisions of *Code Civ. Proc. § 396* and a motion to transfer under *Code Civ. Proc. § 396*, see Ch. 324, *Jurisdiction: Subject Matter Jurisdiction* in California Forms of Pleading and Practice (Matthew Bender).

Welf. & Inst. Code § 15657.3, part of the Elder Abuse Act, allows the probate court to determine that a matter should be determined in another department of the court. Nothing in the language of section 15657.3 indicates that an elder abuse complaint should be treated differently than the transfer of a civil case from a general jurisdiction department to a limited jurisdiction department within the court. Requiring a party to refile a case in the same courthouse, with possible statute of limitations issues, and additional costs to the party, is inconsistent with the legislative attempt to protect elderly Californians [*Conservatorship of Kayle (2005) 134 Cal. App. 4th 1, 6, 35 Cal. Rptr. 3d 671]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureVenueGeneral OverviewCivil ProcedureVenueMotions to TransferGeneral Overview

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23-238 California Points & Authorities § 238.08

§ 238.08 Grounds for Change of Venue

The court may, on motion, change the place of trial in the following cases [*Code Civ. Proc. § 397*]:

1. When the court designated in the complaint is not the proper court;

2. When there is reason to believe that an impartial trial cannot be had therein [*see, e.g., Riverside County Flood Control & Water Conservation Dist. v. Joseph W. Wolfskill Co. (1957) 147 Cal. App. 2d 714, 715-717, 306 P.2d 22* (motion denied)];

3. When the convenience of witnesses and the ends of justice would be promoted by the change;

4. When from any cause there is no judge of the court qualified to act; and

5. When a proceeding for dissolution of marriage has been filed in the county in which the petitioner has been a resident for three months next preceding the commencement of the proceeding, and the respondent at the time of the commencement of the proceeding is a resident of another county in this state, to the county of the respondent's residence when the ends of justice would be promoted by the change. If a motion to change the place of trial is made pursuant to this paragraph, the court may, prior to the determination of such motion, consider and determine motions for allowance of temporary support of the other party and of any children of the marriage, temporary restraining orders, attorney's fees, and costs, and make all necessary and proper orders in connection therewith.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueMotions to TransferGeneral OverviewCivil ProcedureVenueMotions to TransferConvenience of PartiesCivil ProcedureVenueMotions to TransferConvenience of WitnessesFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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23-238 California Points & Authorities § 238.09

§ 238.09 Effect of Pleadings on Motion for Change of Venue

The motion for change of venue is heard on affidavits (or declarations under *Code Civ. Proc. § 2015.5*) and verified pleadings, with a verified complaint being treated as plaintiff's counter affidavit insofar as it contradicts the affidavit of the moving party. If the complaint is not verified and the defendant's affidavit adequately controverts the allegations showing that the county in which the action is pending is proper and avers facts which would make the action triable in another county, the court must, in the absence of a sufficient counter affidavit, grant the motion. An unverified complaint cannot be treated as a counter affidavit. But when the defendant's affidavit does not deny or otherwise meet the essential allegations in the complaint as they relate to venue, it is an insufficient affidavit on which to grant a motion for change of venue, and the complaint will determine venue even though unverified [*Quick v. Corsaro (1960) 180 Cal. App. 2d 831, 835-836, 4 Cal. Rptr. 674* ; *see Mission Imports, Inc. v. Superior Court (1982) 31 Cal. 3d 921, 929 n.7, 184 Cal. Rptr. 296, 647 P.2d 1075* ; *Hollopeter v. Rogers (1962) 199 Cal. App. 2d 814, 817, 19 Cal. Rptr. 25]* .

The question of the nature of the action must be determined at the time of the hearing of a motion for a change of venue from allegations of the complaint which was on file at the time the motion was made and from the nature of a default judgment which might be rendered thereon, assuming the truth of the allegation and, hence, an amended complaint filed after the motion is made cannot be considered by the court [*Johnson v. Superior Court (1965) 232 Cal. App. 2d 212, 215, 42 Cal. Rptr. 645]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueMotions to TransferGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral Overview

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23-238 California Points & Authorities § 238.10

§ 238.10 Payment of Reasonable Expenses and Attorney's Fees

In its discretion, the court may order payment to the prevailing party of reasonable expenses and attorney's fees incurred in making or resisting the motion for change of venue whether or not such party is otherwise entitled to recover his or her costs of action [*Code Civ. Proc. § 396b*]. These sanctions cannot be imposed except on notice contained in a party's papers, or on the court's own noticed motion, and after the opportunity to be heard [*Code Civ. Proc. § 396b*]. In determining whether to make the order, the court must consider [*Code Civ. Proc. § 396b*]:

(1) whether an offer to stipulate to a change of venue was reasonably made and rejected; and

(2) whether the motion or selection of venue was made in good faith given the facts and the law the party making the motion or selecting the venue knew or should have known.

As between the party and his or her attorney, the expenses and fees are the personal liability of the attorney not chargeable to the party [*Code Civ. Proc. § 396b*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueMotions to TransferGeneral OverviewCivil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral Overview

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23-238 California Points & Authorities § 238.11

§ 238.11 Actions Involving Installment or Automotive Sales, Consumer Obligations, and Unlawful Detainer

[1] Statement of Facts Relating to Venue

In a number actions or proceedings arising out of certain consumer-related transactions, the plaintiff must state certain facts relating to venue in the complaint, verified by the oath of the plaintiff or of his or her attorney [*see Civ. Code §§ 1812.10, 2984.4*; *Code Civ. Proc. § 396a*]. The actions or proceedings subject to this requirement are:

- Those subject to the Unruh Retail Installment Sales Act (*Civ. Code § 1801 et seq.*) [*see Civ. Code § 1812.10*; *Code Civ. Proc. § 396a*].

- Those subject to the Rees-Levering Motor Vehicle Sales and Finance Act (*Civ. Code § 2981 et seq.*) [*see Civ. Code § 2984.4*; *Code Civ. Proc. § 396a*].

- Those that are limited civil cases subject to *Code Civ. Proc. § 395(b)*, which concerns actions arising from:

  - An offer or provision of goods, services, loans, or extensions of credit intended primarily for personal, family, or household use.

  - A transaction consummated as a proximate result of an unsolicited telephone call made by a seller engaged in the business of consummating transactions of that kind or a telephone call or electronic transmission made by the buyer or lessee in response to a solicitation by the seller.

- Actions or proceedings for unlawful detainer as defined in *Code Civ. Proc. § 1161* [*see Code Civ. Proc. § 396a*].

In these cases, the facts alleged must show that the action has been commenced in the proper court for the trial of the action or proceeding, and that the action is subject to the provisions of *Civ. Code §§ 1812.10* and *2984.4*, or of *Code*

Civ. Proc. § 395(b), or is an action for an unlawful detainer [*Civ. Code §§ 1812.10, 2984.4*; *Code Civ. Proc. § 396a*]. In cases subject to *Civ. Code §§ 1812.10* or *2984.4*, the facts may not be stated on information or belief [*Civ. Code §§ 1812.10(c), 2984.4(c)*].

In lieu of stating the facts in a verified complaint, the plaintiff or his or her attorney may state the facts in an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) filed with the complaint. A copy of the affidavit or declaration must be served with the summons. If the complaint or affidavit is not so filed, no further proceedings may be had in the action or proceeding, except to dismiss the same without prejudice. The court may, however, on such terms as may be just, permit the affidavit to be filed subsequent to the filing of the complaint. In that case, a copy of the affidavit must be served on the defendant, and the time to answer or otherwise plead will date from the service [*Civ. Code §§ 1812.10(c), 2984.4(c)*; *Code Civ. Proc. § 396a*].

The purpose of *Code Civ. Proc. § 396a* is to protect defendants in actions involving relatively small monetary claims from the inequitable harassment that may ensue when the action is filed in a distant county. Defendants in such cases are often financially unable to expend the money to travel to a distant forum, or to hire an attorney to do so, even for the purpose of moving simply for a change of venue. Without the protection of *Code Civ. Proc. § 396a*, a plaintiff, aware of the practical limitations, could exploit the situation by filing all such actions in distant counties where a defendant could not afford either to defend or to move for a change of venue, and could thereby unfairly obtain default judgments or favorable settlements in such actions. To eliminate such abuse, *Code Civ. Proc. § 396a* requires the plaintiff to reveal facts demonstrating where the action should be tried, and then places upon the trial court the initial responsibility for protecting an absent defendant's interest [*Barquis v. Merchants Collection Assn. (1972) 7 Cal. 3d 94, 117-118, 101 Cal. Rptr. 745, 496 P.2d 817]* . When the requirements of the statute are not met by the plaintiff, the trial court must on its own motion dismiss the action. The venue objection under the statute is not waived by the defendant's failure to move for a change of venue and, if the trial court erroneously enters a default judgment against him or her, he or she can move to set aside the default and the default judgment on the ground that the court in which the action was brought was not the proper court for trial of the action and plaintiff did not comply with *Code Civ. Proc. § 396a* [*Barquis v. Merchants Collection Assn. (1972) 7 Cal. 3d 94, 116-118, 101 Cal. Rptr. 745, 496 P.2d 817]* .

[2] Manner of Raising Objection to Venue

When an action is brought against a defendant in a distant municipal or justice court in violation of *Code Civ. Proc. § 396a*, all the defendant should do to protect himself or herself is to assist the trial court in its statutory duty to dismiss the action by bringing the inadequacy of the complaint to the court's attention through an informal letter to the court or by other appropriate means [*Barquis v. Merchants Collection Assn. (1972) 7 Cal. 3d 94, 118, 101 Cal. Rptr. 745, 496 P.2d 817]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesState RegulationCivil ProcedureVenueMotions to TransferGeneral OverviewContracts LawSecured TransactionsInstallment ContractsGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & DetainerTransportation LawPrivate VehiclesGeneral Overview

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23-238 California Points & Authorities § 238.12

§ 238.12 Counter Motion to Retain Venue to Promote Convenience of Witnesses or Ends of Justice

[1] Authority

A motion for change of venue to the proper court under *Code Civ. Proc. § 397(a)* can be opposed by the plaintiff, and the court may order retention of the cause in the county where it was commenced after an answer has been filed, if it appears either that the convenience of the witnesses or the ends of justice will thereby be promoted [*Code Civ. Proc. § 396b*]. Although *Code Civ. Proc. § 396b* does not require the plaintiff to move the court to retain the action by way of counter motion, the general common law practice [*see Gordon v. Perkins (1928) 203 Cal. 183, 185, 263 P. 231* ; *Sheffield v. Pickwick Stages (1923) 191 Cal. 9, 10-11, 214 P. 852]* , which has been retained since the enactment of *Code Civ. Proc. § 396b* in 1933, is to oppose a motion for change of venue by a counter motion to retain the cause for convenience of witnesses [*see Braunstein v. Superior Court (1964) 225 Cal. App. 2d 691, 697, 37 Cal. Rptr. 666]* .

A cross-defendant is not entitled to seek a change of venue under *Code Civ. Proc. § 396b* based on a compulsory cross-complaint. Rather, the cross-complaint is to be tried in the same county that has been established as the proper venue based on the original complaint [*K.R.L. Partnership v. Superior Court (2004) 120 Cal. App. 4th 490, 506, 15 Cal. Rptr. 3d 517]* .

[2] Grounds for Counter Motion

The statutory grounds for opposing a motion for change of venue and seeking retention of the cause are stated in the disjunctive. Thus, it would appear that a counter motion should be granted if either the convenience of witnesses or the ends of justice will be promoted thereby [*see Code Civ. Proc. § 396b*]. However, because the common law practice was generally to permit a court to retain an action, although commenced in an improper court, when the convenience of witnesses and the ends of justice would be promoted by retention of the cause [*see Gordon v. Perkins (1928) 203 Cal. 183, 185, 263 P. 231* ; *Sheffield v. Pickwick Stages (1923) 191 Cal. 9, 10-11, 214 P. 852]* , no court has specifically noted the disjunctive basis for opposing a motion for change of venue under *Code Civ. Proc. § 396b* and permitting a plaintiff to base his or her counter motion on the grounds that either the convenience of the witnesses or the ends of justice would be promoted by retention of the cause [*see Maxwell v. Murray (1961) 190 Cal. App. 2d 440, 443-444, 11 Cal. Rptr. 916* (stating without discussion that plaintiff must show that both convenience of witnesses and ends of justice will be promoted by retention); *but see Harris v. Cannon (1941) 42 Cal. App. 2d 748, 749, 109 P.2d 961*

(permitting trial court to retain cause on grounds of convenience of witnesses without comment on grounds for counter motion)]. Nevertheless, in an action in which a counter motion for retention of the cause was made on the grounds of convenience of witnesses and the ends of justice, the court of appeal commented that the motion was apparently made under *Code Civ. Proc. § 397(c)*, which permits the court to change the place of trial when the convenience of witnesses and the ends of justice would be promoted by the change [*see Braunstein v. Superior Court (1964) 225 Cal. App. 2d 691, 697-698, 37 Cal. Rptr. 666]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueMotions to TransferGeneral OverviewCivil ProcedureVenueMotions to TransferConvenience of WitnessesCivil ProcedureVenueMotions to TransferInterests of Justice

California Points & Authorities

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Volume 23 Chapters 230-239 TRUST DEEDS---to---WORKERS' COMPENSATION
CHAPTER 238 VENUE
PART I. INTRODUCTION

23-238 California Points & Authorities § 238.13

§ 238.13 Related Pleading and Practice Chapters

For a discussion and forms of motions for change of venue see Ch. 571, *Venue* in California Forms of Pleading and Practice.

For discussions and forms for use in particular cases involving venue, see in that set the following chapters:

- Ch. 7, *Accounting, Action for*.
- Ch. 8, *Accounts Stated and Open Accounts*.
- Ch. 11, *Adjoining Landowners*.
- Ch. 13, *Adverse Possession*.
- Ch. 15, *Affidavits, Certificates, and Declarations*.
- Ch. 20, *Allegations Commonly Used*.
- Ch. 23, *Animals: Civil Liability*.
- Ch. 25, *Annulment (Nullity) of Marriage and Related Spousal Rights*.
- Ch. 36, *Judicial Arbitration*.
- Ch. 61, *Associations and Clubs*.
- Ch. 120, *Class Actions*.
- Ch. 123, *Complaints and Cross Complaints*.

- Ch. 140, *Contracts*.
- Ch. 160, *Corporations*.
- Ch. 221, *Dissolution of Marriage: Procedure*.
- Ch. 308, *Insurance*.
- Ch. 397, *Partition*.
- Ch. 406, *Partnerships: Dissolution*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueMotions to TransferGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsCross-ComplaintsReal Property LawAdjoining LandownersGeneral OverviewReal Property LawAdverse PossessionGeneral Overview

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CHAPTER 238 VENUE
PART I. INTRODUCTION

23-238 California Points & Authorities § 238.14

§ 238.14 Related Points and Authorities Chapters

Related memoranda that may be useful in particular cases involving change of venue may be found in the following chapters in this set:

- Ch. 12, *Accounting*.
- Ch. 20, *Arbitration: Compelling*.
- Ch. 20A, *Arbitration: Resisting*.
- Ch. 20D, *Arbitration: Dismissing*.
- Ch. 22, *Associations and Clubs*.
- Ch. 35, *Civil Rights: Unruh Civil Rights Act*.
- Ch. 35A, *Civil Rights: Equal Protection*.
- Ch. 45, *Consolidation, Severance, and Coordination of Actions*.
- Ch. 50, *Contracts*.
- Ch. 52, *Corporations*.
- Ch. 132, *Jurisdiction: Personal Jurisdiction and Inconvenient Forum*.
- Ch. 133, *Jurisdiction: Subject Matter Jurisdiction*.
- Ch. 158, *Motions to Reconsider and Renewed Motions*.

- Ch. 183, *Privacy: State Constitutional Rights*.
- Ch. 184, *Privacy: Invasion Of Privacy*.
- Ch. 185, *Privacy: Collection, Dissemination, and Inspection of Information*.
- Ch. 196, *Public Entities*.
- Ch. 206, *Sales*.
- Ch. 225, *Trespass*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawUnincorporated AssociationsCivil ProcedureVenueCorporationsConstitutional LawEqual ProtectionGeneral OverviewContracts LawGeneral OverviewReal Property LawTortsTrespass to Real Property

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23-238 California Points & Authorities §§ 238.15-238.29

[Reserved]

§§ 238.15[Reserved]

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Volume 23 Chapters 230-239 TRUST DEEDS---to---WORKERS' COMPENSATION
CHAPTER 238 VENUE
PART II. FORMS
A. Improper Court Designated in Complaint
1. Change to Defendant's Residence

23-238 California Points & Authorities § 238.30

§ 238.30 Supporting Motion for Change of Venue to Proper Court [Code Civ. Proc. §§ 396b, 397(a)] in County of Defendant's Residence [Code Civ. Proc. § 395(a)]--When Complaint Does Not Show Applicability of Exception

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION FOR CHANGE OF VENUE
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Dept.: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THE PROPER COURT FOR THE TRIAL OF AN ACTION IS IN THE COUNTY OF DEFENDANT'S RESIDENCE WHEN THE COMPLAINT FAILS TO SHOW THE APPLICABILITY OF A STATUTORY EXCEPTION THAT WOULD REQUIRE TRIAL ELSEWHERE.

A. Statutory Authority for Motion. The court may, on motion, change the place of trial when the court designated in the complaint is not the proper court (*Code Civ. Proc. § 397(a)*).

B. Transfer Mandatory on Proper Showing. The court must order the action transferred to the proper court when it

appears at the hearing of the motion for change of venue that the action was not commenced in the proper court (*Code Civ. Proc. § 396b*).

C. Proper Court as in County of Defendant's Residence. Except as otherwise provided by law, the proper court for the trial of an action is the superior court in the county where the defendant resided when the action was commenced (*Code Civ. Proc. § 395(a)*).

D. Character of Action as Determined by Complaint and Nature of Judgment. The transitory or local character of an action will be determined for the allegations of the complaint or file at the time the motion for change of venue is made and from the nature of the judgment that might be rendered thereon (*Neet v. Holmes (1942) 19 Cal. 2d 605, 607, 122 P.2d 557*).

E. Venue When Complaint Does Not Show Applicability of Exception. A defendant is entitled to have an action tried in the county of his/her residence when the complaint does not show that the cause of action comes clearly within the terms of some exception to this rule (*Brown v. Happy Valley Fruit Growers (1929) 206 Cal. 515, 521-522, 274 P. 977*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted by a defendant in an action or proceeding that has been filed in a county other than that of the defendant's residence when the complaint does not show that the cause of action comes clearly within the terms of some exception to the general rule that the proper court for the trial of an action or proceeding is in the county of the defendant's residence at the time and the action or proceeding is commenced.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated.

[i] Supporting Affidavits

The burden of proof to justify a change of venue is on the moving party [*Los Angeles v. Pacific Tel. & Tel. Co. (1958) 164 Cal. App. 2d 253, 260, 330 P.2d 888]* . The affidavits (or declarations under *Code Civ. Proc. § 2015.5*) supporting the motion should state facts supporting the propriety of venue in another county and avoid stating conclusions without factual detail [*Los Angeles v. Pacific Tel. & Tel. Co. (1958) 164 Cal. App. 2d 253, 260, 330 P.2d 888]* .

When there are multiple defendants, the fact of residence may be prima facie established by the affidavit of one defendant alleging the residence of others on information and belief [*see Brown v. Happy Valley Fruit Growers (1929) 206 Cal. 515, 519-520, 274 P. 977]* . It may be more prudent, however, to have each defendant make an affidavit or

declaration.

[3] Discussion of Authorities

[a] Proper Court as in County of Defendant's Residence

The statutory exceptions to the general rule set forth in *Code Civ. Proc. § 395(a)* include cases in which the action or proceeding:

(1) Relates to real property [*Code Civ. Proc. § 392*];

(2) Is for the recovery of statutory penalties or is against public officers [*Code Civ. Proc. § 393*];

(3) Relates to actions by or against counties or cities [*Code Civ. Proc. § 394*];

(4) Involves a suit against an executor, administrator, guardian, conservator, or trustee on a claim for the payment of money or for the recovery of personal property, except as otherwise provided in *Prob. Code § 17005* (pertaining to trustees) [*Code Civ. Proc. § 395.1*; *see Prob. Code § 17005* (proceeding under the Trust Law, *Prob. Code § 15000 et seq.*, generally); *see also Prob. Code § 82* (definition of trust); *Prob. Code §§ 17300-17302* (testamentary trust subject to continuing court jurisdiction)];

(5) Is against an unincorporated association [*Code Civ. Proc. § 395.2*]; or

(6) Is against a corporation or an association [*Code Civ. Proc. § 395.5*].

In addition, the law provides for a choice between the county of the defendant's residence and another county when none of the defendants reside in the state, or, if they do, the county of residence is unknown to the plaintiff, or the defendant is about to depart from the state, or the action or proceeding is: for injury to person or property or wrongful death; for dissolution of marriage; for determination of parental relation or support of children; to establish and enforce a foreign judgment for child support; or on contract [*Code Civ. Proc. § 395(a), (b)*; *Fam. Code § 7620(b)*].

For further discussion of the general rule and the exceptions to it, see California Forms of Pleading and Practice, *Venue.*

[b] Character of Action as Determined by Complaint and Nature of Judgment

In ***Neet v. Holmes*** *(1942) 19 Cal. 2d 605, 122 P.2d 557* , which was an action for an accounting, a declaration of trust of certain mining property, and other relief and was primarily based on allegations of fraud and misrepresentation, suit was filed in the county where some of the defendants resided. Other defendants sought to have the trial removed to the county in which the real property involved was situated. In affirming the denial of the motion to change venue, the Supreme Court stated that the question of the transitory or local character of the causes of action stated in the complaint must be determined from the allegations of the complaint of file at the time the motion was made and from the nature of the judgment which might be rendered thereon assuming the truth of the allegations.

[c] Venue When Complaint Does Not Show Applicability of Exception

Brown v. Happy Valley Fruit Growers *(1929) 206 Cal. 515, 274 P. 977* , was an action attacking on the ground of fraud a judgment previously rendered by an Alameda County court. The suit was filed in Shasta County, where the Alameda judgment had been executed against land owned by one of the defendants. On appeal, the order of the Superior Court of Shasta County denying motions for a change of venue was reversed by the Supreme Court.

In its decision the Supreme Court noted that fraud and collusion constituted the crux of the action and held that portion

of the complaint which sought to enjoin the defendants from asserting any interest in the real property executed upon under the Alameda judgment to be surplusage; the action was termed personal and transitory.

The Supreme Court ruled that a plaintiff cannot unite local and personal actions so as to compel the defendants to have both matters tried in county other than that in which the defendants reside. The right of a defendant to have an action brought against him tried in the county in which he has his residence is an ancient and valuable right, which has always been safeguarded by statute and is supported by a long line of judicial decisions. The right of a plaintiff to have an action tried in a county other than that in which the defendant has his residence is exceptional, and, if the plaintiff would claim such right, he must bring himself within the terms of the exception.

[4] Additional Authorities

[a] Character of Action as Determined by Complaint and Nature of Judgment

In *Kaluzok v. Brisson (1946) 27 Cal. 2d 760, 167 P.2d 481* , an action for damages for deceit in the purchase and sale of certain real property, suit was filed where the land was located and the defendants moved for change of venue to the county of their residence. The trial court denied change of venue. On appeal, the Supreme Court reversed the trial court's order. The Supreme Court stated that to decide the question of venue, it is necessary to determine the nature of the action as disclosed by the complaint and the scope of the judgment that might be entered on default. Determining the nature of the action as disclosed by the complaint and the scope of the judgment that might be entered on default, the Supreme Court noted that the title to the real property would not be affected and no interest therein would be determined in the case at issue. Instead, the Court observed, the complaint sought a personal judgment for damages for fraud.

In *Turlock Theatre Co. v. Laws (1939) 12 Cal. 2d 573, 86 P.2d 345* , the plaintiff sought recovery of unpaid rentals under a lease, termination of the lease, and restoration to possession of the real property involved. Suit was filed in the county where the land was located and the defendants sought a change of venue to the county of their residence. The trial court denied the motion for change of venue and on appeal the Supreme Court reversed. In determining that the defendants were entitled to a change of venue, the Supreme Court stated that whether the action is local or transitory must be determined from an inspection of the allegations of the complaint and the nature of the relief sought, and all ambiguities must be resolved against the pleader.

Gallin v. Superior Court (1991) 230 Cal. App. 3d 541, 281 Cal. Rptr. 304 , was a class action filed in San Diego County on behalf of purchasers of certain pop-rock record albums, etc., against the performers, producers, recording companies, and distributors, alleging fraud, negligent misrepresentation, unfair competition (*Bus. & Prof. Code § 17200 et seq.*), deceptive consumer practices (*Civ. Code § 1770 et seq.*), and breach of contract. Plaintiff sought rescission, damages, imposition of a constructive trust, and injunctive relief. Defendants moved to change venue to Los Angeles County on the ground that certain individual defendants resided there, that no corporate defendant had its principal place of business in San Diego County, and that a "single retail sale" in San Diego was insufficient for venue in a consumer remedy class action. The trial court denied the motion, stating that *Code Civ. Proc. § 395* provides the general rule of venue at the place of defendant's residence except as otherwise provided by law, but that *Civ. Code § 1780* of the Consumers Legal Remedy Act sets forth such an alternative basis for proper venue, and that the inclusion of claims other than those under the that Act was not fatal to proper venue in San Diego County. Defendants petitioned the court of appeal for a writ of mandate. In ordering issuance of a peremptory writ of mandate directing the superior court to vacate its order denying the motion to transfer and to grant the motion, the court of appeal stated that the plaintiff's theory of the action as set forth in the complaint determines the venue, that, because the law favors the right of trial at the defendant's residence, the complaint will be strictly construed against a plaintiff seeking to lay the venue elsewhere, that the action was a mixed action (*230 Cal. App. 3d 541, 544)* , that where the defendant is entitled to a change of venue as to one cause of action, the entire action is transferred (*230 Cal. App. 3d 541, 545)* , and that the general venue rule of *Code Civ. Proc. § 395(a)* (requiring trial of action in county of defendant's residence) prevailed over the specific

provision in former Civ. Code § 1780(c), now *Civ. Code § 1780(d)*, because the rights protected by the Consumers Legal Remedies Act do not rise to the level of civil rights, and plaintiff was not disadvantaged or thwarted in pursuing litigation by having the matter transferred (*230 Cal. App. 3d 541, 545-546)* .

[b] Venue When Complaint Does Not Show Applicability of Exception

In *Kaluzok v. Brisson (1946) 27 Cal. 2d 760, 167 P.2d 481* , the factual background of which is discussed in *§ 238.30[4][a]*, after analyzing the complaint and determining that it sought a personal judgment for damages for fraud, the Supreme Court ruled that the defendants were entitled to a change of venue to the county of their residence from the county where certain land involved was situated. The Court reiterated the general rule that the right of a defendant to have an action brought against him tried in the county of his residence in an ancient and valuable right safeguarded by statute and supported by a long line of decisions. The right of a plaintiff to have an action tried in a county other than that of the defendant's residence is exceptional. If the plaintiff would claim such right he must bring himself within the exception, the Court added.

In *Bybee v. Fairchild (1946) 75 Cal. App. 2d 35, 37, 170 P.2d 54* , an action for damages for fraudulent misrepresentations and a purported action to quiet title to certain real property was filed in the county in which the real property was situated. The defendants sought change of venue to the county of their residence. The trial court denied change of venue and on appeal the court of appeal reversed. The appellate court noted that an action for fraud or for money damages is personal and transitory and triable in the county of the defendant's residence, and that when a transitory action is joined with a local action, the defendant is entitled to a change of venue, even though no such right would exist if the local action had been sued on alone. The court observed that the normal right of the defendant is to have the action tried in the county of his residence. For the cause to be triable elsewhere,the plaintiff must bring himself clearly within the terms of some statutory exception, and in this connection all ambiguities will be construed against the pleader to the end that a defendant will not be deprived improperly of his fundamental right to have the cause tried in the county of his residence.

Goossen v. Clifton (1946) 75 Cal. App. 2d 44, 170 P.2d 104 , was an action on contract in which the complaint failed to contain an allegation as to where the cause of action arose or that it was entered into, or to be performed, in the county where suit was filed. The defendants sought a change of venue to the county where they were residents. The trial court denied the defendants' motion for change of venue and on appeal the court of appeal reversed. The appellate court stated the general rule that a defendant is entitled to have an action tried in the county of his residence and that the right of the plaintiff to have an action tried elsewhere is the exceptional right which must find its justification in the terms of some statute. It is, the court observed, the duty of a plaintiff to bring himself within some exception if he can--otherwise, the defendant's right is to have the case tried in the county of his residence. The court added that the right to have the action tried in the county where they, or some of them, reside is remedial in nature and should be liberally construed to the end that defendants may not be unjustly deprived of that right.

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23-238 California Points & Authorities § 238.31

§ 238.31 Supporting Motion for Change of Venue to Proper Court [Code Civ. Proc. §§ 396b, 397(a)] in County of Defendant's Residence [Code Civ. Proc. § 395(a)]--When Complaint Shows That Action Is Essentially Transitory and Any Local Issue Is Incidental

[1] FORM

[*Caption. See § 238.30.*]

THE PROPER COURT FOR THE TRIAL OF AN ACTION IS IN THE COUNTY OF DEFENDANT'S RESIDENCE WHEN THE COMPLAINT SHOWS THAT THE ACTION IS ESSENTIALLY TRANSITORY AND THAT ANY LOCAL ISSUE IS INCIDENTAL.

A. Statutory Authority for Motion. [*See § 238.30[1], Paragraph A.*]

B. Transfer Mandatory on Proper Showing. [*See § 238.30[1], Paragraph B.*]

C. Proper Court as in County of Defendant's Residence. [*See § 238.30[1], Paragraph C.*]

D. Character of Action as Determined by Complaint and Nature of Judgment. [*See § 238.30[1], Paragraph D.*]

E. Venue of Actions as Local or Transitory. If the subject matter of an action is local, the cause should be tried in the county where such subject matter, or some part thereof, is situated; otherwise it should be tried in the country of the defendant's residence (*Bardwell v. Turner (1933) 219 Cal. 228, 230, 25 P.2d 978*).

F. Venue When Action Is Essentially Transitory. When the nature of an action is essentially transitory and the determination of a local issue is only incidental, the defendant is entitled to have the action tried in the county of his/her residence (*Neet v. Holmes (1942) 19 Cal. 2d 605, 611-612, 122 P.2d 557*).

[*Optional*] **G. Reformation of Real Property Agreement.** An action to reform a lease of real property is transitory (*Macracci v. Continental Baking Co. (1962) 202 Cal. App. 2d 224, 226, 20 Cal. Rptr. 567*).

[*Optional*] **H. Specific Performance of Reformed Real Property Agreement.** An action for the reformation of a real property lease and for specific performance of the lease as reformed is transitory (*Marcacci v. Continental Baking Co. (1962) 202 Cal. App. 2d 224, 226, 20 Cal. Rptr. 567*).

[*Optional*] **I. Equitable Action to Set Aside Judgment Obtained by Fraud or Mistake.** An equitable action to declare a judgment null and void for alleged fraud or mistake is transitory and triable in the country of the defendant's residence, [even though the judgment under attack was rendered by the court in which the equitable action was improperly commenced] (*Deas v. Lido Lbr. Co. (1955) 132 Cal. App. 2d 402, 404, 407, 282 P.2d 90*).

[*Optional*] **J. Attack on Judgment in Country Other Than Where Rendered.** An equitable action attacking a prior judgment on the ground of fraud or mistake may be brought in any county, regardless of where in the state the judgment attacked was rendered; the fact that a fraudulent judgment was obtained in one court does not deprive other courts of general and equal jurisdiction from exercising their equity powers to annul it (*Deas v. Lido Lbr. Co. (1955) 132 Cal. App. 2d 402, 404-407, 282 P.2d 90*).

[*Optional*] **K. Action for Damages for Trespass.** Where it can be determined from the allegations of a complaint for damages for trespass quare clausum fregit that money damages are the only relief sought, the title to the real property is not questioned, and there is no attempt to recover possession thereof, the action is transitory and the defendant is entitled to have such an action tried in the county of his/her residence (*Hardy v. White (1955) 130 Cal. App. 2d 550, 552, 279 P.2d 126*).

[*Optional*] **L. Vendor's Action for Breach of Real Property Sale Contract.** A vendor's action for breach of a contract for the sale of real property is transitory where only a money judgment is sought (*Blackman v. Sherman (1940) 41 Cal. App. 2d 20, 22, 105 P.2d 1000*).

[*Optional*] **M. Action for Damages for Fraud With Incidental Real Property Rights Involved.** An action, the gravamen of which is fraud, is transitory, and the mere fact that incidental rights in real property may be involved does not change the rule (*Thielen v. Superior Court (1963) 219 Cal. App. 2d 217, 221, 33 Cal. Rptr. 1*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for change of venue in an action or proceeding that has been filed in a county other than that of the defendant's residence where the complaint indicates that the action is

essentially transitory and the determination of a local issue only incidental, and, thus, the action should be tried in the county of the defendant's residence instead.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. The memorandum should also be accompanied by supporting affidavits as discussed in *§ 238.30[2][a][i]*.

[3] Discussion of Authorities

[a] Venue of Action as Local or Transitory

Bardwell v. Turner *(1933) 219 Cal. 228, 25 P.2d 978* , involved an action in which plaintiff sought an accounting and the establishment of the rights in the terms of a resulting trust in profits from certain oil wells and oil leases. Defendants sought a change of venue from the county in which the leases were located to the county of their residence. They claimed that the gravamen of the action was transitory in that it was no more than an action in equity for an accounting. The trial court denied the motion for a change of venue on the ground that the action was essentially local since plaintiff sought an interest in land in the form of a resulting trust in the oil leases. In appealing the order denying the change of venue, defendants sought a writ of supersedeas to stay proceedings in the trial court pending the outcome of the appeal. The Supreme Court issued the writ, finding that substantial questions would be presented on defendants' appeal as to the local or transitory nature of the action. The Court stated that if the subject matter of the action is local, the cause should be tried in the county where such subject matter, or some part thereof, is situated; otherwise it should be tried in the county of defendant's residence. Since a cause of action for an accounting is transitory, if the complaint had combined local and transitory causes of action defendants would be entitled to have the cause tried in the county of their residence.

[b] Venue When Action Is Essentially Transitory

In ***Neet v. Holmes*** *(1942) 19 Cal. 2d 605, 122 P.2d 557* , plaintiffs sued defendants for an accounting, for a declaration of trust of certain mining property, and for other relief. The action was commenced in the county of defendants' residence, and certain defendants sought a change of venue to the county in which the mining claims were located. The motion was denied and the moving defendants appealed. In affirming the trial court, the Supreme Court found that not all of the causes of action alleged were local in character so as to require that the action be tried in the county in which the mining claims were located. The Court stated in this respect that an action is transitory rather than local when the right to any real property sought by the plaintiffs depends on the outcome of a controversy concerning a personal obligation of the defendants, and the judgment rendered thereon would be one to enforce such an obligation. The nature of the action in the case at issue was essentially transitory and the defendants were entitled to have it tried in the county of their residence since the determination of an estate or interest in land was merely incidental to the determination of the causes of action for an accounting, a declaration of trust as to certain mining property, and other relief based on allegations of fraud and misrepresentation. The nature of an action is local, and must be tried in the county where the land is situated, when it turns on the title to property as distinct from the personal obligation, and the decree operates ex proprio vigore on the title.

[c] Reformation of Real Property Agreement

Marcacci v. Continental Baking Co. *(1962) 202 Cal. App. 2d 224, 20 Cal. Rptr. 567* , was an action for the reformation and specific performance of that portion of a real property lease agreement relating to the payment of money by the defendant lessee. It was filed in the county where the lease payments were to be made and the defendant sought change of venue to the county in which the land was located. The trial court denied the motion and the court of appeal affirmed, holding that the action was transitory. The complaint alleged that one of the two leases involved failed to include agreed on provisions for payment by the defendant of taxes and insurance and erroneously stated the rental agreed on to be paid if the defendant exercised an option to renew. The other lease allegedly omitted defendant's agreement to pay taxes and increased rentals for an addition made after the original plans for the building thereon were amended. As to each lease, one cause of action sought reformation and the other sought specific performance of the

lease as reformed. The court noted that since each lease required payments to be made in the county of suit, that county was a proper one for the trial unless the action was local in nature. The action, said the court, would be local only if it was for the determination of a right or interest in real property. However, the complaint in no way sought determination of the existence, extent, quality, or amount of the defendant's leasehold interest in either parcel. That interest was conceded by both parties; the leasehold interest was, at most, incidentally involved. An action in which the relief sought is personal, and in which title to or possession of real property is only incidentally involved is transitory and not local, said the court. The court further noted that an action by a vendor for the purchase price of land is not within *Code Civ. Proc. § 392*, nor is an action by a vendor for specific performance of a vendee's contract to purchase land. Thus, the court concluded that the action in this case was transitory and that the motion for change of venue was properly denied.

[d] Specific Performance of Reformed Real Property Agreement

Marcacci v. Continental Baking Co. *(1962) 202 Cal. App. 2d 224, 20 Cal. Rptr. 567* , is discussed in *§ 238.31[3][c]*.

[e] Equitable Action to Set Aside Judgment Obtained by Fraud or Mistake

Deas v. Lido Lbr. Co. *(1955) 132 Cal. App. 2d 402, 282 P.2d 90* , was an action to have a default judgment entered against the plaintiff in the county in which this action was filed declared null and void on the ground that it had been obtained by fraud. The defendant moved for change of venue to the county where its principal place of business was located, the trial court denied the change, and the defendant appealed. The court of appeal reversed, holding that an equitable action for relief from a judgment is transitory and that there is no requirement that such an action must be tried in the county where it was rendered. The court observed that the instant action, being based on alleged fraud and mistake and praying for equitable relief, was without doubt a transitory action and that the defendant would be entitled to have it transferred to the county of its residence unless the fact that the judgment under attack was rendered in the county where suit was brought required it to be brought there. The general rule is that a defendant is entitled to have actions tried in the county of his residence, and the right of the plaintiff to have the action tried elsewhere is the exceptional right which must find its justification in the terms of some statute.

The court pointed out that ***Brown v. Happy Valley Fruit Growers, Inc.*** *(1929) 206 Cal. 515, 274 P. 977* , which was relied on by the trial court, also held that an action attacking a judgment on the ground of fraud was transitory, but that there the county in which the judgment was rendered was the county of the defendants' residence. The general statement in that case to the effect that one court will not interfere with the judgment of another court of coordinate jurisdiction could not be regarded as authority in support of the trial court's denial of the defendant's motion for change of venue to the couty where its principal place of business was located. The court noted that the superior court is vested with jurisdiction of all cases in equity, and this jurisdiction is not vested in any particular superior court. The only exception to this rule, said the court, is contained in *Code Civ. Proc. § 392* relating to venue of actions relating to real property. Thus, the court held that a suit attacking a judgment for fraud may be brought in any county of the state, subject to transfer, regardless of where in the state the judgment under attack was rendered. The court added that there is no reason, under proper circumstances, why one court may not afford equitable relief against the judgments of other courts; it is competent for every court to treat as a nullity any judgment which can be shown to have been obtained by manifest fraud.

[f] Attack on Judgment in County Other Than Where Rendered

Deas v. Lido Lbr. Co. *(1955) 132 Cal. App. 2d 402, 282 P.2d 90* , is discussed in *§ 238.31[3][e]*.

[g] Action for Damages for Trespass

Hardy v. White *(1955) 130 Cal. App. 2d 550, 279 P.2d 126* , was an action for damages for trespass quare clausum fregit which was filed in the county where the real property involved was located. The defendants moved for change of venue to the county of their residence, the trial court ordered the change sought by the defendants, and the court of

appeal affirmed, holding that the action was transitory. The complaint alleged that the plaintiffs were tenants in possession of a house which the defendants unlawfully entered and demanded monetary damages but not restoration of the property. The plaintiffs contended that their action was local because it was an action for injury to real property and, thus, within *Code Civ. Proc. § 392*. However, said the court, the question of venue must be determined from an inspection of the allegations of the complaint and the nature of the relief sought since the issue on a motion for change of venue is whether the complaint sets forth a theory of action supporting the chosen venue. The court observed that money damages were the only relief sought, that title to the real property was not questioned, and that there was no attempt to recover possession of the property. A judgment which would be rendered would not determine either of the latter two questions. If the trial court found that the plaintiff was a tenant at the time of the alleged wrongful eviction, it would be merely evidentiary and not a finding as to the tenant's right to or interest in the land. Moreover, the court observed that the complaint did not allege injury to the dwelling house or allege the plaintiffs' interest in the premises. Even if the complaint alleged the elements of a cause of action for trespass quare clausum fregit, it was not sufficient that title to the land might be incidentally involved, or even necessarily entered into, to make the action local if the judgment could be satisfied by the payment of money, the court observed. The general rule is that the defendant is etitled to have an action tried against him in the county of his residence unless the proceeding comes under the exceptions of *Code Civ. Proc. §§ 392-394*, and the action must be wholly local in nature to require it to be brought in the county of the situs of the real property involved. The well-settled rule, the court held, is that if there is a personal cause of action joined with one that is local in nature, the defendant is entitled to have the proceeding transferred to the county of his residence.

[h] Vendor's Action for Breach of Real Property Sale Contract

Blackman v. Sherman *(1940) 41 Cal. App. 2d 20, 105 P.2d 1000* , was an action for damages for breach of a contract for the sale of certain real property which was filed in the county in which the property was located. The trial court denied the defendant's motion for change of venue to the county of his residence, and the court of appeal reversed, holding that since the principal relief sought was for the recovery of damages for breach of contract, the action was transitory in nature. The plaintiff contended that the complaint stated a cause of action essentially local in nature and triable where the land was located; the defendant contended that where a transitory and a local cause of action are joined, the defendant is entitled to trial in the county of his residence. The court of appeal noted that the principal relief sought was the recovery of a money judgment. This, the court held, was based on breach of contract and was transitory in nature; an action which has for its object the mere recovery of money is essentially an action for debt and is transitory, not local. There was no question that a suit to quiet title as set forth in one cause of action stated in the complaint was local. However, the court held, since title was retained by the vendor, the plaintiff in this action, title was not the primary issue. The court ruled that only where land or an interest therein is the exclusive subject matter of the action does *Code Civ. Proc. § 392* control and if, in one complaint, there have been joined actions both local and transitory, the defendant is entitled to have the cause heard in the county of his residence.

[i] Action for Damages for Fraud With Incidental Real Property Rights Involved

Thielen v. Superior Court *(1963) 219 Cal. App. 2d 217, 33 Cal. Rptr. 1* , was a proceeding in mandamus to compel the trial court to vacate its order granting a change of venue of an action based on complaints of fraud with respect to certain real property to the county where that property was located. The court of appeal granted the writ, holding that the action was transitory since the determination of any interest in the land was merely incidental to the determination of the action. The underlying action was brought by a plaintiff who elected to stand on his contract to purchase certain real property in the county to which the trial court granted the venue change. The complaint sought damages for fraud and misrepresentation, injunctive relief against any forfeiture in regard to the promissory note and deed of trust on the property, and a trustee's sale and a declaration of the rights, duties, and obligations of the parties to the controversy. The court of appeal noted that an action, the gravamen of which is fraud, is transitory and the mere fact that, incidentally, rights in real property may be involved, does not change the rule; even though an action relates to real property in some way, it is not regarded as local unless some interest therein will be determined by the judgment. An action, said the

court, is essentially transitory if the determination of an estate or interest in land is merely incidental to the determination of a cause for equitable relief in trust, fraud, or contract. It was apparent, the court noted, that each of the counts pleaded was based on a claim of fraud and misrepresentation. The granting of the relief sought depended on proof of the facts constituting fraud. The declaratory and injunctive relief relating to the real property would follow only as an incident of tort liability. Moreover, it was apparent that the plaintiff, while electing to stand on his contract of purchase, was seeking to avoid forfeiture under the deed of trust by adjusting any balance due on the promissry note by application of the amount of damages obtained on account of the alleged fraud. A judgment to this effect, the court held, would not involve a determination of an interest in real property.

[4] Additional Authorities

[a] Venue When Action Is Essentially Transitory

In *Peiser v. Mettler (1958) 50 Cal. 2d 594, 606, 328 P.2d 953* , the Supreme Court reversed an order granting a change of venue from the county in which one defendant resided to the county in which the real property involved was situated. The complaint set forth four causes of action: (1) breach of contract (lease agreement of real property); (2) conversion of structures and improvements on the leased premises; (3) restoration and redelivery of the removed property with damages resulting from costs of reinstallation and for loss of use; and (4) waste to the real property resulting from removal of the property. The Court stated that it appeared from the allegations and prayer of the complaint that the main relief sought in all four causes of action was personal and that title to, or possession of, real property was only incidentally involved. Citing *Neet v. Holmes (1942) 19 Cal. 2d 605, 611-612, 122 P.2d 557* , the Court noted that nature of the action was essentially transitory, that is, the defendants would be entitled to have it tried in the county of their residence, if the determination of an estate or interest in land was merely incidental to the determination of a cause of action for equitable relief in trust, fraud, or contract.

The Court held that only one cause of action stated on four different legal theories had been set forth, that the entire transaction had arisen out of the alleged breach of the lease agreement, including the cause of action for waste, and that the seeking of different kinds of relief did not establish different causes of action. The Court added that whether it considered that there had been a joinder of transitory causes of action with a local action and that the transitory actions thus controlled so far as venue was concerned, or whether it considered that plaintiffs had stated only one transitory cause of action, the result was the same. Thus, the trial court was in error in granting the defendants' motions for change of venue on the ground that the action was a local one which must be tried at the situs of the real property pursuant to the provisions of *Code Civ. Proc. § 392*.

In *Kaluzok v. Brisson (1946) 27 Cal. 2d 760, 167 P.2d 481* , in reversing an order denying a change of venue to the county of defendants' residence in an action by a purchaser of real property to recover damages for the alleged fraud of his vendor in the sale of the property, the Supreme Court observed that the prayer of the complaint that the amount of damages awarded be ordered applied on the promissory note could not in any substantial sense result in "determination in any form" of an interest in real property. It results merely in a reduction of the obligation represented by the promissory note. Such application of damages awarded is in harmony with cases involving executory contracts where the award was deducted from the unpaid part of the purchase price, or the unpaid part of the purchase price was deducted from the award, regardless of whether there was a prayer to that end. In the case at bar, said the Court, the application would relate to the form of the recovery and be merely incidental to the main purpose of the action which was to recover a personal judgment for damages for fraud.

In *Neet v. Holmes (1942) 19 Cal. 2d 605, 122 P.2d 557* , in affirming an order denying a change of venue from the county of defendants' residence to the county where the subject real property was situated, the Supreme Court noted that the principal relief sought by the plaintiffs was an accounting of operations in certain leased property and other real property and a judgment based on the fruits thereof including title to the real property of which the plaintiffs claimed to have been deprived by the alleged fraud of the defendants. It was apparent that the granting of the major relief sought by

the plaintiffs depended on proof of facts constituting such fraud as to entitle them to any relief in a cause of action for an accounting. Such an action is a proceeding in equity and is essentially a personal action, the Court noted.

In *Turlock Theatre Co. v. Laws (1939) 12 Cal. 2d 573, 86 P.2d 345* , in reversing an order denying a change of venue from the county in which the real property involved in the case was located to the county of the defendant's residence, the Supreme Court observed that, under the allegations in the complaint, the right to possession of the real property involved largely depended on the outcome of the controversy involved in the action concerning the amounts of rentals paid or claimed to have been unpaid. The cause of action for unpaid rentals was the primary object of the complaint, and relief by way of restoration of the premises would follow the judgment on that cause of action. Inasmuch as that relief was not merely an incident to the claim to be restored to possession, but was distinctly a primary object of the complaint, the Court concluded that the plaintiff had joined a personal or transitory cause of action with one of a local character and that the trial court erred in denying the motion.

In *Radio K-Dan, Inc. v. Superior Court (1964) 229 Cal. App. 2d 544, 40 Cal. Rptr. 382* , in issuing a writ of mandate to compel the trial court to vacate its order transferring the action from the county of defendant's residence to the county in which the subject real property was situated on the ground that no affidavit of merits was filed, the court of appeal added that under the allegations and prayer of the complaint, the main relief sought appeared to be a declaration that plaintiff was not in default under its agreement with the defendant, with a prayer for incidental injunctive relief. Plaintiff also sought a determination as to the right of defendant to proceed with a nonjudicial sale under the mortgage, which involved an interpretation of the contract and a question as to whether the mortgage covered real or personal property, or both. It was clear that, even if it included real property in part, it also involved personal property. An action must be wholly local in its nature to require it to be brought in the county wherein is situated the property which is the subject matter of the action. *Code Civ. Proc. § 392* does not apply where the subject matter of the action involves both real and personal property and is essentially transitory.

In *Hammon v. American Exploration & Mining Co. (1962) 203 Cal. App. 2d 306, 21 Cal. Rptr. 409* , in reversing an order changing venue from the county of defendant's principal place of business to the county where the subject real property was situated, the court of appeal said that an action for breach of a mineral lease, seeking principally royalties for the removed minerals, an injunction against encumbrance of claims covered by the agreement, and a decree establishing the rights and duties of the parties under the contract, does not become a local action because realty may be involved. In substance, this is a single action for the redress of one wrong--the main relief sought is personal, and the action is transitory. The court stated that *Code Civ. Proc. § 392*, relating to venue of local actions, applied to the action only if it solely or mainly sought relief that was local in nature. After quoting from the *Peiser* case, *above*, the court said that the counts of the complaint, in this case, pertaining to royalties for the extraction of minerals and rights and duties under the lease which had been broken sought redress, pleaded in four counts, for one wrong. The determination of the nature of the cause lies not in the prayed relief but in the facts precipitating a plaintiff's right to recover. Quoting from Witkin, California Procedure (1st ed), Vol. 1, § 237, p. 749, the court added that if there is only one cause, but different forms of relief are sought, the form of the action for venue purposes is determined by the main relief rule. The same is true where a single cause of action is pleaded in different counts according to different legal theories. There is no joinder of causes and the main relief rule determines venue.

The court further stated that if, as in the case at issue, the plaintiff's sole or main relief consists of a money judgment and the other relief is an incident to that end, the action for venue purposes must be classified as transitory. Indeed, even if an action involves realty, it constitutes for venue purposes a transitory action if the main relief sought is a money judgment. The court concluded that the cause of action before it obviously rested upon breach of contract; the principal relief involved the nonpayment of royalties. The determination of the rights and duties of the parties under the contract, including the right to the monetary recovery, of course, may involve the mineral properties and indeed may depend upon the appellant's rights to such properties. In every case in which a lessor sues for a breach of a lease, the lessor's rights in the property may be involved, but a suit for rental does not thereby become a local action. The main relief sought by the plaintiff must control. The complaint would be distorted if the court were to say that the main relief

involved realty, not personalty.

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23-238 California Points & Authorities § 238.32

§ 238.32 Supporting Motion for Change of Venue to Proper Court [Code Civ. Proc. §§ 396b, 397(a)] in County of Defendant's Residence [Code Civ. Proc. § 395(a)]--When Transitory and Local Actions Have Been Joined in Single Complaint

[1] FORM

[*Caption. See § 238.30.*]

THE PROPER COURT FOR THE TRIAL OF AN ACTION IS THE SUPERIOR COURT IN THE COUNTY OF DEFENDANT'S RESIDENCE WHEN THE COMPLAINT JOINS A TRANSITORY ACTION WITH A LOCAL ACTION BRINGING THE CASE WITHIN THE VENUE PROVISIONS OF SECTION 395(a) OF THE CODE OF CIVIL PROCEDURE WHICH, WITH CERTAIN EXCEPTIONS NOT HERE APPLICABLE, REQUIRES TRIAL IN THE COUNTY OF DEFENDANT'S RESIDENCE.

A. Statutory Authority for Motion. [*See § 238.30[1], Paragraph A.*]

B. Transfer Mandatory on Proper Showing. [*See § 238.30[1], Paragraph B.*]

C. Proper Court as in County of Defendant's Residence. [*See § 238.30[1], Paragraph C.*]

D. Character of Action as Determined by Complaint and Nature of Judgment. [*See § 238.30[1], Paragraph D.*]

E. Defendant as Entitled to Change of Venue on Any Joined Cause of Action. If a complaint states more than one cause of action, on one of which the defendant would be entitled to a change of venue to the county of his/her residence, but not on the other(s), the defendant is entitled to trial in the county of his/her residence (*Ah Fong v. Sternes (1889) 79 Cal. 30, 33, 21 P. 381*).

F. Jointed Local and Transitory Actions Regarded as Transitory for Determination of Venue. If, in complaint, the plaintiff joins a local cause of action with a transitory one or seeks a remedy against the defendant on matters that are not local causes of action provisions, the action comes within the provisions of *Section 395(a) of the Code of Civil Procedure* under which the defendant is entitled to have the trial held in the county of his/her residence (*Peiser v. Mettler (1958) 50 Cal. 2d 594, 605-606, 328 P.2d 953* ; *Smith v. Smith (1891) 88 Cal. 572, 576, 26 P. 356*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for change of venue in an action or proceeding that has been filed in a county other than that of the defendant's residence when: (1) the complaint shows that two or more specific causes of action have been joined and at least one of them is local while another is transitory; and (2) the cause is not wholly within one of the statutory exceptions to the general rule set forth in *Code Civ. Proc. § 395(a)* that the defendant is entitled to trial in the county of his or her residence.

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. This memorandum should also be accompanied by supporting affidavits as is discussed in *§ 238.30[2][a][i]*.

[b] Exceptions Under Code Civ. Proc. § 395

The rule that when transitory and local actions are joined, the defendant is entitled to trial in the county of his or her residence is predicated on the premise that generally proper venue of a transitory action is the county of the defendant's residence. However, *Code Civ. Proc. § 395(a), (b)*, provides, with respect to certain transitory actions, that venue may be laid in counties in addition to that in which the defendants or some of them reside at the commencement of the action. Therefore, if venue is laid in a county other than that of the defendant's residence but in one that is nevertheless authorized by *Code Civ. Proc. § 395(a), (b)*, there would be no action entitling the defendant to change the place of trial to his or her residence and hence, unless the action came within a specified exception in *Code Civ. Proc. § 395*, he or she would not be able to do so.

[c] Situations Assumed for Use of Form

For the purposes of this form, then, it is assumed that one of the following situations exists with respect to a transitory action joined with a local action: (1) the transitory action does not come within any of the exceptions specified in *Code Civ. Proc. § 395*; (2) the transitory action does come within one of the specified exceptions but venue was not laid in any county authorized by that section; or (3) the transitory action does come within one of the specified exceptions and venue was laid in a county other than defendant's resident county, as authorized by *Code Civ. Proc. § 395*, but another transitory action is joined [*see* § 283.33] entitling defendant to trial in the county of his or her residence.

[3] Discussion of Authorities

[a] Defendant as Entitled to Change of Venue on Any Joined Cause of Action

In ***Ah Fong v. Sternes*** *(1889) 79 Cal. 30, 21 P. 381* , the complaint stated a good cause of action for damages for false imprisonment, which the defendant was entitled to have tried in the county of his residence, and what could be assumed to be a good complaint for a penalty imposed by statute (resolving ambiguities against the pleader) which had to be tried in the county where suit was filed subject to the court's power to change venue. The Supreme Court stated that if the complaint could be regarded as stating two separate causes of action, on one of which the defendant would be entitled to a change of venue, but not on the other, the result would be the same--that is, the plaintiff cannot deprive the defendant of his or her right to a change of venue by the addition of something to the complaint. If this were not the rule, the Court observed, it would be very easy for a plaintiff to defeat the defendant's right to a change of venue. Accordingly, the Court concluded that the trial court's order refusing a change of venue was erroneous.

[b] Joined Local and Transitory Causes of Action Regarded as Transitory for Determination of Venue

In ***Peiser v. Mettler*** *(1958) 50 Cal. 2d 594, 328 P.2d 953* , reversing an order changing venue when the complaint set forth four causes of action arising from an alleged breach of a lease agreement of real property and the action was commenced in the county of residence of one of the defendants, the Supreme Court cited a lower court decision to the effect that where local and transitory actions are joined, they will be regarded as transitory for the purpose of determining venue and stated that the well-settled rule is that if there is a personal, or in personam, cause of action joined with one that is local in nature, the defendant is entitled to have the proceeding transferred to the county of his or her residence. The action must be wholly local in nature to require it to be brought in the county of the situs as designated in *Code Civ. Proc. § 392*, governing venue in real property actions. The Court held that an action for damages for breach of contract is transitory, and that the action for conversion of property removed from the leased premises was transitory, the property becoming personal property on severance from the real property. The Court concluded that whether there had been a joinder of transitory causes of action with a local action where the transitory actions control venue or whether the plaintiffs had stated only one transitory cause of action, the result was the same and the trial court was in error in granting defendant's motions for change of venue on the ground that the action was a local one which had to be tried at the situs of the real property pursuant to the provisions of *Code Civ. Proc. § 392*.

In ***Smith v. Smith*** *(1891) 88 Cal. 572, 26 P. 356* , reversing an order denying a change of venue to the county of defendant's residence when a transitory action had been joined with a local action, the Supreme Court stated that if the plaintiff joined a local cause of action with another cause of action that was not embraced within the provisions of *Code Civ. Proc. § 392* governing venue of real property actions, or if he also sought a remedy against the defendant on matters not embraced within the provisions of that section, his action would entitle the defendant under *Code Civ. Proc. § 395* to trial in the county of his residence. The Court concluded that unless the cause of action set forth in the complaint falls wholly within the provisions of *Code Civ. Proc. §§ 392, 394*, the provisions of *Code Civ. Proc. § 395* prevail.

[4] Additional Authorities

[a] Joined Local and Transitory Actions Regarded as Transitory for Determination of Venue

In *Turlock Theatre Co. v. Laws (1939) 12 Cal. 2d 573, 86 P.2d 345* , the Supreme Court reversed an order denying a change of venue to the county of the defendants' residence in an action to recover unpaid rentals under a real property lease agreement, to terminate the lease, and to restore possession of the premises. The Court ruled that *Code Civ. Proc. § 392*, relating to venue of actions involving real property, is effective only when the real property or the title thereto is the exclusive subject matter of the action. When a cause of action for relief in personam also is joined, the defendant is entitled to have the cause transferred to the county of his or her residence. The Court noted that the parties did not question the personal nature of the cause of action seeking recovery for alleged unpaid rentals. Inasmuch as that relief was not merely an incident to the claim to be restored to possession, but was distinctly a primary object of the

complaint, the Court concluded that the plaintiff had joined a personal or transitory cause of action with one of a local character, and that the trial court on the record before it had erred in denying the motion.

In *Sheeley v. Jones (1923) 192 Cal. 256, 219 P. 744* , the Supreme Court reversed an order denying a change of venue to the county of defendants' residence in an action to compel conveyance of stock that the parties had orally agreed to transfer when they had exchanged their real properties, which transfer took place, the Supreme Court ruled that if real and personal actions are joined in the same complaint, the case falls within *Code Civ. Proc. § 395* and must be tried in the county of the defendant's residence.

In *All-Cool Alum. etc. Co. v. Superior Court (1964) 224 Cal. App. 2d 660, 36 Cal. Rptr. 769* , the court of appeal issued a writ of mandate to compel the trial court to set aside its order transferring the action from the county in which the corporate defendant had its principal place of business to the county in which the subject real property was situated where a local action against individual defendants had been joined with a transitory action against the corporate defendants. Quoting from *Weygandt v. Larson (1933) 130 Cal. App 304, 308, 19 P.2d 852* , the court stated that if real and personal actions are joined in the same complaint, the case falls within *Code Civ. Proc. § 395* and must be tried in the county of defendant's residence.

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23-238 California Points & Authorities § 238.33

§ 238.33 Supporting Motion for Change of Venue to Proper Court [Code Civ. Proc. §§ 396b, 397(a)] in County of Defendant's Residence [Code Civ. Proc. § 395(a)]--When Complaint Joins Transitory Actions One of Which Entitles Defendant to Trial in County of His/Her Residence

[1] FORM

[*Caption. See § 238.30.*]

THE PROPER COURT FOR THE TRIAL OF THIS ACTION IS IN THE COUNTY OF DEFENDANT'S RESIDENCE WHEN THE COMPLAINT JOINS TRANSITORY ACTIONS, ONE OF WHICH ENTITLES DEFENDANT TO TRIAL IN THE COUNTY OF HIS/HER RESIDENCE.

A. Statutory Authority for Motion. [*See § 238.30[1], Paragraph A.*]

B. Transfer Mandatory on Proper Showing. [*See § 238.30[1], Paragraph B.*]

C. Proper Court as in County of Defendant's Residence. [*See § 238.30[1], Paragraph C.*]

D. Character of Action as Determined by Complaint and Nature of Judgment. [*See § 238.30[1], Paragraph D.*]

E. Defendant as Entitled to Change of Venue on Any Joined Cause of Action. [*See § 238.32[1], Paragraph E.*]

F. Venue When Transitory Actions Are Joined. The joinder of transitory actions entitles the defendant to trial in the county of his/her residence when one of such actions requires such venue under the provisions of *Code Civ. Proc. § 395(a)* (*Goossen v. Clifton (1946) 75 Cal. App. 2d 44, 49-50, 170 P.2d 104*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for a change of venue in an action or proceeding that has been filed in a county other than that of the defendant's residence and where: (1) the complaint shows that two or more transitory causes of action have been joined; and (2) at least one of those causes of action entitles the defendant to have the matter tried in the county of his or her residence.

Where appropriate, counsel should insert argument in this memorandum showing the relationship between the facts of the case and the points of law stated. This memorandum should also be accompanied by supporting affidavits as discussed in *§ 238.30[2][a][i]*.

[3] Discussion of Authorities

[a] Venue When Transitory Actions Are Joined

In ***Goossen v. Clifton*** *(1946) 75 Cal. App. 2d 44, 170 P.2d 104* , two contract causes of action were joined in the complaint. As to the first cause of action, the defendant would have been entitled to trial in the county of his residence because the plaintiff had failed to bring himself within the exceptions contained in *Code Civ. Proc. § 395*. Under the second cause of action, trial would have been proper in another county. In reversing the trial court's order denying a change of venue, there seemed to be no contract cases directly in point; however, there were many cases, other than contract cases, holding that if a plaintiff unites in one complaint two causes of action, one in which the defendant has the right to have it tried in the county of his residence, the other in which he does not, the defendant is entitled to have the cause tried in the county of his residence.

The important right to protect is that of the defendant to have the cause tried in the county of his residence. If, by joining several causes of action, the defendant could be deprived of his right, the right would be lost in may cases. It is for that reason that the courts hold that the test is whether on any one of the causes of action the defendant is entitled to a change to the county of his residence. If there is one such cause, then defendant is entitled to the change no matter how many other causes may be set forth in which he is not entitled to the change.

[4] Additional Authorities

[a] Venue When Transitory Actions Are Joined

In *Johnson v. Superior Court (1965) 232 Cal. App. 2d 212, 42 Cal. Rptr. 645* , in issuing a writ of mandate to compel the trial court to transfer the case to the county of defendant's residence when the complaint set forth two causes of action, one in contract and one in tort, not separately stated, and was filed in the county in which the contract was to be performed, the court of appeal said that when several causes of action are alleged in a complaint, a motion for change of venue must be granted on all causes if defendant is entitled to a change on any one. The court added that in this case the complaint purported to state only one cause of action for damages for breach of contract, but included in the single

count were the allegations that the wrongful conduct of the petitioner interfered with plaintiffs' business and damaged them in their business reputation to the extent of $30,000. Such a cause of action was not incidental to a breach of contract action, nor was it dependent upon plaintiffs' success in establishing their right to damages for breach of contract. Plaintiffs might recover damages for breach of contract and damages for injury to their business reputation, or one, or neither. One is not dependent upon the other. Accordingly, the court concluded that the complaint included a transitory cause of action in tort of the type triable solely at the defendant's residence that could not be classified as incidental to, and dependent upon, the cause of action for claimed breach of contract.

In *Haurat v. Superior Court (1966) 241 Cal. App. 2d 330, 50 Cal. Rptr. 520* , in granting a writ of mandamus to compel the superior court to vacate an order denying a motion for change of venue by a defendant on the ground of residence and to grant such motion if the counter motion for retention of venue based on convenience of witnesses was denied, the court stated that when several causes of action are alleged in a complaint, a motion for change of venue must be granted on all causes if defendant is entitled to a change on any one. Thus, the petitioner in the present proceeding was entitled to a transfer of the action to the county of his residence unless the county where the action was filed was proper as to each count. Since the plaintiff had pled a cause of action based upon the tort of conversion, the defendant had a right to have the action tried in the county of his residence, unless it could be shown that the convenience of the witnesses or the ends of justice would thereby be promoted if the action was retained in the county where commenced.

In *Archer v. Superior Court (1962) 202 Cal. App. 2d 417, 21 Cal. Rptr. 48* , in issuing a writ of mandate to compel the trial court to vacate an order denying a change of venue and to enter an order granting such change to the county of defendant's residence, the court of appeal noted that the California rule governing venue provides that an action on a contract may be tried in either the county of the defendant's residence, the county where the contract was entered into, or the county where the contract is to be performed. Although there can thus be as many as three counties in which a contract action may properly be brought, the court stated that defendant's residence is the preferred place for trial and added that if the defendant is entitled to a change of venue on any one of the causes of action alleged in the complaint, the motion must be granted as to all.

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[Reserved]

§§ 238.34[Reserved]

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23-238 California Points & Authorities § 238.50

§ 238.50 Supporting Motion for Change of Venue to Proper Court [Code Civ. Proc. §§ 396b, 397(a)] in County Where Local Cause of Action Arises--Proper County for Action Relating to Real Property Is in County Where Property Is Located [Code Civ. Proc. § 392]

[1] FORM

[*Caption. See § 238.30.*]

THE PROPER COUNTY FOR TRIAL OF A LOCAL CAUSE OF ACTION RELATING TO REAL PROPERTY IS THE COUNTY WHERE THE REAL PROPERTY INVOLVED IS LOCATED.

A. Statutory Authority for Motion. [*See § 238.30[1], Paragraph A.*]

B. Transfer Mandatory on Proper Showing. [*See § 238.30[1], Paragraph B.*]

C. Venue Determined by Subject Matter of Complaint. Whether or not the place of trial is governed by *Section 392 of the Code of Civil Procedure* is to be determined by the subject matter of the action as shown by the complaint. The subject matter of an action and the issues involved are determinable from the facts pleaded rather than from the title or the prayer for relief (*Standard Brands of California v. Bryce (1934) 1 Cal. 2d 718, 720-721, 37 P.2d 446* ; *Stauffer Chemical Co. v. Superior Court (1968) 265 Cal. App. 2d 1, 4, 71 Cal. Rptr. 202*).

[*EITHER*]

D. Venue in County Where Real Property Is Located. The proper county for the trial of an action for _____ [the recovery of *or* the recovery of an estate or interest in *or* the determination, in any form, of the right to recovery of real property or any estate or interest in *or* injury to *or* the foreclosure of a lien on *or* the

foreclosure of a mortgage on] real property is the county in which the real property that is the subject of the action, or some part thereof, is situated (*Code Civ. Proc. § 392(a)*).

[*Optional*] **E. Construction Defects.** Absent an allegation of a cause of action for breach of contract, an action for damages to buildings affixed to real property and for a declaration that the defendants must repair the defects, is, in essence, an action for injury to real property, and is local, not transitory (*see Foundation Engineers, Inc. v. Superior Court (1993) 19 Cal. App. 4th 104, 107, 112, 23 Cal. Rptr. 2d 469*).

[*OR*]

D. Venue in County Where Real Property Is Located. The proper county for the trial of actions for the partition of _____ [real property *or* real property and personal property] is the county in which the real property, or some part thereof, is situated (*Code Civ. Proc. § 872.110(b)(1)*).

[*OR*]

D. Venue in County Where Real Property Is Located. Eminent domain proceedings must be commenced in the county in which the property sought to be taken is located [and when the property is situated in more than one county, the proceeding may be commenced in any of such counties] (*Code Civ. Proc. § 1250.020*).

[*OR*]

D. Venue in County Where Real Property Is Located. The proper court for the trial of actions against the State of California for the taking or damaging of private property for public use is a court of competent jurisdiction in the county in which the property is situated (*Gov. Code § 955*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form of memorandum may be submitted in support of a defendant's motion for change of venue of an action relating to real property when the cause of action relates solely to the real property involved but the plaintiff has, for some reason, filed the action in another county. Thus, this form may be used when the action with respect to the real property is for: (1) its recovery; (2) the recovery of an estate or interest therein; (3) the determination, in any form, of the right to recovery thereof or any estate or interest therein; (4) the injury thereto; or (5) the foreclosure of a lien or mortgage thereon. This form includes alternatives for use when the action seeks the partition of real property or of real

and personal property together or when eminent domain proceedings have been initiated. Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[b] Related Memoranda

For a memorandum opposing a motion for change of venue to the county of the defendant's residence for use when the action was commenced in the county where the real property which is the subject of the action is located, see *§ 238.72*.

[3] Discussion of Authorities

[a] Venue Determined by Subject Matter of Complaint

In ***Standard Brands of California v. Bryce*** *(1934) 1 Cal. 2d 718, 37 P.2d 446* , the complaint sought certain injunctive relief and a declaration of the plaintiff's rights and duties with respect to the defendants and certain real property of the defendants and a declaration that the liability for certain claimed injuries to that property was that of some of the defendants. In affirming the lower court's order changing venue to the county in which the property was located, the Supreme Court stated that whether or not the place of trial is governed by *Code Civ. Proc. § 392* is to be determined by the subject matter of the action as shown by the complaint. And, said the Court, the subject matter of an action and the issued involved are determinable from the facts pleaded rather than from the title or the prayer for relief.

Stauffer Chemical Co. v. Superior Court *(1968) 265 Cal. App. 2d 1, 71 Cal. Rptr. 202* , is discussed in *§ 238.72[3][i]*.

[b] Construction Defects

In ***Foundation Engineers, Inc. v. Superior Court*** *(1993) 19 Cal. App. 4th 104, 23 Cal. Rptr. 2d 469* , a property owner filed a complaint against numerous firms for negligent design and construction of buildings, alleging causes of action for negligence, strict liability, breach of implied warranty and declaratory relief. Defendants moved for a change of venue to the county in which the property was located. The trial court conditionally denied the motion, provided that plaintiff would delete from its complaint all allegations of damage to the real property on which the buildings were located. Following plaintiff's amendment to conform with the court's direction, defendants filed a second motion for a change of venue. The trial court denied the motion and defendants petitioned for a writ of mandate.

The court of appeal issued the writ of mandate and directed the trial court to grant the motion for a change of venue. It noted that in an action involving multiple causes of action, the court must determine the essence of the action and the main relief sought in fixing venue. It found that the plaintiff's action was for construction defects and that the California courts had not previously addressed proper venue for such actions (*19 Cal. App. 4th 104, 109-110)* .

The court relied on *Stauffer Chemical Co. v. Superior Court (1968) 265 Cal. App. 2d 1, 3-4, 71 Cal. Rptr. 202* , in which the court concluded that an action for damages to growing crops was a local action for purposes of venue since growing crops are a part of the realty as long as unsevered. Since the main relief sought there was for injury to real property, the joinder of breach of warranty counts to negligence counts did not change the action into a mixed action. The court in the instant action stated that this dictum about crops being like buildings was the closest authority on the venue for defective construction and comported with Supreme Court authority, in *Peiser v. Mettler (1958) 50 Cal. 2d 594, 328 P.2d 953* , which implied that unsevered improvements are realty and that damage to such improvements is an injury to real property (*19 Cal. App. 4th 104, 110)* . Based on these analogous cases, the court concluded that the alleged damages were to buildings affixed to real property and thus the essential character of the action was an injury to real property. Furthermore, the court found that the counts for declaratory relief and breach of implied warranty did not arise from a breach of contract, but rather, arose from tort theories predicated on an injury to real property. The court issued the writ of mandate, directing the trial court to vacate its order denying the motion to change venue and to grant the motion (*19 Cal. App. 4th 104, 113)* .

[4] Additional Authorities

[a] Venue Determined by Subject Matter of Complaint

In *State v. Royal Consolidated Min. Co. (1921) 187 Cal. 343, 202 P. 133* , the facts of which are discussed in *§ 238.51[4][a]*, the Supreme Court stated that an action must be brought where the land involved lies if the subject of inquiry is a right or interest in the land and if the judgment would operate directly on such right or interest. The real question, said the Court, is as to the rule nature of the action; whether it turns on a personal obligation or on title or whether it takes immediate effect in personam or on the interest in the land.

In *Massae v. Superior Court (1981) 118 Cal. App. 3d 527, 539, 173 Cal. Rptr. 527* , the court of appeal found that the essence of plaintiff's action was to reform a trust deed to delete the power of sale clause. The court of appeal then found that such a reformation of a trust deed securing real property has a direct impact on a right or interest in real property and thus is a local action that has to be tried in the county where the real property is located. Therefore, the court of appeal issued a writ of mandate directing the trial court not to transfer the action to the county of defendant's residence.

California Points & Authorities

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Volume 23 Chapters 230-239 TRUST DEEDS---to---WORKERS' COMPENSATION
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2. Change to Court Where Local Cause of Action Should Be Tried

23-238 California Points & Authorities § 238.51

§ 238.51 Supporting Motion for Change of Venue to Proper Court [Code Civ. Proc. §§ 396b, 397(a)] in County Where Local Cause of Action Arises--Main Relief Sought Is Local and Transitory Relief Is Only Incidental

[1] FORM

[*Caption. See § 238.30.*]

THE PROPER COUNTY FOR TRIAL OF A LOCAL ACTION IS THE COUNTY WHERE THE CAUSE OF ACTION ARISES WHEN THE MAIN RELIEF SOUGHT IS LOCAL AND THE TRANSITORY ISSUE JOINED THEREWITH IS ONLY INCIDENTAL.

A. Statutory Authority for Motion. [*See § 238.30[1], Paragraph A.*]

B. Transfer Mandatory on Proper Showing. [*See § 238.30[1], Paragraph B.*]

C. Venue Determined by Subject Matter of Complaint. [*See § 238.50[1], Paragraph C.*]

D. Venue When Main Relief Is Local and Transitory Issue Is Only Incidental. If the complaint shows that the principal relief sought is within *Section 392 of the Code of Civil Procedure* and that the transitory relief sought therein is only incidental, the action will be deemed local in character and the action must be tried in the county where the real property is situated (*Grocers' etc. Union v. Kern etc. Co. (1907) 150 Cal. 466, 471-473, 89 P. 120*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted when the defendant desires to have the trial transferred to the county in which real property is located and the following factors appear: (1) the complaint shows that the principal relief sought is within the scope of either *Code Civ. Proc. § 392* or *872.110* (relating to real property actions) set forth in Paragraph D of § 238.50; (2) the complaint seeks transitory or personal relief as an incident to such principal relief; and (3) the complaint has been filed in a county other than the one in which the property is located.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. This memorandum should be accompanied by supporting affidavits as discussed in *§ 238.30[2][a][i]*.

[b] Related Memoranda

For a memorandum opposing a motion for change of venue to the county of the defendant's residence for use when the action was commenced in the county where the real property which is the subject of the action is located, see *§ 238.72*.

[3] Discussion of Authorities

[a] Venue When Main Relief Is Local and Transitory Issue Is Only Incidental

In ***Grocers' etc. Union v. Kern etc. Co.*** *(1907) 150 Cal. 466, 89 P. 120* , the plaintiff sought specific performance of a land sale contract under which he was the vendee and an accounting for the proceeds from the land. Suit was filed in the City and County of San Francisco rather than in Kern County where the land was located. In reversing an order refusing to change venue to Kern County, the Supreme Court ruled that the action was essentially an action to determine a right to or interest in real property, that the request for an accounting was merely incidental to the real cause of action and did not change the nature thereof, and that under *Code Civ. Proc. § 392* on the demand of the defendant, the action had to be tried in the county where the real property was situated.

The plaintiff contended that the action was properly filed in San Francisco under the provisions of *Code Civ. Proc. § 395* because it joined both real and personal actions and was within the authority of *Smith v. Smith (1891) 88 Cal. 572, 26 P. 356* (*see § 238.32[3][b]*), a case in which the Supreme Court declared that unless the cause of action set forth in the complaint falls wholly within the provisions of *Code Civ. Proc. §§ 392-394*, the provisions of *Code Civ. Proc. § 395* prevail. However, in *Grocers', at page 473* , the Supreme Court distinguished *Smith* as vitally different in character and involving the clear joinder of an action that was local with one that was transitory--that is, *Smith* sought to have the transfer of both real and personal property declared to be a mortgage, alleged that the property so mortgaged has earned funds sufficient to extinguish the debt, and requested an accounting and a personal judgment for the excess and reconveyance of the property. On the other hand, *Grocers'*was termed an action strictly local in character, clearly affecting the title to land, the gist of the action being specific performance of a contract for the conveyance of land and the principal relief sought being conveyance of that land with an accounting as but an incident thereto.

[4] Additional Authorities

[a] Venue When Main Relief Is Local and Transitory Issue Is Only Incidental

In ***Standard Brands of Cal. v. Bryce*** *(1934) 1 Cal. 2d 718, 37 P.2d 446* , the plaintiff filed suit in the City and County of San Francisco, in which certain of the defendants resided, by a complaint alleging that those defendants had, while in the employ of the plaintiff, cause injury to the real property of another defendant. The complaint disclosed that the property was located in Los Angeles County. The defendant whose property was located in Los Angeles County moved for change of venue to that county and the Supreme Court affirmed an order granting the change sought. The Court observed that although the complaint sought a declaration of the plaintiff's rights and duties with respect to the defendants and for a declaration that the liability for the alleged injuries was solely that of the defendants who had caused them, the principal question for determination under the facts disclosed by the complaint and the issues tendered by the allegations thereof was the liability of the parties for injuries to real property.

In *State v. Royal Consolidated Min. Co. (1921) 187 Cal. 343, 202 P. 133* , an action by the State of California to recover the possession of real property in Calaveras County and rents and profits from that land, the complaint was filed in Sacramento County. The Supreme Court reversed the lower court judgment that the state was not the owner of the property, directing dismissal of the case without prejudice to the rights of the state to renew the action in Calaveras County. In its decision, the Supreme Court noted that the action must be brought where the land lies if the subject of inquiry is a right or interest in the land and if the judgment in the case will operate directly on this right or interest. The Court also noted that when the determination of an estate or interest in land is not an incident in the determination of a cause for equitable relief in trust, fraud, or contract, but is itself the immediate question before the court and may come within the immediate effect of its decree, then the venue is local. The real question is as to the true nature of the action--whether it turns on a personal obligation or on title or whether it takes immediate effect in personam or on the interest in the land. Thus, the demand for rents and profits did not destroy the local character of the action for possession of the land.

In *Fletcher v. Nordesta Homes, Inc. (1961) 192 Cal. App. 2d 33, 13 Cal. Rptr. 226* , a case in which the plaintiff sought damages arising out of a contract by the terms of which the defendants were to convey real property to the plaintiff, the court of appeal affirmed an order granting a change of venue from the county in which the real property was located to the county of the defendants' residence. The court said that if the complaint shows that the principal relief sought involves recovery of the possession of, or the title to, real property, or the determination of any estate or right or interest therein, or the enforcement of a lien thereon or recovery for an injury thereto, the action is to be deemed local in character and a trial may be held only in the county where the real property is located, even though the plaintiff may, as an incident to his or her cause of action as to the real property, seek relief that, if sought alone would be transitory in character. Determining the character of the action from the complaint alone, the court concluded that the action was one to recover a money judgment, and the prayer that the court award the plaintiffs a lien as security for the money judgment was but an incident to the cause of action stated.

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23-238 California Points & Authorities § 238.52

§ 238.52 Supporting Motion for Change of Venue to Proper Court [Code Civ. Proc. §§ 396b, 397(a)] in Neutral County When Nonresident Defendant Is Sued by Local Public Entity [Code Civ. Proc. § 394(a)]--General Form

[1] FORM

[*Caption. See § 238.30.*]

DEFENDANT, AS A NONRESIDENT OF _____ COUNTY SUED BY _____ [THAT COUNTY *or* A LOCAL PUBLIC ENTITY LOCATED IN THAT COUNTY], IS ENTITLED TO HAVE THE ACTION TRANSFERRED TO A NEUTRAL COUNTY FOR TRIAL OR, ALTERNATIVELY, TO HAVE A DISINTERESTED JUDGE FROM A NEUTRAL COUNTY ASSIGNED TO HEAR THE ACTION.

A. Statutory Authority for Motion. [*See § 238.30[1], Paragraph A.*]

B. Transfer Mandatory on Proper Showing. [*See § 238.30[1], Paragraph B.*]

C. Transfer to Neutral County. Whenever an action is brought by a _____ [county *or* city and county *or* city *or* local agency] against _____ [a resident of *or* a corporation doing business in] another county, city and county, or city, the action must be transferred for trial to a county other than the _____ [plaintiff *or* county in which the plaintiff is located] and other than that in which the defendant _____ [resides *or* is situated *or* is doing business] (*Code Civ. Proc. § 394(a)*; *San Francisco Foundation v. Superior Court (1984) 37 Cal. 3d 285, 208 Cal. Rptr. 31, 690 P.2d 1* ; *Westinghouse Electric Corp. v. Superior Court (1976) 17 Cal. 3d 259, 131 Cal. Rptr. 231, 551 P.2d 847*).

[*Optional*] **D. Defendant Corporation Reasonably Viewed as Outsider.** Transfer to a neutral county under *Code of Civil Procedure section 394(a)* is proper when a defendant corporation is not "doing business" within the _____ [county *or* city and county] in which the action is pending. The standard of "doing business" for

purposes of section 394 turns on the extent to which the corporation is viewed as an outsider. The question in each case is whether the corporation's activities are such that the corporation is reasonably likely to be viewed as an outsider, not whether it is actually so viewed (*San Francisco Foundation v. Superior Court (1984) 37 Cal. 3d 285, 298-299, 208 Cal. Rptr. 31, 690 P.2d 1* ; *Westinghouse Electric Corp. v. Superior Court of Alameda County (1976) 17 Cal. 3d 289, 271, 271 n.7, 131 Cal. Rptr. 231, 551 P.2d 847*). For purposes of section 394(a), a corporation is doing business in a _____ [county *or* city and county] only if its activities in the _____ [county *or* city and county] are substantial enough that the corporation can reasonably be viewed as being intimately identified with the affairs or closely associated with the people of the community. It is the quality of the business connections, and not their quantity or duration, that determines whether a party is doing business locally. The qualitative analysis must focus on whether the types of contacts with the _____ [county *or* city and county] are substantial enough for the company to be reasonably viewed as closely associated with the community. Given that the purpose of section 394 is to prevent a corporate defendant from suffering prejudice in favor of a local governmental entity, the statute should be liberally construed to promote this policy (*San Francisco Foundation v. Superior Court (1984) 37 Cal. 3d 285, 297, 299-301, 208 Cal. Rptr. 2d 31, 690 P.2d 1* ; *Westinghouse Electric Corp. v. Superior Court (1976) 17 Cal. 3d 259, 266, 271, 131 Cal. Rptr. 231, 551 P.2d 847* ; *Kennedy/Jenks Consultants, Inc. v. Superior Court (2000) 80 Cal. App. 4th 948, 957-958, 961, 95 Cal. Rptr. 2d 817*). Moreover, the relevant inquiry under section 394 includes an analysis of the nature of the litigation as well as the activities of the party seeking a change of venue. When the nature of the case poses a reasonable risk that the defendant would be viewed as an outsider, a change of venue under section 394(a) is proper (*see* *San Francisco Foundation v. Superior Court (1984) 37 Cal. 3d 285, 299-301, 208 Cal. Rptr. 31, 690 P.2d 1* ; *Kennedy/Jenks Consultants, Inc. v. Superior Court (2000) 80 Cal. App. 4th 948, 963-964, 95 Cal. Rptr. 2d 817*).

[*Optional*] **E. Assignment of Disinterested Judge From Neutral County.** In an action brought by a _____ [county *or* city and county *or* city *or* local agency] against _____ [a resident of *or* a corporation doing business in] another county, city and county, or city, when a jury is not of right or is waived, the court may, in lieu of transfer, request assignment of a disinterested judge from a neutral county (*Code Civ. Proc. § 394(a)*; *see* *Brennan v. Superior Court (1994) 30 Cal. App. 4th 454, 457, 35 Cal. Rptr. 2d 693*).

[*Optional*] **F. Contractual Provisions Waiving The Right to Transfer to a Neutral County are Void.** Contractual provisions that seek to waive the right to transfer to a neutral county are void; the rules to determine in what courts and counties actions may be brought are fixed upon consideration of general convenience and expediency by general law; to allow them to be changed by the agreement of the parties would disturb the symmetry of the law, and interfere with such convenience (*Arntz Builders v. Superior Court of Contra Costa County (2004) 122 Cal. App. 4th 1195, 1200, 19 Cal. Rptr. 3d 346*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for a change of venue in an action in which the defendant

has been sued by a local public entity in that entity's county when the defendant desires to require the trial of the action in a neutral county or, in the alternative, appointment of a disinterested judge from a neutral county to hear the case.

This form cannot be used in an action initiated by the district attorney pursuant to *Welf. & Inst. Code §§ 11350, 11350.1, 11475.1,* or *11476.1*, which relate to enforcement of support obligations [*see Code Civ. Proc. § 394(a)*].

[b] Argument

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. The memorandum should be accompanied by supporting affidavits as discussed in *§ 238.30[2][a][i]*.

[3] Discussion of Authorities

[a] Transfer to Neutral County

San Francisco Foundation v. Superior Court *(1984) 37 Cal. 3d 285, 208 Cal. Rptr. 31, 690 P.2d 1* , was a probate proceeding in which the trustee sought to modify the terms of the Buck trust, a trust established for charitable purposes in Marin county. The county opposed the requested modification and petitioned for removal of the trustee. The trustee, pointing to the hostile reaction of county public officials, newspapers, and prominent citizens toward its requested modification of the terms of the trust, filed a motion pursuant to Code Civ. Proc. §§ 394 and 397(2) (*now see Code Civ. Proc. § 397(b)*; (authorizing a change in the place of trial when there is reason to believe that the court designated in the complaint cannot give an impartial trial), and Prob. Code § 1129 (repealed; *now see Prob. Code § 17304*) (allowing transfers of testamentary trust proceedings to another county). On the same day, the trustee also filed a statement with the secretary of state pursuant to former Corp. Code § 24003 [*see now Corp. Code § 18200*] listing its office in San Francisco as its principal office. The attorney general, a real party in interest, and Wells Fargo Bank, an investment trustee, asked that the Chairperson of the Judicial Council be requested to appoint a disinterested judge from a neutral county to hear matters relating to the trust if the court found the trust's motion meritorious, rather than moving the proceedings to another county. The trustee indicated its willingness to comply with this request in its response to the county's opposition to its motion. The trial court denied the motion, and the Supreme Court stayed all proceedings pending its determination of the ensuing writ proceeding.

The Supreme Court found that the trustee was entitled to relief under *Code Civ. Proc. § 394* as a matter of law and granted the writ ordering the trial court to ask that the Chairperson of the Judicial Council appoint a disinterested judge from a neutral county to hear the case. The court stated that the county must be deemed to have brought the proceedings against the trustee within the meaning of *Code Civ. Proc. § 394* as a consequence of its having opposed the trustee's petition to modify the terms of the trust. In addition, the court stated, the county's attempt to remove the trustee constituted a proceeding brought by a county against the trustee for purposes of applying *Code Civ. Proc. § 394* (*37 Cal. 3d 285, 294-296)* . The court rejected the county's argument that former Prob. Code § 1123.5 (*now see Prob. Code § 15642*), placing power to remove the trustee in the court sitting in probate that has jurisdiction over the trust, and former Prob. Code § 1123.7 (*now see Prob. Code § 17000*), making the jurisdictional and procedural provisions of former Prob. Code § 1123.5 (*now Prob. Code § 15642*) and former Prob. Code § 1123.6 (*now see Prob. Code § 15642(e)*) exclusive operate to prevent a change of venue pursuant to the terms of *Code Civ. Proc. § 394*. In doing so, the court noted that nothing in these sections prevents the appointment of a disinterested judge from a neutral county to preside over the proceedings (*37 Cal. 3d 285, 293-294)* . Concluding that the trustee's activities in the forum county did not preclude it from relief under the terms of *Code Civ. Proc. § 394*, the court held that the trustee's filing with the secretary of state entitled the trustee to be treated as a corporation with its principal place of business in another county for purposes of applying *Code Civ. Proc. § 394* (*37 Cal. 3d 285, 296-301)* .

In ***Westinghouse Electric Corp. v. Superior Court*** *(1976) 17 Cal. 3d 259, 131 Cal. Rptr. 231, 551 P.2d 847* , the Bay Area Rapid Transit District (BART) brought actions against suppliers of its transit vehicles and other principal

contractors who had supplied faulty services and allegedly faulty equipment. The trial court granted a motion ordering a separate trial on causes of action concerning an accident on one of BART's lines, but denied defendants' motions for a change of venue. The trial court apparently denied the motion for change of venue on the ground that BART did not qualify as a "local agency within a certain county" for purposes of *Code Civ. Proc. § 394* because its operations encompassed a number of counties, rather than just the forum county. The trial court also deemed the defendants ineligible for relief under *Code Civ. Proc. § 394* because each of them did business in the forum county.

The Supreme Court issued writs of mandate directing the trial court to order a change of venue to a neutral county in the actions. The court held that BART was a "local agency within a county" for purposes of applying *Code Civ. Proc. § 394*, reasoning that the statute's main purpose of avoiding potential prejudice would not be served if the cases were heard by forum county jurors who were virtually certain to be BART taxpayers with a financial interest in any suit for damages (*17 Cal. 3d 259, 264-268)* . Turning then to the issue of whether the defendants did sufficient business in the forum county to be ineligible for relief under *Code Civ. Proc. § 394*, the court stated that the proper test to be applied is whether a particular corporation's activities in the forum county are so substantial that it is reasonable to view them as "intimately identified with the affairs or closely associated with the people of the community" (*17 Cal. 3d 259, 271)* . As a result, corporations with limited contacts in the forum county and principal places of business elsewhere are entitled to relief under *Code Civ. Proc. § 394* because they are regarded as outside corporations, thus creating the potential for prejudice in favor of the local governmental entity. The court determined that the defendant vehicle manufacturer was entitled to a change of venue because its contacts with the forum county were not substantial enough to deem the corporation as one doing business, within the meaning of the statute, in the forum county. Furthermore, the court held, all defendants should be tried in the same neutral county because the alleged fault of each of the defendants, if any, could not be decided separately from that of the other defendants (*17 Cal. 3d 259, 271-276)* . Turning finally to the accident case, the court ruled that the defendants in that action were also entitled to a change of venue because one of them was a successor corporation to a nonresident partnership that did not do any business under its own name in th forum county. In addition, the partnership had agreed to remain liable for its own acts and those of its successor. As a result, the transfer of the action in regard to the other defendants was required out of the interest in protecting against a multiplicity of litigation (*17 Cal. 3d 259, 275-279)* .

[b] Defendant Corporation Reasonably Viewed as Outsider

The facts and procedural background of ***San Francisco Foundation v. Superior Court*** *(1984) 37 Cal. 3d 285* , are discussed in *§ 238.52[3][a]*. In concluding that the foundation, which was a trustee, would likely be viewed as an outsider and that therefore a transfer to a neutral county under *Code Civ. Proc. § 394(a)* was warranted, the court reviewed the standard for "doing business" for purposes of section 394 as stated in *Westinghouse Electric Corp. v. Superior Court (1976) 17 Cal. 3d 259, 271, 131 Cal. Rptr. 231, 551 P.2d 847* , which held that the issue turns on the extent to which the corporation is viewed as an outsider (*37 Cal. 3d 285, 298-299)* . Under a mechanical application of the *Westinghouse* standard the foundation's branch office and related activities in the county would disqualify it for relief under section 394. That conclusion, however, was based on a balancing of competing considerations inherent in a suit for damages between a county or other local governmental agency and a private party (*37 Cal. 3d 285, 299)* . The Court in *San Francisco Foundation* found the relevant considerations in the case before it to be materially different in that the county's primary objective was not the recovery of damages but judicial action that would preclude the foundation from diverting any part of the trust income, now distributed for charitable purposes wholly within the county, to similar purposes outside the county. Thus, the relevant inquiry is whether, in light not only of the status of the foundation but also of the nature of the litigation, the foundation is reasonably likely to be viewed as an outsider (*37 Cal. 3d 285, 299-300)* . Under the circumstance, the court concluded that the foundation's activities including its branch office in the county did not bar it from relief under section 394 (*37 Cal. 3d 285, 300-301)* .

The facts and procedural background of ***Westinghouse Electric Corp. v. Superior Court*** *(1976) 17 Cal. 3d 259, 131 Cal. Rptr. 231, 551 P.2d 847* , are discussed in *§ 238.52[3][a]*. In concluding that the defendants were entitled to a change of venue under *Code Civ. Proc. § 394* the court in relevant part noted that a corporation is doing business for

purposes of *Code Civ. Proc. § 394* only if its activities in the county are substantial enough that the corporation can reasonably be viewed as being intimately identified with the affairs or closely associated with the people of the community. The question in each case is whether the corporation's activities are such that the corporation is reasonably likely to be viewed as an outsider, not whether it is actually so viewed. Under this standard, a corporation with its main place of business in the county in which it is sued cannot invoke section 394. Similarly, a corporation with a major branch office in the county would be denied the benefits of the statute. But a corporation with its principal place of business elsewhere and with only limited contacts in a county may obtain a change of venue in an action brought by a local governmental entity (*17 Cal. 3d 259, 271* & n.7).

In the underlying complaint in ***Kennedy/Jenks Consultants, Inc. v. Superior Court*** *(2000) 80 Cal. App. 4th 948, 95 Cal. Rptr. 2d 817 (First Dist., Div. Five)* , city residents brought suit against the city in the county in which the city was located to recoup damages suffered when their neighborhood was flooded due to the city's alleged faulty storm drainage and flood control systems. The city filed a cross complaint against the cross defendant, a company that provided consulting services regarding the storm drainage systems (the company), alleging causes of action for indemnification, apportionment of fault, and declaratory relief. In response to the cross complaint, the company brought a motion under *Code Civ. Proc. § 394(a)* to transfer venue from the county in which the suit was filed to a neutral county and a motion under *Code Civ. Proc. § 1048(b)* to sever the cross complaint from the underlying complaint. The trial court denied both motions. In rejecting the company's transfer request, the trial court indicated its belief that section 394 does not apply to cross complaints, but even if it did, the company could not obtain a transfer because it was doing business in the county where the action was brought. The company filed a petition for writ of mandate (*80 Cal. App. 4th 948, 952)* .

The court of appeal concluded that the company was entitled to writ relief. On the issue of whether the company was doing business in the county in which the suit was filed, the court held that the company was not doing business in that county. *Under Westinghouse Electric Corp. v. Superior Court (1976) 17 Cal. 3d 259, 131 Cal. Rptr. 231, 551 P.2d 847* , for purposes of section 394(a), a corporation is doing business in a county if its activities in the county are substantial enough that the corporation can reasonably be viewed as being intimately identified with the affairs or closely associated with the people of the community. Given that the purpose of *Code Civ. Proc. § 394* is to prevent a corporate defendant from suffering prejudice in favor of a local governmental entity, the statute should be liberally construed to promote this policy (*80 Cal. App. 4th 948, 957)* . It is the quality of the business connections, and not their quantity or duration, that determines whether a party is doing business locally. The qualitative analysis must focus on whether the types of contacts with the county are substantial enough for the company to be reasonably viewed as closely associated with the community. In the case before the court, the litany of the company's business activities in the county were not substantial enough for the company to be reasonably viewed as being intimately identified with the affairs or closely associated with the people in the community (*80 Cal. App. 4th 948, 961, 964)* .

In addition to the lack of evidence of activities by the company to tie it to the local community, the allegations in the case further justified a change of venue to a neutral county (*80 Cal. App. 4th 948, 963)* . The court noted that the reasoning of *Westinghouse Electric Corp.* was extended in *San Francisco Foundation v. Superior Court (1984) 37 Cal. 3d 285* . While a mechanical application of *Westinghouse Electric Corp*. would have precluded a transfer given the foundation's substantial activities in the county in which the matter was pending, transfer was nevertheless found appropriate, as the *San Francisco Foundation* court held that " 'the relevant inquiry is whether, in light not only of the status of the foundation, but also of the nature of the litigation, the foundation is reasonably likely to be viewed as an outsider' " (*80 Cal. App. 4th 948, 958)* . Given the nature of the dispute, the court found it reasonable to conclude that the foundation would be viewed as an outsider to the county residents despite the foundation's other connections in the county (*80 Cal. App. 4th 948, 963)* . Under *San Francisco Foundation*, the relevant inquiry under section 394 includes an analysis of the nature of the litigation as well as the activities of the party seeking a change of venue (*80 Cal. App. 4th 948, 963)* . As in *San Francisco Foundation*, the nature of the case posed a reasonable risk that the company would be viewed as an outsider to the county community (where the suit was pending) (*80 Cal. App. 4th 948*)..

The court also held that section 394 applies to cross-complaints, following *Ohio Casualty Ins. Group v. Superior Court*

(1994) 30 Cal. App. 4th 444, 35 Cal. Rptr. 2d 771 (Third Dist.) and declining to follow *City of Chico v. Superior Court (1979) 89 Cal. App. 3d 187, 152 Cal. Rptr. 380 (First Dist., Div. Four)* , (*80 Cal. App. 4th 948, 954-957)* .

[c] Assignment of Disinterested Judge From Neutral County

Brennan v. Superior Court *(1994) 30 Cal. App. 4th 454, 35 Cal. Rptr. 2d 693* , involved a combined action and proceeding by a public water district located in Sutter County, and private plaintiffs, against Sutter County. Plaintiffs sought a change of venue, arguing that a change was mandatory because one of the plaintiffs was a "local agency" within *Code Civ. Proc. § 394(3)*. The trial court denied the motion, and plaintiffs sought a petition for writ of mandate (*30 Cal. App. 4th 454, 456)* .

The court of appeal issued a peremptory writ of mandate directing the trial court to vacate its order and to grant relief under *Code Civ. Proc. § 394*, either by transferring the action to a neutral county or assigning a disinterested judge from a neutral county to hear the cause, although the court declined to specify which alternative should be adopted (*30 Cal. App. 4th 454, 462-463)* . The court noted that *Code Civ. Proc. § 394* requires a change of venue in actions in which certain governmental entities are adversaries and either one objects to venue in the county where the defendant governmental entity resides, unless a jury is not of right or a jury is waived, in which case the court may, in lieu of transfer, request assignment of a disinterested judge from a neutral county. The court observed that three of four counts in the petition and complaint by the water district sought relief in mandamus and the fourth count requested declaratory relief based on allegations in the other three counts. It found that although there is no right to a jury trial in a mandamus proceeding, the superior court has discretion to grant one if there is an issue of fact essential to resolution of the case, and that there is no right to a jury in actions for declaratory relief. It then concluded that the trial court should not have denied the motion, but should have either granted it as to the water district or requested assignment of a disinterested judge from a neutral county. As to the remaining plaintiffs, they were not entitled to avail themselves of the provisions of *Code Civ. Proc. § 394* (*30 Cal. App. 4th 454, 460-462)* .

[d] Contractual Provisions Waiving The Right to Transfer to a Neutral County are Void

In ***Arntz Builders v. Superior Court of Contra Costa County*** *(2004) 122 Cal. App. 4th 1195, 19 Cal. Rptr. 3d 346* , the County sued the builder for breach of contract, and the builder sought to change venue to another neutral county pursuant to *Code Civ. Proc. §§ 394* and *397*. The construction contract between petitioner builder and real party in interest County provided that any action arising out of the contract would be brought in that county and expressly waived the builder's right to remove the action to a neutral venue under *Code Civ. Proc. § 394*. Despite many intervening decisions on the matter, the appellate court followed *General Acceptance Corp. v. Robinson (1929) 207 Cal. 285, 277 P. 1039* , which held a contractual venue selection clause to be void. Thus, the court held that the contractual provision purporting to waive a defendant's right to transfer an action to a neutral county pursuant to *Code Civ. Proc. § 394* was invalid (*122 Cal. App. 4th 1195, 1200)* .

[4] Additional Authorities

[a] Transfer to Neutral County

Kennedy/Jenks Consultants, Inc. v. Superior Court (2000) 80 Cal. App. 4th 948, 95 Cal. Rptr. 2d 817 , is discussed in *§ 238.52[3][b]*.

In *Ohio Casualty Ins. Group v. Superior Court (1994) 30 Cal. App. 4th 444, 451, 35 Cal. Rptr. 2d 771* , a construction company sued a school district in the superior court in the county in which the district was situated. The district filed a cross complaint against the company and the company's insurer. The insurer moved for a change of venue to a neutral county pursuant to *Code Civ. Proc. § 394*. The trial court denied the motion (*30 Cal. App. 4th 444, 446-447)* . The court of appeal issued a peremptory writ directing the superior court to vacate its order and to enter a new order granting the motion. The court held that *Code Civ. Proc. § 394* applies to cross complainants and cross defendants, criticizing

and rejecting *City of Chico v. Superior Court (1979) 89 Cal. App. 3d 187, 190-192, 152 Cal. Rptr. 380* , to the extent that it strictly construed the statute to exclude cross-defendants (*30 Cal. App. 4th 444, 450-451)* .

The court also found that when, as here, the motion is properly brought under *Code Civ. Proc. § 394*, the moving party is not required to assume the burden of showing actual prejudice. Under this section, prejudice is presumed, and the granting of the motion is mandatory unless the trial court finds that the nonmoving party would suffer actual prejudice from the requested change of venue (*30 Cal. App. 4th 444, 452)* .

In *Sutter Union High School Dist. v. Superior Court (1983) 140 Cal. App. 3d 795, 190 Cal. Rptr. 182* , a teacher filed a petition in Sacramento County for a writ of mandamus to compel a Commission on Professional Competence to set aside its decision to dismiss her from her employment [*see Educ. Code § 44944(c)(1)*]. The trial court denied the school district's motion to transfer the case to Sutter County, ruling that Sacramento County, as a "neutral" county, was the proper county for commencement of the mandamus proceeding. In granting the school district's request to issue a writ of mandate, the court of appeal noted that *Code Civ. Proc. § 394* is applicable only after an action is commenced under proper rules of venue. Accordingly, because administrative mandate proceedings should be brought in the county in which the action arose (that is, Sutter County) under the terms of *Code Civ. Proc. § 393(1)(b)*, the action was not commenced under the proper rules of venue and the school district was entitled to have the case transferred to Sutter County.

In *Central Contra Costa Sanitary Dist. v. Superior Court (1978) 84 Cal. App. 3d 702, 148 Cal. Rptr. 801* , a sanitary district, determined to be a local agency within the meaning of *Code Civ. Proc. § 394(1)*, was sued in the county that was the principal place of business of both the plaintiff and the district's codefendant. The district was located in another county. The trial court denied the district's motion for a change of venue on the ground that venue was properly laid in the county in which the codefendant had its principal place of business [*Code Civ. Proc. § 395(a)*]. In issuing a peremptory writ of mandate directing the trial court to set aside its order, the court of appeal ruled that the venue provisions of *Code Civ. Proc. § 394(1)* (now *Code Civ. Proc. § 394(a)*) govern actions against local agencies. In reaching this conclusion, the court noted that *Code Civ. Proc. § 395(a)*, by its own terms ("except as otherwise provided by law"), is subordinated to other statutes laying venue (*84 Cal. App. 3d 702, 705)* .

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A. Improper Court Designated in Complaint
2. Change to Court Where Local Cause of Action Should Be Tried

23-238 California Points & Authorities § 238.53

§ 238.53 Supporting Motion for Change of Venue [Code Civ. Proc. § 397(a)] to Court Having Jurisdiction of Estate Represented by Executor, Administrator, Guardian, Conservator, or Trustee Sued in His/Her Official Capacity [Code Civ. Proc. § 395.1]

[1] FORM

[*Caption. See § 238.30.*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION TO CHANGE THE VENUE OF THIS ACTION TO _____ COUNTY BECAUSE DEFENDANT IS BEING SUED IN HIS/HER OFFICIAL CAPACITY AS A REPRESENTATIVE OF AN ESTATE ON A CLAIM FOR THE PAYMENT OF MONEY OR FOR THE RECOVERY OF PERSONAL PROPERTY, AND _____ COUNTY IS THE COUNTY HAVING JURISDICTION OF THE ESTATE THAT DEFENDANT REPRESENTS.

A. Statutory Authority for Motion. [*See § 238.30[1], Paragraph A.*]

B. Transfer to Proper County. Except as otherwise provided in *Probate Code Section 17005* pertaining to trustees, when a defendant is sued in an official or representative capacity as executor, administrator, guardian, conservator, or trustee on a claim for the payment of money or for the recovery of personal property, the county that has jurisdiction of the estate that the defendant represents is the proper county for the trial of the action (*Code Civ. Proc. § 395.1*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for a change of venue when: (1) the defendant has been sued in his or her official capacity as an executor, administrator, guardian, conservator, or trustee; (2) the claim is one for the payment of money or for the recovery of personal property; (3) the action is not governed by *Prob. Code § 17005*, pertaining to trustees; (4) suit was filed in a county other than that which has jurisdiction of the estate the defendant represents; and (5) the defendant desires change of venue to the county having jurisdiction of such estate [*see Code Civ. Proc. § 395.1*]. For discussion of venue in actions against personal representatives, see California Forms of Pleading and Practice, *Venue* (Matthew Bender).

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. This memorandum should also be accompanied by supporting affidavits as discussed in *§ 238.30[2][a][i]*.

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23-238 California Points & Authorities § 238.54

§ 238.54 Supporting Motion for Change of Venue to Proper Court [Code Civ. Proc. §§ 396b, 397(a)] in Action Against Unincorporated Association [Code Civ. Proc. § 395.2]

[1] FORM

[*Caption. See § 238.30.*]

THE COURT SHOULD GRANT DEFENDANT'S MOTION TO CHANGE THE VENUE OF THIS ACTION TO _____ COUNTY BECAUSE DEFENDANT UNINCORPORATED ASSOCIATION HAS FILED A STATEMENT LISTING ITS PRINCIPAL OFFICE IN CALIFORNIA WITH THE SECRETARY OF STATE AND THEREFORE VENUE IN THIS ACTION IS THE SAME AS IF DEFENDANT WERE A CORPORATION. _____ COUNTY WOULD BE THE PROPER COUNTY FOR TRIAL OF THIS ACTION IF DEFENDANT WERE A CORPORATION BECAUSE _____ [*specify basis for venue*]. THIS COUNTY IS NOT A PROPER COUNTY FOR TRIAL OF THIS ACTION BECAUSE _____ [*specify reason why original county would not be proper venue under venue rules applicable to actions against corporations*].

A. Statutory Authority for Motion. [*See § 238.30[1], Paragraph A.*]

B. Transfer Mandatory on Proper Showing. [*See § 238.30[1], Paragraph B.*]

C. Unincorporated Association. When an unincorporated association has filed a statement with the Secretary of State designating its principal office in California, venue is the same as it would be if the unincorporated association were a corporation and, for the purpose of determining the proper county for suit, the principal place of business of the unincorporated association is deemed to be the principal office thereof in California as listed in such statement (*Code Civ. Proc. § 395.2*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This form may be submitted in support of a change of venue when the defendant is an unincorporated association that has filed a statement listing its principal office in California [*see Corp. Code § 18200*] with the Secretary of State and when suit against it has been filed in a county that would not be a proper place of trial under the venue rules applicable to actions against corporations [*see Code Civ. Proc. § 395.2*]. For further discussion of venue of actions against unincorporated associations, see California Forms of Pleading and Practice, *Venue* (Matthew Bender).

These points and authorities should be combined with points and authorities pertaining to the proper place for trial of an action against a corporation [*see Code Civ. Proc. § 395.5* (venue in action against corporation); *see also* Ch. 52, *Corporations*]. Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should refer to facts showing that the county in which the action was commenced is not a proper place for trial of the action under the venue rules applicable to actions against corporations and that the county to which transfer is sought is a proper county for trial of the action under those venue rules. This memorandum should also be accompanied by supporting affidavits as discussed in *§ 238.30[2][a][i]*.

[b] Related Memoranda

For memoranda relating to venue with respect to actions by or against corporations, see Ch. 52, *Corporations* , in this set.

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23-238 California Points & Authorities § 238.55

§ 238.55 Supporting Motion for Change of Venue to Proper Court [Code Civ. Proc. §§ 396b, 397(a)] in County Where Injury Occurred--Action Against State [Gov. Code § 955.2]

[1] FORM

[*Caption. See § 238.30.*]

WHEN THE STATE IS NAMED AS A DEFENDANT IN AN ACTION FOR _____ [INJURY TO PERSON *or* INJURY TO PERSONAL PROPERTY *or* WRONGFUL DEATH], THE PROPER COURT FOR THE TRIAL OF THE ACTION IS IN THE COUNTY WHERE THE _____ [INJURY *or* INJURY CAUSING DEATH] OCCURRED.

A. Statutory Authority for Motion. [*See § 238.30[1], Paragraph A.*]

B. Transfer Mandatory on Proper Showing. [*See § 238.30[1], Paragraph B.*]

C. Venue in County Where Injury Occurred. Notwithstanding any other provision of law, when the State is named as a defendant in any action or proceeding for death or injury to person or personal property and the injury or the injury causing death occurred within California, the proper court for the trial of the action is a court of competent jurisdiction in the county where the injury or injury causing death occurred (*Gov. Code § 955.2*).

[*Optional*] **D. Discretion to Change Venue.** The court may, on motion, change the place of the trial in the same manner and under the same circumstances as the place of trial may be changed when an action is between private parties. However, discretion to choose a different venue from that required under *Gov. Code § 955.2* is conferred only on the superior court of the county where the injury occurred (*Gov. Code § 955.2*; *State of California v. Superior Court (1987) 193 Cal. App. 3d 328, 330, 238 Cal. Rptr. 315*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for change of venue when the state of California is named as defendant and the claim is for personal injury, injury to personal property, or wrongful death.

Counsel should insert argument in this form, showing the relationship between the facts of the case and the points of law stated. This memorandum should also be accompanied by supporting affidavits as discussed in *§ 238.30[2][a][i]*.

[3] Discussion of Authorities

[a] Discretion to Change Venue

In ***State of California v. Superior Court*** *(1987) 193 Cal. App. 3d 328, 238 Cal. Rptr. 315* , plaintiff brought an action in Los Angeles County Superior Court against the State of California for personal injuries suffered by plaintiff in an injury that took place in Inyo County. The State moved for a change of venue to Inyo County on the ground that *Gov. Code § 955.2* required the action to be tried there, where the injury occurred. The trial court denied defendant's motion. It found that it could determine venue on its own in accordance with the second sentence of *Gov. Code § 955.2*, which states, "[t]he court may, on motion, change the place of the trial in the same manner and under the same circumstances as the place of trial may be changed where an action is between private parties." The trial court decided that the action should remain in Los Angeles, where all of the parties and most of the witnesses to plaintiff's injuries were located. The State petitioned for a writ of mandate.

The court of appeal granted a peremptory writ to the State, directing the Los Angeles Superior Court to vacate its order denying the motion for change of venue and to enter a new order granting the motion. The court remarked that the command of *Gov. Code § 955.2* was clear, and the court lacked discretion to decline to follow it. Discretion to choose a different venue is conferred by the statute only on the superior court of the county where the injury occurred, which was in the instant case, Inyo County. The court added that the principle of liberal construction of venue provisions to afford citizens an accessible forum cannot countermand an unambiguous statute (*193 Cal. App. 3d 328, 330)* .

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[Reserved]

§§ 238.56[Reserved]

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23-238 California Points & Authorities § 238.70

§ 238.70 Opposing Motion for Change of Venue [Code Civ. Proc. §§ 396b, 397(a)] to County of Defendant's Residence [Code Civ. Proc. § 395(a)]--Action Commenced in County of Residence of Moving Defendant's Codefendant

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	NO. _____
Plaintiff,	)	POINTS AND AUTHORITIES IN OPPOSITION
vs.	)	TO MOTION FOR CHANGE OF VENUE
_____ [name],	)	Date: _____
Defendant.	)	Time: _____
	)	Dept: _____
	)	Trial Date: None set
	)	[*Code Civ. Proc. §§ 396b*, 397(a)]

_____

A MOTION FOR CHANGE OF VENUE TO THE COUNTY IN WHICH THE MOVING DEFENDANT RESIDES WILL BE DENIED WHEN THE ACTION WAS FILED IN THE COUNTY IN WHICH AT LEAST ONE DEFENDANT RESIDES.

A. Propriety of Chosen Venue. In the absence of an affirmative showing to the contrary, the presumption is that the county in which an action is brought is, prima facie, the proper county when the court in which the action is brought has

subject matter jurisdiction (*Chase v. South P. C. R. Co. (1890) 83 Cal. 468, 472*).

B. Venue in County of Necessary and Proper Codefendant's Residence. A defendant is not entitled to have an action removed to the county of his/her residence unless it appears that none of the other necessary and proper defendants is a resident of the county where the action is brought (*Independent Iron Wks. v. Amer. Pres. Lines, Ltd. (1950) 35 Cal. 2d 858, 860, 221 P.2d 939*).

[*Optional*] **C. Joinder of Actions and Parties.** Under the liberal statutory joinder rules, a number of causes of action may properly be joined in the same complaint, and it is not necessary that each defendant be included in every cause of action. Thus, if a defendant is properly joined as to one or more but less than all of the causes of action sued on, venue in the county of his/her residence is proper (*Monogram Co. v. Kingsley (1951) 38 Cal. 2d 28, 31-32, 237 P.2d 265*).

[*Optional*] **D. Joinder of All Defendants in Motion for Change.** A plaintiff who has brought his/her action in the proper county will not be compelled to go elsewhere merely because all of the defendants prefer it (*Greenleaf v. Jack (1901) 135 Cal. 154, 155, 67 P. 17*).

[*Optional*] **E. Filing of Cross-Complaint.** The filing of a cross-complaint by defendant will not support a plaintiff's subsequent motion for change of venue when venue has been established as the proper venue based on the original complaint (*K.R.L. Partnership v. Superior Court (2004) 120 Cal. App. 4th 490, 506, 15 Cal. Rptr. 3d 517*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a defendant's motion for change of venue to the county of his or her residence when the action or proceeding was filed in the county in which at least one necessary and proper party defendant resides.

An optional additional point (Paragraph C) is included to cover situations in which multiple causes of action are joined against multiple defendants and a defendant is properly joined as to one or more of those actions but less than all of them. Another optional additional point (Paragraph D) is included for use when the plaintiff has filed his or her action in the proper county, but all of the defendants joined in a motion for change of venue to a county in which some of them reside.

For situations in which a resident defendant may be described as "necessary and proper" by reason of the fact that the plaintiff joined the defendant in a good faith belief that he or she had a cause of action against that resident defendant, see *§ 238.71*.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case

and the points of law stated. This memorandum may be accompanied by counteraffidavits [*Code Civ. Proc. § 2009*] or counterdeclarations under penalty of perjury [*Code Civ. Proc. § 2015.5*].

[3] Discussion of Authorities

[a] Propriety of Chosen Venue

In ***Chase v. South P. C. R. Co.*** *(1890) 83 Cal. 468* , an action in which the plaintiff sought damages for the defendant's alleged wrongful refusal to carry his products to market, the suit was filed in the county in which the alleged injury occurred, and the defendant railroad moved for a change of venue to the county of its principal place of business on the ground that the liability sued on did not arise in the county in which the action was filed. The only venue laid in the complaint was to show the county within which the defendant refused to perform its duty as a common carrier. However, since the court had jurisdiction of the subject matter of the action, and since an action on the breach of the obligation could be brought in the county where the breach of the obligation could be brought in the county where the breach occurred, as well as in the county where the defendant had its principal place of business, the action was presumptively brought in the proper county, and it devolved on the defendant to show that the breach of its obligation as a common carrier did not occur in the county of suit. Having failed to do that, the defendant's motion for change of venue was held to have been properly denied.

[b] Venue in County of Necessary and Proper Codefendant's Residence

In ***Independent Iron Wks. v. Amer. Pres. Lines*** *(1950) 35 Cal. 2d 858, 221 P.2d 939* , an action to quiet title to personal property was filed in the county of residence of one of the defendants, and two other defendants filed a motion for change of venue to the county in which they were residents. In reversing the order granting the motion, the Supreme Court noted that under *Code Civ. Proc. § 395*, the county in which the defendants, or some of them, reside at the commencement of the action, is the proper court for the trial of the action. The Court then stated that a defendant is not entitled to have an action removed to the county of his or her residence unless it appears that none of the other defendants is a resident of the county where the action is brought. Even when all of the defendants join in a demand for, or consent to, a change of venue, the cause will be retained if the complaint attempts in apparent good faith to state a cause of action against a defendant who resides in the county where the action was commenced. When a defendant who resides in the county in which an action is brought is a necessary and proper party defendant, it is immaterial that another, and the principal, defendant resides in another county. On analysis, the Court concluded that the defendant which was the resident of the county in which the action was brought was not only a proper but a necessary party defendant.

[c] Joinder of Actions and Parties

In ***Monogram Co. v. Kingsley*** *(1951) 38 Cal. 2d 28, 237 P.2d 265* , the plaintiffs brought an action in 20 counts for libel, slander, and unfair competition in the county where one party, Lewis, who was a defendant as to 12 of the counts, resided. In affirming the lower court's order denying motions by all of the other defendants for change of venue to the county of their residence, the Supreme Court adverted to the general rule that the county in which the defendants, or some of them, reside at the commencement of the action, is the proper county for the trial of the action [see *Code Civ. Proc. § 395*]. When a defendant who resides in the county in which an action is brought is a necessary and proper party defendant, it is immaterial that another, and the principal defendant, resides in another county. Accordingly, a plaintiff who has brought his or her action in the proper county will not be compelled to go elsewhere merely because some or even all of the defendants prefer it.

The rule that a nonresident defendant may not be deprived of the right to a change of venue to the county of his or her residence because the plaintiff included other causes of action in the same complaint on which such defendant is not entitled to a change of venue applies in cases in which none of the defendants reside in the county in which the actions were commenced. However, by reason of the liberal statutory joinder rules, a number of causes of action may properly

be joined in the same complaint [see *Code Civ. Proc. § 427.10*], and it is not necessary that each defendant be included in every cause of action [see *Code Civ. Proc. § 379(b)*]. These joinder provisions must be correlated with the venue provisions. And, in the absence of any objection that Lewis had been improperly named in 12 of the transitory causes of action joined in the complaint, the action as an entire cause was properly retained in the county of his residence.

[d] Joinder of All Defendants in Motion for Change

In ***Greenleaf v. Jack*** *(1901) 135 Cal. 154, 67 P. 17* , the plaintiff, a creditor of a bank brought an action against the shareholders of that bank in the county where the cause of action arose and where some of the defendants resided. Despite the fact that the defendants all joined in a motion for change of venue to another county in which other defendants resided, the Supreme Court affirmed the lower court order denying change of venue. The Court noted that under the circumstances it was the right of the plaintiff to bring and prosecute the action in the county in which it was commenced and held that the consent of the resident defendants to change the place of trial to another county could not take away that right. To entitle the moving party to a change of venue under *Code Civ. Proc. § 395*, it must appear that none of the defendants resided in the county in which suit was commenced.

[e] Filing of Cross-Complaint

In ***K.R.L. Partnership v. Superior Court*** *(2004) 120 Cal. App. 4th 490, 15 Cal. Rptr. 3d 517* , plaintiffs filed a legal malpractice action against their former attorney. The case was transferred to the county in which the attorney resided. The attorney then filed a cross-complaint for breach of contract for the amounts the attorney claimed was owed by the clients. The plaintiffs moved to transfer the case to a different county, but the court held that, once proper venue had been established based on a complaint, a cross-defendant is not entitled to seek a change of venue under *Code Civ. Proc. § 396b* based on a compulsory cross-complaint. Rather, the cross-complaint is to be tried in the same county that has been established as the proper venue based on the original complaint (*120 Cal. App. 4th 490, 505)* .

[4] Additional Authorities

[a] Propriety of Chosen Venue

In *Lakeside Ditch Co. v. Packwood C. Co. (1920) 50 Cal. App. 296, 195 P. 284* , a contract action that was commenced in the county where the contract was made, the defendant sought change of venue to the county in which it had its principal place of business. In affirming the lower court's order denying the motion, the court of appeals stated that in the absence of an affirmative showing with respect to proper venue, the presumption is that the county in which the title of the action shows that it is brought is, prima facie, the proper county when the court in which the action is brought has jurisdiction of the subject matter thereof. The court further noted that the prima facie showing would be sufficient to cast the burden on the defendant to show that the contract was not made, or to be performed, or that the breach thereof by it, or its liability by reason of the breach, did not occur or arise in that county.

In *Ward Mfg. Co. v. Miley (1955) 131 Cal. App. 2d 603, 281 P.2d 343* , a suit joining an action on an account stated and an action on a common count for goods sold and delivered, in affirming an order denying change of venue from the county in which the contract involved was entered into and was to be performed to the county of the defendant's residence, the court of appeal noted the presumption that, in the absence of an affirmative showing in that particular, the county in which the title of the action shows it is brought is, prima facie, the proper county when the court in which the action is brought has subject matter jurisdiction. It also noted that the averments of the complaint are to be deemed true on a motion for change of venue, at least to the extent that they are not controverted. The burden of overthrowing the prima facie venue showing made by the complaint rested in the moving defendant. A showing as to his residence was not enough; he had to show that the contract was not made, or to be performed, in the county where the action was pending. On an analysis of the facts, the court concluded that no such showing had been made.

In *Hellman v. Logan (1905) 148 Cal. 58, 82 P. 848* , suit was begun in the county in which a corporate defendant was

resident. That defendant and the other defendant, an individual, sought change of venue to the individual defendant's county of residence. In affirming the lower court's order denying change of venue, the Supreme Court noted that the facts that the plaintiffs might have maintained an action for a part of the relief to which they were entitled and that in an action for such limited relief only the individual defendant could properly be made a party defendant would not justify a change of venue of the action they stated in the complaint in the case at issue. The test is to be made by ascertaining who are necessary parties to the action as stated in the complaint, and which parties are necessary in order to enable the plaintiffs to obtain all the relief sought. If one of the parties who are thus made necessary resides in the county in which the action is begun, the action is properly begun and may be properly tried in the county, although the other and principal defendant resides in another county.

[b] Venue in County of Necessary and Proper Codefendant

In *Colusa Air Pollution Control Dist. v. Superior Court (1991) 226 Cal. App. 3d 880, 277 Cal. Rptr. 110* , two of several public agency defendants sought a writ of mandate to compel the trial court to grant their motions to transfer the action by 21 California manufacturers, retailers, and contractors against eight public (or related) agencies for declaratory and injunctive relief and for a writ of mandate, insofar as it applied to each of the two petitioning agencies, to their respective counties. The court of appeal denied the peremptory writ on the grounds: (1) the moving defendants were only two of the eight different public (or related) agencies sued on common issues of fact and law; (2) a severance would result in an unnecessary and wasteful multiplicity of litigation; and (3) at least a portion of plaintiffs' claims arose in the county in which the action was pending (*226 Cal. App. 3d 880, 883)* . The court acknowledged what while a defendant is normally entitled under *Code Civ. Proc. § 395* to have a transitory action tried in the county of his or her residence, the rule doesn't apply when there are several defendants who reside in different counties (*226 Cal. App. 3d 880, 890)* . The court said that in such a case either the plaintiff must be denied the privilege of joinder or the residence requirement must be modified, and that the latter course had been followed in *Code Civ. Proc. § 395*, which provides for trial in the county in which the defendants "or some of them" reside. The resulting rule is that a plaintiff may bring a good transitory action against two or more defendants in the county of one who is a proper party, even though the other defendants are nonresidents (*226 Cal. App. 3d 880, 890)* . The court added that this rule applies even though all of the causes of action do not affect all parties, and that venue statutes do not relate to causes of action, but to actions, and prescribe the place where the action in its entirety may be tried (*226 Cal. App. 3d 880, 890)* .

[c] Joinder of All Defendants in Motion for Change

In *Monogram Co. v. Kingsley (1951) 38 Cal. 2d 28, 237 P.2d 265* , all of the defendants joined in a motion for change of venue to the county in which all but one of them resided from the county in which the other defendant resided. In affirming the lower court's denial of a change of venue, the Supreme Court ruled that a plaintiff who has brought his action in the proper county, as it found in this case, will not be compelled to go elsewhere merely because all of the defendants prefer it.

The procedural background of *Colusa Air Pollution Control Dist. v. Superior Court (1991) 226 Cal. App. 3d 880, 277 Cal. Rptr. 110* , is discussed in *§ 238.70[4][b]*. In denying a peremptory writ of mandate seeking to compel the trial court to grant the motions of two of eight defendants to transfer the action to other counties, the court of appeal said that when a plaintiff brings a good transitory action against two or more defendants in the county of one who is a proper party, the nonresident defendants cannot obtain a change of venue even if the resident defendant joins in the motion (*226 Cal. App. 3d 880, 890)* .

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23-238 California Points & Authorities § 238.71

§ 238.71 Opposing Motion for Change of Venue [Code Civ. Proc. §§ 396b, 397(a)] to County of Defendant's Residence [Code Civ. Proc. § 395(a)--Resident Codefendant Properly Joined

[1] FORM

[*Caption. See § 238.70.*]

A RESIDENT CODEFENDANT IS NOT IMPROPERLY JOINED SOLELY FOR THE PURPOSE OF HAVING THE ACTION TRIED IN THE COUNTY OF HIS/HER RESIDENCE WITHIN THE MEANING OF SECTION 395(a) OF THE CODE OF CIVIL PROCEDURE, WHEN PLAINTIFF HAS JOINED RESIDENT CODEFENDANT AS A PARTY IN GOOD FAITH.

A. Propriety of Chosen Venue. [*See § 238.70[1], Paragraph A.*]

[*Optional*] **B. Joinder of Actions and Parties.** [*See § 238.70[1], Paragraph C.*]

[*Optional*] **C. Joinder of All Defendants in Motion for Change.** [*See § 238.70[1], Paragraph D.*]

D. Good Faith Joinder of Codefendant. On the hearing of a motion for change of venue to the county in which other codefendants reside when an action has been filed in the county in which one of several codefendants resides, the real issue for determination by the trial court is whether the plaintiff, in joining the resident defendant as a party, has reasonable grounds for the belief in good faith that the plaintiff had a cause of action against the resident defendant. If the plaintiff did have such reasonable grounds, then it cannot be said that the resident codefendant was improperly joined as a defendant or was made a defendant solely for the purpose of having the action tried in the county of the residence of the resident codefendant within the meaning of *Code of Civil Procedure Section 395(a)* (*Peiser v. Mettler (1958) 50 Cal. 2d 594, 603, 328 P.2d 953*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to the motion of one codefendant for change of venue to the county of his or her residence on the ground that the codefendant who is a resident of the county in which suit was brought was improperly joined for the sole purpose of having the action tried in the county of suit.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. This memorandum may be accompanied by counteraffidavits [*Code Civ. Proc. § 2009*] or counterdeclarations under penalty of perjury [*Code Civ. Proc. § 2015.5*].

[3] Discussion of Authorities

[a] Good Faith Joinder of Defendant

In ***Peiser v. Mettler*** *(1958) 50 Cal. 2d 594, 328 P.2d 953* , suit involving liability under a lease of real property was filed in Los Angeles County, the residence of one of the defendants and the original lessee of that property. The other defendants, who were sublessees, resided in Kern County and sought venue in that county. On appeal, the Supreme Court reversed the trial court's order granting a change of venue to Kern County.

On the issue raised by the other defendants that the resident codefendant had been joined only for the purpose of securing venue in Los Angeles County, the Supreme Court stated that the first question is whether the complaint states a cause of action against the resident defendant. On this question, the Court held that the resident defendant was liable under the lease and was a necessary and proper party to the action and that the complaint stated a cause of action against him.

On the venue question, the Court stated the rule that on the hearing of a motion for change of venue under such circumstances, the real issue for determination by the trial court is whether the plaintiff, in joining the resident defendant as a party, had reasonable grounds for the belief in good faith that the plaintiff had a cause of action against the resident defendant. If the plaintiff did, then it could not be said that the resident codefendant was improperly joined as a defendant or was made a defendant solely for the purpose of having the action tried in the county of that defendant's residence within the meaning of *Code Civ. Proc. § 395(a).*

[4] Additional Authorities

[a] Good Faith Joinder of Codefendant

In *Buerkle v. Superior Court (1963) 59 Cal. 2d 370, 29 Cal. Rptr. 509, 379 P.2d 941* , an action for personal injuries and wrongful death arising out of a collision involving the plaintiff's truck caused by the alleged malfunction of that

truck, the Supreme Court denied a peremptory writ of mandate to compel the trial court to grant a change of venue to the county wherein the defendant insurer's principal place of business was located. The defendant insurance company's liability was predicated on its negligent failure to inspect and repair the truck after a prior collision, and the individual defendant's liability was predicated on his negligent failure to repair and inspect the truck as he had contracted with the insurance company to do.

The Court noted that the provision of *Code Civ. Proc. § 395(a)*, that a defendant's residence cannot be considered for venue purposes if he is improperly joined or has been made a defendant solely for the purpose of having the action tried where he resides, does not justify a change of venue if the plaintiff, in joining the resident defendant, has reasonable grounds for the belief in good faith that he has a cause of action against that defendant and the cause of action pleaded is not prima facie so glaringly defective as to be beyond correction by amendment.

In *McClung v. Watt (1922) 190 Cal. 155, 211 P. 17* , an individual defendant moved for change of venue to the county of his residence from the county of residence of his codefendant, a corporation, on the grounds not only that he was entitled to trial in the county of his residence but also that the corporation had been joined solely for the purpose of having the action tried in the county of the corporate defendant's residence.

In affirming the lower court's denial of the motion, the Supreme Court noted that the right to a change of place of trial to the residence of a defendant must necessarily be determined by the status of the parties joined as defendants in the action as revealed by the pleading existing at the time the party claiming the right first appeared in the action. If the complaint attempts, in apparent good faith, to state a cause of action against the corporate defendant, the individual defendant does not have the right to have the place of trial changed to the county of his residence. The sufficiency of the complaint and the good faith of the pleader are not to be denied, on a motion for a change of venue, unless it can clearly be seen and said that the allegations of fact concerning the corporate defendant are in no wise related to the facts alleged and relied upon as a cause of action against the defendant. The Court added that, even though the complaint might be subject to demurrer for some insufficiency of fact or ambiguity or uncertainty, it was enough for the purpose of a determination of the demand for change of venue that the cause of action purportedly stated against the corporate defendant was apparently pleaded in good faith and was not, prima facie, so glaringly and vitally defective as to be beyond correction by amendment. On analysis of the complaint, the Court concluded that it could not be held that the individual defendant was the only defendant against whom the facts pleaded in the complaint would justify a judgment and, consequently, it could not be said that the joinder was made in bad faith and for the purpose of preventing a transfer of the action to the county of the moving defendant.

The Court distinguished those cases holding that where an action is brought against an individual and a corporation, the individual is entitled to change of venue to the county of his residence, on the ground that in none of the cited cases was the action commenced in the county in which the corporate defendant had its principal place of business, but, rather, in another of the counties authorized by *Cal. Const., Art. XII, § 16* [*see now Code Civ. Proc. § 395.5*]. The Court held that under the provisions of *Code Civ. Proc. § 395(a)*, authorizing trial in the county in which the defendant, or some of them, reside, the action was properly brought in the county where the corporation had its principal place of business.

In *Russello v. Mori (1957) 153 Cal. App. 2d 828, 315 P.2d 343* , a case in which there was an issue as to the existence of an agency, the court affirmed an order denying the moving defendants' motion for change of venue from the county of their codefendant's residence to the county of their residence in an action for damages for breach of contract and declaratory relief against the principals and their agent. The court determined that the complaint did shadow forth the semblance of a cause of action against the agent and added that where there is an issue as to the existence of an agency, both the alleged agent and principal may be joined for the purpose of determining their relationship and liability.

In *Wiley v. Long (1957) 148 Cal. App. 2d 230, 306 P.2d 1063* , in reversing an order granting the moving defendants' motion for change of venue to the county of their residence in an action for libel where the action was commenced in the county of residence of one defendant whose allegedly libelous communication was argued by the moving

defendants to have been privileged, the court of appeal said that in determining the question of whether the resident defendant has been joined solely for the purpose of having the action tried in the county of his residence, the real issue for determination by the trial court was whether plaintiff, in joining the resident defendant as a party, had reasonable grounds for the belief in good faith that the plaintiff had a cause of action against the resident defendant. It added, however, that on the hearing of a motion for change of venue, the court should not try, upon conflicting affidavits, the issues of fact going to the merits of the cause of action stated against the resident defendant.

In *Gottesfeld v. Richmaid Ice Cream Co. (1953) 115 Cal. App. 2d 854, 252 P.2d 973* , in affirming an order changing venue on the ground that the resident defendant had been improperly joined, the court of appeal restated the rules cited above, including the rule that it is enough, on the hearing and determination of a demand for change of venue, that the cause of action purported to be stated against the defendant was apparently pleaded in good faith.

In determining the question as to whether the resident defendant has been joined solely for the purpose of having the action tried in the county of his residence, the real issue for determination by the trial court is whether the plaintiff, in joining the resident defendant as a party, has reasonable grounds for the belief in good faith that the plaintiff had a cause of action against the resident defendant.

In determining whether the plaintiff did in good faith believe that a cause of action existed against the resident defendant, the court was entitled to consider the evasive character of the allegations of the complaint insofar as the resident defendant was concerned, the fact that no relief was in fact prayed for against him, the fact that plaintiff singled him out of all of the defendents and inserted in his complaint an allegation of that defendant's residence in the county in which the action was commenced, the fact that the resident defendant protested the action which is alleged as the culmination of the conspiracy among the other defendants, and the evasive character of plaintiff's counter affidavit when the good faith of his joinder of the resident defendant was called in question. Fraud or bad faith, like any other fact, may be inferred from circumstantial evidence. On the whole, the court concluded that the trial court was justified in finding that even though the complaint may have shadowed forth the semblance of a cause of action against the resident defendant, the plaintiff did not in good faith believe that a cause of action existed against him but joined him as a defendant for the sole purpose of retaining jurisdiction in the county in which suit had been filed.

In *Dallman Supply Co. v. Sweet (1948) 86 Cal. App. 2d 780, 195 P.2d 864* , a case in which the plaintiff alleged doubt as to the defendant from whom it was entitled to redress, thus necessitating the joinder of both parties, the court of appeal reversed an order granting the corporate defendant's motion for change of venue to the county of its principal place of business from the county of residence of the individual defendant in an action for declaratory relief, money due, and damages. The court stated that under the circumstances the plaintiff had in apparent good faith stated a cause of action against the resident defendant and added that neither the sufficiency nor the good faith of the cause of action stated could be denied.

In *Freeman v. Dowling (1933) 219 Cal. 213, 25 P.2d 980* , the plaintiff sued the City of Palo Alto and certain of its officers as well as an individual defendant who had been his partner in an enterprise that had undertaken to perform improvements for the city. Suit was filed in Santa Clara County and the individual defendant sought change of venue to the county of his residence. In affirming orders denying motions for change of venue, the Supreme Court stated that on a motion for a change of venue, if the allegations do no more than shadow forth the semblance of a cause of action, they are proof against assault upon the ground that they are sham and frivolous. The Court added that it is enough, on the hearing and determination of the demand for a change of venue, that the cause of action purported to be stated against the other defendant was apparently pleaded in good faith and is not, prima facie, so glaringly and vitally defective as to be beyond correction by amendment.

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23-238 California Points & Authorities § 238.72

§ 238.72 Opposing Motion for change of Venue [Code Civ. Proc. §§ 396b, 397(a)] to County of Defendant's Residence [Code Civ. Proc. § 395(a)--Action Commenced in County Where Real Property Which Is Subject of Action Is Located [Code Civ. Proc. § 392]

[1] FORM

[*Caption. See § 238.70.*]

THE PROPER COUNTY FOR THE TRIAL OF A LOCAL ACTION RELATING TO REAL PROPERTY IS IN THE COUNTY WHERE THE REAL PROPERTY IS LOCATED.

A. Propriety of Chosen Venue. [*See § 238.70[1], Paragraph A.*]

B. Venue Determined by Subject Matter of Complaint. [*See § 238.50[1], Paragraph C.*]

C. Venue in County Where Real Property Is Located. [*See § 238.50[1], Paragraph D.*]

[*Optional*] **D. Venue When Main Relief Is Local and Transitory Issue Is Only Incidental.** [*See § 238.51[1], Paragraph D.*]

[*Optional*] **E. Venue of Action for Slander of Title.** An action for slander of title to real property is an action for injury to real property and the county in which such real property is located is the proper county for the trial thereof (*Coley v. Hecker (1928) 206 Cal. 22, 27-28, 272 P. 1045*).

[*Optional*] **F. Action for Malicious Prosecution Resulting in Real Property Depreciation.** Although a cause of action for malicious prosecution is one in tort for damages, where the essential damage alleged to flow from the malicious prosecution is the depreciation in value of real estate, the action is one for injury to real property and is local

in nature (*Wick v. Mattison (1962) 207 Cal. App. 2d 608, 610, 24 Cal. Rptr. 677*).

[*Optional*] **G. Action to Quiet Title and Cancel Instrument** An action to quiet title to land and to cancel the instrument affecting title thereto is local in character and triable in the county in which the real property is situated (*Kejr v. Construction Engineers, Inc. (1952) 111 Cal. App. 2d 817, 819, 245 P.2d 21*).

[*Optional*] **H. Action to Quiet Title to Real Property.** An action to quiet title to real property is purely local and triable in the county where the real property is situated (*Strosnider v. Pomin (1939) 32 Cal. App. 2d 103, 106, 89 P.2d 179*).

[*Optional*] **I. Action for Damages for Fraudulent Inducement to Dismiss Quiet Title Action.** An action for damages arising out of fraudulent representations which induced the plaintiff to dismiss a prior quiet title action is local and triable in the county where the real property is situated (*Strosnider v. Pomin (1939) 32 Cal. App. 2d 103, 108, 89 P.2d 179*).

[*Optional*] **J. Action for Consequential Injuries to Real Property.** An action for consequential injury to real property is within the term "injury to real property" as used in *Code Civ. Proc. § 392* and is triable in the county in which the real property is situated (*Strosnider v. Pomin (1939) 32 Cal. App. 2d 103, 108, 89 P.2d 179*).

[*Optional*] **K. Action Requiring Determination of Interest in Real Property.** An action in which a plaintiff would have to prove ownership of his/her property before establishing any right to damages for direct or consequential injury thereto calls for the determination in some form of an estate and interest in real property and is triable in the county where the real property is situated (*Strosnider v. Pomin (1939) 32 Cal. App. 2d 103, 108-109, 89 P.2d 179*).

[*Optional*] **L. Action for Damages for Physical Injury to Real Property.** An action to recover damages for physical injury to real property is a local action and venue is governed by *Code Civ. Proc. § 392* (*Stauffer Chemical Co. v. Superior Court (1968) 265 Cal. App. 2d 1, 3, 71 Cal. Rptr. 202*).

[*Optional*] **M. Action for Damages to Growing Crops.** An action for damage to growing crops, which are considered as part of the real property on which they are growing for venue, is an action to recover damages for physical injury to real property and, therefore, a local action triable in the county in which the real property is situated (*Stauffer Chemical Co. v. Superior Court (1968) 265 Cal. App. 2d 1, 3, 71 Cal. Rptr. 202*).

[*Optional*] **N. Action for Damages for Inverse Condemnation.** Where the only legal right to take possession of land without the consent of the owners thereof is under the power of eminent domain, whether by direct condemnation or by inverse condemnation, the action must be tried where the real property is situated (*Williams v. Merced Irr. Dist. (1935) 4 Cal. 2d 238, 241, 48 P.2d 664*).

[*Optional*] **O. Action for Specific Performance by Vendee of Real Property.** The county in which real property which is the subject of a contract of sale is the county in which an action brought by the vendee for specific performance of such contract should be tried (Santa Barbara Lodge No. 605 v. *Penzner (1951) 104 Cal. App. 2d 494, 494, 231 P.2d 595*).

[*Optional*] **P. Creditor's Action on Fraudulent Conveyance.** A creditor's action to set aside a fraudulent conveyance requires a determination of a right or interest in real property and, therefore, the action is local in character (*Rice v. Schubert (1951) 101 Cal. App. 2d 638, 640-641, 226 P.2d 50*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a defendant's motion for change of venue to the county of his or her residence when the plaintiff has filed a wholly local action relating to real property of the type indicated below in the county in which the property is located, but the defendant has moved for change of venue to the county of his or her residence. Thus, this form may be used when the action with respect to real property is for: (1) its recovery; (2) the recovery of an estate or interest therein; (3) the determination, in any form, of the right to recovery thereof or of any estate or interest therein; (4) the injury thereto; or (5) the foreclosure of a lien or mortgage thereon.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. This memorandum may be accompanied by counteraffidavits [*Code Civ. Proc. § 2009*] or counterdeclarations under penalty of perjury [*Code Civ. Proc. § 2015.5*].

[b] Related Memoranda

For a memorandum in support of a motion for change of venue to the court in the county where the real property involved in the action is located and the action is local in nature, see *§ 238.50*. For a memorandum in support of a motion for change of venue to the county where a local cause of action arises for use when the main relief sought is local and transitory relief is only incidental, see *§ 238.51*.

[3] Discussion of Authorities

[a] Venue When Main Relief Is Local and Transitory Issue Is Only Incidental

For discussion of ***Grocers' etc. Union v. Kern etc. Co.*** *(1907) 150 Cal. 466, 89 P. 120* , on the point involved, see *§ 238.51[1]*, Paragraph D.

[b] Venue of Action for Slander of Title

In ***Coley v. Hecker*** *(1928) 206 Cal. 22, 272 P. 1045* , the defendants appealed from an order of the trial court denying their demand for change of venue to the county of which they were residents in an action to remove a cloud on the title to real property caused by the recording of an abstract of judgment and for damages for slander of title caused by that recording. The action was filed in the county in which the real property was situated and, in appeal, the Supreme Court affirmed the trial court's order, holding that the venue of such an action lies in the county where the real property is situated under *Code Civ. Proc. § 392*.

The Court stated that the owner of the slandered title is given the right to bring and maintain an action in the county where the real property is located on the theory that the action is one in which the determination of the owner's right or interest is properly adjudicated and for the additional reason that slander of title is an injury to the real property. The term "injury to property" embraces every wrong which in legal contemplation is an injury to real property, not only the direct and forcible injury, but consequential injuries, thereatened injuries to land, and even mere nonfeasance, such as permissive waste, the Court observed.

[c] Action for Malicious Prosecution Resulting in Real Property Depreciation

In ***Wick v. Mattison*** *(1962) 207 Cal. App. 2d 608, 24 Cal. Rptr. 677* , the plaintiff filed an action for malicious prosecution which alleged as damages the depreciation in value of the plaintiff's real property. The action was filed in the county where the land was situated and the trial court denied one defendant's motion for change of venue to the county of his residence. The court of appeal affirmed, holding that the action was one for injury to real property. The cause of action for malicious prosecution unquestionably is one in tort for damages; but, said the court, the real question is: damages to what? The essential damage alleged to flow from the unfounded prosecution by the defendants was the depreciation in the value of the plaintiff's real estate. As in slander of title, said the court, the action was one for injury to real property. Thus, held the court, the action was local in nature.

[d] Action to Quiet Title and Cancel Instrument

Kejr v. Construction Engineers, Inc. *(1952) 111 Cal. App. 2d 817, 245 P.2d 21* , was an action in which the plaintiff, who had entered into a recorded contract for the sale of timber on his land, sued in the county where the land was located to have the contract canceled on the ground of fraud and to have his title to the premises quieted. The defendant moved for change of venue to the county of its principal place of business and the trial court denied that motion. The court of appeal affirmed, holding that a complaint seeking to quiet title and to cancel the instrument under which the defendant claims an interest in and to realty stated a local cause of action.

[e] Action to Quiet Title to Real Property

Strosnider v. Pomin *(1939) 32 Cal. App. 2d 103, 89 P.2d 179* , was an action in which the complaint set forth two causes of action--one to quiet title to real property and the other for damages arising out of fraudulent representations which induced the plaintiff to dismiss a prior quiet title action. The action was filed in the county where the real property was situated. The defendants contended that since the second cause of action was transitory, they were entitled to have the case transferred to the county of their residence, and the trial court ordered the change of venue they sought. The court of appeal reversed, holding that the action was purely local in nature. It was conceded by the defendants that if it were not for the second cause of action, venue would be proper in the county where the land was located. This, said the court, was due to the fact that the action to quiet title comes directly and unquestionably under the provisions of *Code Civ. Proc. § 392*. However, as to the contention that *Code Civ. Proc. § 392* was intended to include only physical interference with, or injury to, real property, such as waste, or physical trespass, the court noted that the trend of the decisions is that trespass may be committed by consequential and indirect injuries as well as by direct and forcible injuries. In this case, said the court, the second cause of action was unquestionably based on a tort--damages arising out of fraudulent representations. The real question was: damages to what? The complaint alleged damages to the plaintiff's real property resulting from the dismissal of the prior action through the fraud of the defendants--a consequential injury covered by the term "injury to real property." Moreover, said the court, the complaint brought the action under that portion of *Code Civ. Proc. § 392* governing venue of an action for the determination in any form of an estate or interest in real property. It was clear, said the court, that the plaintiff would have to prove ownership of his property, and of the easement in question, before he could establish any right to damages and this would call for the determination, in some form, of an estate and interest in real property.

[f] Action for Damages for Fraudulent Inducement to Dismiss Quiet Title Action

Strosnider v. Pomin *(1939) 32 Cal. App. 2d 103, 89 P.2d 179* , is discussed in *§ 238.72[3][e]*.

[g] Action for Consequential Injuries to Real Property

Strosnider v. Pomin *(1939) 32 Cal. App. 2d 103, 89 P.2d 179* , is discussed in *§ 238.72[3][e]*.

[h] Action Requiring Determination of Interest in Real Property

Strosnider v. Pomin *(1939) 32 Cal. App. 2d 103, 89 P.2d 179* , is discussed in *§ 238.72[3][e]*.

[i] Action for Damages for Physical Injury to Real Property

Stauffer Chemical Co. v. Superior Court *(1968) 265 Cal. App. 2d 1, 71 Cal. Rptr. 202* , involved actions by four plaintiffs who were landowners and five plaintiffs who were lessees. The first four sought damages to farm soil and growing crops; the others sought damages to growing crops, all caused by an agricultural weed killer. Although all of the plaintiffs farmed in Modoc County, they filed suit in Siskiyou County. The defendant moved for change of venue to Modoc County and the trial court ordered the change for the first four actions but denied the change for the others, ruling that these were transitory. The defendant then brought the instant action in mandamus to require the trial court to order change of venue to Modoc County as to the latter five actions, contending that growing crops are real property for venue purposes.

The court of appeal granted the writ, holding that an action to recover damages for physical injury to real property is a local action governed by *Code Civ. Proc. § 392* and that a suit by a landowner or a lessee for damages to growing crops is a real property action with venue lying in the county where the land is situated. The court pointed out that the general rule is that growing crops are a part of the realty as long as unsevered. While *Civ. Code § 658* defines real property and, for the purposes of sale, excepts industrial growing crops which are agreed to be severed before sale, the court stated that such declarations created fictions of law in order to arrive at just results in particular situations and demonstrate only that the law classifies growing crops as personalty for certain purposes, not necessarily for the purpose of venue. The venue rule governing actions for injury to real property, said the court, usually promotes the convenience of the court, litigants, and witnesses. It points to the most convenient forum as an original matter, relieving the defendant of the burden of demonstrating convenience. To this extent, a suit for injury to growing crops has the same characteristics as one for injury to the land or buildings. Thus, said the court, policy considerations support the rule that the venue of an action for damage to growing crops lies in the county in which the land on which they are growing is situated.

The complaints were framed in counts based on theories of negligent injury, negligent breach of contract, and breach of warranty. The addition of breach of warranty counts did not transform the suit into a mixed action triable in the county of residence of the defendant's dealer. The subject matter of the action, said the court, determines whether venue is governed by *Code Civ. Proc. § 392* and the injury to the real property (growing crops) was the subject matter of the action, even though the injury may have been caused by a breach of warranty.

[j] Action for Damages to Growing Crops

Stauffer Chemical Co. v. Superior Court *(1968) 265 Cal. App. 2d 1, 71 Cal. Rptr. 202* , is discussed in *§ 238.72[3][i]*.

[k] Action for Damages for Inverse Condemnation

In ***Williams v. Merced Irr. Dist.*** *(1935) 4 Cal. 2d 238, 48 P.2d 664* , the Supreme Court reversed a trial court order granting a motion for a change of venue in an action for damages for inverse condemnation from the county in which the land was situated to the county in which the defendant had its residence. In its exercise of its right to take and distribute water for public use, the defendant had constructed a dam across the Merced River and covered part of the plaintiffs' land. The plaintiffs owned remainder interests in the land and had not consented to the acts of the defendant which constituted a trespass and an injury to their real property and, the Court ruled, they could not be affected or defeated by any act of the life tenant, who had consented to the trespass. The only legal right of the defendant to take possession of land without the consent of the owners was under its power of eminent domain, and whether an eminent domain action is a direct condemnation or, as in this case, results in an inverse condemnation, the action had to be tried where the real property was situated, said the Court, citing *Code Civ. Proc. § 392*. The Court added that since this was

so, the existence or nonexistence of a public use was a false quantity. The Court distinguished the instant case from *Gallup v. Sacramento etc. Drainage Dist. (1915) 171 Cal. 71, 151 P. 1142* , pointing out that in the cited case the public corporation and the landowner had expressly agreed to the entry and taking for a public use so that the matter had become, therefore, simply a suit on a contract.

[l] Action for Specific Performance by Vendee of Real Property

In **Santa Barbara Lodge No. 605 v.** ***Penzner*** *(1951) 104 Cal. App. 2d 494, 231 P.2d 595* , the court of appeal reversed a trial court order for change of venue of an action commenced by the vendee under a contract for the sale of real property in the county in which the land was situated. The trial court had granted the defendant's motion for change of venue to the county of which he was a resident. However, the court of appeal ruled that the county in which the real property was situated was the county in which the case should be tried.

[m] Creditor's Action on Fraudulent Conveyance

Rice v. Schubert *(1951) 101 Cal. App. 2d 638, 226 P.2d 50* , was an action by a creditor to set aside a fraudulent conveyance of real property located in the county where the action was brought. The defendants sought change of venue to the county where two of them resided. The court of appeal affirmed the trial court's order denying change of venue. The determinative question was whether the action was local or transitory. The court pointed out that in order to determine that question, it was necessary to ascertain the true character of the action as disclosed by the complaint and the character of the judgment which might be rendered on default. If the defendants had defaulted, the only relief which could have been granted would have been cancellation of the conveyance and thus the title to the property would necessarily be affected, the court observed. The nature of an action is local where it turns on the title to property, as distinct from the personal obligation involved, the court stated, and it was clear that the instant action turned on the title to the property. The question is whether the action requires the determination, in any form, of a right or interest in real property. The court noted that the plaintiff was authorized to bring the action under former Civ. Code § 3439.09 (*now see Civ. Code § 3439.07(a)*) and that an interest--that of the defendants--would be determined in the instant action. Thus, the court concluded that the action was local within the meaning of *Code Civ. Proc. § 392*.

[4] Additional Authorities

[a] Action for Specific Performance by Vendee of Real Property

In *Grocers' etc. Union v. Kern etc. Co. (1907) 150 Cal. 466, 89 P. 120* , the facts and background of which are discussed in *§ 238.51[3][a]*, the Supreme Court ruled that the action (which was brought by the vendee under a contract for the sale of real property for specific performance and for an accounting for the proceeds from the land) was essentially one to determine a right to, or interest in, real property. The Court reversed the trial court's order refusing to change venue to the county where the land was situated, terming the action strictly local in character and clearly affecting the title to the land. It added that the gist of the action was specific performance with the principal relief sought being conveyance of the land.

In *Hammon v. American etc. Mining Co. (1962) 203 Cal. App. 2d 306, 21 Cal. Rptr. 409* , the court of appeal reversed a trial court order granting a motion for change of venue of an action for breach of a mineral lease to the county in which the land involved was situated, holding that the main relief sought was a money judgment and, thus, that the action was transitory and properly triable in the county where the action was brought. Even if the action involves realty, it constitutes, for venue purposes, a transitory action if the main relief sought is a money judgment. Thus, said the court, an action for the specific performance of a contract for the sale of realty is deemed local if brought by the vendee, since the vendee seeks possession (citing Santa Barbara Lodge No. 605 v. *Penzner (1951) 104 Cal. App. 2d 494, 231 P.2d 595*); but it is considered transitory if brought by the vendor, since the vendor merely seeks the purchase price.

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23-238 California Points & Authorities § 238.73

§ 238.73 Opposing Motion for Change of Venue [Code Civ. Proc. §§ 396b, 397(a)] to County of Defendant's Residence [Code Civ. Proc. § 395(a)]--Tort Action Commenced in Proper County

[1] FORM

[*Caption. See § 238.70.*]

WHEN AN ACTION FOR _____ [INJURY TO PERSON *or* INJURY TO PERSONAL PROPERTY *OR* WRONGFUL DEATH] MAY PROPERLY BE BROUGHT IN A COUNTY OTHER THAN THAT OF DEFENDANT'S RESIDENCE, DEFENDANT MAY NOT HAVE SUCH AN ACTION THAT WAS COMMENCED IN A PROPER COUNTY TRANSFERRED TO THE COUNTY OF HIS/HER RESIDENCE.

A. Propriety of Chosen Venue. [*See § 238.70[1], Paragraph A.*]

B. Personal Tort Actions. If the action is for injury to person or personal property or for death from wrongful act or negligence, either the county where the injury or the injury causing death occurs or the county in which the defendants, or some of them, reside at the commencement of the action, shall be a proper county for the trial of the action (*Code Civ. Proc. § 395(a)*).

C. Action Commenced in One of Two Proper Counties. In actions for injury to person or personal property or for death from wrongful act or negligence, since the statute provides for venue in either of two counties, either one is a "proper county" for the trial thereof within the meaning of *Code Civ. Proc. § 397(a)*, and if such an action is brought in the county in which the injury occurred, the court has no authority to change the place of trial to the county of the defendant's residence on the ground that the latter, alone, was the "proper county" (*Gridley v. Fellows (1914) 166 Cal. 765, 768, 138 P. 355*).

[*Optional*] **D. Local Entity as Cross Defendant.** When a tort action against a defendant is commenced in the proper

county, *Section 394(a) of the Code of Civil Procedure*, relating to venue of proceedings against a local entity for injury caused by its negligence, does not require a change of venue if the local entity is only named as a cross defendant (*City of Chico v. Superior Court (1979) 89 Cal. App. 3d 187, 191, 152 Cal. Rptr. 380*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion for change of venue to the county in which the defendant resides in an action for injury to person or personal property or wrongful death which has been filed in the county in which the injury occurred.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. This memorandum may be accompanied by counteraffidavits [*Code Civ. Proc. § 2009*] or counterdeclarations under penalty of perjury [*Code Civ. Proc. § 2015.5*].

[b] "Injury to Person" and "Injury to Property" Defined

As used in *Code Civ. Proc. § 395(a)*, "injury to person" means bodily injury and not "personal injury" as this latter term is used in *Code Civ. Proc. §§ 27* and *29*, classifying all injuries that are not injuries to property as personal injuries [*Graham v. Mixon (1917) 177 Cal. 88, 90-93, 169 P. 1003* ; *Lucas v. Lucas Ranching Co. (1937) 18 Cal. App. 2d 453, 455-457, 64 P.2d 160]* , and the term "injury to property" means physical or corporeal injury [*Spangenberg v. Spangenberg (1932) 123 Cal. App. 387, 391, 11 P.2d 408]* . Thus, only actions for physical injury to person or property, or death, can be brought in the county in which the wrongful act occurs [*Cacciaguidi v. Superior Court (1990) 226 Cal. App. 3d 181, 187, 276 Cal. App. 3d 465]* . The general rule of *Code Civ. Proc. § 395(a)* that the residence of the defendant is the proper place for trial applies to personal torts not involving physical injury, such as conversion [*Haurat v. Superior Court (1966) 241 Cal. App. 2d 330, 333, 50 Cal. Rptr. 520]* . Similarly, actions for libel, malicious prosecution, and false imprisonment are triable solely at the defendant's residence [*Johnson v. Superior Court (1965) 232 Cal. App. 2d 212, 218, 42 Cal. Rptr. 645]* , as are actions for abuse of process, which, like actions for malicious prosecution, are not actions for "injury to the person," which *Code Civ. Proc. § 395(a)* permits to be brought in the county in which plaintiff's injury occurred [*Cacciaguidi v. Superior Court (1990) 226 Cal. App. 3d 181, 184-186, 276 Cal. App. 3d 465]* .

[3] Discussion of Authorities

[a] Action Commenced in One of Two Proper Counties

In ***Gridley v. Fellows*** *(1914) 166 Cal. 765, 138 P. 355* , the plaintiff had filed a personal injury action in Fresno County, where the injury occurred. The defendant sought and was granted a change of venue to Los Angeles County, the county of his residence. In reversing the trial court's order, the Supreme Court noted that *Code Civ. Proc. § 395(a)*

provided that venue of such actions was proper in either the county where the injury occurred or the county of the defendant's residence and that no preference was given to one over the other. Either county was, therefore, the "proper county" for the trial. In personal actions of this character, the only authority to change the venue is that given by former Code Civ. Proc. § 397(1) (*now see Code Civ. Proc. § 397(a)*) which provides that the court may change the place of trial when the county designated in the complaint is not the proper county. The superior court has no power to change the place of trial of an action, except in the cases and for the causes provided by express law. Since the county where the injury occurred was a "proper county," there was no authority in the court to order a change to the county of the defendant's residence on the ground that the latter, alone, was the "proper county."

[b] Local Entity as Cross Defendant

In ***City of Chico v. Superior Court*** *(1979) 89 Cal. App. 3d 187, 152 Cal. Rptr. 380* , plaintiff brought an action for damages against defendant in the county of defendant's residence. Defendant cross complained against the county and city in which the accident occurred for indemnity and contribution, and the trial court denied the cross defendants' motion for a change of venue.

In a petition for a writ of mandate to require the trial court to vacate its order, the cross defendants relied on former Code Civ. Proc. § 394(1) (*now Code Civ. Proc. § 394(a)*), providing in part that an action against a city or county for injury occurring within the city or county caused by its negligence shall be tried in the city or county. The court of appeal held however that *Code Civ. Proc. § 394* was inapplicable where the city and county were not defendants but cross defendants.

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23-238 California Points & Authorities § 238.74

§ 238.74 Opposing Motion for Change of Venue [Code Civ. Proc. §§ 396b, 397(a)] to County of Defendant's Residence [Code Civ. Proc. § 395(a)]--Contract Action Commenced in Proper County [Code Civ. Proc. § 395(a)].

[1] FORM

[*Caption. See § 238.70.*]

A CONTRACT ACTION MAY BE BROUGHT IN ANY OF A NUMBER OF DIFFERENT COUNTIES, INCLUDING THAT OF DEFENDANT'S RESIDENCE, AND DEFENDANT MAY NOT HAVE SUCH AN ACTION THAT WAS COMMENCED IN A PROPER COUNTY TRANSFERRED TO THE COUNTY OF HIS/HER RESIDENCE.

A. Propriety of Chosen Venue. [*See § 238.70[1], Paragraph A.*]

B. Contracts Other Than Consumer Contracts. As to contracts other than consumer contracts, when a defendant has contracted to perform an obligation in a particular county, an action founded on such obligation may properly be tried either in the county where the obligation is to be performed, in the county in which the contract was in fact entered into, or in the county in which the defendant resides (*Code Civ. Proc. § 395(a)*).

C. Contract Action Commenced in One of Several Proper Counties. When a defendant has contracted to perform an obligation in a particular county and the action is commenced in any of the counties specified in *Section 395(a) of the Code of Civil Procedure* as a proper county therefor, other than that in which the defendant or any defendant resides, the defendant may not have the action transferred to the county of his/her residence on the ground that it was brought in an improper court (*Young v. John Haar Pickle Co. (1956) 139 Cal. App. 2d 534, 535, 293 P.2d 796*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion for change of venue to the county of defendant's residence when the plaintiff has commenced an action founded on an obligation the defendant has contracted to perform (other than an obligation under a consumer contract, an installment contract or account, or an automobile sales contract) in a proper county other than that of the defendant's residence. In such a situation, the defendant's motion may be opposed by the plaintiff on the ground asserted in this memorandum that the statute provides for alternate venue of an action founded on an obligation the defendant has contracted to perform [see *Code Civ. Proc. § 395(a)*].

For a memorandum for use in opposing a defendant's motion for change of venue to the county of his or her residence when the defendant's obligation was pursuant to a consumer contract, see *§ 238.75*. For a similar memorandum for use when the defendant's obligation was pursuant to an installment contract or account or an automobile sales contract, see *§ 238.77*.

Where appropriate, counsel should include argument in this form showing the relationship between the facts of the case and the points of law stated. This memorandum may be accompanied by counteraffidavits [*Code Civ. Proc. § 2009*] or counterdeclarations under penalty of perjury [*Code Civ. Proc. § 2015.5*].

[b] Venue of Contract Actions

[i] Application of General Rule of Venue

The general rule of venue is that the residence of the defendant is the proper place for trial and this applies to contract actions with the exceptions set out in *Code Civ. Proc. § 395(a)*[*Quick v. Corsaro (1960) 180 Cal. App. 2d 831, 834, 4 Cal. Rptr. 674]*

[ii] Venue Under Statutory Exceptions

Code Civ. Proc. § 395(a) further provides that when the defendant has contracted to perform an obligation in a particular county, an action based thereon may be tried in the county where the obligation is to be performed, where it was entered into, or in which the defendant or any defendant resides. The county in which the obligation is incurred is deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary. This latter provision, however, does not apply to actions against corporations or associations [*Hale v. Bohannon (1952) 38 Cal. 2d 458, 469-471, 241 P.2d 4]* .

[iii] Burden on Defendant

When the complaint shows that the contract was entered into in the county in which the action is brought, the burden of overthrowing the prima facie venue showing made thereby rests on the moving defendant--his or her residence in another county is not enough--he or she has to show that the contract was not made or to be performed in the county where the action is pending. The rule in this regard is the same as to individuals and corporations [*Ward Mfg. Co. v. Miley (1955) 131 Cal. App. 2d 603, 606-607, 281 P.2d 343]* .

[c] Related Memoranda

For memoranda supporting and opposing a motion for change of venue in a contract action, see in this set Ch. 50, *Contracts*.

[3] Discussion of Authorities

[a] Contract Action Commenced in One of Several Proper Counties

In ***Young v. John Haar Pickle Co.*** *(1956) 139 Cal. App. 2d 534, 293 P.2d 796* , the plaintiff commenced an action in Napa County on a contract under which one of the defendants had contracted to accept delivery of cucumbers delivered by the plaintiff, the seller, in Napa County. All of the defendants sought change of venue to Los Angeles County, the principal place of business of one corporate defendant, or, in the alternative, to Alameda County, the principal place of business of another corporate defendant and the residence of the agent for that corporation. The trial court had denied the motion on implied findings that the contract was made and was to be performed in Napa County and the court of appeal found ample support for such findings.

In affirming the order denying the motion for change of venue to the county of defendants' residence rather than that in which the contract was to be performed and in which it was made, the court stated that under *Code Civ. Proc. § 395(a)*, the action was properly commenced in Napa County as to the individual defendant inasmuch as Napa County was the county in which the contract was in fact entered into in addition to being the county where the obligation was to be performed. The action was also properly commenced in that county as to the corporate defendants under an existing constitutional provision [*see now Code Civ. Proc. § 395.5*] providing that corporations could be used in the county where the contract is made or to be performed or where the obligation or liability arises.

[4] Additional Authorities

[a] Action Commenced in One of Several Proper Counties

In *Gilman v. Nordin (1952) 112 Cal. App. 2d 788, 247 P.2d 394* , the plaintiff sought the dissolution of a partnership and an accounting in an action commenced in San Francisco. In his complaint, the plaintiff had alleged an oral partnership contract and its breach by the defendant. There was no allegation as to where the oral partnership contract was entered into but there was no denial by the defendant of the plaintiff's allegation that the agreement was to be performed in that county. Logically, it appeared that the action was founded on an obligation contracted to be performed in San Francisco. If that were the case, said the court of appeal, the defendant would not be entitled to a transfer of the case to the county of his residence since *Code Civ. Proc. § 395(a)* provides that when a defendant has contracted to perform an obligation in a particular county, either the county where such obligation is to be performed, or in which the contract in fact was entered into, or the county in which the defendant resides at the commencement of the action is a proper county for the trial of an action founded on such obligation. Accordingly, the trial court's denial of the defendant's motion for change of venue to the county of his residence was affirmed.

In *Causley v. Superior Court (1968) 267 Cal. App. 2d 757, 73 Cal. Rptr. 585* , the action was on a promissory note of the defendant corporation that had been signed by the individual defendants as officers of the corporation. Although executed in San Francisco, it was to be paid in Sonoma County. The court of appeal held that the motion for change of venue from Sonoma County to San Francisco, the county where the individual defendants resided, was improperly granted. The corporation could properly be used in the county where the contract was to be performed, under an existing constitutional provision [*see now Code Civ. Proc. § 395.5*]. Since the note indicated on its face that it was to be performed in Sonoma County, under *Code Civ. Proc. § 395(a)* that county was a proper county for the trial of the action against the individual signers as well.

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23-238 California Points & Authorities § 238.75

§ 238.75 Opposing Motion for Change of Venue [Code Civ. Proc. §§ 396b, 397(a)] to County of Defendant's Residence [Code Civ. Proc. § 395(a)]--Consumer Contract Action Commenced in Proper County [Code Civ. Proc. § 395(b)]

[1] FORM

[*Caption. See § 238.70.*]

A CONSUMER CONTRACT ACTION MAY PROPERLY BE BROUGHT IN ANY OF A NUMBER OF DIFFERENT COUNTIES, INCLUDING THAT OF DEFENDANT'S RESIDENCE, AND DEFENDANT MAY NOT HAVE SUCH AN ACTION THAT WAS COMMENCED IN A PROPER COUNTY TRANSFERRED TO THE COUNTY OF HIS/HER RESIDENCE.

A. Propriety of Chosen Venue. [*See § 238.70[1], Paragraph A.*]

B. Contract Action Commenced in One of Several Proper Counties. [*See § 238.74[1], Paragraph C.*]

C. Consumer Contracts. In an action arising from an offer or provision of goods, services, loans, or extensions of credit intended primarily for personal, family, or household use, other than an obligation under an installment contract or account or for the purchase of an automobile, the county in which the buyer or lessee in fact signed the contract, the county in which the buyer or lessee resided at the time the contract was entered into, or the county in which the buyer or lessee resides at the commencement of the action is the proper county for the trial thereof (*Code Civ. Proc. § 395(b)*).

In the superior court designated in *Code of Civil Procedure Section 395(b)* as the proper court, the proper court location for trial of a case is the location where the court tries that type of case that is nearest or most accessible to where the buyer or lessee resides, where the buyer or lessee in fact signed the contract, where the buyer or lessee resided at the time the contract was entered into, or where the buyer or lessee resides at the commencement of the action. Otherwise,

any location of the superior court designated as the proper court in this subdivision is a proper court location for the trial (*Code Civ. Proc. § 395(b)*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a defendant's motion for change of venue to the county of his or her residence when the action is on a consumer contract (other than an installment contract or account or an automobile purchase contract) and it was filed in a county designated as proper for trial under *Code Civ. Proc. § 395(b)*.

Counsel should include argument in the form showing the relationship between the facts of the case and the points of law stated. This memorandum should be accompanied by supporting affidavits as discussed in *§ 238.30[2][a][i]*.

[b] Related Memoranda

For a memorandum that may be submitted for use in opposition to a similar defendant's motion when the action is not based on a consumer contract, see *§ 238.74*.

For a memorandum that may be submitted for use in opposition to a defendant's motion when the action is based on a transaction arising from an unsolicited telephone call or a telephone call or electronic transmission in response to a solicitation, see *§ 238.76*.

For a memorandum for use in opposition to a defendant's motion for change of venue of the county of his or her residence in an action on an installment contract or account or an automobile sales contract, see *§ 238.77*.

[3] Additional Authorities

In *Fontaine v. Superior Court (Cashcall, Inc.) (2009) 175 Cal. App. 4th 830, 838, 96 Cal. Rptr. 3d 607* , a borrower obtained a loan for personal, family, or household use from a lender. After the lender attempted to collect the debt, the borrower filed a complaint in Santa Clara County alleging that the collection methods used by the lender and its employees violated the Rosenthal Fair Debt Collection Practices Act (*Civ. Code § 1788 et seq.*). The trial court granted the lender's motion to transfer the action to Orange County on the ground one of the individual defendants had requested that the case be tried there. The court of appeal issued a peremptory writ of mandate in the first instance, directing the trial court to vacate its order granting the lender's motion to transfer the action to Orange County and to enter a new order denying the motion. The court concluded that venue was proper in Santa Clara County and that the trial court abused its discretion in ordering transfer of the action to Orange County. Because the borrower's action arose from a loan that he obtained primarily for personal, family, or household use, which was a consumer transaction specified in *Code Civ. Proc. § 395(b)*, and the borrower resided in Santa Clara County at the time his action commenced, venue was proper in Santa Clara County. The court rejected the lender's argument that the venue provision

of *Code Civ. Proc. § 395(b)* applies only to actions against a consumer defendant, or, alternatively, does not apply where the consumer is the plaintiff and one of the defendants is an individual. A peremptory writ in the first instance was appropriate to correct the trial court's error expeditiously (*175 Cal. App. 4th 830, 838)* .

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23-238 California Points & Authorities § 238.76

§ 238.76 Opposing Motion for Change of Venue [Code Civ. Proc. §§ 396b, 397(a)] to County of Defendant's Residence [Code Civ. Proc. § 395(a)]--Action Arising From Transaction Consummated as Proximate Result of Unsolicited Telephone Call by Seller or Telephone Call or Electronic Transmission in Response to Solicitation [Code Civ. Proc. § 395(b)]

[1] FORM

[*Caption. See § 238.70.*]

AN ACTION ARISING FROM A TRANSACTION CONSUMMATED AS A PROXIMATE RESULT OF AN UNSOLICITED TELEPHONE CALL MADE BY A SELLER ENGAGED IN THE BUSINESS OF CONSUMMATING TRANSACTIONS OF THAT KIND [OR A TELEPHONE CALL OR ELECTRONIC TRANSMISSION MADE BY THE BUYER OR LESSEE IN RESPONSE TO A SOLICITATION BY THE SELLER] MAY PROPERLY BE BROUGHT IN ANY OF A NUMBER OF DIFFERENT COUNTIES, INCLUDING THAT OF DEFENDANT'S RESIDENCE, AND DEFENDANT MAY NOT HAVE SUCH AN ACTION THAT WAS COMMENCED IN A PROPER COUNTY TRANSFERRED TO THE COUNTY OF HIS/HER RESIDENCE.

A. Propriety of Chosen Venue. [*See § 238.70[1], Paragraph A.*]

B. Contract Action Commenced in One of Several Proper Counties. [*See § 238.74[1], Paragraph C.*]

C. Action Arising From Transaction That Resulted From Unsolicited Telephone Call. In an action arising from a transaction consummated as a proximate result of an unsolicited telephone call made by a seller engaged in the business of consummating transactions of that kind [or a telephone call or electronic transmission made by the buyer or lessee in response to a solicitation by the seller], the county in which the buyer or lessee in fact signed the contract, the county in which the buyer or lessee resided at the time the contract was entered into, or the county in which the buyer or lessee resides at the commencement of the action is the proper county for the trial thereof (*Code Civ. Proc. § 395(b)*).

In the superior court designated in *Code of Civil Procedure Section 395(b)* as the proper court, the proper court location for trial of a case is the location where the court tries that type of case that is nearest or most accessible to where the buyer or lessee resides, where the buyer or lessee in fact signed the contract, where the buyer or lessee resided at the time the contract was entered into, or where the buyer or lessee resides at the commencement of the action. Otherwise, any location of the superior court designated as the proper court in this subdivision is a proper court location for the trial (*Code Civ. Proc. § 395(b)*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a defendant's motion for change of venue to the county of his or her residence when the action arises from a transaction consummated as a proximate result of an unsolicited telephone call made by a seller engaged in the business of consummating transactions of that kind and it was filed in a county designated as proper for trial under *Code Civ. Proc. § 395(b)*.

The optional phrase in brackets should be used if the buyer or lessee responded by telephone or electronically to the seller. It is not needed if the transaction was completed on the seller's unsolicited call.

For discussion of venue in actions arising from these types of contracts, see California Forms of Pleading and Practice, Ch. 571, *Venue* .

Counsel should include argument in the form showing the relationship between the facts of the case and the points of law stated. This memorandum may be accompanied by counteraffidavits [*Code Civ. Proc. § 2009*] or counterdeclarations under penalty of perjury [*Code Civ. Proc. § 2015.5*].

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23-238 California Points & Authorities § 238.77

§ 238.77 Opposing Motion for Change of Venue [Code Civ. Proc. §§ 396b, 397(a)] to County of Defendant's Residence [Code Civ. Proc. § 395(a)]--Installment Contract or Installment Account or Automobile Sales Contract Action Commenced in Proper County [Code Civ. Proc. § 395(b); Civ. Code §§ 1812.10, 2984.4]

[1] FORM

[*Caption. See § 238.70.*]

AN _____ [INSTALLMENT CONTRACT *or* INSTALLMENT ACCOUNT *or* AUTOMOBILE SALES CONTRACT] ACTION MAY PROPERLY BE BROUGHT IN ANY OF A NUMBER OF DIFFERENT COUNTIES, INCLUDING THAT OF DEFENDANT'S RESIDENCE, AND DEFENDANT MAY NOT HAVE SUCH AN ACTION THAT WAS COMMENCED IN A PROPER COUNTY TRANSFERRED TO THE COUNTY OF HIS/HER RESIDENCE.

A. Propriety of Chosen Venue. [*See § 238.70[1], Paragraph A.*]

B. Contract Action Commenced in One of Several Proper Counties. [*See § 238.74[1], Paragraph C.*]

[*EITHER*]

C. Installment Sales. An action on an installment contract or account under the Unruh Retail Installment Sales Act [*Civ. Code § 1801 et seq.*] must be tried in the superior court in the county in which the contract was in fact signed by the buyer, where the buyer resided at the time the contract was entered into, where the buyer resides at the commencement of the action, or where the goods purchased under the contract have been so affixed to real property as to become a part of such real property (*Civ. Code § 1812.10(a)*).

[*OR*]

C. Automobile Sales Contract. An action on an automobile sales contract or purchase order under the provisions of the Rees-Levering Motor Vehicle Sales and Finance Act (*Civ. Code § 2981 et seq.*) must be tried in the county either in which the contract was in fact signed by the buyer, in which the buyer resided when the contract was entered into, in which the buyer resides at the commencement of the action, or in which the motor vehicle purchased under the contract is permanently garaged. In any action involving multiple claims or causes of action, venue lies in these counties so long as there is at least one claim or cause of action arising from a contract subject to the Rees-Levering Act (*Civ. Code § 2984.4*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion for change of venue to the county of defendant's residence in an action on an installment contract or account or an automobile sales contract. In such a situation, the defendant's motion may be opposed by the plaintiff on the ground asserted in this memorandum that the pertinent statute provides for alternate venue of such actions [*see Civ. Code §§ 1812.10* (installment sales), 2984.4 (automobile sales)].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. This memorandum may be accompanied by counteraffidavits [*Code Civ. Proc. § 2009*] or counterdeclarations under penalty of perjury [*Code Civ. Proc. § 2015.5*].

[3] Discussion of Authorities

[a] Contract Action Commenced in One of Several Proper Counties

For a discussion of ***Young v. John Haar Pickle Co.*** *(1956) 139 Cal. App. 2d 534, 293 P.2d 796* , on the point stated, see *§ 238.74[3][a]*.

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23-238 California Points & Authorities § 238.78

§ 238.78 Opposing Motion for Change of Venue [Code Civ. Proc. §§ 396b, 397(a)] to County of Defendant's Residence [Code Civ. Proc. § 395(a)]--Contract Action Against Corporation and Individual Defendant Sued on Alter Ego Theory Commenced in Proper County

[1] FORM

[*Caption. See § 238.70.*]

THIS ACTION SHOULD NOT BE TRANSFERRED TO _____ COUNTY, THE COUNTY OF _____'S [*name of individual defendant*] RESIDENCE BECAUSE HE/SHE HAS BEEN JOINED AS A DEFENDANT ON AN ALTER EGO THEORY IN A BREACH OF CONTRACT ACTION AGAINST A CORPORATION IS THEREFORE NOT ENTITLED TO TRANSFER THE ACTION TO HIS/HER COUNTY OF RESIDENCE.

Venue Proper Where Action Could Be Laid Against Either Individual or Corporate Defendant. In an action for breach of contract against a corporation and an individual as its alter ego, the individual defendant is subject to the expanded venue provisions for breach of contract under *Code of Civil Procedure Sections 395(a)* and *395.5* (*Lebastchi v. Superior Court (1995) 33 Cal. App. 4th 1465, 1470-1471, 39 Cal. Rptr. 2d 787*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion for change of venue to the county of an individual defendant's residence in an action against a corporation and an individual defendant who is sued as the alter ego of the corporation. In such a situtation, the individual defendant's motion may be opposed by the plaintiff on the ground asserted in this memorandum that the action is subject to the expanded venue provisions for breach of contract under *Code Civ. Proc. §§ 395(a)* and *395.5*.

Counsel should insert argument in form showing the relationship between the facts of the case and the points of law stated. In particular, counsel should highlight the allegations of the complaint that allege the alter ego status [*see Lebastchi v. Superior Court (1995) 33 Cal. App. 4th 1465, 1470, 1471 n.7, 39 Cal. Rptr. 2d 787.]* .

[b] Related Memoranda

For points and authorities pertaining to venue rules in actions against corporations, see Ch. 52, *Corporations* .

[3] Discussion of Authorities

[a] Venue Proper Where Action Could Be Laid Against Either Individual or Corporate Defendant

Lebastchi v. Superior Court *(1995) 33 Cal. App. 4th 1465, 1470-1471, 39 Cal. Rptr. 2d 787* , involved an action for breach of a commercial real property lease. The plaintiff filed the action in San Diego County, the location of the property. The complaint alleged that the individual defendant was the alter ego of the corporate defendant. The individual defendant moved under *Code Civ. Proc. § 396b* to transfer the action to Placer County on the grounds venue was improper in San Diego because it was not a county of a defendant's residence (the corporation's principal place of business being Sacramento County). The trial court denied the motion for change of venue, and the defendant petitioned for a writ of mandate.

The court of appeal affirmed. The court recognized the cause of action as transitory and generally triable under *Code Civ. Proc. § 395(a)* at the defendant's residence, the place of contracting or the place of performance, or in the case of a corporation, triable under *Code Civ. Proc. § 395.5* in the county in which the contract was made or to be performed or where the obligation or liability arises, or the breach occurs, or in the county in which the corporation's principal place of business is located (*33 Cal. App. 4th 1465, 1469-1470)* . Noting that the complaint alleged only one cause of action, for breach of lease and sought one form of relief, the court rejected that contention that the case involved a "mixed action" that would allow defendant to transfer it to his county of residence (*33 Cal. App. 4th 1465, 1470)* . The court concluded that the alter ego allegations of the complaint placed the individual defendant in the same position as the corporated defendant, and that the expanded venue provisions for breach of contract under *Code Civ. Proc. §§ 395(a)* and *395.5* (*33 Cal. App. 4th 1465, 1469-1470)* . The court distinguished the situation in which the complaint does not include sufficient facts to allege the alter ego theory [*see Meadows v. Emett & Chandler (1950) 99 Cal. App. 2d 496, 222 P.2d 145]* (*33 Cal. App. 4th 1465, 1471 n.7*).

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23-238 California Points & Authorities § 238.79

§ 238.79 Opposing Motion for Change of Venue to Proper Court [Code Civ. Proc. §§ 396b, 397(a)] in Neutral County When Nonresident Defendant Is Sued by Local Public Entity [Code Civ. Proc. § 394(a); Code Civ. Proc. § 394] Action Not Brought By Public Entity Within Meaning of

[1] FORM

[*Caption. See § 238.30.*]

THIS ACTION SHOULD NOT BE TRANSFERRED TO A NEUTRAL COUNTY BECAUSE THE ACTION IS NOT ONE "BROUGHT BY" A PUBLIC ENTITY WITHIN THE MEANING OF CODE OF CIVIL PROCEDURE SECTION 394.

Code of Civil Procedure Section 394 **Inapplicable When Action Is Not "Brought By" Public Entity Within Meaning of Section.** *Code of Civil Procedure Section 394* applies when the lawsuit is "brought by" a public entity within the meaning of that section. The determination of whether an action is brought by a public entity depends on the role of that public entity within the lawsuit. When a lawsuit is not brought by or on behalf of a public entity within the meaning of that section, *Code of Civil Procedure Section 394* is inapplicable and venue need not be transferred pursuant to that section (*Transamerica Homefirst, Inc. v. Superior Court (1999) 69 Cal. App. 4th 577, 580-581, 81 Cal. Rptr. 2d 705*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion for a change of venue by a defendant who claims to have been sued by a public entity and desires to require the trial of the action in a neutral county or, in the alternative, appointment of a disinterested judge from a neutral county to hear the case, when the action is not one brought by a public entity within the meaning of *Code Civ. Proc. § 394*.

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. The memorandum may be accompanied by counteraffidavits [*Code Civ. Proc. § 2009*] or counterdeclarations under penalty of perjury [*Code Civ. Proc. § 2015.5*].

[3] Discussion of Authorities

[a] Code of Civil Procedure Section 394 Inapplicable When Action Is Not "Brought By" Public Entity Within Meaning of Section

In ***Transamerica Homefirst, Inc. v. Superior Court*** *(1999) 69 Cal. App. 4th 577, 81 Cal. Rptr. 2d 705* , the defendant, a real estate lender, had made a reverse mortgage to a named individual on her home in 1994. In 1997, the Public Guardian of San Mateo County was appointed conservator of the person and estate of that individual. In July, 1998, the probate court granted permission to the public guardian to proceed with a lawsuit. The public guardian, as conservator for that individual, then filed in San Mateo County this class action lawsuit against defendant to challenge the validity of defendant's reverse mortgage program. Defendant was headquartered in San Francisco. Defendant moved to transfer the action to a neutral county in accordance with *Code Civ. Proc. § 394*. The trial court denied the motion, and defendant filed a petition for a writ of mandate to compel the trial court to transfer venue. The court of appeal issued an order to show cause why a peremptory writ of mandate should not issue.

The court of appeal ultimately discharged the order to show cause and denied the petition for writ of mandate. In reaching its conclusion, the court of appeal pointed out there was no dispute that the defendant was a nonresident of San Mateo County and that the public guardian was a county agency (*69 Cal. App. 4th 577, 579-580)* . In rejecting defendant's argument that those two circumstances are all that is required by *Code Civ. Proc. § 394* to mandate transfer to a neutral county, the court stated that the statute applies when the lawsuit is "brought by" a public entity, and the determination of whether an action is brought by a county agency depends on the role of that county agency within the lawsuit. The court noted *Nguyen v. Superior Court (1996) 49 Cal. App. 4th 1781, 1786-1789, 57 Cal. Rptr. 2d 611* , in which the court concluded that a district attorney who brought a red light abatement action against a nonresident defendant acts as an officer of the state, not the county, and that *Code Civ. Proc. § 394* did not apply. Similarly, the public guardian is acting as a conservator of the individual, not on behalf of the county (*69 Cal. App. 4th 577, 580)* . The named plaintiff is the individual, and neither the county nor the public guardian is a party to the action. The public guardian brings the action on the individual's behalf, and any recovery will go to the conservatorship, not to the county or to the public guardian. The public guardian when acting as a conservator stands in a fiduciary relationship with the conservatee and is subject to court supervision. Accordingly, the public guardian is bound to act in the interests of the individual, not in the interests of the county (*69 Cal. App. 4th 577, 580)* . Under these circumstances, the court concluded that the action was not "brought by" a county agency, i.e., a public entity, within the meaning of Section 394 and that the statute was inapplicable, so that venue did not have to be transferred (*69 Cal. App. 4th 577, 579-581)* .

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23-238 California Points & Authorities § 238.80

§ 238.80 Opposing Motion for Change of Venue to Proper Court [Code Civ. Proc. §§ 396b, 397(a)]--Action Involving Statutory Duty.

[1] FORM

[*Caption. See § 238.30.*]

AN ACTION AGAINST A CORPORATION OR ASSOCIATION BASED ON A STATUTORY OBLIGATION MAY BE PROPERLY BROUGHT IN THE COUNTY WHERE THE OBLIGATION OR LIABILITY ARISES.

A. Propriety of Chosen Venue. [*See § 238.70[1], Paragraph A*].

B. Actions Involving Statutory Duty. If the action is based on a statutory duty, for purposes of determining venue, the liabilty "arises" where the injury occurs, and the injury "arises" in the county where the defendant is being sued (*Code Civ. Proc. § 395.5*; *Black Diamond Asphalt, Inc. v. Superior Court of San Joaquin County (2003) 109 Cal. App. 4th 166, 172, 134 Cal. Rptr. 2d 510*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion for change of venue to the county of the defendant's principal place of business. In such a situation, the defendant's motion may be opposed by the plaintiff of the ground asserted in this memorandum that the pertinent statute provides for alternate venue of such actions [*see Code Civ. Proc. § 395.5*].

Counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. This memorandum may be accompanied by counteraffidavits [*Code Civ. Proc. § 2009*] or counterdeclarations under penalty of perjury [*Code Civ. Proc. § 2015.5*].

[3] Discussion of Authorities

[a] Actions Involving Statutory Duty

Black Diamond Asphalt, Inc. v. Superior Court of San Joaquin County *(2003) 109 Cal. App. 4th 166, 134 Cal. Rptr. 2d 510* , involved a petitioner's complaint asserting that real party in interest, California Insurance Guarantee Association (CIGA), breached its statutory duties by refusing to defend and indemnify petitioner in a lawsuit filed in San Joaquin County. CIGA is a creature of statute. An unincorporated association with its principal place of business in Los Angeles County, CIGA was created in 1969 as a compulsory association of state-regulated insurance companies for the purpose of providing insurance against loss arising from the failure of an insolvent insurer to discharge its insurance policy obligations.

In the instant proceeding, CIGA sought to change venue of the declaratory judgment action to Los Angeles County, claiming that under *Code of Civ. Proc. § 395.5*, the only appropriate venue for the action was the location of its principal office, since the liability sued upon was neither tortious nor contractual. The court noted Section 395.5 gives a plaintiff the option of commencing suit against an association in the county where the "obligation or liability" arises, and concluded that this section must be read in light of the paramount purpose of Section 395.5, which is to permit a wider choice of venue against corporations or associations than would be permitted in suits against individuals (*109 Cal. App. 4th 166, 171)* .

In applying the "liability or obligation" language of Section 395.5 to a lawsuit seeking to enforce a statutory obligation or liability, the court found no reason to try to pigeonhole the action into contract, quasi-contract, or tort categories; instead, statutory liability cases should be analyzed independently for purposes of determining proper venue. An action for declaratory relief against an insurer may be commenced in the county where a third party claimant sues, because that is where the insurer's liability arises; the court concluded that the same rule should be applied where the obligation is created by a statute rather than an insurance contract. The court noted that the "obligation or liability" provision of Section 395.5 does not require that the defendant perform any act inside the county for venue to be proper; it merely requires that the obligation arise there (*109 Cal. App. 4th 166, 172)* .

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23-238 California Points & Authorities §§ 238.81-238.99

[Reserved]

§§ 238.81[Reserved]

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23-238 California Points & Authorities § 238.100

§ 238.100 Supporting Counter Motion for Retention in County Where Action Commenced When Convenience of Witnesses or Ends of Justice Will Be Promoted Thereby [Code Civ. Proc. § 396b]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF COUNTER
Plaintiff,	)	MOTION FOR RETENTION IN VENUE IN
vs.	)	COUNTY WHERE ACTION COMMENCED
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

IN A CASE IN WHICH THE DEFENDANT HAS FILED AN ANSWER AND A MOTION FOR CHANGE OF VENUE TO THE COUNTY OF HIS/HER RESIDENCE, A COURT MAY CONSIDER OPPOSITION TO THE MOTION AND RETAIN THE ACTION IN THE COUNTY WHERE IT WAS COMMENCED IF IT APPEARS THAT THE CONVENIENCE OF THE WITNESSES OR THE ENDS OF JUSTICE WILL BE THEREBY

PROMOTED.

A. Propriety of Chosen Venue. [*See § 238.70[1], Paragraph A.*]

B. Authority for Retention. In any case in which a defendant has answered and filed a motion for an order transferring the action to a proper court, the court may consider opposition to the motion and retain the action in the county where commenced if it appears that the convenience of the witnesses or the ends of justice will thereby be promoted (*Code Civ. Proc. § 396b*).

[*Optional*] **C. Uncontradicted Counter Motion.** When an answer has been filed and the showing made by the counter motion is sufficient and uncontradicted, the trial court abuses its discretion in denying the counter motion (*Mettler v. Hedley (1959) 170 Cal. App. 2d 277, 282-283, 338 P.2d 489*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a counter motion by a plaintiff for the retention of the trial in the county where the action was commenced. Such a counter motion is in order when the defendant has sought change of venue on the ground that the action was filed in the "wrong county" [*Code Civ. Proc. § 397(a)*] and after the defendant has filed an answer [*Code Civ. Proc. § 396b*].

The counter motion may be made simply on the ground that the action should be retained "for the convenience of witnesses" alone [*Harris v. Cannon (1941) 42 Cal. App. 2d 748, 109 P.2d 961]* or on the alternate ground stated in the statute, that the "ends of justice" will be promoted thereby [*Code Civ. Proc. § 396b*].

For further discussion of counter motions, see California Forms of Pleading and Practice, Ch. 571, *Venue* .

Where appropriate, counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. This memorandum may be accompanied by counteraffidavits [*Code Civ. Proc. § 2009*] or counterdeclarations under penalty of perjury [*Code Civ. Proc. § 2015.5*].

[3] Discussion of Authorities

[a] Uncontradicted Counter Motion

In ***Mettler v. Hedley*** *(1959) 170 Cal. App. 2d 277, 338 P.2d 489* , an action for reformation of a contract, the trial court's order denying the plaintiff's counter motion to retain the action on the ground of the convenience of witnesses was reversed. The plaintiff had shown that parole evidence would be required from witnesses he intended to produce. He argued that although depositions could be taken, such evidence is not always satisfactory compared to the testimony

of witnesses. The plaintiff also contended that inconvenience to those witnesses would result if they were required to go to the county to which the defendant had sought to have the matter transferred. The defendant did not deny that the persons named would be witnesses or that they would testify to the facts related. He did not indicate that there would be witnesses for the defendant who lived in other counties or that any witness would be inconvenienced by retention of the trial where the action was commenced. The most that could be said of his affidavit was that the testimony of the witnesses would be false. This denial did not bear on the question of inconvenience of the witnesses and created no conflict on that issue. Accordingly, there being no conflict, the court of appeal held that the trial court had erred in refusing to retain the action for trial in the county where it was commenced when the uncontradicted evidence showed that in such county the convenience of witnesses would be better served.

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23-238 California Points & Authorities §§ 238.101-238.119

[Reserved]

§§ 238.101[Reserved]

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B. Impartial Trial Cannot Be Had in County of Suit

23-238 California Points & Authorities § 238.120

§ 238.120 Supporting Motion for Change of Venue of County Other Than County in Which Suit Was Commenced--Impartial Trial Cannot Be Had [Code Civ. Proc. §§ 397(b), 398]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN SUPPORT OF MOTION FOR
Plaintiff,	)	CHANGE OF VENUE
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	[Judge: _____]
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

THE COURT MAY PROPERLY ORDER A CHANGE IN THE PLACE OF THE TRIAL OF AN ACTION WHEN THERE IS REASON TO BELIEVE THAT AN IMPARTIAL TRIAL CANNOT BE HAD IN THE COUNTY WHERE IT WAS COMMENCED.

A. Statutory Authority for Motion. The court may, on motion, change the place of trial when there is reason to believe that an impartial trial cannot be had therein (*Code Civ. Proc. § 397(b)*).

B. Transfer Mandatory. If the court orders the transfer of an action or proceeding pursuant to Subdivision 2, 3, or 4 of *Section 397 of the Code of Civil Procedure*, it must be transferred to a court having jurisdiction of the subject matter of the action and on which the parties may agree, by stipulation in writing, or made in open court and entered in the minutes or docket; or, if they do not so agree, then to the nearest or most accessible court, where the like objection or cause for making the order does not exist (*Code Civ. Proc. § 398*) (Code Civ. Proc. § 397(2), (3), (4) have been renumbered as *Code Civ. Proc. § 397(b), (c),* (d), but the legislature has not yet amended Section 398 to conform with these changes.

C. Widespread Prejudice Against Moving Party. Change of venue on the ground that an impartial trial cannot be had in the county in which an action was commenced will be ordered when it is shown that there is prejudice against the moving party therein that is so widespread, intense, and outspoken, through the public press and otherwise, as to warrant a conclusion that the moving party would not have a fair trial where the action is pending (*J.I. Case T. Co. v. Copren Bros. (1917) 35 Cal. App. 70, 79, 169 P. 443*).

[*Optional*] **D. Motion by One Codefendant.** A motion for change of venue on the ground that an impartial trial cannot be had in the county in which the action was commenced may be made by one of the a number of codefendants and need not be joined in by all of the defendants (*People v. Ocean Shore Railroad, Inc. (1938) 24 Cal. App. 2d 420, 422-425, 75 P.2d 560*).

[*Optional*] **E. Change of Venue Not Prohibited by Mandatory Removal Statute for Local Governmental Entity Cases.** A change of venue may be ordered pursuant to *Section 397(b) of the Code of Civil Procedure* when an impartial trial cannot be had in the county in which an action was commenced, even though the action is brought by or against a local governmental entity in the county in which venue appears to be mandated by *Section 394 of the Code of Civil Procedure*. The mandatory language of *Section 394 of the Code of Civil Procedure* does not take precedence over, nor prohibit discretionary removal pursuant to, *Section 397(b) of the Code of Civil Procedure*, which unambiguously applies without limitation to any action or proceeding within its terms (*Paesano v. Superior Court (1988) 204 Cal. App. 3d 17, 19-20, 250 Cal. Rptr. 842*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for change of venue when a showing can be made by the moving party that there is, in the county in which the action has been commenced, a prejudice against him or her that is so widespread, intense, and outspoken, through the public press and otherwise, as to warrant a conclusion that the moving party would not have a fair trial where the action is pending. It should be noted that the motion for change of venue on this ground would only be appropriate after the issues have been framed through the filing of an answer by the defendant [*Cook v. Pendergast (1882) 61 Cal. 72, 79]* . The motion may be brought in any case, including one brought by or against a local governmental entity (*see* Optional Paragraph E).

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated.

[3] Discussion of Authorities

[a] Widespread Prejudice Against Moving Party

In ***J.I. Case T. Co. v. Copren Bros.*** *(1917) 35 Cal. App. 70, 169 P. 443* , the defendants had had venue charged to the county of their residence. A trial had been held there and a directed verdict had been rendered. On appeal, the court of appeal reversed the judgment and the case was remanded to the trial court for further proceedings. Following the remand, the plaintiff sought change of venue to a neutral county on the ground that an impartial trial could not be had in the county in which the original trial had been held. The plaintiff was a foreign corporation and "practically unacquainted" in the county of trial, whereas the defendants were alleged to have been born and raised in the county, which had a population of 4,100 persons, and one of them was the county assessor whose influence was alleged to have been wide and consequential in the county.

The court noted that a party cannot move for change of venue on the ground that a fair trial cannot be had until an event has occurred that will assist the court in ascertaining whether such local prejudice exists as may influence the conduct of the jury. The court went on to state that the fact that an impartial trial cannot be had must be clearly established and that it is conceivable that a showing might be made of a prejudice against a moving party that would be so widespread, intense, and outspoken, through the public press and otherwise, as to warrant a conclusion that the moving party would not have had a fair trial where the action was pending.

In this case, the court held that without making an attempt to secure an impartial jury for a second trial, it would require something more than a showing that the defendants were well and favorably known throughout the county or that one of them was of wide and consequential influence therein. The fact that the jury in the first trial hesitated to render the verdict directed furnished no ground of assuming that an impartial trial could not be had. In view of the fact that defendant's right to have the case tried in the county of their residence was statutory, the plaintiff could not take that right from them without a clear showing that a fair and impartial trial could not be had there. Accordingly, and in the absence of a sufficient showing to justify the lower court's order transferring the case to a neutral county for trial, the court concluded that the lower court had gone beyond legitimate and reasonable limits in granting the motion for change of venue.

[b] Motion by One Codefendant

In ***People v. Ocean S. R., Inc.*** *(1938) 24 Cal. App. 2d 420, 75 P.2d 560* , a civil eminent domain proceeding, the court of appeal upheld the trial court's order changing venue on the ground that an impartial trial could be had, even though only one of the several defendants sought the change. The court stated that it could find no indication from the wording of the law [*see Code Civ. Proc. §§ 397, 398*] of any legislative intent to require all of the parties plaintiff or defendant to join in a motion for change of venue. The latter section could not be construed as requiring unanimity of action in seeking the relief afforded by the preceding section. The purpose and intent of the statute is to secure to every litigant the right to a trial of his or her cause before a fair and impartial tribunal and to provide the procedure whereby such right may be enforced and protected. In designating the county in which eminent domain proceedings are to be commenced under former Code Civ. Proc. § 1243 [*now see Code Civ. Proc. § 1250.020*], the Legislature made such designation subject to the provisions of the code applicable to changes in the place of trial.

The court noted that it had been repeatedly held that when the action is not brought in the proper county, any defendant, without joining his codefendants, may demand a transfer to the proper county and since the authority for transfer on the ground that an impartial trial could not be had was contained in the same code section, the court could find no reason

why the same rule should not apply to transfers on any of the grounds stated in that section. The right of a defendant to have an action tried in the county where the land is situated or where some of the defendants reside is no higher nor entitled to more protection than is his right to have it tried where an impartial trial may be had. An impartial trial means a trial impartial as to all litigants therein. If one litigant cannot secure an impartial trial in that county, his right to a transfer to a neutral county cannot be defeated by the failure or refusal of his codefendants to join in the demand therefor. Nor is there any reason why the codefendants should be required to join in demanding a right that does not affect them.

[c] Change of Venue Not Prohibited by Mandatory Removal Statute for Local Governmental Entity Cases

In ***Paesano v. Superior Court*** *(1988) 204 Cal. App. 3d 17, 250 Cal. Rptr. 842* , plaintiffs brought a civil action against Mono County. Plaintiffs moved for a change of venue pursuant to *Code Civ. Proc. § 397(b)*, on the ground that an impartial trial could not be had in that county. The trial court denied the motion, ruling that venue was mandated in Mono County by *Code Civ. Proc. § 394*.

The court of appeal granted plaintiffs a writ of mandate, directing the trial court to vacate its order denying the motion and to instead determine whether a change of venue should be ordered on impartial trial grounds. The court held that the mandatory language of *Code Civ. Proc. § 394* does not prohibit discretionary removal of an action pursuant to *Code Civ. Proc. § 397(b)*. Rather, *Code Civ. Proc. § 397* unambiguously applies without limitation to any action or proceeding within its terms. To hold otherwise would be to allow some cases to be tried in counties in which an impartial trial cannot be had, a result that the Legislature did not intend (*204 Cal. App. 3d 17, 20-21)* .

[4] Additional Authorities

[a] Widespread Prejudice Against Moving Party

In *San Joaquin etc. Irr. Co., Inc. v. Stevinson (1919) 179 Cal. 533, 178 P. 292* , the Supreme Court upheld an order changing venue issued on the ground that an impartial trial could not be had in a case in which the plaintiff sought to condemn certain waters of the San Joaquin River for irrigation use on the western side of the river and the defendant used water from that river for an irrigation on the eastern side of that river. The people living in the county of suit on the western side of the river were practically all disqualified from sitting as jurors because they were users under the plaintiff's present irrigation system and for that reason on the three former trials of the case none of such persons had been qualified as jurors. The sentiment of prejudice on the part of the residents on the eastern side of the river had been stimulated by, and reflected in, the comments of several of the newspapers of the county, which had from time to time since the inception of the action, and particularly at and during the times of the said trials thereof, published articles highly prejudicial to the plaintiff's case and favorable to that of the defendant. The judge who presided over the three trials and who granted the motion for change of venue was in a better position to rightly weigh and justly resolve the conflict in affidavits presented by the parties than the court of appeal could possibly be.

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Volume 23 Chapters 230-239 TRUST DEEDS---to---WORKERS' COMPENSATION
CHAPTER 238 VENUE
PART II. FORMS
B. Impartial Trial Cannot Be Had in County of Suit

23-238 California Points & Authorities § 238.121

§ 238.121 Opposing Motion for Change of Venue to Court in County Other Than County Where Suit Was Commenced on Ground That Impartial Trial Cannot Be Had Therein [Code Civ. Proc. § 397(b)]--Fact That Such Trial Unavailable Cannot Be Clearly Established

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM IN OPPOSITION TO MOTION
Plaintiff,	)	FOR CHANGE OF VENUE
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Dept: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: None set

_____

A MOTION FOR CHANGE OF VENUE ON THE GROUND THAT AN IMPARTIAL TRIAL CANNOT BE HAD SHOULD BE DENIED, IN THE EXERCISE OF SOUND JUDICIAL DISCRETION, WHEN THE FACT THAT A FAIR AND IMPARTIAL TRIAL IS UNAVAILABLE CANNOT BE CLEARLY ESTABLISHED.

A. Propriety of Chosen Venue. [*See § 238.70[1], Paragraph A.*]

B. Establishing Unavailability of Fair and Impartial Trial. Whether or not a change of venue should be granted on the ground that there is reason to believe that an impartial trial cannot be had in the county where an action is properly commenced is a question of fact first addressed to the sound discretion of the trial court, and a determination by the trial court that a fair and impartial trial can be had where the action was commenced is not an abuse of discretion when it clearly appears that evidence adduced at the hearing of the motion justifies such a determination as a matter of law (*People v. Ocean Shore Railroad, Inc. (1938) 24 Cal. App. 2d 420, 427, 75 P.2d 560*).

[*Optional*] **C. Defendant's Right to Trial in County of Residence.** The right of defendants to have their case tried in the county wherein they and their witnesses reside is a substantial one and is not to be set aside unless it actually conflicts with the higher right of a plaintiff to have an impartial trial (*Ross v. Kalin (1921) 53 Cal. App. 616, 619, 200 P. 745*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in opposition to a motion for change of venue which was made on the ground that there is reason to believe that an impartial trial cannot be had in the county in which suit was commenced pursuant to *Code Civ. Proc. § 397(b)*. The question of the availability or unavailability of an impartial trial is purely a question of fact for the trial court to determine in the exercise of its sound discretion and, as the authorities cited here point out, such discretion is fairly broad. This form includes an optional paragraph for use when the defendant's right to have the trial held in the county of his or her residence will be jeopardized by a change of venue.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. This memorandum may be accompanied by counteraffidavits [*Code Civ. Proc. § 2009*] or counterdeclarations under penalty of perjury [*Code Civ. Proc. § 2015.5*].

[3] Discussion of Authorities

[a] Establishing Unavailability of Fair and Impartial Trial

In ***People v. Ocean Shore Railroad, Inc.*** *(1938) 24 Cal. App. 2d 420, 75 P.2d 560* , the facts of which are discussed in *§ 238.120[3][b]*, the defendant railroad corporation sought change of venue on the ground that an impartial trial could not be had in the county where the proceeding was commenced. The trial court had determined that there was sufficient evidence to justify such a change of venue.

On Appeal, it was contended that the court should have held its ruling on the motion in abeyance until the impanelment of a jury and the examination of the jurors to disclose whether the defendant could or could not have had a fair and impartial trial. On this point,the court of appeal said that while it might not be an abuse of discretion for the court, if still doubtful after a consideration of the evidence adduced at a hearing on the motion for change of venue, to withhold its

decision until an attempt to secure a fair and impartial jury had been made, there is no necessity for doing so if, at such a hearing there appears sufficient reason to believe that an impartial trial cannot be had.

On the question of the trial court's determination, the court stated that whether or not a change of venue should be granted on the ground that an impartial trial cannot be had is a question first addressed to the sound discretion of the trial court. On appeal, a court of appeal may review such a ruling only to the extent of inquiring whether the same constituted an abuse of that discretion. In order to determine that the trial court abused its discretion, it must clearly appear that the evidence adduced at the hearing on the motion did not as a matter of law justify such a determination.

In this case, the evidence was found to have been sufficient to justify the trial court's determination. The burden of pointing out the deficiency in the evidence justifying the latter determination was on the appellant; however, the appellant had failed to make any attempt to do so, contenting itself with citations of error in receiving in evidence certain affidavits submitted by the moving party.

[b] Defendant's Right to Trial in County of Residence

In ***Ross v. Kalin*** *(1921) 53 Cal. App. 616, 200 P. 745* , the facts of which are *set forth in § 238.121[4][a]*, the plaintiff had sought change of venue on the ground of widespread prejudice against him in the county in which the action had been commenced and the trial court's denial of the motion was affirmed on appeal. The court of appeal ruled the right of the defendants to have their case tried in the county wherein they and their witnesses resided is a substantial one and is not to be set aside unless it actually conflicts with the higher right of a plaintiff to have an impartial trial. The trial court, in finding no such conflict, was held not to have exceeded or abused the discretion vested in it.

[4] Additional Authorities

[a] Establishing Unavailability of Fair and Impartial Trial

In *Ross v. Kalin (1921) 53 Cal. App. 616, 200 P. 745* , the plaintiff appealed from an order denying his motion for a change of venue on the ground that an impartial trial could not be had in the county. It appeared that the plaintiff had been accused in the community of Brawley of being pro-German, assaulted by a mob, beaten, tarred and feathered, chained to a tree in a public place, arrested and tried on charges of uttering threats to commit great bodily injury, fined, and imprisoned. The local newspaper published editorials approving the mob action involved. One of the plaintiff's sureties was assaulted, beaten, and further threated. Another received similar threats. Both were threatened with a boycott. The plaintiff's attorney was assaulted, beaten, boycotted, and expelled from two fraternal associations.

Applying the rules that such a motion is addressed to the sound legal discretion of the trial court and that the trial court's action cannot be disturbed on appeal unless it clearly appears that there was an abuse of discretion, the court of appeal stated that it could not be said to have appeared that the trial court had abused its discretion unless the uncontroverted facts necessarily afford reason to believe that an impartial trial could not be had in the county.

The defendants' affidavits admitted that there was prejudice against the plaintiff in the City of Brawley but denied that it existed elsewhere in the county. The court concluded that some 20 months before the hearing, there had been prejudice against the plaintiff in the minds of a large number of residents, but that probably no more than 300 residents out of 8,000 to 12,000 potential jurors bore any prejudice against the plaintiff at any time. The court added that although the very existence of such a widespread prejudice as claimed by the plaintiff would tend to make it difficult, if not impossible, to procure proof thereof, these circumstances would not justify the court in ignoring the rules of evidence to base its order on suspicion, conjecture, or hearsay. Accordingly, it concluded that the trial court did not abuse its discretion.

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[Reserved]

§§ 238.122[Reserved]

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CHAPTER 238 VENUE
PART II. FORMS
C. Convenience of Witnesses and Promotion of Ends of Justice

23-238 California Points & Authorities § 238.140

§ 238.140 Supporting Motion for Change of Venue to County Other Than County in Which Suit Was Commenced-- Convenience of Witnesses and Ends of Justice Would Be Promoted Thereby [Code Civ. Proc. §§ 397(c), 398]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION FOR
vs.	)	CHANGE OF VENUE
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Dept: _____
	)	Trial Date: None set

_____

THE COURT MAY PROPERLY ORDER A CHANGE IN THE PLACE OF THE TRIAL OF AN ACTION WHEN THE CONVENIENCE OF WITNESSES AND THE ENDS OF JUSTICE WOULD BE PROMOTED BY THE CHANGE.

A. Statutory Authority for Motion. The court may, on motion, change the place of trial when the convenience of witnesses and the ends of justice would be promoted by the change (*Code Civ. Proc. § 397(c)*).

B. Transfer Mandatory. [*See § 238.120[1], Paragraph B.*]

C. Competence of Witnesses. The convenience of witnesses will be considered as a ground for an order granting a change of venue when it is shown that their proposed testimony is admissible, relevant, and material to some issue in the case as shown by the record before the court (*Peiser v. Mettler (1958) 50 Cal. 2d 594, 328 P.2d 953*).

[*EITHER*]

D. Convenience of Witnesses. Convenience of witnesses is shown by the fact that the residence of all of the witnesses is in the county to which the transfer of the cause is requested (*Harden v. Skinner & Hammond (1955) 130 Cal. App. 2d 750, 754, 279 P.2d 978*).

[*OR*]

D. Convenience of Witnesses. Although the mere numerical majority of witnesses on one side or the other does not necessarily determine the merits of a motion on this ground, the court may permit the trial to be had as near as possible to the residences of the greatest number of witnesses (*Harden v. Skinner & Hammond (1955) 130 Cal. App. 2d 750, 754, 279 P.2d 978*).

E. Determination as to Ends of Justice. In determining that the ends of justice will be promoted by a change of venue, the trial court may rely not only on the direct facts set forth in the affidavits, but also on any reasonable and relevant inference arising therefrom (*Harden v. Skinner & Hammond (1955) 130 Cal. App. 2d 750, 755, 279 P.2d 978* .)

[*Optional*] **F. Convenience of Party.** When the serious illness of a party to an _____ [action *or* proceeding] will prevent his/her traveling to attend trial in another county and his/her testimony is material, such facts may justify an order changing the place of trial to the county of his/her residence; in such circumstances, the ends of justice would be promoted by the transfer (*Simonian v. Simonian (1950) 97 Cal. App. 2d 68, 69, 217 P.2d 157*).

[*Optional*] **G. Convenience of Employees of Parties.** When a party proposes to call as witnesses the employees of the adverse party, they are ordinary witnesses as to that party and the general rule that the convenience of employees of the litigants should not be considered on a motion for a change of venue on the ground that the convenience of witnesses and the ends of justice would be promoted thereby does not apply, and the court may properly consider their convenience (*Harden v. Skinner & Hammond (1955) 130 Cal. App. 2d 750, 279 P.2d 978*).

[*Optional*] **H. Convenience of Expert Witnesses.** The convenience of expert witnesses who have personal knowledge of the facts on which their testimony is to be based may be considered in determining whether change of venue should be granted on the ground that the convenience of witnesses and the ends of justice will be promoted thereby (*Security Investment Co. v. Gifford (1918) 179 Cal. 277, 278, 176 P. 444*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted in support of a motion for change of venue by either party after the filing of an answer and the consequent framing of all the issues in support of a motion for change of venue on the ground that the convenience of that party's witnesses and the ends of justice would be promoted thereby [*see Code Civ. Proc. § 397(c)*]. For discussion of the law applicable to the motion, see California Forms of Pleading and Practice, *Venue*.

Where appropriate, counsel should insert argument in the form showing the relationship between the facts of the case and the points of law stated. This memorandum should also be accompanied by supporting affidavits as discussed in *§ 238.30[2][a][i]*. Affidavits in support of a motion for change of venue on the ground that the convenience of witnesses and the ends of justice would be promoted thereby must set forth the names of the witnesses, the nature of the testimony expected from each, and the reasons why the attendance of each would be inconvenient [*Peiser v. Mettler (1958) 50 Cal. 2d 594, 328 P.2d 953]* .

[3] Discussion of Authorities

[a] Competence of Witnesses

In ***Peiser v. Mettler*** *(1958) 50 Cal. 2d 594, 328 P.2d 953* , the defendant had sought change of venue from Los Angeles County to Kern County on the ground, among others, that the convenience of witnesses and the ends of justice would be promoted thereby. It was conceded that the witnesses whose convenience was to be considered resided in Kern County.

The Supreme Court stated the general rule that before the convenience of witnesses may be considered for change of venue purposes, it must be shown that their proposed testimony is admissible, relevant, and material to some issue in the case as shown by the record before the court. The Court added that the affidavits in support of the motion must set forth the names of the witnesses, the nature of the testimony expected from each, and the reasons why the attendance of each would be inconvenient. The convenience of the parties is not to be considered on such a motion. And, generally, the convenience of experts should not be considered on such motions unless they have a personal knowledge of the facts on which their testimony is to be based.

The affidavits filed in support of the motion in this case revealed that the witnesses would have testified as to matters not material to the issues of the case as presented on the motion for change of venue. The Court concluded that the record did not show that the prospective witnesses would testify to facts within their knowledge material to the issues of the case, as distinguished from expert opinion evidence of value, and, thus, that the trial court had erroneously granted the motion for change of venue.

[b] Convenience of Witnesses

Harden v. Skinner & Hammond *(1955) 130 Cal. App. 2d 750, 279 P.2d 978* , involved an action for dissolution of an alleged partnership by a plaintiff claiming that he had been a partner pursuant to an oral agreement. Although filed in San Francisco, the plaintiff sought change of venue on the ground of the promotion of the convenience of witnesses and the ends of justice, showing by affidavits that all of his witnesses resided in the county to which he sought to have the action transferred, rather than in the county of suit where the defendant's principal place of business was situated. In affirming the trial court's order changing venue, the court of appeal noted the absence of any showing by the defendant that its witnesses would be inconvenienced by the change and that, although the witnesses lived within 100 miles of the county of suit and could be subpoenaed, it was apparent that there was a sufficient showing of the convenience of the

plaintiff's witnesses since all of them lived in the county to which transfer was ordered. The court added that although the mere numerical majority of the witnesses on one side or the other does not necessarily determine the merits of the motion, it was clear that a court cannot be said to have abused its discretion if it permits the trial to be had as near as possible to the residences of the greatest number of witnesses.

[c] Determination as to Ends of Justice

In ***Harden v. Skinner & Hammond*** *(1955) 130 Cal. App. 2d 750, 279 P.2d 978* , the facts of which are discussed in *§ 238.140[3][b]*, the court of appeal affirmed the trial court's order granting the plaintiff a change of venue from San Francisco to Santa Clara County on the ground that the convenience of witnesses and the ends of justice would be promoted thereby. There was a sufficient showing as to the convenience of the witnesses. However, aside from the bare claim that the ends of justice would be served by the change, there was no specific statement of the facts relied on to support that averment. The court noted that there must be some evidence that the ends of justice will be served by the change before the motion can properly be granted, but that this does not mean the evidence must be direct. The trial court may rely not only on the direct facts set forth in the affidavits, but also on any reasonable and relevant inference arising therefrom.

There were several logical and valid inferences arising from the statements made in the affidavits to support the trial court's conclusion that the ends of justice would be better served by moving the trial closer to the witnesses. The obvious savings in the witnesses' time and expense in traveling to and from the place of trial promoted the ends of justice, as did the fact that they would be accessible for immediate recall if further testimony were desired, thus preventing delays. Moreover, the proximity of the defendants' office to the place of trial in Santa Clara County presumably made the production of records more expeditious. Accordingly, the court concluded that the trial court was justified in inferring that justice would be promoted by the change.

[d] Convenience of Party

In ***Simonian v. Simonian*** *(1950) 97 Cal. App. 2d 68, 217 P.2d 157* , the defendant appealed from an order granting a change of venue from San Francisco to Los Angeles, the county of the plaintiff's residence on the ground that the convenience of witnesses and the ends of justice would be promoted thereby. The case involved the dissolution of a partnership in which the testimony of the parties was material and important. The plaintiff's affidavit recited that he resided in Los Angeles, had had a heart attack, was confined in a sanatorium, and might suffer serious consequences to his life if compelled to go to San Francisco to prosecute the action.

The court noted that ordinarily the convenience of a litigant is not considered on motion for change of venue. However, the court stated, the code [former Code Civ. Proc. § 397(3) (*now see Code Civ. Proc. § 397(c)*)] authorizes the court to consider the ends of justice as well as the convenience of witnesses, and when one party who is a material witness cannot safely travel to the other county to give his testimony by reason of his physical condition, the ends of justice would be promoted by transferring the trial to the county of his residence. Accordingly, it was concluded that there was no abuse of discretion by the trial court in granting the change of venue.

[e] Convenience of Employees of Parties

In ***Harden v. Skinner & Hammond*** *(1955) 130 Cal. App. 2d 750, 279 P.2d 978* , in which the trial court's grant of a change of venue on the ground of the convenience of witnesses and the ends of justice in favor of the plaintiff was affirmed, the plaintiff had indicated by affidavit that he intended to call nine witnesses who were employees of the defendant and that their convenience was to be considered together with the convenience of other proposed witnesses. The court of appeal noted that the testimony of the nine employee-witnesses would be relevant and material and that their testimony was properly considered by the lower court in granting the motion. While it is generally stated, said the court, that the convenience of employees of the litigants should not be considered on such a motion, these witnesses

were not being called by their employer to testify for that employer. They were being called by the adverse party and so were, as to him, ordinary witnesses.

[f] Convenience of Expert Witnesses

In ***Security Investment Co. v. Gifford*** *(1918) 179 Cal. 277, 176 P. 444* , the plaintiff moved for a change of venue from San Diego County to Butte County on the ground of the convenience of witnesses. The trial court denied the motion and transferred the case to Fresno County. On appeal, the Supreme Court reversed the trial court's order.

In opposing the plaintiff's motion, the defendant submitted an affidavit naming 12 witnesses, 11 of whom were expert witnesses having no knowledge of the facts in the case. The Supreme Court stated that the convenience of expert witnesses, except when they also have personal knowledge of the facts on which their testimony is to be based, should not be considered in determining the question of the convenience of witnesses.

[4] Additional Authorities

[a] Convenience of Witnesses

In *Richfield Hotel Management, Inc. v. Superior Court (1994) 22 Cal. App. 4th 222, 27 Cal. Rptr. 2d 161* , the defendant in a wrongful termination action sought change of venue from San Mateo County to Tulare County on the ground of the promotion of the convenience of the witnesses and the ends of justice by showing that all of the designated witnesses lived or worked, all relevant events allegedly took place and all relevant documents were located in Tulare County. In issuing a peremptory writ of mandate directing the trial court to vacate its order denying petitioner's motion for change of venue, the court noted that petitioner's evidence establishing the convenience of witnesses had not been disputed (*22 Cal. App. 4th 222, 227)* .

In *Pearson v. Superior Court (1962) 199 Cal. App. 2d 69, 18 Cal. Rptr. 578* , the defendant in a divorce action sought change of venue from San Francisco to San Diego County on the ground of the promotion of the convenience of witnesses and the ends of justice on a showing that 11 of her witnesses resided in the county to which she sought the change. In granting a writ of mandate compelling the trial court to vacate and set aside its order denying the defendant's motion, the court of appeal noted that the defendant had not shown that he intended to call any witnesses and did not deny any of the plaintiff's affidavits. The court stated that the convenience of witnesses is shown by the fact that the residence of all the witnesses is in the county to which the transfer of the cause is requested.

The facts and procedural background of *Lieberman v. Superior Court (1987) 194 Cal. App. 3d 396, 239 Cal. Rptr. 450* , are discussed in *§ 238.141[4][a]*. The court of appeal, citing among other cases *Simonian v. Simonian (1950) 97 Cal. App. 2d 68, 69, 217 P.2d 157* (*discussed under§ 238.140[3][d]*), acknowledged that an exception to the rule prohibiting consideration of convenience to a party exists when the serious illness of a party will prevent his or her traveling to attend the trial in the other county and his or her testimony is material (*194 Cal. App. 3d 396, 401)* . The court applied the exception, however, in support of its issuance of a writ of mandate to compel the trial court to vacate its order transferring venue from the county of plaintiff's residence (*194 Cal. App. 3d 396, 403)* .

[b] Convenience of Employees Of Parties

The facts and procedural background of *Lieberman v. Superior Court (1987) 194 Cal. App. 3d 396, 239 Cal. Rptr. 450* , are discussed in *§ 238.141[4][a]*. The court of appeal, although holding it inapplicable to the case before it, acknowledged that a limited exception to the rule prohibiting consideration of the convenience of employees of a party on a motion for change of venue under Code Civ. Proc. § 397(3) (*now see Code Civ. Proc. § 397(c)*) exists when the employees are called as witnesses by the adverse party rather than on behalf of their employer (*194 Cal. App. 3d 396, 401)* .

In *J.C. Millett Co. v. Latchford-Marble G. Co. (1959) 167 Cal. App. 2d 218, 334 P.2d 72* , the court of appeal affirmed the lower court's order granting a motion for change of venue on the ground of the promotion of the convenience of witnesses and the ends of justice in favor of the plaintiff. Certain witnesses who resided in the county to which the transfer was sought were employees of the defendant who the plaintiff claimed the defendant had enticed from his employ and who the plaintiff indicated would be called as adverse witnesses under former Code Civ. Proc. § 2055 [now see *Evid. Code § 776*]. As to the convenience of these witnesses, the court noted that while generally the convenience of the employees of either party will not be considered, when such employees are being called by an adverse party, the court may properly consider their convenience.

[c] Determination as to Ends of Justice

In *Minatta v. Crook (1959) 166 Cal. App. 2d 750, 333 P.2d 782* , the plaintiff was a truck operator who sought sums claimed due him as freight undercharges on lumber hauled for the defendants from Northern California to Southern California. Suit was filed in Los Angeles, where five out of the six individual defendants resided, where the defendant partnership had its main office and records, and where the terminals involved were located. The defendant sought change of venue on the ground of the promotion of the convenience of the witnesses and the ends of justice to Humboldt County where certain of its witnesses resided.

In affirming the trial court's order denying the motion, the court of appeal stated that there were several logical and valid inferences arising from the record that would support the trial court's determination that the ends of justice would be better served by retaining the action in Los Angeles. First, the action was properly brought where five out of the six individual defendants resided, where the main office of the defendant partnership was located, and where its records were kept. Moreover, it was not unreasonable to infer that the records that might be subpoenaed would include voluminous memoranda, accounting materials, and correspondence.

The court further stated that the trial court was not obliged to ignore the obvious advantages of having the records conveniently accessible to the trial court's process for purposes of discovery, examination, pretrial proceedings, and the trial itself. Substantial considerations of time, expense, and convenience were obviously material to the issue. While the fact that a defendant's books and records are located in another county is not relevant to the question of convenience of witnesses, such facts may be considered on the question of whether the ends of justice will be served by making more expeditious the production of records. Moreover, the action was brought by the plaintiff in the county in which most of the deliveries were made. The physical characteristics of the railhead facilities there had a direct bearing on essential issues in the case, and the trial court could reasonably have concluded that the ends of justice would have been better served by retaining the action where the terminals were located and where witnesses qualified to testify as to their nature would be readily available.

California Points & Authorities

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Volume 23 Chapters 230-239 TRUST DEEDS---to---WORKERS' COMPENSATION
CHAPTER 238 VENUE
PART II. FORMS
C. Convenience of Witnesses and Promotion of Ends of Justice

23-238 California Points & Authorities § 238.141

§ 238.141 Opposing Motion for Change of Venue to County Other Than County in Which Suit Was Commenced on Ground That Convenience of Witnesses and Ends of Justice Would Be Promoted Thereby [Code Civ. Proc. §§ 397(c), 398]--Moving Party Must Show Both Conditions Met

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MEMORANDUM IN OPPOSITION TO MOTION
vs.	)	FOR CHANGE OF VENUE
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Dept: _____
	)	Trial Date: None set

_____

A MOTION FOR CHANGE OF VENUE ON THE GROUND THAT THE CONVENIENCE OF WITNESSES AND THE ENDS OF JUSTICE WOULD BE PROMOTED THEREBY WILL BE DENIED WHEN THE MOVING PARTY CANNOT SHOW THAT BOTH CONDITIONS WILL BE MET.

A. Propriety of Chosen Venue. [*See § 238.70[1], Paragraph A.*]

B. Showing of Convenience and Justice. In the absence of a showing by the moving party that both the convenience of witnesses and the ends of justice will be promoted by a change of venue pursuant to *Code of Civil Procedure Section*

397(c), the motion will be denied (*Willingham v. Pecora (1941) 44 Cal. App. 2d 289, 295, 112 P.2d 328*).

C. Competence of Witnesses. The convenience of witnesses may not be considered as a ground for an order granting a change of venue on the ground that the convenience of witnesses and the ends of justice would be promoted thereby in the absence of a showing that their proposed testimony is admissible, relevant, and material to some issue in the case as shown by the record before the court (*Peiser v. Mettler (1958) 50 Cal. 2d 594, 328 P.2d 953*).

D. Showing by Moving Party. A motion for change of venue on the ground that the convenience of witnesses and the ends of justice would be promoted thereby will be denied when the moving party relies on the weakness of the opposition rather than on the strength of his/her own showing (*Chaffin Constr. Co. v. Maleville Bros. (1957) 155 Cal. App. 2d 660, 664, 318 P.2d 196*).

[*Optional*] **E. Inconvenience of Nonmoving Party's Witnesses.** If the affidavit of the party opposing a motion for change of venue on this ground shows that his/her witnesses will be inconvenienced by the change, there is no abuse of the trial court's discretion in denying the motion if the affidavits of the nonmoving party in opposition to the motion show that his/her witnesses will also be inconvenienced by the requested change (*McNeill & Co. v. Doe (1912) 163 Cal. 338, 341, 125 P. 345*).

[*Optional*] **F. Convenience of Parties.** The inconvenience of the parties in attending the trial is not a factor to be considered in a motion for change of venue on the ground that the convenience of witnesses and the ends of justice would be promoted thereby (*Wrin v. Ohlandt (1931) 213 Cal. 158, 160, 1 P.2d 991*).

[*Optional*] **G. Convenience of Employees and Experts.** Neither the convenience of experts nor of employees should be considered in determining the question of convenience of witnesses on application for change of venue and, as to experts, an exception should be made only when the experts have a personal knowledge of the facts on which their testimony is to be based (*Security Investment Co. v. Gifford (1918) 179 Cal. 277, 278, 176 P. 444*).

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Comments

[a] Use of Form

This memorandum may be submitted by either party in opposing a motion for change of venue made by the opposing party on the ground that the convenience of witnesses and the ends of justice would be promoted thereby. For a memorandum for use by a plaintiff in seeking retention of an action in the county of suit on the ground that the convenience of witnesses or the ends of justice would thereby be promoted (in opposition to a defendant's motion for change of venue to the proper court) see *§ 238.140*.

Where appropriate, counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. This memorandum should be accompanied by supporting affidavits as discussed in *§*

238.30[3][a][i].

[3] Discussion of Authorities

[a] Showing of Convenience and Justice

In ***Willingham v. Pecora*** *(1941) 44 Cal. App. 2d 289, 112 P.2d 328* , the trial court's order denying a change of venue for the convenience of the witnesses under Code Civ. Proc. § 397(3) (*now see Code Civ. Proc. § 397(c)*) was affirmed. The defendants had sought the change but the fact that many of the defendants' witnesses resided in the county to which they sought to have the trial transferred was not a deciding factor. The plaintiff submitted affidavits showing that his witnesses were located in the county of suit. The trial court, accordingly, was justified in concluding that the convenience of witnesses and the ends of justice would not be promoted by a change of venue. The court noted that the statute contains conjunctive conditions, both of which must occur before the moving party is entitled to change the place of trial. It is not only necessary that the convenience of witnesses be promoted but equally essential that the ends of justice be promoted before the court is justified in granting the motion. The burden of proving both of these conditions is necessarily on the moving party. The court added that the trial court could have properly denied the motions on the ground that the ends of justice would not have been promoted by the five-month delay in the trial of the action that would have resulted if the motion for change of venue had been granted.

[b] Competence of Witnesses

In ***Peiser v. Mettler*** *(1958) 50 Cal. 2d 594, 328 P.2d 953* , the facts of which are *covered in § 238.140[3][a]*, the trial court's denial of the defendant's motion for change of venue on the ground, among others, that the convenience of witnesses and the ends of justice would be promoted thereby, was affirmed. The affidavits the defendant filed revealed that the witnesses would have testified as to matters not material to the issues of the case as presented on the motion. The Supreme Court stated the general rule that before the convenience of witnesses may be considered for change of venue purposes, it must be shown that their proposed testimony is admissible, relevant, and material to some issue in the case as shown by the record before the court.

[c] Showing by Moving Party

In ***Chaffin Constr. Co. v. Maleville Bros.*** *(1957) 155 Cal. App. 2d 660, 318 P.2d 196* , a contract action, the defendants' motion for change of venue on the ground that the convenience of the witnesses and the ends of justice would be promoted thereby was held properly denied. The defendants contended that the plaintiff's witnesses would be only its officers and employees and that their convenience could not be considered. However, the defendants' affidavits failed to inform the trial court as to what witnesses they intended to call or as to what they would testify. The court noted the general rule that the determination of a motion of this kind is addressed to the sound discretion of the trial court and that its determination will not be disturbed on appeal unless it manifestly appears that there is a clear abuse of discretion on the part of the trial judge. However, it noted, on a motion of this kind the moving party must stand on the strength of his own showing rather than on the weakness, if any, of the opposition. Thus, even assuming that the plaintiff's only witnesses would be its officers and employees, in the absence of any showing as to the convenience of the defendants' witnesses, the court was unable to hold that the trial court had abused its discretion in finding that the convenience of witnesses and the ends of justice did not require a change of venue.

[d] Inconvenience to Nonmoving Party's Witnesses

In ***McNeill & Co. v. Doe*** *(1912) 163 Cal. 338, 125 P. 345* , the defendant's motion for change of venue on the ground of the convenience of witnesses was held to have been properly denied. While the defendant submitted affidavits that tended to show some inconvenience in the attendance of his witnesses should the trial be held in the county in which suit was filed, the affidavit of the plaintiff in some degree tended to show a like inconvenience to the plaintiff's witnesses if the trial was transferred to the requested county. The court of appeal stated that the matter of granting a

change of the place of trial on the ground of the convenience of witnesses is a matter addressed to the sound discretion of the trial court, and a court of appeal will not interfere with its exercise unless such discretion has been abused or injustice done by the ruling. However, in view of the affidavits submitted by the nonmoving party that his witnesses would be inconvenienced by the change sought by the moving party, the court could not find that there had been such an abuse of discretion.

[e] Convenience of Parties

In ***Wrin v. Ohlandt*** *(1931) 213 Cal. 158, 1 P.2d 991* , the trial court's denial of a plaintiff's motion for change of venue on the ground of the convenience of witnesses was affirmed. The issue in the case was the reasonable value of medical services rendered by two doctors. The moving party's affidavits showed that two of the three proposed witnesses were real parties in interest and that the other witness was an expert witness. The defendant's affidavits also revealed that two of her witnesses would testify on the issue. The Supreme Court ruled that the inconvenience of the parties in attending the trial is not a factor to be considered in a motion for change of venue for the convenience of witnesses. The remaining witness for the moving party was an expert witness, and there was no showing that he had any personal knowledge of any of the facts in the case. Accordingly, the Court concluded that there was no showing of any abuse of discretion on the part of the trial court in denying the motion. And, said the Court, a motion for a change of venue on the ground of the convenience of witnesses rests largely in the discretion of the trial court, the exercise of which will not be disturbed on appeal in the absence of a showing of its abuse.

[f] Convenience of Employees and Experts

In ***Security Investment Co. v. Gifford*** *(1918) 179 Cal. 277, 176 P. 444* , the facts of which are discussed in *§ 238.140[3][f]*, the Supreme Court noted that the defendant, in opposing the plaintiff's motion for change of venue on the ground of the convenience of witnesses, had submitted an affidavit naming 12 witnesses whose convenience should also be considered, However, 11 of those witnesses were expert witnesses who had no personal knowledge of the facts in the case, and the other witness was an employee of the defendant. Stated the Court, neither the convenience of experts nor of employees should be considered in determining the question of the convenience of witnesses, except when the experts also have personal knowledge of the facts on which their testimony is to be based.

[4] Additional Authorities

[a] Showing of Convenience and Justice

Lieberman v. Superior Court (1987) 194 Cal. App. 3d 396, 239 Cal. Rptr. 450 , a mandate proceeding, arose out of an action filed in the Los Angeles County Superior Court for personal injuries sustained by plaintiff when the Volkswagen micro bus in which he was a passenger rolled over on a stretch of straight highway in Inyo County and he was rendered a paraplegic. Defendants named were Volkswagenwerk, A.G., Volkswagen of America, Inc., Volkswagen Pacific, Inc., and the State of California. The action against the Volkswagen defendants was based on negligence, breach of warranty, and products liability, and the action against the state was based on an alleged dangerous and defective condition of the road on which the accident occurred. Volkswagen of America's motion for change of venue to Inyo County for the convenience of witnesses and to further the ends of justice was denied without prejudice. Subsequently, Volkswagenwerk Aktiengesellschaft was served with a summons and complaint; it answered the complaint and concurrently filed a cross complaint against the state, which moved to change venue to Inyo County under *Gov. Code § 955.2*. The other defendants joined in this motion. The state's motion was denied on the ground the state was not a defendant in an action for death or injury but a cross defendant in an action for indemnity. The state then moved to change venue on the ground of convenience of 15 named witnesses, all but two of whom were its employees, and the other defendants joined in the motion. Plaintiff filed declarations in opposition to the motion, in which it was claimed (1) the two nonemployee witnesses named in the state's motion had agreed to testify in Los Angeles, that he and the driver of the micro bus, the only eyewitnesses to the accident, would not be served by the change of venue, and that plaintiff's continuing medical problems would make it extremely inconvenient and difficult for him to attend trial

outside Los Angeles. The trial court granted the motion of both the state and the defendant companies, and after his motion for reconsideration was denied, plaintiff filed a petition for writ of mandate seeking to compel the trial court to vacate its order.

The court of appeal granted the writ, stating that to grant a motion under Code Civ. Proc. § 397(3) (now see *Code Civ. Proc. § 397(c)*), it is not only necessary that convenience of witnesses be served but that the ends of justice be promoted as well (*194 Cal.App.3d 396, 401)* . With respect to the ends of justice, the court pointed out that the trial court was correct in considering the convenience of petitioner in ruling on the venue motions, given the possibility that his disability might prevent him from attending the trial and the obvious materiality of his testimony. The court said that it is plain these two factors weigh heavily in favor of maintaining the action in Los Angeles, quite apart from the presumptive correctness of petitioner's choice of venue, and that additionally, particularly in an action in which the plaintiff's physical condition is an issue at trial, it is important for the jury to view the plaintiff. The court said that when transfer of venue might foreclose the possibility of the plaintiff attending the trial, the court should take special heed of the statutory admonition permitting transfer only if the "ends of justice" are served. The court concluded that this is not a matter, as the lower court remarked, of being "sympathetic" to a disabled plaintiff; rather, it is a question of enforcing his rights as a litigant (*194 Cal.App.3d 396, 403)* .

[b] Convenience of Parties

The facts and procedural background of *Lieberman v. Superior Court (1987) 194 Cal. App. 3d 396, 239 Cal. Rptr. 450* , are discussed in *§ 238.141[4][a]*. In granting the writ, the court said that although a motion made under Code Civ. Proc. § 397(3) (*now see Code Civ. Proc. § 397(c)*) is addressed to the trial court's discretion, that discretion is not unfettered, and that the court may not consider the convenience of the parties in passing on the motion, except when the serious illness of a party will prevent his or her traveling to attend the trial in the other county and his or her testimony is material (*194 Cal. App.3d 396, 401)* . As pointed out above, the court concluded the change of venue would prevent plaintiff's attending the trial and that his testimony was material (*194 Cal.App.3d 396, 403)* .

[c] Convenience of Employees and Experts

The facts and procedural background of *Lieberman v. Superior Court (1987) 194 Cal. App. 3d 396, 239 Cal. Rptr. 450* , are discussed in *§ 238.141[4][a]*. In granting the writ, the court said that although a motion made under Code Civ. Proc. § 397(3) (*now see Code Civ. Proc. § 397(c)*) is addressed to the trial court's discretion, that discretion is not unfettered, and that the court may not consider the convenience of employees of the parties in passing on the motion except when the employees are called as witnesses by the adverse party rather than on behalf of their employer (*194 Cal.App.3d 396, 401)* . The court held that the trial court erroneously considered the convenience of the state's employees on both the state's motion and the motion of the defendant companies (*194 Cal.App.3d 396, 402)* . The court said that the state's employees were being called, first and foremost, by the state itself for the purpose, presumably, of establishing a defense to the cross complaint. Properly, then, the state's motion should have been denied (*194 Cal.App.3d 396, 402)* . The court said that denial of the state's motion would necessarily have rendered the defendant companies' motion, which was essentially predicated on the state's motion, moot (*194 Cal. App. 3d 396, 402)* . The court explained that since the state's employees would be compelled to appear in Los Angeles under the determination of the state's motion, they would be available to the defendant companies in Los Angeles, and that to allow the companies to assert the inconvenience of the state's employees would simply allow the state to accomplish indirectly what it is directly prohibited from doing (*194 Cal. App. 3d 396, 402-403)* . The court declared that the law does not, and it would not, countenance this, and that under these circumstances, it was an abuse of discretion for the trial court to have granted the motions of the state or the companies regarding the state employee witnesses (*194 Cal.App.3d 396, 403)* .

California Points & Authorities

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Volume 23 Chapters 230-239 TRUST DEEDS---to---WORKERS' COMPENSATION
CHAPTER 239 WORKERS' COMPENSATION EXCLUSIVE REMEDY DOCTRINE

23-239 California Points & Authorities 239.syn

AUTHOR: Carolyn Rashby

§ 239.syn Synopsis to Chapter 239: WORKERS' COMPENSATION EXCLUSIVE REMEDY DOCTRINE

§ 239.01 Scope of Chapter

§ 239.02 Related Pleading and Practice Chapters

§ 239.03 Related Points and Authorities Chapters

§ 239.04 Related California Torts Chapters

§§ 239.05-239.19 [Reserved]

§ 239.20 Supporting Contention That Workers' Compensation Exclusive Remedy Doctrine Precludes Action by Employee Against Employer--Complaint Does Not Allege Exception to Workers' Compensation Exclusivity Rule

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Failure to Allege Facts Negating Application of Act

§ 239.21 Supporting Contention That Workers' Compensation Exclusive Remedy Doctrine Precludes Action by Employee Against Employer--Plaintiff Is Employee for Workers' Compensation Purposes

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Partner as Employer of Employee of Partnership

[b] Joint Venturer as Employer of Employee of Joint Venture

[c] Employees of Separate Departments of Public Entity as Having Common Employer

[d] Juror as Employee of County

[4] Additional Authorities

[a] Drivers for Courier Service Were Employees, Not Independent Contractors

[b] Newspaper Carriers Were Employees, Not Independent Contractors

§ 239.22 Supporting Contention That Workers' Compensation Exclusive Remedy Doctrine Precludes Action by Employee Against Employer--Determination of Appeals Board That Employee Is Entitled to Compensation as Res Judicata

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Final Determination of Matter of Coverage as Res Judicata

[b] Physical Assault by Employer

[c] Compromise Settlement as Res Judicata

§ 239.23 Supporting Contention That Workers' Compensation Exclusive Remedy Doctrine Precludes Action by

Employee Against Employer--Action for Intentional or Negligent Infliction of Emotional Distress Is Within Exclusive Remedy Provisions

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Emotional Distress Claim Barred by Exclusive Remedy Provisions

[4] Additional Authorities

[a] Emotional Distress Claim Barred by Exclusive Remedy Provisions

§ 239.24 Supporting Contention That Workers' Compensation Exclusive Remedy Doctrine Precludes Action by Employee Against Employer--Power Press Injury Exception Does Not Apply--Employer Did Not Know of Potential Danger in Removing or Replacing Point-of-Operation Guard [Lab. Code § 4558]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Definition of Power Press

[b] Requirement of Actual Knowledge for Power-Press Exception

§ 239.25 Supporting Contention That Workers' Compensation Exclusive Remedy Doctrine Precludes Action by Employee Against Employer--Willful Assault Exception Does Not Apply--Employer Did Not Specifically Intend to Injure Employee [Lab. Code § 3602(b)(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Requirement of Specific Intent to Injure

[4] Additional Authorities

[a] Employer's Liability for Conduct of Co-Employee

§ 239.26 Supporting Contention That Workers' Compensation Exclusive Remedy Doctrine Precludes Action by Employee Against Employer--Actual Knowledge by Employer Required to Establish Cause of Action for Fraudulent Concealment of Work-Related Injury [Lab. Code § 3602(b)(2)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[3] Discussion of Authorities

[a] Requirement of Employer's Actual Knowledge of Industrial Injury

[4] Additional Authorities

[a] Requirement of Employer's Actual Knowledge of Industrial Injury

§ 239.27 Supporting Contention That Workers' Compensation Exclusive Remedy Doctrine Precludes Action by Employee Against Employer--Plaintiff Was Acting in Course of Employment at Time of Injury, and Injury Arose Out of Employment

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Plaintiff in Course of Employment, Not Engaged in Voluntary Social Activity

[4] Additional Authorities

[a] Plaintiff Not in Course of Employment

[i] Civil Action Allowed

[b] Plaintiff in Course of Employment

[i] Civil Action Not Allowed

§ 239.28 Supporting Contention That Workers' Compensation Exclusive Remedy Doctrine Precludes Action by Employee Against Coemployee or Third Person for Damages--Special Employment Relationship Created With Defendant

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Action Barred Against Special Employer

[b] Creation of General and Special Employment Relationship

[c] Paramount Consideration as Control Over Details of Work

[d] Factors in Determining Whether Special Employment Relationship Created

[4] Additional Authorities

[a] Action Barred Against Special Employer

[b] Creation of General and Special Employment Relationship

[c] Paramount Consideration as Control Over Details of Work

[d] Factors in Determining Whether Special Employment Relationship Created

§ 239.29 Supporting Contention That Workers' Compensation Exclusive Remedy Doctrine Precludes Action by Employee Against Parent Corporation Based on Alter Ego Theory

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Action Barred Against Parent Corporation Based on Alter Ego Theory

[4] Additional Authorities

[a] Parent Corporation's Alleged Control of Subsidiary's Budget Did Not Allow Plaintiffs to Avoid Exclusive Remedy Rule

§ 239.30 Supporting Contention That Workers' Compensation Exclusive Remedy Doctrine Precludes Action by Employee Against Non-Negligent Companies Involved in Joint Venture With Employer

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Action Barred Against Non-Negligent Member of Joint Venture

§ 239.31 Supporting Contention That Workers' Compensation Exclusive Remedy Doctrine Precludes Action by Employee Against Employer--Defendant's Concealment of Unsafe Working Conditions and Violation of Environmental Safety Regulations Were Within Compensation Bargain

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Defendant's Concealment of Unsafe Working Conditions and Violation of Environmental Safety Regulations Are Acts Within Compensation Bargain

[4] Additional Authorities

[a] Hazardous Waste Generated by Hirer of Independent Contractor Whose Employee It Injures

§ 239.32 Supporting Contention That Workers' Compensation Exclusive Remedy Doctrine Precludes Action by Employee Against Employer--California Farm Labor Contractor Act Provides No Exception [Lab. Code § 1682 et seq.]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Agricultural Laborer's Industrial Injury Subject to Workers' Compensation Exclusivity, Notwithstanding California Farm Labor Contractor Act

§ 239.33 Supporting Contention That Workers' Compensation Exclusive Remedy Doctrine Precludes Action by Employee Against Employer's Hirer

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Employee's Industrial Injury Subject to Workers' Compensation Exclusivity, and Action for Damages Against Uninsured Employer's Hirer Not Allowed

[4] Additional Authorities

[a] Hazardous Waste Generated by Hirer of Independent Contractor Whose Employee It Injures

[b] Hirer Did Not Exercise Retained Control Over Premises in Manner That Affirmatively Contributed to Subcontractor's Employee's Injury

[c] Landowner Had No Duty to Employee of Employer (Premises Occupant) for Injuries Arising From Employee's Performance of His Job on Landowner's Land

[d] Hirer Had No Liability to Injured Employee of Independent Contractor/Subcontractor When Hirer Had Not Affirmatively Contributed to Employee's Injury, Even Though Subcontractor Was Not Insured Against Workers' Compensation at Time of Employee's Injury

[e] Record Showed Triable Issues of Material Fact as to Whether Defendant, Who Was Hirer of Plaintiff-Employee's

Employer, Breached Nondelegable Regulatory Duty to Provide Fire Extinguishers, Pursuant to California Fire Code, and Whether Such Breach Affirmatively Contributed to Plaintiff's Injuries

[f] Furnishing and Abrupt Withdrawal of Safety Equipment by Hirer and General Contractor Could Be Found to Constitute Negligent Performance of Voluntary Undertaking, Affirmatively Contributing to Plaintiff's Injuries and Thereby Subjecting Defendants to Civil Liability

[g] Homeowners' Association, Which Had Contracted With Plaintiff's Employer for Security Services, Had No Liability for Injuries Received by Plaintiff When Assaulted on Homeowner's Premises

[h] Policy Considerations Holding Hirer of Subcontractor, Whose Employee Was Injured on Job as Result of Subcontractor's Negligence, Not Vicariously Liable Under Peculiar Risk Doctrine Were Equally Applicable to Claims Against Hirer's Agent and Thus Barred Civil Action Against That Agent

[i] Landowner Who Hires Independent Contractor May Be Liable to Contractor's Employee Injured by Undisclosed Hazard on Hirer's Land, Even if Hirer Does Not Retain Control Over Work

[j] Privette and Kinsman Doctrines Apply to Hirers of Subcontractors for Injuries to Those Who Worked for Those Subcontractors, Regardless of Whether Those Injured Were Employees of Subcontractors or Independent Contractors

[k] Gov. Code § 815.4 Provided Statutory Basis for Public Entity Potentially to Be Held Liable on Retained Control Theory Under Hooker and Its Progeny

§ 239.34 Opposing Contention That Workers' Compensation Exclusive Remedy Doctrine Precludes Action by Employee Against Employer--Plaintiff Was Not an Employee Within the Meaning of the Workers' Compensation Act

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Employment Relationship Requirement for Exclusive Remedy

[b] Independent Contractor Is Not an Employee

[4] Additional Authorities

[a] Independent Contractor Is Not an Employee

[b] Ski Lift Employee Not Statutory "Employee" at Time of Injury

[c] Exemption From Contractor's License Requirement Contained in Business and Professions Code Section 7049 for Work Incidental to "clearing or other work upon the land in rural districts for fire prevention purposes" Meant That Trial Court Erred in Ruling That Defendant Was Employee as Matter of Law

[d] Injured Worker Was Not Residential Employee of Homeowners

[e] Injured Worker May Sue in Tort When He Was Neither Independent Contractor Nor, for Purposes of Workers' Compensation, Employee, But Was Employee for Purposes of Labor Code Section 2750.5

§ 239.35 Opposing Contention That Workers' Compensation Exclusive Remedy Doctrine Precludes Action by Employee Against Employer--Employer Failed to Secure Payment of Workers' Compensation [Lab. Code § 3706]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Failure to Secure Payment of Workers' Compensation

[b] Lack of Intent Not a Defense

[c] Payment of Medical Bills and Wages Does Not Bar Suit for Damages

[d] Dual Employment Does Not Bar Suit for Damages Against Uninsured Employer

[e] Self-Insured Public Entities Not Permitted to Extend Coverage to Private Entities

[4] Additional Authorities

[a] Dual Employment Does Not Bar Suit for Damages Against Uninsured Employer

[b] Payment of Medical Bills and Wages Does Not Bar Suit for Damages

§ 239.36 Opposing Contention That Workers' Compensation Exclusivity Doctrine Precludes Action by Employee Against Employer--Employee Permitted to Sue Employer for Injuries Proximately Caused by Employer's Willful Assault [Lab. Code § 3602(b)(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

§ 239.37 Opposing Contention That Workers' Compensation Exclusivity Doctrine Precludes Action by Employee Against Employer--Employee Permitted to Sue Employer for Injuries Proximately Caused by Defective Product Manufactured by Employer and Transferred to Independent Third Person for Consideration [Lab. Code § 3602(b)(3)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Additional Authorities

[a] Liability of Employer as Manufacturer

§ 239.38 Opposing Contention That Workers' Compensation Exclusive Remedy Doctrine Precludes Action by Employee Against Employer--Injury Is Outside of Compensation Bargain--Defamation Action Not Subject to Exclusive Remedy Provisions

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Defamation Action Not Subject to Workers' Compensation Exclusivity

[4] Additional Authorities

[a] Cause of Action for Invasion of Privacy

§ 239.39 Opposing Contention That Workers' Compensation Exclusive Remedy Doctrine Precludes Action by Employee Against Employer--Employee Permitted to Sue Employer for Injuries Proximately Caused by Employer's False Imprisonment of Employee

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Cause of Action for False Imprisonment

§ 239.40 Opposing Contention That Workers' Compensation Exclusivity Doctrine Precludes Action by Employee Against Employer--Action Based on Aggravation of Work-Related Injury Fraudulently Concealed From Employee [Lab. Code § 3602(b)(2)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Cause of Action for Fraudulent Concealment of Plaintiff's Condition

[b] Fraudulent Concealment of Arsenic-Related Injury

[c] Fraudulent Concealment of Asbestos-Related Injury

[d] Punitive Damages

[4] Additional Authorities

[a] Fraudulent Concealment of Asbestos-Related Injury

[b] Aggravation of Pre-Existing Illness From Employer's Failure to Detect or Notify

§ 239.41 Opposing Contention That Workers' Compensation Exclusive Remedy Doctrine Precludes Action by Employee Against Employer--Action Based on Injury Caused by Absence of Power-Press Guard [Lab. Code § 4558]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] No Exclusivity Where Injury Caused by Removal of or Failure to Install Power-Press Guard

[b] Power-Press Guard Required by Manufacturer

[4] Additional Authorities

[a] No Exclusivity Where Injury Caused by Removal of or Failure to Install Power-Press Guard

[b] Definition of Power Press

§ 239.42 Opposing Contention That Workers' Compensation Exclusive Remedy Doctrine Precludes Action by Employee Against Employer--Breach of Contract Action Not Precluded

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Related Pleading and Practice Forms

[d] Related Points and Authorities

[3] Discussion of Authorities

[a] Exclusive Remedy Rule Does Not Bar Breach of Contract Action

[4] Additional Authorities

[a] Arbitration of Return to Work Under Collective Bargaining Agreement

§ 239.43 Opposing Contention That Workers' Compensation Exclusive Remedy Doctrine Precludes Action by Employee Against Employer--Injury Is Outside of Compensation Bargain--Employer's Misrepresentations Made to Induce Party to Become Employee Not Subject to Exclusive Remedy Provisions

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Action for Misrepresentations Made to Induce Employment Not Subject to Workers' Compensation Exclusivity

§ 239.44 Opposing Contention That Workers' Compensation Exclusive Remedy Doctrine Precludes Action by Employee Against Employer--Injury Is Outside of Compensation Bargain--Claim for Damages Pursuant to FEHA Premised on Defendant's Failure to Make Reasonable Accommodation for Plaintiff's Disability--Alleged Injuries Not Within Compensation Bargain [Gov. Code § 12940]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Action for Failure to Make Reasonable Accommodations for Employee's Disability Not Subject to Workers' Compensation Exclusivity

[4] Additional Authorities

[a] Alleged Discriminatory Act in Violation of FEHA and Public Policy Was Not "Substantial Factor" in Causing Subsequent Industrial Injury

[i] Exclusive Remedy Rule Applies

[b] Employee's Petition for Writ of Mandate, Seeking Differential Pay and Reinstatement Under Education Code Sections 44977 and 44987.1, Not Tort Dmages for Work-Related Injury, Was Not Preempted by Exclusivity Provisions of Workers' Compensation Law

§ 239.45 Supporting Contention That Workers' Compensation Exclusive Remedy Doctrine Precludes Action by Employee Against Coemployee--Coemployee Did Not Specifically Intend to Cause Injury [Lab. Code § 3601(a)(1)]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Coemployee Must Specifically Intend to Cause Injury

§ 239.46 Supporting Contention That Exclusive Remedy Doctrine Precludes Action by Employee Against Coemployee--Coemployee Acted Within the Scope of Employment [Lab. Code § 3601]

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[c] Opposing Points and Authorities

[d] Related Pleading and Practice Forms

[3] Discussion of Authorities

[a] Workers' Compensation Sole Remedy in Action Against Coemployee

[b] Requirement of Coemployee's Intent to Serve Employer

[4] Additional Authorities

[a] Workers' Compensation Sole Remedy in Action Against Coemployee

§ 239.47 Opposing Contention That Workers' Compensation Exclusive Remedy Doctrine Precludes Action by Employee Against Coemployee--Injury Caused by Coemployee's Willful and Unprovoked Physical Act of Aggression or Intoxication

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Action Against Coemployee Not Barred by Workers' Compensation Exclusivity

[b] Harm to Employee Need Not Be Physical

§ 239.48 Opposing Contention Workers' Compensation Exclusive Remedy Doctrine Precludes Action by Employee Against Coemployee--Coemployee Was Acting Outside Scope of Employment

[1] FORM

[2] Comments

[a] Use of Form

[b] Argument

[3] Discussion of Authorities

[a] Workers' Compensation Not Exclusive Remedy Where Coemployee Acted Outside Scope of Employment

[b] Requirement of Coemployee's Intent to Serve Employer

Carolyn Rashby n*

FOOTNOTES:
(n16)Footnote *. Carolyn Rashby is an attorney and freelance writer, specializing in labor and employment law.

California Points & Authorities

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Volume 23 Chapters 230-239 TRUST DEEDS---to---WORKERS' COMPENSATION
CHAPTER 239 WORKERS' COMPENSATION EXCLUSIVE REMEDY DOCTRINE
PART I. INTRODUCTION

10-239 California Points & Authorities § 239.01

AUTHOR: Carolyn Rashby

§ 239.01 Scope of Chapter

This chapter contains memoranda of points and authorities that may be submitted in actions in which the applicability of the workers' compensation exclusive remedy doctrine is at issue. It includes memoranda for use in supporting and opposing contentions regarding the applicability of the doctrine in actions brought by the employee against his or her employer, and supporting and opposing the contention that the doctrine applies to bar actions against coemployees.

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIDefensesExclusivity ProvisionsWorkers' Compensation & SSDIRemedies Under Other LawsExclusivityGeneral Overview

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PART I. INTRODUCTION

10-239 California Points & Authorities § 239.02

AUTHOR: Carolyn Rashby

§ 239.02 Related Pleading and Practice Chapters

For discussion and forms relating to workers' compensation generally, see California Forms of Pleading and Practice, Ch. 577, *Workers' Compensation* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIDefensesExclusivity ProvisionsWorkers' Compensation & SSDIRemedies Under Other LawsExclusivityGeneral Overview

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10-239 California Points & Authorities § 239.03

AUTHOR: Carolyn Rashby

§ 239.03 Related Points and Authorities Chapters

For discussion and forms relating to wrongful termination, see Ch. 100, *Employer and Employee: Wrongful Termination and Discipline* .

For discussion and forms relating to employer's liability for employee's torts, see Ch. 100A, *Employer and Employee: Respondeat Superior* .

Legal Topics:

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

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10-239 California Points & Authorities § 239.04

AUTHOR: Carolyn Rashby

§ 239.04 Related California Torts Chapters

For discussion relating to the exclusive remedy doctrine generally, see Levy, Golden & Sacks, California Torts, Ch. 10 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIDefensesExclusivity ProvisionsWorkers' Compensation & SSDIRemedies Under Other LawsExclusivityGeneral Overview

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10-239 California Points & Authorities §§ 239.05-239.19

AUTHOR: Carolyn Rashby

[Reserved]

§§ 239.05[Reserved]

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CHAPTER 239 WORKERS' COMPENSATION EXCLUSIVE REMEDY DOCTRINE
PART II. FORMS

10-239 California Points & Authorities § 239.20

AUTHOR: Carolyn Rashby

§ 239.20 Supporting Contention That Workers' Compensation Exclusive Remedy Doctrine Precludes Action by Employee Against Employer--Complaint Does Not Allege Exception to Workers' Compensation Exclusivity Rule

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S ACTION AGAINST DEFENDANT FOR DAMAGES IS PRECLUDED BY THE EXCLUSIVE REMEDY PROVISIONS OF THE WORKERS' COMPENSATION ACT BECAUSE PLAINTIFF'S COMPLAINT DOES NOT ALLEGE AN EXCEPTION TO THE WORKERS' COMPENSATION EXCLUSIVITY RULE.

A. When Workers' Compensation Is Exclusive Remedy. When the conditions of compensation set forth in *Labor Code Section 3600* concur, the right to recover such compensation, pursuant to the provisions of *Labor Code Section 3201 et seq.* is, with certain exceptions specified in *Labor Code Sections 3602, 3706,* and *4558,* the exclusive remedy for injury or death of an employee against the employer (*Lab. Code § 3602*).

B. Failure to Allege Facts Negating Application of Act. An action may not be maintained against an employer for damages for injuries to an employee when the complaint affirmatively alleges facts showing that the injuries occurred within the course and scope of the employee's employment without pleading facts negative to the application of the Workers' Compensation Act. If the complaint affirmatively alleges facts indicating coverage by the workers' compensation law, but fails to state additional facts negating the application of the exclusive remedy provision of that law, no civil action will lie and the complaint is subject to a general demurrer (*Singleton v. Bonnesen (1955) 131 Cal. App. 2d 327, 331, 280 P.2d 481* ; *Colombo v. State of California (1991) 3 Cal. App. 4th 594, 599, 5 Cal. Rptr. 2d 567*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that plaintiff's action against defendant for damages is precluded by workers' compensation exclusivity provisions because plaintiff has failed to allege facts negative to the application of the exclusive remedy rule.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that plaintiff's action is precluded by the exclusive remedy provisions of the Workers' Compensation Act because plaintiff has failed to allege facts to show that the provisions of the Act are not plaintiff's exclusive remedy, for example, in a demurrer. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should demonstrate that the complaint alleges facts showing that plaintiff was defendant's employee and the injuries occurred within the course and scope of the employment. Counsel also should show that plaintiff has failed to allege any facts in the complaint which would negate the application of the workers' compensation exclusivity rule, such as facts indicating that the injury was of a type outside the application of the act [*see Lab. Code § 3600(a)(1)*] or facts indicating that the injury meets the requirements of an exception to the exclusive remedy rule [*see Lab. Code §§ 3600, 3602*]. For examples of these types of arguments, see *§§ 239.21, 239.23 -239.26*, and *239.28*. Note that because the exclusive remedy provision is an affirmative defense that is waived if not plead, the defense must have been asserted in the answer to plaintiff's complaint.

[c] Related Pleading and Practice Forms

For a general form of demurrer to a complaint based on the failure to state facts sufficient to constitute a cause of action, see *California Forms of Pleading and Practice, Ch. 206, Demurrers and Motions for Judgment on the Pleadings, § 206.122* (Matthew Bender).

[3] Discussion of Authorities

[a] Failure to Allege Facts Negating Application of Act

Singleton v. Bonnesen *(1955) 131 Cal. App. 2d 327, 280 P.2d 481* , was an appeal from a judgment in favor of defendants after defendants' demurrer to plaintiffs' second amended complaint had been sustained and plaintiffs had failed to amend. Plaintiffs' complaint alleged that plaintiffs were the surviving heirs and dependents of decedent who had been a county sheriff, that decedent had died in an automobile collision as a result of the negligent driving of a deputy county sheriff, and that both decedent, who had been a passenger in the automobile, and the deputy county sheriff had been within the scope of their employment as employees of the county. The trial court had sustained the demurrer on the ground that plaintiffs' sole remedy against the deputy sheriff and the county, as employer, was under the Workers' Compensation Act. The court of appeal reversed the judgment of the trial court insofar as it had held that plaintiffs had no cause of action against the deputy sheriff, who, as a coemployee of decedent, was not subject to the exclusive remedy provisions of *Lab. Code § 3601* (*Lab. Code § 3601* has since been amended to provide that workers' compensation is the exclusive remedy for an employee against any other employee acting within the scope of his or her employment), but affirmed the trial court's decision insofar as it had held that the exclusive remedy against the employer was under the Workers' Compensation Act. Quoting from an earlier court of appeal decision, the court found that it is the general rule that the plaintiff need not negative the fact that he or she is within the Act, since this is an affirmative defense. However, when the allegations of the complaint are reasonably sufficient to bring the employee within the provisions of the Act, it must allege facts bringing the employee within the exceptions thereto. The court held that the allegation that the accident occurred within the scope of the employment indicated a situation falling squarely within the fied designed to be encompassed by the Workers' Compensation Act. The court reasoned that, since under the provisions of the Act and within the field of its application, it is a penal offense not to comply with its requirements, it

cannot be inferred, when a complaint is silent on the subject, that one complained against has violated the law. Therefore, since the complaint contained no allegation which would have negated the application of the statute, plaintiffs had failed to state a cause of action against the county (*131 Cal. App. 2d 327, 331)* .

The facts and procedural background of ***Colombo v. State of California*** *(1991) 3 Cal. App. 4th 594, 5 Cal. Rptr. 2d 567* are *set forth in § 239.21[3][c]*. In that case, the court upheld the dismissal of plaintiff's tort action against his employer, the State of California, noting that when the complaint affirmatively alleges facts indicating coverage by workers' compensation law and fails to allege facts negating application of the exclusive remedy provision, no civil action will lie and the complaint is subject to a general demurrer (*3 Cal. App. 4th 594, 599)* .

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PART II. FORMS

10-239 California Points & Authorities § 239.21

AUTHOR: Carolyn Rashby

§ 239.21 Supporting Contention That Workers' Compensation Exclusive Remedy Doctrine Precludes Action by Employee Against Employer--Plaintiff Is Employee for Workers' Compensation Purposes

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S ACTION AGAINST DEFENDANT FOR DAMAGES IS PRECLUDED BY THE WORKERS' COMPENSATION EXCLUSIVITY PROVISIONS BECAUSE AT THE TIME OF THE INJURY, PLAINTIFF WAS AN EMPLOYEE OF DEFENDANT FOR WORKERS' COMPENSATION PURPOSES.

A. Employee Relationship Precludes Action for Damages. An employer is shielded from tort liability under the exclusive remedy provisions of the workers' compensation law when the injured party is an employee and the injury arises out of and in the course of his or her employment and is proximately caused by the employment (*Lab. Code §§ 3600, 3602*).

B. Definition of Employee. For purposes of workers' compensation law, the term "employee" means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether or not the employment is otherwise lawful, and also includes those persons listed in *Lab. Code § 3351* and *3351.5* (*Lab. Code §§ 3351, 3351.5*).

[*Optional*] **C. Partner as Employer of Employee of Partnership.** An employee of a partnership who is injured in the course and scope of his or her employment by the negligence of a partner may not maintain an action to recover damages from the negligent partner since a partnership is not a distinct entity separate from its members and an employee of a partnership is an employee of each of the partners (*Sonberg v. Bergere (1963) 220 Cal. App. 2d 681, 682, 34 Cal. Rptr. 59*).

[*Optional*] **D. Joint Venturer as Employer of Employee of Joint Venture.** An employee of a joint venture is an

employee of each individual member of the joint venture and may not maintain a tort action against a member of the joint venture for injury sustained in the course and scope of his or her employment by the joint venture (*Horney v. Guy F. Atkinson Co. (1983) 140 Cal. App. 3d 923, 927, 190 Cal. Rptr. 18*).

[*Optional*] **E. Employees of Separate Department of Public Entity as Having Common Employer.** An injury occurring to the employee of one department of a public entity as a result of the negligence of the employee of a second department that arose out of and was within the course of the injured employee's employment does not give the injured employee the right to maintain an action for damages against the public entity for the injuries suffered (*Colombo v. State of California (1991) 3 Cal. App. 4th 594, 598-599, 5 Cal. Rptr. 2d 567* ; *Walker v. San Francisco (1950) 97 Cal. App. 2d 901, 903907, 219 P.2d 487*).

[*Optional*] **F. Juror as Employee of County.** A juror is an employee of the county for purposes of workers' compensation while performing jury duty and therefore may not maintain a tort action against the county for personal injury sustained in the course of performing his or her jury service (*Waggener v. County of Los Angeles (1995) 39 Cal. App. 4th 1078, 1083, 46 Cal. Rptr. 2d 141*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that plaintiff's action for damages is precluded by workers' compensation exclusivity provisions because, at the time of the injury, plaintiff was an employee of defendant.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that plaintiff's action for damages is precluded by the workers' compensation exclusivity rule because plaintiff was an employee of defendant, for example in a demurrer. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should demonstrate that there was an employment relationship between defendant and plaintiff at the time of the injury. If appropriate, counsel should discuss evidence of a contract of employment. If plaintiff has alleged an independent contractor relationship, counsel should set forth facts indicating that plaintiff was not an independent contractor [*see, e.g., Lab. Code § 2750.5* for factors indicating existence of independent contractor relationship]. Further, if defendant is either a partner of the partnership that employed plaintiff or an individual member of the joint venture that employed plaintiff, counsel should argue that the exclusive remedy doctrine precludes a civil suit for damages against a partner or joint venturer [*Sonberg v. Bergere (1963) 220 Cal. App. 2d 681, 682, 34 Cal. Rptr. 59* ; *Horney v. Guy F. Atkinson Co. (1983) 140 Cal. App. 3d 923, 927, 190 Cal. Rptr. 18]* .

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 239.34* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Partner as Employer of Employee of Partnership

Sonberg v. Bergere *(1963) 220 Cal. App. 2d 681, 34 Cal. Rptr. 59* , was an appeal by plaintiff from an adverse

judgment in an action to recover damages for personal injuries. Plaintiff had been an employee of a copartnership and had been injured while attempting to enter an automobile owned and driven by defendant. The trial court had found that, at the time of the accident, defendant was acting on behalf of the partnership and the accident occurred in the course and scope of plaintiff's employment by the partnership. After the cause had been submitted to the trial judge, plaintiff moved to reopen the case in order to prove that defendant had been a working member of the partnership, evidently with the purpose of showing that as a working partner, defendant had been an employee of the partnership [former Lab. Code § 3359; *now see Lab. Code § 3351*]. The trial court denied the motion and concluded that it had no jurisdiction over plaintiff's action since plaintiff's exclusive remedy was under the Workers' Compensation Act. The court of appeal affirmed and held that an employee of a partnership who is injured in the course and scope of employment by the negligence of a partner may not maintain an action to recover damages from the negligent partner. The court reasoned that, because a partnership is not a distinct entity separate from its members for the purposes of plaintiff's action, an employee of a partnership is thus an employee of each of the partners, plaintiff's action was against her employer (*220 Cal. App. 2d 681, 682)* . The court rejected plaintiff's argument that a partner may have a dual legal personality under *Corp. Code § 15009*, that of an agent of the partnership for the purpose of its business as well as that of a partner. Plaintiff contended that, as an agent of the partnership, the defendant was not acting as plaintiff's employer at the time of the accident but was in the status of a fellow employee. However, the court found that *Corp. Code § 15009* was inapplicable, since the meaning of the statute is that a partner acts not only for himself or herself but for those associated with him or her. Thus, the statute would not make a partnership a separate legal entity for the purpose of the Workers' Compensation Act. The court also found that the trial court had properly denied plaintiff's motion to reopen since, regardless of the fact that a working partner is an employee under the Workers' Compensation Act, he or she is still an employer with respect to the employees of the partnership.

[b] Joint Venturer as Employer of Employee of Joint Venture

Horney v. Guy F. Atkinson Co. *(1983) 140 Cal. App. 3d 923, 190 Cal. Rptr. 18* , was an action by an employee of a joint venture engaged in the construction of a dam against the construction company that was the managing partner of the joint venture for personal injuries sustained during the course of his employment while attempting to clear a jam in a facility known as a rock plant, which was manufactured by the defendant and sold to the joint venture. The defendant answered, alleging that the action was barred by the exclusive-remedy provisions of the workers' compensation law, and its motion for summary judgment on that ground was granted.

The court of appeal affirmed. The court held that an employee of a joint venture is an employee of each individual member of the joint venture and, therefore, a member of a joint venture is entitled to the protection of the exclusive remedy provisions of the workers' compensation law (*140 Cal. App. 3d 923, 927)* . The court explained that in providing the engineering and other services and component parts for the design and construction of the rock plant, defendant was acting on behalf of the joint venture, that these activities were part of its obligation as a sponsor and joint venturer under the partnership agreement, that defendant was not acting in a capacity other than that of joint venturer, and that, consequently, it followed that defendant was entitled to the protection of *Lab. Code §§ 3600* and *3601(a)* (*140 Cal. App. 3d 923, 928)* .

[c] Employees of Separate Departments of Public Entity as Having Common Employer

In ***Colombo v. State of California*** *(1991) 3 Cal. App. 4th 594, 5 Cal. Rptr. 2d 567* , a California Highway Patrol officer who was called on to investigate an accident was hit by a car traveling on the highway as he stood near one of the vehicles involved in the accident. The driver of the car that struck the officer allegedly had lost control of the car due to the icy condition of the highway. Having sustained serious injuries, the officer filed a workers' compensation claim, listing the State of California Department of Highway Patrol as his employer. In addition, he and his wife filed a personal injury and loss of consortium action against the State of California and its Department of Transportation, alleging that the Department of Transportation was negligent in allowing ice to accumulate on a bridge deck near the accident, thereby creating a dangerous condition of which it purportedly had notice. The trial court sustained the

defendants demurrer to the complaint without leave to amend (*3 Cal. App. 4th 594, 595-596)* .

On appeal, the court rejected the officer's contention that the State of California can be an employer for purposes of a workers' compensation claim by a state employee injured during the course of employment with one state department as well as a third-party tortfeasor for purposes of the employee's civil action at law alleging that the employee's injuries were proximately caused by the negligence of workers of a separate department of state government (*3 Cal. App. 4th 594, 596)* . The court noted that the fact that the California Highway Patrol and the Department of Transportation perform different functions for the State ofCalifornia does not mean that they are akin to separate business entities within a multiunit corporate enterprise. As a matter of law, it is the State of California that is the employer with the right of control over employees of both the California Highway Patrol and the Department of Transportation (*3 Cal. App. 4th 594, 598)* . The plaintiff was an employee of the State of California, as were the Department of Transportation employees whose alleged negligence purportedly caused his injuries. Because the state was his employer, the plaintiff was precluded by workers' compensation law from bringing an action at law against the state, via its Department of Transportation (*3 Cal. App. 4th 594, 599)* . Since the plaintiff-employee's action at law was barred, so too was his wife's action for loss of consortium (*3 Cal. App. 4th 594, 599)* .

In *Walker v. San Francisco (1950) 97 Cal. App. 2d 901, 219 P.2d 487* , plaintiffs, two minor daughters of a deceased employee, appealed from a judgment entered by the trial court after it had granted defendant's motion for a judgment on the pleadings. The decedent, who was a member of a fire department, died from injuries sustained when a streetcar ran into a fire truck which was responding to an alarm and on which decedent was standing. Although the face of the complaint showed that decedent was an employee of the city and county of San Francisco, which owned and operated the municipal railway, plaintiffs contended that, because the railway was operated by defendant in its proprietary capacity, while fire protection is a governmental function, the city and county could legally be sued as a person other than an employer under *Lab. Code § 3852* for the negligence of its employees who are functioning in a proprietary capacity by an employee of the city and county who at the time of the injury was serving defendant in its governmental capacity. The court of appeal rejected this contention and affirmed the judgment of the trial court. The court did not accept plaintiff's argument that defendant, for the purposes of the Workers' Compensation Act, could be divided into two separate legal entities. The court explained, citing an out-of-state decision, that a defendant cannot simultaneously be two distinct entities, that is, an employer and also a third party, capable of being sued under *Lab. Code § 3852*. A third party is one who has no connection whatever with the relationship of employer and employee--that is, a person who is a stranger to that relationship. Thus, the fact that the employer of the employees of both the municipal railway and the fire department was the city and county limited the remedy of plaintiffs to compensation under the Workers' Compensation Act (*97 Cal. App. 2d 901, 903-907)* .

[d] Juror as Employee of County

Waggener v. County of Los Angeles *(1995) 39 Cal. App. 4th 1078, 46 Cal. Rptr. 2d 141* , was an action by a juror who was injured when she slipped and fell exiting a jury box. The juror sued the County of Los Angeles for personal injury damages, and the trial court dismissed the complaint. The court of appeal affirmed, holding that a juror is an employee of the county within the meaning of the Workers' Compensation Act and that the Act provides the exclusive remedy for the plaintiff. The court reasoned that, under the Act, any person rendering service for another is presumed to be an employee [*see Lab. Code § 3357*], that a juror provides services to the county through the deliberative process, and although the county does not and cannot exercise control over the juror's ultimate work product (i.e., the deliberative process), the county does control each and every other aspect of the juror's work environment. The county, therefore, has the responsibility to insure against injuries that a juror may sustain while providing these services to the county (*39 Cal. App. 4th 1078, 1082-1083)* .

[4] Additional Authorities

[a] Drivers for Courier Service Were Employees, Not Independent Contractors

In ***JKH Enterprises, Inc. v. Department of Industrial Relations*** *(2006) 142 Cal. App. 4th 1046, 48 Cal. Rptr. 3d 563* , the court of appeal held that substantial evidence supported the determination by the Department of Industrial Relations that drivers for plaintiff courier service were functioning as employees rather than as true independent contractors. The court of appeal found that the question of the hiree's status must be considered in light of the history and remedial and social purposes of the Workers' Compensation Act, which are: (1) to ensure that the cost of industrial injuries will be part of the cost of goods rather than a burden on society; (2) to guarantee prompt, limited compensation for an employee's work injuries, regardless of fault, as an inevitable cost of production; (3) to spur increased industrial safety; and (4) in return, to insulate the employer from tort liability for employees' injuries. The court of appeal followed *S.G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal. 3d 341, 256 Cal. Rptr. 543, 769 P.2d 399* , in finding that the functions performed by drivers (pick-up and delivery of papers and packages and driving in between) did not require a high degree of skill, that these functions constituted an integral heart of plaintiff's courier service business, that, by obtaining clients in need of this service and providing workers to conduct it, plaintiff retained all "necessary" control over the operation as a whole, and that these circumstances were enough to find an employment relationship for purposes of the Workers' Compensation Act, even in the absence of plaintiff's exercise of control over the details of work and with plaintiff being more concerned with the results of the work than with the means of its accomplishment (*142 Cal. App. 4th 1046, 1059-1066)* .

[b] Newspaper Carriers Were Employees, Not Independent Contractors

In ***Antelope Valley Press v. Steve Poizner as Insurance Commissioner*** *(2008) 162 Cal. App. 4th 839, 75 Cal. Rptr. 3d 887* , a court of appeal, affirming the trial court judgment denying an employer's petition for writ of administrative mandamus, held that the administrative record supported the conclusion that newspaper carriers were employees for purposes of the workers' compensation law, not independent contractors. Thus, the employer's workers' compensation insurer correctly classified the carriers as employees for purposes of the employer's workers' compensation policy. The court of appeal followed the analysis set forth in *S.G. Borello & Sons v. Department of Industrial Relations (1989) 48 Cal. 3d 341, 256 Cal. Rptr. 543, 769 P.2d 399* , to find that the employer had the right to control the manner and means of the newspaper carriers' work, that various other *Borello* indicia demonstrated that the newspaper carriers were employees, and that the employer had failed to carry itsburden of proving that the carriers were independent contractors (*162 Cal. App. 4th 839, 842-843, 852-856)* .

California Points & Authorities

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Volume 23 Chapters 230-239 TRUST DEEDS---to---WORKERS' COMPENSATION
CHAPTER 239 WORKERS' COMPENSATION EXCLUSIVE REMEDY DOCTRINE
PART II. FORMS

10-239 California Points & Authorities § 239.22

AUTHOR: Carolyn Rashby

§ 239.22 Supporting Contention That Workers' Compensation Exclusive Remedy Doctrine Precludes Action by Employee Against Employer--Determination of Appeals Board That Employee Is Entitled to Compensation as Res Judicata

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

A FINAL DETERMINATION BY THE WORKERS' COMPENSATION APPEALS BOARD THAT PLAINTIFF IS ENTITLED TO COMPENSATION IS RES JUDICATA AND THE TRIAL COURT DOES NOT HAVE JURISDICTION TO HEAR A SUBSEQUENT ACTION BY THE EMPLOYEE AGAINST THE EMPLOYER FOR DAMAGES FOR PERSONAL INJURIES FOR WHICH THE EMPLOYEE RECEIVED COMPENSATION.

A. Final Determination of Coverage as Res Judicata. A final determination by the Workers' Compensation Appeals Board that an employee is covered under the Workers' Compensation Act is res judicata as to the issue of the jurisdiction of theBoard in subsequent proceedings or actions between the same parties or those privy to them. In such a case, an employee may not commence a subsequent action against his or her employer for damages for personal injuries for which the employee received compensation (*Jones v. Brown (1970) 13 Cal. App. 3d 513, 520-522, 89 Cal. Rptr. 651* ; *Azevedo v. Abel (1968) 264 Cal. App. 2d 451, 458-460, 70 Cal. Rptr. 710*).

[*Optional*] **B. No Exception for Intentional Tort.** An employee may not maintain an action against an employer for damages for personal injuries intentionally inflicted by the employer after obtaining compensation under the Workers' Compensation Act for the same injuries (*Azevedo v. Abel (1968) 264 Cal. App. 2d 451, 458-460, 70 Cal. Rptr. 710*).

[*Optional*] **C. Compromise Settlement as Res Judicata.** A compromise settlement approved by the Workers' Compensation Appeals Board has the same force and effect as a judgment made after a full hearing and is entitled to res judicata effect (*Hollywood Refrigeration Sales Co. v. Superior Court (1985) 164 Cal. App. 3d 754, 759, 210 Cal. Rptr. 619*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that plaintiff's action for damages is precluded because a prior final determination by the workers' compensation appeals board that plaintiff was entitled to compensation is res judicata. Optional Paragraph C is for use where plaintiff is entitled to compensation for his or her injuries under the terms of a compromise settlement that has been approved by the Workers' Compensation Appeals Board. Note, however, that to preclude an action for personal injury damages, the compromise and release must include the determination that all of the claims released are compensable under the workers' compensation act; if not, then res judicata principles do not preclude the litigation [*Lopez v. Sikkema (1991) 229 Cal. App. 3d 31, 40-44, 280 Cal. Rptr. 7]* . Also, the fact that the compromise and release sets forth the nature of the injury suffered does not, by itself, support the conclusion that all claims arising from that injury were covered by the settlement [*Lopez v. Sikkema (1991) 229 Cal. App. 3d 31, 44, 280 Cal. Rptr. 7]* .

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that plaintiff's action for personal injury damages is precluded because a final determination by the Workers' Compensation Appeals Board that plaintiff is entitled to compensation for those injuries is res judicata, for example, in a demurrer. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence of a Workers' Compensation Appeals Board final determination that plaintiff is entitled to compensation. Counsel specifically should demonstrate that such determination relates to the same injuries for which plaintiff is seeking damages in the present lawsuit. If the final determination is in the form of a compromise and release (approved by the Workers' Compensation Appeals Board), counsel should also set forth facts tending to show that the compromise and release was intended to cover all claims arising from plaintiff's injury [*Hollywood Refrigeration Sales Co. v. Superior Court (1985) 164 Cal. App. 3d 754, 759, 210 Cal. Rptr. 619]* .

[c] Related Pleading and Practice Forms

For a general form of demurrer to a complaint based on the failure to state facts sufficient to constitute a cause of action, see *California Forms of Pleading and Practice, Ch. 206, Demurrers and Motions for Judgment on the Pleadings, § 206.122* (Matthew Bender).

[3] Discussion of Authorities

[a] Final Determination of Matter of Coverage as Res Judicata

In ***Jones v. Brown*** *(1970) 13 Cal. App. 3d 513, 89 Cal. Rptr. 651* , plaintiff appealed from a summary judgment entered in favor of defendants in her personal injury action. Plaintiff had been engaged in her duties of employment as a domestic for defendants when she suffered extensive burns when the contents of a vacuum cleaner she had been emptying into an incinerator caught fire. On the date of the accident there had been in effect a workers' compensation insurance policy issued to defendants for the benefit of their employees. Before plaintiff had filed her legal action she had been awarded temporary disability and medical treatment benefits from the Workers' Compensation Appeals Board.

The court of appeal affirmed the judgment of the trial court. It held that, although there may have been a triable issue of fact concerning whether plaintiff had ever elected to receive compensation benefits as may have been required in this case under *Lab. Code § 4154* (employee who is not subject to workers' compensation provisions as permitted to elect to

come within such provisions if notice is given to employer within five days after employer procured insurance policy), the superior court nevertheless had no jurisdiction over plaintiff's action. In approaching the question of jurisdiction, the court observed that, if at the time of an employee's accident there was no workers' compensation, then the appeals board is without jurisdiction to grant relief, and, as a corollary, if there was such coverage, then the superior court is without jurisdiction and must leave the parties to pursue their remedies before the appeals board. Relying on the principles first enunciated in *Scott v. Industrial Accident Comm'n (1956) 46 Cal. 2d 76, 293 P.2d 18* , the court further observed that since a determination made by either the superior court or the appeals board is res judicata in all subsequent proceedings or actions between the same parties or those in privy with them, a final determination as to the matter of coverage (i.e., jurisdiction) in the appeals board or the superior court is res judicata in subsequent proceedings before the other tribunal between the same parties or those privy to them. Applying these principles, the court found that, at the time plaintiff filed her legal action, the appeals board had already finally determined that plaintiff's injuries were suffered within thecourse and scope of an employment relationship with defendant, which relationship was in turn covered by the workers' compensation laws. By virtue of the award to plaintiff, this determination was a final determination as to the matter of coverage and of jurisdiction to grant relief to plaintiff. Therefore, because this determination was res judicata an binding on the superior court, the superior court could not inquire into the correctness or propriety of the determination made by the appeals board (*13 Cal. App. 3d 513, 521)* .

Azevedo v. Abel *(1968) 264 Cal. App. 2d 451, 70 Cal. Rptr. 710* , involved the issue of the right to recover both compensation benefits and damages in a lawsuit by an employee plaintiff who had been intentionally injured by her angry employer while she was concededly in the course of her employment. She had first filed a claim for workers' compensation benefits and thereafter filed a lawsuit seeking compensatory and punitive damages. After the Industrial Accident Commission (Workers' Compensation Appeals Board) had dismissed her claim on the grounds that it had no jurisdiction to make an award where the injury was intentionally inflicted by the employer, the court of appeal granted review and reversed, holding that an industrially inflicted, although intentionally inflicted, injury is compensable [*see Azevedo v. Industrial Acc. Com. (1966) 243 Cal. App. 2d 370, 376-377, 52 Cal. Rptr. 283]* . Thereafter, the trial court granted defendant's motion for dismissal of the damage action from which plaintiff appealed. At the same time, the court of appeal also granted a writ of review to review an award by the appeals board to plaintiff of temporary and permanent disability benefits, medical expenses, and further medical treatment.

Holding that the award of compensation benefits was proper, the court of appeal also held that, with respect to plaintiff's appeal, the workers' compensation law was plaintiff's exclusive remedy and, therefore, the dismissal of her action had been proper. Plaintiff had urged on appeal that the employer had incurred a pair of concurrent liabilities for his intentional tort and, therefore, the two tribunals had concurrent jurisdiction. However, the court stated that a damage suit as an alternative or additional source of compensation becomes permissible only by carving a judicial exception in an uncarved statute. The court reasoned that neither moral aversion to the employer's action nor the shiny prospect of a large damage verdict justifies interference with what is essentially a policy choice of the Legislature both to provide employees economic insurance against disability in exchange for the speculative possibility of general damages and, in addition, to offer the augmented award for serious and willful misconduct in trade for the relatively rare award of punitive damages [*see Lab. Code § 4553*] (*264 Cal. App. 2d 451, 459-460)* .

However, the court observed that the superior court's dismissal of plaintiff's lawsuit had been premature. It stated that a judicial affirmation of compensability becomes res judicata only when it reaches finality. The commission's award had not actually become final when the superior court dismissed the lawsuit, because the award had been still subject to a writ of review. Nevertheless, the court found that, because the proceedings had been consolidated for decision in the court, the consolidation subjected both judgments to an identical timetable, and, hence, it was safe to affirm both the compensation award and the superior court judgment of dismissal (*264 Cal. App. 2d 451, 460)* .

[b] Physical Assault by Employer

There is a conflict of authority on the question of whether an employee injured as a result of a physical assault by the

employer may file a claim for compensation with the Appeals Board in addition to bringing a civil suit against the employer. Early opinions considered the recovery of both compensation benefits and civil damages in these cases to be inconsistent or mutually exclusive and, therefore, required the injured employee to make an election of remedies. For example, in *Busick v. Workers' Comp. Appeals Bd. (1972) 7 Cal. 3d 967, 976, 104 Cal. Rptr. 42, 500 P.2d 1386* , a civil damages judgment precluded recovery of compensation benefits for the same injury. Similarly, in *Azevedo v. Abel (1968) 264 Cal. App. 2d 451, 460, 70 Cal. Rptr. 710* , discussed in [a], *above*, recovery of workers' compensation benefits barred a civil action for damages. More recent authority, however, such as *Magliulo v. Superior Court (Gallagher) (1975) 47 Cal. App. 3d 760, 780, 121 Cal. Rptr. 621* , and *Meyer v. Graphic Arts International Union (1979) 88 Cal. App. 3d 176, 178, 151 Cal. Rptr. 597* , indicates that the two remedies are cumulative or alternative to the extent that the employee may at least pursue both remedies simultaneously until a final judgment in the civil action is reached or an award of benefits is made in the workers' compensation proceeding. Under this line of authority, one case, *Young v. Libbey-Owens Ford Co. (1985) 168 Cal. App. 3d 1037, 1044, 214 Cal. Rptr. 400* , has indicated that an employee is permitted to recover compensation benefits *and* maintain an action for damages against the employer on the theory that the amount of benefits awarded can be set off against the damages to prevent a double recovery. However, because the traditional view has not been overruled, it is at least arguable that the employee still may not recover compensation benefits and a judgment for damages in cases of physical assault by the employer. The California Supreme Court in *Johns-Manville Products Corp. v. Superior Court (Rudkin) (1980) 27 Cal. 3d 465, 477 n.11, 165 Cal. Rptr. 858, 612 P.2d 948* , expressly refused to resolve the conflict between the two views.

[c] Compromise Settlement as Res Judicata

In ***Hollywood Refrigeration Sales Co. v. Superior Court*** *(1985) 164 Cal. App. 3d 754, 210 Cal. Rptr. 619* , plaintiff filed a claim with the Workers' Compensation Appeals Board (WCAB) for personal injuries occurring from job stress from 1977 to 1980. Before resolution of that claim, plaintiff also filed an action for damages for intentional infliction of emotional distress based on conduct of his supervisor during the same time period. Two years later, plaintiff's workers' compensation claim was disposed of by a "Compromise and Release" under which plaintiff was paid a lump sum. The compromise stated that plaintiff had sustained injury to his body and psyche, that a serious and bona fide dispute existed between the parties as to a variety of issues raised by plaintiff's claim, and that plaintiff's acceptance of the compromise constituted a waiver of any other claims he may have had against the parties because of the events which lead to his claim. The WCAB approved the compromise. The employer then moved for summary judgment in the emotional distress action on the ground that the Workers' Compensation Board had exclusive jurisdiction of the cause and that the compromise settlement was res judicata as to the civil action. The trial court denied the motion, and the employer petitioned for a writ of mandate.

The appeals court issued the writ, finding that the compromise settlement was res judicata as to the civil action. The court stated that plaintiff already had accepted compensation for his injuries under the provisions of the workers' compensation law. The WCAB's approval of the compromise settlement necessarily included the determination that the alleged injuries were compensable under the workers' compensation act. Because the approved compromise and release is a judgment and has the same force and effect as an award made after a full hearing, the issue of compensability under the workers' compensation law was res judicata (*164 Cal. App. 3d 754, 759)* .

In ***Le Parc Community Association v. Workers' Comp. Appeals Bd. (Curren)*** *(2003) 110 Cal. App. 4th 1161, 2 Cal. Rptr. 3d 408* , it was held that settlement of a civil action for personal injury by an injured worker against an alleged employer, coupled with dismissal of the action with prejudice, erected no bar against the worker's application for workers' compensation benefits against the same defendant. Among the reasons cited by the court of appeal for reaching this conclusion was the fact that the civil court in which the personal injury action was brought lacked subject matter jurisdiction over the workers' compensation claim. Thus, the worker could not have litigated this latter claim in the civil action that was dismissed. The injured worker was asserting, said the court of appeal, two distinct primary rights: the common-law right to be free of the employer's negligence in maintaining the work environment, and the statutory right to prompt, certain compensation for all work-related injuries regardless of fault. Voluntary dismissal with prejudice of

an action to enforce the former had no res judicata effect on an action to enforce the latter. In fact, said the court, in light of the Legislature's express intent to permit cumulative recoveries, resolution of the first proceeding, whether by dismissal with prejudice or any other form of judgment on the merits, could not be given res judicata effect to bar continued litigation of the second action. Moreover, since no issue at all was actually litigated or decided in the civil action, the dismissal of that action had no collateral estoppel effect on the subsequent workers' compensation proceeding (*110 Cal. App. 4th 1161, 1170-1175)* .

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Volume 23 Chapters 230-239 TRUST DEEDS---to---WORKERS' COMPENSATION
CHAPTER 239 WORKERS' COMPENSATION EXCLUSIVE REMEDY DOCTRINE
PART II. FORMS

10-239 California Points & Authorities § 239.23

AUTHOR: Carolyn Rashby

§ 239.23 Supporting Contention That Workers' Compensation Exclusive Remedy Doctrine Precludes Action by Employee Against Employer--Action for Intentional or Negligent Infliction of Emotional Distress Is Within Exclusive Remedy Provisions

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S CAUSE OF ACTION FOR INTENTIONAL [*or* NEGLIGENT] INFLICTION OF EMOTIONAL DISTRESS IS BARRED BY THE EXCLUSIVE REMEDY PROVISIONS OF THE WORKERS' COMPENSATION ACT BECAUSE DEFENDANT'S CONDUCT NEITHER CONTRAVENED PUBLIC POLICY NOR EXCEEDED THE RISKS INHERENT IN THE EMPLOYMENT RELATIONSHIP.

Emotional Distress Claim Barred by Exclusive Remedy Provisions. Even if an employee has not alleged a physical injury or disability, a claim for intentional or negligent infliction of emotional distress is within the exclusive remedy provisions of the Workers' Compensation Act, so long as the basic conditions of compensation are otherwise satisfied and the employer's conduct neither contravenes a fundamental public policy nor exceeds the risks inherent in the employment relationship (*Livitsanos v. Superior Court (1992) 2 Cal. 4th 744, 754-755, 7 Cal. Rptr. 2d 808, 828 P.2d 1195* ; *Cole v. Fair Oaks Fire Protection Dist. (1987) 43 Cal. 3d 148, 151, 162, 233 Cal. Rptr. 308, 729 P.2d 743*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that plaintiff's claim for intentional or negligent infliction of emotional distress is barred by the workers' compensation exclusive remedy provisions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that plaintiff has alleged facts indicating coverage by the workers' compensation law [*see Lab. Code § 3600(a)*], as well as evidence that defendant's conduct did not contravene public policy nor exceed the risks inherent in the employment relationship [*Livitsanos v. Superior Court (1992) 2 Cal. 4th 744, 754-755, 7 Cal. Rptr. 2d 808, 828 P.2d 1195* ; *Cole v. Fair Oaks Fire Protection Dist. (1987) 43 Cal. 3d 148, 151, 162, 233 Cal. Rptr. 308, 729 P.2d 743]* . For examples of these types of arguments in the wrongful discharge context, see *Ch. 100, Employer and Employee: Wrongful Termination and Discipline, §§ 100.70* and *100.77*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the workers' compensation exclusivity provisions preclude plaintiff's action for intentional or negligent infliction of emotional distress, for example, in a demurrer. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[c] Related Pleading and Practice Forms

For a general form of demurrer to a complaint based on the failure to state facts sufficient to constitute a cause of action, see *California Forms of Pleading and Practice, Ch. 206, Demurrers and Motions for Judgment on the Pleadings, § 206.122* (Matthew Bender).

[3] Discussion of Authorities

[a] Emotional Distress Claim Barred by Exclusive Remedy Provisions

In ***Livitsanos v. Superior Court*** *(1992) 2 Cal. 4th 744, 7 Cal. Rptr. 2d 808, 828P.2d 1195* , plaintiff sued the defendants for breach of contract, defamation, and intentional and negligent infliction of emotional distress. The plaintiff alleged that the defendants had engaged in a campaign of harassment resulting in the wrongful termination of his employment, including falsely claiming that he had embezzled money from the company and tried to sabotage the company's product, compelling him to sell his independent distribution company which had distributed the company's product, demanding possession of his company's books and records, and forcing him to sign a promissory note for a debt owed to his company under threat of retaliation if he refused. The trial court sustained the employer's demurrers to the causes of action for defamation and negligent and intentional infliction of emotional distress, without leave to amend, based on the exclusive remedy provisions of the workers' compensation act. Subsequently, the court of appeal, citing *Cole v. Fair Oaks Fire Protection Dist.*, discussed *below*, summarily denied plaintiff's petition for a writ of mandate.

In considering plaintiff's contention on appeal that his claims of intentional and negligent infliction of emotional distress, without accompanying physical injury, were not barred by the exclusive remedy rule based on the decision of *Renteria v. County of Orange (1978) 82 Cal. App. 3d 833, 147 Cal. Rptr. 447* , the California Supreme Court held that the *Renteria* court "plainly erred in suggesting that emotional injury which results in an industrial disability is not compensable under the Workers' Compensation Act" (*2 Cal. 4th 744, 754)* . The Court concluded that so long as the basic conditions of compensation are otherwise satisfied, and the employer's conduct neither contravenes a fundamental public policy nor exceeds the risks inherent in the employment relationship, an employee's emotional distress injuries, whether or not accompanied by physical disability, are within the exclusive remedy provisions of workers' compensation (*2 Cal. 4th 744, 754)* . The Court noted that for such an injury to be compensable under the workers' compensation system, however, it must result in an industrial disability or need for medical treatment (*2 Cal. 4th 744, 754)* . Thus, the Court observed that it is theoretically possible for an employee to incur a work-related emotional injury that results in no compensable industrial disability, but that the existence of such a noncompensable injury does not abrogate the exclusive remedy provisions of the workers' compensation act (*2 Cal. 4th 744, 754-755)* . The Supreme Court remanded the case to the court of appeal for a determination of whether the defendants' conduct exceeded the normal risks of the employment relationship.

Cole v. Fair Oaks Fire Protection Dist. *(1987) 43 Cal. 3d 148, 233 Cal. Rptr. 308, 729 P.2d 743* , was an action by a firefighter against his employer, a fire protection district, and a fellow employee, the district's assistant fire chief, for damages for intentional infliction of emotional distress and by the firefighter's wife for intentional infliction of emotional distress and for loss of consortium. The complaint alleged the firefighter's employment history with the district and that the assistant fire chief had subjected him to a deliberate campaign of harassment, which included the unjustified institution of disciplinary proceedings, procuring his temporary demotion, and attempting to force his retirement, as a result of which he suffered a severe and totally disabling stroke. The trial court sustained the defendants' demurrer without leave to amend on the ground plaintiffs' claims were within the exclusive jurisdiction of the Workers' Compensation Appeals Board. The court of appeal affirmed as to eight of the ten causes of action alleged but reversed with directions to permit amendment of the complaint as to causes of action for defamation and for false light invasion of privacy. The Supreme Court granted review. There was no challenge to the court of appeal's holding that the causes of action for defamation and privacy were not barred by the exclusive remedy provisions of the Labor Code.

In affirming the judgment of the court of appeal, the Supreme Court held the action for intentional infliction of emotional distress was barred by the exclusivity provisions of the workers' compensation law (*Lab. Code §§ 3600, 3601, 4553*) as they read prior to their 1982 amendment, because the claim was based on conduct normally occurring in the workplace, and that, because the employee's action was barred, his spouse's actions for damages for intentional infliction of emotional distress and loss of consortium were likewise barred (*43 Cal. 3d 148, 151, 162)* . The Court said that in order properly to manage its business, every employer must on occasion review, criticize, demote, transfer, and discipline employees, that employers are necessarily aware that their employees will feel distressed by adverse personnel decisions, that employees may consider any such adverse action to be improper and outrageous, and that it would, indeed, be unusual for an employee not to suffer emotional distress as a result of an unfavorable decision by the employer (*43 Cal. 3d 148, 160)* . The Court concluded that when the misconduct attributed to the employer is actions that are a normal part of the employment relationship, such as demotions, promotions, criticism of work practices, and frictions in negotiations as to grievances, an employee suffering emotional distress causing disability may not avoid the exclusive remedy provisions of the workers' compensation law by characterizing the employer's decisions as manifestly unfair, outrageous, harassment, or intended to cause emotional disturbance resulting in disability (*43 Cal. 3d 148, 160)* .

When the employer's alleged wrongful actions cannot reasonably be construed as part of the normal employment relationship, the employee may state a cause of action in tort against the employer. For example, the California Supreme Court has held in *Gantt v. Sentry Insurance (1992) 1 Cal. 4th 1083, 4 Cal. Rptr. 2d 874, 824 P.2d 680* , that an employee was entitled to state a cause of action against the employer for tortious discharge in violation of public policy, where the employee was terminated in retaliation for testifying truthfully before the Department of Fair Employment and Housing in support of a coworker's claim of sexual harassment (*1 Cal. 4th 1083, 1095-1101)* . The public policy involved was the injunction set forth in *Gov. Code § 12975*, prohibiting any obstruction of an official investigation of a claim of sexual harassment (*1 Cal. 4th 1083, 1096-1097)* . The Court noted that when an employer's decision to discharge an employee results from an animus that violates a fundamental policy of the state, this misconduct cannot, under any reasonable viewpoint, be considered a normal part of the employment relationship or a risk reasonably encompassed within the compensation bargain (*1 Cal. 4th 1083, 1100)* .

Other cases concerning the application of the exclusive remedy rule to an employee's claim of wrongful termination include *Horn v. Bradco Internat., Ltd. (1991) 232 Cal. App. 3d 653, 665-670, 283 Cal. Rptr. 721* ; *Robomatic, Inc. v. VetcoOffshore (1990) 225 Cal. App. 3d 270, 274-275, 275 Cal. Rptr. 70* ; *Jenkins v. Family Health Program (1989) 214 Cal. App. 3d 440, 449-450, 262 Cal. Rptr. 798* ; and *Pichon v. Pacific Gas & Electric Co. (1989) 212 Cal. App. 3d 488, 496, 260 Cal. Rptr. 677* .

[4] Additional Authorities

[a] Emotional Distress Claim Barred by Exclusive Remedy Provisions

In ***Kacludis v. GTE Sprint Communications Corp.*** *(N.D. Cal. 1992) 806 F. Supp. 866* , plaintiff alleged he was wrongfully terminated in retaliation for complaints concerning his supervisor's management style. The court of appeal upheld dismissal of causes of action alleging infliction of emotional distress, based on the exclusivity of the workers' compensation system. The court noted that plaintiff unsuccessfully attempted to circumvent this result by alleging that defendant committed fraud by virtue of a supervisor's treatment of plaintiff leading to the termination. Any damages alleged in those circumstances are the result of the termination, not any action or forbearance to act in reliance on fraudulent statements (*806 F. Supp. 866, 870-871)* .

In ***Jones v. Department of Corrections and Rehabilitation*** *(2007) 152 Cal. App. 4th 1367, 62 Cal. Rptr. 3d 200* , plaintiff alleged a cause of action for intentional and negligent emotional distress by contending that the legislature did not intend that an employer be allowed to raise the exclusive remedy rule for the purpose of deflecting a claim of discriminatory practices. That is, asserted plaintiff, a claim for emotional and psychological damage, arising out of employment, is not barred when the distress is engendered by an employer's illegal discriminatory practices in violation of a fundamental public policy, since such misconduct lies outside of the exclusive remedy rule. The court of appeal held that, because plaintiff did not establish discrimination, her causes of action for emotional distress failed to the extent that they were tethered to the discrimination claim. Moreover, the causes of action for emotional distress failed because they were barred by the exclusive remedy rule. Even if the discriminatory conduct of which plaintiff complained could be characterized as intentional, unfair, or outrageous, it was nevertheless covered by the exclusivity provisions (*152 Cal. App. 4th 1367, 1382)* .

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PART II. FORMS

10-239 California Points & Authorities § 239.24

AUTHOR: Carolyn Rashby

§ 239.24 Supporting Contention That Workers' Compensation Exclusive Remedy Doctrine Precludes Action by Employee Against Employer--Power Press Injury Exception Does Not Apply--Employer Did Not Know of Potential Danger in Removing or Replacing Point-of-Operation Guard [Lab. Code § 4558]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE POWER PRESS EXCEPTION TO THE EXCLUSIVE REMEDY PROVISIONS OF THE WORKERS' COMPENSATION ACT DOES NOT APPLY, BECAUSE DEFENDANT DID NOT KNOW OF THE POTENTIAL DANGER OF SERIOUS INJURY OR DEATH IN _____ [REMOVING *or* FAILING TO INSTALL] A POWER PRESS POINT-OF-OPERATION GUARD.

A. Definition of Power Press. For purposes of workers' compensation law, the term "power press" means a material-forming machine that utilizes a die, which is designed for use in the manufacture of other products (*Lab. Code § 4558(a)(4)*; *McCoy v. Zahniser Graphics, Inc. (1995) 39 Cal. App. 4th 107, 110, 45 Cal. Rptr. 2d 871*). A "die" is a tool that imparts some version of its own shape to material by pressing or impacting against or through the material, in a punching, stamping or extruding motion (*Rosales v. Deputy Ace Medical Co. (2000) 22 Cal. 4th 279, 288, 92 Cal. Rptr. 2d 465, 991 P.2d 1256*).

B. Requirement of Actual Knowledge for Power Press Exception. The term "known" in *Labor Code Section 4558* means actual awareness, and courts may not impute knowledge or impose constructive knowledge on the employer regarding the danger to employees in removing or failing to install a point-of-operation guard on a power press (*Saldana v. Globe-Weis Systems Co. (1991) 233 Cal. App. 3d 1505, 1519, 285 Cal. Rptr. 385*). Furthermore, the power press exception does not apply unless the awareness of the need for the point-of-operation guard resulted from information supplied by the manufacturer of the machine (*Bryer v. Santa Cruz Pasta Factory (1995) 38 Cal. App. 4th 1711, 1714-1715, 45 Cal. Rptr. 2d 750* ; *see Lab. Code § 4558(c)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the power-press exception to workers' compensation exclusivity provisions does not apply because defendant did not have the requisite knowledge of the danger to employees in removing or failing to install a point-of-operation guard from information supplied by the manufacturer, as required by *Lab. Code § 4558(c)*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the power-press exception to the workers' compensation exclusivity doctrine does not apply because defendant was unaware of the danger in removing or failing to install a guard, for example, in a motion for summary judgment. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that the employer was unaware of the danger of injury or death in its removal or failure to install a point-of-operation guard. For example, if appropriate, counsel could set forth facts indicating that when the employer removed the manufacturer's guard and replaced it with another safety device, the employer intended to make the power press safer and did not know that there was a danger in removing the original guard [*Saldana v. Globe Weis Systems Co. (1991) 233 Cal. App. 3d 1505, 1516-1520, 285 Cal. Rptr. 385]* .

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 239.41* may be used to oppose the contention supported by these points and authorities.

[d] Related Pleading and Practice Forms

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[3] Discussion of Authorities

[a] Definition of Power Press

In ***Islas v. D & G Manufacturing Co.*** *(2004) 120 Cal. App. 4th 571, 15 Cal. Rptr. 3d 559* , the court of appeal reversed a dismissal of an employee's action against his employer that was based on the trial court's determination as an issue of preliminary fact, pursuant to *Evidence Code Section 405*, that the employee was not injured by a "power press" within the meaning of *Labor Code Section 4558(a)(4)*, when the court of appeal found that whether the machine was a "power press" was a factual question that should have been submitted to the jury (*120 Cal. App. 4th 571, 578-580)* .

In ***McCoy v. Zahniser Graphics, Inc.*** *(1995) 39 Cal. App. 4th 107, 45 Cal. Rptr. 2d 871* , the plaintiff, who was injured at work while operating a printing press, filed a personal injury suit against his employer, arguing that the power press exemption to the exclusive remedy provision of the Workers' Compensation Act [*see Lab. Code § 4558*] applied. The trial court granted summary judgment to the defendant, and the court of appeals affirmed, holding that a printing press is not a power press within the meaning of *Lab. Code § 4558(a)(4)*. The court stated that, while a printing press is a machine, it does not fit the statutory definition of power press, because it is not a machine that forms materials to be used in the manufacture of other products (*39 Cal. App. 4th 107, 111)* .

In ***Rosales v. Deputy Ace Medical Co.*** *(2000) 22 Cal. 4th 279, 92 Cal. Rptr. 2d 465, 991 P.2d 1256* , the plaintiff was

injured while operating alathe which used a V-notching tool to form material by cutting along its surface. The lathe's safety sensor, which was designed to prevent operation while the door was open, had been intentionally disabled. The plaintiff filed a civil action against his employer pursuant to *Lab. Code § 4558*, alleging that the machine he was using was a "power press." The defendant filed a motion for summary judgment, which was granted by the superior court based upon its finding that the plaintiff did not dispute that he was injured by a lathe which used a sharp edge cutting tool rather than a mirror image pressing or stamping die. The court of appeal reversed, rejecting the idea that a power press necessarily employs a die that forms material into a mirror image of itself. Relying on a regulatory agency's definition, the court of appeal held that a power press is any mechanically powered machine that forms materials by use of tools *or* dies attached to slides.

The California Supreme Court reversed the court of appeal's decision. Affirming the earlier court of appeal decisions defining the term "die" (*see Ceja v. J. R. Wood, Inc. (1987) 196 Cal. App. 3d 1372, 1377, 242 Cal. Rptr. 531* ; *Graham v. Hopkins (1993) 13 Cal. App. 4th 1483, 1487-1489, 17 Cal. Rptr. 2d 82* , the Court described a "die" as a tool that imparts some version of its own shape to material by pressing or impacting against or through the material, in a punching, stamping, or extruding motion. Thus, the Court held that the V-notching tool used by the plaintiff which formed material by cutting along its surface in the manner of a blade was not a die under *Labor Code § 4558* (*Rosales v. Deputy Ace Medical Co. (2000) 22 Cal. 4th 279, 285, 92 Cal. Rptr. 2d 465, 991 P.2d 1256*).

[b] Requirement of Actual Knowledge for Power-Press Exception

Saldana v. Globe-Weis Systems Co. *(1991) 233 Cal. App. 3d 1505, 285 Cal. Rptr. 385* , involved an employee's action for damages against her employer under *Lab. Code § 4558*, alleging that the employer installed the manufacturer's fixed-barrier guard, but then removed it and replaced it with a pull-back guard that was in place at the time of the accident. Defendant moved for summary judgment on the ground that workers' compensation was plaintiff's exclusive remedy and that plaintiff did not raise any triable issues of fact warranting application of the *Lab. Code § 4558* exception to workers' compensation exclusivity. The trial court granted the motion and the court of appeals affirmed.

The court stated that the elements for a cause of action under § 4558 are (1) that the injury or death is proximately caused by the employer's knowing removal of or knowing failure to install a point-of-operation guard on a power press; and (2) that this removal or failure to install is specifically authorized by the employer under conditions known by the employer to create a probability of serious injury or death. With respect to the second element, the court found that the Legislature used the word "known" in the sense of actual awareness, and that nothing in § 4558 indicates that courts may impute knowledge or impose constructive knowledge on an employer. Replacing a potentially dangerous safety device with another safety device carries an inference that the intent was to make the power press safer, and it necessarily follows that such intent would be contrary to knowledge of the probability of serious injury. The court also found that § 4558 does not encompass situations where the employer did not know of any danger when it replaced the guard and only later was negligent in failing to maintain the replacement guard. Finally, the court held that § 4558 does not apply to an employer's mere act of removing the manufacturer's guard and replacing it with a new guard, without regard to the employer's state of mind (*233 Cal. App. 3d 1505, 1516-1520)* .

In ***Bryer v. Santa Cruz Pasta Factory*** *(1995) 38 Cal. App. 4th 1711, 45 Cal. Rptr. 2d 750* , plaintiff was injured while operating a pasta machine that did not have a point of operation guard. The defendant employer had bought the machine second hand from an individual and had observed a hole in the machine, but the defendant had not received any information from the manufacturer about the necessity of installing a point of operation guard to the machine. The trial court granted summary judgment to the defendant, and the court of appeals affirmed, holding that application of the power press exemption to the exclusive remedy doctrine under *Lab. Code § 4558(c)* requires proof that the manufacturer informed the employer of the need for a point of operation guard. Here, defendant had never received any information from the manufacturer of the machine regarding the necessity of a point of operation guard. In addition, plaintiff produced no evidence that defendant acquired such knowledge from the manufacturer or that the

representations of the third party from whom defendant acquired the machine were attributable to the manufacturer. Finally, while defendant was able to discern from the existence of a hole in the machine that a safety device was missing, the hole did not constitute a conveyance by the manufacturer of the knowledge required under the statute. The hole conveyed no description of the nature of the missing part, nor did it convey the specific fact that the manufacturer required a point of operation guard (*38 Cal. App. 4th 1711, 1714-1715)* .

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PART II. FORMS

10-239 California Points & Authorities § 239.25

AUTHOR: Carolyn Rashby

§ 239.25 Supporting Contention That Workers' Compensation Exclusive Remedy Doctrine Precludes Action by Employee Against Employer--Willful Assault Exception Does Not Apply--Employer Did Not Specifically Intend to Injure Employee [Lab. Code § 3602(b)(1)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

THE EXCLUSIVITY EXCEPTION IN LABOR CODE SECTION 3602(b)(1) FOR INJURIES CAUSED BY A WILLFUL PHYSICAL ASSAULT BY THE EMPLOYER DOES NOT APPLY BECAUSE PLAINTIFF HAS FAILED TO SHOW THAT DEFENDANT SPECIFICALLY INTENDED TO INJURE HIM/HER.

Requirement of Specific Intent to Injure. Willful assaults under *Lab. Code § 3602(b)(1)* include only those common-law batteries that are specifically intended to injure. Thus, if the employee fails to show that the employer has specifically intended to injure him or her, the *Labor Code Section 3602(b)(1)* exception does not apply and workers' compensation benefits are the employee's sole remedy (*Soares v. City of Oakland (1992) 9 Cal. App. 4th 1822, 1825-1831, 12 Cal. Rptr. 2d 405*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that the *Lab. Code § 3602(b)(1)* exception to workers' compensation exclusivity does not apply because defendant did not specifically intend to injure plaintiff.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the *Lab. Code § 3602(b)(1)* exception for willful physical assault does not apply, for example in a motion for summary judgment. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that plaintiff has failed to allege facts indicating that the employer had the specific intent to injure plaintiff. Counsel also should discuss evidence indicating that in committing the alleged battery, the employer did not have the specific intent to injure plaintiff, such as facts indicating that the injury was accidental [*Soares v. City of Oakland (1992) 9 Cal. App. 4th 1822, 1825-1831, 12 Cal. Rptr. 2d 405]* .

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 239.36* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Requirement of Specific Intent to Injure

The factual and procedural background of ***Soares v. City of Oakland*** *(1992) 9 Cal. App. 4th 1822, 12 Cal. Rptr. 2d 405* , is *set forth in § 239.45[3][a]*. The issue before the court was whether *Lab. Code § 3601(a)(1)* excepting willful physical assaults by coemployees from the exclusive coverage of workers' compensation included all common-law batteries or only those batteries that are specifically intended to injure. The court first held that "willful" employer assaults under § 3602(b)(1) do not include all common-law batteries, but only those that are specifically intended to injure. Finding that there was no basis for a different interpretation of the term "willful" in § 3601(a)(1), the court then held that acts of aggression are only "willful" under § 3601(a)(1) if they are intended to injure (*9 Cal. App. 4th 1822, 1825-1831)* .

[4] Additional Authorities

[a] Employer's Liability for Conduct of Co-Employee

In *Fretland v. County of Humboldt (1999) 69 Cal. App. 4th 1478, 82 Cal. Rptr. 2d 359* , an employee filed a complaint against his employer alleging, among other things, a cause of action for assault and battery stemming from actions directed towards him by a co-employee. The employee contended that this cause of action fell within the *Lab. Code § 3602(b)(1)* exception to the exclusive remedy rule, pursuant to the doctrine of respondeat superior. The trial court rejected the employee's contention and granted the employer's motion for summary judgment, finding that the employee's cause of action was barred. The court of appeal upheld the lower court's ruling. The court of appeal reasoned that applying the doctrine of respondeat superior as proposed by the employee to expand the scope of the *Lab. Code § 3602(b)(1)* exception to cover conduct committed by a co-employee would directly violate *Lab. Code § 3601(b)*. In orderto reconcile *Lab. Code § 3602(b)(1)* and *Lab. Code § 3601(b)*, the court of appeal pointed out, liability under the former must be based on positive misconduct by the employer and not on a theory of vicarious liability such as that which forms the basis of the doctrine of respondeat superior. The court of appeal concluded that the exception to the exclusivity rule contained in *Lab. Code § 3602(b)(1)* does not authorize a civil action against an employer for injury resulting from the willful assault of a co-employee based on a theory of respondeat superior, when there is no employer ratification of the co-employee's conduct (*69 Cal. App. 4th 1478, 1490-1491)* .

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10-239 California Points & Authorities § 239.26

AUTHOR: Carolyn Rashby

§ 239.26 Supporting Contention That Workers' Compensation Exclusive Remedy Doctrine Precludes Action by Employee Against Employer--Actual Knowledge by Employer Required to Establish Cause of Action for Fraudulent Concealment of Work-Related Injury [Lab. Code § 3602(b)(2)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF HAS FAILED TO ESTABLISH A CAUSE OF ACTION FOR AGGRAVATION OF A WORK-RELATED INJURY DUE TO THE EMPLOYER'S FRAUDULENT CONCEALMENT OF THE EXISTENCE OF THE INJURY AND ITS CONNECTION WITH THE CONDITION BECAUSE PLAINTIFF HAS FAILED TO PROVE THAT THE EMPLOYER HAD ACTUAL KNOWLEDGE OF THE INDUSTRIAL INJURY, AND, THEREFORE, THE ACTION IS PRECLUDED BY THE EXCLUSIVE REMEDY PROVISIONS OF WORKERS' COMPENSATION LAW.

Requirement of Employer's Actual Knowledge of Industrial Injury. In order to establish a cause of action under *Labor Code Section 3602(b)(2)* for aggravation of a work-related injury due to the employer's fraudulent concealment of a work-related injury, plaintiff must prove that the employer had actual knowledge of the work-related injury (*Santiago v. Firestone Tire & Rubber Co. (1990) 224 Cal. App. 3d 1318, 1334, 274 Cal. Rptr. 576*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that plaintiff has failed to establish a cause of action under *Lab. Code § 3602(b)(2)* because plaintiff has failed to prove that defendant had actual knowledge of the industrial injury.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context

in which counsel wishes to raise the substantive issue that plaintiff has failed to establish a cause of action under *Lab. Code § 3602(b)(2)*, for example, in a motion for summary judgment. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should demonstrate that the employer neither failed to disclose facts regarding plaintiff's injury and its connection to the employment when there was a duty to do so nor made any affirmative misrepresentations. Further, counsel should discuss evidence indicating that the employer did not have actual knowledge of plaintiff's injury or of the injury's connection to the employment. For example, counsel could show that the employee knew about possible health problems arising from exposure to certain chemicals used in his/her work, and that there is no evidence that the employer withheld from plaintiff any information relevant to plaintiff's condition [*Davis v. Lockheed Corp. (1993) 13 Cal. App. 4th 519, 522-523, 17 Cal. Rptr. 233* ; *see also Ashdown v. Ameron International Corp. (2000) 83 Cal. App. 4th 868, 881, 100 Cal. Rptr. 2d 20]* .

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 239.40* may be used to oppose the contention supported by these points and authorities.

[3] Discussion of Authorities

[a] Requirement of Employer's Actual Knowledge of Industrial Injury

In ***Santiago v. Firestone Tire & Rubber Co.*** *(1990) 224 Cal. App. 3d 1318, 274 Cal. Rptr. 576* , the plaintiffs were employees of a tire manufacturer. Plaintiffs, who had leukemia, alleged that their disease resulted fromworkplace exposure to benzene, that their injuries were fraudulently concealed by the employer, and that as a result of this fraudulent concealment, their claims were outside the scope of the workers' compensation law pursuant to *Lab. Code § 3602(b)(2)*. The trial court instructed the jury that plaintiffs had the burden of proving that defendant had actual knowledge both that plaintiffs suffered injuries, and that those injuries were caused by their employment. The jury found that defendant had not possessed actual knowledge of this information, and the trial court entered judgment for defendant.

Plaintiffs appealed, contending that the trial court erred in instructing the jury that actual knowledge was required, and that it should have instructed as to constructive knowledge, imputed knowledge, and reckless misrepresentation. In affirming, the court of appeal rejected this argument, holding that *Lab. Code § 3602(b)(2)* requires proof of actual knowledge on the part of the employer, and that the trial court's jury instruction was proper (*224 Cal. App. 3d 1318, 1334)* .

[4] Additional Authorities

[a] Requirement of Employer's Actual Knowledge of Industrial Injury

In *Davis v. Lockheed Corp. (1993) 13 Cal. App. 4th 519, 17 Cal. Rptr. 2d 233* , the court held that the employee was not entitled, as a matter of law, to bring a civil action against the employer pursuant to *Lab. Code § 3602(b)(2)* when the employer established by uncontroverted evidence that the employee had known for years about possible health problems arising from exposure to asbestos and other chemicals used the course of his work, and when there was nothing in the record to suggest that the employer withheld any information from the employee relevant to his condition (*13 Cal. App. 4th 519, 522-523)* . Similarly, in *Ashdown v. Ameron International Corp. (2000) 83 Cal. App. 4th 868, 100 Cal. Rptr. 2d 20* , the court of appeal affirmed the trial court's finding that the fraudulent concealment exception to

the exclusive remedy rule did not apply, when there was no evidence indicating that decedent's employers knew decedent had an asbestos-related disease, fraudulently concealed the existence of decedent's injuries and their connection with his employment, or hindered decedent from seeking treatment or bringing a lawsuit (*83 Cal. App. 4th 868, 881)* .

In *Jensen v. Amgen, Inc. (2003) 105 Cal. App. 4th 1322, 129 Cal. Rptr. 2d 899* , the court of appeal affirmed the trial court's grant of summary judgment in favor of the defendant/employer on the grounds that there was no evidence that the employer knew of the employee's injury before she did. In the absence of such prior knowledge, the employer could have concealed neither the existence of the employee's injury nor the connection between her symptoms and her employment, both of which are necessary elements of an action pursuant to *Lab. Code § 3602(b)(2)* (*105 Cal. App. 4th 1322, 1326-1327)* .

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10-239 California Points & Authorities § 239.27

AUTHOR: Carolyn Rashby

§ 239.27 Supporting Contention That Workers' Compensation Exclusive Remedy Doctrine Precludes Action by Employee Against Employer--Plaintiff Was Acting in Course of Employment at Time of Injury, and Injury Arose Out of Employment

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S ACTION AGAINST DEFENDANT FOR DAMAGES IS PRECLUDED BY THE WORKERS' COMPENSATION EXCLUSIVITY PROVISIONS BECAUSE AT THE TIME OF THE INJURY, PLAINTIFF WAS ACTING IN THE COURSE OF EMPLOYMENT, AND PLAINTIFF'S INJURY AROSE OUT OF THAT EMPLOYMENT.

Employment-Related Injury Incurred on Employee's Day Off Not Subject to Action for Damages. An employee injured while visiting work on a day off and engaged in actions incidental to the employment, within the employment contract, in furtherance of the employer's business, protecting the employer's assets, and constituting a reasonable expectancy of employment, incurs the injury in the course of employment (*Wright v. Beverly Fabrics, Inc. (2002) 95 Cal. App. 4th 346, 354-357, 115 Cal. Rptr. 2d 503*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that plaintiff's action for damages, which plaintiff alleges were incurred while on defendant's premises to engage in a voluntary social activity, is precluded by workers' compensation exclusivity provisions because plaintiff was in fact injured while in the course of employment.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that plaintiff's action for damages is precluded by the workers'

compensation exclusivity rule because plaintiff wasinjured in the course of employment--in a demurrer, for example. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should demonstrate that plaintiff was in the course of employment at the time of injury and that the injury arose out of that employment. Counsel should specifically counter plaintiff's assertions that the injury arose outside of the scope of employment, while, for example, plaintiff was on defendant's premises to engage in a voluntary social activity [*Wright v. Beverly Fabrics, Inc. (2002) 95 Cal. App. 4th 346, 354-357, 115 Cal. Rptr. 2d 503]* .

[3] Discussion of Authorities

[a] Plaintiff in Course of Employment, Not Engaged in Voluntary Social Activity

Wright v. Beverly Fabrics, Inc. *(2002) 95 Cal. App. 4th 346, 115 Cal. Rptr. 2d 503* , was an employee's suit against her employer for negligence. The suit proceeded to verdict and judgment in the trial court, where the jury awarded plaintiff in excess of one-half million dollars. The court of appeal reversed, directing the trial court to enter an order granting defendant's motion for nonsuit (*95 Cal. App. 4th 346, 349, 357)* .

In reaching its decision, the appellate court reviewed the relevant facts on the issue of whether plaintiff's injury arose out of her employment and occurred in the course of that employment, as defendant-employer contended, or occurred while plaintiff was on defendant's premises to engage in a voluntary social activity, as plaintiff contended, in which case the exclusive remedy provisions of the workers' compensation law would not apply. The court noted that, when plaintiff began her employment with defendant, a retail store, she signed a form entitled "Beverly Fabrics, Inc. Security Program," which stated in bold type: "It is the responsibility of every employee to protect the assets of the company at all times." Plaintiff's primary responsibilities included ordering, pricing, and stocking merchandise, which required heavy lifting, bending, squatting, and climbing ladders. According to the court, plaintiff was, however, trained to do almost any activity in the store. On the day of the injury, plaintiff went to her employer's premises, despite the fact that it was her day off, to sign a condolence card and contribute money for two employees who had lost family members. She was not requested by anyone associated with her employer to do this. While plaintiff was visiting in the back of the store with two fellow employees, both of whom were working at the time, one of those employees noticed movement on a nearby shelving unit stacked with heavy clay pots and other inventory. The two on-duty employees grabbed the shelf to stop it from moving. When plaintiff saw the shelf falling, she moved about six feet from where she was standing, positioned herself between the two other employees, and grabbed the shelf. She immediately felt pain down her back. In responding to the falling shelf, all three employees testified that they acted out of instinct. Soon after the three employees grabbed the falling shelf, other employees came to assist, including the store manager, who also grabbed the shelf and told everyone, if they could not hold it, to let go. One of the original two employees who grabbed the shelf also advised any person to let go if she was hurting. In response, plaintiff stated that her back was hurting, but she could not let go. While plaintiff, the store manager, and another employee held the shelf up, other employees removed items from it. During this time, customers were kept out of the area and precluded from providing assistance. Had plaintiff not been an employee of defendant, she would not have been allowed to provide any assistance. Furthermore, if plaintiff had failed to volunteer to help, she would have been asked by her coworkers to help, despite the fact that it was her day off (*95 Cal. App. 4th 346, 349-350)* .

In response to plaintiff's suit for negligence, defendant filed an answer, asserting as an affirmative defense that plaintiff's sole and exclusive remedy was under the California workers' compensation statutes. Defendant's motion for summary judgment was denied by the trial court. At the close of evidence, defendant moved for a judgment of nonsuit, which the court denied. The court also denied defendant's request for jury instructions directed at whether plaintiff was acting in the course of her employment, concluding that whether plaintiff was acting in the course and scope of her

employment at the time of injury was not a jury question because there was no factual dispute regarding what occurred. The trial court also found that, as a matter of law, the evidence established that plaintiff was not in the course of her employment at the time of her injury. Finally, after the jury returned its verdict and judgment was entered in favor of plaintiff, defendant moved for judgment notwithstanding the verdict or, in the alternative, for a new trial, both of which motions the trial court denied (*95 Cal. App. 4th 346, 350-351)* .

The court of appeal found that plaintiff was acting in the course of her employment at the time of her injury and that her injury arose out of her employment. Injuries sustained while an employee is performing tasks within his or her employment contract but outside normal work hours are, said the court, within the course of employment. The rationale is that the employee is still acting in furtherance of the employer's business. Moreover, the combination of a personal act performed outside of regular working hours with the performance of acts in furtherance of the employer's business does not defeat a finding that the employee was acting in thecourse of employment. In this case, plaintiff was assisting fellow employees in holding up a collapsing shelf. She was doing no more than what a reasonable employer would expect from a responsible employee in her position. Thus, plaintiff was engaged in an activity incidental to her employment in furtherance of her employer's business and protecting its assets (*95 Cal. App. 4th 346, 354-356)* .

The appellate court found plaintiff's reliance on the provisions of *Lab. Code § 3600(a)(9)* misplaced. That statute precludes recovery of workers' compensation benefits for injuries arising out of voluntary participation in off-duty recreational, social, or athletic activities not constituting part of the employee's work-related duties, except when these activities are a reasonable expectancy of, or are expressly or impliedly required by, the employment. Plaintiff was not engaged in a recreational or social activity at the time of her injury, and her injury did not arise out of participation in any such activity. Plaintiff was not hurt while she was signing a condolence card or visiting with coworkers. She was hurt holding up a shelf in an effort to protect the property of her employer, an activity reasonably contemplated by her employment. In short, her actions in assisting her coworkers in holding up the shelf were taken in furtherance of her employer's business and were reasonably expected by her employer (*95 Cal. App. 4th 346, 356)* .

Finally, the court of appeal rejected plaintiff's argument that she responded to an emergency situation out of instinct, without conscious thought, and made a split-second decision to assist in holding up the collapsing shelf, and that in such a case it is not appropriate to examine the activity being performed at the time of the injury but to look instead to the reason the employee was on the premises. In this case, that reason was to engage in a voluntary social activity that exempted her from the exclusive remedy rule of the workers' compensation statutes by virtue of *Lab. Code § 3600(a)(9)*. The court found no such exception to well settled workers' compensation law for split-second or instinctive decisions, pointing out that, to the contrary, California courts have recognized that injuries sustained by an employee during emergency efforts to save the employer's property from fire, theft, or other hazards are within the course of employment and compensable under workers' compensation laws (*95 Cal. App. 4th 346, 357)* .

[4] Additional Authorities

[a] Plaintiff Not in Course of Employment

[i] Civil Action Allowed

In ***Mason v. Lake Dolores Group*** *(2004) 117 Cal. App. 4th 822, 11 Cal. Rptr. 3d 914* , an employee was injured while sliding down his employer's water slide. The court of appeal noted that the question of whether an employee was on-duty or off-duty at the time of injury is not the ultimate test for whether the injury was covered by the compensation bargain and thus subject to the exclusive remedy rule. Rather, the ultimate test is whether the injury arose out of and in the course of the employment. Moreover, said the court, the "reasonable expectancy" requirement of *Labor Code Section 3600(a)(9)* is simply a subset of the ultimate issue, namely, whether the injury arose out of and in the course of the employment (*Lab. Code § 3600(a)(2), (3)*). The court found that the employee's injury did not arise out of or occur in the course of the employment, since the employee was engaging in an activity for his own enjoyment that was

specifically forbidden to employees by company policy and of no benefit to the employer. The court ordered reinstatement of the civil action verdict in favor of the employee (*117 Cal. App. 4th 822, 832-838)* .

[b] Plaintiff in Course of Employment

[i] Civil Action Not Allowed

In ***Vaught v. State of California/Department of Parks and Recreation*** *(2007) 157 Cal. App. 4th 1538, 69 Cal. Rptr. 3d 605* , a court of appeal, affirming the trial court's summary judgment for the employer, held that the exclusive remedy rule of *Lab. Code § 3602(a)* barred the employee and his wife's civil action against the employer for negligence and failure to make a house habitable for human occupation, when the court found that the plaintiffs lived in the ranch house owned by the employer as an "employment benefit" of the husband's job as a park ranger. The husband was injured when, attempting to get up from the bathroom floor of the house, where he had been observing leaking pipes while "on all fours," he slipped and fell. The court found that the bunkhouse rule provides that, when an employee is injured while living on the employer's premises, the course-of-employment requirement of *Lab. Code § 3600(a)* is satisfied if the employment contract contemplates, or work necessity requires, the employee to reside on the employer's premises, which was true in the present case. The court noted that the employment and the injury must be linked in some causal fashion to satisfy the arising-out-of-employment requirement of *Lab. Code § 3600(a)*, and that the injury occurring in employer-furnished housing in the course of employment ordinarily arises out of employment, which was true in the present case (*157 Cal. App. 4th 1538, 1544-1549)* .

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10-239 California Points & Authorities § 239.28

AUTHOR: Carolyn Rashby

§ 239.28 Supporting Contention That Workers' Compensation Exclusive Remedy Doctrine Precludes Action by Employee Against Coemployee or Third Person for Damages--Special Employment Relationship Created With Defendant

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF IS BARRED FROM MAINTAINING AN ACTION AT LAW AGAINST DEFENDANT AND IS LIMITED IN HIS/HER REMEDY TO WORKERS' COMPENSATION BENEFITS WHERE DEFENDANT IS PLAINTIFF'S SPECIAL EMPLOYER AND THE INJURIES AROSE OUT OF THE COURSE AND SCOPE OF THE SPECIAL EMPLOYMENT RELATIONSHIP.

A. Action Barred Against Special Employer. Where a general and special employment relationship is created, both the general and special employers are liable for the payment of benefits to the injured employee under workers' compensation law. Thus, while the employee may proceed against either employer for compensation benefits, he/she is ordinarily barred from maintaining an action for damages against thespecial employer (*McFarland v. Voorheis-Trindle Co. (1959) 52 Cal. 2d 698, 702, 343 P.2d 923* ; *Santa Cruz Poultry, Inc. v. Superior Court (1987) 194 Cal. App. 3d 575, 578, 239 Cal. Rptr. 578*).

B. Creation of General and Special Employment Relationship. A general and special employment relationship is created where an employer loans or furnishes an employee to another person who puts the employee to work on a job and directs his/her activities (*Oxford v. Signal Oil & Gas Co. (1970) 12 Cal. App. 3d 403, 408, 90 Cal. Rptr. 700*).

C. Paramount Consideration as Control Over Details of Work. The paramount consideration in determining whether a general and special employment relationship is created is whether the alleged special employer exercises control, not necessarily complete, over the details of the work (*McFarland v. Voorheis-Trindle Co. (1959) 52 Cal. 2d 698, 705, 343 P.2d 923*).

[*Optional*] **D. Factors in Determining Whether Special Employment Relationship Created.** Important factors to be considered in determining whether a general and special employment relationship has been created are the nature of the services, whether skilled or unskilled, whether the work is part of the employer's regular business, the duration of the employment period, the method of payment, and who supplies the work tools (*Martin v. Phillips Petroleum Co. (1974) 42 Cal. App. 3d 916, 921-922, 117 Cal. Rptr. 269* ; *Kowalski v. Shell Oil Co. (1979) 23 Cal. 3d 168, 177, 151 Cal. Rptr. 671, 588 P.2d 811*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that plaintiff's action for damages for personal injuries is barred because defendant was the special employer of plaintiff and, therefore, plaintiff's sole and exclusive remedy is workers' compensation benefits.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that plaintiff's action is barred by workers' compensation exclusive remedy provisions because defendant was plaintiff's special employer, for example in a motion for summary judgment. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should argue that defendant was a special employer of plaintiff, discussing evidence of a special employment relationship with specific reference to the factors used to determine whether such a relationship exists. Counsel should set forth facts indicating that each employer had some power of direction and control over plaintiff, and that the special employer had the right to exercise control over the details of the work. If appropriate, counsel could also show, for example, that defendant had the power to discharge plaintiff, that the work was unskilled, that the work was part of defendant's regular business, and/or that defendant supplied the work tools [Martin v. Phillips Petroleum co. *(1974) 42 Cal. App. 3d 916, 921-922, 117 Cal. Rptr. 269* ; *Kowalski v. Shell Oil Co. (1979) 23 Cal. 3d 168, 177, 151 Cal. Rptr. 671, 588 P.2d 811]* .

[c] Related Pleading and Practice Forms

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[3] Discussion of Authorities

[a] Action Barred Against Special Employer

McFarland v. Voorheis-Trindle Co. *(1959) 52 Cal. 2d 698, 343 P.2d 923* , was an appeal from a judgment for defendant notwithstanding the verdict for $75,000 in favor of plaintiff for damages for personal injuries and from an order granting a new trial. Plaintiff was a master mechanic and equipment operator for a tractor company, which had agreed to furnish equipment and operators to defendant on an hourly rental basis. The company ordered plaintiff to work with defendant at defendant's job site where his duties were the repair and maintenance of earth-moving and grading equipment. The operation of such equipment was to be supervised by defendant's employees. Plaintiff received his injury while attempting to operate a tractor under the supervision, or at least aid, of one of defendant's supervisors. The apparent ground for the granting of the judgment notwithstanding the verdict was that plaintiff was the special employee of defendant as a matter of law and that for this reason plaintiff's exclusive remedy was worker's

compensation. The Supreme Court reversed the judgment notwithstanding the verdict but affirmed the order granting a new trial. The Court stated the general rule that where a relationship of general and special employment obtains, the injured worker can look to both employers for compensation benefits. If workers' compensation is available, it constitutes the worker's sole remedy against the employer. Therefore, where there is dual employment the worker is barred from maintaining an action for damages against either employer (*52 Cal. 2d 698, 702)* . The court added that it is settled that a general and special employmentrelationship is present if there exists in each some power, not necessarily complete, of direction and control. The paramount consideration in this respect is whether the alleged special employer exercises control over the details of the work. However, the control need not be exercised, it being sufficient if the right to direct the details of the work s present. In the case before it, the Court could not find as a matter of law that the evidence which was most favorable to plaintiff supported the single inference that plaintiff was defendants' special employer. Although defendant's employees designated the work to be done generally, the details of the work were left to the individual equipment operators. In all other respects, the tractor company had control over plaintiff's employment. In reviewing the circumstances of the accident, the Court found that the employee in charge of the assigned work was not necessarily acting as a supervisor of plaintiff in advising plaintiff how to move his tractor, but rather was aiding plaintiff to complete his job. Nevertheless, the Court also found that there was substantial evidence to support the order for a new trial (*52 Cal. 2d 698, 704-707)* .

In ***Santa Cruz Poultry, Inc. v. Superior Court*** *(1987) 194 Cal. App. 3d 575, 239 Cal. Rptr. 578* , an employee had been hired on a one-day assignment from a temporary labor agency when he was injured while attempting to jump on a delivery truck belonging to the employer pursuant to the direction of the truck driver, a coworker who supervised and controlled the temporary employee's work. The employee was on the agency's payroll and recovered workers' compensation from the agency's carrier. The employee and the carrier sued the employer: the employee claimed damages based on negligence and the carrier claimed a lien for compensation benefits paid. Although the trial court found as an issue without controversy that the employer had the ability to control the result of the employee's work and the means by which it was accomplished, including the details relating to his job performance at the time of the injuries alleged, it denied the employer's motion for summary judgment.

In issuing a peremptory writ of mandate directing the trial court to enter summary judgment for the employer, the court said that an employee may have more than one employer for purposes of workers' compensation, and, in situations of dual employers, the second or "special" employer may enjoy the same immunity from a common-law negligence action on account of an industrial injury as does the first or "general" employer (*194 Cal. App. 3d 575, 578)* . The court said that once a special employment relationship is identified, two consequences ensue: (1) the special employer's liability for workers' compensation coverage to the employee, and (2) the employer's immunity from a common-law tort action. The latter consequence is the result of the exclusivity of the compensation remedy embodied in *Lab. Code § 3601* (*194 Cal. App. 3d 575, 578)* . The court concluded that a special employment relationship was created, and that, under the circumstances, the employee's exclusive remedy for the job-related injuries was workers' compensation (*194 Cal. App. 3d 575, 577, 584)* .

[b] Creation of General and Special Employment Relationship

In ***Oxford v. Signal Oil & Gas Co.*** *(1970) 12 Cal. App. 3d 403, 90 Cal. Rptr. 700* , plaintiffs, the heirs at law of decedents Oxford and Akins, brought an action against defendants for damages for the wrongful deaths of decedents, who were killed by the explosion of a certain tank belonging to defendant Signal. All defendants moved for summary judgment, alleging that decedents were Signal's special employees, that they were killed in the course and scope of that employment, and that plaintiffs' exclusive remedy was under the workers' compensation law. The trial court granted the motion of defendant Signal, and plaintiffs and intervenor, the workers' compensation insurance carrier for Trans-Pacific, decedents' alleged general employer, appealed. The court of appeal affirmed the judgment. The undisputed facts of the case showed that at the time of death decedents had been the general employees of Trans-Pacific; that they had been assigned to Signal pursuant to an employment contract under which Trans-Pacific took care of the payroll and all incidental benefits; that they had been assigned to clean the tank by Signal's foreman who had control of the details of

the work; that for several years decedents had been working on Signal's premises; and that during this time Signal exercised supervision and control to the exclusion of the general employer, specified all work assignments, furnished the work tools, controlled the details of the work, and, if dissatisfied with decedents' services, had the power to terminate the employment on notification to the general employer.

The court stated that, generally, the right to control and direct the activities of an employee or the manner and method in which the work is performed, whether exercised or not, gives rise to the employment relationship. Consequently, the court found, quoting from Hanna, California Law Of Employee Injuries And Workmen's Compensation (2d ed.), § 3.142 (Matthew Bender), that where an employer loans or furnishes an employee to another person who puts the employee to work on a job and directs his or her activities, a general and special employment relationship is created. The court added that, while the power to discharge the employee is strong evidence of the existence of a special employment, the payment of wages is not determinative. The court considered other factors, including the nature of the services, whether skilled or unskilled, whether the work is part of the employer's regular business, the duration of the employment period, the method of payment, and who supplies the work tools, but noted that the paramount consideration is whether the alleged special employer exercises control over the details of the work. Reviewing the undisputed facts of the case, the court found that the circumstances were compellingfor the creation of a special employment. The fact that there may have been a triable issue of fact concerning the question of whether Trans-Pacific was decedents' employer was irrelevant to finding that Signal was also decedents' special employer, since the possibility of dual employment had long been recognized in California. Therefore, the court concluded that, because workers' compensation was available against the special employer in that both employers were liable for the payment of benefits under the Workers' Compensation Act, it constituted the workers' sole remedy against the special employer, and the special employee was thus barred from maintaining an action against the special employer.

[c] Paramount Consideration as Control Over Details of Work

McFarland v. Voorheis-Trindle Co. *(1959) 52 Cal. 2d 698, 343 P.2d 923* , is *discussed under § 239.28[3][a]*.

[d] Factors in Determining Whether Special Employment Relationship Created

Martin v. Phillips Petroleum Co. *(1974) 42 Cal. App. 3d 916, 117 Cal. Rptr. 269* , was an appeal by plaintiff and intervenor from a judgment rendered by the trial court in the first part of what was scheduled to be a bifurcated trial of plaintiff's action for damages for personal injuries. The judgment in favor of defendant was based on the conclusion that plaintiff was defendant's special employer. The court of appeal affirmed. The evidence showed that plaintiff was supplied by Plant Maintenance, plaintiff's alleged general employer, to defendant under a contract between defendant and Plant Maintenance, which provided that all of the employees which were furnished to defendant under the contract were deemed to be employees of Plant Maintenance, which maintained complete control over the employees, and that, although some of the employees may work solely or partially under the direction or supervision of defendant, such direction or supervision was for Plant Maintenance's benefit and account. Plaintiff was injured during his lunch hour in a locker room which was supplied by Plant Maintenance but which was maintained by defendant.

The court found that the contract between defendant and Plant Maintenance was not determinative of the true relationship of the parties to the contract. It could not affect that relationship nor could it place an employee in a different position from that which he or she actually held. Analyzing the various factors which would determine the true relationship of the parties, the court found that: (1) although plaintiff had been on the payroll of Plant Maintenance, this factor was relatively unimportant; (2) the fact that plaintiff had been with defendant for at least a year without interruption was a factor tending to show special employment; (3) the fact that plaintiff's services were relatively unskilled also tended to show special employment, since such services would be readily subject to control by defendant's supervisors; (4) the fact that all the tools were supplied by defendant tended to show special employment; (5) although all Plant Maintenance employees wore badges, nothing in the record showed of what practical use the badges were in the performance of required tasks; (6) although a Plant Maintenance foreman checked plaintiff in the

morning, this fact did not affect the details or quality of the work; (7) although defendant did not have the right to terminate plaintiff's employment as such, it did have the right to terminate the special employment, which was an important factor tending to show special employment; and (8) the evidence showed that defendant had the right to control the details of the work for which plaintiff was "lent" or "loaned," which was the factor most tending to show special employment. Thus, the court concluded that based on the nature of the transaction and relationship between the general and special employers and with the employee, the trial court had correctly found that plaintiff was defendant's special employee (*42 Cal. App. 3d 916, 922-923)* .

In ***Kowalski v. Shell Oil Co.*** *(1979) 23 Cal. 3d 168, 151 Cal. Rptr. 671, 588 P.2d 811* , the C. Norman Peterson Company (Peterson) and Shell entered into a contract whereby Peterson agreed to perform maintenance work at one of Shell's refineries. Plaintiff, a Peterson employee, was working on building a scaffold at the refinery along with a crew of Peterson carpenters. While he was operating a saw furnished by Shell, his hand was severed. Plaintiff filed suit against Shell and other defendants for personal injuries. Shell alleged that plaintiff was its special employee such that his exclusive remedy was workers' compensation benefits. The jury returned a special verdict finding that Shell was not plaintiff's special employer and awarded plaintiff damages. The trial court, however, granted Shell's motion for a judgment notwithstanding the verdict on the sole ground that plaintiff was Shell's special employee. Plaintiff appealed.

The Court stated that if general and special employment exist, the injured worker can look to both employers for workers' compensation benefits. The primary consideration in determining whether a special employment relationship exists is whether the special employer has the right to control and direct the activities of the employee or the manner and method in which the work is performed, whether or not the right to control is exercised (*23 Cal. 3d 168, 175)* . The court said that the fact that the contract between Shell and Peterson expressly stated that Shell had a right to control and direct plaintiff's work did not prove the existence of a special employment relationship because a contract is not conclusive evidence of the right to control. Also, courts have looked to a variety of factors, in addition to the right to control, as indicia of the existence of such a relationship. The special employer's power to discharge the worker is strongevidence of a special employment relationship, but payment of wages is not determinative. Evidence that the employee provides unskilled labor and performs work that is part of the employer's regular business, that the employment period is lengthy, and that the employer provides the tools and equipment used all tend to indicate a special employment relationship (*23 Cal. 3d 168, 177)* . Additionally, a court must consider whether the worker expressly or impliedly consented to the employment relationship and whether the parties believed they were creating an 103A/employee relationship. In the case before it, the court found that there was substantial evidence to support the jury's finding that a special employment relationship did not exist: Shell did not exercise control over plaintiff's duties, plaintiff's work was unskilled, plaintiff was on Peterson's payroll and not permanently assigned to Shell, plaintiff had worked at Shell for only 21/2 months, Peterson provided all tools and equipment with the exception of the saw that injured plaintiff, Shell did not have the power to terminate plaintiff's employment with Peterson, and plaintiff did not expressly or impliedly agree to an employment relationship with Shell (*23 Cal. 3d 168, 178-179)* .

[4] Additional Authorities

[a] Action Barred Against Special Employer

In *Enslow v. U.S. (C.D. Cal. 1992) 811 F. Supp. 503* , the court held that a firefighter employed by the California Department of Forestry and Fire Protection who was killed fighting a forest fire under contract to the U.S. Department of the Interior was a "special employee" of the U.S. government, which made the government immune from a wrongful death suit under the Federal Tort Claims Act but subject to payment of compensation under the California workers' compensation law (*811 F. Supp. 503, 506)* .

[b] Creation of General and Special Employment Relationship

In *Marsh v. Tilley Steel Co. (1980) 26 Cal. 3d 486, 162 Cal. Rptr. 320, 606 P.2d 355* , the Court found that where the

negligence of a special employee injures another of the special employer's workers, the victim is not barred by the exclusivity provisions of workers' compensation law from suing the general employer of the tortfeasor in negligence on respondeat superior principles, if the general employer, at the time of the injury, retained total or partial concurrent control over the tortfeasor's work (*26 Cal. 3d 486, 490)* . The court observed that when an employer, also known as the "general" employer, lends an employee to another employer and relinquishes all right of control over the employee's activities to the borrowing employer, a "special" employment relationship arises between the borrowing employer and the employee. During this period of transferred control, the special employer becomes solely liable for the employee's job-related torts under the doctrine of respondeat superior. This special employment relationship and consequent imposition of liability flows from the special employer's power to supervise the details of the employee's work, and that mere instruction by the borrower will not suffice. The court said that several factors tend to negate the existence of such a relationship: (1) the employee is not paid by and cannot be discharged by the borrower; (2) the employee is not a skilled worker with substantial control over operational details; (3) the employee is not engaged in the borrower's usual business; (4) the employee is employed only for a brief period of time; and (5) the employee is using tools and equipment furnished by the lending employer (*26 Cal. 3d 486, 492)* .

[c] Paramount Consideration as Control Over Details of Work

The facts and procedural background of *Santa Cruz Poultry, Inc. v. Superior Court (1987) 194 Cal. App. 3d 575, 239 Cal. Rptr. 578* , are *discussed under § 239.28[3][a]*. In issuing the writ of mandate, the court, analyzing the decision in *Kowalski v. Shell Oil Co. (1979) 23 Cal. 3d 168, 151 Cal. Rptr. 671, 588 P.2d 811* [*discussed under § 239.28[3][d]*], said the primary consideration in determining whether a special employment relationship exists is whether the special employer exercises control over the details of the employee's work, and that this is crucial to a finding of a special employment relationship (*194 Cal. App. 3d 575, 580)* .

[d] Factors in Determining Whether Special Employment Relationship Created

In *Riley v. Southwest Marine, Inc. (1988) 203 Cal. App. 3d 1242, 250 Cal. Rptr. 718* , the court affirmed the trial court's determination that plaintiff, who was sent to work for defendant by a labor broker, had a special employment relationship with defendant, thereby barring plaintiff from bringing a tort action against defendant. The court stated that the primary consideration in determining whether a special employment relationship exists is whether the special employer has the right to control and direct the activities of the employee or the manner and method in which the work is performed, whether such control is exercised or not. Other relevant factors include: (1) whether the borrowing employer's control extends beyond mere suggestion of details or cooperation; (2) whether the employee is performing the special employer's work; (3) whether there was an agreement, understanding or meeting of the minds between the general and special employer as to the employment relationship; (4) whether the employee acquiesced in the new work situation; (5) whether the original employer terminated his or her relationship with the employee; (6) whether the special employer furnished the tools and place for performance; (7)whether the new employment was for a considerable period of time; (8) whether the special employer had the right to fire the employee; and (9) whether the special employer had the obligation to pay the employee (*203 Cal. App. 3d 1242, 1250)* .

In *Wedeck v. Unocal Corp. (1997) 59 Cal. App. 4th 848, 862, 69 Cal. Rptr. 2d 501* , the court relied on the analysis in *Riley v. Southwest Marine, Inc. (1988) 203 Cal. App. 3d 1242, 250 Cal. Rptr. 718* , to find that a special employment relationship existed between a temporary agency employee and her assigned employer as a matter of law. Plaintiff worked for an agency which provided technical employees to other companies on a temporary basis. The agency arranged for plaintiff to work on a temporary basis as a full-time chemist for defendant. Plaintiff filed a tort action against defendant, alleging that she suffered personal injuries from exposure to chemicals while working at defendant's laboratory. Defendant filed a motion for summary judgment, asserting that it was plaintiff's special employer and that plaintiff's complaint was barred under *Lab. Code § 3602*.

In finding that a special employment relationship existed between plaintiff and defendant, the court emphasized that

defendant had the right to control and direct plaintiff's activities and the manner in which she performed her work. Plaintiff received ongoing training and instruction from defendant. She referred to defendant's procedure manuals and followed specific procedures and instructions in performing her work. Defendant provided plaintiff with all of her work assignments, and plaintiff's quality assurance tests were monitored by defendant's supervisors. The court also noted that the application of most of the secondary factors indicated that plaintiff was defendant's employee (*59 Cal. App. 4th 848, 858-859)* . For instance, plaintiff performed defendant's work at defendant's job site, mostly using defendant's tools, defendant agreed to train and supervise plaintiff, plaintiff accepted the assignment with defendant and acquiesced in all of the work conditions set forth by defendant, defendant paid the placement agency an hourly rate for plaintiff's work and the agency paid plaintiff, and plaintiff worked for defendant for nearly one year (*59 Cal. App. 4th 848, 860-861)* . The court granted summary judgment, determining that plaintiff was barred by the exclusive remedy doctrine from bringing a tort action against defendant (*59 Cal. App. 4th 848, 862)* .

California Points & Authorities

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Volume 23 Chapters 230-239 TRUST DEEDS---to---WORKERS' COMPENSATION
CHAPTER 239 WORKERS' COMPENSATION EXCLUSIVE REMEDY DOCTRINE
PART II. FORMS

10-239 California Points & Authorities § 239.29

AUTHOR: Carolyn Rashby

§ 239.29 Supporting Contention That Workers' Compensation Exclusive Remedy Doctrine Precludes Action by Employee Against Parent Corporation Based on Alter Ego Theory

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF IS BARRED FROM MAINTAINING AN ACTION FOR DAMAGES AGAINST THE DEFENDANT PARENT CORPORATION ON AN ALTER EGO THEORY FOR ITS SUBSIDIARY CORPORATION'S CONDUCT BECAUSE THE SUBSIDIARY CORPORATION IS SHIELDED FROM SUCH AN ACTION BY THE WORKERS' COMPENSATION EXCLUSIVE REMEDY PROVISIONS.

Action Barred Against Parent Corporation Based on Alter Ego Theory. A parent corporation is not liable for damages under a theory of alter ego when plaintiff is an employee of a subsidiary corporation and the subsidiary is shielded from an action for damages by the exclusive remedy provisions of the *Workers' Compensation Act (Doney v. TRW, Inc. (1995) 33 Cal. App. 4th 245, 251-252, 39 Cal. Rptr. 2d 292*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted is support of the contention that plaintiff's action for damages for personal injuries is barred against the parent corporation of plaintiff's employer based on an alter ego theory because the subsidiary-employer is shielded from this action by the workers' compensation exclusivity provisions.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that plaintiff's action is barred against the parent corporation of plaintiff's employer, for example, in a motion for summary judgment. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should demonstrate that defendant is the parent corporation of plaintiff'semployer, and that plaintiff's injury arose out of and in the course of employment with defendant's subsidiary. Counsel should argue that the exclusive remedy provision precludes a civil suit for damages against the subsidiary-employer and consequently, against the parent corporation based on an alter ego theory [*Doney v. TRW, Inc. (1995) 33 Cal. App. 4th 245, 251-252, 39 Cal. Rptr. 2d 292]* .

[3] Discussion of Authorities

[a] Action Barred Against Parent Corporation Based on Alter Ego Theory

In ***Doney v. TRW, Inc.*** *(1995) 33 Cal. App. 4th 245, 39 Cal. Rptr. 2d 292* , heirs of employees who died during a killer's rampage at the employer's building brought a wrongful death action against the corporate employer and the employer's parent corporation. The action against the parent corporation was based on an alter ego theory. The trial court granted summary judgment for the employer on the ground that workers' compensation was the plaintiffs' exclusive remedy. The trial court also granted summary judgment for the parent corporation and plaintiffs appealed this ruling.

The court of appeal affirmed, relying on *Privette v. Superior Court (1993) 5 Cal. 4th 689, 21 Cal. Rptr. 2d 72, 854 P.2d 721* , which held that the employer of an independent contractor is not vicariously liable for injuries to the independent contractor's employee. The court of appeal held that under similar reasoning, an action cannot proceed against a parent corporation based on an alter ego theory when the subsidiary corporation is shielded from the action by the exclusive remedy provisions of the Workers' Compensation Act (*33 Cal. App. 4th 245, 251)* . The court reasoned that the alter ego theory is an equitable theory of vicarious liability and that it should not be applied to this situation because it would produce inequitable results. First, the liability of the non-negligent parent corporation would be greater than that of the subsidiary-employer whose negligence actually caused the injury. Second, permitting employees of subsidiary corporations to recover from the parent corporation under an alter ego theory of vicarious liability would give those employees an unwarranted windfall by exempting them from the statutorily limits of workers' compensation. Finally, because of the unavailability of equitable indemnity to the parent corporation [*see Lab. Code § 3864*], application of the alter ego doctrine to permit the owner of the subsidiary corporation to be held liable in tort places an onerous burden on the parent corporation that is fault-free (*33 Cal. App. 4th 245, 252)* .

[4] Additional Authorities

[a] Parent Corporation's Alleged Control of Subsidiary's Budget Did Not Allow Plaintiffs to Avoid Exclusive Remedy Rule

In ***Waste Management, Inc. v. The Superior Court of San Diego County (Guzman de Peralta)*** *(2004) 119 Cal. App. 4th 105, 13 Cal. Rptr. 3d 910* , a complaint against a parent corporation for negligence and wrongful death was subject to demurrer, when it alleged that the parent controlled the budget of its subsidiary and thereby prevented the subsidiary from replacing or repairing the dangerous and improperly maintained trash truck that killed the decedent employee, for whose death plaintiffs were receiving workers' compensation benefits from the subsidiary's insurer. The complaint did not allege any independent tort committed by the parent, since the alleged negligent control or intentional mismanagement of the subsidiary's budget did not create a duty on the part of the parent to ensure safety or prevent injuries to the subsidiary's employees, and plaintiffs' claim that the parent caused unsafe working conditions by controlling the subsidiary's fiscal policies and management decisions was nothing more than a claim that the parent was responsible for acts or omissions of the subsidiary, in which case the parent was sheltered by the exclusive remedy rule (*119 Cal. App. 4th 105, 111-114)* .

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CHAPTER 239 WORKERS' COMPENSATION EXCLUSIVE REMEDY DOCTRINE
PART II. FORMS

10-239 California Points & Authorities § 239.30

AUTHOR: Carolyn Rashby

§ 239.30 Supporting Contention That Workers' Compensation Exclusive Remedy Doctrine Precludes Action by Employee Against Non-Negligent Companies Involved in Joint Venture With Employer

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF IS BARRED FROM MAINTAINING AN ACTION FOR DAMAGES AGAINST NON-NEGLIGENT DEFENDANT INVOLVED IN JOINT VENTURE WITH EMPLOYER WHEN NEGLIGENCE OF EMPLOYER CAUSED PLAINTIFF'S INJURIES AND EMPLOYER PROVIDED WORKERS' COMPENSATION COVERAGE.

Action for Damages Against Non-Negligent Member of Joint Venture Barred by Exclusive Remedy Doctrine. An injured employee is barred from pursuing a personal injury action against non-negligent members of a joint venture or enterprise, when anothermember of the joint venture negligently caused the employee's injury and provided workers' compensation coverage. Allowing an employee to pursue such an action would place an unfair burden on the non-negligent joint venturers, and would be contrary to the public policy behind the workers' compensation laws (*Orosco v. Sun-Diamond Corp. (1997) 51 Cal. App. 4th 1659, 1669-1670, 60 Cal. Rptr. 2d 179*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that plaintiff's action for damages against a non-negligent member of a joint venture or enterprise is barred, when another member of the joint venture negligently caused the employee's injury and provided workers' compensation coverage.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that plaintiff's personal injury action against a non-negligent member of a joint venture or enterprise is precluded by the workers' compensation exclusivity doctrine. For example,

they may be submitted with a motion for summary judgment. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should indicate that plaintiff has filed a claim for tort damages against a non-negligent member of a joint venture or enterprise, based on the negligence of plaintiff's employer, another joint venturer. Counsel should specify the nature of the relationship between the joint venturers and emphasize that the negligent joint venturer has provided workers' compensation benefits. Counsel should argue that holding defendant liable in this circumstance would place an unfair burden on the non-negligent joint venturer, and would be contrary to the public policy behind the workers' compensation laws.

[3] Discussion of Authorities

[a] Action Barred Against Non-Negligent Member of Joint Venture

In ***Orosco v. Sun-Diamond Corp.*** *(1997) 51 Cal. App. 4th 1659, 60 Cal. Rptr. 2d 179* , the plaintiff lost his arm in an industrial accident. His employer, whose negligence caused the plaintiff's injuries, provided workers' compensation insurance. The plaintiff filed a separate action, in tort, against various non-negligent corporations engaged in certain business pursuits with and on behalf of the employer. The defendants filed a motion for summary judgment, alleging that the plaintiff failed to raise a triable issue of material fact concerning their liability. The trial court granted the defendants' motion.

The court of appeal affirmed the trial court's ruling, holding, in part, that no joint enterprise existed between the plaintiff's employer and the defendants since the defendants had no control over the production or sale of the employer's goods, did not share profits with the employer, and had no ownership interest in the employer's assets (*51 Cal. App. 4th 1659, 1666)* . Additionally, relying on the reasoning set forth in *Privette v. Superior Court (1993) 5 Cal. 4th 689, 21 Cal. Rptr. 2d 72, 854 P.2d 721* (California Supreme Court concluded that employer of independent contractor is not vicariously liable for injuries to independent contractor's employee), the court held that an injured employee is barred from pursuing a personal injury action against a non-negligent member of a joint venture or enterprise when another member of the joint venture negligently injured the employee and provided workers' compensation coverage. In so holding, the court reasoned that a joint venture sued for the negligence of one venturer is entitled to indemnity from the negligent venturer. The workers' compensation exclusive remedy doctrine would operate to prevent the joint venture from seeking such indemnity, and make unavailable a remedy to which the joint venture is legally entitled. Moreover, the court noted, public policy as it relates to the existence of workers' compensation coverage favors uniform compensation for all injured employees, regardless of the structure or organization of the business that hires the particular employee. Allowing an employee to recover damages against a non-negligent member of a joint venture would give employees working in the context of a joint venture something that is denied to other workers: the right to recover tort damages based on an employer's failure to provide a safe working environment (*51 Cal. App. 4th 1659, 1669-1670)* .

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PART II. FORMS

10-239 California Points & Authorities § 239.31

AUTHOR: Carolyn Rashby

§ 239.31 Supporting Contention That Workers' Compensation Exclusive Remedy Doctrine Precludes Action by Employee Against Employer--Defendant's Concealment of Unsafe Working Conditions and Violation of Environmental Safety Regulations Were Within Compensation Bargain

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S ACTION AGAINST DEFENDANT FOR DAMAGES IS PRECLUDED BY THE WORKERS' COMPENSATION EXCLUSIVITY PROVISIONS BECAUSE DEFENDANT'S ALLEGED ACTS WERE WITHIN THE COMPENSATION BARGAIN.

Civil Action for Damages Based on Employer's Acts Barred by Exclusive Remedy Provision. An employer's concealment of known unsafe working conditions and violation of environmental safety regulations remain within the compensation bargain, making workers' compensation benefits an employee's exclusive remedy (*Johns-Manville Products Corp. v. Superior Court (1980) 27 Cal. 3d 465, 469-472, 165 Cal. Rptr. 858, 612 P.2d 948* ; *Gunnell v. Metrocolor Laboratories, Inc. (2001) 92 Cal. App. 4th 710, 714, 112 Cal. Rptr. 2d 195*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that defendant's concealment of known unsafe working conditions and violation of environmental safety regulations were within the compensation bargain, making plaintiff's civil action for damages barred by the workers' compensation exclusive remedy rule.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that plaintiff's action for damages is precluded by the workers' compensation exclusivity rule because defendant's acts remain within the compensation bargain--in a demurrer, for

example. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should demonstrate that defendant, in concealing known unsafe working conditions and in violating environmental safety regulations, was acting within the compensation bargain [*Johns-Manville Products Corp. v. Superior Court (1980) 27 Cal. 3d 465, 469-472, 165 Cal. Rptr. 858, 612 P.2d 948* ; *Gunnell v. Metrocolor Laboratories, Inc. (2001) 92 Cal. App. 4th 710, 714, 112 Cal. Rptr. 2d 195]* .

[3] Discussion of Authorities

[a] Defendant's Concealment of Unsafe Working Conditions and Violation of Environmental Safety Regulations Are Acts Within Compensation Bargain

In ***Johns-Manville Products Corp. v. Superior Court*** *(1980) 27 Cal. 3d 465, 165 Cal. Rptr. 858, 612 P.2d 948* , an employer's conduct of concealing from employees its knowledge that asbestos was dangerous to health and operating its plant in violation of state and federal regulations was held to constitute the kind of employer's intentional misconduct warranting penalties pursuant to *Lab. Code § 4553*, so that a civil action for damages was barred, making workers' compensation benefits an employee's exclusive remedy (*27 Cal. 3d 465, 469-472)* .

Since 1924, Johns-Manville had known that long exposure to or ingestion of asbestos was dangerous to health, but the company concealed this knowledge from plaintiff. Johns-Manville advised plaintiff that it was safe to work in close proximity to asbestos, failed to provide him with adequate protective devices, and did not operate the plant in accordance with state and federal regulations governing dust levels. Johns-Manville also retained unqualified doctors to examine plaintiff and did not provide the doctors with adequate information about the risk of asbestos exposure. Johns-Manville performed these acts and omissions falsely and fraudulently, with intent to induce plaintiff to continue to work in a dangerous environment. Plaintiff's complaint alleged causes of action for fraud and conspiracy with others to perpetrate these acts (*27 Cal. 3d 465, 469-470)* .

The California Supreme Court concluded that *Lab. Code § 4553* was designed to penalize an employer's intentional misconduct and to compensate injuries resulting from such acts. In this connection, the Court held that workers' compensation provided the exclusive remedy for injuries suffered because the employer made false representations about, or concealed dangers inherent in, a material that employees were required to handle. Moreover, said the Court, workers' compensation provided the exclusive remedy for injuries cause by an employer's malicious misconduct in allowing an employee to use a machine without proper instruction (*27 Cal. 3d 465, 473-474)* .

When an employer knows that a danger to an employee exists but fails to take corrective action or warn the employee of the risk, said the Court, "[s]uch conduct may be characterized as intentional or even deceitful. Yet if an action at law were allowed as a remedy, many cases cognizable under workers' compensation would also be prosecuted outside that system. The focus of the inquiry in a case involving work-related injury would often be not whether the injury arose out of and in the course of employment, but the state of knowledge of the employer and the employee regarding thedangerous condition which caused the injury. Such a result would undermine the underlying premise upon which the workers' compensation system is based" (*27 Cal. 3d 465, 474)* .

The Court added that to permit an action at law for damages for any intentional misconduct by an employer would significantly disturb the compensation bargain upon which the workers' compensation system is based. *Lab. Code § 4553* "is the sole remedy for additional compensation against an employer whose employee is injured ... as the result of a deliberate failure to assure that the physical environment of the work place is safe" (*27 Cal. 3d 465, 474-475)* .

Thus, if a complaint alleges "that plaintiff contracted the disease because defendant knew and concealed from him that his health was endangered by asbestos in the work environment, failed to supply adequate protective devices to avoid disease, and violated governmental regulations relating to dust levels at the plant, plaintiff's only remedy would be to prosecute his claim under the workers' compensation law" (*27 Cal. 3d 465, 474-475)* .

(*Johns-Manville Products Corp. v. Superior Court* also involved the issue of aggravation of the employee's injury by the employer's fraudulent concealment of the existence of the injury and its connection with the employment. For points and authorities relating to this issue, *see §§ 239.26* and *239.40*.)

In ***Gunnell v. Metrocolor Laboratories, Inc.*** *(2001) 92 Cal. App. 4th 710, 112 Cal. Rptr. 2d 195* , an employer's conduct of providing employees with a hazardous chemical substance to clean a film processing laboratory, concealing known unsafe working conditions, and violating environmental safety regulations was held to be within the compensation bargain, making workers' compensation benefits the employees' exclusive remedy (*92 Cal. App. 4th 710, 714)* .

Plaintiff was an unskilled laborer who worked for four and one-half months at defendant laboratories, cleaning a facility that processed and developed television and movie film. The assignment was to clean walls, pipes, and other parts of the interior of the film lab. Defendant directed plaintiff to clean the interior of the film lab with a blue-green substance plaintiff believed to be cleaning soap. Plaintiff and his co-workers filled mop buckets and sprayers with the blue-green solution from 55-gallon barrels. Defendant provided no hazard training, posted no signs about chemical hazards, and never told the laborers what the 55-gallon barrels contained. None of the barrels of blue-green solution had labels warning of a chemical hazard or identifying the contents of the barrels. During delivery of the 55-gallon barrels, plaintiff observed his supervisor removing labels from each barrel before offloading them from a truck for use by plaintiff and his co-workers in cleaning the facility (*92 Cal. App. 4th 710, 716)* .

Cleaning the interior walls and ceiling of the film lab exposed plaintiff and his co-workers to the blue-green cleaning substance. Plaintiff sprayed the ceiling with the blue-green solution, causing dirt to bead. He then used a mop to remove the cleaner and dirt from the ceiling, usually repeating the procedure several times to clean each area. After cleaning the ceiling, he cleaned the walls, and finally cleaned floors and pipes. As he worked on the ceiling, the blue-green cleaning liquid "rained" down on him, making contact with his skin, running down his back and chest, and getting inside his gloves. Pressing the mop against the ceiling and walls caused liquid to squeeze out of the mop and run down the handle into his sleeves, down his arms, and into his shirt. After a day's work, the blue-green solution soaked his clothing and feet. He remained wet until he arrived home. He worked in street clothes. Defendant provided no protective gear except for rubber gloves, which disintegrated after about one-half hour of use, and a paper suit that did not protect plaintiff from being soaked (*92 Cal. App. 4th 710, 716-717)* .

Plaintiff did not recall ever being told what the blue-green cleaning substance was inside the barrels. No one told him about or required him to attend a safety program or a "right to know" program. No one trained him on how to handle chemicals. Plaintiff testified that on one occasion when he was working in clothing soaked with the blue-green substance, he saw his supervisor, defendant's safety and engineer project coordinator and program manager of defendant's hazard communication program, and defendant's director of facilities observe as he cleaned a room. Plaintiff asked if the blue-green substance was safe. Defendant's safety engineer project coordinator and program manager of defendant's hazard communication program responded, "Yes, sir. Yes, it's safe." Another of defendant's foremen told plaintiff several times the cleaner was safe (*92 Cal. App. 4th 710, 717)* .

Plaintiff subsequently learned that the blue-green substance provided for cleaning the film-processing lab was "Absorb," an organic solvent/degreaser. Absorb contains sodium hydroxide and 2-butoxyethanol, known as "2BE." Sodium hydroxide and 2BE appear on the OSHA Director's list of hazardous substances. 2BE is one of a class of chemicals known to cause brain and nervous system damage. 2BE absorbs readily through the skin and into the bloodstream. Once in the bloodstream, 2BE targets the liver, kidneys, respiratory tract, and central nervous system. Its effects on the central

nervous system include headaches, nausea, dizziness, confusion, loss of consciousness, and possible death. Breathing vapor, combined with skin exposure, significantly increases exposure. Workers using 2BE should avoid skin contact and wear chemical-resistant gloves and possibly a respirator (*92 Cal. App. 4th 710, 717)* .

During four and one-half months of using Absorb, plaintiff sustained injuries that included: a slowing of brain function; anxiety and panic attacks; concentration difficulties; loss of cognitive functioning; personality changes, mood and temper problems; respiratory problems; andnumbness. Plaintiff was classified as disabled from working as a laborer. Plaintiffs' toxicology and neuropsychology experts testified that exposure to 2BE at defendant's film lab, to a reasonable degree of medical probability, caused plaintiff's injuries (*92 Cal. App. 4th 710, 717)* .

Plaintiff's complaint included causes of action for intentional infliction of emotional distress, strict liability ultrahazardous activity, civil conspiracy, battery, and fraud. Although the jury returned a verdict in plaintiff's favor for $6,650,000 in compensatory and punitive damages, the trial court entered judgment notwithstanding the verdict in defendant's favor. The trial court found that, pursuant to *Johns-Manville Products Corp. v. Superior Court (1980) 27 Cal. 3d 465, 165 Cal. Rptr. 858, 612 P.2d 948* , the workers' compensation statutes provided the exclusive remedy for toxic exposure injuries in the workplace (*92 Cal. App. 4th 710, 715)* .

The court of appeal affirmed. It noted that plaintiff claimed defendant deceived and defrauded him by not revealing that Absorb was unsafe to use in his work, assured plaintiff that Absorb was safe to use, did not provide adequate gloves, clothing, or other protective gear, did not provide training in using and handling Absorb, removed warning labels from Absorb containers, and violated government safety regulations regarding use of Absorb and warnings to employees about its toxic chemical properties. "Under *Johns-Manville*," the court went on to say, "an injury to an employee caused by an employer's deceit and concealment of hazardous substances used in the employment, failure to train, and failure to assure a safe workplace environment remains within the course of employment." The court concluded that there was "no meaningful factual distinction between this case and the facts of *Johns-Manville*. Therefore the Workers' Compensation Act provides Gunnell's remedy, and he cannot maintain a civil action against Metrocolor" (*92 Cal. App. 4th 710, 722-723)* .

Other cases holding that the workers' compensation statutes remain the injured employee's exclusive remedy, notwithstanding an employer's knowing failure to assure that the workplace is safe, include *Vuillemainroy v. American Rock & Asphalt, Inc. (1999) 70 Cal. App. 4th 1280, 1286, 83 Cal. Rptr. 2d 269* ; *Williams v. International Paper Co. (1982) 129 Cal. App. 3d 810, 819, 181 Cal. Rptr. 342* ; *Stalnaker v. Boeing Co. (1986) 186 Cal. App. 3d 1291, 1296, 1300-1301, 231 Cal. Rptr. 323* .

Other cases holding that the workers' compensation statutes remain the injured employee's exclusive remedy, notwithstanding an employer's fraud, deceit, or concealment of a dangerous condition, include *United States Borax & Chemical Corp. v. Superior Court (1985) 167 Cal. App. 3d 406, 410-411, 213 Cal. Rptr. 155* ; *Spratley v. Winchell Donut House, Inc. (1987) 188 Cal. App. 3d 1408, 1412, 234 Cal. Rptr. 121* .

[4] Additional Authorities

[a] Hazardous Waste Generated by Hirer of Independent Contractor Whose Employee It Injures

In *Park v. Burlington Northern Santa Fe Railway Co. (2003) 108 Cal. App. 4th 595, 133 Cal. Rptr. 2d 757* , the court of appeal held that, although the hirer of a contractor, having generated hazardous waste that it hired the contractor to remove, and which injured an employee of the contractor, had a nondelegable duty under the hazardous waste statutes [*42 U.S.C.S. § 6901 et seq.*; *Health & Safety Code § 25100 et seq.*] to properly dispose of such waste, nevertheless the *Privette/Toland* doctrine means that the generator of hazardous waste is not liable to the employee of a contractor it hires to dispose of that waste unless the generator's conduct affirmatively contributed to the employee's injuries (*108 Cal. App. 4th 595, 606-611)* .

California Points & Authorities

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Volume 23 Chapters 230-239 TRUST DEEDS---to---WORKERS' COMPENSATION
CHAPTER 239 WORKERS' COMPENSATION EXCLUSIVE REMEDY DOCTRINE
PART II. FORMS

10-239 California Points & Authorities § 239.32

AUTHOR: Carolyn Rashby

§ 239.32 Supporting Contention That Workers' Compensation Exclusive Remedy Doctrine Precludes Action by Employee Against Employer--California Farm Labor Contractor Act Provides No Exception [Lab. Code § 1682 et seq.]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S ACTION AGAINST DEFENDANT FOR DAMAGES IS PRECLUDED BY THE WORKERS' COMPENSATION EXCLUSIVITY PROVISIONS BECAUSE THE CALIFORNIA FARM LABOR CONTRACTOR ACT, ON WHICH PLAINTIFF RELIES, PROVIDES NO EXCEPTION TO THOSE EXCLUSIVITY PROVISIONS.

Agricultural Laborer's Civil Action for Damages Against Licensed Farm Labor Contractor Barred by Exclusive Remedy Provision. The remedies of an agricultural laborer injured in the course of employment against his employer, a licensed farm labor contractor, are limited by the exclusive remedy provision of *Lab. Code § 3602(a)*, and the California Farm Labor Contractor Act [FLCA] (*Lab. Code § 1682 et seq.*) provides no exception to the exclusivity provision (*Ruiz v. Cabrera (2002) 98 Cal. App. 4th 1198, 1201-1204, 120 Cal. Rptr. 2d 320*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a defendant's contention that plaintiff's action for damages is precluded by the workers' compensation exclusivity doctrine, despite plaintiff's contention that the California Farm Labor Contractor Act provides an exception to that exclusivity doctrine.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that plaintiff's action for damages is precluded by the workers' compensation exclusivity doctrine--in a demurrer, for example. These points and authorities may also be adapted for use

in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that plaintiff was injured in the course of employment and argue that the exclusive remedy provision of the workers' compensation law bars this civil action and that the California Farm Labor Contractor Act provides no exception to that exclusivity provision [*Ruiz v. Cabrera (2002) 98 Cal. App. 4th 1198, 1201-1204, 120 Cal. Rptr. 2d 320]* .

[3] Discussion of Authorities

[a] Agricultural Laborer's Industrial Injury Subject to Workers' Compensation Exclusivity, Notwithstanding California Farm Labor Contractor Act

In ***Ruiz v. Cabrera*** *(2002) 98 Cal. App. 4th 1198, 120 Cal. Rptr. 2d 320* , plaintiff filed suit against his employer, a farm labor contractor registered pursuant to the California Farm Labor Contractor Act [FLCA] (*Lab. Code § 1682 et seq.*), for injuries he sustained while, pursuant to defendant's instructions, riding in a van driven by a fellow employee who failed to obey a stop sign and caused a collision in which three fellow employees, also riding in the van, were killed and others, including plaintiff, were injured. The trial court, finding that the exclusive remedy provisions of the Workers' Compensation Act applied, granted defendant's motion for summary judgment. From the final judgment entered on this motion, plaintiff appealed (*98 Cal. App. 4th 1198, 1199-1200)* .

Plaintiff argued that FLCA created an implied exception to the general rule of workers' compensation exclusivity, pointing to *Lab. Code § 1695.7(c)(4)*, which provides that an "aggrieved worker" may bring a civil action for violation of "this section." The section referred to, *Lab. Code § 1695.7*, sets forth the FLCA licensing requirement. Plaintiff also relied on *Lab. Code § 1697(b)*, which provides that an "employee aggrieved by any violation of this chapter" may bring a civil action "for injunctive relief or damages, or both ... ." By virtue of the use of "worker" and "employee" in these sections, plaintiff argued, the legislature must have contemplated an exception to the exclusivity rule of *Lab. Code § 3602*, because, otherwise, the grant of a private right of action would be meaningless. Thus, said plaintiff, an employer registered under FLCA was not entitled to the protection of the exclusivity rule (*98 Cal. App. 4th 1198, 1200-1201)* .

The court of appeal noted that FLCA was primarily intended to protect farmworkers from mistreatment at the hands of their employers. Thus, it was hardly surprising that when the legislature added a private right of action to enforce FLCA, it conferred that right of action upon an "employee." The court found it also unsurprising, however, that the legislature described the employee as one "aggrieved by any violation of this chapter." The focus of FLCA was the preservation of the financial integrity of the employment relationship by insuring the payment of wages, assuring the availability of work when it was promised, and prohibiting imposition of unfair charges against employees as a condition of access to work. The court noted that plaintiff had not referred it to any provision of FLCA that specifically addressed physical injury of farmworkers. The court's own examination of FLCA, however, revealed one instance in which physical injury arguably was addressed in some manner. *Lab. Code § 1695(a)(6)* required that the FLCA licensee (defendant, in this case) "[t]ake out a policy of insurance ... satisfactory to the [Labor Commissioner], which insures the licensee against liability for damage to persons or property arising out of the licensee's operation of, or ownership of, any vehicle or vehicles for the transportation of individuals in connection with his ... operations as a farm labor contractor." Because of this language, said the court, it could be argued that the statute envisions personal injury liability arising from the contractor's injury of workers transported in the insured vehicles (*98 Cal. App. 4th 1198, 1201-1202)* .

One might ask, noted the court (although, the court also noted, plaintiff did not): Why require such insurance if workers' compensation exclusivity means that the insurance would never be called upon for payment of a worker's personal

injury claim? The answer, according to the court, was that the history of *Lab. Code § 1695* suggested that the liability insurance requirement may be no more than a historical anomaly. The requirement was enacted in 1951, when, said the court, the status of farmworkers under the Workers' Compensation Act was "complex." In essence, an agricultural employer could simply opt out of workers' compensation coverage. By opting out, the employer presumably would have been subject to ordinary civil liability for negligent operation of farmworker transportation, so that the employer's workers would have benefitted from the liabilityinsurance requirement. At present, however, workers' compensation coverage for farmworkers is mandatory, rendering the liability insurance requirement archaic, at least to the extent that it concerns employees of a farm labor contractor (*98 Cal. App. 4th 1198, 1202)* .

Finally, said the court, application of the workers' compensation exclusivity provisions in the present circumstances would harmonize the provisions of FLCA and the Workers' Compensation Act in the manner undertaken by the California Supreme Court in the two cases plaintiff cited in his brief on appeal. In *City of Moorpark v. Superior Court (1998) 18 Cal. 4th 1143, 77 Cal. Rptr. 2d 445, 959 P.2d 752* , the Supreme Court held that *Lab. Code § 132a* does not provide the exclusive remedy for disability *discrimination* arising from on-the-job injury. The Supreme Court noted that *Lab. Code § 3602* made the workers' compensation remedy exclusive for only those injuries made compensable by *Lab. Code § 3600*, that is, personal physical injury or death sustained in and arising out of the course of employment. Since the discrimination prohibited under *Lab. Code § 132a* was not an injury made compensable under *Lab. Code § 3600*, the exclusivity provision was not applicable to a disability discrimination claim (*18 Cal. 4th 1143, 1154)* . Accordingly, the Supreme Court concluded that an injured worker could pursue a disability discrimination claim under the Fair Employment and Housing Act, even though the disability arose from an on-the-job injury (*18 Cal. 4th 1143, 1158)* . In the other Supreme Court case cited by plaintiff, *Shoemaker v. Myers (1990) 52 Cal. 3d 1, 276 Cal. Rptr. 303, 801 P.2d 1054* , the Court addressed the scope of workers' compensation exclusivity as established in the earlier case of *Cole v. Fair Oaks Fire Protection Dist. (1987) 43 Cal. 3d 148, 233 Cal. Rptr. 308, 729 P.2d 743* . In *Cole*, the Court held that the exclusivity rule did not bar a civil action against an employer when action taken against an employee fell outside the "compensation bargain" or, roughly speaking, outside the normal employment relationship. In *Shoemaker*, a state employee was harassed by his supervisors and ultimately fired in connection with his complaints about complicity of his supervisors in illegal activities by state contractors (*52 Cal. 3d 1, 7-8)* . The Court concluded that, because of the strong and explicit statutory prohibition on retaliation against governmental "whistleblowers," the supervisors' conduct fell outside the "compensation bargain" as defined in *Cole*. Because the supervisors' intentional conduct fell outside the compensation bargain, the employee was entitled to seek compensation for his emotional distress injury in a civil action (*52 Cal. 3d 1, 23)* .

In the present case, noted the court of appeal, plaintiff contended neither that he had suffered injuries not compensable within the workers' compensation system pursuant to *Lab. Code § 3600*, such as the discrimination suffered in *City of Moorpark*, nor that his injuries arose from employer conduct outside the "compensation bargain," as in *Shoemaker*. Instead, plaintiff alleged that he suffered ordinary (albeit very severe) physical injury while engaged in the course and scope of his employment. Consequently, the court held that plaintiff's exclusive remedy was workers' compensation (*98 Cal. App. 4th 1198, 1204)* .

California Points & Authorities

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Volume 23 Chapters 230-239 TRUST DEEDS---to---WORKERS' COMPENSATION
CHAPTER 239 WORKERS' COMPENSATION EXCLUSIVE REMEDY DOCTRINE
PART II. FORMS

10-239 California Points & Authorities § 239.33

AUTHOR: Carolyn Rashby

§ 239.33 Supporting Contention That Workers' Compensation Exclusive Remedy Doctrine Precludes Action by Employee Against Employer's Hirer

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S ACTION FOR DAMAGES AGAINST EMPLOYER'S HIRER IS PRECLUDED BY THE WORKERS' COMPENSATION EXCLUSIVITY RULE BECAUSE PLAINTIFF HAS AVAILABLE THE REMEDY OF WORKERS' COMPENSATION BENEFITS.

Action for Damages Against Hirer of Plaintiff's Uninsured Employer Barred by Exclusive Remedy Provision. An injured employee is barred from pursuing a personal injury action against the hirer of the employee's illegally uninsured employer, because equity and public policy are not served by penalizing the hirer for the employer's wrongdoing, and because the employee has available, through the Uninsured Employers Fund [now Uninsured Employers Benefits Trust Fund] the remedy of workers' compensation benefits (*Lopez v. C.G.M. Development, Inc. (2002) 101 Cal. App. 4th 430, 444-445, 124 Cal. Rptr. 2d 227*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of a defendant's contention that plaintiff's action for damages against the hirer of plaintiff's illegally uninsured employer is precluded by the workers' compensation exclusivity doctrine, despite plaintiff's contention that such an action should be allowed as an exception to that exclusivity doctrine.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that plaintiff's action for damages is precluded by the workers' compensation exclusivity doctrine--in a demurrer,for example. These points and authorities may also be adapted for use

in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that plaintiff was injured in the course of employment and argue that the exclusive remedy provision of the workers' compensation law bars this civil action and that plaintiff's employer's status as illegally uninsured provides no exception to that exclusivity provision that would permit an action for damages against the employer's hirer [*Lopez v. C.G.M. Development, Inc. (2002) 101 Cal. App. 4th 430, 444-445, 124 Cal. Rptr. 2d 227]* .

[3] Discussion of Authorities

[a] Employee's Industrial Injury Subject to Workers' Compensation Exclusivity, and Action for Damages Against Uninsured Employer's Hirer Not Allowed

In ***Lopez v. C.G.M. Development, Inc.*** *(2002) 101 Cal. App. 4th 430, 124 Cal. Rptr. 2d 227* , plaintiff filed suit against his employer's hirer, alleging an exception to the workers' compensation law's exclusive remedy provision. Defendant, a property owner, had entered into a contract with a general contractor to develop a piece of commercial property. The general contractor entered into a subcontract with plaintiff's employer to frame the roof of the project. Plaintiff's employer was a licensed contractor but illegally uninsured for workers' compensation. Plaintiff was injured while working on the project and sued the property owner on a negligence theory, alleging that it had maintained dangerous working conditions at the jobsite and had not provided him with safety equipment. Defendant's motion for summary judgment was granted by the trial court, judgment was entered in defendant's favor, and plaintiff appealed (*101 Cal. App. 4th 430, 434-435)* .

Plaintiff argued that he should be allowed to recover damages against defendant because plaintiff's employer did not have workers' compensation coverage. He, thus, sought to distinguish his situation from the facts in *Privette v. Superior Court (1993) 5 Cal. 4th 689, 21 Cal. Rptr. 2d 72, 854 P.2d 721* , and in *Toland v. Sunland Housing Group, Inc. (1998) 18 Cal. 4th 253, 74 Cal. Rptr. 878, 955 P.2d 504* , in which injured employees of subcontractors who maintained workers' compensation coverage sought to recover damages from their employers' hirers. In those cases, as summarized by the court of appeal in the present case, the California Supreme Court denied the plaintiffs' right to damages on the ground that allowing such a recovery would constitute a windfall to the plaintiffs, placing them in a better position than that of an employee suffering an industrial injury whose employer had not been hired by another party. Moreover, said the Supreme Court, the plaintiffs' employers must be assumed to have calculated the cost of workers' compensation insurance into the contract prices of the jobs for which they were hired, so that the hirers ultimately paid for that insurance. Additionally, to impose liability for tort damages on a party who hires an independent contractor for specialized work would penalize those individuals who hire experts to perform dangerous work rather than assigning such activity to their own inexperienced employees. In short, the hirer of an independent contractor, according to these earlier cases, should be subject to no greater liability than the independent contractor, who is shielded from injured employees' civil actions by the exclusivity rule of workers' compensation law (*101 Cal. App. 4th 430, 438-439)* .

Under the *Privette/Toland* analysis, argued plaintiff, the hiring property owner and the independent contractor are treated alike--the injured employee cannot sue either of them. In light of that parallel treatment, plaintiff argued that the hiring property owner in *this* case should be treated like the independent contractor in *this* case--plaintiff can sue the illegally uninsured independent contractor (his employer), so he should be able to sue the hiring property owner. As plaintiff pointed out, because his employer did not have workers' compensation insurance, the contract price did not include the cost of that coverage, and the property owner paid relatively less for the independent contractor's labor. Since the property owner did not pay the independent contractor for the cost of coverage, so plaintiff's argument went, it

is not entitled to the protection of the exclusive remedy provisions (*101 Cal. App. 4th 430, 444)* .

The court of appeal disagreed. It quoted *Privette* as having recognized that "the 'principal' who hires an independent contractor should be subject to *no greater liability* 'than its [independent contractor] agent,' ... " [*emphasis by court of appeal*] Thus, said the court, *Privette* did not foreclose the possibility that the principal could be subject to less or no liability compared to the independent contractor. Moreover, the *Privette* result was founded on principles of equity and public policy. Equity and public policy would not be served in the present case by penalizing the hiring property owner for plaintiff's employer's wrongdoing. The employer's failure to obtain workers' compensation coverage should not expose its hirer to civil liability. The court quoted again from *Privette*: "To encourage *employers* to obtain workers' compensation insurance for their employees, the Act's 'exclusive remedy' clause does not apply in favor of *employers* that fail to obtain such insurance, and consequently they are not immune from tort liability for such injuries." [*emphasis by court of appeal*] Consistent with that incentive, plaintiff's employer, not the hiring property owner, should be subject to suit (*101 Cal. App. 4th 430, 444-445)* .

Nor did the hirer have a duty to ascertain whether the independent contractor was properly insured. The court quoted from *State Compensation Ins. Fund v. Workers' Comp. Appeals Bd. (1985) 40 Cal. 3d 5, 219 Cal. Rptr. 13, 706 P.2d 1146* : "The fundamental policy underlying the workers' compensation laws is that those hiring others to perform services should bear the risk of injuries incurred in the undertakings. When the person seeks to hire the services through a licensed independent contractor, it is *reasonable to anticipate* that the independent contractor will insure against the risk and that the cost of the insurance will be passed on as part of the price of the contract. Thus it is *reasonable to exonerate* the hirer of the independent contractor." [*emphases by court of appeal*] Finally, the court noted that plaintiff, despite his employer's failure to maintain workers' compensation insurance, is covered by workers' compensation by virtue of the Uninsured Employers Fund [now Uninsured Employers Benefits Trust Fund]. In short, the exclusive remedy provision applied to plaintiff's case, and the court of appeal affirmed the trial court's summary judgment in defendant's favor (*101 Cal. App. 4th 430, 445)* .

[4] Additional Authorities

[a] Hazardous Waste Generated by Hirer of Independent Contractor Whose Employee It Injures

In ***Park v. Burlington Northern Santa Fe Railway Co.*** *(2003) 108 Cal. App. 4th 595, 133 Cal. Rptr. 2d 757* , the court of appeal held that, although the hirer of a contractor, having generated hazardous waste that it hired the contractor to remove, and which injured an employee of the contractor, had a nondelegable duty under the hazardous waste statutes [*42 U.S.C.S. § 6901 et seq.*; *Health & Safety Code § 25100 et seq.*] to properly dispose of such waste, nevertheless the *Privette/Toland* doctrine means that the generator of hazardous waste is not liable to the employee of a contractor it hires to dispose of that waste unless the generator's conduct affirmatively contributed to the employee's injuries (*108 Cal. App. 4th 595, 606-611)* .

[b] Hirer Did Not Exercise Retained Control Over Premises in Manner That Affirmatively Contributed to Subcontractor's Employee's Injury

In ***Sheeler v. Greystone Homes, Inc.*** *(2003) 113 Cal. App. 4th 908, 6 Cal. Rptr. 3d 683* , a subcontractor's employee was injured on the job site when he slipped on a piece of debris. The employee sued his employer's hirer, the general contractor, arguing that the debris had been placed in his path by a person hired by the general contractor to clean up the job site. Thus, contended the injured employee, there were triable issues as to whether the hirer was liable in negligence for the employee's injuries. The court of appeal held that the general contractor had not exercised the control it retained over the job site in a manner that affirmatively contributed to the employee's injuries. There were no triable issues of fact, said the court, since there was no evidence that the general contractor exercised its retained control over the site by scheduling cleanups solely to ensure safety. Rather, there was evidence that the cleanups prior to the accident were scheduled to facilitate painting. Moreover, there was no evidence that the general contractor exercised any retained

control over the manner in which the cleaners performed their work. Thus, held the court, the injured employee's claim of negligent exercise of retained control failed for want of a triable issue on this point (*113 Cal. App. 4th 908, 918-922)* .

In ***Millard v. Biosources, Inc.*** *(2007) 156 Cal. App. 4th 1338, 68 Cal. Rptr. 3d 177* , the trial court entered summary judgment on the complaint of an injured employee of a heating and air conditioning subcontractor in his suit against the general contractor, finding that the general contractor had no duty of care to the employee under either *Lab. Code § 6304.5* or the doctrine of retained control. The employee was injured while working in the attic of a building being remodeled under the general supervision of the general contractor. The employee alleged that the lights went out suddenly and that he fell through the ceiling (*156 Cal. App. 4th 1338, 1342-1343)* . The court of appeal affirmed the judgment, holding that the employee had not submitted evidence sufficient to raise a triable issue of fact that the general contractor affirmatively contributed to his injuries. The general contractor did not control the means and methods of the employee's work. No personnel of the general contractor were at the work site at the time the employee fell. The only evidence before the trial court was that the lights in the attic space were on immediately following the employee's fall. Although the employee speculated that the two events were connected, he had not submitted any evidence as to why the lights suddenly went out or why the general contractor was responsible for that event. Thus, even if it could be shown that the general contractor retained control over safety conditions at the project, there was no triable issue of fact that the general contractor affirmatively contributed to the employee's injuries (*156 Cal. App. 4th 1338, 1346-1349*).

[c] Landowner Had No Duty to Employee of Employer (Premises Occupant) for Injuries Arising From Employee's Performance of His Job on Landowner's Land

In ***Laico v. Chevron U.S.A., Inc.*** *(2004) 123 Cal. App. 4th 649, 20 Cal. Rptr. 3d 307* , the court of appeal, reversing the trial court, held that a landowner had no duty to the employee of an employer (the premises occupant) for injuries arising from the employee's performance of his job on the landowner's land, when the hazardous conditions were created by the functioning of the employer's business, and were not a danger existing on the land independently of the employer's activity, and when there was no evidence of a landlord-tenant relationship between the landowner and the employer or of any other legal relationship giving the landowner a right of access or control, no evidence showing what a reasonable inspection would have disclosed, and no evidence that the landowner had the ability to detect and avoid unreasonable risk of harm to the employee (123 Cal. App. 4th 649, 670).

[d] Hirer Had No Liability to Injured Employee of Independent Contractor/Subcontractor When Hirer Had Not Affirmatively Contributed to Employee's Injury, Even Though Subcontractor Was Not Insured Against Workers' Compensation at Time of Employee's Injury

In ***Bell v. Greg Agee Construction, Inc.*** *(2004) 125 Cal. App. 4th 453, 23 Cal.Rptr. 3d 33* , the court of appeal, citing *Lopez v. C.G.M. Development, Inc.*, concluded that the hirer had not affirmatively contributed to a subcontractor's employee's injury and, therefore, had no liability for that injury. Among the injured employee's arguments was that the public policies behind *Privette* and its progeny did not apply and that the hirer should be subject to liability for the employee's injury because the employee's employer was uninsured against workers' compensation at the timeof the employee's injury. The court pointed out that, although uninsured at the time of the employee's injury, the employer had been so insured and had so informed the hirer at the time the contract of hire was entered. The court of appeal expressed no opinion on the outcome in cases in which the hirer knowingly retained an independent contractor that was not carrying workers' compensation insurance (*125 Cal. App. 4th 453, 466-468)* .

[e] Record Showed Triable Issues of Material Fact as to Whether Defendant, Who Was Hirer of Plaintiff-Employee's Employer, Breached Nondelegable Regulatory Duty to Provide Fire Extinguishers, Pursuant to California Fire Code, and Whether Such Breach Affirmatively Contributed to Plaintiff's Injuries

In *Barclay v. Jesse M. Lange Distributor, Inc. (2005) 129 Cal. App. 4th 281, 28 Cal. Rptr. 3d 242* , the court of appeal,

citing *Park v. Burlington Northern Santa Fe Railway Co.*, reversed the trial court's summary judgment in favor of a defendant property owner and held that the record showed triable issues of material fact as to whether the defendant, who was the hirer of the plaintiff-employee's employer, breached a nondelegable regulatory duty to provide fire extinguishers, pursuant to the California Fire Code, and whether such breach affirmatively contributed to the plaintiff's injuries. The court of appeal found that the plaintiff's lawsuit was not foreclosed by *Privette v. Superior Court* and its progeny, and it found, instead, that 24 Cal. Code Reg. § 7904.4.9.2, applicable to petroleum bulk plant facilities such as the defendant's, requiring fire extinguishers within 75 feet of those portions of the facility where fires are likely to occur, supported the plaintiff's lawsuit (*129 Cal. App. 4th 281, 290-301)* .

[f] Furnishing and Abrupt Withdrawal of Safety Equipment by Hirer and General Contractor Could Be Found to Constitute Negligent Performance of Voluntary Undertaking, Affirmatively Contributing to Plaintiff's Injuries and Thereby Subjecting Defendants to Civil Liability

In *Browne v. Turner Construction Co. (2005) 127 Cal. App. 4th 1334, 26 Cal. Rptr. 3d 433* , the court of appeal case, focusing on the hirer's negligent exercise of retained control, reversed the trial court's summary judgment for the hirer and the general contractor defendants in a civil action by the plaintiff, an employee of the subcontractor, who was injured in a fall from a ladder while installing the sprinkler system in the hirer's new building. The court of appeal held that the furnishing and abrupt withdrawal of safety equipment by the defendants could be found to constitute negligent performance of a voluntary undertaking, affirmatively contributing to the plaintiff's injuries and thereby subjecting the defendants to liability. The appellate court found that the defendants had made no attempt to refute the plaintiff's allegations and evidence that the defendants had provided, then removed, hydraulic scissor lifts from the room in which sprinklers were being installed, resulting in the plaintiff's having to use a ladder, and had also provided, then removed, suspended anchoring cables to which workers could secure their safety lanyards, resulting in the plaintiff's having nothing to which to fasten his safety lanyard. The defendants had presented no evidence precluding a finding that they affirmatively contributed to the plaintiff's injuries, or affirmatively demonstrating that the plaintiff lacked evidence to prove such affirmative contribution, and the evidence raised a strong possibility, at least, that the defendants not only actively contributed to the plaintiff's injuries, but actually created a situation in which such injuries were likely to occur. The court of appeal remanded the case to the trial court (*127 Cal. App. 4th 1334, 1345-1348)* .

[g] Homeowners' Association, Which Had Contracted With Plaintiff's Employer for Security Services, Had No Liability for Injuries Received by Plaintiff When Assaulted on Homeowner's Premises

The result in *Browne v. Turner Construction Co.* (*see* [f], *above*) may be contrasted with that reached by the court of appeal in *Tilley v. CZ Master Association (2005) 131 Cal. App. 4th 464, 32 Cal. Rptr. 3d 151* , to the effect that a defendant homeowners' association, which had contracted with the plaintiff's employer for security services, had no liability for injuries received by the plaintiff when assaulted on a homeowner's premises. Citing *Privette*, *Toland* (*see* [3][a], *above*), and *Hooker v. Department of Transportation (2002) 27 Cal. 4th 198, 115 Cal. Rptr. 2d 853, 38 P.3d 1081* , the court held that the defendant owed the plaintiff no duty to restrict access to the community's premises or to restrict youth parties within its premises. Moreover, said the court, the plaintiff had assumed the risk of the injuries he suffered, when the undisputed evidence demonstrated that the defendant neither required nor expected its unarmed security personnel to confront potentially violent persons, or otherwise place themselves in danger, and did nothing to alter the basic scope of its security guards' "observe and report" responsibilities. Thus, it could not be held liable for the consequences of the plaintiff's decision to take action beyond the scope of his duties by attempting to arrest the assailant. Nor could the defendant's failure to take affirmative steps to restrict or control juvenile parties within its property be construed as having affirmatively contributed to the plaintiff's injuries for purposes of the peculiar risk doctrine (*131 Cal. App. 4th 464, 482-490)* .

[h] Policy Considerations Holding Hirer of Subcontractor, Whose Employee Was Injured on Job as Result of Subcontractor's Negligence, Not Vicariously Liable Under Peculiar Risk Doctrine Were Equally Applicable to Claims Against Hirer's Agent and Thus Barred Civil Action Against That Agent

In *Ruiz v. Herman Weissker, Inc. (2005) 130 Cal. App. 4th 52, 29 Cal. Rptr. 3d 641* , a case involving the question of a hirer's *agent's* liability for a subcontractor's employee's injuries, the court of appeal held that the policy considerations relied on in *Privette* and *Hooker* (*see* [3][a], *above*), which established that the hirer of a subcontractor whose employee was injured on the job as a result of the subcontractor's negligence was not vicariously liable under the peculiar risk doctrine, were equally applicable to claims against the hirer's agent and thus barred a civil action against that agent (*130 Cal. App. 4th 52, 61-62)* . The court went on to hold that, even assuming, as the plaintiff argued, that the hirer had nondelegable duties under the Public Utilities Code and PUC regulations to ensure the safety of the premises where the employee of the independent contractor was fatally injured, the hirer's attempt to delegate such duties to an agent created no liability on the part of that agent (*130 Cal. App. 4th 52, 64)* . Finally, the court held that, although the hirer of an independent contractor remains liable to an employee of that contractor who is injured during the course of the work when the hirer retains control over details of the work and its conduct affirmatively contributes to the employee's injuries, no evidence in this case showed that the hirer's agent asserted authority over the independent contractor's crew or instructed them as to what safety procedures to use. Thus, no evidence showed that the hirer's agent affirmatively contributed to the contractor's employee's death by some negligent act or omission (*130 Cal. App. 4th 52, 65-67)* .

[i] Landowner Who Hires Independent Contractor May Be Liable to Contractor's Employee Injured by Undisclosed Hazard on Hirer's Land, Even if Hirer Does Not Retain Control Over Work

In *Kinsman v. Unocal Corp. (2005) 37 Cal. 4th 659* , the Supreme Court, reversing and remanding to the court of appeal, has held that a landowner who hires an independent contractor may be liable to the contractor's employee injured by an undisclosed hazard on the hirer's land, even if the hirer does not retain control over the work, if the following conditions are present: (1) the landowner knew, or should have known, of the latent or concealed preexisting hazardous condition on its property; (2) the contractor did not know of, and could not have reasonably discovered, this hazardous condition; and (3) the landowner failed to warn the contractor about this condition. The Court concluded that the jury was not sufficiently instructed that the landowner was liable in this case for failing to warn about only the *hidden* hazardous condition, and that lack of sufficient instruction was prejudicial to the landowner (*37 Cal. 4th 659, 678-683*).

[j] *Privette* and ***Kinsman*** Doctrines Apply to Hirers of Subcontractors for Injuries to Those Who Worked for Those Subcontractors, Regardless of Whether Those Injured Were Employees of Subcontractors or Independent Contractors

In *Michael v. Denbeste Transp., Inc. (2006) 137 Cal. App. 4th 1082, 1093-1096, 40 Cal. Rptr. 3d 777* , the court of appeal held that the *Privette* and *Kinsman* doctrines applied to the issue of liability of the hirers of subcontractors for injuries to those who worked for those subcontractors, regardless of whether those injured were employees of the subcontractors or independent contractors (*137 Cal. App. 4th 1082, 1093-1096)* .

[k] Gov. Code § 815.4 Provided Statutory Basis for Public Entity Potentially to Be Held Liable on Retained Control Theory Under *Hooker* and Its Progeny

The court of appeal has held in *McCarty v. State of California/Department of Transportation (2008) 164 Cal. App. 4th 955, 79 Cal. Rptr. 3d 777* , that *Gov. Code § 815.4* [*see Gov. Code § 810 et seq.* (Government Claims Act)] provided a statutory basis for a public entity potentially to be held liable on a retained control theory under *Hooker* and its progeny and that the plaintiff could bring a claim on this theory. The defendant had hired FCI Constructors, Inc., an independent contractor, to be the general contractor on a project to build an extension on a public freeway. The plaintiff, a heavy equipment operator, was an employee of the general contractor. He was injured while moving a utility pole from the freeway right-of-way when the pole fell on the roof of the excavator he was driving and hit him on the back of the head, causing near quadriplegia (*164 Cal. App. 4th 955, 976-979)* .

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Volume 23 Chapters 230-239 TRUST DEEDS---to---WORKERS' COMPENSATION
CHAPTER 239 WORKERS' COMPENSATION EXCLUSIVE REMEDY DOCTRINE
PART II. FORMS

10-239 California Points & Authorities § 239.34

AUTHOR: Carolyn Rashby

§ 239.34 Opposing Contention That Workers' Compensation Exclusive Remedy Doctrine Precludes Action by Employee Against Employer--Plaintiff Was Not an Employee Within the Meaning of the Workers' Compensation Act

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S ACTION FOR DAMAGES FOR PERSONAL INJURIES IS NOT PRECLUDED BY THE EXCLUSIVE REMEDY PROVISIONS OF THE WORKERS' COMPENSATION ACT BECAUSE PLAINTIFF WAS NOT AN EMPLOYEE OF DEFENDANT.

A. Employment Relationship Requirement for Exclusive Remedy. An employer is shielded from tort liability by the exclusive remedy provisions of the Workers' Compensation Act only if the injured party is an employee, as defined in the Labor Code. In the absence of such an employment relationship, normal tort liability applies (*Lab. Code §§ 3600(a)(1), 3351-3352*).

[*Optional*] **B. Independent Contractor Is Not an Employee.** An independent contractor is not an employee. Therefore, an independent contractor is not entitled to benefits under the Workers' Compensation Act and is not precluded by the exclusive remedy provisions of the Act from bringing a tort action against his or her hirer (*Lab. Code §§ 2750.5, 3353*; *S.G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal. 3d 341, 350-351, 256 Cal. Rptr. 543, 769 P.2d 399* ; *see Lab. Code § 3600*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that plaintiff's action for personal injury damages is precluded by the exclusive remedy provisions of the Workers' Compensation Act, on the ground that

plaintiff was not an employee of defendant. Optional Paragraph B is for use where plaintiff was an independent contractor of defendant. In an appropriate case, These points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 239.21*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the workers' compensation exclusivity provisions do not preclude plaintiff's action because plaintiff was not an employee of defendant, for example, in opposition to a demurrer or motion for summary judgment. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss facts indicating that plaintiff's relationship with defendant did not fall within the definition of "employee" contained in *Lab. Code § 3351*. In an appropriate case, counsel also should demonstrate that one of the exceptions enumerated in *Lab. Code § 3352* applies. If counsel contends that plaintiff was an independent contractor, evidence of such relationship should be discussed, including facts tending to show that plaintiff had the right to control and discretion in the manner of performance of the contract for services and evidence of other factors indicating an independent contractor relationship [*see Lab. Code § 2750.5*; *S. G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal. 3d 341, 350-351, 256 Cal. Rptr. 543, 769 P.2d 399]* .

[3] Discussion of Authorities

[a] Employment Relationship Requirement for Exclusive Remedy

Lab. Code § 3600(a)(1) provides that liability for workers' compensation on the part of an employer shall only exist where, at the time of the injury, both the employer and the employee are subject to the compensation provisions of the Workers' Compensation Act.

Lab. Code § 3351 defines the term "employee" as every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed, including: (1) aliens and minors; (2) elected and paid public officers; (3) paid corporate officers and directors (with some exceptions); (4) certain household laborers; (5) prison inmates engaged in assigned work; (6) certain paid members of a partnership or limited liability company; (7) persons whose employment training is arranged by the State Department of Rehabilitation; (8) certain persons providing in-home domestic services to elderly or disabled persons under Article 7 of the Welfare and Institutions Code; (9) certain authors under contract to publishers. Also, the term "employee" includes members of the California National Guard and the state militia who are injured, disabled, or killed on active service in the line of duty [*Mil. & Vet. Code §§ 340-340.2*].

Lab. Code § 3352 provides that the term "employee" does not include: (1) household workers employed by a parent, spouse, or child, or working less than a specified number of hours depending on the type of injury; (2) persons performing services in return for aid or sustenance only, received from a religious, charitable, or relief organization; (3) certain deputy officials; (4) certain volunteer helpers at camps run by nonprofit organizations; (5) certain voluntary ski patrol members and other employees of ski lift operators; (6) student athletes and other sports participants, other than regular employees, who receive no compensation other than certain specified expenses, and certain persons officiating at sports events as well as certain sports officials; (7) volunteers serving public agencies or private nonprofit agencies for no remuneration other than certain specified expenses; (8) certain law enforcement officers who are regularly employed by a law enforcement agency in an adjoining state and who are deputized to work in California; (9) certain law enforcement officers from adjoining states who are acting as peace officers in California pursuant to *Penal Code § 830.32*; and *(10)* certain workers who have not worked a specified amount of time and/or earned a specified amount of

money within a certain time frame preceding the date of injury.

[b] Independent Contractor Is Not an Employee

Lab. Code § 3353 states that an independent contractor is any person who renders service for a specified recompense for a specified result, under the control of the principal as to the result of the work only, and not as to the means of accomplishing the result.

Lab. Code § 2750.5 provides that proof of independent contractor status includes satisfactory proof of the following: (1) that the individual has the right to control and discretion in the manner of performance of the contract for services in that the result of the work, and not the means by which it is accomplished, is the primary factor bargained for; (2) the individual is customarily engaged in an independently established business; and (3) the independent contractor status is bona fide and is not a subterfuge. Bona fide independent contractor status is evidenced by the following factors, which are cumulative: (1) substantialinvestment other than personal services in the business; (2) holding out that one is in business for oneself; (3) bargaining for a contract to complete a specific project for compensation by project rather than by time; (4) control over the time and place the work is performed; (5) supplying the tools used in the work other than tools that are normally and customarily provided by employees; (6) hiring employees; (7) performing work that is not ordinarily in the course of the principal's business; (8) performing work that requires a particular skill; (9) holding a license pursuant to the Business and Professions Code; and (10) the parties' intention that the work relationship be that of independent contractor or that the relationship is not severable at will but gives rise to an action for breach of contract.

In ***S.G. Borello & Sons, Inc. v. Department of Industrial Relations*** *(1989) 48 Cal. 3d 341, 256 Cal. Rptr. 543, 769 P.2d 399* , a deputy labor commissioner had issued a stop order/penalty against S.G. Borello & Sons, a grower, for failure to obtain workers' compensation coverage for the 50 migrant harvesters of its cucumber crop. At the administrative hearing, Borello admitted failure to secure coverage, but contended that the workers were independent contractors, therefore excluded from the workers' compensation law. The evidence at the hearing established that Borello and the head of each harvester family had signed a preprinted agreement which stated, among other things, that Borello would furnish and prepare the land, plant, fertilize, cultivate, and spray the crop, furnish boxes for the cucumbers, and transport the harvest to the buyer, and that the harvester or "share farmer" would harvest the crop, but the method and manner of harvesting were left solely to the share farmer, who agreed to use accepted agricultural practices, devote the necessary time to the harvest, and supply his own tools and transportation. The agreement also provided that the crop would be sold to a buyer acceptable to both Borello and the share farmer, that Borello would retain title to the crop until sold, but that they would split the proceeds equally. Finally, the agreement stated that the parties were principal and independent contractor, that the share farmer was self-employed, Borello would not withhold taxes and the share farmer must file separate tax returns, and that Borello would not provide workers' compensation or disability insurance coverage. The harvesters arrived a few weeks before the harvest and contracted for the amount of land they wish to harvest. They were responsible for the care of the plants on their assigned land during the harvest. Borello did not have a field supervisor and did not direct the harvesters' work or hours of work. Once the crop was harvested, the workers left and did not harvest any other crops for Borello. Based on this evidence, the Division concluded that the harvesters were employees and affirmed the order, primarily because of Borello's predominant control over the cultivation, harvest and sale of the cucumbers and the workers' lack of investment in the crop. Borello sought mandamus to review the Division's order. The trial court denied the writ. The court of appeal reversed, finding that the harvesters were independent contractors.

The Supreme Court reversed. The Court stated that the Workers' Compensation Act extends only to injuries suffered by an employee which arise out of and in the course of his employment. The term "employee" does not include independent contractors. While the "right of control" test is the most important or significant consideration in determining the nature of the relationship, that test should not be applied rigidly, but rather in combination with an examination of a number of secondary indicia of the nature of the relationship, including those set forth in *Lab. Code §*

2750.5 [discussed *above*] and § 220 of the Restatement Second of Agency (*48 Cal. 3d 341, 350-351)* . Further, the test must be applied with deference to the purpose of the Workers' Compensation Act; that is, the nature of the work and the overall arrangement between the parties must be examined to determine whether they come within the purpose of the statute (*48 Cal. 3d 341, 352)* . The Act intends comprehensive coverage of industrial injuries and accomplishes this goal by defining "employment" broadly. Further, the express exclusion of independent contractors from the Act was designed to recognize those situations where the Act's goals are best served by imposing the risk of injury directly on the provider of the service, rather than on the recipient of the service.

The Court was not persuaded by Borello's contention that it contracted with the harvesters only to obtain a specified result for a specified recompense and that the factor of control weighed against a finding of employment. The Court found that Borello exercised "pervasive control" over the operation as a whole, in that all meaningful aspects of the business relationship, including price, cultivation, fertilization, insect prevention, payment, and the right to deal with buyers were controlled by Borello. On the other hand, the harvest involved only simple manual labor which could be performed in only one correct way. Because the simplicity of the work, and not the harvesters' expertise, made supervision by Borello unnecessary, Borello retained all "necessary" control. The Court also found that other factors placed the risk and cost of injuries on Borello. In particular, even though the harvesting was seasonal, many of the harvester families worked for Borello year after year; the permanent integration of the workers into the business was a strong indicator that Borello functioned as an employer. In contrast, the harvesters exhibited no characteristics that placed them outside the Act's intended coverage of employees: they had no distinct trade, did not hold themselves out in business, performed farm labor for hire wherever jobs were available, invested only in personal service and hand tools, incurred no opportunity for profit or loss, relied solely on the work in the fields for their livelihood, and had no practical means to insure themselves against loss of income caused by nontortious work injuries. Thus, according to the Court, they were a class of workers whom the Act was designed to protect. The Court also stated that even though the harvesters signed a contract stating that they were not employees, Borello did not offer themany real choice of terms. A worker's express or implied agreement to forego coverage is merely a significant, but not controlling, factor, especially when other compelling indicia of employment are present and when there is no evidence that they voluntarily undertook the unprotected status (*48 Cal. 3d 341, 356-359)* .

[4] Additional Authorities

[a] Independent Contractor Is Not an Employee

In *Gonzalez v. Workers' Comp. Appeals Bd. (1996) 46 Cal. App. 4th 1584, 54 Cal. Rptr. 2d 308* , the Court of Appeal applied the *Borello* analysis [*see S.G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal. 3d 341, 256 Cal. Rptr. 543, 769 P.2d 399]* to hold that a newspaper carrier was an employee and not an independent contractor as alleged by the employer, despite the fact that the newspaper carrier signed a contract indicating he was working as an independent contractor. The court concluded that the employer's carrier agreement, under which the carrier was purported to be an independent contractor, was a subterfuge to avoid the workers' compensation laws. The court noted that under *Borello*, the labels placed on the parties are not dispositive of their employment relationship (*46 Cal. App. 4th 1584, 1594)* .

[b] Ski Lift Employee Not Statutory "Employee" at Time of Injury

In ***Vine v. Bear Valley Ski Co.*** *(2004) 118 Cal. App. 4th 577, 13 Cal. Rptr. 3d 370* , the court of appeal held that reasonable inferences from stipulated facts supported the trial court's determination that an employee, injured while attending a party given by her employer for employees at the end of the ski season, went snowboarding on her own initiative, so that she was not an "employee," pursuant to *Labor Code Section 3352(f)*, at the time of her injury and, thus, not bound by the exclusive remedy rule (*118 Cal. App. 4th 577, 586)* .

[c] Exemption From Contractor's License Requirement Contained in Business and Professions Code Section 7049 for Work Incidental to "clearing or other work upon the land in rural districts for fire prevention

purposes" Meant That Trial Court Erred in Ruling That Defendant Was Employee as Matter of Law

In *Moehring v. Thomas (2005) 126 Cal. App. 4th 1515, 25 Cal. Rptr. 3d 118* , the court of appeal held that the exemption from the contractor's license requirement contained in *Business and Professions Code Section 7049* for construction or maintenance work incidental to "clearing or other work upon the land in rural districts for fire prevention purposes" meant that the trial court erred in ruling that the defendant was an employee as a matter of law pursuant to *Labor Code Section 2750.5*. The defendant, who was sued in civil court by the family of another worker whose death he was alleged to have negligently caused, had argued to the trial court that he was a fellow employee of the decedent and that, therefore, workers' compensation was the exclusive remedy. The court of appeal remanded the case for further proceedings on the question of fact of whether the defendant was an employee or an independent contractor (*126 Cal. App. 4th 1515, 1520-1525)* .

[d] Injured Worker Was Not Residential Employee of Homeowners

In *Cal. State Auto. Ass'n Inter-Ins. Bureau v. W.C.A.B. (Hestehauge) (2006) 137 Cal. App. 4th 1040, 40 Cal. Rptr. 3d 743* , a case in which an unlicensed house painter was injured on his first day of painting a house and sought workers' compensation benefits, the Appeals Board, acknowledging that the worker did not qualify as an "employee" pursuant to *Lab. Code §§ 3351(d)* and *3352(h)*, held that he was an "employee" pursuant to *Lab. Code § 3715(b)*. The court of appeal, however, annulled the Appeals Board's decision and held that *Lab. Code §§ 3351(d)* and *3352(h)* were the only relevant statutes for defining "employee" when the issue was whether an injured worker was a residential employee of the homeowners. The court stated that *Lab. Code § 3715(b)*, relied on by the Appeals Board, was inapplicable, since that statute applied to only uninsured homeowners, whereas the homeowners in the present case were insured. Thus, the injured worker was not an "employee" and was not entitled to workers' compensation benefits (*137 Cal. App. 4th 1040, 1044-1048)* .

[e] Injured Worker May Sue in Tort When He Was Neither Independent Contractor Nor, for Purposes of Workers' Compensation, Employee, But Was Employee for Purposes of Labor Code Section 2750.5

In *Mendoza v. Brodeur (2006) 142 Cal. App. 4th 72, 47 Cal. Rptr. 3d 310* , the court of appeal, reversing the trial court's dismissal of the plaintiff's tort action alleging the defendant's negligence, held that the plaintiff, injured while repairing the defendant's roof, was the defendant's employee pursuant to *Labor Code Section 2750.5*, which operated to allow the plaintiff's lawsuit, despite the fact that the plaintiff, by virtue of *Labor Code Section 3352(h)*, was not an employee of the defendant for workers' compensation purposes, when the court of appeal found that the plaintiff was not a licensed roofing contractor and, therefore, not an independent contractor (*142 Cal. App. 4th 72, 79-81*).

California Points & Authorities

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Volume 23 Chapters 230-239 TRUST DEEDS---to---WORKERS' COMPENSATION
CHAPTER 239 WORKERS' COMPENSATION EXCLUSIVE REMEDY DOCTRINE
PART II. FORMS

10-239 California Points & Authorities § 239.35

AUTHOR: Carolyn Rashby

§ 239.35 Opposing Contention That Workers' Compensation Exclusive Remedy Doctrine Precludes Action by Employee Against Employer--Employer Failed to Secure Payment of Workers' Compensation [Lab. Code § 3706]

[1] FORM

[*The following may be included in a memorandum of points and authorities, orin a trial or appellate brief.*]

PLAINTIFF'S ACTION FOR DAMAGES FOR PERSONAL INJURIES IS NOT PRECLUDED BY THE EXCLUSIVE REMEDY PROVISIONS OF THE WORKERS' COMPENSATION ACT BECAUSE DEFENDANT FAILED TO SECURE THE PAYMENT OF WORKERS' COMPENSATION.

A. Failure to Secure Payment of Workers' Compensation. When an employer fails to secure payment of workers' compensation insurance, or fails to be self-insured, an injured employee may bring a civil action for damages against the employer as if the Workers' Compensation Act did not apply (*Lab. Code § 3706*).

[*Optional*] **B. Lack of Intent Not a Defense.** The fact that an employer did not intentionally fail to secure payment of workers' compensation insurance is not a defense in a civil action by an employee for damages for an industrial injury (*Hicks v. Ocean Shore Railroad, Inc. (1941) 18 Cal. 2d 773, 787, 117 P.2d 850*).

[*Optional*] **C. Payment of Medical Bills and Wages Does Not Bar Suit for Damages.** The fact that an employer pays an injured employee's medical bills and wages during a disability caused by an industrial injury or otherwise compensates the employee does not bar the employee's suit for damages when the employer failed to secure payment of workers' compensation prior to the injury (*Coffin v. Bloodworth (1938) 28 Cal. App. 2d 522, 524, 82 P.2d 953*).

[*Optional*] **D. Dual Employment Does Not Bar Suit for Damages Against Uninsured Employer.** In the event of dual employment where one employer is insured and the other employer has failed to secure the payment of workers' compensation, an injured employee may obtain a workers' compensation award jointly and severally against both

employers and still maintain an action for damages against the uninsured employer (*Strickland v. Foster (1985) 165 Cal. App. 3d 114, 118-119, 211 Cal. Rptr. 305*).

[*Optional*] **E. Self-Insured Public Entities Not Permitted to Extend Coverage to Private Entities.** A public entity operating under a self-insured workers' compensation program pursuant to a certificate issued under *Lab. Code § 3700(c)* is not permitted to unilaterally extend its coverage to private entities acting as agencies of the public entity (*Huffman v. City of Poway (2000) 84 Cal. App. 4th 975, 986, 101 Cal. Rptr. 2d 325*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that plaintiff's action for damages is precluded by the exclusive remedy provisions of the Workers' Compensation Act, based on the argument that defendant failed to secure payment of workers' compensation. Optional Paragraph B is for use if defendant contends that the failure to secure payment of workers' compensation was not intentional. Optional Paragraph C is for use where defendant has paid plaintiff's medical bills or wages and contends that such payment bars plaintiff's action for damages. Plaintiff should use Optional Paragraph D in the event of dual employment where only one employer has properly secured payment of workers' compensation.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that plaintiff's action for damages is not barred because defendant failed to properly secure the payment of workers' compensation, for example, in opposition to a demurrer. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should demonstrate that plaintiff is covered by the workers' compensation law (*see Lab. Code § 3600*), and should set forth facts indicating that the employer neither carried workers' compensation insurance nor was self-insured, in violation of *Lab. Code § 3706*.

[c] Related Pleading and Practice Forms

For a form of notice for summary judgment and related discussion, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* (Matthew Bender).

[3] Discussion of Authorities

[a] Failure to Secure Payment of Workers' Compensation

Lab. Code § 3706 states that if an employer fails to secure the payment of workers' compensation, any injured employee or his dependents may bring a civil action against such employer for damages as if the Workers' Compensation Act did not apply.

[b] Lack of Intent Not a Defense

In ***Hicks v. Ocean Shore Railroad, Inc.*** *(1941) 18 Cal. 2d 773, 117 P.2d 850* , plaintiff, an employee of the defendants, was injured on the job and brought an action for damages against defendants who had failed to carry workers' compensation insurance. The jury returned a verdict in favor of plaintiff. Upon defendants' motion for a new trial, the judgment was reduced and the motion was denied. Defendants appealed the judgment, contending, among

other things, that the trial court incorrectly denied defendants' offer to prove that the neglect to carry insurance was not deliberate.

The appeals court affirmed. The court stated that where an employer has failed to secure the payment of workers' compensation, the employee may bring an action for damages after receiving an award under the Workers' Compensation Act [*Lab. Code §§ 3706-3709*]. In a trial of such action, there is a presumption that the employer was negligent and that the injury was a direct result of such negligence; the employer may not defend on the grounds of contributory negligence, assumed risk or negligence of a "fellow servant" [*Lab. Code § 3708*] (*18 Cal. 2d 773, 779-780)* . The court found that the lower court had correctly denied defendants' offer to prove that the failure to carry insurance was not deliberate. According to the court, there is no authority for excusing an employer for failure to comply with legal requirements for the care of employees. When the defendants operated their business through the agency of their employees, they knew that they did not carry insurance and thus operated at their own peril. The court stated that the present wish of defendants that they had taken out insurance and their claim that they would have done so was immaterial (*18 Cal. 2d 773, 787)* .

[c] Payment of Medical Bills and Wages Does Not Bar Suit for Damages

Coffin v. Bloodworth *(1938) 28 Cal. App. 2d 522, 82 P.2d 953* , involved a negligence suit by an employee against his employer for injuries sustained in an accident while on the job. At the time of the accident, defendant did not have workers' compensation insurance and was not self insured. In an appeal from a judgment in favor of plaintiff, defendant contended that the trial court did not have jurisdiction to try the case because defendant had fully compensated plaintiff for all medical bills and medical treatment required as a result of the accident and for all lost wages. The appeals court rejected defendant's argument. Where an employer has both failed to secure workers' compensation insurance and to secure a certificate of consent to self-insure, an employee may bring an action at law against the employer as if the workers' compensation law did not apply, regardless of whether the employer has compensated the employee for all damages (*28 Cal. App. 2d 522, 524)* .

[d] Dual Employment Does Not Bar Suit for Damages Against Uninsured Employer

In ***Strickland v. Foster*** *(1985) 165 Cal. App. 3d 114, 211 Cal. Rptr. 305* , plaintiff, the widow of a truck driver employed by defendant, brought an action for damages for the wrongful death of her husband. Defendant furnished trucks and drivers to others for compensation, and furnished a truck driven by plaintiff's husband to a trucking company which exercised such a degree of control over the truck and driver so as to itself become an employer. The trucking company carried insurance, but defendant did not. Plaintiff's husband died from an industrial injury suffered while working for both employers. Plaintiff secured a workers' compensation award jointly and severally against the defendant and the trucking company's insurer. She also commenced a wrongful death action against defendant. The trial court granted defendant's motion for summary judgment and plaintiff appealed.

The issue before the appeals court was whether plaintiff was entitled to maintain her action against defendant. The court reviewed applicable portions of the Labor Code regarding an employer's failure to obtain workers' compensation insurance [*Lab. Code §§ 3600, 3706*]. Because the workers' compensation award was entered jointly and severally against both employers, the insured employer's insurer was obliged to pay the entire award, but was entitled to an apportionment of liability for the award between itself and defendant. Thus, the public policy expressed in *Rideaux v. Torgrimson (1939) 12 Cal. 2d 633, 637, 86 P.2d 826* , that all employers make full provision for insurance coverage against the liability to furnish compensation, was frustrated. Further, *Lab. Code § 3706* explicitly provides that plaintiff could bring an action against such an employer for damages. Rejecting defendant's arguments that where dual employment exists it is sufficient for only one employer to obtain insurance, that workers' compensation was plaintiff's only remedy, that there is a public policy against double recoveries, and that the remedial and penal purposes of the act are not served by permitting the action, the court reversed the summary judgment. The court found that the public policies asserted by defendant were transcended by the policy requiring each employer to make provision for adequate

workers' compensation insurance and by the plain language of the Labor Code (*165 Cal. App. 3d 114, 117-119)* .

[e] Self-Insured Public Entities Not Permitted to Extend Coverage to Private Entities

In ***Huffman v. City of Poway*** *(2000) 84 Cal. App. 4th 975, 101 Cal. Rptr. 2d 325* , plaintiff was injured while rehearsing a play at a facility owned and operated by the City of Poway. At the time of his injury, plaintiff was an actor employed by AAF, a production company acting as an agency of the City to perform some limited functions. Plaintiff first filed a claim for workers' compensation benefits with the City, claiming he was a city employee. His application was accepted and processed by the California Joint Powers Insurance Authority (CJPIA), an insurance pool of various municipalities including the City. CJPIA determined that AAF was a protected party under its workers' compensation program and paid plaintiff's medical bills.

Plaintiff also filed a lawsuit alleging claims for negligence against AAF and for premises liability against the City. The trial court entered a judgment in favor of AAF, ruling that because AAF was plaintiff's employer and had secured workers' compensation insurance, plaintiff's exclusive remedy under *Lab. Code § 3602(a)* was to collect workers' compensation benefits and he could not pursue a tort claim against AAF.

Plaintiff appealed, contending that under *Lab. Code § 3700* an employer must secure the payment of workers' compensation by either purchasing insurance or securing a certificate of consent to self-insure. He asserted that since AAF did not comply with either of these two alternatives he was not subject to the exclusivity provisions of *Lab. Code § 3602(a),* and could bring a civil suit against his employer. AAF contended, however, that the two alternatives set forth by plaintiff were not exclusive, and that its method of providing insurance to its employees under the City's self-insurance program administered by CJPIA was appropriate.

The court of appeal found no authority permitting a public entity operating a self-insured workers' compensation program pursuant to a certificate issued under *Lab. Code § 3700(c)* to unilaterally extend its coverage to private entities. The court noted that private entities do not qualify for self-insured status under *Lab. Code § 3700(c).* Moreover, the court pointed out that, under the administrative regulations, a certificate of consent to self-insure is valid only as to the entity to which the certificate was issued and not with regard to that entity's subsidiaries or affiliates (*8 Cal. Code Reg. § 15203.9(a)*) (*84 Cal. App. 4th 975, 986)* . The court concluded that because AAF had not secured the payment of compensation as require by *Lab. Code § 3700,* the trial court erred in directing a verdict against plaintiff based on the exclusivity provisions of *Lab. Code § 3602(a)* (*84 Cal. App. 4th 975, 987)* .

[4] Additional Authorities

[a] Dual Employment Does Not Bar Suit for Damages Against Uninsured Employer

In *Hernandez v. Chavez Roofing, Inc. (1991) 235 Cal. App. 3d 1092, 286 Cal. Rptr. 919* , the court held that although an employee of an unlicensed and uninsured subcontractor is covered by general contractor's workers' compensation insurance pursuant to *Lab. Code § 2750.5,* the uninsuredsubcontractor may be liable in tort for injuries sustained by the employee. The court stated that *Lab. Code § 2750.5* makes an unlicensed subcontractor and its employees, employees of the general contractor for workers' compensation purposes, and rejected defendant's argument that because plaintiff and defendant were both employees of the general contractor, the general contractor's workers' compensation insurance was plaintiff's sole remedy. According to the court, *Lab. Code § 2750.5* can create a dual employment relationship whereby a worker may be an employee of both a general contractor and a subcontractor. Each employer must secure workers' compensation insurance in order to be immune from tort liability (*235 Cal. App. 3d 1092, 1093-1095)* .

[b] Payment of Medical Bills and Wages Does Not Bar Suit for Damages

In *Huffman v. City of Poway (2000) 84 Cal. App. 4th 975, 101 Cal. Rptr. 2d 325* , an injured employee brought a civil suit against his employer, alleging a cause of action for negligence. At the time of the employee's injury, the employer

was not insured for workers' compensation. The employer asserted that because the employee applied for and received timely payments of workers' compensation benefits, he suffered no detriment from the employer's failure to secure insurance and therefore should not be permitted to bring a civil action against the employer under *Lab. Code § 3706*. Citing *Strickland v. Foster (1985) 165 Cal. App. 3d 114, 118, 211 Cal. Rptr. 305* , the court concluded that the fact that an employee has received workers' compensation benefits from some source does not bar the employee's civil action against an uninsured employer (*84 Cal. App. 4th 975, 987)* .

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Volume 23 Chapters 230-239 TRUST DEEDS---to---WORKERS' COMPENSATION
CHAPTER 239 WORKERS' COMPENSATION EXCLUSIVE REMEDY DOCTRINE
PART II. FORMS

10-239 California Points & Authorities § 239.36

AUTHOR: Carolyn Rashby

§ 239.36 Opposing Contention That Workers' Compensation Exclusivity Doctrine Precludes Action by Employee Against Employer--Employee Permitted to Sue Employer for Injuries Proximately Caused by Employer's Willful Assault [Lab. Code § 3602(b)(1)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

ALTHOUGH THE WORKERS' COMPENSATION LAW GENERALLY BARS AN ACTION AT LAW FOR AN EMPLOYEE'S INJURY WHICH AROSE OUT OF AND IN THE COURSE OF HIS OR HER EMPLOYMENT, A CAUSE OF ACTION EXISTS FOR DAMAGES PROXIMATELY CAUSED BY A WILLFUL PHYSICAL ASSAULT BY THE EMPLOYER.

Cause of Action for Willful Assault. An employee, or his or her dependents in the event of the employee's death, may bring an action at law for damages against the employer, if the employee's injury or death is proximately caused by a willful physical assault by the employer (*Lab. Code § 3602(b)(1)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that workers' compensation is plaintiff's sole remedy for a work-related injury, based on the argument that the injury was caused by a willful physical assault by the employer. In an appropriate case, These points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 239.25*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that plaintiff's action for damages is not barred by the workers' compensation exclusivity doctrine because the injury was proximately caused by the employer's willful assault on the

employee, for example, in opposition to a demurrer. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that the employer physically assaulted plaintiff, specifying how the employer's conduct caused plaintiff's injury. If the employer's conduct did not amount to a battery, counsel also should set forth facts indicating that the employer had the apparent ability to carry out the threat of harm, and should discuss the reasons for plaintiff's fears. Further, counsel should establish that the employer specifically intended to injure plaintiff. For example, counsel could show that the assault or battery was not accidental [*see Soares v. City of Oakland (1992) 9 Cal. App. 4th 1822, 1825-1831, 12 Cal. Rptr. 2d 405* (discussed in *§ 239.25*)].

[c] Related Pleading and Practice Forms

For a form of complaint for damages for personal injury by an employee against an employer when the action is excluded from Workers'Compensation Act coverage, see California Forms of Pleading and Practice, Ch. 577, *Workers' Compensation* , Pt. IV (Matthew Bender).

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CHAPTER 239 WORKERS' COMPENSATION EXCLUSIVE REMEDY DOCTRINE
PART II. FORMS

10-239 California Points & Authorities § 239.37

AUTHOR: Carolyn Rashby

§ 239.37 Opposing Contention That Workers' Compensation Exclusivity Doctrine Precludes Action by Employee Against Employer--Employee Permitted to Sue Employer for Injuries Proximately Caused by Defective Product Manufactured by Employer and Transferred to Independent Third Person for Consideration [Lab. Code § 3602(b)(3)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

ALTHOUGH THE WORKERS' COMPENSATION LAW GENERALLY BARS AN ACTION AT LAW FOR AN EMPLOYEE'S INJURY WHICH AROSE OUT OF THE AND IN THE COURSE OF HIS OR HER EMPLOYMENT, A CAUSE OF ACTION EXISTS FOR DAMAGES PROXIMATELY CAUSED BY A DEFECTIVE PRODUCT MANUFACTURED BY HIS OR HER EMPLOYER WHICH WAS TRANSFERRED TO A THIRD PERSON FOR CONSIDERATION WHO THEREAFTER PROVIDED IT FOR THE EMPLOYEE'S USE.

Liability of Employer as Manufacturer. If the employee's injury or death is proximately caused by a defective product manufactured by the employer and sold, leased, or otherwise transferred for valuable consideration to an independent third person, and that product is thereafter provided for the employee's use by a third person, the employee, or his or her dependents in the even of the employee's death, may bring an action at law for damages against the employer (*Lab. Code § 3602(b)(3)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that plaintiff's suit for damages for personal injuries is precluded by the workers' compensation exclusivity provisions, based on the argument that plaintiff's injuries were proximately caused by a defective product manufactured by the employer which was transferred to an independent third person for consideration who thereafter provided it for the employee's use.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that plaintiff's action for damages is not precluded by the workers' compensation exclusivity provisions because *Lab. Code § 3602(b)(3)* applies, for example, in opposition to a demurrer. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that plaintiff was injured by a defective product, that such product was manufactured by plaintiff's employer, and that the employer had sold, leased, or transferred the product to an independent third party for valuable consideration. Further, counsel should set forth facts establishing that the third party thereafter provided the product for plaintiff's use, showing in particular that plaintiff came into contact with the product as a consumer, rather than as part of his/her job [*see Behrens v. Fayette Manufacturing Co. (1992) 4 Cal. App. 4th 1567, 1574-1575, 7 Cal. Rptr. 2d 264]* .

[c] Related Pleading and Practice Forms

For a form of complaint for damages for personal injury by an employer against an employer when the action is excluded from Workers' Compensation Act coverage, see California Forms of Pleading and Practice, Ch. 577, *Workers' Compensation* , Pt. IV (Matthew Bender).

[3] Additional Authorities

[a] Liability of Employer as Manufacturer

Lab. Code § 3602(b)(3) provides a statutory exception to the exclusive remedy rule when the employee's injury or death is proximately caused by a defective product manufactured by the employer and sold, leased, or otherwise transferred for valuable consideration to an independent third person, and the product is thereafter provided for the employee's use by a third person. In *Behrens v. Fayette Manufacturing Co. (1992) 4 Cal. App. 4th 1567, 7 Cal. Rptr. 2d 264* , the court held that the employee did not fall within this statutory exception. In that case, the employee had come into contact with the allegedly defective product as the primary objective of her job and not as a consumer, and she was not provided with the product for her use but because it was her job to perform tasks on the product (*4 Cal. App. 4th 1567, 1574-1575)* . The court noted that since *Lab. Code § 3602(b)(3)* is an exception to the exclusive remedy rule, its applicability is to be strictly construed, and a plaintiff who seeks to be excludedfrom the exclusive remedy rule must establish that the exception applies (*4 Cal. App. 4th 1567, 1574)* .

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CHAPTER 239 WORKERS' COMPENSATION EXCLUSIVE REMEDY DOCTRINE
PART II. FORMS

10-239 California Points & Authorities § 239.38

AUTHOR: Carolyn Rashby

§ 239.38 Opposing Contention That Workers' Compensation Exclusive Remedy Doctrine Precludes Action by Employee Against Employer--Injury Is Outside of Compensation Bargain--Defamation Action Not Subject to Exclusive Remedy Provisions

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S CAUSE OF ACTION FOR DEFAMATION IS NOT SUBJECT TO THE EXCLUSIVE REMEDY PROVISIONS OF THE WORKERS' COMPENSATION ACT BECAUSE DEFAMATORY STATEMENTS ARE OUTSIDE OF THE COMPENSATION BARGAIN FOR PURPOSES OF WORKERS' COMPENSATION EXCLUSIVITY.

Defamation Action Not Subject to Workers' Compensation Exclusivity. A cause of action for defamation brought by an employee against his or her employer is not precluded by the workers' compensation exclusive remedy rules. Defamatory statements that have no purpose other than to damage an employee's reputation are not a normal part of the employment relationship and are not a risk inherent in the employment relationship for purposes of the workers' compensation exclusive remedy rules (*Davaris v. Cubaleski (1993) 12 Cal. App. 4th 1583, 1591, 16 Cal. Rptr. 2d 330* ; *Howland v. Balma (1983) 143 Cal. App. 3d 899, 905, 192 Cal. Rptr. 286*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a defendant's contention that plaintiff's action for damages is precluded by the workers' compensation exclusivity doctrine, on the grounds that a cause of action for defamation is not subject to the exclusivity rules.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context

in which counsel wishes to raise the substantive issue that plaintiff's action for defamation is not precluded by the workers' compensation exclusivity doctrine, for example in opposition to a demurrer. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that plaintiff has alleged a claim for defamation, specifying the employer's conduct and statements. Counsel should argue that the defamatory statements made by the employer had no purpose other than to damage plaintiff's reputation and, therefore, were not a normal part of the employment relationship nor a risk of employment within the scope of the workers' compensation law [*Davaris v. Cubaleski (1993) 12 Cal. App. 4th 1583, 1591, 16 Cal. Rptr. 2d 330]* .

[3] Discussion of Authorities

[a] Defamation Action Not Subject to Workers' Compensation Exclusivity

In ***Davaris v. Cubaleski*** *(1993) 12 Cal. App. 4th 1583, 16 Cal. Rptr. 2d 330* , the plaintiff alleged that, following her request for time off to undergo surgery, her employer accused her of trying to ruin the company and subjected her to a campaign of harassment and humiliation designed to induce her to resign. Defendant terminated plaintiff, but before and after the termination he made a number of false and derogatory remarks about plaintiff and her work, including false statements that she had stolen $800,000 from the company. The trial court sustained demurrers to plaintiff's emotional distress causes of action and to her causes of action for public policy wrongful termination and defamation.

With respect to plaintiff's defamation cause of action, the court of appeal reversed the trial court. The court cited dictum from *Livitsanos v. Superior Court (1992) 2 Cal. 4th 744, 757 n.9, 7 Cal. Rptr. 2d 808, 828 P.2d 1195* [discussed in *§ 239.23[3][a]*], stating that although the Supreme Court had declined to decide whether a defamation action is barred by workers' compensation exclusivity, a number of courts have determined that defamation involves damages to reputation, which is a proprietary injury rather than a personal injury, and thus does not come within the exclusive jurisdiction of workers' compensation law. The court also noted that *Howland v. Balma (1983) 143 Cal. App. 3d 899, 904, 192 Cal. Rptr. 286* , which held that defamation actions are not personal injury actions arising out of and in the course of employment, was cited with approval in *Shoemaker v. Myers (1990) 52 Cal. 3d 1, 276 Cal. Rptr. 303, 801 P.2d 1054* , as an example of a situation in which workers' compensation would not apply because the action was not based on an industrial personal injury. The court also reasoned that some of the defamatory acts alleged by plaintiff had occurred after her termination and therefore could not be deemed to have occurred within the course and scope of her employment. The court found that defamatory statements that have no other purposethan to damage an employee's reputation patently are neither a normal part of the employment relationship nor a risk of employment within the Workers' Compensation Act (*12 Cal. App. 4th 1583, 1590-1591)* .

In ***Howland v. Balma*** *(1983) 143 Cal. App. 3d 899, 192 Cal. Rptr. 286* , plaintiff sued his supervisor for slander. The trial court granted defendant's motion for summary judgment, holding that plaintiff's slander action was not barred by the exclusive remedy provisions of the Workers' Compensation Act, but that a prior compromise and release entered into between plaintiff and his employer with respect to plaintiff's application for workers' compensation benefits barred further compensation for plaintiff's injuries. Plaintiff appealed.

The court of appeal rejected defendant's argument that a cause of action for slander is barred by the exclusive remedy provisions of the Workers' Compensation Act; citing a number of out-of-state decisions, the court noted that every case that has considered the issue has ruled otherwise [*Braman v. Walthall (1949) 215 Ark. 582, 225 S.W.2d 342, 344* ; *Foley v. Polaroid Corp. (1980) 381 Mass. 545, 413 N.E.2d 711, 715]* . The court stated that the right to benefits under the Workers' Compensation Act is the employee's exclusive remedy against the employer where the conditions of

liability under the Act exist, i.e. where an employee receives an industrial personal injury arising out of and in the course of his employment. The Act provides a remedy only for physical and mental industrial injuries. According to the court, however, the "gist of an action for slander ... is damage to reputation" and affects a proprietary interest. "The harm flowing therefrom is not a 'personal injury' (i.e. medical or physical injury to the body) or a risk of employment within the purview of workers' compensation law" (*143 Cal. App. 3d 899, 902-904)* . The court concluded that there is nothing in the Workers' Compensation Act which indicates a legislative intent that slander is a risk of employment or is a compensable injury under the Act (*143 Cal. App. 3d 899, 904-905)* .

[4] Additional Authorities

[a] Cause of Action for Invasion of Privacy

In *Operating Engineers Local 3 v. Johnson (2003) 110 Cal. App. 4th 180, 1 Cal. Rptr. 3d 552* , a worker's civil cause of action against her employer for invasion of privacy was held not barred by the exclusive remedy rule, when the worker's supervisor reprimanded worker and disseminated information about the reprimand to other employees who had no reason to know this information, thereby violating the worker's right of privacy conferred by the California Constitution and thus contrary to fundamental public policy (*110 Cal. App. 4th 180, 184-192)* . *Editor's Note:* Counsel is cautioned in citing this case; only Part III. D. of the court's opinion (workers' compensation is not the exclusive remedy for the breach of the worker's constitutional right of privacy) was certified for publication.

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10-239 California Points & Authorities § 239.39

AUTHOR: Carolyn Rashby

§ 239.39 Opposing Contention That Workers' Compensation Exclusive Remedy Doctrine Precludes Action by Employee Against Employer--Employee Permitted to Sue Employer for Injuries Proximately Caused by Employer's False Imprisonment of Employee

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

ALTHOUGH THE WORKERS' COMPENSATION LAW GENERALLY BARS AN ACTION AT LAW FOR AN EMPLOYEE'S INJURY WHICH AROSE OUT OF AND IN THE COURSE OF HIS OR HER EMPLOYMENT, A CAUSE OF ACTION EXISTS FOR DAMAGES PROXIMATELY CAUSED BY THE EMPLOYER'S FALSE IMPRISONMENT OF THE EMPLOYEE.

Cause of Action for False Imprisonment. An employee may bring an action at law for damages against the employer if such employer false imprisons the employee. False imprisonment committed by an employer against an employee is always outside the scope of the compensation bargain (*Fermino v. Fedco, Inc. (1994) 7 Cal. 4th 701, 706, 723, 30 Cal. Rptr. 2d 18, 872 P.2d 559*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a contention that plaintiff's action is precluded by the exclusive remedy provisions of the Workers' Compensation Act, on the grounds that plaintiff has alleged facts showing that the injuries were proximately caused by the employer's false imprisonment of plaintiff.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that plaintiff's action is not precluded by workers' compensation exclusive remedy provisions because plaintiff's injuries were caused by defendant's false imprisonment of plaintiff, for

example, in opposition to a demurrer. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that plaintiff has alleged a claim for false imprisonment, specifying the employer's conduct. Counsel should argue that such conduct falls outside the compensation bargain and, therefore, an action for false imprisonment is not barred by the exclusive remedy provisions of the workers' compensation law [*Fermino v. Fedco, Inc. (1994) 7 Cal. 4th 701, 723, 30 Cal. Rptr. 2d 18, 872 P.2d 559]* .

[c] Related Pleading and Practice Forms

For a form of complaint for damages for personal injury by an employee against an employer when the action is excluded from Workers' Compensation Act coverage, as well as discussion and forms relating to wrongful discharge from employment, see California Forms of Pleading and Practice, Ch. 577, *Workers' Compensation* , Pt. IV (Matthew Bender).

[3] Discussion of Authorities

[a] Cause of Action for False Imprisonment

In ***Fermino v. Fedco, Inc.*** *(1994) 7 Cal. 4th 701, 30 Cal. Rptr. 2d 18, 872 P.2d 559* , the California Supreme Court held that an employee subject to false imprisonment at the hands of his or her employer may sue that employer in a civil action and is not barred by the exclusivity provisions of the Workers' Compensation Act. The Court concluded that an employer who falsely imprisons its employee steps outside its proper role, and an injury resulting therefrom is always beyond the scope of the compensation bargain (*7 Cal. 4th 701, 706, 723)* .

In reaching its conclusion, the Court examined the relationship between intentional torts and workers' compensation (*7 Cal. 4th 701, 708)* . It found that the Legislature has included some intentional torts within the workers' compensation system, but has not clearly expressed its intent to categorically exclude from the courts all intentional torts committed by employers against employees (*7 Cal. 4th 701, 709)* . It also found that prior cases have contemplated a tripartite system for classifying injuries arising in the course of employment. First, there are injuries caused by employer negligence or without employer fault that are compensated at the normal rate under the workers' compensation system. Second, there are injuries caused by ordinary employer conduct that intentionally, knowingly, or recklessly harms an employee, for which the employee may be entitled to extra compensation under *Lab. Code § 4553*. Third, there are certain types of intentional employer conduct that bring the employer beyond the boundaries of the compensation bargain, for which a civil action may be brought (*7 Cal. 4th 701, 713-714)* . With regard to this third category, case law makes clear that any inquiry into an employer's motivation is undertaken not to determine whether the employer intentionally or knowingly injured the employee, but rather to ascertain whether the employer's conduct violated public policy and therefore fell outside the compensation bargain (*7 Cal. 4th 701, 714-715)* .

The Court stated that permitting an employee's civil action for false imprisonment presents none of the dangers recognized in prior cases that allowance of such exceptions would undermine the exclusivity provisions of the workers' compensation system (*7 Cal. 4th 701, 722)* . Rather, in order to plead false imprisonment in a civil action, a plaintiff/employee would have to allege rather specific, and fairly uncommon, acts of involuntary and criminal confinement (*7 Cal. 4th 701, 722-723)* . The question of whether an employer's actions were reasonable, justifiable, or privileged goes to the factual question whether its actions constituted false imprisonment. Once it is determined, though, that a false imprisonment has taken place, then such action cannot be considered a normal aspect of the employment relationship, however legitimate its initial justification (*7 Cal. 4th 701, 723)* .

California Points & Authorities

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Volume 23 Chapters 230-239 TRUST DEEDS---to---WORKERS' COMPENSATION
CHAPTER 239 WORKERS' COMPENSATION EXCLUSIVE REMEDY DOCTRINE
PART II. FORMS

10-239 California Points & Authorities § 239.40

AUTHOR: Carolyn Rashby

§ 239.40 Opposing Contention That Workers' Compensation Exclusivity Doctrine Precludes Action by Employee Against Employer--Action Based on Aggravation of Work-Related Injury Fraudulently Concealed From Employee [Lab. Code § 3602(b)(2)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

ALTHOUGH THE WORKERS' COMPENSATION LAW GENERALLY BARS AN ACTION AT LAW FOR AN EMPLOYEE'S INITIAL INJURY WHICH AROSE OUT OF AND IN THE COURSE OF HIS OR HER EMPLOYMENT, A CAUSE OF ACTION EXISTS FOR DAMAGES RESULTING FROM THE AGGRAVATION OF THE INJURY IF THE EMPLOYER FRAUDULENTLY CONCEALED THE EMPLOYEE'S CONDITION AND ITS CONNECTION WITH THE EMPLOYMENT.

A. Cause of Action for Fraudulent Concealment of Plaintiff's Condition. An employee, or his or her dependents in the event of his or her death, may bring an action at law for damages against the employer, if the employee's injury is aggravated by the employer's fraudulent concealment of the existence of the injury and itsconnection with the employment. The fact that the employee has applied for workers' compensation benefits does not bar the employee's right to bring the action (*see Lab. Code § 3602(b)(2)*; *Foster v. Xerox Corp. (1985) 40 Cal. 3d 306, 308, 219 Cal. Rptr. 485, 707 P.2d 858* ; *Johns-Manville Products Corp. v. Superior Court (1980) 27 Cal. 3d 465, 468-479, 165 Cal. Rptr. 858, 612 P.2d 948*).

[*Optional*] **B. Fraudulent Concealment of Arsenic-Related Injury.** A complaint by an injured employee against his or her employer that alleges generally that defendant knew plaintiff had contracted arsenic poisoning from his or her employment and concealed that knowledge from plaintiff, thereby aggravating plaintiff's illness, sufficiently states a cause of action for fraudulent concealment under *Labor Code Section 3602(b)(2)* (*Foster v. Xerox Corp. (1985) 40 Cal. 3d 306, 312, 219 Cal. Rptr. 485, 707 P.2d 858*).

[*Optional*] **C. Fraudulent Concealment of Carcinogenic-Induced Injury.** A complaint by an injured employee against his or her employer that alleges generally that defendant knew plaintiff's reported skin problems were symptoms that plaintiff was being exposed to carcinogens from his or her employment and concealed that knowledge from plaintiff, thereby aggravating plaintiff's injuries, sufficiently states a cause of action for fraudulent concealment under *Labor Code Section 3602(b)(2)* (*Palestini v. General Dynamics Corp. (2002) 99 Cal. App. 4th 80, 97, 120 Cal. Rptr. 2d 741*).

[*Optional*] **D. Fraudulent Concealment of Asbestos-Related Injury.** When the plaintiff alleges that defendant fraudulently concealed from the plaintiff, and from doctors retained to treat the plaintiff, as well as from the state, that he or she was suffering from a disease caused by ingestion of asbestos, thereby preventing him or her from receiving treatment for the disease and inducing him or her to continue to work under hazardous conditions, an action at law may be maintained for aggravation of the disease, as distinct from the hazards of the employment which caused the plaintiff to contract the disease (*Johns-Manville Products Corp. v. Superior Court (1980) 27 Cal. 3d 465, 477, 165 Cal. Rptr. 858, 612 P.2d 948*).

[*Optional*] **E. Punitive Damages.** An employee may recover punitive as well as compensatory damages under *Section 3602(b)(2) of the Labor Code* for aggravation of an injury resulting from the employer's fraudulent concealment of the injury and its connection with the employment (*McDonald v. Superior Court (1986) 180 Cal. App. 3d 297, 301-302, 225 Cal. Rptr. 394*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that plaintiff's action for damages is precluded by the workers' compensation exclusivity doctrine, on the grounds that plaintiff is permitted to sue the employer where plaintiff's work-related injury was aggravated due to the employer's fraudulent concealment of plaintiff's condition and its connection to the employment. However, no exception exists to the rule that workers' compensation is the exclusive remedy for an industrial injury when the harm complained of is not an aggravation of a work-related injury but is the injury itself and no facts are adduced indicating that the employer intended that the employee be injured [*Stalnaker v. Boeing Co. (1986) 186 Cal. App. 3d 1291, 1298-1300, 231 Cal. Rptr. 323]* . In an appropriate case, these points and authorities may be submitted in opposition to the points and *authorities in § 239.26*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that plaintiff's action is not precluded by the workers' compensation exclusivity provisions because plaintiff's action is based on the employer's aggravation of a work-related injury fraudulently concealed from plaintiff, for example in opposition to a demurrer. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that plaintiff suffered an industrial injury, that the employer knew of the injury, and that the employer thereafter failed to disclose facts or made an affirmative misrepresentation relating to the injury, such as evidence that the employer knew that plaintiff contracted a disease from the employment and concealed that knowledge from plaintiff [*see* *Foster v. Xerox Corp. (1985) 40 Cal. 3d 306, 310, 219 Cal. Rptr. 485, 707 P.2d 858]* . Counsel also should demonstrate that such fraudulent concealment resulted in aggravation of the injury. Additionally, because the employer's liability is limited to damages proximately caused by the aggravation, counsel should argue that the employer bears the burden of proof in apportioning the damages caused by the initial injury and those caused by aggravation of the injury [*Lab. Code § 3602(b)(2)*]. Counsel also may argue that plaintiff can seek

punitive damages based on defendant's conduct [*McDonald v. Superior Court (1986) 180 Cal. App. 3d 297, 301-302, 225 Cal. Rptr. 394]* .

[c] Related Pleading and Practice Forms

For a form of complaint for damages for aggravation of an employee's work-related injury brought by an employee against an employer who fraudulently concealed the injury, see California Forms of Pleading and Practice, Ch. 577, *Workers' Compensation* , Part IV (Matthew Bender).

[3] Discussion of Authorities

[a] Cause of Action for Fraudulent Concealment of Plaintiff's Condition

Lab. Code § 3602(b)(2) provides that an employee, or the employee's dependents in the event of the employee's death, may bring an action at law for damages against the employer, as if the workers' compensation law did not apply, when "the employee's injury is aggravated by the employer's fraudulent concealment of the existence of the injury and its connection with the employment, in which case the employer's liability shall be limited to those damages proximately caused by the aggravation. ..."

Foster v. Xerox Corp. *(1985) 40 Cal. 3d 306, 219 Cal. Rptr. 485, 707 P.2d 858* , was an action by an injured employee against his employer seeking to recover damages under *Lab. Code § 3602(b)(2)*, discussed *above*, which codified the holding in *Johns-Manville Products Corp. v. Superior Court (1980) 27 Cal. 3d 465, 165 Cal. Rptr. 858, 612 P.2d 948* .

Plaintiff alleged in substance as follows: (1) he had been employed by defendant for 11 years as a service technician to maintain and repair equipment manufactured by defendant; (2) this machinery incorporated a drum that was unsafe for its intended use because it contained a large amount of arsenic; (3) defendant did not warn plaintiff of the presence of the arsenic or safeguard him from its effects; (4) as a result he suffered symptoms of arsenic poisoning beginning several years after his employment; (5) these symptoms were reported to his supervisor in 1978 and 1981; (6) although defendant knew that the reported symptoms of plaintiff to his supervisor were symptoms of arsenic poisoning and that plaintiff's physical problems were caused by the arsenic, defendant failed to warn him that the disease was aggravated with the passage of time; and (7) defendant fraudulently concealed from him the facts indicating that his injuries were connected with his employment. Defendant's demurrer to the complaint on the ground that it was barred by *Lab. Code § 3602(a)* was sustained without leave to amend, and plaintiff, contending that his complaint stated a cause of action under *Lab. Code § 3602(b)(2)*, appealed from the ensuing judgment of dismissal. Defendant contended that the complaint was deficient because it failed to allege that defendant had made affirmative representations designed to conceal from plaintiff the fact that he suffered from arsenic poisoning caused by his employment and that it failed to allege that defendant had knowledge that plaintiff had contracted arsenic poisoning. The complaint also alleged a separate cause of action for plaintiff's disease insofar as it was contracted while he was servicing copying machines manufactured by defendant and sold or leased to third parties. This work was performed by plaintiff not as an employee of the defendant but on his own time.

The Supreme Court reversed. With respect to the *Lab. Code § 3602(b)(2)* cause of action, the Court, citing *Civ. Code §§ 1709, 1710(3)*, and *1572(3)*, and cases, pointed out that according to both statute and case law the failure to disclose facts may constitute fraud if the party with knowledge has a duty to make disclosure (*40 Cal. 3d 306, 309)* . The Court held that affirmative misrepresentations by the employer are not required to support the action, that an employer who knows that an employee has contracted a disease in the course of the employment has a duty to advise the employee of that fact, and that *Lab. Code § 3602(b)(2)* provides for an action at law for aggravation of a disease resulting from such concealment (*40 Cal. 3d 306, 310)* . The Court held, however, that defendant's knowledge that plaintiff had contracted arsenic poisoning was essential to establish a claim under *Lab. Code § 3602(b)(2)*, and that the allegations that plaintiff

had advised his supervisors in 1978 and 1981 that he was suffering from certain symptoms and that defendant knew the symptoms were those of arsenic poisoning were insufficient to allege such knowledge (*40 Cal. 3d 306, 312)* . The Court nevertheless said that the complaint alleged such knowledge in general terms and held that in view of the statutory requirement that pleadings be liberally construed with a view to achieving substantial justice between the parties (*Code Civ. Proc. § 452*), the allegations fairly apprised defendant of the basis of plaintiff's action (*40 Cal. 3d 306, 312)* . With respect to the separate cause of action, the Court held that because plaintiff alleged that he was not an employee when he suffered the injuries in question, he could seek to recover on the independent cause of action without regard to the workers' compensation law (*40 Cal. 3d 306, 313)* .

In ***Palestini v. General Dynamics Corp.*** *(2002) 99 Cal. App. 4th 80, 120 Cal. Rptr. 2d 741* , plaintiff, who had worked for more than 10 years as a plastics fabricator in one of defendant's manufacturing plants, alleged that he developed skin rashes and discoloration in the course of his employment, which he reported to his supervisors. He further alleged that he inquired at work whether certain chemicals he worked with were safe for him to use and was repeatedly told the chemicals were safe and would not harm him. Subsequent to leaving his employment with defendant, plaintiff underwent surgical removal of a testicle and was diagnosed with testicular cancer and stage III metastasis to the abdominal and chest areas of his body. He underwent chemotherapy and additional surgeries for the removal of cancerous growths around his prostrate, heart, and lungs.Plaintiff filed suit against defendant pursuant to *Lab. Code § 3602(b)(2),* seeking damages for the injuries he suffered allegedly as a result of his chronic industrial exposure to carcinogenic chemicals. He alleged that defendant fraudulently concealed from him that the chemicals to which he was exposed contained carcinogens and that his skin problems were a precursor to the development of the types of cancer that he later developed, thereby aggravating his work-related injuries. Defendant demurred to plaintiff's complaint, contending that plaintiff's alleged injuries consisted only of (1) skin conditions in the form of rashes, dermatitis, and discoloration, and (2) metastasized testicular cancer. Since plaintiff knew of the skin conditions even before defendant was informed of them, and since the cancer was diagnosed only after plaintiff had ceased his employment with defendant, defendant had no knowledge, while plaintiff was employed by it, of any injury to plaintiff that plaintiff was not himself aware of. In the absence of such knowledge, said defendant, it was impossible for plaintiff's injury to have been aggravated by defendant's fraudulent concealment of the existence of the injury and its connection with the employment. The trial court sustained defendant's demurrer without leave to amend and entered judgment of dismissal of the action, from which judgment plaintiff appealed (*99 Cal. App. 4th 80, 83-86)* .

The court of appeal, citing *Foster v. Xerox Corp.* for the proposition that pleadings are to be liberally construed with a view to achieving substantial justice between the parties, refused to accept defendant's characterization of the extent of plaintiff's "injuries." Rather than being limited to skin rashes and discoloration, on the one hand, and the eventual cancer, on the other, plaintiff had sufficiently pleaded facts showing that, as an alleged result of chronic overexposure to carcinogenic chemicals at work during the many years he was employed by defendant, he suffered an industrial injury in the form of damage to "the protective barrier of the skin" (which plaintiff's appellant's brief characterized as "a breakdown in his dermal barrier"), which, unknown to him, permitted those toxic chemicals to be injuriously absorbed into his body. A fair reading of plaintiff's pleading, said the court, showed that plaintiff was claiming that during a latency period that culminated with the diagnosis of his cancer after his employment ended, the continuing chronic overexposure to carcinogenic chemicals that followed the initial injury caused further harm in the form of unspecified internal physiological injuries that ultimately developed into diagnosable metastatic testicular cancer. The court noted that, although the pleaded skin rashes and discoloration could be viewed as work-related injuries that plaintiff reported to defendant through his supervisors, they also could be viewed as *symptoms* of the alleged dermal barrier breakdown and related injurious absorption of toxic chemicals that together constituted the initial industrial injury of which he was not aware (*99 Cal. App. 4th 80, 89-92)* .

Plaintiff also met his burden of pleading "in general terms" facts showing that defendant *knew* that plaintiff was being harmed by chronic overexposure to carcinogenic chemicals and thus had suffered a work-related injury. For example, plaintiff pleaded that defendant was aware that the skin problems plaintiff was suffering from were a precursor to the development of specific types of cancer that are caused by exposure to chemical substances that contain carcinogens.

The court acknowledged that these allegations were technically insufficient to allege that defendant had actual knowledge that plaintiff was suffering a "dermal barrier" injury and consequent injurious absorption of carcinogenic chemicals into his bloodstream through chronic overexposure to such chemicals. However, it adverted again to the requirement that it liberally construe plaintiff's pleading with a view to achieving substantial justice between the parties and concluded that plaintiff's general allegations that defendant knew plaintiff's physical problems were caused by his exposure at work to carcinogenic chemicals, that he reported those problems to his supervisors, and that defendant was "well aware" his exposure to those chemicals could harm him were sufficient for pleading purposes to show that defendant knew plaintiff had suffered a work-related injury. Finally, the court concluded that plaintiff's pleading that defendant "concealed the causal relationship and significance in chemical exposures, the development of skin conditions, including rashes, other forms of dermatitis, and skin discoloration, and [plaintiff's] contraction of cancer" sufficiently alleged facts that defendant concealed its knowledge that plaintiff was chronically overexposed at work to carcinogenic chemicals and, as a result of that exposure, was being injured by those chemicals (*99 Cal. App. 4th 80, 92-94)* .

Johns-Manville Products Corp. v. Superior Court *(1980) 27 Cal. 3d 465, 165 Cal. Rptr. 858, 612 P.2d 948* , a mandate proceeding that predated the enactment of *Lab. Code § 3602(b)(2)*, arose out of an action by an asbestos worker against his employer for damages for having fraudulently concealed from the worker and the doctors retained by the employer that the worker was suffering from a disease caused by the ingestion of asbestos, thereby preventing him from receiving treatment and inducing him to continue working under hazardous conditions. The worker had earlier filed a claim for workers' compensation benefits for disability caused by exposure to asbestos.

Plaintiff alleged in substance the following: (1) while he worked in defendant's asbestos manufacturing plant, he was continuously exposed to asbestos and as a result developed asbestos-related illnesses; (2) defendant concealed from plaintiff its knowledge that long exposure to asbestos was dangerous to health, and failed to provide plaintiff with adequate protective devices or to operate the plant in accordance with state and federal regulations governing dust levels; (3) defendant retained unqualified doctors to examine plaintiff, and neither provided them with adequateinformation regarding the risk of asbestos exposure nor advised them of the development of pulmonary disease in plaintiff or of the fact that the disease was the result of working conditions; (4) defendant willfully failed to file a required report regarding plaintiff's injury with the state; (5) defendant's acts and omissions were done falsely and fraudulently with intent to induce plaintiff to continue to work in a dangerous environment; and (6) plaintiff was ignorant of the risk involved and would not have continued to work in such an environment had he known the facts. Plaintiff sought both compensatory and punitive damages. Defendant filed an answer alleging, inter alia, that the action was barred under *Lab. Code § 3601*, which, as it then read, declared that when the conditions of workers' compensation exist, the right to recover such compensation is the exclusive remedy against an employer for injury or death of an employee (now see *Lab. Code § 3602(a)*). The defendant's motion for judgment on the pleadings was denied, and the defendant then filed a petition for a writ of mandate to have the trial court's order set aside.

In denying the petition, the Supreme Court held that although the workers' compensation law bars the employee's action at law for his initial injury, a cause of action may exist for aggravation of the disease because of the employer's fraudulent concealment of the condition and its cause (*27 Cal. 3d 465, 469)* , that the facts alleged justified an award of punitive damages (*27 Cal. 3d 465, 478)* , and that although plaintiff had filed an application for workers' compensation and could receive an award in that proceeding, double recovery could be avoided by allowing the employer a setoff in the event plaintiff was awarded compensation for the aggravation of his injury in that proceeding and in the present case as well (*27 Cal. 3d 465, 478-479)* .

[b] Fraudulent Concealment of Arsenic-Related Injury

The factual background of ***Foster v. Xerox Corp.*** *(1985) 40 Cal. 3d 306, 219 Cal. Rptr. 485, 707 P.2d 858* , is *discussed under § 239.40[3][a]*. In reversing the judgment for defendant, the Supreme Court said that, as the complaint alleged that defendant knew plaintiff had contracted arsenic poisoning from his employment and concealed that

knowledge from him, thereby aggravating his illness, it was sufficient to state a cause of action under *Lab. Code § 3602(b)(2)* (*40 Cal. 3d 306, 312)* .

[c] Fraudulent Concealment of Asbestos-Related Injury

The factual background of ***Johns-Manville Products Corp. v. Superior Court*** *(1980) 27 Cal. 3d 465, 165 Cal. Rptr. 858, 612 P.2d 948* , is *discussed under § 239.40[3][a]*. In denying the employer's petition for writ of mandate, the Supreme Court held that plaintiff's allegations that defendant fraudulently concealed from him, and from doctors retained to treat him, as well as from the state, that he was suffering from a disease caused by ingestion of asbestos, thereby preventing him from receiving treatment for the disease and inducing him to continue to work under hazardous conditions, were sufficient to state a cause of action for aggravation of the disease, as distinct from the hazards of the employment that caused him to contract the disease (*27 Cal. 3d 465, 477)* .

[d] Punitive Damages

McDonald v. Superior Court *(1986) 180 Cal. App. 3d 297, 225 Cal. Rptr. 394* , a mandate proceeding, arose out of an action by an employee against his employer for damages for injury from asbestos. Plaintiff alleged in substance the following: (1) from 1956 to 1983 he was employed by the employer, which manufactured, packaged, and distributed asbestos and asbestos products, and was continuously exposed to asbestos fibers and dust through the course of his employment, as a result of which he developed various asbestos-related diseases; (2) since 1933 the employer had knowledge that there was a high risk of injury or death resulting from exposure to asbestos or asbestos products including, without limitation, lung cancer and other forms of cancer and asbestosis, concealed this knowledge from plaintiff, and advised plaintiff that it was safe to work in close proximity with asbestos; (3) the employer did not provide the medical doctors retained by it to examine plaintiff with adequate information regarding the risk of asbestos exposure and failed to advise these doctors of the risk of the development of pulmonary disease in the plaintiff; (4) the employer failed to file with the state a report required by law, and, had this been done and the danger from asbestos revealed, plaintiff would have been protected; (5) each of these acts and omissions was done falsely and fraudulently by the employer with intent to induce plaintiff to continue to work in a dangerous environment; (6) plaintiff was ignorant of the risks involved and would not have continued to work in such environment had he known the true facts; and (7) the employer, by its intentional conduct, which was willful, malicious, outrageous, and with conscious disregard of and indifference to the safety of plaintiff, actually and proximately caused and aggravated the injuries and damages sustained by plaintiff. Plaintiff sought both compensatory and punitive damages. The employer's motion to strike paragraphs in the complaint and the prayer seeking punitive damages without leave to amend was granted. Concurrently, the trial court sustained the employer's demurrer to plaintiff's "cause of action" for punitive damages without leave to amend. The plaintiff petitioned the court of appeal for a writ of mandate to vacate the order.

The court of appeal held that under *Lab. Code § 3602(b)(2)* an employee may recover punitive damages from an employer (*180 Cal. App. 3d 297, 301)* . The court said that when a statute recognizes a cause of action for violation of a right, all forms of relief granted to civil litigants generally, including appropriate punitive damages, are available unless a contrarylegislative intent appears, and that no such intent appears in *Lab. Code § 3602(b)(2)*. The court explained that, on the contrary, the background of *Lab. Code § 3602(b)(2)* and its language establish that punitive damages are recoverable inasmuch as the statute is a codification of the holding in *Johns-Manville Products Corp. v. Superior Court (1980) 27 Cal. 3d 465, 165 Cal. Rptr. 858, 612 P.2d 948* , which expressly recognized that punitive damages were recoverable in that common-law action for aggravation of job-related injuries (*180 Cal. App. 3d 297, 301-302)* . Nevertheless, the court held that the complaint failed to allege sufficient facts to justify an award of punitive damages in that it did not allege that the employer knew and concealed that plaintiff was suffering from the pulmonary disease and thereby aggravating that injury by its fraud, that such knowledge of an existing work-related injury is essential to establish a claim under *Lab. Code § 3602(b)(2)*, and that an action at law for compensatory and punitive damages can only be brought for aggravation of such injury caused by the employer's concealment of the existence of the disease and its connection with the employment (*180 Cal. App. 3d 297, 303)* . The court acknowledged, however,

that the complaint might be amended to allege sufficient facts and ordered that a writ of mandate issue directing the trial court to vacate its order sustaining the demurrer and granting the motion to strike, both without leave to amend, and to enter an order sustaining the demurrer and granting the motion to strike with leave to amend (*180 Cal. App.3d 297, 303-304)* .

[4] Additional Authorities

[a] Fraudulent Concealment of Asbestos-Related Injury

In *Davis v. Lockheed Corp. (1993) 13 Cal. App. 4th 519, 17 Cal. Rptr. 233* , the court held that the employee was not entitled, as a matter of law, to bring a civil action against the employer pursuant to *Lab. Code § 3602(b)(2)* when the employer established by uncontroverted evidence that the employee had known for years about possible health problems arising from exposure to asbestos and other chemicals used in the course of his work, and when there was nothing in the record to suggest that the employer withheld any information from the employee relevant to his condition (*13 Cal. App. 4th 519, 522-523)* .

[b] Aggravation of Pre-Existing Illness From Employer's Failure to Detect or Notify

In *Weber v. United Parcel Service, Inc. (2003) 107 Cal. App. 4th 801, 132 Cal. Rptr. 2d 412* , the court of appeal held that the exclusive remedy rule bars an employee's civil tort action against his or her employer for aggravation of pre-existing illness resulting from negligent diagnostic treatment voluntarily provided by the employer, regardless of the cause of the pre-existing illness. The employer administered regular hearing tests as an ongoing condition of employment to determine whether the noise to which the employee was exposed on the job had adversely affected his hearing. The employer's failure to notify the employee of a test result that indicated a possible brain tumor (whose genesis had nothing to do with the employee's job) until the tumor had caused permanent injury to the employee was held to constitute an industrial injury subject to the exclusive remedy rule (*107 Cal. App. 4th 801, 806-809)* .

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Volume 23 Chapters 230-239 TRUST DEEDS---to---WORKERS' COMPENSATION
CHAPTER 239 WORKERS' COMPENSATION EXCLUSIVE REMEDY DOCTRINE
PART II. FORMS

10-239 California Points & Authorities § 239.41

AUTHOR: Carolyn Rashby

§ 239.41 Opposing Contention That Workers' Compensation Exclusive Remedy Doctrine Precludes Action by Employee Against Employer--Action Based on Injury Caused by Absence of Power-Press Guard [Lab. Code § 4558]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S ACTION FOR DAMAGES AGAINST DEFENDANT IS NOT PRECLUDED BY THE EXCLUSIVE REMEDY PROVISIONS OF THE WORKERS' COMPENSATION ACT BECAUSE THE INJURY WAS CAUSED BY DEFENDANT'S _____ [*insert either* KNOWING REMOVAL OF *or* FAILURE TO INSTALL] A POINT OF OPERATION GUARD ON A POWER PRESS, AND THE _____ [REMOVAL *or* FAILURE TO INSTALL] WAS SPECIFICALLY AUTHORIZED BY DEFENDANT UNDER CONDITIONS KNOWN BY DEFENDANT TO CREATE A PROBABILITY OF SERIOUS INJURY OR DEATH.

A. No Exclusivity Where Injury Caused by Removal of or Failure to Install Power Press Guard. An employee may bring an action for damages against the employer where the employer's knowing removal of or knowing failure to install a point of operation guard on a power press proximately causes the employee's injury or death, and the removal or failure to install is specifically authorized by the employer under circumstances known by the employer to create a probability of serious injury or death (*Lab. Code § 4558(b)*; *Lab. Code § 4558(a)*).

B. Power Press Guard Required by Manufacturer. For liability to attach under *Labor Code Section 4558(b)*, the manufacturer must have designed, installed, required, or otherwise provided by specification for the attachment of the power-press guard and conveyed such knowledge to the employer. Proof of the conveyance of thisinformation to the employer from the manufacturer may come from any source (*Lab. Code § 4558(c)*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a defendant-employer's contention that plaintiff's action for damages is precluded by the exclusive remedy provisions of the Workers' Compensation Act, on the ground that such provisions do not apply because the injury or death was caused by defendant's removal of or failure to install a power-press guard. In an appropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 239.24*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the workers' compensation exclusivity provisions do not apply because plaintiff's injury was caused by the absence of a power-press guard, for example, in opposition to a demurrer. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that plaintiff's injury was proximately caused by the absence of a power press guard, that the employer removed or failed to install a point-of-operation guard on the power press, and that the employer had actual knowledge that such removal or failure to install created a probability of serious injury or death [*see Saldana v. Globe-Weis Systems Co. (1991) 233 Cal. App. 3d 1505, 1516-1517, 285 Cal. Rptr. 385* , discussed in *§ 239.24*]. Further, counsel should demonstrate that the power-press manufacturer designed, installed, required, or otherwise provided by specification for attachment of the guard, and that such requirements were communicated to the employer. Counsel should see *Lab. Code § 4558* for the definition of the terms "power press" and "guard."

[c] Related Pleading and Practice Forms

For a form of complaint for damages for personal injury by an employee against an employer when the action is excluded from Workers' Compensation Act coverage, see California Forms of Pleading and Practice, Ch. 577, *Workers' Compensation* , Pt. IV (Matthew Bender).

[3] Discussion of Authorities

[a] No Exclusivity Where Injury Caused by Removal of or Failure to Install Power-Press Guard

Lab. Code § 4558(b) provides that an employee, or the employee's dependents in the case of the employee's death, may bring a civil action for damages against the employer where the employer's knowing removal of or knowing failure to install a point-of-operation guard on a power press proximately caused the employee's injury or death, and the removal or failure to install is specifically authorized by the employer under conditions known by the employer to create a probability of serious injury or death.

Lab. Code § 4558(a) provides the following definitions: "power press" means any material-forming machine that utilizes a die which is designed for use in the manufacture of other products; "failure to install" means omitting to attach a guard either provided or required by the manufacturer when the attachment is required by the manufacturer and the manufacturer makes this known to the employer at the time of acquisition, installation, or manufacturer-required modification of the power press; "removal" means physical removal of a guard which is either installed by the manufacturer or installed by the employer pursuant to the requirements or instructions of the manufacturer; "specifically authorized" means an affirmative instruction from the employer prior to the injury or death, but does not include subsequent acquiescence in or ratification of removal of a guard; "manufacturer" means the designer, fabricator, or assembler of a power press; "employer" means a named, identifiable individual who is, prior to the injury or death, an owner or supervisor having managerial authority to direct and control the acts of employees.

[b] Power-Press Guard Required by Manufacturer

Lab. Code § 4558(c) provides that no liability will arise under § 4558 unless there is proof that the manufacturer designed, installed, required, or otherwise provided by specification for the attachment of guards and conveyed knowledge of such requirement to the employer. Proof of the conveyance of such information to the employer from the manufacturer may come from any source.

[4] Additional Authorities

[a] No Exclusivity Where Injury Caused by Removal of or Failure to Install Power-Press Guard

In *Lenane v. Continental Maritime of San Diego, Inc. (1998) 61 Cal. App. 4th 1073, 1076-1077, 72 Cal. Rptr. 2d 121* , a shore-based maritime sheetmetal employee suffered an amputation injury while using a power pressmachine to do repair work. The employee filed claims for workers' compensation benefits under both the California Workers' Compensation Act and the Longshore and Harbor Workers' Compensation Act (LHWCA). He also filed a tort action for damages against his employer pursuant to *Labor Code §§ 3602(a)* and *4558*, alleging that his employer either removed or failed to install a point of operation guard on the power press at issue. The "power press" exception does not exist under the LHWCA. The employer brought an action for summary judgment, asserting that the employee's tort action was preempted and barred by the exclusive remedy provisions of the LHWCA (*33 U.S.C. § 905(a)*). The motion was granted.

The employee appealed, contending that summary judgment was improper because Congress intended to supplement rather than supplant state remedies when it amended the LHWCA in 1972 to extend federal workers' compensation jurisdiction inland to cover shore-based maritime workers. He also asserted that his cause of action under *Labor Code § 4558* did not clearly conflict with the LHWCA and, therefore, his tort action was not barred by the exclusive remedy provision of this Act. The court of appeal agreed with the employee's position and reversed the trial court's judgment, finding that the employee's tort action under *Labor Code §§ 3602(a)* and *4558* was not barred (*61 Cal. App. 4th 1073, 1077)* .

In *Uriarte v. United States Pipe & Foundry Co. (1996) 51 Cal. App. 4th 780, 59 Cal. Rptr. 2d 332* , an employee brought an action against his employer for personal injuries he sustained while operating a power press in the plant where he worked. The employee's action was based on the power press exception set forth in *Labor Code § 4558*. Ultimately, the employer moved for and was granted summary judgment on the basis that a *Labor Code § 4558* right of action was unavailable here because, among other things, a safety guard was not available for the model of machine on which the employee was injured. However, several months later, the employee alleged that he had discovered new evidence indicating that a guard was, in fact, available for the power press involved in his injury. On this basis, the employee moved to have the summary judgment vacated. The trial court granted the employee's motion, and the court of appeal affirmed the decision, holding that the trial court did not abuse its discretion by vacating its previous order since, at the time the order was entered, the employee was unaware that a safety guard existed for the model of machine on which he was injured, and that this lack of knowledge regarding the existence of such a device was arguably due to the employer's failure to fully respond to discovery requests (*51 Cal. App. 4th 780, 791)* .

In *Flowmaster, Inc. v. Superior Court (1993) 16 Cal. App. 4th 1019, 20 Cal. Rptr. 2d 666* , the court of appeals considered whether the definition of "manufacturer" in *Lab. Code § 4558(a)* includes an employer, and the meaning of the terms "provided" and "required" by the manufacturer in *Lab. Code § 4558(c)* where the employer is the manufacturer. The defendant contended that where the employer and the manufacturer are one in the same, the § 4558 exception to the exclusivity rule does not apply. Defendant further argued that even if § 4558 does include an 103A/manufacturer of a power press, no liability can attach absent evidence that the press was designed and manufactured to include a point-of-operation guard which was then either removed or not installed as specified. The court found that the Workers' Compensation Act was not intended to immunize employers who design, manufacture and install their own power presses without guards, and that excluding employers from the definition of manufacturer would

not promote the objectives of the Act. The court also declined to limit an 103A/manufacturer's liability under § 4558 only to those cases in which it fails to install or removes a guard that was specified in design plans for the power press, because any such limitation would immunize the 103A/manufacturer who, knowing the risk involved, deliberately omitted specification and installation of the guard. The court concluded that in an action against an 103A/manufacturer of a power press for failure to install a guard, the plaintiff must prove that the employer's own design of the press provided for a guard which was later removed or never installed; alternatively, the plaintiff must prove that a guard was required to protect against a known risk of serious injury, but that it was deliberately omitted by the employer from the design or assembly of the power press (*16 Cal. App. 4th 1019, 1030-1031)* .

[b] Definition of Power Press

In ***Islas v. D & G Manufacturing Co.*** *(2004) 120 Cal. App. 4th 571, 15 Cal. Rptr. 3d 559* , the court of appeal reversed a dismissal of an employee's action against his employer that was based on the trial court's determination as an issue of preliminary fact, pursuant to *Evidence Code Section 405*, that the employee was not injured by a "power press" within the meaning of *Labor Code Section 4558(a)(4)*, when the court of appeal found that whether the machine was a "power press" was a factual question that should have been submitted to the jury (*120 Cal. App. 4th 571, 578-580)* .

California Points & Authorities

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Volume 23 Chapters 230-239 TRUST DEEDS---to---WORKERS' COMPENSATION
CHAPTER 239 WORKERS' COMPENSATION EXCLUSIVE REMEDY DOCTRINE
PART II. FORMS

10-239 California Points & Authorities § 239.42

AUTHOR: Carolyn Rashby

§ 239.42 Opposing Contention That Workers' Compensation Exclusive Remedy Doctrine Precludes Action by Employee Against Employer--Breach of Contract Action Not Precluded

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

ALTHOUGH THE WORKERS' COMPENSATION LAW GENERALLY BARS AN ACTION AT LAW FOR AN EMPLOYEE'S INDUSTRIAL INJURY, A CAUSE OF ACTION FOR BREACH OF CONTRACT IS NOT PRECLUDED BY THE EXCLUSIVE REMEDY RULE OF THE WORKERS' COMPENSATION LAW.

Exclusive Remedy Rule Does Not Bar Breach of Contract Action. The exclusive remedy provisions of the workers' compensation law do not preclude an employee from suing his or her employer for damages for breach of an employment contract (*Pichon v. Pacific Gas & Electric Co. (1989) 212 Cal. App. 3d 488, 500-501, 260 Cal. Rptr. 677*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that plaintiff's action is precluded by the exclusive remedy provisions of the workers' compensation law, on the grounds that plaintiff's action is for damages for breach of contract. Optional Paragraph B is for use where plaintiff's breach of contract action is based on an implied-in-fact contract not to discharge without good cause.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that the workers' compensation exclusive remedy rule does not bar an action for breach of an employment contract, for example, in opposition to a demurrer. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that plaintiff has alleged a cause of action for breach of contract, and that plaintiff seeks to recover only contract damages for such claim, and not damages caused by personal injury or death. For example, if plaintiff was discharged, counsel could set forth facts indicating that the breach of contract claim only seeks to recover plaintiff's economic losses, and not any losses for emotional distress arising out of the termination. Further, if plaintiff already has received workers' compensation benefits in connection with an injury arising out of defendant's conduct, plaintiff should argue that such benefits did not fully compensate him/her for the economic damages caused by the breach of contract [*see Pichon v. Pacific Gas & Electric Co. (1989) 212 Cal. App. 3d 488, 499-501, 260 Cal. Rptr. 677]* .

[c] Related Pleading and Practice Forms

For discussion and forms relating to wrongful discharge, see California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts* , Ch. 249, *Employment Law: Termination and Discipline* , and Ch. 250, *Employment Law: Wage and Hour Disputes* (Matthew Bender).

[d] Related Points and Authorities

For additional forms relating to wrongful discharge actions, see Part I of this chapter.

[3] Discussion of Authorities

[a] Exclusive Remedy Rule Does Not Bar Breach of Contract Action

In ***Pichon v. Pacific Gas & Electric Co.*** *(1989) 212 Cal. App. 3d 488, 500-501, 260 Cal. Rptr. 677* , plaintiff, a discharged employee, sued his former employer for breach of an express and implied contract of employment terminable only for cause, termination in violation of public policy, breach of the implied covenant of good faith and fair dealing, and negligent and intentional infliction of emotional distress. He also alleged a cause of action under *Lab. Code § 3602(b)(2)* for concealment of a medical report stating that he was experiencing an emotional crisis and needed counseling. The trial court granted defendant's motion for summary adjudication on the grounds that workers' compensation was plaintiff's exclusive remedy for all of his claims for damages for injury to his psyche. The trial court also granted defendant's motion in limine dismissing plaintiff's wrongful termination claims for contract damages on the ground that workers' compensation was the exclusive remedy for those claims.

With respect to the trial court's ruling on the motion in limine, the court of appeals reversed. The court found that *Lab. Code §§ 3600* and *3602* bar liability only for physical or emotional injury, and not for other types of injuries, such as economic injury. Where an employee sues for breach of contract and the same conduct also caused a compensable injury, the action is only precluded to the extent that the employee seeks to recover damages caused by the compensable injury. The court stated that it would rely not on the title of a cause of action in determining whether it was preempted, but, rather, would examine the underlying injury to determine whether the essence of the cause of action is personal injury or death. The court rejected defendant's argument that if the employee suffered any compensable injury as a result of the termination of employment, then all causes of action for economic damages are precluded by the workers' compensation exclusivity provisions. The court stated that if it accepted defendant's argument, then anytime an employee suffered a compensableinjury as a result of termination of employment, the employee would be precluded from recovering contract damages caused by the termination, despite the fact that the workers' compensation system would only compensate the employee for medical costs and lost wages caused by the disability. Such a result would be a windfall to employers in cases where the contract damages far exceed workers' compensation benefits. The court did note, however, that if the employee's injury caused by the termination was permanently and totally disabling, it is possible that the workers' compensation system would already have compensated him or her for any economic damages

and there would be no basis for additional contract damages (*212 Cal. App. 3d 488, 499-501)* . The court also found that because of the risk of double recovery if an employee suffers a compensable injury in addition to incurring contract damages as a result of a termination of employment, the amount of compensation paid for economic loss, such as lost wages, should be offset from any contract damages recovered in a civil action (*212 Cal. App. 3d 488, 501)* .

[4] Additional Authorities

[a] Arbitration of Return to Work Under Collective Bargaining Agreement

In *Amalgamated Transit Union Local 1277 v. Los Angeles County Metropolitan Transportation Authority (2003) 107 Cal. App. 4th 673, 132 Cal. Rptr. 2d 207* , the exclusive remedy rule was held not to bar a civil action between an injured workers' union and the employer in which the union sought to compel the employer to arbitrate the worker's return to work under terms of the collective bargaining agreement. Such an action, the court held, is an equitable action to compel specific performance of the contract and is thus not an "action at law" pursuant to *Lab. Code § 3602(a)* that would be prohibited by the exclusive remedy rule. The worker was seeking arbitration on the claim for her salary for the period when she was allegedly no longer suffering the disabling effects of an industrial injury and was able to work, but denied the right to work guaranteed in the collective bargaining agreement. This, said the court, was not a workers' compensation issue. The worker was also seeking arbitration of her demand to be returned to work, and the court noted that a return to work is not one of the workers' compensation benefits available by statute to which the exclusive remedy rule would apply (*107 Cal. App. 4th 673, 682-684)* .

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PART II. FORMS

10-239 California Points & Authorities § 239.43

AUTHOR: Carolyn Rashby

§ 239.43 Opposing Contention That Workers' Compensation Exclusive Remedy Doctrine Precludes Action by Employee Against Employer--Injury Is Outside of Compensation Bargain--Employer's Misrepresentations Made to Induce Party to Become Employee Not Subject to Exclusive Remedy Provisions

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S CAUSE OF ACTION FOR EMOTIONAL DISTRESS IS NOT SUBJECT TO THE EXCLUSIVE REMEDY PROVISIONS OF THE WORKERS' COMPENSATION ACT BECAUSE MISREPRESENTATIONS MADE TO INDUCE A PARTY TO BECOME AN EMPLOYEE ARE OUTSIDE OF THE COMPENSATION BARGAIN FOR PURPOSES OF WORKERS' COMPENSATION EXCLUSIVITY.

Emotional Distress Action Based on Employer's Misrepresentations to Induce Employment Not Subject to Workers' Compensation Exclusivity. A cause of action for emotional distress, based on an employer's misrepresentations made to induce a person to become an employee, brought by an employee against his or her employer is not precluded by the workers' compensation exclusive remedy rules. An employer's misrepresentations made to induce a person to become an employee are not a normal part of the employment relationship or a risk reasonably encompassed within the compensation bargain (*Lenk v. Total-Western, Inc. (2001) 89 Cal. App. 4th 959, 971-973, 108 Cal. Rptr. 2d 34*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a defendant's contention that plaintiff's action for damages is precluded by the workers' compensation exclusivity doctrine, on the grounds that a cause of action for emotional distress, based on an employer's misrepresentations made to induce plaintiff to enter the employment relationship, is not subject to the exclusivity rules.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that plaintiff's action for emotional distressis not precluded by the workers' compensation exclusivity doctrine, in opposition to a demurrer, for example. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that plaintiff has alleged a claim for emotional distress, based on the employer's misrepresentations made to induce plaintiff to enter the employment relationship, specifying the employer's conduct and statements. Counsel should argue that the misrepresentations made by the employer were made for the purpose of inducing plaintiff to enter into the employment relationship and, therefore, were neither a normal part of the employment relationship nor a risk of employment within the scope of the workers' compensation law [*Lenk v. Total-Western, Inc. (2001) 89 Cal. App. 4th 959, 971-973, 108 Cal. Rptr. 2d 34]* .

[3] Discussion of Authorities

[a] Action for Misrepresentations Made to Induce Employment Not Subject to Workers' Compensation Exclusivity

In ***Lenk v. Total-Western, Inc.*** *(2001) 89 Cal. App. 4th 959, 108 Cal. Rptr. 2d 34* , plaintiff filed suit against his former employer for breach of contract and fraud. The jury found in favor of plaintiff and awarded him $210,320 in compensatory damages, $50,000 in emotional distress damages, and $1 million in punitive damages. In the unpublished portion of its opinion, the court of appeal reversed that part of the judgment awarding plaintiff $210,320 in compensatory damages and the punitive damages award, and remanded the case for a new trial on those issues. In the published portion of the opinion, the court found that emotional distress damages arising from a claim of fraud in inducing employment were not barred by the workers' compensation exclusivity doctrine (*89 Cal. App. 4th 959, 962)* .

The court of appeal noted that the focus is on whether the conduct complained of was a normal risk of the employment relationship. It quoted from *Cole v. Fair Oaks Fire Protection Dist. (1987) 43 Cal. 3d 148, 161, 233 Cal. Rptr. 308, 729 P.2d 743* [discussed in *§ 239.23[3][a]*], saying that tort recovery for intentional misconduct is permitted when "conduct of an employer [has] a 'questionable' relationship to the employment, an injury which did not occur while the employee was performing service incidental to the employment and which would not be viewed as a risk of the employment, or conduct where the employer ... stepped out of [its] proper role[ ]" (*89 Cal. App. 4th 959, 971-972)* . In the case at bar, the employer was found to have made misrepresentations related to the financial stability of the company, the company's future plans to relocate its operations, and plaintiff's (then a job applicant) promotion in the corporate ranks, all designed to induce plaintiff to become an employee. These misrepresentations, said the court, "are not (we hope) a normal part of the employment relationship" (*89 Cal. App. 4th 959, 973)* .

The court of appeal distinguished *Spratley v. Winchell Donut House, Inc. (1987) 188 Cal. App. 3d 1408, 234 Cal. Rptr. 121* , in which an employee assaulted by an intruder at her workplace filed suit against her employer for fraudulent inducement to enter into an employment contract. The employee claimed she would not have accepted the job but for the employer's fraudulent representations that it would make the workplace safe. The trial court sustained the employer's demurrer to the complaint without leave to amend. In a two-to-one decision, the appellate court held that workers' compensation was the sole remedy for an employee injured by the employer's failure to provide a safe workplace, and it ruled that the employee could not circumvent the exclusive remedy rule merely by alleging that her employer fraudulently misrepresented that extra security was being provided to protect night workers (*89 Cal. App. 4th 959, 972-973)* .

In the present case, by contrast, the court of appeal pointed out that plaintiff's "fraud claim does not involve a claim of misrepresentation concerning employee safety. Workplace safety is clearly an issue contemplated by the workers' compensation statutory scheme. It is a normal part of the employment relationship and a risk reasonably encompassed within the compensation bargain" (*89 Cal. App. 4th 959, 973)* . Here, the employer made representations regarding matters *not* a normal part of the employment relationship. In doing so, the employer "stepped out of its proper role as an employer. The conduct alleged simply does not reflect matters that can be expected to occur with substantial frequency in the working environment" (*89 Cal. App. 4th 959, 972)* .

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10-239 California Points & Authorities § 239.44

AUTHOR: Carolyn Rashby

§ 239.44 Opposing Contention That Workers' Compensation Exclusive Remedy Doctrine Precludes Action by Employee Against Employer--Injury Is Outside of Compensation Bargain--Claim for Damages Pursuant to FEHA Premised on Defendant's Failure to Make Reasonable Accommodation for Plaintiff's Disability--Alleged Injuries Not Within Compensation Bargain [Gov. Code § 12940]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S ACTION AGAINST DEFENDANT FOR DAMAGES IS NOT PRECLUDED BY THE WORKERS' COMPENSATION EXCLUSIVITY PROVISIONS BECAUSE PLAINTIFF HAS PLEADED A CLAIM FOR DAMAGES PREMISED ON DEFENDANT'S COMMISSION OF A STATUTORY UNLAWFUL EMPLOYMENT PRACTICE, WHICH WAS NOT WITHIN THE COMPENSATION BARGAIN.

Failure to Make Reasonable Accommodation in Violation of California Fair Employment and Housing Act Not Subject to Workers' Compensation Exclusivity. A cause of action for physical injuries suffered in the course of employment, premised on an employer's failure to make reasonable accommodation for an employee's disability, which failure constitutes an unlawful employment practice in violation of *Gov. Code § 12940(m)*, pleads a claim grounded on employer actions that fall outside the compensation bargain (*Bagatti v. Department of Rehabilitation (2002) 97 Cal. App. 4th 344, 356, 366-368, 118 Cal. Rptr. 2d 443*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a defendant's contention that plaintiff's action for damages is precluded by the workers' compensation exclusivity doctrine, on the grounds that a cause of action for physical injuries, based on an employer's failure to make reasonable accommodations for an employee's disability, is not subject to the exclusivity rules.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that plaintiff's action for physical injuries is not precluded by the workers' compensation exclusivity doctrine, in opposition to a demurrer, for example. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that plaintiff has alleged a claim for physical injuries, based on the employer's failure to make reasonable accommodations for the employee's disability, specifying the employer's conduct and statements. Counsel should argue that the employer's failure in this regard violated the California Fair Employment and Housing Act and was, therefore, outside both the compensation bargain and the scope of the workers' compensation law [*Bagatti v. Department of Rehabilitation (2002) 97 Cal. App. 4th 344, 356, 366-368, 118 Cal. Rptr. 2d 443]* .

[3] Discussion of Authorities

[a] Action for Failure to Make Reasonable Accommodations for Employee's Disability Not Subject to Workers' Compensation Exclusivity

In ***Bagatti v. Department of Rehabilitation*** *(2002) 97 Cal. App. 4th 344, 118 Cal. Rptr. 2d 443* , plaintiff filed suit against her employer, alleging, inter alia, that she had suffered physical injuries as a consequence of the employer's failure to make reasonable accommodations for her disability, in violation of the California Fair Employment and Housing Act [FEHA], specifically *Gov. Code § 12940*. Plaintiff alleged in substance that as a result of severe polio and post polio, she was a disabled individual who was unable to walk long distances, that she was substantially impaired in her ability to move around her work site as needed and to transport herself from her car to her work station. Her job duties required her to transport herself long distances within the work site and to travel to and from the work site. She requested a reasonable accommodation of her disability in the form of motorized transportation from her parked car to her work station and motorized transportation within her work site, and her employer refused this request. Defendant's demurrer to the complaint on the ground that it was barred by *Lab. Code § 3602(a)* was sustained without leave to amend, and plaintiff appealed from the ensuing judgment of dismissal (*97 Cal. App. 4th 344, 349-352)* .

The court of appeal agreed with plaintiff that the above allegations pleaded a physiological condition that affected her musculoskelatal system and limited a major life activity within the meaning of *Gov. Code § 12926(k)*. The court also agreed with plaintiff that her complaint's allegations that her request for motorized transportation from her parked car to her work station, for motorized transportation within her work site, and for hand railings or chairs along the hallways of the job site constituted adequate pleading for a request for reasonable accommodations, in that these requests were for the purpose of "[m]aking existing facilities used by employees readily accessible to, and usable by, individuals with disabilities" and constituted the "acquisition or modification of equipment or devices" as described in *Gov. Code § 12926(n)* and *2* Cal. Code Reg. § 7293.9. Finally, the court noted that the complaint pleaded that plaintiff's physical disability was "known" by her employer as required by *Gov. Code § 12940(m)*. In sum, said the court, plaintiff had adequately pleaded that her employer engaged in an unlawful employment practice under *Gov. Code § 12940(m)* and that she suffered injury and damages as a result of the unlawful employment practice (*97 Cal. App. 4th 344, 354-356)* .

Next, the court addressed defendant's argument that plaintiff's lawsuit was barred by the exclusive remedy provisions of workers' compensation law. The court began with an examination of *City of Moorpark v. Superior Court (1998) 18 Cal. 4th 1143, 77 Cal. Rptr. 2d 445, 959 P.2d 752* , in which the California Supreme Court held that *Lab. Code § 132a* did not provide an exclusive remedy and did not preclude an employee from pursuing her FEHA claims in court (*18 Cal. 4th 1143, 1158)* . The *City of Moorpark* Court had first explained that the exclusive remedy provision of *Lab. Code § 3602(a)* was limited to "[l]iability for the compensation provided *by this division* ... " (*18 Cal. 4th 1143, 1154)* . The

Supreme Court continued, "When section 3600 refers to 'this division,' it refers to division 4 of the Labor Code. Section 132a, on the other hand, is in division 1 of the Labor Code. ... Thus, the plain language of the exclusive remedy provisions of the workers' compensation law apparently limits those provisions to division 4 remedies. Remedies that the Legislature placed in other divisions of the Labor Code are simply not subject to the workers' compensation exclusive remedy provisions" (*18 Cal. 4th 1143, 1154-1155)* .

The court of appeal in the present case then noted that this reason for avoiding the exclusive remedy provisions of the workers' compensation law did not favor plaintiff in the case before it. The FEHA cause of action at issue in *City of Moorpark* was for *discrimination* based on disability, and it was plaintiff's claim in that case for *discrimination* that placed the claim ostensibly within the confines of *Lab. Code § 132a*. And it was *Lab. Code § 132a* that was held in that case to be not an exclusive remedy (*97 Cal. App. 4th 344, 366)* .

In the present case, by contrast, plaintiff pleaded a claim for damages premised on failure to make reasonable accommodation in violation of *Gov. Code § 12940(m)*. Because plaintiff had not pleaded a disability discrimination claim, her lawsuit was not ostensibly subject to the antidiscrimination provisions of *Lab. Code § 132a* but was rather for physical injuries suffered in the course of her employment. However, said the court of appeal, the statutory construction of *Lab. Code § 132a* was not the entire basis of the Supreme Court's decision in *City of Moorpark*. Thus, the Supreme Court in that case went on to explain that disability discrimination "falls outside the compensation bargain and workers' compensation is not the exclusive remedy" (*18 Cal. 4th 1143, 1155)* . The legislature, said the court of appeal, had made the failure to accommodate a disability equally as important as disability discrimination. Just as discrimination on the basis of disability falls outside the compensation bargain, so too the employer's commission of another statutory unlawful employment practice, as defined by *Gov. Code § 12940(m)*, falls outside the compensation bargain. The court of appeal concluded that this ground of the Supreme Court's decision in *City of Moorpark* supported plaintiff in the present case and that the workers' compensation law did not provide the exclusive remedy for plaintiff's FEHA claim (*97 Cal. App. 4th 344, 366-368)* .

[4] Additional Authorities

[a] Alleged Discriminatory Act in Violation of FEHA and Public Policy Was Not "Substantial Factor" in Causing Subsequent Industrial Injury

[i] Exclusive Remedy Rule Applies

In ***Huffman v. Interstate Brands Cos.*** *(2004) 121 Cal. App. 4th 679, 17 Cal. Rptr. 3d 397* , the court of appeal held that the workers' compensation exclusive remedy provisions applied to an industrial injury, including the plaintiff's emotional distress as a result of that injury, that followed an allegedly unlawful demotion because of the plaintiff's age, in violation of the FEHA and of public policy, when the court found that evidence demonstrated that the alleged discriminatory act was not a "substantial factor" in causing the subsequent industrial injury (*121 Cal. App. 4th 679, 692-700)* .

[b] Employee's Petition for Writ of Mandate, Seeking Differential Pay and Reinstatement Under Education Code Sections 44977 and 44987.1, Not Tort Dmages for Work-Related Injury, Was Not Preempted by Exclusivity Provisions of Workers' Compensation Law

In *Veguez v. Governing Board of the Long Beach Unified School District (2005) 127 Cal. App. 4th 406, 25 Cal. Rptr. 3d 526* , the court of appeal held that a petition for writ of mandate filed by a public school employee, seeking differential pay and reinstatement under *Education Code Sections 44977* and 44987.1, not tort damages for a work-related injury, was not preempted by the exclusivity provisions of workers' compensation law (*127 Cal. App. 4th 406, 417-418)* .

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10-239 California Points & Authorities § 239.45

AUTHOR: Carolyn Rashby

§ 239.45 Supporting Contention That Workers' Compensation Exclusive Remedy Doctrine Precludes Action by Employee Against Coemployee--Coemployee Did Not Specifically Intend to Cause Injury [Lab. Code § 3601(a)(1)]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S CLAIM FOR DAMAGES AGAINST DEFENDANT, A COEMPLOYEE, IS PRECLUDED BY THE EXCLUSIVITY PROVISIONS OF THE WORKERS' COMPENSATION ACT, AND THE EXCEPTION IN LABOR CODE SECTION 3601(a)(1) DOES NOT APPLY BECAUSE PLAINTIFF HAS FAILED TO PROVE [or PLEAD] THAT DEFENDANT SPECIFICALLY INTENDED TO CAUSE INJURY.

Coemployee Must Intend to Cause Injury. The exception in *Lab. Code § 3601(a)(1)* to the workers' compensation exclusivity provisions for a willful and unprovoked physical act of aggression on an employee by a coemployee, does not apply where plaintiff fails to plead or prove that the coemployee specifically intended to cause injury (*Torres v. Parkhouse Tire Service, Inc. (2001) 26 Cal. 4th 995, 1003-1006, 111 Cal. Rptr. 2d 564, 30 P.3d 57* ; *Soares v. City Oakland (1992) 9 Cal. App. 4th 1822, 1825-1831, 12 Cal. Rptr. 2d 405*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that plaintiff's action against a coemployee is barred by the exclusive remedy provisions of the Workers' Compensation Act, on the grounds that the exception in *Lab. Code § 3601(a)(1)* does not apply because the coemployee did not intend to cause injury.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that *Lab. Code § 3601(a)(1)* does not apply because the

coemployee did not intend to cause injury, for example in a demurrer or motion for summary judgment. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that plaintiff has failed to either plead or prove, as applicable, that the coemployee intended to injure plaintiff. For example, counsel could discuss facts indicating that the injury was accidental [*Soares v. City of Oakland (1992) 9 Cal. App. 4th 1822, 1825-1831, 12 Cal. Rptr. 2d 405]* . If applicable, counsel also should set forth facts indicating that plaintiff provoked the coemployee's conduct.

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in § 239.47* may be used to oppose the contention supported by these points and authorities.

[d] Related Pleading and Practice Forms

For a general form of demurrer to a complaint based on the failure to state facts sufficient to constitute a cause of action, see *California Forms of Pleading and Practice, Ch. 206, Demurrers and Motions for Judgment on the Pleadings, § 206.122* (Matthew Bender). For a form of notice for summary judgment and related discussion, see Ch. 537, *Summary Judgment* , in that publication.

[3] Discussion of Authorities

[a] Coemployee Must Specifically Intend to Cause Injury

In ***Torres v. Parkhouse Tire Service, Inc.*** *(2001) 26 Cal. 4th 995, 111 Cal. Rptr. 2d 564, 30 P.3d 57* , plaintiff, an employee of defendant, was on his knees working on a tire he was repairing, when he was approached from behind by a fellow employee who grabbed plaintiff's back support belt, lifted him off the ground several times, and finally dropped him on his knees, causing plaintiff to suffer a back injury. Plaintiff filed suit against defendant and the coemployee, alleging that the latter committed a "willful and unprovoked physical act of aggression" against plaintiff so as to render the coemployee's acts, which plaintiff alleged its defendant employer had condoned and ratified, subject to civil suit under *Lab. Code § 3601(a)(1)*. The trial court instructed the jury that in order to impose liability, the jury must find that plaintiff's "injury was caused by a wilful and unprovoked physical act of aggression on the part of [the coemployee]" and that the coemployee "committed the act with the intent to cause injury." The jury returned a special verdict finding that the coemployee did not "commit a wilful and unprovoked act of physical aggression against plaintiff Manuel Torres with the intent to cause injury" (*26 Cal. 4th 995, 1000-1001)* .

A majority of the court of appeal reversed the trial court's judgment and held that plaintiffs were not required to prove a coemployee's specific intent to injure in order to recover damages under *Lab. Code § 3601(a)(1)*. The majority found that this statutory exception to workers' compensation exclusivity "does not state that the injury must be 'intentionally' or 'willfully' caused by the physical act of aggression." The majority expressly disagreed with *Soares v. City of Oakland (1992) 9 Cal. App. 4th 1822, 12 Cal. Rptr. 2d 405* [discussed below], which held to the contrary (*26 Cal. 4th 995, 1001)* .

The California Supreme Court reversed the court of appeal's judgment, finding that the meaning of "willful and unprovoked physical act of aggression" in *Lab. Code § 3601(a)(1)* is not clear on its face, thus necessitating a jury instruction that clarifies the application of the statutory language in the particular context of a given case. In considering the proper interpretation of the statute, the Court noted that it looks to both the statutory phrase as a whole and the legislative purpose behind the provision (*26 Cal. 4th 995, 1003-1004)* . The Court then said that "unprovoked physical

act of aggression" logically contemplates intended injurious conduct. "By adding the term 'willful,' the Legislature has underscored the need for an intent to bring about the consequences of that expression, i.e., an intent to inflict injury or harm" (*26 Cal. 4th 995, 1005)* . Said the Court, "We conclude, as a general rule, that a 'willful and unprovoked physical act of aggression' includes an intent to injure requirement" (*26 Cal. 4th 995, 1006)* .

In ***Soares v. City of Oakland*** *(1992) 9 Cal. App. 4th 1822, 12 Cal. Rptr. 2d 405* , defendant, a police sergeant, used force to physically separate plaintiff, a civilian jailer, from a prisoner whom plaintiff had jumped on in a wrestling-type manner. Defendant alleged that he used only a minimum amount of force to separate plaintiff and the prisoner and that he did not try to hurt plaintiff. Plaintiff sued defendant and their common employer for battery. After a jury trial, defendants prevailed. Plaintiff appealed.

The court of appeal affirmed, stating the issue on appeal as whether *Lab. Code § 3601(a)(1)* which excepts willful and unprovoked physical acts of aggression by coemployees from the exclusive remedy of workers' compensation covers all batteries at common law, or only those batteries committed with a specific intent to injure. The court rejected plaintiff's argument that the trial court erred when it ruled that proof of a common-law battery, without additional specific intent to injure, was insufficient to support a recovery against a coemployee under *Lab. Code § 3601(a)(1)*. The appeals court traced the development of *Lab. Code § 3601(b)(1)*, which excepts injuries from a willful physical assault by the employer from the exclusive remedy provisions of the Workers' Compensation Act. Section 3601(b)(1) was enacted to codify the result in *Magliulo v. Superior Court (1975) 47 Cal. App. 3d 760, 773, 121 Cal. Rptr. 621* , in which the court held that if the Labor Code allows an employee can recover against a fellow worker for an intentional assault, he should have no less right because the fellow workers happens to be his boss. In *Johns-Manville Products Corp. v. Superior Court (1980) 27 Cal. 3d 465, 476, 165 Cal. Rptr. 858, 612 P.2d 948* [discussed in *§ 239.40[3][a]*], the Supreme Court, commenting on Magliulo, expressed approval of the trend in the law "toward allowing an action at law for injuries suffered in employment if the employer acts deliberately for the purpose of injuring the employee." The court of appeal here found that the Court's language reflected the virtually unanimous rule in the country that an injury is accidental for purposes of workers' compensation unless it is caused by a conscious and deliberate intent designed to inflict injury. According to the court, precluding civil actions for those intentional torts committed without a specific intent to injure would be consistent with the policy of relying on workers' compensation to cover on-the-job accidents. Thus, the court concluded that "willful" employer assaults under *Lab. Code § 3601(b)(1)* does not include all common-law batteries, but only those batteries that are specifically intended to injure. Further, because there is no basis to interpret the term "willful" in the context of § 3601(a)(1) any differently, the court also found that acts of aggression are only willful for purposes of § 3601(a)(1) if they are intended to injure (*9 Cal. App. 4th 1822, 1825-1829)* . The court stated that it disagreed with *Iverson v. Atlas Pacific Engineering (1983) 143 Cal. App. 3d 219, 191 Cal. Rptr. 696* [discussed in *§ 239.45[3][b]*], to the extent that Iverson suggested that every common-law battery is actionable under § 3601(a)(1).

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Volume 23 Chapters 230-239 TRUST DEEDS---to---WORKERS' COMPENSATION
CHAPTER 239 WORKERS' COMPENSATION EXCLUSIVE REMEDY DOCTRINE
PART II. FORMS

10-239 California Points & Authorities § 239.46

AUTHOR: Carolyn Rashby

§ 239.46 Supporting Contention That Exclusive Remedy Doctrine Precludes Action by Employee Against Coemployee--Coemployee Acted Within the Scope of Employment [Lab. Code § 3601]

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S ACTION AGAINST DEFENDANT, A COEMPLOYEE, IS PRECLUDED BY THE EXCLUSIVE REMEDY PROVISIONS OF THE WORKERS' COMPENSATION ACT BECAUSE DEFENDANT WAS ACTING IN THE SCOPE OF HIS/HER EMPLOYMENT WHEN HE/SHE INJURED PLAINTIFF.

A. Workers' Compensation Sole Remedy in Action Against Coemployee. Workers' compensation is the exclusive remedy for the injury or death of an employee against a coemployee who was acting within the scope of his or her employment caused (*Lab. Code § 3601*).

B. Requirement of Employee's Intent to Serve Employer. A coemployee's activity which results in an employee's injury is within the scope of employment, thus giving rise to the right to receive workers' compensation benefits, where the coemployee was actuated to some extent by an intent to serve his/her employer (*Saala v. McFarland (1965) 63 Cal. 2d 124, 128-129, 45 Cal. Rptr. 144, 403 P.2d 400*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in support of the contention that plaintiff's action for damages against a coemployee is precluded by the workers' compensation exclusivity provisions, on the grounds that the coemployee was acting in the scope of his or her employment.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context

in which counsel wishes to raise the substantive issue that plaintiff's action against a coemployee for damages is precluded by the workers' compensation exclusivity provisions because the coemployee was acting within the scope of his/her employment, for example in a demurrer or motion for summary judgment. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that the coemployee was acting within the scope of his/her employment at the time of the injury to plaintiff in that the coemployee was actuated by an intent to serve the employer [*Saala v. McFarland (1965) 63 Cal. 2d 124, 128-129, 45 Cal. Rptr. 144, 403 P.2d 400]* . For example, if applicable, counsel could set forth facts indicating that the accident occurred during the work day and while the coemployee was using the employer's tools or facilities with the employer's authorization [*see Brittell v. Young (1979) 90 Cal. App. 3d 400, 407, 153 Cal. Rptr. 387]* .

[c] Opposing Points and Authorities

In an appropriate case, the points and authorities *set out in §§ 239.47* and *239.48* may be used to oppose the contention supported by these points and authorities.

[d] Related Pleading and Practice Forms

For a general form of demurrer to a complaint based on the failure to state facts sufficient to constitute a cause of action, see *California Forms of Pleading and Practice, Ch. 206, Demurrers and Motions for Judgment on the Pleadings, § 206.122* (Matthew Bender). For a form of notice for summary judgment and related discussion, see Ch. 537, *Summary Judgment* , in that publication.

[3] Discussion of Authorities

[a] Workers' Compensation Sole Remedy in Action Against Coemployee

Lab. Code § 3601 provides that where the conditions of compensation set forth in *Lab. Code § 3600* concur, the right to recover workers' compensation is the exclusive remedy, subject to the exceptions in *Lab. Code §§ 3601(a)(1)* and *(2)*, for the injury or death of an employee against any other employee of the employer acting within the scope of his or her employment.

[b] Requirement of Coemployee's Intent to Serve Employer

In ***Saala v. McFarland*** *(1965) 63 Cal. 2d 124, 45 Cal. Rptr. 144, 403 P.2d 400* , plaintiff appealed from a summary judgment in favor of defendant in an action to recover for personal injuries sustained when plaintiff was struck by defendant's automobile on a parking lot maintained by the parties' common employer. The accident occurred at the end of the parties' shift while defendant was preparing to drive away from the plant. In support of the judgment, defendant argued on appeal that the employee's immunity from suit for all acts within the scope of his or her employment is of identical extent with the employer's immunity from suit for injuries by an employee arising out of and in the course of employment. However, the Supreme Court found that the phrase "scope of employment" defined a more restricted area of employee conduct than the phrase "arising out of and in the course of employment" and reversed the trial court. The Court noted that prior to the amendment to *Lab. Code § 3601* in 1959, which permitted an employee to maintain an action against a coemployee who was acting within the scope of his or her employment only in those limited instances set forth in *Lab. Code § 3601(a)(1), (2)*, or *(3)*, the court of appeal in *Singleton v. Bonnesen (1955) 131 Cal. App. 2d 327, 280 P.2d 481* [discussed in *§ 239.20[3][a]*], had held that an employee was permitted to sue on an allegedly negligent coemployee who was acting within the scope of his employment as a "person other than the employer" under

Lab. Code § 3852. Because the Legislature had not amended *Lab. Code § 3852* and because the presumption that an overall change is intended where a statute is amended following a judicial decision, the Supreme Court construed the amendment to *Lab. Code § 3601* as exempting from civil liability a coemployee's actions within the "scope of employment" rather than those "arising out of and in the course of employment." In distinguishing between the two phrases, the Court quoted from comment a to Rest. 2d, Agency, § 235, and noted that conduct is within the scope of employment only ifthe servant is actuated to some extent by an intent to serve his or her master (*63 Cal. 2d 124, 129)* . In the case before it, the Court found that defendant had not attempted to establish that she was still serving her employer when she was in the act of removing her automobile from the parking lot after completing her work shift (*63 Cal. 2d 124, 129)* .

[4] Additional Authorities

[a] Workers' Compensation Sole Remedy in Action Against Coemployee

In *Hendy v. Losse (1991) 54 Cal. 3d 723, 1 Cal. Rptr. 2d 543, 819 P.2d 1* , the California Supreme Court held that the 1982 amendment of *Lab. Code § 3602(a)*, which sharply limited the application of the dual capacity doctrine with respect to employers, does not protect coemployees from civil liability; however, coemployees do enjoy the immunity created by *Lab. Code § 3601*, which expressly immunizes them for acts within the scope of their employment. The Court noted that the 1982 amendment of *Lab. Code § 3601* confirms that there can be no judicially created exceptions to the immunity from civil liability granted to coemployees. Thus, the Court held that a physician who was employed by a professional football team to provide treatment to players injured in the course of their employment by the team was protected from a malpractice suit by the statutory immunity of § 3601 since the physician was acting in the scope of his employment when he diagnosed and treated the plaintiff whose injury was proximately caused by his employment with the team (*54 Cal. 3d 723, 737-738)* . However, the Court noted, if a coemployee provides medical services other than those contemplated by the employee's employment and in so doing is not acting for the employer, he or she no longer enjoys the immunity from suit provided by *Lab. Code § 3601* for acts that are in the scope of employment (*54 Cal. 3d 723, 741)* .

In *Childers v. Shasta Livestock Auction Yard, Inc. (1987) 190 Cal. App. 3d 792, 235 Cal. Rptr. 641* , the court of appeal affirmed summary judgment in favor of an employer and against an employee who was injured in an automobile accident caused by a coemployee who had been drinking on the job. The court held that because it was a regular practice for the employer to furnish alcoholic beverages on the premises to employees and clients, the coemployee's consumption of alcohol occurred within the scope of the employment, and therefore the employer could be held liable for the injuries proximately caused to plaintiff. However the court also held that the plaintiff had satisfied all the conditions of entitlement to workers' compensation benefits under *Lab. Code § 3600*, and his tort action was therefore barred by the exclusivity provisions of *Lab. Code § 3601* (*190 Cal. App. 3d 792, 816-817)* .

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PART II. FORMS

10-239 California Points & Authorities § 239.47

AUTHOR: Carolyn Rashby

§ 239.47 Opposing Contention That Workers' Compensation Exclusive Remedy Doctrine Precludes Action by Employee Against Coemployee--Injury Caused by Coemployee's Willful and Unprovoked Physical Act of Aggression or Intoxication

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S ACTION FOR DAMAGES AGAINST DEFENDANT, A COEMPLOYEE, IS NOT PRECLUDED BY THE EXCLUSIVITY PROVISIONS OF THE WORKERS' COMPENSATION ACT BECAUSE PLAINTIFF'S INJURY WAS CAUSED BY DEFENDANT'S _____ [*insert either* WILLFUL AND UNPROVOKED PHYSICAL ACT OF AGGRESSION *or* INTOXICATION].

A. Action Against Coemployee Not Barred by Workers' Compensation Exclusivity. When the conditions of compensation set forth in *Lab. Code 3601* concur, the right to recover workers' compensation benefits is the sole remedy where an employee is injured by a coemployee acting within the course and scope of his or her employment, except where the injury is caused by the willful and unprovoked physical act of aggression of the coemployee, where the coemployee intended to cause injury, or the coemployee's intoxication (*Lab. Code § 3601(a)(1)* and *(2)*; *Torres v. Parkhouse Tire Service, Inc. (2001) 26 Cal. 4th 995, 1003-1006, 111 Cal. Rptr. 2d 564, 30 P.3d 57* ; *Soares v. City of Oakland (1992) 9 Cal. App. 4th 1822, 1825-1831, 12 Cal. Rptr. 2d 405*).

[*Optional*] **B. Harm to Employee Need Not Be Physical.** In order for liability to attach under *Lab. Code § 3601(a)(1)*, the harm to the employee does not have to be physical (*Iverson v. Atlas Pacific Engineering (1983) 143 Cal. App. 3d 219, 225, 191 Cal. Rptr. 696*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to the contention that plaintiff's action for damages against a coemployee is precluded by the exclusive remedy provisions of the Workers' Compensation Act, on the grounds that the injury was caused by the coemployee's willful and unprovoked physical act of aggression or intoxication. Optional Paragraph B is for use where plaintiff did not suffer physical harm. In anappropriate case, these points and authorities may be submitted in opposition to the contention supported by the points and authorities *set out in § 239.45*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that an action for damages against a coemployee is not precluded by the exclusive remedy provisions of the Workers' Compensation Act where the injury is caused by the coemployee's willful and unprovoked physical act of aggression or intoxication, for example, in a demurrer. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that the coemployee was intoxicated when he/she inflicted injury on plaintiff, or that the coemployee physically attacked plaintiff or committed a physical act causing plaintiff a reasonable fear of harm. Counsel also should demonstrate both that the coemployee intended to injure plaintiff, and that plaintiff did not provoke the act of aggression.

[3] Discussion of Authorities

[a] Action Against Coemployee Not Barred by Workers' Compensation Exclusivity

Lab. Code §§ 3601(a)(1) and *(2)* provides that the exclusive remedy provisions of the workers' compensation act do not apply, and an injured employee has a right to bring an action for damages against coemployee, when the employee's injury or death is proximately caused by the willful and unprovoked physical act of aggression of the coemployee or by the intoxication of the coemployee.

The factual and procedural background of ***Torres v. Parkhouse Tire Service, Inc.*** *(2001) 26 Cal. 4th 995, 111 Cal. Rptr. 2d 564, 30 P.3d 57* , is *set forth in § 239.45[3][a]*. In that case, the California Supreme Court held that the "willful and unprovoked physical act of aggression" by a coemployee exception to workers' compensation exclusivity in *Lab. Code § 3601(a)(1)* includes an intent to injure requirement (*26 Cal. 4th 995, 1006)* .

The facts and procedural background of ***Soares v. City of Oakland*** *(1992) 9 Cal. App. 4th 1822, 12 Cal. Rptr. 2d 405* , is *set forth in § 239.45[3][a]*. The court of appeal held that *Lab. Code § 3601(a)(1)* excepting willful and unprovoked physical acts of aggression by coemployees from workers' compensation exclusive remedy provisions does not cover all batteries at common law, but only those batteries that are committed with a specific intent to injure (*9 Cal. App. 4th 1822, 1825-1831)* .

[b] Harm to Employee Need Not Be Physical

In ***Iverson v. Atlas Pacific Engineering*** *(1983) 143 Cal. App. 3d 219, 191 Cal. Rptr. 696* , plaintiff files a complaint for damages against his employer and a coemployee for assault, false imprisonment, intentional infliction of emotional distress, and negligence. The complaint alleged that the coemployee willfully set up a steel horseshoe target above plaintiff's workplace, forced plaintiff to remain in confined quarters against his will, and pounded a large sledge hammer against the target, thus subjecting plaintiff to loud crashing noises. Plaintiff alleged that he suffered loss of hearing, mental anguish, and physical pain and suffering, all of which required medical attention. Plaintiff appealed from a judgment dismissing the compliant, entered upon orders sustaining defendants' demurrers without leave to amend on the basis that workers' compensation was plaintiff's exclusive remedy.

With respect to plaintiff's action against the coemployee, the court of appeal considered whether the coemployee's conduct constituted a "willful and unprovoked physical act of aggression" within the meaning of *Lab. Code § 3601(a)(1)* such that plaintiff could bring a civil suit for damages. The court held that the exception to the exclusive remedy provisions in *Lab. Code § 3601(a)(1)* is intended to permit civil action for damages whenever a coemployee commits an intentional tort by aggressive physical conduct. Thus, to invoke civil liability under the section, a physical act causing reasonable fear of harm must be pleaded and proved, but the resulting harm need not also be physical. While the coemployee's conduct did not rise to the level of a battery, it fairly could be characterized as a willful act of physical aggression. Thus, the trial court erred by sustaining the demurrer to plaintiff's causes of action against the coemployee (*143 Cal. App. 3d 219, 225)* .

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10-239 California Points & Authorities § 239.48

AUTHOR: Carolyn Rashby

§ 239.48 Opposing Contention Workers' Compensation Exclusive Remedy Doctrine Precludes Action by Employee Against Coemployee--Coemployee Was Acting Outside Scope of Employment

[1] FORM

[*The following may be included in a memorandum of points and authorities, or in a trial or appellate brief.*]

PLAINTIFF'S ACTION FOR DAMAGES AGAINST DEFENDANT, A COEMPLOYEE, IS NOT PRECLUDED BY THE EXCLUSIVEREMEDY PROVISIONS OF THE WORKERS' COMPENSATION ACT BECAUSE DEFENDANT WAS ACTING OUTSIDE THE SCOPE OF HIS/HER EMPLOYMENT AT THE TIME OF THE INJURY TO PLAINTIFF.

A. Workers' Compensation Not Exclusive Remedy Where Coemployee Acted Outside Scope of Employment. The exclusive remedy provisions of *Lab. Code § 3601* apply only to the conduct of a coemployee that is within the scope of the coemployee's employment (*Lab. Code § 3601*).

B. Requirement of Coemployee's Intent to Serve Employer. Although a coemployee's activity that results in an employee's injury may arise out of and be in the course of employment and thus gives rise to the right to receive workers' compensation from the employer, such activity is not within the scope of employment, thereby preventing the employee from bringing an action against the coemployee, unless the coemployee was actuated to some extent by an intent to serve his or her employer (*Saala v. McFarland (1965) 63 Cal. 2d 124, 128-129, 45 Cal. Rptr. 144, 403 P.2d 400*).

[2] Comments

[a] Use of Form

These points and authorities may be submitted in opposition to a defendant-coemployee's contention that, in an action by an employee against the coemployee for damages for personal injuries, the defendant was acting in the scope of

his/her employment, on the grounds that there is no evidence that the coemployee was actuated by an intent to serve his or her employer at the time of the injury to plaintiff. In an appropriate case, These points and authorities may be submitted in opposition to the contention supported by supported by the points and authorities *set out in § 239.46*.

These points and authorities may be combined with points and authorities pertaining to the specific procedural context in which counsel wishes to raise the substantive issue that plaintiff's action against a coemployee is not precluded by the workers' compensation exclusive remedy provisions because the coemployee was not acting in the scope of his/her employment, for example, in opposition to a demurrer or motion for summary judgment. These points and authorities may also be adapted for use in a trial or appellate brief or in jury instructions.

[b] Argument

Counsel should insert argument in this form showing the relationship between the facts of the case and the points of law stated. Thus, counsel should discuss evidence that in inflicting injury on plaintiff, the coemployee was not actuated by an intent to serve the employer. For example, counsel could discuss facts indicating that the accident occurred after work hours and while the coemployee was performing an activity not authorized by the employer [*see Brittell v. Young (1979) 90 Cal. App. 3d 400, 407, 153 Cal. Rptr. 387]* .

[3] Discussion of Authorities

[a] Workers' Compensation Not Exclusive Remedy Where Coemployee Acted Outside Scope of Employment

Lab. Code § 3601 provides that when the conditions of compensation set forth in *Lab. Code § 3600* concur, the right to recover workers' compensation is the sole remedy of an injured employee against a coemployee acting within the scope of his or her employment, unless the injury is caused by the willful and unprovoked physical act of aggression of the coemployee or by the intoxication of the coemployee.

[b] Requirement of Coemployee's Intent to Serve Employer

The factual and procedural background of ***Saala v. McFarland*** *(1965) 63 Cal. 2d 124, 45 Cal. Rptr. 144, 403 P.2d 400* , is *set forth in § 239.46[3][b]*. The Court found that conduct is within the scope of employment only if the employee is actuated by an intent to serve his or her employer. In the case before it, the Court found that the defendant, a coemployee, had not attempted to establish that she was still serving her employer when she was in the act of removing her automobile from the parking lot after completing her work shift.